IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 8437 OF 2011
WITH
WRIT PETITION NO. 10482 OF 2011
AND
WRIT PETITION NO. 4879 OF 2012

IN THE MATTER OF:

Applications under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Kamruzzaman Khan
.....Petitioner
-Versus-
Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others
..... Respondents
(In Writ Petition No. 8437 of 2011)

AND

Md. Mujibur Rahman
…….Petitioner
-Versus-
Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others
…….Respondents
(In Writ Petition No. 10482 of 2011)

AND

Md. Saifullah and others
…….Petitioners
-Versus-
Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others
…….Respondents
(In Writ Petition No. 4879 of 2012)

Mr. Hassan M. S. Azim with
Mr. Kamal Hossain Meahzi,
Mr. K. Dider Us Salam,
Mr. Mahin M. Rahman and
Mr. Ashfaqur Rahman, Advocates
.....For the petitioners in Writ Petition Nos. 8437 of 2011, 10482 of 2011 and 4879 of 2012

Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Purabi Saha, AAG
……For the respondent no. 2 in Writ Petition Nos. 8437 of 2011, 10482 of 2011 and 4879 of 2012

Mr. A. F. Hassan Ariff with
Mr. Md. Shahed Ali Jinnah, Advocates
…..For the respondent no. 3 in Writ Petition No. 8437 of 2011

Heard on 30.08.2016, 07.12.2016, 22.02.2017 and 08.03.2017.
Judgment on 11.05.2017.

Present:
Mr. Justice Moyeenul Islam Chowdhury
-And-
Mr. Justice Ashish Ranjan Das

**MOYEENUL ISLAM CHOWDHURY, J:**

As the Writ Petition Nos. 8437 of 2011, 10482 of 2011 and 4879 of 2012 have been heard together because of similar facts and circumstances involved therein, this consolidated judgment disposes of them all.

In the Writ Petition No. 8437 of 2011, a Rule Nisi was issued calling upon the respondents to show cause as to why Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Mobile Court Ain, 2009 should not be declared to be ultra vires the Constitution and why the order dated 14.09.2011 passed by the respondent no. 5 in Mobile Court Case No. 19 of 2011 under Section 8(1)

of the Mobile Court Ain convicting the petitioner under Section 12 read with Section 3 of the Building Construction Act, 1952 pursuant to serial no. 26 of the schedule of the Ain and sentencing him thereunder to suffer simple imprisonment for 30(thirty) days 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.

The case of the petitioner, as set out in the Writ Petition No. 8437 of 2011, in short, is as follows:

The petitioner is a businessman by profession. He is also the Chairman and Managing Director of Aesthetic Property Development Limited, a real estate developer company, having its office at House No. 448, Road No. 31, New DOHS, Mohakhali, Dhaka. During the last military-backed caretaker regime, the Mobile Court Ordinance, 2007 was promulgated by the President. This Ordinance became ineffective in February, 2009 as the 9th Parliament did not approve the same. Subsequently on 23rd July, 2009 in the absence of parliamentary session, the President promulgated the Mobile Court Ordinance, 2009. Thereafter on 13th September, 2009, the Minister-in-charge of the Ministry of Home Affairs placed the Ordinance before the Parliament in the form of Mobile Court Bill, 2009. The Bill was passed by the Parliament on 4th October, 2009. After assent of the President thereto, the Mobile Court Ain, 2009 (Ain No. 59 of 2009) (hereinafter referred to as the Ain No. 59 of 2009) came into operation on 6th October, 2009. Pursuant to the decision dated 02.12.1999 of the Appellate Division in the case of the Secretary, Ministry of Finance, Government of Bangladesh…Vs…Mr. Md. Masdar Hossain and others, 20 BLD (AD) 104 (popularly known as Masdar Hossain's Case), the

Code of Criminal Procedure (Amendment) Act, 2009 was passed by the Parliament providing for two types of Magistrates, namely, Executive Magistrates and Judicial Magistrates. The preamble of the Code of Criminal Procedure (Amendment) Act, 2009 articulated the object and purpose of the law with reference to Article 22 of the Constitution of the People's Republic of Bangladesh which runs thus—"ম্যাজিষ্ট্রেটগণের নির্বাহী প্রকৃতির ও বিচার সংক্রান্ত কার্যাবলী পৃথকীকরণ এবং কতিপয় অন্যান্য বিষয়ে বিধান করার নিমিত্ত Code of Criminal Procedure, 1898 এর অধিকতর সংশোধনকল্পে প্রনীত আইন।

যেহেতু গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের ২২ অনুচ্ছেদ অনুযায়ী রাষ্ট্রের নির্বাহী অংগসমূহ হইতে বিচার বিভাগের পৃথকীকরণ রাষ্ট্র পরিচালনার একটি অন্যতম মূলনীতি; এবং

যেহেতু উপরি-উল্লিখিত মূলনীতি বাস্তবায়নের উদ্দেশ্যে ম্যাজিষ্ট্রেটগণের নির্বাহী প্রকৃতির এবং বিচার সংক্রান্ত কার্যাবলী পৃথকীকরণ এবং কতিপয় অন্যান্য বিষয়ে বিধান করার জন্য Code of Criminal Procedure, 1898 (Act V of 1898) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;" but by giving a complete go-by to the 'ratio' of the decision in Masdar Hossain's Case, the Parliament enacted Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009.

Section 5 of the Ain No. 59 of 2009 is violative of Articles 22, 27, 31 and 35(3) of the Constitution inasmuch as it allows the Executive Magistrates and the District Magistrates, who are not holding posts in the Judicial Service of Bangladesh, to be appointed as the Presiding Officers of the Mobile Courts established under Section 4 of the Ain No. 59 of 2009. Section 5 allows the Executive Magistrates and the District Magistrates to preside over the Mobile Courts for discharge of judicial functions which under the constitutional dispensation can only be performed by the persons holding posts in the Judicial

Service of the Republic. Section 6(1) of the Ain No. 59 of 2009 is also violative of Articles 22, 27, 31 and 35(3) of the Constitution as it allows the persons under the direct control of the Executive Government to perform judicial functions which are prohibited in the scheme of our Constitution. Further, Section 6(1) is inherently opposed to the principle of natural justice as it allows a witness or a prosecutor to become a Judge of his own cause. Section 6(2) of the Ain No. 59 of 2009 offends against Articles 27, 31 and 35(3) of the Constitution as it permits as well as encourages the Government to create offences under delegated legislations and to inflict punishments on the citizens for violation of those offences created thereunder. No offence can be created through any delegated legislation as it is only for the Parliament to create substantive offences by Acts of Parliament. Section 6(4) of the Ain No. 59 of 2009 is violative of Articles 27 and 31 of the Constitution as it allows the Executive Magistrates or the District Magistrates to pick and choose at their sweet will as to whom to prosecute and whom to commit to regular Courts for trial. There is no guideline as to how to be satisfied, upon application of which yardstick, to decide which offences will be grievous in nature so as to warrant trials by regular Courts. As such Section 6(4) is inherently prone to be discriminatory in effect and hence the same is also vitiated by malice in law. Section 7 of the Ain No. 59 of 2009 is repugnant to Articles 22, 27, 31 and 35(3) of the Constitution in that the procedure laid down in Section 7 allows an Executive Magistrate or a District Magistrate, as the case may be, to exert undue pressure on an accused and obtain a confession from him. There is no guideline as to how to obtain a confession from the accused and how to record it. Since the Code of Criminal Procedure has not been made applicable to the

summary trials conducted by the Mobile Courts, the confessions which are obtained by such Courts remain unsafe vitiating the trials and the convictions handed down on the bases of such confessions. Section 8 of the Ain No. 59 of 2009 has been impugned for the reason that it is inconsistent with Articles 27 and 31 of the Constitution in that Section 8 is intrinsically prone to be discriminatory. Section 9 of the Ain No. 59 of 2009 contradicts Articles 27, 31 and 35(3) of the Constitution on the score that Section 9 is inherently prone to be arbitrary and discriminatory in its application. Section 9 does not specify any time-table of the functioning of the Mobile Courts. If a Mobile Court fines an accused to the tune of Tk. 20,00,000/- at 07.00 P.M. on any day, that is to say, after the banking hours, he will hardly get any chance to arrange for the fine money from the bank concerned as it is not very usual for anyone to keep such a huge amount of money anywhere else except in a bank. As such the imprisonment for three months as provided in Section 9 for failure to pay up the fine instantly as imposed by any Mobile Court will largely depend upon at what time of the day the Mobile Court imposes the fine. Section 10 of the Ain No. 59 of 2009 is violative of Articles 27, 31 and 35(2) of the Constitution. Although Section 10 provides for protection against double jeopardy as in Article 35(2) of the Constitution in respect of a convicted person, yet it (Section 10) utterly fails to afford the same protection to an acquitted person facing the same trial. Section 11 of the Ain No. 59 of 2009 is ultra vires Articles 22, 27, 31 and 35(3) of the Constitution inasmuch as Section 11 allows the District Magistrates, who are basically Executive Officers, to be appointed as the Presiding Officers of the Mobile Courts established under Section 4 of the Ain No. 59 of 2009. Section 11 allows the District Magistrates to preside

over Mobile Courts for carrying out judicial functions which under the constitutional scheme can only be performed by the members of the Judicial Service of the Republic. Section 13 of the Ain No. 59 of 2009 has infringed upon Articles 27, 31 and 35(3) of the Constitution as Section 13 allows the District Magistrates to be the appellate authorities also. In the Ain No. 59 of 2009, the District Magistrates may sometimes be the convicting authorities and sometimes be the appellate authorities and when they will carry out which functions will be decided by no one else other than the District Magistrates themselves. Section 15 of the Ain No. 59 of 2009 is violative of Articles 27, 31 and 35(3) of the Constitution as it allows the Government to amend the schedule of the Ain No. 59 of 2009 by way of notifications published in the Official Gazette. A schedule of an Act of Parliament is a part and parcel of that Act. It can only be amended by another amending Act of Parliament. Anyway, apart from Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 being violative of Articles 22, 27, 31 and 35, those Sections are also violative of two important basic features of the Constitution, namely, Independence of the Judiciary and Separation of Powers.

