Supreme Court Online Bulletin

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Justice Moyeenul Islam Chowdhury

Justice Sheikh Hassan Arif

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Supreme Court of Bangladesh

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2. Mr. Justice Hasan Foez Siddique
3. Mr. Justice Mirza Hussain Haider

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97. Mr. Justice Dr. K.M. Hafizul Alam

Justice Syed Mahmud Hossain
Chief Justice of Bangladesh

Supreme Court of Bangladesh
Dhaka-1000

Message

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

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

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

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

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

Justice Syed Mahmud Hossain
Chief Justice of Bangladesh

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Editorial

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

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

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

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

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

Thank you all.

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

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Appellate Division

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1.	Alhaj Dr. Chowdhury Mosaddequl Isdani Vs. Abdullah Al Munsur Chowdhury & ors. *(Mirza Hussain Haider, J.)* 10 SCOB [2018] AD 19	*Persona Designata*	In legal parlance the expression "persona designa" means a person who has been described in a statute or a legal instrument by his official designation, and his function may be judicial or may not be so. But if the function of the designated person is judicial in character then he is nothing but a "court" even though he is not described as a court but by official designation. The test is the power and function he has to discharge.
2.	Bangladesh Rubber Industries & anr. Vs. Dine Ara Begum & ors. (*SYED MAHMUD HOSSAIN, C. J*) 10 SCOB [2018] AD 1	Dissolution of partnership	Having considered the cases cited above, we find that a deed of dissolution of partnership is not required to be registered under section 17 of the Registration Act because the share of a partner in a partnership is essentially moveable property notwithstanding that a part of the partnership property may be immovable.
3.	Md. Hafizuddin Vs. Mozaffor Mridha & ors. *(Hasan Foez Siddique, J.* 10 SCOB [2018] AD 12	Basic Principles of Waqf	Three basic principles governed the waqf: the trust was required to be irrevocable, perpetual, and inalienable. Once property was declared waqf by its owner, the trust thereby created was irrevocable. It means (i) inalienable lands used for charitable purposes and (ii) pious endowments.
4.	Kamal alias Exol Kamal Vs. State (*MUHAMMAD IMMAN ALI, J.*) 10 SCOB [2018] AD 6	Commutation of Sentence	On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell.

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
1.	Bangobir Kader Siddiqui, Bir Uttom Vs. Chief Election Commissioner & ors. *(Md. Ashfaqul Islam, J.)* 10 SCOB [2018] HCD 84	Constitution of the People's Republic of Bangladesh, Article 102.	Any dispute whether that relates to acceptance or non-acceptance of the candidature of the particular candidate should be brought for a decision before an Election Tribunal as election dispute.
2.	Catherine Masud & ors. Vs. Md. Kashed Miah *(Zinat Ara, J.)* 10 SCOB [2018] HCD 30	Motor Vehicles Ordinance, 1983 Section 128.	It is evident that section 128 of the MV Ordinance read with rule 220 of the MV Rules requires that the claim application is to be submitted in CTA Form within six months of the accident. However, the proviso to sub-section (3) of section 128 of the MV Ordinance authorizes the Tribunal to entertain an application after the period of six months, if the Tribunal is satisfied that the claimants were prevented by sufficient cause.
3.	CCB Foundation Vs. Bangladesh & ors. *(Farah Mahbub, J.)* 10 SCOB [2018] HCD 117	*Locus Standi* of the Petitioner & maintainability of the Rule.	The issues being raised in the instant writ petition by the petitioner involves grave public injury as well as invasion on the fundamental right to life of the victim guaranteed under the Constitution. Accordingly, it has sought protection of this Court, the guardian and custodian of the Constitution of the People's Republic of Bangladesh, for violation of the said right by filing application under Article 102 of the Constitution for the bereaved poor family members of the 4 years old boy named Jihad who died by falling into an uncovered deep tube well pipe of Bangladesh Railway situated at Shahjahanpur Railway Colony. As such, it cannot be said that the petitioner has no locus standi on the issue in question. In other words, this Rule is maintainable so far the locus standi of the petitioner Foundation is concerned.
4.	Eastern Diplomatic Services Vs. Anti-Corruption Commission & ors. *(M. Enayetur Rahim, J.)*	Anti-Corruption Commission Act, 2004 Section 17 and 19 of the	At the stage of inquiry, which is nothing but a fact finding process, there is no scope to arrive at a definite conclusion that the alleged allegation/offence will not fall within the preview of relevant Money Laundering Protirodh Ain, which is in the schedule of the Act of 2004.

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
	10 SCOB [2018] HCD 198		Moreover, to prevent corruption the commission has got wide and unfettered power. Section 17 (U) of the Act of 2004 contemplated that Commission has the power to do any such act to prevent corruption. The said provision is as under.
5.	Farhana Akhter Liza & ors. Vs. The Islamic University & ors. *(Zubayer Rahman Chowdhury, J.)* 10 SCOB [2018] HCD 92	Constitution of the People's Republic of Bangladesh, Article,102(2).	The concept of "due process of law" involves two distinct elements. The first element imposes a mandatory duty upon the Authority concerned to appraise the person of the charge or offence for which a proceeding is being initiated against him. Not only that, judicial pronouncements have gone to the extent to hold that even the proposed punishment must be indicated to the person concerned at the very initial stage. The second element requires that the person, who is so charged, should be afforded an opportunity to file a reply/representation to the Authority in respect of the said allegation or charge. Non-compliance or non-observance of the second element is bound to give a "telling blow" to any subsequent action of the Authority.
6.	Grameenphone Ltd. Vs. Chairman, First Labour Court, Dhaka & ors. *(Tariq ul Hakim, J.)* 10 SCOB [2018] HCD 7	The concept of Outsourcing services in Bangladesh.	Outsourcing services is a new concept in our country. Not just labour but also professional services may be procured through outsourcing. It is a process by which the recipient of service enters into an agreement with a contractor / service provider who engages persons to render services to the service recipient. In such a situation, there is employment contract between the service recipient and the service renderer. The contract exists between the service recipient and the contractor and consideration for the services are provided by the service recipient to the contractor. If the service recipient is not satisfied with the service rendered by the persons engaged by the contractor then his remedy lies for breach of the terms and conditions of the

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			agreement against the contractor. Likewise if the contractor does not receive adequate consideration for providing his service through his appointed employees, his remedy lies against the service recipient. The service recipient is generally not concerned who renders the service to him as long as the service sought is rendered adequately. As can be reasonably expected the service recipient may set certain criteria and conditions to be observed by the service renderer and he has a discretion to reject any person through whom the service is provided by the contractor; but in all such cases the matter is governed by the contract between the service recipient and contractor. It is a contract of services as opposed to a contract of employment.
7.	Hayetullah & ors. Vs. Abdul Khaleque & ors. *(Khizir Ahmed Choudhury,J.)* 10 SCOB [2018] HCD 309	Evidence Act, 1872, Section 103	In a civil proceeding both the parties have responsibility to prove their respective cases, although onus rests upon the plaintiff to prove his case but responsibility of the defendant is also there to substantiate his written statement's assertion as per section 103 of the Evidence Act. But the courts below shifted the responsibility to prove the case entirely upon the plaintiffs which cannot be sustained.
8.	Md. Abdul Hye Vs. Government of Bangladesh *(Obaidul Hassan, J.)* 10 SCOB [2018] HCD 163	Enactment of Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974	1962 Constitution of Pakistan was not a Constitution in the eye of law at all, because the same was not given to the nation by the people's representatives of Pakistan, rather the same was given by an usurper dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. Thus the Enemy Property Act [EPA] which was promulgated under a void Constitution of 1962 given by an usurper, the Pakistan Defence Rule 1965 and the Ordinance I of 1969 and its continuance under the grab of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			Emergency Provisions) (Repeal) Act, 1974 was a historical mistake. In view of our observations regarding 1974 Act and 1976 Ordinance we hold that measures are likely to be needed to give proper effect of the objective of the Act, 2001 (amended in 2013) and these are the matter to be dealt with by the legislature and executive.
9.	Md. Kawsar Shikder Vs. State *(Abu Bakar Siddiquee, J.)* 10 SCOB [2018] HCD 158	Narcotics Control Act, 1990 (Report of Chemical Analyzer)	There is no evidence on record to the effect that some portion of those incriminating article were being sent to the chemical analyzer for the purpose of obtaining a chemical report and no such report was marked as exhibit in such case. I have no option to hold that there is doubt so as to ascertain that those incriminating articles were Narcotics or not.
10.	Md. Mahbubur Rahman Vs. Bangladesh & ors. *(Moyeenul Islam Chowdhury, J.)* 10 SCOB [2018] HCD 104	The Constitution of the People's Republic of Bangladesh, Article 102.	Writ Court is also a Court of equity. It is a settled proposition of law that one who seeks equity must come with clean hands. In this case, the petitioner's hands being unclean and dirty cannot invoke the writ jurisdiction of the High Court Division.
11.	Md. Nur Hossain & ors. Vs. Bangladesh & ors. *(Md. Badruzzaman, J.)* 10 SCOB [2018] HCD 299	Constitution of the People's Republic of Bangladesh, Article 102(1):	The issue whether under Article 102(1) judicial review of a decision of authority relating to terms and conditions of service of a person serving in the Republic is maintainable is no longer a *res integra.*
12.	Md. Nurul Islam & ors. Vs. Charge Officer & Appeal officer & ors. *(Sheikh Hassan Arif, J.)* 10 SCOB [2018] HCD 234	Nullity of Record of Rights	We are in fact taken aback with surprise when we see that a government official has been empowered by this Rule 42 to nullify the course of parent law and send it back to an earlier stage for hearing afresh. The reason for such surprise is, when an Act of parliament has provided some specified forums for disposal of particular issues and has provided sequential steps to be taken one after another before different forums up to the

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			Appellate Division of the Supreme Court of Bangladesh, an official like a revenue officer, appointed with the additional designation of Settlement Officer, can nullify everything before final publication of record of rights. When the government even does not have any power to nullify or reverse the course of parent law, since such power has not been delegated to government by the parent law, we are of the view that, even with the existence of Rule 42 empowering such revenue officer to nullify such course of parent law, any such exercise of power by such revenue officer shall be nothing but a nullity in the eye of law.
13.	Md. Safiqul Islam & ors. Vs. Bangladesh & ors. *(Tariq ul Hakim, J.)* 10 SCOB [2018] HCD 1	Regularizing Posts	It is true that the petitioners cannot claim as of right to be regularized in their jobs. However, after having served the authority for 10-15 years as temporary contingent staffs they cannot be blamed to expect being regularized in their posts especially when their superior authority has been satisfied by their work and has recommended their regularization.
14.	Md. Shamim Howlader Vs. The State. *(Muhammad Khurshid Alam Sarkar, J.)* 10 SCOB [2018] HCD 290	Code of Criminal Procedure, 1898, Section 561A	Section 561A the legislature enacts a special law relating to criminal offences with a view to combating the same in the society to a tolerable stage by smoothly concluding the trials of the cases under the said special law within the stipulated time. But, because of the tendency of the accused persons to remain in abscondence at the trial stage, they compel the trial Courts to delay the completion of the trial and, ultimately, the scheme of the special law gets frustrated. Until and unless the accused-turn-convicts are made to realize that non-preferring of appeals within the statutory period of 30 (thirty) days has a severe consequence of depriving themselves of the opportunity of challenging the trial Court's verdict, the tendency of the accused persons and their lawyers as to taking the matter lightly

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Sl. No.	Name of the Parties and Citation	Key Word	Short Ratio
			shall not be changed. They, at present, take it for granted that after being arrested by the police, if they file an application under Section 561A CrPC, stating some concocted reasons, they would be able to overcome the hurdle. This Court views the above prevailing situation of our country to be a fatal disease which eventually would cause collapse of the administration of criminal justice system of Bangladesh.
15.	Moulana Md. Abdul Hakim Vs. Bangladesh & ors. (*Syed Refaat Ahmed, J.*) 10 SCOB [2018] HCD 71	Article 102 of the Constitution of the People's Republic of Bangladesh.	Indeed, under our Constitutional scheme an aggrieved person, in order to agitate his claim and case in judicial review, can do so by invoking Article 102(1) and/or (2) depending on the nature of the grievance as well as of status of the perpetrator. Article 102(1) comes into play in relation to the infringement of any fundamental right guaranteed under Part III of the Constitution. Article 102(2) presupposes the availability of the various Writs that may be appealed to for reviewing actions and operations in the public domain, such actions being otherwise the preserve of the Executive organ of the State affecting the citizenry in their contacts and dealings with the Executive and its functionaries.
16.	Muhammad Imrul Hasan & ors. Vs. Bangladesh & ors. *(Tariq ul Hakim, J.)* 10 SCOB [2018] HCD 18	Definition of Legitimate Expectation	"A person may have a legitimate expectation of being treated in a certain way by administrative authority even though he has no legal right in law to receive such treatment. The expectation may arise either from a representation or promise made by the authority including an implied representation or consistent past practice."
17.	Naripokkho & ors. Vs. Bangladesh & ors. *(Farah Mahbub, J.)* 10 SCOB [2018] HCD 140	First Information Report.	FIR is an important document in the criminal law procedure, its principal object, from the informant's point of view, is to set the machinery of criminal law into motion and from the view of the investigating agency is to obtain information about the alleged occurrence

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			and to take necessary steps to trace the accused and produce him before the court concern for trial.
18.	Professor M. Samsul Alam Vs. Government of Bangladesh. *(Naima Haider, J.)* 10 SCOB [2018] HCD 205	Article 102 of the Constitution of the People's Republic of Bangladesh, Article 51 of the United Nations Convention against Corruption.	Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime. Article 51 of the UNCAC makes the return of assets which are proceeds of crime a fundamental principle of the UNCAC.
19.	State Vs. Md. Manik *(Bhabani Prasad Singha, J.)* 10 SCOB [2018] HCD 259	Code of Criminal Procedure, 1898 Section 164	On perusal of the confessional statements, no irregularities or illegalities in recording the statements are found. So, there is no difficulty to come to a finding that the confessional statements of the condemned-accused-prisoner and the other convict-accused-persons are voluntary and true and that the said statements may well form the basis for conviction of the accused-persons.
20.	State Vs. Md. Saiful Islam & another *(Md. Ruhul Quddus, J.)* 10 SCOB [2018] HCD 249	Discrepancy between medical evidence and confessional statement:	In view of the above two cases of Indian jurisdiction, we can rely on the confessions of two accused, even if it gets partial support from the medical evidence. .... However, the two accused themselves confessed commission of rape and subsequent murder of the victim and if these are believed to be true and voluntary, we do not have any reason not to rely on their confessions.

10 SCOB [2018] AD

APPELLATE DIVISION

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

CIVIL REVIEW PETITION NO.315 OF 2017.
(From the judgment and order dated 24.05.2016 passed by the High Court Division in Civil Appeal No.01 of 2010)

Bangladesh Rubber Industries, a registered Partnership Firm, represented by its Managing Partner, Mr. Ifteker Hussain of 278, Tejgaon Industrial Area, Dhaka and another. : .....Petitioners.

Versus

Dine Ara Begum and others. : .....Respondents.

For the Petitioners.	:	Mr. Farid Ahmed, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For Respondent No.1.	:	Mr. Mohsin Rashid, Advocate (Mrs. Nazneen Nahar, Advocate with him), instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
Respondent Nos.2-13.	:	Not represented.
Date of Hearing.	:	17th May,2018.

Dissolution of partnership:
A deed of dissolution of partnership is not required to be registered under section 17 of the Registration Act because the share of a partner in a partnership is essentially moveable property notwithstanding that a part of the partnership property may be immovable. …(Para 20)

J U D G M E N T

SYED MAHMUD HOSSAIN, C.J.:

1. **This petition for review arises out of the judgment and order dated 24.05.2016 passed by this Division in Civil Appeal No.01 of 2010 allowing the appeal and setting aside the judgment and order dated 07.08.2008 passed by the High Court Division in Writ Petition No.9268 of 2007 making the Rule absolute.**

2. **The facts, leading to the filing of this review petition, in nutshell, are:**

Review-petitioner No.1 brought the writ petition on the averment, *inter alia*, that three full brothers, namely, Noor Hossain, Mosharraf Hossain and Tozammal Hossain and one Saghir Ahmed initially formed a partnership firm under the name and style of Messers East Pakistan Rubber Industries in terms of an agreement of a partnership dated 07.05.1957(that another brother Iqbal Hussain was admitted to the said partnership as a minor). The Government of erstwhile East Pakistan allotted a piece of land measuring 1 (one) acre appertaining to an industrial Plot No.278 at Tejgaon Industrial Area, Dhaka in the name of the said partnership firm on 26.08.1960. The partner, Noor Hussain died on 23.07.1968 leaving behind his two sons, namely, Anwar Husain and Iftekhar Husain, four daughters, Jinnat Husain (Zinat Husain), Jesmin Husain (minor), Israt Husain (minor), Sharmin Husain (minor), a widow Rowshan Ara Hussain and mother Zohra Khatun. They became partners of the said firm as Noor Hossain's legal heirs. Meanwhile, minor Iqbal Husain having attained majority became a full-fledged partner along with others under a reconstituted deed of partnership dated 24.07.1968. A standard lease deed for a period of 99 years in respect of the said industrial plot was executed on 20.01.1970 and registered on 17.02.1971 between the Government of erstwhile East Pakistan and the said partnership firm. On 31.08.1970, another partner Mosharaf Husain resigned from the partnership business in term of a compromise decree passed in Title Suit No.65 of 1970 in the Third Court of the then learned Subordinate Judge, Dhaka. After liberation war, the name of the firm was changed as Bangladesh Rubber Industries by a deed of rectification. In consequence thereof the change was recorded with the Registrar of Firms. Thereafter, a deed of agreement for dissolution of the firm was executed on 31.12.1975 by the remaining partners, namely, Mrs. Rawshan Ara Hossain, Mr. Iftekhar Hussain, Mr. Anwar Hossain and Miss Zeenat Hossain (heirs of late Noor Hossain) on the one hand and Mr. Tofazammel Hossain, Mr. Iqbal Hossain, Mrs. Zohra Khatun and Mr. Sagir Ahmed, on the other hand, vide Annexure-D under the terms and conditions stated therein. After dissolution of the aforesaid partnership, late Noor Hossain's heirs, namely, Anwar Hussain and Iftekhar Husain, four daughters, Zinat Hussain, Jesmin Hussain (minor), Ishrat Hussain (minor) and Sharmin Hussain (minor) and widow Rowshan Ara Hussain, executed a fresh partnership deed dated 01.01.1976 (admitting the minors to the benefit of partnership) to run and continue a partnership business vide Annexure-E and they got it registered with the Registrar of Joint Stock Companies and Firms under the Partnership Act being Registration No.P.F./22285 (wrongly written P.R.33385) dated 09.11.1976. Thereafter, the heirs of late Tozammel Hussain (i.e. the present respondents) filed an application in the office of writ-respondent No.1 for getting their names mutated in place of Bangladesh Rubber Industries as per their share (i.e. two bighas of land in term of the deed of dissolution, vide Annexure-D). The Senior Assistant Secretary (respondent No.3 in writ petition) on the basis of the aforesaid application served notices upon the parties concerned on 06.02.2005 and 20.02.2007 to appear before the Joint Secretary (respondent No.2 in writ petition) with their respective documents. On hearing both the sides, he rejected the prayer for mutation, vide his letter dated 12.06.2007 (Annexure-I) expressing that the Ministry had no scope to interfere with the matter of mutation since a civil suit was pending in this regard, but nevertheless directed the parties concerned to inform the Government of the fate of the pending suit or the result

of the compromise, if made, in the meantime. The further case of the writ-petitioner is that after issuance of letter dated 12.06.2007, the present respondent Nos.1 to 3 (respondent Nos.7-9 in writ petition) did not follow the directive of the said notice and beyond the knowledge of present review-petitioner No.1 (petitioner in writ petition) and in collusion with the officials of the Government got the impugned order dated 13.09.2007 (Annexure-J) allowing mutation of their names in respect of two bighas of land without serving any notice whatsoever to them and simultaneously communicated the said order to the Assistant commissioner Land, Tejgaon Circle, Dhaka and other concerned officials for compliance.

3. **Being aggrieved by and dissatisfied with the letter dated 13.09.2007 issued by writ-respondent No.1, the writ-petitioners filed a writ petition before the High Court Division and obtained Rule Nisi in Writ Petition No.9268 of 2007.**

4. **Writ-respondent Nos.7-9 contested Rule by filing affidavit-in-opposition controverting the material statements made in the writ petition. Their case, in short, is that they accepted the material facts as reproduced in paragraph-2 about the formation of partnership firm on 7th May,1957 under the name of East Pakistan Rubber Industries, subsequent reconstitution of the said firm and ultimate dissolution on 31st December 1975 under the terms of the deed of dissolution (vide Annexure-D). The said deed of dissolution narrates (in recitation portion) about the formation of the partnership firm on 14.05.1957 and its subsequent reconstitutions and ultimate dissolution of the said partnership firm on 1st December 1975 on apportions of the shares among the existing partners in the form of land, cash money and good-will of the said firm.**

5. **The learned Judges of the High Court Division, upon hearing the parties, by the judgment and order dated 07.08.2008 made the Rule absolute.**

6. **Being aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the writ-respondents as the leave-petitioners moved this Division by filing Civil Petition for Leave to Appeal Nos.2237 of 2008, on which, leave was granted on 06.01.2009, resulting in Civil Appeal No.01 of 2010. This Division upon hearing the appeal by the judgment and order dated 24.05.2016 allowed the appeal.**

7. **Feeling aggrieved by and dissatisfied with the judgment and order dated 24.05.2016 passed by this Division, the writ-petitioner-respondents as the review-petitioners filed Review Petition No.315 of 2017 before this Division.**

8. **Mr. Farid Ahmed, learned Senior Advocate, appearing on behalf of the petitioners, submits that Bangladesh Rubber Industries is a registered partnership firm constituted under the provision of Partnership Act,1932 and as such, it is capable of holding immovable property in its own name and to have the title vested in it. Accordingly, the immovable property measuring one acre of land, comprised Industrial Plot No.278 of Tejgaon Industrial Area, Dhaka, having been allotted and transferred by way of perpetual lease deed, it becomes the owner and possessor of the said immovable property, holding the title of the said land and as such, to divest the title of the said immovable property from the partnership firm, a registered deed of transfer is required. Since admittedly, no such deed of transfer was executed and registered by the**

partnership firm relinquishing its title in the said property in favour of the individual partners, the mutation of names in respect of the said property in the individual names of the partners are palpably illegal and as such, the judgment passed by this Division may be reviewed.

9. **Mr. Mohosin Rashid, learned Advocate (Mrs. Nazneen Nahar, Advocate with him), appearing on behalf of respondent No.1, on the other hand, supports the judgment delivered by the High Court Division.**

10. **We have considered the submissions of the learned Senior Advocate for the petitioners and the learned Advocate for respondent No.1, perused the impugned judgment and the materials on record.**

11. **It is admitted that as the disputed property belongs exclusively to the firm, no partner can claim any part of the property as his own and what a partner is entitled to his share of profits only, so long the partnership continues. Upon dissolution of the partnership, his share is his proportion of money representing the firm's asset including immovable property after liquidation of the partnership debts and liabilities.**

12. On dissolution of firm each of the partners is entitled to receive his share of assets of the firm to which he was entitled. Section 32 of the Partnership Act provides for retirement of a partner from the partnership but it makes no provision of separation of share of the retired partner but this matter has been left to be determined by agreement between the partners. ***In the case of Ajudhia Pershad Ram Pershad Vs. Sham Sunder and others, AIR 1947 Lahore,13 Cornelius J.*** elaborately discussed this provision of the law and held as under:

> "There would thus appear to be no doubt that the share of a partner in an existing partnership is essentially movable property, notwithstanding that a part of the partnership property may be immovable."

13. In the case of ***Addanki Narayanappa Vs. Bhaskara Krishnappa, AIR 1966 SC 1300,*** Indian Supreme Court held that "the interest of the partners of Addadki family in the partnership assets was movable property and the document evidencing the relinquishment of that interest was not compulsorily registerable under section 17(1) of the Registration Act."

14. In this case reliance may be placed on the case of ***Lui Ying Ping vs. Leon Fang AI.(1984) 36 DLR (AD)273, t***he Court held as under:

> "In the instant case, the respondent by the agreement Ext.2(a), with her partner retired from the partnership and relinquished all her interests including her share in the land and building at Motijheel on consideration of cash payment of Tk.20,000/-. This document was not required to be registered under the Registration Act. Consequently, her interest in the land and building stood transferred to the appellant who thereupon converted all his assets into a proprietorship and mutated his name accordingly in all relevant public documents."

15. In the case of ***N. Khandervali Saheb (dead) by LRS and another vs. N. Gudu Sahib (dead) and others (2003) 3 SCC 229,*** the question arose whether an award by which residue assets of a partnership firm are distributed amongst the partners on dissolution of the partnership firm requires registration under section 17 of the Registration Act,1908. On dissolution of the partnership firm, accounts are settled amongst the partners and the assets of the partnership are distributed amongst the partners as per their respective shares in the

partnership firm. Thus, on dissolution of a partnership firm, the allotment of assets to individual partners is not a case of transfer of any assets of the firm. The assets which hereinbefore belonged to each partner will after dissolution of the firm stand allotted to the partners individually. There is no transfer or assignment of ownership in any of the assets. This is the legal consequence of distribution of assets on dissolution of a partnership firm. The distribution of assets may be done either by way of an arbitration award or by mutual settlement between the partners themselves. The document which records the settlement in this case is an award which does not require registration under section 17 of the Registration Act since the document does not transfer or assign interest in any asset.

16. In the case of ***S.V. Chandra Pandian vs. S. V. Sivalinga Nadar (1993) 1 SCC 589,*** the Indian Supreme Court held that "the property falling to the share of the partner on distribution of the residue would naturally belong to him exclusively but since in the eye of law it is money and not immovable property there is no question of registration under section 17 of the Registration Act."

17. **In the above case, the Indian Supreme Court further held that if one looks at the award as allocating certain immovable property since there is no transfer, no partition or extinguishment of any right therein, there is no question of application of section 17(1) of the Registration Act.**

18. This Division also relied upon the case of ***Commissioner of Income Tax, West Bengal, Calcutta Vs. Juggilal Kamalapat, AIR 1967 (SC)401.*** The question arose whether non-registration of the relinquishment deed invalidates the transfer of the business assets to the new partnership.

19**. The Supreme Court of India in the above case held as under:**

> "The Deed of Relinquishment, in this case, was in respect of the individual interest of the three Singhania Brothers in the assets of the partnership firm in favour of the Kamla Town Trust, and consequently, did not require registration, even though the assets of the partnership firm included immovable property, and was valid without registration. As a result of this deed, all the assets of the partnership vested in the new partners of the firm."

20. **Having considered the cases cited above, we find that a deed of dissolution of partnership is not required to be registered under section 17 of the Registration Act because the share of a partner in a partnership is essentially moveable property notwithstanding that a part of the partnership property may be immovable.**

21. **The learned Counsel for the petitioners could not make out any case as contemplated under Order XLVII Rule 1 of the Code of Civil Procedure and as such, we do not find any ground for interference. Accordingly, this civil review petition is dismissed.**

10 SCOB [2018] AD

Appellate Division

PRESENT
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CRIMINAL APPEAL NO. 27 OF 2013 WITH JAIL PETITION NO. 10 OF 2013.
(From the judgement and order dated 19th of March, 2012 passed by the High Court Division in Death Reference No.60 of 2006 heard along with Criminal Appeal No.6688 of 2009 and Jail Appeal No.1229 of 2007).

Kamal alias Exol Kamal	.... Appellant
Versus	
The State	... Respondent
For the Appellant	: Mr. Helal Uddin Mollah Advocate, instructed by Mr. Md. Zahirul Islam Advocate-on-Record
For the Respondent	: Mr. Biswajit Deb Nath Deputy Attorney General instructed by Mrs.Madhumalati Chowdhury Barua Advocate-on-Record
Date of hearing & judgement	: The 10th of October, 2017

Commutation of Sentence:
On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell. … (Para 20)

The death sentence is the most severe and irretrievable form of punishment. Once the sentence is carried out, it cannot be redeemed. It is certainly a cruel form of punishment which is an affront to human dignity. However, the death sentence is not unconstitutional in Bangladesh. … (Para 25)

J U D G E M E N T

MUHAMMAD IMMAN ALI, J:-

1. This criminal appeal is directed against the judgement and order dated 19.03.2012 passed by the High Court Division in Death Reference No.60 of 2006 along with Criminal Appeal No.6688 of 2009 and Jail Appeal No.1229 of 2007 accepting the death reference and dismissing the criminal appeal and the jail appeal and thereby affirming the judgement and order of conviction and sentence under sections 302/34 of the Penal Code, passed by the learned Sessions Judge, Narayangonj in Sessions Case No. 28 of 2006.

2. The prosecution case, in brief, was that on 02.3.2004 at about 20.00 hours when the informant's father Giasuddin (deceased) returned to his residence, the accused persons named in the First Information Report (FIR) entered the residence and the appellant told the victim to come outside on the plea of having some urgent and important conversation with him. When the victim Giasuddin came out from inside his house, the convict-appellant opened fire from his firearm indiscriminately aiming at him, on the road near the wall of Bond Fabrics, close to the house, inflicting multiple bleeding injuries on the person of the victim. Convict Ibu, Rubel, Janu and Kala Rafique also shot him from their respective firearms and, thereafter, they went away towards the west. The victim was then taken to Khanpur Hospital by the informant and P.W.10 Ali Hossain and one Zaker. In the Hospital the doctor on duty declared him dead. The informant's father used to protest the evil acts and misdeeds of the convict persons and he also formed a peace committee locally to maintain law and order in the area and out of the grudge the accused persons killed the victim Giasuddin by gun-shots. The informant, his mother, brother, wife, younger sister and others saw the occurrence by electric light. Hence, he lodged the FIR.

3. We find from the record that during investigation of the case, the police visited the place of occurrence, held inquest over the dead body of the victim and sent the same to the hospital morgue for postmortem examination, examined the witnesses under section 161 of the Code of Criminal Procedure, seized the alamats as per seizure lists, prepared the sketch map of the P.O. with separate index and after having found strong prima facie case against the accused persons, submitted charge sheet against the convict appellant and eight others.

4. Then the case record was finally sent for disposal before the Sessions Judge, Narayanganj and at the commencement of the trial charge was framed under sections 302/34 of the Penal Code against all of them, apart from charge-sheeted accused Ibrahim @ Ibu who died in the meantime. The charge was read over and explained to the accused persons present in the dock. They pleaded their innocence and claimed to be tried in accordance with law.

5. The prosecution examined 19 witnesses. After close of the evidence from the side of the prosecution, the convict-appellant and others were examined under section 342 of the Code of Criminal Procedure and their statements were recorded thereunder when they repeated their innocence and declined to adduce any witness in their defence.

6. The defence plea, as it appears from the trend of cross-examination of the prosecution witnesses and the statements of the accused persons recorded under section 342 of the Code of Criminal Procedure is that of innocence and that they had been falsely implicated in this case out of previous enmity and grudge.

7. Considering the evidence and materials on record, the learned Sessions Judge, Narayangonj, by judgement and order dated 03.07.2006 convicted the appellant and 2 others under sections 302/34 of the Penal Code and sentenced them to death and also to pay a fine of Tk.50,000/- each, in default to suffer rigorous imprisonment for 1(one) year more; fifty (50%) of the amount of fine would be paid to the deceased's family and the rest would be paid to the State. Four of the accused persons were acquitted while another died during the trial.

8. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death of the three condemned accused, which was registered as Death Reference No.60 of 2006.

9. Before the High Court Division Criminal Appeal No.6688 of 2006 and Jail Appeal No.1229 of 2007 were preferred by condemned prisoner Kamal @ Exol Kamal, which were heard along with the death reference.

10. By the impugned judgement and order, the High Court Division accepted the reference and dismissed Criminal Appeal No.6688 of 2006 and Jail Appeal No.1229 of 2007 preferred by the condemned prisoner Kamal @ Exol Kamal thus maintaining the judgement and order of conviction and sentence passed by the Sessions Judge, Narayangonj in Sessions Case No. 28 of 2006.

11. Mr. Helal Uddin Mollah, learned Advocate appearing on behalf of the appellant submitted that the impugned judgement and order of conviction and sentence is bad in law and on merits and the same is liable to be set aside for the ends of justice. He further submitted that the conviction of the appellant is against the weight of evidence and materials on record. The convict appellant (condemned prisoner) is totally innocent of the charge leveled against him and he has been falsely implicated in the case and he is not in any way involved with the alleged murder. He submitted that P.W.1 is the wife of the deceased, P.W.2 is the informant, a son of the victim, P.W.3 is the daughter, P.W.4 is the son and P.W.5 is the daughter-in-law of the deceased, who are alleged to be eye witnesses of the occurrence and stated in their evidence that the convict appellant fired shots on the deceased with a pistol. But the informant did not mention in the FIR that the convict appellant fired pistol shot on the deceased and only mentioned it as "firearm". The doctor who held the postmortem examination on the dead body of the deceased could not identify the injuries caused on the body of the deceased, whether they were by pistol or by revolver shots, which creates doubt and the appellant is entitled to get the benefit of doubt. He submitted that no case under the Arms Act was filed against the convict appellant nor the alleged pistol was recovered from his possession, which proves that he has been falsely implicated with the alleged occurrence out of previous enmity. He submitted that the convict appellant did not make any confession under section 164 of the Code of Criminal Procedure and P.W.6 is the doctor, P.Ws.7, 8, 9, 10 (declared hostile) 11, 12, 13, 14, 15, 16 are not eye witnesses and P.Ws.17, 18 and 19 are police personnel's. He submitted that the most vital and independent witnesses who took the victim to the hospital, i.e. Ali Hossain was examined as P.W.10 who was tendered and Zakir was not examined which creates doubt as to whether anyone saw the occurrence. P.Ws.1, 2, 4 and 5 made contradictory statements and at the time of holding inquest none stated anything, which proves they are not the eye witnesses. He submitted that I.O. stated at the time of inquest that he found 14 gunshot injuries, whereas the doctor did not find any gunshot injury on the dead body and the appellant was not examined under section 342 of the Code of

Criminal Procedure and the P.W.1 stated that she identified the assailant by electric light and she also stated that there was no light in the street, and as such the identification is doubtful, but the High Court Division upheld the conviction of the appellant on the ground that P.W.1 saw the occurrence, but at the inquest none said that he saw the occurrence.

12. Mr. Biswajit Deb Nath, learned Deputy Attorney General appearing for the respondent made submissions in support of the judgement and order of the High Court Division. He submitted that the victim was brutally shot from short range only because he was a thorn in the path of their criminal activities. He submitted that the appellant and his cohorts are a constant threat to law abiding citizens of the country.

13. We have considered the submissions of the learned Advocate for the appellant and the learned Deputy Attorney General appearing for the State and perused the impugned judgement and other connected papers on record.

14. We find from the judgement of the trial Court that the depositions of the prosecution witnesses were elaborately discussed. The trial Court noted that the learned Advocate for the defence could not elicit any serious contradiction from the cross-examination of the prosecution witnesses. It was also noted that the victim Gias Uddin was a Muktijoddha and Adviser to the local Law and Order Committee and was active against the terrorist activities of the accused persons. He also took part in the *shalish* and decided against the accused persons, as a result of which they became angry which ultimately led to the victim being mercilessly murdered. It transpires that during the course of trial the accused were granted bail and were absconding at the time of delivery of judgement.

15. The High Court Division noted that in view of the brutality and circumstances of the case, there was no cogent ground to commute the death sentence imposed upon the convict appellant.

16. It has been argued by the learned Advocate appearing on behalf of the appellant that there was no independent witness to the occurrence of murder. However, we cannot ignore the fact that the occurrence took place at 8 O'clock at night when the victim had just returned home and the appellant and other accused persons came to the house of the victim and called him outside and the victim was shot by the appellant a few feet away from his gate. The witnesses recognised the assailants by electric light. Naturally, the inhabitants of his household would be the persons who would witness the occurrence from close quarters. The wife, children and daughter-in-law of the victim are the most natural and competent witnesses in the facts and circumstances of the case. We note that P.W.7, who is a local shopkeeper, deposed that he came to the place of occurrence on hearing shots, saw the victim, who had been shot and also saw the appellant and co-accused Junu running away from the place of occurrence. He stated that he did not know the names of the other assailants. The evidence of P.W.7 is thus independent corroborative evidence of the occurrence.

17. We note from the evidence of the Investigating Officer that no contradictions were elicited from him in respect of the statements of the witnesses recorded under section 161 of the Code of Criminal Procedure.

18. P.W. 6, the doctor, who deposed with regard to the post mortem report, stated that he found 10 bullet injuries on the chest and other parts of the victim's body. The learned Advocate on behalf of the appellant tried to argue that there was no clear evidence as to

whether the injuries were caused by a pistol or by a revolver. In this regard we have to say that to a lay person there is little difference between a pistol and a revolver both fire bullets. The only real distinction is that the revolver has a revolving chamber from which the bullets are fired, whereas a pistol may have a magazine containing between 7 to 16 bullets. The fact remains, the victim suffered as many as 10 bullet injuries, which according to the eye witnesses, were fired from short range.

19. The learned Advocate for the appellant finally submitted that the sentence of death may be commuted in view of the age of the convict, contradiction in the evidence of the witnesses and the lack of independent corroborative evidence. With regard to the appellant's conviction under section 302 of the Penal Code, we are left in no doubt about the correctness of the findings of the trial Court. We can find no fault in the assessment of the evidence of the witnesses and other evidence on record. The High Court Division has correctly upheld the finding of guilt of the appellant.

20. On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell.

21. In the facts and circumstances of the instant case, we cannot ignore the fact that the victim was repeatedly shot from close range. Ten bullet injuries were found on the victim, which is indicative of the vehemence with which the victim was done to death. The appellant called the victim out of his house on the pretext of some urgent discussion and within a few feet of the gate of his house, was repeatedly and mercilessly shot causing his death.

22. We find from the evidence that the victim was actively involved in ensuring law and order in the locality, and as a result his activities were inimical to the activities of the criminal groups. Clearly, this is a case where the victim was an obstruction in the path of local terrorist/criminal gangs, which had to be eliminated. It is equally plain to any law abiding citizen that the accused would do the same again to anyone who made a stand against criminal activities.

23. Although, it is usual for this Court to take into consideration the youth of the accused, such consideration is given only due to the fact that the young of age act in the heat of the moment without considering the consequence of their action. However, in the facts and circumstances of the instant case it is quite apparent that the appellant deliberately, in a preplanned manner, went to the house of the victim armed with firearms with the sole purpose of removing the obstruction in the path of their criminal activities. Hence, it cannot be said that the action of the accused was resultant from his immaturity of mind. His action was purposeful and intentional, which led to cold-blooded murder of the victim.

24. The facts of the case taken as a whole naturally give rise to the apprehension that the appellant would not desist from committing a similar offence when it suited him. He would again commit murder to get rid of anyone in his way. The PCPR of the appellant was that he was accused in Fotulla P.S. Case No. 48(8) 02 and No. 37(9)02.

25. The death sentence is the most severe and irretrievable form of punishment. Once the sentence is carried out, it cannot be redeemed. It is certainly a cruel form of punishment which is an affront to human dignity. However, the death sentence is not unconstitutional in Bangladesh. In this regard we may refer to the case of ***Gregg Vs. Georgia,(1976) 428 U.S. 153***, where the majority view was that the death penalty was not unconstitutional. The majority view as quoted in the case of ***Nalu v. The State, 32 BLD(AD)247*** was expressed as follows:

> *"But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.*
> *We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offence, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."*

26. In our view, the appellant is a threat to law and order and a menace to society. He would do away with anyone, who stands for upholding law and order. In view of the way the victim was murdered, we do not find that the sentence of death is at all disproportionate to the crime alleged. We, therefore, do not find any illegality or infirmity in the judgement and order of the High Court Division confirming the sentence of death.

27. In the result, the criminal appeal and the jail petition are dismissed. The judgement and order of conviction and sentence passed by the High Court Division is maintained.

10 SCOB [2018] AD

APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.552 OF 2009.
(From the judgment and order dated 24.04.2008 passed by the High Court Division in Civil Revision No.1266 of 1999.)

Md. Hafizuddin : Appellant.

Versus

Mozaffor Mridha being dead his heirs: Respondents.
1.Asia Begum and others :

For the Appellants	:	Mr. Syed Amirul Islam, Senior Advocate, instructed by Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondents	:	Mr. Farid Ahmed, Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
Date of hearing on	:	11.07.2017, 01.08.2017 & 08.08.2017
Date of judgment on	:	17.08.2017

Basic Principles of Waqf:
According to Imam Abu Hanifa the meaning of waqf is the detention of a specific thing in the ownership of waqf and the devoting of its profit or products "in charity of poors or other good objects". Imam Abu Yusuf said, "Waqf signifies the extinction of the waqif's ownership in the thing dedicated and detention of all the thing in the implied ownership of the Almighty Allah, in such a manner that its profits may revert to or be applied 'for the benefit of Mankind.'
Three basic principles governed the waqf: the trust was required to be irrevocable, perpetual, and inalienable. Once property was declared waqf by its owner, the trust thereby created was irrevocable. It means (i) inalienable lands used for charitable purposes and (ii) pious endowments. … (Para 13 & 14)

The waqf is irrevocable after possession is handed over to the Mutawalli. The waqif divests himself of the ownership of the property and of everything in the nature of contract from the moment the waqf is created. In purely metaphorical sense the expression "ownership of God" is used but unlike Hindu Law, since conception of a personal God is not recognized, there is no ownership of God or no property belongs to God in the Jural sense, although the ownership of the property becomes reverted in God because God is originally owner of all thing. … (Para 16)

Once the property is given to waqf, it remains for the waqf for ever. The property cannot be alienated or transferred nor is it subject to the rights of inheritance. It cannot be sold or given away to anybody except in accordance with law. … (Para 19)

J U D G M E N T

Hasan Foez Siddique, J:

1. This appeal is directed against the judgment and order dated 24.04.2008 passed by the High Court Division in Civil Revision No.1266 of 1999 making the Rule absolute reversing the judgment and decree dated 09.03.1999 passed by the then Subordinate Judge-in-charge, Patuakhali in Title Appeal No.14 of 1997 reversing those dated 03.02.1997 passed by the Senior Assistant Judge, Patuakhali Sadar, Patuakhali in Title Suit No.40 of 1993.

2. The relevant facts, for the disposal of this appeal, are that the appellant instituted the aforesaid suit for declaration that the sale deeds described in schedule 'Ka' to the plaint are collusive, void, fraudulent, inoperative and those are not binding upon the plaintiff stating, inter alia, that the plaintiff is the Mutwalli of Md. Asaq Waqf Estate. The land described in the schedule 'Kha' to the plaint is the waqf property of the said Waqf Estate and the same was enrolled vide E.C. No.10481. The plaintiff was appointed as Mutwalli of the said Estate on 08.09.1986. He filed an application under Section 64 of the Waqf Ordinance to the Waqf Administrator for eviction of the unauthorized occupants from 'Kha' scheduled land. The Waqf Administrator, by an order dated 04.01.1993, directed the plaintiff to file a suit in the Civil Court for declaration that the kabala deeds as described in the schedule-'Ka' to the plaint are void, inoperative and those are not binding upon the plaintiff. Accordingly, the plaintiff filed instant suit against respondents impugning the kabala deeds, (1)deed No.3360 dated 16.03.1976 executed by Md. Fazlul Karim Howlader in favour of Mozaffar Mridha; (2) deed No.1003 dated 20.04.1962 executed by Abdul Karim Mridha in favour of Abdul Gani and (3) deed No.11889 dated 07.10.1965 executed by Abdul Karim Mridha in favour of Ansaruddin Mollah in respect of the land as described in schedule-Kha to the plaint stating that those 'Kha' scheduled land are waqf property by virtue of waqf deed executed by Md. Asoq Ali and no one was entitled to transfer the same except taking the prior permission of waqf administrator and for the benefit of the waqf estate which was not taken before execution of those deeds.

3. The defendant-respondents contested the suit contending that the land measuring an area of 2.48 acres out of 3.03 acres appertaining to C.S. Khatian No.136 and Plot No.2275 and R.S. Khatian No.1 and Plot No.4203 was recorded in the name of Nirmal Kantha Roy who auction purchased the same on 24.03.1941. Md. Fazlul Karim and Abdul Karim took settlement of the said land from Nirmal Kantha Roy in 1348 B.S. They defaulted to pay rent of years 1351 to 1354 B.S. to the landlord. Thus, Nirmal Kantha filed Rent Suit No.398 of 1948 and got decree and, in execution of the said decree, the said land was again sold in auction. Hossain Ali and Keramat Ali auction purchased the same on 21.07.1948. Meanwhile, Fazlul Karim and Abdul Karim paid the auction money. Consequently, their raiyoti interest was not extinguished. They filed Title Suit No.488 of 1956 for permanent injunction against Hossain Ali and others and got decree. These defendants, purchasing the suit land by the impugned kabala deeds, have been possessing the same. The suit should be dismissed.

4. The trial Court dismissed the suit. The plaintiff preferred appeal and the appellate Court allowed the appeal and decreed the suit. Then the defendants filed a civil revisional application in the High Court Division and obtained Rule. The High Court Division, by the impugned judgment and order, made the said Rule absolute. Thus, the plaintiff has preferred this appeal getting leave.

5. Mr. Syed Amirul Islam, learned Senior Counsel appearing for the appellant, submits that the High Court Division failed to consider that the alleged auction in 1941 was held without serving any notice to the Wakf Commissioner and Mutwalli of the waqf estate and that they were not impleaded in the Rent Suit as well inasmuch as they were the necessary parties. He submits that the High Court Division erred in law in interfering the decision of the appellate Court inasmuch as it was the duty of Fazlul Karim, father of the plaintiff Mutwalli, to pay rent and taxes of the waqf property from the income of the said property. He concocted the story of selling the waqf property in auction for non-payment of rent. He could not claim waqf property as his personal property. He submits that the High Court Division failed to notice that Fazlul Karim continued to be Mutwalli of Md. Asaq Estate after its enrollment vide E.C. No.10481 on 30.01.1942 in the office of Waqf Commissioner he could not become owner of the waqf property and as a manager of the same it was his duty to protect the waqf property. He submits that pursuant to rent decree passed in Rent Suit No.398 of 1948 the property could not be said to have lost its waqf character.

6. Mr. Farid Ahmed, learned Senior Counsel appearing for the respondents, submits that the property in question was sold in auction in 1941 and auction purchaser settled the same to Fazlul Karim and Abdul Karim. Thereafter, the landlord filed Rent Suit No.398 of 1948 and got decree and the same was again sold in auction in execution of the said decree and one Hossain Ali and Keramat Ali auction purchased the same but Fazlul Karim and Abdul Karim, the judgment debtors, paid the entire auction money and protected their ownership in the property and that the defendants are the subsequent purchasers from Fazlul Karim and Abdul Karim, the High Court Division, considering all those facts and evidence on record, rightly made the said Rule absolute.

7. The High Court Division observed that the property, in question, was made waqf by virtue of the waqf deed dated 30.01.1922. The High Court Division held that the same lost its waqf character due to the auction held in 1941 and finally it observed that, at present, the suit land is not the property of said Asaq Waqf Estate.

8. It is the case of the plaintiff that suit land originally belonged to Mohammad Asoq. From the judgment of Title Suit No. $\frac{488 \text{ of } 1956}{208 \text{ of } 1958}$(ext-Ga) it appears that the plaintiffs of that suit, namely, Mahammad Fazlul Karim Howlader and Abdul Karim Howlader sons of Haji Mohammad Asoq admitted that their father Asoq Ali Fakir, was Usat Nim Howla raiyat and his name was duly recorded in Khatian No.136. The High Court Division observed that admittedly, by virtue of registered waqf deed dated 30.01.1922 (ext.3), the suit land became the property of Md. Asoq Waqf Estate. In such view of the matter, we have no hesitation to hold that the suit land originally belonged to Mohammad Asoq. From ext.3 it appears that Mohammad Asoq executed a waqf deed in respect of the suit land and his other lands. From waqf deed, it further appears that Asoq had 4 sons namely Mohammad Hachon, Mohammad Hossain, Mohammad Fazlul Karim and Mohammad Abdul Karim. Mohammad Asoq appointed himself as first Mutwalli of the waqf Estate and it was stipulated that after his death, his first son Mohammad Hashon would be the Mutwalli. In the waqf deed it was, inter

alia, stated, "Awg RxeZ _vKvchš-Awg G vKd †_‡K †gvZ vx_wK vwg¥wZw vgvw‡ Kvh©Kwie Avgvi AeZ@v‡ G vKd vgvi w gA !v‡i Avgvi †R#c$ %xZv()x v g'v*+ 'v- †gvZ vx_wK vw‡g¥ Zcw‡ iwwZ "*/v0 "v "1i2 Kwi‡e †gv0vKx †gvZ vxwh8 ' ‡ vK‡di dv4 ' ‡Z Zv‡vi w#Ri 5i ‡cv6‡ ie Zw, W‡e v Avgvi wh8 evtgvZ vxA5 š‡i Avgvi Kw#7 c$ ga vhw "8ve‡e-K el9gv Ge1"*/v0 i2vKivi : ch8 ' ‡e wZw †gvZ vx_wK‡e G i¤c c$‡c;$w, <‡g vhw "8ve‡e-K el9gv Ge1Kvh2g ' wZw †gvZ vx' ‡e †gvZ vx vK‡di t=>' ‡Z Avc 5i ‡cv6‡ iev Zw, cv‡e v †gvZ vx%? "*/v0 "*@x (v" "1i2 gwKv‡ icvc ivRB@Zw, Av,v R w‡g¥ Zc(x wwZ CD 1"*/v0 i CCEFG, v‡%i GH,! Kw v Rwg hv‡vAvgvi wR l‡v ,l‡ Avt, Zv‡v †gvZ vxAvc l‡v ,l‡ iw vZ, : cB@lJviv A$ vK‡di wwZ "*/v0 i ivRB@Zw, cwi‡(v Kwi‡e Z, A _v †gvZ vxc, ' ‡Z Ae"i ' ‡e Ge1 Z8 evt, Avgvi e1v(Zc(x : 3 †gvZ vxc‡, wh8 ' ‡e vK‡di "*/v0 "*@A hl th t, vxwK ‡d;R, vix th †Kv cKv‡ii thiKc †Kv †gvKLgv : cwB'Z ' Zv‡v †gvZ vxwe@ Kwi‡e Ge1Zv‡vi : ch8 l i- vK‡di t=>e' Kwi‡e t=>i >Kv t_‡K Rgv †Kv wM/v0 vK Kvh©Kwi‡Z ' ‡ †gvZ vxw#Ri Av5cv Ge1 e1(x A v ewB% "wZ civg(©g‡Z hv‡v 5v ' we‡e- vK‡iev‡" cKv‡i Kwi‡Z cwi‡e †gvZ vx t=>i'w R K‡Kv Kvh©Kwi‡ Zv‡v"veB' ' ‡ : 3 †gvZ vx Kvh©' ‡Z Zv‡vtK Ae"i Kwi v Avgvi %wgB' 5, wev(=ewB%? A Avgvi e1(x _vtK †gvZ vx g‡vxZ _vK‡e wZw †gvZ vx' ‡e †gvZ vxwh8 %wgB' 5, wev(=ewB%?i ci "*/v©© 2gZvi ‡ "

9. The waqif Mohammad Asoq started the recitation his waqf deed saying "OOOOOOOO t_vZvi KPv Awg "vgx0l"g¥ i Awa Kvi ' w †" t_vZvi vtg "8 Kvthv0 : tL‡(Avgvi B@Q Zc(x ev?@ "*/v0 ' ‡Z Avgvi B@vt "B' (ix‡i "i vš OOOOOOO vKd Kwi vg "

10. It is the case of the contesting defendants that one Nirmal Kantha Roy auction purchased the land of C.S. Khatian No.136(disputed Khatian) on 24.03.1941 in a Revenue sale. From whom, Fazlul Karim and Abdul Karim (two sons of Waqif Mohammad Asoq) took settlement of the said land. The High Court Division did not find any paper to prove the facts of Revenue Sale and auction purchase by Nirmal Kantha Roy. We also did not find any documentary evidence in support of the claim of Revenue sale and auction. The High Court Division observed that in the plaint the plaintiff admitted the existence of that auction and purchase of the same by Nirmal Kantha Roy. We have perused the contents of the plaint of this suit. We do not find any such admission of the plaintiff in the plaint that Nirmal Kantha Roy auction purchased the suit land in Revenue Sale held on 24.03.1941. The High Court Division misread the plaint, thereby, erroneously observed so. The defendants also did not produce any papers regarding settlement alleged to have been given by Nirmal Kantha to Fazlul Karim and Abdul Karim, the executants of the impugned deeds.

11. From ext. 'Ka' it appears that Nirmal Kantha Roy filed Rent Suit No.398 of 1948 on 15.04.1948 against Fazlul Karim and one Abdul Mridha stating that he purchased touzi No.1565 of Taluk Nabkeshore Datta in Rent sale under the provision of Act II of 1859 on 24.03.1941 and got sale certificate and took over possession through Court. In that suit, he prayed for realization of defaulted rent of Rs.1104/-. From ext 'Ka-1' copy of the decree dated 24.08.1948 it appears that the defendants deposited the decreetal dues with cost. Copy of the judgment of the said suit has not been filed. From ext-'Kha' certified copy of the register of application for the execution of the decree it appears that auction held in Rent Suit No.398 of 1948 was set aside and the Execution case was disposed of on full satisfaction on 01.03.1949. In the said suit, neither wakf Commissioner nor the Mutwalli of Asoq Ali Waqf Estate was impleaded as party. From the judgment and decree passed in Title Suit No. $\frac{488\ of\ 1956}{208\ of\ 1958}$ (ext.Ga and Ga-1) it appears that Mohammad Fazlul Karim Howlader and Abdul Karim Howlader sons of late Mohammad Asoq, filing the said suit, obtained decree

against Hoshen Ali Fakir son of Sabbat Ali Fakir and Keramat Ali Fakir son of Monsur Ali Fakir. They are nobody of the Waqf Estate. In that case also neither the Wakf Commissioner nor the Mutwalli of Asoq waqf Estate was impleaded as party. It is to be mentioned here again that in the waqf deed the waqif categorically stated that " vK‡di "*/v0 "*@A hL ‡h †, vxwK †d;R, vix‡h ‡Kv cKv‡ii ‡hi¤c ‡Kv †gvKLgv: cwB'Z ' ZvvtgvZ vxwe0 Kwi‡e " It was the duty of Fazlul Karim and Abdul Karim to pay the defaulted rent or decreetal dues to protect the waqf property which was made by their father. Without doing so, they executed the impugned deeds. Since in all those transactions and suits Waqf Commissioner and Mutwalli of the Waqf Estate were not impleaded as party those are not binding upon them.

12. The origin of waqf is to the direct prescriptious, of the Prophet (Sm)Ibn Omer as stated in the Jamaa ut Tirmizi that "Omer (R:) had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet (Sm) and sought his counsel, to make the most pious use of it, (whereupon) the Prophet (Sm) declared, 'tie up' the property (asl or corpus) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God. In accordance with this rule Omer dedicated the property, in question, and the waqf contained in existence for several centuries until the land became wastage. (relied on Commentaries on Mohommedan Law by Amir Ali Syed).

13. According to Imam Abu Hanifa the meaning of waqf is the detention of a specific thing in the ownership of waqf and the devoting of its profit or products "in charity of poors or other good objects". Imam Abu Yusuf said, "Waqf signifies the extinction of the waqif's ownership in the thing dedicated and detention of all the thing in the implied ownership of the Almighty Allah, in such a manner that its profits may revert to or be applied 'for the benefit of Mankind.'

14. Three basic principles governed the waqf: the trust was required to be irrevocable, perpetual, and inalienable. Once property was declared waqf by its owner, the trust thereby created was irrevocable. It means (i) inalienable lands used for charitable purposes and (ii) pious endowments.

15. The origin of Waqf can be traced to the impulse of Muslims to do charitable deeds i.e., to endow property 'in the way of the Almighty Allah'. According to Section 2(1) of the Mussalman Waqf Validating Act, 1913 "Waqf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Musslman law as religious, pious or charitable. According to section 6(10) of the Bangol Waqf Act, 1934 'waqf' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognized by the Islamic Law as pious, religious or charitable and includes a waqf by user.

16. The waqf is irrevocable after possession is handed over to the Mutawalli. The waqif divests himself of the ownership of the property and of everything in the nature of contract from the moment the waqf is created. In purely metaphorical sense the expression "ownership of God" is used but unlike Hindu Law, since conception of a personal God is not recognized, there is no ownership of God or no property belongs to God in the Jural sense, although the ownership of the property becomes reverted in God because God is originally owner of all thing.

17. We have already found that the High Court Division held that the disputed property is waqf property of Mohammad Asoq Waqf Estate created by a registered waqf deed executed and registered on 30.01.1922 (ext.3) which was duly enrolled in the office of Waqf Commissioner vide E.C. No.10481 on 30.01.1942 under the provision of the Bengol Waqf Act, 1934. Section 70 of the Bengol Waqf Act 1934 specifically provides:

> Section 70(1): In every suit or proceeding in respect of any wakf property or of a mutwalli as such except a suit or proceeding for the recovery of rent by or on behalf of the mutwalli the Court shall issue notice to the Commissioner at the cost of the party instituting such suit or proceeding.
>
> (2) Before any wakf property is notified for sale in execution of a decree, notice shall be given by the Court to the Commissioner.
>
> (3) Before any wakf property is notified for sale for the recovery of any revenue, case, rates or taxes due to the Crown or to local authority notice shall be given to the whose order the sale is notified.
>
> (4) In the absence of a notice under sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of is coming to know of such suit or proceeding, applied to the Court in this behalf.
>
> (5) In the absence of a notice under sub-section (2) or sub-section (3) the sale shall be declared void, if the Commissioner, within one month of his coming to know of the sale, applies in this behalf to the Court, or other authority under whose order the sale was held."

18. Since Waqf Commissioner and Mutawalli were not impleaded as parts in view of section 70 of the Bengol Waqf Act, 1934 any judgment and decree passed in respect of disputed waqf properly is not binding upon the Waqf Commissioner/Administrator or Mutwalli of the waqf property. We do not find anything in the pleading in the contesting defendants or in the evidence that the provisions of section 70 of the Bengol Waqf Act, 1934 had been complied with in the proceeding of alleged Rent Sale, Rent Suit No.389 of 1948 and in Title Suit No.488 of 1956. We have already found that no evidence was produced in support of the claim of the defendant that Nirmal Kantha auction purchased the suit land in Rent Sale allegedly held on 24.03.1941.

19. From the recital of waqf deed it appears that the object, for which the property in question has been dedicated, is charitable, pious or religious in nature and a portion of the usufructs should be used by the descendents. Therefore, the dedication was complete and it could not be divested for any other purposes. Therefore, when a property can be used only for religious or charitable purpose, it acquires a permanent character. The waqf property vests in the implied ownership of the Almighty in the sense that nobody can claim ownership of it. Even in waqf al aulad, the property is dedicated to the Almighty and only the usufructs are used by the descendents. Once the property is given to waqf, it remains for the waqf for ever. The property cannot be alienated or transferred nor is it subject to the rights of inheritance. It cannot be sold or given away to anybody except in accordance with law. The Islamic Law is a sacred Law, and, thus transaction, or obligation is measured by the standards of religious and moral rules. Those rules are developed through analogical reasoning by Muslim Jurists. When ownership of the waqf property is relinquished by the waqif, it cannot be acquired by any other person, rather it is arrested or detained. In section 56 of the Bangladesh Waqfs Ordinance 1962 Mutwalli's power of alienation of waqf property has been restricted like section 53 of the Bengal Waqf Act, 1934 where the bar to transfer of immovable property of a waqf was provided.

20. From plain reading of section 70(1)(4) of the Bengal Waqf Act, 1934 it is apparent that in every suit or proceeding in respect of any waqf property the court shall issue notice to the Commissioner at the cost of the party instituting such suit and proceeding and, in absence of such notice any decree or order passed in the suit or proceeding shall be declared void.

21. We have already found that no such notice was issued of alleged Rent Sale, Rent Suit No.398 of 1948 and Title Suit No.488 of 1956 upon Waqf Commissioner and Mutwalli. Even they were not impleaded as party in those suit or proceeding. In such view of the matter, the decree or order passed in those suits or proceedings are not binding upon the Waqf Commissioner and by those decrees or orders the Waqf character of that suit land had not been extinguished.

22. Since the property, in question, is waqf property and the same was not transferred by its actual owner, by the impugned deeds, title of the disputed waqf property had not been vested to the recipients of those deeds and those are mere papers transaction.

23. Accordingly, we find substance in the appeal.

24. Thus, the appeal is allowed. Impugned judgment and order of the High Court Division is set aside.

10 SCOB [2018] AD

APPELLATE DIVISION

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

CIVIL APPEAL NO. 473 OF 2009
(From the judgment and order dated 30.01.2008 passed by the High Court Division in Civil Revision No.1088 of 2004)

Alhaj Dr. Chowdhury Mosaddequl Isdani …… Appellant

Versus

Abdullah Al Munsur Chowdhury and others …… Respondents

For the Appellant	: Mr. Mahbubey Alam, Senior Advocate, instructed by Chowdhury Md. Zahangir, Advocate-on-Record.
For the Respondent	: Mr. A.J. Mohammad Ali, Senior Advocate, instructed by Mr. Zainal Abedin, Advocate-on-Record
Date of hearing	: The 26th July, 2016

Persona Designata:
In legal parlance the expression "persona designa" means a person who has been described in a statute or a legal instrument by his official designation, and his function may be judicial or may not be so. But if the function of the designated person is judicial in character then he is nothing but a "court" even though he is not described as a court but by official designation. The test is the power and function he has to discharge.
… (Para 12)

On this score since the revisional application lies against the final order of the District Judge under a special law, the respondents herein correctly invoked revisional jurisdiction of the High Court Division against the order of the District Judge passed in appeal preferred against an order of eviction by the Deputy Commissioner pursuant to the prayer of the Waqf Administrator. Hence on the question as to whether revision is maintainable we hold the same in the affirmative. … (Para 17)

The jurisdiction under section 115 of the Code of Civil Procedure is very limited. It has not empowered the revisional court to sit on appeal and take into consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice. … (Para 21)

J U D G M E N T

MIRZA HUSSAIN HAIDER, J:

1. This civil appeal, by leave, is directed against the judgment and order dated 30.01.2008 passed by a single Bench of the High Court Division in Civil Revision No.1088 of 2004 making the Rule absolute, and setting aside the judgment and order dated 29.02.2004 passed by the learned District Judge, Dinajpur in Miscellaneous Appeal No.74 of 2003 dismissing the appeal and affirming the judgment and order dated 13.09.2003 passed by the Deputy Commissioner, Dinajpur, in eviction Miscellaneous Case No.XXIV/Eviction/47/2003 initiated pursuant to the request of the Waqf Administrator under section 64(1) of the Waqf Ordinance,1962.

2. Facts leading to this civil appeal in short are that:

The present appellant (Mutwalli of Moinuddin Ahmed Chowdhury Waqf estate), alleging illegal occupation of 23 decimals of land of the said waqf estate by the present respondents No. 1 to 3, filed an application on 15.6.2003 to the Waqf Administrator for taking necessary steps for eviction of the said illegal occupants from the said waqf property. The Waqf Administrator, initially, being satisfied, about such illegal occupation of the waqf property by the said respondents, issued show cause notice upon them and the reply of the said respondents to the said show cause notice being not satisfactory, the Waqf Administrator applied to the Deputy Commissioner, Dinajpur, under section 64(1) of the Waqf Ordinance, to take necessary steps for eviction of those illegal occupants from the said waqf property and restore possession of the same to the Mohiuddin Ahmed Chowdhury Waqf Estate. Thereafter the Deputy Commissioner upon holding necessary survey through the Surveyor, Kanungo, regarding the property and the area which have been forcibly occupied by the respondents No. 1 to 3 passed an order on 13.9.2003 in Eviction Miscellaneous Case No.XXIV/Eviction/47/2003, and thereby evicted the said illegal occupants from the said Waqf property on 17.9.2009.

3. Being aggrieved by and dissatisfied with the order dated 13.09.2003 passed in the aforesaid Eviction Miscellaneous Case by the Deputy Commissioner, Dinajpur, and eviction dated 17.9.2003, the evicted-respondents No. 1 to 3, preferred Miscellaneous Appeal No.74 of 2003 before the learned District Judge, Dinajpur, under section 64(2) of the Waqf Ordinance, who after hearing the parties, dismissed the said appeal by judgment and order dated 29.02.2004.

4. Being aggrieved by and dissatisfied with the aforesaid judgment and order of the learned District Judge, Dinajpur the evicted persons(respondents No. 1-3) filed Civil Revision No.1088 of 2004 under section 115(1) of the Code of Civil Procedure and a Division Bench of the High Court Division upon hearing the parties made the Rule absolute by the impugned judgment and order dated 30.01.2008 and directed the Deputy Commissioner "to restore the status-quo ante".

5. Hence, the Mutwalli of the Mohiuddin Ahmed Chowdhury Waqf Estate as appellant filed Civil Petition for Leave to Appeal No.921 of 2008 before this Division and obtained leave giving rise to the instant Civil Appeal.

6. Mr. Mahbubey Alam, the learned Senior Counsel appearing on behalf of the appellant, submits that the Deputy Commissioner having taken action following section 64(1) of the Waqf Ordinance and there being no illegality in taking such action and the learned District Judge having affirmed the order of the Deputy Commissioner by dismissing the appeal holding the same as lawful, the High Court Division committed error in setting aside the same and as such the impugned judgment and order passed by the High Court Division, is liable to be set aside. He further submits that the High Court Division failed to consider that an order passed under section 64(2) of the Waqf Ordinance being a final order revisional application under section 115 of the Code is not maintainable. Hence, the impugned judgment and order passed by the High Court Division is liable to be set aside.

7. Mr. A. J. Mohammad Ali, the learned Senior Counsel appearing on behalf of the respondents, supporting the impugned judgment and order of the High Court Division submits that relying upon the vague and unspecified quantum of 23 decimals of land they have been evicted from their own waqf property which they were enjoying as beneficiary of their waqf estate. According to him the disputed waqf property being Waqf-ul-Awlad, the administrator of Waqf is not empowered to make any decision of his own and rather he is required to hear the desire of the waqif which is created for the benefit of the heirs and successors of the waqiff. The High Court Division having considered all these aspects rightly passed the impugned judgment.

8. Upon hearing the learned Advocates for both the sides, and on perusal of the leave granting order it reveals that two questions are to be decided in this appeal, one is whether the High Court Division failed to consider that an order passed under Section 64(2) of the Waqf Ordinance being a final order civil revisional application is maintainable, and the other one is if so whether the High Court Division erred in law in reversing the decision of the learned District Judge passed under section 64(2) of the Waqf Ordinance.

9. To meet the first point, it is required to see Section 64 of the Waqf Ordinance 1962 as a whole.

10. Section 64 reads as follows:

"64(1). If a co-sharer in a waqf property or an individual beneficiary or any other person interested in a waqf, or a stranger, creates disturbances, or obstruction in the peaceful management of the waqf or any institution attached thereto in any way, or disturbs the possession of a waqf property by the Mutawalli or any person or a managing committee appointed by the Administrator for managing the said property, or commits trespass on any such property, the Administrator shall apply to the Deputy Commissioner, who shall evict the trespasser, or take such steps for preventing such disturbance or obstruction as he deems fit.

64(2). Any person evicted by the Deputy Commissioner under sub-section (1) may, within three months from the date of his eviction, appeal to the District Judge against such order of eviction; and the decision of the District Judge on such appeal shall be final."

11. In the instant case the order of eviction passed by the Deputy Commissioner under section 64(1) is under challenge in appeal preferred before the learned District Judge, under section 64(2) of the said Ordinance wherein no decree is required to be passed. As such the appeal has been registered as Miscellaneous Appeal. Under such circumstances when the

District Judge's order has been given finality by the statute itself, the question arises whether revision would lie before the High Court Division under section 115(1) of the Code of Civil Procedure.

12. The statute empowered the "District Judge" to hear the appeal against the order of eviction passed by the Deputy Commissioner. Under section 2 of the Code of Civil Procedure "District Judge" means the limits of the jurisdiction of a principal Civil Court of original jurisdiction and "Judge" means the presiding officer of a Civil Court. In the General Clauses Act "District Judge" is defined to mean the judge of a principal Civil Court of original jurisdiction. Now question may arise when power is entrusted upon the District Judge then whether he is to act as a Court or as a person. A person is considered as an individual rather than as a member of a class. It may be a person specifically named or identified in law as opposed to the one belonging to an identified category or group. This allows a judge to be appointed to discharge some non-judicial functions. Such entrustment can be termed as "persona designata". The term "persona designata" thus means a person designated individually or by name rather than as a member of a class to do some specific work. In the case of **AK M Ruhul Amin Vs. District Judge and Appellate Election Tribunal, Bhola and others along with other disposed of civil appeals and civil petitions (38 DLR (AD) 173)** this Division held "When one is designated not by name but by official designation it is a 'Persona Designata'". It has further been held considering the definition given by law Lexicon of British India that " The test to find out whether the person who is named as an individual or is designated by his office is the person who is selected to exercise the power by excluding others from the exercise of such power. If the answer is in the affirmative then such person becomes a 'persona designata'." It has further been held " District Judge means the Court of District Judge and not an individual carrying the designation, he is obviously subordinate to the High Court Division." It is to be seen whether the legislature by using the term "District Judge" in Section 64(2) of the Waqf Ordinance intended that the District Judge in disposing of a proceeding should act judicially meaning as a "Court" or as a "persona designata". Under such circumstances the nature of the function of the District Judge is required to be looked into to determine whether he is a persona designata or a Court. If such functions reveal attributes of a Court, he exercises judicial power. When an authority exercises judicial power he is not a persona designata but a Court. In legal parlance the expression "persona designa" means a person who has been described in a statute or a legal instrument by his official designation, and his function may be judicial or may not be so. But if the function of the designated person is judicial in character then he is nothing but a "court" even though he is not described as a court but by official designation. The test is the power and function he has to discharge. In the case of **IDBP(Bangladesh) Vs. M/s. Master Industries (26 DLR 157)** it was held " as the District Judge was required to exercise judicial power, while acting under the aforesaid section, he was not a 'persona designata' but a Court."

13. The Waqf Ordinance 1962 in several other provisions provided appeal to the "District Judge"; one of those is section 43 of the said Ordinance. Therein the law also provides "..... and the decision of the District Judge shall be final" which is similar to what has been contemplated in Section 64(2) of the said Ordinance.

14. This Division in several decisions concluded saying the expressions "District Judge under section 43 of the said Ordinance means a 'Court' not a 'persona designata'". In the case of **Amir Sultana Ali Hyder Vs. Md. K. Alam alias S Alam and others reported in 29 DLR(SC) 295,** this Division held "*though his decision has been made final which precludes*

any further appeal from his decision, such finality as attaches thereto does not oust the revisional power of the High Court. The use of the word 'final' in section 43 does not, therefore, mean that the order of the District Judge is not amenable to the jurisdiction of the High Court." Again in the case of **Aminul Haque Shah Chowdhury Vs. Abdul Wahab Shah Chowdhury and others, reported in 4 MLR(AD) 367**, it has been held "as the District Judge, as contemplated under Section 43 of the the Waqf Ordinance, is not a persona designata but a Court and as it is Court of civil nature, the provision of the Code of Civil Procedure is very much attracted in the present case and thus the provision of Order LXI Rule 19, CPC for admission of appeal dismissed for default is available to the respondents". The expression "District Judge" also occurs in Section 32 of the said Ordinance. Therein also it has been held "District Judge" under such provision means "Court" and not a "persona designata".

15. Another important question is also to be looked into i.e. what the statute meant by using the word "final" in the last portion of section 64(2) of the said Ordinance. The work "final" in relation to the orders of the court occurring in several statutes has been construed to mean that they are not appealable; nevertheless they are open to revision or review. This view has been taken by this Division in 38 DLR's case mentioned earlier. The legislature having empowered the Waqf Administrator 'to apply to the Deputy Commissioner to evict the trespasser from a particular waqf property or for taking steps for preventing such disturbance or obstruction as he deems fit' and accordingly when the trespassers are evicted by the Deputy Commissioner upon holding survey and inquiry, as has been done in the present case, remedy has been given in the statute itself under section 64(2) to prefer an appeal before the District Judge so that the eviction/action of the Deputy Commissioner is tested/judged by the Court of law, as to its legality. Such remedy has been provided for "the person who has been aggrieved' by such actions of the Deputy Commissioner pursuant to the waqf Administrator's prayer and when such appeal is preferred and decided by the learned District Judge as per law, his decision is termed as "final" by the statute. Thus when the District Judge constitutes a Court, which he does under the aforesaid provision of law, he is always subordinate to the High Court Division and is amenable to its jurisdiction.

16. From the above it is clear that under all circumstances this Division in several cases categorically held that the decision of the District Judge in appeal either under section 32 or 43 or 64(2) is given by a 'Court' not by a 'persona designata'. Hence revisional application always lies.

17. On this score since the revisional application lies against the final order of the District Judge under a special law, the respondents herein correctly invoked revisional jurisdiction of the High Court Division against the order of the District Judge passed in appeal preferred against an order of eviction by the Deputy Commissioner pursuant to the prayer of the Waqf Administrator. Hence on the question as to whether revision is maintainable we hold the same in the affirmative.

18. In the present case, another important aspect is necessary to be discussed which relates to dispute between Mutwalli of Mohiuddin Ahmed Chowdhury Waqf Estate, registered under EC No. 14038 (the present appellant) and the respondents herein (claimed to be the beneficiaries of Emajuddin Ahmed Waqf Estate registered under EC No. 14653). It is claimed by the present appellant that 23 decimals of land of his Waqf Estate have been occupied by the present respondents No. 1 to 3. On the other hand, the respondents No. 1 to 3 claimed that 23 decimals of land along with other lands belong to their Emajuddin Ahmed

Chowdhury Waqf Estate not to the appellant's Mohiuddin Ahmed Chowdhury Waqf Estate and as such they being the beneficiaries of the said Emajuddin Ahmed Chowdhury Waqf Estate are legally occupying the said 23 decimals of land. Thus, the said respondents claim that they have been illegally evicted from the lawful possession of their property without serving any notice by the Waqf Arbitrator or directing them to explain anything in respect of the allegations made in the application of the present appellant dated 15.6.2003. They also claim that the District Judge without considering the documents filed by the present respondents affirmed the eviction order committing error of law inasmuch as whenever such complicated matter arises the court must not hesitate to dispose of the same without calling for any evidence or witnesses from both the sides and inviting production of documents and scrutinizing of the said documents. It is also contended that the said 23 decimals of land, which is claimed to be the land of the present appellant is unspecified. As such the order of eviction and affirmance of the same by the District Judge is illegal.

19. From the aforesaid pleadings it appears that the persons evicted from the property have raised a question as to which Waqf Estate is the owner of the said 23 decimals of land. It is to be borne in mind that such question of ownership/title cannot be decided without taking evidence and without considering the documents placed by the parties before the appellate authority hearing an appeal under section 64(2) of the Ordinance. Moreover, the respondents also claimed that since the disputed 23 decimals of land have not been specified, eviction from the said unspecified land is illegal. From the above contention it appears that the ownership or title of the said 23 decimals of land is disputed. The general principle of law is any question as to title/ownership or specification of the scheduled land can only be considered/determined by a competent Court not in a proceeding under section 64 of the Waqf Ordinance, which is a summary proceeding in nature. Only question is to be decided in the said proceeding whether the evicted person was in illegal possession of a waqf property enrolled at the office of the Administrator under section 47(Chapter IV) of the Ordinance. Any person claiming any interest in any waqf property is required to make application to the District Judge under section 35(1) within certain time as provided in section 50 of the Ordinance. In the present case the respondents claim that they have been dispossessed from the property of their waqf estate in which they are beneficiaries. There arises a question whether the said 23 decimals of land belong to which waqf estate. Such dispute can only be resolved under section 50 read with section 35 of the Ordinance. But no such step has been taken by the present respondents. Since the respondents have raised such allegation they need to get the remedy in a competent forum not in a summary proceeding under section 64 of the Waqf Ordinance.

20. Moreover from the record it appears that such allegation has firstly been made in the appeal filed under section 64(2) of the Ordinance which has been squarely dealt with by the appellate Court upon considering the pleadings of the present respondents and found that the allegations as to evicting them from their property illegally is not correct. The appellate Court in its judgment observed that the Waqf Administrator after receiving the complaint from the present appellant on 15.6.2003 issued show cause notice upon the present respondents No. 1 to 3 through the Assistant Waqf Administrator and their reply to the same being unsatisfactory and the administrator was satisfied that 23 decimals of the property of the present appellant's Waqf Estate are in illegal possession of the present respondents thus the administrator invoked section 64(1) of the Ordinance and applied to the Deputy Commissioner to evict the illegal occupants. Pursuant to such prayer the Deputy Commissioner, as it appears from the record, of its own initiative, directed the Assistant Commissioner (Land) to inquire into the matter. In his turn the Assistant Commissioner after

holding necessary enquiry and holding survey through the Kanungo found that the present respondents had indeed been occupying 23 decimals of the appellant's waqf property. The Deputy Commissioner on examining the report of the Assistant Commissioner became fully satisfied about the illegal occupation of 23 decimals of land by respondents No. 1 to 3 and passed the order for eviction on 13.9.2003. Accordingly the illegal occupants have been evicted. So the contention of the respondents that they have not been served with any notice or they have not been heard, as such, is without any basis.

21. From the impugned judgment it appears that the High Court Division upon travelling beyond its revisional jurisdiction came to a finding that the waqf "is not a Waqf-E-Lila and rather it seems to be an Waqf-Ul-Awlad and the Administrator is not empowered from making decision of his own and rather he is required to adhere to the desire of the Waqf Estate in the nature of Waqf-Ul-Awlad which bears a clear and distinguished character from that of an Waqf-E-Lillah" on considering Annexure-A misconstruing the law and the fact that the revision does not arise out of a suit for declaration of title and recovery of possession or a suit under section 9 of the Specific Relief Act but is a matter arising out of section 64(2) of the Waqf Ordinance. The jurisdiction under section 115 of the Code of Civil Procedure is very limited. It has not empowered the revisional court to sit on appeal and take into consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice. It has already been discussed earlier that under a proceeding arising out of section 64 of the Waqf Ordinance there is no scope to decide title or any dispute regarding the property. Only thing is to be looked into in such proceeding is whether the property belongs to a Waqf Estate and whether the occupier of it is an illegal occupier. The Administrator as well as the Deputy Commissioner in the present case after holding separate inquiries found the allegation of illegal occupation of 23 decimals of land by the present respondents, correct/proved and hence evicted the illegal occupants (present respondents No. 1 to 3) from the said property of the Waqf Estate.

22. Under such circumstances we are of the view that the High Court Division, while making the Rule absolute, failed to consider all these aspects and rather misdirected itself and as such came to an erroneous finding and conclusion which is required to be interfered with by this Division. Accordingly we find merit in this appeal.

23. This civil appeal is thus allowed without any order as to cost. The judgment and order complained of herein is set aside.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 6070 of 2012
With
Writ Petition No. 7155 of 2012 and
With
Writ Petition No. 7156 of 2012

Md. Safiqul Islam and others
…. Petitioners in Writ Petition No. 6070 of 2012
-AND-
Md. Hafizur Rahman and others
…. Petitioners in Writ Petition No. 7155 of 2012
-AND-
Md. Jalal Ahmed and others
…. Petitioners in Writ Petition No. 7156 of 2012

Vs.
Bangladesh, represented by the Secretary, Ministry of Establishment, Bangladesh Secretariat, Dhaka and others.
.....Respondents.

Mr. Humayun Ali Reza Advocate
..for the petitioners in all the Writ Petitions.

Mr. Shams-ud Doha Talukder A.A.G.
.....for the Respondent No. 4 .

Heard on 30.04.2013
Judgment on 02.05.2013.

Present:
Mr. Justice Tariq ul Hakim
And
Mr. Justice Abu Taher Md. Saifur Rahman

Kew word

It is true that the petitioners cannot claim as of right to be regularized in their jobs. However, after having served the authority for 10-15 years as temporary contingent staffs they cannot be blamed to expect being regularized in their posts especially when their superior authority has been satisfied by their work and has recommended their regularization. … (Para 30)

In view of long standing period of service of the petitioners the Government consider their cases for absorption and regularization in the revenue budget if they have requisite qualifications and subject to availability of vacancies according to their seniority. They however must have the requisite qualification for the post in which they are seeking regularization, continuity in service and satisfactory service record even though they may exceed their age limit required for fresh appointment in that post . … (Para 32)

Judgment

Tariq ul Hakim, J.

1. Rules Nisi have been issued calling upon the respondents to show cause why they should not be directed to comply with the recommendations and directives stated in Annexures B,C and D to regularize the service of the petitioners to the post of Sepoys and

MLSS and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. All these Rules concern common questions of law and facts and as such were taken up together for hearing and are being disposed of by this single judgment.

3. In Writ Petition No. 6070 of 2012 the petitioner No. 1 Md. Safiqul Islam was appointed as a contingent/ work charged employee on 12.7.2001 and joined his duty on 15.7.2001 . Presently he is working as a Cleaner on daily basis at the rate of Tk. 150/- per day on condition of no work no pay at Commissioner of Customs, Excise and VAT Commissionerate, Rajshahi (the Respondent No.4) .

4. Petitioner No. 2 Md. Aminul Islam was appointed as Driver of Motor Car as contingent employee on 1.4.2002 and joined his duty on 2.4.2002 and is presently working as a Driver of Motor Car on daily basis at the rate of Tk. 150/- per day on condition of no work no pay under the Respondent No.4 at Commissioner of Customs, Excise and VAT Commissionerate, Rajshahi.

5. Petitioner No. 3 Md. Sadequl Islam was appointed as contingent/ work charged employee on 19.8.1997 and joined his duty the same date and is presently working as a Cleaner on daily basis at the rate of Tk. 150/- per day on condition of no work no pay at Commissioner of Customs, Excise and VAT Commissionerate, Rajshahi (Respondent No.4).

6. Petitioner No. 4 Md. Abul Kalam Azad joined his duty on 21.12.1997 as contingent employee and is presently working as a Cleaner on daily basis at the rate of Tk. 150/- per day on condition of no work no pay at Bogra Sadar Divisional office under the Commissioner of Customs, Excise and VAT Commissionerate, Rajshahi (Respondent No.4).

7. Similarly in Writ Petition No. 7155 of 2012 Petitioner No. 1 Md. Hafizur Rahman was appointed as contingent employee on 13.2.1992 and joined his duty on 26.9.1992 and presently is working as MLSS on daily basis on condition of no work no pay at Customs House, Jessore Sadar, Customs, Excise and VAT Commissionerate, Jessore .

