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Justice Moyeenul Islam Chowdhury

Justice Sheikh Hassan Arif

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84. Mr. Justice Mohammad Ali

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86. Mr. Justice Md. Riaz Uddin Khan

87. Mr. Justice Md. Khairul Alam

88. Mr. Justice S. M. Maniruzzaman

89. Mr. Justice Ahmed Sohel

90. Mr. Justice Sardar Md. Rashed Jahangir

91. Mr. Justice Khandaker Diliruzzaman

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Justice Syed Mahmud Hossain
Chief Justice of Bangladesh

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Message

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

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

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

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

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

Justice Syed Mahmud Hossain
Chief Justice of Bangladesh

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Editorial

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

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

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

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

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

Thank you all.

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

12 SCOB [2019]
Index of Cases
Appellate Division

High Court Division

Cases of the Appellate Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
1.	Ashuganj Fertilizer & Chemical Com. Ltd. & ors. Vs. Md. Abu Sufian Bhuiyan & anr. (*Syed Mahmud Hossain C.J*) 12 SCOB [2019] AD 1	Dismissed from service, termination simpliciter	The orders of termination were not termination simpliciter. Consequently, this is the outcome of arbitrary exercise of power in a malafide way and as such, the High Court Division was justified in making the Rule absolute declaring the orders of termination to have been passed without lawful authority and to be of no legal effect. There was an inquiry about the appointment of the writ-petitioner and pursuant to the said inquiry, the writ-petitioner were terminated from service. Therefore, it cannot be said that the writ-petitioner were terminated from service and in fact, they were dismissed from service in the garb of termination
2.	Mir Showkat Ali & ors. Vs. Md. Morsalin Khan & ors. (*Muhammad Imman Ali, J*) 12 SCOB [2019] AD 8	Authority of the Executive Committee of the Orphanage to deal with property;	The Management/Executive Committee of the Orphanage had no authority to deal with the land other than for the purpose stipulated in the indentures. Those persons at the helm of the affairs of the Orphanage could not arrogate to themselves the authority to transfer the title in the property, which they themselves did not have. The Orphanage was given the property on a short term lease, which was apparent from the lease deeds. As long as these lease deeds existed and as long as the terms were not altered by the executant of the deeds none had the authority to deal with the land other than the purpose for which the lease was granted.
3.	BADC Dhaka & ors. Vs. Md. Shohidul Islam & ors. (*Hasan Foez Siddique, J*) 12 SCOB [2019] AD 23	Voluntary retirement of service;	After 10 years of their voluntary retirement and after receiving full financial benefits as offered the prayers for reinstatement cannot be termed as reasonable and fair. After having applied for voluntary retirement of service and taken the money it is not open to contend that they exercised the option under any kind of coercion and undue influence. Who had accepted the ex gratia payment or any other benefit under the scheme, could not have resiled therefrom. It became past and closed transaction. The writ petitioners having accepted the benefit could not be permitted to approbate and reprobate nor they be permitted to resile from their earlier stand.

Cases of the Appellate Division

4.	Rashed Vs. The State (*MIRZA HUSSAIN HAIDER, J*) 12 SCOB [2019] AD 34	Dying declaration, section 32(1) of the Evidence Act 1872;	Dying declaration cannot be considered as the sole basis for conviction and awarding sentence to the appellant, specifically in the absence of any of the witnesses who were present in the hospital during the time when the alleged dying declaration was made by such a critically injured person who was under intensive care and not supposed to be in conscious. As such the finding of the High Court Division that 'the prosecution has clearly established the motive of the case and the oral dying declaration has also been supported by the medical evidence and other circumstances and materials on record' is not sustainable in law.

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
1.	Liberty Fashion Wears Limited -Versus- Bangladesh Accord Foundation and others (*Tariq ul Hakim*) 12 SCOB [2019] HCD1	Article 102(2) of the Constitution.	For Article 102 (2) to be attracted however the petitioner must be aggrieved by an action of a person performing functions "in connection with the affairs of the Republic", or local authority or statutory body and he should be without any other alternative remedy or redress . The remedy sought by the petitioner is simply a direction on the Respondent No. 1 for inspecting the petitioner's factory and publishing the findings in its website. If the petitioner's factor is unsafe and not fit in any way then the Respondent No. 1 has nothing to loose. The petitioner cannot seek remedy from the Civil Court or any other forum in the form of a direction since there is no contractual relationship with the respondent No. 1. Similarly an action for defamation also will not serve any purpose since the petitioner wants the Respondent No. 1 to publish the accurate condition of its factory. Thus to compel the Respondent No. 1 to inspect its factory and publish the findings in its website the petitioner does not appear to have any other alternative remedy. In such view of the matter therefore this Rule is also maintainable under Article 102 (2).
2.	Md. Reza Kamal -Versus- Secretary, Ministry of Civil Aviation, Bangladesh Secretariat, Ramna, Dhaka and others *(Tariq ul Hakim, J.)* 12SCOB[2019]HCD 15	Promotion solely on the basis of an interview.	In *Bangladesh Vs. Shafiuddin Ahmed reported in 50 DLR (AD) 27* it has been clearly stated that marks fixed for interview should be kept to a minimum so that the accumulated credits achieved by the candidates over the years in their respective ACRs should not be disregarded by a momentary impression created in the minds of the Interview Board. However as stated earlier, such practice for providing promotion to the employees solely on the basis of an interview is unfair and creates sufficient scope for arbitrariness and unlawful decisions for which aggrieved persons may take the opportunity of getting redress. It is therefore hoped that the respondents Biman authority shall take appropriate measure in this regard to fill up the lacuna. In this respect it is to be pointed out that in several decisions in the Indian jurisdiction including *B.V. Sivalah V. K. Addanki Babu reported in 1998 6 SCC 720* as well as *Horigovind Yadav Vs.Rewa Sidhi Gramin Bank and others in (2006) 6 SCC*

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			145 promotions with seniority were given to certain officers with retrospective effect for not having been promoted earlier for the ends of justice and in the instant case we feel that the petitioner is in a similar position and has been deprived unlawfully by an unfair method of selection for promotion and deserves to be promoted along with those listed in the impugned order
3.	Dr. A. Y. M. Akramul Hoque -Versus- Government of the People's Republic of Bangladesh and others (*MOYEENUL ISLAM CHOWDHURY, J*) 12 SCOB [2019] HCD 24	Exhaustion of efficacious remedy provided by law: How far it bars the invocation of the writ jurisdiction, Liberal interpretation of Equality before law:	There is a constitutional bar to the invocation of the writ jurisdiction of the High Court Division under Article 102(2)(a) of the Constitution, if there is any other equally efficacious remedy provided by law. If any impugned action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a Writ Petition will be maintainable without exhaustion of the statutory remedy. Besides, on the ground of mala fides, the petitioner may come up with a Writ Petition bypassing the statutory alternative remedy. It is well-settled that mala fides goes to the root of jurisdiction and if the impugned action is mala fide, the alternative remedy provided by the statute need not be availed of. Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. When a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law."

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
4.	Shakwat Hossain Bhuiyan -Versus- Bangladesh and others (*Md. Emdadul Huq, J; F.R.M. Nazmul Ahasan, J; Md. Abu Zafor Siddique, J*) 12 SCOB [2019] HCD 39	Article 102 of the Constitution of the People's Republic of Bangladesh, Article 66 of the Constitution of the People's Republic of Bangladesh Public Interest Litigation, Election Commission,	It is now a well settled proposition of law that if there is efficacious and alternative remedy is available, a writ petition under Article 102 of the Constitution is not maintainable. Admittedly it has been raised whether Article 125 of the Constitution puts a bar in the instant case in hand. Admittedly as per the aforesaid provision of law there is a legal bar questioning the result of the election declared by the commission except following the provisions of RPO. In the present case in hand it appears that the petitioner in the disguise of Article 102 of the Constitution trying to enforce the provisions of RPO. In the present case in hand it further appears that the question as raised by the petitioner regarding certain declarations made by the respondent No.7 before the Election Commission which is completely a dispute to be resolved by the competent authority as provided in the Represented People Order (RPO). It follows that the petitioner can very well seek a remedy under article 102 (2) (b) (ii), of course subject to the condition that no other efficacious remedy is available to him. In seeking a remedy under clause 102(2)(b)(ii). He does not have to be an aggrieved person for filing this case. The underlying principle of a writ *quo warranto,* as interpreted by the Supreme Court of India and as quoted above, is clearly the same as enshrined in clause 102(2) (b) (ii) of our Constitution. Under this clause, "*any person*" can file an application and this court can, upon such an application, exercise the jurisdiction a writ of quo warranto. The applicant is not required to be "*an aggrieved person*" as opposed to the requirement of clause (1) and (2) (a) of article 102 under which a public interest ligation may be filed. In such a case the duty of this is court to hold an inquiry on the allegation and to arrive at a decision keeping in view of the legal and factual issues.

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			(a) The issue of maintainability on account of standing of the petitioner to file this case under article 102(2)(b)(ii) (Issue No. 1) is a purely legal issue, and it has been held that the case is maintainable on that count. (b) The issue of maintainability on account of the bar or restriction imposed by article 125 of the Constitution (Issue No. 2) is purely a legal issue, and it has been held that article 125 article is not a legal bar to entertain this case and that the case is maintainable. More over admittedly he was relased before expiry of 10 years. In such a back ground, it is the well settled principle of law that the fact of merely raising a claim different to the claim of jail authority or the finding of this court does not render it as a disputed question of fact. In fact, the date of his release as decided by this court as being on 01.06.2006 goes to his benefit in calculating the period of sentence served out by him and the quantam of remission permissible to him. If the date of his release claimed by him being 01.12.2005 is taken as correct he would be required to serve a longer period. So the issue of date release is not a disputed question of fact. (Ratio of Md. Emdadul Huq, J Article 66(2) of the Constitution of the People's Republic of Bangladesh and the Article 12(1)(d) of the RPO relates to the election disputes triable before the election Tribunal. These factual aspect of the writ petition which discussed above are not admitted rather, it is disputed in different aspect and without taking evidence about the disputed fact of date of release of the respondent No.7 from Jail custody, the calculation of blood donation to the Sandhani and the special remission provided in the Jail Code which is recorded in the history ticket,

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			it cannot be decided in a summary proceeding in the writ petition. In this respect Article 125 of the Constitution of Bangladesh is very much applicable in the facts and circumstances of the case. Particularly, the facts and circumstances arises in the writ petition is a clear bar as this type of dispute cannot be decided without any evidence both oral and documentary. An election dispute can only be raised by way of an election in the manner provided therein. Where a right or liability is created by a statute providing special remedy for its enforcement such remedy as a matter of course must be availed of first. The High Court Division will not interfere with the electoral process as delineated earlier in this judgment, more so if it is an election pertaining to Parliament because it is desirable that such election should be completed within the time specified under the Constitution. In the instant case, a serious dispute as to the correct age of the appellant was raised before the High Court Division which was not at all a subject matter of decision on mere affidavits and certificates produced by the parties. As regards the first ground, it may be stated that if the purpose of the writ petition was only to challenge the election of the appellant on the alleged ground of his being a defaulter then we would have felt no hesitation to declare at once that the writ petition was not maintainable. Indeed, we have already held while rejecting CPSLA No.21 of 1988 (quoted in the affidavit-in-opposition) that "such questions as to disqualification, etc. which are questions of fact are better settled upon evidence which can be done more appropriately before a Tribunal. In the summary proceeding under Article 102 it is not desirable and, more often than not, not possible to record a finding as to a disputed question of fact."
5.	Md. Rafiqul Islam and others. -Versus- Md. Abdul Hadis	Ingredients to prove the suit for specific performance of	In a suit for Specific Performance of Contract the essential ingredients which the plaintiffs are required to prove in order to succeed in a suit for Specific

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
	(Md. Rais Uddin, J) 12 SCOB [2019] HCD 121	Contract;	Performance of Contract, are that the Bainapatra is genuine, considerations money passed by the parties and delivery of possession was given in pursuance thereof.
6.	British American Tobacco Bangladesh Company Ltd. -Versus- Begum Shamsun Nahar **(***Syed Md. Ziaul Karim, J)* 12 SCOB [2019] HCD 125	Principle to amend Pleadings;	We find that one of the fundamental principles governing the amendment of the pleadings is that all the controversies between the parties as far as possible should be included and multiplicity of the proceedings avoided.
7.	Proshika Manobik Unnayan Kendro -Versus- The Commissioner of Taxes and others. *(Borhanuddin, J)* 12 SCOB [2019] HCD 129	Section 158 of the Income Tax Ordinance 1984:	The proviso to Sub-Section (2) of section 158 of the Ordinance vests discretion with the Commissioner of Taxes to reduce statutory requirement of payment under Sub-Section(2) of section 158 of the Ordinance, if the grounds stated in the application filed by the assessee applicant under the proviso appears reasonable to him/her. From the language of the proviso, we do not find any statutory duty of the CT to pass an order assigning reason. Though there is no requirement to give an opportunity of hearing to the assessee-applicant or recording reason, but still the Commissioner of Taxes should be aware that his /her order must reflect reasonableness from where it can be transpire that the Commissioner of Taxes applied his/her judicial mind in passing the order. But for inadequacy or absence of reasonableness, the order cannot be set aside. It is discretion of the Commissioner of Taxes.
8.	Begum Khaleda Zia -Versus- Anti Corruption Commission (ACC) Dhaka and another (*Obaidul Hassan, J*) 12 SCOB [2019] HCD136	Cr.PC section 540A	In the case at hand, we find that the Petition under section 540A was filed by the Public Prosecutor, though it has not been expressly mentioned whether the Public Prosecutor can file such an application; the Code does not prevent the Public Prosecutor from filing as such. The case reported in *14 DLR*, aides us in concluding that, where there is no such provision preventing the Public Prosecutor from filing such an application, there is no

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			harm if the Public Prosecutor draws the attention of the Court by filing such an application for the sake of expedition and deliverance of Justice
9.	Begum Khaleda Zia -Versus- State & another (*M. Enayetur Rahim, J*) 12 SCOB [2019] HCD 146	Section 5 (2) of Prevention of Corruption Act,1947, Section 409/109 of the panel Code, Corruption, Prime Ministers orphanage Fund, Misappropriation, Criminal design.	Facilitating misappropriation of the fund which was meant to be used for welfare of orphans, particularly when Begum Zia, the Prime Minister, had entrustment and dominion over it indisputably shocks the human conscience and such act reflects a mindset derogatory to humankind. Obviously Begum Zia had liability and obligation to look after whether the Trust so formed was in actual existence. But she did not do it. Thus Begum Zia was a conscious part of a designed plan to the criminal acts constituting the offence of Criminal breach of Trust as defined in section 405 of Penal Code. Merely for the reason of political identity of a person prosecuted for an offence punishable under the penal law it cannot be said that she has been brought to justice on political victimization. We do not find any legal justification and cogent ground to award lesser punishment to the principal offender Begum Zia than the other convicts who were the abators, considering her political and social status. We consider it appropriate that justice would be met if the maximum sentence prescribed in section 409 of the Penal Code is awarded to Begum Zia so that the persons enjoying the highest position in any organ or any public office of the State thinks twice to go ahead with such criminal design in coming days.
10.	Softesule Private Limited -Versus- Govt. of Bangladesh & ors. (*Naima Haider, J*) 12 SCOB [2019] HCD 205	CPTU, Rule 60 of the PPR, Review Panel, NOC	It has been settled by this Division that when a proceeding is initiated which affects the rights of a party, the party whose right would be affected is to be given the opportunity to represent its case, whether statutory contemplated or not. The Review Panel cannot, in exercising powers under Rule 60 of the PPR, proceed to assume more powers than actually conferred. In the instant case, the Review Panel has

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			exceeded jurisdiction and therefore, its findings cannot be sustained. It serves no purpose if the petitioner is awarded the tender but the NOC is not issued. We take the view that the failure of the respondents in issuing the NOC is manifestly arbitrary and without lawful authority.
11.	Azadul Islam and others. -Versus- Most. Asis Bewa and others. (*Md. Rezaul Hasan, J*) 12 SCOB [2019] HCD 211	Declaration of Title and permanent injunction, Lawful possession	I am also of opinion that, in a suit for permanent injunction, this Court should satisfy itself as regards the lawful nature of the plaintiffs' possession. In a suit for permanent injunction, the issue regarding title need not be and should not be conclusively decided, because the purpose of granting the relief of permanent injunction is to prevent forceful ouster of an apparently lawful occupant of the suit property, thereby disapproving the act of taking law into the defendants own hands. Nonetheless, the court should incidentally look into the title or other lawful basis of the plaintiffs acquiring and continuing in possession, to satisfy itself that the plaintiff is not an usurper or trespasser or a land grabber and that he has come in clean hands.
12.	Md. Hossen and others. -Versus- Haji Shamsunnahar Begum and others. (*Md. Rezaul Hasan*, *J*) 12 SCOB [2019] HCD 215	Order 1 Rule 10 of the Code of Civil Procedure, Co-plaintiffs, interest , the Waqf Estate in the suit property	The applicant Md. Hossen and others, who had filed the application under Order 1 Rule 10 of the Code of Civil Procedure, were not entitled to be added as plaintiffs as heirs of deceased plaintiff No. 2 Haji Badsha Miah. Because, the admitted position is that, the suit property has been claimed (in the plaint) as the property of Abdul Nabi Malum Waqf Estate, not personal property of Haji Badsha Miah. As such, the added plaintiff-petitioners have denied the interest of the Waqf Estate in the suit property by asserting their personal right in the same. Hence, their interest in the suit property is in conflict with that of the (surviving) plaintiff who claims herself as the sole *Motwali* (Manager) of the Waqf Estate, since another *Motwali* (plaintiff No. 2) has died. Therefore, the interest claimed by the petitioner being in clear conflict with that claimed by the plaintiff, these Md. Hossen

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			and 4 other are not entitled to be added as co-plaintiffs.
13.	Kapasia Overseas Ltd. -versus- Government of the People's of Bangladesh, and others. (*Md. Faruque (M. Faruque, J*) 12 SCOB [2019] HCD 219	Emigration Ordinance, recruiting license being, Emigration Ordinance, 1982, section 14 of the Emigration Ordinance, 1982, cancellation of the license and forfeiture of securities	It is a mandatory provision of law that before cancellation of a license, the authority must give a chance to the licensee of being heard, failing which the cancellation has no basis in the eye of law. In this case, the order does not show nor there is anything on record to show that the respondent has given any chance of hearing to the petitioner before making such an order of cancellation and forfeiture of securities. Therefore, the order is violative of the section 14(1) of the ordinance and was thus bad in law. The writ Court will not examine and weigh the aggrieved person's case on merit as an Appellate Court but to ensure that he was given a fair deal by the authority in accordance with law.
14.	Shahina Begum -Versus- Election Commission of Bangladesh & ors. (*F.R.M. Nazmul Ahasan, J*) 12 SCOB [2019] HCD 225	Valid Candidate , Election Commission, Re-election, schedule of re-election, rule 37 (3) of Local Government Pourashava Election Rules 2010;	That the period between the declaration of schedule of election till the publication of the result in the official gazette has been held to be comprised in the election process. The case in our hand it appears that the petitioner filed writ petition before this court invoking the Article 102 of the Constitution before publication of the official gazette. As such the writ petition is not maintainable and the rule is liable to be discharged.
15.	Monto Sheikh & ors. -Versus- Ibrahim Miah & ors. (*F.R.M. Nazmul Ahasan, J*) 12 SCOB [2019] HCD 231	It is also settled that the defendants may have thousand of defect but it does not help the plaintiff to prove their case:	It appears that the plaintiff could not prove their case that they have any title in the suit land and also the possession. The main reasoning of this findings stated above that the basis of the title of the plaintiff is the settlement which was cancelled and the order of cancellation is in existence.
16.	The State -Versus- Oyshee rahman *(Jahangir Hossain, J)* 12 SCOB [2019] HCD 238	Mitigating factors to consider the lesser punishment from death sentence to life imprisonment.	This sentence that someone be punished in such a manner is referred to as 'Death Sentence', whereas the act of carrying out the death sentence is known as execution. The execution is not only an exemplary punishment alone that can erase the crime from the society forever. Lesser punishments may significantly prevent or reduce the crimes from the society depending on the good governance and awareness of the people.

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			To consider the lesser punishment from death sentence to life imprisonment mitigating evidence or circumstances must be stronger than that of aggravating evidence produced by the prosecution. In this case we find the following circumstances outweigh the aggravating circumstances, 1. Condemned prisoner committed double murder without any apparent motive and was suffering from mental derailment or some sort of mental disorder and also suffering from ovarian cyst and bronchial asthma; 2. Her paternal grandmother and maternal uncle had a history of psychiatric disorders according to exibit-15; 3. She was around 19[nineteen] year old at the relevant time and the occurrence took place just immediately after her attaining the age of majority; 4. She has no such significant history of prior criminal activity [criminal cases] and 5. She had willingly surrendered to the police station soon after two days of the occurrence.
17.	The State -Versus- Md. Sharif and another *(Jahangir Hossain, J)* 12 SCOB [2019] HCD 258	Mitigating factors to consider the lesser punishment from death sentence to life imprisonment.	The contention of learned Advocate Mr. S.M Abdul Mobin for the defence is that the sentence of death is too harsh in this case because both the accused persons tried to save the life of the victim removing him to more than one hospital from the place of occurrence as disclosed by the prosecution witnesses. Now the question is commutation of sentence as pointed out by the defence to be considered or not. In true sense, it is most difficult task on the part of a judge to decide what would be quantum of sentence in awarding upon an accused for committing the offence when it is proved by evidence beyond shadow of doubt but the judge should have considered the legal evidence and materials for punishment of the perpetrator not as a

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			social activist [63 DLR 460, 18 BLD 81 and 57 DLR 591]. Sometimes, it depends on gravity of the offence and sometimes, it confers upon an aggravating or mitigating factor. In such a situation, it is a very hard job for the court to determine the quantum of sentence whether it will be capital punishment or imprisonment for life upon the accused persons since they played a role for saving the victim's life soon after occurrence as evident by the said prosecution witnesses. At the same time it is very important to note that the victim was completely an innocent teenager who had no fault of such dire consequences at the hands of the accused persons. Since the determination of awarding sentence to the accused persons is at the middle point of views, it may turn to impose capital punishment or imprisonment for life and that is why, the advantage of lesser one shall find the accused persons to acquire in the instant case. More so, both the accused persons have no significant history of prior criminal activities and their PC and PR [previous conviction and previous records] are found nil in the police report. In this regard it finds support from the decision in the case of Nalu –Vs-The State, reported in 1 ALR(AD)(2012) 222 where one of the mitigating factors was previous records of the accused.
18.	Dr. Farhana Khanum -Versus- Bangladesh and others *(Sheikh Hassan Arif, J.)* 12 SCOB [2019] HCD 276	Penal Code, 1860, Educational Institution, Corruption, Nitimala 2012, Anti- Corruption Commission, Public Servant (Discipline and Appeal) Rules,1985,	Therefore, since the very definition of the term 'Coaching Business' has only attracted the involvement teachers of the above mentioned institutions as a mischief, this Nitimala in fact has not prohibited the 'coaching business', or 'coaching centers', run by any individual in his or her private capacity who is not a teacher of the above mentioned institutions. This means involvement of an individual, who is not a teacher of the above mentioned institutions, in such coaching centers or business has not

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
		Durnity Domon Commission Act,2004,Coacing Business,	been prohibited by this Nitimala. Therefore, the prohibition, as provided by this Nitimala, only applies to the teachers of the above mentioned institutions and not to any individuals or private citizens or persons, who are not teachers of such educational institutions. From the above discussions, it appears that even in the absence of the said Nitimala, the petitioners and other teachers of non-government and government schools and colleges are not allowed to engage themselves in any sort of coaching business. This prohibition has not been provided by the said Nitimala of 2012, rather this has been given by their concerned service Rules which are delegated legislations and applicable to them. When the petitioners, or other teachers of government and non-government schools and colleges, joined their services, they joined as such fully knowing that the said Service Rules would be applicable to them. Therefore, by the said Nitimala, the government has in fact supplemented the provisions which are already in the statute books and in doing so, the government does not need to show any other sanction of statute or Act of parliament. It is the part of the constitutional power of the government as executive to run the governance and in running such governance, it is the duty and obligation of the government to take steps for implementation of the laws and regulations time to time enacted by the parliament or by the delegatees of the parliament. Under such obligations, the governments in modern countries issue various Circulars, Paripatra, Nitimala etc. and this has now become essential and normal administrative technic in modern countries. The only limitation in issuing such Nitimala or Nirdeshika is that by such Nitimala or Nirdeshika, the government cannot curtail the rights of any citizen which is already granted in his/her favour either by the Constitution or by law or by any other legal instruments. Therefore, in the facts and circumstances of the present cases, the petitioners have failed to show that either the Constitution or any

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			act of parliament or any delegated legislation of this Country has given them any right to get involved in coaching business. Rather, it has become evident from the above referred delegated legislations that in fact they have been prohibited by the law of the land from getting involved in coaching business. Thus, in so far as the said Nitimala is concerned, since the same has not curtailed any rights of the petitioners guaranteed either by the constitution or any law, it cannot be knocked down by this Court. Rather, it should be protected by this Court as it is the supplemental instrument to the already existing laws of the land. In this regard, the decisions of Indian Supreme Court in Bennett Coleman Co. v. Union of India, AIR 1973 SC 106, Bishamber Daval Chandra Mohan v State of UP, AIR 1982 SC -33 and Distt. Collector, Chittoor v Chittor Disttt. Groundnut Traders Assn, AIR 1989 SC 989 may be looked into as references. Therefore, on this point of unconstitutionality and unimplementablity of the said Nitimala of 2012, as argued by the learned advocates for the petitioners, we find no substance. Therefore, it cannot be denied that when the teachers get involved themselves in coaching business, which is prohibited by law, they are disobeying the direction of law and they know it fully that such disobedience might cause injury to the students or their guardians in that by such engagement they are utilizing their resources, potentials and capabilities in such coaching centers rather than using them in the class rooms. Therefore, this Court is of the view that, since this provision under Section 166 of the Penal Code has been incorporated in the Schedule to the Dudak Act, 2004, Dudak thinly had technical jurisdiction to enquire into the allegations as published in the news paper regarding the involvement of teachers in the coaching business. However, this thin and technical jurisdiction is only confined to the teachers of government colleges and schools and not to the teachers of non-government schools and colleges. Though we are saying that technically Dudak had jurisdiction to enquire into the said

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			matters, we are of the view that Dudak should have priority list as to which offences should get priority in their such enquiry and investigation when it is repeatedly reported in newspapers that Dudak does not have enough resources and logistic supports. We are of the view that leaving behind serious allegations of corruptions in National Banks, Customs Houses, Ports, Court Premises, Government Offices, Land Offices, etc. Dudak should not have inquired into the mere involvement of some teachers in coaching business relying on a newspaper report. When there are some other serious reports of corruption in the country, it does not also look well when Dudak shows such importance to some basically disciplinary matters when teachers of government schools are not attending classes on time. These apparently disciplinary issues should be kept at the bottom of Dudak's priority list in particular when almost each and every institution of this country is now suffering from huge corruption being committed by its employees and staffs. Though by engaging in coaching businesses the said teachers have disobeyed the direction of law, but it cannot be said that they have committed any 'corruption' as we understand the term in its general and common parlance. Therefore, we are of the view that, though thinly and technically Dudak had jurisdiction to enquire into the matters as published in the newspaper as regards involvement of the government teachers in coaching business, they should not have conducted such enquiry at all. Such enquires should have been done by the education directorate of the government or the concerned ministry itself.
19.	Mrs. Mohua Ali -Versus- The State and another *(Md. Nazrul Islam Talukder, J.)* 12 SCOB [2019] HCD 294	Criminal Law Amendment Act, 1958, Money Laundering Protirodh Ain, 2012,Durnity Daman Commission, Corruption, The Code of Criminal Procedure.	It may be mentioned that the names of the accused-petitioners are not mentioned in the FIR but the investigation officer after holding investigation having found prima facie case submitted charge-sheet against them. It may be noted that the money laundering offences are non-violent crimes which are usually committed in the commercial and financial institutions for financial gain. Sometimes it is very difficult to prosecute against the money laundering

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			offenders because they resort to sophisticated means and techniques to conceal their activities through a series of complex transactions. In view of above situation, non-disclosure of the names of the accused-petitioners in the 161 statements of the witnesses does not mean that they are not at all involved in the commission of money laundering offences.
20.	Md. Nasir Mia -Versus- The State. *(Md. Shohrowardi, J.)* 12 SCOB [2019] HCD 309	Application of Section 561A of the Code of Criminal Procedure, 1898.	On a careful reading of the provision of section 561A of the Code of Criminal Procedure it is found that by inserting section 561A in the Code the legislature did not confer any new power to the Court to bypass or override any other statutory provision and this Court is not legally authorized to assess the evidence like an appellate court. On perusal of the evidence if this Court finds that there is no legal evidence to connect the convict with the charge framed against him then this Court to secure the ends of justice is competent to quash the judgment and order of conviction and sentence passed by the trial Court. If there is sufficient evidence against the convict it would not be just and proper to exercise its jurisdiction to quash the judgment and order of conviction and sentence passed by the trial Court.

12 SCOB [2019] AD 1

Appellate Division

PRESENT:
Mr. Justice Syed Mahmud Hossain.
-Chief Justice.
Mr. Justice Hasan Foez Siddique.
Mr. Justice Mirza Hussain Haider.

CIVIL APPEAL NOS.96 -111 OF 2015
(From the judgment and order dated 15.05.2014 passed by the High Court Division in Writ Petition Nos.1755, 1756, 1758, 1759, 1760, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1797, 1798 of 2008).

Ashuganj Fertilizer and Chemical Company Limited, represented by its Managing Director and others. **……...Appellants. (In all the appeals)**

=Versus=

Md. Abu Sufian Bhuiyan and another. .....Respondents. - (In C.A.No.96/15)
Md. Monirul Haq and another. ……Respondents.– (In C.A.No.97/15)
Md. Siddiqul Islam Khondoker and another. .....Respondents. – (In C.A.No.98/15)
Md. Motalib Bhuiyan and another. .....Respondents. – (In C.A.No.99/15)
Md. Mamnur Rashid and another. .....Respondents. – (In C.A.No.100/15)
Md. Jashim Uddin Talukder and another. .....Respondents. – (In C.A.No.101/15)
Md. Shahab Uddin and another. .....Respondents. – (In C.A.No.102/15)
Md. Nurul Islam (Nuru) and another. .....Respondents. – (In C.A.No.103/15)
Md. Iftekhar Bhuiyan and another. .....Respondents. – (In C.A.No.104/15)
Md. Farahn Uddin and another. .....Respondents. – (In C.A.No.105/15)
Md. Borhan Uddin (Bahar) and another. .....Respondents. – (In C.A.No.106/15)
Md. Azizur Rahman and another. .....Respondents. – (In C.A.No.107/15)
Md. Sayed Masud Shumon and another. .....Respondents. – (In C.A.No.108/15)
Md. Emranur Reza and another. .....Respondents. – (In C.A.No.109/15)
Md. Kabir Hossain and another. .....Respondents. – (In C.A.No.110/15)
Md. Shaheen Miah and another. .....Respondents. – (In C.A.No.111/15)

For the Appellants. (In all the appeals) : Mr. Tufailure Rahman, Senior Advocate, instructed by Mr. Md. Firoz Shah, Advocate-on-Record.

For the Respondents. In all the appeals) : Mr. A. F. Hasan Ariff, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

Dates of Hearing. : The 24th and 31st July, 2018
Date of Judgment. : The 31st July, 2018

Dismissed from service, termination simpliciter;

The orders of termination were not termination simpliciter. Consequently, this is the outcome of arbitrary exercise of power in a malafide way and as such, the High Court Division was justified in making the Rule absolute declaring the orders of termination to have been passed without lawful authority and to be of no legal effect.

There was an inquiry about the appointment of the writ-petitioner and pursuant to the said inquiry, the writ-petitioner were terminated from service. Therefore, it cannot be said that the writ-petitioner were terminated from service and in fact, they were dismissed from service in the garb of termination.

J U D G M E N T

SYED MAHMUD HOSSAIN, C. J:

1. All the appeals, by leave, are directed against the judgment and order dated 15.05.2014 passed by the High Court Division in Writ Petition Nos.1755, 1756, 1758, 1759, 1760, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1797, 1798 of 2008 making all the Rules absolute with direction.

2. All the civil appeals have been heard together and are being disposed of by this common judgment as they do involve common questions of laws and facts.

3. The facts, leading to the filing of all the appeals, in a nutshell, are:

All the writ-petitioners were serving in different clerical posts as Senior Clerk, MLSS, LDA-cum-Typist, Bearer, Typist, Assistant Clerk, Office Assistant etc. At the Zia Fertilizer Company Limited (hereinafter referred to as ZFCL) for several years on daily basis. The writ-petitioners applied to the ZFCL authority to appoint them permanently in the vacant posts. On consideration of their quality of service and sound performance, the authority by Memo No.ZFCL/Proshason/ LSA/7(a)/1607 dated 09.10.2006 sent a proposal to the Chief of Bangladesh Chemical Industries Corporation (BCIC), which is the controlling authority of ZFCL seeking approval under Article 13(5) of the Bangladesh Chemical Industries Enterprise (Nationalization) Order, 1972 (P. O. 27 of 1972) for the permanent appointment of the writ-petitioners against vacant posts at ZFCL. It has been further stated in the said letter that "তারা নিজ নিজ কর্মক্ষেত্রে উল্লেখযোগ্য অবদান রেখেছেন। কিন্তু বছরের পর বছর কাজ করার পরও তাদেরকে স্থায়ীভাবে চাকুরীতে নিয়োগ না করায় তাদের মধ্যে অনিশ্চয়তা ও হতাশা বিরাজ করছে। তাদেরকে স্থায়ীভাবে নিয়োগ দেয়া হলে তাদের কর্ম স্পৃহা বৃদ্ধি পাবে।" It is further stated that as a regular practice vacant posts at the ZFCL are generally filled in by regular appointment from daily basis workers, who possess required qualifications.

4. In response to the aforesaid letter dated 09.10.2006 seeking approval under Article 13(5) of the Bangladesh Chemical Industries Enterprise (Nationalization) Order, 1972 (P. O. 27 of 1972) for permanent appointment of the writ-petitioners, the Deputy Employee Chief on behalf of the Employee Chief vide Memo No.BCIC/Niog-3/ZFCL-6/45 dated 05.02.2007 intimated the Managing Director of ZFCL about the approval of BCIC for permanent appointment of the writ-petitioners at ZFCL subject to approval of the ZFCL. In the letter it was clearly stated that '' আপনাদের ০৯.১০.২০০৬ ইং তারিখের সূত্র নং-জেডএফসিএল/প্রশা/এলএসএ/৭(এ)/১৬০৭ এবং ৩১.০১.২০০৭ ইং তারিখের সূত্র নং--জেডএফসিএল/প্রশা/এলএসএ/১১৯/৪৯৯৫/৩০১৩ পত্রের প্রেক্ষিতে জানানো যাচ্ছে

যে, নিম্নে উল্লেখিত ১৮(আঠার) জন কে শুন্য পদের বিপরীত তাদের নামের পার্শ্বে উল্লেখিত পদ বেতনক্রম/মজুরীক্রম সম্পূর্ন অস্থায়ী ও এডহক ভিত্তেতে নিয়োগদানের জন্য কর্ত্রপক্ষ অনুমোদন করেছেন।''

5. After getting formal approval from the Bangladesh Chemical Industries Corporation, ZFCL Authority vide Memo dated 06.02.2007 issued appointment letter to the writ-petitioners and after getting the said appointment letters the writ-petitioners joined in their posts and started serving the authority to the satisfaction of all concerned. It is stated that there is no allegation from any quarter against the writ-petitioners' service or their efficiency. Thereafter, suddenly by letter dated 29.11.2007, the Senior Assistant Secretary of the Ministry of Industries, informed the Chairman of the Bangladesh Chemical Industries Corporation that a newspaper article showed that there were certain irregularities in the appointment of 19 employees at ZFCL and that the writ-petitioners having been found unsuitable for the post, their services should be terminated. On receipt of the aforesaid Memo dated 29.11.2007, Bangladesh Chemical Industries Corporation by letter dated 05.12.2007 informed ZFCL to terminate the Service of the writ-petitioners at once. The ZFCL Authority as per direction of writ-respondent No.2, thereafter, by the impugned letter dated 11.12.2007 informed the writ-petitioners that their services were terminated and they would be entitled to one month's pay in lieu of any prior notice.

6. Being aggrieved by and dissatisfied with the impugned letters dated 11.12.2007 (Annexure-B) issued by writ-respondent No.3 under the signature of writ-respondent No.5, the writ-petitioners filed the writ petitions before the High Court Division and obtained Rules Nisi in the above writ petitions.

7. Writ-respondent Nos.2 and 5 contested the Rules by filing affidavit-in-opposition controverting the material statements made in the writ petitions. Their case, in short, is that the writ-petitioners were appointed on purely temporary and ad-hoc basis and the same was mentioned in their appointment letters. The petitioners joined their services accepting the said terms and conditions as stated in the appointment letters and the employer had every right to terminate their services without assigning any reason and this is also the case as per provision of Bangladesh Labour Law,2006. It has been further stated that since the appointment of the writ-petitioners were irregular, they were legally terminated as per instruction made by the Ministry of Industry in terms of clause-3 of the appointment letter and that the writ-petitioners cannot have any grievance against the same. It has been further stated that as per P. O. 27 of 1972, the concerned Ministry has supervisory and controlling authority over BCIC and ZFCL and as such, ZFCL is bound to carry out the instructions of the Ministry as well as Bangladesh Chemical Industries Corporation. It has been further stated that the writ-petitioners' services have been terminated in accordance with the provision of law and that the impugned orders of termination are nothing but termination simpliciter and hence the writ-petitioners cannot have any grievance against the same and that the Rules are liable to be discharged.

8. The learned Judges of the High Court Division, upon hearing the Rules, by the impugned judgment and order dated 15.05.2014, made the Rules absolute with direction.

9. Feeling aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the writ-respondents as the leave-petitioners have filed Civil Petition for Leave to Appeal Nos.3028-3043 of 2014 before this Division, in which, leave was granted on 19.02.2015, resulting in Civil Appeal Nos.96-111 of 2015.

10. Mr. Tofailure Rahman, learned Senior Advocate, appearing on behalf of the appellants in all the civil appeals, submits that according to term and condition No.3 of the appointment letter, the writ-petitioner-respondents were terminated from service and as such, the termination in question is mere termination simpliciter and not a stigma and that the High Court Division taking into consideration some extraneous matter held that the orders of termination were arbitrary and malafide and as such, the impugned judgment should be set aside. He further submits that according to clause (2) of Article 11 of P.O. No.27 of 1972, the Board shall be subject to the superintendence and control of the Government and shall be guided, in discharge of its functions, by such general or special instruction as may, from time to time, be given to it by the Government and as such, the writ-petitioner-respondents were rightly terminated as per instruction of the concerned Ministry and as such, no interference is called for.

11. In support of his submissions, the learned Senior Advocate relied on the case of Secretary, EPIDC vs. Md. Serajul Haque, (1970) 22 DLR (SC)284.

12. Mr. A. F. Hasan Ariff, learned Senior Advocate, appearing on behalf of the respondents of all the civil appeals, on the other hand, submits that the instant orders of terminations were not termination simpliciter and in fact, the writ-petitioner-respondents had been dismissed from their service in the garb of termination and as such, the High Court Division was justified in making the Rules absolute.

13. We have considered the submissions of the learned Counsel of both the sides, perused the impugned judgment and the materials on record.

14. Admittedly, the writ-petitioners were appointed to the vacant posts at Zia Fertilizer Company Limited (ZFCL) as per recommendation of ZFCL authority. On consideration of their long standing service, the Bangladesh Chemical Industries Corporation at its discretion considered the recommendation of ZFCL and approved the appointment of the writ-petitioners to the respective posts. The writ-petitioners joined those posts and continued to work without any complaint from any quarter. It appears that suddenly the Ministry of Industries by its letter dated 29.11.2007 issued by the Senior Assistant Secretary informed the Bangladesh Chemical Industries Corporation that the writ-petitioners were not fit for the job against which, they were appointed and consequently, they were liable to be terminated.

15. For better appreciation, the letter dated 29.11.2007 is produced below:

গনপ্রজাতন্ত্রী বাংলাদেশ সরকার
শিল্প মন্ত্রনালয়
ৈ×ল-বিসিআইসি শাখা
৯১, মতিঝিল বাণিজ্যিক এলাক্ব, ঢাকা।

নং-শিম/স্বস(বিসিআইসি)বিবিধ-১/২০০৭/১০৪১

তারিখ ২৯, নভেম্বর, ২০০৭

বিষয়ঃণ্ড_আশুগঞ্জের জিয়া সার কারাখানায় গোপনে নিয়োগ, আড়াইশ জন বঞ্চিত সংবাদ পত্রিকায় প্রকাশিত হওয়ার প্রেক্ষিতে ইতোপূর্বে গঠিত তদন্ড় কমিটির দাখিলকৃত প্রতিবেদনে উলেখিত নিয়োগপ্রাপ্ত ১৯ (উনিশ) জন কর্মচারী ও শ্রমিক নিয়োগ যাচাই বিষয়ে দায়ী কর্মকতা/কর্মচারীদের পুঁ-দায়িত্ব নিরূপনের তদন্ড় প্রতিবেদন|

উপর্যুক্ত বিষয়ের আলোকেঅঢ়ইষ্টঢ়ষ তৎকালীন কর্মচারী প্রধান জনাব আব্দুর রহমান, জিয়া সার খারখানার তৎকালীন ব্যবস্থাপনা পরিচালক জনাব গোলাম কিবরিয়া, তৎকালীন মহাব্যবস্থাপক (ভারপ্রাপ্ত) জনাব এম, এ, আক্কাস, তৎকালীন ব্যবস্থাপক (প্রশাসন) সৈয়দ আইনুল হক এবং সিবিএর প্রাক্তন ও বর্তমান নেতৃবৃন্দ যথাক্রমে সর্বজনাব মোজাম্মেল হক খন্দকার, ফরিদউদ্দিন আহমেদ, মোঃ গাউছুর রহমান ও আমিন খন্দকার এর বির"দ্ধে বিধি মোতাবেক ব্যবস্থা গ্রহণ এবং তদন্ড় প্রতিবেদনে উলেখিত নিয়োগপ্রাপ্ত ১৯ (উনিশ) জন শ্রমিক কর্মচারী যাচাই অন্ড়ে অযোগ্য বিবেচিত হওয়ায় নিয়োগপত্রের শর্ত মোতাবেক তাদেরকে অপসারন করার জন্য অনুরোধ করা হলো।

স্বাক্ষর অস্পষ্ট
২৯.১১.২০০৭
(এ, কে, এম, সামসুল আরফীন)
সিনিয়র সহকারী সচিব
ফোন ঃ-৯৫৫১৪৩৫

16. The aforesaid letter reveals that inquiries against some other officers of Bangladesh Chemical Industries Corporation indicated that the writ-petitioners were not fit for the job and as such, they should be terminated. There is nothing on record to show that during the course of inquiry held at the instance of the Ministry, the writ-petitioners were heard and they were allowed to defend their case. There is no doubt that the Government in the Ministry of Industries is the controlling authority of ZFCL but it cannot direct BCIC to remove employees of ZFCL, who were appointed by the proper authority.

17. In this connection, clause (1) and (2) of Article 11 of the Bangladesh Industrial Enterprises (Nationalisation) Order,1972 is quoted below:

> "11.(1) The general direction and administration of the affairs and business of a corporation shall vest in a Board of Directors which may exercise all powers and do all acts and things which may be exercised or done by the Corporation.
>
> (2) The Board shall be subject to the superintendence and control of the Government and shall be guided, in the discharge of its functions, by such general or special instruction as may, from time to time, be given to it by the Government."

18. Clause (1) of Article 11 provides that general direction and administration of the affairs of the business of a corporation shall vest in a Board of Directors, which may exercise all powers and do all acts and things, which may be exercised or done by the Corporation.

19. Clause (2) of Article 11 provides that the Board shall be subject to the superintendence and control of the Government and shall be guided, in the discharge of its functions, by such general or special instruction as may, from time to time, be given to it by the Government.

20. For harmonious construction, both clause (1) and (2) must be read together. Consideration of clause (2) in isolation without considering the other clause cannot give a harmonious interpretation. If the Ministry dictates the Corporation in all matters then the purpose of clause (1) of Article 11 will become nugatory. There is, of course, no doubt that the Ministry has the control and superintendence over the Corporation but the Ministry cannot interfere in its internal management without concurrence of the Board of Directors. Therefore, the letter dated 29.11.2007 issued by the Senior Assistant Secretary of the Ministry of Industry was malafide exercise of power. The concerned authority of ZFCL recommended the appointment of the writ-petitioners to Bangladesh Chemical Industries Corporation which after considering everything recommended the absorption of the writ-

petitioners against the vacant posts. After that, the writ-petitioners were appointed to the said posts and no complaint was made by the Company about their performance. For the reasons best known to the Ministry, it instructed the Corporation to terminate the writ-petitioners' job. Therefore, the orders of termination were not termination simpliciter. Consequently, this is the outcome of arbitrary exercise of power in a malafide way and as such, the High Court Division was justified in making the Rule absolute declaring the orders of termination to have been passed without lawful authority and to be of no legal effect.

21. Mr. Tofailue Rahman, learned Senior Advocate, appearing on behalf of the appellants of all the civil appeals, relied on the case of *Secretary, EPIDC vs. Md. Serajul Haque (1970)22 DLR (SC)284* where the orders of termination do not at all contain any charge or stigma against the respondents. By these orders, their services were terminated with an offer of 1 month's pay in lieu of notice on the sole ground that their services were no longer required by the Corporation. These orders cannot, therefore, be regarded as orders terminating the services of the respondents by way of penalty.

22. In the case in hand, at the instruction of the Ministry of Industries, the Corporation initiated inquiry against some officials of the Corporation and subsequently pursuant to the letter dated 29.11.2007 of the Ministry, the services of the writ-petitioners were terminated. Therefore, the termination in the instant case is not a termination simpliciter and as such, the case cited by the learned Senior Advocate for the respondents has no manner of application.

23. In the case of *The Chartered Bank, Mombay, vs. The Chartered Bank Employees' Union and another AIR 1960 (SC)919,* it has been held as under:

> ".....The form of the order of termination is not conclusive of the true nature of the order, for it is possible that the form may be merely a camouflage for an order of dismissal for misconduct. It is therefore always open to the tribunal to go behind the form and look at the substance; and if it comes to the conclusion, for example, that though in form the order amounts to termination simpliciter it in reality cloaks a dismissal for misconduct it will be open to it to set it aside as a colourable exercise of the power."

24. In order to arrive at a correct decision, the Court has the power to go behind order of termination and may look to the cause underlining the dismissal.

25. Reliance may be placed on the case of *Bangladesh Road Transport Corporation and another vs. Md. Shahidullah (2002)54 DLR (AD)124*, it has been held as under:

> "It appears that the Corporation initially wanted to remove the respondent through a proceeding and that having failed, they wanted to take action for compulsory retirement under Regulation 55(2) of Service Regulations,1990 and that also having failed his service was terminated. As a matter of fact from the materials on record, the learned Judges of the High Court Division correctly held that in the present case, it was punishment/dismissal in the garb of termination and consequently set aside the order of termination."

26. Reliance may be placed on the case of *Parjatan Corporation vs. Md. Ali Hossain and another, (2013) 65 DLR (AD)158* wherein it has been held that the impugned letter of termination passed against the petitioner of this case though appears to be a termination simpliciter, but in fact, it is not. The petitioner was dismissed from his service in the garb of termination by resorting to regulation 50(2) of the Employees Service Regulations,1990.

27. The principle expounded in the case referred to above also applies to the facts and circumstances of the present case as the letter dated 29.11.2007 reveals that there was an inquiry about the appointment of the writ-petitioner-respondents and pursuant to the said inquiry, the writ-petitioner-respondents were terminated from service by the letter dated 11.12.2007. Therefore, it cannot be said that the writ-petitioner-respondents were terminated from service and in fact, they were dismissed from service in the garb of termination.

28. In the light of the findings made before, we do not find any substance in these appeals. Accordingly, all the appeals are dismissed without any order as to costs.

12 SCOB [2019] AD 8

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain,
Chief Justice
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NO.133 OF 2017 WITH CP NOS. 663 AND 530 OF 2017

(From the judgement and order dated the 17th day of September, 2015 passed by the High Court Division in Writ Petition No.1940 of 2013 with Writ Petition No.6974 of 2013)

Mir Showkat Ali	:	. . . Petitioner (in CP No.133 of '17)
Md. Khaled Ahmed (M. Khaled Ahmed) and others	:	. . . Petitioners (in CP No.633 of '17)
Shamsunnahar Khawaja Ahasanullah and another	:	. . . Petitioners (in CP No.530 of '17)
-Versus-		
Md. Morsalin Khan and others	:	. . . Respondents (in all the cases)
For the Petitioner (in CP No.133 of '17)	:	Mr. Rokanuddin Mahmud, Senior Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record
For Petitioner Nos.2-21 (in CP No.663 of '17,)	:	Mr. A. J. Mohammad Ali, Senior Advocate Mr. M. Khaled Ahmed, Advocate instructed by Mrs Shahanara Begum, Advocate-on-Record
For Petitioner No.1 (in CP No.663 of '17)	:	Mr. Mohammad Ali Azam, Advocate-on-Record
For the Petitioner (in CP No.530 of '17)	:	Mr. Mahbub Ali, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record
For Respondent Nos.1-3 (in CP No.133 of '17)	:	Mr. A.Y. Masihuzzaman, Advocate instructed by Mrs. Madhumaloty Chowdhury Barua, Advocate-on-Record
For Respondent No.5 (in CP No.133 of '17)	:	Mr. Nurul Islam Chowdhury, Advocate-on-Record
For Respondent No.7	:	Mr. Mahbubey Alam, Attorney General

(in CP No.133 of '17		instructed by Mr. Soyeb Khan, Advocate-on-Record
For Respondent Nos.4, 6, 8-21 (in CP No.133 of '17)	:	None represented
For Respondent Nos.1-3 (in CP No.530 of '17)	:	Mr. A.Y. Masihuzzaman, Advocate instructed by Mrs. Madhumaloty Chowdhury Barua, Advocate-on-Record
For Respondent Nos.7 and 12 (in CP No.530 of '17)	:	Mr. Soyeb Khan, Advocate-on-Record
Respondent Nos.4-6, 8-12 and 13-20 (in CP No.530 of '17)	:	None represented
Date of Hearing	:	The 12th day of March, 2018

Authority of the Executive Committee of the Orphanage to deal with property;

The Management/Executive Committee of the Orphanage had no authority to deal with the land other than for the purpose stipulated in the indentures. Those persons at the helm of the affairs of the Orphanage could not arrogate to themselves the authority to transfer the title in the property, which they themselves did not have. The Orphanage was given the property on a short term lease, which was apparent from the lease deeds. As long as these lease deeds existed and as long as the terms were not altered by the executant of the deeds none had the authority to deal with the land other than the purpose for which the lease was granted.

JUDGEMENT

Muhammad Imman Ali, J:

1. These petitions for leave to appeal have been filed against the judgement and order dated 17.09.2018 passed by the High Court Division in Writ Petition No.1940 of 2013 which was heard along with Writ Petition No.6974 of 2013 making the Rule *Nisi* absolute.

2. The facts relevant for disposal of these civil petitions for leave to appeal are as follows:
In Writ Petition No.1940 of 2013: a Rule *Nisi* was issued calling upon the writ-respondents to show cause as to why failure of the writ-respondents to protect the property of Sir Salimuallah Muslim Orphanage (the Orphanage) and their failure to prevent the illegal transfer of the land in question to Concord Limited a real estate company (of which writ-respondent No.16 is the Managing Director) under the influence of the committee members of the Orphanage should not be declared to be without lawful authority and of no legal effect and further to show cause as to why the writ-respondents should not be directed to protect and maintain the property of the Orphanage in accordance with the purpose of the lease agreements signed by the then Government vide Annexure A, A-l, A-2, A-3. There was also an ad-interim order of direction upon writ-respondents Nos.13-17 to maintain status-quo in respect of the position of the entire land covered within the area of the Orphanage.

In Writ Petition No.6974 of 2013: a Rule *Nisi* was issued calling upon the writ-respondents to show cause as to why failure of the writ-respondents in implementing the recommendation of the investigation committee dated 10.04.2013 should not be declared to be without lawful authority and was of no legal effect and accordingly, why writ-respondents Nos.1 and 2 should not be directed to implement the recommendation made under Memo No.41.00.0000.005.003.2012 dated 10.04.2013.

The facts of Writ Petition No.1940 of 2013:

The writ-petitioners grew up as orphans in the Orphanage and were studying in different colleges. From their childhood, the writ-petitioners were directly involved with the interest of the Orphanage. They tried to stop the illegal transfer of the property of the Orphanage by raising their voice. They were waiting to get result, but due to interference of the influential people of the executive committee, it was not possible to protect the property of the Orphanage. Though several times initiative was taken and a committee was formed, but finally nothing could be done to recover the land. Even no investigation could proceed due to interference of the influential group of people. Being conscious citizens, they challenged the illegal acts of the influential persons, who upon violating the provisions of law transferred the land of the Orphanage for their personal gain and as such, for the interest of the orphans as well as of the writ- petitioners and for the benefit of the helpless citizens of the country and in order to establish the rule of law, the writ-petitioners moved this Public Interest Litigation (PIL) before the High Court Division under article 102 of the Constitution along with the prayer for direction upon the writ-respondents to take necessary measures as per article 31 of the Constitution to protect the property of the Orphanage. Late Nawab Sir Salimullah established the Orphanage under the name Sir Salimullah Mohamedan Orphanage Society in 1909 in Azimpur, Dhaka. A constitution was adopted and an Executive Committee was constituted for the Orphanage and subsequently, the constitution was amended. The purpose of setting up the said Orphanage was to look after the orphans of the society and to give them education to lead their life properly with the financial support of the said organisation. Subsequently, the then Government of India decided to give patronage to the said orphanage and accordingly, on 27.07.1915, 29.10.1929, 14.05.1931, 18.05.1934 and 07.09.1934, the then Collector of Dacca, on behalf of the State of India, granted year to year lease of total 22 bighas land from different plots including Plot No.1014 of sheet No.20 of Ward No.7 under Police Station-Azimpur, Dhaka to the Orphanage Committee for its foundation and extensions respectively through indentures: Annexures-A, A-1, A-2, A-3. The said indentures, amongst other conditions, contained a condition that the said leased out lands could not be used for any other purpose except for the purpose detailed in the indenture for the benefit of the Orphanage.

3. The constitution of the Orphanage also contains a condition, like the terms and conditions of the lease deeds, not to transfer any land of the orphanage by any of the members of the executive committee without the approval of 2/3 of the members of the general committee.

4. But by violating all the conditions of the lease deeds of the Government as well as the constitution, some members of the Executive Committee signed an agreement on 22.07.2003 with Concord Real Estate Limited (the Developer) (writ-respondent No.16) for construction

of a Multi-storied Commercial-cum-Residential Building on 40 (forty) Kathas land of the Orphanage. According to the terms of the said agreement writ-respondent No.16 would get 65% of the said multistoried building and the remaining 35% would go to the Developer. Subsequently, on 13.04.2004, some amendments were made in the said agreement which allowed writ-respondent No.16 to own and sell 70 % of the said building. Thereafter, the President and Honorary Secretary of the Executive Committee (writ-respondent Nos.15 and 17 respectively) executed a Power of Attorney nominating writ-respondent No.16 to do the needfull to carry out the works to that effect. With regard to the irregularities and illegalities about the property of the Orphanage, some news items were published in different media. On the basis of such media report, the Director General, Department of Social Welfare, formed an inquiry committee to enquire, about the matter and submit a report. On 29.11.2007, after completion of the enquiry, the committee submitted a report to the authority stating that some members of the committee of the Orphanage by violating the terms, condition, rules and regulations have entered into an agreement by which they transferred the land of the Orphanage in favour of writ-respondent No.16, although there was no scope for anyone to transfer the property of the Orphanage. Despite the said specific report no step was taken by the authority to protect the property of the Orphanage. Rather, the influential and vested/interested group managed to stop the authority from taking further action against the illegal transfer of the property. Some influential members, including writ-respondent Nos.15 and 17, of the executive committee of the Orphanage, who were responsible to protect the interest of the Orphanage, by way of taking some financial benefit acted against the interest of the Orphanage by executing the said deed for construction of the said multistoried commercial-cum-residential building on the land measuring 40 kathas in favour of writ-respondent No.16.

5. Thereafter, on the basis of the application submitted by the students of the Orphanage dated 21.11.2012, the Director General, Social Welfare Department formed another enquiry committee who fixed 28.11.2012 for holding enquiry and accordingly notified all concerned. Similarly, the Ministry of Social Welfare also formed an inquiry committee to hold inquiry about the property and management of the Executive Committee of the Orphanage. Thereafter, on 03.01.2013, the committee issued a letter to the Superintendent of the Orphanage and requested him to be present, but subsequently no effective step was taken by the authority concerned. Several news items were published in the daily newspapers on different dates under different headlines. The writ-petitioners upon going through the said news items felt aggrieved about the inaction of the writ-respondents in protecting the properties of the Orphanage along with some other allegations therewith, and issued a notice demanding justice upon the writ-respondents through their learned Advocate, but in vain. Thus, finding no other alternative, they filed the instant writ petition and obtained the present Rule *Nisi*.

6. The writ-petitioners filed a supplementary affidavit by annexing some relevant papers and documents which are also vital for disposal of the instant Rule. The papers and documents contain the 1st Lease Deed No.1919 dated 27.07.1915 by which the Orphanage was set up and presently situated; the 68th Annual Report of the Orphanage, published in 1978 which contains the history of the Orphanage, including when and how the land belonging to the Orphanage were granted. It was stated that in the Government records the land in question was marked as belonging to the Government and this statement was admitted by writ-respondent No.7 in his affidavit-in-opposition dated 22.06.2015. While the order of status-quo was granted by the High Court Division, one Mr. Sameer Kanti Datta, Deputy Project Manager of writ-respondent No.16 (the Developer) led about 40 persons, who

claimed to be the flat purchasers from writ-respondent No.16, to forcibly enter into the disputed land, for which the police had to be called, who dispersed the unruly mob. A General Diary No.1295 dated 22.06.2015 was lodged with the Lalbag Police Station. The said incident was also published in the Daily Prothom Alo on 23.06.2015.

7. The writ-petitioners filed another supplementary affidavit annexing the combined Zarip Map with the Government regarding the land of S.A. Plot No.9, 1004, 1013, R.S. Plot Nos.615, 1241, 1242 and City Zarip Plot No.1002. From the said combined Zarip Map it was clear that writ-respondent Nos.15 and 17 illegally transferred the land to writ-respondent No.16, which was situated in the main part of the Orphanage which was obtained by the second lease deed (1st extension) being Deed No.1560 dated 29.10.1929 from the Khas Mohal land, sanctioned by the Government vide letter No.2713 dated 27.11.1927.

8. When the Rule *Nisi* was ready for hearing, Mr. Asaduzzaman Siddique, on behalf of Human Rights and Peace for Bangladesh (HRPB), filed an application for impleading his organization as writ-petitioner No.5 in the Rule *Nisi.* After considering the application and for effective assistance to the Court for disposal of the Rule *Nisi,* his application for addition of party was allowed vide order dated 16.06.2015. Accordingly, he was made co-petitioner No.5 who relied upon the facts and circumstances of other petitioners of Writ Petition No.1940 of 2013 and made submissions accordingly.

9. Writ-respondent Nos.1, 2 and 8 in one set; writ-respondent No.7 in another set, writ-respondent Nos.15 and 17 as the 3rd set and writ-respondent No.16 as the 4th set contested the Rule *Nisi* contending, *inter alia*, that after publication of the news items in different newspapers about the illegal transfer of land of the Orphanage by the then Executive Committee, to writ-respondent No.16, a meeting was held on 01.11.2007 in the Ministry of Social Welfare, Bangladesh Secretariat, Dhaka whereupon it was decided that the matter should be investigated. Accordingly, a high level investigating committee comprising three members was constituted under section 9 of The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961(the Ordinance, 1961). After conclusion of the investigation, the said committee submitted a report holding that the allegations were correct and the executive committee violated the constitution of the Orphanage, the provisions of the Ordinance, 1961 and Order of 1962 and accordingly made some recommendations. Pursuant to which the then Executive Committee of the Orphanage was suspended and a five member Managing Committee was constituted to run the Orphanage and to hold election to elect the new Executive Committee and to operate the institution. It was further decided that the elected Executive Committee would take necessary steps against all the illegal acts of the suspended Executive Committee. But the elected committee did not take any step against the illegalities of the suspended Executive Committee nor took any step to recover the illegally transferred land of the Orphanage. According to the decision of the Ministry of Social Welfare, and letter No.সকম/প্রতিঃশাঃ/এজিও-২৭/০৭-১৭৭ dated 20.05.2009 and the recommendation of the Anti-Corruption Commission vide Memo No.দুদক/২৭-২০০৮ (অনুঃ ও তদন্ত-১/ঢাকা/৬২০২ dated 22.04.2008, Md. Abu Siddik Bhuiyan, District Social Welfare Officer, Dhaka filed a criminal case against the suspended Executive Committee before the Court of the Chief Metropolitan Magistrate, Dhaka. According to the constitution of the Orphanage, the elected committee with the help of the general members of the organisation directly controlled the supervisory power about all the moveable and immoveable properties of the Orphanage. On 28.02.2013, the Deputy Director, District Social Welfare Office, issued letter No.৪১.০১.২৬০০০.০০০. ২৮.১৯২(০৯) .১৩.৩৮৬ to the General Secretary of the Orphanage (writ-respondent No.15) requesting him to take appropriate and effective steps about the demand of justice notice

issued by the learned Advocate for the writ-petitioners. By letter dated 11.03.2013, the Secretary of Sir Salimuallah Muslim Orphanage (writ-respondent No.15), informed the Deputy Director, District Social Welfare Office that they had taken necessary steps about the Demand Justice Notice issued by the learned Advocate for the writ-petitioners.

10. It was stated that the present elected Executive Committee was responsible to maintain, run and protect the Orphanage including protecting the movable and immovable properties of the Orphanage. As such, since the previous Executive Committee illegally transferred the land of the Orphanage, the present committee was bound to explain and recover the same. It was not the responsibility of the Department of the Social Welfare Ministry.

11. On 04.06.2013, a letter was issued by the Ministry of Social Welfare to the Deputy Commissioner, Dhaka vide letter No.41.01.000.046.24.043. 13-259 directing him to take necessary steps according to the investigation report and recommendations dated 10.04.2013 against the corruption and mismanagement related to the movable and immovable property of the Orphanage. Accordingly with a view to take necessary steps, a letter was issued by the Ministry of Social Welfare to the Deputy Commissioner, Dhaka vide letter No.41.01.0000.046.24.043.13-259 to that effect and constituted a committee comprising five members and the working of that committee was still running. So article 21 of the constitution was followed properly along with other statements therewith.

12. Respondent No.12 herein, the Deputy Commissioner, Dhaka (writ-respondent No.7) further contended, *inter alia*, that the property of Sir Salimuallah Muslim Orphanage is situated on S.A. Plot Nos.9, 1004, 1013 and 1014 measuring an area of 3.3288 acres land under 'Khasmahal' Touzi. The land in question was leased out to Sir Salimuallah Muslim Orphanage by the then Deputy Commissioner, Dhaka, on a nominal salami of taka 1 (one) only and the possession of the land was delivered to the Orphanage authority. In the R.S. record, the land was recorded as "Khas" land. City Zarip was also prepared in the name of the Deputy Commissioner, Dhaka as "Khas land". Thus the orphanage authority had no power to transfer a portion of the land to the Developer. Thus the transfer was illegal as the land of S.A. Plot Nos.9, 1004, 1013 and 1014 was recorded in the name of the Deputy Commissioner, Dhaka as khas land and the Orphanage was simply a lessee. Writ-respondent No.7 also filed an affidavit-in-reply to the affidavit-in-opposition of writ-respondent No.16 and contended that on 01.10.2013, writ-respondent No.16, Concord Condominium Limited, filed a supplementary affidavit-in-opposition annexing a letter of the office of writ-respondent No.7 dated 05.01.2004 (Annexure-"1") which on examination and on consultation of the office records was found to be not genuine. The office of writ-respondent No.7 did not issue any such letter, rather annexure-"1" was created by writ-respondent No.16 for its own interest. The said annexure was fake and managed with a view to grab the land of the Orphanage.

13. Writ-respondent Nos.15 and 17contended that the allegations of the writ-petitioners were not true and they had no *locus standi* to file the instant writ petition though the writ-petitioners were residents of the said Orphanage, now they were no more residents as they passed out and left the Orphanage. They were more than 18 years, thus writ-petitioner Nos.1-4 were not connected with the said Orphanage anymore. As such, they had no *locus standi* to file the instant writ petition. The Executive Committee of the Orphanage was entitled to take decision for betterment of the orphans as well as the Orphanage. Since the Orphanage had no permanent source of income, writ-respondent Nos.15 and 17 took necessary steps to arrange

a permanent source of income for the Orphanage. Accordingly, for the betterment of the orphans of the said Orphanage, the agreement was executed on 22.07.2003 for the benefit of the Orphanage. The Orphanage had no money of its own to construct the building which could permanently provide huge income every month upon letting out the same to different persons. On the execution of the agreement with writ-respondent No.16, the orphanage initially earned taka 30,00,000.00 apart from owning a portion of the building after the construction was complete. Respondent Nos.15 and 17 along with other members of the executive committee, first took over the charge of the Orphanage vide Memo No.2706(6)/09 dated 05.11.2009 issued by the registering authority of the Department of Social Welfare. After taking over the charge, the Executive Committee of writ-respondent Nos.15 and 17 created pressure upon the Developer (writ-respondent No.16) to enhance the share of the Orphanage. Accordingly another supplementary deed of agreement was executed by writ-respondent Nos.15 and 17 and the Developer, Concord Limited, where the share of the Orphanage was enhanced to additional 03% of the commercial space and 08% of the total residential spaces and also realised taka 50,00,000.00 (fifty lac) only in cash in addition to earlier amount of taka 30,00,000.00 (taka thirty lac) only and also added the saving clauses to its agreement. The supplementary agreement was annexed as Annexure-1. The writ-respondents did not transfer any land to the developer. On the basis of some incorrect news published in some of the daily newspapers, the writ-petitioners filed the instant writ petitions falsely.

14. It was further stated that in 2007, during the Caretaker Government, a high power committee was constituted, headed by Ms. Giti Ara Safia Chowdhury, the then Advisor in charge of Ministry of Social Welfare wherein writ-respondent No.7 was a member. In a meeting of the said committee, the then Additional Deputy Commissioner (Revenue), Dhaka representing writ-respondent No.7 stated that the land in question had already vested upon the Orphanage by way of permanent settlement and as such, the authority of the Orphanage had all power to own and manage the land which was vested upon the Orphanage. Accordingly, the authority of the orphanage concerned, in pursuance of the rules, entered into such deeds of agreement and power of attorney with writ-respondent No.16. A letter dated 05.01.2004 (annexure-1) issued by the office of writ-respondent No.7 and the resolution dated 01.11.2007 (annexure-7) if read together, it would be easily construed that the statements made in paragraph No.4 of the writ petition were false and the investigation report in question was concocted.

15. Writ-respondent No.16 (Managing Director of the Developer Company) also contended by filing an affidavit-in-opposition that writ-respondent No.16 was not personally liable for any act done in the capacity of Managing Director of the Concord Condominium Limited, a company registered under Companies Act, 1994. The Orphanage which was not a party in the instant writ petition, was neither a statutory body nor it could be said to be a Government authority against whom judicial review would be maintainable. The writ-petitioners purported to challenge the legality of the contract dated 22.07.2003 entered into between two private parties, the Orphanage and the Concord Condominium Limited to develop a private property belonging to the Orphanage which was not amenable to writ jurisdiction and as such, the writ petition was not maintainable. The subject matter of the writ petition involving a private contract entered into between two private parties writ-respondent Nos.1-10 and 12 had no connection with the said private contract dated 22.07.2003. The writ-petitioners made them parties just to invoke the writ jurisdiction with a *mala fide* intention to by-pass the civil jurisdiction as they knew that they had no factual as well as legal basis in support of their contentions. The Orphanage being the perpetual lease holder of the

contracted property, it required no permission from any authority to sell or change the nature and character of the property, especially when the steps were taken to enhance the income of the orphanage smoothly. The Executive Committee of the Orphanage being empowered under Part 'Tha' Clause 2 Ka of its constitution took resolution to deploy writ-respondent No.16 as the developer for developing its property to enhance the funds of the Orphanage. Subsequently, the General Body of the Orphanage proposed to enhance the share of the Orphanage in the developed property which was accepted by writ-respondent No.16. The Orphanage sought an amendment of the agreement dated 22.07.2003 vide letters dated 20.10.2011 and 22.09.2011, thereafter both parties entered into the amendment agreement on 27.10.2011. Writ-respondent No.16 was carrying on the construction work for the last 10 (ten) years and within that period, nobody had ever raised any question as to the legality of the project or the contract dated 22.07.2003. The structural construction work had already been completed. The interior decoration work was in progress now. Being empowered vide the aforesaid development contracts and the power of attorney executed thereunder most of the spaces/shops/flats of the developed property had already been transferred to third parties. The contract dated 22.07.2003 was not in any way an illegal or void/voidable contract; the contract was legal and valid. The writ-petitioners had no *locus standi* to file the instant writ petition. Since by now long time elapsed after entering into the contract dated 22.07.2003 writ-respondent No.16 and other third party transferees acquired legal and vested rights over the contractual property under part 'Tha' of clause 2Ka of its constitution.

16. **The facts of Writ Petition No.6974 of 2013:**

In addition to the similar facts and circumstances as stated in Writ Petition No.1940 of 2013, the writ-petitioner in Writ Petition No.6974 of 2013 stated that for the purpose of establishment and running of Sir Salimullah Muslim Orphanage, the then Government of India granted five lease deeds wherein the orphanage was set up and run uninterruptedly. Recently when the Executive Committee entered into such agreement with writ-respondent No.16 the residents of the Orphanage submitted several applications to the writ-respondents to take steps against the illegality and requested to protect the property of the Orphanage. On the basis of the application dated 21.11.2012 the Director, Social Welfare Department, of the government of Bangladesh formed an inquiry committee. The date of the inquiry was fixed on 28.11.2012. Similarly the Ministry of Social Welfare also formed an Investigation Committee on 13.12.2012 to investigate about the property and management of the Orphanage. Thereafter, on 03.01.2013 the committee issued a letter to the Superintendent of the Orphanage and requested him to be present on 09.01.2013.

17. Thereafter, on 10th April, 2013 the said Investigation Committee comprising (i) Deputy Director (Current Charge), District Welfare Office, (ii) Deputy Director Institution-2, Department of Social Welfare and (iii) Deputy Director (Institution) Ministry of Social Welfare submitted the Investigation report.

18. The said investigation report pointed out the following problems;

"(a) 20 to 25 over aged boys are living in the Orphanage area and these over aged students are involved in unsocial and immoral activities.

19. As per S.A survery it was recorded that the orphanage owns Plot No.48 Azimpur Road, Mouja Lalbagh, Khatian No.15, Dag Nos.9, 10, 15, 146, 147 and 148 measuring up to 8.14 acres. But during the Metropolitan Survey no record has been made in the name of the Orphanage, rather all the properties of the Orphanage are shown under the name of D.C,

Dhaka (Khatian No.l, land-measuring 3.416 acres) and under the C & B Bangladesh Government in Khatian No.1, Dag No.431 measuring up to 2.5640 acres.

20. The agreement entered into between the Governing Body of the Orphanage and Concord Limited is against the interest of the Orphanage.

21. That the said investigation report also made certain recommendations for the purpose of protecting the land of the Orphanage which are as follows:

To recover the landed properties of the Orphanage and file civil cases to rectify the records.

To evict the over aged students who are living in the Orphanage.

To take steps to recover the properties which have been done away by the Governing Body illegally.

To cancel the agreement with Concord Limited and recover its lost properties.

As a long term development plan transform the Orphanage into children village.

As the Governing Body has failed to carry out its duty properly, to suspend the current Governing Body and appoint an Administrator.

To appoint an experienced lawyer to conduct the Writ Petition No.1940 of 2013 pending before the High Court Division of the Supreme Court of Bangladesh."

22. In the meantime, several news items were published in the Daily Newspapers on different dates under different headlines in respect of the illegalities surrounding the Orphanage. The petitioner read the news items of the newspapers and felt very much aggrieved about the inaction of the respondents to protect the leasehold property of the Orphanage illegally transferred upon violating the provisions of lease deeds and the law. It was reported in the newspaper that some of the influential persons are behind the scene.

23. After lapse of about two months when it was found that no step had been taken by the respondents to protect the properties of the Orphanage, the writ-petitioner, on 03.06.2013, wrote a letter to writ-respondent No.1 and requested to take steps according to the investigation report. But no step having been taken the writ-petitioners filed this writ petition and obtained Rule *Nisi* for direction for implementation of the aforesaid recommendation.

24. Writ-respondent Nos.1, 2 and 4, Secretary, Ministry of Social Welfare, Director General (DG) Department of Social Welfare, Director (Institution) Ministry of Social Welfare appeared in the Rule *Nisi* by filing a joint supplementary affidavit-in-opposition contending, *inter alia*, that they supported the Memo dated 10.04.2013 of respondent No.1(Annexure-4) and pursuant to the recommendation of the investigation committee, writ-respondent No.2, the Director General, Department of Social Welfare issued a show cause notice on 09.09.2013 upon writ-respondent No.8, Nawabzada Khawaja Zaki Ahsanullah, President, Executive Committee, Sir Salimullah Muslim Orphanage asking him to show cause, within seven days, as to why the Executive Committee would not be suspended under sections 9(1) and 9(2) of the Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961. But on receipt of the said show cause notice, writ-respondent No.8 instead of replying to the same sent an application for time, on 22.09.2013 which was rejected. Thereafter, writ-respondent No.2, considering the investigation report and the recommendations dated 10.04.2013 (Annexure-4) temporarily suspended the Executive Committee of Sir Salimullah Muslim Orphanage and appointed the Additional Deputy Commissioner (General) Dhaka, as the Administrator of the said Orphanage, vide order No.41.01.0000.046.24. 036.13-88 dated 19.02.2014. It further stated that the Additional

Deputy Commissioner (General), Dhaka, Md. Jasim Uddin has already taken over the charge of the office of Sir Salimullah Muslim Orphanage as an Administrator and issued three letters dated 03.03.2014, 13.03.2014 and 23.03.2014 to the Ex-President of the Executive Committee, Nawabzada Khawaja Zaki Ahsanullah for making an inventory of the assets and liabilities of the orphanage.

25. Writ-respondent No.7, the Deputy Commissioner, Dhaka appeared in the Rule *Nisi* by filing an affidavit-in-opposition contending, *inter alia*, that more or less 17 acres land was granted by lease in favour of purpose "Sir Salimullah Muslim Orphanage" with a condition not to use the said land other than the purpose for which it was leased out. Writ-respondent No.7 has come to know that some office bearers of the Sir Salimullah Muslim Orphanage by violating the terms and conditions of those lease deeds illegally handed over more or less 40 kathas of land to the Concord Real Estate Company for construction of Multi- storied Commercial and Residential Building. It was further stated that the case land is Government Khas land, the District Magistrate, Dhaka has got the right to investigate the matter for such transaction between the office bearers and the developer company accordingly appropriate steps are being taken in accordance with law.

26. Writ-respondent Nos.8 and 9, Nawabzada Khawaja Zaki Ahsanuallah, the then President, and Md. Anisur Rahman, the then Secretary, of the Executive Committee of the Sir Salimullah Muslim Orphanage filed a joint affidavit-in-opposition denying all material allegations of the petitioner. But they did not appear at the time of hearing of the Rule.

27. In due course, after hearing the parties, by the impugned judgement and order the said Rules *Nisi* were made absolute. Hence, writ-respondent No.16 filed Civil Petition for Leave to Appeal No.133 of 2017 before this Division. Against the same judgement and order, Civil Petition for Leave to Appeal No.633 of 2017 was filed by Md. Khaled Ahmed and others claiming that they have purchased flats from the Developer. Shamsun Nahar Khawaja Ahsanullah and another being the former President and present President respectively of the committee of the Orphanage filed Civil Petition for Leave to Appeal No.530 of 2017.

28. For the petitioner in Civil Petition for Leave to Appeal No.133 of 2017, Mr. Rokanuddin Mahmud, learned Senior Advocate appeared. Petitioner Nos.2-21 and petitioner No.1 in Civil Petition for Leave to Appeal No.633 of 2017 were represented by Mr. A.J. Mohammad Ali, learned Senior Advocate and Mr. Mohammad Ali Azam, learned Advocate-on-Record and Mr. Mahbub Ali, learned Senior Advocate, appeared for the petitioners in Civil Petition for Leave to Appeal No.530 of 2017.

29. Mr. Rokanuddin Mahmud, learned Senior Advocate, appearing for the petitioner in Civil Petition for Leave to Appeal No.133 of 2017 submitted that the petitioner as a Real Estate Company on 22.07.2003 entered into a contract with the Orphanage to develop the private property of the Orphanage which was not amenable to writ jurisdiction and thus the writ petition was not maintainable; the High Court Division upon misconceived view made the Rule *Nisi* absolute with direction and observation declaring the contract as illegal. He further submitted that the High Court Division failed to consider that the Orphanage as perpetual lease holder of the contracted property requires no permission from the concerned authorities to sell or change the nature and character of the property, particularly any steps taken for enhancement of income from the said charitable organisation and as per clause 2(Ka) of the constitution, the Orphanage took resolution and deployed the developer company, namely, Concord Condominium Limited by entering into an agreement with

subsequent amendment, which had been made in accordance with law. Hence, the High Court Division erred in law in declaring the agreement as illegal and void *ab initio*. He further submitted that after entering into agreement the petitioner as Real Estate Company started construction over 8.5 bighas land of Sir Salimullah Muslim Orphanage and the authority of RAJUK on 26.05.2004 by a letter mentioned that earlier over the proposed land clearance letter was issued on 13.01.2004 for construction of 6 stories residential-cum-commercial building as per section section 75(1) of Building Construction Rules, 1996 and thus considered the proposal of construction of 18 storied building over more or less 6 bighas land of orphanage by the petitioner; the High Court Division overlooked the correspondence and earlier transactions by the managing committee of the orphanage and made the Rule *Nisi* absolute by declaring the legal private contract with the petitioner for developing the land of the Orphanage by making construction of residential cum commercial building as illegal and made some directions upon different authorities which are liable to be set aside. He further submitted that under the constitution of Sir Salimullah Orphanage, Dhaka to raise fund of the Orphanage, article 2 provides that "(ক) অত্র গঠনতন্ত্রের নিয়মাবলী অনুসারে তহবিল উন্নয়নের স্বার্থে বিভিন্ন প্রকল্প হাতে নেওয়া যাইবে এবং (খ) প্রকল্প বাস্তবায়নের স্বার্থে গঠনতন্ত্রে বিধি অনুযায়ী স্থাবর কিংবা অস্থাবর সম্পত্তি সমূহ লগ্নি করা যাইবে" and the managing committee of the Orphanage as per provision of the constitution entered into a contract with the petitioner for developing the property after issuing tender notice in the newspaper. Thus the High Court Division ought to have discharged the Rule as the agreement was approved in the general meeting of Sir Salimullah Muslim Orphanage on 02.10.2003 in which 61 members were present and accepted the agreement unanimously. He further submitted that the writ-petitioner in response to the tender notice published in the daily Inqilab dated 17.03.1999 wherein Sir Salimullah Mulsim Orphanage authority called bid for development of a multipurpose complex on their land at Lalbagh through joint venture, submitted bid in the tender and became highest bidder, thus was awarded the contract, the High Court Division without considering such the facts abruptly declared the agreement as illegal and made directions, which is liable to be set aside. He further submitted that the writ-petitioner was awarded the contract in 1999, signed the project in 2003 and has undertaken construction work from 2007 and the writ petition was filed in the year 2013 when the total structure of the building was completed. Furthermore, the petitioner has constructed the building upon getting necessary permission and approval from all concerned government bodies including RAJUK, the filing of writ petition under Public Interest Litigation depicts clearly dishonest intention as after 10 years of signing of the agreement and after 6 years of commencement of work, they filed the writ petition; the High Court Division ought to have discharged the Rule *Nisi* in holding that the writ petition is not maintainable. He further submitted that as perpetual lease property, Sir Salimullah Muslim Orphanage Trustees had the legal authority to handover the land to any outside party with a view to betterment of the orphanage and the High Court Division erred both in law and facts in not considering that the orphanage as a registered society had complied with the terms of the lease deeds, entered into an agreement with the petitioner for making construction of the building for the purpose of enhancement of funds for betterment of the orphanage.

30. Mr. A.Y. Masihuzzaman, learned Senior Advocate for respondent Nos.1-3, Mr. Mahbubey Alam, learned Attorney General for respondent No.7, Mr. Nurul Islam Chowdhury, learned Advocate-on-Record for respondent No.5, appearing in Civil Petition for Leave to Appeal No.133 of 2017 and Mr. Soyeb Khan, learned Advocate-on-Record for respondent Nos.7 and 12, appearing in Civil Petition for Leave to Appeal No.530 of 2017 all supported the impugned judgement and order of the High Court Division.

31. From the judgement of the High Court Division, it appears that the conduct of the supervisory and controlling authority of the said Orphanage, i.e. the Executive Committee, was found to be not satisfactory and the high power inquiry committee made some observations and recommendations to safeguard and protect the interest of the Orphanage which was considered by the High Court Division. The High Court Division observed that to protect the Government property and the orphanage, it needed to pass some directions for the interest of backward, disadvantaged and helpless Orphans of the said Orphanage.

32. The High Court Division observed that the failure of the respondents to protect the Government property leased out in favour of the Orphanage and illegal transfer of land to the developer company (respondent No.16) under the influence of the committee members, namely, the President and the Secretary (respondent Nos.15 and 17 in the Writ Petition No.1940 of 2013) to be without lawful authority and of no legal effect. The High Court Division declared that the deed of agreement dated 22.07.2003 and amendment agreement dated 22.07.2003 and irrevocable power of attorney dated 13.04.2004 Annexures-C, C-1 and C-2 respectively between respondent Nos.15, 16 and 17 are also illegal and thus those were cancelled as those are void *ab-initio.*

33. The High Court Division went on to hold that the building which was being constructed on the Government land along with all properties and structures situated thereon made in pursuance of Annexures-C, C1 and C2 be confiscated in favour of the Orphanage to be used for the purpose and benefit of the orphans and the Orphanage. Respondent No.16 was directed to hand over the said multi-storied building in favour of the Orphanage through respondent No.1 within 30 (thirty) days from the date of receipt of the order of the High Court Division. Respondent No.1 was also directed to take possession of the said land along with the multi-storied building from respondent No.16 and hand over the said building to the Orphanage within the said period, failing which respondent Nos.1 to 12 of Writ Petition No.1940 of 2013 were directed to take necessary steps for taking possession of said building and property by evicting respondent No.16 and his men from the said property within 7(seven) days without fail in accordance with law and hand over the same to the said Orphanage.

34. The High Court Division also directed respondent Nos.1 to 12 to take immediate steps for constituting an effective managing committee to run the administration and management of the said Orphanage who will protect, maintain, improve and run the administration of said Sir Salimullah Muslim Orphanage and properties situated within the campus of the Orphanage in accordance with law keeping in mind the purposes of the lease deeds executed by the Government vide annexures-A, A-1, A-2 and A-3 and H respectively.

35. Respondent No.7 was also directed to take necessary steps against respondent Nos.15, 16, 17 and others, if any, for committing forgery, cheating and abetting and purposefully acting against the interest of the orphans/Orphanage, in accordance with law.

36. We find from annexures-'A' that the Government granted lease of land at various times for the benefit of the Orphanage at a nominal rent. Each of the deeds stipulates the specific purpose for which the land is to be used, failing which the land would revert to the Government.

37. The High Court Division observed that the Management/Executive Committee of Sir Salimullah Muslim Orphanage framed its own constitution on 13.12.1987 giving themselves

the authority to sell land of the organisation, but there is no such provision to sell Government leasehold property of the Orphanage in any manner. By reference to the Government Estates Manual, the High Court Division held that the lease of the land of the Orphanage was short term and the land is not transferrable; the land is recorded in the name of the Government, and hence the entire land of the Orphanage is Government land, and as such, the transfer of the land by the Executive Committee was illegal.

38. Turning to the inquiry report of the Ministry of Social Welfare, the High Court Division noted that the land used by the Orphanage is recorded in Khatian No.1 in the name of the District Collector, Dhaka on behalf of the Government. The high powered inquiry committee recommended, *inter alia,* to cancel the agreements between the Executive Committee of the Orphanage and respondent No.16-the Developer and thereby confiscate the said building in favour of the Orphanage.

39. The claim of respondent No.16-the developer and respondent Nos.15 and 17-President and Secretary respectively of the Executive Committee of the Orphanage is that the agreements Annexures-C, C1 and C2 are legal and valid being in accordance with article 2(Ka) of the Constitution of the Orphanage. They also claim that the building was constructed with due permission from the Government through the Additional Deputy Commissioner (Revenue), Dhaka. Thereafter, RAJUK accorded permission to construct the multi-storied building. The claim of respondent No.16 that the lease was a perpetual one was refuted by the Deputy Commissioner, Dhaka (respondent No.7).

40. With regard to the permission by RAJUK to construct a building on the land, the High Court Division, upon scrutiny of the affidavit materials found that there was no final approval letter issued by RAJUK for constructing the said Residential-cum-Commercial Multi-storied Building on any land of the Orphanage.

41. On perusal of the five original lease deeds in favour of the Orphanage, it is plainly evident that each time more land was given on lease for the Orphanage, there was a specific purpose mentioned in the deed itself and there was a categorical bar on using the land for any purpose other than the one stipulated, and failure to observe the condition would result in the land reverting to the Government. We find from annexure-'A' series that on each occasion of new lease for land, the specific purpose of giving more land was to expand existing Orphanage for dormitory etc. In 1934, land was given for the purpose of a playground for the Orphanage. In each of the leases, there was a condition that if the land was not used for the purpose stipulated then it would revert to the Government.

42. By no stretch of imagination can a multi-storied residential-cum-commercial building, where apartments have been sold to the public, be said to comply with the stipulations entrenched in the lease deeds. This, along with the record of rights and the reports of the high power committee, led the High Court Division to hold that respondent Nos.15 and 17 entered into agreement with respondent No.16 illegally to construct the multi-storied building. It was held that the deeds of contract and power of attorney in respect of the land in question were illegal and void *ab-initio.*

43. In the case of Begum Khaleda Zia-Vs-Government of Bangladesh and others, 63 DLR 385 it was held that "it is a well settled principle of law that void deeds need not be cancelled….[possession] for 28 years on the basis of a void deed cannot create vested right against the Government."

44. We find it curious to note that writ-respondent Nos.15 and 17 defended their action of entering into an agreement with respondent No.16 *by claiming that they were acting for the benefit of the orphans/Orphanage* by arranging a permanent source of income and that they did not transfer any land to the Developer. On the other hand, it is patently obvious from the standpoint of respondent No.16 that the Orphanage held the land on the basis of a perpetual lease and there was no bar to sell or change the nature and character of the property. Indeed, respondent No.16 has admitted that third party transferees have acquired legal and vested rights over the contracted property. According to the third party petitioners (petitioners in Civil Petition for Leave to Appeal No.633 of 2017), they purchased apartments in the building constructed by the Developer on payment of large sums of money. The obvious legal and factual position is that the Developer can only transfer to others right/title/interest in the property if it had such right/title/interest in the property and had the authority to make such transfer.

45. It is on record that the Deputy Commissioner, Dhaka (writ-respondent No.7) denied the issuance of the letter from his office which purportedly stated that the property was held by the Orphanage on a perpetual lease. Writ-respondent No.7 categorically stated that the letter dated 05.01.2004 (Annexure-1) claimed by the Developer to have been issued by the Office of the Deputy Commissioner, was a forgery.

46. The report dated 10.04.2013 makes reference to the land of the Orphanage given under lease deeds dated 27.07.1915, 29.10.1929, 14.05.1931, 18.05.1934 and 01.09.1934, comprising in total more or less 22 bighas. The report indicates that the inquiry committee comprising officials of the Department of Social Services and Ministry of Social Welfare came to a finding that the agreement between the Executive Committee of the Orphanage and Concord Condominium Limited was contrary to the interests of the Orphanage. It recommended, *inter alia,* that steps be taken to recover the property of the Orphanage which had been illegally transferred.

47. In any event, we are of the view that the lease deeds, Annexure-'A' series are short term leases incorporating specific terms and conditions, breach of which would result in the land reverting to the Government. The Management/Executive Committee of the Orphanage had no authority to deal with the land other than for the purpose stipulated in the indentures. Those persons at the helm of the affairs of the Orphanage could not arrogate to themselves the authority to transfer the title in the property, which they themselves did not have. The Orphanage was given the property on a short term lease, which was apparent from the lease deeds. As long as these lease deeds existed and as long as the terms were not altered by the executant of the deeds none had the authority to deal with the land other than the purpose for which the lease was granted. The agreements entered into between respondent Nos.15 and 17 and respondent No.16 as well as the power of attorney are, therefore, illegal and void *ab initio* and of no legal effect.

48. In view of the discussion above, we find the claims made by the petitioners in Civil Petition for Leave to Appeal No.530 of 2017 untenable. Hence we do not find any merit in the petition.

49. With regard to Civil Petition for Leave to Appeal No.633 of 2017, the claims of the petitioners rise and fall with those of the Developer. Since we do not find any merit in the

claim of the Developer, the claim of the petitioners in Civil Petition for Leave to Appeal No.633 of 2017 fails. Their claim, if any, may be against the Developer.

50. Hence, we do not find any illegality or impropriety in the impugned judgement and order of the High Court Division.

51. Accordingly, the Civil Petition for Leave to Appeal No.133 of 2017 is dismissed. Consequently, the Civil Petition for Leave to Appeal Nos.530 of 2017 and 633 of 2017 are also accordingly dismissed.

12 SCOB [2019] AD 23

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain,
Chief Justice
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NOS.429-468 OF 2015 WITH C.R.P.NO.61, 76-77 OF 2014 AND CIVIL PETITION FOR LEAVE TO APPEAL NO.784 OF 2011

(From the judgments and orders dated 05.08.2012, 05.05.2010, 25.05.2010, 08.05.2011, 18.01.2011, 09.05.2011, 08.06.2010, 05.08.2012, 14.08.2012, 12.08.2012, 26.07.2012, 25.7.2012 07.08.2012, 26.07.2012, 24.07.2012, 10.04.2012, 11.06.2012, 12.02.2014 and 05.05.2010 passed by the High Court Division in Writ Petition Nos.3643 of 2010; 7399, 8417 of 2009, 1417, 3176, 3421 of 2010, 8945 of 2009, 1540-1544 of 2010, 1672 of 2012, 4482 of 2009, 3659 of 2010, 10216 of 2012, 1402, 2451 of 2011, 6663, 1291, 2748 of 2010, 6151 of 2011, 8928 of 2009, 5256, 4259, 6368, 3358 of 2010, 3035, 6042, 3402, 8766 of 2009, 3845, 4008 of 2010, 7176, 7177 of 2011, 4071 of 2013, 6701, 934, 5835, 1788 of 2010, C.A.No.45, 46, 48 of 2012 and W.P. No.7950 of 2009.)

Bangladesh Agricultural Development Corporation, represented by its Chairman, Dhaka and others:		Appellants. (In all the appeals, In C.P.784/11
Md. Ataur Rahman and others	**:**	Petitioner (C.R.P.No.61/14)
Md. Abdur Rashid and others	**:**	Petitioner (C.R.P.No.76/14)
Md. Saiful Alam Khondakar	**:**	Petitioner (C.R.P.No.77/14)

=Versus=

Md. Shohidul Islam and others	**:**	Respondents. (In C.A.No.429/15)
Md. Alaz Miah and others	**:**	Respondents. (In C.A.No.430/15)
Md. Nurul Islam and others	**:**	Respondents. (In C.A.No.431/15)
Md. Omar Ali Fakir and others	**:**	Respondents. (In C.A.No.432/15)
Syed Emran Reza and others	**:**	Respondents. (In C.A.No.433/15)
Md. Abul Hasem and others	**:**	Respondents. (In C.A.No.434/15)
Iqbal Uddin Ahmed and others	**:**	Respondents. (In C.A.No.435/15)
Md. Abdul Barik and others	**:**	Respondents. (In C.A.No.436/15)
Md. Shahidur Rahman and others	**:**	Respondents. (In C.A.No.437/15)
Md. Mahatab Ali and others	**:**	Respondents. (In C.A.No.438/15)
Md. Yakub Ali Khan and others	**:**	Respondents. (In C.A.No.439/15)
Md. Nazrul Islam and others	**:**	Respondents. (In C.A.No.440/15)
Md. Rezaul Huq and others	**:**	Respondents. (In C.A.No.441/15)
Shamsul Alam and others	**:**	Respondents. (In C.A.No.442/15)

Md. Rezaul Karim and others	**:**	Respondents. (In C.A.No.443/15)
Golam Rahmanul Alam and others	**:**	Respondents. (In C.A.No.444/15)
Md. Abdul Awal Howlader and others	**:**	Respondents. (In C.A.No.445/15)
Md. Abul Kalam Azad and others	**:**	Respondents. (In C.A.No.446/15)
Md. Mokhlesur Rahman and others	**:**	Respondents. (In C.A.No.447/15)
Md. Mofizul Islam and others	**:**	Respondents. (In C.A.No.448/15)
Md. Rafiqul Islam and others	**:**	Respondents. (In C.A.No.449/15)
Manotosh Biswas and others	**:**	Respondents. (In C.A.No.450/15)
Md. Khalequzzaman Pramanik & others	**:**	Respondents. (In C.A.No.451/15)
Md. Wahiduzzaman and others	**:**	Respondents. (In C.A.No.452/15)
Md. Mostafa and others	**:**	Respondents. (In C.A.No.453/15)
Md. Mojibur Rahman and others	**:**	Respondents. (In C.A.No.454/15)
Md. Afzal Hossain and others	**:**	Respondents. (In C.A.No.455/15)
Suresh Chandra Roy and others	**:**	Respondents. (In C.A.No.456/15)
Md. Faizur Rahman and others	**:**	Respondents. (In C.A.No.457/15)
Md. Wahidullah and others	**:**	Respondents. (In C.A.No.458/15)
Md. Abu Siddique and others	**:**	Respondents. (In C.A.No.459/15)
S.Saidur Rahman and others	**:**	Respondents. (In C.A.No.460/15)
Md. Abdul Kuddus Sarder and others	**:**	Respondents. (In C.A.No.461/15)
Md. Mahfuzul Haque and others	**:**	Respondents. (In C.A.No.462/15)
Md. Abdus Salam and others	**:**	Respondents. (In C.A.No.463/15)
Md. Kamruzzaman Lasker and others	**:**	Respondents. (In C.A.No.464/15)
Md. Abed Ali Prodhan and others	**:**	Respondents. (In C.A.No.465/15)
Md. Mahfuzur Rahman and others	**:**	Respondents. (In C.A.No.466/15)
Md. Wazed Ali Mondal and others	**:**	Respondents. (In C.A.No.467/15)
Md. Abul Hossain Sarker and others	**:**	Respondents. (In C.A.No.468/15)

Bangladesh Agricultural Development Corporation represented by its Chairman and others	:	Respondents. (In C.R.P.Nos.61,76-77/14)
Bangladesh Agricultural Development Corporation represented by its Chairman and others	:	Petitioners. (In C.P.No.784/11)
S.M. Ismail Hossain and others	:	Respondents. (In C.P.No.784/11)

For the Appellants (In C.A.Nos.429,433,435,436-444,446-468/15)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mrs. Nahid Sultana, Advocate-on-Record.
For the Appellants (In C.A.Nos.430 & 432/15)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
For the Appellants (In. C.A. Nos.431 & 434/15)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
For the Appellant (In C.A.No.445/15)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mrs. Shahanara Begum, Advocate-on-Record.
For the Respondents (In C.A.No.429/15)	:	Mr. Probir Neogi, Senior Advocate instructed by Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.
For the Respondents (In C.A.No.430/15)	:	Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Respondents (In C.A.No.431, 432, 435, 441, 452, 460-463,465,467-468/15)	:	Mr. Zainul Abedin, Advocate-on-Record.
For the Respondents (In C.A.No.433/15)	:	Mr. Abdul Matin Khosru, Senior Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Respondents (In C.A.Nos.434, 436-440, 442-448,450,453-456,458-460,466/15)	:	Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondents (In C.A.No.449/15)	:	Mr. Sheik Reazul Haque, Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondents (In C.A.No.451/15)	:	Mr. Giasuddin Ahmed, Advocate-on-Record.
For the Respondents (In C.A.No.457/15)	:	Mr. Md. Bodroddoza, Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondents (In C.A.No.464/15)	:	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioners (In C.R.P.No.61/14)	:	Mr. Abdul Wadud Bhuiyan, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Petitioners (In C.R.P.Nos.76-77/14)	:	Mr. N.K. Saha, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Respondents (In C.R.P.No.61,76/14)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
For the Respondents (In C.R.P.No.77/14)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
For the Petitioners (In C.P.No.784/11)	:	Mr. Mahbubey Alam, Senior Advocate(with Mr. Hefzul Bari, Advocate), instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
Respondents (In C.P.No.784/11)	:	Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.

Date of hearing on : 18.02.2018, 06.03.2018, 27.03.2018.
Date of judgment on : 11.04.2018.

Voluntary retirement of service;

After 10 years of their voluntary retirement and after receiving full financial benefits as offered the prayers for reinstatement cannot be termed as reasonable and fair. After having applied for voluntary retirement of service and taken the money it is not open to contend that they exercised the option under any kind of coercion and undue influence. Who had accepted the ex gratia payment or any other benefit under the scheme, could not have resiled therefrom. It became past and closed transaction. The writ petitioners having accepted the benefit could not be permitted to approbate and reprobate nor they be permitted to resile from their earlier stand.

J U D G M E N T

Hasan Foez Siddique, J:

1. The above mentioned Civil Appeals, Civil Petitions for leave to appeal and Civil Review Petitions have been heard analogously since the facts and the questions of law involved in all the appeals, civil petitions and review petitions are identical.

2. The respondents of the appeals and civil petitions and the petitioners of Review petitions were the employees of the Bangladesh Agricultural Development Corporation (BADC, for short). All of them went on voluntarily retirement from service (VRS, for short) before the age of superannuation and before 25 years of their respective service in the BADC. The High Court Division, on the basis of writ petitions filed by the respondents, directed the BADC to re-instate the writ petitioners, who have not yet crossed their 57 years of age, to join their service with continuity of their service and to pay the benefits with effect from the date of their respective VRS. The High Court Division also directed the BADC to pay the remaining benefits up to the age of superannuation to the writ petitioners who have already crossed the age of retirement.

3. In the writ petitions, the writ petitioners, inter alia, stated that the BADC is a statutory body of the Government and its all employees are directly under administrative control, supervision and monitoring of the Ministry of Agriculture. The Government, by notification in the year 1990, framed Bangladesh Agricultural Development Corporation Employees Service Regulation, 1990 (Service Regulations, for short) and the service of the writ petitioners are governed by the said Service Regulation. The Ministry of Agriculture issued a notification communicated under Memo No.Krishi-5/5-2/52(Part-1) dated 13.12.1992 regarding the option of VRS for the employees of the BADC. Last date of filing the application for VRS was fixed on 31.01.1993. Thereafter, the BADC extended the time for filing application for VRS from time to time. It was the case of the writ petitioners that the BADC Authority under coercion, threat and undue influence compelled the writ petitioners to go on prematured retirement by the impugned orders. It was stated in the writ petition that they were threatened by the authority uttering that they would lose their job and other service benefits if they do not seek VRS. They contended that VRS was an unilateral act of the employees but in the instant cases, the employer had done everything and by creating pressure had obtained signature of the writ petitioners and others under threat, coercion and undue influence. Though the writ petitioners had been retrenched from service in the name of VRS on the ground of downsizing the excess manpower in the BADC, subsequently, the BADC had appointed many employees who were terminated with three months notice, have also been reinstated in compliance with the orders of the Court. The said act of retrenchment of the BADC manifestly proved that they have been ousted malafide for the collateral purposes. The VRS have been implemented without any guideline and policy. The authority had adopted policy of "pick and choose" while dealing with the similarly situated employees. Those unguided and arbitrary action are liable to be declared unlawful. It was further contended that the provisions of Services (Reorganization and Condition) Act, 1975 ensured that all the public bodies and nationalized enterprizes are found to ensure equal term and service of its employees. Furthermore, under the provision of Constitution the writ petitioners cannot be discriminated with regard to their right to continue in service till the age of 57 years in service (at present 59 years). Under section 4 of Public Servant (Retirement Act), 1974 a Public Servant shall retire from service on the completion of 57th year of his age.

Thus, the writ petitioners, impugning prematured retirement before 57th year age, filed different writ petitions and obtained Rules.

4. The common case of the BADC in those writ petitions was that the writ petitioners voluntarily signed the VRS forms without any intimidation or undue influence whatsoever. It was added that with a view to reorganize the manpower structure of the BADC it offered the VRS scheme on 13.11.1992 which was thereafter extended from time to time. The writ petitioners voluntarily accepted the incentives offered for VRS and that their prayers for voluntary retirement from service were accepted by the authority. For the reason best known to the writ petitioners they had subsequently made a summersault from their own original stand, which they resorted to of their own volition being allured by the financial incentive of the VRS offer.

5. The High Court Division, hearing the parties, made all the Rules absolute. Then BADC filed Civil Petitions for Leave to Appeal and obtained leave. Thus, are the appeals. In Civil Petitions, the BADC sought for leave against the judgment and order of the High Court Division passed in separate writ petitions directing the BADC to re-instate the writ petitioners of those writ petitions. In the review petitions, the petitioners sought review of the judgment and order of this Division passed in Civil Appeals No.45-48 of 2012. In those appeals, this Division set aside the judgment and order of the High Court Division passed in connected writ petitions, by which, the High Court Division directed the BADC to re-instate the petitioners of those writ petitions.

6. Mr. Mahbubey Alam, learned Senior Counsel appearing for the BADC, submits that since the writ petitioner-respondents voluntarily retired from service and, thereafter, withdrew voluntary retirement benefit/facilities and after about 10 years of their retirement they filed the instant writ petitions, they were not entitled to get any relief, the High Court Division erred in law in making the Rules absolute. He submits that the writ petitioners had availed the opportunity of voluntary retirement programme about 10 years ago and almost all the employees of the BADC including the writ petitioners, who applied for VRS, accepted almost all of their service benefits and that the BADC Authority had accepted their prayers for VRS, the High Court Division erred in law in making the Rules absolute.

7. Mr. Abdul Wadud Bhuiyan, Mr. Abdul Matin Khasru, Mr. Md. Badrodozza and Mr. Shaikh Reazul Haque, learned Counsel appeared for the respondents in their respective appeals. They submit that under the terms of the provision of section 2D of the Public Servant (Retirement) Act 1974 "public servant" includes any person in the service of any Corporation and that the writ petitioners having been in service of the BADC they are public servants and their retirement should be governed by the provision of Public Servant (Retirement) Act, 1974. He submits that the provisions of section 4 and 9(1) of the said Act are applicable to the writ petitioners and that in view of those provisions the retirement of the writ petitioners before they completed 25 years of service is illegal, so the judgment and orders of the High Court Division are sustainable in law. He submits that there can be no waiver of the fundamental right of the writ petitioners and estoppel against statute, their alleged application for VRS would not deprive them from their fundamental and statutory right, the judgment and order of the High Court should not be interfered with.

8. Mr. N.K. Saha, learned Senior Counsel appearing for petitioners of the Review petitions also endorsed the submissions of Mr. Bhuiyan and submitted that this Division erred

in law apparent on the face of the record in allowing the Civil Appeal Nos.45-48 of 2012 inasmuch as writ petitioners are legally entitled to be re-instated.

9. In these appeals, Civil petitions and Review petitions, the only question is whether the employees of the BADC who accepted the VRS programme and received almost all of their service benefits and incentives offered for VRS are entitled to be reinstated to their services in their respective former posts on the plea that their signatures were obtained in the forms prepared for voluntary retirement from service by exercising coercive force inasmuch as BADC in it's affidavit-in-opposition contended that such story of taking signatures by exercising force in the forms of VRS is absolutely false. It is the case of the writ petitioners that since the writ petitioners are public servants the provisions of their retirement should be regulated by the provision of Public Servant (Retirement) Act and they were terminated from the service in the garb of VRS. Their service tenure is protected by the law.

10. It appears from the materials on record that in order to downsize the strength of staffs of BADC, the Ministry of Agriculture issued a circular regarding voluntary retirement scheme, in which, some privileges were specially offered to its employees who would express their intention of retirement from their service voluntarily. Accordingly, the employees, who sought for voluntary retirement as per terms of the circular, were offered to accept the ex-gratia payment mentioned therein. There was a clause in the circular that, "এই ব্যবস্হা সম্পূর্ণ ঐচ্ছিক। তবে একবার অবসর গ্রহনের ইচ্ছা প্রকাশ করলে তা পরে প্রত্যাহার করা যাবে না।" This clause speaks that the programme is purely voluntary. Once an employee has applied for VRS under the scheme, the option cannot be withdrawn. Such a programme is ordinarily floated with a purpose of downsizing the employees. When pursuant to or in furtherence of such a Voluntary Retirement Scheme an employee opts and he makes an offer which upon acceptance by the employer gives rise to a contract. Thus, the matter relating to voluntary retirement is not governed by any statute, the provisions of the Contract Act, 1872, therefore, would be applicable. [Bank of India V.O.P. Swarnakar (2003) 2SCC 721]. Similar view has been expressed by the Supreme Court of India in the case of HEC Voluntary Retd. Employees Welfare Society V. Heavy Engg. Corpn. Ltd. reported in (2006) 3 SCC page 708 where it was observed,

> "An offer for voluntary retirement in terms of a scheme, when accepted, leads to a concluded contract between the employer and the employee. In terms of such a scheme, an employee has an option either to accept or not to opt therefor. The scheme is purely voluntary, in terms whereof the tenure of service is curtailed, which is permissible in law. Such a scheme is ordinarily floated with a purpose of downsizing the employees. It is beneficial both to the employees as well as to the employer."

11. Here, in these cases, in view of the offer, the writ petitioners accepted the same and they themselves prayed for voluntary retirement from their service and also prayed for their service benefits and incentives mentioned in the circular and, accordingly their prayers for VRS were duly accepted and approved by the BADC Authority. The entire scheme was offered to the employees as a package and the same had to be treated as such and in that view of the matter, it being within the realm of contract, statutory regulation cannot be said to have any application whatsoever.

12. Almost in an identical circumstances, this Division in the case of Md. Nurul Haque V. Govt. of Bangladesh and others reported in 18 BLD(AD)142 has observed:

> "Sections 4 and 9 of the Public Servant's (Retirement) Act, 1974 have no application in this case. The scheme of retirement of the petitioners were under some special

circumstances and that was outside the ambit of the Public Servant's (Retirement) Act, 1974. It was in fact a special arrangement made for those who voluntarily want to retire on getting certain monitory and other financial benefits. There was no compulsion on any of the petitioners to accept the special scheme of retirement. The petitioners finding the scheme to be beneficial in their interests applied in the prescribed form and got the retirement. The petitioners themselves accepted the scheme out of their free will on some special considerations as given by the Government and went under voluntary retirement and as such the petitioners cannot now say that the scheme is illegal and violative of the provisions of Public Servant's (Retirement) Act, 1974. Further, Public Servant's Retirement Act, 1974 has no bearing at all with their acceptance of the special scheme with benefits. The petitioners having accepted the benefit cannot now term the same as illegal. The learned Judges of the High Court Division in exercising their writ jurisdiction which is a discretionary relief rightly refused to exercise their discretion in favour of the petitioners as it is unconscionable to blow hot and cold in the same breadth."

13. It is relevant here to peruse the nature of application for VRS submitted by the employees. Contents of one of such prayers run as follows:

"বাংলাদেশ কৃষি উন্নয়ন কর্পোরেশনের কর্মকর্তা/কর্মচারীদের স্বেচ্ছায় অবসর গ্রহন ও তৎসংক্রান্ত আর্থিক সুবিধাদি মঞ্জুরীর আবেদন পত্র।

বরাবর,
সচিব,
বাংলাদেশ কৃষি উন্নয়ন কর্পোরেশনের
কৃষি ভবন
৪৯/৫১, দিলকুশা বানিজ্যিক এলাকা,
ঢাকা।

মহোদয়,

নিম্ন স্বাক্ষরকারী গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের কৃষি মন্ত্রনালয়ের স্মারক কৃষি-৫/ম-২/৯২ (অংশ-১)/১২৪ তারিখ ১১/৬/১৯৯৪ইং এর আওতায় ৩০/৯/১৯৯৪ইং তারিখ থেকে স্বেচ্ছায় চাকুরি থেকে অবসর গ্রহনের ইচ্ছা প্রকাশ করছি। আমার আবেদন ও উল্লেখিত স্মারক অনুযায়ী আর্থিক সুবিধাদি মঞ্জুরীর জন্য অনুরোধ করছি।

আমি অবহিত আছি যে, এই দরখাস্তের মাধ্যমে অবসর গ্রহনের ইচ্ছা প্রকাশ করার পর তা প্রত্যাহার করার অবকাশ নেই এবং যথাযথ কর্তৃপক্ষ এই প্রস্তাব গ্রহন বা প্রত্যাখ্যান করতে পারেন।

আমি এই মর্মে অংগীকার করছি যে, আমাকে প্রদত্ত অর্থ যদি প্রাপ্যের অতিরিক্ত বলে পরবর্তীতে প্রমানিত হয়, তাহলে আমি তা ফেরত প্রদানে বাধ্য থাকব এবং পাওনা থেকে কর্তন করতে আমার সম্মতি আছে।

সম্পূর্ন পাওনা পরিশোধের পূর্বে আমার মৃত্যু হলে অবশিষ্ট পাওনা অর্থ নিম্ন বর্ণিত উত্তরাধিকারীগন পাবেনঃ

ক্রমিক নং	নাম	সম্পর্ক	অংশ"
১।	মোছাঃ ফজিলাতুননেছা	স্ত্রী	১০০%
২।			
৩।			
৪।			

আবেদন পত্রের সাথে নিম্ন বর্ণিত দলিলাদি সংযুক্ত করলামঃ

১।পাসপোর্ট সাইজের সত্যায়িত ছবি ৩(তিন)কপি।
২।নমুনা স্বাক্ষর ও পাঁচ আংগুলের ছাপপত্র ৩(তিন) কপি।

আপনার অনুগত
স্বাক্ষরঃঅস্পষ্ট
নামঃ মোঃ শহিদুল ইসলাম
পিতার নামঃ মোঃ কোরবান আলী
পদবীঃ সহকারী মেকানিক

কর্মস্হলঃ বিএডিসি (সেচ) গাবতলী ইউনিট,
গাবতলী, বগুড়া।
যোগাযোগের ঠিকানাঃ ঐ”

14. The writ petitioners, making statements in the writ petitions, made an attempt to exclude the contents of their prayers for VRS stating that their signatures were obtained by the BADC authority by exercising coercive force and undue influence inasmuch as such claims are essentially a question of facts. In writ jurisdiction, it is dangerous to decide the allegation of departure from the contents of the written documents where signatures of the executants are admitted and the writ petitioners virtually did not deny the statements made therein specifically subsequent to making such prayers rather they themselves upon admitting the contents of their prayers received financial benefits.

15. The BADC authority, accepting the prayers, sanctioned the financial benefits as per circular issued by the Ministry of Agriculture. Contents of the specimen copy of the financial sanction letters are as follows:

“ বাংলাদেশ কৃষি উন্নয়ন কর্পোরেশনের
কৃষি ভবন
৪৯/৫১, দিলকুশা বানিজ্যিক এলাকা, ঢাকা-১০০০।
(অর্থ সেল)

মঞ্জুরী নং স্বেঃঅঃ ০০১৮২৯/৯৫-৯৬ তাং ২৫/০৩/১৯৯৬

বিষয়ঃ স্বেঃ অঃ গ্রহন সংক্রান্ত কৃষি মন্ত্রনালয়ের ১৩/১২/১৯৯২ ইং তারিখের স্বারক নং ৫/ম-২/৯২/(অংশ-১)৩৭৫ এবং কৃষি ৫/ম-২/৯২(অংশ-১)/১২৪ তাং ১১/৬/১৯৯৪ এর আলোক =২,৭৯,৪১২/- টাকা পরিশোধ বাবদ অর্থ মঞ্জুরী।

সুত্রঃ নথি নং স্বেঃ অঃ গ্রহন (২য় পর্য্যায়) নথি নং ২৬৯৮।

স্বেচ্ছা অবসর গ্রহন সংক্রান্ত কৃষি মন্ত্রনালয়ের ১১/৬/১৯৯৪ ইং তারিখের স্বারক নং ৫/ম-২/৯২/(অংশ-১)৩৭৫ এবং কৃষি ৫/ম-২/৯২(অংশ-১)/১২৪ তাং ১১/৬/১৯৯৪ এর আলোকে স্বেচ্ছা সেল প্রধানের/সংস্থাপন বিভাগের প্রস্তাবনুযায়ী নিম্নোক্ত খাত সমূহের নিরুপিত টাকা =২,৭৯,৪১২/- (দুই লক্ষ উনাশি হাজার চারশত বার) নিম্নবর্ণিত শর্ত পালন পূর্বক জনাব মোঃ শহিদুল ইসলাম, পদবী-সহঃ মেকানিক, বর্তমান অফিস বগুড়া সেচ জোন বগুড়া কে পরিশোধ করার নিমিত্তে অর্থ মঞ্জুরী দিতে আদিষ্ট হয়েছি।

কর্মকর্তা/কর্মচারীর পাওনা টাকা		সংস্থার পাওনা টাকা
১।ক)আনুতোষিক বাবদ=১,৩০,৬০০/-		১। গৃহ নির্মান ঋণ ও সুদ
খ)আনুতোষিকের উপর অতিরিক্ত সুবিধাদি ১৭ ১/২ হিসাবে	= ২২,৮৫৫/-	২। মটর সাইকেল/মটর কার/সাইকেল ঋণ সুদ
২।এলপিআর বাবদ	= ৪৬,৮৫৭/-	৩। অতিরিক্ত গৃহীত বেতন=২৩,৩১৪/-
৩।বোনাস	= ৬,৫৩০/-”	৪। নিরাপত্তা তহবিলের চাঁদা=৭২০/-
৪।ছুটি নগদী করন বাবদ	= ৩৭,৫৭০/-	৫। ইঞ্জিনের মূল্য=২৪০০/-
৫।পরিবার নিরাপত্তা তহবিল	= ৩৫,০০০/-	
সর্বমোট টাকা	= ২,৭৯,৪১২/-	সর্বমোট টাকা=২৬,৪৩৪/-

শর্তাবলীঃ-
১।মঞ্জুরীকৃত টাকা ২,২৩,৫৩০/-(দুই লক্ষ তেইশ হাজার পাঁচশত ত্রিশ) মাত্র হতে সংস্থার উপরোক্ত পাওনা টাকা=২৬,৪৩৪/= সমন্বয়করে বাকী টাকা =১,৯৭,০৯৬/=(এক লক্ষ সাতানব্বই হাজার ছিয়ানব্বই)পরিশোধ যোগ্য হবে।
২। অবশিষ্ট ২০% টাকা ৫৫,৮৮২/- টাকা সান্ডি ক্রেডিট খাতে বুকিং করে রাখতে হবে যা সংশ্লিষ্ট কর্মকর্তা/কর্মচারীদেরও হিসাব সংক্রান্ত সমাপ্ত করে।
৩।সংস্থার প্রচলিত নিয়ম কানুন পালন পূর্বক পরিশোধ করতে হবে।
৪।প্রঃভঃতঃ এর পাওনা বিভিন্ন ভাবে হিসাব বিভাগ কর্তৃক পরিশোধিত সমন্বিতহবে।
৫।সংস্হাপন বিভাগ কর্তৃক অবসর গ্রহন সংক্রান্ত অফিস আদেশ জারীর পর মঞ্জুরী কার্যকর হবে।

উপরোক্ত খরচ বাকৃউকর ১৯৯৫-৯৬ সালের 'স্বেচ্ছা অবসর(২য় পর্য্যায়)' এর বরাদ্দকৃত অর্থ হতে নির্বাহিত হবে।
সহকারী অর্থ উপদেষ্টা(স্বেঃ সেল)
বাকৃউক, ঢাকা
তাং ২৫/৫/১৯৯৬ইং
স্মারক নং সেঃ অঃ (২য় পর্য্যায়)/৯৫-৯৬/২৮২১(৮)
অনুলিপিঃ-
১।স্বেচ্ছা সেল প্রধান, বিএডিসি, ঢাকা।
২।সচিব, বিএডিসি, ঢাকা।
৩।সংশ্লিষ্ট বিভাগীয় প্রধান প্রকৌশলী (সেচ) বাকৃউক, ঢাকা।
৪। উহিনি (স্বেঃসেল), বিএডিসি, ঢাকা।
৫। আহরন ও ব্যয়ন কর্মকর্তা, বিএডিসি, সহঃ প্রকৌঃ সেচ বগুড়া জোন।
৬। জনাব মোঃ শহিদুল ইসলাম, সহঃ মেকানিক
৭। অ/ক/মাঃফাঃ

অনুলিপি
বিল পরিশোধ যোগ্য
মোট=২,৭৯,৪১২/-
মঞ্জুরী অর্থ=২,৭৯,৪১২/-
কর্তন=২৬,৪৩৪/-
৮০% প্রদেয় ১,৯৭,০৯৬/-(এক লক্ষ সাতানব্বই হাজার ছিয়ানব্বই)
(সেল প্রধান)
প্রতিক নং ১৮৯২
তারিখঃ৩০/৬/১৯৯৬
বি,পি আর নং
পরিশোধকৃত টাকা=১,৯৭,০৯৬/-
(এক লক্ষ সাতানব্বই হাজার ছিয়ানব্বই)
খরচের হিসাব নং ০১৩/০৩৮৫
স্বাঃ অস্পষ্ট
পরিশোধ ও বাতিল
স্বাঃ অস্পষ্ট,
চেক নং ২৪৩৫১৯২
তাং ৩০/৬/১৯৯৬
সোনালী ব্যাংক কৃষি ভবন শাখা
৪৯-৫০ দিলকুশা, বা/এ, ঢাকা।
স্বাঃ অস্পষ্ট।"

16. The identical prayers were made and sanction letters were issued in respect of almost all the cases of the writ petitioners. It is clear from the undisputed facts that the writ petitioners prayed in the prescribed form to accept their prayers for VRS with immediate effect. The learned Counsel for the writ petitioner-respondents failed to notice any exception. About 10 years thereafter the writ petitioners filed the writ petitions. It is not the case of the writ petitioners that after tendering applications of VRS they filed any application for withdrawal of those applications. On acceptance by the BADC of the request for voluntary retirement made by the writ petitioners their jural relationship ceases.

17. Mr. Bhuyian submits that inspite of withdrawal of benefits, the writ petitioners are entitled to get relief since there can be no waiver of fundamental right of the writ petitioners and estoppel against statute. Estoppel is a bar or impediment preventing a party from assertaining or putting up claim inconsistent with the position, he previously took, either by conduct or words. According to Black's Law Dictionary, in estoppel, a party is prevented by

his own act from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly. Submission of Mr. Bhuiyan is correct that there cannot be any estoppel against a statute and such doctrine cannot be used against or in favour of the administration as to give de facto validity to ultra vires administrative acts. But estoppel is a mixed question of law and fact. It appears from the materials on record that in these cases the writ petitioners, in fact, abandoned their right. Firstly by not filing the application for withdrawal of their prayers for VRS. Secondly, by accepting the benefits and incentives. In fact, the writ petitioners intentionally relinquished their rights. The writ petitioners long after making their prayers for voluntary retirement and acceptance of those prayers and receiving financial benefits have filed the writ petitions. They are guilty of acquiesance in accepting the retirement. By not asserting their right in time they allowed it to lapse by delay, latches and acquiescence and accepting the VRS by conduct, the Court cannot come to the rescue of such persons where they themselves withdrew the financial benefits accepting VRS.

18. Mr. Bhuiyan mainly relied upon the provisions of Section 9 of the Public Servants (Retirement) Act, 1974 which run as follows:

> "9.**Optional retirement**-(1) A public servant may opt to retire from service at any time after he has completed twenty five years of service by giving notice in writing to the appointing authority at least thirty days prior to the date of his intended retirement; Provided that such option once exercised shall be final and shall not be permitted to be modified or withdrawn.
>
> (2) The Government may, if it considers necessary in the public interest so to do, retire from service a public servant at any time after he has completed twenty five years of service without assigning any reason."

19. The aforesaid provisions of the Act is not applicable for the writ petitioners. Voluntary retirement is an early retirement. Incentive is offered to the staffs to reduce workforce and right size the organizations. Such scheme is completely voluntary and different. It is virtually a contract between employer and employees.

20. Section 9 of the Act provides for voluntary retirement from service on completion of 25 years' service by giving notice in writing to the appointing authority at least 30 days prior to the date of his intended retirement. The words "may opt to retire" clearly indicate that the aforesaid provision does not confer on the employee a right to retire. It confers on the employee a right to make an option to permit him to retire. An employee who has put in less number of years of service would not be on better footing than the employee who has put in longer service. The words "opt to retire" indicate that the right which is conferred by it is not the right to retire but a right to ask for retirement. The words "opt to retire" imply a request by the employee and corresponding acceptance by the authority. Here in the case, some of the writ petitioners claimed that since they opted to retire from service before completion of 25 years of service so their option itself was bad in law as such the same was not acceptable and those do not carry any legal validity and those offers were not offers at law. It is upon the authority whether they shall accept such option or not. It cannot be said that an employee retires only on superannuation and there is no other circumstance under which an employee can retire. Retirement on superannuation is not the only mode of retirement known to service jurisprudence. There can be other types of retirements like premature retirement, either compulsory or voluntary. Here the proper authority, accepting those offers, sanctioned the retirement benefits and the writ petitioners withdrew those benefits. Since the appointing authority did not refuse to grant the permission for retirement rather accepted the same their retirement became effective from the date of acceptance. It was, in fact, a contract. The employer offered the proposal and the employees accepted such proposal voluntarily.

21. In the case of ITI Ltd. V. ITI Ex/VR Employees/Officers Welfare Association and others reported in (2010) 12 SCC 347 Supreme Court of India observed that "if an employee has got benefits under the VRS scheme, whether right or wrong, it cannot be reopened....".

22. Moreover, we have considered the whole scheme of VRS and found that there was specific stipulation to the effect, "এই ব্যবস্হা সম্পূর্ণ ঐচ্ছিক। তবে, একবার অবসর গ্রহনের ইচ্ছা প্রকাশ করলে তা পরে প্রত্যাহার করা যাবে না।" That is scheme was purely voluntary and once an option to voluntary retirement is exercised by an employee and the same is accepted by the BADC authority the employee is not entitled to withdraw from voluntary retirement.

23. We have already found that the writ petitioners did not file any application for withdrawal of their prayers for VRS and after 10 years of termination of their service and withdrawal of the pensionaries and other benefits they have filed writ petitions. In all the cases it appears that the writ petitioners themselves by their own conduct abandoned the service in lieu of some consideration. The severance of the relationship of employer and employee takes place immediately on acceptance of the prayers for VRS. The moment their prayers are accepted by the BADC authority their retirement became effective. After 10 years of their voluntary retirement and after receiving full financial benefits as offered the prayers for reinstatement cannot be termed as reasonable and fair. Here, the writ petitioners in their wisdom thought that in view of the situation VRS was a better option available and chose the same. After having applied for VRS and taken the money it is not open to them to contend that they exercised the option under any kind of coercion and undue influence. Who had accepted the ex gratia payment or any other benefit under the scheme, could not have resiled therefrom. It became past and closed transaction. The writ petitioners having accepted the benefit could not be permitted to approbate and reprobate nor they be permitted to resile from their earlier stand.

24. In such view of the matter, our considered opinion is that the writ petitioner-respondents were not entitled to get any relief as prayed for. The High Court Division committed error of law in directing to reinstate the writ petitioner-respondents to their former posts and to pay their back salaries.

25. Accordingly, we find substance in all the appeals.

26. Thus, all the appeals are allowed. The judgment and order of the High Court Division are set aside. The Civil Petitions are disposed of in the light of the decision of the appeals. The review petitions are dismissed accordingly.

12 SCOB [2019] AD 34

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CRIMINAL APPEAL NO. 60 OF 2009
(From the judgment and order dated 29.11.2007 passed by the High Court Division in Death Reference No.52 of 2004 heard along with Criminal Appeal Nos.1164 of 2004, 1187 of 2004, 1231 of 2004, 1504 of 2004, 1887 of 2004 and Jail Appeal Nos. 393 of 2004 and 394 of 2004)

Rashed	**…… Appellant**
=Versus=	
The State	**…… Respondent**
For the Appellant	: Mr. Munsurul Huq Chowdhury, Senior Advocate instructed by Mrs. Madhumalati Chowdhury Barua, Advocate-on-Record.
For the Respondent	: Mr. Bashir Ahmed, Assistant Attorney General, instructed by Mr. Shamsul Alam, Advocate-on-Record
Date of hearing	: The 24th January, 2017

Dying declaration, section 32(1) of the Evidence Act 1872;

Dying declaration cannot be considered as the sole basis for conviction and awarding sentence to the appellant, specifically in the absence of any of the witnesses who were present in the hospital during the time when the alleged dying declaration was made by such a critically injured person who was under intensive care and not supposed to be in conscious. As such the finding of the High Court Division that 'the prosecution has clearly established the motive of the case and the oral dying declaration has also been supported by the medical evidence and other circumstances and materials on record' is not sustainable in law.

J U D G M E N T

MIRZA HUSSAIN HAIDER, J:

1. This criminal appeal, by leave, is directed against the judgment and order dated 29.11.2007 passed by the High Court Division in Death Reference No.52 of 2004 heard along with Criminal Appeal Nos.1164 of 2004, 1187 of 2004, 1231 of 2004, 1504 of 2004, 1887 of 2004 and Jail Appeal Nos. 393 of 2004 and 394 of 2004 rejecting the death reference with modification of sentence by commuting the death penalty to imprisonment for life and dismissing all the aforesaid appeals.

2. Facts leading to this criminal appeal in short are:

That on 8.5.1996 at about 10.00 in the morning victim Aminul Isalm @ Babu, son of the informant Hosne Ara, P.W 1, left his residence No. 558/C Khilgaon, Dhaka, to meet his elder brother, Md. Shafiqul Hossain,(PW.2), at his office and when he reached near the T&T Bhaban adjacent to Bishwa Road, the appellant along with accused Moinul alias Ripon, Shahed, Biddut and Mohammad Hossain Faruque @ Poka Babu, abducted him at gunpoint, and took him to Shahjanpur; at that time, one unknown boy was in front of the T&T Bhaban, who came and informed the informant about the said incident. On receiving such information the informant immediately rushed to the spot and came to know from the local people that the above mentioned accused persons had taken the victim to Amtala, Shahjanpur, then she rushed back to her residence and sent Badal, son of her neighbour Matiar Rahman, to the office of her elder son P.W.2, who upon receipt of such information, went to the Motijheel Police Station and then to Shabujbag Police Station where he came to know that the victim was in the Hospital. PW 2 then went to the Dhaka Medical College Hospital where the informant also sent Shiuli Begum, the wife of her elder son (PW 2) and one Parul, a neighbour along with some local people. All of them found the victim in seriously injured condition and was being treated by the doctors of the hospital. The victim then disclosed to P.W .2 that the appellant and accuseds, Ripon, Shahed, Biddut and Poka Babu tied him up with a date-tree whereupon accused Ripon dealt a chapati blow on the back of his head and the appellant shot him in his stomach while the other accused persons struck him indiscriminately. Thereafter at about 1.40 PM the victim died in the hospital. At 3.00 p.m. P.W.2 came back home and narrated everything to the informant what the victim disclosed to him. Then at 22.35 hours the informant lodged a written FIR narrating the incident and also stating that after the occurrence the local people and one autorickshaw driver had taken the victim to the hospital and that out of previous grudge and enmity the appellant and other accused persons murdered the victim. It is also stated that prior to the occurrence, she made a complaint to the Police Commissioner against the appellant and other accused persons which was registered a G.D. Entry No.318 dated 5.12.95. She also filed an extortion case against the elder brother of the appellant. On the basis of the FIR Shabujbag Police Station Case No.25 dated 8.5.1996 was started under section 364/302 of the Penal Code.

3. The police, after investigation, submitted Charge Sheet No. 469 dated 09.08.1996 against the five accused persons including the present appellant under sections 364/302/34 of the Penal Code. The case record was transmitted to the Court of Metropolitan Sessions Judge, Dhaka, for trial and was registered as Metro Sessions Case No. 188 of 1996, which was subsequently transferred to the 2nd Court of Metropolitan Additional Sessions Judge, Dhaka, for disposal who accordingly commenced the trial upon framing charge against five accused persons under sections 364/302/34 of the Penal Code. The charge was read over and explained to the accused persons who pleaded not guilty and claimed to be tried. The prosecution examined 11 prosecution witnesses while the defence examined none. The defence plea, as it transpires from the trend of cross-examination of the prosecution witnesses and the statement of the accused persons recorded under section 342 of the Code of Criminal Procedure, to be that of innocence and false implication and that the victim might have been killed by other assailants who were inimical to him.

4. The learned Metropolitan Additional Sessions Judge, after hearing the parties and on perusal of materials on record found the appellant and other accused persons, as aforesaid, guilty under sections 302/34 of the Penal Code and convicted and sentenced accused Moinul Huq @ Ripon and Rashed (appellant herein) to death penalty with fine of TK.30,000/= each and also sentenced Shahed, Saifur Rahman @ Biddut and Md. Hossain @ Faruque Ahmed @ Poka Babu to life imprisonment with fine of TK.30,000/- each in default to suffer three years rigorous imprisonment more, by judgment and order of conviction and sentence dated 11.04.2004.

5. A reference was sent to the High Court Division under section 374 of the Criminal Procedure Code seeking confirmation of the death sentence which was registered as Death Reference No. 52 of 2004. On the other hand, the appellant preferred Criminal Appeal No. 1164 of 2004 and Jail Appeal No.394 of 1994 and the other condemned prisoner Moinul Hoque alias Ripon preferred Criminal Appeal No. 1187 of 2004 with Jail Appeal No.393 of 2004. A Division Bench of the High Court Division, after hearing the aforesaid death Reference along with all the criminal appeals and jail appeals preferred by all the convicts, rejected the Death Reference and dismissed all the appeals upon modifying the sentence of the appellant and that of Moinul Haque @ Ripon from death to imprisonment for life, by the impugned judgment and order dated 29.11.2007.

6. Hence the present appellant preferred Criminal Petition for Leave to Appeal No. 291 of 2008 and obtained leave giving rise to this appeal.

7. Mr. Munsurul Hoq Chowdhury, the learned Counsel for the appellant submits that the High Court Division fell in error in not appreciating that the prosecution has miserably failed to establish a complete chain of circumstances and that no witness was examined regarding the alleged occurrence at Railway collony adjacent to Amtala, Shahjahanpur, nor the persons who took the victim to the Dhaka Medical College Hospital were examined. Apart from that, he submits that admittedly no eye witness to the occurrence has been produced and not a single independent witness has been examined to prove the prosecution case beyond reasonable doubt; Moreover P.W.8, Dr. Tajendra Chandra Das has clearly stated that after having sustained the injury marked as 'ka' to the post-mortem report, it was almost impossible for the victim to retain his consciousness and further the victim being shot at around 10.30 a.m. making the alleged dying declaration around 1.00 p.m. even after loosing huge amount of blood is absolutely unbelievable and thus the alleged dying declaration made by the victim at that state of health condition was out of question and accordingly, the trial court fell in an error in convicting the appellant relying solely on the said dying declaration which was not even corroborated by any independent witness. He submits that even if under such critical condition the victim made dying declaration to P.W.2 at about 1.00 PM before his death at 1.40 PM and then PW 2 having gone home at 3.00 PM narrating the same to his mother, the informant, lodging of the FIR after 7(seven) hours at 22.35 hours is totally a circuitous way of filing of the case relying on the alleged dying declaration raises doubt as to the veracity of the dying declaration. Thus the conviction and sentence handed down to the appellant wholly relying on such uncorroborated, doubtful dying declaration is not at all sustainable in law.

8. Mr. Bashir Ahmed, the learned Assistant Attorney General appearing on behalf of the respondent, state, supported the impugned judgment and without filing any concise statement he prayed for dismissal of this appeal.

9. On perusal of the materials on record including the impugned judgment and order it appears that the positive case of the prosecution is that on 08.05.1996 at about 10.00 in the morning the victim Amirul Islam @ Babu son of the informant (P.W. 1), came out of his house and on his way to meet his elder brother, Md. Shafiqul Hasan (PW 2) in his office, the accused persons forcibly abducted him at gun-point and took him to Shahjanpur where they tied him first with a date tree and then with a lamp post and caused multiple serious bleeding injuries by bullet shots and chapatti blows and left him in a profusely bleeding condition. Thereafter the local people took him to the Dhaka Medical College Hospital by a scooter in a critical condition where while he was being given medical attendance he made oral dying declaration to P.W. 2 at about 1 PM describing the manner as to how the accused persons took part in the occurrence causing/inflicting injuries upon his person and also disclosing the names of the accused persons. After making such statement the victim died in the hospital on the same day at about 1.40 pm. due to such severe injuries.

10. In support of the FIR story the prosecution examined 11 (eleven) witnesses amongst whom PW 1 is the informant of the case and mother of the victim. PW.2 is the elder brother of the victim who went to the hospital to whom the victim narrated the sequential occurrence disclosing the names of the accused persons and their role. PW 3 is the wife of PW 2. P.W. 4 is the seizure list witness. PW 5 is the hearsay witness. PW 6 is a witness who after 2/3 days of the occurrence went to the Gausul Azam Jame-Mosjid for saying Magrib prayer when he saw gathering of people in the place of occurrence and put his signature in a blank paper on being asked by the Daroga. P.W.7 is the uncle of the victim. P.W.8 is Dr. Tajendra Chandra Das, who held post mortem examination and prepared the report. PW 9 is Sub-Inspector of Police who lodged the case pursuant to the written Ejahar filed by the informant. PW 10 is the Sub-Inspector who conducted investigation and submitted charge sheet. PW 11 SI who prepared the inquest report of the body of the deceased.

11. The trial Court on consideration of the materials on record and the evidence adduced by the parties found the five accused persons guilty and sentenced, each one of them in the manner as stated above which the High Court Division on consideration of the materials on record sustained the conviction but modified the death sentence to imprisonment for life, for ends of justice.

12. In this appeal filed by the convict-appellant, Rashed, the points raised for determination are whether the High Court Division erred in law in not appreciating that the prosecution has miserably failed to establish a complete chain of circumstances and also failed to produce any witness regarding the occurrence at the Railway Collony adjacent to Amtala, Shahjahanpur and also failed to consider prosecution's failure to produce the persons who took the victim to the Dhaka Medical College Hospital, as witness. And whether there was any eye witness who could be produced to prove appellant's involvement in causing death of the victim and whether there was any single independent witness to corroborate the alleged dying declaration and/or to prove the prosecution case beyond all reasonable doubt. Lastly whether the dying declaration of the victim made at around 1.00 pm even after sustaining such grievances multiple injuries causing loss of huge amount of blood is true and if not whether the conviction and sentence awarded against the appellant basing on the sole uncorroborated dying declaration of the victim is justified.

13. To answer the aforesaid points, we need to examine the evidence of PWs 1, 2, 3, 8 who are not police personnel and the post mortem report.

14. P.W. 1, Hosne Ara Begum, mother of the victim and informant of the case narrated the prosecution story as described in the FIR. She stated that she went to the police station with her elder son, P.W. 2 who wrote the ejahar which has been read over and explained to her, she put her signature therein. She proved her signature in the FIR which has been marked as Exhibits 1 and 1/1. She also identified the accused persons on the dock. In cross examination, she denied all material suggestions put forward by the defence and asserted her statements what she stated in her examination in chief. She categorically denied defence suggestions that victim did not make any oral dying declaration as alleged and stated to her son P.W. 2 and also denied that out of enmity they implicated the accused persons falsely. She further denied that the victim was caused to death by some unknown assailants inimical to him.

