Supreme Court Online Bulletin

(Law Report)

2020

Editor

Justice Moyeenul Islam Chowdhury

Justice Sheikh Hassan Arif

Citation:

13 SCOB [2020] AD

13 SCOB [2020] HCD

Supreme Court of Bangladesh

Published by:
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100. Mr. Justice Kazi Zinat Hoque

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.

❖ **Retired on 08 January, 2020 as Judge of the High Court Division of the Supreme Court of Bangladesh.**

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

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
1.	Govt. of Bangladesh Vs. Abdul Mannan & ors. 13 SCOB [2020] AD (*SYED MAHMUD HOSSAIN, C. J*)	Abandoned property, suit for specific performance contract;	In the suit for specific performance of contract the declaration of the suit property is not an abandoned property, is beyond the scope of the suit and such declaration has no legal value at all. In a suit for specific performance of contract the only issue to be decided whether the contract was genuine or not and as such, though the Government is made a party to a suit for specific performance of contract as a requirement of law it is not bound by the decree.
2.	Mahbubul Anam Vs. Ministry of Land & ors. (*MUHAMMAD IMMAN ALI, J*) 13 SCOB [2020] AD	Cancellation of lease, preservation of ecological balance and protection of natural resources;	Cancellation of long term lease granted by the government for the purpose of constructing hotels in the hotel/motel zone of Cox's Bazar: Dismissing the review petitions, the Court directed that all leases within Jhilanja Mouza of Cox's Bazar granted after 19.04.1999 be cancelled in the same way as those of the writ-petitioners and any constructions made thereon be demolished; the leaseholders shall be compansated for their loss due to such cancellation/demolition. It was further directed that henceforth no lease shall be granted within Jhilanja Mouza or any area which has been classified as ecologically critical area.
3.	State Vs. Abu Hanifa @ Hanif Uddin (*MIRZA HUSSAIN HAIDER, J*) 13 SCOB [2020] AD	Section 84 of the Penal Code and plea of unsoundness of mind;	On a plain reading of the aforesaid provisions of law and on scrutinizing the materials on record, specifically the Medical reports (Exhibits-A,B,C and D), submitted by the DWs we have already found that the defence has been able to prove that the accused-respondent was of unsound mind from 22.6.1999 i.e. 8(eight) months after the date of occurrence (13.10.1998) but failed to prove the same, prior to that date. Since the defence failed to prove its plea of unsoundness of mind of the accused-respondent, at the time of commission of the offence on 13.10.1998, as required under section 84 of the Penal Code and section 105 of the Evidence Act by

			providing sufficient evidence, he cannot get any benefit under section 84 of the Penal Code nor under Chapter XXXIV of the Criminal Procedure Code. Plea of insanity or of unsoundness of mind of the accused-respondent being not prima facie found, the Court is not obligated to take recourse to the provisions as laid down in Chapter XXXIV of the Criminal Procedure Code.
4.	The State Vs. Abdur Razzak & ors. (*Hasan Foez Siddique, J*) 13 SCOB [2020] AD	Absorption and doctrine of legitimate expectation;	1. The legitimate expectation would not override the statutory provision. The doctrine of legitimate expectation can not be invoked for creation of posts to facilitate absorption in the offices of the regular cadres/non cadres. Creation of permanent posts is a matter for the employer and the same is based on policy decision. 2. While transferring any development project and its manpower to revenue budget the provisions provided in the notifications, government orders and circulars quoted earlier must be followed. However, it is to be remembered that executive power can be exercised only to fill in the gaps and the same cannot and should not supplant the law, but only supplement the law. 3. Before regularization of service of the officers and employees of the development project in the revenue budget the provisions of applicable "Bidhimala" must be complied with. Without exhausting the applicable provisions of the "Bidhimala" as quoted above no one is entitled to be regularised in the service of revenue budget since those are statutory provisions. 4. The appointing authority, while regularising the officers and employees in the posts of revenue budget, must comply with the requirements of statutory rules in order to remove future complication. The officers and

			employees of the development project shall get age relaxation for participation in selection process in any post of revenue budget as per applicable Rules. 5. A mandamus can not be issued in government and its instrumentalities to make anyone regularized in the permanent posts as of right. Any appointment in the posts described in the schedule of Bangladesh Civil Service Recruitment Rules, 1981, Gazetted Officers (Department of Live Stock Service) Recruitment Rules, 1984 and Non-gazetted Employees (Department of Live Stock Service) Recruitment Rules, 1985 bypassing Public Service Commission should be treated as back door appointment and such appointment should be stopped. 6. To become a member of the service in a substantive capacity, appointment by the President of the Republic shall be preceded by selection by a direct recruitment by the PSC. The Government has to make appointment according to recruitment Rules by open competitive examination through the PSC. 7. Opportunity shall be given to eligible persons by inviting applications through public notification and appointment should be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law. 8. It is not the role of the Courts to encourage or approve appointments made outside the constitutional scheme and statutory provisions. It is not proper for the Courts to direct absorption in permanent employment of those who have been recruited without following due process of selection as envisaged by the constitutional scheme.

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
1.	M/S BHIS Apparels Limited represented by its Managing Director, 671, Dattapara, Hossain Market, Tongi, Gazipur, Bangladesh. -Versus- Alliance for Bangladesh Workers Safety, BTI Celebration Point, Plot 3 & 5, Road 113/A, Gulshan-2, Dhaka-1212, Bangladesh and others. (*MOYEENUL ISLAM CHOWDHURY, J*) 13 SCOB [2020] HCD	Private body - Acting on the footing of Republic Company- when can be treated on citizen	Thus it is palpably clear that the respondent no. 1 (Alliance) has been acting with the consent of the DIFE and assisting it in inspecting and ensuring the safety of the garment factories in the country. So we hold that the Alliance has been performing *de facto* functions in connection with the affairs of the Republic. Since as per Article 102(1) any person aggrieved can enforce any of the fundamental rights guaranteed under Part III of our Constitution, we do not find any difficulty on the part of the petitioner-company, an indigenous Bangladeshi company whose shareholders and directors are all Bangladeshi citizens, to invoke Articles 27 and 40 of the Constitution in this case. Besides, Articles 27 and 40 do not say who can enforce them; it is only Article 102 (1) which says any person aggrieved can enforce them which undeniably fall under Part III of the Constitution. So Articles 27 and 40 which have been invoked by the petitioner-company are to be interpreted in the light of Article 102(1) of the Constitution. We are of the opinion that for the limited purpose of enforcement of any of the fundamental rights as guaranteed by Part III of the Constitution, an indigenous company like the petitioner-company, whose shareholders and directors are all Bangladeshi citizens, is a 'citizen' of Bangladesh. This interpretation, as we see it, is in perfect accord with the intention of the framers of the Constitution and the tone and tenor of Article 102(1) of the Constitution.
2.	Md. Zohurul Islam Vs. Sree Aokkhoy Kumar Roy and others	Ego cannot be allowed by the court of law.	In the facts and circumstances as it appears from the record, I find that the deceased Most. Hosneara Begum Laizu/Lipa Rani Roy was a Hindu lady, but she was converted to Muslim and she

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	(Md. Miftah Uddin Choudhury, J) 13 SCOB [2020] HCD		died as a Muslim, presence in her father's house at the time of committing suicide can be a reason to find that she was reconverted to a Hindu. As a Muslim or a believer in Islam she is entitled to get burial as per the Islamic rituals. The prayer of Mr. Subrata Chowdhury as mentioned above cannot be considered by this Court since the deceased herself did not donate her dead body to any institution. Apparently, the father of the deceased has been suffering from some ego and for his such ego Mr. Subrata Chowdhury, as well as Mr. Md. Mominul Islam made such prayers finding themselves helpless to establish that the deceased was reconverted to a Hindu. Such ego cannot be a reason for the Court to decide any dispute like the instant one. For such ego a dead body has been rottening in mortuary since last four years. Keeping dead body of a human being for such long time cannot be allowed by any religion, rather it amounts to an inhuman act. Apparently the father just for his ego behaved like an inhuman being, and such sort of ego cannot be allowed in the society or by the court of law.
3.	Syed Saifuddin Kamal and another Vs. Bangladesh, represented by the Secretary, Ministry of Health, Bangladesh Secretariat, P. S. Ramna, Dhaka and others	Provide Emergency Medical services for accidental injured persons and protecting "Good Samaritans"**.**	The Court issued a Rule Nishi on 10.02.2016 calling upon the Respondents to show cause as to why the failure to ensure the provision by existing hospitals and clinics, whether governmental or private, of emergency medical services to critically injured persons should not be declared to be without lawful authority and violative of the fundamental rights as guaranteed under Articles 27, 31 and 32 of the Constitution. The Court further ordered that the underlying Writ Petition

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
	(Syed Refaat Ahmed, J) 13 SCOB [2020] HCD		has been filed with the primary intent of ensuring the easy accessibility to emergency medical care and intervention as prevents the undue loss of life of road accident victims. Concomitantly, the intent also is of preparing a set of back-up action plans, policy formulations and, in all likelihood, statutory enactments to facilitate the assured availability of such services and interventions in the best feasible manner. The courts aid is sought in this regard to bring about a mechanism ensuring further the personal safety of "Good Samaritans" made possible by the assured and ready availability of assistance of law enforcement agencies and medical service providers both in the public and the private sectors. As per the directions of the Court, the guidelines that are placed before this Court for its sanction and approval are in the form of the সড়ক দূর্ঘটনায় আহত ব্যক্তির জরুরী স্বাস্থ্যসেবা নিশ্চিতকরণ ও সহায়তাকারীর সুরক্ষা প্রদান নীতিমালা, ২০১৮। (নীতিমালা) This Court, hereby, further directs, and as per the prayer of all parties concerned agreed on the same, that the *নীতিমালা* in its entirety be deemed enforceable as binding by judicial sanction and approval pending appropriate legislative enactments incorporating entrenched standards objectives, rights and duties. This Court further directs a wide dissemination of the *নীতিমালা* through publication variously in the Official Gazette and through electronic and print media as shall serve both public interest and secure a broader objective of social mobilization of views and perception of the necessity of such guidelines.
4.	Major Md. Nazmul Haque & ors. Vs. State and another (***Farah Mahbub, J.***)	CrPC Section 265D:	Where the case is at a stage of framing charges and the prosecution evidence is yet to commence, the trial court has to consider the question of sufficiency of

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	13 SCOB [2020] HCD		the ground for proceeding against the accused on a general consideration of materials placed before him by the investigating agency. The truth, veracity and effect of the evidence are not to be meticulously judged. The standard of the test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at this stage.
5.	AHN. HONG, SIK. HPCC-SEL JV Vs. Central Procurement Technical Unit (CPTU) & ors. (***Md. Ashfaqul Islam, J***) 13 SCOB[2020] HCD	General Jurisdiction of Reveal Panel	If we now exercise our common sense it can be perceived when the Review Panel can 'dismiss' an Appeal if the same is not well founded either in fact or law then why it can not 'allow' the same if a decision appealed against is otherwise wrong ? In other words, when CPTU is competent to dismiss an Appeal it can also allow an Appeal if it is otherwise found to be competent.
6.	Md. Shamsujjaman & ors. Vs. Bangladesh & ors. (***Zubayer Rahman Chowdhury, J***) 13 SCOB [2019] HCD	The Concept of Administrative Fairness	This concept of "administrative fairness" requires that an Authority, while taking a decision which affects a person's right prejudicially, must act fairly and in accordance with law. We note, albeit with utmost regret and disappointment, that in the instant case, there has been a gross violation of the well-settled principles of natural justice, and that too by the Syndicate. In our view, failure to comply with the principles of natural justice leads to arbitrariness, which in turn, vitiates the impugned order.
7.	The State Vs. Abul Kashem & ors. (***Md. Ruhul Quddus, J***) 13 SCOB [2020] HCD		The form prescribed in the Criminal Rules and Order (Practice and Procedure of Subordinate Courts), 2009 presupposes no handwritten memorandum under column No.7. However, there is a blank space for making memorandum under column No.8, which the recording Magistrate is required to fill up stating the reason of his belief regarding voluntariness of the confession. If any Magistrate does not make any memorandum in his own handwriting

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			under column No.7 of the prescribed form of confession, or does not put his signature after making memorandum under column No.8 and does not put his signature after making memorandum, if any, under column No.9, it cannot be held to be a gross illegality and fatal to the prosecution case. The purpose of making memorandum in compliance with section 164 (3) of the Code would suffice by signing the printed memorandum, provided that the precautions prescribed by the Code are duly taken by the recording Magistrate. There is confusion among the members of Bar as well as the Magistrates as to whether a Magistrate is required to make handwritten memorandum at the bottom of recorded confession under column No.7. Where there is already a printed memorandum in the language of law, albeit pre-amendment, it would be an unnecessary and meaningless exercise for the Magistrates to make another memorandum thereunder in the same language. Since the use of old printed memorandum with pre-amendment language and not making of memorandum by own hand of the Magistrate do not injure the accused as to their defence on merits, it would not make the confessions inadmissible.
8.	Mosammat Syeda Shamima Kader Vs. Mohammad Enamur Rashid Chowdhury (***Md. Rezaul Hasan, J***) 13 SCOB [2020] HCD	Permanent injunction, City Corporation tax, boundary of the property, transfer of specific property, prima-facie title, tax	That the City Corporation holding tax receipt is not the proof of possession if isolated from a lawful prima-facie title claimed on the basis of apparently genuine deed and with reference to a clear chain of title. It has to be noted here that, this case of claiming title in the suit property based on no title in any specific property is apparently a case of the land grabbers.

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		receipt, misreading and non-reading of evidence	Case of a land grabber is totally isolated from the chain of title and their deeds do not refer to any specific immovable property, so that a land grabber can grab any property or any portion of a property, on the basis of the papers created by or kept in their hands.
9.	Md. Nazmul Huda Vs. The State and another (***M. Enayetur Rahim, J***) 13 SCOB [2020] HCD	Quashment , Nari-O-Shishu Nirjatan Damon Ain, 2000 (as amended, 2003), Complaint, inquiry, police station, cognizance	Moreso, the word 'অভিযোগটি অনুসন্ধানের জন্য' as contemplated in section 27(1ka) is very significant. It means that an inquiry should be done on the allegations brought against an accused. It does not mean that inquiry should be done to ascertain whether the complainant went to the police station and he/she was refused by the police.
10.	East West Property Development (Pvt.) Ltd. and another. Vs. Deputy Commissioner, Manikgonj. (***Naima Haider, J***) 13 SCOB [2020] HCD	Mutation, Water Development Board, the (Emergency) Requisition of Property Act, 1948, Deputy Commissioner, cancellation of mutation, repealed, স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ (The Act, 2017), valid acquisition, acquisition of the property	That there being no decision of the Government for acquisition of the property in question, there is no valid acquisition of the property and in the meantime the said proceeding having become non-est due to repeal of the said section 47 of the said Ordinance, 1982, there is no further scope to take decision for acquisition of the property.
11.	The State Vs. Md. Sharif and Md. Mintu Khan (***Jahangir Hossain, J***)	Factors considered the capital punishment to lesser punishment	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

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	13 SCOB [2020] HCD		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. 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.
12.	**Md. Abu Yousuf Shah.** -Versus-	Anti-Corruption Commission,	It appears from the impugned judgment that the learned Judge took step of

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
	The State (*Md. Shawkat Hossain, J*) 13 SCOB [2020] HCD	Prevention of Corruption Act, 1947, demanding bribe, substantive evidence, extra-judicial confession.	hearing the audio cassette in his chamber and he himself alone heard it behind the knowledge of the convict-appellant. No doubt, for securing justice the learned trial Judge rightly displayed it and heard it but he could also make arrangement to be heard it in open Court in presence of the convict-appellant under trial. That the investigation officer being over interested produced the inquiry report before the Court making as exhibit-VIII series and the learned trial Court being misconceived also based on papers of the inquiry as to extra-judicial confession of the convict-appellant in proving the charge against the convict-appellant. In no way, such extra-judicial confession, if any, can be based on and it can't be considered as evidence at all.
13.	S.M. Sajjad Hossain, Vs. Chairman, National Freedom Fighter Council, Ministry of Freedom Fighter, (*SHEIKH HASSAN ARIF, J*) 13 SCOB [2020] HCD	Age of freedom fighters.	**Circulars, Nitimala, Paripatra etc.** It is well settled that in exercise of executive functions of the government, the government can issue circulars, notifications, paripatra etc. to keep its work transparent. Such notifications or circular etc. may be issued in order to give benefits of the enlisted freedom fighters, which is no doubt an appreciable job by the government. But in doing so, the government cannot amend the parent law, namely the definition of freedom fighter as provided by Article 2(h) of P.O. 94 of 1972. **Section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No.51 of 2018),** When parliament itself cannot fix the age of freedom fighters as the fixing of such age of freedom fighters will be contrary to the Speech of Bangabandhu and the Declaration of Independence by Bangabandhu, which are part of the Constitution, the same Parliament cannot empower the government to fix such age.

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			On this very simple ground, this empowerment "উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে" as incorporated in the definition of 'বীর মুক্তিযোদ্ধা' under section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No.51 of 2018), has become untra-vires the Constitution. It has long been decided by various judicial pronouncements that which you cannot do directly, you cannot do the same indirectly. As stated above, when the Parliament itself cannot fix the age of the freedom fighters even by enactment of law without amending the Constitution, it cannot empower anybody including the government to fix such age of freedom fighters.

13 SCOB [2020] AD

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain
-Chief Justice.
Mr. Justice Hasan Foez Siddique
Ms. Justice Zinat Ara
Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO.41 of 2008.
(From the judgment and order dated 04.03.1998 passed by the High Court Division in Writ Petition No.435 of 1994)

Government of Bangladesh, represented by the Secretary, Ministry of Works. : .....**Appellant**.

-Versus-

Abdul Mannan being dead his heirs:
1. Begum Shamsun Nahar and others. : .....**Respondents.**

For the Appellant.	:	Mr. Mahbubey Alam, Attorney General (with Mr. Biswajit Debonath, Deputy Attorney General) instructed by Mr. Md. Ferozur Rahman, Advocate-on-Record.
For the Respondents.	:	Sheikh Fazle-Noor-Taposh, Advocate (with Mr. Mehedi Hassan, Advocate) instructed Mr. Moulavi Md. Wahidullah, Advocate-on-record.
Dates of Hearing.	:	05.03.2019, 06.03.2019 and 02.04.2019
Date of Judgment	:	The 2nd April, 2019.

Abandoned property, suit for specific performance contract;
In the suit for specific performance of contract the declaration of the suit property is not an abandoned property, is beyond the scope of the suit and such declaration has no legal value at all. ... (Para 25)

In a suit for specific performance of contract the only issue to be decided whether the contract was genuine or not and as such, though the Government is made a party to a suit for specific performance of contract as a requirement of law it is not bound by the decree. ... (Para 26)

J U D G M E N T

SYED MAHMUD HOSSAIN, C. J:

1. This civil appeal by leave is directed against the judgment and order dated 04.03.1998 passed by the High Court Division in Writ Petition No.435 of 1994 making the Rule Nisi absolute and setting aside the judgment and order dated 18.01.1994 passed by the learned Chairman, First Court of Settlement, Dhaka in Case No.66 of 1991 rejecting the case upholding the inclusion of the case property in the list of abandoned buildings.

2. The writ-petitioner Mohammad Abdul Mannan (respondent No.1 herein) filed the above case before the First Court of Settlement for exclusion of the case property comprising 1 (one) bigha of land with a two storey building and other structures thereon, being holding No.130-A, Road No.3, Dhanmondi R/A, from the 'Ka' list of the abandoned buildings.

3. The writ-petitioner's case, in short, is that the property in question belonged to Mr. Fazal Dossani on the basis of the deed of lease dated 16.02.1957 executed by the Government and he was said to have made an oral gift dated 01.07.1962 in favour of his wife and said to have delivered possession thereof. The fact of oral gift was affirmed by an affidavit dated 13.10.1971. Mr. Fazle Dossani's wife Mrs. Gulbanu Dossani entered into an agreement with the writ petitioner and his brother to transfer the property in question and received an amount of Tk.15,000/- as earnest money and thereupon executed a deed of agreement on 24.02.1971. On 28.02.1972, Gulbanu received a further amount of Tk.1,00,000/-(one lac) from the writ petitioner and his brother towards the part payment of the consideration money which was fixed at Tk.2,00,000/-(two lac). But document having not been executed and registered the writ petitioner and his brother filed Title Suit No.15 of 1972 and obtained an *ex parte* decree and in execution thereof obtained the deed of sale through Court. It was further case of the writ petitioner that possession of the property was obtained by him and his brother on 08.10.1971 and that they let out the property to Lumba and another, both officials of the Indian High Commission. The property in question was listed as abandoned property but it was released and the writ petitioner became sole owner of the property pursuant to an amicable partition effected by a solenama dated 26.11.1980 between him and his co-sharers in Title Suit No.676 of 1979 of Court of Subordinate Judge, Khulna.

4. It may be recalled that respondent No.1 Abdul Mannan died during pendency of the appeal and his heirs were substituted in his place.

5. It is the contention of the writ petitioner that the property was unjustly and illegally listed as abandoned building.

6. The case before the Court of Settlement was contested at the hearing stage by the Government upon making oral submissions. The Court of Settlement by its judgment dated 18.01.1994 dismissed the case filed before it seeking delisting of the property from the list of the abandoned buildings.

7. Against the judgment and order dated 18.01.1994 passed by the First Court of Settlement, the writ petitioner, Mohammad Abdul Mannan as the writ-petitioner filed a writ petition before the High Court Division and obtained Rule Nisi in Writ Petition No.435 of 1994.

8. The learned Assistant Attorney General opposed the Rule Nisi appearing on behalf of the writ-respondents but did not file any affidavit-in-opposition.

9. The learned Judges of the High Court Division upon hearing the Rule Nisi by the judgment and order dated 04.03.1998 made the Rule absolute.

10. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the writ-respondent as the leave-petitioner filed Civil Petition for Leave to Appeal No.1454 of 2006 before this Division and obtained leave on 15.01.2008 resulting in Civil Appeal No.41 of 2008.

11. Mr. Mahbubey Alam, learned Attorney General, appearing on behalf of the appellant, submits that the High Court Division in its writ jurisdiction resettled the questions of fact which were settled by the Court of Settlement on consideration of materials on record and as such, the impugned judgment should be set aside. He further submits that the decree in a suit for specific performance of contract does not decide the title and possession of the property in question and that there is no bar to inclusion of the property in the 'Ka' list of the abandoned property and as such, the impugned judgment should be set aside. He also submits that mere agreement to sell by itself would not be sufficient to establish transfer of title of the property in question and there is no satisfactory evidence regarding transfer of any legal right, title or interest in the property in question. He then submits that writ-petitioner failed to prove the oral gift said to have been made by Mr. Dossaini, the original owner to his wife Mrs. Gulbanu and the subsequent agreement to sell in favour of the writ-petitioner and his brother and as such, interference is called for by this Division.

12. Mr. Mehadi Hasan, learned Advocate, appearing on behalf of the writ-petitioner-respondents, on the other hand, submits that the case property is not an abandoned property since a certificate dated 15.11.1972 was issued by the then Sub-Divisional Officer (S.D.O.), Sadar (South), Dhaka (Annexure-I to the writ petition) specifically stating that the case property is not an abandoned property.

13. He further submits that the writ-petitioner and his brother have been in possession of the disputed property and that while they have been in possession of the case property, the same could not be treated as an abandoned property and as such, the impugned judgment and order dated 18.01.1994 passed by the Court of Settlement is highly illegal and without jurisdiction.

14. He then submits that the finding of the Court of Settlement that the note verbal dated 26.12.1979 issued by the Ministry of Foreign Affairs to the High Commission of India (Annexure-N to the writ petition) was managed by the writ-petitioner is based on no evidence and that the High Commission of India acted on the said note verbal and handed over possession of the property to the writ-petitioner in June,1980 and as such, no interference is called for.

15. He then submits that the Court of Settlement failed to exercise its jurisdiction by not sending the signature of Mr. A.F.M. Abdur Rashid contained in Annexure-U to the writ petition for comparison with his other admitted signatures by the handwriting expert and as such, the impugned judgment and order dated 18.01.1994 passed by the Court of Settlement is illegal and without jurisdiction. He also submits that the First Court of Settlement became the party to the case before it and assumed all the functions of the appellant-Government by *suo motu* calling Mr. A. F. M. Abdur Rashid to be examined and suo muto calling other records and thus lost its role as a Court constituted under law and as such, the High Court Division rightly interfered with the judgment and order arrived at by the Court of Settlement.

16. We have heard the submissions of the learned Attorney General for the appellants and the learned Advocate for respondent No.1, perused the impugned judgment and the materials on record.

17. Admittedly, the case property originally belonged to Mr. Fazal Dossani and the Government has not questioned the fact that Mrs. Gulbanu was not his wife. The Government has challenged the genuineness of the alleged deed of gift in favour of the Mrs. Gulbanu.

18. The High Court Division came to a finding that Mrs. Gulbanu entered into an agreement for sale of the suit property in favour of the writ-petitioner and his brother and that she also made over possession of the property in favour of the writ-petitioner. The High Court Division noted that Gulbanu took entire consideration money and also made over the income tax certificate and other

documents in favour of the writ-petitioner but she could not execute and register the deed of sale in favour of the writ-petitioner and as such, the writ-petitioner was constrained to file a suit for specific performance of contract and obtained a decree. The High Court Division then noted that the decree was duly executed and the deed of sale was registered through Court and as such, the question of presence of the real owner or her whereabouts or management of the property did not arise at all. The High Court Division held that the property was managed by the writ-petitioner before the President's Order came into force and as such the requirements of Article 2 are totally nil and as such the disputed property could not be treated as abandoned property.

19. The High Court Division found that the certificate issued by the Sub-Divisional Magistrate, the competent authority proved that the property is not an abandoned property. The High Court Division observed that the Government did not file any affidavit-in-opposition controverting the statements made in the writ petition and as such, it could safely be presumed that the appellants had accepted the statements made in the writ petition. The High Court Division noted that the appellants did not file any written statement in the Court of Settlement and found that once the appellants found that the property was not an abandoned property, the same could not be published in the 'Ka' list of the Abandoned Buildings by the Gazette Notification as abandoned building. The High Court Division also held that the writ petitioner had been in possession of the disputed property throughout and that while he had been in possession thereof, the property could not be treated as abandoned property. The High Court Division, therefore, held that the judgment and order of the Court of Settlement is highly illegal and had been passed without consideration of materials on record.

20. The Court of Settlement held that there was no evidence whatsoever oral or documentary to prove the oral gift by Mr. Dossani in favour of Mrs. Gulbanu on 01.07.1962. In order to prove the oral gift, the writ-petitioner filed an affidavit sworn by Mr. Dossani on 13.10.1971 (Annexure-D to the writ petition). Having gone through the affidavit, we find that this affidavit was sworn before a Magistrate at Karachi, Pakistan then an enemy country at war with Bangladesh. There is no explanation for the long gap of 9 years between the alleged oral gift and the affidavit. Although the affidavit mentioned possession of Mrs. Gulbanu in the property, there is no paper such as receipts showing payment of various taxes, ground rents, etc. by her to the tax receiving authorities during the said long period of 9 years.

21. What is remarkable to note here is that there is no paper showing mutation/substitution of Mrs. Gulbanu's name in place of Mr. Dossani with the DIT (Dhaka Improvement Trust) or Ministry of Works, or Income Tax Authority, etc. to prove Mrs. Gulbanu's exclusive possession of the case property. Therefore, the Court of Settlement did not give importance to the affidavit sworn in an enemy country and at the time of swearing the affidavit liberation war was going on in this country. What is important to note here is that the so-called affidavit was sworn in 8 months after the deed of agreement of sale of the writ-petitioner.

22. Admittedly, the deed of agreement dated 24.02.1971 is an unregistered agreement and there is no explanation why it was not registered. Even if the deed of agreement was registered, the oral gift not being proved Mrs. Gulbanu has no interest in the case property and subsequently the deed of agreement did not confer any enforceable right upon the writ-petitioner in the property.

23. The writ-petitioner instituted Title Suit No.15 of 1972 against Mrs. Gulbanu for a specific performance of contract as she failed to honour her commitment made in the agreement. The agreement dated 24.02.1971 (Annexure-B to the writ petition) showed the payment of Tk.15000/- as earnest money and the writ-petitioner claimed to have paid a further sum of Tk.100,000/-(one lakh) as part payment of the consideration to Mrs. Gulbanu on 28.02.1971 (Annexure-C to the writ petition).

24. The Court of Settlement called the record of Title Suit No.15 of 1972 and examined the record. The Court of Settlement noted that the suit was filed against Mrs. Gulbanu on 18.03.1972 although the writ-petitioner claimed to have paid Tk.100,000/- towards the consideration to Mrs. Gulbanu on 28.02.1972. The Court of Settlement further held that if the payment of Tk.100,000/- was

made on 28.02.1972 why no document was obtained from Mrs. Gulbanu as a proof of the payment. But before the High Court Division the writ petitioner produced a receipt (Annexure-C) showing payment of Tk.100,000/- to Mrs. Gulbanu on 28.02.1972. From the judgment of the Court of Settlement, it appears that the receipt (Annexure-C) showing payment of Tk.100000/- was not produced before it. Had Annexure-C been produced before the Court of Settlement, it would have been considered by it. Such apparent contradiction in payment of Tk.100,000/- also belies the claim of the writ-petitioner. The Court of Settlement also noted that Mrs. Gulbanu's address was given as Gulistan building which was not her residential quarter. The Court of Settlement also noticed that summons on Gulbanu in the suit record showed that it was served upon one Saifur Ahmed and there was nothing in the Peon's report clarifying as to who this Saifur Ahmed was and whether he was at all authorized to receive summons on Gulbanu's behalf. Therefore, the Court of Settlement came to the finding that the address of Gulbanu as shown in the plaint of Title Suit No.15 of 1972 was false and no summons of the suit was served upon her and that the affidavit dated 13.10.1971 sworn at Karachi, Pakistan, proved that Mrs. Gulbanu was not residing in this country in 1971 or 1972 at all. In view of the aforesaid finding of the Court of Settlement, we are of the opinion that *ex parte* decree was obtained by practicing fraud upon the Court and as such, the decree did not prove the writ-petitioner's claim over the property.

25. The *ex parte* decree passed in Title Suit No.15 of 1972 of the Third Court of the then Subordinate Judge has been annexed as Annexure-H to the writ petition. Having gone through the ex parte decree dated 09.08.1973, we find that not only the suit for specific performance of contract was decreed but also the disputed property was declared to be not an abandoned property. Such a declaration in a suit for specific performance of contract is beyond the scope of the suit and such declaration has no legal value at all.

26. For argument sake even if the decree was obtained legally the Government is not bound by the decree passed in a suit for specific performance of contract. In a suit for specific performance of contract the only issue to be decided whether the contract was genuine or not and as such, though the Government is made a party to a suit for specific performance of contract as a requirement of law it is not bound by the decree.

27. In this connection reliance may be placed on the case of *C Q M H Ayub Ali vs. Bangladesh and others (1995) reported in 47 DLR (AD)71,* where it has been held as under:

> "A 'decree' by definition means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The decree in the suit for specific performance of contract will show that it has only decided the controversy between the vendor and the vendee and directed the vendor to execute the necessary document in favour of vendee. I have, therefore, no hesitation to hold that such a decree is not the one which is mentioned in Proviso (a) [to section 5 of the Abandoned Buildings (Supplementary Provisions) Ordinance,1985 (Ordinance No.LIV of 1985)]and, as such, the existence of such a decree cannot be pleaded as a bar for inclusion of the building in the list."

28. The principle expounded in the case referred to above applies to the facts and circumstances of the case in hand.

29. Record reveals that the Government filed Title Suit No.17 of 1976 in the Third Court of the then Subordinate Judge, Dhaka after over 2½ years of the *ex parte* decree dated 09.08.1973 passed in Title Suit No.15 of 1972 for declaration that the judgment and decree dated 09.08.1973 passed in Title Suit No.15 of 1972 was void, inoperative and not binding because the case property was an abandoned property. The plaintiff in the suit, that is, the Government did not file requisite deficit court-fee as directed by the Court (Annexure-L to the writ petition). By the order dated 14.01.1980 [Annexure-L(1) to the writ petition], the then learned Subordinate Judge, Third Court, Dhaka, rejected the plaint for not paying deficit court-fee.

30. We have already held that Government is not bound by the decree passed in a suit for specific performance of contract and as such, rejection of plaint in Title Suit No.17 of 1976 would not improve the case of the writ-petitioner. The Government can still claim that the disputed property is an abandoned property although a suit by the Government in that respect is barred.

31. The writ-petitioner relied on the certificate dated 15.11.1972 (Annexure-I to the writ petition) alleged to have been issued by Mr. M. A. Hye, Sub-Divisional Officer, SDO, (South), Dhaka, which is quoted below:

> "This is to certify that the immoveable property as per scheduled below is not an abandoned property or has not been restored within one year of the issuance of this certificate."

32. We have already noticed that Mrs. Gulbanu was not in this country in 1971-1972 as the said fact has been proved by the affidavit dated 13.10.1971 sworn at Karachi. As a result, the case property automatically became abandoned property as soon as P.O.16 of 1972 dated 28.02.1972 came into being. As regards the certificate dated 15.11.1972 (Annexure-I) issued by the S.D.O, the Court of Settlement came to the finding that it could not understand how the then S.D.O. could issue certificate or what he intended to mean by the statement to the effect "or has not been restored within one year of the issuance of this certificate." The Ministry's letter dated 06.07.1979 (Annexure-M-4 to the writ petition) was signed by A.F.M. Abdur Rashid, Senior Scale Section Officer of the Ministry. Mr. Rashid deposed before the Court of Settlement and has denied his alleged signature on the letter dated 06.07.1979. He also stated that the letter issued from the Ministry did not bear the personal seal of the Officer issuing such letters. The Court of Settlement noted that the Ministry's file revealed that such rubber stamp seal did not appear in any other letters issued from the Ministry. The Court of Settlement also noted that there were other letters in the Ministry's file issued by Mr. Rashid and those letters bore his signatures in Bengali but in this particular letter the signature is in English, the letter being the only exception in the entire case file to bear an English signature in the midst of Bengali signatures of other Officers as well. Therefore, the Certificate and the letter are documents fabricated by the writ-petitioner for creating evidence in his favour.

33. By the note verbal dated 26.12.1979 (Annexure-N to the writ petition), the Ministry of Foreign Affairs, Bangladesh, informed the Indian High Commission that the case property in the High Commission's possession "as an abandoned property" has been released in favour of Mr. Abdul Mannan and Abdul Hannan. Having examined the letter dated 26.12.1979, we find that it did not bear the required embossed seal with initial of the issuing officer and as such, its credibility is not above doubt.

34. We are of the view that as soon as P.O.16 of 1972 came into being the case property was listed as abandoned and this fact has also been proved by the annexures to the writ petition.

35. The Court of Settlement noted that the Government file showed that after the case property became abandoned, the Indian High Commission occupied it as tenant of the Ministry of Works. We are of the view that the note verbal has been created by the writ-petitioner to suit his purpose.

36. It is contended on behalf of the writ petitioner-respondent that the signatures of Mr. A.F.M. Abdur Rashid as contained in Annexure-M-4 to the writ petition and other signatures should have been compared by a handwriting expert before the Court of Settlement could have drawn adverse inference about Annexure-M-4.

37. Having considered the Annexures of the writ petition and the attending facts and circumstances of the case, we are inclined to hold that it was not necessary to obtain the opinion of the handwriting expert before coming to a conclusion as regards Annexure-M-4. Moreover, the signature of A.F.M. Abdur Rashid appearing in Annexure-M-4 is in English although his other signatures in the official files are in Bengali.

38. Therefore, the question of obtaining the opinion of the handwriting expert does not arise. It is also contended on behalf of the writ-petitioner-respondent that the Court of Settlement assumed the function of the Government-appellants by *suo motu* calling Mr. A.F.M. Abdur Rashid as a witness. This contention is devoid of any substance as all Courts including the Court of Settlement have inherent jurisdiction to call any person as court witness. And as such, no exception could be drawn for calling Mr. A.F.M. Abdur Rashid as a witness by the Court of Settlement.

39. The findings arrived at and the decision made by the Court of Settlement have been based on proper appreciation of materials on record.

40. But the findings and decision made by the High Court Division having not been based on proper appreciation of materials on record call for interference.

41. In the light of the findings made before, we find substance in this civil appeal. Accordingly, this appeal is allowed without any order as to costs and the impugned judgment delivered by the High Court Division is set aside and the judgment and order passed by the Court of Settlement is restored.

13 SCOB [2020] AD

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
Ms. Justice Zinat Ara
Mr. Justice Abu Bakar Siddiquee
Mr. Justice Md. Nuruzzaman

CIVIL REVIEW PETITION NOS.305-306 OF 2015 WITH C.R.P. NOS.315-316 OF 2015 AND C.R.P. NO. 320 OF 2015 AND C.P. NO.2367 OF 2010

(From the judgement and order dated 5th day of August, 2015 passed by this Division in Civil Petitions for Leave to Appeal Nos.2489, 2591, 2632, 2667, and 2577 of 2010, and judgement and order dated 22nd day of July, 2010 passed by the High Court Division in Writ Petition No. 639 of 2010)

Mahbubul Anam	... Petitioner (In C.R.P. No.305 of 2015)
Farid Uddin Ahmed Chowdhury and another	... Petitioners (In C.R.P. No.306 of 2015)
Md. Abul Bashar	... Petitioner (In C.R.P. No.315 of 2015)
Firoz Bokht Toaha and another	... Petitioners (In C.R.P. No.316 of 2015)
Md. Hafiz Ibrahim	... Petitioner (In C.R.P. No.320 of 2015)
Mohammad Faridul Alam and another	... Petitioners (In C.P. No.2367 of 2010)
= Versus =	
Ministry of Land, represented by its Secretary Government of the People's Republic of Bangladesh and others	... Respondents (In all the cases)

For the Petitioner (In C.R.P. Nos.305 and 315 of 2015)	:	Mr. Rokan Uddin Mahmud Senior Advocate, with Mr. Mizan Sayyed, Advocate appeared with the leave of the Court, instructed by Syed Mahbubar Rahman Advocate-on-Record
For the Petitioners	:	Mr. Ajmalul Hossain

(In C.R.P. No.306 of 2015)		Senior Advocate, instructed by Syed Mahbubar Rahman Advocate-on-Record
For the Petitioners (In C.R.P. No.316 of 2015)	:	Mr. M.A. Samad, Senior Advocate instructed by Syed Mahbubar Rahman Advocate-on-Record
For the Petitioner (In C.R.P. No.320 of 2015)	:	Mr. Probir Neogi Senior Advocate, instructed by Mr. Taufique Hossain Advocate-on-Record
For the Petitioners (In C.P. No.2367 of 2010)	:	Mr. A.M. Aminuddin Senior Advocate, instructed by Mr. Zainul Abedin Advocate-on-Record
For the Respondents (In C.R.P. Nos.305 and 320 of 2015)	:	Mr. Mahbubey Alam Attorney General, with Mr. Biswajit Debnath Deputy Attorney General, instructed by, Mr. Haridas Paul Advocate-on-Record
For the Respondents (In C.R.P. Nos.306 and 315-316 of 2015)	:	None represented
For Respondent No.2 (In C.P. No.2367 of 2010)	:	Mr. Manzill Murshid, Advocate instructed by Mr. Md. Nurul Islam Chowdhury Advocate-on-Record
For Respondent Nos.1 & 3-4 (In C.P. No.2367 of 2010)	:	None represented
Date of hearing & judgement	:	The 9th of December, 2018

Cancellation of lease, preservation of ecological balance and protection of natural resources;

Cancellation of long term lease granted by the government for the purpose of constructing hotels in the hotel/motel zone of Cox's Bazar:

Dismissing the review petitions, the Court directed that all leases within Jhilanja Mouza of Cox's Bazar granted after 19.04.1999 be cancelled in the same way as those of the writ-petitioners and any constructions made thereon be demolished; the leaseholders shall be compansated for their loss due to such cancellation/demolition.

It was further directed that henceforth no lease shall be granted within Jhilanja Mouza or any area which has been classified as ecologically critical area. ... (Para 31-32)

JUDGEMENT

MUHAMMAD IMMAN ALI, J:-

1. These five review petitions and one civil petition for leave to appeal are directed against the judgement and order dated 05.08.2015 passed by this Division in Civil Petitions for Leave to Appeal Nos.2489, 2591, 2632, 2667, and 2577 of 2010 (heard analogously with Civil Petitions for Leave to Appeal Nos.2423, 2574, 2633, 2647, 2651, 2662 to 2666 of 2010) dismissing the petitions challenging the judgement and order dated 22.07.2010 passed by the High Court Division in Writ Petition No.639 of 2010 which was heard along with Writ Petition Nos.1473 of 2010, 433 of 2010, 8638 of 2009, 468 of 2010, 640 of 2010, 689 of 2010, 579 of 2010, 1186 of 2010, 8635 of 2009, 8636 of 2009, 8637 of 2009, 551 of 2010, 1317 of 2010, 573 of 2010, 575 of 2010, 580 of 2010, 8639 of 2009, 567 of 2010, 512 of 2010, 686 of 2010, 721 of 2010, 775 of 2010, 568 of 2010, 583 of 2010, 698 of 2010, 699 of 2010, 519 of 2010, 536 of 2010, 480 of 2010, 481 of 2010, 501 of 2010, 511 of 2010, 893 of 2010, 894 of 2010, 1003 of 2010, 565 of 2010 and 692 of 2010 discharging the Rules *Nisi.*

2. The facts, relevant for disposal of the instant civil review petitions, are that all the writ petitions were filed challenging the memo No.জঃপ্র/কক্স/রাজস্ব/২৪-৫৯/২০০৯-১০৫ dated 12.01.2010 issued by writ-respondent No.3, Deputy Commissioner, Cox's Bazar cancelling long term leases of lands in Hotel/Motel Zone of Cox's Bazar. The writ-petitioners stated, *inter alia,* that they were granted long term lease of various quanta of land in the Hotel/Motel Zone of Cox's Bazar by the proper authority for the purpose of constructing 1-5 star hotels and motels thereon by registered deed of agreement of different dates. The writ-petitioners paid the entire consideration money in instalments and were handed over possession of the lands and they have also mutated those lands in their respective names. As per terms of the lease deed the writ-petitioners started construction work also in their leasehold land after obtaining clearance from various authorities and have already invested big amounts of money for the construction in those plots. Some of the writ-petitioners have already completed their construction works in the leasehold land as per deed of agreement. In these circumstances, all of a sudden, the Deputy Commissioner, Cox's Bazar, without serving any show cause notice, issued the impugned memo cancelling the permanent lease of the said plots in favour of the writ-petitioners directing the writ-petitioners to hand over possession of those plots in favour of the Government.

3. Rules *Nisi* were issued in all those writ-petitions.

4. Writ-respondent No.l Government contested those Rules by filing affidavit-in-opposition.

5. The material case of writ-respondent No.l is that in order to protect the environment and the ecosystem of the largest sea beach area of Cox's Bazar, the Government issued a Gazette Notification on 19.04.1999 declaring the area in question as Ecologically Critical Area (ECA) and also prohibiting any change of the nature of the land and water of that area. As such the construction of Hotel/Motel in that Ecologically Critical Area is totally illegal, inasmuch as any such construction will frustrate the purpose of that Gazette Notification. In the affidavit-in-opposition it was alleged also that as per the lease agreement the lessees were to make the constructions in their leasehold land within one year from the date of lease agreement which the lessees could not comply and for this reason also the lessor was empowered to cancel the lease unilaterally as per terms of that lease deed. It has further been

alleged in that affidavit-in-opposition that some of the writ-petitioners, violating the conditions of the lease deed, constructed multistoried buildings and sold out flats of that building to different persons instead of constructing hotels/motels in those plots as per terms of the lease deed.

6. After hearing the parties and considering the materials on record, the High Court Division discharged the Rules *Nisi* giving some directions, one of which was to return the lease money to the lessees. Being aggrieved, the writ-petitioners filed the above mentioned civil petitions for leave to appeal which upon hearing the parties were dismissed by this Division. Hence, the petitioners are now before us having filed the instant civil review petitions.

7. Mr. Rokan Uddin Mahmud, learned Senior Advocate with Mr. Mizan Sayyed, learned Advocate appeared on behalf of the petitioners in Civil Review Petition No.305 and 315 of 2015, Mr. Ajmalul Hossain, learned Senior Advocate appeared on behalf of the petitioners in Civil Review Petition No.306 of 2015, Mr. M. A. Samad, learned Senior Advocate appeared on behalf of the petitioners in Civil Review Petition No.316 of 2015, Mr. Probir Neogi, learned Senior Advocate appeared on behalf of the petitioner in Civil Review Petition No.320 of 2015 and Mr. A.M. Aminuddin, learned Senior Advocate appeared on behalf of the petitioner in Civil Petition for Leave to Appeal No.2367 of 2010.

8. It was submitted on behalf of the petitioners that this Division has committed an error on the face of the record in not considering that the hotel/motel zone, including the plots of the petitioners, does not fall within the purview of the "ecologically critical area" as described in the Government Notification No.ceg/4/7/87/99/245 dated 19.04.1999 and the said Notification was amended by a subsequent Notification No. ceg/4/7/87/99/269 dated 03.05.1999 whereby Cox's Bazar-Teknaf Sea Beach and Sonadia Island were excluded from the areas previously declared by the said Notification dated 19.04.1999 as "ecologically critical area" and hence, this Division committed an error apparent on the face of the record in upholding the decision of the High Court Division. It is submitted that the plots of the petitioners situated within the hotel/motel zone by no manner of application can be considered as "ecologically critical area" within the meaning of the said Notification dated 19.04.1999 as amended subsequently by Notification dated 03.05.1999 which made it more clear that the hotel/motel zone including the plots of the petitioners do not fall within the "ecologically critical area" and the same also has been confirmed by the Directorate of Environment, Cox's Bazar Office, Saimon Road, Cox's Bazar vide Memo No.পঅ/কঃজেঃকাঃ/ছাড়পত্র/১৪৩২/২০১৫/৫২৭ dated 02.11.2015 by recent certificate issued by him upon physical verification and, therefore, this Division committed a patent error apparent on the face of the record in upholding the decision of the High Court Division that needs to be reviewed. It is submitted that the review petitioners *bona fide* feel that they would be deprived of getting proper justice if the judgement and order dated 05.08.2015 passed by this Division in above mentioned civil petitions for leave to appeal is not reviewed for ends of justice, particularly when the learned Advocate for the review petitioner never conceded that "the location of the land in question have been declared by the Government as 'Ecologically Critical Area' by a Gazette Notification dated 19.04.1999 and that the petitioners were granted lease of this land violating this gazette notification which has prohibited also any construction in such land" as mentioned by this Division in its judgement and order dated 05.08.2015.

9. In addition Mr. Ajmalul Hossain, learned Senior Advocate appearing for the petitioners in Civil Review Petition No. 306 of 2015 made the following submissions:

> This Court fell into error in coming to the conclusion that "the leave petitioners …… did not deny the fact that the location of the land in question have been declared by the Government as Ecologically Critical Area by Gazette Notification dated 19.04.1999 and that the petitioners were granted lease of this land violating this Gazette Notification which has prohibited also any construction in such land". It is submitted that this finding is an error apparent on the face on the record, and thus reviewable. He submitted that the plot of the review petitioner is not within the ECA and the authority illegally cancelled the petitioners' registered lease deed. He further submitted that no evidence was placed on the record by the Government before the High Court Division that any notice was given to the petitioners to cancel their leases on the ground that the petitioner's plot was in the ECA. The only notice of cancellation is the one relating to failure to get plans approved for construction and which point was conceded. He further submitted that there was no evidence placed before the High Court Division that the subject plot of the petitioners, namely plot 10 on Road No.1, Marine Drive is within the ECA. In contrast, it is submitted that there is substantial body of evidence before the Court coming from at least three Government departments, namely the DC's office, the Revenue Department and the Department of Environment dated 26.08.2015, which shows that the petitioners' plot is not within the ECA.

10. Mr. Rokan Uddin Mahmud, learned Senior Advocate appearing with Mr. Mizan Sayeed, learned Advocate for the petitioner in Civil Review Petition Nos.315 of 2015 and 305 of 2015 made additional submissions as follows:

> The petitioner persistently argued that the entire Hotel/Motel Zone is outside the area of the maritime boundary of "ECA" which has already been substantiated by a number of credible documents. In addition to that the petitioner has already submitted the videography with aerial scene of the entire Hotel/Motel Zone and some still photographs of the Hotels/Motels within the Hotel/Motel Zone which are in existence from long since. These Hotels are fully functional at the moment and doing business without any hindrance within the same area. There are as many as 20 Hotels (3-star to 5–star standard) (including Hotel Radison Blu which is under construction) within the Hotel/Motel Zone. The owners of the said Hotels have invested more than 20,000(twenty thousand)crores (Approx.)in establishing those Hotels/Motels. He submitted that it would be a travesty of justice and an example of sheer discrimination and violation of equality clause as guaranteed by the Constitution under Art.27 if the plot of the petitioner (along with those of the other Review Petitioners)-is allowed to be cancelled on a false plea that the same (along with other plots of the Hotel/Motel Zone) falls within ECA and conversely the other existing Hotels are allowed to be continued despite the fact that all plots within the same area deserve equal treatment and fairness. In other words, if the existing structures in the Hotel/Motel Zone can be allowed to exist, then the plot of the petitioner is also liable to exist and not to be cancelled. He further submitted that the Cox's Bazar Sea Beach Area is excluded for the ECA, which has been overlooked by this Division and hence the impugned decision is liable to be reviewed.

11. Mr. Mahbubey Alam, learned Attorney General, appeared on behalf of the respondents in Civil Review Petition Nos.305 and 320 of 2015 and Mr. Manzill Murshid, learned Advocate, appeared on behalf of respondent No.2 in Civil Petition for Leave to

Appeal No.2367 of 2010 and made submissions in support of the impugned judgements and orders of this Division and of the High Court Division. The learned Attorney General submitted that the plots in question are all within Mouza Jhilanja which is within the ECA and is protected by the prohibitions mentioned in the Notification dated 19.04.1999. He submitted that by the subsequent Notification dated 03.05.1999 only the reserve forest areas are excluded from the ECA, and not the sea beach area. He submitted that the subsequent letter dated 02.11.2015 issued by the Department of Environment was somehow procured after the judgement was delivered by the High Court Division. He submitted that this letter was issued at the behest of only one of parties who litigated before the High Court Division and cannot override the Notification dated 19.04.1999 which was published in the Official Gazette. Moreover, there is nothing in the gazette notification to suggest that 'Nal' land will be excluded from the ECA.

12. We have considered the submissions of the learned Advocates for the parties concerned, perused the judgements sought to be reviewed and the judgement and order of the High Court Division under challenge in the civil petition for leave to appeal and other connected papers on record.

13. In the impugned judgement this Division noted that "the learned Counsel for the leave-petitioners though have made some submissions in support of their respective leave petitions but did not deny the fact that the location of the land in question have been declared by the Government as Ecologically Critical Area by a Gazette Notification dated 19.04.1999 and that the petitioners were granted lease of this land violating this gazette notification which has prohibited also any construction in such land."

14. Although the basis of the observation is now denied by the petitioners, we find that they are now relying heavily on the contention that the Cox's Bazar to Teknaf Sea Beach has been excluded by a subsequent Notification dated 03.05.1999. This aspect will be discussed later.

15. We find from the judgement of the High Court Division that two substantive issues were agitated before that Division by the petitioners. Firstly, that the cancellation of their lease deeds for non-compliance with the conditions of the lease deed was illegal since no notice was given to them before the cancellation. Secondly, the respondents belatedly urged the point that the plots fell within the ECA.

16. With regard to the claim of illegal cancellation of the leases, we find from the papers submitted by the respondents, that the leases were all cancelled due to the fact that the plots were found empty, i.e. no construction had taken place. Therefore, the petitioners were in breach of the terms and conditions specified in the lease deeds.

17. From the judgement of the High Court Division it appears that initially the leases/allotments were cancelled due to breach in terms and conditions of the lease, and the respondents in their affidavits-in-opposition substantiated their action in cancelling the leases by pointing to the breaches alleged. However, we see from the submissions made by the learned Attorney General before the High Court Division that the thrust of the respondents' case changed to the preservation of ecological balance in the environment and protection of natural resources. Here the case turned to a new dimension, i.e. the protection of natural resources for the benefit of the public. The learned Attorney General went so far as to submit that the Government had granted the leases without taking notice of the Notification dated

19.04.1999 declaring the Cox's Bazar Sea Beach as Ecologically Critical Area under section 5 of the Bangladesh Environment Conservation Act 1995.

18. In response to the new dimension introduced by the learned Attorney General, learned Counsel appearing for the petitioners have turned their attention to the second Notification dated 03.05.1999, by which, according to them, their plots were excluded from the ECA.

19. At the outset, we note that Cox's Bazar to Teknaf is reputed to be the longest natural sand beach in the world stretching for 120 kilometres (70 miles). This bounty has been bestowed upon us by the Almighty Creator. We should all endeavour to protect and preserve this national asset which undoubtedly brings benefits for our economy, but more importantly leaves a heritage for our offspring-our future generations.

20. The learned Attorney General most zealously made submissions stirring emotions for the sake of preserving the natural heritage of our country. He went so far as to suggest that those officials, who granted leases in spite of prohibitions in the Notification dated 19.04.1999, did so illegally, perhaps due to extrinsic considerations, forgetting the national interests.

21. Be that as it may. The crux of the submissions of the learned Counsel for the review petitioners is that the plots of land in question were given on long lease to the petitioners and they have spent huge sums of money in developing them for commercial purposes. Their leases have been cancelled without giving any notice and without affording any opportunity to be heard. Moreover, they argue that the new ground for cancelling the leases, i.e. that the plots are within the ECA, is not sustainable since the subsequent Notification dated 03.05.1999 excluded the plots along the Cox's Bazar to Teknaf Sea Beach from the ECA. Therefore, the prohibitions upon commercial development of the plots mentioned in the Notification dated 19.04.1999, are no longer applicable to the plots of the review petitioners.

22. We find from the judgement of the High Court Division that both the substantive submissions now placed before us were placed before the High Court Division and have been dealt with in that judgement.

23. With regard to the submission that the plots have been excluded in the later Notification dated 03.05.1999, the High Court Division held as follows:

> "We have meticulously examined the notification dated 03.05.1999 by which certain areas were excluded from the declaration and found that "কক্সবাজার জেলার কক্সবাজার-টেকনাফ সমুদ্র সৈকত ও সোনাদিয়া দ্বীপ এর সংশ্লিষ্ট রিজার্ভ ফরেষ্ট এলাকাসমুহ, বর্ণিত প্রজ্ঞাপন উল্লেখিত বিধি নিষেধের আওতা বহির্ভূত করা হল।" Thus this clearly means that রিজার্ভ ফরেষ্ট এলাকাসমূহ, বর্ণিত প্রজ্ঞাপন উল্লেখিত বিধি নিষেধের আওতা বহির্ভূত করা হল। This means "**Reserved Forest Area"** of the Cox's Bazar Sea Beach has been excluded from the Ecologically Critical Area but not the Cox's Bazar Sea Beach from the declaration of Ecologically Critical Area." The same argument has been made before us with more force by eminent Senior Advocates.

24. There is no ambiguity about the Notification dated 19.04.1999, by which, among others, the Sea Beach from Cox's Bazar to Teknaf, including Jhilanja Mouza, was included in the ECA. And that was done to protect the natural and ecological balance of the areas in question.

25. In the additional paper book dated 06.08.2017 the respondents have annexed papers which clearly show that all the plots of the present petitioners are within Jhilanja Mouza, which was included in the ECA by Notification dated 19.04.1999. The said Notification was published in the Official Gazette. However, on 03.05.1999 a further Notification was published partly amending the earlier Notification. The petitioners claim that this last mentioned Notification has excluded their plots from the ECA.

26. The Notification dated 03.05.1999 provides as follows:

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
পরিবেশ ও বন মন্ত্রণালয়
শাখা-৪
নং পবম ৪/৭/৮৭/৯৯/ ২০/০১/১৪০৬ বাং
তারিখঃ
০৩/০৫/১৯৯৯ ইং

প্রজ্ঞাপন

পরিবেশগত সংকটাপন্ন এলাকা সংক্রান্ত পরিবেশ ও বন মন্ত্রণালয়ের ১৯-০৪-৯৯ ইং তারিখের পবম-৪/৭/৮৭/৯৯/২৪৫ সংখ্যক প্রজ্ঞাপনের আংশিক সংশোধনক্রমে বাগেরহাট, খুলনা ও সাতক্ষীরা জেলার সুন্দরবন রিজার্ভ ফরেষ্ট এলাকা এবং কক্সবাজার জেলার কক্সবাজার-টেকনাফ সমুদ্র সৈকত ও সোনাদিয়া দ্বীপ এর সংশ্লিষ্ট রিজার্ভ ফরেস্ট এলাকাসমূহ, বর্ণিত প্রজ্ঞাপনে উল্লেখিত বিধি নিষেধের আওতা বহির্ভূত করা হলো। উক্ত প্রজ্ঞাপনে উল্লিখিত অন্যান্য এলাকাসমূহে জারীকৃত প্রজ্ঞাপনের বিধি নিষেধ যথারীতি বহাল থাকবে।

২। রিজার্ভ ফরেষ্ট এলাকা বন অধিদপ্তরের নিয়ন্ত্রণাধীন হওয়ায় এবং বন ব্যবস্থাপনার জন্য সুনির্দিষ্ট আইন, বিধি ও ব্যবস্থাপনা পরিকল্পনা থাকায় উল্লেখিত রির্জাভ ফরেষ্ট এর আওতাধীন এলাকায় যাবতীয় কার্যাবলী বন আইন, বন্য প্রাণী সংরক্ষণ আইন এবং সরকার অনুমোদিত কার্যকরী পরিকল্পনা অনুযায়ী সকল সম্পদ সংরক্ষণ ও ব্যবস্থাপনা করা হবে।

৩। এই আদেশ অবিলম্বে কার্যকর হবে।

রাষ্ট্রপতির আদেশক্রমে

সচিব"

27. The petitioners claim that the Sea Beach from Cox's Bazar to Teknaf within Cox's Bazar District is excluded from the ECA.

28. However, we must construe the Notification in its totality. It is clear that the sentence read as a whole refers to the "Reserve Forest areas of the Sundarbans in Bagerhat, Khulna and Satkhira District," and the "Reserve Forest areas of the sea beach within Cox's Bazar District from Cox's Bazar to Teknaf and Sonadia Island."

29. Clause 2 of the said Notification makes it clear that the Reserve Forest areas are being excluded from the ECA due to the fact that they are under the control of the Forest Department and are governed by other specific laws, rules and management plans.

30. The High Court Division was absolutely correct in holding that the plots in question are not excluded from the ECA. The exclusion of the petitioners' plots from the ECA being the main thrust of their submissions, we do not find any merit in the review petitions.

31. The review petitioners also adverted to the letter dated 02.11.2015 issued by the Department of Environment which states that the plot in question has been described as 'Nal' land and is, therefore, not included in the ECA. We note that this is a letter issued at the request of one of the writ-petitioners after the High Court Division delivered its judgement. We agree with the submission of the learned Attorney General that such a letter cannot

override the gazette notification which has included all the area of a particular Mouza, namely Jhilanja Mouza. In that notification no exception has been made on the basis of category of land. The Notification dated 19.04.1999 has simply included all land within Jhilanja Mouza as ECA. Hence, we find the letter dated 02.11.2015 is misconceived and contravenes the official gazette. The said letter is, therefore, of no legal effect.

32. Before concluding, we must appreciate the zeal with which the learned Attorney General made his submissions for the sake of preserving our natural resources. His sentiments are laudable as is the apparent policy of the Government to protect the environment and the natural resources of this country. However, we hope that in the days and years to come the Government will adhere to the policy of preservation of the ecological balance and protection of the natural resources of our country not only for our future generations, but also to ensure protection of the environment from degradation and the harmful effects of climate change. Certainly, this much we owe to our progeny. It would indeed be a travesty of justice if the petitioners having been deprived of their business opportunities, the plots are leased out to others for the purpose of construction and commercial development.

33. We, therefore, direct that all leases within Jhilanja Mouza granted after 19.04.1999 be cancelled in the same way as those of the writ-petitioners and any constructions made thereon be demolished. Of course, the lease holders shall be compensated for their loss due to such cancellation/demolition. We further direct that henceforth no lease shall be granted within Jhilanja Mouza or any area which has been classified as ecologically critical area.

34. We finally re-iterate that the petitioners shall be fully compensated for their loss due to the cancellation of their leases, in accordance with the decision of the High Court Division.

35. In the light of the above discussion, all the review petitions and Civil Petition for Leave to appeal No.2367 of 2010 are dismissed.

13 SCOB [2020] AD

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha
Chief Justice.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Mirza Hussain Haider.

Criminal Appeal No. 23 OF 2009.

(From the judgment and order dated 19.11.2006, passed by the High Court Division in Criminal Appeal No. 3129 of 2002.

State ..... Appellant. : .....Petitioners.

-Versus-

Abu Hanifa @ Hanif Uddin son of Md. Musa Ali, Village- Barak, PS-Haluaghat, District-Mymensing. : .....Respondent.

For the Appellant	:	Mr. Khondaker Diliruzzaman, D.A.G., instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Respondent.	:	Mr. Chowdhury Md. Zahangir, Advocate-On-Record.
Date of Hearing and Judgment.	:	The 11th July, 2017.

Section 84 of the Penal Code and plea of unsoundness of mind;
On a plain reading of the aforesaid provisions of law and on scrutinizing the materials on record, specifically the Medical reports (Exhibits-A,B,C and D), submitted by the DWs we have already found that the defence has been able to prove that the accused-respondent was of unsound mind from 22.6.1999 i.e. 8(eight) months after the date of occurrence (13.10.1998) but failed to prove the same, prior to that date. Since the defence failed to prove its plea of unsoundness of mind of the accused-respondent, at the time of commission of the offence on 13.10.1998, as required under section 84 of the Penal Code and section 105 of the Evidence Act by providing sufficient evidence, he cannot get any benefit under section 84 of the Penal Code nor under Chapter XXXIV of the Criminal Procedure Code. Plea of insanity or of unsoundness of mind of the accused-respondent being not prima facie found, the Court is not obligated to take recourse to the provisions as laid down in Chapter XXXIV of the Criminal Procedure Code. ... (Para 39)

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 19.11.2006, passed by a Division Bench of the High Court Division in Criminal Appeal No. 3129 of 2002 allowing the appeal and acquitting the present respondent of the charge levelled against him.

2. Facts leading to this criminal appeal in short are that on 14.10.1998 at around 23.35 hours, one Md. Bazlur Rahman, as informant, lodged First Information Report (F.I.R.) with Haluaghat Police Station, Mymensingh, alleging that his younger sister Shahanaz Begum was married to accused Abu Hanifa 11 years back and from that marriage, she gave birth to three children. From the very beginning of their marriage, Abu Hanif, a man of questionable character often used to torture her physically. Shahanaz Begum tried to rectify him but in vain which led their relationship to more bitterness. On 13.10.1998 at 11.00 P.M. the informant came to know from his brother, Md. Nazrul Islam, and others that the accused Abu Hanifa, (respondent herein), Musa Ali, Siddiqur Rahman and Sarwar have beaten up his sister, Shahanaz Begum. The next morning i.e. on 14.10.1998, the informant started for Barak village where the accused used to live with his wife Shahnaz Begum and on his way he came to know that the accused persons including the present respondent in collusion with each other inflicted indiscriminate sharp weapon blows on his sister Shahanaz Begum causing severe bleeding injuries and they took her to Halua Ghat Hospital and upon keeping her there they fled away. Then the informant rushed to the said Hospital and came to know from the doctor that his sister succumbed to her injuries. He saw the dead body and the injuries inflicted on her body. Subsequently, the informant went to the place of occurrence along with Md. Yakub Ali and Momtazuddin, the former and sitting Chairman respectively of Dhobaura Union, Professor Md. Abdul Motalib Akanda of Dhobaura College and Ijjat Ali, the former member of Baghber Union and came to know from the surrounding people that at the relevant time the accused respondent being instigated by other accused persons dealt dao and dagger blows indiscriminately on Shahnaz Begum's head and other parts of her body. At one stage she fell down on the ground and the accused respondent dealt several blows and eventually murdered her which was witnessed by Aiton, Amena Khatun, Tofi Miah and Sakina. Whereupon Haluaghat P.S. Case No. 5 dated 14.10.1998 was started.

3. Police, after investigation submitted charged-sheet No. 10 dated 31.01.1999 only against the accused respondent under section 302 of the Penal Code showing 17(seventeen) persons as witnesses.

4. At course of trial, the prosecution examined as many as 13 (thirteen) witnesses to prove the charge brought against the accused respondent, who have been cross examined by the defence and the defence examined as many as 7(seven) witnesses to prove his innocence.

5. After conclusion of examination of the witnesses, the accused person was examined under section 342 of the Criminal Procedure Code.

6. The defence case, as derived from the trend of cross-examination of P.Ws and evidence of DWs., in short was that the accused Abu Hanifa was insane at the relevant time and he was not capable of understanding the consequence of his act and did not know that his wife would die as a result of such act.

7. The trial Court upon considering the materials on record found the convict-respondent guilty under section 302 of the Penal Code and sentenced him to suffer imprisonment for life and to pay fine of TK. 5,000/= in default to suffer rigorous imprisonment for 2(two) years more by its judgment and order of conviction and sentence dated 27.08.2002.

8. Against the said judgement and order of conviction and sentence the convict-respondent preferred Criminal Appeal No. 3129 of 2002 before the High Court Division which has been allowed by a Division Bench of the said Division after hearing the parties and thereby set aside the judgment and order of conviction and sentence dated 27.08.2002 passed by the learned Sessions Judge, Mymensingh and acquitted the accused respondent of the charge levelled against him in Sessions Case No. 49 of 1999 arising out of Haluaghat Police Station Case No. 5 dated 14.10.1998, by the impugned judgment and order dated 14.11.2006.

9. Hence, the State as appellant filed Criminal Petition for Leave to Appeal No. 425 of 2007 and obtained leave giving rise to this criminal appeal.

10. Mr. Khondker Diliruzzaman, the learned Deputy Attorney General appearing on behalf of the appellant, State, submits that the High Court Division erred in relying on the evidence of D.Ws. on the point of insanity of the accused inasmuch as those witnesses were not competent witness to prove that the accused was insane and as such they are not proper witnesses to prove insanity in the eye of law. He submits that when the defence has miserably failed to prove by proper and competent witness that at the time of commission of the offence the accused respondent was insane and the evidence adduced in respect of his mental disorder being not proper as contemplated in section 105 of the Evidence Act, showing the state of the mental health of the accused at the time of occurrence, the impugned judgment and order of acquittal passed by the High Court Division is liable to be set aside. He lastly submits that the instant case is a wife killing case and the evidence of P.W.5 is most vital in this respect but the High Court Division without giving due consideration on the evidence of the said PW relied upon the non tenable evidence of DWs and allowed the appeal on misappreciation of evidence on record and thereby acquitted the accused. Thus the impugned judgment and order of the High Court Division is liable to be set aside.

11. Mr. Chowdhury Md. Zahangir, the learned Advocate-on-record appearing on behalf of the accused respondent submits that the trial court erred in law in shifting the onus of proof upon the defence. The prosecution failed to prove the case by giving any tangible evidence beyond any reasonable doubt. In order to prove the charge of murder none of the witnesses deposed that the murder was committed by the accused respondent in their presence nor could they prove that the accused respondent was of sound mind at the time of commission of the alleged murder. Moreover, the optimum witnesses examined on the part of the prosecution categorically deposed in support of the insanity of the accused-respondent during the course of offence and that has not been weighed at all by the trial court and as such the finding and decision of the trial court is neither sustainable nor tenable in the eye of law which the High Court Division rightly considered and as such the impugned judgment and order of the High Court Division is liable to be affirmed for ends of justice. He also submits that the trial court erred in law in not considering the fact that in the present case there is no circumstantial evidence which could lead to convict the accused respondent for the charge nor there is any ingredient which could lead the Court to find him guilty for the offence he was charge and as such in such a case motive and mens rea of the accused respondent was required to be proved by the prosecution side but they totally failed to do so. Moreover, in the

present case the ingredients which are necessary for proving commission of an offence under section 302 of the Penal Code are totally absent which has been clearly reflected in the judgment and order of the High Court Division and as such the same is liable to be affirmed for ends of justice. He finally submitted that for securing conviction in a criminal case, the individual liability of the accused person must be proved beyond all reasonable doubt but the prosecution side has totally failed to prove the same in the instant case. The prosecution also totally failed to prove that at the time of occurrence the accused-respondent was of sound mind and he committed the murder in a pre-planned way. On the contrary, it is proved that at the time of alleged occurrence the accused respondent, without any provocation penetrated a knife into his own body and brought out his entire belly which clearly indicates that how much insane he was at the time of commission of the alleged offence that he was unaware about the consequence of his action because of his insanity at the time of commission of the alleged offence. Therefore, there is nothing to interfere with the findings and decision of the High Court Division, as claimed by the prosecution side, and as such the High Court Division rightly passed the judgment and order of acquittal. Hence, the instant appeal should be dismissed.

12. Heard the learned advocates appearing on behalf of both the parties, perused the judgment and order passed by the trial court, the impugned judgment and order passed by the High Court Division and also other materials available on record. On perusal of the same it appears that it is a wife killing case without any eye witness of the actual occurrence.

13. In this case in order to arrive at a conclusive decision two questions are to be solved, they are whether the accused-respondent Abu Hanifa @ Hanif Uddin killed his wife Shahnaj Begum and whether the accused-respondent was of unsound mind at the time of committing such murder as claimed by the defence witnesses. If we find the answer to the first question in the negative form, then it would not be necessary to proceed with the second question. Now let us come to the first question.

14. The informant stated in his FIR that on 13.10.1998 at about 11.00 p.m. he got information from his younger brother, Nazrul Islam and another person that the accused respondent and others beat up his sister, Shahnaj Begum, but on the next morning, on his way to the accused's house he came to know that his sister died due to indiscriminate chopping by the accused respondent and other persons. When he along with some other persons went to accused's house he came to know that the accused-respondent in provocation of other accused persons killed the victim by inflicting indiscriminate chopping blows by a sharp cutting weapon. The informant deposed as PW-1 supporting FIR case and remained unimpeached during his cross examination. He stated that he did not see anybody to kill his sister but he heard that the accused-respondent and other accused persons killed his sister. PW-2, Ayatannessa, stated that she went to Shahanaz's house at about 'Asar' prayer time to purchase one kilogram rice when she saw Shahanaz Begum(victim) exclaimed and came out of her hut holding her cheek. Having seen such condition PW-2 rushed to Siddique's house but having not found Siddique at home she returned to Shahanaz's house and saw Shahanaz was being carried to a pushcart for taking her to hospital. PW-3, Amena Khatun, stated that the victim was killed at 3.30 P.M. but she did not see who killed the victim. In reply to a suggestion by the defence she stated that 'আমি জানি না ঘটনার সময় হানিফা পাগল ছিল কিনা। আমি জানি না হানিফা ৭/৮ বৎসর যাবৎ ডাক পাগল ছিল কিনা এবং তাকে ঢাকা, পাবনা ও ময়মনসিংহে চিকিৎসা করানো হয়েছিল কিনা।' PW-4, Sakhina Khatun, was tendered. PW-5, Tofi Miah, stated that hearing hue and cry he came to Hanifa's house, the place of occurrence, and saw Hanifa's mother, brother and sister standing outside the house and were raising hue and cry. When the hue and cry came to an

end, he entered inside the house and found the victim lying on the ground with severe bleeding injuries on her body and the accused-respondent standing beside her holding a dagger in his hand. PW-6, Md. Shamsul Hoque, stated that he came after the occurrence and saw the blood stained body of the victim lying on the ground and the convict was also injured. PW-7, Zamir Ali, stated that the victim was murdered at about 3.00/4.00 pm; upon hearing hue and cry he went to the place of occurrence and saw that the parents of accused Hanifa pouring water on the victim's head. PW-8, A. Rahman, was tendered. PW-9 to 13 are official witnesses.