8. Petitioner No. 2 Mrs. Karnali Sarder was appointed as contingent employee on 2.5.1993 and joined her duty on 4.5.1993 and is presently working on daily basis on condition of no work no pay at Customs House, Jessore Sadar, Customs, Excise and VAT Commissionerate, Jessore.

9. Petitioner No. 3 Mrs. Selina Akhondo was appointed as contingent employee on 24.7.1994 and joined her duty on 1.8.1994 and is presently working on daily basis on condition of no work no pay at Customs House, Jessore Sadar, Customs, Excise and VAT Commissionerate, Jessore .

10. Petitioner No. 4 Md. Mehedi Hasan was appointed as contingent employee on 31.5.2004 and joined his duty on 1.6.2004 and is presently working on daily basis on condition of no work no pay at Customs House, Jessore Sadar, Customs, Excise and VAT Commissionerate, Jessore .

11. Petitioner No. 5 Md. Kamal Hossain was appointed as contingent employee on 31.5.2004 and joined his duty on 1.6.2004 and is presently working on daily basis at the

rate of Taka 50/-on condition of no work no pay at Customs House, Jessore Sadar,Customs, Excise and VAT Commissionerate, Jessore.

12. Petitioner No. 6 Zahir Hossain Khan was appointed as contingent employee on 29.5.2006 and joined his duty on the same date and presently is working on daily basis at the rate of Taka 50/- on condition of no work no pay at Customs House, Jessore Sadar, Customs, Excise and VAT Commissionerate, Jessore.

13. Petitioner No. 7 Md. Rashidul Islam was appointed contingent employee on 29.05.2006 and he joined his duty on the self same date on daily basis at the rate of Tk. 50/- on condition of no work no pay at Kushtia Customs, Excise and VAT, Kushtia.

14. Petitioner No. 8 Md. Abdus Salam was appointed contingent employee on 19.03.1992 and he jointed his duty on the self same date at the rate Tk. 800/- per month on no work no pay basis. His appointment was made by Nathi No. ২য়/৫ (৪র্থ)-২- ইসি/৮৯ dated 19.03.1992 .

15. Petitioner No. 9 Minto Mondol was appointed contingent employee by the Commissioner of Customs , Excise and VAT Commiserate Jessore, on 31.05.2004 at the rate of Tk. 50/- per day on no work no pay basis. He joined on 01.06.2004 and is working till to day.

16. Petitioner No. 10 Md. Farid Sikder was appointed as contingent employee on 30.06.1994 by the Collector Customs, Excise and VAT Collector, Jessore at the rate Tk. 50/- per day on no work no pay basis. He joined on 02.07.1994 and is working as such .

17. Petitioner No. 11 Md. Sumon was appointed by the Commissioner of Customs, Excise and VAT Commissionerate, Jessore on 29.05.2006 as contingent employee at the rate of Tk. 50/- per day on condition of no work no pay . He joined his duty on the self same date .

18. Petitioner No. 12 Md. Abdus Sattar Mondal was appointed as contingent employee by the Commissioner of Customs, Excise and VAT Commissionerate, Jessore on 29.05.2006 at the rate of Tk. 50/- per day on condition of no work no pay basis . He joined his duty on the self same date and has been working as such.

19. In Writ Petition No. 7156 of 2012 Petitioner No. 1 Md. Jalal Ahmed was appointed as contingent employee on 2.5.1993 and joined his duty on the same date and is presently working on daily basis on condition of no work no pay at Customs House, Benapole Commissioner, Benapole, Jessore.

20. Petitioner Nos. 2 Md. Anowar Hossain (Minto) and 3 Md. Musa Mollah were appointed as contingent employees on 29.3.2001 and presently are working on daily basis on condition of no work no pay at Customs House, Benapole Commissioner, Benapole, Jessore.

21. Petitioner Nos. 4 Md. Anwar Hossain and 5 Md. Sadequr Rahman were appointed as contingent employees on 15.12.2003 and presently are working as Computer Operator on daily basis at the rate of Taka 120/- per day on condition of no work no pay at Customs House, Benapole Commissioner, Benapole, Jessore.

22. It is stated that being satisfied with the works of the petitioners , the National Board of Revenue through its Second Secretary Md. Golam Rahman under office Nothi No.7(1) Sha: Bho: Pro-2/2002/332 dated 25.6.2003 informed the Commissioner of Customs, Excise and VAT Commissionerate, Rajshahi that for the contingent employees letter of request has been sent to the Internal Resources Division to regularize them. Subsequently the National Board of Revenue by another letter dated 22.5.2004 requested the Internal Resources Division of the Finance Ministry of the Government to give sanction to regularize the aforesaid employees in the post of MLSS and Sweeper .

23. It is further stated that Mr. Md. Mafizal Islam Patwary, Senior Assistant Secretary of the Internal Resources Division of the Ministry of Finance by his letter No. M/Asni 3/Excise/22/2008/184 dated 24.3.2008 after getting order from the higher authority requested the Commissioner of Customs, Excise and VAT Commissionerate , Rajshahi to give preference to the contingent/work charged employees after clearance from the Ministry of Establishment for appointment. Senior Assistant Secretary of the Ministry of Establishment by letter dated 25.8.2008 informed all concerned that to fill up 80% vacant posts there would be no necessity of clearance from the Establishment Ministry. Besides, in case of filling up directly recruitable vacant posts there was necessity for taking clearance from the Establishment Ministry. By letter dated 29.9.2008 the Second Secretary of the National Board of Revenue informed all the Commissioners of Customs, Excise and VAT Commissionerate, Rajshahi Benapole, Jessore and others that there would be no necessity for clearance for filling 80% vacant posts and as such with the order of the higher authority requested all concerned to take necessary steps on emergency basis. It is further stated that the Respondent No.4 after receiving representation of 32 contingent/worked charged employees praying for regularization of their job as MLSS sent a letter under Nothi no. 2-5(3)-1ET/ Sadar/ niog/2004/ 2364 dated 17.4.2008 to the Member of National Board of Revenue stating inter-alia that their service as contingent/work charged was indispensable and the same is sent for information and necessary action. It is further stated that the Respondent No.4 sent a letter under Nothi no. 2(10) 4(1) ET/ Sadar/2005/338 dated 15.1.2009 to give information about the contingent employees on daily basis with a photo copy of the letter No. 2(10)-4/1/ET/Sadar/2005/6189 dated 12.11.2008 for information and necessary action that 45 contingent employees have been working on daily basis (no work no pay) as office cleaners. One of them is working as Driver of a Motor Car and that it is Commissioner's jurisdiction to appoint and give remuneration to those people. It is further stated that with reference to the letter no. 7(1) Shu:Bho: Pro-2/2001/561 dated 13.11.2003 issued by the National Board of Revenue , 25 employees' job was regularized on 1.09.2004 to the posts of MLSS and under this circumstances as 45 contingent employees have been working as daily basis (no work no pay) for a longer period so if the National Board of Revenue agrees on principle that they can be regularized as MLSS and for that necessary steps can be taken.

24. Thus despite various recommendations from different Ministries and Departments of the Government to regularize the posts of the petitioners , no satisfactory response is being received and the petitioners despite performing long periods of service for the Republic are continuing to remain in uncertainty as to their livelihood and chance of being regularized in their jobs; being aggrieved, the petitioners have come to this Court and obtained the present Rules.

25. The Rules are being opposed by the learned Assistant Attorney General and in Writ petition No. 7156 Affidavit-in-Opposition has been filed on behalf of Respondent No. 4

stating inter alia that the Ministry of Establishment has given instruction to the concerned office to fill up 80% vacant posts in accordance with established rules and that since there is no law or rule or even directive to regularize the job of contingent employees who have been employed after 1990 the petitioners have not been regularized in their posts as per the recommendation from different authorities.

26. Mr. Humayun Ali Reza, the learned Advocate for the petitioners has drawn our attention to Annexure B, letter from the National Board of Revenue recommending absorption and regularization of the petitioners and stating clearly that it would not be in the interest of the Government to terminate their posts and submits that the petitioners due to their long period of service with the Government have legitimate expectation to be regularized in permanent posts of the Republic to compensate them for the extremely low wages that they have been receiving all this time. The learned Advocate also has drawn our attention to Annexures C and D, letters from the National Board of Revenue to the Internal Resources Division of the Ministry of Finance recommending that the petitioners' service be regularized due to their long period of service with the Government and submits that the respondents' act of not regularizing the service of the petitioners is arbitrary, illegal and against all the principles of fairness and in this respect he has drawn our attention to the judgment passed by a Division Bench of this Court in Writ Petition No.9537 of 2010 along with others (unreported) where their Lordships in a similar matter directed the respondents to regularize the service of the petitioners.

27. As against this, Mr. Shams-ud Doha Talukder, the learned Assistant Attorney General appearing on behalf of the Respondent No. 4 submits that since there is no circular, Rule, law or directive of the Government to regularize the posts of the petitioners who are contingent employees the Government is not able to regularize their post even though some of their services may have become indispensable in certain cases.

28. Heard the learned Advocates, perused the Writ Petition and the Annexures.

29. The instant petitioners have been working as contingent employees for the Government for 10-15 years up to the satisfaction of the employer. Annexures BCD clearly show that the National Board of Revenue has recommended their absorption and regularization in their respective post. The respondents however are not regularizing their posts without stating clearly any reasons. It appears from the Petition Nos. 4, 5 Affidavit-in-Opposition and from the submissions of the learned Assistant Attorney General that the reasons for not regularizing them is that there is no specific rule, provision or even directive from any appropriate authority to regularize them. Such a directive exists for those employees who were employed prior to 1990. The fact however remains that these petitioners have been working since the year 2000 for the Government and that they have been reassured from time to time that they would be regularized in their posts which has given arise to a legitimate expectation on their behalf. As has been held in the case of ***Ashutosh Chakma and others Vs. Rajdhani Unnayan Kartripakkha (Rajuk) and others reported in 60 DLR (2008) 273*** legitimate or reasonmable expectation arises whenever there is an express promise given on behalf of a public authority or from the existence of regular practice which the claimant can reasonably expect to continue. The doctrine of legitimate expectation owes its origins in English jurisprudence but has been judicially approved by our Courts in a number of decisions and gives the petitioners sufficient locus standi for judicial review.

30. It is true that the petitioners cannot claim as of right to be regularized in their jobs . However, after having served the authority for 10-15 years as temporary contingent staffs they cannot be blamed to expect being regularized in their posts especially when their superior authority has been satisfied by their work and has recommended their regularization. In an unreported decision of this Court in Writ Petition No. 9537 of 2010 along with others a Division Bench of this Court consisting Justice Farah Mahbub and Justice Abdur Rob directed the respondents to regularize the posts of the petitioners who are in the same footing as the present petitioners.

31. In the case of Chief Engineer, Local Government & Engineering Department Vs. Kazi Mizanur Rahman and others reported in 17 BLC (AD) (2012) page 91 the Appellate Division held that the Government may consider the absorption of the petitioners under the revenue budget if there is any vacancy in regular post in accordance with law and cerain guidelines.

32. In the instant case agreeing with the said decision of the Appellate Division we also hold that in view of long standing period of service of the petitioners the Government consider their cases for absorption and regularization in the revenue budget if they have requisite qualifications and subject to availability of vacancies according to their seniority. They however must have the requisite qualification for the post in which they are seeking regularization, continuity in service and satisfactory service record even though they may exceed their age limit required for fresh appointment in that post.

33. With the above directions this Rules are disposed of. There will be no order as to costs.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition Nos. 16781 of 2012 with
16679/2012, 16680/2012, 16681/2012, 16682/2012, 16683/2012, 16684/2012, 16685/2012, 16686/2012, 16687/2012, 16688/2012, 16689/2012, 16690/2012, 16691/2012, 16692/2012, 16693/2012, 16694/2012, 16695/2012, 16696/2012, 16697/2012, 16698/2012, 16699/2012, 16700/2012, 16701/2012, 16702/2012, 16703/2012, 16704/2012, 16705/2012, 16706/2012, 16707/2012, 16708/2012, 16709/2012, 16710/2012, 16711/2012, 16712/2012, 16713/2012, 16714/2012, 16715/2012, 16716/2012, 16717/2012, 16724/2012, 16725/2012, 16726/2012, 16727/2012, 16728/2012, 16729/2012, 16730/2012, 16731/2012, 16732/2012, 16733/2012, 16734/2012, 16735/2012, 16736/2012, 16737/2012, 16738/2012, 16739/2012, 16740/2012, 16741/2012, 16742/2012, 16743/2012, 16744/2012, 16745/2012, 16746/2012, 16747/2012, 16748/2012, 16749/2012, 16750/2012, 16751/2012, 16752/2012, 16782/2012, 16783/2012, 16784/2012, 16785/2012, 16786/2012, 16787/2012, 16788/2012, 16789/2012, 16790/2012, 16791/2012, 16792/2012, 16793/2012, 16794/2012, 16795/2012, 16796/2012, 16797/2012, 16798/2012, 16799/2012, 16801/2012, 16802/2012, 16803/2012, 16804/2012, 16805/2012, 16806/2012, 16807/2012, 16808/2012, 16809/2012, 16810/2012, 16811/2012, 16812/2012, 16813/2012, 16814/2012, 16815/2012, 16816/2012, 16817/2012, 16818/2012, 16819/2012, 16820/2012, 16821/2012, 16822/2012, 16823/2012, 16824/2012, 16825/2012, 16826/2012, 16827/2012, 16828/2012, 16832/2012, 16833/2012, 16834/2012, 16835/2012, 16836/2012, 16837/2012, 16838/2012, 16839/2012, 16840/2012, 16841/2012, 16842/2012, 16843/2012, 16844/2012, 16846/2012, 16847/2012, 16848/2012, 16849/2012, 16850/2012, 16851/2012, 16852/2012, 16853/2012, 16854/2012, 16855/2012, 16856/2012, 16857/2012, 16858/2012, 16859/2012, 16926/2012, 16927/2012, 16928/2012, 16929/2012, 16930/2012, 16931/2012, 16932/2012, 16933/2012, 16934/2012, 16952/2012, 16953/2012, 16954/2012, 16955/2012, 16956/2012, 16957/2012, 16958/2012, 16959/2012, 16960/2012, 16961/2012, 16962/2012, 16963/2012, 16969/2012, 16970/2012, 16972/2012, 16973/2012, 16974/2012, 16975/2012, 16976/2012, 16977/2012, 16978/2012, 16979/2012, 16980/2012, 16981/2012, 16982/2012, 16983/2012, 16984/2012, 16985/2012, 16986/2012, 16987/2012, 16988/2012, 16989/2012, 16990/2012, 17000/2012, 17001/2012, 17002/2012, 17003/2012, 17004/2012, 17005/2012, 17006/2012, 17007/2012, 17008/2012, 17009/2012, 17010/2012, 17011/2012, 17012/2012, 17013/2012, 17014/2012, 17015/2012, 17016/2012, 17017/2012, 17018/2012, 17058/2012, 17059/2012, 17060/2012, 17061/2012, 17062/2012, 17063/2012, 17064/2012, 17065/2012, 17066/2012, 17067/2012, 17068/2012, 17069/2012, 17070/2012, 17071/2012, 17072/2012, 17073/2012, 17074/2012, 17075/2012, 17076/2012, 17077/2012, 17078/2012, 17079/2012, 17080/2012, 17081/2012, 17082/2012, 17083/2012, 17084/2012, 17085/2012, 17086/2012, 17087/2012, 17088/2012, 17089/2012, 17090/2012, 17091/2012, 17092/2012, 17093/2012, 17094/2012, 17095/2012, 17096/2012, 17097/2012, 17098/2012, 17099/2012, 17100/2012, 17101/2012, 17102/2012, 17103/2012, 17104/2012, 17105/2012, 17106/2012, 17107/2012, 17108/2012, 17109/2012, 17110/2012, 17111/2012, 17112/2012, 17113/2012, 17114/2012, 17115/2012, 17116/2012, 17117/2012, 17268/2012

Grameenphone Limited
…...Petitioner in all the Writ Petitions
Vs.
Chairman, First Labour Court, Dhaka and others
…… Respondents
Mr. A.F. Hassan Ariff with
Mr. Sheikh Fazle Noor Taposh with
Mr. Meah Mohammad Kawsar Alam, Advocates
…..for the petitioner

Mr. Monsurul Hoque Chowdhury with
Mr. Syed Mizanur Rahman and
Mr. Abdul Mannan with
Mr. Haroon Ar Rashid Advocates
….For the respondent No.3.

Mr. Amit Das Gupta
….for the respondent No.4.

Heard On 11.05.2016,09.11.2016 and 17.11.2016
Judgment on 15.12. 2016

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

The concept of Outsourcing services in Bangladesh.
Outsourcing services is a new concept in our country. Not just labour but also professional services may be procured through outsourcing. It is a process by which the recipient of service enters into an agreement with a contractor / service provider who engages persons to render services to the service recipient. In such a situation, there is nemployment contract between the service recipient and the service renderer. The contract exists between the service recipient and the contractor and consideration for the services are provided by the service recipient to the contractor . If the service recipient is not satisfied with the service rendered by the persons engaged by the contractor then his remedy lies for breach of the terms and conditions of the agreement against the contractor. Likewise if the contractor does not receive adequate consideration for providing his service through his appointed employees, his remedy lies against the service recipient. The service recipient is generally not concerned who renders the service to him as long as the service sought is rendered adequately . As can be reasonably expected the service recipient may set certain criteria and conditions to be observed by the service renderer and he has a discretion to reject any person through whom the service is provided by the contractor; but in all such cases the matter is governed by the contract between the service recipient and contractor. It is a contract of services as opposed to a contract of employment. … (Para 21)

Judgment

Tariq ul Hakim,J:

1. Rules Nisi have been issued calling upon the respondent Nos. 1-3 to show cause why the judgments dated 12.09.2012 passed by the Chairman, Labour Appellate Tribunal, Dhaka in Appeal No. 82 of 2011 (Annexure D) dismissing the Appeal along with 263 similar Appeals affirming the judgment dated 30.03.2011 passed by First Labour Court, Dhaka in BLL Case No. 284 of 2008 along with 263 similar cases should not be declared to have been passed without lawful authority and of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper .

2. All these Rules concern common questions of law and facts and were heard together and are being disposed of by this single judgment.

3. Facts relevant for disposal of these Rules is that the Respondent Nos. 3 in all the Writ Petitions as plaintiff filed separate applications under section 213 of the Labour Act, 2006 (Act No. XLII of 2006) against the petitioner Grameenphone for a direction to treat them as permanent workers and provide them facilities of permanent workers alleging inter alia that the Respondent Nos. 3 were appointed as drivers on 18.02.2007 and since their appointment have been driving the cars of the petitioner company and were provided with 'Identity Cards', staff uniforms and were paid salaries, bonus, overtime and other benefits by the petitioner Grameenphone and has thus become permanent workers of the petitioner .

4. The further case of the Respondent Nos. 3 plaintiff workers is that the Respondent No.4 is a company engaged in supplying workers and that the Respondent Nos. 3 are not employees of the Respondent No.4 but employees of the petitioner but the petitioner is illegally treating the Respondent Nos. 3 as employees of the Respondent No.4 . The Respondent Nos. 3 on several occasions requested the petitioner Grameenphone to treat them as permanent workers but the petitioner refused to do so and hence they have been constrained to file petitions under Section 213 of the Labour Act, 2006 in the Labour Court for a direction upon the petitioner to treat the Respondent Nos. 3 permanent workers of the petitioner company Grameenphone.

5. The petitioner contested the case by filing written statement denying the material allegations alleged in the plainatiff's petition contending inter alia that there was no contractual relationship between the petitioner and the Respondent Nos. 3 and the Respondent Nos. 3 were engaged by the Respondent No.4 to render services for the petitioner Grameenphone on outsourcing basis as employees of the Respondent No.4 and that the Respondent No.4 was being paid by the petitioner company for the service and that the Respondent No.4 paid the salaries and other benefits to the Respondent Nos. 3 for the services they rendered to the petitioner company and therefore the Respondent Nos. 3 had no locus standi to file the cases against the petitioner Grameenphone in the Labour Court and the said Labour Cases were not maintainable in their present form and manner.

6. The Respondent No. 4 also contested the said Labour Cases by filing separate written statements contending inter alia that there is no relationship between the Respondent Nos. 3 and the petitioner Grameenphone and that the Respondent No.4 is engaged in providing workers on outsourcing basis and in the course of their business the Respondent No.4 entered into agreement with the petitioner Grameenphone on the Ist day of April, 1999 for a period of one year which was renewed yearly and lastly on 01.12.2008 for a period of one year upto 31.12.2008 to carry on its business of providing drivers on outsourcing basis and the Respondent No.4 employed and appointed a number of drivers , issued letters of appointment in their favour including the Respondent Nos. 3 and thereafter placed them with the petitioner Grameenphone for discharging the duties as drivers.

7. It is further stated that according to the terms of the said agreement the Respondent No.4 received remunerations from the petitioner and the Respondent No.4 recruited the Respondent Nos. 3 on temporary basis to render services as drivers for the petitioner Grameenphone as employees of the Respondent No.4 and that the petitioner Grameenphone never appointed the drivers on temporary or permanent basis and never issued any letters of appointment to them or gave them any assurance that they would be absorbed permanently in the employment of the petitioner company Grameenphone and that the impugned judgment and orders of the Court below are liable to be set aside.

8. The Respondent No. 2 First Labour Court after hearing the learned Advocates of the parties and adducing evidence by witnesses and perusing the relevant documents passed the judgment and order dated 30.03.2011 against the petitioner Grameenphone . The petitioner Grameenphone thereafter filed Appeals before the Labour Appellate Court against the said judgment and order of the Labour Court who after hearing the parties dismissed the Appeals vide its judgment dated 12.09.2012.

9. Being aggrieved , the petitioner Grameenphone has come to this Court and obtained the present Rules.

10. As against this, the Respondent Nos. 3 has filed Affidavits-in-Opposition stating inter alia that the said respondents were employed by the petitioner and were provided indenty cards and after completing their probation period satisfactorily they have acquired the status of a permanent worker as per the provisions of the Labour Law, 2006.

11. It is further stated that the Respondent Nos. 3 have been working for the petitioner as per their requirement and driving their cars as drivers and that the Respondent No.4 have no control and supervision in their services and work rendered by the Respondent Nos. 3 and therefore they are the employees of the petitioner Grameenphone and they are entitled to be treated as permanent employees/ workers of the petitioner and get benefits as permanent workers.

12. The Respondent No.4 in its Affidavit-in-Opposition stated inter alia that the said Respondent under its agreement with the petitioner provided outsource persons to the petitioner Grameenphone as per its requirement and after their recruitment the petitioner has the authority to control the service of the Respondent Nos. 3. It is further stated that the wages and salaries were paid to the Respondent Nos. 3 after getting paid from the petitioner for the services rendered by the Respondent Nos. 3. It is further stated that the Respondent No.4 recruited the Respondent Nos. 3 on temporary and contract basis to fullfil the requirements of the petitioner company and they are not permanent workers of the said Respondent No.4 .

13. Mr. A.F. Hassan Arif, assisted by Mr. Sheikh Fazle Noor Taposh and Mr. Meah Mohammad Kawsar Alam, learned Advocates for the petitioner Grameenphone took us through the judgments of the Labour Court and Labour Appellate Court below and submits that the said courts committed a gross error in law in holding that the Respondent Nos. 3 are employees/ workers of the petitioner because there is no relationship of employer and employees between the petitioner and the Respondent Nos. 3. The learned Advocate further submits that there is no privity of contract between the Respondent Nos. 3 workers and the petitioner Grameenphone and that the Respondent Nos. 3 was not a party to the contract between the petitioner Grameenphone and the Respondent No.4 Smart Services Ltd./Jamsons International and therefore the said Respondent Nos. 3 cannot claim to be a worker or employee of the petitioner company or claim any benefit from it. The learned Advocate further submits that section 213 of the Labour Law, 2006 is for enforcing a right guaranteed to a worker under an award, settlement or law and that since it is not admitted by the petitioner that the Respondent Nos. 3 are its workers the question of treating them permanent under the law does not arise .

14. Mr. Monsurul Hoque Chowdhury,assisted by Mr. Syed Mizanur Rahman and Mr. Abdul Mannan assisted by Mr. Md. Haroon Ar Rashid, learned Advocates for the

Respondent Nos.3 submit that the Respondent Nos. 3 have completed three months probationary period with the petitioner Grameenphone and have become permanent in their jobs and are entitled to be treated as permanent workers of the petitioner Grameenphone . The learned Advocate further submits that the Respondent Nos. 3 are getting salaries and other benefits by the petitioner Grameenphone through the Respondent No.4 Smart Services Ltd./Jamsons International and the courts below rightly found them permanent workers of the petitioner which calls for no interference by this Court .

15. The learned Advocate further submits that even though no appointment letter was issued by the petitioner in favour of the Respondent Nos. 3 nevertheless since they have been working for the petitioner Grameenphone for several years at their premises and driving their cars and rendering other services as per their requirement they are deemed to be permanent employees of the petitioner company.

16. Mr. Amit Das Gupta, the learned Advocate for the Respondent No.4 submits that the Respondent Nos. 3 were recruited by them as per instruction of the petitioner Grameenphone on temporary basis to provide services as drivers to the petitioner company and that the salaries and other financial benefits were paid to the Respondent Nos. 3 after getting paid by the petitioner for the services rendered by them. The learned Advocate further submits that the Respondent Nos. 3 were recruited for temporary period only and that they are not permanent workers of the Respondent No.4 .

17. We have considered the submissions of the learned Advocates.

18. In the instant case the Respondents workers filed cases before the Labour Court to be treated as permanent workers of the defendant petitioner Grameenphone. They have alleged in the plaint that they are workers of the petitioner Grameenphone and are receiving salaries from the petitioner . This fact has been denied by the petitioner all along . The Labour Court in its judgments and orders have held that the Respondent No.1 workers have been working for more than three months and as such as per the provisions of Labour Law, 2006 they are deemed to be permanent workers. The Labour Court has also held that the Respondent No.1 plaintiffs satisfied the conditions in section 2(65) of the Labour Law, 2006 and they should be considered workers. In the judgment and order however no reasoning appear to be given why and on what grounds the Labour Court found the plaintiff respondent permanent workers of the petitioner Grameenphone .

19. It is admitted by the petitioner Grameenphone and all the parties that the Respondent No.1 are workers within the definition of Labour Law, 2006 . It is also admitted that they have been employed for more than three months and that they are rendering service to the petitioner Grameenphone. The point for adjudication therefore is to decide whose workers the Respondent No.3 is i.e. who is the employer of the Respondent No.3 plaintiff worker . For an application under section 213 of the Labour Law, 2006 to be maintainable in the Labour Court for being treated as permanent worker of the petitioner Grameenphone it must be first evident that he is a worker of the petitioner Grameenphone.

20. The petitioner's case is that the Respondent No.3 are workers of the Respondent No. 4, Smart Services Ltd. and/or Jamsons International and that the service of the Respondent No.3 workers have been procured through a contract between the petitioner and the Respondent No. 4 . The Respondent No. 4 are contractors and they issued appointment letters

in favour of the Respondent Nos.3 for rendering services to the petitioner as outsourced workers without being a party in the contract between the petitioner and the respondent No. 4. The Respondent Nos.3 plaintiff workers on the other hand, claimed that they are rendering services to the petitioner Grameenphone at their premises and driving their Vehicles and getting their salaries from the petitioner Grameenphone through the Respondent No. 4 and therefore they should be considered workers of the petitioner Grameenphone .

21. Outsourcing services is a new concept in our country. Not just labour but also professional services may be procured through outsourcing. It is a process by which the recipient of service enters into an agreement with a contractor / service provider who engages persons to render services to the service recipient. In such a situation, there is no employment contract between the service recipient and the service renderer. The contract exists between the service recipient and the contractor and consideration for the services are provided by the service recipient to the contractor . If the service recipient is not satisfied with the service rendered by the persons engaged by the contractor then his remedy lies for breach of the terms and conditions of the agreement against the contractor. Likewise if the contractor does not receive adequate consideration for providing his service through his appointed employees, his remedy lies against the service recipient. The service recipient is generally not concerned who renders the service to him as long as the service sought is rendered adequately . As can be reasonably expected the service recipient may set certain criteria and conditions to be observed by the service renderer and he has a discretion to reject any person through whom the service is provided by the contractor; but in all such cases the matter is governed by the contract between the service recipient and contractor. It is a contract of services as opposed to a contract of employment.

22. A recruiting agency on the other hand, recruits persons including workers and professionals for being employed by a third party. After the candidates are selected they are sent to the service recipient who employs them under a employment contract on terms and conditions agreed between the service renderers and service recipients who becomes the employer . After the worker /professional is employed by the service recipient the person recruiting the worker drops off the picture and there is a direct relationship of employer and employee between the service recipient and the worker. Such situation is commonly seen in our country when workers are recruited for employment for overseas, construction sites, industries etc. The recruiting agency gets a commission for his service from the overseas employer and also sometimes from the recruited workers and the workers get their salaries and other benefits directly from their employer for the duration of their employment . In the case of outsourcing the worker gets his salary and other benefits from the contractor as long as he renders his services to the service recipient.

23. In an unreported decision of this Court in ***Writ Petition No.7068 of 2011 in Sharmeen Annie Vs. First Labour Court , Dhaka and another*** it has been held:

> *"To be an employee one has to be in the employer's pay roll and subject to the latter's control on questions of employment. There has to be a contract of employment inter se, containing terms of employment. Nothing like that is present in the file before us. It transpires, the respondent No.2 is indeed an employee of an independent contractor named TEAM Services. The contractual relationship is between the petitioner and TEAM Services, the respondent No.2 is not a privy to it. So, he has no cause of action against the petitioner."*

24. In the instant case it is admitted that the Respondent No.3 workers are rendering services as drivers for the petitioner Grameenphone. It is also admitted that their salaries and allowances and other benefits are being paid directly by the Respondent No. 4 although it has been urged on behalf of the Respondent No.3 workers that the salaries and other financial benefits are being paid to them by the Respondent No. 4 on behalf of the petitioner Grameenphone although there is no written contract of employment between the petitioner Grameenphone and the Respondent No. 3 . From the facts and circumstances of the case it has to be seen whether any unwritten contract of employment can be construed between the petitioner Grameenphone and the Respondent No.3 workers or whether there is any contract of employment between the Respondent No.3 workers and the contractor /service provider Respondent No. 4.

25. The consistent case of the respondent workers is that they are rendering services to the petitioner as drivers by driving their cars as per their requirements by wearing uniforms provided to them, carrying ID cards and even receiving salaries from the petitioner through the respondent No. 4 Smart Services Ltd. and Jamson International . However, it has been admitted by the P.W.1 in the Labour Court ((hereinafter referred to as the Labour Court case) that Staff Uniforms have been provided by the petitioner Grameenphone but in cross examination he admitted that there is no logo of the petitioner grameenphone on his uniform. Moreover, in the agreement between the petitioner and the respondent No.4 Smart Services dated 16.1.2006 in clause 4 it has been stated that uniforms will be provided by Smart Services and in Clause D-5 it has been stated that a sum of Taka 400 would be given monthly by the petitioner Grameenphone to the respondent No.4 Smart Services Ltd. as dress allowance . Thus it cannot be said with certainty that uniforms were provided by the petitioner Grameenphone. The "ID Cards" provided to the respondent workers have the petitioner company's name as well as that of the respondent No.4 Smart Services/Jamsons International . Moreover it appears that they are not called 'ID Cards' bus 'Gate Pass' as evident from the evidence of P.W.1 in the said case. Thus this is also not conclusive evidence that the workers / drivers are the exclusive employees of the petitioner Grameenphone.

26. Quite apart from the evidence adduced by the witnesses in the Labour case the petitioner and the respondent No.4 entered into a contract dated 16.2.2006 under the heading " Agreement for providing Outsource Personnel" Exhibit Kha . In the said agreement it has been stated in the preamble that

> *"Whereas First Party has offered to provide the outsource personnel for the Second Party and Second party has agreed to assign the outsource personnel of the First party on the terms and conditions hereinafter contained."*

27. In the first clause of the said agreement in paragraph A Clause 1 it has been stated that outsource personnel services will be rendered at different locations of the Second Party. In letters dated 31.10.2016 and 23.10.2016 from the respondent No.4 Jamsons International and Smart Service respectively addressed to the petitioner (Annexures G and G-1 in the Supplementary Affidavit dated 09.11.2016) the respondent No.4 has admitted that they are providing outsource workers to the petitioner and they are being paid by them . The two letters are reproduced below: (G and G-1)

> *"JAMSONS INTERNATIONAL*
> *Dated 31.10.2016*
> *To*

Mr. Zahed Bin Ahsan
Chief Procurement Officer (Acting)
Global Sourcing
Grameenphone Ltd.
Dhaka.
Re: No further renewal of agreement Ref: No: GP/SA/POP/JI/06 made on 16.02.2006 after 30.11.2016
Dear Sir,
We have a long standing business relationship with you since 2000. We have tried our best to serve your company upon providing outsource workers. It may be mentioned here that most of the workers provided by us to you, had filed cases to be treated permanent workers under you as per the provision of Labour Act, 2006. Mentionable, here that under the agreement executed between us, we could not treat the workers as our permanent workers as well. The agreement executed between us will be expired on 30.11.2016. Due to enhancement of taxes and other expenditure it had become difficult for us to continue our business and as such we are not inclined to extend our last agreement with you which will be exired on 30.11.2016.
Hope our relation will remain same.
With thanks
Sd/ Illegible 31.10.16.
Md. Mostofa Kamal Khan
On behalf of CEO "

Annexure G-1

"Smart Services Ltd.
Mr. Zahed Bin Ahsan
Chief Procurement Officer (Acting)
Global Sourcing
Grameenphone Ltd.
Basundhara
Dhaka.
Subject: Deduction of money from the monthly bill of Smart Services Ltd.

Dear Sir,
We have noticed that a huge amount of money have been deducted from the service Bill of Smart Services Limited for the month of September 2016. The deduction was so sudden and without any notice and the amount is almost half of the service charge of Smart Services Ltd.
We would like to say that this information was not communicated to us neither by Grameen Phone nor by any other sources. We are a business company and we will not do any business where there is no profit since we have to pay to the workers.
We have 24 clients and none of them have deducted money from our bill showing the cause of Tax.
We would request you to kindly solve the issue as early as possible so that the October 2016 bill can be forwarded to Grameen Phone.
In short we would like to inform you that we cannot bear the loan of such a big amount deduction from our bill.
Thank you for our goods understanding.

Yours sincerely,
Sd/- Illegible

Peter P Sarkar
Managing Director."

28. From the language of the aforesaid letters it appears that the workers are not employees of the petitioner. Further more in all the pleadings of the respondent No.4 it has been clearly and categorically stated that the said respondent No.3 workers were appointed by them for a temporary period. Paragraph 13 and 22 of the written statement of the respondent Nos. 3 and 4 in the Labour case is as follows:

> "13. That Grameen Phone Ltd. did not issue them any appointment letter as an employee rather they are the user of the services against which Grameen Phone Ltd. pays service charge to the respondents (Jamsons International) every months as per the contractual agreement ."
>
> "22. That Jamsons International is the temporary and contract basis employer of the petitioner."

29. Our attention has also been drawn to an undertaking given by the respondent plaintiff worker to the respondent No.4 marked as exhibit "Ta" where at the time of giving appointment by the respondent No.4 , the respondent worker clearly stated that "আমি স্মাট সার্ভিসস লিঃ এর একজন ড্রাইভার হিসাব গ্রামীন ফোন অফিস চাকুরী করত আগ্রহী " Exhibit Ta runs as follows:

"Smart Services Ltd.

অঙ্গীকার নামা

১. *আমি স্মার্ট সার্ভিসস লি: এর একজন ড্রাইভার হিসাব গ্রামীন ফোন অফিস চাকুরী করত আগ্রহী।*

২. *আমার মাসিক বেতন হব ৫৩২০.০০ টাকা।*

৩. *যদি আমি এ্যাক্সিডন্ট না কর গাড়ী চালাত পারি ও আমার পরিষ্কার পরিচ্ছন্নতা, ব্যবহার ও গাড়ী চালনায় কর্তৃপক্ষ সন্তুষ্ট হন তাহল আরা ৫৬০ টাকা প্রতি মাস পেত পারি। যা তিন মাস পর পাওয়া যাইত পার।*

৪. *আমার চাকুরীর মেয়াদ যোগদান হত ১২ মাস পর্যন্ত হব। ভালা কাজর জন্য সময় বৃদ্ধি হত পার।*

৫. *আমি অথবা কর্তৃপক্ষ চাইল এক মাসর নোটিশ চাকুরীর চুক্তিপত্র বাতিল করত পারবা।*

৬। *তব চরি, অসামাজিক কার্যকলাপ, খারাপ ব্যবহার, মাদকাসক্তি ও নিয়ম ভঙ্গর কারন এবং মারাত্নক দুর্ঘটনার কারন যে কোন সময় আমাক চুাকুরী হত বরখাস্ত করা যাব। এক্ষত্র আমি কোন প্রতিবাদ করত পারব না অথবা কোন সংস্থার সাহায্য প্রার্থনা করবা না।*

৭। *আমি যখনই গ্রামীন ফোন অফিসর গাড়ী চালাবা তখনই আমাক কোম্পানী থেক প্রদত্ত ইউনিফর্ম পরত হব। যে কোন কারনই এর অনাথা করা যাব না ।*

৮। *প্রতিদিন ১০ ঘন্টা কাজ করত হব এবং এর অতিরিক্ত কাজ করল তা ওভারটাইম বল বিবচিত হব।*

৯। *ওভারটাইমর জন্য প্রতিঘন্টায় আমি ২৭ টাকা কর পাবা এবঙ কার্য্যস্থলর বাইর কোন অফিসিয়াল কাজ াত্রি যাপন করর প্রতি রাত্রির জন্য ৬০০ টাকা থাকা ও খাওয়া হিসাব পাবা।*

১০। *১২ মাস চাকুরী পুর্ন করার পর আমি দুইটি উৎসব উৎসব ভাতা পেত পারি যা গ্রামীন ফোন অফিস স্মাটর মাধ্যম দেবন। এক একটি বোনাস ২৮০০ টাকা।*

১১। *স্মার্ট সার্ভিসস লিমিটড তাদর নিয়ম অনুসার আমার কাছ থেক মোট ৬০০০(ছয় হাজার টাকা) সিকিউরিটি ডিপাজিট রাখব। আমার ব্যক্তিগত কারণ গ্রামীন ফোন এর গাড়ীর ক্ষতি হল এই টাকা থেক কেট রাখা হব। অন্যথায় চাকুরী ছেড় গেল ঐ টাকার বাকী অংশ ফেরত পাবা।*

১২। *গ্রামীন ফোন থেক নির্ধারিত মাইলজ আমাক দিত হব ।দিত অপারগ হল আমাক চাকুরী থেক বরখাস্ত করা যাব। অথবা অন্য ব্যবস্থা গ্রহন করত পারব।*

১৩। *আমি জানি য গাড়ী চালানার সময় আমাক সিটবল্ট বাঁধত হব।*

১৪। *গাড়ীর লগবই যথাযথ লিপিবদ্ধ করত হব।*

১৫। *কোম্পানীর প্রদত্ত মোবাইল ফোন এর ব্যবহার মাসিক ১৫০০ (ভ্যাট ও টাক্স ছাড়া পনর শত টাকা) সীমিত রাখিব বেশি হল অতিরিক্ত অর্থ দিত বাধ্য থাকবা। পর পর ০৩ মাস বিল বেশি হল কোম্পানী আমার বিরুদ্ধ ব্যবস্থা নিত পারব।*

১৬। *মাত্র এক মাসর নোটিশ আমাক চাকুরী থক বরখাস্ত করা যাব, সে ক্ষেত্র আমার কোন বক্তব্য অথবা দাবী প্র-যাজ্য হব না।*

আমি সুস্থ্য অবস্থায় স্বজ্ঞান ও ইচ্ছাপ্রনাদিত হয় এই অঙ্গিকার নামায় আমার দস্তখত দিলাম এবং এর নিয়ম পালন করবা বর স্বীকারাক্তি করলামঃ

তাং- *নামঃ*

স্বাক্ষীঃ *আইডি নংঃ*

30. After having given the aforesaid undertaking to the respondent No.4 and thereafter receiving salary and other benefits from the respondent No.4 for several years without any objection it does not lie in their mouth to say that they are not employees of the respondent No.4 Smart Service Limited but employees of some one else like the petitioner simply because they are rendering services to the petitioner as driver as per the petitioner's requirements.

31. Further Section 3Ka of the Labour Law, 2006 as amended by section 5 of the Bangladesh Labour Law, 2013 states as follows:

"৩ক। ঠিকাদার সংস্থা রেজিস্ট্রেশন।- (১) অন্য কোন আইন ভিন্নতর যাহাই কিছু থাকুক না কেন, কোন ঠিকাদার সংস্থা, যে নামই অভিহিত হউক না কেন, যাহা বিভিন্ন সংস্থায় চুক্তিত বিভিন্ন পদ কর্মী সরবরাহ করিয়া থাক সরকারর নিকট হইত রেজিস্ট্রেশন ব্যতীত এইরুপ কার্যক্রম পরিচালনা করিত পারিব না।

(২) এই আইনর অধীন এতদুদ্দশ্য বিধি প্রণীত হইবার ০৬ (ছয়) মাসর মধ্য দশ বিদ্যমান সকল ঠিকাদার সংস্থা সরকারর নিকট হইত রেজিস্ট্রেশন গ্রহণ করিত বাধ্য থাকিব।

(৩) ঠিকাদার সংস্থা দ্বারা সরবরাহকৃত শ্রমিকগণ সংশ্লিষ্ট ঠিকাদারর শ্রমিক হিসাব গন্য হইবন এবং তাহারা শ্রম আইনর আওতাভূক্ত থাকিবন।

(৪) এই ধারার অধীন রেজিস্ট্রেশন প্রদানর পদ্ধতি বিধি দ্বারা নির্ধারিত হইব।

ব্যাখ্যাঃ এই ধারার উদ্দশ্য পূরণকল্প কর্মী বলিত শ্রমিক সহ নিরাপত্তাকর্মী, গাড়ীচালক ইত্যাদিক বুঝাইব।"

32. The aforesaid provision gives statutory recognition to outsourcing arrangements and provides clearly that outsourced employees will be employees of the contractor. It has been urged on behalf of the respondent worker that this provision came into force in the year 2013 and will not be applicable to the respondent workers as they started their employment prior to the said provision being enacted. This contention is however misconceived since even though statutory recognition was not given prior to 2013 the practice of outsourcing services of workers and professionals has been prevalent all over the world including our country for several years before getting statutory recognition in the Labour Law, 2006 and was never restricted by law and the parties anyone to the contract and for providing of such service . After inclusion of section 3Ka in the Bangladesh Labour Law, 2006 there remains little room for doubt on the arrangement of outsourcing services of workers .

33. In an unreported decision of this Court in ***Writ Petition No. 1105 of 2012 along with 19 others in Arirtel and others Vs. Chairman First Labour Court, Dhaka*** on similar facts as in the present case before us the concept of outsourcing service from third party has been recognized and affirmed by this Court.

34. On the facts and evidences before us therefore we do not see any contract of employment or service between the respondent worker and the petitioner Company Grameenphone. The respondent workers are merely outsourced workers /drivers employed by the respondent No.4 on the terms and conditions agreed between the Petitioners and the Respondents No. 4. Smart Services Ltd. and/or Jamsons International. Thus since the respondent Nos. 3 plaintiff workers are not even employees of the petitioner Grameenphone the question of treating them 'permanent workers'of the petitioner does not arise.

35. ***Section 213 of the Labour Law, 2006 states as follows:***

"213. Application to Labour Court –Any Collective Bargaining Agent, employer or worker may apply to the Labour Court to enforce any right guaranteed to him or by any award , settlement of contract under this Act"

36. Under the aforesaid provision of law, a worker, Collective Bargaining Agent (CBA) or an employee may file an application before the Labour Court for the enforcement of a right guaranteed under any settlement, award, contract or law.

37. The aforesaid section 213 cannot be used as an instrument for establishing any right but only for enforcing an existing right guaranteed by law.

38. The cases in the Labour Court for direction upon the petitioner Grameenphone Limited to treat the respondent plaintiff workers as permanent worker is therefore not maintainable under section 213 of the Labour Law, 2006 on this ground as well.

39. Thus the judgments and orders dated 12.09.2012 passed by the Chairman, Labour Appellate Tribunal, Dhaka dismissing Appeal No. 82 of 2011 (Annexure D) along with 263 similar Appeals affirming the judgment dated 30.03.2011 passed by the First Labour Court, Dhaka in BLL Case No. 284 of 2008 allowing the case along with 263 similar cases are declared to have been passed without lawful authority and of no legal effect and set aside.

40. Accordingly, all the Rules are made absolute.

41. There will be no order as to costs.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9297 of 2014
with
Writ Petition No.9706 of 2014
Writ Petition No.10844 of 2014
Writ Petition No.1482 of 2015
Writ Petition No.517 of 2015
Writ Petition No. 9591 of 2014
Writ Petition No.5951 of 2015
Writ Petition No.6557 of 2015
Writ Petition No.6863 of 2015
Writ Petition No.2710 of 2015
Writ Petition No.5849 of 2015
Writ Petition No.10021 of 2015
Writ Petition No.10544 of 2015
Writ Petition No.11354 of 2015
Writ Petition No.13023 of 2015
Writ Petition No.13111 of 2015
Writ Petition No.13109 of 2015
Writ Petition No.13382 of 2015
Writ Petition No.11845 of 2015
Writ Petition No.11847 of 2015
Writ Petition No.51 of 2016
Writ Petition No.13415 of 2015
Writ Petition No. 6661 of 2015
Writ Petition No. 7549 of 2015
Writ Petition No.13 of 2016
Writ Petition No. 667 of 2016
Writ Petition No. 12824 of 2015
Writ Petition No. 12971 of 2015
Writ Petition No. 12972 of 2015
Writ Petition No. 12973 of 2015
Writ Petition No. 12887 of 2015
Writ Petition No. 12642 of 2015
Writ Petition No. 13024 of 2015
Writ Petition No. 13110 of 2015
Writ Petition No. 13108 of 2015
Writ Petition No. 8037 of 2015

Muhammad Imrul Hasan and others

…Petitioners in Writ Petition No. 9297 of 2014

Sumon Hossain and others

…Petitioners in Writ Petition No. 9706 of 2014

Writ Petition No. 9583 of 2015
Writ Petition No. 11844 of 2015
Writ Petition No. 8340 of 2015
Writ Petition No. 6519 of 2015
Writ Petition No. 13037 of 2015
Writ Petition No. 13038 of 2015
Writ Petition No. 10924 of 2015
Writ Petition No. 6946 of 2015
Writ Petition No. 13588 of 2015
Writ Petition No. 13027 of 2015
Writ Petition No. 7512 of 2015
Writ Petition No. 13418 of 2015
Writ Petition No. 13416 of 2015
Writ Petition No. 215 of 2016
Writ Petition No. 2559 of 2015
Writ Petition No. 11909 of 2014
Writ Petition No. 868 of 2015
Writ Petition No. 5950 of 2015
Writ Petition No. 3446 of 2015
Writ Petition No. 12917 of 2015
Writ Petition No. 11848 of 2015
Writ Petition No. 11846 of 2015
Writ Petition No. 12199 of 2015
Writ Petition No. 13065 of 2015
Writ Petition No. 10883 of 2015
Writ Petition No. 263 of 2016
Writ Petition No. 12075 of 2015
Writ Petition No. 13078 of 2015
Writ Petition No. 12029 of 2015
Writ Petition No. 12123 of 2015
Writ Petition No. 12514 of 2015
Writ Petition No. 12200 of 2015
Writ Petition No. 12461 of 2015
Writ Petition No. 12198 of 2015
Writ Petition No. 189 of 2016

Mohammad Mizanur Rahman and others

…Petitioners in Writ Petition No. 10844 of 2014

Kamrunnesha and others

..for the petitioner in Writ Petition No. 1482 of 2015

Agmal Hossain Chowdhury and others
..for the petitioner in Writ Petition No. 517 of 2015

Abul Manjur Ahmed and others
…Petitioners in Writ Petition No. 9591 of 2014

Md. Abu Sayed and others
…Petitioners in Writ Petition No. 5951 of 2015

Most. Taslima Khatun and others
..for the petitioner in Writ Petition No. 6557 of 2015

Md. Sheikh Sadi and others
…Petitioners in Writ Petition No. 6863 of 2015

Md. Moniruzzaan Khan and others
…Petitioners in Writ Petition No. 2710 of 2015

Md. Ishahaq Ali and others
…Petitioners in Writ Petition No. 5849 of 2015

Md.Jashimuddin and others
…Petitioners in Writ Petition No. 10021 of 2015

Md.Reaz Uddin and others
…Petitioners in W. P No. 10544 of 2015

Md. Kamal Hossain and others
…Petitioners in Writ Petition No. 11354 of 2015

Md. Abdul Hakim and others
…Petitioners in Writ Petition No. 13023 of 2015

Zillul Haque Zilu and others
…Petitioners in Writ Petition No. 13111 of 2015

Md. Mutaleb Mollah and others
…Petitioners in Writ Petition No. 13109 of 2015

Md. Ruhul Amin and others
…Petitioners in Writ Petition No. 13382 of 2015

Md. Bellal Hossain and others
…Petitioners in Writ Petition No. 11845 of 2015

Md. Dilwar Hossain and others
…Petitioners in W. P. No. 11847 of 2015

Sumi Khatun and others
…Petitioners in W. P. No. 51 of 2016

Md. Anwar Hossain and others
…Petitioners in W. P. No.13415 of 2015

Md. Abdul Kader and others
…Petitioners in W. P. No.6661 of 2015

Md. Abdul Hannan Mia and others
…Petitioners in W. P. No.7549 of 2015

Md. Abu Hanif and others
…Petitioners in W. P. No.13 of 2016

Md. Murshed Ali and others
…Petitioners in W. P. No.667 of 2015

Md. Abu Bokar and others
…Petitioners in W. P. No.12824 of 2015

Muhammad Anwar Hossain and others

…Petitioners in W. P. No.12971 of 2015

Akhtaruzzaman and others
…Petitioners in W. P. No.12972 of 2015

Abu Abdullah and others
…Petitioners in W. P. No.12973 of 2015

Md. Ferozul Islam and others
…Petitioners in W. P. No.12887 of 2015

Mohammad Abdullah-Al- Mamun and others
…Petitioners in W. P. No.12642 of 2015

Md. Amir Hossain Akhandh and others
…Petitioners in W. P. No.13024 of 2015

Md. Milon Hossain and others
…Petitioners in W. P. No.13110 of 2015

Shahadat Hossain and others
…Petitioners in W. P. No.13108 of 2015

Md. Juwel Miah and others
…Petitioners in W. P. No.8037 of 2015

Md. Shahidul Islam and others
…Petitioners in W. P. No.9583 of 2015

Kawsar Ahmed Mamun and others
…Petitioners in W. P. No.11844 of 2015

Md. Firoz Hossain and others
…Petitioners in W. P. No.8340 of 2015

Md. Amirul Islam and others
…Petitioners in W. P. No.6519 of 2015

Sayed Manir Hossain and others
…Petitioners in W. P. No.13037 of 2015

Rasel Khan and others
…Petitioners in W. P. No.13038 of 2015

Md. Abu Hashem Khan and others
…Petitioners in W. P. No. 10924 of 2015

Md. Ariful Islam and others
…Petitioners in W. P. No. 6946 of 2015

Saydul Islam and others
…Petitioners in W. P. No. 13588 of 2015

Md. Akhlakur Rahman and others
…Petitioners in W. P. No. 13027 of 2015

Anoara Begum Purakaystha and others
…Petitioners in W. P. No. 7512 of 2015

Md. Shahidul Islam and others
…Petitioners in W. P. No. 13418 of 2015

Shafia Khanom and others
…Petitioners in W. P. No. 13416 of 2015

Md. Rafiqul Islam and others
…Petitioners in W. P. No. 215 of 2016

Md. Abdur Rahman and others
…Petitioners in W. P. No. 2559 of 2015

Md. Kamrul Hossain and others

…Petitioners in W. P. No. 11909 of 2014

Sharmin Akhter and others
…Petitioners in W. P. No. 868 of 2015

Md. Abul Fazal and others
…Petitioners in W. P. No. 5950 of 2015

Md. Ariful Islam and others
…Petitioners in W. P. No. 3446 of 2015

Md. Ruhul Amin and others
…Petitioners in W. P. No. 12917 of 2015

Harun-A-Rashid and others
…Petitioners in W. P. No. 11848 of 2015

Md. Mubarak Hossain and others
…Petitioners in W. P. No. 11846 of 2015

Md. Moniruzzaman and others
…Petitioners in W. P. No. 12199 of 2015

Mohammad Ahasan Habib and others
…Petitioners in W. P. No. 13065 of 2015

Mst. Rulia Khatun and others
…Petitioners in W. P. No. 10883 of 2015

Jannatul Ferdous and others
…Petitioners in W. P. No. 263 of 2016

Krisna Lal Roy and others
…Petitioners in W. P. No. 12075 of 2015

Md. Mahabub Hossain and others
…Petitioners in W. P. No. 13078 of 2015

Mst. Sunia Sultana and others
…Petitioners in W. P. No. 12029 of 2015

Chamon Ara Begum and others
…Petitioners in W. P. No. 12123 of 2015

Afroza Shirin and others
…Petitioners in W. P. No. 12514 of 2015

Golam Mostafa and others
…Petitioners in W. P. No. 12200 of 2015

Most. Muslima Khatun and others
…Petitioners in W. P. No. 12461 of 2015

Md. Farhad Ali and others
…Petitioners in W. P. No. 12198 of 2015

Swapna Rani Dey and others
…Petitioners in W. P. No. 189 of 2016

Vs.
People's Republic of Bangladesh, represented by the Secretary, Ministry of Primary and Mass Education, Bangladesh Secretariat, Ramna, Dhaka and other.
…. Respondents

Mr.M. Amirul Islam with
Mr. Sheikh Rafiqul Islam Advocates
….for the petitioners in 9591/2014 and 868 / 2015

Mr. Sk. Md. Morshed with
Mr. Niaz Murshed and
Mr. Syed Nafiul Islam Advocates
……..for the petitioners in W. P. Nos. 9297/2014, 5951/ 2015, 517 of

2015,9706 of 2014,10844 of 2014, 6557 of 2015, 6863 of 2015, 13023 of 2015,13111 of 2015, 13109 of 2015, 11845 of 2015, 11847 of 2015,13 of 2016, 12642 of 2015, 13024 of 2015, 13110 of 2015, 11844 of 2015,13416 of 2015, 5950 of 2015, 3446 of 2015, 11848 of 2015,11846 of 2015, 12199 of 2015,12514 of 2015,12198 of 2015

Mr. Khairul Alam Advocate
..for the petitioners in W.P. Nos. 2710/2015, 5849/2015, 51/2016, 13415/2015, 13108 /2015, 8037/2015, 8340/2015, 13418/2015, 12917/2015, 12029 of 2015, 12123/2015, 12200/2015, 12461/2015

Mr. Md. Hafizur Rahman Advocate
……for the petitioners in W. P. No.6519/2015

Mr. Moinul Islam Advocate
….for the petitioners in Writ Petition No.1482 of 2015

Mr. Mohammad Siddiq Ullah Miah Advocate
….for the petitioners in W. P. Nos.10021/ 2015, 10544/2015, 12824 / 2015, 13037/2015, 13038/2015, 13027/2015, 7512/2015, 12075/ 2015, 189/ 2016,13588/2015

Ms. Nasrin Ferdous Advocate
…..for the petitioners in Writ Petition No.11354 of 2015

Mr. Md. Belal Hossain Advocate
…..for the petitioners in Writ Petition No. 13382 of 2015

Mr. Md. Mahbubur Rahman Advocate
…..for the petitioners in W. P. No. 667 of 2016

Mr. Md. Giasuddin Ahammed Advocate
…..for the petitioners in W. P. Nos. 12971 of 2015,
12972/ 2015, 12973/2015,

Mr. Mohammad Shahidul Islam Advocate
…..for the petitioners in W. P. Nos. 12887/2015, 263 of 2016

Mr. Md. Uzzal Hossain Advocate
…..for the petitioners in W. P. Nos. 9583/2015, 10883/2015

Mr. Md. Motaher Hossain Advocate
…..for the petitioners in W. P. No.10924/2015

Mr. Md. Mohaddesh Ul Islam Advocate
…..for the petitioners in W. P. No. 6946/2015

Mr. Md. Matiur Rahman Advocate
…..for the petitioners in W. P. No. 215 of 2016

Mr. Zakir Hossain Munshi Advocate
…..for the petitioners in W. P. No. 2559/2015

Mr. Md. Israfil Hossain Advocate
…..for the petitioners in W. P. No. 11909 /2014

Mr. S.M.Bazlur Rashid Advocate
…..for the petitioners in W. P. No.13065 /2015

Mr. Md. Imrul Hayder Advocate
…..for the petitioners in W. P. No.13078 /2015, 6661/2015

Mr. Nowsad Al Alif Advocate
…..for the petitioners in W.P. No. 7549/2015

Ms. Amatul Karim D.A.G. with
Mr. A.R.M. Hasanuzzaman A.A.G. and
Mr. Abu Saleh Md. Fazle Rabbi Khan, A.A.G.

.....for the Respondent No. 5

Judgment on 03.02.2016

Heard on 17 .11.2015 , 03.12.2015 and 26.1.2016,

Present:
Mr. Justice Tariq ul Hakim
And
Mr. Justice Bhishmadev Chakrabortty

Definition of Legitimate Expectation:
Legitimate Expectation has been defined as follows:
"A person may have a legitimate expectation of being treated in a certain way by administrative authority even though he has no legal right in law to receive such treatment. The expectation may arise either from a representation or promise made by the authority including an implied representation or consistent past practice."
… (Para 21)

The Government cannot act arbitrarily and capriciously while choosing persons for employment. It cannot pick and choose employees like private individuals.It is always under a duty to act fairly and without discrimination while making choices for employment. … (Para 22)

Judgment

Tariq ul Hakim, J:

1. Rules Nisi were issued calling upon the respondents to show cause why Appointment Circular under Memo No. প্রাশিঅ/ ৭ (নিয়াগ)/ সশিনি (রাজস্ব)/ ২০১৪/ ২৪৯ dated 14.09.2014 (Annexure-G) issued under the signature of Respondent No. 6, Director General, Directorate of Primary Education, Dhaka for appointment to posts of Assistant Teachers in Government Primary Schools without appointing the petitioners even though they passed written and viva voce examinations for the purpose as evident from the Result Sheet (Annexure-C) should not be declared to have been issued without lawful authority and is of no legal effect and why the Respondents should not be directed to appoint the petitioners in vacant posts of Assistant Teachers in Government Primary Schools pursuant to Appointment Circular under Memo No. প্রাশিঅ/ নিয়াগ/০২/ স:শি:নি:/ ২০১১/ ২৯৫ dated 04.08.2011 issued under the signature of the Respondent No. 6, Director General of Directorate of Primary Education (Annexure-A) and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. All these Rules concern common questions of law and facts and were heard together and are being disposed of by this single judgment.

3. Facts relevant for disposal of these Rules is that the Respondent No. 5, Director General of Primary Education through the respective District Primary Education Officers issued Admit Cards in favour of the petitioners to attend a written examination and accordingly, the petitioners attended and passed the written examination conducted by the said Directorate. Thereafter the petitioners attended viva voce examinations conducted by the Respondent Nos. 5 and 6 and passed the same and became qualified for being appointed to the post of Assistant Teachers for Government Primary Schools under the Directorate of

Primary Education. The petitioners complied with all the terms and conditions of the appointment circular issued under Memo No. প্রাশিঅ/ নিয়োগ/০২/ স:শি:নি:/ ২০১১/ ২৯৫ dated 04.08.2011 and the Respondent Nos. 5 and 6 on 14.8.2012 published the list of successful candidates in two categories. In category (1) it was stated "সরকারী প্রাথমিক বিদ্যালয়ের সহকারি শিক্ষক পদে নিয়োগ-২০১১ এর জন্য গৃহীত লিখিত ও মৌখিক পরীক্ষায় চুড়ান্ত ভাবে নির্বাচিত প্রাথীদের জেলা ভিত্তিক তালিকা " and in category (2) it was stated "সহকারি শিক্ষক নিয়োগের জন্য শূন্য পদের বিপরীতে প্রার্থী নির্বাচনের পর অবশিষ্ট প্রার্থীদের মধ্য হতে উপজেলা/ থানা ওয়ারী প্রাথমিক শিক্ষক পুল গঠনের নিমিত্তে সুপারিশকৃত রোল নম্বরের তালিকা " The petitioners are in the second category . The publication of the results show two groups: one group of candidates were selected for appointment as Assistant Teachers in Government Primary Schools all over the country and another group was to comprise a Teachers "Pool". In the instant case all the petitioners belong to the second category and have been incorporated in the Teachers Pool.

4. In the meantime, the Respondent No. 1 Ministry of Primary and Mass Education issued another Circular dated 13.03.2012 for the creation of Primary Teachers Pool at Upazila/ Thana level under the heading "উপজেলা/ থানা পর্যায়ে প্রাথমিক শিক্ষক পুল" from the successfully qualified candidates who attended and qualified in Government Primary School Assistant Teachers Appointment Examination giving effect to the same on and from the date of its publication i.e. 13.03.2012. Thereafter the Respondent No. 1 Ministry of Primary and Mass Education on 3.4.2014 circulated "প্রাথমিক শিক্ষক পুল নীতিমালা ২০১৪" stating several conditions for appointment of pool teachers. In the meantime the Respondent Nos. 5 and 6 appointed some of the petitioners as Pool teachers for limited periods under a contract as per the aforesaid 'Nithimala' 2014.

5. It has been further stated that the petitioners have been pursuing their claim for appointment as Assistant Teachers in Government Primary Schools but the respondents are not paying any heed to them. In the meantime many of the petitioners have crossed the age limit of 30 and have become ineligible to apply for any Government job. In the circumstances the petitioners through their learned Advocates served Notices Demanding Justice on 12.10.201 requesting the respondents to rescind, cancel and withdraw the impugned Appointment Circular under Memo No. প্রাশিঅ/ ৭ (নিয়োগ)/ সশিনি (রাজস্ব)/ ২০১৪/ ২৪৯ dated 14.09.2014 (Annexure-G) issued under the signature of the Director General, Directorate of Primary Education, Dhaka for appointment to posts of Assistant Teachers all over the country and to appoint the petitioners to the vacant posts of Assistant Teachers in the Government Primary Schools as they have passed and qualified to be appointed to the said posts pursuant to the aforesaid Appointment Circular under Memo No. প্রাশিঅ/ নিয়োগ/০২/ স:শি:নি:/ ২০১১/ ২৯৫ dated 04.08.2011 issued under the signature of the the Director General of Directorate of Primary Education but the respondents did not pay any heed to the same.

6. It has been further stated that the respondents by the impugned appointment notice inviting fresh applications for Assistant Teachers have denied the legal and fundamental rights of the petitioners to be appointed to the vacant posts of Assistant Teachers even though they qualified for such appointment after attending and succeeding in the written and viva voce examinations conducted for the purpose by the respondents and as such the impugned appointment circular is liable to be declared to have been issued without lawful authority and is of no legal effect. It has been further stated that according to the final result a total of 27,720 candidates were found successful of whom 12,701 candidates were appointed Assistant Teachers of Government Primary Schools and the rest 15019 candidates were not appointed to the said post which is ex-facie discriminatory, arbitrary, malafide and without

lawful authority. The Respondent No. 2 made a Pool with the aforesaid 15,019 successful candidates including the petitioners who are being made to wait for vacant positions of temporary duration in Government Primary Schools thus introducing a scope for creating an arbitrary barrier and making arbitrary choices at the mercy of the appointing authority.

7. Being aggrieved, the petitioners have come to this Court and obtained the present Rules.

8. The Rules are being contested by the Respondent No. 5 , Director, Directorate of Primary and Mass Education, Mirpur, Dhaka by filing Affidavit-in-Opposition stating inter alia that as part of the Government policy to form a "Teachers Pool" pursuant to "প্রাথমিক শিক্ষক পুল নীতিমালা ২০১৪" persons who qualifying in written viva voce examinations for appointment in Government Primary Schools Teachers but are not so appointed are to be incorporated in the said pool and since in the instant case the petitioners were not recommended for appointment as teachers in Government Primary Schools they have been incorporated in the pool and they have nothing to be aggrieved. It has been further stated that those who are not interested in staying in the pool are at liberty to leave and that 10% of the members of the said pool will eventually be given permanent appointment as Assistant Teachers in Government Primary Schools.

9. In a Supplementary Affidavit on behalf of the Respondent No. 5 it has been further stated that in the instant case the successful candidates recommended for recruitment as Assistant Teachers in Government Primary Schools under general quota had achieved more marks than the candidates who were recommended for forming "Teachers Pool" and therefore there was no arbitrary selection of the candidates.

10. Mr. M. Amirul Islam, Senior Advocate on behalf of the petitioners submits that the petitioners' legitimate expectation for being appointed after having passed and qualified in the written and viva voce examinations has not turned into reality as the Respondent Nos. 1-8 did not take any steps whatsoever in appointing the successful passed candidates. The learned Advocate further submits that the Respondents instead of appointing qualified successful and eligible persons to vacant posts of Assistant Teachers by the impugned Memo they are being made to wait in an arbitrary and discriminatory manner by creating a so called 'pool' for the last two years which is ex-facie illegal, arbitrary, malafide and an abuse of executive discretion. The learned Advocate submits that the final result of 27,720 candidates were issued on the same day but the results were published in two parts-12,701 candidates in one part and the rest 15,019 candidates in another part which is ex-facie discriminatory, arbitrary, malafide and without lawful authority and it demonstrates an arbitrary exercise of power indulging in a pick and choose method and therefore the process of selection of Assistant Teachers for appointment in Government Primary Schools by the respondent Nos. 1-8 cannot be called transparent. The learned Advocate further points out that the act of recruiting new candidates for the position of Assistant Teachers of Government Primary Schools vide job circular dated 14.9.2014 despite already having successfully passed candidates waiting in the pool for appointment is an exhibition of arbitrary exercise and abuse of power.

11. Mr.Sheikh Muhammad Morshed, the learned Advocate for the petitioners submits that the respondents by the impugned appointment notice are seeking fresh applications for vacant posts of Assistant Teachers in Government Primary Schools by denying the legal

and fundamental rights of the petitioners to be appointed to those posts although they successfully qualified for such appointment after attending and succeeding in the written and viva voce examinations conducted for the purpose by the respondents. The learned Advocate further submits that the petitioners were found qualified in all respects for appointment and there is no reason why fresh notice seeking applications for appointment should be made without first filling up the vacancies by the petitioners. The learned Advocate points out that the provisions of the said Nithimala, 2014 dated 03.04.2014 are not applicable to the petitioners who attended and qualified for appointment as Assistant Teachers pursuant to the earlier appointment circular issued under Memo No. প্রাশিঅ/ নিয়াগ/০২/ স:শি:নি:/ ২০১১/ ২৯৫ dated 04.08.2011. The learned Advocate submits that the respondents most illegally, malafide and without lawful authority without taking any steps for appointing the petitioners to vacant posts have published a new circular dated 14.9.2014 for the appointment of Assistant Teachers and as such the same is liable to be declared without lawful authority and of no legal effect. The learned Advocate further points out that the Respondents have not taken into consideration that the petitioners have already qualified in the written and viva voce examinations for appointment as Assistant Teachers of Government Primary Schools and without appointing them to vacant posts, the respondents most illegally and without lawful authority have published the impugned appointment circular dated 14.9.2014 . The learned Advocate next points out that the 'Nithimala'2014 ' dated 3.4.2014 did not exist when the petitioners applied for appointment of Primary School Teachers and it cannot be given retrospective effect by appointing the petitioners as 'Pool Teachers' pursuant to its provision.

12. Ms. Amatul Karim, the learned Deputy Atttorney Gerneral with Mr. A.R.M. Hasanuzzaman Assistant Attornery General appearing for the Respondent No.5 submits that the "Pool Nithimala,2014",has been formulated to ensure that the Government Primary Schools are not short of teaching staff when a teacher is away on temporary leave. The Pool has therefore being formed from those candidates who successfully passed and qualified in the written and viva voce examinations for appointment as Assistant Teachers of Government Primary Schools. There is no compulsion on any one for appointment as Pool Teacher. Ten percent of the pool teachers would be subsequently given appointment in permanent jobs in Government Primary Schools. The learned Deputy Attorney General submits that since there is no compulsion for the candidates to join the pool there is no illegality in appointing them. The learned Deputy Attorney General further submits that in view of the huge number of vacancies in the post of Assistant Teachers in Government Primary Schools it was not possible to quote the exact number of vacancies at the time of publication of the appointment circular but at the time of filling up the posts they were recruited as per the available number of vacancies and in the instant case 12,701 teachers were appointed to posts of Assistant Teachers in Government Primary Schools since that many posts were available. The learned D.A.G. further submits that in the meantime more vacancies have been created and the new circular was issued in 2014 and those who could not be appointed earlier are at liberty to apply again and they have a chance of being recruited if their performance in the written and viva voce examination is satisfactory.

13. The learned Advocate vehemently submits out that the petitioners may have qualified in the written and viva voce examinations along with others but that does not give them any right to get the job and as such no interference by this Court is called for in the matter. The learned Deputy Attorney Gerneral next points out that the recruitment and appointment of Government Primary School Teachers is an on going process as every year a huge number of vacancies occur and those interested in getting the jobs must apply and pass

the relevant examinations. She also points out that just because some one is qualified in a certain year he/she cannot have a right to be appointed in a subsequent year and in the instant case the learned Advocate submits that qualified persons were not only appointed in the job but those with higher qualification got priority over those who got less marks in the written and viva voce examination and therefore no illegality has been done and the petitioners have nothing to be aggrieved .

14. We have considered the submissions of the learned Advocates.

15. The children of today are the leaders of tomorrow; those who are going to school now will one day grow up as matured men and women and contribute to nation building. We should therefore try to attract the most brilliant amongst us to impart education to the school children. To achieve this goal the Government must act with transparency and legitimacy.

16. Pursuant to an advertisement in different newspapers vide Circular under Memo No. প্রাশিঅ/ নিয়াগ/০২/ স:শি:নি:/ ২০১১/ ২৯৫ dated 04.08.2011 the petitioners applied for appointment to permanent posts of Assistant Teachers in different Government Primary Schools. The applicants were required to sit for written and viva voce examinations. It appears that 11,20,290 candidates appeared in the examination of which 27,720 were successful but out of them only 12,701 were appointed as Assistant Teachers in different Government Primary Schools. The petitioners are among the remaining 15,019 persons who passed their examinations but were not appointed Assistant Teachers.It is not clear why only 12701 candidates were appointed Assistant Teachers and why the respondents kept mum for another two years until publication of the impugned notice on 14.9.2014 although another 15,019 (fifteen thousand nineteen) persons were listed as qualified in the earlier examination. Since the examination was taken by applicants for permanent posts of Assistant Teachers in Government Primary Schools it is not clear why the successful candidates were offered jobs as 'Pool Teachers'against temporary vacancies in different Primary Schools at a comperatively lower scales of pay and allowances. In the circular dated 4.8.2011 there was no mention of the number of vacant posts or how many persons would be appointed as Assistant Teachers in different Government Primary Schools. The petitioners qualified in the written and viva voce examinations but were not appointed to the advertised jobs. The petitioners had a legitimate expectation that if they qualified in the written and viva voce examinations they would be appointed to the posts of Assistant Teachers of Government Primary Schools but the Respondents appear to have appointed some of the qualified candidates and denied appointment to many others like the petitioners. It was not stated in the result sheet on what criteria one group of the successful applicants were selected for permanent employment as Assistant Teachers and what was the reason for selecting another group of successful candidates for temporary posts of 'Pool Teachers'. The learned Deputy Attorney General's submission that applicants with higher marks in the written and and viva voce examination got priority over those with lesser mark is not acceptable since the Result Sheet does not say that the selection for appointment was done in accordance with merit. It appears therefore that the Respondents acted arbitrarily in making their choices and adopted an unfair policy of pick and choose.

17. Article 27 of our Constitution states

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

18. Similarly Article 29(1) clearly states

" There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic."

19. In **Attorney General of Hong Kong Vs. Ng Yuen Shin (1983) 2 AC 629** it has been held by Lord Fraser that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long the implementation does not interfere with the statutory duty.

20. In the case of **Public Service Commission Vs. Md. Sohel Rana and others reported in VIII ADC (2011) 332** it has been held that Legitimate expectation can be claimed where a person is the victim of an unfavourable decision taken by a public authority ,amounting to infringement of that person's legitimate expectations where, for example, the decision contradicts an earlier promise or course of conduct on the part of the public authority concerned. Such expectation will also arise where a public authority makes a promise and then reneges on it or where there has been some established practice entitling the claimant to expect that practice to be followed and it is not followed.

21. In **Halsbury's Laws of England , 4th Edition** Legitimate Expectation has been defined as follows:

> "A person may have a legitimate expectation of being treated in a certain way by administrative authority even though he has no legal right in law to receive such treatment. The expectation may arise either from a representation or promise made by the authority including an implied representation or consistent past practice."

22. The Government cannot act arbitrarily and capriciously while choosing persons for employment.It cannot pick and choose employees like private individuals.It is always under a duty to act fairly and without discrimination while making choices for employment.

23. Thus in our opinion since the Respondents prepared a list of 27,720 qualified persons for the post of Assistant Teachers after taking written and viva voce examinations and appointed only 12,701 persons those who were not appointed can legitimately complain of inequality before law and discrimination in public employment.

24. In the Affidavit-in-Opposition filed by the respondents no where it has been asserted about the ineligibility of the Writ Petitioners for being appointed as Primary School Teachers as per the advertisement. The petitioners who have been left out cannot be discriminated from those who have been appointed to the post of Government Primary School Teachers after they have been selected and qualified in their written and viva voce examinations.

25. In the case of Syed S.M. Hasan Vs. Bangladesh and another reported in 60 DLR (AD) (2008) 76 it has been held:

> "Once an incumbent is selected for promotion the list should continue until it is exhausted and thereafter steps should be taken to select others who would follow the suit. Making a long list than the expected vacant posts and putting a time frame and then again selecting others and preparing a new list is highly deprecated as the same tends to deprive the listees who are in the lower side of the list of their legitimate expectation to be promoted in due course."

26. It has been held in N.T. Devin Kantti and others vs. Karnataka Public Service Commission reported in 3 SC Cases 1990 157

> "The power of appointment, no doubt, is discretionary but it also cast a duty to act fairly and not arbitrarily. It is not the case of the respondents that the petitioners were not fit to be appointed or that they did not qualify in the written and viva voce examinations. Candidates who apply and undergo written or viva voce test acquire a vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement unless the advertisement itself indicates a contrary intention. Generally, a candidate has a right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of the advertisement, however he has no absolute right in the matter. If recruitment Rules are amended retrospectively during pendency of selection, in that event selection must be held in accordance with the amended Rules. A candidate on making an application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of the rules during pendency of the selection unless amended rules are retrospective in nature."

27. Those who appeared in the written and viva voce examinations for being appointed as Assistant Teachers of Government Primary Schools had a legitimate expectation that they would be so appointed if they qualified in the examinations but their such expectations have been frustrated due to arbitrary selection by the respondents. In the meantime many of petitioners have grown older and have passed the age of being appointed to Government service. The respondents' demand for school teachers is however increasing day by day as evident from the impugned Appointment circular under Memo No. প্রাশিঅ/৭ (নিয়াগ)/সশিনি (রাজস্ব)/ 2014/ 249 dated 14.09.2014 (Annexure-G). In such view of the matter, we see no reason why the petitioners who have been aggrieved by being deprieved from being appointed as Assistant Teachers earlier should not be first considered for appointment to the post of Assistant Teachers of Government Primary Schools before considering other candidates for appointment pursuant to Appointment circular under Memo No. প্রাশিঅ/৭ (নিয়াগ)/সশিনি (রাজস্ব)/ 2014/ 249 dated 14.09.2014.

28. In the result, we find merit in all these Rules and they are made absolute. The respondents are hereby directed to appoint the petitioners to vacant posts of Assistant Teachers of Government Primary Schools before considering other candidates for appointment as Assistant Teachers pursuant to Appointment circular under Memo No. প্রাশিঅ/ ৭ (নিয়াগ)/ সশিনি (রাজস্ব)/ 2014/ 249 dated 14.09.2014.

29. There will be no order as to costs.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(Special Statutory Jurisdiction)

TRANSFERRED MISC. CASE NO. 01 OF 2016

Catherine Masud (a. k. a. Catherine Shapere, Wife of the late Abu Tareque Masud currently residing at B-2, Siza Court 152, Monihar Road, Monipuri Para Police Station-Tejgaon, Dhaka Permanent Address-170, Darling Road, Salem CT 06420 USA and two others
… Petitioner-claimants
Vs.
Md. Kashed Miah Son of Haji Loshkor Miah Co-owner of Chuadanga Deluxe Service Gokulkhali Police Station-Alamdanga District-Chuadanga Present Address- Chuadanga Deluxe Service New Malik Traders Shahid Abdul Kashem Sharok Chuadanga Head Office- Counter No. Gha/16 Inter City Bus Terminal Mirpur, Dhaka and four others
… Opposite-parties

Dr. Kamal Hossain with
Ms. Sara Hossain,
Mr. Ramzan Ali Sikder,
Mr. Md. Motahar Hossain, Advocates
… For the petitioner-claimants

Mr. Md. Abdus Sobhan Tarafder, Advocate
… For opposite-party Nos. 1 to 4

Mr. Ehsan A. Siddiq with
Mr. Imran A. Siddiq,
Dr. Chowdhury Ishrak Ahmed Siddiky,
Mr. Mohammad Shishir Manir, Advocates
… For opposite-party No. 5

Mr. A. Z. M. Fariduzzaman, Advocate
… For opposite-party No. 6

Mr. Mahbubey Alam, Attorney General with Ms. Israt Jahan, DAG
Ms. Nurun Nahar, AAG
Mr. Swarup Kanti Dev, AAG
Mr. A. H. M. Ziauddin, AAG
… For the Court

Arguments heard on: 09.07.2017, 10.07.2017, 11.07.2017, 12.07.2017, 16.07.2017, 18.07.2017, 19.07.2017, 20.07.2017 and 16.11.2017.

Judgment on the 03rd December, 2017

Present:
Ms. Justice Zinat Ara
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

Motor Vehicles Ordinance, 1983
Section 128:
It is evident that section 128 of the MV Ordinance read with rule 220 of the MV Rules requires that the claim application is to be submitted in CTA Form within six months of the accident. However, the proviso to sub-section (3) of section 128 of the MV Ordinance authorizes the Tribunal to entertain an application after the period of six months, if the Tribunal is satisfied that the claimants were prevented by sufficient cause. … (Para 96)

The Preamble of the Validation Act not only narrates the background of enactment of the Act, but also, in unambiguous words, declares the intention of the legislature. In the 3rd, 4th and 5th paragraphs of the Preamble of the Act, the Parliament has unambiguously declared that the Validation Act was enacted to fill in the legal vacuum resulting from the decision of the Apex Court and it authorizes the continuity of some of the ordinances (কতিপয় অধ্যাদেশ) and continuation of the validity of the actions taken under the ordinances and the rights and liabilities acquired by the people thereunder "উক্ত অধ্যাদেশসমূহ ও উহার অধীনে প্রণীত বিধি, প্রবিধান বা আদেশবলে কৃত কাজ-কর্ম, গৃহীত ব্যবস্থা বা কার্যধারাসমূহ, ..., জনগণের অর্জিত অধিকার সংরক্ষণ এবং প্রজাতন্ত্রের কর্মের ধারাবাহিকতা বহাল ও অক্ষুণ্ন রাখিবার নিমিত্ত ....." … (Para 114)

The settled principle of interpretation of a statute including an Act of Parliament is that in ascertaining the legislative intent, the Preamble is an important pointer to the intent, but the text of the Act is the ultimate determinant factor of such intent. … (Para 115)

The use of the words "shall" and "may" in the same provision in relation to registration of the application and examination of the applicant is legally significant. The significance is that the registration of the application is mandatory, but examination of a claimant is the discretion of the Tribunal. The principle of interpretation of a statutory provision in respect of the words "shall" and "may" is that the first word "shall" is generally mandatory and the second word "may" is generally discretionary.

… (Para 122)

The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible.

On the other hand, there is consistency on the point that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance Company is neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Act.

In the case of the Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95(2) of the Act and would not be liable to pay the entire amount. (Para 161)

It needs to be emphasized that the standard for estimating the amount of damages in case of actionable negligence resulting in death must not be a subjective standard but an objective one and regard in this behalf is to be had to the earnings of the deceased at the time of his death, his future prospects, his life expectancy, the amount he would have spent on himself and on the support of his dependants, the economic condition of the country, the property left by him and the like. On this court ends of justice would be

met if we award compensation to the tune of Taka 1,50,00,000 on these two claims/items. This money on the fact of the given case, according to us is not unreasonable but good. … (Para 173)

Judgment

Zinat Ara, J:

1. This is an application under section 128 of the Motor Vehicles Ordinance, 1983 (shortly, the MV Ordinance) for compensation over the road accidental death of Abu Tareque Masud and injuries caused to claimant No. 1, Catherine Masud, wife of Abu Tareque Masud (now deceased). The two other claimants of this case are Nishaad Binghamputra Masud and Nurun Nahar, son and mother of Abu Tareque Masud, respectively.

Transfer of the Case to this Court

2. The claimants initially filed the case under section 128 of the MV Ordinance before the District Judge, acting as the Motor Accident Claims Tribunal, Manikganj (shortly, the Tribunal). It was accepted by the Tribunal and registered as Miscellaneous Case No. 01 of 2012 on 13.03.2016.

3. To contest the case, opposite-party Nos. 1 and 2, Md. Kashed Miah and Md. Khokon Miah (Md. Mujibul Haque Khokon) filed a joint written statement/objection and opposite-party Nos. 3, 4 and 5 Md. Jahangir Kabir (Tuhin), Md. Jamir Uddin and Reliance Insurance Limited, each filed a separate written statement/objection before the Tribunal. The case proceeded and the Tribunal, on 23.08.2012, framed issues to decide the merit of the case.

4. Thereafter, the claimants filed Transfer Petition No. 01 of 2013 before the High Court Division under article 110 of the Constitution for transfer of the case from the Tribunal to the High Court Division. Whereupon, a rule was issued by the High Court Division on the matter and upon hearing, the rule issued was made absolute by the High Court Division by judgment dated 29.10.2014. Consequently, Miscellaneous Case No. 01 of 2012 was withdrawn from the Tribunal and registered/re-numbered as Transferred Miscellaneous Case No. 01 of 2016. Eventually, the Hon'ble Chief Justice has sent this case for hearing and disposal by the Division Bench presided over by one of us (Zinat Ara, J.).

