

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Suo-Moto Rule No. 07 of 2019.

In the matter of:

The State

..... Petitioner.

Vs.

Ministry of law, Justice and Parliamentary
Affairs, Government of Bangladesh,
represented by it's Secretary, Bangladesh
Secretariat, Ramna, Dhaka and others.

...Respondents.

Mr. Md. Abdul Halim with
Ms. Israt Hasan, Advocates

...For the petitioner.

Mr. Mahbubey Alam, Attorney General with
Mr. Bepul Bagmar, D.A.G with

Mr. Mohammad Nazrul Islam Khandaker,
A.A.G with Ms/.Tahmina Polly, A.A.G with
Mr. Delwar Hossain, A.A.G with
Mr. Md. Salim Azad, A.A.G

..For the respondent Nos. 1 and 11.

Heard on 12.02.2020 and 01.03.2020
judgment on: 11.03.2020.

Present:

**Mr. Justice Sheikh Hassan Arif
And**

Mr. Md. Mahmud Hassan Talukder

SHEIKH HASSAN ARIF, J

1. **Preface:**

1.1. On 31st October, 2019, the Daily Prothom Alo published a news under the heading “আইনে মানা, তবু ১২১ দন্ড” regarding detention of 121 children in Child Development Centers (শিশু উন্নয়ন কেন্দ্র) (“CDC”) at Tongi, Gazipur and Pooler Hat, Jashore pursuant to orders of conviction and sentence passed by different Mobile Courts in Bangladesh run by the executive magistrates under the Mobile Court Act, 2009.

1.2. Mr. Abdul Halim, who is the Chairman of Children's Charity Bangladesh Foundation, an organization which works for the welfare of children, brought that news to the notice of this Court stating, inter-alia, that the Children Act, 2013, being a special law, provided special procedures, amongst others, for trial of the child offenders. However, according to him, some Mobile Courts have convicted and sentenced the said 121 and other children in Bangladesh in different cases without jurisdiction. Upon his such steps, a Suo-Moto Rule was issued by this Court calling upon the concerned Ministries and departments of the government, Rapid Action Battalion (RAB) and the executive magistrates concerned to show cause as to why the trials, conviction, sentences and detention of the said 121 children, or any other children, by the Mobile Courts in Bangladesh, should not be declared to be without lawful authority and are of no legal effect.

2. **Back Ground Facts:**

2.1. Back ground facts are that the said children allegedly committed different offences and at the time of commission of the said offences, they were reportedly spotted by different Mobile Courts led by the executive magistrates. Accordingly, the said Mobile Courts conducted trials instantly, passed the orders of conviction and sentence upon them for different terms and detained them in Child Development Centers (CDC)

at Tongi, Gazipur and Pooler Hat, Jashore in Mobile Court Case Nos. RAB-4/125 of 2019 dated 09.08.2019 under Section 42 of the Madok Drobbo Niyontron Ain, 2018, RAB-4/127 of 2019 dated 09.08.2019 under Section 42 of the Madok Drobbo Niyontron Ain, 2018, RAB-3/136 of 2019 dated 26.08.2019 under Sections 9(1)(Ga)/36(1) সারণি ক্রমিক ২১ কলাম (৩) of the Madok Drobbo Niyontron Ain, 2018, RAB-3/137 of 2019 dated 26.08.2019 under Sections 9(1)(Ga)/36(1) সারণি ক্রমিক ২১ কলাম (৩) of the Madok Drobbo Niyontron Ain, 2018, RAB Shador/465 of 2019 dated 30.07.2019 under Section 356 of the Penal Code, RAB Shador/468 of 2019 dated 30.07.2019 under Section 356 of the Penal Code, RAB Shador/469 of 2019 dated 30.07.2019 under Section 356 of the Penal Code, RAB Shador/476 of 2019 dated 08.08.2019 under Section 356 of the Penal Code, RAB Shador/477 of 2019 dated 08.08.2019 under Section 356 of the Penal Code and RAB Shador/519 of 2019 dated 19.09.2019 under Section 36(1), Table 21 of the Madok Drobbo Niyontron Ain, 2018.

- 2.2. The above incidents were reported, as stated above, in the 'Daily Prothom Alo' and some other news papers. Thereupon, this Court issued the Suo-Moto Rule as aforesaid. At the time issuance of the Rule, this Court, vide ad-interim order dated 31.10.2019, directed the Child Development Centers at Tongi, Gazipur and Pooler Hat, Jashore (respondent Nos. 11 and 12)

to immediately release all the children under the age of 12 years as detained by them pursuant to the said orders of conviction and sentence. By the same order, this Court also granted bail in favour of the said children aged between 12-18 years for a period of 06 (six) months to the satisfaction of the Children Courts of the districts concerned. RAB (respondent No.7) and executive magistrates concerned (respondent Nos. 8, 9 and 10) were also directed to create separate files of those cases wherein those children, or any other children, were convicted and sentenced by them and send the said files to this Court within 07 (seven) working days. Pursuant to the said order, the Child Development Centers (CDC) of Tongi, Gazipur (respondent No. 11) and Pooler Hat, Jashore (respondent No. 12) released the said children below 12 (twelve) years. They also released others between 12-18 on bail to the satisfaction of the concerned Children Courts. Accordingly, respondent No. 11 filed a compliance before this Court. The executives magistrates concerned also sent the files of the cases concerned to this Court, but they did not file any affidavits or any response to contest the Suo-Moto Rule. RAB also remained silent for reasons best known to them.