15. None of these witnesses saw the occurrence but they depicted the picture that had been seen by them immediately after the occurrence took place. PWs-3 and 7 used the word ÔLyb nqÕ (was murdered) in their deposition which transpires that somebody killed the victim. PWs. 2 and 6 deposed that they saw the victim being injured lying on the ground. PWs. 4 and 8 were tendered. Among those witnesses PW-5 first entered the house of the accused-respondent and found the sanguinary body of the victim lying on the ground and none else but the accused respondent standing on her right side with a dagger in his hand.

16. From the evidence of the aforesaid witnesses it appears that at the time of occurrence only the victim and the accused-respondent were inside the room wherefrom the victim came out exclaiming and holding her cheek with profuse bleeding from the injuries she sustained on different parts of her body. Thus duty cast upon the accused-respondent to explain as to how the victim, his wife, sustains such bleeding injuries which resulted in her death. In the case of ***Ilias Hussain vs. the State 54 DLR (AD) 78*** it has been held:

> "It is well settled that when a wife met with unnatural death while in custody of the husband and also while in his house the husband is to explain under what circumstances she met with her death.'

17. Here in this case the accused-respondent failed to explain as to how his wife sustained such bleeding injuries which was the cause of her death. During trial the defence took the plea that the victim died due to quarrel with the accused respondent, who was of unsound mind, which they tried to prove by adducing defence witnesses. From the above it is clear that the accused did not deny the charge of killing his wife and rather the defence took the plea that the accused was a person of unsound mind. Thus it is clear that the accused killed his wife, the victim. So, the answer to question No. 1 is in the affirmative.

18. As the answer to question No.1 is in the affirmative we need to answer the second question as to whether the accused was a person of unsound mind. The defence during cross examination of the prosecution witnesses and in examining the defence witnesses took the plea of right of private defence as well as of unsoundness of mind and as such the accused is entitled to get benefit of section 84 of the Penal Code. To substantiate this plea the defence adduced 7 (seven) defence witnesses.

19. The plea of unsoundness of mind of the accused- respondent falls within the general exceptions of the Penal Code and the burden to prove such fact lies completely on the defence under section 105 of the Evidence Act, 1872 which provides:

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the court shall presume the absence of such circumstances".

20. In the case of ***Md. Abdul Majid Sarkar vs. State, 40 DLR (AD) 83*** this Division held "Section 105 of the Evidence Ac, 1872 casts a burden upon the accused to prove the existence of circumstances bringing the case within any special exception or proviso contained in other part of the Penal Code, 1860". Such view has also been reiterated in the case of ***Shah Alam vs. State, 42 DLR (AD) 31***.

21. On this perspective on scrutinizing the evidence on record it appears that PWs. 2, 4, 6 and 8 stated that the accused was a person of unsound mind. Although, PW. 7 also stated that the accused-respondent was of unsound mind but he did not clarify whether he was of unsound mind at the time of occurrence. PW-2 stated that the accused was of unsound mind for about 7/8 years but she could not say that he was of unsound mind at the time of occurrence. PWs. 3 and 5 stated that they do not know whether at the time of occurrence the accused was of unsound mind. The house of PWs. 3, 5 and 7 are located within 100, 50/60 and 200/300 yards respectively but only PW.7 stated that he knew accused-respondent was of unsound mind whereas PWs. 3 and 5 stated that they did not know whether the accused was of unsound mind. Practically, in a locality if a person is of unsound mind and remains so for a period of 7/8 years people residing nearby would be aware of his mental condition. So in this case if the accused-respondent would have been actually a man of unsound mind then all the PWs residing nearby would know the same and would specifically mention the duration or length of unsoundness of mind.

22. Actually mental condition of a person as to whether he is of unsound mind cannot be specifically proved only by oral evidence. Such fact must be proved by oral as well as medical evidence. In this respect the defence examined Dr. Sayed Anwarul Hoque as DW-1, who stated that when he was serving as Assistant Surgeon at Mymensingh Central Jail he examined the accused-respondent on 22.06.99 and 21.10.99 and issued two reports (Exhibits A and B) wherein it is stated that the accused-respondent was suffering from 'schizophrenia'. DW-2, Md. Hemayet Uddin, Deputy Inspector General (Prisons), stated that when he was serving as Senior Jail Super in Mysensingh Jail he sent two medical certificates, which were issued by the Medical Board, to the court on 12-09-1999 and 21-10-1999 (Exhibits-A/1 and B/1). DW- 3, Dr. Md. Waziul Alam Chowdhury, stated that when he was serving as Assistant Professor, Department of Mental Health at Mymensingh Medical College Hospital he was a member of the medical board in which the accused-respondent was examined on 21.03.1999 and 11.07.2000 whereupon two certificates (Exhibit C and D) were issued stating that the accused-respondent was suffering from 'schizophrenia' disease. Dr. Khandkar Mahbubur Rahman, Medical Officer, Mymensingh Medical College and Hospital, while deposing as DW-4 recognized his signature in the Medical Certificate. But none of the aforesaid DWs stated that the accused-respondent was of unsound mind at the time of occurrence. Rather DW-3 in reply to a suggestion expressed his inability to say as to whether the accused-respondent was of unsound mind in 1998.

23. DW-7, Dr. Waezuddin Faraji, Medical Officer, Haluaghat Thana Health Complex, stated that he examined the accused-respondent on 22.09.98 and advised some medicine and subsequently on 07.10.98 he re-examined him and having found no progress he advised the accused-respondent to have further treatment from Dhaka or Mymensingh. On perusal of the prescription given by DW-7 the trial court observed that he did not give such prescription on any prescribed paper but on his personal pad. However the accused-respondent neither took any treatment from any of those places nor was admitted in any hospital pursuant to such advice clearly proves that such prescription was false, fabricated and antedated and

manufactured for the purpose of this case. The defence tried to make the court believe that the accused-respondent was suffering from mental illness for 7/8 years but they failed to produce any medical certificate in support of such plea by producing any other medical prescription or receiving any medical attendance/ treatment in those 7/8 years.

24. It appears that DWs. 3, 5 and 7 are medical experts who in their cross examinations stated that a 'schizophrenia' patient sometimes may behave rationally or sometimes may not know what they are doing. From their evidence it is clear that a 'schizophrenia' patient does not always remain in unsound mind. So in this situation the burden of proof always falls upon the defence to prove that the accused-respondent was of unsound mind at the time of occurrence but they failed to prove the same by adducing proper evidence. Apart from the evidence of above medical experts the defence also examined Dr. ABM Muzaharul Islam, Medical Officer, Mymensingh Medical College and Hospital, as D.W.6 who examined the accused-respondent at the emergency ward of the said Hospital on the date of occurrence, i.e. on 13-10-1998 and gave him necessary treatments. Subsequently on 12-06-1999 after eight months, he issued a certificate disclosing that there was no fatal injury on his body which might cause death. Moreover, there is no indication in the said certificate that at the time of occurrence i.e. on 13.10.1998 the accused was of unsound mind.

25. Neither of the prosecution nor the defence witnesses stated that due to unsoundness of his mind the accused ever attacked anybody at any time or behaved violently/irrationally. If the accused would have been of unsound mind for 7/8 years he would have attacked or would try to attack anybody or would behave violently or irrationally during that period. Thus it is not clear as to how can he be deemed to be a person of so unsound mind at the time of occurrence which led to kill his wife who was married to him for 11 years and gave birth to three of his children. Besides, had the accused-respondent be a person of unsound mind then he could have applied to the court for being dealt with the procedures mentioned in Chapter xxxiv of the Code of Criminal Procedure. But no such step has ever been taken from the defence side. In the case of ***Dahybhai Chhaganavhai Thakkar vs. the State of Gujrat, AIR 1964 SC 1563*** it was held:

> "the crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of section 84 of the Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

26. After assessing all the evidence on record and discussions made hereinabove it is clear that the defence have been able to prove that the accused-respondent was of unsound mind from 22.06.1999 and thereafter only. But they completely failed to prove that he was of unsound mind before or at the time of occurrence and as such for the act done on 13.10.1998 he cannot get the benefit of section 84 of the Penal Code.

27. Thus the trial court rightly assessed all the evidence on record and found that the accused-respondent is guilty of killing his wife and as such convicted and sentenced him to suffer imprisonment for life but the High Court Division failed to assess the facts and circumstances and the evidence as placed by both the parties and particularly the fact that the defence totally failed to prove that the accused-respondent was of unsound mind at the time of occurrence or since before such occurrence.

28. So the High Court Division was wrong in acquitting the accused respondent giving benefit of section 84 of the Penal Code. Section 84 reads as follows:

"**84. Act of a person of unsound mind**.- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

29. The main ingredient of section 84 of the Penal Code is: the defence is to prove that the accused was of unsound mind at the time of occurrence which the defence failed to prove in this case. Thus as the plea of insanity or unsoundness of mind of the accused respondent at the time of occurrence(underlined for emphasis) is not clearly and distinctly proved, the accused respondent, thus cannot get benefit of the same nor benefit as provided under sections 469 and 470 of the Criminal Procedure Code. Moreover on acquitting the accused respondent the High Court Division erred in law in not taking appropriate step under section 471 of the said Code.

30. We have already discussed earlier that the defence has totally failed to prove its plea that the accused respondent was of unsound mind at the time of occurrence by oral evidence adduced by some of the PWs and all the DWs which are actually not sufficient to prove such plea. Unsoundness of mind is the medical condition of a human being which can only be proved by adducing medical examination by experts. Here in this case the DWs adduced medical experts who could only prove that the accused respondent was of unsound mind from 22.6.1999 to 11.7.2000. Not prior or after that period. So he cannot get the benefit of Chapter XXXIV of the Criminal Procedure Code.

31. Sections 469, 470 and 471 of the Criminal Procedure Code read as follows:

"469. **When accused appears to have been insane**.- When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate or, as the case may be, the Court is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate or, as the case may be, the Court shall proceed with the case.

470. **Judgment of acquittal on ground of Lunacy.**- Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

471. **Person acquitted on such ground to be detained in safe custody.**-(1) Whenever the finding states that the accused person committed the act alleged the Magistrate or the Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, or such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Government;

32. Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Government may have made under the Lunacy Act, 1912.

33. (2)**Power of Government to relieve Inspector General of certain functions.-** The Government may empower the officer in-charge of the jail in which a person is confined under the provisions of section 46 of this section, to discharge all or any of the functions of the Inspector General of Prisons under section 473 or section 474."

34. On a plain reading of the aforesaid provisions of law and on scrutinizing the materials on record, specifically the Medical reports (Exhibits-A,B,C and D), submitted by the DWs we have already found that the defence has been able to prove that the accused-respondent was of unsound mind from 22.6.1999 i.e. 8(eight) months after the date of occurrence (13.10.1998) but failed to prove the same, prior to that date. Since the defence failed to prove its plea of unsoundness of mind of the accused-respondent, at the time of commission of the offence on 13.10.1998, as required under section 84 of the Penal Code and section 105 of the Evidence Act by providing sufficient evidence, he cannot get any benefit under section 84 of the Penal Code nor under Chapter XXXIV of the Criminal Procedure Code. Plea of insanity or of unsoundness of mind of the accused-respondent being not prima facie found, the Court is not obligated to take recourse to the provisions as laid down in Chapter XXXIV of the Criminal Procedure Code.

35. Accordingly, we hold that the submissions of the learned advocate for the appellant have substance.

36. Thus, this criminal appeal is allowed. The impugned judgment and order of acquittal passed by the High Court Division is hereby set aside and the judgment and order of conviction and sentence passed by the trial court is hereby affirmed. The convict-respondent Abu Hanifa alias Hanif Uddin, son of Md. Musa Ali, of Village-Barak, Police Station-Haluaghat, District-Mymensingh, is directed to surrender to his bail bond within 30 (thirty) days from the date of receipt of this judgment, in default the learned Sessions Judge, Mymensingh is directed to secure arrest of the convict-respondent Abu Hanifa @ Hanif Uddin, in connection with the instant Criminal Appeal No. 23 of 2009 filed against the judgment and order dated 19.11.2006 passed by the High Court Division in Criminal Appeal No. 3129 of 2002 arising out of Sessions Case No. 49 of 1999 of the Court of Sessions, Mymensingh corresponding to Haluaghat Police station Case No. 5 dated 14.10.1998 to serve out the sentence as awarded against him in accordance with law.

13 SCOB[2020] AD

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

Ms. Justice Zinat Ara

Mr. Justice Abu Bakar Siddiquee

Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO.460 OF 2017 with

CIVIL REVIEW PETITION NO.181 OF 2018.

(From the judgment and order dated 07.09.2016 passed by the High Court Division in Writ Petition No.7166 of 2015 and judgment and order dated 21.08.2017 passed by the Civil Petition for Leave to Appeal No.1790 of 2017.)

The Secretary, Ministry of Fisheries and Livestock & others:	Appellants. (In C.A.No.460/17)
The Secretary, Ministry of Fisheries and Livestock & others:	Petitioners. (In .R.P.No.181/18)

=Versus=

Abdur Razzak and others	**:**	Respondents. (In C.A.No.460/17)
Ashraf-Uz-Zaman others	**:**	Respondents. (In .R.P..No.181/18)

For the Appellants : (In C.A.No.460/17)	Mr. Mahbubey Alam, Attorney General, with Mr. Biswajit Debnath, D.A.G & Mr. Samarandra Nath Biswas, D.A.G, instructed by Ms. Mahmuda Begum,Advocate-on-Record.
For the Petitioners : (In C.R.P.No.181/18)	Mr. Mahbubey Alam, Attorney General, with Mr. Biswajit Debnath, D.A.G & Mr. Samarandra Nath Biswas, D.A.G, instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Respondents (In C.A.No.460/17)	:	Mr. Rokanuddin Mahmud, Senior Advocate ,with Mr. N.K. Saha, Senior Advocate instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.
For the Respondents (In C.R.P No.181/18)	:	Mr. Probir Neogi, Senior Advocate instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.
Date of hearing	:	2404.2019, 08.05.2019, 21.05.2019 & 22.05.2019.
Date of judgment	:	02.07.2019.

Absorption and doctrine of legitimate expectation;

1. The legitimate expectation would not override the statutory provision. The doctrine of legitimate expectation can not be invoked for creation of posts to facilitate absorption in the offices of the regular cadres/non cadres. Creation of permanent posts is a matter for the employer and the same is based on policy decision.

2. While transferring any development project and its manpower to revenue budget the provisions provided in the notifications, government orders and circulars quoted earlier must be followed. However, it is to be remembered that executive power can be exercised only to fill in the gaps and the same cannot and should not supplant the law, but only supplement the law.

3. Before regularization of service of the officers and employees of the development project in the revenue budget the provisions of applicable "Bidhimala" must be complied with. Without exhausting the applicable provisions of the "Bidhimala" as quoted above no one is entitled to be regularised in the service of revenue budget since those are statutory provisions.

4. The appointing authority, while regularising the officers and employees in the posts of revenue budget, must comply with the requirements of statutory rules in order to remove future complication. The officers and employees of the development project shall get age relaxation for participation in selection process in any post of revenue budget as per applicable Rules.

5. A mandamus can not be issued in favour of the employees directing the government and its instrumentalities to make anyone regularized in the permanent posts as of right. Any appointment in the posts described in the schedule of Bangladesh Civil Service Recruitment Rules, 1981, Gazetted Officers (Department of Live Stock Service) Recruitment Rules, 1984 and Non-gazetted Employees (Department of Live Stock Service) Recruitment Rules, 1985 bypassing Public Service Commission should be treated as back door appointment and such appointment should be stopped.

6. To become a member of the service in a substantive capacity, appointment by the President of the Republic shall be preceded by selection by a direct recruitment by the PSC. The Government has to make appointment according to recruitment Rules by open competitive examination through the PSC.

7. Opportunity shall be given to eligible persons by inviting applications through public notification and appointment should be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law.

8. It is not the role of the Courts to encourage or approve appointments made outside the constitutional scheme and statutory provisions. It is not proper for the Courts to direct absorption in permanent employment of those who have been recruited without following due process of selection as envisaged by the constitutional scheme.

... (Para 82)

J U D G M E N T

Hasan Foez Siddique, J:

1. Civil Appeal No.460 of 2017 has arisen out of the judgment and order dated 07.09.2016 passed by the High Court Division in Writ Petition No.7166 of 2015. Civil Review Petition No.181 of 2018 has arisen out of the order dated 21.08.2017 passed by this Division in Civil Petition for Leave to Appeal (CPLA) No.1790 of 2017. The civil appeal as well as the review petition originate from the impugned judgment and order passed by the High Court Division in Writ Petition No.7166 of 2015 and so, both the matters have been heard together and are being disposed of by this common judgment.

2. The respondents of Civil Appeal No.460 of 2017 and Civil Review Petition No.181 of 2018, as writ petitioners, filed Writ Petition No.7166 of 2015 in the High Court Division stating, inter alia, that the writ petitioners were appointed in the "Small Scale Dairy and Poultry Farmers Support Services in 22 Selected Districts Project" (herein after referred to as the Project) in 5 different categories of posts and on different dates under the Ministry of Fisheries and Livestock (shortly, the Ministry) through written and viva-voce examinations. Writ Petitioner Nos.1-13 have been working as Veterinary Surgeons, Writ Petitioner Nos.14-21 have been working as Scientific Officers, Writ Petitioner Nos.22-26 have been working as Animal Production Officers, Writ Petitioner Nos.27-40 have been working as Veterinary Compounders and Writ Petitioner Nos.41-46 have been working as Laboratory Technicians.

3. The first phase of the Project had started on 01.01.2010 and ended on 30.06.2013. Thereafter, it was extended for 1 year up to 30.06.2014 and then it was extended for further 1 year till 30.06.2015. Even after completion of the Project, the writ petitioners are still serving in their respective posts. According to the Project proposal (shortly, the PP), the writ-petitioners were supposed to be transferred to the revenue budget inasmuch as the PP contained that after completion of the Project, the assets and manpower would be transferred to the revenue budget. Clause 4.3(M) of the decision of the Executive Committee of National Economic Council (ECNEC) dated 31.12.2007, was amended and it was circulated by the Planning Division vide Memo No. পবি/এনইসিএকনেক/সমন্বয়-২/২৬/২০০৭/৩ dated 10.01.2008, wherein it has been stated that "সমাপ্ত প্রকল্পের জনবল বিদ্যমান বিধি বিধান অনুসরনপূর্বক দ্রুত রাজস্ব বাজেটে স্থানান্তরের ব্যবস্থা করতে হবে।" The Prime Minister also gave her consent to transfer the manpower to the revenue budget from completed projects started after July, 1997.

4. The Director General, Department of Livestock, wrote a letter being Memo No.Hm Hp/¢fC¢p-65(1j LÛ)/2014/536 dated 30.11.2014 (Memo dated 30.11.2014) to the Project Director of the Project informing that a resolution was taken on 09.11.2014 with a view to transferring the manpower for the completed project to the revenue set up. The Project Director was also asked to submit a proposal in the Form as prescribed. In response of the letter dated 30.11.2014, the Project Director submitted a proposal vide Memo No.SDPFSP/l¡Sü M¡a/2014/708 dated 11.12.2014 (shortly, Memo dated 11.12.2014). After getting the said proposal, the Director General, Department of Livestock sent a letter vide Memo No. শাখা- ১/ ৬ এ ৭৬৮/২০১৪/২৩৭২ dated 28.12.2014 to the Secretary of the Ministry with recommendation to transfer the manpower of the Project to the revenue set up. The Ministry thereafter sent a complete proposal vide Memo No.33|01|0000|120|15|04|15-17 dated 04.02.2015 (shortly, Memo dated 04.02.2015) to the Secretary, Ministry of Establishment in order to create 77 posts of 5 categories in revenue budget on a temporary

basis. The Ministry of Establishment then wrote a letter under Memo No.05|02|0002|15|157|008|15-77 dated 22.03.2015 to the Secretary of the Ministry of Fisheries and Livestock requesting him not to apply separately for the Project rather to apply in combination with the organogram of the Ministry. The Director General, Department of Livestock sent another proposal vide Memo No.33|01|00000|001|15|786|15-1111 dated 24.05.2015 to the Secretary of the Ministry in accordance with the check list as provided by the Ministry of Establishment. Thereafter, in the meeting of steering Committee held on 01.01.2015 it was decided that in order to continue the Project and also to extend activity of the Project in other areas a new project proposal would be launched. An inter-ministerial meeting was held on 29.01.2015 and it was decided that after completion of the Project, the same would be expanded to more areas. After completion of the various development projects under the Ministry, the assets as well as the manpower have been transferred/ absorbed in the revenue budget on 24.05.2004, 27.03.2007, 10.04.2011 and 08.10.2013 but the petitioners were not absorbed in the revenue budget.

5. In the above circumstances, the writ-petitioners filed the above mentioned Writ Petition for a direction upon the writ respondents for transferring/regularising/absorbing their service in the revenue budget and obtained a rule.

6. Respondent No.1, the Secretary, Ministry of Fisheries and Livestock contested the Rule by filing an affidavit-in-opposition, contending, inter alia, that the petitioners were appointed in the Project under the Ministry with consolidated pay temporarily for the Project period only on contractual basis. The Project started in 2010 and ended in 2015. Therefore, the writ petitioners are not entitled to be absorbed in the revenue budget. The Ministry and the Department of Livestock have taken a decision for starting a new project and duration of the said project would be up to 30th June, 2020 and the writ petitioners would be given preference for recruitment in the said new project and the age limit would be relaxed, if necessary and, as such, the Rule should be discharged.

7. Respondent No.2, also contested the Rule by filing an affidavit-in-opposition contending, inter alia, that the Government had never made any promise to absorb the writ petitioners in the revenue budget. The appointment letters of the petitioners clearly contained that their services would be terminated after completion of the Project. The Project had started in 2010 and ended in 2015. Therefore, the writ petitioners cannot claim to be absorbed in the revenue budget and, as such, the writ petitioners have no cause of action to file the Writ Petition. The writ petitioners were appointed in different posts of the Project temporarily with consolidated pay for the Project period only. In order to absorb the employees and officers of development Project, the Government has promulgated Rules namely "উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারী নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫". In rule 2(M)of the said Rules, the projects mean the projects started between 9 April, 1972 and 30th June, 1997. The Project, where the writ petitioners were working does not fall within the ambit of rule 2(N) of the Rules. The Rules prescribed the guidelines for the transfer of employees and officers of the development projects to revenue set up. The writ petitioners do not fall within the scope of the guidelines given by the Appellate Division in the case reported in 17 BLC (AD) 91. Therefore, the writ petitioners are not at all entitled to be transferred/absorbed/regularized in the revenue set up and, as such, the Rule is liable to be discharged.

8. The High Court Division, upon hearing the learned Advocates for the contending parties, disposed of the Rule with the following directions:

> "Respondents are directed to regularize/ absorb the petitioners under the revenue budget with continuity of service and other benefits subject to availability of the same/equivalent posts provided that they have requisite qualifications."

9. In the aforesaid facts and circumstances, the writ-respondents being aggrieved filed CPLA No.1790 of 2017 and leave was granted to consider as to whether the post of Scientific Officers, Veterinary Surgeons and Animal Production Officers could be absorbed in the revenue set up without recommendation of the Public Service Commission as directed by the High Court Division.

10. Civil Review Petition No.181 of 2018 has been filed by the writ-respondents for review of the order dated 21.08.2017 passed by this Division in CPLA No.1790 of 2017, so far as it relates to the post of Veterinary Compounder and Laboratory Technicians.

11. Mr. Mahbubey Alam, learned Attorney General appearing for the appellants, submits that the writ petitioners were appointed in the project under the Ministry of Fisheries and Livestock which started in 2010 and ended in 2015 with consolidated payment temporarily for the project period on contract basis, the High Court Division failed to appreciate the facts and circumstances of the case in its true perspective, as a result of which there has been serious miscarriage of justice. He submits that the Ministry has taken decision for a new Project, namely, "Increasing Livestock Productivity through Community Support Service and Facilities the Implementation of Feed Act Project" (hereafter referred to as the New Project) and duration of the New Project is from 01.07.2015 to 30.06.2020 and in the New Project the writ petitioners would be given preference for recruitment . He also submits that the Government had never made any promise to absorb the writ petitioners in the revenue budget and their appointment letters clearly demonstrated that their services would come to an end automatically after completion of the Project and, therefore, the High Court Division erred in law in directing to absorb the writ petitioners in revenue set up. He further submits that in order to absorb the employees and officers of the Development Project, the Government has framed Rules in the name of , "উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারী নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫" and in that Rules, Development Project has been specifically defined but the High Court Division without taking into consideration of the said Rules erroneously made the Rules Nisi absolute. He lastly submits that the posts for which the writ petitioner-respondents in the appeal have prayed for absorption are to be appointed following the concerned service rules and there is no scope to regularize their service without following the relevant laws, the High Court Division erred in law in giving the impugned direction and as such the same is liable to be interfered with.

12. The learned Attorney General, appearing for the petitioner in review petition, submits that in the order granting leave this Court most illegally observed that the posts of Veterinary Compounder and Laboratory Technicians are not included in the schedule of the relevant laws although those posts are included in the schedule of the Rules.

13. Mr. Rokanuddin Mahmud, learned Senior Counsel appearing for the respondents in Civil Appeal No.460 of 2017, submits that in the Project Proforma (P.P.) it was categorically mentioned that after completion of the Project the assets and manpower of the Project should be transferred in the revenue budget and on perusal of the said provision in the P.P. and some other subsequent communications the writ petitioners legitimately expected that their service would be absorbed/transferred in the revenue budget, and, thus the High Court Division upon proper appreciation the materials on record made the Rule Nisi absolute. He submits that in

identical matters the High Court Division passed similar orders directing to absorb the writ petitioners in the revenue budget and pursuant to the order of the High Court Division, the writ petitioners of the concerned writ petition have already been absorbed in the revenue set up, so there would be discrimination if the present writ petitioners are deprived from absorption and in such view of the matter, the High Court Division rightly passed the impugned direction and the appeal is thus liable to be dismissed.

14. Mr. Probir Neogi, learned Senior Counsel, appearing for the respondents in the review petition, submits that at the time of granting leave this Division refused to grant leave in respect of the review-respondents and that there is no error of law apparent of the face of the record in the order under review so the review petition is liable to be rejected.

15. Admittedly, the first phase of the instant project had started on 01.10.2010 and ended on 30.06.2013. Thereafter, it was extended for a period of one year and, thereafter, again extended for a further period of one year, that is, till 30.06.2015. The writ petitioners filed the instant Writ Petition No.7166 of 2015 with a prayer to get a direction upon the writ respondents to transfer/absorb the writ petitioners in the revenue set up. The High Court Division, by the impugned judgment and order, made direction as quoted earlier.

16. Learned Attorney General drew our attention to the Gazetted Officers' (Department of Livestock Service) Recruitment Rules, 1984. Rule 3 of the said Rules provides that subject to the provisions of the Schedule and instructions relating to reservation of posts, appointment to a specified post shall be made-

(a)by direct recruitment;
(b) by promotion; or
(c)by transfer on deputation.

17. Sub Rule 2 of Rule 3 provides that no person shall be appointed to a specified post unless he has the requisite qualifications and, in the case of direct recruitment, he is within the age limit, if any, prescribed in the Schedule for that post. Rule 4 provides that **no appointment to a specified post by direct recruitment shall be made except upon the recommendation of the Commission.** Schedule of the said Rules provides the method of direct recruitment that the recruitment should be made as prescribed in the B.C.S. (Agriculture Livestock) Recruitment Rules, 1984.

18. The non-gazetted employees (Department of Livestock Services) Recruitment Rules, 1985 provides the provisions for recruitment of the Non-gazetted Employees.

19. Rule 3 of the said Rules provides that subject to the provisions of the Schedule and instructions relating to reservation and quota, appointment to a specified post shall be made-

(a)by direct recruitment, or
(b) by promotion.

20. Sub-rule (2) of Rule 3 provides that no person shall be appointed to a specified post unless he has the requisite qualifications, and in the case of direct recruitment, he is within the age limit, if any, prescribed in the Schedule for that post. Rule 4 provides that **no appointment to a specified post by direct recruitment shall be made except upon the recommendation of the Commission.**

21. In Bangladesh Civil Service Recruitment Rules, 1981, the provisions and procedure for appointment of officers in the posts for which some of the writ petitioners sought for absorption have specifically been mentioned.

22. Those are the regular and usual statutory provisions for appointment through the Public Service Commission in the posts, for which, the writ petitioners have prayed for absorption.

23. It appears that sometimes the Courts have not kept the legal aspect in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed irregular or improper entrants to be absorbed into service. The Court has also on occasions issued direction which can not said to be consistent with the laws of public employment. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of legally approved procedure established by the relevant laws. However, article 133 of the Constitution does not abridge the power of the executive to act without a law. But, if there is statutory Rule on the matter, the executive must abide by that Rule and it can not in exercise of executive power ignore or work contrary to that Rule. Sometimes it is found that the process is not adhered to and the constitutional scheme of public employment is bypassed.

24. It is the case of the writ petitioners that since in the P.P. it has been mentioned that after completion of the Project, the assets and manpower of the Project should be transferred in the revenue budget the writ petitioners legitimately expected that their service would be absorbed in the revenue set up.

25. Learned Attorney General produced circular dated 05.11.1991. Ministry of Establishment issued the same mentioning the decision of the Government in respect of transfer of the officers and employees of the development project in the revenue budget. The contents of the said circular run as follows:

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
সংস্থাপন মন্ত্রণালয়

শাখা (বিধি-১)
পরিপত্র
সম/আর-১/এস-৬/৯১-৩০৮(২৫০), তারিখ ০৫-১১-১৯৯১ইং /২০-০৭-১৩৯৮ বাং।
বিষয়ঃ **উন্নয়ন প্রকল্পের পদধারীকে রাজস্ব খাতভুক্ত পদে এবং রাজস্ব খাতভুক্ত পদধারীকে উন্নয়ন প্রকল্পের পদে নিয়োগ/পোষ্টিং/ পদোন্নতি প্রদান সম্পর্কিত।**

উপরোক্ত বিষয়ে গত ২৯-৫-৯১ইং তারিখে জারীকৃত সম/আর-১/এস-৬/৯১-১৬৪(২০০) নং পরিপত্রটি (সংযুক্ত) বাতিলপূর্বক আলোচ্য পরিপত্রটি জারী করা হইল। ইদানিং লক্ষ্য করা যাইতেছে যে, উন্নয়ন প্রকল্পের পদধারীকে রাজস্ব খাতভুক্ত পদে এবং রাজস্ব খাতভুক্ত পদধারীকে উন্নয়ন প্রকল্পের পদে নিয়োগ/পোষ্টিং/ পদোন্নতি প্রদান করিবার প্রবণতা দেখা দিয়াছে। এই প্রবণতা দূর করিবার লক্ষ্যে সরকার **নিম্নরূপ** সিদ্ধান্ত গ্রহণ করিয়াছেনঃ
(ক) উন্নয়ন প্রকল্পের পদ এবং রাজস্ব খাতভুক্ত পদ সম্পূর্ণ ভিন্ন। উভয়ের নিয়োগ ক্ষেত্রে নিয়োগ বিধিও ভিন্ন। কাজেই উভয়ের পারস্পরিক নিয়োগ/পোষ্টিং/বদলী/পদোন্নতি সম্পূর্ণ বিধি বহির্ভূত। **উন্নয়ন প্রকল্পের চাকুরীর কোন নিশ্চয়তা নাই। উন্নয়ন প্রকল্প শেষ হইয়া গেলে প্রকল্পে চাকুরীরতদের চাকুরী হইতে অব্যাহতি দেওয়া হয়**। তবে উন্নয়ন প্রকল্প মেয়াদ শেষে রাজস্ব খাতভূক্ত হইলে সেইক্ষেত্রে প্রকল্পে চাকুরীরতগণ ৯-৩-৮৬ইং তারিখের সম/আর-১/এস-৮/৮৬-৫৫(১০০)নং স্মারক বা সময়ে সময়ে সরকার কর্তৃক সংশোধিত স্মারক মোতাবেক রাজস্ব খাতভূক্ত পদে নিয়োগের জন্য কতিপয় শর্ত সাপেক্ষে বিবেচিত হইতে পারেন। প্রধান শর্ত এই যে, **তাহাদের রাজস্ব** খাতভূক্ত **পদের নিয়োগবিধির শর্ত পূরণ করিয়া অন্যান্য সকল প্রার্থীর সহিত প্রতিযোগিতার মাধ্যমে নির্বাচন লাভ করিতে হইবে । কাজেই উন্নয়ন**

প্রকল্পের পদধিকারী কোন অবস্হাতেই রাজস্ব খাতভুক্ত পদে বদলী বা পদোন্নতির মাধ্যমে নিয়োগ/পোষ্টিং লাভ করিতে পারেন না।

(খ) রাজস্ব খাতভুক্ত কোন কর্মকর্তা/কর্মচারীকে উন্নয়ন প্রকল্পের নিয়োগবিধির অধীনে উন্নয়ন প্রকল্পের পদের বিপরীতে বদলী, পদোন্নতি প্রদান বা পদোন্নতি প্রদানপূর্বক নিয়োগ/ পোষ্টিং দেওয়া যাইবে না।

(গ) রাজস্ব খাতভুক্ত কোন কর্মকর্তা/ কর্মচারীকে শুধুমাত্র স্বীয় পদমর্যাদা ও বেতনস্কেলেরসহ উন্নয়ন প্রকল্পের কোন পদে প্রেষণে নিয়োগ/পোষ্টিং প্রদান করা যাইবে। এইক্ষেত্রে প্রেষণে নিয়োগলাভকারী তাহার গ্রেড পে অর্থাৎ রাজস্ব বাজেটাধীন পদে তিনি যে বেতন-ভাতদি পাইতেন তাহাই পাইবেন।

(ঘ) রাজস্ব খাতভুক্ত কোন কর্মকর্তা /কর্মচারী স্বেচ্ছায় সরাসরি নিয়োগের সকল আনুষ্ঠানিকতা পালনপূর্বক উন্নয়ন প্রকল্পের সরাসরি নিয়োগলাভ করিতে পারিবেন। তবে সেইক্ষেত্রে উন্নয়ন প্রকল্পে যোগদানের তারিখ হইতে তিনি পূর্ব পদে (রাজস্ব খাতভুক্ত পদে) প্রত্যাবর্তনের যোগ্যতা হারাইবেন। অর্থাৎ উন্নয়ন প্রকল্পে যোগদানের তারিখ হইতে তিনি উন্নয়ন প্রকল্পের কর্মকর্তা/কর্মচারী হিসাবে গণ্য হইবেন।

২। সকল প্রশাসনিক মন্ত্রণালয়/বিভাগকে তাহার নিয়ন্ত্রণাধীন সকল অফিস/প্রশিক্ষণ প্রতিষ্ঠানে বিষয়টি অবহতি করিয়া কার্যকরী পদক্ষেপ গ্রহণ নিশ্চিত করিবার জন্য অনুরোধ করা হইল।

৩। ইহাতে অর্থ মন্ত্রণালয়ের সম্মতি রহিয়াছে।

(মোঃ হাসিনুর রহমান)
সচিব
সংস্হাপন মন্ত্রণালয়"

26. Thereafter, Ministry of Establishment on 17.04.2000 issued an office memorandum with the subject heading, "সমাপ্ত উন্নয়ন প্রকল্পের পর রাজস্ব বাজেটে **স্থানান্তরের প্রস্তাব** সংগঠন ও ব্যবস্হাপনা অনুবিভাগে প্রেরণ|" The contents of the said office memorandum run as follows:

" গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
সংস্থাপন মন্ত্রণালয়
সংগঠন ও ব্যবস্হাপনা অনুবিভাগ

টিম-৪(২)
অফিস স্মারক
নং-সম/সও ব্য/টিম-৪(২)উঃ প্রঃনিঃ-৪৭/৯৭-৬১, তারিখঃ ৪বৈশাখ ১৪০৭, ১৭ এপ্রিল ২০০০।
বিষয়ঃ সমাপ্ত উন্নয়ন প্রকল্পের পর রাজস্ব বাজেটে স্হানান্তরের প্রস্তাব সংগঠন ও ব্যবস্হাপনা অনুবিভাগে প্রেরণ ।

মন্ত্রণালয়/বিভাগ ও তদধীনস্থ সংস্থা সমূহের পমাপ্ত উন্নয়ন পকল্পের পদ, যানবাহন, অফিস সরঞ্জামাদি রাজস্ব বাজেটে স্থানান্তরের প্রস্তাবে প্রাথমিকভাবে সংস্থাপন মন্ত্রণালয়ের সংগঠন ও ব্যবস্থাপনা অনুবভিাগে েএবং অর্থ মন্ত্রণালয়ের অর্থ বিভাগের সম্মতির প্রয়োজন হয়। প্রকল্প সমাপ্তির পর প্রস্তাব প্রেরণ করা হলে এ ধরনের জনবলের বেতন ভাতাদি প্রদানসহ অন্যান্য নানাবিধ জটিলতা দেখা দেয় বলে প্রকল্প সমাপ্তির অন্তত ছয় মাসে পূর্বে অনুরূপ প্রস্তাব সংস্থাপন মন্ত্রণালয়ে প্রেরণ করার নির্দেশ ইতিপূর্বে অরথ বিভাগ থেকে জারি হয়েছে। তা আরো সংশোধন করে সরকার এ মর্মে সিদ্ধান্ত গ্রহণ করেছে যে, রাজস্ব বাজেটে স্থানান্তরযোগ্যে পদের প্রস্তাব প্রকল্প সমাপ্তির অন্তত ছয় মাস পূর্বে যুগপৎভঅবে সংস্থাপন মন্ত্রণালয়ের সওব্য অনুবিভাগ এবং অর্থ বিভাগের উন্নয়ন অনুবিভাগের প্রেরণ করতে হবে। শিক্ষা ও স্বাস্থ্য প্রতিষ্ঠান সম্পর্কিত প্রকল্পের ক্ষেত্রে প্রকল্প সমপাপ্তির অনধিক এক বৎসর কিংবা অন্তত ছয় মাস পূর্বে প্রস্তাব পাঠাতে হবে। প্রস্তাবে রাজস্ব বাজেটে স্থান্তরযোগ্য জনবলের যৌক্তিকতা, ন্যূনতম জনবলের সংখ্যা এবং প্রস্তাবিত সাংগঠিনিক সম্পর্কে একটি বিশেষধর্মী স্বয়ংসম্পূর্ণ সসার সংক্ষেপ থাকতে হবে।

২। উল্লেখ্য যে, বর্তমানে উল্লিখিত প্রস্তাব সংস্থাপন মন্ত্রণালয়ে প্রেরণের সময় এ মন্ত্রণালয়ের ১- ২- ১৯৮৭ তারিখের সম/সওব্য(সমন্বয়)- ১১/৮৭- ৮৫(২৩৩)সংখ্যক স্বানক মারফত প্রণীত ছকটি অনুসরণ করতে হয়। এ ছকটি আংশিক সংশোদনের প্রয়োজন অনুভূত হওয়ায় একটি সংশেঅ:ধিত ছক প্রণয়ন করা হয়েছে। সংশোধিত ছক সংলগ্নী 'ক'রূপে সংযোজন করা হল।

৩। এখন থেকে প্রথম অনুচ্ছেদে বর্ণিত সার- সংক্ষেপসহ সংলগ্ন- ছক(ছকের পরিশিষ্ট বর্ণিত সকল তালিকাসহ) পূরণপূর্বক উল্লিখিত প্রস্তাব সংস্থাপন মন্ত্রণালয়ে প্রেরণের জন্য অনুরোধ করা হল।

যথাযথভাবে প্রেরিত প্রস্তাবের উপর সংস্থাপন মন্ত্রণালয়ের মতামত প্রস্তাব প্রাপ্তির এক মাসের মধ্যে প্রদনা করা হবে।

(মুহম্মাদ হুমায়ুন কবির)
উপ-সচিব"

27. On 03.05.2003, Cabinet Division issued a Government Order providing principle and procedure regarding creation of temporary post in revenue budget, transfer of the officers and employees from the development project to revenue budget, reservation of post and/or making the same permanent. The contents of the said order run as follows:

" গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
মন্ত্রিপরিষদ বিভাগ
কমিটি বিষয়ক শাখা।

নং-মপবি/কঃবিঃশাঃ/কপগ-১১/২০০১-১১১, তারিখঃ০৩-০৫-২০০৩ খ্রিষ্টাব্দ/২০-০১-১৪১০ বঙ্গাব্দ

সরকারি আদেশ

সরকার সিদ্ধান্ত গ্রহণ করেছে যে, রাজস্ব খাতে অস্থায়ীভাবে পদ সৃষ্টি, উন্নয়ন প্রকল্প থেকে রাজস্বখাতে পদ স্থানান্তর, পদ সংরক্ষণ, পদ স্থায়ীকারণ ইত্যাদি বিষয়ে মনম্নরূপ নীতি ও পদ্ধতি অনুসৃত হবেঃ

(১) বিভিন্ন মন্ত্রণালয়/বিভাগ/অধিদপ্তর /পরিদপ্তর/স্বয়ত্তশাসিত সংস্থা/অধীনস্থ অফিসসমূহে রাজস্ব খাতে পদ স্থানান্তরের জন্য প্রশাসনিক মন্ত্রণলয়ের প্রস্তাব সংস্থাপন মন্ত্রণালয ও অর্থ বিভাগ কর্তৃক অনুমোদ;নের পর ৩ (তিন) বছঠর র্প্যন্ত বছর ভিত্তিক পদ সংরক্ষণের ক্ষমতা নিম্নলিখিত শর্তে প্রশাসনিক মন্ত্রণালয়কে দেয়া হলঃ

(ক) প্রত বছর পদ সংরক্ষণের ক্ষেত্রে প্রশঅসনিক মন্ত্রণালয় সংরক্ষণের যৌক্তিকতা যথাযথভঅবে যাচাই করবে;

(খ) প্রশাসনিক মন্ত্রণালয় কোন পদের পদনাম ও বেতনস্কলে পরিবর্তন করতে পারবে না। পদগনাম ও বেতনস্কেল পরিবর্তন করনতে হলে সংস্থঅপন মন্ত্রণালয় ও অর্থ বিভাগরে সম্মতি গ্রহণ করতে হবে;

(গ) কোন পদ এক নাগাড়ে ০২(দুই) বছর শূন্য থাকলে সংস্থঅপন মন্ত্রণালয় ও অর্থ বিভাগের অনুমোদন ছাড়া সংরক্ষণ করা যাবে না;

(ঘ)প্রশঅসনিক মন্ত্রণালয় কর্তৃক জারীকৃত পদ সংরক্ষণের জি,ও এর কপি, সংস্থাপন মন্ত্রণালয় ও অর্থবিভাগে প্রেরণ করতে হবে;

(ঙ) উন্নয়ন প্রকল্পের পদ রাজস্ব বাজেটে স্থানারন্তরের সময় কোনো শর্ত আরোজিত হয়ে থাকলে প্রশাসনিক মন্তদ্রণালয়কেত তা পালন করতে হবে।

(২) এই নীতিমালা বাস্তবায়নের পূর্বে অস্তঅয়ীভাবে সৃজনকৃত পদসমূহের মধ্যে যে সকল পদের মেয়াদ ৩(তিন) বছর পূর্ণ হয়নি, সে সকল পদ প্রশাসনিক মন্ত্রণায় (১) উপঅনুচ্ছেদে বর্ণিত শর্ত অনুসরণপূর্বক তিন বছর পর্যন্ত বছরভিত্তিক সংরক্ষণ করতে পারবে।

এই নীতিমালা বাস্তবায়নের পর কোন কারণে অস্থায়ীভাবে সৃষ্ট পদ তিন বছরের মধ্যে স্থায়ী করা সম্ভব না হলেও, সংস্থাপন মন্ত্রণালয় ও অর্থ বিভাগের সম্মতিক্রমে প্রশাসনিক মন্ত্রুণালয পরবর্তী বছরের জন্য উক্ত পদসমূহ সংরক্ষণ করতে পারবে।

(৪) অধিদপ্তর/পরিদপ্তর/স্বায়ত্বশাসিত সংস্থার ন্যায় মন্ত্রণালয়/বিভগের অস্থায়ী পদও সংশ্লিষ্ট মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মাননীয় মন্ত্রীর সম্মতি নিয়ে সংরক্ষণ করা যাবে।

(মোঃ মোসলেহ উদ্দিন)
সচিব''

28. On 24th December 2008, the Ministry of Establishment issued another circular with the subject heading, " উন্নয়ন প্রকল্প সমাপ্তির পর অত্যাবশ্যকীয় পদ রাজস্ব বাজেটে স্হানান্তর" The contents of the circular dated 24.12.2008 run as follows:

" গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
সংস্থাপন মন্ত্রণালয়
স ও ব্য-১(৪)অধিশাখা।

পরিপত্র

নং-সম(সও ব্য-৪)-১প-১/২০০৮-২৫৫ তারিখঃ ১০পৌষ, ১৪১৫/২৪ ডিসেম্বর,২০০৮।

বিষয়ঃ **উন্নয়ন প্রকল্প সমাপ্তির পর অত্যাবশ্যকীয় পদ রাজস্ব বাজেটে স্হানান্তর।**

সরকার সিদ্ধান্ত গ্রহণ করেছে যে, উন্নয়ন প্রকল্পের মাধ্যমে গৃহীত কর্মসূচী প্রকল্প সমাপ্তির পর পরিচালনার জন্য রাজস্ব বাজেটে পদ সৃজন ও স্থানান্তরের বিষয়ে নিম্নরূপ বিধান অনুসৃত হবেঃ

১।এখন থেকে যে সকল উন্নয়ন প্রকল্প অনুমোদিত হবে তাতে প্রকল্প চলাকালীন পদের চাহিদার পাশাপাশি প্রকল্প সমাপ্তির পর ***সংশ্লিষ্ট প্রতিষ্ঠানের বিদ্যমান পদের অতিরিক্ত যেসব পদ অপরিহার্য বলে গণ্য হবে,*** সে সকল পদের চাহিদাও একই পদ্ধতিতে পর্যোলাচনা কের উন্নয়ন প্রকল্প ছক (উচচ) - এ অন্তভূক্ত করতে হবে অতঃপর (উচ্চ) - তে অন্তভূক্ত ***রাজস্বখাতে স্থানান্তরযোগ্য অপরিহার্য পদের ক্ষেত্রে বিধি মোতাবেক সংস্থাপন মন্ত্রণালয়ের সম্মতি গ্রহণ রেতে হবে।*** মন্ত্রিপরিষদ বিভাগের ২২-০১-২০০৩ খ্রি. তারিখের মপবি/কঃবিঃশাঃ/মক-০১/২০০৩/২৮ নংপ্রজ্ঞাপন মূলেগঠিত উননয়ন প্রকল্পের পদ/জনবল নির্ধারণ সংক্রান্ত কমিটি পুঙ্খানুপুঙ্খ পরীক্ষা-নিরীক্ষা করার মাধ্যমে প্রকল্প চলাকালীন ও সমাপ্তির পর রাজস্ব খাতের অপরিহার্য উভয় প্রকার পদের শ্রেণী ও সংখ্যা নির্দরেণের সুপারিশ প্রদান করে।

২। প্রকল্প ***সমাপ্তির সাথে সাথে রাজস্বাখাতে স্থানান্তরযোগ্য অপরিহার্য পদ স্বয়ংক্রিয়ভাবে অস্থায়ীভিত্তিতে রাজস্ব বাজেটে স্থানান্তরিত হবে।*** সংশ্লিষ্ট প্রশাসনিক মন্ত্রণালয় সংস্থাপন মন্ত্রণালয় ও অর্থ বিভাগকে অবহিত রেখে রাজস্ব বাজেটে পদ স্থানান্তরের আদেশ/প্রজ্ঞাপন জারী করবে। এক্ষেত্রে সংস্থাপন ও অর্থ মন্ত্রণালয়ের পুনরায় সম্মতি গ্রহণের প্রয়োজন হবে না।

৩। প্রকল্পের মাধ্যমে গৃহীত কোনো কর্মসূচী দ্বারা উপজেলা, জেলা ও বিভাগীয় পর্যায়ে কোন দপ্তর, থানা ও তদন্ত কেন্দ্র স্থাপন এবং পদ সৃজন করা হলে সে ক্ষেত্রে প্রশাসনিক উন্নয় সংক্রান্ত সচিব কমিটির সুপারিশও নিকার এর পূর্ব অনুমোদন গ্রহণ করতে হবে।

৪। ***উন্নয়ন প্রকল্প সমাপ্তির পর রাজস্বখাতে স্থানান্তরিত পদে নিয়োগ বিধি ও বিদ্যমান বিধি-বিদান অনুরনণ করে জনবল নিয়োগ করতে হবে।*** তবে প্রকল্প সমাপ্তির পূর্বে নিয়োগ প্রক্রিয়া শুরু করা যেতে পারে। এছাড়াও প্রচলিত বিধি-বিধান ও পদ্দতি অনুসরন করে রাজস্বখাতে স্তানান্তরিত পদগুলো সংরক্ষণ ও স্থায়ীকরণের ব্যবস্থা গ্রহণ করতে হবে। স্থায়ীকরণ প্রক্রিয়া সম্পন্ন হওয়ার পর সরকারি আদেগশসমূহের কপিসহ টিও এন্ডই সংশোধনের প্রস্তাব সংস্থাপন মন্ত্রনালয়ে প্রেরণ করতে হবে।

৫। উন্নয়ন প্রকল্প বাস্তবায়নের জন্য জনবল নিয়োগের ক্ষেত্রে অর্র্থ মন্ত্রণালয়ে অর্থ বিভাগ কর্তৃক ২২-০৫-২০০৮ খ্রিঃ তারিখের অম/অবি/বা-১২/বিবিধ-৬৫/০৭(অংশ)/১০৪০ নং স্মরমে জারীকৃত পরিপত্র অনুসরণ করতে হবে।

৬। এ পরিপত্র জনস্বার্থে জারী করা হলো এবং তা ০১ জানুয়ারী, ২০০৯ খ্রিঃ হতে কার্যকর হবে।

(মোঃ মোসলেহ উদ্দিন)
সচিব''

29. On 15.04.2010, the Ministry of Establishment issued another circular regarding transfer of the officers and employees of the completed development project in revenue budget with the subject heading, "উন্নয়ন প্রকল্প সমাপ্তির পর অত্যাবশ্যকীয় /অপরিহার্য পদ রাজস্ব বাজেটে স্হানান্তর।" The contents of the said circular run as follows:

" গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

সংস্থাপন মন্ত্রণালয়
স ও ব্য শাখা-১

পরিপত্র

নং-০৫.১৬১.০১৫.০০.০০.০০৭.২০০৯-৭৮(ক) তারিখঃ ০২ বৈশাখ ১৪১৭
১৫ এপ্রিল ২০১০

বিষয়ঃ **উন্নয়ন প্রকল্প সমাপ্তির পর অত্যাবশ্যকীয়/অপরিহার্য পদ রাজস্ব বাজেটে স্হানান্তর।**

সংস্থাপন মন্ত্রণালয়ের ২৪-১২-২০০৮ তারিখের স্মারক নং সম(সও ব্য-৪)-১প-১/২০০৮-২৫৫ মূলে জারীকৃত পরিপত্রে উল্লেখ করা হয়েছিল যে, ০১ জানুয়ারী ২০০৯ হতে যে সকল উন্নয়ন প্রকল্প সংশ্লিষ্ট কর্তৃপক্ষ কর্তৃক অনুমোদিত হবে তাতে প্রকল্প চলাকালীন প্রয়োজনীয় পদের পাশাপাশি প্রকল্প সমাপ্তির পর সংশ্লিষ্ট প্রতিষ্ঠানের বিদ্যমান পদের অতিরিক্ত যে সব পদ অপরিহার্য বলে গণ্য হবে, সে সকল পদের চাহিদাও একই পদ্ধতিতে পর্যালোচনা করে উন্নয়ন প্রকল্প ছক (উচচ)-এ অন্তর্ভূক্ত করতে হবে। অতঃপর উচচ -তে উক্তরুপে অন্তর্ভূক্ত অত্যাবশ্যকীয়/অপরিহার্য পদসমূহ রাজস্বখাতে স্হানান্তরের ক্ষেত্রে বিধি মোতাবেক সংস্হাপন মন্ত্রণালয়ের সম্মতি গ্রহণ করতে হবে।

২। কিন্তু উক্ত পরিপত্রটি জারীর পর উন্নয়ন প্রকল্প প্রণয়ন ও অনুমোদনের ক্ষেত্রে পরিপত্রটির বিধি-বিধান যথাযথভাবে অনুসৃত না হওয়ায় উক্ত পরিপত্রের নির্দেশনামতে রাজস্বখাতে স্হানান্তরযোগ্য অপরিহার্য পদের চাহিদা উচচ -তে অন্তর্ভূক্ত করে রাজস্বখাতে স্হানান্তরযোগ্য অপরিহার্য পদসমূহ রাজস্বখাতে স্হানান্তরের নিমিত্ত কোন প্রস্তাব অদ্যাবধি সংস্হাপন মন্ত্রণালয়ে পাওয়া যায়নি। উন্নয়ন প্রকল্পের মেয়াদ শেষে অত্যাবশ্যকীয়/অপরিহার্য পদসমূহ যথাসময়ে এবং যথাযথ উপায়ে উচচ -তে অন্তর্ভূক্ত না করা হলে অপরিহার্য পদসমূহ রাজস্বখাতে স্হানান্তরের ক্ষেত্রে ভবিষ্যতে জটিলতা সৃষ্টি হতে পারে।

৩। উপরোক্ত অবস্হায় পরিপ্রেক্ষিতে সরকার কর্তৃক সিদ্ধান্ত গ্রহণ করা হয়েছে যে, ভবিষ্যৎ জটিলতা পরিহারের লক্ষ্যে সংস্হাপন মন্ত্রণালয়ের ২৪-১২-২০০৮ তারিখের ২৫৫ নং স্মারকে জারীকৃত পরিপত্রের নির্দেশনাগুলো আগামী ০১ জুলাই ২০১০ হতে বাধ্যতামূলকভাবে অনুসরণ করতে হবে।

৪।মন্ত্রিপরিষদ বিভাগের ২২-০১-২০০৩ তারিখের স্মারক নং মপবি/কঃবিঃশাঃ/মক-০১/২০০০/২৮ এর আলোকে গঠিত উন্নয়ন প্রকল্পের পদ/জনবল নির্ধারণ সংক্রান্ত কমিটি সরকারের উক্তরুপ নির্দেশনা বাস্তবায়ন নিশ্চিত করবে।

৫।অর্থবিভাগ ও পরিকল্পনা বিভাগ ভবিষ্যতে গৃহীত উন্নয়ন প্রকল্পের অত্যাবশ্যকীয়/অপরিহার্য পদসমূহ উচচ-তে অন্তর্ভূক্তির বিষয়ে আগামী ১ জুলাই ২০১০ হতে বাধ্যতামূলকভাবে অনুসরণের ক্ষেতের প্রয়োজনীয় পদক্ষেপ গ্রহণ করবে।"

30. Except the aforesaid Government memorandum, circulars or orders, we do not find any specific statutory provision to transfer/absorb the officers or employees of the development project to revenue set up. However, in the circular dated 24.08.2008 it has been specifically mentioned that after completion of the development project, appointment should be given in the transferred revenue set up following the related service Rules. As the Government has got a right to issue executive instructions in the spheres which are not covered by the Rules, any administrative instructions issued are supposed to be followed. It is to be remembered that the executive power could be exercised only to fill up the gaps but the instructions cannot and should not supplant the law, but only supplement the law. No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Broadly speaking, those administrative orders, circulars or instructions do not have any statutory force and those do not give rise to any legal right in favour of the party aggrieved and cannot be enforced in a court of law against the Government.

31. On 2nd May, 1995, the Government framed a "Bidhimala" in the name of, "উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্ড়রিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতানির্ধারণ বিধিমালা, 1995". In the said Rule "উন্নয়ন প্রকল্প" has been defined in Rule 2(Ka) as under:

''২(ক) 'উন্নয়ন প্রকল্প' অর্থ উন্নয়ন বাজেট বা খাতভূক্ত যে সকল প্রকল্প ১৯৮৩ সনের মে মাসের ১৩ তারিখ বা ***তৎপরবর্তীকালে রাজস্ব বাজেটে স্থানান্তরিত হইয়াছে বা হইবে ঐ সকল উন্নয়ন প্রকল্প;***

32. In Rules 2(Ga) the employees of the project has been defined as under:

"২(গ) 'প্রকল্পের কর্মচারী' অর্থ ১৯৭২ সনের এপ্রিল মাসের ৯ তারিখ হইতে এই বিধিমালা জাররি তারিখ পর্যন্ত (উভয় তারিখ অন্তভূক্ত) সময়সীমার মধ্যে উন্নয়ন প্রকল্পের কোন পদে নিযুক্ত এবং ১৯৮৩ সনের মে মাসের ৩ তারিখ বা ***তৎপরবর্তীকালে রাজস্ব বাজেটে স্থানান্তরিত কোন পদে সাময়িকভাবে পদস্থ কর্মকর্তা বা কর্মচারী; "***

33. On 20th June, 2005, the Government framed another identical Rule in the name of "উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে **স্থানান্তরিত** পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতানির্ধারণ বিধিমালা, ২০০৫". In the said Rule, the word, "উন্নয়ন প্রকল্প" has been defined as under:

২(ক) "উন্নয়ন প্রকল্প" অর্থ ৯ এপ্রিল, ১৯৭২ ইং হইতে ৩০ জুন, ১৯৯৭ইং তারিখ পর্যন্ড় সময়ের মধ্যে হওয়া সরকার অনুমোদিত, উন্নয়ন বাজেটভুক্ত প্রকল্পসমূহ, Definition of development project in Rule 1995 and Rule 2005 are quite different.

34. The words "উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারী" রহ বিধিমালা, ২০০৫ has been defined as under:

"২(গ) "উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারী" অর্থ **১৯৭২ সনের এপ্রিল মাসের ৯ তারিখ হইতে ৩০শে জুন, ১৯৯৭ ইং তারিখের মধ্যে শুরু হওয়া উন্নয়ন প্রকল্পের কোন পদে স্কেলভিত্তিতে নিযুক্ত কর্মচারী এবং ১৯৮৩ সনের মে মাসের ১৩ তারিখ বা তৎপরবর্তীকালে রাজস্ব বাজেটের কোন পদে সামায়িকভাবে পদস্হ কর্মকর্তা বা কর্মচারী; "**

35. The word "নিয়মিতকরণ" has been defined as under:

২(চ)"নিয়মিতকরণ" অর্থ রাজস্ব বাজেটের পদে সাময়িকভাবে পদস্হ কোন কর্মকর্তা কর্মচারীকে নিয়োগকারী কর্তৃপক্ষ কর্তৃক নিয়মিতকরণ;

36. Rule 3 of the said Rules provides non-obstante clause. The contents of which run as follows:

" ৩। **বিধিমালার প্রাধান্য** - আপাততঃ বলবৎ অন্য কোন বিধিমালা, আদেশ বা নির্দেশে যাহা কিছুই থাকুক না কেন, উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারীদের ক্ষেত্রে এই বিধিমালার বিধানাবলী কার্যকর হইবে। "

37. Rule 4 of the said Rules provides the process of regularization of the officers and employees in the revenue budget from development project.

''৪। ***রাজস্ব বাজেটে নিয়মিতকরণ পদ্ধতিঃ- (১)*** উন্নয়ন প্রকল্পের কোন কর্মকর্তা ও কর্মচারীকে নিম্নবর্মিত শর্তে নিয়মিতকরণ করা যাইবে, যথাঃ-

(ক) রাজস্ব বাজেটের কোন পদে সাময়িকভাবে পদস্থ কোন কর্মকর্তা ও কর্মচারীর সংশ্লিষ্ট ***প্রকল্পে নিয়োগ করকারের প্রচলিত নিয়োগবিধি বা নিয়োগ পদ্ধতি বা সংশ্লিষ্ট প্রকল্পের জন্য সরকার কর্তৃক অনুমোদিত নিয়োগবিধি অনুসরণ হইতে হইবে; এবং***

(খ) উক্ত কর্মকর্তা বা কর্মচারীর রাজস্ব বাজেটের ***পদে নিয়মিতকরণের পূর্বের চাকুরীর ধারাবাহিকতা থাকিতে হইবে; এবং***

(গ) উক্ত কর্মকর্তা বা কর্মচারীর রাজস্ব বাজেটের পদে নিয়মিতকরণের পূর্বের চাকুরীর সন্তোষজনক হইতে হইবে।

(২) রাজস্ব বাজেটের পদে সাময়িকভাবে পদস্থ কোন কর্মকর্তা বা কর্মচারী অবসর প্রস্তুতিকালীন ছুটি ভোগরত থাকিলে অথবা অবসর গ্রহণের বয়স উত্তীর্ণ হইলে অথবা মৃত্যুবরণ করিলে তাহাকে ভূতাপেক্ষভাবে ক্ষেত্রমত, অবসর প্রস্তুতিকালীন ছূটি বা বয়স উত্তীর্ণ বা মৃত্যুবরণের তারিখের পূর্ব তারিখে কার্যকারিতা প্রদান করিয়া নিয়মি,ত করা যাইবে।

তবে শর্ত থাকে যে, এইরুপ ক্ষেত্রে সংশ্লিষ্ট ব্যক্তি ছুটিতে যাইবার বা বয়স উত্তীর্ন হইবার বা মৃত্যুবরণের পূর্বের চাকুরী সন্তোষজনক হইতে হইবে।

৩) কর্মকমিশনের আওতাভুক্ত কোন পদে কমিশনের সুপারিশক্রমে এবং কমিশনের আওতা বহির্ভুক্ত কোন পদে বিভাগীয় পদোন্নতি বা বাছাই কমিটির সুপারিশক্রমে নিয়মিত করিতে হইবে।

38. On the same day, that is, on 20.06.2005 another Rule was framed in the name of, "সমাপ্ত উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটের পদে নিয়োগের ক্ষেত্রে বয়স শিথিলকরণ বিধিমালা, ২০০৫"

39. In the said Rule, the word ''**উন্নয়ন প্রকল্প**'' has been defined as under:

"২(ক) "উন্নয়ন প্রকল্প" অর্থ ১ জুলাই , ১৯৯৭ইং তারিখ হইতে শুরু হওয়া উন্নয়ন বাজেটভুক্ত সরকার কর্তৃক অনুমোদিত সমাপ্ত প্রকল্পসমূহ;"

40. The word ''**উন্নয়ন** প্রকল্পের কর্মকর্তা ও কর্মচারী" has been defined as under:

২(খ) "উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারী" অর্থ উন্নয়ন প্রকল্পের কোন পদে নিয়োগপ্রাপ্ত হইয়া উক্ত প্রকল্পের সামাপ্তির তারিখ পর্যন্ত সাকুল্য বেতনে চাকুরীরত ছিলেন এইরুপ কর্মকর্তা বা কর্মচারী; "

41. Rule 3 provides the non-obstante clause which is as under:

"৩। **বিধিমালার প্রাধান্যঃ-** আপাততঃ বলবৎ অন্য কোন বিধিমালা, আদেশ বা নির্দেশ যাহা কিছুই থাকুক না কেন, এই বিধিমালার বিধানবলী প্রাধান্য পাইবে।"

42. Rule 4 provides the provision of "বয়স শিথিলকরণ পদ্ধতি।" যিরপয ৎঁহং ধং ভড়ষষড়ৎিঃ

"৪। বয়স শিথিলকরণ পদ্ধতিঃ- (১) যে ক্ষেত্রে রাজস্ব বাজেটের কোন শূন্য পদে উন্মুক্ত প্রতিযোগিতার মাধ্যমে সরাসরি নিয়োগের জন্য সংশি-ষ্ট পদের নিয়োগ বিধি ও পদ্ধতি অনুযায়ী কর্তৃপক্ষ বা ক্ষেত্রমত, কমিশন কর্তৃক বিজ্ঞপ্তি প্রচার করিয়া দরখাস্ত আহবান করা হয় সেইক্ষেত্রে উক্ত বিধি বা পদ্ধতিতে প্রার্থীর বয়ঃসীমার বিষয়ে যাহা কিছুই থাকুক না কেন, বহিরাগত প্রার্থীদের সহিত উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারীগণের ও দরখাস্ড় দাখিল করিবার অধিকার থাকিবে।

(২)উপ-বিধি(১) এর অধীন রাজস্ব বাজেটের কোন পদে নিয়োগ লাভের জন্য প্রার্থী হইবার ক্ষেত্রে উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারীগণের বয়সসীমা শিথিল করা হইয়াছে বলিয়া গণ্য হইবে।

(৩) এই বিধির অধীন প্রদত্ত বয়ঃসীমা শিথিলের সুযোগ গ্রহণ করিয়া চাকুরীপ্রাপ্ত হইলে সেইক্ষেত্রে সংশ্লিষ্ট কর্মকর্তা বা কর্মচারীর নিয়োগ নবনিয়োগ বলিয়া গণ্য হইবে।"

43. It is clear from those "Bidhimalas" dated 02.05.1995 and 20.06.2005 that before regularization of the service of the officers and employees absorbed in the revenue budget from development project, the provisions of regularization as provided in those Bidhimalas, whichever is applicable, should be followed.

44. The question arises for consideration is as to whether the writ petitioner-respondents could lay a valid claim of absorption and, thereafter, regularization of their services in the revenue set up.

45. Creation and sanction of post is a prerogative of the executive or legislative authority and the Court cannot arrogate to itself this purely executive or legislative function. The creation and abolition of post, formation and criteria structure/re-structure of cadre, prescribing the source and mode of recruitment and qualification and criteria of selection, etc. are matters which fall within the exclusive domain of the employer. Although the decision of the employer to create or abolish post or cadre or to prescribe the source or mode of recruitment and lying down the qualification etc. is not immune from judicial review. The Court ought to be always extremely cautious and circumspect in tinkering with the exercise

of discretion by the employer. The power of judicial review can be exercised in such matter only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or malafide.

46. When a person enters into a temporary employment or gets engagement on a contractual basis or as casual employees and the engagement is not based on a proper selection as recognized by the relevant rules and procedures, he is well aware of the consequence of the appointment being temporary, casual or contractual in nature. It is recognized that no Government order, notification or circular can overide the statutory rules framed under the authority of law. During the course of argument various orders of the Courts both interim and final were brought to our notice. The purport of these orders more or less was the issue of direction for continuation or absorption/regularization/confirmation without referring to the legal position. It is settled provision of law that all appointment shall be made in accordance with the recruitment Rules. From the judgment it appears to us that the High Court Division failed to differentiate between absorption and regularization. It is necessary to keep in mind that there is distinction between absorption, regularization and confirmation of service in the service jurisprudence. The Government is bound to follow the law and have the selection of the candidates made as per recruitment Rules and the appointment shall be made accordingly. The Government is also controlled by the economic consideration. The viability of the department or the instrumentality of the Project is also of equal concern for the Government. The Government works out the scheme taking into consideration the financial implication and economic aspect of the matter. The Court ought not to impose a financial burden on the Government by making such type of direction. The Government is the better judge of the interests of the general public for whose service is necessary for its set up.

47. The High Court Division in some cases directed the Government or its instrumentalities to absorb/regularise the writ petitioners even though no vacancies were available for them. Such directions, in fact, amount to directions for creating vacancies and to give new appointment ignoring the Public Service Commission and also ignoring the Rules framed for the appointment of Gazetted Officers or Non-Gazzetted Officers, whichever is applicable. It would not be unusual to term such type of appointment, as “back door appointment” bypassing the Public Service Commission and ignoring the law. The appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law.

48. In the case of State of Karnataka Vs. Umadevi , reported in (2006) 4 SCC page 1 the Constitution Bench of the Supreme Court of India considered such question and observed that a class of employment which can only be called “litigious employment” has risen like a phoenix seriously impairing the constitutional scheme. It was further observed that the Court has also on occasions issued directions which could not be said to be consistent with the constitutional scheme of public employment. Such directions are issued presumbly on the basis of equitable considerations or individualisation of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of the country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any Court of law or justice, is to adhere to the law as laid down by the Constitution and not make directions, which at times, even if they do not run counter to the constitutional scheme, certainly tend to

water down the constitutional requirements. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subject to constitutional limitations and cannot be exercised arbitrarily.

49. It was further observed:

> "With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent-the distinction between regularisation and making permanent, was not emphasized here-can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete."

50. We shall now advert to the question whether the respondents can invoke the doctrine of promissory estoppel or legitimate expectation for supporting their claim. This part of the respondents' claim is founded in the assertion made in the Development Project Proposal (PP) wherein it has been mentioned:

13.After completion, whether the project needs to be transferred to the revenue budget.	Yes After completion of the project with assets and manpower **<u>should</u>** be transferred to revenue budget.

51. Mr. Mahmud in his submission mostly relied upon such specific assertion in the PP and submitted that in view of such specific assertion the respondents legitimately expected that their service would be transferred to the revenue budget. He added that, in fact, it was the written promise of the appointing authority and the same was duly approved by the Government.

52. The word "should" has been used in the P.P. So, it cannot be treated as promise as the word "shall" has not been used in the P.P. Moreover, P.P. is an internal document of a Project. The terms and conditions of the appointment of the writ petitioners shall be governmed by their respective advertisement for appointment in the Project, their appointment letters and respective contract. The question is, whether the rule of promissory estoppel or doctrine of legitimate expectation could be invoked in the particular facts and circumstances of the matter.

53. The basic principle is that the plea of estoppel cannot be raised to defeat the provisions of statute. The rule of promissory estoppel cannot be invoked for the enforcement of a promise which is contrary to law or outside the authority of the persons making the promise. Such principle cannot be used or invoked to compel the Government or public authority to act contrary to law or against a statute. There is no estoppel against law and at any rate the abstention of the Government in absorving the writ petitioners in the revenue budget does not attract the law of estoppel. The Court will refuse to invoke the principles of promissory estoppel/equitable estoppel since there are specific laws providing the procedures of appointment in the posts for which the writ petitioners were seeking absorption. Such doctrine cannot be allowed to operate so as to override the clear words of statute.

54. Mr. Mahmud submits that the writ petitioners legitimately expected that their service would have been absorbed in view of the expressed assurance.

> "Legitimate expectations" are those expectations which travel beyond enforceable legal rights provided they have some reasonable basis.
>
> In Halsbury's laws of England (Fourth Edition), the doctrine of legitimate expectation has been described in the following words :
> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice."

55. In Union of India and others vs. Hindustan Development Corporation and others reported in (1993)4SCC 433 Supreme Court of India considered the doctrine of legitimate expectation and held :

> "For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

56. In Punjab Communications Ltd. vs. Union of India reported in (1994) 4SCC 727 the Indian Supreme Court observed as under :

> "The principle of `legitimate expectation' is still at a stage of evolution. The principle is at the root of the rule of law and requires regularity, predictability and certainty in the Government's dealings with the public. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. ...

57. However, the more important aspect is whether the decision-maker can sustain the change in policy by resort to Wednesbury principles of rationality or whether the court can go into the question whether the decision-maker has properly balanced the legitimate expectation as against the need for a change. ... In sum, this means that the judgment whether public interest overrides the substantive legitimate expectation of individuals will be for the decision-maker who has made the change in the policy. The choice of the policy is for the decision-maker and not for the court. The legitimate substantive expectation merely permits the court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made."

58. In Dr. Chanchal Goyal (Mrs.) vs. State of Rajasthan [2003 (3) SCC 485], the appellants claim for absorption in the regular cadre/regularization of service was rejected by the High Court. While approving the orders the Supreme Court of India observed :

> "On the facts of the case delineated above, the principle of legitimate expectation has no application. It has not been shown as to how any act was done by the authorities

which created an impression that the conditions attached in the original appointment order were waived. Mere continuance does not imply such waiver. No legitimate expectation can be founded on such unfounded impressions. It was not even indicated as to who, if any, and with what authority created such impression. No waiver which would be against requisite compliances can be countenanced. Whether an expectation exists is, self-evidently, a question of fact. Clear statutory words override any expectation, however founded."