On 14.09.2011 at 05.00 P. M., the respondent no. 5 (Executive Magistrate) along with other officials and the accompanying force went to the site of an under-construction building of the petitioner at 5/7A, Block A, Lalmatia, Police Station Mohammadpur, District- Dhaka. At the construction site, the Chief Building Inspector of Rajdhani Unnayan Kartipakkya (RAJUK), Dhaka allegedly found some discrepancies in the construction work vis-à-vis the approved plan. The petitioner was given to understand by the Chief Building Inspector of RAJUK that a nominal fine would be imposed if the

petitioner made a written confession. Thereafter on the self-same date (14.09.2011), the petitioner in good faith signed the so-called written confession and then and there, the respondent no. 5 made an order under Section 8(1) of the Ain No. 59 of 2009 in Mobile Court Case No. 19 of 2011 convicting him under Section 12 read with Section 3 of the Building Construction Act, 1952 and sentenced him thereunder to suffer simple imprisonment for 30(thirty) days. Subsequently as against the order of conviction and sentence dated 14.09.2011, the petitioner preferred Criminal Appeal No. 137 of 2011 wherein he was granted ad-interim bail by the Additional Deputy Commissioner (L.A), Dhaka on 20.09.2011. The Criminal Appeal No. 137 of 2011 is still pending for adjudication in the Court of the Additional Deputy Commissioner (L.A), Dhaka. Afterwards the petitioner challenged the constitutionality of the aforesaid provisions of the Ain No. 59 of 2009 and obtained the Rule.

The respondent no. 2 (Ministry of Home Affairs) has contested the Rule by filing an Affidavit-in-Opposition. The case of the respondent no. 2, as set out therein, in brief, runs as under:

Executive Magistrates and District Magistrates do not perform judicial functions. They perform functions relating to the law and order situation of their respective areas. Their functions do not require sifting or analyzing of the evidence on record nor are they required to give decisions with respect to the determination of the guilt of the accused on the basis of the recorded evidence. They record orders of convictions and sentences only on the bases of the confessions of the accused. In case the accused do not make any confessions, the case is sent to the Judicial Magistrate concerned for trial. As the functions

of the Mobile Courts are not judicial functions as mentioned in Chapter II of Part VI of the Constitution, the constitutional provision in respect of the 'Magistrates exercising judicial functions' shall not be applicable to the Mobile Courts of Bangladesh. Section 190(4) of the Code of Criminal Procedure, 1898 provides that the Executive Magistrates may be invested with the power of taking cognizance of offences. This does not mean that the Executive Magistrates are performing judicial responsibilities. The petitioner has failed to comprehend that the power to impose limited punishment by the Mobile Court is subject to the voluntary confession of the guilt of the accused. Therefore the Ain No. 59 of 2009 is not ultra vires the Constitution. Similar summary procedure and dispensation with respect to certain offences are practised under Section 163 of the Motor Vehicles Ordinance, 1983. So the procedure as contemplated by the Ain No. 59 of 2009 is not unique in our criminal justice delivery system. Viewed from this angle, so far as minor offences involving fines or short sentences are concerned, it is not proper to say that a witness acts as a prosecutor and becomes a Judge of his own cause. Section 6(2) of the Ain No. 59 of 2009 does not create any subordinate legislation. It only creates the jurisdiction of the Mobile Court over a charter of offences. So Section 6(2) is not at all in conflict with the Constitution or any other law. Section 6(4) of the Ain No. 59 of 2009 only makes provision for setting the law in motion in case any Mobile Court comes across any serious crime which entails regular investigation and trial leading to longer jail terms for the accused. In this view of the matter, Section 6(4) is not at all discriminatory or violative of any of the constitutional provisions. There is hardly any cogent ground for the petitioner to presume that the Executive Magistrates or the District Magistrates, as the

case may be, will exert undue pressure upon the accused in order to obtain confessional statements from them. Confession of guilt and conviction thereupon at the time of framing of charge is a valid old procedure and there is nothing wrong therewith. It is not correct to say that the Ain No. 59 of 2009 allows the pick and choose policy as to whom to prosecute and whom to commit for trial to regular Courts. Section 7 is quite clear and unequivocal in this regard. Section 8 of the Ain No. 59 of 2009 is not violative of Articles 27 and 31 of the Constitution. As the sentencing principle allows dissimilar sentences and those sentences may vary from case to case depending upon any extenuating grounds, this can not be interpreted as discriminatory. It is not at all possible and feasible to fix up the time-table of the Mobile Courts. So no exception can be taken to Section 9 of the Ain No. 59 of 2009. The petitioner is totally misconceived in challenging the vires of Section 10 of the Ain No. 59 of 2009. Section 11 of the Ain No. 59 of 2009 is not ultra vires the Constitution. The District Magistrates have been empowered to hold Mobile Courts to convict and sentence the accused only upon their confessions of guilt and not upon the adjudication or evaluation of the evidence on record. It is not uncommon that a Court conducting trial of one case may also function as a Court of Appeal of another case. So no objection can be taken to Section 13 of the Ain No. 59 of 2009. Section 15 of the Ain No. 59 of 2009 allows the Government to include additional Statutes in the schedule of the Ain so that the Mobile Court's jurisdiction extends to those Statutes. By virtue of Section 15, the Government does not make any new legislation. Consequently the petitioner's contention that the Government's power to amend the schedule of the Ain No. 59 of 2009 is ultra vires the Constitution has no substance at all. In

view of the above, Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 are intra vires the Constitution and those Sections have not violated the two basic structures of the Constitution, namely, Independence of the Judiciary and Separation of Powers. The Ain No. 59 of 2009 was not enacted with a view to frustrating the spirit of the decision of Masdar Hossain's Case. Therefore the impugned order of conviction and sentence dated 14.09.2011 passed by the respondent no. 5 in Mobile Court Case No. 19 of 2011 is valid and sustainable in law. Accordingly the Rule is liable to be discharged.

In the Writ Petition No. 10482 of 2011, a Rule Nisi was issued calling upon the respondents to show cause as to why Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 should not be declared to be ultra vires the Constitution and why the order dated 24.11.2011 passed by the Additional Deputy Commissioner (L.A), Dhaka in Criminal Appeal No. 196 of 2011 dismissing the same and thereby affirming the order of conviction and sentence dated 13.09.2011 passed by the respondent no. 5 in Mobile Court Case No. 11 of 2011 under Section 8(1) of the Ain No. 59 of 2009 convicting the petitioner under Section 12 read with Section 3 of the Building Construction Act, 1952 pursuant to serial no. 26 of the schedule of the Ain and sentencing him thereunder to pay a fine of Tk. 10,00,000/- only, in default, to suffer simple imprisonment for 30(thirty) days and also directing the petitioner to demolish the allegedly illegally constructed part of the building situated at 28/1/C, Toyenbee Circular Road, Police Station Motijheel, District- Dhaka by 12.11.2011 should not be declared to be without lawful authority and of no legal effect and why the respondents should not be directed to refund the said

amount of Tk. 10,00,000/- with interest in favour of the petitioner as realized from him vide Money Receipt No. 195109 dated 13.09.2011 with reference to Mobile Court Case No. 11 of 2011 and/or such other or further order or orders passed as to this Court may seem fit and proper.

In the Writ Petition No. 10482 of 2011, the petitioner has impugned Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 as ultra vires the Constitution on similar grounds as in the Writ Petition No. 8437 of 2011. His further case is that on 13.09.2011 at 12.30 P.M., the respondent no. 5(Executive Magistrate of RAJUK) along with others and the accompanying police force went to the site of an under-construction building at 28/1/C, Toyenbee Circular Road, Police Station Motijheel, District- Dhaka. At the construction site, the respondent no. 6 (Authorized Officer of RAJUK) allegedly found some discrepancies in the construction work in relation to the approved plan. However, on the basis of the professed confession dated 13.09.2011 made by the petitioner, the respondent no. 5 (Executive Magistrate of RAJUK) rendered an order under Section 8(1) of the Ain No. 59 of 2009 in Mobile Court Case No. 11 of 2011 and convicted him under Section 12 read with Section 3 of the Building Construction Act, 1952 and sentenced him thereunder to pay a fine of Tk. 10,00,000/- only, in default, to suffer simple imprisonment for 30(thirty) days and also directed him to demolish the so-called illegally constructed part of the building by 12.11.2011. On appeal, the Additional Deputy Commissioner (L.A), Dhaka affirmed the order of conviction and sentence of the petitioner by dismissing his Criminal Appeal No. 196 of 2011 on 24.11.2011.

The respondent no. 2 (Ministry of Home Affairs) has contested the Rule issued in the Writ Petition No. 10482 of 2011 by filing an Affidavit-in-Opposition. Since the case of the respondent no. 2 in the Writ Petition No. 10482 of 2011 is identical with that of the respondent no. 2 in the Writ Petition No. 8437 of 2011 in so far as the constitutionality of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 is concerned, it is not reiterated here. Anyway, the further case of the respondent no. 2 is that the impugned order dated 24.11.2011 passed by the Additional Deputy Commissioner (L.A), Dhaka in Criminal Appeal No. 196 of 2011 dismissing the same and thereby affirming the order of conviction and sentence dated 13.09.2011 passed by the respondent no. 5 in Mobile Court Case No. 11 of 2011 is absolutely lawful and in consonance with the Constitution.

In the Writ Petition No. 4879 of 2012, a Rule Nisi was issued calling upon the respondents to show cause as to why Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 should not be declared to be ultra vires the Constitution and why the failure of the respondents in formulating guidelines for operation of Mobile Courts in bakery shops in presence of any Food Expert from the respondent no. 6, Bangladesh Standards and Testing Institution (BSTI) along with necessary testing apparatus should not be declared to be without lawful authority and of no legal effect and why a direction should not be given upon the respondents to formulate guidelines for operation of Mobile Courts in bakery shops in presence of any Food Expert from the respondent no. 6 (BSTI) along with necessary testing apparatus and/or such other or further order or orders passed as to this Court may seem fit and proper.