15. P.W. 2. Md. Shafique Hasan, the elder brother of the victim and husband of P.W. 3, Shiuli Begum. The sum and substance of his evidence is that on 08.05.96 while he was in his office at about 11.30 am, his neighbour Badal came and informed him that accused Rashed and others had abducted his younger brother Aminul Islam @ Babu from T.N.T. Bhaban adjacent to Bishwa Road. Upon hearing the same he went to the Motijheel Police Station and then to Shabujbag Police Station and came to know from P.W. 5, Kabir that his brother was in the Hospital in a critical condition and then he went to the Dhaka Medical College Hospital where he saw his injured brother in ward No. 32 where his wife P.W.3, Shiuli Begum and another lady were present. Being asked by him (P.W. 2) as to what had happened, the victim replied in feeble voice that "accused Rashed, Poka Babu, Biddut, Ripon and Shahed abducted him forcibly at gunpoint from in front of the T.N.T. Bahaban and took him to the Shahjahanpur Amtala Road Colony and accused Ripon dealt a chapatti blow on the back of his head and then tied him up first with a date tree and later with a lamp post and accused Rashed shot him at his stomach (belly) and others shot him indiscriminately and left the place leaving him there. Then local people boarded him on a scooter and took him to the hospital." The said PW also stated that at quarter to two pm his brother, victim Babu, died in the hospital. Then at around 2.15 pm he came back hom and at about 3.00 in the afternoon he told his mother, P.W. 1, about the occurrence. He further stated that he wrote the ejahar as per statements of his deceased brother and then it was read over and explained to his mother and then she put her signature on the same.

16. He deposed that earlier on 05.12.95 his mother lodged G.D Entry No.318 against the accused persons and on 9.3.96 accused Rashed's elder brother and 4 others attacked their house and demanded a sum of Tk.10 Lac as subscription for which his mother filed Shabujbag P.S Case No. 28(3)96. He believes that due to that grudge the accused persons killed his brother. He identified the accused persons present on the dock. In his cross examination he denied all material suggestions put to him by the defence and asserted what he had stated in his examination in chief,. he further denied defence suggestions that the victim did not make any dying declaration to him as alleged and that he had deposed falsely and had implicated the accused persons due to enmity.

17. P.W.3, Shiuli Begum wife of PW 2, stated in a similar way as that of PW 1 and 2 on all matters particulars. In cross examination, she also denied all the material suggestions made to her and asserted her statements relating to the occurrence and oral dying declaration as she stated in examination in chief.

18. P.W.8, Dr. Tejendra Chandra Das, held post mortem examination on 08.05.96 upon the dead body of the victim Amirul Islam @ Babu, aged 28 years brought and identified by

constable No. 4812 Delwar Hossain and on examination he found several injuries on his body. Accordingly he opined that the death of the victim was due to the injuries mentioned in the post mortem report, which were ante-mortem and homicidal in nature. He proved the post mortem report Exhibit 4, his signature Exhibit 4(1) and the death certificate Exhibit 5 and his signature Exhibit 5/1. In his cross-examination he described the injuries caused by bullet (in total 11 injuries) and sharp cutting weapon and further stated that having sustained those injuries the victim was not suppose to remain conscious.

19. On scrutiny of the aforesaid evidence of the P.Ws and considering the nature of injuries, as reflected in the post-mortem report, it appears that P.W.2 in his evidence stated that on the date of occurrence upon receiving information from Badal, his neighbour to the effect that his brother has been abducted by some persons he rushed to the place of occurrence and then having come to know that his brother has been taken to the Hospital in a critical condition he went to the hospital and found him there with severe injuries. According to him the victim in such critical condition, in reply to the questions of PW 2, in a feeble voice gave a vivid description as to how the accused persons abducted him at gun-point and also who inflicted which blow with 'chapati' and gun shots indiscriminately and then how he was brought to the hospital by the local people. From the post-mortem report, it appears that the doctor found a number of injuries including one on the right side of the chest which pierced through the body injuring the entire right lungs, liver and stomach and also found a number of gun short injuries on the right thigh, leg and ankle and toe/finger. He also found a severe cut injury at the occipital region which also cut the scalp of the head. The doctor in his report opined that the death was due to the aforementioned injuries causing severe bleedings paralyzing the nerves which were ante mortem and homicidal in nature.

20. Admittedly, the victim was brought to the hospital at 11.00 a.m. and he died at 1.40 pm. i.e. he was under treatment in the hospital for about 2½ hours. PW 8, the doctor, admitted in his cross examination that the injury caused in the head can cause death. He also admitted that a person upon receiving such injury is not supposed to remain conscious. He also admitted that there were bullets injuries all of which pierced through his body and one caused severe damage to right lung, liver and stomach and one is inside his body and such patient is required to be given intensive care treatment because such injury has caused profuse bleedings and his life was at high risk.

21. From the nature of injury as mentioned above and from the evidence of PW-8 it cannot be said that the victim had good conscious of giving a vivid description as to which accused person inflicted which blow. PW-2 had admitted in his deposition that his mother lodged a GD Entry against the accused persons earlier on 5.12.1995 and thereafter, on 09.03.1996, the elder brother of appellant, Rashed and four others attacked their house and demanded money from them which led their mother file Shabujbag Police Station Case No. 28(3)96. He thus believes that due to the grudge of such GD Entry and filing of criminal case, the accused persons killed his brother, the victim. Admittedly, there is no eye witness of the occurrence or killing the victim at the place of occurrence. Only Badol, a neighbour, who, informed PW-2 about the abduction of his brother the victim who is not a witness of murder. Thereafter, PW-2 rushed to the hospital, after looking for his brother at three places, and claimed that the victim gave a full description of the occurrence to him. PW 3, wife of PW-2, stated that the victim told the whole story in her presence and in presence of doctor, nurse and many other persons, but interestingly, none of the hospital staff nor anyone present there, including Parul or Badal has been produced as witness who could have been independent witness in the case so far the dying declaration is concern.

22. From the record it appears that the statement of the victim bearing 11 bullets injuries and one severe cut injury on the back of the head has been taken into consideration by both the Courts as an oral dying declaration of the victim, which, both the Courts believed to be true and trustworthy. The High Court Division observed that 'the language of dying declaration need not be identical and of the same, but if substance of the same fulfills other conditions to act upon which such declaration, then it is admissible as evidence. A detail statement cannot necessarily lead to the inference that the statement is fabricated one. It is now well settled that a dying declaration, oral or written, when established as true can form the sole basis of conviction'. Taking the said dying declaration into consideration the High Court Division observed that 'the same has been well proved by PWs 1 to 3 and the motive of the case has been established'. Although, the High Court Division has considered the oral dying declaration to be proved but one thing is required to be noted that the said dying declaration has been made by a person, who admittedly received 11 gun shot injuries on his body one of which pierced his body damaging his right lungs, liver and stomach and there was a severe cut injury damaging the scull on back side of the head, whereupon the doctor admitted that any person receiving such injury is not supposed to remain conscious and give a vivid description as to how and which of the accused inflicted such injury upon him.

23. On a close scrutiny of the post mortem report it appears that the injury (Ka) is a bullet injury which pierced through the right chest mid line and went out of the body through the back side creating 8" x ½" diameter hole between 9th and 10th rib of the right chest damaging the right lungs, liver and stomach and there are as many as 7 bullet injuries in the body of the victim and a cut injury on the occipital area creating 3" x ¾ "x ½", bone injury 1½ x ¾ on the right side of the head creating blood clod with liquid blood below the occipital region.

24. As such from the above report and the evidence of PW 8, it appears that the injuries were so severe in nature that at least one of the aforesaid injuries which pierced through his body damaging right lungs and liver and the sharp cutting injury at the back of the head which according to the doctor, who prepared the post mortem report, in his cross examination stated 'ভিকটিম বাবুলের ভর্তির সময় ও তারিখ মৃত্যু প্রতিবেদন অনুসারে তাং ৮/৫/৯৫ সময় সকাল ১১.১০ মিঃ এবং মৃত্যুর সময় দুপুর ১.৪০ মিঃ ভিকটিম বাবুল আমাদের হসপিটালে ২ ঘন্টা ৩০ মিঃ চিকিৎসাধীন ছিলেন । কোন রোগীর মৃত্যু নিশ্চিত হইতে কোন ডাক্তারের রোগীকে পরীক্ষা করিতে ১ মিনিট বা ১৫ মিঃ বা ৩০ মিঃ সময় লাগিতে পারে ইহা ডাক্তারের অভিজ্ঞাতার উপর নির্ভরশীল । (ক) injury দিয়েও লোক মারা যেতে পারে । ঐ injury হওয়ার পরে ভিকটিমের জ্ঞান থাকার কথা নয় ।(ঙ)..... মৃত দেহে injury mark ১১ টি বুলেটের প্রবশ ও বাহির পথ মিলিয়া এবং ১টি বুলেট বাহির না হওয়ায় সর্ব মোট বুলেট injury ১১টি এই ধরনের injury নিয়া কোন লোক হাসপাতালে আসিলে ডাক্তারদের উচিৎ সার্বক্ষনিক রোগীর পাশে থাকা । এই injury গুলির সাথে সাথে প্রচুর রক্ত ক্ষরন হয়েছে ।' Thus it is not believable that a person having received multiple injuries and who died after 40 minutes of making the alleged dying declaration can give a thorough description of the actions of his assailants. So the High Court Division erred in believing the uncorroborated dying declaration to be true and correct which from the nature of injuries and according to doctor's opinion does not show that the deceased was in such physical condition that he could make such declaration. Moreover the said dying declaration has not been corroborated by any other or any independent witness as none of the hospital staff or the people present in the hospital at that time and people who brought him to the hospital having been examined.

25. It is true that a dying declaration to be admissible under section 32(1) of the Evidence Act, is not necessarily to be recorded in accordance with the provisions contained in Chapter XXV of the Code of Criminal Procedure which includes both oral and written statements i.e. it may not necessarily be only in writing. It can be treated as evidence if it is found to be free

from suspicion and believed to be genuine and true, only in that case it may be sufficient to form a material basis for conviction. The main tests for determining the genuineness of a dying declaration requires three criterions (I) whether intrinsically it rings true, (II) whether there is no chance of mistake on the part of the dying man in indentifying or naming his assailant and (III) whether it is free from prompting from any outside quarter and is not inconsistent with the other evidence and circumstances of the case.

26. In the case of **Alais Miah Vs. State reported in 20 BLC(AD)341** this Division held "*while considering dying declaration the Court is required to see whether the victim had the physical capability of making such a declaration whether witnesses who had heard the deceased making such statement heard it correctly. Whether they reproduced names of assailants correctly and whether the maker of the declaration had an opportunity to recognize the assailants. Value of dying declaration depends on the facts and circumstances of the case in which it was made. Unlike English law, for admissibility of a statement a person should not necessarily be in the expectation of death when he made the statement."*

27. In the instant case, from the materials on record, it appears that other than the elder brother PW-2 and PW-3 wife of PW-2, none were produced at whose presence the victim made such dying declaration in the hospital. Admittedly, PW-2 stated that when he went to the hospital, he found Doctor and other staffs of the hospital were giving him treatment and medical attendance. He also found his wife and one lady with her beside the victim. He said that when he asked his younger brother, the victim in a feeble voice, stated the names of the accused persons and the blows inflicted by them. But, unfortunately, none of the hospital staffs or the lady named Parul was produced to prove making of such dying declaration by the victim, who heard the statement made by the victim. Moreover, PW-8, Doctor, who held the post mortem examination, in his cross examination clearly stated that the injuries found on the body of the victim, specifically the bullets which pierced through the right chest damaging the right lungs, lever and stomach and the injury cutting the scull of the victim at the back of the head along with other 11 bullet injuries, he was not suppose to be conscious and, such a patient requires intensive care treatment which was being given to him within 2½ hours time till his death. He also opined in his deposition that such patient is at the verge of meeting death because of such injuries and profuse bleedings.

28. From the above, it is clear that the victim was not in physical capability of making such declaration before 40 minutes of his death. It has already been stated that other than PW 2 who is the elder brother of the victim and PW 3 wife of PW 2 both being closely related to the victim and admittedly there were some enmity between the appellant's family and the victim's family the circumstances clearly show that the the three requirements as mentioned above to determine the genuinity of the dying declaration is absent in this particular case. Thus the same cannot be the basis for conviction and, as such, the same cannot be the sole basis for conviction.

29. Thus from the above facts and circumstances of the case, it appears that such dying declaration cannot be considered as the sole basis for conviction and awarding sentence to the appellant, specifically in the absence of any of the witnesses who were present in the hospital during the time when the alleged dying declaration was made by such a critically injured person who was under intensive care and not supposed to be in conscious. As such the finding of the High Court Division that 'the prosecution has clearly established the motive of the case and the oral dying declaration has also been supported by the medical evidence and other circumstances and materials on record' is not sustainable in law. Consequently, the

impugned judgment passed by the High Court Division basing on the such uncorroborated oral dying declaration against the present appellant is liable to be set aside.

30. Accordingly, this criminal appeal is allowed. The impugned judgment and order of conviction and sentence so far the present appellant, Rashed, is concerned, is set aside. The convict-appellant Rashed son of Formuj Ali Bhuiyan, Village-Rajapur, PS. Burichang, District-Comilla at present 517/C Khilgaon, PS. Sabujbag, District-Dhaka, be acquitted of the charge and be set at liberty forthwith if not wanted in connection with any other case.

12 SCOB[2019] HCD 1

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 10929 of 2015

Liberty Fashion Wears Limited
…. Petitioner
-Versus-
Bangladesh Accord Foundation and others
…… Respondents

Mr. Qumrul Haque Siddique with
Mr. Imtiaz Moinul Islam
..……for the petitioner.

Mr. K.S. Salah Uddin Ahmed
……for the respondent No. 1

Mr. Azmalul Hossain QC with
Present:
Mr. Justice Tariq ul Hakim
And
Mr. Justice Md. Faruque (M. Faruque)

Mr. Foyez Uddin Ahmed and
Mr. Suhan Khan
…for the respondent Nos. 2 and 3

Mr. Md. Yousuf Ali
…for the respondent Nos. 4 and 5

Ms. Amatul Karim, D.A.G with
Mr. A.R.M.Hasanuzzaman A.A.G. and
Mr. Abu Saleh Md. Fazle Rabbi A.A.G.
……for the Respondents

Heard on 17.07.2016
Judgment on 01.09.2016, 04.09.2016 and 06.09. 2016

Article 102(2) of the Constitution.

For Article 102 (2) to be attracted however the petitioner must be aggrieved by an action of a person performing functions "in connection with the affairs of the Republic", or local authority or statutory body and he should be without any other alternative remedy or redress . The remedy sought by the petitioner is simply a direction on the Respondent No. 1 for inspecting the petitioner's factory and publishing the findings in its website. If the petitioner's factor is unsafe and not fit in any way then the Respondent No. 1 has nothing to loose. The petitioner cannot seek remedy from the Civil Court or any other forum in the form of a direction since there is no contractual relationship with the respondent No. 1. Similarly an action for defamation also will not serve any purpose since the petitioner wants the Respondent No. 1 to publish the accurate condition of its factory. Thus to compel the Respondent No. 1 to inspect its factory and publish the findings in its website the petitioner does not appear to have any other alternative remedy. In such view of the matter therefore this Rule is also maintainable under Article 102 (2). ... (Para 43)

JUDGMENT

Tariq ul Hakim, J:

1. On an application under Article 102 of the Constitution by the petitioner Rule Nisi was issued calling upon the Respondent No.1 to show cause why it should not be directed to circulate the name of the petitioner as a compliant garment-manufacturing factory amongst its members all over the world and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. In the midst of hearing of the Rule on another application of the petitioner, a Supplementary Rule was also issued on the Respondent No.1 to show cause why it should not be directed to immediately arrange for inspection of the factory of the petitioner as per Clause 10 of the Accord agreement in accordance with all necessary protocols and publish the inspection report in its website and/or pass such other or further order or orders as this Court may seem fit and proper.

3. The case of the petitioner is that it is a private limited company incorporated under the Companies Act, 1994, engaged in the business of manufacturing readymade garments. The factory of the petitioner comprises three buildings, plant and machineries valued at about Taka 120 crore. It was established in the year 2001 and about 5000 workers directly depended on it for their livelihood. In 2013 the petitioner made a gross annual income of about Taka 200 crore by manufacturing and exporting readymade garments to European and American buyers including the respondent No.2 Primark, Debenhams, Target, K-mart and other well known brands/ companies .

4. The respondent No.1 Bangladesh Accord Foundation (hereafter referred to as Accord) is registered in the Netherlands with the primary objective of ensuring fire and building safety in the garments factories of Bangladesh for a period of five years pursuant to an agreement amongst its members under the name and style "Accord on fire and building safety in Bangladesh" (hereafter referred to as the Accord Agreement). The signatories to the Accord Agreement are more than 150 apparel corporations including the respondent No.2, 2(two) global trade unions, eight Bangladeshi trade unions and the International Labour Organization (ILO). The Accord Agreement was signed on 13.5.2013 after the Rana Plaza disaster where 1129 people died and the Tazreen Garments devastating fire of 24.11.2012. The Ministry of Labour and Employment of the Government of Bangladesh also formed a National Tripartite Committee, respondent No.4, with the owners of garments factories and Labour Organizations and adopted a National Tripartite Plan of Action (NTPA or NAP) to ensure fire and building safety in garments factories. The committee in their joint statements welcomed assistance from stakeholders (foreign garments buyers International Development Organizations, donors etc.) wanting to help improve the fire and building safety conditions in garment factories in Bangladesh leading to the setting up of the Accord Foundation by European Buyers.

5. Similar to Accord, American buyers of Bangladeshi garments formed an Association under the name and style "Alliance" with objectives similar to "Accord on fire and building safety in Bangladesh". They also entered into an agreement among themselves with similar objectives like the Accord Agreement. There is an unwritten understanding between Accord and Alliance that the inspection report of Accord regarding the infrastructural fire and building safety conditions of a particular garments factory in Bangladesh would be accepted by Alliance and vice-versa. Thus if a negative report is published either by Accord or Alliance in its website, the members of both Accord and Alliance stops sourcing ready made garments from that factory and in effect the whole world stops taking goods from such a factory. Both Accord and Alliance committed themselves to work under the platform created

by the respondent No. 4 National Tripartite Committee (NTC) to ensure fire and building safety measjures pursuant to the National Tripartite Action Plan (NAP) as stakeholders. The Accord agreement came into effect on 23.5.2013.

6. After the collapse of Rana Plaza, foreign buyers of readymade garments from Bangladesh became concerned about fire and safety hazards in garment factories in the country and the respondent No.2 appointed the respondent No.3 Medway Consultancy Services to inspect the factory of the petitioner. The respondent No.2 and 3 visited the factory of the petitioner on 18.5.2013 and 25.5.2013 and after a cursory visual inspection, the respondent No.3 reported that there was a serious structural weakness in the main production building i.e. building No. 2. The same building however was reported to be safe by the respondent No.2 in an earlier report dated 28.06.2012. The respondent No.3's report stated that the slab of each floor is only just able to support its own weight and that the weight of workers or equipment on each floor is likely to cause one of these floors to collapse . Should one floor collapse, the extra weight on the floor will cause the building to progressively collapse. This was a complete surprise to the petitioner and he immediately requested the Bangladesh Garment Manufacturers & Exporters Association (BGMEA) to inspect the said building. The engineers of BGMEA certified that the aforesaid building no. 2 was safe vide their letter dated 10.06.2013. Thereafter the petitioner engaged Bangladesh University of Engineering and Technology (hereinafter referred to as the BUET) which is the most reputable Institution on civil engineering in the country and they also by their letter dated 29.06.2013 certified that the petitioner's buildings may be used with caution but minor retrofitting work should be done to make the building better. Thereafter the petitioner, at the insistence of the respondent no. 1, took advice from one Ali Asgar & Associates, a renowned engineering firm who also confirmed that the building may be used for production. Thereafter on 11.06.2013 the Respondent No.2 along with Primark (an apparel Corporation based in UK and the Respondent No.3 went to the petitioner's factory and compelled the petitioner to shut down building no. 2 completely. After the petitioner's factory was shut down the petitioner wrote several letters to the Respondent No. 2 to review their decision but the respondents insisted that the petitioner submit proposals for retrofitting. The petitioner submitted retrofitting proposals prepared by Ali Asgar and Associates but the respondent no. 1 asked for Professional Indemnity Insurance (PII) from Ali Asgar and Associates amounting to 10 Million Pounds Sterling but that engineering firm was not willing to provide the indemnity Insurance nor did any other Engineering Consultancy Company agreeable to do so. The petitioner accordingly requested Accord to withdraw the condition of Professional Indemnity Insurance but while negotiations were going on suddenly on 15.10.2013 the Respondent No.1 informed the petitioner that all Accord brands (members of Accord) would terminate their relationship with the petitioner if it did not repair its factory. The petitioner by its letter dated 21.10.2013 and 27.10.2013 offered to comply with the requirements of the Respondent No.1 but requested it to withdraw its demand for the Professional Indemnity Insurance of 10 Million Pound Sterling because the engineering firms of this country were unwilling to provide it .

7. It is further stated that by this time all buyers cancelled their orders with the petitioner and the petitioner was thrown out of its business but the Respondent No.1 did not bother to inspect the petitioner's factory to determine the actual condition of the buildings.The Government of Bangladesh intervened in the matter and requested the Respondent No.1 by letter dated 24.11.2013 under the signature of the Senior Assistant Chief, Planning Cell, Ministry of Labour and Employment to inspect the petitioner's factory but the Respondent No.1 by its letter dated 08.12.2013 addressed to the Secretary, Ministry

of Labour and Employment of the Government of Bangladesh informed it that the Respondent No.1 had accepted the inspection report of the Respondent No. 3 and did not place the petitioner's factory in its list for inspection.

8. It is further stated that under Clause 10 of the Accord Agreement the Respondent No.1 is required to arrange inspection of all factories of readymade garments at least once by a Safety Inspector appointed by Accord to determine its safety standard but the Respondent No.1 has been refusing to inspect the petitioner's factory . On the other hand Accord published the name of the petitioner's factory in its web site as non compliant and risky causing buyers all over the world to refrain from placing orders for ready made garments to the petitioner's factory . It is further stated that although the Respondent No.1 undertook to work in sync with the NTPA i.e. the Respondent No. 4 but the Respondent No.1 has refused to listen to the requests made by the Government of Bangladesh to inspect the petitioner's factory pursuant to clause 10 of the Accord Agreement resulting in complete shut down of the petitioner's factory causing it substantial financial loss. The petitioner again wrote to the Respondent No.1 on 30.4.2014 and 4.5.2014 to inspect its factory and the BGMEA vide their email dated 08.09.2014 also requested the Respondent No.1 to inspect the condition of the petitioner's factory . Similarly the Inspector General (Additional Secretary of the Department of Inspection for Factories and Establishments) i.e. respondent No. 5 , by its letter dated 14.9.2014 also requested the Respondent No. 1 to inspect the petitioner's factory but the Respondent No.1 has continuously refused to inspect it. The petitioner sent a Notice for Demand of Justice through its learned Advocate to the respondents on 27.10.2014 (Annexure L) to inspect the petitioner's factory but the said respondents did not bother to take any steps or even reply to the said notice.

9. It is further stated that (the International Labour Organization (ILO) appointed) TUV SUD, a Bangladeshi private limited company inspected the petitioner's factory on the recommendation of BGMEA and found it to be absolutely safe and satisfactory. Thereafter the BGMEA again wrote to the Respondent No.1 on 12.08.2015 to inspect the petitioner's factory but the said respondent continued to ignore the request of every one. It is also stated that Clause 10 of the Accord Agreement imposes a duty upon the Respondent No.1 to inspect the petitioner's factory as it is a supplier of readymade garments to many of signatories of the Accord Agreement but the persistent refusal of the Respondent No.1 to inspect the petitioner's factory and publication of a false report in its website about the petitoner's factory being risky and unsafe has made the petitioner bankrupt and having no other alternative remedy it has been compelled to come to this Court and obtain the present Rule.

10. In a Supplementary Affidavit on behalf of the petitioner it has been further stated that BUET after inspecting the petitioner's factory submitted its report on 29.6.2013 making seven recommendations and corrective works and the petitioner complied with the said recommendations .

11. The Respondents are contesting the Rule by filing separate Affidavits-in-Opposition.

12. The Respondent No.1 Accord in its Affidavit-in-Opposition has denied the material allegations against it and stated inter alia that the Accord Agreement was signed in May, 2013 by global apparel companies, international retailers,two global trade unions and eight Bangladeshi trade union Federations. The agreement is designed to make RMG factories in Bangladesh safe and sustainable. Accord was established in the Netherlands with its liaison

office in Bangladesh with permission from the Board of Investment to implement commitments of the signatory companies towards making their supplier RMG factories in Bangladesh safe. One of its objectives is to provide technical support to the National Tripartite Committee (NTC) but neither the NTC nor Accord has any authority to give directions to each other. Accord has conducted engineering based safety inspections of more than 1400 RMG factories in Bangladesh. Accord and its signatories provide significant technical support and resources to all the RMG factories to ensure that safety hazards are identified through inspection and are properly corrected and has spent almost 50 million US Dollars over the 5 years of their agreement period for the purpose .

13. It is further stated that in cases where factory buildings after inspection are found unsafe rectifications are recommended and if a factory owner does not comply , the Respondent No.1 publishes it as non-compliant and since the petitioner's factory was unsafe and the petitioner did not co-operate with the Respondent No. 2 , Accord decided not to source from the petitioner's factory.It is further stated that the members of the Respondent No.1 cannot continue to do business with a factory which does not have a safe building. The petitioner's factory was inspected by the Respondent no. 2 and 3 before the Respondent No.1 opened any office in Bangladesh . Since the inspection was conducted on behalf of a signatory organization of the Respondent No.1, Accord accepted the findings of the Respondent No.3 and considered it as part of its program activities pursuant to clause 10 of the Accord Agreement. As per clause 10 of the Accord Agreement the Respondent No.1 Accord had accepted the report prepared by the Respondent No.3 as it met the standards of thorough and credible inspection. The provisio to Clause 10 of the Accord Agreement is applicable to a situation where the factory has been inspected by any signatory organization and has worked on the rectification plan as per the recommendations suggested by the inspectors. Respondent No.1 is reqired to make at least one inspection but the petitioner has not worked on the retrofitting work and was insisting to continue operation in the unsafe building thereby risking the lives of thousands of workers . Several communications were made to the petitioner by the Respondent No.1 to do retrofitting works in its factory building and on one occasion Respondent No.1 even scheduled a visit to the petitioner's factory but when it knew that the retrofitting work had not been done or even started Accord had no option but to cancel its visit because it would be a waste of its valuable funds and time .

14. It is further stated that Accord even provided funds to pay salaries and bonuses to the petitioner's workers but still the petitioner repeatedly ignored the Respondent No.1's direction to complete retrofitting works of its factory and therefore the said respondent was constrained to declare the petitioner's factory as a non compliant factory . Once a factory is categorized non compliant as per the Accord Agreement the Respondent No.1 has no authority to inspect it as any inspection would be a violation of the agreement amongst the members of Accord . Furthermore such inspection would open the flood gates for other non compliant factories to demand multiple inspections. The petitioner's name was accordingly published in the respondent No. 1's web site as a non compliant factory on 14th October, 2013 and although more than 2 years have elapsed the petitioner has not carried out any retrofitting work in its factory and any inspection by the Respondent No.1 will be a meaningless exercise involving unnecessary cost and this Rule has no substance and is liable to be discharged.

15. The Respondent No.2 Tesco in its Affidavit-in-Opposition has stated that in April, 2013 it initiated a program of Structural and Safety Audits of its Bangladeshi supplier

factories through an international engineering consultancy firm MCS (Medway Consultancy Services) with offices in the United Kingdom and Bangladesh. On 17.5.2013 the Respondent No.2 Tesco came to know of the petitioner's name appearing in the list of "unapproved facilities" published by another major American retailer, Walmart. Immediately thereafter the Respondent No. 2 Tesco instructed Respondent No.3 MCS to audit the petitioner's factory and to report on the structural safety of the petitioner's factory building . After inspecting the petitioner's factory on two occasions it came to the finding that building no. 2 could not support itself along with the equipment and workers and revealed the risk of structural collapse, technically known as "punching shear failure" . The findings and calculations were checked by Fairhurst one of the largest Consulting Engineering Partnerships in the United Kingdom as well as another independent engineering firm called String Maynard which confirmed the Respondent No.3's findings. The Respondent No.2 thereafter urgently informed the petitioner on 7.6.2013 about the Respondent No.3's report and asked it to evaluate building no. 2 but the petitioner refused to stop production in it . The Respondent No. 2 sent a letter to BGMEA on 07.06.2013 informing it about the critical safety risks at the petitioner's factory and asked it to take immediate action to protect employees working there. The Respondent No.2's representative during its factory visit on 11.6.2015 also recommended relocating the sewing machines to the ground floor of other buildings at the site for safety of the workers in the endangered building.

16. It has also been stated that the Respondent No.1 Accord does not represent Tesco since Accord is an independent entity with its own independent press office. Tesco did not participate in or cause the publication of any report published by Accord. Tesco informed Accord about Respondent No.3's report and findings and Accord chose not to reassess the same in exercise of its own discretion and judgment. Tesco did not participate in the decision making process pertaining to the conditions imposed by Accord on the petitioner. The persistent failure by the petitioner to take remedial action in its buildings led the Respondent No.2 to stop taking readymade garments from the petitioner. Although the petitioner has claimed no relief against the Respondent No.2, the relief claimed by the petitioner if granted would amount to licensing a non compliant building as compliant without making the factual assessment of the conditions of the factory building.

17. The Respondent No.3 in its Affidavit-in-Opposition has stated that in April, 2013 the Respondent No.3 was appointed by the Respondent No.2 Tesco to carry out inspection of all its Bangladeshi suppliers' factories under its program of Structural and Safety Audits following the Rana Plaza disaster. The petitioner's factory was inspected by the Respondent No.3 on two occasions, on 18.05.2013 and 03.06.2013 by a team of the Respondent No.3 led by Mr. I. A. Khan OBE , a British national and a Chartered Civil engineer from the United Kingdom. Inspection revealed various faults in building no. 2 of the petitioner's factory specially relating to the load carrying capacity of the floor slabs. Building No. 2 was of flat slab construction without beams supported on columns. On physical measurement, it was apparent that the thickness of the slab was less than that required by the Bangladesh National Building Code (BNBC). Moreover, the use of brick aggregate for the concrete slab raised further concern. The findings of the Respondent No.3 were checked by two other consultancy firms in the United Kingdom, Fairhurst and String Maynard who agreed with the calculations. The said respondent requested the petitioner to stop production at building no. 2 but the petitioner refused to do so. It is further stated that the said respondent is not a member of Accord and has no role in Accord's decision making process and did not participate or cause the publication of any report that may have been published by Accord. It is further stated that the instant Writ Petition involves a number of disputed questions of

fact and calls for an adjudication on the basis of inspection and since no relief has been claimed against the Respondent No.3 by the petitioner there is no legal basis for making the Respondent No.3 a party in the instant Writ Petition.

18. The respondent No. 4 Secretary, Ministry of Labour and Respondent No. 5, Inspector General of Factories, in their separate Affidavits-in-Opposition, have stated that pursuant to the third meeting of the National Tripartite Committee (NTC) the representative of the International Labour Organization (ILO) arranged a consultation meeting with Accord and Alliance and as per their suggestions a team from the Bangladesh University of Engineering and Technology (BUET) prepared a revised version of the Operation Manual (OM) for assessing the infra-structural integrity and fire safety of readymade garments buildings in Bangladesh which was endorsed by the said meeting . In a subsequent meeting of the National Tripartite Committee (NTC) it was decided that the evaluation and recommendations of Accord and Alliance on readymade garments factories will be subject to review by a Review Panel formed under the said Operation Manual (OM). In the case of the petitioner however since the recommendation for closure of the petitioner's factory was not made by Accord, Alliance or BUET, the same was not subject to review by the Review Panel. The respondent No.1 found the assessment of the petitioner's factory by Primark and Tesco as credible and accepted it as an inspection under its own program and accordingly on 14.10.2013 and 24.10.2013 published a summary of the aforesaid inspection report in their website and declared the petitioner's factory as a non complaint manufacturing facility . It is further stated that they welcomed Accord's initiative to assess the infrastructure of garments factories in Bangladesh under the National Tripartite Plan of Action (NTPA) framework using the Operational Manual developed by the National Tripartite Committee (NTC) under the monitoring and review system of the National Tripartite Committee (NTC). However the inspection conducted by Tesco and Primark of the petitioner's factory was not a specific inspection under the National Tripartite Plan of Action (NTPA) framework and therefore the office of the respondent No.4 by its letter dated 24.11.2013 requested Accord to include the name of the petitioner's factory in the list of factories for inspection by it. The respondent No.5 also sent a similar request by their letter dated 24.9.2014 but Accord did not comply with any of the aforesaid requests.

19. It is further stated that there is no formal agreement between the respondent Nos. 4 and 5 with Accord and Alliance apart from the Operation Manual (OM) and the National Tripartite Plan of Action (NTPA) and therefore the said respondent cannot exercise any authority on the respondent No.1 for any of its activities outside the scope of the National Tripartite Plan of Action (NTPA) framework. Furthermore, the said respondent does not have the authority to compel the respondent No.1 to inspect a particular factory including the petitioner's factory if it is unwilling to do so as there is no binding agreement with the respondent No.1. After introduction of the provision for review in the Operation Manual (OM) on 28.01.2014 in cases of recommendations for evacuation or closure of factories by Accord or Alliance the decision will be subject to automatic review by the Review Panel of which the respondent Nos. 4 and 5 are members . In the instant case since the inspection of the petitioner's factory was not conducted by the respondent no. 1 Accord and it was done before the creation of the Review Panel, the respondents cannot compel the Respondent No.1 to inspect the petitioner's factory

20. Mr. Qumrul Haque Siddique, appearing with Mr. Imtiaz Moinul Islam, the learned Advocates for the Petitioner submit that the respondent No.1 has acted arbitrarily without any legal basis in publishing the name of the petitioner in its website as a unsafe and non

compliant factory prompting foreign buyers to stop placing orders to the petitioner's garments factory and therefore causing it to be shut down. He has become bankrupt due to the arbitrary and unlawful action of the Respondent No. 1 and his fundamental right to profession, trade and business as guaranteed by Article 40 of the Constitution has been infringed. The learned Advocates further submits that the respondent No.1 without inspecting the petitioner's factory has published a false and fabricated report about the petitioner's factory . The learned Advocates further submit that the respondent No.1 has embarked upon a policy of 'pick and choose and although it has inspected over 1400 garments factories in Bangladesh, it has not inspected the petitioner's factory and therefore the respondent No.1 is also liable for discrimination and is in breach of the equality Clause i.e. Article 27 of our Constitution. The learned Advocates further submit that the respondent No.1 is in breach of its own Rules and standards of operation and the provisions of "Accord on fire and safety in Bangladesh" specifically Clause 10 which requires Accord to inspect all RMG factories supplying foreign buyers at least once by an international reputed independent Factory Inspector causing loss and damage to the petitioner. The learned Advocates further submit that there is no specific contract between the petitioner and the respondent No.1 and as such the petitioner has no remedy under contract or otherwise before a Civil Court or any other forum to compel the respondents to inspect its factory and publish the findings and therefore he has been constrained to invoke the special jurisdiction of this Court under Article 102 of the Constitution. The learned Advocates further submit that the respondent No.1 did not give the petitioner any hearing or opportunity to defend itself and instead of assessing the situation themselves they relied upon a false and fabricated report by a third party and arbitrarily published the petitioner's name in its website as a non compliant Ready Made Garments facility. The petitioner was acting in the public domain performing a public function and its arbitrary unlawful action has caused loss and damage to the petitioner. In this respect the learned Advocates for the petitioner have drawn our attention to the decision in the English case ***R v Panel on Take Overs and Mergers, ex-parte Datafin plc and another 1987 1 All England 564 .***

21. As against this, Mr. K.S. Salah Uddin Ahmed and Mr. Azmalul Hossain QC, the learned Advocates appearing for the respondent Nos.1, 2 and 3 have submitted in one voice that the instant Rule is not maintainable since the action impugned by the petitioner is not by a person performing any function in connection with the affairs of the republic. The learned Advocates further point out that the impugned action is by the respondent No.1, an association of foreign buyers and that they are all private entities for which the petitioner must seek relief elsewhere and cannot invoke the special jurisdiction of this Court under Article 102 of the Constitution .

22. Mr. K.S. Salah Uddin Ahmed, the learned Advocate for the respondent No.1 further submits that there has been no breach of provision of Article 40 of the Constitution since the petitioner is at liberty to do business with any buyer of the world and supply readymade garments to any company and that the respondent No.1 has merely stated the inspection findings on its website. The learned Advocate further submits that the respondent No.1 requested the petitioner several times to perform retrofitting works to make its factory fit and safe but the petitioner continuously refused to do so and therefore they had no choice but to publish the findings of the inspection report in its website to inform its members which calls for no interference by this Court.

23. Mr. Azmalul Hossain, the learned Advocate for the respondent Nos. 2 and 3 submits that no relief has been claimed against the said respondents and that their names be struck

out from the Writ Petition . The learned Advocate further submits that the respondent No.2 requested the respondent No.3 to conduct certain inspections of the petitioner's factory and the respondent No.3 did so in accordance with the highest standards and submitted their report to the respondent No. 2 who in turn informed the respondent No.1. The learned Advocate further submits that the respondent No.2 does not represent the respondent No.1 in any way and takes no responsibility for the publication of the report in the respondent No.1's website.

24. Mr. Md. Yousuf Ali,the learned Advocate for the respondent Nos. 4 and 5 submits that there is no binding agreement between the said respondents and the petitioner and although they cannot compel it to inspect any readymade garments factory nevertheless they requested the respondent No.1 on several occasions to inspect the petitioner's factory but it did not comply. The learned Advocate further submits that after incorporating the provision for review any inspection conducted by the respondent No.1, is subject to review by a Review Panal at the request of an aggrieved party but in the instant case since the inspection was conducted prior to the inclusion of the provision for review on 28.1.2014 and since the inspection was not conducted by the respondent No.1 therefore the decision of the Respondent No. 1 to publish the name of the petitioner as a non compliant factory could not be reviewed by the Review Panel.

25. We have considered the submissions of the learned Advocates and perused the averments and the Annexures.

26. Since maintainability of this Rule has been challenged by the learned Advocates for the respondent Nos. 1,2 and 3 on the ground that the impugned action was not performed by a person in the service of the Republic we will address this point first .

27. Article 102 of the Constitution states:

> "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this constitution.

28. The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

> on the application of any person aggrieved, make an Order –directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or
>
> declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect ; or on the application of any person, make an order-
>
> directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or
>
> requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.
>
> …..

29. A plain reading of the aforesaid provision of the Constitution shows that pursuant to Article 102(1) this Court is empowered to give directions or orders to any person or authority for the enforcement of any aggrieved person's fundamental rights .

30. Generally to maintain an application under Article 102(1) the impugned action must be by a person who is in the service of the Republic or a statutory body or a local authority . The language of Article 102(1) however clearly states that a person must be aggrieved by the action or order of "any person" including a person acting in connection with the affairs of the Republic. Thus it is not necessary for the impugned act or order to be done or made by a public functionary or statutory body or local authority for Article 102(1) to be attracted. When fundamental rights of a person is infringed the remedy under Article 102(1) is available to the aggrieved person irrespective of whether he is in the service of the Republic, local authority, statutory body or even a private capacity.

31. In the case of **Moulana Md. Abdul Hakim Vs. the Government of Bangladesh and others reported in 34 BLD (HCD)(2014) 34** it has been held "when issues of fundamental rights are raised, the sanction under Article 102(1) is clearly of availability of redress against "anyone", or "any authority", inclusive of any person performing any function in connection with the affairs of the Republic. The reference to government functionaries must accordingly be seen as an appendage made to the broader category of "anyone" or "any authority" by way of abundant caution."

32. Similarly in an unreported decision of this Court in Writ Petition No. 2499 of 2010 in the case Rokeya Akter Begum Vs. Bangladesh and others it has been held "as far as Article 102(1) is concerned i.e. when fundamental rights are relied on, the question of status of the impugned person or authority losses its relevance because the phrases "any person or authority" in the said sub-Article necessarily refers to a person or any authority , irrespective of his/it's status. Decisions by such a person or any authority , whether he /it is a public functionary or a private one, is hence reviewable, provided however, that infringement of one of the fundamental rights , figured in Part III of the Constitution, is in question . In so far as such a person need not be a public functionary, little complication arises in fundamental rights oriented cases."

33. In ***Rajuk Vs. A. Rouf Chowdhury and others in 61 DLR (AD) 28*** it has been held when violation of fundamental right as enumerated in the Constitution is the only ground and no violation of legal right or law has been alleged whatsoever resort may be taken under Article 102 of the Constitution. This decision of the Appellate Division establishes that when any violation of fundamental rights enumerated in Part III of the Constitution is established , this Court may issue appropriate orders provided the aggrieved person has no other alternative remedy before any other court.Thus it appears when infringement of fundamental rights is alleged, this Court under Article 102(1) can give directions to any person or authority irrespective of whether he is in the service of the Republic or not for redress of the aggrieved person's loss or grievance.

34. The question however as to when a person is performing functions in connection with the affairs of the Republic has caused considerable concern in many countries of the world where the common law is practiced resulting in considerable jurisprudence.

35. Since private bodies are increasingly performing public functions the courts are intervening and passing appropriate directions and orders reviewing the action, inaction and functions of private bodies. The Courts regulate their discretion by looking at the nature of the function exercised by the private bodies and by scrutinizing whether the body is acting in the public domain and whether the aggrieved person has any other alternative efficacious remedy. This view has also been confirmed in the Indian case of ***Board of Control for Cricket V. Cricket Association of Bihar and others AIR 2015 SC 3194 .***

36. In the Landmark English case ***R v Panel on Take Overs and Mergers, ex-parte Datafin plc and another reported in 1987 1 All England Reports 564*** the Court of Appeal held that where a public duty is imposed on a body, expressly or by implication, or where a body exercises public functions the court will have jurisdiction to entertain an application for judicial review of that body's decision. There is no single test however as to what is public function. The source of the body's power is a significant factor; if it is by an Act of Parliament or subordinate legislation then the body's action will be subject to judicial review. On the other hand, if the decision of the body is derived solely from contract its decision will not be amenable to judicial review. In such cases the Court will try to decide whether the impugned action has been performed in the public domain in which case the court is likely to infer that the decision has been taken in connection with the affairs of the Republic. A government element may also appear where governmental functions are carried out by private bodies. By contrast, when the nature of the function is such that it does not generate any interest of the Government then the body's action will not be subject to judicial review. Thus not only the source of the power of the body but also the nature of the action exercised by it will determine the availability of judicial review. It also appears that when a private sector body steps into the shoes of a public body then its action will be amenable to judicial review. In ***Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust v. V. R. Rudani reported in AIR 1989 SC 1607*** it has been held :

> "The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartments. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226."

37. In the case of ***Consumer Education and Research Centre and others Vs. Union of India and others reported in AIR 1995 (SC) 922*** the Supreme Court of India held that in an appropriate case, the Court would give appropriate directions to the employer be it the State or private employer to make the right to life meaningful; to prevent pollution of work place; protection of the environment; protection of the health of the workmen or to preserve free and unpolluted water for the safety and health of the people. The authorities or even private persons or industry are bound by the directions issued by the Supreme Court under Article 32 and Article 142 of the Constitution. In the aforesaid case the Supreme Court issued mandamus upon a private industry for the enforcement of the petitioner's fundamental rights.

38. In the Datafin case Lloyd L.J. held

" If the body in question is exercising public law functions or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review. It may be said that to refer to public law in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other".

39. In Bangladesh the responsibility for inspecting factories and their safety vests on the Inspector General of Factories i.e. respondent no. 5. This is conferred by sections 61 and 62 of the Bangladesh Labour Law, 2006 which provide as follows:

> **"Sec.-61: Safety of the building and the machinery.** -(1) If any inspector deems it necessary that any building or any of its part or any of its passage, machinery or plant is in such condition that it is dangerous to life or security of man then he shall by a written order direct to take the necessary steps within the specified time.

(2) If it deems to any inspector that any building of any factory or establishment is very dangerous to life or safe of man then he shall, by written order to the owner restrict their of such building or part of a building until the repairment or re-shaping.

Sec.-62: Precautions about fire. - In every factory at least one exit way with each floor must be attached so that at the time of fire accident it can be used as a substitute way and necessary provision for extinguishing fire should be taken.
(2)If any inspector deems it fit that as per sub-section (1) there is no means of exit, then he shall, by an order writing to the owner inform him to take necessary steps within the stated period of time.
(3)In every factory or establishment no exit way from the room shall be made under lock and key so that every man working inside it can get easily open and all three type of doors, if not sliding type, shall be made in such way so that it is kept open outward or if any door is between the two rooms, it must be kept open clear to the exit way and no such door shall be kept under lock and key at the working hour.
(4)Every passage for exit must be used except the exit during the time of fire accident and every such window door or any other exit must be worked with red letters.
(5)To aware or whistle the workers in such establishment the provision for easily audible whistle must be maintained in for each working workers.
(6)For all the workers of the factory of each establishment there shall be made an exit way for all at the time of fire accident.
(7) In any factory or establishment where in any above place of the ground floor ten or more workers one working or explosive or easily inflammable substance is used or is stored then the workers shall be cautions about the incident of fire and can determine what they should to do at that time and so that they can take proper and full-fledged training and so why necessary steps should also be taken for it.
(8) In every factory and establishment having fifty or more workers a rehearshlor of extinguishing of fire shall be maintained and for this reason a record book must be preserved by the owner."

40. The work of checking and inspecting the safety conditions of all readymade garments factories in the country within a short time after the Rana Plaza tragedy was not possible for the Government. The Government therefore welcomed the assistance of other stake-holders like Accord and Alliance through the National Tripartite committee (respondent No.4) and the National Tripartite Plan of Action (NTPA) in this regard. The agreement of the respondent no. 1 Accord states that all Bangladeshi garments factories supplying its members would be inspected at least once by an independent Safety Inspector appointed by the respondent No.1. The commitment of the respondent No.1 to inspect fire and safety facilities of readymade garments factories in Bangladesh at their own expenses is no doubt a welcome step for the improvement and development of the infrastructure of garments factories in the country. In the process they are assisting the Inspector General of Factories of the Government in ensuring fire and building safety of readymade garments factories in the country. Respondent No.1 has accordingly inspected over 1500 garments factories in the country and found some of them to be non compliant and lacking adequate facilities on fire and building safety. Thus it is apparent that the respondent No.1 has been acting with the consent of the Inspector General of factories and assisting it in inspecting and ensuring the safety of the garments factories in the country and therefore performing functions" in connection with the affairs of the Republic".

41. Furthermore the Respondent No 1 has been performing a public function and acting in the public domain.The facts seem to be similar to the aforesaid Datafin case. Thus the petitioner's application under Article 102(1) is maintainable on this ground as well.

42. In the instant case the petitioner's right to profession trade and business as guaranteed by Article 40 of the Constitution has been infringed by the arbitrary act of the Respondent No.1 in publishing/showing the name of the petitioner as a non compliant and unsafe garments factory in its website without inspecting it and therefore in the opinion of this Court the Rule is not only maintainable under Article 102(1 but has substance.

43. For Article 102 (2) to be attracted however the petitioner must be aggrieved by an action of a person performing functions "in connection with the affairs of the Republic", or local authority or statutory body and he should be without any other alternative remedy or redress . The remedy sought by the petitioner is simply a direction on the Respondent No.1 for inspecting the petitioner's factory and publishing the findings in its website. If the petitioner's factor is unsafe and not fit in any way then the Respondent No.1 has nothing to loose. The petitioner cannot seek remedy from the Civil Court or any other forum in the form of a direction since there is no contractual relationship with the respondent No.1. Similarly an action for defamation also will not serve any purpose since the petitioner wants the Respondent No.1 to publish the accurate condition of its factory. Thus to compel the Respondent No. 1 to inspect its factory and publish the findings in its website the petitioner does not appear to have any other alternative remedy. In such view of the matter therefore this Rule is also maintainable unde Article 102 (2).

44. In the instant case it is admitted that the respondent No.1 never inspected the petitioner's factory but relied upon a report submitted by the respondent No.3 who inspected the petitioner's factory at the request of the respondent No.2 on 18.5.2013 after Accord was created although Clause 10 of the Accord Agreement clearly stipulates that all garments factories would be inspected by an independent internationally reputed Inspector appointed by Accord. The petitioner's factory was never inspected by an Inspector appointed by the Respondent No.1 despite several requests by the petitioner and the Government. The respondent no. 1 without inspecting the petitioner's factory published its name in its website and stated it to be a non compliant and unsafe factory resulting in adverse publicity of the petitioner's garments factory causing all European buyers not only to cancel their existing orders but also refrain from giving future orders to the petitioner factory . Due to the adverse report of the respondent No.1 in its website even American buyers of readymade garments represented by Alliance refrained from giving orders to the petitioner causing it huge financial and economic loss and driving it to bankruptcy.

45. The contention of the respondents that the petitioner's factory was not inspected by the Respondent No. 1 as it did not comply with its report to make certain structural improvements of its factory building is misconceived since there is no such precondition for inspecting a factory in the Accord Agreement and therefore the arbitrary insistence of such condition prior to inspecting the petitioner's factory is illegal and not sustainable in law. Furthermore, in the inspection report of the respondent No.3 although certain apprehensions have been expressed regarding safety of the petitioner's factory, no specific and detailed corrective measures was suggested and therefore the petitioner was justified in requesting the inspection of his factory by the respondent No.1 or its appointed Safety Inspector to specify the nature of correctional works required for the petitioner's factory so that compliance may be made to the satisfaction of the said respondent. The arbitrary imposition of pre-conditions by the respondent No.1 for inspecting the petitioner's factory and publishing a report containing adverse remarks in its website has caused serious damage

and loss to the petitioner which could have been easily avoided by the respondent No.1 by merely inspecting it as it did in the case of other garments factories. This policy of pick and choose, of inspecting some factories and not inspecting the petitioner's factory cannot be condoned or approved by any standard of fairness. The Respondent No.1 Accord was acting in concert with the Inspector General of Factories of the Government of Bangladesh through the National Tripartite Action Committee to ensure the safety of ready made garments factories in Bangladesh and therefore the Respondent No.1 was acting in connection with the affairs of the Republic . Their failure to act in accordance with law, by publishing a report in their website about the petitioner's factory without inspecting it is a breach of Clause 10 of their own agreement and the action may be subject to judicial review under Article 102(2) of the Constitution also.

46. The submission by the learned Advocate for the respondent No.1 that if a direction is given to the respondent No.1 to inspect the petitioner's factory it will open up the floodgates for other non compliant factories to come to this Court and obtain similar orders is misconceived since it has not been denied that the petitioner is the only factory whose name has been published on the respondent No.1's website as a non compliant factory without inspecting it. Had the petitioner's factory been inspected it could seek relief before the Review Panel. Other non compliant factories therefore have every opportunity to review the decision by the Review panel.

47. It is not for this court to decide whether the petitioner's factory is safe for manufacturing garments or direct any particular foreign buyer to place orders with the petitioner. The foreign buyers are free to decide where to place their orders and from which source to procure their products; what this court is concerned about is that the petitioner's name should not be published in the website of the Respondent No.1 as a non compliant/ unsafe factory without any prior inspection in accordance with the terms and conditions enumerated in its own Agreement.

48. It is to be noted that the respondent No.4 (National Tripartite Committee headed by the Secretary, Ministry of Labour and Employment) as well as the respondent No.5 (Inspector General of Factories of the Government of Bangladesh) requested the respondent No.1 to inspect the petitioner's factory but the request was not complied with and since the respondents did not have any binding contractual relationship with the respondent No.1 they were unable to compel it to comply with their request. The petitioner therefore had no other choice but to approach this court and invoke the special jurisdiction under Article 102 of the Constitution.

49. The petitioner's application is thus not only maintainable both under Article 102(1) as well as under Article 102(2) and also has substance for the reasons stated above.

50. Accordingly, the Rule is made absolute.

51. The respondent No.1 is directed to immediately arrange for inspection of the petitioner's factory as per Clause 10 of the Accord Agreement and other necessary protocols and publish the inspection report in its website and circulate it among its members all over the world.

52. There will be no order as to costs.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 8308 of 2014

Md. Reza Kamal
…...Petitioner
-Versus-
Secretary, Ministry of Civil Aviation, Bangladesh Secretariat, Ramna, Dhaka and others
…… Respondents

Mr. Al. Mamun Advocate
……. For the petitioner
Mr. Khandaker Deliruzzaman Advocate
…..for the respondent Nos.2 and 9

Heard on 03.11.2016, 808.11.2016, 09.01.2017, 17.01.2017 and 18.01 2017.

Judgment on 30.01 2017 and 31.01 2017.

Present:
Mr. Justice Tariq ul Hakim
And
Mr. Justice Md. Faruque (M. Faruque)

Promotion solely on the basis of an interview;

It appears that there is no specific guideline as to what criteria is to be used for awarding marks in the interview so that the merit of a candidate may be assessed. Not only that the aforesaid order also provides that all persons eligible for promotion i.e. those who have completed a specified number of years in service without having any adverse remarks in this service record will be called for interview with the objective of being promoted. The said process by its nature appears to disregard an employee's performance in his service as well as his Annual Confidential Report (ACR) in the cumulative report about the performance of an employee over a number of months and put together a number of years and they are supposed to reflect an employee's performance in his job. This appears to have been to falling disregarded while considering an employees promoion to the next higher post. The aforesaid Administrative Order seems to stipulate that the promotion will be given solely on the basis of an interview but there is no guideline or criteria as to how the interview is to take place and what method is to be used for assessing the merit of the incumbent . ... (Para 18)

In the instant case according to the Administrative Orders of Biman fitness of a candidate for promotion to the higher post is to be on the basis of merit cum seniority an opposed to seniority cum merit. Merit cum seniority means the candidate who has got the highest marks is to be given priority for promotion over other candidates irrespective of his seniority in relation to the other candidates. This process allows the junior most person to supersede his senior if he possesses merit. This is an extra ordinary rule and persons who have put in several years of service may be superseded by his junior colleagues. It is not for this Court to decide whether this system of

giving promotion on the basis of merit cum seniority or seniority cum merit is to be maintained. However, if merit is to get precedence over seniority then the assessment of merit of a candidate must be done most stringently and there should be no scope for arbitrary decisions of pick and choose. ... (Para 22)

JUDGMENT

Tariq ul Hakim,J:

1. This Rule Nisi was issued calling upon the respondents to show cause why the Administrative Order No.15 dated 14.10.2010 (Annexure C) issued by the respondent No.4 and the promotion of the respondent Nos. 8-10 vide Memo No. ঢাকজিএফ/পদোন্নতি/ ২০১২/১১৮৬ dated 20.06.2012 (Annexure F) issued by the respondent No.7 in violation of the Petitioner's fundamental rights guaranteed under Articles 27, 29 and 31 of the Constitution and in contravention of the express provision of Bangladesh Biman Corporation Employees (Service) Regulations, 1979 should not be declared to have been made without lawful authority and of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper .

2. The petitioner is a Ground Service Officer of Bangladesh Biman. He joined the service of Bangladesh Biman Corporation on 4.11.1984 as an Accounts Assistant in the pay group of 3(II) The petitioner performed his duties and responsibilities to the satisfaction of all concerned and was promoted to different posts from time to time and lastly he was promoted to his present post of Ground Service Officer in Pay Group VI .

3. The petitioner's service is governed by Bangladesh Biman Corporation Employees (Service) Regulations, 1979 (hereinafter referred to as the Regulations) . Pursuant to the said regulations Biman authority issues Administrative Orders from time to time and promotion of employees of Biman is governed by the said the Administrative Orders and the the aforesaid regulations . The Administrative Order No.15/2010 dated 18.10.2010 in respect of promotion of officers from Pay Group VI to Pay Group X empowers the interview board to make final selection of candidates to the next higher post . The petitioner appeared before the interview board on 30.5.2012 and was not selected for promotion to the next higher post even though he passed the said interview having attained 70% marks .

4. It is further stated that the petitioner continued in service and was gradually promoted to higher posts with increase in pay scale and in the year 2001 he was in Pay Group V as Junior Ground Service Officer. In October, 2006 the petitioner attended viva voce examination for promotion to Pay Group VI and successfully passed the examination but the respondents promoted some other successful candidates to the Pay Group VI and prepared a panel for promotion for others where the petitioner's name was included . The panel was however valid for 6 months and it is stated that despite vacancies the respondents did not send the file for promotion and the petitioner was not promoted to the higher pay scale VI. On 4.6.2012 the respondents held interview for promotion and although the petitioner attended the same and 38 candidates were successful but the petitioner was unsuccessful by one mark allegedly due to the modifide of the Respondents.

5. Thereafter in 2008 the Petitioner made representation to the caretaker government who enquired into Biman's Promotion procedure and the Respondents again held interview of the

unsuccessful candidates alongwith the petitioner and he became successful in the viva voce examination and promoted to Pay Group VI as Ground Service Officer.

6. Thereafter on 30.5.2012 the respondents called the petitioner and others for interview for promotion to the post of Assistant Manager Ground Service Pay Group VII and the petitioner attended the said examination on 4.6.2012 and subsequently came to know that the respondent No.7 vide Memo No. ঢাকজিএফ/পদোন্নতি/ ২০১২/১১৮৬ dated 20.06.2012 (Annexure F) promoted three ground officers respondent Nos. 8-10 who were junior to the petitioner along with 4 others to the post of Assistant Manager Ground Services in Pay Group VII.

7. Being aggrieved, the petitioner has come to this Court and obtained the present Rule .

8. Mr. Al Mamun, the learned Advocate for the petitioner submits that the said Memo No. ঢাকজিএফ/পদোন্নতি/ ২০১২/১১৮৬ dated 20.06.2012 (Annexure F) issued by the respondent No.7 was illegal and without lawful authority as it was issued pursuant to Administrative Order No.15/2010 which is violative of Articles 27,29 and 31 of the Constitution and is in contravention of the Bangladesh Biman Corporation Employees (Service) Regulations, 1979. The learned Advocate further submits that the impugned Administrative Order No.15/2010 has given Biman unfettered power to promote their selected candidates by manipulating the result on the plea of viva voce exam . The learned Advocate further submits that the impugned Administrative Order No.15/2010 dated 14.10.2010 is contrary to the provision of Bangladesh Biman Corporation Employees (Service) Regulations, 1979 where under section 12(1) it is stated that employees of Biman would be promoted to the next higher post on the basis of requisite educational technical and other qualifications after assessing his fitness in every respect to the post which is to be promoted . The learned Advocate has drawn our attention to the case of ***Bangladesh Vs Shafiuddin Ahmed 50 DLR (AD) 27*** where it has been held by the Appellate Division that marks in viva voce examination should not exceed 50% of the total marks in an examination for promotion. The learned Advocate has also drawn our attention to an Indian case ***Ashok Kumar Yadav Vs. State of Haryana 1985 4 SCC 417*** where it has been held that marks in an interview should be set to a minimum and should not exceed 70% while considering candidates for promotion . The learned Advocate finally submits that there the petitioner is a victim of arbitrary assessments of the respondents and deprived from his legitimate right for being properly consideration for promotion. The learned Advocate therefore submits that the impugned Administrative Order No. 15/10 dated 14.10.2010 and the Administrative Order dated 20.6.2012 promoting the respondent Nos. 8-10 should be declared illegal and without lawful authority .

9. The respondent No.2 Bangladesh Biman is contesting this Rule by filing Affidavit-in-Opposition stating inter alia that promotion from Pay Group VI to Pay Group VII in Biman is given on the basis of merit rather than seniority . That rule was first incorporated in Biman by Administrative Order No. 01 if 1998 which was subsequently amended by Administrative Order No. 07 of 2000 and Administrative Order No. 15 of 2010 without changing the aforesaid rule for promotion on the basis of merit rather than seniority . The respondent Nos. 8-10 appeared before the Interview Board for promotion and since they obtained higher marks than the petitioner they were promoted. By amending Administrative Order No. 07 of 2000 by Administrative Order No. 15/10 Biman management did not change the principle of selection process i.e. promotion on the basis of merit and the rule allows all eligible candidates to appear before the Promotion Board

for interview and the candidates having highest merit would be promoted to the next higher post. The petitioner along with others appeared before the Interview Board for interview and the persons who obtained requisite marks were promoted from Pay Group VI to VII and the petitioner not being successful in the said interview he has nothing to be aggrieved and cannot complain about the interview process.

10. It is further stated that Administrative Order No. 15/10 does not in any way prejudice the right of the petitioner to appear before the Promotion Board for interview and that the employee has no right to pray for any consideration to be promoted. As per Biman Rules promotion from Pay Group III to Pay Group V is made on the basis of seniority . It is further stated that employees from Pay Group III to Pay Group V are known as staff and employees from Pay Group VI to Pay Group X are known as officers. Promotion from Pay Group VI to Pay Group X are made on the basis of merit. In the case of a tie in merit seniority is to be considered. The competent authority issued the Administrative Orders to implement the service regulations. The Administrative Order No. 15 of 2010 did not put any embargo on the right of the petitioner and it is equally applicable to all employees of Biman from Pay Group VI to Pay Group X. Biman Management did not pick and choose any candidate for promotion and that the Administrative Order No. 15/10 allows every eligible candidate to appear before the Interview Board to prove his/her merit for promotion and it is said in the instant case no illegality has been done in the case of the petitioner and the impugned order calls for no interference by this Court.

11. Mr. Khandaker Deliruzzaman the learned Advocate for the respondent Nos.2 and 9 submits that the impugned Administrative Order No. 15/10 clearly stipulates that eligible candidates have a right to attend interview for being considered for promotion which will be done on the basis of merit. The learned Advocate further submits that the process for assessing merit has been in existence since 1998 and that the petitioner having obtained a benefit from the said process earlier cannot challenged the same in the instant Rule . The learned Advocate further submits that the petitioner appeared in the viva voce examination before the interview Board and although he was successful in the viva voce examination the candidates who got higher marks were promoted next even though some of them were junior to the petitioner as it was not prohibited by the Biman Regulations. The learned Advocate further submits that the respondent No.9 was promoted in 2012 from Pay Group VI to Pay Group VII by the impugned Administrative Order No. 15 dated 20.6.2012 and subsequently on 22.11.2016 he was further promoted to Pay Group VIII. The said respondent No.9 her already arquired a vested right and it will not be proper to disturb him at this late stage since he cannot be blamed from any wrong. The learned Advocate has drawn our attention to Administrative Order No. 15/10 (Annexure C) which has been repealed by the Administrative Order No. 4 of 2016 dated 28.6.2016 and therefore submits that the instant Rule has become infractuous and is liable to be discharged.

12. We have considered the submissions of the learned Advocates , perused the Writ Petition , Affidavit-in-Opposition and impugned orders.

13. ***Section 12(1) of the Bangladesh Biman Corporaton Employees (Service) Regulations , 1979*** states as follows :

> *"12. Promotion: (1) An employee of the Corporation will be eligible for promotion to a higher vacant post provided he possesses the requisite educational, technical and other qualifications required for such higher post and is considered fit for*

promotion in all respects and fulfills such other conditions as may be laid down in this behalf by the competent authority from time to time."

14. The aforesaid provision of law clearly stipulates that an employee of Bangladesh Biman may be promoted to a higher post if he possesses the requisite educational, technical and other qualifications required for the said post and is considered fit for promotion in all respects. The provision also requires the incumbent candidate to fulfill all other conditions as may be laid down in this respect by the employer from time to time.

15. It appears that Biman publishes Administrative Orders from time to time to stipulate the educational conditions required for promoting a person to the next higher post. Initially Administrative Order No. 1 of 1998 dated 01.11.1998 was published but it was amended by Administrative Order No. 07 of 2000 and thereafter in supersession of Administrative Order 2000, Administrative Order No. 15 of 2010 dated 14.10.2010 was issued so far it related to the promotion of Biman employees from Pay Group VI to Pay Group X which has been impugned in the instant Rule.

16. The said Administrative Order No. 15 of 2010 dated 14.10.2010 is reproduced below:

গুবিমান বাংলাদেশ এয়ারলাইন্স লিমিটেড
প্রশাসন পরিদপ্তর

তারিখ-১৪ অক্টোবর ২০১০

প্রশাসনিক আদেশ নং- ১৫/২০১০

বিষয়ঃ পদোন্নতি নীতিমালা সংক্রান্ত প্রশাসনিক আদেশ নং- ০৭/২০০০ সংশোধন ।

১) পদোন্নতি নীতিমালা সংক্রান্ত প্রশাসনিক আদেশ নং- ০৭/২০০০ তারিখ ১০-০৫-২০০০ উল্লেখ্য।

২) কর্তৃপক্ষের সিদ্ধান্তক্রমে প্রশাসনিক আদেশ নং- ০৭/২০০০ তারিখ ১০-০৫-২০০০ এর অনুচ্ছেদ ০১ ক (১) নিম্নরুপভাবে সংশোধন করা হইল-

ক. (১) বেতনক্রম-৬ হইতে ১০ এবং সমপদমর্যাদার পদে পদোন্নতি সাক্ষাৎকার পর্ষদের মাধ্যমে পদোন্নতি বিবেচনা করা হইবে। পদোন্নতি সাক্ষাৎকার কৃতকার্যতার গড় নম্বর হইবে শতকরা ৭০ (সত্তর) । উক্ত পদোন্নতি কঠোরভাবে মেধার ভিত্তিতে প্রদান করা হইবে অথ্যাৎ যে প্রার্থী সাক্ষাৎকারে সর্বোচ্চ নম্বর প্রাপ্য হইবেন তিনিই প্রথম পদোন্নতি প্রাপ্ত হইবেন। তবে দুই বা ততোধিক প্রার্থী একই নম্বর প্রাপ্ত হইলে জেষ্ঠ্যতার ভিত্তিতে পদোন্নতি নির্ধারন করা হইবে। অনুমোদিত / ফলস্বরুপ লব্দ শুণ্য পদের সংখ্যা যাই হোক না কেন পদোন্নতির শর্ত/ যোগ্যতা অর্জনকারী সকল প্রার্থীকে পদোন্নতির জন্য সাক্ষাৎকারে ডাকা হইবে এবং পদোন্নতি পর্ষদের সুপারিশের ভিত্তিতে যথাযথ কর্তৃপক্ষের অনুমোদনক্রমে কার্যকর করা হইবে।

০৩) প্রশাসনিক আদেশ নং- ০৭/২০০০ তারিখ ১০-০৫-২০০০ সংশোধনক্রমে এই আদেশ জারী করা হইল যা অবিলম্বে কার্যকর হইবে।

স্বাক্ষর অস্পষ্ট
১৪.১০.১০
(রাজপতি সরকার)
পরিচালক প্রশাসন (এ্যাক্টিং)

বিতরণঃ

০১। সকল পরিচালক।

০২। সকল মহাব্যবস্থাপক/ অধ্যক্ষ, বিএটিসি/ হিসাব নিয়ন্ত্রক/ চীফ অব ট্রেনিং/ চীফ অব টেকনিক্যাল / চীফ অব ফ্লাইট সেফটি/ চীফ অব সিডিউল এন্ড প্লানিং/ চীফ ফ্লাইট ইঞ্জিনিয়ার/ প্রধান চিকিৎসক সেক্রেটারী।

০৩। সকল উপ-মহাব্যবস্থাপক/ প্রধান প্রশিক্ষক/ উপ-প্রধান প্রকৌশলী।

০৪। ব্যবস্থাপনা পরিচালক ও সিইউ মহোদয়ের ব্যবস্থাপক সমন্বয়-ব্যবস্থাপনা পরিচালক ও সিইও মহোদয়ের সদয় অবগতির জন্য।
০৫। সকল ব্যবস্থাপক/ জেলা ব্যবস্থাপক/ ষ্টেশন ব্যবস্থাপক।
০৬। সকল এন্ট্রি ম্যানেজার ডিক্রিক ম্যানেজার/ রিজিওনাল ম্যানেজার/ এরিয়া ম্যানেজার/ ষ্টেশন ম্যানেজার/ ম্যানেজার অপারেশন্স/ ম্যানেজার ফাইন্যান্স।
০৭। সকল সহকারী ব্যবস্থাপক/ ষ্টেশন হিসাব রক্ষক/ ভারপ্রাপ্ত শাখা প্রধান।
০৮। সকল প্রশাসনিক সেল। ”

১৭. According to the aforesaid Administrative Order promotion to a higher post in Pay Group VI to Pay Group X will be given solely on the basis of an interview and that the pass marks for the interview will be 70% . In the interview the merit of the incumbent will be assessed and the person getting the highest marks will be given priority in respect of promotion . The said order further provides that all persons eligible for being promoted to the higher post will be called for interview . Thus the aforesaid method of giving promotion gives considerable discretion to the person taking the interview.

18. It appears that there is no specific guideline as to what criteria is to be used for awarding marks in the interview so that the merit of a candidate may be assessed. Not only that the aforesaid order also provides that all persons eligible for promotion i.e. those who have completed a specified number of years in service without having any adverse remarks in this service record will be called for interview with the objective of being promoted. The said process by its nature appears to disregard an employee's performance in his service as well as his Annual Confidential Report (ACR) in the cumulative report about the performance of an employee over a number of months and put together a number of years and they are supposed to reflect an employee's performance in his job. This appears to have been to falling disregarded while considering an employees promoion to the next higher post. The aforesaid Administrative Order seems to stipulate that the promotion will be given solely on the basis of an interview but there is no guideline or criteria as to how the interview is to take place and what method is to be used for assessing the merit of the incumbent .

19. In ***Bangladesh Vs. Shafiuddin Ahmed reported in 50 DLR (AD) 27*** it has been held

> *"In the present cases Commander Pilots working in a commercially oriented Airlines are not being selected for promotion to the Selected post of Deputy Operations Manager. Deputy Secretaries are being considered for promotion to the Selected Posts of Joint Secretary. Additional Deputy Commissioners and the like are being considered for promotion to the Selected Posts of Deputy Secretary. They have already put in a number of years in Government service which is basically different from working as a Pilot in a Commercial Airline. Evaluation of their efficiency, conduct, discipline, comprehension, initiative, zeal to work, honesty, personality and various other requirements of service have been recorded each year in their respective ACRs. That ought to be the most dominant and persuasive document for the purpose of evaluating the candidates' eligibility for the promotion post. The marks fixed for interview should be minimum so as not to upset the accumulated credits achieved by the candidates over the years in their respective ACRs by a momentary impression created in the minds of the Interview Board before which the candidates cannot possibly appear for more than a few minutes. There is a strong need to protect the public servant from the propensity of politicization of administration by a party Government by keeping the marks for interview as*

minimum as possible so that the scope of arbitrariness and the possibility of pick and choose are absolutely minimized. We would therefore agree with the ultimate decision of the learned majority Judges of the Special Bench that allocation of 40% marks for interview in the context of the situation obtaining in our country and in the context of the finding that the guidelines were arbitrarily departed from, was lopsided and was capable of being used arbitrarily and that 15% marks for interview under the circumstances would be a safe marking system for protecting the neutral character of public service"

20. In the aforesaid decision it has been clearly stated that marks fixed for interview should be kept to a minimum so that the accumulated credits achieved by the candidates over the years in their respective ACRs should not be disregarded by a momentary impression created in the minds of the Interview Board.

21. In the case of ***Ashok Kumar Yadav Vs. State of Haryana (1985) 4 SCC 417*** the Indian Supreme Court following the recommendations of Public Service Commission reduced the percentage marks to 12.2% from 17.11% of the total marks in an examination for suitability of a person for promotion to the next higher post.

22. In the instant case according to the Administrative Orders of Biman fitness of a candidate for promotion to the higher post is to be on the basis of merit cum seniority an opposed to seniority cum merit. Merit cum seniority means the candidate who has got the highest marks is to be given priority for promotion over other candidates irrespective of his seniority in relation to the other candidates. This process allows the junior most person to supersede his senior if he possesses merit. This is an extra ordinary rule and persons who have put in several years of service may be superseded by his junior colleagues. It is not for this Court to decide whether this system of giving promotion on the basis of merit cum seniority or seniority cum merit is to be maintained. However, if merit is to get precedence over seniority then the assessment of merit of a candidate must be done most stringently and there should be no scope for arbitrary decisions of pick and choose. In the case of giving promotion on the criteria of seniority cum merit persons who are senior but less meritorious get priority for promotion . In the case of 'merit cum seniority' persons meritorious persons get priority for promotion even if they are junior.

23. According to Administrative Order No. 15 of 2010 the criteria for promotion is the candidates performance in the interview. There is no guideline or rule as to how an interview is to be conducted in assessing the merit of a candidate leaving considerable scope for the employer to act arbitrarily and defeat the scope of ascertaining the actual meritorious candidates. We are therefore of the opinion that the Administrative Order No. 15 of 2010 dated 14.10.2010 (Annexure C) stipulating promotion to the higher post will be given solely on the basis of interview is not sustainable in law .

24. The submission of the learned Advocate for the respondents that the said Administrative Order has been repealed by the Administrative Order No. 04 of 2016 dated 28.06.2016 and the Rule issued on the said basis has become infractuous is totally misconceived. Steps taken by an administrative authority regarding a matter before a Court for adjudication in which the administrative authority is a party to a judicial proceeding is an attempt to preempt a judgment and cannot be condoned. This finds support from a judgment of the Appellate Division in the case of ***Syed Mohammad Salem Azam Vs. Bangladesh reported in 47 DLR (AD) (1995) 38*** simply because the said Administrative

Order has been repealed by a subsequent Administrative Order by maintaining similar provision will not help the respondents.

25. The impugned orders being Memo No. ঢাকজিএফ/পদোন্নতি/ ২০১২/১১৮৬ dated 20.06.2012 (Annexure F) promoting other officers of Biman including the respondent Nos. 8-10 are tainted with malafide and cannot be condoned . However, in view of the fact that almost 5(five) years has elapsed since issuing of the said impugned Memo we refrain from interfering with the same as the said persons have also acquired a vested right to remain in their post and nothing is on record before us to show that they have committed any misrepresentation or illegalities to get their promotions. However, due to the unlawful method adopted by the respondent Biman in assessing the candidates' fitness for promotion to the higher post solely on the basis of a momentary interview the petitioner has been aggrieved and we feel that justice will be done if he is also promoted to Pay Group VII from the date of issuance of the impugned Memo i.e on 20.06.2012 .

26. For the ends of justice therefore the seniority list of the promoted persons by the impugned order dated 20.6.2012 (Annexure F) should also be reviewed/reconstructed in terms of their seniority in their last post i.e. Pay Group VI excluding the respondent No.9 who has been promoted to Pay Group VIII by now.

27. It should be noted further that although the petitioner's appointment/promotion will be effective from 20.6.2012 he will be entitled to salary and other financial benefits including retirement benefits from the date of this judgment.

28. The submission by the learned Advocate for the respondent that if the petitioner is promoted to the higher post for being deprived of the same earlier due to the arbitrary character of Administrative Order No. 15 of 2010 then other officers of Biman who have been deprived from promotion due to the said Administrative Order will also come to this Court and seek orders for promotion with retrospective effect and the floodgates of litigation will be opened is totally misconceived in view of the fact that much water has already flown below the bridge and those promoted already have acquired vested rights and the aggrieved persons will have no equity due to their delay in coming to this Court and will be deemed to have waived their rights and acquiesced in the decisions of the Respondents.

29. It has been pointed out by the learned Advocate for the respondents that the Administrative Order No. 4 of 2016 came into effect on 28.06.2016 repealing the earlier Administrative Order No.15 of 2010 dated 14.10.2010. However the said provision for promoting employees from Pay Group VII to X solely on the basis of interview still remains. Since the aforesaid Administrative Order has not been challenged it is not before us for adjudication and we refrain from passing any order on that score.

30. However as stated earlier, such practice for providing promotion to the employees solely on the basis of an interview is unfair and creates sufficient scope for arbitrariness and unlawful decisions for which aggrieved persons may take the opportunity of getting redress. It is therefore hoped that the respondents Biman authority shall take appropriate measure in this regard to fill up the lacuna. In this respect it is to be pointed out that in several decisions in the Indian jurisdiction including ***B.V. Sivalah V. K. Addanki Babu reported in 1998 6 SCC 720*** as well as ***Horigovind Yadav Vs.Rewa Sidhi Gramin Bank and others in (2006) 6 SCC 145*** promotions with seniority were given to certain officers

with retrospective effect for not having been promoted earlier for the ends of justice and in the instant case we feel that the petitioner is in a similar position and has been deprived unlawfully by an unfair method of selection for promotion and deserves to be promoted along with those listed in the impugned order (Annexure F).

31. Thus in view of the aforesaid matters , we find merit in this Rule and accordingly it is made absolute .

32. Before parting with this judgment, we wish to record our appreciation for the learned Advocate Mr. Al Mamun and Mr. Khandaker Deliruzzaman for assisting this court in this matter during the several days of hearing .

33. There will be no order as to costs.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 1852 OF 2014

Dr. A. Y. M. Akramul Hoque
.....Petitioner
-Versus-
Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Public Administration, Bangladesh Secretariat, Ramna, Dhaka and others
…..Respondents

Mr. Khair Ezaz Maswood with
Mr. Mohammad Faridur Rahman,
Advocates
.....For the petitioner.

Mr. Md. Ekramul Hoque, DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Purabi Saha, AAG
….For the respondent no. 1.

Heard on 02.07.2017, 29.11.2017, 01.02.2018, 19.07.2018, 10.10.2018, 24.10.2018 and 25.10.2018.

Judgment on 04.11.2018.

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

Exhaustion of efficacious remedy provided by law: How far it bars the invocation of the writ jurisdiction, Liberal interpretation of Equality before law;

There is a constitutional bar to the invocation of the writ jurisdiction of the High Court Division under Article 102(2)(a) of the Constitution, if there is any other equally efficacious remedy provided by law. ... (Para 24)

If any impugned action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a Writ Petition will be maintainable without exhaustion of the statutory remedy. Besides, on the ground of mala fides, the petitioner may come up with a Writ Petition bypassing the statutory alternative remedy. It is well-settled that mala fides goes to the root of jurisdiction and if the impugned action is mala fide, the alternative remedy provided by the statute need not be availed of. ... (Para 29)

Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. ... (Para 52)

When a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law." ... (Para 65)

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why Rule 4(2) of "সরকারের উপ-সচিব, যুগ্ম-সচিব, অতিরিক্ত সচিব ও সচিব পদে পদোন্নতি বিধিমালা, ২০০২" should not be declared to be ultra vires the Constitution of the People's Republic of Bangladesh and why the Notification No. pj(Ee-1)-01/2009-63 dated 27.01.2009 issued by the respondent no. 1 promoting 72 Joint Secretaries to the post of Additional Secretary (Annexure-'D') and Notification No. pj(Ee-1)-01/2009-852 dated 07.09.2009 issued by the respondent no. 1 promoting 60 Joint Secretaries to the post of Additional Secretary (Annexure-'D-1') and Notification No. 05.130.011.00.00.002.2011-347 dated 10.10.2011 issued by the respondent no. 1 promoting 31 Joint Secretaries to the post of Additional Secretary (Annexure-'D-2') and Notification No. 05.00.0000.130.12.002.2012-52 dated 08.02.2012 issued by the respondent no. 1 promoting 127 Joint Secretaries to the post of Additional Secretary (Annexure-'D-3') and Notification No. 05.00.0000.130.12.002.14-16 dated 13.01.2014 issued by the respondent no. 1 promoting 80 Joint Secretaries to the post of Additional Secretary (Annexure-'D-4'), so far as they relate to the exclusion of the name of the petitioner therefrom, should not be declared to be without lawful authority and of no legal effect and why a direction should not be given upon the respondents to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011 and to pay him all attending benefits 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 having qualified in the Bangladesh Civil Service (BCS) Examination held in 1982 was recommended by the Public Service Commission (PSC) for appointment in the Administration Cadre and accordingly he joined the Administration Cadre as Assistant Commissioner on 14.12.1983. Thereafter he served in various capacities under the Government and ultimately he was promoted to the post of Joint Secretary on 05.03.2005. As Joint Secretary to the Government of Bangladesh, he served as Director, Bangladesh Jute Mills Corporation from 15.05.2005 to 15.03.2006 and as Director General, Bureau of Statistics from 30.03.2006 to 15.10.2009. However, he was made an Officer on Special Duty (OSD) under the then Ministry of Establishment (now Ministry of Public Administration) on 16.10.2009 and since then he has been an OSD thereunder. A combined gradation list of the officers of the Administration Cadre of various batches of 1982 was updated on 27.01.2014 by the Public Administration Computer Centre (PACC). The name of the petitioner appears at serial no. 79 in that combined gradation list. One Mr. Golam Mostafa Kamal (ID No. 3873) bearing serial no. 80 in the gradation list was next below the petitioner. But Mr. Golam Mostafa Kamal and 27 other officers of the Administration Cadre, who were below the petitioner, were promoted to the post of Additional Secretary superseding him by the Notification No. pj(Ee-1)-01/2009-63 dated 27.01.2009 issued by the Ministry of Public Administration. Again by the Notification No. pj(Ee-1)-01/2009-852 dated 07.09.2009 issued by the Ministry of Public Administration, 46 officers of the Administration Cadre with Mr. Chowdhury Md. Babul Hassan (ID No. 3968) at the top, who were below the petitioner in the

gradation list, were promoted to the post of Additional Secretary superseding the petitioner. Subsequently by the Notification No. 05.130.011.00.00.002.2011-347 dated 10.10.2011 issued by the Ministry of Public Administration, 27 officers (Joint Secretaries) of the Administration Cadre with Mr. Md. Lutfar Rahman (ID No. 1683) at the top were promoted to the post of Additional Secretary superseding the petitioner. By the Notification No. 05.00.0000.130.12.002.2012-52 dated 08.02.2012, 123 Joint Secretaries with Mr. Md. Abdul Quddus (ID No. 2548) at the top were promoted to the post of Additional Secretary superseding the petitioner. Lastly by the Notification No. 05.00.0000.130.12.002.14-16 dated 13.01.2014, the Ministry of Public Administration promoted 78 Joint Secretaries with Mr. Md. Alauddin (ID No. 1359) at the top superseding the petitioner. Thus, a total of 302 Joint Secretaries, who were below the petitioner in the gradation list, were promoted to the higher post of Additional Secretary to the Government bypassing the petitioner without any justifiable reason.

3. One Mr. Mizanur Rahman (ID No. 1969) bearing serial no. 262 (far below the petitioner) in the combined gradation list of the officers of the Administration Cadre of 1982 batches was promoted to the post of Secretary by the Notification No. 05.130.012.00.00.011.2011-215 dated 28.06.2011. Besides, by the Notification No. 05.130.012.00.00.011.2011-345 dated 10.10.2011, Mr. K. H. Masud Siddiqui (ID No. 3878) and 4 other officers, who were junior to the petitioner as per the gradation list, were promoted as Secretaries to the Government. Moreover, by the Notification No. 05.130.012.001.00.001.2011-452 dated 15.12.2011, Mr. Md. Rafiqul Islam (ID No. 2167), who was below the petitioner in the gradation list, was promoted as Secretary to the Government. Furthermore, one Mr. Syed Manjurul Islam (ID No. 1431) and 10 other officers, who were below the petitioner in the gradation list, were promoted as Secretaries by the Notification No. 05.00.0000.130.12.001.13-54 dated 31.01.2013. Again Mr. Md. Foizur Rahman Chowdhury (ID No. 1027) and 2 other officers, who were below the petitioner in the gradation list, were promoted to the post of Secretary by the Notification No. 05.00.0000.130.12.001.13-467 dated 18.11.2013. Thus a total of 21 officers of the 1982 batches, who were below the petitioner in the combined gradation list, were promoted as Secretaries bypassing the petitioner.

4. The legal instrument for regulation of the appointment of the civil servants by promotion to the ranks of Deputy Secretary, Joint Secretary, Additional Secretary and Secretary is "সরকারের উপ-সচিব, যুগ্ম-সচিব, অতিরিক্ত সচিব ও সচিব পদে পদোন্নতি বিধিমালা, ২০০২" (hereinafter referred to as the Promotion Rules of 2002). Rule 4(1) of the Promotion Rules of 2002 provides merit, efficiency and seniority as the basis of promotion. Rule 4(2) provides that in case of promotion to the rank of Additional Secretary or Secretary, the importance and nature of assignments discharged by a concerned officer in his total service tenure and his personal reputation and other relevant matters will also be considered. Rule 5 prescribes the procedure for promotion. As per Rule 5(4), the respondent no. 2 (Superior Selection Board (SSB)) will make necessary recommendations for promotion which are required to be approved by the Prime Minister. The petitioner had the requisite qualifications as enumerated in the 1st schedule of the Promotion Rules of 2002 for appointment by promotion to the rank of Additional Secretary on 27.01.2009, when a good number of officers of the 1982 batches, who were below the petitioner in the gradation list, were promoted as Additional Secretaries. The 2nd schedule of the Promotion Rules of 2002 sets 100 marks for evaluation of an officer for promotion. On 27.01.2009, when the officers of the 1982 batches were considered for promotion, the petitioner besides being otherwise eligible for promotion had presumably

obtained the qualifying marks; but unfortunately he was not promoted to the next higher post, that is to say, to the post of Additional Secretary to the Government of Bangladesh. The additional considerations as contemplated by Rule 4(2) of the Promotion Rules of 2002 are not only redundant; but also vague, because these are covered by the ACRs of the officers concerned. The provisions of Rule 4(2) have been constantly used by the authority as a pick and choose instrument to condition the higher ranks of the Civil Service of Bangladesh. Hence, Rule 4(2) of the Promotion Rules of 2002 is discriminatory. The repeated supersessions of the petitioner by the junior officers to the post of Additional Secretary and thereafter to the post of Secretary to the Government of Bangladesh are arbitrary and vitiated by malice in law. The repeated supersessions of the petitioner are also violative of Article 29(1) of the Constitution of the People's Republic of Bangladesh. Against this backdrop, the Rule is liable to be made absolute.

5. The respondent no. 1 has contested the Rule by filing an Affidavit-in-Opposition. The case of the respondent no. 1, as set out in the Affidavit-in-Opposition, in brief, runs as follows:

> The promotions to the posts of Deputy Secretary and above are regulated by the Promotion Rules of 2002. According to the Promotion Rules of 2002, the SSB scrutinizes the eligible candidates for promotion and recommends them to the competent authority. The Ministry of Public Administration, after getting approval of the Prime Minister, issues orders of promotion. However, the petitioner was not found eligible for promotion to the post of Additional Secretary to the Government and as such he was not recommended by the SSB. The petitioner had been serving as Joint Secretary and as such his case for promotion to the post of Secretary to the Government was not placed before the SSB. Moreover, the SSB had no option to consider him for promotion to the post of Secretary in accordance with Rule 5(6) of the Promotion Rules of 2002. The Government denies the claim of the petitioner that he had the requisite qualifications for being promoted to the next higher posts. The provisions laid down in Rule 4(2) of the Promotion Rules of 2002 are not vague inasmuch as those provisions require consideration of the nature and importance of the duties performed by the officer concerned throughout his service career. Rule 4(2) is not redundant, but supplementary to Rule 4(1) of the Promotion Rules of 2002. Moreover, there is no chance of adopting any pick and choose policy by misusing Rule 4(2), because it is equally applicable to all incumbents. Therefore Rule 4(2) of the Promotion Rules of 2002 is not discriminatory.

6. The officers junior to the petitioner were found eligible and accordingly they were recommended for promotion by the SSB. Seniority is not the only basis of promotion. Merit, efficiency and seniority are the basis of promotion. The supersessions of the petitioner in the matter of promotion to the post of Additional Secretary are not vitiated by malice in law. No right of the petitioner was curtailed or infringed by the Government nor was he deprived of his legal entitlement. The petitioner is now retired and as such the Government has no scope to give him promotion to any higher post. Promotion can not be claimed as a matter of right. It is not a fundamental right; rather it is a statutory right. The Writ Petition is not maintainable because the petitioner being a public servant is not amenable to the judicial review under Article 102 of the Constitution. As such the Rule is liable to be discharged with costs.

7. By filing a Supplementary Affidavit-in-Opposition dated 03.07.2018, the respondent no. 1 has annexed the copies of the ACRs of the petitioner, minutes of the meeting held by

the SSB for promotion and summary for the Prime Minister and other documents for perusal by the Court.

8. At the outset, Mr. Khair Ezaz Maswood, learned Advocate appearing on behalf of the petitioner, submits that the Writ Petition is maintainable in the High Court Division under Article 102 of the Constitution inasmuch as he has challenged the vires of Rule 4(2) of the Promotion Rules of 2002 and secondly he has come up before the High Court Division for enforcement of his fundamental rights as guaranteed by the Constitution and in that view of the matter, the decision in the case of the Government of Bangladesh and others…Vs…Sontosh Kumar Shaha and others, 6 SCOB (2016) AD 1 is not a bar to the maintainability of the Writ Petition under Article 102 of the Constitution.

9. Mr. Khair Ezaz Maswood also submits that Rule 4(2) of the Promotion Rules of 2002 provides for additional considerations such as nature and importance of the duties performed during the entire service period, personal reputation and other relevant matters of an officer in case of promotion to the rank of Additional Secretary or Secretary and the additional considerations are not only redundant; but also vague and the provisions of Rule 4(2) have been constantly used by the concerned authority as a pick and choose instrument to condition the higher ranks of the Civil Service of Bangladesh and as such Rule 4(2) of the Promotion Rules of 2002 is discriminatory and hence the same is liable to be struck down as being unconstitutional.

10. Mr. Khair Ezaz Maswood further submits that indisputably a total of 302 Joint Secretaries, who were junior to the petitioner in the combined gradation list, were promoted to the post of Additional Secretary by various notifications as evidenced by Annexure-'D' series to the Writ Petition and the reasons for repeated supersessions of the petitioner to the post of Additional Secretary appeared to be vague and no specific reason was spelt out by the SSB in this regard and in this perspective, the repeated supersessions of the petitioner to the post of Additional Secretary to the Government are not tenable in law.

11. Mr. Khair Ezaz Maswood next submits that a total of 21 officers, who were originally junior to the petitioner, were promoted to the post of Secretary from the post of Additional Secretary as evidenced by Annexure-'E' series to the Writ Petition and had the petitioner been promoted to the post of Additional Secretary in due course, he would have been promoted to the post of Secretary from the post of Additional Secretary in the normal course of things; but as ill luck would have it, he was subjected to discrimination in the matter of promotion to the posts of Additional Secretary and Secretary to the Government through no fault of his own.

12. Mr. Khair Ezaz Maswood also submits that the petitioner submitted a representation dated 13.09.2009 to the Secretary of the then Ministry of Establishment for reconsideration of his case for promotion to the post of Additional Secretary; but ironically enough, that was answered by making him an OSD on 16.10.2009 and this posting of the petitioner as an OSD in the Ministry of Public Administration in the above background is a classic case of malice in law and given this scenario, the repeated supersessions of the petitioner to the next higher post of Additional Secretary are vitiated by bad faith, arbitrariness and unreasonableness.

13. Mr. Khair Ezaz Maswood further submits that the evaluation report of the petitioner's Annual Confidential Reports (ACRs) from 1982 to 2013 (Annexure-'2' to the Supplementary Affidavit-in-Opposition) is a testament to the fact that his service career is spotless and

unblemished and from 2000 to 2009, on an average, he scored about 95% marks and subsequently being an OSD in the Ministry of Public Administration, his ACRs were not written by the concerned authority.

14. Mr. Khair Ezaz Maswood next submits that as the total service record of the petitioner is unblemished and untainted, it does not stand to reason and logic as to why he was superseded time and again in the matter of promotion to the post of Additional Secretary and resultantly to the post of Secretary to the Government and considering the entire scenario from this standpoint, a man of ordinary prudence will definitely come to the conclusion that the petitioner was victimized out of oblique motives.

15. Mr. Khair Ezaz Maswood also submits that it is clear from the minutes of the meeting of the SSB held on 27.01.2009 (Annexure-'3' to the Supplementary Affidavit-in-Opposition) that no objective assessment was made with regard to the efficiency, skill and suitability of the petitioner for promotion in view of the cryptic finding- "f-c¡æ¢a ¢h¢dj¡m¡l 4(2) ¢hd¡ej-a ¢h-hQe¡ L-l f-c¡æ¢al ®k¡NÉ fËa£uj¡e e¡ qJu¡u" and as no objective assessment was made thereabout, he did not have a fair deal before the SSB.

16. Mr. Khair Ezaz Maswood further submits that the evaluations of the efficiency, conduct, discipline, quickness of understanding, initiative, zeal to work, honesty, personality and various other requirements of service were recorded each year in the ACR of the petitioner and those evaluations ought to be the most dominant and persuasive factors for the purpose of determining his eligibility for the promotion post. In support of this submission, Mr. Khair Ezaz Maswood draws our attention to paragraph 66 of the decision in the case of Bangladesh represented by the Secretary, Ministry of Establishment…Vs…Shafiuddin Ahmed and 2 others, 50 DLR (AD) 27.

17. Mr. Khair Ezaz Maswood lastly submits that in the event of the petitioner's success in this Writ Petition, his financial benefits to the promoted posts of Additional Secretary and Secretary may not be given; but his pension may be fixed, as he is now retired, regard being had to the pay scale of a Secretary to the Government of Bangladesh under S¡a£u ®hae ®úm, 2009 (as was in force at the relevant time) treating the petitioner as deemed to have been promoted to the post of Secretary on 28.06.2011. In this respect, Mr. Khair Ezaz Maswood relies upon the decision in the case of Md. Nurul Hoque Miah…Vs…Government of Bangladesh represented by the Secretary, Ministry of Establishment and others, 17 BLT (AD) 211.

18. Per contra, Mr. Md. Ekramul Hoque, learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that as the petitioner is admittedly a public servant, his remedy lies not in the writ jurisdiction of the High Court Division under Article 102 of the Constitution; but in the concerned Administrative Tribunal as constituted under Article 117 of the Constitution. In this regard, he adverts to the decision in the case of the Government of Bangladesh and others…Vs…Sontosh Kumar Shaha and others, 6 SCOB (2016) AD 1.

19. Mr. Md. Ekramul Hoque also submits that it is manifestly clear from the minutes of the meeting of the SSB held on 27.01.2009 (Annexure-'3' to the Supplementary Affidavit-in-Opposition) that having not been found eligible for promotion under Rule 4(2) of the Promotion Rules of 2002, the petitioner was not promoted to the post of Additional Secretary

to the Government and on this count, the impugned supersessions of the petitioner can not be found fault with.

20. Mr. Md. Ekramul Hoque further submits that undoubtedly a reason was assigned for supersessions of the petitioner to the post of Additional Secretary as evidenced by Annexure-'3' to the Supplementary Affidavit-in-Opposition and as his juniors were found eligible for promotion in view of Rule 4(2) of the Promotion Rules of 2002, they were promoted to the post of Additional Secretary and subsequently some of them were promoted to the post of Secretary to the Government of Bangladesh and the impugned supersessions of the petitioner are quite valid and justified in the facts and circumstances of the case.

21. Mr. Md. Ekramul Hoque next submits that at the fag-end of his service career, the petitioner was made an OSD and as such his ACRs for the period from 2010 to 2013 as an OSD were not written by the concerned authority in view of the Memo No. pj(¢pBl/¢p¢f-3)-41/93-27(225) dated 01.04.1993 and the non-writing of the ACRs of the petitioner during that period (2010 to 2013) as evidenced by Annexure-'2' to the Supplementary Affidavit-in-Opposition is very much in accord with the Memo dated 01.04.1993 issued by the then Ministry of Establishment and as such no exception can be taken thereto.

22. Mr. Md. Ekramul Hoque also submits that both in law and equity, the petitioner can not get the reliefs sought for in the Writ Petition and that is why, the Rule should be discharged.

23. We have perused the Writ Petition, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and relevant Annexures annexed thereto and heard the submissions of the learned Advocate for the petitioner Mr. Khair Ezaz Maswood and the counter-submissions of the learned Deputy Attorney-General for the respondent no. 1 Mr. Md. Ekramul Hoque.

24. To begin with, the issue of maintainability of the Writ Petition must be decided first. In Article 226 of the Indian Constitution, we do not come across the expression "if satisfied that no other equally efficacious remedy is provided by law"; but in our constitution, this expression is very much there in Article 102(2)(a). So there is a constitutional bar to the invocation of the writ jurisdiction of the High Court Division under Article 102(2)(a) of the Constitution, if there is any other equally efficacious remedy provided by law.

25. In England, prerogative writs particularly writs of mandamus were not issued by the Court when alternative remedy under the statute was available. This was a self-imposed rule of the Court on the ground of public policy. Issuance of writs when alternative remedies were not availed of would undermine the Subordinate Courts and Tribunals. Under the Pakistan Constitution of 1956, the Supreme Court and the High Courts in issuing prerogative writs used to follow the rule of the English Court. It was, however, pointed out that this rule of exhaustion of alternative remedies was the rule of the Court and did not affect the jurisdiction of the Court to entertain writ petitions. But the Pakistan Constitution of 1962 provided that the High Courts would interfere only when there was no other adequate remedy available to the petitioner. The same position has been maintained in our Constitution which stipulates non-availability of efficacious remedy as a pre-condition for interference by the High Court Division.

26. In the case of Shafiqur Rahman…Vs…Certificate Officer, Dhaka and another reported in 29 DLR SC 232, the Supreme Court of Pakistan noted the change and observed in paragraph 28:

> "... if the alternative remedy is adequate and equally efficacious, in that case, such an alternative remedy is a positive bar to the exercise of the writ jurisdiction, even though the writ concerned is in the nature of certiorari."

27. Article 102(2)(a) having incorporated the rule of exhaustion of statutory remedies, the existence of efficacious remedy will preclude reliefs thereunder. The bar of efficacious remedy is not attracted when an infringement of any fundamental right is alleged.

28. In the case of Dhaka Warehouse Ltd. and another...Vs... Assistant Collector of Customs and others reported in 1991 BLD (AD) 327, it was held in paragraph 12:

> "12. In principle, where an alternative statutory remedy is available, an application under Article 102 may not be entertained to circumvent a statutory procedure. There are, however, exceptions to the rule. Without attempting an exhaustive enumeration of all possible extraordinary situations, we may note a few of them. In spite of an alternative statutory remedy, an aggrieved person may take recourse to Article 102 of the Constitution where the vires of a statute or a statutory provision is challenged; where the alternative remedy is not efficacious or adequate; and, where the wrong complained of is so inextricably mixed up that the High Court Division may, for the prevention of public injury and the vindication of public justice, examine that complaint. It is needless to add that the High Court Division is to see that the aggrieved person must have good reason for bypassing an alternative remedy."

29. If any impugned action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a Writ Petition will be maintainable without exhaustion of the statutory remedy. Besides, on the ground of mala fides, the petitioner may come up with a Writ Petition bypassing the statutory alternative remedy. It is well-settled that mala fides goes to the root of jurisdiction and if the impugned action is mala fide, the alternative remedy provided by the statute need not be availed of.

30. Another exception has been made in the case of M. A. Hai and others...Vs...Trading Corporation of Bangladesh, 40 DLR (AD) 206 where the Appellate Division has held in paragraph 10 that availability of alternative remedy by way of appeal or revision will not stand in the way of invoking the writ jurisdiction of the High Court Division raising purely a question of law or interpretation of any statute.

31. In Sontosh Kumar Shaha's Case (6 SCOB (2016) AD 1), it has been clearly, categorically and unambiguously held that any person in the service of Republic or any statutory authority can not seek judicial review in respect of terms and conditions of his service or actions taken relating to him as a person in such service including transfer, promotion, and pension rights, except in matters relating to challenging the vires of the law and infringement of fundamental rights as guaranteed Part III of the Constitution.

32. Reverting to the case in hand, we find that the petitioner has challenged the vires of Rule 4(2) of the Promotion Rules of 2002. Over and above, he has come up with the Writ Petition for enforcement of his fundamental rights as guaranteed by Articles 27 and 31 of the

Constitution. On top of that, it has been alleged by the petitioner that his repeated supersessions are mala fide.

33. Considered from the above angle, the decision in the case of the Government of Bangladesh and others…Vs…Sontosh Kumar Shaha and others, 6 SCOB (2016) AD 1, according to us, is not a bar to the maintainability of the Writ Petition before this Court under Article 102 of the Constitution. What we are driving at boils down to this: this Writ Petition is maintainable under Article 102 of the Constitution.

34. It is admitted that the petitioner is an officer of the Administration Cadre. He served in various capacities under the Government till he was promoted to the post of Joint Secretary on 05.03.2005. It is also admitted that he was made an OSD on 16.10.2009 and remained so till he went on post-retirement leave (PRL) on 28.02.2014. However, indisputably a total of 302 Joint Secretaries junior to the petitioner as per the gradation list were promoted to the post of Additional Secretary by various notifications as evidenced by Annexure-'D' series to the Writ Petition. As the petitioner was not promoted to the post of Additional Secretary, the question of his promotion to the post of Secretary being an Additional Secretary did not arise at all in view of Rule 6(5) of the Promotion Rules of 2002. Anyway, there is no gainsaying the fact that a total of 21 officers of the 1982 batches, who were junior to the petitioner in the gradation list, were promoted to the post of Secretary to the Government by various notifications as evidenced by Annexure-'E' series to the Writ Petition.

35. Now let us deal with the reason for supersession of the petitioner to the next higher post of Additional Secretary to the Government as provided by Annexure-'3' to the Supplementary Affidavit-in-Opposition. It is in Annexure-'3' that the petitioner did not seem to be eligible for promotion in the light of Rule 4(2) of the Promotion Rules of 2002. But stunningly enough, no specific reason was assigned for the supersession of the petitioner in Annexure-'3'. It is strikingly noticeable that the SSB did not objectively assess the worth, efficiency, drive, zeal to work and integrity of the petitioner as to suitability of his promotion particularly when the evaluation report of his ACRs from 1984 to 2013 speak volumes about his spotless, untainted and unblemished service record. What is signally important is that admittedly on an average, the petitioner scored about 95% marks from 2000 to 2009 as evidenced by Annexure- '2' to the Supplementary Affidavit-in-Opposition. Since he had been undeniably an OSD in the Ministry of Public Administration from 2010 to 2013, we can not impute any blame to him for non-writing of his ACRs for that period (2010 to 2013), regard being had to the Memo No. pj(¢pBl/¢p¢f-3)-41/93-27(225) dated 01.04.1993. As the ACRs of the petitioner during his entire service career are excellent and as no specific reason was assigned for his repeated supersessions, he can not be a victim of the whims and caprices of the respondents. Such being the state of affairs, we feel constrained to hold that the SSB did not act fairly in evaluating the suitability of the petitioner for promotion to the post of Additional Secretary to the Government.

36. In Re Infant H(K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. In this connection, we feel tempted to say that the duty to act fairly is required of a purely administrative act (Council of Civil Service Union…Vs…Minister for the Civil Service [1984] 3 All E.R. 935).

37. The Indian Supreme Court has adopted this principle holding:

> "…this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands" (Swadeshi Cotton Mills…Vs... India, AIR 1981 SC 818).

38. It is often said that mala fides or bad faith vitiates everything and a mala fide act is a nullity. Now a pertinent question arises: what is mala fides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held:

> "It is commonplace to state that mala fides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra…Vs…Secretary to the Government of W. B, AIR 1964 Cal 265).

39. To render an action mala fide, there must be existing definite evidence of bias and action which can not be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act (Punjab…Vs… Khanna, AIR 2001 SC 343).

40. The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. According to Lord Greene, an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture…Vs… Wednesbury Corporation [1948] 1 KB 223).

41. It goes without saying that bad faith is interchangeable with unreasonableness and extraneous consideration. The distinction between malice in law and malice in fact has been vividly and graphically made by Viscount Haldane, L.C:

> "Between malice in fact and malice in law, there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question whether a valid cause of action can be stated. (Shearer…Vs…Shield, [1914] AC 808).

42.Thus there is malice in law where it is an act done wrongfully and wilfully without reasonable or probable cause and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard of the rights of others. (State of A.P. and others…Vs…Goverdhanlal Pitti, (2003) 4 SCC 739).

43. f an authority acts on what are, justly and logically viewed, extraneous grounds or if an authority acts on a legally extraneous or obviously misconceived ground of action, it would be a case of malice in law. (Regional Manager…Vs…Pawan Kumar Dubey, AIR 1976 SC 1766).

44. Malice in law is a malice which is implied by law in certain circumstances, even in the absence of malicious intention or improper motive. (Shearer…Vs…Shield, [1914] AC 808).

45. Colourable exercise of power is equated with malice in law and in such a case, it is not necessary to establish that the respondent was actuated by a bad motive. (Venkataraman…Vs…India, AIR 1979 SC 49).

46. No employee has any right to claim promotion. Generally speaking, a person can not claim promotion on the basis of seniority alone; but a senior employee has a right to be considered for promotion. If the relevant law provides that promotion will be given only on the basis of seniority, promotion given to a junior bypassing the senior who has also the qualification required for the promotion post will be violative of Articles 27 and 29(1) of the Constitution. Where the promotion post is to be filled up on seniority-cum-suitability basis, the guarantee of Articles 27 and 29(1) requires that an employee fulfilling the qualification of the promotion post should be considered for promotion. Thus if the junior employee is promoted without considering the case of the senior employee who fulfills the qualification of the promotion post, the guarantee of equality of opportunity is violated. The appointing authority is the judge of the suitability of a candidate for the promotion post. Once the senior employee's case is considered and the junior is promoted, the promotion can not be challenged as unconstitutional unless it can be shown that the action of the authority is ex-facie arbitrary or mala fide or unreasonable in the Wednesbury sense.

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

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

48. A.V. Dicey in his "Law of the Constitution" mentioned:

> "Equality before the law does not mean absolute equality of men which is a physical impossibility, but the denial of any special privileges by reason of birth, creed or the like, in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law Courts."

49. In the "Limitations of Government Power" by Rotundy and others, the phrase "equal protection of the law" was described in the following manner:

> "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the Government. It does not reject the Government's ability to classify persons or draw lines in creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or be arbitrarily used to burden a group of individuals. Such a classification does not violate the guarantee when it distinguishes persons as 'dissimilar' upon some permissible basis in order to advance the legitimate interest of society."

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

> "Equal protection of the law means subjection to equal laws, applying alike to all in the same situation."

51. Chandrachud-J, in the case of Smt. Indira Gandhi V. Raj Narayan, AIR 1975 SC 2279, described his idea of equality in the following words:

> "All who are equal are equal in the eye of law, meaning thereby that it will not accord favoured treatment to persons within the same class."

52. On consideration of the views expressed by these distinguished Judges and Authors as to the meaning of the phrase "equality before law and equal protection of law", we do not think that we will be able to define this term in a better way. "Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same.

53. The Indian Supreme Court gave a new dimension to the equality clause when it delivered the judgment in E.P. Royappa Vs. T. N. (AIR 1974 SC 555). In that judgment, Bhagwati J observed:

> "The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is the founding faith, to use the words of Bose J, 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We can not countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it can not be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to the political logic and constitutional law and is therefore violative of Article 14..."

54. The principle of equating discrimination with arbitrariness was affirmed by the Indian Supreme Court in a number of subsequent decisions such as Maneka Gandhi…Vs...India, AIR 1978 SC 597; Romana Shetly…Vs…International Airport Authority, AIR 1979 SC 1628, Ajay Hashia…Vs…Khalid Mujib, AIR 1981 SC 487; D.S. Nakara…Vs…India, AIR 1983 SC 130; A.L. Kalra…Vs…P and E Corporation of India, AIR 1984 SC 1361 et al.

55. The expression 'intelligible differentia' or 'permissible criteria' has been interpreted in the landmark decision in the case of Sheikh Abdus Sabur ….Vs… Returning Officer, District Education Officer-in-Charge, Gopalganj & others reported in 41 DLR (AD) 30.

56. Article 31 of the Constitution stands couched in the following language:

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

57. Coming back to the present case before us, the petitioner and others who are in the combined gradation list of the officers of 1982 batches are a class by themselves. There is no 'intelligible differentia' or 'permissible criteria' between them as spelt out in 41 DLR (AD) 30 (supra). In the absence of any 'intelligible differentia' or 'permissible criteria' between the petitioner and others in the combined gradation list, the petitioner should not have been discriminated against as regards his promotion. More so, when admittedly the ACRs of the petitioner all through his service career are uniformly above board containing no adverse comments therein and there has been no departmental proceeding initiated against him for misconduct or any other like cause. So in all fairness, the petitioner should have been promoted to the post of Additional Secretary to the Government as was done in the case of his juniors as evidenced by Annexure-'D' series to the Writ Petition.

58. The reason for supersession of the petitioner as mentioned in Annexure-'3' to the Supplementary Affidavit-in-Opposition is "পদোন্নতি বিধিমালার ৪(২) বিধানমতে বিবেচনা করে পদোন্নতির যোগ্য প্রতীয়মান না হওয়ায়". This reason, on the face of it, is cryptic, vague, unspecific and nebulous. In this perspective, we are led to hold that the impugned supersessions of the petitioner as evidenced by Annexure- 'D' series are arbitrary and unreasonable in the Wednesbury sense.

59. As a sequel to our earlier discussion, we find that mala fides is enough if the aggrieved party establishes that the authority making the impugned supersessions did not apply its mind at all to the matters in question. It is simply incomprehensible and unfathomable as to why the SSB brushed aside the spotless, untainted and unblemished service record of the petitioner throughout his career without any plausible reason whatsoever. On this point, the learned Deputy Attorney-General Mr. Md. Ekramul Hoque has failed to furnish any acceptable explanation. It may be reiterated that on an average, the petitioner scored about 95% marks from 2000-2009 as per Annexure-'2' to the Supplementary Affidavit-in-Opposition. It is quite astounding that the SSB singularly failed to assess the performance of the petitioner as per his ACRs during his service career in an objective manner. It is a case of total non-application of mind. Some extraneous factors were definitely taken into account by the SSB out of ulterior motive while superseding him to the promotion post repeatedly. The bad motive or intent of the SSB is quite discernible in this regard. From the facts and circumstances of the case, it is crystal clear that the repeated supersessions of the petitioner are classic cases of bad faith or mala fides. The doctrine of acting fairly mandates that the SSB ought to have examined the matter of promotion of the petitioner with a fine tooth-comb and arrived at an appropriate and just decision. But unfortunately the SSB did not do so and consequentially he became a victim of its ex-facie arbitrariness, unreasonableness and bad faith. As such we are impelled to hold that the petitioner was superseded several times in colourable exercise of power and for collateral purpose.

60. It is on record that the petitioner submitted a representation dated 13.09.2009 to the Secretary of the Ministry of Public Administration for reconsideration of his case for promotion; but without responding thereto, he was made an OSD in the Ministry of Public Administration on 16.10.2009. This is, no doubt, malice in law, pure and simple.

61. We find substance in the submission of Mr. Khair Ezaz Maswood that the evaluations of the efficiency, conduct, discipline, quickness of understanding, initiative, zeal to work, honesty, personality and various other requirements of service were recorded each year in the

ACR of the petitioner and those evaluations ought to be the most dominant and persuasive factors for the purpose of determining his eligibility for the promotion post. But shockingly enough, those evaluations were completely disregarded by the SSB for reasons best known to itself.

62. In the case of the Director-General, NSI…Vs…Md. Sultan Ahmed reported in 1 BLC (AD) 71, the Appellate Division has deprecated double-standard on the part of the executive Government giving a benefit to a particular person and denying the same to another, although they are otherwise equal. As the petitioner and his junior colleagues in the combined gradation list stand on the same footing, they should have been treated alike. In the absence of any disqualification criteria vis-à-vis the promotion of the petitioner, the respondents should not have superseded him. Needless to say, the junior officers in the gradation list were promoted superseding him repeatedly without any legally justifiable reason. In this way, the SSB resorted to double-standard as held by the Appellate Division in 1 BLC (AD) 71. We deprecate this sort of double-standard in unequivocal terms.

63. Now let us address the vires of Rule 4(2) of the Promotion Rules of 2002. It is well-settled that there is a presumption of constitutionality in favour of the impugned provisions of Rule 4(2) of the Promotion Rules of 2002. Of course, that presumption is a rebuttable presumption.

64. Anyway, Rule 4(2) of the Promotion Rules of 2002 is quoted below verbatim:

"৪।(২) অতিরিক্ত সচিব কিংবা সচিব পদে পদোন্নতি প্রদানের ক্ষেত্রে সংশ্লিষ্ট কর্মকর্তার সমগ্র চাকুরীকালীন সময়ের মধ্যে পালনকৃত দায়িত্বের গুরুত্ব ও প্রকৃতি এবং তাহার ব্যক্তিগত সুনামসহ প্রাসঙ্গিক অন্যান্য বিষয় বিবেচনা করা হইবে।"

65. In the case of Bangladesh Agricultural Development Corporation represented by the Chairman, Krishi Bhaban, 49-50 Dilkusha Commercial Area, Dhaka and others…Vs…Md. Shamsul Haque Mazumder & others reported in 14 MLR (AD) 197, it was held in paragraph 33:

> "33. In the instant case, the vires of Regulation 55(2) though challenged, the High Court Division declined to declare the Regulation as ultra vires as the High Court Division thought it prudent to dispose of the case otherwise than by striking down the Regulation. The approach of the High Court Division is appreciated because when a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law."

66. In the instant case, we find that the impugned supersessions of the petitioner are violative of Articles 27 and 31 of the Constitution. In the first place, the SSB failed to apply the equality clause to the petitioner in the matter of promotion to the next higher post. Secondly, he was not dealt with in accordance with law as per Article 31 of the Constitution. In this context, it is to be borne in mind that the due process of law is incorporated in Article 31 of the Constitution. As we have found that the respondents contravened Articles 27 and 31 of the Constitution with respect to the promotion of the petitioner, we opine that there is no need for striking down Rule 4(2) of the Promotion Rules of 2002. Precisely speaking, the relief sought for in the Writ Petition can well be given to the petitioner without knocking down Rule 4(2) of the Promotion Rules of 2002. Considered from this standpoint, Rule 4(2) of the Promotion Rules of 2002 is left as it is.

67. In the case of Md. Nurul Hoque Miah…Vs…Government of Bangladesh represented by the Secretary, Ministry of Establishment and others, 17 BLT (AD) 211 relied upon by Mr. Khair Ezaz Maswood, it was held in paragraph 19:

> "19. Since the appellant did not serve in the post of Commissioner of Taxes with effect from 07.09.1995 until he went on L.P.R on 30.12.1996 and considering the financial complication as has been submitted by the learned Additional Attorney-General, we direct to treat him promoted as the Commissioner of Taxes with effect from 07.09.1995 but will not be entitled to any financial benefit for the said period until going on L.P.R as a Commissioner of Taxes and consequential retirement with effect from 30.12.1997 but would get his pension calculated at the rate of basic pay for the scale at Tk.7800-200X6-9000/- as amended by the new scale at 11,700-300X6-13500/- w.e.f. 01.07.1997 per month treating the appellant as deemed to have been promoted to the said post of Commissioner of Taxes."

68. From the foregoing discussions and in the facts and circumstances of the present case, a direction may be given upon the respondents to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011. Admittedly the petitioner went on PRL on 28.02.2014. Now he is a retired public servant. At the time of his going on PRL on 28.02.2014, the National Pay Scale of 2009 was in force. According to that National Pay Scale of 2009, a Secretary to the Government of Bangladesh got basic salary at the rate of Tk. 40,000/- (fixed) per mensem. In view of any possible complication that may arise out of the financial benefits for the entire period from 27.01.2009 to 28.02.2014 in the future, we refrain from awarding the financial benefits of that period to the petitioner; but he shall be deemed to have gone on PRL on 28.02.2014 as a Secretary to the Government of Bangladesh in the scale of Tk. 40,000/-(fixed) as per the National Pay Scale of 2009 and he will be entitled to all pensionary benefits of that scale of Tk. 40,000/-.

69. Having regard to the discussions made above and the facts and circumstances of the case, the Rule is made absolute in part. The respondents are directed to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011. He will be deemed to have gone on PRL as a Secretary to the Government of Bangladesh on 28.02.2014. Consequentially he will be entitled to all pensionary benefits of a Secretary to the Government of Bangladesh in view of the then prevalent National Pay Scale of 2009 as discussed in the body of this judgment.

70. The respondents are further directed to implement this judgment within 90(ninety) days from the date of receipt of its copy.

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

72. Let a copy of this judgment be immediately transmitted to each of the respondents for information and necessary action.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 5556 of 2014.

Shakwat Hossain Bhuiyan
….Petitioner.
Versus.
Bangladesh and others.
……Respondents.

Mr. Qumrul Haque Siddique with
Mr. Sattya Ronjan Modal Advocates.
……. For the petitioner.

Mr. Shafiq Ahmed, Senior Advocate.
With Mr. Md. Nurul Islam Sujan,
Advocate.
…… For the Respondent No.7

Mr. Aminur Rahman Chowdhury, AAG.
..For the Respondent No. 8 and 9.

Mr. Aftab Uddin Siddique, Advocate.
…..For the Respondent No.10.

Heard on: 3.11.2016, 14.11.2016,
22.11.2016, 01.12.2016
Judgment on: 06.12.2016

Present:
Mr. Justice Md. Emdadul Huq
And
Mr. Justice F.R.M. Nazmul Ahasan

Present:
Mr. Justice Md. Abu Zafor Siddique (Hon'ble Third Judge)
Minority view:

Article 102 of the Constitution of the People's Republic of Bangladesh, Article 66 of the Constitution of the People's Republic of Bangladesh Public Interest Litigation, Election Commission;

It follows that the petitioner can very well seek a remedy under article 102 (2) (b) (ii), of course subject to the condition that no other efficacious remedy is available to him. In seeking a remedy under clause 102(2)(b)(ii), he does not have to be an aggrieved person for filing this case. ... (Para 69)

The underlying principle of a writ of *quo warranto,* as interpreted by the Supreme Court of India and as quoted above, is clearly the same as enshrined in clause 102(2) (b) (ii) of our Constitution. Under this clause, "*any person*" can file an application and this court can, upon such an application, exercise the jurisdiction a writ of quo warranto. The applicant is not required to be "*an aggrieved person*" as opposed to the requirement of clause (1) and (2) (a) of article 102 under which a public interest ligation may be filed. In such a case the duty of this court is to hold an inquiry on the allegation and to arrive at a decision keeping in view of the legal and factual issues. ... (Para 75)

The reply to this principal issue depends upon decisions on the issues on (1) the deduction of prejudgement custody period of 143 days as claimed by him, (2) the period of sentence served out by him, (3) the remission permissible to him on various counts clamied by him and (4) the remaining sentence, if any. The discussion, findings and decision on those matters i.e. on issues Nos 1-6 show that no disputed questions of facts are involved on those 4(four) matters and the related issues. ... (Para 196)

In view of the findings and decision on the issue of the remaining period of sentence (Isssue No. 6) it is evident that, on the date of his release from jail on 01.06.2006, the incumbent MP (respondent No. 7) had not served out the entire sentence and that he was required to serve out the remaining sentence for another 468 days. There is nothing on record to show that, after his release on 01.06.2006, he was ever taken to jail in connection with the sentence imposed on him in Special Tribunal Case No. 757 of 1999.

It follows that as per article 66(2)(d) of the Constitution he was disqualified to be nominated and elected as an MP in the election held on 05.01.2014. It is noted that article 66(2)(d) speaks of conviction for a criminal offence involving moral turpitude. The offence under section 19A and 19 (f) of the Arms Act, 1878 is such an offence. Because in the context our society the nature of the prescribed penalty namely a minimum rigorous imprison of 10 years and 7 years for illegal possession of fire arms and ammunition without licence issued by appropriate authority is an offence against the security of the society at large and also against the state and moral value in general.

... (Para 197 & 198)

(Per Mr. Md. Emdadul Huq, J)

<u>Majority view:</u>

Article 66(2) of the Constitution of the People's Republic of Bangladesh and the Article 12(1)(d) of the RPO relates to the election disputes triable before the election Tribunal. These factual aspect of the writ petition which discussed above are not admitted rather, it is disputed in different aspect and without taking evidence about the disputed fact of date of release of the respondent No.7 from Jail custody, the calculation of blood donation to the Sandhani and the special remission provided in the Jail Code which is recorded in the history ticket, it cannot be decided in a summary proceeding in the writ petition. ... (Para 276)

In this respect Article 125 of the Constitution of Bangladesh is very much applicable in the facts and circumstances of the case. Particularly, the facts and circumstances arises in the writ petition is a clear bar as this type of dispute cannot be decided without any evidence both oral and documentary. ... (Para 278)

An election dispute can only be raised by way of an election in the manner provided therein. Where a right or liability is created by a statute providing special remedy for its enforcement such remedy as a matter of course must be availed of first. The High Court Division will not interfere with the electoral process as delineated earlier in this judgment, more so if it is an election pertaining to Parliament because it is desirable that such election should be completed within the time specified under the Constitution. In the instant case, a serious dispute as to the correct age of the appellant was raised before the High Court Division which was not at all a subject matter of decision on mere affidavits and certificates produced by the parties. .. (Para 281)

As regards the first ground, it may be stated that if the purpose of the writ petition was only to challenge the election of the appellant on the alleged ground of his being a defaulter then we would have felt no hesitation to declare at once that the writ petition was not maintainable. Indeed, we have already held while rejecting CPSLA No.21 of 1988 (quoted in the affidavit-in-opposition) that "such questions as to disqualification, etc. which are questions of fact are better settled upon evidence which can be done more appropriately before a Tribunal. In the summary proceeding under Article 102 it is not desirable and, more often than not, not possible to record a finding as to a disputed question of fact." As regards the first ground, it may be stated that if the purpose of the writ petition was only to challenge the election of the appellant on the alleged ground of

his being a defaulter then we would have felt no hesitation to declare at once that the writ petition was not maintainable. Indeed, we have already held while rejecting CPSLA No.21 of 1988 (quoted in the affidavit-in-opposition) that "such questions as to disqualification, etc. which are questions of fact are better settled upon evidence which can be done more appropriately before a Tribunal. In the summary proceeding under Article 102 it is not desirable and, more often than not, not possible to record a finding as to a disputed question of fact." ... (Para 301)

(Per Mr. F.R.M. Nazmul Ahasan, J)

It is now a well settled proposition of law that if there is efficacious and alternative remedy is available, a writ petition under Article 102 of the Constitution is not maintainable. Admittedly it has been raised whether Article 125 of the Constitution puts a bar in the instant case in hand. Admittedly as per the aforesaid provision of law there is a legal bar questioning the result of the election declared by the commission except following the provisions of RPO. In the present case in hand it appears that the petitioner in the disguise of Article 102 of the Constitution trying to enforce the provisions of RPO. In the present case in hand it further appears that the question as raised by the petitioner regarding certain declarations made by the respondent No.7 before the Election Commission which is completely a dispute to be resolved by the competent authority as provided in the Represented People Order (RPO). ... (Para 339)

(Per Mr. Md. Abu Zafor Siddique, J)

JUGEMENT

Md. Emdadul Huq, J. (Minority view):

1. 1.00: Subject matter of this Case: This case is about the lawful authority of respondent No.7 Mr. Nizam Uddin Hajari (**shortly the incumbent MP**) to hold the office of Member of Parliament for the Constituency of Feni-2. This issue has been raised upon an allegation that he was convicted and sentenced under sections 19A and 19(f) of the Arms Act, 1878 to rigorous imprisonment for 10(years), but he was released from the jail on serving a lesser period.

2. The facts relevant for disposal of this case are presented in the following paragraphs under appropriate headings.

3. **2.00: Order of the Honorable Chief Justice**: This case was earlier fixed for hearing and disposal by two other Division Benches. Lastly the Honorable Chief Justice has, by order dated 02.12.2015, sent this case with the following direction: "*Let this matter be heard and disposed of by the Division Bench presided over by Md. Emdadul Huq, J."*

4. Accordingly the matter was previously heard on various dates by the Division Bench presided over by myself (Md. Emdadul Huq, J) with several other 2nd judges. Lastly the matter has been heard by the current Division Bench and judgment is being delivered today.

5. **3.00: Terms of the Rule nisi and interim orders**: Upon an application (Writ Petition) under Article 102(2)(b)(ii) of the Constitution, a Rule Nisi was issued by this Court by order dated 08.06.2014 as follows):

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to under what authority the respondent No. 7 is holding the post of Member of Parliament*

(MP) for the constituency of Feni-2 and why the said seat of the Member of Parliament(MP) for the said Constituency of Feni-2 shall not be declared vacant and/or pass such other or further order or orders as to this court may seem fit and proper."

6. **3.01:** By the Rule issuing order the following **interim directions** were given:

(a) The jail authorities being the Inspector General of Prison **(IG Prison)** and the Senior Jail Super, Chittagong Central Jail, Chittagong, **(respondent Nos. 8 and 9)** were directed "*to submit a report on the service of the period of sentence in Jail by respondent No.7 along with relevant record / file"; and*

(b) Editor of the Daily Prothom Alo **(respondent No. 10)** was "*directed to explain his position and also the sources and authenticity of the news item "সাজা কম খেটে, বেরিয়ে যান সাংসদ" published in the Daily Prothom Alo dated 10.05.2014".*

7. **3.02:** During pendency of the case, **several other interim orders** were also passed by this Court on different dates with specific directions to the Jail authorities, the District Magistrate, **(DM)** Chittagong, the Registrar of this Court, the learned Metropolitan Sessions Judge, Chittagong and the concerned Section of the office of this Court.

8. 3.03: Moreover, by order dated 10.09.2014, Mr. M.A. Bashar, being an advocate of this court and Mr. AKM Mohiuddin Chowdhury, being an Assistant Attorney General (AAG), were also directed to explain their respective position with regard to the bail application allegedly filed in Criminal Appeal No. 1409 of 2006 in which bail was allegedly granted to the incumbent MP by a Division Bench of this Court and he was allegedly released from the Jail on the basis of that bail.

9. 4.00: Responses to the Rule and interim orders: Pursuant to the above noted Rule nisi and interim directions (1) the incumbent MP **(respondent No. 7)** and (2) the jail authorities **(respondent Nos. 8 and 9),** and (3) Ediditor Prothom Alo (respondent No. 10) have filed their respective Affidavit-in-opposition. They have also filed several Supplementary Affidqavits and Affidavits in Reply.

10. 4.01: However Advocate Mr. MA Bashar has filed a vakalatnama, but has not filed any written explanation nor did he personally appear due to sickness (vide order dated 14.10.2014). Mr. AKM Shafiullah, the learned AAG, has neither filed any written explanation nor did he personally appear.

11. 4.02: Other authorities being the DM, Chittagong, the learned Metropolitan Sessions Judge, Chittagong, Registrar of this Court the concerned section of this court have complied with the relevant direction.

12. 4.03: Summery of the Writ Petition and the materials presented to this court by various respondents and the aforesaid authorities are briefly presented in the following paragraphs under appropriate headings.

13. 5.00: Writ Petitioner's case: The Writ Petitioner has presented his case in the Writ Petition and 2 (two) other Affidavits, as follows:

5.01: Petitioner has stated that earlier he had been the Joint Convener of Feni District Jubo League and also a Councilor of the Feni Pouroshava. He and many others of the

locality feel concern about the fact that the incumbent MP (respondent No. 7) was disqualified to be elected as an MP and yet he is holding that public office. So the petitioner has filed this case as a "*public interest litigation*".

14. **5.02:** Petitioner has further stated that, in the national election held on 05.01.2014, respondent No.7, as a candidate for election as MP for the Constitution of Feni-2, submitted to the Election Commission his Affidavit being No. 941 dated 02.12.2013 (**Annexure-B**). In that Affidavit, he made false statement to the effect that in Special Tribunal Case No. 757 of 1999 he had been acquitted. Eventualley the Election Commission published Gazette Notification dated 08.01.2014 (**Annexure-A**) declaring him as the elected MP.

15. **5.03:** Petitioner claims that the incumbent MP has suppressed the fact that the Special Tribunal, Chittagong by judgment dated 16.08.2000 passed in the said case, convicted and sentenced him under sections 19A and 19(f) of the Arms Act, 1878 to suffer rigorous imprisonment for 10(ten) years and 7(seven) years respectively with a direction that both the sentences would run concurrently.

16. 5.04: Petitioner further claims that the above noted judgment was affirmed by the High Court Division in Criminal Appeal No. 2369 of 2001 by judgment dated 02.05.2001 **(Annexure-C),** which was further affirmed by the Appellate Division, firstly by judgment dated 27.04.2002 **(Annexure-C-1)** in Criminal Petition for Leave to Appeal No. 107 of 2001 and lastly by order dated 26-6-2004 **(Annexure-C-2)** rejecting Review Petition No. 18 of 2002 filed by the incumbent MP.

17. **5.05:** Petitioner has stated that, **a news report** was published in the issue of 10.05.2014 of the Daily Prothom Alo under heading "সাজা কম খেটে, বেরিয়ে যান সাংসদ" **(Annexure-D).**The news report stated that, pursuant to the judgment passed by the Special Tribunal, the incumbent MP had surrendered on 14.09.2000, that he was sent to the Jail on the same date, that he was released from Jail on 01.12.2005 before serving out the entire sentence and that he still required to serve a sentence for 2 years 10 months and 01 days.

18. **5.06:** The petitioner has further stated that the **Information Slip No. 654 dated 08.05.2014 (Annexure-E)** issued by the office of this Court shows that the incumbent MP had filed a fresh Criminal Appeal being Criminal Appeal No. 1409 of 2006 against the same judgment of conviction and sentence dated 16.08.2000 which was passed by the Special Tribunal and affirmed up to the Appellate Division as stated above, and that, in this fresh Appeal, he managed to obtain an order of bail and accordingly he was released from jail on 01-06-2006.

19. **5.07:** Petitioner claims that the calculation of the period of sentence served out by the incumbent MP and the maximum period of remission permissible to him and the remaining period of sentence to be served out by him are as follows:

Sentence- (10 years× 360)	**-3600 days.**
Period served out (14.09.200 01.06.2006).	**-2084 days**
Permissible remission (as per rule 768 of Jail Code)	**-600 days**
Total-	2684 days
Remaining Period	- 3600-2084= 916 days.

20. 5.08: Petitioner claims that, in consideration of the above noted remaining period of imprisonment, the incumbent MP, as per article 66(2)(d) of the Constitution, was disqualified to be a candidate for and to be elected as, an MP in the national election held on 05.01.2014. But he suppressed the said remaining period of sentence and managed to get a declaration by the Election Commission that he is an elected MP and thus he has been unlawfully holding that public office.

21. **6.00: Case of respondent No. 7 (Incumbent MP):** Respondent No. 7 being the incumbent MP has, in his Affidavit-in-Opposition and 8(eight) other Affidavits (Supplementary Affidavit and Affidavits in Reply), presented his case as follows:

6.01: He contends that this case involves disputed questions of fact and therefore this case is not maintainable.

22. **6.02:** He has stated that, during the period of his Mayorship of Feni Pourashava, the petitioner, as a Councilor of that Pourashava, acted as the tadbirkar on behalf of respondent No. 7 in Special Tribunal Case No757 of 1999 and also in the Appeals preferred against the judgment of conviction and sentence up to the Appellate Division. But subsequently the petitioner filed this case out of local rivalry and malafide intention. Thus the petitioner has no standing to file this case as a public interest litigation and on that count this case is not maintainable.

23. **6.03:** He has further stated that Mr. Manjil Morshed, the learned Advocate engaged by the Petitioner in this case, is debarred from conducting this case, because Mr. Morshed had conducted the said Appeals on behalf of respondent No. 7.

24. 6.04: He admits that he was convicted and sentenced in Special Tribunal Case No. 757 of 1999 by judgement dated 16.08.2000 passed by the Special Tribunal and that this judgment was affirmed by the High Court Division in Criminal Appeal No. 26369 of 2000 and further affirmed upto the Appellate Division as stated by the petitioner.

25. 6.05: He also admits that, pursuant to the said judgment passed by the Special Tribunal, **he surrendered on 14.09.2000 and served out the sentence in Chittagong Central Jail up to 01.12.2005.** While in Jail he preferred the above noted Appeals.

26. 6.06: He claims that he **was lawfully released on 01.12.2005 on the basis of the said period of serving out the sentence and the remission earned by him** in accordance with the various provisions of the Jail Code.

27. 6.07: He claims that, after his release, he was lawfully elected as MP for the Constitution of Feni-2 in the national election held on 05.01.2014. However he admits that in the affidavit submitted by him as a candidate for election of MP, he made an erroneous statement with regard to his criminal record. But it was "*due to his misunderstanding and misconception of law*"

28. 6.08: He claims that, after publication of the report in the Daily Prothom Alo on 10.05.2014, the Senior Jail Super of Chittagong Central Jail (respondent No.9) sent a letter of protest (প্রতিবাদ লিপি) under Memo No. 44.07.15.00.111.03.13.14/2511/13 dated 10-5-2014 (**Annexure 7)** stating that respondent No. 7 was released from the prison on the basis of the

sentence served out and the remission earned by him (রেয়াত প্রথায় সাজা ভোগ শেষে তিনি বিগত ০১.১২.২০১৫ তারিখ অত্র কারাগার থেকে মুক্তি লাভ করেন।)

29. 6.09: He denies that he had filed any fresh appeal being Criminal Appeal No. 1409 of 2006 and that he had obtained bail in that Appeal. He claims that the Information Slip (**Annexure-E**) filed by the petitioner and the reports of the jail authorities (respondent Nos.8 and 9) about obtaining the bail order passed in the said fresh Appeal are also false.

30. 6.10: He contends that, during his stay in jail as a convict prisoner, he was allowed "*both general remission and special remission as per the jail code.*" He claims that the correct calculation of the periods of his pre-judgment custody, post-judgment period of serving out the sentence and the remission of the sentence as per Jail Code are as follows:

"**০১। মূল সাজা ১০ বছর** -	**৩৬০০ দিন**
০২। হাজত বাস (২২.০৩.১৯৯২ ইং হইতে ২৮.০৭.১৯৯২ পর্যন্ত)	১৪৩ দিন
০৩। **কয়েদ বাস** ১৪.০৯.২০০০ হইতে ০১.১২.২০০৫ পর্যন্ত	১৯০৬ দিন
০৪। **সাধারন রেয়াত** বিধি- ৭৫৬,৭৫৭,৭৫৮,৭৫৯, এবং ৭৬০ মোতাবেক	৫৫৭ দিন
০৫। **বিশেষ রেয়াত** বিধি ৭৬৫ উপধারা ৩ মোতবেক	৩৪৩ দিন
০৬। **ধর্মীয় আচার, সাপ্তাহিক ও গেজেট ছুটি** বিধি ৬৮৯ মোতবেক	৬৫১ দিন
(সাজা) বাকী নাই	

উল্লেখ্য যে, বিশেষ রেয়াত ও সাধারন রেয়াত মিলিয়ে মূল সাজার ১/৪ অংশের বেশি না হওয়ায় কারা বিধির ৭৬৮ লংঘন হয়নি।"

31. **6.11:** He further contends that, while serving out the imprisonment, **he donated blood on 13 different dates and earned remission as per Circular No. 353 – H.J. dated 21.05.59** (**Annexure-12)** issued by the then Government of East Pakistan, which was subsequently endorsed by a Circular being Memo No. 581/(56)/M-10/78 dated 27 April 1978 issued by the Home Ministry of the Bangladesh Government (**Annexure-13**). As per these two circulars the quantum of remission earned by him is as follows:

For 1st time ---------- 30 days
2nd time ---------- 32 days
3rd time ---------- 34 days
4th time ---------- 36 days
5th time ---------- 38 days
6th time ---------- 40 days
7th time ---------- 42 days
8th time ---------- 44 days
9th time ---------- 46 days
10th time ---------- 48 days
11th time ---------- 50 days

12th time ---------- 52 days
13th time ---------- 54 days
Total 13th times ----------486 days

32. **6.12:** In support of his claim on blood donation, he has filed a প্রশংসাপত্র dated 06.10.2005 (**Annexure-9**) issued by the President and General Secetary of সন্ধানী, চট্টগ্রাম মেডিকেল কলেজ ইউনিট to the effect that he (respondent No.7) donated 13(thirteen) units of blood during the period from 14.12.2000 to 15.05.2005 while he was in Chittagong Central Jail.

৩৩. **6.13:** He has stated that the practice of awarding remission of sentence on the basis of blood donation was being followed in various jails including Barishal Central Jail as evidenced by the photocopy of the entries in the relevant register dated 24.04.2006 (**Annexure-15**)

34. **6.14:** He contends that a History Ticket was maintained by the jail authorities and that all the relevant information with regard to his stay in jail including the fact of remission as required by the Jail Code were recorded therein. But, according to the reports-cum-affidavits made by the Jail Authorities (respondent Nos. 8 and 9), the History Ticket is not available and therefore their statement with regard to the quantum of remission and the maximum limit of $\frac{1}{4}$th (one fourth) of the sentence and their calculation about the sentence served out and the remaining period and other related statements are not acceptable.

35. Case of the Jail Authorities (Respondent Nos. 8 and 9):

7.00: Pursuant to the Rule issuing order dated 08.06.2014 and the subsequent 5(five) interim orders dated 16.07.2014, 10.09.2014, 03.03.2016, 26.05.2016 and 31.08.2016, the Jail Authorities being the IG Prison and the Senior Jail Super, Central Jail, Chittagong (Respondent Nos. 8 and 9) have presented their case in an Affidavit-in-opposition and 4 Affidavits-in-Compliance.

36. 7.01: The IG prison has also sent a report dated 27.03.2016 not in the form of Annexure to any of those Affidavits. However in his Affidavit of compliance dated 19.07.2016, he has stated that the contents of the said report dated 27.03.2016 are correct.

37. 7.02: The Senior Jail Super, Chittagong, Md. Sagir Mia (respondent No.9) has, under his signature, sent two reports dated 30.06.2014 (Annexure-X) and 03.09.2014 Part of (Annexure-X-I series) to the IG Prison. These reports from part of the Affidavit submitted by the IG Prison. Substance of these two reports is as follows:

(A) The news Report published in the daily Prothom Alo on 10.05.2014 about release of Nizam Uddin Hajari (respondent No. 7) on 01.12.2015 was not consistent with the relevant Dairies and Registers of the Jail (Part of Annexure X-I-series).