Addition of Party

5**.** The petitioners, after transfer of the case to the High Court Division, filed an application, on 26.03.2016, for adding the United Commercial Bank Limited, Jhenaidah Branch, Jhenaidah (the Bank, in brief) as opposite-party No. 6 to the claim application on the ground that the Bus was mortgaged to the Bank by Md. Jahangir Kabir being owner of the Bus and Proprietor of M/S Ruhin Motors. The application was allowed and the Bank has been added as opposite-party No. 6 to this case.

Case of the Petitioner-claimants

6. The sum and substance of the case of the petitioner-claimants is as under:-

Deceased victim Abu Tareque Masud (shortly, Tareque) used to make films. He intended to make a new film titled "Kagojer Phool." So, on 13.08.2011, he started from Dhaka along with nine others, namely,- (1) claimant No. 1, Catherine Masud (shortly mentioned as Catherine), (2) Cameraman Ashfaque Munier, (3) Painter Dhali Al-mamun, (4) Painter Dilara Zaman Jolly, (5) Tareque's Assistant Monish

Rafiq and several Production Crew Members being (6) Saidul Islam Saeed (briefly, Saidul), (7) Wasim, (8) Jamal and (9) driver of the Microbus Mostafizur Rahman for visiting a shooting site at Saljana village of Shibalaya Upazila under Manikganj district. The team went there by a microbus bearing registration No. DHAKA METRO CHA-13-0302 (shortly, the Microbus) owned by claimant No. 1, Catherine and Tareque. After arrival at Saljana, they spent some time there.

7. On their way back to Dhaka at about 12.30 p.m., the Microbus arrived at a place named "Joka" on the Dhaka-Aricha Highway under Ghior Police Station. At that time, a passenger bus in the name and style "Chuadanga Deluxe Paribahan" licensed as "Dhaka Metro Ba 14-4288 (hereinafter stated as the Bus) was coming from the opposite direction at a high speed. It was carrying about fifty passengers from Dhaka to Chuadanga. The Bus driver Md. Jamir Uddin (shortly, Jamir), in order to overtake a smaller bus, at a curving point of the road (Highway), suddenly took a sharp turn and continued to drive the Bus through the wrong lane i.e. right side of the road through which the Microbus was running and caused head on collision with the Microbus. The effect of the collision was disastrous. Five persons boarded in the Microbus, film-maker Tareque, the driver and three other passengers, died instantly. But Jamir, instead of stopping the Bus to assist the victims, sped away and then abandoned the Bus at Paturia, further ahead on the road towards Manikgonj. Out of the surviving passengers, four were injured, namely, Catherine, Dhali Al-Mamun, Dilara Begum Jolly and Saidul. They were initially taken to Manikganj Sadar Hospital. Subsequently, they were sent to Dhaka and admitted into Square Hospital.

8. On hearing about the accident, Sub-Inspector of Police (S.I.) Lutfar Rahman, S.I. Enamul Haque and other police personnel of Ghior Police Station rushed to the place of occurrence. On the same day i.e. on 13.08.2011, S.I. Lutfor Rahman lodged a First Information Report (FIR) alleging that the Bus Driver Jamir was driving the Bus recklessly and negligently at a high speed leading to a head-on collision with the Microbus resulting in killing the driver and four passengers of the Microbus and causing injuries to some other passengers of the Microbus. The FIR was recorded as Ghior Police Station Case No. 07 dated 13.08.2011 under sections 279, 337, 338-A/304-B and 427 of the Penal Code.

9. The claimants claim that deceased victim Tareque was a renowned film-maker. Catherine and Tarique were the owners of a production house named Audiovision. They were well-known for directing the films, "Muktir Gaan" (1995) and "Matir Moyna" (2002) (also released under English title "The Clay Bird") the latter won the FIPRESCI International Critics Prize at the Cannes Film Festival in 2002 for its authentic, moving and dedicated portrayal of a country struggling for its democratic rights.

10. The claimants further claim that due to the death of Tareque, his wife Catherine, as a widow, has been deprived of the love and affection of her beloved husband. Their minor son, claimant No. 2, has been deprived of his father's love, affection, support, care and nursery. Claimant No. 3, mother of Tareque, an old lady of 75 years and dependant on her eldest son Tareque, has been deprived of her son's care, support and affection.

11. In the above noted background, the petitioners i.e. the claimants claim that opposite parties/defendant Nos. 1 to 4 as the custodians, owner and driver of the Bus and opposite party/defendant No. 5, Reliance Insurance Limited, as the insurer of the Bus, are liable to pay the following compensation and damages caused due to the accident :-

Nature of Damage	**Amount Claimed**
1. Loss of Income	Tk. 2,40,00,000/-
2. Loss of Dependency suffered by Claimant Nos. 1 and 2, the minor	Tk. 2,50,00,000/-
3. Loss of Dependency suffered by Claimant No. 3, represented by Abu Tayab Masud	Tk. 10,00,000/-
4. Loss of Future Advancement	Tk. 10,00,000/-
5. Loss of Estate	Tk. 10,00,000/-
6. Loss of Love & Affection suffered by Claimant Nos. 1 and 2	Tk. 2,50,00,000/-
7. Medical Expenses of Claimant No. 1	Tk. 25,452/-
8. Funeral Expenses	Tk. 1,00,000/-
9. Damage to Property (Microbus)	Tk. 5,00,000/-
Total	**Tk. 7,76,25,452/-**

12. The petitioners, by way of amendment of the original claim petition, claimed an amount of Tk. 2,18,04,646/- instead of Tk. 25,452/- for treatment and future treatment of Catherine. Thus, their total claim stands at Tk. 9,94,04,646/-.

13. The petitioner-claimants filed the original claim application for compensation under section 128 of the MV Ordinance as a simple petition and not in the prescribed form. Subsequently, they have submitted a filled up application form for the same compensation in CTA Form with their photographs. It was received and accepted by this court on 13.03.2016.

Case of Opposite-party Nos. 1 & 2

14. The sum and substance of the case of opposite-party Nos. 1 and 2 as stated in their joint written objection/statement is as under:-

> They are full brothers. They have been running the business of transporting passengers under the business banner "Chuadanga Deluxe Paribahan" in the route of Dhaka-Chuadanga-Dhaka. For running their business, they operate several passenger coaches (buses) along with the Bus. They are the actual owners of some of the buses but not the owners of all the buses including the Bus involved in the accident.

15. On the day of accident, on 13.08.2011, they were operating the Bus under necessary and valid documents like registration certificate, fitness certificate, tax-token, route permit and insurance certificate. They admit that on 13.08.2011, the Bus in question was in operation under their business name/banner "Chuadanga Deluxe Paribahan" and that on its way from Dhaka to Chuadanga, the Bus reached the place called 'Joka' when the accident took place. They claim that the driver of the Microbus carrying the victims crossed the divider line of the road and hit the Bus directly. It is the driver of the Microbus, not the driver of the Bus, who was driving the Microbus recklessly at a high speed. On the contrary, the driver of the Bus, in order to avoid the accident, slided the bus beside the road, but failed to

avoid the collision. However, due to the said collision, several road side trees and the left side of the Bus were damaged.

16. They admit that the police initiated a criminal case by lodging an FIR over the accident and submitted a charge-sheet in the said case. They claim that the said criminal case is pending for disposal and that before disposal of the criminal case, the claimants have filed this claim case out of greed. They contend that, in the above circumstances, the claim made in this case is not maintainable and liable to be disallowed.

Case of Opposite-party No. 3

17. The case of opposite-party No. 3, Jahangir Kabir Tuhin, is that the Bank is the owner of the Bus involved in the accident, but it was being operated, in his Jimma, under the business banner of "Chuadanga Deluxe Paribahan." With regard to the accident, he has stated the facts similar to those stated by opposite-party Nos. 1 and 2.

Case of Opposite-party No. 4

18. Opposite-party No. 4, Jamir, in his separate written objection/statement, has stated that he is a poor man and a professional driver. He admits that, on 13.08.2011, at 12.30 p.m., he was driving the Bus in question as usual. When the Bus reached at Joka on the Dhaka-Aricha Highway from Gabtali, Dhaka towards Chuadanga, the Microbus carrying the victims crossed the divider line of the road and hit the Bus. He has raised similar objection to the claim as raised by opposite-party Nos. 1 to 3.

Case of Opposite-party No. 5

19. Opposite-party No. 5, Reliance Insurance Limited (in brief, Reliance), filed a written objection/statement stating that on 24.08.2010, this opposite-party, in course of its business, Reliance issued a Commercial Vehicle Comprehensive/Third Party Insurance Policy for the Bus, which was jointly owned by M/S Ruhin Motors, Proprietor- Md. Jahangir Kabir (Tuhin) as mortgagor and the Bank as mortgagee. According to the Insurance Policy document vide Motor Insurance Policy No. RIL /JES /MV(CV) /P-00303 /08 /2010(COMP) and Certificate No. RIL/JES/MV(CV)/CERT-00303/08/2010(COMP) (briefly stated as the Insurance Policy), the Insurance Policy was valid for the period from 26.08.2010 to 25.08.2011.

20. The Insurance Policy contains specific terms of coverage stipulating the quantum of the liabilities of Reliance in respect of losses caused to third parties by the vehicle insured, which are,- (1) for death- Tk. 20,000/-, (2) for severe hurt- Tk. 10,000/-, (3) for any other hurt- Tk. 5,000/- and (4) for property damage-Tk. 50,000/-.

21. On 14.08.2011, the Jessore Branch Manager of Reliance informed the Head Office of Reliance that the owners of the Bus submitted a formal claim, under the Insurance Policy for Tk. 8,17,000/- for the damage caused to the Bus. In that claim, supported by the statement of the driver of the Bus, it has been stated that, on 13.08.2011, the Bus was running from Dhaka to Chuadanga carrying 32 passengers and the Bus had a head-on collision with a microbus (registration No. Dhaka Metro-Cha 13-0302) at a place called 'Joka' under Ghior Police Station, Manikganj on the Dhaka-Aricha Highway. In the said claim it has further been stated that the **Microbus was on the wrong side of the road and was trying to overtake another vehicle and** that the Bus, in an attempt to avoid collision, hit the road side trees, but failed to avoid accident and that due to the accident, **the Bus was damaged and the driver, the helper and some passengers were injured**. After observing necessary formalities and

conducting survey, Reliance has paid to the owner of the insured Bus an amount of Tk. 1,45,350/- as full and final settlement of the claim under the Insurance Policy.

22. Reliance claims that, under the Insurance Policy, it has limited liability to a third party as stated above and, as such, it is not liable to pay the compensation as claimed by the claimants.

23. Reliance in an additional written objection/statement has stated that the case is not maintainable in the present form, as it has not been filed in the Form CTA as prescribed by rule 220 of the Motors Vehicles Rules, 1940 (hereinafter mentioned as the MV Rules).

24. **Reliance has further stated that after making payment on the claim of the Bus owners, recently, it came to the knowledge of Reliance that the driver of the Bus had no valid driving license. Reliance has also stated that it came to know that charge-sheet No. 15 dated 22.03.2012 was submitted in Ghior Police Station Case No. 07 dated 13.08.2011 to the effect that the driver of the Bus had no valid driving license on the date of accident, that the validity of his driving license had expired three years back and that he managed to collect a fake slip about renewal of the expired driving license**.

(Bold, to give emphasis)

Issues to be Considered

25. Before transfer of the case to this Court, the Tribunal framed the following issues:-

"বিচার্য বিষয়

১। অত্রাকারে মামলাটি চলতে পারে কিনা?

২। অত্র মামলায় প্রদত্ত কোর্ট ফি সঠিক আছে কিনা?

৩। অত্র মামলা তামাদিতে বারিত কিনা?

৪। অত্র মামলায় পক্ষাভাব দোষ আছে কিনা?

৫। অত্র মামলার আরজিতে বর্নিত মতে মোটরযান দূর্ঘটনার জন্য ক্ষতিপূরন বাবদ বাদীপক্ষ বিবাদীদের নিকট হতে ৭,৭৬,২৫,৪৫২/- টাকা পেতে অধিকারী কিনা?

৬। অত্র মামলার আরজিতে বর্নিত মতে মোটরযান দূর্ঘটনার জন্য ক্ষতিপূরন বাবদ বাদীপক্ষ বিবাদীদের নিকট হতে পেতে অধিকারী হলে কি পরিমান টাকা পেতে অধিকারী?

৭। বাদীপক্ষ প্রার্থীত প্রতিকার পেতে পারে কিনা?"

26. After transfer of the case, none of the parties raised any objection to the issues framed by the Tribunal. However, as stated earlier, the claimants, by amending the claim petition, have claimed Tk. 9,94,04,646/-.

27. So, issue No. 5, accordingly, stands modified on the quantum of compensation.

The Manner of Contest in the Trial

28. In support of their claim, the petitioner-claimants have adduced oral evidence through seven witnesses, PWs-1 to 7, including petitioner-claimant Catherine herself as PW-1. They have produced some documents marked as Exbts.-1 to 9 and 15.

29. On the contrary, opposite-party Nos. 1 to 3 and opposite-party No. 4-Jamir, the driver of the Bus, have adduced oral evidence through five witnesses (OPWs-1 to 5) including opposite-party No. 4 himself as OPW-1 and opposite-party No. 2 Md. Mujibul Hoque Khokon as OPW-2.

30. Opposite-party No. 5-Reliance has produced one witness as OPW-1, who also produced two documents marked as Exbts.-A and B.

31. The witnesses of the petitioners' side were cross-examined by the respective opposite-parties, sometimes jointly and sometimes separately. Similarly, the witnesses adduced by the opposite-parties were also cross-examined by the petitioners' side.

32. The Bank (added-opposite-party No. 6) though has filed a written objection/statement, but neither adduced any evidence, oral or documentary, nor cross-examined any witness of the other parties.

33. Apart from the above noted manner of participation in the trial, the learned Advocates for all the contending parties, including the Bank, advanced detailed arguments.

Substance of Depositions
of Witnesses of the Parties

34. **P.W.1-Catherine, claimant No. 1,** appeared and deposed on behalf of herself and the two other claimants, being her minor son Nishaad and her mother-in-law, Nurun Nahar. She produced a guardianship certificate for her son Nishaad. She stated that her husband Tareque died at the age of 54 years due to accident. She and Tareque were film-makers and owners of a film producing enterprise, namely, Audiovision Productions. Both of them were Co-Directors of Audiovision Productions. Together they made several films including 'Muktir Gan' and 'Matir Moyna'. Matir Moyna won the International Critics Prize at Cannes Film Festival in 2002. They decided to make a new film titled 'Kagojer Phool.' So, on 13.08.2011 at 06.00 a. m., she herself, her husband along with others, being ten in all, including the driver, started their journey from their home situated at Monipuripara, Dhaka by their own microbus bearing No. Dhaka Metro-Cha 13-0302 (the Microbus) towards the shooting site at Saljana village of Shibalaya Thana in Manikganj. They reached the site at about 09.00 a.m. and spent about two and half hours there. At about 11.30 a.m. they boarded the Microbus for returning to Dhaka.

35. She described their sitting arrangement inside the Microbus. She herself was sitting facing backside of the road. So, she could see everything in the backside. At about 12.10 to 12.15 p.m, the Microbus reached the Dhaka-Aricha Highway. They were heading towards Dhaka in the eastern side. The Microbus was running through the correct lane at a low speed, as it was raining and they were looking for a place to take lunch. She was in a seat facing backwards and so, she could clearly see from the backside window that they were travelling on the correct side of the road. After about fifteen minutes of driving on the Highway, at about 12.30 p.m., they faced the accident. **Suddenly, she heard a tremendous sound of crashing and she was pushed back by the force of the impact. She could hear the roaring sound of a huge engine towards her left side and their Microbus was being pushed backward down the road. She felt a blow on the back of her head. After about ten seconds, she noticed bright light overhead. She could understand later on that the roof of the Microbus had been torn open by the Bus that hit them. None from the Bus came to help them. Rather, she heard the sound of the Bus speeding away towards the left.**

36. After a little while, the local people came to help them. With their help, she and her co-passenger Jolly could get down from the Microbus and found the damage done to the

Microbus and also found the dead bodies inside. Monish Rafique and some local people found Dhali Al-Mamun in the Microbus alive, but seriously wounded. Saidul was also injured. She also found the dead body of co-passenger Mishuk Munier fallen out of the Microbus to the road on the other side. With the help of local people, they stopped a running local passenger bus to make arrangement for treatment of surviving passengers of the Microbus. She and three other surviving co-passengers boarded the bus for going to hospital. Monish Rafique, the only one who was not injured, stayed back with the Microbus.

37. Firstly, they had gone to Manikganj Hospital. Dhali Al-Mamun was bleeding heavily. She herself had head injury. Jolly and Saidul had broken arms. After initial treatment at Manikgonj Hospital, they, by two ambulances, went to Square Hospital in Dhaka and got admitted there.

38. She had a CT scan which showed cranial hematoma. She was released on the next date. Few days after, she noticed some changes in her eye-sight with pain and flashes. But, before the accident, she had perfect vision. Her eye-sight gradually deteriorated. In December, 2011, she went to USA and got her eyes were checked. The US doctor found that she had developed an epi retinal membrane (ERM) in right eye, which developed due to traumatic injury to the eyes. For the next four years, she had been under treatment for her eye condition. Retina Specialist, Dr. Niaz Rahman of Bangladesh opined that her eye sight has been permanently affected, possibly as a result of the trauma in the accident.

39. Subsequently, she came to know that Manikgonj police had come to the spot of the accident immediately after and initiated a criminal case over the accident. In that case, the Investigating Officer examined her as a witness.

40. **After the accident, she had to close their business. In 2011, as per the tax return filed in USA, the joint income of herself and Tareque was approximately taka five lacs per month.** But the death of Tareque has caused loss to the business and also deprived her of the love, affection and care of Tareque. Similarly, she herself, her minor son and mother of Tareque, as dependents of Tareque have been deprived of love, affection and care of Tareque.

41. As stated in the plaint, she mentioned ten items of compensation claimed by herself and two others claimants, amounting to Tk. 9,94,04,646·00.

42. In support of her statements, she produced the following documents:- (1) Succession Certificate, Exbt.-1, (2) Guardianship Certificate for her son, Exbt.-2, (3) Plan for making of the film titled 'Kagojer Phool,' Exbt.-3, (4) Trade License for their Production Company, Exbt.-4, (5) Birth Certificate of her son Nishaad, Exbt.-5, (6) Death Certificate of Tareque, Exbt.-6, (7) Certified copy of the seizure list, Exbt.-7, (8) Certified copy of the F.I.R. relating to the accident, Exbt.-8 and (9) Certified copy of the charge-sheet, Exbt.-9.

43. She has denied the defence suggestion that the Bus was on the correct side of the road and that the Microbus crossed the divider line and hit the Bus.

44. In cross-examination by the Insurer Reliance (opposite party No. 5), she has stated that **the certificate of insurance for** the Microbus **expired on 25.07.2011, but due to her stay in USA at the end of 2011 and her father-in-law's death in August, 2011, she could not get renewal of the insurance for the Microbus in time.** She could not re-call if any part of the Microbus was lying on the road crossing the divider line. She admitted that she

deposed as a witness in Sessions Case No. 109 of 2012 relating to the accident. She admitted that the first indication of the accident was the sound of a tremendous crashing noise and that she did not hear any horn of the Microbus prior to the accident.

45. In cross-examiantion by opposite-party Nos. 1 to 4, she stated that it was raining on that day and as they were looking for a place to stop to take some food, the Microbus was being driven slowly. She stated that probably the Bus that caused accident was mortgaged in favour of the Bank and for that reason, she made the Bank a party to the case subsequently. She admitted that while she was sitting in the Microbus, she could not see the exact traffic situation in front of the Microbus but voluntarily added that other co-passengers and other witnesses to the accident told her that the Bus was overtaking another bus at the time of accident.

46. **PW.-2 Md. Saidul Islam**, a passenger of the Microbus, corroborated the statements of PW.-1 with regard to the date, time and the purpose of the visit of the ten member team including himself, Tareque and others to Saljana, their return journey by the same Microbus and the vivid description of the accident at 12.30 p.m. on the Dhaka-Aricha Highway. He described the sitting arrangement of those ten including himself in the Microbus. P.W.2 also corroborated PW-1 about the light rain and about searching for a food shop, when the Microbus was running through Dhaka-Aricha Highway.

47. PW-2 further stated that from his seat he could see the frontal scenario ahead of the Microbus and thus, he witnessed the manner in which the accident took place. He narrated that the **Microbus was running within the left side lane from the middle traffic line of the highway. He saw a turning/curving point at the right side of the road towards Dhaka. He found, in the front of the Microbus, a minibus at the right side coming from the opposite side i.e. from Dhaka towards Aricha. Then, all on a sudden, he found that a big bus overtook the minibus and the Bus hit the Microbus with force and he became senseless.**

48. PW-2 further stated that he sustained injuries on his legs, right arm and head. Subsequently, he had surgical operation in his right arm and a steel device was placed in his right arm. PW-2 also stated that at the Square Hospital, he heard from others that five of his co-passengers, namely, Tareque, Mishuk Munier, Washim, Zamal and driver Mostafiz had been killed in the accident and that the surviving four others had sustained various injuries.

49. In cross-examination by the Bus driver, PW-2 denied the defence suggestions that the dirver of the Bus, before the accident, had tried to avoid accident by blowing a horn and that the Microbus hit the Bus after crossing the middle traffic line of the highway.

50. Opposite-party Nos. 1 to 3 declined to cross-examine PW-2.

51. However, Reliance, the Insurer, cross-examined PW-2 and he denied the suggestion that the driver of the Microbus was responsible for the accident.

52. PW-2 was further cross-examined on some other points, but there is no deviation from what he has stated in examination-in-chief.

53. **PW-3 is Dilara Begum Jolly, another surviving passenger of the Microbus**. She corroborated the statements of PWs 1 and 2 relating to the date, time, place and manner of the

accident. She stated that the Microbus was running through the left side of the road. Suddenly, the Bus hit the Microbus and **that the Microbus was being pushed by the Bus for about ten seconds with severe forces after the said hit** and that the accident led to the instant death of the driver and four co-passengers of the Microbus including Tareque and injuries caused to herself and others.

54. PW-3 was cross-examined separately by opposite-party Nos. 1-3 and by opposite-party No. 4. But there is no deviation from her statements made in the examination-in-chief.

55. Opposite-party No. 5, the Insurer Reliance, declined to cross-examine PW-2.

56. **PW-4, Dhali Al-Mamun, another co-passenger of the Microbus,** also corroborated the statements of PWs-1, 2 and 3 about the date, time and place of the accident. He also narrated their sitting arrangement in the Microbus and the manner of the accident including the fact that the Microbus was running through the left/correct lane of the road and the injuries sustained by him. He further stated that **he became senseless and regained his sense at a hospital in Bangkok and he had to undergo several surgical operations to recover from head, shoulder and other injuries. He denied the defence suggestion that the Microbus hit the Bus.**

57. **PW-5 is S. I. Md. Lutfor Rahman**. He has stated that on 13.08.2011, he was serving as a Sub-Inspector of Police at Ghior Police Station of Manikganj district. On that day, on the basis of General Diary No. 437, he with his companion police force went to the site of accident called "Joka" on the Dhaka-Aricha Highway. He found the severely damaged Microbus and five dead bodies and a passenger bus of Chuadanga Deluxe Paribahan. He has mentioned the registration numbers of the Microbus and the Bus.

58. On asking a passenger of the Microbus named Md. Monish Rafique and the local people, he came to know that the Microbus with passengers was going towards Dhaka and that the Bus was coming from Dhaka and going towards Aricha. They told him that the Bus was being driven recklessly at a high speed and it the Microbus directly at about 12.30 p.m. He found the backside roof of the Microbus torn apart. He came to know that the five persons killed in the accident were Tareque, Mishuk Monier, Mostafizur Rahman, Wasim and Jamal and that Catherine, Dhali Al-Mamun and Dilara Begum Jolly were injured.

59. He seized the Microbus and the Bus by preparing seizure lists, prepared inquest reports on the dead bodies of the victims. However, he did not send the dead bodies to the morgue at the request of the relatives of the deceased persons. On the same day, he lodged an FIR bearing No. 07 dated 13.08.2011 and stated therein that the Bus driver of the Bus named Jamir was responsible for the accident. He produced and proved the certified copy of the FIR and the seizure list, which were used as evidence in the criminal case. These two documents have been marked as Exbts. 8 and 7 respectively in this case. He added that the original of those documents were lying with the record of the relevant criminal case.

60. In cross-examination, he admitted that he had not witnessed the accident. But, immediately after the accident, he found the Bus on the left side of the road towards Aricha and right side towards Dhaka and the **Microbus in the middle of the road**. He admitted that he did not get the driving license of the driver of the Microbus and that he had not conducted any search inside the Microbus.

61. **PW-6 is Md. Ashraf-ul-Islam**. He stated that, while he was working as Officer-in-Charge of CID, he conducted investigation of the criminal case initiated on the basis of the aforesaid FIR dated 13.08.2011. He narrated the manner of his investigation of the criminal case relating to the accident and produced and proved the certified copy of the charge-sheet marked as Exbt.-9 in this case and Exbt.-11 in criminal case.

62. His findings recorded in the charge-sheet are quoted below:-

"তদন্তকালে আমি বাসের এম. ভি. আই (Motor Vehicle Inspection) টেস্ট করাই। রিপোর্ট পর্যালোচনায় দেখা যায় বাসের স্পিড গভর্নর সিল (গতি নিয়ন্ত্রক) টেম্পার্ড করা অর্থ্যাৎ বাস তৈরির কোম্পানী কর্তৃক নির্দিষ্ট গতি সীমা রেখে গাড়ী চালানের যে বাধ্যবাধকতা ছিল তাহা নষ্ট করা হয়। এক্ষেত্রে স্পিড গভর্নর সিল (গতি নিয়ন্ত্রক) না থাকার কারণে বাসের গতি নিজ ইচ্ছামত বাড়ানো কমানো সম্ভব। যদি স্পিড গভর্নর সিল (গতি নিয়ন্ত্রক) টেম্পার্ড করা না থাকত তাহলে কখনই বাসের নির্দিষ্ট গতির বেশি গতিতে বাস চালানো সম্ভব ছিল না। তদন্তকালে দেখা যায় বাসের ফিটনেস মেয়াদ উত্তীর্ন ছিল। বাসের ড্রাইভার জমির হোসেনের ড্রাইভিং লাইসেন্স এর মেয়াদ বেশ কয়েক বছর পূর্বে উত্তীর্ন হয়। তিনি জানান যে, ড্রাইভিং লাইসেন্স নবায়নের জন্য বিআরটিএ কর্তৃপক্ষের কাছে ড্রাইভিং লাইসেন্স জমা আছে। এই মর্মে একখানা কাগজ প্রদর্শন করিলে তদন্তকালে দেখা যায় ঐ কাগজটি ভূয়া। আমার তদন্তে চুয়াডাংগা ডিলাক্স পরিবহনের বাস নাম্বার ঢাকা মেট্রো-ব ১৪-৪২৮৮ বাসটি রাত্রি ৪ টার সময় চুয়াডাংগা থেকে ঢাকার উদ্দেশ্যে রওয়ানা হয়ে সকাল ১০.০০ টায় গাবতলী পৌছায়। পুনরায় ১০.৩০ মিনিটে গাবতলী থেকে যাত্রী নিয়ে চুয়াডাংগার উদ্দেশ্যে রওয়ানা করে এবং ঘিওর থানাধীন জোকা নামক স্হানে অনুমান ১২.৩০ মিনিটে পৌছায় এবং দুর্ঘটনা ঘটায়। ঘটনাস্হলে ৫ জন মারা যায় এবং বাকী ৩ জন গুরুতর আহত হয় এবং বাকী ২ জন সাধারন জখম প্রাপ্ত হয়। মৃত ব্যক্তিদের মধ্যে বিখ্যাত চলচিত্রকার তারেক মাসুদ, বিশিষ্ট সাংবাদিক এবং ক্যামেরাম্যান মিশুক মনির, ড্রাইভার মোস্তাফিজুর রহমান, সেট ডিজাইনার ওয়াসিম এবং জামাল। আঘাত প্রাপ্তদের মধ্যে ছিলেন তারেক মাসুদের স্ত্রী ক্যাথেরিন মাসুদ, চট্রগ্রাম বিশ্ববিদ্যালয়ের শিক্ষক ঢালি আল মামুন ওনার মিসেস দিলারা জামান জলি, সাইদুর রহমান সাইদ, মনিশ রফিক। ঘটনাস্হল পরিদর্শনকালে দেখা যায় ঘটনাস্হল থেকে মহাসড়ক এর ১৭৫ ফুট পূর্বে একটা বাক আছে। ঘটনাস্হল থেকে মহাসড়কের পূর্বে ৪৫০ ফুট দুরত্বে আর একটা বাক আছে। ৪৫০ ফুট বাক থেকে আরিচার দিকে যাওয়ার পথে ১৭৫ ফুট দুরে আর একটি বাক থাকায় পরপর দুইটি বাকে বাসের গতি নিয়ন্ত্রন না করার কারণে সাদা মার্কিং করা রোড ডিভাইডার পার হয়ে মাইক্রোবাসকে আঘাত করে পুনরায় বামে ৭০ ফুট পশ্চিমে যাওয়ার পর মহাসড়ক হইতে বাসটি কাচা রাস্তায় নেমে যায় এবং মোট ১২৬ ফুট যাওয়ার পর বাসটি পরপর ৩ টি গাছের সাথে ধাক্কা খেয়ে থেমে যায়। বাসের গতি যদি নিয়ন্ত্রনে থাকত তাহলে ১৭৫ ফুট, ৪৫০ ফুট এবং দুর্ঘটনার পর ১২৬ ফুট পরে ৩টি গাছের সাথে ধাক্কা খেত না।"

63. In cross-examination, PW-6 stated that he could not examine the passengers or the Supervisor/Conductor or Helper of the Bus, as they were not available for recording their statements. During investigation, he came to know that the Bus was purchased by Ruhin Motors by taking loan from the Bank and the blue book of the Bus was in the name of the Bank and Ruhin Motors jointly. During investigation, he found that the Bus and the Microbus had head-on collision. He denied the defence suggestion that he found both the Microbus and the Bus on the left side of the road.

64. **PW-7 Dr. Niaz Abdur Rahman** has stated that he is an Ophthalmologist having 27 years' experience as a Retina Specialist. He is practising in Bangladesh Eye Hospital as a Retina Consultant and he is also the Managing Director of the said hospital. Catherine (PW-1) came to him on 22.09.2014 for her eye-examination. On examination, he found that she had an operation in her right eye and that her right eye had a good vision with glasses. Catherine also produced some medical reports before him showing that she had retina operation **on her right eye and she had epi retinal membrane removal through surgery**. Her left eye showed signs of epi retinal membrane. Catherine informed him that in a motor accident, she had been hit on her head and eyes and that in the next couple of years, her vision became blurred and she saw gray spots. Membrane develops slowly after trauma.

65. PW-7 proved the medical report dated 7th March, 2016 prepared by him and marked as Exbt.-15 and also the signature of the issuing doctor. He further stated that Catherine

developed cataract as the consequence of the retina surgery and that there is possibility that in future she might again develop epi retinal membrane.

66. In cross-examination, PW-7 admitted that in the US medical report dated **7th March, 2013 as submitted by the claimants' side with documents, but not produced for marking as an exhibit, it contains certain statements about Catherine's medical condition under the heading of 'ocular history**,' "**trauma-no**." On various dates during the periods from on 18th June, 2013 to 17th December, 2015, **the said US medical report** under the heading of **ocular history contains "trauma-no.**"

67. PW-7 further admitted that in the said US medical report **dated 7th March, 2013, it has been stated,- "patient state July, 2011 her son was playing with plastic shovel and was poked with it in the OD (right eye), states she had pain short after.**" He also admitted that **this incident was not mentioned in his medical report** and that he had not gone **through the whole US medical report before issuing medical report dated 7th March, 2016. He also admitted that he had no knowledge if the US physician refused to issue medical report stating "trauma due to accident.**" However, he denied the defence suggestion that he has issued a false and motivated medical report.

68. **Md. Jamir Hossain** (opposite-party No. 4), driver of the Bus, deposed as opposite-party witness No. 1 (OPW-1). He has stated that he has been driving motor vehicles since 1978. His monthly income is Tk. 8,500/-. He has a family comprising five persons. On 13.08.2011, he was the driver of the Bus of Chuadanga Deluxe Paribahan having all valid driving documents. He started his trip at 10.30 a.m. from Gabtali, Dhaka through Dhaka-Aricha Highway. It was a drizzling day.

69. His bus (the Bus) was carrying about forty passengers and when he reached Joka, he found a Microbus coming towards Dhaka from the opposite direction. He was driving the Bus in the left side of the Highway. However, on seeing the Microbus being driven in a zigzag manner, he took the Bus to the further left side on the Kancha road (**কাচা রাস্তা**) beside the Highway. At that time, the Bus hit the trees on the left side. But the Microbus crossed the divider line of the Highway and hit the right side of the Bus and the accident took place resulting in the death of several passengers and driver of the Microbus and injuries to some passengers. He fled away from the Bus due to fear of being beaten up by the public. No one was injured in the Bus. He stated that claimants are not entitled to get the compensation from him and the other opposite-parties. He added that he is a poor man and he has no capacity to pay the amount.

70. In cross-examination, he stated as follows:-

"সত্য নয় যে, মানিকগঞ্জের ফৌজদারী আদালতে আমি কোন ড্রাইভিং লাইসেন্স জমা দেই নাই। এবং অদ্য এই বিষয়ে মিথ্যা সাক্ষ্য দিলাম। ইহা সত্য আমি একটা টোকেন কার্ড মানিকগঞ্জের ফৌজদারী আদালতে জমা দিয়েছিলাম। আমি চুয়াডাঙ্গায় আমার নিজ বাড়ীতে থাকি কোন বাড়ী ভাড়া দেইনা। আমাকে প্রতি দিনে আপ-ডাউন ট্রিপে ৮৫০ টাকা দেওয়া হয়। আমি ঘটনার দিনে সকাল ৯.০০ ঘটিকায় চুয়াডাঙ্গা থেকে ঢাকায় গাবতলী পৌছাই। চুয়াডাঙ্গা থেকে ঢাকায় পৌছতে ০৫.০০ ঘন্টা সময় লাগে। বাস ছাড়ার ০২ ঘন্টা আগে অফিসে রিপোর্ট করতে হয়। মজিবুল হক খোকন সাহেব চুয়াডাঙ্গা ব্যানারে গাড়ীটির মালিক। ঘটনার স্হলের পিছনদিকের রাস্তা বাকা ছিল তবে ঘটনাস্হলের রাস্তা সোজা ছিল। ইহা সত্য নয় যে, আমি ওভার স্পিডে গাড়ী চালাইতে ছিলাম। বাসটির স্পিড গভর্নর ভাঙ্গা ছিল ইহা সত্য নয়। ইহা সত্য নয় যে, আমাদের একটা নির্দিষ্ট সময়ের মধ্যে গন্তব্যস্হলে বাস নিয়ে পৌছানোর বাধ্যবাধকতা ছিল। জোকা থেকে চুয়াডাঙ্গা গন্তব্যস্হলে পৌছাতে অনুমান ৩.৩০ থেকে ৪.০০ ঘন্টা সময় লাগে। ঢাকা থেকে চুয়াডাঙ্গার দুরত্ব ২৪০ কিঃমিঃ। দুর্ঘটনার পূর্বে আমি আস্তে আস্তে গাড়ী চালাইয়া বাম দিকে নামাই এবং থামাই। ইহা সত্য যে, বাসটির বাম দিকে ধাক্কালেগে ক্ষতিগ্রস্ত হয়। ইহা সত্য নয় যে, আমি বেপরোয়া গতিতে চালাইতে ছিলাম যাহার ফলশ্রুতিতে গাড়ীটি গাছের সংগে ধাক্কালাগে। সত্য নয় যে, আমি বেপরোয়াভাবে উচ্চ গতিতে রাস্তার মধ্যবর্তী বিভাজন এ্রোস

করে উল্টা দিক থেকে আসা মাইক্রোবাসে সজোরে ধাককা মারি এবং দুর্ঘটনা ঘটাই। সত্য নয় যে, আমি দুর্ঘটনা ঘটিয়ে ০৫ জন লোককে নিহত করি ও ৩ জনকে আহত করি এবং মাইক্রোবাসটি মারাত্মক ক্ষতিগ্রস্ত করি এবং এই কারণে আমি ঘটনাস্থল থেকে পালাইয়া যাই।"

71. **OPW-2 Md. Mujibul Haque Khokon** (opposite-party No. 2) deposed on his behalf and also on behalf of opposite-party Nos. 1 and 3. He stated that United Commercial Bank, Jhenaidah is the owner of the Bus. He further stated as follows:-

"৩নং বিবাদী জাহাঙ্গীর কবির তুহিনের লোন একাউন্টে এই গাড়ীটি আছে এবং তিনি এই গাড়ীটিসহ তার স্হাবর সম্পত্তি ব্যাংকের কাছে বন্ধক রেখেছে। আমি এবং ১ নং প্রতিপক্ষ আমার ভাই চুয়াডাংঙ্গা ডিলাক্স পরিবহনের ব্যানারের সত্ত্বাধিকারী। ঘটনার সময় ১৩-০৮-২০১১ চুয়াডাংঙ্গা ডিলাক্স পরিবহনের ব্যানারে বিভিন্ন মালিকানাধীন সর্বমোট ১২ টি গাড়ী ছিল। আমার ব্যানারে এই গাড়ীগুলি চলাচল করে এবং আমার ট্রেড লাইসেন্স আছে। আমি প্রতিটি গাড়ীর ট্রিপ প্রতি নির্দিষ্ট টাকা পাই জিপি সিস্টেম অনুযায়ী। গাড়ীর যাবতীয় কাগজপত্র ব্যাংকের নামে ছিল। ঘটনার সময় এই গাড়ীটি ড্রাইভার জামির হোসেন চালাইত। ড্রাইভার জামির হোসেন একজন পেশাদার চালক। ১৯৮৮ সাল থেকে ড্রাইভার জামির হোসেন চুয়াডাংঙ্গা ডিলাক্স পরিবহনের গাড়ী চালাইয়া আসিতেছিলেন। এর পূর্বে অন্য পরিবহনে গাড়ী চালাইত। আমার মনে হয় যে, বাদীপক্ষ আমাদের পক্ষ থেকে ক্ষতিপুরন পাওয়ার হকদার না।"

72. In cross-examination, OPW-2 stated that there was no written agreement between him and Jahangir Kabir **for operating the Bus and the management thereof. He admitted that at the request of Jahangir Kabir, he allowed the Bus to operate under his banner and that the Bank never approached him for operating (পরিচালনা) the Bus. He added that "ইউনাইটেড কমর্শিয়াল ব্যাংক নয় রুহিন মটরস মালিক জাহাঙ্গীর কবির (৩ নং প্রতিপক্ষ) লোনের মারফত এই গাড়ী চালানোর ব্যবসা করে.**" **He further stated that the Bus was placed under their care and custody in the year 2010 and that since then he used to supervise the affaris of the Bus including validity and renewal of the driver's license, which he did regularly and found that the driving license was valid before the accident.** He could not say if Jahangir Kabir repaid the loan to the Bank. His own motor vehicles are six in number and Chuadanga Deluxe Paribahan is his proprietorship establishment. He further stated "আমার ট্রেড লাইসেন্স শুধু আমাকে ব্যবহার করার জন্য দেওয়া হয়েছে কিন্তু পরিবহন ব্যবসায় অনেক গাড়ী ছাড়া চালানো যায়না বলে আমি একটি ব্যানার তৈরী করে অন্যান্য গাড়ীও চালাচ্ছি।"

73. **OPW-3 is Nasrin Ashrafi**. She stated that she was a teacher of a Non-Government College. On 13.08.2011 at 10.30 a.m., she was going to Chuadanga from Gabtali by the Bus. It was drizzling. When the Bus reached Joka of Manikganj, she saw a white microbus running at high speed was coming from the opposite direction. So, the Bus shifted towards the left side of the road. She narrated the next phase of the scenario as follows:-

"কিন্তু ঐ মাইক্রোটা দ্রুত এসে ব্যালেন্স হারিয়ে সাদা আইল্যান্ড ক্রোস করে বাসের ভিতরে ঢুকে বেরিয়ে যায়। আমাদের বাসটি থেমে যায়। এরপর আসে পাশের লোকজন ভিড় করে এবং আমাদেরকে বাস থেকে বের করে নিয়ে আসে। আমাদের বাসটি বাম দিকে ছিল। বাসের ডান দিকে মাইক্রোবাসটি আসছিল। ঐ সময়ে বাসে প্রায় ৩৭/৩৮ জন যাত্রী ছিল।"

74. In cross-examination, OPW-3 stated that she **had collected the tickets of the Bus for traveling from Dhaka to Chuadanga, but at the time of shifting their house from Chuadanga to Dhaka, her valuables and the tickets were stolen. She herself and her husband were acquainted with the employees of Chuadanga Deluxe Paribahan and at their request, she deposed in another case.**

75. **OPW-4 is Md. Mahbub Haque**. He stated that he was the Supervisor of the Bus on 13.08.2011, the accident day. At 10.30 a.m., they started their trip by the Bus for Chuadanga from Gabtali. When they had reached Joka, he found that a microbus was running at a high speed from the side of Paturia. **The driver of the Bus blew the horn many times. But the driver of the Microbus, crossing the white dividing line entered into their lane, through**

which the Bus was running. To avoid collision, the driver of the Bus slowly shifted the Bus further to the Kancha road and hit several trees. **However, the Microbus hit the right side of the Bus and crushed. The driver of the Bus fled away**. Then OPW-4 made an arrangement for the passengers of the Bus with their goods to be shifted to another bus and all of them left for Chuadanga.

76. In reply to a question put by the Court, he admitted that he had not taken any step for helping the victims of the accident or informing the police about the accident.

77. In cross-examination, OPW-4 stated that he is unable to show any document about his status as an employee of Chuadanga Deluxe Paribahan. **However, he knew that the Bus was under the supervision and control (পরিচালনা) of Md. Mujibul Haque Khokon and his brother, Md. Kashed Miah. He further admitted that there was a culvert and curving of the road, a little back from the place of accident towards Dhaka.**

78. **OPW-5 is Md. Hiron Sheikh**. He stated that he was the Helper of the Bus and narrated the accident as under:-

"মানিকগঞ্জের যোকা নামক স্থানে পৌছিলে দেখি সম্মুখ দিকে থেকে সাদা মাইক্রোবাস আসতেছিল। আমার ড্রাইভারকে বলি সামনে গাড়ী বায়ে চাপেন। বামে চাপাতে চাপাতে বাস গাছের সাথে ধাক্কা লাগে। দ্রুত গতিতে একটি মাইক্রোবাস আমাদের বাসের ডান সাইডে ধাক্কা মারে। মাইক্রোবাসের ৫(পাঁচ) জন লোক মারা যায়। আমি ও আমার সুপারভাইজার (মাহাবুব) সেখানে যাই ও দেখি ৫(পাঁচ) জনলোক মারা গেছে। তারপর ফায়ার সার্ভিসের গাড়ী আসে। তারা পাঁচ জনের লাশ বের করেন। আমাদের বাসের ৩৭/৩৮ জন যাত্রীদের অন্যান্য বাসে তুলে দিলাম। এরপর পুলিশ এসে আমাদের বাস রেকার দিয়ে তুলে নিয়ে যায়। তারপর আমি ও আমার সুপারভাইজার চুয়াডাঙ্গা চলে গেলাম। মাইক্রোবাসটি রেকার দিয়ে পুলিশ রাস্তার সাইডে নিয়ে যায়। সত্য নয় যে, আমাদের গাড়ীর ড্রাইভার ধীর গতিতে বাস চালাচ্ছিল। মাইক্রোবাসের ড্রাইভারের গাফিলতিতে দুর্ঘটনা সংঘটিত হয়েছিল।"

79. In cross-examination, OPW-5 admitted that he had no document to show that he was the Helper of the Bus and that he could not say the **name of the owner of the Bus.** He stated that, after the accident, **he started working in a truck. However, at the request of Jinarul, a leader of the** W**orkers' Union, he deposed in Manikganj Court in a criminal case and also in this case.** He further stated that before deposing in the Court room, he had a talk with the owner of the Bus in the Court verandah and replied as under:-

"প্রশ্নঃ কখনও মালিকের স্বার্থ বিরোধী কোন কাজ করেছেন কি না?
উত্তরঃ মালিকের কাজ করলে মালিকের স্বার্থ দেখতেই হয়।"

80. **OPW-1 Ashiqur Rahman** for opposite-party No. 5 is the sole witness produced by Reliance. He stated that Reliance is engaged in issuing insurance policies relating to general non-life insurance including motor vehicle insurance. He further stated that, on 24.08.2010, Jessore Branch of Reliance issued a motor insurance certificate in favour of opposite-party Nos. 2 and 3 to cover the comprehensive risk of the Bus owned by them. He produced and proved the copy of the Insurance Policy (marked as Exbt.-B). He further stated that as per this policy, the liabilities of Reliance are limited to **Tk. 20,000/- for the death, Tk. 10,000/- for grievous hurt and Tk. 50,000/- for property damage.** For damage of the Bus due to the accident, Reliance has paid Tk. 1,45,350/- to the Bus owner, Ruhin Motors. But **Reliance has not paid any amount to the heirs of the persons killed or the persons injured in the accident, as no one claimed any compensation.**

81. In cross-examination, he admitted that the capacity and number of seats of the vehicle has not been mentioned under clause 1(b) of the Insurance Policy; that the comprehensive insurance policy covers the death or bodily injury to any person or damage to any property of

third party caused by the insured vehicle in a public place. He further admitted that Reliance appointed an independent surveyor to assess various aspects of the accident and that the Survey Report states that the insured bus received damage in its front left side, which might be caused **due to severe hit with the road side trees**. **He has gone through the additional written statement filed by Reliance and that he does not disown the statements made in the additional written statement.**

(Bold and underlines put by us in the depositions of witnesses)

Arguments Advanced
by the Contending Parties

82. Dr. Kamal Hossain, the learned Advocate appearing with the learned Advoicates Ms. Sara Hossain, Mr. Ramzan Ali Sikder and Mr. Md. Motahar Hossain for the petitioner-claimants, with reference to the claim petition, the written objection/written statements of the contending opposite-parties, the oral as well as the documentary evidence led by the parties put forward the following arguments:-

(1) From the statements of the six witnesses of the petitioners, Catherine, Md. Saidul Islam, Dilara Begum Jolly, Dhali Al Mamun, S.I. Md. Lutfur Rahman and Md. Ashraful Islam, it is evident that opposite-party No. 4 Jamir was driving the Bus recklessly and at a high speed, that caused the accident, resulting in the death of Tareque and four others and injuries sustained by petitioner No. 1-Catherine and others.

(2) The eye witnesses and the victims of the accident being PWs-1 to 4, in a voice, stated that the Bus, at the time of overtaking another motor vehicle called 'mini bus' at a curving of the road, rushed at a high speed and crossed the dividing line of the highway and hit the Microbus and as a result, the roof of the Microbus was torn apart causing death and injuries to the passengers.

(3) From the written statements of the opposite-parties as well as the statements made by their witnesses (OPWs), it is evident that opposite-party Nos. 1 and 2 were in supervision and control of the Bus and in fact, they were engaged in operation **(পরিচালনা)** of the Bus in the route of Dhaka-Chuadanga-Dhaka under the business name/banner "Chuadanga Deluxe Paribahan" on the accident day.

(4) Since they were in control and operation of the Bus and the accident was caused by their engaged driver Jamir, they are liable to pay compensation to the claimants.

(5) In the criminal case, over the accident, being Sessions Case No. 109 of 2012, the Trial Court i.e. the Additional Sessions Judge, Manikganj has found the Bus driver Jamir guilty of the offence of culpable homicide under section 304 of the Penal Code and also of the offence under section 427 of the Penal Code and convicted and sentenced him under those sections. The decision of the said court shows that the Bus driver was found responsible for the accident.

(6) PW-5, S. I. Lutfur Rahman, who initiated the said criminal case, stated in this case that he had rushed to the place of occurrence immediately after the accident and came to know from a passenger of the Microbus, Md. Monish Rafique, and the local people that the Bus was being driven recklessly at a high speed and that the Bus directly hit the Microbus.

(7) PW-6, the Investigating Officer of the criminal case, has stated that, according to the report of Motor Vehicles Inspection, the speed Governor (গতি নিয়ন্ত্রক) of the Bus was tampered with and due to such tampering, the Bus could be driven beyond speed limit of the Bus that has been restricted/limited by the manufacturer. This independent witness (PW-6) further stated that the period of fitness of the Bus had expired and the

validity period of the driving license of driver Jamir also expired several years back. These statements of PW-6 clearly prove that the driver (opposite party No. 4) as well as the owner and the operator of the Bus i.e. opposite party Nos. 1-3 are collectively and directly responsible for the accident and hence for paying compensation as claimed by the petitioners.

(8) Reliance, the insurer, is also liable to pay the entire compensation to the petitioners under the indemnity clause of the Insurance Policy. However, Reliance may, by way of subrogation or otherwise, recover from opposite party Nos. 1-4, the compensation which Reliance has to pay in excess of the insurance coverage under the Insurance Policy.

(9) The petitioners have also been able to prove that due to the accident, petitioner No. 1 (Catherine) had to not only spend money for treatment of her injured eye, but she will also have to spend money for future treatment of her injured eye and PW-7 Dr. Niaz Abdur Rahman supports it. Therefore, petitioner No. 1 is also entitled to the additional amount as claimed for treatment of her eyes.

(10) The petitioners have lawfully claimed a reasonable amount of compensation on ten items of damage resulting from the accident amounting to Tk. 9,94,04,646/-.

(11) The money claimed by the petitioners cannot compensate for the loss of life of Tareque and other sufferings faced by the claimants/petitioners, but the compensation can at least help them survive and render some consolation.

(12) It is a common scenario in Bangladesh that everyday serious accidents are being caused by the drivers of buses and trucks due to their rough, high speed and reckless driving and thereby, causing death and injuries to many innocent people. In most cases, the victims remain silent and their miseries remain unattended. The petitioners are similar victims, however, with a difference that they have approached this Court with some claim against the backdrop of the accidental death of a renowned film-maker and the winner of an international award.

(13) The Court, while deciding the claims made in this case or similar claim made in other cases, must not confine itself on minor technicalities or minor discrepancies, because an accident generally takes place at the twinkle of an eye and the victims may not be able to see every minor details and narrate the same in Court.

83. In support of his submission, Dr. Kamal Hossain has relied on the decisions in the following cases:-

(i) Bangladesh Beverage Industries Limited vs. Rawshan Aktar and others, reported in 69 DLR (AD) 196.

(ii) Sri Manmath Nath Kuri vs. Mvi. Md. Moklesur Rahman and another, in CA No. 38-D of 1965, Mvi Md. Mokhlesur Rahman and others, in CA No. 73-D/1966, reported in 22 DLR (SC) 51.

(iii) Amrit Lal Sood and another vs. Smt. Kaushalya Devi Thapar and others, reported in AIR 1998 (SC) 1433.

(iv) An unreported decision dated 10.04.2003 passed by the High Court of Gujarat in First Appeal No. 1519 of 1979 with First Appeal No. 198 of 1980 (Oriental Fire and General Insurance Company vs. Firdos Pervez Mysorewala and others), reported in the electronic version of Manupatra i.e. MANU/GJ/0135/2003.

(v) An unreported decision dated 05.10.2010 passed by the Supreme Court of India in Civil Appeals No. 1578-1579 of 2004 (New India Assurance Company Limited vs. Vimal Devi and others), reported in the electronic version of Manupatra i.e. MANU/SC/1087/2010.

84. In reply, Mr. Md. Abdus Sobhan Tarafder, the learned Advocate for opposite-party Nos. 1 to 4, takes us through the written objection/statement filed by opposite-party No. 1 and 2 jointly and the ones filed separately by opposite-party No. 3 and 4, the oral and documentary evidence as adduced by the contending parties and contends as under:-

(a) The accident took place on 13.08.2011, and the claim application was filed before the Tribunal on 13.02.2012, but the Tribunal has not complied with the mandatory requirement of examining at least one of the claimants/applicants on oath as mandated by rule 220(2) of the MV Rules. The legal effect of such non-examination is that the claim petition is to be rejected under rule 221 of the MV Rules.

(b) The application was not initially filed in Form CTA as provided under rule 113 of the MV Rules. However, the petitioners filed a filled up Form CTA before the High Court Division in the year 2016, which is beyond the period of six months as provided in section 128(3) of the MV Ordinance. Therefore, the entire proceeding of the claim case as entertained by the Tribunal as well as by the High Court Division is not maintainable and hence, unlawful.

(c) Under paragraph (20) of the CTA Form, before filing of a case before the Claim Tribunal, the claimants are required to notify the owner of the vehicle and, in case of non-response or insufficient response, the result has to be mentioned in the claim petition. In the instant case, this did not happen. Therefore, the case is liable to be rejected outright.

(d) With regard to the accident, none of the PWs has stated anything relating to the averment made in paragraph 6 of the claim petition that the Bus was overtaking a third minibus at a curving/turning point of the road.

(e) None of the PWs stated that driver Jamir was driving the Bus recklessly or at a high speed. On the contrary, OPW-5 stated that the driver shifted the Bus slowly to the Kancha road to avoid the accident and this statement was not challenged in cross-examination which indicates that the driver of the Bus, Jamir, is not responsible for the accident.

(f) The license of the Microbus has not been produced in the criminal case or in the instant case.

(g) All the OPWs produced by opposite-party Nos. 1 to 4 uniformly stated that the driver of the Bus was driving slowly and that the driver of the Microbus was driving recklessly and thus, hit the Bus causing the accident. So, neither the Bus driver nor the owners/operators of the Bus are responsible for paying any compensation to the petitioners.

(h) From the statements of PW-1, it is evident that her injury to the right eye was caused by her own son which she has reported to the doctor in USA. Therefore, the evidence of PW-1 Catherine and PW-7 Dr. Niaz Abdur Rahman is not believable on the subsequent claim relating to injuries to her eye or compensation for the purpose of treatment of the eye. The additional claim of compensation is an afterthought for the purpose of getting more compensation from the opposite-parties.

(i) The petitioners have raised their claims under the MV Ordinance which was promulgated by General Ershad in exercise of the powers under the Proclamation of Martial Law Order of the 24th March, 1982. In the case of Siddique Ahmed vs. Government of Bangladesh and others, reported in 1 Counsel (Spl) (2013), known as and hereinafter referred to as the 7th Amendment Judgment, the Appellate Division declared section 3 of the Constitution (7th Amendment Act) (Act No. 1 of 1986) to be void. In that judgment dated 15th May, 2011, in sub-paragraph (7) of paragraph 152, it has also been declared that the Proclamation of Martial Law itself on 24 March, 1982 and all other Proclamations, Proclamation Orders, Ordinances, etc. made by

Lieutenant General H. M. Ershad, ndc. psc. from 24.03.1982 till 11.11.1986 are absolutely illegal and void ab initio.

(j) Subsequently, a Validation Act was promulgated by the Parliament, namely, ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরকরণ (বিশেষ বিধান) আইন, ২০১৩ (hereinafter referred to as the Validation Act) on 26th February, 2013. Therefore, on the date of filing of the application before the Tribunal on 13.02.2012 under the MV Ordinance and entertainment of the same were beyond jurisdiction of the Tribunal and also of this Court inasmuch, as the MV Ordinance itself was not legally in existence as decided by the Appellate Division. So, the case, as framed, has no legal backing and liable to be dismissed.

85. Mr. Ehsan A. Siddiq, the learned Advocate appearing with learned Advocates Mr. Imran A. Siddiq, Dr. Chowdhury Ishrak Ahmed Siddiky and Mr. Mohammad Shishir Manir for opposite-party No. 5, takes us through the written objection/statement filed by Reliance, the statement of OPW-1 deposing for Reliance. Mr. Siddiq contends that Reliance has a limited liability relating to the claim of third party like the petitioners of this case, simply because the premium paid by the Bus owner as the insured did not cover the entire risk relating to third parties in case of an accident. He next contends that Reliance, in relation to a third-party claimant, is liable for payment of Tk. 20,000/- for a death, Tk. 10,000/- for serious injuries and maximum Tk. 50,000/- for property damage caused due to road accident. Mr. Siddiq further contends that Reliance has already paid to the Bus owners sufficient compensation for the damage of the Bus. He adds that the petitioners or any other legal heirs of the deceased persons or the injured victims never approached Reliance for payment of compensation and for that reason, Reliance has not paid any compensation to the claimants, as third-party claimant.

86. In support of his submissions, Mr. Siddiq has relied on the decisions in the following cases:-

(i) M/S. Sheikhupura Transport Company Limited vs. Northern India Transport Insurance Company, reported in 1971(1) Supreme Court Cases 785.

(ii) New India Assurance Company Limited vs. Shanti Bai (Smt) and others, reported in (1995) 2 Supreme Court Cases 539.

(iii)New India Assurance Company Limited vs. C. M. Jaya and others, reported in (2002) 2 Supreme Court Cases 278.

87. Mr. A. Z. M. Fariduzzaman, the learned Advocate for added respondent No. 6 i.e. the Bank, takes us through the written statement filed by the Bank and submits that the Bank is not the owner of the Bus and Md. Jahangir Kabir, Proprietor of Ruhin Motors, is the owner of the Bus and that he had purchased the Bus by taking loan from the Bank. He next submits that the Bus was mortgaged to the Bank with other properties only as a security for the loan given by the Bank. He finally submits that, meanwhile, Md. Jahangir Kabir, Proprietor of Ruhin Motors has repaid the loan of the Bank and that the Bank was never in charge of the Bus. So, the Bank is not responsible for payment of any compensation to the petitioner-claimants.

88. Since a very important legal question about the existence of MV Ordinance on the date of filing of the application under section 128 of the MV Ordinance has been raised in this case, Mr. Mahbubey Alam, the learned Attorney General, on our direction, appeared

before us with Ms. Israt Jahan, the learned Deputy Attorney General, Ms. Nurun Nahar, Mr. Swarup Kanti Dev and Mr. A. H. M. Ziauddin, the learned Assistant Attorney Generals to address this issue.

89. Mr. Mahbubey Alam, the learned Attorney General, refers to the Preamble of 1982 সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরণ (বিশেষ বিধান) অধ্যাদেশ, ২০১৩ (২০১৩ সনের ২ নং অধ্যাদেশ) (hereinafter referred to as Ordinance No. 2 of 2013), particularly, sections 1, 3, 4 and 5 of Ordinance No. 2 of 2013 and the provisions of the Validation Act enacted after expiry of that Ordinance, Mr. Alam contends that the whole purpose of Ordinance No. 2 of 2013 as well as of the Validation Act was to keep the MV Ordinance and the other Ordinances promulgated during the period from 24.03.1982 to 11.11.1986 in continuous force and also to protect and preserve all actions taken under the aforesaid Ordinances, that were declared void by the 7th Amendment Judgment passed by the Appellate Division. Mr. Alam further contends that the intention of the legislature was to give validation to the MV Ordinance, 1983 and other Ordinances from the date of their respective inception. Therefore, the MV Ordinance is to be treated a continuous law as an Act made by the Parliament from the date of its inception.

90. On the legal issue about the existence of the MV Ordinance, Dr. Kamal Hossain makes similar submissions as advanced by the learned Attorney General.

91. Dr. Kamal Hossain further submits that the full text of the 7th Amendment Judgment was available on 22.02.2012 that is after nineteen months of the date of its pronouncement and immediately after the availability of the full text of the judgment, the President promulgated Ordinance No. 2 of 2013 on 22.01.2013 and subsequently, the Parliament enacted the Validation Act with similar provisions. Thus, the MV Ordinance has been validated from the date of its inception and the petitioners are entitled to get the claimed compensation for the damages under the MV Ordinance.

Discussions, Findings and
Decision on the various Issues

Issue No. 2 (court fee)

92. Let us first decide issue No. 2 i.e. if the court fees paid is correct.

93. On this point, the learned Advocate for the opposite-parties did not raise any question. Moreover, during pendency of the case, the petitioners have deposited Tk. 57,500/- along with VAT as the maximum court fees. Therefore, the court fees paid by the petitioners are sufficient. Thus, issue No. 2 is decided in favour of the petitioners.

Issue No. 3 (Limitation)

94. This issue has been raised by the learned Advocates for the contending opposite-parties with reference to the fact that the accident took place on 13.08.2011, the claim petition was filed in the Tribunal on 13.02.2012 and the CTA Form was submitted in this Court on 13.03.2016 i. e. after more than four years from the dates of accident and filing of the original claim petition.

95. The issue of limitation has to be examined and decided in view of the provision of section 128 of the MV Ordinance and the requirement of filing of a claim petition in the CTA Form under rule 220 of the MV Rules. For proper appreciation, section 128 of the MV Ordinance and rules 220 and 221 of the MV Rules are quoted below:-

*"**section 128. Application for compensation-** (1) An application for compensation arising out of an accident for the nature specified in section 127 may be made-*

(a) by the person who has sustained injury or whose property has been damaged; or

(b) where the death has resulted from the accident, by all of or any of the legal heirs of the deceased; or

(c) by any agent duly authorized by the person injured or by all or any of the legal heirs of the deceased, as the case may be:

Provided that where all the legal heirs of the deceased have not joined in any such application for compensation the application shall be made on behalf of or for the benefit of all the legal heirs who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made to the Claims Tribunal having jurisdiction over the area in which the accident occurred and shall contain such particular as may be prescribed.

*(3) **No application for compensation under this section shall be entertained unless it is made within six months of the occurrence of the accident:***

Provided that the Claims Tibunal may entertain the application after expiry of the said period of six months if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

(Bold, emphasis given)

*"**rule 220**. **Application for compensation**,-(1) An application under section 128 of the Motor Vehicles Ordinance, 1983 (LV of 1983), for payment of compensation shall be made in Form CTA in person or by registered post to the Claims Tribunal having jurisdiction over the area in which the cause of claims has arisen and shall be accompained by a fee of twenty taka in the form of court fee stamp:*

Provided that the Claims Tribunal may accept an application under this sub-rule without the fee specified therefor, subject to the condition that in case of an award of compensation in favour of the applicant the fee shall be recovered from the amount of compensation.

(2) Upon receipt of an application under sub-rule (1) the Claims Tribunal shall enter it into a register of applications to be maintained in Form T and may examine the applicant on oath and reduce the substance of such examination to writing.

***"rule 221**. **Disposal of application for compensation**,--(1) If, after considering the substance recorded under sub-rule 92) of rule 220, the Claims Tribunal is of the opinion that there is no sufficient ground for proceeding the case further, it may reject the application summarily and inform the applicant accordingly."*

(Underlined by us)

96. It is evident that section 128 of the MV Ordinance read with rule 220 of the MV Rules requires that the claim application is to be submitted in CTA Form within six months of the accident. However, the proviso to sub-section (3) of section 128 of the MV Ordinance

authorizes the Tribunal to entertain an application after the period of six months, if the Tribunal is satisfied that the claimants were prevented by sufficient cause.

97. The Tribunal, due to transfer of the case, had no opportunity to examine and decide in details the limitation issue. The Tribunal received the application, notified the opposite-parties and after filing of their written statements/objection framed issues to be decided. The Tribunal, however, did not record any decision with regard to non-filing of the application in CTA Form or non-attaching thereof. But, the actions of the Tribunal, as revealed from the record, clearly indicate the primary satisfaction of the Tribunal for entertaining the application without CTA Form.

98. However, we have thoroughly examined the various aspects of limitation issue and our findings are as under:-

(a) The claim application contains all the relevant facts of the accident including the date, time and description of the accident, the particulars of the Bus, the claims along with the reasons and persons responsible to meet the claims.

(b) The entries required to be made in the prescribed CTA Form are nothing more than what are mentioned in the application. This CTA Form has been prescribed in the MV Rules under section 136 of the MV Ordinance only for easy/convenient presentation.

(c) The original application substantially conforms to the requirement of recording the relevant entries in the CTA Form and submission of the CTA Form by the claimants in this Court is a proper and legal compliance with the technical requirements of rule 220 of the MV Rules.

(d) Section 128 or any other section of the MV Ordinance or any rule or the CTA Form of the MV Rules does not contain any provision to the effect that failure of the claimants to submit their claim in CTA Form itself would render the claim to be rejected outright.

(e) The accident, according to the claimants, resulted in the death of the head of their family, Tareque and also of four other persons along with injuries to Catherine and co-passengers. Despite such disaster to the family the claimants filed the claim petition within the statutory period of six months. Had they filed it after six months, the disaster caused to them would be a sufficient reason justifying the delay.

(f) The Tribunal was primarily satisfied and we are fully satisfied that the claim petition can be lawfully entertained, despite the delay in submitting the CTA Form, which, in our considered view, was a mere formality.

99. In view of the above, we hold that the case is not barred by limitation.

100. Accordingly, issue No. 3 is decided in favour of the claimants.

Issue No. 4 (Defect of Parties)

101. At the time of arguments, the learned Advocates of the opposite-parties did not agitate this issue.

102. However, we have examined this aspect of the case. The record shows that all the necessary parties have been impleaded in this case, namely, the two brothers, who were operating the Bus that allegedly caused the accident (Opposite-party Nos. 1 and 2), the Bus owner (opposite-party No. 3), the driver of the Bus (opposite-party No. 4) and Reliance, the insurer of the Bus (opposite-party No. 5) and the Bank with which the Bus had been hypothecated/mortgaged (opposite-party No. 6).

103. None of the contesting parties, after the Bank was added as opposite-party No. 6 in the case, indicated at any stage of the case that any other person or enterprise was a necessary party or even a proper party for adjudication of the dispute.

104. In the above circumstances, we hold that the case does not suffer from any defect of party.

Issue No. 1
(Maintainability of the Case)

105. In filing this case, the claimants have invoked the provision of section 128 of the MV Ordinance. But the learned Advocates for the opposite-parties have raised serious objection relating to entertainment and maintainability of the case.

106. Their objections are focused on the following three points.

107. **The first point** of objection is whether the MV Ordinance was in operation as a law on the date of filing of the case on 13.02.2012. This question has been raised in the context of the admitted legal position that MV Ordinance was declared as being unconstitutional by the Appellate Division by judgment dated 15.05.2011 passed in the 7th Amendment Case and thereafter, Ordinacne No. 02 of 2013 was promulgated on 21.01.2013 validating the MV Ordinance. Subsequently, the Parliament enacted the Validation Act by incorporating similar provisions and published the same in the Gazette on 26.02.2013.

108. The first objection is purely a legal issue as to whether the Validation Act i.e. Act No. 07 of 2013 has a retrospective effect authorizing continuous operation of the MV Ordinance that was promulgated in 1983 by the Martial Law Authority, but was declared unconstitutional by the Apex Court by judgement dated 15.05.2011 passed in the 7th Amendmant case.

109. **The second point** of objection on maintainability of the case as raised by the learned Advocates for the opposite-parties is that even if it is presumed that the MV Ordinance was in operation by virtue of the retrospective effect given by the Validation Act, the Tribunal, while initially receiving the claim application, did not comply with the requirement of rules 220 and 221 of the MV Rules made under the MV Ordinance. This provision, according to the objection raised, requires mandatory examination of, at least, one of the claimants on oath in the Tribunal/the Court.

110. **The third point** of objection is that paragraph (20) of the CTA Form requires that, before filing of a case before the Tribunal, the claimants must present their claim with the owner of the motor vehicle.

111. **In order to decide the first point** of objection on maintainability i.e. the legal issue of the retrospectivity of the Validation Act in relation to the continuous operation of the MV Ordinance, we need to examine the Preamble of the Validation Act and the related provisions of the Act. These are quoted below:-

"**২০১৩ সনের ০৭ নং আইন**

১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকর করিবার লক্ষ্যে প্রণীত আইন

যেহেতু সংবিধান (পঞ্চদশ সংশোধন) আইন, ২০১১ (২০১১ সনের ১৪নং আইন) দ্বারা ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত অধ্যাদেশসমুহ অনুমোদন ও সমর্থন (ratification and confirmation) সংক্রান্ত গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের চতুর্থ তফসিলের ১৯ অনুচ্ছেদ বিলুপ্ত হওয়ায় উক্ত অধ্যাদেশসমূহ কার্যকারিতা হারাইয়াছে; এবং

যেহেতু সিভিল আপীল নং ৪৮/২০১১ এ সুপ্রীমকোর্টের আপীল বিভাগ কর্তৃক প্রদত্ত রায়ে সংবিধান (সপ্তম সংশোধন) আইন, ১৯৮৬ (১৯৮৬ সনের ১নং আইন) এর ধারা ৩ এবং বাংলাদেশের সংবিধানের চতুর্থ তফসিলে ১৯ অনুচ্ছেদ বাতিল ঘোষিত হওয়ায় উক্ত সময়ের মধ্যে জারীকৃত উক্ত অধ্যাদেশসমুহ কার্যকারিতা হারাইয়াছে; এবং

যেহেতু উক্ত অধ্যাদেশসমূহ ও উহার অধীনে প্রণীত বিধি, প্রবিধান বা আদেশবলে কৃত কাজ-কর্ম, গৃহীত ব্যবস্থা বা কার্যধারাসমুহ, অথবা প্রণীত, কৃত, গৃহীত বা সূচীত বলিয়া বিবেচিত কাজ-কর্ম, ব্যবস্থা বা কার্যধারাসমূহ আইনের শাসন, জনগণের অর্জিত অধিকার সংরক্ষণ এবং প্রজাতন্ত্রের কর্মের ধারাবাহিকতা বহাল ও অক্ষণ্ন রাখিবার নিমিত্ত, জনস্বার্থে, উহাদের কার্যকারিতা প্রদান আবশ্যক; এবং

যেহেতু উক্ত সময়ে জারীকৃত কতিপয় সংশোধনী অধ্যাদেশ (amending Ordinances) দ্বারা প্রচলিত আইন সংশোধন করা হইয়াছে বিধায় আইনের শাসন, জনগণের অর্জিত অধিকার সংরক্ষণ এবং প্রজাতন্ত্রের কর্মের ধারাবাহিকতা বহাল ও অক্ষণ্ন রাখিবার নিমিত্ত, জনস্বার্থে, উহাদের কার্যকর রাখা আবশ্যক; এবং

যেহেতু উক্ত অধ্যাদেশসমূহের অধীন সূচীত কার্যধারাসমূহ বা গৃহীত ব্যবস্থা বা কাজ-কর্ম বর্তমানে অনিস্পন্ন বা চলমান থাকিলে, জনস্বার্থে, উক্ত কার্যধারাসমুহ বা গৃহীত ব্যবস্থা বা কাজ-কর্ম চলমান রাখা আবশ্যক; এবং

যেহেতু উক্ত অধ্যাদেশ কার্যকারিতা হারাইবার ফলে সৃষ্ট আইনী শূন্যতা পূরণ করিবার লক্ষ্যে আশু ব্যবস্থা গ্রহণের প্রয়োজনীয় পরিস্থিতি বিদ্যমান রহিয়াছে মর্মে রাষ্ট্রপতির নিকট সন্তোষজনভাবে প্রতীয়মান হওয়ায় এবং সংসদ অধিবেশনে না থাকিবার কারণে বিগত ২১ জানুয়ারি ২০১৩ তারিখে রাষ্ট্রপতি গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের ৯৩(১) অনুচ্ছেদে প্রদত্ত ক্ষমতাবলে উক্ত অধ্যাদেশসমূহকে তফসিলভুক্ত করিয়া ২০১৩ সালের ২ নম্বর অধ্যাদেশ জারী করেন; এবং

যেহেতু সংবিধানের ৯৩(২) অনুচ্ছেদের নির্দেশনা পূরণকল্পে, নবম জাতীয় সংসদের ১৬তম অধিবেশনের ২৭ জানুয়ারি ২০১৩ তারিখে অনুষ্ঠিত প্রথম বৈঠকে ২০১৩ সালের ২নং অধ্যাদেশ উপস্থাপিত হইয়াছে এবং উহার পরবর্তী ৩০ দিন অতিবাহিত হইলে অধ্যাদেশটির কার্যকরতা লোপ পাইবে; এবং

যেহেতু দীর্ঘসময় পূর্বে জারীকৃত অধ্যাদেশসমূহ যাচাই-বাছাইপূর্বক বাংলায় নূতনভাবে আইন প্রণয়ন করা সময় সাপেক্ষ; এবং

যেহেতু উপরি-বর্ণিত প্রেক্ষাপট বিবেচনায় ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত অধ্যাদেশ সমূহের মধ্যে কতিপয় অধ্যাদেশ কার্যকর করা সমীচীন ও প্রয়োজন;

সেহেতু এতদ্দ্বারা নিম্নরুপ আইন করা হইলঃ-

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।**- (১) এই অধ্যাদেশ ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরকরণ (বিশেষ বিধান) আইন, ২০১৩ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **সংজ্ঞা।**- বিষয় বা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে-

(ক) "**অধ্যাদেশ**" অর্থ ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত ধারা ৪ এ উল্লিখিত অধ্যাদেশসমুহ; এবং

(খ) "**তফসিল**" অর্থ এই আইনের তফসিল।

৩। **আইনের প্রাধান্য।**- আপাততঃ বলবৎ অন্য কোন আইনে ভিন্নতর যাহা কিছুই থাকুক না কেন, এই আইনের বিধানাবলী কার্যকর থাকিবে।

৪। **কতিপয় অধ্যাদেশের কার্যকারিতা প্রদান।**- ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত (উভয় দিনসহ) সময়ের মধ্যে জারীকৃত

(ক) তফসিলভুক্ত অধ্যাদেশসমুহ; এবং

(খ) অন্যান্য অধ্যাদেশসমূহ দ্বারা প্রচলিত কোন আইন, আদেশ বা অধ্যাদেশ সংশোধন করা হইয়া থাকিলে উক্ত সংশোধনী অধ্যাদেশসমূহ (amending Ordinances),

এমনভাবে কার্যকর থাকিবে যেন উহা এই আইনের উদ্দেশ্য পূরণকল্পে, জাতীয় সংসদ কর্তৃক প্রণীত কোন আইনঃ
তবে শর্ত থাকে যে, এই ধারার অধীন ১১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরকরণ করা হইলেও যতটুকু উহাদের বিষয়বস্তুর (contents) সহিত সংশ্লিষ্ট শুধুমাত্র ততটুকু গ্রহণ করা হইয়াছে মর্মে গণ্য হইবে এবং উক্ত সময়কালে অবৈধ ও অসাংবিধানিকভাবে রাষ্ট্রক্ষমতায় আসীন সামরিক শাসন আমলের কৃতকর্মের অনুমোদন ও সমর্থন (confirmation and ratification) করা হইয়াছে বলিয়া কোনক্রমেই বিবেচিত হইবে না।
৫। **হেফাজতকরণ।**- (১) অধ্যাদেশসমূহ ও উহাদের অধীন প্রণীত বিধি, প্রবিধান বা আদেশবলে কৃত কাজ-কর্ম, গৃহীত ব্যবস্থা বা কার্যধারাসমূহ, অথবা প্রণীত, কৃত, গৃহীত বা সূচীত বলিয়া বিবেচিত কাজ-কর্ম, ব্যবস্থা বা কার্যধারাসমূহ এমনভাবে নিষ্পন্ন হইয়াছে বলিয়া গণ্য হইবে যেন এই আইনের বিধানাবলী বলবৎ ছিল।
(২) অধ্যাদেশসমূহের অধীন দায়েরকৃত কোন মামলা বা সূচীত কোন কার্যধারা বা গৃহীত কোন কাজ-কর্ম বা ব্যবস্থা নিষ্পন্নাধীন থাকিলে উহা এমনভাবে নিষ্পন্ন করা যাইবে যেন উহা সংশ্লিষ্ট অধ্যাদেশের অধীন দায়েরকৃত বা সূচীত বা গৃহীত হইয়াছে।
(৩) অধ্যাদেশসমূহের অধীনে কৃত কাজ-কর্ম, গৃহীত ব্যবস্থা বা কার্যধারাসমুহের ফলস্বরুপ কোন প্রতিকার বা করণীয় বাস্তবায়নের স্বার্থে উক্ত প্রতিকার বা করণীয় পদক্ষেপ সংশ্লিষ্ট অধ্যাদেশের অধীন বাস্তবায়িত হইবে।
(৬) রহিতকরণ ।- .....
....."

(Underlines added by us to emphasize)

112. The Preamble of the Validation Act states the background in relation to the MV Ordinance. It provides that certain ordinances including the MV Ordinance were promulgated during the period from the 24th March, 1982 to the 11th November, 1986 by the then authority (Martial Law Authority) and these were ratified by the Parliament by 7th Amendment of the Constitution.

113. The various provisions of the Validation Act declare the manner of validation and consequences of such validation.

114. The Preamble of the Validation Act not only narrates the background of enactment of the Act, but also, in unambiguous words, declares the intention of the legislature. In the 3rd, 4th and 5th paragraphs of the Preamble of the Act, the Parliament has unambiguously declared that the Validation Act was enacted to fill in the legal vacuum resulting from the decision of the Apex Court and it authorizes the continuity of some of the ordinances **(কতিপয় অধ্যাদেশ**) and continuation of the validity of the actions taken under the ordinances and the rights and liabilities acquired by the people thereunder "উক্ত অধ্যাদেশসমূহ ও উহার অধীনে প্রণীত বিধি, প্রবিধান বা আদেশবলে কৃত কাজ-কর্ম, গৃহীত ব্যবস্থা বা কার্যধারাসমুহ, ..., জনগণের অর্জিত অধিকার সংরক্ষণ এবং প্রজাতন্ত্রের কর্মের ধারাবাহিকতা বহাল ও অক্ষণ্ন রাখিবার নিমিত্ত ....."

115. The settled principle of interpretation of a statute including an Act of Parliament is that in ascertaining the legislative intent, the Preamble is an important pointer to the intent, but the text of the Act is the ultimate determinant factor of such intent.

116. Short title of the Validation Act as provided in sub-section (1) of section 1 of the Act clearly states the intention of the Act in the expression "……কতিপয় অধ্যাদেশ কার্যকরকরণ ……." by referring to the period during which those were promulgated, namely, "১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত ....." This short title is fully consistent with the Preamble that states the background and intention of enactment of the Act. However, sub-section (2) of section 1 of the Validation Act containing the expression "ইহা অবিলম্বে কার্যকর হইবে" creates some doubts about the retrospectivity of the Validation Act. Because the Act

was published in the gazette in 2013. But this doubt is removed when we consider the language employed in section 4 of the Act, namely,-

"8। **কতিপয় অধ্যাদেশের কার্যকারিতা প্রদান**।- ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ত (উভয় দিনসহ)
সময়ের মধ্যে জারীকৃত
(ক) তফসিলভুক্ত অধ্যাদেশসমূহ; এবং
(খ) অন্যান্য অধ্যাদেশসমূহ দ্বারা প্রচলিত কোন আইন, আদেশ বা অধ্যাদেশ সংশোধন করা হইয়া থাকিলে উক্ত সংশোধনী অধ্যাদেশসমূহ (amending Ordinances),
এমনভাবে কার্যকর থাকিবে যেন উহা এই আইনের উদ্দেশ্য পূরণকল্পে, জাতীয় সংসদ কর্তৃক প্রণীত কোন আইনঃ
তবে শর্ত থাকে যে, ..."

(Underlined by us)

117. The above quoted provisions unambiguously declare the continuity of the ordinances including the MV Ordinance from its very inception and further declare that those are deemed to be an Act of Parliament. It is noted that MV Ordinance is one of the ordinances mentioned in the 4th Schedule at serial No. 32.

118. Thus, the Preamble read with the text of the Validation Act as a whole, particularly, sections 1, 4 and the 4th Schedule of the Act lead us to conclude that, by virtue of this Act, the MV Ordinance has been operating since its inception in 1982 without any disruption.

119. It follows that, on the date of filing of the claim application on 13.02.2012 in the Tribunal, the MV Ordinance was in operation. So, the objection raised by the learned Advocates for the opposite-parties on the first aspect of maintainability of the case is not tenable.

120**. The second point** of objection on maintainability as advanced by the learned Advocates for the opposite-parties is based on the requirement of rules 220 and 221 of the MV Rules.

121. The plain reading of rules 220 and 221 of the MV Rules as quoted earlier in the discussion of the issue of limitation shows that the proceeding of the claim case has to be initiated by the Tribunal upon receipt of an application under sub-rule (1) of rule 220. Then this rule requires that the Claims Tribunal *"shall enter into a register ....."* The next phase of the proceeding is *"the Tribunal may examine the applicant on oath ....."*

122. The use of the words "shall" and "may" in the same provision in relation to registration of the application and examination of the applicant is legally significant. The significance is that the registration of the application is mandatory, but examination of a claimant is the discretion of the Tribunal. The principle of interpretation of a statutory provision in respect of the words "shall" and "may" is that the first word "shall" is generally mandatory and the second word "may" is generally discretionary.

123. Rule 221 of the MV Rules spells out the next phase of a proceeding after receipt of an application and the mandatory registration thereof and discretionary examination of the claimant. Under this rule, the Tribunal may proceed with the case or summarily reject it.

124. In the instant case, the Tribunal, after receipt of the application, registered it as Miscellanelus Case No. 01 of 2012 and then without examining the claimants proceeded with the case.

125. In our considered view the Tribunal did all these lawfully. There was no violation of the provisions of rules 220 and 221 of the MV Rules. So, the second objection raised by the learned Advocates for the opposite-parties are not also tenable.

126. **The third point** of objection on maintainability is based on the requirement of presentation of the claim with the owner of the motor vehicle under CTA Form. For proper appreciation, paragraph (20) of the CTA Form is quoted as under:-

"(20) Has the claim been lodged with the owner? If so, with what results."

127. Thus, it is apparent that only an information is to be provided in the CTA Form as to whether a claim has been earlier lodged with the owner and result thereof. It is not a requirement of this form or of section 128 or other provisions of the MV Ordinance or the MV Rules that if such information is not furnished, the claim made in the CTA Form, is liable to be outright rejected. Therefore, the third objection raised by the learned Advocates for the opposite-parties is not acceptable.

128. In view of the above discussions made on all the aspects of maintainability of the case, we hold that the case is maintainable and accordingly, issue No. 1 is decided in favour of the claimants.

129. Issue No. 5
(Claimants Right to Get Compensation from the Opposite-Parties)

1360. Issue No. 6
(Quantum of Compensation, if any)

131. Issue No. 7
(Entitlement of the Claimants to get Relief, if any)

132. The above noted three issues are interlinked. So, those are taken up together for the convenience of consideration, recording discussion and decisions.

133. In deciding these issues, the 1st point to be considered is whether Tareque's death was the result of a road accident. This aspect is fully admitted in the respective written statement/objection filed by the contesting opposite-parties, namely, the Bus operators, the Bus driver and Reliance, the insurer of the Bus. They have admitted the date, time and place of the accident. They have also partly admitted the manner thereof to the extent of collision between the Bus and the Microbus and the result of the accident causing the death of five persons and injuries to other travelers of the Microbus.