59. In State of Karnataka vs. Umadevi (supra), the Constitution Bench referred to the claim of the employees based on the doctrine of legitimate expectation and observed as under:

"The doctrine can be invoked if the decisions of the administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

60. In Ram Pravesh Singh vs. State of Bihar [2006 (8) SCC 381], a two-Judges Bench considered the question whether the employees of Futwah Phulwarisharif Gramya Vidyut Sahakari Samiti Ltd., which was a cooperative society, could claim absorption in the services of Bihar State Electricity Board by invoking the doctrine of legitimate expectation. The facts of that case show that the society was brought into existence by the State Government, the Electricity Board and the Rural Electrification Corporation for effective implementation of Rural Electrification Scheme meant for better distribution of electricity to rural areas, but the license of the society was revoked in the year 1995 and the Board refused to absorb the employees of the society. The Single Judge and Division Bench of the High Court declined to interfere with the decision of the Board. Supreme Court of India dismissed the appeal of the employees and observed :

"What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term "established practice" refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by the courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a "legitimate expectation" of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above "fairness in action" but far below "promissory estoppel". It may only entitle an expectant: (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, the courts may grant a direction requiring the authority to follow the promised procedure or established

> practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bona fide reason given by the decision-maker, may be sufficient to negative the "legitimate expectation". The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognised legal relationship with the authority."

61. After noticing the judicial precedents on the subject, the Supreme Court of India held that employees of the erstwhile society cannot invoke the theory of legitimate expectation for compelling the Board to absorb them despite its precarious financial condition.

62. In the case of Union of India V. P.K. Choudhury reported in AIR 2016 SC 966 it has been observed that legitimate expectation as a concept arises out of what may be described as a reasonable expectation of being treated in a certain way by an administrative authority even the person who has such as expectation; no right in law to receive the benefit expected by him. Any such expectation can arise from an express promise or a consistent course of practice or procedure which the person claiming the benefit may reasonbly expect to continue. Expectation may be derived from either-

(1) an express promise or representation;

[Attorney General of Hongkong Ng Yuen shiv (1983)2 Ac 629]

or

(2) A representation implied from established practice based upon the past actions or the settled conduct of the decision makers.

[R.V. Secretary of State for Home Dept. (1987) 1WLR 1482]

63. Before applying the principle the Courts have to be cautious. It depends on the facts and recognized general principles of administrative law applicable to such facts. A person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation, that is, he has locus-standi to make such claim. Such claim has to be determined not according to the claimant's perception but in the public interest.

64. The doctrine of legitimate expectation can neither preclude legislation nor invalidate a statute enacted by the competent legislature. The theory of legitimate expectation cannot defeat or invalidate a legislation which is otherwise valid and constitutional. Legitimate expectations must be consistent with statutory provisions. The doctrine can be invoked only if it is founded on the sanction of law. Clear statutory words override any expectation, however well-founded.

65. It is open to the Government to frame, reframe, change or rechange its policy. If the policy is changed by the Government and the Court do not find the action malafide or otherwise unreasonable, the doctrine of legitimate expectation does not make the decision vulnerable. The choice of policy is for the decision maker and not for the Court. While dealing with public policy in juxtaposition with the doctrine of legitimate expectation, the following observations of Lord Diplock in Hughes v. Department of Health & Security (1985) 2WLR 866 must always be kept in view by a Court of law:

> "Administrative policy may change with changing circumstances, including changes in the political complexion of Governments. The liberty to make such changes is something that is inherent in our constitutional form of government."

66. An expectation, fulfillment of which requires that a decision-maker should take an unlawful decision cannot be said to a legitimate expectation. This is based on the doctrine that can be no estoppel or legitimate expectation against a statute (Wade: Administrative Law, (2005)p.p 376.

67. In the instant case, the employment notification dated 20.03.2011 it was specifically stated, "মৎস্য ও প্রাণীজ সম্পদ মন্ত্রণালয়ের আওতাধীন প্রাণীজ সম্পদ অধিদপ্তরের ২২(বাইশ)টি নির্বাচিত জেলায় ক্ষুদ্র, দুগ্ধ ও মুরগী খামারীদের সহায়ক সেবাদান প্রকল্পের অধীনে নিম্নোক্ত পদে সম্পূর্ণ অস্হায়ী ভিত্তিতে প্রকল্প চলাকালীন সময়ের **চুক্তিভিত্তিক** সাকুল্যে বেতন জনবল নিয়োগের নিমিত্তে প্রকৃত বাংলাদেশের নাগরিকের নিকট হতে দরখাস্ত আহবান করা যাচ্ছে। In the appointment letter it was categorically stated,

ক। এ নিয়োগ সম্পূর্ণ অস্হায়ী ভিত্তিক প্রকল্প চলাকালীন সময়ের জন্য প্রযোজ্য হইবে।

খ। কোনরুপ কারণ দর্শানো ব্যতিরিকে যে কোন সময়ে প্রার্থীর নিয়োগ বাতিল করা যাবে।

চ। **প্রকল্প মেয়াদ শেষে চুক্তিপত্র চাকুরী হতে অব্যাহতি পত্র হিসেবে গণ্য হবে।** Each of the appointees, thereafter, executed an agreement specifically stipulating that, "**প্রকল্প মেয়াদ শেষে এই চুক্তিপত্রই অব্যাহতি পত্র হিসাবে গন্য হবে।**" The conditions of service of officers and employees appointed to the temporary posts of project are to be regulated by the terms of the contract and appointment letter.

68. We have already found that there is specific laws in the names of the Gazetted Officers (Department of Livestock Service) Recruitment Rules, 1984, the Non-Gazetted Employees (Department of Livestock Service) Recruitment Rules, 1985 and the Bangladesh Civil Service, Recruitment Rules, 1981 for the purpose of appointment of the officers in the Department of Livestock Service of the Government. All those laws categorically provide that the Public Service Commission shall recommend the best candidates on holding legally approved rigorous selection process for appointment to be made by President of the Republic. The Public Service Commission is to ensure selection of best available persons for appointment to a post to avoid arbitrariness and nepotism in the matter of appointment. The PSC is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. Whenever the Government is required to make an appointment to a high public office, it is required to consult the PSC.

69. The instant project was launched under the Directorate of Livestock, Ministry of Fisheries and Livestock. Every appointment was given on contract basis and in the respective appointment letter it was categorically stated that after completion of the Project as per terms of the appointment letter and instrument of contract should be treated as the order of release.

70. In the judgment of the High Court Division, we have found that the writ respondents were directed to regularize/absorb the writ petitioners under the revenue budget with continuity of service and other benefits subject to availability of the same/equivalent posts provided that the writ petitioners have requisite qualifications. While drawing such conclusion, the High Court Division relied upon the case of Government of Bangladesh, represented by the Secretary, Ministry of Labour and Manpower and others Vs. Mohammad Anisur Rahman and others reported in 18 MLR(AD)page 372.

71. In the cited case this Division has observed,

> "Having considered the project pro-forma and other materials-on-record, the High Court Division found that the Government made a clear promise and commitment to transfer or absorb the writ petitioners in revenue budget. The High Court Division

took into consideration that the Executive Committee of the National Economic Council (ECNEC) at its meeting dated 31.12.2007 had taken decision to transfer all personnel of the development project to the revenue budget and accordingly, all concerned were directed to take necessary steps to transfer all completed development project to the revenue set up. The High Court Division came to a finding that the conduct and the policy of the Government created legitimate expectation of the writ petitioners and such expectation has now become a vested and indefeasible right to be absorbed and regularized in the revenue budget.

72. What is important to note here is that admittedly, the project started on 01.07.2001 and ended on 30.06.2009. Since the project started after 30.06.1997, the writ petitioners would not be automatically absorbed in the revenue budget. Though they have the legitimate expectation to be absorbed in the revenue budget such expectation can only be implemented subject to availability of the posts in the Bureau of Manpower Employment and Training (BMET)."

73. In the cited case it was further observed,

"In the light of the findings made before, we are inclined to dispose of the leave-petition with the following observations:

(a) The leave petitioners are directed to absorb the writ petitioners-respondents under the revenue budget subject to availability of same/equivalent posts under the Bureau of Manpower Employment and Training provided that they have the requisite qualification.
(b) In the event of non availability of adequate vacant posts to absorb the writ petitioners-respondents, the authority shall not make any recruitment in BMET in future until the writ petitioners are absorbed provided that they have requisite qualification.
(c) The writ petitioners-respondents are entitled to salaries and other benefits only for the period of rendition of their service."

74. In the cited case it is not clear from the employment notification and other materials that whether the statutory provisions provided for selection process and appointment of the officers and employees as well as Government circular with subject heading, "উন্নয়ন প্রকল্প সমাপ্তির পর অত্যাবশ্যকীয় পদ বাজার বাজেটে স্থানান্তর" dated 24.12.2008 were complied with or not.

75. When a person enters a temporary employment or gets engagement as a contractual employee and such engagement is not based on legally approved selection process as recognized by the rules or procedure, he is aware of the consequences of the appointment being temporary or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being regularized in the post when an appointment to the post could be made only by following the legally approved procedure for selection provided in the Rules quoted earlier. Since the recommendation of Public Service Commission is statutory requirement, before regularization of service, such recommendation must be accorded. The plea of legitimate expectation of the employees can not be raised which is contrary to statutory provisions. The legitimate expectation of an incumbent, if there be any, would not override the statutory provision to the contrary even if he continued in a temporary service by several orders of extension. The instant direction was given mainly on the ground of legitimate expectation of the writ petitioners inasmuch as we have already observed that the doctrine of legitimate expectation cannot override the statutory provision. Such doctrine would not have application where the legislature has enacted a statute. The theory cannot be pressed into service if its invocation would defeat or invalidate a legislation enacted by the

legislature. It is not understandable as to how the service of the officers are to be regularized without recommendation of the Public Service Commission ignoring specific statutory provisions. That is, the High Court Division directed to regularize the service of the writ petitioners of this writ petition totally ignoring specific provisions provided in the statute as well as the circular dated 24.12.2008. The constitutional scheme which our country has adopted does not contemplete any back door appointment.

76. We have gone through the "Bidhimalas", 1995 and 2005. Both the "Bidhimalas" were promulgated by the President of the Republic pursuant to the power conferred under article 133 of the Constitution in consultation with the Public Service Commission as per provision of article 140(2) of the Constitution. In wewagvjv, 2005 a non-obstante clause has been provided in Rule-3 stating that- "৩। বিধিমালা প্রাধান্য- আপাততঃ বলবৎ অন্য কোন বিধিমালা, আদেশ বা নির্দেশে যাহা কিছুই থাকুক না কেন উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারীদের ক্ষেত্রে এ বিধিমালার বিধানবলী কার্যকরী হইবে।" ওই বিধিমালা, ২০০৫ ''উন্নয়ন প্রকল্প'' has been defined as ''উন্নয়ন প্রকল্প'' অর্থ ৯ এপ্রিল, ১৯৭২ ইং হইতে ৩০ শে জুন, ১৯৯৭ইং তারিখ পর্যন্ত সময়ের মধ্যে শুরু হওয়া সরকার অনুমোদিত, উন্নয়ন বাজেট প্রকল্পসমূহ। That is, by this definition development project has been used for limited purpose in respect of those Projects which were started on and from 09.04.1972 and ended on 30.06.1997. On perusal of the wewagvjv, 2005 it appears that by that "Bidhimala", "Bidhimala" 1995 has not repealed expressly but overriding effect has been given using the aforesaid non-obstante clause. Maxwell on the interpretation of statues (Twelfth Edition) observed that a later statute may repeal an earlier one either expressly or by implication. But repeal by implication is not favourable to the Courts. If, as with all modern statutes, the later contains a list of earlier enactments which it expressly repeals, an omission of a particular statute from the list will be a strong indication of an intention not to repeal that statute. If, therefore, earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done. And when the later Act is worded in purely affirmative language, without any sort of negative expression or implied, it becomes even less likely that it was intended to repeal the earlier law. In the case of Municipal Council V. T.J. Joseph reported in AIR 1962 SC 922 it was observed that the legislature while enacting a law is aware of the existing laws of the same subject and hence if the legislature does not make a provision repealing the earlier law it does not indicate an intention to repeal the existing law. The "Bidhimala" 1995 is still in force.

77. In বিধিমালা, 1995 we have found that the "deveopment project" has been defined as under:

২(ক)"উন্নয়ন প্রকল্প" অর্থ উন্নয়ন বাজেটে বা খাতভুক্ত যে সকল প্রকল্প ১৯৮৩ সনের মে মাসের ১৩ তারিখ বা তৎপরবর্তী কালে রাজস্ব বাজেটে স্থানান্তরিত হইয়াছে বা হইবে ঐ সকল উন্নয়ন প্রকল্প। In both the "Bidhimalas" identical procedure of regularization of the service of the officers and employees from development project to revnue budget have been provided. In 1995, "Bidhimala" the same has been provided in Rule 3 with the heading "নিয়মিতকরণ পদ্ধতি" and in Bidhi-4 of Bidhimala, 2005 with the heading "রাজস্ব বাজেটে নিয়মিতকরণ পদ্ধতি।" In both the Bidhimalas it has been provided that-

"রাজস্ব বাজেটে কোন পদে সাময়িক ভাবে পদস্থ কোন কর্মকর্তা ও কর্মচারী সংশ্লিষ্ট প্রকল্পে নিয়োগ সরকারের প্রচলিত নিয়োগ বিধি বা নিয়োগ বা নিয়োগ পদ্ধতি বা সংশ্লিষ্ট প্রকল্পের জন্য সরকার কর্তৃক অনুমোদিত নিয়োগ বিধি অনুসরণ হইতে হইবে।"

78. For the purpose of regularization of the service in the revenue budget from development project other legal requirements which have been provided in the "Bidhiamala"

should be followed. Those are : (ধ) "উক্ত কর্মকর্তা বা কর্মচারীর রাজস্ব বাজেটের পদে নিয়মিতকরণের পূর্বের চাকুরীর ধারাবাহিকতা থাকিতে হইবে।" ধহফ (ন) উক্ত কর্মকর্তা বা কর্মচারীর রাজস্ব বাজেটের পদে নিয়মিতকরণের পূর্বের চাকুরী সন্তোষজনক হইতে হইবে। And another important precondition for regularization, which has been provided in both the "Bidhimalas" is: **"কর্ম কমিশনের আওতাভূক্ত কোন পদে কমিশনের সুপারিশক্রমে এবং কমিশনের আওতাবর্হিভূত কোন পদে বিভাগীয় পদোন্নতি বা বাছাই কমিটির সুপারিশক্রমে নিয়মিত করিতে হইবে।** " That is, it is to be examined for regularising the service of an incumbent to revenue budget that he was appointed in the development project following the service Rules provided by the legislature; there must be continuity of service; service record in the development project must be satisfactory and the Public Service Commission must recommend in respect of the posts described in the schedule of the relevant law and, in other cases, must be recommended by departmental promotion committee or selection committee. Government cannot use its executive power to circumvent requirements of statutory rules. No body is entitled to flout the Rules.

79. One thing is clear from the Rules that since the Rules provide the provisions of "নিয়মিতকরণ পদ্ধতি" "জ্যেষ্ঠতা নির্ধারণ" ধহফ "প্রকল্পের চাকুরীকাল গণনা", of the employees who served in the project, it is apparent that the laws did not prohibit the provision of absorption and, thereafter, regularization of the officers and employees of the development project to revenue budget. It is entirely for the Government to take policy decision considering the facts, circumstances, viability and future necessity of the project subject matter whether or not to absorb the services of the project employees in the revenue set up. However, policy decision once taken should apply equaly and uniformly. Simultaneously, it is to be remembered that absorption of project employees, who obtained employment by taking recourse to back door method, is violative of the constitutional scheme as the appointments have to be made on merits of the candidates. Finally, such absorption and thereafter, regularization must be processed and done following the Government instructions as well as the statutory provisions as mentioned earlier.

80. It is to be remembered that before regularization in the revenue budget in respect of the posts scheduled to be recruited by the Public Service Commission, recommendation of the Public Service Commission must be accorded. Similarly, recommendation of departmental promotion committee or selection committee is to be accorded for the posts which are not to be recruited by the Public Service Commission. That is, if the service of the officers and employees is transferred/absorbed in the revenue budget upon due compliance with the circular issued under Memo No. নং-সম(সও ব্য-৪)-১প-১/২০০৮-২৫৫ তারিখঃ ১০পৌষ, ১৪১৫/২৪ ডিসেম্বর,২০০৮ then the service of the officers and employees of those transferred project should be regularized following the provisions of the applicable "Bidhimala" as quoted earlier. However, "সমাপ্ত উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটের পদে নিয়োগের ক্ষেত্রে বয়স শিথিলকরণ বিধিমালা, ২০০৫" provides special privilege of relaxation of age limit of employees of development budget for participation for getting employment in the posts of revenue budget. That is, the legislature, considering the experience and disadvantageous position of the officers and employees of the Development Project, has provided such special privilege to them since they have lost their valuable times while serving in the Projects.

81. Since the provisions of "Bidhimalas" are statutory provisions the authority concerned must comply with the provisions of the "Bidhimalas" as quoted earlier before regularization of absorbed officers and employees in the revenue set up. However, this Court, is bound to insist the Government making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. No court can

direct the Government or its instrumentalities to regularize the service of the officers and employees of the development project in the revenue budget in the cases where statutory requirements have not been fulfilled. Regularization cannot be claimed as a matter of right. It is statutory requirement that opportunity shall be given to eligible persons by public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the Government. When the High Court Division is approached for relief by filing writ petition, necessarily the High Court Division has to ask itself whether the person before it had any legal right to be enforced or not. It can not be directed to devise a third mode of selection.

82. Accordingly, it is observed that:

9. The legitimate expectation would not override the statutory provision. The doctrine of legitimate expectation can not be invoked for creation of posts to facilitate absorption in the offices of the regular cadres/non cadres. Creation of permanent posts is a matter for the employer and the same is based on policy decision.
10. While transferring any development project and its manpower to revenue budget the provisions provided in the notifications, government orders and circulars quoted earlier must be followed. However, it is to be remembered that executive power can be exercised only to fill in the gaps and the same cannot and should not supplant the law, but only supplement the law.
11. Before regularization of service of the officers and employees of the development project in the revenue budget the provisions of applicable "Bidhimala" must be complied with. Without exhausting the applicable provisions of the "Bidhimala" as quoted above no one is entitled to be regularised in the service of revenue budget since those are statutory provisions.
12. The appointing authority, while regularising the officers and employees in the posts of revenue budget, must comply with the requirements of statutory rules in order to remove future complication. The officers and employees of the development project shall get age relaxation for participation in selection process in any post of revenue budget as per applicable Rules.
13. A mandamus can not be issued in favour of the employees directing the government and its instrumentalities to make anyone regularized in the permanent posts as of right. Any appointment in the posts described in the schedule of Bangladesh Civil Service Recruitment Rules, 1981, Gazetted Officers (Department of Live Stock Service) Recruitment Rules, 1984 and Non-gazetted Employees (Department of Live Stock Service) Recruitment Rules, 1985 bypassing Public Service Commission should be treated as back door appointment and such appointment should be stopped.
14. To become a member of the service in a substantive capacity, appointment by the President of the Republic shall be preceded by selection by a direct recruitment by the PSC. The Government has to make appointment according to recruitment Rules by open competitive examination through the PSC.
15. Opportunity shall be given to eligible persons by inviting applications through public notification and appointment should be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law.
16. It is not the role of the Courts to encourage or approve appointments made outside the constitutional scheme and statutory provisions. It is not proper for the Courts to direct absorption in permanent employment of those who have been recruited without following due process of selection as envisaged by the constitutional scheme.

83. In view of the discussion made above and since it is not apparent from the judgment of the High Court Division and other materials available in the record that the procedure provided in the Government notification, circulars or orders and the process of appointment indicated in the "Bidhimalas" 1995 or 2005 have been followed duly for appointing the writ petitioners and that they are no longer in service in view of terms of appointment letters and contracts, the direction of the High Court Division to absorb/regularise their service giving continuity of the same can not be approved. So, the same is set aside.

84. In the light of the observation made above, the appeal and review petition are disposed of.

13 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7882 OF 2017

M/S BHIS Apparels Limited represented by its Managing Director, 671, Dattapara, Hossain Market, Tongi, Gazipur, Bangladesh.
...Petitioner

-Versus-

Alliance for Bangladesh Workers Safety, BTI Celebration Point, Plot 3 & 5, Road 113/A, Gulshan-2, Dhaka- 1212, Bangladesh and others.
... Respondents

Mr. Imtiaz Moinul Islam, Advocate
.....For the petitioner.

Mr. Tanjib-ul Alam with
Mr. M. Saquibuzzaman and
Mr. Kazi Ershadul Alam, Advocates
....For the respondent nos. 2 and 3.

Heard on 24.10.2018, 31.10.2018, 14.11.2018, 23.01.2019, 06.02.2019, 13.03.2019, 31.03.2019, 03.04.2019, 08.05.2019, 26.06.2019, 30.06.2019 and 01.07.2019.
Judgment on 21.07.2019 and 22.07.2019.

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

Private body -Acting on the footing of Republic;
Thus it is palpably clear that the respondent no. 1 (Alliance) has been acting with the consent of the DIFE and assisting it in inspecting and ensuring the safety of the garment factories in the country. So we hold that the Alliance has been performing *de facto* functions in connection with the affairs of the Republic. ... (Para 65)

Since as per Article 102(1) any person aggrieved can enforce any of the fundamental rights guaranteed under Part III of our Constitution, we do not find any difficulty on the part of the petitioner-company, an indigenous Bangladeshi company whose shareholders and directors are all Bangladeshi citizens, to invoke Articles 27 and 40 of the Constitution in this case. Besides, Articles 27 and 40 do not say who can enforce them; it is only Article 102 (1) which says any person aggrieved can enforce them which undeniably fall under Part III of the Constitution. So Articles 27 and 40 which have been invoked by the petitioner-company are to be interpreted in the light of Article 102(1) of the Constitution. ... (Para 88)

We are of the opinion that for the limited purpose of enforcement of any of the fundamental rights as guaranteed by Part III of the Constitution, an indigenous company like the petitioner-company, whose shareholders and directors are all Bangladeshi citizens, is a 'citizen' of Bangladesh. This interpretation, as we see it, is in perfect accord with the intention of the framers of the Constitution and the tone and tenor of Article 102(1) of the Constitution. ... (Para 95)

JUDGMENT

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the escalation process of the respondent no. 1 (Alliance) and the notice dated 18.06.2017 (Annexure-'O') issued by the respondent no. 1 suspending the business of the petitioner-company should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:
The petitioner is a limited company duly incorporated under the Companies Act, 1994 and is engaged in ready-made garment business with high reputation. Anyway, on 24.04.2013, the infamous "Rana Plaza Disaster" prompted a chain of cautionary initiatives and the Government of Bangladesh through the Ministry of Labour and Employment (MOLE) formed a National Tripartite Committee (NTC) with the owners of garment factories and all Bangladeshi labour organizations and adopted the National Tripartite Plan of Action (NTPA). The whole purpose of the NTPA was to take every possible measure to ensure fire and building safety in the garment sector of Bangladesh. The NTC in its joint statement(s) prescribed and adopted that it would provide entry point to any stakeholders (buyers/brands, international development organizations, donors etc.) that would wish to help improve the fire and building safety condition in the Ready-Made Garment (RMG) factories of Bangladesh. The international buyers who have been placing regular orders to Bangladesh realized that they needed to take positive steps to improve the fire and building safety condition in RMG factories in Bangladesh and that this realization must be translated into reality. Accordingly, all the American buyers formed "Alliance" (respondent no. 1) which is the only exclusive inspecting authority to inspect the RMG factories of Bangladesh. The Government of Bangladesh ratified Alliance's actions through the NTPA and therefore Alliance is an instrumentality of the Government of Bangladesh. Similarly the Europe-based apparel corporations signed a legally binding agreement named "Accord on Fire and Building Safety in Bangladesh" and created Accord which is the only exclusive inspecting authority created under the NTPA with the assent of the Government of Bangladesh. That being so, Accord is another instrumentality of the Government of Bangladesh. The inspection reports of the Alliance or Accord Foundation are final. The fate of Bangladeshi RMG factories is dependent upon such reports. Both the Alliance and Accord can stop any Bangladeshi factory's business by reporting publicly the result of any such inspection. However, the petitioner is a factory supplying to both European and American buyers and is, therefore, liable to be inspected by both the Alliance and Accord. Both the Alliance and Accord initiatives have been adopted to assist the NTC in ensuring fire and building safety of the RMG factories of Bangladesh. The Alliance came into existence as a collective help from the America-based buyers to make the RMG factories safe up to the international standard. The signatories to the Alliance agreement established the respondent no. 1 (Alliance) and opened an office in Dhaka to administer its operations. The agreement itself provides that the signatories will work in sync with the NTPA enforced by the NTC established under the MOLE. Thus the respondent no. 1 came into effect on 10.07.2013. The functions of the respondent no. 1 (Alliance) are to inspect each supplier factory, to prescribe a Corrective Action Plan (CAP) and to keep doing follow-up inspections to make sure that

the remediation work (were needed) is being done. Once a factory is inspected and it is found that retrofitting/remediation work is needed, such factory is asked to prepare a Detailed Engineering Assessment (DEA). This DEA will then be sent to the respondent no. 1 and if approved, the supplier Bangladeshi factory will start the work of remediation/retrofitting and the respondent no. 1 will keep doing follow-up inspections to ensure compliance and upgradation. This *modus operandi* was followed in the case of the petitioner too which was inspected initially on 21.05.2014 and 24.05.2014 by the Alliance and the DEA was prescribed to do the necessary remediation/retrofitting work. The petitioner started doing the remediation work as requested by the Alliance and made significant progress. However, the Alliance kept doing follow-up inspections to check on the updates and it lastly inspected the petitioner's factory on 27.03.2017 when it was conspicuously found that the petitioner had already done most of the remediation/retrofitting work and the remaining work was underway. Even the website of the Alliance reported on 14.04.2017 that most of the remediation work of the petitioner had been completed and the rest of the work was minimal and under process and there was no risk involved with the current status of the factory of the petitioner. Although the petitioner endeavoured to finish all the remediation work as dictated by the Alliance, a few minor Non-Compliances (NCs) were to be done swiftly. The Alliance did not give the petitioner any space to breathe and called a "Remediation Escalation Roundtable Meeting" on 12.04.2017. In that meeting, the Alliance did not appreciate the remediation efforts made by the petitioner and it stated that if no "noteworthy" progress is made in 4(four) weeks, the petitioner could receive 1st warning letter leading to suspension of the factory from the list of approved suppliers to the Alliance member companies. The Alliance sent an email dated 14.04.2017 dictating the petitioner what needed to be done. The petitioner with all sincerity and honesty completed the major part of the remediation work and updated the respondent no. 1 about the progress by an email dated 29.04.2017. It was mentioned in this email that a few NCs could not be accomplished in a hurried fashion as the petitioner has to do the remediation work keeping the production of the factory ongoing and some NCs are impossible to be performed within a short span of time. By the 4(four) weeks timeline set by the respondent no. 1, the petitioner completed 88% of the total remediation work; but it needed a little more time and there are legitimate reasons for such time extension. Hence the petitioner by its email dated 11.05.2017 asked the respondent no. 1 for a meeting to explain the progress made so far; but the respondent no. 1 harshly refused the fair request and denied any more meeting to give the petitioner any chance to explain the progress.

3. Out of the blue, on the one hand, the respondent no. 1 refused the meeting; but on the other hand, it issued 1st warning letter dated 11.05.2017 telling the petitioner that its business will be suspended soon. The impugned warning letter dated 11.05.2017 shows that "noteworthy" progress was made; but still the impugned warning letter was issued without giving the petitioner any opportunity to explain itself. The impugned 1st warning letter dated 11.05.2017 gave the petitioner 14(fourteen) days time, that is, up to 25.05.2017 to satisfy the respondent no. 1. However, the reason behind issuance of such illegal and arbitrary 1st warning letter dated 11.05.2017 is absolutely unclear and vexatious; but the petitioner kept on investing and doing the remediation work thinking about the betterment of the workers. Within those 14(fourteen) days, the petitioner invested a sum of Tk. 4 crore for hydrant installation and completed 90% of the remediation work. The petitioner apprised the respondent no. 1 of the "noteworthy" remediation work completed by its email dated 25.05.2017. Although the 1st impugned warning letter dated 11.05.2017 clearly stipulated that the respondent no. 1 would do follow-up inspections to evaluate the progress; yet without

doing any such inspections or giving the petitioner an opportunity to show the "noteworthy" progress achieved, the respondent no. 1 issued the 2nd warning letter dated 26.05.2017.

4. The petitioner also supplies for European buyers and as such the petitioner is amenable to inspections and remediation suggestions, if any, made by the exclusive European inspecting authority, namely, Accord Foundation. The Accord duly inspected the petitioner's factory and accorded approval to the DEA and the petitioner was doing the remediation work as suggested by the Accord as well. It is strange that for the same reason, the petitioner has to do the remediation work in 2(two) standards–one given by the respondent no. 1 (Alliance) and the other given by the Accord–particularly when both are to ensure the same thing, that is to say, safety of workers. The remediation recommendations given by the Accord were totally complied with as per the schedule and the Accord is very much satisfied at the progress as evidenced by its last follow-up inspection report dated 09.05.2017. If there was any imminent safety issue, the Accord would have not given the petitioner any "pass" on 09.05.2017. The dual standards are utterly confusing. But the petitioner kept on doing the safety remediation work to satisfy both the standards.

5. The petitioner immediately objected by its email dated 30.05.2017 to the impugned 2nd warning letter dated 26.05.2017 and requested the respondent no. 1 that since 90% of the remediation work had already been done as admitted in the 2nd warning letter itself, the impugned 2nd warning letter should be withdrawn. The escalation protocol of the respondent no. 1 by which it pushes a factory to suspension is not at all detailed and precise. What is more, the escalation protocol of the respondent no. 1 is unapproved and arbitrary.

6. In the Supplementary Affidavit dated 02.07.2017 filed by the petitioner, it has been averred that the respondent no. 1 visited the factory premises of the petitioner on 14.06.2017 and found that there was ample progress, but to the sheer disappointment of the petitioner, the respondent no. 1 suspended its business by issuing a notice of suspension dated 18.06.2017. Immediately on receipt of the notice of suspension dated 18.06.2017, the petitioner replied to the respondent no. 1 to reconsider listing of the NCs complained of. It is evident that most of the NCs were due to the whimsical attitude of the respondent no. 1 to give a date to test and commission the remediation work done; but majority of the NCs were already corrected and approved by the Accord (the other inspecting authority).

7. In the Supplementary Affidavit dated 31.01.2019, it has been stated that as per the Accord's website, the remediation of the petitioner's factory is complete to the extent of 98%. There is no severe or imminent danger to the safety of the workers in the factory of the petitioner. This fact is not only apparent from the Accord's report; but also it is apparent from the inspection of Li & Fung, a prominent buyer of the petitioner. The Accord had an escalation protocol as well like the respondent no. 1 (Alliance) and that protocol was not approved by the NTPA or the Government. As such the Accord is now negotiating with the Transition Monitoring Committee (TMC) to get approval to its escalation protocol; but the Alliance has not taken any such step as yet in that direction. The Remediation Coordination Cell (RCC) has been in place under the respondent no. 3, Department of Inspection for Factories and Establishments (DIFE), as the inspecting authority for the RMG sector. The Accord is already set to hand over its supplier factories to the RCC through the TMC. Since the Alliance has decided to stop its functions in Bangladesh, it will not seek any approval to its escalation protocol. Therefore the unapproved escalation protocol of the respondent no. 1(Alliance) is without lawful authority and of no legal effect.

8. The Rule has been contested by the respondent nos. 2 and 3 by filing Affidavits-in-Opposition. The case of those respondents, as set out therein, briefly, is as under:

> The facts appearing from different Annexures of the Writ Petition are that the remediation work in the area of structural integrity of the factory of the petitioner was not possible until and unless the prescribed DEA was conducted. Retrofitting of a building can only be done once the DEA is completed, as the retrofitting requirements are only derived from the DEA. The admitted position is that the DEA was submitted both to the Accord and Alliance on 23.03.2015 and the same was approved only by the Accord on 04.04.2017. The website publication as annexed in Annexure-'D' is indicating mainly the overall other parameters in addition to the remediation work of the factory building. In that report, the remediation work was reported to require intervention from the respondent no. 1 which means the escalation protocol is required to be implemented for the delayed remediation progress of the factory of the petitioner. As the DEA was approved on 04.04.2017, a target of only 40% of the implementation of the CAP in the structural area of the remediation within next 4(four) weeks was suggested. A substantial part of the remediation work in fire and electricity sphere was not completed and the very important structural re-enforcement of columns was not started by that time as evidenced by Annexure-'F'. The petitioner failed to even commence the structural retrofitting work of the building even on the date of requesting for a meeting with the Alliance after 4(four) weeks had elapsed. The 1st warning letter dated 11.05.2017 was the outcome of the escalation roundtable dated 12.04.2017 for not implementing the remediation work of the factory to the satisfaction of the Alliance. There was no progress in the remediation work of the factory building especially in the highest priority area of the required structural re-enforcement of 52 columns of the building. By that warning letter dated 11.05.2017, the petitioner was given 14(fourteen) days time to provide remediation progress of the factory. The remediation work of the factory was being monitored and supervised by the Alliance, not by the Accord; though for the purpose of the structural remediation, the Accord-approved DEA was followed. According to Annexure-'L', the petitioner only corrected 90% in the fire and electrical safety, while it could not achieve even 40% of the remediation target in the structural sphere given by the Alliance within the given time-frame after the escalation roundtable. The manner by which the petitioner has impugned the escalation process of the respondent no. 1 is totally absurd. The escalation process adopted by the respondent no. 1 is compatible with the spirit of the NTPA duly recognized by the respondents. At a subsequent stage, the Alliance issued a 2nd warning letter in favour of the petitioner-company at the slow remediation work of the factory. As the petitioner failed to complete the remediation work in line with its suggestions and recommendations given in the impugned warning letters, the respondent no. 1 (Alliance) suspended the business of the petitioner by issuing a notice of suspension dated 18.06.2017.

9. In the Supplementary Affidavit-in-Opposition dated 05.05.2019 filed by the respondent nos. 2 and 3, it has been mentioned that in the 4th meeting dated 21.11.2013 of the NTC on fire safety and structural integrity in the RMG sector of Bangladesh, it was decided that a Review Panel would be created to review any recommendation for closure of any building and the said Review Panel would consist of two engineers of the Bangladesh University of Engineering and Technology (BUET), one engineer from the Accord, one engineer from the Alliance and others. As part of the commitment given to the people of Bangladesh and to the international community, the Government of Bangladesh developed a single parameter with the assistance of the International Labour Organization (ILO) to assess the RMG sector in

Bangladesh regarding fire, electrical safety and structural integrity. Following the parameter, the three actors, namely, the Accord, Alliance and National Initiative (NI) assessed 3780 factories initially. This inspection process commenced in late 2013 and by the end of 2015, the process was complete. The Government in a meeting held on 05.09.2016 formed a cell under the name and style– Remediation Coordination Cell (RCC) –to manage and organize the remediation process to be commenced in all the inspected factories. Afterwards the RCC was reconstituted by the Memo No. 40.00.0000.039.06.005.18-25 dated 27.05.2018.

10. Anyway, the Writ Petition contains highly disputed questions of facts which cannot be ascertained in the writ jurisdiction of the High Court Division under Article 102 of the Constitution. The writ-petitioner has raised some issues as to the inspection and escalation process of the Alliance whereby assertions have been made that it remedied most of the concerns raised by the Alliance and despite such remedial work, it was suspended. These assertions and factual aspects can only be adequately dealt with by the Review Panel. The Review Panel is the only alternative and equally efficacious remedy for the writ-petitioner. That remedy having not been availed of by the writ-petitioner, the instant Rule is not maintainable.

11. However, there is a new development. From the website entry dated 30.04.2019 of the respondent no. 1, the name of the petitioner has been shown as "participating" and as the petitioner has been a "participating" factory according to this entry dated 30.04.2019, the Rule Nisi has already become infructuous.

12. In the Supplementary Affidavit-in-Opposition dated 03.07.2019 filed by the respondent nos. 2 and 3, it has been stated that during the course of the remediation work of the petitioner's factory, the respondent no. 1 (Alliance) conducted as many as 6(six) Remediation Verification Visits (RVVs). After issuance of the 2(two) warning letters (1st warning letter dated 11.05.2017 and 2nd warning letter dated 26.05.2017) in compliance with the established inspection protocol, the respondent no. 1 went for the 6th RVV on 14.06.2017 and having found unsatisfactory progress, it finally issued the notification of suspension dated 18.06.2017 (Annexure-'O').

13. As per the Agreement (Annexure-'A'), it is not obligatory for the Alliance to conduct any RVV in between the 1st warning letter dated 11.05.2017 and the 2nd warning letter dated 26.05.2017, albeit the Alliance conducted the 6th RVV before issuance of the notice of suspension to the petitioner. The draft escalation protocol was presented before the 14th meeting of the NTC wherein it was decided that the ILO would review the same and thereafter it would be sent to the MOLE for its approval. The final draft escalation protocol was sent to the MOLE for its approval by the Memo No. 40.01.0000.103.16.008.17.139 dated 19.02.2019. The escalation protocol is currently being applied to the factories under inspection by the NI on behalf of the DIFE. The petitioner has failed to establish how its fundamental rights have been infringed by the escalation protocol particularly when it is no longer suspended by the respondent no. 1 and is actually a "participating" entity. As at the moment, the petitioner is a "participating" entity, this Court will not decide on the constitutionality of the actions of the respondent no. 1 in that the alleged threats to the fundamental rights of the petitioner as guaranteed by Articles 27, 31 and 40 of the Constitution are already over.

14. In the Affidavit-in-Reply dated 04.07.2019 filed on behalf of the petitioner, it has been averred that in reality, there exists no disputed questions of facts and so the Rule cannot

be discharged on that score. The question of de-escalation of the factory is out of the question because all the Alliance signatories refused business to do with the petitioner. The petitioner never did any remediation work after the suspension of its business simply for the reason that that would mean admitting the illegal, arbitrary and *mala fide* escalation of its factory; rather the petitioner sought shelter of this Court thereagainst. The assertion that the Operating Manual (OM) creates a common standard is denied. Nowhere in the said OM, there is a single word about the escalation protocol of the respondent no. 1 (Alliance) or Accord Foundation. The respondent no. 1 escalated the factory of the petitioner from stage 1 to stage 2 as evidenced by Annexures- 'H' and 'J' without inspecting the factory. When the Accord approved the DEA on 04.04.2017, the respondent no. 1 (Alliance), as per Annexure-'Q', was *coram non judice* in the matter of escalating the factory of the petitioner. The NTPA did not develop any escalation protocol for the Alliance; rather it drafted an escalation protocol for the factories under the NI. It is common knowledge that there are 3(three) initiatives being the NI, Accord and Alliance. The NI is supervised by the DIFE. The DIFE has devised the RCC to supervise the factories under the NI and the RCC is also set to take over the Accord-listed factories. But on the contrary, the respondent no. 1 (Alliance) did never intend to negotiate with the RCC to hand over its factories thereto. It is *ex-facie* clear from a conjoint reading of Annexures- '12' and '12A' that the 14th meeting of the NTC prescribed a course of action for the NI-listed factories. This NI has nothing to do with the Alliance or its factories. If the escalation protocol of the Alliance is declared illegal, then it will have to negotiate with the Government and the BGMEA, just like the Accord is doing and a common standard will be achieved which will benefit the RMG sector, members of the public and the Government alike. The Government has made it abundantly clear that the draft escalation protocol is for the NI-listed factories only. The Review Panel has been in place as an Appellate Authority in order to review the recommendations of closure of factories posing severe and imminent danger to human life and that is the only periphery of the Review Panel. Admittedly the factory of the petitioner-company was never recommended to be closed down. On the contrary, the petitioner has always been doing business with the Accord, even after issuance of the notice of suspension by the respondent no. 1. The suspension of the business relation of the petitioner with the signatories of the Alliance is not a matter to be resolved within the jurisdiction of the Review Panel. Since the petitioner has filed this Writ Petition for enforcement of its fundamental rights under Articles 27, 31 and 40 of the Constitution, the Rule cannot be thrown out on the ground of disputed questions of facts. The respondent nos. 2 and 3, who have no direct or firsthand knowledge about the facts alleged by the petitioner in the Writ Petition and Supplementary Affidavits with regard to inspection and remediation of the factory, cannot legally raise the plea of disputed questions of facts. The respondent no. 1 with a *mala fide* intention wrote "participating" after issuance of the suspension notice in order to confuse the Court and to frustrate the Rule. As per the Accord's website, the present status of the petitioner is that it is a 100% compliant factory. The petitioner being a local juristic person can invoke the fundamental rights guaranteed by Articles 27, 31 and 40 of the Constitution both as a citizen and a resident of the country.

15. At the outset, Mr. Imtiaz Moinul Islam, learned Advocate appearing on behalf of the petitioner, submits that admittedly the petitioner is a Private Limited Company incorporated under the Companies Act, 1994 and it is also admitted that the petitioner's factory is a 'shared' factory, that is to say, shared by both the Accord and the Alliance and as a local company, it is a local juristic person and as a local juristic person, being both a resident and a citizen of Bangladesh, it can invoke its fundamental rights as guaranteed under Articles 27, 31 and 40 of the Constitution.

16. Mr. Imtiaz Moinul Islam also submits that the petitioner-company being a juristic person is a 'person' for the purpose of the relevant provisions of the Constitution; but according to the definition of 'citizen' given in Article 152(1) of the Constitution, a company is apparently not a citizen and for the first time, a question has arisen as to whether a local company can enforce the fundamental rights exclusively reserved for the citizens of Bangladesh under the Constitution.

17. Mr. Imtiaz Moinul Islam further submits that the petitioner being a juristic person can undoubtedly enforce its fundamental right guaranteed under Article 31 of the Constitution in view of the decision in the case of Elias Brothers (Md) (Pvt) Limited and another…Vs…Bangladesh and others; 16 BLC (2011) 327 and as such there does not appear to be any dispute as regards the enforcement of the fundamental right of the petitioner thereunder.

18. Mr. Imtiaz Moinul Islam also submits that as per Article 44(1) of the Constitution, the right to move the High Court Division in accordance with Clause (1) of Article 102 for the enforcement of the rights conferred by Part III is guaranteed and Article 102 (1) of the Constitution envisages that 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 Constitution and the petitioner-company, being a local juristic person, is undoubtedly entitled to enforce its fundamental rights as per Article 102 (1), whether the fundamental rights enumerated in Part III are applicable to citizens or non-citizens.

19. Mr. Imtiaz Moinul Islam next submits that it has been ruled in the case of Bangladesh Small Industries Corporation, Dacca…Vs…Mahbub Hossain Chowdhury, 29 DLR (SC) 41 that the word 'person' in the Constitution shall include the word 'person' as defined in section 3(39) of the General Clauses Act, 1897 which states that a 'person' shall include any company or association or body of individuals, whether incorporated or not.

20. Mr. Imtiaz Moinul Islam also submits that the petitioner has invoked Articles 27, 31 and 40 of the Constitution and Article 31 relates to the fundamental right incorporated therein which applies to both citizens and non-citizens, but the fundamental rights enshrined in Articles 27 and 40 are applicable to citizens only; but Articles 27 and 40 do not indicate as to who can enforce those Articles; but Article 102 (1) does indicate and in this view of the matter, the petitioner-company, being a local juristic person, can invoke Article 102(1) for enforcement of its fundamental rights guaranteed under Articles 27 and 40, apart from the fundamental right guaranteed under Article 31 of the Constitution.

21. Mr. Imtiaz Moinul Islam further submits that according to the definition of 'citizen' provided in Article 152(1) of the Constitution, except where the subject or context otherwise requires, 'citizen' means a person who is a citizen of Bangladesh according to law relating to citizenship; but if the subject or context otherwise requires, then the definition of 'citizen' as given in Article 152(1) will not be evidently applicable and that being so, in Article 102(1) of the Constitution, the phraseology 'any person aggrieved' has been used and if Article 102(1) and the definition of 'citizen' as given in Article 152(1) are read together, there is not an iota of doubt that 'any person aggrieved', whether a citizen or a non-citizen, may invoke Article 102(1) for enforcement of any of his fundamental rights guaranteed under Part III of the

Constitution and considered from this perspective, the petitioner being a local juristic person is necessarily a citizen of Bangladesh.

22. Mr. Imtiaz Moinul Islam also submits that the petitioner-company being an indigenous company is a collective representation of its shareholders who are undeniably all citizens of Bangladesh and by that reason, there is no difficulty in construing an indigenous company like the petitioner-company as a citizen of Bangladesh.

23. Mr. Imtiaz Moinul Islam next submits that the Appellate Division took the interpretation of the Constitution to a new height in the case of Dr. Mohiuddin Farooque…Vs…Bangladesh represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others, 49 DLR (AD) 1 (popularly known as BELA's case) wherein it ruled that 'a person aggrieved' will include an indigenous association when it is espousing the cause arising out of an invasion of the fundamental rights of an indeterminate number of people and in that case, the Appellate Division further ruled that an association can enforce the fundamental rights of the other citizens of Bangladesh in the form of a Public Interest Litigation (PIL) and if it is the view of the Appellate Division in BELA's case, then there can be no bar whatsoever in the way of the petitioner-company to enforce its own fundamental rights under Articles 27 and 40 of the Constitution which are applicable to citizens only, apart from Article 31 of the Constitution which applies both to citizens and non-citizens.

24. Mr. Imtiaz Moinul Islam also submits that the Appellate Division allowed another association to enforce its fundamental right guaranteed under Article 27 of the Constitution in the case of Bangladesh Retired Government Employees Welfare Association and others…Vs…Bangladesh represented by the Secretary, Ministry of Finance and another, 51 DLR (AD) 121 and the petitioner-company, being an indigenous association of its shareholders, can, no doubt, invoke the writ jurisdiction of the High Court Division for enforcement of its fundamental rights guaranteed under Articles 27 and 40 of the Constitution and considered from this point of view, the Writ Petition as framed is maintainable.

25. Mr. Imtiaz Moinul Islam further submits that in our neighbouring country India, it has been observed in the case of State Trading Corporation of India, Limited…Vs….The Commercial Tax Officer and others, AIR 1963 SC 1811 that the fundamental rights of the people of India are enforced by the Supreme Court of India under Article 32 and by the High Courts of India under Article 226 of the Indian Constitution; but neither of those Articles contemplates as to who can enforce the fundamental rights under Articles 32 or 226 of the Indian Constitution unlike Article 102(1) of our Constitution and in actuality, there is no enforcement device/mechanism of the fundamental rights of the people of India like that of the people of Bangladesh in Article 102(1) of our Constitution and that is why, the constitutional mandate of India is different from that of Bangladesh.

26. Mr. Imtiaz Moinul Islam next submits that in the decision reported in AIR 1963 SC 1811, according to the majority view, State Trading Corporation of India being a company is not a 'citizen'; but according to the minority view, it is a 'citizen' and as the constitutional mandate of Bangladesh is different from that of India, an indigenous company of Bangladesh like the petitioner-company, whose shareholders are all Bangladeshi citizens, can definitely be regarded as a citizen of Bangladesh.

27. Mr. Imtiaz Moinul Islam further submits that admittedly there was no inspection of the factory of the petitioner by the Alliance between escalation stage 1 and stage 2 and the issuance of the 2nd warning letter dated 26.05.2017 without any RVV is clearly *mala fide* and against the principle of natural justice.

28. Mr. Imtiaz Moinul Islam also submits that when the DEA was approved by the Accord on 04.04.2017, the Alliance did not have any jurisdiction thereafter, as per Annexure-'Q', to conduct any inspection or to suggest any CAP or to initiate any escalation process and to suspend the business of the petitioner all of which were done in flagrant contravention of the fundamental rights of the petitioner.

29. Mr. Imtiaz Moinul Islam next submits that the Review Panel is not an alternative efficacious remedy of Article 102(1) of the Constitution and the Review Panel can only review the recommendation of closure of any factory posing any severe and imminent danger to the safety of the workers and that is the only jurisdiction of the Review Panel; but indisputably there was no recommendation made by the Alliance for closing down the factory of the petitioner and even after suspension of the business of the petitioner by the respondent no. 1, the petitioner has been doing business with the Accord and as it is not a case of recommendation of closure of the factory of the petitioner, the question of availing of the alleged equally alternative efficacious remedy of the Review Panel by the petitioner does not arise at all.

30. Mr. Imtiaz Moinul Islam further submits that the petitioner has invoked Articles 27, 31 and 40 of the Constitution for enforcement of its fundamental rights under Article 102(1) of the Constitution and in such a Writ Petition under Article 102(1) of the Constitution, the disputed questions of facts, if any, are of no avail and, if necessary, in an appropriate case, the Court will have to take evidence, either itself or by issuing a commission, to resolve any disputed question of fact to determine whether a fundamental right has at all been violated. In support of this submission, Mr. Imtiaz Moinul Islam relies upon paragraph 5.19 of Mahmudul Islam's "Constitutional Law of Bangladesh", 3rd edition and the decision in the case of Kavalappara Kottarathil Kochunni alias Moopil Nayar…Vs…State of Madras and others, AIR 1959 SC 725.

31. Mr. Imtiaz Moinul Islam also submits that the contesting respondent nos. 2 and 3 have no direct or firsthand knowledge about the facts as to inspection or remediation of the factory of the petitioner and as such they cannot legally raise any plea of disputed questions of facts in this case and it is only the respondent no. 1 (Alliance) which can raise this plea of disputed questions of facts in the case; but curiously enough, the Alliance has not come forward to raise the plea.

32. Mr. Imtiaz Moinul Islam next submits that on 30.04.2019, the website of the respondent no. 1 (Alliance) showed the petitioner-company as "participating" and this showing of the petitioner-company as "participating" is a cunning ploy to confuse the Court.

33. Mr. Imtiaz Moinul Islam further submits that the petitioner, after being suspended on 18.06.2017, did never resume any remediation work as per the Alliance requirement and the Alliance, after the 6th RVV on 14.06.2017, did never inspect the factory of the petitioner nor did it suggest any new remediation work which are *ex-facie* clear from the CAP reports on structural, fire and electric safety that are preserved in the website of the Alliance and the said CAP reports unerringly indicate that the Alliance wrote the word "participating" against the

name of the petitioner-company which contradicts the CAP reports themselves saved in its own website thus conspicuously proving that the Alliance *mala fide* penned "participating" in order to frustrate the Rule Nisi.

34. Mr. Imtiaz Moinul Islam also submits that had the Alliance, without having any *mala fide* intention, followed the general system, then every person who would have entered the Alliance's CAP respecting the petitioner would have been redirected to the Accord website where he would have found that the petitioner is a 100% compliant factory; but by falsely writing "participating" and by not including the Accord report in its website as is the general rule, the respondent no. 1 violated the petitioner's fundamental right guaranteed under Article 27 of the Constitution.

35. Mr. Imtiaz Moinul Islam next submits that the Accord Foundation too had an escalation protocol like that of the respondent no. 1 (Alliance); but that protocol was not approved by the NTPA or the Government and hence the Accord negotiated with the Government and the BGMEA to get approval to its escalation protocol as evidenced by the Workshop Summary dated 29.08.2018 and finally on 08.05.2019, the Accord signed a Memorandum of Understanding (MOU) with the BGMEA and Clause 2 of the MOU is indicative of the fact that the Accord has agreed to enforce its escalation protocol in collaboration with the BGMEA.

36. Mr. Imtiaz Moinul Islam further submits that the respondent no. 1 (Alliance) has not taken any step till date for approval of its escalation process like the NI or the Accord did and therefore the unapproved escalation protocol of the respondent no. 1 has no legs to stand upon.

37. Mr. Imtiaz Moinul Islam also submits that the escalation process of the respondent no. 1 does not stipulate as to what is to be regarded as 'adequate progress' or 'noteworthy progress' and even after doing 90% of what was suggested, the respondent no. 1 can determine that the progress is not 'adequate' or 'noteworthy' which is arbitrary and whimsical and since the escalation process is not approved by the NTPA or the Government of Bangladesh, the respondent no. 1, being an instrumentality of the Government, cannot enforce such unlawful escalation process.

38. Mr. Imtiaz Moinul Islam next submits that the Alliance has agreed in Clauses 1.1, 4.1 and 5.1 of its Agreement (Annexure-'A') that it will follow a common standard and as per its factory inspection standard (Annexure-'Q'), it will not duplicate any inspection completed by the Accord and will accept the Accord's findings; but the Alliance has acted in contravention of its own standard and issued the impugned notice of suspension in absolute disregard of the fundamental rights of the petitioner guaranteed under Articles 27, 31 and 40 of the Constitution.

39. Mr. Imtiaz Moinul Islam further submits that it is admitted by the respondent no. 1 (Alliance) as well as the other inspecting authority (Accord) and the buyer company Li & Fung that there is no severe and imminent danger to the workers' safety in the factory of the petitioner and the only thing to be done is to upgrade its standard a bit more in order to make it world-class and the respondent no. 1 in Clause 7.2 (c) of the Agreement (Annexure-'A') has clearly stipulated that it will only suspend and close down a factory if there is severe and imminent danger to the workers' safety and as there is no severe and imminent danger to the workers' safety in the factory of the petitioner, there is no earthly reason for issuance of the

impugned notice of suspension dated 18.06.2017 (Annexure-'O') and in this perspective, Annexure-'O' is without lawful authority and of no legal effect.

40. Per contra, Mr. Tanjib-ul Alam, learned Advocate appearing on behalf of the respondent nos. 2 and 3, submits that the petitioner cannot raise any objection to the escalation protocol of the respondent no. 1 (Alliance) on the score that it is not compatible with the ethos and norms of the NTPA, or for that matter, the MOLE and had the petitioner any genuine grievances about the escalation process of the Alliance, it would have raised its objections, if any, thereto at the earliest opportunity; but the petitioner-company did not do so and it challenged the escalation process of the Alliance only after issuance of the impugned notice of suspension.

41. Mr. Tanjib-ul Alam also submits that the Rule Nisi has already become infructuous in view of the Alliance's website entry dated 30.04.2019 showing the petitioner as a "participating" entity and as the Rule has already become infructuous as above, the petitioner cannot get any relief on merit.

42. Mr. Tanjib-ul Alam further submits that there are disputed questions of facts and those disputed questions of facts cannot be resolved in this summary proceeding under Article 102 of the Constitution and hence the Rule Nisi is not maintainable.

43. Mr. Tanjib-ul Alam next submits that the petitioner ought to have sought necessary relief(s) from the Review Panel against the impugned notice of suspension dated 18.06.2017 (Annexure-'O') and as the petitioner did not avail itself of the equally efficacious remedy available from the Review Panel, the Rule is incompetent.

44. Mr. Tanjib-ul Alam also submits that as the petitioner failed to carry out the remediation/retrofitting work of the factory to the satisfaction of the respondent no. 1, it issued two successive warning letters and eventually after the 6th RVV, it had to suspend the business of the petitioner-company under compelling circumstances.

45. We have perused the Writ Petition, Supplementary Affidavits, Affidavit-in-Opposition, Supplementary Affidavits-in-Opposition, Affidavit-in-Reply and relevant Annexures annexed thereto and heard the submissions of the learned Advocate for the petitioner Mr. Imtiaz Moinul Islam and the counter-submissions of the learned Advocate for the respondent nos. 2 and 3 Mr. Tanjib-ul Alam.

46. At first, a short narration about the background of the formation of the Alliance by the American buyers of Bangladeshi suppliers of RMGs is necessary. Following the fire of November 24, 2012 at Tazreen Fashions Limited in which 112 workers lost their lives and many others were injured, the Tripartite Partners adopted a Joint Statement of Commitment during a meeting organized jointly by the MOLE and the ILO on January 15, 2013. Through the Joint Statement, the Tripartite Partners committed to work together to develop a NTPA on Fire Safety by the end of February, 2013 with a view to taking comprehensive actions aimed at preventing any further loss of lives, limbs and properties due to work place fires and fire-related accidents and incidents. A further factory fire on January 26, 2013 at Smart Export Garments in which 8(eight) workers lost their lives and others were injured underlined the need for urgent tripartite actions in this respect. To ensure the timely development of a NTPA, the MOLE established a Tripartite Committee, which met several times with the support of the ILO. The NTPA was endorsed by the MOLE on March 24, 2013.

47. On 24 April, 2013, the Rana Plaza building collapsed leaving 1,129 dead and almost 2,000 injured, many of whom will remain permanently disabled. Most of the victims were garment sector workers given that the building housed 5(five) RMG factories. The ILO subsequently dispatched a High-Level Mission led by the Deputy Director General for Field Operations and Partnerships, Mr. Gilbert Houngbo, to Bangladesh from 1-4 May to express the solidarity of the ILO with those affected by these tragic events, partners from the Government, labour, and industry, and with the nation as a whole. The Mission engaged with the tripartite partners and other stakeholders to identify what needed to be done to prevent any such future tragedies. Within the framework of the mission, the tripartite partners issued a Joint Statement in which they committed to the formulation of an action plan focusing on six short and medium-term steps aimed at improving the structural integrity of RMG factories and other measures to prevent further tragedies from recurrence. To this end, in course of time, the Alliance, a platform of American buyers and the Accord Foundation, a platform of European buyers came into being after exhaustive deliberations among the stakeholders including the MOLE.

48. At this juncture, we would like to discuss the issue of maintainability of the Writ Petition. The petitioner in the Writ Petition has alleged contravention of its fundamental rights as guaranteed by Articles 27, 31 and 40 of the Constitution. By the way, Articles 27, 31 and 40 of the Constitution are quoted below verbatim:

"27. All citizens are equal before law and are entitled to equal protection of law."

. . .

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

AND

. . .

"40. Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business."

49. Indisputably those three Articles are in Part III of the Constitution.

50. Article 102(1) of the Constitution provides that 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. In other words, when it comes to enforcement of any of the fundamental rights as guaranteed by Part III, an aggrieved person can invoke Article 102(1) of the Constitution. From a plain reading of Article 102 (1) of the Constitution, we find that its ambit is very wide. In this context, we feel tempted to refer to the decision in the case of Moulana Md. Abdul Hakim alias Md. Abdul Hakim…Vs…Government of Bangladesh and others, 34 BLD (HCD) 129. Paragraph 12 of that decision is to the following effect:

"12. Article 102(1) sets itself apart from Article 102(2) (a) (ii) by bringing within its purview a wider group of individuals and authority on whom the Court may on judicial

review hold sway. When issues of fundamental rights are raised, the sanction of redress under Article 102(1) is clearly of availability 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."

51. Tracing such jurisprudential development in this jurisdiction through the cases like Zakir Hossain Munshi…Vs…Government of the People's Republic of Bangladesh, 55 DLR (HCD) 130; Farzana Moazzem…Vs…Securities and Exchange Commission and others, 54 DLR (HCD) 66 and Conforce Limited, a Limited Liability Company…Vs…Titas Gas Transmission and Distribution Company Limited, a Public Limited Liability Company and another, 42 DLR (HCD) 33, it is now well-settled that the functional test approach enables a judicial review of an ostensibly private body, but which nevertheless performs a public function that aims at benefiting the public at large.

52. As a matter of fact, under our Constitutional scheme, an aggrieved person, in order to agitate his claim/case in judicial review, can do so by invoking Article 102(1) and/or Article 102(2) depending on the nature of the grievance and status of the perpetrator.

53. Article 102(1) comes into play in relation to the infringement of any of the fundamental rights guaranteed under Part III of the Constitution. Article 102(2) presupposes the availability of various writs that may be resorted to for review of actions and operations in the public domain, such actions and operations being otherwise the preserve of the Executive organ of the State affecting the citizenry in their contacts and dealings with the Executive and its functionaries.

54. There is no gainsaying the fact that the respondent no. 1 (Alliance) is basically a private platform/body set up by the American buyers and this respondent no. 1 has been operating in Bangladesh with the approval of the Government of Bangladesh. To be precise, there is a public element in the functions that are being discharged by the respondent no. 1 (Alliance). Needless to say, some of the public functions of the DIFE are being discharged both by the Alliance and the Accord on being recognized by the Government and its instrumentalities and agencies.

55. However, in the decision reported in 34 BLD (HCD) 129 (supra), it has been spelt out in paragraph 25:

"25…What can, however, be asserted with certainty is that the question whether an activity has sufficient public element in it is quite properly a matter of fact and degree ascertainable from a consideration of each given case on its merit. But it is nevertheless indisputably well-established by now and as held by the Privy Council in Jeewan Mohit…Vs…The Director of Public Prosecutions of Mauritius reported in (2006) UKPC 20 that the principle enunciated in *Datafin* is invariably the effective law, or rather the 'invariable rule' entrenched in judicial psyche."

56. Indubitably it is a principle of law that by virtue of Article 152 (2) of the Constitution, the General Clauses Act, 1897 is applicable to the interpretation of the Constitution. It has been settled in various judicial pronouncements of both the Divisions of the Supreme Court of Bangladesh that the word 'person' in the Constitution shall include the 'person' as defined in Section 3(39) of the General Clauses Act which contemplates that a person shall include

any company or association or body of individuals, whether incorporated or not. In view of this definition provided in Section 3(39) of the General Clauses Act, the respondent no. 1 (Alliance) is, no doubt, a person within the meaning of Article 102(1) of the Constitution.

57. The language of Article 102(1) of the Constitution, 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 a statutory body or a local authority so as to attract Article 102(1) of the Constitution. When any fundamental right of a person is violated, the remedy provided by Article 102(1) is available to the aggrieved person irrespective of whether the violator is in the service of the Republic or in any local authority or statutory body or even in a private capacity.

58. Under our Constitution, the High Court Division has power under Article 102(1) to pass necessary orders to enforce fundamental rights and under Article 44(1), the right to move the High Court Division under Article 102(1) is itself a fundamental right. The position of the High Court Division in respect of enforcement of fundamental rights is the same as that of the Indian Supreme Court with the difference that its decision is not final and is subject to appeal under Article 103 of our Constitution. Thus it is not discretionary with the High Court Division to grant the relief sought for under Article 102(1). Once the High Court Division finds that any fundamental right of a citizen has been violated, it is under a constitutional obligation to grant the necessary relief(s).

59. In the case of the Chairman, Rajdhani Unnayan Kartipakkha (RAJUK)…Vs…A. Rouf Chowdhury and others, 61 DLR (AD) 28, the Appellate Division has clearly held that when any violation of any fundamental right enumerated in the Constitution is alleged as the only ground and no violation of any legal right or law has been alleged whatsoever, only then resort may be had to the fundamental right(s) guaranteed by Part III of the Constitution for protection by the High Court Division. So it is *ex-facie* clear that when violation of any fundamental right guaranteed by Part III of the Constitution is alleged by any citizen and if he can prove to the satisfaction of the Court that such fundamental right has been infringed, in that event, the Court must pass necessary orders or give directions to the person or authority concerned for enforcement of his fundamental right. There cannot be any deviation whatsoever therefrom.

60. In an unreported decision dated 08.06.2010 passed by the High Court Division in Writ Petition No. 2499 of 2010 in the case of Rokeya Akhter Begum…Vs…Bangladesh and others, it has been held that as far as Article 102(1) is concerned, that is to say, when fundamental rights are relied on, the question of status of the impugned person or authority loses its relevance because the phrase 'any person or authority' therein necessarily refers to a person or any authority, irrespective of his/its status. Any decision by such a person or authority, whether he/it is a public functionary or a private one, is reviewable provided, however, that infringement of one of the fundamental rights embodied in Part III of the Constitution is in question.

61. Since private bodies now-a-days are increasingly performing public functions, the Courts are intervening and passing appropriate directions and orders reviewing the actions, inactions and functions of those private bodies. The Courts regulate their discretion by looking at the nature of the functions exercised by the private bodies and by scrutinizing whether those bodies are acting in the public domain and whether the aggrieved person has

any other alternative efficacious remedy. This view has been underpinned in the case of the Board of Control for Cricket in India and others…Vs…Cricket Association of Bihar and others, AIR 2015 SC 3194.

62. In the landmark English Case of R…Vs…Panel on Take-overs and Mergers, ex-parte Datafin plc and another (Norton Opax plc and another intervening) reported in (1987) 1 All England Reports 564 (popularly known as Datafin Case), the Court of Appeal has held that where a public duty is imposed on a body, expressly or by implication or where a body exercises a public function, the Court will have jurisdiction to entertain an application for judicial review of that body's decision. There is not a single test, however, as to the nature of public function. The source of the body's power is a significant factor; if it is by an Act of Parliament or by any 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 any contract, its decision will not be amenable to judicial review. In such a case, the Court will try to decide whether the impugned action has been taken in the public domain wherein the Court is likely to infer that the decision has been taken in connection with the affairs of the Republic. A public element may also appear where the 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 functions exercised by it will determine the availability of judicial review. It also seems that when a private sector body steps into the shoes of a public body, in that event, its action will be amenable to judicial review.

63. In Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others…Vs…V. R. Rudani and others, 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 water-tight compartment. 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."

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

65. In Bangladesh, the responsibility for inspecting factories and their safety vests in the DIFE. This vesting is clearly discernible from Sections 61 and 62 of বাংলাদেশ শ্রম আইন, ২০০৬ (Bangladesh Labour Act, 2006). The work of checking and inspecting the safety conditions of all RMG factories in the country within a short time after the Rana Plaza tragedy was not possible for the Government alone. The Government, therefore, welcomed the assistance of other stakeholders like the Accord and the Alliance through the NTC and the NTPA in this

respect. The Alliance Agreement states that all Bangladeshi factories supplying RMGs to 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 the RMG factories of Bangladesh at their own expense is certainly a welcome step for the improvement and development of the infrastructures of those factories. In the process, both the Accord and the Alliance are assisting the DIFE in ensuring fire and building safety measures of the RMG factories of Bangladesh. Thus it is palpably clear that the respondent no. 1 (Alliance) has been acting with the consent of the DIFE and assisting it in inspecting and ensuring the safety of the garment factories in the country. So we hold that the Alliance has been performing *de facto* functions in connection with the affairs of the Republic.

66. The petitioner-company, it is undisputed, is a juristic person. Now a question has arisen as to whether an indigenous company like the petitioner-company is a 'citizen' and whether as a 'citizen', it can invoke the fundamental rights which are exclusively reserved for the citizens of Bangladesh guaranteed by Part III of the Constitution.

67. A definition in a modern statute provides the vocabulary for understanding the different provisions of the statute. But the definition clause cannot control the legislative intent or the express provisions of the statute, or any particular provision which is clear from the language of the section. This view finds support from the decision in the case of James Finlay & Company Limited…Vs…Chairman, Second Labour Court, Dacca & another, 1981 BLD (AD) 21.

68. In the case of Jabir…Vs…Middle-Sex County Council, (1949) 1 KB 142, Scott, L.J. has opined that the definition sub-section ought not to be treated as prima facie an operative sub-section. "It is a definitive sub-section and no more" and a definition section ought to be construed as not cutting down the enacting provisions of an Act, unless there is absolutely clear language having the opposite effect.

69. Crawford in his book "Construction of Statutes" at pages 361-362 has dealt with this aspect of interpretation in the following words:

> "The legislature has the power to embody within the statute itself a definition of its language as well as rules for its construction. These are usually binding upon the courts, since they form a part of the statute, even though in the absence of such a definition or rule of construction, the language would convey a different meaning. But the meaning of the legislature, as revealed by the statute considered in its entirety, if contrary to the expressions of the interpretation clause or the legislative definitions, will prevail over them. That is, the interpretation clause will control in the absence of anything else in the Act opposing the interpretation fixed by the clause. No interpretation clause should be given any wider meaning than is absolutely necessary. In other words, it should be subjected to a strict construction."

70. Halsbury in his "Laws of England", vol. XXXI, pages 476-477, has stated the rule in the following words:

> "Most modern statutes contain an interpretation, or definition section, wherein is declared the meaning which contain words and expressions are to or may, bear or include for the purpose of the statute in question. As a result, it should be used for interpreting words which are ambiguous or equivocal only, and not so as to disturb the meaning of such words as are plain. Definition section does not necessarily apply

in all the possible contexts in which it may be found in the statute. If a defined expression is used in a context which in the definition will not fit, it may be interpreted according to its ordinary meaning. Definition sections are often inserted ex abundenti cautela, and are not necessarily to be construed in a positive enactment."

71. Craies on Statute Law, sixth edition at page 212, has stated the rule of construction in the following words:

"In most modern Acts of Parliament, there is an 'interpretation clause' enacting that certain words when found in the Act are to be understood as regards that Act in a certain sense, or are to include certain things, which but for the interpretating clause, they would not include."

72. In the same book at page 161, it has been also stated:

"The modern statute contains, in the form of an interpretation clause, a little dictionary of its own, in which it endeavours to define, often arbitrarily, the chief terms used. Any ambiguity in the definition of such terms can rarely be solved otherwise than by examination of this statute itself or other enactments with which it is to be read by reason of its subject matter or the direction of the legislature."

73. Craies on Statute Law at page 215 has further stated:

"If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter of argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration. The learned author quoted the rule of interpretation of statute by Lord Selsborne in Mouz V. Jacohs, (1875) 127 H.L. 488, 'It appears to me that the interpretation clause does no more than say that, when you find these words in the Act, they shall, unless there be 'something' repugnant in the context or in the sense, include fixtures.' "

74. In the case of Punjab Co-operative Bank Ltd...Vs...Republic of Pakistan, PLD 1964 (SC) 616= 16 DLR (SC) 518, the Supreme Court of Pakistan has stated the rule in the following words:

"The object of incorporating a definition clause or section in a statute is generally to declare what certain words or expressions used in that statute shall mean. The definition thus is a rule of a declaratory character and normally applies to all cases which come within its ambit, whatever might have been the position before."

75. But the Supreme Court of Pakistan in the subsequent decision in the case of Pramatha Nath Chowdhury...Vs... Kamir Mandal, PLD 1965 (SC) 434= 17 DLR (SC) 392 has stated as follows:

"A definition clause has the effect of a declaration provision and governs all cases coming within the ambit."

76. The rules of interpretation shown above are being followed by the Superior Courts of various jurisdictions without any controversy. Crawford, however, has stated in his book "Construction of Statutes" at page 363, as a measure of caution, the application of the legislative definition for interpreting the statute in the following words:

"Although the legislative definition may be of great assistance in clearly revealing the legislative meaning, it may also create considerable confusion. The definitive

> language may itself require construction. Its own language may be ambiguous. It may be clearly contradictory with the language of the statute proper. The statute may indicate that the legislative definition is inaccurate. It is, therefore, obvious that before that legislative definition can be relied upon, its applicability as well as its reliability should be ascertained. And in this connection, one important situation should be mentioned. In the event that the definition found in the interpretation clause is at variance with the intention of the law-makers as expressed in the plain language of the statute, that intention must prevail over the legislative definition."

77. From the above-noted principles of interpretation stated by the different authorities, it seems that the definition clause is generally binding upon the Courts, provided that it is not at variance with the intention of the law-makers as expressed in the plain language of the statute. However, the definition clause need not be in accord with the ordinary dictionary meaning. When a word or phrase is defined as having a particular meaning in an enactment, it is that meaning alone which must be given to it in interpreting a section of the Act. Courts have no power to extend the meaning of a provision of a statute. If the Courts are to have the power to extend the meaning of the words used in a statute, they will be travelling beyond their function which is to interpret law and not to amend or make law. Of course, in a proper case, when an expression used in a statute has a meaning from that which the language used to indicate, a Court would not be exceeding its jurisdiction in giving an extended meaning to it. But before this is done, the intention of the Legislature must be clear on the point. It is an elementary rule of interpretation of statutes that in construing a statute, all the provisions should be considered together and the interpretation sought to be given must reconcile with the different provisions of the statute, if possible. The word "context" occurring in section 13 of the General Clauses Act implies that in construing a statute, one should not isolate words or give them their abstract meaning or consider the different provisions separately and independently. Every part must be considered together and every part is to be considered as an integral part of the whole, and it should be kept subservient to the general intent of the whole enactment.

78. In the decision in the case of Charanjit Lal Chowdhury...Vs...The Union of India and others, AIR 1951 SC 41, Justice B. K. Mukherjea has articulated himself in the following manner:

> "...The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons."

79. Basing on this observation of Justice B. K. Mukherjea of the Indian Supreme Court, the Bombay High Court in the case of State of Bombay...Vs...R.M.D. Chamarbaugwalia and others, AIR 1956 Bombay 1, has found that the fundamental right guaranteed to every citizen under Article 19(1) (f) and (g) of the Indian Constitution is guaranteed as much to a citizen as to a corporation, where all the shareholders and directors are Indian citizens. If a case arises where the shareholders or the directors are not citizens, then the Court may well consider whether the particular corporation is a citizen or not.