(B) However he admits that, he on seeing the news report in the daily Prothom Alo, sent a mistaken rejoinder (প্রতিবাদলিপি) (Annexure-7) to the Prothom Alo. He had stated in the Rejoinder that "সংশ্লিষ্ট কয়েদী নিজাম হাজারী রেয়াত প্রথায় সাজাভোগ শেষে গত ০১/১২/২৫০০৫ খ্রিস্টাব্দ অত্র কেন্দ্রীয় কারাগার হতে মুক্তি লাভ করেন"

(C) He claims that he hurriedly collected inadeqate information from a single Register, the entries of which were manipulated by unknown persons. Thus he failed to consult

other Registers and documents and sent the erroneous Rejoinder. (যাচাই না করে শুধুমাত্র একটি রেজিষ্ট্রার দেখে তাড়াহুড়ো করে প্রতিবাদ লিপিতে ভুল তথ্য উপস্থাপনের জন্য নিম্নস্বাক্ষরকরী আন্তরিকভাবে দুঃখিত এবং ক্ষমাপ্রার্থী।)

(D) Nizam Uddin Hajari was actually released from Jail on 01.06.2006 pursuant to the bail order passed by this court in Cr. Appeal No. 1409 of 2006 and communicated by the office of this Court by a memo dated 24.05.2006. This bail order and the bail bond were sent to the Jail by the Additional District Magistrate, Chittagong under Memo dated 31.05.2006 as processed in Criminal Misc. Case No. 280 of 2006 (**Part of Annexure-X-series**).

(E) The Release Diary of the jail does not contain any entry about release of Nizam Uddin Hazari on 01.12.2005. The entries in the other relevant 4(four) documents maintained by the Jail namely-(1) Misc Case Register relating to Bail, (2) Diary of the Convict Prisoners, (3) the Ward and Cell Register, and (4) the Gate Register show that Nizam Uddin Hazari served out the sentence as কয়েদি নং ৪১১৪/এ in Cell No.1 upto 01.06.2006 on which date he was released pursuant to the above noted bail (**photocopy of those Diary and Registers annexed as part of Annexure-X-series**).

(F) The fact of stay of Nizam Uddin Hazari in the Jail upto 01.06.2006 is supported not only by the said jail documents but also by order dated 04.04.2006 (**part of Annexure-X-series**) passed by the Special Tribunal consisting of the learned 4th Additional Metropolitan Sessions Judge, Chittagong in another case being Special Tribunal Case No. 759 of 1999 in which the incumbent MP was one of the under trial accused persons. By that order the Tribunal rejected the prayer of the Jail Authority for transfer of Nizam Hajari from Chittagong Cental Jail to any other Jail due to disciplinary matter

38. 7.03: The IG Prison (**Respondent No. 8) has stated in his report dated 30.06.2016 (Annexure –X-3 series)** that, pursuant to this Court's order dated 26.05.2016, he formed an Inquiry Committee consisting of three officers, all being senior to the said Jail Super Sagir Mia (respondent No. 9), and that this Committee conducted the inquiry on the following matters :-

(1) remission allowed to respondent No. 7, if any,
(2) quantum of the period of the sentence served out by respondent No.7 and the remaining period, if any;

(3) the basis of Annexure-5 filed by the Daily Prothom Alo showing the following entries in the register-

শার্ট-১	০১/১২/২০০৫
পেন্ট-২	"মূল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো
---------	রেয়াত ০১-০৬-১৭"
হাজারী	(স্বাক্ষর)
	০১.১২.২০০৫
	সিনিয়র জেল সুপার,
	চট্টগ্রাম কেন্দ্রীয় কারাগার"

39. 7.04: The IG Prison has submitted another report dated 27.03.2006 on those matters on the basis of the findings of the 3(three) members Inquiry Committee. The summery of the two reports dated 27.03.2016 and 30.06.2016 is as follows:

(A) Nizam Hazari was taken to jail as a convict on 14.09.2000 pursuant to the judgement of conviction and sentence for 10 years in Special Tribunal Case No. 757 of 1999. There after he stayed in the jail up to 01.06.2006 on which he was released on the basis of bail granted to him by the High Court Division in Cr. Appeal No. 1409 of 2006.

(B) while serving the said sentence, convict Nizam Hazari was allowed remission (রেয়াত). However his History Ticket and Remission Card are not available as these were preserved for 1(one) year as per Jail Code. The Admission Register (ভর্তি রেজিষ্টার) contains the quantum of remission with the figure "৫৫৭ দিন" but with "ঘষা মাজা"।

(C) So the committee formed by the IG Prision calculated the quauntum of remission as 482 days up to 31.12.2004 and another 143 days thereafter up to 01.06.2006.

(D) The date of his release on 01.12.2005 as recorded in the concerned register (Annexure-5) was signed by the then Senior Jail Super Bazlur Rashid, but it was the product of undue and illegal exercise of recording a wrong entry, which is not consistent with the other registers and documents of the Jail.

(E) According to the calculation of the said committee on the basis of available record, namely গেইট আর্টিকেল অব পারসন, বিলিজ ডাইরি, কয়েদ পরোয়ানা, জামিন নামা (photocopy annexed as Part of Annexure-X-series) his periods are as follows:-

	বছর	**মাস**	**দিন**
ক) জামিন গমন	২০০৬	৬	০১
কারাগারে আগমন	২০০০	৯	১৪
ভোগকৃত সাজা=	**৫**	**৮**	**১৯**
অর্জিত রেয়াত=	১	৮	২৫
রেয়াতসহ ভোগকৃত সাজা=	**৭**	**৫**	**১৪**

	বছর	**মাস**	**দিন**
খ) মোট সাজা	১০	০০	০০
রেয়াতসহ ভোগকৃত সাজা	৭	৫	১৪
অবশিষ্ট সাজা=	**২**	**৬**	**১৬**

40. 7.05: With regard to Blood Donation the IG Prison has submitted another detailed Report dated 09.10.2016 (**part of Annexure-X-6**). The summery of this report is as follows:

(A) As per the then East Pakistan Goverment Circular dated 21.05.1959 and the Bangladesh Government Circular dated 27.04.1978, Blood Donation and collection thereof were conducted by various Medical College Hospitals, District Hospitals and also by সন্ধানী ব্লাড ব্যাংক.

(B) But record of convict Nizam Uddin Hazari with regard to donation of blood and remission on that count was not available, as his History Ticket and রেয়াত কার্ড were not available.

(C) However, in response to the letter issued by the jail authority, the সন্ধানী কর্তৃপক্ষ, by its letter dated 01.10.2016 **(Part of Annexure-x-4-series)** informed that they did not preserve the record of such an event of long past, being the period from 14.12.2000 to 15.09.2005. But the Sandhani has not denied the fact of issuance of the certificate by it (তবে সন্ধানী কর্তৃপক্ষ প্রদত্ত সনদ অস্বীকার করেনি).

41. 8.00: Case of Editor, Prothom Alo (Respondent No.10): Pursuant to the Rule issuing order dated 08.06.2014, this respondent has filed an affidavit-in-compliance and two other Affidavits, the substance of which is as follows:

(A) He contends that the news report published in the issue of 10.05.2014 of the Daily Prothom Alo as stated by the petitioner was an investigative report and that all journalistic ethics and standards have been followed in publishing the same.

(B) The news report is based on four elements namely (1) the judgments of the respective courts with regard to conviction and sentence of respondent No. 7 (**Annexure C-series**), (2) the affidavit filed by respondent No.7 with the Election Commission in the national election of 2014 (**Annexure-3**), (3) the information delivered by the Deputy Jail Super about the pre-judgment custody period of respondent No. 7 amounting to 4 (four) months and 23 (twenty three) days (**Annexure-4**) and (4) the snapshots of the কয়েদি register (**Annexure-5**) containing the entries as follows:

> "মূল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো রেয়াত ০১-০৬-১৭".
> (স্বাক্ষর).
> ০১/১২/২০০৫,
> সিনিয়র জেল সুপার,
> চট্টগ্রাম কেন্দ্রীয় কারাগার"

(C). The protest letter dated 10.05.2014 (annexure-2) allegedly issued by the Senior Jail Super, Chittagong in protest of the said news report and referred to in the Affidavit-in-opposition filed by respondent No. 7 as **Annexure-7 was never received** by the Prothom Alo and hence not published.

42. 9.00: Report of Metropolitan Sessions Judge, Chittagong

Pursuant to the order dated 03.03.2016 passed by this Court, the learned Metropolitan Sessions Judge has sent a report dated 27.03.2016 to the effect that no notice of the alleged fresh appeal being Criminal Appeal No. 1409 of 2006 or no order of bail passed therein was received by his office. However a copy of the order of extension of bail being order dated 16-11-2006 passed in Criminal Appeal No. 1409 of 2006 was received by his office containing a direction about extension of the bail for six months.

43. 10.00: File of Crl. Misc. PetitionNo. 280 of 2006 sent by DM, Chittagong: Pursuant to order dated 10.09.2014 passed by this Court, the District Magistrate, Chittagong has sent the original file of Criminal Miscellaneous Case No. 280 of 2006 in which the bail order allegedly passed in Criminal Appeal No. 1409 of 2006 was processed for the purpose of acceptance of the bail bond.

44. 10.01: This file shows that an application was filed along with copy of a bail order and that bail a bond was filed and accepted on 30.05.2006 and a warrant of release was issued to the Jail.

45. 10.02: The contents of this file are presented in details in the later part of the Judgment in the discussion on issue No. 4 relating to Date of Release.

46. 11.00: Report of the Registrar of this Court:

Pursuant to order dated 10-9-2014 passed in this Case, the Registrar of this Court caused an Inquiry with regard to the filing of the alleged fresh appeal being Criminal Appeal No. 1409 of 2006. The report (note sheet) and other materials of the concerned file show that- (a) during the inquiry, the record of the said appeal could not be traced; (b) according to the Movement Register, the record was last assigned to an employee named Ganesh Kuri but he had died on 11.12.2013; and (c) the liability for the missing record of Appeal could not be fixed.

47. 12.00: Record of Special Tribunal Case No. 759 of 1999, Chittagong

As mentioned earlier, the Senior Jail Super, Chittagong (respondent No. 9), in his report, stated that the incumbent MP was in jail up to 01.06.2006, not only as a convict prisoner in Special Tribunal Case No. 757 of 1999 but also as an under-trial-prisoner in another case being Special Tribunal Case No. 759 of 1999 of the Metropolitan Sessions Judgeship, Chittagong.

48. 12.01: So, for verifying the correctness of this statement, the office of this court was directed, by order dated 25.11.2016, to report on the disposal situation of said Special Tribunal Case No. 759 of 1999 and to present the record thereof, if available, in connection with any case instituted in this Court.

49. 12.02: Accordingly the Office has presented the record of Special Tribunal Case No. 759 of 1999 which was earlier called for by another Division Bench of this court in connection with another case being Miscellaneous Case No. 15077 of 2014 pending in this Court.

50. 12.03: The original record of Special Tribunal Case No. 759 of 1999 shows that it arose form an allegation of an offence under the Arms Act, 1878 and respondent No.7 was one of the accused persons. This record reveals the details of the position of his custody, his appearance in court and bail during the period of 10.10.2001 to 06.06.2006 in that case. This record shows that he was in custody upto 31.05.2006.

51. 12.04: It is noted that this period is relevant for deciding the date of his release form jail. Because admittedly he surrendered on 14.09.2000 as a convict. But the incumbent MP claims the date of his release on 01.12.2005 and the jail authority claims that he was released on 01.06.2006. So the facts relating to these matters as available in the said judicial record have been presented in the latter part of the judgment in the discussion on issue No. 4 relating to the date release.

52. DISCUSSION, FINDINGS AND DECISION:

13.00: Admitted facts: Materials on record show that the following facts are admitted:

(a) The incumbent MP was convicted and sentenced by a Special Tribunal (Metropolitan Additional Sessions Judge, 4th Court) of Chittagong under sections 19A and 19(f) of the Arms Act, 1878 to suffer rigorous imprument for 10 years and 7 years respectively for the offences of illegal possession of fire arms and ammunition. The

decision of the trial court was upheld upto the Appellate Division. These facts are **further evidenced by Annexure-C, C-1, and C-2 to** the Writ Petition.

(b) The incumbent MP, as a convict, surrendered and he was taken to jail on 14.09.2000 He started serving out the sentence since that date and **served out the sentence at least upto 01.12.2005**, as admitted by the incumbent MP.

(c) He was released from the Jail before the expiry of the said 10 years, i.e. **either on 01.12.2005 as claimed by him or on 01.06.2006 as claimed by the Jail authorities.**

(d) He was allowed some remission during the period of his stay in Jail as a convict.

(e) A report was published in the daily Prothom Alo of 10.05.2014 raising questions about the propriety and legality of the release of the incumbent MP.

53. 14.00: A primary Issue: Competence of Advocate Mr. Manjil Morshid to conduct this case. The incumbent MP has raised this issue on the ground that he had engaged Mr. Murshid and accordingly Mr. Murshid conducted the Appeals preferred against the judgment of conviction and sentence. This issue was initially agaitated by the learned Advocates for the incumbent MP to the effect that MR. Morshid is debarred from conducting this case.

54. 14.01: Mr. Morshid has not filed any affidavit admitting or opposing his role in the said Appeals.

55. 14.02: The record of this case shows that this Writ Petition was drafted by Mr. Morshid, as the Advocate engaged by the Writ Petitioner, and it was signed by the Writ Petitioner as the deponent. Mr. Morshid appeared at the time of issuance of the Rule nisi on 08-06-2014 and on various subsequent dates upto 27.02.2016. Then he stopped appearing for the petitioner. Lastly on 18.05.2016, he personally appeared and informed this Court that, in view of the objection raised by the incumbent MP, he has withdrawn himself from this case, and that he has issued a no objection certificate.

56. 14.03: Thereafter other advocates conducted the hearing and the issue of Mr. Morshid was not further agitated by the learned Advocates for incumbent MP.

57. 14.04: So, the involvement of Mr. Morshed at the primary stage of this case, as the engaged advocate of the Writ Petitoner, has not affected the cause of justice and the issue of legality and propriety of his professional conduct as an advocate in this case need not be addressed.

58. 15.00: The principal issue and related issues to be adjudicated:
The terms of the Rule nisi and the materials on record show that **the principal issue** raised in this case is whether respondent No. 7, being the incumbent MP, was disqualified to be elected as an MP and, on that count, whether he has the lawful authority to hold that office after such election.

59. In deciding this principal issue, the determinant factor is whether the period of sentence served out by the incumbent MP and the remission permissible to him cover the entire sentence of 10 years imprisonment.

60. 15.01: In the course of the lengthy hearing in the case, a number of related legal and factual issues came up. For deciding the said principal issue the following issues are to addressed :-

(1) maintain ability of the case on account of standing of the petitioner to file this case,
(2) maintainability of the case on account of the bar if any imposed by article 125 of the Constitution,
(3) the date of release of the incumbent MP and calculation of the sentence served out by him
(4) the deduction of the pre-judgement custody from the sentence,
(5) remission permissible to the incumbent MP
(6) the remaining period of sentence, if any to be served out by him,
(7) disputed questions of fact involved, if any,
(8) whether the incumbent MP was qualified to be nominated and elected as an MP;
(9) result of disqualification, if any,
(10) Conclusion and result.

61. 15.02: All these issues and the related aspectly are discussed in the later part of the judgement under proper headings.

62. Issue No.1: Petitioner's standing and maintainability of the case.

63. 16.00: Deliberations: On this issue, **Mr. Qamrul Haque Siddque,** the learned Advocate for the Writ Petitioner, submits as follows:-

(a) that although in the Cause Title and at some places of the text of the Writ Petition, the expression "*public interest litigation*" has been used, the dispute raised in this case and the Rule nisi issued by this court are in the nature which, in English law, is called ***a writ of quo warranto***,

(b) that the principle of writ of quo-warranto has been clearly enshrined in article 102(2)(b)(ii) of our Constitution, according to which "*any person*" can raise a question about the lawful authority of a person holding a public office, and accordingly the petitioner has simply set the law in motion and now it is the duty of the court to inquire into and decide the matter,

(c) that the petitioner has no personal right to, or interest, in the said public office and therefore the issue raised in this case cannot be equated to a right to property or to any form of character of the petitioner and consequently he cannot file a civil suit e.g. a suit for a declaration under 42 of the Specific Relief Act, 1877 or any other suit under that Act or even a representative suit under the Code of Civil Procedure, 1908 or any other statutory law.

(d) that the petitioner was not a candidate in the election and therefore he had no standing to approach the High Court Division by filing an election case under the Representation of the People's Order, 1972 (**shortly the RPO**) and thus the only forum available to him is this Court by invoking article 102(2)(b)(iii) of the Constitution.

64. 16.01: In support of his submission, Mr. Siddique refers to the cases of (1) The University of Myshore and another vs. CD Govinda Rao and another (1965 AIR (SC) page-

491, and (2) the case of Jamal Uddin (Md) vs Major General Abdus Salam (Relived) and others (66DLR2014) page 362).

65. 16.02: In reply Mr. Shafique Ahmed, the learned Advocate for the incumbent MP, submits as follows:-

(a) that in the Cause Title and in the body of the Writ Petition (para-3), the petitioner has himself described this case as a "*public interest litigation"* ***(shortly PIL)*** and that it involves a question of great public importance, namely the validity of the election of respondent No. 7 as declared by the appropriate constitutional body, being the Election Commission and therefore this Writ Petition has to be judged by the principles applicable to a PIL, and

(b) that it is a settled principle of law that a PIL may be filed in the form of an application under clause 102(1) or 102(2) of the Constitution and it must be filed by a "*person aggrieved*", but the petitioner has not taken any ground so as to treat him as a "*person aggrieved"* as required by those clauses.

(c) this case involves a number of disputed questions of fact on the date of release and the quantum of remission.

66. 16.03: In support of the above submission Mr. Ahmed refers to the cases of *(1) National Board of Revenue vs. Abu Sayeed Khan and others, (18BLC (AD) (2013) page-116) and the case of (2) Kurapati Das vs. M/S Dr. Ambedkar Seba Samjan and others (Indian Kanoon. Org/doc/1530123).*

67. **Discussion and Findings on Issue No.1:**

17.00: For addressing this issue, we need to firstly look into clauses (1) and (2) of article 102 of the Constitution which are quoted below *(relevant portions are written in bold characts to emphasize):*

"102. ***(1) The High Court Division, on the application of any person aggrieved, may give such directions or orders*** *to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate* ***for the enforcement of any of the fundamental rights*** *conferred by part III of this Constitution.*

(2) The High Court Division may, if satisfied that no other equally officious remedy is provided by law-

(a) ***on the application of any person aggrieved, make an order-***

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) ***on the application of any person, make an order -***

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) ***requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.***

(3)-(5) **(not relevant)"**

68. **17.01:** A plain reading of the clauses (1) and (2) of article 102 of the Constitution show the following features:

(a) Clause (1) of article 102 provides that for enforcement of a fundamental right only a "***person aggrieved***" can apply to the High Court Division.

(b) Clause 2(a) provides that for obtaining a remedy in relation to an action or ommission of a public authority only a "**person aggrieved**" can apply to the High Court Division.

(c) As opposed to the above noted two clauses, clause (2) (b) (ii) provides that "***any person****"* can apply to High Court Division challenging the **lawful authority of a person in holding a public office, if no other efficacious remedy is available to the petitioner provided by other laws.**

69. 17.02: So the principal issue raised in this case namely the lawful authority of respondent No. 7 to hold the public office of MP, (Feni-2) clearly falls within the purview of article 102 (2)(b)(ii), under which "**any person**", whether aggrieved or not, can make an application to this Court. It follows that the petitioner can very well seek a remedy under article 102 (2) (b) (ii), of course subject to the condition that no other efficacious remedy is available to him. In seeking a remedy under clause 102(2)(b)(ii). He does not have to be an aggrieved person for filing this case.

70. **17.03: With regard to the principles applicable to** a*"**public interest litigation***, I generally agree with Mr. Shafique Ahmed, the learned Advocate for the petitioner, that a ***public interest litigation*** is to be instituted under article 102(1) or 102(2) (a) and that the principles or parameter to be followed in indentifying such a case have been outlined by the Appellate Division in the case of *National Board of Revenue vs Abu Sayeed Khan and others, reported in 18BLC (AD)(2013) page 116*.

71. 17.04: But I fail to accept the submission of Mr. Ahmed that the expression "*public interest litigation*" as used in the Cause Title or in a paragraph of the Writ Petition has rendered this case to be a public interest litigation. Such sporadic references to that expressin are not the determinant factors for deciding the nature of the case. The determinant factors are the issues raised in the Writ Petition in relation to the particular fact (s) and the standing of the petitioner.

72. **17.05:** Apart from the facts claimed by the writ petitioners as presented earlier, the terms of the Rule nisi issued by this court is a pointer to the nature of the case. The terms of the Rule nisi, as quoted earlier, has two components, namely –(a) a direction to the respondents including the incubent MP (respondent No. 7) to explain his lawful authority in holding the public office MP for the Constituency of Feni-2, and (b) a declaration with regard to vacancy in that office, as a probable result.

73. 17.06: The issue raised in the Writ Petition in the background of the admitted conviction and sentence imposed on the incumbent MP and the Rule nisi issued by this court are clearly in the nature of a *writ of quo warranto* of the English Law and not of a PIL.

74. 17.07: For illustrating the concept of a *writ of quo-warranto*, the interpretation of the Indian Supreme Court in the case of University of Mysore and another vs. CD Govinda Rao and another (AIR 1965 SC 491) is relevant and quoted below (*underlines added*):

> "*Broadly stated, the quo warrant proceeding affords a judicial remedy by which any person, who holds an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; so that his title to it may be duly determined and in case finding is that the holder of the office has no title to it, he would be ousted from that office by judicial order----------."*

75. **17.08:** The underlying principle of a writ *quo warranto,* as interpreted by the Supreme Court of India and as quoted above, is clearly the same as enshrined in clause 102(2) (b) (ii) of our Constitution. Under this clause, "*any person*" can file an application and this court can, upon such an application, exercise the jurisdiction a writ of quo warranto. The applicant is not required to be "*an aggrieved person*" as opposed to the requirement of clause (1) and (2) (a) of article 102 under which a public interest ligation may be filed. In such a case the duty of this is court to hold an inquiry on the allegation and to arrive at a decision keeping in view of the legal and factual issues.

76. **17.09:** Similar view was taken by another Division Bench in the case of Jamal Uddin vs. Major General Abdus Salam (Retired) and others (66DLR(2014) page-364)- para-55,56, and 59).

77. 17.10: The above view finds further support in the observation made by our apex court in the case of Bangladesh vs Aftab Uddin (2010 BLD (AD), page 10 para -20) as follows: (underlines added):

> *"20. Besides, this writ petition before the High Court Division being one under Article 102(2)(b)(ii) does not require that the applicant for a writ of quo-warranto must be an aggrieved party. Any person can maintain such an application without showing any violation of his legal right. ---------"*

78. **17.11: On the question of availability of other remedies or an efficacious remedy to the petitioner**, I agree with the submission of Mr. Qamrul Haq Siddique, that the petitioner cannot approach a civil court for a declaration under section 42 or for any other relief under the other provision of the Specific Relief Act, 1882. Because, his personal right to any property or character is not involved in the issue raised. He cannot approach any other court under any other statutory law for availing any remedy not to speak of an "efficacious remedy" The only remedy open to him is to invoke artice 102(2)(b)(ii) of the Constitution.

79. 17.12: It is noted that the RPO provides for challenging the election of a returned candidate by way of filing an election petition to the High Court Division. But Article 49(1) of the RPO limits the said opportunity only to a person who is a candidate for the election. Article 49(1) of the RPO runs as follows:

> ***"49-*** *(1) No election shall be called in question except by an election petition presented by a candidate for that election in accordance with the provisions of this Chapter.*
> *(2) ---------- (4) ----------." (not relevant)*

80. 17.13: It is evident that since the petitioner was not a candidate in the election, he has no right to avail the remedy under the RPO.

81. 17.14: It is noted that the issue of involvement of disputed questions of fact, as pointed out by Mr. Shafique Ahmed, with reference to the Indian case reported in Indian kanoon org/doc/430123 has been separately discussed and decided as issue No. 7 in the later part of this judgment.

82. 18.00: Decision on issue No. 1: In consideration of the above findings, it is held that the petitioner as an **"any person**," has a right to file this case under article 102(2)(b)(ii) of the Constitution and that no other efficacious remedy provided by law is available to him and therefore this case is maintainable and an inquiry is to be held under that article. Accordingly issue No. 1 is decided in favour of the petitioner.

83. Issue No. 2: Legal bar, if any, imposed by article 125 of the constitution to entertain the case.

84. 19.00: Deliberation: On this issue, **Mr. Sahafique Ahmed,** the learned Advocate for the incumbent MP, submits that article 125 of the Constitution is an overriding provision and it puts a legal bar on filing a court case questioning the result of the election declared by the Election Commission, except by filing an election case under the relevant law, namely the RPO and that since the petitioner has failed to do so, this case is not maintainable.

85. 19.01: In reply **Mr Qamrul Haque Siddique** the learned Advocate for the petitioner, submits that petitioner claims that respondent No. 7 was disqualified to be a candidate for election as an MP due to the fact that he had not served out the entire sentence imposed on him, but he suppressed that fact in his Affidavit, and that the Election authorities had no scope to examine the disqualification matter and therefore article 125 is not a legal bar to entertain this case.

86. Discussion and Findings on Issue No. 2:

20.00: For considering this issue we need firstly to look into article 125 of the Constitution, which is quoted below (*underlines added*):

> ***"125. Validity of election law and election. -***
> *Notwithstanding anything in this Constitution* **-**
> *(a) the validity of any law relating to the delimitation of constituencies, or the allotment of seats to such constituencies, made or purporting to be made under article 124, shall not be called in question in any court;*
> *(b) no election to the offices of President or to parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by Parliament."*

87. **20.01:** The expression "*Notwistauding anything contained in the constitution*" clearly shows that article 125 is a overriding provision and clause (b) thereof puts a restriction on questioning the validity of, among others, an election of an MP. However this article allows the filing of an election case "*only in such manner as may be provided for by or under a law made by the Parliament"*. RPO is the law as contemplated in article 125 of the constitution.

88. 20.02: The RPO contains detailed provisions with regard to, among others, the procedure for nomination of a candidate for election as MP, the qualification and disqualification of a candidate, scrutiny of nomination papers by the election functionaries, fixing the election schedule, conducting the election, declaration of election results, filing of

an election case by a candidate challenging the election held, power of the High Court Division in relation to the election case and the relieves that may be granted in such a case.

89. 20.03: Article 12(1) of the RPO deals with the matter of nomination and the qualification and disqualification of a candidate. Relevant portion of Article 12(1) is quoted below *(underlines added):*

> *"12. (1) Any elector of a constituency may propose or second for election to that constituency, the name of any person qualified to be a member under clause (1) of Article 66 of the Constitution:*
> *Provided that a person shall be disqualified for election as or for being, a member, if he-*

(a) – (o) **(Not relevant)**
Explanation I---------- VI ---------- **(not relevant)**
(C)--------- (7) ----------" **(not relevant)**

90. 20.04: Article 12(1) of the RPO, with reference to article 66(1) of the Constitution, clearly provides as to who is qualified to be nominated as a candidate. The proviso to clause 12(1) contains the list 15 categories of persons who are disqualified to be nominated and elected e.g. a non-voter of the constituency, a person convicted and sentenced for election related offences as specified in Chapter VI of RPO, certain class of persons who were in the service of the Republic, bank loan defaulters, certain bill defaulters a person convicted of war crime etc.

91. 20.05: But, Article 12(1) of the RPO or the proviso there of does not directly refer to the disqualification resulting from a conviction and sentence imposed on a candidate for a criminal offence before the submission of nomination paper. This disqualification is specified by article 66 (2)(d) of the Constitution. Relevant portion of this article is quoted below: *(underlines added):*

> *"66. **Qualification and disqualification for election to parliament.** (1) A person shall, subject to the provision of clause (2), be qualified to be elected as, and to be, a member of pariliament if he is a citizen of Bangladesh and has attained the age to twenty-five years.*
>
> *(2) A person shall be disqualified for election as, or for being a member of Parliament who-*
>
> *(a) ---------- (c) ---------- **(not relevant)***
>
> *(d) has been, on conviction for a criminal offence involving moral turpitude, sentenced for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less that two years, unless a period of five years has elapsed since his release;"*
>
> *[(dd) ---------- **(not relevant)***
> *(2A) –(5) ---------- **(not relevant)***

92. 20.06: A careful reading of article 66(2), particularly the expression "*A person shall be disqualified for election as, or for being a member of Parliament*" read with clauses (d) shows that the Constitution contemplates 3 (three) situations about the disqualification of a person, namely- (1) the dis-qualification acquired before election, (2) the disqualification

acquired after election, and (3) disqualification that was acquired before but continues after the election.

93. **20.07:** In the instant case, the petitioner claims that incumbent MP acquired the disqualification before election and it still continues as per clause (d), because he was released from jail before serving out the sentence of 10 years.

94.**20.08:** On perusal of the materials on record, particularly the photocopy of the Affidavit-cum-Nomination Paper of the incumbent MP **(Annexure-B),** it is revealed that he, as a candidate for election, has recorded in the 2nd page at serial Nos. 3 and 4 the following entry at sub-serial 07:

৩.খ. অতীতে আমার বিরুদ্ধে দায়েরকৃত ফৌজদারী মামলা বা মামলাসমূহ এবং উহার ফলাফল বিবরণীঃ

৪.

ক্রমিক নম্বর	যে আইন ও আইনের ধারায় মামলা দায়ের করা হইয়াছে	যে আদালতে মামলাটি আমলে নিয়াছে	মামলা নম্বর	মামলার ফলাফল
০১----- ০৬---------- (not relevant)				
০৭	বিশেষ ক্ষমতা আইনের ১৯(ক) (চ) ধারা	মাননীয় ৪র্থ ট্রাইবুনাল আদালত, চট্টগ্রাম	বি. ট্রা মামলা নং-৭৫৭/৯৯	নিষ্পত্তি/খালাস

95. **20.09:** Respondent No. 7 in his Affidavit in opposition dated 18.01.2016 (para-9), claims that he has not made any false declaration in his affidavit cum nomination paper that was submitted by him as a candidate, and that it is a disputed question of fact.

96. 20.10: But in all his subsequent affidavits he has admitted the fact of his conviction and sentence of 10(ten) years imprisonment in the case as mentined in the said Affidavit Cum Nomination paper i.e. Special Tribunal Case No. 757/1999. This is further evidenced by the certified copies of the judgment of the Special Tribunal affirmed up to the Appellate Division (Annexure-C-series). However he has tried to make out a case that he has served out the entire sentence.

97. **20.11:** The Writ Petitioner claims that the incumbent MP has suppressed the fact of serving a lesser period and that such suppression ended in the result that the Election Commission declared him as the returned candidate in the Parliament election of 2014.

98. 20.12: The question is, whether the Election Commission has the lawful authority under article 125 to reopen the issue of legality of the candidature of the incumbent MP whom the Commission itself has declared as the returned candidate by Gazette Notification.

99. 20.13: Article 125 of the Constitution requires the Election Commission to exercise its authority through the legal regime of the RPO. The scheme of RPO as pointed out earlier show that, after accepting the nomination paper of a candidate as a valid one and after declaring the result of the election within the framework of the RPO, the Election Commission becomes a *functus officio* for re-examining the issue of disqualification of a candidate acquired prior to the election.

100. 20.14: Article 125 as an overriding clause, provides that an election dispute can be raised only as per law made by the Parliament, i.e. by filing an election petition to the High

Court Division by a candidate within a specified time on the grounds as provided by the RPO.

101. **20.15:** But the petitioner was admittedly not a candidate in the election. So article 125 of the constitution and the RPO article 12(1) has debarred him from availing the remedy by filing an election case under the RPO and yet the Commission itself cannot re-open the issue of disqualification.

102. **20.16:** So the next question is whether the overriding provision of article 125(1)(b) stands as a legal bar to invoke the jurisdiction of this Court under article 102(2)(b)(ii).

103. **20.17:** On this question, the materials on record show that incumbent MP admits his conviction and sentence, but he has stated in his Affidavit/Nomination Paper (Annexure-B) his position as নিস্পত্তি/খালাস. There is nothing on record to show that any objection was ever raised from any quarter with regard to his disqualification before the election functionaries or before the High Court Division in the from of an election case under the RPO. The ultimate result was that he was declared by the Election Commission as the elected MP.

104. **20.18:** Article 125 of the Constitution when read with articles 12(1) and 49(1) of the RPO and article 66(2) of the Constitution, show that the bar or restriction imposed by the non-obstante/overriding clause 125(1)(b), of the Constitution are applicable at best to two situations:- (a) the issues which have been considered by the Election Commission in the election process up to the elction result, and (b) the issues that may be considered by the High Court Division after the elction results, i.e. in the form of an elction cases under the RPO being the law made by parliament pursuant to article 125.

105. **20.19:** Article 125 of the Constitution does not cover a situation when a candidate for, or the holder of the public office of an MP, has allegedly suppressed certain vital facts about his disqualification and due to such suppression to, or non discovery by, the election functioneries, the election result has been declared and there was none to challenge the result within the frame work of article 125 and the RPO.

106. **20.20:** The intention of article 125 is never to encourage or allow suppession of the vital facts on disqualification of a candidate nor to obstruct the door of justice to seek a legal remedy or to unearth the truth about the alleged disqualification.

107. **20.21:** In such a situation, the scope of opening the issue of disqualification of an MP is very much subject to scrutiny by this Court under the writ jurdiction by invoking article 102(2) (b) (ii). Simply because, the incumbent MP was allegedly disqualified to submit his nomination paper so as to initiate the election process and the whole election process/result allegedly stood on a legal void.

108. **Decision on Issue No. 2**

20.22: In view of the above discussion and findings, the decision on this issue goes in favour of the petitioner. It is held that article 125 does not stand as a legal bar to entertain this case and it is maintainable under article 102(2)(b)(ii) for the purpose of examining the other issues.

109. **Issue No. 3. The date of release of the incumbent MP from jail and the period of sentence served out by him.**

110. **21.00:** On this issue, the incumbent MP claims that he was released on 01.12.2005. On the contrary the contrary the Jail authorities claim that he was realeased on 01.06.2006. The incumbent MP relies on two documents, namely **Annexure-1** being the photocopy of a Register, which has also been filed by Prothom Alo as **Annexure-5**, and the Rejoinder issued by the Senior Jail Super named Md. Sagir. The photocopy and original thereof are on record as **Annexure-2 and 7.**

111. 21.01: The jail authority relies on various jail registers and the file of the District Magistrate relating to bail bond and also on the reocrd of the Special Tribunal Case No. 759 of 1999.

112. 21.02: Deliberations: On this issue, **Mr Qamrul Haq Siddique**, the learned Advocate for the writ petitioner submits as follows:-

(a) the date of release of the incumbent MP, whether on 01.12.2005 or on 01.06.2006, is not very material, because the total remission permissible to him as per rule 768 of the Jail Code cannot exceed one-fourth of the sentence, and

(b) the period of sentence served out by him from 14.09.2000 whether upto 01.12.2005 or up to 01.06.2006, together with the maximum remission allowable to him, do not cover the entire period of sentence.

113. **21.03: In reply, Mr. Shafique Ahmed** the learned Advocate for the incumbent MP, submits as follows:-

(a) as per the reports of the jail authorities, the mandatory History Ticket of the incumbent MP is not available, and

(b) the jail authorities in their reports admit the fact of recording an entry in the register about the release of the incumbent MP on 01.12.2005 **(Annexure 1 or 5)** and the Rejoinder issued by the Senior Jail Super **(Annexure-2/7)** supports the said date of release.

114. 21.04: Discussion and Findings on issue No. 3: Annexure-1 and Annexure-5 are the photocopies of the same document, namely an entry in the কয়েদী Register. It contains the following information:

"শার্ট-১ ০১/১২/২০০৫
পেন্ট-২ মূল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো
--------- রেয়াত ০১-০৬-১৭
হাজারী (স্বাক্ষর)
০১.১২.২০০৫
সিনিয়র জেল সুপার,
চট্টগ্রাম কেন্দ্রীয় কারাগার"

115. 21.05: Evidently the above entries state the follwing three facts :-

(1) release of the incumbent MP on 01.12.2005,

(2) the quantum of remission up to that date was "রেয়াত ০১-০৬-১৭" which means that it was 1 year 6 months 17 days = 365+180+17= 552 days or 557 days as claimed by the incumbent MP and partly admitted by the jail authorities in their report with a remark ঘষা মাজা and

(3) the fact of serving out the entire sentence without any reference to any other remission as claimed by the incumbent MP in this case namely Special Remission of 343 days and remission of 486 days on account of blood donation.

116. 21.06: The other document relied on by the incumbent MP is the Rejoinder (প্রতিবাদ লিপি) issued by the Senior Jail Super, Central Jail, Chittagong named Sagir Mia. This প্রতিবাদ লিপি (Annexure-2 or 7) was issued under স্মারক নং ৪৪.০৭.১০০.১১১.০৩.১৩.১৪-২৫১১/৫ তারিখ-১০/০৫/২০০৪ and addressed to the Editor, Prothom Alo. The protion of this letter under heading প্রতিবাদলিপি is quoted below *(underlines added):*

"প্রতিবাদ লিপি

অদ্য ১০.০৫.২০১৪ খ্রিঃ তারিখ দৈনিক প্রথম আলো পত্রিকায় প্রকাশিত শিরোনাম "সাজা কম খেটেই বেরিয়ে যান" প্রতিবেদনটিতে নিম্নস্বাক্ষরকারী কর্তৃক মনে হচ্ছে এটা জালিয়াতি। নিজাম হাজারী দুই বছর ১০ মাস একদিন কম কারাভোগ করে বেরিয়ে গেছেন মর্মে যে বিবৃতি প্রকাশিত হয়েছে তাহা সত্য নয় উক্ত প্রতিবেদকের নিকট তিনি এ ধরনের কোন মতামত ব্যক্ত করেননি। কারাগার হতে সাজা কম খেটে বের হওয়ার কোন সুযোগ নাই। অত্র কেন্দ্রীয় কারাগারের রক্ষিত রেজিষ্টার দৃষ্টে দেখা যায় যে, উক্ত নিজাম হাজারী, পিতাঃ জয়নাল আবেদীন হাজারী গত ১৪.০৯.২০০০ খ্রিঃ তারিখ বিজ্ঞ অতিরিক্ত মহানগর দায়রা জজ, ৪র্থ আদালত, চট্টগ্রাম কর্তৃক এস,টি ৭৫৯/৯৯, ডবলমুরিং থানার মামলা নং ২৯(৩)৯২, ধারা অস্ত্র আইনের ১৯(ক) ও (চ) মামলায় ১০(দশ) বছরের সশ্রম কারাদন্ডে দন্ডিত হয়ে অত্র কারাগরে প্রেরিত হয়। রেয়াত প্রথায় সাজাভোগ শেষে তিন গত ০১.১২.২০০৫ খ্রিঃ তারিখ অত্র কারাগার হতে মুক্তি লাভ করেন।

মোঃ ছগির মিয়া
সিনিয়র জেল সুপার
চট্টগ্রাম কেন্দ্রীয় কারগার।"

117. 21.07: The above Rejoinder clearly supports the claim of the incumbent MP that he was permanently released on 01.12.2005 on the basis of the period of sentence served out and the system of remission "রেয়াত প্রথায় সাজা ভোগ শেষে তিনি গত ০১/১২/২০০৫ খ্রিঃ তারিখ অত্র কারাগার হতে মুক্তি লাভ করেন"।

118. 21.08: But pursuant to this court's direction as contained in the Rule issuing order dated 08.06.2014 and the subsequent order dated 16.07.2014, **the same Senior Jail Super Sagir Mia submitted two reports denying the correctness of his own Rejoinder and also of the entries in the said কয়েদী Ragister about release of the incumbent MP on 01.12.2005**. He has asserted that the correct date of release is 01.06.2006 and that the release was not after serving out the entire sentence but on the basis of a bail order of this court.

119. 21.09: The 1st report dated 03.06.2014 **(Annexure-X)** submitted by the Senior Jail Super is a brief one. However, in the 2nd report dated 30.09.2014 (Annexure-XI), he has reiterated the statements made in the 1st report and stated other detailed information collected by him.

120. 21.10: In his 2nd Report, he has stated that he hurriedly prepared and issued the Rejoinder without consulting the relevant registers and thus issued a mistaken Rejoinder. The relevant portions of this 2nd report are quoted below *(underlines added):*

"গত ১০/০৫/২০১৪ খ্রিস্টাব্দ তারিখ দৈনিক প্রথম আলো পত্রিকায় "সাজা কম খেটেই বেরিয়ে যান সাংসদ" শিরোনামে প্রকাশিত সংবাদটি পড়ার পর নিম্নস্বাক্ষরকারী অত্র কেন্দ্রীয় কারাগারের তৎকলীন সময়ের অথাৎ ০১/১২/২০০৫ খ্রিস্টাব্দ তারিখের রিলিজ ডাইরী পর্যবেক্ষণ করে দেখেন যে, ০১/১২/২০০৫ খ্রিস্টাব্দ তারিখের রিলিজ ডাইরীতে সংশ্লিষ্ট কয়েদী নিজাম হাজারীর কারাগার হতে মুক্তি যাওয়ার বিষয়ে কোন তথ্য উল্লেখ নেই (কপি সংযুক্ত)। কারাভ্যন্তরে বন্দীরা বিভিন্ন ওয়ার্ডে / সেলে অবস্থান করেন। কারাভ্যন্তরে রক্ষিত তৎকালীন সময়ের অথাৎ ০১/১২/২০০৫ খ্রিস্টাব্দ তারিখের ওয়ার্ড / সেল রেজিস্ট্রার পর্যালোচনা করে দেখা যায় যে, সংশ্লিষ্ট কয়েদী নিজাম হাজারী কারাভ্যন্তরে ০১(এক) নম্বর সেলে ০১/০৬/২০০৬ খ্রিস্টাব্দ তারিখ পর্যন্ত আটক ছিলেন (কপি সংযুক্ত)। পরবর্তীতে, অত্র কারাগারের তৎকালীন সময়ের পুরাতন রিলিজ ডাইরী এবং গেইট পার্সন্স আরো নিবিরভাবে খোঁজাখুঁজির পর গত ০১/০৬/২০০৬ খ্রিস্টাব্দ তারিখের রিলিজ ডাইরী এবং গেইট পার্সন্সে সংশ্লিষ্ট কয়েদী নিজাম হাজারীর জামিনে মুক্তি যাওয়া সংক্রান্ত তথ্য উল্লেখ পাওয়া যায়।

এখানে উল্লেখ্য যে, গত ১০/০৫/২০১৪ খ্রিষ্টাব্দ তারিখ দৈনিক প্রথম আলো পত্রিকায় "সাজা কম খেটেই বেরিয়ে যান সাংসদ" মর্মে সংবাদটি প্রকাশিত হওয়ার পর অত্র কেন্দ্রীয় কারাগারের পক্ষ থেকে প্রদত্ত প্রতিবাদ লিপিতে নিম্নস্বাক্ষরকারী কর্তৃক "সংশ্লিষ্ট কয়েদী নিজাম হাজারী রেয়াত প্রথায় সাজাভোগ শেষে গত ০১/১২/২৫০০৫ খ্রিস্টাব্দ অত্র কেন্দ্রীয় কারাগার হতে মুক্তি লাভ করেন" মর্মে লিখিত বক্তব্যটিও সঠিক নয়। কে বা কারা অসৎ উদ্দেশ্য সাধনের জন্য একটি রেজিষ্ট্রটারের কিছু অংশ কেটে পত্রিকায় প্রকাশিত অংশটি জোড়া লাগিয়ে রেখেছেন তা নিম্নস্বাক্ষরকরী প্রথমে দৃষ্টিগোচরে আসেনি। সম্প্রসারণ এবং আধুনিকীকরন প্রকল্পের মাধ্যমে ২০১১ সালের ২০ ডিসেম্বর বর্তমান চট্ট গ্রাম কেন্দ্রীয় কারাগার উদ্বোধন করা হয়। যার ফলে ২০০৫ সালের পুরাতন নথিপত্র খুঁজে পেতে দেরী হয়। যাচাই না করে শুধুমাত্র একটি রেজিষ্ট্রার দেখে তাড়াহুড়ো করে প্রতিবাদ লিপিতে ভুল তথ্য উপস্থাপনের জন্য নিম্নস্বাক্ষরকরী আন্তরিকভাবে দুঃখিত এবং ক্ষমাপ্রার্থী।

121. 21.11: In view of the contradiction in the two documents made by the same officer, namely the Rejoinder (প্রতিবাদ লিপি) and the report as quoted above, this court by order dated 26.05.2006 and also by a previous order dated 03.03.2016 directed the IG Prison (Respondent No. 9) to cause an inquiry by a committee consisting of officers superior to the said Sagir Mia and to report on the date of release, the matter of the sentence served out by him, the quantum of remission if any allowed to him and the related matters.

122. 21.12: Accordingly the IG Prison caused inquiry by a committee and submitted two Reports dated 27.03.2016 and 30.06.2016 (Annexure-X-3-series).

123. 21.13: It is noted that the Report dated 27.03.2016 submitted by the IG Prison was not submitted in the form of an Affidavit. However in the subsequent Affidavit of compliance, the IG Prison asserted that the report dated 27.03.2016 was correct. These two reports submitted by the IG Prison support the 2nd report of Sagir Mia as quoted above. In both the Reports, the IG Prison has stated inter alia that-

(1) the History Ticket and Remission Card of the Incumbent MP were not available, as the two documents were required to be preserved only for one year as per rule 558 and 780(8) respectively of the Jail Code,

(2) the other registers namely- গেইট আর্টিকেল অব পবেশন, রিলিজ ডাইরী, কয়েদ পরোয়ানা, জামিননামা ইত্যাদি show that he was released on 01.06.2006 on the basis of bail granted by this court in Criminal Appeal No. 1409 of 2006, and

(3) the entries in Annexure-5, being snapshot of the কয়েদী register as produced in this court by the Editor Prothom Alo and also by the incumbent MP, showing the date of release on 01.12.2005 after serving out the sentence were incorrect and that the entries therein were the product of illegal and collusive activities.

(4) out of the sentence 10 years, he served out 5 years 8 months 19 days, and earned remission of 1 year 8 months 25 days and the remaining sentence is 2 years 6 months and 16 day.

124. **21.14:** Relevant portions of the report dated 30.06.2016 (Annexure-X-3-series) submitted by the IG Prison is quoted below *(underlines added)*:

(ক) Respondent No. 7 নিজামউদ্দীন হাজারী স্পেশাল ট্রাইবুনাল মামলা নং ৭৫৭/৯৯ ডবলমুরিং থানার মামলা নং ২৯(৩)৯২ এ গত ১৪.০৯.২০০০ খ্রিঃ তারিখে অস্ত্র আইনের ১৯(ক) ধারায় দশ (১০) বছর সশ্রম কারাদন্ড এবং অস্ত্র আইনের ১৯(চ) ধারায় সাত (৭) বছর সশ্রম কারাদন্ডে (উভয় দন্ড একত্রে চলবে) দন্ডিত হয়ে কারাগারে আসেন। অথাৎ উভয় ধারায় তিনি সর্বমোট দশ (১০) বছরের সশ্রম কারাদন্ড ভোগ করবেন। সশ্রম কারাদন্ডে দন্ডিত বন্দি হিসেবে তিনি কারাবিধি ১ম খন্ড অনুযায়ী রেয়াত সুবিধা প্রাপ্ত হন। তদন্ত কমিটির প্রাপ্ত ভর্তি রেজিস্টারে ঘষামাজা ব্যতীত নির্ভরযোগ্য তথ্য মতে ৩১.১২.২০০৪ খ্রিঃ পর্যন্ত তাঁর অর্জিত রেয়াত ছিল ৪৮২ দিন যা স্পষ্টভাবে তাঁর কয়েদ পরোয়ানায় উল্লেখ পাওয়া যায় (NICVD, ঢাকায় উন্নত চিকিৎসা শেষে ঢাকা কেন্দ্রীয় কারাগার থেকে চট্টগ্রাম কেন্দ্রীয় কারাগারে গত ২৩.০৩.২০০৫ খ্রিঃ তারিখে ফেরত প্রেরণের সময় কয়েদ পরোয়ানায় প্রদত্ত নোটের ছায়ালিপি সংযুক্ত-খ)।

কারা বিধি ১ম খন্ডের ৭৮০(৮) ও ৫৫৮ ধারা অনুযায়ী রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষণের মেয়াদ ০১ বৎসর হওয়ায় উক্ত রেয়াত কার্ড ও হিস্ট্রি টিকেট অবলোকন করার কোন সুযোগ ছিল না এবং ভর্তি রেজিস্টারের রেয়াত সংক্রান্ত প্রাপ্ত তথ্য ৩য় কোয়ার্টার ২০০৫ পর্যন্ত প্রাপ্ত রেয়াত ৫৫৭ দিন ঘষামাজ থাকায় তার নির্ভরযোগ্যতা প্রশ্নের সম্মুখীন। তাই ভর্তি রেজিস্টারের তথ্য আমলে না নিয়ে সর্বশেষ নির্ভরযোগ্য তথ্য ৩১.১২.২০০৪ পর্যন্ত অর্জিত রেয়াত ৪৮২ দিন ধরে তাঁর ০১.০৬.২০০৬ খ্রিঃ তারিখে জামিনে মুক্তি গমনের পূর্বদিন পর্যন্ত কারা বিধি মোতাবেক সর্বোচ্চ আরো ১৪৩ দিন রেয়াত প্রাপ্ত হতেন (তদন্ত কমিটি কর্তৃক প্রস্তুতকৃত ক্যালকুলেশন সীট সংযুক্ত-গ)। তদন্ত কমিটির হিসাবমতে মুক্তির পূর্বদিন পর্যন্ত রেয়াত নিয়মের আওতায় তাঁর প্রাপ্ত সর্বোচ্চ রেয়াত ৬২৫ দিন বা ১ বছর ৮ মাস ২৫ দিন। উল্লেখ্য যে, কারা বিধি ৭৬৮ ধারা মোতবেক রেয়াত কখনও মূল সাজার ১/৪ অংশ অতিক্রম করবেনা।

(খ) Respondent No. 7 নিজাম উদ্দীন হাজারী রেয়াত প্রথার আওতায় পুরো সাজা খেটে মুক্তি লাভ করেননি। মহামান্য সুপ্রিম কোর্টের হাইকোর্ট বিভাগের আপীল নং ১৪০৯/২০০৬ এর রেফারেন্সে বিজ্ঞ অতিরিক্ত জেলা ম্যাজিস্ট্রেট, চট্টগ্রামের ফৌঃ মিস পিটিশন নং ২৮০/২০০৬ তারিখ ৩১.০৫.২০০৬ খ্রিঃ মোতবেক তিনি গত ০১.০৬.২০০৬ খ্রিঃ তারিখে চট্টগ্রাম কেন্দ্রীয় কারাগার হতে জামিনে মুক্তি লাভ করেন। ভোগকৃত এবং অবশিষ্ট সাজার হিসাব নিম্নে প্রদত্ত হলোঃ

	বছর	**মাস**	**দিন**
ক) জামিন গমন	২০০৬	৬	০১
কারাগারে আগমন	২০০০	৯	১৪
ভোগকৃত সাজা=	**৫**	**৮**	**১৯**
অর্জিত রেয়াত=	১	৮	২৫
রেয়াতসহ ভোগকৃত সাজা=	**৭**	**৫**	**১৪**

	বছর	**মাস**	**দিন**
খ) মোট সাজা	১০	০০	০০
রেয়াতসহ ভোগকৃত সাজা	৭	৫	১৪
অবশিষ্ট সাজা=	**২**	**৬**	**১৬**

তার সাজা সর্বমোট ১০ বছরের মধ্যে রেয়াত নিয়মের আওতায় খাটা বাকি ২ বছর ৬ মাস ১৬ দিন।

(গ) গেইট আর্টিকেল অব পারসন, রিলিজ ডায়রী, কয়েদ পরোয়ারা, জামিননামা ইত্যাদি পর্যালোচনা করে দেখা যায় নিজাম উদ্দীন হাজারী জামিনে ০১.৬.২০০৬ তারিখে মুক্তি লাভ করেন (ছায়ালিপি সংযুক্ত-ঘ-১,২,৩ ও৪)। তিনি রেয়াত

প্রথায় মূল সাজা শেষে মুক্তি লাভ করেননি এবং তার আরো ২ বছর ৬ মাস ১৬ দিন সাজা অবশিষ্ট রয়েছে। বিজ্ঞ আদালত কর্তৃক প্রেরিত উদ্ধৃতাংশ পরীক্ষা করে দেখা যায় উদ্ধৃতাংশটুকু ০১.১২.২০০৫ তারিখে তৎকালীন সিনিয়র জেল সুপার জনাব বজলুর রশীদ কর্তৃক স্বাক্ষর করা অথচ প্রকৃতপক্ষে নিজাম উদ্দীন হাজারী মুক্তি লাভ করেন ০১.৬.২০০৬ খ্রিঃ তারিখে। সুতরাং জনাব নীজাম উদ্দীন হাজারীকে অবৈধ কোন সুবিধা দেয়ার উদ্দেশ্যে কোন দুষ্ট চক্রের জাল স্বাক্ষর হতে পারে, কেননা উল্লেখিত উদ্ধৃতাংশের সাথে নিজাম উদ্দীন হাজারীর কারা মুক্তির কোন সংশ্লিষ্টতা তদন্তে প্রতীয়মান হয়নি। উক্ত উদ্ধৃতাংশের মুক্তিপ্রাপ্ত ব্যক্তির নাম উল্লেখ নেই বা রেয়াত হিসেবে যা উল্লেখিত তা নিজাম উদ্দীন হাজারীর রেয়াতের সাথে সংশ্লিষ্ট বলেও প্রতীয়মান হচ্ছে না। কয়েদি নং ৪০৪১/এ জনাব নিজাম উদ্দীন হাজারী সম্পর্কিত চট্টগ্রাম কেন্দ্রীয় কারাগারের ভর্তি রেজিস্টার নিরীক্ষা করে দেখা যায়, উক্ত পৃষ্ঠায় নীচের কোনায় একটি বড় অংশ ছেঁড়া, অথাৎ কয়েদি ভর্তি রেজিষ্টারের ২৫ নং কলামে যেখানে বন্দি মুক্তি সংক্রান্ত তথ্য লিপিবদ্ধ করা হয় সেই অংশটুকুই ছেঁড়া (ছায়ালিপি সংযুক্ত-ঙ)।

(ঘ) ---------- **(not relevant)**

125. **21.15**: In support of his Reports, the IG Prison has Annexed *inter alia* the attested photo copies the following documents:

(1) Case Diary of Convict Prisoners, showing admission of the incumbent MP into jail on 14.09.2000 and stay up to 31.05.2006 with the remark about his release pursuant to the bail granted in Criminal Appeal No. 1409 of 2006.
(2) Photocopy of the entries recorded on 08.02.2005 in another Register (not named) showing transfer of the incumbent MP to NICVD for treatment, along with the statement "৩১/১২/২০০৪ পর্যন্ত অর্জিত রেয়াত ৪৮২ দিন"
(3) Photocopy of the Gate Register dated 01.06.2006 with the remark "কয়েদী খালাস (১) নিজাম হাজারী, (২) ---------"
(4) Photocopy of the bail bond dated 01.06.2006 furnished pursuant to the bail order passed in Cr. Appeal No. 1409 of 2006.
(5) Photocopy of the Warrant of Discharge issued by the office of District Magistrate in Cr. Misc Petition No. 280/06

126. 21.16: The above report of the IG Prison about the date of release of the incumbent MP on 01.06.2006 is consistent with the original file of Cr. Misc. Petition No. 280 of 2006 of the office of the District Magistrate (DM), Chittagong which was called for by this court. This file reveals the following scenario:

(a) A bail order dated 17.05.2006 was purportedly passed by a Division of this court in Criminal Appeal No. 1409 of 2006 and it was purportedly sent by the office of this Court under Memo No. 19185 dated 24.05.2006 under the signature of an Assistant Registrar of this Court. But the name or seal of that Assistant Register is not recorded. It was received by the office of DM, Chittagong on 28.05.2006.
(b) An application was filed by an Advocate (signature illegible) on behalf of নিজাম হাজারী, along with a vokalat nama containing a reference to কয়েদী নং ৪১১৪/এ, with a prayer for release on bail.

(c) The Additional District Magistrate, Chittagong recorded an order to the effect that the said convict would be released on bail subject to furnishing bail bond by two Advocates and a local representative

(d) Accordingly three sureties, being two Advocates named শামশুল হক চৌধুরী and আনিসুল হক সেলিম and প্যানেল চেয়ারম্যান, ফেনী পৌরসভা, filed bail bond which was accepted on 30.05.2006 with the remark on the margin "confirmed" and "issued nail bond"

127. 21.17: The reports made by the Senior Jail Super and the IG, Prison that incumbent MP was in jail after 01.12.2005 and up to 01.06.2006 is further supported by the original judicial record of Special Tribunal Case No. 759 of 1999 (*GR No. 129 of 1991 corresponding to Double Mooring P.S. Case No. 24(1) 1991*) of the Special Tribunal (Additional Metropolitan Sessions Judge, Court No. 4, Chittagong. Pursuant to the order of this court, that record was produced by the office of this Court as available in the office in connection Misc Case No. 15077 of 2014 arising from the said case No. 759 of 1999 in which the incumbent MP is one of the accused persons.

128. 21.18: The original record of Special Tribunal Case No. 759 of 1999 reveals the following scenario:

Date	**Position of accused Nizam Uddin Hajari in Special Tribunal Case No. 759/1999**
10.10.2001	He was recorded as absconding in this case.
02.01.2002	Application filed on his behalf for issuing Production Warrant **(P.W.)** for securing his attendance in court form Hajat. It was allowed.
13.03.2002	Bail was granted to him by the Tribunal in this case, but he was not released from hajat.
29.11.2005 04.01.2006, 08.03.2006	**On these 3(three) dates, he was produced in court from hajat pursuant to the said P.W.**
04.04.2006	**Jail authorities prayed for his transfer from Chittagong Central Jail to any other jail, but the prayer was rejected by the Tribunal.**
02.05.2006	**He was again produced in court from hajat pursuant to the said P.W.**
31.05.2006	**Application filed on his behalf for calling the P.W back.** Reasons stated are that, although he was granted bail in this case, he was required to stay in Hajat in connection with another case being Special Tribunal Case No. **257/1999,** in which also he had been granted bail.
01.06.2006	**The above application was allowed by the Tribunal and P.W. was recalled.**
06.06.2006	Accused Nijam Hajari (on bail) present in court.

129. 21.19: With regard to the correctness of the continuous stay of the incumbent MP in the jail during the period of 02.01.2002 up to 31.05.2006 as found in the above noted case, he has neither denied the above noted custody period nor furnished any information or document to controvert the said custody period.

130. 21.20: History Ticket: This document appears to be relevant for considering the date of release. Chapter XI, rules 549 to 558, of the Jail Code contains detailed provisions with regard to the History Ticket of a prisoner. These provisions require that the Jail authorities shall, for each prisoner, prepare and maintain a History Ticket in which the specified officer shall record the gist of the relevant particulars of the prisoner including the following:

(i) The date of admission of a convict prisoner to jail (rule- 556(a);
(ii) The award of Special Remission (rule 552 to be read with rule 767)

(iii)The total remission in days up to the end of each quarter (rule 556 (k);
(iv)dispatch to a court or transfer, discharge or death (rule 556(o);

131. 22.21: Rule 557 deals with the custody of the History Ticket to the effect that the ticket is to be preserved by the specified officer. However the prisoner is allowed access to it. Because he is required to show the Ticket to the Superintendent at the time of inspection of the regular parade. The Rule is quoted below *(underlines added):*

> ***"557*** *The history ticket of each prisoner shall be kept in a proper receptacle by the convict officer in whose charge he is with the prisoner whenever he is changed to another hang or work or sent to hospital. At the weekly parades each prisoner shall hold his ticket in his left hand for the Superintendent's inspection; and it shall invariably be produced with the prisoner when he is reported for an offence or brought before the Superintendent or Medical Officer for any reason, or when remission is awarded."*

132. 21.22: Rule 558 deals with the period for which a History Ticket is to be preserved. It is quoted below *(underlines added)*:

> ***"558*** *The history tickets of prisoners who died in jail shall be kept for two years after death; those of prisoners released, for one or two years at the discretion of the Superintendent. When a prisoner is transferred to another jail, his history ticket shall be sent with him"*

133. 21.23: With regard to the position of the History Ticket, the jail authorities were not specifically directed by this court to furnish detailed information. However the IG Prison has briefly stated in his report that there was a History Ticket but it was not available. The exact wording of the relevant portion of his report runs as follows:

> "কারা বিধি ১ম খন্ডের ৭৮০(৮) ও ৫৫৮ ধারা অনুযায়ী রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষণের মেয়াদ ০১ বৎসর হওয়ায় উক্ত রেয়াত কার্ড ও হিস্ট্রি টিকেট অবলোকন করার কোন সুযোগ ছিল না ----------"

134. 21.24: Other Jail documents: Be that as it may, the scheme of the Jail Code considered as a whole, show that History Ticket is just one of many documents and Registers required to be prepared and maintained by the jail authority. **Rule 1385** of Jail Code gives a list of the Jail Registers being 37 in all, including the Register of Convicts Admitted (rule 542(1), Release Diary (rule 542(3), Remission Card (Rule-780), Diary of Termination of Jail Punishment (rule 734), Gate Register of Persons (rule 328) etc.

135. 21.25: Although the jail authorities (respondent Nos. 8 and 9) could not produce the History Ticket they have furnished photocopies of the other relevant documents with regard to the admission of the incumbent MP in to Jail, and the date of release on the date claimed by them i.e. on 01.06.2006, as discussed earlier.

136. Decision On Issue No. 3:

22.00: The documents relied on by the jail authorities, namely (1) the report of the Senior Jail Super Sagir Mia (Respondent No. 9) denying the correctness of the Rejoinder dated 10.05.2014 (Annexure 1) issued by himself ,and the documents in support of his denial and (2) the reports of the IG Prison along with other Jail documents including the Release Diary, (3) the contents of the original file of Misc Petition No. 280 of 2006 of the DM, Chittagong, no doubt establish the fact of release of the incumbent MP on 01.06.2006.

137. 22.01: However, even if the above documents produced by the jail authorities are ignored, two other facts namely (1) judicial record of Special Tribunal Case No. 759 of 1999 of Special Tribunal cum Additional Metropolitan Sessions Judge Court No. 4, Chittagong showing continuous stay of the incumbent MP during period from 02.01.2002 to 31.05.06, and (2) non-denial of the said continuous stay by the incumbent MP, undisputedly establish the date of his release on 01.06.2006. **Thus it is held that-**

(a) he was released from the jail on 01.06.2006, and not on 01.12.2005, and

(b) he served out the sentence from 14.09.2000 to 01.06.2006= 2088 days (both days included)

138. 22.03: Mysterious bail order: It is further held that the incumbent MP was so released on 01.06.2006 on the basis of a mysterious bail order dated 17.05.2006 passed in a fresh Appeal being Criminal Appeal No. 1409 of 2006. This bail order is mysterious because according to the incumbent MP he did not file any such Appeal and according to the report of the Register of this court the record of that Appeal is not available yet the bail order was received by the office of the DM Chittagong and it was acted upon. So the Anti Correcption Commission is to be directed to inquire into the mystry.

139. Issue No. 4. Deduction of pre-judgment custody from sentence:

23.00: With regard to the quantum of the pre-judgment custody period of the incumbent MP, the claims and statement of the parties are as follows:

Writ Petitioner -	-144 days	-No document filed
Incumbent MP -	-143 days *(23.03.1992 to 28.07.1992)*	-No document filed
Editor Prothom Alo-	-143 days	-Informationslip delivered by Jail Super. (Annexure-4)
Jail authorities -		-Silent. *(They were not directed to report on the matter.)*

140. 23.01: Deliberation: On this Issue, **Mr. Shafique Ahmed**, the learned Advocate for the incumbent MP, submits that, according to section 35A of the Code of Criminal Procedure, 1898 **(Cr.P.C)** deduction of the period of the pre-judgment custody of an accused from the sentence of imprisonment imposed on him is mandatory and therefore the incumbent MP is entitled to that benefit.

141. 23.02: In reply, Mr. Qamrul Haque Siddique the learned Advocate for the petitioner submits that section 35A containing the deduction provision was inserted in Cr.P.C. in 2003 and therefore that section was not applicable to the judgments pronounced by the trial court on 16.08.2000 and affirmed by the Appellate Division on 27.04.2002.

142. 23.03: Discussion and Findings on Issue No. 4: Section 35A was at first inserted in the Cr.P.C. by the Code of Criminal Procedure (Amendment) Act, 1991 (No. 16 of 1991). This provision was valid up to 08.07.2003, on which date another Amending Act namely the Code of Criminal Procedure (Amendment) Act, 2003 (No. 19 of 2003) was published in the Gazette.

143. 23.04: The Amending Act No. 19 of 2003 omitted the old section 35A and substituted the new section 35A containing some changes. So for proper appreciation of the legal position, the old and new version of section 35A are quoted below *(underlines added):*

> ***OLD**: "**35A. Term of imprisonment in cases where convicts are in custody.-** Where a person is in custody at the time of his conviction and the offence for which he is convicted is not punishable with death or imprisonment for life, the Court may, in passing the sentence of imprisonment, take into consideration the continuous period of his custody immediately preceding his conviction."*
>
> ***NEW "35A: Deduction of imprisonment in cases where convicts may have been in custody.-**(1) Except in the case of an offence punishable only with death, when any Court finds an accused guilty of an offence and upon conviction, sentences such accused to any term of imprisonment, simple or rigorous, it shall deduct from the sentence of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence.*
> *(2) ----------" **(not relevant)***

144. 23.05: The expression "*the Court may, in passing the sententence of imprisonment, take into consideration"* occurring in the old section 35A clearly shows that it conferred a discretion on the Court to deduct the pre-judgment custody period from the sentence of imprisonment. On the other contrary, the expression "*it shall deduct*" occurring in the new section 35A shows that it has made the deduction mandatory.

145. 23.06: In the instant scenario, the judgment of the trial court (Special Tribunal) was admittedly passed on 16.08.2000 and it was affirmed by the High Court Division by judgment dated 20.05.2001 in Criminal Appeal No. 2369 of 2000 **(Annexure-C)** and also affirmed by Appellate Division in Criminal Petition Leave to Appeal No. 107 of 2001 by judgment dated 27.04.2002 **(Annexure-C-1)** and further affirmed by the Appellate Division by rejecting Review Petition No. 18 of 2002 by judgment dated 26.04.2004 **(Annexure-C-2).**

146. **23.07:** Thus the dates of the above noted judgments passed by of the trial court and the appellate courts show that those were passed between 16.08.2000 to 27.04.2002. This means that the **old section 35A was in force at that time**. But the trial court and the appellate courts did not exercise their discretion by way of directing deduction of the pre-judgment custody.

147. **23.08:** It is noted that neither the text of the new section 35A Cr.P.C nor any other provision of the Amending Act No. 19 of 2003 contains any provision authorizing or requiring the court to deduct the period of the pre-judgment custody with retrospective effect i.e. in relation to a period before commencement of the Amending Act of 2003 which came into operation on 08.07.2003.

148. 23.09: It follows that this Court, in exercising writ Jurisdiction, has no lawful authority to deduct the period of the pre-judgment custody of the incumbent MP under the new section 35A Cr.P.C, and more so when the judgment of the trial court has been affirmed by Appellate Division.

149. Decision on Issue No. 4:

24.00: In view of the above, **it is held that** the incumbent MP is not entitled to the deduction of the pre-judgment custody period of 143 days as claimed by him. Accordingly Issue No. 4 is decided in the negative i.e. against the incumbent MP.

150. **Issue No. 5: Remission permissible to Incumbent MP**

25.00: The real controversy on this aspect has arisen from the difference in the claims raised by the incumbent MP and the report of Jail authorities. Their respective claims are presented in the following Table:

Subject	**Claim of incumbent MP**	**Report/Affidavit of Jail authority**
Remission	(a) **General**- 557 days (b) **Special** - 343 ” (c) **Festival**, ” **holiday** etc.- 651 ” **(d) Blood** donation - 486 **Total- 2037 days** **Based on** Jail Code provisions and two Govt. circular	As per Jail Admission register : 557 days up to 3rd quarter, 2005 i.e. 30.09.2005, but the entry contains ঘষামাজা and hence ignored. As calculated by Inquiry Committee – 482 days *(up to 31.12.2004)* 143 days *(up to 01.06.2006)* **Total - 625 days** **Based On** Jail record and Jail Code provisions.
Remaining	Served+Remission=2049+ 2037 = 4086 days No remaining period	2 years 6 months 16 days = 926 days

151. 25.01: Deliberation: On this issue, **Mr. Qamrul Haq Siddique,** the learned advocate for the Writ Petitioner, submits as follows:

(a) according to rule 766 of the Jail Code, Special Remission can be awarded on yearly basis, by the Superintendent up to a maximum of 30 days and by the Government up to 60 days, but no document has been produced by the incumbent MP or by the Jail authorities about such Remission and therefore he is not entitled to Special Remission,

(b) the remission of 486 days claimed by the incumbent MP on account of blood donation is based on an Executive Order of the Government which cannot supersede the statutory Rules of Chapter XXI of the Jail Code made under the Prisons Act, 1894,

(c) according to rule 768 of the said Rules, the claim of the incumbent MP on all kinds of remission cannot exceed the maximum of $\frac{1}{4}$ (one forth) of the sentence,

(d) even if the Ordinary Remission of 557 days and the remission of 486 days on account of blood donation, as claimed by the incumbent MP, are added to the period of the sentence served out during the period from 14.09.2000 to 01.06.2006, the sum total of these periods do not cover the entire sentence of 10 days.

152. 25.02: In reply Mr. Shafique Ahmed, the learned Advocate for the incumbent MP, submits as follows:-

(a) Chapter XXI of the Jail Code, particularly **rules 756 to 760**, provide for allowing Ordinary Remission and Special Remission. **Moreover rule 689 further provides** for Remission on account of Festival days, and Public holidays, and Gazetted holidays and thus, under the said rules, the incumbent MP is entitled to three types of remission and the total quantum thereof stand as follows: **General Remission - 557 days+Special Remission - 343 days+ Festival, holiday etc – 651 days = Total = 1551 days.**

(b) The 4th type of remission on account of blood donation was added to the Remission system by two Government Circulars dated 21.10.1959 and 27.04.1978 **(Annexure-12 and 13)** and these Circulars contain an overriding expression namely "*in supersession of all previous orders*" and accordingly these were followed, as admitted in the reports of the Jail authorities, and further evidenced by the entries in the Register of Barishal Central Jail dated 24.04.2006 **(Annexure- 15)**.

(c) The Certificate of সন্ধানী **(Annexure X-4)** about blood donation by the incumbent MP on 13 dates is to be taken as correct and thus he, according to those Circulars, is entitled to a remission of 486 days and the total remission earned by him stands at 1551+486=2037 days.

(d) the summation of the sentence served out by the incumbent MP and the total remission earned by him exceeds the sentence of 10 years.

153. 25.03: Mr. Aminur Rahman Chowdhury, the learned Assistant Attorney General, submits that respondent Nos. 8 and 9 being the Jail authorities have complied with the directions of this Court by submitting their Affidavits in compliance and necessary documents.

154. 26.00: Laws on Remission: It appears that the status of the Jail Code as a law should be examined first and then the provisions of the Jail Code and also of the Prisons Act, 1894 are to be considered for deciding the quantum of remission.

155. It is noted that the issue of remission on account of blood donation as claimed by the incumbent MP on the basis certain circulars has been discussed in the later part of the judgment under appropriate heading.

156. 26.01: The Bengal Jail Code, Volume –I (7th Edition) published by the Government Press, Dhaka in 1989 "*under the authority of the Government*" contains detailed provisions with regard to management of Jails. This 7th Edition also contains the reprint of the Preface to the 5th Edition, 1910. In this Preface to 5th Edition, the then IG Prisons, Bengal has stated about the fact of first publication of the Jail Code as an "*admirable Code of Rules*" in 1864 and also about the subsequent Editions that were published to make the Jail Code consistent with various statutory laws.

157. 26.02: The Jail Code of today (7th Edition, 1989) contains provisions that are shown and numbered as rules. But the marginal notes of the rules contain reference to various Government Orders and Circular of long past, e.g. the years of 1892 (rule 10), 1912 (rule 14), 1922 (rule 98) etc. This means that these provisions were not made at a time and the text of various rules are based mainly on circulars, order etc issued by the Executive authorities at different times beginning from 1864.

158. **26.03:** This becomes further clear from the fact that none of the Chapters of the 7th Edition of the Jail Code (1989), except Chapter XXI, contains any expression about the power enabling the Government to make the rules as included in the Jail Code. Only Chapter XXI- on Remission contains the following introductory expression:

> *"In exercise of the powers conferred by section 59, sub-section (5) of the Prisons Act, 1894 (IX of 1894), the Governor-General in shortening of sentences by the grant of remissions."*

159. 26.04: Thus it is clear that, after the first publication of the Jail Code in 1864, the Prisons Act 1894 was enacted. Section 3(5) of this Act contains the definition of the expression *"remission system"* as follows:

> "3. **Definitions** – *In this Act –*
> *(1) -------- (4) ------- (not relevant)*
> *(5) "**remission system**" means the rules for the time being in force regulating the award of marks to, and the **consequent shortening of sentences of**, prisoners in jails"*
> *(6) ----- (9) ---------- (not relevant)*

160. 26.05: Section 59 of the Prisons Act, 1894 provides for the rule making power of the Government on various matters including "**shortening of sentence**" or the "**remission system"**. The relevant clauses of section 59 are quoted below:

> ***"59. Power to make rules**: The Government may make rules consistent with this Act –*
> *(1) ------ (4) ---------- (not relevant)*
> ***(5)** for the award of marks and **the shortening of sentences***
> *(6) ---- (18) ---------- (not relevant)*
> ***(19)** for the preparation and maintenance of history ticket;*
> *(20) ---------- (not relevant)*
> ***(21)** for rewards of good conduct;*
> *(22) ------ (26) -------- (not relevant)*
> ***(27)** in regard to the admission, custody, employment, dieting treatment and release of prisoners; and*
> ***(28)** generally for carrying into effect the purposes of this Act."*

161. 26.06: It is evident, that the Rules of Chapter-XXI on Remission were made and included in the Jail Code in exerise of the Rule making power of the Government under section 59. But section 59 does not specify any particular manner of publication of the rules e.g. publication in the gazette, as is generally specified in other laws. Accordingly the Government of the time previously had, and the Government still has, the lawful authority to make rule in any form including by issuance of Circular letters.

162. **26.07:** In consideration of the above noted legal position of the Jail Code as a law, and the provisions of the Prisons Act, 1894, the issue of remission in this case is discused below with reference to the relevant provisions.

> **(1) Rule 756** generally specifies the scale of **Ordinary remission** of "*two days per month for good conduct"* and "*two days per month for industry and the due performance of the daily work imposed*."
> (2) **Rule 757** allows **Ordinary Remission** at a higher scale in lieu of the remission under rule 756. This alternative remission can be allowed up to 8 days, 7 days, and 5 days on monthly basis only to convicts acting as warders, guards and night watch man respectively.

(3) Rule 759 allows an additional **Ordinary Remission** of 3 days in each Quarter (i.e. 3 months) only to convicts who work as cooks, sweepers or who work on Sundays and other holiday.

(4) 760 allows further additional **Ordinary Remission** of 15 days to a convict in a year who has not committed any offence.

(5) Special Remission:- **Rule 765** provides for allowing Special Remission on the basis of satisfaction of the 6(six) specified criteria. **Rule 766** provides that Special remission may be awarded in one year either by the Superintendent up to 30 days, or by the Inspector-General or the Local Government up to sixty days. **Rule 767** provides that Special Remission awarded to a prisoner is to be recorded in the History Ticket by the Superintendent.

(6) Maximum Limit of Remission: Rule 768 specifies the maximum limit of remission allowable under Chapter XXI is $\frac{1}{4}$ (one fourth) of the sentence.

(7) Remission Card: Rule 774-780 deals with Remission Card and the summery of these provisions is as follows:

(a) Remission Card is to be opened at the time of admission of a convictl rule 780 (1),

(b) all remission allowed, whether Ordinary or Special, are to be recorded in the Remission Card (rule 780 (1) proviso);

(c) Remission Card must be kept ***in a special locked box, (rule 780 (5);***

(d) ***No prisoner shall*** *be allowed* ***access to any Remission Card. (rule 780 (7)***

(e) Remission Cards of released prisoners shall be preserved for one year after the release of such prisoners. **rule 774 and 780 (8);**

(h) an abstract of the Remission card is to be posted up in every barrack **(rule 775)**

(8)Festival, holiday, etc and Remission, if any: Rule 689 of Chapter XVIII declares that, in addition to Sundays, certain other days e.g. Eid days, Muharram, Christmas etc, shall be observed as gazetted holidays. But this Rule or other rules of that chapter or any other provision of the Jial Code do not allow remission due to the fact that convicts are allowed holidays on those days. This means that the convict prisoners who are otherwise required to work are simply exempted from work on holidays but without the benefit of remission of sentence.

(09) **Rule 782** generally prohibits engaging a convict sentenced to rigorous imprisonment to work on "*Sundays*" and "*the gazetted holidays"* as specified by rule 689. However as stated earlier **Rule 759** allows engaging certain convicts to work as cooks, sweeper etc on Sundays and holidays, and they are entitled to remission of three days of ordinary remission in a Quarter (i.e. 3 months), in addition to other remission.

163. **Findings on Remission under the Jail Code:-**

27.00: The provisions of the Jail Code (rule 767 and 780) require that all remissions awarded to a prisoner are to be recorded in two documents namely History Ticket of the Prisoner and Remission Card. However according to the report dated 30.06.2016 (Annexure-X-3-Series) submitted by the jail authority, these documents are not available. The relevant portion of that report runs as follows:

কারা বিধি ১ম খন্ডের ৭৮০(৮) ও ৫৫৮ ধারা অনুযায়ী রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষণের মেয়াদ ০১ বৎসর হওয়ায় উক্ত রেয়াত কার্ড ও হিস্ট্রি টিকেট অবলোকন করার কোন সুযোগ ছিল না এবং ভর্তি রেজিস্টারের রেয়াত সংক্রান্ত প্রাপ্ত তথ্য ৩য় কোয়ার্টার ২০০৫ পর্যন্ত প্রাপ্ত রেয়াত ৫৫৭ দিন ঘষামাজ থাকায় তার নির্ভরযোগ্যতা প্রশ্নের সম্মুখীন। তাই ভর্তি রেজিস্টারের তথ্য আমলে না নিয়ে সর্বশেষ নির্ভরযোগ্য তথ্য ৩১.১২.২০০৪ পর্যন্ত অর্জিত রেয়াত ৪৮২ দিন ধরে তাঁর ০১.০৬.২০০৬ খ্রিঃ তারিখে জামিনে মুক্তি গমনের পূর্বদিন পর্যন্ত কারা বিধি মোতাবেক সর্বোচ্চ আরো ১৪৩ দিন রেয়াত প্রাপ্ত হতেন (তদন্ত কমিটি কর্তৃক প্রস্তুতকৃত ক্যালকুলেশন সীট সংযুক্ত-গ)। তদন্ত কমিটির হিসাবমতে মুক্তির পূর্বদিন পর্যন্ত রেয়াত নিয়মের আওতায় তাঁর প্রাপ্ত সর্বোচ্চ রেয়াত ৬২৫ দিন বা ১ বছর ৮ মাস ২৫ দিন। উল্লেখ্য যে, কারা বিধি ৭৬৮ ধারা মোতবেক রেয়াত কখনও মূল সাজার ১/৪ অংশ অতিক্রম করবেনা।

164. 27.01: But irrespective of non-availability of the History Ticket and the Remission Card, the quantum of the remission claimed by and admissble to the incumbent MP can be a ascertained keeping in view of the provisious of the Jail Code and the materials on record. Accordingly Findings on the three counts of Remission under the Jail Code claimed by him are recorded in the following paragraphs:

28.00: Ordinary/General Remission:- On this aspect, claim of the incumbent MP about the remission of 557 days is partly admitted by the jail authority to the effect that the "ভর্তি রেজিষ্টার রেয়াত সংক্রান্ত প্রদত্ত তথ্য ৩য় কোয়াটার পর্যন্ত প্রাপ্ত রেয়াত ৫৫৭ দিন ঘষা মাজা থাকায় তার নির্ভরযোগ্যতা প্রশ্নের সম্মুখীন।……"

165. 28.01: The Jail authorities made their own calculation on the basis of সর্বশেষ নির্ভরযোগ্য তথ্য and fixed the same to 482 days up to 31.12.2004 and added another 143 days up to the date of release i.e. 01.06.2006. They calculated a total of 625 days of remission.

166. 28.02: In view of the suspicion expressed by the jail authorities in the documents available to them, it appears that their calculation may be safely ignored, except the fact of the common element namely their reference to 557 days which is also claimed by the incumbent MP. It is noted that, according to various provisions of the Jail Code the incumbent MP had access to the History Ticket (rule 557) and he also had access to the information recorded in the Remission Card (rule 774). So his claim has a basis and further evidenced by the report of the jail authorities as quoted above.

167. 28.03: Accordingly his claim about 557 days of ordinary/general remission is taken as correct up to the period of 3rd Quarter of 2005 i.e. 30.09.2005 as reported by the jail authorities. More over, as per calculation of the jail authority, some additinal ordinary remission is admissible to the incumbent MP up to the date of his release on 01.06.2006. The jail authorities calculated this period to be 143 days by taking account the $\frac{1}{4}$th rule about maximum limit as provided in rule 768.

168. 28.04: However as will be seen in the later part of this judgement, the maximum limit of remission was raised to 30% of the sentence by the circular dated 21.0.1959.

169. 28.05: So the ordinary remission permissible to the incumbent MP is fixed at 557 days up to the 3rd quarter of 2005. The ordinary/remission permissible to him after that period is recorded by taking in to consideration the said circular.

170. 29.00: Special remission: On this aspect, the incumbent MP claims 343 days of remission under rule 765. But he has not made any reference to the basis of his claim nor has he produced any document.

171. 29.01: On the contrary, the jail authorities are silent on the point of Special Remission on the ground that both the History Ticket and Remission Card are not available. In consideration of the silence of the jail authorities and the incumbent MP's access to the information about remission recorded in those two documts as per rule 557 and 775 of the Jail Code, **it is held that the claim of the incumbent MP on this count is taken as correct and that he was allowed Special Remission of 343 days.**

172. Remission on account of Festival, holiday etc:

30.00: The incumbent MP was admittedly sentenced to 10 years rigorous imprisonment. This means that he was required to do some work in jail assigned by the jail authorities. Scheme of the Jail Code shows that various classes of prisoners may be assigned with various types of work (rule 552). There are detailed provision in chapter XVI (rule 633-662) for regulating their discipline and daily works/routine.

173. 30.01: Rule 689 of the Jail Code provides that certain days being festival days and public holidays have been declared as gazetted holidays. **Rule 782** generally prohibits the work of a convict prisoner on Sundays and gazetted holidays, except in case of emergency works or self request of prisoner.

174. 30.02: Rule 757 and 759 provide that a prisoner may be engaged in works involving prison services such as cooks, sweeper, night watchman etc on Sundays and holidays and for such works additional ordinary remission is allowable. This means that the remission allowable under rule 757 or 759 on festival days and holidays are not a separate type of remission but an ordinary remission, as pointed out earlier.

175. 30.03: So from the scheme of the of Jail Code considered as a whole, particularly rule 689 specifiing the holidays, and rule 782 generally prohibiting work on holidays, rule 757 and 759 allowing additional ordinary remission for work on holidays, read with the other provisions of Chapter XXI- on Remission, it is evident that, on the holidays and festival days, a convict prisoner is generally exempted from work. But he is not entitled to the benefit of remission for such exemption from work. However if he is required to work on holidays he is entitled to a few days of additional ordinary remission only, which is again subject to the maxiumum limit.

176. So the claim of the incumbent MP about the remission of 651 days on account Festival days and holidays is not consistent with the Jail Code and hence not acceptable. **Accordingly it is held that remission on this count is not admissible to him.**

177. 31.00: Remission on account of Blood donation: As found earlier, section 59 of the Prisons Act, 1894 empowers the Government to make rule in any form e.g. by gazzette notification and also by issuing Circular letters. In exercise of that power, the Government of East Pakistan issued the Circular dated 21.05.1959 containing specific direction about allowing Remission on account of blood donation **(Annexure-12).** The said Circular is quoted below *(underlines added) :*

> ***No. 353H.J. dated 21.5.59*** *from the Assistant Secretary to the Government East Pakistan, Home (Jails), Department to the Inspector General of Prisons.*

178. **"East Pakistan, Dacca.**
***Sub**: Donation of blood to the Blood Bank by convicts in Jails in East Pakistan,*
***Ref**: His Memorandum No. 2806/G.L. dated the 29th August, 1958.*

The undersigned is directed to say that the Government, in supersession of all previous orders on the above subject, are pleased to allow the convicts in jail East Pakistan to donate blood to the Blood Bank in the Medical College Hospital, Dacca and have decided that 30 (thirty) days remission should be allowed to prisoners who donate their blood for the first time and that for each subsequent donation the remission should be 2 days in addition to the remission awarded for the immediately proceeding donation i.e. the remission for the second donation will be 32 days, for the third 34 days, for the fourth 36 days and so one subject to the following conditions.

a) *That no prisoner with a sentence not exceeding two months shall be ontitled to any such remission;*
b) *That no prisoner with a sentence exceeding two months but not exceeding three months shall be permitted to reduce his sentence to less then two months by such remission; and*
c) *That no prisoner with a sentence exceeding three months shall be permitted to reduce his sentence by more then 30 per centum by remission.*

2. Government have also decided that in addition to the remission specified in foregoing paragraphs a prisoner donating blood shall get cash allowance Rs. 1 for each donation out of the Blood Transfusion Fund.
The superintendents of all Oentral, District and Subj. may be Informed accordingly.

179. 31.01: It is evident that the Circular dated 21.05.1959 was issued containing the following features:

(a) it was issued in supersession of all previous orders,

(b) it allowed remission on account of blood donation at a specified scale, namely 30 days for the 1st time, 32 days for the 2nd time, 34 days for the 3rd times and so on with an increase of 2 days on each subsequent donation.

(c) it sets a limit of remission of the sentence, namely 30 percentum of the sentence as a whole in place of $\frac{1}{4}$ (one fourth) or 25 percentum as allowed by the existing rule 768.

180. 31.02: The above noted Circular was endorsed by the Bangladesh Government by a Circular dated 27.08.1978 **(Annexure-13)** and the scheme of blood donation was expanded to the Hospitals of all Medical Colleges and District level Hospitals. However the system of Remission on account of blood donation by prisoners was stopped by the Government as evidenced by the letter dated 23.07.2007 **(Annexure-14)**

181. **31.03:** The report the IG Prison dated 09.10.2006 **(Annexure-X-4 series)** and **Annexure-15** being the photocopy the Entries in a Register of the Barishal Central Jail dated 26.04.2006 show that the above noted Circulars had been followed in allowing remission on account of blood donation namely 30 days for the 1st time donation of a unit of blood.

182. **31.04:** In view of the above discussion, it is found that the Circular dated 21.05.1959 was in operation as a rule up to 23.03.2007. The fact of non-inclusion thereof in the Jail Code does not negate its status as an instrument having the force of law/rule made under the Prisons Act, 1894.

183. 31.05: Moreover according to the definitions of the expression "*law*" and "*existing law*" as provided in article 152 of the Constitution, though the Jail Code is a compilation of various legal instruments, including executive orders and circulars, the Jail Code is an existing law and so was the said Circular upto 23.03.2007 as part of the Jail Code.

184. 31.06: Keeping in view above legal position of the circular dated 21.05.1959, we need to look into the materials or record. The incumbent MP has produced the following certificate issued by the President and General Secretary of সন্ধানী:-

প্রশংসাপত্র

এই মর্মে প্রত্যয়ন করা যাইতেছে যে, নিজাম উদ্দিন হাজারী, পিতা- জয়নাল আবেদীন হাজারী, আইডি নং ৪১১৪/এ কারাঅন্তরীন থাকাকালীন চট্টগ্রাম কেন্দ্রীয় কারাগারে গত ১৪/১২/২০০০ ইং হইতে ১৫/০৯/২০০৫ ইং সময়ের মধ্যে আত্মমানবতার সেবায় নিয়োজিত হইয়া চট্টগ্রাম কেন্দ্রীয় কারাগার কর্তৃপক্ষের মাধ্যমে ১৩ (তের) ইউনিট রক্তদান কারায় আপনাকে অত্র সংস্থার পক্ষ থেকে দেশ ও জাতির কল্যানে ভূমিকা রাখায় আন্তরিকভাবে ধন্যবাদ জ্ঞাপনসহ আপনার মঙ্গল ও উজ্জ্বল ভবিষ্যত কামনা করছি।

সভাপতি	সাধারন সম্পাদক
সন্ধানী চট্টগ্রাম মেডিকেল কলেজ ইউনিট	সন্ধানী চট্টগ্রাম মেডিকেল কলেজ উইনিট

185. **31.07:** In respect of the correctness of the সন্ধানী certificate, the Jail authorities reported as follows:

"বিস্তারিত পর্যালোচনা ও নথি পত্র যাচাই করে দেখা যায় যে, সার্কুলার নং 353-H.J. Dated. 21-5-1959 মূলে পূর্ব পাকিস্তান সরকার কর্তৃক ইস্যুকৃত স্মারকের আলোকে ও পরবর্তীতে গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের মেমো নং 581/(56)M-10/78 Dated. 27-4-1978 মূলে রক্ত দানের বিনিময় বিশেষ রেয়াত সুবিধা প্রদানের নিয়ম বহাল ছিল। এ কার্যক্রম মেডিকেল কলেজ হাসপাতাল, জেলা আধুনিক হাসপাতাল, সন্ধানী ব্লাড ব্যাংক ও রেড ক্রিসেন্ট সোসাইটির মাধ্যমে পরিচালিত হয়ে থাকতো। এ সুবিধার আওতায় বন্দীরা রক্ত দান করে বিশেষ রেয়াত প্রাপ্ত হতো; যা পরবর্তীতে স্মারক নং পিডি/পরি(সার্কুলার)/১০/২০০৭/৭৭৬(৭০) তারিখঃ ২৭-২-২০০৭ খ্রিঃ মোতাবেক রহিত করা হয। উল্লেখ্য যে, রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষনের মেয়াদ কারা বিধির ৭৮০(৮) ও ৫৫৮ এর বিধান মোতাবেক ০১ (এক) বৎসর। কয়েদী নং ৪১১৪/এ নিজাম উদ্দিন হাজারী এর হিস্ট্রি টিকেট, রেয়াত কার্ড এবং রক্তদান সংক্রান্ত কোন নথি পত্র চট্টগ্রাম কেন্দ্রীয় কারগারে খুজে না পাওয়ায় উক্ত বিষয়ে বিস্তারিত তথ্য উদঘাটন করা সম্ভব হয়নি।

কারা কর্তৃপক্ষের পত্রের প্রেক্ষিতে সন্ধানী কর্তৃপক্ষ ৩ অক্টোবর ২০১৬ খ্রিঃ তারিখ সন্ধানী চট্টগ্রাম মেকিল কলেজ শাখায় সভাপতি এবং সাধারণ সম্পাদক স্বাক্ষরিত পত্রের মাধ্যমে জানান যে, পর্যাপ্ত আর্থিক স্বচ্ছলতা, জনবল, অবকাঠামোগত সুবিধা না থাকায় এতদসংক্রান্ত রেকর্ডপত্রাদি দীর্ঘ সময় পর্যন্ত সংরক্ষণ করা দুষ্কর হওয়ায় ১৪-১২-২০০০ খ্রিঃ হতে ১৫-৯-২০০৫ খ্রিঃ পর্যন্ত সময়ের চাহিত রেকর্ড পত্রাদি ১০-১২ বছরের পুরনো বিধায় এবং তাদের কার্যালয় স্থানান্তরের সময় বিনষ্ট হয়েছে বিধায় চাহিত তথ্য প্রদানে অপারগতা প্রকাশ করে দুঃখ প্রকাশ করেছেন (কপি সংযুক্ত)। তবে সন্ধানী কর্তৃপক্ষ প্রদত্ত সনদ অস্বীকার করেননি"।

186. 31.08: Thus in consideration of the legal status of the Circular dated 21.05.1959 as an existing law allowing remission on account of blood donation and the certificate of সন্ধানী about the donation of blood by the incumbent MP on 13 dates and the report of the jail authority as quoted above, it is held that the incumbent MP is entitled to remission of 486 days as calculated by him, of course, subject to the maximum limit allowable to him. His calculation is correct as per the Circular dated 21.05.1959.

187. 32.00: Maximum Limit of Remission: A legal issue comes up about the maximum limit of remission permissible under the Jail Code and the Circular dated 21.05.1959. In this respect we have two different maximum limits, one unde rule 768 of the Jail Code and the other under para (c) of Circular dated 21.05.1959. For ready reference both the provisions are quoted below:

188. Jail Code rule 768

768*. The total remission awarded to a prisoner under all these rules shall not without the special sanction of the local Government, exceed one-fourth part of his sentence*.

Circular para (c):

c) "That no prisoner with a sentence exceeding three months shall be permitted to reduce his sentence by more then 30 per centum by remission".

189. 32.01: The question is which one should be followed in this case. The Circular dated 21.05.1959 was issued by the Government under its rule making authority under section 59 of the Prisons Act and it was given overriding effect which is apparent from the expression "*in supersession of all previous orders"*. It follows that the Circular dated 21.05.1959 added a new dimension to the Remission system by firstly allowing blood donation as a ground for remission and secondly by setting a new maximum of "*30 percentum of the sentence*"

190. 32.02: It is to be noted that this new limit does not specify the remission only on account of blood donation, rather it refers to the sentence as a whole.

191. 32.03: Considering that the Circular had the same status as that of a rule, we have no other option than holding that the maximum limit of remission was raised from 25% specified by rule 768 to 30% of the sentence.

192. 32.04: Thus it is held that the remission of 486 days is permissible to the incumbent MP on account of blood donation as allowed by the Circular. However the total amount of Remission permissible to him on all the counts is subject to the limit of 30 percentum of sentence as fixed by the same Circular.

193. 32.08: Total permissible remission:- Thus the total quantum of remission allowable to the incumbent MP stands as follow:

(1) Ordinaiary Remission *(From 14.09.2000 up to 30.09.2005)*	-557 days
(2) Further Ordinary Remission *From 01.10.2005 to 01.06.2006 = 244 days* *30% of 244= 74 days.*	-74 days
(3) Special Remission	-343 days
(4) Remission on account of blood donation	-486 days
Grand Total of all remissions	-1460 days

Total sentence= 10 years = 365×10=3650
Leap year days (2004 and 2008) = +2
Total sentence days = 3652 days.
Maximum permissible remission 30% of sentence = $\frac{3652\times30}{100}$ = 1095.60 = 1096 days.

194. Issue No. 6: Remaining period of sentence, if any:

33.00: In view of the findings and decision on the issues of remission permissible to the incumbent MP and the period of sentence served out by him, the remaining period of the sentence to be served out by him stand as follows:

(1) 10 years Imprisonment= 10×365= 3650 days
+ Leap year days (2004 and 2008) +2
Total imprisonment days 3652 days (as per calenedar)

(2) Sentence served = 2088 days
+
Permissible remission = 1096 days
Total ------ = 3184 days

(3) Remaining sentence- 3652-3184= 468 days

195. **Issue No. 7: Disputed questions of fact involved, if any**

34.00: The principal issue raised in this case is the lawful authority of the incumbent MP in holding the office of MP for the constituency of Feni- 2 resulting from the alleged disqualification arising from serving a lesser period of sentence.

196. 34.01: The reply to this principal issue depends upon decisions on the issues on (1) the deduction of prejudgement custody period of 143 days as claimed by him, (2) the period of sentence served out by him, (3) the remission permissible to him on various counts clamied by him and (4) the remaining sentence, if any. The discussion, findings and decision on those matters i.e. on issues Nos 1-6 show that no disputed questions of facts are involved on those 4(four) matters and the related issues. The reasons are briefly stated below:

(a) The issue of maintainability on account of standing of the petitioner to file this case under article 102(2)(b)(ii) **(Issue No. 1)** is a purely legal issue, and it has been held that the case is maintainable on that count. **(vide para 17-18).**

(b) The issue of maintainability on account of the bar or restriction imposed by article 125 of the Constitution **(Issue No. 2)** is purely a legal issue, and it has been held that article 125 article is not a legal bar to entertain this case and that the case is maintainable. **(vide para 19-20.22)**

(c)**The issue of date of release of the incumbent MP (Issue No. 3),** on 01.12.2005 as claimed by him or on 01.06.2006 as claimed by the Jail authority, has the flavour of a disputed question of fact. But the decision on the principal issue, namely the issue of disqualification due to the alleged remaining sentence, does not depend on the issue of any of the said two dates of release, but on the quantum of the remaining sentence **(Issue No. 6)** as determined earlier in the discussion and findings on issue Nos. 4-6.This aspect of the case is not a disputed question of fact. Because the incumbent MP admits that he was released before serving the entire 10 years. The real controversy is about the quantum of remission permissible to him.

(d) **However the issue of date of his release (Issue No. 3)** has been earlier discussed and decided for calculating the exact quantum of remaining sentence. This has been done not on the information furnished by jail authorities but on the information available in the orginal judicial record of Special Tribunal Case No. 757 of 1999 of the Special Tribunal, 4th Court of Metropolitan Addition and Session Judge. This can be lawfully

done in an inquiry process in writ juridicision under article 102(2)(b)(ii) of the constitution. That record clearly shows that he was in jail from 02.01.2002 upto 31.05.2006, and was released on 01.06.2006. This finding is further supported by the fact that, the incumbent MP has not denied or controverted his continuous stay in jail from 02.01.2002 up to 31.05.2006 as found from the record of that case. So this date has been accordingly determined to be 01.06.2006. **(vide para 21.18-21.19 and 22.00-22.03)**

(e) More over admittedly he was relased before expiry of 10 years. In such a back ground, it is the well settled principle of law that the fact of merely raising a claim different to the claim of jail authority or the finding of this court does not render it as a disputed question of fact. In fact, the date of his release as decided by this court as being on 01.06.2006 goes to his benefit in calculating the period of sentence served out by him and the quantam of remission permissible to him. If the date of his release claimed by him being 01.12.2005 is taken as correct he would be required to serve a longer period. So the issue of date release is not a disputed question of fact. **(vide para 22-22.03)**

(f) The claim of the incumbent MP about remission on three accounts namely Ordinary Remission (557 days), Special Remission (343 days) and Blood Donation (486 days) are taken as correct and lawful as discussed earlier in deciding the issue on permissible Remission **(Issue No. 5).** So there is no disputed questions of fact involved in these matters. **(vide para 25-29 and 31.00-31.05)**

(g) The claim of the incumbent MP about remission of 651 days on account Festival days and holidays under rule 649 of the Jail Code is not a disputed question fact, rather it **is purely a legal issue** and it has been discussed earlier in deciding **Issue No. 5** on permissible Remission. His claim on this count is not legally acceptable. **(vide para 30-30.03)**

(h) The claim of the incumbent MP about deduction of the prejudgment custody period of 143 days is not a disputed question of fact. It is purely a legal issue. It is has been discussed and decided against him earlier in deciding **Issue No. 4.** This matter is not a disputed question of fact and his claim is not acceptable. **(vide para 23-24)**

(i) The maximum limit of remission permissible to him is 30 percemtum of the sentence of 10 years as per the Circular dated 21.05.1959, which had the status of rule upto 23.07.2007 when operation of the said Circular dated 21.05.1959 was stopped. This is purely a legal issue as discussed earlier in deciding **Issue No. 5.** So this is not a disputed question of fact. **(vide para 32.00- 33.00)**

(j) In view of the above findings, the decision of the Indian Supreme Court in the Case of *Kurapati Maria Das vs. Dr. Ambed Seva Samajan and others (Indian kanoon .org.doc/1530123)* as referred to by Mr. Shafique Ahmed, the learned Advocate for the incumbent MP about lack of jurisdiction of a writ court in deciding disputed questions of fact is not applicable to the present case.

197. Issue No. 8 Whether the incumbent MP was disqualified to be elected:

35.00: In view of the findings and decision on the issue of the remaining period of sentence **(Isssue No. 6)** it is evident that, on the date of his release from jail on 01.06.2006, the incumbent MP (respondent No. 7) had not served out the entire sentence and that he was required to serve out the remaining sentence for another 468 days. There is nothing on record to show that, after his release on 01.06.2006, he was ever taken to jail in connection with the sentence imposed on him in Special Tribunal Case No. 757 of 1999.

198. 35.01: It follows that as per article 66(2)(d) of the Constitution he was disqualified to be nominated and elected as an MP in the election held on 05.01.2014. It is noted that article 66(2)(d) speaks of conviction for a criminal offence involving moral turpitude. The offence under section 19A and 19 (f) of the Arms Act, 1878 is such an offence. Because in the context our society the nature of the prescribed penalty namely a minimum rigorous imprison of 10 years and 7 years for illegal possession of fire arms and ammunition without licence issued by appropriate authority is an offence against the security of the society at large and also against the state and moral value in general.

199. Issue No. 9 Result of disqualification:

36.00: The result of disqualification of the incumbent MP at the time of his filing the nomination paper is that the declaration made by the Election Commission about his election held on 05.01.2014 was illegal and that he has no lawful authority to hold the office of the MP for the Constituency of Feni-2 and hence it is to be declared as vacant.

200. Conclusion:

37.00: In view of the decisions on the issue Nos. 1-9, the Rule is to be made absolute with consequential directions.

201. 37.01: In the Result the Rule nisi issued in this case is made absolute in the following terms:

(1) Respondent No.7 Nizam Uddin Hazari is hereby declared to have no lawful authority to hold the office of MP for the Constituency of Feni-2 and accordingly the said office is hereby declared to be vacant.

(2) It is further declared that the respondent No. 7 shall serve out the remaining period of sentence of 468 days from the date of his surrender or arrest in connection with Special Tribunal Case no. 757 of 1999 of the Special Tribunal (Metropolitan Additional Sessions Judge, 4th Court), Chittagong.

(3) The Anti Corruption Commission is directed to inquire into the matter of the mysterious bail alleged granted by this Court in Criminal Appeal No. 1409 of 2006 and also into the alleged use of that bail order in connection with release of Respondent No. 7 Nizam Uddin Hazari as a convict in connection with Special Tribunal Case No. 757 of 1999 and to take other actions in accordance with law.

(4) Send at once a copy of this judgment to the the Speaker of the Parliament (respondent No.1), Chief Election Commissioner (respondent No. 2), the said Tribunal and the jail authorites (respondent No. 8 and 9) and also to the Chairman, Anti Corruption Commission.

202. No order as cost.

F.R.M. Nazmul Ahasan, J: (Majority view):

203. I respectfully differ with the judgment pronounced by my senior brother, Md. Emdadul Huq, J and I am delivering the following judgment.

204. Short facts for disposal of the Rule Nisi are that the petitioner is a voter of the Constituency No.266 of Feni-2. The petitioner is a political person. He was a Councilor of word No.15, Feni Pourashava. He was Joint-Convener of Feni District Jubo League. The petitioner is a conscious citizen of the country.

205. The respondent No.7 contested in the Parliament Election in 2014 and elected as uncontested representative from the Constituency of Feni-2. A Gazette Notification was published by the Election Commission in 8th January, 2014 confirming the same. The name of the respondent No.7 was published in serial No.266 at page 228 of the Notification.

206. The petitioner came to know from the reliable sources that the respondent No.7 has made false statement in the affidavit as regards his criminal records for taking part in the National Election which has been submitted to the concerned Returning Officer, Feni. The correct information was not reflected in the affidavit though it was mandatory.

207. The petitioner has obtained a copy of the affidavit which was submitted by the respondent No.7 to the Returning Officer at the time of submitting the nomination paper for contesting the National Election at the Constituency of Feni-2 in 2014. The respondent No.7 submitted the affidavit being No.941 dated 02.12.2013 containing all material information required by the Election Commission. As per law, the information in the affidavit must be true to the best of knowledge of the deponent. However, in the affidavit in paragraph-3 (history of criminal records) at column No.7, the respondent No.7 stated that the Special Tribunal Case being No.757 of 1999 has been disposed of and he has been acquitted, which is wrong information. Actually he has deliberately suppressed the facts and eventually succeeded in becoming a Member of Parliament in the Constituency of Feni-2 in the last Parliament Election held on 05.01.2014. Earlier in the election of Feni Pourashava in 2011, the respondent No.7 also concealed information as to his criminal records referring the word 'acquitted'. The correct information as to criminal records was not mentioned in the affidavit, which is illegal and violation of the provision of law.

208. The respondent No.7 was charged under section 19(ka)(cha) of the Arms Act, 1878 in the Special Tribunal Case No.757 of 1999 arising out of Doublemuring P.S. Case No.29 dated 22.03.1992 and accordingly on 16.08.2000, the Additional Metropolitan Sessions Judge, 4th Court, Chittagong convicted and sentencing him to suffer rigorous imprisonment for 10 years and 7 years respectively both to run concurrently.

209. Thereafter, on 02.05.2001, the High Court Division dismissed the Criminal Appeal No.2369 of 2000 as preferred by the respondent No.7, Nijam Uddin Hajari. As the Criminal Appeal being dismissed, respondent No.7 preferred a Criminal Petition for Leave to Appeal being No.107 of 2001, which was also dismissed on 27.04.2002 by the Appellate Division. Thereafter, the respondent No.7 filed a Criminal Review Petition being No.18 of 2002 which was also dismissed on 26.06.2004 by the Appellate Division. After dismissal of the appeal and review the respondent has to suffer sentence as per judgment passed by the Tribunal on 16.08.2000 in Special Tribunal Case No.757 of 1999 under section 19(ka)(cha) of the Arms Act, 1878. But the respondent No.7 did not suffer the sentence by way of committing fraud.

209. On the other hand, a news item was published in 'the daily Prothom Alo' on 10.05.2014 having a title 'সাজা কম খেটেই বেরিয়ে যান সংসদ.' As per the news report, after the judgment being pronounced, the respondent No.7 surrendered to the Court on 14.09.2000 and accordingly he was sent to the Jail on the same day. It was also reported that he has been freed from the Jail on 01.12.2005 after serving 5 years 2 months and 17 days in Jail as Koyedi. As per the said news report, earlier the respondent No.7 had been in hajot for the instant case for a period of 4 months and 24 days but surprisingly as per the Koyed Register, it (hajotbas) was shown as 3 years 2 months and 25 days, which is illegal. The respondent No.7 had suffered both in hajot and Jail for a total period of 5 years 7 months and 21 days. It was reported that the duration of period of conviction of the respondent No.7 was reduced to 1 year 6 months and 17 days. In that context, it was reported that the respondent No.7 became free before 2 years 10 months and 1 day left of his actual exit date from Jail. It was also mentioned worthy that the Senior Super of the Chittagong Jail observed that it was a serious fraud made by the accused-convicted.

210. The petitioner has also obtained another confidential official records/information slip being No.654 dated 08.05.2014, which shows that the respondent No.7 has preferred another Criminal Appeal being No.1409 of 2006 dated 13.04.2006 against the judgment dated 16.03.2006 as pronounced by the Additional Sessions Judge, 4th Court, Chittagong in the Special Tribunal Case being No.757 of 1999. As the Tribunal passed judgment in Tribunal Case No.757 of 1999 in 2000 but the respondent with a malafide intension filed a fresh appeal by creating some concocted papers, which is evident from the information slip supplied by the office of the High Court Division, Dhaka.

211. As per Article 66(2)(d) of the Constitution of the People's Republic of Bangladesh, a person shall be disqualified for election as a Member of Parliament who has been on conviction for a criminal offence involving moral turpitude, sentenced to suffer imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release. Conduct of the respondent No.7 tantamount to moral turpitude for different practical reasons. Before serving out the punishment and thereby elapsing of subsequent five years, the respondent No.7 having contested the national election, hence, he may be declared disqualified for being Member of Parliament as per Articles 66(2)(d) and his seat may be vacated as per Article 67(1)(d) of the Constitution of the People's Republic of Bangladesh as well.

212. Pursuant to the show cause notice respondent No.7 appeared and filed affidavit-in-opposition with the contention that the petitioner filed this writ petition before this Court as one of the political rivals of the respondent No.7. The petitioner was the councilor of the Feni Pourashava but when the respondent No.7 elected Mayor of the Feni Pourashava, the petitioner defected to be elected as councilor of the said Pourashava and thereafter, conflict arises between the petitioner and the respondent No.7. Once upon a time, the petitioner was one of the close man of the respondent No.7 and when the respondent No.7 was inside the Jail in falsely implicated Criminal Case for the allegation of recovery of unauthorized arms in his possession and was convicted and sentenced, and the writ petitioner was the tadbirkar of the said Criminal Case up to the Appellate Division of the Supreme Court of Bangladesh. Since the petitioner is an interested person and political rival of the respondent No.7 and brought the present writ petition with malafide intention in the name of public interest litigation after 8(eight) years of release of the respondent No.7 from Jail and became elected as Mayor of Feni Pourashava and then elected as a Member of Parliament.

213. It is further contended that the respondent No.7 did not serve the sentence by way of committing fraud is not correct; that the respondent No.7 has been released from the Jail custody as per provision of the Jail Code by serving the sentence awarded against him. The respondent No.7 did not commit any wrong in filing the affidavit before the Returning Officer for participating in the National Election for the Member of Parliament and he was released from Jail after completion of the period of sentence as per provision of Jail Code and that the respondent No.7 did not suppress anything in his aforesaid affidavit.

214. The Metropolitan Sessions Judge, 4th Court, Chittagong vide judgment and order dated 16.08.1999 convicted the respondent No.7 in Special Tribunal Case No.757 of 1999 arising out of Doublemuring Police Station Case No.29 dated 22.03.1992 under section 19(a) and (f) of the Arms Act and sentenced him to suffer rigorous imprisonment for a period of 10(ten) years under section 19(a) of the said Act and further sentenced for a period of 7(seven) years under section 19(f) of the said Act concurrently. After judgment dated 16.08.1999, the respondent No.7 surrendered before the Court on 14.09.1999 and preferred appeal being Criminal Appeal No.2369 of 2000 before the High Court Division of the Supreme Court of Bangladesh. The High Court Division dismissed the appeal vide judgment and order dated 02.05.2001 and against that the respondent No.7 preferred Criminal Petition for Leave to Appeal No.107 of 2001 before the Appellate Division which was dismissed on 27.02.2002. Against the said judgment dated 27.02.2002, the respondent No.7 filed Criminal Review Petition No.18 of 2002 and the said Review Petition was dismissed on 26.06.2004.

215. The respondent No.7, after dismissal of the Review Petition served in the custody and after serving in the custody he has been released from the Chittagong Central Jail on 01.12.2005 as per the Jail Code on the basis of remission. The respondent No.10-'the daily Prothom Alo' in paragraph No.6 of its affidavit-in-compliance dated 07.07.2014 by annexing the photocopy of snap shot of remission ticket at page-26 stated that 'the reporter took some snaps of the relevant parts of Koyed Register where necessary information lies as evidence of his news' which shows that the respondent No.7 has been released from Jail on the basis of remission on 01.12.2005.

216. The respondent No.7 after releasing from the Jail contested in the Pourashava election and was elected as Mayor of Feni Pourashava on 18.01.2011. Subsequently, he has contested in the National General Election and he has been elected as a Member of Parliament on 05.01.2014 from Feni-2, Constituency No.266.

217. The present petitioner claimed in the writ petition that he filed the instant writ petition pursuant to the news item published in 'the daily Prothom Alo' dated 10.05.2014 and he annexed the judgments passed by the different courts arising out of the Criminal Case against the respondent No.7. The petitioner applied for obtaining certified copy of judgment on 13.04.2014 and also applied for information slip on 08.05.2014 which shows that the petitioner has not filed the instant writ petition with clean hand. After publication of the said news item dated 10.05.2014 in 'the daily Prothom Alo', the Jail authority vide re-joinder (প্রতিবাদ-লিপি) dated 10.05.2014 clearly stated that the respondent No.7 after serving in custody was released from Jail on 01.12.2005 on the basis of remission.

218. The petitioner stated in the writ petition annexing an information slip that the respondent No.7 was released from Jail on 01.06.2006 pursuant to an order of the High Court Division passed in Criminal Appeal No.1409 of 2006 arising out of the judgment and order

dated 16.03.2006 passed by the Additional Sessions Judge, 4th Court, Chittagong in Special Tribunal Case No.757 of 1999. But the said date of judgment and information slip is absolutely false and fabricated and not correct as the judgment of the said Special Tribunal Case No.757 of 1999 was passed on 16.08.1999. The respondent No.7 obtained information slip from the Court of Additional Sessions Judge, 4th Court, Chittagong which shows that no such case was fixed on 16.03.2006 in the Court diary and cause list for judgment or order in Special Tribunal Case No.757 of 1999. It appears from the report of the Metropolitan Sessions Judge, Chittagong that no notice or order of the High Court Division passed in Criminal Appeal No.1409 of 2006 was communicated to the concerned Court.

219. The respondent Nos.8 and 9 in their affidavit-in-compliance dated 09.09.2014 annexed a copy of bail bond in page No.13 of the said affidavit-in- compliance. Subsequently, the respondent No.8 again submitted an inquiry report annexing a bail bond before the Court on 27.03.2016, but there are some gross discrepancies in the said two bail bonds which manifestly show that both the said bonds are fake and forged and created by the petitioner in connivance with the vested quarter.

220. The judgment of Special Tribunal Case No.757 of 1999 was upheld in Criminal Appeal No.2369 of 2000 by the High Court Division which was subsequently confirmed by the Appellate Division in Criminal Petition for Leave to Appeal No.107 of 2001 and Criminal Review Petition No.18 of 2002, hence, there is no scope to prefer second appeal against the self-same judgment and as such the story of releasing of the respondent No.7 on bail in the alleged Criminal Appeal No.1409 of 2006 is not correct.

221. Since, there is no record of the alleged Criminal Appeal No.1409 of 2006 in the High court Division as such the order of bail in Criminal Appeal No.1409 of 2006 which has been annexed by respondent Nos.8 and 9 as Annexure-X-1 of the affidavit-in-compliance dated 09.09.2014 is manufactured and fabricated.

222. While the respondent No.7 was inside the Jail from 14.12.2000 till his release on 01.12.2005 has donated blood 13 times and according to special remission the respondent No.7 has got extra remission of his sentence and also earned allowance of Tk.15 for donation of blood.

223. According to Jail Code sections 549-558 there is a provision for recording history ticket for each of the prisoners where all the records of the prisoners will be recorded from the date of entry of prisoner in Jail to release from Jail but the respondent No.8 could not produce history ticket of the respondent No.7 and the report is not a complete report.

224. One Mr. Sagir Miah, Senior Jail Super, Central Jail, Chittagong under his signature dated 10.05.2014 vide letter Memo No.44.07.15.00.111.03.13.14-2511/5 dated 10.05.2014 sent to the Editor, 'the daily Prothom Alo' protesting the news published on 10.05.2014 in the heading that 'সাজা কম খেটেই বেরিয়ে যান সংসদ' and in the said protest letter claimed that "রেয়াত প্রথায় সাজা ভোগ শেষে তিনি গত ০১.১২.২০১৫খ্রিঃ তারিখ অত্র কারাগার হতে মুক্তি লাভ করেন।"

225. The petitioner filed this writ petition with malafide intention and he is not a public spirited person as well as he has no track record in the field of public interest litigation as such the present writ petition is not maintainable. The respondent No.7 did not violate any

provision of Article 66(2)(d) of the Constitution of the People's Republic of Bangladesh or provisions of RPO, hence, the Rule may be discharged for ends of justice.

226. Pursuant to the show cause notice respondent Nos.8 and 9 appeared in the case. In compliance with the order of this Court dated 16.07.2014, the Respondent Nos.8 and 9 served a copy of the affidavit-of-compliance filed by them upon the learned Advocate for the Respondent No.7 and also prepared a report dated 03.09.2014 explaining their position as to Annexure-5 series of the affidavit-of-compliance filed by the Respondent No.10 and specifying as to how Annexure-5 series of the affidavit-of-compliance of Respondent No.10 could show that "মূল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো" Giving therein on 01.12.2005 as a date and also specifying the Annexure-X of their affidavit-of-compliance as to the release of the convict on 01.06.2006.

227. This court on 26.05.2016 passed an interim order of direction in the following manner:

"In view of the above, the IG Prison (Respondent No.8) shall, within 30(thirty) days from the receipt of the copy of this order, cause and inquiry by an officer above the rank of Senior Jail Super (Md. Sagir Mia) and shall within the 30 days file an affidavit on the following matters:

a. Whether respondent No.7, Nizam Uddin Hajari was allowed any remission in connection with the sentence imposed upon him in Special Tribunal Case No.757 of 1999, and if any remission was allowed to him, the exact period of remission, a calculation sheet and the attested photocopy of the decision of the Jail authority on such remission, if any, are to be furnished with the affidavit;
b. Whether respondent No.7, Nizam Uddin Hajari has served out the entire period of imprisonment by taking into account such remission period, if allowed, and whether any period of imprisonment is remaining to be served out by him;
c. Whether the following entry about remission of Nizam Uddin Hajari is recorded in the Register of the Jail and if so recorded what was the basis of recording such entry:

"মূল সাজা রেয়াত
প্রথায় ভোগ শেষে
মুক্তি দেওয়া হলো
রেয়াত ০১-০৬-২০১৭
(স্বাক্ষর-অস্পষ্ট)
১/১২/২০০৫
সিনিয়র জেল সুপার
চট্রগ্রাম কেনদ্রীয় কারাগার ।"

d. Respondent No.8 shall also make statement in the above affidavit with regard to the report dated 27.03.2016 already sent to this Court.

Office is directed to send at once a copy of this order to respondent No.9 by Guaranteed Express Post along with the photocopy of the Annexures-1 & 5.

The Bench Officer shall furnish free of cost an attested copy of this order to the learned Advocate for writ petitioner and also to the learned Advocates for respondent Nos.7 and 10 and the learned A.A.G.
This matter will appear in the list for further order on 12th July, 2016."

228. In compliance with the order of this Court dated 26.05.2016, the respondent No.8 formed a three member enquiry committee headed by the Deputy Inspector General, Prison

and the said committee after due investigation submitted report to the respondent No.8 and on the basis of the report submitted by the enquiry committee, the respondent No.8 stated that:

a. The respondent No.7 had been brought to prison on 14.09.2000 for the purpose of serving rigorous imprisonment for 10(ten) years in Special Tribunal Case No.757 of 1999 and was released from Jail on 01.06.2006. During this period, he enjoyed the total period of remission extending to 625 days i.e. 1 year 8 months and 25 days till his release from Jail custody on 01.06.2006.
b. The respondent No.7 has not served out the entire period of imprisonment. On 01.06.2006, he was released on bail from prison in pursuance to the Order dated 31.05.2006 passed by the Additional Magistrate, Chittagong in Criminal Miscellaneous Petition No.280 of 2006 complying with the bail order passed by the Division Bench of this Court comprising by their Lordships Mr. Justice S.K. Sinha and Mr. Justice Zubayer Rahman Chowdhury in Criminal Appeal No.1409 of 2006. Still the remaining portion of punishment left to be served out by the respondent No.7 is 2 years 6 months and 16 days.
c. The lower part of inmate admission register wherein the entry regarding release of the inmate is usually made was torn. And analyzing the given quotation by this Court, it can be seen that the then Senior Jail Super Mr. Bazlur Rashid signed that. The date of signature was on 01.12.2005 but the respondent No.7 was released on 01.06.2006. Such signature might have been forged by some evil circle inside the prison for giving benefit to the respondent No.7. However, such quotation has no relevance for releasing the respondent No.7 inasmuch as he was released on bail.
d. The respondent No.8 affirms and asserts that the report dated 27.03.2016 which was produced before this Court is true and correct. It appears from the facts that the portion of inmate admission register was torn and there was over writing with respect to the remission and there was fake entry to release him by asserting that he served out the sentence after deducting the period of remission that some evil circle inside the prison committed such act. The authority is considering to inquiry into the matter. And the respondent No.8 prepared a report dated 30.06.2016 along with relevant record/file in compliance with the order of this Court dated 26.05.2016.

229. By the Order of this Court dated 31.08.2016, the respondent No.8 investigated the matter and after perusing the relevant documents prepared a report on 09.10.2016.

230. The respondent No.8 humble submits that the provision of granting special remission to the prisoner for the act of blood donation was introduced by the Government of East Pakistan promulgating Circular No.353-H.J. dated 21.05.1959 and the Government of Bangladesh continue the provision of the said special remission for the blood donation vide the office order contains in Memo No.581/(56)/M-10/78 dated 27.04.1978. The said activities of blood donation were conducted by Medical College Hospital, District Modern Hospital, Sandhani Blood Bank and Red Crescent Society. The prisoner used to get special remission on the basis of blood donation. The aforesaid special remission for blood donation has been repealed by the office order contained in Memo No.পিডি/পরি(সাকুলার)/১০/২০০৭/৭৭৬(৭০) dated 27.02.2007.

231. As per Rule 767 of the Jail Code, there is a provision for recording the reason of remission, if any, and the number of days remitted by the authority in the remission card and history card. Rule 780(8) and 558 of the Jail Code require to preserve the said remission card and history card for 1(one) year. The Chittagong Central Jail authority did not find any record

for blood donation in the file of prisoner No.4114/A Nijam Uddin Hajari, Consequently, it was not possible to discover any date regarding the matter.

232. The authority of Chittagong Central Jail contracted with Sandhani, Chittagong Medical College Unit, Chittagong for seeking a report about blood donation of Nijam Uddin Hazari, the president of the Sandhani, Chittagong Medical College Unit informed that owing to financial hardship, lack of manpower and infrastructure, it was not possible to keep the records after passing so long time and moreover, the records were damaged owing to the office shifting. They do not have any record of blood donation from the period of 14.12.2000 to 15.9.2005. But Sandhani authority did not disown the blood donation certificate which was submitted by Respondent No.7 and the Sandhani expressed regret for this kind of unintentional mistake.

233. Respondent No.10 appeared and filed affidavit. In compliance of the show cause notice it is stated that the said news item (Annexure-2), the reporter took some snaps of relevant parts of Koyed Register where necessary information lies as evidence of his news. In respect of the statements made in paragraph Nos.1-9 of Affidavit-of-compliance dated 09.09.2014 are matters of record except the re-joinder (প্রতিবাদ-লিপি) dated 10.05.2014 made by respondent No.9 & the statement 'গত ০১.০৭.২০১৪ খ্রিষ্টাব্দ তারিখ প্রথম আলো পত্রিকার চট্টগ্রাম অফিসের সিনিয়র রিপোর্টার জনাব একরামুল হকের লিখিত আবেদনের প্রেক্ষিতে নিম্বাক্ষরকারী প্রদত্ত যে সকল তথ্য' respondent No.10 (Annexure-5 series) of Affidavit-of-compliance এর মাধ্যমে মহামান্য আদালতে উপস্থাপন করেছেন, তা সঠিক নয়। made by the respondent No.9 in his report dated 03.09.2014 and hence, the respondent No.10 has no comment except to state that the respondent Nos.8 & 9 are to put to strict proof thereof. The respondent No.10 didn't receive the re-joinder(প্রতিবাদ–লিপি) dated 10.05.2014 made by respondent No.9 to be published in 'the daily Prothom Alo'. It is further stated that the respondent No.9, regarding the service of the period of sentence in Jail by the Respondent No.7, Nizam Uddin Hazari, admitted in his re-joinder(প্রতিবাদ–লিপি) dated 10.05.2014 that 'রেয়াত প্রথায় সাজা ভোগ শেষে তিনি ০১.১২.২০০৫ খ্রিঃ তারিখ অত্র কারাগার হতে মুক্তি লাভ করেন' (Annexure-X1 to Affidavit-of-compliance dated 09.09.2014) which is a focal basis to the news item dated 10.05.2014 with regard to statement 'গত ০১.০৭.২০১৪ খ্রিষ্টাব্দ তারিখ প্রথম আলো পত্রিকার চট্টগ্রাম অফিসের সিনিয়র রিপোর্টার জনাব একরামুল হকের লিখিত আবেদনের প্রেক্ষিতে নিম্বাক্ষরকারী প্রদত্ত যে সকল তথ্য' respondent No. 10 Annexure-5 series of Affidavit of compliance- এর মাধ্যমে মহামান্য আদালতে উপস্থাপন করেছেন, তা সঠিক নয়।' (Annexure-X1 to Affidavit-of-Compliance dated 09.09.2014 page-9), the deponent begs to state that this statement is false, misleading and suppression of facts as Annexure-5 series of Affidavit-of-compliance dated 07.07.2014 filed on behalf of respondent No.10 are photocopies of snaps of concerned original koyed Register where lies some necessary information relating to the service of the period of sentence in Jail by the respondent No.7, Nizam Uddin Hazari.

234. At the time of hearing, Mr. M. Qumrul Haque Siddique, the learned Senior Advocate with Mr. Sattya Ronjan Mondal, the learned Advocate appeared on behalf of the petitioner. On the other hand, Mr. Shafiq Ahmed, the learned Senior Advocate with Mr. Md. Nurul Islam Sujan, the learned Advocate appeared on behalf of the Respondent No.7. Mr. Aminur Rahman Chowdhury, the learned Assistant Attorney General appeared on behalf of the Respondent Nos.8 and 9. Mr. Aftab Uddin Siddique, the learned Advocate appeared on behalf of the respondent No.10.

235. Mr. M. Qumrul Haque Siddique, the learned Senior Advocate appearing on behalf of the petitioner submits that as per Article 66(2)(d) of the Constitution of the People's Republic

of Bangladesh, the respondent No.7 is disqualified for election as, or for being, a Member of Parliament because the conduct of the respondent No.7 tantamount to moral turpitude in context of legal interpretation and for different practical reasons as well.

236. He next submits that as per Article 12(1)(d) of the RPO, the respondent No.7 is disqualified for election as, or for being, a Member of Parliament because of an offence as regards making false statement punishable under Article 73 of the RPO. Hence, he may be declared disqualified for election as per Article 12(1)(d) of the RPO for offences under Article 73 of the RPO and effective legal measures may also be taken against him for his corrupt practice under Article 73(3)(a) of the RPO for giving false statement in the affidavit.

237. He also submits that the respondent No.7 had an obligation under Article 12, clause (3b), sub-clause (b & C) of RPO, 1972 to submit true information as regards present and past criminal records of the candidate in the affidavit but he did not honestly disclose all the material and true information in the affidavit, which is clear violation of the above mentioned Article 12 (3b) (b & c) of the RPO, 1972. Hence, holding the present post by the respondent No.7 may be declared illegal.

238. He further submits that the respondent No.7 should be declared as disqualified because, under Article 63(1) (b & c) of the RPO, 1972 the High Court Division has authority to declare the election of any returned candidate to be void if, it is satisfied that the returned candidate was not, on the nomination day, qualified for, or was disqualified from, being elected as a member or the election of the returned candidate has been procured or induced by any corrupt and illegal practice.

239. He next submits that the respondent No.7 after failing in his all legal steps up to the Hon'ble Appellate Division preferred Criminal Appeal No.1409 of 2006 in this Court on 17.05.2006 and subsequently released from the Jail custody on 01.06.2006. As he was convicted and sentenced to suffer rigorous imprisonment for 10 years and 7 years concurrently and he surrendered on 14.09.2000 before the trial Court and sent to Jail custody and thereafter, he was released on bail on 01.06.2006. Thus, he was in Jail for 5 years 8 months and 19 days and if, he got the highest remission as per Jail Code, 1894 i.e. 60 days per year he will get remission with the sentenced 10 years for 600 days and in this way he has to be in the custody about 916 days more, which has not yet been served out. He further submits that according to section 568 of the Jail Code, 1894 the petitioner will not get remission more than one third of the entire sentence.

240. Mr. Shafiq Ahmed, the learned Senior Advocate along with Mr. Md. Nurul Islam Sujon, the learned Advocate appearing on behalf of the respondent No.7 submits that the Writ Petition is not maintainable as the petitioner is one of the political rival of the respondent No.7 who was a Councilor of the Feni Pourashava when the respondent No.7 was elected as Mayor of the said Pourashava and thereafter, conflict arises between the petitioner and respondent No.7 and since the petitioner is an interested person and political rival of the respondent No.7, Writ Petition brought with malafide intention after 8 years of released of the respondent No.7 from the Jail and became elected as Mayor of Feni Pourashava and thereafter, elected as a Member of Parliament.

241. He further submits that the respondent No.7 did not commit any fraud in order to get remission from the Jail and he has been released from the Jail custody as per provision of the Jail Code after serving sentence awarded against him and on remission. Thus, the question

raised by the petitioner is a disputed question of fact which is brought with malafide intention.

242. He next submits that a news which has been published in 'the daily Prothom Alo' and the allegation made by the petitioner and the respondent Nos.8 and 9 that he has not served out the entire period of sentence is a matter of calculation about the period of Jail custody of the respondent No.7 and all are disputed question of facts which cannot be resolved in the writ petition.

243. He also submits that the respondent No.7 did not file any Criminal Case so far known to him other than the Criminal Case in which he was convicted and preferred appeal and it was upheld by the Appellate Division and the respondent No.7 released from jail custody on 01.12.2005. Thus, this matter is also a disputed question of fact which cannot be resolved in the writ petition.

244. He next submits that the respondent No.7 did not commit any wrong in filing the aforesaid nomination paper before the Returning Officer i.e. for the Member of Parliament and he was released from jail after served out his sentence and on remission as per provision of Jail Code and the respondent No.7 did not suppress anything in his aforesaid affidavit.

245. He also submits that the respondent Nos.8 and 9 could not produce the history ticket in which the blood donation of the respondent No.7 was recorded and the report submitted by the respondent Nos.8 and 9 is not a complete report without placing the proof of blood donation which was recorded in the history ticket. Thus, on the basis of the aforesaid report, which is a disputed one, cannot be said that the respondent No.7 did not serve out the entire period which is claimed by the petitioner and the calculation of the remission awarded by the respondent No.7 by donation of blood is a disputed question of fact, as the respondent No.7 claimed that he has served out entire period of sentence with remission and the respondent Nos.8 and 9 claimed that he did not serve out the entire period of sentence is a highly disputed question of fact which cannot be resolved in the writ petition.

246. Mr. Aminur Rahman Chowdhury, the learned Assistant Attorney General appeared on behalf of the respondent Nos.8 and 9 and placed the affidavit-of-compliance dated 10.07.2014, 30.06.2016 and 09.10.2016 and submits that upon a direction, the respondent No.8 formed a 3 members inquiry committee and on the basis of the report submitted by the inquiry committee it appears that the respondent No.7 was released from jail on 01.06.2006 and during this period, he enjoyed the total period of remission extending to 625 days i.e. 1 year 8 months and 25 days till his release from jail on bail and has not served out the entire period of imprisonment and the remaining portion of punishment left to be served out by the respondent No.7 is 2 years 6 months and 16 days.

247. Learned A.A.G. placing the report of the jail authority submits that the Rules 780(8) and 558 of the Jail Code require to preserve the said remission card and history card for 1 year. The Chittagong Central Jail authority did not find any record for blood donation in the file of prisoner No.4114/A Nijam Uddin Hajari. Consequently, it was not possible to discover any data regarding the matter.

248. In this regard, he next submits that the Sandhani authority, Chittagong Medical College Unit informed that they do not have any record of blood donation from the period of

14.12.2000 to 15.09.2005 but admit certificate which was submitted by the respondent No.7 and the Sandhani expressed regret for this kind of unintentional mistake.

249. Mr. Aftab Uddin Siddique, the learned Advocate appearing on behalf of the respondent No.10 and submits that the news item published in 'the daily Prothom Alo' dated 10.05.2014 under the heading 'সাজা কম খেটেই বেরিয়ে যান সংসদ' is an authentic news which was published for public interest maintaining all ethics and norms of Journalism.

250. He next submits that after the publication of the aforesaid news item dated 10.05.2014, neither the respondent No.7 nor Chittagong Central Jail Authority denied the allegations or information made in the news item; or sent any re-joinder(প্রতিবাদ-লিপি) against the news item to Prothom Alo; which establishes the authenticity of content of the news item, but after filing of the present writ petition the respondent No.9 has stated, "গত ১০/০৫/২০১৪খ্রিঃ তারিখ দৈনিক প্রথম আলো পত্রিকায় 'সাজা কম খেটেই বেরিয়ে যান সংসদ' প্রকাশিত বক্তব্য সঠিক নহে" Which is nothing but an ill motivated trial to run the original fact into another direction. The respondent No.10 didn't receive the rejoinder (প্রতিবাদ-লিপি) dated 10.05.2014 made by the respondent No.9 to be published in 'the daily Prothom Alo'. The respondent No.9 regarding the service of the period of sentence in jail by the respondent No.7, Nizam Uddin Hazari, admitted in his re-joinder(প্রতিবাদ-লিপি) dated 10.05.2014 that, "রেয়াত প্রথায় সাজা ভোগ শেষে তিনি ০১/১২/২০০৫খ্রিঃ তারিখ অত্র কারাগার হতে মুক্তি লাভ করেন" which is a focal basis to the news item dated 10.05.2014.

251. We have heard the learned Advocates for the respective parties, perused the writ petition with supplementary affidavits and affidavits-in-reply, affidavits-in-compliance and other documents on record. It appears from the aforesaid facts and circumstances of the case that the respondent No.7 was convicted under section 19(a) and (f) of the Arms Act and sentenced to suffer rigorous imprisonment for a period of 10 years under section 19(a) of the said Act and further sentenced for a period of 7 years under section 19(f) of the said Act concurrently in Special Tribunal Case No.757 of 1999 passed by the judgment dated 16.08.1999. Thereafter, the respondent No.7 surrendered before the Court on 14.09.1999 and preferred appeal being Criminal Appeal No.2369 of 2000 before the High Court Division which was dismissed on 02.05.2001. Against which the respondent No.7 preferred Criminal Petition for Leave to Appeal No.107 of 2001 which was also dismissed on 27.02.2002. Against that, a Criminal Review Petition No.18 of 2002 was filed and the same was dismissed on 26.06.2004.

252. Admittedly, the respondent No.7 contested the Pourashava election and elected as Mayor of Feni Pourashava in the year of 2011 and thereafter, elected as Member of Parliament from Feni-2, Constituency No.266 dated 05.01.2014 and has been performing as a Member of Parliament.

253. On 10.05.2014 'the daily Prothom Alo' a daily newspaper published a news that,

'সাজা কম খেটেই বেরিয়ে যান সংসদ'
মনে হচেছ এটা জালিয়াতি ।
নিজাম হাজারী দুই বছর দশ মাস এক দিন কম
কারা ভোগ করে বেরিয়ে গেছেন ।
মোঃ ছগির মিয়া
চট্রগ্রাম কারাগারের জ্যেস্ঠ সুপার ।

254. From Annexure-5 series of the respondent No.10 a snap of 'the daily Prothom Alo' was annexed wherein it is found that,

"মূল সাজা রেয়াত
প্রথায় ভোগ শেষে
মুক্তি দেওয়া হলো
রেয়াত ০১-০৬-২০১৭
(স্বাক্ষর-অস্পষ্ট)
১/১২/২০০৫
সিনিয়র জেল সুপার
চট্রগ্রাম কেনদ্রীয় কারাগার ।"

255. The writ petitioner filed the writ petition and Rule Nisi was issued on 08.06.2014. The allegation was brought against the respondent No.7 in the writ petition is that the respondent No.7 was convicted and sentenced to suffer rigorous imprisonment for 10 years and 7 years concurrently meaning that he had to suffer 10 years in Jail, i.e. the respondent No.7 had suffered both in hajot and Jail for a total period of 5 years 7 months and 21 days and the duration of period of conviction of the respondent No.7 was reduced to 1 year 6 months and 17 days as per news report. In that context, it appears that the respondent No.7 became free almost 2 years and 10 months long before of his actual exit date from Jail, i.e. before finality of serving out his punishment, the respondent No.7 came out of the jail and contested the national election in 2014 from Feni-2 Constituency and as per Article 66(2)(d) of the Constitution of the People's Republic of Bangladesh, a person shall be disqualified for election as a Member of Parliament who has been on conviction for a Criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release and before serving out the punishment and thereby elapsing of subsequent five years, the respondent No.7 contested the national election and making false statement in the affidavit of the nomination paper and as such he may be declared disqualified for election as per Article 12(1)(d) of the RPO for offences under Article 73 of the RPO and holding the present post by the respondent No.7 is unlawful and may be declared illegal.

256. The respondent No.7 denied the allegation made in the writ petition stating that he has been released from Jail on 01.12.2005 after serving the sentence and getting remission from the Jail authority. This contention of the respondent No.7 is particularly supported by the respondent No.10 which published a news with a snapshot of the register of Chittagong Jail authority signed by the Senior Jail Super, Chittagong Central Jail that, "মূল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো রেয়াত ০১-০৬-২০১৭ (স্বাক্ষর-অস্পষ্ট) ১/১২/২০০৫ সিনিয়র জেল সুপার চট্রগ্রাম কেনদ্রীয় কারাগার ।" but this fact is denied by the respondent Nos.8 and 9 in their affidavit-in-compliance, they have stated that the respondent No.7 was released from jail on bail on 01.06.2006 in Criminal Appeal No.1409 of 2006 from the High Court Division.