134. The above noted admitted facts are again proved not only by PWs-1 to 4, all being passengers of the Microbus and eye-witnesses to the accident, but also by other eye-witnesses produced by the opposite-parties, being driver of the Bus, Jamir (OPW-1), and the Supervisor and Helper of the Bus (OPWs- 3 and 4). Those facts are also proved by the police witness (PW-5) who immediately after the accident reached the place of accident and witnessed the result of the accident.

135. PW-5, Lutfor Rahman, S.I. of Police, formally initiated a criminal case by lodging FIR (Exbt.-7), recorded as Ghior Police Station Case No. 07 dated 13.08.2011. This FIR led to investigation and submission of a charge-sheet (Exbt.-9) by another police officer (PW-6). In the FIR and the charge-sheet, the said two police personnel have specifically stated the result of the accident as noted above and both of them found the Bus driver Jamir responsible for the accident. After detailed investigation, PW-6 recommended for prosecution of Jamir under section 304 along with other sections of the Penal Code for commission of the offence of culpable homicide not amounting to murder and other offences.

136. The result of the said criminal case is not on record, but it is in evidence that the case was at least at trial stage as stated by the Bus driver Jamir while deposing as PW-1.

137. **Principal Controversy:**

The principal controversy is, however, about who is responsible for the collision between the two motor vehicles leading to the death of Tareque.

138. At the time of argument, Dr. Kamal Hossain placed before us a copy of the judgment delivered in Sessions Case No. 109 of 2012 by the learned Additional Sessions Judge, Manikgonj and verbally submitted that the driver of the Bus has been convicted and sentenced to suffer imprisonment for life under section 304 of the Penal Code for causing death of the same victim Tareque.

139. Mr. Md. Abdus Sobhan Tarafder, the learned Advocate for opposite-party Nos. 1 to 4, at the time of argument, also verbally contended that driver Jamir has been convicted in the said Sessions Case.

140. However, in deciding the controversy as pointed above, we need to rely not on the verbal submission but on the evidence led by the parties in the instant case.

141. Evidence on record shows that three groups of witnesses have stated their experiences gathered on the spot of the accident. They are-(1) PWs-1 to 4, all being eye-witnesses to the occurrence and co-passengers of the Microbus travelling with deceased Tareque, (2) OPWs-1 to 4, all being eye-witnesses to the occurrence and on board the Bus and (3) two police witnesses who visited the place of accident after the accident.

142. On scrutiny of the deposition of the above noted witnesses, we find the following narrations in respect of the accident moment:-

(1) PWs-1 to 4 all being co-passengers of the Microbus, in a voice, stated that it was a drizzling day and the Microbus was running at a low speed through the left side that is the correct and lawful side of the road and they were looking for an eating place.

PWs-3 and 4 both stated that it was the Bus that hit the Microbus. PW-2 elaborates the scene by stating that he was sitting in the Microbus facing the front side and that, from his seat, he could see the scenario ahead the Microbus and thus, witnessed the manner in which the accident took place. He further stated that he saw a turning/curving point in the right side of the road towards Dhaka and found that in front of the Microbus and through the right side of the road a minibus was coming from the opposite direction i.e. from Dhaka towards Aricha. Then, all on a sudden, he found that the Bus overtook the said minibus and hit the Microbus with severe force

and he became senseless. PW-1, claimant Catherine, who was in a seat facing the backside of the Microbus stated that she heard from a passenger of the Microbus that the Bus overtook another bus and then hit the Microbus.

(2) On the other hand, OPW-1, the Driver of the Bus, also stated that there was a curving point behind the accident spot (i.e. towards Dhaka). But the road, at the place of accident, was straight and that he was driving at a slow speed.

OPW-3, a college teacher and a passenger of the Bus, OPW-4, the Supervisor of the Bus and OPW-5, Helper of the Bus, stated that the Bus was bound for Chuadanga and that it was coming from Dhaka through the left side of the road and that the Microbus was coming from the opposite direction.

However, the above four eye-witnesses to the occurrence (OPWs-1 and 3-5) narrated different versions about the exact moment of accident as follows:-

OPW-1, the Bus driver stated in his examination-in-chief that,- **"ঐদিন টিপ টিপ করে বৃষ্টি হইতেছিল। ..... মাইক্রোবাসটি আকাবাকা ভাবে চালানো হচ্ছিল। এই অবস্থায় আমি আস্তে আস্তে আমার গাড়ি বাম দিকে কাচা রাস্তায় নামাইয়া দেই। "** In his cross-examination, OPW-1 stated that,- "ইহা সত্য যে, বাসটির বাম দিকে ধাককা লেগে ক্ষতিগ্রস্ত হয়। ইহা সত্য নয় যে, আমি বেপরোয়া গতিতে চালাইতে ছিলাম যাহার ফলশ্রুতিতে গাড়ীটি গাছের সংগে ধাককা লাগে।"

OPW-3 in his examination-in-chief stated that,- "……. কিন্তু ঐ মাইক্রোটা দ্রুত এসে ব্যালেন্স হারিয়ে সাদা আইল্যান্ড এন্স করে বাসের ভিতরে ঢুকে বেরিয়ে যায়। আমাদের বাসটি থেমে যায়। ..... "

OPW-4 in his examination-in-chief stated that,- "…..জোকা নামক স্থানে পৌছিলে তখন পাটুরিয়ার দিক থেকে একটা মাইক্রবাস দ্রুত গতিতে ছুটে আসতে দেখতে পাই। আমি তখন সামনে বসা ছিলাম ড্রাইভার অনেক বার হর্ণ দেয়। মাইক্রোর ড্রাইভার তার লেন এন্স করে আমাদের লেনে ঢুকে পড়ে। রাস্তার মাঝে সাদা ডিভাইডার দেওয়া ছিল। আমাদের গাড়ী বাম পাসে ছিল। এ সময় আমাদের বাস আস্তে আস্তে কাঁচা রাস্তায় নেমে আসে এবং কয়েকটি গাছের সঙ্গে ধাককা লাগে। কাঁচা রাস্তাটি আমাদের গাড়ীর বামদিকে। এরপর মাইক্রোটি এসে বাসের সামনের ডান দিকের চাকায় ধাককা মারে। বিকট আওয়াজ হয় ও মাইক্রোবাসটি চুরমার হয়ে যায়। ড্রাইভার ঘটনার পরপরই উধাও হয়ে যায়।..... "

OPW-5 in his examination-in-chief stated that,- "মানিকগঞ্জের যোকা নামক স্থানে পৌছিলে দেখি সম্মুখ দিকে থেকে সাদা মাইক্রোবাস আসতেছিল। আমার ড্রাইভারকে বলি সামনে গাড়ী বায়ে চাপেন। বামে চাপাতে চাপাতে বাস গাছের সাথে ধাক্কা লাগে। দ্রুত গতিতে একটি মাইক্রোবাস আমাদের বাসের ডান সাইডে ধাককা মারে। মাইক্রোবাসের ৫(পাঁচ) জনলোক মারা যায়।..... "

(3) PW-5 a police officer, in his examination-in-chief, stated that,- "জোকা সড়কে উপস্থিত হইয়া দেখি সড়কের উপর একটি মাইক্রো গাড়ী যাহার নং ঢাকা মেট্রো-চ ১৩-০৩০২ গাড়ীটি দুমড়ে মুচরে আছে এবং গাড়ীর মধ্যে ৫ (পাঁচ) টি মৃতদেহ দেখি। রাস্তার দক্ষিন পার্শ্বে একটি যাত্রীবাহী বাস চুয়াডাংগা ডিলাক্স পরিবহনের যাহার নাম্বার ঢাকা মেট্রো-ব ১৪-৪২৮৮ দেখিতে পাই। দুর্ঘটনায় কবলিত মাইক্রোবাসের পার্শ্বে মাইক্রোর যাত্রী মোঃ মনিস রফিক এবং উপস্থিত স্থানীয় লোকজনের নিকট জিজ্ঞাসাবাদে জানা যায় যে, মাইক্রোবাসটি আরিচা হইতে মাইক্রোবাসের লোকজনসহ ঢাকার উদ্দেশ্যে রওয়ানা হয় এবং চুয়াডাংগা ডিলাক্স পরিবহনের বাসটি ঢাকা হইতে যাত্রীসহ আরিচার উদ্দেশ্যে রওয়ানা হইয়া যাত্রীবাহী বাসটি ঘটনাস্থলের কাছাকাছি এসে দ্রুতবেগে বেপরোয়া গতিতে চালাইয়া বেলা অনুমান ১২.৩০ ঘটিকার সময় মাইক্রোবাসে সরাসরি আঘাত করে। যাহাতে মাইক্রোবাসটি দুমড়ে মুচড়ে যায় এবং মাইক্রোবাসের ছাদ উল্টাইয়া পিছনের দিকে যায়। ..... "

PW-6 another police officer being the Investigating Officer of the criminal case relating to the accident, in his examination-in-chief stated that,- তদন্তকালে আমি বাসের MVI (Motor Vehicle Inspection) টেষ্ট করাই। রিপোর্ট পর্যালোচনায় দেখা যায় বাসের স্পিড গভর্নর সিল

(গতি নিয়ন্ত্রক) টেম্পার্ড করা অর্থ্যাৎ বাস তৈরির কোম্পানী কর্তৃক নিদিষ্ট গতি সীমা রেখে গাড়ী চালানের যে বাধ্যবাধকতা ছিল তাহা নষ্ট করা হয়। এক্ষেত্রে স্পিড গভর্নর সিল (গতি নিয়ন্ত্রক) না থাকার কারণে বাসের গতি নিজ ইচ্ছামত বাড়ানো কমানো সম্ভব। যদি স্পিড গভর্নর সিল (গতি নিয়ন্ত্রক) টেম্পার্ড করা না থাকত তাহলে কখনই বাসের নির্দিষ্ট গতির বেশি গতিতে বাস চালানো সম্ভব ছিল না। তদন্তকালে দেখা যায় বাসের ফিটনেস মেয়াদ উত্তীর্ন ছিল। বাসের ড্রাইভার জমির হোসেনের ড্রাইভিং লাইসেন্স এর মেয়াদ বেশ কয়েক বছর পূর্বে উত্তীর্ন হয়। তিনি জানান যে, ড্রাইভিং লাইসেন্স নবায়নের জন্য বিআরটিএ কর্তৃপক্ষের কাছে ড্রাইভিং লাইসেন্স জমা আছে এই মর্মে একখানা কাগজ প্রদর্শন করিলে তদন্তকালে দেখা যায় ঐ কাগজটি ভূয়া। ..... " এবং ঘিওর থানাধীন জোকা নামক স্থানে অনুমান ১২.৩০ মিনিটে পৌছায় এবং দুর্ঘটনা ঘটায়। .....ঘটনাস্থল থেকে মহাসড়ক এর ১৭৫ ফুট পূর্বে একটা বাক আছে। ঘটনাস্থল থেকে মহাসড়কের পূর্বে ৪৫০ ফুট দুরত্বে আর একটা বাক আছে। ৪৫০ ফুট বাক থেকে আরিচার দিকে যাওয়ার পথে ১৭৫ফুট দুরে আর একটি বাক থাকায় পরপর দুইটি বাকে বাসের গতি নিয়ন্ত্রন না করার কারণে সাদা মার্কিং করা রোড ডিভাইডার পার হয়ে মাইক্রোবাসকে আঘাত করে পুনরায় বামে ৭০ ফুট পশ্চিমে যাওয়ার পর মহাসড়ক হইতে বাসটি কাচা রাস্তায় নেমে যায় এবং মোট ১২৬ ফুট যাওয়ার পর বাসটি পরপর ৩ টি গাছের সাথে ধাক্কা খেয়ে থেমে যায়। বাসের গতি যদি নিয়ন্ত্রনে থাকত তাহলে ১৭৫ ফুট, ৪৫০ ফুট এবং দুর্ঘটনার পর ১২৬ ফুট পরে ৩টি গাছের সাথে ধাক্কা খেত না।

In his cross-examination, this witness (PW-6) stated that,-"…….. মাইক্রোবাসের মটর ভিহিক্যাল প্রতিবেদন অনুযায়ী কোন টেম্পার্ড হয়নি।....."

Upon careful scrutiny of the deposition of the above noted witnesses, our findings on the accident scenario are as follows:-

(a) On the date of accident, the Bus was running on a Highway without fitness certificate and the Bus-driver had no valid driving license on that day and his driving license had expired a few years back and he submitted a renewal slip/token which was found to be fictitious (ভূয়া).

In this respect, the testimony of PW-6 is credible, simply because it has not been refuted by the opposite-parties by producing the fitness certificate of the Bus or driving license of the Bus-driver.

On the contrary, it is in evidence of PW-1 that, due to the death of Microbus-driver Mostafiz and Tareque, the driving license of driver Mostafiz and fitness certificate of the Microbus could not be produced by the claimants, which is natural in the facts and circumstances of the case.

(b) As stated by PW-2, a passenger of the Microbus, and by OPW-1, the driver of the Bus and also by PW-6, the police officer, the Bus, before reaching the accident spot, had to pass a curving point on the road. According to PW-6, the distance of the curving point from the accident spot is 175 feet and the Bus, after the collision with the Microbus, further moved forward by 126 feet from the accident spot and collided with three trees. The statement of PW-6 about collision of the Bus with the trees after it got down to the Kancha road is corroborated by the driver, supervisor and helper of the Bus (OPWs- 1, 4 and 5) who stated that the Bus had collision with several trees while it was driven through the Kancha road.

It follows that at the time of hitting the Microbus or collision with the Microbus, the Bus was being driven at a very high speed.

The statements of the Bus-driver and other OPWs with regard to the manner in which the Microbus was being driven are not believable, because- **firstly,** the Bus-driver stated that the Microbus was running in a zigzag manner, but the other witnesses i.e. OPWs 3, 4 and 5 are totally silent on this aspect, **secondly,** the helper of the Bus stated that the Bus-driver blew horns several times, but the Bus-driver himself made no such statement, **thirdly,** if the Bus was stopped beside the road and the Microbus collided with the Bus, as stated by the OPWs., there was no reason why the Bus

would move forward 126 feet, far from the accident spot. This distance as travelled by the Bus before it was stopped on the Kancha road clearly shows that the Bus was not being driven at a low speed or in the correct lane.

(c) The actual picture of the moment of collision is partly revealed from the testimony of PW-6 who stated that, during investigation of the criminal case, he found that the Bus, after hiting the Microbus, proceeded through the Highway and took the left lane i.e. the Kancha road and after moving forward 70 feet collided with three road side trees, which is 126 feet away from the accident spot. This aspect of the scenario is corroborated by PW-1 and PW-3 who stated that the Bus, after hitting the Microbus, pushed the Microbus for about ten seconds. PW-1 further stated that, after the accident, when she was leaving the place of accident for going to hospital, she found the Bus far away from the Microbus on the south side of the Highway.

(d) The above findings read with the statement of the first police officer, PW-5, that he found part roof of the Microbus torn lead us to believe that the testimony of PW-2 is credible and, as such, we hold that for overtaking another vehicle, the Bus was being driven at a high speed through the wrong lane resulting in a head-on collision with the Microbus, which was running through the correct lane on its left side.

143. The evidence on record with regard to the accident scenario lead us to conclude that the Bus-driver was driving the Bus recklessly at a high speed through a wrong lane. He is directly responsible for the accident causing the death of Tareque and four others and injuries to some others including Catherine (P.W.1).

144. We further conclude that the operators of the Bus—opposite-party Nos. 2 and 3 and also the Bus owner—opposite-party No. 4 had full knowledge about the condition of the Bus itself being operated on the Highway without a fitness certificate and also about ineligibility of the Bus-driver. Opposite-party No. 1 (the Bus driver) was engaged by the operators of the Bus with endorsement of the owner of the Bus. So, they are vicariously responsible for the loss suffered by the claimants.

145. Accordingly, we decide the responsibility part of issue No. 5 that opposite-party Nos. 1 to 4 are jointly responsible for the accident and are liable to pay the compensation as determined by us on the aspect of quantum thereof.

146. The liability of Reliance, as insurer, in relation to compensation has been discussed in the later part of this judgment under a separate heading.

147. Liability of Reliance, the Insurer

Reliance admits that it has issued an Insurance Policy covering the risk of an accident in which the Bus may be involved. But Reliance claims that, by issuing the policy, it has undertaken to pay specified amount of compensation on four aspects of such an accident, namely,- (1) Tk. 20,000/- against death of a person, (2) Tk. 10,000/- in case of serious injury to a person, (3) Tk. 5,000/- in case of simple injury to a person and (4) Tk. 50,000/- against damage to property resulting from an accident.

148. Reliance claims that, as per claim of the Bus owner/operators, it has discharged its liability under the policy as against the Bus and that since as the claimants never approached for any compensation as noted above, it has not paid any compensation to them. However, Reliance agrees to pay the above mentioned compensation to the claimants.

149. Reliance denies its liability to pay the compensation as claimed in this case on different heads.

150. **So, the issue before us is whether Reliance, as the insurer, has any liability to pay compensation beyond the limit admitted by it and, if so, to what extent**.

151. We have gone through the Insurance Policy document (Exbt.-B) and the relevant clause/portion thereof. This document under the heading "COMMERCIAL VEHICLE POLICY SCHEDULE" specifies the amounts of compensation in the following terms:-

> "*Limit of the amount of the Insurer's liability under Section II-1(ii) in respect of any one claim or series of claims arising out of one event as under:*
>
> *1) Death* *Tk. 20,000/-*
>
> *2) Permanent total disablement by Grievous hurt* *Tk. 10,000/-*
>
> *3) Temporary disablement by other hurt and requires medical attention not exceeding* *Tk. 5,000/-*
>
> 4) *Property Damage* *Tk. 50,000/-*"

152. The Policy document contains a further condition under heading *"Important Notice to the Policy"* as under:-

> *"The insured is not indemnified if the Vehicle is used or driven otherwise than in accordance with this Schedule.* ***Any payment made by the Company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act is recoverable from the insured.***
>
> *See the clause headed 'AVOIDANCE OF CERTAIN"*

153. The *"Avoidance of Certain Terms and Right of Recovery of the Policy"* reads as under:-

> *"Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person* ***to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1991***.
>
> *But the insured shall repay to the insurer all sums paid by the insurer which the insurer would not have been liable to pay but for the said provisions."*

154. On scrutiny of the Insurance Policy produced before us, it is evident that it does not directly refer to the claims of the nature as raised by the claimants/petitioners, for example the probable income that might be earned by the deceased victim, quantification of the loss of love, affection, care, etc. sustained by his heirs/dependants.

155. However, the Insurance Policy under heading *"Avoidance of certain terms and Right of Recovery"* vaguely recognizes the right of "a person indemnified by the Policy or any other person" to recover compensation under or by virtue of the Motor Vehicle Act, 1991. This clause stipulates that if the insurer (Reliance) has to pay compensation under the MV Act, 1991, Reliance may recover it from the insured. In other words, the principal liability to pay compensation under the Motor Vchicle Act, 1991 is to be borne by the insured.

156. It is noted that the Motor Vehicle Act, 1991, by itself is not the principal legislation on the subject, rather it is an amending Act, titled Motor Vehicles (Amendment) Act, 1991 incorporating certain amendment to the MV Ordinance.

157. On examination of the MV Ordinance and the MV Rules, we find that these statutes do not contain any provision relating to the amount of compensation to be paid by the insurer covering the risk of a third party.

158. The learned Advocates for both sides admit that the statutes are silent about the said amount and there is no case law on this subject in our jurisdiction. So, they have referred to the principles of law enunciated by various superior courts of India in various cases.

159. We have gone through and considered the principles laid down in Indian cases, with regard to the liability of the insurer in relation to third party claim.

160. It be noted that this issue arose in the Indian cases in view of requirement of obtaining insurance policies to cover the risks in operating various kinds of motor vehicles and the extent of liabilities under such insurance policies. It is further noted that section 95 of the Motor Vehicles Act, 1939 of India is substantially similar to section 110 of our MV Ordinance on the matter of requirements of policies and limits of liabilities.

161. Indian Supreme Court, in interpreting section 95 of the Motor Vehicles Act, 1939, has taken two different lines of approach as follows:-

(a) In the case of Amit Lal Sood and another vs Smt Kaushalya Devi Thapar and others {AIR 1998 (SC) 1433} it was held that insurer is liable to pay the entire award amount and then may recover the amount paid through court process.

The above noted view was followed by the Indian Supreme Court in the case of New Indian Assurance Limited vs Vimal Devi and others (MANU/SC/1087/2010).

(b) However, in the case of New India Assurance Compnay Limited vs C.M. Jaya and others (2 SCC 278), the above noted view taken in the aforesaid two cases and also the view taken in other cases, namely, Santi Bai case, Juglal Keshoris case were re-examiend by a Larger Bench of Indian Supreme Court, the issue of insurer's liability, observed and found as follows:-

" .....

The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. *However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be.* ***In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible.***

In the light of what is stated above, we do not find any conflict on the question raised in the order of reference between the decisions of two Benches of three learned Judges in Shanit Bai and Amrit Lal Sood aforementioned and, ***on the other hand, there is consistency on the point that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance Company is neither unlimited nor higher than the statutory liability fixed under***

Section 95(2) of the Act. *In Amrit Lal Sood case the decision in Shanti Bai is not noticed. However, both these decisions refer to the case of Jugal Kishore and no contrary view is expressed.*

In new India Assurance Co. Ltd. v. Ram Lal looking to the insurance policy that ***the appellant had undertaken to indemnify the insured to the extent of Rs. 50,000 only****, it was held that the High Court was in error in holding that the appellant was liable to pay the* ***entire amount of compensation which was more than*** *Rs 50,000 and that the liability of the appellant was limited to Rs 50,000.*

In a recent judgment in National Insurance Co. Ltd. v. Nathilal this Court, following the case of Jugal Kishore aforementioned, ***held that in view of the fact that no extra premium was paid towards unlimited liability as could be seen from the policy produced, the liability of the Insurance Company was limited to Rs. 15,000. The Court set aside the award to the Tribunal*** *and affirmed by the High Court.*

(c) In the premise, we hold that the view expressed by the Bench of three learned Judges in the case of ***Shanti Bai is correct and answer the question set out in the order reference in the beginning as under****:*

(d) In the case of the Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95(2) of the Act and would not be liable to pay the entire amount

……

……

……

It is not in dispute from the admitted copy of the insurance policy produced before the Court that the ***liability of the appellant is limited to Rs 50,000 in regard to the claim in question. The relevant clause in the policy relating to limits of liability reads:***

……..

It is also not the case that any additional or higher premium was paid to cover unlimited or higher liability than the statutory liability fixed as found in the term of the policy extracted above. In the light of the law stated above, it necessarily follows that the liability of the appellant is limited to Rs 50,000 as was rightly held by the Tribunal. The High Court committed an error in taking the contrary view that the liability of the appellant was unlimited merely on the ground that the insured had taken a comprehensive policy.

……

In the circumstances, we hold that the liability of the appellant-Insurance Company is limited to Rs 50,000, as held by the Tribunal.

……

The appeals are, therefore, allowed to the extent of limiting the liability of the appellant–Insurance Company to Rs 50,000, making ***it clear that it does not affect in any manner the liability of Respondents 4 and 5 (the truck-owner and the driver) to pay the full amount of the award……"***

162. In the instant case, it is in evidence that the insurer has undertaken to cover the risk of the accident to the extent of specified amount, as stated earlier. It is also in evidence that the Insurance Policy holders being the United Commercial Bank, Jhanaidah Branch, Jhanaidah, as mortgagee and Jahangir Kabir (Tuhin), Proprietor of M/S. Ruhin Motors as mortgagor, have not paid any additional amount of premuiem under the Insurance Policy (Exbit-B)

163. Thus, undoubtedly the Insurance Policy was issued covering limited liabiltity.

164. The provisions under title "the Avoidance of Certain Terms and Right of Recovery in the Insurance Policy" contains a rather vague indemnity clause in relation to "any other person," but only with reference to "Motor Vehicles (Amendment) Act, 1991, which does not contain any provision relating to the amount to be paid for covering the risk of a third party.

165. Thus, in the given situation of these facts, we can safely follow the principle laid down by the Indian Supreme Court.

166. Accordingly, we hold that Reliance has a limited liability to the exten of the stipulation in the Insurance Policy.

Liability of the Bank, if any

167. From the evidence of the witnesses as discussed hereinbefore, it is evident that Jahangir Kabir (Tuhin), by obtaining loan from the Bank (opposite-party No. 6), had purchased the Bus and the Bank was never in control and supervision of the Bus and it was not also responsible for operation of the Bus. The Bus was purchased by taking loan from the Bank by keeping it under mortgage. Therefore, the Bank is not responsible for payment of any compensation.

Joint Liability to Pay Compensation

168. Considering the entire evidence on record, we are of the view that opposite-party Nos. 1 to 5 are responsible for payment of compensation and that the insurance company i.e. Reliance's liability is limited to the extent as provided in the Insurance Policy. We are of the further view that the Bank is not liable to pay any compensation to the petitioner-claimants.

Quantum of Compensation

169. Now we need to determine the quantum of compensation to which the claimants are entitled to and the extent of the liability of opposite party Nos. 1 and 2-operators of the Bus, opposite party No. 3-the owner of the Bus, opposite party No. 4-the driver of the Bus and opposite party No. 5-Reliance, the Insurer of the Bus.

170. Neither the MV Ordinance nor the MV Rules nor any other statute prescribes any criteria or guideline in determining the quantum of compensation payable in case of a road accident except filing a claim case in exercise of power conferred by section 136 of the MV Ordinance, further amendment was made in the Motor Vehicles Rules, 1940 and a Form is included in the MV Rules and published **under section 173(1) of the MV Ordinance** in the Bangladesh Gazette (Extra Ordinary) on 7th July, 1984. So, we can safely follow the principles as laid down by the Superior Courts of this sub-continant in various cases.

171. In the case of *Sri Manmath Nath Kuri vs. Mvi. Md. Mokhlesur Rahman and another, reported in 22 DLR (SC)(1970) 51* their lordships of the Supreme Court of Pakistan observed as under:-

> *"26-**Assessment of damages in such a case must, therefore, necessarily be to some extent of a rough and approximate nature based more or less on guess work, for it may be impossible to accurately determine the loss which has been sustained by the death of a husband, wife, parent or child.***

> *27-No definite or hard and fast rule can, as such be laid down as to the matters which should be taken into account. But* ***this much can be said that only such damages can be given as can be shown to have been financially suffered by those who bring the action.*** *In estimating such damages the Court will, no doubt, take into account* ***the age of the deceased, his or her health, earning capacity and even the chances of advancement.*** *There must, however, be evidence of* ***"reasonable expectation of pecuniary advantage" and not of a "mere speculative possibility"****. Thus parents may recover for the loss of the probability that the deceased child would have contributed towards their maintenance and* ***children may recover for the loss of education, comfort and position in society which they would have enjoyed if the father had lived and maintained the income which had died with him.*** *The basis of the assessment is not the requirement of plaintiff but the money value of the assistance which the deceased might probably have given had he continued to live."*

172. The case of *Bangladesh Beverage Industries Limited vs Rawshan Aktar and others, reported in 69 DLR (AD) 196* arose from Money Suit No. 03 of 1991 in which claim for compensation was made by the relatives of the deceased victim of a road accident, endorsed the view taken by the Pakistan Supreme Court in the case of Sri Manmath Nath Kuri vs. Mvi. Md. Mokhlesur Rahman and another as quoted above.

173. The Appellate Division recorded the following findings in the said Bangladesh Beverage case:-

> *"……..*
> *……*
> *In the instant case the High Court Division having considered the material evidence on record was of the view that plaintiff-respondents are entitled to the compensation under claim Nos. 2 and 3. The High Court Division observed that pain, agony, suffering and loss of expectation of life as claimed in item Nos. 2 and 3 are tortuous and can be awarded. The High Court Division rightly observed that in respect of claim Nos. 2 and 3 affection, pain, suffering, mental agony, physical incapability and emotion are not calculable and if the court is satisfied that plaintiff is entitled to any compensation that can be only in lump sum and not on calculation. The High Court Division held that there is no subjective value in giving compensation on these to claims and it is the court which has to decide the compensation in lump as such. Accordingly, the High Court Division rightly underlined the standard of estimating the amount of damages as stated below:*
> *"It has already seen that there is no subjective value in giving compensation on these two claims i.e. item Nos. 2 and 3 and it is the court who will decide the compensation in lump as such. It needs to be emphasized that the standard for estimating the amount of damages in case of actionable negligence resulting in death must not be a subjective standard but an objective one and regard in this behalf is to be had to the earnings of the deceased at the time of his death, his future prospects, his life expectancy, the amount he would have spent on himself and on the support of his dependants, the economic condition of the country, the property left by him and the like. On this court ends of justice would be met if we award compensation to the tune of Taka*

1,50,00,000 on these two claims/items. This money on the fact of the given case, according to us is not unreasonable but good.……
…….
The plaintiff-respondents proved that the victim ***Mozammel Hossain Montu was the only earning member of the family who used to receive salary of Taka 5,968 per month as a journalist of the Daily Songbad and he used to write articles, poetry and scripts for play in the theatre and also earned Taka 5,000 (Five thousand) per month approximately.*** *The victim died at the age of 44 years and he would have served in the news paper industry as a journalist till he attains the age of 57 years. The victim would have received increments in each year and, as such, at the time of retirement the victim would have received Tk. 10,000 per month as salary. He would have earned more money by subscribing articles in different papers, magazines, periodicals and weeklies as such for 13 years. He would have received in all Taka 19,07,008 as the total salary as News Editor till his retirement……..”*

174. In the Bangladesh Beverage case, the Appellate Division recorded further observation and findings as follows:

“……..

It is the consistent view of the apex courts of the Sub-Continent and also of the courts of the United Kingdom that assessment of damages in such cases necessarily be to some extent of rough and approximate nature based more or less on guess work because it would be impossible to accurately determine the loss which has been sustained by the death of the victim who happened to be the husband and the father of the plaintiffs. It has also been observed in the decision reported in 22 DLR (SC) 51 at page 59 that although no rule of mathematical calculation can be adopted in every case yet it is the duty of the plaintiff to adduce some evidence to afford the court a reasonable basis for the ascertainment of the damages suffered. <u>The Supreme Court of Pakistan in the decision reported in 22 DLR (SC) 51 held that merely because some element of guess work has been introduced in the calculation it cannot be said that there has been any departure from the principles laid down in the decided cases for determining the quantum of damages in such cases.</u>

In the instant case we do not find any illegality in granting damage in item No. 1 to the tune of Taka 19,07,008 and in item No. 4 to the tune of Taka 32,40,000 by the High Court Division. As regards the amount of damages granted by the High Court Division in item Nos. 2 and 3 to the tune of Taka 1,50,00,000 [One crore fifty lacs] only we are of the view that there is no illegality in granting damages in item Nos. 2 and 3 but we find it difficult to agree with the amount of damages granted by the High Court Division because the wife working as an Associate Professor has been earning a remuneration which is relevant to meet the loss she would suffer and accordingly, her remuneration has to be adjusted in the assessment of damage under item No. 3. <u>We have already noticed that assessment of damages in such a case must necessarily be to some extent of a rough and approximate nature based more or less on guess work.</u> Considering the facts and circumstances of the case we are of the view that ends of justice would be best served if the damages granted in item Nos. 2 and 3 of their claim be reduced to the tune of Taka 1,20,00,000 (one crore twenty lac) only. In view of the foregoing

discussions and findings plaintiffs-respondents be awarded a decree to the tune of Taka 1,71,47,000 as compensation in respect of the following items:

i)	*For item No. 1*	*Tk.*	*19,07,008*
ii)	*For item Nos. 2 and 3*	*Tk.*	*1,20,00,000*
iii)	*For item No. 4*	*Tk.*	*32,40,000*
	Total:	*Tk.*	*1,71,47,008"*

(Bold and underlined, to put emphasis)

175. Following the principles quoted above, the Appellate Division in Bangladesh Beverage Industries Limited case reported in 69 DLR (AD) 196 decided the quantum of compensation on the 4 items of claims as follows:

i) For item No.1, loss of salary income- Tk. 19,07,008
ii) For item No. 2 and 3, pain and suffering caused to two minor sons and wife- Tk. 1,20,00,000
iii) For item No. 4, loss of gratuity Tk. 32,40,000
Total = Tk. 2,01,47,008

176. In the instant case, claimants have claimed compensation on nine items i.e. (1) loss of income Tk. 2,40,00,000/-, (2) loss of dependency suffered by claimant Nos. 1 and 2, the minor Tk. 2,50,00,000/-, (3) loss of dependency suffered by claimant No. 3, represented by Abu Tayab Masud Tk. 10,00,000/-, (4) loss of future advancement Tk. 10,00,000/-, (5) loss of estate Tk. 10,00,000/-, (6) loss of love and affection suffered by claimant Nos. 1 & 2 Tk. 2,50,00,000/-, (7) medical expenses of Claimant No. 1 Tk. 2,18,04,646/-, (8) funeral expenses Tk. 1,00,000/- and (9) damage to property (Microbus) Tk. 5,00,000/- in Total= Tk. 9,94,04,646/-.

177. Out of the above noted items, Item No.1, in our view, is not justifiable, simply because the death of Tareque has not resulted in the loss of income of the claimants, rather their security on account of their dependence on Tareque's income has been lost. Accordingly, we hold that all the 3 (three) claimants being wife, minor son and old mother are entitled to get compensation on item No. 2 under heading Dependency Suffered.

178. With regard to quantification of this item, we accept the evidence led by the claimants as credible. The claimants have produced the USA Income Tax Return (marked as X for indentification) showing that Tareque and Catherine had a combined monthly income of USD 76,944, equivalent to Tk. 5,00,000/- (five lacs)–. Therefore, Tareque's monthly income was Tk. 2,50,000/-. Tareque and Catherine Jointly used to maintain a Microbus with a driver and also used to live in a house in Dhaka. It is also in evidence that Tarque was an active man of 54 years pursuing his profession as a renowned film-maker. There is nothing on record to show that he had any health problem.

179. So, the principle followed in Bangladesh Beverage case and the criteria applied was the potential income of the deceased victim, as salaried person upto his retirement. Following similar criteria in this case, we hold that the quantum of compensation claimed by claimant

No.1 Catherine and claimant No. 2 Nishaad Binghamputra Masud on account of loss of their dependancy is reasonable, in that Tareque had a monthly income of Tk. 2,50,000/- and the claim is for 100 (one hundred months) i.e. total amount of Tk. 2,50,00,000/-.

180. Similarly, the compensation claimed on account of loss of dependency of Tareque's old mother Nurun Nahar (claimant No. 3) amounting to Tk. 10,00,000/- only is also reasonable.

181. Now comes up the other item being compensation on account of loss of love and affection. This is a sensitive item and there is no concrete and strict principle for quantifying love and affection in terms of money. So, compensation on this account (item No. 6) is in the nature of consolation.

182. We hold that in quantifying the compensation on account of loss of love and affection, the basic criteria is the relationship between the victim and the claimants. The evidence on record shows that the claimants were not only close and/or blood related persons, but had a continuous and visible manifestation of love. They used to live together and they were fully dependant on deceased victim Tareque.

183. In the Bangladesh Beverage case the Appellate Division allowed to the wife and minor children of the deceased victim an amount of Tk. 1,20,00,000/- against the claim of Tk. 3,00,00,000/- for the accidental death in 1991.

184. Considering the downward trend in purchasing power of taka as a currency, we hold that Tk. 2,00,00,000/- as against Tk. 2,50,00,000/- claimed in this case would be justified.

185. With regard to claim in item No. 4 (Loss of future Advancement) Tk. 10,00,000/-, we hold that this item is a remote one and it is merged with the compensation on account of loss of dependency. Therefore, we hold that this claim should not be allowed.

186. With regard to claim in item No. 5 (Loss of Estate) no evidence was led by the claimants so that compensation in this item can be allowed.

187. With regard to claim in item No. 7 (Medical Expenses of Catherine) for an amount of Tk. 25,452/-, we hold that this aspect is proved by P.W. 1 Catherine.

188. However, claim of the additional expenses incurred in USA by Catherine for treatment of damage caused to her eye and the claim on account of future expense of Tk. 2,17,79,194/- is not acceptable to us because P.W.7 Dr. Niaz Abdur Rahman, stated in his evidence that "…… It is true that it is written in the US medical report dated 7th March, 2017, ……**patient states July, 2011 her son was playing with plastic shovel and was poked with it in the OD (right eye), states she had pain short after.**" This report is available in the record, though not marked as exhibit from the claimants' side. So, Catherine could not prove that epi-retinal membrane was due to the result of the accident.

189. With regard to claim in item No. 8 (Funeral Expenses) for amount of Tk. 1,00,000/-, we hold that the death of victim Tareque in the accident justifies this claim.

190. With regard to claim in item No. 9, damage to property (the Microbus), we hold that an amount of Tk. 50,000/- is justified out of the claimed amount.

191. It is noted that the evidence on record, as discussed hereinbefore, shows that the insurance of the Microbus itself expired. Had the Insurance Policy of the Microbus been valid on the date of accident, the concerned insurance company would have been liable to pay the entire compensation relating to the damage of the Microbus.

192. Since we have held that the damage to the Microbus was caused as a result of the accident, in which the Bus is involved, Reliance as the insurer of the Bus, is liable to pay compensation for the amount of Tk. 50,000/- under the Insurance Policy for the Bus. The Insurance Policy covers the risk of damage to the party, the Microbus owners.

193. In view of the discussions and findings made hereinbefore, the petitioner-claimants are entitled to the following compensations:-

(i)	Loss of Dependency suffered by petitioner-claimant Nos. 1 and 2 … … … … … …	Tk. 2,50,00,000/-
(ii)	Loss of Love and Affection by petitioner-claimant Nos. 1 and 2	Tk. 2,00,00,000/-
(iii)	Loss of Dependency suffered by petitioner-claimant No. 3	Tk. 10,00,000/-
(iv)	Funeral Expenses for Deceased Tareque …	Tk. 1,00,000/-
(v)	Medical expenses for Treatment of petitioner-claimant No. 1-Catherine … … ……	Tk. 25,452/-
(vi)	Damage to the Property	Tk. 50,000/-
	Total	Tk. 4,61,75,452/-

193. The total amount of compensation as fixed above shall be paid by the opposite party Nos. 1 to 5 as decided earlier. The distribution of the amounts are discussed below:-

(1) Out of the aforesaid amount, the insurance company i.e. opposite-party No. 5-Reliance as per the Insurance Policy (Exbt.-B) would pay Tk. 80,000/- being Tk. 20,000/- for the death of Tareque, Tk. 10,000/- for the injury caused to Catherine (P.W.1), and Tk. 50,000/- as damage caused to the Microbus.

194. It is in evidence that OPW-1, Md. Jamir Hossain, Driver of the Bus, has some property and a house but not in Dhaka. So, we are of the view that he should be directed to pay Tk. 30,00,000/- out of the total amount.

195. Opposite-party Nos. 1 to 3, the controller-supervisor-operators and owner of the Bus respectively, would equally pay the remaining amount of Tk. 4,30,95,452/-.

197. To avoid complication of calculation while making payment to each of the petitioner-claiments the payments are to be made following the ordering part of the judgment.

198. Issue Nos. 5, 6 and 7 are decided as above.

199. Accordingly, it is

Ordered that

(1) the Transferred Miscellaneous Case No. 01 of 2016 arising out Miscellaneous Case No. 01 of 2012 (Manikganj) (Claimed Case) is allowed on contest in part with costs against opposite-party Nos. 1 to 5 and dismissed on contest without cost against opposite-party No. 6;
(2) Opposite party Nos. 1 to 3 shall jointly pay an amount of Tk. 4,30,95,452/- to the petitioner-claimants. Out of this amount, Tk. 10,00,000/- is to be paid to claimant No. 3 and the rest to claimant Nos. 1 and 2;
(3) Opposite-party No. 4 Jamir shall pay an amount of Tk. 30,00,000/- to the petitioner-claimant Nos. 1 and 2;
(4) Opposite-party No. 5 Reliance shall pay Tk. 80,000/- to the petitioner-claimant Nos. 1 and 2;
(5) The opposite-party Nos. 1 to 5 are directed to pay the aforesaid amounts within six months from date, failing which the claimants are at liberty to realize the same through court process in accordance with law.

10 SCOB [2018] HCD

HIGH COURT DIVISION
SPECIAL ORIGINAL JURISDICTION

WRIT PETITION NO. 3178 OF 2011

Moulana Md. Abdul Hakim alias Md. Abdul Hakim
..... Petitioner
Vs.
Government of Bangladesh and others
..... Respondents.

Mr. Rehan Husain, Advocate with
Ms. Asma Akhter, Advocate
..... For the Petitioner.

Mr. Md. Idrisur Rahman, Advocate
… For the Respondent No. 10.

Mr. Mahmudul Islam, Senior Advocate
and
Mr. Rokanuddin Mahmud, Senior Advocate
… Amici Curiae

Ms. Israt Jahan, A.A.G.
… For the Respondents.

Heard on: 3.1.2012, 4.1.2012 and 19.3.2012
Judgment on: 3.10.2013.

Present :
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Md. Ashraful Kamal

Article 102 of the Constitution of the People's Republic of Bangladesh:

Indeed, under our Constitutional scheme an aggrieved person, in order to agitate his claim and case in judicial review, can do so by invoking Article 102(1) and/or (2) depending on the nature of the grievance as well as of status of the perpetrator.
Article 102(1) comes into play in relation to the infringement of any fundamental right guaranteed under Part III of the Constitution. Article 102(2) presupposes the availability of the various Writs that may be appealed to for reviewing actions and operations in the public domain, such actions being otherwise the preserve of the Executive organ of the State affecting the citizenry in their contacts and dealings with the Executive and its functionaries. … (Para 9 & 10)

The emerging judicial consensus in this jurisdiction as noted earlier is that Article 102(a) (ii) allows for identifying amenability to judicial review not exclusively by reference to an obvious derivative public status of a person but increasingly by the public domain within which it operates and prevails irrespective of its derivative status. The ever increasing reality of public-private partnership of providing services to the public at large and in regulating public activity has blurred the traditionally held view that a Writ in Certiorari, in particular, under Article 102(2) can only validly be addressed to public functionaries. This traditional view indeed risks being exposed as fallacious as it belies the fact that public functionaries in the strictest sense have in reality long forsaken their perceived monopoly over public affairs and that private and public enterprise and endeavour are inextricably intertwined in the conduct of business of the Republic or of a local authority. … (Para 14)

Viewed from a different perspective, the postulation here, therefore, is that even given the truism that private persons or bodies generally do not have an overreach in the public realm, it cannot, however, be gainsaid that they never do, and in instances they do so there indeed remains the possibility of their treading on constitutional guarantees and arriving at erroneous and arbitrary decisions while performing a "public function" and unwarrantedly so. Such function could ideally have as its objective the granting of some collective benefit in the public realm. The complexities of social or economic enterprise in the public realm create opportunities for private bodies to strike a partnership with the public sector to keep the wheels of commerce and service delivery well-oiled and operational. Allowance is, therefore, made for private bodies and individuals to assume a hybrid character in discharging responsibilities in the public interest. … (Para 15)

Judgment

SYED REFAAT AHMED, J:-

1. In this Application under Article 102 of the Constitution a Rule Nisi was issued calling upon the Respondents to show cause as to why the Impugned Order vide Memo No. Ma.Gu.Da.Aa. 912 dated 12.2.2011 (Annexure-'J') signed and issued by the Respondent No. 10 purporting to dismiss the Petitioner should not be declared to be without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The Petitioner who is a Superintendant of a non-Governmental Madrasah has filed this Writ Petition challenging an order dated 12.2.2011 issued by the Respondent No. 10, the Chairman of the Madrasah's Managing Committee. The backdrop to the filing of this Application is that the concerned Upazila Nirbahi Officer upon first suspending the Petitioner formed an inquiry committee leading to a report adverse to the Petitioner. Thereafter, upon a show cause notice issued, the Petitioner was dismissed under Section 11 (ঙ) of বেসরকারী মাদ্রাসা শিক্ষকের (চাকুরীর অবস্থা ও শর্তাবলী) বিধি ১৯৭৯ on 28.11.2002 as submitted by the learned Advocate for the Petitioner Mr. Rehan Husain by reference to the said 1979 Rules. The dismissal order having received due approval of the Appeal and Arbitration Committee ("Committee"), Bangladesh Madrasah Education Board ("Board") on 22.7.2004, the present Petitioner filed Writ Petition No. 6855 of 2004 (hereinafter referred to as the "earlier Writ Petition") challenging the Memo dated 27.11.2004 issued by the Board's Registrar communicating such approval. It so transpired that the Petitioner, having been acquitted from a criminal case lodged against him, decided, however, not to prosecute the Rule issued in the earlier Writ Petition as per agreement with the Respondents leading to his reinstatement vide the Madrasah's Memo dated 30.7.2009. Having been granted a time-scale since and being duly paid up to December 2010, the Petitioner suddenly received a show cause notice on 30.1.2011 to which he replied on 7.2.2011. It is against this backdrop that he was dismissed vide Memo dated 12.2.2011 issued by the Respondent No. 10, Chairman of the Madrasah leading to the filing of this Writ Petition

3. In these proceedings, the Respondent No. 10 having at the outset raised reservation as to the reviewability of the Impugned Order issued by an ostensible private authority, this Court delved into the issue of maintainability by exploring the ambit of judicial review as we understand it today. Maneuvering within the perimeter of Article 102 of the Constitution in

an effort to understand better the avenues of protection pursuable thereunder, this Court posed certain queries to the Amici Curiae Mr. Mahmudul Islam and Mr. Rokanuddin Mahmud as to the interpretation of the Constitution pertaining, in particular, to the distinction in and between the application and the provisions of Article 102(1) and (2).

4. The purpose of the enquiry made of the Amici Curiae has been to ascertain the extent of judicial reviewability of actions and decisions of ostensible private bodies but which nevertheless operate in the public domain. Mr. Mahmudul Islam, relying upon the decisions, in particular, of the Appellate Division reported in *48 DLR (AD)121, 60 DLR (AD)12, 17 DLR (SC) 74* has submitted that it is a given that judicial review of an act of a private entity which is neither a statutory nor a local authority is not permissible under the Constitution. Proceeding on that premise, for his part Mr. Rokanuddin Mahmud has delved deeper into the forays made by Courts in various jurisdictions to chip away at that basic tenet so introduced by Mr. Islam.

5. Accordingly, Mr. Rokanuddin Mahmud has more pertinently introduced the premise of enquiry as postulates that the derivative status of a body's powers is of little concern as to the judicial reviewability of an order in the evolving realm of the Writ of Certiorari. Mr. Mahmud informs that such notion has long given way to the importance attached rather to the nature of the function that such body discharges or engages in. It is in that regard, discussing at length the judgment in the landmark case of *R. vs. Panel on Take-overs and Mergers, ex parte Datafin PLC and another ("Datafin")* reported in *(1987) QB 815,* Mr. Mahmud submits that in particular the English Courts have over the last two decades freed themselves of an overly restrictive approach in the application of the Writ of Certiorari. In doing so the English Courts have since come to recognize that instead of probing into the source of power exclusively the better more pragmatic view is instead to analyze the type of function performed by any decision-making body as can be made amenable to judicial review.

6. Tracing such jurisprudential development in this jurisdiction through cases like *Zakir Hossain vs. Bangladesh* reported in *55 DLR 130, Farzana Moazzem vs. Securities and Exchange Commission* reported in *54 DLR 66* and *Conforce Ltd. vs. Titas Gas Transmission and Distribution Co. Ltd.* reported in *42 DLR (HC) 33,* Mr. Mahmud has highlighted the fact that even in this jurisdiction it is now well recognized that the functional test approach enables a judicial review of an ostensibly private body but which nevertheless performs a public function that aims at benefiting the public at large.

7. Highlighting the fact, therefore, that public function need not be the exclusive preserve of the State, Mr. Mahmud interprets the provision of Article 102(2) of the Constitution as accommodating the idea of non-State actors operating in the commercial and professional arena that far exceed their nominally private terms of reference and takes them into the larger realm of functioning in the public domain. Article 102(2), therefore, permits of any function "*in connection with the affairs of the Republic*" which the Sate itself may not perform but necessarily other bodies, even private non-statutory bodies, may in substitution of the State or government perform, thereby, significantly complementing and supplementing the otherwise essential responsibilities of the Republic due its citizenry.

8. Mr. Mahmud has submitted that these bodies, therefore, almost assume the character of an alter ego of the State and should they have not been licensed or permitted to perform certain public duties then the Government or the local authority would invariably have had to step in and discharge obligatory functions in this regard. It is to be noted that such

empowerment of the private sector by the State is tolerated and licensed in the most obvious sectors of education and health.

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

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

11. Article 102(1) and (2)(a) (ii) (as envisages a Writ of Certiorari) for our purpose relevantly read thus:

> *"Article 102. Power of High Court Division to issue certain orders directions etc. (1) The High Court Division on the application of any person aggrieved may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.*
> *(2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-*
> *(a) on the application of any person aggrieved, make an order- ...*
> *(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect."*

12. Article 102(1) sets itself apart from Article 102(2) (a) (ii) by bringing within its purview a wider group of individuals and authority on whom the Court may on judicial review hold sway. When issues of fundamental rights are raised, the sanction under Article 102(1) is clearly of availability of redress against "*anyone*," or "*any authority*", inclusive of *"any person performing any function in connection with the affairs of the Republic*." The reference to government functionaries must accordingly, be seen as an appendage made to the broader category of *"anyone"* or *"any authority"* by way of abundant caution.

13. That appendage in Article 102 (1) appears in a similar avatar taking centre stage in a Writ of Certiorari under Article 102 (a) (ii), when fundamental rights aside the focus is on the legality or not per se of an action or decision emanating from any *"person performing functions <u>in connection with</u> the affairs of the Republic or of a local authority… ."*

(Emphasis added by this Court).

14. The emerging judicial consensus in this jurisdiction as noted earlier is that Article 102(a) (ii) allows for identifying amenability to judicial review not exclusively by reference to an obvious derivative public status of a person but increasingly by the public domain within which it operates and prevails irrespective of its derivative status. The ever increasing reality of public-private partnership of providing services to the public at large and in regulating public activity has blurred the traditionally held view that a Writ in Certiorari, in particular, under Article 102(2) can only validly be addressed to public functionaries. This traditional view indeed risks being exposed as fallacious as it belies the fact that public

functionaries in the strictest sense have in reality long forsaken their perceived monopoly over public affairs and that private and public enterprise and endeavour are inextricably intertwined in the conduct of business of the Republic or of a local authority.

15. Viewed from a different perspective, the postulation here, therefore, is that even given the truism that private persons or bodies generally do not have an overreach in the public realm, it cannot, however, be gainsaid that they never do, and in instances they do so there indeed remains the possibility of their treading on constitutional guarantees and arriving at erroneous and arbitrary decisions while performing a "public function" and unwarrantedly so. Such function could ideally have as its objective the granting of some collective benefit in the public realm. The complexities of social or economic enterprise in the public realm create opportunities for private bodies to strike a partnership with the public sector to keep the wheels of commerce and service delivery well-oiled and operational. Allowance is, therefore, made for private bodies and individuals to assume a hybrid character in discharging responsibilities in the public interest. How has this Court, therefore, to accept the intrinsic worth of such an assumption as posited by Mr. Rokanuddin Mahmud? The mode of ascertaining the strength of that argument has been to delve specifically into the legacy of certain English cases and examine the extent to which an entrenched judicial view has emerged since to clothe any identifiable test of reviewability with the status of invariability. That line of enquiry has brought to fore the *Datafin* test as highlighted by Mr. Rokanuddin Mahmud.

16. In *Datafin* the Court of Appeal was concerned with the actions of the Panel on Take-overs and Mergers which it termed *"a truly remarkable body"* in that it *"is an unincorporated association without legal personality"*, thereby, performing its functions without visible means of legal support. The Panel, the Court of Appeal found, is effectively a *"self-regulating"* body lacking any authority de jure but exercising considerable authority de facto in *"devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers ... ."* The issue of judicial reviewability of the Panel's actions wielding considerable collective power compelling compliance by others loomed large in this case given the very real potential of exercise of such powers arbitrarily and manifestly unfairly. Sir John Donaldson MR in finding that the Court in these circumstances has jurisdiction to entertain applications for the judicial review of the Panel's decisions considered two opposing views forwarded by Counsel for either side in this regard. Counsel for the Panel submitted that the Queen's courts' historic supervisory jurisdiction does not extend to a body as the Panel given that the Panel's power is not derived from legislation or the exercise of the prerogative. On the other hand, Counsel for *Datafin* submitted this to be a too narrow a view arguing "*that regard has to be had not only to the source of the body's power , but also to whether it operates as an integral part of a system which has a public law character"* (Emphasis added by this Court). Sir John Donaldson MR in these circumstances revisited at length the judgment in *R. v. Criminal Injuries Compensation Board, ex p Lain* reported in *[1967]2 All ER770 at 778,* and in *[1967]2QB 864 at 882* where Lord Parker CJ said that the exact limits of the ancient remedy of Certiorari had never been and ought not to be specifically defined. The true inspiration for intervention in Certiorari for Sir John Donaldson MR, however, is derived from Diplock LJ's observations in *Lain* thus:

> *"The jurisdiction of the High Court as successor of the court of Queen's Bench to supervise the exercise of their jurisdiction by inferior tribunals has not in the past been dependent on the source of the tribunal's authority to decide issues submitted to its determination…*

The earlier history of the writ of certiorari shows that it was issued to courts whose authority was derived from the prerogative, from royal charter, from franchise or custom, as well as from Act of Parliament. Its recent history shows that as new kinds of tribunals have been created, orders of certiorari have been extended to them too and to all persons who under authority of government have exercised quasi-judicial functions. ...

If new tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics on which the subjection of inferior tribunals to the supervisory control of the High Court is based. What are these characteristics? It is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right or liability. Its determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates. It is not even essential that the determination must have the result, for there may be some subsequent condition to be satisfied before the determination can have any effect on such legal rights or liabilities. That subsequent condition may be a later determination by another tribunal (see R. v. Postmaster General, Ex p. Carmichael ([1928]1 KB 291) R. v. Boycott, Ex p. Keasley ([1939]2 All ER 626, [1939]2 KB 651)). Is there any reason in principle why certiorari should not lie in respect of a determination where the subsequent condition which must be satisfied before it can affect any legal rights or liabilities of a person to whom it relates, is the exercise in favour of that person of an executive discretion as distinct from a discretion which is required to be exercised judicially?" (Emphasis added by this Court)

17. Sir John Donaldson's view that in the absence of legislation certain bodies must not continue to be "*cocooned*" from judicial gaze and attention, was carried forward further by Lloyd LJ in *Datafin* when he held that where *"there is a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility."* This led him to conclusively find against the supposition *"that the source of power is the sole test whether a body is subject to judicial review or not."*

18. In the unreported judgment in *R. vs. The London Metal Exchange ex p. Albatros Warehousing BV of* 30.3.2000, Mr. Justice Richards considered the issue of what constitutes a public function. In doing so, he referred to the *Datafin Case,* as well as the judgment in *R vs. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* reported in *[1993] 1 WLR 909,* and *R v. Lloyd's of London, ex parte Briggs* reported in *[1993] 1 Lloyd's Rep 176*. Mr. Justice Richards in doing so premised his enquiry on the need to make a broad assessment of all circumstances of a case and, in particular, on the extent to which *"the powers can be said to be woven into a system of governmental control"* Referring first to the *Datafin* Judgment Mr. Justice Richards cited the oft-quoted observation of Lloyd LJ thus:

"Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of a private arbitration, then clearly the arbitrator is not subject to judicial review.

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law

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

19. The decision in *R vs. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* reported in *[1993] 1 WLR 909*, was taken note of in *Albatros Warehousing BV* in the context of Sir Thomas Bingham's observation in *Aga Khan* that the effect of the decision in *Datafin* was *"to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation…"*(Emphasis added by this Court). This concept of the function of the any public body being *"woven into any system of governmental control"* (Emphasis added by this Court) as highlighted by Sir Thomas Bingham in *ex parte Aga Khan* would eventually find further elaboration in *Poplar Housing Association vs. Donoghue* (2006) as will be discussed below.

20. Moving on to the case of *R. vs. Lloyd's of London, ex parte Briggs* reported in *[1993] 1 Lloyd's Rep 176,* Mr. Justice Richards in *Albatros Warehousing BV* noted Leggatt LJ's observation in *Briggs* that in determining whether a particular function is public or private would depend on detecting a public law element in the relationship between a decision-maker and an affected party as places such relationship within the public domain and so renders it amenable to judicial review.

21. Before proceeding on to the *Donoghue Case*, it shall suffice to note at this juncture that Murray Hunt in a Chapter in the *"The Province of Administrative Law" (ed. Michael Taggart, Hart Publishing, January 1, 1997)* in elaborating on the legal-philosophical premise of a court's jurisdiction over the exercise of non-statutory powers spoke of the redundancy of identification of the source of a body's power in determining its "public" status thus:

"The test for whether a body is "public", and therefore whether administrative law principles presumptively apply to its decision making, should not depend on the fictional attribution of derivative status to the body's powers. The relative factors should include the nature of the interests affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction, and the nature of the context in which the body operates. Parliament's non involvement or would be involvement, or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant to answering these questions. The very existence of institutional power capable of affecting rights and interests should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would be source."(Emphasis added by this Court)

22. This Court notes that "*The Province of Administrative Law*", being a compilation of essays, dwells on the phenomenon of the expanding frontier of Administrative Law through judicial activism in various jurisdictions as the UK, and US, Canada, Australia and New Zealand. As one review of this book reads aptly in almost mirroring the observation in *Datafin*:

> *"During the past decade, administrative law has experienced remarkable development. It has consistently been one of the most dynamic and potent areas of legal innovation and of judicial activism. It has expanded its reach into an ever broadening sphere of public and private activities. Largely through the mechanism of judicial review, the judges in several jurisdictions have extended the ambit of the traditional remedies, partly in response to a perceived need to fill an accountability vacuum created by the privatization of public enterprises, the contracting-out of public services, and the deregulation of industry and commerce. The essays in this volume focus upon these and other shifts in administrative law."*

23. As Lloyd LJ in *Datafin* and Murray Hunt as above explored at length the "public" character of a body or authority derived from its institutional power and capacity to affect significantly any individual's rights and interests, thereby, justifying a remedy in Certiorari, the judgment in *Poplar Housing Association vs. Donohue* reported in *(2001) 1 EWCA Cir 595* and *(2002) QB 48* witnessed the Court of Appeal stressing on the administrative structural inter-connectedness of private and public bodies as an additional facet to the test of "public" character, Therefore, in dealing with the term *"public authority"* as arising within Section 6 of the Human Rights Act, 1998, the Court of Appeal in *Donoghue* significantly elaborated on the test of the *"extent of control over the function exercised by another body which is a public authority"* as an important determinant of the act of an ostensible private body assuming public dimensions. In elaborating on that test and carrying the argument in that regard a notch further than *ex parte Aga Khan,* Lord Woolf CJ observed thus:

> *"What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public." (Emphasis added by this Court).*

24. This Court notes that a snapshot of what has been achieved by *Datafin, Donoghue* and the other cases cited above in terms of the modus operandi of ascertaining the public denominator of any act comes across in the judgment in *Hampshire County Council v. Beer* (2003) that revisited the ambit of the notion of the public element of a private act and its determinants. Dyson LJ accordingly said:

> *"It is clear from the authorities that there is no simple litmus test of amenability to judicial review. The relevant principles tend to be stated in rather elusive terms. There was a time when courts placed much emphasis on the source, rather than the nature, of the power being exercised by the body making the impugned decision. If the pwer derived from statute or the prerogative, then it was a public body and the decision was amenable to public law challenges. If the source was contractual, then public law had no part to play. The importance of the seminal decision in R v. Panel on Take-overs and Mergers, ex p Datafin Plc [1987] 1 QB 815 was its recognition of the fact that the issue of amenability to judicial review often requires an examination of the nature of the power as well as its source"*

25. Noting further that in *Datafin* Lloyd LJ did not explain what he meant by "*public law functions*", Dyson LJ found the *Datafin* test of *"public element"* to be one "*which can take many forms"* and as being one expressed in very general terms. In that context, taking a cue from Lord Woolf CJ's observations in *ex parte Donoghue* that what could make an act

"which would otherwise be private, public is a feature or a combination of features which impose public character or stamp on the act", Dyson LJ further enunciated the exercise a court must undertake to ascertain the true nature of such feature thus:

> *"It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted. There is a growing body of case-law in which the question of amenability to judicial review has been considered. From these cases, it is possible to identify a number of features which point towards the presence or absence of the requisite public law element." (Emphasis added by this Court).*

26. Aside from the fact that the common law pronouncements above considered against our Constitutional context necessarily operate to blur the distinction between the diverse situational approach taken under Article 102 (1) and (2), the otherwise pronounced and distinct impression that this Court is left with from a perusal of the authorities cited above is significantly that the dividing line between "public and private", is, at best, vague. What can, however, be asserted with certainty is that the question of whether an activity has sufficient public clement to it is quite properly a matter of fact and degree ascertainable from a consideration of each given case on its merits. But it is nevertheless indisputably well-established by now, and as held by the Privy Council in *Jeewan Mohit v. The Director of Public Prosecutions of Mauritius* reported in *(2006) UKPC 20* that the principle enunciated in *Datafin* is invariably the effective law, or rather the *"invariable rule"* entrenched in judicial psyche.

27. That matter of "*fact and degree*" being a determinant of the public element of any ostensible private authority's operational ambit has struck a chord with this Court in delving into the facts and issues raised in this Writ Petition. In that regard, this Court has had to examine the extent of the Madrasah Managing Committee Chairman's capacity to affect the rights and interests of the affected Petitioner. Also examined has been such authority's capacity to so act being inextricably enmeshed in a complex regulatory regime that links it to a higher authority that is a creature of statute and resultantly is a repository of statutory powers including that of oversight to the extent of overturning, ratifying or confirming decisions emanating from such Chairman.

28. It is in that sense that the Impugned Order in this Court's view may easily acquire, and as viewed purely from the *Datafin* perspective, a hybrid character in that being issued by the Respondent No. 10 in his capacity as Chairman, Madrasah Managing Committee the Order is clearly meant to operate in the public domain. Furthermore, the Impugned Order's public denomination has to be gauged against the provisions of the *The Madrasah Education Ordinance, 1978 (Ordinance No. IX of 1978)* ("Ordinance") and the বাংলাদেশ মাদরাসা শিক্ষা বোর্ড, ঢাকা (গভর্ণিং বডি ও ম্যানেজিং কমিটি) প্রবিধানমালা, ২০০৯ ("2009 Regulations") and the resultant statutory prescription of the Managing Committee's authority to be exercised under the constant and active oversight of the Committee and the Board. It is not disputed by either party that both the Committee and the Board exercise and discharge statutory authority in the public domain and in their capacities as instrumentalities of the State. By that reason alone clearly, and

applying the *Datafin* test, therefore, the action of the Respondent No. 10 falls equally to be reviewed under Article 102(2) of the Constitution.

29. Turning to the Petitioner's case, it is contended that the Impugned Order was passed illegally and should be declared to have been passed without lawful authority and of no legal effect for a host of reasons. It is argued that the Impugned Order is stated to be final and no approval has been taken from the Board and the Committee has not examined it as required under the law i.e., Rule 12 of the 1979 Rules and Regulation 41(2)(O)(2) of the 2009 Regulations.

30. Rule 12 reads thus:

> *"১২। শাস্তি প্রদানের ক্ষমতাঃ*
> *নিয়োগকারী কর্তৃপক্ষ শাস্তি প্রদানের ক্ষমতাপ্রাপ্ত। তবে শর্ত থাকে যে, বোর্ডের আপীল ও সালিশী কমিটি কর্তৃক পরীক্ষা-নিরীক্ষা ছাড়া এবং বোর্ড কর্তৃক অনুমোদন ছাড়া শিক্ষককে বরখাস্ত বা অপসারণ করা যাবে না।*
> (emphasis added by this Court).

31. Regulation 41(2) (O)(2) reads thus:

> *"৪১। গভর্ণিং বডি বা, ক্ষেত্রমত, ম্যানেজিং কমিটির ক্ষমতা ও দায়িত্ব।-*
> *(১) গভর্ণিং বডি বা, ক্ষেত্রমত, ম্যানেজিং কমিটি সংশ্লিষ্ট মাদরাসা পরিচালনা, আর্থিক ও প্রশাসনিক ব্যবস্থা তদারকীকরণ, লেখাপড়ার মান নিশ্চিতকরণার্থে কার্যকর পদক্ষেপ গ্রহণ, শৃঙ্খলা বজায় রাখা এবং রক্ষণাবেক্ষণ সংক্রান্ত কাজের দায়িত্ব পালন করিবে।*
> *(২) গভনিং বডির বা, ক্ষেত্রমত ম্যানেজিং কমিটির নিম্নরুপ ক্ষমতা থাকিবে, যথাঃ ...*
> *(ঘ) শৃঙ্খলামূলক কার্যাদিঃ...*
> *(২) শিক্ষক-কর্মচারীগণের চাকুরির শর্তাবলী অনুসরণে বিভাগীয় ব্যবস্থা গ্রহণ ও দন্ড অনুমোদন, তবে অপসারণ বা বরখাস্তের বিষয়ে বোর্ডের পূর্বানুমোদন গ্রহণ ব্যতীত উক্তরুপ কোন দন্ড আরোপ করা যাইবে নাঞ।* (Emphasis added by this Court).

32. The Respondent No. 10 through an Application for vacating the Order of stay has stated that the Impugned Order has been acted upon. In other words, the Impugned Order of dismissal is to be treated as final notwithstanding the otherwise mandatory approval of the Board remaining wanting and outstanding. In fact, the approval is assumed to be in existence by the Respondent No. 10 by reference to the earlier Memo dated 27.11.2004 which pertained to the earlier dismissal Order but clearly was overtaken by supervening events, most notably by the Petitioner's reinstatement on 30.7.2009. That supervention, this Court finds, must operate to the total exhaustion of that earlier episode of disciplinary action taken against the Petitioner. In other words, given that there has been a flagrant disregard of the 1997 Rules and the 2009 Regulations in initiating afresh the requisite vetting process and securing final approval by the Board, there is, therefore, clearly no justifiable ground to assume that such approval of 2004 can any longer be in force. The Impugned Order, being so shorn of any legal basis, is, accordingly, not only illegal but also amounts to a colourable and arbitrary exercise of authority.

33. It is at this juncture that the learned Advocate for the Petitioner Mr. Rehan Husain has vigorously argued on the maintainability of this Writ Petition. In taking up the gauntlet thrown down by the learned Advocate for the Respondent No. 10 Md. Idrisur Rahman, Mr. Husain has satisfactorily invoked the very tests of determining the public element of any authority's functions as explored, explained and perfected by the decisions in *Datafin, Donoghue,* and *Aga Khan*. In doing so, Mr. Rehan Husain, keeping squarely within the bounds of the challenge thrown him by Mr. Rahman as to the questions of reviewability of

the Impugned Order and the maintainability of this Writ Petition, has submitted on the 'functional approach' to best determine the amenability to judicial review of the Impugned Order. In that context, Mr. Husain has satisfactorily argued that the Chairman of the Managing Committee of a Non-Governmental Madrasah in discharging his powers and duties engages effectively in regulating the service of teachers. By doing so, the Chairman is seen to wield considerable authority in the education sector. In that regard, the Chairman remains a repository of power that otherwise is the preserve of the State under Article 15(a) and 17 of the Constitution to ensure and provide education. The Respondent No. 10 Chairman, resultantly, finds himself as part of a statutory regulatory regime evidenced in the Ordinance, the 1979 Rules and 2009 Regulations, discharging functions for and on behalf of the State subject to a well-defined hierarchical order of compliance and oversight.

34. *But,* this is also a case, Mr. Rehan Husain stridently argues, that is far more compelling for judicial review than is immediately apparent. Mr. Husain points out significantly further in this regard that the appeal to the public status of the Respondent No. 10 Chairman in the present case is all the more compelling given that in any case under Section 30 of the Ordinance of 1978

> "*Every member of the Board and ... and every person appointed for carrying out the purpose of this Ordinance, shall be deemed to be a public servant within the meaning of section 21 of the Penal Code…"*

35. Moreover, Mr. Husain establishes the derivative public status of the Office of the Chairman, Managing Committee is statutorily defined in Regulation 8 of the 2009 Regulations thus:

> *"৮। ম্যানেজিং কমিটির সভাপতি নির্বাচন।- (১) দাখিল স্তরের প্রত্যেক বেসরকারি মাদরাসার সভাপতি ব্যতীত অন্যান্য সদস্য নির্বাচন সম্পন্ন হইবার অনধিক সাত দিনের মধ্যে শিক্ষা প্রতিষ্ঠান প্রধান সভাপতি নির্বাচনের উদ্দেশ্যে ম্যানেজিং কমিটির উক্তরুপ নির্বাচিত সদস্যগণের একটি সভা আহবান করিবেন।*
>
> *(২) উক্ত ম্যানেজিং কমিটির উপস্থিত সদস্যগণের মধ্য হইতে তাহাদের দ্বারা মনোনীত, ম্যানেজিং কমিটির সভাপতি পদে প্রতিযোগী নহেন, এমন একজন সদস্য সভায় সভাপতিত্ব করিবেন।*
>
> *(৩) উক্ত সভায় উপস্থিত সদস্যগণের সংখ্যাগরিষ্ঠের সমর্থনে কমিটির সদস্যগণের মধ্য হইতে অথবা স্থানীয় শিক্ষানুরাগী ব্যক্তি, খ্যাতিমান সমাজসেবক, জনপ্রতিনিধি বা অবসরপ্রাপ্ত প্রথম শ্রেণীর সরকারি কর্মকর্তাগণের মধ্য হইতে ম্যানেজিং কমিটির একজন সভাপতি হইবে।"*

36. Based on the discussion above, this Court finds that it is indeed reposed with the authority under Article 102 in general of the Constitution, in the facts and circumstances of this case, to consider and dispose of the Rule Nisi. In this regard, this Court holds that the Impugned Order being issued by the Respondent No. 10, Chairman, Managing Committee of the Madrasah does indeed operate in the public domain **both in the derivative and the functional sense** to affect the rights and interests of the Petitioner through unlawful intervention without legal sanction and results in a scenario that is clearly envisaged in both Article 102(1) and Article 102(2) of the Constitution making the Petitioner's grievances in this Writ Petition amenable to judicial review by invocation of the said Article.

37. Upon a substantive consideration of the Rule delving into the merit of this case it is evident that the Impugned Order presupposes a decision of the Committee concerning the dismissal of the Petitioner and predicated on which the Impugned Order appears to have been issued. No documents on record are, however, found attesting to such a decision being made

by such Committee or indeed significantly of the final endorsement of that Committee's decision by the Board itself.

38. A perusal of the 1997 Rules with the 2009 Regulations in particular reveals that such process of disciplinary action resulting in a dismissal of any functionary of a Madrasah like the Petitioner without exception in law requires active investigatory intervention by the Committee and can only be validly imposed and effected upon a prior express approval of the Board. Evidently such mandatory compliance measures have completely been skipped over in the Petitioner's case.

39. The facts as presented to this Court are indicative of the Petitioner's long-standing yet troubled relationship with the Madrasah for many years now. An initial phase of discord between the two parties, it is noted, came to be investigated and deliberated upon extensively with the active participation of the Petitioner and in due course came to a close with a decision of the Board of 2004 in sanctioning the dismissal of the Petitioner.

40. Between that Order of 2004 and the Impugned Order of 2011, the facts on record bear testimony to certain supervening developments primarily in the form of criminal proceedings instituted against the Petitioner, his eventual exoneration and acquittal from the charges brought there under and, significantly, his negotiated reinstatement back into the same Madrasah on the basis of such exoneration and acquittal upon the approval of the Managing Committee in 2009.

41. There is very little on record to explain to this Court as to how all this come to pass. The reinstatement of 2009 represents the beginning of a new chapter in the Petitioner's relationship with the Madrasah which appears to have progressed concurrently in 2010 and 2011 with the Madrasah in general and the Managing Committee in particular seeking the initiation of disciplinary measures against the Petitioner. Yet here again, documents on record chiefly in the form of a notice to show cause and the Petitioner's written response are in substantiation of an initiation of process of inquiry into certain allegations but are not further accompanied by any information or substantiating documents of a duly instituted and continued process of determination based on the principle of natural justice or indeed due subscription to the provisions of the Ordinance and the Rules in allowing that process to reach its natural legal conclusion with the active involvement of the Committee and finally the Board as the ultimate arbiter. It is, therefore, this Court's finding that the Impugned Order in the manner in which it has been issued and formulated is marred by arbitrariness seriously and irreparably prejudicing the Petitioner's legitimate interests.

42. The law, this Court finds, reflected in the Ordinance as well as the 1979 Rules, and 2009 Regulations itself prescribes an investigation of the circumstances concerning both the Petitioner's reinstatement in 2009 as well as the issuance of the Impugned Order by the specifically assigned statutory authority being the Committee and the Board. It is, therefore, deemed prudent at this stage not to encroach on the jurisdiction of such statutory authority in this regard and consequentially to refer this matter to the Board with a direction to revisit the facts that have been a matter of some concern to this Court and arrive at a final decision in supersession of the Impugned Order of 2011.

43. Given the facts above, this Court is now inclined to dispose of the Rule with a specific direction upon the Chairman and Registrar of the Bangladesh Madrasah Education Board, the Respondent Nos. 3 and 4 respectively, to fully acquaint themselves with the facts and

circumstances of the second round of appointment and termination of the Petitioner as sought to be effected by the Impugned Order and duly arrive at a final decision on the Petitioner's fate within a period of 3(three) months from the date of receipt of a certified copy of this Judgment and order. Until such time, and in the interest of justice, it stands to reason to direct all the Respondents to allow the Petitioner to continue to discharge his function as a Superintendent of the Madrasah without let or hindrance.

44. In the result, the Rule is disposed of with the directions above.

45. There is no Order as to costs.

46. Communicate this Judgment and Order forthwith.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION NO. 10701 of 2015.

Bangobir Kader Siddiqui, Bir Uttom,Son of late Mohhamamed Abdul Ali Siddiqui and late Lotifa Siddiqui, Kalian, Sakhipur Upazilla, District-Tangail.
…… Petitioner.

Vs.

Chief Election Commissioner, Sher-E-Banglanagar, Dhaka and others.
..... Respondents.

Mr. A.J. Mohammad Ali, Senior Advocate with
Mr. Raghib Rouf Chowdhury,
Mr. Rubaiyat Hossain,
Mr. Raisul Islam and
Mr.Md. Habibur Rahman Sarker, Advocates
… For the petitioner.

Mr. Mahbubey Alam, Senior Advocate with Mr. Md. Abdul Hai,
Mr. A.Z.M. Fariduzzaman, Advocates
…. For the respondent No.5.

Dr. Mohammed Yeasin Khan,
Ms. Shanzana Yeasin Khan, Advocates.
… For the respondent Nos.1-2.

Heard on 13.01.2016, 21.01.2016, 25.01.2016 27.01.2016,, 28.01.2016, 31.01.2016 &
Judgment on 04.02. 2016.

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Zafar Ahmed

Constitution of the People's Republic of Bangladesh, Article, 102
Any dispute whether that relates to acceptance or non-acceptance of the candidature of the particular candidate should be brought for a decision before a election Tribunal as election dispute. ... Para 26)

In election matter, even when it ensues out of a pre-election dispute, this Division cannot invoke Article 102 of the Constitution, election tribunal is the only forum, except on a very limited ground of corum non-judice or malice in law. The discipline of law in this sphere that has been taken a positive shape drawing it's inspiration from the constitution and the consisting judicial pronouncements should not be disturbed in any manner. ... (Para 36)

Judgment

Md. Ashfaqul Islam, J:

1. The Rule under adjudication, issued on 21.10.2015 was in the following terms:
"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the order dated 18.10.2015 (Annexure-"J") passed by the respondent No.1 and 2 dismissing the petitioner 's Election Appeal No.04/2015 and affirming the order dated 13.10.2015 passed by the respondent No.3 (Annexure- "C") rejecting the nomination

papers of the petitioner should not be declared to have been issued without any lawful authority and are of no legal effect and why the respondents should not be directed to accept the nomination papers of the petitioner and allow him to participate in the By-Election-2015 of Constituency 133 Taingail-4.

2. At the time of issuance of the Rule this Division stayed the operation of the orders dated 13.10.2015 and 18.10.2015 (Annexure- "C" and "J") respectively and also directed the respondent No.1-3 the accept the petitioner's nomination papers in respect of By-Election-2015 of the Constituency-133, Tangail-4 and allow him to contest in the election. Against the ad-interim order of Election Commission Moved Civil Miscellaneous Petition No. 117/ 2015 before the Appellate Division wherein Appellate Division passed the following order:

"Heard the learned Advocate and perused petition and stayed filed by the chief Election Commissioner"

The order of stay passed by the learned Judge-in-Chamber shall continue till disposal of the Rule pending before the High Court Division. A Division Bench presided over by Ashfaqul Islam, J, is directed to dispose of the Rule by 31.01.2016 positively.

In the meantime, the interim order passed by the High Court Division be stayed.

This petition is accordingly disposed of with the above observation and direction."

3. Averments figure in the petition leading to the Rue are as under:-

The petitioner is one of the most famous organizers of the Bangladesh Liberation War who made an unparallel contribution in the War Liberation and independence of Bangladesh. He was elected as the Member of Parliament on two successive occasions in the years 1996 and 2001. The petitioner is the President of Krishak Sramik Janata League. Respondent No.1 herein is the Chief Election Commissioner, Sher-E-Banglanagar, Dhaka; the respondent No.2 is the Election Commissioner of Bangladesh, represented by the Chief Election Commissioner, Sher-E-Banglanagar, Dhaka; the respondent No.3 is the Returning Officer, 133 Tangail-4 Bye-Election-2015 and the respondent No.4 is the Government of Bangladesh, represented by its Secretary, Prime Minister's Secretariat and respondent No.5 is the Agrani Bank Limited having its Head office at Motijheel C/A, and Branch office, known as Tangail Branch, Tangail.

4. In this petition the petitioner impugns the order dated 18.10.2015 issued by the respondent No.1 and 2 dismissing the petitioner's appeal by affirming the order dated 13.10.2015 rejecting the petitioner's nomination papers by the respondent No.3 being illegal, arbitrary and without lawful authority. The Constituency 133 Tangail-4 fell vacant on 01.09.2015 following the resignation of the then Member of Parliament of that constituency. Following the vacancy, the Election Commissioner, by its Notification bearing No.17.00.0000.034.36.02815.302 dated 15.09.2015 declared the schedule of the Bye-Election in respect of the said constituency in the following manner:-

Last date of filing nomination papers	30.09.2015
Scrutiny of the nomination papers by the Returning Officer.	03.10.2015
Withdrawal of nomination papers	11.10.2015
Election/Poll	28.10.2015

5. The above schedule was subsequently changed by the respondents by issuing its further Notification dated 16.09.2015 in the following manner:

Last date of filing nomination papers	11.10.2015
Scrutiny of the nomination papers by the	13.10.2015

6. The petitioner in terms of the above schedule submitted his complete set of nomination paper to the respondent No.3 on 11.10.2015 enclosing the relevant documents by searing affidavit etc. and respondent No.3 granted a receipt of receiving the same. In terms of the subsequent schedule, the date fixed for scrutiny of nomination papers was on 13.10.2015. The respondent No.3 upon scrutiny of the petitioner's nomination papers rejected the same under section 12 of the representation of the People Order 1972 (hereinafter referred to as "RPO 1972") and on the holding that the Sonar Bangla Prokowsholi (Pvt.) Ltd. of which the petitioner is the Chairman was defaulter lonee (Annexure- "C").

7. The petitioner being aggrieved by and dissatisfied with the aforesaid order dated 13.10.2015 rejecting the nomination paper, preferred an appeal on 16.10.2015 before the respondent No.1 being Election Appeal No.04 of 2015 on different grounds.

(a) That the petitioner is the Chairman of Sonar Bangla Prokowsholi Sangshta (Pvt.) Ltd. in the name of the Company availed credit facilities for running of its business. Since his company could not pay off the said loan in time, the loanee company applied to the Head Office of the proforma respondent No.5-Agrani Bank Limited on 12.08.2015 seeking reschedule of the said loan facilities. In response to the said application, the Board of Directors of Agrani Bank Limited in its 427th Meeting held on 26.08.2015 rescheduled the entire loan for repayment of the same within next 10 years at a interest of 10%. The said decision of the Board of Directors was duly communicated to the Regional Branch/Office of Agrani Bank Limited by its Memo No. BD/BMA/15/1017 dated 07.09.2015 (Annexure- "E"). Agrani Bank Limited, Head Office Motijheel, Dhaka also sent its letter dated 08.09.2015 to the CIB of Bangladesh Bank with a request to remove the name of the petitioner form the database of the loan defaulter and also to treat the said loan as declassified since the loan has been rescheduled for 10 years (Annexure-F).

(b) In terms of the aforesaid request of the creditor Bank, the name of the petitioner's Company was removed on or after 08.09.2015 from the database of the loan defaulters. The Bangladesh Bank accordingly issued on 08.09.2015 its No objection Certificate (NOC) approving and confirming the aforesaid reschedule of the loan amounting to Taka 10,88 crore for next 10(ten) years (Annexure-G) and as a result the petitioner's company was no longer a loan defaulter as no amount was payable because of the rescheduling. As such the respondent No.3's decision was based on wrong information furnished by the Agrani Bank and CIB of Bangladesh Bank which is unlawful, arbitrary, malafide and liable to be set aside.

(c) After rescheduling the loan and approval of the same by the Bangladesh Bank as stated above, the respondent No.5-Agrani Bank Limited issued its letter dated 13.09.2015 informing that the credit facility, availed by the company of the petitioner has been rescheduled for a period of 10 years with interest at the rate of 10% and the loan will be deemed to have been declassified since 26.08.2015. In view of the above letter of the creditor Bank, the petitioner's company is not a defaulter loanee and therefore, the respondents ought to have declared the petitioner's nomination paper as valid and pursuant to said letter dated 13.09.2015 Agrani Bank, Tangail Branch, Tangail issued its letter dated 12.10.2015 informing that they have mistakenly wrote in the letter dated 13.09.2015 regarding declassification of the loan from 26.08.2015 but in fact status of the loan remained Bad Loan (BL) although it was rescheduled for 10 years.

> The impugned orders were passed basing on Agrani Bank's letter dated 12.10.2015 and without informing the petitioner about this subsequent letter dated 12.10.2015. The respondent No.5 has however, served upon the petitioner a copy of the said letter dated 12.10.2015 on 14.10.2015 and as such the petitioner was in dark on the fact of rejecting his nomination paper on 13.09.2015. Therefore, the petitioner's nomination paper dated 11.10.2015 was rejected without considering the material circumstances as to unawareness of the petitioner about the rescheduled loan (Annexure-"I").