80. In the decision in the case of State Trading Corporation of India, Limited…Vs….The Commercial Tax Officer and others, AIR 1963 SC 1811, according to the majority view, the word "citizen" in Article 19(1)(f) and (g) of the Indian Constitution has no special meaning and refers to a natural person. The State Trading Corporation cannot be regarded either by

itself or by taking it as an aggregate of citizens, as a citizen for the purpose of enforcing rights under Article 19(1)(f) and (g). The State Trading Corporation is really a department of the Government behind the corporate veil and it is not possible to pierce the veil of incorporation in India to determine the citizenship of the members and then to give the corporation the benefit of Article 19. The corporation cannot claim to enforce the fundamental rights under Part III of the Indian Constitution against the State as defined in Article 12. But according to the minority view, the State Trading Corporation, so long as it consists wholly of citizens of India, can ask for enforcement of the fundamental rights granted to the citizens under Article 19(1)(f) and (g) of the Indian Constitution. The State Trading Corporation is not a department or organ of the Government of India and can claim to enforce the fundamental rights under Part III of the Constitution against the State as defined in Article 12. It is also the minority view that the Constitution-makers when they used the word "citizen" in Article 19 intended that at least a corporation of which all the members were citizens of India would get the benefit of the fundamental rights enshrined in that Article and the legal position that the corporation is a distinct entity from its members does not appear to create any real difficulty in the way of giving effect to this intention.

81. In view of what have been stated above, it is crystal clear that according to the majority view, the State Trading Corporation of India is not a citizen of India; but it is a citizen of India as per the minority view. In this regard, it is very interesting to note that in the State Trading Corporation case, the Supreme Court of India referred to the observation of Justice B. K. Mukherjea which we quoted earlier. But according to the majority Judges in the State Trading Corporation case, that observation of Justice B. K. Mukherjea was merely an obiter dictum and since it was an obiter dictum, the majority Judges found themselves unable to accept the above observation of Justice B. K. Mukherjea as a guiding principle for entitlement of an indigenous Indian company as a citizen of India. Whatever may be the character/nature of the observation of Justice B. K. Mukherjea in the case reported in AIR 1951 SC 41, the fact remains that it is a momentous observation and its significance cannot be whittled down in the least.

82. At this stage, let us discuss in the light of the various provisions of the Constitution of Bangladesh as to whether an indigenous company incorporated in Bangladesh is a citizen or not for the purpose of enforcement of its fundamental rights under Article 102(1) of the Constitution.

83. As per Article 152(1) of our Constitution, except where the subject or context otherwise requires- "citizen" means a person who is a citizen of Bangladesh according to the law relating to citizenship. So it is understandable that the definition of "citizen" as given in Article 152(1) is not a water-tight definition. Where the subject or context otherwise requires, the definition of "citizen" as provided in Article 152(1) of the Constitution will not be applicable.

84. It may be reiterated that Article 102 (1) of the Constitution provides that 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 Constitution. Here the framers of the Constitution have consciously used the expression 'any person aggrieved'. To put it differently, the term 'any person aggrieved' employed in Article 102(1) of the Constitution may be either a citizen or a non-citizen. Considered from this standpoint, it leaves no room

for doubt that the definition of "citizen" as given in Article 152(1) is not applicable for enforcement of any of the fundamental rights guaranteed under Part III of the Constitution. What we are driving at boils down to this: the phraseology 'any person aggrieved' is open-ended and it does not distinguish any citizen from any non-citizen.

85. From a careful perusal of Part III of our Constitution, it transpires that Articles 27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42 and 43 of the Constitution provide fundamental rights only to the citizens of Bangladesh. On the other hand, Articles 31, 32, 33, 34, 35 and 44 of the Constitution provide fundamental rights to any person, whether a citizen or a non-citizen.

86. The mechanism/device for enforcement of the fundamental rights as guaranteed by Part III of our Constitution has been embodied in Article 102(1); but in contrast, the Indian Constitution does not lay down any such enforcement mechanism/device. Precisely speaking, it has not been spelt out who can enforce the fundamental rights guaranteed under Part III of the Indian Constitution. Anyway, the fundamental rights guaranteed under Part III are enforced as per Articles 32 and 226 of the Indian Constitution.

87. Reverting to the Constitution of Bangladesh, there is no dispute about the invocation of the fundamental rights by the petitioner-company for enforcement of its fundamental rights which are applicable to non-citizens as well. Article 31 is one of those Articles which the petitioner-company has admittedly invoked in this case and this view, to be sure, gets support from the decision in the case of Elias Brothers (Md) (Pvt) Limited and another…Vs…Bangladesh and others, 16 BLC (2011) 327.

88. Since as per Article 102(1) any person aggrieved can enforce any of the fundamental rights guaranteed under Part III of our Constitution, we do not find any difficulty on the part of the petitioner-company, an indigenous Bangladeshi company whose shareholders and directors are all Bangladeshi citizens, to invoke Articles 27 and 40 of the Constitution in this case. Besides, Articles 27 and 40 do not say who can enforce them; it is only Article 102 (1) which says any person aggrieved can enforce them which undeniably fall under Part III of the Constitution. So Articles 27 and 40 which have been invoked by the petitioner-company are to be interpreted in the light of Article 102(1) of the Constitution.

89. It is a truism that a company is a collective representation of its shareholders. The petitioner-company is, no doubt, a collective representation of its shareholders who are all Bangladeshi citizens. It is incorporated in Bangladesh under the Companies Act, 1994. In a word, it is an aggregate of the citizens of Bangladesh. By way of recapitulation, the petitioner-company is a person as per the definition of 'person' given in section 3(39) of the General Clauses Act. It seems that Mr. Imtiaz Moinul Islam has rightly pointed out that the Appellate Division accepted the standing of Bangladesh Environmental Lawyers Association (BELA), an indigenous association, in enforcing the fundamental rights of an indeterminate number of people. In BELA's case, Dr. Mohiuddin Farooque was the Secretary General of BELA. It is the finding of his Lordship Mr. Justice Mustafa Kamal in BELA's case that any person aggrieved as provided in Article 102 meaning only an exclusive individual and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution itself. So we have no hesitation in holding that a collective and consolidated personality can enforce his or its fundamental rights under Article 102(1) of the Constitution. The petitioner-company, it goes without saying, is a collective and consolidated personality in accordance with the phraseology used by Mr. Justice Mustafa Kamal in BELA's case.

90. Moreover, the Appellate Division allowed Bangladesh Retired Government Employees Welfare Association to enforce its fundamental right guaranteed under Article 27 of the Constitution in the case of Bangladesh Retired Government Employees Welfare Association and others…Vs…Bangladesh represented by the Secretary, Ministry of Finance and another, 51 DLR (AD) 121. If BELA and Bangladesh Retired Government Employees Welfare Association could invoke the writ jurisdiction of the High Court Division for enforcement of their fundamental rights under Article 102(1) of the Constitution, then it is not comprehensible as to why the petitioner-company will be precluded from enforcing its fundamental rights guaranteed under Articles 27 and 40 in accordance with Article 102(1) of the Constitution. It does not stand to reason and logic as to why this Court will shut out the petitioner-company in the matter of invocation of its fundamental rights, whether applicable to citizens or non-citizens, and enforcing them under Article 102(1).

91. On top of that, as adverted to earlier, the Indian Supreme Court has found the State Trading Corporation of India, by majority view, a non-citizen on the ground that it is a department of the Government of India for all practical purposes. But in the present case before us, indisputably the petitioner-company is a Private Limited Company incorporated in Bangladesh. It is not an entity of the Government, let alone the question of any department of the Government of Bangladesh. So these facts of the case are clearly distinguishable from those of the State Trading Corporation case.

92. To us, it plainly appears that the reason behind inclusion of the word 'citizen' in Articles 27 and 40 or any other similar Article of our Constitution is not to exclude any indigenous Bangladeshi company which is essentially and practically an aggregate of the citizens of Bangladesh. Of course, a foreign company will not be able to enforce the fundamental rights guaranteed under Articles 27 and 40 or any other Articles which are applicable to citizens only in accordance with Article 102(1) of the Constitution.

93. It is abundantly clear from the diction– 'any person aggrieved'–used in Article 102(1) of the Constitution that it requires a citizen to include any indigenous company like the petitioner-company and such inclusion in apparent contradiction with the definition of 'citizen' as given in Article 152(1) is permitted, except where the subject or context otherwise requires. In this regard, our view is fortified by the decisions in the cases of Special Officer and Competent Authority, Urban Land Ceilings, Hyderabad and another...Vs…P. S. Rao, AIR 2000 SC 843 and The State of Maharashtra….Vs…Indian Medical Association and others, AIR 2002 SC 302.

94. Incidentally we are reminded of an oft-quoted dictum of Justice Oliver Wendell Holmes of the American Supreme Court–"The life of law is not logic; it has been experience." Law is never static. It is always in a state of flux. It is always developing by the experience of Judges through judicial activism.

95. From the discussions made hereinabove, we are led to hold that virtually there is no conflict between Article 102(1) and the definition of 'citizen' as given in Article 152(1) of the Constitution. As Article 152(1) starts with the words–"in this Constitution, except where the subject or context otherwise requires…", so Article 102(1) is not obviously controlled or governed by the definition of 'citizen' as given in Article 152(1). Given this scenario, without going into the question as to whether the petitioner-company is a 'citizen' of Bangladesh according to the law relating to citizenship, we are of the opinion that for the limited purpose

of enforcement of any of the fundamental rights as guaranteed by Part III of the Constitution, an indigenous company like the petitioner-company, whose shareholders and directors are all Bangladeshi citizens, is a 'citizen' of Bangladesh. This interpretation, as we see it, is in perfect accord with the intention of the framers of the Constitution and the tone and tenor of Article 102(1) of the Constitution.

96. However, the petitioner has challenged the escalation process of the Alliance and the notice of suspension of its business after accrual of the cause of action. There is no need on the part of the petitioner-company to challenge the escalation protocol of the respondent no. 1 before issuance of the warning letters and the notice of suspension. Unless the fundamental rights, if any, of the petitioner-company are adversely affected by any action of the respondent no. 1, it need not invoke the writ jurisdiction of the High Court Division under Article 102(1) of the Constitution. The petitioner-company has approached the High Court Division under Article 102(1) of the Constitution only after accrual of the cause of action, that is to say, after issuance of the two warning letters and the notice of suspension of its factory. This being the landscape, the petitioner-company is not required to approach the High Court Division under Article 102(1) of the Constitution for enforcement of its fundamental rights at the earliest opportunity especially when the escalation protocol of the Alliance is professedly unapproved by the NTPA or the Government of Bangladesh. So in this respect, the submission of Mr. Tanjib-ul Alam stands negatived.

97. It is admitted that the respondent no. 1 escalated the petitioner's factory from stage 1 to stage 2 without inspecting it. After approval of the DEA on 04.04.2017 by the Accord, the other inspecting agency, the respondent no. 1 (Alliance) cannot carry out any inspection or suggest any NC or escalate the petitioner's factory because of its status as a 'shared' factory. As the Alliance is under a contractual obligation to follow the inspection of the Accord and the resultant CAP and the DEA approved by the Accord, the Alliance cannot replicate the same in relation to the petitioner's factory. But the replication was done by the Alliance in sheer contravention of the provisions of the contract as evidenced by Annexures- 'A' and 'Q'.

98. No scrap of paper or document has been furnished on behalf of the contesting respondents to show that the escalation protocol of the Alliance is approved by the NTPA or the Government. On the contrary, the record shows that the NTPA has already drafted an escalation protocol for the factories under the NI. Undeniably the RCC has been created by the DIFE to supervise the NI-listed factories. It is *ex-facie* evident from Annexures- '12' and '12A' filed by the contesting respondent nos. 2 and 3 that the NTC has prescribed a course of action for the NI-covered factories. The NI runs with the support of the ILO and the NI has nothing to do with the Alliance or its factories. Any inspecting agency like the Alliance, an instrumentality of the Government of Bangladesh, cannot formulate an escalation protocol on its own without any legal sanction or authority from the NTPA or the Government of Bangladesh. This being the panorama, we have no option but to hold that the so-called escalation protocol of the Alliance is 'de hors' the law. So the natural consequence is that the entire escalation process including the 2(two) warning letters and the notice of suspension of the petitioner's factory are all without any legal basis.

99. As to the contention of Mr. Tanjib-ul Alam that there are disputed questions of facts and those facts cannot be resolved in this summary proceeding under Article 102 of the Constitution and hence the Rule is not maintainable, Mr. Imtiaz Moinul Islam has drawn our

attention to paragraph 5.19 at page 610 of Mahmudul Islam's "Constitutional Law of Bangladesh", 3rd edition, wherein it has been stated in unmistakable terms:

> "In view of the provision of Article 44, the High Court Division cannot refuse to entertain an application under Article 102(1) on the ground that the petition involves resolution of disputed questions of facts; if necessary, in appropriate cases, the Court will have to take evidence, either itself or by issuing commission, to resolve any disputed question of fact to determine whether a fundamental right has at all been violated."

100. So in enforcing the fundamental rights under Article 102(1) of the Constitution, if need be, the Writ Court may take evidence and settle disputed questions of facts, if any. A similar view has been taken in the case of Kavalappara Kottarathil Kochunni alias Moopil Nayar…Vs…State of Madras and others, AIR 1959 SC 725.

101. Coming back to the case in hand, we find that admittedly the Alliance has not contested the Rule. Only the respondent nos. 2 and 3 have contested the Rule. The facts alleged by the petitioner-company in the Writ Petition, Supplementary Affidavits and Affidavit-in-Reply can only be assailed/controverted by the Alliance inasmuch as the respondent nos. 2 and 3 have no direct or firsthand knowledge thereabout. Against this backdrop, the respondent nos. 2 and 3, in our opinion, are not competent enough to raise the plea of the disputed questions of facts in this case.

102. However, in the facts and circumstances of the case, we are of the considered view that the instant Rule can well be disposed of on merit, apart from the disputed questions of facts, if any. This Court need not record any evidence vis-à-vis any alleged disputed question of fact and resolve it on that basis.

103. As regards the argument of Mr. Tanjib-ul Alam that the petitioner-company ought to have approached the Review Panel for necessary relief(s) against the notice of suspension dated 18.06.2017 (Annexure-'O') and since the equally efficacious remedy was not availed of by the petitioner-company, the Rule is incompetent, we deem it pertinent to state that previously the Superior Court used to refuse to entertain any Writ Petition if the petitioner did not avail himself of any alternative remedy. This was a self-imposed rule of the Court. But now it is a constitutional requirement of Article 102 (2) that a Writ Petition for judicial review of any action shall not be entertained if the petitioner does not, before coming to the High Court Division, exhaust any efficacious remedy available to him under any law. But there is no requirement of exhaustion of efficacious remedy for enforcement of fundamental rights under Article 102(1) and a petition under Article 102(1) cannot be turned down on the ground of non-exhaustion of any efficacious remedy. (Government of Bangladesh represented by the Ministry of Works and another…Vs…Syed Chand Sultana and others, 51 DLR (AD) 24).

104. It may be recalled that the instant Writ Petition has been filed under Article 102(1) of the Constitution for enforcement of the fundamental rights of the petitioner-company under Articles 27, 31 and 40 of the Constitution. It is not a Writ Petition under Article 102(2) of the Constitution. So the Rule is maintainable. Anyway, what is of paramount importance is that it is not a case of closure of the factory of the petitioner-company; rather it is a case of suspension of the business of the petitioner-company. So no appropriate relief(s) can be sought from the Review Panel as evidenced by Annexure- 'S' (Memo No. 40.00.0000.022.10.009.2013.115 dated 11.05.2014) to the Affidavit-in-Reply.

105. Regard being had to the facts and circumstances of the case, it is the admitted position that there was never any severe and imminent danger to the workers' safety in the factory of the petitioner and that was also conceded by the other inspecting agency Accord and the buyer Li & Fung; but even then, the notice of suspension dated 18.06.2017 was issued in violation of Clause 7.2(c) of the Agreement (Annexure-'A') by the respondent no. 1 (Alliance) for reasons best known to itself.

106. The entry dated 30.04.2019 in the website of the respondent no. 1 (Alliance) shows that the petitioner is a "participating" company. But we fail to understand as to why the Alliance made the entry "participating" in its website without having any communication with the petitioner and without any RVV to its factory. It is undisputed that after issuance of the notice of suspension dated 18.06.2017, the Alliance did never inspect the petitioner's factory nor did it suggest any remediation work thereof which is manifest from the CAP reports on the structural, fire and electrical safety of the factory preserved in the website of the Alliance. So the very insertion of the word "participating" against the name of the petitioner-company in the website of the Alliance as of 30.04.2019 appears to be mysterious, inexplicable and unfathomable. This might have been done by the Alliance to frustrate the instant Rule as submitted by Mr. Imtiaz Moinul Islam.

107. It is admitted that the petitioner's factory is a "shared" factory. It is further admitted that the DEA was approved by the Accord on 04.04.2017. But strangely enough, the Alliance does not indicate that the petitioner is under the Accord as well and the CAP relating to the petitioner in the Alliance website does not redirect any viewer/buyer to the Accord website. Now every person, wishing to do business with the petitioner, will enter the Alliance website and find the petitioner to be a "participating" company; but when he will enter the CAP of the Alliance, he will see that the petitioner has done nothing after the 6th RVV and he will naturally cancel any such wish. Had the Alliance, without having any ill-intention, followed the general system, then every person who would have entered the Alliance's CAP would have been necessarily redirected to the Accord website where he would have found that the petitioner is a 100% compliant factory at the moment. By inserting the word "participating" with a *mala fide* intention in its website and by not including the Accord's report therein as is the general rule, the respondent no. 1 violated the petitioner's fundamental right guaranteed under Article 27 of the Constitution. By suspending the business of the petitioner-company through the notice of suspension dated 18.06.2017 (Annexure-'O'), the petitioner's fundamental right to profession guaranteed under Article 40 was also contravened. As according to the Accord website, the petitioner-company is a 100% compliant factory at present and as it is a "shared" factory both by the Accord and the Alliance, the suspension of its business by the Alliance by way of issuance of the notice dated 18.06.2017 cannot be maintained at all; albeit at a later stage, the Alliance fraudulently wrote "participating" in its website as of 30.04.2019.

108. The Accord had an escalation protocol like that of the respondent no. 1 (Alliance). But that escalation protocol of the Accord was not also approved by the NTPA or the Government of Bangladesh. Hence the Accord negotiated with the Government and the BGMEA to get approval to its escalation protocol vide the Workshop Summary dated 29.08.2018. Finally on 08.05.2019 (Annexure-'V-2'), the Accord signed a MOU with the BGMEA. Clause 2 of the MOU dated 08.05.2019 indicates that the Accord has agreed to enforce its escalation protocol in collaboration with the BGMEA which conclusively proves that Annexures- '12' and '12A' to the Supplementary Affidavit-in-Opposition dated

03.07.2019 have nothing to do with the escalation process of the Accord or that of the Alliance and the Alliance has not taken any step as yet for approval of its escalation protocol as the NI or the Accord did (Annexures- '12A' and 'V-2' respectively).

109. For the same purpose of electric, fire and structural safety of the supplier factories, the Alliance and the Accord are prescribing different standards. The Alliance has agreed in Clauses 1.1, 4.1 and 5.1 of its Agreement (Annexure-'A') that it will follow a common standard and according to its factory inspection standard (Annexure-'Q'), it will not duplicate any inspection completed by the Accord and will accept and use the Accord's inspection report and the CAP concerned to track the progress of the remediation work of the factory. But the Alliance violated its own standard and issued the impugned notice of suspension dated 18.06.2017 (Annexure-'O') in flagrant infringement of the fundamental rights of the petitioner guaranteed under Articles 27, 31 and 40 of the Constitution.

110. Having regard to the facts and circumstances of the case and in view of the foregoing discussions, we find merit in the Rule. The Rule, therefore, succeeds.

111. Accordingly, the Rule is made absolute without any order as to costs. It is hereby declared that the escalation protocol of the respondent no. 1 (Alliance) and the impugned notice dated 18.06.2017 (Annexure-'O') suspending the business of the petitioner-company are without lawful authority and of no legal effect. As a corollary to this order, the respondent no. 1 (Alliance) is directed to formulate a proper escalation protocol for its RMG factories in collaboration with the Government and/or the BGMEA at the earliest.

12 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 9535 of 2018
With
WRIT PETITION NO. 10000 of 2018

AHN. HONG, SIK. HPCC-SEL JV
..…. Petitioner

(In writ petition No.9535 of 2018)
Versus-
Central Procurement Technical Unit (CPTU) and others
..... Respondents

(In writ petition No.9535 of 2018)

Bangladesh Bridge Authority and others
..….. Petitioner

(In writ petition No.10000 of 2018)
-Versus-
Central Procurement Technical Unit (CPTU) and others
..... Respondents

(In writ petition No.10000 of 2018)

Mr. Rokonuddin Mahmud, Senior Advocate with
Mr. Rais Uddin Ahmed

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Mohammad Ali

Mr. Md. Bodruddoza
Mr. Mohammad Shahidul Islam,
Advocates.
……For the petitioner
(In writ petition No.9535 of 2018)

Mr. Md. AbdunNur, with
Mr. Abdul Jabbar Joel,
Advocates
….. For the petitioner
(In writ petition No.10000 of 2018)
and
….. For the respondent No. 5, 6 & 8.
(In writ petition No.9535 of 2018)

Mr. M. Qumrul Hoque Siddique, with
Mrs. Towfika Karim
Mr. Md. Shaharia Kabir, Advocates
…….. For respondent No.6

(In writ petition No.9535 of 2018 and
Writ petition No. 10000 of 2018)

Heard on 11.10.2018,
24.10.2018,31.10.2018,
5.11.2018, 08.11.2018, 14.11.2018 &

Judgment on 28.11.2018

If we now exercise our common sense it can be perceived when the Review Panel can 'dismiss' an Appeal if the same is not well founded either in fact or law then why it can not 'allow' the same if a decision appealed against is otherwise wrong ? In other words, when CPTU is competent to dismiss an Appeal it can also allow an Appeal if it is otherwise found to be competent. (Para-32)

JUDGMENT

Md. Ashfaqul Islam, J:

1. Both the writ petitions are taken up together and heard and disposed of by this single judgment as there involved a common question of fact and law.

2. In writ petition No. 9535 of 2018 Rule was issued at the instance of AHN. HONG, SIK. HPCC-SEL JV. In Writ Petition No. 10,000 of 2018 Rule was issued at the instance of Bangladesh Bridge Authority represented by it's Executive Director and others.

3. In Writ Petition No. 9535 of 2018, the petitioner of Writ Petition No. 10000 of 2018 Bangladesh Bridge Authority featured as Respondent No. 7 and 8.

4. Terms of the Rule of Writ Petition No. 9535 of 2018 issued on 23.07.2018, was in the following:-

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why judgment and order dated 17.07.2018 passed by the respondent Nos.2-4, the Review Panel-3 in Review Appeal No.43-03 of 2018 (Annexure-E) declaring the petitioner as "Technically Non Responsive" should not be declared to have been passed without lawful authority and of no legal effect "*

5. By an ad-interim order operation of the said judgment was stayed.

6. In Writ Petition 10000 of 2018 Rule issued on 30.07.2018, under the following terms:-

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why judgment and order dated 17.07.2018 passed by the Review Panel-3, Central Procurement Technical Unit (CPTU); implementation Monitoring & Evaluation Division, Sher-E-Bangla Nagar, Dhaka-1207 in Review Petition No.43-03 of 2018 (Annexure-A) should not be declared to have been passed without lawful authority and of no legal effect. "*

7. As we have found/seen that almost both the Rules were issued almost in a common terms challenging the Judgment and Order dated 17.07.2018 passed by the Review Panel 3 in Review Appeal No. 43-03/2018 (Annexure-"E").

8. The averments figured in both the petitions, leading to the Rules are that Bangladesh Bridge Authority, the petitioner of Writ Petition No. 10,000 of 2018 invited Expression of Interest (EOI) on 16.03.2016 for appointment for selection of Firm/Service Provider for Supply, Customize Installation and Maintenance of a proven Modern Real-Time Web Based On-Line Centralized Toll Collection System with the Web Based Monitoring and Related Services Including Collection of Toll for 5 (Five) years for Toll Plaza of Bangabandhu Bridge. Nine Firms submitted Expression of Interest (EOI). The petitioner of Writ Petition No. 10000 of 2018 Bangladesh Bridge Authority who is the Procuring Entity evaluated the expression and made a short list of 6 (six) Firms. They were requested to submit technical offer and financial offer simultaneously (two envelope system) Out of them 5 Firms submitted technical offer and financial offer. The Proposal Evaluation Committee (PEC) consisting of 9 (Nine) members evaluated the proposal that included a Senior Professor from BUET and another Additional Chief Engineer of LGED and Every individual member gave marks individually. Head of Procuring Entity (HOPE) examined the evaluation sheet and

approved 3 (three) offers as responsive and gave letter to them to participate in the opening of financial offer. Be it mentioned that one of the successful bidders Computer Network System Ltd. featured as Respondent No. 6 in Writ Petition No. 9535 of 2018 and also Respondent No. 5 in Writ Petition No. 10000 of 2018. It is also mentioned that the petitioner of the said Writ Petition No. 9535 of 2018 i.e. HPCC-SEL JV the KEC-S TRAFFIC-TECH –VALLY JV and Computer Network System (hereinafter referred to as HPCC, KEC and CNS) were declared responsive by the Technical Evaluation Committee and those were communicated to all of them mentioning that the financial proposal would be opened in the Evaluation Committee meeting on 3 June, 2018 at 11.00 am.

9. Computer Network System Respondent No. 6 thereafter filed an application before the CPTU and simultaneously they also moved the High Court Division in Writ Petition No. 7677 of 2018 and obtained Rule and ad-interim direction. Against which the government i.e. the Procuring Entity and the HPCC filed two separate Writ Petitions and during pendency of the said Writ Petition at the instance of the CNS the review which was filed was allowed by the CPTU in Review Appeal No. 43-03 of 2018 against which both the Writ Petitions were filed respectively by HPCC as petitioner in Writ Petition No. 9535 of 2018 and by the Procuring Entity (Bridge Authority) in Writ Petition No. 10000 of 2018.

10. Mr. Rokonuddin Mahmud the learned Senior Advocate appearing with Mr. Md. Bodruddoza, Mr. Rais Uddin Ahmad, Mr. Mohammad Shahidul Islam the learned Counsels appearing for the petitioner in Writ Petition No. 9535 of 2018 after placing the petition and drawing our attention on the materials on record advanced the following arguments:-

Firstly, it was argued that the Review Panel acted malafide and in gross violation of Rule 60(3) (ক) (খ) (গ) (ঘ) (ঙ) and (চ) of the Public Procurement Rules, 2008 in declaring the bids of the petitioner HPCC together with other responsive bidder KEC as "technically non-responsive" as the Review panel under the said Rule was only empowered to "Advise" or "Recommend" the concerned authority and therefore, the Judgment and Order passed by the Review Panel is liable to be declared to have been passed without lawful authority having no legal effect. In support of this argument he has placed reliance in the decision of Softesule Private Ltd. vs Bangladesh 12 ALR, 8, this Judgment was delivered by a bench presided over by her Lordship Justice Naima Haider on 04.01.2018.

11. Second, important argument which was advanced by the petitioner was that the decision of the CPTU was given in gross violation of principle of natural Justice. It has been substantiated that the Review Appeal admittedly was allowed without hearing the present petitioner HPCC as well as KEC and they were not served with any notice and were not given any opportunity of being heard and therefore, the ex parte Judgment and order passed by the Review Panel simply on that score should be declared to have been passed without any lawful authority having no legal effect. Several decisions were cited on this point. M.M Abdul Nayem vs CPTU (21 BLC, 422), Patimas International vs. Review Panel (13 BLC, 474) which was affirmed by the Hon'ble Appellate Division in St. Electronics Private Ltd. vs Patimas International Sdn Berhad and others (12 MLR (AD) (2007) 325). And plethoras of decisions on this point could also be found in the Case of M.M Abdul Nayem vs CPTU as referred to above.

12. Third important point that has been advanced by the petitioner HPCC was that the Technical Proposals were opened at the office of the Respondent No. 7, Chief Engineer, Bangladesh Bridge Authority on 12.09.2017 and the Proposal Evaluation Committee (PEC) after evaluation declared KEC, CNS and HPCC as technically responsive and accordingly

CNS (Respondent No. 6 of Writ Petition No. 9535 of 2018) was notified on 24.05.2018 (Annexure-"D") with regard to opening of Financial Proposal on 03.06.2018 but the Respondent No. 6 CNS having been dissatisfied with the said decision of the Procuring Entity with regard to declaring petitioner and another bidder as technically responsive lodged 2 (two) complaints on 21.05.2018 (as it could be found in Annexure-"B" in Writ Petition No. 10000 of 2018) to the Procuring Entity and on 27.05.2018 Annexure-"B-1 in Writ Petition No. 10000 of 2018 which was lodged admittedly in violation of Rule 57(1) read with schedule (2) of PPR-2008 as it had been lodged after the alleged cause of action and the Review Panel while passing the said Judgment totally ignored this aspect of law. Hence, the Judgment and Order on that score should be declared illegal. Reliance have been placed in the decision of VA-TECH WABAG Ltd. vs Secretary, Ministry of Industries and others 17 BLC 568 on the point.

13. Besides, learned Counsel Mr. Bodruddoza has also drawn our notice to the additional grounds those have been categorized in the supplementary affidavit filed by the petitioner HPCC in Writ Petition No. 9535 of 2018. The grounds are mentioned in Paragraph 5 of the said supplementary affidavit. Those are as follows:-

> Since the petitioner in strict compliance of the requirements of sub-clause 4 submitted work experience/Testimonials and Agreements of collecting Toll amount of Tk. 18,119,900,000.00 (Eighteen Hundred Eleven Crore Ninty Nine) which is more than the value as required under sub-clause 4 but the Review panel on misconstruing the Toll Collection amount of Tk. 14,44,78,829.00 (Revised Tk. 14,54,91644.00) as value of the contract declared the petitioner's bid as non responsive despite the fact that the said amount of Tk. 14,44,78,829.00 was the amount paid to the Service Provider and not Toll Collection and as such the Judgment and Order of the Review panel is liable to be set aside.

14. Next he submits that in the RFP under clause 21.1(C) all the documents asked for are related with the bidders' experience only and only 10 points are allocated for the same and since the petitioner already obtained 81.29 point/marks, the 10 points allocated for experience shall not affect the responsiveness of the petitioner's bid as the minimum qualifying marks for being responsive is 70 points/marks and as such the decision of Review Panel being based only on 10 points/marks regarding experience is liable to be declared to have been posed without lawful authority and is of no legal effect.

15. Lastly , he contends though the respondent No. 6 was short listed on 16.07.2017 along with 5 (Five) other including the petitioner but the respondent No. 6 neither filed any complaint at that EOI stage, rather as an unauthorized person lodged the complaint on 21.05.2018 and respondent No. 6 lodged the complaint on 30.05.2018 when Schedule-2 Rule 57 of PPR provides provisions for lodging complaint within 7 calendar days and as such the complaint lodged beyond 7 calendar days is not a complaint in the eye of law but the Review Panel without discussing this legal requirements declared the bid of the respondent No.6 as responsive and as such the decision of the Review Panel is liable to be set aside by this Hon'ble Court.

16. It seems all these submissions are related with the decision of the CPTU touching upon the merit of the case which I will address later stage of the Judgment.

17. Mr. Abdun Nur the learned Counsel appearing for the petitioner Bangladesh Bridge Authority and others in Writ Petition No. 10000 of 2018 adopted the same argument as it has

been advanced in Writ Petition No. 9535 of 2018. In addition, by filing Supplementary Affidavit dated 14.11.2018 he has argued that section 30 of the Public Procurement Act, 2006 provides for qualification of members of Review Panel. Section 30(3) runs as under:-

> *" (৩) ধারা ৩০ (২) এর অধীন সরকার, দায়েরকৃত কোন আপীল পর্যালোচনা ও সিদ্ধান্ত প্রদানের জন্য আইন, সংশ্লিষ্ট পন্য বা কার্য বুাদ্ধিবৃত্তিক ও পেশাগত সেবা ক্রয়ে কারিগরি জ্ঞানসম্পন্ন, ব্যবস্থাপনা বিষয়ে এবং ক্রয় কার্যে সুবিদিত বিশেষজ্ঞ ব্যক্তিবর্গের সমন্বয়ে এক বা একাধিক রিভিউ প্যানেল গঠন করিতে পারিবে: তবে শর্ত থাকে যে, প্রজাতন্ত্রের চাকুরীরত কোন সদস্য রিভিউ প্যানেলে অন্তর্ভূক্ত হইবে না।"*

18. And quoting the said law the learned Counsel contends that one Mr. M. Shamsul Haque, Chairperson of the Review Panel-3 was a former Secretary, another member Mr. Md. Aulad Hossain was a former District Judge and Mr. Abu Alam Chowdhury another member of the panel was a former Director of FBCCI, a businessman and none of them possesses technical knowledge and fulfill requisite qualifications for which the constitution of Review Panel-3 was illegal as opposed to Section 30(3) of the Act.

19. On the other hand, Mr. M. Qumrul Hoque Siddique the learned Counsel appearing with Mr. Md. Shahriar Kabir for the Respondent No. 6, CNS vehemently opposes the Rule refuting and rebutting all the arguments pressed into service on behalf of the petitioner HPCC and the Procuring Entity respectively in both the Writ Petitions. He made following written submissions:-

> Review Panel on examination of materials before them rightly came to a conclusion that two of the three proposal were non-responsive as they did not have any required qualifications and experience. Secondly, he submits that the decision of Technical Evaluation Committee was impugned before the Review Panel and Review Panel was under legal obligation to examine and give a full fledged decision whether the decision of the Technical Evaluation Committee was correct or not. Since law has empowered the Review Panel to decide legality or otherwise of the decision of the Technical Evaluation Committee, the Review Panel has acted Intra-vires in arriving at a decision that two of the three bidders were non-responsive.

20. Next he submits since in Request for Proposal (RFP) it was clearly mentioned that the bidders have to submit their Technical Proposal in one sealed envelope and it's financial offer in another sealed envelope specifying which one is technical offer and which one is financial offer, but the Procuring Entity had opened the technical offer first keeping the sealed financial offer intact and this fact clearly imply that the two envelope offer rule has been meant for not opening the financial offer unless the technical offer is found to be responsive.

21. He further submits that under PPA, 2006 and PPR, 2008 no provisions have been made for making anyone a party in an Appeal taken before the Review Panel under CPTU. Neither in the Act or Rule provisions have been made for any oral submissions or written submissions from the part of adversary to submit any documents together with technical proposal. So, the technical question of defect of party is not applicable in the present Case.

22. In respect of submissions on the ground of limitation by the petitioner, Mr. Siddique has tried to impress upon us that the complaint lodged by Respondent No 6, CNS on 21.05.2018 was not an objection rather it was against the apprehended conspiracy in terms of Rule 56(গ)(5) which enjoins:

> *৫৬। অভিযোগ করার অধিকার।- নিম্নবর্ণিত ক্ষেত্রে বা পরিস্থিতিতে কোন ক্রয়কারীর বিরুদ্ধে আনুষ্ঠানিক অভিযোগ দায়ের করা যাইবে, যথাঃ-*

(গ) প্রস্তাব দাখিলের অনুরোধ জ্ঞাপনের ক্ষেত্রে-
(১) .....
(২) .....
(৩) .....
(৪) .....
(৫) দুর্নীতি বা চক্রান্তমূলক কার্যকলাপ সম্পর্কে সন্দেহ হইলে;

23. Therefore, 21.05.2018 cannot be treated as the starting point for the purpose of calculating limitation in the manner as it has been alleged.

24. Objection dated 27.05.2018 (Annexure-"B-1") was lodged against the decision dated 24.05.2018 which was well within time. Submissions otherwise are not only misconceived but also deliberate deviation from the relevant Rules and procedure particularly Rule 57 of the PPR 2008 read with schedule 2.

25. Lastly, on the point of violation of Principle of natural justice, Mr. Siddiky contends that the decisions placed by the petitioner are not applicable in the present Case. He further submits that the decision of CPTU is always open to wide jurisdiction of judicial Review under Article 102 of the Constitution as it could be found in the decision as referred to above in 13 BLC affirmed by the Appellate Division in 12 MLR.

26. That being the position, and on the diverse submissions made by the parties in both the petitions, the only question that faces this Division is whether under the facts and circumstances of the present Case conjunct with the relevant laws and Rules the decision given by the CPTU would sustain.

27. We have heard the learned Counsel of both sides at length and considered their submissions with utmost care and also in our anxiety we have given meticulous adherence to the relevant laws and decisions governing the issue. As we have seen the first point which was taken by the petitioner, HPCC in Writ Petition No. 9535 of 2018 that in gross violation of Rule 60(3) of PPR-2008 (hereinafter referred to Rules, 2008) the Review Panel most illegally declared the petitioner HPCC as technically non-responsive placing reliance in the decision delivered on 04.01.2018 by Justice Naima Haider in 12 ALR 8 as referred to above. In the said decision in paragraph 20 it has been observed:

> "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"."

28. But I am surprised to note that in BTCL vs CPTU (18 BLC 98) Judgment delivered on 07.08.2012, exactly on the same point Justice Naima Haider gave contradictory decision. In BTCL decision in paragraph 15 & 16 it has been observed:

> " Now, let us deal with the Second argument of BTCL that the Review Panel does not have any power to issue any direction.

29. The learned Advocate for the petitioner has submitted that the Review Panel has no authority to pass any order or direction and that it can only advise or recommend the purchasing entity and, consequently, the decision of the Review Panel is liable to be set aside. This Court is not persuaded by the above argument inasmuch as the particular words used by

the Review Panel in delivering its decision is not material. What is important is the effect. Rule 60(5) says " (৫) রিভিউ প্যানেলের সিদ্ধান্ত চূড়ান্ত হইবে এবং সংশ্লিষ্ট সকল পক্ষ উক্ত সিদ্ধান্ত মোতাবেক ব্যবস্থা গ্রহণ করিবে ।'' Therfore, even if Review Panel No. 2 had used the words "Advice" or "recommendation", it would not have made any difference in the impugned decision because of the operation of Rule 60(5) of the PPR, 2008, which has been clarified by the competent authority vide "Annexure-11" to the affidavit-in-opposition of the writ petition No. 5073 of 2012. Thus, as per PPA, 2006 and PPR, 2008, once the Review Panel has entertained any complaint it has all the powers to pass any order as it deems fit and proper including any direction upon the petitioners to treat any bidder as Pre-qualified."

30. In that Case the Review Panel's decision allowing the Appeal was challenged before this Division which was discharged.

31. I want to quote from a pertinent portion of Rule 60 (3). It enjoins:-

৬০(৩) তুচ্ছ কারণে অভিযোগ দায়েরের কারণে উহা খারিজ এবং ক্ষেত্রমত, নিরাপত্তা জামানত বাজেয়াপ্ত করার ক্ষেত্র ব্যতীত, আপীল নিষ্পত্তির ক্ষেত্রে, রিভিউ প্যানেল নিম্নবর্ণিত যে কোন সিদ্ধান্ত স্বতন্ত্রভাবে বা সম্মিলিতভাবে প্রদান করিতে পারিবে, যথাঃ

(ক) কারণ উল্লেখপূর্বক আপীল আবেদন খারিজ করিয়া ক্রয়কারীকে ক্রয় কার্যক্রম পরিচালনা অব্যাহত রাখার পরামর্শ প্রদান;

(খ) আপীল আবেদনে উত্থাপিত অভিযোগের বিষয়বস্তু নিষ্পত্তির ক্ষেত্রে প্রযোজ্য বিধি-বিধান ও নীতি উল্লেখপূর্বক উহার আওতায় অভিযোগকৃত বিষয় নিষ্পত্তির জন্য যথাযথ ব্যবস্থা গ্রহণের জন্য পক্ষবৃন্দকে পরামর্শদান;

(গ) ক্রয়কারী কর্তৃক গৃহীত পদক্ষেপ এই বিধিমালার পরিপন্থী হইলে উহার প্রতিকারমূলক ব্যবস্থা গ্রহণের জন্য পক্ষবৃন্দকে পরামর্শদান;

(ঘ) ক্রয় সংক্রান্ত চুক্তি কার্যকরণে গৃহীত ব্যবস্থা বা সিদ্ধান্ত ব্যতীত, ক্রয়কারী কর্তৃক বিধি-বিধানের সহিত সামঞ্জস্যপূর্ণ নহে এইরূপ কোন কার্য বা সিদ্ধান্ত, সম্পূর্ণ বা আংশিক, বাতিলের সুপারিশ প্রদান:

(ঙ) ক্রয়কারী, এই বিধিমালার অধীন উহার বাধ্যবাধকতা প্রতিপালনে ব্যর্থ হইয়া থাকিলে, রিভিউ প্যানেল আপীল আবেদন দাখিলকারী ব্যক্তিকে দরপত্র দলিল প্রস্তুত ও আইন সংক্রান্ত ব্যয় এবং অভিযোগ দাখিল সংক্রান্ত অন্যান্য ব্যয় বাবদ ক্ষতিপূরণসহ বিধি ৫৭(১২(গ) এর অধীন প্রদত্ত নিরাপত্তা জামানত ফেরত প্রদানের সুপারিশ প্রদান; এবং

(চ) ক্রয় কার্যক্রম সমাপ্তির জন্য সুপারিশ প্রদান।

32. If we now exercise our common sense it can be perceived when the Review Panel can 'dismiss' an Appeal if the same is not well founded either in fact or law then why it can not 'allow' the same if a decision appealed against is otherwise wrong ? In other words, when CPTU is competent to dismiss an Appeal it can also allow an Appeal if it is otherwise found to be competent.

33. In the Case of Techno Venture Ltd. vs. Bangladesh reported in 20 BLC 377 CPTU declared the petitioner of that case technically non-responsive allowing the Appeal filed by one Respondent No. 8 Confidence Electronics Ltd. , the petitioner Techno Venture filed Writ Petition and the High Court Division discharged the Rule upholding the decision of the Review Committee. I have only mentioned this pertinently.

34. Now comes the Second argument which is very important. The petitioner HPCC has contended that in the whole process of Appeal before Review Panel the petitioner HPCC was not a party and without hearing HPCC in gross violation of principle of natural justice the decision that has been given by the CPTU is absolutely without lawful authority simply for that reason. On this point several decisions have been cited. One thing I want to make clear in this context that the judicial review is wide open to interfere with the decision of CPTU as it has been found in the decision as reported 13 BLC case as referred to above which was also affirmed by the Appellate Division in 12 MLR as referred to above. High Court Division's

decision was given firstly addressing the point of violation of principle of natural Justice (paragraph 38 of 13 BLC's decision) and thereafter his Lordship Justice A.B.M Khairul Haque went on deliberating upon the merit of the Case starting from paragraph 39 onwards. Here I want to signify that this decision as a whole was upheld by the Appellate Division in 12 MLR case.

35. On the question of violation of principle of natural justice, the learned counsel for the petitioner has submitted that:

> *"It is well settled that requirements of the principles of natural justice is deemed to be included in every proceedings unless it is expressly excluded by the Parliament. (Parmits International vs- Review Penal 13 BLC 474)."*

36. This decision was affirmed by the Appellate Division in St. Electronics (Infor Soft ware System) Pvt. Ltd. vs. Pamitas International Sdn Berhad and others 12 MLR (AD) 325). The case of Abdul Al Moududi **vs.** West Pakistan 17 DLR (SC) 2009, Farid Khan Ltd. vs. Pakistan 13 DLR (SC) 273 and Swadeshi Cotton Mills vs. India AIR 1981 (SC) 818, and the decision of 13 BLC 474 upheld by the Appellate Division 12 MLR (AD) 325 are some authorities out of thousands. There is no denying that this age old principle of law has been grounded on a solid basis and no longer a resintegra.

37. The jurisprudence on this score has developed in a new dimension. Now there is an accepted phrase "Post hearing decision". The question of violation of principle of natural justice (***audi alterm partem)*** goes at the root. The principle of natural justice in this sub-continent has been consistently followed in the manner as quoted in 13 BLC Case. Mr. Justice ABM Khairul Hoque, in 13 BLC case has interfered with the decision of CPTU and delivered the judgment <u>on merit</u> and also held that the principle of natural of justice was also violated in that case. The judgment of CPTU was set aside and eventually the said decision was affirmed by the Appellate Division in 12 MLR (AD) 325.

38. But there is another vital change in the jurisprudence which cannot be brushed aside. It is often found that on the plea of violation of principle of natural justice, so many cases are being filed highlighting the aforesaid violation before this Division. Often we come across that even on a frivolous ground, contending violation of principle of natural justice, a litigant efforts to establish a right before a court of law. Certainly in a fit case violation of the principle of natural justice should be followed in its strict adherence but not in all cases. There may be exception. This view of mine finds support in the case of Maneka Gandhi vs. Union of India 2 SCR 1978 621. In the said decision Indian Supreme Court observed as under:-

> "**The audi alteram partem rule** <u>is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, merely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise</u>. That is why Tucker,I.J. emphasized in Russel v. Duke of Norfolk that "whatever standard of Natural Justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case" What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of situation. It may be a sophisticated fullfledge hearing or it may be a hearing which is very brief and minimal. **It may be a hearing prior to the decision or it may be a post decisional remedial hearing prior to the decision or it may even be a post decisional remedial hearing**. The audi alteram partem rule is

sufficiently flexible to permit modifications and variations to suit the exigencies or myriad kinds of situations which may arise. This circumstantial flexibility of the audi alteram partem rule was emphasized by Lord Reid in Wiseman v. Sorneman (supra) when he said that he would be "sorry to see this fundamental general principle degenerate in to a series of hard and fast rules" and Lord Hallison L.C. also observed in Pear-berg v. Party that the court "have taken in increasingly sophisticated view of what is required in individual cases" It would not, therefore, be right to conclude that the audi alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The passport authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding is recalled."

(underlined by me).

39. In the decision of KANARA BANK V. V.K. AWASTHY it was further held by the Supreme Court of India:

"In view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellant, unless failure of justice is occasioned or that it would not be in public interest to do so in a particular case, this Court may refuse to grant relief to the employee concerned. It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. **In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing**.

40. Same principle echoed in the decision of Charan Lal Shahus in AIR 1990 (SC) as referred to above.

41. In the case of Charan Lal Sahu –vs- Union of India AIR 1990 (SC) 1480 it was observed:

"This Court reiterated that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of Natural Justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application seems to be that **where a statute does not in terms exclude this rule or prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram partam rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good**."

42. In Abdul A'la Moudoodi –vs- West Pakistan, 17 Act (SC) 209, Farid sons Ltd. –vs-Pakistan 13 DLR (sc) 233 and Swadeshi Cotton Mills –vs- India AIR 1981 sc 818 the court of this sub-continent held that the principles of natural Justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute. *(Emphasis supplied)*

43. Further in the case of Fazal Bhai –vs- Custodian General, AIR 1961 SC 1397 it was held that where the statute does not require service of notice and the person sought to be affected has already filed a representation, the question would arise whether that person has really been prejudiced by the non-service of notice as the essence of the principle of fairness. *(Emphasis supplied)*

44. In our Jurisdiction we have found in the decision of Professor Golam Azam vs. Bangladesh that our Appellate Division also endorsed the view that the violation of principle of Natural Justice in a fit case may be construed by taking into consideration **post decisional hearing**. Justice MH Rahman (as his Lordship then was) observed:

> *"In case where no prior notice could be served, if, subsequent to the order, an opportunity of being heard is given to the person aggrieved, then that may be considered in certain circumstances to be a sufficient compliance of principle of Natural Justice.* ***Had the respondent been given a post-decisional hearing after his arrival in this country or after the show cause notice dated 23 March 1992 served on him then perhaps the appellant's case could not have been assailed on the ground of violation of the principle of hear the other side or fair hearing****. After hearing the respondent the Government could have omitted his name from the notification as it was done in a number of cases. The respondent's case is that his case is not at all different from those persons whose names were omitted from the notification and that his case is totally dissimilar from those persons who did not come to challenge the notification.*

45. Upon going through all these decisions we can safely say that the parties before us had placed sufficient materials to be treated that a decision on merit can be given on consideration of those materials on record. Before going into the merit of the Case it is also require to address the point of limitation that was forcefully argued by the petitioner HPCC. Here I want to reiterate the submissions of Mr. Quamrul Hoque Siddique that I have already discussed above.

46. The scheme of law regarding limitation have been enjoined in Rule 57 of PPR Rule, 2008.

> *"৫৭। প্রশাসনিক কর্তৃপক্ষের নিকট অভিযোগ দায়ের, নিস্পত্তি, ইত্যাদি।-(১) কোন ব্যক্তিকে তফসিল-২ এর বর্ণিত সময়সীমার মধ্যে লিখিতভাবে তাহার অভিযোগ দাখিল করিতে হইবে।"*

47. The Law is very much clear and settled in this regard for ventilating any grievance against the Procuring Entity in a given situation. In the context of the instant case I have found that 3 dates are important, of course in respect of 3 letters- vide 21.05.2018, 24.05.2018 and 27.05.2018 respectively Annexure-B, B-1 (in Writ Petition No. 10000 of 2018) and Annexure-"D" (in Writ Petition No. 9535 of 2018).

48. In the letter dated 21.05.2018 a formal complaint in keeping with Rule 56(গ)(5) of Rule 2008 was addressed by CNS to the Procuring Entity. I have already quoted the law. It is simply a complaint in apprehension of probable conspiracy and corruption. Later on in the letter dated 27.05.2018 where the reference of earlier letter dated 21.05.2018 has been made to the reference of date of cause of action dated 24.05.2018. Therefore, the submissions of the learned Counsel Mr. Siddique which I endorse apply in the affirmative in this context in as much as nowhere in schedule 2 Rule 56 has been mentioned rather Rule 57 have been encompassed in the said schedule for the purpose of asserting limitation within the meaning of Rule 57 of PPR, 2008. Rule 57 has already been quoted. I think the allegation dated

27.05.2018 is well within the time specified in schedule-2 as mentioned in Rule 57.At this point of course the learned Counsel Mr. Rais Uddin Ahmad has brought to our notice that the formal application so to say under Rule 56(গ)(5) was disposed by the Procuring Entity. But this is not material to us to decide the point of limitation. I hold that the Appeal has been preferred well within the time as required under law and this aspect has been well discussed by the Review Panel in the impugned Judgment itself.

49. Writ of certiorari is directed against order of public functionary and the local body as and when the public functionary or the local body are required to do a particular act under law which they are not doing or implementing or when such authority is debarred by any law from doing any act under the law which they are not obeying. Therefore, now comes the most significant aspect of the case that is the merit itself. For better understanding and appreciation of the issue before us the positive finding of CPTU while affirming the Appeal has to be quoted of all in the finding portion of CPTU has addressed that the Appeal was filed well within the time and we have also endorsed the said view of CPTU with positivity. Next is the findings which runs thus:-

"According to sub-clause 3 and 4of ITC Clause 21.1(c) under Section-2 (Proposal Data Sheet), the interested participants (bidders), amongst others, were obliged to submit experience certificate, which runs as under:

"3. Provide Client Testimonial of minimum one completed service within last 5 (Five) years on complete centralized real time online computer based solution involving software development, supply, implementation, operation, maintenance and support services and collection of Government Toll/Fees/Tax/Revenue under any Government, Semi-government or Autonomous Body of which, contract value not less than Tk. 40.00 (Forty) Crore or equivalent USD in a single contract (exchange rate 28 days prior to submission of EOI).

4. Provide Client Testimonial of minimum one completed service within last 5 (Five) years on complete centralized real time online computer based solution involving Software development, supply, implementation, operation, maintenance and support services and collection of Government Toll/Fees/Tax/Revenue under any Government, Semi-government or Autonomous Body and for such work, the yearly Toll/Fees/Tax/Revenue collection is not less than Tk. 250.00 (Two Hundred and Fifty) Crore or equivalent USD (exchange rate 28 days prior to submission of EOI)"

And wherefrom it appears that the participating bidders must have experience of rendering completed service on "Complete Centralized Rail Time Online Computer Based Solution inlvolv0ng Software Development, Supply, Implementation, Operation, Maintenance and Support Services, and Collection of Government Toll/Fees/Tax/Revenue under any Government, Semi Government or Autonomous Body" of which contract Value is not less than Tk.40.00 (Forty Crore or equivalent USD in a single contract and the collection is not less than Tk.250.00 Crore or equivalent USD.

HPCC-SEL. JV.

Against the requirement of experience certificate (as above), HPCC-SEL. JV submitted a certificate in the name of Shamim Enterprise (Pvt) Ltd. (SEL) and a few foreign agreements in the name of Hipluscard Corporation (HPCC), which are related to manufacturing and supply of "Prepaid Transportation Card/ Electronic Card". Certificate dated 24.02.2016 issued by Bangladesh Bridge Authority in favour of SEL and its JV partners reflects that the value of the contract was for Tk. 14.44.78.829.00 (Revised Tk.16,54,91,644.00) for Toll Collection, Maintenance of Toll Equipments, Software Maintenance and Modification, Operation and

Maintenance of Toll Boths and Associated Facilities [Page: ITC.21.1(C) .163 of Submitted proposal]. This certificate relates to undervalued contract without mentioning Toll Collection Figure and it does not relate to "Complete Centralized Real Time Online Computer Based Solution involving Software Development". The agreements, so filed by the HPCC-SEL JV with their proposal, not being experience certificate as asked for in the RFP, is not tenable in law and thus, deserve no consideration. However, for example one of such agreement is discussed hereunder: Agreement dated 23.03.2017 was executed between Hipluscard Corporation (HPCC) as "Card Manufacturer" and Inchon-Gimpo High way Co. Ltd. as "Operator" for "Issuance and Recharge of Hipass Plus Card" [Page-ITC 21.1(c)-61 to 65 of submitted proposal]. Neither of the agreements sub mitted by the HPCC-SEL JV with its proposal relates to "Complete Centralized Real Time Online Computer Based Solution involving Software Development" i.e. none of the parties of the agreement has, amongst others, any expertise of Software Development. Besides theses, those agreements were not authenticated by the concerned Bangladesh Embassy in order to validate them."

50. Mr. Siddique in this context has elaborated his stand in the affidavit in reply dated 05.11.2018 filed on behalf of Respondent No. 6, CNS. He has addressed all of the issues there. It has been stressed that the bidder submits documentary evidence related to completion of computer based solution involving software development, supply, implementation, maintenance and support services and collection of government toll/ fees/ text/ revenue under any government, semi government or autonomous body or which, the contract value is not less than 40 (Forty) crore or equivalent USD in a single contract. But the documents submits by the HPCC indicate that it is under contract with its client Korean Express corporation for supply of prepaid type IC (smart Card only) HPCC clearly failed to provide any documentary evidence related to toll collection software development implementation maintenance and support services of software as required under sub- clause 3 of ITC clause 21.1(c) under section 20 (proposal data sheet).

51. Further, it is noted that non compliance of clause 4 of ITC 21.1© under Section 2 has been clearly observed by the CPTU which is evident in supplementary affidavit filed by the HPCC in entire G series. There are lots of correspondences and testimonial and almost all of them are written in the letter head of HPCC and those are not even endorsed by the local Bangladesh Embassy. These are the positive findings of fact which have been categorically addressed by the CPTU while taking it's decision. Even in case of marking there is also a positive findings in the impugned decision endorsed by the CPTU and accepted in favour of the Respondent No. 6, CNS. Significantly, it has been submitted though not by an affidavit that no mark at all was given to the petitioner HPCC in this regard.

52. Logical justification together with the decisions focusing on the issues have been well articulated in the discussions as made above. Therefore, unhesitatingly I hold that the decision of CPTU in allowing the Appeal suffers from no legal infirmity.

53. Another submissions made by the learned counsel Mr. Abdun Nur in Writ Petition No.10000 of 2018 that the formation of CPTU suffers from corum non judice has no legs to stand. The law is very much clear in this respect. Rule 58(2) PPR, 2008 envisages:

"৫৮(২) আইনের ধারা অনুসারে, রিভিউ প্যানেল গনং করিবার উদ্দেশ্যে সিপিইউ, তফসিল-২ অনুযায়ী এবং নিম্নবর্ণিতভাবে সুবিদিত বিশেষজ্ঞগণের একটি তালিকা প্রস্তুত করিবে-

(ক) নিম্নবর্ণিত ৩ (তিন) শ্রেণীর প্রতিটি হইতে ১ (এক) জন করিয়া সদস্য সমন্বয়ে রিভিউ প্যানেল গঠন করিতে হইবে;

(অ) ক্রয় সংক্রান্ত আইনগত বিষয়ে অভিজ্ঞতাসম্পন্ন সুখ্যাত বিশেষজ্ঞগণ, যাহাদের মধ্যে সরকারি, আধা-সরকারি, স্বায়ত্তশাসিত প্রতিষ্ঠানসমূহ বা কর্পোরেশনের অবসরপ্রাপ্ত সিনিয়র কর্মকর্তাগণ অন্তভুক্ত হইতে পারেন;
(আ) কারিগরি বিশেষ জ্ঞানসম্পন্ন এবং ক্রয়কার্যে অভিজ্ঞতাসম্পন্ন সুখ্যাত বিশেষজ্ঞগণ; এবং
(ই) ক্রয়কার্য ও চুক্তি ব্যবস্থাপনার রীতিনীতি এবং অভিযোগ ও বিরোধ নিষ্পত্তির বিষয়ে অভিজ্ঞতাসম্পন্ন সুখ্যাত বিশেষজ্ঞগণ, যাহারা ফেডারেশন অব বাংলাদেশ চেম্বার অব কমার্স এন্ড ইন্ডাস্ট্রী কর্তৃক মনোনীত হইতে পারেনঃ
তবে শর্ত থাকে যে, প্রজাতন্ত্রের চাকুরীতে কর্মরত কোন কর্মকর্তা রিভিউ প্যানেলে অন্তর্ভুক্ত হইতে পারিবে না।''

54. The Review Panel in question was constituted by one District Judge, another person from FBCCI and another one was a former Secretary. Therefore, Sub-Rule 'অ' and 'ই' of 58(2) had been complied with in terms of the requirement therein and in respect of 'আ' the learned counsel Mr. Abdun Nur did not come up with any credential of the former Secretary so to make us belief that the former secretary was a person without any technical knowledge. It was his duty to show us that.

55. Therefore, these Rules should be discharged being devoid of any substance from all point of views.

56. In the result both the Writ Petitions are discharged, however, without any order as to cost. The concerned authorities are hereby directed to implement the decision of CPTU forthwith.

57. The orders of stay granted earlier by this Court is hereby recalled and vacated.

58. Communicate at once.

13 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 18301 OF 2017

East West Property Development (Pvt.) Ltd. and another.
.....Petitioners.

-VERSUS-

Deputy Commissioner, Manikgonj.
.....Respondent.

Mr. Ahsanul Karim, with
Mr. Khairul Alam Choudhury,
Mr. Tanveer Hossain Khan, Advocates
.....For the Petitioners.

Mr. Md. Mokleshur Rahman, DAG
.....For Respondent

Heard on 26.02.2018 & 14.03.2018.
Judgment on: 04.04.2018.

Present:
Ms Justice Naima Haider
And
Mr. Justice Zafar Ahmed

Mutation, Water Development Board, the (Emergency) Requisition of Property Act, 1948, Deputy Commissioner, cancellation of mutation, repealed, স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ (The Act, 2017), valid acquisition, acquisition of the property:

That there being no decision of the Government for acquisition of the property in question, there is no valid acquisition of the property and in the meantime the said proceeding having become non-est due to repeal of the said section 47 of the said Ordinance, 1982, there is no further scope to take decision for acquisition of the property. ... (Para 24)

JUDGMENT

Naima Haider, J:

1. This is an application under Article 102 read with Article 44(1) of the Constitution of the People's Republic of Bangladesh, wherein at the instance of the petitioner this Division vide order dated 12.12.2017 issued Rule in the following terms:

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the action of the respondents in failing to cancel the Land Acquisition Case No. 12/1970-71 pending before the respondent in compliance of the decision of Divisional Commissioner, Dhaka as evinced in Memo No. ০৫.৪১.৩০০০.০১০.১৪.০০১.১৬-৬০ (সং) dated 30.05.2017 of Divisional Commissioner, Dhaka (Annexure-A) shall not be declared to have been done without lawful authority and is of no legal effect and as to why the respondent shall not be directed to cancel the Land Acquisition Case No. 12/1970-71 pending before the respondent in compliance of the decision of Divisional Commissioner, Dhaka in Memo No. ০৫.৪১.৩০০০.০১০.১৪.০০১.১৬-৬০ (সং) dated 30.05.2017 of Divisional Commissioner, Dhaka (Annexure-A) and/or such other or further order or orders passed as to this court may seem fit and proper."

2. Mr. Ahsanul Karim and Mr. Khairul Alam Choudhury, Advocates appeared for the petitioners. Mr. Md. Mokhlesur Rahman, Deputy Attorney General, appeared for the respondent.

3. The respondent submitted affidavit-in-opposition dated 06.03.2018 against the writ petition. The petitioners thereafter filed an affidavit-in-reply dated 14.03.2018 against the said affidavit-in-opposition dated 06.03.2018.

4. The case of the writ petition is that the petitioner No. 1 is absolute owner of the lands fully described in Schedule-A as well Schedule-B of the writ petition (hereinafter referred to as the said lands). The name of the petitioner No. 1 was duly mutated against the said lands. But subsequently Union Land Assistant Officer of Ghior Upazilla of Manikgonj initiated Miscellaneous Case No. 11/2012-2013 before the Court of Assistant Commissioner (Land), Ghior, Manikgonj for cancelling the mutation of name of the petitioner No. 1 against the said lands. The Assistant Commissioner (Land), Ghior, Manikgonj vide order dated 14.11.2012 in the said Miscellaneous Case No. 11/2012-2013 cancelled the name of the petitioner No. 1 against the said lands (Annexure-B). The said Assistant Commissioner (Land) cancelled the mutation of the name of the petitioner against the said lands on the alleged ground that the said lands includes certain lands, which was acquired for Water Development Board in L/A Case Nos. 12/1970-1971 and 13/1970-1971. The petitioners state that the petitioners having enquired found that the said lands was never acquired as claimed in the said order dated 14.11.2012 of Assistant Commissioner (Land). The petitioners also state that the land in question was requisitioned under the (Emergency) Requisition of Property Act, 1948 (the Act, 1948) for the purpose of acquisition, but the property was never acquired. The petitioners rely on section 5 of the said Act, 1948, which requires the Government to publish gazette notification for acquiring the land. The petitioners state that there is no decision of the Government for acquiring the lands, neither the Government has ever published any gazette notification for this purpose. The petitioners state that the respondent vide Memo Nos. ০৫.২৭৪.৩০৩.১৫.০০.০১২.২০১২-১০০(সং) dated 07.07.2012 and ০৫.২৭৪.৩০৩.১৫.০০.০১২.২০১২-১০১(সং) dated 07.07.2012 (Annexures-D & D(1)) admitted that the gazette notification was not published, rather the respondent on 07.07.2012 requested the Commissioner, Dhaka to publish gazette notification in respect of the said L/A cases for acquisition of land under the said Act, 1948. The petitioners state that the said Act, 1948 having no more any force of law, the said L/A proceedings is liable to be cancelled. The petitioners again state that the requiring body, i.e., the Bangladesh Water Development Board of Manikgonj vide Memo No. L21/1788 dated 04.12.2016 stated that the requiring body does not need the said land any more (Annexure-I). The petitioners thereafter refer the Memo No. ০৫.৪১.৩০০০.০১০.১৪.০০১.১৬-৬০(সং) dated 30.05.2017 directed the respondent to take step for cancelling the proceeding of L/C Case No. 12/1970-1971 since there is no subsisting proceeding of the said L/A case (Annexure-A). The petitioners pray for direction upon the respondent to comply with the direction of Deputy Commissioner, Dhaka as evidenced in the said Memo dated 30.05.2017.

5. The respondent filed affidavit-in-opposition dated 06.03.2018. The respondent states that the land in question was acquired under the said Act, 1948 for the Water Development Board and neither the acquiring body nor the required body has any right to cancel or to recommendation for cancellation of the L/A case. The respondent further states that delay of publishing gazette or non publishing the gazette under the said Act, 1948 for acquiring the land does not give the owners of the petitioners to get release of the land or to cancel the L/A proceedings. The respondent states that section 5(5) of the said Act, 1948 requires the Deputy

Commissioner to submit the case to Government for final decision only if any objection against the acquisition is raised, and since no such objection was ever raised against the L/A proceeding, the Deputy Commissioner did not submit any case with the Government for its decision and hence the respondent vide Memo Nos. ০৪.২৭৪.৩০৩.১৫.০০.০১২.২০১২-১০০(সং) and ০৫.২৭৪.৩০৩.১৫.০০.০১২.২০১২-১০১(সং) both dated 07.07.2012 directly requested Commissioner, Dhaka Division, Dhaka to publish notification in the official gazette in respect of the lands in the said acquisition proceedings. The respondent in the affidavit-in-opposition further asserts that in view of section 8 of General Clauses Act, 1897, section 16 of the said Act, 1948 as well as section 47 of the Acquisition and Requisition of Immovable Property Ordinance, 1982, the proceedings of the said L/A cases are alive till date and further step for completing the acquisition process can be taken ahead, and the petitioners do not have any right to get the property in question released. The respondents also assets that for cancellation of mutation, the petitioner has alternative remedy by way of appeal under section 147 of the State Acquisition & Tenancy Act, 1950, in view of which the above writ petition is not maintainable. The respondent prays for discharge of the Rule.

6. The petitioners filed an affidavit-in-reply dated 14.03.2018 against the affidavit-in-opposition of the respondent. The petitioners in the reply dated 14.03.2018 states that the requiring body, i.e., Water Development Board on record has admitted that the land in question is no more require for them. The petitioner in the affidavit-in-reply also states that section 47 of the Acquisition & Requisition of Immovable Properties Ordinance, 1982 provided that after cessation of the said Emergency Acquisition of Property Act, 1948, all proceedings and matters including all notices and orders relating to acquisition of any property under the said Act, 1948 shall continue as if the said Act, 1948 were not ceased to have effect. So in respect of pending proceedings, the said Act, 1948 was continuing on the strength of section 47 of the said Ordinance, 1982. Section 50 of the স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ has repealed the said Ordinance, 1982 and as such the said section 47 of the Ordinance, 1982 has also been repealed. Section 50 of স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ has saved pending proceeding under the said Ordinance, 1982. But section 50 of স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ has not saved the pending proceedings under the said Act, 1948. No provision of the said স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ states that the proceeding initiated under the said Act, 1948 shall continue even after repeal of section 47 of the said Ordinance, 1982. The petitioners submit that the said Act, 1948 no more survives after the promulgation of the said Act, 2017 and as such the proceeding in question as well does not have any activity of this reason as well.

7. Mr. Ahsanul Karim and Mr. Khairul Alam Chowdhury, Advocates appearing for the petitioners submitted that the Divisional Commissioner, Dhaka vide Memo No. ০৫.৪১.৩০০০০.০১০.১৪.০০১.১৬-৬০(সং) dated 30.05.2017 directed the respondent to cancel the L/A case in question simply because the Divisional Commissioner, Dhaka found that the proceeding of the said L/A case in question does not have any existence or activity, and as such the respondent is liable to comply with decision of the Divisional Commissioner, Dhaka; that the proceeding of the said L/A case in question was initiated under the said Act, 1948, which ceased to have effect after 34 years from the promulgation of the said Act, 1948, but after cessation of the said Act, 1948, the proceeding initiated there under continued to survive as if the said Act, 1948 were not ceased on the strength of section 47 of the Ordinance, 1982; however, when section 47 along with all other provisions of the said Ordinance, 1982 was repealed by the Act, 2017, section 50 of the said Act, 2017 did not save the proceedings initiated under the said Act, 1948 and for this reason, as Mr. Karim submits,

the proceeding of the L/A case in question does not have any activity as on today. He submits that the Rule be made absolute for these reasons.

8. Mr. Md. Mokleshur Rahman, Deputy Attorney General appearing for respondent submits that once a L/A proceeding is initiated, then such L/A proceeding can never be cancelled, neither does the Government have any authority to cancel the L/A proceeding initiated under the said Act, 1948. Mr. Rahman further submits that section 47 of the said Ordinance, 1948 gave lifeblood to the proceeding in question even after the said Act, 1948 ceased to have effect. Again, Mr. Rahman, submits that in view of section 16 of the said Act, 1948 read with section 8 of the General Clauses Act, 1897 the proceeding of the said Act is still surviving. Therefore, as Mr. Rahman submits the Rule is liable to be discharged because no proceeding once initiated under the said Act, 1948 can be cancelled.

9. Perused the affidavits along with the documents submitted by the parties. Heard the learned counsels appearing for the petitioner as well as the respondent.

10. We find that the L/A case in question, i.e., the L/A Case Nos. 12/1970-71 and 13/1970-71 were initiated under the (Emergency) Requisition of Property Act, 1948 (the Act, 1948). The said Act, 1948 was a temporary Act of Parliament. Section 1(4) of the said Act, 1948 provides that the said Act, 1948 shall remain in force for a period of 34 years. The said Act, 1948 came into force with effect from 16th August 1948 as Dhaka Gazette Extra of 16th August 1948 published on the strength of section 1(3) of the said Act, 1948 brought the said Act, 1948 into immediate effect on publication of the said official gazette. Therefore, the said Act, 1948 ceased to have effect after 34 years, i.e., from 16th August 1982. Hence, the said Act, 1948 having expired with effect from 16th August 1982, the said Act, 1948 ceased to exist with effect 16th August 1982.

11. The consequence of cessation of a temporary Act by efflux of time is articulated by Indian Supreme Court in the case of *S. Krishnan v. State of Madras* reported in AIR 1951 S.C. 301 (at paragraph No. 10) as follows:

> "The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires (Craies on Statutes, Edn. 4, p. 347)."

12. In another Indian case of *Ram Chandra v. State of Rajashtan* reported in 1972 Crl. L. J. 1386, Rajashtan High Court relying on the decision of Indian Supreme Court of AIR 1951 SC 301 held that –

> As a general rule and unless it contains some special provision to the contrary, after a temporary Act expires no proceedings can be taken upon it and it ceases to have any further effect. Therefore, offences committed against temporary enactments have to be prosecuted and punished before the Act expires and as soon as the Act expires, any proceedings which are being taken against a person will *ipso facto* terminate.

13. Likewise, in a Full Bench decision of the Calcutta High Court, reported in *Rabindra Nath v. Gour Mondal,* AIR 1957 Cal 274 (FB). It was laid down:

> "Ordinarily, no action can be taken under a temporary statute after it has expired and all proceedings pending at the date of its expiry terminate automatically. But there may be provision to the contrary in the Act itself. And it has to be seen whether it contained any provisions indicating an intention that even after its expiry it would remain alive for certain purposes."

14. In another Fully Bench decision of the same High Court in *Tarak Chandra v. Ratan Lal.* Air 1957 al 257 (FB) it has been observed:

> The general rule is that unless it contains some special provision to the contrary a temporary Act ceases to have any further effect after it has expired. No proceedings can be taken under it any longer and proceedings already taken and pending terminate automatically as soon as it expires."

15. No provision of the said Act, 1948 provides that the proceeding pending under the said Act, 1948 shall continue after cessation of the said Act, 1948. Hence, in normal course of action the said L/A proceedings initiated under the said Act, 1948 were supposed to terminate/determined/ceased to exist with effect from 16th August 1982. But before 16th August 1982, the Acquisition & Requisition of Immovable Property Ordinance, 1982 (the Ordinance, 1982) came into being on 13th April 1982. Section 47 of the said Ordinance, 1982 saved the proceedings initiate under the said Act, 1948 as if the said Act, 1948 were not expired so far the proceedings already initiated under the said Act, 1948 are concerned. Section 47 of the said Ordinance, 1982 reads as follows:

> "47. Special savings relating to expired EB Act XIII of 1948- Notwithstanding the cessation of the Emergency Requisition of Property Act, 1948, on the expiry of the period of its operation, all proceedings and matters, including all notices, notifications, and orders, relating to requisition or acquisition of any property or compensation or award in respect of any property requisitioned or acquired and all applications and appeals pending before any authority, arbitrator or court under that Act shall be continued, heard or disposed of as if that Act had not ceased to have effect and were continuing in operation.