257. From Annexure-X of the respondent Nos.8 and 9 Md. Sagir Mia, Senior Jail Superintendent, Chittagong Central Jail submitted that, 'কারাগার হতে সাজা কম খেটে বেরিয়ে যাওয়ার কোন সুযোগ নেই । বর্ণিত কয়েদী নিজাম হাজারী অত্র কারাগার হতে সাজা ভোগরত অবস্থায় মহামান্য আদালতের আদেশ মোতাবেক জামিনে মুক্তি লাভ করেন ।' and he begs apology for his earlier re-joinder(প্রতিবাদ-লিপি) that the respondent No.7 was released on 31.12.2005 from the jail on remission.

258. From the report dated 30.06.2016 filed by the respondent No.9 that, 'কয়েদি নং ৪০১৪/এ জনাব নিজাম উদ্দীন হাজারী সম্পর্কিত চট্টগ্রাম কেন্দ্রীয় কারাগারের ভর্তি রেজিস্টার নিরীক্ষা করে দেখা যায়,

উক্ত প্রষ্ঠায় নীচের কোনায় একটি বড় অংশ ছেড়া কয়েদি ভর্তি রেজিস্টারের ২৫ নং কলামে যেখানে বন্দি মুক্তি সংক্রান্ড় তথ্য লিপিবদ্ধ করা হয় সেই অংশটুকুই ছেড়া (ছায়ালিপি সংযুক্ত-ঙ)।
ভর্তি রেজিস্টারের মুক্তি সংক্রান্ড় তথ্য লিপিবদ্ধ সংক্রান্ড় কলামের অংশটুকু ছেড়া থাকা, ভর্তি রেজিস্টারে রেয়াত সংক্রান্ড় তথ্য ঘষামাজা থাকা, মূল সাজা রেয়াত প্রথায় মুক্তি দেয়া হলো মর্মে ভুয়া এন্ট্রি ইত্যাদি বিষয়গুলো পর্যবেক্ষণ করে প্রতীয়মান হচ্ছে কারাগারের কোন দুষ্ট চক্রের মাধ্যমে কোন অবৈধ উদ্দেশ্য/হীন স্বার্থ চরিতার্থ করার মানসে এ মিথ্যা ঘটনাসমূহ সাজানো হয়েছে। জনাব নিজাম উদ্দীন হাজারী ২০১১ সালে পৌরসভা নির্বাচনে আইনগতভাবে মনোনয়ন দাখিলের শর্ত পূরণার্থে ৫ বছর পূর্বে কারা মুক্তির কোন প্রত্যয়ন সংক্রান্ড় তথ্য বা নথি যদি কারা কর্তৃপক্ষ বা বিজ্ঞ বিচারিক আদালত কর্তৃক নির্বাচন কমিশনে উপস্থাপিত হয়ে থাকে তবে তা নিরীক্ষণ করার প্রয়োজন রয়েছে এবং তার জন্য একটি সমন্বিত তদন্ড় কমিটি গঠনের প্রয়োজনীয়তা বিবেচিত হচ্ছে।'

259. From Annexure-X dated 09.10.2016, report of the IG Prison it appears that, 'উপরোক্ত সার্কুলার মূলে রক্তদানের বিনিময় কোন কয়েদী আসামীর প্রাপ্ত বিশেষ রেয়াত সুবিধা বিস্ড়ারিত কারা বিধি ৭৬৭ এর বিধান মোতাবেক বন্দীর রেয়াত কার্ড ও হিস্ট্রি টিকেটে রেয়াত প্রদানের কারণ ও প্রাপ্ত রেয়াতের পরিমাণ উলে- খ থাকতো। উলে- খ্য যে, রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষণের মেয়াদ কারা বিধির ৭৮০ (৮) ও ৫৮৮ এর বিধান মোতাবেক ০১ (এক) বৎসর। কয়েদী নং ৪১১৪/এ নিজাম উদ্দিন হাজারী এর হিস্ট্রি টিকেট, রেয়াত কার্ড এবং রক্তদান সংক্রান্ড় কোন নথি পত্র চট্টগ্রাম কেন্দ্রীয় কারাগারে খুজে না পাওয়ায় উক্ত বিষয়ে বিস্ড়ারিত তথ্য উদঘাটন করা সম্ভব হয়নি। চট্রগ্রাম কেন্দ্রীয় কারাগারে জনাব নিজাম হাজারীর রক্ত দান সংক্রান্ড় কোন তথ্য না পাওয়ায় কারা কর্তৃপক্ষ এ বিষয়ে প্রতিবেদন প্রেরণের জন্য সন্ধানী, চট্টগ্রাম মেডিক্যাল কলেজ ইউনিট, চট্টগ্রাম বরাবরে পত্র মারফত যোগাযোগ করেন।
সন্ধানী এক পত্রের মাধ্যমে জানায় যে, ১৪-১২-২০০০ খ্রিঃ হতে ১৫-০৯-২০০৫ খ্রিঃ পর্যন্ড় সময়ের চাহিত রেকর্ড পত্রাদি ১০-১২ বছরের পুরনো বিধায় এবং তাদেও কার্যালয় স্থানান্ড়রের সময় বিনষ্ট হয়েছে বিধায় চাহিত তথ্য প্রদানে অপারগতা প্রকাশ করে দু:খ প্রকাশ করেছেন । তবে সন্ধানী কর্তৃপক্ষ প্রদত্ত সনদ অস্বীকার করেননি।'

260. From the aforesaid report of the respondent Nos.8 and 9 it appears that the respondent Nos.8 and 9 admitted that the information record in the admission register was torn and it was done by some dishonest clique and to find out the real fact, an inquiry committee may be formed and it further reveals that there is no existence of history ticket wherein the elaborate information of blood donation of the prisoner is recorded. There is no information about the blood donation in the record of the Chittagong Central Jail. The Sandhani authority also could not produce any record though they did not deny their certificate about the blood donation.

261. From Annexure-10, it appears that during his custody in jail from 14.09.2000 to 01.12.2005 respondent No.7 donated blood in total 13 times through the Chittagong Jail authority to the Sandhani, a renowned charitable organization of medical students, and thereby obtained special remission under Code No.765 of the Jail Code, but the respondent No.8 did not count the said special remission. From the certificate dated 06.10.2005 given to the respondent No.7 by Sandhani (Annexure-9) has been annexed with the affidavit-in-reply of the respondent No.7 to the affidavit-in-compliance of the respondent No.8, a certificate was also given to the respondent No.7 by the Sandhani authority which quoted below:

প্রশংসাপত্র

এই মর্মে প্রত্যায়ন করা যাইতেছে যে, নিজাম উদিদন হাজারী, পিতা-জয়নাল আবেদীন হাজারী, আইডি নং-৪১১৪/এ কারান্তরীন থাকাকালীন চট্রগ্রাম কেনদ্রীয় কারাগারে গত ১৪-১২-২০০০ খ্রিঃ হতে ১৫-০৯-২০০৫ খ্রিঃ পর্যন্ড় সময়ের মধ্যে আত্মমানবতার সেবায় নিয়োজিত হইয়া চট্রগ্রাম কেনদ্রীয় কারাগার কর্তৃপক্ষের মাধ্যমে ১৩ (তের) ইউনিট রক্তদান করায় আপনাকে অত্র সংস্হার পক্ষ থেকে দেশ ও জাতির কল্যাণে ভূমিকা রাখায় আন্তরিকভাবে ধন্যবাদ জ্ঞাপনসহ আপনার মংগল ও উজ্বল ভবিষ্যত কামনা করছি।

স্বাক্ষর স্বাক্ষর
সভাপতি সাধারণ সম্পাদক

সন্ধানী, চট্টগ্রাম মেডিক্যাল কলেজ ইউনিট, সন্ধানী, চট্টগ্রাম মেডিক্যাল কলেজ ইউনিট,

262. The total extra remission of sentence as per the circular has been calculated as follows:

For 1st time ---------- 30 days
2nd time ---------- 32 days
3rd time ---------- 34 days
4th time ---------- 36 days
5th time ---------- 38 days
6th time ---------- 40 days
7th time ---------- 42 days
8th time ---------- 44 days
9th time ---------- 46 days
10th time ---------- 48 days
11th time ---------- 50 days
12th time ---------- 52 days
13th time ---------- 54 days
Total 13th times ---------- 486 days

263. For proper adjudication of the matter, let us examine the Articles 65 & 66 of the Constitution of the People's Republic of Bangladesh and other provisions of the RPO, which reads as follows:

পঞ্চম ভাগ
আইন সভা
প্রথম পরিচ্ছেদ-সংসদ

সংসদ প্রতিস্ঠা ৬৫।(১) জাতীয় সংসদ নামে বাংলাদেশের একটি সংসদ থাকিবে----------

সংসদে নির্বাচিত হইবার যোগ্যতা ও অযোগ্যতা

৬৬। (১)----------

(২) কোন ব্যক্তি সংসদের সদস্য নির্বাচিত হইবার এবং সংসদ সদস্য থাকিবার যোগ্য হইবেন না, যদি

(ক)----------
(খ)----------
(গ)----------
(ঘ) তিনি নৈতিক স্খলনজনিত কোন ফৌজদারী অপরাধে দোষী সাব্যস্ত হইয়া অন্যূন দুই বৎসরের কারাদনেড দনিডত হন এবং তাঁহার মুক্তিলাভের পর পাঁচ বৎসরকাল অতিবাহিত না হইয়া থাকে;

264. The Representation of the People Order, 1972 (Amendment 2007), section:

"12.(1) Any elector of a constituency may propose or second for election to that constituency, the name of any person qualified to be a member under clause (1) of Article 66 of the Constitution:

(a)…….

[(ai) is a person who is convicted of an offence punishable under Articles 73, 74, 78, 79, 80, 81, 82, 83, 84 and 86, and sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since the date of his release;

265. Article 15 of the Representation of the People Order, 1972 (Amendment 2007) provides as under:

"15. (1) The Returning Officer shall, after the scrutiny of nomination papers, prepare and publish in the prescribed manner a list of candidates who have been validly nominated."

266. Chapter V (Election Disputes) of the Representation of the People Order, 1972 (Amendment 2007) provides sections 49, 51 and 57 as under:

49.(1) No election shall be called in question except by an election petition presented by a candidate for that election in accordance with the provisions of this Chapter.

(2) An election petition shall be presented to the High Court Division within such time as may be prescribed.

51.(1)Every election petition shall contain-

(a)……

(b)full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice or illegal act and the date and place of the commission of such practice or act; and

(2) A petitioner may claim as relief any of the following declarations, namely-

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

(3) Every election petition and every schedule or annex to that petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings.

57.(1)Subject to the provisions of this Order and the rules, every election petition shall be tried, as nearly as may be, in accordance with the procedure for the trial of suits under the Code of Civil Procedure, 1908;

(2)Subject to the provisions of this Order the evidence Act, 1872, shall apply for the trial of an election petition.

267. The present petitioner stated in the writ petition by annexing an information slip (Annexure-E to the writ petition) that the respondent No.7 was released from Jail on 01.06.2006 pursuant to an order of the High Court Division passed in Criminal Appeal No.1409 of 2006 arising out of the judgment and order dated 16.03.2006 passed by the learned Additional Sessions Judge, 4th Court, Chittagong in Special Tribunal Case No.575 of 1999. But the respondent No.7 filed an information slip from the Court of the learned Additional Sessions Judge, 4th Court, Chittagong which shows that no such case was fixed on 16.03.2006 in the court diary and cause list for judgment or order in special Tribunal Case No.757 of 1999. The High Court Division asked for report of the learned Metropolitan Sessions Judge, Chittagong and it appears from the report of the learned Metropolitan Sessions Judge, Chittagong dated 23.03.2016 that no notice or order of the High Court Division passed in Criminal Appeal No.1409 of 2006 was communicated to the concerned Court.

268. The High Court Division asked for report of the Inspector General (Prison), i.e. the respondent No.8 and it appears from the report submitted by the respondent No.8 that the respondent No.7 was released bail on 01.06.2006 in Criminal Appeal No.1409 of 2006. But the learned Metropolitan Sessions Judge, Chittagong in his report clearly stated that no notice or order of bail/admission/call for record passed by the High Court Division in the said Criminal Appeal was communicated to the concerned court.

269. The respondent No.8 and respondent No.9 (Senior Jail Super, Chittagong Central Jail) in their affidavit-in-compliance dated 09.09.2014 annexed a copy of bail bond in page No.13 of the said affidavit-in-compliance. Subsequently, the respondent No.8 again submitted an inquiry report annexing a bail bond before the Court on 27.03.2016, but there are some gross discrepancies in the said two bail bonds. Some of the discrepancies are given in the table below:

SI	Copy of bail bond annexed with affidavit-in-compliance of respondent Nos. 8 and 9 dated 9.9.2014	Copy of bail bond submitted by respondent No.8 on 27.3.2016
Nature of Case	Tick mark on appeal	Tick marks on both appeal and revision
Section	19(f)	19(a) and 19(f)(Ka)
Name of the District	X	Feni
Appeal Number	X	1409/06
Signature of the accused	X	
Seal of the court of District Magistrate	X	
Signature of the Advocate	Not Same	Not same
Alignment	Not same	Not same

270. From the above discrepancies it may be presumed that the report and documents before this Court are not admitted rather disputed and beyond reasonable doubt.

271. The High Court Division vide order dated 26.05.2016 further directed the respondent No.8 i.e. IG Prison, to submit the attested photocopy of the decision of the jail authority on the remission given to the respondent No.7. But the respondent No.8 has submitted only a calculation sheet without submitting the decision on remission. The calculation sheet prepared by the respondent No.8 does not reflect the actual remission given to the respondent No.7 since the respondent No.8 has prepared the calculation sheet as per 1st part of the Jail Code in relation to the remission (general remission) partially counting the remission of respondent No.7. The respondent No.8 in its calculation sheet has not considered the special remission as laid down in the 2nd Part of the Jail Code in relation to the remission, i.e. Code No.765. The respondent No.8 also has not considered any Gazette leave and weekly holidays as laid down in Code No.689 of the Jail Code (ধর্মীয় আচার). The respondent No.8 also has not considered previous custody of the respondent No.7 served from 22.03.1992 to 28.07.1992 in connection with the Special Tribunal Case. The above mentioned remission has been recorded in the history ticket of the respondent No.7 as per Code No. 556 of the Jail Code which has been kept with the jail authority.

272. The calculation report on remission submitted by the respondent No.8 does not reflect the actual remission as the respondent No.8 admittedly stated in its calculation report/sheet, ‘ কারা বিধি ১ম খন্ডের ৭৮০(৮) ও ৫৫৮ ধারা অনুযায়ী রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষণের মেয়াদ ১ বৎসর হওয়ায় উক্ত রেয়াত কার্ড ও হিস্ট্রি টিকেট অবলোকন করার কোন সুযোগ ছিল না।’ In this regard Code No.558 of the Jail Code provides, ‘কোন বন্দী কারাগারে মারা গেলে তার হিস্ট্রি টিকেট মৃত্যুর পর দুই বছর পর্যন্ড় সংরক্ষিত

থাকবে। সাজাপ্রাপ্ত বন্দীর মুক্তির পর এক বা দুই বছর পর্যন্ড় তার হিস্ট্রি টিকেট সংরক্ষিত থাকবে।' The Code No.774 of the jail Code further provides " যে সব সাজাপ্রাপ্ত বন্দী মুক্তি পেয়ে যাবে তাদের রেয়াত কার্ড (জেল ফরম-১৮) এক বছর কারাগারে সংরক্ষণ করতে হবে।" As admittedly the respondent No.8 has destroyed the remission card and history ticket after 1(one) of releasing the respondent No.7. It appears that the respondent No.7 was released from the jail after serving out his sentence on the basis of remission on 01.12.2005 (as evidence from the remission register namely রেয়াত টিকেট-১৮ annexed as Annexure-1 to the supplementary affidavit on behalf of respondent No.7 dated 18.05.2016). It is necessary to mention here that after publication of the news item dated 10.05.2014 in 'the daily Prothom Alo' regarding release of respondent No.7 from Jail, the Jail authority vide re-joinder(প্রতিবাদ-লিপি) dated 10.05.2014 signed by Senior Jail Super, Sagir Mia clearly stated that the respondent No.7 after serving in custody was released from Jail on 01.12.2005 on the basis of remission. The respondent No.8 does not disown the said re-joinder(প্রতিবাদ-লিপি) dated 10.05.2014.

273. The statement of the respondent No.8 regarding preferring Criminal Appeal being No.1409 of 2006 by the respondent No.7 and releasing him on bail is also a disputed question of fact. As mentioned above, the learned Metropolitan Sessions Judge, Chittagong submitted a report dated 23.03.2016 clearly stating that no notice or order of High Court Divison passed in Criminal Appeal No.1409 of 2006 was communicated to the concerned Court. Moreover, if any prisoner prefers any appeal to the High Court Division than Code No.605 of the Jail Code provides, 'যখন কোন বন্দী হাইকোর্ট আপীল করে তখন জেল সুপার উক্ত আপীলের বিষয়ে দায়রা আদালতকে (এম)১০৫ নম্বর হাইকোর্ট ফরমে অবহিত করবেন।' But the Chittagong Jail authority never informed the special Tribunal about the said Criminal Appeal No.1409 of 2006 which further creates a doubt whether such appeal was preferred by the respondent No.7. Hence, the claim of the respondent No.8 that the respondent No.7 was released on bail is also a disputed question of fact.

274. The respondent No.8 has admitted that 'the lower part of inmate admission register wherein the entry regarding release of the inmate is usually made was torn'. The respondent No.8 has also admitted that the remission ticket on 01.12.2005 has been signed by the then Senior Jail Super Mr. Bazlul Rashid from where it appears that the respondent No.7 has been released from jail on 01.12.2005 on the basis of remission.

275. It appears that the petitioner alleged that the respondent No.7 is disqualified from the time of filing nomination paper as a candidate of the Member of Parliament by making false statements.

276. Article 66(2) of the Constitution of the People's Republic of Bangladesh and the Article 12(1)(d) of the RPO relates to the election disputes triable before the election Tribunal. These factual aspect of the writ petition which discussed above are not admitted rather, it is disputed in different aspect and without taking evidence about the disputed fact of date of release of the respondent No.7 from Jail custody, the calculation of blood donation to the Sandhani and the special remission provided in the Jail Code which is recorded in the history ticket, it cannot be decided in a summary proceeding in the writ petition.

277. Articles 57(1) and (2) of the RPO provides that:

"57.(1)Subject to the provisions of this Order and the rules, every election petition shall be tried, as nearly as may be, in accordance with the procedure for the trial of suits under the Code of Civil Procedure, 1908;

(2)Subject to the provisions of this Order the evidence Act, 1872, shall apply for the trial of an election petition."

278. In this respect Article 125 of the Constitution of Bangladesh is very much applicable in the facts and circumstances of the case. Particularly, the facts and circumstances arises in the writ petition is a clear bar as this type of dispute cannot be decided without any evidence both oral and documentary. If we read Articles 102 and 125 of the Constitution together with Article 66 of the Constitution and relevant sections 12, 15, 49, 57 of the RPO, it may be presumed that the disputes of the present writ petition cannot be decided without any trial in accordance with Article 57(1) and (2) of the RPO. As the disputed facts arises which is discussed above which came before this Court on making inquiry and report, it is not clear in which report is correct. The respondent No.7 claims that he has been released from jail custody on 01.12.2005. The respondent Nos.8 and 9 in their report stated that the respondent No.7 was released on bail in Criminal Appeal No.1409 of 2006 on 01.06.2006 which is strongly denied by the respondent No.7 that he has preferred another appeal in which he has been granted bail.

279. It is discussed above that the record of the subsequent Appeal No.1409 of 2006 is missing (from the report of the office of the High Court Division) and also the report of the respondent No.9, IG Prison, Dhaka that the history ticket is not available and the other record was not in proper position and he also recommended for an inquiry committee to find out the real fact.

280. From the aforesaid facts and circumstances it appears that there cannot be any decision that the respondent No.7 has made false statements in the nomination paper releasing from the Jail without serving entire sentence awarded against him before establishing an allegation by any legal proceedings that he has committed any fraud for releasing from the Jail custody before serving the entire sentence.

281. In the case of Mahmudul Haque (Md) vs. Md. Hedayetullah and others reported in 48 DLR (AD) 128 wherein it is held, "Constitution of Bangladesh, 1972-Article 102-In election matters the jurisdiction of the High Court Division cannot be invoked under Article 102 of the Constitution except on a very limited ground of total absence of jurisdiction (Coram non-judice) or malice in law for the purpose of interfering with any step taken in the election process." "Election" connotes the process of choosing representatives by electorates in democratic institutions. The election process starts from the Notification issued by the competent authority (in a parliamentary election or bye election, by the Election Commission) declaring election schedule and culminates in the declaration of result of election by a gazette notification. In the instant case the election process started with the Notification issued by the Election Commission on 12.12.1994. In pursuance thereof the appellant and respondent Nos.1-3 submitted their respective nomination papers on 01.01.1995. On 02.01.1995 at the time of scrutiny respondent No.1 raised a dispute as to the age of the appellant. But the Returning Officer in exercise of his authority under clause (3) of Article 14 of President's Order No.155 of 1972 upon assigning reasons and upon apparent compliance with Article 14(3)(d)(iii) of President Order No.155 of 1972, namely, that "the Returning Officer shall not enquire into the correctness or validity of any entry in the electoral roll" disallowed the objection and accepted the nomination paper of the appellant as valid. Thereafter, the question as to whether the appellant had really attained the age of 25 years on 01.01.1995 or not, undoubtedly became an election disputes. For proper adjudication of election dispute President's Order No.155 of 1972 provides under Chapter V a special

forum and procedure. An election dispute can only be raised by way of an election in the manner provided therein. Where a right or liability is created by a statute providing special remedy for its enforcement such remedy as a matter of course must be availed of first. The High Court Division will not interfere with the electoral process as delineated earlier in this judgment, more so if it is an election pertaining to Parliament because it is desirable that such election should be completed within the time specified under the Constitution. In the instant case, a serious dispute as to the correct age of the appellant was raised before the High Court Division which was not at all a subject matter of decision on mere affidavits and certificates produced by the parties.

282. It was not within the jurisdiction of the High Court Division to enter into a field of investigation as to the correct age of the appellant on 01.01.1995, which would be appropriate for the Election Tribunal to investigate into on taking evidence, if and when raised after the poll."

283. In the case of Dr. Mohiuddin Khan Alamgir vs. Government of the People's Republic of Bangladesh reported in 62 DLR (AD) (2010) 425 wherein it is held, "Constitution of Bangladesh, 1972-Article 125-Article 125 of the Constitution provides that no election to the offices of President or to the Parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under law made by the Parliament and in such view of the matter there is a complete ouster of jurisdiction in entertaining writ petition in the matter of election disputes except in cases of Coram non-judice or malice in law."

284. From the aforesaid decisions it appears that our Appellate Division is reluctant to entertain any application which ought to have disposed of by the election Tribunal. So, on this context present writ petition is not maintainable.

285. And in the case of Kurapati Maria Das vs. M/S. Dr. Ambedkar Seva Samajan in Supreme Court of India Civil Appeal No.2617 of 2009 (arising out of SLP (Civil) No.15144 of 2007). On 20.08.2006 a writ petition was filed before the Andhra Pradesh High Court with the following prayers:

> "For the said reasons, it is prayed that this Court may be pleased to issue a writ or order or direction more particularly one in the nature of Writ of Quo- Warranto against the 9th respondent. (a) directing the 9th respondent to disclose the authority under which he is holding the office of the Chairperson and the office of the Councilor of the Bapatla Municipal Council, Guntur District (representing Ward No.8).(b) directing the 9th respondent to vacate the offices of the Chairperson and the Councilor of the Bapatla Municipal Council, Guntur District (representing Ward No.8), or, (c) removing the 9th respondent from the office of the Chairperson and from the office of the Councilor of the Bapatla Municipal Council, Guntur District (representing Ward No.8) and (d) to pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."
>
> "For the said reasons, it is prayed that this Court may be pleased to issue a writ or order or direction more particularly one in the nature of Writ of Quo- Warranto against the 9th respondent. (a) directing the 9th respondent to disclose the authority under which he is holding the office of the Chairperson and the office of the Councilor of the Bapatla Municipal Council, Guntur District (representing Ward No.8).

286. In paragraph-14 of the aforesaid judgment it is observed: "In the first place, it would be better to consider as to whether the bar under Article 243ZG (b) is an absolute bar. The Article reads as thus:

"243ZG(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

287. At least from the language of clause (b), it is clear that the bar is absolute. Normally, where such a bar is expressed in a negative language as is the case here, it has to be held that the tone of clause (b) is mandatory and the bar created therein is absolute. This Court in its recent decisions has held the bar to be absolute. First such decision is reported as Jaspal Singh Arora v. State of M.P & Ors. [1998 (9) SCC 594]. In this case the election of the petitioner as the president of the Municipal Council was challenged by a writ petition under Article 226, which was allowed setting aside the election of the petitioner. In paragraph 3 of this judgment, the Court observed;

> "It is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by Courts in electoral matters contained under Article 243ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition."

288. The second such decision is reported as Gurdeep Singh Dhillon Vs. Satpal & Ors. 2006 (10) SCC 616]. In that decision, after quoting Article 243ZG (b) the Court observed that the shortcut of filling the writ petition and invoking Constitutional jurisdiction of the High Court under Article 226/227 was not permissible and the only remedy available to challenge the election was by raising the election dispute under the local statute.

289. In our Constitution, Article 125 reads as under:

"১২৫। এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও

(ক)----------

(খ) সংসদ কর্তৃক প্রণীত কোন আইনের দ্বারা বা অধীন বিধান-অনুযায়ী কর্তৃপক্ষের নিকট এবং অনুরুপভাবে নির্ধারিত প্রণালীতে নির্বাচনী দরখাস্ত ব্যতীত (রাস্ট্রপতি পদে) নির্বাচন বা সংসদের কোন নির্বাচন সম্পর্কে কোন প্রশ্ন উলথাপন করা যাইবে না।"

290. The Article 243ZG(b) of the Indian Constitution and Article 125(Kha) of the Constitution of Bangladesh is similar.

291. In paragraph-17 of the aforesaid judgment it is stated that, "There is no dispute that Rule 1 of the Andhra Pradesh Municipalities (Decision on Election Disputes) Rules, 1967, specifically provides for challenging the election of Councilor or Chairman. It was tried to be feebly argued that this was a petition for quo-warranto and not only for challenging the election of the appellant herein. This contention is clearly incorrect. When we see the writ petition filed before the High Court, it clearly suggests that what is challenged in the election. In fact the prayer clauses (b) and (c) are very clear to suggest that it is the election of the appellant which is in challenge."

292. Another point raised by the respondent No.7 that the facts involved in the case is disputed in nature. It appears that 'the daily Prothom Alo' published the news that the

respondent No.7 released from the Jail on 01.12.2005 without serving the entire sentence. Thereafter, on the same day the Jail authority made a re-joinder(প্রতিবাদ-লিপি) on this issue containing that the respondent No.7 was released on remission. It is admitted by the respondent No.10 in affidavit-in-compliance that it has been proved by the snap of koyed register.

293. Now, the dispute arises when respondent Nos.8 and 9 in their affidavit-in-compliance and other affidavits contended that the respondent No.7 released from the Jail on 01.06.2006 on bail in an another Criminal Appeal No.1409 of 2006. This fact is denied by the respondent No.7 that he has been released on bail on 01.06.2006.

294. It is presumed that the respondent No.7 came out from the Jail released by the Jail authority, if there is any allegation against him that he has committed any fraud, legal action could be taken against him but nothing was done. If it is true that he is released on 01.06.2006 then the respondent Nos.8 and 9 is responsible for releasing him from the jail before completion of the serving of his remaining period.

295. For proper adjudication of the aforesaid matter, let us examine 'The Bengal Jail Code' 1894, which reads as under:

> Chapter XI-Prisoners' History Tickets
>
> 549. Every prisoner shall immediately of his reception in jail be provided with a History Ticket (B.J. Form Nos. 20, 21 or 22) in which, besides the information required by the heading, shall be recorded at the time, and in chronological sequence every occurrence of importance in the jail life of such prisoner, and every order specially relating to him.
>
> 556.The Deputy Superintendent (in a central jail) or the Jailer, the deputy Jailers or European warders, as the rules, or orders given by the Superintendent there under, require, shall enter in the ticket the following particulars-
>
> (a) the date of admission into the Jail;
>
> (b) the issue of clothing and kit on admission and subsequently, see Rule 506 and chapter XXXVIII;
>
> © any complaint made by the prisoner of sickness or report of his sickness;
>
> (d) application for copy of judgment if the prisoner wants to appeal, see Rule 603;
>
> (e) receipt of copy of judgment, see Rule 603;
>
> (f) dispatch of appeal, see Rule 603;
>
> (g) substance of order of Appellate court, see Rule 609;
>
> (h) the fact of appeal not being made before expiration of term allowed for appealing, see Rule 599;
>
> (i) the fact that a prisoner does not wish to appeal, see rule 606;
>
> (j) the amount of remission awarded, see Rule 763;
>
> (k) the total remission in days earned up to the end of each quarter;
>
> (l) any offence committed, including omission to perform tasks;
>
> (m) any interviews allowed and the receipt or dispatch of private letters, see Rule 664;
>
> (n) Inspector-General's sanction for employment as convict warder or night guard, see Rule 405 and 408;
>
> (o) Dispatch to a court, or transfer, discharge, or death;
>
> (p) the use of the latrine out of hours;
>
> (q) the word " unidentified'' in respect of every prisoner notified under rule 623;
>
> ® the weight of ankle ring or fetters if imposed; see Rule 1216;
>
> (s) any order for the repair of clothing, see rule 800.

Chapter XIII-Release of Prisoners

566. The warrants of all convicts whose release becomes due in any month shall be examined on the 25th day of the month proceeding to ascertain their correctness.

571. Each prisoner shall, before being released, be carefully compared with his personal description in the Admission Register, and the superintendent or Jailer, as the case maybe, shall satisfy him that the proper prisoner has been brought forward and that his sentence has been duly executed except in respect of remission earned under the remission rules.

The medical officer shall record, or cause to be recorded the health and weight of every prisoner on release, in the admission register, releases diary, and history ticket.

576. Every prisoner sentenced to imprisonment for 6 months or upwards shall, on release, be furnished with a certificate (B.J. Form No. 31) signed by the superintendent to the effect that he has completed his term of imprisonment. In case any remission of sentence has been granted, the amount should be stated.

Chapter XIV-Appeals and Petitions.

610(3) In every case in which a sentence is confirmed on appeal, the jail authorities shall receive information to this effect by means of the form prescribed. Irrespective, of the procedure prescribed above, the appellate court shall, for the information of the appellant, notify to the superintendent of the jail in which such appellant is confined the result of his appeal. This notification, which shall be made in the sanctioned form, is intended solely for the communication of the result of the appeal to the appellant, and in no way relieves judicial officers from the duty of issuing revised warrants when such are necessary. All warrants and orders issued with reference to a prisoner's appeal should be in English, and should state the prisoner's father's name as well as the prisoner's name.

Chapter XXI-Remission

756. Ordinary remission shall be awarded on the following scale:

(a) two days per month for thoroughly good conduct and scrupulous attention to all prison regulations;

(b) two days per month for industry and the due performance of the daily task imposed.

757. In lieu of the remission allowed under Rule 756, convict warders shall receive eight days ordinary remission pronto, convict night guards seven days per month, convict overseers six days per month and convict night watchmen five days per month.

758. Subject to the provisions of Rule 755, remission under rule 756 shall be calculated from the first day of the calendar month next following the date of the prisoner's sentence; any prisoner who, after having been released on bail or because his sentence has been temporarily suspended is afterwards re-admitted to jail shall be brought under the remission system on the first day of the calendar month next following his re-admission, but shall be credited on his return to jail with any remission which he may have earned previous to his release on bail or the suspension of his sentence. Remission under Rule757 shall be calculated from the first day of the next calendar month following the appointment of the prisoner as convict warder, convict overseer or convict night watchman.

759. Prisoners employed on prison services, such as cooks and sweepers, who work on Sundays and holidays, maybe awarded three days ordinary remission per quarter in addition to any other remission earned under these rules.

760. Any prisoner eligible for remission under these rules who for a period of one year reckoned from the first day of the month following the date of his sentence or the

date on which he was last punished for a prison offence, has committed no prison offence whatever, shall be awarded fifteen days ordinary remission in addition to any other remission earned under these rules.

761. Ordinary remission shall be awarded by the superintendent or, subject to his control and supervision and to the provisions of Rule 762, by the deputy Superintendent, Jailer, Deputy Jailer or any other officer specially empowered in that behalf by him.

762. An officer awarding ordinary remission shall, before making the award, consult the prisoner's history ticket in which every offence proved against the prisoner must be carefully recorded.

If a prisoner has not been punished during the quarter otherwise than by a formal warning, he shall be awarded the full ordinary remission for that quarter under Rule 756, or, if he is a convict officer under Rule 757.

If, a prisoner has been punished during the quarter otherwise than by a formal warning the case shall be placed before the Superintendent, who, after considering the punishment or punishments awarded, shall decide what amount of remission shall be granted under rule 756 or, if the convict is a convict officer, under Rue 757. All remissions recorded on the prisoner's history ticket shall be entered quarterly on the remission Card (B. J. Register No. 18)

763. The award of ordinary remission shall be made, as nearly as possible on 1st January, 1st April, 1st July and 1st October, and the amount shall be intimated to the prisoner and recorded on his history ticket. Remission granted to a prisoner under Rule 760 shall be recorded on his history ticket as soon as possible after it is awarded.

764. No prisoner shall receive ordinary remission for the calendar month in which he is released.

765. Special remission may be given to any prisoner whether entitled to ordinary remission or not, other than a prisoner undergoing a sentence referred to in Rule 752, for special services, as for example:

(1). Assisting in detecting or preventing breaches of prison discipline or regulations;

(2) Success teaching handicrafts;

(3) Special excellence in or greatly increased outturn of work of good quality;

(4) Protecting an officer of the prison from attack;

(5) Assisting an officer of the prison in the case of outbreak, fire or similar emergency;

(6) Economy in wearing clothes.

766. Special remission maybe awarded-

(a) By the Superintendent to an amount not exceeding thirty days in one year;

(b) By the inspector General or the Local Government to an amount not exceeding sixty days in one year.

767. An award of special remission shall be entered on the history ticket of the prisoner as soon as possible after it is made, and the reasons for every award of special remission by a superintendent shall be briefly recorded.

768. The total remission awarded to a prisoner under all these rules shall not without the special sanction of the Local Government, exceed one fourth part of his sentence.

296. So, the controversial statement of the respondent Nos.8 and 9 is not believable, even in their report they have admitted that there is no existence of history ticket about the claim of the respondent No.7 that he is released from the Jail after serving and on remission, this claim cannot be adjudicated as there is no existence of the history ticket. From the facts and

circumstances discussed above, we find the claim and counter claim of the respondent Nos.8 and 7 which is a disputed question of fact.

297. Now, another development is, respondent Nos.8 and 9 contends that the respondent No.7 was in Jail in another case which is found from the Criminal Appeal No.1409 of 2006 and which is also denied by the respondent No.7 and this matter is also a disputed question of fact what we have discussed earlier. It is very much clear that this factual aspect of the relevant documents which especially, the report of the respondent Nos.8 and 9 is disputed, controversial, contradictory and on the basis of those report, which is not a complete report, the respondent No.7 who is sitting Parliament Member, cannot be adjudicated that he was disqualified at the time of filing nomination paper making false statement and his seat should be vacated.

298. In the case of Abdul Mukit Chowdhury vs. The Chief Election Commissioner & ors reported in 41 DLR (HCD) (1989) 57 wherein it is held, "Examination of Annexure-A which in its turn requires elaborate investigation warranting proofs which is not the function of this court and it may cause prejudice to either party if the same be taken into consideration under summary proceeding. There being a forum namely, the Election Tribunal set up to investigate into facts, we, therefore, restrain ourselves from making any observation as to whether the same is authentic or otherwise."

299. In the case of Farid Mia (Md.) vs. Amjad Ali (Md.) alias Mazu Mia and ors reported in 42 DLR 13 wherein it is held, "Constitution of Bangladesh, 1972-Article 102-In a summary preceding under Article 102 of the Constitution it is not possible to record a finding as to a disputed question of fact.

300. In a quo-warranto proceeding, the exercise of authority is discretionary and, among other things, the court takes into consideration the motive of the person who moves the court.

301. As regards the first ground, it may be stated that if the purpose of the writ petition was only to challenge the election of the appellant on the alleged ground of his being a defaulter then we would have felt no hesitation to declare at once that the writ petition was not maintainable. Indeed, we have already held while rejecting CPSLA No.21 of 1988 (quoted in the affidavit-in-opposition) that "such questions as to disqualification, etc. which are questions of fact are better settled upon evidence which can be done more appropriately before a Tribunal. In the summary proceeding under Article 102 it is not desirable and, more often than not, not possible to record a finding as to a disputed question of fact."

302. The better view would have been to hold that in view of the facts of the case, it was not desirable to decide the issue in the writ jurisdiction without consideration of all the evidence-both oral and documentary."

303. In the case of AFM Shah Alam vs. Mujibul Huq & ors reported in 41 DLR (AD) (1989) 68 wherein it is held, "Reading the entire law and the rules we have come to this conclusion that the real and larger issue is completion of free and fair election with rigorous promptitude. Hence, election being a long, elaborate and complicated process for the purposes of electing public representatives it is not possible to lay down guidelines by any court because all the exigencies cannot be conceived humanly nor the vagaries of people contesting the election can be fathomed. In a dispute the issue is to be raised and evidence adduced for adjudication by a competent Tribunal. This function has been given to the

Election Tribunal and to nowhere else. The Election Commission has been given power to decide certain matters but such enquiry will not come within the purview of judicial enquiry because the power to decide judicially is different from deciding administratively. By taking resort to extraordinary jurisdiction for a writ the High Court Division will be asked to enter into a territory which is beset with the disputed facts and certainly by well-settled principles it is clear a writ court will not enter into such controversy."

> "The jurisdiction of the High Court Division under Article 102 of the Constitution cannot be invoked except on the very limited ground of total absence of jurisdiction (Coram non-judice) or malice in law to challenge any step in the process of election including an order passed by the Election Commission under Rule 70 because:
> (a)……
> (b)……
> (c) Almost invariably there will arise dispute over facts which cannot and should not be decided in an extraordinary and summary jurisdiction of writ."

304. In addition to the decisions referred to above of our apex Court, we may rely the rest part of the Judgment in the case of Kurapati Maria Das vs. M/S. Dr. Ambedkar Seva Samajan in Supreme Court of India Civil Appeal No.2617 of 2009 (arising out of SLP (Civil) No.15144 of 2007).

> "We are afraid, we are not in position to agree with the contention that the case of K. Venkatachalam vs. A Swamickan & Anr. [1999 (4) SCC 526] is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the scheduled Caste. Therefore, the Caste status of the appellant was a disputed question of fact depending upon the evidence. Such was not the case in K. Venkatachalam vs. A Swamickan & Anr. [1999 (4) SCC 526] Every case is an authority for what is actually decided in that. We do not find any general proposition that eve where there is a specific remedy of filing an Election petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

305. Shri Gupta, however, further argued that in the present case what was prayed for was a writ of quo-warranto and in fact the election of the appellant was not called in question. It was argued that since the writ petitioners came to know about the appellant not belonging to the Scheduled Caste and since the post of the Chairperson was reserved only for the scheduled caste, therefore, the High Court was justified in entering into that question as to whether he really belongs to scheduled caste. In short, the learned counsel argued that independent of the election of the appellant as a ward member or as a chairperson; his caste itself was questioned in the writ petition only with the objective to see whether he could continue as the chairperson. This argument is clearly incorrect as the continuance of the appellant as the chairperson was not dependent upon something which was posterior to the appellant's election as chairperson. It is not as if some event had taken place after the election of the appellant which created a disqualification in appellant to continue as the firstly, as a ward member and secondly as the chairperson which election was available only to the person belonging to the scheduled caste. It is an admitted position that wards No.8 was reserved for scheduled caste and so, also the post of chairperson. Therefore, though indirectly worded, what was in challenge in reality was the validity of the election of the appellant. According to the writ petitioners, firstly the appellant could not have been elected as a ward member nor could he be elected as the chairperson as he did not belong to the scheduled

caste. We can understand the eventuality where a person who is elected as a scheduled caste candidate, renounces his caste after the elections by conversion to some other religion. Then it is not the election of such person which would be in challenge but his subsequently continuing in his capacity as a person belonging to a particular caste. This counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though apparently the petition is for the writ of quo-warranto.

306. The Counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though apparently the petition is for the writ of quo-warranto.

307. In conclusion their Lordships held, "Under such circumstances, we do not think that the High Court could have decided that question of fact which was very seriously disputed by the appellant. It seems that in this case, the High Court has gone out of its way, firstly in relying on the Xerox copies of the service records of the appellants and then at the appellate stage, in calling the files of the Electricity Board where the appellant was working. This amounted to a roving enquiry into the caste of the appellant which was certainly not permissible in writ jurisdiction and also in the wake of Section 5 of 1993 Act."

308. Again merely because the appellant was described as being a Christian in the service records did not mean that the appellant was actually a person professing Christian religion. It was not after all known as to who had given those details and further as to whether the details, in reality, were truthful or not. It would be unnecessary for us to go into the aspect whether the petitioner in reality is a Christian for the simple reason that this issue was never raised at the time of his election. Again the appellant still holds the valid caste certificates in his favor declaring him to be belonging to Scheduled Caste and further the appellant's status as the Scheduled Caste was never cancelled before the authority under the 1993 Act which alone had the jurisdiction to do the same. If it was not for High Court to enter into the disputed question of fact regarding the caste status of the appellant, the findings recorded by it on that question would lose all its relevance and importance. There is one more peculiar fact which we must note. It has come in the judgment of the learned Single Judge as also in the Division Bench that the appellant 'converted' to Christianity. Now, it was not nobody's case that the petitioner ever was converted nor was it anybody's case as to when such conversion took place, if at all it took place. All the observations by the learned Single Judge regarding the conversion of the appellant to Christianity are, therefore, without any basis, more particularly, in view of the strong denial by the appellant that he never converted to Christianity. Again the question whether the petitioner loses his status as Scheduled Caste because of his conversion is also not free from doubt in view of a few pronouncements of this Court on this issue. However, we will not go into that question as it is not necessary for us to go into that question in the facts of this case.

309. It was further held that, "If it was not for High Court to enter into the disputed question of fact regarding the caste status of the appellant, the findings recorded by it on that question would lose all its relevance and importance."

310. Be that as it may, in our opinion, the High Court clearly erred firstly, entertaining the writ petition, secondly in going into the disputed question of fact regarding the caste status, thirdly, in holding that the appellant did not belong to the Scheduled Caste and fourthly, in allowing the writ petition.

311. We, therefore, allow this appeal by setting aside two judgments one of the learned Single Judge and the other of the Division Bench of the High Court filed in appeal and direct the dismissal of the writ petition."

312. I have gone through the decisions referred to above; the principles laid down in the aforesaid decisions are very much applicable in the facts and circumstances of the present case as such the writ petition is not maintainable and the Rule is liable to be discharged.

313. The learned Advocate for the respondent No.7 argued that the writ petition is not maintainable on the ground that the petitioner is an interested person, he has come with malafide intention and he has not come before this Court with clean hands and he referred to a decision in the case of National Board of Revenue vs. Abu Saeed Khan and others reported in 18 BLC (AD) 116 regarding this writ petition is not maintainable in the light of the judgment passed by the Hon'ble Appellate Division of the Supreme Court of Bangladesh. As it is discussed above that the writ petition is not maintainable. So, there is no necessity to discuss this issue raised by the learned Advocate for the respondent No.7.

314. From the discussions made above and the decisions referred to in the aforesaid paragraphs, the facts and circumstances of the case, I am of the opinion that the writ petition is not maintainable.

315. Thus, the Rule fails.

316. In view of the discussions as made above, the Rule is discharged without any order as to cost.

Md. Abu Zafor Siddique, J: (Majority view):

317. In an application under Article 102(2)(b)(ii) of the Constitution of the People's Republic of Bangladesh, Rule was issued calling upon the respondents in the following terms;

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to under what authority the respondent No.7 is holding the post of Member of Parliament (MP) for the constituency of Feni-2 and why the said seat of the Member of Parliament (MP) for the said constituency of Feni-2 shall not be declared vacant and/or pass such other or further order or orders as to this court may seem fit and proper."*

318. While issuing the Rule this Court also issued the following directions;

> *"(a) The jail authorities being the Inspector General of Prison (IG Prison) and the senior Jail Super, Chittagong Central Jail, Chittagong, (respondent Nos.8 and 9) were directed "to submit a report on the service of the period of sentence in Jail by respondent No.7 along with relevant record /file." And*
> *(b) Editor of the Daily Prothom Alo (respondent No.10) was "directed to explain his position and also the sources and authenticity of the news item সাজা কম খেটে, বেরিয়ে যান সাংসদ. Published in the Daily Prothom Alo dated 10.05.2014".*

319. The respective respondents contested the rule by filing affidavit in oppositions.

320. Subsequently the matter was taken up by a Division Bench comprising by their Lordships Mr. Justice Md. Emdadul Hoque and Mr. Justice FRM Nazmul Ahasan. The Court heard the matter for 4(four) consecutive days and fixed 06.12.2016 for judgment. On the date the Court passed split judgments wherein Mr. Justice Md. Emdadul Hoque made the Rule absolute with consequential directions, wherein Mr. Justice FRM Nazmul Ahasan discharged the rule. As their Lordships passed dissenting order the matter was referred to the Hon'ble Chief Justice for order. The Hon'ble Chief Justice thereafter Constituted this bench as 3rd Judge to hear and dispose of the matter.

321. While disposing the instant writ petition both the lordships elaborately stated the facts in their respective judgments. As such I am of the view that elaborate facts need not be re-attriated again. However, for the disposal of the Rule by this Court the short fact is that the petitioner is a voter of constituency number 266 of Feni-2. The petitioner is a conscious citizen of the country. The respondent No.7 contested in the Parliamentary Election in 2014 and elected as a Member of the Parliament. The Election Commission by gazette notification notified the same. As per the petitioner the respondent No.7 has made false statement in the affidavit filed before the Election Commission as regards to his criminal record for taking part in the National Election. The main allegation as made by the petitioner is that the respondent No.7 escaped the sentence awarded by a Court of law by way of committing fraud. The conduct of the respondent No.7 is against the provision of Article 66 (2)(d) of the Constitution of the People's Republic of Bangladesh. As such the respondent No.7 shall be disqualified to contest or to be elected as Member of Parliament.

322. The respondent No.7 entered appearance and contested the Rule by filing affidavit in opposition. The contention of the respondent No.7 is that; the petitioner filed this writ petition before this Court as one of the political rivals of the respondent No.7. The petitioner was the councilor candidate of the Feni Pourashava when the respondent No.7 was elected Mayor of the Feni Pourashava, but the petitioner defeated to be elected as councilor of the said Pourashava and thereafter, conflict arises in between the petitioner and the respondent No.7.

Once upon a time, the petitioner was one of the close associate of the respondent No.7 and when the respondent No.7 was inside the Jail in a falsely implicated Criminal Case for the alleged recovery of unauthorized arms from his possession and was convicted and sentenced, and the writ petitioner was the tadbirkar of the said Criminal Case up to the Appellate Division of the Supreme Court of Bangladesh. Since the petitioner is an interested person and political rival of the respondent No.7 and brought the present writ petition with malafide intention in the name of public interest litigation after 8 (eight) years of release of the respondent No.7 from Jail and became elected as Mayor of Feni Pourashava and then elected as a Member of Parliament. It has been further contended that the respondent No.7 did not serve the full sentence by way of committing fraud is not at all correct; that the respondent No.7 has been released from the Jail custody as per provision of the Jail Code by serving the full sentence awarded against him. The respondent No.7 did not commit any wrong in filing the affidavit before the Returning Officer for participating in the National Election for the Member of Parliament and he was released from Jail after completion of the period of sentence as per provision of Jail Code and that the respondent No.7 did not suppress anything in his aforesaid affidavit. The Metropolitan Sessions Judge, 4th Court, Chittagong vide judgment and order dated 16.08.1999 convicted the respondent No.7 in Special Tribunal Case No.757 of 1999 arising out of Doublemuring Police Station Case No.29 dated 22.03.1992 under section 19A and (f) of the Arms Act and sentenced him to suffer rigorous imprisonment for a period of 10(ten) years under section 19A of the said Act and further sentenced for a period of 7(seven) years under section 19(f)of the said Act concurrently. After judgment dated 16.08.1999, the respondent No.7 surrendered before the Court on 14.09.1999 and preferred appeal being Criminal Appeal No.2369 of 2000 before the High Court Division of the Supreme Court of Bangladesh. The High Court Division dismissed the appeal vide judgment and order dated 02.05.2001 and against that the respondent No.7 preferred Criminal Petition for Leave to Appeal No.107 of 2001 before the Appellate Division of the Supreme Court which was dismissed on 27.02.2002. Against the said judgment dated 27.02.2002, the respondent No.7 filed Criminal Review Petition No.18 of 2002 and the said Review Petition was dismissed on 26.06.2004. The respondent No.7, after dismissal of the review Petition served in the custody and after serving in the custody he has been released from the Chittagong Central Jail on 01.12.2005 as per the Jail Code on the basis of remission.

323. The respondent No.10 'the daily Prothom Alo' in paragraph No.6 of its affidavit-in-compliance dated 07.07.2014 annexing the photocopy of snap shot of remission ticket stated that 'the reporter took some snaps of the relevant parts of Koyed Register where necessary information lies as evidence of his news' which shows that the respondent No.7 has been released from Jail on the basis of remission on 01.12.2005. The respondent No.7 after releasing from the Jail contested in the Pourashava election and was elected as Mayor of Feni Pourashava on 18.01.2011. Subsequently, he has contested in the National General Election and he has been elected as a Member of Parliament on 05.01.2014 from Feni-2, Constituency No.266. Hence none appeared for respondent No.10. The respondent Nos.8 and 9 also filed affidavit in compliance pursuant to the direction given at the Rule issuing order.

324. Mr. Qumrul Haque Siddique, the learned senior Advocate appearing along with Mr. Satya Ranjan Mondal and Ms. Rashida Chowdhury, the learned Advocates on behalf of the petitioner submits that the respondent No.7 is disqualified to be elected as Member of the Parliament because of moral turpitude in this connection. He referred the provision of Article 66(2)(d) of the Constitution of the Republic. The main contention as raised by the learned counsel is that the respondent No.7 is disqualified for making false statement punishable under Article 73 of the RPO. He submits that because of the false declaration the respondent

No.7 is disqualified to be elected as per Article 12 (1)(d) of the RPO for offences under Article 73 of the RPO and effective legal measure be taken against the respondent No.7 for his corrupt practice under Article 73(3)(a) of the RPO for giving false statement in the affidavit. He further submits that the respondent No.7 has an obligation under Article 12, clause (3b), sub-clause (b & C) of RPO, 1972 to submit true information as regards present and past criminal records of the candidate in the affidavit but he did not honestly disclosed all the material and true information in the affidavit, which is clear violation of the above mentioned Article 12 (3b) (b & c) of the RPO, 1972. Hence, holding the present post by the respondent No.7 is liable to be declared illegal. He submits that this writ petition is being filed by the petitioner in the nature of quo warranto and he made out a positive case in this regard. He submits further that this petition by way of quo warranto is very much maintainable as per the provision of the Constitution itself and thus the respondent No.7 is not liable to hold the office of the Member of Parliament. He further submits that this is a fit case of quo warranto in public interest which requires interference by this Court.

325. Mr. Siddique further submits that the respondent No.7 should be declared as disqualified because, under Article 63(1) (b & c) of the RPO, 1972 the High Court Division has the authority to declare the election of any returned candidate to be void if, it is satisfied that the returned candidate was not, on the nomination day, qualified for, or was disqualified from, being elected as a member or the election of the returned candidate has been procured or induced by any corrupt and illegal practice. He next submits that the respondent No.7 after failing in all the legal steps up to the Hon'ble Appellate Division of the Supreme Court preferred Criminal Appeal No.1409 of 2006 in this Court on 17.05.2006 and subsequently released from the Jail custody on 01.06.2006. As he was convicted and sentenced to suffer rigorous imprisonment for 10 years and 7 years concurrently and he surrendered on 14.09.2000 before the trial Court and sent to Jail custody and thereafter, he was released on bail on 01.06.2006. Thus, he was in jail for 5 years 8 months and 19 days and if, he got the highest remission as per Jail Code, 1894 i.e. 60 days per year he will get remission with the sentenced 10 years from 600 days and in this way he has to be in the custody about 916 days more, which has not yet been served out. He further submits that according to section 568 of the Jail Code of 1894 the petitioner will not get any remission more than one third of the entire sentence. In support of the above submission, Mr. Siddique referred to the case of THE KING V. SPEYER AND THE KING V. CASSEL before the KING'S BENCH DIVISION, Judgment dated 16, 17 November, 1915, Hussain Mohammad Ershad vs. Zahidul Islam Khan and others, reported in 21 BLD 142 (AD) 2001, Habibur Rahman @ Raju vs. the State, reported in 20 BLD (HCD)117 (2000), Abdur Rob mia (Md) vs. District Registrar and others reported in 4 BLC (AD) 8 (1999), Dangar Khan and others vs. Emperor reported in AIR 1923 Lahor 104, Chandgi Ram Thakar Dass vs. Election Tribunal and Asstt. Development Commissioner for Panchayat Election, Delhi and others, reported in AIR 1965 PUNJAB 433 (V 52 C 136) (AT DELHI) and Risal Singh V. Chandgi Ram and others, reported in AIR 1966 PUNJAB 393.

326. Mr. Shafiq Ahmed the learned Senior Advocate appearing along with Mr. Nurul Islam Sujon the learned Advocate on behalf of the respondent No.7 submits that the writ petition is not maintainable as the petitioner is one of the political rival of the respondent No.7 who was a Councilor candidate of the Feni Pourashava when the respondent No.7 was elected as Mayor of the said Pourashava and thereafter, conflict arises between the petitioner and respondent No.7 and since the petitioner is an interested person and political rival of the respondent No.7, writ petition brought with malafide intention after 8 years of the release of the respondent No.7 from the Jail and became elected as Mayor of Feni Pourashava and thereafter, elected as a Member of Parliament. He further submits that the respondent

No.7 did not commit any fraud in order to get remission from the Jail and he has been released from the Jail custody as per provision of the Jail Code after serving the sentence awarded against him and on remission. Thus, the question raised by the petitioner is a disputed question of fact which is brought with malafide intention. He further submits that a news which has been published in the daily Prothom Alo and the allegation made by the petitioner and the respondent Nos.8 and 9 that he has not served out the entire period of sentence is a matter of calculation about the period of Jail custody of the respondent No.7 and all are disputed questions of fact which cannot be resolved in the writ petition. He also submits that the respondent No.7 did not face any criminal case so far known to him other than the criminal case in which he was convicted and preferred appeal and it was upheld by the Appellate Division and the respondent No.7 released from jail custody on 01.12.2005. Thus, this matter is also a disputed question of fact which cannot be resolved in the writ petition. Mr. Ahamed further submits that the respondent No.7 did not commit any wrong in filing the aforesaid nomination paper before the Returning Officer i.e. for the election of the Member of Parliament and he was released from jail after served out his sentence as well as on remission as per provision of Jail Code and the respondent No.7 did not suppress anything in his aforesaid affidavit. Mr. Shafiq Ahamed submits that the respondent Nos.8 and 9 could not produce the history ticket in which the blood donation of the respondent No.7 was recorded and the report submitted by the respondent Nos.8 and 9 is not a complete report without placing the proof of blood donation which was recorded in the history ticket. Thus, on the basis of the aforesaid report, which is a disputed one, cannot be said that the respondent No.7 did not serve out the entire period which is claimed by the petitioner and the calculation of the remission awarded by the respondent No.7 by donation of blood is a disputed question of fact, as the respondent No.7 claimed that he has served out entire period of sentence with remission and the respondent Nos.8 and 9 claimed that he did not served out the entire period of sentence is a highly disputed question of fact which cannot be resolved in the writ petition. In support of his contention he relied upon the decision reported in 31 DLR (AD) 303. He further submits that the present case does not come within the purview of the Public Interest Litigation (PIL) as there are some fundamental principles are to be followed in a case of PIL. But in the case in hand the petitioner mainly raises his personal interest rather than public. In support of contention he relied upon the decision reported in 18 BLC (AD) 116. Apart from that he further submits that as per Article 66(2) (d) of the Constitution of the Republic puts bar if the offence involves the question of Moral Turpitude but the offence as alleged does not comes within the definition of Moral Turpitude in any manner. In support of his contention he relied upon the decision of Hussain Mohammad Ershad Case. Mr. Ahamed submits that the rule is liable to be discharged. In support of the above submission Mr. Ahamed referred to the Case of National Board of Revenue Vs. Abu Syed Khan and others reported in 18 BLC (AD) 116, AFM Shah Alam Vs. Mujibul Huq & ors. reported in 41 DLR(AD) 68, Farid Mia (Md) Vs. Amjad Ali (Md) alias Mazu Mia and ors. reported in 42 DLR(AD) 13, Kurapatia Maria Das Vs. M/S Doctor Ambedker Seva Samajan and others. (in Civil Appeal No. 2617 of 2009 arising out of SLP (civil) No. 15144 of 2007) Judgment dated 17th April, 2009, Supreme Court of India and New India Tea Company Ltd. Vs. Bangladesh and others reported in 31 DLR (AD) 303 (1979).

327. Mr. Aminur Rahman Choudhury, the learned Deputy Attorney General appearing on behalf of the Respondent No. 8 and 9 opposes the Rule and submits that the instant writ petition itself is not maintainable because of the personal interest of the petitioner in question. He submits that the petitioner in the case in hand raises serious disputed question of fact which cannot be resolved in a summary proceedings under Article 102 of the Constitution of the Republic. He further submitted that the questions as raised by the petitioner needs to be

addressed only by taking elaborate evidence as much as the jail authority themselves admitted that there are defective papers submitted by the petitioners which cannot be relied upon in any manner. He lastly submits that the rule is liable to be discharged.

328. I have perused the application under Article 102 of the Constitution of the People's Republic of Bangladesh, rule issuing order, affidavit in opposition, supplementary affidavits, affidavit in reply as well as affidavit in compliance. I have also perused the different papers and documents annexed with the writ petition as well as time to time supplied to this court as directed. I have also heard the learned counsels for the contesting parties, perused the decisions as referred to as well as the provisions of law. On perusal of the same it appears that the petitioner filed the writ petition as a bonafide citizen for public interest in the nature of writ of quo warranto. The petitioner has challenged the holding of the office of Member of Parliament by the respondent No.7 without lawful authority as he is being elected in violation of the provision of Representative Peoples Order (RPO) and ultimately in violation of the provisions of the Constitution of the Republic. In course of arguments both the parties raises numerous issues as well as a series of documents has been filed to justifying the respective claims.

329. The main contention as it appears from the writ petition is that the respondent No.7 was convicted under section 19A and (f) of the Arms Act and sentenced to suffer rigorous imprisonment for a period of 10(ten) years under section 19A of the said Act and further sentenced for a period of 7 years under section 19(f) of the said Act concurrently in Special Tribunal Case No.757 of 1999 passed by the judgment dated 16.08.1999. Thereafter, the respondent No.7 surrendered before the Court on 14.09.1999 and preferred appeal being Criminal Appeal No.2369 of 2000 before the High Court Division which was dismissed on 02.05.2001. Against which the respondent No.7 preferred Criminal Petition for Leave to Appeal No.107 of 2001 which was also dismissed on 27.02.2002. Against that, a Criminal Review Petition No.18 of 2002 was filed and the same was dismissed on 26.06.2004.

330. The respondent No.7 thereafter contested the local government election in the year 2011 and he was elected as Mayor of Feni Pourashava. Thereafter, he was elected as a Member of the Parliament and presently holding the office of the same. On the basis of a report in a news paper that the respondent No.7 escaped certain jail term the instant writ petition was filed.

331. The allegation as brought against the respondent No.7 is that the respondent No.7 was convicted and sentenced to suffer rigorous imprisonment for 10 years and 7 years concurrently meaning that he had to suffer 10 years in Jail, i.e. the respondent No.7 had suffered both in custody and Jail for a total period of 5 years 7 months and 21 days and the duration of period of conviction of the respondent No.7 was reduced to 1 year 6 months and 17 days as per news report. In that context, it appears that the respondent No.7 became free almost 2 years and 10 months long before of his actual exit date from Jail, i.e. before finality of serving out his punishment, the respondent No.7 came out of the jail and contested the national election in 2014 from Feni-2 Constituency and as per Article 66(2)(d) of the Constitution of the People's Republic of Bangladesh, a person shall be disqualified for election as a Member of Parliament who has been on conviction for a Criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release and before serving out the punishment and thereby elapsing of subsequent five years, the respondent No.7 contested the national election and making false statement in the affidavit of the nomination paper and as such he may be declared disqualified for election as per Article 12(1)(d) of the RPO for

offences under Article 73 of the RPO and holding the present post by the respondent No.7 is unlawful and may be declared illegal.

332. On the other hand, the respondent No.7 denied the allegation made in the writ petition stating that he has been released from Jail on 01.12.2005 after serving the sentence and getting proper remission from the Jail authority. This contention of the respondent No.7 is particularly supported by the respondent No.10 which published a news with a snap shot of the register of Chittagong Jail authority signed by the Senior Jail Super, Chittagong Central Jail that, মুল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো রেয়াত ০১-০৬-২০১৭ (স্বাক্ষর অস্পষ্ট) ১/১২/২০০৫ সিনিয়র জেল সুপার চট্রগ্রাম কেন্দ্রীয় কারাগার।" but this fact is denied by the respondent Nos.8 and 9 in their affidavit-in-compliance. They have stated that the respondent No.7 was released from jail on bail on 01.06.2006 in Criminal Appeal No.1409 of 2006 from the High Court Division. Mr.Sagir Mia, Senior Jail Superintendent, Chittagong Central Jail submitted that, "কারাগার হতে সাজা কম খেটে বেরিয়ে যাওয়ার কোন সুযোগ নেই। বর্নিত কয়েদি নিজাম হাজারী অত্র কারাগার হতে সাজা ভোগরত অবস্থায় মহামান্য আদালতের আদেশ মোতাবেক জামিনে মুক্তি লাভ করেন।'' and he begs apology for his earlier re-joinder (প্রতিবাদ-লিপি) that the respondent No.7 was released on 01.12.2005 fro the jail on remission.

333. From the report dated 30.06.2016 filed by the respondent No.9 that, "কয়েদি নং ৪০১৪/এ জনাব নিজাম উদ্দিন হাজারী সম্পর্কিত চট্রগ্রাম কেন্দ্রীয় কারাগারের ভর্তি রেজিষ্টার নিরীক্ষা করে দেখা যায়, উক্ত পৃষ্টায় নীচের কোনায় একটি বড় অংশ ছেড়া কয়েদি ভর্তি রেজিস্টারের ২৫ নং কলামে যেখানে বন্দি মুক্তি সংক্রান্ত তথ্য লিপিবদ্ধ করা হয় সেই অংশটুকুই ছেড়া (ছায়ালিপি সংযুক্ত ঙ)।''

ভর্তি রেজিস্টারের মুক্তি সংক্রান্ত তথ্য লিপিবদ্ধ সংক্রান্ত কলামের অংশটুকু ছেড়া থাকা, ভর্তি রেজিস্টারে রেয়াত সংক্রান্ত তথ্য ঘষামাজা থাকা, মুল সাজা রেয়াত প্রথায় মুক্তি দেয়া হলো মর্মে ভুয়া এন্ট্রি ইত্যাদি বিষয়গুলো পর্যবেক্ষন করে প্রতীয়মান হচ্ছে কারাগারের কোন দুষ্ট চক্রের মাধ্যমে কোন অবৈধ উদ্দেশ্য /হীন স্বার্থ চরিতার্থ করার মানসে এ মিথ্যা ঘটনা সমুহ সাজানো হয়েছে। জনাব নিজাম উদ্দীন হাজারী ২০১১ সালে পৌরসভা নির্বাচনে আইনগতভাবে মনোনয়ন দাখিলের শর্ত পুরনার্থে ৫ বছর পুর্বে কারা মুক্তির কোন প্রত্যয়ন সংক্রান্ত তথ্য বা নথি যদি কারা কর্তৃপক্ষ বা বিজ্ঞ বিচারিক আদালত কর্তৃক নির্বাচন কমিশনে উপস্থাপিত হয়ে থাকে তবে তা নিরীক্ষণ করার প্রয়োজন রয়েছে এবং তার জন্য একটি সমন্বিত তদন্ত কমিটি গঠনের প্রয়োজনীয়তা বিবেচিত হচ্ছে।''

334. From Annexure-X dated 09.10.2016, report of the IG Prison it appears that, 'উপরোক্ত সার্কুলার মুলে রক্তদানের বিনিময় কোন কয়েদী আসামীর প্রাপ্ত বিশেষ রেযাত সুবিধা বিস্তারিত কারা বিধি ৭৬৭ এর বিধান মোতাবেক বন্দীর রেয়াত কার্ড ও হিস্ট্রি টিকেট রেয়াত প্রদানের কারণ ও প্রাপ্ত রেয়াতের পরিমান উল্লেখ থাকতো। উল্লেখ্য যে, রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষনের মেয়াদ কারা বিধির ৭৮০(৮) ও ৫৮৮ এর বিধান মোতাবেক ০১(এক) বৎসর। কয়েদী নং ৪১১৪/এ নিজাম উদ্দিন হাজারী এর হিস্ট্রি টিকেট, রেয়াত কার্ড এবং রক্ত দান সংক্রান্ত কোন নথিপত্র চট্রগ্রাম কেন্দ্রীয় কারাগারে খুজে না পাওয়ায় উক্ত বিষয়ে বিস্তারিত তথ্য উদঘাটন করা সম্ভব হয়নি। চট্রগ্রাম কেন্দ্রীয় কারাগারে জনাব নিজাম হাজারীর রক্ত দান সংক্রান্ত কোন তথ্য না পাওয়ায় কারা কর্তৃপক্ষ এ বিষয়ে প্রতিবেদন প্রেরনের জন্য সন্ধানী, চট্রগ্রাম মেডিকেল কলেজ ইউনিট, চট্রগ্রাম বরাবরে পত্র মারফত যোগাযোগ করেন।

সন্ধানী এক পত্রের মাধ্যমে জানায় যে, ১৪-১২-২০০০ খ্রিঃ হতে ১৫-৯-২০০৫ খ্রিঃ পর্যন্ত সময়ের চাহিত রেকর্ড পত্রাদি ১০-১২ বছরের পুরনো বিধায় এবং তাদের কার্যালয় স্থানান্তরের সময় বিনষ্ট হয়েছে বিধায় চাহিত তথ্য প্রদানে অপারগতা প্রকাশ করে দুঃখ প্রকাশ করেছেন। তবে সন্ধানী কর্তৃপক্ষ প্রদত্ত সনদ অস্বীকার করেননি।'

335. So it appears from the aforesaid report of the respondent Nos.8 and 9 appears that the respondent Nos.8 and 9 admitted that the information record in the admission register was torn and it was done by some dishonest clique and to find out the real fact and it further reveals that there is no existence of history ticket wherein the elaborate information of blood donation of the prisoner is recorded. There is no information about the blood donation in the record of the Chittagong Central Jail. The Sandhani authority also could not produce any record though they did not deny their certificate about the blood donation.

336. Furthermore Annexure-10, it appears that during his custody in jail from 14.09.2000 to 01.12.2005 respondent No.7 donated blood in total 13 times through the Chittagong Jail authority to the Sandhani, a renowned charitable organization of medical students, and thereby obtained special remission under Code No.765 of the Jail Code, but the respondent No.8 did not count the said special remission. From the certificate dated 06.10.2005 given to the respondent No.7 by Sandhani (Annexure-9) has been annexed with the affidavit in reply of the respondent No.7 to the affidavit-in-compliance of the respondent No.8, a certificate was also given to the respondent No.7 by the Sandhani authority which quoted below :

প্রশংসা পত্র

এই মর্মে প্রত্যয়ন করা যাইতেছে যে, নিজাম উদ্দিন হাজারী, পিতা-জয়নাল আবেদীন হাজারী, আইডি নং-৪১১৪/এ কারান্তরীন থাকাকালীন চট্রগ্রাম কেন্দ্রীয় কারাগারে গত ১৪-১২-২০০০ খ্রিঃ হতে ১৫-৯-২০০৫ খ্রিঃ পর্যন্ত সময়ের মধ্যে আর্ত্তমানবতার সেবায় নিয়োজিত হইয়া চট্রগ্রাম কেন্দ্রীয় কারাগার কর্তৃপক্ষের মাধ্যমে ১৩ (তের) ইউনিট রক্তদান করায় আপনাকে অত্র সংস্থার পক্ষ থেকে দেশ ও জাতির কল্যাণে ভুমিকা রাখায় আন্তরিকভাবে ধন্যবাদ জ্ঞাপনসহ আপনার মঙ্গল ও উজ্জল ভবিষ্যত কামনা করছি।

স্বাক্ষর
সভাপতি
চট্রগ্রাম মেডিকেল কলেজ ইউনিট,
সন্ধানী

স্বাক্ষর
সাধারন সম্পাদক
চট্রগ্রাম মেডিকেল কলেজ ইউনিট,
সন্ধানী

337. Article 102 of the Constitution of the People's Republic of Bangladesh runs as follows:

"102.(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental right conferred by part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally officious remedy is provided by law-

(a) on the application of any person aggrieved, make an order-

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do ; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order –

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office."

Clause (1) and (2) of article 102 of the Constitution show the following features:

(a) Clause (1) of article 102 provides that for enforcement of a fundamental right only a 'person aggrieved' can apply to the High Court Division.

(b) Clause 2(a) provides that for obtaining a remedy in relation to an action or omission of a public authority only a 'person aggrieved' can apply to the High Court Division.

(c) As opposed to the above noted two clauses, clause (2) (b) (ii) provides that "any person" can apply to High Court Division challenging the lawful authority of a person in holding a public office, if no other efficacious remedy is available to the petitioner provided by other laws."

338. So it appears that the lawful authority of the respondent No.7 to hold of the public office of the Member of Parliament comes within the purview of Article 102(2)(b)(ii) of the Constitution and under which any person can make an application. Obviously the person may not be aggrieved to challenge the same but any person is competent to do so. But the fundamental principle is that such application is to be a public interest one. In the present case in hand it appears that the petitioner is a local rival of the respondent No.7. In numerous papers and documents it clearly transpires that the petitioner is a political rival of the respondent No.7 and he has personal interest in the present case in hand. The cardinal principle as determined time to time and got endorsement by this Court as well as our Apex Court that a person has to come before a court of law with clean hand. A person who is seeking remedy is to show his fairness, moral impartiality. It is the duty of the court of law to ensure that there is no personal or malafide intention when an application has been pressed for public interest. As such fairness is very much essential to ensure the rule of law and the establishment of administration of justice. In the present case in hand it is very much clear that the petitioner though pose himself as an aggrieved person with a cause of greater public interest which attracted the principle of public interest but there is a clear deviation from the same because of the personal interest. The petitioner being a political rival and for being personal interest cannot succeeds to press his bigger cause namely public interest litigation.

339. It is now a well settled proposition of law that if there is efficacious and alternative remedy is available, a writ petition under Article 102 of the Constitution is not maintainable. Admittedly it has been raised whether Article 125 of the Constitution puts a bar in the instant case in hand. Admittedly as per the aforesaid provision of law there is a legal bar questioning the result of the election declared by the commission except following the provisions of RPO. In the present case in hand it appears that the petitioner in the disguise of Article 102 of the Constitution trying to enforce the provisions of RPO. In the present case in hand it further appears that the question as raised by the petitioner regarding certain declarations made by the respondent No.7 before the Election Commission which is completely a dispute to be resolved by the competent authority as provided in the Represented People Order (RPO). Admittedly there is a provision namely Article 12 of the RPO to deal with the issue as raise herein.

340. Article 66 2(d) of the Constitution runs as follows;

"66. Qualification and disqualification for election to parliament. (1) A person shall, subject to the provision of clause (2), be qualified to be elected as, and to be, a member of parliament if he is a citizen of Bangladesh and has attained the age to twenty five years.

(2) A person shall be disqualified for election as, or for being a member of Parliament who –

(a)----------(c) ----------(not relevant)

(d) has been, on conviction for a criminal offence involving moral turpitude, sentenced for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less that two years, unless a period of five years has elapsed since his release."

1(dd)----------(not relevant)

(2A)---(5) ----------(not relevant)

341. So a careful reading a Article 66(2) of the Constitution runs as follows;

"Particularly the expression "A person shall be disqualified for election as, or for being a member of Parliament" read with clauses (d) shows that the Constitution contemplates 3 (three) situations about the disqualification of a person, namely- (1)

the disqualification acquired before election, (2) the disqualification acquired after election, and (3) disqualification that was acquired before but continues after the election."

342. In the present case in hand the it has been argued that the respondent No.7 acquired the disqualification before election but despite that such allegation can be adjudicated following the provisions of the RPO.

343. The question as relates to the date of release of the incumbent MP from jail and the period of sentenced served out by him has been raised in the present case in hand. I have carefully examined the papers and documents as well as numerous materials submitted before this Court. On careful analyses of the same it appears that a series of disputed questions of fact has been raised while dealing with the said issue. The claim of the petitioner was vehemently opposed by the respondents including the respondent No.7. In course of hearing before this Court numerous affidavits were filed as well as papers and documents were submitted. So it appears that a serious dispute has been raised regarding the same. The deliberations and the contentions as raised herein clearly shows that the same falls within the established principle of, "Disputed Question of Fact." The contentions as raised by the petitioner and the respondents requires elaborate investigation as well as it also requires examination, as production of evidence and also the question of examination and cross examination of witnesses. As such I am of the view that since serious disputed question of fact has been raised the same cannot be addressed in a summary proceeding under Article 102 of the Constitution of the People's Republic of Bangladesh.

344. In the case of Abdul Mukit Chowdhury vs. The Chief Election Commissioner & ors reported in 41 DLR 57 wherein it is held,

"Examination of Annexure-A which in its turn requires elaborate investigation warranting proofs which is not the function of this court and it may cause prejudice to either party if the same be taken into consideration under summary proceeding. There being a forum namely, the Election Tribunal set up to investigate into facts, we, therefore, restrain ourselves from making ay observation as to whether the same is authentic or otherwise."

345. In the case of Farid Mia (Md.) vs. Amjad Ali (Md.) alias Mazu Mia and ors reported in 42 DLR 13 wherein it is held,

"Constitution of Bangladesh, 1972-Article 102-In a summary preceding under Article 102 of the Constitution it is not possible to record a finding as to a disputed question of fact.

In a quo-warranto proceeding, the exercise of authority is discretionary and, among other things, the court takes into consideration the motive of the person who moves the court.

As regards the first ground, it may be stated that if the purpose of the writ petition was only to challenge the election of the appellant on the alleged ground of his being a defaulter then we would have fell no hesitation to declare at once that the writ petition was not maintainable. Indeed, we have already held while rejecting CPSLA No.21 of 1988 (quoted in the affidavit-in-opposition) that "such questions as to disqualification, etc. which are questions of fact are better settled upon evidence which can be done more appropriately before a Tribunal.In the summary proceeding under Article 102 it is not desirable and, more often than not, not possible to record a finding as to a disputed question of fact."

The better view would have been to hold that in view of the facts of the case, it was not desirable to decide the issue in the writ jurisdiction without consideration of all the evidence-both oral and documentary."

346. In the case of National Board of Revenue vs. Abu Saeed Khan and others reported in 18 BLC (AD) 116 (2013) wherein it is held,

"Constitution of Bangladesh, 1972-Article 102(2)Public Interest Litigation-The parameters within which the High Court Division should extend its discretionary jurisdiction in entertaining a PIL.

1. *Before entertaining a petition the Court will have to decide the extent of sufficiency of interest and the fitness of the person invoking the discretionary jurisdiction.*
2. *The court which considering the question of bonafide in a particular case will have to decide as to why the affected party has not come before it and if it finds no satisfactory reason for non appearance of such affected party, it may refuse to entertain the petition.*
3. *If a petition is filed to represent opulent members who were directly affected by the decision of the Government or Public Authority, such petition would not be entertained.*
4. *The expression 'person aggrieved' used in Article 102(1) means not any person who is personally aggrieved but one whose heart bleeds for the less fortunate fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.*
5. *If the person making the application on enquiry is found to be an interloper who interferes with the action of any person or authority as above which does not concern his is not entitled to make such petition.*
6. *The Court is under an obligation to guard that the filing of a PIL does not convert into a publicity interest litigation or private interest litigation.*
7. *Only a public spirited person or organization can invoke the discretionary jurisdiction of the Court on behalf of such disadvantaged and helpless persons.*
8. *The Court should also guard that its processes are not abused by any person.*
9. *The Court should also guard that the petition is initiated for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the Court.*
10. *It must also be guarded that every wrong or curiosity is not and cannot be the subject matter of PIL.*
11. *No petitions will be entertained challenging the policy matters of the Government, development works being implemented by the Government, Order of promotion or transfer of public servants, imposition of taxes by the competent authority.*
12. *The Court has no power to entertain a petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.*
13. *A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach the Court due to illiteracy or monetary helplessness.*
14. *Apart from the above, the following some categories of cases 'which will be entertained;*

a) *For protection of the neglected children.*
b) *Non-payment of minimum wages to workers and exploitation of casual workers complaints of violation of labour laws (except in individual case).*
c) *Petitions complaining death in jail or police custody; or caused by law; enforcing agencies.*

d) Petitions against law enforcing agencies for refusing to register a case despite there are existing allegations of commission of cognizable offences.

e) Petitions against atrocities on women such as, bride burning, rape, murder for dowry, kidnapping.

f) Petitions complaining harassment or torture of citizens by police or other law enforcing agencies.

g) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance or heritage and culture, antiques, forest and wild life.

h) Petitions from riot victions.

347. In the case of AFM Shah Alam vs. Mujibul Huq & ors reported in 41 DLR (AD) (1989) 68 wherein it is held,

"Reading the entire law and the rules we have come to this conclusion that the real and larger issue is completion of free and fair election with rigorous promptitude. Hence, election being a long elaborate and complicated process for the purposes of electing public representatives it is not possible to lay down guidelines by any court because all the exigencies cannot be conceived humanly nor the vagaries of people contesting the election can be fathomed. In a dispute the issue is to be raised and evidence adduced for adjudication by a competent Tribunal. This function has been given to the Election Tribunal and to nowhere else. The Election Commission has been given power to decide certain matters but such enquiry will not come within the purview of judicial enquiry because the power to decide judicially is different from deciding administratively. By taking resort to extraordinary jurisdiction for a writ the High Court Division will be asked to enter into a territory which is beset with the disputed facts and certainly by well settled principles it is clear a writ court will not enter into such controversy."

"The jurisdiction of the High Court Division under Article 102 of the Constitution cannot be invoked except on the very limited ground of total absence of jurisdiction (Coram non-judice) or malice in law to challenge any step in the process of election including an order passed by the Election Commission under Rule 70 because:

(a) ……

(b) ……

(c) Almost invariably there will arise dispute over facts which cannot and should not be decided in an extraordinary and summary jurisdiction of writ."

In addition to the decisions referred to above of our apex Court, we may rely the rest part of the Judgment in the case of Kurapati Maria Das vs. M/S. Dr.Ambedkar Seva Samajan in Supreme Court of India Civil Appeal No.2617 of 2009 (arising out of SLP (Civil) No.15144 of 2007).

"We are afraid, we are not in position to agree with the contention that the case of K. Venkatachalam vs. A Swamickan & anr. [1999 (4) SCC 526] is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the scheduled Caste. Therefore, the Caste status of the appellant was a disputed question of fact depending upon the evidence. Such was not the case in K. Venkatachalam vs. A Swamikan & Anr. [1999(4) SCC 526] Every case is an authority for what is actually decided in that. We do not find any general proposition that eve where there is a specific remedy of filing an Election petition and even when there is a disputed question of fact regarding the caste of a person who has

been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

Shri Guipta, however, further argued that in the present case what was prayed for was a writ of quo-warranto and in fact the election of the appellant was not called in question. It was argued that since the writ petitioners came to know about the appellant not belonging to the Scheduled Caste and since the post of the Chairperson was reserved only for the scheduled caste, therefore, the High Court was justified in entering into that question as to whether he really belongs to scheduled cast. In short, the learned counsel argued that independent of the election of the appellant as a ward member or as a chairperson; his caste itself was questioned in the writ petition only with the objective to see whether he could continue as the chairperson. This argument is clearly incorrect as the continuance of the appellant as the chairperson was not dependent upon something which was posterior to the appellant's election as chairperson. It is not as if some event had taken place after the election of the appellant which created a disqualification in appellant to continue as the firstly, as a ward member and secondly as the chairperson which election was available only to the person belonging to the scheduled caste and so, also the post of chairperson. Therefore, though indirectly worded, what was in challenge in reality was the validity of the election of the appellant. According to the writ petitioners, firstly the appellant could not have elected as a ward member nor could he be elected as the chairperson as he did not belong to the scheduled caste. We can understand the eventually where a person who is elected as a scheduled caste candidate, renounces his caste after the elections by conversion to some other religion. Then it is not the election of such person which would be in challenge but his subsequently continuing in his capacity as a person belonging to a particular caste. This counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though apparently the petition is for the writ of quo-warranto.

The Counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though apparently the petition is for the writ of quo-warranto.

In conclusion their Lordships held, ''Under such circumstances, we do not think that the High Court could have decided that question of fact which was very seriously disputed by the appellant. It seems that in this case, the High Court has gone out of its way, firstly in relying on the Xerox copies of the service records of the appellants and then at the appellate stage, in calling the first of the Electricity Board where the appellant was working . This amounted to a roving enquiry into the caste of the appellant which was certainly not permissible in writ jurisdiction and also in the wake of Section 5 of 1993 Act."

Again merely because the appellant was described as being a Christian in the service records did not mean that he appellant was actually a person professing Christian religion. It was not after all known as to who had given those details and further as to whether the details, in reality, were truthful or not. It would be unnecessary for us to

go into the aspect whether the petitioner in reality is a Christian for the simple reason that this issue was never raised at the time of his election. Again the appellant still holds the valid caste certificates in his favor declaring him to be belonging to Scheduled Caste and further the appellant's status as the Scheduled Caste was never cancelled before the authority under the 1993 Act which alone had the jurisdiction to do the same. If it was not for High Court to entire into the disputed question of fact regarding the caste status of the appellant, the findings recorded by it on that question would lose all its relevance and importance. There is one more peculiar fact which we must note. It has come in the judgment of the learned Single Judge as also in the Division Bench that the appellant 'converted' to Christianity. Now, it was not nobody's case that the petitioner ever was converted nor was it anybody's case as to when such conversion took place, if at all it took place. All the observations by the learned Single Judge regarding the conversion of the appellant to Christianity are, therefore, without any basis, more particularly, in view of the strong denial by the appellant that he never converted to Christianity. Again the question whether the petitioner loses his status as Scheduled Caste because of his conversion is also not free from doubt in view of a few pronouncements of this Court on this issue. However, we will not go into that question as it is not necessary for us to go into that question in the facts of this case.

It was further held that, "If it was for High Court to enter into the disputed question of fact regarding the caste status of the appellant, the findings recorded by it on that question would lose all its relevance and importance."

Be that as it may, in our opinion, the High Court clearly erred firstly, entertaining the writ petition, secondly in going into the disputed question of fact regarding the caste status, thirdly, in holding that the appellant did not belong to the Scheduled Caste and fourthly, in allowing the writ petition.

We, therefore, allow this appeal by setting aside two judgments one of the learned Single Judge and the other of the Division Bench of the High Court filed in appeal and direct the dismissal of the writ petition."

348. In the case of New India Tea Company Ltd. vs. Bangladesh and others reported in 31 DLR(AD) (1979) 303 wherein it is held,

"Mr. S.R. Pal, Counsel for the appellant, submitted that the learned Judges of the High Court were wrong in deciding the disputed question of facts relating to title to the land which could only have been done by taking proper evidence, oral and documentary. Whether the relinquishment by Hiralal

Mukherjee, Manager of Ramgarh Tea Estate in whose favour the land was originally settled legally transferred title in favour of the Union Agency Ltd. depended on the decision as to whether a registered document was necessary to effect the relinquishment. The learned Counsel also submitted that the decision as to whether the Union Agency Ltd. was a part and parcel of the appellant-company required investigation into facts. It appears that the High Court did not believe the genuineness of the rent receipt dated 25.3.67 produced by the appellant-company in support of its claim that rent was being paid by the company to the Government and it also found discrepancies with respect to the Khatian number mentioned in the rent receipt. The land in dispute was recorded as Khatian No.1/36 after the mutation case No.2/1, whereas the rent receipt showed that rent was being paid in respect of land in Khatian No.1/38. Further, there was no reason as to why the appellant-company whose name was not recorded in the Khatian should pay rent in respect of the land of which M/s. Union Agency Ltd. was the recorded tenant. The questions raised by the

learned Counsel relate to the title of the appellant-company which depend on facts which are in dispute and can only be settled after full evidence has been properly taken. Mr. Sultan Hossain Khan, the learned Deputy Attorney General who appeared on behalf of the Government also conceded that where facts are disputed; the High Court, in exercising jurisdiction under Article 102 of the Constitution should not proceed to settle the disputed facts requiring taking of evidence. There is a long line of decisions in favour of the view that the High Court should not enter into disputed questions of fact nor decide any question as to title which require investigation into facts and taking of elaborate evidence."

349. I have also examined the decisions as referred by the learned counsel for the petitioner. On perusal of the same I am of the view that since the Writ Petition is itself not maintainable because of the disputed question of fact as such these are not relevant or considerable in any manner.

350. Regarding writ of quo warranto the fundamental Rule is that the petition has to be in greater public interest. Any such attempt for securing private interest cannot be encouraged. In the case in hand it has been revealed that the petitioner has far reaching personal interest and intends to use this as weapon to defeat his political rival. Apart from that it is now a well settled proposition of law is that if there is any alternative remedy available no writ petition even in the form of quo warranto is liable to be maintained.

351. The proceeding under Art. 102(2) of the Constitution is a summary one and it is decided on the statements made on affidavits filed by the parties and the documents annexed to the application and the affidavit-in-opposition. Hence it is often held that the court will decline to exercise jurisdiction when the application involves resolution of disputed question of fact. The decision reported in 42 DLR(AD) 13 lends support to the above contention. In this summary proceeding examination of disputed question of fact which is a complicated in nature and as a general rule cannot be undertaken nor investigation of title to property made and it is neither desirable nor advisable to enter into the merit and record a finding as to disputed question of fact. The decision reported in 51 DLR (AD) 232 lends support to the above order. The court will neither decide the complicated question of title nor disputed questions of fact relating to damages or compensation.

352. The rule is that the court will decline to exercise the jurisdiction only when the dispute as regards facts is such that the dispute cannot be reasonably resolved on the facts pleaded and documents produced before the court. The decision reported in 19 DLR (SC) 228 lends support to the above order.

353. In the instant writ petition it clearly transpires that the contentions as raised by the parties can only be determined by adjudication of the factual aspects and for that a detailed investigation is requires which includes examination of evidence as well as examination of witnesses. The contentions as raised thus are highly disputed question of facts which in the line of the above authorities cannot be adjudicated in a summary proceedings under Article 102 of the Constitution of the republic.

354. Considering the facts and circumstances, discussion made hereinabove as well as the decisions as referred to, I am of the view that the instant writ petition is not maintainable.

355. Accordingly the Rule is discharged. However, there will be no order as to cost.

Editors' Note:

By virtue of majority view, rule was discharged.

12 SCOB [2019] HCD

High Court Division

(Civil Revisional Jurisdiction)

Civil Revision No.331 of 2006.

Md. Rafiqul Islam and others.
.....Petitioners.
Vs.
Md. Abdul Hadis being dead his heirs:

Mahbub Alam and others.
..... Opposite-Parties.

Mr. Tapan Kumar Chakraborty with
Mrs. Aynunnahar Siddiqua, Advocate
..... for the petitioners.

Mr. Subrata Saha, Advocate.
.....for the opposite-parties.

Heard on 19.11.2015, 23.11.2015 and
Judgment on : 24.11.2015.

Present:
Mr. Justice Md. Rais Uddin.

Ingredients to prove the suit for specific performance of Contract;

In a suit for Specific Performance of Contract the essential ingredients which the plaintiffs are required to prove in order to succeed in a suit for Specific Performance of Contract, are that the Bainapatra is genuine, considerations money passed by the parties and delivery of possession was given in pursuance thereof. ... (Para 12)

1. This Rule was issued calling upon the opposite parties to show cause as to why the judgment and decree dated 10.11.2005 passed by the learned Additional District Judge, 6th Court, Dhaka in Title Appeal No. 66 of 2003 dismissing the appeal and affirming the judgment and decree dated 26.01.2003 passed by the Joint District Judge, 1st Court, Dhaka in Title Suit No. 228 of 1999 dismissing the suit, should not be set-aside.

2. The relevant fact giving rise to this Rule, in short, is that the petitioners as plaintiffs instituted a suit for Specific Performance of Contract and for declaration that registered deed being number 12883 dated 05.09.1999 is not binding upon the plaintiffs contending, inter-alia, that business compensation money of Tk. 950/- of L.A. Case No. 153/62-63 was received before 17.04.1965 by deceitful means by the defendant No.1 and as such on 12.10.1973 he executed an agreement to pay the same within one month and having failed to pay the said money the defendant No.1 proposed to sell the suit property at consideration of Tk. 1,00,000/-in favour of the father of the plaintiffs and on 25.06.1982 after receiving Tk. 50,000/- (fifty thousand) as advance executed a bainapatra for selling the suit land and handed over the possession of the suit land to their father. After repeated request while failed to get the registered deed again on 18.11.1996 the defendant No.1 executed new bainapatra in presence of local elite persons and witnesses on consideration at Tk. 2,00,000/- (two lac) and received Tk. 1,80,000/- (one lac eight thousand) as advance in cash. In the meantime the father of the plaintiffs dies and the plaintiffs on many occasions requested the defendant No.1 to receive remaining Tk. 20,000/- (twenty thousand) and to execute and register a sale deed as per bainapatra, failing which lastly on 26.08.1999 gave legal notice through their advocate for enforcing the said contract of sale but failed. In the meantime after receiving the said legal notice on 29.08.1999 the defendant No.1 sold the suit land to the defendant No.5 by a registered sale deed No. 12883 dated 05.09.1999 and as such the plaintiff instituted this suit

for specific performance of contract along with prayer for declaration that registered sale deed No. 12843 dated 05.09.1999 is collusive, void and not binding upon them.

3. The defendant Nos. 1-5 contested the suit by filing separate written statements denying the material allegations made in the plaint contending, inter-alia, that after purchasing the suit land from one Hasina Begum vide registered sale deed No. 9159 dated 24.06.1963 he erected tin shed hut and possessing the same. In July 1980, father of the plaintiffs took monthly rent of the suit land by paying monthly rent at Tk. 700/- and had been paying rent regularly upto November, 1990 but he failed to pay total 9 month rent upto August, 1991 amounting to Tk. 6300/- as a result he executed an agreement to pay rent of Tk. 7000/- upto September 1991 in presence of local people and while on 18.10.1991 he went to demand the said due rent, the father of the plaintiffs used filthy language and assaulted him as such he filed G.D. Entry being Gulshan Police Station G.D. Entry No. 153 dated 18.10.1991 and subsequently he paid the said due rent of Tk. 7000/- by different installments. Thereafter, he did not pay any rent to him and he became a defaulter. The plaintiffs with evil intention to grab the suit land created a forged agreement dated 12.10.1973 and bainapatra dated 25.06.1982 and 18.11.1996 and served a legal notice on 26.08.1999 and after receiving the said legal notice he gave reply on 12.09.1999 denying all the allegations and demanded to hand over possession of the suit land after paying due rent. The plaintiffs did not hand over the suit land and pay the due rent and as such he filed Title Suit No. 333 of 1999 in the court of Assistant Judge, Dhaka for eviction and realization of arrear rent against the plaintiffs for which the plaintiffs suit is liable to be dismissed. The defendant No.5 also filed a written statement denying the material allegations made in the plaint and making almost identical statement of defendant No.1 written statements and further stating inter-alia that in the middle of August 1999 the defendant No.1 proposed to sell the suit property and accordingly she purchased the suit property by registered sale deed dated 05.09.1999 on consideration at Tk. 2,00,000/- (two lac). The plaintiffs knew about the said sale and as such the suit is liable to be dismissed.

4. At the trial, the plaintiffs examined 4(four) witnesses and the defendants examined 5(five) witnesses in support of their respective cases.

5. The learned Judge of the trial court on conclusion of trial after hearing the parties, considering the evidence and materials on record dismissed the suit by his judgment and decree dated 26.01.2003. Against the said judgment and decree the plaintiffs preferred appeal before the learned District Judge, Dhaka. On transfer it was heard and disposed of by the learned Additional District Judge, 6th Court, Dhaka who after hearing the parties, considering the materials on record dismissed the appeal and affirmed the judgment and decree of the trial court by his judgment and decree dated 10.11.2005.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and decree the plaintiffs as petitioners moved this court and obtained the instant Rule.

7. Mr. Tapan Kumar Chakraborty, the learned advocate appearing for the petitioners has placed the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below and submits that the appellate court failed to consider that expert opinion in respect of comparison of hand writing of the alleged vendor of Bainapatra was necessary but rejected and thus committed illegality. He submits that the appellate court failed to consider the observation of his own passed in order dated 03.09.2005. He submits that the relatives are not ground to reject and disbelieve the evidence of the witnesses. He further submits that the trial court misread the Bainapatra exhibits 1 and 5 in respect date of Bainapatra. He lastly

submits that both the courts below failed to consider the source of possession which is the basis of agreement. In support of his contention he has referred the decision reported in: (1) 13 BLT(AD) 177, (2) 60 DLR(AD) 55, (3) 13 MLR(AD)171, (4) 26 DLR(AD) 70, (5) 20 BLC(AD) 25.

8. Mr. Subrata Saha, the learned advocate appearing for the opposite-parties opposed the rule and submits that the plaintiffs failed to prove Bainapatra by adducing evidence and as such trial court rightly dismissed the suit and the appellate court affirmed the judgment and decree of the trial court. He submits that Bainapatra dated 25.06.1982 has no schedule and no name of witnesses mentioned in the aforesaid Bainapatra and P.W.1 in cross-examination admitted that- "বিগত ২৫-০৬-১৯৮২ ইং তারিখেভ বায়নাপত্র .৭৫ পয়সা স্টাম্পের উপর ংলখা হহ. বায়নাপত্রে কেহ সাক্ষী নাই । বায়নাপত্রে তফশিল নাই। ১৮-০৬-১৯৯৬ ইং তারিখ অপর একটি বায়নাপত্রের কথা বলিয়াছেন উহাতে সাক্ষী নাই।'' He submits that none of the P.Ws. stated that they were present at the time of execution of Bainapatra dated 25.06.1982 and as such Bainapatra dated 25.06.1982 has not been proved by the plaintiffs. He submits that the plaintiffs purchased the stamp on 26.12.1975 by which Bainapatra was executed after 06(six) years on 25.06.1982 which proved that the Bainapatra is forged and concocted one. He submits that none of the P.Ws. stated that Tk. 50,000/- was paid to defendant No.1 as earnest money in his presence and as such the Bainapatra dated 25.06.1982 has not been proved. He further submits that in respect of Bainapatra dated 18.11.1996 which was marked as exhibit-1 and submits that P.W.1 stated that he is not a witness in Bainapatra dated 18.11.1996 and he was not present at the time of execution of the Bainapatra which proved that he knows nothing about Bainapatra dated 18.11.1996. He submits that P.W.2 is the attesting witness No.3 of Bainapatra dated 18.11.1996 but in cross-examination he admitted that-"বায়নাপত্র তফশিলে খতিয়ানে একটু ঘষামাজা দেখা যায়। বায়নাপত্রে ১ নং বিবাদীর সহি ভিন্ন দেখা যায়।" This admission proved that Bainapatra is forged one. Mr. Subrata Saha further adds that P.W.3 is attesting witness No.2 of Bainapatra who in his cross-examination stated that he is uncle of plaintiffs and also admitted that-"বায়নাপত্রে কিছু কাটাকাটি আছে।" He submits that P.W.4 is an attesting witness of Bainapatra dated 18.11.1996 and who is brother in law of the plaintiffs and he knew nothing about Bainapatra and thus P.W.1-4 failed to prove the execution of Bainapatra dated 18.11.1996. He submits that the plaintiff purchased the stamp on 17.11.1995 and Bainapatra was executed on 18.11.1996 after 01(one) year of purchase which proved that Bainapatra is ante dated and forged one. He further submits that evidence beyond pleadings is not sustainable as per provisions under order VI rule 7 of the Code of Civil Procedure. He lastly submits that the plaintiffs failed to file any scrap of paper to prove that defendant No.1 withdrew compensation money of Ismail and P.W.2, 4 stated that they have no any paper to show that defendant No.1 withdrew compensation money of Ismail. In support of his contention he has referred the decisions reported in: (1) 50 DLR(AD) 88, (2) 16 DLR(AD) 157, (3) 44 DLR 69, (4) 38 DLR 39, (5) 58 DLR 329, (6) 15 MLR(AD) 500, (7) 4 MLR(AD) 127, (8) 62 DLR(AD) 242, and (9) 16 BLD (AD) 280.

9. In order to appreciate the submission made by the learned advocates of the parties, I have gone through the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below very carefully.

10. Now the question calls for consideration whether the learned Judge of the court of appeal below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

11. On perusal of the record it appears that the plaintiffs brought a suit for Specific Performance of Contract and for declaration that sell deed dated 05.09.1999 is not binding

upon the plaintiffs. To prove the case the plaintiffs adduced the evidence both oral and documentary. The learned Judge of the trial court considering the evidence and materials on record dismissed the suit holding that the plaintiffs failed to prove their case with observation that-"উভয়পক্ষের স্বাক্ষীগণের জেরা জবানবন্দি পর্যালোচনা করিলে দেখা যায় যে, বাদীগণের পূর্ববর্তী মৃত ইসমাইল মিয়া নালিশী বাড়ীতে ভাড়াটিয়া ছিলেন। বাদীপক্ষের বায়নাপত্র পর্যালোচনা করিয়া দেখা যায়, উহাতে ঘষামাজা আছে। তদুপরি অংগীকার নামা এবং বায়নাপত্রে ১ নং বিবাদীর স্বাক্ষরের মধ্যে ভিন্নতা দেখা যায়।" The learned Judge of the appellate court considering the evidence, assessing and reassessing the evidence independently dismissed the appeal and affirmed the judgment of the trial court with the finding that the plaintiffs failed to prove the Bainapatra which were basis of the plaintiffs by any evidence oral and documentary as to Bainapatra dated 25.06.1982 exhibit-5(ka) and Bainapatra dated 18.11.1996 exhibit-1.

12. In a suit for Specific Performance of Contract the essential ingredients which the plaintiffs are required to prove in order to succeed in a suit for Specific Performance of Contract, are that the Bainapatra is genuine, considerations money passed by the parties and delivery of possession was given in pursuance thereof. But in the instant case the plaintiffs measurably failed to prove the Bainapatra considerations of money and also as to possession and as such the learned Judge of the trial court rightly dismissed the suit and the appellate court on assessing the evidence on record rightly dismissed the appeal and affirmed the judgment and decree of the trial court.

13. On analysis of the judgment of the appellate court it appears to me that the findings arrived by the court of appeal below having been rested upon considerations and discussions of evidence and materials on record and also on a correct and proper analysis of the legal aspect involved in the case. Moreover, the impugned judgment and decree of the appellate court below in its entirety are well founded in the facts and circumstances of the case. Therefore, grounds urged and the contentions advanced by the learned advocate for the petitioners are not correct exposition of law. However, I have gone through the decisions reported in (1) 13 BLT(AD) 177, (2) 60 DLR(AD) 55, (3) 13 MLR(AD)171, (4) 26 DLR(AD) 70, (5) 20 BLC(AD) 25, as referred by the learned advocate for the petitioners. I am respectful agreement with principles enunciated therein. But the facts leading to those cases are quite distinguishable to that of the instant case and therefore, to that effect I am also unable to accept his submissions. On the contrary the legal pleas taken by the learned advocate for opposite parties prevail and the decisions cited by him reported in (1) 50 DLR(AD) 88, (2) 16 DLR(AD) 157, (3) 44 DLR 69, (4) 38 DLR 39, (5) 58 DLR 329, (6) 15 MLR(AD) 500, (7) 4 MLR(AD) 127, (8) 62 DLR(AD) 242, and (9) 16 BLD (AD) 280, appear to have a good deal of force.

14. In view of discussions, decisions and reasons stated above, I am of the view that the impugned judgment and decree of the court of appeal below suffers from no legal infirmity which calls for no interference by this court in revision. Thus, I find no merit in the Rule.

15. In the result, the Rule is discharged. However, there will be no order as to costs.

16. Let the Lower Court Records along with a copy of the judgment be sent to the court concerned at once.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

Civil Revision no. 4486 of 2015

British American Tobacco Bangladesh Company Ltd., represented by its Company Secretary Md. Azizur Rahman, New DOHS Road, Mohakhali, Dhak-1206.
..... Defendant-petitioner.

Versus

Begum Shamsun Nahar,
.....Plaintiff-opposite party.

Mr. A.J. Mohammad Ali, Senior Advocate with Ms. Rubaiyat Hossain, Advocate, and Ms. Jamila Mamtaz, Advocate,
..... For the defendant petitioner.

Mr. Muhammad Nawshed Jamir, Advocate, with
Mr. A.H.M. Abdul Wahab, Advocate,
Mr. Reajul Hasan, Advocate, and
Mr. Tanvir Prodhan, Advocate,
… For the Plaintiff opposite party.

Hearing on: 04-10-2017,
And
Judgment delivered on: 05-10-2017

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

Principle to amend Pleadings;

We find that one of the fundamental principles governing the amendment of the pleadings is that all the controversies between the parties as far as possible should be included and multiplicity of the proceedings avoided. ... (Para 15)

JUDGMENT

Syed Md. Ziaul Karim, J:

1. This Rule was issued on an application under section 115(1) of the Code of Civil Procedure (briefly as the Code) at the instance of defendant petitioner calls in question the legality and propriety of the order dated 14-10-2015 passed by learned Joint District Judge and Arbitration Court, Dhaka, allowing an application for amendment of the plaint of Money Suit no. 26 of 2013 under order VI Rule 17 of the Code.

2. Material facts leading to this Rule, are that on 23-05-2004 opposite party as plaintiff instituted Money Suit no. 32 of 2004 in the first Court of Joint District Judge, Dhaka, impleading the petitioner as defendant for realization of money for Tk.2,50,38,000.00 from the defendant.

3. The relieves claimed in suit reads as hereunder:

a. A decree for damages against the defendant in favour of the plaintiff for Tk.2,50,38,000.00 only may kindly be passed with cost;
b. Interest at the rate of 15% (fifteen percent);

c. The defendant may be directed to pay the decreetal amount to the plaintiff or to deposit the same in court within a time to be specified by this honorable Court.
d. In case of failure on the part of the defendant to satisfy the decree passed by the honorable Court the decreetal amount may be recovered by attachment and sale of moveable and immovable properties belonging to the defendant;
e. The decreetal amount if recovered may be directed to be paid to the plaintiff;
f. Such other relief or relieves this honorable court deems just and proper may be granted to the plaintiff.

4. In suit, the plaintiff by filing an application dated 12-11-2012 sought to amend the plaint under Order VI Rule 17 of the Code by incorporating some clarification of the statements already made in the plaint and some correction of error apparent from the face of the plaint. The defendant opposed the proposed amendment by filing written objection stating that the proposed amendment will change the nature and character of the suit which cannot be allowed.

5. After hearing the learned Judge of the Court below by the impugned order allowed the application for amendment.

6. Feeling aggrieved the defendant as petitioner filed the instant application and obtained the present Rule.

7. The learned Advocate appearing on behalf of the petitioner seeks to impeach the impugned order on two fold arguments:

> **Firstly:** The plaintiff by identical application sought to amend the plaint earlier which was allowed by the Court below but the same was set aside by the High Court Division on 22-01-2014 in Civil Revision no.355 of 2013, wherein this Court directed the Court below to pass a proper judgment considering the amendment application with written objection in accordance with law. He adds that the impugned order is a non-speaking order which cannot be sustained in law.
> **Secondly:** Later, another identical application was allowed without complying this Court's direction. So the impugned order cannot be sustained in the eye of law.

8. The learned Advocate appearing for the plaintiff opposite party opposes the Rule and candidly submits that the trial Court did not comply the direction of this Court. He, however submits that non-speaking impugned order itself is not the valid ground for interference by the High Court Division. He lastly submits that by such non speaking impugned order will not affect the merit of this case.

9. In support of his contention he refers the case of Abdul Motaleb Vs. Md. Ershad Ali and others 18 BLD (AD) 121 held:

> ***" Section -115)***
> ***Non-Speaking Order-***
>
> *Simply because the impugned order was not a speaking order, could not by itself be a valid ground for interference by the High Court Division unless it can be shown that the subordinate Court has committed any error of law "resulting in an error in the decision occasioning failure of justice.*

The order of the subordinate Court may have been a bad order and improper one not having given any reasons but before interfering with the same the High Court Division is required to examine whether the same has resulted in an erroneous decision occasioning failure of justice.

Order VI Rule 17

Since all rules of the Court are intended to secure the proper administration of justice, it is essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment be enjoyed and as such it should always be liberally exercised. The only limitation in allowing an amendment of the plaint is that the proposed amendment should not change the fundamental character and nature of the suit. The settled law that amendment of pleadings may be allowed at any stage of the proceedings for the purpose of determining the real controversy between the parties."

10. In order to appreciate their submissions we have gone through the records and given our anxious considerations to their submissions.

11. The point for consideration whether the impugned order calls for interference by this Court.

12. On going to the materials on record it transpires that it is the definite case of plaintiff that proposed amendment are for clarification of some statements made in the plaint and will not change the nature and character of the suit.

13. For the convenience of understanding the Provisions of Order VI Rule 17 of the Code reads as hereunder:

" *17- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.*

14. Therefore, Order VI Rule 17 of the Code provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such term as may be just and necessary for the purpose of determining the real question in controversy between the parties. The proposed amendment would settle the question of disputes between the parties. This will end all pending controversies between the parties and will not amount to a change in the nature and character of the suit.

15. It transpires to us that proposed amendment will in no way change the nature and character of the suit rather the plaintiff wants to amend his plaint by proposed amendment for proper and complete adjudication of the suit which do not appear to be inconsistent, irrelevant, immaterial or contradictory of the facts of suit. We find that one of the fundamental principles governing the amendment of the pleadings is that all the controversies between the parties as far as possible should be included and multiplicity of the proceedings avoided.

16. Therefore, we hold that the proposed amendment is necessary for the purpose of determining the real questions in controversies between the parties and proper adjudication of the suit. Moreover, the respective party will prove their own case by adducing evidence and

other party has the ample opportunity to file additional written statement against such amendment and to prove their case at the time of hearing.

17. In the case of Abdul Mutaleb Vs. Ershad Ali 1998 BLD(AD)121=4 BLC(AD)150 held:

> *" Since all rules of the Court are intended to secure the proper administration of justice, it is essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment may be enjoyed and, as such, it should always be liberally exercised. The only limitation in allowing an amendment of the plaint is that the proposed amendment should not change the fundamental character and nature of the suit. The settled law is that amendment of pleadings may be allowed at any stage of the proceedings for the purpose of determining the real questions in controversies between the parties."*

18. This view receives support in the case of Md. Khaledur Reza Chowdhury Vs. Saleha Begum and others 1997 BLD(AD) 86= 2 BLC(AD) 20, S.N. Roy Chowdhury Vs. A. Jabber and others 1994 BLD 229=46 DLR 273. Moyjuddin Mondol Vs. Bena Rani Das and others 45 DLR 154 and M. A. Jahangir and others Vs. Abdul Malek and others 41 DLR 389.

19. In the light of discussions made above and the preponderant judicial views emerging out of the authorities referred to above, we are of the view that the Court below rightly allowed the application for amendment. We find that earlier in Civil Revision no. 355 of 2013 there was a direction by this Court dated 22-01-2014 to the effect that the trial Court should pass a proper judgment on considering the amendment application itself but such direction was not complied by the Court below we highly disapprove such act of the learned Judge. Therefore, she is cautioned not to do such act in future failing which she should be dealt in accordance with law.

20. In view of foregoing narrative, the Rule is discharged without any order asto cost. The order of stay granted earlier stands vacated.

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

22. Let a copy of judgment and order be served upon Mrs. Monowara Begum, Joint District Judge, Arbitration Court, Dhaka.

12 SCOB [2019] HCD

HIGH COURT DIVISION

SPECIAL ORIGINAL JURISDICTION

WRIT PETITION N0. 933 OF 2007

Proshika Manobik Unnayan Kendro
.... Petitioner

-Versus-
The Commissioner of Taxes and others
..... Respondents

Mr. Sardar Jinnat Ali, Advocate
..... For the Petitioner

Ms. Mahfuza Begum, A. A. G
..... For the Respondent No.1

Judgment dated: 28.10.2018

Present:
Mr. Justice Borhanuddin
And
Mr. Justice Sardar Md. Rashed Jahangir

Section 158 of the Income Tax Ordinance 1984;

The proviso to Sub-Section (2) of section 158 of the Ordinance vests discretion with the Commissioner of Taxes to reduce statutory requirement of payment under Sub-Section(2) of section 158 of the Ordinance, if the grounds stated in the application filed by the assessee applicant under the proviso appears reasonable to him/her. From the language of the proviso, we do not find any statutory duty of the CT to pass an order assigning reason. ... (Para 18)

Though there is no requirement to give an opportunity of hearing to the assessee-applicant or recording reason, but still the Commissioner of Taxes should be aware that his /her order must reflect reasonableness from where it can be transpire that the Commissioner of Taxes applied his/her judicial mind in passing the order. But for inadequacy or absence of reasonableness, the order cannot be set aside. It is discretion of the Commissioner of Taxes. ... (Para 22)

JUDGMENT

Borhanuddin, J:

1. The rule Nisi has been issued calling upon the respondents to show cause as to why the impugned order bearing Nothi No. Misc.8/law/ka au-5/2006-07 dated 17.08.2006 (Annexure-A) passed by the respondent No.1 purportedly under section 158(2) of the Income Tax Ordinance, 1984, rejecting petitioner's application for exemption from payment of 15% of the demanded income tax prior to preferring an appeal before the Income Tax Appellate Tribunal for the Assessment Year 2004-2005 should not be declared to have been issued without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of the rule are that the petitioner is a Non-Government Voluntary Organization registered under the Societies Registration Act. The petitioner submitted Income Tax return for the assessment year 2004-2005 to the Deputy Commissioner

of Taxes, (hereinafter called 'the DCT') respondent no.3 herein, with audited accounts showing a loss of taka 61,12,27,742/-.But the respondent no.3 by his order dated 29.04.2015 determined taxable income of the petitioner at taka 21,10,62,372/-ignoring audited accounts submitted by the petitioner. Against the order, assessee-petitioner preferred appeal to the Appellate Joint Commissioner of Taxes (hereinafter called 'the AJCT'), respondent no. 4 herein. Upon hearing the parties and perusing relevant papers/documents, the AJCT affirmed order of the DCT vide its order dated 03.05.2006. At the relevant period, pre-deposit of 15% tax determined by the AJCT or Commissioner of Taxes (appeal), as the case may be, was a condition precedent under section 158(2) of the Income Tax ordinance (hereinafter stated 'the ordinance') for preferring appeal to the Appellate Tribunal. A Proviso attached to sub-section (2) of section 158 runs as follows:

> *"Provided that on an application made in this behalf by the assessee, the commissioner of taxes, may reduce, the requirement of such payment, if the grounds of such application appears reasonable to him."*

3. Accordingly, the assessee-petitioner filed an application to the Commissioner of Taxes (hereinafter called 'the CT'), respondent no.1 herein,to reduce the amount of 15% statutory requirement under section 158(2) of the ordinance and allow the petitioner to file appeal depositing taka 10,000/-only. Respondent no.1 on perusal of the application and materials on record reduced the amount at taka 50,00,000/- from taka 87,16,569/- which is 15% of the tax determined by the AJCT vide order dated 14.08.2006.

4. Being aggrieved, the assessee-petitioner moved this application under Article 102 of the Constitution of the People's Republic of Bangladesh and obtained the present rule along with an order of stay.

5. Mr. Sardar Jinnat Ali, learned advocate appearing for the petitioner challenged the impugned order on two counts, firstly, arbitrary fixation of the amount for pre-deposit at taka 50,00,000/- without affording an opportunity of hearing to the petitioner. Secondly, the respondent no.1 did not record any reason how he arrived such a finding that the assessee has the ability to deposit taka 50,00,000/-. Mr. Ali submitted that the impugned order is without lawful authority and is of no legal effect and also violative of Article 27 and 31 of the Constitution inasmuch as respondent no.1 passed the order without providing an opportunity of hearing to the petitioner and without recording any reason to arrive its finding. In support of his submission, learned advocate referred to the case of J.T (India) exports and another – Vs- Union of India and another, reported in 2003 ITR (Vol 262) 269 and the case of Commissioner of Income Tax, East Pakistan, central Secretariat, Dacca, -Vs- Fazlur Rahman, reported in 16 DLR506.

6. On the other hand, Ms. Mahfuza Begum learned Assistant Attorney General appearing for the respondent no.1 submits that pre-deposit of 15% was a condition precedent at the relevant period for filling appeal to the Taxes Appellate Tribunal under section 158(2) of the ordnance and the proviso attached to the section conferring power to reduce the statutory requirement for filling appeal was a discretionary power of the CT and to exercise the discretion the CT had no legal obligation to provide personal hearing or record reasoning since the DCT and AJCT determined tax liability of the petitioner after hearing representative of the assessee-petitioner and taking into consideration the points raised by the assessee as such the rule is liable to be discharged. In support of her submissions, learned Assistant Attorney General referred to the case of Union of India & another-Vs-M/S. Jesus Sales Corporation, reported in 1996 AIR1509 and the case of Vijay Prokash D. Meheta and

another –Vs- Collector of Customs, reported in 1989 ITR (Vol-175) 540 and the case of Shyam Electric Works –Vs- Commissioner of Income Tax, reported in (2006) 284 ITR 413.

7. Heard learned advocate for the petitioner and learned Assistant Attorney General for the respondent. Perused the application under Article 102 of the constitution and annexure appended thereof along with citations referred by learned counsels.

8. Since the dispute centered round section 158 of the ordinance, it will be profitable to quote the section as it was at the relevant period:

> *"158. **Appeal to the Appellate Tribunal** (1) An assessee may appeal to the Appellate Tribunal if he is aggrieved by an order of*
> *a) an Appellate Joint Commissioner or the Commissioner (Appeals) as the case may be, under section 128 or 156.*
> *2) No appeal under sub-section (1) shall lie against an order of the Appellate Joint Commissioner or the Commissioner (Appeals), as the case may be, unless the assessee has paid fifteen per cent of the amount representing the difference between the tax as determined on the basis of the order of the Appellate Joint Commissioner or the Commissioner (Appeals), as the case may be, and the tax payable under section 74.*
> *Provided that on an application made in this behalf by the assessee, the Commissioner of Taxes, may reduce, the requirement of such payment, if the grounds of such application appears reasonable to him".*

9. On the basis of the proviso attached to section 158(2) of the Ordinance, the assessee-petitioner filed an application to the CT to reduce the amount of 15% statutory requirement from taka 87,16,659/- to taka 10,000/- only for preferring appeal to the Appellate Tribunal under Section 159 of the ordinance against order of the AJCT.

10. Relevant portion of the application filed by the assessee-petitioner are reproduced below:

> "মারকেনটাইল সিস্টেমে রক্ষিত প্রশিকার হিসাব সমূহ এবং নিরীক্ষা প্রতিবেদন সমূহ, বিল ভাউচার ও হিসাবের খাতাপত্র দাখিল করা সত্ত্বেও বিজ্ঞ উপ-কর কমিশনার তার দপ্তর কর্তৃক প্রাপ্তি স্বীকার করা কাগজপত্র পান নাই বলিয়া মন্ড়ব্য করিয়াছেন এবং আক্রোশমূলক , কাল্পনিক ও বেআইনিভাবে নিরীক্ষা রিপোর্ট সমূহ অগ্রাহ্য করিয়া নিরীক্ষা রিপোর্টে উলে- খিত বিবিধ খরচ সমূহকেও অগ্রাহ্য করিয়াছেন এবং দাতা সংস্থার সহিত সংশিষ্ট প্রকল্প Towards a Proverty- Free Society (Phase VI) program, Disaster management programme, Collaborative project সমূহের মোট ব্যয় (১২৮,৫৭,৪৪,৪৫১ + ১৩,৭৬,০৯৯ + ৫৪,৫৭,৯২৯) = ১২৯,২৫,৭৮,৪৭৯/- টাকা হিসাবে না নিয়া শুধু এ প্রকল্প সমূহ থেকে প্রাপ্ত অর্থ (৮,৫০,৬১,৪১৯/- + ২,৭০,৫৮২/- + ৫৭,০৭২/- টাকা) মোট ৮,৫৩,৮৯,০৭৩/- টাকা আয় হিসাবে নিয়া এবং তথ্যগত ভিত্তি না থাকা স্বত্তেও কাল্পনিকভাবে ইন্টিগ্রেটেড এগ্রিকালচার ফার্ম হতে আয় ১,২৫,৭৬,০৪৫/- টাকা, সেন্ট্রাল আই এ এফ এর হিসাব হতে আয় ৫৯,০৯,০১৩/- টাকা, প্রশিকা কম্পিউটার সিস্টেম (পিসিএস) থেকে আয় ৫,১২,৮৮,৩৩২/- টাকা, গোলাম মাওলা ফাতেমা ওয়েলফেয়ার ট্রাষ্ট থেকে ১২,৪৮,৩৫৭/- টাকা আয় দেখাইয়া সংস্থা প্রশিকার প্রকৃত নীট ক্ষতি ৬১,১২,২৭,৭৪২/- টাকা এর স্থলে সর্বমোট ২১,১০,৬২,৩৭২/- টাকা আয় দেখাইয়া ২৯/১২/২০০৫ তারিখে কর নির্ধারণ আদেশ প্রদান করিয়াছেন এবং আয়কর ৫,২৬,৬৮,০৯৩/- + সুদ ৫৪,৪২,৩৬৯/- টাকা সহ মোট ৫,৮১,১০,৪৬২/- টাকা আয়কর প্রদানের জন্য আইটি-১৫ প্রেরন করিয়াছেন। উপকর কমিশনার কর্তক কর বছর ২০০৪-২০০৫ এর বেআইনি কর নির্ধারণ আদেশ তারিখ ২৯-১২-২০০৫ এর অনুলিপি করদাতা প্রশিকা ১৭/০১/২০০৬ তারিখ পাইয়াছে। এজেসিটির আয়কর আপীল আদেশ পত্র ৯৭৯/সাঃ-৫১/কঃঅঃ-৫/০৫-০৬, তারিখ ০৩/০৫/২০০৬ এর অনুলিপি করদাতা প্রশিকা ০৬/০৭/২০০৫ইং তারিখ পাইয়াছে। সেহেতু, কর বছর ২০০৪-২০০৫ এর উপকর কমিশনার কর্তৃক কর নির্ধারণ আদেশ তারিখ ২৯/১২/২০০৫ এবং ০৩/০৫/২০০৫ তারিখের এজেসিটির আয়কর আপীল আদেশ পত্র ৯৭৯/সাঃ-৫১/কঃঅঃ-৫/০৫-০৬ এর

বির"দ্ধে ট্যাকসেস আপীলাত ট্রাইবুনালে আপীল করা প্রয়োজন। কিন্তু বর্তমানে আয়কর অধ্যাদেশের ১৫৮(২) ধারায় সংশোধনী অনুযায়ী ১৫% কর সরকারী কোষাগারে জমা করিয়া ট্যাকসেস আপীলাত ট্রাইবুনালে আপীল করার বিধান রহিয়াছে।

সংস্থা প্রশিকার প্রকৃত নীট ক্ষতি ৬১,১২,২৭,৭৪১/- টাকা এর বিপরীতে উপ-কর কমিশনার কর্তৃক উপরোলে- খিত কাল্পনিক ও বেআইনিভাবে ২১,১০,৬২,৩৭২/- টাকা আয় নির্ধারন তথা আয়কর ৫,৮১,১০,৪৬২/- টাকা ধার্য করার পরিপ্রেক্ষিতে করদাতা প্রশিকাকে শুন্য আয়করের স্থলে আয়কর ৫,৮১,১০,৪৬২/- টাকার ১৫% সমপরিমান ৮৭,১৬,৫৬৯/- টাকা কোষাগারে জমা দিয়া ট্যাকসেস আপীলাত ট্রাইবুনালে আপীল করার প্রয়োজনিয়তা দেখা দিয়াছে। কিন্তু প্রশিকার বর্তমান আর্থিক অবস্থার পরিপ্রেক্ষিতে এত বিপুল পরিমান অর্থ কোষাগারে প্রদান করার সম্ভব নয়। ইহা ব্যতিত উক্ত অর্থ পরিশোধ করতে আপীলকারীর hardship এর কারন হইবে। প্রশিকার বর্তমান আর্থিক অবস্থা খুবই খারাপ।

এমতাবস্থায়, আপনার নিকট বিনীত আরজ এই যে, ন্যায় বিচারের স্বার্থে উপ-কর কমিশনার কর্তৃক আক্রশমূলক, কাল্পনিক ও বেআইনিভাবে প্রশিকার শূন্য আয়করের স্থলে প্রশিকার জন্য ধার্যকৃত আয়কর ৫,৮১,১০,৪৬২/- টাকার ১৫% কর সমপরিমান ৮৭,১৬,৬৫৯/- টাকা জমা মওকুফ করিয়া শুধু টোকেন অর্থ ১০,০০০/- টাকা সরকারী কোষাগার বাংলাদেশ ব্যাংকে জমা দান পূর্বক ট্যাক্সেস আপীলাত ট্রাইবুনালে আপীল করিবার অনুমতি দানে বাধিত করিবেন।"

11. Respondent no.1 Commissioner of Taxes disposed of the application vide its order dated 14.08.2006 in the following manner:

"আপনার ১৮-০৮-২০০৬ইং তারিখের গৃহিত আবেদনের প্রেক্ষিতে আয়কর নথি, দাখিলকৃত কাগজপত্র ইত্যাদি পরীক্ষান্তে প্রতীয়মান হয় যে, আপনার কর প্রদানের সামর্থ আছে। অতএব, আয়কর অধ্যাদেশের ১৫৮/(২) ধারার শর্ত অনুযায়ী ২০০৪-০৫ কর বর্ষেও আপীলাত ট্রাইবুনালে মামলা দায়েরের জন্য ৫০,০০,০০০/- (পঞ্চাশ লক্ষ) টাকা পরিশোধ সাপেক্ষে আপীলাত ট্রাইব্যুনালে মামলা দায়েরের জন্য আপনার আবেদন মঞ্জুর করা হইল।"

12. Petitioner's contention is that though there was no statutory requirement under the proviso of section 158 (2) but principle of natural justice demands a personal hearing before passing the order. The moot question is whether the Commissioner of Taxes was under obligation to provide an opportunity of hearing to the assessee-petitioner and passed the order assigning reasons. Learned counsel for the parties referred citations in support of their submission. It need not be pointed out that under different situations and conditions the requirement of the compliance of the principle of natural justice vary. The application of the audi alterem partem is not applicable to all eventualities or to cure all ills. Its application is excluded in the interest of administrative efficiency and expedition. Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and background of statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case. These principles do not apply to all cases and situations. Applications of these uncodified rules are often excluded by express provision or by implication. The rule of audi alteram partem is not attracted unless the impugned order is shown to have deprived a person of his liberty or his property.

13. The question of audi alterem pertam arose in the case of Union of India & Anr.-Vs-M/S. Jesus Sales Corporation, wherein a Full Bench of Delhi High Court observed that:

"Before rejecting the prayer made on behalf of the respondent to dispense with the whole amount of penalty an opportunity should have been given to the said respondent of being heard in terms of the proviso to Section 4-M of the Imports and Exports (Control) Act, 1947."

14. Section 4-M of the Act provides amongst other that where the Appellate authority is of the opinion that the deposit to be made will cause undue hardship to the appellant it may at

its discretion dispense with such deposit either unconditionally or subject to such conditions as it may impose. Union of India challenged the order of the Delhi High Court before the Indian Supreme Court.

15. After thorough and meticulous discussions, Indian Supreme Court held.

> *"When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded. This is all the more important in the context of taxation and revenue matters. When an authority has determined a tax liability or has imposed a penalty, then the requirement that before the appeal is heard such tax or penalty should be deposited cannot be held to be unreasonable as already pointed out above. In the case of Shyam Kishore-Vs-Municipal Corporation of Delhi, it has been held by this court that such requirement cannot be held to be harsh or violative of Article 14 of the Constitution so as to declare the requirement of pre-deposit itself as unconstitutional. In this background, it can be said that normal rule is that before filing the appeal or before the appeal is heard, the person concerned should deposit the amount which he has been directed to deposit as a tax or penalty. The non-deposit of such amount itself is an exception which has been incorporated in different statutes including the one with which are concerned. Second proviso to sub-section (1) of Section 4 M says in clear and unambiguous words that an appeal against an order imposing a penalty shall not be entertained unless the amount of the penalty has been deposited by the appellant. Thereafter, the third proviso vests a discretion in such Appellate authority to dispense with such deposit unconditionally or subject to such conditions as it may impose in its discretion taking into consideration the undue hardship which it is likely to cause to the appellant. As such it can be said that the statutory requirement is that before an appeal is entertained, the amount of penalty has to be deposited by the appellant; an order dispensing with such deposit shall amount to an exception to the said requirement of deposit. In this background, it is difficult to hold that if the Appellate authority has rejected the prayer of the appellant to dispense with the deposit unconditionally or has dispensed with such deposit subject to some conditions without hearing the appellant, on perusal of the petition filed on behalf of the appellant for the said purpose, the order itself is vitiated and liable to be quashed being violative of principle of natural justice and with the above observation allowed the appeal filed by the Union of India. As it is stated above that the attached provision of section 158 of the Ordinance is states that the Commissioner of Taxes on an application made by the assessee may reduce the requirement of pre-deposit appears reasonable to him."*
>
> *(Emphasis supplied by us.)*

16. Article 102 of out Constitution empowers the High Court Division to issue certain orders and directions. Language of the Article 102 runs as follows:

> *"102 (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the this Constitution".*

17. From the language above, it is apparent that existence of fundamental right to be the formation of the exercise of jurisdiction by the High Court Division under this Article. This right has to be a legal right. Legal right means legally enforceable rights and not purely personal right or personal contract having no statutory force. The above words must be read in the context of and in anti-thesis of the words "for the enforcement of any of the rights conferred by part III".

18. The proviso to Sub-Section (2) of section 158 of the Ordinance vests discretion with the Commissioner of Taxes to reduce statutory requirement of payment under Sub-Section(2) of section 158 of the Ordinance, if the grounds stated in the application filed by the assessee applicant under the proviso appears reasonable to him/her. From the language of the proviso, we do not find any statutory duty of the CT to pass an order assigning reason.

19. The rule that decisions of an authority exercising judicial or quasi judicial authority should be reasoned, is not a universally established rule, although in certain situations it is rigidly enforced. The duty to give reasons may be either a statutory requirement or non statutory. Where the duty is laid down by the act or the rules made thereunder, obviously, the authority is bound to give reasoned decision in all cases to which that provision is applicable. But in the absence of a statutory duty, the court have been emphatic to advise judicial or quasi judicial authorities to assign reasons in such a form as to justify the orders being called what are described as speaking orders.

20. It may be mentioned here that, upon hearing the authorized representative of the assessee-petitioner and considering the points raised by the assessee-petitioner the DCT and the AJCT determined tax liability of the assessee as such requirement of further hearing is always with the authority who decides the matter. There is no statutory requirement for hearing the applicant or recording reason under the proviso of section 158(2) of the ordinance.

21. We have perused section 249(4) of the Indian Income Tax Act, 1961, which runs as follows:

A) No appeal under this chapter shall be admitted unless at the time of filing of the appeal,-

a) Where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

b) Where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him:

"*Provided that in a case of filing under clause (b) and on an application made by the appellant in this behalf, the Commissioner (Appeal) may, <u>for any good and sufficient reason to be recorded in writing,</u> exempt him from the operation of the provisions of that clause".*

(Emphasis supplied by us.)

22. It appears from Section 249(4) of the Indian Income Tax Act, 1961, that there was a statutory requirement to record good and sufficient reason by the Commissioner (Appeal) to exempt assessee applicant from the payment under clause (a) and (b) of the section. But in our statute there is no such requirement. We cannot interprete language of the statute framed by our legislators in between the lines. Legislators framed the law at their wisdom. Though there is no requirement to give an opportunity of hearing to the assessee-applicant or recording reason, but still the Commissioner of Taxes should be aware that his /her order must reflect reasonableness from where it can be transpire that the Commissioner of Taxes applied his/her judicial mind in passing the order. But for inadequacy or absence of reasonableness, the order cannot be set aside. It is discretion of the Commissioner of Taxes.

23. Under the facts and circumstances of the case and for the reasons stated above, we are inclined to discharge the rule with the observation made above.

24. Accordingly, the rule is discharged without any order as to cost.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(CRIMINAL REVISIONAL JURISDICTION)

DIST-DHAKA

CRIMINAL REVISION NO.2367 OF 2018

Begum Khaleda Zia, Former Prime Minister, wife of Shaheed President Ziaur Rahman

.....…*Accused petitioner.*

-Versus-

Anti-Corruption Commission (ACC), Dhaka and another

…….. *Opposite parties.*

Mr. AJ Mohammad Ali, Senior advocate with Mr. Kayser Kamal, Advocate & Mr. Md. Aminul Islam, Advocate .....For the accused-petitioner.

Mr. Md. Khurshid Alam Khan, Advocate .....For the ACC

Mr. Md. Jahangir Alam, DAG with Mr. Md. Jashim Uddin, AAG & Mr. Shafquat Hussain, AAG ..... For the State

The 14th day of October, 2018

Present:
Mr. Justice Obaidul Hassan
And
Mr. Justice S M Kuddus Zaman

Cr PC section 540A;

In the case at hand, we find that the Petition under section 540A was filed by the Public Prosecutor, though it has not been expressly mentioned whether the Public Prosecutor can file such an application; the Code does not prevent the Public Prosecutor from filing as such. The case reported in *14 DLR*, aides us in concluding that, where there is no such provision preventing the Public Prosecutor from filing such an application, there is no harm if the Public Prosecutor draws the attention of the Court by filing such an application for the sake of expedition and deliverance of Justice. ... (Para 21)

Mr. Justice Obaidul Hassan
And
Mr. Justice S M Kuddus Zaman

Judgment

1. The petitioner Begum Khaleda Zia has filed this application under section 10(1A) of the Criminal Law Amendment Act 1958, with a prayer to "issue rule, calling upon the opposite party to show cause as to why the order dated 20/9/2018, passed by the learned Special Judge, Court No.5, Dhaka in special case No. 18 of 2017, arising out of Tejgaon Police station, case No. 15, dated 8/8/2011, corresponding to ACC GR No.84, of 2011 under section 5(2) of the Prevention of Corruption Act 1947, read with section 109 of the Penal Code allowing the application for dispensing with personal attendance of the accused petitioner under section 540A of the Code of Criminal Procedure 1898, filed by the learned Public Prosecutor and thereby directing to proceed with the case in the absence of the accused petitioner, should not be set aside."

2. In addition to the above prayer, she also prayed for staying the proceedings of special case No. 18 of 2017, arising out of Tejgaon Police station case No. 15, dated 8/8/2011, corresponding to ACC GR No. 84 of 2011, under section 5(2) of the Prevention of Corruption Act 1947, read with section 109 of the Penal Code before the learned Special Judge, Special Judge Court No.5, Dhaka.

3. The prosecution story, in short, is that former Prime Minister Begum Khaleda Zia during her regime from 2001 to 2007 formed a trust namely "Shsheed Ziaur Rahman Charitable Trust", which was registered in Gulshan Sub-Registry Office vide Registration No.IV-33, dated 26.10.2004 No.6, Shaheed Moinul Road, Dhaka, the then residence of Begum Zia, was used as the address of the trust and Begum Khaleda Zia was the 1st Trustee of the trust and her two sons Tarique Rahman and Arafat Rahman were the members of the Trust. Begum Khaleda Zia as the 1st Managing Trustee on 09.01.2005 opened a savings account being No.34076165 with the Sonali Bank, Prime Minister's Office Branch and after opening the account collected money from different illegal sources by using her official power and deposited to the said account.

4. On 16.01.2005 by using the name of Metro Makers and Developers Ltd. the following moneys were deposited to the said account from Shahjalal Bank Ltd., Dhanmondi Branch. The Managing Director of Metro. Makers and Developers Ltd. Mr. A.F.M Jahangir informed that they never donated any money to the "Ziaur Rahman Charitable Trust." He also informed that Assistant Personal Secretary of the then Mayor of Dhaka City Corporation Mr. Monirul Islam managed to deposit the said money to the account of the said Trust by using the name of his company. Mr. Monirul Islam Khan informed that Political Secretary of the then Prime Minister Mr. Abul Haris Chowdhury gave him the money to deposit to the said account through pay-order. On 18.01.2005 Assistant Private Secretary of Political Secretary of the then Prime Minister Md. Ziaul Islam deposited BDT 27,00,000.00; apart from that huge amount of money was deposited to the said account on different dates, which he deposited at the instruction of Abul Haris Chowdhury, the Politice Secretary of the then Prime Minister.

5. Mr. Harunur Rashid, Assistant Director (Special Inquiry and Investigation-1), Anti Corruption Commission (ACC), Head Office, Dhaka as investigation officer investigated the case perfunctorily and after investigation submitted charge sheet being No.27 dated 16.01.2012 under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code against the petitioner and 3(three) others.

6. The case record was transmitted to the Metropolitan Sessions Judge and Ex-Officio Senior Special Judge, Dhaka and the case was registered as Special Case No.05 of 2013. Thereafter, the case record was transmitted to the Special Judge, Court No.5, Dhaka for holding trial and the case was renumbered as Special Case No.18 of 2017.

7. On 19.03.2014 the Special Judge framed charge against the petitioner under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code which was read over to her to which she pleaded not guilty and prayed for trial.

8. Out of 36(thirty six) charge sheeted witnesses the prosecution examined the following 33(thirty three) witnesses in order to prove the case.

9. After conclusion of the examination of the witnesses the petitioner was examined under section 342 of the Code of Criminal Procedure and the petitioner again claimed to be the innocent and prayed for trial and on 21.12.2017 i.e. on the date of argument she submitted a written statement.

10. The case was against fixed for argument on 25.02.2018, but the petitioner could not be produced before the Court from jail because of her illness and consequently the case was adjourned. Subsequently, several dates were fixed for arguments of the case, but because of the same reason the petitioner could not be produced before the Court and the case was adjourned.

11. On 05.09.2018 on the fixed dated of hearing of the case the learned advocates for the petitioner went to the Special Judge, Court No.5, Dhaka at Alia Madrasha, Makshibazar, Dhaka for conducting the case and came to know for the first time that the Court has already been shifted to the old Central Jail, Nazimuddin Road, Dhaka. Thereafter, on 12.09.2018 the learned advocate for the petitioner appeared before the Court inside the old Central Jail and filed an application for adjournment of hearing of the case till recovery from hear illness and also filed an application for extension of bail and after hearing the learned advocates of both sides the Court was pleased to fix the next date on 13.09.2018 for further hearing.

12. On 13.09.2018 the Public Prosecutor filed an application under section 540A of the Code of Criminal Procedure praying for dispensation with the personal attendance of the petitioner and for proceeding with the case in her absence. After hearing the learned advocates of both the parties the learned Special Judge, Court No.5, Dhaka by order dated 20.09.2018 allowed the application under section 540A of the Code of Criminal Procedure for dispensation with the personal attendance of the petitioner and directed to proceed with the case in her absence. The next date of the case is on 30.09.2018.

13. Mr. A J Mohammad Ali, learned Advocate in support of the application submitted that the learned Special Judge, Court No.5, Dhaka passed the impugned order, dispensing with the personal attendance of the petitioner and directing to proceed with the case in her absence, without applying his judicial mind and as such the same is liable to be set aside. He also submitted that the privilege of section 540A of the Code of Criminal Procedure can only be sought by the accused. The public prosecutor is in no way entitled to file such application for dispensation with the personal attendance of an accused. This aspect of law was not considered by the learned Special Judge, Court No.5, Dhaka while passing the impugned order and as such the same is liable to be set aside. He also submitted that the learned Special Judge failed to appreciate that order of dispensation with the personal attendance of an accused cannot be passed in her absence while the accused is in custody inasmuch as if the order of dispensation with the personal attendance is passed in her absence the accused will highly be prejudiced and as such the impugned order is liable to be set aside for ends of justice. He further submitted that the learned Judge of the Court below did not take into consideration that an application under section 540A of the Code of Criminal Procedure is not maintainable when the accused is in custody and as such the impugned order is liable to be set aside in the interest of justice. In support of the submissions Mr. Mohammad Ali referred to two cases; ***Emperor Vs RadharamanMittra (accused) AIR 1930 Allahabad, page 817*** and ***Jagdish Narayan Bajpai (applicant) Vs Emperor through Ram Gopal and Others AIR 1940 Allahabad, page 178***.