8. The respondent No.1 upon hearing the parties by its order dated 18.10.2015 dismissed the petitioner's appeal affirming the order rejecting the petitioner's nomination papers purely on the grounds, among others, that the petitioner is a defaulter loanee in terms of 12(m) of the Representation of the People Order, 1972 (RPO) (Annexure- "J"). It is at this stage the petitioner moved this Division and obtained the present Rule, order of stay and direction.

9. Mr. A.J. Mohammad Ali, the learned Senior Advocate appearing with Mr. Raghib Rouf Chowdhury and Mr. Rubaiyet Hossain, the learned Advocate for the petitioner after placing the petition, both the impugned orders advances the following arguments: the impugned orders have been passed without lawful authority in as much as clause 5 of the Master Circular on Loan Rescheduling, BRPD Circular No.15 of 23.09.2012 provides that a rescheduled loan will not be considered a "defaulted loan" and the borrower will not be considered a "defaulted borrower" and as such the impugned orders are liable to be declared to have been passed without lawful authority having no legal effect.

10. Next he submits that section 5(cc) of the Bank Companies Act, 1991 provides that a debtor company will be considered as a defaulter borrower after the expiry of 6 (six) months from the date of scheduled repayment and in this case, the company of the petitioner did not fail in making repayment of the rescheduled loan and thus neither the petitioner nor his aforesaid company is a loan defaulter within meaning of section 5 (cc) of the Bank Companies Act, 1991.

11. His further submission is that the impugned orders are not sustainable in as much as respondent No.1 and 2 failed to appreciate that the creditor Agrani Bank re-scheduled and declassified the loan for 10 years with effect from 26.08.2015 and hence neither the petitioner nor his aforesaid company is a defaulter within the meaning of the Bank Companies Act, 1991.

12. Finally he submits that the impugned orders have been passed without lawful authority since respondents failed to appreciate that neither the petitioner or the aforesaid loanee company is a defaulter of any loan before 7 (seven) days of filing of nomination papers as envisaged in Article 12(m) of the RPO and on that score the impugned orders should be declared to have been passed without lawful authority having no legal effect. Mr. A.J. Mohammad Ali while substantiating his arguments meticulously drawn our attention to various Annexures in the petition and tried to impress upon us that the petitioner was not at all a bank defaulter and was absolutely clean in terms of section 12(m) of RPO. Article 12(m) is as follows:-

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

(a) ……..to……(L)

(m) is a director of a company or a partner of a firm which has defaulted in repaying before seven days from the day of submission of nomination paper any loan or any installment thereof taken by the concerned company or firm from Bank."

13. He has focused his arguments to establish those from different points of view.

14. Election Commission has been represented by Dr. Mohammed Yeasin Khan, the learned counsel and Respondent No.5 Agrani Bank has been represented by Senior Advocate Mr. Mahbubey Alam appearing with Mr. Md. Abdul Hai. By filing two affidavit-in-oppositions and supplementary affidavit-in-opposition they have tried to press into service the argument rebutting the petitioner's contention that the petitioner was not competent in terms of Article 12(m) of RPO to contest in the election as candidate. Mr. Mahbubey Alam made his submissions controverting almost all the submissions of the petitioner including the maintainability of this writ petition.

15. Simplifying his contention Mr. Mahbubey Alam submitted that the petitioner did never apply for any rescheduling of his loan of Agroni Bank. By letter dated 12.08.2015 addressed to Agroni Bank (Annexure 7 series of the affidavit in opposition of Agrani Bank), he only sought for the waiver of his interest accrued upon principle amount from 1994 and to pay off the same at one time upon which the respondent Agroni Bank favoured him with an arrangement to pay it off extending over a period of ten years subject to approval of Bangladesh Bank. And this has nothing to do with rescheduling of his loan so as to attract any of the provisions of Bank Companies Act, 1991 or BRPD circular 15 of 23.09.2019 from that reason.

16. On the question of maintainability of the writ petition he submits that the question of maintainability goes at the root while deciding constitutional issue in particular. Mr. Mahbubey Alam basing on the series of decisions of our Appellate Division e.g. Mahmudul Huq Vs. Md. Hedayet Ullah reported in 48 DLR (AD) 120, A.F.M. Shah Alam vs. Mujibul Huq and others 41 DLR (AD) 68, A.K. Maidul Islam vs. Election Commission and others 48 DLR (AD) 208, Dr. Mohiuddin Khan Alamgir vs. Government of Bangladesh 62 DLR (AD) 425 and Dr. Md. Shahjahan, Advocate Vs. Election Commission and others, 63 DLR 543(where one of us was a party) submits that quite clearly the petitioner is a candidate within the definition in the RPO as he was proposed as a candidate from his constituency for the election as a Member within the definition of Article 2(II) of the RPO and therefore, he would be entitled to file any petition before the Election Tribunal under Article 49 of RPO where he may pray for a relief even to declare the whole election to be void, on the ground that the Returning Officer being person involved in the election process did not comply with the provision of RPO. He further submits that election process begins with the notification declaring the election schedule and culminate in the declaration of result of the election by Gazette Notification. Therefore, in view of the decision of Maidul Islam and also Dr. Mohiuddin Khan Alamgir case, any mater arising in relation to the election during holding of the election process may be agitate after election before election Tribunal and High Court Division should not entertain any matter relating to the election process under the writ jurisdiction. He also submits that in the decision as cited above their Lordships in the Appellate Division maintained that only on two grounds election process can be challenged in the writ jurisdiction i.e. coram non-judice or malice in law. But in the instant case, as he points out that no such allegation has been made with regard to coram non-judice or malice in law.

17. That being the situation, the only point that follows for consideration in this petition is whether under the facts and circumstances of the case together with the relevant decision and provisions of law having bearing on the issue. Both the orders impugned against can be sustained under law if the writ petition itself is maintainable.

18. Before discussing the issue it would be proper to mention that the learned Senior Advocate Mr. A.J. Mohammad Ali specifically submitted that as per Article 49 of the RPO an election petition may be filed by a candidate for that election, but since in this case the petitioner is unable to take part in the election he would not be able to file a petition under Article 49. Moreover, in terms Article 51(2) the petitioner cannot be remedied before the tribunal. Therefore, without preferring this writ petition he had no other option.

19. To address this vital aspect it required to have a gleaning upon some of the relevant Articles of the RPO. To start with Article 49 in Chapter 5 which runs thus:

> "No election shall be called in question except by an election petition presented by a candidate for that election in accordance with the provisions of this Chapter:-
>
> (2) ……
>
> (3) ……..
>
> (4) ……

20. Article 51(2) says a petitioner may claim as relief any of the following declarations, namely-

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

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

(c) that the election as whole is void.

21. In Article 57(6) it is stated that the High Court Division shall try an election petition as expeditiously as possible and shall endeavour to conclude the trial within six months from the date on which the election petition is (presented) to it for trial.

22. Now let us see Article 2(ii) which defines candidate – "candidate" means a person proposed as a candidate for election as a member.

23. Further Article 2 (VI) defines : "contesting candidate" means a candidate who has been validly nominated for election as a member and whose candidature has not been either withdrawn under clause (1) or ceased under clause (2) of Article 16.

24. Then again Article 14(5) reads:- "If a candidate or any bank is aggrieved by the decision of the Returning Officer, he may prefer an appeal to the Commission within the prescribed period and any order passed on such appeal shall be final."

25. So on a combined reading of all these provisions it can be clearly said that the election petition can be filed by a candidate. Although he may not be "contesting candidate" as it has been defined in Article 2 (VI). Therefore, let us now digress to the most vital issue of maintainability of the writ petition.

26. The decisions referred to above unequivocally maintained that any dispute whether that relates to acceptance or non-acceptance of the candidature of the particular candidate

should be brought for a decision before a election Tribunal as election dispute. To my mind drawing its inspirations from gainsaying that the petitioner will unable to file election petition under section 49 of RPO as "Candidate". Article 125 of the Constitution the said above proposition of law have been propounded. Article 125 postulates:-

"125. Notwithstanding anything in this Constitution-

(a) ……..

(b) No election to the offices of President or to Parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by Parliament."

27. Reflection of Article 125 has been echoed in the case of A.K.M. Maidul Islam vs. Election Commission as referred to above. His Lordship Justice Mustafa Kamal Observed:

> "In the case of A.F.M. Shah Alam vs. Mujibul Huq and others, 41 DLR (AD) 68, this court in very clear terms retain that the Local Government elections process can be challenged under Article 102 of the Constitution in High Court Division unless the impugned order passed by the authority concerned is coram non judice or is afflicted with malice in law. <u>This decision of ours is equally if not more forcefully applicable to Parliamentary and Presidential election held under Constitution. The petitioner has neither alleged coram non judice nor malice in law in the writ petition.</u>

28. Certainly this observation has backed by Article 125 of the Constitution. Same reflection we could find in the case of Mahmudul Huq vs. Hedayetullah 48 DLR 128 (relating to acceptance of nomination paper) wherein his Justice Abdur Rob observed:

> "Election connotes the process of chossing representative by electorate in democratic institutions. The election process starts from the Notification issued by competent authority (in a parliamentary election or bye election by the Election Commission) declaring election schedule and culminates in the declaration of result of election by Gazette notification".

29. Further his lordships observed:-

> "The High Court Division will not interfere with the electoral process as delineated earlier in the judgment, more so if it is an election of pertinent to parliament because it is desirable that such election should be completed within specified period under the constitution"

30. This has also a positive bearing on Article 125 of the Constitution.

31. Then again in the case of Dr. Mohiuddin Khan Alamgir vs. Bangladesh after discussing all the decisions as referred to above on the question of maintainability of a writ petition where facts and circumstances of the case is almost similar to that of the present one their Lordships of the Appellate Division held:-

> "In holding against the maintainability of the writ petition in election dispute the real and larger issue of free and fair election promptitude and functioning of elective bodies like parliament is of greater importance than settlement of private disputes. Moreover, Article 125 of our Constitution provides that no election to the officers of President or to the Parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by Parliament and in such view of the mater there is a complete ouster of jurisdiction, in entertaining writ petition in the matter election dispute except in case of coram non-judice and malice in law."

32. Be it mentioned that the petitioner in the instant petition has not come up with a case of coram non-judice or that the decision of the Election Commission have been afflicted with malice in law. Mr. A.J. Mohammad Ali has not argued in that regard.

33. But in our own volition we ventured to see whether the case in hard has been afflicted with malice in law. To understand and appreciate what is malice in law or what facts and circumstances constitute malice in law or so to say how a particular case ay be tainted with that and what would be the magnitude or impact which may lead to malice in law, we have not found a better decision than that of Dr. Narul Islam –vs- Bangladesh 33 DLR (AD) 201 on the issue. In the said decision in a well crafted manner Our Appellate Division came down heavily holding that the compulsory retirement of Dr. Nurul Islam under section 9(2) of the Public Service Retirement Act at the behest of the Government functionary was unconstitutional and violative of Articles 27 and 29 of the constitution and also suffers from malice in law. The impugned action was taken to circumvent the judgment of the High Court Division passed in favour of Dr. Nurul Islam in Writ Petition No. 571 of 1979 and it is liable to be struck down on the ground of malice in law which formed the basis of the action against Dr. Nurul Islam.

34. That's how the conception of malice in law can be perceived and inferred into, which may however, vary from cast to case. The conceptual aspect o f malice in law rooted deep in the above cited noble decision. But the case in hand is not at all a case which can be viewed being afflicted with malice in law. It is not a case of malice in law.

35. We want to make it clear that the Rule that has been enunciated in those decision is equally applicable in case by election also. We have observed that the decision appealed against was given after considering different statements of bank justifying that the petitioner does not fulfill criteria envisaged in 12(m) in the RPO. Certainly the petitioner can go against this decision with a proper election dispute under section 49 of RPO before the High Court if so advised and he can well ventilate his grievances there. But sitting on writ certiorari this Division would be loath to interfere with a situation where there are divergences of arguments or so to say there are arguments those require to be tested on evidences both oral and documentary.

36. In election matter, even when it ensues out of a pre-election dispute, this Division cannot invoke Article 102 of the Constitution, election tribunal is the only forum, except on a very limited ground of corum non-judice or malice in law. The discipline of law in this sphere that has been taken a positive shape drawing it's inspiration from the constitution and the consisting judicial pronouncements should not be disturbed in any manner.

37. That being the situation we find ourselves bound by the decisions of the Appellate Division as discussed above having positive bearing in the instant case and we are of the view that the writ petition is not maintainable and accordingly should be discharged on that score.

38. In the result, the Rule is discharged as being not maintainable. The order of stay granted earlier by this Court is hereby recalled and vacated. The Election Commission is directed to hold the bye-election of the constituency 133 Tongail-4 in accordance with law forthwith.

39. Communicate this order at once.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 3319 of 2017

Farhana Akhter Liza and others
Vs.
The Islamic University, Bangladesh and others.

Mr. Md. Ruhul Quddus, Advocate with
Mr. Khaled Mahmudur Rahman,
Mr. Akter Rasul,
Ms. Nusrat Yeasmin,
Mr. Mossaddek Billah, Advocates
…. For the Petitioners

Mr. Mahbubey Alam, Senior Advocate with
Mr. Syed Quamrul Hossain, Advocate
…… For Respondent nos. 1-5

Mr. S.M. Maniruzzaman, DAG
….. For Respondent no. 6

Date of Hearing: 11.04.2017 and 12.04.2017
And
Date of Judgment: 17.04.2017

Present:
Zubayer Rahman Chowdhury, J:

Constitution of the People's Republic of Bangladesh, Article,102(2).
The concept of "due process of law" involves two distinct elements. The first element imposes a mandatory duty upon the Authority concerned to appraise the person of the charge or offence for which a proceeding is being initiated against him. Not only that, judicial pronouncements have gone to the extent to hold that even the proposed punishment must be indicated to the person concerned at the very initial stage. The second element requires that the person, who is so charged, should be afforded an opportunity to file a reply/representation to the Authority in respect of the said allegation or charge. Non-compliance or non-observance of the second element is bound to give a "telling blow" to any subsequent action of the Authority. … (Para 24)

In matters of disciplinary proceeding taken by the University against delinquent students, it has been unequivocally endorsed and upheld by the Courts that the principle of natural justice shall apply in each and every case. In other words, every student has a right to be heard and to make a representation to the authorities before any decision is taken against such student. … (Para 47)

Judgment

Zubayer Rahman Chowdhury, J:

1. The concept of "due process of law", which has found a place in our Constitution in Article 31 under the heading "Right to protection of law", has come up once again before this Court for consideration. From one perspective, the issue is quiet simple and straight forward; yet, from another perspective, it is rather complex, involving various dimensions, not just legal, but social and administrative as well.

2. 88 writ petitioners, all being students of 1st year in the Department of Mathematics and Department of Statistics, Islamic University, Kushtia have challenged the legality of Decision No. 196, taken at the 233rd Meeting of the Syndicate of Islamic University, Kushtia, held on 06.03.2017 cancelling the result of the admission test of the 1st year students of F Unit in respect of the academic session 2016-2017 and directing to hold the admission test, afresh, for the 1st year students of F Unit, as per circular contained in Memo No. 02/¢nr¡/C¢h-2017/616 dated 08.03.2017, issued by respondent no. 3, published in the daily Bangladesh Protidin on 10.03.2017, as evidenced by Annexure F.

3. At the time of issuance of the Rule on 13.03.2017, although a prayer was made in the writ petition itself and also by the learned Advocate appearing for the petitioners to postpone the re-admission test, this Court declined to grant the prayer. Rather, the respondents were directed to proceed with the admission test scheduled to be held on 16.03.2017 and the petitioners were also directed to take part in the admission test. It has to be brought on record that the learned Advocate appearing for the petitioners readily agreed to abide by the Court's directive upon the petitioners to take part in the re-admission test in order to demonstrate their bonafide.

4. Certain facts, which are undisputed, need to be recorded at the very outset.

5. The petitioners, who are the students of the Department of Statistics and the Department of Mathematics, The Islamic University, Jhenaidah, Kushtia (briefly, the University), appeared in the admission test of F Unit held on 07.12.2016. The result was published on the following day i.e. on 08.12.2016. Subsequently, the process of admission started on 16.01.2017 when the students, including the petitioners, who had qualified in the admission test, were directed by the University to pay the fees and other charges in order to complete the admission procedure. The 88 petitioners and the remaining 12 students, who are not before us (totaling 100), duly paid the fees and other charges through the Bank, as directed by the University. Thereafter, the classes of the 1st year students of both the departments namely, Mathematics and Statistics departments, commenced on and from 30.01.2016.

6. While the petitioners along with the other students were attending the classes regularly, the University authorities took a mock test of all the students on 14.02.2017. However, without any further steps or directive, the students of both the Departments were allowed to continue with their classes.

7. On 06.03.2017, the University authorities issued the impugned order contained in Decision No. 196, taken at the 233rd Meeting of the Syndicate, cancelling the result of the 1st year admission test of F Unit and directing to hold a fresh admission test of 1st year students of 'F' unit. Being aggrieved thereby, the petitioners moved this Court and obtained the instant Rule.

8. The Rule is being opposed by respondent nos. 1-5 by filing an affidavit-in-opposition.

9. Mr. Md. Ruhul Quddus, the learned Advocate appears along with Mr. Khaled Mahmudur Rahman, Mr. Akter Rasul, Ms. Nusrat Yeasmin, and Mr. Mossaddek Billah, Advocates on behalf of the petitioners, while Mr. Mahbubey Alam, the learned Senior Advocate appears with Mr. Syed Quamrul Hossain, the learned Advocate on behalf of respondent nos. 1-5.

10. Having placed the instant application together with the Annexures, Mr. Md. Ruhul Quddus, the learned Advocate appearing on behalf of the petitioners submits that the impugned action of the respondents in cancelling the result of the 1st year admission test of F unit is not tenable in law for the simple reason that the same was passed in gross violation of Article 31 of the Constitution, which provides for the right to protection of law. Moreover, according to Mr. Quddus, the impugned decision was taken in utter disregard to the well-settled principle of natural justice. The learned Advocate submits that if a person is accused of a crime which carries "capital punishment", even in that case, the accused is dealt with in accordance with law. However, in the instant case, the petitioners were completely kept in the dark and no prior notice was served upon the petitioners and therefore, the impugned order was passed behind their back. He further submits that this is not a simple order cancelling the result of the admission test held on 07.12.2016, but an "administrative order", which has grave consequences for the students in as much as, they would be prevented from persuing their academic career in any public or private University. Therefore, according to Mr. Quddus, the impugned order had the effect of causing "academic death" of the petitioners.

11. The learned Advocate submits that even if it is accepted, but not conceded, that the allegation of leakage of question paper, as alleged by the University, is correct, that by itself cannot absolve the University from giving an opportunity to the petitioners to be heard before passing the impugned order. He submits forcefully that none of the petitioners had any involvement with the alleged leakage of question paper. Referring to the Inquiry Report filed by the University through the supplementary affidavit-in-opposition dated 12.04.2017, Mr. Quddus submits emphatically that it is evident from the said Report that as many as 4-5 teachers and staff of the University were involved in the said incident. However, not a single student belonging to the 1st year F Unit, in either Mathematics Department or the Statistics Department, was found to be involved with the incident in question.

12. Mr. Quddus contends that the students of "F" unit, who had qualified in the admission test held on 07.12.2016, were directed to pay the fees on the very same date on which the University formed an Inquiry Committee to inquire into the matter. Therefore, according to the learned Advocate, the University authorities came to know of the matter at a very early stage, only when the result had been published. Despite being fully aware of the matter and having initiated an inquiry into the same, but without waiting for its outcome, the University Authority directed the students to complete their admission process and also allowed them to start their respective classes from 30.01.2017.

13. The learned Advocate contends that by their own conduct, the University authorities are, at the least, guilty of waiver and acquiescence. Mr. Quddus concludes his submission by submitting that if the arbitrary and malafide decision of the University is allowed to stand, it would destroy the future prospect of the petitioners by causing "academic death" at the very early stage their career.

14. Mr. Mahbubey Alam, the learned Senior Advocate appears in his personal capacity, and not as the Attorney General, along with Mr. Syed Quamrul Hossain, the learned Advocate in opposition to the Rule.

15. Mr. Alam submits that the Inquiry Committee was formed on 16.01.2017 immediately after the University became aware of the matter, which first came to light through the newspaper report, published on 04.01.2017. Referring to the writ petition itself, Mr. Alam

submits that although the admission of 100 students was cancelled, only 88 have appeared before this Court, out of whom only 2 writ petitioners have filed necessary documents evidencing their admission in the University, while the rest have not annexed any documents to prove their standing. According to Mr. Alam, the petitioners have accepted the impugned decision by their own conduct by taking part in the subsequent re-admission test held on 16.03.2017.

16. Referring to the re-admission test result, which has been annexed in the affidavit of compliance dated 23.03.2017, Mr. Alam submits that out of 88 petitioners before this Court, only 29 petitioners have been able to secure their names in the merit list of 100 successful students. Although the names of 11 other petitioners have appeared in the 1st waiting list containing 100 names, the names of the remaining 48 petitioners do not appear in the result published by the University.

17. Mr. Alam submits that admittedly the question papers were leaked before holding of the 1st admission test on 07.12.2016, as is evident from the Inquiry Report submitted to the Syndicate on 04.03.2017. Therefore, according to Mr. Alam, since the matter of leakage of question paper has been established by the University upon holding a full fledged inquiry, the petitioners, whose admission test result has been cancelled, cannot be allowed to benefit from a wrongful act, even though all of them may not have any link with such act. He submits that no person can claim to be benefitted from a wrongful act.

18. Mr. Alam next submits that merely by attending classes, the petitioners cannot be said to have been vested with a legal right. On the contrary, he contends that the students, who have taken part in the subsequent admission test and qualified, now have a legitimate expectation to pursue their academic career in the University. Mr. Alam submits that if the Rule is made absolute and the petitioners' admission result, test published on 08.12.2016, is held to be valid, that would create both academic and administrative complications as there are only 100 seats in the Statistics and Mathematics Departments, each having 50 seats. Therefore, any additional number of students cannot be accommodated in the present academic year without prior approval and sanction from the University Grants Commission (UGC).

19. Referring to paragraph 3 of the supplementary affidavit-in-opposition dated 12.03.2017, Mr. Alam submits that in the Admission Form given to the students at the time of admission, it has been clearly stated in the Form itself that the University Authority has every right to cancel the admission of any student at any moment and no question can be raised regarding such action.

20. Mr. Alam submits that since the factum of leakage of question paper has been established beyond any reasonable doubt by the Inquiry Committee, it cannot be said that the cancellation of the 1st year admission test of F Unit, held on 07.12.2016, by the Syndicate is without lawful authority and consequently the Rule is liable to be discharged.

21. As indicated at the very outset of this judgment, the concept of "due process of law", as enshrined in Article 31 of our Constitution, is central for determination of the issue before us.

22. Let us now refers to Article 31 of the Constitution, which reads as under :

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

23. From the language of Article 31, it is evident that the Constitution not only confers upon a person the right to protection of law, but seeks to ensure the same by prohibiting any action detrimental to one's life, liberty, reputation or property, save and except in accordance with law. This constitutional guarantees, as envisaged by Article 31, is referred to as "the due process of law".

24. The concept of "due process of law" involves two distinct elements. The first element imposes a mandatory duty upon the Authority concerned to appraise the person of the charge or offence for which a proceeding is being initiated against him. Not only that, judicial pronouncements have gone to the extent to hold that even the proposed punishment must be indicated to the person concerned at the very initial stage. The second element requires that the person, who is so charged, should be afforded an opportunity to file a reply/representation to the Authority in respect of the said allegation or charge. Non-compliance or non-observance of the second element is bound to give a "telling blow" to any subsequent action of the Authority.

25. Now, let us have an over view of the matter before us. The whole issue arose following the leakage of the question paper of the admission test of 'F' Unit. Admittedly, the question papers were leaked prior to holding of the admission test on 07.12.2016. The result was published on the following day. Even if it is accepted for the sake of argument that the University Authority had no knowledge about the matter prior to holding of the admission test, quite clearly, the University Authorities became fully aware of the matter, as early as 04.01.2017, when the newspaper report was published, as acknowledged by Mr. Alam himself. Thereafter, the Inquiry Committee was formed on 16.01.2017 to investigate into the matter. Being fully aware of the matter and having started an inquiry into the same, the University Authorities, on the very same date, i.e. on 16.01.2017, initiated the actual process of admission by directing the students to deposit their fees and other charges. The matter did not end there. The University authorities completed the admission procedure and allowed the students, including the present petitioners, to start their academic career in the University by holding the 1st year classes on and from 30.01.2017. It was not until 06.03.2017, i.e., after a period of two and half months, that the impugned order was passed. All this while, the University Authorities did not take any step to suspend the classes and prevent the petitioners from attending the classes. Rather, despite initiation and continuation of the inquiry, the University Authorities allowed the petitioners to attend their classes in their respective departments.

26. On the other hand, the petitioners, having duly qualified in the admission test and having paid their admission fees and other charges and having completed the admission procedure, started their classes on and from 30.01.2017. It is not until the issuance of the impugned order on 06.03.2017 that the petitioners were officially intimated about the matter. There is not a single document on record nor is there any statement in the affidavit-in-opposition to the effect that on any date prior to 06.03.2017, the petitioners were notified about the proceeding or that they were issued show cause notice or that some explanation was sought from the petitioners. Therefore, upto 06.03.2017, the petitioners were totally kept in the dark and they had no prior notice about the proceeding or the inquiry, which culminated in the issuance of the impugned order.

27. The issue of leakage of question paper is undoubtedly a very serious matter which, in our view, cannot be condoned in any manner. The persons involved with such heinous act should be punished very severely, without any sympathy. Having said that, it has to be borne in mind that no person can be condemned unheard. In other words, a person against whom an action is proposed to be taken which is detrimental to his life, liberty and/or property, should be afforded an opportunity of stating his case before the concerned authority.

28. From Annexure 3 of the supplementary affidavit-in-opposition dated 12.04.2017, filed on behalf of respondent nos. 1-5, being the Report of the Inquiry Committee (তদন্ত কমিটির প্রতিবেদন), it appears that the Inquiry Committee did not find the involvement of any of the students of F Unit, who had appeared in the admission test on 06.12.2016. On the contrary, the Report discloses the complicity and involvement of some senior academic staff of the University. The only student, who has been named in the said report, appears to be a student of the Master Degree in the Department of Mathematics.

29. It is on record that the Inquiry Report has not been made available to any of the petitioner before us, although it is on the basis of this very report that the impugned Decision No. 196 was taken by the Syndicate on 06.03.2017 cancelling the admission test result of F unit, held on 06.12.2016.

30. During the course of his submission, the learned Advocate for the respondents has provided several official correspondences made by the University, although the same has not been filed by way of affidavit-in-opposition, despite a directive by this Court to do so. However, we take judicial notice of the same.

31. It appears from the letter dated 09.03.2017, issued vide প্রশাঃ/ইবি-২০১৭/১৩৫০, under the signature of the Registrar (Acting) and addressed to one Md. Saiful Islam, Senior Auditor, Finance and Accounts Department, Islami University, Kushtia, that pursuant to a written complaint filed by a student organization on 20.01.2017, the University Authorities constituted a Inquiry Committee. The letter reads as under :

> ‘‘নং প্রশাঃ/ইবি-২০১৭/১৩৫০ তারিখ ০৯/৩/২০১৭
> জনাব মোঃ সাইফুল ইসলাম
> সিনিয়র অডিটর
> অর্থ ও হিসাব বিভাগ
> ইসলামী বিশ্ববিদ্যালয়, কুষ্টিয়া।
>
> জনাব,
>
> ইসলামী বিশ্ববিদ্যালয়ের ২০১৬-২০১৭ শিক্ষাবর্ষের ১ম বর্ষ ভর্তি পরীক্ষায় ‘এফ’ ইউনিটের প্রশ্নপত্র ফাঁসের বিষয়ে ইসলামী বিশ্ববিদ্যালয়ের ছাত্র সংগঠনের ২০/০১/২০১৭ তারিখের লিখিত অভিযোগের পরিপ্রেক্ষিতে গঠিত তদন্ত কমিটির প্রতিবেদন গত ০৬-০৩-২০১৭ তারিখে অনুষ্ঠিত ২৩৩ তম সিন্ডিকেট সভায় সর্বসম্মতিক্রমে সিদ্ধান্ত হওয়ায় তদন্ত কমিটির সুপারিশ অনুযায়ী প্রশ্নপত্র ফাঁসের ঘটনার সাথে জড়িত থাকার অপরাধ প্রাথমিকভাবে প্রমানিণত হওয়ায় আপানাকে সিনিয়র অডিটর পদ থেকে সাময়িকভাবে বরখাস্ত করা হলো। অত্রসহ সংযুক্ত অভিযোগনামার প্রেক্ষিতে ইসলামী বিশ্ববিদ্যালয়ের কর্মচারী দক্ষতা ও শৃংখলা বিধির ৩ (ডি) উপধারার অপরাধ সংঘটেনের জন্য কেন আপনাকে চাকুরী থেকে চূড়ান্তভাবে বরখাস্ত করা হবে না তা পত্র প্রাপ্তির ০৭ (সাত) দিনের মধ্যে কারণ দর্শাতে বলা হলো। উল্লেখ্য, আপনি সাময়িকভাবে বরখাস্তকালীন সময়ে বিধি মোতাবেক জীবনধারণ ভাতা পাবেন।
>
> ধন্যবাদান্তে,
>
> আপানর বিশ্বস্ত,
> স্বাক্ষর, অস্পষ্ট
> (এস.এম. আব্দুল লতিফ)
> রেজিস্ট্রার (ভারপ্রাপ্ত)
> ইসলামী বিশ্ববিদ্যালয়’’

32. Although the said letter has not been annexed by the University, Mr. Syed Quamrul Hossain, the learned Advocate appearing on behalf of the University, does not dispute the authenticity of the letter. It is, therefore, palpably clear that the University authorities became aware of the matter, at least on 20.01.2017, i.e. ten days prior to commencement of the 1st year classes.

33. Furthermore, from the letter dated 07.03.2017, bearing Memo No. প্রশাঃ ইবি/2017/1289, it appears that the Acting Registrar of the University wrote to the Officer-in-Charge, Islamic University Thana, Kushtia regarding filing of an FIR about the incident in question. On a perusal of the same, it appears that the persons named in the FIR are the teachers and staff of the University, including one Post-Graduate student pursuing a Master Decree in the Department of Mathematic. Apart from the aforesaid persons, not a single student from amongst the 100 students, who took part and qualified in the admission test of F Unit held on 07.12.2016, has been named in the FIR.

34. It has been strenuously argued by Mr. Mahbubey Alam that the petitioners, who took part in the admission test on 16.03.2017, did not fare well and out of 100 students, only 28 qualified and were placed in the merit list. Therefore, according to Mr. Alam, the cancellation of the admission test result held on 07.12.2016 was fully justified.

35. In view of the submission advanced by Mr. Alam, we are called upon to examine the backdrop which led to the holding of the subsequent admission test on 16.03.2017. Admittedly, the petitioners had been pursuing their 1st year studies in the Department of Mathematics and the Department of Statistics. While they were doing so, all of a sudden, without any prior notice, their admission was cancelled on 06.03.2017 and they were asked to take another admission test on 16.03.2017. The subsequent admission test, which comprised of 80 marks, was taken on two subjects namely, Mathematics and English. In all fairness, the petitioners, who are the students of Mathematics and Statistics Departments, were no longer studying English nor were they undertaking any preparation to appear for another admission test. Moreover, their earlier admission test having been cancelled, they were obviously under a tremendous amount of mental stress and pressure. Not only had their future academic career become uncertain owing to the arbitrary action of the Authorities, but they were also asked to appear in a fresh admission test within 10 days of such cancellation. By no stretch of imagination can it be presumed that upon receiving the news of the Syndicate's decision, the petitioners would merrily start to prepare for the re-admission test forthwith.

36. On the other hand, the remaining 71 students, who qualified in the subsequent admission test held on 16.03.2017, were not attending classes in the University, but were preparing for their next admission test. Obviously, they were better prepared than the petitioners. Therefore, it cannot be said that the petitioners were on a "level playing field", so far as the subsequent admission test was concerned. Given their tender age and the tremendous mental anxiety and stress which they were facing, coupled with the uncertainty about their academic career, it is not surprising that many of the petitioners did not perform well in the re-admission test held on 16.03.2017 and consequently could not find a place amongst the first 100 students.

37. During the course of submission, Mr. Quddus has referred to two celebrated decisions of the Apex Court.

38. In the case of Dhaka University vs. Zakir Ahmed, reported in 16 DLR (SC) 722 (733-734), the Court held:

> "Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the "elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and "to correct or controvert any relevant statement brought forward to his prejudice."

39. In that case, the Court also held :

> "In other word, "in order to act justly and to reach just ends by just means" the Courts insist that the person or authority should have adopted the above "elementary and essential principles" unless the same had been expressly excluded by the enactment empowering to so act."

40. In the case of Sk. Ali Ahmed vs. Secretary, Home, reported in 40 DLR (AD) 1988 170, the Apex Court, while endorsing the decision in Zakir Ahmed's case, held as under:

> "It must, however, he pointed out that there is a long line of decisions from the Pakistan Jurisdiction, (The University of Dhaka vs. Zakir Ahmed, PLD 1965 S.C. 90 = 16 DLR (SC) 1 722) which have consistently taken the view that in all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting "the person or property or other right of the parties concerned". This rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases this requirement is to be implied into it as the minimum requirement for fairness."

41. Although the matter before us is of some public importances, not to mention urgency, involving several issues, the learned Advocate for the petitioners has not referred to any other decisions. The respondents, on their part, have not troubled us by citing any decisions. However, since the matter involves several important issues, we do so at our own instance.

42. More than half a century ago, the issue of "adopting unfair means at an examination" came up for consideration in the case of Rajdendra Kumar vs. Vice Chancellor, Vikram University, reported in AIR 1966 Madhya Pradesh 136 (V 53 C32). While deciding the issue, the Court held:

> "The broad features of natural justice would be firstly the principle of "Audi Alteram Partem" which means that no person should be condemned behind his back. So far as, disciplinary action of any sort whether under the Service Rules or under the University or the School Education Board Acts is concerned, there can be no doubt that a charge of adopting unfair means in the examinations would be more or less of a quasi-criminal nature involving the reputation and career of the student. Therefore, it is all the more necessary that before a person is condemned, he must be given an opportunity to be heard. As to what is a sufficient or a reasonable opportunity will depend on the particular facts of a case."

43. Subsequent judicial pronouncements on the issue have endorsed, expanded and upheld the decision in Rajendra Kumar's case, referred to above.

44. In the case of Pradeep Singh and Lucknow University, reported in AIR 1983 Allahabad 427, the Court held :

> "No doubt the problem faced by the University in conducting the examinations has to be appreciated but it has also to be borne in mind by the University Authorities while inflicting punishment on a student which may adversely affect his future career as well that he should be given a reasonable opportunity to defend himself."

45. In the case of Pradip Kumar v. Utkal University, reported in AIR 1987 Orissa 98, the Court held:

> "... the petitioner had received no communication with regard to any charges leveled against him by the invigilator or the Superintendent of the Examination Centre. In a case of this nature, the person proceeded against must have due notice of the charges leveled against him and he must be asked to show cause as to why action should not be taken against him for adoption of malpractice."

46. In the case of Jayesh Bhupatrai Parikh v. University of Bombay, reported in AIR 1987 Bombay 332, the Court held as under:

> "True, bodies and institutions which conduct domestic enquiries are not expected to go by the book as is the expectation from the Courts of law. This however does not mean that the basic requirements of fairness can be dispensed with."

47. On a careful perusal of the decisions referred to above, starting from our own jurisdiction and that of our neighbouring jurisdictions in India and Pakistan, it is evident that in matters of disciplinary proceeding taken by the University against delinquent students, it has been unequivocally endorsed and upheld by the Courts that the principle of natural justice shall apply in each and every case. In other words, every student has a right to be heard and to make a representation to the authorities before any decision is taken against such student.

48. Regrettably, in the instant case, the University has given a clear go by to this aspect of due process of law. There is no document on record nor has any submission been made to the effect that the University Authorities gave any prior intimation to the petitioners about the inquiry that was being conducted, which would ultimately decide their fate. Even the Inquiry Report, which was submitted before this Court through a supplementary affidavit, was not made available to the petitioners. Therefore, by keeping them totally in the dark, the impugned order was passed by the University. Needless to say that this undoubtedly tantamounted to causing an "academic death" of the students, who were persuing the academic course in the 1st year of the Mathematics and Statistics Departments.

49. Judicial pronouncements, starting from the late twentieth century, have tended to hold that the action of an Authority, be it administrative or quasi judicial, is required to be judged by the standard of "administrative fairness". Professor H.W. Wade, in his celebrated treaty "Administrative Law", 5th edition, commented that any administrative action, which has the effect of determining a person's right, be it propriety or personal or intellectual, must be made upon observing due process of law, which must be reflected by way of administrative fairness.

50. The concept of "administrative fairness" appears to have been endorsed and upheld in our own jurisdiction in the case of Chittagong Medical College vs. Shahrayar Murshed, reported in 48 DLR (AD) 1996 39, when the Apex Court held :

> "The first requirement of the rule of fairness, well- settled as it is, is that the person to be proceeded against must be made aware of the allegations against him- the right to have notice of the charges-as the House of Lords put it."

51. The concept of "Administrative Fairness" in being increasingly adopted by the English Court and the Courts in other developed countries. We see no reason as to why we should not adopt such principles in deciding similar matters, as the one presently before us.

52. As indicated earlier, the issue before us is both simple and complicated. The issue is simple because the impugned action of the University Authorities is, in our view, arbitrary, being violative of Article 31 of the Constitution and having been taken in utter disregard to the well-settled principles of "natural justice". Therefore, on that count, the Rule is liable to succeed.

53. On the other hand, the matter is complex since it involves various social and administrative issues. To start with, in the event of the Rule being made absolute, as we propose to do, what would happen to the fate of the other 71 students who had taken part in the subsequent admission test held on 16.03.2017 and qualified? Mr. Mahbubey Alam submitted that they have a legitimate expectation to be admitted to the University following publication of the result. We do not disagree with the contention of Mr. Alam. However, the legitimate expectation of the students, who have qualified in the second admission test held on 16.03.2017, must be weighed vis-à-vis the legitimate expectation as well as the legal right of the students who had earlier been admitted through the admission held on 07.12.2016. If the students, who had qualified in the subsequent admission test, can be said to have a legitimate expectation, as argued by Mr. Alam, the 100 students including the petitioners, not only have a legitimate expectation to be dealt with in accordance law, but they also have a legal right, which has been vested upon them by the conduct of the University itself in allowing them to get admitted and pursue their academic career for almost three months. Therefore, the rights of the 100 students including the petitioners are, by far, greater than the legitimate expectation of the students, who qualified in the admission test held on 16.03.2017.

54. Having said that, we are also mindful of the fact that the 71 students, who qualified in the subsequent admission test held on 16.03.2017, also deserve to be treated in accordance with law, although they are not being represented before us. It is at this juncture that we take note of Mr. Alam's contention that in the event of the Rule being made absolute, it would give rise to academic and administrative complexities in that the 71 students, who qualified subsequently on 16.03.2017, cannot be accommodated in the present academic year without increasing the number of seats, which, in turn, would require the approval and sanction of UGC.

55. The argument advanced by Mr. Alam is not novel. The Supreme Court of India had the occasion to address a similar issue in the case of Punjab Engineering College vs. Sanjay Gulati, reported in AIR 1983 SC, 580, Y.V. Chandrachud, C.J., while delivering the judgment, observed:

> "It is strange that in all such cases, the authorities who make admissions by ignoring the rules of admissions contend that the seats cannot correspondingly be increased, since the State Government cannot meet that additional expenditure which will be caused, by increasing the number of seats or that the institution will not be able to cope up with the additional influx of students. An additional plea available in regard to Medical Colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission. Those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admissions made."

56. Similarly, in the case of Arti Sapru v. State of Jammu and Kashmir and Ors, reported in AIR 1981 SC 1009, after allowing the writ petitions of the candidates who were wrongly denied admission to the Medical College, the Court held :

> "The candidates who will be displaced in consequence have already completed a few months of study and in order to avoid serious prejudice and detriment to their careers it is hoped that the state Government will deal sympathetically with their cases so that while effect is given to the judgment of this Court the rules may be suitably relaxed, if possible by a temporary increase in the number of seats, in order to accommodate the displaced candidates."
>
> Per Pathak, J, (as he then was)

57. The Syndicate ought to have been more cautious and prudent before taking the impugned decision as it involved the future of one hundred students. It was not merely an administrative decision deferring or postponing a course or an examination which would be rescheduled at a future date. It was an administrative order which had far reaching consequences involving not only the academic career but also the future of the young students. On one hand, the impugned action of the Syndicate cast an uncertainty over the academic career of the students who were perusing their 1st year classes in the Statistics and Mathematics Departments. On the other hand, the decision to retake the admission test gave rise to several complex issues. Needless to state that having created such a complex scenario, albeit by their own action, the University Authority have now left it to this Court to attempt to solve this intricate problem and outline a solution for the parties concerned.

58. We are reminded of the pronouncement made by A.T.M. Afzal, CJ, one of the finest legal minds to have graced the Bench, in the case of Chittagong Medical College vs. Shahrayar Murshed, reported in 48 DLR (AD) 1996 39, in the following terms:

> "The bare minimum was to notify the students that disciplinary action would be taken against them in view of the evidence which was forthcoming regarding their involvement in the incident. However much the pressure was, it was expected of the College authority to show that much of care for the respondents as, it is said, they stand *loco parentis* to the students."

59. A similar view had earlier been expressed by the Supreme Court of India, in the case of Punjub Engineering College, Chandigarh vs. Sanjay Gulati and ors., reported in AIR 1983 (SC) 580, Chandrachud, C.J., while delivering the Court's verdict, stated :

> "... the conduct of the authorities charged with the duty of making admissions to educational institutions has to be above suspicion. They cannot play with the lives and careers of the young aspirants who, standing at the threshold of life, look to the future with hope and expectations."

60. The term "arbitrary" denotes the absence of "reasonableness" and "fairness" in the decision making process. The conduct of the University, more particularly the Syndicate, in dealing with such a serious and sensitive issue, leaves much to be desired. Not only did the concerned Authority act arbitrarily, thereby failing to observe "due process of law", but they also acted in gross violation of the well settled principles of natural justice. Needless to state that their impugned action and decision fail to stand the test of "administrative fairness".

61. Be that as it may, having given our anxious consideration to the facts and circumstances of the case, we are inclined to hold that the impugned Decision No. 196 dated 06.03.2016, taken at the 233rd Meeting of the Syndicate of the University, is not tenable in law and the same is liable to be set aside.

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

63. The cancellation of the result of the admission test of the 1st year students under F Unit, for the academic year 2016-2017, as contained in the impugned Decision No. 196, taken on 06.03.2017 at the 233rd Meeting of the Syndicate of Islamic University, Kushtia, as evidenced by Annexure E, is declared to be without lawful authority and to be of no legal effect.

64. The University authority is directed to allow all the students, including the 88 petitioners, who qualified in the 1st year admission test of F Unit, held on 07.12.2016 and thereafter obtained admission and had commenced their classes, to continue and pursue their academic career as 1st year students in their respective Departments namely, Department of Mathematics and the Department Statistics of the University.

65. With regard to the remaining 71 students, who qualified in the admission test held on 16.03.2017, the University authorities are directed to either make provision for their admission in the present 1st year, subject to obtaining approval from the University Grants Commission (UGC). However, if the University Authorities are unable to obtain the required approval from UGC and accommodate them in the current academic session, the aforesaid 71 students shall have the right to be admitted to the Islamic University under F Unit in the next academic year i.e. 2017-2018. In that event, the University Authorities will only publish notice and take admission test in F Unit for the remaining 29 seats only in the next academic year. However, should any of the 71 students decline to take admission in the University in the following academic year, the University Authority will be at liberty to fill up those seats from amongst the new applicants.

66. Furthermore, we direct the University Authority to carry out a thorough investigation into the matter and identify the persons involved with the leakage of question papers and take severe punitive action against each of them.

67. Let it be made very clear that if any of the students, including any of the petitioners, are found guilty of being involved with the incident in question, the University Authority shall be at liberty to proceed against them in accordance with law and impose the severest punishment under the law, if necessary.

68. There will be no order as to cost.

69. The office is directed to communicate the order.

10 SCOB [2018] HCD

High Court Division
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 525 of 2017

MD. Mahbubur Rahman. .....Petitioner
Vs.
Bangladesh and others. .....Respondents.

Mr. Nurul Islam Sujan with
Mr. Md. Mustaque Ahmed, Advocate
..... for the petitioner

Mr. Syed Apurba Islam with
Mr. Md. Abdur Rahman and
Mr. Faruk Ahmed, Advocates
.....For the respondent nos. 2 and 3

Heard on 04.03.2018, 05.03.2018, 09.05.2018 and 13.05.2018.
Judgment on 16.05.2018

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

The Constitution of the People's Republic of Bangladesh
Article 102:
Writ Court is also a Court of equity. It is a settled proposition of law that one who seeks equity must come with clean hands. In this case, the petitioner's hands being unclean and dirty can not invoke the writ jurisdiction of the High Court Division. ... (Para 42)

We are led to hold that for breach of any of the terms and conditions of the contract in the present case before us, say for example, clause 14 of Annexure-'C' to the Writ Petition, the remedy of the petitioner lies in a properly constituted suit in the competent Civil Court for damages under section 73 of the Contract Act. So it necessarily follows that the writ jurisdiction of the High Court Division under Article 102 of the Constitution is not available to him. ... (Para 52)

The facts and circumstances of the case irresistibly lead us to uphold the contention of the contesting respondents that the petitioner was governed by the Rule of Master and Servant. As such the Board of Governors, that is to say, the master had the authority to terminate the petitioner (servant) at any time even before his attainment of 60 years of age as contemplated by clause 14. This is because no servant can be forced upon an unwilling master, for whatever reason it is. ... (Para 53)

It is a truism that no servant is entitled to any prior show cause notice in case of his dismissal, removal, termination etc. by his master. Had the Rule of Master and Servant not been applicable to the case of the petitioner, in that event, he would have been entitled to a prior show cause notice. As the relationship between the petitioner and the Board of Governors of the PDBF was regulated by the Master and Servant Rule, we opine that the Board of Governors did not commit any illegality in terminating the petitioner from the post of the MD without any prior show cause notice. ... (Para 53)

Judgement

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the Memo No. 47.66.0000.033.06.060.16-452 dated 28.12.2016 issued under the signature of the respondent no. 3 terminating the service of the petitioner (Annexure-'E' to the Writ Petition) should not be declared to be without lawful authority and of no legal effect. Subsequently on another application filed by the petitioner, a further Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to reinstate the petitioner in the post of the Managing Director (MD) of Palli Daridra Bimochan Foundation (PDBF), House No. 05, Avenue-03, Hazi Road, Rupnagar, Mirpur-2, Dhaka-1216 with all arrear salaries and service benefits and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The petitioner obtained BSS (Hons.) and MSS degrees from the University of Dhaka in 1983 and 1984 respectively. In 1984, he joined the Foundation for International Training (FIT) as Program Officer and remained there till 30.06.1988. From 01.07.1988 to 31.08.1995, he worked as Program Manager of Canadian Resource Team (CRT). From 01.09.1995 to 13.01.2001, he acted as Coordinator of Mobilization, Training and Social DEU of Canadian Resource TESA CRT (CIDA). He joined the PDBF as Manager (Human Resources) on 14.01.2001 and worked in the same post till 03.06.2009. On 04.06.2009, he was appointed as officiating MD of the PDBF and remained in that post till 12.05.2013.

3. Anyway, in response to an advertisement published in various national dailies, 4(four) candidates including the petitioner submitted applications for appointment to the post of the MD of the PDBF by its Board of Governors. On 12.05.2013, a Selection Committee was constituted for appointing the MD of the PDBF. As per the decision of the Selection Committee, the intending candidates were called for an interview which was held on the same day (12.05.2013). According to the assessment of the Selection Committee, the petitioner stood first securing 89 marks out of 100 marks. As such the Selection Committee proposed his name to the Board of Governors of the PDBF for his appointment to the post of its MD. On 12.05.2013, the Board of Governors held its 61st Meeting and unanimously decided to appoint the petitioner as the MD of the PDBF under certain terms and conditions. One of the conditions (clause 14) was that the petitioner would be entitled to continue his service as the MD of the PDBF up to the age of 60 years. Accordingly an appointment letter was issued in his favour on 13.05.2013. On the self-same date (13.05.2013), he submitted his joining letter as the MD of the PDBF to the Chairman of the Board of Governors which was duly accepted on 13.05.2013. Having been appointed as the MD of the PDBF, the petitioner had been discharging his duties and responsibilities to the satisfaction of all concerned. In the 69th Meeting of the Board of Governors of the PDBF held on 28.12.2016, the respondent no. 3 disclosed that he had already received a report from the Inquiry Committee formed at the 68th Board Meeting to enquire into the irregularities occurred in the process of appointment of the MD of the PDBF. The respondent no. 3 did not unveil the inquiry report at the 69th Board Meeting. However, at the concluding stage of that Board Meeting, the respondent no. 3, without taking any consent from any of the Members of the Board of Governors, declared that the petitioner would be terminated from the service of the respondent no. 2. Pursuant to

the decision taken at the 69th Board Meeting dated 28.12.2016, the respondent no. 2 issued the impugned Memo terminating the service of the petitioner as the MD of the PDBF.

4. The impugned order of termination dated 28.12.2016 refers to the breach of Rule 7 of the Service Rules for the position of the Managing Director (MD) approved at the 2nd Meeting of the Board of Governors. But this Rule 7 was not applicable to the petitioner inasmuch as the terms and conditions of his appointment were laid down in the proceedings of the 61st Board Meeting. Clause 14 of the aforesaid terms and conditions specifically provides that the petitioner may hold the post of the MD of the PDBF till completion of 60 years of age. After the issuance of the impugned order, 6(six) Members out of 9(nine) Members of the Board of Governors, recorded notes of dissent to the effect that the decision of termination of the petitioner had been taken solely by the Chairman of the PDBF. So the impugned order of termination dated 28.12.2016 of the petitioner from the post of the MD of the PDBF is clearly without lawful authority and of no legal effect.

5. In the Supplementary Affidavit dated 18.09.2017 filed by the petitioner, it has been stated that in pursuance of Rule 10 of the Service Rules for the position of the MD of the PDBF, the MD can be terminated with the majority votes of the Board of Governors. But in view of the notes of dissent given by 6(six) Members out of 9(nine) Members of the Board of Governors, it is palpably clear that the petitioner was not terminated from the service of the PDBF with the majority votes of the Members of the Board of Governors. That being so, the resolution taken at the 69th Board Meeting terminating the petitioner from the service of the PDBF is *coram non judice*.

6. In the Supplementary Affidavit dated 19.03.2018 filed by the petitioner,

It has been averred that the date of birth of the petitioner, as per his National Identification Card, is 19.12.1962 and accordingly he will reach the age of 60 years on 18.12.2022.

7. In the Supplementary Affidavit dated 13.05.2018 filed by the petitioner, it has been mentioned that on 07.03.2007, one Md. Shamsuzzaman was appointed as the MD of the PDBF on contractual basis for a period of 3(three) years; but the petitioner was appointed as the MD of the PDBF following a resolution at the 61st Board Meeting on 13.05.2013 on regular basis as a departmental candidate.

8. In the Supplementary Affidavit dated 15.05.2018 filed by the petitioner, it has been stated that as per the resolution taken at the 68th Board Meeting of the PDBF on 28.08.2016, a 3-Member Inquiry Committee headed by an Additional Secretary to the Government was constituted in order to inquire into the irregularities in the process of appointment of the petitioner as the MD of the PDBF and the Inquiry Committee submitted its inquiry report on 20.12.2016. This Inquiry Committee was constituted with a mala fide intention with a view to ousting him from the post of the MD of the PDBF. So the inquiry report dated 20.12.2016 can not be the basis for termination of the petitioner from the service of the PDBF.

9. The respondent nos. 2 and 3 have contested the Rule by filing a joint Affidavit-in-Opposition. Their case, as set out in the Affidavit-in-Opposition, in brief, is as under:

> The instant Rule is not maintainable and tenable in law in that the petitioner was appointed on contractual basis and a contractual obligation can not be enforced through the writ jurisdiction of the High Court Division under Article 102 of the Constitution. The Service Rules for the position of the MD were framed by the Board

of Governors of the PDBF at its 2nd Meeting held on 23.05.2000. As per Rule 7 of the aforementioned Service Rules, the MD will be hired on contract for a term of three years subject to satisfactory annual performance of service by the Board. This contract may be extended by the Board subject to the satisfaction of all other terms and conditions of employment. The appointment letter of the petitioner dated 13.05.2013 as the MD of the PDBF was issued in violation of Rule 7 of the Service Rules at his instance so as to suit his convenience. In this respect, he misused his position as the officiating MD of the PDBF. However, pursuant to Rule 7 of the Service Rules, the tenure of the petitioner as the MD of the PDBF expired on 12.05.2016 and thereafter his contractual service was never extended by the Board of Governors. After expiry of his tenure on 12.05.2016, he was holding the post of the MD of the PDBF without any legal basis. As the petitioner's contractual period came to an end on 12.05.2016, he made an attempt to extend his tenure by publishing a gazette notification dated 19.09.2016 in a fraudulent manner. When the fraud was detected by the Board of Governors of the PDBF, the gazette notification dated 19.09.2016 was cancelled by issuing another gazette notification dated 06.11.2016. Be that as it may, the Board of Governors took a very lenient view and terminated the petitioner from the post of the MD by a letter dated 28.12.2016 in compliance with the Service Rules for the position of the MD of the PDBF. Anyway, Regulation 61(2) of পল্লী দারিদ্র বিমোচন ফাউন্ডেশন কর্মচারী চাকুরী প্রবিধানমালা,২০১১ (hereinafter referred to as the Regulations of 2011) was inadvertently referred to in the impugned Memo of termination. As the service of the petitioner came to an end automatically after expiry of 3(three) years on 12.05.2016, there remained virtually nothing for his termination and he was released from his post by the impugned Memo dated 28.12.2016.

10. At the 69th Board Meeting dated 28.12.2016 of the PDBF, the inquiry report dated 20.12.2016 and other materials on record were taken into account by the Board and thereafter the Board decided to release the petitioner from his service. So by no stretch of imagination, it can be said that the decision of termination/release of the petitioner from the post of the MD was solely taken by the Chairman (respondent no. 3) of the PDBF. That decision for termination/release of the petitioner was taken after long deliberations under the agenda item no. 7. The Service Rules for the position of the MD of the PDBF that were approved at the 2nd Meeting of the Board of Governors are still in force. However, the petitioner was appointed in accordance with the decision of the 61st Board Meeting of the PDBF wherein it was simply stated in clause 14 that he would be eligible to hold the post of the MD up to his 60th year; but it was never spelt out that pursuant to the appointment letter, he would continue as the MD of the PDBF in derogation of the Service Rules. The Service Rules were framed pursuant to section 11(6) of পল্লী দারিদ্র বিমোচন ফাউন্ডেশন আইন, ১৯৯৯ (১৯৯৯ সনের ২৩ নং আইন) (hereinafter adverted to as the Act No. 23 of 1999). Although the decision for termination/release of the petitioner from the post of the MD was taken unanimously; yet the petitioner misguided some of the Board Members and obtained the alleged notes of dissent. But subsequently 4(four) Board Members realized the real state of affairs and the fraudulent practice of the petitioner and withdrew their earlier notes of dissent. What is more, the decision taken at the 69th Board Meeting was afterwards confirmed by the 70th Board Meeting of the PDBF. So on this count, no exception can be taken to the impugned Memo dated 28.12.2016. Given this scenario, there is no illegality or irregularity in issuing the order of termination/release of the petitioner from the post of the MD of the PDBF.

11. However, as the service of the petitioner was contractual in nature and as it was not a statutory contract, the appropriate remedy, if any, of the petitioner lies in a properly

constituted suit for damages in the competent Civil Court under section 73 of the Contract Act, 1872 for alleged violation of any terms of the contract. In other words, the petitioner can not invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution for necessary redress arising out of his termination/release from the post of the MD of the PDBF. So the Rule is liable to be discharged with costs.

12. In the Supplementary Affidavit-in-Opposition dated 05.03.2018 filed on behalf of the respondent nos. 2 and 3, it has been stated that after the termination/release of the petitioner from the post of the MD of the PDBF, one Mr. Madan Mohan Saha was appointed as the acting MD of the PDBF and he has been performing the functions of the MD to date. So the letter of termination/release dated 28.12.2016 has already been acted upon.

13. In the Supplementary Affidavit-in-Opposition dated 11.04.2018 filed by the respondent nos. 2 and 3, it has been mentioned that as the officiating MD of the PDBF, the petitioner was well-acquainted with the Service Rules and he held that position till he was appointed as the MD on regular basis on 13.05.2013. As he was well aware of the Service Rules, he can not turn round and deny that he was appointed on contractual basis. With regard to the termination/release of the petitioner from the PDBF, the principle of natural justice has no manner of application as his service was governed by the terms and conditions of the contract. By that reason, the relationship between the petitioner and the PDBF was governed by the Master and Servant Rule. This being the situation, even if the termination/release of the petitioner from the PDBF is illegal, he can not invoke the writ jurisdiction of the High Court Division for necessary redress.

14. In the Supplementary Affidavit-in-Opposition dated 13.05.2018 filed by the respondent nos. 2 and 3, it has been averred that in pursuance of the resolution of the 2nd Board Meeting dated 23.05.2000 of the PDBF, all the previous 3(three) Managing Directors, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman were appointed on contractual basis according to the stipulated terms and conditions as incorporated in their appointment letters. Accordingly, they served as the MDs of the PDBF and completed their respective tenures of service.

15. In the Affidavit-in-Reply dated 05.03.2018 filed on behalf of the petitioner, it has been stated that the contesting respondents have admitted that Regulation 61(2) of the Regulations of 2011 is not applicable to the petitioner and hence the impugned termination letter is without lawful authority and of no legal effect. As the petitioner was appointed under certain terms and conditions pursuant to the decision of the 61st Board Meeting, the question of applicability of Rule 7 of the Service Rules is out of the question. In any view of the matter, the authority can not go beyond the terms and conditions as stipulated in the letter of appointment of the petitioner as the MD of the PDBF. He was appointed as the MD on full-time basis and as per his appointment letter, the tenure of his service is up to 60 years of age. The termination/release of the petitioner from the post of the MD is a feat of high-handedness of the Chairman of the PDBF. The petitioner was not afforded any opportunity of being heard prior to the issuance of the termination letter. In this perspective, the termination letter is unsustainable in law.

16. At the outset, Mr. Nurul Islam Sujan, learned Advocate appearing on behalf of the petitioner, submits that indisputably the petitioner was the officiating MD of the PDBF and having secured the highest marks in the interview, he was finally selected by the Board of Governors of the PDBF and as such the Board issued a letter dated 13.05.2013 appointing

him to the post of the MD under certain terms and conditions as evidenced by Annexure-'C' to the Writ Petition; but he did not contravene any of the terms and conditions as stipulated in Annexure-'C' to the Writ Petition; yet curiously enough, he was terminated/released from the post of the MD whimsically and illegally pursuant to the decision taken at the 69th Meeting of the Board of Governors on 28.12.2016 and on this score, the impugned order of termination dated 28.12.2016 has no legs to stand upon.

17. Mr. Nurul Islam Sujan also submits that admittedly the principle of "Audi Alteram Partem" was not adhered to prior to termination of the petitioner from the post of the MD of the PDBF and in that view of the matter, the impugned order of termination dated 28.12.2016 is liable to be knocked down as being without lawful authority.

18. Mr. Nurul Islam Sujan further submits that the record does not show that the petitioner was formally charged with the commission of any illegalities/irregularities in his appointment process as the MD of the PDBF; but funnily enough, a 3-Member Inquiry Committee headed by an Additional Secretary to the Government was formed at the 68th Board Meeting and at the 69th Board Meeting dated 28.12.2016, the report submitted by the Inquiry Committee was taken into consideration unfairly and the Chairman of the PDBF took a decision to terminate the petitioner from the post of the MD which can not be tenable in law. By way of elaboration of this submission, Mr. Nurul Islam Sujan draws our attention to the fact that out of 9(nine) Members of the Board of Governors, 6(six) Members recorded their notes of dissent and thereby they did not support or approve the decision allegedly taken by the Board at its 69th Meeting in the matter of termination of the petitioner from the post of the MD of the PDBF and this being position, it leaves no room for doubt that the termination of the petitioner was carried out in a hush-hush manner.

19. Mr. Nurul Islam Sujan next submits that the petitioner was never appointed on contractual basis; rather as per Annexure-'C' dated 13.05.2013 to the Writ Petition, he was appointed as the MD of the PDBF as a full-timer and until he reaches the age of 60 years, he can not be terminated from service unless he has committed any gross misconduct to the detriment of the interest of the PDBF.

20. Mr. Nurul Islam Sujan also submits that the petitioner was appointed to the post of the MD of the PDBF under certain terms and conditions pursuant to sub-section (1) of section 11 of the Act No. 23 of 1999 and those terms and conditions were specifically laid down in his appointment letter dated 13.05.2013 and as the petitioner did not offend against any of the terms and conditions of his appointment letter, he can not be shown the door by issuance of Annexure-'E' dated 28.12.2016.

21. Mr. Nurul Islam Sujan next submits that the Regulations of 2011 are not applicable to the post of the MD of the PDBF and the petitioner was never appointed thereunder; rather he was appointed maintaining the continuity of his earlier service in the PDBF and because of this distinguishing feature, he can not be put on a par with the 3(three) previous MDs, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman and this distinguishing feature was absolutely disregarded while terminating the petitioner from the post of the MD of the PDBF by issuance of Annexure-'E' dated 28.12.2016.

22. Mr. Nurul Islam Sujan further submits that as the petitioner was not a contractual appointee, he has invoked the writ jurisdiction of the High Court Division under Article 102 of the Constitution and as such the Writ Petition is maintainable.

23. Mr. Nurul Islam Sujan also submits that in the facts and circumstances of the present case, section 16 of the General Clauses Act, 1897 and the Rule of Master and Servant will not come into play and this is why, the petitioner is entitled to get the reliefs sought for in this Writ Petition.

24. Per contra, Mr. Syed Apurba Islam, learned Advocate appearing on behalf of the respondent nos. 2 and 3, submits that it is true that the petitioner was appointed to the post of the MD of the PDBF by Annexure-'C' dated 13.05.2013 under certain terms and conditions which were approved at the 61st Meeting of the Board of Governors; but in effect and for all practical purposes, he was a contractual appointee as the MD of the PDBF and as he was a contractual appointee, the Board of Governors terminated his contract by dint of Rule 7 of the Service Rules, albeit it is in his appointment letter dated 13.05.2013 that he would continue to function as the MD till his attainment of 60 years.

25. Mr. Syed Apurba Islam also submits that the authority, that is to say, the Board of Governors terminated the contract of the petitioner because of commission of some irregularities in his appointment process as the MD of the PDBF and his unauthorized publication of the gazette notification dated 19.09.2016 as evidenced by Annexure-'1' to the Affidavit-in-Opposition and this termination of the petitioner as a contractual appointee can not be agitated in the writ jurisdiction of the High Court Division under Article 102 of the Constitution inasmuch as it was an ordinary contract and not a statutory one.

26. Mr. Syed Apurba Islam further submits that as the contract was not a statutory contract, the remedy, if any, for the petitioner lies in a properly constituted suit in the competent Civil Court for damages under section 73 of the Contract Act and on that count alone, the instant Writ Petition is not maintainable.

27. Mr. Syed Apurba Islam next submits that although Annexure-'C' dated 13.05.2013 is conspicuously silent about the termination of the petitioner, yet the Board of Governors had the authority to terminate him as its servant for the commission of any acts of malfeasance and misfeasance and accordingly the Board of Governors terminated its servant (petitioner) under the Master and Servant Rule and by that reason, this Writ Petition is also incompetent.

28. Mr. Syed Apurba Islam further submits that as a servant, the petitioner can not be thrust upon the master at any rate and if the master is unwilling and reluctant to retain the service of the petitioner, the master is always at liberty to terminate him at any point of time and considered from this standpoint, his appointment letter (Annexure-'C' dated 13.05.2013) can not be a stumbling-block in this regard and as such the Board of Governors lawfully terminated him from the post of the MD of the PDBF.

29. Mr. Syed Apurba Islam also submits that it is undisputed that prior to issuance of the impugned letter of termination, the petitioner was not afforded any opportunity of being heard; but the fact remains that he was examined by the 3-Member Inquiry Committee and he submitted his written statement before that Committee and the Committee examined the pros and cons of the matter under inquiry and recommended punitive measures against him and it was decided at the 69th Meeting of the Board of Governors that he would be terminated from service and accordingly he was terminated by the impugned Annexure-'E' dated 28.12.2016.

30. Mr. Syed Apurba Islam next submits that the record shows that after the 69th Board Meeting, 6(six) Members recorded their notes of dissent out of 9(nine) Members; but soon afterwards, 4(four) dissenting Members realized their mistakes resulting from the machinations adopted by the petitioner and ultimately withdrew their notes of dissent and as a result the minutes of the 69th Board Meeting were approved at the 70th Board Meeting and taking the entire scenario into consideration, it can safely be concluded that the Board of Governors terminated the petitioner from service at the 69th Board Meeting by majority view and on this account, no objection can be raised to the impugned letter of termination.

31. Mr. Syed Apurba Islam further submits that assuming for the sake of argument that the letter of termination of the petitioner as evidenced by Annexure-'E' to the Writ Petition is without lawful authority and of no legal effect, even then his remedy lies in a suit for damages in the competent Civil Court and not in the writ jurisdiction of the High Court Division under Article 102 of the Constitution.

32. Mr. Syed Apurba Islam next submits that although no formal deed of contract was drawn up between the parties to the contract, that is to say, the petitioner and the Board of Governors; yet the fact remains that Annexure-'C' dated 13.05.2013 is an offer and that offer was accepted by the petitioner by Annexure-'C-1' dated 13.05.2013 and in this backdrop, the petitioner was effectively a contractual appointee as the MD of the PDBF.

33. Mr. Syed Apurba Islam also submits that through inadvertence, Regulation 61(2) was referred to in Annexure-'E' dated 28.12.2016 and since the petitioner was not appointed to the post of the MD of the PDBF in accordance with the provisions of the Regulations of 2011, this reference to Regulation 61(2) in the impugned Annexure-'E' is of no avail to the petitioner.

34. Mr. Syed Apurba Islam further submits that according to sub-section (6) of section 11 of the Act No. 23 of 1999, the PDBF had a legal obligation to frame necessary regulations for the purpose of implementation of the provisions of section 11 of the aforesaid Act and as such necessary regulations were framed pursuant thereto under the name and style–'Service Rules for the position of the Managing Director' and the nomenclature 'Service Rules' instead of 'Regulations' (Probidhanmala) is a mere misnomer and the petitioner can not capitalize on that misnomer as an insider of the PDBF.

35. Mr. Syed Apurba Islam also submits that as an insider, the petitioner knew everything about the appointment process of the MD and that is why, as the officiating MD of the PDBF and the ex-officio Member-Secretary of the Board of Governors, he orchestrated the entire process leading to his appointment as the MD of the PDBF and in good faith, the Board Members relied on him pertaining thereto; but through adoption of some backstage manoeuvres by him, the terms and conditions of his appointment as the regular MD were a conspicuous deviation from those of the three previous MDs, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman.

36. Mr. Syed Apurba Islam further submits that beyond the knowledge and without the approval of the Board of Governors, the petitioner published the gazette notification (Annexure-'1' to the Affidavit-in-Opposition) on 19.09.2016 so as to suit his convenience and eventually after detection of this fraud, he had to issue another gazette notification dated 06.11.2016 (Annexure-'2' to the Affidavit-in-Opposition) revoking the earlier notification, that is to say, Annexure-'1' to the Affidavit-in-Opposition and in such a situation, it is

manifestly clear that the petitioner committed gross misconduct and by reason of that misconduct, the Board of Governors intervened and terminated him from the post of the MD of the PDBF by Annexure-'E' dated 28.12.2016.

37. In support of the above submissions, Mr. Syed Apurba Islam adverts to the decisions in the cases of Bangladesh Power Development Board and others…Vs…Md. Asaduzzaman Sikder, 9 BLC (AD) 1; Superintending Engineer, RHD, Sylhet and others…Vs…Md. Eunus and Brothers (Pvt) Ltd and another, 16 BLC (AD) 73; Government of Bangladesh represented by the Secretary, Ministry of Communications, Dhaka and others…Vs…Zafar Brothers Limited and another, 69 DLR (AD) 52; Professor Dr. Md. Yusuf Ali…Vs..Chancellor of Rajshahi University, Rajshahi and others, 50 DLR (HCD) 1; Messrs Malik & Haq and another…Vs…Muhammad Shamsul Islam Chowdhury and two others, 13 DLR (SC) 228 and M/s. Eastern Mercantile Bank Ltd…Vs…Mohammad Shamsuddin, 21 DLR (SC) 365.

38. We have heard the submissions of the learned Advocate for the petitioner Mr. Nurul Islam Sujan and the counter-submissions of the learned Advocate for the respondent nos. 2 and 3 Mr. Syed Apurba Islam and perused the Writ Petition, Supplementary Affidavits, Affidavit-in-Opposition, Supplementary Affidavits-in-Opposition and Affidavit-in-Reply and relevant Annexures annexed thereto.

39. It is admitted that prior to the appointment of the petitioner as the MD of the PDBF on 13.05.2013, he was a Director of the PDBF and since 2009, he had been functioning as the officiating MD of the PDBF. It is also admitted that the petitioner was appointed to the post of the MD of the PDBF under certain terms and conditions pursuant to sub-section (1) of section 11 of the Act No. 23 of 1999. It is further undeniable that the terms and conditions of the appointment of the petitioner as the MD of the PDBF were spelt out in the proceedings of the 61st Meeting of the Board of Governors.

40. The bone of contention is that according to Mr. Nurul Islam Sujan, the petitioner was a regular appointee under certain terms and conditions as evidenced by Annexure-'C' to the Writ Petition whereas according to Mr. Syed Apurba Islam, the petitioner was a contractual appointee thereunder. In this regard, clause 14 of Annexure-'C' may be gone into. As per clause 14, the petitioner was set to function as the MD of the PDBF up to the age of 60 years at the most. It is his claim that before attainment of 60 years of age, he can not be terminated from service as was done by Annexure-'E' to the Writ Petition. The record indicates that the previous 3(three) MDs, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman were appointed pursuant to the Service Rules (in fact, Regulations) for the position of the MD and all of them signed their respective contracts in presence of witnesses; but in the instant case before us, no independent deed of contract was drawn up. But nevertheless, Annexures- 'C' and 'C-1' to the Writ Petition, as we see them, respectively partake of the nature of an offer and acceptance. If Annexures- 'C' and 'C-1' both dated 13.05.2013 are read conjointly, it becomes signally clear to us that the petitioner was a contractual appointee by necessary implication.

41. As admittedly the petitioner had been functioning as the officiating MD of the PDBF since 2009, he had access to various files and papers of the PDBF as a matter of course and probably for that reason, the terms and conditions of his appointment as spelt out in the minutes of the 61st Meeting of the Board of Governors and Annexure-'C' to the Writ Petition are singularly distinguishable from those of all the previous 3(three) MDs, namely, Mr. A. Q.

Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman. In this perspective, the facts and circumstances of the present case unerringly reveal that as an insider, that is to say, as the officiating MD of the PDBF, the petitioner orchestrated the entire process of his appointment as the MD of the PDBF so as to suit his convenience and the Board of Governors simply relied on him. He was indeed the protagonist of the drama of his appointment process as the MD of the PDBF.

42. Even unauthorizedly the petitioner went to the extent of publishing a gazette notification dated 19.09.2016 (Annexure-'1' to the Affidavit-in-Opposition) to the effect that the MD is a permanent appointee and the post of the MD stands incorporated in the Schedule of the Regulations of 2011, though indisputably the Regulations of 2011 are not applicable to the post of the MD of the PDBF. So we smell a rat on the part of the petitioner in this respect. Eventually he had to rescind the gazette notification dated 19.09.2016 as evidenced by Annexure-'1' by publishing another gazette notification dated 06.11.2016 as evidenced by Annexure-'2' to the Affidavit-in-Opposition. What does this obnoxious, freakish and unseemly conduct of the petitioner demonstrate? This conduct of the petitioner, to our mind, demonstrates that he has approached the High Court Division under Article 102 of the Constitution with unclean and dirty hands. It goes without saying that the Writ Court is also a Court of equity. It is a settled proposition of law that one who seeks equity must come with clean hands. In this case, the petitioner's hands being unclean and dirty can not invoke the writ jurisdiction of the High Court Division. This is one dimension of the case.

43. Assuming that the petitioner was appointed legally by Annexure-'C' to the Writ Petition, yet the terms and conditions specified therein positively show that the petitioner was a contractual appointee in accordance with sub-section (1) of section 11 of the Act No. 23 of 1999. We have already observed that the Regulations of 2011 are not applicable to the petitioner. So the question of applicability of the Schedule of the Regulations of 2011 in the case of the petitioner is out of the question. Hence it is easily deducible that the petitioner published the gazette notification dated 19.09.2016 (Annexure-'1' to the Affidavit-in-Opposition) with mala fide intention.

44. It is curious to note that 6(six) Members out of 9(nine) Members of the Board of Governors of the PDBF did not record their notes of dissent on the very date of the holding of the 69th Board Meeting on 28.12.2016. Those 6(six) Members did so on subsequent dates (29.12.2016 and 01.01.2017). Even the petitioner being the ex-officio Member-Secretary of the Board did not record his note of dissent on 28.12.2016. Anyway, 4(four) dissenting Members comprehended their mistakes arising out of the machinations resorted to by the petitioner and ultimately withdrew their notes of dissent and consequently the proceedings of the 69th Board Meeting dated 28.12.2016 were subsequently approved at the 70th Board Meeting. This being the panorama, the decision made at the 69th Board Meeting dated 28.12.2016 by majority view as to the termination/release of the petitioner from the post of the MD of the PDBF can not be found fault with.

45. Leaving aside the question of applicability of the Service Rules to the position of the MD of the PDBF, a pertinent question arises: did the Board of Governors terminate the petitioner from service by Annexure-'E' to the Writ Petition lawfully? To answer this question, first of all, we are to decide as to whether the contract entered into between the petitioner and the Board of Governors was a statutory contract or not taking Annexures- 'C' and 'C-1' into account.

46. In the case of the Government of Bangladesh represented by the Secretary, Ministry of Communications, Dhaka and others…Vs…Zafar Brothers Limited and another, 69 DLR (AD) 52, it has been held in paragraph 21:

> "21. Considering the decisions reported in a good number of cases, this Division in the case of Bangladesh Power Development Board and others…Vs…Md. Asaduzzaman Sikder, 9 BLC (AD) 1, held that the writ jurisdiction is available in case of breach of contracts of the following categories.
>
> (a) the contract is entered into by the Government in the capacity as sovereign;
> (b) where contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority;
> (c) where contract is entered into in exercise of an enabling power conferred by a statute that by itself does not render the contract a statutory contract, but 'if entering into a contract containing prescribed terms and conditions is a must under the statute, then that contract becomes a statutory contract. If a contract incorporating certain terms and conditions is a must under the statute, then the contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory, then the said contract to that extent is statutory';
> (d) where a statute may expressly or impliedly confer power on a statutory body to enter into any contract in order to enable it to discharge its functions and the contract so entered into by the statutory body is not an exercise of statutory power, then merely because one of the parties to the contract is a statutory or public body, such contract is not a statutory contract;
> (e) when contract is entered into by a public authority invested with the statutory power, in case of breach thereof, relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power;
> (f) where the contract has been entered into in exercise of statutory power by a statutory authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke writ jurisdiction because the relief sought is against breach of statutory obligations."

47. Similar view has also been taken in the case of the Government of Bangladesh and others…Vs…Excellent Corporation, 20 BLC (AD) 255.

48. We have already found that the petitioner was a contractual appointee as the MD of the PDBF, no matter whether the terms and conditions of his appointment were governed by those specified in Annexure-'C' to the Writ Petition or by the Service Rules for the position of the MD of the PDBF. There is no gainsaying the fact that he was appointed to the post of the MD of the PDBF pursuant to sub-section (1) of section 11 of the Act No. 23 of 1999. The facts and circumstances of the case, in our opinion, attract clause (d) of the categories of contracts as spelt out by the Appellate Division in 69 DLR (AD) 52 (supra). From this clause (d), it is explicit that the contract executed between the petitioner and the Board of Governors by necessary implication is not a statutory contract. Since it is not a statutory contract, it is an ordinary contract.

49. The decisions in the cases of Superintending Engineer, RHD, Sylhet & ors…Vs…Md. Eunus and Brothers (Pvt) Ltd and another; 16 BLC (AD) 73 and Bangladesh Power Development Board and others…Vs…Md. Asaduzzaman Sikder; 9 BLC (AD) 1 are in line with the decision reported in 69 DLR (AD) 52. So we find that there is a consensual view in a catena of judicial pronouncements on this issue.

50. In the case of M/s. Eastern Mercantile Bank Ltd….Vs…Mohammad Shamsuddin reported in 21 DLR (SC) 365, the Pakistan Supreme Court has held, inter alia, in paragraph 7:

> "7. The primary question arising in the appeal is concluded by the decision of this Court in Malik and Haq…Vs…Muhammad Shamsul Islam (PLD 1961 S.C. 531). On similar facts, it was held in that case:
>
> "…in the absence of any statutory provision protecting the servant it is not possible in law to grant to him a decree against an unwilling master that he is still his servant. A servant can not be forced upon his master. The master is always entitled to say that he is prepared to pay damages for breach of contract of service but will not accept the services of the servant. A contract for personal service as will appear from section 21(b) of the Specific Relief Act can not be specifically enforced. But it is not even necessary to invoke section 21(b) for such a contract is unenforceable on account of section 21(b) wherein it is provided that a contract for the non-performance of which compensation in money is adequate relief can not be specifically enforced. In a case where there is a contract between a master and a servant the master agreeing to pay the salary and the servant agreeing to render personal service it is obvious that money compensation is full relief, for all that the servant was entitled to under the contract was his salary. A breach of contract can give rise to only two reliefs: damage or specific performance. If specific performance be barred, the only relief available is damages. When a master, in breach of his contract, refuses to employ the servant, the only right that the servant can claim is the right to damages and a decree for damages is the only decree that can be granted to him."

51. The decision in the case of Messrs Malik & Haq and another…Vs…Muhammad Shamsul Islam Chowdhury and two others reported in 13 DLR (SC) 228 is in tune with the decision quoted above.

52. Regard being had to the above discussions, we are led to hold that for breach of any of the terms and conditions of the contract in the present case before us, say for example, clause 14 of Annexure-'C' to the Writ Petition, the remedy of the petitioner lies in a properly constituted suit in the competent Civil Court for damages under section 73 of the Contract Act. So it necessarily follows that the writ jurisdiction of the High Court Division under Article 102 of the Constitution is not available to him.

53. Undeniably there is no termination clause in Annexure-'C', that is to say, in the appointment letter of the petitioner. But none the less, the Board of Governors terminated him from service by Annexure-'E' dated 28.12.2016. The facts and circumstances of the case irresistibly lead us to uphold the contention of the contesting respondents that the petitioner was governed by the Rule of Master and Servant. As such the Board of Governors, that is to say, the master had the authority to terminate the petitioner (servant) at any time even before his attainment of 60 years of age as contemplated by clause 14. This is because no servant can be forced upon an unwilling master, for whatever reason it is.

54. There is another aspect of the case. Section 16 of the General Clauses Act, 1897 provides that where, by any Act of Parliament or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. By virtue of the provisions of section 16 of the General Clauses Act, the Board of Governors being the appointing authority had the power to terminate the appointment of the petitioner as the MD of the PDBF and accordingly it terminated the appointment. This power of termination under section 16 of the General Clauses Act has been dealt with in the decision in

the case of Professor Dr. Md. Yusuf Ali…Vs…Chancellor of Rajshahi University, Rajshahi and ors. reported in 50 DLR (HCD) 1.

55. It is an indubitable fact that the petitioner was not afforded any opportunity of being heard prior to his termination by the Board of Governors as evidenced by Annexure-'E' to the Writ Petition. Can the Board of Governors terminate him without giving him any prior show cause notice? The 3-Member Inquiry Committee examined the petitioner and he submitted his written statement to the Inquiry Committee. The Inquiry Committee in its turn considered the pros and cons of the matter under inquiry and made its own findings. On the basis of the findings arrived at by the 3-Member Inquiry Committee, the Board of Governors terminated the petitioner by Annexure-'E' to the Writ Petition and that was subsequently endorsed by the Board of Governors at its 70th Meeting.

56. It is a truism that no servant is entitled to any prior show cause notice in case of his dismissal, removal, termination etc. by his master. Had the Rule of Master and Servant not been applicable to the case of the petitioner, in that event, he would have been entitled to a prior show cause notice. As the relationship between the petitioner and the Board of Governors of the PDBF was regulated by the Master and Servant Rule, we opine that the Board of Governors did not commit any illegality in terminating the petitioner from the post of the MD without any prior show cause notice.

57. We have discussed earlier that erroneously instead of Regulations, Service Rules for the position of the MD have been framed pursuant to sub-section (6) of section 11 of the Act No. 23 of 1999. The "Rules" must be "Regulations" as mandated by sub-section (6) of section 11. This apparent mistake must be corrected by the Board of Governors. Furthermore, the Board of Governors must take concrete steps for immediate gazette notification of the Regulations (mistakenly called Service Rules) for the position of the MD of the PDBF for information of all concerned.

58. Before parting with this case, we feel constrained to make some observations about the conduct of the Members of the Board of Governors of the PDBF. A reference to the materials on record reveals in unmistakable terms that the Board Members of the PDBF conducted themselves in a very negligent, callous and lackadaisical manner. For all the ills centring round the process of the appointment of the petitioner to the post of the MD of the PDBF, they blamed the then officiating MD of the PDBF, that is to say, the present petitioner. They did not feel even a twinge of conscience at their irresponsible conduct of the whole affair. They even heavily relied upon the petitioner who fully exploited his position to his advantage as the officiating MD and the ex-officio Member-Secretary of the Board of Governors of the PDBF at the relevant time. This blind reliance of the Board of Governors upon its Member-Secretary (the then officiating MD), in our opinion, led to all the ills in the matter of his appointment as the Managing Director of the PDBF. The Board of Governors, in this regard, can not skirt round their liability and the consequential blame. We hope, the Board of Governors will be vigilant and responsible in the conduct of the affairs of the PDBF in the days to come.

59. From the foregoing discussions and having considered the various dimensions of the case, our conclusion is that the Rule is not maintainable. The Rule, therefore, fails.