16. Therefore, even after expiry of the said Act, 1948, the said L/A proceedings were surviving and continuing by dint of section 47 of the said Ordinance, 1982, and the said L/A proceedings were continuing under the said Act, 1948 as if the said Act, 1948 were not ceased so far the said L/A proceedings are related.

17. Therefore, the said L/A proceedings were continuing only on the strength of the said section 47 of the said Ordinance, 1982. But section 50 of স্থাবর সম্পত্তি অধিগ্রহণ ও হুকুমদখল আইন, ২০১৭ (The Act, 2017) repealed the said Ordinance, 1982 with effect from 21st September, 2017. Therefore, section 47 of the said Ordinance, 1982 has been repealed with effect from 21st September, 2017. Hence, the buttress, i.e., the said section 47 of the Ordinance, 1982, upon which the said L/A proceeding was hinging on, was removed. Therefore, unless any provision of the said Act, 2017 saves the said L/A proceedings, on repeal of the said section 47 of the Ordinance, 1982, the said L/A proceedings fall on the ground.

18. Section 50 of the said Act, 2017 saves only the proceedings initiated under the said Ordinance, 1982. Section 50 of the said Act, 2017 reads as follows:

> "৫০। রহিতকরণ ও হেফাজত।- (১) Acquisition and Requisition of Immovable Property Ordinance, 1982 (Ordinance No. II of 1982), অতঃপর উক্ত অধ্যাদেশ বলিয়া উল্লিখিত, এতদ্বারা রহিত হইবে।
>
> (২) উক্ত অধ্যাদেশ রহিতকরণ সত্ত্বেও উহার অধীন-
>
> (ক) কৃত কোন কাজ-কর্ম ও গৃহীত কোন ব্যবস্থা বা কার্যধারা এই আইনের অধীন কৃত বা গৃহীত বলিয়া গণ্য হইবে;
>
> (খ) প্রদত্ত সকল নোটিশ, বিজ্ঞপ্তি, আদেশ, ক্ষতিপূরণ বা রোয়েদাদ এই আইনের অধীন প্রদত্ত নোটিশ, বিজ্ঞপ্তি, আদেশ, ক্ষতিপূরণ বা রোয়েদাদ বলিয়া গণ্য হইবে; এবং

(গ) কোন কর্তৃপক্ষ, আরবিট্রেটর এবং আরবিট্রেশন আপিলেট ট্রাইব্যুনাল সমীপে কোন কার্যধারা নিস্পন্নাধীন থাকিলে, নিস্পন্ন না হওয়া পর্যন্ত, উহা এমনভাবে চলমান থাকিবে যেন উক্ত অধ্যাদেশ রহিত হয় নাই।

19. On plain reading of section 50 of the said Act, 2017 we find that section 50 saves only the proceedings or actions taken under the Ordinance, 1982. Section 47 of the said Ordinance, 1982 never stated that after expiry of the said Act, 1948, the said proceedings initiated under the said Act, 1948 shall be deemed to be continued under the said Ordinance, 1982. Rather section 47 of the said Ordinance, 1982 stated that after expiry of said Act, 1948, the proceeding initiated under the said Act, 1948 shall continue as a proceeding under the said Act, 1948. Therefore, by dint of section 47 of the said Ordinance, 1982, the proceedings in question were continued as a ongoing proceeding under the said Act, 1948. But section 50 of the said Act, 2017 did not save the proceedings initiated under the said Act, 1948 and neither did section 50 of the said Act, 2017 save the proceedings of L/A cases, which are deemed to continue as a proceeding under the said Act, 1948 on the strength of section 47 of the said Ordinance, 1982. Hence, the said L/A proceedings in question, which were initiated under the said Act, 1948 have automatically been terminated or ceased to exist with effect from 21st September 2017, when the said section 47 of the said Ordinance, 1982 was repealed.

20. Now we will consider at what stage the said L/A proceedings in question was at the relevant date of repeal of the said section 47 of the said Ordinance, 1982 on 21st September, 2017.

21. The respondent itself vide Memo No. এল.এ. কেস নং ১২/৭০-৭১-২৭৮(২) dated 06.10.2016 (Annexure-G of the writ petition) informed the Divisional Commissioner, Dhaka recommended as follows:

"৩। নথি পর্যালোচনায় প্রাপ্ত তথ্য নিম্নরূপ

ক)(১) চূড়ান্ত প্রাক্কলন নথিতে নেই, (২) ৫(৫) ধারার প্রতিবেদন নথিতে নেই, (৩) ৫(৭) ধারার নোটিশ নথিতে নেই, (৪) প্রশাসনিকা অনুমোদনপত্র নথিতে নেই, (৫) প্রস্তাবপত্র নথিতে নেই, (৬) জেলা ভূমি বরাদ্দ কমিটির অনুমোদন নথিতে নেই, (৭) স্বাক্ষরিত দাগসূচি নথিতে নেই, (৮) লে-আউট প্ল্যান নথিতে নাই। উল্লেখ্য, দখল হস্তান্তরের সিডিউলে সিএস দাগ উল্লেখ করে ৯.১১ একর জমিকেও দখল হস্তান্তর করা হয়েছে।

খ) (১) ৫(১) ধারার নোটিশ আছে, (২) ৫(৩) ধারার নোটিশ আছে, (৩) অগ্রীম প্রদানের নোটিশ আছে, (৪) অর্থ জমাদানের চালান আছে, (৫) স্বাক্ষর বিহীন দাগসূচি আছে, (৬) এল এ প্ল্যান্ট আছে, (৭) সাময়িক প্রাক্কলন আছে ও (৮) দখল হস্তান্তর পত্র আছে।"

৬। সম্পত্তি (জরুরী) হুকুম দলখ আইন, ১৯৪৮ এর ৫(৭) উপ-ধারায় অধিগ্রহণকৃত জমি গেজেট আকারে প্রকাশের নির্দেশনা রয়েছে। কিন্তু ১২/৭০-৭১ নং এল এ কেসের সম্পত্তি গেজেট প্রকাশিত না হওয়ায় সংশ্লিষ্ট আইনের ৫(৭) উপ-ধারার নির্দেশনা সম্পাদিত হয়নি। যেহেতু আর এর রেকর্ড ব্যক্তি মালিকানায়, প্রত্যাশি সংস্থা কর্তৃক প্রস্তাবিত জমি ব্যবহৃত হচ্ছে না এবং গেজেট প্রকাশিত হয়নি, সেক্ষেত্রে ১২/৭০-৭১ নং এল এ কেস বাতিল করে ক্ষতিগ্রস্থদের মাঝে বিতরণকৃত ১১,১৬৭.০০ (এগার হাজার একশত সাতষট্টি) টাকা সুদসহ পিডি আর এ্যাক্ট ১৯১৩ মোতাবেক আদায় করা যেতে পারে।"

22. Further, the requiring body, i.e., Bangladesh Water Development Board by its Memo No. L/21/1788 dated 04.12.2016 (Annexure-I of the writ petition) informed the respondent that the lands in question the said L/A case are no more required. In turn the respondent vide its Memo No. এল এ কেস নং ১২/৭০-৭১-৩৪৪(সং) dated 22.12.2016 (Annexure-J of the writ petition) informed the Divisional Commissioner of Dhaka Division that the requiring body does not require the said land in question. We herein reproduce the relevant information given by respondent in the said Memo dated 22.12.2016 as below:

"যেহেতু সরকারী নির্দেশে প্রকল্পটির বাস্তবায়ন কাজ বন্ধ হয়ে গিয়াছে সেহেতু এল.এ. কেস নং ১২/৭০-৭১-এ অধিগ্রহণকৃত ৯.১১ একর জমি অব্যবহৃত থেকে যায়। তৎপরবর্তীতে ১৯৮৫-১৯৮৬-১৯৮৭ ইং সালে উক্ত অব্যবহৃত ৯.১১ একর জমি

ভূমি অধিগ্রহণ আইননুযায়ী ঢাকা পওর বিভাগ-১, পাউবো, ঢাকা কর্তৃক জেলা প্রশাসক, মাণিকগঞ্জ এর নিকট সমর্পণ করা হয়। ভবিষ্যতে অধিগ্রহণকৃত সম্পত্তি প্রত্যাশী সংস্থার প্রয়োজন নাই।"

23. The respondent earlier vide Memos dated 07.07.2012 (Annexures-D & D(1) of the writ petition) requested Commissioner of Dhaka Division to publish gazette notification. But we found that till date or at least on/or before 21.09.2017 no gazette notification under section 5(7) of the said Act, 1948 has been published. Therefore, we are of the view that after repeal of section 47 of the said Ordinance, 1948 with effect from 21.09.2017, there is no scope to publish any gazette notification under the said section 5(7) of the said Act, 1948, because as we have observed above the L/A proceeding became non-est with effect from 21.09.2017 when the said section 47 of the said Ordinance, 1948 was repealed.

24. Another important aspect is that section 5(6) of the said Act, 1948 imposes a mandatory requirement of obtaining decision of the Government for acquisition of the property in question and such decision is final. Admittedly there is no report of Deputy Commissioner as required under section 5(5) of the said Act, 1948. It is also admitted position that there is no decision of the Government for acquisition of the property in question. The respondent in its affidavit-in-opposition dated 06.03.2018 (paragraph 10) stated that "it needs to be stated here that Section 5(5) of the said Act, 1948 provides for sending the case by the Deputy Commissioner to the Government for final decision whenever any objection was raised and since no objection was raised against the L/A proceedings, the Deputy Commissioner sent the case for publishing gazette notification as per section 7 of the said Act". But having read the said section 5 of the said Act, 1948 along with other provisions of the said Act, 1948, we find that there is no provision under which Deputy Commissioner, i.e., respondent or any other authority except the Government can take decision of acquisition of property under the said Act, 1948. Only the decision of the Government for acquisition is final. Hence, the proposition of the respondent that since there is no objection against the acquisition, the respondent can take decision to acquire the property is fallacious. Therefore, we are of the view that there being no decision of the Government for acquisition of the property in question, there is no valid acquisition of the property and in the meantime the said proceeding having become non-est due to repeal of the said section 47 of the said Ordinance, 1982, there is no further scope to take decision for acquisition of the property.

25. Therefore, we find that the Divisional Commissioner rightly found that there is no proceeding (কার্যক্রম) of the said L/A Case and as such the Divisional Commissioner rightly vide the Memo dated 30.05.2017 (Annexure-A of the writ petition) directed respondent to cancel the said L/A proceeding.

26. In view of the above, we find merit in the Rule. Hence, the Rule is made absolute. Hence, the action of the respondent in failing to cancel the Land Acquisition case No. 12/1970-71 pending before the respondent in compliance of the decision of Division Commissioner, Dhaka as evinced in Memo No. ০৫.৪১.৩০০০.০১০.১৪.০০১.১৬-৬০(সং) dated 30.05.2017 of Divisional Commissioner, Dhaka (Annexure-A) is hereby declared to have been done without lawful authority and is of no legal effect. Further, the respondent is also hereby directed to cancel the Land Acquisition Case No. 12/1970-71 pending before the respondent in compliance of the decision of Divisional Commissioner, Dhaka in Memo No. ০৫.৪১.৩০০০.০১০.১৪.০০১.১৬-৬০(সং) dated 30.05.2017 of Divisional Commissioner, Dhaka (Annexure-A).

27. Communicate the judgment at once.

13 SCOB [2020] HCD

HIGH COURT DIVISION

(CRIMINAL REVISIONAL JURISDICTION)

Criminal Revision No. 1050 Of 2016

Major Md. Nazmul Haque and others
- Accused-Petitioners.

-Versus-

The State and another
- Opposite Parties.

Mr. Rokanuddin Mahmud, Senior Advocate with
Mr. Muhammad Shafiqur Rahman with
Mr. Mohiuddin Shamim with Ms. Fowjia Akhter and Ms. Ajmeri Chowdhury, Advocates
- for the Accused-Petitioners.

Mr. Khondaker Mahbub Hossain, Senior Advocate, with
Ms. Fouzia Karim Firoze,
Mr. M. Masud Rana,
Ms. Feroza Pervin,
Ms. Sathia Sahajahan and
Mr. Md. Shariful Haque, Advocates
- for the Opposite Party No.2.

Mr. Biswojit Roy, D.A.G. with
Mr. M. Masud Alam Chowdhury, A.A.G with
Mr. Mamunor Rashid, A.A.G
..... For the opposite party No. 1.

Heard on 16.02.2017, 28.02.2017, 01.03.2017, 073.03.2017, 08.03.2017, 15.03.2017 and 21.03.2017

Judgment on 06.04.2017.

Present:
Mrs. Justice Farah Mahbub.
And
Mr. Justice Mahmudul Hoque

CrPC Section 265D:
Where the case is at a stage of framing charges and the prosecution evidence is yet to commence, the trial court has to consider the question of sufficiency of the ground for proceeding against the accused on a general consideration of materials placed before him by the investigating agency. The truth, veracity and effect of the evidence are not to be meticulously judged. The standard of the test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at this stage. ... (Para-35)

JUDGMENT

Farah Mahbub, J:

1. This Rule at the instance of the accused-petitioners was issued under section 439 read with section 435 of the Code of Criminal Procedure directing the opposite parties to show cause as to why the impugned order dated 03.03.2016 passed by the learned Sessions Judge, Mymensingh in Sessions Case No.725 of 2015 rejecting the application filed by them under section 265C of the Code of Criminal Procedure and framing charge against them should not be set aside.

2. At the time of issuance of the Rule, all further proceedings of Sessions Case No.725 of 2015 arising out of C.R. Case No.220 of 2013 in the connection with Kotwali Police Station Case No.10(3)2005 corresponding to G.R. No.176 of 2005 under sections 302/34/201/202/203 of the Penal Code, had been stayed by this court for a prescribed period.

3. Facts, relevant for disposal of the present Rule, are that on 11.02.2005 a cadet namely Sharmila Shahreen Polin was found hanging in the bathroom of Mymensingh Girl's Cadet College (in short, the Collage). The Principal of the said college accordingly lodged UD Case No.4 of 2005 on 11.02.2005 with Kotowali Police Station, Mymensingh stating, *inter alia,* that the victim had committed suicide. Pursuant thereto Kotowali Police Station General Diary No.539 dated 11.02.2005 was recorded. Accordingly, the Sub-Inspector of Kotowali Police Station came at the place of occurrence and prepared seizure list in the presence of the seizure list witnesses(Annexure-B) as well as *surat-e-hal* report on 11.02.2005 at 2.00 p.m. (Annexure-C). On completion of the said process he sent the body of the victim to the Forensic Department, Mymensingh Medical College for post mortem report in order to find out the cause of death. Later, on 12.02.2005 the said Sub-Inspector further seized some articles(Annexure-D-1) from the place of occurrence. However, in the post mortem report dated 14.02.2005 the opinion as to the cause of death of the victim was as follows:

> "*Considering the Autopsy findings & primary investigation report submitted by the police authority in inquest & challan, I am with the opinion that death of Sharmila Shahreen Polin was due to Asphyxia resulting from Hanging which was antemortem. Opinion regarding the nature of death to be given after the chemical analysis report of the preserved viscerae is available*."

4. On 01.03.2005, chemical analysis report was given by the authority concern opining, *inter alia*,-

> " *Considering the Autopsy findings & primary investigation report submitted by the police authority in inquest & challan & Chemical anlysis report No.609, dated 24.02.2005(copy enclosed), I am with the opinion that death of Sharmila Shahreen Polin was due to Asphyxia resulting from Hanging which was antemortem and suicidal in nature.*" (Annexure-C-2).

5. However, the father of the victim filed a petition of complaint on 19.02.2005 being C.R. Case No.154 of 2005 in the 1st Court of Cognizance, Mymensingh under sections 302/34/202/203/201 of the Penal Code alleging, *inter alia*,-

> " …..অত্র বাদীর মেয়ে পলিনকে তার ঘাড়ের বাম পার্শ্বে ময়মনসিংহ গার্লস ক্যাডেট কলেজের দায়িত্রপ্রাপ্ত ও দায়িত্বে নিয়োজিত কর্মকর্তা,ব্যক্তি ও তৎসহযোগী ব্যক্তি আসামী ভারী বস্তু দ্বারা স্বজুড়ে আঘাত করিয়া পলিনকে খুন করিয়া অতঃপর উক্ত খুনকে আত্মহত্যা বলিয়া ধামাচাপা দেওয়ার কু-উদ্দেশ্যে মিথ্যা তথ্য প্রদান কারী ব্যক্তিগনকে আসামী করিয়া দৃস্টান্তমূলক বিচারের দাবীতে বাদী অত্র মোকদ্দমা দায়ের করিলেন। ...."

6. Instead of taking cognizance the learned Magistrate concern sent the said complaint petition to the Officer-in-charge Kotowali Police Station, Mymensingh under section 156(3) of the Code of Criminal Procedure(in short, the Code) for investigation. However, despite direction of the learned Magistrate the said complaint petition had not been registered as FIR by the Officer-in-charge of the respective police station. As such, the father of the victim, the complainant, by making an application dated 03.03.2005(Annexure-B) sought for a direction from the learned Magistrate concern to register the case as FIR and for re-examination of the body of the victim. However, in this application the complainant for the 1st time brought the allegation of murder against the accused petitioners. The said prayer was allowed by the learned Magistrate concern vide order dated 12.03.2005. Accordingly, on 14.03.2005 upon

examination of the body of the victim a further s*urat-e-hal* report was prepared by the officers concern belonging to the law enforcing agency and the body of the victim was duly sent to the Forensic Department of the Dhaka Medical College Hospital for post-mortem report(Annexure-C-3).

7. In the 2nd post-mortem report dated 07.05.2005(Annexure-C-4) it has been opined, *inter alia*,-

".....শবব্যবচ্ছেদে দেহের প্রায় সমস্ত আবরণী কলা পচিত এবং আংশিক গলিত অবস্থায় প্রাপ্ত, গলার কোষকলা এতই পচিত যে উহাতে কোন যখম বা আঘাতের চিহ্ন নির্ণয় করা সম্ভব হইল না। রাসায়নিক পরীক্ষার রিপোর্ট ১২০৮ বি, তাং ৩১/৩/০৫ যাহাতে কোন বিষের আস্বাস্ত পাওয়া যায় নাই।

মৃত্যুর কারণ সম্পর্কে মেডিকেল অফিসারের মতামত।

বিঃ দ্রঃ যখমের ক্ষেত্রে, যখমে হত্যার আত্মহত্যার বা অন্য কিছুর আলামত আছে কিনা তাহা লিখুন মৃত্যুর কারন এবং ধরণ সম্পর্কে বলা যায় যে, সমগ্র দেহের কোষগুলি কলা পচিত ও আংশিক গলিত অবস্থার কারণে এবং কোন অস্থিতে আঘাতের চিহ্ন না পাওয়ায় রাসায়নিক পরীক্ষার কোন বিষের কোন অস্তিতি না থাকায় আমাদের পক্ষে কোন প্রকার মতামত দেয়া সম্ভব হইল না।....."

8. Meanwhile, pursuant to the order of the learned Magistrate concern the petition of complaint, filed earlier by the father of the victim, had been registered as Kotowali Police Station Case No.10 dated 06.03.2003(Annexure-A). However, during the course of investigation on 22.03.2005 the officer concern further seized certain articles from " ঘটনাস্হল ময়মনসিংহ গার্লস ক্যাডেট কলেজের ১০৫ নং শান্তি হাউজের বাথরুমের পার্শ্বে ডর্ম হইতে স্বাক্ষী হোসনে আরার দেখানো মতে। " (Annexure-D-2).

9. In the meanwhile, the Investigation Officer after conclusion of investigating submitted final report tender (FRT) on 29.09.2005(Annexure-F) opining as under-

" …… অত্র মামলার সার্বিক তদন্তকালে ময়না তদন্ত প্রতিবেদন পর্যালোচনা ভিসেরা রিপোর্ট পর্যালোচনা এবং উপস্হিত সাক্ষ্য প্রমানাদি পর্যালোচনা পূর্বক অত্র মামলা গোপন ও প্রকাশ্য তদন্ত কালে সাক্ষ্য প্রমানে এজাহারে উল্লেখিত ময়মনসিংহ গার্লস ক্যাডেট কলেজের দায়িত্রপ্রাপ্ত ও দায়িত্বে নিয়োজিত কর্মকর্তা ও তৎসহযোগী ব্যক্তির বিরুদ্ধে কোন অভিযোগ প্রমানিত হয় নাই। বাদীর মেয়ে স্বেচ্ছায় গলায় ওড়না পেচাইয়া আত্মহত্যা করিয়াছে বলিয়া প্রতীয়মান হওয়ায় মামলাটি তথ্যগত ভুল বলিয়া প্রতীয়মান হয়।....." and had recommended to release the name of the accused persons as mentioned in column 4 of the said police report.

10. Being aggrieved the complainant filed *naraji* on 16.10.2005(Annexure-G) contending, *inter alia*,-

" …..ঘটনার দিন অর্থাৎ ১১/০২/০৫ ইং তারিখ সকাল ৯.৪৫ ঘটিকায় পলিন তার কমনরুম হইতে অধ্যায়ন শেষে কিছু বই হাতে তার নিজের রুমে ফিরিয়া আসে এবং তারি নিজের চেয়ারটি অন্য বান্ধবী ব্যবহারে থাকায় বান্দবীর অনুরোধে আরেকটি চেয়ার আনার জন্য রুম থেকৈ বেসরয়ে যায়। তখন মেজর নাজমুল ও সার্জেন্ট নওশের পলিনকে সি্কিউরিটি গার্ড হেনাকে দিয়া ডাকিয়া তাহার রুমে নিয়া যায় এবং পরিকল্পিত ভাবে ঠান্ডা মাথায় হত্যা করে।..." and prayed for further investigation by any high ranking officer of CID. The prayer was allowed by the learned Magistrate concern. Ultimately, after conducting further investigation another FRT dated 04.09.2009 was submitted by one Assistant Superintendent of Police, CID, Mymensingh opining, *inter alia*,-

".....পূর্ববর্তী তদন্তকারী অফিসারদের তদন্তে প্রাপ্ত সাক্ষ্য প্রমানাদি বিশ্লেষনে মৃতা পলিনের বান্দবী সহকাপঠি ক্যাডেটদের জবানবন্দিতে শান্তি হাউজে তৎসময় কর্তব্যে নিয়োজিত ক্যাডেট কলেজের কর্মকর্তা ও কর্মচারীদের জবানবন্দিতে মৃত পলিন এর সুরতহাল প্রতিবেদন ও ময়না তদন্ত প্রতিবেদন পর্যালোচনায় এবং ঘটনার পারিপাশি।বকতায় প্রমানিত হইয়াছে। বাদীর কন্যা ক্যাডেট নং ১১৪৫, শর্মিলা শাহরিন পলিন ঘটনার তারিখে সে নিজেই গলায় ফাঁস দিয়া আত্মহত্যা করিয়াছে। বাদী

আবেগপ্রবন হইয়া এই ঘটনাকে অতিরঞ্জিত করিয়া অত্র মামলার অভিযোগ দায়ের করিয়াছেন।বাদীর মানিত সাক্ষী সহ নিরপেক্ষ সাক্ষীদের জিজ্ঞাসাবাদে এবং প্রকাশ্য ও গোপনে তদন্তে বাদীর দায়েরকুত অভিযোগ ও নারাজীর আবেদন বর্ণিত ঘটনাবলী প্রমান করার মত কোন সাক্ষ্য প্রমান পাওয়া যায় নাই। . . . . . ”

11. The officer concern also recommended to release the name of the accused petitioners from being proceeded. Being aggrieved the complainant filed 2nd *naraji* on 04.11.2009 before the learned Magistrate concern (Annexure-L) and prayed for judicial inquiry under section 202(2A) of the Code. Upon hearing both the contending parties the learned Senior Judicial Magistrate, Mymensingh had examined the complainant under section 200 of the Code and allowing the prayer had directed the learned Judicial Magistrate, Mymensingh for judicial inquiry vide order dated 15.12.2009(Annexure-M).

12. During the course of judicial inquiry 10(ten) judicial witnesses were examined and ultimately, after about 4(four) years the judicial inquiry report was finally submitted on 22.05.2013 by the learned Magistrate, concern opining, *inter alia*,-

“……উপরিউক্ত আলোচনার ভিত্তিতে ভিকটিম পলিনের মৃত্যুর ঘটনার আগের ও পরের পারিপার্শ্বিক অবস্থা বিবেচনা করে এই বিচার বিভাগীয় তদন্তে নিম্নরুপ বিষয়সমূহ উদঘটিত হয়েছে:-

ক্যাডেট নং-১১৪৫ ভিকটিম শার্মিলা শাহরিন পলিন আত্মহত্যা করেনি। বরং তাকে বিগত ১১/০২/২০০৫ ইং তারিখ শুক্রবার বেলা১০.৩০ ঘটিকার পর কলেজের মিল্ক ব্রেকের সময় ময়মনসিংহ গার্লস ক্যাডেট কলেজের অভ্যন্তরে শারীরিক নির্যাতন করার পর লাঠি জাতীয় ভোঁতা বস্তু দ্বারা আঘাত পূর্বক নি:স্তেজ করে পরবর্তীতে শ্বাসরোধ করে হত্যা করা হয়েছে এবং উক্ত হত্যাকান্ডটিকে ধামাচাপা দিয়ে আত্মহত্যা হিসেবে প্রচারের উদ্দেশ্যে তার মৃতদেহ শান্তি হাউজের বাথরুমে ঝরনার শাওয়ারের পাইপের সাথে ওড়না দ্বারা ঝুলিয়ে রাখা হয়েছে।

বিচার বিভাগীয় তদন্তকালে ভিকটিম ক্যাডেট নং-১১৪৫ শার্মিলা শাহরিন পলিনের মূল হত্যাকারী হিসাবে ময়মনসিংহ গার্লস ক্যাডেট কলেজের এ্যাডজুটেন্ট মেজর নাজমুল হক এবং উক্ত হত্যাকান্ডের প্রত্যেক সহযোগী হিসাবে সার্জেন্ট নওশেরুজ্জামান ও সিকিউরিটি গার্ড হেনা বেগম এর সরাসরি সম্পৃক্ততার বিষয়ে আপাতভাবে প্রাথমিক সত্যতা (Prima Facie) পাওয়া গিয়াছে ।

বিচার বিভাগীয় তদন্তকালে ভিকটিম ক্যাডেট নং- ১১৪৫ শার্মিলা শাহরিন পলিনের হত্যাকান্ডের সাথে জড়িত অপরাধীদের রক্ষার একই উদ্দেশ্য জ্ঞাতসারে সাক্ষ্য গায়েবসহ ভুল তথ্য প্রদান, ইচ্ছাকৃতভাবে হত্যা সংক্রান্ত তথ্য প্রদানের বিরত থাকা এবং হত্যাকান্ড সম্পর্কে ভুল তথ্য প্রদানের মাধ্যমে এই হত্যাকান্ডকে আত্মহত্যা হিসাবে প্রমানের চেস্টার সাথে ময়মনসিংহ গার্লস ক্যাডেট কলেজের এ্যাডজুটেন্ট মেজর নাজমুল হক, এনসিও সার্জেন্ট নওশরউজ্জামান, সিকিউরিটি গার্ড হেনা বেগম, ক্যাডেট কলেজ সমূহের ডিএএজি মেজর মুনির আহাম্মদ চৌধুরী এবং ময়মনসিংহ গার্লস ক্যাডেট কলেজের সহযোগী অধ্যাপক আবুল হোসেন এর সরাসরি সম্পৃক্ততার বিষয়ে আপাতভাবে সত্যতা (Prima Facie) পাওয়া গিয়াছে । তবে মেস ম্যানেজার শাহজাহান আলীর এই হত্যাকান্ড বা হত্যাকান্ডের ঘটনা ধামাচাপা দেওয়ার জন্য তা আত্মহত্যা হিসাবে প্রচারে সম্পৃক্ততার বিষয়ে আপাতভাবে প্রাথমিক সম্পৃক্ততা (Prima Facie)পাওয়া যায়নি।

বিচার বিভাগীয় তদন্তকালে বিগত ১১/০২/২০০৫ তারিখ শুক্রবার বেলা ১০.৩০ ঘটিকার পর ময়মনসিংগ গার্লস ক্যাডেট কলেজের মিল্ক ব্রেকের সময় ভিকটিম ক্যাডেট নং ১১৪৫ শার্মিলা শাহরিন পলিনের হত্যাকান্ড ও হত্যাকন্ডের ঘটনা ধামাচাপা দিয়ে উক্ত ঘটনা আত্মহত্যা হিসাবে প্রচারের সাথে জড়িত ময়মনসিংহ গার্লস ক্যডেট কলেজের এ্যাডজুট্যান্ট মেজর নাজমুল হক,এনসিও সাজেন্ট নওশরউজ্জামান, সিকিউরিটি গার্ড হেনা বেগম,ক্যাডেট কলেজ সমূহের অধ্যাপক ডি এ এজি মুনির আহাম্মেদ চৌধুরী এবং ময়মনসিং গার্লস ক্যাডেট কলেজের সহযোগী অধ্যাপক আবুল হোসেন এর বিরুদ্ধে ১৮৬০ সনের দন্ড বধির ৩০২/২০১/২০২/২০৩/৩৪ ধারার অধীনে অপরাধের সংশ্লিস্টতার অভিযোগের আপাতভাবে প্রাথমিক সত্যতা (Prima Facie) পাওয়া গিয়াছে।

পরিশেষে বলা যায় যে, এই বিচার বিভাগীয় তদন্তকালে সাক্ষ্য আইনের অন্যতম প্রনিধান যোগ্য মতবাদ A man can tell a lie, but circumstances of evidence can not (Illegible) a lie এর কার্যকারিতা আরও একবার প্রমানিত হল। ..... ”

13. The learned Senior Judicial Magistrate, Mymensingh having found *prima facie* substance thereto took cognizance of the offence against the accused petitioners under sections 302/201/202/203/34 of the Penal Code and issued warrant of arrest against them vide

order dated 27.05.2013. However, since cognizance was taken pursuant to judicial inquiry report the learned Magistrate vide the same order had treated the matter as C.R. case instead of G.R. case. Accordingly, the case was registered as C.R. Case No.220 of 2013 and the record was duly transferred to the learned Sessions Judge, Mymensingh for trial and disposal. On receipt thereof the case had been registered as Sessions Case No.725 of 2015.

14. On 04.10.2015 the accused petitioners filed an application before the trial court under section 265C of the Code of Criminal Procedure (in short, the Code) (Annexure-Q) stating, *inter alia,* that the complainant's story of murder was apparently fictitious, for, the allegation was vague and constantly varying throughout the course of investigation; that the complainant's source of knowledge of the alleged murder, a letter and a photograph were not authentic; that no allegation of murder was found amongst the statements of the witnesses; that the post-mortem report described the incident as suicide; that the judicial inquiry report was flawed because it only took into account the statements of witnesses preferred by the complainant but did not take into consideration the statements of the impartial witnesses recorded during the course of investigation as well as further investigation.

15. The complainant submitted counter application to oppose the prayer of discharge of the accused petitioners (Annexure-R). Upon hearing the respective contending parties the learned Sessions Judge, Mymensingh rejected the application filed under section 265C of the Code and vide order dated 03.03.2016 had framed charge against the accused petitioners under sections 302/201/34 of the Penal Code. The said court accordingly transferred the case record to the learned Additional Sessions Judge, 1st Court, Mymensingh for trial.

16. Earlier, however, the accused petitioner Nos.1 and 2 obtained anticipatory bail from the High Court Division of the Supreme Court of Bangladesh. Subsequently, all the accused petitioners obtained bail from the 1st Court of Cognizance, Mymensingh as well as from the 1st Court of learned Additional Sessions Judge, Mymensingh on 24.03.2016. However, till date they are enjoying the privilege of bail.

17. Being aggrieved by and dissatisfied with the order of framing of charge upon rejecting the prayer so made under section 265C of the Code the accused petitioners filed the instant application under section 439 read with section 435 of the Code and obtained the present Rule and stay.

18. Mr. Rokanuddin Mahmud, the learned Senior Advocate appearing with Mr. Muhammad Shafiqur Rahman, the learned Advocate on behalf of accused-petitioners submits that section 265C has been incorporated in the Code of Criminal Procedure(in short, the Code) after deleting Chapter XVIII of the Code by the Law Reforms Ordinance, 1978 with a view to protecting innocent persons from being harassed and also to make sure that the case of no evidence does not occupy the valuable time of the Sessions Court. In the instant case, he goes to argue, whether the evidence and materials collected during investigation as well as during judicial inquiry were sufficient to frame charge against the petitioners, is the only consideration for disposal of the instant revisional application.

19. Accordingly, he goes to argue that basing on the complaint petition if the Magistrate takes cognizance of the offence as alleged and examine the complainant on oath during the course of judicial inquiry, the only material he will have for consideration is the judicial inquiry report and the complaint petition along with the complainant's statements on oath. But in the present case, order for holding judicial inquiry was passed by the learned

Magistrate concern after the matter was investigated in not once but twice, one by the respective Investigating Officer and the other by the CID. During the course of investigation, the Investigating officer collected evidence, prepared seizure list and recorded statements of as many as 33 (thirty-three) witnesses under section 161 of the Code. All these documents must be considered by the charge hearing court. In this connection he submits that amongst those witnesses who were residing inside the Cadet College at the relevant time(as many as 25 (twenty five)witnesses, 10 (ten) of whom were young girl who were the classmates of the victim), in their statements have categorically stated that the deceased committed suicide. On the other hand, the witnesses who were residing in Dhaka, far away from the place of occurrence(all neighbours, relatives of the informant), and who came to see the dead body of the victim when it arrived in Dhaka, in their statements recorded under section 161 of the Code only stated that they saw 3(three) injury marks on the dead body but none of them alleged murder. Moreover, he submits that neither the complaint petition nor the statements of 10(ten) judicial witnesses, who were examined on oath during the course of judicial inquiry, reveal anything which indicate that there was homicide or that the petitioners were connected with the death of the victim in any way whatsoever. Accordingly, he submits that since none of the witnesses, so have been examined during the course of investigation or judicial inquiry alleged any specific act against any of the accused as such, they cannot be prosecuted for causing death of the victim.

20. Mr. Mahmud further goes to argue that the judicial inquiry report is the only material which the prosecution has relied on. The said report itself is a questionable one, for, it is not a report as contemplated under section 202(2A) of the Code, it is rather in the form of judgment giving decision thereon with reason of his own, not upon the evidence and materials collected in the case. Moreso, he submits that the court is not bound to follow the judicial inquiry report at the time of framing of charge; whatever may be the report of the Judicial Magistrate holding inquiry, the trial court is required to exercise his own independent judgment. In the instant case, the learned Sessions Judge, Mymensingh solely relied upon the conclusion of the learned Judicial Magistrate concern and thus, fell into error. In support he has relied upon the decisions of the cases of ***Ruhul Alim Kha*** Vs. ***State: reported in 56 DLR 632*** and ***Abul Ahsan Joardar*** Vs. ***Kazi Misbahul Alam: reported in 45 DLR 606***.

21. He also goes to submit that 3(three) injury mark on the basis of which the learned Magistrate concluded that it was a case of murder were not mentioned by the complainant, and the neighbours/relatives in their statements recorded under section 161 of the Code, but 5(five) years after the incident they had mentioned those marks during the course of judicial inquiry, which goes to show their falsity, these aspects were overlooked by the learned Magistrate. In addition, the prosecution has heavily relied on a photograph which claimed to have revealed injury marks on the face of the deceased. In this regard he submits that photograph cannot be a legal piece of evidence unless it is supported by medical evidence. In the inquest and the post-mortem report no such injury marks were found in the body of the deceased. Secondly, even if for argument's sake, the photograph is accepted the mere sign of an injury on the face, as shown in the photograph, is not at all sufficient to lay a charge of murder. As such, he submits that framing of charge on the basis of this photograph is not sustainable in the eye of law.

22. He further submits that the complainant filed as many as 4(four) petitions i.e., complaint petition, supplementary complaint petition, and 2(two) *naraji* petitions. None of those contain any specific allegation whatsoever which can be said to be legal evidence. The main thrust of his allegations is based on suspicion allegedly raised by a letter sent by a girl

named Shila who was neither examined during the investigation nor in the judicial inquiry. He also goes to submit that in the post-mortem report the doctor concern gave opinion that the death of the victim was suicidal in nature. Against the said post-mortem report there is no other material or any other findings of any expert in the record of the case before claiming that the death of the victim was homicidal.

23. In the 2nd *naraji* petition, he goes to argue, the complain claimed to have heard the incident from cadet Munmun Roada who according to him seems to be the only witness to the unfortunate incident. Munmun was examined during judicial inquiry and her statements were recorded on oath as J.W.10, but she did not utter a single word against any of the accused. As such, his claim does not stand in the eye of law, and the prosecution story of murder is effectively destroyed.

24. Lastly, he submits that the judicial inquiry report failed to provide any new plausible ground to the learned Sessions Judge to proceed against the accused petitioners. The police and the CID by filing final report tender categorically concluded that there was no sufficient ground to proceed. The learned Sessions Judge, Mymensingh did not find, apart from the photograph, what new ground had been unveiled by the judicial inquiry report, nor made any observation as to why the final report by the police and the CID should be overturned and why the 161 statements of the witnesses, the post-mortem report and the inquest report should be disregarded. Instead the said court has framed charge without proper consideration of the materials on record and application of judicial mind. In support he has referred the decision of the case of ***The State*** Vs. ***Khondoker Md. Moniruzzaman*** reported in ***17 BLD(AD)54.***

25. Accordingly, he submits that upon striking down the impugned order dated 03.03.2016 passed by the learned Sessions Judge, Mymensingh this Rule is liable to be made absolute for the ends of justice.

26. *Per contra*, Mr. Khondaker Mahbub Hossain, the learned Senior Advocate appearing with Ms. Fouzia Karim Firoze, the learned Advocate on behalf of complainant opposite party No.2 submits that vide section 265D of the Code the learned Sessions Judge shall frame charge in writing after hearing the accused and the prosecution provided he found existence of *prima facie* case on the basis of the materials so placed before him by the prosecution. However, he goes to argue, while considering the judicial inquiry report or the police report, as the case may be, the court is not bound by the opinion of the Judicial Magistrate or the Investigating officer as to the nature of the offence. The court is to frame charge according to law as would emerge from the records of the case and the documents submitted therewith by the prosecution. At the same time, he submits that the obligation to discharge the accused under section 265C of the Code arises when the learned Sessions Judge after considering the records of the case, all documents furnished by the prosecution, hearing both the prosecution and the defence, considers that there is no sufficient ground for proceeding. However, in that case the court has to record the reasons for so doing. In the instant case, he goes to argue, the learned Sessions Judge, Mymensingh after considering the records of the case and after hearing both the contending parties opined, *inter alia*, that there is ground for presuming that the accused petitioners have committed the alleged offence. Accordingly, he framed charge vide the impugned order dated 03.03.2016 under sections 302/201/34 of the Penal Code. Now, the burden lies upon the prosecution to prove its case with the evidence, which cannot be denied at this stage by striking down the order of framing of charge.

27. He further submits that at the beginning of the unfortunate incident the accused petitioners have taken a positive defence that it is a case of suicide without their knowledge; hence, vide section 106 of the Evidence Act onus lies upon them to prove the said context with evidence in view of the fact that it is a custodial death, for, the victim, a cadet of Mymensingh Girl's Cadet College (in short, the College) died while she was in the custody of the college authority. In support of his contention the learned Advocate has relied upon the ratio as decided by the Appellate Division in the case of ***Mahbur Sheikh alias Mahabur*** Vs. ***State:*** reported in ***67 DLR (AD)34.*** Accordingly, he submits that since a prima facie case has been disclosed against the accused petitioners hence, they have no scope to have any shelter under section 265C of the Code. In that view of the matter the contention of the accused petitioners being not tenable in the eye of law this Rule is liable to be discharged.

28. Mr. Biswojit Roy, the learned Deputy Attorney General appearing with Mr. M. Masud Alam Chowdhury, the learned Assistant Attorney Genearal with Mr. Mamunor Rashid, the learned Assistant Attorney General on behalf of the Opposite Party No.1 adopts the submissions so have been advanced by the learned Advocate appearing on behalf of the complainant Opposite Party No.2.

29. Pursuant to the unfortunate death of Cadet Sharmila Shahreen Polin at Mymensingh Girl's Cadet College UD Case No.4 of 2005 was registered with Kotowali Police Station, Mymensingh on 11.02.2005 at the instance of the Principal of the said college. Ultimately, the father of the victim filed C.R. Case No.154 of 2005 on 19.02.2005 before the learned 1st Class Magistrate, Cognizance Court No.1, Mymensingh under sections 302/201/202/203/34 of the Penal Code alleging murder of his daughter by the respective officers of the said college along with others. The learned Magistrate, however, instead of taking cognizance of the offence had directed the Officer-in-charge of Kotowali Police Station, Mymensingh under section 156(3) of the Code to investigate the allegation. Accordingly, the information was registered as Kotowali Police Station Case No.10 dated 06.03.2005. Meanwhile, upon conclusion of investigation final report tender was submitted by the Investigating Officer on 29.09.2005(Annexure-F). The complainant being aggrieved filed *naraji* on 16.10.2005(Annexure-G) and prayed for further investigation. Said prayer was allowed, and vide the respective order the learned Magistrate had directed the CID to conduct further investigation. Pursuant thereto the Assistant Superintendent of Police, CID, Mymensingh conducted further investigation and submitted supplementary FRT on 04.09.2009. Being aggrieved the complainant again filed *naraji* on 04.11.2009(Annexure-L) with a prayer for judicial inquiry under section 202(2A) of the Code. The learned Senior Judicial Magistrate, Mymensingh treating the said *naraji* as fresh complaint had examined the complainant under section 200 of the Code of Criminal Procedure and vide order dated 15.12.2009 sent the matter to the concerned Magistrate for judicial inquiry under section 202(2A) of the Code.

30. It is the established principle of law that when the complaint has been sent to the learned Magistrate concern for judicial inquiry he will examine the complainant and his witnesses on oath. He will, however, critically examine them to ascertain the truth of the alleged occurrence and the complicity of the accused person in the offence. He will also ask for the relevant documents, if any, in support of the allegations put forth by the complainant, verify them and try to ascertain the truth or falsehood. On completion of the said steps the learned Magistrate will submit a report with his findings as to the alleged offence and involvement of the individual accused. These findings will be in the form of "recommendation" mentioning specifically the penal section of the offence and the name of the accused, if the case is so made out through evidence.

31. In the instant case, the learned Magistrate concern upon examining the FIR, *surat-e-hal* report, post-mortem report, seizure list, map of the place of the occurrence, 161 statements of the witnesses recorded during the course of investigation, the case docket, final report tender, supplementary final report tender, the *naraji* petitions, the statements of witnesses so recorded during judicial inquiry including the complainant and the other documents as produced by the complainant, submitted report on 22.05.2013 recommending that there is *prima facie* case to proceed further under section 204 of the Code against the accused petitioners. The accused petitioners duly appeared/surrendered before the court concern and obtained bail therefrom. Since the offence is triable exclusively by the Court of Sessions the case record has been duly sent to the Court of learned Sessions Judge, Mymensingh for trial. On receipt thereof it has been registered as Sessions Case No.725 of 2015. The learned Sessions Judge, however, duly took cognizance of the offence against the accused petitioners.

32. Meanwhile, the accused petitioners upon obtaining bail from the Court of learned Sessions Judge, Mymensingh filed application under section 265C of the Code. Upon hearing the respective contending parties the learned Sessions Judge, Mymensingh rejected the same finding-*inter-alia,*

> *"……It appears from the record that the Learned Judicial Magistrate, after holding judicial enquiry, has submitted an elaborate Report depending on the deposition of the witnesses and also on the attending circumstance of the occurrence. The witnesses, including the informant, have claimed that the victim Sharmila Shahrin Polin was killed by the accused petitioners and thereafter a drama of committing sucide, by hanging her inside the bathroom from a shower, was staged by the accused-persons. It has been mentioned in the report of the learned Senior Judicial Magistrate that he has noticed the mark of injury caused by nail in the left cheek, a circular abrasion on the left side of neck, marks of fingers & nail on the both sides of trachea and marks of scratch on the chest of victim Sharmila Shahrin Polin in the photograph of dead body supplied by her father.*
>
> *Although the said photograph was saying something about the alleged atrocity on the persons of the victim Shirmila Shahrin Polin, but that was not reflected in the inquest report prepared by the police and the post-mortem report prepared by the doctor concerned. The learned Magistrate has relied on the circumstantial evidence and came to the finding that there was no sign & symptom of commission of suicide by the victim as the story of suicide by hanging was not supported by the medical jurisprudence. In the absence of such signs and symptoms as to commission of suicide by hanging the occurrence of death of the victim Sharmila Shahrin Polin cannot be opined as an occurrence of suicide. Since there were some marks of injury on the person of the victim-deceased and since the story of commission of suicide by hanging could not be made believable, so the accused persons owe an explanation as to the cause & nature of death of the victim. In the absence of proof as to commission of suicide by the victim, there is reasonable ground to believe that the victim was killed and she did not commit suicide. The claim and counter claim of both sides can be decided only after examination of witnesses during trial. So, there is no cogent ground to discharge the accused persons from the charges brought against them. As such, I do not find any reason to allow the petition and accordingly, the same is rejected.*

There having sufficient reasons to presume that the accused persons have committed offence punishable under sections 302/201/34 of the Penal Code, the charges under the said sections against the accused (1) Adjutant Major Najmul Haque, (2) N.C.O. Md. Nowsheruzzaman, (3) Hena Begum, (4) D.A.A.G. Major Munir Ahammed Chowdhury and (5) Md. Abul Hossain are framed. The framed charges are read over & explained to the present accused persons and they pleaded not guilty and claimed to be tried.
Issue summons upon the witnesses No.1-5 fixing 24-3-2014 for trial……" and framed charge against them under sections 302/201/34 of the Penal Code in exercise of power as provided under section 265D of the Code.

33. Sections 265C and 265D of the Code of Criminal Procedure provide as under-
"265C. Discharge.- If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submission of the accused and the prosecution in this behalf, the Court considers that there is no sufficient grounds for proceeding against the accused, it shall discharge the accused and record the reasons for so doing.
265D. Framing charge.- (1) If, after such consideration and hearing as aforesaid, the Court is of opinion that there is ground for presuming that the accused has committed an offence, it shall frame in writing a charge against the accused.
(2) Where the Court frames a charge under sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

34. The obligation to discharge the accused under section 265C of the Code comes when the court considers that there is no sufficient ground for proceeding against the accused.

35. "*No sufficient ground*" in section 265C of the Code means that the materials placed before the court do not make out or are not sufficient to make out a *prima facie* case against the accused i.e., absence of any ground for presuming that the accused has committed an offence. Where the case is at a stage of framing charges and the prosecution evidence is yet to commence, the trial court has to consider the question of sufficiency of the ground for proceeding against the accused on a general consideration of materials placed before him by the investigating agency. The truth, veracity and effect of the evidence are not to be meticulously judged. The standard of the test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at this stage. At this stage, even a very strong suspicion found upon materials before the court, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of commission of the offence: as has been observed in the case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal*** Vs. ***Amit Kumar Bhunja and others: (1979) 4 Supreme Court Cases 274***.

36. Similarly, in ***State of Himachal Pradesh*** Vs. ***Krisan Lal Pardhan and others: AIR 1987 (SC)773*** the court made it clear that all that is required at the stage of framing of charges is to see whether *prima facie* case regarding the commission of certain offence is made out. The question whether the charges will eventually stand proved or not can be determined only after the evidence is recorded in the case. At this stage, the court is not to weigh the evidence. The court is not to go into the details on the pros and cons of the matter or enter into meticulous consideration of the evidence and materials, as has been observed in

the case of ***Md. Akbor Dar and others Vs. State of Jammu and Kashmir and others: AIR 1981(SC)1548.*** If the court is of the opinion that there is ground for presuming that the accused has committed an offence, it shall frame charge in writing against the accused and that reasons are not required to be given.

37. In the instant case, the learned Sessions Judge, Mymensingh categorically opined that there is sufficient reason to presume that the accused petitioners have committed offence punishable under sections 302/201/34 of the Penal Code and has framed charge against them under the said sections vide the impugned order dated 03.03.2016.

38. However, the revisional jurisdiction of the High Court Division of the Supreme Court of Bangladesh vested in section 439 read with section 435 of the Code is exercised only in exceptional cases where the interest of public justice required interference for the correction of a manifest illegality or for prevention of gross miscarriage of justice.

39. The impugned order of framing of charge dated 03.03.2016 does not appear to have suffered from manifest illegality or has caused gross miscarriage of justice to the accused petitioners, for, the complainant is yet to prove his case with the evidence already on record; conversely, the accused petitioners will have the opportunity to controvert those with counter evidence. Last but not the least, vide section 227 of the Code the trial court has ample power to alter or add to any charge at any time whatsoever before the judgment is pronounced if the evidence, so recorded during the course of trial, disclosed an offence under another section of the Penal Code.

40. In view of the above, the decisions so have been referred by the accused petitioners cannot be made applicable in the facts and circumstances of the present case.

41. Be that as it may, we find no ground requiring interference in the order of framing of charge dated 03.03.2016 passed by the learned Sessions Judge, Mymensingh in Sessions Case No.725 of 2015.

42. In the result, the Rule is discharged.

43. The order of stay granted earlier by this Court is hereby vacated.

44. Communicate this judgment and order to the court concern.

45. Send down the Lower Court’s record at once.

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HIGH COURT DIVISION

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 8720 of 2016.

Md. Abu Yousuf Shah.
...Convict-appellant.

-Versus-

The State
....Respondent.

Mr. Golam Kibria, Advocate
With
Mrs. Nashreen Siddique, Advocate.
…For the Convict-appellant.

Mr. Shaheen Ahmed, Advocate.
..For the Respondent (A.C.C) No.2.

Heard in part on 26.02.2019, 11.03.201 and Judgment on: 09.05.2019.

Present:
Mr. Justice Md. Shawkat Hossain

Anti-Corruption Commission, Prevention of Corruption Act, 1947, demanding bribe, substantive evidence, extra-judicial confession;
It appears from the impugned judgment that the learned Judge took step of hearing the audio cassette in his chamber and he himself alone heard it behind the knowledge of the convict-appellant. No doubt, for securing justice the learned trial Judge rightly displayed it and heard it but he could also make arrangement to be heard it in open Court in presence of the convict-appellant under trial. ... (Para 25)

That the investigation officer being over interested produced the inquiry report before the Court making as exhibit-VIII series and the learned trial Court being misconceived also based on papers of the inquiry as to extra-judicial confession of the convict-appellant in proving the charge against the convict-appellant. ... (Para 27)

In no way, such extra-judicial confession, if any, can be based on and it can't be considered as evidence at all. ... (Para 28)

JUDGMENT

Md. Shawkat Hossain, J:

1. The instant Criminal Appeal, by the convict-appellant Md. Abu Yousuf Shah is directed against the judgment and order of conviction and sentence dated 30.08.2016 passed by the learned Special Judge, Rangpur in Special Case No. 23 of 2014 arising out of Gaibandha Police Station Case No. 36 dated 30.06.2009 convicting the appellant under Section 161 of Penal Code and sentencing him to suffer rigorous imprisonment for 02(two) years with a fine of Tk/- 10,000(ten thousand) in default to suffer rigorous imprisonment for 06(six) months more and also convicting him under Section 5(2) of the Prevention of Corruption Act 1947 and sentencing him to suffer simple imprisonment for 04(four) years and to run both the sentences concurrently.

2. Prosecution case, in short, is that while the convict-appellant had his posting at Anti-Corruption Office, Gaibandha as Data-entry-Control Operator he talked with Md. Abu Yousuf, Principal-in-charge, Siddikia Bilateral Senior Madrasha, Gaibandha on 15.07.2007 and initially demanded bribe of Tk/- 1,50,000/- and later on Tk/- 1,00,000/- for disposal of the complaint petition No. 188 of 2007 and that the Principal-in-charge conveyed it to his teacher Md. Mattaleb and recorded their conversation with the convict-appellant on 05.08.2007 of demanding bribe and afterwards brought it to the notice of Md. Abdur Rashid, A.D.C. (Rev), the Chairman of the Managing Committee of the Madrasha and on preliminary enquiry the prima facie case being made out the Anti-Corruption department lodged the instant case.

3. The case was investigated by Anti-Corruption Commission and afterwards submitted charge-sheet against the convict-appellant under Section 161/420/419 of the Penal Code along with 5(2) of the Prevention of Corruption Act, 1947.

4. Learned Chief Judicial Magistrate sent the case record to the Court of learned Sessions Judge and Senior Special Judge, Gaibandha.

5. Learned Senior Special Judge, Gaibandha on receipt of the record registered the case as Special Case No. 03 of 2010 and took cognizance of the offence and having found prima facie case charged the convict-appellant under Section 161/420/419 along with Section 5(2) of the Prevention of Corruption Act, 1947. The convict-appellant being present pleaded his innocence and claimed to be tried.

6. After examination of the prosecution witnesses Learned Special Judge took up the case for examination of the convict-appellant under Section 342 of the Code of Criminal Procedure. The convict-appellant being present pleaded his innocence once again and declined to adduce any evidence.

7. Learned Special Judge on appreciation of the prosecution case, the evidence, other materials on record and in view of the facts and circumstances of the case found the convict-appellant guilty of the offence under Section 161/420/419 of the Penal Code along with Section 5(2) of the Prevention of Corruption Act, 1947 and sentenced him as aforesaid.

8. Having aggrieved at and dissatisfied with the impugned judgment for conviction and order of sentence the convict-appellant preferred the instant Criminal Appeal.

9. Mr. Golam Kibria with Nashreen Siddique, the learned Advocates appearing on behalf of the convict-appellant submits that prosecution could not bring home the charge against the convict-appellant by adducing any substantive evidence and trial Court having failed to sift and weigh the evidence, oral and documentary, in view of the facts and circumstances of the case, erroneously found him guilty of the offence as charged for and sentenced him illegally and arbitrarily.

10. Mr. Kibria further submits that there was no disclosure of conversation of the convict-appellant in audio cassette and it was not displayed before the Court and the voice of the convict-appellant could not be identified in presence of the convict-appellant before the Court and that hearing of the audio cassette by the trial Judge himself in his chamber beyond judicial process and behind knowledge of the convict-appellant can’t be appreciated as evidence against the convict-appellant.

11. Mr. Kibria also submits that there was no allegation against P.W. 2, the Principal in charge who was, in fact, in- charge of the Principal in leave vacancy for pilgrimage and there was no occasion of his alleged contact with the convict-appellant for disposing of the compliant petition 188 of 2007.

12. Mr. Kibria further submits that the convict-appellant had no judicial confession and extra-judicial confession if any obtained during inquiry can't be based on for proving the charge against the convict-appellant and the learned trial Judge committed gross illegality having taken it into consideration.

13. Mr. Kibria also submits that learned trial Judge failed to apply his judicial mind in appreciating the evidence on record in view of the attending facts and circumstances of the case and erroneously found him guilty of the charges without proof to the allegation against him beyond reasonable doubt and sentenced merely on surmise and conjecture and the instant Appeal deserves consideration.

14. Mr. Shaheen Ahmed, the learned Advocate appearing on behalf of the Anti Corruption Commission submits that prosecution examined as many as 10 P.Ws and all are competent witnesses and their evidence being consistent, corroborative together with video-cassette of the conversation of the convict-appellant the learned Judge of the trial Court in view of the facts and circumstances case rightly found the convict-appellant guilty of the offence and sentenced him rightly and lawfully.

15. Mr. Ahmed further submits that it is apparent that for disposal of the complaint petition No. 188 of 2007 against P.W. 2, the Principal in charge, the convict-appellant himself called him and demanded Tk/- 1,50,000 for disposal of the petition and later on, it was settled at Tk/-1,00,000 and the conversation with the convict-appellant on above point was recorded in video-cassette and was submitted before the Court as material exhibit-1 and the learned Judge for securing justice heard the conversation and being satisfied to the prosecution case rightly found him guilty of the offence as charged for.

16. Mr. Ahmed also submits that the convict-appellant had his inculpatory confessional statement before the authority during enquiry and that appears true and in addition to that together with consistent and corroborative evidence of the prosecution witnesses in view of the facts and circumstances of the case trial Court rightly found him guilty of the offence as charged for and sentenced him rightly and lawfully and it does not warrant any interference.

17. I have gone through the record in detail, scanned the evidence adduced by the prosecution considered, the submissions of the learned Advocates for both the sides.

18. It appears that prosecution in support of it's case examined P.W. 1 Md. Kamrul Ahsan, P.W. 2 Sharif Md. Abu Yousuf, P.W. 3 Md. Abdul Aziz, P.W. 4 Balram Proshad Eshek, P.W. 5 Md. Ismail Hossain, P.W. 6 Md. Abdul Mottalib, P.W. 7 Md. Shasul Alam, P.W. 8 S.M. Nazim Uddin, P.W. 9 Md. Nuruzzaman Khan and P.W. 10 Md. Nazrul Islam.

19. It further appears that among the prosecution witnesses P.W. 1 is the Deputy Director of the ACC, P.W. 2 is the Principal-in-charge of Siddika Bilateral Kamil Madrasha, Gaibandha, P.Ws. 3, 4, 8 and 9 are the seizure witnesses, P.W. 5 is the lecturer of the Siddika Bilateral Kamil Madrasha, Gaibandha, P.W. 6 is the Assistant Teacher of the Siddika

Bilateral Kamil Madrasha, Gaibandha, P.W. 7 is a tendered witness and defence declined cross-examine him and P.W. 10 is the investigation officer.

20. P.W. 1 is the director of ACC the informant of the instant case. He appears as merely a formal witness. He admitted in his cross-examination 'আমি অত্র মামলা investigation or inquiry করি নাই। অত্র মামলার তদন্ত কার্যক্রম সম্পর্কে আমার কোন জ্ঞান নাই।'

21. P.Ws. 3, 4, 8, 9 are the seizure witnesses they also appear as formal witnesses. P.W. 7 is a tendered witness and defence declined to cross examine him. P.Ws. 2 is the Principal-in-charge of Siddika Bilateral Kamil Madrasha, Gaibandha and P.Ws. 5 and 6 are also the teaching staff of Siddika Bilateral Kamil Madrasha, Gaibandha. P.W. 10 is the investigation officer. The evidence of P.Ws 5 and 6 apparently appears hearsay in nature.

22. P.W. 5 claims to hear the talk of the convict-appellant and the complaint P.W. 2 and P.W. 6 also claim to accompany P.W. 2 on 4.08.2007 in order to negotiate the demanding of bribe by the convict-appellant from P.W. 2, the complaint. In view of the above evidence it appears that he heard of the demand through the mobile of P.W. 2. P.W. 6 also claims to accompany P.W. 2 office of DUDK i.e. of the convict-appellant. He admitted in his examination-in-chief 'এর পর আমি ও অধ্যক্ষ সাহেব একই রিক্সায় দুদক অফিসে যাই এবং আমি অফিসের পাশে একটি চায়ের দোকানে অবস্থান করি। অধ্যক্ষ সাহেব অফিসের ভিতর যান ।'

23. It is needless to say that his evidence also appears hearsay in nature as to demanding bribe from P.W. 2 by the convict-appellant.

24. Admittedly, the prosecution claims that that the conversation between P.W. 2 and the convict-appellant was recorded in audio cassette and that audio cassette was seized vide seizure list exhibit-VI and audio cassette itself was produced before the Court and identified as materials exhibit-I. P.W. 6 is the seizure witness to that material article I and he himself produced it before the Court but in cross-examination he admitted 'আমি ক্যাসেটটি শুনি নাই। জব্দকৃত ক্যাসেটে কি কথাবার্তা আছে তা শুনি নাই।' P.W. 10 the investigation officer echoed the similar voice admitting in his cross-examination 'দুদক হেড অফিস থেকে অডিও ক্যাসেট জব্দ করি। আমি অডিও ক্যাসেটের কথা টাইপ করি নাই। আসামী কর্তৃক ঘুষ গ্রহণ করা হয়েছে তা ক্যাসেটে নাই। তবে ঘুষ দাবীর কথা আছে।'

25. It is clear that there appears no hard copy of the audio cassette as to conversation of the convict-appellant with P.W. 2 as of demanding bribe as alleged. From 4 corners of the evidence it does not appear that audio cassette material exhibit-I ever displayed before the Court. It appears from the impugned judgment that the learned Judge took step of hearing the audio cassette in his chamber and he himself alone heard it behind the knowledge of the convict-appellant. No doubt, for securing justice the learned trial Judge rightly displayed it and heard it but he could also make arrangement to be heard it in open Court in presence of the convict-appellant under trial.

26. However, in order to proper scanning of the evidence this Court asked the learned lawyer for the A.C.C to produce the audio cassette before the Court but although the learned Advocate for the Anti-Corruption Commission took several adjournments for the purpose but ultimately failed to produce the audio-cassette, the only document for the alleged conversation in demanding bribe as alleged by the convict-appellant from P.W. 2. In absence of the audio cassette, the material article-I, it does not appear that the prosecution has any other substantive evidence to the charge against the convict-appellant.

27. It is also to be noted that the investigation officer being over interested produced the inquiry report before the Court making as exhibit-VIII series and the learned trial Court being misconceived also based on papers of the inquiry as to extra-judicial confession of the convict-appellant in proving the charge against the convict-appellant.

28. In no way, such extra-judicial confession, if any, can be based on and it can't be considered as evidence at all.

29. On above discussion, it appears that the learned trial Judge having failed to sift and weigh the evidence on record in view of the facts and circumstances of the case erroneously found the accused-appellant guilty of the offence as charged for and sentenced him arbitrarily and the impugned judgment and order of sentence thus warrants necessary interference.

30. The Appeal, thus, merits consideration.

31. In the result, the Appeal is allowed.

32. The impugned judgment and order of sentence is set aside. The convict-appellant is acquitted from the charge leveled against him.

33. The appellant is also released from his bail bonds.

34. Send down the L.C. record along with the copy of the judgment at once.

13 SCOB [2020] HCD

DISTRICT-MADARIPUR

HIGH COURT DIVISION

(CRIMINAL MISCELLANEOUS JURISDICTION)

CRIMINAL MISCELLANEOUS CASE NO.25615 OF 2019

Mr. Md. Moniruzzaman, Advocate
--For the Petitioner

Md. Nazmul Huda
---- Petitioner
-VERSUS-
The State and another
----- Opposite Parties

Mr. Farhad Ahmed, D.A.G with
Ms. Nusrat Jahan, D.A.G
------ For the State

The 3rd February, 2019

Present:
MR. JUSTICE M. ENAYETUR RAHIM
AND
MR. JUSTICE MD. MOSTAFIZUR RAHMAN

Quashment , Nari-O-Shishu Nirjatan Damon Ain, 2000 (as amended, 2003), Complaint, inquiry, police station, cognizance;
Moreso, the word 'অভিযোগটি অনুসন্ধানের জন্য' as contemplated in section 27(1ka) is very significant. It means that an inquiry should be done on the allegations brought against an accused. It does not mean that inquiry should be done to ascertain whether the complainant went to the police station and he/she was refused by the police. ... (Para 8)

JUDGMENT

M. ENAYETUR RAHIM, J:

1. By filing an application under section 561A of the Code of Criminal Procedure the accused petitioner has sought quashment of the proceedings in Nari-O-Shishu Case No.106 of 2018 under section 11(ga) of the Nari-O-Shishu Nirjatan Damon Ain,2000 (as amended,2003), now pending in the Court of Nari-O-Shishu Nirjatan Daman Tribunal, Madaripur.

2. Heard the learned Advocate for the accused petitioner, perused the petition of complaint, inquiry report, order of framing charge and other materials as placed before us.

3. The accused petitioner has sought quashment of the proceedings mainly on the plea that in the inquiry report it was not mentioned whether the complainant went to the police station for lodging the First Information Report and the concerned police officer refused to lodge the First Information Report and thus the Tribunal took cognizance of the offence against the accused illegally.

4. To address the above issue it is needed to examine section 27(1ka) (ka) (kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000, (hereinafter after referred to as Ain, 2000) which runs as follows:

"(১ক) কোন অভিযোগকারী উপ-ধারা (১)-এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে হলফনামা সহকারে ট্রাইব্যুনালের নিকট অভিযোগ দাখিল করিলে ট্রাইব্যুনাল অভিযোগকারীকে পরীক্ষা করিয়া-

(ক) সন্তুষ্ট হইলে অভিযোগটি অনুসন্ধানের (রহয়ঁরৎু) জন্য কোন ম্যাজিস্ট্রেট কিংবা অন্য কোন ব্যক্তিকে নির্দেশ প্রদান করিবেন এবং অনুসন্ধানের জন্য নির্দেশপ্রাপ্ত ব্যক্তি অভিযোগটি অনুসন্ধান করিয়া সাত কার্য দিবসের মধ্যে ট্রাইব্যুনালের নিকট রিপোর্ট প্রদান করিবেন;

(খ) সন্তুষ্ট না হইলে অভিযোগটি সরাসরি নাকচ করিবেন।" [underlines supplied to give emphasis]

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

6. It appears that in the case in hand, the complainant filed the petition of complaint before the Tribunal along with an affidavit stating that she went to the police station but the police refused to accept her complaint and the concerned Tribunal being satisfied about the same, upon examining the complainant, directed to hold inquiry into the allegation.

7. Since the complainant by swearing an affidavit before the Tribunal asserted that the concerned police officer refused to accept her complaint and the Tribunal has also been satisfied about the said complaint, in our view, there is no legal necessity to make an inquiry into the said issue afresh.

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

9. Section 27(1ga) of the Nari-O-Shishu Nirjatan Ain, 2000 speaks as follows:

(১গ) উপ-ধারা (১) এবং (১ক) এর অধীন প্রাপ্ত রিপোর্ট কোন ব্যক্তির বিরুদ্ধে অপরাধ সংঘটনের অভিযোগ বা তৎসম্পর্কে কার্যক্রম গ্রহণের সুপারিশ না থাকা সত্ত্বেও ট্রাইব্যুনাল, যথাযথ এবং ন্যায়বিচারের স্বার্থে প্রয়োজনীয় মনে করিলে, কারণ উল্লেখপূর্বক উক্ত ব্যক্তির ব্যাপারে সংশ্লিষ্ট অপরাধ বিচারার্থ গ্রহণ করিতে পারিবেন।

10. In view of the above provision, the Tribunal has given unfettered power to take cognizance of the offence against an accused assigning cogent reasons, despite no recommendation is made for accusation in the report.

11. Further, when upon an inquiry by a competent person the allegations made against an accused is prima facie found to be true then the concerned accused should not be given a go by merely on any hiper technical issue.

12. In view of the above, we find no merit in the application.

13. Accordingly, the application is rejected summarily.

14. Communicate a copy of this order at once.

13 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 3691 of 2014

Md. Shamsujjaman and others
…… Petitioners

-Versus-

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

Mr. Imran A Siddiqueue, Advocate with
Mr. Mohd. Shishir Monir, Advocate and
Mr. Syed Mohd. Raihan Uddin, Advocate
...…. For the Petitioner

Mr. M. Khaled Ahmed, Advocate
..... For Respondent Nos. 2 and 3

Date of Hearing: 11.11.2018 & 12.11.2018

Date of Judgment: 14.11.2018

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

This concept of "administrative fairness" requires that an Authority, while taking a decision which affects a person's right prejudicially, must act fairly and in accordance with law. We note, albeit with utmost regret and disappointment, that in the instant case, there has been a gross violation of the well-settled principles of natural justice, and that too by the Syndicate. In our view, failure to comply with the principles of natural justice leads to arbitrariness, which in turn, vitiates the impugned order. ... (Para-23)

JUDGMENT

Zubayer Rahman Chowdhury, J:

1. By an application under section 102 of the Constitution of the Peoples Republic of Bangladesh, the petitioners, being 10 in number, have challenged the order of their expulsion from the Shahjalal University of Science and Technology, Sylhet, as contained in Memo No. একা ৯৮/১২০(৭)/৫/১১৯৩ dated 16.03.2014, issued by respondent no. 3.

2. Subsequent thereto, by order dated 21.10.2014, the petitioners were allowed to sit for their examination. However, the authorities of Shahjalal University of Science and Technology, Sylhet (hereinafter referred to as the University) were allowed to withhold the examination result till disposal of the Rule.

3. The Rule is being opposed by respondent no. 3 by filing an affidavit-in-opposition. The petitioners, in their turn, have filed affidavit-in-reply as well as two supplementary affidavits.

4. Relevant facts necessary for disposal of the Rule are that petitioner no. 1 is a student of Department of Biochemistry and Molecular Biology, School of Life Sciences, who was admitted in 2010-2011 session; petitioner no. 2 is a student of Department and Food

Engineering and Tea Technology, School of Applied Sciences and Technology, who was admitted in 2008-2009 session; petitioner no. 3 is a student of Department of Social Work, School of Social Sciences, having been admitted in 2009-2010 session; petitioner no. 4 is a student of Department of Social Work, School of Social Sciences, having been admitted in 2009-2010 session; petitioner no. 5 is a student of Department of Bangla, School of Social Sciences, having been admitted in 2009-2010 session; petitioner no. 6 is a student of Department of Social Sciences, having been admitted in 2008-2009 session; petitioner no. 7 is a student of Department of Civil and Environmental Engineering, School of Applied Sciences and Technology, having been admitted in 2010-2011 session; petitioner no. 8 is a student of Department of Public Administration, School of Social Sciences, having been admitted in 2007-2008 session; petitioner no. 9 is a student of Department of English, School of Social Sciences, having been admitted in 2006-2007 session ; petitioner no. 10 is a student of Department of Social Work, School of Social Sciences, having been admitted in 2011-2012 session.

5. On account of an incident that took place on 13.12.2013, the Authorities issued the order of expulsion of the petitioners from the University. On that day, a human chain was formed by the teachers and students of the University condemning the heinous attack on the monument of the University, named "চেতনা ৭১". Some miscreants attacked the teachers and students forming the human chain, causing injury to some. The said incident was published in both the national and local dailies. Following the incident, an inquiry committed was formed headed by one Professor Jahir Bin Alom. After conducting the inquiry, the Committee submitted its report to the Proctor, being the Member Secretary of the Committee, recommending action against certain students of the University, including the petitioners.

6. In pursuance of the report and recommendation of the Committee, the University Authority issued show cause letters, all dated 02.02.2014, upon the petitioners, asking them to submit reply within 15 days of receiving the said notice.

7. Earlier on 26.12.2013, the Inquiry Committee issued letters to petitioner nos. 1 and 2 only, asking them to appear before the Committee on 30.12.2013. However, the petitioners refrained from appearing before the Committee.

8. Subsequent thereto, on 27.02.2014, at its 183rd Meeting, the Syndicate of the University took a decision approving the temporary suspension order of the petitioners. However, on the very same day, the Syndicate also passed the order of expulsion of the petitioners. Accordingly, in pursuance of the decision of the Syndicate, the impugned letters dated 16.03.2014 were issued to all the petitioners, communicating the orders of their expulsion from the University.

9. The petitioners filed applications before the Vice-Chancellor of the University with a prayer for cancelling the suspension order. However, there was no response from the other end. The petitioners issued a Notice Demanding Justice requesting the concerned respondents to cancel the expulsion order. However, no steps were taken by the respondents in that regard. Being constrained, the petitioners moved this Court and obtained the instant Rule.

10. Mr. Imran A. Siddique, Mr. Mohd. Shishir Monir and Mr. Syed Raihan Uddin, the learned Advocates appear on behalf of the petitioners, while contesting respondent nos. 2 and 3 are being represented by Mr. M. Khaled Ahmed, the learned Advocate.

11. Having placed the instant application as well as the various documents annexed thereto, Mr. Siddique submits that the issue involved in the instant writ petition concerns the violation of the principle of natural justice as well as the denial of the due process of laws to the petitioners, as guaranteed under the Constitution. Elaborating his submission, Mr. Siddique submits that from a plain reading of the show cause notices dated 02.02.2014, as evidenced by Annexure B series, it is evident that save and except mentioning the date of occurrence, the notice does not specify the time, place and manner of occurrence, nor does it disclose the extent of damage or the number of persons who suffered injuries on account of such incident, which indicates a gross non-application of mind on the part of the respondents. He submits that on the basis of some vague and unspecified allegations, the University Authorities issued the show cause notice upon the petitioners, which prevented them from giving a proper of reply to the same.