In this Writ Petition (Writ Petition No. 4879 of 2012), the petitioners have challenged the constitutionality of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 on similar grounds as in the other two Writ Petitions, namely, Writ Petition No. 8437 of 2011 and Writ Petition No. 10482 of 2011. The further case of the petitioners is that they as well as other members of Dinajpur Zilla Bakery Samity are engaged in the business of bakery shops. They use 4(four) main ingredients such as flour, sugar, oil and dalda to prepare their baked products for sale. All these products are approved by the respondent no. 6 (BSTI). They have been running their businesses for a long time upon obtaining licences from all the relevant departments of the Governments as required by law. While preparing products for their bakeries, the petitioners also use different types of powders, namely, Baking Powder, Ammonium Bicarbonate etc. which are approved by BSTI. So only a Food Expert (Food Analyst) can recognize which ingredients are allowed to be used in food products in a bakery shop. The Mobile Courts which are usually given authority to operate in Dinajpur are never accompanied by any Food Expert (Food Analyst). The Executive Magistrates who operate those Mobile Courts are not sufficiently trained in this respect. So the natural corollary is that whenever the Mobile Courts carry out operations in bakery shops, there are always incidents of harassment and severe violation of the fundamental rights of the owners thereof. As a result, in most of the cases, the bakery shop-owners are forced to sign written confessions and get convicted by the Mobile Courts despite there being no case of adulteration or use of banned/forbidden items. The main grievance of the petitioners is that when the Mobile Courts carry out their operations in bakery shops, they can not make the Presiding Magistrates

understand that those products are approved by BSTI. It is only fair to convict a businessman involved in the food industry on the basis of a report from a Food Expert (Food Analyst) revealing any malpractice in the preparation of any food item. In the absence of any guidelines in this regard, the petitioners are being often harassed and maltreated by the Mobile Courts.

The respondent no. 2 (Ministry of Home Affairs) has contested the Rule by filing an Affidavit-in-Opposition. As the case of the respondent no. 2 is akin to that of the respondent no. 2 in other two Writ Petitions, namely, Writ Petition No. 8437 of 2011 and Writ Petition No. 10482 of 2011 in so far as the vires of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 is concerned, we refrain from repeating the same here. However, its further case is that it is not necessary to formulate guidelines for operation of Mobile Courts in bakeries so as to ensure the presence of a Food Expert from BSTI. Formulation of guidelines is not contemplated by the Ain No. 59 of 2009. A Mobile Court run by an Executive Magistrate consists of a team of BSTI Inspectors as well as Sanitary Inspectors of the local authority in order to ascertain the ingredients of various food items of bakery shops. They are well-trained in detecting any banned/forbidden ingredient used in the food items of bakery shops. Whenever they detect use of any banned/forbidden ingredient in the food items of bakery shops, the offenders are brought to justice instantaneously by the Mobile Courts under the relevant law.

At the outset, Mr. Hassan M. S. Azim, learned Advocate appearing on behalf of the petitioners, submits that he has challenged the constitutionality of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 mainly on the score that the provisions embodied in those Sections are

violative of two important basic structures of the Constitution, namely, Independence of the Judiciary and Separation of Powers.

Mr. Hassan M. S. Azim further submits that Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11 and 13 of the Ain No. 59 of 2009 are ex-facie ultra vires Articles 22, 27, 31 and 35 of the Constitution and that being so, those Sections are liable to be struck down as being unconstitutional.

Mr. Hassan M. S. Azim next submits that the Ain No. 59 of 2009 was enacted with a view to circumventing the 'ratio' enunciated in Masdar Hossain's Case reported in 20 BLD (AD) 104.

Mr. Hassan M. S. Azim also submits that the lower Judiciary was separated from the Executive organ of the State as per the judgment passed in Masdar Hossain's Case with effect from 1st November, 2007 for the purpose of implementing the provisions of Article 22 of the Constitution and accordingly two classes of Magistrates, namely, Executive Magistrates and Judicial Magistrates were created by amending the Code of Criminal Procedure, firstly in 2007 and subsequently in 2009 and it is the mandate of the judgment passed in Masdar Hossain's Case that the judicial functions of the Republic shall be performed by the Judicial Magistrates and the executive functions of the Republic shall be performed by the Executive Magistrates; but as the Executive Magistrates have been invested with the judicial functions of the Republic under the Ain No. 59 of 2009, this has clearly violated the scheme of the Constitution and the 'ratio' of the judgment passed by the Appellate Division in Masdar Hossain's Case.

Mr. Hassan M. S. Azim further submits that in the scheme of the Constitution, the Judges and the Judicial Magistrates are mandated to exercise

the judicial powers of the Republic and this legal stance has been spelt out in the judgment of Masdar Hossain's Case in a very lucid, vivid and graphic manner; but under the Ain No. 59 of 2009, the Executive Magistrates or the District Magistrates, as the case may be, have usurped the judicial powers and functions of the Republic by running the Mobile Courts throughout the country.

Mr. Hassan M. S. Azim next submits that the Parliament has committed a monumental blunder in vesting the judicial powers of the Republic in the Executive Magistrates or the District Magistrates, as the case may be, by the Ain No. 59 of 2009 by giving a damn to the decision rendered in Masdar Hossain's Case and the Constitution.

Mr. Hassan M. S. Azim also submits that as per the scheme of the Constitution and in view of the judgment passed in Masdar Hossain's Case, the Mobile Courts must be manned by the Judicial Magistrates or the Metropolitan Magistrates, as the case may be, who are members of the Judicial Service of Bangladesh; but the operation of the Mobile Courts by purely Executive Officers (Executive Magistrates/District Magistrates) is patently and palpably illegal and unconstitutional.

Mr. Hassan M. S. Azim next submits that in both India and Pakistan, Mobile Courts are being run by the members of the Judicial Service of the respective countries; but in Bangladesh, under the Ain No. 59 of 2009, the Mobile Courts run by the Executive Officers ought to be declared to be 'de hors' the Constitution.

Mr. Hassan M. S. Azim further submits that in contradistinction to Section 164 of the Code of Criminal Procedure, 1898, there is no procedural

safeguard in respect of any confession of any accused in the Ain No. 59 of 2009 and in that view of the matter, no order of conviction and sentence should be recorded merely on the basis of the confession of the accused and what is more, it does not stand to reason and logic as to how the Executive Magistrate or the District Magistrate, as the case may be, being a witness to the commission of the alleged offence, will act as the Judge of the Mobile Court.

Mr. Hassan M. S. Azim also submits that in view of the non-obstante clause in Section 3 of the Ain No. 59 of 2009, it is an overriding law and presently there are more than 100 laws in the schedule of that Ain which the Executive Magistrates administer by operating the Mobile Courts and there is no gainsaying the fact that the schedule is an integral part of the Ain No. 59 of 2009; but funnily enough, the power of amending the schedule of the Ain has been vested in the Government which is a plenary power of the Legislature and this vesting of the plenary power of the Legislature in the Government is manifestly illegal and violative of the scheme of the Constitution.

Mr. Hassan M. S. Azim further submits that since Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 are ultra vires the Constitution, the impugned convictions and sentences awarded to the two petitioners, namely, Kamruzzaman Khan and Md. Mujibur Rahman are clearly untenable in law and as such those convictions and sentences must be knocked down.

Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 2 in all the Writ Petitions, contends that Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 are intra vires the Constitution inasmuch as the Executive

Magistrates operating the Mobile Courts are not required to sift or analyze the evidence on record in order to come to a finding of guilt of any accused in any case.

Mr. Md. Motaher Hossain (Sazu) also contends that the Executive Magistrates manning the Mobile Courts convict and sentence the accused only on the bases of their confessions of the commission of the offences with which they are charged and which are committed or unfolded in the presence of the Executive Magistrates.

Mr. Md. Motaher Hossain (Sazu) next contends that the functions performed by the Executive Magistrates while operating the Mobile Courts are not judicial functions as they are not required to record the evidence of any witness and assess the truth or otherwise of the same.

Mr. Md. Motaher Hossain (Sazu) further contends that the Ain No. 59 of 2009 is not intended to circumvent the directives given by the Appellate Division in Masdar Hossain's Case and hence the Ain No. 59 of 2009 can not be found fault with.

Mr. Md. Motaher Hossain (Sazu) next contends that no Rules have been framed as yet in exercise of the power conferred on the Government by Section 16 of the Ain No. 59 of 2009, but the framing of the Rules is underway for carrying out the purposes of the Ain.

Mr. Md. Motaher Hossain (Sazu) also contends that the Ain No. 59 of 2009 was enacted with a view to maintaining law and order and preventing commission of certain petty offences and punishing the offenders at the scene of crime and as the Mobile Courts are convicting and sentencing the offenders

instantly at the spot following a summary procedure, the law and order situation has vastly improved much to the relief of the people of the country.

Mr. Md. Motaher Hossain (Sazu) next contends that the Ain No. 59 of 2009 has been proved to be an effective tool in dealing with various types of crimes in the society and because of speedy dispensation of justice by the Mobile Courts, the people have welcomed them.

Mr. Md. Motaher Hossain (Sazu) further contends that according to Section 163 of the Motor Vehicles Ordinance, 1983, a police officer, upon admission of guilt by an accused, may impose fine on him; though the police officer does not exercise the judicial power of the Republic like an Executive Magistrate operating any Mobile Court and nobody has castigated the imposition of fine by the police officer under Section 163 of the Ordinance; but curiously enough, the petitioners have found fault with the Ain No. 59 of 2009 without any basis.

Mr. Md. Motaher Hossain (Sazu) also contends that according to the Gram Adalat Ain, 2006, the Gram Adalat imposes fine upon an accused under Section 7 for commission of any offence mentioned in Part I of the schedule of the Gram Adalat Ain and if the Gram Adalat can punish any offender under the Gram Adalat Ain, 2006, then why a Mobile Court shall not be able to punish any offender under any law mentioned in the schedule of the Ain No. 59 of 2009.