14. Mr. Md. Khurshed Alam Khan, learned advocate, appearing on behalf of the opposite party No.1, the Anti-Corruption Commission (ACC); drawing our attention to *page no.126 and 136* of the petition, submitted that the learned Public Prosecutor, during trial, drew attention of the learned Judge of the trial Court to the Jail Custody in which, it is written that "Khaleda Zia is Unwilling to appear before the Court, which indicates that she does not want to come to court, which prolongates the trial." He also submitted that on 5/9/2018, the petitioner appeared before the court and said that ***"আমি বারবার আদালতে হাজির হতে পারবো না।"*** And thereafter, on 12/9/2018 and 13/9/2018, the petitioner did not appear before the court. In jail custody, on both dates, it was mentioned that ***"তাঁকে বিজ্ঞ আদালতে হাজিরার জন্য জানানো হলে তিনি বিজ্ঞ আদালতে আসতে পারবেন না বলে জানান (অনিচ্ছুক)।"***. He also submitted that in Jail Custody, it has also been mentioned that***"বিজ্ঞ আদালতে হাজিরার জন্য অনুরোধ করা হলে তিনি বিজ্ঞ আদালতে যেতে অপারগতা প্রকাশ করেন।".*** From this, it is quite clear that, it is not a situation rendering the accused incapable; rather it is one where the accused petitioner is merely unwilling. He further submitted that the learned Public Prosecutor only drew the attention of the court, to the idea that if she is so unwilling to appear in court, that her presence may be dispensed with for the continuance of the trial. He also submitted that in absence of any application from the Public Prosecutor, learned judge himself could have dispensed with the appearance of the accused petitioner. However, there is nothing barring the Public Prosecutor (appearing for opposite party No.1) from filing such an application under section 540A of the Code of Criminal Procedure 1898. Furthermore, he submitted that the attempt taken by the accused petitioner, bringing the present application before this Court is nothing but a regrettable practice to delay the deliverance of justice and the completion of the trial. Hence, he prays for the rejection of the application, summarily.

15. After having considered the submissions by counsels of both sides, having gone through the application and the papers annexed, particularly the impugned order; we are of the view that it is a new phenomenon for our judicial arena.

16. It appears from the record that the First Information Report (FIR) was launched against the accused petitioner on 08.08.2011 and the charge sheet was submitted on 16.01.2012. Charges were then framed on 19.03.2014, against the accused petitioner and two others. Thereafter, the trial began. Out of 36 charge sheeted witnesses, the prosecution has managed to examine as many as 33 witnesses so far, in order to prove the case. All of these witnesses have then been cross-examined. After conclusion of the witnesses' examination, the accused petitioner was examined under section 342 of the Code of Criminal Procedure 1898 where the Accused Petitioner claimed innocence and prayed for trial. It must be mentioned that on 21.12.2017, the date for arguments, the petitioner submitted a written statement, which she was supposed to submit on the date of her examination under section 342. Thereafter, on 25.02.2018, a date was fixed for arguments. However, the accused petitioner could not be produced before the Court, for her ill health.

17. Since then, till the date fixed for arguments, the accused petitioner took 32 adjournments and then submitted her written statement on 21.12.2017. Records also show that on 30.01.2018, the prosecution, concluded their arguments. Then the arguments on behalf of the co-accused, Ziaul Islam Munna and Monirul Islam Khan began.

18. Since the accused petitioner took 32 adjournments and did not appear before the Court for a significant amount of time (since 25.02.2018 to 07.08.2018) and subsequently the Jail authority informed the Court that she is not willing to attend Court. In the circumstances it is also argued by the prosecution that since there are two more accused, who have almost

completed their arguments and the accused petitioner has submitted a written statement at the time of examination under section 342 of the Code of Criminal Procedure 1898, it is not essential for her to remain present in Court; she may be well represented by her existing team of lawyers. It also appears from the record that the petitioner on 05.09.2018, remained present in the Court and proclaimed that ***"আমি বারবার আদালতে হাজির হতে পারবো না।".*** The Court then fixed a date for 12/9/2018, on which date, the learned advocate on behalf of the Accused Petitioner sought yet another adjournment and prayed for bail till the Accused Petitioner recovers. The learned Judge accepted the prayer for adjournment and fixed the following date for her appearance. She once again failed to appear and in Jail Custody, a statement was produced by the Jail Authority ***"বিজ্ঞ আদালতে হাজিরার জন্য অনুরোধ করা হলে তিনি বিজ্ঞ আদালতে যেতে অপারগতা প্রকাশ করেন।"***. In these circumstances the prosecution filed an application under section 540A of the Code of Criminal Procedure, asking the Court to proceed with the trial having dispensed with the need for personal appearance of the accused petitioner. In this regard the learned Judge framed four issues:

1. Whether the Public Prosecutor can file an application under section 540A of the Code of Criminal Procedure 1898
2. Whether only the accused can file such an application
3. Whether the Court can proceed with the case applying the provisions of section 540A, while the accused is in custody
4. Whether the Court can, of its own volition, exercise its discretion in applying section 540A, without any application from either side.

19. To find the answers of the question, the learned Judge, without finding any decision from our jurisdiction, looked to the decisions under the Jurisdiction of the Neighbouring nation of India. In doing so, he considered the cases reported in *AIR 1970 Raj. 102 (103), 1979 (47) Cut LT 103 (105) Orissa, 1991 CriLJ 2299 (2303) (AP).* He also considered the cases reported in *(1990) 3 Orissa, Cri R 577 (580), the cases of Basil Banger Lawrance vs Emperor, AIR (20) P.C. 218* and *Aditya PD Bagchi Vs Jogendranath AIR (35) 1948 All. 393, Sultan Singh Jain Vs The State AIR, AIR 1951 All 864 (866)* and also the cases of *Lalit Mohan Dev Burman Vs Hridoy Ranjan Dev Burman AIR 1958 Tripura 17(18).* He also considered the case of *Gulam Mohammad Azimuddin and Others Vs State AIR 1959 Madhyapradesh 147, 151, 2005(4) Cur Cri R 353(354).*

20. From all the above-mentioned cases it appears that, the Court has ample powers to exercise its discretion under section 540A at any stage of the trial process. Considering these decisions, the learned Trial Court concluded that since the Accused Petitioner was unwilling to attend Court, the other co-accused should not be deprived of their right to Justice by adjourning the case again and again, thus he exercised his discretion under section 540A, by entertaining the application filed by the Public Prosecutor. It has also been observed by the Trial Court that, although there is no express provision allowing the Public Prosecutor to file this application under section 540A; nonetheless, there is no provision barring the Public Prosecutor from doing so, either. In the circumstances at hand, we also searched, the Bangladeshi Jurisdiction to seek guidance from the Apex Court. Unfortunately, there are not many decisions from our jurisdiction on the subject matter. However, from the case of ***Mr.Nalinikanta Sen, Petitioner Vs M Siddiq, Opposite Party, reported in 14 DLR 1962 page-355****,* we have found some guideline. A Division Bench comprising of their Lordships Mr. Justice Asir and Mr. Justice SU Ahmed, observed that *"while considering certain provisions of the Code of Civil Procedure in the case of* ***Muhammad Sulaiman Khan and others v. Muhammad Yar Khan and another, ((AIR 11 Allah 267 FB) Mahmood, J.,*** *observed at page 287 of the same report that it was an undoubted principle of law that*

everything was to be taken as permissible unless there was some prohibition against it. Similarly while dealing with the question as to whether there was an inherent jurisdiction of the Court of Sessions to discharge the Jury before the verdict for misconduct or other similar and sufficient ground and to empanel another, it was observed by Buckland, J., in the case of ***Rahim Sheikh v. Emperor, (ILR 50 Cal 872 P.875)*** *that so far as it dealt with any point specifically the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions but where a case arose which obviously demanded interference and it was not within those for which the Code specifically provided, it would not be reasonable to say that the Court had not the power to make such orders as to ends of justice required. It was also held by a Division Bench of the Calcutta High Court in the case of* ***Nagen Kundu and another v. Emperor, (AIR 1934 Cal 428)*** *that so far as it dealt with any point specifically by the Code of Criminal Procedure should be deemed to be exhaustive as the law should be ascertained by reference to its provision but where a case arose which demanded interference and it was not within those for which the Code specifically provided it would not be reasonable to say that the Court had not the power to make such order as the ends of justice required. In the case of* ***Hansraj Harijiwan Bhate and others v. Emperor, (AIR 1940 Nagpur 390)*** *held that the Code of Criminal Procedure was an exhaustive one only with regard to matters specifically dealt with by it. Absence of any provisions on a particular matter did not mean that there was no such power and the Court might act on the principle that every procedure should be understood as permissible till it was shown to be prohibited by law. Keeping these propositions of law in view it seems clear to us that a Court of Law has got inherent powers which can be exercised in cases not covered directly by any specific provision of the Code provided ends of justice required so. In the present case the opposite party admittedly appears to be a victim of a bad type of tuberculosis. Even if it is assumed that there is no specific provision in the Code of Criminal Procedure which empowers the Trial Court to grant exemption of personal attendance and allow his representation through a lawyer on condition that he should appear on call yet in view of the principle laid down in the cases referred to above we do not think it unreasonable to hold that the trying Court had inherent powers for ends of justice to make an order as made in the present case."*

21. In the case at hand, we find that the Petition under section 540A was filed by the Public Prosecutor, though it has not been expressly mentioned whether the Public Prosecutor can file such an application; the Code does not prevent the Public Prosecutor from filing as such. The case reported in *14 DLR*, aides us in concluding that, where there is no such provision preventing the Public Prosecutor from filing such an application, there is no harm if the Public Prosecutor draws the attention of the Court by filing such an application for the sake of expedition and deliverance of Justice.

22. Mr. A J Mohammad Ai, submitted that before the Trial Court had decided, the Accused Petitioner should have been allowed to engage her representative. Upon an Inquiry from the Court, the Learned Advocate said that the present lawyers are in the Court to defend the case of the petitioner. They cannot be termed as the representative of the petitioner, while she has been exempted from appearing in Court. In this regard, we have searched the meaning of the word "representation". *According to the Law Lexicon, the word "representation" does not merely mean filing a warrant of appearance or a 'vakalatnama', it implies that the advocate appears in person or through a duly authorised advocate on behalf of the party when the matter is called out for hearing. An advocate cannot be said to have represented a party when the advocate himself is not present. A representation before Court, always implies that a person is present in Court on behalf of someone else.* Thus, we are

convinced that the accused petitioner is adequately represented by her team of advocates. As such, we find that the learned Trial Judge was not wrong for not asking the Accused Petitioner to appoint a representative before passing such an order.

23. We are also of the view that:

The Rule of Law and the principles of Criminal Justice believes and demands that the accused be present at his/her own trial; ideally for the entirety of it. The principle and such laws exist to benefit the accused and give him/her the opportunity to explain himself/herself and address the charges laid against him/her. This is a right allowed to him/her. However, it must be remembered that this benefit is extended to him/her for the sake of justice. Justice, therefore, cannot be held hostage by the whims of the accused in the execution of his/her rights.

24. If the accused chooses to forego this benefit, it is entirely his/her prerogative. However, in exercising his/her prerogative, Justice cannot and should not be obstructed. As such, trials may and should continue in the case where the accused chooses to absent himself/herself from his/her trial, even where he/she has been ordered to appear at the trial.

25. These principles were considered in Hayward [2001] QB 826, where the Court of Appeals in the United Kingdom laid down a series of principles to be considered in a scenario where the accused voluntarily chooses to absent themselves from their own trial (D15.86 Blackstone's Criminal Practice 2018).

26. **Principles to be Considered In Hayward [2001] QB 862, the Court of Appeal considered the principles which the trial judge ought to apply when dealing with an absent defendant, and summarised them as follows.**

(a) An accused has, in general, a right to be present at his trial and a right to be legally represented.

(b) Those rights can be waived, separately or together, wholly or in part, by the accused himself:

(i) they may be wholly waived if, knowing or having the means of knowledge as to when and where his trial is to take place, he deliberately and voluntarily absents himself and/ or withdraws instructions from those representing him;

(ii) they may be waived in part if, being present and represented at the outset, the accused, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

(b) The trial judge has a discretion as to whether a trial should take place or continue in the absence of an accused and/or his legal representatives. The judge is required to warn the defendant at the Pre-Trial Preparation Hearing of the risk of the trial continuing in his absence.

(c) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the accused is unrepresented.

(d) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the accused's behaviour in absenting himself from the trial or disrupting its continuation, and, in particular, whether his

behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the accused being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the accused, though absent, is, or wishes to be, legally represented at the trial or has waived his right to representation;

(v) the extent to which the absent accused's legal representatives are able to present his defence;

(vi) the extent of the disadvantage to the accused in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the accused (but see (f) below);

(viii) the seriousness of the offence to the accused, victim and public;

(viii) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(ix) the effect of delay on the memories of witnesses;

(xi) where there is more than one accused and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

(f) If the judge decides that a trial should take place or continue in the absence of an unrepresented accused, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the accused as the evidence permits. In summing-up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.

27. It is evident from this paragraph, that it is indeed possible for a trial to continue without the presence of the accused, where the accused has chosen to voluntarily absent themselves from their own trial.

28. It is important at this stage to recognize that the recording of evidence during trial requires the presence of the accused more. This is from a pragmatic view of the trial. The evidentiary stage is the only time at which the accused is able to express their views and concerns and in doing so address the charges laid at them. Although it is, of course, desirable for the accused to be present during the argument stage of the trial, it is less important since, the arguments are usually prepared by the Advocates, based on the instructions of the accused. This is to say that, at times where the accused has chosen to absent themselves from the trial, and in particular, during the argument stage; assuming they have representation, the Court may take the view that for the sake of delivering appropriate Justice, the trial should continue in their absence. It should go without saying that the Rights of the accused under the principles of Criminal Justice must be preserved, and thus, this approach should be taken with the **greatest of caution**.

29. While it is important to give the accused every opportunity to be present at their own trial, it is equally important to deliver Justice and to prevent the obstruction of the same. If there happens to be a practice where the trial process is halted due to the accused's desire to exercise their prerogative to not appear; it could prove fatal to the Criminal Justice System.

To avoid such "hostage" scenario, there ought to be, as argued above, the opportunity to continue a trial in the absence of a non-cooperative defendant.

30. The law and all facets of the law must apply to all individuals equally. While it is true that in the Bangladeshi Prison Systems there are classifications of prisoners; but this classification was created in order to extend a degree of comfort to a certain class of individuals. The classification is based for too many reasons, including the nature of the crime, the social status of the individual, etc. Begum Khaleda Zia is deemed to be a prisoner of the highest class. Her status as the former Prime Minister of the country must allow her this modicum of respect. However, as stated earlier, the law must equally apply to all. As such, the Court is hence left with one of two options. Either, Begum Khaleda Zia is to be forced into appearing in Court or alternatively, she may be allowed to exercise her right to not appear in Court, while allowing the Court to exercise their prerogative under section 540A of the Criminal Procedure Code 1898 and continuing with the trial or inquiry in her absence.

31. Having said so, the concerns regarding section 540A must now be addressed. The Applicants have raised three chief concerns within their submissions and they will be addressed in turn.

32. The applicant addresses the following concern: that the *"privilege of section 540A of the Code of Criminal Procedure can only be sought by the accused; the public prosecutor is in no way entitled to file such application for dispensation with the personal attendance of the accused."* While this has become a common practice that the accused themselves are the ones to make such an application, it is however true that nothing in section 540A of the Code of Criminal Procedure bars the prosecution to make such an application and nothing indeed bars the court from making such an order of its own volition. As such, it is only normal for such an application to be made. However, of course, it must be with great caution that such an order is made by any Court. As addressed above, such guidelines for consideration has been provided in the case of ***Hayward [2001]*** in the UK. Indeed, it is at the Judge's discretion as to the direction in which they believe that the scales of Justice might tip.

33. The scenario at hand is unusual in that while being in custody and fully aware of the trial's timing and location, the accused chooses to absent herself. Indeed, this is a rare case and perhaps, the first of its kind in this Jurisdiction. However, that should not mean that the laws at hand must conform to what is merely in practice and not allow itself to take into consideration the pragmatic necessities of the Criminal Justice System. By not submitting herself before the court, though it may be her prerogative to do so, the accused risks the trial proceeding in her absence. Hence, it is well advised that the accused at least be there to address the charges laid against her. In the case at hand this stage is over. The accused was present at the time of framing of charge and recording statement of the witnesses. Even she submitted her written statement at the time of examining her under section 342 of the Code of Criminal Procedure.

34. The applicant claims that the court should have allowed the accused to engage a lawyer of her choice before making such an order. It is on record that this accused has, at her disposal, the advice of one hundred and twenty-six lawyers, standing as her representations. The language in sections 205/540A of the Code of Criminal Procedure gives no special meaning to the word "representation" or "pleader". This is to suggest that a new advocate is not at all necessary to be appointed in favour of the accused, in consideration of the

application at hand. Her current team of representatives (Advocates) can easily suffice for the role suggest in these sections. As such the Court has evidently not failed in their duties to allow such an opportunity to the accused.

35. Finally, the applicant claims that "*the learned Judge failed to take into consideration that an application under section 540A of the Code of Criminal Procedure is not maintainable when the accused is in custody."* However, similar to the argument above; there is no specific provision in section 540A of the Code of Criminal Procedure that states that such an application may only be made where the accused is not in custody. The application under section 540A of the Code of Criminal Procedure clearly is intent on ensuring the deliverance of Justice, especially when faced with a non-cooperative accused. Whether the accused is in custody or not has no direct relation to the application of section 540A and as such, the learned Judge has not failed in his considerations.

36. We do not find any illegality in the order passed by the learned Special Judge, Court No.5, Dhaka and there is no substances in the submissions of the learned advocate for the accused petitioner.

37. Hence, it is ordered that in light of the scenario before us, we are constrained to direct the learned Judge of the Special Judge, Court No.5, Dhaka that the trial must continue on the next date as fixed, regardless whether the accused is present in Court or otherwise.

38. With the above observations and direction, the application is **rejected, summarily.**

39. However, we are of the view that in order to assist her to make her appearance in Court, provided that such is her wish, she must be extended adequate facilities, as per Jail Code.

12 SCOB [2019] HCD

HIGH COURT DIVISION

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No.1676 of 2018

Begum Khaleda Zia
--- Appellant
-Vs-
The State and another
---- Respondents
With
Criminal Appeal No.2215 of 2018
Quzi Salimul Haque @ Qazi Kamal
---- Appellant
-Vs-
The State and another
---- Respondents
With
Criminal Appeal No.2292 of 2018
Sharfuddin Ahmed
---- Appellant
-Vs-
The State and another
--- Respondents
With
Criminal Revision No.741 of 2018
Durnity Daman Commission
--- Petitioner
-Vs-
Begum Khaleda Zia alias Khaleda Zia and another
---- Opposite parties

Mr. Rafiqul Haq, Advocate with
Mr. Khandker Mahbub Hossain, Advocate,
Mr. Moudud Ahmed, Advocate,
Mr. Muhammad Jamiruddin Sircar, Advocate,
Mr. Hasan Arif, Advocate,
Mr. Abdur Razzaque Khan, Advocate,
Mr. A.J. Mohammad Ali, Advocate,
Mr. Zainul Abedin, Advocate,
Mr. Aminul Haq, Advocate,
Mr. Mir Md. Nasir Uddin, Advocate,
Mr. A.M. Mahbub Uddin, Advocate,
Mr. Nitai Roy Chowdhury, Advocate,
Mr. Md. Badruddoza, Advocate,
Mr. Md. Ruhul Quddus, Advocate,
Mr. A.H.M. Mushfiqur Rahman, Advocate,
Mr. Muhammad Nawshad Zamir, Advocate,
Mr. Md. Aminul Islam, Advocate,
Mr. Raghib Rouf Chowdhury, Advocate,
Mr. Kayser Kamal, Advocate,
Mr. Md. Jamila Akhter Elahi, Advocate,
Mr. Md. Zakir Hossain Bhuiyan, Advocate,
Mr. A.H.M. Kamruzzaman, Advocate,
Ms. Syeda Asifa Ashrafi Papia, Advocate,
Ms. Shamima Sultana, Advocate,
Mr. Md. Sagir Hossain Leon, Advocate,
Mr. Mir Md. Helal Uddin, Advocate,
Mr. M. Mahbubur Rahman Khan, Advocate,
Mr. Md. Jahirul Islam Sumon, Advocate,
Mr. M. Masud Rana, Advocate,
Ms. Jamila Mamtaz, Advocate,
Mr. Md. Anisur Rahman Raihan, Advocate and
Mr. H.M. Shanjid Siddique, Advocate.
--- For the Appellant

(In Criminal Appeal No.1676 of 2018)
Mr. Shah Monjurul Hoque, Advocate, and
Mr. Palash Chandra Roy, Advocate
---- For the Convict-Appellant

(In Criminal Appeal No.2215 of 2018)
Mr. Ahsanullah, Advocate
---- For the Appellant

(In Criminal Appeal No.2292 of 2018)
Mr. Mahbubey Alam, Attorney General with
Mr. Farhad Ahmed, DAG,
Mr. Md. Basir Ahmed, DAG,
Mr. Biswajit Debnath, DAG,
Ms. Nusrat Jahan, DAG,
Mr. Md. Nurul Islam Matubber, AAG, and
Mr. Md. Yousuf Mahmud Morshed, AAG
-- For the Respondent No.1-State

(In Criminal Appeal No.1676 of 2018, Criminal Appeal No.2215 of 2018
and Criminal Appeal No.2292 of 2018)
Mr. Md. Khurshid Alam Khan, Advocate, with
Mr. Mosharraf Hossain Kazal, Advocate,

Mr. Md. Abdur Salam, Advocate and
Ms. Fowjia Akhter, Advocate
--- For Respondent No.2-Anti-Corruption Commission.

(In Criminal Appeal No.1676 of 2018, Criminal Appeal No.2215 of 2018
and Criminal Appeal No.2292 of 2018)
And
--- For the Petitioner

(In Criminal Revision No.741 of 2018)
Mr. Abdur Razzaque Khan, Advocate with
Mr. A.J. Mohammad Ali, Advocate,
Mr. Muhammad Nawshad Zamir, Advocate,
Mr. Kayser Kamal, Advocate and
Mr. A.H.M. Kamruzzaman, Advocate.
---- For the Opposite Party No.1

(In Criminal Revision No.741 of 2018)
Heard on 12.07.2018, 15.07.2018, 16.07.2018, 17.07.2018, 18.07.2018, 22.07.2018, 23.07.2018, 24.07.2018, 25.07.2018, 29.07.2018, 30.07.2018, 08.08.2018, 09.08.2018, 13.08.2018, 04.10.2018, 08.10.2018, 14.10.2018, 15.10.2018, 16.10.2018, 29.10.2018 & Judgment on 30.10.2018

Present:
Mr. Justice M. Enayetur Rahim
And
Mr. Justice Md. Mostafizur Rahman

Section 5 (2) of Prevention of Corruption Act,1947, Section 409/109 of the panel Code, Corruption, Prime Ministers orphanage Fund, Misappropriation, Criminal design;

Facilitating misappropriation of the fund which was meant to be used for welfare of orphans, particularly when Begum Zia, the Prime Minister, had entrustment and dominion over it indisputably shocks the human conscience and such act reflects a mindset derogatory to humankind. Obviously Begum Zia had liability and obligation to look after whether the Trust so formed was in actual existence. But she did not do it. Thus Begum Zia was a conscious part of a designed plan to the criminal acts constituting the offence of Criminal breach of Trust as defined in section 405 of Penal Code. ... (Para 175)

Merely for the reason of political identity of a person prosecuted for an offence punishable under the penal law it cannot be said that she has been brought to justice on political victimization. ... (Para 214)

We do not find any legal justification and cogent ground to award lesser punishment to the principal offender Begum Zia than the other convicts who were the abators, considering her political and social status. ... (Para 219)

We consider it appropriate that justice would be met if the maximum sentence prescribed in section 409 of the Penal Code is awarded to Begum Zia so that the persons enjoying the highest position in any organ or any public office of the State thinks twice to go ahead with such criminal design in coming days. ... (Para 222)

JUDGMENT

M. Enayetur Rahim, J:

1. These 3(three) Appeals and the Rule have arisen out of the same judgment and order dated 08.02.2018 passed by the learned Special Judge, Court no.5, Dhaka in Special Case no.17 of 2017 and those have been heard together and are being disposed of by this single judgment.

2. The present convict appellants along with three others, who are absconding, were put on trial before the Metropolitan Senior Special Judge, Dhaka in Special Case no. 177 of 2009 arising out of Ramna Police Station Case No.08(7)2008 corresponding to ACC G.R. no.102 of 2008. Eventually, the case was transferred to the Special Judge, Court no.3, Dhaka and then again to the Special Judge, Court no.5, Dhaka wherein it was registered as Special Case no.17 of 2017.

3. Convict Begum Khaleda Zia (**hereinafter referred to as Begum Zia**) was charged under section 409 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 and other convicts were charged under sections 409/109 of the Penal code and section 5(2) of the Prevention of Corruption Act, 1947 along with section 109 of the Penal Code. The charges were read over to the present appellants and they pleaded not guilty and claimed to be tried.

4. **Prosecution version as unfolded during trial and which formed the foundation of the prosecution case essentially as follows:**

While Begum Zia performed the functions as the Prime Minister of the country from 1991 to 1996 a current account being no.5416 was opened with the Sonali Bank, Ramna Corporate Branch, Dhaka in the name of "cÖavbgš¿xi GwZg Znwej (hereinafter referred to as **PM's Orphanage Fund**)". As per instruction of Prime Minister Begum Zia her secretary convict Kamaluddin Siddique (**hereinafter referred to as Kamal Siddique**) opened the said account on 02.06.1991. On 09.06.1991 she received US $12,55,000 equivalent to Bangladeshi TK.4,44,81,216/- as donation vide Demand Draft (**hereinafter referred to as DD**) no.153367970 issued from United Saudi Commercial Bank and same was deposited in the said account but those were not distributed among the orphans till 05.09.1993. Begum Zia formed Zia Orphanage Trust (**hereinafter referred to as the Trust**) along with her two sons namely convict Tareque Rahman and Arafat Rahman and sister's son of her husband, convict Mominur Rahman. Accordingly, a deed of Trust was executed and registered on 05.09.1993 showing address of the said Trust at 6, Shaheed Moinul Road, Dhaka Cantonment, Dhaka. On 13.11.1993, a cheque for Tk.2,33,33,500/- was issued from the said account of PM's Orphanage Fund in favour of the said Trust and the said cheque was deposited in the account of the Trust being STD account no.7 with the Sonali Bank, Gulshan New North Circle Branch. On 04.02.1993 a sum of Tk.4,00,000/- was withdrawn from the said account and 2.79 acres of land was purchased at a consideration of Tk. 2,77,000/- in the name of the Trust and rest of the money was kept in the said STD account. On 12.04.2006, the said money stood Tk.3,37,09,757.32/- with interest. Thereafter, a sum of Tk.3,30,000/- was withdrawn from the account by issuing 6(six) cheques on 12.04.2006, 15.06.2006 and 04.07.2006 and those cheques were deposited in a FDR account with the Prime Bank, Gulshan Branch. On 12.04.2006 Tk.50,00,000/- was encashed and made FDR in the name of convict Kazi Salimul Haque alias Kazi Kamal (**hereinafter referred to as Salimul Haque**). On 16.07.2006 said FDR was encashed and a new FDR was opened for a sum of Tk.50,68,450/- in the name of the Trust. Two other FDRs being FDR no.4103-3117 dated 09.07.2006 for Tk.80,00,000/- and FDR no.4103-26669 dated 27.06.2006 for Tk.1,00,000/- were opened in the name of the Trust. Another FDR account was opened for Tk.1,00,00,000/- in the name of Salimul Haque. Thereafter, Tk.1,00,00,000/- of the Trust and Tk.1,00,00,000/- which was kept in the name of Salimul Haque had been transferred to the Prime Bank, New Eskaton Branch in the joint account of Salimul Haque and Sayed Ahmad @ Sayeed Ahmed on 16.11.2006

being FDR account no.4102-2619/73193 for a sum of Tk.1,03,19,365/- and in the name of one Giasuddin Ahmed in FDR no.4102-4435/73491 on 07.02.2007 for a sum of Tk.1,06,38,686/-. Thereafter, the money kept in the name of Salimul Haque and Sayed Ahmed had been again transferred to FDR no.4102-5511/73489 dated 07.02.2007 in the name of Giasuddin. Thereafter, Giasuddin withdrawing Tk.2,10,71,643.80/- by 6(six) payment orders deposited the same on 28.03.2007 in account no.1101-3134 of convict Sharfuddin Ahmed (**hereinafter referred to as Sharfuddin**). Eventually, Sharfuddin withdrew Tk.2,10,71,643.80 from his said account on various occasions. In this process Begum Zia in collusion with other accused persons misappropriated and/or aided other accused persons to misappropriate the said money using the name of the Trust.

5. Inorder to prove the charges the prosecution in all examined 32 witnesses, out of whom PW-1 (as informant) and PW-31 (as investigating officer) is the same person, who were duly cross-examined by the defence. The prosecution also adduced documentary and material evidences which were duly marked as exhibits and material exhibits respectively.

6. On behalf of Begum Zia no defence witness was examined. However, 3(three) and 1(one) defence witnesses were examined on behalf of Sharfuddin and Salimul Haque respectively.

7. **Defence Case:**

The defence case of Begum Zia reveals from the trend of cross-examination of the prosecution witnesses as well as the written statement submitted by her at the time of examination under section 342 of the Code of Criminal Procedure, in short, is that she had no knowledge about the PM's Orphanage Fund and also had no involvement with the opening of the Bank account being no.5416 in the name of PM's Orphanage Fund as well as withdrawal of money from the said account. Late Mustafizur Rahman, the then Foreign Minister brought the said money from the Amir of Kuwait as donation for charity and he (Mustafizur Rahman) knew about the said fund. She is innocent and this case has been initiated against her for political victimisation.

8. The defence case of Salimul Haque in short was that he kept the alleged money of the Trust in his account on good faith and eventually he returned the money to Tareque Rahman.

9. The defence case of Sharfuddin, in short, was that the alleged misappropriated money was transferred to his account for purchasing land in favour of the Trust. And by receiving the said money they did not commit any offence as alleged. Eventually, Sharfuddin returned the entire money to the account of the Trust pursuant to the court's decree.

10. After closing the evidence the present appellants, who were present in the dock, were duly examined under section 342 of the Code of Criminal Procedure and all the appellants having claimed their innocence submitted separate written statements.

11. On conclusion of the trial the learned Special Judge found the present appellants guilty along with three other absconding accused under sections 409/109 of the Penal Code and section 5(2) of the Prevention of the Corruption Act, 1947 read with section 109 of the Penal Code, but sentenced the convicts only under sections 409/109 of the Penal Code. Begum Zia was sentenced to suffer rigorous imprisonment for a period of 5(five) years and the other convicts were sentenced to suffer rigorous imprisonment for a period of 10(ten) years. All the convicts were also fined to pay Tk.2,10,71,645.80/- in equal share.

12. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence Begum Zia, Salimul Haque and Sharfuddin have filed Criminal Appeal no.1676 of 2018, Criminal Appeal mo.2215 of 2018 and Criminal Appeal No.2292 of 2018 respectively before this Court.

13. Being aggrieved by the inadequate sentence awarded to Begum Zia the Anti-Corruption Commission (**hereinafter referred to as the Commission**) by preferring a revisional application has obtained the present Rule.

14. **Submissions on behalf of the Convict Begum Zia**:

Mr. Abdur Razzak Khan and Mr. A.J. Mohammad Ali, learned Advocates for convict-appellant Begum Zia, with the assistance of a good number of learned lawyers have submited as under:

i) The Prime Minister will not come within the ambit of **'Public Servant'** as defined in section 21 of the Penal Code as well as in section 2(b) of the Criminal Law Amendment Act,1958 and as such the trial of Begum Zia before the Special Court constituted under the Criminal Law Amendment Act, 1958 is illegal and without jurisdiction and section 409 of the Penal Code or section 5(2) of the Prevention of Corruption Act,1947 will not attract to Begum Zia;

ii) the prosecution has failed to bring an iota of evidence that the PM's Orphanage Fund was a public fund and the said fund was entrusted with Begum Zia as a Prime Minister or she had dominion or control over the same and thus, conviction under sections 409/109 of the Penal Code or 5(2) of the Prevention of Corruption Act,1947 is *prima facie* illegal and bad in law;

iii) the prosecution with a malafide intention did not ascertain the source of money of the alleged PM's Orphanage Fund and if the investigation was done properly then it would have been proved that the money was sent by the Amir of Kuwait for the Trust and in this regard the learned Special Judge most illegally and arbitrarily discarded the notarized certificate issued by the Embassy of Kuwait in Dhaka filed before the court for judicial notice under section 57(6) of the Evidence Act wherein it was mentioned that the alleged money was given to the Trust by the Amir of Kuwait;

iv) admittedly in the opening form of PM's Orphanage Fund, A/C no.5416, and in the withdrawal cheques the signatures of Prime Minister Begum Zia were not available and thus, she had no involvement with the process of opening of the said account as well as disbursement of the money from the same and as such question of dominion or control over the alleged money and misappropriation of the same does not arise at all;

v) material exhibit-III and III(A) i.e. the alleged additional 'nothi' (records) regarding the PM's Orphanage Fund are concocted and fabricated one and some overwritings and manipulation are apperent on the face of it, despite the learned Special Judge most erroneously relied on those documents in finding the guilt of Begum Zia;

vi) admittedly it transpires from material exhibit-III and III(A) that there is no signature or any initial of any officer of PM's office to show who prepared the said documents or dealt with the 'nothi' and thus, those have got no evidentiary value;

vii) Begum Zia had no involvement or connection with the Trust, which was a private trust and if any misappropriation of the Trust fund was committed by the trustees and others for which Begum Zia can not be liable and remady lies under the Trust Act,1984;

viii) PW-9, PW-10, PW-11, PW-14, PW-20 and PW-21 were managed and tainted witnesses and the learned Special Judge relying on their evidence in finding the guilt of Begum Zia committed serious illegality and arrived at a wrong decision;

ix) the inquiry and investigation being incomplete regarding the source of fund has led to a wrongful presumptions on the part of the court below regarding the nature of the fund; the fund was sourced for establishing philanthropic organizations in the name of former President late Ziaur Rahman is a crucial element of this case and as such investigation and inquiry on this point is a necessity to ascertain this point as the depositions of the PW-26 and PW-31 falls short of a complete story; failing which the appellant will not get justice.

15. Submissions on behalf of Convict Salimul Haque:

Mr. Shah Monjurul Haque, learned Advocate, for convict Salimul Haque has submitted as under:

i) The element of dishonest intention under section 409 being of paramount importance to decide the guilt, required careful consideration both objectively and subjectively. The convict-appellant after receiving 5(five) cheques with no name of the account holder on those and then being authorized to open FDRs and thereafter returning all of them to Tareque Rahman had no reason to believe that the convict-appellant did the same with dishonest intention;

ii) the learned Special Judge failed to consider that it was not possible for Salimul Haque to know that the alleged cheques belonging to the Trust or of Tareque Rahman or the money in those cheques were misappropriated money taking place some 13 years back and without knowing that the convict appellant could not aid the misappropriation of the money standing in those cheques;

iii) Salimul Haque did not receive five cheques or was not entrusted with those cheques in his capacity as a member of Parliament or Chairman or Director of the Prime Bank Ltd., rather he received those cheques from Tareque Rahman only as an acquaintance following an oral request and then handedover those cheques to the manager of the Prime Bank Ltd, Gulshan Branch with an honest intention in the presence of the Managing Director of the Bank; nevertheless, the learned Special Judge without considering the later capacity in which those five cheques were actually received by the convict-appellant, erroneously came to a finding that the convict-appellant, by receiving those five cheques in the former capacity, was entrusted with those cheques as a public servant and thus section 409 of the Penal Code and section 5(2) of the Prevention of Corruption Act,1947 came into play in his respect and thus, came to an erroneous decision in finding guilty to Salimul Haque;

iv) the money of PM's Orphanage Fund was transferred to the Trust in the year 1993 and at the said particular time of alleged transfer of fund, Salimul Haque did not have any involvement at all and as such question of abetment as defined in section 109 of the Penal Code does not arise at all and thus, the learned Special Judge improperly and illegally convicted the appellant by failing to appreciate that the convict-appellant had no connection with any of the subsequent transactions after he had returned all the FDRs to Tareque Rahman in July, 2006;

v) the learned Special Judge failed to consider that DW-1, Sharfuddin himself stated that he opened FDR being no.41022619/73193 dated 16.11.2006 in the name of Salimul Haque and his son, Sayed Ahmed and thus, the finding of the learned Special Judge that Salimul Haque himself by using his influence as Chairman of the Prime Bank Ltd. got the aforesaid FDR opened in his name and Sayed Ahmed is erroneous and perverse and thus, Salimul Haque deserves acquittal.

16. Submissions on behalf of Convict Sahrfuddin Ahmed:

Mr. Ahsan Ullah, learned Advocate, appearing for the convict Sharfuddin has submitted as under:

i) the prosecution has no specific case, who committed the offence of 'criminal breach of trust', when the offence was committed, who abetted in commission of such offence and who, when and how instigated in commission of the offence and the prosecution failed to prove the ingredients of sections 409/109 of the Penal Code against Sharfuddin beyond reasonable doubt;
ii) the convict-appellant is not a merchant or agent and he not being a merchant or agent can be tried for commission of offence under section 409 of the Penal Code;
iii) the learned Special Judge did not at all consider the evidence adduced on behalf of Sharfuddin, in particular the judgment and decree passed in Money Suit no.01 of 2012 by the learned Joint District Judge, 3rd Court, Dhaka and the bank statement of the Trust being maintained with the Uttara Bank, Gulshan Branch and erroneously held that there is no account of the Trust in the Uttara Bank and the money taken as advance for purchasing land in the name of the Trust has been returned by the appellant to the Trust in pursuent to the judgment and decree passed in Money Suit no.01 of 2012;
iv) Sharfuddin at best can be charged under section 411 of the Penal Code for receiving or retaining the alleged misappropriated money.

17. Submissions on behalf of Respondent no.1-the State:

Mr. Mahbubey Alam, learned Attorney General, having supported the impugned judgment and order of conviction has submitted as under:

i) In finding guilty to the convict persons the learned Special Judge in assesing and evaluating the evidence on record, both oral and documentary, did not commit any error or illegality;
ii) in order to sustain a conviction under section 409 of the Penal Code the prosecution is required to prove that (a) the accused, a public servant was entrusted with property of which he was duty bound to account for, and (b) the accused had misappropriated the property and in this particular case the prosection has proved by adducing unimpeachable evidence that Begum Zia being the Prime Minister at the relevant time entrusted with the PM's Orphanage Fund and she had dominion and control over the same and she dishonestly used and disposed of that property in violation of the direction in which trust had to be discharged i.e. she did not distribute the funds among the orphans, rather forming a paper Trust in her husband's name through two sons and one nephew transferred a portion of money from the said fund which ultimately transferred to the account of other convicts and thus offence of 'Criminal breach of trust' has been committed by Begum Zia and all the convicts consciously aided each other in commission of such offence;
iii) where the entrustment is proved against an accused it is for him/her to discharge the burden that the entrustment has been carried out as accepted and the obligation has been discharged and in this particular case entrustment of Begum Zia with the property has been proved but she failed to discharge her burden that she carried out or discharged her obligation and thus, the learned Special Judge rightly and lawfully found guilty to Begum Zia and other accused who played active role in different stages in committing the offence of misappropriation;
iv) the actual manner of misappropriation is not required to be proved by the prosecution; once entrustment is proved, it was for the accused to explain how the property entrusted to him/her was dealt with and in this particular case Begum Zia has failed to discharge her obligations.

18. Learned Attorney General to substantiate his submissions referred to the cases of **Mustafikhar Vs. State of Maharashtra, reported in (2007),1 SCC, page-23, State Vs. H.P.V Karnavir, reported in Cr. LJ, 2006, page 2917 and Mir Nagvi Askari Vs. Central Bureau of Investigation, reported in (2009)15 SCC, page 643**.

19. Submissions on behalf of Respondent No.2, Anti-Corruption Commission:

Mr. Md. Khorshed Alam Khan, learned Advocate, appearing for the Respondent no.2-Commission, refuting the submissions made by the learned Advocates for the respective appellants has submitted as under:

i) the issue- 'whether Begum Zia being the Prime Minister of the country at the relevant time was a 'public servant' has already been decided earlier by the High Court Division in Criminal Miscellaneous Case no.21979 of 2009 [Reported in 64 DLR(HC), page-1], which has also been affirmed by the Appellate Division in Criminal Petition for Leave To Appeal no.134 of 2012. In the said case it has been held that as a public servant, the appellant (Begum Zia) was entrusted with the orphanage fund and if she is found to have helped others to use any amount given from the fund in violation of prescribed mode in which trust is to be discharged, offence under sections 409/109 of the Penal Code may also come up for consideration;

ii) PM's Orphanage Fund being account no.5416 was opened with the Sonali Bank, Corporate Branch, Ramna, Dhaka by Kamal Siddique, secretary of the Prime Minister, as per the instruction of Prime Minister Begum Zia sometimes ahead of deposit of money through a DD sent from United Saudi Commercial Bank and thus, there is no scope to accept the submission of the learned advocates for appellant Begum Zia that the said account and fund was a Private fund, not a public fund;

iii) PW-9,10,11 and 14 in their respective depositions categorically and consistently stated about the existence of PM's Orphanage Fund and material exhibit III and III(A) supported their testimonies;

iv) investigating agency had tried it's best to find out the source or sender of the alleged DD but due to non-operation of United Saudi Commercial Bank since 1995, which merged with the SAMBA FINANCIAL GROUP, the source could not be traced out and for this reason only the prosecution case can not be brushed aside, when other strong and corroborative evidences are available in the record;

v) prosecution has been able to prove that Begum Zia as the Prime Minister was entrusted with the PM's Orphanage Fund and she had dominion and control over the same and she dishonestly disposed of a portion of the fund transferring the same to the so called Zia Orphanage Trust by forming it with her two sons and nephew and the said trustees ultimately transferred the money to Salimul Haque and Sharfuddin who had no connection with the said Trust and thereby money was misappropriated;

vi) offence of '**criminal breach of trust'** as well as '**Criminal misconduct'** have been well proved against Begum Zia and the offence of 'abetment' has also been well proved against the other convicts.

20. Mr. Khurshed Alam Khan in support of the Rule has submitted that the learned Special Judge has committed serious error in awarding lesser sentence to Begum Zia who is the principal offender than the abators considering social and police status of her. He has submitted that social and political status of an accused cannot be an extenuating factor for awarding lesser punishment. Begum Zia deserves highest purnishment as provided in law as

she committed the offence in exercise of the highest office of the state taking recourse of fraudulent acts.

21. Before considering the submissions of the learned Advocates for the respective parties it is necessary to peruse and discuss the evidence adduced by the respective parties.

22. Evidence adduced by the prosecution-

Harunur Rashid being the informant at first examined as PW-1, who in his deposition reiterated the prosecution story and proved the first information report and his signatures thereon, exhibit-1, 1/1, 1/2 and 1/3 respectively. He also proved the sanction letter, issued by the Commission for lodging the first information report, exhibit-2.

23. In cross-examination PW-1 stated that in connection with the present case he conducted inquiry and the Commission gave sanction on 27.04.2008 for such inquiry. Prior to his inquiry PW-32 conducted an inquiry and on 11.06.2008 PW-32 submitted a report. He was appointed as the inquiry officer after submission of the said report and he submitted his report on 25.06.2008. He had no knowledge whether report submitted by PW-32 was accepted or rejected. During inquiry he recorded the statements of PW-19 and PW-21. At the time of lodging the first information report on 03.07.2006 Begum Zia was in jail hazat in connection with another case. Previous inquiry officer, PW-32 recorded the statement of Begum Zia during his inquiry. The previous inquiry officer also recorded the statement of Tareque Rahman and Arafat Rahman. During investigation he recorded the statements of Begum Zia and Tareque Rahman but he did not submit the same before the court. He submitted the charge sheet on 05.08.2009 i.e. after the Government led by Bangladesh Awami League came into power. He did not record any statement of the Ambassador of Kuwait in Bangladesh or the Ambassador of Bangladesh in Kuwait at the relevant time. US $12,55,000 came from United Saudi Commercial Bank in Riyadh vide DD no.153369970 dated 09.06.2011. He did not seize the said DD from Sonali Bank Limited, Ramna Branch but he verified the same. In order to know the identity of the ‘drawer’ of the said DD Bangladesh Embassy in Riyadh was contacted by the Commission through Ministry of Foreign Affairs but they could not ascertain the identity of the ‘drawer’. In the said DD the name of the payee was mentioned as Prime Minister’s Orphanage Fund, Current A/C no.5416, Sonali Bank, Ramna Branch, Dhaka and the amount was mentioned as One Million Two Hundred Fifty Five Thousands. In the account opening form of A/C no.5416 Begum Zia had no signature but as per her instructions the concerned officer Kamal Siddique signed on the same. The said account was opened on 02.06.1991 and at the relevant time there was no rule (Nitimala) to operate the said orphanage fund. The Prime Minister’s office runs as per the organogram. At the relevant time additional secretary Kamal Siddique was in-charge of the secretary of Prime Minister’s office and he has been implicated in the case as *prima facie* materials have been found against him in commission of the offence. He could not seize any file or cheque having signature of Begum Zia with regard to the disbursement from the PM’s Orphanage Fund. When the money was brought through DD at that time the Trust was not established. He had no knowledge whether the then Foreign Minister Mustafizur Rahman collected and brought the said money and he established Zia Memorial Trust at Bagerhat spending Tk.2,33,33,500/- from the said fund. He also conducted inquiry about the fund of the said Trust. During his inquiry he did not interrogate the cabinet secretary, secretary, additional secretary, joint secretary, director general of the Prime Minister’s Office but he interrogated the additional secretary Kamal Siddique as he was working as the secretary in the Prime Minister’s Office and found his involvement in commission of the offence. According to the Trust deed Begum Zia was not the settlor or the trustee or the member of

Trustee board. He examined the orphanage fund and relief fund's record of the Prime Minister's Office. He did not ask any officer of the Sonali Bank, Ramna Corporate Branch regarding the source or sender of the DD US $12,55,000 which was deposited in the said bank. In his inquiry report he did not mention about the letter which was sent to the Bangladesh Ambassador in Saudi Arab through Foreign Ministry for knowing the source of the DD. Tareque Rahman and Mominur Rahman informed him during their respective interrogation that the said US dollar was sent by the Amir of Kuwait for raising fund for the Trust in the name of former President late Ziaur Rahman. He did not make any contact with the Kuwait Embassy in Bangladesh for verifying the statement of Tareque Rahman. He did not contact with the Bangladesh Embassy in Saudi Arab for knowing the source of the said DD because he had no opportunity to contact with them. Mominur Rahman also informed him that half of the said amount was allotted for the Trust and the half of the said amount was allotted for Bagherhat Zia Memorial Orphanage Trust for establishing an orphanage in Bagherhat. During interrogation Begum Zia informed him that she could not able to remember about the foreign donation which allotted for the Zia Orphanage Trust and Zia Memorial Orphanage Trust and the then Foreign Minister Mustafizur Rahman knew regarding formation of the Trust and foreign donation. PW-1 denied the defence suggestions that Begum Zia did not open the orphanage fund account no.5416 with the Sonali Bank. Ramna Corporate Branch and his statement regarding the DD for the amount of US $12,55,000 sent from the United Saudi Commercial Bank was false, and that Begum Zia did not formulate any regulation regarding the uses of orphanage fund or without following the rules and regulation formed the Trust with a dishonest intention in order to misappropriate the fund, and that money was not used for the welfare and benefit of the orphans, and that Begum Zia was not involved with the fund allotment, account opening and withdrawal of money from the PM's Orphanage Fund and that amount of the Trust fund was never misappropriated and the said amount was kept in the bank, and that the Trust fund was formed legally and properly with the donation of the Amir of Kuwait, and that the alleged US dollar was came from Riyadh, Suadi Arab was false. PW-1 did not make any inquiry in Bangladesh Bank regarding transfer of the said US $12,55,000 to the Sonali Bank, Ramna Corporate Branch. Tareque Rahman was interrogated by previous inquiry officer at the jail gate with the permission of the court. During inquiry he did not interrogate Tareque Rahman and perused the records of previous inquiry officer. The Trust was a private Trust and according to Article-14 of the Trust deed, a Board of Trustee was formed and Tareque Rahman, Arafat Rahman and Mominur Rahman were the member of Trustee Board and according to Arcitle-3(III) of deed of Trust, FDR was included with the investment fund. The Trust deed provided the power for opening FDR in the name of the Trust. During investigation, he saw the deed of Trust, Balam books, thumb impressions and various documents relating to the Trust. At the time of formation of the Trust and registration of the Trust deed Begum Zia and her two sons Tareque Rahman and Arafat Rahman were living together at 6, Shaheed Moinul Road, Dhaka Cantonment, Dhaka and at the relevant time that house was being used as the official residence of Prime Minister Begum Zia. PW-1 denied the defence suggestions that the Trust office was not at 6, Shaheed Moinul Road though he knew the said information, and no illegality was done in transfering the money from the Sonali Bank to the Prime Bank by the trustees, and that no bank officer did raised any question as to the said transfer, and that the Trustee board member Tarek Rahman, Mominur Rahman transferred in total Tk. 3,30,00,000/- on 12.04.2006, 15,06.2006 and 04.07.2006 to the Prime Bank, Gulshan Branch for opening FDR with bonafide intention, and that according to Trust deed, the amount of the Trust was transferred legally from one bank to another bank, and that opening of FDRs in the name of Salimul Haque, Sayed Ahmed @ Sayed Ahmed, Giasuddin Ahmed and Sharfuddin and encashment of the FDRs were legal, and that according to the Trust law and trust deed

their activities were legal, and that in order to get maximum benefit the said Trust funds had transferred to the different accounts, and that no misappropriation of money was occurred, and that the activities of the Trust were done by following the decisions of Trust deed, and that after the death of former President Ziaur Rahman the Amir of Kuwait sent funds for the Trust, and that the Trust being a private Trust the Government has no power to control the Trust, and that the case was filed against the accused persons with malafide motive.

24. PW-2 S.M. Gaffarul Alam deposed that on 03.07.2008 while he was on duty as a Sub-Inspection of Police in Ramna Police Station he received a First Information Report (**hereinafter referred to as FIR**) from the informant, PW-1 and pursuant to the instruction of the officer-in-charge he filled up the FIR form and registered the case being Ramna Police Station Case no.8 dated 03.07.2008 under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 against the accused persons named in the FIR. He proved the FIR form, exhibit-1(Ka) and his two signatures thereon, exhibit-1(Ka)/1 and 1(Ka)/2.

25. In cross-examination PW-2 stated that he had no personal knowledge about the contents of the FIR. After receiving the FIR he and the officer-in-charge read the same and lodged the case. The informant himself came to the police station with the FIR which was computer composed. There was no forwarding letter of the Commission regarding the lodgment of the FIR. In 2008 there was no elected Government but the Care Taker Government was in power. He could not remember whether Begum Zia was in coustody at the time of lodging the FIR. He further stated that according to the FIR, the time of occurrence was between 28.11.1993 and 28.03.2007 but the time of occurrence was not mentioned in FIR form. In the FIR nothing was mentioned regarding the delay of lodging the same. In the FIR the place of occurrence was mentioned at Prime Bank Ltd. Eskaton Branch, Dhaka. The place of occurrence was 1.5 kilometer far away from the Ramna Police Station. Before lodging the FIR he examined the same.

26. PW-3 Safiuddin Mia deposed that on 15.07.2008 at about 11.20 while he was working in the Sonali Bank Ltd. of the New North Circle Branch, Gulshan as an officer PW-31 came to their branch and seized the following documents relating to the Trust:

i) account opening form of STD account no.7 dated 09.10.1993;

ii) photostat copy of the deed of the Trust and receipts altogether 17 pages;

iii) signature card of the STD account no.7 and an attested photo of Tareque Rahman, deposit slip for Tk.2,33,33,500.00/- of the said account, Cheque no.8431103 dated 10.11.1993 of the Sonali Bank, Ramna Branch, Dhaka altogether 2 pages;

iv) cheque no.4882407 dated 12.04.2006 of the STD account no.07 where Tk.50,00,000.00/- was written as cash transfer, cheque no.4882402 dated 15.06.2006 for the amount of Tk.1,00,00,000.00/-, cheque no.4882406 dated 15.07.2006 for Tk 1,00,00,000/-, in the name of the Trust as cash transfer, cheque no.4882404 dated 04.07.2006 for Tk.50,00,000.00/- in the name of the Trust, cheque no.4882403 dated 05.07.2006 for Tk.30,00,000.00/- in the name of the Trust and 5 cheques and 4 money withdrawal notices;

v) manual bank details between 1993 and 30.12.2002 of the Trust STD account no.7 and prepared computer statement between 01.01.2003 and 30.12.2007 wherein at serial no.4 the details of 5 cheques were given.

27. PW-3 proved the seizure list, exhibit-3 and his signature thereon, exhibit-3/1. He also proved the above seized documents produced before the court as material exhibit-I series.

28. In cross-examination PW-3 stated that according to the account opening form, the Trust account was opened on 09.10.1993. According to the Trust resolution Tareque Rahman, Arafat Rahman and Mominur Rahman were maintaining the account of the Trust and the account could able to operate by Tareque Rahman and another one. The 'Deed of Trust' was submitted to the Bank while the account was opened. At the time of opening the account Tk.2,33,33,500/- was not deposited, but same was deposited in the said account on 15.11.1993 through clearing cheque of the Sonali Bank, Ramna Branch. The said money was deposited in the Trust account and money was withdrawn from the said account. The transaction of the Trust was done lawfully and it was a private Trust. On 12.04.2006 the account holder presented cheque no.4882407 for withdrawing the amount of Tk.50,00,000/-. The account holder also on 15.06.2006 presented cheque no.4882402 for Tk.1,00,00,000/- in the name of the Trust and the said cheques amount were transferred from the Sonali Bank to the Prime Bank and the said cheques did not handover to anyone. Cheque no.4882406 dated 15.06.2006 for Tk.1,00,00,000/- was transferred by cash with the permission of the account holder. Tk.1,00,00,000/- was withdrawn vide cheque no.4882406 from the Trust account and the said money was used for issuing a DD in the name of the Sonali Bank Ltd., local Office, Dhaka. Documentary evidence of DD number, the name of beneficiary of the DD, Bank account details, the amount of money, the name of the applicant of DD or the receipent of the DD or any other documents were not available before him. Cheque no.4882403 dated 05.07.2006 and cheque no.4882404 dated 04.07.2006 for Tk.30,00,000/- and Tk.50,00,000/- respectively were in the name of the Trust. The said 2(two) cheques were issued for transferring the said money from one account to another account. The account holder could not be identified seeing the said 5(five) cheques.

29. PW-4 Md. Abul Khair deposed that on 15.07.2008 while he was working in the Sonali Bank Ltd. New North Circle Branch, Gulshan-2, Dhaka as an officer PW-31 came to their branch and requested to the bank manager for presenting the case related documents. The bank manager presented the required documents. PW-31 seized the required documents and prepared a seizure list, exhibit-3, in presence of him. He proved his signature thereon, exhibit-3/2.

30. In cross-examination PW-4 stated that he had no personal knowledge or idea about the seized documents. As a banker he understood which documents were seized and statement of accounts of the Trust were seized among other documents. On 15.11.1993 an amount of Tk.2,33,33,500/- was deposited in the Trust STD current account no.7. On 04.12.1993 Tk. 4,00,000/- was withdrawn through cheque no.4882401, on 27.12.1993 Tk. 1,07,060/- was deposited with interest and the excise duty Taka 200.00 and on 31.12.1993 the remaining balance was at Tk.2,30,40,360/-. Between 1993 and 29.12.2005 the principal and interest were deposited in the said account and on 29.12.2005 the balance stood at Tk.3,37,03,757.32/-. After withdrawal of money, on 06.07.2006 the remaining balance was at Tk.7,09,757.32/-. Between 13.04.2006 and 06.07.2006 money was withdrawn and transferred through various cheques following the bank rules and regulation. On 30.12.2007 the said account's balance was at Tk.11,59,437.18/-. He could not remember the interest rate of Sonali Bank FDR between 13.04.2006 and 06.07.2006. He had no idea whether money was transferred for the best profit between 13.04.2006 and 06.07.06 through 05 cheques. He denied the defence suggestion that he hide many true informations.

31. PW-5 Md. Harun-Ur-Rashid deposed that on 15.07.2008 while he was working in Sonali Bank Ltd. New North Circle Branch, Gulshan, Dhaka as the manager PW-31 came to their branch. PW-31 submitted a demand letter for seizing required documents. On the basis of PW-31's demand letter he presented the demanded documents in presence of the two bank officials namely Abul Khair (PW-4) and Shafiuddin Mia (PW-3). PW-31 seized the required documents and prepared a seizure list, exhibit-3 and took his signature on the same, exhibit-3/3.

32. In cross-examination PW-5 stated that he was not working in the said branch at the time of opening STD account no.7 and he joined there as the manager at the end of 2007 and on 15.07.2008 PW-31 came to him. He saw the said documents at the time of presentation but he did not see the said documents before. The written demand letter was not with him. He denied the defence suggestions that no written demand letter was provided to him and for that he could not able to submit the said demand letter. Before presentation of the said documents to PW-31 on 15.07.2008 those were kept in his custody. After his joining in the New North Branch before or after the date 15.07.2008 nobody complained to him about the STD account no.7. He saw the opening form of the said account and he had no idea whether any irregularities were happened at the time of opening of the account. The deed of the Trust was enclosed at the time of opening the account. The STD account no.7 was operated by following the resolutions of the Trust. He could not remember the STD account's interest rate in the year of 1993 and between April 2006 and June 2006. He denied the defence suggestions that between 1993 and 2006 the STD account's interest rate was 5% which he knew and he intentionally hide the said information. On 15.07.2008 he was a senior principal officer and also the manager of the branch. The seized cheques were transferred and cleared by following the preveailing bank rules. He had no knowledge whether interest rate was 12.25% in the Prime Bank. He denied the defence suggestions that in 2006 the interest rate of the Sonali Bank was low and the Trust funds were transferred to the Prime Bank which he knew and he suppresed the said information intentionally and deposed falsely. He further stated that he signed on the seizure list. The names of the account holder were mentioned in the seized cheques. STD 7 was written in the seized cheques but no identification mark was thereon.

33. PW-6 Md. Iqbal deposed that on 15.07.2008 at about 3.30 pm while he was working in the Prime Bank Ltd., New Eskaton Branch as a first assistant vice president PW-31 came to the room of the branch manager and in presence of him he seized some documents as presented by the manager and he also signed on the seizure list. The seized documents were as follows:

i) official letter regarding encashment of Taka 1(one) crore of Salimul Haque's FDR no.58462/41032276 dated 15.06.2006 of the Prime Bank, Gulshan Branch;

ii) encashment office copy regarding the Trust FDR no.50001/41032669 dated 27.06.2006 of the Prime Bank, Gulshan Branch;

iii) original copy (1 page) of the FDR no.41032267 dated 15.06.2006, advice no.1007 dated 07.02.2007 by which Tk.1,06,38,686/- was transferred from the Prime Bank, Gulshan Branch to Prime Bank, Eskaton Branch;

iv) original advice copy (1 page) of the FDR no.41032669 dated 27.06.2006 for Tk.1,00,00,000/- of the Trust, advice no.1091 dated 16.11.2006 by which Tk.1,03,19,365.00/- was transferred including interest from the Prime Bank, Gulshan Branch to Prime Bank, Eskaton Branch;

v) FDR no.41025535 dated 02.07.2007 of the Prime Bank Ltd. Eskaton Branch for Tk.1,06,38,686/- in the name of Giasuddin Ahmed along with opening form of the FDR (3 pages) and FDR KYC form;

vi) FDR no.41122619 dated 16.11.2006 of the Prime Bank, New Eskaton Branch in the name of Kazi Salimul Haque (Q.S. Haq) and Sayed Ahmed for Tk.1,03,19,365/- along with FDR opening form, the original copy of the FDR and KYC form (3 pages);

vii) FDR no.41025535 dated 07.02.2007 and FDR no.41122619 dated 16.11.2006; FDR no.41025535 was encashed and another FDR account no.41025511 for Tk.1,04,032,957.80/- was opened on 07.02.2007 in the name of Giasuddin Ahmed (original FDR 1 page); FDR no.41025535 and FDR no.41025511 were encashed on the request of Giasuddin Ahmed by 6 payment orders bearing numbers:659348-659353, the total amount of Tk.2,10,71,643.80/- was deposited in the account no.11013134 of Sharfuddin; the order was written in the opposite pages of the above payment orders;

viii) account opening form of Sharfuddin's account no.11013134 dated 15.03.2009 with the Prime Bank New Eskaton Branch along with one copy photo, KYC form-1 and a copy (2 pages) of the account statement of Sharfuddin between 15.03.2007 and 30.06.2007 where the last balance was at Tk.19.155.80/-.

34. PW-6 proved the seizure list dated 15.07.200, Exhibit-4 and his signature thereon, exhibit-4/1. The said seized documents were given to the bank manager Md. Afzal Hossain (PW-8) for keeping the documents to his own custody and he also signed on the 'jimmanama' dated 15.07.2008, exhibit-5. He identified his signature thereon, exhibit-5/1.

35. In cross-examination PW-6 stated that in the seizure list it was not mentioned that the documents were seized in order to follow the Court's order. The accounts transactions were done following the banks rules and regulations. The seized documents were submitted in the court. In the seizure list at serial no.5, KYC Form, the customer name was mentioned as Giasuddin Ahmed, S/O Late Mr. Sahabuddin Ahmed and Late Mrs. Balatunnassa, Address: 712, Tongi Diversion Road Boro Mogbazar. At serial no.8 the name of Sharfuddin Ahmed, S/o Late Mr. Sahabuddin Ahmed and late Mrs. Balatunnessa, Address: 712, Tongi Diversion Road Bora Moghbazar, Ramna, Dhaka was mentioned and at serial no.6, KYC form, the customer name was mentioned as Sayeed Ahmed, S/o: Mr. Sarfuddin Ahmed and Mrs. Shamina Ahmed, Address: 712, Tongi Diversion Road, Boro Mogbazar, Shantinagor, Ramna, Dhaka. The said three persons maintained accounts with their bank. In June 2006 the Prime Bank's FDR amount interest rate was 12.25%. FDR interest rate used to mention at the time of issuing FDR. He had no knowledge whether the seized documents were transferred from the Trust STD account no.7, Sonali Bank, Gulshan New North Circle Branch. PW-6 denied the defence suggestions that the Trust funds were transferred from the Sonali Bank, Gulshan New North Branch which he knew and he hide the said facts and made false diposition.

36. PW-7 Md. Masud Bin Karim deposed that on 15.07.2008 at about 3.30 pm while he was working in the Prime Bank Ltd., New Eskaton as a principal officer, the branch manager Md. Afzal Hossain (PW-8) called him in his chamber. He went to the chamber of branch manager and he was given a seizure list for reading and he read the same and he saw the seized documents and signed on the same. He proved the seizure list, exhibit-4 and his signature thereon, exhibit-4/2. The seized alamats were given to the bank manager (PW-8)

for keeping in his own custody and a 'jimmanama' was prepared wherein he also signed. He proved the said 'jimmanama', exhibit-5, and his signature thereon, exhibit-5/2.

37. The present appellants declined to cross-examine PW-7.

38. PW-8 Md. Afzal Hossain deposed that on 15.07.2008 at about 3.00 pm while he was working in the Prime Bank Ltd. New Easkaton Branch as a vice president and manager PW-31 came to his office. PW-8 presented case related documents as required by PW-31 who prepared a seizure list in presence of the bank officer Md. Iqbal (PW-6) and Md. Masud Bin Karim (PW-7). PW-31 seized the said documents, details of which were mentioned in the seizure list. He received a copy of seizure list and signed on it. PW-8 proved the seizure list and his signature thereon, exhibit-4 and exhibit-4/3. The said seized alamats were given 'jimma' to him and he signed on the 'jimmanama'. He proved the 'jimmanama', exhibit-5 and his signature thereon, exhibit-5/3. His custody documents had already been produced before the Court. PW-8 also proved the seized documents produced before the court as material exhibit-II series. On 28.07.2008 PW-8 made statement before the investigating officer and on the same day he made statement under section 164 of Code of Criminal Procedure before the concerned Magistrate. He proved the said statement and his 4(four) signatures thereon as exhibit-6 and 6/1-4.

39. In cross-examination PW-8 stated that he saw the original copies of the FDRs. He could not say whether the amount was transferred from the Sonali Bank, New North Circle Branch STD account no.7 vide cheque no.4882404 dated 15.06.2006 to FDR account no.58462 dated 15.06.2006. If any cash cheque is marked with transfer seal then the cheque will be a negotiable instrument. The cash cheque with transfer seal cannot be encashed like as a normal cheque and the same can only be transferred to a specific account. He denied the defence suggestions that he knew that the cheque no.4882406 of the STD account no.7 of the Sonali Bank, New North Circle Branch, was transferred to FDR account no.58462 in the name of Salimul Haque on 15.06.2006 and he intentionally hide the relevant informations. On 15.06.2006 the interest rate of the FDR no.58462 was 12.25% and accused Tareque Rahman's signature was not available in any documents which were seized in his presence. The letter of FDR encashment and encasement were done following the bank's rules and regulations. PW-31 came to his office with a demand letter of the Commission. There was no court's order for giving the bank's documents but the documents were given due to the emergency situation. The FDR was encashed and transferred to Salimul Haque's account and the Trust account and Salimul Haque did not receive any money personally and the money was transferred with interest. The documents of Sharfuddin and his brother Giasuddin Ahmed and son Sayed Ahmed were in the bank's custody and the above documents were seized and the 3 FDR accounts were in the name of above 3 persons and the money was withdrawn from Sharfuddin's FDR through various cheques. The FDR purchase or FDR encashment were done following the bank's rules and regulations. PW-8 gave written statement with signature to PW-31 and he made similar statement before the Magistrate. Sharfuddin did lien his 2 FDRs but did not take any loan. The said 2 FDRs were sent to the Prime Bank, Gulshan Branch because no money was sanctioned for the said 2 FDRs. The amount of 2 FDRs were Tk.1,06,38,686/- and Tk.1,03,19,365/- and the said FDRs were transferred to the Prime Bank, New Eskaton Branch and then 2 new FDRs were opened, one in the name of Salimul Haque and Sayed Ahmed and another in the name of Giasuddin Ahmed. After encashment of said 2 FDRs the money was deposited in the account of Sharfuddin. The bank account of Sharfuddin was seized. The said money was deposited in Sharfuddin's account through payment orders. PW-8 denied the defence suggestions that his written statements was sent to

the Magistrate and the Magistrate recorded his statement from the said written documents, and due to the emergency situation he was afraid of and compelled to make statement before the Magistrate.

40. PW-9 Md. Majed Ali deposed that on 16.07.2007 while he was working in the Prime Minister's Office in donation section as an accountant PW-31 came to their office. PW-31 demanded the required documents and he presented all the required documents in presence of the administrative officer Md. Alfashani (PW-10) and Md. Mokhleshur Rahman (PW-11). PW-31 seized the said documents and prepared a seizure list in presence of him, PW-10 and PW-11. The seized documents were as follows:

i) The record of the PM's Orphanage funds being no.02.39.19.01.13.14.93-প্রমকা/সচিব/এতিমতহবিল/২৪/৯৩, wherein the following informations and documents were available:

a) in page no.1 informations regarding various funds of Prime Minister;
b) in page no.2 informations regarding the amount of Tk.4,59,98,048.00/- deposited in FDR account no.984112 with the Sonali Bank in the name of Prime Minister's fund;
c) in page no.3 informations regarding credit voucher dated 17.06.1991 for Tk.4,44,81,216/- of Foreign Exchange Department of Sonali Bank, Dhaka;
d) in page no.4 photostat copy of DD no.153367970 dated 09.06.1991 for US $12,55,000.00 issued by the United Saudi Commercial Bank deposited in PM's Orphanage Fund being account no.5416 with the Sonali Bank, Ramna Branch;
e) in page no.5 detail informations regarding PM's Orphanage Funds;
f) in page no.6 details of account no.5416 of the PM's ORPHAN FUND;
g) in page no.7 the account informations between 03.01.1993 and 03.10.1993;
h) in page no.8 bank statement dated 27.01.1993 of the PM's Orphanage Fund being account no.5416 with the Sonali Bank, Ramna Branch;
i) in page no.9 informations regarding deposit of US $12,55,000.00 equivalent to TK.4,44,81,216.00/- in the said account and deposit slip regarding DD no.01774014-153367970 of United Saudi Commercial Bank dated 09.06.1991;
j) in page no.10 the donation informations about Bogura orphanage and Bagherhat orphanage;
k) in page no.11 the deposit slip dated 14 November 1993 of Tk.4,66,76,289.00/- in account no.5416 with the Sonali Bank, Ramna Branch;
l) in page no.12 informations regarding the PM's Orphanage Fund account no.5416 with the Sonali Bank; and
m) in page no.13 and 14 Photostat copy of the Credit voucher and DD of the United Saudi Commercial Bank dated 09.06.1991.

41. At serial no.4(2) of the said seizure list, the statements of PM's Orphanage Fund account no.5416 was there. In page no.1 the detail informations of credit/debit regarding the PM's Orphanage Fund being account no.5416 with the Sonali Bank was mentioned. In page nos.2-4 the deposit slips of the PM's Orphanage Fund being account no.5416 of Sonali Bank were available. In page no.5 withdrawal of two cheques amount informations being cheque nos.8431102 and 8431103 by which Tk.2,33,33,500/- and Tk.2.33.33.500/- were withdrawn on 15.11.1993 were written.

42. Serial no.4(3) of the seizure list was an unauthenticated 200 pages register regarding the PM's Orphanage current account no.5416 wherein page nos.1-9 were written. In page no.9, it was written that the cheque nos.8431102 and 8431103 dated 13.11.1993 for each Tk.2,33,33,500/- donated for establishing Bagura orphanage and Bagherhat orphanage.

43. Serial no.4(4) of the seizure list was an unauthenticated register for the PM's Orphanage fund FDR account no.984112.

44. PW-9 proved the said seizure list and his signature thereon as exhibit no.7 and exhibit-7/1. He also proved the seized alamats presented before the Court as material exhibits III series.

45. PW-9 further deposed that PW-31 on 22.07.2008 also came to their office and requested to show required documents and he presented to him the Prime Minister's relief and welfare related records and at that time the administrative officer Md. Al Fasani (PW-10) and Md. Mokhleshur Rahman (PW-11) were also present there. PW-31 seized the documents and prepared a seizure list wherein he put his signature. He proved the said seizure list, exhibit-8 and his signature thereon 8/1. The seized alamats dated 22.07.2008 were mentioned in the column 4 of the seizure list-

i) serial no.4(1) a original record of the Prime Minister's Relief and Welfare Fund for the assessment year 1993-94 including 195 pages along with 7 note sheets;
ii) serial no.4(2) a original record of the Prime Minister's Optional Fund for assessment year 1993-94 where Prime Minister signed the documents including 165 pages along with 5 note sheets;
iii) serial no.4(3) 5 pages photostat copy wherein Nitimala (policy) had been prescribed including the said 2(two) funds.

46. In cross-examination PW-9 stated that in 1986 he was appointed in the Prime Minister's Office as a cashier and he worked in the said post till 1991. Between 1991 and 2007 Barek Bhuiyan (PW-21) worked in the account section as an accountant. Before 16.07.2007 PW-31 went to the Prime Minister's Office but he could not remember the date. PW-9 did not overwrite the record being no.02.39.19.01.13.14 .93 and he could not able to say who did it. The last line of the said record was cÖgKv/mwPe/GwZg Znwej/24/93 and the digit '24' was overwritten. The said file was issued by the Prime Minister's Office. The record opening index was in the secretarial office and the record number was given thereon. He did not know whether there was any discussion between secretary, additional secretary and director regarding the said overwriting. Altogether 20 officers had been working in the Prime Minister's Office. In the Prime Minister's Office there were peon books or movement register. There is no endorsement copy on material exhibit-III who received the file. There were no detail descriptions in the exhibit III series record who attached the documents. When he dealt with the said material exhibit series file he did not put any signature thereon and he could not able to say who done the accounting of the said file and attached a copy of United Saudi Commercial Bank's DD to the material exhibit-III. He did not know how the documents of the Sonali Bank were attached to the record. PW-9 did not give any page number in the material exhibit-III series. In Prime Minister's Office he did not see any orphanage fund file accept the material exhibit-III. Audit was completed regarding Prime Minister's Orphanage Fund but he did not present the file during audit. He did not know whether the material exhibit III record was false and fabricated one and who wrote the account details. He did not attach Sonali Bank related documents along with other documents to the material exhibit III(A) file. The record number of material exhibit III(A) was not in their office. He did not write in the material exhibit III(A) file and his signature was not on there and there was no proof whether he had dealth with the said records and there was no note or signature of his any senior officer. PW-9 had no knowledge who attached the documents to the material exhibit III(A) and he did not attach any document thereto. In their

office no investigation was done regarding the documents of material exhibit III(A) file. In the pages 1-9 of material exhibit III(B) register statement was not written by him and it was written by the previous accountant Mostafa Kamal (PW-19) and Barek Bhuiyan (PW-21) and they maintained the said register. No official/employee signed on the material exhibit III(B). In page nos.1401-1404 of the material exhibit III(C) the statements were not written by him and no one signed from the Prime Minister's Office. The record number 02.39.19.1.04.05.93-94 was regarding the relief and welfare fund but not about the orphanage fund and the said record was signed by the secretary and the Prime Minister also signed thereon. PW-9 denied the defence suggestions that the orphanage fund related case against Begum Zia was false and fabricated. PW-9 could not able to say whether any person went to the Prime Minister's Office to find out the records. Between 1991 and 2007 internal and external audit were completed but no objection was raised and he did not also raise any objection.

47. PW-10 Md. Al-Fashani deposed that on 16.07.2007 while he was working in the office of Chief Advisor of Care Taker Government as an administrative officer PW-31 came to their office. On the basis of Majed Ali's (PW-9) presentation PW-31 seized some records and documents relating to the case and he prepared a seizure list in presence of him and PW-11. He proved the said seizure list, exhibit-7 and his signature thereon, exhibit-7/2. On 22.07.2008 PW-31 again came to their office and according to his demand PW-9 presented some documents and records. The said documents and records were also seized in presence of him and PW-11 and a seizure list was prepared by PW-31. He proved the said seizure list, exhibit-8 and his signature thereon, exhibit-8/2.

48. In cross-examination PW-10 stated that in October 1995 he was appointed in the account's section of Prime Minister's Office as an office assistant and in July 2008 he was promoted to the post of administrative officer. Between 1991 and 2007 he worked as an office assistant. In 1991 Abdul Barek Bhuiyan worked as an accountant. It was not mentioned from which section record being no.02.039.19.1.13.14.93 came and when or who received the said record; he did not receive the same. He did not overwrite on the register book or he had no knowledge who did it. He did not know whether PW-31 went to the Prime Minister's Office before 16.07.2008 and he was not interrogated prior to the said date. In Prime Minister's Office there were records of relief and welfare fund and optional fund. He did not deal with any file regarding the orphanage fund. He denied the denfece suggestions that Prime Minister's Office sent letter to the Commission informing that there was no file regarding orphanage fund. The seized records were presented by PW-9 and he signed on the seizure list. He also denied the defence suggestion that PW-9 prepared the said records and registers in his own way.

49. PW-11 Md. Mokhlesur Rahman deposed that on 16.07.2007 PW-31 came to the office of the Chief Advisor while he was working in the said office as an administrative officer. On the demand of PW-31 accountant Majad Ali (PW-9) presented Prime Minister's Orphanage Fund related documents and records. PW-31 prepared a seizure list, exhibit-7 in presence of him and Al-Fashani (PW-10) and took their signatures. He proved his signature on the said seizure list, exhibit-7/3. On 22.07.2008 PW-31 again came to their office and seized Prime Minister's Relief and Welfare related documents in presence of PW-9 and PW-10 and prepared a seizure list, exhibit-8 and took their signatures. He also proved his signature thereon, exhibit-8/3.

50. In cross-examination PW-11 stated that in 1997 he was appointed in administrative section of the Prime Minister's Office as an office assistant and he did not work in the

accounts department. PW-9 Majed Ali presented the seized records and registers. He denied the defence suggestions that the seized records and registers, exhibit-7 and 8 were created in order to follow the Commission's desire.

51. PW-12 Monjur Hossain deposed that on 22.07.2008 at about 10.00 am PW-31 came to the Sonali Bank, Ramna Corporate Branch while he was working as an assistant general manager in the said branch and PW-31 requested for presenting the documents of opening form, signature card etc. relating to PM's Orphanage Fund being account No.5416/14 and accordingly he presented the related documents of the said account by following the order of DGM. PW-31 seized the said documents and a seizure list was prepared in presence of him and witnesses Rezaul Karim, SPO and Mohiuddin Ahmed, PO (PW-13). The seized documents were mentioned at serial no.4 of the seizure list. Serial no.4(1) and 4(2) of the seizure list were the opening form of account no.5416/14 in the name of the PM's Orphanage Fund and the signature card where Kamal Siddique, additional secretary (acting), Prime Minister's Office put his signatures on 02.06.1991. PW-12 proved the seizure list and his signature thereon, exhibit-9 and exhibit-9/1. The seized alamats were given to PW-31 and he received a copy of the seizure list.

52. In cross-examination PW-12 stated that he was working in the Ramna Corporate Branch when the documents were seized. He did not work with any officers who prepared account opening form and signature card of orphanage fund account. He had no personal knowledge who filled up or signed on the said account opening form and signature card. Before 22.07.2008 the Commission sent requisition to their bank. PW-12 in his cross-examination further stated that he had no knowledge whether money was sent in the said account by the Amir of Kuwait. He denied the defence suggestions that account no.5416/14 was the account of Zia orphanage fund, and that forged documents were created in the name of PM's Orphanage Fund.

53. PW-13 Mohiuddin Ahmed deposed that on 22.07.2007 at about 10.00 am while he was working in the Sonali Bank Ltd. Ramna Corporate Branch as a principle officer PW-31 came to the room of DGM of their branch and in order to comply the instruction of DGM, the opening form of the PM's Orphanage Fund, signature card etc. were presented in presence of him, senior principal officer Rezaul Karim and AGM Monjur Hossain (PW-12). PW-31 seized the said documents and prepared a seizure list, exhibit-9 and took his signature thereon. He proved his signature, exhibit-9/2.

54. In his cross-examination PW-13 stated that in November 2006 he was appointed in Ramna Corporate Branch of the Sonali Bank Ltd. as a principle officer. He had no personal knowledge regarding the seized documents. He did not provide any documents of remittance regarding the account no. 5416/14. Deputy General Manager presented the said documents. The name of Begum Zia was not mentioned in the seized documents. The balance remittance and the deposited amount of account no.5416/14 were not mentioned in the seized documents. PW-13 denied the defence suggestions that the said account was in the name of Zia Orphanage Trust, not in the name of Prime Minister's Orphanage Fund, and that on behalf of the government of the state of Kuwait, the Amir of Kuwait made a donation to the Zia Orphanage Trust, and that the bank authority withheld the remittance documents in order to follow the illegal order of the Commission, and that the seized documents were fabricated one.

55. PW-14 Sayed Jaghlul Pasha deposed that between 2nd half of the year 1992 and 1st half of the year 1994 he worked in the Prime Minister's Office as the private secretary of the Prime Minister's secretary. At the relevant time Kamal Siddique had been working as the secretary of the Prime Minister. The Prime Minister's funds were controlled by Kamal Siddique. At the time of opening the PM's Orphanage Fund he was not in the said office. He came to know regarding PM's Orphanage Fund when he was updating the other Prime Minister's funds records in the year 1993. The said orphanage fund was deposited in a FDR account with the permission of the Prime Minister. The secretary of the Prime Minister ordered to withdraw the said FDR amount with the permission of the Prime Minister and allocated the said amount for the Zia Orphanage Trust and the Zia Memorial Trust. Kamal Siddique signed on two cheques, each of Tk.2,33,00,000/- for the said Trusts. Office opened an additional record with the permission of Kamal Siddique for collecting the documents. Kamal Siddique kept the important records of PM's Orphanage Fund in his own custody. The main record of the PM's Orphanage Fund was signed and approved by the Prime Minister. The investigation officer showed the records to him. The material exhibit-III series and III(A) series were related to the PM's Orphanage Fund. He had idea about the original records and additional record of the Prime Minister's Orphanage Fund. He made statement before the investigating officer and also before the Magistrate under section 164 of the Code of Criminal Procedure. He proved the said statement and his signature thereon as exhibit 10 and 10/3.

56. In cross-examination PW-14 stated that in August 1992 he was appointed in the Prime Minister's Office as the personal secretary to Prime Minister's secretary and worked till 30.06.1994. After that he did not work in Prime Minister's Office. He made statement before PW-31 in 2008 while he was working in the Privatization Commission as a director. He also made statement before the Magistrate. He did not know whether internal audit was done in the Prime Minister's Office. During his working period an audit was completed in Prime Minister's Office. He saw the record of the relief and welfare Fund in the Prime Minister Office between 1993 and 1994. On 27.09.1993 the first note was written in the said record no.02.39.9.1.4.5.93-94, part-1. The said record was signed by him, Prime Minister's secretary and Prime Minister. The said record was used for keeping the summary of the government and private different applications which were presented before the Prime Minister for the permission. On 19.11.1991 Prime Minister's secretary presented summary before the Prime Minister regarding welfare fund and the said summary was approved on 28.11.1991. PW-14 denied the defence suggestions that there was separate fund like PM's Orphanage Fund and the Relief and Welfare fund included the orphanage fund, and that the claim of PM's Orphanage Fund was false one, and that the statement which he was given regarding PM's Orphanage Fund were concocted, and that the amount of Tk.4,66,00,000/- in the name of Zia Orphanage Trust and Zia Memorial Trust were allotted and approved by the Prime Minister was false, and that the Commission had shown him the false and fabricated register and documents.

57. PW-15 Md. Mofizul Islam deposed that in between 2003 and 2007 he worked in the Sonali Bank Gulshan, New North Circle Branch as the branch manager. The account of Zia Orphanage Trust STD-7 was opened in said branch. From STD-7 account Tk.30,00,000/- through cheque no.4882403 dated 05.07.2006, Tk.50,00,000/- through cheque no.4882404 dated 04.07.2006 and Tk.1,00,00,000/- through cheque no.4882402 dated 15.06.2008 were writhdrawn. The said 3 cheques were jointly signed by Tareque Rahman and Mominur Rahman and the said amounts were transferred from the Sonali Bank Ltd. Gulshan New North Circle Branch to the Prime Bank Ltd. Gulshan Branch through clearing house. (However, money of Cheque no.4882406 dated 15.06.2006 for Tk.1,00,00,000/- and Cheque

no.4882407 dated 12.04.2006 for TK.50,000/- was given on the basis of joint signatures of the said two persons) and due to insufficient fund the Sonali Bank, local office provided the said amount through the demand draft. The said cheque's money Tk.1,00,00,000/- and Tk.50,000/- was encashed from the Prime Bank, local office. They gave the money in one day notice. Cheque no.4882407 dated 12.04.2006 for Tk.50,00,000/-, material exhibit-I(G) and the signature of PW-15 was thereon, exhibit-I(G)/1; Cheque no.482402 dated 15.06.2006 for Tk.1,00,00,000/-, material exhibit-I(H) signed by principal officer Sohrab Hossain, exhibit-I(H)/1. Cheque no.4882403 dated 05.07.2006 for Tk.30,00,000/-, material exhibit-I(N), cheque no.4882406 dated 15.06.2006 for Tk.1,00,00,000/-, material exhibit-I(J) and cheque no.4882404 dated 4.7.2006 for Tk.50,00,000/-, material exhibit-I(L) were also signed by the principle officer Sohrab Hossain, exhibits-I(H)/1, I(N)/1, I(J)/1 and I(L)/1. PW-15 permitted Sohrab Hossain through note of withdrawal for signing the said cheques. The said amounts were paid by following the Bank's rules and regulations.

58. In cross-examination PW-15 stated that the 3 cheques, material exhibit-I(H), I(N), I(C) were issued in the name of Zia orphanage fund. In two cheques, material exhibit-I(G) and I(J), there were transferred seal and the said cheques were cash cheque and said cheques were transformed as negotiable instrument due to transfer seal. The cash cheque with transfer seal could not be encashed it would only used to transfer the bank amount to the specific bank.

59. PW-16 Md. Golam Faruk deposed that on 05.08.2008 while he was working at Gabtoli, Bogura sub-registry office as sub-registrar PW-31 came to his office and presented a request letter and accordingly he presented all the records as per his request. PW-31 seized the said documents and prepared a seizure list, exhibit-11. The discreptions of seized records were mentioned at serial no.5 of the seizure list, Balam Book nos.122, 116, 115, 121 and 117, material exhibit no.IV series wherein details of 18 deeds infavour of the Trust had been narrated. Register book being no.4 of the Gabtoli Sub-registry office, material exhibit-V, wherein page nos.34-38 thumb impressions and signatures were taken from the vendors of the respective deeds.

60. PW-16 proved the said seizure list exhibit-11 and his signature thereon as exhibit-11/1. The seized records were given to his custody and he received a copy of 'jimmanama' from PW-31. PW-16 also proved the said 'jimmanama', exhibit-12 and his signature thereon, exhibit-12/1.

61. In cross-examination PW-16 stated that he submitted the finger print book before the court and provided the certified copies of said deeds. The said deeds were in the name of the Trust.

62. PW-17 Md. Mehmud Hossain deposed that between 2003 and February 2007 he worked in the Prime Bank Ltd. Gulshan Branch as the branch manager. On 28.07.2008 PW-31 called him for interrogation and he went to the head office of the Commission. PW-31 interrogated him and he made his statement before him. Between 13.04.2006 and 05.07.2006, 5 cheques of STD-7 account with Sonali Bank, New North Circle, Gulshan Branch were given to their branch for opening an FDR, which were jointly signed by Tareque Rahman and another. He received the said 5 cheques in presence of M. Sahjanan Bhuiya, managing director of the Prime Bank Ltd. through Salimul Haque. Salimul Haque who was the director and chairman of the Prime Bank. Among the said 5 cheques, 1 cheque was for Tk.50,00,000/-, 2 cheques were for Tk.2,00,00,000/-, each Tk.1,00,00,000/-, 1 cheque was for

Tk.50,00,000/- and 1 cheque was for Tk.30,00,000/- in total amounting to Tk.3,30,00,000/-. By receiving direction from Salimul Haque the cheque amounting to Tk.50,00,000/- was given on 13.04.2006 for encashment and the cheque amounting to Tk.1,00,00,000/- was given on 15.06.2006 for encasement and another 3 cheques were given to the Trust. The said 2 cheques were given to the branch officer Masud Parvez for withdrawal. On 13.04.2006 and on 15.06.2006 two FDRs for Tk.50,000/- and Tk.1,00,000/- respectively were issued in the name of Salimul Haque. Thereafter another 3 cheques in respect of Tk.1,00,00,000/-, Tk.50,00,000/- and Tk.30,00,000/- were collected through clearing house for opening FDRs on 15.06.2006, 04.07.2006 and 05.07.2006 respectively and Salimul Haque ordered for opening FDR account and on 27.06.2006 FDR no.41032669 for Tk.1,00,00,000/- and on 09.07.2006 FDR no.41033117 for Tk.80,00,000/- were issued in the name of the Trust. The said FDRs were transferred to Salimul Haque. FDR no.41029462 for the amount of Tk.50,68,450/- (including interest) was used for opening another new FDR being no.41033338 on 16.07.2006 in the name of the Trust in compliance of the order of Salimul Haque. PW-17 requested to the bank managing director for necessary documents of the Trust and eventually, he received the said documents. On 01.11.2006 the Prime Bank, Eskaton branch wrote a letter which was received by the Prime Bank, Gulshan branch on 05.11.2006 and FDR for Tk.1,00,00,000/- was liened in the name of Salimul Haque. The lien was marked jointly by the manager operation Amzad Hossain and Farid Ahmed of the Prime Bank, Gulshan Branch and for making the lien they failed to communicate with Salimul Haque over phone. Thereafter, the Prime Bank, Eskaton Branch cancelled the said lien mark. Eventually, on 16.11.2006 a written order was passed by the Prime Bank, Eskaton Branch on the basis of the Trust resulation that Zia Orphanage Trust's FDR for Tk.1,00,00,000/- was required to be encashed and ordered to deposit the said amount to the Prime Bank, Eskaton Branch in the name of Salimul Haque. Accordingly they transferred the fund of said FDR for Taka 1,00,00,000/- through credit advice to Prime Bank, Eskatan Branch for encashment. PW-17 also made statement under section 164 of the Code of Criminal Procedure before the Magistrate. He proved his said statement, exhibit-13 and his six signatures thereon, exhibit-13/1-6.

63. In cross-examination PW-17 stated that there were 2 cash cheques and 3 account payee cheques of the STD account no.7, Sonali Bank and the said cheques were cleared from the said STD account no.7, Cheque no.4882407 dated 12.04.2006 for Tk.50,00,000/- and cheque no.4882406 dated 15.06.2006 for Tk.1,00,00,000/- were presented in their bank but there were no endorsement seal of their bank. The said three cheques were collected by Prime Bank, Gulshan Branch, Dhaka. The beneficiary of the five cheques never complained that they did not receive the money and the said five FDRs were transferred to the Prime Bank, Eskaton Branch with the permission of the beneficiary and the branch manager. He was interrogated by the investigating officer and he made his statement before the Magistrate. Cheque no.4882407 dated 12.04.2006 was issued from the STD account no.7 with the Sonali Bank, Gulshan New North Circle Branch and there was a transfer seal on cheque no.44888822406 dated 15.06.2006. According to the material exhibit-II series, the FDR interest was 12.25%. FDR no.41029262 for Tk.50,000/- dated 13.04.2006 and FDR no.41032276 for Tk.1,00,00,000/- were in the name of Salimul Haque**.**

64. PW-18 Md. Abdul Jalil deposed that on 05.08.2008 while he was working in Gabtoli, Bogura as a Mohorar in the Sub-registry office PW-31 came to their office and seized 18 deeds and prepared a seizure list and took his signature. He proved the seizure list, exhibit-11, and his signature thereon, exhibit-11/2. The seized deeds were given in the custody of the

sub-registrar Md. Golam Faruk (PW-6) and he signed on the 'jimmanama' as a witness. He also proved the 'jimmanama', exhibit-12 and his signature thereon, exhibit-12/2.

65. In cross-examination PW-18 stated that he was not present when the deeds were registered and he had no knowledge about the registration of the same.

66. PW-19 Md. Mostofa Kamal Mozumder deposed that in 2008 while he was working as the upazila nirbahi officer (UNO) in Fatikchhari, Chittagong, PW-31 sent him a notice to appear before the Commission. Thereafter he came to the Head office of the Commission on 17.06.2008. During interrogation he informed to PW-31 that on 23 May 1990 he joined as an accountant in the President's Secretariat and he worked in the President's Secretariat till May 1992. He was declared as a surplus staff in the President's Secretariat and thereafter he worked in the Prime Minister's Office as an accountant from June 1992 to 31 January 1993. During his working period in the Prime Minister's Office he worked as an accountant in the Prime Minister's relief and rehabilitation fund, voluntary fund, reserve fund and orphanage fund and he was controlled and advised by the private secretary (PW-14) of the Prime Minister's secreatary Kamal Siddique. PW-14 the private secretary of the Prime Minister's secretary preserved all the Prime Minister's various important fund records, cheque books, counter foil of cheques, counter foil of FDRs and he performed his work by taking advice from PW-14. PW-14 supplied him the orphanage fund related documents and bank statement for entry in the cash register. PW-19 after completing entry informed about the said entry to PW-14. PW-19's own hand writing was in the orphanage fund cash register and some portion was written by another accountant who joined after him. His hand writings were in the register's page nos.1,2,3,9. In page no.9 of the register it was written in the column of debit as Zia Memorial Trust donation for establishing orphanage fund, House no.41, Raod No.37, Gulshan, Dhaka Cheque No.4831102, dated 13.11.1993, the amount of Tk.2,33,33,500/-. Record no.02.39.19.01.13.14.93 was the additional record of the PM's Orphanage Fund and in the said record he wrote about the bank statement and informations of other documents. In page no.9 at serial no.3 informations were written as Zia Orphanage Trust, 6 Shaheed Moinul Road, Dhaka, Cheque no.8431103 dated 13.11.1993, the amount of Tk.2,33,33,500/-, purpose for establishing Orphanage fund. It was also written in deposit receipt no.984112 for Tk.4,66,76,298/- of the PM's Orphanage fund. He handed over the said register to the next accountant Abdul Bareq Bhuiyan (PW-21) when he left the Prime Minister's Office.

67. In cross-examination PW-19 stated that the Commission did not demand the audit report and he did not provide any report to the Commission. He kept the account details and the PM's Orphanage Fund. PW-14 also kept the said account details. Thereafter Abdul Barek Bhuiyan (PW-21) kept the account details of the said orphanage fund. In material exhibit-III series and III(A) series there were no note sheet and he did not see any note sheet there. He was aware about the Prime Minister's Relief and Welfare Fund. He did internal and external audit regularly while he was working in the Prime Minister's office. His hand writings were available in material exhibits III(B) and III(C). PW-14 called him from his new service place after 9/10 months of leaving his job from Prime Minister's office for updating the records. He denied the defence suggestions that there was no PM's Orphanage Fund register and files in the Prime Minister's office, and that there was no existence of the PM's Orphanage Fund and additional record. He did not know whether the Amir of Kuwait sent directly foreign remittance to the Sonali Bank in the name of Zia Orphanage Trust. But he knew a remittance came to the PM's Orphanage Fund.

68. PW-20 Tohidur Rahman Khan deposed that in May 2008 while he was working as a director in the Chief Advisor Office PW-31 sent him a letter requesting to supply the records of the PM's Orphanage Fund and he replied to the said letter in June 2008. Thereafter on 14.08.2008 PW-31 came to their office and he made his statement before him. The Commission asked for the original records of the PM's Orphanage Fund but the Chief advisor office could not able to supply the required informations because the original record could not traced out. Between 1991 and 1996 another additional record was made in compliance of the order of the private secretary of the Prime Minister's secretary and he informed PW-31 regarding the said additional record. In 1991 the account no.5416 was opened with the Sonali Bank, Ramna Corporate Branch regarding PM's Orphanage Fund. The register of the PM's Orphanage Fund and additional records were handed over to PW-31. PW-20 proved material exhibit-III series.

69. In cross-examination PW-20 stated that on 14.08.2008 he made statement before PW-31. In May 2008 before recording the said statement PW-32 came to him who asked for some files of the Prime Minister's office for his perusal. But they could not provide the said required files to PW-32 as the original record was not found at that time. During his working period he could not traced out the said original record. In January, 2009 he was transferred from the Prime Minister's Office. He had no involvement with the additional record but same was ultimately traced out.

70. PW-21 Abdul Barek Bhuiyan deposed that in 2003 he retired from the Prime Minister's Office as an accountant. Between 1993 and 1994 he dealt with the relief fund, optional fund, secret fund and orphanage fund of the Prime Minister's Office. Mostafa Kamal Mojumder (PW-19) had worked as an accountant prior to him and at the time of his transfer he (PW-19) handed over additional records and 2 registers to him (PW-21). PW-21's hand writings were available on the additional records and registers. He having seen the material exhibit-III series further deposed that the cover pages of material exhibit-III and material exhibit-III(A) were written by him. Material exhibit-III(B) and III(C) registers were written by Mostafa Kamal Mojumder (PW-19). In 1994 he was transferred from the said office and he handed over the additional records and registers to Majed Ali (PW-9).

71. In cross-examination PW-21 stated that he was appointed in the Prime Minister's Office as an accountant and retired in the year 2003. Before his appointment Mostafa Kamal Majumder (PW-19) worked in that post. After his retirement Majed Ali (PW-9) was appointed in his post. During his working period he never saw the original records of orphanage fund.

72. PW-22 Md. Sohrab Uddin deposed that in 2006 he worked in the Sonali Bank Ltd. New North Circle Branch as a principle office and he was responsible for 'transfer the clearing cheque pass' section. On 15.06.2006 he passed cheque no.4882402 for Tk.1,00,00,000/- of STD account no.7 of the Trust and his signature was thereon, material exhibit-I(H)/2. The said cheque was presented from the Prime Bank Ltd. Gulshan Branch through clearing house. On 15.06.2006 cheque no.4882406 for Tk.1,00,00,000/- of STD account no.7 was presented before the bank as cash cheque and due to insufficient fund Sonali bank issued a demand draft invavour of the local office and the said DD was encashed and the said cheque was passed by him and his signature was thereon, exhibit-I(J)/2. On 04.07.2006 he passed cheque no.2882404 for Tk.50,00,000/- of STD account no.7 and the said cheque was signed by him, material exhibit-I(L)/2. Cheque no.4882403 dated 05.07.2006 for Tk.30,00,000/- was presented from the Prime Bank Ltd. Gulshan Branch and

he passed the said cheque and his signature was thereon, material exhibit-I(N)/2, the above cheques were jointly signed by Tareque Rahman and Mominur Rahman.

73. In cross-examination PW-22 stated that while he was working in the Sonali Bank, Gulshan New North Circle Branch he did clearing and transfer related activities by following the bank's rules and regulations. The 3 cheques, material exhibited-I(H), I(N), I(L), were clearing cheque and said 3 cheques were in the name of the Trust. The cheque material exhibit-I(G)was passed by the manager and his signature was also thereon. The cheque material exhibit-I(J) was a cash cheque and his signature was on the said cheque. PW-22 denied the defence suggestions that FDR nos.41032276 and 41029462 were in the name of Salimul Haque which came from the Prime Bank, and that the said 5(five) cheques, material exhibit-I(G), I(H), I(J), I(L), I(N), were transferred from the Sonali Bank to the Prime Bank for the best interest which he knew. He did not know wheather the Prime Bank's FDR interest rate was 12.25% between April,2006 and June, 2006. The said 05 cheques were cleared and transferred by following the bank's rules and regulation.

74. PW-23 Shah Rezwan Hayat deposed that in 2008 he was working as the upazilla nirbahi officer, Gabtoli, Bogura and on 21.07.2008 the Commission sent a letter vide memo no.11983 by mentioning some Dagh numbers of Gabtoli and Darail Mouja and requested for submitting a report regarding the possession and position of the said land since 1993. He proved the said memo dated 21.07.2008, exhibit-14. After receiving the said letter he ordered to upazila land assistant officer Jahangir Alam (PW-27) and surveyer Momin (PW-28) for inquiry into the said matter and to submit a report. After receiving their report he sent a letter being memo no.1281 to the Commission on 31.07.2008 attaching the photostat copy of the report. In the said report it was mentioned that between 1993 and 1994 the said lands were vacant and thereafter one Shobhan took possession of the same and former Parliament Member Helauzzaman Talukder and former Mayor of Pourashava Morshed Liton used to look after the said land. The record of right remained in the name of the previous owners. There was no structure on the said land. PW-23 proved the said 3 pages report, exhibit-15 and his signature thereon, exhibit-15/1.

75. PW-24 Md. Amjad Hossain deposed that he worked in the Prime Bank Ltd. Gulshan Branch as an assistant vice president from October 2003 to November 2007 and during his working period Prime Bank Ltd. Eskaton Branch sent him a letter requesting for lien of 2 FDRs being FDR no.41032276 for Tk.1,00,00,000/-, material exhibit-VI, and FDR No.41032669 for Tk.1,00,00,000/-, material exhibit-VII. After receiving the said letter he discussed the matter with his branch manager Mehbub Hossain and requested for his direction. Mehbub Hossain after consulting with the manager of Prime Bank Ltd. Eskaton Branch, instructed him to do for lien of the said 2 FDRs. After receiving the instruction he signed jointly with the general banking incharge Molla Farid Ahmed in the said 2 FDRs and confirmed the its lien and informed the matter to Prime Bank, Eskaton Branch. On the request of Prime Bank Ltd. Eskaton Branch the said 2 FDRs were encashed and transferred.

76. In cross-examination PW-24 stated that the said FDRs were liened by following the rules and regulations and the said lien FDRs were to be encashed at any time. No loan was taken from the said two FDRs. He made a written statement to PW-31, exhibit-16. In his cross-examination he also stated that he did not present the FDRs lien letter but he saw the said letter which was with the record. The material exhibit-II(A), letter regarding encashment of FDR cancelling lien, was a Photostat copy and his signature was not thereon and there was no written order. The material exhibit-VI was FDR no.41032276 for Tk.1 crore. On

15.06.2006 the said FDR was deposited in the name of Salimul Haque and the interest rate was 12.25%. The material exhibit-VII was FDR no.41032669 dated 27.06.2006 for Tk.1 crore was deposited in the name of the Trust and the interest rate was 12.25%. There were no written instructions from Tareque Rahman to their Bank regarding lien, cancellation of lien and advice. Material exhibit-VIII was a Photostat copy and it was not authenticated by any bank officer. PW-24 denied the defence suggestion that he hide the original copy of the material exhibit-VIII and provided a Photostat copy to the Commission. In his statement made before PW-31 he did not mention that the said FDRs transactions were done following Tareque Rahman's order. The bank account operation was reflected in the lajer book of the said branch. Account opening form, signature card and documents of transactions were kept with the account file. During his working period PW-31 never came to Prime Bank Ltd. Gulshan Branch. The said bank could provide the bank statement upon the court's order. External and internal audit were done in their all branchs in every year.

77. PW-25 Molla Farid Ahmed deposed that he worked in the Prime Bank Ltd., Gulshan Branch from the year 1999 to the 1st part of the year 2008. On 01.11.2006 a letter being memo no. cÖvBg/GbBwe/wmAvi/2006 issued by the Prime Bank, Eskaton Branch was sent to his branch requesting to do lien of 2 FDRs. After receiving the said letter they discussed with the branch head and on the basis of his order FDR no.41032276 dated 15.06.2006 for Tk.1,00,00,000/- and FDR no.41032669 dated 27.06.2006 for Tk.1,00,00,000/- were marked lien and the matter was informed to the Eskaton Branch. He signed thereon, material exhibit nos-VI/2 and VII/3. Thereafter, lien of the said 2 FDRs was cancelled and money was transferred to the Prime Bank Ltd. Eskaton Branch through advice. He proved the encashed advice no.1007 for FDR No.41032276, material exhibit-IX, and his signature thereon, material exhibit-IX/1. He made written statement before PW-31, exhibit-17 and he proved his signature thereon, exhibit-17/1 (with objection).

78. In cross-examination PW-25 stated that the said two lien FDRs were signed by the manager and he did not submit any advice regarding the said two FDRs before the Court. The material exhibit-IX was a Photostat copy. There is no signature of Tareque Rahman on the material exhibit-VI, VIII and IX.

79. PW-26 Khondokar Abdus Sattar deposed that in the year 2009 while he was working in the Foreign Ministry of Bangladesh as the director general PW-31 on 16.06.2008 sent a letter being memo no.9191 to the secretary of the Ministry of Foreign Affiars. In the said letter it was mentioned that in 1991 a DD issued by the United Saudia Commercial Bank for US $12,55,000 was deposited in the PM's Orphanage Fund being account no.5416 maintained with the Sonali Bank Ltd. Ramna Corporate Branch and it was asked to provide information about the source of the said DD. He sent the said letter along with the Commission's letter to the Bangladesh Embassy in Saudi Arab and requested for necessary inquiry and to send a report. The said letter was signed by him and he also sent another copy of the said letter to the Commission and the said copy was signed by him, exhibit-19. He identified his signature on the said letter, exhibit-19/1. After receiving their letter the senior minister and deputy chief of commission of the Bangladesh Embassy in Saudi Arab sent a letter vide memo no.weBAvi(ivR: wewea)/1/5/98-08 dated 02.07.2008. In that letter it was mentioned that after receiving the letter they inquired into the matter and came to know that United Saudi Commercial Bank was no longer in operation and in 1995 the said bank was merged with the SAMBA FINANCIAL GROUP. So, it was uncertain to collect information as sought for and requested them for providing the Photostat copy of the DD and advised to make inquiry about the said documents in the concerned branch of the bank. The said letter of

Bangladesh Embassy in Saudi Arab was marked as exhibit-20. After receiving the said letter he forwarded the same to the Commission. The Commission sent them another letter being memo no.11267 dated 14.07.2008 and requested to know the information about the sender and purpose of sending funds, exhibit-21. After receiving the said letter they sent a letter being memo no.GgGdG/WweøDG/‡KGmG/701/08 to the Bangladesh Embassy in Saudi Arab on 15.07.2008, exhibit-22. Thereafter the Commission sent them a reminder letter being memo no.14024 dated 13.08.2008, exhibit-23 and requested to provide required information. On the basis of the said letter, he sent a letter vide memo no. GgGdG/WweøDG/‡KGmG/701/08 dated 13.08.2008, exhibit-24 to the Bangladesh Embassy in Saudi Arab. After receiving the said letter the Bangladesh Embassy in Saudi Arab sent an e-mail letter, exhibit-25, informing that they had communicated with SAMBA FINANCIAL GROUP intending to know the name of the sender who remitted the money and the purpose for remit. The Deputy Chief of Mission personally went to the Head Office of SAMBA FINANCIAL GROUP and discussed with its Relationship Manager Mr. Tala Al-Otaibi regarding this issue and Mr. Tala informed that the matter was now under inquiry and he assured to supply the necessary information as early as possible. The said e-mail being memo no. GgGdG/WweøDG/‡KGmG/701/08 dated 18 August 2008 was marked as exhibit-26. Thereafter, on 6 September 2008 Bangladesh Embassy, Riyadh sent a letter being memo no. weBAvi(ivR: wewea)-01/05/98-08 dated 06.09.2008, exhibit-27 to him and informed that Mr. Tala through e-mail informed that it would take more time to provide the information regarding the DD as the same was an old one and Mr. Tala gave assurance that they would notify them if they get any information. After receiving the said letter Bangladesh Embassy in Riyad informed the said fact to the Commission vide letter dated 9 September, 2008, exhibit-28 and assistant secretary Mohammad Sakib Sadakat signed thereon which PW-26 knew and identified, exhibit-28/1.

80. In cross-examination PW-26 stated that PW-31 did not mention in the letter dated 16.06.2008, exhibit-18, whether the Amir of Kuwait sent US $12,55,000 for the Trust. He had no knowledge whether the Amir of Kuwait sent US $12,55,000 for the Trust. The alleged DD was deposited in the Sonali Bank, Ramna Corporate Branch which was mentioned in exhibit-18. The Foreign Ministry did not send any letter to the United Saudi Commercial Bank or Saudia Central Bank. In exhibit-18 it was mentioned that the money was for PM's Orphanage Fund and the said money was misappropriated. The Foreign Ministry collected information from the Bangladesh Embassy in Riyad. An officer of Bangladesh Embassy sent a letter to him for information as emergency basis. In exhibit-25 it was mentioned that they had been trying to collect informations in their own way. PW-26 denied the defence suggestions that the Bangladesh Embassy in Kuwait informed Foreign Ministry that the Amir of Kuwait sent the alleged amount for the Trust. He had no personal knowledge whether the said DD was sent by the Amir of Kuwait.

81. PW-27 Md. Zahangir Alam deposed that on 29.07.2008 he was working in the Lathigonj Union land Office, Gabtoli Bogura as sub-assistant officer of land. On that day as per the order of upazila nirbahi officer (PW-23) he along with upazila surveyer Abdul Momin Mondal (PW-28) went to village Darial under Police Station Gabtoli, Bogra for inspection of the land, detail account of which was described in exhibit-15. During their inspection local people also present there. From the local people they came to know that the said land was vacant between 1993 and 1994. In 1995 Md. Abdus Sattar took 'pattan' of the land from the former Parliament Member Helaluzzaman lalu at a consideration of Tk.5000/- for a period of 1(one) year. Between 1996 and 2002 Md. Abdus Satter also got pattan from the pouroshabha chairman Md. Morshed Milton at a consideration of Tk.1,00,000/- for a period of 7 years.

Between 2003 and 2008 Abdus Sobhan (Bulu) got 'pattan' from Morshed Milton at a consideration of Tk.1,05,000/- for a period of 5 years and the said land was in possession of Abdus Sobhan Bulu. The said persons informed to them that they paid the lease money to Helaluzaman Talukdar and Morshed Milton. Record of right was in the name of the previous owners. There was no structure on the land and those were using for agriculture purpose. They also came to know from the 'pattan' receivers that the income and expenditure from the said land were controlled/supervised by Helaluzzaman and Morshed Milton. They inspected the said lands on 29.07.2008 and they submitted their report to the upozila nirbahi officer, Gabtoli, Bogura. The upozila nirbahi officer forwarded the said report to the Commission. He proved the said report exhibit-15(Ka) and his signature thereon, exhibit-15(Ka)/1.

82. In cross-examination PW-27 stated that before going to the above land he did not serve any notice to union parisahd chairman, member, land owners and the neighbours. He asked the local people and collected informations but did not mention any name in the report. They came to know that the Trust was the owner of the land and they did not find any structure thereon. He did not ask anything to Helaluzzaman Talukder and Murshed Milton. PW-27 denied the defense suggestions that they prepared the report without going to the place in question and sent it to the Commission.

83. PW-28 Md. Abdul Momin Mondal surveyer, upazila land office diposed in the line of PW-27. He proved his signature on the report, exhibit-15(Ka)/2.

84. In cross-examination PW-28 stated that he did not mention any name of the interrogated persons or how he collected informations. He did not interrogate the leasees Abdus Sattar, Abdus Shobhan Bulu or Morshed Milton or Helaluzzaman. He did not mention the land maps, plot and Khatian numbers in the report. He denied the defence suggestions that they did not visit the said place and did not mention the related information in their report, and that the report exhibit-15(Ka) was a concocted one.

85. PW-29 Md. Omar Kabir deposed that on 15.07.2008 while he was working as the vice president in the Prime Bank, Gulshan Branch, an officer of the Commission seized some documents and the seized documents were given custody to the branch executive vice president. PW-29 proved the seizure list dated 15.07.2008, exhibit-29 by which the banks documents relating to i)FDR no.41033117 dated 09.07.2006 for Tk.80,00,000/-, ii)FDR no.41033338 dated 16.07.2006 for Tk.50,68,450/-, FDR opening forms, KYC forms FDR statements, iii)FDR receipt no.41032669 dated 27.06.2006 for Tk.1,00,00,000/-, advice voucher and FDR oepening form, iv)FDR no.41032276 dated 15.06.2006 for Tk. 1,00,00,000/- in the name of the Trust, opening form, KYC form, transfer voucher, statements etc. and v) extract of the resolution of the Trust dated 28.03.2006 were seized. He also proved 'jimmanama' dated 15.07.2008, exhibit-30. The then executive vice president Md. Mojammal Hossain was given 'jimma' of the documents and he also signed on it. PW-28 identified the signature of Mojammal Hossain, exhibit-30/1. The said documents were marked as material exhibit-X series.

86. In cross-examination PW-29 stated that the said documents were in the custody of the Prime Bank Limited, Gulshan Branch and he received the Court's summon as a witness and collected documents from the said branch and produced before the court. He further stated that PW-28 did not submit the original FDR no.41033117 and he did not see the said FDR and the same was in the name of the Trust and according to the report the balance of the said FDR was Tk.98,18,096/- till 09.07.2008. He had no knowledge whether the FDR

no.41033338 dated 16.09.2006 for Tk.50,68,450/- was opened with interest after encashment of the above FDR and the FDR no.41029462 dated 13.04.2006 and the FDR no.41033338 dated 16.07.2006 were opened for the best interest. He did not know whether the FDR no.41032669 dated 27.06.2006 for Tk.1 crore was attached to the material exhibit-I(H) and material exhibit-VII and the FDR no.41032276 dated 15.06.2006 for Tk.1 crore was attached to the material exhibit-I(J). He had no personal knowledge about the material exhibit-X series. Begum Zia did not sign on the documents which were seized vides seizure list exhibit-29. 11 (eleven) counter foils and 2 payment orders were submitted before the court, material exhibit-B series and material exhibit-A series respectively. All the said payment orders were issued by the Prime Bank in between 11.02.2013 and 28.08.2016.

87. PW-30 Md. Sirajul Islam deposed that while he was working as a senior officer of the Prime Bank, Gulshan Branch on 15.07.2008 at about 1.00pm PW-31 came to their branch and seized the required documents as produced by manager Mozammel Hossain in presence of him and Syeda Nazma Parvin, senior assistant vice president of the said branch. Details of the seized documents were mentioned at serial nos.4(1)-4(5) of the seizure list. He proved the seizure list dated 15.07.2008, exhibit-29 and his signature, exhibit-29/1 and signature of Sayeda Nazma Parveen, exhibit-29/2. The seized banking documents were given 'jimma' to Mojammal Hossain and the 'jimmanama' was singed by him and Sayeda Nazma Parvin. He also proved the 'jimmanama' dated 15.07.2008, exhibit-30 and his signature exhibit-30/2 and signature of Sayada Nazma Parvin, exhibit-30/3. The seized documents were as under:

i) FDR no.41033117 dated 09.07.2006 for Tk.80,00,000/- of the Prime Bank Ltd. Gulshan Branch along with original FDR opening form, KYC form, resolution copy dated 28.03.2006 and 2 pages account details of FDR of the Trust;

ii) FDR no.41033338 dated 16.07.2006 for Tk.50,68,450/-, KYC Form, Resolution copy dated 28.03.2006 the 2 pages FDR account details of the Trust, letter dated 16.07.2006 written by Kazi Salimul Haque for encashment of the FDR and to open a new FDR;

iii) letter being memo no.cÖvBg/GbBwe/wmAvi/ 2006/744 dated 16.11.2006 issued by Prime Bank, New Eskaton Branch, FDR opening form, advice voucher copy and details of the FDR no.41032669 dated 27.06.2006 for Tk.1,00,00,000/-;

iv) account details of the FDR no.41032276 dated 15.06.2006 for Tk.1,00,00,000/- of the Prime Bank Ltd. Gulshan Branch in the name of Salimul Haque;

v) extract of the Zia Orphanage Trust resolution dated 28.03.2006.

88. In cross-examination PW-30 stated that he did not prepare the seized documents and he had no signature on those documents.

89. PW-31 Harunur Rashid as investigating officer deposed that he was entrusted with the investigation on 09.07.2008 by the Commission, exhibit-31. During his investigation on 10.07.2008 he sent a letter being memo no.11178 to the executive vice president, Prime Bank Ltd. Gulshan Branch, Dhaka requesting to provide required documents of the case. PW-31 requested for the following informations:

i) latest transaction information such as voucher, lajer, cash book etc. of the account no.4103338;

ii) transferable documents which transferred from the STD account no.7, Sonali Bank, Gulshan New North Branch to the Prime Bank Ltd. Gulshan Branch;

iii) statement record details of the said account;

iv) records of Salimul Haque's FDR account no.41032276 dated 15.06.2006, the Trust FDR account no.41033117 dated 16.07.2006 and FDR account no.41032669 dated 27.07.2006.

90. On 10.07.2008 PW-31 sent a letter being memo no.11177 to the executive vice president of the Prime Bank Ltd. Easkaton Branch, Dhaka requesting for the case related records, exhibit-33.

91. PW-31 also sent the following letters to various authorities/Banks and institutions for collecting evidence with regard to subject matter of the investigation:

i) on 10.07.2008 a letter being memo no.11178, exhibit-34 to the manager of the Sonali Bank Ltd. Gulshan New North Circle Branch, Dhaka;
ii) on 10.07.2008 a letter being memo no.11176, exhibit-35 to the deputy secretary of the Chief Advisor Office, Old Airport, Tejgaon, Dhaka;
iii) on 13.07.2008 a request letter being memo no.11239, exhibit-36 to the Sub-registrar, Gulshan, Dhaka;
iv) on 13.07.2008 a letter being memo no.11238, exhibit-37 to the settlor of the Trust at the address 6, Shaheed Moinul Road, Dhaka cantonment;
v) on 13.07.2008 a letter being memo no.11237, exhibit-38 to the Sub-Registrar, Gabtoli, Bogura;
vi) on 14.07.2008 a letter being memo no.11267 to the director (East Asia), Ministry of Foreign affairs, Dhaka, exhibit-21.

92. On 15.07.2008 PW-31 seized some records for the Sonali Bank Ltd. Gulshan New North Circle Branch, Dhaka vide exhibit-3. He proved his signature thereon, exhibit-3/4. Descriptions of said seizure list documents were at serial nos.4(1) to 4(5) which were marked as material exhibits. On 15.07.2008 at about 1.00 pm PW-31 seized some documents vide exhibit-29 from two witnesses namely Md. Sirajul Islam (PW-30) and Sayeda Nazma Parvin, senior assistant vice president of the Prime Bank Ltd. Gulshan Branch as presented by Md. Mozammal Hossain, executive vice president, Head of Branch. Details of seized documents records were described at serial nos.4(1)-4(5) of the seizure list. PW-31 proved his signature on it, exhibit-29/3. The seized materials were given 'jimma' to Mojammal Hossain, exhibit-30. PW-31 proved his signature, exhibit-30/4. The said documents were produced before the court and marked as material exhibit-X series. On 15.07.2008 PW-31 seized some documents relating to the case in presence of two witnesses as presented by Md. Afzal Hossain, vice president of the Prime Bank Ltd. New Eskaton Branch (PW-8). Details of the seized documents were described at serial nos.4(1)-4(8) of the seizure list, exhibit no.4. He proved his signature thereon, exhibit-4/4 and another signature on the 1st page of the seizure list, exhibit-4/5. The seized documents were given 'jimma' to PW-8 and he received the 'jimmanama', exhibit-5 and his signature was on the said 'jimmanama', exhibit-5/4. The documents were submitted before the court, material exhibit-II series. On 16.07.2008 PW-31 seized case related records from the office of the Chief Advisor in presence of PW-10 and PW-11 as presented by Md. Majed Ali (PW-9). The descriptions of the seized materials were mentioned at serial no.4(1) of the seizure list, exhibit-7. PW-31 proved his signature on it, exhibit-7/4. PW-31 kept the said seized alamats in his own custody, material exhibit-III series. During investigation PW-31 intrrogated Begum Zia and Tareque Rahman in jail gate with the permission of the Court. On 21.07.2008 a request letter being memo no.11984, exhibit-42 was sent to the manager of Sonali Bank, Ramna Corporate Branch, Dhaka. During investigation on 22.07.2008 PW-31 went to the said branch and he seized the records in connection with the case and prepared a seizure list, exhibit-9 in presence of Md. Rezaul

Karim, SPO and Mohiduddin Ahmed (PW-13) as presented by Monjur Hossian (PW-12). He proved his signature thereon, exhibit-9/3. He kept the seized alamats in his own custody. The seized alamats were produced before the Court and marked as material exhibit-XI series. On 22.07.2008 at about 12.30 hours on presentation of Md. Majed Ali (PW-9) PW-31 seized some records in connection with the case from the office of the Chief Advisor and he prepared a seizure list, exhibit-8 in presence of Md. Alfasani, administrative officer (PW-10) and Md. Mokhlesur Rahman (PW-11). The descriptions of the seized records were mentioned at serial nos.4(1),4(2),4(3) of the seizure list. PW-31 proved his signature, exhibit-8/4. The seized materials were produced before the court and marked as material exhibit-XII series. PW-31 on 24.07.2008 interrogated FIR named accused Sharfuddin and he also recorded statements of the witnesses as per provision of section 161 of the Code of Criminal Procedure. He had also taken steps for recording statements of witnesses before the Magistrate as per provision of section 164 of the Code Criminal Procedure. On 05.08.2008 PW-31 went to Gabtoli Sub-registry office and he seized the records in connection with the case as presented by Md. Golam Faruk, Sub-registrar, Gabtoli, Bogura (PW-16) and prepared a seizure list, exhibit-11 in presence of two witnesses, Md. Mizanur Rahman, office assistant and Md. Jalil, a mohrar of Sub-registry office, Gabtolil. Descriptions of the seized records were mentioned at serial nos.5(1) to 5(2) of the seizure list. He proved his signature on the seizure list, exhibit-11/3. The said seized alamats were given 'jimma' to Md. Golam Faruk. On 13.08.2008 PW-31 sent a letter being memo no.14023 dated 13.08.2008 to the manager of Sonali Bank, Ramna Corporate Branch for providing information regarding the PM's Orphanage Fund current account no.5416 and same was replied by the concerned officer of the Bank, exhibit-48. On 14.08.2008 PW-31 visited the place 6, Saheed Moinul Road, Dhaka Cantonment, Dhaka and recorded some informations, exhibit-49. During investigation PW-31 sent a letter being memo no.14028 dated 13.08.2008, exhibit-23 to the director general of the East Asia of the Ministry of Foreign Affairs, Dhaka to request the Ambassador of Bangladesh in Riyadh for collecting the information with regard to the source of alleged DD. Md. Sakib Sadakat, assistant secretary of the East Asia sent the said letter to the Bangladesh Ambassador in Riyadh on 13.08.2008 and a copy of the letter was given to PW-31, exhibit-24. The exhibit-25 was attached to exhibit-24. PW-31 received the Photostat copy of the letters, exhibit-26, exhibit-27 and exhibit-28. During investigation PW-31 examined the seized records of the case and statements of witnesses as well as statements of accused persons. In the year 1991 the former Prime Minister Begum Zia opened a bank account being account no.5416 with the Sonali Bank Ltd. Ramna corporate branch, Dhaka in the name of PM's Orphanage Fund. Kamal Siddique was in charge for maintaining the said account. On 09.06.1991 the amount of Tk.4,44,81,216/- equivalent to US $12,55,000 was deposited in the said account which came from United Saudi Commercial Bank vide DD no.153367970. Between 09.06.1991 and 05.09.1993 no money was utilized from the said fund for any orphan in the country and eventually, Begum Zia formed the Trust through her two sons Tareque Rahman and Arafat Rahman and nephew Mominur Rahman in order to misappropriate the said fund. The address of the Trust was the Prime Minister's own residence 6, Shaheed Moinul Road, Dhaka Cantonment. Begum Zia appointed her son Tareque Rahman as the settlor of the said Trust. On 13.11.1993 an amount of Tk.2,33,33,500/- was transferred to the Trust account, STD account no.7 with the Sonali Bank Ltd. Gulshan New North Circle Road Branch through cheque no.8431103 from the PM's Orphanage Fund. On 15.11.1993 an amount of Tk.2,33,33,500/- was deposited in the STD account no.7. On 04.12.1993 an amount of Tk.4,00,000/- was withdrawn from the said STD account no.7 through cheque no.48882401 and an amount of Tk.2,77,000/- was spent for purchasing 2.79 acres land in Darail Mouja under Gabtoli Police Station, Bogura in the name of the Trust. Between 1993 and 2006 the money was not spent for the orphans and no

structure or eastablishment was built on the said purchased land and the said money was kept in STD account no.7. On 12.04.2006 the amount was increased to Tk.3,37,09,757.32/- with interest. Thereafter between 12.04.2006 and 04.07.2006 Tareque Rahman and Mominur Rahman, settlor and trustee of the Trust respectively in order to misappropriate the money transferred the same through 5 cheques opening new FDR account with the Prime Bank, Gulshan Branch with the aid of Salimul Haque. On 12.04.2006 the cheque amount for Tk.50,00,000/- was withdrawn and Salimul Haque opened a FDR in his own name being account no.41028462. On 16.07.2006 the said FDR was encashed and another FDR account was opened being account no.41033338 in the name of the Trust. On 09.07.2016 an FDR being no.41033117 for Tk.80,00,000/- was opened in the name of the Trust and FDR no.41032669 for Tk.1,00,00,000/- was also opened on 27.06.2006 in the name of the Trust and the remaining amount of Tk.1,00,00,000/- was used for opening another personal FDR account being no.41032276 in the name of Salimul Haque. On 28.03.2006 the Trustee board of the Trust took a decision giving power to M.S. Rahman for dealing the above two FDRs (Tk.50,00,000/- and Tk.80,00,000/-) of the Trust and accused Salimul Haque was given power for monitoring another two FDRs account, the amount of Tk.1,00,00,000/- and Tk.1,00,00,000/- (personal account of Salimul Haque). The two FDRs amounting to Tk.50,00,000/- and Tk.80,00,000/-, were running in the name of the Trust with the Prime Bank Ltd. Gulshan Branch. On the basis of Salimul Haque's verbal order the Trust FDR for Tk.1,00,00,000/- and Salimul Hoque's FDR for 1,00,00,000/- including interest were transferred from the Prime Bank Ltd. Gulshan Branch to the Prime Bank Ltd. New Eskaton Branch through inter banking credit advices and on 16.11.2006 an FDR being no.41022619 for Tk.1,03,19,365/- was opened jointly in the name of Salimul Haque and Sayed Ahmed. On 07.02.2007 another FDR being no.41025535 for Tk.1,06,38,686/- was opened in the name of Giasuddin Ahemd. Out of the said 2 FDRs, the FDR no.410022619 which was opened on 16.11.2006 jointly in the name of Salimul Haque and Sayed Ahmed was encashed on 07.02.2007 and thereafter another FDR being no.41025511 for Tk.1,04,32,957.80/- was opened in the name of Giasuddin Ahmed. 2 FDRs in the name of Giasuddin were encashed and withdrawn on 15.02.2007 and an amount of Tk.2,10,71,643.80/- was deposited on 28.03.2007 to Sharifuddin's account being no.110131 with the Prime Bank Ltd. New Eskaton Branch through six payment orders and the said amount was credited in the said account. Thereafter, Sharfuddin withdrew Tk.2,10,71,643.80 from his said account on various occasions and completed the process of misappropriation**.** In this fraudulent process the accused persons named in the charge sheet misappropriated the PM's Orphanage Fund. Accordingly PW-31 submitted charge sheet against the accused persons. The FIR named accused Giasuddin Ahmed and Sayed Ahmed were not charge sheeted because their involvement in commission of the offence had not been found. Salimul Haque and Sharfuddin used those names for their own interest and to facilitate the commission of the offence.

93. In cross-examination PW-31 stated that in his inquiry report in every page he had signed but there was no signature in every page of 1st inquiry report submitted by Noor Ahmed (PW-32). In the first inquiry report it was mentioned that the Trust was registered as a private Trust so the members of said Trust would not be treated as public servant, and that the Prime Minister's Office could not avail to provide the documents of record no.02.39.19.1.13.94.93 and thus, he (PW-32) could not ascertain whether the rules and regulations were followed for allotment of the funds, and that in 1993 the amount of Tk.2,33,33,500/- was donated for the said Trust from the PM's Orphanage Fund, and that the Amir of Kuwait sent the said amount in the name of former President late Ziaur Rahman for establishment of the said welfare Trust. PW-32 in his inquiry report did not recommend for

prosecution of Begum Zia. The amount of Tk.2,33,33,500/- was given to Zia Memorial Trust in Bagerhat which was established by Mustafizur Rahman and on the same day Tk.2,33,33,500/- was given to the Trust. Mustafizur Rahman was the settlor of Bagerhat Zia Memorial Trust and his wife, son Riajur Rahman were the trustees of said Trust and Mustafizur Rahman was not interrogated as he was dead. He interrogated Mustafizur Rahman's wife and son but did not record their statements. He interrogated Begum Zia and Tareque Rahman during his investigation and recorded their statements but he did not submit the same before the court. On 16.06.2008 he sent a letter to the secretary, Ministry of Foreign Affairs for knowing the source of the alleged fund and they came to know that United Saudi Commercial Bank was not in operation. He did not mention in the letter, exhibit-21 that he required information wheather the Amir of Kuwait donated the said fund. He sent a letter to the director of the Ministry of Foreign Affiars, East Asia, as an emergency basis for knowing the information, exhibit-23. Sonali Bank Ltd. had its own foreign exchange department and gave information to the Bangladesh Bank regarding the remittance or foreign exchange. There was no statement from Mustafizur Rahman's family regarding the source of the said funds and he did not interrogate them. On 14.08.2008 he interrogated Touhidur Rahman Khan, director of Chief Advisor's Office, but the original record of the PM's Orphanage fund could not trace out though he found cash register, counter foil of cheques etc. On 21.07.2008 he sent a letter, exhibit-42 to the manager of the Sonali Bank Ltd., Ramna Corporate branch, but he did not give any reply and on 22.07.2008 he went to the said bank and seized some documents. He denied the defence suggestion that the documents or Photostat copies of PM's Orphanage Fund which he collected were created and fabricated. He received sanction for submitting the charge sheet on 10.09.2008. In the seized record, material exhibit-III series, there was overwriting and nobody could not able to give him the information who did the said overwriting. The informations and documents regarding US $12,55,000 for the PM's Orphanage Fund and the current account no.5416 of Sonali Bank, Ramna Corporate Branch were available to the material exhibit-III and exhibit-III(A) series records. Informations regarding the Prime Minister's relief and welfare fund were also available to material exhibit-XIII(A) series and according to the said record applications were presented properly in every year and the record shows that the Prime Minister approved those applications. Prime Minister's relief funds, welfare funds and optional funds were not the issue of this case. PW-31 denied the defence suggestion that material exhibit-III series and exhibit-III(A) series were created one. In material exhibit-III(B) and III(C) it was not mentioned who wrote on those and there was no signature thereon. In the said seized documents there was no signature of Begum Zia. Tareque Rahman informed him that the Amir of Kuwait donated the said fund for raising Zia orphanage fund and the said fund was managed by the former foreign minister Mustafizur Rahman. During investigation he could not able to interrogate PW-32 and Mominur Rahman. The amount of US $12,55,000 came from obverseas on 09.06.1991 in account no.5416 and during investigation on 22.07.2008 he seized account opening form and signature card of account no.5416. He denied the defence suggestion that said documents were fabricated one. During investigation he found that the said DD came from United Saudi Commercial Bank. But he could not able to find out who sent the DD. He requested to the Ministry of Foreign Affiars for collecting the name and information of the 'drawer' of the DD. The Bangladesh Embassy in Saudi Arabia could not able to provide the information about the said DD. He denied defence suggestion that the main record was not trached out because there was no record in the name of PM's Orphanage Fund. On 28.07.2008 he called Syed Jaglul Pasha (PW-14) in the Head Office of the Commission and he recorded his statement. PW-14 worked in the Prime Minister's Office between 1992 and 1994. On 17.06.2008 he met Md. Mostafa Kamal Mojumder (PW-19) who made statement under section 161 of the Code of Cirminal Procedure. PW-20 Towhidur Rahman informed him that

they could not trace out the original record of the PM's Orphanage Fund. PW-20 sent two letters to him from the Prime Minister's Office informing about the whereabout of the original record of the PM's Orphanage fund**,** but he did not submit the said two letters. PW-21 Abdul Barek Bhuiyan in his statement stated that he never saw the original records of the PM's Orphanage Fund. PW-31 denied the defence suggestions that during the inquiry and investigation he got the evidence that the Amir of Kuwait sent the money through the alleged DD and intentionally he did not inform it to the Ministry of Foreign Affiars, and that the family members of Mustafizur Rahman informed him that the alleged DD was sent from the Amir of Kuwait but he did not take any step to find out any evidence to that effect. Prime Minister's Office did not give any allegation to the Commission regarding the PM's Orphanage Fund. After opening STD account no.7 dated 15.11.1993 by Tareque Rahman the amount of Tk.2,33,33,500/- was deposited in the said account through clearing and on 04.12.1993 Tk.4,00,000/- was withdrawn from the STD account no.7 and the said money was used for purchasing 2.79 acres of land in Darail Mouza, under Gabtoli Police Station, Bogura at a consideration of Tk.2,77,000/-. He denied the defence suggestion that the value of the said land was more than Tk.2,77,000/-. He seized the bank statements between the date of 15.07.2008 and 15.07.2008. The said money was withdrawn in the name of the Trust and transaction was done through the bank. Between 13.04.2006 and 06.07.2006 Tk.3,30,00,000/- was transferred and cleared from the STD account no.7 through 5 instruments. On 30.12.2006 Tk.4,63,143.24 was deposited in the STD account no.7 as interest. The extract was seized from the Prime Bank Limited, Gulshan Branch, material exhibit-X-D, wherein it was mentioned that the Prime Bank, Gulshan Branch authorized to open the said FDR and one M.S. Rahman was given power to operate two FDRs account of the Trust for Tk.50,00,000/- and Tk.80,00,000/-. The said Tk.50,00,000/- and Tk.80,00,000/- were used for opening the FDRs in the name of the Trust. It was mentioned in extract resolution dated 15.10.2006 that the Prime Bank, Gulshan Branch authorized to encash FDR No.0050301/410302669 for Tk.1(one) crore, in the name of the Trust and after such encashment a new FDR was opened in the name of Salimul Haq. According to the resolution date 15.10.2006 FDR No.0073194/41022619 for Tk.1(one) crore was opened on 16.11.2006 in the name of Salimul Haque and Sayed Ahmed. PW-31 denied the defence suggestions that accused Tareque Rahman informed him that Tk.4,00,000/- was withdrawn from the Trust fund and the same was spent for purchasing 2.79 acres of land in Bogra, and that Tareque Rahman also informed him that the said land had been using for the orphans. STD account no.7 with Sonali Bank, Gulshan, New North Circle Branch was in the name of the Trust. According to Paragraph 37 of page no.15 of the Trust deed, the Board of trustee may delegate such of its power and functions as it may deem proper to any persons, committees, sub-committees or any other body(ies) with a view to efficient and proper management of any projects of the Trust and also to facilitate and ensure the aims and objects of the Trust. He denied the defence suggestions that the Trust was operating properly, and that according to the resolution dated 28.03.2006 and 15.10.2006 the Trust was operated by the persons who were involved with the Trust and that money was donated by the Amir of Kuwait and the PM's Orphanage fund was not a Government fund.

94. PW-31 on 04.06.2008 sent a notice to Sharfuddin to appear before the commission and accordingly he came to the head office of the Commission on 24.07.2008 and he interrogated him and recorded his statement. During investigation PW-31 came to know that Giasuddin Ahmed is his brother. Sharfuddin submitted money receipt dated 16.04.2007 where he mentioned that down payments were made by him for purchasing the G-002 and G-003 shops at Gulshan. According to the money receipt for Tk.3(three) crore was given by payment order and the payment order numbers were 071090, 0719091, 0719099, 0719100,

0719136, 0719135 and all the payments were made to the City Twin Tower, a developer company. PW-31 submitted the documents which he received during the interrogation of Sharfuddin. PW-31 denied the defence suggestions that Sharfuddin received two FDRs amounting to Tk.2 crore from the Trust in order to sale his land at Ashulia in favour of the Trust, and that an agreement was signed between the Trust and him, and that eventually, he returned the advance money to the Trust pursuant to the Court's decree.

95. During inquiry PW-31 collected Photostat copies of 5 cheques of the STD account no.7 from the bank and found how the said cheques money was delt but he did not find out who signed on the said 5 cheques. During enquiry he seized the Zia Orphanage Trust deed and according to the deed of Trust, the Trust Board can manage or operate the said Trust fund. During inquiry he did not send any notice to Salimul Haque for taking his statement. He denied the defence suggestions that the Trust Fund was not misappropriated by Salimul Haque and he has been falsely implicated in the case. PW-31 denied the suggestions that the money was not enjoyed by accused Salimul Haque and did not commit any offence and that he did not investigate the case properly and submitted a perfunctory report.

96. PW-32 Md. Noor Ahmed deposed that in 2008 while he was working in the Commission as an assistant director he was appointed as the inquiry officer for inquiring the allegation regarding the misappropriation of PM's Orphanage Fund. On 29.04.2008 he started inquiry. During inquiry he collected photostat copies of the documents from the concerned banks and he interrogated the concerned persons and recorded their statements. Thereafter PW-31 was appointed as the inquiry officer and he handedover the inquiry related documents to him.

97. In cross-examination PW-32 stated that on 28.04.2008 he started inquiry and he followed the Anti-Corruption Commission Regulation 2007 (Rule-7). In his inquiry report he mentioned that the Trust was a private Trust. During inquiry he interrogated Tareque Rahman, Arafat Rahman, Mominur Rahman and Begum Zia and recorded their statements. During inquiry he did not seize any document and he never went to Bagerhat or did not ask the trustees of Zia Memorial Trust or any other. Tareque Rahman mentioned in his statement that the Amir of Kuwait sent a fund in the name of Ziaur Rahman for establishing Trust. During his inquiry he did not communicate with Bangladesh Embassy in Kuwait directly or with the foreign ministry. He submitted the inquiry report to the Head Office of the Commission. He had no knowledge about the inquiry report submitted by PW-31. During his inquiry he did not examine the Prime Minister's Office Rules of Business. He did not communicate with the former foreign minister Mustafizur Rahman for interrogation. He denied the defence suggestions that commission having failed to fulfill it's desire appointed PW-31 again for further inquiry, and that the allegations which he made against Tareque Rahman in his inquiry report were baseless. PW-32 mentioned in his report that on 15.02.2007 Giasuddin Ahmed encashed the FDRs and issued 6 payment orders in his name which he found from the record of the Prime Bank, New Eskaton Branch. He also mentioned that Giasuddin requested to deposit the money through payment orders to his brother Sharfuddin Ahmed's current account no.11013134. On 28.03.2007 the said 6 payment orders amounting to Tk.2,10,71,683.80/- was deposited in the said account. He denied the defence suggestions that Sharfuddin received his notice and informed him that he was received Tk.2,10,71,683.80/- for the purpose of selling his land to the Trust, and he did not make any allegation against Sharfuddin for misappropriation of said money, and that persuent to a compromise decree passed in Money Suit no.01 of 2012 by the learned Joint District Judge, Court No.3, Dhaka he returned Taka 2,25,00,000/- to the Trust fund maintained with Uttara

Bank Ltd, Gulshan Branch through 13 payment orders in between 11.02.2013 and 13.08.2013.