12. Mr. Siddique submits that it is now well settled that mere issuance of a show cause notice will not amount to fulfillment of the legal requirement of issuance of such notice. He submits that such a notice must contain the specification as to the time, place and manner of occurrence as well as the specific allegations against the persons to whom the notice was issued, so as to enable him to give an effective reply to the same. He further submits that although the said show cause notice makes a reference to a report prepared by the Inquiry Committee on the basis of which the show cause notice was issued, the copy of the said report was never provided to the petitioners.

13. Referring to Annexure E series, being the impugned order dated 16.03.2014, Mr. Siddique submits that the said order was passed expelling the petitioners for life (আজীবন বহিষ্কার) from the University, without giving them any opportunity of a personal hearing. The learned Advocate forcefully submits that these aspects of the case, i.e., the vague and unspecific show cause notice, the non-service of the inquiry report to the petitioners and the admitted failure of the University Authority to give personal hearing to the petitioners before passing the impugned order tantamounts to a gross violation of the principle of natural justice and on that count alone, the Rule is liable to be made absolute.

14. In support of his contention, Mr. Siddique has referred to a number of decisions, to which we shall advert in due course.

15. On the other hand, Mr. M. Khaled Ahmed, the learned Advocate appearing on behalf contesting respondent nos. 2 and 3 submits that the University Authorities took the action of expelling the petitioners from the University following a heinous attack that took place on the campus on 13.12.2013. He submits that in order to maintain discipline in the University and to ensure the security and safety of the teachers, students and staff of the University, the authorities took the decision to expel the petitioners as their involvement with the incident in question was proved through the investigation conducted by the Inquiry Committee.

16. Mr. Ahmed submits that the contention of Mr. Siddique with regard to the show cause notices being vague and unspecific is not correct in view of the fact that the petitioners submitted detailed replies to the show cause notice. Therefore, accepting, but not conceding that there may have been lack of some material particulars in the said show cause notice, that was not sufficient to prevent the petitioners from submitting a detailed reply to the same. He submits that the University Authorities considered the replies of the petitioners and found the same to be unsatisfactory, following which the orders of expulsion was passed by the highest body of the University, namely the Syndicate.

17. Mr. Ahmed further submits that the Rules of the University do not provide for issuance of a show cause notice. Nevertheless, the University Authority issued the show cause notice to the petitioners and therefore, according to Mr. Ahmed, there was compliance with the principles of natural justice. On being asked as to whether the Inquiry Report had been furnished to the petitioners, Mr. Ahmed replied in the negative.

18. The moot question that requires to be answered in this writ petition relates to the legality or otherwise of the expulsion order of the petitioners, issued by the University.

19. On account of an incident which took place on 13.12.2013 at the campus of the University, which was widely reported in the national and local dailies, the University formed an Inquiry Committee. Upon conducting an investigation, the Committee prepared a report and submitted the same to the Proctor. On the basis of the said report, each of the petitioner was issued with a show cause notice, to which they replied. However, after considering their respective replies, the Syndicate passed the impugned expulsion orders on 16.03.2014.

20. Let us now refer to the show cause notice, dated 02.02.2014, issued to petitioner no. 1, which reads as under:

"প্রাপক তারিখঃ ০২/০২/২০১৪
নামঃ মোঃ সামসুজ্জামান
বিভাগঃ বি.এম.বি
রেজিঃ ২০১০৪৩৩০৪৩
শাবিপ্রবি, সিলেট।

গত ১৩/১২/২০১৩ ইং তারিখে বিশ্ববিদ্যালয় ক্যাম্পাসে ছাত্র ও শিক্ষকদের উপর হামলা এবং মোটর সাইকেল ও বাইসাইকেল পোড়ানো ঘটনার জন্য গঠিত তদন্ত কমিটির প্রতিবেদন ও সুপারিশ এর ভিত্তি করে গত ৩০/০১/২০১৪ ইং তারিখে শৃঙ্গলা বোর্ডের সভায় নিম্নলিখিত সিদ্ধান্ত গৃহীত হয়।

১। আপনার বিরুদ্ধে অভিযোগ এর সত্যতা মেলায় বিশ্ববিদ্যালয় থেকে আপনাকে সাময়িক ভাবে বহিস্কার করা হয়েছে। আপনাকে কেন স্থায়ী ভাবে বহিস্কার করা হবে না এ ব্যাপারে আপনার লিখিত বক্তব্য ১৫ (পনের) দিনের মধ্যে নিম্নস্বাক্ষরকারী নিকট জমা দিতে হবে।

২। নির্ধারিত সময়ের মধ্যে লিখিত বক্তব্য জমা না দিলে বিশ্ববিদ্যালয় বিধি মোতাবেক যথাযথ ব্যবস্থা গ্রহণ করা হবে।

ধন্যবাদান্তে,

প্রক্টর ও সদস্য সচিব, শৃঙ্গলা বোর্ড
শাবিপ্রবি, সিলেট।"

21. It is to be noted that the other nine petitioners were also issued with an identical show cause notice.

22. From a plain reading of the show cause notice, quoted above, it is apparent that the said notice is anything but satisfactory. To begin with, the show cause notice was the first step in the initiation of a proceeding which would culminate with the expulsion of the petitioners from the University, and that too for the rest of their life. Therefore, he said process would tantamount to causing an academic death to the respective petitioners, not to speak of their future career. The Syndicate, being the highest Administrative body of the University, in issuing the expulsion orders of the petitioners, was also acting as a quasi

judicial body. It was, therefore, imperative for the Authorities to comply with the requirements of the principles of natural justice. This is also the dictate of our Constitution, as enshrined in Article 31, relating to the concept of the due process of law.

23. This concept of "administrative fairness" requires that an Authority, while taking a decision which affects a person's right prejudicially, must act fairly and in accordance with law. We note, albeit with utmost regret and disappointment, that in the instant case, there has been a gross violation of the well-settled principles of natural justice, and that too by the Syndicate. In our view, failure to comply with the principles of natural justice leads to arbitrariness, which in turn, vitiates the impugned order.

24. From a plain reading of the show cause notice, it appears that the show cause notice merely states that an incident took place at the University Campus (বিশ্ববিদ্যালয় ক্যাম্পাস), without mentioning the exact place of the occurrence. Moreover, the said notice reveals that an attack took place on some teachers and students and some motorcycles and bicycles were burnt. However, there is no mention of the time of the incident nor is there any details or names of the teachers and students, who were alleged to have been injured, nor is there any mention of the extent and nature of the injuries sustained by them. There is also no mention of the number of motorcycle and bicycle that were alleged to have been burnt on that day at the place of occurrence. It is on the basis of such vague, unspecific and indefinite allegations that the show cause notices were issued upon the petitioners.

25. Furthermore, the show cause notice clearly states that an Inquiry Committee conducted the inquiry and submitted a report and thereafter, pursuant to the recommendations of the Committee, the decision to issue the impugned orders of expulsion was taken by the Syndicate. Admittedly, no such report was either annexed with the show cause notice itself nor was it served upon the petitioners to a later stage, thereby preventing them from giving a proper reply to the allegations brought against them, in the show cause notice.

26. The impugned order itself, as evidenced by Annexure E to the writ petition, reads as under :

"অফিস আদেশ

গত ১৩/১২/২০১৩ ইং তারিখে 'চেতনা ৭১' এ হামলার ঘটনায়, আয়োজিত মানববন্ধনে আক্রমন ও শিক্ষকদের গাড়ী পুড়িয়ে দেয়ার ঘটনা তদন্ত কমিটি কর্তৃক প্রমানিত হওয়ায় ও দোষী সাব্যস্থ হওয়ায় শৃঙ্গলা বোর্ডের ২৭-০২-২০১৪ তারিখের সভার সুপারিশের আলোকে নিম্নোক্ত অভিযুক্ত ১০ (দশ) জন ছাত্রকে এ বিশ্ববিদ্যালয় থেকে আজীবন বহিষ্কার করা হয়েছে। তবে গত ১৩-১২-২০১৩ তারিখের পূর্বে সমাপ্ত পরীক্ষার অর্জিত ডিগ্রী বহাল থাকবে।

গত ২৭/০২/২০১৪ তারিখে অনুষ্ঠিত সিন্ডিকেটের ১৮৩ তম সভার অনুমোদনের প্রেক্ষিতে বিশ্ববিদ্যালয় কর্তৃপক্ষের অনুমোদনক্রমে এ আদেশ জারী করা হলো। অবিলম্বে এ আদেশ কার্যকর হবে।"

27. On a perusal of the impugned order dated 16.03.2014, it is apparent that the concerned respondent, in a very mechanical manner, issued the order expelling the petitioners from the University for life. Admittedly, the said order was passed without affording an opportunity of personal hearing to each of the petitioners. This un-assailed position of the case establishes the fact that the petitioners were condemn unheard. That by itself is a gross violation of the principle of natural justice, not to mention the non-observance of the due process of law.

28. Let us now refer to the decisions referred to by the learned Advocates of the contending sides.

29. In the case of Government of Government of Bangladesh and others vs. Md. Tajul Islam, reported in 49 DLR (AD) (1997) 177, the Apex Court, while deciding the issue of adequacy of a show cause notice issued in relation to cancellation of a license, observed as under :

> "It is well settled that a show cause notice is not a technical requirement or an idle ceremony. The notice must not be vague or in bare language merely repeating the language of the statute."

30. The Court went on to observe as under :

> "The principle of a meaningful show cause has been highlighted when a person is called upon to meet explain some charges brought against him."

31. In the case of Bangladesh Muktijoddha Kalyan Trust and another Vs. Md. Arshad Ali and others, reported in 14 BLC (AD) (2009) 180, the Appellate Division held as under :

> "We are of the view in the background of the principle of natural justice or, in other words, in the background of the universal principle that, one should not be condemned unheard and that also because of the universally accepted concept of transparency and fairness, the authority in imposing punishment on an employee would be required to serve the second show cause notice accompanying the inquiry report to enable the officer or the person against whom the authority is going to take action, which may not be favourable to such officer or person, to enable him to explain the facts obtained against him in the course of inquiry and to put forward his case as regard the facts obtained against him in the course of inquiry."

32. In the case referred to above, the Apex Court was deciding a case where, admittedly, the Inquiry Report had not been enclosed with the second show cause notice.

33. Admittedly, in the instant case, no Inquiry Report was ever served upon the petitioners.

34. In the case of Borhanuzzaman and others vs. Ataur Rahman Chowdhury and others, reported in 46 DLR (AD) (1994) 94, the Apex Court held as under :

> "When the report of the enquiry forms the basis of the allegations against the Managing Committee a copy of the report is an indispensable tool in its hands in giving a suitable reply to the show cause notice, because a report may contain both favourable and adverse matters against the Managing Committee which has every right and justification in relying upon the favourable contents in the report in its reply."

35. The contention of Mr. Ahmed, the learned Advocate appearing for the University, that the Rules do not provide for issuance of show case notice annexing the Inquiry Report has been answered by the Apex Court in the case of Bangladesh Agricultural Development Corporation vs. Saidul Huq Bhuiyan, reported in 8 BLC (AD) (2003) 49. While dealing with a similar issue, the Apex Court held that even though the Regulations of the Corporation did not make any provision for supplying the inquiry report along with the show cause notice, the Corporation was still required to supply the inquiry report, without which the concerned official was being "seriously handicapped" in making an effective reply to the second show cause notice.

36. Let us now refer to some decisions from our neighboring jurisdiction, cited by Mr. Siddique.

37. In the case of State of Uttar Pradesh vs. Md. Sharif (dead, through legal representative), reported in AIR 1982 SC 937, the Court held that the absence of the particulars as to date and time of the alleged misconduct having not been mentioned in the charge sheet, the person concerned was prejudiced by such omission in the matter of his defense at the inquiry.

38. In the case of Board of Technical Education, UP and others vs. D. Kumar and others, reported in AIR 1991 SC 271, the Court held:

> "notices served on the students were so vague and imprecise that they could not effectively defense themselves in the inquiries."

39. In the instant case, the petitioners are on a much better footing in as much as they were never given an opportunity to appear before the Inquiry Committee.

40. In the case of Sawai Singh Vs. State of Rajasthan, reported in AIR 1986 SC 995, the Court held as under :

> "But a departmental enquiry entailing consequences like loss of job which now-a-days means loss of livelihood, there must be fair play in action in respect of an order involving adverse or penal consequences against an employee, there must be investigation to the charges consistent with the requirement of the situation in accordance with the principles of natural justice in so far as these are applicable in a particular situation."

41. In his turn, Mr. Ahmed has referred to two decisions from our own jurisdiction; the first being the celebrated case of Zakir Ahmed vs University of Dhaka, reported in 16 DLR (SC) (1964) 722 on the point that the Rules do not provide for issuance of any show cause notice before any disciplinary proceeding against a delinquent student. However, the reliance of Mr. Ahmed on Zakir Ahmed's case appears to be misplaced in view of the following observation made by the Court:

> "We are not impressed by the argument that such interference by Courts of law with orders passed by educational institutions in the interest of maintenance of discipline would defeat the very purpose for which these institutions exist or that it would stultify the powers of the authorities in charge of educational institutions or prevent them from taking any action against students' misconduct. The Universities and educational institutions generally are armed with abundant powers of disciplinary action against the recalcitrant students and the Court are, in no way, minded to deprive them of their powers but all that they are entitled to instant upon in the interest of fairness is that the minimum requirements of fairness must be observed by them before such action is taken, for, it is equally important to remember that unfair action may cause greater harm to the prestige of the heads of educational institutions who are expected to be in *loco parentis* to the students and may seriously undermine the authority which they claim to possess over the students place in their charge."

42. Mr. Ahmed has next referred to the case of Vice Chancellor, University of Dhaka and others vs. A.K.M. Muid and others, reported in 69 DLR (AD) (2007) 403 with regard to judicial review of the administrative decisions taken by the University. Mr. Ahmed, relied on paragraph 27 of the judgment which reads as under:

> "The court should refrain itself from interfering with the internal administration of an authority if such authority does not contravene the law and it can interfere only in those cases where there is infraction of law in taking decision affecting the right of a citizen. The court shall always keep in mind while exercising its power of judicial review that it has not trans gressed the jurisdiction in any authority transacting its business."

43. Once again, we are of the view that this observation does not come to the aid of Mr. Ahmed; rather it goes to substantiate the petitioner's case.

44. We are conscious of the fact that the image of the University and the sanctity of the University premises cannot be allowed to be vandalized and perpetrators of such action must be dealt with sternly, without showing any lenience, even if such perpetrators are the students of the University. However, in doing so, the Authorities must follow the principles of natural justice and conduct the proceeding in accordance with law and only in accordance with law.

45. The University, more particularly the Syndicate, being in a position of "loco parentis", is obliged not only to observe the well-established principle of natural justice, but it must also act in accordance with law. Regrettably, in the instant case, not only did the University Authority fail to observe the due process of law, as guaranteed by our Constitution, but the impugned orders of expulsion were passed in gross violation of the principles of natural justice, which is manifested in the show cause notice itself as well as the final expulsion order. Consequently, the same is not tenable in the eye of law.

46. In view of the discussion made above, we are inclined to hold that the instant Rule merits positive consideration.

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

48. The impugned order of expulsion of the petitioners, as contained in Memo No. একা ৯৮/১২০(৭)/৫/১১৯৩ dated 16.03.2014, issued by respondent no. 3 is declared to have been made without lawful authority and to be of no legal effect.

49. The University Authorities are directed to publish the result and also issue the certificate to the successful candidates.

50. There will be no order as to cost.

51. The office is directed to communicate the order.

13 SCOB [2020] HCD

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION NO.2725 OF 2014

Md. Zohurul Islam
... Petitioner

-Versus-

Sree Aokkhoy Kumar Roy and others
... Opposite party

Mr. Md. Shafiur Rahman, with
Ms. Nasrin Begum, Advocates
... For the petitioner.

Mr. Subrata Chowdhury, with
Mr. Md. Mominul Islam,
Mr. Rabin Chandra Paul,
Mr. Samir Majumder, and
Ms. Shagufta Tabassum Ahmed,
Advocates
... For the opposite party No.1.

Heard on 10.04.2018 and 11.04.2018.

Judgment on 12.04.2018.

Present:
Mr. Justice Md. Miftah Uddin Choudhury

Ego cannot be allowed by the court of law:
In the facts and circumstances as it appears from the record, I find that the deceased Most. Hosneara Begum Laizu/Lipa Rani Roy was a Hindu lady, but she was converted to a Muslim and she died as a Muslim, presence in her father's house at the time of committing suicide can be a reason to find that she was reconverted to a Hindu.
... (Para 15)

As a Muslim or a believer in Islam she is entitle to get burial as per the Islamic rituals.
... (Para 16)

The prayer of Mr. Subrata Chowdhury as mentioned above cannot be considered by this Court since the deceased herself did not donate her dead body to any institution.
... (Para 17)

Apparently, the father of the deceased has been suffering from some ego and for his such ego Mr. Subrata Chowdhury, as well as Mr. Md. Mominul Islam made such prayers finding themselves helpless to establish that the deceased was reconverted to a Hindu. Such ego cannot be a reason for the Court to decide any dispute like the instant one.
... (Para 18)

For such ego a dead body has been rottening in mortuary since last four years. Keeping dead body of a human being for such long time cannot be allowed by any religion, rather it amounts to an inhuman act. Apparently the father just for his ego behaved like an inhuman being, and such sort of ego cannot be allowed in the society or by the court of law.
... (Para 19)

JUDGMENT

Md. Miftah Uddin Choudhury, J

1. This Rule arises out of the judgment and decree dated 18.06.2014, passed by the Joint District Judge, Nilphamari, in Title Appeal No.24 of 2014 setting aside and reversing those dated 04.05.2014, passed by the Assistant Judge, Domar, Nilphamari, in Other Suit No.10 of 2014.

2. The petitioner Md. Zohurul Islam as plaintiff instituted the suit impleading (1) The then District Magistrate, Nilphamari (2) Sree Aokkhoy Kumar Roy, Son of Norendra Nath Roy of Village- Khamar Bamunia, P.S. Domar, District- Nilphamari, and (3) The Officer-in-charge, Domar Police Station, Nilphamari as defendant Nos.1, 2 and 3 respecti1vely for declaration, that deceased Most. Hosneara Begum Laizu (previously named as Lipa Rani Roy) was a Muslim and her dead body should be given to him since he is her father-in-law for burial as per the Islamic Sariah.

3. The plaint of the plaintiff in brief, that the Most. Hosneara Begum Laizu (previously named as Lipa Rani Roy) is daughter of defendant No.2 Sree Aokkhoy Kumar Roy. She was aged about 19 years and being attracted to the religion of Islam on 18.10.2013 converted to a Muslim and named herself as Most. Hosneara Begum Laizu. In respect of her such conversion on 24.10.2013 she sworn an Affidavit before the Notary Public, Nilphamari and declared herself as a Muslim. She married his son late Md. Humayun Farid Lazu on 24.10.2014 as per the Muslim law with a dower of Taka 1,51,000/ (one lac fifty one thousand), and she declared such marriage by sworning another Affidavit on the same day before the same Notary Public. Their such marriage was registered with the Nika registrar on 24.10.2013 as per the Muslim law. Since then she had been leading her life as a Muslim. That her father (the defendant No.2) instituted G.R. Case No.164 of 2013 under Nari-O-Shishu Nirjatan Daman Ain alleging kidnapping of her. Knowing about such case the said Hosneara willingly appeared before Domar Police Station on 04.11.2013, and prayed before the Senior Judicial Magistrate –cum- Court of Cognizance-3, Domar, Nilphamari for releasing her to self custody. The said Court did not allow such prayer, rather sent her to safe custody in Rajshahi. While she was in safe custody radiological test was done by Doctor to ascertain her age, and as per doctor's report she was about 18-19 years. In the said case she made statement under section 22 of the Nari-O-Shishu Nirjatan Daman Ain stating that willingly she was converted to muslim and married Md. Humayun Farid Lazu. That by this time his son Md. Humayun Farid Lazu while had been returning from Rajshahi by train suddenly started to suffer from poisoning and ultimately died in Rangpur Medical College Hospital. That his son's wife Most. Hosneara Begum Laizu on 16.01.2014 was released from the safe custody and allowed to released to her self custody. After such release she came to Domar with Police Scott, but her father against her wish forcibly took her to his house and confined therein. The defendant No.2 created pressure upon her to reconvert to Hinduism. Being denied, she was tortured physically and mentally and in such condition on 10.03.2014 at 1:00 P.M. she was taken to Domar Upazilla Health Complex and expired therein at 6.00 P.M. For such unnatural Death a Case being U.D. Case No.7 of 2014 dated 10.03.2014 was instituted in Domar Police Station. The Officer-in-charge of Domar Police Station (defendant No.3) to ascertain cause of death arranged post-mortem of the dead body. Since the deceased was a Muslim he as her father-in-law for her burial as a Muslim prayed for the dead body to the defendant No.1 (District Magistrate, Nilphamari). The defendant No.2 also made such prayer. Being not is a position to ascertain the religious faith of the deceased, without handing over

the dead body to him (plaintiff) or to the defendant No.2, the Magistrate directed the defendant No.3 (Officer-in-charge, Domar Police Station) to keep the dead body in mortuary, and suggested the plaintiff to take shelter of the Court. That deceased Most. Hosneara Begum Laizu was a major sue-juries and a Bangladeshi citizen. As per the Constitution of Bangladesh she had right to express her own opinion, and having such right she was converted to a Muslim and declaring herself as Muslim on 24.10.2013 sworn an Affidavit. His son Md. Humayun Farid Lazu married Most. Hosneara Begum Laizu as per the Islamic Sariah performing "Izab" and "Kabul" and as such he (plaintiff) as her father-in-law is entitle to get her dead body for burial as per Islamic rituals. As per Section 174 of the Code of Criminal Procedure the defendant No.1 is bound to hand over the dead body to him. That for not handing over the dead body to him he constrained to institute the suit for declaration as mentioned above.

4. The defendant No.2, the father of the deceased Most. Hosneara Begum Laizu previously known as Lipa Rani Roy contested the suit by filing written statement denying the claim of the plaintiff, and stating that the plaintiff's son Md. Humayun Farid Lazu and others kidnapped his daughter, and as such he instituted a case alleging such kidnapping accusing six persons being Domar Police Station Case No.15 dated 25.10.2013 corresponding to G.R. Case No.164 of 2013. His daughter was recovered by police and produced before the Magistrate who directed to keep her in safe custody. By order dated 16.01.2014 the Magistrate finding as major lady released her to her self custody. In the Zimmanama furnished for such release she signed her name as Lipa Rani Roy. Thereafter she came to his house and started to lead life as a Hindu. She disclosed to him that the plaintiff's son Md. Humayun Farid Lazu and others forcibly took her signature and created illegal Affidavits and Nikahnama, but she did never convert to Muslim. To humiliate him and his daughter in society they have committed such occurrence. By a Brahman on 20.01.2014 in presence of local elites he arranged an occasion for expiation (প্রায়শ্চিত্ত) on setting fire (অগ্নিযজ্ঞ). While residing in his house she had been following the Hinduism. That being annoyed and angry she had committed suicide on 10.03.2014 by taking poison. That for such suicide, an unnatural death case being U.D. Case No.7 dated 10.03.2014 was instituted in Domar Police Station. That in fact Lipa Rani Roy never left Hindu religion. That plaintiff's son Md. Humayun Farid Lazu and others forcibly kidnapped Lipa Rani Roy and against her will created some false Affidavits. She never went to the house of plaintiff or his son, nor she lead family life with him. The Affidavits and Nikahnama had not been acted upon and for that reason she willingly by a Puruhit (Brahman) performed expiatation (প্রায়শ্চিত্ত) and had been living in his house. In case of her conversion she was not supposed to return to her father's house after getting release to her self custody. During her life time the plaintiff did not claim her as his daughter-in-law, and as such the plaintiff is not entitle to get any relief, and the suit is liable to be dismissed.

5. During trial 3 PWs and 4 DWs were examined on behalf of plaintiff and contesting defendant No.2 respectively.

6. In deciding the suit the Assistant Judge framed five issues that, (1) whether the suit is maintainable, (2) whether the deceased willingly converted to a Muslim and lead her life as muslim till death (3) whether she after performing expiation had been leading life as a Hindu in her father's house (4) whether the Affidavits and Nikahnama were forcibly created, and (5) whether the plaintiff is entitled to get any relief as prayed for.

7. The learned Assistant Judge decided all the issues in positive and by the judgment and decree dated 04.05.2014 decreed the suit, and directed the defendant No.1 to hand over the dead body immediately to the plaintiff. In passing such judgment the Assistant Judge after considering the evidences on record arrived into his decision that the deceased willingly converted to a Muslim, and she was a Muslim till her death, and willingly she sworn the Affidavits and executed the Nikahnama, and though residing in father's house she did not lead life as a Hindu.

8. Against the said judgment and decree the defendant No.2 preferred Title Appeal No.24 of 2014 before the District Judge, Nilphamari, and on transfer it was heard by the Joint District Judge, Nilphamari who by the impugned judgment and decree set aside and reversed the judgment of the Assistant Judge, and dismissed the suit.

9. Being aggrieved by and dissatisfied with the impugned judgment and decree dated 18.06.2014 the plaintiff as petitioner invoked the revisional jurisdiction of this Court and obtained the Rule.

10. Mr. Md. Shafiur Rahman, learned Advocate, appearing for the petitioner took me through the judgments of the Courts below and submits, that the Trial Court on proper consideration of the exhibited documents like the Affidavits sworn by the deceased, the Nikahnama, the concerns papers of the criminal case, and the depositions of the witnesses found that the deceased was a Muslim, and rightly directed the defendant No.1 to hand over her dead body to her muslim father-in-law. But the Appellate Court without proper consideration of the depositions of the witnesses and the said papers on surmise and conjecture illegally reversed the judgment of the Trial Court and on setting aside the same dismissed the suit.

11. He also took me through the depositions of the witnesses and submits, that admittedly the deceased Most. Hosneara Begum Laizu previously named as Lipa Rani Roy was a Hindu and daughter of the defendants No.2, but she was converted to a Muslim by reading "Kalema", and she declared such conversion by sworning an Affidavit before the Notary Public and married plaintiff's son late Md. Humayun Farid Lazu as per Muslim Law. She was a major sui-juries as per the report of the Doctor gave after radiological test made at the instance of the defendant No.2 and a major girl like her has right to choose her husband or religion. That out of love and affection she married plaintiff's son and before such marriage she was converted to a Muslim to marry her lover according to Muslim law. But the defendant No.1 feeling himself humiliated instituted a false criminal Case against her husband and others. In the said case the deceased was initially send to safe custody and thereafter she was released to her own custody. Before such release her husband died by poisoning, and naturally finding herself as helpless she may took shelter in her father's house, but this does not mean that she was reconverted to a Hindu by performing expiatation as claimed by the defendant No.2. She made statement under section 22 of the Nari-O-Shishu Nirjatan Daman Ain before the Court stating that she willingly converted to a muslim and got married with plaintiff's son. He further submits that a Muslim can never be converted to Hindu and as such her alleged conversion is impossible, and the judgment and decree passed by the Appellate Court is illegal.

12. Mr. Subrata Chowdhury, Mr. Samir Majumder, Mr. Md. Mominul Islam, and Mr. Rabin Chandra Paul, learned Advocates, appeared on behalf of the contesting defendant No.2/ opposite party No.1 i.e. the father of the deceased. After reading depositions of the

witnesses Mr. Choudhury find himself helpless and ultimately made a prayer to hand over the dead body to any Medical College for experiment by the students. Mr. Samir Mazumder, subsequently appearing for the opposite party No.1 also cannot deny the facts reveals from the record, but he supports the judgment of the Appellate Court saying that in case of handing over the dead body to the plaintiff bitter relation and enmity can be created in the locality amongst the members of two different communities.

13. Ultimately Mr. Md. Mominul Islam, learned Advocate, made a new prayer that the dead body may be buried as per the religion as decided by the Court in presence of an Executive Magistrate and police force to prevent any illegal activities by any body.

14. After hearing the learned Advocates of both the sides I have gone through the records. Apparently, the execution of the Nikanama and sworning of the Affidavits are admitted. It is also admitted that the said girl went with the son of the plaintiff out of love and affection. For such love and affection she left her father's house and converted to a Muslim and she married Md. Humayun Farid Lazu. Their marriage was performed as per the rituals followed by the Muslim. As per her father she was reconverted into a Hindu by performing a function of expitation (প্রায়শ্চিত্ত) by a Brahmman. Such reconversion is questionable and no where in this subcontinent such reconversion is allowed. However, from the deposition of the defendant No.2 (DW.1) himself it appears that he tired to insist his daughter to reconvert but she denied. For her such denial he created pressure upon her which amounts to serious mental torture, and it is not unlikely that she was even tortured physically. And in such circumstances she was compelled to kill herself by taking poison. Such suicide is also admitted. In case of her reconversion there was no reason of taking poison by herself, and to commit suicide. Apparently, the boy was also died by poisoning. As per Mr. Md. Shaifur Rahman such poisoning also may be caused by the contesting defendant or his party men. However, how he was killed or died is not a matter to be decided in this case, and no certain cause of his death is available in the record.

15. In the facts and circumstances as it appears from the record, I find that the deceased Most. Hosneara Begum Laizu/Lipa Rani Roy was a Hindu lady, but she was converted to a Muslim and she died as a Muslim, presence in her father's house at the time of committing suicide can be a reason to find that she was reconverted to a Hindu.

16. As a Muslim or a believer in Islam she is entitle to get burial as per the Islamic rituals.

17. The prayer of Mr. Subrata Chowdhury as mentioned above cannot be considered by this Court since the deceased herself did not donate her dead body to any institution.

18. Apparently, the father of the deceased has been suffering from some ego and for his such ego Mr. Subrata Chowdhury, as well as Mr. Md. Mominul Islam made such prayers finding themselves helpless to establish that the deceased was reconverted to a Hindu. Such ego cannot be a reason for the Court to decide any dispute like the instant one.

19. For such ego a dead body has been rottening in mortuary since last four years. Keeping dead body of a human being for such long time can not be allowed by any religion, rather it amounts to an inhuman act. Apparently the father just for his ego behaved like an inhuman being, and such sort of ego cannot be allowed in the society or by the court of law.

20. However, for the ends of justice and to prevent any activities in response of such ego this court may direct the administrative authority to take necessary step.

21. With such finding and observation, this Rule is hereby made absolute.

22. In the result the impugned judgment and decree dated 18.06.2014 passed by the Joint District Judge, Nilphamari, in Title Appeal No.24 of 2014 is hereby set aside, and those dated 04.05.2014 passed by the Assistant Judge, Domar, Nilphamari, in Other Suit No.10 of 2014 is hereby restored.

23. The dead body in dispute should immediately hand over to the plaintiff who will bury the same as per Islamic rituals.

24. The Deputy Commissioner, Nilphamari is hereby directed to deploy a Executive Magistrate and some police force during burial (দাফন) of the dead body within 2(two) days from the date of receipt of the copy of this judgment.

25. The parents of the deceased are allowed to see her dead body during such burial if they are interested.

26. However, there is no order as to costs.

27. Send down the lower Courts records immediately.

28. Copies of this judgment be sent immediately to the Deputy Commissioner and the Superintendent of Police, Nilphamari.

13 SCOB [2020] HCD

HIGH COURT DIVISION

Civil Revision No. 444 of 2016.

Mosammat Syeda Shamima Kader.
.....Plaintiff-Respondent-Petitioner.
-Vs-
Mohammad Enamur Rashid Chowdhury.
…Defendant-Appellant-Opposite Party.

Mr. A.K.M. Rabiul Hassan with
Mr. Mohammad Selim Jahangir with
Mr. Md. Ziaur Rahman, Advocates.
……For the petitioners.

Mr. Maqbul Ahmed with
Mr. Khairul Hasan, Advocates.
.....For the Opposite Party.

Heard on 06.05.2019, 12.05.2019
And
Judgment on 14.05.2019.

Present:
Mr. Justice Md. Rezaul Hasan.

Permanent injunction, City Corporation tax, boundary of the property, transfer of specific property, prima-facie title, tax receipt, misreading and non-reading of evidence

That the City Corporation holding tax receipt is not the proof of possession if isolated from a lawful prima-facie title claimed on the basis of apparently genuine deed and with reference to a clear chain of title. ... (Para 16)

It has to be noted here that, this case of claiming title in the suit property based on no title in any specific property is apparently a case of the land grabbers. Case of a land grabber is totally isolated from the chain of title and their deeds do not refer to any specific immovable property, so that a land grabber can grab any property or any portion of a property, on the basis of the papers created by or kept in their hands. ... (Para 20)

JUDGMENT

Md. Rezaul Hasan, J.

1. The defendant-appellate-opposite party has filed counter affidavit denying the allegation of the revisional application which is kept with the record.

2. This Rule has been issued calling upon the opposite party, to show cause as to why the impugned judgment and decree dated 30.11.2015 (decree signed on 06.01.2016), passed by the learned Additional District Judge, 1st Court, Chattogram, in Other Appeal No.191 of 2010, allowing the appeal and reversing the judgment and decree dated 22.04.2010 (decree signed on 25.04.2010), passed by the learned Additional Assistant Judge, 3rd Court, Sadar, Chattogram, in Other Suit No.45 of 2008 decreeing the suit, should not be set-aside and/or pass such other order or orders passed as to this Court may seem fit and proper.

3. Facts, relevant for disposal of the Rule, in brief, are that, the petitioner as plaintiff has filed Other Suit No.45 of 2008 before the court of Senior Assistant Judge, 5th Court,

Chattogram against the opposite party, being the defendant with a prayer for permanent injunction in respect of the suit property mentioned in the schedule to the plaint.

4. The defendant has appeared in the suit and filed written statements on 26.02.2003 and contested in the suit.

5. I have gone through the pleadings of the parties which need not be reproduced here. The plaintiff has produced 2 witnesses and proved certain documents which were marked as Ext. 1-11. On the other hand, the defendant produced 3 witnesses and has proved certain documents which were also marked as exhibit "Ka" to "Ja" series. The appellate court on an application has marked certain documents exhibit "Neo" to "Tha" by re-calling D.W. 1 at the time of taking additional evidence.

6. However, the Trial Court, after hearing the parties and assessing the evidence on record, decreed the suit by his judgment and decree dated 22.04.2010 (decree signed on 25.04.2013).

7. Against the said judgment and decree of the Trial Court, the defendant-appellant preferred Other Appeal No.191 of 2010 (as appellant) before the District Judge, Chattogram, which was heard by the learned Additional District Judge, 1st Court, Chattogram, 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 30.11.2015 (decree signed on 06.01.2016).

8. Being aggrieved by and dissatisfied with the judgment and decree of the Appellate Court, the Plaintiff-Respondent-Petitioner filed this application under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

9. Learned Advocates Mr. A.K.M. Rabiul Hassan, Mr. Mohammad Selim Jahangir and Mr. Md. Ziaur Rahman appeared for the petitioner. Mr. Hassan having placed the petition, first of all submits that, both the parties admitted that the original land owner of the suit property was the Emperor of the Indian from whom one Nalini Ranjan Chowdhury obtained settlement and the legal heirs of Nalini Ranjan Chowdhury and then sold the property on 10.09.1959, by a registered deed No. 5117, to Chattogram Islamabad Town Co-operative Bank Limited, who sold the same to Khorshed Alim Siddiquee. The said Khorshed Alim Siddiquee sold the property to Arog Limited of Khatungonj and Arog Limited sold the same to Chattogram Menon Jamat Committee and, accordingly B.S. 410 khatian has been prepared in the name of Chattogram Menon Jamat Committee. He continues that, the plaintiff's case is that, the said Chattogram Menon Jamat Committee sold the said property through 5(five) saf-kabala deeds namely- deed No. 15574 dated 07.10.1980, deed No. 8756 dated 23.05.1981, deed No. 8876 dated 25.05.1981, deed No. 9574 dated 08.06.1981 and deed No. 12082 dated 20.07.1981, totaling 6.80 acres of land to Suja Miah Majumder and after his death his son Jamal Uddin Majumder got the suit property by way of amicable partition among the heirs of deceased Saja Miah Majumder and Jamal Uddin Majumder, then, by a registered deed No. 4234 dated 04.08.1994 sold the suit property to the plaintiff and had handed over the possession of the suit property. The said deed has been marked as exhibit -1. The learned Advocate further submits that, this deed No. 4234 dated 04.08.1994 (Ext. 1) clearly stated the quantity as well as the schedule of property sold to the plaintiff, which has been described in the schedule to the plaint and both the schedules are harmonious. He also submits that, pursuant to the aforesaid sale, the Mutation Case filed by the plaintiff-purchaser a Mutation

has been prepared in the name of the plaintiff, which has been marked as exhibit 4. He proceeds on that, although the defendant claimed that the aforesaid Chattogram Menon Jamat Committee sold 6.12 acres of land to Raja Miah and his wife by 4 *kabala* deeds, however, no description of these deeds was given in the written statements, nor any of these 4 deeds has even placed or proved before the trial court. He next submits that, although the defendant has produced and proved the document like deed No. 14867 dated 20.08.1984, whereby Raja Miah has allegedly sold the property to Akhter Zaman (marked as Ext. "Kha"), however, the schedule of this deed does not referred to any plot No. 36, nor any boundary has been given to show that any specific property was sold to said Akhter Zaman. Moreover, the schedule to the said deed marked as Ext. "Kha", shows transfer of 6 decimals or 3 *gondas* and one Kora of land allegedly from the suit property. Moreso, he proceeds on, schedule to the Ext. "Kha" shows transfer of only 6 decimals (3 *gondas*) land allegedly transferred to Akhtar Zaman, but, the said deed No. 3633 dated 21.06.2001, whereby Akhtar Zaman allegedly sold the property to the defendant Mohammad Enamur Rashid Chowdhury, shows to have transferred 8 decimals of land or 4 Gondas i.e. in excess of the land alleged to have been purchased by Akhtar Zaman. He argues that, the fact that Raja Miah and his wife claimed to have purchased the property from Chattogram Menon Jamat Committee, but none of these 4 *kabalas* could be proved and that there is no schedule to the Ext. Kha, and that, while Akhtar Zaman claimed to have purchased 6 decimals i.e. 3 *gandas* of land but has allegedly sold 8 decimals have recorded by the trial court and considered by it in its judgment. He also submits that, the trial court has recorded that in the schedule to the deed No. 3633 dated 21.06.2001, but reference has been made to the City Corporation Holding No. 1091, the City Corporation tax receipt submitted by the defendant as Ext. Umo series shows no such holding number. The learned Advocate for the petitioner also submits that, in the schedule of the deed No. 3633, the suit property which was sold has been shown as Mouza Nasirabad which is not the address of suit property, because two Mouzas, namely, Nasirabad and East Nasirabad are different and this discrepancies has been noted by the trial court in its judgment. He proceeds on that, although the kabalas by which the said Raja Miah alleged to have purchased the property were not adduced, nor produced or proved before the court, however, some photocopies of same *kabalas* were filed before the trial court, but none of these shows any boundary of the property alleged to have been purchased by Raja Miah. The trial court has also pointed out the peculiarity of writing two deeds No. ১৪৮৬৭ as well as again in English 14867 on Ext. Kha, which is not the usual practice, while the defendant did not produce the original of the deed and that the certified copy of the said deed No. 14867 was not proved before the court below. The trial court has recorded that, the holding tax receipt or bills bear no holding number of the suit property. He next submits that, the trial court has found the exclusive possession of the plaintiff and has rightly found that the plaintiff is in possession. Therefore, he proceeds, the finding of the appellate court is result of misreading and non-reading of the evidence and deviation from the evidence on record. Moreover, the appellate court has given interpretation of all oral and documentary evidences and by its lengthy judgment it has tried to improve and make out a case for the defendant, by disregarding the evidence on record as well as the principle of law settled by the Superior Court. He lastly submits that, the Rule has merit and the same may kindly be made absolute. In support of his contention, the learned Advocate for the petitioner has referred to two decisions, reported in BLD 1989 at page 368: Sheikh Ahmed and others –Vs- Abdul Alim and BLD 1986 at page 155: Pasharuddin Mir V. Ismail Mia and others wherein it has held that, question of title in a suit for permanent injunction may be gone into incidentally but decision of title in a suit for permanent injunction is not the guiding principle. He has prayed for making the Rule absolute.

10. Mr. Makbul Ahmed along with Mr. Khairul Hasan, learned Advocates, appeared for the opposite parties. Mr. Ahmed, on the contrary, submits that, the appellate court has discussed all the issues and pointed out elaborately in its judgment and there is no lacuna in the judgment of the appellate court and the judgment of the appellate court as the last court of fact, being reasonable, does not call for any interference. The learned Advocate submits that, in this suit a complicated question of title is involved and without filing a suit for partition, the suit was not maintainable. He next submits 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.

11. 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.

12. Chain of title from Emperor of India to Chattogram Menon Jamat Committee is not disputed. The plaintiff has placed and proved khatian No. 410 (Ext. 3) in their names.

13. I find that, Jamal Uddin Majumder (one of the heirs of Suja Miah) by a registered deed No. 4234 dated 04.08.1994 sold the suit property to the plaintiff and handed over the possession and the said deed has been marked as exhibit -1. This deed No. 4234 dated 04.08.1994 clearly stated the quantity as well as the specific schedule of the land sold to the plaintiff, which has been described in the schedule of the plaint, as well. I also find that pursuant to the aforesaid transfer, Mutation khatian No. 410/62 of Mouza East Nasirabad has been prepared in the name of the plaintiff, which has been proved and marked as exhibit 4.

14. It also appears that Suja Miah had purchased 6.80 acres of land through 5 deeds. In paragraph No. 15 of the written statements, the defendant-opposite party has admitted that, Suja Miah had purchased 6.80 acres of land from Chattogram Menon Jamat Committee, but asserted that one Raja Miah (and his wife) had also purchased 4.80 acres of land from Chattogram Menon Jamat Committee by 4 deeds and that the said Raja Miah and Suja Miah started a Housing project (on mutual understanding) and that, Raja Miah has sold plot No. 36 (claimed to be the suit property) to Most. Akhtar Zaman by a deed No. 14867 dated 22.08.1984 (Ext. Kha). It has also been admitted in the written statement by the defendant that, 6.80 acres of land was purchased by Suja Miah from Chattogram Menon Jamat Committee and as such, it is admitted and this Suja Miah purchased 6.80 acres of land from Chattogram Menon Jamat Committee. But, the defendant could not produce, nor proved any of the said 4 deeds whereby Raja Miah is alleged to have purchased 4.08 acres of land from Chattogram Menon Jamat Committee in the name of himself and his wife. None of these alleged deeds, whereby the said Raja Miah and his wife had purchased the suit property was produced or proved at any stage of the suit. Rather, photocopy of the said kabalas of Raja Miah were placed before the trial court, but none of the photocopies of the said deeds show that any specific property was sold to Raja Miah. Moreover, these photocopies are not admissible in evidence, as per law. On the other hand, in the deed of Most. Akhtar Jahan (Ext. Kha) 6 decimals or 3 *gondas* of land is shown to have been transferred in her favour by the said Raja Miah. But, there is no boundary in this deed to show that any specific property was transferred to Akhtar Zaman by Raja Miah (whose title has not been proved). As such, there was no transfer of specific property to the defendant as per deed No. 14867 dated 20.08.1984. Moreover, the deed No. 3633 dated 21.06.2001 (Ext Ka) has been proved to show that, the defendant has purchased 8 (eight) decimals of land from Most. Akhtar Zaman,

which is clearly in excess of the land shown in deed No. 14867 dated 20.08.1984 (Ext. Kha). So, genuineness and legality of this deed is questionable.

15. The trial court has very specifically noted all these discrepancies and other material defects in the chain of title of the defendant. But the appellate court has given a distorted interpretation of judgment of the trial court. Moreover, in order to improve the case of the defendant, the appellate court has allowed additional evidence to be taken and allowed some documents to be proved by the defendant and marked them as exhibits ***"Neo" to "Tha"***. But, none of these documents proves the prima-facie title of the defendant or his possession in the suit property, rather the trial court has rightly pointed out that, the kabala No. 4234 dated 04.08.1994 of the plaintiff as well as her mutation case both were allowed earlier, in point of time, than that of the defendant. The trial court has rightly pointed out that the schedule of the land of kabala dated 04.08.1994 (Ext. 1) of the plaintiff is inconsonance with the property described in the *khotain* as well as to the schedule of the plaint. The trial court has also rightly pointed out that, the defendant has tried to prove his possession by the Advocate Commissioner D.W. 3 and it has rightly recorded that, the defendant has failed to prove his possession either by adducing evidence or by the City Corporation holding tax receipt that has no nexus with the suit property.

16. **I am of the considered opinion that the City Corporation holding tax receipt is not the proof of possession if isolated from a lawful prima-facie title claimed on the basis of apparently genuine deed and with reference to a clear chain of title.**

17. I find that, the appellate court has totally ignored the factual aspect of this case and has given distorted interpretation of the judgment of the trial court, which is not only unreasonable, but also extremely perverted. The appellate court has also went out of the scope of this case by writing a lengthy judgment only to dismiss the suit on extraneous issues. I also find that, the findings of the appellate court are totally perverse as well as these are result of misreading and non-reading of the evidence on record and also misinterpretation of law cited in the judgment of the superior court.

18. I also find that no right or title of Raja Miah could be proved by adducing any evidence, oral or documentary, as has been rightly pointed out the trial court. But title of Suja Miah in respect of 6.80 acres of land has been admitted in paragraph No. 15 of the written statement of the defendant.

19. I also find that, the plaintiff has purchased the suit property and has been paying Government taxes on that. But this defendant claims to have purchased the suit property from Most. Akhtar Zaman on the basis of a deed (Ext. Ka), which does not bear any specific schedule. It shows that Raja Miah has allegedly sold 6 decimals or 3 *gondas* of land to Most. Akhtar Zaman, but the title of Raja Miah has not been proved, hence, the title of Most Akhtar Zaman has no prima-facie basis. On the other hand, title in any of unspecified property cannot be transferred. Besides, the defendant's deed (Ext. Ka) shows that Most. Akhtar Zaman has purportedly transferred 8 decimals or 4 *gondas* land to him, whereas she claims to have purchased only 6 decimals or 3 *gondas* of land from Raja Miah (Ext. Kha). All these anomalies and material discrepancies prove that the defendant No. 1 or the person from whom he claims title do not have any prima-facie title, nor there is given any consistent account of deriving title by the defendant in any specific property. As such, findings of the appellate court in favour of the defendant are all distorted and based on misreading and non-reading of evidence and the same are liable to be reversed.

20. It has to be noted here that, this case of claiming title in the suit property based on no title in any specific property is apparently a case of the land grabbers. Case of a land grabber is totally isolated from the chain of title and their deeds do not refer to any specific immovable property, so that a land grabber can grab any property or any portion of a property, on the basis of the papers created by or kept in their hands. This court should be very cautious about these type of persons who apparently seems to be lands grabbers**.**

21. With these findings and observations, I find that, the impugned judgment and decree passed by the appellate court suffers from misreading and non-reading of evidence and from serious illegality and its findings are totally perverse. The appellate court in passing the impugned judgment and decree has committed grave error of law, resulting in error in the decision, occasioning failure of justice.

22. This Rule has merit and the same should be made absolute.

O R D E R

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

24. The findings of the appellate court are hereby reversed. The impugned judgment and decree dated 30.11.2015 (decree signed on 06.01.2016), passed by the learned Additional District Judge, 1st Court, Chattogram, in Other Appeal No.191 of 2010 is hereby set aside and the judgment and decree dated 22.04.2010 (decree signed on 25.04.2010), passed by the learned Additional Assistant Judge, 3rd Court, Sadar, Chattogram, in Other Suit No.45 of 2008, decreeing the suit, is hereby restored and upheld.

25. The order of stay granted earlier by this Court is hereby vacated.
No costs.

26. Let a copy of this judgment along with the Lower Court's Record be sent down to the concerned Courts at once.

13 SCOB [2020] HCD

HIGH COURT DIVISION

SPECIAL ORIGINAL JURISDICTION

WRIT PETITION NO. 1509 OF 2016

Syed Saifuddin Kamal, son of SM Kamal Pasha, of House 419, Road 30, Mohakhali, DOHS, Dhaka- 1206 and another

..... Petitioners

-VERSUS-

Bangladesh, represented by the Secretary, Ministry of Health, Bangladesh Secretariat, P.S. Ramna, Dhaka and others.

..... Respondents.

Ms. Sara Hossain, Advocate
Ms. Anita Ghazi Rahman,
Ms. Rashna Imam and
Ms. Sharmin Akter, Advocates
… For the Petitioners.

Ms. Kazi Zinat Hoque, DAG with
Mr. Amit Talkder, DAG,
Mr. Zakir Hossain Ripon, AAG,
Ms. Nazma Afreen, AAG
… For the Respondent No. 1

Mr. Khaled Hamid Chowdhury, Advocate with
Mr. Shafayat Ullah, Advocate
… For the Respondent No. 2

Heard on: 28.2.2017, 5.4.2017, 7.5.2017, 23.8.2017, 3.1.2018, 27.3.2018, 28.3.2018 and 7.8.2018.

Judgment on: 8.8.2018

Present:
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Farid Ahmed

To provide Emergency Medical services for accidental injured persons and protecting Good Samaritan.
In substantiating the significance of the role of Good Samaritans the Petitioners draw on a similar exercise previously undertaken under the aegis of the Supreme Court of India in *Save Life Foundation and another vs. Union of India and another* in Writ Petition (Civil) No. 235/2012 in which the Ministry of Road Transport and Highways (Road Safety) issued necessary directions by gazette notifications with regard to the protection of Good Samaritans to be followed by hospitals, police and all other authorities until appropriate legislation by the Union Legislature. ... (Para 24)

This Court, hereby, further directs, and as per the prayer of all parties concerned agreed on the same, that the *নীতিমালা* in its entirety be deemed enforceable as binding by judicial sanction and approval pending appropriate legislative enactments incorporating entrenched standards objectives, rights and duties. This Court further directs a wide dissemination of the *নীতিমালা* through publication variously in the Official Gazette and through electronic and print media as shall serve both public interest and secure a broader objective of social mobilization of views and perception of the necessity of such guidelines as indeed anticipated in Clause 15 of the *নীতিমালা*. Such dissemination shall positively be initiated within a period of 2 (two) months from the date of receipt of

a certified copy of this Judgment and Order by the Respondent No. 1, Ministry of Health reflecting preferably all textual amendments as observed upon above by this Court and declare specifically and expressly in its preambular provisions the approval and sanction granted by this Judgment and Order of today's date clothing the *নীতিমালা* with legal enforceability up until necessary legislative enactments are brought forth.

... (Para 45)

JUDGMENT

SYED REFAAT AHMED, J:

1. In this Application under Article 102 of the Constitution a Rule Nisi was issued on 10.2.2016 calling upon the Respondents to show cause as to why the failure to ensure the provision by existing hospitals and clinics, whether governmental or private, of emergency medical services to critically injured persons should not be declared to be without lawful authority and violative of the fundamental rights as guaranteed under Articles 27, 31 and 32 of the Constitution and why the Respondent Nos. 1 and 3 should not be directed to require hospitals, clinics and doctors to render immediate emergency medical services as and when critically injured persons are brought to them and if any hospital/clinic does not have such emergency medical service, why they should not be directed to ensure that those critically injured persons are sent to the nearest available hospital with an emergency service, and/or to incorporate such a requirement in the licence issued to any private hospital or clinic, and to set up a complaint-system to receive reports regarding any such denial of services and/or such other or further Order or Orders passed as to this Court may seem fit and proper.

2. Accompanying the Rule were an initial set of directions which have since formed the basis of successive Orders leading finally to the formulation of the guidelines anticipated therein. The guidelines that are now placed before this Court for its sanction and approval are in the form of the *সড়ক দুর্ঘটনায় আহত ব্যক্তির জরুরী স্বাস্থ্য সেবা নিশ্চিতকরণ ও সহায়তাকারীর সুরক্ষা প্রদান নীতিমালা, ২০১৮* ("নীতিমালা")।

3. It is noted that apart from an initial teething problem regarding due compliance with this Court's initial directions the ensuing two-year period has witnessed a mobilization of efforts of both the Petitioners and the concerned Respondents that have led to the *নীতিমালা* emerging as the product of a concerted effort overseen crucially at all material dates by this Court. Such effort is duly reflected in a series of Orders issued by this Court and bear reference in this Judgment in charting and explaining the process through which the formulation of the *নীতিমালা* has evolved from a mere aspiration to a ground-breaking reality.

4. On 6.6.2016 this Court was constrained to issue a notice to show cause for contempt on the concerned Respondents on their perceived failure to duly submit a progress report as anticipated in the Rule issuing Order. An Order of 26.7.2016 records the Affidavit-of-Compliance being filed on the part of the concerned Respondents with an apology sought for any unwitting delay and upon satisfaction of which the Respondents were exonerated by this Court.

5. The process thereafter has essentially been a tripartite one with the Court at all material dates issuing extensive directions to both sides and monitoring the progress and compliance with the same. This Court will be remiss in not acknowledging specifically the effort put in on behalf of the Petitioners by Ms. Anita Ghazi Rahman, Ms. Rashna Imam and Ms.

Sharmin Akhtar, and on behalf of the concerned Respondents by Ms. Kazi Zinat Hoque, the learned Deputy Attorney General and Mr. Zakir Hossain Ripon, the learned Assistant Attorney General. It is acknowledged that the *নীতিমালা* as discussed below would not have seen the light of day without the good efforts of these individuals and the assistance extended to this Court at all material times.

6. The Petitioner No. 1, Syed Saifuddin Kamal, is a citizen of Bangladesh and the founder and managing director of Toru, a company incorporated under the Companies Act, 1994, which works with youth across the country to transform innovations to social enterprises. The Petitioner No. 2, Bangladesh Legal Aid and Services Trust (BLAST) is a national non-governmental legal services organization which has a substantial track record of extending legal aid to the poor and disadvantaged as well as initiating public interest litigation for ensuring access to justice and protection of the fundamental rights of all citizens.

7. The Respondent Nos. 1 to 4 are Bangladesh, represented by the Secretary, Ministry of Health and Family Welfare, the Secretary, Ministry of Road Transport and Bridges, the Director General of the Directorate General of Health Services, and the Bangladesh Medical and Dental Council respectively.

8. The Petitioners are aggrieved by the failure to ensure emergency medical care by hospitals and clinics in derogation of the constitutional and statutory duties owed to the citizenry of this country ensuring the availability of emergency medical care at all hospitals and by doctors as and when needed.

9. The facts in the context of which this Petition arises are that at 8.26 pm on Thursday, 21 January 2016, the Petitioner No. 1 was driving his car on Airport Road near Road No. 23, Banani, Dhaka when he was shocked to see a man slip and fall under the wheels of a bus just as he was trying to board it. The Petitioner No. 1, horrified at what he witnessed, immediately stopped his car, got out and ran to assist the man. On seeing that he was critically injured, the Petitioner No. 1 and another bystander together put the victim in the Petitioner's car and drove to the nearest private hospital in Gulshan. However, a guard at the hospital refused admission on learning that the man in question was an emergency patient. The Petitioner accompanied by the other man then drove on to two other private hospitals in the area but was turned away each time, first by a security guard, and then by a doctor. The doctor in this latter instance checked the patient but refused to treat him, even when the Petitioner stated that he would bear the costs of treatment, and instead advised the Petitioner to take the man to the Dhaka Medical College Hospital. The hospital also refused to provide an ambulance when requested for this purpose despite the Petitioner No. 1 being willing to pay for this service.

10. The Petitioner No. 1 then went to the Gulshan Police Station, from where a Sub-Inspector accompanied him to a government hospital, the Kurmitola General Hospital, where the critically injured man was declared dead on arrival at around 9.45 pm. The Petitioner No. 1 was informed subsequently by the Sub-Inspector that the victim had been identified as one Arafat, aged about 18 years, and that he had worked as a bus helper and lived with his maternal uncle, Alam, in Tongi. A report on this incident was published in a national newspaper, The Daily Star on 24.1.2016. Arafat's sad demise, and a loss of a precious life that was wholly aviodable, thus proved to be a catalyst for both a systemic change and legal redress to address the fate similarly suffered until now by countless others at the hands of an unresponsive emergency medical service delivery system in this country. Arafat's story

alerted all concerned to shrug off the sense of the all prevailing resigned acceptance of the status quo where such unresponsive system operates defiantly without accountability and with impunity.

11. In addition to the facts above germane to Arafat's story, it is asserted further that the situation and predicament faced by the Petitioner No. 1 as a conscientious citizen is in fact one experienced by thousands of persons, victims and their aiders, across the country on a regular basis, in seeking to obtain emergency medical services following critical injuries inflicted.

12. It is stated that effective emergency medical services, which require that every person has access to emergency care regardless of his/her ability to pay, are simply currently not available in Bangladesh. The reasons for this are manifold. First, the numbers of state hospitals or health centres with available emergency facilities are inadequate. Second, even where private hospitals have emergency facilities, they often deny admission to emergency patients, a situation which is aggravated by the fact that there is no accountability for hospitals or doctors who refuse such services. Thirdly, there is a lack of proper coordination of such services among both Government and private hospitals. The National Road Safety Strategic Action Plan ("NRSSAP") 2014-2016 which has been adopted by the National Road Safety Council, under the aegis of the Respondent No. 2, Ministry of Road Transport and Bridges, Road Transport and Highways Division, provides for measures to be taken regarding administering first aid and also for transporting those injured in highways and for collection by hospitals of casualty data. However, the Petitioners assert, the NRSSAP contains no clear directions regarding the exact nature, kind and extent of services to be provided or indeed how to regulate or monitor compliance by hospitals and doctors with their duties to provide emergency services.

13. This Court has also been taken through the existing body of laws which the Petitioners contend to be inadequate but which nevertheless provide the essential tools for evaluating a comprehensive body of the rules and standards as prayed for. In this regard the learned Advocate, Ms. Rashna Imam, for the Petitioners submits that the failure to provide emergency medical services may be primarily attributed to there being no specific legal framework for provision of emergency medical services in Bangladesh.

14. The law applicable to medical and dental practitioners and medical assistants in general, the Bangladesh Medical and Dental Council Act 2010 ("BMDC Act"), *inter alia*, mandates registration of medical and dental practitioners and medical assistants by the Bangladesh Medical and Dental Council (Sections 18-20), lays down criteria to be fulfilled for registration and circumstances in which registration may be cancelled (Section 23), and makes false pretence, use of fake titles, use of banned medicines, etc, criminal offence punishable with fines and/or imprisonment.

15. In exercise of the powers conferred by the predecessor Act being the Medical and Dental Council Act, 1980, Bangladesh Medical Dental Council on 24.3.1983 adopted the Code of Medical Ethics ("Code") to be followed by all registered medical and dental practitioners. Clause 5 of the Code states that, "*Gross negligence in respect of his professional duties to his patient may be regarded as misconduct sufficient to justify the suspension or the removal of the name of a Medical/Dental practitioner from the Register*".

16. The law applicable to private hospitals and clinics in general, the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982, mandates licensing of private clinics, hospitals, nursing homes (Section 8), lays down the conditions that must be fulfilled before a licence may be granted (Section 9 read with Schedules B and C), empowers Director-General Health Services to inspect any chamber of a registered medical practitioner, private clinics, hospitals, nursing homes and laboratories to monitor compliance with the provisions of the Ordinance. Upon inspection, the Ordinance empowers the DGHS to cancel the licence of a private clinic, hospital or nursing home and in the case of a registered medical practitioner or a laboratory, recommend to the Government to debar the former and close down the latter, if found to be non-compliant (Section 11).

17. The closest provision that one can argue that the Ordinance has to mandating the establishment of an emergency department in every private clinic and hospital can be found in section 9(d) and (e) which provides that in order to get a licence , the clinic must have "*such essential equipments as are specified in Schedule B*" and " *adequate supply of life-savingand essential medicines"*. Ms. Imam submits that on the face of it this is inadequate and nothing short of expressly making emergency departments a condition of the licence of a private clinic will suffice.

18. In exercise of the powers conferred by section 6 of the Ordinance, the Ministry of Health framed the Private Clinics and Laboratories License Rules, 1982 which contains the forms in which a private clinic shall apply for a licence and in which a licence shall be granted, upon satisfaction of all the conditions specified in the Ordinance.

19. Ms. Rashna Imam further submits that the general laws discussed above are inadequate, at best, insofar as mandating, laying down standards for and regulating the provision of emergency medical services are concerned inasmuch as integral to the provision of emergency medical services in Bangladesh are*, inter alia*, the following matters and none of the said matters have been provided for by the general laws discussed above:

- mandate the provision of emergency medical services irrespective of financial inability or legal complications of the patient.
- mandate hospitals and clinics to have emergency departments if they are to be licensed.
- lay down standards for emergency departments of hospitals and clinics, in terms of infrastructure, equipment, manpower, etc.
- lay down structural and functional requirements of ambulances.
- legal protection of good Samaritans against police questioning and harassment.
- legal obligations of medical practitioners providing emergency medical services, e.g. consent to surgery if patient is a minor and unattended by an adult or unconscious or of unsound mind and unattended by an adult.

20. It is argued, consequentially, that for any legal framework on emergency medical services to be considered adequate, it must provide for the above matters at the very least. The Ordinance read with the Rules and the BMDC Act read with the Code are completely silent on all of the aspects of emergency medical services stated above.

21. The intent and objective behind this Writ Petition and the scope of the proposed set of guidelines came to be considered by this Court as reflected in its Order of 18.1.2017

> *"It appears that the underlying Writ Petition has been filed with the primary intent of ensuring the easy accessibility to emergency medical care and intervention as*

prevents the undue loss of life of road accident victims. Concomitantly, the intent also is of preparing a set of back-up action plans, policy formulations and, in all likelihood, statutory enactments to facilitate the assured availability of such services and intervention in the best feasible manner. It is in that context further that the Petitioners concomitantly bring forth the notion of a "Good Samaritan" being a bystander unreservedly coming to the aid of such road accident victims and taking on the responsibility of access to emergency medical care and intervention. The Court's aid is sought in this regard to bring about a mechanism ensuring further the personal safety of such "Good Samaritans" made possible by the assured and ready availability of assistance of law enforcement agencies and medical service providers both in the public and the private sectors."

22. That Order threw light on the entire gamut of stakeholders who must necessarily have identified roles in the formulation of the guidelines and would be assigned specific tasks and responsibilities thereunder. Indeed, the issue of the proposed guidelines serving to secure the status and role of *"Good Samaritans"* emerged at this point as a cornerstone of the Petitioners' Application.

23. In this regard, the Petitioners highlight the absence of legal protection of a Good Samaritan i.e., someone who renders aid in an emergency to an injured person on a voluntary basis. This Court is told that it is an all too common occurrence to see an injured person lying on the road with passers-by just watching, expressing their pity or walking away without intervening. In many cases people are afraid to act as Good Samaritans for fear that they will become involved in police questioning or giving evidence in courts. Currently in Bangladesh there is no law that offers protection to such Good Samaritans, that is, those who come forward to help accident victims. While no such study appears to be in place in Bangladesh as yet, it may be noted that in a survey done in India 2013 by Save LIFE Foundation, an NGO focused on improving road safety and emergency care, it was found that 74% bystanders in India are unlikely to assist a seriously injured person on the road, irrespective of whether they are alone at the spot or in the presence of others, with the finding that 88% of bystanders who were unlikely to assist cited legal hassles like police questioning and court appearances as a deterring factor while 77% of those unlikely to assist said lack of cooperation from hospitals is also a reason. It is submitted that the percentage of such apathy may be safely assumed to be similar and as abysmal in Bangladesh.

24. In substantiating the significance of the role of Good Samaritans the Petitioners draw on a similar exercise previously undertaken under the aegis of the Supreme Court of India in *Save Life Foundation and another vs. Union of India and another* in Writ Petition (Civil) No. 235/2012 in which the Ministry of Road Transport and Highways (Road Safety) issued necessary directions by gazette notifications with regard to the protection of Good Samaritans to be followed by hospitals, police and all other authorities until appropriate legislation by the Union Legislature. In this regard this Court has had the benefit of the said Gazette notifications dated 13.5.2015 and 21.1.2016 placed before it for its perusal.

25. As early as in January 2017 this Court, seized of the above facts and apprised of judicial interventions elsewhere, noted that the existing Article 9 of the NRSSAP constituted a starting point for requisite action to be taken further by the lead agents/agencies as stakeholders in this venture of formulation of guidelines of whom the Respondent No. 1, Ministry of Health appeared to have already taken a lead role. It was also noted that the NRSSAP, with an implementation period culminating in December, 2016 appeared to have,

however, been revisited halfway due to this Court's intervention as early as in February, 2016 through its Rule issuing Order and accompanying direction. That exercise, spurred by this Court's successive directives and Orders since January, 2017, bore testament to the need for a more comprehensive approach to the issues at hand and the formulation of a broad-based response and intervention mechanism to be devised. On that date this Court took note of an Affidavit-of-Compliance filed by the Respondent No. 1, Ministry of Health on 1.9.2016 apprising of a stakeholders' meeting of 23.8.2016. Documents brought on record suggest an Action Blueprint devised by specific reference to the Orders and directions of this Court and assigning sector specific roles and responsibilities to various stakeholders and implementing authorities. Chief among the decisions taken and roles assigned at that meeting, in this Court's view, was the assumption of responsibility by the Respondent No. 1, Ministry of Health itself to formulate guidelines with regard to the provision of emergency medical services to victims of road accidents. As emphasized further by Ms. Rashna Imam representing the Petitioners, this Court deemed fit to also require the Respondent No. 1 to additionally consider bringing the protection of Good Samaritans under the purview of the proposed guidelines.

26. At that time there was concern expressed by this Court of an absence of co-ordinated activity between the two major stakeholders and lead implementation agencies being the Respondent No. 1 and Respondent No. 2, Ministry of Road Transport and Bridges given the initial intent and objective behind the Court's Order for these two stakeholders to work together. The Respondent No. 2 in that light was asked to bring to the Court its own proposal on the issues at hand and this was complied with duly. It suffices to note here that two years on, with the drafting of the *নীতিমালা* the Respondent No. 2 now raises no objection to a judicial sanction being granted it, thereby, expressing the Ministry of Road, Transport and Bridge's acceptance in principle of the sufficiency of the *নীতিমালা*.

27. On 29.1.2017 this Court recorded an initiative taken by the Respondent No. 1 on 26.1.2017 to form a Special Committee for drafting the guidelines within a reasonably short period of time. The complexion of the Committee so formed was brought on record through a compliance filed by the Respondent No. 1 and as recorded by this Court's Order on 19.2.2017. It is evident from Annexure-'1' of the Respondent No. 1's Supplementary Affidavit-in-Compliance of 31.1.2017 that the Respondent No. 1, Ministry by a memo being No. 45.156.116.00.00.011.2011-37 dated 26.1.2017 constituted a four-member Committee headed by the Joint Secretary (Hospital) of the Respondent No.1, Ministry to formulate the guidelines. The other members of the Committee are the Joint Secretary (Hospital) of the Respondent No. 1, Ministry, the Director (Hospital and Clinic), Directorate of Health, Mohakhali, Dhaka and Senior Assistant Secretary, (Hospital-3) Section, Ministry of Health.

28. An Affidavit-in-Compliance of 23.3.2017 filed on behalf of the Respondent No. 1 was further in evidence of a Core Committee formed on 16.3.2017 to formulate the guidelines. A perusal of the minutes of the Ministry meeting of 15.3.2017 chaired by the Additional Secretary (Hospital) reveals that the Core Committee would comprise of the Joint Secretary (Hospital), Ministry of Health acting as the chair with membership drawn from the Director (Hospital and Clinic), Health Directorate, the Line Director, NCDC, Directorate of Health and the Senior Assistant Secretary (Hospital -3) of the Ministry. The Core Committee was given a fortnight's time to report back on the best practices deduced from a study of prevalent standards in India, Thailand, Singapore and Malaysia in particular. Noted further was the need for a broad-based approach in this regard and for dissemination of standards of services available with specific rules assigned to various stakeholders as stressed at the

meeting by Mr. Md. Mutahar Hossain Saju, the Deputy Attorney General representing the Attorney General's Office at the said meeting. The extract of the minutes recording his proposals are reproduced hereinbelow:

> *"জনাব মোঃ মোতাহার হোসেন সাজু, ডেপুটি অ্যাটর্নি জেনারেল, মহামান্য হাইকোর্ট ডিভিশন বলেন, জনগনের মধ্যে সচেতনতা বৃদ্ধির লক্ষ্যে সরকারি ও বেসরকারি প্রেস ও ইলেকট্রনিক্স মিডিয়াগুলো দুর্ঘটনায় আহত রোগীদের জরুরী চিকিৎসা সেবা প্রদানের বিষয়ে ব্যাপক প্রচারনা চালাতে হবে। সরকারি ও বেসরকারি হাসপাতালসহ সংশ্লিষ্ট সকল কর্তৃপক্ষ যাতে সড়ক দুর্ঘটনা আহত ব্যক্তিদের Good Samaritan নীতি অনুসরণপূর্বক তা বাস্তবায়ন করে এবং বেসরকারি হাসপাতাল কর্তৃপক্ষকর্তৃক তাদের চিকিৎসা সেবা নিশ্চিতকরনেদায়বদ্ধতা নির্ধারন করা যায় সে বিষয়ে নীতিমালায় উল্লেখ থাকতে হবে। তিনি গতানুগতিক নীতিমালা প্রণয়ন না করে পার্শবর্তী অন্যান্য দেশ যেমন ভারত, থাইল্যান্ড, সিঙ্গাপুর, মালয়েশিয়ার জরুরী স্বাস্থ্য সেবা সংক্রান্ত নীতিমালা পর্যালোচনা করে একটি যুগোপযোগি নীতিমালা প্রনয়নের উপর গুরুত্বারোপ করেন। এছাড়াও তিনি প্রতিটি জেলা ও উপজেলা পর্যায়ে প্রতিমাসে সড়ক দুর্ঘটনার বিষয়ে আর টি এ এর সমন্বয় সভার ব্যবস্থা করণ এবং পুলিশ ও দুর্ঘটনাস্থান থেকে প্রাপ্ত তথ্য প্রদানের নিমিত্ত রোগীসেবার জন্য সকল হাসপাতালে একটি হটলাইন চালু এবং জোরালো মনিটরিং ব্যবস্থার সংস্থান রেখে নীতিমালা প্রণয়ন করা যায় বলে মর্মে অভিমত ব্যক্ত করেন।"*

29. It suffices to note that the position so adopted by the Attorney General's Office set the pace and tone for enquiry to be undertaken by the Core Committee.

30. A distinct feature of the Court's various Orders parallel to these developments on the ground is the stress paid on the necessity for any future guidelines not only covering the matter of urgent medical care to victims of accidents or offences but also the status of their aiders or Good Samaritans and their protection from undue harassment consequent upon their interventions in aid of victims. One such reminder was addressed by this Court to the Respondent No. 1 on 7.5.2017 along with a directive to revert with definite information of either completion of formulation of guidelines or the stage at which the process then stood.

31. On 2.7.2017 the Respondent No. 1 through an Affidavit-in-Compliance of 4.6.2017 apprised of draft guidelines already formulated and at the time undergoing a process of further evaluation and amendment as necessary with the prayer for time to produce in Court the finalized set of guidelines. The first draft of the guidelines was brought on record through an Affidavit-in-Compliance dated 9.8.2017 by the Respondent No. 1 eliciting a broad set of recommendations placed by the Petitioners as an outcome of an expert consultation that had already previously taken place. This Court's Order of 17.10.2017 noted that the Petitioners had placed for the Court's consideration the set of recommendation as were the outcome of two expert consultations held in August and September, 2017 under the auspices of the Petitioner No. 2, BLAST. The Court deemed imperative at the time for all Respondents to peruse and evaluate such recommendations as well as the established good practices, particularly in India, pertaining to Good Samaritans as a prerequisite to any finalization of the guidelines previously placed before this Court and set the time-frame for the Respondent No. 1 within which to revert to this Court. It suffices to note further the expert consultations held on 8.8.2017 and 29.7.2017 at BLAST premises do indicate the active participation of medical practitioners who contributed greatly to the conceptual clarification and expansion of the kinds of specialized services to be provided by service providers.