Mr. Md. Motaher Hossain (Sazu) lastly contends that in the facts and circumstances of the cases, there is no merit in the Rules and as such the Rules should be discharged.

Mr. A. F. Hassan Ariff, learned Advocate appearing on behalf of Rajdhani Unnayan Kartipakkya (RAJUK) in the Writ Petition No. 8437 of 2011, argues that according to Section 6(2) of the Code of Criminal Procedure, 1898, there are two classes of Magistrates, namely, Judicial Magistrates and Executive Magistrates and the Judicial Magistrates belong to the Judicial Service of Bangladesh and the Executive Magistrates belong to the Bangladesh Civil Service (Administration) Cadre and it is quite natural that the Judicial Magistrates will discharge judicial functions and the Executive Magistrates will discharge executive functions of the Republic as per law.

Mr. A. F. Hassan Ariff further argues that Section 11(4) of the Code of Criminal Procedure contemplates that notwithstanding anything contained in Section 11, the Government may require any Executive Magistrate to perform the functions of a Judicial Magistrate for a period to be determined in consultation with the High Court Division and during such period, the Magistrate shall not perform the functions of an Executive Magistrate and Section 190(4) of the Code provides that notwithstanding anything contained to the contrary in Section 190 or elsewhere in the Code, the Government may, by an order specifying the reasons and the period stated therein, empower any Executive Magistrate to take cognizance of offences under clauses (a), (b) or (c) of Sub-Section (1) and the Executive Magistrate shall send them for trial to the Court of competent jurisdiction and from a combined reading of the provisions of Sections 11(4) and 190 (4) of the Code of Criminal Procedure, it becomes clear that the Executive Magistrates can take cognizance of offences and perform judicial functions for a limited period and this is why, the

Executive Magistrates are operating the Mobile Courts within the meaning of the Ain No. 59 of 2009.

Mr. A. F. Hassan Ariff also argues that it can not be said at all that the Executive Magistrates running the Mobile Courts are not independent in the discharge of their judicial functions; rather their independence in this behalf has been protected and safeguarded by Article 116A of the Constitution and in this perspective, the Presiding Magistrates of the Mobile Courts are administering justice independently.

We have heard the submissions of the learned Advocate Mr. Hassan M. S. Azim and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and the learned Advocate Mr. A. F. Hassan Ariff and perused all the Writ Petitions, Affidavits-in-Opposition and relevant Annexures annexed thereto.

The scheme of our Constitution clearly provides that the people are sovereign and the Constitution is supreme. The executive power of the Republic is vested in the Executive. The legislative power of the Republic is vested in the Legislature. The judicial power of the Republic is necessarily vested in the Judiciary. The Constitution has placed the Supreme Court of Bangladesh as the guardian of the Constitution. Being the guardian of the Constitution, the Supreme Court is empowered to interpret and expound the provisions of the Constitution, as and when required, and the interpretations and expositions of various provisions of the Constitution given by the Supreme Court are binding upon all concerned. As the guardian of the Constitution, it is the duty of the Supreme Court to see that the other 2(two) organs of the State,

namely, the Executive and the Legislature do function within the parameters set by the Constitution.

In his preface to the book, "The Changing Law", Lord Denning wrote—

> "People think that the law is certain and that it can be changed only by Parliament. In theory, the Judges do not make law. They only expound it. But as no one knows what the law is until the Judges expound it, it follows that they make it."

Judge-made law, it is well-settled, is also a source of law. Both the statutory and Judge-made laws stand on the same plane. However, if any piece of legislation enacted by the Parliament is found to be inconsistent with and repugnant to any of the provisions of the Constitution, then that piece of legislation will be struck down by the High Court Division as being void and ultra vires the Constitution.

While acknowledging that Courts do make laws, Warren CJ of the US Supreme Court stated:

> "It doesn't make it consciously, it doesn't do it by intending to usurp the role of Congress but because of the very nature of our job. When two litigants come into Court, one says the act of Congress means this, the other says the act of Congress means the opposite of that, and we say the act of

> Congress means something – either one of the two or something in between, we are making law, aren't we?"
>
> Quoted from Henry J. Abraham's The Judicial Process, 1993, P. 318.

So it is seen that in a sense, Courts make laws through the process of interpretation and exposition.

As per Article 65(1) of the Constitution, there shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative power of the Republic. So it is easily deducible that although the legislative power of the Republic is vested in the Parliament, yet it is not unlimited; rather the lawmaking power of the Parliament has been circumscribed by the provisions of the Constitution. In other words, our Parliament is not like the British Parliament which is supreme. In our jurisdiction, the Constitution is supreme and all the 3(three) organs of the State owe their existence to the Constitution. As the lawmaking power of the Parliament is not absolute, it can not make any law in derogation of the provisions and the basic features of the Constitution.

The rule of law is a basic feature of the Constitution of Bangladesh. 'Law' does not mean anything that the Parliament may pass. Articles 27, 31 and 32 have taken care of the qualitative aspects of law. Article 27 forbids discrimination in law or in State actions, while Articles 31 and 32 import the concept of due process, both substantive and procedural, and thus prohibit arbitrary or unreasonable law or State actions. The Constitution further

guarantees in Part III certain rights including freedom of thought, speech and expression to ensure respect for the supreme value of human dignity.

An independent and impartial Judiciary is a precondition of rule of law. Constitutional provisions will be mere moral precepts yielding no result unless there is a machinery for enforcement of those provisions. Faithful enforcement of those provisions is impossible in the absence of an independent and impartial Judiciary. In Masdar Hossain's Case, the Appellate Division has referred to the three essential conditions of independence of the Judiciary listed by the Canadian Supreme Court in *Walter Valente...Vs... Her Majesty The Queen and another, ([1985] 2 R. C. S. 673)* which are security of tenure, security of salary and other remunerations and institutional independence to decide on its own matters of administration bearing directly on the exercise of its judicial functions.

The critical question is whether the Court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the Executive and Legislative organs of the State.

Independence and impartiality are, in fact, intertwined and it is futile to expect an impartial judgment from a Judge who is not immune from extraneous influences of any kind whatever. 'Impartiality', as one of America's best Judges once observed, 'is not a technical conception. It is a state of mind' [Durga Das Basu's Limited Government and Judicial Review, 1972, page 27].

Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it is in conformity with the Constitution both in letter and spirit. If any action is

actually inconsistent with the provisions of the Constitution, such action shall be void and can not, under any circumstances, be ratified by passing a declaratory law in Parliament. If a law is unconstitutional, it may be re-enacted removing the inconsistency with the Constitution or re-enacted after amendment of the Constitution. However, supremacy of the Constitution is a basic feature of the Constitution and as such even by an amendment of the Constitution, an action in derogation of the supremacy of the Constitution can not be declared to have been validly taken. Such an amendment is beyond the constituent power of the Parliament and must be discarded as a fraud on the Constitution [*Khondker Delwar Hossain Secretary, BNP and another…Vs…Bangladesh Italian Marble Works and others, 62 DLR (AD) 298*].

Where the power of the Legislature is limited by the Constitution or the Legislature is prohibited from passing certain laws, the Legislature sometimes makes a law which in form appears to be within the limits prescribed by the Constitution; but which, in substance, transgresses the constitutional limitation and achieves an object which is prohibited by the Constitution. It is then called a colourable legislation and is void on the principle that what can not be done directly can not also be done indirectly. The underlying idea is that although a Legislature in making a law purports to act within the limit of its powers, the law is void if, in substance, it has transgressed the limit resorting to pretence and disguise. The bottom line is that a Legislature can not overstep the field of its competence by adopting an indirect means. Adoption of such an indirect means to overcome the constitutional limitation is often stigmatized as a fraud on the Constitution.

The doctrine of colourable legislation does not, however, involve any question of bona fides or mala fides on the part of the Legislature. It is not permissible for a Court to impute malice to the Legislature in making laws which is its plenary power [*Shariar Rashid Khan...Vs...Bangladesh, 1998 BLD (AD) 155, paragraph 37*]. The entire question is one of competence of the Legislature to enact a law. A law will be colourable if it is one which, in substance, is beyond the competence of the Legislature. If a Legislature is competent to do a thing directly, then the mere fact that it has attempted to do it in an indirect manner will not render the law invalid (*Gajapati Narayan Deo...Vs...Orissa, AIR 1953 SC 375*).

We should not be mindless of the fact that independence of the Judiciary is a sine qua non of modern democracy and so long as the Judiciary remains truly separate and distinct from the Legislature and the Executive, the people's power will never be endangered as found by the High Court Division in the case of *The State...Vs...Chief Editor, Manabjamin, (2005) 57 DLR (HCD) 359*.

In the judgment of the Eighth Amendment Case (*Anwar Hossain Chowdhury and others…Vs…Bangladesh and others, 1989 BLD (SpI) 1*), paragraphs 272 and 273 are in the following terms:

> "272. This point may now be considered. Independence of Judiciary is not an abstract conception. Bhagwati, J: said 'if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the Judiciary which is entrusted with the task of

keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective'. He said that the Judges must uphold the core principle of the rule of law which says— 'Be you ever so high, the law is above you.' This is the principle of Independence of the Judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of Independence of the Judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (*S. P. Gupta and others…Vs…President of India and others, AIR 1982 SC at page 152*)."

"273. He further says— 'What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for

> accountability, not to any party-in-power nor to the opposition … We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. He quoted the eloquent words of Justice Krishna Iyer:
>
> "Independence of the Judiciary is not genuflection; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor to Government's pleasure."

*In Masdar Hossain's Case*, it was held by the Appellate Division:

> "The Independence of the Judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and can not be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney-General, is subject to the provisions of the Constitution, but we find no provision in the

> Constitution which curtails, diminishes or otherwise abridges this independence..."