98. Evidence adduced by the Defence:

Accused Sharfuddin examined himself as DW-1. In his examination-in-chief he stated that he was involved in the business of vehicles, CNG filling stations and also land and housing. On 16.11.2006 he entered into a 'memorandum of agreement' with the Trust for selling 74½ decimals of land under Mouza Ashulia at a consideration of Tk.2 crore and 25 lac. One Enamul Haque being the representative of the Trust was the second party of the agreement. He received two FDRs, each of Tk.1 crore and on the following day the said FDRs were encashed and he opened two separate FDRs in the name of Salimul Haque and Sayed Ahmed (son of the DW-1). Eventually, he encashed the said FDRs and opened a new FDR in the name of his elder brother Giasuddin. Thereafter, he encashed the said FDR and through 6 payment orders along with his other funds he made payment to United Twin Towers Development for purchasing two shops. After 2007 due to the preveling situation of the country he could not able to transfer the land infavour of the Trust. However, in 2012 he received a notice from the Court of Joint Distinct Judge, Court No.3, Dhaka in connection with Money Suit No.1 of 2012 filed on behalf of the Trust. Eventually, the said suit was decreed on 12.02.2013 on compromise as they field a 'solenama' in the court to that effect. According to the terms of the 'solenama' he returned Tk.2,10,71,600/- through 13 payment orders in the account of the Trust at Uttara Bank, Gulshan Branch. He submitted the memorandum of agreement dated 16.11.2006, the plaint and decree of Money Suit no.1 of 2012 before the court and the copy of the payment orders, exhibit-Ka and Kha series, respectively. He further deposed that he did not do any illegal transaction with the Trust.

99. In-cross examination DW-1 stated that he knew about the Trust. He, Salimul Haque and Giasuddin were not involved with the Trust. He opened FDR in the name of Giasuddin. He denied the suggestions put by the prosecution that he talked with Begum Zia, Kamal Siddique, Tareque Rahman and Arafat Rahman regarding the sale of the land. He had no knowledge whether FDR for Tk.1 crore, the Trust money, was opened in the name of Giasuddin. Another FDR for Tk.1 crore was in the joint name of Salimul Haque and Sayed Ahmed. None of the accused contacted him for purchasing the land in favour of the Trust. The address of the Trust was 6, Shaheed Moinul Road, Dhaka. The consideration of proposed land for sale was Tk.2,10,71,000/-. No stamp paper was used for executing the memorandum of agreement, exhibit-Ka and he did not submit any document whether Enamul Haque was given authority to execute the said document as the representative of the Trust. He denied the suggestions of the prosecution that exhibit-Ka was a created document. He received money from the Trust which was in two FDRs, one FDR was in the name of Trust and another was in the name of Salimul Haque. None of the accused signed on the FDR on behalf of the Trust. He encashed the said FDR in the Prime Bank, New Eskaton Branch, Dhaka. Sayed Ahmed is his son and he had no connection with the Trust. A FDR was opened jointly in the name of Salimul Haque, his one of the friends and his son Sayed Ahmed. He denied the prosecution suggestion that he illegally received the money of the Trust. Exhibit-Ka was not submitted before the concerned Court (Joint District Judge, Court No.3, Dhaka).

100. DW-2 Md. Shajahan Siraj, a tax consultant of accused Sharfuddin, deposed that the TIN number of accused Sharfuddin was 147-105-9943. He filed the certified copy of income tax return of Sharfuddin for the year 2006-2007, exhibit-Gha series. In the said return the statement of 6 FDRs were mentioned and one of the FDR was in the name of Salimul Haque

and Sayed Ahemd. He further deposed that he acted as per instructions of Sharfuddin. One FDR was in the name of QS Haque and Sayed Ahmed. QS Haque is not Sharfuddin but interest was deposited in the account of Sharfuddin. He did not file any documents regarding the ownerships of the land situated at Ashulia and how Sharfuddin became the owner of the said land. He had no knowledge of source of money of the FDR in the name of QS Haque and Sayed Ahmed. In the certificate issued by the Prime Bank, Eskaton Branch it was mentioned that 'Mr. QS Haque and Mr. Sayed Ahmed, 712 Boro Mogbazar, Shantinagar, Ramna, Dhaka Bangladesh have been maintaining the following FDR account with us and they received interest and paid tax'. In the said certificate it was also stated that 'the full proceedings of the above FDR including interest transferred to account No.11013134 favoring Sharfuddin Ahmed as on 28.03.2007'. In the said certificate the relationship between QS Haque and Sayed Ahmed was not mentioned. He had no knowledge how the interest of the said FDR was transferred to the account of Sharfuddin. He was the tax consultant of the accused since 2010-2011 and he did not prepare the income tax return for the year of 2006-2007. In the return for the year of 2006-2007 the descriptions of the land at Ashulia in the name of Sharfuddin had not been mentioned. He admitted that he worked as Chief Financial Officer (CFO) and ITP of GQ ball pen at a remuneration of Tk.70,000/- per month. Salimul Haque was one of the share holders of said GQ ball pen and he was an employee under him and Salimul Haque was present before the Court. He did not file any document regarding the 'advance against property sale Ashulia less advance refund drawing the period' in the return form for the year of 2013-2014. He had no knowledge whether on 16.11.2006 Sharfuddin executed any agreement for selling land and how Tk.2,10,71,643.80/- was deposited in account no.11013134, Prime Bank New Eskaton Branch and whether Sharfuddin misappropriated the said money. In the return form for the year 2013-2014 it was not mentioned that Sharfuddin returned Tk.2 crore and 25 lac through 13 payment orders to the Trust. In the return form nothing was mentioned about 74½ decimals of land of Ashulia mouza. He denied the defence suggestion that he made false statements before the court in order to save his employer Salimul Haque and Sharfuddin.

101. DW-3 Taherul Islam Touhid an advocate practing in Dhaka District Court deposed that he was one of the lawyers of Money Suit no.1 of 2012 filed on behalf of the Trust. On behalf of the Trust Enamul Haque impleading Sharfuddin filed the said suit for realization of money. A memorundam of agreement was executed between the Trust and Sharfuddin for purchasing 74½ decimals of land infavour of the Trust at a consideration of Tk.3 crore and 25 lac. On the date of execution of the agreement two payment orders were given to Sharfuddin. The said suit was decreed on compromise on 12.02.2013 and the terms of the compromise was that Sharfuddin would pay Tk.2 crore and 25 lac to the Trust in eight installments. DW-3 as an advocate signed on the 'solenama' and on behalf of the Trust Enamul Haque and defendant Sharfuddin deposed before the Court.

102. In cross-examination DW-3 stated that he was the lawyer for the Trust and Mr. A.M. Mahbub Uddin was also a lawyer for the Trust. Mahbub Uddin did not sign on the 'solenama'. The defendant's lawyer D. Dulal Mridha did not also sign on the 'solenama'. He had no knowledge whether Begum Zia and the trustees transferred the Trust fund to various persons. Since the proposed land for sale was not given registration, the suit was filed. The agreement was unregistered one and the same was not file in the Money Suit. He had no knowledge whether Begum Zia in order to misappropriate the said money transferred the same from Trust fund to various persons. He could not say who gave letter of authorization to conduct the money suit on behalf of the Trust. Sharfuddin got money through FDRs. In the plaint address of Enamul Haque was mentioned as 6, Moinul Road and his present and

permanent address were not mentioned. In the plaint it was not written that the Board of Trustee authorized Enamul Haque to file the suit. He refused to say anything with regard to the PM's Orphanage Fund and money transferred from the said fund to Trust fund on 13.11.1993. He had no knowledge about the purchase of land at Bogra in the name of the Trust and encashment of two FDRs in the name of Giasuddin and thereafter the money was transferred to Sharfuddin's account by 6 payment orders. In the plaint it was not mentioned from whom Enamul Haque received the money to pay the same to Sharfuddin. In the 'memorandum of agreement' no trustee was signed as a witness and none of the trustee authenticated the said agreement. Advocate Sanaullah Mia signed on the agreement as a witness but he did not use his professional designation. He denied the defence suggestions that he being a leader of Bangladesh Nationalist Party(BNP) made false statement to save the accused persons.

103. DW-4 Shajahan Kabir assistant secretary of FCA Prime Bank Ltd. Dhaka deposed that on behalf of the Company on 15.06.2016 a certificate was issued mentioning that Kazi Salimul Haque was the Chairman of the Company in between 1 June, 2005 and 31 May, 2006. He proved the said certificate as exhibit-chha. Online Banking service is available in their bank.

104. In cross-examination DW-4 stated that he deposed before the Court to prove the issuance of certificate, exhibit-Chha.

105. In the light of the above evidence, let us now consider the rival submissions advanced by the learned Advocates for the respective parties.

106. **Whether Convict Begum Zia being the Prime Minister of the Republic was a public servant at the relevant time-**

The learned Advocates for convict Begum Zia have strenuously argued that the office of the Prime Minister being the head of executive branch of the Republic is a constitutional office and not removable from the office otherwise than in accordance with the modes prescribed by the constitution and thus Prime Minister does not come within the definition and preview of '**Public servant**' as defined in section 21 of the Penal Code and section 2(b) of the Criminal Law Amendment Act,1958 or 'public officer' as defined in Article 152 of the constitution of the Peoples Republic of Bangladesh and as such trial of Begum Zia as a public servant before the Special Court constituted under Criminal Law Amendment Act, 1958 is illegal and without jurisdiction. The learned Advocates have further submitted that clause '**Twelfth**' was added in section 21 of the Penal Code by Ordinance No.X of 1982 during martial law regime where in every person in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty has been defined as '**public servant**'. However, said inserted clause '**Twelfth**' has no existence after the judgment passed by this Court in the case of Siddique Ahmed Vs Bangladesh which is popularly known as 7th amendment case.

107. We have carefully examined the above submissions of the learned Advocates for Begum Zia.

108. Having regard to the fact that pursuant to judgment passed by the Appellate Division in Civil Appeal No.48 of 2011,**[Siddique Ahmed Vs Bangladesh, reported in 65 DLR (AD), page-8]** section 3 of the Constitution (Seventh Amendment) Act, 1986 including

adding paragraph 19 in the fourth schedule sought to ratify and confirm various proclamations, proclamation orders, CMLA's orders, Martial Law Regulations order, Ordinances etc. made time to time since 24 March,1982 till 11 November,1996 have been declared ultra virus the constitution, void and non-est. And consequently the Ordinances and Rule, sub-rule and order passed under those Ordinances had lost its force automatically. But for the public interest and to avoid legal vacuum a new law, namely '**১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকর করন বিশেষ বিধান আইন, ২০১৬** has been promulgated by the parliament and the Ordinances as mentioned in the schedule of the said Ain and the Ordinances by which amendments were made in various laws have been given effect. Section 4 of the above Ain runs as follows:

> **"৪। ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত (উভয় দিনসহ) সময়ের মধ্যে জারীকৃত-**
> **(ক) তফসিলভুক্ত অধ্যাদেশসমূহ, এবং**
> **(খ) অন্যান্য অধ্যাদেশসমূহ দ্বারা প্রচলিত কোন আইন, আদেশ বা অধ্যাদেশ সংশোধন করা হইয়া থাকিলে উক্ত সংশোধনী অধ্যাদেশসমূহ (**amending Ordinances**),**
> **এমনভাবে কার্যকর থাকিবে যেন উহা এই আইনের ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকর করা হইলেও যতটুকু উহাদের বিষয়বস্তুর (**contents**) সহিত সংশ্লিষ্ট শুধুমাত্র ততটুকু গ্রহণ করা হইয়াছে মর্মে গণ্য হইবে এবং উক্ত সময়কালে অবৈধ ও অসাংবিধানিকভাবে রাষ্ট্রক্ষমতায় আসীন সামরিক শাসন আমলের কৃতকর্মের অনুমোদন ও সমর্থন (**confirmation and ratification**) করা হইয়াছে বলিয়া কোনক্রমেই বিবেচিত হইবে না।" [**underlines supplied**]**

109. It is true that in the schedule of the above law the Ordinance No.X of 1982 has not been listed. However, on careful reading of section 4(Kha) of the above law, it reveals that said section has made applicable in the cases of amending Ordinances. Ordinance No.X of 1982 was promulgated for amending Penal Code i.e. it was an amending Ordinance.

110. In view of the provision of section 4(Kha) of the above Ain the provision of clause '**Twelfth**' of section 21 of the Penal Code still exists in the law book, which is evident in Bare Act.

111. It is pertinent to quote clause '**Twelfth**' of section 21 of the Penal Code, which runs as follows:

> ["**Twelth**'- every person- (a) in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty; (b) in the service or pay of a local authority or of a corporation, body or authority established by or under any law or of a firm or company in which any part of the interest or share capital is held by, or vested in, the Government.]

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

113. *Explanation 2*-Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

114. *[Explanation 3*-The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under any law prescribed as by election.]

115. Article 56(1) of the constitution of the Peoples Republic of Bangladesh speaks that there shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy

Ministers as may be determined by the Prime Minister. Article 56(2) speaks about the appointment of Prime Minister and other Ministers, Ministers of State and Deputy Ministers by the President. Article 56(3) also speaks that President shall appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament. That means there is no scope to be a Prime Minister unless he/she is elected as a Member of Parliament.

116. However, as per Article 55 of the constitution Prime Minister is the head of the cabinet for Bangladesh and the executive power of the Republic shall be exercised by or on the authority of the Prime Minister.

117. In the case of **Anti Corruption Commission Vs. Md. Shaheedul Islam along with two other cases, reported in 68 DLR(AD) page-242 our Appellate Division** upon detail discussions has held that:

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

118. In the case of **Nasiruddin Ahmed Pintu VS State, reported in 63 DLR, page-214** High Court Division held that a Member of Parliament (MP) is a public servant within the preview of clause '**Twelfth**' of section 21 of the Penal Code.

119. Besides, the High Court Division **in Criminal Miscellaneous case No.21979 of 2009,** which had arisen upon an application under section 561A of the Code of Criminal Procedure preferred by Begum Zia has observed that:

> "as a public servant, the accused petitioner was entrusted with the orphanage fund and if she is found to have helped others to use any amount given from the fund in violation of prescribed mode in which trust is to be discharged, offence under sections 409/109 of the Penal Code may also come up for consideration. [(underline supplied); **reference 64 DLR, page-1**].

120. The Appellate Division **in Criminal Petition for Leave to Appeal No.134 of 2012** affirmed the above judgment passed by the High Court Division.

121. In the cases of **Abdul Mansur Ahmed Vs. State, reported in PLD 1961 (Dhaka) 733 = 13 DLR 353 and Sheik Mojibur Rahman Vs. State 15 DLR, Page-549** it has been held that 'a Minister is a public servent'. In above cases 9th Clause of section 21 was considered and it has also been held that:

> 'No person could be a more public person than a Minister in the sense that his duties are with the public and he is the people's man in the Government of the Country.'

122. In view of the above consideration and discussion, we have no hesitation to hold that the Prime Minister who is also a Member of Parliament being remunerated/paid by the Government for the performance of his/her public duty definitely come within the mischief/ambit of clause '**Twelfth**' of section 21 of the Penal Code as public servent.

123. Thus, the submission of the learned Advocates for Begum Zia that she being the Prime Minister of the Republic at the relevant time was not a public servant and thus, the trial is illegal and without jurisdiction and conviction and sentence under section 409 of the Penal Code is absolutely misconceived, appears to be baseless and has no leg to stand.

124. Whether convict Begum Khaleda Zia had any manner of entrustment, dominion or control over PM's Orphanage Fund being account no.5416 maintained with the Sonali Bank, Ramna Corporate Branch and wheather the same was a private fund, not public fund-

To decide the above issue it is necessary to peruse section 405 of the Penal Code wherein 'Criminal breach of Trust' has been defined. **Section 405 of the Penal Code runs as follows:**

405. Criminal breach of trust- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

125. The first element of section 405 of the Penal Code is to be ***"in any manner entrusted with property, or dominion over property"***. The words '**in any manner**' in the context are significant. The expression '**entrusted'** in section 405 is used in a widesense and includes all cases in which property is voluntarily handed over for specific purpose. The entrustment may arise in any manner, whatsoever. That manner may or may not involve fraudulent conduct of the accused. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment.

126. Keeping in mind the above proposition let us decide the issue of entrustment and dominion regarding PM's Orphanage Fund with reference to the evidence on record.

127. PW-1 who also examined as PW-31, the informant as well as the investigating officer of the case deposed that while Begum Zia was the Prime Minister of the country between 1991 and 1996 a current account being no.5416 was opened with Sonali Bank, Ramna Corporate Branch in the name of PM's Orphanage Fund and thereafter, on 09.06.1991 a DD amounting to US $12,55,000 (BDT 4,44,81,216/-) issued by United Saudi Commercial Bank was deposited in the said account. Kamal Siddique being the secretary of Prime Minister had signed on the said account opening form and signature card, material exhibit-XI series. The said documents were seized by PW-31 vide seizure list exhibit-9. PW-12 and PW-13, the concerned bank officials, proved the said seizure list and their respective signatures thereon, exhibit-9/1 and 9/2. PW-12, PW-13 and PW-31 denied the defence suggestions that the holder of the said account was the Trust, not PM's Orphanage Fund, and the Amir of Kuwait donated the money vide the DD deposited in the said account for the Trust. It is true that in the account opening form and signature card there was no signature of Begum Zia. But after perusal and consideration of the attached documents at serial no.6(3) of material exhibit-XII(A) and serial No.6(3) of material exhibit-XII(B) it transpires that two summaries regarding i) "প্রধানমন্ত্রীর ত্রান তহবিল নামকরন, ব্যবহার ও পরিচালনা 'and ii) মাননীয় প্রধানমন্ত্রীর স্বেচ্ছাধীন তহবিল (discretion fund) পরিচালনা ও ব্যবস্থাপনা প্রসংগে" were placed by Kamal Siddique before Prime Minister Begum Zia and she approved the said summaries on 19.11.1991 and 24.11.1991 respectively and Kamal Siddique being the secretary of Prime Minister was authorized/assigned to deal with PM's relief and welfare fund as well as discretionary funds. This factual aspects validly and legally lead us to presume that Kamal Siddique as the

secretary of Prime Minister Begum Zia with due approval and instruction of the later opened the current account no.5418 in the name of PM's Orphanage Fund, signed on the account opening form, signature card and eventually transferred the money to Zia Orphanage Trust and Zia Memorial Trust by issuing two separate cheques.

128. PW-14, in between 1992 and 1994, worked in Prime Minister's office as the personal secretary of Prime Minister's secretary Kamal Siddique. PW-14 categorically and consistently deposed that Kamal Siddique being the secretary of Prime Minister Begum Zia supervised and dealt with various funds of the Prime Minister's office. In year 1993 PW-14 came to know about the PM's Orphanage Fund while he was updating various funds of Prime Minister's office and he was acquainted with the said fund as well as the original and additional file for the same. PW-14 also identified material exhibit-III series and III(A) series produced before the court, seized from the Prime Minister's office,(at the time of seizing the above documents said office was used as the office of Chief Advisor of the Care Taker Government) vide exhibit-7, which are the documents relating to PM's orphanage fund. In cross-examination PW-14 asserted that during his working period he dealt with the PM's orphanage fund. PW-9 who was working as an accountant in Prime Minister's office at the relevant time produced the documents, material exhibits-III, III(A), III(B) and III(C) i.e. two additional files and two registers before PW-31 as required by him on 16.07.2008. PW-31 seized the said documents and prepared a seizure list, exhibit-7. PW-9 proved the seizure list and his signature thereon, exhibit-7/1 and he also identify material exhibits-III series. PW-9 denied the defence suggestion that material exhibits-III and III(A) were created files. PW-10 and PW-11 also proved the seizure list, exhibit-7 and their respective signatures thereon, exhibit-7/2 and 7/3 respectively. They also deposed that in their presence PW-31 seized the documents on 16.07.2008 as presented by PW-9. PW-19 deposed that between June 1992 and 31 January 1993 he worked in Prime Minister's office as an accountant and under the supervision and instructions of PW-14 he dealt with various funds files of Prime Minister including PM's orphanage fund. PW-14 handed over relevant bank documents of PM's orphanage fund to him in order to make entry in cash register and accordingly he (PW-19) made entry of the same in cash register, material exhibit-III(B). PW-19 categorically testified that the writings of page nos.1, 2, 3 and 9 of the said register were his own handwriting. When he left the Prime Minister's Office he handed over the registers to PW-21, who joined in his post. In cross-examination PW-19 asserted that his writings were also available in material exhibits-III(B) and III(C). He further stated to the effect-"বস্তু প্রদর্শনী ওওও(ঈ) ক্যাশ রেজিষ্ট্রারের কভারে মাননীয় প্রধানমন্ত্রীর এতিম তহবিল লেখাগুলি আমি নিজে লিখেছি।. . . . . । বস্তু প্রদর্শনী ওওও(ই) ক্যাশ রেজিষ্ট্রারের ভিতরের কাঠ পেন্সিলে লেখা এতিম তহবিলে যে টাকা আসিবে উহা তহবিল নম্বর ৫৪১৬ জমা হবে লেখাটি আবদুর বারেক ভূইয়ার হাতের লেখা। বস্তু প্রদর্শনী ওওও(ই) রেজিষ্ট্রারের কয়েকটি পৃষ্ঠায় আমার লেখা আছে এবং কয়েকটি পৃষ্ঠায় আবদুল বারেক ভূইয়ার লেখা।

বস্তু প্রদর্শনী ওওও(ঈ)রেজিষ্ট্রারের সব পাতায় আমার নিজের। বস্তু প্রদর্শনী ওওও(ই) রেজিষ্ট্রার ও বস্তু প্রদর্শনী ওওও(ঈ) রেজিষ্ট্রারে সোনালী ব্যাংকের ১টি হিসাব যা প্রধানমন্ত্রীর এতিম তহবিলের হিসাব নম্বর ৫৪১৬ সংক্রান্ত এবং ওওও(ঈ) ঋউজ সংক্রান্ত।" [underlines supplied]

129. PW-19 in his cross-examination stated that he updated above material exhibit-III after 9/10 months of his leaving from Prime Minister's Office. He was called by PW-14 to do so and accordingly he updated the entry. PW-19 stated to the effect:

". . . . . এবং অডিট হওয়ার কারণে আমাকে নিয়ে অডিট ফাইন্ডিংস এর কারনে আপডেট এন্ট্রি দেয়ার জন্য আমাকে ডেকে নিলে আমি এন্ট্রি লিখি। কম্পট্রলার এন্ড অডিটর জেনারেলের টিম অডিট করাকালে আমাকে ডাকেনি তবে অডিট ফাইন্ডিংস এর কারনে কর্তৃপক্ষ আমাকে ডেকে নিয়ে এন্ট্রিগুলি আপডেট করিয়ে নেয়।"

130. Those assertions of PW-19 appears to be bonafide and genuine. In the Government offices of our country this kind of practices are not unusal and uncommon. Moreso, if we consider the time of updating the files by PW-19 (in the year 1994) and initiation of the present case (in the year 2007) then there is no room to hold that for the purpose of the present case those documents were created as argued by the defence. PW-20, who worked as one of the directors in the office of the then Chief Advisor of the Care Taker Government, deposed that they could not provide the original record/file regarding the PM's orphanage fund to the investigating officer as the same was found missing. However, an additional file regarding the PM's Orphanage fund was opened as per instruction of the Prime Minister's secretary and he informed about the said additional file to PW-31 and eventually, the same was handedover to PW-31, material exhibit-III series. PW-20 identified the said material exhibit-III before the court.

131. In cross-examination PW-20 asserted that 'অতিরিক্ত নথি খোলার বিষয়ে আমি সম্পৃক্ত ছিলাম না তবে খুঁজে পাওয়া গিয়েছে।'

132. PW-21 deposed that in the year 1993-1994 he worked as an accountant in Prime Minister's office and dealt with various funds of the Prime Minister including PM's orphanage fund. Prior to him PW-19 worked in his place and he handed over two additional files and two registers to him at the time of his transfer. The hand writings of PW-21 were available thereon. He wrote on the file cover of material exhibit-III and III(A) series. The hand writing of PW-19 were also available in material exhibit-III(B) and III(C). In 1994 PW-21 handed over those files and registers to PW-9 when he transferred from the said office.

133. It is true that there is an overwriting in the file (Nathi) number of material exhibit-III. But said fact has been mentioned in the seizure list, exhibit-7 by the investigating officer, which shows the bonafide intention of the investigating officer and he (PW-31) did not suppress the said fact.

134. We have carefully examined the said file, material exhibit-III series and the documents attached to the file. In the said file we have found:

i) a Photostat copy of the DD bearing no.153367970 dated 09.06.1991 amounting to US Dollar one Million Two hundred and Fifty Five thousand only issued by the United Saudi Commercial Bank infavour of PM's Orphanage Fund. Current A/C No.5416 of Sonali Bank, Ramna, Branch, Dhaka, Bangladesh;

ii) Photostat copy of a credit voucher dated 17.06.1991 in respect of Taka 4,44,81,216/- issued by Sonali Bank, Foreign Exchange Department, Ramna, Dhaka wherein it was mentioned-

"Being the amount of Foreign cheque/DD No.153367970 dated 09.06.1991 for US $12,55,000 of United Saudi Commercial Bank FVG Prime Minister's Orphanage Fund Received from Prime Minister's Sectt. as donation now purchased @35,44,32";

(iii) original copy of deposit slips and

(iv) a original copy of bank statement of current account no.5416 dated 01.01.1993.

135. After encashment of the DD the said money was made FDR and the attached documents to the material exhibit-III(A) are the deposit slips (original copy) and a copy of the statement of accounts till 15.11.1993. Thus, there is no room to hold that those bank documents have been created for the purpose of the present case long after about 17 years. The overwriting on degit '24' only of the cover page file number, material exhibit-III and some mere discrepencies in the handwritings in the register, material exhibit-III(B) no way

create any doubt about the veracity of the prosecution case and the attached documents thereto. Moreso, the transactions made in account no.5416 are undisputed.

136. It was further argued by the learned Advocates for Begum Zia that the alleged DD was sent by the Amir of Kuwait for the Trust in Private chanel/capacity, not for any public fund like PM's Orphanage fund.

137. Having regard to the fact that the PM's Orphanage Fund being current account no.5416 was opened on 02.06.1991 and the alleged DD was deposited in the said account on 09.06.1991 and money was credited in the said account on 17.06.1991. Admittedly at the relevant time there was no existence of the Trust. The Trust deed was registered on 05.09.1993 i.e. about one and half year after opening of the PM's Orphanage Fund. In the DD it was clearly mentioned that it was issued in favour of PM's Orphanage Fund, which was a public fund.

138. Upon consideration of unimpeachable, trustworthy and corroborative evidences of PW-9, PW-10, PW-11, PW-14, PW-19, PW-20 and PW-21 coupled with the material exhibits-III, III(A), III(B) and III(C) we have no other option but to hold that the prosecution has successfully proved that PM's orphanage fund being no.5416 was a public fund and that was controlled and supervised by the office of Prime Minister as per instructions and approval of the Prime Minister Begum Zia through her secretary, Kamal Siddique and thus, entrustment and dominion of Prime Minister Begum Zia over the said fund is also well founded.

139. The case at hand bids a two-pronged question. First; who was the money given to, the PM's Orphanage Fund or the individual who was the Prime Minister at the relevant time? If the answer is that the money was given to the individual, then it leads to a second question:- why was the individual paid into an account titled the "PM's Orphanage Fund"? A question would then arise as to why the individual was soliciting funds for their personal use by using the office they were holding. However, if the answer to the first question is that the money was given to the PM's Orphanage Fund; then the second question would be who empowered the individual with the authority to use the money from the PM's Orphanage Fund for their personal use? It is considered that any money paid into a public office is deemed to be held in trust by the office for the use of the public. This would mean that the fund available under the PM's Orphanage Fund is to be used by the Prime Minister's Office for public use, which in this particular case would be for well being of the orphans. However, under no circumstances the money paid into the PM's Orphanage Fund could ever be used for anyone's personal use.

140. It is pertinent to be mentioned here that Kamal Siddique was a high ranking government official at the relevant time and under no stretch of imagination it can be presumed that Kamal Siddique opened the account in the name of PM's Orphanage Fund and eventually dealt with the fund without any approval and instruction from the Prime Minister Begum Zia. No prudent man can believe such an absurd proposition that Kamal Siddique himself opened the above bank account in his personal initiative and capacity. Another question is why Kamal Siddique opened the account in the name of PM's Orphanage Fund in order to deposit a foreign DD which was donated for the Trust as urged by the learned Advocates for Begum Zia.

141. It is also pertinent to be discussed here that on behalf of Begum Zia an application under section 57(6) of the Evidence Act was filed before the trial court for taking judicial notice to the Noterial Certificate and Photostat copy of a letter dated 11.08.2015 allegedly issued by Embassy of the State of Kuwait. The content of the above certificate runs as follows:

"Embassy of the State of Kwauit, Dhaka.
Date: 11th of August 2015
Mr. Mohammad Ali
Former Attorney General
Bangladesh Nationalist Party (BNP), Dhaka.
Dear Mr. Ali,

142. This is the convey to you the clarification issued by the Government of the State of Kuwait on the donation to Zia Orphanage Trust by his Highness the Amir of the State of Kuwait. As per the clarification, the donation was given to Zia Orphanage Trust and not for any individual or any other purpose. The Embassy would further like to request all concerned not to use this clarification for any political purpose.

Thanking you.
Sincerely Yours,
(Signature)
Embassy of the State of Kuwait**"**

143. The learned Special Judge having considered the above letter has observed that:

"ইহা বোধগম্য নয় আসামী বেগম খালেদা জিয়ার পক্ষে কুয়েত অ্যাম্বাসি থেকে প্রদত্ত সার্টিফিকেটের ফটোকপি কেন দাখিল করা হলো? উহার মূল কপি কোথায়? একটা ফটোকপি কিভাবে ঔঁফরপরধষ ঘড়ঃরপব এ দেওয়া যায়? তথাপি উক্ত ফটোকপি প্রমাণের জন্য কুয়েত অ্যাম্বাসি থেকে কোন কর্মকর্তাকে সাফাই সাক্ষী হিসাবে এনে উক্ত সার্টিফিকেট প্রমাণ করার কোন চেষ্টা আসামী বেগম খালেদা জিয়ার পক্ষে করা হয় নি। উক্ত পত্রে পত্র প্রেরকের কোন নাম এবং পদবী ব্যবহার করা হয় নাই। পত্রটিতে কুয়েত অ্যাম্বাসির কোন স্মারক নং উল্লেখ করা হয় নি। ১১/০৮/২০১৫ তারিখে ইস্যুকৃত ঐ সার্টিফিকেট এ বলা হয়েছে যে, জিয়া অরফানেজ ট্রাষ্টেকে কুয়েত সরকার অনুদান দিয়েছে। ঐ পত্রে ইহা উল্লেখ করা হয় নাই যে, ১২,৫৫,০০০ মার্কিন ডলার জিয়া অরফানেজ ট্রাষ্টকে প্রদান করা হয়েছে। উক্ত টাকা অনুদান হিসাবে দেয়া হয়েছে তাও ঐ পত্রে উল্লেখ করা হয় নি। আসামী পক্ষে নিয়োজিত বিজ্ঞ কৌশুলীগণের বক্তব্য অনুসারে সাবেক পররাষ্ট্র মন্ত্রী এ. এস. এম. মোস্তাফিজুর রহমান ১২,৫৫,০০০ মার্কিন ডলার অনুদান হিসাবে কুয়েত সরকারের নিকট থেকে প্রাপ্ত হন এবং উহা পরবর্তীতে ড. কামাল উদ্দিন সিদ্দিকী জিয়া মেমোরিয়াল অরফানেজ ট্রাষ্ট এবং জিয়া অরফানেজ ট্রাষ্ট্রে প্রদান করেন। কিন্তু কুয়েত অ্যাম্বাসি উক্ত পত্র পর্যালোচনায় লক্ষ্য করা হয় যে, ঐ পত্রে ১২,৫৫,০০০ মার্কিন ডলার সাবেক পররাষ্ট্র মন্ত্রী এ.এস.এম. মোস্তাফিজুর রহমান এনেছিলেন এবং উহা সাবেক প্রেসিডেন্ট জিয়াউর রহমানের নামে এতিমখানা খোলার জন্য দেয়া হয়েছে তা উল্লেখ করা হয় নি। ঐ পত্রে শুধুমাত্র জিয়া অরফানেজ ট্রাষ্ট এর নাম ব্যবহার করা হয়েছে যা থেকে ধরে নেয়া যায় যে, এই মামলার আসামী বেগম খালেদা জিয়াসহ অন্যান্য আসামীদের বাঁচানোর লক্ষ্যে উক্ত ১১/০৮/২০১৫ তারিখের কুয়েত অ্যাম্বাসি প্রদত্ত পত্রটি সৃজন করা হয়েছে। আসামীপক্ষ থেকে ১৭/১০/২০১৬ তারিখ ইস্যুকৃত ঘড়ঃবৎরধষ ঈবৎঃরভরপধঃব প্রমাণের জন্য সংশ্লিষ্ট নোটারী পাবলিককে আদালতে এনে উক্ত সার্টিফিকেট এবং কুয়েত অ্যাম্বাসির দেয়া সার্টিফিকেটের ফটোকপির সত্যাসত্যি প্রমাণ করার চেষ্টা করা হয় নি। ঘড়ঃবৎরধষ ঈবৎঃরভরপধঃব ইস্যুকারী ব্যক্তি এবং কুয়েত অ্যাম্বাসির কোন কর্মকর্তাকে সাফাই সাক্ষী হিসাবে আদালতে উপস্থাপন না করা আসামী পক্ষের দুর্বলতার পরিচয় বহন করে। প্রসঙ্গক্রমে উল্লেখ করা প্রয়োজন যে, ইউনাইটেড সৌদি কর্মাশিয়াল ব্যাংকের মাধ্যমে ১২,৫৫,০০০ মার্কিন ডলার প্রধান মন্ত্রীর এতিম তহবিলে ১৯৯১ সালে আসে। তখন জিয়া অরফানেজ ট্রাষ্ট গঠিত হয় নাই। উহা গঠিত হয় ২ বছর পর অর্থাৎ ০৫/০৯/১৯৯৩ তারিখে। তাহলে প্রশ্ন এসে যায় জিয়া অরফানেজ ট্রাষ্ট গঠনের আগেই কি কুয়েতের আমির ১৯৯১ সনে ঐ ট্রাষ্টকে অনুদানের টাকা প্রদান করলো? কুয়েত অ্যাম্বাসির পত্রটি পাঠ করে দেখা যায় যে, উহা সাবেক প্রধান মন্ত্রী বেগম খালেদা জিয়াকে অফফৎবংং করে লেখা হয় নি। নিয়ম মাফিক ঐ পত্রটি পররাষ্ট্র সচিবকে অফফৎবংং করে লেখার কথা। কিন্তু তা না হয়ে এই মামলায় আসামী বেগম খালেদা জিয়ার আইনজীবী জনাব মোহাম্মদ আলীকে অফফৎবংং করে উহা লেখা হয়েছে যা বাস্তব সম্মত না। টাকা আসে ১৯৯১ সালে অথচ ১১/০৮/২০১৫ তারিখে ইস্যুকৃত চিঠি দিয়ে উহা ঈষধৎরভু করার চেষ্টা করা হয়েছে। ২০১৫ চিঠি আবার ২০১৬ সনের শেষভাগে নোটারাইজড করা হয়েছে। ফলে উক্ত

ঘড়ঃবৎরধষ ঈবৎঃরভরপধঃব এবং উহার সাথে সংযুক্ত কুয়েত অ্যাম্বাসির ১১/০৮/২০১৫ তারিখের পত্রটি অত্র আদালত কর্তৃক এই মামলা নিষ্পত্তির ক্ষেত্রে বিবেচনায় গ্রহন করার কোন কারণ লক্ষ্য করা যায় না। কুয়েত অ্যাম্বাসির উক্ত সার্টিফিকেট আসামীপক্ষ কর্তৃক জাল ও সৃজিত মর্মে এই আদালত মনে করেন।"

144. We have also carefully examined the Photostat copy of the above letter and we have no hesitation to agree with the above observations made by the learned Special Judge. It is further to be noted here that for a prudent man it is very difficult to believe such a defence plea that like the Amir of Kuwait had sent the money through the alleged DD in the account of PM's Orphanage Fund for Zia Orphanage Trust, when it had no existence at all. This kind of defence plea is nothing but an '**old wive's tale** (আষাঢ়ে গল্প)'.

145. Thus, it is well proved by the prosecution that the then Prime Minister Begum Zia had entrustment, dominion and control over the PM's Orphanage fund being account no.5416.

146. Whether convict Begum Zia committed the offence of 'Criminal breach of trust' as defined in section 405 of the Penal Code and 'Criminal Misconduct' as defined in section 5(1) of the Prevention of Corruption Act, 1947 and whether convict Salimul Haque and Sharfuddin had abated in commission of such offence-

Upon careful examination and scrutiny of the evidence adduced by the prosecution, the following undisputed incriminating facts are unvailed-

i) PM's Orphanage Fund being current account no.5416 was opened on 02.06.1991 with the Sonali Bank, Ramna Corporate Branch, Dhaka by Kamal Siddique, secretary of Prime Minister Khaleda Zia, exhibit-9 and material exhibit-XI series;

ii) a DD being no.153367970 dated 09.06.1991 amounting to US $12,55,000 (BDT 4,44,81,216.00) issued by the United Saudi Commercial Bank was deposited in the said account on 09.06.1991 and thereafter, said amount was made FDR being no.984112 and after two years it stood Taka.4,66,67,000/- and thereafter, said money was again deposited in account no.5416 and not a single farthing was spent for the welfare or benefit of any orphan of the country from the said fund after it's creation;

iii) the Trust deed was registered on 05.09.1993, material exhibit-IV-30 and an account being no.STD-7 was opened on 09.10.1993 with the Sonali Bank Gulshan, New North Circle Branch, Dhaka in the name of the said Trust;

iv) Tareque Zia son of Begum Zia was the settlor and her another son Arafat Rahman and nephew Mominur Rahman were the trustees of the said Trust and address of the Trust was mentioned as 6, Moinul Road, Dhaka Cantonment, Dhaka wherein Prime Minister Begum Zia resided at that relevant time;

v) after forming the said Trust on 13.11.1993 Taka.2,33,33,500/- was transferred from the account of PM's Orphanage Fund to the Trust account being STD account no.7 vide cheque no.8431103 and aforesaid amount was deposited in the said account on 15.11.1993;

vi) Taka.4,00,000/- was withdrawn from STD account no.7 on 8.12.1993 and out of the said money by spending Taka.2,77,000/- 2.79 acres of agricultural land was purchased in the name of the Trust at mouza Darial, under police station Gabtali, District-Bogura;

vii) no establishment/structure was made on the said land rather the land was given lease to various persons taking money from them by former Member of Parliament Helaluzzaman Talukder and pourashava mayor Morshed Milton and that the money of STD account no.7 was not utilized for the orphans till 2006; however, the fund stood Tk.3,37,09,757.32 with interest on 12.04.2006;

viii) in between 12.04.2006 and 04.07.2006 through 5(five) cheques issued by Tareque Zia and Mominur Rahman Taka.3.30.00.000/- was transferred to the Prime Bank, Gulshan Branch in order to open new FDRs with the aid of Salimul Haque who had no connection or involvement with the Trust but he was the chairman/director of the said bank;

ix) in between 12.04.2006 and 15.02.2007 i.e. within a period of nine and half months Salimul Haque and Sharfuddin made several transactions with the said money opening several FDRs and encashed those FDRs, descriptions of which are as follows:-

(a) FDR no.41028462 dated 12.04.2006 for Taka.50,00,00,000/- in the name of Kazi Salimul Haque;
(b) after encashment of the said FDR another FDR no.41033338 dated 16.07.2006 for Tk.50,68,450/- was opened in the name Kazi Salimul Haque;
(c) FDR no.41033117 dated 09.07.2016 for Taka.80,00,000/- in the name of the Trust;
(d) FDR no.41032669 dated 27.06.2006 for Taka 1,00,00,000/- in the name of the Trust;
(e) FDR no.41032276 dated 16.06.2006 for Taka.1,00,00,000/- (in the name of Salimul Haque)
(f) FDR no.41022619 dated 16.11.2006 for Taka.1,03,19,365/- in the name of Salimul Haque and Sayed Ahmed and FDR no.41025535 dated 07.02.2007 for Taka 1,06,38,686 in the name of Giasuddin were opened after encashment of FDR no.41032669 in the name of the Trust and FDR no.41032276, in the name of Salimul Haque.
(g) FDR no.41025511 dated 07.02.2007 for Taka.1,04,32,957.80 was opened in the name of Giasuddin Ahmed after encashment of FDR no.41022619 which was in the name of Salimul Haque and Sayed Ahmed,
(h) FDR nos.41025535 and 41022619 in the name of Giasuddin were encashed on 15.02.2007 and by 6(six) payment orders in total Taka.2,10,71,643.80 was deposited in the account of Sharfuddin being no.11013134 with the Prime Bank, New Eskatan Branch; and
(i) Finally, convict Sharfuddin withdrew the said money from his said account on different occasions. [underlines supplied to give emphasis]

147. From the above undisputed factual scenario it is crystal clear-how a huge amount of money of the PM's Orphanage Fund was disposed of in an illegal and unusual manner, in other words dishonestly and fraudulently.

148. It is pertinent to mention here that DW-1 Sharfuddin in his deposition admitted about the above two FDRs, one in the joint name of Salimul Haque and Sayed Ahmed and another in the name of Giasuddin Ahmed. After encashment of both the FDRs money was deposited in the account of Sharfuddin through 6(six) payment orders. Admittedly, Giasuddin is the elder brother and Sayed Ahmed is the son of Sharfuddin. Said Giasuddin and Sayed Ahmed were not charge sheeted as after investigation it was found that Salimul Haque and Sharfuddin fradulently used their names for the purpose of opening the FDRs and encashed those. Giasuddin is an American immigrant and he has been residing there long before the alleged occurrance.

149. In view of the above undisputed facts let us decide the very crucial issue whether money of the PM's orphanage fund was misappropriated or not and if it is found proved then question is by whom and who aided or facilitated to do so.

150. In this particular case the key arraignment is that the alleged huge amount of fund deposited and dealt with in the account of PM's Orphanage Fund was aimed to nobility of ensuring welfare of orphans. But the management and use of the said fund was contrary to the terms aim and objects of the entrustment and obligation of Prime Minister Begum Zia, the principal accused who had dominion and control over the fund which tantamount to misappropriation constituting the offence of criminal breach of trust.

151. In section 405 of the Penal Code the words used are **". . . . or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied"** very significant.

152. Any use of trust wealth/property other than any purpose for which trust is to be discharged would and should amount to '**Criminal breach of trust**'.

153. The term misappropriation again deserves its ordinary dictionary meaning. The assumption of any right or exercise thereof will amount to appropriation of the property. In light of the argument above, it is considered that the money of the PM's Orphanage Fund was indeed held in trust for the use of the welfare of the orphans or for charitable purposes. The assumption of any right or exercise thereof of any part of that money, for any purpose other than charity or for public use, is thus misappropriation of such rights.

154. In the instant case it is evident that on 02.06.1991 a bank account being no.5416 was opened with the Sonali Bank, Ramna Corporate Branch, Dhaka in the name of PM's Orphanage Fund. Intention was to secure well-being of orphans by creating 'Trust' using the fund. Begum Zia as Prime Minister received foreign fund amounting to Taka 4,44,81,216.00, one week later which was deposited to the account of PM's Orphanage Fund**.** The account was operated by the Prime Minister's secretary Kamal Siddique, a senior public servant, on behalf of Prime Minister Begum Zia and such entrustment obviously made Begum Zia obligated and responsible to ensure due and proper use of the fund in achieving purpose of creating the 'Fund'. PM's Secretary as the key official of Prime Minister Begum Zia had role to act in ensuring proper use of the fund. For the 'Fund' deposited in the account was for 'specific purpose' as the same came to dominion and control of Prime Minister Begum Zia.

155. What happened next? It is evident that the fund so deposited in the account of PM's Orphanage Fund remained inactive for more than 2(two) years. Finally, in November, 1993 two years later two Trusts were created one was Zia Orphanage Trust and another was Zia Memorial Trust. Fifty percent of the fund was then transferred to Zia Orphanage Trust and rest fifty percent fund was allowed to be used by Zia Memorial Trust for the purpose of which it was meant.

156. It is evident too that Zia Orphanage Trust did not exist at all. Forming said Trust was confined to paper showing its office at the residence of Prime Minister Begum Zia. It also transpires that in 1994 only about 3 lacs Taka was spent only from the Trust fund for purchasing land and from the evidence of PWs 27 and 28 it transpires that there is no structure or establishment on the said land and the land was given 'lease' to various persons by two persons namely Helaluzzaman Talukder, Ex MP and Morshed Milton, Ex Mayor of Gabtoli Pourashava who were not at all connected with the Trust.

157. The expression '**entrustment**' carries with it the implication that manner of allowing the fund to be used for welfare of orphans by forming the Trust created a fiduciary relationship between Begum Zia and the accused persons of whom the same were formed. Be that as it may, obligation of Begum Zia did not extinguish in keeping vigilance on due use of the fund even after forming the Trust as the said Trust was formed in the name of her late husband and her two sons and one nephew were made settlor and trustees showing its address at her own residence. Facts of the case fairly and legally indicate that dominion of Begum Zia over the fund did not come to an end merely with allowing it to be used by the Trust formed.

158. What about the rest of the 'Fund' over which 'dominion' or 'control' of Prime Minister did not come to cessation? It is evident that in 2006, i.e. long 13 years after creation of so called paper Trust the rest of the fund i.e. almost the entire fund was made deposited as FDRs in the accounts of Salimul Haque, Sayed Ahmed and Giasuddin and finally the fund was transferred to Sharfuddin's account. We have already noticed that the names of Sayed Ahmed and Giasuddin were used in the alleged transactions by the convicts, though said two persons were not involved with the process in commission of the offence.

159. Why the fund was so transferred to the accounts of Salimul Haque and Sharfuddin, particularly long 13 years after creating so called peper Trust. Salimul Haque and Sharfuddin knowing the fund to be misappropriated fraudulently allowed it to be made deposited in their accounts as FDRs and current account respectively.

160. Main collusion happened between Begum Zia and the other convicts of which the paper Trust was formed. Conscious failure and deliberate inaction of Begum Zia made space in enjoying the fund dishonestly and fraudulently for long 13 years. Non-spending the fund for welfare of orphans in any manner reflects the *mens rea* of Begum Zia, her secretary Kamal Siddique and the accused persons of whom the Trust were formed.

161. Intention was not pious indeed. Instead of using the fund for welfare of orphans for which purpose the same got deposited in PM's Orphanage Fund, the trusts had kept it with them for years together fraudulently and dishonestly. It leads to conclude that the Trust was not in actual existence and the so called Trust had carried such fraudulent act obviously within the knowledge and indulgence of Begum Zia.

162. Admittedly the Trust was formed of two sons and one near relative of Begum Zia presumably, they did it with culpable suzerainty and on explicit endorsement of Begum Zia. The facts unveiled suggest the conclusion that Begum Zia knowingly and in violation of obligation, allowed the fund to be dealt with dishonestly by the Trust leading to its misappropriation.

163. The fund was handed over to the Trust which was eventually disposed of or used contrary to the terms and object of the fund, although, the Trust was not in actual existence. The same was a mere paper Trust, we have already find it.

164. There are two distinct parts involved in the commission of the offence of criminal breach of trust. The first consists of the creation of an obligation in relation to the property over which dominion or control was acquired by convict Begum Zia. The second is misappropriation or dealing with or dispose of the property dishonestly and contrary to the obligation created.

165. The fact of non-functioning of the Trust and keeping the fund in the account of the said Trust for long 13 years together indisputably lead to infer that act and omission of inaction on the part of Begum Zia, as found patent allowed causing wrongful gain of other constituting the act of the misappropriation of the 'Fund' and such act of Begum Zia had nexus of dishonest intention agreeing with which the accused persons of whom the so called paper Trust was formed and also dealt with the fund fraudulently.

166. Thus the persons who happen to be the sons and near relative of Begum Zia were active part of the criminal enterprise and they deliberately abstained from ensuring due use of the fund which was meant to the welfare of orphans. And this factual aspect leads us to hold that they planned to go with such inaction with dishonest intention on endorsement of Begum Zia.

167. Upon scrunity of the account statements of the Trust account being STD no.7 which is available in material exhibit-I series, it reveals that after transfer of Taka 2,33,33,500/- from the PM's Orphanage Fund to the said account on 15.11.1993 no one donated/gifted any money to the said Trust account for raising it's fund till 12.04.2006 i.e. when the money of STD account no.7 was transferred to the accounts of Salimul Haque and Sharfuddin, and that no money was spent from the Trust fund for the welfare of the orphans for last 13 years, save and except Taka 4,00,000/- for purchasing land in Bogura. From the evidence of PWs 27 and 28 and exhibit-15, a report of upazila nirbahi office, Gabtoli it also transpires that the purchased land in the name of the Trust was agricultural land and same was given lease to various persons by the then local member of parliament and pourashava mayor who were not related with the Trust, and that the lease money were also not deposited in the Trust account, and that on the land there was no structure of any orphanage.

168. From the above factual scenario we may also be validly and legally inferred that money of the PM's Orphanage Fund was transferred to the socalled Trust account with a criminal design in order to grab the same.

169. It appears that the fund was made deposited as FDRs in the account of Salimul Haque and two other persons namely Giasuddin and Sayed Ahmed, the elder brother and son of Sharfuddin respectively and Sharfuddin in year 2006-2007. Why the trustees and settlor opted to make the fund so shifted after keeping it under their control for long 13 years? And why within a period of nine and half months (12.04.2006-15.02.2007) so many FDRs were opened and then encashed in the haste manner?

170. From this fact, it may be inferred that intention of such act was dishonest indeed. Salimul Haque and Sharfuddin in favour of whom the fund was made deposited were not lawfully entitled to deal with the fund or to use it for welfare of orphans. These two convict had aided and facilitated to execute the planned fraudulent and dishonest intention of the principal accused Begum Zia and the settlor of the Trust Tareque Rahman and the trustees Arafat Rahman and Mominur Rahman. All the accused did it knowing the dishonest intention of using the fund i.e. misappropriation.

171. It transpires that in 2006, at the ending phase of the regime of BNP Government they did it intending to secure wrongful gain by grabbing the fund fraudulently which was the upshot of 'dishonest intention'. Evidence shows that within a short period, 2006-2007, the convicted persons made several transactions opening several FDRs and encashed those. Even, in their fradulent transactions they used the name of two other persons, namely Sayed

Ahmed and Giasuddin who were not actually involved with the process of alleged transctions.

172. It is not believable that without the knowledge and endorsement of Begum Zia the fund was so transferred in the accounts of other convict persons. For Begum Zia in no way can be exonerated of liability and obligation of such dishonest intention. Besides, Begum Zia was the key person on deliberate failure and endorsement of whom the fund was eventually misappropriated.

173. Begum Zia, trustees and settlor of so called Trust formed in collaboration with each other for reaching dishonest intention eventually took hold of and misappropriated the fund. In absence of any legitimate explanation the act of shifting the fund in the accounts of two other convict persons obviously happened within the knowledge of Begum Zia, the facts suggest it irresistibly. Shifting the fund in such a manner, long 13 years after the so called Trust was formed is a fact that had material nexus with the act of misappropriation of the fund.

174. Purpose of receiving the fund was to use it for welfare of orphans. Begum Zia as the Prime Minister was the principal person who was supposed to ensure prompt and due use of the said fund. But she instead of doing it consciously allowed her secretary, sons and near relative engaging those with the so called Trust to deal with the same in a manner contrary to terms of obligation created to her by virtue of entrustment and dominion over it.

175. Facilitating misappropriation of the fund which was meant to be used for welfare of orphans, particularly when Begum Zia, the Prime Minister, had entrustment and dominion over it indisputably shocks the human conscience and such act reflects a mindset derogatory to humankind. Obviously Begum Zia had liability and obligation to look after whether the Trust so formed was in actual existence. But she did not do it. Thus Begum Zia was a conscious part of a designed plan to the criminal acts constituting the offence of **Criminal breach of Trust** as defined in section 405 of Penal Code.

176. '**Criminal Misconduct**'- has been defined in section 5(1) of the Prevention of Corruption Act,1947, which runs as follows:

> **5. Criminal Misconduct-**(1) A public servant is said to commit offence of Criminal misconduct-
>
> (a) . . . . . .
>
> (b) . . . . . .
>
> (C) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or
>
> (d) if he by corrupt or illegal means or by otherwise abusing his position as public servant, obtains [or attempts to obtain] for himself or for other person any valuable thing or pecuniary advantage. [underlines supplied]

177. The wordings of last portion of section 5(1)(c) of the Prevention of Corruption Act, 1947 are ". . . **or allowed any other person to do so**". These wordings are very significant and its amplitude is much wider. The meaning put on the word '**allows**' would certainly be different from 'dishonest misappropriation' by the offender himself. It may be that the word can mean allowing by negligence or without any violation on the part of the offender.

178. In view of the section 5(1)(c) of the Prevention of Corruption Act,1947 if a public servant allows another person to dishonestly or fraudulently misappropriate or otherwise converte for his own use any property so entrusted, then it is an offence. **[Referrence: OM Prakash Gupta Vs. State of UP, AIR 1957, SC 458]**

179. In this particular case it is well founded that Begum Zia allowed other convicts to misappropriate the fund so entrusted to her and as such it is also an offence within the mischief of section 5(1)(c) of the Prevention of Corruption Act,1947. In view of the proposition inunciated in the above cited case whether Begum Zia allowed the other convicts to do so by negligence or consciously that is immaterial.

180. Attempt to commit an offence of 'Criminal Misconduct' is also an offence within the mischief of section 5(2) of the Prevention of Corruption Act,1947 and the above provision also provides punishment for such offence.

181. Act or conduct and culpable inaction of Begum Zia and next, activities carries out in dealing with the fund going beyond the terms of entrustment formed 'collective criminality' and reciprocal connivance to which all the accused persons were conscious part, sharing intent to effect misappropriation of the fund or cause wrongful gain of own or of others.

182. Providing aid to commit an offence is one of ingredients to consititute 'abetment'. An act of providing intentional aid to a person in committing an offence refers to abetment. Totality of facts unveiled suggest the conclusion that accused Salimul Haque and Sharfuddin consciously allowed the fund to be made so deposited in their accounts and thereby they aided accomplishment of the fact of misappropriation of the fund. Such culpable act of these two convict formed part of collective criminality. In this way, these two convict along with others participated as abettors so as to facilitate the principal offender towards materializing the criminal and fraudulent design in committing the offence.

183. There has been nothing to show that without being aware about the purpose of the fund, culpable inaction on part of the principal accused having dominion over the same in using it for the welfare of orphans and sham creation of trusts these two convict made them engaged with the criminal mission, by allowing the fund to be deposited as FDR in their accounts.

184. In view of the above, we are unable to accept the submission of the learned Advocates for convict Salimul Haque and Sharfuddin that the said two convict did not abet Begum Zia in commission of the offence in 1993 when money was transferred in the account of the Trust and thus, said two convicts at best can be found guilty under section 411 of the Penal Code instead of sections 409/109 of the Penal Code.

185. Whether the offence which started in the year 1993 and ended in 2007 is a single transaction-

The case at hand has its origin a certain sum of money of the PM's orphanage fund. Some portion of the fund was transferred to a socalled paper trust namely Zia Orphanage Trust in the year 1993. After 13 years the money along with interest was later moved from the Trust account unlawfully, in 2006 without doing any charity in particular for the orphans. The money was later moved in 2006 to the FDR account of Salimul Haque and two others, who then transferred the money again to Sharfuddin's account. Considering all of these separate transactions relates to the same money,

arising out of the same origin point PM's orphanage fund, it can well be argued and indeed considered for these transactions to be rooted in the same origin. Hence, these transactions can be considered to be one single and continuous transaction although they are separated by a number of years.

186. Plea of Alibi:

We have already noticed and discussed about the plea of alibi of convict Begum Zia that PM's Orphanage Fund was not a public fund and that the Amir of Kuwait donoted the money for Zia Orphanage Trust, not for PM's orphanage fund, for charitable purpose, and there was no fund in Prime Minister's office in the name of PM's Orphanage Fund.

187. In the instant case on behalf of Begum Zia save and except an application under section 57(6) of the Evidence Act, which was filed to accept the Noterial Certificate and Photostat copy of a letter dated 11.08.2015 issued by the Embassy of Kuwait in Bangladesh, no steps were taken to prove her alibi. On the above alleged letter issued by the Embassy of Kuwait we have already made our observations.

188. Sharfuddin by examining 3 witnesses including himself had tried to establish his plea of alibi that he received the alleged money for selling 74½ decimals of land to the Trust and returned the said money in complience of the Court's decree.

189. The learned Special Judge upon consideration and appreciation of the evidence adduced on behalf of Sharfuddin has observed as under:

"উপরোক্ত সাক্ষীর বক্তব্য থেকে লক্ষ করা যায় যে, জিয়া অরফানেজ ট্রাষ্ট এবং আসামী শরফুদ্দীন আহমেদের মধ্যে আশুলিয়া মৌজার ৭৪.৫ শতক জমি ক্রয়-বিক্রয়ের জন্য ১৬/১১/২০০৬ তারিখে একটি বায়নাপত্র সম্পাদিত হয়। উহা আন-রেজিস্টার্ড বায়নাপত্র ছিল। ২০০৪ সনের পরে বায়নাপত্র রেজিস্ট্রি করা বাধ্যতামূলক হওয়া সত্বেও আইনের বরখেলাপ করে উপরোক্ত বায়নাপত্রটি সম্পাদন করা হয়। সম্পত্তির মূল্য ৩ কোটি ২৫ লক্ষ টাকা নির্ধারণ করা হয়। উহার মধ্যে ২ কোটি ২৫ লক্ষ টাকা মূল্যের ২টি পে-অর্ডার দেয়া হয়। জনৈক এনামুল হক (যিনি ট্রাষ্ট দলিলের কোন পক্ষ নন) ঐ টাকা আসামী শরফুদ্দীনকে বায়না বাবদ প্রদান করেন মর্মে সাক্ষীর সাক্ষ্য থেকে দেখা যায়। ঐ টাকা এনামুল হক কিভাবে পেয়েছেন তা স্পষ্ট নয়। তর্কের খাতিরে যদি ধরে নেয়া যায় যে, সত্যিকার অর্থেই জিয়া অরফানেজ ট্রাষ্ট ও আসামী শরফুদ্দীনের মধ্যে জমি কেনা বেচার একটা বায়নাপত্র সম্পাদিত হয়েছিল তথাপি ট্রাষ্টের পক্ষে উহার ট্রাষ্টিদের যথা আসামী তারেক রহমান, আরাফাত রহমান ও মমিনুর রহমান এর উচিৎ ছিল সম্পত্তির অস্তিত্ব আদৌ আছে কি না উহার খোঁজ করা। ডি.ডব্লিউ-৩ এর সাক্ষ্য থেকে আরো দেখা যায় যে, তিনি জিয়া অরফানেজ ট্রাষ্টের পক্ষে টাকা আদায়ের জন্য আসামী শরফুদ্দীন আহমেদের বিরুদ্ধে মানি মামলা দায়ের করেছেন। তিনি চুক্তি সুনির্দিষ্টভাবে বাস্তবায়নের জন্য তথা নালিশী সম্পত্তি বায়না পত্রের ভিত্তিতে দলিল মূলে পাওয়ার জন্য কোন মামলা করেন নাই। আসামী শরফুদ্দীন মানি মালায় জবাব না দিলেও হঠাৎ করেই ১২/০২/২০১৩ তারিখে উক্ত মামলায় সোলেনামা দাখিল করেন। এই সাক্ষী তার সাক্ষ্যে উল্লেখ করেছেন যে, তিনি উক্ত মানি মামলার আইনজীবী ছিলেন এবং সোলেনামায় স্বাক্ষর প্রদান করেছেন। তিনি উক্ত মামলার আইনজীবী হিসেবে দাবী করলেও পরক্ষণেই বলেছেন যে, ট্রাষ্টের পক্ষে এনামুল হক মামলা পরিচালনা করেন। তাছাড়া বাদী পক্ষে এডভোকেট এ.এম. মাহবুব উদ্দিন আইনজীবী ছিলেন। জেরাতে এই সাক্ষী প্রসিকিউশনপক্ষের দেয়া গুরুত্বপূর্ন প্রশ্নগুলোর জবাব না দিয়ে এড়িয়ে গেছেন।

নথি পর্যালোচনায় দেখা যায় যে, গত ২৪/০৮/২০১৭ তারিখে প্রসিকিউশনপক্ষে ঢাকার তৃতীয় যুগ্ম জেলা জজ আদালত কর্তৃক নিষ্পত্তিকৃত মানি মোকদ্দমা নং-১/২০১২ এর রেকর্ড তলব করার প্রার্থনা করা হয়। আদালত উহা মঞ্জুর করেন। উক্ত মামলার নথি থেকে লক্ষ করা যায় যে, এই মামলাটি উক্ত সাক্ষী এডভোকেট তাহেরুল ইসলাম তৌহিদ দায়ের করেন নি। উহা এডভোকেট এ.এম. মাহবুব উদ্দিন খোকন দায়ের করেছেন। সাক্ষী তার সাক্ষ্যে উল্লেখ করেছেন যে, মানি ১/২০১২ মোকদ্দমায় দাখিলী সোলেনামায় আইনজীবী হিসেবে তিনি বাদীপক্ষে স্বাক্ষর করেন। সোলেনামায় উভয়পক্ষ ও তাদের পক্ষে নিয়োজিত এডভোকেটগণ স্বাক্ষর করেন। তার সাক্ষ্যে তিনি এটাও বলেছেন যে, বিবাদীপক্ষে অর্থাৎ আসামী শরফুদ্দীন আহমেদ এর পক্ষে ডি. দুলাল মৃধা এডভোকেট ছিলেন এবং আইনজীবী হিসেবে তিনি মোকাদ্দমায় তার পক্ষে

স্বাক্ষর করেন। কিন্তু উক্ত মানি মোকদ্দমায় দাখিলকৃত সোলেনামা পর্যালোচনা করে দেখা যায় যে, উক্ত সোলেনামায় পক্ষগণ স্বাক্ষর করেছেন মর্মে দেখা গেলেও উক্ত সোলেনামায় উভয়পক্ষের বিজ্ঞ কৌশুলীদের স্বাক্ষর নাই। বাদীপক্ষে এডভোকেট হিসেবে ডি. ডব্লিউ-৩ স্বাক্ষর করলেও বিবাদী পক্ষে ডি. দুলাল মৃধা স্বাক্ষর করেন নাই। কাজেই উক্ত সোলেনামার অস্তিত্বের বিষয়ে ডি. ডব্লিউ-৩ যে সাক্ষ্য প্রদান করেছেন উহা বিশ্বাস করার কোন কারণ নেই। এই সাক্ষী একবার বলেছেন তিনি মানি মামলায় আরজি দাখিল করেছেন আবার অন্য ক্ষেত্রে তিনি শুধুমাত্র সোলেনামা প্রস্তুত করেছেন মর্মে সাক্ষ্য প্রদান করেছেন। জেরাতে সাক্ষী বলেছেন যে, আদালতের মধ্যস্থতায় মানি মামলায় আপোষ হয়। কিন্তু উক্ত মামলার আদেশপত্র ও সোলেনামা পর্যালোচনায় দেখা যায় যে, উহা আদালতের মধ্যস্থতায় সম্পন্ন হয়নি। কেন না আদালতের মধ্যস্থতায় কোন মামলা আপোষ হলে সোলেনামার পক্ষগণ ও তাদের পক্ষে নিযুক্ত এডভোকেটগণের স্বাক্ষর থাকায় পাশাপাশি মধ্যস্থতাকারী হিসেবে আদালতের স্বাক্ষর ও সীল থাকা বাঞ্চনীয়। সোলেনামা পর্যালোচনায় দেখা যায় যে, উক্ত দেওয়ানী কার্যবিধির অর্ডর-২৩ রুল-৩ অনুযায়ী দাখিল করা হয়। পরে কে বা কারা উক্ত অর্ডার এবং রুলের উপর ওভাররাইটিং করে সেকশন-৮৯ এ লিখেছেন এবং সেখানে কোন স্বাক্ষর বা অনু-স্বাক্ষর প্রদান করেন নাই। ইহা থেকেও ধরে নেয়া যায় যে, উক্ত সোলেনামা আদালতের মধ্যস্থতায় সম্পন্ন হয়নি এবং উহা আসামীপক্ষ কর্তৃক সৃজিত। ডি. ডব্লিউ-৩ একজন এডভোকেট হওয়া স্বত্বেও অসত্য বয়ানে আদালতে শপথ পূর্বক স্বাক্ষ দিয়ে মিথ্যাকে সত্য রুপান্তরের চেষ্টা করেছেন। তার সার্বিক সাক্ষ্য বিশ্লেষন করে এই আদালত মনে করেন যে, তিনি নিরপেক্ষ সাক্ষী নয়। তিনি আসামী দ্বারা পক্ষাশ্রিত হয়ে আসামী শরফুদ্দীন আহমেদসহ অন্যান্য আসামীদের এই মামলার দায় থেকে বাঁচানোর বৃথা চেষ্টা করেছেন মাত্র। এই সাক্ষীর সাক্ষ্য থেকে আসামী শরফুদ্দীন আহমেদ কোন বেনিফিট পাবেন না। মানি মামলা-১/২০১২ একটি সৃজিত মামলা মর্মে অত্র আদালত মনে করেন। এবং উহা অত্যান্ত কৌশলের সাথে মামলা বিজ্ঞ এডভোকেট এ.এম.মাহবুব উদ্দিন খোকন আদালতে দাখিল করেছেন। সত্যিকার অর্থে যদি জিয়া অরফানেজ ট্রাষ্ট এবং আসামী শরফুদ্দিনের মধ্যে জমি কেনা বেচা কোন বায়না চুক্তি সম্পাদিত হত এবং উক্ত চুক্তি মেয়াদের মধ্যে শরফুদ্দিন আহমেদ যদি বায়না টাকা সহ জমি সাকুল্যে মূল্য গ্রহন করে ক্রেতার অনুকুলে কবলা দাখিল সম্পাদন করে দিতে ব্যর্থ হত তাহলে সে ক্ষেত্রে উক্ত ট্রাষ্ট্রের পক্ষে মামলা দায়েরকারী বিজ্ঞ এডভোকেট জনাব এ.এম. মাহবুব উদ্দিন খোকন এর উচিত ছিল Specific Perfomance of Contract এর মামলা দায়ের করা। কিন্তু তিনি উহা দায়ের না করায় এটাই ধরে নিতে হবে যে, তারা প্রকৃতপক্ষে জমি কেনা বেচার কোন চুক্তি আসামী শরফুদ্দিন আহমেদের সাথে সম্পাদন করেন নাই। মানি স্যুট দায়ের করে এই মামলার বাদী ও আসামী শরফুদ্দিন আহমেদ কৌশলে জিয়া অরফানেজ ট্রাষ্টের টাকা তথা রুপান্তরিতভাবে প্রধানমন্ত্রীর এতিম তহবিলের টাকা আত্মসাতের চেষ্টা করেছেন। কাজেই উক্ত মানি মামলাটি একটি নিষ্ফল ও দুর্বিসন্ধিমূলক মামলা মর্মে আদালত বিশ্বাস করেন।

আসামী শরফুদ্দিন আহমেদ আশুলিয়া মৌজা ৭৪.৫ শতক জমির মালিকানা দাবী করলেও সাফাই সাক্ষী প্রদানকালে তিনি বা তার পক্ষে উপস্থিত সাক্ষীরা ঐ জমির কোন দলিল আদালতে দাখিল করেন নাই। ফলে ধরে নেয়া যায় যে, তিনি আদৌ ৭৪.৫ শতক জমির মালিক ছিলেন না এবং ঐ জমি বিক্রয়ের জন্য জিয়া অরফানেজ ট্রাষ্টের সাথে তার কোন দিন আদৌ কোন বায়না চুক্তি সম্পাদিত হয় নাই। তিনি মানি ১/২০১২ মামলায় মিথ্যা সোলেনামা দাখিল করে সরকারি এতিম তহবিলের অর্থ আত্মসাত করার প্রক্রিয়াটি প্রকৃত প্রস্তাবে মিথ্যা প্রমান করার চেষ্টা করলেও ব্যার্থ হয়েছেন। . . . . . ।

আশুলিয়া মৌজার ৭৪.৫ শতক জমির কোন কাগজ (ফববফ ড়ভ ঃরঃষব) আসামী আদালতে দাখিল না করায় এটাই প্রমানিত হয় যে, তিনি বর্নিত ট্রাস্ট্রের সাথে জমি বিক্রয়ের আদৌ কোন চুক্তি সম্পাদন করেন নাই এবং ঐ কাহিনী সৃজন করে তর্কিত ২,১০,৭১,৬৪৩/৮০ টাকা আত্মসাত করেন। বস্তু প্রদর্শনী 'এ' এবং 'বি' সিরিজে যে ১৩টি পে-অর্ডারের বিষয়ে উল্লেখ করা হয়েছে উহার মুড়ি পর্যালোচনায় দেখা যায় যে, সেখানে জিয়া অরফানেজ টাস্ট্রের নামে লেখা নাই। তাছাড়া পূর্বেই উল্লেখ করা হয়েছে যে, স্বীকৃত মতেই উত্তরা ব্যাংকে জিয়া অরফানেজ ট্রাষ্ট্রের কোন হিসাব নেই।" [underlines supplied]

190. We have also examined and scrutinized the evidence of DWs.

191. DW-1, Sharfuddin in his cross examination stated that-"দাখিলা 'ক' চিহ্নিত কাগজটি Memorandum of understanding উহাতে এনামুল হক সাহেবকে জিয়া অরফানেজ ট্রাষ্টের নামে authority দেয়া হয় মর্মে কোন কাগজপত্র আমি দাখিল করি নাই। - - - - - - - - । আমাকে যারা টাকা দেন তারা ঐ অরফানেজ ট্রাষ্টের ট্রাষ্টি কিনা তা আমি জানি না। - - - - - - - - - - - - । মানি মামলার মাধ্যমে ২ কোটি ২৫ লাখ টাকা ফেরত দেই কিন্তু জানি না যে কার নামে Trust গঠন করা হয়।"

192. DW-2, Tax-advisor of DW-1, in his cross examination stated that-"আমি আসামী শরফুদ্দিন আহমেদের আশুলিয়ার জমির মালিকানা সংক্রান্ত কাগজপত্র আয়কর রির্টানে ঢুকাই নাই। আসামী শরফুদ্দিন কবে ও কিভাবে আশুলিয়ার জমির মালিক হন ঐ মর্মে কোন কাগজপত্র অংংবংসবহঃ এর সময় আমি দেখি নাই। এবং আজও কোর্টে তা সাথে আনি নাই। - - - - - - - - - । ২০০৬-২০০৭ কর বছরের আয়কর রির্টানে আশুলিয়া মৌজার কোন নাম উল্লেখ নাই। ২০০৭-০৮ কর বর্ষে আয়কর রির্টানেও আসামীর আশুলিয়ার মৌজায় কোন জমি আছে/ছিল মর্মে লেখা নাই। - - - - - - - - - - - - - । ১১/২/১৩ থেকে ১৩/৮/১৩ তাং পর্যন্ত ১৩টি পে-অর্ডারের মাধ্যমে বর্নিত ট্রাষ্টের অনুকুলে ২ কোটি ২৫ লাখ টাকা ফেরৎ দেন মর্মে ২০১৩-১৪ কর বছরের আয়কর নথিতে কিছু লেখা নাই। সেখানে ১ কোটি ৩২ লাখ টাকা ফেরতের কথা বর্ননা করা হয়েছে। আয়কর রির্টানে আশুলিয়া মৌজার ৭৪.৫ শতক জমি দেখানো নাই।" [underlines supplied]

193. DW-3 who was a lawyer for the Trust in Money Suit in his cross examination stated that-" unregistered পেপারটি ৭/৮/১৭ তাং এই আদালতে দাখিল করা হয়। এই বায়নাপত্রটি মানি স্যুটে দাখিল করা হয়নি। - - - - - - - - - । ট্রাষ্টের পক্ষে এনামুল হক সাহেব মামলা পরিচালনা করেন। Authorise letter টি কোর্টে দাখিল নাই। - - - - - - - - । জিয়া অরফানেজ ট্রাষ্ট্রের যে এনামুল হকের কথা বলা হয়েছে তার কোন স্থায়ী অস্থায়ী ঠিকানা দেয়া নেই, তবে মানি স্যুটের আরজিতে তার ঠিকানা ৬ মঈনুল রোড লেখা আছে। মানি মামলার আরজিতে এনামুল হক সাহেবকে যে Authority দেয়া হয় ঐ মর্মে জিয়া অরফানেজ ট্রাষ্টের ট্রাষ্টি বোর্ড তাকে Authority দিয়েছে যা Authorise letter মর্মে কোন কথা আরজির কোন পাতায় লেখা নাই বা Annexure হিসাবে আরজির সাথে যুক্ত করি নাই। - - - - - - - - - । জিয়া অরফানেজ ট্রাষ্টের পক্ষে আশুলিয়া মৌজার ৭৪.৫ শতক জমি ক্রয়ের জন্য বায়নাপত্র মুলে জমির মালিককে দেয়া টাকা ফেরৎ নেয়ার জন্য ট্রাষ্টের পক্ষে জনাব তারেক রহমান ঝবঃঃষড়ৎ হিসেবে এনামুল হককে মামলা করার জন্য Authorit দেয় কিনা তা মানি মামলার আরজিতে উল্লেখ করা হয়নি। - - - - - - - - । দাখিলা Memorandum of Agreement এ জিয়া অরফানেজ ট্রাষ্টের কোন Trustee সাক্ষী হিসেবে স্বাক্ষর দেন নাই। তেমনিভাবে কোন Trustee উহা সত্যায়িতও করেন নাই।" [underlines supplied]

194. In view of the above assertions made by the DWs we have no hesitation to hold that the alleged compromise decree obtained in Money Suit No.1 of 2012 is afterthought and collusive one and the convicts in order to save them from criminal liability did such frudulent act. Admittedly, charge sheet was submitted against the convicts on 05.08.2009. After about 4 years of submission of charge sheet the alleged Money Suit was filed and the convicts very hurriedly managed to get a so called compromise decree from the Court. If we consider this factural aspect coupled with the prosecution evidence and other circumstances then the *mens rea*, dishonest and fraudulent intention of the accused persons in commission of the offence of misappropriation are crystal clear.

195. In the case of **G.R Farland, AIR 1961, AP-3** it has been held that in a case of misappropriation of property entrusted with an accused, if the accused gives an explanation, which is found to be false the setting up the false defence would impute to him a fraudulent and dishonest intention.

196. This view has also been reiterated in the case of **Krishna Kumar Vs. Union of India, AIR 1959(SC) 1390**.

197. In the case of **Mustafikhar Vs. State of Maharastra reported in (2007)1 SCC, page-623** it has been held that:

> "It is not necessary or possible in every case to prove as to in what precise manner the accused had dealt with or appropriated the goods. In a case of criminal breach of trust, the failure to account for the money, proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused. Although onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it would be difficult for

the prosection to prove the actual mode and manner of misappropriation and in such a case the prosecution would have to rely largely on the trust or falsity of the explanation given by the accused. In the instant case, there is no dispute about the entrustment."

198. Section 103 and Section 106 of the Evidence Act one as follows:

103. Burden of proof as to particular fact- the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

199. 106. Burden of proving fact especially within knowledge- when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

200. Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.

201. In **Shambu Nath Mehra vs. State of Ajmer, AIR 1956 SC 404: 1956 SCR 199**: the following legal principle has been enunciated:

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge." [Under lines supplied]

202. In the case of **State of WB Vs. Mir Mohammad Omar**, reported in AIR 2000 SC, page-2988, it has been held that:

"The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which drive the court to draw a different inference."

And

"The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty." (Underlines supplied)

203. In the case of **State of H.P Vs. Karanvir, reported in 2006 cri. L.J, page-2917** it has been held that:

"The actual manner of misappropriation, it is well settled, is not required to be proved by the prosecution. Once entrustment is proved, it was for the accused to prove as to how the property entrusted to him was dealt with in view of Section 405 of the IPC. If

the respondent had failed to produce any material for this purpose, the prosection should not suffer therefor". [Underlines supplied]

204. In view of the above settled propositions in absence of any valid and legal explanation whatsoever we have no scope to accept the plea of alibi as taken by the convicts. Moreso, we have already observed that the prosecution has been able to prove it's case against the convicts beyond doubt.

205. Whether further investigation for collecting evidence to ascertain the source of the DD deposited in PM's Orphanage Fund is at all necessary at this stage-

The learned Advocates for Begum Zia repeatedly urged for further investigation of the case to ascertain the identity of the sender of the alleged DD deposited in the account of the PM's Orphanage Fund. It was suggested by the defence that said money was sent by the Amir of Kuwait for Zia Orphanage Trust, not PM's Orphanage Fund.

206. It is evident from the evidence of PW-26 and PW-31 that the investigating agency tried it's best to know the identity of the sender of the DD; but the investigating agency could not identify it because the DD issuing Bank United Saudi Commercial Bank was no longer in operation and in 1995 the said bank was merged with the SAMBA FINANCIAL GROUP. The authority of said Group was contacted by the investigating agency through Bangladesh Embassy in Riyad and Relationship Manager of the Group Mr. Tala Al-Otaibi, informed the Bangladesh Embassy through E-mail, exhibit-26 that it would take more time to provide information regarding the DD as the same was an old one and they would provide information if they could collect information as sought for.

207. It is our considered view that in this particular case identity of the sender of the alleged DD is not at all an incriminating issue. It is to be the prime consideration that a foreign donation was received by the Prime Minister's Office through the alleged DD for the PM's Orphanage Fund, which was created for the well being of the orphans of the country and thereafter the said DD was deposited in the account of PM's Orphanage Fund being account no.5416, over which Prime Minister Begum Zia had entrustment and dominion as we have already held. For the sake of argument, if we accept the contention of the learned Advocates for Begum Zia that the DD was sent by the Amir of Kuwait then question arises as to 'what benefit Begum Zia will get' from it. We are of the view that it will not in any way help Begum Zia.

208. It can not be possible for any one to change the nature and object of the PM's Orphanage Fund, which was a public fund. There is no scope to treat the PM's Orphanage Fund as the Fund of Zia Orphanage Trust as argued by the learned Advocates for Begum Zia and on that issue we have already made our observations. On the DD itself it was clearly mentioned that same was issued in favour of PM's Orphanage Fund, A/C no.5416 Sonali Bank, Ramna Corporate Branch, Dhaka. Moreover, the witnesses, in particular PW-1, PW-26 and PW-31 were throughly cross examined by the deffence on the said issue and thus, the question of being Begum Zia prejudiced does not arise at all.

209. Thus, we are unable to accept the fruitless as well as misconceived submission of the learned Advocates for Begum Zia.

210. Moreover, there is no provision in any relevant laws or Code of Criminal Procedure wherby an accused can sought further investigation. It is well settled that there is no scope to pass any order for further investigation at the instance of a charge sheeted accused or a convict during pendency of an appeal in order to collect more evidence. Thus, the attempt of

Begum Zia for further investigation into the case at this stage is beyond the scope of law and deserves no consideration.

211. Whether the present case against Begum Zia is a politically motive case-

It has been attempted, on part of Begum Zia to label the case as politically motivated and thereby moved to exonerate her. But from the facts unfolded in evidence it transpires that the prosecution was initiated not on any political ground and Begum Zia has been brought to justice for specific arraignment constituting an offence punishable under the Penal Law. Thus she does not deserve any exception or immunity by virtue of being in the political opposition. Begum Zia has been prosecuted and tried in compliance with established lawful procedure governing investigations and trial.

212. We further reiterate that no one is above the law and even a person having potential political identity is not immuned from being prosecuted and tried if he or she is arraigned to have committed an offence.

213. Political affiliation of an accused does not deserve to be considered, as blanket immunity in arriving at decision as to his or her guilt and culpability. Facts and circumstances unveiled in evidence tendered by the prosecution led the trial court in arriving at decision, not the political identity of the accused. It has also been depicted that during trial Begum Zia got all defence rights permitted by law and prosecutorial procedures.

214. Thus, merely for the reason of political identity of a person prosecuted for an offence punishable under the penal law it cannot be said that she has been brought to justice on political victimization. In the case in hand, it is rather evident that in exercise of political position and identity togher with the office of the head of the government Begum Zia is found to have had committed a penal offence which is found to have been proved beyond reasonable doubt. It would be a dangerous precedent indeed for the future if any such mere political identity is taken into account in the process of lawful adjudication of a criminal arraignment.

Conclusion and decisions:

215. The learned Special Judge found guilty to all the appellants under sections 409/109 of the Penal Code as well as section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code. However, the leanred Special Judge having considered the provision of section 26 of the General Clauses Act coupled with the principle of law enunciated in the cases of ATM Nazimullah Chowdhury VS. The State, reported in 65 DLR, page 500 and Kazi Ahmed Bazlul Karim Vs. The State, reported in 11 BLC, page 60, awarded sentence to the convicts only under sections 409/109 of the Penal Code.

216. We have already hold that Begum Zia had entrustment and dominion over the PM's Orphanage Fund, a public fund and a huge amount of money of the said fund was disposed of, used and misappropriated dishonesly by Begum Zia with the active aid of other convicts. In the instant case Begum Zia is the principal offender and other convicts actively aided and facilitated to commit such offence.

217. Thus, it is our considered view that it is not proper to convict the principal offender Begum Zia under sections 409/109 of the Penal Code. Rather, Begum Zia being the principal offender is guilty of committing offence under section 409 of the Penal Code as well as section 5(2) of the Prevention of Corruption Act, 1947. And Begum Zia is to be sentenced only under section 409 of the Penal Code in view of the provision of section 26 of the General Clauses Act.

218. Conviction and sentence of other convict appellants under sections 409/109 of the Penal Code deserves no consideration.

219. In awarding sentence to Begum Zia the learned Special Judge has considered her age, social and political status and quantum of misappropriated money. We do not find any legal justification and cogent ground to award lesser punishment to the principal offender Begum Zia than the other convicts who were the abators, considering her political and social status.

220. It was the obligation of the principal accused Begum Zia to secure due and proper use of the fund obtained, for the welfare of orphans. But in exercise of the highest office of the government she rather allowed her sons, relative and party men in misdealing the fund with fraudulent intention by creating fake Trust. She being at the helm of power at the relevant time rather abused the chair of the premier of a country. It was a ruthless blow to the sanctity of state machineries as well. It derogated the image of the country to the global community. Abusing the highest chair of the government, Begum Zia was not expected to remain mute for years together in securing due and proper use of the fund over which she had entrustment. Deliberate and culpable inaction on her part appeared as the key part of the criminal design which was intended to deprive the orphans. All these cumulatively aggravated the nature and pattern of the offence for which she has been found guilty.

221. Today, corruption which includes financial crime also in our country not only poses a grave danger to the concept of good governance, it also threatens the very foundation of the democracy, social justice and the Rule of Law. It is beyond controversy that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values of our constitution. Thus, the duty of the court is to work in such a manner to strengthen the fight against corruption. Therefore, there is no scope to take a lenient view in awarding punishment to an accused against whom charge has been proved considering his/her social and/or political position.

222. Taking the above facts into account we consider it appropriate that justice would be met if the maximum sentence prescribed in section 409 of the Penal Code is awarded to Begum Zia so that the persons enjoying the highest position in any organ or any public office of the State thinks twice to go ahead with such criminal design in coming days.

223. Section 409 of the Penal Code prescribed purnishment with imprisonment for life or with imprisonment for a term which may extend to ten years with fine. In the instant case since the learned Special Judge awarded sentence to the other convicts for 10 years rigorous imprisonment with fine, we are of view that it would be legal, proper and just to award the same sentence to Begum Zia.

224. In the result, the Appeals fail and are dismissed. The Rule is made absolute.

225. Conviction and sentence of convict Kazi Salimul Haque alias Kazi Kamal and Sharfuddin Ahmed as awarded by the learned Special Judge is hereby maintained.

226. Begum Khaleda Zia is convicted under section 409 of the Penal Code and section 5(2) of the Prenvetion of Corruption Act,1947 and she is sentenced only under section 409 of the Penal Code to suffer rigorous imprisonment for a period of 10(ten) years and also to pay fine as imposed by the learned Special Judge.

227. Send down the lowyer court records with a copy of this judgment and order at once to the court concerned for informations and necessary steps.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 4730 of 2017
With
Writ Petition No. 11134 of 2017
Softesule Private Limited
… Petitioner
-Vs-
Govt. of Bangladesh represented by the Secretary Ministry of Health, Bangladesh Secretariat, Dhaka, and others
.....Respondent

Mr. Sheikh Fazle Noor Taposh with
Mr. Mohammad Mehidi Hasan Chowdhury
Mr. Sayed Abdullah Al Mamun Khan and
Mrs. Jausna Parveen and
Mrs. Upoma Shaha, Advocates
… Petitioner

(In both the writ petitions)
AND
Mr. Md. Mokleshur Rahman, DAG with
Mr. Samarendra Nath Biswas, AAG and
Ms. Farida Yeasmin, AAG
....for respondent No.2

(In writ petition No.11134/2017)
Ms. Tasmia Prodhan, Advocate
.....for respondent No.9

(In both the writ petitions)

Heard on: 01.11.2017 and 23.11.2017
Judgment on: 04.01.2018

Present:
Ms. Justice Naima Haider
&
Mr. Justice Zafar Ahmed

CPTU, Rule 60 of the PPR, Review Panel, NOC;

It has been settled by this Division that when a proceeding is initiated which affects the rights of a party, the party whose right would be affected is to be given the opportunity to represent its case, whether statutory contemplated or not. ... (Para 19)

The Review Panel found the petitioner "non responsive" and found the respondent No.9 responsive. This means that the Review Panel, in exercising its powers, substituted its judgment over the Selection Panel's finding. The powers of the Review Panel, as set out in Rule 60 of the PPR are clear. The Review Panel is not conferred with the power of "substitution of judgments". Rule 60 of the PPR also does not confer any residuary power upon the Review Panel. The powers conferred are exhaustive. The Review Panel cannot, in exercising powers under Rule 60 of the PPR, proceed to assume more powers than actually conferred. In the instant case, the Review Panel has done exactly this. In the instant case, the Review Panel has exceeded jurisdiction and therefore, its findings cannot be sustained. ... (Para 20)

JUDGMENT

NAIMA HAIDER J:

1. As both the writ petitions are interconnected, these are taken up together and disposed of by this single judgment.

2. In Writ Petition No. 4730 of 2017, this Division issued Rule Nisi be issued calling upon the respondents to show cause as to why the impugned order dated 29.08.2016 passed in Review Application No. 30 of 2016 by the Review Panel No. 2 of Central Procurement Implementation Monitoring and Evaluation Division of Ministry of Planning under the signature of Respondent Nos. 6, 7 and 8 whereby the CPTU has declared "Ranata Limited" as "Responsive" and the Petitioner Company as "Non-responsive" in relation of certain goods and ancillary services, viz supply of "Vitamin-A capsule (200000 IU)" against Package No. G-1540(Lot-03), IFB No. CMSD/G- 1540/ICB/2015-16/D-6/35 dated, 02.03.2016 for Procurement of "Vitamin-A Capsule" under Health Sector Development Program (HSDP) (Annexure-B) should not be declared to have been issued 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.

3. In Writ Petition No. 11134 of 2017, this Division issued Rule Nisi be issued calling upon the respondent to show cause as to why the illegal acts of the Respondents not issuance of No. Objection Certificate (NOC) for the year of 2015-2016 in favour of the Petitioner for supplying 2,70,00,000/-(Two Crore Seventy Lac) Pcs Vitamin A Capsules under Package No. G-1540 (Lot-03), IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 dated 02.03.2016 for procurement of "Vitamin-A Capsule" under Health Sector Development Program (HSDP) should not be declared illegal and without any lawful authority and as to why No Objection Certificate (NOC) will not be issued for the year of 2015-2016 in favour of the Petitioner for supplying 2,70,00,000/-(Two Crore Seventy Lac) Pcs of Vitamin A Capsules under Package No. G-1540(Lot-03) IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 date 02.03.2016 for procurement of "Vitamin-A Capsule" under Health Sector Development Program (HSDP) and/ or pass such other or further order or orders as to this Court may seem fit and proper.

4. Writ Petition No. 4730 of 2017 was filed in light of the relevant factual backgrounds: the petitioner was set up in 1962 and has revolutionized Soft Gelatin Capsule manufacturing in India. The petitioner has received acknowledgements from ISO and World Health Organization.

5. The petitioner participated in a competitive in light of Tender Notice published by the respondent No.5 for procurement of "Vitamin A Capsule" under Health Populations and Nutrition Sector Development Program (HPNSDP), Credit No. 4954-BD. The petitioner was successful and subsequently, the petitioner signed the NOA. Thereafter, the respondent No.5 sent a letter to the respondent No. 2 for issuance of a No Objection Certificate in favour of the petitioner.

6. In the meantime, the respondent No. 5 issued an L/C in favour of the petitioner for supply of 2,70,00,000 (Two Cores Seventy Lac) pieces of Vitamin A Capsules and on 02.08.2016, the petitioner issued the Pro-forma Invoice in connection with supply of the said Vitamin A Capsules. Suddenly, the respondents requested the petitioner to delay shipment given that one of the bidders have appealed in the Review Panel of CPTU regarding the tender. In the meantime, the respondent No. 2 requested the respondent No. 5 to issue NOC in favour of the petitioner and on 23.08.2016, the respondent No.2 requested the Secretary, Ministry of Health to issue instruction regarding issuance of NOC in favour of the petitioner.

7. In light of the request for delaying shipment, the respondent No. 5 sent a letter to the Executive Director of Bangladesh Bank for amendment of the LC issued in favour of the petitioner.

8. On 30.10.2016, the respondent No. 5 sent a letter to the petitioner informing it that the Review Panel 2 of CPTU declared "Renata Limited" as "responsive" and the petitioner was declared "non responsive in relation to Lot 3. In the meantime, the petitioner exchanged correspondence with the respondents regarding the issuance of NOC. The petitioner inquired and found out that on 29.08.2016, the Review Panel 2 of CPTU in Review Application No. 30 of 2016 declared Renata Limited as responsive and declared petitioner as "non responsive". In the said proceedings, the petitioner was not made a party and the said order dated 29.08.2016 was passed without offering the petitioner any opportunity to represent its case.

9. Being aggrieved, the petitioner moved this Division and obtained Rule Nisi.

10. The Rule was opposed by the respondent No.9-Renata Limited by filing an Affidavit in Opposition. According to respondent No.9, the order dated 29.08.2016 was passed in accordance with law. The respondent No.9 points out that the petitioner was not a qualified bidder to start with in light of the Notification dated 02.06.1998 issued from the Prime Minister's Office which provides that any medicine that is produced in ample within Bangladesh cannot be imported from overseas. The Tender Evaluation Committee did not take into consideration the aforesaid notification and illegally declared the petitioner to be responsive. The respondent No.9 further points out that since the petitioner does not have a NOC, it cannot be regarded as a responsive bidder. The respondent No.9, through its Affidavit in Opposition argued that it has met the required selection criteria and that it should be declared responsive.

11. Mr. Sheikh Fazle Noor Taposh, the learned Counsel for the petitioner takes us through the writ petition and submits that the order dated29.08.2016 is without lawful authority. In this regard, Mr. Taposh submits that the Review Panel does not have the jurisdiction to make the petitioner non responsive and the respondent No.9 responsive in light of Rule 60 of the Public Procurement Rules 2008 (" hereinafter referred to as PPR"). According to Mr. Taposh, under Rule 60 of the PPR, Review Panels can only reject appeal, set out Rule and procedures governing the subject matter of appeal, recommend remedial measures in appropriate circumstances, suggest annulment of non compliant actions and suggest compensation. Mr. Taposh referring to Rule 60 points out that the Review Panel does not have jurisdiction to declare the petitioner non responsive. Mr. Taposh also points out that the order dated 29.08.2016 was without lawful authority as the same was in violation of the principles of natural justice. With regard to the contentions raised in the Affidavit in Opposition, Mr. Taposh submits that the terms of the Tender Document clearly contemplates that the local manufacturers may not be able to carry out the obligations contemplated in the Tender Document and hence foreign participation was invited; on this count, Mr. Taposh submits that there was never any violation of the order issued by the Prime Minister's Office. Mr. Taposh further points out that when the respondents themselves have repeatedly recommended for the issuance of No Objection Certificate, the failure to issue the same cannot be attributed on the petitioner; accordingly it is a misconceived submission that the petitioner is not otherwise qualified to participate. Mr. Taposh lastly makes elaborate submission on the eligibility of the respondent No.9 and contends that respondent No.9 was

correctly described as non responsive by the Selection Committee. On the above counts, he prays that the Rule should be made absolute.

12. Mr. Md. Mokleshur Rahman, the learned Deputy Attorney General on behalf of respondent No. 2 in writ petition No. 11134 of 2017 submits that now a days, as many as eight pharmaceuticals industries in our country had given registration to produce Vitamin A 200000IU Capsule to resolve the demand all over the country on the other hand those industries are earning foreign currency by export in such medicine and as a result of which NOC could not be issued in favour of the petitioner company.

13. He further submits that as per the decision/instruction of the Hon'ble Prime Minister as well as respondent no. 1, some restriction has been imposed in respect of importation of such medicine including the medicine in question which has been manufacturing locally and adequately and now a days, since the medicine in question has been manufacturing in country adequately, the respondent no. 2 by the letter date 27.06.2016 (Annexure-2 series to this writ petition), refused to issued NOC in favour of the petitioner company for supplying "Vitamin A Capsule" but without challenging the said order of refusal of the instant writ petition has been filed and as such considering this aspect of the case be the Rule is liable to be discharged.

14. Ms. Tasmia Prodhan, the learned Counsel appearing for the respondent No.9 submits that the respondent No. 9 should have been declared responsive by the Selection Committee and that the petitioner was correctly declared non responsive. She next submits that as per Public Procurement Rule 2008 the decision by the Review Panel shall be final and all concerned parties will act upon such decision. The review Panel of CPTU can only recommend or advice is not correct proposition. Furthermore they have full authority to make decision and binding upon the concerned parties. Hence, as a government institution, CMSD is obliged to follow the order of CPTU.

15. She further submits that the Technical Evaluation Committee of the said tender failed to take into consideration the ITB Clause 16.4 of the Bidding Document which states that, "Products offered from overseas manufacturers must be registered with the National Regulatory Authority from the country of origin and bidder should submit a copy of the Product Registration Certificate". She lastly submits that the Rule is liable to be discharged on the maintainability ground because there is other efficacious and alternative remedy to agitate petitioner' grievances and prayer that the Rule be discharged.

16. We have heard the learned Counsels at length and perused the Writ Petitions supplementary affidavits and the Affidavit in Opposition and other materials on record.

17. The Invitation for Bids dated 02.03.2016 issued by the respondents clearly contemplate both foreign and local participation. It further contemplate that local manufacturers shall be given preference. The relevant part of the Invitation for Bids reads as follows:

> *"... A margin of preference will be granted for the goods manufactured in Bangladesh if it meets the criteria as specified in the bidding documents..."*

18. The petitioner has relied on the Invitation for Bid and submitted the bid. The petitioner was found responsive by the Selection Committee. Not only that, the respondents have opened L/C in favour of the petitioner and the respondents have repeatedly taken steps

to obtain NOC for the petitioner. At this stage, we do not think it was appropriate for the Review Panel to erroneously rely on the Notification dated 02.06.1998 issued from the Prime Minister's Office and hold that the petitioner is non-responsive. The tender document clearly contemplated participation of foreign bidders for supplying the Vitamin A Capsules. That be the position, we think that the respondents themselves have taken the view that it may not be possible for the local manufacturers to supply all the Vitamin A Capsules. Why else would the tender documents contemplate participation of foreign entities?

19. What is interesting is the manner in which the Review Panel proceeded with disposal of the review. In deciding the "responsiveness" of the petitioner, the Review Panel proceeded with the determination without the petitioner. It has been settled by this Division that when a proceeding is initiated which affects the rights of a party, the party whose right would be affected is to be given the opportunity to represent its case, whether statutorily contemplated or not. We fail to understand why the Review Panel proceeded with determination without hearing the petitioner. As a result, the decision of the Review Panel did not take into account the explanation(s) that could have been offered by the petitioner. The findings of the Review Panel also did not take account of the petitioner's explanation(s). In our view, the Review Panel proceeded with the determination and arrived at the decision in violation of the principles of natural justice.

20. The Review Panel found the petitioner "non responsive" and found the respondent No.9 responsive. This means that the Review Panel, in exercising its powers, substituted its judgment over the Selection Panel's finding. The powers of the Review Panel, as set out in Rule 60 of the PPR are clear. The Review Panel is not conferred with the power of "substitution of judgments". Rule 60 of the PPR also does not confer any residuary power upon the Review Panel. The powers conferred are exhaustive. The Review Panel cannot, in exercising powers under Rule 60 of the PPR, proceed to assume more powers than actually conferred. In the instant case, the Review Panel has done exactly this. In the instant case, the Review Panel has exceeded jurisdiction and therefore, its findings cannot be sustained.

21. Accordingly, we find merit in the Rule. The Rule issued in Writ Petition No. 4730 of 2017 is made absolute for the reasons set out aforesaid.

22. The petitioner filed Writ Petition No. 11134 of 2017 challenging the failure of the respondents to issue NOC in favour of the petitioner for the year 2015-2016 for 2,70,00,000 pieces of Vitamin A capsules under Package No. G-1540 (Lot3), IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 dated 02.03.2016. The facts in this writ petition and the facts in Writ Petition No. 4730 of 2017 are overlapping. As such, we do not find it necessary to set out the factual backgrounds further.

23. From the facts set out and the documents annexed, it seems to us that the petitioner had been issued NOC previously and for the relevant year, different departments of the Government had repeatedly requested for issuance of the NOC in favour of the petitioner. The NOC to be issued is interconnected with the performance under the tender documents. It serves no purpose if the petitioner is awarded the tender but the NOC is not issued. Since the petitioner had been issued NOC in the past, even well after the issuance of the order dated 02.06.1998, the different departments of the Government have consistently recommended for issuance of the NOC in favour of the petitioner and the petitioner was awarded the tender and without the NOC the petitioner would not be able to perform the obligations under the tender. We find no reason as to why the respondents should not issue the NOC in favour of the

petitioner for the year 2015-2016. We take the view that the failure of the respondents in issuing the NOC is manifestly arbitrary and without lawful authority. Accordingly, we are inclined to make the Rule issued in Writ Petition No. 11134 of 2017 absolute with the following directions:

> ***" The concerned writ respondents in Writ Petition No. 11134 of 2017 is directed to issue NOC in favour of the petitioner for the year 2015-2016 for 2,70,00,000 pieces of Vitamin A capsules under Package No. G-1540 (Lot3), IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 dated 02.03.2016 within 15 days from the date of receipt of the copy of the judgment and order. "***

24. Communicate the judgment at once.

12 SCOB [2019] HCD

HIGH COURT DIVISION

Civil Revision No. 1749 of 2014.

Azadul Islam and others.
.....Defendant-Respondent-Petitioners.
-Vs-
Most. Asis Bewa and others.
…Plaintiff-Appellant-Opposite Parties.

Mr. Mohammad Jamiruddin Sircar with
Mr. A.H.M. Abdul Wahab, Advocates.
……For the petitioners.

Mr. Bivash Chandra Biswas with
Mr. Mrinal Kanti Biswas, Advocates
.....For the Opposite Parties.

Heard on 31.01.2019, 03.03.2019,
05.03.2019, 05.03.2019, 06.03.2019
And
Judgment on 07.03.2019.

Present;
Mr. Justice Md. Rezaul Hasan.

Declaration of Title and permanent injunction,
Lawful possession;

I am also of opinion that, in a suit for permanent injunction, this Court should satisfy itself as regards the lawful nature of the plaintiffs' possession. In a suit for permanent injunction, the issue regarding title need not be and should not be conclusively decided, because the purpose of granting the relief of permanent injunction is to prevent forceful ouster of an apparently lawful occupant of the suit property, thereby disapproving the act of taking law into the defendants own hands. Nonetheless, the court should incidentally look into the title or other lawful basis of the plaintiffs acquiring and continuing in possession, to satisfy itself that the plaintiff is not an usurper or trespasser or a land grabber and that he has come in clean hands.

JUDGMENT

Md. Rezaul Hasan, J.

1. This Rule has been issued calling upon the opposite parties, to show cause as to why the impugned judgment and decree dated 12.02.2014 (decree signed on 17.02.2014), passed by the learned Additional District Judge, Gaibanda, in Other Appeal No.41 of 2013, allowing the appeal and reversing the judgment and decree dated 28.04.2013 (decree signed on 05.05.2013), passed by the learned Joint District Judge, 1st Court, Gaibanda, in Other Suit No.8 of 2003, should not be set-aside and/or pass such other order or orders passed as to this Court may seem fit and proper.

2. Facts, relevant for disposal of the Rule, in brief, are that one Most. Asia Khatun and others, as plaintiffs, filed Other Suit No. 20 of 2002, subsequently re-numbered as 8 of 2003, against Md. Azadul Islam and others, impleaded as defendants, with a prayer for declaration of title and permanent injunction, in respect of the schedule property. However, the plaintiffs have subsequently dropped the prayer as regards declaration of title in the suit property. Hence, the suit remains to be one for permanent injunction, and, evidently, the defendant did not challenge this amendment of the plaint.

3. Be that as it may, the defendants Nos. 6-8/11/13/20/24-26 have filed written statements and contested in the suit.

4. I have gone through the pleadings of the parties which need not be reproduced here.

5. The Trial Court, after hearing the parties and assessing the evidence on record, dismissed the suit by his judgment and decree dated 28.04.2013 (decree signed on 05.05.2013).

6. Against the said judgment and decree of the Trial Court, the plaintiff-appellant-opposite parties, preferred Other Appeal No.41 of 2013 (as appellants) before the District Judge, Gaibanda, which was heard by the learned Additional District Judge, Gaibanda, who being the Appellate Court, has passed the impugned judgment and decree, allowing the appeal by setting aside the judgment and decree of the trial court, vide judgment and decree dated 12.02.2014 (decree signed on 17.02.2014).

7. Being aggrieved by and dissatisfied with the judgment and decree of the Appellate Court, the Defendant-Respondent-Petitioners filed this application under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

8. Learned Senior Counsel Mr. Mohammad Jamiruddin Sircar with learned Advocate Mr. A.H.M. Abdul Wahab appeared for the petitioners. Mr. Sircar has placed the petition. He first of all submits that, the trial court having properly assessed the evidence on record, had come to the correct findings as regards the facts and circumstances of this case, which ought not to have been set aside by the appellate court. He also submits that, the trial court has rightly found that, the genology placed by the heirs of late Azizur Rahman (predecessor of the defendant) was not correct and that, the C.S. khatain No. 122 Ext. 1 does not support the plaintiff's case of taking grant (*patton*) from Kosir Uddin, who had the superior rent receiving interest in the suit property. He next submits that, the findings of the trial court has been wrongly set aside by the appellate court without applying the judicial mind or assessing the evidence on record. He, making reference to the judgment of the appellate court as well as to the C.S. khatain No. 1, also submits that the plaintiff could not prove their prima-facie title in the suit land in as much as Vomor Ali Sarker is entitled to get 59 decimals of land as per C.S. khatain, but the plaintiffs have made out a case of obtaining *kabuliat* for 90 decimals of land in the suit property, which is in excess of the land owned by Kosir Uddin, who was son of Vomor Ali Sarker. In support of his contention, he has referred a decision reported in 8 M.L.R. (AD) 2003, at page 41: between Sushil Kumar Paik and another -Vs- Harendra Nath Samadder and another. He further submits that, the plaintiffs have submitted certain documents purported to be the *kabuliat dakhila* in support of the alleged *kabuliat* to prove their title in the suit property, but the court cannot take the same into consideration, vide the decision reported in 51 D.L.R. (AD)(1999) 150: between Chandan Mondal @ Kushal Nath Mondal and others -Vs- Abdus Samad Talukder and others. But, the appellate court has totally ignored the law declared in the said decisios and thereby passed the impugned judgment and decree and has committed serious error of law in passing the impugned decision occasioning failure of justice and, therefore, the impugned judgment and decree passed by the appellate court are liable to be set aside and the judgment and decree passed by the trial court may be upheld, he prayed for.

9. Mr. Bivash Chandra Biswas along with Mr. Mrinal Kanti Biswas, learned Advocates appeared for the opposite parties. Mr. Bivash Chandra Biswas, on the contrary, submits that, this is a case for permanent injunction in which the question of proof of title does not at all arise. The learned Advocate submits that, the question of title may be looked into incidentally in a suit for permanent injunction. He submits that, the plaintiffs have filed R.S. khatian No. 147 showing 16 annas lands in the suit plot No. 796 and 830/1685, comprising 98 decimals of land, and the said khatian is in the name of predecessor of the plaintiffs, but the other side (defendants) did not challenge the said khatians and the presumption of the validity of the said khatians remains un-rebutted and this proves the prima-facie basis of the plaintiff's acquiring and remaining possession of the suit land. He next submits that, the schedule "Ka" to the plaint correctly described the land shown in the S.A. khatian No. 147 of Mouza Mouza Sathalia, P.S. Saghata, under District- Gaibanda. He further submits that, the plaintiffs have proved their case by adducing P.W. 1, who has deposed in support of the plaintiff's case and proved the documentary evidence including aforesaid khatian, to support their prima-facie case regarding the plaintiff's lawful possession in the suit land. P.W. 1 was then corroborated by P.Ws. 2 and 3. He next submits, the defendants did not cross examine these P.W. Nos. 2 and 3, nor did the defendants adduce any witness to prove their positive case. He also submits that, the appellate court has pointed out all these aspects of this case and has rightly passed the impugned judgment and decree, which calls for no interference by this revisional Court. In support of his contention, he has referred to the decisions reported in 1986 B.L.D. (HCD) 155: between Pasharuddin Mir -Vs- Ismail Mir and others, 4 B.L.D. (AD)(1984) 285 :between Manindar Nath Sen Sarma -Vs- Bangladesh, 9 B.L.D. (HCD) (1989) 368: between Sheikh Ahmed and others -Vs- Abdul Alim and also the decision reported in 56 D.L.R. (AD)(2004) 53: between Government of Bangladesh, represented by the Additional Deputy Commissioner, Gazipur -Vs- AKM Abdul Hye and others. In these decisions, referred to above, the superior Court has confirmed the presumption of the validity attached to R.S. khatain as per section 144A of the State Acquisition and Tenancy Act, 1950, and also held that, failure to prove the title in a case for permanent injunction will not disentitle the plaintiff to get permanent injunction, if they prove their exclusive possession in the suit property. He proceeds on that, the impugned judgment and decree passed by the appellate court suffers from no illegality or from any other lacuna, whatsoever, and this Rule has no merit and the same may be discharged.

10. I have heard the learned Advocates for both sides, perused the application for revision, lower Court's record as well as the judgment of both the Courts below and other materials in the record.

11. This is a case for permanent injunction, in which the question of declaration of title does not at all arise, though the question of title should be looked into incidentally, to satisfy the court about the basis of the lawful possession of the plaintiff (as opposed to the possession of a trespasser or land grabber).

12. I find that, R.S. khatian No. 147, shows 16 annas lands of the suit plot No. 796 and 830/1685, comprises 98 decimals of land, and that the said khatian is in the name of predecessors of the plaintiffs, but the other side (defendants) did not challenge the legality or correctness of the same and the presumption of the validity of these khatian remains un-rebutted. The schedule "Ka" to the plaint has correctly described the land shown in the S.A. khatian No. 147 of Mouza Mouza Sathalia, P.S. Saghata under District- Gaibanda.

13. I also find that, the plaintiffs have proved their case by adducing P.W. 1, who has deposed in support of the plaintiff's case and proved the documentary evidence including aforesaid khatians to support their prima-facie case regarding their lawful possession in the suit land and he was corroborated by P.Ws. 2 and 3, but the defendants did not cross examine these P.W. Nos. 2 and 3, nor did they adduce witness to prove their positive case.

14. I also find that, the appellate court has pointed out and discussed all these aspects of this case and has rightly passed the impugned judgment and decree, which call for no interference by this revisional Court.

15. **I am also of opinion that, in a suit for permanent injunction, this Court should satisfy itself as regards the lawful nature of the plaintiffs' possession. In a suit for permanent injunction, the issue regarding title need not be and should not be conclusively decided, because the purpose of granting the relief of permanent injunction is to prevent forceful ouster of an apparently lawful occupant of the suit property, thereby disapproving the act of taking law into the defendants own hands. Nonetheless, the court should incidentally look into the title or other lawful basis of the plaintiffs acquiring and continuing in possession, to satisfy itself that the plaintiff is not an usurper or trespasser or a land grabber and that he has come in clean hands. Therefore, decree in a suit for permanent injunction will not operate as res-judicata, in a subsequent suit, so far as the issue of title is concerned.**

16. With these findings and observations, I find that, the impugned judgment and decree passed by the appellate court suffers from no illegality, nor from any other lacuna whatsoever, and this Rule has no merit and the same should be discharged.

O R D E R

17. In the result, the Rule is discharged.

18. The impugned judgment and decree dated 12.02.2014 (decree signed on 17.02.2014), passed by the learned Additional District Judge, Gaibanda, in Other Appeal No.41 of 2013 is hereby upheld.

19. The order of stay granted earlier by this Court is hereby vacated.

20. No costs.

21. Let a copy of this judgment along with the Lower Court's Record be sent down to the concerned Courts at once.

12 SCOB [2019] HCD

HIGH COURT DIVISION

Civil Revision No. 1783 of 2016.

Md. Hossen and others.
…….Petitioners.
-Vs-
Haji Shamsunnahar Begum and others.
.....Opposite Parties.
Mr. Abul Kalam Chowdhury, Advocate.
....For the petitioners.

Mr. Shafique Ahmed, Sr. Advocate with
Mr. Mahbub Shafique with
Mr. Mohammad Abdul Karim, Advocates.
....For the Opposite Party Nos.1.

Heard on 06.02.2019, 24.02.2019
and Judgment on 25.02.2019.

Present:
Mr. Justice Md. Rezaul Hasan.

Order 1 Rule 10 of the Code of Civil Procedure, Co-plaintiffs, interest , the Waqf Estate in the suit property;

The applicant Md. Hossen and others, who had filed the application under Order 1 Rule 10 of the Code of Civil Procedure, were not entitled to be added as plaintiffs as heirs of deceased plaintiff No. 2 Haji Badsha Miah. Because, the admitted position is that, the suit property has been claimed (in the plaint) as the property of Abdul Nabi Malum Waqf Estate, not personal property of Haji Badsha Miah. ... (Para 13)

As such, the added plaintiff-petitioners have denied the interest of the Waqf Estate in the suit property by asserting their personal right in the same. Hence, their interest in the suit property is in conflict with that of the (surviving) plaintiff who claims herself as the sole *Motwali* (Manager) of the Waqf Estate, since another *Motwali* (plaintiff No. 2) has died. ... (Para 14)

Therefore, the interest claimed by the petitioner being in clear conflict with that claimed by the plaintiff, these Md. Hossen and 4 other are not entitled to be added as co-plaintiffs. ... (Para 15)

JUDGMENT

Md. Rezaul Hasan, J.

1. This Rule has been issued calling upon the Opposite Party No. 1, to show cause as to why the impugned judgment and order dated 12.04.2016, passed by the Additional District Judge, 6th Court, Chattogram, in Civil Revision No.153 of 2015, allowing the revision and thereby setting aside the judgment and order dated 26.08.2015, passed by the learned Senior Assistant Judge, 3rd Court, Chattogram in Other Class Suit No. 129 of 1999, should not be set-aside and/or pass such other order or orders passed as to this Court may seem fit and proper.

2. Facts, relevant for disposal of the Rule, in short, are that one Haji Shamsunahar Begum, the 1st wife of Haji Badsha Miah, has filed Other Class Suit No. 129 of 1999 on 26.09.1999, as plaintiff, before the court of 3rd Assistant Judge, Chattogram, seeking

following reliefs that " (ক) ১নং বিবাদীর নামে পি.এস. ১২৩৫/২৭০৯ খতিয়ান এবং রিএস. ৩৭৮নং খতিয়ান ও ২নং বিবাদীর নামে বি.এস. ৩১৯৯ নং খতিয়ানে লিপি ভুল, ভিত্তিহীন, তঞ্চকতাপূর্ণ, যোগসাজশী, বাতিল অকার্য্যকর এবং তৎ দ্বারায় বাদীগন ও ওয়াকফ ষ্টেট বাধ্য নহে মর্মে ঘোষনামূলক ডিক্রি প্রদানের মর্জি হয়।(খ) প্রোক্ত মতে ঘোষনা প্রচারান্তে নালিশী জমি আবদুল নবী মালুম ওয়াকফ ষ্টেটের পক্ষে মোতায়াল্লী সূত্রে বাদীগনের নাম রাজস্ব দপ্তরে লিপি করিয়া নিতে অধিকারী হওয়া মর্মে ঘোষনামূলক প্রতিকারের ডিক্রি প্রদানের মর্জি হয়।"

3. The said suit was filed against Sahajadi Begum and 6 others as defendants.

4. It appears from an application filed by Md. Hossen and 4 others, son and daughter of Haji Badsha Miah, who died on 27.07.2013 because of aliment of old age, leaving his 1st wife Haji Shamsunnahar Begum (the plaintiff No. 1) and the children, who are the present applicants. Further case of the applicants Md. Hossen and 4 others, is that, the plaintiff No. 2, Haji Badsha Miah, had 2(two) wives, of whom Haji Shamsunnahar Begum, plaintiff No. 1, is his 1st wife, while these applicants (Md. Hossen and others are children of Haji Badsha Miah and his 2nd wife, Bagicha Khatun). In these backgrounds, the applicants had filed an application under Order 1 Rule 10 of the Code of Civil Procedure, before the trial court, to add them as co-plaintiffs with Haji Shamsunnahar Begum, as heirs of the plaintiff No. 2.

5. The trial court, after hearing the said application, allowed the prayer of the applicants Md. Hossen and 4 others, by its order dated 26.08.2015, passed in Other Class Suit No. 129 of 1999, and added them as co-plaintiff Nos. 2(Ka) to 2(Umo), in place of plaintiff No. 2, deceased Jahi Badsha Miah.

6. Against the said order dated 26.08.2015, of the trial court, Haji Shamsunnahar Begum preferred a revisional application, being No. 153 of 2015, before the learned District Judge, Chattogram, which was heard and disposed of by the learned Additional District Judge, 6th Court, Chattogram who, by his judgment and order dated 12.04.2016, has allowed the revision and thereby set aside the judgment and order of the trial court. Consequently, the said applicants have ceased to remain as co-plaintiffs number 2(Ka) to 2(Umo).

7. Being aggrieved by and dissatisfied with the said order dated26.08.2015 of the lower revisional court, Md. Hossen and others filed this application under section 115(4) of the Code of Civil Procedure and obtained leave as well as the present Rule.

8. Mr. Abul Kalam Chowdhury, learned Advocate appeared for the petitioner. He submits that, the trial court has rightly passed the order dated 26.08.2015 making the applicants as co-plaintiffs Nos. 2(Ka) to 2(Umo) in the place of plaintiff No. 2 Haji Badsha Miah (died on 22.07.2013), as his heirs. But, the revisional court has failed to appreciate the factual and legal significance of the order dated 26.08.2015 and has committed error of law, in passing the impugned order, that has resulted in error in the impugned order thus passed, occasioned failure of justice and thereby prejudiced the interest of the applicants. He empathically submits that, since the petitioner are admitted heirs of deceased plaintiff No. 2 Haji Badsha Miah, therefore, they are legally entitled to be added as co-plaintiffs. As such, he concludes, the Rule bears merit and the same may kindly be made absolute.

9. Learned Senior Counsel Mr. Shafique Ahmed alongwith learned Advocates Mr. Mahbub Shafique and Mr. Mohammad Abdul Karim have appeared on behalf of the Opposite party No. 1. The main contention of the learned Counsel Mr. Shafique Ahmed is that, from a mere perusal of the plaint it will appear that, the suit has been filed by Haji Shamsunnahar Begum, as plaintiff No. 1, and her husband Haji Badsha Miah, as plaintiff No. 2, in which,

the children of Haji Badsha Miah (subsequently added as plaintiffs Nos. 2(Ka) to 2(Umo) were not plaintiffs, nor they were defendant in that suit. He further submits that, this is a suit relating to right and title of Waqf Estate, in the suit property, and the reliefs prayed for are (i) the correction of three khatins and records of right which ought to have prepared in the name of Waqf Estate and (ii) to record the name of the plaintiff Nos. 1 and 2, in the corrected khatins, as the *Motwali* of Abdul Nobi Malum Waqf Estate. Therefore, admittedly, the suit is concerning correction of the khatian or records of right in respect of the property of the Waqf Estate, not in respect of the personal property of Badsha Mia (deceased plaintiff No.2). He proceeds on that, the property as mentioned in the schedule of the plaint, since not claimed as the individual property of Haji Badsha Miah, rather it was claimed to be the property of Waqf Estate, therefore, the *Motwaliship* in respect of the suit property will be governed as per provisions of Waqf deed, not by way of inheritance, as claimed by the heirs of deceased Haji Badsha Miah. The learned Advocate further submits that, the trial court has committed error of law in as much as it has failed to appreciate that the property described in the schedule of the plaint belonged to Waqf Estate as distinct from individual property of the plaintiff No.2. Hence, the application for addition of parties filed by the heirs of deceased Haji Badsha Miah was totally misconceived and, in passing the impugned judgment and order dated 12.04.2016, by setting aside the order dated 26.08.2015 of the trial court, the lower revisional court has committed no error of law, nor the same has resulted in any error in the impugned decision, causing any prejudice to the interest of the applicants. He, therefore, submits that, the Rule has no merit and the same may be discharged.

10. I have heard the learned Advocates appeared for the parties, perused the application for revision, as well as the counter affidavit filed by the plaintiff-opposite party No. 1, alongwith judgment and order of the Courts below and other materials in the record.

11. From a mere perusal of the plaint (Annexure-A), I find that, the suit has been filed by Haji Shamsunnahar Begum, Opposite Party No. 1 and her husband Haji Badsha Miah, respectively as the plaintiff Nos. 1 and 2, claiming right and title of the Waqf Estate, in the schedule property, and for correction of three khatians by recording name of the Waqf Estate as per prayer "Ka". Further prayer (Kha) is that, the name of the *Motwali* i.e. plaintiffs shall be recorded in the corrected khatians as representative (*Motwali*) of Abdul Nabi Malum Waqf Estate.

12. It appears that, this is a case concerning right and title of the Waqf Estate that was clouded because of alleged wrong recording of name of the principal defendants in the khatian referred to in prayer "Ka", with a further prayer (Kha) to record name of the *Motwali* of Waqf Estate in the corrected khatians, if the suit is proved before the court.

13. As such, the distinction is very much clear and the applicant Md. Hossen and others, who had filed the application under Order 1 Rule 10 of the Code of Civil Procedure, were not entitled to be added as plaintiffs as heirs of deceased plaintiff No. 2 Haji Badsha Miah. Because, the admitted position is that, the suit property has been claimed (in the plaint) as the property of Abdul Nabi Malum Waqf Estate, not personal property of Haji Badsha Miah. If the plaintiff seeks that, the record was wrong, then these disputed khatians should be corrected and name of Motwali should, as per procedure, be recorded in the corrected khatian to be prepared in the name of Waqf Estate (if and to the extent the plaintiff succeeds). Hence, I do not find anything wrong, nor any error in the impugned decision, passed by the first revisional court, in Civil Revision No. 153 of 2015.

14. Another very much important legal and factual aspect is that, the interest claimed by the applicants Md. Hossen and others, in the light of the facts and circumstances stated in the application filed by them under Order 1 Rule 10 of the Code of Civil Procedure vis-a-vis, the case stated in the plaint, is in clear conflict with the interest claimed by the plaintiffs in Other Class Suit No.129 of 1999. In this suit, the plaintiff claimed right and interest of the Abdul Nabi Malum Waqf Estate in the suit property and prayed for correction of the khatians, not as individual owners. On the contrary, the applicants Md. Hossen and others have claimed personal interest in the suit property, practically denying the right and title claimed by Waqf Estate in the suit property. As such, the added plaintiff-petitioners have denied the interest of the Waqf Estate in the suit property by asserting their personal right in the same. Hence, their interest in the suit property is in conflict with that of the (surviving) plaintiff who claims herself as the sole *Motwali* (Manager) of the Waqf Estate, since another *Motwali* (plaintiff No. 2) has died.

15. **Therefore, the interest claimed by the petitioner being in clear conflict with that claimed by the plaintiff, these Md. Hossen and 4 other are not entitled to be added as co-plaintiffs.**

16. Having further considered the application filed under Order 1 Rule 10 of the Code of Civil Procedure, I also find that, the applicants did not claim to add themselves as defendants, alleging that they are necessary parties. Therefore, this Court can neither pass any order to add them as defendants.

17. In view of the above, I find no merit in this Rule.

O R D E R

18. In the result, the Rule is discharged.

19. The impugned judgment and order dated 12.04.2016, passed by the Additional District Judge, 6th Court, Chattogram, in Civil Revision No.153 of 2015, allowing the revision and thereby setting aside the judgment and order dated 26.08.2015, passed by the learned Senior Assistant Judge, 3rd Court, Chattogram, in Other Class Suit No. 129 of 1999, is hereby upheld.

20. The order of stay and stay granted earlier by this Court is hereby vacated.

21. No costs.

22. Let a copy of this judgment be sent to the concerned Courts at once.

12 SCOB [2019] HCD

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 489 of 2014.

Kapasia Overseas Ltd.
4A-B, Baitul Khair Tower, 8th Floor, Purana Paltan, Dhaka.
…… Petitioner

-versus-

Government of the People's of Bangladesh, Ministry of Expatriates' Welfare and Oversees Employer Affairs, Bangladesh Secretariat, Ramna, Dhaka and others.
…… Respondents.

Mr. Mizanul Hoque Chowdhury, Advocate
.....For the petitioner.
Mr. Tanvir Parvez, Advocate
..... For the respondent No. 2.

Mrs. Amatul Karim, D. A. G. with
Mr. A. R. M. Hasanuzzaman, A. A. G. with
Mr. Abu Saleh Md. Fazle Rabbi Khan, A.A.G.
..... For the Respondents.

Heard on: 21.03.2017, 01.08.2017, 08.08.2017.

Judgment on: 16.08.2017.

Present:
Mr. Justice Tariq ul Hakim
And
Mr. Justice Md. Faruque (M. Faruque)

Emigration Ordinance, recruiting license being, Emigration Ordinance, 1982, section 14 of the Emigration Ordinance, 1982, cancellation of the license and forfeiture of securities;

It is a mandatory provision of law that before cancellation of a license, the authority must give a chance to the licensee of being heard, failing which the cancellation has no basis in the eye of law. ... (Para 24)

In this case, the order does not show nor there is anything on record to show that the respondent has given any chance of hearing to the petitioner before making such an order of cancellation and forfeiture of securities. Therefore, the order is violative of the section 14(1) of the ordinance and was thus bad in law. ... (Para 25)

The writ Court will not examine and weigh the aggrieved person's case on merit as an Appellate Court but to ensure that he was given a fair deal by the authority in accordance with law. ... (Para 26)

JUDGMENT

Md. Faruque (M. Faruque), J:

1. Rule Nisi was issued calling upon the respondents to show cause as to why the Memo No. 49.008.011.0977.00.2075.2010-330 dated 08.07.2013 (Annexure-L) issued by the respondent No. 3 cancelling the petitioner's license being No. RL-977 and thereby forfeiting the entire security deposits against the said recruiting license of the petitioner under section

14 of the Emigration Ordinance, 1982 and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. At the time of issuance of the Rule the operation of the impugned Memo No. 49.008.011.0977.00.2075.2010-330 dated 08.07.2013 (Annexure-L) was stayed.

3. The short facts, for disposal of the Rule are that the petitioner is a private limited company being registered with the Register of Joint Stock Company and engaged in manpower business having recruiting agency and the petitioner is the member of Bangladesh Association of International Recruiting Agencies (BAIRA). The petitioner has been granted a recruiting license being No. RL-977 by observing all the formalities under Section 10 of the Emigration Ordinance, 1982 to conduct the business of a recruiting agency.

4. The respondent No. 2 issued a notice vide Memo No. ESRL-2285/2005/2011 dated 27.09.2012 (Annexure-D) upon the petitioner stating that the Ministry of Manpower, Singapore did not authorize First Care Employment Agency in relation to the appointment of 5000 Bangladeshi Workers and Bangladesh High Commission did not attest any demand letter in favor of the petitioner and accordingly asked the petitioner to give a reply from the within 7(seven) days.

5. The petitioner on 07.10.2013 sent a reply to the respondent No. 2 in relation to the show cause notice dated 27.09.2012 stating that the petitioner had no knowledge about the allegation of the show cause notice and the petitioner did not send any worker to the said company of Singapore and the petitioner did not give any power of authority and also did not take any money in the name of that company of Singapore. (Annexure-E).

6. The Director, Bureau of Manpower, Employment and Trading formed an investigation team for investigation to submit a report about the demand letter for 5000 Bangladeshi Workers to the First Care Employment Agency by forgoing seal and signature of First Secretary (Labour), Singapore, Bangladesh High Commission and also requested the investigation team to submit a report within 10(ten) working days vide Memo No. ESRL 2285/2005 dated 26.11.2012. The Deputy Director and Investigation Officer, Bureau of Manpower, Employment and Trading issued a letter vide Memo No. ESRL-977/তদন্ত/2012/2437 dated 29.11.2012 before the investigation officer in person with a written statement and related evidence to the said allegation. (Annexure-F).

7. Thereafter, respondent No. 3 issued a show cause notice vide memo No. 49.008.011.0833.00.101.2010-11 dated 10.01.2013 upon the petitioner as to why the license of the petitioner shall not be cancelled and the securities of the petitioner shall not be forfeited according to section 14 of the Emigration Ordinance, 1982 and also asked the petitioner submit to reply of that show cause notice within 15 (Fifteen) days. (Annexure-H)

8. Thereafter, the petitioner sent a reply to the Secretary, Ministry of Expatriates' Welfare and Overseas Employer Affairs in relation to the show cause notices dated 10.01.2013 stating that the petitioner had no knowledge about the said allegation and moreso the Investigation Team did not find any connection of the petitioner with the said allegation and accordingly prayed for discharging him from the said allegation. (Annexure-I).

9. The respondent No. 3 again issued another show cause notice vide Memo No. 49.008.011.0033.00.101.2010-179 dated 02.04.2013 upon the petitioner stating that the

petitioner failed to submit any documentary evidence in relation to one namely Md. Hossain and accordingly the liability of making forged seal and signature goes to the petitioner and hence the respondent No. 3 according to section 104 of the Emigration Ordinance, 1982 asked the petitioner as to why the license of the petitioner shall not be cancelled and the securities of the petitioner shall not be forfeited and also requested the petitioner to submit a reply within 15 (Fifteen) days. (Annexure-J).

10. The petitioner submitted a reply to the Secretary, Ministry of Expatriates' Welfare and Overseas Employer Affairs in relation to the show cause notice dated 02.04.2013 stating that the investigation team did not find any connection of the petitioner with the said allegation and moreso gave the address and telephone number of Md. Hossain mentioning that the petitioner is willing to give testimony at any time and prayed for discharging him from the said allegation. (Annexure-K).

11. Thereafter, the respondent No. 3 cancelled the license of the petitioner and forfeited the securities of the petitioner under section 14 of the Emigration Ordinance, 1982 vide Memo No. 49.008.011.0977 .00.2075.2010-330 dated 08.07.2013 stating that the petitioner failed to submit any evidence in relation to confirmation of Md. Hossen with the allegation (Annexure-L). The petitioner having no other alternative and efficacious remedy, filed this writ petitioner under Article 102 of the Constitution of People's Republic of Bangladesh and obtained the instant Rule.

12. The learned Advocate Mr. Mizanul Hoque Chowdhury appearing for the petitioner submits that section 14 of the Emigration Ordinance, 1982 provides that Government may cancel license after making inquiry and by giving opportunity of being heard to the licensee but in the instant case the respondents issued as many as 4 (four) show cause notices upon the petitioner and accordingly the petitioner replied the said show cause notices and also expressed his desire to participate in the hearing vide reply dated 27.04.2013 but the respondents without giving any opportunity to the petitioner issued the impugned order cancelling the license of the petitioner and forfeiting the securities which is violative of section 14 of the Emigration Ordinance, 1982. In this context the learned Advocate referred the case of Government of Bangladesh and others –versus- Tajul Islm reported in 4MLR(AD) 199.

13. He further submits that the respondents did not supply the inquiry report along with the show cause notice before cancelling the license and forfeiting the securities which is violative of section 14 of the Emigration Ordinance, 1982 and also violation of principle of natural justice and the impugned order has been passed at the direction of the Bangladesh High Commission, Singapore. Therefore the respondent No. 3 failed to exercise his own discretion considering the reply of the petitioner which is evident from the impugned order as such the impugned order is liable to be declared to have been passed without lawful authority and is of no legal effect.

14. He submits that the petitioner cannot run his business due to cancellation of the licensee and he has been deprived from his right to life, livelihood, business as guaranteed under Article 31, 32 and 40 of the Constitution of the People's Republic of Bangladesh.

15. Rule has been contested by the respondent No. 2 by filing affidavit-in-opposition wherein it has been stated that the petitioner was given opportunity of being heard appearing before the respondent No. 3. The investigation team mentioned in the investigation report that Md. Hossain is a Bangladeshi national, worked as a representative of the petitioner who

managed the demand letters for sending workers abroad by the petitioner. But while the address of Md. Hossain was asked by the investigating team, the petitioner failed to give the address of Md. Hossain which proved the involvement of the petitioner with the allegation.

16. By filing another supplementary affidavit dated 08.08.2018 for the respondent No. 2 the learned Advocate Mr. Tanvir Parvez submits that the Ministry of Expatriates' Welfare and Overseas Employment came to learn about the forged demand note from a letter dated 27.07.2012 issued by the First Secretary (Labour) of the Bangladesh High Commission in Singapore. The respondent No. 2 cannot confirm as to whether the copy of the inquiry report was given to the writ petitioner and the record does not show anything that the copy was given to the writ-petitioner. He also submits that the petitioner is not entitled to get a copy of the inquiry report, as such the petitioner's right under the principle of natural justice had not been breached. The Ministry of Expatriate Welfare and Overseas Employment has not initiated any action against Md. Hossain.

17. We have heard the learned Advocate for the writ-petitioner and the learned Advocate for the respondent No. 2, perused the impugned letter, writ petition and other materials on record.

18. It appears that the petitioner is a private limited company duly registered in the Register of Joint Stock Company and engaged in manpower business having recruiting agency and the petitioner is a member of Bangladesh Association of International Recruiting Agencies (BAIRA). The petitioner has been granted a recruiting license being No. RL-977 under Section 10 of the Emigration Ordinance, 1982 to conduct the business of a recruiting agency. The respondent No. 2 issued a notice vide Memo No. ESRL-2285/2005/2011 dated 27.09.2012 upon the petitioner stating that the Ministry of Manpower, Singapore did not authorize First Care Employment Agency in relation to the appointment of 5000 Bangladeshi Workers and Bangladesh High Commission did not attest any demand letter in favor of the petitioner and accordingly asked for a reply from the petitioner within 7(seven) days. On 07.10.2013 the petitioner sent a reply to the respondent No. 2 in relation to the show cause notice dated 27.09.2012 stating that the petitioner had no knowledge about the allegation of the show cause notice stating that the petitioner company did not send any worker to the said company of Singapore . The petitioner-company also stated that the company did not give any power of authority to any person and has not take any money in the name of that company of Singapore.

19. The Director, Bureau of Manpower, Employment and Trading formed an investigation team for investigation and to submit a report about the demand letter for 5000 Bangladeshi Workers to the First Care Employment Agency by forgoing seal and signature of First Secretary (Labour), Singapore, High Commission and the investigation team asked to submit a report within 10(ten) working days vide Memo No. ESRL 2285/2005 dated 26.11.2012. The Deputy Director and Investigation Officer, Bureau of Manpower, Employment and Trading issued a letter vide Memo No. ESRL-977/তদন্ত/2012/2437 dated 29.11.2012 before the investigation officer in person with a written statement and related evidence to the said allegation. Thereafter, the respondent No. 3 issued a show cause notice vide memo No. 49.008.011.0833.00.101.2010-11 dated 10.01.2013 upon the petitioner as to why the license of the petitioner shall not be cancelled and the securities of the petitioner shall not be forfeited according to section 14 of the Emigration Ordinance, 1982 and also requested the petitioner to submit a reply of that show cause notice within 15 (Fifteen) days.

20. It appears from the record that the petitioner sent a reply to the Secretary, Ministry of Expatriates' Welfare and Overseas Employer Affairs in relation to the show cause notices dated 10.01.2013 stating that the petitioner had no knowledge about the said allegation. Thereafter, the Investigation Team did not find any connection of the petitioner with the said allegation and accordingly prayed for discharging him from the said allegation.

21. The respondent No. 3 again issued another show cause notice vide Memo No. 49.008.011.0033.00.101.2010-179 dated 02.04.2013 upon the petitioner stating that the petitioner failed to submit any documentary evidence in relation to one namely Md. Hossain and accordingly the liability of making forged seal and signature goes to the petitioner and hence the Respondent No. 3 according to section 104 of the Emigration Ordinance, 1982 asked the petitioner as to why the license of the petitioner shall not be cancelled and the securities of the petitioner shall not be forfeited and also requested the petitioner to submit a reply within 15 (Fifteen) days. Thereafter, the petitioner submitted a reply to the Secretary, Ministry of Expatriate Welfare and Overseas Employer Affairs in relation to the show cause notice dated 02.04.2013 stating that the investigation team did not find any connection of the petitioner with the said allegation and the petitioner has no relation with the said Md. Hossain or any other person to the First Secretary, Singapore and the petitioner never submitted the demand letter for 5000 person or any person to the concerned Ministry and the alleged Mohamad Hossain is not connected with the petitioner company. The petitioner also stated that he is willing to give testimony at any time and prayed for discharging him from the said allegation. But the respondent No. 3 cancelled the license of the petitioner and forfeited the securities of the petitioner under section 14 of the Emigration Ordinance, 1982 vide Memo No. 49.008.011.0977 .00.2075.2010-330 dated 08.07.2013 which cannot be sustainable in the eye of law.

22. Section 14 of the Emigration Ordinance, 1982 clearly provides that before cancelling the licensee, an opportunity of being heard must be given to the petitioner. The said section is reproduced below:

> Section 14 (1)- " If, at any time during the pendency of a license, the Government is satisfied, after making such enquiry as it may deem necessary, that the licensee has been guilty of misconduct or that his conduct or performance as a licensee has been unsatisfactory or that he has violated any of the provisions of the Ordinance or the rules made thereunder or the prescribed Code of Conduct, it may, after giving the licensee an opportunity of being heard, by order in writing, cancel the licence or suspend it for a period to be specified in the order and may also forfeit the security furnished by him under section 10 in full or part."

23. In the case of Government of Bangladesh and others –versus- Tajul Islm reported in 4MLR(AD) 199 their Lordships held that:

> "Section-14(1)-Cancellation of license without proper show cause notice-Violative of natural justice-
>
> Government have the power to suspend or cancel licence under section 14 of the Ordinance on the ground of misconduct and violations of the relevant provisions of the Ordinance. But in doing so the licensee must be given sufficient notice to show cause and reasonable opportunity of being heard. Licence is a legal privilege granted under law and not a charity. The show cause notice is not a mere technicality or idle ceremony. The notice must be clear and contain the facts of allegations. When the notice is vague it is no notice in the eye of law. Cancellation of licence without proper

notice to show cause and without opportunity of representing the defence being arbitrary and violative of the principle of natural justice is not sustainable in law."

24. Section 14 of the Immigration Ordinance, 1982 and the settled principle of law derives from the decision of our Apex Court stated above, it is a mandatory provision of law that before cancellation of a license, the authority must give a chance to the licensee of being heard, failing which the cancellation has no basis in the eye of law.

25. In this case, the order does not show nor there is anything on record to show that the respondent has given any chance of hearing to the petitioner before making such an order of cancellation and forfeiture of securities. Therefore, the order is violative of the section 14(1) of the ordinance and was thus bad in law. We shall confine to the allegation of not giving the petitioner an opportunity of being heard before issuing the impugned order dated 08.03.2013 (Annexure-L), we find that there was no hearing at all.