60. Accordingly, the Rule is discharged. However, in the peculiar facts and circumstances of the case, we make no order as to costs.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION No. 12388 OF 2014

Children's Charity Bangladesh Foundation(CCB Foundation)
- Petitioner

-vs-

Bangladesh and others.
- Respondents.

And

Mr. Md. Abdul Halim, Advocate
..... for the Petitioner.

Mr. Amit Talukder, D.A.G with
Ms.Nusrat Jahan, A.A.G. with
Ms. Bilkis Fatema, A.A.G.
... for the Respondent Nos. 3 and 5.

Mr. Shaheed Alam, Advocate
..... for the respondent No.4

Ms. Quamrun Nessa, Advocate
..... for the respondent No.6

Ms. Sara Hossain, Advocate with
Ms. Sharmin Akter, Advocate
..... for the Intervenor.

Heard on 11.11.2015, 12.11.2015, 18.11.2015, 17.02.2016.
Judgment on 18.02.2016.

Present:

Mrs. Justice Farah Mahbub.
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

Locus Standi of the Petitioner & maintainability of the Rule.
The issues being raised in the instant writ petition by the petitioner involves grave public injury as well as invasion on the fundamental right to life of the victim guaranteed under the Constitution. Accordingly, it has sought protection of this Court, the guardian and custodian of the Constitution of the People's Republic of Bangladesh, for violation of the said right by filing application under Article 102 of the Constitution for the bereaved poor family members of the 4 years old boy named Jihad who died by falling into an uncovered deep tube well pipe of Bangladesh Railway situated at Shahjahanpur Railway Colony. As such, it cannot be said that the petitioner has no locus standi on the issue in question. In other words, this Rule is maintainable so far the locus standi of the petitioner Foundation is concerned. … (Para 46)

In an action of negligence the affected person must affirmatively prove negligence but may find hardship in cases where the aggrieved person can prove the accident, but cannot show how it happened, the fact being solely outside his knowledge and within the knowledge of the other party who causes it. In such cases, it is sufficient for the aggrieved person to prove the accident and nothing more, for, there is a presumption of negligence according to the maxim "res ipsa loquitur" (the thing speaks for itself). Such presumption arises when the cause of the mischief was apparently under the control of

the other person or his servants. The accident itself constitutes reasonable evidence of negligence in the particular circumstances. … (Para 54)

Judgment

Farah Mahbub, J:

1. In this Rule, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the inaction and/or negligence, and/or failure on the part of the respondent Nos. 2,4,6 and 7 and the respondent Nos. 3,4 and 5 respectively in respect of rescuing a minor boy of 4(four) years named Jihad which resulted in his tragic and shocking death, as reported in all the national dailies and medias particularly in the "Daily Prothom Alo" and the "Daily Star" dated 27.12.2014 and 28.12.2014 (Annexure- A,A-1,A-2 and A-3 respectively) should not be declared to be illegal, without lawful authority and hence, of no legal effect being violative of the law of the country, as well as his fundamental rights as guaranteed under Articles 31,32 and 36 of the Constitution of the People's Republic of Bangladesh; and accordingly, why the respondent Government /Ministry concern should not be directed to take appropriate steps against the concerned officials /respondents for failing to discharge their respective duties in accordance with law; also as to why the respondents concern should not be directed to give compensation of Tk. 30,00,000/- (Taka thirty lac) only to the respective family members of the said deceased for gross negligence and violation of his fundamental rights as guaranteed under Articles 31 and 32 of the Constitution of the People's Republic of Bangladesh; also as to why the respondent Nos. 2,4,6 and 7 should not be directed to make a list of pipes, wells, tube wells, sewerage pipes, holes and water tanks left uncared for or uncovered or unsafe throughout the country under their jurisdiction and submit a list to that effect before this Court within a prescribed period; further, as to why the respondent Nos. 3 and 5 should not be directed to produce before this Court all information, data on purchase of expenditure on modern technologies and expertise so far they had with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, water-tanks, water-bodies, sewerage pipes, drowning, entrapping in fences etc. causing death-traps and or such other or further order or orders passed as to this court may seem fit and proper.

2. Facts, in brief, are that the petitioner, being a conscious and a respectable law abiding citizen, who is also a practicing lawyer of the Supreme Court of Bangladesh filed this writ petition in the form public interest litigation on behalf of Children's Charity Bangladesh Foundation(CCB Foundation), a non-profit and charitable society, registered under the Societies Registration Act, 1860, which works for the promotion and protection of rights and interests of the children and young persons and to protect their welfare, education, safety, security, acts against gender-discrimination and also to protect the life, liberty and freedom of expression, conscience, movement etc. of students, children, young girls and women, respectively.

3. Zihad, a 4 years old boy while playing in the Shahjahanpur Railway Colony playground fell inside the 16 inches uncovered shaft which was left abandoned by Bangladesh Railway and WASA authorities, i.e., the respondents Nos.3,5 and 6. The said tragic incident took place at 3.30 p.m. on 26.12.2014 which was broadcasted throughout all electronic and print media of the country. As a part of the rescue operation the respondent Nos. 3,5 and 6 sent down cameras through the said shaft to see the condition of the boy. However, the said camera being unworkable, they brought about another camera in order to

see his condition without taking fruitful step to rescue him immediately. The said camera show down went on for about 10-12 hours, but without any result.

4. Following the said camera show down for long 10-12 hours the respondent Nos. 3 and 5 ultimately abandoned the rescue operation of the said child in public and left the place of occurrence. Immediate thereafter a group of five young volunteers by using their hand-made device pulled up the dead body of the said child from the said pipe within a short time after it was declared by the respondents concern that there was nothing in the pipe, leaving the whole nation frustrated, mum and shocked.

5. Being aggrieved by and dissatisfied with the petitioner filed the instant writ petition and obtained the present Rule Nisi.

6. During the pendency of the instant Rule Bangladesh Legal Aid and Services Trust(in short, BLAST), a national legal services organization with a long track record in providing legal aid to individuals as well as undertaking public interest litigation(PIL) and has in particular undertaken many cases on child rights and child issues and has considerable experience and expertise in implementing human rights and fundamental rights under the laws applicable within the country, had been added as Intervenor vide order dated 24.04.2015 passed by this Court in order to assist on the issues of accountability of these public authorities to be brought under judicial scrutiny for better human rights protection, fundamental rights protection and human rights justice in the country and at the same time safety and security of the children in the country.

7. However, at the time of issuance of the Rule the respondent Nos. 4 and 5 were directed to produce before this Court all information, data on training, expenditure on purchase of modern technologies, equipments of the last 2(two) years and expertise so far they had gathered with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, wells, tube wells, water-tanks, water-bodies, sewerage pipes, drowning, entrapping in fences etc. causing death-traps, by filing an affidavit.

8. In compliance thereof the respondent No.5 filed an affidavit in compliance stating, *inter alia*, that the Directorate of Fire Service and Civil Defense(in short, the Fire Service) is a Directorate under the Ministry of Home Affairs and that the officers and employees of the said Directorate work under the provision of "AwgRxeZ_Kc h v©šR© AKG© d" and the Civil Defense Act,1952. During any rescue operation the employees of the said Directorate give their best effort to discharge their professional duties and due to their service they have earned a good reputation in the country.

9. In this regard it has also been contended that on receiving any information of any accident such as, fire accident, building collapse, accident in garments factory or other commercial places the members/employees of the Directorate rush to the place of occurrence immediately and try to rescue the victims with the help of their equipments and experiences. The members of the Directorate never show any negligence whatsoever to serve the nation.

10. On receiving the message about the tragic accident held at Shahjajanpur Railway Colony on 26.12.014 the members of the rescue team of the Fire Service immediately rushed to the place of occurrence in order to rescue the boy named Jihad and took active part in the rescue operation.

11. So far the list of equipments and the programmes undertaken by the officers and employees concern for handling emergency situation and any kind of rescue operation it has been stated, *inter alia*, that in the year 2013 and 2014, the officers and employees of the Directorate participated in a good number of training programmes organized by Bangladesh Army, BRTA, BPATC, RPATC, NAPD, BRAC and by the Directorate itself. They participated in various other training programmes outside the country and had completed the same successfully(Annexure-2 and 2(A) respectively). Moreover, pursuant to the policy decision of the respondent-government to establish fire station in every upazilla of the country necessary work has already been started. Moreso, the Directorate for its smooth functioning had purchased required number of vehicles and other equipments.

12. It has been stated that since there was no high tech powerful camera/equipment in Fire Service and Civil Defense which could be used to locate any victim in such a deep and narrow pipe it sought support and co-operation from the other government and non-government machineries, volunteers and common people to take part in the rescue operation.

13. In this regard, it has been stated that the incident, which took place at Shahjahanpur Railway Colony on 26.12.2014, is unique and rare in Bangladesh. The personnel concern of Fire Service and Civil Defense were not quite familiar with such kind of incident. But they tried their best to rescue the victim with utmost sincerity but could not succeed; that does not go to construe negligence on the part of this respondent in discharging their public duties. Ultimately, the victim was rescued by the integrated efforts of all the stakeholders(Annexure-3).

14. Respondent Nos. 3 and 5 entered appearance by filing affidavit in opposition taking more or less similar stand as they have taken in the affidavit in compliance stating, *inter alia*, that these respondents are the authorities of the Directorate of Fire Service and Civil Defense, which is under the respondent No.1. However, the officers and employees of the Directorate work under the provision of "AwgRxeZ_Kch v©ŠR© AKG© d" and Civil Defense Act, 1952. The Fire Service is serving the nation with sincerity and diligently with its limited manpower of only about 8,000 employees in Dhaka City and that it has only 13 Fire Stations.

15. In this connection, it has also been stated that earlier Fire Service had actively and successfully took part in rescue operation at Rana Plaza collapse, Tajrin Fashion Fire accident at Savar and Neemtali Chemical Storage fire accident in Dhaka which earned good reputation at home and abroad.

16. In the instant case, the members of the rescue team of the Fire Service rushed to the place of accident at Shahjahanpur Railway Colony immediately after they received the information in order to rescue the boy named Jihad and had actively took part in the rescue operation. However, despite the fact that this type of incident was an exceptional and rare incident in Bangladesh and that the personnel of Fire Service were not quite familiar with such type of accident nevertheless they tried their heart and soul to rescue the victim sincerely. The Fire Service, however, had thermal imaging camera and with its support persons and objects in fire could be detected and with search vision camera location of a victim in a collapsed building could be detected, but there was no high-tech powerful camera or equipment in Fire Service which could be used to locate the victim in such a deep and narrow pipe. Consequently, at Shahjanpur Railway Colony, the respondent Nos. 3 and 5 did not use any camera since the cameras of Fire Service could not locate the child in the narrow pipe. In the given context, they sought support and co-operation from the other government

and non-government organizations, volunteers and common people to take part in the rescue operation.

17. It has also been stated that the nature of the said accident at Shahjahanpur Railway Colony was a rare of the rarest one. The rescue team of Fire Service tried their best to rescue the boy, but unfortunately they did not succeed. Later on, with the support of the local volunteers the victim was rescued following an indigenous method. The respondent Nos. 3 and 5, however, had no negligence in discharging its professional duties to rescue the boy, named Jihad (Annexure-X, X-(1)-X(3) respectively).

18. In compliance of the direction so given by this Court at the time of issuance of the Rule respondent No.4, Bangladesh Railway also filed affidavit of facts stating, *inter alia*, that the authority concern of Bangladesh Railway through its officers immediately went to the place of accident after receiving the information in order to rescue the boy and they took part in the rescue operation accordingly.

19. However, following the incident on 26.12.2014 the Ministry of Railway vide Memo dated 28.12.2014 constituted a 2(two) members enquiry committee to enquire into the matter. Said committee after due enquiry submitted report on 06.01.2015 for consideration by the authority concern.

20. Pursuant thereto process was duly initiated with service of notice upon all the persons concern. Ultimately, vide order dated 25.12.2014 its enlisted contractor, M/S. S.R. House had been relieved from doing the work of deep tubewell excavation and installation "†©© h ‡KR©" and was blacklisted(Annexure-A to the affidavit in opposition filed by respondent No.4).

21. Mr. Md. Abdul Halim, the learned Advocate appearing in person on behalf of the petitioner submits that the respondent No.5 in its affidavit in compliance by identifying the incident as a unique and rare incident in Bangladesh has categorically admitted that the personnel of Fire Service and Civil Defense are not quite familiar with such kind of incident. To that effect he goes to submit that falling in pipes, wells, holes and entrapping into fences of human body are not rare, rather they often occur but unfortunately, the respondent Nos.3 and 5 have not gained any expertise to handle such kind of situation for reasons best known to them. As such, he submits that by making an assertion that they are not familiar with such an incident cannot absolve them from their liability of not being able to rescue the boy named Jihad in time, which resulted in his tragic death due to their sheer negligence, which is further fortified from the fact that when they had abandoned the rescue operation declaring that there was no trace of human body inside the pipe, the dead body of the child was found and uplifted by a group of five young people within a short time. In the given context, he submits that if this simple and ordinary device is not known to the respondent Nos. 3, 4 and 5 what special training and expertise do they have with regard to rescuing people in danger? What expertise do they have gained during the last 44 years for public benefit?

22. He further goes to contend that as per direction of this Hon'ble Court the respondent No.5 did not submit required information in their affidavit in compliance regarding expertise, expenditure or training with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, wells, tube wells, water-tanks, water-bodies, sewerage-pipes. Thus, goes to prove that the said respondents had negligence on rescuing the ill-fated child Jihad. He further submits that no clear averments have been

made in the said affidavit that there was any person from the Fire Service at the site of the accident who was expert in rescuing a human being trapped in any hole or deep pipe. Rather, the respondent Nos.3,5 and 6 had sent down cameras to see the condition of the baby and the camera being unworkable, they brought about another camera just to see his condition without taking fruitful step to rescue him immediately. Said camera show down went on for about 10-12 hours. This untrained show down substantiates how careless those respondents were in dealing with emergency and tragic accidents on human life.

23. In this connection he goes to argue that in today's modern days the rescue technology has been so developed that anything being underneath the sea can be seen and observed within 5 minutes whereas the respondent Nos.3,5 and 6 posing to be legally trained and specialized in rescuing people were not at all equipped to handle the rescue operation and due to their sheer negligence resulted the death of Jihad in an uncovered deep tube well pipe.

24. He also submits that it was reported and also telecasted live through all electronic and print medias that both the Ministry of Homes and Fire Service declared the rescue operation abandoned by giving declaration in public that there was no trace of human body inside the pipe. However, after such abandonment a group of five young people rescued the dead body of Jihad within a short period of such declaration; as such, it cannot be said that the victim was rescued by the integrated efforts of all the stakeholders, as claimed by the respondent No.5.

25. Respondent No.4, i.e., Bangladesh Railway in its affidavit of facts stated that following the tragic incident of Jihad's death an inquiry committee was formed. In this regard, he submits that while making recommendation the Inquiry Committe had by-passed the liability and negligence of the respondent No.4 by shifting the same on its contractor. Accordingly, he submits that the respondent No.4 is vicariously liable for the negligence of its contractor and also for gross violence of the human as well as fundamental rights of the said victim.

26. The respondent No.5 in its affidavit in compliance categorically stated that "*there is no high tech powerful camera/equipment in Fire Service and Civil Defence that can be used to locate victim in such a deep and narrow pipe*." Referring to the said averments of the respondents concern he goes to submit that it is not only surprising but also astonishing that the Civil Defense authority has not purchased any powerful camera in its 44 years of tenure to see if there is any human being who has fallen in a pipe or deep hole. Having and possessing a high powered camera should have been a usual purchase item by this respondent, for, a high powered camera is very much necessary for search in rescuing incidents like drowning in a ship, boat, deep sewearage pipe or deep wells. He also submits that the respondent No.5 has annexed the list of instruments purchased in the last two years. From a plain reading of this Annexure it appears that in 2012-2013 they purchased instrument worth Tk.29,03,58,486/= and in 2013-2014 they purchased instruments worth Tk.67,81,14,708/=, but surprisingly they did not buy a modern camera to rescue people in danger in any pipe or holes or wells, which goes to substantiate their negligence in their rescue operation.

27. So far the maintenance system is concerned he submits that the respondent No.4 owed a public duty to maintain the deep tube well, so as to keep the same from harming those who would rightly assume that they would not fall down, but in the instant case they miserably failed to discharge their said duty.

28. Accordingly, he goes to submit that the maxim r*es ipsa loquitor* as well as strict liability principles are squarely applicable and attracted in the instant case and as such, the family members of the victim are entitled to compensation due to the irretrievable loss suffered by them on account of the negligence of the said respondents.

29. He lastly submits that this is not a case of violation of ordinary right under any ordinary law; rather this is a case of violation of the fundamental right to life, which is guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh. Since the State has failed to protect the fundamental rights of the victim Jihad accordingly, this public law remedy is available to his bereaved family members to claim compensation. In support the learned counsel for the petitioner has relied upon the decisions of the Supreme Court of India in ***Rudul Shah*** Vs. ***State of Bihar (1983) 3 SCR 508***, ***Smt. Nilabati Behera*** v. ***State of Orissa 1993 2 SCC 746*** as well as the case of ***DK Basu*** Vs. ***Union of India(1997) 1 SCC 416*** to contend that a writ petition to claim compensation is maintainable where it involves infraction of the fundamental rights of the citizens.

30. He also relied upon various other judgments in support of his contention that the principles of strict liability including the maxim r*es ipsa loquiter* will apply, for, the negligence of the respondents is writ large in the face of keeping the deep tube well uncovered situated in a densely populated area i.e., Shahjahanpur Railway Colony.

31. Per contra, Mr. Amit Talukder, the learned Deputy Attorney General appearing on behalf of the respondent Nos. 3 and 5 submits that this writ petition as public interest litigation is not maintainable in view of the decision and parameters set by the Hon'ble Appellate Division in ***National Board of Revenue*** Vs. ***Abu Sayeed Khan*** reported in ***18 BLC(AD)(2013)116*** since it is in the nature of *certiorari* and *mandamus* and that the petitioner is not a person aggrieved. Moreover, he submits that in the writ petition there is no explanation as to why the affected party has not come before this Hon'ble Court. As such, in the absence of satisfactory reason for non appearance of such affected party this Rule is liable to be discharged.

32. He further submits that the respondent Nos.3 and 5 are under the authority of Fire Service and Civil Defense Directorate which is regulated by the "AwgRxeZ_K c h v©šR© AK©
d"(in short, the Ain). Section 25 of the said Ain provides that if any harm or damage is caused due to any act done in good faith by any officer or any employee of the Fire Service he will not be liable to any civil suit or criminal case or any other legal proceeding. In this regard, he submits that the unfortunate accident did not take place due to any negligence of the respondent Nos.3 and 5. Moreover, said respondents did actively participate in the rescue operation with utmost sincerity and diligently with the equipment and manpower they have. Moreover, the rescue team of Fire Service did not show any negligence in the said rescue operation with their limited equipments and trainings to rescue the victim in this type of rare accident. In the given context, he submits that for not having modern technological device and lack of expertise in handling this type of rare accident cannot go to render the said respondents liable for negligence.

33. He also submits that following the said incident Bangladesh Railway had black listed its contractor namely M/S S.R. House including one Senior Assistant Engineer named Jahangir Alam who had been suspended soon after the accident on the ground that said Engineer was responsible for supervising the work of the firm but he did not look into the

situation that the said contractor had kept the pipe open. In that view of the matter, he submits that if anybody is responsible for the accident it is the contractor and the concerned Engineer. Consequently, they are liable to give compensation to the respective family members of the deceased for their negligence. The respondent Nos. 3 and 5 are not in any way liable to give compensation.

34. In this connection, he also submits that claim of compensation of the petitioner should not be considered under Article 102 of the Constitution, for, disputed question of facts are involved for determination of the negligence of the authorities concern. As such, he submits that this Rule should be discharged.

35. Ms. Quamrun Nessa, the learned Advocate appearing on behalf of the respondent No.6 by filing affidavit in opposition submits that the deep tube-well at Shahjahanpur Railway Colony in which the ill fated boy named Jihad had fallen belonged to Railway authority which was installed, operated and maintained by the concerned department of Bangladesh Railway. Dhaka WASA, however, had no manner of involvement with the installation, operation or maintenance of the said deep tube well. As such, she submits that Dhaka WASA is not responsible for the tragic death of the innocent boy named Jihad.

36. She also submits that hearing the news of the accident, the Managing Director of Dhaka WASA rushed to the place of occurrence taking a powerful camera of Dhaka WASA in order to co-operate the rescue operation conducted by Fire Service. As such, the allegation of negligence against WASA authority is without any substance.

37. Mr. Shaheed Alam, the learned Advocate appearing on behalf of the respondent No.4, Bangladesh Railway submits by filing an affidavit in opposition that the respondent No.3 undertakes rescue operation with the aid of all its equipments to rescue the victims of such accident. However, he does not deny the occurrence of the aforesaid incident.

38. The cardinal issues requiring determination in the present Rule Nisi are: whether the petitioner, CCB Foundation, has *locus standi* to file the instant writ petition in the form of public interest litigation agitating the cause of death of a 4 years old boy named Jihad due to the alleged negligence of the respondents concern; whether the death of Jihad was due to the alleged negligence of the respondents concern; whether a claim for compensation be made against public authority regarding an action/inaction which resulted in a death of the 4 years old boy Jihad, for breach of statutory/constitutional duty; whether claim for compensation be made directly under the writ jurisdiction against the public authority in question; and how to quantify such a claim for compensation.

39. At the very outset, the categorical assertion of the respondents concern is that the instant writ petition is not maintainable in the form of public interest litigation in view of the ratio as decided by the Appellate Division in ***National Board of Revenue*** Vs. ***Abu Sayeed Khan*** reported in ***18 BLC(AD)(2013)116.***

40. In ***National Board of Revenue*** Vs. ***Abu Sayeed Khan (supra)*** the Appellate Division has set 14 criterions for entertainment of public interest litigation. Of those 14 conditions Nos. 4,7,9 and 13 are relevant for disposal of the said issue and thus, are quoted as under-

"*(4) The expression "person aggrieved" used in Article 102(1) means not any person who is personally aggrieved but one, whose heart bleeds for the less fortunate fellow*

beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.

(7) Only a public spirited person or organisation can invoke the discretionary jurisdiction of the court on behalf of such disadvantaged and helpless persons.

(9) The court should also guard that the petition is instituted for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the court.

(13) A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach the Court due to illiteracy or monetary helplessness."

41. On the duty of the writ bench to see whether the writ petition itself is maintainable in law the Appellate Division in the case of ***Kartic Das Gupta*** Vs. ***Election Commission of Bangladesh and others*** reported in ***8 ADC 578*** observed, *inter alia*,-

" ..... before going into the merit of a writ petition the first and primary duty of the writ Bench is to see whether writ petition itself is maintainable in law or whether the writ petitioner has got any interest in the matter which if not protected he shall suffer injury. "

42. In the case of ***Kazi Mukhlesur Rahman*** Vs. ***Bangladesh and another*** reported in ***26 DLR(SC)44***, the Appellate Division also observed, *inter alia*,-

" It appears to us that the question of locus standi does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstance of each case."

43. In ***Bangladesh Sangbadpatra Parishad(BSP) represented by its Secretary General Anwarul Islam*** Vs. ***The Government of the People's Republic of Bangladesh represented by its Secretary, Ministry of Information and 4 others*** reported in ***43 DLR(AD)126***, the Appellate Division further goes to observe, *inter alia*,-

" The Parishad was not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental right and enforce its constitutional remedy. The indication was thus broadly given that in case of a violation of any fundamental right of the citizens affecting particularly the weak, downtrodden or deprived section of the community or that if there is a public cause involving public wrong or public injury, any member of the public or an organisation, whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realisation of any of the objectives and purposes of the Constitution."

44. While giving interpretation to the words "*sufficient interest*" with the words "*any person aggrieved*" the Appellate Division in the case of ***Dr. Mohiuddin Farooque*** Vs. ***Bangladesh :*** reported in ***49 DLR(AD)1*** observed, *inter alia*,-

"Any person other than an officious intervenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution

or the law and seek enforcement of such constitutional or legal provision. Now what is 'sufficient interest' will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. .....

The High Court Division will exercise some rules of caution in each case. It will see that the applicant is, in fact, espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting bona fide, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest."

45. The petitioner, CCB Foundation, is a non-profit and charitable registered society under Societies Registration Act, 1860 (bearing registration No. S-4000(102)/2004 dated 04th August, 2004). The said organisation works for the promotion of child rights and child education in the country. It has outlined its objectives in paragraph 3 of the writ petition and also by supplementary affidavit. However, clause 13 of the object clause of the Memorandum of Association of the petitioner-organisation is "to organise legal assistance, support groups for victims of social, political and human rights crimes". Further, Annexure-C series to the supplementary affidavit substantiate that the petitioner organisation has undertaken different projects as well as conduct programmes for child education and promotion of child rights.

46. The issues being raised in the instant writ petition by the petitioner involves grave public injury as well as invasion on the fundamental right to life of the victim guaranteed under the Constitution. Accordingly, it has sought protection of this Court, the guardian and custodian of the Constitution of the People's Republic of Bangladesh, for violation of the said right by filing application under Article 102 of the Constitution for the bereaved poor family members of the 4 years old boy named Jihad who died by falling into an uncovered deep tube well pipe of Bangladesh Railway situated at Shahjahanpur Railway Colony. As such, it cannot be said that the petitioner has no *locus standi* on the issue in question. In other words, this Rule is maintainable so far the *locus standi* of the petitioner Foundation is concerned.

47. The categorical assertion of the petitioner is that it is a clear case of negligence on the part of the respondent No.4, Bangladesh Railway, as they owed a public duty to keep the uncovered tube well pipe surrounded with a fence or something with clear sign of caution to the inhabitants of the area concern of the risk it entails with and also to cover it so that no one could fall down having not known that it was uncovered, which they did not. The further contention of the petitioner is that Fire Service, respondent Nos.3 and 5 also have miserably failed to discharge their public duty, for, admittedly they did not even have a camera to locate the position of the boy named Jihad whereas they posed a show-down for long 10-12 hours by sending down a camera which was unworkable and ultimately, they declared the rescue operation abandoned making statements in public that there was nothing or no body inside the pipe, which is a glaring instance of negligence on the part of the said respondents. Thus, the maxim *res ipsa loquitor* as well as strict liability principles are squarely attracted in the present case and as such, the bereaved family members of the victim are entitled to compensation due to the irredeemable loss suffered by them on account of the said negligence of the respondents.

48. Conversely, the contention of the respondents are that they are not responsible for the occurrence, rather it was the duty of the contractor M/S S.R. House and the Engineer concern to look after and maintain the said tube well.

49. The word "negligence" is defined as the breach of a duty caused by the omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. In other words, negligence may arise from non-feasance or from misfeasance.

50. An action for negligence proceeds upon the idea of an obligation or duty on the part of the person concern to use care, a breach whereof results in the injury of the aggrieved person.

51. However, the standard or degree of care which a man is required to use in a particular situation varies with the obviousness of the risk. If the danger of doing injury to the person or property of another in pursuance of a certain line of conduct is great, great care is necessary. If the danger is slight, only a slight amount of care is required. The care that will be required of them will be the care that an ordinary prudent man is bound to exercise. But, persons who profess to have special skill, or who have voluntarily undertaken a higher degree of duty, are bound to exercise more care than an ordinary prudent man.

52. In order to succeed in an action for negligence, the aggrieved person must prove the followings -1. that the other party was under a legal duty to exercise due care and skill; 2. that the duty was towards aggrieved person; 3. that in the circumstances of the case, the other party failed to perform that duty; 4. that the breach of such duty was the *causa causans* i.e., the direct and proximate cause, of the damage complained of; and 5. that the injury is caused on account of this breach of duty.

53. As a general rule, the onus of proving negligence is on the aggrieved person. He must not merely establish the facts of the other parties' negligence and of his own injury, but must show that the one was the effect of the other.

54. However, in an action of negligence the affected person must affirmatively prove negligence but may find hardship in cases where the aggrieved person can prove the accident, but cannot show how it happened, the fact being solely outside his knowledge and within the knowledge of the other party who causes it. In such cases, it is sufficient for the aggrieved person to prove the accident and nothing more, for, there is a presumption of negligence according to the maxim "*res ipsa loquitur*" (the thing speaks for itself). Such presumption arises when the cause of the mischief was apparently under the control of the other person or his servants. The accident itself constitutes reasonable evidence of negligence in the particular circumstances.

55. Thus, the following are the essential requirements for application of the said maxim: (i) The thing causing the damage must be under the control of the other party or his servants; (ii) the accident must be such as would not, in the ordinary course of things, have happened without negligence and (iii) there must be no evidence of the actual cause of the accident.

56. A classic exposition of the said maxim is found in the judgment of Sir William Erle C.J. in the leading English case, ***Scott*** v. ***London & St. Katherine Docks Co.(1865 3 H & C 596)***, where it was observed as follows:

> *" There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, the accident is such as in the ordinary course of things does not happen if those who have the management used proper*

care, it affords reasonable evidence, in the absence of any explanation by the defendant, that the accident arose from want of care. "

57. The incident in question has not been disputed by the respondents concern, nor it is disputed that the cause of death of the 4 years old boy named Jihad was due to falling in the uncovered deep tube well pipe maintained by the respondent No.4.

58. The respondent Nos. 3 and 5, Fire Service and Civil Defense in their affidavit in compliance categorically contends that "*this type of incident is an unique and rare incident in Bangladesh. The personnel of Fire Service and Civil defence are not quite familiar with such an incident."* However, falling in pipes, wells, holes and entrapping into fences of human body are not rare in the country. Rather, in their own volition they admitted that they did not have any expertise in the incident in question. In the said state of position, when the said respondents had abandoned the rescue operation upon declaring that "*there was no trace of human body inside the pipe*", the dead body of Jihad was found and uplifted by a group of five young people within a short time of such declaration. The said simple and ordinary device was not known to the respondent Nos. 3 and 5. By making a mere statement that they did not have proper expertise in the matter in question, cannot go to absolve them from their public duties as well as liabilities, which have been casted upon them by the statute.

59. Moreover, the respondent No. 5 did not submit any information, by filing affidavit in compliance, as to their *expertise, expenditure or training with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, wells, tube wells, water-tanks, water-bodies, sewerage-pipes,* as was directed by this Court. Even, there was no statement in the said affidavit that there was any person from the Fire Service Department at the site of the incident who was expert in rescuing a human being trapped in any hole or deep pipe.

60. In this regard, it is also pertinent to observe that in paragraph 11 of the affidavit in compliance said respondents have categorically stated that *"there is no high tech powerful camera/equipment in Fire Service and Civil Defence that can be used to locate victim in such a deep and narrow pipe."* It is astonishing that Civil Defense Authority has not purchased any powerful camera to see if there is any human body in danger in the pipe or deep hole, for, having and possessing a high powered camera is an important item for any rescue operation to be conducted by the said respondents. Even in ordinary rescuing incidents like drowning in a ship, boat, deep sewerage pipe or deep wells searching by high powered camera is a common method to be applied in any rescue operation.

61. Even, in 2012-2013 they claimed to have purchased instruments worth Tk. 29,03,58,486/= and in 2013-2014 they had purchased instruments worth Tk. 67,81,14,708/=. It is surprising to observe that although more than 60 crores of taka the authority had expended to purchase life saving instruments in a year, but they did not buy a modern camera to rescue people in danger in any pipe or holes or wells.

62. The respondent Nos. 3, 5 and 6 though had sent down cameras to see the condition of the child but the same being unworkable, they brought about another camera just to see the condition of the boy without taking fruitful step to rescue him immediately. This camera show down went on for about 10-12 hours resulted in tragic death of Jihad.

63. Furthermore, in the said affidavit the respondent No. 5 also stated that "*Fire Service and Civil Defence had sought support and co-operation from other government and non-government orgnaisations, volunteers and common people to take part in the rescue operation. The victim was rescued finally by the integrated efforts of all stakeholders*."

64. From record it appears that the Ministry of Homes and Fire Service declared the rescue operation abandoned by making statement in public that there was no trace of human body inside the pipe, which was reported and also telecasted live through all the electronic and print medias. However, within a short time of declaration a group of 5(five) young people rescued the dead body of Jihad. Therefore, it is apparent that rescuing the dead body of the victim Jihad by 5(five) young people is not the result of integrated efforts but an unfortunate reflection of negligence on the part of the respondents concern demonstrating their ineligibility to handle rescue operation in any deep pipe/shaft.

65. The respondent No. 4 i.e., Bangladesh Railway in its affidavit-of- facts stated that following the tragic incident of Jihad's death an inquiry committee was formed, which gave the following opinion–

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66. M/S S.R. House, an enlisted contractor of Bangladesh Railway was given work orders for excavation and installation of deep tube well in the area in question. It also appears from record that the said contractor without taking necessary precautionary measures around the said deep tube well, which was situated at a densely populated area within Shahjahanpur Railway Colony and without covering the same was extracting water therefrom without taking due approval of the authority concern.

67. Thus, it is apparent that the said enlisted contractor of the respondent No.4 had miserably failed to take due care while doing his work, as stated above. As such, we have no manner of doubt to find that the respondent No.4 cannot avoid it's liability when the negligence of it's contractor is admitted by the said respondent in it's affidavit in compliance.

68. From Annexure-A to the affidavit in opposition of the respondent No. 4 it appears that the enquiry committee while giving recommendation has by-passed the liability and negligence of the respondent No.4 by shifting the said liability on the contractor, as has been stated in paragraph 6 of the affidavit in opposition "*Bangladesh Railway was not negligent because it was the fault of the contractor who were carrying out the work* ". Thus, it appears that the said respondent is shifting their liability on each other for the failure to take proper maintenance of the said shaft. They, however, do not dispute that one or the other is indeed responsible for the negligent act.

69. There can be no denying of the fact that said respondents owed a duty of care to the public in general so that no action or inaction on their part may cause any harm to the public at large. Also, there can be no dispute that the shaft in question should have remained covered, there should have been sufficient precautionary measures on the part of the respondent No.4 so that no one can fall down. Falling of Jihad inside the said uncovered shaft is itself a *prima facie* evidence of negligence. Moreso, nothing otherwise has been posed by the respondents to suggest that Jihad fell down despite the respondents taking proper care of the same, or for any other cogent/plausible reason whatsoever.

70. In view of the above, there is no doubt to find that the respondent No.4 through its contractor was negligent in the maintenance of the said shaft, due to which Jihad fell down and died.

71. Said negligent acts of the respondents concern are also a glaring instance of gross invasion of human and fundamental rights of the 4 years old boy named Jihad as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh.

72. Now, the next question is whether a claim of compensation be made against public authority regarding the action/inaction which resulted in a death of Jihad, for breach of their statutory/constitutional duty.

73. In respect of death or injuries occurring consequent to wrongful act the person aggrieved (the injured person) or in cases of death the members of the bereaved family may file case under section 1 of the Fatal Accidents Act,1855. While disposing of the said case the court has discretion to award such compensation as it deem commensurate to the loss resulting to the bereaved party from such death and if so doing the court may also award for any pecuniary loss that was caused to the family members of the diseased after his/her death. In this regard, the categorical assertion of the Intervenor is that the timeline for settlement of such cases is 10-20 years. Moreover, when a case is filed in civil court the pecuniary jurisdiction depends on the value of the suit, which also involves dilatory court's procedure and delay in trial. As a result, several cases were not even pursued to the end.

74. In this regard, it has also been contended that in the case of ***Bangladesh Beverage Industries Ltd.*** Vs. ***Rowshan Akter and others*** reported in ***62 DLR 483*** the only recorded instance of such a case where the High Court Division in an appeal in the year 2010 has awarded Tk. 02,00,00,000/= (Taka two crore) as compensation to the dependants of a journalist killed in a road accident in 1989 24 years after the case was originally filed and is still remain pending for hearing before the Appellate Division of the Supreme Court of Bangladesh and the payment of compensation is still unrealized.

75. Accordingly, an argument has been advanced on behalf of the Intervenor that the High Court Division while exercising it's constitutional power under Articles 44 and 102 (1) of the Constitution has ensured an effective response to the disaster by enabling remedial action to be taken for compensation to be paid to the victim and at same time penal action to be initiated against those who are responsible. In this regard, it has also been contended that such liability of the respondent has been recognized by the court on the basis of the principle of *res ipsa loquitor*, which was followed in ***Scott* V. *London and St Katherine Docks Co. (supra).***

76. In the book named "Constitutional Law of Bangladesh authored by Late Mr. Mahmudul Islam his opinion was that under our Constitution, the High Court Division of the Supreme Court of Bangladesh has power under Article 102(1) to pass necessary orders to enforce fundamental rights. However, under Article 44(1) the right to move the High Court Division under Article 102(1) is itself a fundamental right. The position of the High Court Division in respect of enforcement of fundamental rights is the same as that of the Indian Supreme Court with the difference that its decision is not final and is subject to appeal under Article 103 of the Constitution. Thus, it is not discretionary with the High Court Division to grant relief under Article 102(1). Once it finds that a fundamental right has been violated, it is under constitutional obligation to grant necessary relief: ***Kochuni*** V. ***Madras, AIR 1959 SC 725***.

77. The Constitution, however, does not stipulate the nature of relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of the particular case: ***Bangladesh*** V. ***Ahmed Nazir(1975) 27 DLR(AD)41***. It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed: ***Mehta*** V. ***India, AIR 1987 SC 1086,1091***.

78. As to the power of the Supreme Court of India under Article 32 of the Indian Constitution(which is identical to Article 44 of the Constitution of the People's Republic of Bangladesh) the Supreme Court of India observed, *inter-alia*, *in granting relief in case of a*

violation of fundamental rights the court is not helpless and it should be prepared to forge new tools and devise new remedies and, if necessary, to develop new principles of liability for the purpose of vindicating those precious fundamental rights": ***Khatri*** V. ***Bihar, AIR 1981 SC 928****; **Nilabati Bahera** V. **Orissa, AIR 1993 SC 1960***. In this regard, the decision of the ***Privy Council*** in ***Maharaj*** V. ***A.G. of Trinidad and Tobago*** reported in ***1978(2) all E.R. 670***. is apt to be quoted, which runs as under-

" ..... This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies where more appropriate. "

79. In ***Rudul Shah*** v ***State of Bihar 1983 (4) SCC 141: AIR 1983 SC 1086,*** one of the earliest decisions where interim compensation was awarded by way of public law remedy in the case of an illegal detention, the Supreme Court observed as under:

" It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary process of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32 , this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. "

80. The Court further observed:

" In these circumstances of the case the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip service to his fundamental right to liberty which the State Government has so grossly violated. Article 21, which guarantees the right to life and liberty, will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation."

81. In this regard, it is pertinent to observe that Article 146 of our Constitution, however, does not make any distinction between the sovereign and non-sovereign acts nor makes any reference to the extent of liability of the government. Thus, the power to grant compensation against public authority regarding an action/inaction which resulted in a death, for breach of statutory/constitutional duty is not barred by our Constitution.

82. However, in every case of violation of the fundamental rights, compensation may not be given by the High Court Division. But there is no reason why the relief should not be denied in a case of clear and blatant violation of fundamental rights involving life or liberty of the citizens caused by the State machineries.

83. In ***Railway Board*** V ***Chandrima Das (2000)2 SCC 465***, the Court considered the question whether the High Court could entertain the petition filed by the respondent by way of public interest litigation and award compensation of Rs. 10 lakhs to Hanuffa Khatoon, a national of Bangladesh, who was sexually assaulted by the employees of the Eastern

Railway. While rejecting the argument of the appellant that the victim of rape could have availed remedy by filling suit in a civil court, the Supreme Court of India observed:

" Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law. It was more so when it was not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which was involved as petitioner was a victim of rape which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. "

84. In ***M.C. Mehta*** V. ***Union of India [AIR 1987, SC 1086],*** while dealing with a writ petition, filed for closure of certain units, the Supreme Court observed as follows:

" *..... The applications for compensation are for enforcement of the fundamental right to life enshrined in Art 21 of the Constitution and while dealing with such applications, a hyper-technical approach which would defeat the ends of justice could not be adopted. If the court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individuals who cannot approach the court for justice, there is no reason why the applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Article 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the forum".*

85. The Court further observed:

" *..... We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) has the implicit power to issue whatever direction, order or writ is necessary the Court in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha's case (supra). If the Court was powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. ..... The infringement of fundamental right must be gross and patent, that is, incontrovertible and exfacie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. It is only in exceptional cases, compensation may be awarded in a petition under Article 32 of the Indian Constitution."*

86. In ***Smt. Nilabati Behera*** v. ***State of Orissa 1993 (2) SCC 746*** the deceased was arrested by the police, handcuffed and kept in police custody. The next day, his dead-body was found on a railway track. The Court awarded compensation to the mother of the deceased on the following principles:-

" *.... Enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention. ..... A claim in public law for compensation" for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is "distinct from, and in additional to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the state or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 31 and 226 of the Constitution*."

87. The Court further goes to observe that-

" *Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability of the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law*."

88. In ***U.P. State Co-operative Land Development Bank Ltd***. Vs. ***Chandra Bhyan Dubey and others [1999(1)SCC 741*** it was observed that

" the Constitution is not a statute. It is a fountainhead of all the statutes. ..... When any citizen or person is wronged the High Court will step in to protect him, be that wrong be done by the State, or an instrumentality of the State. ....."

89. In the case of ***D.K. Basu*** Vs. ***State (1997)1 SCC 416***, it has also been observed -

" *A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim-civil action for damages is a long-drawn and a cumbersome judicial process. Monetary compensation for redressal by the court is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.* "

90. In Bangladesh, awarding cost in judicial proceedings for being aggrieved is an established practice in the Supreme Court of Bangladesh. However, there is still vacancy on giving "*constitutional compensation*" in a petition for judicial review for violation of fundamental rights guaranteed under the Constitution.

91. In ***BLAST*** Vs. ***Bangladesh) (2003) 55 (DLR (HCD) 363***:

a petition was filed with respect to the death of a student in police custody and also, for general direction regarding duty of the police under section 54 of the Code of Criminal Procedure. Although no compensation was awarded in this case, but the High Court Division made certain observations, which are apt to be quoted and runs as follows:

> " *If this Court, in exercise of its power of judicial review finds that fundamental rights of an individual have been infringed by colourable exercise of power by the police under section 54 of the Code or under section 167 of the Code, the Court is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held that compensatory relief under the public law jurisdiction may be given for breach of public duty by the state of not protecting the fundamental right to life of a citizen. We accept the argument that compensation may be given by this Court when it is found that confinement is not legal and the death resulted due to failure of the state to protect the life. ....."*

92. In ***A.K. Fazlul Hoque*** Vs. ***Bangladesh 57 DLR (HCD) 725***, a petition was filed and Rule was issued against high officials of the Housing and Settlement Directorate to show cause as to why they should not be held responsible for non-payment of the pension and gratuity to the petitioner in terms of his service conditions and why they should not be directed to pay compensation for such delay. After hearing and disposal the High Court Division awarded token compensation of Tk. 25,000/=.

93. Also, in ***Md. Shahanewas*** Vs. ***Government of Bangladesh 18 BLD (HCD) 337***: this Court awarded 'compensatory' costs of Tk. 20,000/=, against a delinquent police officer for negligently arresting a poor fisherman in place of a convicted criminal merely on the basis of their identical names by observing that the poor victim should be 'well compensated' for his 'immense sufferings' and loss of livelihood for six months due to a sheer negligence of the public servant in discharging his public duty.

94. In this connection the ratio of ***Habibullah Khan*** Vs. ***Azaharuddin, 35 DLR(AD)72*** may be referred to. In that case the High Court Division awarded compensatory cost against the then Minister-in charge of the Ministry of Information for exercising excessive power and for taking *malafide* action. But the Appellate Division knocked down the said judgment having offended the principles of natural justice on the ground that the High Court Division made several adverse findings against said Habibullah Khan in the judgment of the writ petition though he was not a party to the same. However, while disposing of the said matter the Appellate Division observed that "*awarding of compensatory costs is no doubt a matter of discretion of the Court, but it must be exercised judiciously*".

95. In the case of ***Bilkis Akhter Hossain*** Vs. ***Bangladesh and others 17 BLD HCD(1997)395,*** one of the Benches of this Division had directed the government to pay an exemplary compensation of Tk.1,00,000/- to each of the 4(four) political detenues who were held detain unlawfully, by observing, *inter alia*,-

" Under Article 102 of the Constitution Special Original Jurisdiction has been conferred to us. It is an original, but not appellate or revisional jurisdiction conferred under Article 102 of the Constitution conferring discretionary as well as extra-ordinary power to meet every situation where no other alternative, adequate and efficacious remedy is available. Though there is no specific provision for awarding cost and compensation under Article 102 of the Constitution. Yet it is a long drawn tradition., custom or discretion of the High Court Division that in every writ case this Court always passes judgment either with cost or without cost. Since this Court exercises its special jurisdiction and since this Court has got extraordinary and inherent jurisdiction to pass any order as it deems fit and proper. We are of the view that this Court has the power to award simple cost of the case as well as monetary compensation considering the facts and circumstances of each case.

In our opinion, the upshot of all the above judicial pronouncements is that the Constitutional Court, in exercise of its constitutional jurisdiction, can award monetary compensation in favour of the aggrieved detenu in case of violation of his fundamental rights guaranteed under the Constitution by the detaining authority in appropriate Habeas Corpus cases for illegal confinement in jail. "

96. Said observations of the High Court Division were subsequently set aside by the Appellate Division in ***Bangladesh*** Vs. ***Nurul Amin*** reported in ***67 DLR(AD)352*** on the ground that –

" *..... There was no foundation in the writ petitions or prayer for exemplary, monetary compensation and compensatory costs was never made in the writ petitions and connected affidavits rather on the prayer of the learned Senior Advocate for the writ petitioners the learned Judges of the High Court Division on mere surmises and conjectures wrongly directed the respondent Nos.1 and 2 to pay monetary compensation to the respective detenues. .....* "

97. However, while disposing of the said matter the Appellate Division by making the following observations has opened the forum to the aggrieved party to claim *constitutional compensation/monetary compensation* in appropriate cases for violation of fundamental rights, guaranteed under the Constitution of the People's Republic of Bangladesh. The relevant portion is quoted as under –

" *We have no hesitation in holding that the paramount object and purpose for which Article 102 has been enacted and the relevant factor and provision on which the interpretation of the Article 102 has been linked, the High Court Division in exercise of its jurisdiction under Article 102 of the Constitution, which is an instrumentality and a mechanism, containing both substantive and procedural provisions "to realise the objectives, purposes, policies, rights and duties which[the people] have set out for themselves and which they have strewn over the fabric of the Constitution," can award monetary compensation or compensatory cost mostly in appropriate cases for violation of fundamental rights which must be gross and patent i.e. incontrovertible and ex-facie glaring or that violation should appear unjust, unduly harsh or oppressive on account of the victim's disability or personal circumstance..... That is why the Court has to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 102 are misused as "appropriate cases" or "a disguised substitute for civil action in private law" It is only in the exceptional cases of the nature indicated above that compensation or compensatory cost may be awarded to a victim in a petition properly drawn under Article 102 of the Constitution. The violation must be gross and its magnitude must be such as "to shock the conscience of the Court" and it would be*

gravely unjust to the person whose fundamental right was violated to require him to go to the Civil Court for claiming compensation. "

98. In view of the above observations of the Appellate Division, it can unequivocally be discerned that the High Court Division is competent to award compensation in the cases of established unconstitutional deprivation of the fundamental right to personal life or liberty of the person concern, while exercising its jurisdiction under Article 102 of the Constitution provided said violation is gross and patent i.e., incontrovertible and *ex-facie* glaring.

99. The present case is a case of evident negligence on the part of the respondent Nos.3,5 and 4 (Fire Service and Civil Defense and Bangladesh Railway), which led to violation of the fundamental right to life of the deceased Jihad. Consequently, the maxim *res ipsa loquitor* as well as strict liability principles applies. As such, the petitioner is entitled to take resort to a constitutional remedy for award of compensation in favour of the bereaved family members of the said boy. In this regard, it is pertinent to observe that in the Constitution of India the State has the defence of sovereign immunity as provided under Article 300 of the Indian Constitution. Despite the same the Supreme Court of India awarded compensation to the aggrieved person for infraction of fundamental right to life or liberty. In our Constitution there is no such provision like Article 300 of the Indian Constitution; as such, there can be no bar to award compensation to the bereaved family members of Jihad for the injustice being caused to them due to the sheer negligence of the respondents concern leading to violation of his fundamental right to life, guaranteed under Article 32 of the Constitution.

100. So far respondent No.6, Dhaka WASA, is concerned, we do not find any material whatsoever to suggest that they were responsible for the maintenance of the shaft in question nor they were under any statutory obligation to take part in the said rescue operation. The said respondent merely co-operated with the respondent No.5 by providing a camera in order to locate the position of the boy, who fell down in the uncovered deep tube well. Rather, it was, in fact, the duty and responsibility of the respondent Nos. 3 and 5 to participate in the rescue operation with sufficient required equipments and expertise in order to rescue Jihad, which they miserably failed.

101. Accordingly, this Court finds that the instant writ petition under Article 102 of the Constitution of the People's Republic of Bangladesh is maintainable, for, the said negligence of the respondent Nos.3,5 and 4 has culminated in infringement of the fundamental right to life of the deceased Jihad guaranteed under Article 32 of the Constitution.

102. As observed earlier, the court while exercising jurisdiction under Article 102 of the Constitution can award monetary compensation against the State and its officials for its failure to safeguard the fundamental rights of the citizens of the country, but there is no set method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact-situations. The yardstick generally adopted for determining the compensation payable in a suit for damage are not applicable when a constitutional court determines the compensation for violation of the fundamental rights guaranteed to its citizens under Part III of the Constitution.

103. In ***D.K. Basu*** v ***Union of India (supra):*** a Constitution Bench held that there is no straight jacket formula for computation of damages and it is found that there is no uniformity or yardstick followed in awarding damages for violation of fundamental rights.

104. Fact remains, once a life is snatched away by a negligent act of the persons concern it cannot be equated or compensated with money. In view of the observations so made in ***Rudul Shah*** v ***State of Bihar (supra),*** " *the right to compensation is some palliative*" to the bereaved family members of the victim and is the only effective mode of redress available for the negligence of the State or its instrumentalities so caused while discharging their public duties.

105. In this regard, we feel the urge to quote the following observations so made in ***Smt. Nilabati Behera's case(supra)***:

> " *It is a sound policy to punish the wrongdoer and it is in that spirit the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure the public bodies or officials do not act unlawfully and to perform their duties properly particularly where the fundamental right of a citizen under Article 21 is concerned.*
> *Law is in the process of development and the process necessitates developing separate proceedings and principles to apply and the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitutes for civil action in private law."*

106. In the case of ***Sri Manmath Nath Kuri*** Vs. ***Mvi. Md. Mokhlesur Rahman*** reported in ***22 DLR(SC)51*** at page 58 it has been observed that –

> " A*ssessment of damages in such a case must, therefore, necessarily be to some extent of a rough and approximate nature based more or less on guess work, for, it may will be impossible to accurately determine the loss which has been sustained by the death of a husband, wife, parent or child.*"

107. In the case of ***Bangladesh Beverage Industries Ltd.*** Vs. ***Rowshan Akter(supra)*** the High Court Division goes to observe, *inter alia*,-

> " *..... affection, pain, suffering, mental agony, physical incapability and emotion are not calculable and if the court is satisfied that plaintiff is entitled to any compensation that can be only in lump sum and not on calculation*."

108. The instant case is one of such kind, which requires intervention by this Court with the award of compensation, not on calculation but in lump sum, while exercising jurisdiction under Article 102 of the Constitution. Accordingly, we are inclined to allow the prayer so made by the petitioner.

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

110. The inaction and/or negligence, and/or failure on the part of the respondent Nos. 3, 5 and 4 respectively in respect of rescuing a minor boy of 4(four) years named Jihad which resulted in his tragic and shocking death, is hereby declared to be illegal, without lawful authority and hence, of no legal effect being violative of the law of the country, as well as his fundamental rights as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh.

111. However, considering the socio-economic position of the country and also keeping in view of the applicable laws of the country with regard to award of compensation, instead of awarding Tk.30(Taka thirty lacs) as compensation, as claimed by the petitioner we direct

the respondent No.4, Bangladesh Railway to pay the sum of Tk.10,00,000/=(Taka ten lac) and Tk.10,00,000/- (Taka ten lac) by the Fire Service and Civil Defense, the respondent Nos. 3 and 5 to the respective parents of the victim named Jihad as *monetary compensation* within 90(ninety) days from the date of receipt of the copy of this judgment and order.

112. This order of awarding compensation will not impede/affect other liabilities, if there be any, of the respondents concern or its officials resulting from the death of the said victim.

113. There will be no order as to costs.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION No. 5541 OF 2015

Naripokkho and others
- Petitioners

Vs.

Bangladesh and others.
- Respondents.

And
Ms. Sara Hossain, Advocate, with
Mr. Z.I. Khan Panna, Advocate with
Ms. Masuda Akhter Rosie, Advocate with
Ms. Sharmin Akter, Advocate and

Ms. Mehbuba Akhter Jui, Advocate
..... for the Petitioners.

Ms. Amatul Karim, D.A.G with
Ms.Nusrat Jahan, A.A.G. with
Ms. Bilkis Fatema, A.A.G.
... for the Respondent Government.

Heard on 12.08.2015, 12.11.2015, 18.11.2015 and 17.02.2016.

Judgment on 18.02.2016.

Present:
Mrs. Justice Farah Mahbub.
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

First Information Report:
FIR is an important document in the criminal law procedure, its principal object, from the informant's point of view, is to set the machinery of criminal law into motion and from the view of the investigating agency is to obtain information about the alleged occurrence and to take necessary steps to trace the accused and produce him before the court concern for trial. … (Para 42)

In the instant case, the categorical assertion of the petitioners is that after the alleged occurrence the victim went to 3 (three) different police stations at around 4.00 a.m. i.e., Uttara Police Station, then Khilkhet Police Station and then to Gulshan Police Station to report commission of a cognizable offence but she was refused on the plea that the occurrence took place within the jurisdiction of another police station. Said assertion has not been denied by the respondents concern rather in their affidavits in compliance it has been averred that departmental actions have been duly initiated against the delinquent officers concern for their failure to discharge their professional duties. Under the circumstances, refusing to lodge FIR by the respondent Nos.4-6 as to the commission of a cognizable offence, is a violation of section 154 of the Code of Criminal Procedure. … (Para 49)

The fundamental rights to life or personal liberty (Article 32 of the Constitution), to equality before law (Article 27 of the Constitution), not to be discriminated on the grounds of religion, race, caste, sex or place of birth (Article 28(1) of the Constitution), to work in her chosen profession occupation, trade or business (Article 40 of the Constitution) and to enjoy protection of law, and to be treated in accordance with law and only in accordance with law(Article 31 of the Constitution) undoubtedly include protection from sexual harassment, which our Constitution guarantees. … (Para 74)

Judgment

Farah Mahbub, J:

1. In this Rule, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the impugned action of causing delay by the respondents Nos. 4-6 in lodging FIR regarding the allegation of rape of the victim as well as in sending her to the Victim Support Centre and also causing delay of over 24 hours of the alleged occurrence in sending her for medical examination should not be declared to be without lawful authority and of no legal effect, being a violation of their constitutional and statutory duties including section 32 of the Nari-O- Shishu Nirjaton Daman Ain,2000 (as amended in 2003) and also a violation of the fundamental rights of the victim as guaranteed under Articles 27,28 and 31 of the Constitution of the People's Republic of Bangladesh; also, as to why the respondents should not be directed to compensate the victim for violation of her fundamental right to equal protection under the law, including prompt recording of her complaint and medical examination, and also as to why the respondents Nos. 1,2 and 3 should not be directed to take disciplinary action against the concerned police officers responsible for causing such delay in recording the complaint of the victim and sending her to the Victim Support Centre including taking steps for her medical examination; and also as to why the respondent Nos.1,2 and 3 should not be directed to frame and disseminate a circular to all the respective police stations within Dhaka Metropolitan Area and beyond, on their obligation to ensure that required services are provided to all concern without any discrimination in particular on the grounds of religion, race, sex, caste or place of birth, and to record promptly and without delay any complaint so received regarding the allegation of rape and or such other or further order or orders passed as to this Court may seem fit and proper.

2. The petitioner No.1 is a membership-based women's activist organization working since 1983. It is registered with the Ministry of Women and Children Affairs, under the Voluntary Social Welfare Agencies(Registration and Control) Act,1961 and that it is at the forefront in mobilizing grassroot women's organizations and designing platforms for the advancement of women's rights and entitlements and building resistance against violence, discrimination and injustice. It has developed training modules for developing institutional capacity for the police, medical personnel, and judicial officers on human rights promotion, and training manual for police and medical personnel on gender and violence against women; it undertakes research, awareness raising, advocacy and action to prevent violence against women, including thorough working with women to build solidarity and increase confidence, and working with the community and the government to assist in order to bring about accountability of the government services dealing with cases of violence against women.

3. The petitioner No.2 is the largest national women's human rights organisation and is registered as a society under the Societies Act, 1860, which has been working to empower women and has provided support including legal aid and emergency shelter to hundreds of women and girls who are victims of rape and violence across the country. It played a leading role in campaigning to end violence against women and in leading the movement for reforms of law, policy and procedure.

4. The petitioner No.3 is a national organisation involved in raising awareness on citizen's rights and against discrimination and inequality on the basis of ethnicity and campaigns to ensure empowerment and rights of "আদিবাসী" communities, including from the

Sawtals, Oraons, Mundas, Garo, Monipuri, Khasia and other communities, to equality and equal protection under the law.

5. The petitioner No.4 is a national legal aid and human rights organisation established in 1986 as a society under the Societies Act, 1860 which aims to establish the rule of law based on principles of equality, democracy and human rights justice and gender equity and has a long track record in undertaking public interest litigation on women's rights.

6. The petitioner No.5 is a national legal services and human rights organization, incorporated as a non-profit company under the Companies Act and established following a resolution of the Bangladesh Bar Council to provide legal aid and has a long track record of litigating in public interest and has conducted research on the collection of medico-legal evidence in cases of rape.

7. The petitioners being aggrieved by reports regarding the repeated refusal of the respective police officers to record an FIR(First Information Report) by the victim regarding an allegation of rape and delay in sending her to the Victim Support Centre and also causing delay in sending her for medical examination in breach of their statutory duties under section 32 of the Nari-O-Shishu Nirjaton Daman Ain, 2000(as amended in 2003)(in short, the Ain) as well their constitutional duties which require them to ensure the right of women and girls without discrimination on any ground whatsoever, to protect against sexual violence, including thorough and prompt recording of an FIR, immediate emergency assistance by referral to a Victim Support Centre, and prompt medical examination within 24 (twenty four) hours, as guaranteed under Articles 27,28 and 31 of the Constitution of the People's Republic of Bangladesh (in short, the Constitution), have filed the instant application as public interest litigation, whereupon present Rule Nisi has been issued.

8. The facts and circumstances in the context of which this petition arises are as follows-
According to reports, published in several national newspapers dated 23.05.2015, at around 9:25 p.m. on 21.05.2015, a 21 year old woman from Garo community, while waiting after completion of her work at the Biswa Road Bus Stop in front of Jamuna Future Park, Dhaka was suddenly forced into a grey coloured microbus by 2(two) youths and was allegedly raped by them along with 3 (three) others in the said vehicle, while it circled around Kuril Biswa Road and the street in front of Jamuna Future Park.

9. After a period of one and half hours, at around 10.45 p.m. she was reportedly dumped at Jasimuddin Road in Uttara. Information so gathered from the respective news reports as well as from the victim's family suggested that subsequent to alleged occurrence the victim reportedly went to different police stations at around 4.00 a.m. i.e., at Uttara Police Station, than to Khilkhet Police Station and then to Gulshan Police Station but on every occasion she was refused on the purported ground that the incident occurred within the jurisdiction of another police station. After reaching Vatara Police Station at around 6 a.m., she was reportedly compelled to wait for 3(three) hours for the Officer-in-Charge in order to have her information recorded under section 154 of the Code of Criminal Procedure (in short, the Code). Her information was finally recorded and registered at 12.30. p.m. on Friday 22.05.2015(Annexure-A).

10. It has also been stated that the respective police officers at Vatara Police Station finally sent the victim to the Victim Support Centre(in short, the Centre) at Tejgaon on Friday 22.05.2015 and informed her that she would be sent to Dhaka Medical College Hospital on

Saturday, 23.05.2015 for medical examination; in other words, after more than 24(twenty four) hours of the alleged occurrence. Thus, occurs violation of section 32 of the Nari-O-Shishu Nirjaton Daman Ain, 2000(in short, the Ain).

11. Said tragic incident had resulted in widespread protests by a cross-section of citizens, including different organizations and others, demanding action to ensure a safe environment for women and girls in particular working women, especially those from marginalized communities, to exercise their fundamental rights to personal liberty, to movement and occupation, and demanding action against the police for their failure to ensure a prompt and effective response to a serious allegation of sexual violence.

12. In view of the above context, a direction was given upon the respondents concern to frame and disseminate a circular to all the respective police stations within Dhaka Metropolitan Area and beyond, on their obligation to ensure that required services are provided to all concern without any discrimination in particular on the grounds of religion, race, sex, caste or place of birth, and to record promptly and without delay any complaint so received regarding the allegation of rape. The respondent Nos.1,2 and 3 were further directed to report within 03(three) weeks on the action so taken to identify those who were responsible for the impugned action.

13. In compliance thereof respondent Nos.1,2 and 3 filed separate sets of affidavit in compliance more or less on similar standing.

14. In the affidavit filed by the respondent No.2 i.e., Inspector General of Police it has been stated, *inter alia,* that pursuant to the direction of this Hon'ble Court the Additional DIG(Special Crime), Police Headquarters, Dhaka was instructed to formulate and disseminate the circular vide Memo No. Ain/Writ/47-2015/(Writ-5541/15)/934 dated 01.06. 2015. The Police Commissioner of Dhaka Metropolitan Police was also instructed to conduct a thorough inquiry regarding the acts and omission of the concerned police personnel in the process of receiving complaint of gang rape and the associated responsibilities thereby. The updates in relation to investigation of the criminal case was also asked to be provided vide Memo No. Ain/Writ/47-2015/(Writ-5541/15)/934 dated 01.06. 2015(Annexure-2 series).

15. Accordingly, a circular was issued bearing No.02/2015 under the signature of the Inspector General of Police throug an office Memo bearing No. Na: O Shi: Pro: Cell/Circular /44.01.0000.047.01.011.15.223/1 (105) dated 10 .06. 2015 containing the directions and guidelines for the police officers concern of the respective police stations to be followed/ adopted on receipt of information of rape and or associated allegations.

16. Circular No.02 of 2015 is quoted herein below:-

" AvvwgRxeZxcRi©RS-GK RK
cRi©RS-GKwdDGK
wdDGK‡ š RPvRaK RvK
পরিপত্র নং-০২/২০১৫

†c !K" R"R#SK dwgK‡ RSA-K PvS PvKtc RSAK-RS xK†¥K‡wv¥G#K#R())*+,-.+)K/ KORS©RS K#R_K1K‡G2K
#3Rx#K"R"©RK 4 kK h/ 4keRS (#š-G#RvK
R6!KK 8R K#R(0PvS#,†¥,*9(-.+),:†¥())*+;,<=*KxRi(.+,.>,-.+)K?gjK
K " R"R#SKK dwgK‡ RSA-K PvS PvKtc RSAK-RS xK†¥K‡wv¥G#K#R())*+,-.+)K/ KORS-šG KORS©RS K
@‡vaK‡3A#K R#K#R_K1K‡G2K#3Rx# K0†š3RSA K hcR-wgBaK"R"©RK 4 k1Kx-eRtc šK#Cc‡vxK
#š-G#R"6KwgR#K RK©iK

.+ikcRc©RS-GKwdDSG K ©K- $KAvwgRxeZxcRc©RS-tG Kwtc7K htc@#S# Ktc@#Rc©_K "#HzK‡ S?K-RtxKBwR©#K
Sc#iK
.-iK@vaK‡3A#K R#,‡3A#w_F# K#R_K1KtG2K#3Rx#K O†S3RA "S KtGS7K htc@#S# KO#SH-K
-9:0P%S# K-JKSxK "xR,aKO#SH-K-L:@tKwg"xK RSvKtc "$,aKO#SH-K=+:0P%S# KOPgK©RS KO†@R;K
/chK#R_K1KtG2K#3Rx#K-"#KOP%#KOP%#aK-....: hSGR@#,-..=;K/ K=-K@RRK:0w RS@KtG RKc$14K
‡"†š ©Kw_GR;Ktc Ktc@#Rc©_KwgxK""KO#@Rc#w6L K3NR3NKwgRAK#fDxK šxKšciK
.=iK@vaK‡3A#w_F# K#R_K1KtG2K#3Rx#K h/4eRS0w RS@K‡ R#KO†S3RAKNR#RKORRK RSNK RSNK‡ R#K
wgRKtc "$1KtC©PQIRF%K"R"©RK4kl šxKšciK
.*iK0w RS@KtG R,† ¥", R24S RA,R P%RS-KO†c©SPQR14R_Kw_GRK RKc$cS RKAgvK šxKšciK
.)iK0w RS@KOR©R"x "6K3NR3N RScK hAgaK hGv K‡ TS©RKwgRS#K-4kK RR†# ,†/#/Kw_GRK
c$cS RK šxKšciK
.>iK3K ©KO†@GS7K† ¥"K RSwR4K‡ UvR,1 R#KV wK/4P%t K‡ UvR,‡ ©KwgkWxK šSIK‡ K ©K
O†@GS7K@vKcRK‡3A#Kw_FS# KtG RKc$14,† ¥", R P%RS-šKwgRS#KY14K† ¥"K RSwR4K
‡UvR,1 R#KV wK/4P%t K‡ UvR,‡ ©KtwgvK xK"R"©RKx-eS RB/4kOc$RxKR?šxKšciK
.9iK#R_K1KtG2K#3Rx#Kwgkš RQ@ šZK%SxRwšcKwdDGK‡ š RR4RKšxK Rt xK8R K#h(K#RK1KtG!K#!KwgK
‡©, RdR,.+(-.+=,+=.:-.;,.+HxRt?K),.-,-.+=K?gK/ K3NR3NKwgkwR©#K#fDxK šxKšci"KK

17. In compliance of the direction of this Hon'ble Court said circular was duly disseminated to all the police stations within Dhaka Metropolitan Area and beyond on the obligation of police personnel to ensure that required services are provided to all concern without any dicrimination in particular on the grounds of religion, race, sex, caste or place of birth, and to record promptly and without delay any complaint so received regarding the allegation of rape(Annexure-IV). The above steps so far have been taken were duly notified by the Police Commissioner, DMP, Dhaka to the Ministry of Home Affairs vide Memo No.225 dated 12.07.2015 (Annexer-3).

18. In this regard, it has also been stated that earlier the Additional DIG (Special Crime and Prosecution) on behalf of the respondent No.2 had circulated instructions amongst all the departments concern of police for preventing torture against women and children vide Memo No. Na: O Shi: Pro: Cell/Circular/01.2013/130(20)/1 dated 05.02.2013 giving reference to Memo No.jamak/che/do /177/ 12/18 dated 09.01.2013(Annexure-5) issued by the National Human Rights Commission, which runs as under-

"AvwgRxeZxcRc©RS-GK RK
cRc©RS-GKwdDGK
wdDGK‡ š RR4RaKRRiK

8R K#h(নাঃ ও শিঃ নিঃ প্রঃ সেল/সার্কুলার/০১/২০১৩/১৩০(২০)/১.
তারিখঃ০৫/০২/২০১৩খ্রিঃ।
প্রতি,

০১. অতিরিক্ত আইজি, এসবি/সিআইডি /এপিবিএন, বাংলাদেশ পুলিশ, ঢাকা.
০২. মহাপরিচালক(র‍্যাব), ফোর্সেস হেডকোয়ার্টার্স, ঢাকা.
০৩. পুলিশ কমিশনার, ডিএমপি/ সিএমপি/কেএমপি/এসএমপি/বিএমপি।
০৪. ডিআইজি, ঢাকা/ চট্টগ্রাম/ রাজশাহী/খুলনা/বরিশাল /সিলেট/ রংপুর/ রেলওয়ে / হাইওয়ে রেঞ্জ, বাংলাদেশ পুলিশ.
০৫. ডিজি, ইন্ডাস্ট্রিয়াল পুলিশ, উত্তরা ঢাকা।

বিষয়ঃ নারী ও শিশু নির্যাতন প্রতিরোধে দিক-নির্দেশনা প্রেরণ প্রসঙ্গে।
সূত্রঃ মানবাধিকার কমিশন এর স্মারক নং - জামাক/চে/ডিও /১৭৭/১২/১৮,তারিখ-০৯/০১/২০১৩ খ্রিঃ।

উপর্যুক্ত বিষয় ও সূত্রোক্ত স্মারকের প্রেক্ষিতে জাতীয় মানবাধিকার কমিশন হতে প্রাপ্ত পত্র এতদসঙ্গে প্রেরণ পূর্বক জানানো যাচ্ছে যে, দেশে আশংকাজনকভাবে নারীর প্রতি সহিংসতা তথা ধর্ষনের হার বৃদ্ধি পাওয়ায় তা রোধকল্পে নিম্নবর্নিত দিক নির্দেশনা সমূহ পালনের জন্য নির্দেশক্রমে অনুরোধ করা হলো।

০১. #R_নির্যাতন সংক্রান্ত ঘটনায় রুজুকৃত মামলায় অভিযুক্ত আসামীদের দ্রুত গ্রেফতার করা।
২। রাজনৈতিক বিবেচনা না করে প্রকৃত আসামীদের বিরুদ্ধে আইনানুগ ব্যবস্থা গ্রহন করা।
৩। ভিকটিমের আলামত যথাযথভাবে সংগ্রহ, সংরক্ষনসহ যথাসময়ে বিজ্ঞ আদালতে উপস্থাপন নিশ্চিত করা।
৪। মামলার আলামত যথাযথভাবে সংগ্রহ, সংরক্ষনসহ যথাসময়ে বিজ্ঞ আদালতে উপস্থাপন নিশ্চিত করা।
৫। মামলা আপোষ-মিমাংসা হতে বিরত থাকার জন্য প্রয়োজনীয় কার্যক্রম গ্রহন করা।
৬।বিচারের দির্ঘসুত্রিতা রোধে যথাসময়ে সাক্ষীদেরকে আদালতে হাজির নিশ্চিত করা।
৭। সামাজিকভাবে হেয় প্রতিপন্ন যাতে না হয় সে লক্ষ্যে জনসচেতনতা মূলক কার্যক্রম গ্রহন করা।
৮। বিজ্ঞ আইনজীবী কর্তৃক সাক্ষী ফেরৎ রোধকল্পে সাক্ষীদেরকে ডিসি, প্রসিকিউশন/কোর্ট পুলিশ পরিদর্শক এর নিকট রিপোর্ট করতঃ বিজ্ঞ পিপির মাধ্যমে সংশ্লিষ্ট আদালতের উপস্থাপন নিশ্চিত করা। ”

19. However, so for initiating disciplinary actions against the officers concern it has been stated, *inter-alia*, that pursuant to the order dated 25.05.2015 passed by this Hon'ble Court and being directed by the respondent No.2, at the instance of the respondent No.3, Dhaka Metropolitan Police formed a 3(three) members inquiry committee headed by the Joint Police Commissioner (Crime), Dhaka Metropolitan Police, Dhaka vide its order No.76 dated 04.06.2015. During the course of inquiry the committee collected the FIR regarding the incident of rape, related General Diaries and other documentary evidence. Moreover, the committee recorded the statements of 15(fifteen) persons including the victim. It also considered the progress of investigation of Bhatara Police Station Case No.26 dated 22.05.2015 lodged under sections 7/9(3) of the Ain, 2000 and finally submitted a report on 13.06.2015 with the recommendation to take appropriate action against Md. Nurul Mottakin, Officer-in-Charge, Bhatara Police Station and Jahirul Islam, Sub-Inspector, Gulshan Police Station for their inefficiency(Annexure-I). In view of the said recommendation respective show cause notices were served upon both the delinquent officers as to why disciplinary action should not be taken against them under rule 3(ka) and (cha) of the Metropolitan Police (Discipline and Appeal for Sub-bordinate Officers) Rules, 2006 vide Memo No. #ÑN,-.+),ORaK 1(-:tw/ /[OPwOPv, T©GR#(+*,+);,=)<9 dated 28.06.2015 and Memo No. #ÑN,-.+),ORaK1(-:tw/ /[OPwOPv, T©GR#(+*,+);,=)<< dated 28.06.2015 respectively(Annexure-II and III).

20. On receipt thereof they gave reply and applied for personal hearing. Allowing their prayer for personal hearing namely unarmed Police Inspector Md. Nurul Mottakin(BP No.689104038), Officer (In Charge), Vatara Police Station, Gulshan Division, DMP, Dhaka and S.I. Zahirul Islam(BP No.8411133479) Gulshan Police Station, Gulshan Division, DMP, Dhaka were held on 02.09.2015 and 29.07.2015 respectively. Considering their oral submissions, written statements, inquiry reports and other relevant records(Annexure-6) unarmed Police Inspector Md. Nurul Mottakin(BP No.689104038), Officer (In Charge), Vatara Police Station, Gulshan Division, DMP, Dhaka was ultimately awarded punishment of reprimand under rule 4(ka)(5) of the Metropolitan Police(Discipline and Appeal for sub-ordinate Officers) Rules,2006 vide the order of the Commissioner (PS and II) No.73 dated 02.09.2015 and S.I. Zahirul Islam(BP No.8411133479) Gulshan Police Station, Gulshan Division, DMP, Dhaka was awarded with fine equivalent to 15 (fifteen) days salary under rule 4(ka)(2) of the said Rules,2006 vide the order of Professional Standard and Internal Investigation Department (PS and II) No.454 dated 29.07.2015.

21. It has also been stated that the victim was shifted to Victim Support Centre, her medical examination was conducted, DNA samples were taken, the microbus used in the

criminal act was confiscated, 2(two) suspects who were arrested in the connection with the case concern confessed their involvement in the criminal act and their statements were duly recorded by the learned Magistrate concern under section 164 of the Code of Criminal Procedure (in short, the Code).

22. In addition, the Deputy Secretary, Ministry of Home Affairs by exercising power as provided under section 6B(1) of the Armed Police Battalions(Amendment) Act,2003 had vested the duty of investigation of Vatara Police Station Case No.26 dated 22.05.2015 under section 7/9(3) of the Nari O Shishu Nirjatan Daman Ain, 2000 (amended in 2003) upon RAB-01, Dhaka vide Memo No.44.00.0000.056.09.011.12-96 dated 4.06.2015. After completion of investigation the investigating agency submitted police report being charge sheet No.175 dated 16.08.2015 recommending the name of (two) accused persons to stand trial.

23. In this regard by filing a supplementary affidavit the petitioners have contended that no specific directions have been set out in the circular dated 10.06.2015 to address the obstacles faced by the victims of rape and sexual violence. In particular, clause 3 of the said circular does not specify that a complaint of rape must be accepted by any police station to which it is brought, irrespective of where the offence occurred. In this regard, regulation 244 of the Police Regulations of Bengal, 1943 clearly specifics that a "first information report must be recorded in respect of every cognizable complaint preferred before the police.....", while section 154 of the Code requires that every information relating to commission of a cognizable offence be reduced in writing by the officer to whom the information is given, with no mention or requirement of the place of occurrence to be within the jurisdiction of the police station in question. Moreover, the word " অবিলম্বে " (without delay) so used in clause 4, is vague and fails to specify that any woman or girl who reports a rape must be sent for medical examination within a specified period, preferrably within 24 (twenty four) hours of the complaint being received in order to ensure proper collection of medico-legal evidence. The word " প্রয়োজনে " (if necessary) so used in clause 5 suggests that in some cases chemical/DNA tests need to be conducted as soon as possible. In clause 6, there is no mention of whether any person is to accompany the victim, or a police officer or a VSC officer or any other person to the Victim Support Centre. Also, there is no reference in the circular as to making available interpreters in necessary cases, including for women and girls with disabilities who are victims of rape or sexual violence, or to any organisations providing such interpretation services. There is also no reference in the circular as to the consequences of non-compliance with its provisions, or as to the procedures and criteria for monitoring such compliance.

24. It has also been stated that the name of the victim has been disclosed in various documents annexed to the affidavits filed by the respondents Nos. 1-3 in violation of section 14 of the Nari-o-Shishu Nirjaton Daman Ain, 2000 which prohibits publication in the media of the name of any victim in a pending case under the Ain, in order to ensure her safety and security.

25. Moreover, in the application dated for recalling the order of this Hon'ble Court dated 25.5.2015 and 31.05.2015 respectively the respondent No. 1 had stated that Bangladesh Law Commission is a statutory authority which is responsible for reviewing existing laws and procedures, and making recommendations, and accordingly submitted that there is no requirement to appoint a committee of experts to carry out this function. Allowing the said prayer this Hon'ble Court vide order dated 05.08.2015 recalled its earlier orders dated

25.05.2015 and 31.05.2015 respectively so far giving a direction for appointing a committee of experts to review the existing laws and procedures in connection with rape cases, and make recommendations for effective enforcement of the law.

26. In this regard, it has been stated that Law Commission of Bangladesh has made several recommendations specifically on reform of the laws relating to rape or sexual violence, which are quoted as follows:

a) "Final Report on a proposed law relating to protection of victims and witnesses of crimes involving grave offences" submitted on 17.10.2006;

b) " গুরতর অপরাধে ক্ষতিগ্রস্থ ব্যক্তি (victim) ও স্বাক্ষী সুরক্ষার প্রস্তাবিত আইনের শর্তাবলীর সুপারিশ বিষয়ক আইন কমিশনের প্রতিবেদন" submitted on 09.02.2011;

c) " ২০০০ ইং সনের নারী ও শিশু নির্যাতন দমন আইন,(২০০০ সনের ৮ নং আইন) এর কতিপয় ধারার প্রস্তাবিত সংশোধনী সংক্রান্ত প্রতিবেদন".

d) "নারী ও শিশু নির্যাতন দমন আইন, ২০০০ এর অধীন দায়েরকৃত মামলায় পুলিশ রিপোর্ট দাখিল বা তদন্ত শেষ না হওয়া পর্যন্ত জামিন সংক্রান্ত শুনানী কোন আদালতের এখতিয়ারাধিন তা স্পষ্টকরন বিষয়ে আইন কমিশনের সুপারিশ "

e) "Paper work on Evidence Act", published on the Law Commission website for review and comment by 18 October 2015.

27. But, unfortunately those reports do not appear to have been considered or acted upon by the respondent government.

28. Moreso, the Ministry of Women and Children has subsequently published a National Action Plan to Prevent Violence Against Women and Children 2013-2025 (Annexure- 3 to the supplementary affidavit). Said National Action Plan identifies key actions to be undertaken by different ministries and agencies to address violence against women including rape of women and girls. In particular:

a) For the Ministry of Law, Justice and Parliamentary Affairs to ensure that medical examination of women and children who are victims of violence, be carried out in a respectful way.

b) For the Ministry of Law, Justice and Parliamentary Affairs to ensure that effective services are in place for victims with special needs, including accessible environment, appropriate facilities for taking evidence from blind, hearing and speech impaired, and intellectually disabled women and children, and implementing the practice of use of sign language where necessary.

c) For the Ministries of Law, Justice and Parliamentary Affairs, Women and Children Affairs, and Home Affairs to conduct special activities and to take initiatives for the legal support of women and children who are victims of violence through district national legal aid services committee. Further, to provide easy access to free legal support as well as assistance for support services for disabled women and children who are victims of violence.

d) For the Ministries of Women and Children Affairs and Home Affairs to ensure legal support for victims through a victim support centre, investigation unit and quick response team.

e) For the Ministry of Women and Children Affairs to ensure availability of legal advice through the national helpline centre for violence against woman and children.

f) For the Ministry of Women and Children Affairs to ensure support for cases by the national forensic DNA profiling laboratory and divisional DNA screening laboratories.

g) For Ministry of Women and Children Affairs to ensure legal support by One-Stop Crisis Centres.
h) For the Ministry of Law, Justice and Parliamentary Affairs to arrange for training to ensure gender sensitivity among doctors, nurses and police including law enforcing agencies.
i) For the Ministry of Law, Justice and Parliamentary Affairs to improve publicity among the population at the grassroot level about all types of law in preventing violence against women and children .
j) For the Ministry of Women and Children Affairs, and Home Affairs to increase publicity around the help line number 10921 for women and children who are victims of violence.
k) For the Ministry of Women and Children Affairs to establish One-Stop Crisis Centre in every public medical college hospital.
l) For the Ministry of Women and Children Affairs to establish One-Stop Crisis Centres in every private medical college hospital.
m) For the Ministry of Women and Children Affairs to develop guidelines to increase the quality of service providing institutions for women and children survivors.
n) For the Ministry of Women and Children Affairs to strengthen the services of national helpline centre for violence against women and children.
o) For the Ministry of Women and Children Affairs to establish regional trauma counselling centres at the divisional level.
p) For the Ministry of Women and Children Affairs to expand the services of psychosocial counselling in all upazilas.
q) For the Ministry of Women and Children Affairs, and Health and Family Welfare to provide for the collection and preservation of DNA samples facilities in all government medical college hospital.
r) For the Ministry of Women and Children Affairs, and Health and Family Welfare to ensure medico legal examination for the child, adolescent and women survivors at the upazilla level.
s) For the Ministry of Home Affairs to establish Victim Support Centres at all police stations.
t) For the Ministry of Women and Children Affairs, and Social Welfare to ensure the establishment of shelter homes, half way homes, drop in centres in every district.
u) For the Ministry of Women and Children Affairs to create mass awareness for the requirement of psychosocial counselling for decreasing the tendency of suicidal attack of women and children of sexual assault.
v) For the Ministry of Women and Children Affairs to provide training on language to the service providers for ensuring better services of women and children who are victims of violence.
w) For the Ministry of Women and Children Affairs, Home Affairs, and Health and Family Welfare to provide forensic report of the women and children who are victims of violence in time.

29. Notwithstanding the fact that recommendations of the Law Commission of Bangladesh were made decade ago but neither any attention has been paid for implementation of the same nor those Action Plan has been carried out effectively.

30. Accordingly, Ms. Sara Hussain the learned Advocate appearing for the petitioners submits that in the absence of standard operating procedures being adopted for the use of law enforcement agencies in responding to complaints of rape, there is a lack of uniformity and

consistency in response, resulting in a failure to ensure prompt and effective recording of complaints of sexual violence, prompt referral to the Victim Support Centre to enable prompt medical examination and a failure to ensure adequate advice and support to victims during the legal process.

31. Moreso, she submits that in the circular in question in some places vague language has been used, and that it does not give specific and concrete directions to address the obstacles faced by the victims seeking to report crimes of rape and sexual violence. As such, she submits that the respondents concern may be directed to take into account the recommendations of the Law Commission of Bangladesh as well as the relevant provisions of the National Action Plan, as detailed above, in order to address the gaps in laws and procedures in dealing with victims of rape and sexual assault, and to ensure that women and girls who are victims of such crimes have access to justice.