As the guardian of the Constitution, the Supreme Court will not countenance any inroad upon the Constitution. Independence of the Judiciary is an essential attribute of the rule of law. The notion of independence of the Judiciary is not limited to the independence from the executive pressure or influence-it is a wider concept which takes within its sweep independence from any other pressure or prejudice. If the Judiciary manned by the Judges is not independent, how can the independence of the Judiciary be secured? It was observed in *C. Ravichandran Iyer…Vs…Justice A. M. Bhattacharjee, (1995) 5 SCC 457* as under:

> "Independent Judiciary is, therefore, most essential when liberty of citizens is in danger. It then becomes the duty of the Judiciary to poise the scales of justice unmoved by the powers (actual or perceived) and undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The Judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. Judicial individualism, in the language of Justice Powell of the Supreme Court of the United States in his address to the American Bar Association, Labour Law Section on

> 11.08.1976, is 'perhaps one of the last citadels of jealously preserved individualism…"

It is now a well-established principle that the judicial power should be regarded in its nature, and even more in the persons who administer it, as separate from other instruments of political authority. An independent and impartial Judiciary is universally recognized as a basic requirement for the establishment of the rule of law; an inevitable and inseparable ingredient of a democratic and civilized way of life. It is only thus that a citizen can be assured of a just and fair determination of his disputes with other citizens, and with the State.

Whenever a Constitution is justiciable, i.e., enforceable in a Court of law, the Judiciary becomes the guardian of the Constitution. According to A.V. Dicey:

> "This system (referring to the American), which makes the Judges the guardians of the Constitution provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation."
>
> (The Law of Constitution, 10th Ed. P-137)

Montesquieu in his book "Spirit of Laws", Vol.-1, Page 181 observed:

> "There is no liberty if the power of judging be not separated from the Legislative and the Executive powers."

Our Constitution has not only taken care to empower the Supreme Court of Bangladesh to limit the power of the Legislature in lawmaking but has also

authorized the Supreme Court to function as the bulwark of the Constitution against executive encroachments on the lives and properties of the citizenry and against any breach of their fundamental rights.

Since ours is a limited Government, the limitations imposed by the Constitution can only be preserved in practice, in the words of Hamilton, in "no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing" [Federalist Paper No. 78 by Alexander Hamilton].

In this connection, it is pertinent to refer to the eloquent statement of the Chief Justice John Marshall of America who said:

> "The judicial department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that the Judge should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?"
>
> [Proceedings and Debates of the Virginia State Convention of 1829-30(1830), page-616].

The Supreme Court of India through its comprehensive judgment in the leading case of *Minerva Mills Ltd....Vs...Union of India (AIR 1980 SC 1789)* literally left no query unanswered on Parliamentary limitation in making law

and in amending the Constitution, as well as the superior Courts' power, including the source of their power, to judicially review the Acts of Parliament. Their Lordships of the Indian Supreme Court expressed themselves in that case in the following manner:

> "It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of the Government are divided; the Executive, the Legislative and the Judiciary. Under our Constitution, we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is

that the ‘concentration of powers in any one organ may’, to quote the words of Chandrachud, J. (as he then was) in Smt. Indira Gandhi’s Case (AIR 1975 SC 2299) ‘by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which they were pledged’. Take, for example, a case where the executive which is in charge of administration, acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously can not be left to the executive to decide for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the Legislature makes

a law and a dispute arises whether in making the law, the Legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution can not, for the same reasons, be left to the determination of the Legislature."

Their Lordships continued to observe:

"It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law which, inter alia, requires that 'the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.

The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power

> of judicial review and it is unquestionably, to any mind, part of the basic structure of the Constitution."

Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard…Vs…Canada, [1986] 2 S.C. R. 56*) and has been said to exist "for the benefit of the judged, not the judges" (*Ell…Vs…Alberta, [2003] 1 S.C.R. 857*). We ought not to be oblivious of these dicta of the Canadian Supreme Court.

Undeniably, there are two dimensions of judicial independence, one individual and the other institutional. The individual dimension relates to the independence of a particular Judge. The institutional dimension relates to the independence of the Court. Both the dimensions depend upon some objective standards that protect the Judiciary's role. The Judiciary must both be and be seen to be independent. Public confidence hinges upon both these requirements being met. Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.

Judicial independence flows as a consequence of separation of powers. This independence also operates to insulate the Courts from interference by the parties to litigations and the public generally. In the case of *Ell...Vs…Alberta, [2003] 1 S.C.R 857,* the Canadian Supreme Court observed in paragraph 23:

> "23. Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution requires that it be independent from all other bodies. A separate, but

> related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the Judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it". See *Mackin…Vs…New Brunswick (Minister of Finance), [2002] 1 S. C. R. 405, 2002 SCC 13*, at paragraph 38, per Gonthier J. The principle requires the Judiciary to be independent both in fact and perception."

We see eye to eye with the above-mentioned observation of the Canadian Supreme Court.

Federalist Paper No. 78 is an essay by Alexander Hamilton. This is regarded as a foundation text of constitutional interpretation. Of all the essays, Federalist Paper No. 78 is the most cited by the Judges of the United States Supreme Court.

Federalist Paper No. 78 describes the process of judicial review by which the Federal Courts review statutes to determine whether they are consistent with the Constitution and its statutes. It also indicates that under the Constitution, the Legislature is not the Judge of the constitutionality of its own

actions. Rather, it is the responsibility of the Federal Courts to protect the people by restraining the Legislature from acting inconsistently with the Constitution:

> "If it be said that the legislative bodies are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this can not be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."

Independence of the Judiciary is an inseparable component of the concept of separation of powers. But this independence is a concept that has no in-built mechanism to remain operative in a country uninterruptedly; rather it has to face numerous challenges on its way. It is the Judiciary upon which the duty of upholding its independence rests through ages.

The Constitution of Bangladesh is neither the outcome of a negotiated settlement with a former colonial power nor drawn up with the concurrence or approval of any external sovereign power. It is the fruit of a historic war of independence making it a class apart from other constitutions of comparable description [*Dr. Mohiuddin Farooque…Vs...Bangladesh, (1997) 49 DLR (AD)1*]. In the Constitution of Bangladesh, the people feature as the dominant actors and it is a manifestation of what is called 'the people's power'.

By the landmark decision dated 02.12.1999 rendered in Masdar Hossain's Case, the Appellate Division directed the Executive to take steps for separation of the lower Judiciary from the Executive organ of the State in accordance with Article 22 of the Constitution in the light of the directives specified therein.

In Masdar Hossain's Case, the Appellate Division spelt out:

> "We have held earlier in the case of *Mujibur Rahman (Md.)…Vs…Government of Bangladesh, 44 DLR (AD) 111 Para 71*, that both "the Supreme Court and the subordinate Courts are the repository of judicial power of the State." Functionally and structurally judicial service stands on a different level from the civil administrative executive services of the Republic. While the function of the civil administrative executive services is to assist the political executives in formulation of policies and in

execution of the policy decisions of the Government of the day, the function of the judicial service is neither of them. It is an independent arm of the Republic which sits on judgment over parliamentary, executive and quasi-judicial actions, decisions and orders. To equal and to put on the same plane the judicial service with the civil administrative executive services is to treat two unequals as equals. Article 116 A of the Constitution was also lost sight of and it was conveniently forgotten that all persons employed in the judicial service and all magistrates are independent in the exercise of their judicial functions while the civil administrative executive services are not. The Government was also unmindful of the fundamental right enshrined in Article 35(3) of the Constitution which provides that 'Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.' Every person means both a citizen and a non-citizen. In *Walter Valente…Vs...Her Majesty the*

*Queen, (1985) 2 R.C.S.*, the Supreme Court of Canada held that "the concepts of 'independence' and 'impartiality', although obviously related, are separate and distinct values or requirements. 'Impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. 'Independence' reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others-particularly to the executive branch of the Government-that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a Judge as reflected in such matters as security of tenure and the institutional independence of the Court as reflected in its institutional or administrative relationships to the executive and legislative branches of the Government." We fully subscribe to this view which has been restated by the

> Supreme Court of Canada in later cases, as late as in 1997."

In Masdar Hossain's Case, the Appellate Division also held:

> "Magistrates exercising judicial functions do so only temporarily and do not as yet fall within judicial service. They are purely executive officers performing judicial functions for the time being. Their appointment is governed by Article 115, control over them is vested in the President as long as they exercise judicial functions, but their terms and conditions of service are governed by Article 133. District Magistrates, Additional District Magistrates, Chief Metropolitan Magistrates, Metropolitan Magistrates etc. who are purely executive officers, are performing judicial functions. If and when an issue is raised as to whether in view of the Fundamental Right contained in Article 35(3) executive officers can at all perform purely judicial functions, that question may be examined in future; but for the present, it seems to be incongruous that magistrates performing judicial functions will be

> governed in their terms and conditions of service by Article 116, but as soon as they are reverted to executive work, their terms and conditions of service will be governed by Article 133. By amending the Code of Criminal Procedure, the Government can create purely Judicial Magistrates and make Article 116 meaningful."

Coming back to the cases in hand, indisputably the Mobile Courts of Bangladesh are being operated by the Executive Magistrates or the District Magistrates, as the case may be, who are purely Executive Officers belonging to the Bangladesh Civil Service (Administration) Cadre. So the instant cases have afforded us an opportunity to examine as to whether in view of the fundamental right contained in Article 35(3) of the Constitution, those Magistrates can at all perform purely judicial functions. In this context, it may be pointed out that the powers of taking cognizance of offences, convicting and sentencing the offenders under the relevant provisions of law are all judicial powers. There can not be any iota of doubt about those judicial powers. At this juncture, a momentous question arises: can the Executive Magistrates, or, for that matter, the District Magistrates exercise those judicial powers while manning the Mobile Courts under the Ain No. 59 of 2009?