- 2.3. However, an affidavit was filed by respondent No. 1 (Ministry of Law) contending mainly that some of the children concerned were convicted under the provisions of Narcotics

Control Act, 2018 (in short, "Narcotics Act") read with Mobile Court Act, 2009. It is contended by this respondent that Section 57 of the Narcotics Act has empowered the Mobile Courts to impose conviction and sentence instantly in accordance with the summary procedure as provided by the Mobile Courts Act, 2009 and that this has overriding effect over provisions of the said Act including Section 52 which provides application of Children Act, 2013 in case of child offenders. It is also contended that, in an earlier writ petition, constitutionality of Mobile Courts Act, 2009 was challenged and the Rules issued therein were made absolute by the High Court Division. However, the Appellate Division granted leave against the said judgment and stayed operation of the said judgment till disposal of the Civil Appeals arising there-from, being Civil Appeal No. 673 of 2016 and Civil Appeal No. 43-45 of 2018, which are yet to be disposed of. Therefore, it is contended by respondent No. 1 that in so far as conviction and sentence of the said children under Narcotics Act are concerned, no illegality has been committed.

2.4. Mr. Abdul Halim, learned advocate, has also filed an affidavit-in-reply to assist this Court contending, inter alia, that the said children were convicted on the basis of confessional statements extorted from them and some of the said convicted children were even below 12 years of age, which is violative of Section 83 of the Penal Code. It is further contended by him

that though the allegations against some of the children were of robbery punishable under Section 384 read with Section 392 of the Penal Code and as such they did not come within the purview of Mobile Court's jurisdiction, yet they were imposed conviction and sentences by the Mobile Courts by framing charges against them under Section 356 of the Penal Code. It is also contended that same sets of witnesses were used in order for recording confessional statements of the said children and in one case, one of the executive magistrates, Mr. Sarwar Alam, recorded confessional statements etc. of 23 children in two cases in respect of occurrences at two different places within a period of 32 (thirty two) minutes. It is further contended by him that the Children Act, 2013, being a special law providing special procedure for dealing with and trial of children, the Mobile Courts do not have any jurisdiction to proceed against them for any offence. By this affidavit-in-reply, he has also narrated different inconsistencies in the orders of the said executive magistrates to show, according to him, how callous and negligent they were.

3. Submissions:

3.1. In the course of hearing, Mr. Abdul Halim, learned advocate has made the following submissions:

- a) That the Children Act, 2013 is a special law which provides, amongst others, special procedures for dealing with children

coming in conflict with law, and the said law has been enacted by Parliament in order for implementation of the United Nations Child Rights Convention, 1989 (CRC) being the State obligation of Bangladesh. He then referred to Chapter-IV of the Children Act.

- b) That Chapter-V of the Children Act has provided special trial procedure for accused children by Special Courts named 'শিশু আদালত', and the senior most Judges of the district, namely the learned Judges incharge of Nari-O-Shishu Nirjaton Daman Tribunals in different districts, have been empowered by the amendment in 2018 to conduct such trial. Therefore, according to him, in view of the provisions of Section 6 of the Mobile Court Act, 2009, the executive magistrates can not have any jurisdiction to conduct trial of the children under 18 years of age.
- c) By referring to the safeguards under Sections 164 and 364 of the Code of Criminal Procedure, he submits that the confessions of the said children were recorded in a very inhuman way not to speak of in violation of the said safeguards provided by the Code of Criminal Procedure. According to him same sets of witnesses have been used again and again in order for recording such confessional statements, and the names and addresses of the said

witnesses have not been mentioned properly. He submits that, one of the child-accused was even convicted and sentenced on the basis of an incomplete confessional statement.

- d) By referring to the confessional statements recorded and orders passed in Mobile Court Case Nos. 476 of 2019 and 477 of 2019, learned advocate submits that two incidents allegedly took place at two different places, one at Farmgate and the other at Shyamoli Shishu Mela, Sher-E-Bangla Nagar, Dhaka, and in those two cases executive magistrate, Mr. Sarwar Alam, recorded confessional statements of about 23 accused children in 32 (thirty two) minutes, which is humanly impossible. He submits that in the said 32 (thirty two) minutes of time, the said magistrate recorded the confessional statements of 11 children at Farmgate in Case No. 476 of 2019 and 12 children at Shyamoli Shishu Mela, Sher-E-Bangla Nagar in another Mobile Court Case, being 477 of 2019. This, according to him, manifestly suggests that the cases were in fact prepared in the office of the said magistrate and he had never visited the said places of occurrences.