32. Lastly, she submits that in the absence of adequate procedural frameworks to ensure the effective protection of the victims of rape and sexual violence this Hon'ble Court may be pleased to issue guidelines.

33. Conversely, Ms. Amatul Karim, the learned Deputy Attorney General appearing on behalf of the respondents concern submits that in compliance of the directions given by this Hon'ble Court the respondent No.2, the Inspector General of Police had issued circular providing guidelines on the procedure for the police to follow when dealing with cases of rape or sexual violence against women. Moreso, departmental proceedings had been duly initiated against the delinquent officers under the respective service law applicable in their case for their inefficiency while discharging their professional duties. In view of the above context, she submits, this Rule may be disposed of

34. The cardinal issue which arises for consideration in the matter in question is whether a police officer is bound to register a First Information Report(in short, FIR) upon receiving any information relating to commission of a cognizable offence under section 154 of the Code of Criminal Procedure,1898 irrespective of the place of occurrence.

35. The said issue is of great public importance and thus, needs to have a clear enunciation of law and adjudication by this court for the benefit of all concerned i.e., the court, the investigating agencies and the citizens in particular the women and the girls who are victims of rape and other forms of sexual violence.

36. The present writ petition, under Article 102 of the Constitution of the People's Republic of Bangladesh, has been filed by 5(five) non-governmental orginations providing legal and other support to women and girls who are victims of rape and sexual violence for issuance of a writ of *certiorari* to declare the delay caused by the police officers concerned in recording an FIR by the victim regarding the allegation of gang rape committed on her on a moving microbus, as well as the delay in sending her to the Victim Support Centre for her medical examination. The respective petitioners also have sought for a direction upon the respondents concern to issue circular, giving guidelines on the procedure for the police to follow when dealing with cases of sexual violence against women and children, and disseminate to all police stations concern and also to ensure that they respond to the victims promptly and without discrimination based on race, religion, gender, caste or place of birth, and to submit a report identifying those who are responsible.

37. Upon hearing the petitioners and having found substance to the contentions so have been advanced a Rule Nisi was issued by this Court vide order dated 25.05.2015 along with directions upon the authority concern i.e., respondent Nos. 1,2 and 3 to issue and disseminate a circular to the concerned police stations on the subject matter, as referred above.

38. Pursuant to the above direction the respondent No.2 viz., Inspector General of Police had issued a circular bearing No.2 of 2015 dated 10.06.2015 giving guidelines on the procedure for the police to follow when dealing with cases of violence against women and children and had disseminated to all police stations concerned.

39. We have carefully examined the said circular dated 10.06.2015.

40. Before we proceed with the said circular, it is necessary to answer the main issue being posed before this Court. In order to do so, it is relevant to refer section 154 of the Code:-

> *" 154.* ***Information in cognizable cases****.- Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the [Government] may prescribed in this behalf. "*

41. Ms. Sara Hussain, the learned counsel appearing for the petitioners while adverting to the conditions prescribed in section 154 of the Code submitted that section 154 is mandatory as the use of the word "*shall*" is indicative of the statutory intent of the legislature and thus, leaves no room for doubt that irrespective of the place of occurrence when information relating to the commission of cognizable offence is given orally or in writing the officer in charge of the respective police station is left with no other option but to forthwith enter the same into the register maintained for the said purpose.

42. FIR is an important document in the criminal law procedure, its principal object, from the informant's point of view, is to set the machinery of criminal law into motion and from the view of the investigating agency is to obtain information about the alleged occurrence and to take necessary steps to trace the accused and produce him before the court concern for trial.

43. The golden rule of interpretation of a statute is the literal rule of interpretation.

44. From a plain reading of the respective provision of law all we have to look at is what does it say. Resultantly, the language used in section 154 of the Code is the determinative factor of the legislative intent.

45. In this connection, it is apt to quote the following observations of the Supreme Court of India so made in ***M/s Hiralal Rattanlal Vs. State of Uttar Pradesh and others (1973) 1SCC 216,*** which are quoted as under:

> *"In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of*

statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear."

46. From a plain reading of the said provision of law it is apparent that the language of section154 of the Code is absolutely clear and unambiguous and suggests of no other construction but literal construction.

"It is, therefore, manifestly clear that if any information disclosing a cognizable offence is placed before an officer in charge of a police station said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

However, the condition that is sine qua non for recording an FIR under section 154 of the Code is that there must be an information and that information must disclose a cognizable offence.

It is relevant to mention that the object of using the word "shall" in the context of section 154 of the Code is to ensure that all information relating to all cognizable offences is promptly registered by the police and investigated in accordance with the provisions of law", as has been observed in ***Khub Chand Vs. State of Rajasthan*** reported in ***AIR 1967 SC 1074.***

47. We have no reason to depart from the above observations, that vide section 154 of the Code if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer-in-charge of the respective police station irrespective of the place of occurrence, for, the legislature in its collective wisdom has intentionally not included the place of occurrence relating to commission of a cognizable offence unlike section 155 of the Code where jurisdictional element is present in terms of information given to the officer in charge/police officer with regard to commission of a non-cognizable offence, as argued by Ms. Hussain. In other words, the officer in charge can not refuse to register the said information on the plea that the occurrence did not take place within his jurisdiction. Regulation 244(a) of the Police Regulation of Bengal (in short, PRB) further fortifies the said legal position, which provides as under: -

" ২৪৪ ঃ কতিপয় মামলা ছাড়া সকল মামলার প্রাথমিক তথ্য লিপিবদ্ধ হবে (১৮৬১ সালের ৫নং আইনের ১২ ধারা)।-(ক) পুলিশের নিকট দাখিলকৃত সকল মামলা প্রথম দৃষ্টিতে তা মিথ্যা বা সত্য, গুরুতর বা সাধারণ দন্ডবিধির অধীনে দন্ডনীয় বা অন্য কোন বিশেষ বা স্থানীয় আইনে দন্ডনীয় যাই হোক না কেন তার প্রাথমিক তথ্য নিতে হবে। পুলিশ আইন ১৮৬১ এর ধারা ৩৪ অথবা পৌর, রেলওয়ে বা টেলিগ্রাফের বিরুদ্ধে কোন অপরাধের জন্য তা অপ্রযোজ্য হবে।

(খ) .....

(গ) .....

(ঘ) ..... "

" 244 : First information to be recorded in all but certain cases [12 Act V of 1861].- (a) A first information shall be recorded in respect of every cognizable complaint preferred before the police, whether prima facie, false or true, whether serious or petty, whether relative to an offence punishable under the Indian Penal Code or any special or local law. This does not apply to cases under section 34 of the Police Act, 1861, or to offences against Municipal, Railway and Telegraph by-laws".

(b) ……

(c) ……..

(d)……."

48. From the above, it is abundantly clear that there is inviolable duty cast upon the police officer in charge of the respective police station to register an FIR once the information given to such an officer discloses a cognizable offence.

49. In the instant case, the categorical assertion of the petitioners is that after the alleged occurrence the victim went to 3 (three) different police stations at around 4.00 a.m. i.e., Uttara Police Station, then Khilkhet Police Station and then to Gulshan Police Station to report commission of a cognizable offence but she was refused on the plea that the occurrence took place within the jurisdiction of another police station. Said assertion has not been denied by the respondents concern rather in their affidavits in compliance it has been averred that departmental actions have been duly initiated against the delinquent officers concern for their failure to discharge their professional duties. Under the circumstances, refusing to lodge FIR by the respondent Nos.4-6 as to the commission of a cognizable offence, is a violation of section 154 of the Code of Criminal Procedure.

50. In the instant case, the further assertion of the petitioners is that after being refused by the officers concern of Uttara, Khilkhet and Gulshan police stations respectively the victim went to Vatara Police Stations at around 6.00 a.m.; there she was reportedly compelled to wait for 3(three) hours for the officer in charge in order to have her information recorded under section 154 of the Code. Finally, at 12:30 p.m. her information was reduced to writing on Friday 22.05.2015. However, though subsequently she was sent to Victim Support Centre (VSC) at Tejgaon on 22.05.2015 but she was informed that she would be sent to Dhaka Medical College Hospital on 23.05.2015 for her medical examination i.e., after 24 hours of the alleged occurrence; which is a violation of section 32 of the Ain.

51. Section 32 of the Nari-O-Shishu Nirjatan Daman Ain,2000(in short, the Ain) runs as follows:-

> " ৩২, অপরাধের শিকার ব্যক্তির মেডিক্যাল পরীক্ষা- (১) এই আইনের অধীন সংঘটিত অপরাধের শিকার ব্যক্তির মেডিক্যাল পরীক্ষা সরকারী হাসপাতালে কিংবা সরকার কর্তৃক এতদুদ্দেশ্যে স্বীকৃত কোন বেসরকারী হাসপাতালে সম্পন্ন করা যাইবে।
>
> (২) উপ-ধারা (১) এ উল্লিখিত কোন হাসপাতালে এই আইনের অধীন সংঘটিত অপরাধের শিকার ব্যক্তির চিকিৎসার জন্য উপস্থিত করা হইল, উক্ত হাসপাতালের কর্তব্যরত চিকিৎসক তাহার মেডিক্যাল পরীক্ষা অতিদ্রুত সম্পন্ন করিবে এবং উক্ত মেডিক্যাল পরীক্ষা সংক্রান্ত একটি সার্টিফিকেট সংশ্লিষ্ট ব্যক্তিকে প্রদান করিবে এবং এইরুপ অপরাধ সংঘটনে বিষয়টি স্থানীয় থানাকে অবহিত করিবে।
>
> (৩) এই ধারার অধীন যুক্তিসঙ্গত সময়ে মধ্যে কোন মেডিক্যাল পরীক্ষা সম্পন্ন না করার ক্ষেত্রে, তৎসম্পর্কে ব্যাখ্যা সম্বলিত প্রতিবেদন পর্যালোচনার পর নিয়ন্ত্রণকারী কর্মকর্তা কিংবা, ক্ষেত্রমত, মেডিক্যাল পরীক্ষার আদেশ প্রদানকারী কর্তৃপক্ষ বা তাহার নিকট হইতে ক্ষমতাপ্রাপ্ত কর্মকর্তা,ম্যাজিস্ট্রেট,ট্রাইবুনাল বা সংশ্লিষ্ট অন্য কোন কর্তৃপক্ষ যদি এই সিদ্ধান্তে উপনীত হন যে, যুক্তিসঙ্গত সময়ের মধ্যে মেডিক্যাল পরীক্ষা সম্পন্ন না হওয়ার জন্য সংশ্লিষ্ট চিকিৎসকই দায়ী, তাহা হইলে উহা দায়ী ব্যক্তির অদক্ষতা ও অসদাচরণ বলিয়া বিবেচিত হইবে এবং এই অদক্ষতা ও অসদাচরণ তাহার বার্ষিক গোপনীয় প্রতিবেদনে লিপিবদ্ধ করা হইবে এবং উপযুক্ত ক্ষেত্রে চাকুরী বিধিমালা অনুযায়ী তাহার বিরুদ্ধে ব্যবস্থা গ্রহন করা যাইবে, এবং সংশ্লিষ্ট চিকিৎসকের বিরুদ্ধে কর্তব্যে অবহেলার জন্য তাহার নিয়োগকারী কর্তৃপক্ষ বা ক্ষেত্রমত, যথাযথ কর্তৃপক্ষ কর্তৃক ব্যবস্থা গ্রহণের জন্য ট্রাইব্যুনাল নির্দেশ দিতে পারিবে। "

52. Vide section 32(1) of the Ain the medical examination of the victim is to be completed at a government hospital or any other hospital designated for this purpose.

53. Vide sub-section (2) if the victim is produced before the hospital concern the duty doctor of the said hospital shall complete her medical examination as early as possible (অতিদ্রুত সম্পন্ন করিবে) and shall issue a certificate to that effect to the person concern and shall inform the local police station as to the commission of said offence. However, vide sub-

section (3) for the failure of the doctor concern to complete medical examination of the victim within reasonable time "যুক্তিসঙ্গত সময়ের মধ্যে" he shall be proceeded against for inefficiency " অদক্ষতা " and misconduct " অসদাচরন ".

54. Immediate *medico-legal examination* of the victim of rape or sexual violence or assault is the most important factor in a case launched on the allegation of rape or related offence. Unfortunately, section 32 of the Ain is absolutely silent about the duty and the responsibility of the police officer of the respective police station to be undertaken on receipt of an information of commission of offence of rape or sexual violence. Rather, on being produced before the doctor concern for examination " †\†] RK #$KYwtS xK RK%©© " the duty has been imposed upon him to complete said examination as early as possible " O†xK-gkK P #K †šcK'.

55. In ***Pt. Parmanand Katar*** Vs. ***Union of India;(1989)4 SCC 286*** the Supreme Court of India has emphasized the paramount obligation of the doctor concern, whether in private or government service to render his/her services with due expertise for protecting the life of the victim without interference from laws or procedures. This duty needs no support from any code of ethics or rule of law. Said decision also casts a duty on the state machinery to abstain from unduly harassing the doctors who will have to be the witnesses in such cases. The Court further directed that this duty be duly published through visual, audio and print media.

56. On the face of the above loopholes existed in the statute viz., Nari-O-Shishu Nirjatan Daman Ain,2000 a direction has been given by this Court at the time of issuance of the Rule Nisi to issue a circular as to the obligations of the police officer concern of the respective police station to ensure that required services are provided to all concern without any discrimination in particular on the grounds of religion, race, sex, caste or place of birth, and to record promptly and without delay any complaint so received regarding the allegation of rape.

57. In compliance thereof a circular being No.02/2015 was issued vide an administrative order under the signature of the Inspector General of Police vide Memo No. Na: O Shi: Pro:Cell/ Circular/44.01.0000. 047.01.011.15.223/1(105) dated 10.06.2015, as quoted above.

58. Clause 3 of the said circular provides that every information relating to commission of cognizable offence like rape, sexual assault etc. shall immediately be reduced to writing by the officer-in-charge of a police station without any discrimination whatsoever and without causing any delay. Clause 3 is quoted below:

> ". =iK@ivaK‡3A#w_F# K#R_K1K‡c2K#3Bk#K h/4eKOw RS@K‡ R#KO†šÍ3RAKNR#RKORRK R$NK R$NK ‡ R#KwgRKvc "$K1Kc©PQIRFPvK"R©RK4 kl šxKšci"

59. The offence of rape is a cognizable offence; as such, there should be a penal provision if the officer in charge of a police station refuses to record the information reported relating to a cognizable offence including offence of rape.

60. Vide clause 4 of the circular immediate steps (অবিলম্বে) are to be taken for medico-legal examination of the victims/survivors. Clause 4 runs as under:

> ". *ikOw RS@K‡G R,† †¥", IR4s RA_ R P%RŠ- KO†c©SPQ R14R_w _GK RKc$cS RKAgvK šxK šci "

61. Vide clause 5 of the circular forensic evidence is to be collected properly (3NR3N Rsc) and to be preserved and if necessary (wgR Š#) should be sent for chemical/DNA test. Clause 5 provides as follows:

".) iKOw Rs@KOR©Rx "6K3NR3N RscK hAgaK hGv K‡ TS©RKwgR Š#K-gkK RR#¥ ,†/#/K w_GRKc$cS RK šxKšci"

62. The word "অবিলম্বে" used in clause 4 is vague and unspecified, for, the victim who reports a rape or sexual assault is required to be sent to the hospital concern for medical examination preferrably within 24 (twenty four)hours of receipt of the complaint for proper collection of medico-legal evidence.

63. Moreso, the word "প্রয়োজনে" so used in clause 5 for sending forensic evidence for the purpose of chemical /DNA tests is also not tenable in view of the fact that in all rape cases or cases of sexual violence such tests are required to be conducted mandatorily in order to find out the real culprit.

64. Clause 6 of the circular provides that where Victim Support Centre/One Stop Crisis Centre/Cell has been established the victim of rape/sexual assault/survivor is to be sent there, if necessary, pending investigation:

". >iKS3K ©KO†@GS7K† ¥"K RswP¥K‡ U¥R,1 R#KV wK/4P¶† K‡ U¥R,‡©KwgkªWxK š šIK‡K ©K O†@GS7K@vKcRK‡3A#Kw_FS# K†G RKc$14† ¥", R P% RŠ- š Kwgr Š#KY14K† ¥"K RswP¥K ‡U¥R,1 R#KV wK/4P¶† K‡ U¥R,‡©K‡wgvK xK"R©RKx-eB RB/4'KOc$RxKR?šxKšci"

65. In this regard, the contention of the petitioners is that said provision is silent as to whether any person, or a police officer or an officer of Victim Support Centre is to accompany the victim while going to the Centre. Moreover, no provision has been incorporated for providing interpretation services where necessary especially for women and girls with disabilities who are victims of rape or sexual assault; thus, leaving them without adequate legal support as well as effective access to justice.

66. We are in agreement with the said propositions.

67. In addition, every police station must have round the clock a female police officer not below the rank of a Constable. On receipt of the complaint/information of the offence of rape or sexual assault the duty officer recording the information shall call the female police official present at the police station and make the victim and her family members comfortable.

68. Moreso, the duty officer immediately upon receipt of the complaint/information shall inform the Victim Support Centre.

69. After reducing the information into writing, the Investigating Officer along with the female police official available, escort the victim for medical examination.

70. Moreover, the Investigating Officer shall endeavour to complete the investigation at an earliest; and in case where the victim reports any threat being posed by the accused or his family the officer concern of the respective police station shall take immediate steps under section 506 of the Penal Code.

71. However, the further contention of the petitioners is that the name of the victim has been disclosed in various documents annexed to the affidavits of the respondents concern, which is opposed to section 14 of the Ain,2000 and hence, needs to be redacted. Section 14 of the Ain,2000 provides as under:

" **সংবাদ মাধ্যমে নির্যাতিতা নারী ও শিশুর পরিচয় প্রকাশের ব্যাপারে বাধা-নিষেধ**।-(১) এই আইনে বর্ণিত অপরাধের শিকার হইয়াছেন এইরুপ নারী বা শিশুর ব্যাপারে সংঘটিত অপরাধ বা তৎসম্পর্কিত আইনগত কার্যধারার সংবাদ বা তথ্য বা নাম-ঠিকানা বা অন্যবিধ তথ্য কোন সংবাদ পত্রে বা অন্য কোন সংবাদ মাধ্যমে এমনভাবে প্রকাশ বা পরিবেশন করা যাইবে যাহাতে উক্ত নারী বা শিশুর পরিচয় প্রকাশ না পায়।

(২) উপ-ধারা (১) এর বিধান লংঘন করা হইলে উক্ত লংঘনের জন্য দায়ী ব্যক্তি বা ব্যক্তিবর্গের প্রত্যেকে অনধিক দুই বৎসর কারাদন্ডে বা অনূর্ধ্ব এক লক্ষ টাকা অর্থদন্ডে বা উভয় দন্ডে দন্ডনীয় হইবেন। "

72. Vide the said provision of law publication in the media of the name of any victim in a pending case under the Ain is prohibited with a view to ensure her safety and security.

73. The respondents concern are to keep the same in mind as a general practice in cases of rape or sexual assault and also the cases involving vulnerable women and children.

74. The fundamental rights to life or personal liberty (Article 32 of the Constitution), to equality before law (Article 27 of the Constitution), not to be discriminated on the grounds of religion, race, caste, sex or place of birth (Article 28(1) of the Constitution), to work in her chosen profession occupation, trade or business (Article 40 of the Constitution) and to enjoy protection of law, and to be treated in accordance with law and only in accordance with law(Article 31 of the Constitution) undoubtedly include protection from sexual harassment, which our Constitution guarantees.

75. Further, the Preamble to the Constitution guarantees democracy and socialism meaning economic and social justice which automatically include gender justice, liberty of thought, expression, belief, faith and worship; equality of status and opportunity that would again strengthen the concept of equality.

76. The right to be protected from sexual harassment or assault is, therefore, guaranteed by the Constitution, and is one of the pillars on which the very construct of gender justice stands: as has been observed by the Supreme Court of India in ***Vishakha Vs. State of Rajasthan, AIR 1997 SC 3011*** and also in ***Apprel Export Promotion Council Vs. A.K. Chopra, AIR 1999 SC625.***

77. This right is further fortified by the fundamental principles of State policy contained in Articles 8, 10, 11, 15, 19 and 21 of our Constitution, which are to be construed harmoniously with the fundamental rights as guaranteed in Part III; and these fundamental principles bind the State while discharging its rule of governance of the country. Also, considering the fact that Bangladesh is one of the signatories of the Declaration on the Elimination of all Forms of Discrimination Against Women, 1979 as well as the Declaration on the Elimination of Violence against Women, (Resolution No.48/104 dated 20.12.1993).

78. Article 1 of the said Declaration provides as follows:-

"For the purposes of the Declaration the term "violence against women" means any act of gender-based violence that results in or is likely to result in physical sexual or psychological harm or suffering to women including threats of such acts, coercions or arbitrary deprivation of liberty, whether occurring in public or in private life.";

79. Article 4 of the said Declaration requires the State to ensure "*exercise of due diligence in prevention, investigation and punishment of offences of violence against women, to provide prompt and effective responses in cases of sexual violence against women.*"

80. Therefore, the State has obligation also under the international law to provide a safe environment, at all times, for women, who constitute half the nation's population. This role is not merely responsive to apprehend and punish the culprits for their crimes; but also to prevent commission of any crime to the best of its ability with the aid of law enforcing agency and justice delivery system coupled with the discharge of the fundamental duties of every citizen.

81. This Court, however, appreciates the effort taken by the respondents concern incorporating specific guidelines to be followed by the police officer concern of the respective police station with regard to recording an FIR as well as dealing with the rape victim but those guidelines are the product of administrative order; consequently, has no force of law.

82. Now, time has come to take immediate steps towards filling up the above loopholes, as observed earlier, making necessary amendments in the existing laws and by implementing the recommendations of the Law Commission of Bangladesh on the subject matter in question as well as the National Action Plan to Prevent Violence Against Women and Children 2013-2015 so has been formulated by the respective ministries with a view to discharge the obligation of the State to ensure gender justice including giving protection to women, girls and children from being subjected to rape or sexual assault in any form whatsoever.

83. However, fact remains that the existing procedural frame works to ensure effective protection of the victims of rape, sexual violence and other gender based violence are not adequate.

84. In order to fill up the gap in between, we issue the following directives in the form of guidelines, of which this Court has power under Article 102 of the Constitution and are binding on all concerned in view of Article 111 of the Constitution and are to be implemented in the respective field until such legislative vacuum is filled up by necessary enactment by our legislature.

1) Every information relating to commission of cognizable offence including rape, sexual assault or like nature shall immediately be reduced to writing by the officer-in-charge of a police station irrespective of the place of occurrence without any discrimination whatsoever and without causing any delay.
2) Also, a designated website should be opened enabling the informant to register his/her complaint online.
3) The statute should contain specific provision dealing with refusal or failure of the officer concern of the respective police station without sufficient cause to register such cases.
4) Every police station must have round the clock a female police officer not below the rank of a Constable. On receipt of the information of the offence of rape or sexual assault the duty officer recording the information shall call the female police officer present at the police station and make the victim and her family members comfortable.
5) At all stages the identity of the victim should be kept confidential.

6) To keep a list of female social workers who may be of assistance at all police stations.
7) The statements of the victim should be recorded in the presence of a lawyer or friend nominated by her, or a social worker or protection officer.
8) The victim should be made aware of her right to protection from the State and to give any information she requests on the matter.
9) The duty officer immediately upon receipt of the information shall inform the Victim Support Centre.
10) Interpretation services should be provided where necessary especially for women or girls with disabilities who are victims of rape or sexual assault.
11) After reducing the information into writing, the Investigating Officer along with the female police official available, shall escort the victim for medical examination without causing delay.
12) The Victim Support Centre should be discreet and should at all times have all the facilities required for the recovery of the victim.
13) In all rape cases or cases of sexual assault chemical/DNA tests are required to be conducted mandatorily.
14) The DNA and other samples should be sent to the concerned Forensic Science Lab or DNA Profiling Centres with 48(forty-eight) hours of the alleged occurrence.
15) Any failure of duty on the part of the investigating agency in collecting the report or causing the victim to be taken to the nearest hospital for medical examination would be punishable offence.
16) The investigating officer shall endeavour to complete the investigation at an earliest.
17) There should be wider dissemination of the national line number on violence against women, girls or children namely 10921 through visual, audio as well as in the print media including designated websites.
18) In addition to the above, to establish an office in every Metropolitan City for the purpose of providing necessary security, medical, chemical and counselling assistance and secured protection for the victim.

85. The respondents concern are hereby directed to follow and observe the above guidelines strictly, until required legislation is enacted by the Parliament on the subject matter in question.

86. With the above observations and directions this Rule is accordingly disposed of.

87. Office is directed to communicate the judgment and order to the Ministry of Law, Justice and Parliamentary Affairs, Ministry of Children and Women Affairs and Ministry of Home Affairs as well as the Inspector General of the Police for taking necessary steps in view of the recommendations, observations and directions referred above in the form of guidelines.

88. Before we part we would like to record our note of appreciation to the petitioners organisations for advancing the cause in question before this Court in greater public interest and also for providing assistance with substantive materials for effective disposal of the Rule Nisi.

89. There will be no order as to costs.

10 SCOB [2018] HCD

HIGH COURT DIVISION

Criminal Revision No.2964 of 2017.

Md. Kawsar Shikder
...Convict-petitioner-petitioner.

Vs.

The State.
...Opposite party.

Mr. Amit Das Gupta, Advocate
...For the Convict-petitioner.

Mr. M.A. Mannan Mohan, D.A.G. with
Mr. Md. Sarwardhi, A.A.G
...For the State.

Heard on:17.05.2018.
Judgment on: 24.05.2018.

Present
Mr. Justice Abu Bakar Siddiquee.

Narcotics Control Act, 1990 (Report of Chemical Analyzer)
There is no evidence on record to the effect that some portion of those incriminating article were being sent to the chemical analyzer for the purpose of obtaining a chemical report and no such report was marked as exhibit in such case. I have no option to hold that there is doubt so as to ascertain that those incriminating articles were Narcotics or not. … (Para 22)

Narcotics Control Act, 1990 (Benefit of Doubt):
In the instant case I find that there are intrinsic weaknesses and blatant contradictions in the evidence of the P.Ws and the witnesses are partisans and interest witness. The learned Judge of the Trial Court has not considered the material discrepancies, contradictions and omissions of the witnesses for which an error has crept in the impugned judgment resulting in the conviction of petitioner. On consideration of the evidence on record, the convict-petitioner is held to be entitled to benefit of doubt and as such he is also entitled to be acquitted from the charge. … (Para 25)

Judgment

Abu Bakar Siddiquee, J.

1. The Rule under adjudication, issued on 14.11.2017, was in the following terms:
"Let a Rule be issued calling upon the opposite party to show cause as to why the judgment and order of conviction and sentence dated 08.08.2017 passed by the learned Sessions Judge, Chandpur in Criminal Appeal No.19 of 2017 allowing the appeal in part and thereby modified the judgment and order of conviction and sentence dated 14.12.2014 passed by the learned Senior Judicial Magistrate, Court No.1, Chandpur in Chandpur Sadar Model Police Station Case No.29 dated 24.07.2011 corresponding to G.R. Case No.317 of 2011 (Sadar Thana) under section 19(1) of Table 7(Ka) of the Narcotics Control Act, 1990 convicting the petitioner under the above Section and sentencing him to suffer rigorous imprisonment for a period of 01 year and to pay a fine of Tk.1,000/-should not be set aside and /or pass such other order or further order or orders as to this Court may seem fit and proper."

2. The prosecution case may briefly be stated as follows:-

One Head Constable Md. Nazrul Islam Bhuiyan lodged the FIR with Chandpur Sadar Model Police Station as informant alleging *inter-alia* that on 23.07.2011 while he and his companion forces were on mobile duty around the Chandpur Launch Terminal Area beside the Chandpur Madrasha, they saw a person with a load of a shopping bag in his hand and being suspicious they caught hold the person and were able to recover 4 Kg ganja kept in 5 separate polythene bags within his shopping bag in presence of local witnesses. Thereafter it has been alleged that they informed the matter to the Chandpur Sadar Police Station wherefrom one S.I Sk. Salauddin rushed to the spot and prepared a seizure list in presence of local witnesses and lodged the FIR after being returned to the Police Station. Hence is this case.

3. One SI Jahir Uddin took over the task of investigation who visited the place of occurrence and prepared its sketch map along with its index. Thereafter he recorded 161 statements of the P.Ws. On completion of the investigation, he has submitted a charge sheet against the convict-petitioner for commission of offence punishable under 9(1) table 7(ga) of the Narcotics Control Act, 1990.

4. Thereafter the case record has been transmitted to the Chief Judicial Magistrate, Chandpur who after taking cognizance of the offence transfer the same to the Senior Judicial Magistrate, Court No.1, Chandpur for purpose of holding trial.

5. The learned Magistrate framed a formal charge against the convict-petitioner after observing all the formalities and read over the same to him whereupon he pleaded not guilty of the offence and claimed to be tried.

6. In course of trial the prosecution adduced as many as two witnesses. On the other hand the defence examined none.

7. The defence as it appears from the trend of the cross-examination that the convict-petitioner is innocent and he has been falsely implicated in this case and he is victim of police conspiracy.

8. On completion of evidence the convict-petitioner again examined under Section 342 of the Code of Criminal whereupon he abjured his guilt.

9. On conclusion of trial the learned Trial Judge attributed the order of conviction and sentence as stated above.

10. Being aggrieved by and dissatisfied with such order of conviction and sentence the convict-petitioner preferred an appeal before the Sessions Judge, Chandpur who after hearing of the appeal dismissed the same. The convict-petitioner thereafter moved before this court and obtained the present Rule.

11. Mr. Amit Das Gupta, learned Advocate appearing on behalf of the convict-petitioner strenuously argued that the order of conviction and sentence is neither proper nor in accordance with law and as such the impugned order of conviction is liable to be set aside. He further adds that it was the duty of the Investigating Officer to produce the chemical report before the Court but he has not been examined in this case. He further adds that

unfortunately prosecution withheld the Investigating Officer including the seizure list witnesses and non examination this vital witness renders the prosecution case doubtful. He further adds that both the witnesses have made inconsistent and contradictory statements and as a result of which it is a case of no evidence in spite of that learned Trial Judge attributed the order of conviction and sentence mere on surmise and conjecture.

12. On the other hand, M.A. Mannan Mohan, the learned Deputy Attorney General appearing on behalf of the state strenuously argued that all the P.Ws supported the prosecution case in a harmonious voice mentioning the time place and manner of occurrence and as such the impugned judgment and order of conviction is liable to be affirmed.

13. I have heard the learned Advocate for both the parities and perused materials available on record.

14. Let me proceed to examine the evidence and other materials of the case and see therefrom as to how far the prosecution proves its case beyond reasonable shadow of doubt.

15. The informant Md. Nazrul Islam while deposing as P.W.1 stated that on 23.07.2011, he was being attached as Head Constable in Chandpur Sadar Neval Police Fary and at the time of occurrence, he was being entrusted with the task of mobile duty around the Chandpur Launch Terminal Area along with his companion forces. He further deposed that at about 20.30, they saw a person to loiter beside the pontoon of the Launch Terminal with a load of a shopping bag in his hand and they became suspicious after seeing him. Thereafter he deposed that they apprehended the convict-petitioner and was able to recover 4 Kg of ganja kept in his shopping bags. Thereafter he deposed that he informed the matter to the Police Station wherefrom S.I Salah Uddin rushed to the spot and prepared a seizure list in presence of local witnesses and returned back to the Police Station along with the convict-petitioner. He also deposed that he lodged the FIR subsequently after arrival on the Police Station.

16. None cross-examined this witness. Since the convict-petitioner was being absconded.

17. P.W.2, Constable Rafiqul Islam deposed that on 23.07.2011 he was on duty under the leadership of P.W.1, around the Chandpur Launch Terminal Area beside the Chandpur Madrasha Road. Thereafter he deposed that they saw one person to loiter around the Terminal Area and they being suspicious was able to catch hold him with a load of a shopping bag in his hand. He further deposed that they recovered 4 Kg ganja from the shopping bag of the convict-petitioner. Thereafter he deposed that his team leader informed the matter to the Police Station wherefrom S.I Salauddin prepared a seizure list in respect of recovered incriminating articles. Thereafter he deposed that their team leader returned to the Police Station and lodged the FIR. He identified the convict-petitioner on dock and produced incriminating article before the trial court.

18. None cross-examined this witness. Since the convict-petitioner was not present.

19. On perusal of the charge sheet it appears that as many as 8 persons were being named in the witness column out of which only informant and P.W.2, Constable Rafiqul Islam was being examined in this case. It further appears that the prosecution withheld the Investigating Officer and so also the seizure list witness in this case. On further perusal of the seizure list it appears that two nonlocal persons were being implicated there as seizure list witnesses. On scrutiny such point the learned Advocate appearing on behalf of the convict-petitioner

submits that the prosecution hopelessly violated the provision of Section 103 of the Code of Criminal Procedure in preparing the seizure list. He further adds that only two constables were examined in this case who were partisan and interested witness in the sense of that they are concerned in the success of their raid. He took me to a decision enunciated in the case of one Jewel and another Vs. The State reported in 5 MLR (HC) 2000, 170 wherein it has been held that:

> "The law of search and seizure requires mandatorily that it should be made in presence and in the witness of respectable persons of the locality where such search and seizure are made Non-compliance with these mandatory provisions of law renders the recovery and seizure doubtful resulting in the benefit in favour of the accused. Police personnel making the alleged recovery are interested witnesses. Unless the evidence of the interested witness are materially corroborated by the local disinterested and impartial witness, it is unsafe to place reliance on the interested witness while convicting the accused. Material contradictions and omissions in the evidence of the P.Ws and non-examination of seizure list witnesses in the facts and circumstances of the case make the prosecution case not only doubtful but also render the same not proved eventually leading to the acquittal of the accused. "

20. In the instant case it is seen that no neighbouring witness being examined and also that there is no corroboration of disinterested witness in the case. It is also seen that most of the cited witnesses were being withheld by the prosecution and none cross-examined those vital witness particularly the Investigating Officer and the seizure list witnesses raises a presumption against the prosecution to the effect that had they been examined in the case they would not have supported the prosecution case and the benefit of such defect will to the accused-person.

21. Learned DAG appearing on behalf of the State strenuously argued that all those local witnesses are interested witnesses and they made obliging statements in favour of the convict-appellants with a view to save him from punishment. He further argued that whenever the seizure list witnesses made obliging statement, the Court may convict an accused solely on the basis the unimpeachable evidence of the officer who made search and seizure. In this respect he took me to a decision enunciated in the case of S.M. Kamal Vs. State reported in 6 BLC 113 wherein it has been held that:

> "All the public seizure list witnesses did not support the prosecution case but when the informant as police personnel prove the prosecution case corroborated by the other police personnel who were the member of the petrol party, there is no legal bar to convict the appellant on such unimpeachable evidence of the police"

22. Let me proceed to examine the testimonies of two witnesses and see therefrom as to how far they are able to advice unimpeachable evidence. The informant while deposing as P.W.1, deposed that some people were being present at the time of search and seizure but P.W.2, have not supported the P.Ws in toto. On further perusal of the record, it appears that the seizing officer was not present at the time of recovery and as such he has no personal knowledge about the search and he only seized the articles. Over and above there is no evidence on record to the effect that some portion of those incriminating article were being sent to the chemical analyzer for the purpose of obtaining a chemical report and no such report was marked as exhibit in such case. I have no option to hold that there is doubt so as to ascertain that those incriminating articles were Narcotics or not.

23. Having considered the facts, circumstances and evidence on record the facts circumstance and evidence or record I find that it is unsafe to attribute the order of conviction towards the convict-appellant since no report of chemical analyzer was being marked exhibit in this case. Learned DAG further argued that the convict-petitioner was being inabscontion during the course of trial and the fact of such abscontion furnish a strong corroboration to the prosecution case that he is the culprit. On the other hand learned advocate appearing on behalf of the convict-petitioner took me to a decision enunciation in the case of Abul Kashem and others Vs. State reported in 56 DLR (2004), 132 wherein it has been held that:-

> "Absconsion itself is not an incriminating matter inasmuch as even an innocent person implicated in a serious crime sometimes absconds during the investigation to avoid repression by the police."

24. Thus it appears to me that abscondence of an accused in some circumstances may not be an incriminating circumstances in respect of his guilt. Learned Advocate appearing on behalf of the convict-petitioner strenuously argued that if after an examination of the whole evidence it is seen that there is reasonable possibility that the defence put forward by the accused might be true, in such a view it react on the whole prosecution case and in this circumstances the accused is entitled to get benefit of doubt not as a matter of grass but as a matter of right.

25. In the instant case I find that there are intrinsic weaknesses and blatant contradictions in the evidence of the P.Ws and the witnesses are partisans and interest witness. The learned Judge of the Trial Court has not considered the material discrepancies, contradictions and omissions of the witnesses for which an error has crept in the impugned judgment resulting in the conviction of petitioner. On consideration of the evidence on record, the convict-petitioner is held to be entitled to benefit of doubt and as such he is also entitled to be acquitted from the charge.

26. In the result, the Rule is made absolute. The impugned Judgment and order of conviction and sentence dated 08.08.2017 passed by the learned Sessions Judge, Chandpur in Criminal Appeal No.19 of 2017 is hereby set aside.

27. The convict-petitioner is found not guilty of the charge levelled against him and he and his sureties are discharged from their respective bail bonds.

28. Let a copy of this judgment along with L.C.R. be sent to the concerned court at once.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO.8932 OF 2011

Md. Abdul Hye, son of late Abdur Rashid, 2/404, Eastern Rokeya Tower 98 Boro Moghbazar, Dhaka.
……..Petitioner
Vs.
Government of Bangladesh, represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Dhaka and others
…….. Respondents

Mr. Mohammad Imtiaz Farooq, Advocate with Mr. M. Syed Ahmed, Advocate
.....For the petitioner

Mr. Mahbubey Alam, Attorney General with Mr. Md. Jahangir Alam, Deputy Attorney General, Mr. Samarendra Nath Biswas, Assistant Attorney General, Mr. Md. Jashim Uddin, Assistant Attorney General, Mr. Md. Shafquat Hussain, Assistant Attorney General
.....For the State

Mr. Manzil Murshid, Advocate
.....For the respondent No.1

Mr. Abdul Wadud Bhuiyan, Senior advocate with Mr. Fida M. Kamal, Senior advocate, Mr. Qumrul Haque Siddique, Senior advocate, Mr. Probir Neogi, Senior advocate & Mr. A.M. Amin Uddin, Senior advocate
.....Amicus Curiae

Mr. Subrata Chowdhury, Senior advocate
.....For the respondent No.6

Heard on 02.05.2016, 18.05.2016, 16.08.2016,23.08.2016, 11.04.2017, 18.05.2017, 29.05.2017, 30.05.2017, 01.06.2017, 04.06.2017, 08.06.2017, 12.07.2017 & 20.07.2017
Judgment on 23.11.2017

Present:
Mr. Justice Obaidul Hassan
And
Justice Krishna Debnath

Enactment of Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974:
1962 Constitution of Pakistan was not a Constitution in the eye of law at all, because the same was not given to the nation by the people's representatives of Pakistan, rather the same was given by an usurper dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. Thus the Enemy Property Act [EPA] which was promulgated under a void Constitution of 1962 given by an usurper, the Pakistan Defence Rule 1965 and the Ordinance I of 1969 and its continuance under the grab of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 was a historical mistake. In view of our observations regarding 1974 Act and 1976 Ordinance we hold that measures are likely to be needed to give proper effect of the objective of the Act,

2001 (amended in 2013) and these are the matter to be dealt with by the legislature and executive.

Laxmi Kanta Roy Vs. UNO, 46 DLR (HCD) 1994, Page-136, Aroti Rani Paul vs. Shudarshan Kumar Paul and others, 56 DLR (AD) 73, Saju Hosein and other, 58 DLR (AD) 177 and Pulichand Omraolal Case, 33 DLR (AD) 30 relied.

… (Para 138)

All actions, decisions regarding listing any property within the territory of Bangladesh as enemy property or vested property after 23.03.1974 are illegal;

The persons engaged with the task of listing the property as vested property after 23.03.1974 are liable to be held responsible for doing illegal works; and

The above decisions were given by the Supreme Court of Bangladesh during 1980-2004. Not a single judgment has yet been pronounced in contrary to the principles enunciated by our apex court in the above mentioned cases. Thus, the persons who were/are engaged in listing properties as vested property subsequent to 18.06.1980 are liable to be proceeded with for contempt of Court.

… (Para 139)

Judgment

Obaidul Hassan, J.

1. Two Rules were issued on an application filed under Article 102 of the Constitution of the People's Republic of Bangladesh. 1st Rule Nisi was issued calling upon the respondents to show cause as to why promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance NO. XCII of 1976), and all actions taken pursuant to the said Ordinance; and actions taken pursuant to the 1976 Ordinance; and inclusion of new properties as enemy property subsequent to enactment of 1974 Act; and section 6(Ga) and (Gha) of the 2001 should not be declared to have been enacted without lawful authority and is of no legal effect, and or why such other or further order or orders as to this court may deem fit and proper should not be passed.

2. After issuance of the Rule, this Court by an order dated 19.05.2016 appointed 5(five) learned senior Advocates namely Mr. Abdul Wadud Bhuiyan, Mr. Fida M. Kamal, Mr. Quamrul Huq Siddique, Mr. Probir Neogi and Mr. A.M. Amin Uddin, as Amicus Curiae to assist the Court in resolving the issues involved. Since the question raised in this Rule has historical backdrop and evaluation of law and its interpretation is needed, on 09.06.2016 upon an application filed by the petitioner we asked the respondent No.1 to submit a comprehensive report of the list of properties as have been listed as Enemy Property subsequent to the 1976 Ordinance and to give further report as to how such properties were disposed of. The respondent No.1 was also directed to take immediate steps asking the Deputy Commissioners of the Country to provide a comprehensive report from each District for placing the same before this Court for its perusal. The respondent No.1, after collecting the reports from 46 Deputy Commissioners submitted those before this Court by way of filing supplementary affidavits.

3. At the midst of hearing of the case, the petitioner filed an application seeking issuance of supplementary Rule challenging section 3 of the Enemy Property (Continuance of Emergency Provision) (Repeal) Act, 1974. This Court on 12.04.2017 issued a supplementary Rule (2nd Rule) in the following term:

> "Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why section 3 of the enemy property (continuance of Emergency Provision) (Repeal) Act, 1974 in its present form should not be declared to have been enacted without lawful authority and is of no legal effect and or such other or further order or orders passed as to this court may seem fit and proper."

4. The petitioner impleaded the People's Republic of Bangladesh represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Dhaka as respondent No.1, the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Dhaka as respondent No.2; the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka as respondent No.3; Land Appeal Board represented by its Chairman, Segun Bagicha, Dhaka as respondent No.4 and Land Reform Board represented by its Chairman, Segun Bagicha, Dhaka as respondent No.5. Thereafter, on 16.07.2017 considering an application initiated Mr. Rana Das Gupta, the Secretary of Hindu Buddhist Christian Unity Council was allowed to be added as respondent No.6.

5.The petitioner has challenged promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976) and all actions taken pursuant to the said Ordinance and also challenged inclusion of the properties in the list of 'Enemy Property' after enactment of 1974 Act, the petitioner also challenged section 6 of the অর্পিত সম্পত্তি প্রত্যার্পন আইন, ২০০১ being violative of the core spirit of the Constitution of the People's Republic of Bangladesh.

6. The petitioner's case in short is that in the pretext of the powers under the 1965 Rules, the Government of Pakistan indiscriminately took over the properties of Hindu minorities as being 'enemies' or 'enemy subjects' or [anyone who] appear to the Pakistan Government to be associated with enemies in the then East Pakistan, present Bangladesh. East Pakistan government also made an order in 1966 under Rule 161 titled the East Pakistan Enemy Property (Lands and Building) Administration and Disposal Order of 1966. In 1968, the Supreme Court of Pakistan asked the Government of Pakistan to explain its view point on the said Act, as the Supreme Court considered it as a political question to be answered by the Government of Pakistan (M.M. Monsur Ali Vs. Arodbendu Shekhar Chatterjee and others (21 DLR (Sc) Page-20). However, the Government of Pakistan did not formulate its view point on this crucial question till the independence of Bangladesh. Although the armed conflict between India and Pakistan ended in 1965, the state of Emergency continued until 16 February 1969, on which date the Government of Pakistan Promulgated Enemy Property (Continuance Emergency Provision) Ordinance 1969 by operation of which the provisions relating to vesting of enemy property contained in the 1965 Rules continued to be in force, and until the glorious liberation war of 1971, the act of arbitrary and discriminate confiscation of properties belonged to the Hindus , the civilians of the then East Pakistan/ the present Bangladesh remained continued by the Government of Pakistan.

7. The Liberation War of 1971 was ensued on the basis of denial of the two-nation theory by the Bengali nation and thus the fundamental ethos of the liberation war of 1971 was compatible with the notion of equal rights of citizens irrespective of religion, including the Hindu religion. The proclamation of independence and formation of the provisional

Government of Bangladesh happened at Mujibnagar on April 10, 1971. By the proclamation of Independence, the elected representatives of the People's Republic of Bangladesh, "in order to ensure for the people of Bangladesh equality, human dignity and social justice" declared and constituted Bangladesh as a sovereign Republic. On the same day, i.e. 10 April 1971 Laws of Continuance Enforcement Order, 1971 was promulgated purporting to keep in force all the Pakistani laws which were in force in the then East Pakistan on or before March 25, 1971, which were not in conflict with the Proclamation of Independence.

8. That is to say, in other words, Ordinance No.I of 1969, which did not fit with the spirit of the proclamation of independence of Bangladesh, automatically remained ineffective in the new State. Bangladesh was not a successor state of Pakistan. On the contrary, Bangladesh was established itself by waging a war of liberation against Pakistan. Immediately after liberation, the Bangladesh Vesting of Property and Assets Order, 1972 (Order 29 of 1972) was enforced on March 26, 1972 by the Government of Bangladesh. By this order, all properties situated in East Pakistan that belonged to Pakistan government became vested in the People's Republic of Bangladesh. Thus, all government properties, including but not limited to khas land, river and enemy Properties listed under the 1965 and 1969 Ordinances etc became vested in Bangladesh. However, each category of land continued to be of government by specific laws relating to each category.

9. Although, by operation of the Proclamation of Independence and the Laws of Continuance Enforcement Order, 1971, the 1969 Ordinance lost its applicability in the People's Republic of Bangladesh, in 1974 the Government of Bangladesh, for ensuring further equality of all the citizens of Bangladesh, passed the Enemy Property (Continuance of) Emergency Provisions (Repeal) Act, Act XLV of 1974, expressly repealing Ordinance I of 1969. However, the 1974 Act stopped short of return of the 'enemy property' to the original owners or their heirs who became citizens of Bangladesh and in fact the 1974 Act left all enemy properties and firms which were vested with the custodian of enemy property in the then East Pakistan, vested in the Government of Bangladesh. Pursuant to section 3 of the 1974 Act, such properties remained as vested on the government of Bangladesh. However, the Act did not state any wide power in respect of management or disposing of such properties by the Government. On 20 January 1975, the Ministry of Law, by its circular no.51, issued an order to immediately 'delist' any property remained included in the enemy property list, after enactment of the 1974 Act. Subsequently, on 26 July 1975, the Ministry of Law by its Circular No. VNR 29/75 issued a direction to stop any listing of property as enemy property and also to submit a detailed report on any such listing.

10. After the assassination of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, the then President, promulgated the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976(Ordinance No.XCII of 1976) by which section 3 of the 1974 Act was amended to give further power to the government with regards the 'enemy properties'. Section 2 of the Ordinance added the following sentence to section 3 of the 1974 Act, *"And shall be administered, controlled, managed and disposed of by transfer or otherwise by the government or by such office or authority as the Government may direct"*. By the aforesaid amendment through the 1974 Ordinance, the Government, with ill motivation and following discriminatory practice, continued to include new properties belonging to the Hindus in the enemy property list and also started to dispose of such properties in favour of interested quarters, often anti liberation forces. The practice of inclusion of new properties purported to belong to enemies of state of Pakistan continued until 21 June 1984, and by Notification dated 23 November 1984, the Ministry of Land

ordered that any decision to list a property after 21 June 1984 shall be null and void. Up until 11th anniversary of War of Liberation, the Government of Bangladesh continued to include properties belonging to Hindu minorities on the pretext of being 'enemies of Pakistan' which is not only a violation of fundamental rights guaranteed under the Constitution of the People's Republic of Bangladesh, but also against the spirit of the Proclamation of Independence, the preamble of the 1972 Constitution and the ethos of the struggle for liberation by the Bengali Nation.

11. In 1999, the parliamentary standing committed prepared a draft law with a view to return possession of the properties listed as enemy property since 1969 to their original owners who are citizens of Bangladesh or his of their heirs under applicable personal law. The title of the draft law was Vested Property (Return of Possession) Bill 1999. Pursuant to the draft law, it was expected that upon enactment, subject to the provision of determination claim provided in the draft Act, any property which was not listed prior to 16 February 1969 would cease to be treated as vested on the Government as 'enemy property' and the title and possession of the original owner who is a citizen of Bangladesh or his lawful heir or heirs would be restored. In the said draft of 1999, it was expressly provided upon enactment of the draft Act, any lease created by the Government on such properties would be deemed to be cancelled.

12. Subsequently, to the utter surprise, in the name of examining the draft in the Ministry of Land, for further improvement it has been transformed into অর্পিত সম্পত্তি প্রত্যর্পন বিল (2000 Bill) the main features of the draft proposed by the parliamentary Committee, has been abruptly changed by the Bureaucratic Process, headed by the Secretary of the Ministry of Land. The word "প্রত্যার্পন" does not commensurate with the Indo Pak subcontinent Land Laws and equity from Nababi Amal to present time "প্রত্যার্পন" is used for moveable property. Subsequently, the Parliament enacted the অর্পিত সম্পত্তি প্রত্যর্পন আইন ২০০১ (the 2001 Act) clearly deviating from the initial scheme of reinstating title and possession of the original owners of the properties listed as enemy property, the 2001 Act, excluded a large number of properties from the list by operation of section 6 of the 2001 Act, which reads as follows:

"৬। প্রত্যার্পনযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভূক্ত করা যাইবে না, যথাঃ (ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি।

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এইরূপ কোন সম্পত্তি।

(গ) সরকার কর্তৃক কোন সংবিধিবদ্ধ সংস্থা বা অন্য কোন সংগঠন বা কোন ব্যক্তির নিকট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি ।

(ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পত্তি এবং এইরূপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশবিশেষ হস্তান্তর করিয়া থাকিলে সেই হস্তান্তরিত সম্পদ,

(ঙ) এমন অর্পিত সম্পত্তি যাহা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি ।

(চ) জনস্বার্থে অধিগ্রহন করা হইযাছে এইরূপ কোন অর্পিত সম্পত্তি।"

13. The government has presented a new Bill 'vested Property Return (Amendment) Bill, 2011' before the parliament to amend certain provisions of the 2001 Act. However, the 2011 Bill does not either exclude the properties listed as enemy property after enactment of 1974 Act, or reverse the actions taken under the 1976 Ordinance or amend section 6 of the 2001 Act.

14. Mr. Mohammad Imtiaz Farooq, the leaned Advocate appearing on behalf of the petitioner submits that the concept of enemy property emerged from the war between

Pakistan and India occurred in 1965, and thus with the break in history of Pakistan by the Bengali nation in 1971 had diminished any need or justification for continuance of the 1969 Ordinance in the independent Bangladesh and in this backdrop the 1974 Act repealed the 1969 Ordinance, but successive Governments have, in utter disregard of the proclamation of independence and history of struggle for liberation, has continued with the process of listing properties as 'enemy property' in independent Bangladesh, and as such any and all inclusion of the properties in the list of enemy property after enactment of the 1974 Act is liable to be declared to have been done without any lawful authority and is of no legal effect. He further submitted that although on 10 April 1971 Laws of Continuance Enforcement Order, 1971 was promulgated purporting to keep in force all the Pakistani laws which were in force in the then East Pakistan on or before March 25, 1971, and were not in conflict with the Proclamation of Independence and thus the Ordinance No.I of 1969, which did not fit with the spirit of proclamation of independence of Bangladesh, automatically remained ineffective in the new state, successive Governments have, in utter disregard of the proclamation of independence and the Laws of Continuance Enforcement Order 1971, has continued with listing of properties as 'enemy property' in independent Bangladesh, and as such any and all inclusion of the properties in the list of enemy property after enactment of the 1974 Act is liable to be declared to have been done without any lawful authority and is of no legal effect.

15. He also submitted that since Bangladesh was not a successor state of Pakistan, and in fact Bangladesh established itself by waging a war of liberation against Pakistan, continuance of enlistment of 'enemy property' within the meaning of 1969 Ordinance is unconstitutional, and is liable to be declared to have been done without any lawful authority and is of no legal effect. He also submitted that in independent Bangladesh no one should be treated as 'Enemies of Pakistan,' because there is no existence of East Pakistan anymore. Rather, in other words the government of Pakistan and its occupation army became the enemies of Bangladesh. During our Liberation War the Enemy of Pakistan as determined in 1965 became the friends of Bangladesh and Bangladeshi people. Thus continuance of enlistment of Enemy Property within the meaning of 1969 Ordinance is unconstitutional and is liable to be declared to have been done without lawful authority and is of no legal effect.

16. He further submitted that continuance of enlistment of 'enemy property' within the meaning of 1969 Ordinance is violative of articles 27, 28, 29, 32, 42 of the Constitution of Bangladesh and as well as fundamental principle of secularism under the Constitution. Since the parliament, through 1974 Act repealed the 1969 Ordinance, no further property should have been included as enemy property afterwards on the basis of a law which is already dead. In another judgment of the Appellate Division (civil) dated 14th August 2004 in ***Saju Hossain Vs Bangladesh (58DLR (AD) (2006)*** on Enemy Property (continuance of Emergency Provisions) Ordinance (1 of 1969) Section 2. It was stated that "Since the law of enemy property itself died with the Repeal Ordinance No.1 of 1969 on 23 March 1974 no further vested property case can be started thereafter on the basis of the law which is already dead.

17. He further submitted that promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976) has been declared as illegal, void, and non east by the Hon'ble Appellate Division in the case of ***'Khondokar Delwar Hossain, Secretary of B.N.P. and others Vs. Bangladesh Italian Marble Works Ltd. and others (ADC 2010 Vol-VI(B, (5th Amendment case)'*** and as such any actions taken pursuant to the said Ordinance which is also violative of fundamental rights of citizens of the republic, is liable to be declared to have been done without lawful authority and is of no legal effect. Enlisting the properties as enemy property and disposal of such

properties belonging to citizens of Bangladesh on the pretext of being belonging to enemies of Pakistan pursuant to the 1976 Ordinance are clearly derogatory to the rights of the citizens and violative of the rights under the Constitution and thus not within the ambit of 'condoned acts' as decided by the Hon'ble Appellate Division and as such all actions taken pursuant to the 1976 Ordinance are liable to be declared to have been done without lawful authority and is of no legal effect.

18. He further submitted that by combined reading of the Laws of Continuance Enforcement Order, 1971, 1974 Act and judgment of the Hon'ble Appellate Division in the 5th Amendment case, it is clear that inclusion of any property in the list of enemy property subsequent to 1974 is illegal and such properties should be treated as if it has never been included in such list. Although the legislative history of the 2001 Act clearly shows that aim of the Parliament was to restore title and possession of the said land to the original owners who are Bangladeshi citizens or their lawful heirs, the 2001 Act applies a misnomer "প্রত্যার্পন" which is a concept unknown to the law of property and thus wording of the statute has diluted the right of the citizens who had has lost their properties. Indeed it is humbly submitted that the wording of the draft of 1999 prepared by the Parliamentary Standing Committee had more effectively dealt with the issue. The right of the land owners thus has not been extinguished by the operation of the law; it has been kept suspended for the time being. Section 6(Ga) and (Gha) of the 2001 Act makes an exception to "প্রত্যার্পন" of the properties which had been disposed of by the Government without taking into consideration that such right to dispose of the properties of citizens of Bangladesh on the pretext of being 'properties of enemies of Pakistan' is violative of the Constitution and as such the exception created by section 6 of the 2001 Act is also violative of the Constitution of the People's Republic of Bangladesh. Section 6(Ga) and (Gha) of the 2001 Act makes an exception to "প্রত্যার্পন" of the properties which had been disposed of by the Government without taking into consideration that the exception also covers the properties listed after enactment of 1974 Act and subsequently disposed of and that inclusion of such properties as enemy property is itself violative of the Constitution. Section 6 of the 2001 Act is clearly violative of Articles 27, 28 and 42 of the Constitution.

19. Mr. Manzill Murshid, the learned advocate appearing on behalf of the respondent No.1 by filing an affidavit in opposition denied all the material allegations brought against the respondent No.1 and stated *inter alia* that the Vesting of Property and Assets Order, 1972 (Order 29 of 1972) has been included in the list of First Schedule of the Constitution of the People's Republic of Bangladesh and the said order is protected by Article 47(2) of the Constitution. As per Article 47(1)(a) of the Constitution, the matter of control or management of any property shall not be deemed to be void on the ground that it is inconsistent with, takes away or abridges any right guaranteed by Part-III of the Constitution. Article 47 runs as follows:

> "47(1) No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges, any of the rights guaranteed by this Part-(a)the compulsory acquisition, nationalization or requisition of any property, or the control or management thereof whether temporarily or permanently; (b) the compulsory amalgamation of bodies carrying on commercial or other undertakings; (c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning share or stock (in whatever form) therein; (d) the extinction, modification, restriction or regulation of rights to search for or win minerals or mineral oil; (e) the carrying on by the government or by a corporation owned,

controlled or managed by the government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons; or (f) the extinction, modification, restriction or regulation of any right to property, any right in respect of profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking; If parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of State policy set out in Part-II of this Constitution.

(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution:

Provided that nothing in this Article shall prevent amendment, modification or repeal of any such law."

20. Mr. Monzil Murshed continued submitting that there is no reasonable grievance of the petitioner that can reasonably justify the instant writ petition and hence the writ petition is not maintainable in the eye of law. The petitioner is not aggrieved at all in any manner, hence no cause of action arose to confront the law and hence the instant Rule should be discharged. He further submitted that section 6 of the অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ is not violative of the Constitution of the People's Republic of Bangladesh. The petitioner is not aggrieved by the provision contemplated in section 6 of the said Act. During preparation of list, the properties, which were under control of a different government institution and for using the same for public purpose became protected under the provision of section 6 of the said Act. The reason to insert the provision of section 6 is aimed to secure greater public interest and thus the petitioner does not have any reason of being aggrieved. Hence the Rule is liable to be discharged.

21. He also submitted that the Government of Bangladesh has not made any disregard to the proclamation of independence and the history of struggle for liberation and independence of Bangladesh, the government has justifiably included all the properties in the list of the property named as 'vested property' lawfully. So, it cannot be declared illegal and without lawful authority. He further submitted that after following the procedure and legal steps the property of the persons who left the country for India was listed in the vested property list. So no right of the people has been violated by such list because the property was listed only who left the country. Hence, the question of violation of the right of any citizen guaranteed under the Constitution does not arise. He also submitted that section 6(Ga) and (Gha) of the অর্পিত সম্পত্তি প্রত্যর্পন আইন, 2001 is not violative of the Constitution of the Peoples Republic of Bangladesh. The section has been inserted rather to protect the greater public interest and hence it is not violative of the rights of any citizen of Bangladesh.

22. He also submitted that the Hon'ble Supreme Court of Bangladesh in many cases decided that under Article 102 of the Constitution of Bangladesh any citizen who is aggrieved may file a petition under the above provision of law, but neither the petitioner is aggrieved nor any property belonging to him has been listed in the vested property list, hence the instant writ petition is not maintainable and the rule is liable to be discharged.

23. He next submitted that the Laws Continuance Enforcement Order 1971 dated 10th April, 1971 having retrospective effect from 26th March, 1971 has legalized the Enemy

Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No.1 of 1969) along with other laws of Pakistan as the law of Bangladesh. Hence, it is not correct to say that with the Proclamation of Independence dated 10th April, the so-called Enemy Property law namely: the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No- 1 of 1969) which was passed to provide for the continuance of certain provisions of the Defense of Pakistan Rules 1965 relating to control of trading with enemy and control of enemy firms, and the administration of the property belonging to them, becomes dead and void. In view of the laws Continuance Enforcement Order 1971 dated 10th April, 1971 having retrospective effect from 26th March, 1971, the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No.1 of 1969) is not a dead law in Bangladesh.

24. He went on to submit too that Bangladesh (Vesting of Property and Assets) Order 1972 (President's Order No-29 of 1972 was also made on 26th March,1972 as an ancillary to the enemy property law by the then President of Bangladesh giving it retrospective effect from the 26th March, 1971. On the other hand, the very P.O. No- 29 of 1972 has also been expressly protected by article 47(2) of the Constitution and included unhindered in the First Schedule to the Constitution of Bangladesh. Article 47(2) is reproduced as under:

> "(2) Notwithstanding anything contained in this Constitution, the Laws specified in the First Schedule (including any amendment of Any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done Under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution" [underline is ours].

25. Hence, it is submitted that even if right to property of any citizen is affected in this regard, that cannot be challenged in any way for the reasons and constitutional provisions as cited above. On the other hand, right to property as enshrined in article 42 is a qualified right subject to any restrictions. Article 42(1) is reproduced below:

> " 42(1) Subject to any restrictions imposed by law, every citizen shall have right to acquire, hold, transfer of otherwise dispose of Property, and no property shall be compulsorily acquired, nationalized have by authority of Law."

26. He further submitted that the constituent Assembly while framing the original Constitution of Bangladesh included the very P.O. No.29 of 1972 in the 1972 Constitution with an explicit conscience and / or wisdom of that assembly, which cannot be challenged unless altered / amended by the Parliament keeping itself within the limitations prescribed by the Constitution and the judgment of the Supreme Court of Bangladesh. Hence, an express provision of the constitution cannot be changed and thereby impugned laws should not be declared illegal and void by legal arguments of the jurists, which are mainly based on implied provisions of the constitution and hypothesis as well. Rather, the so-called enemy property was vested in the Government of Bangladesh lawfully and the properties are being managed, controlled and administered lawfully as well by different laws (Ordinances and Acts etc) and circulars. Article 2(1) of the very P.O. No.29 of 1972 authorizes the People's Republic of Bangladesh to pass order of vesting in the custodian of enemy property or Assistant Custodian of enemy property as appointed by the then Government of Pakistan. That means all enemy properties as identified by the then Government of Pakistan got vested in the Custodians of enemy property. Those Custodians were allowed to manage the enemy properties under the laws promulgated during Pakistan.

27. Mr. Monzil Murshed further submitted that no new property can be included as enemy property in the enemy property list as per the judgment of the apex court after enactment of 1974 Act (i.e. the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act 1974) (Act No-XLV of 1974) by which the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969 (Ordinance No-1 of 1969) was repealed as on 23rd March, 1974. It is also submitted that by the provisions of the saving clause of the said repealing Act 1974 (Act No-XLV of 1974), all enemy Properties vested in the Custodians of enemy property shall vest in the Government (so, now termed as vested property) but nothing spelled out as regards how those vested properties will be dealt with. Accordingly, the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act 1974 (Act No-XLV of 1974) was amended by the Enemy Property (Continuance of Emergency Provisions) Ordinance 1976 (Ordinance No. XCIII of 1976) by which only the government was empowered with administration, management, control and disposal of vested property by transfer or otherwise. For the proper adjudication, the relevant portion of the Act 1974 (Act No. XLV of 1974) and the Ordinance 1976 (Ordinance No. XCIII of 1976) are reproduced below:

> **Section 3 of the Act 1974:**
>
> 3. Savings: (1) Notwithstanding the repeal of the said Ordinance and anything contained in any other law for the time being in force on such repeal,-
>
> (a) all enemy property vested in the Custodian of Enemy Property appointed under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government;
>
> (b) all enemy firms, the trade or the business . . . shall vest in the Government.
>
> **Section 2 of the Ordinance 1976:**
>
> "2. Amendment of section 3, Act XLV of 1974.- in the enemy property (Continuance of Emergency Provisions) (Repeal) Act 1974 (XLV of 1974), in section 3, in sub-section (1) after the word, "government" occurring twice, the following words and commas shall be inserted in both the places, namely:
>
> "And shall be administered, controlled, managed and disposed of by transfer or otherwise by the Government or by such office or authority as the Government may direct."

28. He also submitted that in view of such repealing Act 1974 (Act No.XLV of 1974) and subsequent judgment of the Hon'ble Appellate Division in ***Saju Hosen and others Vs. Bangladesh and another*** reported in ***58 DLR(AD) 177***, there is no scope of opening or inclusion of new properties as enemy property subsequent to enactment of 1974 Act (Act No.XLV of 1974) above. On the other hand, the amendment above brought into the 1974 Act (Act No.XLV of 1974) by the 1976 Ordinance (Ordinance No. XCIII of 1976) does only relate to administration, management and control and dispose of the vested property, and it has not taken away any right of any citizen, and hence, the impugned 1976 Ordinance (Ordinance No. XCIII of 1976) and all actions taken there under are not *ultra vires* the Constitution of Bangladesh. He also submitted that in the order of Civil Review Petitions being No.17-18 of 2011 (arising out of Civil Petition for Leave to Appeal No.1044 and 1045 of 2009) (Khandaker Delwar Hossain and another Vs. Bangladesh Italian Marbel Works and others (popularly known as Fifth Amendment case), the Hon'ble Appellate Division by its order disposed of the petitions with modification of the operating portion of the judgment of this Division to the effect that:

> "1) All proclamations, Martial Law Regulations, Martial Law Orders made/promulgated during the period between 20th August 1975 and 9th April, 1979 are hereby declared illegal, void *ab initio* subject to the following exceptions:

a) All executive acts things and deeds done and actions taken during the aforesaid period which were required to be done for the ordinary orderly running of the country and which were not otherwise illegal at the relevant time;
b) All transaction, which are past and closed, and no useful purpose would be served by reopening them;
c) All acts and deeds which are past and closed and are not otherwise illegal;
c) All international treaties;
d) All day-to-day affairs of the executive are hereby provisionally condoned.

29. Hence, all the actions of the respondents under section 1976 Ordinance (Ordinance No. XCIII of 1976) are by virtue of the above review petitions order are past and closed transaction, on the other hand, they are condoned by the Honb'ble Appellate Division, Mr. Monzil Murshed added.

30. He further submitted that International Crimes Tribunal Act and its trial are similarly protected under Article 47. This provision was challenged in a writ petition on the grounds of fundamental rights of the persons facing prosecution and trial under the said Act, but in the said writ petition the petitioners did not get any benefit of fundamental rights only because they (war criminals) are excluded from enjoying such right by article 47(3) of the constitution of Bangladesh. That in the light of that judgment, the present petitioner should not get remedy by virtue of Article 47(2) of the Constitution as referred above. He also submitted that section 6(ga) and (gha) of the 'অর্পিত সম্পত্তি প্রত্যাপন আইন' 2001 is not violative of the Constitution of the People's Republic of Bangladesh. Rather, the provisions of such section were inserted in to the Act 2001 to protect the greater public interest; hence it is not violative of the rights of any citizen of Bangladesh. He also submitted that by virtue of the Bangladesh (Vesting of Property and Assets) order 1972 (President's Order No.29 of 1972), and the Enemy property (Continuance of Emergency Provisions) (Repeal) Act 1974) (Act NO.XLV of 1974), that property as referred in section 6(ga) and (gha) of the 'অর্পিত সম্পত্তি প্রর্ত্যাপন আইন' 2001 has already been vested in the Government and the Government got the power of management and control and dispose of the vested property by transfer or otherwise under the said 1976 Ordinance (Ordinance No. XCIII of 1976).

31. Further, article 47(2) shall prevail over article 42 and hence, section 6(ga) and (gha) of the 'অর্পিত সম্পত্তি প্রত্যাপন আইন' 2001 is not violative of the Constitution of Bangladesh. Moreover, the Hon'ble Appellate Division in Rahima Khatun's case held that the vesting of the enemy property initially in the Custodian of Enemy Property and ultimately in the Government of Bangladesh is absolute. It also says that the enemy owner lost all of his title and interest in the property after such judgment. [40 DLR (AD) 23]. In view of the judgment, section 6(ga) and (gha) of the 'অর্পিত সম্পত্তি প্রত্যাপন আইন' 2001 is not violative of the Constitution of Bangladesh.

32. He further submitted that there has developed 3rd party interest in the properties as referred in section 6 of the 'অর্পিত সম্পত্তি প্রত্যাপন আইন' 2001. He also submitted that during preparation of list, the property which are under the control of different government institutions and are being used for public purpose are protected under the provision of section 6 because all these are past and closed issues and those are condoned by the order passed in the Civil Review Petition No.17-18 of 2011 as referred to above. Moreover, the purpose of the law of the 'অর্পিত সম্পত্তি প্রর্ত্যাপন আইন' 2001 was reflected in preamble as 'কতিপয় সম্পত্তি . . . . . প্রত্যার্পন. . সম্পর্কে বিধান প্রনয়নকল্পে প্রনীত আইন। Hence inclusion of (Ga) and (Gha) under section 6 of the 'অর্পিত সম্পত্তি প্রর্ত্যাপন আইন' 2001 is not illegal. Thus, the Rule is liable to be discharged.

33. Mr. Mahbubey Alam, the learned Attorney General appearing in this case submitted that by the Ordinance No.1 of 1969 the Pakistan Government promulgated Enemy Rules on 19.02.1969. Rule 2(3) defines the enemy territory, the persons who had been staying in India during 1965 India-Pakistan War, their properties were declared enemy property and the said properties were taken over by the then East Pakistan Government. He further submitted that though emergency rule was repealed after the cessation of the War between Pakistan and India, the Ordinance No.1 of 1969 was promulgated. He further submitted that by Ordinance No.1 of 1969 the territory which was treated as enemy land, after 26th March 1971 that land became friend's land. Thus, the territory as described as enemy territory according to Ordinance No.1 of 1969 cannot be treated as enemy territory after 26th March 1971.

34. Learned Attorney General candidly submitted that concept of enemy property after 26th March 1971 is absolutely wrong. It was historical mistake treating the Indian soil as enemy land even after 1971. He also submitted that by the Presidential Ordinance No.29 the property was vested to the government. The vested property cannot be treated as enemy property. He further submitted that Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 was an outcome of bad drafting. In the said Act the word 'enemy' should not have been used. He submitted that in view of the judgment of 5th amendment case, 1976 Ordinance is non-est. Thus, there is no justification to adjudicate the legality of the Ordinance 1976 which has already lost its' force by the above mentioned 5th amendment judgment.

35. He also submitted that since the Act of 1974 does not have existence any more, the Rule regarding the Act 1974 has become infructuous and thus the same is liable to be discharged. He further submitted that the purpose of filing this writ petition is to protect the interest of the minority people of Bangladesh who are the citizens of the country and to offer the minority citizen a feeling of dignity as a citizen of the country. In this regard he further submitted that the government after amending the law has been trying to return back the properties which were declared enemy property to the original owners who are the citizens of Bangladesh.

36. He further submitted that section 6(Ga)(Gha) of the Act of 2001 should not be declared illegal as those properties falling under the category of section 6(Ga) and (Gha) cannot be returned for the time being but the government has made a way-out to return back most of the properties to the original owners or their successors-in-interest now living in Bangladesh. But if it seems to this Court that this procedure is cumbersome this Court can pass an order giving guidelines in conformity with the provisions of the said law.

37. The learned Attorney general added that in filing application for claims to the tribunal, provision of section 5 of the Limitation Act may be made applicable. He also submitted that if the property cannot be returned to the owners or successors of the owners they may be compensated in accordance with law. He also submitted that if any property being treated as enemy property, (subsequently vested property) is now under the control of any hospital, educational institution or charitable institution, those institutions may be named after the names of the original owner of the property to give recognition to them.

38. In his concluding submission Mr. Mahbubey Alam, the learned Attorney General emphatically submitted that to make the secular force in the then Pakistan minority in size, the then Pakistan Government deliberately promulgated the Ordinance of enemy property with a political motive. Bangladesh has been emerged as a secular country by achieving

independence through a nine-month bloody battle against the Pakistan juntas. In this situation the properties which were treated as 'enemy properties' and subsequently listed as 'vested property' should be released in favour of the original owners of the property or their lawful successors now living in Bangladesh as its citizens, in accordance with law.

39. Mr. Quamrul Huq Siddique, the learned advocate appearing in this case as *amicus curiae* submitted that our liberation war was against communalism which was the core spirit of Pakistan, which declared its own citizen as enemy. For securing equal right of the citizen of the country irrespective of religion, race and caste our freedom fighters sacrificed their lives in 1971. He further submitted that since the law of continuance order was promulgated the enemy property ordinance also remained continued. After the Liberation War the then Government under the leadership of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman took the decision to dispose of the property to the person who left the country out of fear during 1965 war that took place between India and Pakistan, but the Act of 1974 was done hastily that resulted in existence of the word 'enemy' in the Act. He further submitted that amending the 1974 Act by 1976 Ordinance has opened an unpleasant door. Bad process was thus re-opened.

40. He further submitted that in 1966 a list of enemy property was prepared. After 1966 no property was supposed to be included in the list but in 1976 by promulgating the new Ordinance a door was opened and accordingly a list of enemy property became longer and longer.

41. He further submitted that in 1979 after the general election millions of acres of property was enlisted as enemy property and in 1984 listing the property again started with a political motive. He further submitted that the legislation of 1974 Act was frustrating. Though the present Government has taken initiative to return back the property to the original owners, but sections 9, 13, 14 of Act 2001 yet stand as bad laws. These sections need judicial review. He also submits that section 6(Ga)(Gha) is not in conformity with the Constitutional provision as the owner of property has been defined discriminately. These sections are *ultra vires* of Article 27 of the Constitution.

42. Mr. Abdul Wadud Bhuiyan, the learned advocate, an *amicus curie* submitted that the properties which were described as enemy property were later on vested to the government in 1972 which has been protected by Article 47(I)(II) of the Constitution. He further submitted that in 1974 this law was enacted with an intention to dispose of the vested properties to the persons who were the original owners of the properties. The Ordinance 1976 is only an enabling provision of 1974 Act which does not give power to the Government to get anymore property enlisted anew, it only provides a power to the government to manage or control or dispose of the property already vested to the government. This is the incidence of the process of vesting. Thus, this Ordinance cannot be declared *ultra vires* to the Constitution. He further submitted that as per provision of Act of 1974 and the decision of our Apex Court the new listing of the property is absolutely illegal.

43. He further submitted that section 6 of the Act of 2001 is a valid piece of legislation, this is a mere guideline to go on with the process of disposal of the property vested to the government and thus it should not be declared *ultra vires* to the Constitution.

44. He further submitted that there is no need to strike down the law rather all actions taken subsequent to 1974 Act in listing new properties can be declared illegal in view of the

decisions cited in the case of Saju Hossain reported in ***58 DLR(AD) 206, Para-27***. He concludes his submission saying that all actions taken by the executive of the government in listing new properties after 1974 Act is absolutely illegal and this sort of action taken by the government should be declared illegal immediately. The government may be directed to take proper initiatives for releasing those properties in favour of the original owners or their lawful successors which got listed subsequent to 1974 Act, observing all legal formalities as soon as possible.

45. Mr. A.M. Amin Uddin, the learned advocate appearing in this case as *amicus curie* submitted that in view of the 5th amendment judgment, 1976 Ordinance has no more existence though it was a valid law. He concurring the submissions advanced by Mr. Abdul Wadud Bhuiyan, submitted that 1976 Ordinance only provided the government power to manage, control or dispose of the property already vested to the government in 1972, but since by the judgment of 5th amendment case all actions taken during the martial law of Ziaur Rahman was declared illegal, 1976 Ordinance has become non-existent. Thus, the Rule relates to 1976 Ordinance is liable to be discharged. He further submits that after 1974 inclusion of any property as vested property is illegal. He also submits that in the case of ***Saju Hosein and others vs. Bangladesh and another*** reported in ***58 DLR (AD) 177*** listing of a property of a single person was declared illegal, but since this application has been brought as a 'public interest litigation' to protect the interest of the citizens of the country and to remove stigma of enemy against the citizens of the country, this Court can declare all actions including enlisting the properties within the territory of the country as vested after 1974 is illegal.

46. He further submitted that after enacting the Act of 2001, the Act of 1974 has lost its force and vide judgment of 5th amendment case 1976 Ordinance has become non-existent. These two rules are liable to be discharged.

47. Mr. Amin Uddin further submitted that by the repeal Act of 1974, certain properties got vested in the Government, but there was no provision as to how those properties would be dealt with. By the amendment of 1976 Ordinance, nothing has been incorporated/ inserted in the repealed law authorizing the Government either taking any new property as vested property or in any way preparing any list. By the said amendment, only the 'management mechanism' has been provided in relation to the properties which have already been vested to the Government by the repeal Act of 1974.

48. Mr. A.M. Amin Uddin drew our attention to the relevant portion of the provision of section 3 of the Act, 1974 and the amendment Ordinance, 1976 which are quoted below:

Section 3 of the Act, 1974

3. Saving –(1) Notwithstanding the repeal of the said Ordinance and anything contained in any other law for the time being in force, on such repeal-

(a) all enemy property vested in the Custodian of Enemy Property appointed under the provisions of the defence of Pakistan rules contained in force by the said Ordinance shall vest in the Government;

Relevant Portion of Ordinance 1976

"And shall be administered controlled, managed and disposed of by transfer or otherwise by the Government or by such office or authority as the Government may direct."

49. Having cautious look to the above amendment, it is patent that the Ordinance 1976 does not seem to be conflicting or incompatible with any provision of law, any Article of the Constitution and it has not taken away any right of any citizen, in any manner and as such it cannot be said that the impugned Ordinance is *ultra vires.*

50. However, in this regard he submitted that since in view of the declaration made by the Hon'ble Appellate Division in the case of ***Khondker Delwar Hossain, Secretary, BNP Party and ors V. Bangladesh Italian Marble Works Ltd. & Ors*** reported in ***62 DLR (AD) 298***, the Chapter 3A and 18 of the 4th Schedule of the Constitution of Bangladesh having declared void and as such the Ordinance, 1976 has become Non est.

51. In respect of the Act No.XLV of 1974 the enemy property he also submitted that, in view of intention of enacting the Act No. XLV of 1974, the Enemy Property (Continuance of Emergency provision) (Repeal), Act, 1974 no property can be treated as enemy property subsequent to 23.03.1974 as the said repealed Act came into force on that day.

52. In respect of section 6(Ga) and (Gha) of the অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ it has been further submitted that these are *ultra virus* to Article 42 of the Constitution because by the said provisions of law the right of the citizens over the properties they own has been taken away. He took us through the section 6 of the Act which runs as follows:

"৬। কতিপয় সম্পত্তি প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় অন্তর্ভূক্তি নিষিদ্ধ। প্রত্যার্পনযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবেনা, যথাঃ-

(ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি,

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এরূপ কোন সম্পত্তি,

(গ) সরকার কর্তৃক কোন সংবিধিবদ্ধ সংস্থা বা অন কোন সংগঠন বা কোন ব্যক্তির নিকট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি,

(ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পদ এবং এইরূপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশ বিশেষ হস্তান্তর করিয়া থাকলে সেই হস্তান্তরিত সম্পত্তি,

(ঙ) এমন অর্পিত সম্পত্তি যা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি,

(চ) জনস্বার্থে অধিগ্রহণ করা হইয়াছে এইরূপ কোন অর্পিত সম্পত্তি,

তবে শর্ত থাকে যে, উক্ত অধিগ্রহণকৃত সম্পত্তির বিপরীতে প্রদেয় ক্ষতিপূরণের অর্থ জমা থাকিলে উক্ত সম্পত্তির অধিগ্রহণ পূর্ব মালিককে বা তাহার উত্তরাধিকারী বা স্বার্থাধিকারীকে ক্ষতিপূরণের অর্থ এই আইনের বিধান অনুসারে প্রদান করা হইবে যদি উক্ত মালিক বা উত্তরাধিকারী বা স্বার্থাধীকারী বাংলদেশের নাগরিক ও স্থায়ী বাসিন্দা হন।"

53. So the properties falling under sub-section (Ga) and (Gha) of section 6 should not have been included in the list of প্রত্যার্পনযোগ্য সম্পত্তির তালিকা and under section 10 of the said প্রত্যার্পন আইন, an application seeking release of the property can be filed only in respect of the property which has been included in the list. Provision of section 10(1) is quoted below:

*"১০। (১) [ধারা ৯ এর অধীন গেজেটে প্রকাশিত ক তফসিলভূক্ত অর্পিত] সম্পত্তির **মালিক** উক্ত সম্পত্তি তাহার অনুকূলে প্রত্যর্পনের জন্য, উক্ত সম্পত্তির তালিকা প্রকাশের [৩০০ (তিনশত)] দিনের মধ্যে, ট্রাইব্যুনালের নিকট আবেদন করিতে পারিবেন এবং আবেদনের সহিত তাহার দাবী সমর্থনে সকল কাগজপত্র সংযুক্ত করিবেন।"*

54. He also submitted that in view of section 10(4) of the Act, 2001, if any property mentioned in section 6 of the Act, 2001 is included in the list of প্রত্যর্পনযোগ্য সম্পত্তির তালিকা the person having lawful interest can come up with the claim of releasing the same before the Tribunal. Section 10(4) is quoted below:

"১০। (৪) প্রত্যর্পনযোগ্য সম্পত্তির তালিকায় ধারা ৬ তে উল্লিখিত কোন সম্পত্তি অন্তর্ভুক্ত হইয়া থাকিলে ***সংশ্লিষ্ট স্বার্থবান*** *ব্যক্তি ট্রাইব্যুনালের নিকট উক্ত সম্পত্তি প্রত্যর্পণ যোগা সম্পত্তির তালিকা হইতে অবমুক্তির জন্য উপ-ধারা (১) এ উল্লিখিত সময়সীমার মধ্যে আবেদন করিতে পারিবেন এবং দাবীর সমর্থনে সকল কাগপত্র আবেদনের সহিত সংযুক্ত করিবেন। "*

55. He further submitted that on reading of section 10(1) and (4) of the Act, 2001, it is clear that in section 10(1) the word ***মালিক*** has been used and in section 10(4) the word ***স্বার্থবান ব্যক্তি*** has been used. Therefore, the owner has been disqualified from claiming the property. He also submitted that in view of section 7, right of claim has been barred by promulgating the Act, 2001 and in view of the same, the lawful owners of the property remained deprived form claiming their property which is in express conflict with Article 42 of the Constitution as the persons whose property has fallen in the category of section 6(Ga) and (Gha) of the Act, 2001 are being deprived of their right to property.