32. This Court is satisfied that the *নীতিমালা* as now placed before this Court revolves around certain core concepts that were refined through these expert consultations and thereafter placed before the Respondent No. 1, Ministry. Indeed, the Petitioners' learned Advocate Ms. Rashna Imam attests to the fact that these concepts have figured duly in the *নীতিমালা* now awaiting this Court's approval. Fundamental to the *নীতিমালা* are, therefore, the notions of an Emergency Medical Services Authority (EMSA), the kind and range of

emergency medical services that the *নীতিমালা* seeks to regulate, the extent of first aid as is envisaged to the administered, the essential components of basic life support as well as advance life support, Emergency Medical Technicians or EMTs and last but not the least, that of Good Samaritans. These concepts and notions as recommended for inclusion by the experts and as explained to this Court, bear recording in the text and body of this Judgment and are being reproduced from the Petitioner No. 2's compliance of 10.10.2017 as hereunder-

"(i)A new definition of ***"Emergency Medical Services Authority or EMSA"*** *should be inserted in the Draft Guidelines, which names the authority responsible for regulation and management of Emergency Medical Services in Bangladesh, including implementation of the Draft Guidelines. EMSA could be a department of the Directorate General of Health Services (DGHS);*

(ii)The definition of ***"Emergency Medical Services"*** *in Clause 5.2 should include basic life support services by Emergency Medical Technicians and emergency departments of all hospitals and advanced life support services at district level hospitals and medical college hospitals; the scope of the definition should include pre-hospital care, care during inter-hospital transfer and while in the emergency department of a hospital;*

(iii) ***"First Aid"*** *in Clause 5.5 should be replaced with comprehensive definitions of* ***"basic life support"*** *and* ***"advanced life support"****;*

*(iv) "****Basic Life Support"*** *should be defined as initial assessment and treatment using the Airway, Breathing, Circulation, Disability, Exposure (ABCDE) approach, including but not limited to emergency first aid and cardiopulmonary resuscitation procedures which, as a minimum, include recognizing respiratory and cardiac arrest and starting the proper cardiopulmonary resuscitation to maintain life without invasive technique until the victim may be transported or until life support is available;*

(v) ***"Advanced Life Support"*** *should be defined as basic life support services and cardiac monitoring, cardiac defibrillation, advanced airway management, intravenous therapy, administration of specified drugs and other medicinal preparations, and other specified techniques and procedures administered by authorized personnel under the direct supervision of a hospital as part of a local emergency medical services system, while in the emergency department of a district level hospital and a medical college hospital;*

(vi) Definition of "Individuals Providing Health Service" in Clause 5.8 should be replaced with a definition of ***"Emergency Medical Technicians or EMT"****; an EMT should be defined as an individual who belongs to any one of the three levels of EMTs, having received training according to standards prescribed by the Emergency Medical Services Authority (EMSA) for each level, and who holds a valid certificate issued by the EMSA; the three levels should include:*

- *Primary care EMT- able to measure vital signs, perform basic life support techniques.*
- *Advanced care EMT-builds on EMT-1, provide ECG monitoring, application of the laryngeal mask and pneumatic anti-shock garment, and operate automatic external defibrillators and some medications.*
- *Critical care EMT- provides skills such as advanced airway management, advanced cardiac life support, trauma life support, pediatric advanced life support, obstetric life support, disaster management and procedures for dealing with hazardous materials.*

(vii) The term ***"Good Samaritan"*** *should be included in the Draft Guidelines. The following definition is proposed:*

> *"Good Samaritan means any bystanders and/or passers-by who render help to the victims of accidents in view of the fact that these individuals can play a significant role in order to save lives of the victims by either immediately rushing them to the hospital or providing immediate life saving first aid".*

33. Also brought forth through these expert consultations was another component of the *নীতিমালা* that was absent in the guidelines as initially prepared. These are the provisions relating to ambulance services. Extensive deliberations are found recorded under this head on the categories of ambulances that would be called into operation as needed with a consensus arrived at on the need for rapid response vehicles, general ambulances and cardiac ambulances.

34. At this juncture, this Court feels that the provisions on the protection of Good Samaritans require some elaboration. It is noted that the Rule Nisi dated 10.2.2016 directed framing of a separate set of guidelines *"for the protection of Good Samaritan to be followed by the hospitals, police and all other relevant authorities"*. The draft guidelines only sparingly acknowledged a need for a "Good Samaritan নিতি" guarding against harassment of Good Samaritans by hospital authorities and the police. To fill in that obvious lacuna in this regard, a comparative evaluation of prevailing standards and practices in other jurisdictions was suggested by the Petitioners. Of these were highlighted the separate and specific laws promulgated in India, Canada and Ireland such as the Indian Good Samaritan Guidelines, the Canadian Good Samaritan Act, 2001 and the Civil Law (Open Miscellaneous Provisions) Act, 2011 of Ireland. The range and breadth of best practices worldwide that the experts considered and brought forth in their recommendation led this Court to dwell on the feasibility of drawing on practices prevalent in medical systems that are relatively more developed than ours and as operate in social settings where sensitivity to emergency medical needs and the institutional capacity to respond effectively are for more heightened and advanced than ours. Accordingly, this Court has been of the view that a sustainable response and delivery mechanism in this regard may draw on social settings relatively similar to ours in terms of crises settings and situations and standards and capacities which may realistically be adopted by and added to our system. In that regard, the Indian experience provided the best example to study and evaluate.

35. It is predicated on these developments and points of view that a working draft of the guidelines eventually surfaced in early 2018. An Affidavit-in-Compliance on behalf of the Respondent No. 1 of 14.11.2017 revealed that by that date a *"working draft"* of the guidelines had been uploaded on the website of the Respondent No. 1 creating some consternation among the Petitioners who apprehended that the said draft ran the risk of being mistakenly and prematurely treated as a final set of guidelines agreed upon by all stakeholders.

36. The Petitioners at that juncture initiated two consultations to which favourable responses were received from the Respondent No. 1 and was actively participated by all stakeholders. A Supplementary Affidavit of 28.3.2018 on behalf of the Petitioner No. 2 records that the Respondent No. 1 organized two meetings at the Ministry on 29.1.2018 and 5.2.2018 pursuant to this Court's Order of 17.10.2017 to review the Petitioners' recommendations with the following stakeholders on board-

a. Meeting dated 29.1.2018-

(i) Md. Habibur Rahman Khan, Additional Secretary, Hospital, Ministry of Health and Family Welfare;

(ii) Rehana Yasmin, Deputy Secretary, Ministry of Health and Family Welfare;
(iii) Jakia Sultana, Joint Secretary, Government Health Administration, Ministry of Health and Family Welfare;
(iv) Zakir Hossain Ripon, Assistant Attorney General for Bangladesh;
(v) Dr. Md. Ashraf Uddin Ahmed, Resident Physician, Head, Department of Emergency, BIRDEM General Hospital;
(vi) Advocate Sharmin Akter, Senior Staff Lawyer, BLAST;
(vii) Barrister Anita Ghazi Rahman, Advocate for BLAST and Saif Kamal;
(viii) Barrister Rashna Imam, Advocate for BLAST and Saif Kamal;
(ix) Mahbuba Akhter, Deputy Director, Advocacy and Communications, BLAST.

b. Meeting dated 5.2.2018-

(i) Dr. Md. Faruk Hossain, Junior Consultant (Casualty), Dhaka Medical College Hospital;
(ii) Jakia Sultana, Joint Secretary, Government Health Administration, Ministry of Health and Family Welfare;
(iii) Rehana Yasmin, Deputy Secretary, Ministry of Health and Family Welfare;
(iv) Advocate Sharmin Akter, Senior Staff Lawyer, BLAST;
(v) Barrister Anita Ghazi Rahman, Advocate for BLAST and Saif Kamal;
(vi) Barrister Rashna Imam, Advocate for BLAST and Saif Kamal;

37. These meetings yielded a consensus on how the draft guidelines could be modified emphasizing further the content and the language of the modifications. The Petitioners through the Affidavit of 28.3.2018 stressed further additions to a future more comprehensive text of guidelines. One such issue has to do with the application of establishing international standards regarding consent to surgical procedure in a emergency situation to safe lives as is reflected in Clause 9.1 of both the draft guidelines and the *নীতিমালা*. The Petitioners proposal herein were two fold. In case of an unconscious patient or a minor not accompanied by an attendant and/or family member, the consent to a surgical procedure would necessarily have to be implicit in instances where the procedure is imminently and unavoidably necessary to save the patient's life. Secondly, in case of a conscious person of sound mind not accompanied by an attendant family member prior informed personal consent to a surgical procedure would be required. However, if in the latter scenario such person proves to be incapable of accurately comprehending his or her own medical condition, and thus incapable of expressly providing informed consent, consent to a surgical procedure shall be implicit should such procedure be imminently and unavoidably necessary to save the patient's life.

38. The other notable recommendations of the Petitioners' at this juncture have to do with the time frame within which supplementary directions are to be issued by the Government to implement the guidelines. In this regard it is submitted that Clause 6.1, as deals with the infrustactural and manpower requirements for feasibly and sustainably providing emergency medical services, would have to be complemented by the Government issuing detailed information on the requisite and available infrastructure, manpower and equipments for emergency hospital services no later than three months from the date that the guidelines would come into force. Concomitantly, the requirement would also be of a Government prescription in the form of a National Ambulance Code that lays down detailed structural and functional requirements for road ambulances in Bangladesh no later than three months from the date that the guidelines *"Emergency Medical Services for Road Accident Victims and Protection of Good Samaritans Guidelines, 2018"* would come into force.

39. It has since transpired that all these recommendations, for the most part have been favourably received and considered by the Respondent No. 1, Ministry of Health. An Affidavit-in-Compliance on behalf of the said Ministry dated 11.3.2018 has finally brought on record the finalized text of the *নীতিমালা,* the outcome of input and consideration by various stakeholders concerned. This Court on 27.3.2018 on noting such fact additionally observed that in the Supplementary Affidavit on behalf of the Petitioner No. 2, BLAST dated 27.3.2018 there is indeed a satisfaction of the Petitioners' proposals being for the most part incorporated into the *নীতিমালা*.

40. Additionally, and by way of abundant caution and prudence, and as reflected in this Court's Order of 3.7.2018, this Court reminded all stakeholders concerned that the process of finalization of the guidelines would always be a consultive and participatory exercise, as had been the case thus far, to its satisfaction and as attested to by the information already brought on record. As stressed upon at the very initial stages, this Court in reiteration highlighted that the parties concerned, including the Respondent No. 2, Ministry of Roads and Highways, would coordinate their activities and efforts towards such finalization process and revert to this Court within an assigned time with the text of the finalized draft. Mr. Khaled Hamid Chowdhury, the learned Advocate for the Respondent No. 2 affirms that the Ministry of Roads, Highways and Bridges having so reverted with due instructions from his client presently sees no objection to either the content or feasibility of implementing the guidelines in the form of the *নীতিমালা* and prays that this Court may now place its final stamp of approval subject to any observations and further directions as necessary.

41. The learned Deputy Attorney General, Ms. Kazi Zinat Hoque, being the latest in several Officers of the Attorney General's Office (being Mr. Mutahar Hossain Saju, DAG, Mr. Amit Talukder DAG and Mr. Zakir Hossain Ripon AAG) assigned to this case, has discharged the responsibility on behalf of the Respondent No. 1, Ministry of Health to bring on record the finalized guidelines in the form of *নীতিমালা* through an Affidavit-in-Compliance dated 5.8.2018.

42. The *নীতিমালা* reads as under in its entirety:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
স্বাস্থ্য ও পরিবার কল্যাণ মন্ত্রণালয়
স্বাস্থ্য সেবা বিভাগ
সরকারি স্বাস্থ্য ব্যবস্থাপনা-২ অধিশাখা
বাংলাদেশ সচিবালয়, ঢাকা

সড়ক দুর্ঘটনায় আহত ব্যক্তির জরুরী স্বাস্থ্য সেবা নিশ্চিতকরণ ও সহায়তাকারীর সুরক্ষা প্রদান নীতিমালা, ২০১৮

সড়ক মহাসড়ক নির্মানে কারিগরি ত্রুটি, যানবাহন চলাচলে অনিয়ম, চালকের অদক্ষতা, সড়ক মহাসড়কে অবৈধভাবে স্থাপিত হাটবাজার ও স্থাপনা, অবৈধ ও অযান্ত্রিক যানবাহনের উপস্থিতি, জনসচেতনতার অভাব ও সড়ক-মহাসড়কে চলাচল উপযোগী নিরাপদ যানবাহনের অভাবে নাগরিকগণ প্রতিনিয়ত সড়ক দুর্ঘটনার শিকার হন। এ সকল দুর্ঘটনায় আহত ব্যক্তি যথাসময়ে উপযুক্ত চিকিৎসার অভাবে কর্মক্ষমতা হারিয়ে ফেলেন, বিকলাঙ্গ বা পঙ্গুত্ব বরণ করেন এমনকি তাদের মৃত্যুর আশংকাও থাকে। এ ধরণের দুর্ঘটনার শিকার ব্যক্তির জরুরী চিকিৎসা আবশ্যক। সে বিবেচনায় জাতীয় স্বাস্থ্য নীতি, ২০১১-এ জরুরী চিকিৎসা সেবাকে অগ্রাধিকার প্রদান করা হয়েছে। এছাড়া টেকসই উন্নয়ন লক্ষ্যমাত্রা ২০৩০ এর ৩.৬ নং সিদ্ধান্তে সড়ক দুর্ঘটনায় আহত বা মৃত্যুর সংখ্যা অর্ধেকে নামিয়ে আনার লক্ষ্য নির্ধারণ করা হয়েছে। একইসাথে জাতীয় সড়ক নিরাপত্তা স্ট্র্যাটেজিক প্লান, ২০১৪-১৬ এর অনুচ্ছেদ ৯(১) এ জরুরী স্বাস্থ্য সেবা প্রদানের লক্ষ্যে কার্যক্রম গ্রহণের সুপারিশ করা হয়েছে। এছাড়া, মহামান্য হাইকোর্ট বিভাগে দায়েরকৃত রীট পিটিশন নং-১৫০৯/২০১৬ এর ১০/২/২০১৬ তারিখের আদেশে সড়ক দুর্ঘটনায় আহত ব্যক্তির জরুরী স্বাস্থ্য সেবা প্রদান ও সহায়তাকারীর (Good Samaritan) সুরক্ষা প্রদানের লক্ষ্যে নীতিমালা প্রণয়নের নির্দেশনা রয়েছে। এ পরিপ্রেক্ষিতে নিম্নোক্ত নীতিমালা প্রণয়ন করা হ'লঃ

২.০. শিরোনামঃ

এ নীতিমালা 'সড়ক দুর্ঘটনায় আহত ব্যক্তির জরুরী স্বাস্থ্য সেবা নিশ্চিতকরণ ও সহায়তাকারীর সুরক্ষা প্রদান নীতিমালা, ২০১৮' নামে অভিহিত হবে।

৩.০ প্রযোজ্যতাঃ

দেশের সকল সড়ক মহাসড়কে সংঘটিত দুর্ঘটনার ক্ষেত্রে এ নীতিমালা প্রযোজ্য হবে।

৪.০ উদ্দেশ্যঃ

৪.১ সড়ক দুর্ঘটনায় আহত ব্যক্তিকে দ্রুততম সময়ে জরুরী চিকিৎসা সেবা প্রদানের মাধ্যমে সম্ভাব্য স্বাস্থ্য ঝুঁকি ও প্রাণহানি হ্রাস করা; এবং

৪.২ সড়ক দুর্ঘটনায় আহত ব্যক্তিকে সহায়তাকারীর (Good Samaritan) সুরক্ষা প্রদান।

৫.০ সংজ্ঞা:

৫.১ 'উন্নত জীবন রক্ষাকারী চিকিৎসা' অর্থ প্রশিক্ষিত জনবল দ্বারা মৌলিক লাইফ সাপোর্ট, কার্ডিয়াক নিরীক্ষণ, ডিফিব্রিলেশন, এ্যাডভান্স এয়ারওয়ে ম্যানেজমেন্ট, ইন্ট্রাভেনাস থেরাপী এবং উপযুক্ত ঔষধ ব্যবহার করে চিকিৎসা প্রদান।

৫.২.'মৌলিক জীবন রক্ষাকারী চিকিৎসা' অর্থ রোগীর প্রাথমিক মূল্যায়ন ও কার্ডিওপালমোনারী রিসাসিটেশনের মধ্যে সীমাবদ্ধ না থেকে লাইফ সাপোর্ট না পাওয়া পর্যন্ত ABCDE (Airway, Breathing, Circulation, Disabilaty, Exposure) পদ্ধতি ব্যবহার করে চিকিৎসা প্রদান।
৫.৩ **'সড়ক দুর্ঘটনা'** অর্থ সড়কে সংঘটিত কোন আকস্মিক বা অপ্রত্যাশিত বা অবহেলাজনিত ঘটনা, যার ফলে কোন ব্যক্তির আহত হওয়াসহ শারীরিক সক্ষমতা হ্রাস বা মৃত্যু ঝুঁকি সৃষ্টি হয়;

৫.৪. **'জরুরী চিকিৎসা সেবা'** অর্থ দুর্ঘটনায় আহত ব্যক্তিকে তাৎক্ষনিক চিকিৎসা প্রদানের লক্ষ্যে প্রদত্ত প্রাথমিক চিকিৎসা (First aid), পরামর্শ (Advice) অথবা সহায়তা (Assistance) এবং প্রযোজ্য ক্ষেত্রে মৌলিক ও উন্নত জীবনরক্ষাকারী চিকিৎসা;

৫.৫. **'চিকিৎসক'** অর্থ বাংলাদেশ মেডিকেল এবং ডেন্টাল কাউন্সিল আইন, ২০১০ (২০১০ সনের ৬১ নং আইন) এর অধীনে নিবন্ধিত চিকিৎসক;

৫.৬. **'আহত ব্যক্তি'** অর্থ সড়ক দুর্ঘটনার ফলে শারীরিক বা মানসিকভাবে ক্ষতিগ্রস্ত ব্যক্তি;

৫.৭. **'প্রাথমিক চিকিৎসা'** অর্থ সড়ক দুর্ঘটনায় আহত ব্যক্তির জীবন রক্ষার্থে প্রদত্ত জরুরী চিকিৎসা সেবা;

৫.৮. '**Good Samaritan**' অর্থ কোন প্রকার পুরস্কার বা আর্থিক সহায়তার প্রত্যাশা না করে স্বত:প্রণোদিতভাবে দু:স্থ ব্যক্তির সাহায্যার্থে এগিয়ে আসা ব্যক্তি;

৫.৯. **'হাসপাতাল'** অর্থ কোন সরকারি বা সরকার অনুমোদিত কোন বেসরকারি হাসপাতাল, ক্লিনিক, নার্সিং হোম, মেডিকেল সেন্টার অথবা চিকিৎসা সেবা প্রদানের উদ্দেশ্যে স্থাপিত কোন মেডিকেল বিশ্ববিদ্যালয় কলেজ, ইনষ্টিটিউট বা প্রতিষ্ঠান, তা যে নামেই অভিহিত করা হোক না কেন;

৫.১০. **'স্বাস্থ্য সেবা প্রদানকারী ব্যক্তি'** অর্থ স্বাস্থ্য সেবা সংশ্লিষ্ট সংবিধিবদ্ধ সংস্থার অধীনে নিবন্ধিত চিকিৎসক, মেডিকেল এ্যাসিসটেন্ট, নার্স, মিডওয়াইফ, প্রশিক্ষণরত ইন্টার্ন চিকিৎসক বা নার্স ও চিকিৎসা সহায়তাকারী অথবা স্বাস্থ্য সেবা প্রতিষ্ঠানে স্বাস্থ্য সেবায় নিয়োজিত ব্যক্তি যারা নিম্নরূপ তিন স্তরের সেবা প্রদানে সক্ষম:

(ক) প্রাথমিক সেবা প্রদানকারী ব্যক্তি: প্রাথমিক নিরীক্ষণ ও মৌলিক লাইফ সাপোর্ট প্রদানে সক্ষম;
(খ) এ্যাডভান্স কেয়ার টেকনিশিয়ান: বেসিক লাইফ সাপোর্ট প্রদানসহ ইসিজি পর্যবেক্ষণ, ল্যারিঞ্জিয়াল মাস্ক ও এন্টি শক এয়ার গার্মেন্টস প্রয়োগে সক্ষম এবং স্বয়ংক্রিয় অটো এক্সটারনাল ডিফিব্রিলেটর পরিচালনাসহ ঔষধ প্রয়োগে সক্ষম; এবং
(গ) ক্রিটিক্যাল কেয়ার টেকনিশিয়ান: উন্নত এয়ারওয়ে ম্যানেজমেন্ট, কার্ডিয়াক লাইফ সাপোর্ট, পেডিয়াট্রিক এ্যাডভান্স লাইফ সাপোর্ট, অবসটেট্রিক লাইফ সাপোর্ট প্রদান ও যেকোন জরুরি অবস্থা মোকাবেলাসহ দুর্যোগ ব্যবস্থাপনায় সক্ষম।

৫.১১. **'জরুরি স্বাস্থ্য সেবা সেল'** অর্থ সংশ্লিষ্ট 'সড়ক দুর্ঘটনায় আহত ব্যক্তির জরুরী স্বাস্থ্য সেবা ও সহায়তাকারী সুরক্ষা প্রদান নীতিমালা, ২০১৭' বাস্তবায়ন ও পরিবীক্ষণের লক্ষ্যে স্বাস্থ্য অধিদপ্তরে গঠিত সেল;

৫.১২. **'অসদাচরণ'** অর্থ সংশ্লিষ্ট নিবন্ধন প্রদানকারী কর্তৃপক্ষ নির্ধারিত অসদাচরণ।

৬.০. সড়ক দুর্ঘটনায় আহত ব্যক্তির জরুরী চিকিৎসা সেবা প্রদান–

৬.১. হাসপাতাল স্থাপনের অনুমতি প্রদানের ক্ষেত্রে প্রয়োজনীয় অবকাঠামো, জনবল ও জরুরি চিকিৎসা সরঞ্জামাদিসহ জরুরি বিভাগ স্থাপনের শর্ত আবশ্যিকভাবে পরিপালন করতে হবে। ইতোমধ্যে স্থাপিত হাসপাতালের অনুমতি/নিবন্ধন/ লাইসেন্স নবায়নের ক্ষেত্রে উক্ত শর্ত পালন নিশ্চিত করতে হবে;
৬.২. সড়ক দুর্ঘটনায় আক্রান্ত ব্যক্তির জীবন রক্ষার্থে তাৎক্ষনিকভাবে (Golden Hour এর মধ্যে) তাকে নিকটতম হাসপাতালে প্রেরণ এবং মৌলিক জীবন রক্ষাকারী চিকিৎসা প্রদান করতে হবে;

৬.৩. আইনী জটিলতার সম্ভাবনা বিবেচনায় চিকিৎসা সেবা প্রদানে বিলম্ব করা যাবে না; এবং

৬.৪. আহত ব্যক্তির আর্থিক সক্ষমতার বিষয় বিবেচনা না করে বেসরকারি হাসপাতালসমূহ Corporate Social Responsibility (CSR) এর আওতায় চিকিৎসা সেবা প্রদান করবে।

৭.০. চিকিৎসা সেবা প্রদানে স্থানান্তর (Refer)-

৭.১. গুরুতর আহত ব্যক্তিকে মৌলিক জীবন রক্ষাকারী চিকিৎসা প্রদানের লক্ষ্যে মেডিকেল স্ক্রিনিং এবং প্রযোজ্য ক্ষেত্রে স্থিতিশীল (Stable) করতে হবে;

৭.২. সংশ্লিষ্ট হাসপাতালের পূর্ণাঙ্গ (Integrated) চিকিৎসা সেবা সুবিধা বা সক্ষমতা না থাকলে রোগীর শারীরিক অবস্থা এবং প্রাথমিক চিকিৎসা সংক্রান্ত তথ্যাবলী লিপিবদ্ধ করে Golden Hour এর মধ্যে হাসপাতাল কর্তৃপক্ষ তাঁকে উন্নত জীবন রক্ষাকারী চিকিৎসা প্রদানের লক্ষ্যে উপযুক্ত চিকিৎসা সুবিধা সম্বলিত হাসপাতালে নিজ দায়িত্বে স্থানান্তর (Refer) করবে।

৮.০. উপযুক্ত সুবিধাসম্পন্ন হাসপাতাল কর্তৃক চিকিৎসা প্রদানের বাধ্যবাধকতা-

আহত ব্যক্তির চিকিৎসা প্রদানে সক্ষমতা সম্পন্ন হাসপাতাল কোন অবস্থাতেই রোগীর চিকিৎসা প্রদান ব্যতিরেকে ফেরৎ বা স্থানান্তর (Refer) করতে পারবে না।

৯.০. চিকিৎসাধীন ব্যক্তির সম্মতি গ্রহন-

৯.১. আহত ব্যক্তির জরুরী শল্য চিকিৎসার প্রয়োজন হলে উপযুক্ত অভিভাবক বা আত্নীয়ের অনুপস্থিতিতে কোন আত্নীয় বা অভিভাবকের সম্মতি ব্যতিরেকেই প্রয়োজনীয় শল্য চিকিৎসার প্রস্তুতি গ্রহণ সাপেক্ষে চিকিৎসা প্রদান করা যাবে;

৯.২ উক্তরুপ জরুরী শল্য চিকিৎসার ফলে আহত ব্যক্তির জীবন নাশের আশঙ্কা থাকলে বা জীবন হানি ঘটলে উক্ত চিকিৎসকের বিরুদ্ধে কোনরুপ আইনগত ব্যবস্থা গ্রহন করা যাবে না।

১০.০. অবহেলা বা শৈথিল্য প্রদর্শন-

১০.১. জরুরী চিকিৎসা সেবা প্রদানের ক্ষেত্রে কোন চিকিৎসক বা স্বাস্থ্য সেবা প্রদানকারী ব্যক্তি অবহেলা বা শৈথিল্য প্রদর্শন করলে তা অসদাচরণ হিসেবে বিবেচিত হবে;

১০.২. জরুরি চিকিৎসা সেবা প্রদানের ক্ষেত্রে কোন হাসপাতাল অবহেলা বা শৈথিল্য প্রদর্শন করলে নিবন্ধন বা লাইসেন্স বা অনুমোদন প্রদানকারী কর্তৃপক্ষ উক্ত হাসপাতালের বিরুদ্ধে বিধিমতে প্রয়োজনীয় প্রশাসনিক ব্যবস্থা গ্রহণ করবে।

১১.০. জরুরি স্বাস্থ্য সেবা সেল গঠন-

১১.১. সরকার এ নীতিমালা বাস্তবায়ন ও পরিবীক্ষণের লক্ষ্যে স্বাস্থ্য সেবা বিভাগের আওতাধীন স্বাস্থ্য অধিদপ্তরে একটি জরুরি স্বাস্থ্য সেবা সেল গঠন করবে;

১১.২. জরুরি স্বাস্থ্য সেবা সেল এ নীতিমালার কার্যকারিতা নিশ্চিতকরণের লক্ষ্যে উপযুক্ত সুপারিশ প্রণয়ন ও মনিটরিং করবে;

১১.৩.জরুরি স্বাস্থ্য সেবা সেলের মনিটরিং-এর ফলে কোন ব্যক্তি বা প্রতিষ্ঠান কর্তৃক চিকিৎসা সেবা প্রদানে অবহেলা/শৈথিল্য চিহ্নিত হলে প্রচলিত আইন অনুযায়ী তা বিচার্য হবে।

১২.০.আহত ব্যক্তির তথ্য সংরক্ষণ ও সরবরাহকরণ–

সকল হাসপাতাল সড়ক দুর্ঘটনায় আহত ব্যক্তিকে চিকিৎসা সেবা প্রদান সংক্রান্ত তথ্য নির্ধারিত ছক অনুযায়ী ত্রৈমাসিক ভিত্তিতে স্বাস্থ্য সেবা বিভাগের আওতাধীন স্বাস্থ্য অধিদপ্তরে প্রেরণ করবে। স্বাস্থ্য অধিদপ্তর তাৎক্ষনিকভাবে তা মন্ত্রণালয়ে প্রেরণ করবে।

১৩.০. সড়ক দুর্ঘটনায় আহত ব্যক্তিকে সহায়তাকারীর (Good Samaritan) সুরক্ষা-

১৩.১. একজন সহায়তাকারী (Good Samaritan) কোন কর্মের জন্য দায়ী হবেন না, যদি তিনি-

১৩.১.১. গুরুতর অসুস্থ/আহত/বিপদাপন্ন/বিপদগ্রস্থ ব্যক্তিকে সহায়তা করেন, উপদেশ প্রদান
করেন বা তাঁর প্রতি যত্নশীল আচরণ করেন।
১৩.১.২. যেকোন যোগাযোগ মাধ্যম ব্যবহার করে তাঁকে যৌক্তিক পরামর্শ প্রদান করেন;

১৩.২. আহত ব্যক্তিকে হাসপাতালে আনয়নকারী ব্যক্তি/সহায়তাকারী (Good Samaritan)-কে নীতি অনুসরণপূর্বক হাসপাতাল কর্তৃপক্ষ কোন প্রকার আটক বা অন্য কোন প্রকার হয়রানি করতে পারবে না;

১৩.৩. আহত বা বিপদগ্রস্থ ব্যক্তির সহায়তাকারীকে নিজ পরিচয় বা টেলিফোন নম্বর প্রদানে বাধ্য করা যাবে না। তবে তিনি স্বেচ্ছায় এতদসংক্রান্ত তথ্য প্রদান করলে তা লিপিবদ্ধ করে প্রয়োজনে ব্যবহার করা যাবে;

১৩.৪. আহত ব্যক্তিকে হাসপাতালে পৌঁছানোর পর হাসপাতাল কর্তৃপক্ষ সহায়তাকারী ব্যক্তির নাম, ঠিকানা ও প্রযোজ্য ক্ষেত্রে টেলিফোন নম্বর লিপিবদ্ধ করে সংরক্ষণ করবে;

১৩.৫. সড়ক দুর্ঘটনায় আহত ব্যক্তিকে হাসপাতালে আনয়ন পরবর্তী স্বাস্থ্য সেবা প্রদানের দায়িত্ব হাসপাতাল কর্তৃপক্ষের উপর বর্তাবে;

১৩.৬. কোন বেসরকারী হাসপাতাল কর্তৃপক্ষ আহত ব্যক্তির আত্নীয় ব্যতীত অন্য কোন সহায়তাকারীকে চিকিৎসা ব্যয় সংশ্লিষ্ট কোনরূপ অর্থ পরিশোধে বাধ্য করতে পারবে না;

১৩.৭. আহত বা বিপদগ্রস্থ ব্যক্তিকে চিকিৎসা প্রদানে সহায়তাকারীকে কোনরূপ দায়বদ্ধতার সাথে সংশ্লিষ্ট করা হবে না মর্মে হাসপাতাল কর্তৃপক্ষ দৃষ্টিগোচর স্থানে ঘোষণামূলক বিজ্ঞপ্তি প্রকাশ করবে;

১৩.৮. কোন সহায়তাকারীকে সাক্ষ্য প্রদানে বাধ্য করা যাবে না;

১৩.৯. কোন প্রত্যক্ষদর্শী সহায়তাকারীর (Good Samaritan) নিকট হতে দূর্ঘটনা সংশ্লিষ্ট তথ্য সংগ্রহের জন্য তাকে আইন প্রয়োগকারী সংস্থার নিকট একাধিকবার উপস্থিত হওয়ার বিষয়টি নিরুৎসাহিত করতে হবে এবং তার প্রতি জন্ম, জাতীয়তা, বর্ণ, লিঙ্গ বা অন্য কোনরূপ বৈষম্য প্রদর্শন বা হয়রানি করা যাবে না।

১৩.১০. সরল বিশ্বাসে বিপদগ্রস্থ/ আহত ব্যক্তির জীবন রক্ষাকল্পে সহায়তা প্রদানকালে কোনরূপ ক্ষতি হলে সহায়তাকারীর নিকট থেকে কোন ক্ষতিপূরণ আদায়যোগ্য হবে না।

১৪.০ আহত ব্যক্তিকে জরুরী চিকিৎসা প্রদানের ক্ষেত্রে আইন প্রয়োগকারী সংস্থা বা অন্য কোন ব্যক্তি কর্তৃক করণীয়-

১৪.১. সড়ক দুর্ঘটনায় আহত ব্যক্তি সড়ক দুর্ঘটনার সাথে জড়িত থাকলে চিকিৎসা সেবা প্রদানের পূর্বে তাকে কোনরূপ হয়রানি বা আইনগত ব্যবস্থা গ্রহনের লক্ষ্যে কোন পুলিশ ষ্টেশনে প্রেরণ/আনয়ন করা যাবে না;

১৪.২. একজন পুলিশ কর্মকর্তা কোন প্রকার আইনী (Medico-Legal) প্রক্রিয়া শুরু করার পূর্বে আহত ব্যক্তির চিকিৎসার্থে প্রয়োজনীয় ব্যবস্থা গ্রহন করবেন;

১৪.৩. পুলিশ কর্মকর্তা আহত ব্যক্তির জখমের প্রকৃতি এবং আঘাতের বিস্তারিত বিবরণ প্রদানের জন্য কোন চিকিৎসক বা স্বাস্থ্য সেবা প্রদানকারী ব্যক্তিকে কোন প্রকার বল প্রয়োগ করতে পারবেন না;

১৪.৪. আহত ব্যক্তিকে প্রয়োজনীয় চিকিৎসা সুবিধা সম্বলিত হাসপাতালে স্থানান্তরের ক্ষেত্রে কোন এ্যাম্বুলেন্স পাওয়া না গেলে সংশ্লিষ্ট এলাকার আইন প্রয়োগকারী সংস্থার দায়িত্বপ্রাপ্ত কর্মকর্তা উপযুক্ত যানবাহন অধিযাচনের ব্যবস্থা করবেন;

১৫.০. জনসচেতনতা ও প্রচার-

১৫.১. আহত ব্যক্তির জরুরী স্বাস্থ্য সেবা প্রদান বিষয়ে সরকার প্রিন্ট ও ইলেক্ট্রনিক মিডিয়ায় নিয়মিত প্রচার ও বিভিন্ন পর্যায়ে কর্মশালা আয়োজনের মাধ্যমে জনসচেতনতা বৃদ্ধি করবে;

১৫.২. শিক্ষা প্রতিষ্ঠানসমূহ শিক্ষার্থীগণকে সড়ক দুর্ঘটনায় আহত ব্যক্তির প্রাথমিক চিকিৎসা সেবা প্রদান বিষয়ে নিয়মিত মহড়া ও প্রশিক্ষণ প্রদান করবে;

১৫.৩. আহত ব্যক্তিকে জরুরী চিকিৎসা প্রদানের লক্ষ্যে জরুরী বিভাগে দায়িত্বরত চিকিৎসক ও স্বাস্থ্য সেবা প্রদানকারী ব্যক্তিকে আইনী প্রক্রিয়াসহ সংশ্লিষ্ট বিষয়ে দক্ষতা বৃদ্ধির লক্ষ্যে নিয়মিত প্রশিক্ষণ প্রদান করতে হবে।

১৫.৪.সড়ক দুর্ঘটনায় আহত বা মৃত্যুবরণকারী পরিচয়হীন ব্যক্তির পরিচয় সন্ধানে সকল ইলেক্ট্রনিক ও প্রিন্ট মিডিয়া বিনামূল্যে প্রয়োজনীয় প্রচারণার সহায়তা প্রদান করবে।

১৫.৫. স্বাস্থ্য শিক্ষা ও পরিবার কল্যাণ বিভাগ ইন্টার্ন চিকিৎসকদের প্রশিক্ষণ কারিকুলামে জরুরি চিকিৎসা সেবা সংক্রান্ত বিষয়াদি অন্তর্ভুক্ত করবে;

১৫.৬. আহত/বিপদগ্রস্থ ব্যক্তিকে সহায়তা প্রদানে স্বেচ্ছায় উদ্বুদ্ধ হওয়ার জন্য সামাজিক সচেতনতা বৃদ্ধির লক্ষ্যে উপযুক্ত পুরস্কার বা ক্ষতিপূরণের মাধ্যমে এ ধরণের কার্যক্রমকে উৎসাহিত করতে হবে।

১৬.০. সরকারের ক্ষমতা-

১৬.১. সরকার সময়ে সময়ে এ নীতিমালা বাস্তবায়নে প্রয়োজনীয় নির্দেশনা জারি করতে পারবে।

স্বাক্ষরিত/-
তারিখঃ ০৪-০৩-২০১৮ ইং
(মোঃ হাবিবুর রহমান খান)
অতিরিক্ত সচিব(হাসপাতাল)
স্বাস্থ্য সেবা বিভাগ

স্বাস্থ্য ও পরিবার কল্যাণ মন্ত্রণালয়

43. This Court has gone through the *নীতিমালা* with a fine tooth comb and notes with some satisfaction that it is an outcome of strident, bold and trail-blazing efforts of all stakeholders concerned and chiefly the two Petitioners and the Respondent No. 1, Ministry of Health. That is not to say, however, that the *নীতিমালা* may not be revisited further and improved upon with greater reflection. It is in that context and in the spirit of delivering to the people a comprehensive set of guidelines that the Court, therefore, makes two observations which the Respondent No. 1, Ministry of Health in a spirit of co-operation and goodwill, it is thought, shall duly consider in making the guidelines more comprehensive and effective:

(a) Clause 9.1 may be revisited to reflect to the fullest extent possible the recommendations of the Petitioners as earlier recorded to bring that Clause in line with established international standards concerning consent to surgical procedure in an emergency situation. Clause 9.1, this Court believes, shall, accordingly, be better served by reserving to any adult accident victim, fully conscious and of sound mind, the right to provide an informed consent to any surgical intervention in preference to such consent sought instead from next of kin;

(b) The effective implementation of the guidelines is dependent on both the capacity and range of services to be made available crucially under Clause 6.1 read with Clause 6.2. In this regard, Clause 16.1 assigns to the Government the authority to ensure the availability of the same. It is this Court's opinion that the objective of the *নীতিমালা* shall be better served with Clasue 16.1 being reformulated as a time bound task assigned the Government to attain specific targets identified under Clauses 6.1 and 6.2. In that regard, Clause 16.1 should ideally incorporate a time frame which, in this Court's opinion, should be a period of 6 (six) months computed from the date that the *নীতিমালা* comes into force, for the purpose of producing a full list detailing infrastructure and manpower requirements and targets for emergency medical services envisaged in Clause 6.1. Furthermore, Clause 6.2 shall equally benefit from a 6(six) month period similarly computed and assigned for the Government to issue requisite directives for road ambulance services to be provided within the ambit of the *নীতিমালা*.

44. Predicated on the above, and with this Court's satisfaction and appreciation already recorded of the concerted efforts of all concerned, this Court resultantly approves and sanctions the official publication of the *নীতিমালা* as reproduced hereinabove by Gazette notification subject to the observations made.

45. This Court, hereby, further directs, and as per the prayer of all parties concerned agreed on the same, that the *নীতিমালা* in its entirety be deemed enforceable as binding by judicial sanction and approval pending appropriate legislative enactments incorporating entrenched standards objectives, rights and duties. This Court further directs a wide dissemination of the *নীতিমালা* through publication variously in the Official Gazette and through electronic and print media as shall serve both public interest and secure a broader objective of social mobilization of views and perception of the necessity of such guidelines as indeed anticipated in Clause 15 of the *নীতিমালা*. Such dissemination shall positively be initiated within a period of 2 (two) months from the date of receipt of a certified copy of this Judgment and

Order by the Respondent No. 1, Ministry of Health reflecting preferably all textual amendments as observed upon above by this Court and declare specifically and expressly in its preambular provisions the approval and sanction granted by this Judgment and Order of today's date clothing the *নীতিমালা* with legal enforceability up until necessary legislative enactments are brought forth.

46. It is hoped that the *নীতিমালা* shall henceforth serve as an eulogic ode to Arafat and countless other victims of road accidents whose ultimate sacrifice will not have been in vain but rather have served a higher purpose.

47. Resultantly, the Rule is made absolute with the observations and directions above.

48. There is no Order as to costs.

49. Communicate this Order at once.

13 SCOB [2020] HCD

HIGH COURT DIVISION

Death Reference No. 51 of 2012

The State

-Versus-

Abul Kashem and two others
...Condemned prisoners
with
Criminal Apeal No. 6253 of 2012
Monir Hossain
…Appellant
with
Jail Appeal No. 209 of 2012
Monir Hossain
...Appellant
with
Criminal Appeal No. 7528 of 2012
Abul Kashem and another
...Appellants
with
Jail Appeal No. 208 of 2012
Abul Kashem
...Appellant
with
Jail Appeal No. 207 of 2012
Mohsin
... Appellant
-Versus-
The State
... Respondent in all the appeals

Mr. Md. Moniruzzaman (Rubel), Deputy Attorney General with Mr. Abul Kalam Azad Khan, Mr. Abdur Rokib and Ms. Marufa Akhter, Assistant Attorney Generals
... for the State

Mr. Md. Bodiuzzaman, Advocate appearing on behalf of Fatema Begum, Advocate
…for appellant in Cr Appeal 6253 of 2012

Dr. Md. Shamsur Rahman, Advocate
... for appellants in Cr Appeal 7528 of 2012

Judgment on 22.07.2018

Present:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice A S M Abdul Mobin

The form prescribed in the Criminal Rules and Order (Practice and Procedure of Subordinate Courts), 2009 presupposes no handwritten memorandum under column No.7. However, there is a blank space for making memorandum under column No.8, which the recording Magistrate is required to fill up stating the reason of his belief regarding voluntariness of the confession. ... (Para 36)

If any Magistrate does not make any memorandum in his own handwriting under column No.7 of the prescribed form of confession, or does not put his signature after making memorandum under column No.8 and does not put his signature after making memorandum, if any, under column No.9, it cannot be held to be a gross illegality and fatal to the prosecution case. The purpose of making memorandum in compliance with section 164 (3) of the Code would suffice by signing the printed memorandum, provided that the precautions prescribed by the Code are duly taken by the recording Magistrate. ... (Para 37)

There is confusion among the members of Bar as well as the Magistrates as to whether a Magistrate is required to make handwritten memorandum at the bottom of recorded confession under column No.7. Where there is already a printed memorandum in the language of law, albeit pre-amendment, it would be an unnecessary and meaningless exercise for the Magistrates to make another memorandum thereunder in the same language. ... (Para 44)

Since the use of old printed memorandum with pre-amendment language and not making of memorandum by own hand of the Magistrate do not injure the accused as to their defence on merits, it would not make the confessions inadmissible. ... (Para 54)

JUDGMENT

Md. Ruhul Quddus,J:

1. The Sessions Judge, Comilla awarded sentence of death under sections 302 and 34 of the Penal Code upon the condemned prisoners Abul Kashem, Mohsin and Monir Hossain by judgment and order dated 25.09.2012 in Session Case No. 1073 of 2011 giving rise to this Death Reference under section 374 of the Code of Criminal Procedure. Challenging the selfsame judgment the condemned prisoners preferred two criminal appeals and three jail appeals as mentioned above. All the matters have been heard together and are disposed of by this judgment.

2. The informant Nilufa Akhter (PW2) lodged a first information report (FIR) with Sadar South Police Station, Comilla on 10.07.2011 at 20:40 hours alleging, *inter alia,* that one year back her husband Abdur Rahim Charu, since deceased lent Taka 90,000/- to accused Abul Kashem. He did not repay the money or any interest thereon, though promised several times. He called away her husband to his tea stall situated at Rajpara Chowmohani on the pretext of repayment of loan money on 09.07.2011 at about 5:00 pm, wherefrom the accused persons took him elsewhere by a CNG driven auto-rickshaw. As he did not return home, she started searching for him and made several phone calls at his number but found it switched off. Next day at about 4:30 pm she came to know that police recovered a dead body from Dhalkaia forest. Then and there she along with her brother-in-law Billal (PW4) and cousin-sister Rokeya rushed the police station. In the meantime the dead body was sent to the morgue of Comilla Medical College Hospital. She, however, saw a photograph of the dead body and recognized it to be of her husband. They rushed Comilla Medical College Hospital Morgue, saw the dead body of her husband and came back to village. They informed the villagers about the occurrence, when they (villagers) caught hold of Abul Kashem and the CNG driver Mohsin. On interrogation, they disclosed that 9:00-11:00 pm on at 09.07.2011 they had killed Charu by strangulation with a piece of cloth and left the dead body in Dhalkaia forest. They also disclosed the name of Monir as their accomplice. It was further stated in the FIR that the apprehended persons were bit injured because of mass beating.

3. The police investigated the case and submitted charge sheet on 22.08.2011 against the three accused (condemned prisoners herein) under sections 302 and 34 of the Penal Code. It is mentioned that immediately after arrest, all the accused persons made confessions before the Senior Judicial Magistrate, Comilla on 11.07.2011 wherein they confessed their complicity and participation in the occurrence.

4. The case being ready for trial was sent to the Sessions Judge, Comilla. Learned Sessions Judge by order dated 29.09.2011 framed charge against the accused under sections 302 and 34 of the Penal Code. The charge was read over to them, to which they pleaded not guilty and claimed justice.

5. The prosecution in order to prove its case examined ten witnesses out of eighteen who were named as such in the charge sheet. PW 1 Md. Bahauddin Kazi, the then Senior Judicial Magistrate, Comilla stated that he had recorded confessions of accused Monir Hossain, Mohsin and Abul Kashem under section 164 of the Code of Criminal Procedure on 11.07.2011. He did it in prescribed form following the rules and procedure as laid down in section 164 of the Code. They confessed their guilt voluntarily. The recorded confessions were read over to them, and accused Abul Kashem put his left thumb impression while Monir Hossain and Mohsin put their signatures there.

6. In cross-examination he reiterated that he had observed all legal formalities in recording the confessions. Accused Monir Hossain had stated that he was arrested on 10.07.2011 at 7:00 pm and also stated that he (Monir) had confessed his guilt to the villagers. He did not make any statement about physical torture on him. He (PW 1) denied the defence suggestion that because of threat of police as well as local people, accused Monir was compelled to make confession. He further denied that while recording confessions, the police was standing at the door on the plea of security, or that the accused persons made statement about police torture on them or that the confessions were not voluntary or that those were not read over to them.

7. PW 2 Nilufa Akhter, informant and widow of deceased Abdur Rahim Charu stated that accused Kashem had called away her husband to his tea stall on 09.07.2011 at about 5:00 pm for repayment of loan money. He did not return home in the following night and on several calls his phone was found switched off. Her parents-in-law, brother-in-law and other relations unsuccessfully searched for him. On the following day i.e 10.07.2011 at about 4-4:30 pm she got news that police had recovered a dead body from Dhalkaia forest at village Ekbalia and took it to police station. She rushed the police station, where police showed her a photograph of the dead body and informed that it was already sent to the Comilla Medical College Hospital Morgue for holding autopsy. She identified the dead body of her husband seeing the photocopy and went to morgue and saw the dead body. She returned home and disclosed the facts to the villagers, when the villagers caught hold of accused Kashem from his tea stall and Mohsin from his house. Both of them confessed their involvement in the occurrence in front of the villagers. She produced them to the police station with the help of others and lodged the FIR. At about 10:00 pm another accused Monir was apprehended.

8. In cross-examination she affirmed her statement made in the FIR that the accused persons were injured because of beating by the villagers, but denied the suggestions that Kashem did not owe her husband or that he did not call him away at 5:00 pm on the date of occurrence.

9. On recall for cross-examination, she further stated that Kashem had called away her husband on 09.07.2011. She and other inmates of the house saw him to call. She also informed her neighbors Ali Ashraf, Mizanur Rahman, Munir and Zaynal about the calling away. She denied that at the instance of those who had beaten the accused, she implicated them (accused) falsely in the present case.

10. PW 3 Rajib, a villager stated that he along with others caught hold of Mohsin at about 5:00 pm on 10.07.2011 from his house, where he confessed that he along with Monir and Kashem had killed Charu. Thereafter, they caught hold of Abdul Kashem from a place beside his tea stall, where he was playing carom. On interrogation Kashem disclosed that he owed Charu Taka 90,000/-, which he had taken on an undertaking on stamp paper. He called away Charu on 09.07.2011 on the pretext of repaying the loan money taking from Monir's sister. Thereafter, he took Charu to Monir's house situated at village Ekbalia with the help of Mohsin. All of them walked inside the forest and killed him by strangulation with a piece of cloth. However, the villagers handed them over to the police and apprehended Monir from village Ekbalia, who also confessed his guilt. The police took him to the police station as well.

11. In cross-examination he denied the suggestions that he had not stated to the IO what he deposed on dock, or that while they apprehended the accused, no senior citizen was there or that they had beaten Mohsin. He further denied that deceased Charu was involved in smuggling and killed by his own men.

12. PW 4 Bilal Hossain, cousin brother of deceased Charu stated that at about 11:00 pm on 09.02.2011 he learnt from his sister-in-law (informant) that Kashem had called away Charu at about 5:00 pm. At about 12 o'clock she further informed him that he (Charu) did not yet return. At afternoon on the following day he had come to know about recovery of the dead body and went to police station along with the informant and his sister. They identified the dead body of Charu seeing the photographs taken by police, went to the morgue thereafter and saw the dead body. He further stated that he was also included in the team, which apprehended accused Mohsin. He made an extra-judicial confession disclosing his involvement in the occurrence and that of accused Kashem and Monir. Thereafter they (PW 4 and villagers) apprehended accused Abdul Kashem, who also disclosed the occurrence in similar manner. Subsequently they apprehended accused Monir, who made similar extra-judicial confession and all the accused were produced to the police.

13. In cross-examination he affirmed that they had apprehended Mohsin first and he made an extra-judicial confession. He further stated that the accused persons made confessions out of fear. On recall he stated that on the following day of lodging the FIR, the informant told him that accused Kashem had called away her husband at about 4:00 pm on the previous day.

14. PW 5 Md. Russell stated that she came to know about the occurrence from the informant on 10.07.2011. She informed him that Kashem had called away her husband on 09.07.2011 at about 5:00 pm. Since then he was traceless. On the following day his dead body was found. He (PW 5) along with the villagers apprehended Mohsin. On interrogation he made an extra-judicial confession that he along with Kashem and Monir had killed Charu. Then and there they apprehended Kashem, who also made an extra-judicial confession in similar way. They had communicated the inmates of Monir's village over cell phone, who apprehended Monir.

15. In cross-examination he stated that accused Mohsin made an extra-judicial confession in a three storied building belonged to Naim.

16. PW 6 Doctor Md. Ariful Haque, Lecturer of Forensic Medicine Department, Comilla Medical College stated that he had conducted autopsy on the dead body of the deceased

victim. The dead body was brought by constable Shafique Khan. He (PW 6) found thereon one continuous circular ligature mark around his neck and one hematoma measuring 2" X 2" on the back scalp.

17. He opined that the death caused of asphyxia due to strangulation and head injury as well. The injury was antemortem and homicidal in nature. He proved the autopsy report and his signature there (exhibits-5 and 5/1).

18. PW 7 Mozammel Hoque, a local witness stated that he went to Chowmohani at the evening on 10.07.2011 and learnt that victim Charu was killed and further learnt that accused Kashem had called him away from his house on 09.07.2011 on the pretext of repayment of loan money. Since then he was missing and thereafter his dead body was found. He along with the local people apprehended Mohsin, who made an extra-judicial confession that they (accused persons) took Charu inside the forest and killed him. On the same day they (PW 7 and villagers) apprehended Kashem, who also made an extra-judicial confession in similar way. Following their statements, accused Monir was apprehended from his house at village Ekbalia.

19. He denied the defence suggestion that out of enmity on share of gambled money, the victim was killed or that out of enmity he deposed falsely against the accused or that because of beating by police and local people, the accused were compelled to confess.

20. PW 8 Mahiuddin, a local witness was tendered by the prosecution and the defense declined to cross-examine him.

21. PW 9 Md. Haidar Ali, a *Habildar* of Border Guard Bangladesh (BGB) stated that he was posted to Bouhara BGB Camp on 10.07.2011. He received information that dead body of an unknown person was lying in Dhalkaia forest. After obtaining instruction of the Camp-in-charge, he along with four other members of BGB and some police personnel rushed there and saw the dead body. Its neck was tied by a local towel (গামছা). Police conducted inquest on the dead body and prepared an inquest report. He proved the said inquest report and his signature there (exhibits-6 and 6/1).

22. In cross-examination he stated that the dead body was found on no-man's-land and a flag meeting was held for taking the dead body.

23. PW 10 Md. Abu Yousuf, a Sub-Inspector of police and Investigating Officer (IO) stated that he along with police forces was on mobile duty on 10.07.2011. At about 13:00 hours he received a radio message that a dead body was found inside Dhalkaia forest. On holding a flag meeting along with the BGB personnel, they went there and saw dead body of a man. There was mark of injury on the dead body and its neck was wrapped with a piece of cloth looked like a local towel. He conducted inquest thereron and prepared an inquest report. They took photograph of the dead body and sent it for conducting autopsy through police constable Shafique Khan. He (PW10) proved the photograph as material exhibit-1. He further stated that the widow of deceased Charu produced Abdul Kashem and Mohsin to the police station and lodged the FIR. Inspector Jashim Uddin filled up the FIR form. Since he (PW 10) had served with him (Inspector Jashim Uddin), he knew his hand writing and signature. He took up the investigation of the case and immediately thereafter arrested accused Monir. He visited the place of occurrence (PO), prepared an sketch map with the index thereof. All the three accused made confessions to the Magistrate. The CNG auto rickshaw, by which Charu

was taken to forest, was also seized under a seizure list. He proved the said seizure list and his signature there (exhibits-12 and 12/1). The seized CNG driven auto rickshaw was given back in custody of its owner under order of the Court. The accused Mohsin was the driver of that auto rickshaw.

24. In cross-examination he stated that he could not seize any blood stained earth from the place of recovery as it was washed away by rainwater in the meantime. He, however, made a note to that effect in the case diary. He denied the defence suggestion that the dead body was found inside the Indian territory and brought to Bangladesh on holding flag meeting. He further denied that he had threatened the accused of cross-fire taking them to a vacant place around Comilla airport or that because of his threat and torture the accused were compelled to make confessions. He further stated that he had examined the witnesses on 11.07.2011 under section 161 of the Code of Criminal Procedure, when PW 3 Rajib stated that after mass beating the accused made extra-judicial confessions to the villagers and further stated that he recorded their statements under section 161 of the Code at about 11:40 am on 11.07.2011.

25. After closing the prosecution evidence, the accused were examined under section 342 of the Code to which all the three accused reiterated their innocence and did not examine any defence witness, but accused Mohsin and Monir made separate statement. In his statement accused Mohsin explained that he was taking shower at home, when PW 3 Rajib, PW 5 Russel, Naim, Raju and Masum (not examined) went to his house and called him to a three storied building. They beat him there and gave false hope that if he made a confession, they would send him safely to India. They had confined him for a long time and opted that if he paid them Taka 50,000/-, he would be free. Thereafter, the police took him to police station and tortured him. On the following day, police produced them to the court with threat that if they did not make confessions before the Magistrate, they would be put in danger. Accused Monir explained that at the time of apprehension by the local people, he was severely beaten. Police threatened him of cross-fire keeping foot on his chest. Still he did not make any confession to the Magistrate. Then he was taken to the General Registering Officer (GRO) and put his signature on a paper at the instance of the IO.

26. After conclusion of trial, learned Sessions Judge pronounced the judgment and order of conviction and sentence as stated above giving rise to this death reference, criminal and jail appeals.

27. Mr. Md. Moniruzzaman, learned Deputy Attorney General appearing for the State submits that according to the FIR condemned prisoner Abul Kashem called the deceased victim Abdur Rahim Charu away from his house at afternoon on the date of occurrence. PW 2, the informant in her evidence clearly affirmed this part of the FIR. PWs 4 and 5 stated that the informant had told them about calling away of the deceased victim by accused Abul Kashem at afternoon on the date of occurrence and thereby corroborated PW 2. At the following night, deceased victim Charu did not return home and on the following day his dead body was found. If this circumstance of seeing the victim lastly with accused Kashem is read together with the confessions made by the accused and background of lending money from the deceased victim, it can easily be held that accused Abul Kashem with the help of CNG driver Mohsin and his close friend Monir took the deceased victim to Dhalkaia forest and killed him by strangulation with a piece of cloth which looked like a local towel (গামছা). The postmortem report read with the evidence of PW 6 Doctor Ariful Haque shows the reason of death to be asphyxia by strangulation, which lends further corroboration to the confessions. Before making the judicial confessions, when the accused persons were

apprehended by the villagers on receiving information from the informant, they (accused persons) also made extra-judicial confessions. They were arrested in the evening on 10.07.2011 and produced before the Senior Judicial Magistrate on the following day i.e. 11.07.2011, where all of them made confessions. PW 1, the recording Magistrate himself affirmed those confessions to be true and voluntary and proved the same as exhibits 1-3 with his signatures and that of the accused put there. The case is clearly a proved one and the trial Court on proper sifting of evidence rightly passed the conviction and sentence. Since it was a pre-planned cool-blooded murder of heinous nature, learned trial Judge was fully justified in awarding the sentence of death.

28. Mr. Md. Bodiuzzaman, learned Advocate appears on behalf of Ms. Fatema Begum, Advocate engaged for Monir Hossain, one of the condemned prisoners and appellant in Criminal Appeal No. 6253 of 2012 submits that the Magistrate who recorded confessions of the accused did not tell them that they would not be sent back to police custody even if they did not make any confessions and also did not make any memorandum as required by section 164 (3) of the Code. Without such memorandum a confession cannot be treated to be true and voluntary. Referring to the postmortem report, which shows an antemortem and homicidal head injury on the dead body, Mr. Bodiuzzaman further submits that the said injury having not been mentioned in either confession, it cannot be said to have been corroborated by the postmortem report. Besides, there are major contradictions between the confessions made by the three accused, which discarded the truthfulness of each other. It would be evident from the last line of the FIR as well as cross-examination of PWs 1, 4 and 10 read with the statement of PW 3 made under section 161 of the Code that before making the so called extra-judicial confessions, the accused persons were beaten by mass people. The forwarding report by which the police produced them before the Magistrate also shows injuries on their persons. Still the Magistrate in the prescribed form of confessions stated that he did not find any such injury. It clearly indicates that the Magistrate mechanically recorded their statements and did not at all satisfy himself that those were made voluntarily. Such confessions can never form the basis of conviction.

29. Mr. Bodiuzzaman further submits that it would be clear from the evidence of PWs 3, 4, 5 and 7 that the villagers apprehended accused Mohsin first. If the accused Abul Kashem had called away the deceased victim from his house and it was the only clue, then usual course of human conduct suggests that they would apprehend Abul Kashem first, interrogate him and on extracting information from him would go for further apprehension of his accomplices, namely, Mohsin and Monir. Since they apprehended accused Mohsin first, it indicates that there was a plan to implicate the accused persons, which makes the case seriously doubtful.

30. Mr. Bodiuzzaman lastly submits that the demeanor of accused Monir does not indicate his complicity in the occurrence and he had no reason to be involved therein. No motive on his part was disclosed by the prosecution. The prosecution failed to prove the case on that count as well.

31. Mr. Shamsur Rahman, learned Advocate appearing for two others condemned prisoners and appellants in Criminal Appeal No. 7528 of 2012 refers to the FIR and submits that it is not clearly mentioned whether the informant herself saw accused Kashem to call away her husband. It rather gives an impression that after making extra-judicial confessions, she came to learn about the facts and lodged the FIR, but in her evidence on recall she posed herself to be an eyewitness to the calling away of her husband to make out a case that the

accused was last seen with the deceased victim. This is nothing, but subsequent embellishment by way of deposition. None of the villagers saw the victim to go with accused Abul Kashem or by the CNG driven auto rickshaw of accused Mohsin, none of the inmates from the house of deceased victim except the informant came forward to depose that accused Abul Kashem actually had called him away. In such a position it is really difficult to believe that the calling away of deceased Charu by the principal accused Abul Kashem has been proved. According to PW 3 Rajib, accused Kashem was playing carom beside his tea stall before apprehension. According to the confession made by accused Mohsin, he was taking shower at his home, wherefrom he was taken to a three storied building. It is quite unusual and against criminal psychology that after recovery of the dead body, the real offenders would not be alert or go in hiding. So, the demeanor of the appellants does not support their complicity in the occurrence.

32. Mr. Rahman lastly submits that the recording Magistrate did not make any memorandum at the foot of the recorded confession in his own hand, even the printed language of the memorandum does not contain the words provided in section 164 (3) of the Code and as such the confessions cannot be treated to be true and voluntary and form the basis of conviction. In support of his submission on this point, he refers to the case of State vs Babul Miah, 63 DLR (AD) 10.

33. In reply thereto, learned Deputy Attorney General submits that the Magistrate recorded confession on a prescribed form. The form was prescribed in the General Rules and Circular Orders (Criminal) framed by the High Court Division under article 107 of the Constitution and supplied to all the Magistrates. There is no scope for a Magistrate to make a hand written memorandum except that under column No.8 of the prescribed form. At the foot of recorded confession under column No.7, there is already a printed memorandum, under which the Magistrate already put his signature. Where there is already a printed form of making memorandum in the language of the statute and the place of putting signature is also pointed, the Magistrate has no scope to make a new memorandum of his own. In this case, the Magistrate filled up all necessary blank places, put his signatures on the required places, it was read over to the accused and on clear understanding of the contents thereof one of the accused put his left thumb impression and two of them put signatures there. The Magistrate himself deposed on oath supporting the procedural correctness, truthfulness and voluntariness of the confessions and proved the same. In such a position there is no scope to invalidate the confessions for not making a hand written memorandum by the Magistrate himself. Even if the Magistrate did not put his signature under column No. 7, it would be valid in the event of his deposition in support of recording the same by him.

34. Learned Deputy Attorney General further submits that in 63 DLR (AD) 10, their lordships of the Appellate Division did not consider its own judgment passed earlier in the bunch cases of Major Bazlul Huda (Artillery) vs State, 62 DLR (AD) 1 and also did not consider the legal implication of section 533 of the Code. In case of non-compliance with any of the provisions of section 164 or section 364 of the Code, if the recording Magistrate deposes in support of the correctness of recording the statement, and if it does not affect the merit of the defence case, the confession is admissible in evidence. Such confession can from the basis of conviction without any second thought, if it is true and voluntary.

35. We have considered the submissions of the learned Advocates of both the sides, carefully examined the evidence and other materials on record and gone through the decisions cited and some other decisions on the points raised. Learned Advocate raises

objection against validity of the confessions as the memorandum was not written by own hand of the recording Magistrate and its language did not exactly match that of section 164 (3) of the Code.

36. It appears that the learned Magistrate filled up the blank spaces in columns No.1-4 of the prescribed form of confession and put tick mark on every explanation under column No.5 in his own hand writing. He put questions to the accused whether he (accused) knew that he was not bound to make any confession and if he made any confession, it would be used as evidence against him. The accused made replies thereto in affirmative. The Magistrate noted all the questions and the replies of the accused in his own handwriting under column No.6. He also recorded the confessional statement under column No.7 in the same way, took a signature of the accused just thereunder and put his own signature at the place below as fixed in the form. He put his signature at the bottom of recorded confession on the additional sheet and took that of the accused. Just below to his signature under column No. 7 of the form there is a printed memorandum and next to that another space is fixed for putting his (Magistrate's) another signature. There is no blank space for making any memorandum in own handwriting of the Magistrate in between the printed memorandum and the place fixed for his signature. This type of prescribed form presupposes no handwritten memorandum under column No.7. However, there is a blank space for making memorandum under column No.8, which the recording Magistrate is required to fill up stating the reason of his belief regarding voluntariness of the confession. Accordingly, the Magistrate made a memorandum in his own handwriting recording his satisfaction towards the voluntariness of the confession. Since there is no place fixed for his signature under column No.8, he did not sign the memorandum.

37. There is another blank space under column No.9 to record the reason of discontinuing the proceeding under section 164 of the Code, if it appears to the Magistrate that the confession of the accused is not voluntary. There is also no place fixed for putting the Magistrate's signature. But at the extreme bottom of the form and under column No.10 there is a place fixed for putting his last signature. So, if any Magistrate does not make any memorandum in his own handwriting under column No.7, or does not put his signature after making memorandum under column No.8 and does not put his signature after making memorandum, if any, under column No.9, it cannot be held to be a gross illegality and fatal to the prosecution case. The purpose of making memorandum in compliance with section 164 (3) of the Code would suffice by signing the printed memorandum, provided that the precautions prescribed by the Code are duly taken by the recording Magistrate.

38. The Magistrate himself deposed on oath as PW 1 and asserted that he had recorded the confession in accordance with the provisions of section 164 of the Code and proved the recorded confessions, his signatures and that of the accused put there.

39. For better appreciation of the above discussion, part of the prescribed form with recorded confession of accused Abul Kashem is reproduced below:

"6. In order to ascertain whether the accused is prepared to make a statement of his own free will, he is next examined as follows:-

Questions.	*Answers and any further Statement made by the accused.*

১। আমি পুলিশ নই ম্যাজিস্ট্রেট, জানেন কি? জ্বি হা।

২। আপনি দোষ স্বীকার করতে বাধ্য নন। জানেন কি? হা।

৩। আপনি দোষ স্বীকার করলে তা স্বাক্ষ্যে আপনার বিরুদ্ধে ব্যবহৃত হবে, জানেন কি? জ্বি হা।

৪। আপনি অন্যের শেখানো মতে কিছু বলবেন না তো? জ্বি না।

৫। আপনি অসত্য কিছু বলবেন না তো? জ্বি না।

7. Record of statement made-

The statement of আবুল কাশেম aged about ৩০ years, made in the বাংলা language.

My name is আবুল কাশেম

My father's name is মৃত-তাজুল ইসলাম

I am by caste মুসলমান and by occupation চায়ের দোকান

My home is at Mauza রাজাপাড়া Police-station সদর দক্ষিণ

District কুমিল্লা I reside at রাজাপাড়া

রাজাপাড়া চৌমুহনী বাজারে আমার চায়ের দোকান আছে। মনির আমার বন্ধু। মহসিন CNG ড্রাইভার, সে জানতোনা। রহিম @ চারু আমার কাছ থেকে ৪৫,০০০ টাকা পাওনা ছিল। সুদে আসলে তারা ৯০ হাজার টাকা দাবী করে। মনির বলেছে তার বোনের জামাইর কাছ থেকে ৫০ হাজার টাকা হাওলাত দিবে। মনির আমাকে বলে যে, রহিমকে সাথে করে নিয়ে গেলে ৫০ হাজার টাকা দিবে। C.N.G. ড্রাইভার মহসিনকে নিয়ে মনিরের বাড়ী একবালিয়া যাই। এর ১০/১২ দিন আগে আমি ও মনির রহিম @ চারুকে মারার পরিকল্পনা করি। রাত ১০.০০/১০.৩০ এর সময় আমি, মহসীন ও রহিম @ চারু মনিরের বাসায় পৌছি। মনিরের বাড়ীর পাশে C.N.G. রাখি। মনিরের বাড়ী থেকে বাগানে যাই। রাত অনুমান ১১.০০ এর সময় ধলকাইয়া ফরেস্ট বাগানে মনির রহিম @ চারুর গলা ও পরে মুখ চেপে ধরে। মহসীন বুকের উপর উঠে। আমি ২ পায়ে ধরে রাখি। কিছুক্ষণ পর রহিম @ চারু মারা যায়। আমরা বাগান হতে চলে আসি। মনির তার বাড়ীতে চলে যায় আমি ও মহসীন আমার দোকানে ঘুমাই। এলাকার লোকজন জিজ্ঞাসা করায় আমি ঘটনা স্বীকার করি। এ আমার জবানবন্দী।

Statement

[*Note*-This should be taken down as nearly as possible in the words of the accused and whenever a question is put to him the question should be recorded together with the answer. If the statement is long, foolscap sheets serially numbered may be inserted here for the purpose, provided the statement begins and also ends and is signed on the form itself.]

Sd/=

(Signature mark of the accused.)

Sd/=

(Signature of Magistrate)

40. I have studied carefully the provisions of Rule 23 of the High Court's General Rules and Circular Orders Chapter I, Volume I (Criminal), and have observed strictly the directions therein. I have also applied strictly the provisions of section 164 of the Criminal Procedure Code.

41. I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

Sd/=

(Signature of Magistrate.)

8. Brief statement of Magistrate's reason for believing that the statement was voluntarily made.

[Note-Any complaints of ill-treatment or injuries noticed on the accused or referred to by the accused should appear under paragraphs 6 and 7 but should be specifically noticed here and the action taken by the Magistrate tereon should mentioned. When the confession is recorded otherwise than in the Court building and during Court hours the Magistrate's reasons are likewise to be recorded here.]

আসামীকে reflection এর জন্য ৩ ঘন্টা সময় প্রদান করা হয়। তাকে CrPC এর ১৬৪ ধারার বিধান ব্যাখ্যা করা হয়। আসামী পুলিশি নির্যাতনের অভিযোগ করেনি, তার শরীরে নির্যাতনের চিহ্ন পাওয়া যায়নি। বেআইনী হেফাজতে ছিল না। তাই জবানবন্দী স্বেচ্ছায় হয়েছে।

9. If at any stage it shall appear to the Magistrate that the statement made or about to be made by the accused is not voluntary, the Magistrate shall forthwith record an order hereunder discontinuing the proceeding under section 164, Criminal Procedure Code, and stating reasons therefor.

10. The accused is forwarded to কুমিল্লা কেন্দ্রীয় কারাগার

Sd/=

(Signature of Magistrate)

[Note. The Form to be used by Magistrates recording confessions is the one which contains the appropriate Rules in margin.] **"**

(emphasis supplied)

42. The above quoted form of recording confession is a statutory form, which was prescribed in the General Rules and Circular Orders (Criminal). The memorandum appended under column No.7 of the form was printed in the language of section 164 (3) of the Code that was in force before its amendment by the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923). By the said amendment, the words "*I believe*" at the bottom of section 164 (3) were substituted by "*I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe*", but no ancillary modification was made to the General Rules and Circular Orders (Criminal) or in the form of confession prescribed and printed thereunder. As a result the old prescribed forms were supplied to the Magistrates with the

same language used in section 164 (3) of the Code before its amendment in 1923. Even after repeal of the General Rules and Circular Orders (Criminal) by the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009 and prescribing a modified form under the title "Form No. M (45)" the same pre-amendment language is printed in the memorandum.

43. We have collected a form printed in 2017-18 to examine the present position and found that the old title "Form No. M (84)" instead of "Form No. M (45)" is still printed at the top of the form and also at the margin of front page. Similarly the reference of rule "23" instead of "78" and section 24 to 28 of the "Indian Evidence Act" instead of the "Evidence Act" at the top of margin of the front page and "rule 23 of the General Rules and Circular Orders, Chapter I, Volume I (Criminal)" instead of "rule 78 of the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009" in the memorandum under column No.7 on page 4 are still printed. These are inconsistent with the form prescribed in the existing Rules. This defective form is being supplied to the Magistrates, and they have been recording confessions there.

44. It thus appears that there was/is inconsistency between the law and form of confession including the printed memorandum to be signed by the Magistrate as prescribed under the repealed/existing Rules. There is also inconsistency between the form prescribed under the existing Rules and the printed form, which is now available to the Magistrates. It creates confusion among the members of Bar as well as the recording Magistrates as to whether the Magistrate is required to make handwritten memorandum at the bottom of recorded confession under column No.7. Where there is already a printed memorandum in the language of law, albeit pre-amendment, it would be an unnecessary and meaningless exercise for the Magistrates to make another memorandum thereunder in the same language.

45. The purpose of making memorandum, issuing certificate or sanction or writing application in a prescribed form is to do it perfectly so that no mistake takes place. When a prescribed form for a particular purpose is provided with in the Criminal Rules and Orders, there is no scope to deviate therefrom and make something new by the Magistrate himself, even if the form is defective and not yet corrected/amended/modified by proper authority.