- 3.2. Mr. Mahbubey Alam, learned Attorney General, has appeared for respondent No.1 (Government). He has made the following submissions:

- a) That the children between 12-18 in this country are repeatedly committing various offences in different area and some of them have formed Kishore Gangs (Juvenile Gangs) and have been committing offences of extortions, kidnapping, drug peddling and, sometimes, even killing. According to him, such gangs have become engaged in supply of illegal drugs and getting addicted to such drugs. Therefore, such offences cannot be stopped without the instant intervention of the Mobile Courts at the time of commission of such offences. According to him, such actions of Mobile Courts in our country have become very popular, in particular their actions against adulterated foods, hoardings etc. have been widely praised by the people at large.
- b) By referring to Sections 52 and 57 of the Narcotics Act, he submits that although Section 52 has provided for the application of Children Act, 2013 in case of child offenders, Section 57 has ruled out that provision providing thereby that the offences under the said Act may be tried by the Mobile Courts under Mobile Court Act, 2009. This being so, in so far as conviction and sentences under the Narcotics Act are concerned, the Mobile Courts did not commit any illegality.

4. Deliberations, Findings and Orders of the Court:

- 4.1. Before going into the merit of the case, let us first examine different provisions of the Mobile Court Act, 2009. It is known

to all concerned that this Act has already been declared unconstitutional by the High Court Division of Bangladesh Supreme Court. However, the operation of that judgment of the High Court Division has been stayed by our Appellate Division upon granting Leave to Appeal preferred by the government and that the Civil Appeals concerned have been pending before the Appellate Division for long time. Such long pendency of the said Civil Appeals has, no doubt, created huge confusion amongst public, particularly when the mobile courts run by the executive magistrates are continuously functioning and sentencing numerous numbers of people every day merely on the strength of the said stay order.

- 4.2. It may be noted that the Mobile Court Act, 2009 (Act No. 59 of 2009) was enacted by the Parliament after repealing the Mobile Court Ordinance, 2007 and Mobile Court Ordinance, 2009, which were in fact proclaimed to instantly appease the Admin Cadre Officers of the government after separation of judiciary from the executive organ of the State for implementation of the judgment of historic **Masdar Hossain case** delivered by none other than our Appellate Division, particularly when the judicial powers, which they exercised since the british colonial era in the interest of maintaining colonial rule, were taken away from them and the same were given to the judicial cadre officers, namely the Judicial

Magistrates recruited by the Judicial Service Commission. Corresponding amendments were made in the Code of Criminal Procedure to give some judicial powers to admin cadre officers of district and divisional level. As of today, almost all offences, cognizable and triable by the judicial magistrates and metropolitan magistrates, have been included in the schedule to the Mobile Court Act thereby enabling the said Admin Cadre Officers (executive magistrates) to prosecute, try and pass orders of conviction and sentence instantly in a summary procedure as provided by Sections 6 to 9 of the said Act.

- 4.3. The very preamble of the Mobile Court Act, 2009 provides that the same has been enacted to empower the executive magistrates in order for conducting instant trial of some offences. Section 3 of the said Act has given overriding effect to the provisions of the said Act by saying that notwithstanding any inconsistent provisions in any other law, the provisions of the Mobile Court Act shall be effective. Sections 4 and 5 have categorically empowered the executive magistrates to take cognizance, record confessional statement, conduct trial and impose convictions instantly at the place of commission of such offences. Section 6 has, however, provided the extent of such power of the Mobile Courts, which is relevant in this case. Thus, Section 6 is reproduced below:

মোবাইল কোর্টের ক্ষমতা

৬। (১) ধারা ৫ এর অধীন ক্ষমতাপ্রাপ্ত এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ধারা ১১ এর অধীন ক্ষমতাপ্রাপ্ত ডিস্ট্রিক্ট ম্যাজিস্ট্রেট আইন শৃংখলা রক্ষা ও অপরাধ প্রতিরোধ কার্যক্রম পরিচালনা করিবার সময় তফসিলে বর্ণিত আইনের অধীন কোন অপরাধ, যাহা কেবল জুডিসিয়াল ম্যাজিস্ট্রেট বা মেট্রোপলিটন ম্যাজিস্ট্রেট কর্তৃক বিচার্য, তাহার সম্মুখে সংঘটিত বা উদ্ঘাটিত হইয়া থাকিলে তিনি উক্ত অপরাধ তাৎক্ষণিকভাবে ঘটনাস্থলেই আমলে গ্রহণ করিয়া অভিযুক্ত ব্যক্তিকে, স্বীকারোক্তির ভিত্তিতে, দোষী সাব্যস্ত করিয়া, এই আইনের নির্ধারিত দন্ড আরোপ করিতে পারিবেন।