26. A license in a commercial sense is not a charity done to a person but a privilege accorded generally on payment of fee. So, the cancellation of a license is a serious matter, adversely touching a person's pecuniary interest. More than that, it affects a fundamental right of a citizen to conduct any lawful trade or business subject to certain restrictions imposed by law. The Court would always insist that an authority exercising such a drastic power of cancellation, do act strictly according to law and always with fairness. The writ Court will not examine and weigh the aggrieved person's case on merit as an Appellate Court but to ensure that he was given a fair deal by the authority in accordance with law.

27. In the instant case, the order of cancellation of the license and forfeiture of securities of the petitioner even does not show that the Government was either "satisfied" as required under section 14(1) or that the petitioner's long representation was ever brought to its notice. The impugned order thus was a bad order in the eye of law.

28. In view of the above facts and circumstance of the case, we find that the impugned order issued by the respondent No. 3 cancelling the petitioner's recruiting license being No. RL-977 and forfeiting the entire securities, deposited by the petitioner (Annexure-L) was not in accordance with law.

29. In the result, the rule is made absolute.

30. Impugned memo No. 49.008.011.0977.00.2075.2010-330 dated 08.07.2013 (Annexure-L) issued by the respondent No. 3 cancelling the petitioner's license being No. RL-977 and forfeiting the entire security deposits against the said recruiting license of the petitioner under section 14 of the Emigration Ordinance, 1982 is declared to have been passed without lawful authority and is of no legal effect.

31. The respondents are directed to renew the license of the petitioner subject to payment of all arrears of renewal fees in accordance with law within 3(three) months from the date of receipt of this judgment and order.

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

12 SCOB [2019] HCD

HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION N0.4149 of 2018
Shahina Begum
..... Petitioner
-Versus-
The Election Commission of Bangladesh, represented by the Chief Election Commissioner, Election Commission Secretariat, Dhaka and others.
…….Respondents

Mr. Abdul Baset Majumder, Senior Counsel with
Mr. Abdul Matin Khashru, Senior Advocate
Mr. Md. Nurul Islam, Senior Advocate
Mr. S.M. Abul Hosain and
Mr. Nakib Saiful Islam, Advocates
...For the petitioner.

Mr. Tawhidul Islam, Advocate
.....For the respondent No.1

Mr. Md. Azahar Ullah Bhuiyan with
Mr. Sheikh Jahangir Alam, Advocates
.... For the respondent No.9.

Mr. ABM Abdullah Al Mahmud (Bashar) DAG
Mr. Md. Saiful Alam, AAG and
Mr. Md. Asazuzzaman, AAG
.. For the respondent-government

Heard On: 22.10.2018
And
Judgment On: 31.10.2018

Present:
Mr. Justice F.R.M. Nazmul Ahasan
And
Mr. Justice K.M. Kamrul Kader

Valid Candidate , Election Commission, Re-election, schedule of re-election, rule 37 (3) of Local Government Pourashava Election Rules 2010;

That the period between the declaration of schedule of election till the publication of the result in the official gazette has been held to be comprised in the election process. The case in our hand it appears that the petitioner filed writ petition before this court invoking the Article 102 of the Constitution before publication of the official gazette. As such the writ petition is not maintainable and the rule is liable to be discharged.
... (Para 23)

JUDGMENT

F.R.M. Nazmul Ahasan, J:

1. Upon an application under Article 102 of the Constitution of the People's Republic of Bangladesh a rule *nisi* was issued in the following terms:

> *"Let a Rule Nisi issue calling upon the respondents to show cause as to why the impugned decision (Annexure-L) taken by the respondent No.1 on 14.03.2018 for holding re-election Malirchar Haji Para Govt. Primary School polling centre at Bakshigonj Pouroshava, Jamalpur on 29.03.2018 ignoring inquiry report (Annexure-K) should not be declared to have been done without lawful authority and of no legal*

effect and why a direction should not be given upon the Respondents to hold re-election in polling centre Nos.2,3,5,7,8 and 9 of the said Pourashava and / or pass such other or further order or orders as to this Court may seem fit and proper."

2. Facts relevant for disposal of the rule, in short, are that on 12.11.2017 the respondent No.1 published schedule of 4 (four) Pourashava Election including Bakshigonj Pourashava under Jamalpur District fixing date of election on 28.12.2017. The petitioner being interested was nominated for the post of Mayor by the Bangladesh Awami League to participate in Bakshigonj Pourashava General Election, 2017. Accordingly, she purchases nomination paper from the respondents and submitted the same to the respondent office and accordingly she was declared valid candidate and allocation of symbol was Boat (Nouka).

3. During the election, the petitioner appointed as many as 120 agents as well as polling agent. But the other contesting candidate tried to influence the election process and accordingly, he made complain to the returning Officer on 28.12.2017 to take necessary action. But the returning officer and other officials conducted the election ignoring all the complain and allegations and prepared result sheets of the polling centre and published the total result of election for the post of Mayor of Bakshigonj on 31.12.2017as primary result unofficially showing the highest vote and near to the highest vote. On 01.01.2018 the petitioner made a complain to the respondent No.1 to inquire about the matter and to take step to hold re-election against those polling centres but the respondent No.1 did not take any step regarding the re-election.

4. Finding no other alternative the petitioner filed a writ petition being No.519 of 2018 before the High Court Division and a Division Bench on 16.1.2018 disposed of the said petition with a direction upon the respondent No.1 to dispose of the complain dated 01.01.2018 within 15 days from date of receipt of the order and also given some observations. After receiving the order, the respondent No.1 form a two members inquiry committee and after conducting inquiry, the said committee prepared a report and the same was submitted to the Election Commission. But the respondent No.1 ignoring the inquiry report took decision on 14.3.2018 for holding re-election in polling centre No.1 wherein the election was stopped by the presiding officer and thereby the schedule of re-election was declared by the Assistant Secretary of Election Commission.

5. Being aggrieved and dissatisfied with the aforesaid order the petitioner filed this writ petition and obtained the present rule and an order of stay of the aforesaid re-election.

6. Against the said interim order the respondent No.9 filed a Civil Petition for Leave to Appeal being No.1534 of 2018 and the Appellate Division after hearing the parties passed an order as follows: *"Let the Rule be heard and disposed of by the High Court Division expeditiously. However, operation of the order dated 28.03.2018 passed by the High Court Division in Writ Petition No.4149 of 2018, so far as it relates to interim order of stay be stayed till disposal of the Rule. The leave petition is disposed of with the above observations and directions."*

7. At the time of hearing the petitioner filed supplementary affidavit, respondent No.9 and respondent No.1 filed affidavit-in-opposition.

8. At the time of hearing Mr. Abdul Baset Majumder, Senior Counsel along with Mr. Abdul Matin Khashru and Mr. Md. Nurul Islam and Mr. Nakib Saiful Islam, the learned

Advocates appears on behalf of the petitioner. On the other hand Mr. Md. Azahar Ullah Bhuiyan with Mr. Sheikh Jahangir Alam, learned Advocate for the respondent No.9 and Mr. Tawhidul Islam, learned Advocate appears on behalf of the respondent No.1.

9. Mr. Abdul Baset Majumder, learned senior counsel submits that the impugned order has been passed by the respondent No.1 violating the provision of Rules- 24, 25, 28, 32, 38, 40, and 41 of the Local Government Pourashava Election 2010. As such the whole process of election is *coram- non-judice* and malice in law and same is liable to be declared without any lawful authority and is of no legal effect. The learned Advocate for the petitioner further submits that the respondent was very much biased upon the influence of the candidate Md. Nazrul Islam and they have done all possible action for wining him and violating the provision of election rule they declared Mayor of Bakshigonj Pourashava which is contrary to the process of free and fair election and as such the same is declared to have been done without any lawful authority and is of no legal effect. The learned Advocate for the petitioner also submits that the respondent No.1 did not consider the inquiry report which was held by the direction of this court in writ petition No.519 of 2018 in which it is clearly stated that the allegation of the petitioner so far as it relates to the irregularities in conducting the election has been proved but the Election Commission without considering the aforesaid facts and circumstance and the contents of the inquiry report took decision of the re-election in one centre which was earlier stopped by the presiding officer. Thus the impugned decision and the schedule of the election is absolutely malice in law and the same is declared to have been passed without any lawful authority and is of no legal effect. The learned Advocate for the petitioner next submits that declaring schedule of the re-election by the Election Commission is itself violation of the rule 37 (3) of Local Government Pourashava Election Rules 2010. In view of that the process of re-election is coram-non-judice and malice in law and as such the schedule of the re-election which is declared by the Election Commission is illegal and the same is liable to be declared without any lawful authority and is of no legal effect.

10. On the other hand Mr. Md. Azahar Ullah Bhuiyan, learned Advocate for the respondent No.9 placing the affidavit-in-opposition with the inquiry report and the result sheets submits that the petitioner did not raise any objection on the day of election on 28.12.2017 either Returning or the Presiding Officer regarding the alleged rigging. The petitioner after obtaining minimum votes lodged a fabulous complain after three days on 1.1.2018 in order to obstruct the election process and publication of the election result. He next submits that with the direction of the High Court Division the respondents made an inquiry in which they did not find any veracity in the allegation made by the petitioner. The learned Advocate further submits that the respondent No.1 duly and properly declared the election of the one polling centre and the election process should not be stopped before publishing the final result and the petitioner may agitated her grievance, if any, before the election tribunal.

11. Mr. Tawhidul Islam, learned Advocate appearing for the respondent No.1, Election Commission placing the affidavit-in-opposition and submits that the respondent No.1 after declaration of the election schedule in that pourashava conducting the election properly and after end of the election on 28.12.2017 the official result of the said election was declared and in one centre Malirchar Government Primary School, the election was stopped by the presiding officer within 12 centres and result of all the centres was declared by the returning officer on 28.12.2017. Upon direction by the High Court Division in writ petition No.519 of 2018 the respondent No.1 conducted an inquiry and accordingly the report was submitted on 28.2.2018 with the following observation.

12. " ৩৫। পর্যবেক্ষন

(ক) মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে উল্লিখিত বকশীগন্জ পৌরসভার ২,৩,৫,৬,৭,৮, ও ৯ নং ভোট কেন্দ্রে নির্ধারিত সময় সকাল ৮.০০ টায় ভোট গ্রহণ পর্যন্ত সুস্ঠ ও শান্তিপূর্ণভাবে সম্পন্ন হয়।

(খ) মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে উল্লিখিত বকশীগন্জ পৌরসভার ২,৩,৫,৬,৭,৮, ও ৯ নং ভোট কেন্দ্রে জোরপূর্বক অবৈধভাবে ব্যালট পেপারে সিল মারার কোনরুপ প্রমাণ পাওয়া যায়নি।

(গ) ২ নং মালির চর হাজীপাড়া আমেনা খাতুন এতিমখানা ও হাফিজিয়া মাদ্রাসা (মালিরচর হাজীপাড়া) ভোটকেন্দ্র এবং ৫ নং বকশীগন্জ এন এম উচ্চ বিদ্যালয় (বকশীগন্জ মিয়াবাড়ী) ভোটকেন্দ্রের ভোটগণনা কক্ষ থেকে আবেদনকারীর পোলিং এজেন্ট বের হয়ে যাওয়ার ক্ষেত্রে দায়িত্ব প্রাপ্ত পুলিশ কর্মকর্তা এবং প্রিজাইডিং অফিসার বিধি সম্মত ও যথাযথভাবে দায়িত্ব পালন না করার প্রমাণ পাওয়া গিয়েছে। তবে উক্ত ২টি ভোটকেন্দ্রে ভোট গণনার সময় আবেদনকারীর পোলিং এজেন্ট উপস্থিত ছিলেন এবং তারা ভোট গণনার বিবরনী ফরম-এঃ তে স্বাক্ষও করেছেন। ফলে এ ২ টি ভোটকেন্দ্রে বন্ধ ঘোষনার মত কোন অনিযম. ঘটেনি।

(ঘ) বকশীগন্জ পৌরসভার ২৮.১২.২০১৭ তারিখে অনুস্ঠিত নির্বাচন সুস্ঠুভাবে সম্পাদনে সর্বাত্মক প্রচেস্টা গ্রহণ করেন এবং আবেদনকারীর আবেদনে উল্লিখিত ৭ টি ভোটকেন্দ্রসহ ১১ টি ভোটকেন্দ্রে শান্তিপূর্ণভাবে ভোটগ্রহণ অনুস্ঠিত হয়। ১ নং ভোটকেন্দ্রে অনিয়মের কারণে প্রিজাইডিং অফিসার কর্তৃক বন্ধ ঘোষনা করা হয়।

13. He also submits that after considering the inquiry report the election commission decided to conduct re-elation in the No.1 Malirchar Hajeepara Government Primary on 29.3.2018. After obtaining the rule and an order of stay the election could not be held. The learned Advocate further submits that it is now well settled that the election process cannot be challenged by an application under Article 102 of the Constitution. The period between the declaration of the schedule of election and the publication of the result in the official gazette has been held to be comprised in the election process and it has been consistently viewed by our Hon'ble Supreme Court that any step comprising in the election process cannot be challenged by an application under Article 102 of the Constitution; and as such the writ petition itself is not maintainable and the rule is liable to be discharged.

14. Heard the learned Advocate for the respective parties, perused the writ petition and supplementary affidavit and affidavit-in-opposition filed by the respondent no.1 as well as the respondent No.9.

15. It appears from the aforesaid facts and circumstances that the petitioner is a contesting candidate of the election of the Bakshigonj, Pourashave, District-Jamalpur. Accordingly, election was held on 28.12.2017. The petitioner filed an application on 28.1.2017 that is on the date of election to the returning officer and district election officer, jamalpur with the allegation that the agent of polling centre Nos.4,5,7,9,10 and 11 of the petitioner was forcefully ousted from the centre. Thereafter, she filed another application on 1.1.2018 and made allegation about centre Nos.2,3,5,6,7,8 and 9 with the similar allegation which was made earlier on 28.12.2017. But the returning officer unofficially declared result of 11 centres and stopped one centre.

16. From the aforesaid result it appears that one Md. Nazrul Islam independent candidate obtained 8599 votes and nearest candidate one Mr. Fakruzzaman obtained votes 7705. It appears that the petitioner thereafter preferred writ petition before the High Court Division being No.519 of 2018 and the same was disposed of with the findings;

> "*In the fitness of things we are of the view that ends of justice would be better served if we make an order directing the Election Commission to take up the application of the petitioenr (Annexure-H) and dispose of it in accordance with law instead of issuing of Rule.*

This petition is, thus, disposed of.
Accordingly, the Election Commission is directed to disposed of the application made by the petitioner as contained in Annexure-H of the petition within 15 days from receipt of this order."

17. After receiving the aforesaid order of this court the respondent No.1 formed an inquiry committee and the committee after inquiry submitted a report the opinion:-

মতামতঃ

(ক)২ নং মালিরচর হাজীপাড়া আমেনা খাতুন এতিমখানা ও হাফিজিয়া মাদ্রাসা (মালিরচর হাজীপাড়া) ভোটকেন্দ্র এবং ৫ নং বকশীগঞ্জ এন এম উচ্চ বিদ্যালয় (বকশীগঞ্জ মিয়াপাড়া) ভোটকেন্দ্রের ভোটগণনা কক্ষে থেকে আবদনকারীর নির্ধারিত পোলিং এনেজন্ট বের হয়ে যাওয়ার ক্ষেত্রে দায়িত্বপ্রাপ্ত পুলিশ কর্মকর্তা এবং প্রিজাইডিং অফিসার বিধি সম্মত ও যথাযথভাবে দায়িত্ব পালন না করার প্রমান পাওয়া গিয়েছে। এ দুটি ভোটকেন্দ্রের দায়িত্বপ্রাপ্ত প্রিজাইডিং অফিসার এবং পুলিশ কর্মকর্তার বিরুদ্ধে ব্যবস্থা গ্রহণ করা যেতে পারে। তবে উক্ত ২ টি ভোট কেন্দ্রে ভোট গণনার সময় আবেদনকারীর পোলিং এজেন্ট উপস্থিত ছিলেন এবং তারা ভোট গণনার বিবরী ফরম- ঞ তে স্বাক্ষর করেছেন। ফলে এ ২ টি ভোটকেন্দ্রে বন্ধ ঘোষণার মত কোন অনিয়ম ঘটেনি; এবং

(খ) ২৮.১২.২০১৭ তারিখে অনুস্ঠিত জামালপুর জেলার বকশীগঞ্জ পৌরসভা নির্বাচনে মেয়র প্রার্থী শাহীনা বেগম এর দাখিতকৃত আবেদনে (Annexure-II) উল্লিখিত ২,৩,৫,৬,৭,৮ ও ৯ নং ভোটকেন্দ্রের বিষয়ে আনীত অভিযোগ সন্দেহাতীতভাবে প্রমাণিত হয়নি।

18. The above report was signed by Mr. Tajul Islam, District election Officer and Mr. Md. Forhad Hossain, Senior Assistant Secretary, Election Commission, Dhaka. Thereafter, the Election Commission after considering the report in a meeting dated 14.3.2018 decided to hold the re-election of one centre which was stopped earlier by the presiding officer. From the report and agenda No.2, it appears that the election commission recommended that;

০২। অপরদিকে রিট পিটিশন নং ৫১৯/২০১৮ এর মাননীয় হাইকোর্টের আদেশ প্রতিপালনের লক্ষ্যে রিট পিটিশনে পরিশিস্ট হিসেবে সংযুক্ত একটি অভিযোগ / আবেদন নিস্পত্তির জন্য অপর একটি তদন্ত কমিটি গঠন করা হয়। তদন্ত কমিটিতদন্ত প্রতিবেদনে নিম্নরুপ সুপারিশ করে (সংলাগ-২)

(ক) তদন্তকারী কর্মকর্তা ২ নং মালিরচর হাজীপাড়া আমেনা খাতুন এতিমখানা ও হাফিজিয়া মাদ্রাসা (মালিরচর হাজীপাড়া) ভোটকেন্দ্র এবং ৫ নং বকশীগঞ্জ এন এম উচ্চ বিদ্যালয় (বকশীগঞ্জ মিয়াপাড়া) ভোটকেন্দ্রের দায়িত্বপ্রাপ্ত প্রিজাইডিং অফিসার এবং পুলিশ কর্মকর্তার বিরুদ্ধে ব্যবস্থা গ্রহন করা;

(খ) মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে বর্ণিত ৭ টি ভোট কেন্দ্রের বিষয়ে আনীত অভিযোগ প্রমাণিত হয়নি।

০৩। জামালপুর জেলার বকশিগঞ্জ পৌরসভার নির্বাচনের বিষয়ে উল্লিখিত তদন্ত প্রতিবেদন সংশ্লিস্ট নথিতে উপস্হাপন করা হলে মাননীয় নির্বাচন কমিশন নিম্নোক্ত সিদ্ধান্ত/নির্দেশনা প্রদান করেন ;

(ক) ১ নং মালিরচর হাজীপাড়া সরকারী প্রাথমিক বিদ্যালয়ে স্হগিতকৃত কেন্দ্রে পুনরায় ভোট গ্রহনের জন্য রিটানির্ং অফিসারকে নির্দেশনা প্রদান করা ;

(খ) উক্ত ভোটকেন্দ্রে কেন্দ্র দখল ও ব্যালট পেপার ছিনতাই এর ঘটনায় থানার ভারপ্রাপ্ত কর্মকর্তা জনাব আসলাম হোসেনের বিরুদ্ধে বিভাগীয় ব্যবস্থা গ্রহনের জন্য মহাপুলিশ পরিদর্শক (IGP) কে নির্দেশনা প্রদান এবং তদন্তকারী কর্মকর্তা বৃন্দের অন্যান্য সুপারিশ কমিশন সভায় আলোচনা করে ব্যবস্থা গ্রহণ করা - এ প্রস্তাবের প্রেক্ষিতে পরবর্তী কমিশন সভায় উত্থাপনের সিদ্ধান্ত গ্রহীত হয়।

৪। উপরোল্লিখিত সিদ্ধান্ত মোতাবেক জামালপুর জেলার বকশিগঞ্জ পৌরসভার বন্ধঘোষিত ভোটকেন্দ্র ০১ নং মালিরচর হাজীপাড়া সরকারী প্রাথমিক বিদ্যালয়, মালিরচর হাজীপড়া মহিলা ভোটকেন্দ্রে মেয়র, ১ নং সংরক্ষিত ওয়ার্ডের কাউন্সিলর ও ১ নং সাধারণ ওয়ার্ডের কাউন্সিলর পদে ভোট গ্রহনেণর জন্য আগামী ২৯ মার্চ ২০১৮ তারিখ বৃহাস্পতিবার নির্ধারণ করা যেতে পারে।

19. Accordingly, a notice was issued on 14.3.2018 signed by Forhad Ahmed Khan, Joint Secretary, (Current Charge) to hold the election for No.1 Malirchar Government Primary School, Mahila polling Centre, the date was fixed on 29.3.2018 for re-election. The learned Advocate for the petitioner tried to argue that the election commission i.e. respondent No.1 violated the provision of Rule 37 (3) in declaring the re-election by the Joint Secretary (In

Charge) of the Election Commission. According to Rule 37 (3) the returning officer is the appropriate authority to declare the schedule of the pourashava election. His next argument was that the respondent no.1 did not take any consideration about the report submitted by the inquiry committee formed by the respondent no.1 which itself is contradictory and in the opinion finally made by the inquiry officer the content of the report and discussion was not reflected in the decision and the opinion of the Election Commission respondent No.1. So, the same is within the purview of malice in law and the High Court Division should interfere with the aforesaid facts and circumstances.

20. We have considered the argument advanced by the learned Advocate for the petitioner. It is admitted that the petitioner raised some allegations from the date of election to the returning officer as well as the respective respondents and thereafter upon a direction by this court an inquiry was held and with some observation and recommendation the report was submitted to the Election Commission and the respondent No.1 after considering the aforesaid report declared the schedule for re-election and it was signed by Joint Secretary (in-charge) of the election commission and this schedule was fixed on 29.3.2018 and this order was stayed by the High Court Division in the present writ petition and thereafter the interim order of the High Court Division was stayed by the Appellate Division. So, the election could not be held on 29.03.218 and the notice issued by the Election Commission, Joint Secretary (in-charge) has become infructuous and has no validity at this stage.

21. Though, the Rule 37 (3) has empowered the returning officer to declare the election scheduled in the pourashava election.

22. In the case of A.F.M. Shah Alam Vs. Mujibul Huq, reported in 41 DLR (AD) 68 it is held that "this court in very clear terms retain that the Local Government elections process cannot be challenged under Article 102 of the Constitution in High Court Division unless the impugned order passed by the authority concerned is *coram non-judice* or is afflicted with malice in law."

23. It is also settled that the period between the declaration of schedule of election till the publication of the result in the official gazette has been held to be comprised in the election process. The case in our hand it appears that the petitioner filed writ petition before this court invoking the Article 102 of the Constitution before publication of the official gazette. As such the writ petition is not maintainable and the rule is liable to be discharged.

24. However, the allegations of the irregularities raised by the petitioner in the writ petition are election dispute which may be agitated and proved on proper evidence before the Election Tribunal constituted under the relevant law. The petitioner may file election case before the Election Tribunal, if any, in accordance with law stating all the allegations agitated before this court.

25. Thus, we do not find any merit in the Rule.

26. Accordingly, the rule is discharged.

27. Communicate the judgment and order to the respondent No.1.

12 SCOB [2019] HCD

HIGH COURT DIVISION

Civil Revision No. 1436 of 2009

1. Monto Sheikh being dead his legal heirs:
1.(a) Taslima Begum (Wife) and others
..... Petitioners.
-Versus-
1. Ibrahim Miah being dead his legal heirs:
1.(a) Siarun Nessa (wife) and others
.....Opposite parties.

Mr. Md. Ali Reza, Advocate
…….For the petitioners
Mr. Sk. Akhtarul Islam, Advocate
……For the opposite parties

Heard on: 22.5.18 & 23.5.2018
And
Judgment on: 31.05.2018

Present:
Mr. Justice F.R.M. Nazmul Ahasan

It is also settled that the defendants may have thousand of defect but it does not help the plaintiff to prove their case:
It appears that the plaintiff could not prove their case that they have any title in the suit land and also the possession. The main reasoning of this findings stated above that the basis of the title of the plaintiff is the settlement which was cancelled and the order of cancellation is in existence. ... (Para 38)

JUDGMENT

1. This Rule was issued calling upon the opposite party Nos.1-14 to show cause as to why the judgment and decree dated 18.11.2008 passed by the Additional District Judge, Gopalganj, in Title Appeal No.69 of 2004 affirming those dated 3.11.2004 passed by the Joint District Judge, 1st Court, Gopalgonj in Title Suit No.54 of 2003 dismissed the suit should not be set aside.

2. Facts, relevant for disposal of the rule, in brief, are that the petitioner as plaintiff filed Title Suit No.102 of 2000 on 29.11.2000 in the Court of learned Assistant Judge, Kashiani, Gopalganj which was subsequently transferred to the learned Joint District Judge, 1st Court, Gopalganj and renumbered as Title Suit No.54 of 2003 and the suit was filed for declaration of title. It is stated in the plaint that the suit land appertaining to 37 Pignolia Mouza originally belonged to government in R.S. Khas Khatian No.1. Plaintiff Nos.1,2 and the predecessor of plaintiff Nos.3-7 took settlement from the government.

3. The predecessor of plaintiff Nos. 3-7 took settlement of 1.00 acre by kabuliyat dated 12.4.1974 from disputed Plot No. $\frac{49}{1701}$ in Miscellaneous Case No. $\frac{XII-3464/72-73}{172/73-74}$ and he died leaving behind plaintiff Nos.3-7. Similarly plaintiff No.1 took settlement of .45 acre from disputed plot No. $\frac{49}{1701}$, .06 acre from plot No.958, .15 acre of land from plot no.959 measuring an area of .66 acre of land from plot no.959 measuring an area of .66 acre of land

through kabuliyat dated 02.8.1974 by Miscellaneous Case No. $\frac{XII-1296/72-73}{180/73-74}$. Plaintiff no.2 also took settlement of 1.00 acre of land from disputed plot No. $\frac{49}{1701}$ by kabuliyat dated 27.07.1974 Miscellaneous Case No. $\frac{XII-857/72-73}{175/73-75}$.

4. Thus plaintiffs obtained 2.66 acre of land and have been in possession for more than 12 years upon payment of rent. Defendants were never in possession in the suit land and they have no title. Defendants denied title of the plaintiffs on 16.11.2000. Hence the suit was filed for declaration of title.

5. On the other hand defendant Nos.1-7 and defendant Nos.8-14 contested the suit by filing separate written statements. The content of both the written statements almost similar are that some Tarok Chakdra, Sorot Chandra, Bhorot Chandra, Suroshibala Dashi in 8 anna of property and Poromananda Kapali and Taraprashanna Kapali another 8 anna owner and possession of the land. Poromananda Kapali and Taraprashanna Kapali sold their portion to Sharot Chandra Shinha, Varat Chandra Shinha and Tarok Chandra Shinha dated 16.3.1937 kabala no.792. Sukhendra Lal Mukharjee took potton from that Sarot Chandra and others.

6. Thereafter, Sabed Ali Biswas and others took potton from Sukhendra Lal Mukharjee. Being defaulter of paying rent. A rent suit was instituted against Sabed Ali and others by Sukehndra Lal Mukharjee which was ultimately disposed of in the terms of compromise and Sabed Ali got the land in question by the sole decree. This defendant Sobed Ali Biswas is the predecessor of the defendants. Subsequently, Sobed Ali Biswas got recognition of transfer of right from the government and took settlement of 28.2.1961 and S.A. Record was published in the name of government instead of Sobed Ali and thus the land in question was recorded in the Khas Khatian. The government or the plaintiff never possess of the suit land; the defendant from their predecessor have been owning and possessing the suit land. With the aforesaid contention the defendant prayed for disposed of the suit.

7. At the trial the learned Judge, framed as many as four issues about the maintainability, about cause of action, about title and possession of the suit land and whether the plaintiff can get a decree as claimed.

8. Both the parties adduced evidence and produced documents before the trial court which was duly marked as exhibit and after hearing the parties, the trial court dismissed the suit by the judgment and decree dated 3.11.2004, against that the plaintiff preferred Title Appeal No.69 of 2004 before the learned District Judge, Gopalganj on transferred it was heard by the learned Addition District Judge, Gopalponj who after hearing the parties also dismissed the appeal by his judgment and decree dated 18.11.2008.

9. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the appellate court. The plaintiff appellant preferred revisional application before this court and obtained this rule and order of status-quo.

10. Mr. Ali Reza, the learned Advocate appearing for the plaintiff petitioner submits that both the court below upon misconception of law misconstrued the facts and circumstances of the case without proper appreciation of evidence on records and improperly dismissed the

suit of the plaintiffs and committed an error of law occasioning failure of justice. The learned Advocate for the petitioner submits that the plaintiff by adducing oral and documentary evidence prove the case but the trial court without proper discussion and consideration of the evidence on record and the exhibit wrongly held that the plaintiff could not prove their case. They have title and position of the suit land. The Appellate court also without proper discussion of the evidence on record independently and without discussion of the relevant issue wrongly and mechanically affirmed the judgment and decree passed by the Trial Court thus committed an error of law which occasioning failure of justice.

11. The learned Advocate for the petitioner submits that the plaintiff obtained settlement from the government in the year 1974 by different settlement cases and khatians were opened in their name and they have paid rent to the government and have been owning and possessing the same by dint of registered kabuliat. But the trial court wrongly found that the plaintiff could not produce any document in favour of their settlement.

12. On the other hand the appellate court also did not consider the title and document of the plaintiff i.e. registered kabuliat and the subsequent document which prove their possession in the suit land and wrongly affirmed the judgment passed by the trial court. Thus both the court below committed an error of law occasioning failure of justice. The learned advocate for the petitioner also submits that the defendants could not prove their title in the suit land and they also could not prove their possession as claimed in the written statement. But the trial court as well as the appellate court wrongly believed the document and exhibit by the defendant and found title and possession of the defendants erroneously.

13. Thus both the court below upon misreading of the evidence on record and non consideration of the documents produced by the plaintiff erroneously found that the plaintiff could not prove their title and possession of the suit land. On the other hand the defendants have title and possession in the suit land. Thus both the court bellow committed an error law in the decision occasioning failure of justice. The learned Advocate for the petitioner submits that the trial court believed the rent receipt produced by the defendants but the defendant did not produce those rent receipt of the khatian No.42 which is relevant to the khatian claimed by the defendants. Thus on the basis of wrong findings of facts the trial court as well as appellate court erroneously decided that the defendants are in possession of the suit land.

14. Learned Advocate for the petitioner also submits that both the court below upon misreading of the evidence did not consider that the defendants produced exhibit-1, 1(Kha) and 2 without showing any evidence of settlement claimed to have acquired by their predecessor on 28.2.1961 as well as the approval by Additional Deputy Commissioner on 31.5.1961. So, the title and possession on the basis of the aforesaid settlement which has been found by the court below are wrong findings of facts which may be set aside.

15. The learned for the petitioner lastly submits that the appellate court as the last of facts without proper discussion of the evidence on record and the exhibit mechanically affirmed the judgment of the trial court without flowing the provision of the order 31 rule 41 of the Code of Civil Procedure. Thus committed an error of law in the decision occasioning failure of justice.

16. On the other hand the learned Advocate Mr. Sheikh Akterul Islam, appearing for the opposite party submits that the trial court after proper perusal of the plaint and the written statement framed issued and discussed those issues elaborately and found that the plaintiff

could not prove their case by adducing oral and documentary evidence on record. The appellate court also affirmed the judgment and decree passed by the trial court upon proper consideration of the evidence on record and judgment and decree passed by the trial court. Thus the appellate court committed no error of law in the decision occasioning failure of justice.

17. Learned Advocate for the opposite party further submits that the plaintiff obtained kabuliat in the year 1974 which was subsequently cancelled by the government authority and without taking proper steps against those cancellation of kabuliat filed the suit for declaration of title and the plaintiff could not prove by adducing oral and documentary evidence that they have possession in the suit land. The trial court on consideration of the aforesaid facts and circumstances rightly dismissed the suit of the plaintiff and the appellate court also affirmed the judgment passed by the trial court.

18. The learned Advocate for the opposite party further submits that the present defendants are the successive heirs of Sobed Ali Biswas who obtained the suit land by way of settlement and also subsequently by way of compromise decree and the defendants in support of their possession produced rent receipt before the trial court and the trial court on consideration of the aforesaid documents which was marked exhibits found that the defendants have title and possession in the suit land. The appellate court also after proper discussion of the evidence on record and perusal of the exhibit found title and possession of the defendants.

19. Therefore, the concurrent findings of the facts arrived at by the court below that the plaintiff could not prove their case by adducing oral and documentary evidence should not be interfered with by the revisional court as there is no misreading and non consideration of the evidence on records in the judgment passed by the appellate court as the last courts of fact.

20. Heard the learned Advocate for both the parties and perused the revisional application and the impugned judgment passed by the trial court as well as the judgment and decree passed by the appellate court below and also the Lower Court's records including exhibits marked by both parties.

21. It appears from the record that the plaintiff filed the suit for declaration of title. The plaintiff case which was mentioned above that they have obtained the suit land by way of settlement cases in the year 1974.

22. On the other hand the defendants case is that they are in possession in the suit land. Since their predecessor Sabed Ali Biswas obtained the suit land along with the other property by way of settlement and resettlement in total their possession of 4.82 acore of land and after obtaining the suit land by the settlement case in the year 1961. The land was wrongly recorded in the name of the government and subsequently the plaintiff with some government officials collusively created the settlement case and subsequently it was cancelled by the governed authority so, the plaintiff have no title and possession in the suit land.

23. The trial Court on perusal of the settlement case with the registered kabuliat which is marked as exhibit found that the plaintiff though claim that after settlement the possession of the land was handed over to the plaintiff predecessor. But they could not produce any document in favour of the suit land as khas land of the government i.e. how the government took the land from the owner of P.S. record. The plaintiff did not make any statement in this

respect. So there is no proof of government legal ownership in the suit land by which the government settled the land to the plaintiff. The trial court while discussing the cases of the defendants found that Sobed Ali Biswas and others took potton from the C.S. recorded owners.

24. Thereafter, on non- payment of rent and a rent case was started being rent case No.851 of 56. It was disposed of on compromise and Sobed Ali obtained decree. So, according to exhibit-Gha i.e. the sole decree, the defendant predecessor had title and possession. The defendants took settlement on 28.2.1961 i.e. exhibit- Kha then the suit land was wrongly recorded in the government name at the time of S.A. survey and published in the name of government at the time of S.A. Khatian.

25. The defendants also claim that they have purchased the land from Sobed Ali along with other land and muted their name and paid rent to the government and they have produced documents exhibit-R and also produce rent receipt annexure-চ-series. The trial court found that the defendants made an objection against the settlement case of the plaintiff to the sub-divisional officer who by his order dated 02.07.1981 cancelled those three settlement cases of the plaintiff against which one Shamsul Huq and his brother made an objection which was also rejected. The defendant in support of their contention produced the office order dated 2.7.1981 exhibit-ঠ। The trial court also found that the defendant on 11.11.1986 also submitted exhibit-জ। office order of upazila revenue officer 2.4.2001 and all those documents prove that the settlement were cancelled by the government authority and without taking any steps against those cancellation the plaintiff filed the present suit with a different cause of action.

26. The trial court lastly found that in the latest survey record was prepared in the name of the defendants and in support of their contention they produced the Khatian No. 262 as exhibit-ট. The trial court also discussed the oral evidence of the P.W. 2 Ohiduzzaman Munshi, P.W.3 Abdul Kashem Talukder, P.W.4 Abdul Rashid Mollah and found that all of them are from the same village and they are interested witness.

27. The trial court considered the aforesaid evidence of the P.W. and found that plaintiff could not prove their title in the suit land as the settlement cases were cancelled by the government. So, the plaintiff have no title in the suit and from the defendants documents it appears that they are in possession in the suit land for long time. With the aforesaid discussion the trial court dismissed the suit of the plaintiff.

28. On the other hand the appellate court after discussion of the respective case of the parties found that the plaintiff have filed the settlement case in support of their claim which were cancelled subsequently by the government. On the other hand the defendant side claim their title and possession since 1961. Thereafter, auction sale, compromise decree and in support of the aforesaid title they have produced rent receipt which are the corroborative evidence of their title and possession, the appellate court also found that some of P.Ws. admitted the possession of the defendants in the suit land.

29. However, the appellate court found that the plaintiff also failed to prove the cause of action of the case so the plaintiff by any way could not prove their case that they have title and possession of the suit land. With the aforesaid findings and decision the appellate court affirmed the judgment and decree passed by the trial court.

30. The learned Advocate for the petitioner submits that though the judgment passed by both the courts below dismissing the suit upon concurrent findings of facts but those findings are not based on evidence on records.

31. The learned Advocate for the petitioner in support of his argument referred to a decision in the case of the Province of East Pakistan now Bangladesh Vs. Aaluddin Ahmed reported in 4 BCR (AD) 201 (1984) *"Suit for declaration of title to suit land –plaintiff was allotted 5 (five) acres of government khas land in 1958 approved by the Additional Collector and he was in possession of the same since then- In 1962 the Board of Revenue by an order dated 3.10.1962 cancelled the settlement- Trial Court dismissed the suit mainly on the ground that the plaintiff was not a bonafide cultivator and since the plaintiff did not come within the category of person to whom settlement could be given, such settlement was illegal, without jurisdiction and void ab initio and the same could not be binding against the government-HIGH COURT DIVISION held that the administrative control and power exercised by the Board of Revenue do not extend to cancellation of lease granted by a valid settlement and if the lessee had violated any terms of the lease, the government could proceed against him for the cancellation of his lease and his eviction from the land-High Court Division's decision was upheld-".*

32. On the other hand the learned Advocate for the opposite party referred to a decision in the case of Milksar Ali Dewan (Md.) and others Vs. Dares Ali Mondal and others reported in 13 MLR 105 *Specific Relief Act, 1877, Section 42 – Suit for declaration of title on the basis of pattan taken through amalnama from the Ex-land lord – Title and possession of the plaintiff found well established and as such the suit is decreed by the appellate court which the High Court Division and the Appellate Division affirmed.*

33. And also in the case of Md. Mozaffer Rahman and others Vs. Government of Bangladesh and another reported in 15 MLR 170 (AD) 2010 *Specific Relief Act, 1877- Section 39- Suit for declaration of title in the absence of satisfactory proof thereof is not maintainable- In the instant case the plaintiffs could not prove their title to the suit land by producing documentary evidence as well as oral evidence. The trial court dismissed the suit on specific finding which the court of Appeal, High Court Division and the Appellate Division held perfectly justified.* And also in the case of Mohar Ali Bhuiyan Vs. Michir Ali Bhuiyan and others reported in 15 MLR (AD) 501 (2010) *Code of Civil Procedure, 1908- Section 115- Concurrent findings of facts arrived at by the trial court as well as the appellate court are binding upon the revisional court- unless there is a case of misreading or non-consideration of material evidence on record, the concurrent findings of the trial court as well as the appellate court are binding upon the revisional court. The High Court Division affirmed the decision of the court of appeal below with the apex court found nothing wrong to interfere.*

34. I have gone through the judgment of both the court's below and the exhibit on record. It appears that the plaintiffs have filed a suit for declaration of title and it is the settled principal of law that the plaintiff has to prove their case by adducing oral and documentary evidence.

35. From the evidence on record it appears that the plaintiffs obtained settlement from the government by three settlement cases in the year 1974. From the evidence on record it appears that those three settlement cases were cancelled by the government authority. The learned Advocate for the petitioner relying on the decision submits that the sub-divisional

officer has no authority to cancel the settlement case. But it appears from the plaint as well as the evidence from the plaintiff side some of them challenged those but all of them never challenged those decision in an appropriate forum.

36. So, the order of cancellation was affected from the time of cancellation and the plaintiff have filed the present suit for declaration of title. So, the basis of their title was not in existence. The another aspect of the case is that the trial court elaborately discussed the evidence of the P.Ws. and found that they could not prove their possession by adducing oral and documentary evidence.

37. On the other hand the learned advocate made some argument in respect of believing the exhibit of the defendants side. It is also settled that the defendants may have thousand of defect but it does not help the plaintiff to prove their case. From the whole pleading or of the exhibits produced by the defendants it appears that the defendants were possession in the suit land either by way of compromise decree or settlement from government. Question may be raised in this regard whether they have proved their chain of title and document. But admittedly they are in possession though they have put in rent receipt mentioning old khatian No.42 but it is not proved that those rent receipts are forged or created.

38. Moreover, the defendant side when made objection about the settlement of the plaintiff and when it was cancelled in that order of cancellation the authority recognized settlement case of the defendant and that document was marked as exhibit before the trial court. So, from the whole discussion of the evidence and exhibit of the parties it appears that the plaintiff could not prove their case that they have any title in the suit land and also the possession. The main reasoning of this findings stated above that the basis of the title of the plaintiff is the settlement which was cancelled and the order of cancellation is in existence.

39. So, the trial court rightly dismissed the suit of the plaintiff. The appellate court though did not discuss the issue elaborately yet affirmed the judgment and decree passed by the trial court with some findings regarding settlement case of the plaintiff and the subsequent cancellation of those settlement case and also discussed the evidence of the plaintiff side by which the appellate court found that plaintiff could not prove their case. So, the decision taken by the appellate court is not wrong.

40. From the discussion made above and the facts and circumstances of the case. I do not find any error of law in the decision taken by the courts below which are concurrent in nature and no interference is called for.

41. Thus the Rule fails.

42. In the result, the rule is discharged. The judgment and decree passed by the appellate court affirming the judgment and decree passed by the trial court is hereby upheld.

43. The order of status-quo granted earlier is hereby vacated.

44. Send a copy of the judgment and order of this court to the court below at once.
Send down the L.C. records at once.

12 SCOB [2019] HCD

HIGH COURT DIVISION

CRIMINAL APPELLATE JURISDICTION

Death Reference No. 99 of 2015

The State

-Versus-

Oyshee Rahman

.....Condemned prisoner

with

Criminal Appeal No. 10281 of 2015

Oyshee Rahman

-Versus-

The State

Mr. Afzal H. Khan with

Mr. Sujit Chatterjee, Advocates.

.....for the appellant

with

Jail Appeal No. 2016 of 2015

Oyshee Rahman

-Versus-

The State

Mr. Zahirul Haque Zahir, D.A.G with

Mr. Md. Atiqul Haque [Selim], A.A.G and

Mr. Nizamul Haque Nizam, A.A.G

….....….for the State

Heard on: 13.03.2017, 14.03.2017, 15.03.2017, 19.03.2017, 20.03.2017, 21.03.2017, 22.03.2017, 27.03.2017, 28.03.2017, 03.04.2017, 09.04.2017, 10.04.2017, 07.05.2017

Judgment on 05.06.2017

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Jahangir Hossain

Mitigating factors to consider the lesser punishment from death sentence to life imprisonment;

This sentence that someone be punished in such a manner is referred to as 'Death Sentence', whereas the act of carrying out the death sentence is known as execution. The execution is not only an exemplary punishment alone that can erase the crime from the society forever. Lesser punishments may significantly prevent or reduce the crimes from the society depending on the good governance and awareness of the people.

To consider the lesser punishment from death sentence to life imprisonment mitigating evidence or circumstances must be stronger than that of aggravating evidence produced by the prosecution. In this case we find the following circumstances outweigh the aggravating circumstances,

1. **Condemned prisoner committed double murder without any apparent motive and was suffering from mental derailment or some sort of mental disorder and also suffering from ovarian cyst and bronchial asthma;**
2. **Her paternal grandmother and maternal uncle had a history of psychiatric disorders according to exibit-15;**
3. **She was around 19[nineteen] year old at the relevant time and the occurrence took place just immediately after her attaining the age of majority;**
4. **She has no such significant history of prior criminal activity [criminal cases] and**

5. She had willingly surrendered to the police station soon after two days of the occurrence. ... (Para 83 & 84)

JUDGMENT

Jahangir Hossain, J

1. This Death Reference No. 99 of 2015 is the outcome of judgment and order of conviction and sentence dated 12.11.2015 referred to the High Court Division by the learned Judge of Druto Bichar Tribunal No. 03, Dhaka for confirmation of death sentence to condemned prisoner Oyshee Rahman under section 374 of the Code of Criminal Procedure [briefly Cr.P.C].

2. Challenging the said judgment and order of conviction and sentence, condemned prisoner Oyshee Rahman filed a petition of appeal being numbered as Criminal Appeal No. 10281 of 2015 and she also filed Jail Appeal No. 216 of 2015. Death Reference and both the said Criminal Appeals have been heard together and are disposed of by this common judgment.

3. The prosecution case is briefly described as under:

One Md. Moshiur Rahman @ Rubel being informant lodged an ejahar with Paltan Model Police Station, Dhaka after consultation with some of his relatives alleging that his elder brother Mahfuzur Rahman, police inspector, along with his wife Shawpna Rahman, daughter Oyshee Rahman, son Ohee Rahman and maid servant Sumi used to reside at Flat No. 5/B, 2 No. Chamelibagh, Dhaka. On 16.08.2013 Iftekharul Alam, brother-in-law of Mahfuzur Rahman, intimated him over cell phone that Mahfuzur Rahman and his wife were missing and further told him that at about 02:00 am at night on 15.08.2013 his niece Oyshee Rahman had informed her aunt Suborna over cell phone that her parents had gone to Rajshahi and she along with her brother was afraid to stay at their residence without their parents. Oyshee also informed Iftekharul Alam that her brother Ohee was staying with her and she had left maid servant Sumi at the Aftabnagar slum. Being afraid after hearing such information, Iftekharul Alam asked his younger brother Rubel to inquire about them through the security guard of the Chamelibagh house and Rubel informed his elder brother Iftekharul Alam that early in the morning of 15.08.2013 Oyshee, Ohee and the maid servant Sumi had left the house for Oyshee's aunt Suborna's Mirpur residence by a CNG auto rickshaw. Iftekharul also told the informant that he had asked many persons regarding the whereabouts of his elder brother and sister-in-law but in vain. Subsequently, Dr. Rayhan, a relative of the informant, made contact with Malibagh office of the Special Branch, workplace of Mafuzur Rahman, who in turn, asked the Palton Model Police Station to look into the matter.

4. Thereafter, police of Paltan police station entered the house of Mahfuzur Rahman at about 05:30 pm on 16.08.2013 by breaking the main door of the house with the help of a locksmith and found the dead bodies of the informant's brother Mahfuzur Rahman and sister-in-law Shawpna Rahman inside a bathroom of their house. Police duly held inquest reports of the dead bodies and sent the same to Dhaka Medical College Hospital for autopsy. Said Dr. Ryhan further asked the informant to come quickly to Dhaka and thereafter the informant rushed to Dhaka same day and found the dead bodies of his brother and sister-in-law lying at the Dhaka Medical College Hospital's morgue. He also found marks of several injuries

inflicted by sharp weapons on the persons of his brother and sister-in-law. The informant further stated in the ejahar that his brother and sister-in-law were killed by some unidentified assailants between 11:00 pm of 14.08.2013 and 04:30 pm of 16.08.2013.

5. Having received the ejahar police started Paltan Model Police Station Case No. 13 dated 17.08.2013 against unknown miscreants under sections 302/34 of the Penal Code.

6. Soon after lodging the FIR, police seized some materials and ornaments relating to the death of the deceased and apprehended maid servant Khadiza Akhter Sumi, Mizanur Rahman Rony and Asaduzzaman @ Jony while Oyshee Rahman surrendered to the police station. During investigation of the case, Oyshee and maid servant Sumi made confessional statements before the magistrate under section 164 of the Cr.P.C and seven witnesses also made statements before the magistrate under the aforesaid section. The investigating officer after completion of investigation, submitted police report being charge sheet No. 64 dated 08.03.2014 against the three accused persons including the condemned prisoner under sections 302/201/212/109/328/380/34 of the Penal Code while separate police report being charge sheet No. 65 dated 08.03.2014 was submitted in Kishore Adalat against Khadiza Akhter Sumi on being minor under sections 302/114/201 /380/328/34 of the Penal Code. Except minor Khadiza Akhter Sumi all other accused persons were put on trial by the learned Metropolitan Sessions Judge, Dhaka in Metro. Sessions Case No. 3380 of 2014.

7. Learned Metropolitan Sessions Judge, Dhaka framed charge on 06.05.2014 against accused Oyshee Rahman under sections 328/302/201/380 of the Penal Code, accused Asaduzzaman @ Rony under sections 302/109/212/34 of the Penal Code and accused Mizanur Rahman @ Rony under sections 302/34/212 of the Penal Code which was read over and explained to them present on dock to which they pleaded not guilty and claimed to be innocent at the trial.

8. Thereafter, the aforesaid case was transferred to Druto Bichar Tribunal No. 03, Dhaka by a gazette notification dated 21.10.2014. Gravamen of charge was again framed after being amended by the Druto Bichar Tribunal on 30.11.2014 against accused Oyshee Rahman and Asaduzzaman @ Jony under section 302 read with section 109 of the Penal Code and accused Mizanur Rahman Rony under section 212 of the Penal Code which was also read over and explained to them while they were present on dock to which they claimed further to be innocent at the trial. The prosecution in order to prove its case, examined 39[thirty nine]out of 57[fifty seven] witnesses cited in the charge sheet while defence did not call any witness in their favour, but put their case by way of suggestions to the prosecution witnesses.

9. On closure of the prosecution evidence, the accused persons present in dock, were also examined under section 342 of the Cr.P.C wherein the incriminating evidence and confessions brought to their notices and consequence thereof were explained to them. This time the accused persons present in the dock reiterated their innocence, non-complicity and declined to adduce any evidence in their favour through defence witnesses but accused Oyshee Rahman submitted a written statement depicting that at the relevant time she was 17[seventeen] year old as per her birth certificate as well as passport and having been drunk by taking whisky she went to her friend's house. During remand she was beaten to state something abnormally before the magistrate, otherwise she would be taken on remand time and again and she knew nothing about her parents' killing. Her sense was not working properly at that time.

10. Considering the evidence including confessions and facts and circumstances of the case, learned Judge of Druto Bichar Tribunal No. 03, Dhaka found accused Oyshee Rahman guilty of the offence punishable under section 302 of the Penal Code and sentenced her to death with a fine of Tk. 20,000/-[twenty thousand] and accused Mizanur Rahman Rony was found guilty of the offence punishable under section 212 of the Penal Code and sentenced him to imprisonment for 2[two] years with a fine of Tk. 5000/-[five thousand], in default, to suffer simple imprisonment for 1[one] month more while accused Asaduzzaman @ Jony was found not guilty and acquitted from the charge leveled against him under section 302 read with section 109 of the Penal Code.

11. Mr. Md. Atiqul Haque @ Selim along with Mr. Md. Nizamul Haque Nizam, learned Assistant Attorney Generals has taken us to the FIR, inquest reports, DNA test, reports of mental condition of accused Oyshee Rahman and her age, autopsy reports, seizure list, seizing articles, testimony of the witnesses, confessional statements, impugned judgment and other connected documents on record wherefrom it alleges that both the victims were killed by the condemned prisoner from 11:00 pm of 14.08.2013 to early in the morning of 15.08.2013 in a pre-planned manner.

12. Having gone through the evidence of all the 39 prosecution witnesses it is found that pw-01 Md. Moshiur Rahman is the informant of the case. Deceased Mahfuzur Rahman and Swapna Rahman were his elder brother and sister-in-law [bhabi] respectively. At the time of occurrence he was in the village home under Mymensingh district. Getting news from pw-20 Dr. Md. Rayhan he came to Dhaka and found the dead bodies of the victims in Dhaka Medical College morgue on 17.08.2013. After that he lodged the FIR, marked as exhibit-01 against unknown assailants. This witness could not provide any evidence against the persons by whom the victims were killed. Simply identification of the dead bodies has been made by him. He heard the occurrence from others and in the FIR [exhibit-01] he stated that his elder brother Mahfuzur Rahman and his wife Swapna Rahman were killed in the house of Flat No. 5/B, at 2, Chamelibagh, Dhaka between 11:00 pm of 14.08.2013 and 04:00 pm of 16.08.2013 but he failed to narrate any single word against the condemned prisoner before the trial court whether she was involved with the killing of the victims. The evidence of this witness is silent with regard to the involvement of the condemned prisoner. Because this witness said he had no personal knowledge subsequently, by whom the victims were killed.

13. Pw-12 Md. Amzad Ali who is the manager of the house testified that he made a call over cell phone to the mother of Oyshee who gave permission to allow Oyshee for going outside of the house as she showed interest on 15.08.2013. On 16.08.2013 maternal uncle of Oyshee came and found the door of the flat locked from outside. In his presence and others police broke the lock of the door and found two dead bodies inside Oyshee's bath room. He signed the seizure list prepared by the police on 22.08.2013. Pw-33 recorded the statement of this witness, marked as exhibit-24, under section 164 of the Cr.P.C on 26.08.2013.

14. Pw-13 Md. Shahinur Islam is a security guard who testified that Oyshee went outside when manager allowed her to go on 15.08.2013 in the morning. He could see the door of the flat locked from outside but subsequently relatives of the deceased and the police recovered dead bodies from that flat on 16.08.2013 and he signed the seizure list prepared by the police on 22.08.2013. Pw-35 Keshob Roy Chowdhury, Senior Assistant Judge, recorded statement of this witness, marked as exhibit-29, under section 164 of the Cr.P.C on 26.08.2013.

15. Pw-16 A. Motaleb is also a security guard of the house, who after having breakfast came and saw Oyshee, Ohee and Sumi in front of a CNG. They left with two bags in a CNG on being allowed by manager to go outside on 15.08.2013 in the morning. On 16.08.2013 morning Oyshee informed her maternal uncle that she was in her friend's house and did not turn out. Oyshee was asked to come but she sent her brother Ohee only. Maternal uncle, Ohee and manager went upstairs and found the door of the house locked. In the afternoon police and other relatives broke the lock of the door with the help of a locksmith and found dead bodies of Mahfuzur Rahman and his wife inside the house. Pw-12 recorded statement of this witness, marked as exhibit-12, under section 164 of the Cr.P.C on 26.08.2013. The evidence of these three witnesses namely pws-12, 13 and 16, who were deployed in the house for security purposes, established the time and place of occurrence wherefrom the dead bodies of the victims were recovered by the law enforcing agencies. Even then, their evidence finds the condemned prisoner at the downstairs' of the house and the condemned prisoner very tactfully went out of the house showing dramatic and cleverish attitude to the said witnesses. The door of the house was opened with the help of a locksmith, brought by police, which has been supported by pw-14 A. Hannan, a locksmith by profession. He said in his evidence that he was brought to the place of occurrence house by police in order to open the door of the house on 16.08.2013 and he entered the house after breaking the door and found two dead bodies therein. The evidence of these witnesses in respect of recovery of the dead bodies has been corroborated by the evidence of pw-18 Constable Taslim Uddin and pw-19 Constable Mojibur Rahman both were present at the time of recovery of the dead bodies from the place of occurrence on 16.08.2013. On 16.08.2013 morning pw-20 Dr. Md. Rayhan after being informed went to the place of occurrence building where he found Ohee who did not tell him anything correctly but said Oyshee sent him there. Police recovered dead bodies of Mahfuzur Rahman and his wife from their rented flat at Chamelibagh between 04:32 pm and 05:00 pm. This witness heard later that Oyshee was involved with the murder.

16. Pw-17 Iman Ali is a CNG auto rickshaw driver who started running the CNG auto rickshaw from 12:30 pm on 15.05.2013 under instruction of Oyshee from one place to another place in the capital and handed over the auto rickshaw in the garage at 04:30 pm. Oyshee along with her brother left keeping the maid servant Sumi in the house of the auto rickshaw driver who made a statement [exhibit-13], recorded by pw-32 Md. Mustafizur Rahman, a Metropolitan Magistrate.

17. On 19.08.2013 at 11:30 am pw-10 S.I Shahidullah recovered huge quantity of necessary goods, worn apparels, ornaments and cash money including foreign currency, marked as material exhibits-I-XXXVI [kha] at the showing of accused Oyshee Rahman from the house [tin shed] of 58/36/4, Uttar Mugda, Modinabagh, Washa Road in presence of the witnesses. Recovery of the said articles and ornaments, cash money has been supported by the evidence of pw-04 Bazlur Rahman and pw-05 Kabir Uddin Ahmed and pw-09 ASI Tobibur Rahman being seizure list witnesses.

18. Pw-11 Khokon Mollik testified that on 23.08.2013 at 08:40 pm D.B police along with accused Sumi and Oyshee came in Flat No. 5E and seized pillow cover, napkin and four tea-cups at the showing of the accused. He signed the seizure lists prepared by police in his presence and others. The evidence of this witness has been corroborated by the evidence of pw-15 Dr. Ali Munsur Md. Shoriful Islam.

19. Pw-21 Dr. Nahid Mahjabeen Morshed and pw-22 Dr. Sultana Algin both are associate professors of Department of Psychiatry in Bangabandhu Sheikh Mujib Medical University

[BSMMU], who examined accused Oyshee for ascertaining her mental condition [psychological assessment] following the order of the High Court Division of the Supreme Court of Bangladesh on a Writ Petition No. 9093 of 2013. They rendered report, marked as exhibit 15, after a long examination on her mental condition.

20. Pw-23 Dr. Sohel Mahmud is an assistant professor of Forensic Department of Dhaka Medical College Hospital, who examined the dead bodies of deceased Mahfuzur Rahman and Swapna Rahman on 17.08.2013 and found the following injuries:

21. Deceased Mahfuzur Rahman-

1. Stab wounds on a [front of base of the neck along with midline [1"X ½" X cavity]

[b] Mid abdomen along with midline 4" above the Umbilicus [1"X ½" X cavity]

Considering autopsy [exhibit-16] findings and chemical analysis report he opined that the cause of death due to haemorrhage & shock resulting from above mentioned stab injuries which were ante mortem and homicidal in nature and signs of ingestion of Bromazepam found in the dead body which was ante-mortem.

Deceased Swapna Rahman-

01. Body was swollen & initial stage of decomposition [scalp formation].

02. Stab wounds on

(a) Back of the abdomen 1" right to midline [1½" X ½" X cavity]

(b) 3 stab wounds on back of the mid abdomen two are ½" right to midline [1"X ½" X 1½"] another on ½" left to midline [1"X ½" X 1½"]

(c) 3 stab wounds on right lateral surface of right lower chest each are 1" a part each other [1½" X ½" X cavity]

(d) On left breast ½" right to nipple [1½" X ½" X 2"]

(e) On left lateral aspect of lower left abdomen [1½" X ½" X cavity]

(f) On front of base of neck ½" right to midline [1½" X ½" X cavity]

(g) On front of base of neck ½" left of midline [1½" X ½" X cavity]

22. Considering autopsy [exhibit-17] findings and chemical analysis report, he opined that the cause of death due to haemorrhage & shock resulting from above mentioned injuries [PM report] which were ante-mortem & homicidal in nature and signs of ingestion of Bromazepam found in the body which was ante-mortem.

23. Pw-24 Md. Kaiser Rahman is a chemical expert who examined the viscera of deceased Mahfuzur Rahman and Swapna Rahman and prepared reports [exhibits-18 and 19] dated 26.09.2013. No poison was detected in the viscera and blood of both the deceased but Bromazepam was found. Residuary of the coffee in the cup was examined and found Bromazepam and its report issued by him, marked as exhibit-20.

24. Pw-25 Tanvir Sultana is an assistant professor who supported the said viscera reports as she is one of the members of the board.

25. Pw-26 Md. Mahmud Hasan, a scientific officer, DNA laboratory prepared DNA test report, marked as exhibits-21 which makes conclusion as under,

26. Among the samples presented to us, exhibit-A (Bloodstain on Cotton Swab from deceased Mahfuzur Rahman), exhibit-B (Bloodstain on Cotton Swab from deceased Swapna Rahman) and exhibit-C (Bloodstain on Bangles) yielded complete DNA profile.

27. However, exhibit-D(Bloodstain on Salower) and exhibit-E (Bloodstain on kameez) yielded mixed DNA profiles.

28. The DNA profile obtained from the bloodstain present on the source of exhibit C (Bangles) matches with the DNA profile obtained from the source of exhibit-B (Bloodstain on cotton Swab from Deceased Shapna Rahman).

29. The DNA profiles obtained from exhibit-D (Bloodstain on Salower) and exhibit-E (Bloodstain on Kameez) reflects a mixed DNA profile of deceased Mahfuzur Rahman (exhibit-A) and deceased Shapna Rahman (exhibit-B).

30. Pw-27 Tasnim Ferdous is an assistant supervisor of Kishore Sangshodhanagar, Gazipur who found accused Oyshee normal between 24.08.2013 and 31.08.2013 and she used to do daily task in a normal condition. This witness saw nothing abnormal with Oyshee to commit suicide when she was in the said organization.

31. Pw-28 Md. Anisul Islam, Sub-Inspector of Detective Branch, visited Khulna Mishuk Clinic on behalf of pw-37 Md. Abu Al Khair Matabber [investigating officer] and seized diary [page 1-424 wherein at page 101 it is written that Swapna Rahman wife of Mahfuzur Rahman of Anjuman Road, Doulatpur, Khulna was admitted on 16.08.1994 at 18:45 hours] and photo copy of license of the said clinic and collected birth certificate of Oyshee issued by Dr. Abdur Rahim in presence of the witnesses and prepared seizure list, marked as exhibit-22. 16.08.1994 is the birth date of accused Oyshee recorded by Mishuk Clinic and its certificate issued by Dr. Abdur Rahman who died on 22.07.2015, have been supported by pw-36 Md. Diderul Islam, Ex-Manager of the said clinic. The birth date of accused Oyshee has also been supported by the evidence of pw-39 Nur Jahan Mery, who deposed that Oyshee was born in her presence at the said clinic on 16th August, 1994 and the delivery of her birth was normal.

32. Pw-02 Md. Jony and pw-03 Rakib Hasan are the witnesses of inquest report and seizure list. In their presence inquest reports of both the dead bodies of the deceased were prepared by pw-06 Abu Tahar Bhuiyan, Sub-Inspector of Police, on 16.08.2013 at 17:40 hours. Pw-07 Constable Maleka Begum and pw-08 Constable Mahbub Alam signed the said seizure list and challan of both the dead bodies. Pw-06 also seized many articles including a dagger and some Frence Fries from the house of the deceased on the same day. Pw-29 Md. Jahangir Hossain Sub-Inspector of Detective Branch, pw-30 Md. Golam Mustafa, Sub-Inspector of Special Branch and pw-31 Md. Nazrul Islam, Senior ASP were also present at the time of recovery of the said articles.

33. Pw-37 Md. Abu Al Khair Matabbar after receiving the case docket by the order of DC. DB memo No. 1518 dated 22.08.2013 revisited the place of occurrence, re-examined the sketch map with index [exhibit-31] prepared by the earlier Investigating Officer, seizing goods and materials, re-examined witnesses and examined 34 witnesses, autopsy reports, inquest reports, report of assessment for mental condition of Oyshee, DNA test, report of age relating to accused Oyshee and finally submitted charge sheet being No. 64 dated 08.03.2014 against accused Oyshee Rahman, Asaduzzaman Jony and Mizanur Rahman Rony after finding prima facie case and submitted a separate charge sheet being No. 65 dated 08.03.2014 against minor accused Khadiza Akhter Sumi and on 15.09.2014 a supplementary charge sheet being No. 64/1 was also submitted by him.

34. Pw-38 Md. Monir Hossain being Sub-Inspector of Horirampur Police Station verified the name and address of accused Asaduzzaman Jony.

35. It appears from documents on record that Dr. Meruna Mahjaben and Dr. Farhana Rahman, Forensic Medicine Department, DMCH clinically examined accused Oyshee Rahman to ascertain her age. Considering findings of physical examination and radiological reports they opined that the present age of accused Oyshee Rahman is around 19[nineteen] years.

36. In this case Oyshee Rahman and Khadiza Akhter Sumi made confessional statements before the magistrate during investigation of the case. It reveals from the confessional statement of Oyshee that she having brought sedative tablets from the shop blended with the coffee and administered the same to her mother after Magrib prayer and father after around 11:00 pm on 14.08.2013. She stabbed her mother on her abdomen indiscriminately with a sharp knife at about 02:00 am [15.05.2013] after being drunk from two small bottles of whisky in the master bed room. She took her younger brother Ohee inside bath room when he started crying after waking up. She gave jomjom water to her mother when she wanted to drink. Thereafter, she made some more stabs on her mother and then more blows on her neck. Her mother fell on the ground from the bed and died of sustaining wounds. Her father also died sustaining stabs dealt by her.

37. She did not tell anything to the maid servant Sumi on how her parents were killed and she took shower and the maid servant cleaned the blood stained room of her mother. Both the dead bodies were kept inside the bathroom putting off worn ornaments from her mothers' hands. She told her brother that as mother sustained a small wound, she was taken to a hospital by their father. Failing to communicate with Jony she sought shelter from one Rocky known to her previously. It also appears from her statement that she took her mother's wallet along with ornaments, money and other worn apparels. In the name of going to her aunt's house she along with her brother and maid servant Sumi went out of the house by telling security guard at 08:10 pm.

38. Throughout the day she roamed around in a CNG in order to get shelter and met Rocky and Jony while she spoke with Rony over cell phone. She has also stated in her confession that she retained Sumi under the shelter of the CNG driver in his house at night. Another CNG driver arranged for her to stay in the house of the CNG owner. She also communicated with her aunt Suborna who talked to her maternal uncle Robiul in the night of 15.08.2013. She also talked to her maternal uncle Robiul in the morning of 16.08.2013 and handed over her younger brother to him by a rickshaw. She stayed the night of 16.08.2013 in the house of Rony's aunt Kulsum at Basabo. At night she started to realize repentance [for her wrong doing] and decided to disclose it. Even then, she went to her aunt's house at Uttara and failing to get her available she surrendered to Palton Police Station and disclosed the incident to the police.

39. She has a friend named Jony aged about 25-26 who has a 'step up' named, a dance school at Aftab Nagor. She used to take yaba with Jony who was supplying the same. Rocky aged about 40 years is a businessman of a rent-a-car. Rony aged about 22-24 is a dancer by profession. A distance was created from her parents when she was 12/13 years old and her parents used to beat her up. She fled away from her house more than once and her parents kept her in the house and did not let her go outside. She could not share anything with the inmates of the house rather she shared everything with Jony. She further narrates that 4/5

days before incident she was planning to kill her parents and she shared her plan with Jony who hoped to give her shelter, if required. Before surrendering to the police her worn apparels along with money and ornament were kept in the house of Rony's aunt and police recovered all the things from there by her pointing.

40. The said confessional statement finds the involvement of the maker in the killing of the victims in a pre-planned manner. From the evidence of pw-34 Md. Anowar Shadat, Senior Assistant Judge, it appears that he being a judicial magistrate endorsed her confession that it was made voluntarily and after maintaining all formalities he recorded her confessional statement, marked as exhibit-27 on which he put several signatures and the confessing accused also put her signatures as well and contents of the confessional statement were read over and explained to her who signed the same after having found correct and from the confession it is found that the magistrate made remarks depicting that confession of the accused seemed to be true and voluntary in nature.

41. Before recording her confession, he alerted her saying that it might be used against her as evidence if she confesses. And further told her that he was not a police officer but a magistrate and she is not bound to confess and whether she was tortured by anybody. Having understood the questions she made the confessional statement willingly.

42. Before or after recording the statement she did not make any kind of complaints to him as to whether she was tortured or assaulted by the investigating officer or she was under any duress or coercion to make confession. From the said evidence of this witness and confession of the accused it has revealed that there was no sign of conflict between the recording officer or investigating officer and the confessing accused. And the defence failed to discard the evidence that any authority or interested quarter came forward to compel her to make such confession. So, the arguments made by the learned Advocate Mr. Sujit Bhattacharjee seem to be unworthy in nature. There may have been some minor irregularities in recording the confessional statement of the accused but such irregularities are not being considered as major mistakes. It reveals from confession of condemned prisoner that there was no complaint of police torture or any kind of threat before the pw-34 that she was compelled to confess beyond her willingness, if any violence or inducement is not made by the police then the confession may be regarded as voluntary. Even then, recording magistrate rendered her reasonable time to think that if she confesses it may go against her as evidence. Therefore, it can be firmly said that the confessional statement made by her is absolutely voluntary and true and can form the sole basis of conviction as against the maker of the same. It finds support from a decision held in the case of Islamuddin –Vs-State, reported in 13 BLC [AD] 81 which is run as follows,

> **"It is now the settled principle of law that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same. The High Court Division has rightly found the judicial confession of the condemned prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case found the condemned prisoner guilty and accordingly imposed the sentence of death upon him."**

43. In the present case pw-34 as recording magistrate has been produced before the trial court and examined thoroughly by the defence but nothing is found shaken with regard to the sanctity of the said confession.

44. The expression 'confession' has been defined by Stephen in his 'Digest of the Law of Evidence' that 'a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime'. The presence of a magistrate is a safe-guard and guarantees the confession as not made by influence. When a confession is taken by a public servant there is a degree of sanctity and solemnity which affords a sufficient guarantee for the presumption that everything was formally, correctly and duly done. In this case the recording magistrate came forward to give the evidence and there has been found nothing that he failed to give the memorandum as to her confession and pw-34 has been thoroughly cross-examined by the defence as to the genuineness of the confession and memorandum issued by him. It is not necessary that the memorandum as to the confession is to be issued separately. It is enough, if it is inserted in the prescribed form but there must be signature of the recording officer which is found present. So, no question of genuineness of the confession is found present in this case. It finds support from the case of State-Vs-Munir and another, reported in 1 BLC, 345 which is run as follows,

> **".....The confessional statement of Munir Ext. 50 recorded in accordance with the provision of section 164 of the Code of Criminal Procedure was signed by the confessing accused and the Magistrate and, as such, the Court shall presume under section 80 of the Evidence Act that the document is genuine and that the statement as to the circumstances under which it was taken by the Magistrate are true and the confession was duly taken."**

45. Although the condemned prisoner, subsequently retracted her confession by placing written statement at the time of examination under section 342 of the Cr.P.C that she was compelled to confess before the magistrate under threat of torture by police and she being minor was not stable because of being drunk from two bottles of whiskey. But that does not reflect on her confession made by her because such history of confession was unable on the part of any interested quarter to make falsely in such way. No such clue or document is found in the entire evidence of the prosecution case. More so, if the confession is found to be true and voluntary, the retraction at a later stage does not affect the voluntariness of the confession. The retraction of the confession is wholly immaterial once it is found voluntary as well as true.

46. On a plain reading of her confession it is clearly found that she made the confession involving herself alone in the commission of offence. So, there is no doubt that the confession of the accused is inculpatory in nature. The confession is so natural and spontaneous that one cannot harbor any doubt about its voluntariness. When a confession is found to be true and voluntary and inculpatory in nature without corroborating evidence a conviction can be imposed upon the maker of the statement. It finds support from the case of Mofti Abdul Hannan Munshi @ Abul Kalam and another–Vs-the State, [judgment dated 7th December, 2016] reported in 2017(1)LNJ (AD)38 in which the Apex Court opined that

> **"Even if there is no corroborative evidence, if a confession is taken to be true, voluntary in nature, a conviction can be given against the maker of the statement relying upon it subject to the condition mentioned above. In view of the above proposition of law, there is no legal ground to interfere with the conviction of the appellants and co-accused since the confessions are not only inculpatory but also true and voluntary. Deliberate and voluntary confession of guilt, if clearly proved, are among the most effectual proofs in the law-their value depending on the sound presumption that a rational being will not make admission prejudicial**

to his interest and safety, unless when urged by the promptings of truth and conscience."

47. From the confession of minor accused Khadiza Akhter Sumi it reveals that Oyshee disclosed to her that she blended medicine with coffee for her mother to sleep and administered the same to her mother in the evening. Oyshee also administered coffee mixed with sedative medicine to her father after 11:00 pm at night. She could see Oyshee stabbing her mother when she once woke up from bed. She became scared and feared on seeing through door's hole while Oyshee committing such acts and went back to her room. Early in the morning Oyshee woke her up by saying that Rony and Jony having come killed her parents but she could see blood stains on the trousers of Oyshee who took the dead bodies inside the bath room with her help. As per instruction of Oyshee she cleaned a room in which victim Swapna Rahman was killed. She was under threat from Oyshee. Having taken ornaments and money from 'almira' Oyshee went out of the house along with her and Oyshees younger brother Ohee next morning by misleading security guard that she was going to her aunt's house. They went to many places throughout the day by a CNG and Oyshee had talks with others. Oyshee put her in the house of the CNG driver giving hope to take back her next morning but did not come to take her back. She stayed in the house of CNG driver for three days and narrated everything to the CNG driver who took her to Badda Police Station. This confessional statement of Khadiza Akhter Sumi indicates that she directly saw the offence of killing committed by Oyshee and in fear of Oyshee she performed some acts after incident.

48. The confession made by the condemned prisoner regarding killing incident of the deceased has been supported by information provided made by Khadiza Akhter Sumi. But this confession of Sumi should not be treated as corroborative evidence. It may be a piece of circumstantial event because such information provided by co-accused in her confession has not been tested on oath.

49. Although defence has claimed that accused Oyshee was minor at the relevant time but evidence of pws 28, 36 and 39 along with diary of Mishu Clinic and her birth certificate and school certificate from Oxford International School strongly proved that she was above 18 years at the relevant time. So the trial of accused Oyshee held by Druto Bichar Tribunal cannot be said quorum-non-judice or beyond its jurisdiction even the medical examination of accused Oyshee for ascertaining her age as around 19 years held by DMCH on 01.09.2013 is forgone as doctor was not examined.

50. Movement of Oyshee throughout the following day of the occurrence by CNG in the capital is one of the circumstances that includes her conduct for coming out of the house early in the morning misleading the security guards including the manager of the 'apartment building' where she along with her parents, younger brother Ohee and maid Sumi used to reside together. Since Oyshee was only the major girl with her parents in the house on the dreadful night she has to explain how her parents were brutally killed in the house and that has been proved by her subsequent conduct surrendering to the police station.

51. Her staying outside locking the door of the place of occurrence flat is un-explained. If Oyshee was innocent as claimed by the learned defence lawyer Mr. Surojit Chatterjee, why Oyshee stayed the night of 16.08.2013 at Basabo in a house of Kulsum Begum wherefrom a huge quantity of worn apparels, small goods, cash money and ornaments were recovered by police at the showing of accused Oyshee and she also admitted that she brought the said

materials from their house after killing her parents. Although only on the basis of confessional statement conviction can be imposed upon the maker as per section 30 of the Evidence Act but it finds support from other circumstantial evidence as stated above. Considering the above evidence, discussions and findings and facts and circumstances of the case we are constrained to hold that the prosecution has been able to prove the case against the condemned prisoner beyond shadow of doubt under section 302 of the Penal Code.

52. Having realized the quality of evidence provided by the prosecution and multiple murder in the case, Mr. Afzal H. Khan, learned Advocate appearing for the condemned prisoner at the outset contends that though there are many ambiguities in the evidence of prosecution witnesses but he does not intend to press the appeal on merit seeking commutation of sentence to the effect that the murder took place without any motive and the condemned prisoner was suffering from mental derailment or some sort of mental disorder and at the relevant time she was drunk after having two bottles of whisky. In support of these contentions both the learned Advocates referred to many decisions held by our Apex Courts and foreign courts as well. They have also drawn our attention to the report held by a board of three members' committee at Bangabondhu Sheikh Mojib Medical University, for assessment of mental condition of accused Oyshee Rahman, marked as exhibit-15 which is the outcome of Writ Petition No. 9093 of 2013.

53. Per contra, Mr. Zahirul Haque Zahir, learned Deputy Attorney General along with Mr. Md. Atiqul Haque Selim and Mr. Nizamul Haque Nizam, learned Assistant Attorney Generals appearing for the State opposes the appeal to be dismissed and to accept the death reference, submits that at the time of occurrence the condemned prisoner was around 19 years of age and she brutally killed her parents in a pre-planned manner and she does not deserve any kind of sympathy from this Court.

54. We have given our anxious thought over the contentions of the learned Advocates of both the parties, perused the report held for assessment of mental condition of the condemned prisoner and other documents on record wherefrom it transpires that the occurrence took place by the hands of daughter of the deceased and the case has been proved by the evidence of the prosecution witnesses as well as confessional statement of condemned prisoner as discussed earlier.

55. Now the vital question is before us whether the condemned prisoner has any scope to get mercy of this Court by awarding sentence to imprisonment for life from the death sentence. In the criminal justice system the purpose of punishment recognized five specific things namely,

1. **'Deterrence' which prevents crime by frightening an individual offender with punishment and by frightening the public with the punishment of an individual offender.**
2. **'Incapacitation' which prevents future crime by removing the accused from society i.e to put him in a confined place.**
3. **'Rehabilitation' also prevents future crime by altering an offender's behaviour through education, vocational programs, treatment and counsel etc.**
4. **'Retribution' prevents future crime by removing the desire for personal avengement against the offender such as when victims or society discover that the accused has been adequately punished for a crime, the achieve a certain satisfaction that the criminal procedure is working effectively, which fetches faith in law enforcement as well as government.**

5. 'Restitution' prevents future crime by pecuniary punishment to the accused. Restitution is when the court orders the criminal to pay the victim for any harm and restitution can be for physical injuries, loss or property or money, and rarely, emotional distress. Such punishment can also be a fine that covers some of the criminal prosecution and punishment.

56. The above punishments are generally imposed upon the perpetrators for committing crimes in the dispensation of criminal justice system in order to get the society more civilized and stable.

57. Among all the punishments the death penalty is the highest one which the abolitionists believe is the worst violation of human rights, because the right to life is the most important factor, and capital punishment violates it without necessity and inflicts to the condemned a psychological torture while human rights activists oppose the death penalty calling it 'cruel, inhuman, and degrading punishment'. Amnesty International also intends to say that it is to be 'the ultimate, irreversible denial of human rights'.

58. Among countries around the world almost all European and many specific States including Australia in 1973 [although the State of Western Australia retain the capital penalty until 1984], New Zealand and Timor Leste, and Canada in 1976 [except for some military offences, with complete abolition in 1998], France in 1981 have abolished capital punishment. In Latin America, most States have completely abolished the use of capital punishment while some countries, such as Brazil, allow for capital punishment only in exceptional situations, such as treason committed during war. In the United Kingdom, it was abolished for murder, leaving only treason, piracy with violence, arson in royal dockyards and a number of war time military offences for capital punishment, for a five year experiment in 1965 and permanently 1969, the last execution took place in 1964. It was abolished for all peacetime offences in 1998.

59. In the United States, Michigan was the first State to ban the death penalty, on 18.05.1846. The death penalty was declared unconstitutional between 1972 and 1976 based on Furman-Vs-Georgia, 408 U.S. 238[1972] and further limitations were placed on the death penalty in Atkins –Vs- Virginia stating that it was unconstitutional for people with an intellectual disability and in the case of Roper –Vs-Simmons it was held that it is unconstitutional if the accused is under age eighteen at the time of crime committed. In the United States, 18 States and the District of Columbia banned capital punishment.

60. In America, the case of Lockett –Vs- Ohio [1978] emphasized the importance of mitigation in capital trials. Sandra Lockett was charged with aggravated murder with specifications for her involvement in planning and facilitating the robbery of a pawnshop that resulted in the murder of the pawnbroker. According to one of the other suspects in the case, Lockett drove the gunman away from the crime scene, concealed the murder weapon, and hid two suspects from police. The jury was instructed that someone who "purposely aids, helps, associates herself with another for the purpose of committing a crime is regarded as if she were the principal offender and is just the guilty as if the person performed every act constituting the offense." The jury found Lockett guilty. Under Ohio law at the time, the death penalty was mandatory for those found guilty of aggravated murder unless one of three specified mitigating factors was found:

1. The victim induced or facilitated the offence;

2. **It is unlikely the offence would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or**
3. **The offence was primarily the product of the offender's psychosis or mental deficiency.**

61. In Walton –Vs- Arizona [1990] the Judge found the aggravating circumstances that the murder was 'especially heinous, cruel, or depraved' and that it was committed for pecuniary gain. As mitigation, Walton presented a psychiatrist's testimony on Walton's history of substance abuse and possible childhood sexual abuse. Walton's youth was also presented as mitigation as he was twenty years of age at the time of sentencing.

62. The role of mitigation in the **Aileen Wuornos case** focused on her traumatic childhood and mental illness. Aileen Wuornos was abandoned by her parents and raised by her maternal grand-parents. Her father committed suicide while incarcerated for child molestation. She was physically and sexually abused throughout her childhood and teenage years. At the age of fifteen, following the death of her grandmother, Wuornos was kicked out of her grandmother's house and became a ward of the court. Three Psychologists testified that Wuornos suffered from 'border line personality disorder', likely brought on by her traumatic upbringing. The Jury's sentencing recommendation found only one mitigating factor: the defendant suffered from border line personality disorder. The Judge, however, found five mitigating factors; namely

[1] Wuornos suffered antisocial and borderline personality disorder;
[2] she may have been physically abused as a child;
[3] her natural father and grandfather committed suicide;
[4] her grandmother died as alcoholic; and
[5] her mother abandoned her as an infant.

63. According to the Indian procedure the provision of section 235(2) of Criminal Procedure Code calls upon the court that the convicted accused must be given an opportunity of being heard on the question of sentence. This provides the accused an opportunity to place his antecedents, social and economic background and mitigating and extenuating circumstances before the court. Besides the statutory provisions, the Constitution of India also empowers the President and the Governor of the State to grant pardon to the condemned offenders in appropriate cases. These powers are, however, co-extensive with the legislative powers. The power to cut short a sentence by an act of executive exists in India and elsewhere. It is significant to note that the controversy raised in this regard in Nanavatis case, has been settled by the Supreme Court of India once for all in the case of Sarat Chandra –Vs- Khagendra Nath which affirmed the principle that sentencing power of judiciary and executive are readily distinguishable.

64. In law mitigating and extenuating circumstances in criminal cases are unusual or extreme facts leading up to or attending the perpetration of the offence which, although an offence has been perpetrated without legal justification or excuse, mitigate or reduce its gravity from the point of view of punishment or moral opprobrium. Mitigation, also referred to as mitigating factors or 'mitigating evidence' is evidence the defence can present in the sentencing phase of a capital trial to provide reasons why the accused should not receive a death sentence. This evidence, which can include mental problems, remorse, youth, childhood abuse or neglect, a minor role in the homicide, or the absence of a prior criminal record, may reduce the culpability of the accused in the killing or may provide other reasons for preferring a life sentence to death.

65. In the case of our criminal justice system there is no provision in law for the offender to reduce the sentence by mitigating circumstances as of right but in practice the judges have powers to determine the punishment to be awarded for an offence. The sentence, with certain exceptions in capital cases, is within the sole discretion of the judges and the judges are determined by discretion to weigh the mitigating factors presented by the defence against the aggravating factors presented by the prosecution. Practice reminds precedents that the death penalty is intended only 'for the worst of the worst' crimes.

66. In America, as mitigation has been recognized as a critical part of a capital trial, defence attorneys have turned to mitigation specialists to investigate defendant's backgrounds. Mitigations specialists examine dependants' family history, medical history, education and employment background, and any other element of an individual's life that may convince the Jury to return a sentence other than death. After getting information, they assist defence counsel in presenting a coherent case for mitigation. The role of the mitigation specialist is so central to a client's defence that the American Bar Association includes them in their guidelines on the defence in death penalty cases.

67. In the history of Pakistan's judiciary mitigations are often used in the calculation of sentence when the allegation is found proved against the defendant. In the case of Zulfiqar alias Bhutto Vs The State [1995 SCMR 1668] the benefit of tender age was given to the accused but it was further opined that tender age of the accused may not be a firm rule applicable in cases where the offence is so heinous or brutal. In another case of Muhammad Ikram alias Billa –Vs- The State, reported in 1999 SCMR 406 the accused was allowed such benefit on account of his tender age by conversion of his sentence of death to imprisonment for life and the evidence referred to the fact that the accused who was of tender age got annoyed over failure of the deceased to return borrowed money and his use of foul tongue when the money was demanded from him by the accused. Even then, considering the young age of the accused at the time of commission of offence as a mitigating factor resulted in conversion of sentence from death to that of imprisonment for life although the motive of the murder was successfully established by the prosecution, observed in the case of Muhammad Afzal –Vs-The State, 1999 SCMR 2851.

68. In the case in hand, it appears from evidence on record that the prosecution has marked the report prepared for the assessment of mental condition of condemned prisoner as exhibit-15 which basically has come into light by a Writ Petition No. 9093 of 2013. During examination of her mental condition after around two months of the occurrence, the medical board took five interviews of the condemned prisoner on 28.10.2013, 03.11.2013, 07.11.2013, 08.12.2013 and 16.01.2014 and Md. Abu Al Khair Matbbor, Inspector of Police, Detective Branch, who investigated the case as 3rd Investigator, on 11.11.2013 and Iftekar Alam, husband of only maternal aunt of condemned prisoner on 18.11.2013 and Moshiur Rahman [pw-01] only paternal uncle of condemned prisoner on 18.11.2013 and Khadiza Akhter Sumi maid servant on 03.12.2013 respectively wherefrom it reveals that her father was Police Inspector of Special Branch and mother worked in Destiny since 2001 and her birth history was not eventful according to her close relatives and she studied in different schools. She has history of ovarian cyst and bronchial asthma and taking Allopathic and Homeopathy medicine. Her family history discloses that her paternal grandmother and maternal uncle had psychiatric disorders.

69. When she was in class VI in 2009 problems initially started such as lack of interest in study, lack of interest in maintaining daily life activities, decreasing interest in attending school, breaking family rules, taking drugs with smoking, poor concentration, irritability, stealing money from her father's pocket. Due to above problems and poor academic performance she had to change her school. She had a history of attempted suicide in 2009 by taking sedative overdose [20-30 sedative tables] and was hospitalized at that time and followed by another attempt after 3 or 4 months with insecticide of cockroaches and 3rd attempt was at the end of 2012 and tried to hang by netting rope but the rope tore and she was survived. She even got suicidal thought and ideas in jail. She started smoking cigarette when she was in class IV. Since 2008 she needed at least twenty sticks per day and is still continuing.

70. The above problems were gradually increasing and more marked from class VIII [2011]. She then started to mix with different persons other than her classmates. At that moment her previous problems remarkably increased and were identified by her parents. Unmindful, impulsivity, continuous deceitfulness, destruction of household properties, violation of family rules, irritability, substance misuse, stealing, staying outside home overnight, thus caused clinically significant impairment of her social and academic functioning. It is noted that substance misuse behavior remarkably started when she was a student of class IV or V and the same was increased from class VIII in 2011.

> 'For the last few years she was less concerned about her family affairs. She had no feeling about her parents concern regarding her present and future. She had a tendency not to learn from the previous fault. Even she had no guilty feeling or remorse about her such activities. She had also a tendency to rationalize her own act, thinking and behavior.'

71. She started taking alcohol from her father's store when she was in class four or five. Taking alcohol gradually became a habit for her from 2012. Habit of taking shisha started in 2011 from different places and taking yaba irregularly started since 2012 and she used to take cannabis occasionally.

72. From the above personal including family history, psychiatric, suicidal and drug history it has emerged that she has been suffering from,

1. **Personal disorder [dissocial personally disorder]**
2. **Conduct disorder [before the age of eighteen years] and**
3. **Mental and behavioral disorders due to psychoactive substance use-**
   [a] mental and behavioral disorders due to use of tobacco and
   [b] harmful use of shisha [volatile substance], alcohol, yaba and cannabis [ganja]

73. At the time of occurrence she was drunk according to her statement and it was confirmed by taking history from the condemned prisoner although there was no way to confirm it clinically as she was put on medical board for mental assessment after more than two months of the occurrence while suffering from the above illness. Immediately after the occurrence before her surrender to the police she was found anxious, restless, perplexed, helpless and hopeless. Possible mental condition after the incident it is clear from her history and assessment that her personality problems are still persisting. The medical board finally concluded that Oyshee Rahman currently is suffering from

1. Post traumatic stress disorder [PTSD]
2. Personal disorder [dissocial personally disorder].

74. She was prescribed to take medication [mirtazepine 15mg] for her present psychiatric illness and need psychotherapy and further follow-up for her present condition.

75. Although in the neighboring country like India in a case of murder, if proved, the imprisonment for life is the first option of punishment imposed upon the perpetrator and the second option is death penalty which can be imposed upon the perpetrator in a case of an extreme crime committed but it has to assign the reasons why the capital punishment i.e death penalty has been imposed upon the offender. But in our criminal justice system, if an offence of murder is proved beyond reasonable doubt, the capital punishment is the first choice to impose upon the offender and the second option is imprisonment for life imposed if the court finds any mitigating circumstances upon its discretionary power which means that court has to explain the reason why the sentence of death has been commuted to one of imprisonment for life. Our Apex Court very recently opined in a case of Ataur Mridha @ Ataur and another -Vs-The State [unreported] that the capital punishment is the rule while the imprisonment for life is an exception. It was further observed that when the question of commutation is considered the court has to assign the reasons as to why it has occurred and in case of commutation from death penalty to life imprisonment, this court may direct that the offender shall have to suffer rest of his natural life and such type of cases would be beyond the application of remissions.

76. In the case in hand, it is evident that the condemned prisoner killed her parents in a pre-planned manner. Before the occurrence took place she made a plan to kill her parents and she brought a number of sedative tablets in the occurrence house and administered the same blending it in coffee to both the victims one after another. In these circumstances, the pertinent question is before us whether the commutation can be considered to the condemned prisoner while there is no sentencing guideline in law other than in practice. In the case of Nalu –Vs-The State, reported in ALR [AD][2012] the Apex Court considered four mitigating circumstances, two of them are as follows:

> **[a] The condemned prisoner has no significant history or prior criminal activity in the police report and**
>
> **[b] The condemned prisoner was very young at the time of commission of the offence.**

77. In the case of State –Vs-Tasiruddin, reported in 13 DLR 203 where the age of the offender even up to 27 years, has been considered as a ground of commutation of the sentence of death. It finds more support from the decision held in the case of the State –Vs-Saifullah Al-Mahmood Tanvir and others, reported in 1 LM [AD] by which the Apex Court has accepted the opinion of the High Court Division to the effect that since the age of the appellants [the convicted- respondents] were not that much and they had just attained the age of majority they [the learned judges] found it justified to commute the sentences of death to imprisonment for life."

78. In the above discussions, we find that many developed and civilized countries' higher judiciaries all over the world discourage the death sentence in the cases of murder, even if heinous in nature but our country has not achieved that much of a remarkable position in terms of such betterment. Yet, the people of this country are trying to be more conscious than the past about organizing the civilized society and focusing on primary education as well as higher education for self development. However, increasing rate of population growth means crimes are also increasing in the society day by day according to statistical reports.

79. Apart from this, in a criminal case it is often found that both the parties in order to make their respective case strong, provide untrue statements or evidence in a real incident or occurrence which sometimes makes persons/men involved in the dispensation of justice, confused. Therefore, the dispensers have to face a lot of challenges while adjudicating justice. But there is no scope to take a back step from continuing to dispense justice until the end of the day when the offender is brought to the notice of the court in fear of any of these challenges. To develop and upgrade the highest credibility of the judiciary it needs more consciousness, more education, more patriotism and remarkable civilization among the people of the country to bring about pragmatic thinking in awarding punishment upon the perpetrator who commits the crime. In a country like ours it is yet not up to the remarkable position that the death penalty can be abolished or the same can be withdrawn by amending law of the land. But in order to impose the sentence upon a perpetrator for the crime committed by him/her, if proved, there must be a guideline or rules as to how it can be imposed. Because, the defence does not know as to whether the prosecution is being able to prove its case before delivery of the verdict, then how the defence can approach to the court to avail lesser punishment. If the defence, before pronouncement of judgment, urges the court for lesser punishment which indicates that the defence is admitting the commission of the offence. And as such, the concerned authorities may think about the guidelines on what and how the sentencing system is being applicable in law.

80. In the present case, considering the social disruption learned trial judge in his findings showed some sort of emotion on how the condemned prisoner dared to kill her parents brutally by her own hands, but there is no scope to show such emotion in determination of awarding sentence or during adjudication of justice. The court has to consider legal evidence and materials that under what circumstances the occurrence took place by her cruel actions at the age of around 19[nineteen] years being a female member. It appears further from evidence that the condemned prisoner being a daughter killed her parents apparently in a pre-planned manner which is undoubtedly a painful event for the family members and the people of a civilized society as well. At the same time it is evident by exhibit-15 that the condemned prisoner has been suffering from personal disorder [dissocial personally disorder], conduct disorder [before the age of eighteen years] and mental and behavioral disorders due to psychoactive substance use of tobacco, shisha [volatile substance], alcohol, yaba and cannabis [ganja]. A three member medical board also found her as anxious, restless, perplexed, helpless and hopeless immediately after occurrence before surrendering to the police station. They also found her personality problems still persisting from for possible mental condition after the incident.

81. This Court during hearing of the death reference brought the condemned prisoner physically on 10.04.2017 from the prison to make an assessment for considering the exhibit-15 by an order dated 03.04.2017 following section 375 of the Cr.P.C. During inquiry she did not show any kind of realization that she was facing gallows on hearing death reference and appeals for the crime committed by her. Rather she said she feels unwell when someone places something before her with a bad intention to recall her past conduct and finally she wishes to commit suicide. From the said direct inquiry it is found that she is still not in a position to ponder about the killing of her parents by her own hands on the dreadful night at their residence. In such a situation how far is it justifiable for gallows to be imposed on her?

82. From the family history of the condemned prisoner it is also found that her father was a Police Officer and mother was working in Destiny [a private business organization] which

indicates that her parents were busy with their livelihood and also evident in the case that in her early life sufficient care did not take place by her parents although they could realize it at a later stage when her life had already been ruined by addiction and other things. And that is why, it can be said that parents or guardians are the only teachers of their children at the beginning of children's their early lives. Parents should encourage their children to different books as it can prevent them from slipping into a wrong path. Children can be prevented from heading down the wrong path only by getting them involved in good environment and also good family atmosphere. The amount of time the parents spend with their children or they get involved in domestic chores is not very significant for the betterment of the children. They are to spend enough time for their children with a good environment in the early lives so that children can approach towards the good things for their future lives.

83. This sentence that someone be punished in such a manner is referred to as 'Death Sentence', whereas the act of carrying out the death sentence is known as execution. The execution is not only an exemplary punishment alone that can erase the crime from the society forever. Lesser punishments may significantly prevent or reduce the crimes from the society depending on the good governance and awareness of the people.

84. To consider the lesser punishment from death sentence to life imprisonment mitigating evidence or circumstances must be stronger than that of aggravating evidence produced by the prosecution. In this case we find the following circumstances outweigh the aggravating circumstances,

6. **Condemned prisoner committed double murder without any apparent motive and was suffering from mental derailment or some sort of mental disorder and also suffering from ovarian cyst and bronchial asthma;**
7. **Her paternal grandmother and maternal uncle had a history of psychiatric disorders according to exibit-15;**
8. **She was around 19[nineteen] year old at the relevant time and the occurrence took place just immediately after her attaining the age of majority;**
9. **She has no such significant history of prior criminal activity [criminal cases] and**
10. **She had willingly surrendered to the police station soon after two days of the occurrence.**

85. Therefore, we do find extraneous grounds to commute the sentence but we do not find any reason to interfere with the conviction recorded against her under section 302 of the Penal Code.

86. In the above facts and circumstances of the case, we are of the view that ends of justice will be met if accused Oyshee Rahman is sentenced to one of imprisonment for life instead of awarding her sentence to death with a fine of Tk. 5,000/-[five thousand].

87. It is also found from the confession of Oyshee that she left the house along with her brother Ohee and maid Sumi the following day of occurrence i.e on 15.08.2013 and went to Badda after having a talk with accused Jony, who has been acquitted, but got no assistance from Jony. Thereafter she made contact with Rony who took her to his maternal aunt's [Kulsum Begum] house at Mugda and having full knowledge that Oyshee has committed the murder still gave her shelter, which has been supported by the evidence of pws-4, 5, 9, seizure list witnesses at Mugda from where the belongings and some other materials were

recovered at the showing of accused Oyshee Rahman. Having considered the confession of accused Oyshee Rahman and evidence of the said witnesses and other circumstances it can be said that accused Mizanur Rahman Rony had knowledge about the offence of murder committed by Oyshee and by giving shelter he tried to conceal accused Oyshee Rahman with the intention of screening her from legal punishment. However, since there is no appeal before us with regard to the said accused Mizanur Rahman Rony, we are refrained ourselves from passing any order in this regard.

88. In the result, the Death Reference No. 99 of 2015 is, hereby, rejected with the said modification in awarding sentence. The Criminal Appeal No.10281 of 2015 and Jail Appeal No. 206 of 2015 are dismissed.

89. Accordingly, the condemned prisoner Oyshee Rahman is sentenced to imprisonment for life with a fine of Tk.5,000/- as stated above and be shifted from the condemned cell to normal cell meant for similar convicts at once.

90. Let a copy of the judgment and order along with lower court's records be transmitted to the Druto Bichar Tribunal No. 03, Dhaka for taking necessary measures.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(CRIMINAL APPELLATE JURISDICTION)

Death Reference No. 92 of 2015

The State
-Versus-
1. Md. Sharif and
2. Md. Mintu Khan
.....Condemned prisoners
with
Criminal Appeal No. 9051 of 2015
Md. Sharif
-Versus-
The State
Mr. Golam Mohammad Chowdhury with
Mr. Md. Hemayth Uddin and
Mr. Md. Akhteruzzaman Talukder, Advs.
.....for the appellant
with
Criminal Appeal No. 9170 of 2015
Md. Mintu Khan @ Mintu
-Versus-
The State
Mr. S. M Abdul Mobin with
Mr. Mahabub-Ule-Islam
Mr. Md. Muhibullah Tanvir
Mr. Md. Emran Khan and
Mr. Md. Abdus Salam, Advocates
.....for the appellant

with
Jail Appeal No. 222 of 2015
Md. Sharif
-Versus-
The State
And
Jail Appeal No. 224 of 2015
Md. Mintu Khan
-Versus-
The State
Mr. Zahirul Haque Zahir, D.A.G with
Mr. Md. Atiqul Haque [Selim], A.A.G
Ms. Bilkis Fatema, A.A.G and
Mr. Nizamul Haque Nizam, A.A.G
…….....…..for the State
Mr. Kazi Md. Sajawar Hossain,
Advocate
.....[assisted the State informally during CAV of the Death Reference]

Heard on: 10.01.2017, 11.01.2017, 15.01.2017, 16.01.2017, 17.01.2017, 18.01.2017, 22.01.2017, 23.01.2017, 24.01.2017, 29.01.2017 and 29.03.2017.

Judgment on 04.04.2017

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Jahangir Hossain

Mitigating factors to consider the lesser punishment from death sentence to life imprisonment;

The contention of learned Advocate Mr. S.M Abdul Mobin for the defence is that the sentence of death is too harsh in this case because both the accused persons tried to save the life of the victim removing him to more than one hospital from the place of occurrence as disclosed by the prosecution witnesses. Now the question is commutation of sentence as pointed out by the defence to be considered or not. In true sense, it is most difficult task on the part of a judge to decide what would be quantum of sentence in awarding upon an accused for committing the offence when it is proved by evidence beyond shadow of doubt but the judge should have considered the legal evidence and materials for punishment of the perpetrator not as a social activist [63 DLR 460, 18 BLD 81 and 57 DLR 591]. Sometimes, it depends on

gravity of the offence and sometimes, it confers upon an aggravating or mitigating factor. ... (Para 82)

In such a situation, it is a very hard job for the court to determine the quantum of sentence whether it will be capital punishment or imprisonment for life upon the accused persons since they played a role for saving the victim's life soon after occurrence as evident by the said prosecution witnesses. At the same time it is very important to note that the victim was completely an innocent teenager who had no fault of such dire consequences at the hands of the accused persons. Since the determination of awarding sentence to the accused persons is at the middle point of views, it may turn to impose capital punishment or imprisonment for life and that is why, the advantage of lesser one shall find the accused persons to acquire in the instant case. More so, both the accused persons have no significant history of prior criminal activities and their PC and PR [previous conviction and previous records] are found nil in the police report. In this regard it finds support from the decision in the case of Nalu –Vs-The State, reported in 1 ALR(AD)(2012) 222 where one of the mitigating factors was previous records of the accused. ... (Para 87)

JUDGMENT

Jahangir Hossain, J

1. This Death Reference No. 92 of 2015 is the outcome of judgment and order of conviction and sentence dated 08.11.2015 referred by the learned Metropolitan Sessions Judge [in-charge], Khulna for confirmation of death sentence to condemned prisoners, Md. Sharif Sheikh and Md. Mintu Khan @ Mintu under section 374 of the Code of Criminal Procedure [briefly Cr.P.C].

2. Challenging the said judgment and order of conviction and sentence condemned prisoners, Md. Sharif Sheikh and Md. Mintu Khan @ Mintu both filed two separate petitions of appeals being numbered as Criminal Appeal Nos. 9051 of 2015 and 9170 of 2015 and also filed two separate Jail Appeal Nos. 222 of 2015 and 224 of 2015 respectively. The aforesaid Death Reference and all criminal appeals have been heard together and are disposed of by this common judgment.

3. The prosecution case is briefly described as under:
On 04.08.2015 Md. Nurul Alam, the father of the deceased, being informant lodged an FIR with Khulna Police Station against the condemned prisoners and accused Beauty Begum, mother of condemned prisoner Md. Sharif Sheikh, alleging inter alia that his son Rakib Hawlader worked in the motorcycle service centre namely 'Sharif Motors' situated at North-East corner of Tutpara graveyard at Khan Jahan Ali Road, Khulna owned by condemned prisoner Sharif who used to give him less wages and often beat him. Due to this reason, Rakib left the job and joined another work place namely 'Nur Alam Motors' where he was doing the same task for about 3/4 months. On 03.08.2015 around 04:30 pm when his son reached near the aforesaid place in order to purchase colour paint, condemned prisoner Sharif forcibly took him into his motor garage where condemned prisoner Mintu and accused Beauty Begum were also present. On an inquiry Rakib replied that he left the job because condemned prisoner Sharif did not give him adequate salary. Being enraged condemned prisoner Sharif used abusive words with him who raised his voice on it.

4. Thereafter, condemned prisoner Mintu along with accused Beauty Begum held Rakib and laid him down on the floor taking off his trousers and forcibly inserted a high pressure air pump nozzle into his rectum while condemned prisoner Sharif switched on of the inflator. As a result, his son became severely injured and his belly also got abnormally puffed having clotted blood in the rectum and intestines tore apart and lunges burst as air filled the abdomen. They all shut down the shutter of the garage to confirm his death while his son was groaning. Having reached the place on hearing hue and cry surrounding locals came to the spot and rescued him from the garage and instantly took him to local 'Good Health Clinic' from where he was referred to Khulna Medical College Hospital as his condition deteriorated. Thereafter, doctor of the KMCH referred him to Dhaka Medical College Hospital for better treatment. At about 09:30 pm on the way to Dhaka from Khulna he died in the ambulance. Having arrived home he [informant] came to know the incident from his wife and locals. The accused persons were confined and beaten by angry mobs on hearing death news of his son and handed them over to the police.

5. Having received the FIR police recorded Khulna Police Station Case No.04 dated 04.08.2015 against the aforesaid accused persons under sections 302/34 of the Penal Code.

6. Police thereafter held inquest report of dead body of the deceased and seized some materials relating to the death of the deceased. During investigation of the case both the condemned prisoners and accused Beauty Begum made confessional statements before the magistrate under section 164 of the Cr.P.C. The investigating officer after completion of investigation submitted police report being charge sheet No. 275 dated 25.08.2015 against the three accused persons including the condemned prisoners under sections 302/34 of the Penal Code, 1860. All the accused persons were put on trial by the learned Metropolitan Sessions Judge [In-charge], Khulna in Metropolitan Sessions Case No. 1161 of 2015.

7. Gravamen of charge against three accused persons was framed on 05.10.2015 under the aforesaid sections, as stated in the charge sheet which was read over and explained to them present on dock to which they pleaded not guilty and claimed to be innocent in the trial. The prosecution in order to prove its case, examined in all 38[thirty eight] out of 40[forty] witnesses cited in the charge sheet while defence did not call any witness in their favour, but put their case by way of suggestions to the prosecution witnesses.

8. On closure of the prosecution evidence, the accused persons present in dock, were also examined under section 342 of the Cr.P.C wherein the incriminating evidence and confessions brought to their notices and consequence thereof were explained to them. The accused persons present in the dock reiterated their innocence, non-complicity and declined to adduce any evidence in their favour through defence witnesses but they orally narrated before the court that they were compelled to confess by torture and also fearing cross-fire.

9. Considering the evidence and facts and circumstances of the case, learned Metropolitan Sessions Judge found the condemned prisoners guilty of the offence punishable under sections 302/34 of the Penal Code and sentenced them to death while acquitted accused Beauty Begum from the charge levelled against her. Hence, the aforesaid death reference and criminal appeals have been arisen.

10. Mr. Md. Atiqul Haque @ Selim along with Mr. Md. Nizamul Haque Nizam and Ms. Bilkis Fatema, learned Assistant Attorney Generals has taken us to the FIR, inquest report, confessional statements, autopsy report, seizure list, seizing articles, testimony of the witnesses and impugned judgment and other connected documents on record wherefrom it transpires that the victim was killed by the condemned prisoners on 03.08.2015 between 04:30 pm and 09:30 pm.

11. Having gone through the evidence of all the prosecution witnesses it is found that pw-01 Nurul Alam, father of the victim, is not an eye witness to the occurrence but he heard the incident that accused Sharif forcibly took the victim inside the shop and switched inflator on while accused Mintu pressed inflator's pipe in the rectum, as a result, victim's belly got puffed and subsequently he died. Such facts he received from his relatives and locals. The story of ejahar [exhibit-01] lodged by him, has been supported by his subsequent evidence, deposed in court.

12. Pw-02 Constable Badrul Alam is a member of rescue party, who saw the beating upon the three persons including a woman and took them to the hospital after rescue them from the angry mobs on 03.08.2015 at 11:30 pm.

13. Pw-03 Zahidul Islam is also a hearsay witness who heard the incident from the mother of the victim that Sharif and Mintu gave blue air inside the rectum of the victim and pw-04 Mizan Howlader is an important witness in this case because he heard from the mouth of the accused Sharif that he pumped air inside the belly of the victim.

14. Pw-05 Khokon Sheikh and pw-08 Ruksana heard from pw-14 Shahidul, a helper of 'Nur Alam Motors' that accused Sharif and Mintu gave blue air through inflator's pipe in the rectum of the victim but subsequently victim Rakib told pw-05 that Sharif held him and Mintu gave air into the rectum by machine. Pw-10 Rimi, pw-11 Lucky Begum and pw-13 Sujon directly heard from victim Rakib that accused Mintu pressed pipe while Sharif switched on of the inflator machine during the occurrence.

15. Pw-06 Constable Maksudul Haque is a formal witness who received the dead body of the victim and took the same to the hospital for autopsy and signed the seizure list of wearing apparels of the victim.

16. Pw-07 Md. Zahirul Islam is also a member of rescue party who rescued three persons including a woman from the angry mobs on 03.08.2015 at 23:10 pm and came to know that victim died due to sustaining blue air pumped by inflator machine in the anus and due to late night he could not prepare inquest report but the same was held next morning at 08:00 am [exhibit-02].

17. Pw-09 Khadiza, grandmother of the victim, saw the victim feeling unwell in the hospital on 03.08.2015 and she became unconscious and saw him died after regain.

18. Pw-12 Selina Rahman heard the incident the following day that Rakib was given blue air and the shop of 'Sharif Motor Garage' was provided on a rental basis by her father.

19. Pw-14 Shahidul Sheikh heard that blue air was given inside the rectum of the victim and he signed the seizure list of a navy blue trousers and a color paint pot recovered by police from the house of Rakib.

20. Pw-15 Durgapada Bowliah, O.T in-charge of Gazi Medical College Hospital, Khulna, saw the belly of the victim Rakib abnormally puffed and saliva coming out from his nose and mouth on 03.08.2015 at 05:30 pm and victim told him that his one uncle by pressing inflator's pipe in the rectum pumped blue air in the shop where the victim worked before. They committed the crime by calling him because he was working in another shop after resigning from the earlier one. Anaesthesia doctor told this witness that it was not possible to treat the victim in their hospital, then, they left with victim.

21. Pw-16 Md. Nur Alam is a hearsay witness who heard that both the accused Sharif and Mintu gave air into his belly. Having gone to the surgical clinic he found victim Rakib's belly being puffed and on the way to Dhaka he eventually died.

22. Pw-17 Md. Sorowar Hossain is also a hearsay witness who heard that the victim died due to blue air pumped by inflator machine. In his presence police recovered two inflators and a sandal and prepared a seizure list which he signed as witness. He recognized the alamots in court. Pw-18 Kamrul Mollah echoed the same voice as deposed by pw-17.

23. Pw-19 Sumon Howlader heard that Sharif and Mintu gave air inside rectum of the victim who felt sick severely and he gave a bag of blood for victim Rakib and he heard at night that Rakib had died.

24. Pw-20 Nabil Hasan Fahim in his deposition stated that accused Mintu forcibly took the victim Rakib inside the shop and accused Sharif switched on of the machine. Thereafter, victim Rakib started vomiting while he was standing in front of the shop. He had seen Rakib vomiting on his own eyes.

25. Pw-21 Md. Selim Sheikh stated in his examination-in-chief that accused Sharif and Mintu both have pumped blue air inside the rectum of the victim by pressing inflator machine.

26. Pw-22 Md. Zahirul Islam said, police seized two inflator machines and a sandal of Rakib in his presence and signed the seizure list and also identified the sandal in court.

27. Pw-23 Md. Robiul Islam Howlader testified that Rakib came to his shop and left after buying colour paint and he could see vomiting in front of the shop and he heard from pw-20 that accused Mintu took the victim inside the shop and pressed the inflator's pipe in the rectum of the victim while Sharif switched on of the inflator and he heard at night that Rakib had died.

28. The evidence of Pw-24 Tahmina Akhter is that she saw the belly of the victim hard and abnormally puffed when Rakib was taken to clinic.

29. Pw-25 Sheikh Asaduzzaman Jalal is a seizure list witness who signed the seizure list of shirt, trousers and shawl of victim Rakib.

30. Pw-26 Sheikh Mosharaf Hossain, staff nurse of Khulna Sadar Hospital, saw a boy brought by some persons in the hospital on 03.08.2015 in the afternoon and he heard that some youths pumped air in the rectum by making fun. Doctor suggested to take him to 250 beds' hospital as his condition seemed to be fatal.

31. Pw-27 Md. Zafor Kalifa, a staff nurse of Khulna Sadar Hospital, Pw-30 Constable Khusrul Alam and Pw-36 Provash Chandra Golder, an administrative officer of 'Good Health Clinic', Khulna have been tendered by the prosecution and defence declined to cross-examine them.

32. Pw-28 S.I Md. Alam verified the address of accused Sharif and Beauty and found correct.

33. Pw-29 Constable Nurul Islam testified that he was on patrol duty under leadership of S.I Zahirul Islam on 03.08.2015 and rescued accused Sharif, Mintu and Beauty Begum from the hands of angry people from Tutpara Tank Road after getting message at 23:30 hours and heard that the boy named Rakib was killed by gas.

34. Pw-31 Sukumar Biswas, officer-in-charge, Khulna Police Station is a formal witness who filled up the FIR form, marked as exhibit-12.

35. Pw-32 S.I Taposh Kumar is also a formal witness who received the autopsy report [exhibit-13] of deceased Rakib from Khulna Medical College Hospital.

36. Pw-33 Aysha Akhter Mousumi, Metropolitan Magistrate, Khulna recorded confession of accused Beauty Begum on 07.08.2015 under section 164 of the Cr.P.C. The accused signed the confessional statement, marked as exhibit-14 wherein she put her signatures.

37. Pw-34 Md. Faruk Iqbal, Metropolitan Magistrate, Khulna recorded the confessional statements of accused Sharif and Mintu when they were produced before him on 11.08.2015 and 12.08.2015 respectively. Before recording their confessions he alerted both of them that he would not send them to the police custody if they do not confess and he also gave them sufficient reflection time. Accused Sharif signed the confessional statement, marked as exhibit-15 and he also put nine signatures thereon. Accused Mintu Khan signed his confessional statement, marked as exhibit-16 wherein this witness put nine signatures.

38. Pw-35 Dr. Subrata Kumar Mondal, Assistant Registrar of Khulna Medical College Hospital, stated that Rakib [15] was admitted to their hospital on 03.08.2015. He placed the document, marked as exhibit-17.

39. Pw-37 Dr. Mohammad Wahid Mahmud rendered autopsy report after examining the dead body of the victim on 04.08.2015. The autopsy report contains the following injuries,

1. Bruise was present on both wrists joint.
2. Bruise was present on both ankles joint.
3. Abrasion was present on dorsum of the right foot.
4. Clotted blood on anus.

40. **Dissection:** The abdomen was distended. The anterior abdominal highly congested. Ante-mortem clotted blood was present on the peritoneal cavity. The small intestine and whole large intestine was ruptured and gangrenous. The urinary bladder was ruptured. Both lungs were collapsed.

41. **Opinion:** The cause of death was due to haemorrhage as shock as a result of above mentioned injury which was ante-mortem and homicidal in nature.

42. Pw-38 S.I Kazi Mustaque Ahmed submitted police report [charge sheet No. 275 dated 25.08.2015] as investigator after completing investigation against the three accused persons under sections 302/34 read with section 201 of the Penal Code.

43. In this case none of the prosecution witnesses saw the occurrence directly except pw-20 whose evidence reveals that accused Mintu grappled the victim inside the shop and pumped air inside his anus by inflator pipe while Sharif switched it on and this witness also saw the victim vomiting which was supported by pw-16 that he found sign of vomiting near his shop. Prior to the death, the victim made dying declarations before pws. 03, 05, 10, 11, 13 and 15 that due to resigning from the job of 'Sharif motors', accused Sharif pumped air inside his rectum with the help of accused Mintu by inflator on the day of occurrence. This version of evidence has also been corroborated by the extra judicial confession of accused as disclosed by pw-04 in his evidence. In this case dying declaration made by the deceased prior to his death was not recorded by a magistrate or by any other way but it was made orally to the witnesses. Such declaration is admissible even if it were made orally [3 DLR 388, 7 BLC 265 and 8 BLC 132].

44. A dying declaration is a valuable piece of evidence if it is from suspicion and believed to be true. If a dying declaration is found to be true and genuine, it can be by itself form a satisfactory basis for conviction [12 DLR (WP)Lahore 30 (DB)]. Dying declaration may not be natural if it is recorded by a person with the help of interested persons of the maker. Rather it could be quite natural and true statement when the victim utters orally and instantly the cause of his injuries to the neutral persons who provide version of the victim before the court on oath having is being tested. The court is to see whether the victim had the physical capability of making such a declaration, whether witnesses who had heard the deceased making such statements heard it correctly. Whether the reproduced names of assailants correctly and whether the maker of the declaration had an opportunity to recognise the assailants [42 DLR 397].

45. In the present case dying declarations of the victim have been stated by pws 03, 05, 10, 11, 13 and 15 such as Pw-3 in his deposition said,- 'রাকিব বলে, মামা আমাকে শরীফ, মিন্টু এবং বিউটি ধরে পাছায় হাওয়া দিয়ে দিয়েছে।' Pw-5 said in his deposition, 'সে বলে (রাকিব) শরীফ ধরছে আর মিন্টু পাছায় হাওয়া মেশিন ঢুকিয়ে দিয়েছে।' Pw-10 in his examination said, 'মিন্টু, শরীফ এবং বিউটি আমাকে মারছে বলে রাকিব। মিন্টু পাইপ ঢুকিয়েছে, শরীফ সুইচ দিয়েছে। বিউটি চেপে ধরেছে এটা রাকিব বলে।' Pw-11 stated in his deposition, 'আমি তাকে জিজ্ঞাসা করি এ অবস্থা কেমন করে হলো? রাকিব বলে, শরীফ,মিন্টু এবং বিউটি বেগম এরা রাস্তা দিয়ে ধরে নিয়ে দোকানে নিয়ে শাটার টেনে রেখে শরীফ সুইচ দেয়, মিন্টু পাইপ ঢুকিয়ে দেয় আর বিউটি ফ্লোরের সাথে চেপে ধরে। শরীফ রাকিবের পেটে হাওয়া ঢুকিয়ে দেয়।' Pw-13 stated in his examination-in-chief, 'কি হয়েছে জানতে চাইলে সে বলে, মামা শরীফ মামা আমার পাছায় হাওয়া দিয়েছে। তার সাথে বিউটি, মিন্টু ছিল বলে।' Pw-15 stated in his deposition, 'তোমার কি হয়েছে জিজ্ঞাসা করিলে ছেলেটি বলে, " আমার এক মামা আমার মলদ্বার দিয়ে গাড়ীর চাকায় হাওয়া দেওয়া মেশিনের পাইপ দিয়ে হাওয়া ঢুকিয়ে দিয়েছে। " আমি বললাম তোমার মামা এটা করবে কেন? সে বলতো ঞ্চু মামার দোকানে আগে কাজ করতাম। এখন তার দোকান ছেড়ে অন্য দোকানে গেছি। তাই আমাকে তারা ডেকে নিয়ে ধরে এই কাজ করেছে।" The aforesaid

declarations were taken by the trial court as if in the words of the victim. Such statements made by the victim prior to his death [around 2-4 hours before his death], cannot be said to be untrue and unauthenticated. Even then, no inconsistent versions regarding dying declarations of the victim are found among the witnesses who provided the victim's declarations of his attack. Here we find the dying declarations of the victim provided by the said witnesses are consistent and corroborative to each other.

46. It has emerged from the entire evidence through examination-in-chief and cross-examination of pws-04, 05, 13, 16, 21, 24, 33 and 38 that the condemned prisoners took the victim to the hospitals for treatment immediately after the occurrence which proves that the allegation brought by the pw-01 against the condemned prisoners is absolutely true and genuine. So, there is no scope from the side of defence to say that the occurrence did not take place at the relevant time by the condemned prisoners and their subsequent denials and suggestions do not lead to them to be innocent in the alleged commission of offence. Their subsequent conduct as well as prosecution witnesses as discussed earlier proved that they have committed the offence of inserting blue air in the rectum of the victim and the cause of death of the victim, occurred for their heinous violence on his person.

47. Apart from the evidence of live witnesses, there are 3[three] confessional statements made by condemned prisoners and accused Beauty Begum in this case. It has revealed from the confession of condemned prisoner Sharif that Rakib worked in his workshop for one year and left the job 4/5 months ago as he repeatedly demanded money back, lent by him to Rakib's mother. Rakib stopped doing work in his Garage at the instance of his mother. One day Rakib suddenly told him that he would not come to do the work. On the day of incident at 04:00 pm Rakib came to the shop of Sumon to purchase colour paint and also came to his shop after buying the same. Mintu asked Rakib whether he was irregular to have food seeing him in the garage. In reply Rakib said, he was punctual to have his foods. Mintu said, in that case why Rakib became ill-health.

48. Thereafter, Rakib started making fun with Mintu and he also pushed Mintu holding his belly. Before Rakib's coming he was cleaning inflator machine. Then Rakib was offered by Mintu to have something. Rakib replied that he wouldn't take anything. Then Mintu told him to take some blue air. At that time Mintu was sitting on the chair and putting his trousers off and telling him to take some air. He had some angriness with Rakib as he left his shop around 05/06 months ago. Thereafter, he pressed the pipe of inflator inside his rectum making fun and forgot to remember that the inflator machine switched on. Accordingly, air entered his belly while Mintu embraced holding Rakib. When Rakib's belly was seen puffing up Mintu being enraged told that he did not tell him to give him blue air. In reply he told that he forgot to remind the same.

49. Then and there they took Rakib to 'Good Health Clinic' wherein no doctor was found and they also took him to Sadar Hospital but no doctor was there. Thereafter, on the way to Khulna Medical College Hospital by EG bike Rakib feeling unwell started vomiting. In no way they took Rakib to 'surgical clinic' and having seen by doctor told them to admit him into it quickly. He filled up the form to admit him who was taken up to ICU by attendants. At that time Sumon made a call to him and he told him that Rakib was admitted to surgical department intimating the incident. Sometimes after, someone told them that they did not have good doctor in the hospital and thereafter the victim was removed to Khulna Medical College Hospital as suggested by that man. In need he along

with Sumon gave two bags of blood after examining blood groups of all. On primary examination in the operation room doctor found the condition of the victim deteriorated and suggested them to take the victim to Dhaka for better treatment.

50. Secretary of Owners Association felt whether the victim would die on the way to Dhaka and then they brought medicines as per doctor's prescription and gave the victim saline keeping him in the hospital. After sometimes, doctor gave him oxygen as his condition deteriorated and told them that the victim would die at any time. After around 1[one] hour locals started to gather there and took the victim in the ambulance. Locals started beating them including his mother. They heard through mobile phone that on the way to Dhaka victim died when they reached Boikali by EG Bike and saw the ambulance coming back towards Khulna. Police rescued them from the angry mobs and took them to hospital by police van. He expressed to suffer punishment as he committed offence even capital punishment. But his mother is innocent.

51. It appears from confession of accused Mintu Khan that he used to work on painting at different places. On the day of occurrence he was sitting in the Sharif's shop being previously known. He called Rakib when he came to purchase colour paint from nearby shop. Having taken Rakib on his lap asked whether he was not taking food regularly. Rakib replied that he could not take food because of work pressure on him and he refused to take anything at the moment. Then he told him to take some blue air. At the moment Sharif was cleaning air tank and he took off his trousers under fun. He had no knowledge previously that Sharif was enraged with Rakib due to work in the garage. He asked Sharif to give some blue air to Rakib. Then Sharif pressed inflator's pipe in the rectum of Rakib. He could not realise that blue air entered inside the belly of Rakib and saw his belly puffing up after a while and then and there took him to 'Good Health Clinic' where no doctor was found.

52. Then they took him to Sadar hospital and subsequently removed him to surgical clinic by EG Bike and admitted there-under after being suggested by Sadar hospital. But they failed to give treatment initially as there was no experienced doctor in the clinic. Thereafter, they took the victim to 250' beds hospital by EG Bike and admitted him accordingly. Sharif and Sumon gave two bags of blood in need. Although the doctor took the victim to the operation theatre but failed to operate him as his pulse was not found available. As per doctor's prescription they brought medicine from the shop and the victim was given saline. Meanwhile, locals including members of Rakib's house came to the hospital and told them that they would take him to Dhaka. Accordingly, Rakib was placed inside ambulance and started towards Dhaka. Locals confined and beat them up taking to the locality by EG Bike. When they reached Boikali could see the ambulance coming back and came to know that Rakib died on the way to Dhaka. Thereafter, they were brought to central road where locals beat them up. About 15/20 minutes later, police came and rescued them and took them to hospital by police van. The incident took place due to making fun with the victim. He had no intention to kill Rakib.

53. The confessions made by both the accused are found similar to each other. There is no major difference between them. Both the accused narrated in their confessions that the victim came to a nearby shop for buying colour paint and on seeing him one of them invited him to enter their shop. Both of them, helping each other gave the victim air in the rectum by inflator in the afternoon of the alleged day of occurrence.

54. Although, confessional statement of accused Beauty Begum, mother of the condemned prisoner Sharif, is found as exculpatory in nature but she admitted that she saw her son Sharif and Mintu rendering air in the rectum of the victim by pressing inflator's pipe and the incident took place within a minute and she became surprised to see the incident happening by the condemned prisoners. So, the admissions made by the condemned prisoners as regards to the commission of offence, has also been supported by the confessing accused Beauty Begum although she has been acquitted by the trial court. This confessing accused also supported regarding taking of the victim to the hospitals soon after occurrence and helping for treatment by condemned prisoners.

55. The contention of Mr. Golam Mohammad Chowdhury, learned Advocate is that the confession made by condemned prisoner Sharif before a magistrate is not found to be true and voluntary. Such confession has been obtained from the accused person under torture and threat of cross-fire. From the evidence of pw-34 it reveals that he as a judicial magistrate endorsed their confessions that those were made voluntarily and after maintaining all formalities he recorded their confessions, marked as exhibits-15 and 16 respectively on which he put several signatures and the confessing accused also put their signatures as well and contents of the confessional statements were read over and explained to them who signed the same after having found correct. In those confessions it is found that magistrate made remarks stating that confessions of the accused persons are seemed to be true and voluntary in nature.

56. Before recording their confessions, he alerted them saying that it might be used against them as evidence if they confess. And further told them that he was not a police officer but a magistrate and the accused persons were not bound to confess and whether the accused were tortured by anybody. Having understood the questions they made the confessions willingly. Exactly same scenario has been found in the case of confessing accused Beauty Begum. Pw-33 being Magistrate recorded confession of the said Beauty Begum on 07.08.2015. Nothing remains from the part of this witness to follow during recording of her confession.

57. Before or after recording the statements the confessing accused did not make any kind of complaints to the magistrates as to whether they were tortured or severely assaulted by the investigating officer or they were given any threat to make confessions. From the said evidence of these witnesses it has revealed that there was no sign of enmity between the recording officers or investigating officers and the confessing accused. And the defence failed to discard their evidence that any authority or interested quarter came forward to compel them to make such confessions. So, the arguments made by the defence seem to be unworthy in nature. Yes, there may have been some minor irregularities in recording the confessional statements of the accused but such irregularities are not being considered as major mistakes.

58. It reveals from confessions of condemned prisoners that there was no complaint of police torture or any kind of threat before the magistrates by any one of them that they were compelled to confess beyond their willingness, if any violence or inducement is not made by the police then the confessions may be regarded as voluntary. Even then, recording magistrates rendered them reasonable time to think that if they confess it may go against them as evidence. Therefore, it can be firmly said that the confessional statements made by them are absolutely voluntary and true and can form the sole basis of conviction as against the maker of the same. It finds support from the decision in the case of Islam

Uddin –Vs-State, reported in 13 BLC [AD] 81 which is run as follows, "It is now the settled principle of law that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same. The High Court Division has rightly found the judicial confession of the condemned prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case found the condemned prisoner guilty and accordingly imposed the sentence of death upon him."

59. In the instant case pws-33 and 34 as recording magistrates have been produced before the trial court and examined thoroughly by the defence but nothing is found shaken with regard to the sanctity of both the confessions.

60. The expression 'confession' has been defined by Stephen in his 'Digest of the Law of Evidence' that 'a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime'. The presence of a magistrate is a safe-guard and guarantees the confession as not made by influence. When a confession is taken by a public servant there is a degree of sanctity and solemnity which affords a sufficient guarantee for the presumption that everything was formally, correctly and duly done. In this case the recording magistrates came forward to give the evidence and there have been found nothing that they failed to give the memorandums as to their confessions and both the pws 33 and 34 have been thoroughly cross-examined by the defence as to the genuineness of the confessions and memorandums issued by them. It is not necessary that the memorandums as to the confessions are issued separately. It is enough, if they are inserted in the prescribed form but it must have signature of the recording officer which is found present. So, no question of genuineness of the confessions is found present in this case. It finds support from the case of State-Vs-Munir and another, reported in 1 BLC, 345 which is run as follows, ".....The confessional statement of Munir Ext. 50 recorded in accordance with the provision of section 164 of the Code of Criminal Procedure was signed by the confessing accused and the Magistrate and, as such, the Court shall presume under section 80 of the Evidence Act that the document is genuine and that the statement as to the circumstances under which it was taken by the Magistrate are true and the confession was duly taken."

61. Although both the condemned prisoners, subsequently retracted their confessions by placing written statements at the time of examination under section 342 of the Cr.P.C that they were compelled to confess before the magistrate under threat of cross-fire. But that does not reflect on their confessions made by them because such history of confessions was unable on the part of any interested quarter to make falsely in such a way. And at what interest lying with the police who without having any interest or enmity brought those accused persons into book and put them on trial making a false story and also compelled them to make confessions, no such clue or document are found in the entire evidence of the prosecution case. More so, if the confessions are found to be true and voluntary, the retraction at a later stage does not affect the voluntariness of the confessions. The retraction of the confession is wholly immaterial once it is found voluntary as well as true.

62. On a plain reading of their confessions it is clearly found that they made the confessions involving themselves in the commission of offence. So, there is no doubt that the confessions of the accused are inculpatory in nature. The confessions are so natural and spontaneous that one cannot harbor any doubt about its voluntariness. When a

confession is found to be true and voluntary and inculpatory in nature without corroborating evidence a conviction can be imposed upon the maker of the statement. It finds support from the case of Mufti Abdul Hannan Munshi @ Abul Kalam and another– Vs-the State, judgment dated 7th December, 2016, reported in 2017(1)LNJ (AD)38 in which the Apex Court opined that "Even if there is no corroborative evidence, if a confession is taken to be true, voluntary in nature, a conviction can be given against the maker of the statement relying upon it subject to the condition mentioned above. In view of the above, preposition of law, there is no legal ground to interfere with the conviction of the appellants and co-accused since the confessions are not only inculpatory but also true and voluntary. Deliberate and voluntary confession of guilt, if clearly proved, are among the most effectual proofs in the law-their value depending on the sound presumption that a rational being will not make admission prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience."

63. Further contention of Mr. Golam Mohammad Chowdhury, learned Advocate for the defence is that the trial judge wrongly gave capital punishment to the condemned prisoners although it was not a pre-planned murder committed by them. We do agree with the contention of the learned Advocate that it was not an intended murder as the condemned prisoners prior to the occurrence did not go for any premeditation nor did they intend to kill the victim taking him forcibly in the 'Motor Garage'. But the way they took the victim to their custody in the name of giving him unbearable things into his belly through his anus by a heavy weapon like inflator is obviously beyond imagination of the human integrity.

64. None can say that human body and any of its parts are so strong that it can bear all sorts of inflicts made by another human being. Sometimes it is difficult to bear even a beat of an ant in any private organ of the human body but the inflicts made by the accused persons through a private organ like rectum is absolutely unbearable to a human being especially for the victim, a boy of only 14 year old. Generally, if a man takes food more than his tolerance, he then has to face severe sickness instantly because every limb of a human body is so soft it cannot afford unbearable and intolerable blows. The act committed by the condemned prisoners is so severe that this perhaps never happened over the past hundred years in the crime world of this sub-continent.

65. In this case the intention of the perpetrators is totally absent. They did not call the victim with a pre-planned manner rather when they saw the victim near the motor garage, one of them took him inside the garage. So, it is a clear case of no evidence as regard to the intention of the perpetrators. But they intended to give him some blue air into his belly through his private soft organ after taking off his trousers is indicating that they made themselves to commit a heinous crime with a teenage victim.

66. Mr. S.M Abdul Mobin, learned Advocate contends that although it is a case of no acquittal but it is not a clear case of murder. At best this can be attracted under section 304 of the Penal Code as culpable homicide not amounting to murder because the alleged occurrence took place without any intention and due to making fun with the victim.

67. Now the question is whether the inflator used in the rectum of the victim to be considered as heavy weapon. Admittedly, the said weapon is used in the wheels of the small and heavy vehicles to strengthen its capability to run on the street. Pressure of such air by the said inflator to the human body is not at all bearable in any way. Such inflator

has been made for only those purposes stated above. So, it is undoubtedly a powerful weapon than that of a heavy fire arms. Question has been raised as to whether the conduct of the perpetrators by the said weapon to cause the death of the victim should be treated as murder or culpable homicide not amounting to murder.

68. It can be determined by distinction between murder and manslaughter as enumerated in sections 299 and 300 of the Penal Code. Culpable homicide not amounting to murder or manslaughter is genus while murder its specie. All murders are culpable homicide but not vice versa. The punishments are described in sections 302 and 304 of the Penal Code if such offence, committed by the perpetrators is being proved by the prosecution evidence. To fix the punishment, proportionate to the gravity of this generic offence, the code apparently recognizes three degrees of culpable homicide. The gravest form of culpable homicide has been defined in section 300 of the Penal Code as murder and its punishment is laid down in section 302 of the Penal Code and the second degree may be termed as culpable homicide not amounting to murder and its punishment is prescribed in section 304 Part-I of the Penal Code while punishment of lowest type of culpable homicide has been provided under second part of section 304 of the Penal Code.

69. A comparative table may be shown in appreciating the points of distinction between the two offences on the following manner.

70. **Section 299 provides that**, 'A person commits culpable homicide if the act by which the death is caused is done-

[a] with the intention of causing death; or

[b] with the intention of causing such bodily injury as is likely to cause death; and or

[c] with the knowledge that the act is likely to cause death.

71. **Section-300 stipulates that**, 'subject to five exceptions culpable homicide is murder if the act by which the death caused is done,

[1] with the intention of causing death; or

[2] with the intention of causing such bodily injury as the perpetrator knows to be likely to cause the death of the person to whom the harm is caused; or

[3] with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

[4] with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

72. Clause [b] of section 299 along with clauses [2] and [3] of section 300 has no sign of intention to cause the death of a person in normal health or condition. It is very important to note here that the intention to cause death is not an essential requirement of clause [2] of section 300 of the Penal Code. Only the intention of causing the bodily injury coupled with the perpetrator's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause.

73. In clause [3] of section 300 of the Penal Code despite the words likely to cause death occurring in the corresponding clause [b] of section 299, the words 'sufficient in the ordinary course of nature' have been used. And therefore, the distinction lies between a

bodily injury likely to cause death and bodily injury in the ordinary course of nature. Undoubtedly it is a sophisticated distinction narrated above. The difference between clause [b] of section 299 and clause [3] of section 300 is one of the degrees of probability of death resulting from the intended bodily injury. It is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause [b] of section 299 conveys the sense of probable as distinguished from a mere possibility. The words 'bodily injury is sufficient in the ordinary course of nature to cause death' mean that the death will be the 'most probable' resulting injury having regard to the ordinary course of nature. For the case to fall within clause [3] of section 300 of the Penal Code it is not necessary that the perpetrator intended to cause the death, as long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. It finds support from the case of Rajwant –Vs- State of Kerala, reported in AIR 1966 SC, 1874 in this regard being an illustration.

74. In the present case it is evident that the offence committed by both the condemned prisoners by using said weapon which resulted the death of the victim meant that the death of the victim by the action of the condemned prisoners would be the 'most probable' resulting from such injury in the ordinary course of nature. Although the intention to kill the victim is absent in this case but the act conducted by the condemned prisoners has been amounted to murder when such act has been done with the intention of causing such bodily injury as is likely cause death.

75. If the act is having fallen within any of the five exceptions as enumerated in section 300 of the Penal Code that,

> [I] the perpetrator being deprived of the power of self-control by grave and sudden provocation causes the death of the person who irritated or causes the death of any other person by mistake or accident: or
>
> [II] the perpetrator, in exercise in good faith of the right of private defence of person or property, exceeds the powers given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing harm than is necessary for the purpose of such defence: or
>
> [III] the offender being a public servant or aiding a public servant acting for the advancement of public justice exceeds the powers given to him by law, and causes death by doing an act which he, in good faith believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused: or
>
> [IV] the offence is committed without premeditation in a sudden combat in the heat of passion on a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner: or
>
> [V] when the person whose death is caused, being above the age of eighteen years, suffers death or takes risk of death with his own consent:
>
> Only then the offence will fall within the ambit of culpable homicide not an amounting to murder or manslaughter but we do not find any materials on record that the act of the condemned prisoners has been fallen in any of the above five exceptions. In this regard it also finds support from the case of Govt. of Bangladesh –Vs- Siddique Ahmed, reported in 31 DLR [AD] [1997] 29 where it was held as under,

> "It is to be observed that section 304 of the Penal Code which consists of two parts, does not create any offence but provides for the punishment of manslaughter or culpable homicide not amounting to murder. The section makes a distinction in the award of punishment. Under the first part of the section, the intention to kill is present, and the act would have amounted to murder if the act is done with the intention of causing such bodily injury as is likely to cause death, but the act having fallen within any one of the five exceptions, in Section 300 of the Code, the offence will fall within its ambit. The second part of the Section is attracted to a case where the act is done with the knowledge likely to cause death but without any intention of causing death or to a case where bodily injury is caused as is likely to cause death. The first part applies to a case where there is guilty intention and the second part where there is no such intention, but there is guilty knowledge."
> ".....Here the finding of the High Court is one of the guilty intention, and it can only be converted into an offence under Part-I of section 304, if any of the five exceptions of section 300 is attracted, but the learned Judges of the High Court did not find any. The trial Court has clearly found that the accused was guilty of murder under section 302. The finding of High Court also cannot take the offence out of the ambit of section 302 in order to reduce it to one of manslaughter or culpable homicide amounting to murder under part I of section 304 of the Penal Code. According to High Court Division the respondent in the present case did not fire the shots aiming at deceased with the intention of causing death but he did so with the intention of causing such bodily injury as was likely to cause death. They also found that the death was caused by the gun-shot. From such a finding an offence under Part I of section 304 of the Penal Code could not be made out."

76. In the above case it is found that the respondent did not fire the shots aiming at the victim with the intention of causing death but he did so with the intention of causing such bodily injury as was likely to cause death. In the case in hand it appears from evidence that the death of the victim was caused by blue air pumped into his belly through inflator by the condemned prisoners. Such act of the condemned prisoners proves that they did it with the intention of causing such bodily injury and ultimate result came into death of the victim and as such they cannot escape themselves from such liability as stated above under section 302 of the Penal Code.