In compliance with the judgment of the Appellate Division passed in Masdar Hossain's Case and in order to create two classes of Magistrates, namely, Executive Magistrates and Judicial Magistrates, the Code of Criminal Procedure was first amended by the Mobile Court Ordinance, 2007 and

thereafter by the Mobile Court Ordinance, 2009 and lastly by the Parliament in 2009. The Preamble of the Code of Criminal Procedure (Amendment) Act, 2009 spelt out the purpose of the amendment with reference to Article 22 of the Constitution and accordingly the Code of Criminal Procedure (Amendment) Act, 2009 was passed by the Parliament. This being the panorama, after the separation of the lower Judiciary from the Executive organ of the State on the basis of the judgment passed by the Appellate Division in Masdar Hossain's Case, there is no scope whatsoever on the part of the Executive Magistrates or the District Magistrates, as the case may be, to exercise judicial powers and discharge judicial functions like the Judicial Magistrates or the Metropolitan Magistrates who admittedly belong to the Judicial Service of Bangladesh.

On this issue, the contention of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) is that the Executive Magistrates operating the Mobile Courts do not at all sift or analyze any evidence on record; rather they simply record orders of convictions and sentences only on the bases of the confessions of the accused. This contention of Mr. Md. Motaher Hossain (Sazu) is unacceptable on the face of it. It should be borne in mind that the act of taking cognizance of an offence by a Court is a judicial act (Abdul Ali and another…Vs…The State, 30 DLR (SC) 58). The power of passing a sentence is essentially a judicial power and can not be exercised by any Executive Officer. Besides, determination of sentence, it goes without saying, is a judicial act. A sentence may be a custodial sentence or a pecuniary sentence. A custodial sentence is a sentence of imprisonment whereas a pecuniary sentence is a sentence of fine. It is the mandate of the judgment passed in Masdar Hossain's Case that the Executive Magistrates will perform executive functions and the

Judicial Magistrates will perform judicial functions as per the scheme of the Constitution. What we are trying to stress is this: the Executive Magistrates, or, for that matter, the District Magistrates can not usurp the judicial power of the Republic in any manner and run the Mobile Courts as are being run within the purview of the Ain No. 59 of 2009.

The Ain No. 59 of 2009 is admittedly an overriding law (Section 3). The preamble of the Ain No. 59 of 2009 is in the following terms:

> "যেহেতু জনস্বার্থে, আইন শৃঙ্খলা রক্ষা এবং অপরাধ প্রতিরোধ কার্যক্রমকে কার্যকর ও অধিকতর দক্ষতার সহিত সম্পাদন করিবার জন্য এক্সিকিউটিভ ম্যাজিস্ট্রেটকে কতিপয় অপরাধ তাৎক্ষণিকভাবে ঘটনাস্থলে আমলে গ্রহণ করিয়া দন্ড আরোপের সীমিত ক্ষমতা অর্পণ করিয়া মোবাইল কোর্ট পরিচালনার লক্ষ্যে বিধান করা সমীচীন ও প্রয়োজনীয়;
>
> সেহেতু এতদদ্বারা নিম্নরুপ আইন করা হইল:"

In public interest, it is the duty of the Executive Magistrates/District Magistrates to maintain law and order and to prevent commission of any offences within their respective jurisdictions. This part of the preamble can not be objected to; but the other part of the preamble that the Executive Magistrates are to be empowered to impose penalties on the accused at the spot by taking cognizance of offences runs counter to the spirit of the judgment passed in Masdar Hossain's Case and is violative of the Independence of the Judiciary and Separation of Powers between the three organs of the State, namely, the Executive, the Legislature and the Judiciary. In order to conform to

the scheme of the Constitution and in obedience to the judgment of the Appellate Division rendered in Masdar Hossain's Case, the Mobile Courts created under Section 4 of the Ain No. 59 of 2009 must be run by the Judicial Magistrates or the Metropolitan Magistrates, as the case may be, belonging to the Judicial Service of Bangladesh.

Article 22 of the Constitution postulates that the State shall ensure the separation of the Judiciary from the Executive organ of the State. Besides, Article 31 of the Constitution provides that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Over and above, Article 35(3) of the Constitution envisages that every person accused of a criminal offence shall have the right to a speedy and public trial by any independent and impartial court or tribunal established by law. To our way of thinking, there is no legally or constitutionally guaranteed individual and institutional independence of the Executive Magistracy which is absolutely controlled by the Executive organ of the State. This being the position, we are led to hold that Section 5 of the Ain No. 59 of 2009 is violative of Articles 22, 31 and 35(3) of the Constitution.

In India, there is an experimental scheme called "Justice on Wheels" in which a Mobile Court delivers legal redress to the poor and the marginalized people. Under that scheme, the Mobile Court bus visits India's rural poor to deliver justice at their footsteps and the Presiding Officer of the Mobile Court is a Judicial Officer. In this respect, one Indian daily, namely, "The Hindu"

published a report captioned "India's First Mobile Court Inaugurated on 5th August, 2007". The relevant portions of the report are quoted below verbatim for our enlightenment:

> "MEWAT (HARYANA): With an endeavour to make the judicial system accessible to remote and backward areas, the country's first Mobile Court was inaugurated in the Mewat district of Haryana on Saturday.
>
> Chief Justice of India K.G. Balakrishnan, while inaugurating the Court in the presence of Union Law Minister H.R. Bhardwaj, Chief Justice of Punjab and Haryana High Court Vijender Jain, Haryana Chief Minister Bhupinder Singh Hooda and Supreme Court Judges Ashok Bhan and H. S. Bedi, said, 'People generally go to Courts to get justice but today with Mobile Courts, the Courts will come to the people.'
>
> Asserting the importance of Judiciary in a democratic setup, Mr. Justice Balakrishnan said, 'A judicial system for the masses is a must for maintenance of rule of law and for safeguarding the democracy. It is because of the Judiciary that democracy is maintained

in India.' So he urged more State Governments and the Centre to come forward in strengthening this system.

The Chief Justice of India also advised the people of Mewat to make full use of the facilities made available to them through the Mobile Court and not to misuse their rights. 'Unless economic growth percolates to the common man in the form of better education, jobs and a better judicial system, it will remain a myth and never become a reality,' he added.

From Monday, the Mobile Court, that has been set up in a bus, would move from one location to another according to a well-prepared plan and schedule. The Court shall sit on four days every week at four different centres and on two days it would work as a regular Court at Ferozepur Jhirka. The selected centres include Punhana, Shikrawa, Indana and Lohinga Kalan. In the first phase, the Court will start functioning in Punhana block which has been divided into four zones, each consisting of 25 to 30 villages.

> Said to be a brainchild of former President A. P. J. Abdul Kalam, the concept of Mobile Court is based on the pressing need to take the administration of civil and criminal justice closer to the people so that those living in remote areas are able to benefit without incurring the expenses of travelling to Courts at distant places.
>
> Speaking on the occasion, Mr. Hooda said, 'We chose Mewat for inaugurating the first Mobile Court because of its abysmal literacy rate and as it is the most backward district of Haryana. We need further innovations such as these in the Judiciary to take our country forward.' The Mobile Court would be staffed like a regular Court and transact serious judicial business in both civil and criminal cases through a full-fledged trial. It would be presided over by an Additional Civil Judge-cum-Sub-Divisional Judicial Magistrate."

By the way, the Gram Nyayalayas Act, 2008 may be referred to. The Gram Nyayalayas Act, 2008 is an Act of Parliament of India enacted for establishment of Gram Nyayalayas for speedy and easy access to justice system in the rural areas of India. The main object of enactment of the Gram

Nyayalayas Act is to provide for the establishment of Gram Nyayalayas at the grassroots level for the purpose of providing easy access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities. The Act came into force on 2nd October, 2009. A Gram Nyayalaya has jurisdiction over the area specified by a notification by the State Government in consultation with the respective High Court. The Court can function as a Mobile Court at any place within the jurisdiction of such Gram Nyayalaya after giving wide publicity in that regard. A Gram Nyayalaya is presided over by a Nyayadhikari who is a Judicial Magistrate of the First Class. This is perfectly in consonance with the doctrine of Separation of Powers between the three organs of the State.

In Pakistan, there is a law called “The Establishment of Civil Mobile Courts Act, 2015”. The object of this law is to provide for the establishment of Civil Mobile Courts in the Province of the Khyber Pakhtunkhwa. A Civil Mobile Court under this law of 2015 is presided over by a Civil Judge. On the other hand, the Minor Offences Courts Ordinance, 2002 deals with minor offences which are cognizable and triable by a Judicial Magistrate in Pakistan. Of course, under the aforesaid Ordinance of 2002, there is no scope to operate any Mobile Court in respect of minor criminal offences in Pakistan. Precisely speaking, in Pakistan there is no Mobile Court in place for dispensation of instant criminal justice to the offenders at the spot.

Mobile Courts are also functioning on experimental basis under various UNDP-aided projects in Sierra Leone, Democratic Republic of the Congo and Somalia. It is on record that the Mobile Courts in those countries are speedily

and effectively delivering the goods to the litigant people in their rural areas. [See EVALUATION OF UNDP'S SUPPORT TO MOBILE COURTS published by UNDP May, 2014].