(২) তফসিলে বর্ণিত কোন আইনের অধীন প্রণীত বিধি, প্রবিধি বা আদেশের অধীন কোন অপরাধ উক্ত আইনের অধীন অপরাধ বলিয়া গণ্য হইবে।

(৩) তফসিলে বর্ণিত কোন আইনের অধীন কোন অপরাধ কোন আদালত বা ট্রাইব্যুনাল কর্তৃক বিচার্য হইবে তাহা উক্ত আইনে নির্ধারণ করা না থাকিলে, ফৌজদারী কার্যবিধির ধারা ২৯ এর সংশ্লিষ্ট দ্বিতীয় তফসিলের অষ্টম কলাম অনুযায়ী নির্ধারিত আদালত কর্তৃক উক্ত অপরাধ বিচার্য বলিয়া গণ্য হইবে এবং যদি অনুরূপ কোন অপরাধ বিচার করিবার এখতিয়ার মেট্রোপলিটন ম্যাজিস্ট্রেট এবং প্রথম, দ্বিতীয় বা তৃতীয় শ্রেণীর জুডিসিয়াল ম্যাজিস্ট্রেটের না থাকে, তাহা হইলে উক্ত অপরাধ, তফসিলে বর্ণিত আইনের অধীন অপরাধ হওয়া সত্ত্বেও, এই আইনের অধীন আমলে গ্রহণ করিয়া দন্ড আরোপ করিবার এখতিয়ার এই আইনের অধীন মোবাইল কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেটের থাকিবে না।

(৪) মোবাইল কোর্ট পরিচালনা করিবার সময় যদি অনুরূপ কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেটের নিকট এইরূপ মনে হয় যে, অপরাধ স্বীকারকারী ব্যক্তির সংশ্লিষ্ট অপরাধ এমন গুরুতর যে, এই আইনের অধীন নির্ধারিত দন্ড আরোপ করা হইলে উহা যথোপযুক্ত দন্ডারোপ হইবে না, তাহা হইলে তিনি উক্ত ব্যক্তিকে দন্ড আরোপ না করিয়া তাহার বিরুদ্ধে নিয়মিত মামলা দায়েরের ব্যবস্থা করিবেন।

(৫) মোবাইল কোর্ট পরিচালনা করিবার সময় যদি এইরূপ কোন অপরাধ এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেট এর সম্মুখে সংঘটিত বা উদ্ঘাটিত হয়, যাহা সেশন আদালত কিংবা অন্য কোন উচ্চতর বা বিশেষ আদালত বা ট্রাইব্যুনাল কর্তৃক বিচার্য, তাহা হইলে মোবাইল কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেট উক্ত অপরাধের সহিত সংশ্লিষ্ট ব্যক্তির বিরুদ্ধে অভিযোগ এজাহার হিসাবে গণ্য করিবার জন্য সংশ্লিষ্ট থানার ভারপ্রাপ্ত কর্মকর্তাকে নির্দেশ প্রদান করিবেন।

(Underlines supplied)

4.4. Thus, it appears from sub-section (1) of Section 6 that the said executive magistrates shall have power to conduct Mobile Courts and impose conviction instantly only in such offences

mentioned in the schedule to the Mobile Court Act, 2009 which are triable by judicial and metropolitan magistrates. Sub-section (3) of Section 6 has further clarified such power of the said mobile courts to the effect that if such offences are not triable by the metropolitan magistrate and 1st, 2nd and 3rd class magistrates, the said executive and district magistrates, who are running such mobile courts, shall not have jurisdiction to take cognizance and/or impose conviction in those offences **even-though they are included in the schedule to the said Act**. This, otherwise, means that the offences not triable by the judicial or metropolitan magistrates are not within the jurisdiction of the Mobile Courts run by the executive magistrates. In such cases, the executive magistrate shall direct the Officer-in-Charge of the police station concerned to register FIR against the accused [see sub-section (5)].

4.5. Section 7 provides detailed procedures as to how a Mobile Court operates. This Section 7 is also reproduced below:

মোবাইল কোর্টের পরিচালনা পদ্ধতি

৭। (১) এই আইনের অধীন মোবাইল কোর্ট পরিচালনা করিবার সময় কোন ব্যক্তির বিরুদ্ধে অপরাধ আমলে গৃহীত হইবার পরপরই মোবাইল কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেট সংক্ষিপ্ত অভিযোগ লিখিতভাবে গঠন করিয়া উহা অভিযুক্ত ব্যক্তিকে পাঠ ও ব্যাখ্যা করিয়া শুনাইবেন এবং অভিযুক্ত ব্যক্তি গঠিত অভিযোগ স্বীকার করেন কি না তাহা জানিতে চাহিবেন এবং স্বীকার না করিলে তিনি কেন স্বীকার করেন না উহার বিস্তারিত ব্যাখ্যা জানিতে চাহিবেন।