77. More so, it appears from dissection of autopsy report, prepared by pw-37 that the abdomen of the victim was distended and the anterior abdominal highly congested. The small intestine and whole large intestine was ruptured and gangrenous and the urinary bladder was ruptured and also both lungs were collapsed. Such analysis proved that inside the body of the victim was disrupted by the blue air pumped through the inflator by the condemned prisoners.

78. Injury Nos. 01 and 02 both are on wrists joints and ankles joint and injury No. 03 present on the dorsum of the right foot of the victim meant that the perpetrators applied serious pressure on the victim. Not only this, clotted blood is found present in the rectum, a soft organ of the victim of 14[fourteen] year old.

79. The aforesaid injuries they caused, were so imminently dangerous that it must, in all probability, have caused the death of the victim. It finds support from the case of Ayub Ali alias Md. Ayub Ali –Vs-The State, reported in 1987 BCR[AD]66 where it was held that, "The learned Judges of the High Court Division gave due consideration to this

question and found that though the offender namely, the appellant, had no intention to cause the death of the victim, he certainly had the intention to inflict bodily injury which, he knew, was most likely to cause death in the normal circumstances. Even if the contention of Mr. Serajul Huq that the appellant had neither any intention to cause the death nor any intention to inflict bodily injury most likely to cause death, still we find that the accused had the knowledge that the injuries he caused were so dangerous that they would, in all probability, cause the death and that in inflicting these injures he acted in a very cruel and unusual manner. This brings his action within clause (4) of section 300 of the Penal Code. The appellant is, therefore found to have been rightly convicted for murder. In the result, the appeal is dismissed."

80. Where the accused has the guilty intention of causing such injury as is likely to cause death the offence cannot be converted into one under first part of section 304 of the Penal Code, unless it is brought to any of the five exceptions of section 300 of the Penal Code. In the instant case, both the condemned prisoners had guilty intention and common intention to cause bodily injury as is likely to cause death. And therefore, there is no scope to alter the sentence to one under section 304 from 302 of the Penal Code as advanced by the learned Advocates, for the condemned prisoners. Furthermore, the common intention under section 34 of the Penal Code can be established as an inference from the fact of participation in the commission of the offence [Tera mean –Vs-Crown, reported in 7 DLR 539]. Here, we find in the present case that the criminal act was committed by both the condemned prisoners jointly and the death of the victim was also caused by the result of their common conduct. So, in furtherance of the common intention of both, to cause bodily injury as is likely to cause has been proved beyond any doubt.

81. Having considered the above discussions and findings and facts and circumstances of the case, we are constrained to hold that the prosecution has been able to prove the case beyond shadow of doubt under sections 302/34 of the Penal Code.

82. The contention of learned Advocate Mr. S.M Abdul Mobin for the defence is that the sentence of death is too harsh in this case because both the accused persons tried to save the life of the victim removing him to more than one hospital from the place of occurrence as disclosed by the prosecution witnesses. Now the question is commutation of sentence as pointed out by the defence to be considered or not. In true sense, it is most difficult task on the part of a judge to decide what would be quantum of sentence in awarding upon an accused for committing the offence when it is proved by evidence beyond shadow of doubt but the judge should have considered the legal evidence and materials for punishment of the perpetrator not as a social activist [63 DLR 460, 18 BLD 81 and 57 DLR 591]. Sometimes, it depends on gravity of the offence and sometimes, it confers upon an aggravating or mitigating factor. Under section 302 of the Penal Code discretion has been conferred upon the court to award two types of sentence either death or imprisonment for life and shall also impose fine.

83. It is now pertinent to note that pw-3 in his deposition stated that the mother of the victim also told him that Rakib was removed by accused persons to Khulna Medical College Hospital. In cross-examination pw-5 said, 'আসামীরা রাকিবকে বিভিন্ন হাসপাতালে চিকিৎসার চেষ্টা করে কিন্তু আমাদেরকে জানায় নাই।' In cross-examination-pw-13 said, 'তবে, আসামীদের আড়াইশ বেড হাসপাতালে পাই। ..... আসামীরা রাকিবকে খুলনা মেডিকেলে ভর্তি করে ডাক্তারের পরামর্শে এটি আই/ও কে বলি।' In cross-examination pw-16 replied, 'আসামী মিঠু পাঁজাকোলা করে রাকিবকে গুড হেলথ ক্লিনিকে নিয়ে যায়। সেখানে ভালো চিকিৎসা না হলে সদর হাসপাতাল, তারপর সার্জিক্যালে, সেখান থেকে আড়াইশ বেড হাসপাতালে নেয়।'

84. In examination-in-chief pw-19 deposed, ' আমি নাবিলের কাছে শুনতে পাই শরীফ, মিন্টু এরা রাকিবের পাছায় হাওয়া দিয়েছে। এজন্য রাকিব অসুস্থ হয়ে পড়লে শরীফ,মিন্টু এরা হাসপাতালে নিয়ে যায়। খবর নিয়ে সার্জিক্যালে যাই শরীফের কাছ থেকে ফোনে জেনে। সার্জিক্যালে রাকিবের ট্রিটমেন্ট চলছে আর শরীফ, মিন্টুকে বাইরে বসা দেখি। আমরা আসামীদের সাথে রাকিবকে নিয়ে আড়াইশ বেডে নিয়ে যাই। .....শরীফরা দুই ব্যাগ রক্ত ম্যানেজ করে। এক ব্যাগ আমি দেই., আরেক ব্যাগ শরীফ দেয়। মিন্টু ঔষধ আনতে যায়।' In cross-examination, 'আসামীরা রাকিবকে বাচানোর চেষ্টা করেছিল।' Pw-20 in his deposition stated, 'শরীফ, মিন্টু এরা রাকিবকে ধরে মিন্টু পাঁজাকোলা করে নিয়ে হাসপাতালে নিয়ে যায়। আমি দেখেছি।'

85. Pw-21 in his deposition said, 'আমি দোকানের বাইরে বের হয়ে এসে দেখি মিন্টুকে পাঁজাকোলা করে নিয়ে যেতে দেখি। রাকিব কোলে ছিল। শরীফকে দেখি দোকানের শাটার টেনে দিয়ে মিন্টুর পিছনে পিছনে শরীফকে দৌড় দিয়ে যেতে দেখি।' Pw-23 in cross-examination said, 'আসামীরা স্থানীয় লোকজন সহ রাকিবকে গুড হেলথ ক্লিনিকে নিয়ে যায় এটি বলেছিলাম আই/ও কে।' Pw-24 in cross-examination replied, 'ডকে দাঁড়ানো ২ জন আসামী রোগীকে সংগে এনেছিল। মিন্টুর কোলে রাকিব ছিল।' Pw-25 in cross-examination said,- 'আমরা জনতার রোষানল হইতে উদ্ধার না করলে এরা মারা যেতো। এদের মাথা ফাটা ছিল, গায়ে দাগ ছিল।' Pw-33 in cross-examination replied,- 'শরীফ এবং মিন্টু মিলে গুড উইল হাসপাতালে নিয়ে যায় এটি রেকর্ড হয়েছে।..... এক জায়গায় লেখা আছে, জনগন শরীফকে মারপিট করে।' Pw-34 in cross-examination said,- 'আসামীকে গণ ধোলাই দেওয়া হয়েছিল শুনেছি। .....গণ পিটুনিতে আসামী আহত হয়েছে এটি আসামী আমাকে বলেছিল তাহা আমি রেকর্ড করি। .....আসামী বলেছে ইয়ার্কি করতে করতে ঘটনাটি ঘটেছে। রাকিবকে চিকিৎসার জন্য ভর্তি করে, ঔষধ কিনে আনে এটি বলেছে। রাকিবকে মারার উদ্দেশ্য ছিল না এটি আসামী বলেছে।' Pw-38 in cross-examination said,.... 'আসামী মিন্টু রাকিবকে কোলে করে হাসপাতালে নেয় এটি আমি তদন্তে পেয়েছি।.....তদন্তে পাই, মিন্টু রাকিবকে কোলে তুলে গুড হেলথ ক্লিনিকে নিয়ে যায়।'

86. From the evidence of aforesaid witnesses it is found that the accused persons removed the victim from the place of occurrence to the hospitals soon after incident. It is also evident by pws-25, 33 and 34 that the accused persons were beaten by angry mobs after occurrence meaning that the accused persons did not flea away rather they tried to save the life of the victim when they felt that they committed serious crime on the victim by pumping air into his belly by inflator.

87. In such a situation, it is a very hard job for the court to determine the quantum of sentence whether it will be capital punishment or imprisonment for life upon the accused persons since they played a role for saving the victim's life soon after occurrence as evident by the said prosecution witnesses. At the same time it is very important to note that the victim was completely an innocent teenager who had no fault of such dire consequences at the hands of the accused persons. Since the determination of awarding sentence to the accused persons is at the middle point of views, it may turn to impose capital punishment or imprisonment for life and that is why, the advantage of lesser one shall find the accused persons to acquire in the instant case. More so, both the accused persons have no significant history of prior criminal activities and their PC and PR [previous conviction and previous records] are found nil in the police report. In this regard it finds support from the decision in the case of Nalu –Vs-The State, reported in 1 ALR(AD)(2012) 222 where one of the mitigating factors was previous records of the accused. It also indicates from the evidence of prosecution witnesses that doctors got confused as to how the treatment was given to the victim when he was taken to the hospitals in Khulna Divisional Head Quarters because it was an exceptional offence

committed by the accused persons and the victim died around four hours later on the way to Dhaka. Therefore, we do find an extraneous ground to commute the sentences but we do not find any reason to interfere with conviction recorded under sections 302/34 of the Penal Code.

88. In the above facts and circumstances of the case, we are of the view that ends of justice will be met if the accused persons are sentenced to one of imprisonment for life instead of awarding them sentences to death with a fine of Tk. 50[fifty] thousand each, in default, to under R.I for 02[two] years. On recovery of the fine from both the convicts, the same has to be paid to the legal heirs of the deceased.

89. In the result, the Death Reference No. 92 of 2015 is, hereby, rejected with the said modification in awarding sentences. The Criminal Appeal Nos. 9051 of 2015, 9170 of 2015 and Jail Appeal No. 222 of 2015 and 224 of 2015 are dismissed.

90. Accordingly, both the condemned prisoners are sentenced to imprisonment for life with a fine of Tk. 50[fifty] thousand as stated above and be shifted from the condemned cell to normal cell meant for similar convicts at once.

91. Let a copy of the judgment and order along with lower court's records be transmitted to the Metropolitan Sessions Judge, Khulna for taking necessary measures.

SCOB [2019] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 2611 of 2018

Dr. Farhana Khanum
……. Petitioner.
Vs.
Bangladesh and others.
...…Respondents.
with
Writ Petition No. 2842 of 2018

Mohammad Kabir Chowdhury and others
……. Petitioners.
Vs.
Bangladesh and others.
…Respondents.
with
Writ Petition No. 11230 of 2012.

Md. Mizanur Rahman and others.
……. Petitioners.
Vs.
The Government of Bangladesh, represented by the Secretary, Cabinet Division, Bangladesh Secretariat, PS-Shahbagh, Dhaka and others.
...…Respondents.
with
Writ Petition No. 1954 of 2018.
Md. Shahjahan Siraj and others.
……. Petitioners.
Vs.
Bangladesh and others.
...…Respondents.
with
Writ Petition No. 7366 of 2011.
Md. Ziaul Kabir Dulu.
……. Petitioners.
Vs.
Bangladesh and others.
...…Respondents.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Razik-Al-Jalil

Mr. M. Amir Ul Islam, Senior Advocate with
Mrs. Tania Amir, Senior Advocate with

Mr. Sheikh Rafiqul Islam with
Mr. Yadnan Rafique Rossy with
Mr. Mia Mohammad Ishtiaque, Advocates
… For the petitioner in Writ Petition No. 2611, 2842 and 1954 of 2018
.
Dr. Belal Husain Joy, Advocate
.....For the petitioner in Writ Petition No. 11230 of 2012.
Mr. Nasir uddin, Advocate
…For the petitioner in Writ Petition No.7366 of 2011.
Mr. Khurshid Alam Khan, Advocate
..for the respondent No.5 in Writ Petition No. 2611 of 2018, 2842 of 2018
Mr. Md. Mokleshur Rahman, D.A.G
Ms. Shuchira Hossain, A.A.G with
Ms. Samira Tarannum Rabeya, A.A.G
..For the respondent No. 4 in Writ Petition No. 2611 of 2018 and 2842 of 2018. For the respondent No. 5 in Writ Petition No. 11230 of 2012.
Mr. Md. Osman Ghani Bhuiyan, Advocate
..for the respondent No.06 in Writ Petition No. 7366 of 2011
Mr. Mohammad Ali Khan, Advocate
..For the respondent No.17 in Writ Petition No. 7366 of 2011.
Mr. Mohammad Ali Zinnah, Advocate
..For the respondent No. 16 in Writ Petition No. 7366 of 2011.

Heard on 22.07.2018, 29.07.2018, 24.10.2018, 30.11.2018, 17.01.2019 and 27.01.2019.
Judgment on: 07.02.2019.

Therefore, since the very definition of the term 'Coaching Business' has only attracted the involvement teachers of the above mentioned institutions as a mischief, this Nitimala in fact has not prohibited the 'coaching business', or 'coaching centers', run by any individual in his or her private capacity who is not a teacher of the above mentioned institutions. This means involvement of an individual, who is not a teacher of the above mentioned institutions, in such coaching centers or business has not been prohibited by this Nitimala. Therefore, the prohibition, as provided by this Nitimala, only applies to the teachers of the above mentioned institutions and not to any individuals or private citizens or persons, who are not teachers of such educational institutions. ... (Para 29)

From the above discussions, it appears that even in the absence of the said Nitimala, the petitioners and other teachers of non-government and government schools and colleges are not allowed to engage themselves in any sort of coaching business. This prohibition has not been provided by the said Nitimala of 2012, rather this has been given by their concerned service Rules which are delegated legislations and applicable to them. When the petitioners, or other teachers of government and non-government schools and colleges, joined their services, they joined as such fully knowing that the said Service Rules would be applicable to them. Therefore, by the said Nitimala, the government has in fact supplemented the provisions which are already in the statute books and in doing so, the government does not need to show any other sanction of statute or Act of parliament. It is the part of the constitutional power of the government as executive to run the governance and in running such governance, it is the duty and obligation of the government to take steps for implementation of the laws and regulations time to time enacted by the parliament or by the delegatees of the parliament. Under such obligations, the governments in modern countries issue various Circulars, Paripatra, Nitimala etc. and this has now become essential and normal administrative technic in modern countries. The only limitation in issuing such Nitimala or Nirdeshika is that by such Nitimala or Nirdeshika, the government cannot curtail the rights of any citizen which is already granted in his/her favour either by the Constitution or by law or by any other legal instruments. ... (Para 34)

Therefore, in the facts and circumstances of the present cases, the petitioners have failed to show that either the Constitution or any act of parliament or any delegated legislation of this Country has given them any right to get involved in coaching business. Rather, it has become evident from the above referred delegated legislations that in fact they have been prohibited by the law of the land from getting involved in coaching business. Thus, in so far as the said Nitimala is concerned, since the same has not curtailed any rights of the petitioners guaranteed either by the constitution or any law, it cannot be knocked down by this Court. Rather, it should be protected by this Court as it is the supplemental instrument to the already existing laws of the land. In this regard, the decisions of Indian Supreme Court in Bennett Coleman Co. v. Union of India, AIR 1973 SC 106, Bishamber Daval Chandra Mohan v State of UP, AIR 1982 SC -33 and Distt. Collector, Chittoor v Chittor Disttt. Groundnut Traders Assn, AIR 1989 SC 989 may be looked into as references. Therefore, on this point of unconstitutionality and unimplementablity of the said Nitimala of 2012, as argued by the learned advocates for the petitioners, we find no substance. ...(Para 35)

Therefore, it cannot be denied that when the teachers get involved themselves in coaching business, which is prohibited by law, they are disobeying the direction of law and they know it fully that such disobedience might cause injury to the students or their guardians in that by such engagement they are utilizing their resources, potentials and capabilities in such coaching centers rather than using them in the class rooms.

Therefore, this Court is of the view that, since this provision under Section 166 of the Penal Code has been incorporated in the Schedule to the Dudak Act, 2004, Dudak thinly had technical jurisdiction to enquire into the allegations as published in the news paper regarding the involvement of teachers in the coaching business. However, this thin and technical jurisdiction is only confined to the teachers of government colleges and schools and not to the teachers of non-government schools and colleges. ... (Para 41)

Though we are saying that technically Dudak had jurisdiction to enquire into the said matters, we are of the view that Dudak should have priority list as to which offences should get priority in their such enquiry and investigation when it is repeatedly reported in newspapers that Dudak does not have enough resources and logistic supports. We are of the view that leaving behind serious allegations of corruptions in National Banks, Customs Houses, Ports, Court Premises, Government Offices, Land Offices, etc. Dudak should not have inquired into the mere involvement of some teachers in coaching business relying on a newspaper report. When there are some other serious reports of corruption in the country, it does not also look well when Dudak shows such importance to some basically disciplinary matters when teachers of government schools are not attending classes on time. These apparently disciplinary issues should be kept at the bottom of Dudak's priority list in particular when almost each and every institution of this country is now suffering from huge corruption being committed by its employees and staffs. Though by engaging in coaching businesses the said teachers have disobeyed the direction of law, but it cannot be said that they have committed any 'corruption' as we understand the term in its general and common parlance. Therefore, we are of the view that, though thinly and technically Dudak had jurisdiction to enquire into the matters as published in the newspaper as regards involvement of the government teachers in coaching business, they should not have conducted such enquiry at all. Such enquires should have been done by the education directorate of the government or the concerned ministry itself. ... (Para 42)

JUDGMENT

SHEIKH HASSAN ARIF, J

1. Since the questions of law and facts involved in the aforesaid writ petitions are almost same, they have been taken up together for hearing and are now being disposed of by this common judgment.

2. Rule in Writ Petition Nos. 2611 of 2018, 2842 of 2018 and 1954 of 2018 were issued in similar terms, namely calling upon the respondents to show cause as to why the "শিক্ষা প্রতিষ্ঠানের শিক্ষকদের কোচিং বাণিজ্য বন্ধ নীতিমালা-২০১২", (in short, "the said Nitimala"), purporting to regulate commercial coaching, should not be declared to be discriminatory and violative of Articles 26(2), 27, 31 and 40 of Part-III of the Constitution and done without lawful authority and is of no legal effect and as to why different memos issued by the respondent authorities either initiating departmental proceedings against the petitioners or transferring them from one school to another for their alleged involvement in commercial coaching, should not be declared to be without lawful authority and are of no legal effect.

3. In Writ Petition No. 2611 of 2018, the petitioner is a non-MPO teacher of Viqarunnisa Noon School and College, which is a Non-Government Secondary and Higher Secondary educational institution, and has, apart from the said Nitimala, challenged the Memo No.

04.01.2600.612.01.014.17.36333 dated 03.12.2017 (Annexure-B) issued by the Durniti Damon Commission (Dudak) and Memo No.04.00.0000.521.18.087.17-1123 dated 05.12.2017 (Annexure-C) issued by the Cabinet Division of the Government, Memo dated 05.02.2018 (Annexure-A) issued by the Education Board, Dhaka and Memo No. 37.02.0000.107.99.35.2018-1167(10) dated 04.02.2018 (Annexure-G) issued by the Education Department of the Government.

4. In Writ Petition No. 2842 of 2018, the petitioners, who are teachers of Motijheel Government Boys High School, Dhaka and Motijheel Government Girls High School, Dhaka, have, apart from the said Nitimala, challenged the Memo No.04.01.2600.612.01.014.17.36333 dated 03.12.2017 (Annexure-E), Memo No. 0400.0000.521.18.087.17-1123 dated 05.12.2017 (Annexure-D), Memo No. 37.00.0000.000.27.001.17.6 dated 02.01.2018 (Annexure-C), Memo No. ৬সি/০৫-সম/২০১৩/১৭০ dated 29.01.2018 (Annexure-A) and subsequent charge-cum-show cause Notices dated 07.02.2018 issued upon them vide Memo Nos. ৬সি/০৫-সম/২০১৩/২৪৪, ৬সি/০৫-সম/২০১৩/২৪৫, ৬সি/০৫-সম/২০১৩/২৪৬, ৬সি/০৫-সম/২০১৩/২৪৭, ৬সি/০৫-সম/২০১৩/২৪৮, ৬সি/০৫-সম/২০১৩/২৪৯, ৬সি/০৫-সম/২০১৩/২৫০, ৬সি/০৫-সম/২০১৩/২৫১, ৬সি/০৫-সম/২০১৩/২৫২, ৬সি/০৫-সম/২০১৩/২৫৩, ৬সি/০৫-সম/২০১৩/২৫৪, ৬সি/০৫-সম/২০১৩/২৫৫, ৬সি/০৫-সম/২০১৩/২৫৬ (Annexure-B series).

5. In Writ Petition No. 1954 of 2018, the petitioners, who are teachers of Government Laboratory High School, Dhanmondi, New Market, Dhaka, have particularly challenged the Memo No. 04.01.2600.612.01.014.17.36333 dated 03.12.2017 (Annexure-B) issued by the Dudak, Memo No. 0400.0000.521.18.087.17-1123 dated 05.12.2017 (Annexure C) issued by the Cabinet Division of the Government, Memo No. 37.00.0000.000.27.001.17.6 dated 02.01.2018 (Annexure-D) issued by the Ministry of Education and subsequent transfer of the petitioners vide Memo No. 6C/05-Somo/2013/170 dated 29.01.2018 issued by the Director General, Directorate of Secondary and Higher Secondary Education, Dhaka (Annexure E).

6. Apart from the above three writ petitions, we have also heard two other earlier writ petitions analogously. They are Writ petition No. 7366 of 2011 and Writ Petition No. 11230 of 2012. In Writ Petition No. 7366 of 2011, this Court, at the instance of the petitioner, a public interest litigant, issued Rule calling upon the respondents to show cause as to why a direction should not be given upon the respondents to take appropriate steps to prohibit M.P.O. registered teachers and government teachers from providing coaching, teaching etc. commercially and also why the respondents should not be directed to declare such prohibition through publishing a gazette notification. After issuance of this Rule, the government circulated the impugned Nitimala, namely "শিক্ষা প্রতিষ্ঠানের শিক্ষকদের কোচিং বাণিজ্য বন্ধ নীতিমালা-২০১২" dated 20 June 2012. Some guardians then filed Writ Petition No.11230 of 2012 and obtained Rule from this Court calling upon the respondents to show cause as to why the said Nitimala should not be declared to be without lawful authority and is of no legal effect. At the time of issuance of the Rule, this Court also ordered for hearing of the Rule along with the above mentioned Writ Petition No.7366 of 2011.

BACKGROUND FACTS:

7. For the sake of clarity, let us start from the earlier writ petitions. Facts relevant for disposal of the Rule in **Writ Petition No.7366 of 2011** are that the petitioner is the Chairman of Guardian United Forum and also a member of Ideal School Guardian Forum, which is a registered Social Welfare Organization having Registration No. Y-08227. That petitioner's son and daughter are students in Ideal School and College, Motijheel, Dhaka and the petitioner is the founding Chairman of the said Ideal School Guardian Forum. That the

Ministry of Education on 10.08.2010 published a notification for providing extra classes to the weak students and the fees for such extra classes were also fixed by the said notification. However, it is contended, the said Motijheel Ideal School and College was taking extra money from the guardians for providing such extra classes without giving any receipts to them. Accordingly, the petitioner made complaint against such actions of the school and college authority, but did not get any positive response. It is further stated that the coaching centers in Dhaka and other areas of the country are destroying the education system in schools and colleges and have turned the education into a business product. Accordingly, the petitioner, on 31.05.2011, filed application before the Principal of the said school and college to stop such coaching businesses by the teachers. That the organization of the petitioner has also filed application before the Ministry of Education on 21.07.2011 for taking actions in order to stop coaching business in the country, which, according to the petitioner, was paralysing the education system of the country. That different daily newspapers have also published reports as regards mushrooming of coaching centers in Dhaka and other parts of the country, but the government, in particular the Ministry of Education, has not taken any effective steps to stop such coaching businesses which, according to him, discouraging the students from attending classes as well as the teachers from providing education to the students in the class rooms. Under such circumstances, the petitioner moved the said writ petition and obtained the aforesaid Rule seeking a direction on the government to take appropriate steps to prohibit coaching by the teachers in the said coaching centers.

8. Immediate after issuance of the above Rule in Writ Petition No. 7366 of 2011, the government circulated a Nitimala, being "শিক্ষা প্রতিষ্ঠানের শিক্ষকদের কোচিং বাণিজ্য বন্ধ নীতিমালা-২০১২", vide Memo dated 20.06.2012. Thereupon, some guardians have filed **Writ Petition No. 11230 of 2012** challenging the said Nitimala. It is stated by the said guardians that the petitioner No.1 is the President of Ovibhabak Alliance, which was created with primary object of increasing educational awareness including rights to education etc., and petitioner Nos. 2, 3 and 4 are guardians of some students. It is stated by the said petitioners that the said Nitimala of 2012 is contradictory and direct violation of fundamental rights to education, renouncing the grading and even defaming the educated, trained and experienced teachers who practice their novel profession in the government and non-government educational institutions all over Bangladesh. It is further stated that the primary object of the said Nitimala is to restrict the teachers of the educational institutions having appropriate qualifications and experiences from providing teaching in the coaching centers thereby allowing the unqualified, untrained and unprofessional self-declared teachers to run the said coaching centers and to provide education in the said coaching centers. It is further stated by those guardians that the said Nitimala being a directive and policy document cannot be implemented. According to the petitioners in this writ petition, the guardians strongly feel that their children need extra guidance and tutoring facilities to be provided by the regulated teachers rather than profit making coaching operators with the help of unregulated self-declared teachers. It is also contended that the definition of কোচিং বাণিজ্য as provided by the said Nitimala has concentrated only on profit motive thereby totally ignoring the importance of quality education by the trained teachers of schools and colleges and as such the same has been framed with mala-fide intention in order to facilitate the commercial coaching by self-declared teachers. It is also contended that since the coaching is widely provided to the students for medical admissions, engineering admissions and even entry in judiciary, such coaching cannot be stopped in respect of the students of schools and colleges only. It is contended that the definition of 'private tuition' as provided by Clause 1 (Ja) of the said Nitimala has given a narrow meaning in that it only means the tuition given by the teachers at their residence or the residence of the students. It is contended that by this Nitimala the

engagement or involvement of teachers in coaching centers has been stopped in one hand and coaching in the schools in the name of extra classes has been encouraged on the other hand, which itself is a contradictory policy. Accordingly, it is contended by these petitioners that, the said Nitimala should be knocked down by this Court.

9. Facts relevant for disposal of the Rules in **Writ Petition Nos. 2611 of 2018, 2842 of 2018** and **1954 of 2018** are almost similar, the only difference being that the petitioner in Writ Petition No. 2611 of 2018 is a teacher of non-government Secondary & Higher Secondary educational institution and the petitioners in Writ Petition Nos. 2842 of 2018 and 1954 of 2018 are teachers of government Secondary & Higher Secondary educational institutions. It is commonly stated by these petitioners that, with proper qualification and through due recruitment process, they have been appointed as teachers of different schools in Dhaka. That the petitioner in Writ Petition No. 2611 of 2018, being employed in a non-government educational institution, does not receive any MPO from the government. On the other hand, the petitioners in Writ Petition No. 2842 of 2018 and Writ Petition No.1954 of 2018 are teachers of different subjects in government educational institutions.

10. The case of the petitioner in **Writ Petition No. 2611 of 2018** is that while she was serving as teacher of the Viqarunnisa Noon School and College, the school suddenly received a memo dated 05.02.2018 issued by the College Invigilator, Board of Intermediate and Secondary Education, Dhaka (respondent No.10) in pursuance of the order of the Chairman of the Board wherein instructions were given to the school authority of the petitioner along with other schools to take appropriate steps against the teachers involved in coaching business in violation of the said Nitimala. By such communication, it is stated, the petitioner came to know that an enquiry was conducted by the Anti-corruption Commission, (Dudak), which is reflected in Memo dated 03.12.2017 of the Anti-corruption Commission containing a list of the names of the teachers of various educational institutions in Dhaka including the name of the petitioner alleging that they were involved in coaching business. By the said Memo, Dudak requested the Cabinet Division of the Government to take immediate disciplinary actions against the petitioner and others. According to the petitioner, she further learnt that, upon receipt of the said memo from Dudak, the Cabinet Division of the government issued a memo dated 05.12.2017 to the Secretary, Secondary School and Higher Secondary Education Department of the Ministry of Education for taking necessary steps as per law in this regard and, accordingly, the Department of Secondary and Higher Secondary Education, Dhaka issued Memo dated 04.02.2018 asking the concerned school authorities including the school of the petitioner to take appropriate steps against the petitioner and others listed therein for violation of the provisions under Rule 13 of the said Nitimala. Under such circumstances, the petitioner moved this Court and obtained the aforesaid Rule.

11. The factual scenario in other two writ petitions filed by the teachers are also similar in that while the petitioners in the said writ petitions were performing their duties as teachers in the said government schools and colleges, the Cabinet Division of the Government, by making reference to the aforesaid memo issued by Dudak, asked the concerned Ministry to take appropriate steps for stopping 'commercial coaching' and to take actions against the teachers involved therein. Thereupon, the concerned department of education issued memos asking the concerned schools of the petitioners to take appropriate legal actions against the petitioners and others for violation of Rule 13 of the said Nitimala on the allegation that they were involved in coaching business. Accordingly, impugned departmental proceedings were initiated against the petitioners in **Writ Petition No. 2842 of 2018** asking them to show cause as to why they should not be punished in accordance with the provisions under Rule 3(b) of

the Public Servant (Discipline and Appeal) Rules, 1985, which was followed by the impugned transfer orders transferring them from their present schools to other schools.

12. In **Writ Petition No.1954 of 2018** as well, the petitioners came before this Court when the Education Ministry issued Memo dated 02.01.2018 (Annexure-D) asking the Director General of Secondary and Higher Secondary Department, Education Vavan, Dhaka to immediately transfer 25 teachers mentioned in the enclosed list including the petitioners out of Dhaka and initiate departmental proceedings against them for alleged violation of the said Nitimala on the allegation that they were involved in coaching business. Consequently they were transferred vide impugned Memo dated 29.01.2018 (Annexure-E) to different schools outside Dhaka.

13. Under above circumstances, the teachers, who are petitioners in the aforesaid three writ petitions, came up before this Court and obtained Rules and ad-interim orders of stay against such actions initiated against them and such ad-interim orders were not interfered by the Appellate Division though, in Writ Petition No. 2611 of 2018, the Government preferred Civil Petition for Leave to Appeal No. 1552 of 2018 before the Appellate Division.

14. Common case of the petitioner-teachers in these three writ Petitions (Writ Petition Nos. 2611 of 2018, 2842 of 2018 and 1954 of 2018) are that the very Nitimala is a no-nest instrument as the same was not issued by the government as a delegated legislation in exercise of any power conferred on the government by any Act of parliament and as such any actions against the petitioners pursuant to the said non-est Nitimala are liable to be struck down by this Court. The further case as regards the said Nitimala is that since the said Nitimala has created an offence under the title 'কোচিং বাণিজ্য' (Coaching Business) and provided punishment for the same, it is without lawful authority in that only the Parliament can create any punishable offence by enactment under Article 65 of the Constitution. It is also contended by these petitioners that since the mischief of involvement in coaching business by the teachers of government and non-government schools and colleges do not fall under any office as mentioned in the schedule to the Durniti Domon Commission Act, 2004, Dudak did not have any authority to initiate the said enquiry as regards such alleged involvement of the petitioners and other teachers in coaching business. Accordingly, it is contended that, since the impugned proceedings and actions against the petitioners were initiated pursuant to a memo of Dudak dated 03.12.2017, the same are liable to be declared to be without lawful authority and are of no legal effect.

15. The Rules in these three writ petitions have been opposed by the D.G., Department of Secondary & Higher Secondary Education under the Education Ministry and Durniti Domon Commission (Dudak) by filing separate affidavits-in-opposition. It is contended by the education department that after issuance of the Rule in Writ Petition No. 7366 of 2011 by the High Court Division as regards framing of Rules to stop coaching business, the Ministry of Education held various meetings attended by the headmasters and principals of various schools and colleges presided over by the Hon'ble Minister himself and through such meetings, it was resolved that a Nitimala should be promulgated for stopping such coaching business which is destroying the normal education system in this country. Therefore, according to this respondent, since the education policy of the government has made provisions for preventing coaching business and for encouraging class-room education, the government has committed no illegality in framing the said Nitimala thereby making provisions for departmental punishments of the teachers if found involved in such coaching business. It is further contended by this respondent that it is the executive responsibility of the

government to protect the education system of the country and, in order to do that, the government can time to time issue notifications, orders, circulars etc. Therefore, it is also contended that, since the Dudak has found involvement of some teachers in such coaching business and has recommended actions against them, the government has committed no illegality in instructing the concerned authorities to take appropriate departmental actions as well as other actions against the concerned teachers. It is also contended by this respondent that the said Nitimala has in the meantime been published in government gazette vide Bangladesh Gazette dated 24.01.2019.

16. The case of respondent- Dudak is that it is the prime responsibility of Dudak to take steps for prevention of corruption and to detect corruption in any sector including the education sector and since the definition of the term 'corruption', as provided by the Durniti Domon Commission Act, 2004, includes the offences mentioned in the Schedule to the said Act, Dudak has committed no illegality in conducting enquiry in exercise of its power under Section 17 of the said Act as regards involvement of some teachers of non-government and government schools and colleges in the coaching business in violation of the said Nitimala of 2012. It is further contended by Dudak that since the mischief, as has been detected by such enquiry, falls under the offences mentioned in the said schedule to the Durniti Domon Commission Act, 2004, Dudak did have the jurisdiction to initiate enquiry about the same and also did have the option to refer the matter to the government for taking appropriate actions against the concerned teachers instead of initiating criminal proceedings against them.

SUBMISSIONS:

17. Since the Rule in the above mentioned three writ petitions (Writ Petition Nos. 2611 of 2018, 2842 of 2018 and 1954 of 2018) have in fact been contested by the parties seriously, we will give emphasis in our judgment on the submissions made by the parties in respect of the said Rules, as the same will cover the issues raised in other two writ petitions.

18. Though Mr. M Amir-Ul-Islam and Ms. Tania Amir, learned senior counsels, have appeared for the petitioner-teachers in the said three writ petitions, it is in fact Ms. Tania Amir, learned advocate, who has extensively argued the case for them. She has made the following submissions:

(1) That the said Nitimala, thereby making provisions for creating offence of coaching business as well as defining the 'coaching business' without any sanction of parliament or in exercise of any delegated power given by the parliament, is a no-nest instrument in the eye of law and as such the same should be declared to be without lawful authority;

(2) Since the said Nitimala was and is a no-nest instrument, any actions including the enquiry initiated by Dudak as well as the departmental proceedings as proposed/initiated against the petitioners pursuant to a report of Dudak also do not have any legal footing to stand and, accordingly, the same should also be declared to be without lawful authority.

(3) Drawing this Court's attention to various provisions of the Durniti Domon Commission Act, 2004, in particular the definition of the term 'Durniti' as provided by Clause (Uma) of Section 2 of the same and the functions of Dudak as provided by Section 17 of the same, she submits that under no circumstances involvement of any teacher of government and non-government Schools and colleges fall under the radar of enquiry of Dudak in particular when such involvement of teachers is not an offence under any provisions of the Penal Code which have been mentioned in the schedule to the said Dudak Act, 2004. This being so, Dudak in fact did not have any jurisdiction

to initiate enquiry into the alleged involvement of the petitioners in the coaching business and thereby send any recommendation to the cabinet division of the government for taking appropriate actions against them. Therefore, according to her, each and every actions taken pursuant to the said recommendation of Dudak, as sent by Memo dated 03.12.2017 (Annexure-B to the writ petition No. 2611 of 2018), do not have any legal footing to stand and as such the same should be declared to be without lawful authority.

(4) Further referring to the provisions under Article 152 of the Constitution, in particular the definition of term 'law' as provided therein, she submits that this Nitimala does not come under the purview of law under any circumstances and as such the same cannot be implemented by Dudak, government or by the concerned authority and, accordingly, any actions taken on the basis of the said Nitimala as well as recommendation of Dudak pursuant to the said Nitimala are actions without lawful authority and as such the same should be struck down by this Court.

(5) By drawing this Court's attention to the said Nitimala itself, as annexed to the Writ Petition no. 2611 of 2018 as Annexure-D, learned advocate submits that even the preamble of the said Nitimala has given a wrong information deliberately in that the said Nitimala was claimed to have been issued pursuant to a direction of the High Court Division in Writ Petition No. 7366 of 2011 inasmuch as that no such direction was ever given by the High Court Division in the said writ petition to frame any such Nitimala. Therefore, according to her, the government has committed fraud on this Court by making reference therein to a direction in the said writ petition.

(6) Learned advocate further points out that during pendency of the Rules, the government has published the said Nitimala in the gazette without even waiting for the result of the said writ petition which, according to her, is a contemptuous act by the government.

19. As against above submissions, Mr. Mokleshur Rahman, learned Deputy Attorney General, has made following submissions on behalf of the Director General, Secondary and Higher Secondary Education Department:

(1) Though there was no specific direction to frame any Nitimala in Writ Petition no. 7366 of 2011, government can, on its own, frame such Nitimala as an expression of its policy decision in line with the Education Policy, 2010 as declared by the government which, according to him, clearly prohibits any coaching business;

(2) By making reference to various reports as well as minutes of meetings as held in the Education Ministry under the leadership of the then Hon'ble Minister himself, learned DAG submits that after issuance of the said Rule in Writ Petition No.7366 of 2011, the government itself decided to hold inquiry as well as to hold meetings with the concerned stake holders, in particular the headmasters and principals of different schools and colleges, and in the said meetings, it was unanimously resolved that a Nitimala should be framed by the government for preventing such coaching business. In this regard, learned DAG has referred to the minutes of a meeting dated 22.02.2012, as annexed to the affidavit-in-opposition as Annexure-C;

(3) Further referring to the enquiry report dated 19.01.2012, learned DAG submits that a five member enquiry committee was constituted by the Education Ministry to find out the way- out from the burning problems as caused by the mushrooming of coaching centers in the country and it was recommended by the said committee, amongst others, to frame a Nitimala in this regard for prevention of such coaching business.

(4) Referring to a relevant portion of the National Education Policy, 2010, in particular Clause 22 under the Chapter fl£r¡ J j§mÉ¡ue, learned DAG submits that it is the

policy of the government to discourage coaching business so that the students can concentrate on the text books upon avoiding guide books, note books etc. in order to make the class room education more popular and the only education system in the country. Therefore, according to him, since the said Nitimala is nothing but a reflection of the said education policy of the government, the same cannot be interfered with by this Court.

(5) Learned DAG further submits that even the concerned service rules of the non-government and government teachers of the said schools and colleges prohibit their involvement in the coaching business without proper sanction of the concerned authorities or the government. This being so, according to him, the said Nitimala has just supplemented the said statutory provisions as contained in the said service Rules by which no rights of the petitioner have been curtailed.

20. Opposing the Rules, Mr. Khurshid Alam Khan, learned advocate appearing for the respondent Dudak, has made the following submissions:

(1) That Dudak is an independent body to enquire and investigate the offences mentioned in the schedule to the Dudak Act, 2004 and as such since the involvement of the petitioners, in particular the petitioners who are serving in government schools and colleges, in the coaching business have violated the provisions under Section 166 of the Penal Code, 1860 and some other provisions of the Penal Code which are included in the said schedule, Dudak did have the ample authority and jurisdiction to initiate enquiry into the said involvement of the petitioners and other teachers in the coaching business.

(2) Mr. Khan further submits that though Dudak is entitled to initiate such enquiry even on its own under the said law, without any complaint being lodged by any one, in the instant case Dudak has acted pursuant to a news report published in the Daily Jugantor on 04.04.2017 under the heading শিক্ষকদের কাছে জিম্মি অভিভাবক-শিক্ষার্থী. This being so, he submits, since Dudak has assigned its concerned officers to initiate enquiry into the matter and the said enquiry officers submitted a report finding such involvement of the teachers including the petitioners in such coaching business in violation of the said Nitimala, it opted to refer the matter to the government so that appropriate actions could be taken against the said teachers. Therefore, according to him, no act of without jurisdiction has been committed by Dudak in conducting such enquiry as well as in making recommendations to the government for taking actions against the said teachers.

(3) Further referring to the provisions under Section 17 of the Dudak Act, 2004, Mr. Khan submits that it is one of the main functions of Dudak to conduct enquiry and investigation as regards offences mentioned in the schedule to the said Act. Therefore, according to him, since Section 166 of the Penal Code is one of the sections mentioned in the said schedule and since the teachers of the government schools have in fact committed offences under the said provision of the Penal Code, Dudak lawfully conducted the said enquiry and, accordingly, issued the impugned memo dated 03.12.2017 (Annexure-B to the Writ Petition No.2611 of 2018) requesting the cabinet Secretary to take appropriate steps for containing such coaching business in this country.

21. Since the learned advocates appearing for the petitioner-guardians in Writ Petition No.11230 of 2012 have not argued the case in favour of the said petitioners separately, rather they have adopted the submissions of Ms. Tania Amir, we do not need to address their submissions separately.

22. In the course of hearing, learned advocates for the petitioners have repeatedly argued that government cannot issue such Nitimala or any Nitimala without sanction of parliament or without being delegated by any Act of parliament. Since this issue involves interpretation of provisions of the Constitution and laws, we have requested Mr. A.F. Hasan Ariff and Mr. Fida M Kamal, learned senior counsels, to assist this Court as Amici Curiae. Accordingly, they have made extensive submissions, though contrary to each other to certain extent.

23. According to Mr. A.F. Hasan Ariff, learned Amicus Curiae, when a Nitimala is framed by the government without making reference to any law or without being delegated by any Act of parliament, such Nitimala cannot be enforced or the same is not enforceable. In this regard, Mr. Ariff has referred to the fundamental principle of state policies as incorporated in our Constitution under Part II. According to him, though the said policies are the policies of the government and the State and will guide the Courts in respect of interpretation of the Constitution and laws, such policies of the State are not judicially enforceable. Therefore, according to him, same standard should be applicable in respect of the directions and Nitimalas as time to time framed by the government without any sanction of law in that the same may be the guidance as to how the government will act in respect of certain issues or on the basis of certain attending facts, but the same cannot be implemented or enforced. By referring to certain paragraphs of renowned text books on Administrative Law as authored by **D. Smith and Hilaiare Barnelt**, D. Smith, Judicial Review, 7th Addition-287 and Hilaiare Barnelt, Constitutional And Administrative Law, 5th Addition-798, he submits that by such Nitimala no rights of a citizen guaranteed by the Constitution or Act of Parliament can be curtailed. According to him, since the impugned Nitimala has defined an offence under the title 'coaching business' and provided punishment for the said offence, the same has curtailed the rights of the citizens of this country and as such the same, having not been issued under the authority of any act of parliament, cannot sustain as a valid Nitimala.

24. Surprisingly, a bit opposite submissions have been made by the other Amicus Curiae, Mr. Fida M Kamal. According to him, the decision of the government as regards it's policy are normally circulated by different instruments, and in Bangladesh, such instruments are called Nitimala, Nirdeshika, Paripotra, Biggopti, Rules, Regulations etc. Therefore, according to him, in a modern governance, a government cannot wait for a specific legislation every time to address each and every issue in the running of the affairs of the State. Therefore, he submits, government takes recourse to various Nitimala, Nirdeshika, Paripatra etc. which do not necessarily need to have the statutory backing or sanction of parliament always in particular when the governance by the executives has already been sanctioned by the Constitution itself. He further submits that since the National Education Policy, 2010 has clearly discouraged coaching business, the government has committed no illegality in framing the said Nitimala, even without any direction from the High Court Division, as a supplementary instrument to prevent such mischief of coaching business which has become a parallel educational system in this country. According to him, though the government has time and again taken preparations to enact Education Act, 2016 to regulate such affairs, it is yet to be enacted by the Parliament and as such until such enactment is made, the executives cannot sit idle whenever it faces problems like coaching business. Therefore, he submits, to prevent such mushrooming of coaching business in the country, government had no option but to frame a Rule in the form of instructions to the teachers and concerned authorities to deal with such problems. According to him, all the modern governments issue such circulars, Nitimala etc. for handling the situations they face time to time which are not directly covered by law or Act of parliament. In this regard, learned advocate has referred to some articles as

written *by some jurists, namely* ***"Circular Arguments****: The status and Legitimacy of Administrative Rules" by Robert Baldwin and John Houghton, published in (1986) Public Law at page 239-284,* ***"The Scope of Judicial Review****: Public Duty" not "Source of Power" by C.F. Forsyth, published in (1987) Public law at Pages 356-367*. According to him, since the MPO teachers in non-government schools and colleges receive government portions of salary and government benefits, they are also bound by any instructions and circulars issued by the government as regards their conduct and affairs. This being so, he submits, by such Nitimala, the government can also address the teachers of non-government schools and colleges as regards any illegalities committed by them. He further submits that the coaching business cannot be considered under any circumstances as a legal right of the petitioners under Article 40 of the Constitutions as such rights are restricted by laws like Rules, regulations and byelaws and legal instruments having force of law in Bangladesh. Therefore according to him, since the said Nitimala has prohibited the coaching business, not teaching or tuition, the same should not be interfered with by this Court as the same is the policy statement of the government in line with the National Education Policy, 2010.

25. **DELIBERATIONS OF THE COURT**:

Nitimala of 2012:

Since the source of every grievance of the petitioners, in particular the petitioner-teachers in the above three writ petitions, is the "শিক্ষা প্রতিষ্ঠানের শিক্ষকদের কোচিং বাণিজ্য বন্ধ নীতিমালা-২০১২" as circulated by the government vide Memo dated 20.06.2012 (Annexure-D to the writ petition No. 2611 of 2018), let us first decide whether this Nitimala is sustainable in law. In order to do that, let us first examine the very Nitimala itself.

26. It appears from the said Nitimala that at the beginning, it was said that the same was framed pursuant to a direction of the High Court Division in Writ Petition No. 7366 of 2011. However, upon examining the orders passed in the said writ petition, we have not found any such direction therein. On the other hand, it appears, this Court only issued Rule in the said writ petition upon the respondents to show cause as to why such Nitimala should not be framed. Therefore, apparently, a misleading information has been given at preamble of the said Nitimala, which should be corrected by the concerned authority immediately.

27. It further appears that the said Nitimala has defined the 'educational institutions' to which is applicable and the 'teachers' to whom it is applicable. Some relevant definitions under Article 1 of the said Nitimala are quoted below;

(ক) **শিক্ষা প্রতিষ্ঠানঃ** এ নীতিমালায় শিক্ষা প্রতিষ্ঠান বলতে সরকারি/বেসরকারী স্কুল (নিম্ন মাধ্যমিক ও মাধ্যমিক), কলেজ (উচ্চ মাধ্যমিক, স্নাতক ও স্নাতকোত্তর) মাদরাসা (দাখিল, আলিম, ফাজিল, কামিল) ও কারিগরি শিক্ষা প্রতিষ্ঠানসমূহকে বোঝাবে।

(গ) **শিক্ষকঃ** শিক্ষক বলতে উপানুচ্ছেদ (ক) এ বর্ণিত শিক্ষা প্রতিষ্ঠানসমূহে পাঠদানরত সকল শিক্ষককে বোঝাবে।

(চ) **কোচিংঃ** শিক্ষা প্রতিষ্ঠানে অধ্যয়নরত শিক্ষার্থীদের শিক্ষা কার্যক্রম চলাকালীন শিক্ষকের নির্ধারিত ক্লাসের বাইরে বা এর পূর্বে অথবা পরে শিক্ষক কর্তৃক শিক্ষা প্রতিষ্ঠানের অভ্যন্তরে/বাইরে কোন স্থানে পাঠদান করাকে কোচিং বোঝাবে।

(ছ)) **কোচিং বাণিজ্যঃ** উপানুচ্ছেদ (চ) অনুযায়ী বিভিন্ন জাতীয়/দৈনিক/স্থানীয় পত্রিকায় বিজ্ঞপ্তি, পোস্টার, লিফলেট, ফেস্টুন, ব্যানার, দেয়াল লিখন অথবা অন্য কোন প্রচারণার মাধ্যমে মুনাফা অর্জনের লক্ষ্যে শিক্ষার্থী ভর্তির মাধ্যমে কোচিং কার্যক্রম পরিচালনা করাকে বোঝাবে।

(Underlines supplied)

28. It appears from the above quoted definitions that the teachers to whom this Nitimala will be applicable are the teachers who are imparting education in the '**educational institutions**' mentioned under Article-1 (L). On the other hand, the institutions mentioned under Article-1 (L) are government/non-government Schools (lower secondary and

secondary), Colleges (higher Secondary, graduation and post graduation), Madrasah (Dakhil, Alim, Fazil, Kamil) and Technical Educational Institutions. At the same time, **'Coaching'** means imparting education by teachers of the said institutions to the students of the said institutions during class time or beyond class time in the institutions or outside institutions. The definition of **'Coaching Business'** as quoted above is very much important in that it only applies to sub-article (Cha), which means the involvement of the teachers of the above mentioned educational institutions has been defined as a mischief. Again, Article-2 has prohibited coaching by teachers except under certain circumstances mentioned therein. Article-3 has prohibited coaching of students of the said institutions by the teachers of the said institutions except that a teacher of an institution may indulge in coaching of ten students of some other institutions with the prior permission of the head of his/her institution. Article-4 clearly prohibits the involvement of teachers of the above mentioned institutions, either directly or indirectly, in any coaching centers which are developed for coaching business. Article-9 has also prohibited any 'coaching business' upon renting any house in the name of coaching center.

29. Therefore, since the very definition of the term 'Coaching Business' has only attracted the involvement teachers of the above mentioned institutions as a mischief, this Nitimala in fact has not prohibited the 'coaching business', or 'coaching centers', run by any individual in his or her private capacity who is not a teacher of the above mentioned institutions. This means involvement of an individual, who is not a teacher of the above mentioned institutions, in such coaching centers or business has not been prohibited by this Nitimala. Therefore, the prohibition, as provided by this Nitimala, only applies to the teachers of the above mentioned institutions and not to any individuals or private citizens or persons, who are not teachers of such educational institutions.

30. Now, let us see whether the said Nitimala is sustainable in law. In doing so, let us first examine the relevant service laws applicable to the concerned teachers. The teachers in non-government educational institutions are regulated by a delegated legislation issued by the concerned Board with prior approval of the government in exercise of the power of the Board under Section 39 of the Intermediate and Secondary Education Ordinance, 1961 ("the said Ordinance"). The said delegated legislation is titled 'the Recognized Non-government Secondary School Teachers (Board of Intermediate and Secondary Education) Terms and Conditions of Service Regulations, 1979 ("in short, Regulation of 1979"). According to this Regulations of 1979, though the appointing authority of a teacher in non-government educational institutions is the concerned managing committee, the conduct of teachers of such institutions (schools and colleges) are somehow regulated by the Board or by the government through the Board. For example, any disciplinary proceedings initiated against a teacher of such institutions and punishment imposed on them are to be approved by the concerned Board through its Appeal and Arbitration Committee as constituted under section 19 of the said Ordinance of 1961. Again, regulation 9 of the said Regulations of 1979 provides as follows:

৯. ব্যক্তিগত টিউশনি নিষিদ্ধ ইত্যাদিঃ কোন পূর্ণকালীন শিক্ষক স্কুলের স্বাভাবিক কাজের বাইরে নিয়োগকারী কর্তৃপক্ষের পূর্ব অনুমোদন ব্যতিরেকে কোন ব্যক্তিগত টিউশন বা অন্য কোন নিয়োগ লাভ বা অন্য কোথাও ভাতাসহ বা ভাতা ব্যতীত নিজেকে নিয়োজিত করতে পারবেন না।

(Underlines supplied)

31. Therefore, it appears from the above provisions under regulation 9 that a teacher in non-government educational institutions cannot engage himself/herself in any private tuition without prior approval of the governing body or managing committee. While the said

regulation has prohibited such private tuition by the teachers without prior approval of the governing body, it can be presumed that the legislatures even did not have in their mind that in near future the teachers of such schools or colleges would engage themselves in coaching business. Thus, when private tuition is prohibited by regulation 9 of the said Regulations of 1979, involvement of teachers in coaching business is out of question. Therefore, it appears that, so far as the teachers of non-government schools and colleges are concerned, their service regulations, which is a delegated legislation having sanction of Parliament, clearly prohibits any such private tuition not to speak of their involvement in any coaching business as defined by the said Nitimala of 2012.

32. Now, the teachers of government schools and colleges. Some of the petitioners are admittedly serving in government schools and colleges. Thus, in view of the definition of the term 'public servant' as provided by Section 21 of the Penal Code, they are public servants or government servants. Therefore, their conducts and affairs are regulated by the provisions under the Government Servants (discipline and appeal) Rules, 1985 and the provisions of the Government Servants (Conduct) Rules, 1979, in addition to other Rules and Regulations as applicable to such government employees. The Government Servants (Conduct) Rules, 1979 (in short, "Conduct Rules, 1979") was framed by the Hon'ble President of Bangladesh in exercise of power conferred on him under Article 133 of the Constitution. Therefore, it cannot be said or argued that this Conduct Rules of 1979 does not have any sanction of parliament. Rather, it has sanction of the supreme law of the land, namely the Constitution. Rule 17 of the said Conduct Rules of 1979 provides as follows:

> *"17.* ***Private trade or employment****–(1) Subject to the other provisions of this rule, no government servant shall, except with the previous sanction of Government, engage in any trade or undertake any employment or work, other than his official duties:*
> *Provided that a non-gazetteed Government servant may, without such sanction undertake a small enterprise which absorbs family labour and where he does so, he shall file details of the enterprise along with the declaration of assets.*
> *(2) A Government servant may undertake honorary work of a religious, social or charitable nature and occasional work of a literary or artistic character which includes publication of one or a few literary or artistic works, provided that his official duties do not suffer thereby; but the government may, at any time, forbid him to undertake or require him to abandon any employment which, in its opinion, is undesirable.*
> *(3) A Government servant shall not, without the previous sanction of the Government, permit any member of his family to engage in any trade in the area over which such Government servant has jurisdiction.*
> *(4) This rule shall not apply to sports activities and membership of recreation clubs."*

33. It appears from the above quoted provisions under Rule 17 of the Conduct Rules of, 1979 that no government servant may engage himself/herself in any trade or undertake any employment or work, other than his official duties, without previous sanction of the government. Though learned advocate Ms. Tania Amir has argued that the petitioner teachers, who are serving in government schools and colleges, have not employed themselves under any one, rather they are providing tuition on their own, we do not find any substance in such submissions inasmuch as that the said provisions under Rule 17 has even prohibited the government servant from undertaking any employment or work other than his/her official duties. Admittedly, the allegations against the petitioners are that they are engaged in coaching business. Now, if it is their case that they are not in fact engaged in coaching business and that they are providing private tuition with the prior approval of the head of the

institution, they may easily give such explanations in the departmental proceedings initiated or to be initiated against them. Under writ jurisdiction, we are not in a position to determine whether in fact they were involved in coaching business or not. Since the concerned authority has initiated proceedings against them on the said allegation that they are involved in coaching business, as has been found by Doduk in the enquiry, they can easily give such reply to the show cause notices that the allegations are not true.

34. From the above discussions, it appears that even in the absence of the said Nitimala, the petitioners and other teachers of non-government and government schools and colleges are not allowed to engage themselves in any sort of coaching business. This prohibition has not been provided by the said Nitimala of 2012, rather this has been given by their concerned service Rules which are delegated legislations and applicable to them. When the petitioners, or other teachers of government and non-government schools and colleges, joined their services, they joined as such fully knowing that the said Service Rules would be applicable to them. Therefore, by the said Nitimala, the government has in fact supplemented the provisions which are already in the statute books and in doing so, the government does not need to show any other sanction of statute or Act of parliament. It is the part of the constitutional power of the government as executive to run the governance and in running such governance, it is the duty and obligation of the government to take steps for implementation of the laws and regulations time to time enacted by the parliament or by the delegatees of the parliament. Under such obligations, the governments in modern countries issue various Circulars, Paripatra, Nitimala etc. and this has now become essential and normal administrative technic in modern countries. The only limitation in issuing such Nitimala or Nirdeshika is that by such Nitimala or Nirdeshika, the government cannot curtail the rights of any citizen which is already granted in his/her favour either by the Constitution or by law or by any other legal instruments.

35. The fundamental rights of citizens of this Country to do any lawful profession, occupation, trade or business is guaranteed by the Constitution only subject to restrictions imposed by law. Therefore, in the facts and circumstances of the present cases, the petitioners have failed to show that either the Constitution or any act of parliament or any delegated legislation of this Country has given them any right to get involved in coaching business. Rather, it has become evident from the above referred delegated legislations that in fact they have been prohibited by the law of the land from getting involved in coaching business. Thus, in so far as the said Nitimala is concerned, since the same has not curtailed any rights of the petitioners guaranteed either by the constitution or any law, it cannot be knocked down by this Court. Rather, it should be protected by this Court as it is the supplemental instrument to the already existing laws of the land. In this regard, the decisions of Indian Supreme Court **in Bennett Coleman Co. v. Union of India, AIR 1973 SC 106**, **Bishamber Daval Chandra Mohan v State of UP, AIR 1982 SC -33 and Distt. Collector, Chittoor v Chittor Disttt. Groundnut Traders Assn, AIR 1989 SC 989** may be looked into as references. Therefore, on this point of unconstitutionality and unimplementablity of the said Nitimala of 2012, as argued by the learned advocates for the petitioners, we find no substance.

36. Jurisdiction of Dudak:

Another point raised by the petitioners in the above writ petitions is that the Durniti Daman Commission (Dudak) did not have any authority to conduct any enquiry, as has been done in the present case, regarding the alleged involvement of the petitioners and other teachers in the coaching business. In this regard, we need to examine the relevant provisions of the Durniti Daman Commission Act, 2004. The preamble of the Dudak Act, 2004 clearly

declares the intention of the Legislature as to why an independent body named 'Durniti Daman Commission' has been established. The said intention is to prevent act of corruption and to enquire and investigate such act of corruption. Therefore, since the key word in the entire Dudak Act, 2004 is the "corruption" (দুর্নীতি), we need to see how the said term 'Corruption' has been defined by the Act itself.

37. According to Clause (Uma) of Section 2 of the said Act, দুর্নীতি (corruption) means the offences mentioned in the schedule to the said Act. Section 17 of the said Act has described the functions of the Commission which, amongst others, provides that it is the functions of the Commission to enquire and investigate the offences mentioned in the schedule. Therefore, it appears that, the jurisdiction or authority of Dudak to initiate inquiry or investigation or to lodge a case depends on some specific offences and only on such offences which are mentioned in the schedule to the said Act. Thus, the Schedule to the said Act is quoted below for ready reference:

তফসিল

[ধারা ১৭(ক) দ্রষ্টব্য]

(ক) এই আইনের অধীন অপরাধসমূহ;

(খ) The Prevention of Corruption Act, 1947 (Act II of 1947) এর অধীন শাস্তিযোগ্য অপরাধসমূহ;

[(খখ মানিলন্ডারিং প্রতিরোধ আইন, ২০০২ (২০০২ সালের ৭ নং আইন)]

(গ) the Penal Code, 1860 (Act XLV of 1860) এর Sections 161-169, 217, 218, 408, 409 and 477A এর অধীন শাস্তিযোগ্য অপরাধসমূহ।

(ঘ) অনুচ্ছেদ (ক) হইতে (গ) তে বর্ণিত অপরাধসমূহের সহিত সংশ্লিষ্ট বা সম্পৃক্ত ঢ়বন ঙনশতর ইষধন, ১৮৬০ (অদঢ় ডকট ষপ ১৮৬০) এর ড়নদঢ়ভষশ ১০৯ এ বর্ণিত সহায়তাসহ অন্যান্য সহায়তা, এ বর্ণিত ষড়যন্ত্র এবং ড়নদঢ়ভষশ ১২০আ এ বর্ণিত ষড়যন্ত্র এবং ড়নদঢ়ভষশ ৫১১ এ বর্ণিত প্রচেষ্টা অপরাধসমূহ।

38. It appears from the above quoted Schedule that apart from some other offences, the offences punishable under Sections 161 to 169, 217, 218, 408, 409 and 477A of the Penal Code have been mentioned therein. Therefore, it can be concluded that Dudak also has jurisdiction to inquire into the offences mentioned in the said sections of the Penal Code. Though all the sections of the Penal Code as mentioned in the said Schedule are not relevant for our purpose, the provisions under Section 166 of the Penal Code is relevant. Therefore, the said provision as well as the illustration provided therein are quoted below:

> *166. whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.*
>
> ***Illustration***
>
> *A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.*
>
> (Underlines supplied)

39. It appears from the above quoted provision under Section 166 of Penal Code that it is an offence by a public servant if he knowingly disobeys any direction of law as to the way in which he is to conduct himself as such public servant either intending to cause or knowing it

to be likely that he will by such disobedience cause injury to any person, he shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both.

40. Now the question has arisen whether the petitioners, by their alleged involvement in the coaching business, have disobeyed the direction of law. The answer is given above already in that since their service rules clearly prohibit such engagement, they have in fact violated or disobeyed the direction of law as to the way in which they are supposed to conduct themselves. However, this provision is only applicable to the public servants, namely the petitioners who are teachers of government schools and colleges, and this provision does not apply to the teachers who are not government servants, namely the petitioner in W.P. No. 2611 of 2018. The illustration given at the bottom of the said Section has also clarified one very important aspect in that the injury which is likely to cause to any person may be a civil injury as well.

41. Therefore, it cannot be denied that when the teachers get involved themselves in coaching business, which is prohibited by law, they are disobeying the direction of law and they know it fully that such disobedience might cause injury to the students or their guardians in that by such engagement they are utilizing their resources, potentials and capabilities in such coaching centers rather than using them in the class rooms. Therefore, this Court is of the view that, since this provision under Section 166 of the Penal Code has been incorporated in the Schedule to the Dudak Act, 2004, Dudak thinly had technical jurisdiction to enquire into the allegations as published in the news paper regarding the involvement of teachers in the coaching business. However, this thin and technical jurisdiction is only confined to the teachers of government colleges and schools and not to the teachers of non-government schools and colleges. Therefore, in so for as the petitioner in W.P. No. 2611 of 2018 is concerned, who is admittedly a teacher in non-government school and college, Dudak has in fact acted without jurisdiction in initiating enquiry in respect of her alleged involvement in the coaching business. However, it cannot be said that, she has not violated any law. But for such violation, it is the governing body of the institution which may initiate proceedings against her independently not being instructed by Dudak. Therefore, the proceedings or the actions proposed against the petitioner in the said W.P. No. 2611 of 2018, being proposed or taken pursuant to the said recommendation of the Dudak given on the basis of its unauthorized or unlawful enquiry, the same is liable to be declared to be without lawful authority. However, in so far as the petitioner-teachers in other writ petitions are concerned, since they are public servants or government servants, Dudak did have technical jurisdiction and authority to enquire into their alleged involvement in the coaching business as because by such involvement they have allegedly disobeyed the direction of law. Therefore, in so far as they are concerned, Dudak has technically committed no illegality in strict sense and, accordingly, the recommendations of Dudak as well as the actions proposed and taken against them pursuant to such recommendations do not suffer from any legal infirmity and, accordingly, the said actions should sustain in the eye of law.

42. Though we are saying that technically Dudak had jurisdiction to enquire into the said matters, we are of the view that Dudak should have priority list as to which offences should get priority in their such enquiry and investigation when it is repeatedly reported in newspapers that Dudak does not have enough resources and logistic supports. We are of the view that leaving behind serious allegations of corruptions in National Banks, Customs Houses, Ports, Court Premises, Government Offices, Land Offices, etc. Dudak should not have inquired into the mere involvement of some teachers in coaching business relying on a newspaper report. When there are some other serious reports of corruption in the country, it

does not also look well when Dudak shows such importance to some basically disciplinary matters when teachers of government schools are not attending classes on time. These apparently disciplinary issues should be kept at the bottom of Dudak's priority list in particular when almost each and every institution of this country is now suffering from huge corruption being committed by its employees and staffs. Though by engaging in coaching businesses the said teachers have disobeyed the direction of law, but it cannot be said that they have committed any 'corruption' as we understand the term in its general and common parlance. Therefore, we are of the view that, though thinly and technically Dudak had jurisdiction to enquire into the matters as published in the newspaper as regards involvement of the government teachers in coaching business, they should not have conducted such enquiry at all. Such enquires should have been done by the education directorate of the government or the concerned ministry itself. However, for the same technical reason, we cannot say that Dudak acted without jurisdiction.

43. Accordingly, the order of this Court in the instant writ petitions are as follows:-

Orders of the Court:

1) The Rule in Writ Petition No. 7366 of 2011 has become infructuous and as such the same is discharged as being infructuous.
2) Since we have found the said Nitimala of 2012 as a valid Nitimala being supplemental to the existing laws of the land, the Rule issued in Writ Petition No. 11230 of 2012 and three other writ petitions, being Writ Petition Nos. 2611 of 2018, 2842 of 2018 and 1954 of 2018, in so far as impugning the said Nitimala is concerned, are discharged.
3) Since the petitioner in Writ Petition No. 2611 of 2018 is admittedly a teacher of non-government school and college, the Rule in that writ petition, in so far as the Memo dated 03.12.2017 (Annexure-B) issued by Dudak and other memos issued by the concerned authorities, in particular the Memo dated 04.02.2018 (Annexure-G) issued by the Secondary and Higher Secondary Department is concerned, is hereby declared to be without lawful authority and is of no legal effect as the same have been initiated on the basis of the said enquiry report of Dudak. Accordingly, no departmental proceedings pursuant to such report of Dudak or the subsequent memos emanating therefrom can be initiated against the petitioner in the said writ petition. Thus, the Rule in the Writ Petition No. 2611 of 2018 is made absolute-in-part.
4) Since we have found the said Nitimala as valid Nitimala as well as the said enquiry report of Dudak being valid enquiry report in respect of the teachers of the Government colleges and schools, the Rules in Writ Petition Nos. 2842 of 2018 and 1954 of 2018 are discharged. The petitioners in these writ petitions are at liberty to make out their cases as regards their non-involvement in coaching business, as submitted by their learned advocate before this Court, by way of reply to the show cause notices already issued or to be issued against them.

44. At the end, we express our heart felt gratitudes to the learned Amici Curiae, Mr. A.F. Hassan Ariff and Mr. Fida M. Kamal, as their research and submissions have immensely helped us reach the conclusions above.

45. Communicate this.

12 SCOB [2019] HCD

HIGH COURT DIVISION

CRIMINAL REVISION JURISDICTION

Criminal Revision No. 778 OF 2017.
And
Criminal Revision No. 1256 Of 2017.

Mrs. Mohua Ali
.....Accused-Petitioner.

-V E R S U S-

The State and another
..... Opposite-Parties.

Mr. S.M Mobin, Advocate with
Mr. B.M Elias, Advocate
....For the Accused-Petitioner.

Mr. Md. Omer Farooq, Advocate
…For the Anti-Corruption Commission.

Mr. Gazi Md. Mamunur Rashid, A.A.G
and
Mr. Md. Asaduzzaman, A.A.G
…...For the State-Opposite Party.
And
Mrs. Dilruba Yeasmin and another
.....Accused-Petitioners.

-V E R S U S-

The State and another
..... Opposite-Parties.

Mr. Yusuf Hossain Humayun, Advocate
with
Mr. Md. Motiur Rahaman, Advocate
....For the Accused-Petitioners.

Mr. Md. Khurshid Alam Khan, Advocate
…For the Anti-Corruption Commission.

Mr. Gazi Md. Mamunur Rashid, A.A.G
and
Mr. Md. Asaduzzaman, A.A.G
…...For the State-Opposite Party.

Heard on: 08.06.2017,02.07.2017,
03.07.2017 and 06.07.2017
Judgment on: 13.07.2017.

Present:
Mr. Justice Md. Shawkat Hossain.
And
Mr. Justice Md. Nazrul Islam Talukder.

Criminal Law Amendment Act, 1958, Money Laundering Protirodh Ain, 2012,Durnity Daman Commission, Corruption, The Code of Criminal Procedure;

It may be mentioned that the names of the accused-petitioners are not mentioned in the FIR but the investigation officer after holding investigation having found prima facie case submitted charge-sheet against them. It may be noted that the money laundering offences are non-violent crimes which are usually committed in the commercial and financial institutions for financial gain. Sometimes it is very difficult to prosecute against the money laundering offenders because they resort to sophisticated means and techniques to conceal their activities through a series of complex transactions. In view of above situation, non-disclosure of the names of the accused-petitioners in the 161 statements of the witnesses does not mean that they are not at all involved in the commission of money laundering offences.

Md. Nazrul Islam Talukder, J:

1. On the applications under Section 10(1A) of the Criminal Law Amendment Act,1958, these Rules at the instance of the accused-petitioners were issued calling upon the opposite parties to show cause as to why order No.7 dated 21.03.2017 passed by the learned Special Judge (District Judge), Special Judge Court No. 9, Dhaka in Special Case No. 2 of 2017 arising out of Metro Special Case No.16 of 2016 corresponding to Gulshan Police Station Case No. 24 dated 22.12.2014 and ACC GR No.1301 of 2014 framing charge against the accused-petitioners under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 now pending in the court of Special Judge, Court No. 9, 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. Since both the Rules have been arisen out of the same F.I.R and the legal points involved in these Rules are all identical in nature, we have taken both the Rules together for hearing and disposal analogously and accordingly, both the Rules are disposed of in one consolidated judgment.

3. The prosecution case for disposal of the Rules may be, briefly, stated as follows:-
The Durnity Daman Commission was requested by the Bangladesh Bank Financial Intelligence Unit (BFIU) to conduct an inquiry with regard to some financial transactions relating to predicate offences under serial Nos.(3) and (5) of Section 2(k) of the Money Laundering protirodh Ain, 2012. On inquiry, the Dudak found that on 15.12.2011, the F.I.R named accused Nos. 1-3 applied to South East Bank Ltd, Progoti Sarani Branch, Dhaka to open a bank account in the name of Cross World Power Ltd introducing themselves as directors of the company. They provided copies of memorandum and articles of association, the incorporation certificate of the company, trade license, income certificate and national identity cards of the account holders and accordingly, a current account was opened. Later it was found that all the documents supplied by the accused persons were forged and fabricated. The F.I.R accused No.4 identified the accused Nos.1-3 and signed the account opening form as identifier. On 23.11.2013, one Md. Saiful Islam Khan, Finance Manager of Cross World Power Ltd. made a written complaint to the South East Bank, Progoti Sarani Branch that the F.I.R named accused No.2 Md. Shariful Islam Sharif, an employee of the company opened a false account with the aforesaid South East Bank branch in the name of Cross World Power Ltd. by creating forged documents and had been doing financial transactions in that account. The said Md. Shariful Islam collected cheques and bank drafts having issued in the name of Cross World Power Ltd from different companies and deposited those in the fake account opened in the name of the fake company and misappropriated the money. It has been further alleged in the F.I.R that in course of inquiry, it was revealed that the real Cross World Power Ltd. was established on 08.03.2005 but by creating the fake account to misappropriate the money, the accused Nos.1-3 collected 57 cheques and pay orders having issued in the name of Cross World Power Ltd. and deposited those in the fake account and in such a way, the accused persons misappropriated Tk. 2,51,68,866.55. It is further alleged that the F.I.R named accused No.2 Md. Shariful Islam Sharif transferred the said amount of money in 3 separate bank accounts and purchased a flat at Uttar Badda, Dhaka in his name at the cost of Tk. 50,10,573/-. It is stated in the F.I.R that the accused No. 5 Firoz Mollah was in-charge of collection and receipt of money coming from sale activities of the real Cross World Power Ltd. and the accused No. 2 Md. Shariful Islam who was

working under accused Firoz Mollah used to collect the cheques from the company's customer, prepare collection statements and deposit the same to accused Firoz Mollah who after the occurrence quitted the job without any notice. Hence, the accused persons committed offences under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012. Accordingly, Gulshan police Case No.24 dated 22.11.2014 corresponding to A.C.C. G.R No. 1301of 2014 under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain 2012 was started against the accused persons. Hence, the F.I.R.

4. It is stated in the application that the investigating officer being appointed by the Durnity Daman Commission (hereinafter referred to as "Commission'') during investigation of the case collected the prosecution materials, recorded the statements of the witnesses and after conclusion of investigation submitted memo of evidence before the Durnity Daman Commission. The Commission after perusal of memo of evidence gave sanction under Section 32 of the Anti-Corruption Commission Act, 2004 and after obtaining sanction, the investigating officer submitted charge-sheet along with sanction before the Chief Metropolitan Magistrate, Dhaka being charge-sheet No.236 dated 24.11.2015 under Sections 4(2)/4(3) of the Money Laundering Protirodh Ain, 2012 against the accused-petitioners and others.

5. After submission of charge-sheet along with sanction, the case record was transferred to the Court of Metropolitan Senior Special Judge, Dhaka who having received the case took cognizance against the accused-petitioners and others under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 on 17.04.2016.

6. Having taken the cognizance, the Metropolitan Senior Special Judge, Dhaka transferred the case record to the Court of Special Judge, Court No. 9, Dhaka and thereafter, the case was registered as Special Case No. 02 of 2017.

7. The accused-petitioners filed separate applications under Section 241A of the Code of Criminal Procedure before the learned Special Judge, Court No. 9, Dhaka for discharging them from the case but their applications were rejected by an order dated 21.03.2017 and the learned trial judge framed charge against the accused-petitioners and others under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 on the self-same date. The said charges were read over to the accused-petitioners to which they pleaded not guilty and claimed to be tried in accordance with law.

8. The case is now ready for examination of witnesses and the accused-petitioners are now on bail.

9. Being aggrieved by the order of framing of charge, the accused-petitioners filed two applications under Section 10(1A) of the Code of Criminal Law Amendment Act, 1958 before this Court challenging the order of framing charge passed in Special Case No.2 of 2017 arising out of Metro Special Case No.16 of 2016 corresponding to Gulshan Police Station Case No. 24 dated 22.12.2014 and ACC G.R. No.1301/2014 under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012, now pending in the Court of Special Judge, Court No.9, Dhaka and the aforesaid applications were heard on 29.03.2017 and 16.05.2017 and learned Judges of the High Court Division after hearing the parties issued the Rules respectively and stayed the proceeding of the case so far as it relates to the accused-petitioners.

10. Against the orders of the High Court Division passed in the above mentioned criminal revisions, the opposite party No.2 Durnity Daman Commission filed Criminal Petition for Leave to Appeal Nos. 531 and 543 of 2017 before the Hon'ble Appellate Division. On 05.06.2017, the Hon'ble Judges of the Appellate Division after hearing the parties disposed of the Criminal Petition for Leave to Appeal Nos. 531 and 543 of 2017 directing the Rules issuing High Court Bench to hear and dispose of the Rules issued in Criminal Revision No.1256 of 2017 and Criminal Revision No. 778 on merit.

11. At the instance of the Durnity Daman Commission, this Court fixed the Rules for hearing.

12. Mr. Yousuf Hossain Humayun, the learned Advocate along with Mr. Md. Motiur Rahaman,the learned Advocate appeared for accused-petitioners Mrs Dilruba Yasmin and Mrs. Ishrat Jahan and Mr. S.M Mobin, the learned Advocate with Mr. B.M Elias, learned Advocate appeared for accused-petitioner Mrs Mohua Ali.

13. Mr. Md. Khurshed Alam Khan, the learned Advocate and Mr. Md. Omar Farook, the learned Advocate appeared for Durnity Daman Commission.

14. At the very outset, Mr. Yusuf Hossain Khan, the learned Advocate appearing for the accused-petitioners namely Mrs. Dilruba Yeasmin and Mrs. Ishrat Jahan, submits that the names of the accused-petitioners were not mentioned in any of the statements of the witnesses recorded under Section 161 of the Code of Criminal Procedure. He next submits that the prosecution materials including the 161 statements of the witnesses neither disclose any offence nor indicate any circumstances from which it can be inferred that the accused-petitioners are directly or indirectly involved in the commission of offences either as principle accused or as abettors or as conspirators. He then submits that the allegations brought against the accused-petitioners do not attract the ingredients of the offences under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 and as such, since there is no iota of elements to frame charge against the accused-petitioners under the aforesaid sections of the Money Laundering Protirodh Ain, 2012, the charge so framed against the accused-petitioners is illegal and is liable to be set aside. He candidly submits that the allegations made in the charge-sheet against the accused-petitioners only relate to the alleged negligence in the performances of official duty and there is no allegation that they aided, abetted or conspired to commit the alleged offences and in the absence of such allegations, the accused-petitioners cannot be charged for the offence only for being negligent in performing their official duty, if any and as such, the charge so framed against the accused-petitioners is illegal and is liable to be set aside. He vigorously submits that the accused-petitioners have been made accused in the case on the basis of the principle of vicarious liability though the vicarious liability and/or superior responsibility do not constitute an offence for which the accused-petitioners have been charged with and that being so, the charge framed against the accused-petitioners is liable to be set aside. He lastly submits that the then branch Manager has neither been made an accused nor a witness in the case and for this reason also, the charge framed against the accused-petitioners is illegal and the same is liable to be set aside.

15. Mr. S.M. Mobin, the learned Advocate appearing for this petitioner namely Mrs. Mohua Ali, submits that the allegation against the accused-petitioner is that she has facilitated the other accused in opening a bank account through which the other accused

misappropriated the fund of the company and if the allegation is taken to be true, the accused-petitioner may be liable for abetment of misappropriation of fund of the company and as such, the accused-petitioner under no circumstances can be made liable for the offence punishable under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 and therefore, the order of framing charge against the accused-petitioner under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 is illegal and liable to be set aside. He next submits that in the instant case, the investigating officer was appointed by the letter dated 26.01.2015 and the charge-sheet was submitted on 24.11.2015 and prior to submission of the charge-sheet, the Investigating Officer obtained sanction letter on 17.11.2015 but the Investigating Officer could not complete the investigation of the case within (120+60)=180 days as per mandate of Section 20A of the Anti-Corruption Commission Ain, 2004 amended by Act No.60 of 2013 violating Section 20A(3) of the Anti-Corruption Commission Ain, 2004 amended by Act No.60 of 2013 which prescribes appointment of another Investigating Officer for completion of investigation within 90 days, but the investigating officer submitted charge-sheet on 24.11.2015 and the same being submitted beyond the period of limitation is a nullity in the eye of law and shall be held to have been done without lawful authority in view of provision of Sub-section 3 of Section 20A of the newly added provision by the Act, 60 of 2013 and framing of charge on the basis of such charge-sheet is also illegal and liable to be set aside. He lastly submits that Ordinance No.2 of 2015 in respect of the Money Laundering Protirodh Ain, 2012 came into force on 11.10.2015 while the instant case was under investigation and by the provision of Section 2(L) of said Ordinance investigating agency has been changed and save and except the money laundering offences relating to predicate offences committed through corruption and bribery, other offences of money laundering relating to other predicate offences described in 2(k) have been taken away from the jurisdiction of Anti- Corruption Commission and from the moment the Ordinance No.02 of 2015 came into force, the jurisdiction of Anti-Corruption Commission in holding investigation in the instant case has been ousted in view of enactment of Ordinance No.02 of 2015 and it has been made clear and expressed when the Act No.25 of 2016 amending the Anti-Corruption Commission Act, 2004 particularly it's schedule was made and therefore, the very investigation by the Anti-Corruption Commission and submission of charge-sheet and subsequent orders of taking cognizance and framing charge are illegal and liable to be set aside.

16. Per contra, Mr. Md. Khurshid Alam Khan, the learned Advocate along with Mr. Omar Farook, the learned Advocate appearing for the Durnity Daman Commission, submits that in spite of any amendment in the definition of "তদন্তকারী সংস্থা" made in section 2 (V) of the Money Laundering Protirodh Ain, 2012, the Commission is not precluded from making inquiry and investigation relating to the offences committed through "দুর্নীতি ও ঘুষ under the Money Laundering Protirodh Ain, 2012 including this particular case besides other investigation agencies. He next submits that the provision of completion of investigation within the stipulated period is not mandatory in nature and as such, non submission of the report by the investigating officer within the stipulated working days cannot be a ground for setting aside the order of framing charge, since no consequences have been provided regarding the proceedings pending before the trial court after submission of investigating report even after expiry of the stipulated period of investigation, and as such, it cannot be said that the time limit for investigation is mandatory in nature, rather the same can, at the best, be treated as a directory one and for this reason, the order of framing charge cannot be set aside. He further submits that the submissions made by the learned Advocate for the accused-petitioners are totally mechanical, unspecific and vague in nature and as such, the order of framing charge against the accused-petitioners should not be set aside. He candidly submits

that from the prosecution materials like F.I.R, seizure lists, 161 statements of the witnesses and the charge-sheet submitted by the Investigating Officer having obtained sanction from the Commission, it is crystal clear that there is sufficient prima-facie case to frame charge against the accused-petitioners under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 and considering the aforesaid aspects of the case, the Rules are liable to be discharged.

17. Mr. Gazi Md. Mamunur Rashid, learned Assistant Attorney-General appearing for the State, has adopted the submissions advanced by Mr. Khurshid Alam Khan, the learned Advocate for the Durnity Daman Commission and prayed for discharge of the Rules.

18. We have gone through the revisional applications, the supplementary affidavits along with counter affidavits and the prosecution materials annexed therewith. We have also considered the submissions advanced by the learned Advocate for the respective parties. Upon hearing the submissions from the learned Advocates for the respective parties, we have formulated the following issues to be answered as raised by them during hearing of the Rules.

19. First of all, we want to speak something about the money laundering matters particularly highlighting the nature of the money laundering offences and the consequences of the same on the society along with some thoughts and views with regard to tackling the offences since the present case has been arisen out of offences of money laundering which have been described in the Money Laundering Protirodh Ain, 2012 as predicate offences which, amongst others, are much-talked-about issue in our country.

20. Secondly, as per submissions of the learned Advocate for the accused-petitioners, we want to discuss whether the prosecution materials prima-facie disclose the alleged offences against the accused-petitioners under Sections 4(2) and 4(3) of the Money Laundering Protirodh Ain, 2012 .

21. Thirdly, we want to come to a decision whether the Durnity Daman Commission has any locus standi to investigate the offences relating to money laundering after amendment of the Money Laundering Protirodh Ain, 2012 amended by Act No.25 of 2015 following Ordinance No.2 dated 11.10.2015.

22. Fourthly, the issue which has come to the light for decision is that if the investigation into the money laundering offences by the Investigating Officer is not concluded within 180 days as contemplated in Section 20A of the Anti-Corruption Commission Ain,2004 as inserted and amended by Act No.60 of 2013, and the charge-sheet has been submitted beyond the period of limitation violating Section 20A(3) of the aforesaid Ain, what will be the consequence of taking cognizance and framing charge on the basis of such charge-sheet.

23. Now we can take up the first issue for our discussion and decision. It may be mentioned that the present case brought against the accused-petitioner and others relates to predicate offences which are generally committed by 27 modes and means. The offences of money laundering perpetrated through corruption (দুর্নীতি) and bribery (ঘুষ) are all the schedule offences of the Anti-Corruption Commission Act, 2004. In "ব্যবহারিক বাংলা অভিধান" published by "বাংলা একাডেমী" the word "দুর্নীতি" means নীতিবিরুদ্ধ, কুনীতি, অসদাচরন। According to WHARTON'S LAW LEXICON, the word corrupt does not necessarily include an element of bribe taking only, it is also used in a much larger sense denoting conduct which is morally unsound or debased which was decided in the case reported in AIR 1966 SC 523. According to Oxford

English Dictionary, the word 'corrupt' means- (of people) willing to use their power to do dishonest or illegal things in return for money or to get an advantage. The meaning of the word "corruption" is very wide and it has far reaching effect on our daily lives. The word corruption has a wide connotation and embraces all the spheres of our day-to-day life. In a limited sense, it connotes to decisions and actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations which were settled in the case of State of A.P.V. Vasudeva Rao, (2004) 9 SCC 319 (323): AIR 2004 SC 960. The money laundering has been defined and described as predicate offence which is committed resorting to corruption and bribery.

24. The definition of the money laundering offences has been defined in Section 2 (Fa) of the Money Laundering Protirodh Ain, 2012, which runs as follows:

(ফ) ‘‘মানিলন্ডারিং’’ অর্থ-

(অ) নিম্নবর্ণিত উদ্দেশ্যে অপরাধের সাথে সম্পৃক্ত সম্পত্তি জ্ঞাতসারে স্থানান্তর বা রুপান্তর বা হস্তান্তরঃ

(১) অপরাধলব্ধ আয়ের অবৈধ প্রকৃতি, উৎস, অবস্থান, মালিকানা ও নিয়ন্ত্রণ গোপন বা ছদ্মাবৃত্ত করা; অথবা

(২) সম্পৃক্ত অপরাধ সংগঠনে জড়িত কোন ব্যক্তিকে আইনগত ব্যবস্থা গ্রহণ হইতে রক্ষার উদ্দেশ্যে সহায়তা করা;

(আ) বৈধ বা অবৈধ উপায়ে অর্জিত অর্থ বা সম্পত্তি নিয়ম বহির্ভূতভাবে বিদেশে পাচার করা;

(ই) জ্ঞাতসারে অপরাধলব্ধ আয়ের অবৈধ উৎস গোপন বা আড়াল করিবার উদ্দেশ্যে উহার হস্তান্তর, বিদেশে প্রেরণ বা বিদেশ হইতে বাংলাদেশে প্রেরণ বা আনয়ন করা;

(ঈ) কোন আর্থিক লেনদেন এইরুপভাবে সম্পন্ন করা বা সম্পন্ন করিবার চেষ্টা করা যাহাতে এই আইনের অধীন উহা রিপোর্ট করিবার প্রয়োজন হইবে না;

(উ) সম্পৃক্ত অপরাধ সংঘটনে প্ররোচিত করা বা সহায়তা করিবার অভিপ্রায়ে কোন বৈধ বা অবৈধ সম্পত্তির রুপান্তর বা স্থানান্তর বা হস্তান্তর করা;

(ঊ) সম্পৃক্ত অপরাধ হইতে অর্জিত জানা সত্ত্বেও এই ধরণের সম্পত্তি গ্রহণ, দখলে নেওয়া বা ভোগ করা;

(ঋ) এইরুপ কোন কার্য করা যাহার দ্বারা অপরাধলব্ধ আয়ের অবৈধ উৎস গোপন বা আড়াল করা হয়;

(এ) উপরে বর্ণিত যে কোন অপরাধ সংঘটনে অংশগ্রহণ, সম্পৃক্ত থাকা, অপরাধ সংঘটনে ষড়যন্ত্র করা, সংঘটনের প্রচেষ্টা অথবা সহায়তা করা, প্ররোচিত করা বা পরামর্শ প্রদান করা;

25. The suspicious transactions leading up to money laundering offences have been described in Section 2 (Ja) of the Money Laundering Protirodh Ain, 2012, which runs as follows:

(য) “সন্দেহজনক লেনদেন” অর্থ এইরূভ লেনদেন-

(১) যাহা স্বাভাবিক লেনদেনের ধরণ হইতে ভিন্ন;

(২) যেই লেনদেন সম্পর্কে এইরূভ ধারণা হয় যে,

(ক) ইহা কোন অপরাধ হইতে অর্জিত সম্পদ,

(খ) ইহা কোন সন্ত্রাসী কার্যে, কোন সন্ত্রাসী সংগঠনকে বা কোন সন্ত্রাসীকে অর্থায়ন;

(৩) যাহা এই আইনের উদ্দেশ্যে পূরণকল্পে, বাংলাদেশ ব্যাংক কর্তৃক, সময়ে সময়ে, জারীকৃত নির্দেশনায় বর্ণিত অন্য কোন লেনদেন বা লেনদেনের প্রচেষ্টা;

26. The money laundering offences have been termed as predicate offences in Section 2(k) of the Money Laundering Protirodh Ain, 2012 which runs as follows:

(১) দুর্নীতি ও ঘুষ;

(২) মুদ্র জালকরন;

(৩) দলিল দস্ড়াবেজ জালকরণ;

(৪) চাঁদাবাজি;

(৫) প্রতারণা ;

(৬) জালিয়াতি;

(৭) অবৈধ অস্ত্রের ব্যবসা;

(৮) অবৈধ মাদক ও নেশা জাতীয় দ্রব্যের ব্যবসা;

(৯) চোরাই ও অন্যান্য দ্রব্যের অবৈধ ব্যবসা;

(১০) অপহরণ, অবৈধভাবে আটকাইয়া রাখা ও পণবন্দী করা;
(১১) খুন, মারাত্মক শারীরিক ক্ষতি;
(১২) নারী ও শিশু পাচার;
(১৩) চোরাকারবার;
(১৪) দেশী ও বিদেশী মুদ্রা পাচার;
(১৫) চুরি বা ডাকাতি বা দস্যুতা বা জলদস্যুতা বা বিমান দস্যুতা;
(১৬) মানব পাচার;
(১৭) যৌতুক;
(১৮) চোরাচালানী ও শুলক সংএ"ান্ড় অপরাধ;
(১৯) কর সংএ"ান্ড় অপরাধ;
(২০) মেধাস্বত্ব লংঘন;
(২১) সন্ত্রাস ও সন্ত্রাসী কার্যে অর্থ যোগান;
(২২) ভেজাল বা স্বত্ব লংঘন করে পণ্য উৎপাদন;
(২৩) পরিবেশগত অপরাধ;
(২৪) যৌন নিপীড়ন (ঝবীঁধষ ঊীঢ়ষড়রঃধঃরড়হ) ;
(25) পুঁজি বাজার সম্পর্কিত মূল্য সংবেদনশীল তথ্য জনসম্মুখে প্রকাশিত হওয়ার পূর্বে তাহার কাজে লাগাইয়া শেয়ার লেনদেনের মাধ্যমে বাজার সুবিধা গ্রহণ ও ব্যক্তিগত বা প্রতিষ্ঠানিক সুবিধার লক্ষ্যে বাজার নিয়ন্ত্রণের চেষ্টা করা (Insider Trading & Market Manipulation);
(২৬) সংঘবদ্ধ অপরাধ (ঙৎমধহরংবফ ঈৎরসব) বা সংঘবদ্ধ অপরাধী দলে অংশগ্রহণ;
(২৭) ভীতি প্রদর্শনের মাধ্যমে অর্থ আদায়; এবং
(২৮) এই আইনের উদ্দেশ্য পুরণকল্পে বাংলাদেশ ব্যাংক কর্তৃক সরকারের অনুমোদনএ"মে গেজেটে প্রজ্ঞাপনের মাধ্যমে ঘোষিত অন্য যে কোন সম্পৃও" অপরাধ;

27. The money laundering offences are also termed as white collar crimes. Before coming to the conclusion in this matter, we want to describe the pattern and variety of the money laundering offences which are usually committed in national and trans-national level. The phrase "white-collar crime" was coined in 1939 during a speech given by Edwin Sutherland, an American sociologist and criminologist to the American Sociological Society. Sutherland defined the term as crime committed by a person of responsibility, respectability and high social status in the course of his occupation. Although there has been some debate as to what qualifies as a white-collar crime, the term today generally encompasses a variety of non-violent crimes usually committed in commercial institutions for financial gain. Many white-collar crimes are especially difficult to prosecute because the perpetrators use sophisticated means to conceal their activities through a series of complex transactions. The most common white-collar offences include: anti-trust violations, computer and internet fraud, credit card fraud, phone and telemarketing fraud, bankruptcy fraud, healthcare fraud, environmental law violations like discharge of a toxic substance into the air, water and soil which pose significant threat of harm to people, property, or the environment including air pollution, water pollution, and illegal dumping, insurance fraud, mail fraud, government fraud, tax evasion, financial fraud, securities fraud, insider trading, bribery, kickbacks, counterfeiting, public corruption, money laundering, embezzlement, economic espionage and trade secret theft. "White collar crime" can describe a wide variety of crimes, but they all typically involve in crime committed through deceit and motivated by financial gain. The most common white collar crimes are various types of fraud, embezzlement, tax evasion and money laundering. Many types of scams and frauds fall into the bucket of white collar crimes, including Ponzi schemes and securities fraud such as insider trading. More common crimes like insurance fraud and tax evasion also constitute white collar crimes. Many white collar crimes are frauds. Fraud is a general type of crime which generally involves deceiving someone for monetary gain. The money laundering are financial crimes which are committed and carried out by individuals, corporations or by organized crime groups for the purpose of

generating huge profits. In order to give colour of legitimacy, these profits are laundered by the criminals. Corrupt public officials launder their ill–gotten bribes and kick-backs to give them the colour of legitimacy. If the money laundering offences are unchecked, money-laundering can destabilize the financial system and undermine development efforts in emerging markets. It weakens the social fabric and collective ethical standards. Money-laundering can adversely affect economies by making interest and exchange rates more volatile changing the demand for cash and by causing inflation in economies where criminals are engaged in business. The siphoning away of huge volumes of money from normal economic growth poses a real danger to the economies and affects the stability of the national and global market. It empowers corruption and organized crime. Criminals always disguise the origin of investments out of the proceeds of crime. Money-laundering involves, at some point, a conversion process, with the objective to give the appearance that the money has a legitimate source, so that it raises no suspicions when it is finally turned into apparently legitimate wealth.

28. The money laundering often involves a complex series of transactions but it generally includes the following three basic steps:

1) Placement -It involves introduction of the proceeds of crime into the financial system.
2) Clearing- This involves formation of complex layers of financial transactions which distance the illicit proceeds from their source and disguise the audit trail.
3) Integration- This involves investment in the legitimate economy so that the money gets the colour of legitimacy.

29. It may be noted that the concept of a "soft state" was famously articulated by the Nobel Laureate, Karl Gunnar Myrdal who was Swedish economist and sociologist and awarded the Nobel prize for Economics in 1974. Among the other books, he wrote a book under the name "An American Dilemma: The Negro problem and Modern Democracy" which kept huge influence in the landmark case of **Brown v. Board of Education of Topeka** in which the Supreme Court of United States declared State laws establishing separate public school for black and white students to be unconstitutional in 1954 and in an unanimous decision, it was decided that separate educational facilities are inherently unequal and violation of the equal protection clauses of the constitution of the United Stated of America overturning the previous rulings made in the cases of Plessy V. Ferguson (1896), Cumming V. Richmond County Board of Education (1899), Berea College V. Kentucky (1908). However, the term ‘soft state’ was introduced by Karl Gunnar Myrdal while comparing South Asian countries with European countries. According to him, South Asian countries follow the policy of ‘soft state’. The policy of ‘soft state’ means a lenient attitude of the State towards social deviance. The soft States do not take hard decisions, even if the situation demands. This soft state policy weakens the capacity of the State in enforcing rule of law. Not taking hard decision increases the crime rate, violence and corruption etc. The more soft the State is, the greater the likelihood is that there is an unholy nexus between the law maker, the law keeper, and the law breaker. Similarly, if the "greed is good" culture without restraint is nourished and appreciated at any stage of governance of the country, there is a huge chance of offences of money laundering including criminal breach of trust together with cheatings. From the discussions made above, we are of the view that the statutory predicate offences are quite different and distinct from the general offences, and they should be dealt with cautiously without leniency but of course in accordance with law.

30. The second issue in this case is whether the prosecution materials disclose any offences against the accused-petitioners or not. In order to come to a decision in this matter,

we have gone through all the prosecution materials including the 161 statements of the witnesses recorded under Section 161 of the Code of Criminal Procedure. It may be mentioned that the names of the accused-petitioners are not mentioned in the FIR but the investigation officer after holding investigation having found prima facie case submitted charge-sheet against them. It may be noted that the money laundering offences are non-violent crimes which are usually committed in the commercial and financial institutions for financial gain. Sometimes it is very difficult to prosecute against the money laundering offenders because they resort to sophisticated means and techniques to conceal their activities through a series of complex transactions. In view of above situation, non-disclosure of the names of the accused-petitioners in the 161 statements of the witnesses does not mean that they are not at all involved in the commission of money laundering offences. Sometimes the offenders at the time of committing offences kept their footages or footsteps at the place of occurrence which may be evident and inferred from the facts and circumstances of the case as well as from the conducts and behaviors of the perpetrators. It appears from the charge-sheet that the investigating officer during investigation of the case collected so many papers and documents from the South East Bank from which it is evident that the accused-petitioner Mrs. Mohua Ali at the relevant time of occurrence had been working and serving as S.A.V.P and Manager-In-Operation in that branch of the Bank. From examining the papers and documents, it is noticed that the accused-petitioner Mahua Ali assisted the accused-persons to open the fake account by using her I.D without examining the papers and documents submitted by the accused persons. Apart from this, as from 15.12.2011 to 20.10.2013, the accused persons deposited and withdrew Tk. 31,71,472 using 12 cheque/pay orders, which were contrary to the banking laws and rules for the accused-petitioner Mrs. Mahua Ali was dismissed from service as she had been in lacking of supervision of the aforesaid matters. Accordingly, a prima-facie case has been disclosed against this accused-petitioner, which is required to be resolved on taking evidence by the trial Judge, whether this accused-petitioner was involved in the commission of money laundering offences or not.

31. Going through the charge-sheet, we find that the accused-petitioner Mrs. Dilruba Yeasmin was serving as senior officer in the Bank in question when the occurrence occurred. Having opened the fake bank account, this accused-petitioner sent the letter of thanks to the account holders by hand to hand method though she was supposed to deliver the letter of thanks to the customers either by currier service or through post office. It is alleged against her that she did not send the letter of thanks to the customers by currier service or through post office so that the fake addresses of the fake customers could not be traced out or come out to the notice of the other officers of the Bank. During investigation, the investigating officer came to know from the letter sending register that the letter of thanks was signed on 21.12.2011 but the same was shown to have sent to the account holders on 20.12.2011 and received by the account holders on the self same date, which are evident from serial Nos. 297 and 297/A of the concerned register, which appears to be absurd and unacceptable. The investigating officer found so many illegalities and irregularities which have been categorically described and disclosed in the charge-sheet. It is prima-facie apparent from the prosecution materials that the accused persons in connivance with the accused-petitioner opened the fake bank account and thereby, misappropriated an amount of Tk. 2,51,68,866,55/- which being suspicious transaction falls within the purview of money laundering offences as per mandate of the Money Laundering protirodh Ain, 2012.

32. The accused-petitioner Mrs. Ishrat Jahan was also an officer of the Bank, who was in charge of Bank clearing branch from 17.10.2011 to 24.10.2013 i.e at the relevant time of occurrence. What is found from the prosecution materials is that she was not in charge of

account opening affairs of the Bank but she in the absence of senior officer Mrs. Dilruba Yeasmin put her signature on the form for opening bank account as identifier, which was not business of the accused-petitioners. However, it is found from the prosecution materials that the accused persons in collaboration with the accused-petitioner opened fake account and misappropriated Tk. 31,71,472/- by withdrawing the same through fake account.

33. It is worthwhile to mention that the money laundering is a financial crime which are committed and carried out by individuals, corporations or by organized crime groups for the purpose of gaining unlawful financial profits. As regards setting aside of the order of framing charge, one of the grounds taken by the learned Advocates for the accused-petitioners is that the names of the accused-petitioners are not mentioned either in the F.I.R or in the 161 statements of the witnesses recorded by the investigating officer. But we find that the prosecution materials collected by the Investigating Officer have disclosed prima-facie case against the accused-petitioners and others.

34. Under the circumstances, we are of the view that non-implication of the accused-petitioners in the F.I.R as well as non-mentioning of the names of the accused-petitioners in the 161 statements are not satisfactory grounds for setting the order of framing charge when the prosecution materials collected by the Investigating Officer during investigation of the case disclose prima-facie offences against the accused-petitioners. The allegations and involvements of the accused-petitioners so found during commission of money laundering offences are all disputed questions of fact which are required to be resolved or looked into on taking evidence by the learned trial Judge. Accordingly, we do not find any legal grounds to interfere with the order of taking cognizance and framing charge.

35. Now we want to come to a decision, whether the Durnity Daman Commission has any locus standi to investigate the offences relating to money laundering after amendment of the Money Laundering Protirodh Ain, 2012 by Act No. 25 of 2015 dated 26.11.2015 following Ordinance No. 2 dated 11.10.2015.

36. It is known to us that the Durnity Damon Commission Ain, 2004 (Act No. 5 of 2004) came into force on 23.02.2004, wherein all the offences of the Prevention of corruption Act, 1947 including some Penal offences were the schedule offences of Anti-Corruption Commission Act, 2004. In that schedule of the Ain, the offences of money laundering were not incorporated for investigation by the Durnity Damon Commission. Subsequently, the Durnity Damon Commission Ain was amended by Act No. 60 which came into force on 20.11.2013 and included all the offences of money laundering in the schedule of the Anti-Corruption Commission Ain. Accordingly, the offences of money laundering have been incorporated in the schedule of the Durnity Damon Commission Ain by Act No. 60 of 2013, which amongst others runs as follows:-

(ঘ) মানি লন্ডারিং প্রতিরোধ আইন, ২০১২ (২০১২ সনের ৫ নং আইন) এর অধীন শাস্তিযোগ্য অপরাধসমূহ;

37. It is argued by the learned Advocates for the accused-petitioners that the Money Laundering Protirodh Ain, 2012 was amended by ordinance No. 2 of 2015 which came into force on 11.10.2015 giving power and authority to the police by Section 2(V) of the Money Laundering Protirodh Ain to investigate the offences of money laundering excluding the power and authority of the Anti-Corruption Commission to investigate the offences of money laundering. The aforesaid Ordinance became Act by Act No. 25 of 2015 which came into effect on and from 26.11.2015. Accordingly, for investigation into some other predicate offences eligible for investigation, the power and authority of the police in conducting

investigation into some eligible predicate offences has been vested in Criminal Investigation Department by way of amendment in Section 2(V) of the Money Laundering Protirodh Ain by Ordinance No. 2 of 2015 as well as by Act No. 25 of 2015 which runs as follows:- (খ) দফা (ঠ) এর পরিবর্তে নিম্নরূপ দফা (ঠ) প্রতিস্থাপিত, যাহা:-

(ঠ) "তদন্তকারী সংস্থা" অর্থ এই আইনের অন্য কোন বিধান ভিন্নরূপ কোন কিছু না থাকিলে-(অ) দফা (শ) এ বর্নিত, সম্পৃক্ত অপরাধ' তদন্তের জন্য সংশিষ্ট আইনে ক্ষমতাপ্রাপ্ত তদন্তকারী সংস্থা:

তবে শর্ত থাকে যে, যে সকল সম্পৃক্ত অপরাধ বাংলাদেশ পুলিশ কর্তৃক তদন্তযোগ্য তাহা বাংলাদেশ পুলিশের অপরাধ তদন্ত বিভাগ (ঈৎরসরহধষ ওহাবংঃরমধঃরড়হ উবঢ়ধৎঃসবহঃ) কর্তৃক তদন্ত করিতে হইবে;

(আ) সরকারে সহিত পরামর্শক্রমে বাংলাদেশ ফাইন্যান্সিয়াল ইন্টেলিজেন্স ইউনিট কর্তৃক ক্ষমতাপ্রাপ্ত উপ-দফা (অ) এ উলে-খিত এক বা একাধি তদন্তকারী সংস্থা;"

Prior to the said amendment the "তদন্তকারী সংস্থা" was defined in the following manner:

(ঠ) "তদন্তকারী সংস্থা" অর্থ দুর্নীতি দমন কমিশন আইন, ২০০৪ (২০০৪ সনের ৫ নং আইন) এর অধীন গঠিত দুর্নীতি দমন কমিশন; এবং কমিশনের নিকট হইতে তদন্তের উদ্দেশ্য ক্ষমতাপ্রাপ্ত কমিশনের কোন কর্মকর্তা বা অন্য আইনে যাহা কিছুই থাকুক না কেন, অন্য কোন তদন্তকারী সংস্থার কর্মকর্তা ও ইহার অন্তর্ভুক্ত হইবেন;

38. In the view of the above, as per submission of the learned Advocates for the accused-petitioners, the investigating report dated 24.11.2015 submitted by the Anti-Corruption Commission after amendment of Money Laundering Protirodh Ain by Ordinance No. 2 dated 11.10.2015 is illegal and not valid in the eye of law and the order of framing charge on the basis of the aforesaid charge-sheet is not maintainable and liable to be set aside. Now it is abundantly clear that before the amendment of the Anti-Corruption Act, 2004 made in 2016 by Act of 25 of 2016, the Commission had the exclusive jurisdiction to investigate all the predicate offences under the Money Laundering Protirodh Ain, but after the amendment of the Anti-Corruption Commission Ain by Act No. 25 of 2016, the Anti-Corruption Commission has been empowered to investigate the following predicate offences alongwith other offences:-

(ক).....

(খ) (আ) section ৪২০, ৪৬৭, ৪৬৮, ৪৭১ এবং ৪৭৭অ এর অধীন কোন অপরাধ সরকারি সম্পদ সম্পর্কিত হইলে অথবা সরকারি কর্মচারী বা ব্যাংকের কর্মকর্তা-কর্মচারী বা আর্থিক প্রতিষ্ঠানের কর্মকর্তা-কর্মচারী কর্তৃক দাপ্তরিক দায়িত্ব (official duty) পালনকালে সংঘটিত হইলে কেবল সেইক্ষেত্রে বর্ণিত অপরাধসমূহ;

(গ).....

(ঘ) মানিলন্ডারিং প্রতিরোধ আইন ২০১২ (২০১২ সনের ৫ নং আইন) এর অধীন ঘুষ ও দুর্নীতি সংক্রান্ত অপরাধসমূহ।"

39. The word "দুর্নীতি" has been defined in the Anti-Corruption Act, 2004 in the following manner:

২ (ঙ) দুর্নীতি অর্থ এই আইনের তফসিলে উলে-খিত অপরাধসমূহ"

40. Anyway, in the Money Laundering Protirodh Ain, 2012, there is no definition of the word "দুর্নীতি" but the Commission has been given power to investigate the offences relating to- "ঘুষ ও দুর্নীতি সংক্রান্ত অপরাধ সমূহ"- under the Money Laundering Protirodh Ain, 2012.

41. As per submission of Mr. Khan, the Commission is entitled to submit charge-sheet in this particular case and in any cases/offences wherein there is a smell of "ঘুষ ও দুর্নীতি" in spite of the above amendment of the law.

42. In order to come to a decision in this regard, let us see and examine the Jurisdiction, aim and object of the Anti-Corruption Commission that have been mentioned in Section 17 of the Anti-Corruption Commission Act, 2004, which run as follows:

১৭। কমিশনের কার্যাবলি। কমিশন নিম্নবর্নিত সকল বা যে কোন কার্যসম্পাদন করিতে পারিবে, যথা;

(ক) তফসিলে উলে-খিত অপরাধসমূহের অনুসন্ধান ও তদন্ড় পরিচালনা;
(খ) অনুচ্ছেদ (ক) এর অধীন অনুসন্ধান ও তদন্ড় পরিচালনার ভিত্তিতে এই আইনের অধীন মামলা দায়ের ও পরিচালনা;
(গ) দুর্নীতি সম্পর্কিত কোন অভিযোগ স্বউদ্যোগে বা ক্ষতিগ্রস্থ ব্যক্তি বা তাহার পক্ষে অন্য কোন ব্যক্তি কর্তৃক দাখিলকৃত আবেদনের ভিত্তিতে অনুসন্ধান;
(ঘ) দুর্নীতি দমন বিষয়ে আইন দ্বারা কমিশনকে অর্পিত যে কোন দায়িত্ব পালন করা;
(ঙ) দুর্নীতি প্রতিরোধের জন্য কোন আইনের অধীন স্বীকৃত ব্যবস্থাদি পর্যালোচনা এবং কার্যকর বাস্ড়বায়নের জন্য রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;
(চ) দুর্নীতি প্রতিরোধের বিষয় গবেষনা, পরিকল্পনা তৈরি করা এবং গবেষনালব্দ ফলাফলের ভিত্তিতে করনীয় সম্পর্কে রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;
(ছ) দুর্নীতি প্রতিরোধের লক্ষ্যে সততা ও নিষ্ঠাবোধ সৃষ্টি করা এবং দুর্নীতির বির"দ্ধে গনচেতনতা গড়িয়া তোলার ব্যবস্থা করা;
(জ) কমিশনের কার্যাবলি বা দায়িত্বের মধ্যে পড়ে এমন সকল বিষয়ের উপর সেমিনার, সিম্পোজিয়াম, কর্মশালা ইত্যাদি অনুষ্ঠানের ব্যবস্থা করা;
(ঝ) আর্থ-সামাজিক অবস্থার প্রেক্ষিতে বাংলাদেশে বিদ্যমান বিভিন্ন প্রকার দুর্নীতির উৎস চিহ্নিত করা এবং তদানুসারে প্রয়োজনীয় ব্যবস্থা গ্রহনের জন্য রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;
(ঞ) দুর্নীতির অনুসন্ধান, তদন্ড়, মামলা দায়ের এবং উক্তর"প অনুসন্ধান, তদন্ড় ও মামলা দায়েরের ক্ষেত্রে কমিশনের অনুমোদন পদ্ধতি নির্ধারন করা, এবং
(ট) দুর্নীতি প্রতিরোধের জন্য প্রয়োজনীয় বিবেচিত অন্য যে কোন কার্য সম্পাদন করা।"

43. If we consider the above aims and objects of the Anti-Corruption commission as contemplated in Section 17 particularly in Sections 17(ga), 17(jha), 17(aaw) and 17(ta) of the Anti-Corruption Act, 2004, we have no hesitation to hold that to prevent "দুর্নীতি" (corruption), the Commission has got the unfettered power to make any enquiry, investigation and to take necessary actions/steps in accordance with law as it thinks fit and proper in respect of any offences relating to "দুর্নীতি", no matter whether the offence is investigatory by the police or by other investigating agencies.

44. The word corruption does not necessarily include an element of bribe taking only, it is also used in a much larger sense denoting conduct which is morally unsound or debased. The word corruption has a wide connotation and embraces almost all the spheres of our day to day life affairs. It connotes to decisions and actions of a person to be influenced not by rights or wrongs of a cause but by the prospects of monetary gains or other selfish considerations. Hence, the meaning of the word "দুর্নীতি" (corruption) is very wide and it has far reaching effects on our daily lives.

45. Having considered the above facts and circumstances of the case, we are constrained to hold that whatever amendment is made in the definition of "তদন্ড়কারী সংস্থা" in the Money Laundering Protirodh Ain, 2012 by Ordinance No. 2 of 2015 and Act No. 25 of 2015, the Commission is not precluded from making inquiry and investigation in this particular case and in the matter of any offences relating to "দুর্নীতি" under the Money Laundering Protirodh Ain, 2012 besides other investigating agencies."

46. The last issue that has been raised by the learned Advocates for the accused-petitioners is that the investigating officer could not submit charge-sheet within 180 days as per Section 20A of the Anti-Corruption Commission Ain, 2004 as amended by Act No.60 of 2013 and thereafter, he submitted the charge-sheet beyond the period of limitation violating Section 20A sub Section 3 of the aforesaid Ain. Under the circumstances what will be the legal consequence of taking cognizance and framing charge on basis of such charge-sheet as mentioned above. As per submission of the learned Advocates for the accused-petitioners,

both the orders taking cognizance and framing charge will be set aside as those are not taken and framed on the basis of lawfully submitted charge-sheet. In order to come a decision, we have gone through Section 20K of the Durnity Damon Commission Ain, 2004 amended in 2013 which runs as follow:-

"২০ক। তদন্তের সময়সীমা।-(১) অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, ধারা ২০ এর অধীন ক্ষমতা প্রাপ্তির তারিখ হইতে অনধিক ১২০ (একশত বিশ) কর্মদিবসের মধ্যে তদন্তকারী কর্মকর্তাকে এই আইন ও তফসিলে উলি-খিত কোন অপরাধের তদন্ত কার্য সম্পন্ন করিতে হইবে।

(২) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, কোন যুক্তিসঙ্গত কারণে, উক্ত উপ-ধারায় উলি-খিত সময়সীমার মধ্যে তদন্ত কার্য সম্পন্ন করা সম্ভবপর না হইলে তদন্তকারী কর্মকর্তা সময়সীমা বৃদ্ধির জন্য কমিশনের নিকট আবেদন করিতে পারিবেন এবং উক্ত ক্ষেত্রে কমিশন আরও অনধিক ৬০ (ষাট) কর্মদিবস সময় বৃদ্ধি করিতে পারিবে।

(৩) তদন্তকারী কর্মকর্তা উপ-ধারা (১) বা, ক্ষেত্রমত, (২) এ উলি-খিত সময়সীমার মধ্যে তদন্ত কার্য সম্পন্ন করিতে ব্যর্থ হইলে,-

(ক) উক্ত তদন্ত কার্য ৯০ (নব্বই) কর্মদিবসের মধ্যে সমাপ্তির জন্য নূতনভাবে অন্য কোন কর্মকর্তাকে, ধারা ২০ এর বিধান অনুসারে, ক্ষমতা অর্পণ করিতে হইবে; এবং

(খ) সংশি-ষ্ট কর্মকর্তার বির"দ্ধে অদক্ষতার অভিযোগে, ক্ষেত্রমত, কমিশন, পুলিশ বা সংশি-ষ্ট সংস্থার জন্য প্রযোজ্য আইন বা বিধি-বিধান অনুযায়ী বিভাগীয় ব্যবস্থা গ্রহণ করিতে হইবে।"

47. Going through the above provision of law, we find that the investigating officer is lawfully obliged to submit charge-sheet within 180 working days from the date of receipt of the letter empowering him to investigate the matter. In this matter, the accused-petitioners did not submit any chart showing off the working days in that the investigating officer submitted the charge-sheet. The accused-petitioner also did not make any statement as to when the investigating officer submitted the memo of evidence before the commission for its perusal and consideration. It is true that the investigation officer submitted charge-sheet before the concerned court on 24.11.2015 having received sanction on 17.11.2015. In this respect, the Durnity Daman Commission relied upon the case of Anti-Corruption Commission vs. AAM Habibur Rahman reported in 67 DLR (AD) 278 in which it has been held by the Appellate Division that the provision of completion of investigation within the stipulated period is not mandatory in nature and as such, non-submission of the report by the investigating agency within the stipulated working days cannot be a ground for quashing the proceedings, since no consequences have been provided regarding the proceedings. Under the circumstances, it cannot be said that the time-frame for investigation is mandatory rather it can, at the best, be treated as directory. The aforesaid view finds support in the case of SM Mozammel Hoque Talukder @ Shahjahan Talukder @ Shahjahan and others vs. the State reported in 68 DLR (AD)(2016) 370.

48. Before parting with the case, in view of the seized documents, charge-sheet, order of framing charge by the trial Judge, it is palpably clear that the accused-petitioners signed some documents, but their alleged bonafides in the matter of signed documents are the matter of evidence and trial and that cannot be gone into these criminal revisions under Section 10(1A) of the Criminal Law Amendment Act, 1958. On the face of the averments made in the charge-sheet over the accused-petitioners' involvement, prima-facie criminal liability is apparent on the face of the record. Now it is settled proposition of law that question of 'mens rea' of an accused cannot be gone into a criminal revision under section 10(1A) of the Criminal Law Amendment Act, 1958. It is essentially a matter of evidence and trial. Their alleged bonafides can only be looked into and resolved during the trial of the case. At this stage, the accused-petitioners cannot presuppose their bonafides or innocence. In coming to a decision in this matter, we have taken into consideration of the decisions taken in the cases of Abdul Kader Chowdhury Vs State, 28 DLR(AD)38 and Ali Akkas Vs Enayet Hossain, 17 BLD(AD)(1997)44.

49. Accordingly, we are of the view that the charge framed against the accused-petitioners and others is not groundless.

50. Considering the facts and circumstances of the case, the proposition of law and the legal decisions discussed above, we are not inclined to set aside the order of framing charge by making the Rules absolute.

51. Consequently, both the Rules issued at the instance of the accused-petitioners are discharged.

52. The orders of the stay of the proceedings passed at the time of issuance of the Rules are recalled and vacated.

53. The learned Judge of the trial court is directed to proceed with the case in accordance with law.

54. Let a copy of this judgment and order be communicated to the concerned Judge of the Special Court at once.

12 SCOB [2019] HCD

HIGH COURT DIVISION

(CRIMINAL MISCELLANEOUS JURISDICTION)

CRIMINAL MISCELLANEOUS CASE NO.3949 OF 2013.

Md. Nasir Mia
…….. Convict-petitioner.
-Versus-
The State.
…… Opposite party

Mr. Jhangir Ahmed Khan, Advocate
……...For the convict-petitioner.

Mr. Monjur Kader, D.A.G. with
Ms. Helana Begum(Chaina), A.A.G. and
Mr. Mohammed Akhter Hossain, A.A.G,
.....For the opposite party(State).

Heard on 13.03.2018,
20.03.2018,28.03.2018,
10.04.2018, 10.5.2018 and 17.05.2018.
Judgment delivered on 29.05.2018.

PRESENT:
MR. JUSTICE MD. EMDADUL HUQ
AND
MR. JUSTICE MD. SHOHROWARDI

Application of Section 561A of the Code of Criminal Procedure, 1898.
On a careful reading of the provision of section 561A of the Code of Criminal Procedure it is found that by inserting section 561A in the Code the legislature did not confer any new power to the Court to bypass or override any other statutory provision and this Court is not legally authorized to assess the evidence like an appellate court. On perusal of the evidence if this Court finds that there is no legal evidence to connect the convict with the charge framed against him then this Court to secure the ends of justice is competent to quash the judgment and order of conviction and sentence passed by the trial Court. If there is sufficient evidence against the convict it would not be just and proper to exercise its jurisdiction to quash the judgment and order of conviction and sentence passed by the trial Court. ... (Para 19)

JUDGMENT

MD. SHOHROWARDI J:

1. Upon an application filed by the convict petitioner under section 561A of the Code of Criminal Procedure, 1898 a Rule was issued by this Court on 29.01.2013 for quashing the judgment and order of conviction and sentence dated 18.09.2011 passed by the Special Tribunal No.2, Brahmanbaria in Special Tribunal Case No. 175 of 2005 arising out of Brahmanbaria Police Station Case No. 19(08))05 convicting the petitioner under section 19A and 19(f) of the Arms Act, 1878 and sentencing him to suffer rigorous imprisonment for 14((fourteen) years.

2. The prosecution case, in short, is that convict Md. Nasir Mia was in custody in connection with Brahmanbaria Police Station Case No. 22 dated 13.06.2005 under section

392 of the Penal Code was taken on police remand and he had given some information about possession of illegal arms which was used at the time of the alleged robbery. Thereafter on the basis of GD No.530 dated 09.08.2005, S.I. Ranjit Mojumder of Brahmanbaria Thana along with police force and convict Md. Nasir Mia went to his house purchased in the name of his wife Nazma Begum and in presence of the local witnesses and Chowkider recovered one U.S. made revolver and two cartridges kept under the bedding of Chowki of his east facing tin-shed dwelling hut and the convict Md. Nasir Mia failed to show any valid license for keeping the said arms in his possession. Thereafter, the S.I. Ranjit Majumder lodged the F.I.R.

3. S.I. Md. Jashimuddin was appointed as Investigating Officer and after completing investigation he submitted the police report on 22.08.2005 against the convict petitioner under section 19A and 19(f) of the Arms Act, 1878. After that, the learned Magistrate sent the case records to the Special Tribunal No.1, Brahmanbaria for trial who by the order dated 19.07.2006 transferred the case to the Special Tribunal No.2, Brahmanbaria for disposal of the case. During the trial, the charge was framed under section 19A and 19(f) of the Arms Act, 1878 by order dated 29.08.2006 against the convict petitioner which was read over in his presence and he pleaded not guilty and claimed to be tried.

4. During the trial, the prosecution examined 9(nine) P.Ws and they were also cross-examined by the convict petitioner. Pending trial, the convict petitioner was enlarged on bail by the Hon'ble High Court Division and thereafter on 08.09.2009 he absconded. On 20.05.2010 an Advocate was appointed by the legal aid committee to conduct the case on behalf of convict petitioner.

5. Out of 9(nine) witnesses examined by the prosecution, P.W.1 SI. Ranjit Mojumder is the informant, P.W.2 Md. Abdul Hai, P.W.3 Taleb Ali Bhuiyan, P.W.4 Abdul Hannan and P.W.5 Abu Taher are the seizure list witnesses. P.W. 6 Ajit Kumar Sarkar and P.W. 7 Md. Imtiaz Ahmed are police personnel and members of the raiding party. P.W.8 Muslim Miah is the local witness who was declared hostile. P.W. 9 Md. Jashim Uddin is the Investigating Officer.

6. P.W. 1 Ranjit Mojumder stated that while convict Md. Nasir Mia was on police remand in connection with Brahmanbaria Police Station Case No. 22 dated 13.06.2005 under section 392 on the basis of G.D entry No. 530 dated 09.08.2005, he along with police force and convict petitioner at 19.55 pm went to the house of convict Md. Nasir Mia situated at village Atla of Brahmanbaria Thana. On the basis of information given by the convict petitioner he along with the police force raided the east facing tin-shed dwelling-house of the convict petitioner and in presence of the witnesses and the Constable No.269 Abu Taher recovered one U.S. made revolver and two round cartridges kept under the bedding of Chowki and prepared the seizure list. P.W. 1 proved the seizure list as exhibit-1. During the trial, the recovered revolver was exhibited and proved as material exhibit No. 1 and the two rounds of cartridges was proved as material exhibit No. 2 series. P.W. 1 proved the F.I.R. and he also proved his signature as exhibit No. 2/ 1. During cross-examination in reply to a question put to P.W.1, he stated that before recovery of arms the convict petitioner was taken on police remand, but he could not say how many days he was in custody before recovery of the arms. He also stated that Hannan member was present at the time of recovery of arms at the place of occurrence. He denied the suggestion that no arms and cartridges were recovered from the dwelling hut of the convict petitioner. He also denied the suggestion that since there

was an enmity between the neighbor of the convict petitioner and his wife, he falsely implicated the convict petitioner in this case.

7. P.W. 2 Abdul Hai stated that on 09.01.2005 police recovered one revolver and two cartridges from the house of the convict petitioner kept under the bedding. He proved his signature put in the seizure list which was marked as exhibit-1 and 2. He also identified the recovered arms and cartridges. During cross-examination, he stated that his house was situated far from the house of Nazma, wife of convict petitioner and police taken him to the place of occurrence. He also stated that while he went to the house of convict petitioner, he found the door open and he stayed at the place of occurrence for about ½ an hour. He denied the suggestion that no arms were recovered from the possession of the convict petitioner.

8. P.W.3 Teleb Ali Bhuiyan, inhabitant of village Atla, stated that on 09.08.2005 at about 8.00 pm police recovered one revolver and two cartridges from the house of convict Md. Nasir Mia kept under the bedding and he proved the seizure list and his signature put on the seizure list. On recall, during cross-examination P.W.3 stated that Kashem, Barik and many other neighbors of convict Md. Nasir Mia were present at the time of occurrence and he was present at the shop of Abdur Mia and at about 7.30 pm he went to the place of occurrence and stayed there about ½ an hour and he also entered into the house of Md. Nasir Mia and at that time police personnels were also present there along with Md. Nasir Mia. He denied the suggestion that no arms and cartridge were recovered from the possession of the convict petitioner.

9. P.W. 4 Abdul Hannan of village Atla stated that on 09.08.2005 at about 8.00 pm police recovered one revolver and two cartridges from the house of convict Md. Nasir Mia kept under the bedding. He proved his signature put in the seizure list which has been marked as exhibit-1/4 and he identified the seized arms and cartridges. He admitted that the place of occurrence is the house of the wife of convict Md. Nasir Mia and his house was situated about ½ a kilometer far from the house of Md. Nasir Mia. He also stated that at about 7.30 pm he went to the place of occurrence. He affirmed that he is a member of local Union Parishad and he along with police and convict Md. Nasir Mia entered the house of the wife of convict Md. Nasir Mia. He denied the suggestion that no arms and ammunition were recovered in his presence from the possession of the convict petitioner.

10. P.W.5 Constable No. 269 Abu Taher stated that on 09.08.2005 at about 9.30 pm he along with police force went to the house of convict Md. Nasir Mia of village Atla and at about 10 to 11 pm as per showing of convict Md. Nasir Mia, he recovered one revolver and two cartridges kept under the bedding of chowki and at that time he was present inside the hut and in his presence the informant prepared the seizure list. He proved his signature which has been marked as exhibit-1/5. In cross-examination in reply to a question put to P.W.5, he stated that at evening he started from thana and while he reached at the place of occurrences, he saw that the doors of the house is closed and he and the police force opened the door and 8/9 locals including Union Parishad member came at the place of occurrence. He denied the suggestion that convict petitioner was not aware of the recovered arms and cartridges.

11. P.W. 6 Constable No. 970 Ajit Kumar Sarkar stated that on 09.05.2005, he along with S.I. Ranjit Mojumder and police force went to the house of convict Md. Nasir Mia of village Atla and at about 19.55 pm he recovered one revolver and two cartridges from his house kept under the bedding. He identified recovered arms in Court. In cross-examination,

he stated that he started at 17.50 pm from thana and after 3 and ½ an hour he reaches at village Atla. He denied the suggestion that the place of occurrence is not the house of convict Md. Nasir Mia. He affirmed that he found Hannan member, Taleb Ali and 50/60 locals at the place of occurrence. He denied the suggestion that the convict petitioner was falsely implicated in this case.

12. P.W.7 Md. Imtiaz Ahmed, Inspector of Police, D.B stated that he along with S.I. Ranjit Mojumder and police force on 09.08.2005 on the basis of G.D Entry No. 530 at about 17.50 pm started for village Atla by a Government pickup. At about 19.55 pm they reached at the house of Nazma Begum and in presence of the local members and the respectable persons as per showing of convict petitioner recovered one 32 bore revolver and 2 cartridges from the east facing tin-shed dwelling hut of the convict kept under the bedding in the polythene bag and in presence of the witnesses police prepared the seizure list. During cross-examination, he admitted that convict petitioner was on remand before recovery of the arms and Nazma Begum, wife of convict Md. Nasir Mia is the owner of the house wherefrom the arms and cartridges were recovered. He also affirmed that the house of convict petitioner and his wife is the same house. He denied the suggestion that before one month of occurrence convict Md. Nasir Mia was detained at Brahmanbaria Thana and at the instance of his local enemy, he falsely implicated him in this case. He affirmed that it was a dark night while the arms were recovered and he did not enter into the house wherefrom the arms were recovered, but stated that the respectable persons of the locality went to the place of occurrence along with the informant. He also denied the suggestion that no arms and cartridges were recovered from the possession of the convict petitioner.

13. P.W.8 Muslim Mia is the inhabitant of village Atla wherefrom the alleged arms were recovered and convict Md. Nasir Mia is his neighbor. P.W. 8 was declared hostile. During the cross-examination, he stated that convict Md. Nasir Mia resides in the house of his wife at village Atla. He also stated that he does not know as to whether there is any local enemy of the convict petitioner.

14. P.W. 9 S.I. Md. Jashimuddin is the Investigating Officer and he stated that during investigation of the case he prepared the sketch map and index and recorded statement of witnesses and after investigation he found prima-facie truth of the allegation made in the F.I.R and submitted charge sheet against the convict petitioner under section 19A and 19(f) of the Arms Act, 1878.

15. Mr. Jahangir Ahmed Khan, the learned Advocate appearing on behalf of the convict Md. Nasir Mia submits that he was falsely implicated in the instant case at the instance of the police in connivance with his local rivals and he is also not the owner of the house wherefrom the alleged arms and cartridges were recovered. He further submits that at the relevant time the convict petitioner was in police remand and showing false recovery of arms the police falsely implicated him in the instant case. He also submits that the sentence imposed by the trial Court is too harsh and for ends of justice the impugned judgment and order of conviction and sentence is liable to be quashed.

16. Mr. Monjur Kader, the learned Deputy Attorney General appearing on behalf of the state submits that P.Ws. 2,3 and 4 who were present at the time of recovery of arms are locals and they also corroborated the evidence of P.Ws.1, 5,6 and 7 who were police personnel and there is no legal ground for quashing the judgment and order of conviction and sentence passed by the trial Court against the convict petitioner.

17. The issue involved in the Rule as to whether the prosecution successfully proved the charge against the convict petitioner under section 19A and 19(f) of the Arms Act, 1878 and further question involved as to whether under section 561A of the Code of Criminal Procedure, 1898 this Court is authorized to review the sentence passed by the trial Court.

18. To answer the points raised, it is required to quote the provision of section 561A of the Code of Criminal Procedure which runs as follows;

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure such the ends of justice."

19. On a careful reading of the provision of section 561A of the Code of Criminal Procedure it is found that by inserting section 561A in the Code the legislature did not confer any new power to the Court to bypass or override any other statutory provision and this Court is not legally authorized to assess the evidence like an appellate court. On perusal of the evidence if this Court finds that there is no legal evidence to connect the convict with the charge framed against him then this Court to secure the ends of justice is competent to quash the judgment and order of conviction and sentence passed by the trial Court. If there is sufficient evidence against the convict it would not be just and proper to exercise its jurisdiction to quash the judgment and order of conviction and sentence passed by the trial Court.

20. On perusal of the evidence, it transpires that P.W.1 Ranjin Mojumder along with P.Ws. 5,6,7 and police force went to the house of convict Md. Nasir Mia on 09.08.2005 at about 19.55 pm and in presence of local witnesses recovered one 3.2 bore revolver and two cartridges from the east facing tin-shed dwelling hut of the convict petitioner kept under the bedding of Chowki. P.Ws. 2,3 and 4 who are locals also corroborated the evidence of P.W.1. P.W. 4 Abdul Hannan is the local member of the Union Parishad. During the trial, P.W 5 Police Constable No. 269 Abu Taher, P.W. 6 Constable No. 970 Ozid Kumar Sarker and P.W. 7 Inspector of Police Md. Imtiaz Ahmed also corroborated the evidence of P.W.1 as regards recovery of arms from the possession of the convict Md. Nasir Mia. P.W. 8 was declared hostile by the prosecution, but during cross-examination, he affirmed that convict Md. Nasir Mia resides along with his wife at village Atla wherefrom the alleged arms were recovered. The defence cross-examined all the P.Ws but failed to bring out any material contradiction as regards statement made in examination in chief regarding recovery of arms from possession of convict petitioner.

21. Section 561A was inserted in the Code by the Code of Criminal Procedure(Amendment) Act, 1923(XVIII of 1923) and after that the Privy Council in the Case of Emperor vs Khwaja Nazir Ahmed reported in AIR(1945) PC 18 examined the inherent power of this Court under section 561A and observed that;

> "It has sometimes been thought that 561A has given increased powers to the Court which it did not possess before that Section was enacted. But this is not so, the section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted as their Lordships think, lest it should be considered that only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent powers had survived the passing of

the Act." (1944) LR 71, I.A.203, 212, Privy Council, King Emperor vs Khawaja Nazir Ahmed. [As quoted in AIR 1963(SC)447]

22. In the case of Md. Samiullah vs State reported in 15 DLR(SC)(1963)150, the Supreme Court of Pakistan examined the inherent power of the Court under section 561A of the Code of Criminal Procedure as regards alteration and modification of the sentence passed by the trial Court and held as under;

"The jurisdiction under Sec. 561A of the Criminal Procedure Code is, in our opinion, of an extraordinary nature intended to be used only in extraordinary cases where there is no other remedy available. It is of a limited scope and cannot be utilised where there is another express remedy provided by the Code of Criminal Procedure. In the exercise of the inherent jurisdiction under this section the High Court can neither exercise the powers of a Court of appeal nor can it enhance a sentence nor can it even re-consider the question of sentence."

23. In the case of Abdul Quader Chowdhury and others and the state reported in 28 DLR (AD)38 our Apex Court after elaborate discussion of the provision of section 561A of the Code of Criminal procedure,1898 made some category of cases where this Court can exercise its jurisdiction under the said section and observed in the following terms;

" a) some categories of cases may also be indicated where the inherent jurisdiction can and should be exercised for quashing the proceeding. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceedings in question are in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings the High Court would be justified in quashing the proceedings on that ground.

b) Cases may also arise 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, in such cases no question of appreciating evidence arises, it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person.

c) The third category of cases in which the inherent jurisdiction of the High Court can be invoked may also arise. In cases falling under this category the allegations made against the accused person 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, In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is consistent with the accusation made and cases where there is legal evidence which on its appreciation may not support the accusation in question. In exercising the jurisdiction under section 561A the High Court would not embark upon an inquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate and ordinarily, it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly speaking that is the nature and scope of the inherent jurisdiction of the High Court under section 561A in the matter of quashing criminal proceedings.

24. In the case of Golam Rasul vs Habibubullah Shakir reported in 20 BLC(AD) 58, Judgment dated 11.06.2013 our Apex Court considering the other decisions of the Apex Court as regards jurisdiction under section 561A of the Code of Criminal procedure observed in the following terms;

> "The exercise of jurisdiction under inherent power as envisaged under section 561A of the Code of Criminal procedure to have the criminal proceedings quashed is an exception rather than a rule and the case for quashing must be treated as rarest of rare cases so that it can't scuttle or bury a prosecution case on flimsy and unfounded reasons. The High Court Division though, is clothed with inherent power to quash a proceeding or to make such order or orders as may be necessary for the ends of justice that power should be exercised in appropriate case, sparingly and cautiously but in the above case the High Court Division on a flimsy ground quashed the proceeding of a Criminal Case which is liable to be knocked down by this Division. "

25. In the case of Mir Mohammad. Ali vs The State, Judgment dated 11th May 1993.(Special Tribunal Case) , para 10 as regards the jurisdiction of the High court Division under section 561A of the Code of Criminal Procedure his Lordship Mr. AKM Sadeque J observed in the following term;

> "This section enables the Court to invoke the inherent jurisdiction in order (I) to give effect to any order under the Code, or (2) to prevent abuse of the process of any Court or (3) otherwise to secure the ends of justice. In the instant case there is no allegation that the Tribunal who tried the case was Coram non-judice or that Law of Limitation cannot strike down there was any legal bar to try the cases; nor is there any allegation of abuse of process of the Court. "

26. In the referred case his Lordship Mr. Justice AKM Sadeque echoes the view made in the case of Md Salimullah vs the State reported in 15 DLR(SC)150 and further observed that

> "But in the cases under consideration, it is not the provisions under the Code which seek to limit the inherent jurisdiction of the Court. It is the law of limitation which limits the jurisdiction. In other words, it is the law of limitation and not any provisions of the Code that has taken off the cases out of the jurisdiction of the Code sealing their fate. Therefore, section 561A of the Code of Criminal Procedure cannot be conceived to give the High Court the jurisdiction to retrieve the case from moratorium after they have been barred by limitation. The section 561A of the Code of Criminal Procedure has not given any new jurisdiction to the High Court to override other laws. It is easy to see that this Court cannot have any inherent jurisdiction to strike down the law of limitation in t he following terms;"

27. Subsequently in the case of Jahangir Alam(MD) alias Zakir vs State reported in 56DLR(AD)(2004) page 217 our Apex Court modified the sentence under section 561A of the Code of Criminal Procedure and observed that;

> " Having regard to the above finding of the High Court Division, we are of the view that the ends of justice will be met if this application is disposed of with modification of sentence. Accordingly maintaining the conviction, the sentence is modified to 10 (ten) years rigorous imprisonment and to a fine of TK.5,000 in default to suffering rigorous imprisonment for 6(six) months more."

28. Since our Apex Court in the referred case modified the sentence under section 561A of the Code of Criminal Procedure, we are of the view that this Court also in an appropriate

case is legally authorized to review or modify the sentence passed by the trial Court to secure ends of justice.

29. In the instant case, it is found that P.Ws. 2,3 and 4 who are the local respectable persons of the locality of the crime site corroborated evidence of P.Ws.1 and 5 to 7 who are police personnel as regards recovery of arms from the possession of the convict Md. Nasir Mia and their evidence remains unshaken during cross-examination. Therefore, we are of the view that the prosecution successfully proved the charge up to the hilt against the convict petitioner under section 19A and 19(f) of the Arms Act, 1878. In view of the above, we do not find any valid ground for quashing the judgment and order of conviction and sentence passed by the trial Court.

30. As regards sentence, we have found that the trial Court convicted accused Md. Nasir Mia under section 19A and 19(f) of the Arms Act, 1878 and sentenced him to suffer rigorous imprisonment for 14(fourteen) years. We hold that the trial Court rightly convicted the accused under section 19A and 19(f) of the Arms Act, 1878. But so far it relates to the sentence we are of the view that theere is no previous record of commission of any offence by the petitioner and therefore the minimum sentence may be imposed on him. Accordingly, we are inclined to modify the sentence passed by the trial Court maintaining the conviction under section 19A and 19(f) of the Arms Act, 1878.

31. In the result, the Rule is disposed of in the following terms;

(1) The conviction of the petitioner Md. Nasir Mia under section 19A and 19(f) of the Arms Act, 1878 as found and decided by the trial Court is maintained.
(2) The sentence of 14 (fourteen) years imposed by the trial Court is modified to the effect that the petitioner is convicted and sentenced to suffer 10(ten) years rigorous imprisonment under section 19A and 7 (seven) years rigorous imprisonment under section 19(f) of the Arms Act, 1878.
(3) Both the sentences shall run concurrently.
(4) The custody period of the convict petitioner before the pronouncement of the judgment by the trial Court shall be deducted under section 35A of the Code of Criminal Procedure, 1898 from the sentence as modified above.

32. Send down the lower court records along with a copy of the judgment and order to the concerned Court below.