46. The effect of non-compliance with any of the provisions of section 164 or section 364 of the Code has been decided in the bunch cases of *Major Bazlul Huda (Artillery) vs State*, 62 DLR (AD) 1 in the light of section 533 of the Code. In the said case, S K Sinha, J (as his lordship then was) speaking for the Court observed:

> *"641. In this particular case we are concerned with section 533 of the Code. The first learned Judge has wrongly noticed section 537 of the Code in considering any error or omission or irregularities that occurs while recording confessional statement by a Magistrate. Section 533 reads as follows:*
>
> *'533. Non-compliance with provisions of section 164 or 364(1)- If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.*
>
> *(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.'*

"642. This section provides a mode for the rectification of an error arising from noncompliance with any of the provisions of section 164 or section 364. The object is to prevent justice being frustrated by reason of such non-compliance. If any of the provisions of this section have not been complied with by a Magistrate, the document may be admitted under this section upon taking evidence that the statement recorded was duly made, if non-compliance has not injured the accused to his defence on the merit. If the record of the confession or the statement is inadmissible owing to the failure to comply with any of the provisions of section 164 or section 364, intrinsic evidence notwithstanding anything in section 91 of the Evidence Act may be given to show that the accused person duly made the statement and the statement, when so proved may be admitted and used as evidence of the case, if non-compliance has not injured the accused. The non-compliance with the provisions is cured only when there is no injury caused to the accused as to his defence on merit." (emphasis supplied)

47. In deciding the above case, his lordship relied on the views expressed in *Mohammad Ali vs Emperor*, 35 CrLJ 385 (FB); Kehar Sing and other vs The State (Delhi Admin) AIR 1988 SC 1883 and in the bunch cases of State vs Nalini and others, 1999 5 SCC 253.

48. We have also gone through some other cases from Indian jurisdiction including *Chavadappa Pujari and others vs Emperor,* AIR 1945 (Bom) 292; *Tukaram Khandu Koli vs Emperor*, AIR 1933 (Bom) (Full Bench) 145 and *Mussamat Aimna vs Emperor,* 32 CrLJ 1931, 579.

49. In the case of *Chavadappa Pujari* (ibid), the Magistrate did not record confessions of two accused in his own handwriting and also did not make any memorandum. In deciding the case, Divatia, J observed:

"Then as to the contention that the confession was not taken by the Magistrate in his own handwriting and had not made any memorandum thereof, the learned Magistrate admits that he did not make any memorandum of the confession in English, but that the confession was recorded in the vernacular in his presence and he has appended this certificate at the end of the confession. No doubt under S. 164 read with S. 364 the Magistrate has to make a memorandum in his own handwriting, but that defect, as we have recently held is cured by the provisions of sub-s. (1) of S. 533 when the Magistrate is examined in the case. As the Magistrate has been examined and has given a satisfactory explanation of the same, I do not think the omission to make the memorandum in the Magistrate's own handwriting makes the confession inadmissible in evidence. Lastly, the contention that there were two certificates at the end of the confession instead of one has no force in it. Really speaking, a note has been added to the certificate which is attached to the confession, and the note simply states what the Magistrate did after the accused was produced before him. That note is not a part of the certificate. There is, therefore, no substance in that contention. In our opinion, the confession of accused 1 must be regarded as true as well as voluntary and it is undoubtedly evidence against him." (emphasis supplied)

50. In *Tukaram Khandu Koli* (ibid), the same point was referred to a Full Bench, wherein it was observed:

"It cannot reasonably be inferred from S. 364 that the memorandum at the foot of the confession prescribed by S. 164(3) must also be in the Magistrate's own hand. He has only to make the memorandum and that is sufficiently done by signing it. The form of the memorandum being prescribed by the Code itself, it would surely be futile to

require the Magistrate to copy the words from the book, and to make the admissibility of the confession depend upon his having done so. As regard the third point urged by Mr. Rele, independently of the judgment in Emperor vs Housabai (2)*, namely, that the memorandum, was appended at the foot of the English record of the confession and not at the foot of the vernacular record of it, I agree with my learned brother Baker that if this is an irregularity at all, it is a mere technicality and of no consequence. In the present case I am satisfied by the record of the confession and the Magistrate's certificate at the foot thereof that the precautions prescribed by the Code were duly taken, that the accused was warned that he was not bound to confess, and that the Magistrate satisfied himself by all reasonable and necessary means that the confession was voluntary. I hold therefore that it is admissible."* (emphasis supplied)

51. In *Mussamat Aimna* (ibid), the question of using the old form before amendment of section 164 of the Code in 1923 was raised. In deciding the issue, Coldstream, J observed:

"*Objection is taken by Counsel for appellants to the evidence of the confessions at Sitpur on the ground that the Honorary Magistrate did not append to his records certificates that he had explained to the accused that their confessions might be used as evidence against them, the certificates appended being on the old form prescribed before the amendment of section 164 of the Code of Criminal Procedure in 1923. The irregularity has not injured the appellants as to their defence on the merits and has been duly cured by the evidence of the Magistrate himself who as a witness testified that he had, as a fact, made the necessary explanation before recording the statements."* (emphasis supplied)

52. In *State vs Babul Miah*, 63 DLR (AD) 10 as cited by the learned Advocate for the appellant, no one was named even suspected in the FIR and no allegation of stealing any articles was there. Accused Babul Miah, who held the leg of deceased victim Dhan Miah, was convicted under section 302/34 of the Penal Code and sentenced to death, but another accused named Jabbar who killed the deceased victim by throttling followed by strangulation was acquitted for want of legal evidence. On an appeal, the High Court Division acquitted him (Babul Miah) on the grounds that the extrajudicial confessions as evidenced by PWs 3, 4 and 6 were subsequent embellishment and not reliable, and that the judicial confessions being recorded after three months lost its force apart from being obtained by means of torture and intimidation. The Appellate Division affirmed the said judgment of acquittal passed by the High Court Division disbelieving recovery of some articles including a tape recorder and current jack, and found the allegation of stealing those articles to be concocted and also observed that the Magistrate while recording judicial confession did not make any memorandum under column No.7 as required by law.

53. In the present case, the accused were specifically named in the FIR. They made confessions just on the next day of their arrest and without going on remand i.e. at the earliest possible time, and their confessions appear to be partly true. Their extrajudicial confessions are not subsequent embellishment and appear to be true on the material fact of taking the deceased victim inside the forest and killing him there, but not voluntary as being extracted under mass beating. The principal accused has also not been acquitted here. So, the case of *Babul Miah* (ibid) and the present one are distinguishable on facts and circumstances. It also appears that the Bar failed to bring into notice of the Hon'ble Court the curing effect of section 533 of the Code in case of non-compliance with any of the provisions of section 164 or section 364 thereof and also failed to bring into its notice the inconsistency between the law and prescribed form of confession, and relevant decisions on the points involved.

54. Since the use of old printed memorandum with pre-amendment language and not making of memorandum by own hand of the Magistrate do not injure the accused as to their defence on merits, it would not make the confessions inadmissible in the case in hand. At the same time we are of the view that the apparent inconsistency, irregularity and ambiguity in the printed form as discussed above should not continue for indefinite period. Under article 107 of the Constitution read with section 554 (2) (b) (c) of the Code of Criminal Procedure it is duty of the Supreme Court to frame Rules, or amend the existing Criminal Rules and Orders in conformity with the law and prescribe a correct and unambiguous form of confession so that no confusion arises on the part of the Magistrates in recording confessions under section 164 of the Code. The legal debate on the procedure of recording confessions in prescribed form should also be decided once for all. It is expected that the Rule Committee constituted under rule 7A of the Supreme Court of Bangladesh (High Court Division) Rules, 1973 (as amended up to date on 12 November, 2012) will look into the matter and make necessary recommendation for consideration of the Full Court.

55. It appears from the record that the Sub-Inspector of Police Md. Abu Yousuf, who produced the arrested accused before the Magistrate on 11.07.2011, in his application for recording the confessions stated that since accused Abul Kashem and Mohsin were beaten and injured by the local people, they were medically treated by Doctor. A medical certificate to that effect was also attached with the application. In the lower Court's file, we also find a prescription issued by the Doctor, which shows that the arrested persons were medically treated at the outdoor of General Hospital at Comilla and was prescribed to take medicines including capsule Tetracycline 200 mg. The prescription of an anti-biotic to the accused presupposes some wounds on their persons. Statement about mass beating of the accused was also made in the FIR as well as in the evidence of PWs 1, 4 and 10. Attention of PWs 3 and 10 was drawn about his (PW 3's) statement made under section 161 of the Code that the accused made extrajudicial confession after they were beaten.

56. In section 164 of the Code, in the Rules framed under article 107 of the Constitution read with section 554 of the Code and in so many decisions of the Supreme Court, the Magistrates have been cautioned that at the time of recording confession, the precautions prescribed by law must be taken and they must be satisfied about the truthfulness and voluntariness of confession. Where an accused is produced by police, the Magistrate would not only satisfy himself about the truthfulness and voluntariness from the declaration of the accused, but also from an attentive observation of his demeanour. In the present case the Magistrate recorded that he did not find any injury caused by the police on the accused, but he ought to have applied his mind into the contents of the forwarding application and carefully observed their demeanour and made an explanation about the injury found on their persons, and made further inquiry on the injuries and recorded his satisfaction whether the injuries were caused by mass beating or custodial torture and whether they were still under fear of beating. Besides, there are some other inconsistencies in the prosecution case, which need to be considered to arrive at a correct decision. According to the FIR and evidence of PW 2, accused Kashem called away deceased Charu from his house. Therefore, the suspicion raised among the informant and villagers should be directed towards Kashem and it was quite natural that after the dead body was found, the villagers would apprehend and interrogate him first. But from the evidence of PWs 3, 4, 5 and 7 it appears that condemned prisoner Mohsin was apprehended first. It is not clear what prompted the villagers to apprehend Mohsin before extracting any information from accused Kashem. At the same time it appears from the postmortem report as well as the evidence of PW 6 that there was a head injury on the dead

body and according to the expert witness (PW 6) that injury was also a cause of his death, which was antemortem and homicidal. How this injury was caused on the head of the deceased is not explained and the confessing accused did not make any statement about the said injury.

57. Under the above circumstances, we are of the view that the confessions appear to be partly true, but not voluntary. This type of confessions cannot form the sole basis of conviction unless it is corroborated by some other piece of evidence.

58. This is true that the accused persons were arrested in the evening on 10.07.2011 and produced before the Magistrate at 12 o'clock on the next day i.e. at the earliest opportunity and they made the confessions before the Magistrate without going on remand. The recording Magistrate is still required to be objectively satisfied about the truthfulness and voluntariness of the confessions, otherwise it cannot be the sole basis of conviction under the facts and circumstances already stated.

59. In that view of the matter, we have also to examine whether there is any corroboration to the confessions. The informant herself deposed in support of statement made in the FIR that accused Kashem had called away her husband, which was corroborated by PWs 4 and 5. PW 7 Mozammel Hoque, apparently an independent witness also stated in his deposition that at the afternoon on 09.07.2011 he heard that accused Kashem had called away victim Charu on the pretext of repayment of loan. This part of his evidence has got circumstantial value, although he did not mention any specific name who had told him about the calling away. Nowhere in the defence case we find that somewhere at some point of time victim Charu was departed from accused Abul Kashem. On the following day his dead body was found at Dhalkaia forest. This circumstance corroborates the confession of accused Kashem. The background of taking loan and not repaying the same despite repeated demand also appears to be believable. So, it has been proved that accused Kashem had taken loan from the deceased victim and he called him away at the afternoon on the day of occurrence. We thus find that the confession made by Abul Kashem has been corroborated by the circumstance of his calling away of the deceased victim at the afternoon on the day of occurrence and as such his confession can be based for his conviction. But so far it relates to accused Mohsin and Monir, we do not find any other prosecution evidence that they were seen with the deceased victim before or after the occurrence, or to go together with Kashem by the auto rickshaw or enter into the forest or come out therefrom at the material time. So, their confessions, which do not appear to be voluntarily made and not corroborated by any other direct or circumstantial evidence, are not sufficient to base their conviction. This is correct that there are strong reasons to suspect them to be involved in the occurrence, but this suspicion whatever strong is cannot be the substitute of legal evidence. We are, therefore, of the view that the charges so far it relates to accused Mohsin and Monir have not been proved by legal evidence. However, accused Abul Kashem is in imprisonment for seven years and in the death row for about six years. At the time of commission of occurrence he was a young man of 30 (thirty) years age and his previous record appears to be clean. In such a position we also think that the sentence of death awarded upon him should be commuted.

60. Accordingly the Death Reference is rejected. The Criminal Appeal No. 6253 of 2012 is allowed and Criminal Appeal No. 7528 of 2012 is allowed in part so far it relates to appellant No.2 Mohsin, and it is dismissed with modification of the judgment and order so far it relates to appellant No.1 Abul Kashem. The judgment and order dated 25.09.2012 passed in Session Case No. 1073 of 2011, so far it relates to condemned prisoners Mohsin and Monir

Hossain, is set aside. The judgment and order so far it relates to conviction of Abul Kashem passed under section 302 of the Penal Code is upheld, but the sentence of death awarded upon him (Abul Kashem) is commuted to imprisonment for life. The jail appeals are accordingly disposed of.

61. The condemned prisoner Abul Kashem is to be shifted from condemned cell and Mohsin and Monir Hossain are to be set at liberty forthwith if not wanted in any other case.

62. Let a copy of this judgment be placed before the learned Members of the Rule Committee.

63. Send down the lower Court's record.

13 SCOB [2020] 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

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-83)

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-88)

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 " 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:

76. 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."

77. 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.

78. 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.

79. 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.

80. 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."

81. 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.

82. 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.

83. 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.

84. 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।'

85. 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।'

86. 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।'

87. 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.

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.

13 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 7251 of 2016

S.M. Sajjad Hossain, son of late Bozlur Rahman and late Jobeda Begum, Village-Khararia, P.O.-Khararia, Upazila-Kalia, District-Narail.
……. Petitioner.

Vs.

Chairman, National Freedom Fighter Council, Ministry of Freedom Fighter, Goveremnt Paribahan Pool Bhavan Secretariat Link Road, Dhaka-1000 and others.
…Respondents.

Mr. Omar Sadat with
Mr. Md. Jahangir Zamadder, Advocates
..For the petitioner.

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.2.

with
Writ Petition No. 11671 of 2016

In the matter of:
Md. Abul Hashnath Beg. Freedom Fighter
……. Petitioner.

Vs.

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

Ms. Nargis Tangima Khatun, Advocate
....For the petitioner.

with
Writ Petition No. 14203 of 2016

In the matter of:
Md. Ahamad Ali and others
……. Petitioners.

Vs.

Bangladesh and others.
…Respondents.

Ms. Salina Akter, Advocate
....For the petitioners.

with
Writ Petition No. 15155 of 2016

In the matter of:
Md. Rowshon Ali & others, Advocates
.. petitioners.

Vs.

Bangladesh and others.

Ms. Salina Akter, Advocate
.....For the petitioners.

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.1.

with
Writ Petition No. 15572 of 2016

In the matter of:
Md. Abdul Mannaf and others.
……. Petitioners.

Vs.

Bangladesh and others.
...…Respondents.

Ms. Salina Akter, Advocate
....For the petitioners.

with

Writ Petition No. 16076 of 2016

In the matter of:
Neamat Ali Sheikh and others
……. Petitioners.

Vs.

Government of Bangladesh and others.
..…Respondents.

Mr. Sharif Ahmed, Advocate
....For the petitioners.
with
Writ Petition No. 625 of 2017

In the matter of:
Md. Rois-ul Mufassirin and others
……. Petitioners.

Vs.

Bangladesh and others.
…Respondents.

Mr. Md. Eunus Ali Akond, Advocate

....For the petitioners.

with
Writ Petition No. 4395 of 2017

In the matter of:
Md. Anamul Haque and others
……. Petitioners.

Vs.

The govt. of Bangladesh and others.
…Respondents.

Mrs. Nargis Tanzim Khatun, Advocate

....For the petitioners.
with
Writ Petition No. 14784 of 2017

In the matter of:
Md. Humayun Kabir and others
……. Petitioners.

Vs.

Governemnt of Bangladesh and others.
…Respondents.

Mr. Sharif Ahmed, Advocate
....For the petitioners.
with
Writ Petition No. 13163 of 2017

In the matter of:
Jatindra Nath Sen and others
……. Petitioners.

Vs.
Governemnt of Bangladesh and others.
…Respondents.
Mr. Sharif Ahmed, Advocate
....For the petitioners.
with
Writ Petition No. 13262 of 2018

In the matter of:
Md. Abul Kalam
……. Petitioner.

Vs.

The Secretary, Ministry of Freedom Fighter and Liberaton War Affairs, Goverment of the People's Republic of Bangladesh, Secretariat, Dhaka and others.
.....Respondents.

Mr. Md. Eunus Ali Akond, Advocate
....For the petitioner.

Mr. Md. Borhan Miah, Advocate
..For the respondent No.5.
with
Writ Petition No. 10736 of 2018

In the matter of:
Md. Siddiqur Rahman and others
……. Petitioners.

Vs.

Governemnt of People's of Bangladesh and others.
…Respondents.

Mr. Shasti Sarker, Advocate
....For the petitioners.
with
Writ Petition No. 12353 of 2018
In the matter of:
Md. Saizuddin alias Haji Mohammad Saiz Uddin Ahamed.
……. Petitioner.

Vs.

Governemnt of People's Republic of Bangladesh and others.
…Respondents.

Mr. Shuvrojit Banerjee, Advocate
....For the petitioners.
with
Writ Petition No. 11821 of 2018

In the matter of:
B.M. Amdad Hossain
……. Petitioner.

Vs.

Governemnt of People's Republic of Bangladesh and others.
…Respondents.

Mr. Shuvrojit Banerjee, Advocate
....For the petitioner.
with
Writ Petition No. 8708 of 2018

In the matter of:
Mahmud Hasan
……. Petitioner.
Vs.
Governemnt of Bangladesh and others.
…Respondents.
Mr. A.R.M. Kamruzzaman Kakon, Advocate
....For the petitioner.

Heard on 24.01.2019, 10.04.2019 and 08.05.2019.

Judgment on: 19.05.2019.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Razik-Al-Jalil

Age of freedom fighters;

It is well settled that in exercise of executive functions of the government, the government can issue circulars, notifications, paripatra etc. to keep its work transparent. Such notifications or circular etc. may be issued in order to give benefits of the enlisted freedom fighters, which is no doubt an appreciable job by the government. But in doing so, the government cannot amend the parent law, namely the definition of freedom fighter as provided by Article 2(h) of P.O. 94 of 1972.

When parliament itself cannot fix the age of freedom fighters as the fixing of such age of freedom fighters will be contrary to the Speech of Bangabandhu and the Declaration of Independence by Bangabandhu, which are part of the Constitution, the same Parliament cannot empower the government to fix such age. On this very simple ground, this empowerment "উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে" as incorporated in the definition of 'বীর মুক্তিযোদ্ধা' under section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No.51 of 2018), has become untra-vires the Constitution.

It has long been decided by various judicial pronouncements that which you cannot do directly, you cannot do the same indirectly. As stated above, when the Parliament itself cannot fix the age of the freedom fighters even by enactment of law without amending the Constitution, it cannot empower anybody including the government to fix such age of freedom fighters.

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. The petitioners, who are claiming themselves to be the enlisted and gazetted freedom fighters, have challenged in these writ petitions the actions of respondent authorities stopping their honorarium that they were receiving as freedom fighters as well as the memoranda issued on different dates by which minimum age of freedom fighters during liberation war have been fixed by the government.

3. <u>Back Ground Facts:</u>

3.1. Facts, relevant for disposal of the Rules, are that, according to the petitioners, they were juvenile/child freedom fighters and joined the war of liberation to liberate this country in response to the call of Bangabandhu Sheikh Mujibur Rahman. It is contended by them that they fought in different frontiers during liberation war under the leadership of different sector commanders and, accordingly, they made their marks as child/juvenile freedom fighters and even lost some of their juvenile colleagues in such war. That after the war of liberation i.e. after independence of Bangladesh, they were accordingly given certificates by the concerned authorities including the government and their names were published in 'Muktibarta', which is commonly known as 'red book' and, subsequently, their names were published as freedom fighters in the gazette of the government. It is contended by some of the petitioners that though they were physically fit enough to participate in the liberation war, their SSC certificates were subsequently prepared with wrong dates of birth showing less age as that was the practice at the relevant time as adopted by the teachers and parents. It is also contended that child/juvenile freedom fighters, warriors or solders are not new concept, rather it has long history going back to the World War-I and that the participation of the child and juvenile freedom fighters in the war of liberation has been recognized by various historians in this country who wrote on the history of liberation war, in particular the book "মুক্তিযুদ্ধে শিশু-কিশোরদের অবদান", as written by Major Kamrul Hassan Bhuiyan. However, the petitioners have found in 2015 that the government started fixing the minimum age of freedom fighters at the time of liberation war by issuing different Paripotro, Nirdeshika and memo from time to time purportedly on the recommendation of the Jatiyo Muktijoddha Council.

3.2. It is commonly contended by them that since they have fought the war of liberation responding to the call of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman, who did not make such call with any discrimination

or to any particular group of citizens, rather to all the citizens of Bangladesh irrespective of their age, and since the such call of Bangabandhu and his declaration of independence have become part of the Constitution, government is not empowered to change the status of the petitioners as freedom fighters by fixing a minimum age at any particular time for being such freedom fighters.

3.3. By obtaining the Supplementary-Rule challenging the definition of 'Valiant Freedom Fighters' as provided by Section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018, in particular the empowerment of the government by such definition to fix the date of freedom fighters, it is contended in Writ petition No. 7251 of 2016 that this provision is ultra-vires the Constitution inasmuch as that the same has empowered the government to fix the date of the freedom fighters retrospectively who fought the war of liberation in 1971. It is contended therein that this empowerment of the government by the Legislature cannot be done inasmuch as that the same has given unguided power to the government and that the same is contrary to the historic speech of Bangabandhu Sheikh Mujibur Rahman and his declaration of independence as incorporated in the Constitution. It is also contended that such power cannot be given to the government inasmuch as that the same has given the power on the executives to fix the date of freedom fighters retrospectively, in particular when the executives are not in a position to determine such age after 45 years of the liberation war as to whether a freedom fighter at certain age was competent to participate in the liberation war.

3.4. With the above backgrounds, the petitioners obtained the aforesaid Rules challenging the said memos fixing the minimum date of freedom fighters as well as the provisions of Section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No. 51 of 2018) in so far as the same relates to the empowerment of the government to fix the age of the Freedom Fighters time to time.

3.5. The Rules are opposed by the government by filing affidavit-in-opposition and supplementary-affidavit-in-opposition in one writ petition, namely in Writ Petition No. 15155 of 2016, contending mainly that after enactment of the Freedom Fighters Council Act, 2002, in particular the provisions under Section 7(jha) therein, the Jatiyo Muktijoddha Council (JAMUCA) has been conferred with the power by the Parliament to prepare the list of genuine freedom fighters and to determine the forgery in the certificates of the freedom fighters and, accordingly, to recommend the government for cancellation of such freedom fighters' certificates. In doing so, it is contended, JAMUCA initially recommended the government for fixing the minimum age of freedom fighters at 13 years on 26.03.1971 and, subsequently, made further recommendations to change the said age and finally the same was changed on such recommendation to 12 years 6 months on a particular date in 1971. Therefore, it is contended that, since JAMUCA has been empowered by the Parliament to detect exploitation of the benefits of freedom fighters given by the government time to time and to detect the forged certificates of freedom fighters in order to publish the list of genuine freedom fighters and to recommend accordingly, the government has fixed the said ages on

JAMUCA's recommendation and, as such, has committed no illegality. However, by a subsequently filed supplementary-affidavit dated 06.05.2019 in Writ Petition No.15155 of 2016, it is contended by this respondent that such age limit will only be applicable to the new enlistment of freedom fighters, and not to the freedom fighters who have already been enlisted and gazetted.

3.6. It is also contended by this respondent that with the enactment of Bangladesh Freedom Fighters Welfare Trust Act, 2018, in particular with the conferment of power on the government by the definition of 'Valiant Freedom Fighters' as provided by Section 2(11) of the said Act, the government became empowered to fix such ages of freedom fighters time to time. Therefore, according to this respondent, no illegality has been committed and that such empowerment by the Parliament should not be held to be ultra-vires the Constitution.

4. **Submissions**:

4.1. Learned advocates appearing for the petitioners, namely Mr. Omar Sadat, Mr. A.B.M. Altaf Hossain, Ms. Salina Akter, Mrs. Nargis Tanzim Khatun, Mr. Md. Eunus Ali Akond, Mr. Sharif Ahmed, Mr. Shasti Sarker, Mr. Shuvrojit Banerjee and Mr. A.R.M. Kamruzzaman Kakon have argued the cases at length in favour of the petitioners. However, main legal submissions in this bunch of cases has been made by Mr. Omar Sadat by referring to various provisions of the Constitution as well as enactments and notifications, circulars, Nirdeshika etc. as issued by the government from time to time. The basic submissions of Mr. Omar Sadat, learned advocate, which have been adopted by the learned advocates of the other petitioners in all writ petitions, are as follows:

1) That the definition of the term 'freedom fighters' was given by Bangladesh (Freedom Fighters) Welfare Trust Order, 1972 (P.O. 94 of 1972) immediately after the liberation of this country in exercise of the power of the then President Bangabandhu Sheikh Mujibur Rahman and the said definition did not restrict anything as regards the age of the freedom fighters. Therefore, according to him, that definition as provided by the said P.O. 94 of 1972 cannot be changed by the government without amending the said law;

2) That the said P.O. 94 of 1972 has empowered the government or the Board to make Rules and Regulations for proper working of the said Presidential Order. However, no such Rules and/or Regulations having been framed by the government, the definition of freedom fighter as provided by the said Presidential Order has been changed by the Government by different circulars time to time without any lawful authority and as such the same cannot stand in the eye of law;

3) By referring to the provisions under the Constitution, in particular the Preamble of our Constitution and the provisions under the 6th Schedule of the Constitution as incorporated vide Article 150(2) containing particularly therein the historic speech of Bangabandhu Sheikh Mujibur Rahman as delivered on 7th March, 1971, the telegraphic declaration of independence as given by Bangabandhu Sheikh Mujibur Rahman in the early morning of 26th March, 1971 and the proclamation of independence as given by the Mojibnagar

Government on 10th April, 1971, he submits that the same having become part of the Constitution and since in the said speeches and proclamations, the people at large of this country were urged to participate in the liberation war to liberate the country from Pakistany occupying forces and since the petitioners participated in the said liberation war on such call of Bangabandhu Sheikh Mujibur Rahman irrespective of their ages, religions cast etc., the Government cannot now change basic tenor of such historic speech and proclamations of Bangabandhu Sheikh Mujibur Rahman as well as the definition of freedom fighters impliedly given therein through such speech and proclamations without amending the Constitution. Therefore, according to him, since the fixation of ages of freedom fighters at different times by the government, either on its own or on the recommendation of JAMUCA, being made contrary to the provisions of the Constitution, the same are nothing but nullity in the eye of law;

4) That since the aforesaid declaration of independence and speech of the father of the nation became part of the Constitution, the same cannot be changed by mere enactment of law in the Parliament, in particular by enacting Bangladesh Freedom Fighters Welfare Trust Act, 2018, thereby changing the definition of freedom fighters as given by such speech and declaration of independence. Therefore, since the provision under Section 2(11) of the said Act, 2018 has changed the said definition as incorporated in the Constitution without amending the Constitution, the same has become void ab initio in view of the provisions under Article 7(2) of the Constitution;

5) That since the Freedom Fighters Welfare Trust Act, 2018, in particular Section 2(11) of the same, has given unguided power on the government to fix the age of the freedom fighters who participated in the war of liberation in 1971, such unguided and unbridled power cannot be delegated by the Parliament and as such the delegation of legislative power to the executives is beyond the scope of the Constitution. Accordingly, the said empowerment of the government is ultra-vires the Constitution.

6) That since child warriors, soldiers, freedom fighters is nothing new in this world, rather it has histories as back as to the World War-1 wherein some children of 8 years, 9 years and 12 years fought the war with gallantry and were awarded different gallantry certificates, some children and juveniles in Bangladesh were also not exception as they participated in the liberation war and were awarded certificates for their gallantry. In this regard, he has referred to the awarding of 'Bir Protik' in favour of one such child freedom fighter named Shahidul Islam (Lalu). He then referred to a detailed report published on the said Shahidul Islam (Lalu) in Daily Ittefaq on 10.12.2014 showing him in a picture on the lap of Bangabandhu Sheikh Mujibur Rahman surrounded by Kader Siddique Bir Uttom and other freedom fighters;

7) Further referring to a decision of our Appellate Division in **Freedom Fighters Trust vs Mominul Haq, 14 BLC (AD) 2009-41**, Mr. Sadat submits that since the petitioners' entitlement to receive honourariam regularly being curtailed without any prior show cause notice or enquiry being conducted against them

on the basis of any allegation, such stoppage of honourariam and cancellation of benefits are without lawful authority being violative of principle of natural justice;

8) By referring to some schemes as adopted by the Indian Government to give benefit to their freedom fighters, learned advocate submits that when our neighboring country is providing more and more benefits to the freedom fighters, who agitated and fought against the British Regime, our government is reducing such benefits time to time by putting forward various hurdles for the freedom fighters who have once been recognized as freedom fighters and gazetted as such;

9) That if the provisions under Section 2(11) of Bangladesh Freedom Fighters Welfare Trust Act, 2018 are allowed to remain in the statute book, any future government, with hidden anti-liberation agenda, might take the advantage of the said provisions and might further curtail the entitlement of the freedom fighters as the said provision has given unguided power on the government to determine the age of the freedom fighters retrospectively. According to him, if such practices of empowerment of government is allowed, one day might come when the freedom fighters will be declared as Razakars;

10) As against above submissions, Mr. Mokleshur Rahman, learned Deputy Attorney General representing the Government, submits that under the Jatiyo Muktijoddha Council Act, 2002, JAMUCA was empowered by the Parliament to detect the forgery in the certificates of freedom fighters and to enlist the genuine freedom fighters and, accordingly, to recommend the government for cancellation of any such certificates. Therefore, according to him, since the JAMUCA has time to time recommended the government to fix the age of the freedom fighters to prevent the illegal exploitation of different benefits given to the freedom fighters, the government has committed no illegality in complying with such recommendation of JAMUCA and, accordingly, in fixing such minimum ages of freedom fighters. He submits that with the new enactment of Bangladesh Freedom Fighters Welfare Trust Act, 2018, in particular the provisions under Section 2 (11) therein, the government has been finally empowered by the Parliament to fix such ages of freedom fighters.

5. <u>Discussions, Findings and Orders:</u>

5.1. Before going into the merit of the arguments of the parties, let us first discuss the history of the definition of the term 'freedom fighters' as has recognized by the presidential orders, our Constitution and different laws. Even before the Bangladesh Constitution came into being physically, the then President of Bangladesh Bangabandhu Sheikh Mujibur Rahman issued President Order No. 94 of 1972 on 7th August, 1972, wherein the term 'freedom fighter' was defined for the first time under Article 2(h) in the following terms:

"2(h) freedom fighter" means any person who had served as a member of any force engaged in the war of liberation but shall not include members of the defence Services or the Police or the Civil Armed Forces:"

5.2. Under the said P.O. 94 of 1972, in particular Articles 16 and 17 thereof, the government and the Freedom Fighters Welfare Board respectively were empowered to make Rules and Regulations, not inconsistent with the provisions of the said Presidential Order, for carrying out the purposes of the said P.O. Admittedly, no such Rules and Regulations have ever been framed under the said Presidential Order. The said Presidential Order went through various amendments subsequently, but the relevant amendment in 1980 vide Act No. 41 of 1980 is relevant in that by this amendment, the definition of 'freedom fighter' has been amended by excluding two other categories or persons from the said definition, namely the government pensioners and any other persons having any regular source of income. However, these subsequent amendments are not very much relevant for the purpose of these writ petitions.

5.3. The Government Servant (Seniority of Freedom Fighters) Rules, 1979:

This Rules of 1979 was framed by the President (circulated vide notification dated 24.12.1979) in exercise of the power of the President under Article 133 of the Constitution. It has been stated in the preamble of the said Rules that the same was framed after consultation with the Public Service Commission as required by Clause (2) of Article 140 of the Constitution. It appears that this Rules of 1979 was in fact framed to recognize or declare the government officials as freedom fighters who played role in favour of liberation of Bangladesh during the war of liberation. Amongst others, Rule 4 of the said Rules gave two years anti-dated seniority to the government servants who were determined as freedom fighters as per the definition given by Rule 3 of the said Rules. The said definition, as provided by the said Rules under Rule 3, is quoted below:

"3. Definition.-In these rules, unless there is anything repugnant in the subject or context, "Freedom Fighter" means any of the following persons who being employee on the 25th March, 1971, of the erstwhile Government of Pakistan or of the Government of East Pakistan/West Pakistan participated in the War of Liberation, namely:

(ii) Those who officially reported to the Government of Bangladesh at Mujibnagar and were accepted by the Government of Bangladesh;

(iii) Those who abstained from their duty under the occupation regime and did not receive salary from that regime with a view to participating in the liberation struggle, whether staying inside or outside Bangladesh, for a continuous period of not less than three months immediately preceding the 3rd of December, 1971, and did not serve under any other Government or under any organization which was not under the control of the Government of Bangladesh but could not formally report to the Government of Bangladesh at Mujibnagar;

(iv) Those who expressly declared their allegiance to the Government of Bangladesh from abroad and thereby defected from service under the else while Central or Provincial Government before the 31st of October, 1971.

(v) Those who worked for the liberation struggle and carried out instructions of the Government of Bangladesh at Mujibnagar during the period from the 17th April to the 10th December, 1971 but has not openly declared their allegiance to the Government of Bangladesh from abroad for tactical reasons and under clear and recorded instructions from, the Government of Bangladesh at Mujibnagar; and

(vi) those who suffered imprisonment or detention in the hands of occupation army and on release were not reinstated or were dismissed or removed from Service or did not join Service before 16th December, 1971".

5.4. Therefore, it appears that, for a particular purpose of giving benefit to the government servants who played Role in favour of the Mujibnagar government or played role in various countries in favour of the liberation war of Bangladesh, the government has given them recognition as 'freedom fighters' by incorporating them in the above quoted definition. In this regard, Article 133 of the Constitution may be quoted below:

"133. Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic: Provided that it shall be competent for the President to make rules regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law".

It appears from the above proviso to Article 133 that the Constitution has empowered the Hon'ble President to make Rules regulating the appointment and conditions of service of the public servants until any law in that behalf is made. Therefore, in exercising the power to make Rules regulating the appointment condition of service of the public servant, whether the president can give a new definition of 'freedom fighters' by Rule 3 of the said Rules of 1979 remains a big question, in particular when the definition of freedom fighter as given by PO 94 of 1972 was still operative at the relevant time. However, since this issue is not relevant in these writ petitions, we do not need to go any further thereon.

5.5. Jatiyo Muktijoddha Council Ain, 2002

Subsequently, Parliament enacted the above Act in 2002 (Act No. 08 of 2002) and gazetted the same on 07.04.2002 in order to establish or create a Council under the name 'Jatiyo Muktijoddha Council' (JAMUCA). Amongst various other acts, Section 7 (Jha) of the said Act provides that JAMUCA shall prepare the list of genuine freedom fighters and shall detect the forgery in the certificates of freedom fighters and, accordingly, shall recommend the government for cancellation of such certificates. Neither this Act No. 08 of 2002 has defined the term 'freedom fighter, nor the same Act has amended the already existing definition of the term 'freedom fighter' as provided by Article 2(h) of P.O. 94 of 1972. This Act has not also given any power on JAMUCA to redefine the term 'freedom fighter'. It has only empowered JAMUCA to prepare the list of genuine freedom fighters, to check the certificates of such freedom fighters, to detect the forgery therein and to recommend the government for cancellation of such certificate, if they are found to be forged certificates. Therefore, we have not found anything in this Act under which JAMUCA can recommend the government for fixation of the minimum age of freedom fighters, in particular when such fixation will in fact change the definition of the term 'freedom fighter' as provided by Article 2(h) of the P.O. 94 of 1972. On the other hand, like P.O. 94 of 1972, Sections 25 and 26 of this Act have empowered the Government and Council respectively to make Rules and Regulations for carrying out the purpose of the said Act. Admittedly, no

such Rules or Regulations have yet been framed either by the government or by the JAMUCA.

5.6. Bangladesh Muktijoddha Kalyan Trust Act, 2018 (Act No. 51 of 2018):

Finally, the Parliament has enacted this Act No. 51 of 2018 and gazetted the same on 08.10.2018. By this Act, Presidential Order No. 94 of 72 has been repealed and, accordingly, the term 'freedom fighters' has been renamed and redefined by Section 2 (11) in the following terms:

২(১১) **"বীর মুক্তিযোদ্ধা"** অর্থ জাতির পিতা বঙ্গবন্ধু শেখ মুজিবর রহমান কর্তৃক স্বাধীনতার ঘোষণায় সাড়া দিয়া যাঁহারা দেশের অভ্যন্তরে গ্রামে-গঞ্জে যুদ্ধের প্রস্তুতি ও অভ্যন্তরীণ প্রশিক্ষণ গ্রহণ করিয়াছেন এবং ১৯৭১ খ্রিস্টাব্দের ২৬ মার্চ হইতে ১৬ ডিসেম্বর পর্যন্ত বাংলাদেশের মহান স্বাধীনতা অর্জনের লক্ষ্যে পাকিস্তানি হানাদার বাহিনী ও জামায়াতে ইসলামী এবং তাহাদের সহযোগী রাজাকার, আলবদর, আলশামস বাহিনীর বিরুদ্ধে মুক্তিযুদ্ধে সক্রিয় অংশগ্রহণ করিয়াছেন এইরুপ সকল বেসামরিক নাগরিক এবং সশস্ত্র বাহিনী, মুজিব বাহিনী, মুক্তি বাহিনী ও অন্যান্য স্বীকৃত বাহিনী, পুলিশ বাহিনী, ই.পি.আর. নৌ কমান্ডো, কিলো ফ্লাইট আনসার বাহিনীর সদস্য এবং নিম্নবর্নিত বাংলাদেশের নাগরিকগণ, উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়সসীমার মধ্যে, বীর মুক্তিযোদ্ধা হিসাবে গন্য হইবেন, যথা:-

ক) যে সকল ব্যক্তি মুক্তিযুদ্ধে অংশগ্রহণের লক্ষ্যে বাংলাদেশের সীমানা অতিক্রম করিয়া ভারতের বিভিন্ন প্রশিক্ষণ ক্যাম্পে তাহাদের নাম অন্তর্ভূক্ত করিয়াছিলেন;

খ) যে সকল বাংলাদেশি পেশাজীবী মুক্তিযুদ্ধের সময় বিদেশে অবস্থান কালে মুক্তিযুদ্ধের পক্ষে বিশেষ অবদান রাখিয়াছিলেন এবং যে সকল বাংলাদেশি নাগরিক বিশ্বজনমত গঠনে সক্রিয় ভূমিকা পালন করিয়াছিলেন;

গ) যাঁহারা মুক্তিযুদ্ধকালীন গঠিত গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) অধীন কর্মকর্তা বা কর্মচারী বা দূত হিসাবে দায়িত্ব পালন করিয়াছিলেন;

ঘ) মুক্তিযুদ্ধে অংশগ্রহণকারী ও গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) সহিত সম্পৃক্ত সকল এম.এন. এ (Member of National Assembl) বা এম.পি.এ (Member of Provincial Assembly), যাঁহারা পরবর্তীকালে গণপরিষদের সদস্য (Member of Constituent Assembly) হিসাবে গণ্য হইয়াছিলেন;

ঙ) পাকিস্তানি হানাদার বাহিনী ও তাহাদের সহযোগী কর্তৃক নির্যাতিতা সকল নারী (বীরাঙ্গনা); তবে সন্দেহতীতভাবে প্রমাণিত নির্যাতিতা নারী বা বীরাঙ্গনার ক্ষেত্রে সরকার কর্তৃক নির্ধারিত বয়সসীমা প্রযোজ্য হইবে না;

চ) স্বাধীন বাংলা বেতারকেন্দ্রের সকল শিল্পী ও কলা-কুশলী এবং দেশ ও দেশের বাহিরে মুক্তিযুদ্ধের স্বপক্ষে দায়িত্ব পালনকারী সকল বাংলাদেশি সাংবাদিক;

ছ) স্বাধীনবাংলা ফুটবল দলের সকল খেলোয়াড়;এবং

জ) মুক্তিযুদ্ধকালে আহত বীর মুক্তিযোদ্ধাগণের চিকিৎসাসেবা প্রদানকারী মেডিক্যাল টিমের সকল ডাক্তার, নার্স ও চিকিৎসা-সহকারী;

(Underlines supplied)

By this Act, in particular Section 2(14), the term 'Muktijoddho' (Liberation War) has for the first time been defined by the Parliament, which is also quoted below:

২(১৪) **"মুক্তিযুদ্ধ"** অর্থ জাতির পিতা বঙ্গবন্ধু শেখ মুজিবর রহমান কর্তৃক স্বাধীনতার ঘোষণায় সাড়া দিয়া পাকিস্তানি হানাদার বাহিনী ও জামায়াতে ইসলামী এবং তাহাদের সহযোগী রাজাকার, আলবদর, আলশামস বাহিনীর বিরুদ্ধে গণপ্রজাতন্ত্রী বাংলাদেশের স্বাধীনতার জন্য ১৯৭১ খ্রিস্টাব্দের ২৬ মার্চ হইতে ১৬ ডিসেম্বর পর্যন্ত সংঘটিত যুদ্ধ;

(Underlines supplied)

5.7. Therefore, it appears from the above definition of the term 'Liberation War' (মুক্তিযুদ্ধ) that the Liberation War is the war which took place in Bangladesh between a period from 26 March, 1971 to 16 December, 1971 in response to the declaration of independence as given by the father of the nation Bangabandhu Sheikh Mujibur Rahman and the war which took place against the Pakistani occupying forces, Jamati Islami and their associate forces Razakar, Al-Bodor, Al-Shams. Therefore, this definition of 'Liberation of

War' again has recognized the 'Declaration of Independence' as given by the Father of the Nation and participation of the mass people of this Country in such Liberation War in response to such declaration.

5.8. However, the definition of "Valiant Freedom Fighter" (বীর মুক্তিযোদ্ধা) as provided by Section 2(11), has, amongst others, incorporated a new element therein in that it has empowered the government, by the terms "উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে", to determine the allowable age of the freedom fighters who participated in the Liberation War during the said period. Apart from the above four Legislations (three parent laws and one delegated legislation), we have not found any other parent law or delegated legislation dealing with the said definition of the term 'freedom fighters'. However, we have found some Nitimala, Nirdeshika or Paripatra issued by the government during a period from November, 2013 to 11.02.2018 by which the government has redefined and amended the term 'freedom fighters'. The said Nitimala, Nirdeshika, Paripatra etc (most relevant ones) are discussed below one after another.

5.9. In November, 2013, the government, through the Ministry of Liberation War, circulated a Nitimala under the title বীর মুক্তিযোদ্ধাদের সম্মানীভাতা বিতরণ নীতিমালা, 2013. There is no reference in the said Nitimala, either in the preamble or in the body, as to under what authority or exercise of what power of the parent law such Nitimala was framed and circulated. It appears from the said Nitimala of 2013 that the same was in fact circulated by the government in order to give certain benefits, namely the honorarium, to the freedom fighters, and initially Tk. 3000/- per month was fixed as honorarium to be paid to the freedom fighters. By this Nitimala of 2013, different committees down to the Upazilla level were constituted for distribution of such honorarium or benefits to the freedom fighters.

5.10. There is nothing wrong on the part of the government to frame such Nitimala in order to give benefits to the best Children of the Nation. Rather, it is one of the highly appreciable steps taken by the government to provide some benefits to the freedom fighters which the previous governments hardly gave. However, the problem arose when this Nitimala determined a standard under the title মুক্তিযোদ্ধা চিহ্নিতকরণের মানদন্ড (standard for identifying freedom fighters) at Clause 4 of the said Nitimala. The said মানদন্ড (standards) under Clause 4 of the said Nitimala are quoted below:

০৪. মুক্তিযোদ্ধা চিহ্নিতকরণের মানদন্ডঃ

মুক্তিযোদ্ধা নীতিমালার আওতায় মুক্তিযোদ্ধা বলতে নিম্নবর্ণিত ব্যক্তিগণকে বুঝাবেঃ-

১.মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে যাঁদের নামে মুক্তিযোদ্ধা সনদপত্র/মুক্তিযোদ্ধা সাময়িক সনদপত্র ইস্যু করা হয়েছে;

২.মাননীয় প্রধানমন্ত্রী কর্তৃক স্বাক্ষরিত বাংলাদেশ মুক্তিযোদ্ধা সংসদ, কেন্দ্রীয় কমান্ড কাউন্সিল হতে সনদধারী ব্যক্তিগণ;

৩.যাঁদের নাম মুক্তিবার্তা চূড়ান্ত তালিকায় (মুক্তিবার্তা লালবই) অন্তর্ভুক্ত আছে;

৪.যাঁদের নামে মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে গেজেট প্রকাশ করা হয়েছে;এবং

৫.মুক্তিযোদ্ধা হিসেবে মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে চূড়ান্তভাবে প্রকাশিত ডাটাবেইজে যাঁদের নাম অন্তর্ভূক্ত আছে।

5.11. Therefore, it appears that the government has set some standards for determining the freedom fighters in order for giving them benefits under the said Nitimala and by setting up such standards, the government has, knowingly or unknowingly, amended the then existing definition of "freedom

fighter", as provided by P.O. 94 of 1972. Not only that, by setting up such standards (or amending the said definition), the government has not made any reference to any power conferred on it by the Parliament under which such amendment was made.

5.12. The twist in the definition of the 'freedom fighters' has not ended there. By a further circular dated 02.09.2015 (which is specifically impugned in these writ petitions), as issued under the signature of one Assistant Secretary of the Ministry of Liberation, the government has given an instruction to the concerned officials of the government as regards formation of the Zilla Committee, Upazilla Committee etc. for giving benefits to the freedom fighters probably pursuant to the said Nitimala of 2013, (though no mention of the said Nitimala has been made therein). In this impugned circular dated 02.09.2015, the definition of the 'freedom fighters' has again been changed in the following terms:

(৩) ভাতা প্রাপ্তির ক্ষেত্রে বিবেচ্য-

ক) যাঁদের নাম মুক্তিবার্তা চূড়ান্ত তালিকায় (মুক্তিবার্তা লালবই) অন্তর্ভূক্ত আছে (সবুজ তালিকা গ্রহণযোগ্য নয়);

খ) যাঁদের নাম ভারতীয় তালিকায় অন্তর্ভূক্ত আছে;.....

গ) মাননীয় প্রধানমন্ত্রী কর্তৃক প্রতিস্বাক্ষরিত বাংলাদেশ মুক্তিযোদ্ধা সংসদ, কেন্দ্রীয় কমান্ড কাউন্সিল হতে সনদধারী মুক্তিযোদ্ধাগণ;

ঘ) মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে যাঁদের নামে মুক্তিযোদ্ধা সাময়িক সনদপত্র ইস্যু করা হয়েছে এবং যাদের নামে এ মন্ত্রণালয় কর্তৃক গেজেট প্রকাশ করা হয়েছে (তবে এক্ষেত্রে সাময়িক সনদপত্রধারীদের অবশ্যই গেজেট থাকতে হবে এবং গেজেটের নাম ঠিকানার সাথে সাময়িক সনদের মিল থাকতে হবে)

(৪) এছাড়াও মুক্তিযোদ্ধা সম্মানী ভাতা বিতরণে নিম্নবর্ণিত বিষয়সমূহ বিবেচনা করতে হবে-

ক) বিভিন্ন কারণে কারনিক ভূল হিসেবে নামের বানানে ই কার, ঈ কার, মৃত/মরহুম, মিয়া/মিঞা, সৈয়দ/ছৈয়দ ইত্যাদি কারণিক ভূল হিসেবে বিবেচ্য;

খ) নাম ঠিকানার ক্ষেত্রে মৌলিক পার্থক্য/ভূল থাকলে ভাতা প্রদান না করে এ ধরণের বিষয় সিদ্ধান্তের জন্য মন্ত্রণালয়ে প্রেরণ করতে হবে;

গ) সনদ, গেজেট, জন্ম সনদ, মুক্তিবার্তা/ভারতীয় তালিকা নম্বর প্রমাণকসমূহের আলোকে ভাতা প্রাপ্তির লক্ষ্যে মুক্তিযোদ্ধার তথ্যাদি যাচাই-বাছাই করতে হবে;

ঘ) মহানগর, জেলা ও উপজেলা পর্যায়ে গঠিত কমিটি মুক্তিযোদ্ধা সম্মানী ভাতা বিতরণ কার্যক্রম গ্রহণ করবেন এবং এ সংক্রান্ত প্রতিবেদন মন্ত্রণালয়ে প্রেরণ করবেন;

ঙ) ভাতা প্রাপ্তির ক্ষেত্রে ভাতাভোগীর বয়স ২৬/০৩/১৯৭১ তারিখে নূন্যতম ১৩ বৎসর হতে হবে। বয়স প্রমানের ক্ষেত্রে এসএসসি সনদকে সর্বাধিক গুরুত্ব দিতে হবে। এসএসসি সনদ না থাকলে সেক্ষেত্রে পাসপোর্টে উল্লেখিত বয়স বিবেচনায় নেয়া যেতে পারে অথবা নির্ধারিত ফরমে জন্ম সনদ ও এনআইডি মিলিয়ে বয়সের ক্ষেত্রে সিদ্ধান্ত নিতে হবে। মৃত মুক্তিযোদ্ধার ক্ষেত্রে যথাযথ কর্তৃপক্ষের নিকট হতে নিধারিত ফরমে মৃত্যুসনদ দাখিল করতে হবে।

It appears from Clause (4) (Uma) of the above circular that the government has, for the first time, fixed the minimum age of the freedom fighters at 13 years as on 26.03.1971. Further, it has been directed by the government that for determining such age, the SSC certificates shall have importance and, in the absence of such certificates, passports and other documents may be relied upon.

This fixation of minimum age has not stopped there. By another memo dated 25.04.2016, Clause 4(Uma) of the said Circular dated 02 September, 2015 has been amended in the following terms.

"ক) সূত্রের পরিপত্রে ৪ নং এনমিকের 'P' অনুচ্ছেদে ২৬.০৩.১৯৭১ তারিখের পরিবর্তে ১৭.০২.২০১৬ তারিখে অনুষ্ঠিত জাতীয় মুক্তিযোদ্ধা কাউন্সিলের ৩৪ তম সভায় 'যে সকল বীর মুক্তিযোদ্ধার নাম ভারতীয় তালিকায়, লাল মুক্তিবার্তায় আছে এবং যাদের মাননীয় প্রধানমন্ত্রীর প্রতিস্বাক্ষরিত সনদ আছে তাদের ক্ষেত্রে ৩০.১১.১৯৭১ তারিখে মুক্তিযুদ্ধকালীন বয়স ১৩ বছর নির্ধারণ করা হয়। অন্যান্যদের ক্ষেত্রে মুক্তিযোদ্ধার বয়স পূর্বের ন্যায় ২৬.০৩.১৯৭১ তারিখে ১৩ বছর বলবৎ থাকবে।"

(Underlines supplied)

5.13. Therefore, by the above amendments, two categories of freedom fighters were created and two dates were fixed for the said two categories of freedom fighters. One category being the category whose names were published in the Indian list of freedom fighters m¡m j¤¢J²h¡aÑ¡ and whose certificates were attested by the Hon'ble Prime Minister, the other category being the general freedom fighters. There is nothing on record to justify this creation of two categories of freedom fighters. We have not been able to know the position of JAMUCA as regards fixation of these dates and minimum ages. Apart from the statement in the affidavit-in-opposition of the government that they have done so on the recommendation of JAMUCA, JAMUCA itself has not cared to respond to the Rules issued by this Court. Therefore, we have not come to know as to on what basis these dates and ages were recommended by JAMUCA or these two categories of freedom fighters were created by JAMUCA, in particular when JAMUCA was not given any power under the JAMUCA Act, 2002 to amend the definition of 'freedom fighters' or to create different categories of freedom fighters.

5.14. Now another twist was in offing. Vide gazette notification dated 10.11.2016, a decision of the government vide notification dated 06.11.2016 was published. It was contended therein that the definition of Muktijoddha and the age of Muktijoddha were re-determined by the government on the recommendation of JAMUCA. The concerned gazette is reproduced below:

বাংলাদেশ গেজেট

অতিরিক্ত সংখ্যা

কর্তৃপক্ষ কর্তৃক প্রকাশিত

বৃহস্পতিবার , নভেম্বর ১০, ২০১৬

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয়
প্রজ্ঞাপন

তারিখ : ২২ কার্তিক ১৪২৩ বঃ/০৬ নভেম্বর ২০১৬ খ্রিঃ

বিষয় ঃ "মুক্তিযোদ্ধা" এর সংজ্ঞা ও বয়স নির্ধারণ ।

নং ৪৮.০০.০০০০.০০৪.৪৯.২৩৩.০৯-১৮৩২-জাতীয় মুক্তিযোদ্ধা কাউন্সিলের সুপারিশের আলোকে প্রকৃত মুক্তিযোদ্ধাগণের একটি নির্ভরযোগ্য ও গ্রহণযোগ্য তালিকা প্রণয়নের লক্ষ্যে **"মুক্তিযোদ্ধা"** এর সংজ্ঞা ও বয়স নিম্নরূপ নির্ধারণ করা হ'লঃ

সংজ্ঞা ঃ "জাতির পিতা বঙ্গবন্ধু শেখ মুজিবর রহমান কর্তৃক স্বাধীনতার ঘোষণায় সাড়া দিয়ে ১৯৭১ সালের ২৬ শে মার্চ হতে ১৬ ডিসেম্বর পর্যন্ত সময়ের মধ্যে যে সকল ব্যক্তি বাংলাদেশের মহান স্বাধীনতা অর্জনের লক্ষ্যে মুক্তিযুদ্ধে অংশগ্রহণ করেছেন তাঁরাই মুক্তিযোদ্ধা হিসেবে গণ্য হবেন"। যথাঃ

ক) যে সমস্ত ব্যক্তি মুক্তিযুদ্ধে অংশগ্রহণের জন্য বাংলাদেশের সীমানা অতিক্রম করে ভারতের বিভিন্ন ট্রেনিং /প্রশিক্ষণ ক্যাম্পে নাম অন্তর্ভূক্ত করেছেন;

খ) সে সকল বাংলাদেশী পেশাজীবী মুক্তিযুদ্ধের সময় বিদেশে অবস্থানকালে মক্তিযুদ্ধের পক্ষে বিশেষ অবদান রেখেছেন এবং যে সকল বাংলাদেশী বিশিষ্ট নাগরিক বিশ্বে জনমত গঠনে সক্রিয় ভূমিকা রেখেছেন;

গ) যাঁরা মুক্তিযুদ্ধকালীন সময়ে গঠিত গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) অধীনে কর্মকর্তা/কর্মচারী হিসেবে দায়িত্ব পালন করেছেণ;

ঘ) সশস্ত্র বাহিনী, পুলিশ, ইপিআর, আনসার বাহিনীর সদস্য যাঁরা মুক্তিযুদ্ধে সক্রিয় অংশগ্রহণ করেছেন;

ঙ) মক্তিযুদ্ধে অংশগ্রহণকারী ও গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) সাথে সম্পৃক্ত এমএনএগণ (MNA) ও এমপিএগণ (MPA) (গণপরিষদ সদস্য);

চ) পাকিস্তানি হানাদার বাহিনী ও তাদের সহযোগী কর্তৃক নির্যাতিত নারীগণ (বীরাঙ্গনা);

ছ) স্বাধীন বাংলা বেতার কেন্দ্রের শিল্পী ও কলাকুশলীবৃন্দ এবং দেশ ও দেশের বাহিরে দায়িত্ব পালনকারী বাংলাদেশী সাংবাদিকগণ;

জ) স্বাধীন বাংলা ফুটবল দলের খেলোয়াড়বৃন্দ;

ঝ) মুক্তিযুদ্ধকালে আহত মুক্তিযোদ্ধাদের চিকিৎসাসেবা প্রদানকারী মেডিক্যাল টীমের ডাক্তার, নার্স ও সহকারীবৃন্দ।

০২ । মুক্তিযোদ্ধা হিসেবে নতুনভাবে অন্তর্ভূক্তির ক্ষেত্রে মুক্তিযোদ্ধার বয়স ২৬-০৩-১৯৭১ তারিখে ন্যূনতম ১৩ বছর হতে হবে।

০৩। জনস্বার্থে প্রজ্ঞাপনটি জারী করা হল এবং উহা অবিলম্বে কার্যকর হবে।

রাষ্ট্রপতির আদেশক্রমে
মোঃ মাহবুবুর রহমান ফারুকী
উপসচিব।

(Underlines supplied)

By this gazette notification, in particular Clause 2 thereof, the government fixed the minimum age of freedom fighters at 13 years on 26.03.1971 and it was provided therein that such age limit would apply only in respect of new enlistment of freedom fighters. Therefore, it appears that the government has shifted from its earlier position as regards determination of the minimum age of freedom fighters who were already enlisted. Now the government declares that this age fixation will only apply in respect of new enlistment as freedom fighters.

5.15. The surprises did not end there as further surprises were in the pipe line. By a Paripatra, as issued by the government vide memo dated 19.06.2017, regarding the entitlement of freedom fighters quota and benefit at the time of recruitment, admission and PRL in respect of employees of different Ministries, establishments, bodies and universities, the government again shifted its position. According to this Paripatra, to avail of the benefits of such freedom fighters quota at the time of appointment, admission or obtaining PRL, the age of the freedom fighters must be minimum 13 years on or before 30.11.1971. There is nothing in the said Paripatra as to whether this re-fixation of date has been done on the recommendation of JAMUCA. This Paripatra dated 19th June, 2017 was to be amended by memo dated 17.01.2018 issued by the government whereby the government re-fixed the said minimum age of

freedom fighters at 12 years 6 months as on 30.11.1971 or before and this amending circular has been notified vide notification dated 21.01.2018 and published in the gazette on 31.01.2018, which have been impugned by the petitioners by way of Supplementary Rules issued by this Court. By this gazette notification, Clause 2 of the earlier notification dated 06.11.2016 (published in gazette on 10.11.2016) has been substituted in the following terms:

"মুক্তিযোদ্ধার বয়স ৩০.১১.১৯৭১ তারিখে কিংবা তার পূর্বে কমপক্ষে ১২ বছর ০৬ মাস হতে হবে।"

5.16. Therefore, it appears that while the earlier gazette notification dated 10.11.2016 fixed the age at 13 years as on 26.03.1971 making it applicable only to those freedom fighters who would be enlisted as new freedom fighters, by this subsequent amendment as published in the gazette on 31st January, 2013, the amended age of 12 Years 6 months as on 30.11.1971 was made applicable to all freedom fighters. Therefore, since it is evident from this gazette notification dated 31st January, 2018 that this age criteria will apply to all freedom fighters, the position taken by the respondent No.1 in supplementary-affidavit dated 06.05.2019 in Writ Petition No.15155 of 2016 is not correct. By a subsequent notification, being Paripatra dated 11.02.2018, the government has reaffirmed its position as regards fixation of such date of freedom fighters in the following terms:

"ভাতা প্রাপ্তির ক্ষেত্রে মুক্তিযোদ্ধার বয়স ৩০/১১/১৯৭১ খ্রিষ্টাব্দ তারিখে কিংবা তার পূর্বে কমপক্ষে ১২ বৎসর ০৬ মাস হতে হবে, অর্থাৎ কোন বীর মুক্তিযোদ্ধার জন্ম তারিখ ৩০.০৫.১৯৫৯ খ্রিষ্টাব্দের পর বিবেচিত হবে না"

(Underlines supplied)

Interestingly, by this Paripatra, the government has also fixed the required date of birth of the freedom fighters being 30.05.1959 or before.

5.17. As stated above, there is nothing in the above mentioned circulars, Paripatra, Nitimala etc. that the same were issued by the government either in exercise of its power under any parent law as enacted by the Parliament or by any delegated legislation. It has also not been mentioned in the said Circular, Paripatra or Nitimala that the government fixed the said ages or dates in exercise of any power conferred on it under any Act of Parliament. In particular to the latest notification being dated 2 April, 2018 and the Bangladesh Muktijoddha Kallyan Trust Act, 2018 being published in the gazette on 08 October, 2018, it cannot be said that the said Circulars, Paripatra, Nitimala, as issued by the government for fixing or re-fixing the age of freedom fighters, were issued under its power conferred on it by Section 2(11) of the said Act No. 51 of 2018. This being so, we have miserably failed to find any single reference either in the said notifications, circulars, Paripatra, Nitimala or even in the affidavit-in-opposition of the respondent No.1-governemnt that the said fixation of ages or dates by the government time to time was done in exercise of any power as delegated by parliament, in particular when such circulars have defined, redefined and amended the definition of the term 'freedom fighter' as provided by Article 2(h) of the P.O. 94 of 1972. Neither the P.O. 94 of 1972 nor the Act No. 08 of 2002 (Jatiyo Muktijoddha Council Act, 2002) has also given any power to the government to amend the definition of the term 'freedom fighter' by way of fixing the minimum age of freedom fighters retrospectively.

5.18. It is well settled that in exercise of executive functions of the government, the government can issue circulars, notifications, Paripatra etc. to keep its work transparent. Such notifications or circular etc. may be issued in order to give benefits to the enlisted freedom fighters, which is no doubt an appreciable job by the government. But in doing so, the government cannot amend the parent law, namely the definition of 'freedom fighter' as provided by Article 2(h) of P.O. 94 of 1972. However, we have frustratingly noted that the government not only acted whimsically, it also acted without jurisdiction in determining the age of the freedom fighters retrospectively without any such power being conferred on them by any parent law. Nothing has been stated in the said notifications, circulars or gazette as to how such dates were fixed and what was the reason in fixing such dates. There is nothing in the affidavit-in-opposition of the government as to why it was felt by the government or JAMUCA that a boy below the age of 12 years and 06 months could not be a freedom fighter, in particular when we have found in various books and documents, as referred to by the learned advocate Mr. Omar Sadat, that there is a long history in this world in support of child freedom fighters, soldiers and warriors, particularly when we have taken note of the fact that Shahidul Islam (Lalu), a valiant freedom fighter who was awarded Bir Pratik, was only 10 years of age when he took part in our liberation war.

5.19. Now with these circulars and Nitimala fixing minimum ages of freedom fighters being 12 years 06 months on a particular date in 1971, the Bir Protik award of Shahidul Islam (Lalu) would become non-existent. We do not find any proper words to express our anger as against such unreasonable acts of the government. It is recorded in the government documents that the said Shahidul Islam (Lalu) was awarded Bir Protik by none other than the Father of the Nation Bangabandhu Sheikh Mujibur Rahman. His picture in the lap of Bangabandhu Sheikh Mujibur Rahman was published in the Daily Ittefaq on 10.12.2014. Even after publication of such news in 2014, we are surprised to note that the government has stared the impugned scheme of fixing and re-fixing the minimum age of freedom fighters. We are of the view that the individuals concerned in fixing these ages of freedom fighters time to time by ignoring the facts, that there was a Bir Protik who was aged 10 years at the time of liberation war, should be made accountable for their such negligent act, in particular when they did not have any legislative backing to do such acts. By such acts of fixing and re-fixing the 'freedom fighters' age and amending the definition of 'freedom fighters' without any legislative backing, the said officials have insulted the very feeling of the people of this country and the very respect of the people of this country towards the freedom fighters. Therefore, we are of the view that, these notifications, circulars etc cannot stand in the eye of law and the same should be declared without lawful authority in clear terms.

5.20. Now the issue of definition of the term 'freedom fighter', as given by the Parliament in 2018 by enacting বাংলাদেশ মুক্তিযোদ্ধা কল্যাণ ট্রাস্ট আইন, ২০১৮, (Bangladesh Freedom Fighters Welfare Trust Act, 2018) in particular the definition provided therein under Section 2(11) under the title বীর মুক্তিযোদ্ধা (Valiant Freedom Fighters). By this definition, a power has been conferred on

the government to determine the age of the freedom fighters in the following terms: **"উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে"**. The question is: when the majority of the people of this country, irrespective of their age, religion, cast etc., participated in the liberation war in response to the call of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman, can the Parliament now say that the government is allowed to fix the age of freedom fighters who took part in the war of liberation in 1971.

5.21. As referred to by the learned advocate Mr. Omar Sadat vehemently, it appears that the historic speech of 7th March, 1971, as delivered by the Father of the Nation Bangabandhu Sheikh Mujibur Rahman in the Race Course Maidan, Dhaka, the telegraphic Declaration of Independence as given by the Bangabandhu in the early morning of 26th March, 1971 and the Proclamation of Independence as given by the Mujib Nagar Government on 10th April, 1971 have been incorporated in the Constitution under 5th, 6th and 7th Schedule by Article 150(2) of the Constitution. The final call of Bangabandhu Sheikh Mujibur Rahman in his historic speech on 7th March, 1971 was as follows:

"প্রত্যেক গ্রাম, প্রত্যেক মহল্লায় আওয়ামী লীগের নেতৃত্বে সংগ্রাম পরিষদ গড়ে তোল এবং তোমাদের যা কিছু আছে, তাই নিয়ে প্রস্তুত থাকো। মনে রাখবা, রক্ত যখন দিয়েছি, রক্ত আরো দিবো। এই দেশের মানুষকে মুক্ত করে ছাড়বো ইনশাল্লাহ। এবারের সংগ্রাম আমাদের মুক্তির সংগ্রাম, এবারের সংগ্রাম স্বাধীনতার সংগ্রাম। জয় বাংলা।"

The resonance of this call of independence is very much evident in his telegraphic Declaration of Independence, being the last words of Bangabandhu immediately before his arrest after the crack down on the night of 25th March. The same is quoted below:

"ইহাই হয়ত আমার শেষ বার্তা, আজ হইতে বাংলাদেশ স্বাধীন। আমি বাংলাদেশের জনগণকে আহবান জানাইতেছি যে, যে যেখানে আছ, যাহার যাহা কিছু আছে, তাই নিয়ে রুখে দাঁড়াও, সর্বশক্তি দিয়ে হানাদার বাহিনীকে প্রতিরোধ করো। পাকিস্থানী দখলদার বাহিনীর শেষ সৈন্যটিকে বাংলার মাটি হইতে বিতাড়িত না করা পর্যন্ত এবং চুড়ান্ত বিজয় অর্জন না করা পর্যন্ত লড়াই চালিয়ে যাও।"

(Underlines supplied)

The historic speech of Bangabandhu on the 7th March, 1971 and his Declaration of Independence on 26th March, 1971 have been recognized by the Mujibnagar Government in its Proclamation of Independence dated 10th April, 1971.

5.22. The admitted position is that these historic speech and declarations are now part of the Constitution. Now the question arises when a part of the Constitution by which the people of this country were urged upon to stand against the Pakistani Army with whatever means they had, and on the said call when some children participated in the war of liberation with whatever they had, can they now be said or declared as non-freedom fighters by any Act of Parliament? The answer is 'No'. Without amending the Constitution, such enactment cannot be made by the Parliament. Therefore, when Parliament itself cannot fix the age of freedom fighters as the fixing of such age of freedom fighters will be contrary to the Speech of Bangabandhu and the Declaration of Independence by Bangabandhu, which are part of the Constitution, the sane Parliament cannot empower the government to fix such age. On this very simple ground, this empowerment "উক্ত সময়ে যাহাদের বয়স সরকার

কর্তৃক নির্ধারিত বয়স সীমার মধ্যে", as incorporated in the definition of 'বীর মুক্তিযোদ্ধা' under section 2(11) of the said Act No. 51 of 2018, has become untra-vires the Constitution. It has long been decided by various judicial pronouncements that which you cannot do directly, you cannot do the same indirectly. As stated above, when the Parliament itself cannot fix the age of the freedom fighters even by enactment of law without amending the Constitution, it cannot empower anybody including the government to fix such age of freedom fighters.

5.23. Apart from above, it appears from this very definition of বীর মুক্তিযোদ্ধা, as provided by Section 2(11), that by such empowerment the Parliament has given unbridled and unguided power to the government. No guidelines have been indicated by the Parliament or no guidelines have been framed by the government either by any valid Rules or Regulations. This empowerment of unbridled and unguided power on the government is also hit by the doctrine of reasonableness, and no such unbridled and unguided power can be given to any delegatee by the Parliament as has been established by our Apex Court in **Dr. Nurul Islams' Case, 33 DLR (AD) 201**. Therefore, from the above analysis of the said definition of বীর মুক্তিযোদ্ধা, in particular the said conferment of power "উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে" as provided therein, this Court is of the view that the same is ultra-vires the Constitution. Accordingly, the same has become void ab initio.

5.24. In the course of hearing, it has come to our notice that a division bench of the High Court Division in **S.M. Sohrab Hossain vs. Bangladesh, 69 DLR-285** expressed a different view. While deciding a case on a Rule issued whether there was any definition of the term 'freedom fighters', the said bench has observed under paragraph 16 of the said reported case as follows:

16. That being the position we have found that from the beginning of 1972 definition of "Freedom Fighter" was very much there and time to time its scope and ambit had been elaborated or restricted, for practical purposes. By any stretch of imagination it cannot be said that there is no definition of "Freedom Fighter". It may be suggested that for all practical purposes the government may further modify the definition of "Freedom Fighter" as it exists should it require. But certainly it is within the domain and competence of the policy of the government as well as the legislature.

(Underlines supplied)

5.25. After examination of above decision, it appears that the Rule in the concerned writ petition was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why direction shall not be given upon the respondents to provide the definition of 'freedom fighters' before preparing and publishing the final list of the Freedom Fighters."

5.26. Therefore, it appears that a writ of mandamus was filed seeking direction on the government to provide definition of the term 'freedom fighter' and after hearing the Rule issued therein, the said division bench found that there already existed a definition of the term 'freedom fighter' in P.O. 94 of 1972. Therefore, it was not necessary to provide any further definition. In taking such view, the said division bench of this Court has made the above quoted

observation under paragraph 16 of the reported case which was not the ratio of the said case. Rather, it was the obiter dicta as because it was not an issue in that writ petition as to whether the government was empowered to modify the definition of the term "freedom fighter" as provided by P.O. 94 of 1972. The only issue in that writ petition was whether the government or the concerned respondents should be directed to provide definition of "freedom fighters" before preparing and publishing the final list of freedom fighters. Therefore, the view expressed therein under paragraph-16 of the reported case cannot be regarded as stare decisis for this bench in deciding the issues in these cases, in particular when the issue in these writ petitioners is whether the government can fix, re-fix and amend the definition of the term 'freedom fighter'. Therefore, the said obiter is not binding on this bench and as such we are not required to refer this matter to a larger bench as because we are disagreeing vehemently with the said obiter of the said division bench.

5.27. In view of the above facts and circumstances of the cases, we find merit in the Rules and Supplementary Rules and as such the same should be made absolute.

5.28. <u>The Orders of the Court:</u>

1) Rules and Supplementary-Rules are made absolute.

2) Thus, all the circulars, in particular the circulars dated 02.09.2015 and 31.01.2018, in so far as the same relate to the fixing and re-fixing the minimum age of freedom fighters, are hereby declared to be without lawful authority. Consequently, the stoppage of the honorariums of the petitioners, who have already been gazetted as freedom fighters, is also declared to be without lawful authority. The government and the concerned authorities are directed to continue payment of the honorarium of the said freedom fighters as before with all arrears within thirty days from receipt of the copy of this judgment/orders.

3) The definition of the term বীর মুক্তিযোদ্ধা (Valiant Freedom Fighters), as provided by section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No. 51 of 2018), in so far as the same relates to the conferment of power on the government to determine the age of the freedom fighters at the relevant time ("উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে") is concerned, is hereby declared to be ultra-vires the Constitution and as such the same has become void ab initio.

At the end, we highly appreciate the laborious job of Mr. Omar Sadat, learned advocate and his associates preceded by their laborious research in order to assist this Court. Our judgment has been enriched by their tremendously good performance.

Communicate this.