(২) অভিযুক্ত ব্যক্তি অভিযোগ স্বীকার করিলে তাহার স্বীকারোক্তি লিপিবদ্ধ করিয়া উহাতে অভিযুক্তের স্বাক্ষর বা ক্ষেত্রমত, টিপসই এবং দুইজন উপস্থিত স্বাক্ষর বা, ক্ষেত্রমত, টিপসই গ্রহণ করিতে হইবে; এবং অতঃপর মোবাইল কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেট তাহার বিবেচনায় যথোপযুক্ত দণ্ড আরোপ করিয়া লিখিত আদেশ প্রদান করিবেন এবং উক্ত আদেশে স্বাক্ষর করিবেন।

(৩) অভিযোগ অস্বীকার করিয়া আত্মপক্ষ সমর্থনে অভিযুক্ত ব্যক্তি কর্তৃক প্রদত্ত ব্যাখ্যা সন্তোষজনক হইলে, মোবাইল কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেট তাহাকে অভিযোগ হইতে অব্যাহতি প্রদান করিবেন।

(৪) অভিযুক্ত ব্যক্তি কর্তৃক উপ-ধারা (৩) এর অধীন প্রদত্ত ব্যাখ্যা সন্তোষজনক না হইলে মোবাইল কোর্ট পরিচালনাকারী এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ডিস্ট্রিক্ট ম্যাজিস্ট্রেট অভিযোগটি বিচারার্থে উপযুক্ত এখতিয়ার সম্পন্ন আদালতে প্রেরণ করিবেন।

4.6. It provides that, immediately after taking cognizance of any offence, the following acts are to be done by the executive magistrate concerned:

a) Framing of summary charge in writing,

b) Reading out and explaining of the said charge to the accused;

c) Asking the accused as to whether he/she admits the charge. If he/she admits the charge, the executive magistrate shall have to do some more acts, such as he/she shall:

i) Write down the confessional statement,

ii) Take accused's signature/thumb impression on the confessional statement;

iii) Take the signature/ thumb impression of two witnesses on the said confessional statement;

iv) Impose appropriate punishment in writing;

v) Sign the said order;

4.7 However, if the charge is not admitted, the executive magistrate shall ask the accused the reason for such non-admission. If the explanation of the accused is found satisfactory (subjective satisfaction), he/she will discharge the

accused. But if the explanation is not satisfactory, the magistrate shall send the accused to the competent court for trial. Section 13 of the said Act has made provisions for filing of appeal against the order of conviction and sentence of the Mobile Courts before the District Magistrates, and any one aggrieved by the order of the District Magistrate or Additional District Magistrate, may prefer appeal to the Sessions Judge of the district. Section-14 of the said Act has given impunity to the executive magistrates for any acts done by them in bonafide good faith in running the affairs of such Mobile Courts.

- 4.8 As against above procedure of Mobile Courts, let us now examine the relevant provisions of the Constitution under Part III granting enforceable fundamental rights in favour of the citizens and other persons in this Country. It appears that, under Article 31 of the Constitution, every citizen, or person in Bangladesh, has fundamental right to enjoy the protection of law and to be treated in accordance with law and only in accordance with law, and no action detrimental to the life, liberty, body, reputation or property of any such person may be taken except in accordance with law. Article 32 guarantees the personal liberty of all persons in Bangladesh except in accordance with law. Article 33 has given another important fundamental right in favour of every person in Bangladesh which is the right to consult and be defended by a legal

practitioner of his choice. Not only that, this Article has also guaranteed the right of an accused arrested under any law to be produced before a nearest Magistrate (judicial) within 24 hours. Article 35 has ensured/guaranteed in favour of an accused the right to have public trial by an independent and impartial court or tribunal. Sub-article (4) of Article 35 provides that no person accused of any offence shall be compelled to be a witness against himself. Besides, most importantly, Article 26 of the Constitution provides, amongst others, that the State shall not make any law inconsistent with any provisions of Part III of the Constitution, and any law so made shall, to the extent of such inconsistency, be void.

4.9 Let us now examine how the fundamental rights of the children concerned here have been violated by the trial, convictions, sentences etc. by the Mobile Courts. Admittedly, some of the convicted children were even below the age of 12, who, according to Section 83 of the Penal Code, cannot commit an offence if they are found to have insufficient maturity of understanding to judge the nature and consequences of their conducts. There is nothing in the records of the said mobile court cases to suggest that the executive magistrates concerned have ever tried to understand that the said accused, below the age of 12, did have mental maturity to judge the consequences of their conducts. Therefore, on the

face of it, the convictions imposed on the children below the age of 12 years are directly hit by Section 83 of the Penal Code and as such they have become nullity in the eye of law.

4.10 Now, Section 6 of the Mobile Court Act, 2009 provides that the accused may be convicted instantly on the basis of confession. Unlike the procedures provided by Sections 164 and 364 of the Code of Criminal Procedure, no safeguard has been provided for recording such confession. There is nothing in the records of the concerned cases that the said children were given any chance to engage any lawyers, the reason being that the provisions of Mobile Court Act do not allow an accused to engage any lawyer of his choice to defend himself. Therefore, it is a clear violation of fundamental right guaranteed under Article 33 of the Constitution.