Coming back to the present Rules, Section 6(1) of the Ain No. 59 of 2009 is reproduced below for better appreciation:

> "৬। মোবাইল কোর্টের ক্ষমতা।- (১) ধারা ৫ এর অধীন ক্ষমতাপ্রাপ্ত এক্সিকিউটিভ ম্যাজিস্ট্রেট বা ধারা ১১ এর অধীন ক্ষমতাপ্রাপ্ত ডিস্ট্রিক্ট ম্যাজিস্ট্রেট আইন শৃংঙ্খলা 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 উদঘাটিত হইয়া থাকিলে তিনি উক্ত অপরাধ তাৎক্ষণিকভাবে ঘটনাস্থলেই আমলে গ্রহণ করিয়া অভিযুক্ত ব্যক্তিকে, স্বীকারোক্তির ভিত্তিতে, দোষী সাব্যস্ত করিয়া, এই আইনের নির্ধারিত দন্ড আরোপ করিতে পারিবেন।"

As we have already found that the Executive Magistrates, or the District Magistrates, as the case may be, can not perform the judicial functions of the Republic and as the powers of taking cognizance of offences, convicting and sentencing the offenders under the relevant laws are all judicial powers, the question of exercise of those judicial powers by them is out of the question. Further, it is admitted that there is no procedural safeguard of any kind of the alleged confession of an accused, let alone the question of the safeguards as embodied in Section 164 of the Code of Criminal Procedure. On top of that, the Presiding Magistrate of the Mobile Court can not try the case for the simple

reason that in his presence, the offence is committed or unfolded. Since as per Section 6(1), the offence is committed or unfolded in his presence; at the most, he can be a witness in the case on the side of the prosecution. It is well-settled that a witness can never be the Judge of any case. So the imposition of any sentence upon the accused by the Presiding Magistrate of the Mobile Court can not be sustainable in law on that count.

What is of signal importance is that the Executive Magistrates or the District Magistrates, as the case may be, being out-and-out Executive Officers are always at the beck and call of their departmental high-ups. Those Magistrates are not in a position to administer justice fairly and impartially because of the executive and other extraneous influence upon them. In this respect, the public perception reigns supreme. There goes an age-old adage— "Justice should not only be done, but it should be shown to have been done."

For all the reasons mentioned above, Section 6(1) of the Ain No. 59 of 2009 is contradictory to Articles 22, 31 and 35(3) of the Constitution.

It is only for the Parliament to create offences by Acts of Parliament. The argument of Mr. Md. Motaher Hossain (Sazu) that Section 6(2) of the Ain No. 59 of 2009 creates jurisdiction of a Mobile Court in respect of a charter of offences can not be brushed aside at all. But nevertheless Section 6(2) postulates that— "তফসিলে বর্ণিত কোন আইনের অধীন প্রণীত বিধি, প্রবিধি বা আদেশের অধীন কোন অপরাধ উক্ত আইনের অধীন অপরাধ বলিয়া গণ্য হইবে". It is a settled proposition of law that no offence can be created and punished under any delegated or subordinate or subsidiary legislation. What we are trying to emphasize is that offences can only be created and punished by or under the parent law of the relevant subordinate legislation. As Section 6(2) is found to have contravened the

above-mentioned proposition of law, the same has no legs to stand upon. In the result, Section 6(2) of the Ain No. 59 of 2009 seems to have offended against Articles 27 and 31 of the Constitution.

Section 6(4) of the Ain No. 59 of 2009 does not reveal any guideline as to how to be satisfied, upon application of which yardstick, to decide which offences are grievous in nature so as to warrant trials by the regular Courts. In other words, Section 6(4) allows the Executive Magistrates or the District Magistrates, as the case may be, to pick and choose at their sweet will as to whom to prosecute and whom to commit to the regular Courts for trial. In this regard, the accused before the Mobile Courts are always subject to the whims and caprices of the Executive Magistracy. This being the state of affairs, we have no hesitation in holding that Section 6(4) being inherently prone to be discriminatory is in conflict with Articles 27 and 31 of the Constitution.

A reference to Section 7 of the Ain No. 59 of 2009 indicates that as the Code of Criminal Procedure is hardly applicable to the summary trials held by the Mobile Courts, the confessions which are obtained from the accused remain unsafe vitiating the convictions and sentences handed down on the bases of such confessions. To be more explicit, we do not come across any modality laid down in Section 7 as to how to obtain a confession from any accused and how to record the same. In the absence of any such modality, Section 7 appears to be violative of Articles 27 and 31 of the Constitution. Besides, the imposition of any sentence by any Executive Magistrate or any District Magistrate, as the case may be, as per Section 7 contravenes Article 22 of the Constitution. Needless to say, the operation of the Mobile Courts by the Executive Magistrates, or, for that matter, by the District Magistrates fully and

wholly contradicts the judgment passed by the Appellate Division in Masdar Hossain's Case.

Section 8 of the Ain No. 59 of 2009 seems to have infringed upon Articles 27 and 31 of the Constitution inasmuch as it is intrinsically apt to be discriminatory. If, for example, a particular penal provision prescribes punishment for five years imprisonment, a Mobile Court convicting an accused will only mete out punishment to him for a maximum period of two years as opposed to an accused who is tried by a regular Court and even though the latter stands on the same footing, he may be required to suffer punishment to the maximum extent as provided by the relevant law.

It has been clearly, categorically and unambiguously stated in all the Writ Petitions that Section 9 of the Ain No. 59 of 2009 is arbitrary and discriminatory in its application. If a Mobile Court fines someone an amount of Tk. 20,00,000/- only at 07.00 P.M on any day, that is to say, after banking hours, the convict will hardly get any chance to arrange the money from his bank as it is not very usual for anyone to keep such a huge amount of money anywhere else. As such the imprisonment for three months as provided in Section 9 for failure to pay up the fine instantly as imposed by the Mobile Court will largely depend upon at what time of the day, the Mobile Court imposes the fine for which there is no guideline in the Ain No. 59 of 2009. As no Rules have been framed by the Government as yet in exercise of its power under Section 16 of the Ain No. 59 of 2009, the detailed procedure for holding of trial by any Mobile Court has not seen the light of the day. Broadly speaking, Section 9 seems to be violative of Articles 27 and 31 of the Constitution.

Although Section 10 provides for the constitutional protection under Article 35(2) against double jeopardy in respect of a convicted person, yet it utterly fails to provide for the same protection to an acquitted person facing the same trial. So it leaves no room for doubt that Section 10 contradicts Articles 27 and 35(2) of the Constitution.

The District Magistrates are the heads of Executive Magistracies in their respective Districts. As already held, they are essentially Executive Officers. So the running of the Mobile Courts by the District Magistrates as contemplated by Section 11 of the Ain No. 59 of 2009 violates Articles 22, 27, 31 and 35(3) of the Constitution.

According to the Ain No. 59 of 2009, a District Magistrates can sometimes be the convicting authority and sometimes be the appellate authority. When he will carry out what functions will be decided by no one else; but by the District Magistrate himself. As we see it, this is an anomalous position leaving ample scope for exercise of discretion by the District Magistrate in an arbitrary manner. Furthermore, Section 13 of the Ain No. 59 of 2009 allows the District Magistrate or any Additional District Magistrate, who is not holding any post in the Judicial Service of the Republic, to be the appellate authority of any Mobile Court presided over by any Executive Magistrate. The vesting of appellate powers (which are, in fact, judicial powers) in the District Magistrate and in the Additional District Magistrate by Section 13 has contravened Articles 27, 31 and 35(3) of the Constitution.

It is a truism that the schedule of an Act of Parliament is its integral part. It does not stand to reason and logic as to why and how the Government has been empowered to amend the schedule of the Ain No. 59 of 2009 by any

notification in the Official Gazette. The power of amendment of any Statute is the plenary power of the Parliament. It is really astounding to note that the Parliament has delegated its plenary power of amendment of the schedule of the Ain No. 59 of 2009 in favour of the Government under Section 15. On this question, it may be reiterated that the Parliament may delegate the power of making subordinate or subsidiary legislations in favour of the Government or any other instrumentality; but the Parliament can not delegate its plenary power of amendment of the main Statue, that is to say, the Ain No. 59 of 2009. By delegating the power of amendment of the schedule of the Ain No. 59 of 2009 by virtue of Section 15, the Parliament has undoubtedly infringed upon the Doctrine of Separation of Powers which is one of the basic structures of the Constitution.

In view of what have been stated above, it is ex-facie clear that the manning of the Mobile Courts by the Executive Magistrates or the District Magistrates, as the case may be, has hit the Independence of the Judiciary and Separation of Powers between the three organs of the State, apart from being violative of various Articles of the Constitution as enumerated above.

The contention of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) that while operating the Mobile Courts under the Ain No. 59 of 2009, the Executive Magistrates or the District Magistrates, as the case may be, do not perform judicial functions in that they convict and sentence the accused on the bases of their voluntary confessions of guilt is clearly untenable in law the reason being that we have already found that the functions of taking cognizance of any offences and convicting and sentencing the accused are all judicial functions. Regard being had to the judgment of

Masdar Hossain's Case, we opine that the judicial functions of the Judiciary can not be assumed and usurped by the Executive Magistracy. So the above contention of Mr. Md. Motaher Hossain (Sazu) stands negatived.

The Gram Adalat Ain, 2006 came into operation on 9th May, 2006. In this connection, it may be mentioned that a Gram Adalat shall have the jurisdiction to try some criminal cases specified in 1st part of the schedule of the Ain. From a bare reading of Section 7 of the Gram Adalat Ain, 2006, it transpires that the Gram Adalat may direct any person to pay compensation subject to a maximum of Tk. 75,000/- for commission of any offence specified in 1st part of the schedule of the Ain. The Gram Adalat does not impose any sentence of fine upon any offender. A sentence of fine is quite distinct and separate from an order of payment of compensation in respect of commission of any offence specified in 1st part of the schedule of the Gram Adalat Ain.

We think, Mr. Md. Motaher Hossain (Sazu) has confused an order for payment of compensation with a sentence of fine. The Gram Adalat does not take cognizance of any offence nor does it convict and sentence any offender. It can only make an order for payment of compensation not exceeding an amount of Tk. 75,000/- as stated above. The Gram Adalat does not exercise any judicial power of the Republic. So no comparison can be made between a Gram Adalat and a Mobile Court. Against this backdrop, the invocation of Section 7 of the Gram Adalat Ain, 2006 does not appear to be of any avail to Mr. Md. Motaher Hossain (Sazu).

Section 163(1) of the Motor Vehicles Ordinance, 1983 provides that notwithstanding anything to the contrary contained in the Ordinance or any other law for the time being in force, a police officer in uniform, not below the

rank of a Sub-Inspector or Sergeant, specially empowered in this behalf by the competent authority or any Inspector of Motor Vehicles or other persons authorized in this behalf by the Authority, may, in any area to be notified by the Authority in this behalf, charge on the spot any person who, in his presence or view, commits any of the offences set forth in the Twelfth Schedule with the commission of that offence.

Section 163(2) of the Motor Vehicles Ordinance, 1983 contemplates that an officer acting under Sub-Section (1) of Section 163 shall draw up the charge in the form prescribed, specifying the nature of the offence, the fine as mentioned against such offence in the Twelfth Schedule payable in respect thereof and the accused person shall pay the fine on the spot by means of stamps to the officer who made the charge and shall receive an acknowledgement therefor. According to the contention of Mr. Md. Motaher Hossain (Sazu), a police officer (Sub-Inspector or Sergeant) may impose the prescribed fine upon the accused for commission of any of the offences specified in the Twelfth Schedule of the Motor Vehicles Ordinance, 1983. Mr. Md. Motaher Hossain (Sazu), by way of analogy, tries to impress upon us that an Executive Magistrate operating a Mobile Court like a police officer under the Motor Vehicles Ordinance, 1983 can definitely impose fine upon any offender for violation of the relevant provision of any law enumerated in the Schedule of the Ain No. 59 of 2009. It is worthy of notice that the police officer under Section 163 of the Motor Vehicles Ordinance, 1983 does not take cognizance of any offence nor does he record any order of conviction and sentence of imprisonment. He simply imposes the prescribed fine upon the offender for commission of any of the offences set forth in the Twelfth

Schedule of the Ordinance. Given the scenario, a pertinent question arises: can a police officer under the Constitution impose the prescribed fine upon the offender for commission of any of the offences set forth in the Twelfth Schedule of the Motor Vehicles Ordinance? This question may be examined in an appropriate case in future. As such the invocation of Section 163 of the Motor Vehicles Ordinance, 1983 is a futile exercise.

Section 11(4) of the Code of Criminal Procedure, 1898 provides that notwithstanding anything contained in this Section, the Government may require any Executive Magistrate to perform the functions of a Judicial Magistrate for a period to be determined in consultation with the High Court Division and during such period, the Magistrate shall not perform the functions of an Executive Magistrate. This provision embodied in Sub-Section (4) of Section 11 of the Code of Criminal Procedure is in the nature of an exception. The essence of this provision is that an Executive Magistrate may be empowered to perform the functions of a Judicial Magistrate for a limited period to be determined in consultation with the High Court Division of the Bangladesh Supreme Court.

Again Section 190 (4) of the Code of Criminal Procedure envisages that notwithstanding anything contained to the contrary in Section 190 or elsewhere in the Code, the Government may, by an order specifying the reasons and the period stated therein, empower any Executive Magistrate to take cognizance of offences under clause (a), (b) or (c) of Sub-Section (1) and the Executive Magistrate shall send the same for trial to the Courts of competent jurisdiction. From the language employed in Section 190(4) of the Code of Criminal Procedure, it is obvious that Section 190(4) does not refer to holding of any

trial of any case by any Executive Magistrate and it only pertains to taking cognizance of offences and sending them to the Courts of competent jurisdiction for trial by him, if he is so empowered. Undeniably the Code of Criminal Procedure is a general law. On the other hand, the Ain No. 59 of 2009 is a special law. Since the Ain No. 59 of 2009 is an overriding special law, Sections 11(4) and 190(4) of the Code of Criminal Procedure have no manner of application to the proceedings of any Mobile Court. Considered from this standpoint, the argument of Mr. A. F. Hassan Ariff that from a conjoint reading of the provisions of Sections 11(4) and 190(4) of the Code of Criminal Procedure, it becomes clear that the Executive Magistrates can take cognizance of offences and perform judicial functions for a limited period and on that account, the Executive Magistrates are operating the Mobile Courts within the meaning of the Ain No. 59 of 2009 stands discarded.

As discussed earlier, all Executive Magistrates are the members of the Bangladesh Civil Service (Administration) Cadre. With the separation of the lower Judiciary from the Executive organ of the State in terms of Article 22 of the Constitution on the basis of the judgment of Masdar Hossain's Case, two classes of Magistrates, namely, Executive Magistrates and Judicial Magistrates were created by amending the Code of Criminal Procedure of 1898. From this point of view, the question of performance of any judicial functions by the Executive Magistrates or the District Magistrates, as the case may be, after the separation of the lower Judiciary from the Executive organ of the State under the Mobile Court Ordinance, 2007 with effect from 1st November, 2007, does not arise at all.

It is our considered view that the Magistrates exercising judicial functions shall be independent according to Article 116A of the Constitution has lost all its relevance with effect from 1st November, 2007. So we are not impressed by the specious argument of Mr. A. F. Hassan Ariff that the Executive Magistrates running the Mobile Courts are independent in the exercise of their judicial functions under Article 116A of the Constitution.

Both Mr. A. F. Hassan Ariff and Mr. Md. Motaher Hossain (Sazu) have singularly failed to controvert the grounds articulated in the Writ Petitions challenging the vires of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 to our satisfaction. Those Sections, in our opinion, are directly in conflict with the spirit of the judgment passed by the Appellate Division in Masdar Hossain's Case and are also violative of two basic structures of the Constitution, namely, Independence of the Judiciary and Separation of Powers between the three organs of the State, that is to say, the Executive, the Legislature and the Judiciary. The violation of the relevant Articles of the Constitution and the two basic structures of the Constitution as adverted to above can not be countenanced by the guardian of the Constitution, that is to say, the Supreme Court of Bangladesh.

What we are driving at boils down to this: by investing the Executive Magistrates and the District Magistrates with the judicial power of the Republic by the Ain No. 59 of 2009, the Legislature has contravened the Constitution. This contravention is a frontal attack on the Independence of the Judiciary and is violative of the Theory of Separation of Powers. All members of the Bangladesh Civil Service (Administration) Cadre including the Executive Magistrates and the District Magistrates are all Administrative

Executives. As Administrative Executives, they can not exercise the sovereign judicial power of the Republic which has been spelt out by the Appellate Division in the judgment of Masdar Hossain's Case. In the facts and circumstances of the instant cases, we find that the provisions of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 are colourable provisions and are intended to nullify the implication of the judgment of the Appellate Division rendered in Masdar Hossain's Case and on that score, those Sections can not remain in the Statute (Ain No. 59 of 2009).

We are not opposed to the concept of Mobile Courts; rather we support it. As we see them, the Mobile Courts are undoubtedly fast-track Courts. In the social context of Bangladesh and in order to facilitate access to justice at the grassroots level, fast-track Courts like Mobile Courts are an imperative necessity. This type of fast-track Courts may prove to be an effective tool in curbing the rising wave of crime in the country.

Be that as it may, the running of the Mobile Courts by the Executive Magistracy under the Ain No. 59 of 2009 not being sanctioned by the Constitution is a vicious blow to the rule of law and constitutionalism in the country. In a word, the Mobile Courts being run by the Executive Magistracy are coram non judice. Therefore the operation of the Mobile Courts by the Executive Magistracy must be knocked down.

The Mobile Courts, if any, must be manned by the Judicial Magistrates or the Metropolitan Magistrates, as the case may be. In other words, the Mobile Courts must be manned by the members of the Bangladesh Judicial Service which will be perfectly in accord with the Constitution and the judgment passed by the Appellate Division in Masdar Hossain's Case. On the contrary,

the manning of the Mobile Courts by the Executive Magistrates or the District Magistrates, as the case may be, and the disposal of appeals arising out of the orders of convictions and sentences of the Mobile Courts by the District Magistrates, or for that matter, by the Additional District Magistrates are all 'de hors' the Constitution and the law declared by the Appellate Division in Masdar Hossain's Case.

As we have found that Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 are ultra vires the Constitution, the impugned orders of convictions and sentences awarded to the petitioners of the Writ Petition Nos. 8437 of 2011 and 10482 of 2011 can not be maintained. Accordingly, the Rules issued in the Writ Petition Nos. 8437 of 2011 and 10482 of 2011 may be made absolute. As to the other Writ Petition No. 4879 of 2012, the Rule may be made absolute in part, so far as it relates to the vires of Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11,13 and 15 of the Ain No. 59 of 2009. As those Sections are ultra vires the Constitution, the Government is not required to frame any Rules in exercise of its power under Section 16 of the Ain No. 59 of 2009. So the Rules issued in the Writ Petition Nos. 8437 of 2011 and 10482 of 2011 succeed in full and the Rule issued in the Writ Petition No. 4879 of 2012 succeeds in part.

Accordingly, the Rules issued in the Writ Petition Nos. 8437 of 2011 and 10482 of 2011 are made absolute and the Rule issued in the Writ Petition No. 4879 of 2012 is made absolute in part without any order as to costs. It is hereby declared that Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11, 13 and 15 of the Ain No. 59 of 2009 are ultra vires the Constitution and violative of two basic structures of the Constitution, namely, Independence of the Judiciary and

Separation of Powers between the three organs of the State, namely, the Executive, the Legislature and the Judiciary. Consequentially the impugned orders of convictions and sentences dated 14.09.2011 and 13.09.2011 passed in Mobile Court Case Nos. 19 of 2011 and 11 of 2011 challenged in the Writ Petition Nos. 8437 of 2011 and 10482 of 2011 respectively are declared to be without lawful authority and of no legal effect. The respondents of the Writ Petition No. 10482 of 2011 are hereby directed to refund the amount of Tk. 10,00,000/- in favour of the petitioner as realized from him vide Money Receipt No. 195109 dated 13.09.2011 with reference to Mobile Court Case No. 11 of 2011 within 90(ninety) days from the date of receipt of a copy of this judgment.

However, in order to avoid unwarranted complications, controversies and legal niceties, all orders of convictions and sentences passed by the Mobile Courts of Bangladesh under the Ain No. 59 of 2009 are hereby condoned as being past and closed transactions excepting those which have been challenged in higher Courts which will be subject to their decisions.

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

**ASHISH RANJAN DAS, J:**

I agree.