4.11 Not only that, the said children have also been deprived of their fundamental rights to have a public trial by an independent and impartial Court or tribunal as guaranteed by sub-article (3) of Article 35 of the Constitution. The very term “executive”, as used before the term ‘Magistrate’ in the cases concerned, suggests that the magistrates concerned are part of executive organ of the State. Given that the State itself is the prosecutor, they were not independent and/or impartial individuals, not to speak of Court or Tribunal. The very nature of the trial conducted by the said Mobile Courts under Section

7 of the said Act further suggests that there was no scope for public trial in respect of the said children, which was guaranteed in their favour under Article 35. The manner in which the said trials were conducted (will be discussed later) also suggests that the said children were also compelled to give confessional statements in violation of the fundamental rights guaranteed under Article 35.

4.12 Chapter IV of the Children Act, 2013, which is a special law, has provided different procedures for dealing with the children coming in conflict with law. Specific procedures have been provided under Chapter V of the Children Act for their trial. According to Section 16 of the said Act, it is only the Children Court which can conduct the trial in respect of the children coming in conflict with law, and only the senior most judges equivalent to the district judges, who have jurisdiction to try cases under Nari-O-Shishu Nirjatan Daman Ain, 2000, have been empowered by a recent amendment in 2018 to conduct trial of such children in compliance with such special procedures. Not only that, immediately after arrest of a child coming in conflict with law, it is incumbent upon the 'Child Affairs Police Officer' of the police station concerned to inform the parents of the child as well as probation officer. His/her age has to be determined by following specific procedure. Even any statement of the child (not the confessional

statement) can only be taken in presence of the parents and probation officer. Specific provision has been made to take recourse to 'diversion', namely to resolve the case without even forwarding the same to the Children Court. It has further been provided that if the diversion cannot be done, the child may be released on bail by the police (in both bailable and non-bailable offences) even before producing him/her to the Court. Special procedures have also been provided for the said senior most judges of the district when the child is produced before them. The judge concerned even cannot sit in the formal Court to conduct a trial of the child accused and he has been asked to conduct such trial in an informal attire. Admittedly, none of the above procedures were followed by the executive magistrates in the cases concerned.

4.13 We have not found anything in the Mobile Court Act, 2009 which has empowered the executive magistrates to conduct trial of a child accused. Rather, the Children Act, 2013, being the subsequent special law, the provisions of the same will override in case of any conflict of it with the Mobile Court Act, 2009. Therefore, when the said Children Act, 2013 has provided special procedure for dealing with and trial of the children under the age of 18, Mobile Court Act cannot confer jurisdiction on the executive magistrates even to deal with the said children, not to speak of conducting their trial. Therefore, the children concerned in these cases have been deprived of

their fundamental rights to be treated in accordance with law and only in accordance with law as guaranteed by Article 31 of the Constitution.

4.14 Now, the issue so strongly raised by the learned Attorney General regarding offences punishable under the Narcotics Control Act, 2018 (“Narcotics Act”). It appears from the provisions of the Narcotics Act that various offences regarding narcotics (মাদকদ্রব্য) have been created by the said Act. According to the provisions under Sections 44 and 45 of the Narcotics Act, the offences under the said Act are triable by the Special Tribunals established by the government, and the judges of the rank of additional district judge shall be the judge of the said Tribunals. Until such tribunals are established, the government may confer such responsibility of tribunal on an additional district judge or sessions judge. Therefore, apparently, the offences created by this Narcotics Act are not triable either by the judicial magistrates or by the metropolitan magistrates. Thus, in view of the clear provisions under sub-sections (1) and (2) of Section 6 of the Mobile Court Act, 2009, the mobile courts can not have any jurisdiction to take cognizance and conduct trial of the said offences under Narcotics Act.

4.15 However, the problem arose when we have come across the apparently contrary provisions under Sections 52 and 57 of

the Narcotics Act. The said provisions under Sections 52 and 57 are reproduced below:

৫২। অভিযুক্ত শিশুর বিচার পদ্ধতি।— কোন শিশু মাদকদ্রব্য অপরাধ সংঘটনের অভিযোগে অভিযুক্ত হইলে তাহার ক্ষেত্রে শিশু আইন, ২০১৩ (২০১৩ সনের ২৪ নং আইন) এর বিধানবলি প্রযোজ্য হইবে।

৫৭। মোবাইল কোর্ট আইনের প্রয়োগ।— এই আইনে ভিন্নতর যাহা কিছুই থাকুক না কেন, মাদকদ্রব্য অপরাধসমূহ মোবাইল কোর্ট আইন, ২০০৯ (২০০৯ সনের ৫৯ নং আইন) এর অধীন মোবাইল কোর্ট পরিচালনা করিয়া বিচারকার্য সম্পাদন করা যাইবে।

4.16 It appears from the above provisions under Section 52 that the provisions of the Children Act will apply to the accused-child under the said Narcotics Act. Almost in the same breath, Section 57 provides that notwithstanding anything contrary in the said Narcotics Act, the offences under the Narcotics Act may be tried by operating Mobile Courts. Learned Attorney General has heavily relied on this provision under Section 57 and has invited us to give answer to this issue by saying that even though the offences under the Narcotics Act are triable by Tribunals, or the Children Court in case of child-accused, the said offences may also be tried by the mobile courts. Therefore, according to him, the mobile courts concerned in this case have not committed any illegality in trying the cases of the child-accused in respect of the offences under Narcotics Act.

4.17 Admittedly, the children accused in Mobile Court cases, being RAB-4/125 and RAB-4/127, RAB-3/136, RAB-3/137 and RAB

Shodor/519, have been convicted and sentenced for the offences under the Narcotics Act. It appears from the provisions under Section 52 of the Narcotics Act that the legislators did have in their minds that after enactment of the Children Act, 2013, any child, accused of offences under the Narcotics Act, could only be dealt with under the provisions of the Children Act, 2013. However, by incorporating Section 57 in the Narcotics Act, they apparently allowed such offences to be tried by the Mobile Courts under the Mobile Court Act, 2009. While allowing such trial by the Mobile Courts, Section 57 has overridden any contrary provisions in the Narcotics Act only (এই আইনে ভিন্নতর যাহা কিছুই থাকুক না কেন,). However, it has not overridden, or cannot over ride, the provisions of the very Mobile Court Act, 2009, in particular Section 6 of the Mobile Court Act, 2009, which is the source of jurisdiction of mobile courts in Bangladesh. Section 6 of the Mobile Court Act, 2009 gives jurisdiction to the Mobile Courts only for those offences which are triable by judicial magistrates or metropolitan magistrates. Not only that, sub-section (3) of Section 6 even takes away those offences from the jurisdiction of the mobile courts which are not triable by the metropolitan magistrates and first, second or third class judicial magistrates.

4.18 Evidently, the offences under the Narcotics Act are not triable by the metropolitan magistrates or any judicial magistrates.

Rather, they are triable by the Tribunals presided over by a judge of additional district judge. Therefore, by virtue of the Mobile Courts Act, 2009 itself, jurisdiction of the mobile courts led by the executive magistrates is simply ousted in so far as those offences are concerned. The non-obstante clause under Section 3 of the Narcotics Act cannot also prevent such ouster, the same being in a law enacted for operation in different field [see **Jay Engineering Works Ltd. vs. Industrial Facilitation Council (2006) 8 SCC 677 (Para 24 and 31)**]. The only way-out is to amend the relevant provisions of the Mobile Court Act 2009. However, such amendment will certainly aggravate the constitutional chaos already created by the enactment of the Mobile Court Act, 2009.

4.19 Consequently, the conviction and sentences imposed on the said children became nullity in the eye of law as being void ab-initio. The very jurisdictional existence of the Mobile Courts in Bangladesh basically stands on Section 6 of the Mobile Court Act, 2009 which has given them power to try only those cases which are triable by the judicial magistrates and metropolitan magistrates. Therefore, if the provisions under Section 57 of the Narcotics Act is interpreted in line with the submissions of the learned Attorney General, the very existence of the Mobile Courts created under Section 6 of the Mobile Court Act, 2009 will become more questionable. Accordingly, such unrealistic

proposition cannot be accepted by this Court. As sated above, since the Children Act, 2013 has made special provisions for dealing with, or conducting the trial of children, coming in conflict with law, and since it is the Children Court which can only conduct such trials, the trial followed by convictions and sentences imposed by the executive magistrates in the said cases have become nullity in the eye of law. Besides, the manner in which the said executive magistrates have conducted the said trials, as reflected from the case records sent by them, further discloses that they lack proper training. Of course, we don't expect such quality from them like a trained judicial officer. A doctor cannot be asked to do the job of an engineer.

4.20 Thus, in those cases, not only that the prosecutor himself has become investigator and judge, the judge himself has conducted the trial in such manner that it will shake the conscience of any judicious mind. Just one example will make it clear. In Mobile Court Case No. RAB Shador/476 of 2019, the executive magistrate concerned, Mr. Sarwar Alam, recorded confessional statements of eleven children and convicted them accordingly. The place of occurrence in this case was allegedly Farmgate, Tejgaon, Dhaka. The time of occurrence was at 19:10 hour, i.e. 07:10 P.M., on 08.08.2019. Same executive magistrate recorded confessional statements of twelve children in another case, being Mobile Court Case

No. RAB Shador/477 of 2019, and convicted them in the same way. The place of occurrence in this case was Shyamoli Shishu Mela, Sher-E-Bangla Nagor, Dhaka and the time of occurrence was 19:42 hour, i.e. 7:42 P.M., on 08.08.2019, i.e. in the same evening.

4.21 Therefore, according to the said executive magistrate's own recording, the first incident took place at 07:10 P.M. at Farmgate area and the 2nd incident took place at 7:42 P.M. at Shyamoli Shishu Mela in the same evening, i.e. after 32 (thirty two) minutes of the 1st incident. According to Google Map, the distance between Farmgate and Shyamoli Shishu Mela is 4.12 Km and in the fastest route, it takes minimum 11 (eleven) minutes for a car to reach Shishu Mela from Farmgate. Thus, the magistrate had only $(32-11) = 21$ minutes in the first incidents. During this 21 minutes, the said magistrate did the following acts:

- 1) Saw the alleged offences being committed by the said 11 children;
- 2) Detained the said 11 children;
- 3) Recorded their names, fathers' names and addresses;
- 4) Took cognizance'
- 5) Recorded the Complaint;
- 6) Framed charge in writing against them under Section 356 of the Penal Code;

- 7) Read over the said charge and explained the charge to each of them;
 - 8) Recorded 11 separate confessional statements ;
 - 9) Took signature of each child in each confessional statement;
 - 10) Took signatures of two witnesses on each confessional statement.
 - 11) Put his two signatures on each confessional statement;
 - 12) Prepared the order of punishment (conviction and sentence);
 - 13) Signed the order of punishment; and
 - 14) Took the fastest route to reach Shishu Mela (2nd place of occurrence).
- 4.22 Therefore, he completed the above mentioned acts under serial Nos. 1 to 14 within the said 21 minutes. Is it humanly possible? Is he a bionic man with supersonic speed? This impossibility is reflected in each and every cases in hand. Can this be called justice? Can this be called trial? Some people in our country praise this sort of so called instant justice system. Do they not think that these children also have fundamental rights guaranteed by the Constitution to have public trial, to engage lawyers of their choice, right to be treated in accordance with law and only in accordance with law? Do they

forget the famous words of Martin Luther King Jr. ***“Injustice anywhere is a threat to Justice everywhere”***. Why don't they speak out when they see such injustices unfolding in front of their very eyes? Do they ignore it because somebody else is the victim of such injustices, not their brothers, sisters or children? Why do they forget the historic frustration, as expressed by German pastor **Martin Niemoller (1892-1984)**, in the following terms:

*First they came for the socialists,
and I did not speak out—
Because I was not a socialist.
Then they came for the trade unionists,
and I did not speak out—
Because I was not a trade unionists.
Then they came for the jews,
and I did not speak out—
Because I was not a jew.
Then they came for me—
and there was no one left to speak for me.*

4.23 Martin Niemoller expressed above frustration against the non-protesting German intellectuals (including himself) as they were not raising their voices against Nazi injustices. If this sort of trials is referred to in any international conference by any jurist, will the image of Bangladesh legal system not be

tarnished irreparably? We humbly ask them to think afresh.
Better late than never.

4.24 In view of above facts and circumstances of the case and our considered view of legal provisions, we hold that the Mobile Courts concerned did not have any jurisdiction to conduct trial of the said mobile court cases. Accordingly, the convictions and sentences imposed by the said Mobile Courts in Mobile Court Case Nos. RAB-4/125 of 2019 dated 09.08.2019 under Section 42 of the Madok Drobbo Niyontron Ain, 2018, RAB-4/127 of 2019 dated 09.08.2019 under Section 42 of the Madok Drobbo Niyontron Ain, 2018, RAB-3/136 of 2019 dated 26.08.2019 under Sections 9(1)(Ga)/36(1) সারণি ক্রমিক ২১ কলাম (৩) of the Madok Drobbo Niyontron Ain, 2018, RAB-3/137 of 2019 dated 26.08.2019 under Sections 9(1)(Ga)/36(1) সারণি ক্রমিক ২১ কলাম (৩) of the Madok Drobbo Niyontron Ain, 2018, RAB Shador/465 of 2019 dated 30.07.2019 under Section 356 of the Penal Code, RAB Shador/468 of 2019 dated 30.07.2019 under Section 356 of the Penal Code, RAB Shador/469 of 2019 dated 30.07.2019 under Section 356 of the Penal Code, RAB Shador/476 of 2019 dated 08.08.2019 under Section 356 of the Penal Code, RAB Shador/477 of 2019 dated 08.08.2019 under Section 356 of the Penal Code and RAB Shador/519 of 2019 dated 19.09.2019 under Section 36(1), Table 21 of the Madok Drobbo Niyontron Ain, 2018 are declared to be nullity

as being void ab-initio and without any lawful authority. The children in question shall not bear any consequences, legal or factual, of such conviction and sentences in their future life. There shall not be any criminal records against the said children in so far as the said cases are concerned.

4.25 With the above declarations and orders, the Suo-moto Rule is made absolute. At the end, we highly appreciate the job done by the Daily Prothom Alo, Mr. Abdul Halim, learned advocate and his associates.

Communicate this.

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(Sheikh Hassan Arif,J)

I agree.

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(Md. Mahmud Hassan Talukder, J)