56. Furthermore, since the properties which has fallen under section 6(Ga) and (Gha) will not be included in the প্রত্যর্পনযোগ্য সম্পত্তির তালিকা the person having legitimate claim of ownership over the property as mentioned in sub-section (Ga) and (Gha) of section 6 is debarred form raising claims under section 10. In view of the above facts, the provision of section 6(Ga) and (Gha) of the Act, 2001 are not in conformity with the Article 42 of the Constitution and is *ultra vires.*

57. Mr. Fida M. Kamal, the learned advocate as *amicus curiae* submitted that Bangladesh is not a successor State as we fought against Pakistan in achieving independent Bangladesh and thus no property can be treated as the enemy property after 26th March 1971.

58. He concurring the argument advanced by Mr. A.M. Amin Uddin submitted that section 6(Ga)(Gha) and (Umo) are bad laws, all the properties vested to the government are returnable property to the original owner. He further submitted that the territory which was treated as enemy during 1965, was no more enemy of the people of Bangladesh, after 26th March 1971 and thus in the 'Continuance of the Enemy Property (Repeal) Ordinance 1974' the word 'enemy" should not have been used. Those were vested properties, only which were vested to the government. He further submitted that after the Act of 1974 and the judgment pronounced in ***58 DLR(AD)117*** and ***62 DLR (AD) 298*** all actions including enlisting the properties in the enemy property list/vested property by unscrupulous employees of the country should be declared illegal in general.

59. However, Mr. Kamal moved up the question of *locus standi* of the petitioner for filing this petition and submitted that since no aggrieved person has come up to the Court and the petitioner either directly or indirectly is not aggrieved person, he has no *locus standi* in bringing this writ petition.

60. Mr. Probir Neogi, the learned advocate as an *amicus curiae* on the point of *locus standi* submitted that in view of Article 7 of the Constitution which declares that all powers lying in the Republic belong to the People, the writ petition is maintainable. Article 21(1) also provides "It is the duty of every citizen to obey the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property." The petitioner being a member of the 'people' and citizen of Bangladesh has the right to challenge any provision of law which is *ultra vires* the Constitution of the Peoples' Republic of Bangladesh. This view will find support in a number of decisions by the Appellate Division including ***Kazi Mukhlesur Rahman Vs. Bangladesh,*** reported in ***26 DLR (AD) 44*** and in the case of

Dr. Mohiuddin Farooque Vs. Bangladesh, reported in ***49 DLR (AD) 1***. Therefore, he submitted that the petitioner can file this writ petition as Public Interest Litigation (PIL).

61. On merit of the Rule he submitted that Article 7 contemplating the supremacy of Constitution which was termed as the 'pole star' of our Constitution by our Appellate Division in the Constitution (8th Amendment) case. The provision of Article 7 runs as follows:

> "7(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

62. Mr. Probir Neogi also referred-

> Part III of the Constitution containing fundamental rights starts with Article 26 which provides:
> "26. (1) All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.
> (2) The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the extent of such inconsistency, be void."
> Articles 27, 31, 41 and 42 also provide:
> "27. All citizens are equal before law and are entitled to equal protection of law.
> 31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
> 41.(1) Subject to law, public order and morality –
> (a) every citizen has the right to profess, practice or propagate any religion;
> (b) every religious community or denomination has the right to establish, maintain and manage its religious institutions.
> (2) No person attending any educational institution shall be required to receive religious instruction or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.
> 42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority lf law.
> (2) A law made under clause (1) of this article shall provide for the acquisition, nationalization or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate;"

63. Mr. Probir Neogi submitted that having regard to the provisions of the above Articles of our Constitution, and the Proclamation of Independence and the Laws Continuance Order, the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance 1 of 1969) was rendered void, being *ultra vires* the aforesaid constitutional instruments. And which is void being *ultra vires* the historical, constitutional instruments, namely the

Proclamation of Independence, the Laws of Continuance Order and above all the Constitution of the People's Republic of Bangladesh, need not be avoided.

64. He also submitted by questioning that can a law like the Enemy property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance 1 of 1969) be passed by our parliament even unanimously? Answer is an emphatic "No", he added. He also submitted that which a legislature themselves cannot do, they cannot ratify/save such a piece of legislation made by others even employing the word "Repeal". The Enemy Property (Act XLV of 1974) has been impugned in this writ petition, this Hon'ble Court should declare the said Act void taking the principle of constitutional law as submitted above into account. Once this principle of constitutional law is accepted, the Amendment Ordinance 1976, the Vested Property Restitution Act, 2001 all in fact become rendered void.

65. He went on to submit too that the contention made in paragraph No.10 of the affidavit in opposition filed on behalf of respondent No.1 is misconceived, incorrect and untenable. In this regard, it is submitted that it is true that the Vesting of Property and Assets Order, 1972 (P.O. 29 of 1972) has been listed in the First Schedule of the Constitution; but in view of the fact that the law relating to so called 'enemy property' having embraced its natural death with the Proclamation of Independence dated 10th Aril, 1971 with effect from 26 March, 1971 and with the promulgation of Laws Continuance Enforcement Order, 1971, the properties vested in the Government of Pakistan and East Pakistan under that dead law, stood divested with effect from 26 March, 1971, and as such the so called notion of enemy properties do not come under the purview of "properties" as defined in P.O. 29 of 1972 made on 26 March, 1972. Moreover, in view of the proviso of Article 47(2) of the Constitution to the effect-- "Provided that nothing in this article shall prevent amendment, modification or repeal of any such law."—

66. Mr. Probir Neogi also submitted that the Legislature is under constitutional obligation to formally repeal the unconstitutional laws. He further submits that since the laws challenged in this writ petition are discriminatory and unconstitutional the Rule is liable to be made absolute.

67. This application has been filed by a public feisty person as public interest litigation, upon which Rules were issued to dispose of the Rules (including supplementary Rule) we are to retort three questions.

i. Whether the Enemy Property (Continuance of Emergency Provision) (Repeal) Act 1974 was enacted in conformity with the Constitutional provision of Bangladesh?

ii. Whether the amendment Ordinance 1976 (Ordinance No.XLII of 1976 (Amendment) was done for any just purpose?

and

iii. Whether section 6(Ga)and (Gha) of অর্পিত সম্পত্তি প্রত্যার্পণ আইন, ২০০১ could pass the test of constitutionality?

68. To answer the above three questions, we are to search of the root of Pakistan Defence Rule 1965 and Ordinance No.1 of 1969. What is Enemy Property Act? At the outbreak of India and Pakistan in 1965, proclamation of Emergency was issued and Defence Ordinance 1965 was promulgated by the President of Pakistan in exercise of power conferred by Clause 4 of Article 30 of the Constitution of Pakistan 1962. The Defence of Pakistan Rule (DPR) was framed by the central government of Pakistan in exercise of power given in section 3 of the Defence of Pakistan Ordinance. It is to be noted that the Enemy Property Act (EPA) was

passed in both countries, India and Pakistan in order to control properties of non-resident citizens in their absence. After 17 days war, which ended with the Tashkent Pact, the Indian Government withdrew the law, but it was kept alive in Pakistan. Basically, Enemy Property Act was an international law. Once it's application is found to exist in Europe during World War II. Under this law the government was supposed to control enemy properties as a 'custodian' during the owner's absence and not as an owner, and hand it over to the owner when the war ended. Similarly after the Tashkent Pact between Pakistan and India the law in relation to control enemy properties should have been virtually dead, but it did not happen. In that situation the Pakistan Government introduced the above mentioned Pakistan Defence Rules Ordinance 1965. The EPA was not a discriminatory law at the beginning. However, within 15 days of the proclamation, the land Ministry of Pakistan published a circular which stated, 'Enemy property owners are those, who belong to minority communities,' and by such discriminatory view contemplated in the said circular the norm of international law was gravely degraded.

69. As per Rule 2(2) of the DPR the **'enemy'** means any persons or State at war with Pakistan.

2(3) **'enemy territory'** means-

(a) any area which is under the sovereignty of, or administered by, or for the time being in the occupation of a State at war with Pakistan, and;

(b) any area which may be notified by the Central Government to be enemy territory, for the purposes of these rules or such of them as may be specified in the notification."

70. Rule 182 provided treatment of enemy property which are reproduced below:

"182(1) With a view to preventing the payment of monies to an enemy fund, and preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Central Government may appoint a Custodian of Enemy Property for Pakistan and one or more Deputy Custodians and Assistant Custodians of Enemy Property for such local areas as may be prescribed and may by ordered-

(a).....

(b) Vest, or provide for an regulate the vesting in the prescribed custodian such enemy property as may be prescribed;

(c) Vest in the prescribed custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been, and is not required by the order to be, vested in the custodian."

Historical background of the law:

71. Instead of independence, India was partitioned in 1947 giving birth of two separate States—Pakistan and India, patently on communal basis. Of those, Pakistan declared itself to be an Islamic Republic. On the other hand, the Union of India though declared itself to be a secular State started going on by maintaining congenial relationship amongst religious communities. The inevitable result was enmity erupted between two States maintaining communal division of the population in the sub-continent. In course of such antagonism, war broke out between India and Pakistan in 1965. Leaders of Pakistan had been endeavoring to consolidate their position on communal basis with reference to the War. On the plea of war, emergency was proclaimed by the President of Pakistan in exercise of powers conferred upon him by Article 30(1) of the Constitution of Pakistan, 1962.

72. Following the proclamation of emergency, the President of Pakistan also promulgated an ordinance on 06.09.1965 titled "Defence of Pakistan Ordinance, 1965" (Ordinance No.23 of 1965). Section 3 of the said Ordinance empowered the Central Government to make rules to reduce 'Constitutional' and 'Civil' rights of the people on the plea of "Defence of Pakistan." Particularly section 3(2)(IV) empowered the central government to make rules to prevent anything "Likely to assist the Enemy or to prejudice successful conduct of War." In exercise of the said power the central government on the same day i.e. on 06.09.1965 framed rules entitled "The Defence of Pakistan Rules" (hereinafter referred to as DPR). Rule 2(2) defined "Enemy" and Rule 2(3) defined "Enemy Territory." Part-XV of DPR starts with sub-title "Control of Trading with ENEMY." This part started from Rule 161. The word 'enemy' has been further defined in Rule 161 for the purpose of this part. Part XVI starting from Rule 169 dealt with control of Enemy funds. In Rule 169 'Enemy Subject' and 'Enemy Property' have been defined. Rule 181 dealt with "ENEMY FIRM". Rule 182 dealt with 'Collection of Tax' of enemy firms and custody of property. By these legislations, the concept of "Enemy Property" has been originated in our legal and socio economic classification. Subsequently, the "Enemy Property Laws" had under gone several changes. On 03.12.1965 by notification in the official gazette the central government of Pakistan appointed Deputy Custodian and Assistant Custodian of "Enemy Property" and made order of vesting of "Enemy Property" to the custodian in accordance with Rule 182(1)(b) of the DPR.

73. It further reveals that on 08.01.1966 the Provincial Government of the then East Pakistan made another notification in exercise of the powers given in Rule 182(1) naming it as "East Pakistan Enemy Property (Land and Buildings) Administration and Disposal Order, 1966." This order of 1966 conferred certain more powers to the Custodian, Deputy Custodian and Assistant Custodian to deal with 'Enemy Properties' and for disposal and administration including taking over possession evicting persons possessing Enemy Property unlawfully.

74. Afterwards, the state of emergency was lifted on 16.02.1969 when the Government of Pakistan promulgated Enemy Property (Continuance of Emergency Provision) Ordinance, 1969, but the provisions which were related to vesting the enemy property continued to be in force. The Government of Pakistan promulgated Enemy Property (Continuance of Emergency Provision) Ordinance 1969 stating that *"WHEREAS it is expedient to provide for the continuance of certain provisions of the Defence of Pakistan Rules relating to the control of trading with enemy and control of enemy firms, and the administration of the property belonging to the;...."* The laws so far made and actions so far taken with respect of Enemy Properties were preserved and kept in force in spite of lifting of emergency. As a result thereof War, Emergency, Defence of Pakistan Ordinance and DPR died natural death leaving their offspring "Enemy Property" alive. With all these legacies of the past, through the glorious War of Liberation of 1971, Bangladesh a new legal entity came into being with effect from 26th day o f March, 1971.

75. At the early hour of 26th day of March 1971 our Father of the Nation Bangabandhu Sheikh Mujibur Rahman declared the independence of the country. Thereafter, the proclamation of independence and formation of the Provisional Government of Bangladesh took place at Mujibnagar on April 10, 1971.

76. By the Proclamation of Independence, the elected representatives of the People's Republic of Bangladesh, *"in order to ensure for the people of Bangladesh* ***equality, human dignity*** *and* ***social justice"*** declared and constituted Bangladesh as a sovereign Republic. On the same day, i.e. on 10 April 1971 Laws of Continuance Enforcement Order, 1971 was

promulgated purporting to keep in force all the Pakistan laws which were in force in the then East Pakistan on or before March, 25, 1971, *which were not in conflict with the Proclamation of Independence*.

77. Immediately, after liberation, the Government of Bangladesh enforced on March, 26, 1972, the Bangladesh Vesting of Property and Assets Order, 1972 (Order 29 of 1972) By this order, *all properties situated in East Pakistan that belonged to Pakistan Government became vested in the People's Republic of Bangladesh. Thus all government properties, including but not limited of Khas land, river, enemy properties listed under the 1965 and 1969 Ordinance etc all became vested in Bangladesh.* But this did not change the nature and the character of the enemy properties which were taken in custody from the *purported enemies* of Pakistan.

78. In 1974 the Government of Bangladesh passed the Enemy Property (Continuance of Emergency) Provision (Repeal) Act, (Act XLV of 1974), expressly repealing Ordinance I of 1969. In which Rule 3(a) stated that "*all enemy property vested in the Custodian of Enemy Property appointed under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government."*

79. On 20 January 1975, the Ministry of Law, by its Circular No.51, issued an order to immediately de-list any property included in the enemy property list after enactment of the 1974 Act. Subsequently, on 26 July 1975, the Ministry of Law by its Circular No.VNR 29/75 issued a direction to stop any further listing of property as enemy property and also to submit a detailed report on any such listing. The government further promulgated the Enemy Property (Continuance of Emergency Provisions) (Repeal) Amendment Ordinance 1976 (Ordinance No.XCII of 1976) by which section 3 of the 1974 Act amended to give further power to the government with regards the 'enemy properties'. Section 2 of the Ordinance, added the following sentence to section 3 of the 1974 Act, *"And shall be administered, controlled, managed and disposed of by transfer or otherwise by the Government or by such office or authority as the Government may direct."* Through the 1976 Ordinance, the government, with ill motivation and following discriminatory practice, continued to include new properties belonging to the Hindus in the enemy property list and also started to dispose of such properties in favour of interested quarters, often to the anti-liberation forces. The practice of inclusion of new properties purported to belong to enemies of State of Pakistan continued up until 21 June 1984, and by notification dated 23 November 1984, the Ministry of Land ordered that any decision to list a property after 21 June 1984 shall be null and void.

80. It may be mentioned here that enmity between Pakistan and India continued to remain while Bangladesh, the newborn State, took its birth as a friend of India and therefore it could be thought that the spirit of Enemy Property laws came to cessation in Bangladesh. Accordingly, the term "Enemy Property" was transformed to "Vested Property." It was rather the same old wine, but in a new bottle. By Ordinance No.XLVI of 1974 procedure was laid down for the administration of the 'Enemy Property' transformed to "Vested Property." The said two ordinances were ratified by the Parliament on 01.07.1974 by enactment of the Act No.XLV and XLVI of 1974. In this way, a black law, patently infringing right to property of some of the citizens treating them as "Enemies" was allowed to persist in spite of the fact that the Constitution of Bangladesh 1972 guarantees equality before law and right to property as fundamental rights. Unfortunately, the black legacy of the past with the banner of 'Enemy Property' has been transformed into 'Vested Property' which is persisting in our legal system.

81. In 1999, the Parliamentary Standing Committee prepared Vested Property (Return of Possession) Bill 1999 intending to return back possession of the properties listed as 'enemy property' since 1969 to the original owners who are citizens of Bangladesh, or their lawful heirs under applicable personal law. Section 3 of the draft law stated that subject to the provision of determination claim provided in the draft Act, any property which was not listed prior to 16 February 1969 would cease to be treated as vested on the government as enemy property and the title and possession of the original owner who is a citizen of Bangladesh or his lawful heirs would be restored.

82. Indo-Pakistan War continued for 17 days starting from September 6, 1965. On February 16, 1969, the President of Pakistan revoked Emergency, being "satisfied that the grounds on which he issued the proclamation of emergency on the 6th September 1965, have ceased to exist." This revocation of emergency was notified in the gazette of Pakistan dated February 17, 1969. On the very day of revocation of emergency i.e. 16 February 1969, he promulgated Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance I of 1969). This ordinance also was published in the gazette of Pakistan on February 17, 1969. Preamble of Ordinance I of 1969 made it clearly that the purposes and objectives of this Ordinance and provisions laid down in sections 2, 3, 5 and 6 thereof made it clear too that notwithstanding the revocation of emergency, it continued in respect of so called enemy property.

83. Bangladesh came into force on 26 Mach 1971 through the declaration of independence by the Father of the Nation Bangabandhu Sheikh Mujibur Rahman. The proclamation of independence of Bangladesh was made on 10th April, 1971 with effect from 26 March 1971. Laws of Continuance Enforcement Order 1971 came into force with effect from 26 March 1971. This Order provided that "all laws were enforced in Bangladesh on 26 March 1971 subject to proclamation aforesaid continuance to be so enforcement with such consequence as may be necessary on account of creation of the independence of Bangladesh formed by the will of the People's Republic of Bangladesh. The relevant portion of the proclamation of independence is reproduced below:

> "..... having held mutual consultations, and *in order to ensure for the people of Bangladesh* ***equality, human dignity and social justice*** *declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman."*

84. The Constitution of the People's Republic of Bangladesh came into being on the 4 November 1972 and came into force on 16 December, 1972. Our parliament passed the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 (XLV of 1974) on 1st July 1974, effect has been given to this Act from 23rd March 1974. In view of the proclamation of independence dated 10 April, 1971 with effect from 26 March 1971, Laws Continuance Enforcement Order 1971 with effect from 26 March 1971 and the Constitution of the People's Republic of Bangladesh which came into force on 16 December, 1972, the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance I of 1969) stood inoperative, void, and ultra vires on 10 April 1971. We are of the view that the law which ceased to exist on 26 March, 1971 could not be repealed by an Act passed on 1 July, 1974. So, it is a misnomer to call the Act XLV of 1974 as the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974. Yet, we can examine what were gifted to the nation by Act XLV of 1974 and the Rule made there under:

"3 Savings-(1) Notwithstanding the repeal of the said Ordinance and anything contained in any other law for the time being in force on such repeal-

(a) all enemy property vested in the custodian of Enemy Property appointed under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government;

(b) All enemy firms the trade or business of which was being carried on by any person or board authorised under the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance shall vest in the Government.

Explanation: In this sub-section-

(i) "Custodian of Enemy Property" includes an Additional Custodian and an Assistant Custodian of Enemy Property appointed under the Defence of Pakistan Rules continued in force by the said Ordinance; and

(ii) "enemy property" and "enemy firms" shall have the same meaning as are respectively assigned to them in the Defence of Pakistan Rules continued in force by the said Ordinance.

(2) Subject to the provisions of sub-section (1) the repeal of the said Ordinance shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the said Ordinance or the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance or any order made there under or anything duly done or suffered under the said Ordinance or such provisions or order;

(c) affect any right, title, privilege, obligation or liability acquired, accrued, or incurred under the said Ordinance or the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the provisions of the Defence of Pakistan Rules continued in force by the said Ordinance or any order made there under; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as aforesaid.

85. And any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the said Ordinance had not been repealed.

4. Indemnity: No suit, prosecution or other legal proceeding shall lie in any Court against the Government or any person for anything, or for any damage caused by anything, which is in good faith done or intended to be done in pursuance of any of the provisions of the said Ordinance or the Defence of Pakistan Rules continued in force by the Ordinance or any order made there under.

14. Surrender of non-resident property: If any non-resident or vested property is found to be in the unlawful possession of any person, and if such person does not surrender possession of such property to the committee on being directed to do so by the date fixed by it, the Sub-Divisional Magistrate or any other officer authorized by him in this behalf may, on the application of the committee, enforce the surrender of such property by such person to the Committee and the Sub-Divisional Magistrate or the officer so authorized may use or cause to be used such force as may be necessary for taking possession of the property.

15. Procedure of records etc: (1) A committee may, for the purposes of this Act, by notice in writing, require any person to make or deliver to it a statement or to produce before it records and documents in his possession or control relating to any vested property or non-resident property at such time and place as may be specified in the notice.

(2) Every persons required to make or deliver a statement or to produce any record or document under sub-section (1) shall be deemed legally bound to do so within the meaning of sections 175 and 176 of the Penal Code (XLV of 1860).

16. Indemnity: No suit or other legal proceeding shall lie against the government or a committee for anything which is in good faith done or intended to be done in pursuance of this Act or the rules made there under.

86. From the above we are of the view that this Act, XLV of 1974 was "Repealed" in name, but "Saving" the colonial Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 in substance.

87. We will see whether this could be validly, constitutionally and lawfully done by our parliament. Before that we see what the Amendment Ordinance, 1976 added to Act XLV of 1974. The relevant portion of 1976 Ordinance runs as follows:

"And shall be administered, controlled, managed and disposed of by transfer or otherwise by the government or by such office or authority as the government may direct"

88. The issue in this Rule also traces its root in the exercise of powers of Pakistan's President conferred by the Constitution of Pakistan, 1962. The preamble of that Constitution candidly pointed out its source:

"Now, therefore, I, filed Marshal Mohammad Ayub Khan, Hilal-i-Zuraat President of Pakistan, in exercise of the mandate given to me on the fourteenth day of February, 1960, by the people of Pakistan, and in the desire that the people of Pakistan may prosper and attain their rightful and honoured place amount the nations of the world and make their full contribution towards international peace and the progress and happiness of humanity, **do hereby enact this Constitution**."

89. So, this was enacted by a military dictator who imposed it upon the people of Pakistan and also upon its colony, the then East Pakistan.

90. Now, let us see the preamble of the Constitution of the People's Republic of Bangladesh, which is reproduced below:

" We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh;

Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and out brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;

Further pledging that it shall be a fundamental aim of the State to realize through the democratic process a **socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens**;

Affirming that it is our sacred duty to safeguard , protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, this eighteenth day of Kartick, 1379 BS, corresponding to the 4th day of November, 1972 AD, do hereby adopt, enact and give to ourselves this Constitution."

91. This fundamental difference between the above mentioned two constitutions as appearing from their respective preamble totally dislodged and wiped out the concept of 'enemy' and legitimacy of so called 'enemy property' rules altogether.

92. The preamble of 1962 Constitution of Pakistan reflects the test of Pakistani military junta and disrespect to the democratic norms of the people of Pakistan. Though the 1962 Constitution of Pakistan has no existence even in Pakistan as the same was abrogated by another general the successor of Ayub Khan, Mr. Yahia Khan in 1969, but we have no hesitation to say that 1962 Constitution was not a Constitution in the eye of law at all. For the same was not given to the nation by the people's representatives of Pakistan. Rather, the same was given by a dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. In this regard the observation of my Lord Justice Md. Tofazzul Islam (as his Lordship then was) in the case of ***Khondker Delwar Hossain vs. Italian Marble Works,*** report in ***62 DLR(AD) 298*** may be of imminence benefit to all of us. His Lordship summarized the submission of Mr. Mahmudul Islam in the following manner:

"A constitutional and legislative practice has been devised and restored to by the extra-constitutional rulers of Pakistan, and subsequently, in Bangladesh. this practice was that some Generals at the gun-point took over the state power ousting the legitimate government sometimes with bloodshed and sometimes without bloodshed. At one stage under an exit scheme they formed a parliament through an election conducted by them and in the first session of the parliament their extra-constitutional regime that ruled the country in between is ratified by a constitutional amendment."

93. The summary of Mr. Mahmudul Islam's submission relevant in this case was as follows:

"*Our Constitution does not contemplate governance by any authority other then the elected representatives of the people and thus, any government formed by the members of military service is unconstitutional and constitutes gross violation of the Constitution and the governance by such authority is also contrary to the legal order established by the Constitution and such a government is out and out an unconstitutional government and all its actions are ultra vires to the Constitution and Martial Law Government continues because the people had hardly any way of defying the mandate of the arms but once a Martial Law government goes, it goes leaving no trail unless its deeds and actions are condoned by application of the doctrine of necessity but there are limits to the application of such doctrine and to come out of this the parliament has resorted to the private law contrivance of ratification of unauthorized actions of agents by principals but* ***there is inherent limitation even to such ratification as life cannot be given to a prohibited transaction by ratification and moreover, by the device of ratification an authority cannot enhance its authority inasmuch as it can ratify only those actions of other which it can lawfully***

> ***do and thus, Parliament cannot, by resort to the device of ratification, ratify and render valid an amendment which it cannot itself do because of infringement of the basic features of Constitution*** *and accordingly the inclusion of impugned paragraphs 3A and 18 in the Fourth Schedule by Fifth Amendment is not only unconstitutional but also violative of the basic features of the Constitution, namely, Supremacy of the Constitution, Rule of Law, Independence of Judiciary and its Power of Judicial Review as all of them are basic features or structures of the Constitution and the Parliament does not have any competence under Article 142 of the Constitution, even in exercise of the power with two-third majority, to make an amendment damaging or flouting any of the basic structures of the Constitution as held by their Lordships of this Division in Anwar Hossain's case."*

94. In view of the observation of My Lord Justice Tofazzal Islam and the submission of Mr. Mahmudul Islam made in Khondker Delwar Hossain Vs. Italian Marble Works case reported in 62 DLR(AD)298 we are of the view that the act which was done under a void Constitution of 1962, given by Ayub Khan an usurper i.e. Pakistan Defence Rule 1965 and the Ordinance I of 1969 and it's continuance under the garb of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 was a 'historical mistake'.

95. It is an argument of the respondent No.1 Mr. Manzill Murshid that the constituent assembly framed the original Constitution of Bangladesh which included the PO 29 of 1972 in the year 1972 giving retrospective effect from 26 March 1971; by which the properties which were declared as enemy property during Pakistan were vested to the Government by this order. The said order has been given protection under Article 47(2) of the Constitution and it has been included in the 1st schedule of the Constitution of Bangladesh.

96. In this regard we are of the view that PO 29 of 1972 was not passed to include the property which was declared by Pakistan government as enemy property. Since in view of the fact that Ordinance, 1969 died its natural death with the proclamation of independence dated 10.04.1971 with effect from 26th March 1971 and with the Promulgation of Laws Continuance Enforcement Order, 1971, the properties vested in the Pakistan and East Pakistan government under the dead law, stood divested and as such the so called enemy property do not come under the purview of "properties" as defined in P.O 29 of 1972 made on 26 March 1972.

97. We are of the view that some unscrupulous government officials who also served under the Pakistan government during 1971 liberation war of the country, without realizing the real spirit and intent of the proclamation of independence and "Laws Continuance Enforcement Order" to its proper perspective gave wrong interpretation of PO 29. Thus, we accept the submission of Mr. Probir Neogi, the amicus curiae that the Act of 1974 was a misnomer. We want to add that the enactment of Act XLV of 974 was a historical mistake.

98. Mr. Manzill Murshid also argued that the P.O 29 of 1972 is a protected piece of legislation like the International Crimes (Tribunals) Act, 1973 (ICT Act). We are not agreed with this argument as the ICT Act enacted in 1973 was given constitutional protection by the Article 47 to ensure the unhindered trial of the perpetrators of crimes as enumerated in the Act, committed in 1971 war, during the war of liberation. But the P.O 29 of 1972 was made in 1972 regularly for the purpose of the vesting of the property. We have already expressed our view that the property as meant in the Ordinance does not include the Enemy Property as

the core concept of Enemy Property Act died its natural death on the 26th March of 1971 with the proclamation of independence and as per law of continuance of Enforcement Ordinance, 1971. Thus, these two laws are quit distinguishable.

99. In respect of submission advanced by Mr. Manzil Murshid in light of the decision rendered in the case of Rahima Akhter reported in 40 DLR (AD) page-23 we are of the view that the Hon'ble Appellate Division while considering the interpretation of addition of words by 1976 Ordinance, was not required to consider the applicability of the definition of 'enemy' as provided in the Defence of Pakistan Rules, 1965 after proclamation of independence of Bangladesh, which is the primary contention of the instant Writ Petitioner.

100. Furthermore, from the facts of Rahima Akhter case it is revealed that the *bainapatra* executed by the original owner before vesting of the property in 1965 was upheld to be enforceable and as such in view of the factual matrix, the actions of the original owner before promulgation of the Defence of Pakistan Rules, 1965 had been validated. Therefore, we do not consider that the judgment of their Lordships in the Rahima Akhter case, on principle contradicts the views expressed by us in the instant writ petition.

101. With the tragic assassination of the Father of the Nation on 15th August 1975 the political paint of the country started changing. In 1976 when another Ordinance regarding vested property came into force so many things as well were erased from the Constitution by that time. The then rulers obliterated the principle of secularism from the Constitution.

102. On the other hand, the then rulers introduced the aforesaid Ordinance for the purpose of dealing with the properties' management including its disposal. In the midst of hearing we directed the respondent No.1 to ask all the Deputy Commissioners of the country to furnish a comprehensive report to this Court providing information about listing of properties as 'vested' after promulgation of 1976 Ordinance and also to inform this Court as to how those properties were disposed of. We received as many as 46 reports from the office of the Deputy Commissioners. It transpires from the reports that the Deputy Commissioners failed to satisfy the question of the Court.

103. However, from their reports it transpires that huge properties are still lying with the government as vested property. The office of the Deputy Commissioner, Sirajgonj stated that "উপর্যুক্ত আইন/বিধি/পরিপত্র/নির্দেশনা অনুসরপূর্বক ১৯৬৬ সালের Enemy Property Census list অনুযায়ী প্রস্তুতকৃত সেন্সাস তালিকা মোতাবেক ১৯৭৬ সালের পর হতে অর্পিত সম্পত্তির দখল গ্রহণ পূর্বক স্থানীয় ব্যক্তি/প্রতিষ্ঠানের নিকট হতে আবেদন প্রাপ্তি সাপেক্ষে লীজ নথি সৃজন করে বিভিন্ন ব্যক্তি/প্রতিষ্ঠান/সংস্থা/দপ্তরকে একসনা বন্দোবস্ত প্রদান করা হয়েছে। তবে অর্পিত সম্পত্তিভূক্ত পুকুর/দিঘী এবং ফলের বাগানের ক্ষেত্রে প্রকাশ্য নিলামের মাধ্যমে সর্বোচ্চ ডাককারীর নিকট ০৩(তিন) বছর মেয়াদে ইজারা দেয়া হয়।" The above statement speaks of the fact that the government took possession of the newly listed properties after 1976 Ordinance came into force.

104. Our apex Court in the cases of ***Laxmi kanta Roy Vs. UNO*** reported in ***46 DLR(HCD) 1994***, Page-136, ***Aroti Rani Paul vs. Shudarshan Kumar Paul and others***, reported in ***56 DLR (AD) 73***, ***Saju Hosein and other*** reported in ***58 DLR(AD) 177*** and ***Pulichand Omraolal Case*** reported in ***33 DLR(AD) 30***, has clearly declared that after 23.03.1974 no property can be enlisted in the list of enemy property and no new VP Case should be started. But from most of the reports furnished by the office of the Deputy Commissioners it transpires that number of properties have been enlisted in the list of vested property and many new VP Cases have been initiated, even after 1974 Act.

105. Reality is that by the repealed Act of 1974, certain properties were vested in the Government despite absence of any provision as to how those properties will be dealt with. By the Ordinance 1976, only the management mechanism has been provided for the properties which were already vested to the government under the repealed Act of 1974. There was no provision to incorporate/insert in the repealed law authorizing the government either taking any new property as vested property or in any way preparing any list in this regard.

106. The government machinery in the field level being over enthusiastic sometimes has done excess of their jurisdiction. However, since in the case of ***Khondker Delwar Hussain vs. Italian Marble Works,*** reported in ***62 DLR (AD)298*** the Chapter 3A and 18 of the 4th schedule of the Constitution of Bangladesh having declared void, the Ordinance, 1976 also became Non-est.

107. Since no person of the then Pakistan was declared engaged in war against Pakistan or nobody's name was published by the gazette notification as the enemy of Pakistan the members of Hindu community who being feared had left the property after 1965 should not be termed as 'enemy'. A country cannot infringe the fundamental right of any of its citizen and to retain his property treating it to be of enemy. Sate has no right to stigmatize any of its citizens as enemy of his or her mother land. Thus, the people belonging to Hindu community, who left the territory of the then Pakistan out of fear after 1965 war should not have been declared enemy of Pakistan. The purpose of the Ordinance was aimed to manage or occupy the properties of the persons who left Pakistan to the enemy territory i.e. to India leaving their assets and properties in Pakistan. But scenario changed in the year of 1971 when the country which was declared enemy by Pakistan Government became the friend of the new born Bangladesh (the then East Pakistan). On the other hand, Pakistan (Particularly West Pakistan) and the government of Pakistan as a whole rather became enemy of Bangladesh. The properties of those people who got engaged themselves working with Pakistani government and participated in the War against Bangladesh or left the country leaving behind their property uncared were declared abandoned property vide P.O. 16 of 1972. Thus, the person who left the territory of Bangladesh [the then East Pakistan] during 1965 war out of fear and being oppressed by Pakistani government should not be allowed to be stigmatized as enemy any more, after the nation achieved its independence in 1971.

108. The Enemy Property Act, 1965 and the Ordinance 1969 were enacted by the Pakistan government with an ulterior motive having a hidden political agenda. After 1948 when Mr. Jinnah's speech regarding the State language was protested by the students of the then East Pakistan in Curzon Hall of the Dhaka University the then Pakistan government and its Pakistani bureaucrats could realize that the size of Bengali population in Pakistan is to be reduced so that the Bengali population in the country (Pakistan) could not be bigger than the non-Bengali population. The Pakistan government was moving on with an antagonistic behaviour to the Hindu minorities living in the then East Pakistan so that they felt forced to leave the country with the purpose of materializing Jinnah's daydream. In an opportune moment in 1965 at the outbreak of India-Pakistan War the Proclamation of emergency was issued and Defence of Pakistan Ordinance, 1965 was promulgated by the President of Pakistan in exercise of power conferred by Clause (4) of Article 30 of the Constitution of Pakistan, 1962, wherein "Enemy" and "enemy territory" have been defined.

109. After achieving independence from Pakistan in 1971, the newly formed Republic of Bangladesh retained the inequitable provisions of the EPA through the Vested Property Act

(VPA). By cataloging Hindus as "enemies" of the state in the erstwhile East Pakistan and later on in Bangladesh, the EPA and its subsequent adaptations, not only led to a colossal misappropriation of land owned by Hindu, but also hurried a dire decline in the Hindu population. The EPA and its subsequent adaptations have methodically violated the norms of fundamental human rights of Hindu community living in Pakistan and Bangladesh in breach of established human rights treaties and conventions.

110. According to United State Commission on International Religious Freedom (USCIRF) a quasi-governmental body responsible for promoting religious freedom throughout the World, described the Enemy Property Act (EPA) as "one of Pakistani key instruments of anti Hindu discrimination," which was used "selectively to siege Hindu owned property after the 1965 Indo-Pakistan War."

111. Additionally, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) encompass the key human rights treaties that prohibit discrimination based on religion, race, nationality, sex, colour, language, or political affiliation.

112. Thus, it is to be noted that the right to property, equal protection under the law, and freedom of religion are some of the basic norms and principles which are broadly recognized and accepted as by most civilized nations around the world. Almost all countries ensure constitutional protections for minorities and prohibit discrimination based on religion or race. Therefore, as discussed above, the inequitable provisions, and discriminatory application of the EPA and VPA have obviously violated the legal standards created and practiced by the international community. Accordingly, the action under and use of the EPA and VPA by the Governments of Pakistan and then Bangladesh to stifle the rights of Hindus are infringement of obligations under customary international law as well.

113. Now let us see what was the scenario existed in Pakistan and India who are still arch rivals in the sub-continent. Though the Defence of Pakistan Rule was enacted in 1965 and thereafter the Ordinance No.1 of 1969 was promulgated by the then Pakistan Government to administer and manage the enemy properties by a custodian, suddenly in the year of 1971 the Pakistan Government flouting the provisions of Tashkent Declaration, disposed of all the properties listed as enemy property in Pakistan, particularly in the then West Pakistan.

114. It is to be noted that India and Pakistan had signed the 'Tashkent declaration' after the 1965 war and had decided to discuss the possibilities of returning of enemy properties under control of each side. The birth place of the former Indian Prime Minister Inder Kumer Gujral (IK Gujral) situated at Pari Darweza under the Tehsil Sohawa District Jhelun was sold to one Raza Shahid who presently has been owning the property. Though Mr. Gujral migrated to India after 1947 during partition of India many properties of Hindus who left Pakistan during 1965 war have been sold out who left Pakistan during 1965 war.

115. In 1971 when war was going on between the freedom fighters of Bangladesh and the Pakistan occupation army for the independence of Bangladesh with the help of India, Pakistan and India also locked into a war, at a stage. In the said war Pakistan was defeated and its occupation Army in Bangladesh (the then East Pakistan) surrendered to the joint force of Indian army and Bangladesh Liberation Force. Pakistan government in that situation when acrimony was in its highest position between two countries (India and Pakistan) sold all the

properties listed as enemy property within Pakistan (West Pakistan) shutting the doors of returning those properties to the persons, who were treated as enemy of Pakistan during 17 days war in 1965 between Pakistan and India.

116. However, on the other hand, Indian government has also amended the Enemy Property Act and enacted new law to dispose of the enemy properties in India, despite some opposition parties opposed the enactment of the said new Act. By this Act the 40 years old Enemy Property Act has got a new status. The Indian government initially enacted the Enemy Property Act in 1968. This law laid down the powers of custodian of enemy, management and preservation of enemy property. President of India time to time made Ordinances aiming to manage and control the enemy properties. The last Ordinance was issued in the years 1969 which has been replaced recently by a law enacted by the parliament.

117. We have already discussed that Pakistan had enacted a similar law in 1965 to manage and preserve the properties of the citizen who left for India in 1965, but unlike of India they sold all the properties in 1971 ignoring the terms of Tashkent Declaration.

118. It is true when nations are locked into war, they often seize the properties in their countries belonging to the citizens and corporations of the enemy country. This happened during the First and the Second World Wars when both the United States and the United Kingdom seized properties of German corporations and citizens. Properties that are seized under these circumstances are referred to as 'alien properties' or 'enemy properties'. The Idea behind seizing these properties is that an enemy country should not be allowed to take advantage of its assets in the other country during war. India too seized properties belonging to Pakistani and Chinese citizens when it was engulfed in war with these countries. Parliament of India recently has passed the Enemy Property (Amendment and Validation) Bill, 2016, incorporating comprehensive amendments to the existing law relating to confiscation of enemy property in India.

119. The bill of 2016 was passed by the 'Rajya Shobha', India on 10th March 2017 and with some other amendments made in Rajya Shobha were also incorporated by the Lokshobha of India on 14th March 2017. This bill amends the Enemy Property Act, 1968 with intent to vest all rights, title and interest over the enemy property. The custodian of enemy property has become the owner under this Act in India. The bill declared transfer of enemy property by the enemy conducted under the Act to be void. These apply retrospective to transfer that occurred before or after 1968. The bill prohibits Civil Court and other from entertaining the disputes related to enemy properties. The new definition of enemy in the said Indian Act also covers legal heirs of enemy even if they are the citizens of India or any other country and nationals of an enemy country who changed their nationality.

120. Though the Supreme Court of India in the case if Union of India & another vs. Raja Mohammad Amir Mohammad Khan reported in 8 SCC(2005) page-696 decided that " the definition of enemy provided under section 2(b) excludes citizens of India as an enemy", the new law in India included the heirs of enemy as enemy even if they are now the citizens of India.

121. In the circumstances many properties which were declared enemy property in 1968 cannot be claimed to be returned in his/their favour by the heirs of any person who left India for Pakistan or China, even if the claimant is a citizen of India. As a result, the house of Mohammad Ali Jinnah situated in Malaber Hill of south Mumbai, the property of Raja

Mohammad Amir Mohammad Khan, son of 'Raja' of Mahmudabad, Uttar Prodesh, some properties of Nawab of Bhopal presently the bollywood actor Saif Ali Khan has been declared enemy property. Saif Ali Khan has been fighting a legal battle in the Court. In India lot of Muslim families are affected by the movement and actions of the government. Lot of Nawab's, Zaminder's properties is in the process of disposal due to enacting the aforementioned Act. It is known from various news reports of India and Pakistan that as the new Act of 2017 has been enacted many middle class Muslim families are being threatened as well.

122. We have opted to portray the above state of affairs with a view to show that the India and Pakistan who are the arch rivals are engaged in an action of **'tit for tat'**. Action similar to that taken by Pakistan in 1971 has been taken by India too in 2017. Certainly we are not dealing with the properties of the citizens of India and Pakistan. We are to see the justification as to whether any property of Bangladeshi citizen should be treated as enemy or vested property when Bangladesh and India are now two most friendly countries in this sub-continent. Bangladesh always memorizes and recognizes the contribution of Indian people and the government of India in the liberation war of Bangladesh in 1971.

123. Though the territory of India has never been treated as enemy territory of Bangladesh, we believe that some people left Bangladesh (the then East Pakistan) out of fear of war in 1965. The action of leaving the country by the minority community which was encouraged by the then East Pakistan government and thus those people can never be treated as enemy of the country and for this reason Government of Bangladesh and our legislature has enacted "অর্পিত সম্পত্তি প্রর্ত্যপণ আইন ২০০১" which has been amended in 2013 to return back the properties which were listed as vested property in 1974 and thereafter, to the original owners or their successor-in-interest living in Bangladesh.

124. The government of Bangladesh and the legislature considering the grave situation erupted owing to migration of minority population from the then East Pakistan (now Bangladesh) to India has enacted the Act of 2001.

125. Census of India 1901-1941, Census of East Pakistan 1951-1961, and Bangladesh Government Census 1974-2011 shows that the percentage of Hindu population in East Bengal in 1901 was 33.00%. In 1911 the percentage was dropped to 31.50%. In 1921 it again dropped to 30.60%. In 1931 it went down to 29.40%. In 1941 it was dropped to 28.00%. In 1951 it was went down to 22.05%. In 1961 it again dropped to 18.50%. In 1974 it was 13.50%. In 1981 it was 12.13%. In 1991 it was 10.51%. In 2001 it went down to 9.20% and in 2011 it was dropped to 8.96%. Since 1901-1941 the minority people of East Bengal particularly belonging to the upper class migrated to different towns of West Bengal of India chiefly to Kolkata with the hope of enjoying better livelihood.

126. It is seen that in 1951 this percentage dropped around 6% which means after 1947 many of the minority population thought that since the Pakistan had been created for the Muslims they would not feel good in this land and thus opted to migrate to India. For the similar reason again the percentage of Hindu population dropped for about 4% in 1961. Up to 1974 it was reduced about 5% population. The minority population migrated to India mostly due to the situation prevailing during the war of 1965. But within 27 years, since 1981 to 2011 3% people migrated not only to India but to some other developed countries also which is lesser than the trend as has already been focused.

127. Why the minority people migrated from Bangladesh to India? To get its answer we have endeavored to go into the root of the cause by making above deliberation. In our opinion, after the liberation of Bangladesh different reasons have caused such migration. Many Bangladeshi minority 'bride' and 'groom' both got married to the citizens of India when they went for pursuing higher studies in the countries where his/her future life partner came for the same purpose. They liked each other and got married. Other reason is for reunification of family. Some citizens of Hindu Community migrated from Bangladesh to India opt to be united with the family members who left Bangladesh much earlier for India. People at all times want to have a better life where economy is sturdy. For these various reasons some people of Hindu community might have migrated to India. However, since the government of Bangladesh and the legislature of our country thought in a positive way to return the properties which were listed as vested property in 1974 to the original owners or their successor-in-interest living in Bangladesh will certainly stop the trend of migration of minority people from Bangladesh to India.

128. Another portion of the Rule is "to show cause as to why section 6(Ga) and (Gha) of the Act, 2001 should not be declared to have been passed without lawful authority and is of no legal effect."

129. In this regard the submissions extended on part of respondent No.6 drew our attention. Mr. Rana Das Gupta, the General Secretary of the Hindu, Buddhist, Christian Unity Council by filing an application sought permission of this Court for allowing them to be added as respondent No.6. We allowed the application and added Mr. Rana Das Gupta, General Secretary as respondent No.6 as they are the stake holders in this case.

130. Mr. Subrata Chowdhury, the learned advocate appearing on behalf of the added respondent No.6 submitted that although in the original law, i.e. in Act No.16 of 2001, there was a provision for publication of the list of returnable properties in official gazette under the provisions of section 9(1) thereof, but through amendment made by Act No.23 of 2011, the provisions for publication of 'ka' and 'kha' schedule was made and the council, the added respondent No.6 with National Co-ordination Cell for Implementation of Vested Property Return Act formed by various social organizations expressed their resentment against such classification of 'ka' and 'kha' schedules and demanded deletion of 'kha' schedule from the Act of 2001 (as mended) as it was against the decision of the Apex Court and the spirit of the original law. In the backdrop of this situation and after discussion with the Hon'ble Prime Minister by the Council, Act No.46 of 2013 was passed and the provisions of publication of list in 'kha' schedule was repealed and all the lists already published thereby were cancelled. By such amendment it was also provided that the property listed and published in the 'kha' schedule would not be treated as vested property and shall be deemed as if to be those which were never vested properties.

131. Mr. Subrata Chowdhury candidly submitted that though section 6(Ga) and (Gha) are discriminatory Act, but for the purpose of returning the property to the persons whose property was declared enemy or vested property government may have some mechanism. The property which cannot be returned at all the lawful claimants, government may retain those properties, upon which industry, charitable institution or commercial establishment, school, college have been established. But in the case of other properties the intention of the government is clear and it is acceptable. Mr. Chowdhury also submitted that to give the full and true effect of the law this Court also may give some directions, Mr. Subrata Chowdhury added.

132. At the very outset the object of enacting the said Act, 2001 has been defined as under:

''অর্পিত সম্পত্তি হিসাবে তালিকাভূক্ত কতিপয় সম্পত্তি বাংলাদেশী মূল মালিক বা তাহার বাংলাদেশী উত্তরাধিকারী বা উক্ত মূল মালিক বা উত্তরাধিকারীর বাংলাদেশী স্বার্থাধিকারী (Successor-in-interest) এর নিকট প্রত্যর্পণ এবং আনুষংগিক বিষয়াদি সম্পর্কে বিধান প্রণয়নকল্পে প্রণীত আইন।

যেহেতু অর্পিত সম্পত্তি হিসাবে তালিকাভূক্ত কতিপয় সম্পত্তি বাংলাদেশী মূল মালিক বা তাহার বাংলাদেশী উত্তরাধিকারী বা উক্ত মূল মালিক বা উত্তরাধিকারীর বাংলাদেশী স্বার্থাধিকারী (Successor-in-interest) এর নিকট প্রত্যর্পণ এবং আনুষংগিক বিষয়াদি সম্পর্কে বিধান প্রণয়ন সমীচীন ও প্রয়োজনীয়।''

133. The above clearly indicates the intention of the legislature and the government to return back the vested property as being vested to the government in the year 1974 and thus the Act 2001 (Amended up to 2013) can be termed as an instrument to help the Bangladeshi owners, successors-in-interest whose property has been listed as enemy property/vested property. Thus, the very intention of the government appears to be *bonafide.* Section 6 is the provisions meant for making a list of the property which cannot be returned back to the persons whose properties or whose predecessor's properties have been declared enemy or vested property. The provision of section runs as follows:

*''**৬। কতিপয় সম্পত্তি প্রত্যর্পণযোগ্য সম্পত্তির তালিকায়** অন্তর্ভূক্তি **নিষিদ্ধ-** [প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবে না।] যথাঃ-*

(ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি,

(খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এরুপ কোন সম্পত্তি,

(গ) সরকার কর্তৃক কোন সংবিধিবদ্ধ সংস্থা বা অন্য কোন সংগঠন বা কোন ব্যক্তির কিট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি,

(ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পদ এবং এইরুপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশবিশেষ হস্তান্তর করিয়া থাকিলে সেই হস্তান্তরিত সম্পত্তি,

(ঙ) এমন অর্পিত সম্পত্তি যাহা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি,

(চ) জনস্বার্থে অধিগ্রহণ করা হইয়াছে এইরুপ কোন অর্পিত সম্পত্তিঃ তবে শর্ত থাকে যে, উক্ত অধিগ্রহণকৃত সম্পত্তির বিপরীতে প্রদেয় ক্ষতিপূরণের অর্থ জমা থাকিলে উক্ত সম্পত্তির অধিগ্রহণ-পূর্ব মালিককে বা তাহার উত্তরাধিকারী বা স্বার্থাধিকারীকে ক্ষতিপূরণের অর্থ এই আইনের বিধান অনুসারে প্রদান করা হইবে যদি উক্ত মালিক বা উত্তরাধিকারী বা স্বার্থাধিকারী বাংলাদেশের নাগরিক ও স্থায়ী বাসিন্দা হন।''

134. This provision under section 6 has been kept in the Act to retain those properties which cannot be returnable. It means some of the properties out of total quantum of enemy or vested property which was vested to the government would be retained by the government. The legislature in section 6(Ga) intended to say that if any property which was vested to the government and has been permanently given settlement to any statutory authority or organization or anybody will be treated as non returnable. By section 6(Gha) the legislature wanted to say that the property (vested property) on which industry, commercial institutions have been established also cannot be returned to any claimant. We are of the view that these two sub-sections no doubt curtail the right of the persons whose property has been declared as enemy or vested property.

135. In view of our observations regarding 1974 Act and 1976 Ordinance we hold that some more legislative and administrative measures are essentially needed aiming to give proper effect of the object of the Act, 2001 (amended in 2003) and these are the matter to be dealt with and resolved by the legislature and executive.

136. However, since the government has a fair intention to return back the vested properties to the actual and lawful claimants of the property presumably for avoiding any further complications section 6(Ga) and (Gha) have been inserted in the said Act as a transitory measure. Again we believe that the legislature should come forward in taking further legislative measure regarding the properties listed under section 6(Ga) and (Gha) of the Act.

137. We have discussed how Pakistan dealt with the enemy property so declared in 1965. They sold all the properties in 1971. On the other hand India has already enacted a law in 2017 to dispose of the enemy properties by selling all. In such a situation existing in the sub-continent we find that the attempt taken by the Bangladesh government and our legislature is friendlier to the stake holders. This initiative on part of the Bangladesh government indubitably will help in establishing peace among the people of the subcontinent. Thus, we are not inclined to declare section 6(Ga)(Gha) ultra vires to the Constitution at this stage and under circumstances as discussed above.

138. However, in view of our discussions made above and considering the provision of Act of 2001 as a whole and the scenario existing in the Tribunals and also considering other material aspects we are inclined to pass the following observations and directions:

Observations

(a) 1962 Constitution of Pakistan was not a Constitution in the eye of law at all, because the same was not given to the nation by the people's representatives of Pakistan, rather the same was given by an usurper dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. Thus the Enemy Property Act [EPA] which was promulgated under a void Constitution of 1962 given by an usurper, the Pakistan Defence Rule 1965 and the Ordinance I of 1969 and its continuance under the grab of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of Emergency Provisions)(Repeal) Act, 1974 was a historical mistake.

(b) In view of our observations regarding 1974 Act and 1976 Ordinance we hold that measures are likely to be needed to give proper effect of the objective of the Act, 2001(amended in 2013) and these are the matter to be dealt with by the legislature and executive.

139. In the light of the decisions in the cases of ***Laxmi Kanta Roy Vs. UNO*** reported in ***46 DLR (HCD) 1994***, Page-136, ***Aroti Rani Paul vs. Shudarshan Kumar Paul and others***, reported in 56 ***DLR (AD) 73***, ***Saju Hosein and other*** reported in ***58 DLR (AD) 177*** and ***Pulichand Omraolal Case*** reported in ***33 DLR (AD) 30,*** we believe and further observe that:

(c)all actions, decisions regarding listing any property within the territory of Bangladesh as enemy property or vested property after 23.03.1974 are illegal;

(d) the persons engaged with the task of listing the property as vested property after 23.03.1974 are liable to be held responsible for doing illegal works; and

(e) the above decisions were given by the Supreme Court of Bangladesh during 1980-2004. Not a single judgment has yet been pronounced in contrary to the principles enunciated by our apex court in the above mentioned cases. Thus, the persons who were/are engaged in listing properties as vested property subsequent to 18.06.1980 are liable to be proceeded with for contempt of Court.

140. Now, in view of above observations based on deliberation made herein above we are convinced to make directives as below:

Directions

a. All the government officials are hereby directed not to take any attempt in future to enlist any property in the official gazette as the vested property;
b. Government may set up an exclusive Tribunal having no other jurisdiction, but only to dispose of the applications under section 10 of the Act No.16 of 2001 in each District and where huge number of petitions are pending more than one Tribunal may be set up;
c. The Tribunals already set up under the Act No.16 of 2001 are directed to dispose of the applications maintaining the time frame strictly as provided in the Act No.16 of 2001;
d. The Limitation Act should be made applicable in filing application under section 10(1) of the Act;
e. The concerned authorities are directed to implement /execute the decision of the Appellate Tribunal or in the case of Tribunal where no appeal has been preferred within the time of limitation and **the government officials are directed not to make any delay in executing the decree of the Tribunal on the plea of filing writ petition or any other plea in any way or in any other form as the government by enacting this Act has decided to return back the property to the owner or successors-in-interest in the property within shortest period of time**;
f. Since the law provides to set up a Special Appellate Tribunal to decide the appeal against the verdict of the Tribunal there should be a Special Appellate Tribunal in each district;
g. The property which has been lying with the government as vested property having no legal claimant should be utilized by the government for the purpose of human development only;
h. The government may take necessary measures by enacting law in respect of properties which were vested to the government and where institution have already been developed for the purpose of the development of the country may be named after the name of the original and lawful owner;
i. The legislature may enact law to give sufficient and just compensation to a lawful claimant in lieu of returning the property to him whose property has already been made non-returnable under the provision of section 6.

141. With the observations and directions as made herein above the Rules (main Rule and supplementary Rule) are **disposed of.**

142. Let a copy of this judgment be communicated at once to the parties and the government in the Ministry of Law, Justice and Parliamentary Affairs.

10 SCOB [2018] HCD

High Court Division
(Special Original Jurisdiction)

Writ Petition No.16300 of 2012

Eastern Diplomatic Services
... Petitioner

Vs.

Anti Corruption Commission and another
... Respondents

Mr. A.F. Hassain Arif, Advocate with
Mr. Md. Ramjan Ali Sikder
…For the Petitioner

Mr. Md. Khurshid Alam Khan, Advocate
… For the Respondent No.2 (ACC)

Date of hearing: 02.08.2017, 25.10.2017, 26.10.2017, 01.11.2017, 09.11.2017

Date of Judgment: 22.11.2017

Present:
Mr. Justice M. Enayetur Rahim
And
Mr. Justice Shahidul Karim

Section 17 and 19 of the Anti Corruption Commission Act, 2004:
At the stage of inquiry, which is nothing but a fact finding process, there is no scope to arrive at a definite conclusion that the alleged allegation/offence will not fall within the preview of relevant Money Laundering Protirodh Ain, which is in the schedule of the Act of 2004. … (Para 33)

Moreover, to prevent corruption the commission has got wide and unfettered power. Section 17 (U) of the Act of 2004 contemplated that Commission has the power to do any such act to prevent corruption. The said provision is as under. … (Para 34)

Judgement

M. Enayetur Rahim, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, this Rule Nisi was issued calling upon the respondents to show cause as to why the orders (hereinafter referred to as the impugned notices) bearing Memo No.(i) 32225 and (ii) 32337 both dated 29.11.2012 (Annexure-A and A1) issued by the respondent No.2 directing the petitioner to produce certain documents for the purpose of inquiry of allegation of evasion of customs duties and taxes should not be declared to have been passed without lawful authority and are of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Short facts for disposal of the Rule are as follows:
The petitioner is the holder of a licence being Licence No.125/Cus/SBW/84 dated 02.08.1984 issued by the Collector of Customs, Excise and Vat under section 13 of

the Customs Act, 1969 to carry out the business of selling goods to diplomats and privileged persons in Bangladesh as Special Bonded Warehouse. The licence is valid till date. The petitioner has been duly paying the applicable duties and taxes to the regulator i.e. the customs authority. However, all of a sudden the petitioner was surprised to receive the impugned notices, Annexures-A and A1 directing him to produce certain documents for the purpose of inquiry of allegation of evasion of customs duties and taxes.

3. It is further stated that the regulators of the petitioner i.e. the office of the Customs Bond Commissionerate, Dhaka and also the Directorate of Narcotic Control, Dhaka, conducted investigation separately and secretly and filed two separate reports, Annexure-I and II confirming, inter alia, that the petitioner did not sale any of its imported goods including the Alcohol and Beer in the open market as alleged.

4. An NGO namely, Save the Rural Development Association (SARDA) based on a newspaper report moved a writ petition being No.10829 of 2014 before the High Court Division wherein a Rule was issued and an order of injunction was passed restraining the petitioner from selling duty free alcohol and beer in open market for a period of three months.

5. Eventually, a Division Bench of the High Court Division, upon taking hearing, discharged the Rule vide judgment dated 15.04.2015 and vacated the aforesaid order of injunction.

6. All warehoused goods are subject to the strict control and supervision of the bond officer and as such, there is no scope for the petitioner to bring into the bonded warehouse or take out therefrom any goods without the presence and prior authorization of the Bond Officer posted by the Customs Bond Commissionerate. The petitioner duly observes the above procedures and only sells the goods to the diplomatic mission/persons or privileged persons under strict control and supervision of the bond officer posted by the Customs Bond Commissionerate.

7. In a similar situation, where the Comptroller And Auditor General (CAG) directed certain business organizations and persons to furnish documents, the High Court Division declared the said demand of the CAG to supply the documents illegal. The National Board of Revenue, against the said Judgment of the High Court Division preferred appeals being Civil Petition for leave to appeal Nos. 3397-3422 of 2015 and Civil Petition for Leave to Appeal No.708 of 2016 before the Appellate Division. The Appellate Division, after hearing the parties, observed that the assesses are not under obligation to furnish or submit documents directly to the Comptroller and Auditor General. The documents may be furnished through the Board of Revenue. The CAG cannot ask any business organization or person to submit documents for the purpose of accounting for ascertaining as to whether they paid VAT in accordance with law.

8. The respondent No.2, Anti Corruption Commission (hereinafter referred to as the Commission) contested the Rule by filing affidavit in opposition.

9. The respondent No.2 in its affidavit denied the material statements made in the writ petition as well as in supplementary affidavit and further contended that the allegation against the petitioner is that he evaded customs duties and taxes which is found through inquiry and the respondent No.2 rightly directed the petitioner to submit certain documents for proper

inquiry but the petitioner did not submit the same. It is found in the inquiry that the petitioner did not pay the applicable duties and taxes regularly to the Customs authority. The Commission is an independent Institution constituted by the Anti Corruption Commission Act of 2004 (hereinafter referred as to Act of 2004). Hence, the respondent No.2 rightly and lawfully directed the petitioner to produce certain documents for the purpose of inquiry of allegation of evasion of customs duties and taxes under the Anti Corruption Commission Act,2004.

10. The offence committed by the petitioner is under the schedule of the Act of 2004 and the Commission or authorized person by the Commission may investigate or inquire any person who commits the offences in any institution under the Act of 2004 and hence the inquiring officer was accorded sanction from the Commission to inquire into the offence of 'revenue evasion' and as such writ petition is not maintainable in its present form.

11. It is further contended that the term money laundering has been defined in section Awg of the Money Laundering Protirodh Ain, 2012. In view of the definition mentioned in section 2 of the Money Laundering Protirodh Ain, 2012 it is clearly found that the allegations of 'evasion of customs duty' mentioned in the notice dated 29.11.2012 is an offence under the Ain of 2012 and as such the Commission has got the authority to make any inquiry on the issue.

12. Section 19 of the Act of 2004 deals with the special powers of commission in inquiry or investigation. The Commission shall have the powers in matters of inquiry or investigation against any corruption and as such there is no illegality in issuing the impugned notices and thus, the Rule is liable to be discharged.

13. Mr. Hasan Arif, learned Advocate appearing for the petitioner with Mr. Ramjan Ali Shikder in support of the Rule has submitted as under:

i. the respondents are not authorized under the Act of 2004 to inquire/investigate into any allegations of offence under Customs Act,1969 in particular 'evasion of tax' since offence under Customs Act,1969 is not a Schedule offence under the Act of 2004;

ii. the office of the Customs Bond Commissionerate, Dhaka and also the Directorate of Narcotic Control, Dhaka, conducted investigation separately and secretly and filed two separate reports confirming, inter alia, that the present petitioner did not sale any of its imported goods including the Alcohol and Beer in the open market as alleged;

iii. an NGO, Save the Rural Development Association (SARDA) based on a newspaper report moved writ petition No.10829 of 2014 before the High Court Division seeking direction to refrain the present petitioner from selling duty free alcohol and beer in open market for a period of three months and after hearing the Rule was disposed of.

iv. the allegation as mentioned in the impugned notices do not come with the mischief of Money Laundering Ain and as such the Commission has got no authority to inquiry into the allegation as mentioned in the notices.

14. Mr. Khurshid Alam Khan, learned Advocate for the respondent No.2, rebutting the submissions of the learned Advocate for the petition submits that as per the law i.e Act of 2004 the Commission has got every authority to make inquiry or investigation, as the case may be, relating to any corruption and as such the Commission having legal authority issued

the impugned notices to the petitioner and thus, there is no room to say that the impugned notices/orders have been passed without lawful authority.

15. Mr. Khan further submits that the commission was not aware of the judgment passed in writ petition No.10829 of 2014 as it was not made a party thereto, and the reports Annexure I and II have no manner of application in relation to the inquiry process conducted by the Commission and the Commission being an independent body is not bound by those reports and the said judgment.

16. Heard the learned Advocate for the respective parties, perused the writ petition, affidavit in opposition and the Annexures hereto as well as the relevant provisions of laws.

17. In several cases the Appellate Division and the High Court Division including this Bench have discussed about the aim, object and functions of the Commission as described in section 17 as well as the power of the Commission as contemplated in section 19 of the Act of 2004.

18. This Bench in the case of Dom-Inno Limited Vs. Bangladesh and others (writ petition No.12441 of 2013) after meticulous examination of section 17 and 19 of the Act of 2004 has held to the effect:

> "If we consider the above aims and objects of the Anti-Corruption Commission as contemplated in section 17, in particular subsections 17(ga) and 17(ta), of the Anti-Corruption Act, 2004 we have no hesitation to hold that to prevent R¨vZ‡ch (corruption/corrupt) the Commission has got the unfettered power to make any enquiry, investigation and to take necessary actions/steps in accordance with law as it thinks fit and proper in any form of R¨vZ‡chv©š
>
> -Gš GKwU‡š ‡ š K¥eh published by ‡ š‡a i_the word R¨vZ‡ch means: e‡cKd¤ !š †ë‡c!š #R $de%&
> According to law of lexicon, the word corrupt or illegal means- The juxta-position of the word "otherwise", with the words "corrupt or illegal means".
> According to Oxford English Dictionary, the word 'corrupt' means- willing to act dishonestly in return for money or personal gain.
> Thus, the meaning of the word R¨vZ‡ch(corrupt) is very wide and it has far reaching effect.

19. In the case of Sonali Jute Mills Ltd. Vs ACC, our Appellate Division having considered the scope of section 19 of the Act of 2004 held that;

> "Having gone through the provisions of the above section, we find that sub-sections(1) and (2)of section 19 have given wide jurisdiction to the Commission to enquire into and investigate any allegations whatsoever as covered in its schedule and in doing so may direct any authority, public or private to produce relevant documents. The person concerned shall be bound to comply with the said direction.
> The power contained in section 19 of the Act can be exercised both at inquiry as well as investigation stage. It is of course true that the Act of 2004 or the KwVi framed there under did not prescribe the procedures to be adopted by the officers of the Commission for procuring those documents. . . . . .
> "The word "inquiry" v e# egš as envisaged under rule 2(ka) of the Rules, 2007 is with regard to fact finding inquiry for "' (š Ka) a*dš#c c š R+,aedš a- ", which will go to

> assist the Commission either to proceed further by lodging an FIR or to keep it with the record, if found no basis to the allegation. As such, the word "inquiry" as used in section 2(4) of the Act of 1981 (Bankers Book Evidence Act) has no manner of application for enquiry by the Commission since at the stage of enquiry by the Commission question of giving evidence does not arise at all . . . . . .
> "Over and above, the provisions of Act of 2004 being special in nature shall prevail over other laws notwithstanding the fact that the provisions of other laws were not excluded by any non-obstante clause." [Underlines supplied]

20. We have gone through the judgment passed in writ petition No.10829 of 2014 which was filed by a NGO in the capacity of public interest litigation. In the said writ petition Rule Nisi was issued on the following terms:

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why they should not be directed to take appropriate legal steps against the respondent No.6 from selling duty free beverage including alcohol and beer to others violating the terms of Bonded Warehouse License as reported in the national daily newspaper namely Jugantor dated 28.05.2013 (Annexure-D) and/or pass such other or further order or orders passed as to this Court may seem fit and proper"

21. In the said petition the writ petitioner relying on a newspaper report sought a direction upon the respondents to take steps against the present writ petition for selling duty free beverage, including alcohol and beer in violation of the Bonded Warehouse licence.

22. The above writ petition was disposed of with the following observation:

> "The learned Counsel for the petition sought our intervention for direction to investigate into this serious issue. We note that two separate authorities have conducted investigation and took the view that the report published against the respondent No.6 was not correct. Since specific investigation was carried out and the allegation raised in the report dated 28.05.2013 were investigated into, we think that the writ has become infructuous and further interference is not necessary."

23. Mr. Arif after referring to various provisions of the Money Laundering Protirodh Ain, 2003 (hereinafter referred to as the Ain of 2003), Money Laundering Protirodh Ain, 2009 (hereinafter referred to as the Ain of 2009) and Money Laundering Potirodh Ain, 2012 (hereinafter referred to as the Ain of 2012) has tried to convice us that in the Ain of 2003 and the Ain of 2009 'evasion of tax' was not included as 'predicate offence' and this offence was included only in the Ain of 2012 as one of the predicate offences and that in the impugned notices the allegation as sought to be inquired was alleged to have been committed before the promulgation of the Ain of 2012 and as such the Commission has no authority under the Act of 2004 to continue with the inquiry.

24. It reveals from the impugned notices that the subject matter of inquiry i.e the allegations as sought to be inquired was alleged to have been committed in between 2007 and 2012.

25. In section 2v. g of the Ain of 2009 the following offences have been included as 'predicate offence' amongst other offences:

v/ g R¤ZK C š- š+¤!š
v1 g a$ d 2š- š e e šR8 dš 4 ¥š #!š
v/ 5g a$ d † d dš ‡šR7 š- šKaR7 šiR38 $ d!š

26. And in section 2(7) of the Ain of 2012 the following offences have been included as 'predicate offence' amongst other offences:

v/ g R¤ZKc š- š+Q!š
v/ 9gšR7_š- šKaR7_šiR38 $ d!š
v/ : gš6d$ eš- š_<š#‡= >š 8d¥!š
v/ 1g †dš#‡= >š 8d¥!š
[Underlines supplied]

27. If we consider the subject matter of the inquiry against the petitioner coupled with the above 'predicate offence' as mentioned in the Ain of 2009 and the Ain of 2012, then we are convinced that *prima facie* smell of 'predicate offence' like R¤ZKcAš 4¥š #Aš6R7_š- šKaR7_šiR38 $ dš ‡š†dš#‡= >Bš 8d¥ are available in the impugned notices, which falls either under the Ain of 2009 or the Ain of 2012.

28. In the Ain of 2003 the 'predicate offence' was not included but the definition of money laundering as defined in section 2(V) was very wide, which runs as follows:

vCgš¿i Keš E Kd‡Fš .Zš
v gš 4¥š8>Hš8d - š š8ad- a š GKdcš š KKZš#LMR!š
v gšN¥š š 4¥š8>Hš8d - š š8ad- a š GKdcš š KKZš#LMaRdš 4¥šGO?>dAšdP8 >dAš Oaedš 6* 8e†deš š (š†aKš#G Ic š†d%š

[underlines supplied]

29. In view of the above, we are unable to accept the submission of Mr. Arif that in the impugned notices there is no reflection of any allegation which could have come within the preview of the Ain of 2003, the Ain of 2009 and the Ain of 2012.

30. Having regard to the fact that in the above cited writ petition the Commission was not made a party, it is our considered view that the findings made in the judgment has got no binding effect on the Commission and the Commission is not debarred from making its lawful inquiry against the petitioner on the basis of the power and jurisdiction conferred on it by section 17 and 19 of the Act of 2004.

31. Two departmental reports, Annexure-I and II are also subject to scrutiny with other materials by the Commission and as such the Commission is not bound to stop the inquiry, relying on those reports only.

32. Moreover, upon a plain reading of the said reports we do not find any nexus between the reports, Annexure-I and II and the subject matter of inquiry in question.

33. At the stage of an inquiry, which is nothing but a fact finding process, there is no scope to arrive at a definite conclusion that the alleged allegation/ offence will not fall within the preview of relevant Money Laundering Protirodh Ain, which is in the schedule of the Act of 2004.

34. Moreover, to prevent corruption the Commission has got wide and unfettered power. Section 17(U) of the Act of 2004 contemplated that Commission has the power to do any such act to prevent corruption. The said provision is as under:

DVQš¿ gR¤ZKcš Kcad¥dš Keš aJ Ke_ Kš a $cš eš6)š6† eš†)Z#LMReš†d%š

35. In the light of the above provisions of law if we consider the submissions made by Mr. Arif, then we have no other option but to hold that the Rule deserves no consideration.

36. Having considered and discussed as above, we find no merit in the Rule.

37. Accordingly, the Rule is discharged.

38. However, there is no order as to cost.

39. The order of stay passed at the time of issuance of the Rule which was extended time to time is hereby re-called and vacated. The Commission is at liberty to proceed with the matter in accordance with law.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 5673 of 2016

Professor M. Samsul Alam, son of Late Md. Khabidur Rahman Mia, of 2/H Eastern Housing Apartment, 26/B, Topkhana Road, Segun Bagicha, Dhaka
..……Petitioner
Vs.
Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources, Bangladesh Secretariat, Dhaka and others
…….Respondents.

Mr. Tanjib-ul-Alam, with
Mr. Md. Saquibuzzaman, Advocates
… For the Petitioner

Mr. Mahbubey Alam, Attorney General, with
Mr. Ekramul Haque Tutul, DAG

Mr. Md. Mokleshur Rahman, DAG
Mr. Samarendra Nath Biswas, AAG
Ms. Farida Yeasmin, AAG
…. For the Respondent No1.

Mr. Ashraf Uddin Bhuiyan, Advocate

… For the respondent Nos.2 & 3

Mr. Rokanuddin Mahmud, with
Mr. Mustafizur Rahman Khan and
Ms. Safayat Sultana Rumey, Advocates
…For the Respondent No.4

Date of hearing: 11.04.2017, 11.07.2017, 12.07.2017, 16.07.2017, 17.07.2017, 06.08.2017, 20.08.2017, 21.08.2017 and 22.08.2017.
Date of judgment: 24.08.2017

Present:
Ms. Justice Naima Haider
And
Mr. Justice Abu Taher Md. Saifur Rahman

Article 102 of the Constitution of the People's Republic of Bangladesh, Article 51 of the United Nations Convention against Corruption:
Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime. Article 51 of the UNCAC makes the return of assets which are proceeds of crime a fundamental principle of the UNCAC. … (Para 76)

The corrupt cannot be allowed to live handsomely off the profits of their crimes while millions of law-abiding citizens work hard to earn a living. … (Para 83)

2003 till 2006 the respondents No. 4 and No. 5 had set up a corrupt scheme to illegally obtain gas exploration rights in Bangladesh. Based on the undisputed facts, we find that the JVA and GPSA have been procured by corruption and thus render them void ab initio. The rights and assets of the respondent No. 5 in Block 9 PSC, for which respondent No. 5 was found to be the least qualified of seven bidders in 1997, have also been obtained through this corrupt scheme and are thus being seized and confiscated as proceeds of crime as well as to provide compensation for the 2005 blowouts. …(Para 91)

Judgment

Naima Haider, J:

1. In this application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued on 09.05.2016calling upon the respondents to show cause as to why the Joint Venture Agreement For The Development and Production of Petroleum From the Marginal/Abandoned Chattak and Feni Fields ("JVA") dated 16.10.2003 between the respondents No.3 and No.4 should not be declared to be without lawful authority and of no legal effect and thus void *ab initio*; and why the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between the respondents No.2, as Buyer, and a joint venture between respondents No.3 and No.4, as Seller, should not be declared to be without lawful authority and of no legal effect and thus void *ab initio*; and also why the assets of respondents No.4 and No.5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 should not be attached and seized to provide adequate compensation for the 2005 blowouts, and/or such other or further order or orders be passed as this Court may deem fit and proper.

2. The facts leading to the issuance of the Rule, in brief, are as set out below.

The petitioner is a reputed energy expert and one of the leading activists in the protection of natural resources of the country. In light of his academic and professional experience, the petitioner serves as an advisor to the Consumer Association of Bangladesh (CAB) with regard to the energy sector and has conducted hearings at the Bangladesh Energy Regulatory Commission (BERC). Being a respected citizen of the country the petitioner is concerned about the welfare of the people and is vigilant about the duties of government authorities to act in public interest and protect the rights and resources of the people in discharging their statutory duties. The petitioner is considered an expert in the energy sector and has been vocal against corruption, fraud, and bribery and has for a long time promoted environmental causes in the interest of the public.

3. The respondent No. 1 is the Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources, which has the exclusive right and authority to explore, develop, exploit, produce, process, refine and market petroleum resources within Bangladesh and to enter into any petroleum agreements with any person for the purpose of petroleum operations under the Bangladesh Petroleum Act, 1974, and entitled to delegate such of its rights and powers to statutory bodies; the respondent No. 2 is the Bangladesh Oil, Gas and Mineral Corporation (Petrobangla), a statutory corporation established under the Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985 and has been authorized and entrusted with responsibilities which include, *inter alia*, to prepare and implement programs for exploration and development of oil, gas, and mineral resources and implement the Petroleum Act, 1974 and authorized to establish subsidiary corporations; the respondent No. 3 is a company incorporated under the Companies Act, a wholly owned subsidiary of the respondent No. 2, and falls within the definition of "statutory public authority" under Article 152 of the Constitution; the respondent No. 4 is Niko Resources (Bangladesh) Limited, a private company incorporated under the laws of Barbados, which entered into the JVA with the respondent No.3 and the GPSA with the respondent No.2; respondent No.5 is Niko Resources Limited, a publicly traded corporation with head office in Calgary, Alberta, Canada and the parent company of the respondent No. 4, and which owns 80% working interest in the Chattak and Feni gas fields and 60 % working interest in Block 9 gas field in Bangladesh.

4. Being aggrieved by and dissatisfied, with the inaction and the manifest and continuing failures on the part of the respondents No.1, No.2 and No. 3 to act in compliance with the Constitution and laws of Bangladesh by

(i) not treating the JVA as being without lawful authority and of no legal effect and thus void *ab initio* despite having evidence that the JVA was procured through bribery, fraud, and corruption in violation of the laws of Bangladesh;

(ii) not treating the GPSA as being without lawful authority and of no legal effect and thus void *ab initio* despite having evidence that the GPSA was procured through bribery, fraud, and corruption in violation of the laws of Bangladesh;

(iii) the *mala fide* and continuing failure of the respondents No.1, No.2, and No.3 to seek adequate compensation from the respondent No. 4 and No.5 for losses caused by two successive blowouts in 2005 in Chattak ("the 2005 blowouts") resulting from not undertaking petroleum operations in a proper and workmanlike manner in accordance with good oil-field practice as required under law;

(iv)the continuing payments being made to respondent No. 5, the beneficial owners of the respondent No. 4, circumventing in a fraudulent manner the rule and injunction issued by this Hon'ble High Court Division of the Supreme Court in the judgment dated 02.05.10 in writ petition No. 6911 of 2005, and

(v) the manifest omissions and actions of the respondents No. 2 and No. 3 in ICSID Case Nos. ARB/10/11 and ARB/10/18, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* in misleading the International Centre for Settlement of Investment Disputes ("ICSID") tribunals and acting against the public interest of Bangladesh with the *mala fide* intention of conferring undue benefits to the respondent No.4, the petitioner has moved to this Court and obtained the Rule Nisi.

5. The facts, in brief, relevant for the purpose of disposal of this Rule are that in 1997 respondent No.4 participated in Bangladesh's second bid round for Production Sharing Contracts ("PSC"), including Block 9 PSC, to develop oil and gas resources and was the least qualified, both technically and financially, of seven bidders as evidenced by the report dated 28.09.1997 submitted to the respondent No.2 by Arthur Anderson, a reputed international consultant. Having failed to qualify for the exploration of gas fields in Bangladesh through a competitive and transparent bidding process, the respondent No. 4 proposed to carry out a study, partly funded by the Canadian International Development Agency (CIDA), and entered into a Framework of Understanding for Study for the Development and Production of Hydrocarbon from Non Producing Marginal Gas Fields of Chattak, Feni, and Kamta ("FOU")"dated 23.08.1999 with respondent No. 3. As part of the study under the FOU, in February 2000, respondent No.3 and respondent No. 4 produced a report entitled "Bangladesh Marginal Field Evaluation Chattak,Feni, and Kamta, February 2000" which expressly stated that Chattak East is an "exploration structure" and an "exploration target". The respondents No. 3 and No.4 stated in the Marginal Field Evaluation that the February 2000 report concluded the requirement of the FOU and a joint venture contact may be executed between respondent No. 3 and No.4 as stipulated in the study upon approval of respondents No. 1 and No.2.After the conclusion of the study requirements of FOU, there was not, and could not have been, any binding legal obligations to grant any rights over natural resources, through execution of the JVA, to the respondent No.4 without any competitive bid in a non-transparent manner simply because respondent No.4 under the terms of the FOU was allowed to conduct a study of marginal/abandoned fields. Neither did the FOU treat Chattak East as a marginal/abandoned field.

6. Subsequently, the respondent No.1 issued a "Draft Procedure for Development of Marginal/Abandoned Gas Fields" where "marginal/abandoned fields" were distinguished from "gas fields" as follows:

> "In Bangladesh 22 gas fields of sizes ranging from 25 to 4000 Bcf have so far been discovered. Fifteen of these gas fields have been brought under production. Some of these fields which have been in the process of depletion for continued production over time have become commercially unviable and remained unattended. There are yet other gas fields, which have not been put under operation for want of commercial viability development under the existing techno-economic considerations, may be termed marginal/abandoned."

7. An Explanatory Note in the Draft Procedure stated that "For the purposes of these procedures Chattak, Kamta, and Feni gas fields shall be deemed to have been declared marginal/abandoned gas fields". The petitioner submits that this reference to Chattak in the Draft Procedure clearly refers to "Chattak West" since "Chattak East" had been determined in the FOU study and agreed by all parties to be an "exploration target" and clearly could not have been a "gas field" or been declared "marginal/abandoned" since Chattak East was never even explored, let alone been depleted due to production or declared commercially unviable.

8. Two years later on 01.10.2003 (i.e. 15 days before the JVA was executed on 16.10.2003), the respondent No. 4 entered into a Management Services Contract with Stratum Development Limited, a company registered in Jersey, Channel Islands and represented by Mr. Qasim Sharif, a person who later became Vice President, South Asia of respondent No.4. Under the terms of the Management Services Contract the parties agreed that respondent No.4 "has executed" a JVA with respondent No.3 and that "Stratum shall invoice Niko Bangladesh for a retainer fee in the sum of US$20,000 per month effective October 1, 2003". According to clause 6 of the Management Service Contract it was agreed that the fee shall cover Stratum's fee in addition to all costs and expenses made or incurred by Stratum related to the provision of the Services such as "payments made to expedite or secure the performance by a foreign (i.e. Bangladeshi)public official of any act of a routine nature that is part of the foreign public official's duties and functions, such as the issuance of permits or licenses" required for the Niko Project.

9. Respondent No.4 had also executed a Consultancy Agreement dated 27.07.1999 with Stratum Development Limited (represented by Mr. Qasim Sharif). According to Clause 6 of the Consultancy Agreement Stratum agreed to assist in the execution of a joint venture agreement with the respondent No. 3 (BAPEX) for Kamta, Chattak and Feni Gas Fields for which respondent No.4 (Niko Bangladesh) agreed to pay a "CONSULTANCY FEE" equal to "US$0.03 per mcf (three cents per thousand standard cubic feet)" of the Niko Bangladesh's net share of established proven reserves and "a minimum initial consulting fee of US DOLLARS FOUR MILLION" within 15 days of execution of the JVA.

10. Respondent No.4 (Niko Bangladesh) has admitted to having another consultancy agreement with another company called Nationwide (owned by a Bangladeshi national Mr. Salim Bhuiyan) under which, following the execution of the JVA, respondent No.5 (Niko Canada),through Stratum, paid US$500,000 to Mr. Bhuiyan and admitted that a key part of the services provided by Mr. Bhuiyan was obtaining and arranging meetings with appropriate personnel as BAPEX, Petrobangla and the Ministry of Energy.

11. Mr. Salim Bhuiyan paid another politically influential person, Mr. Giasuddin Al Mamoon, an amount of Tk. 10,800,000 (Taka one crore eight lac) by Standard Chartered Bank Pay Order dated 07.01.2004.Mr. Mamoon is currently in prison following his conviction for money laundering activities in association with his business partner and close friend, Mr. Tarique Rahman, son of former Prime Minister Khaleda Zia. As part of an investigation into Niko's corrupt practices in Bangladesh, Mr. Mamoon admitted to the Royal Canadian Mounted Police ("RCMP") in interviews dated 01.11.2008 and 02.11.2008 of receiving the payments from Mr. Salim Bhuiyan for Mr. Mamoon's role as a sub-agent for Niko. Mr. Mamoon stated that fifty per cent of his power came from the fact that he was close friend and business partner of Mr. Tarique Rahman, son of the former Prime Minister Khaleda Zia. Mr. Salim Bhuiyan provided a statement before a Magistrate Court under section 164 of the Criminal Procedure Code and confirmed paying Tk. 180,00,000 (one crore eighty lac taka) to Mr. Mamoon, Tk. 60,00,000 (sixty lac taka) to State Minister for Energy Mr. AKM Mosharraf Hossain, and retaining the remaining Tk. 60,00,000 (sixty lac) of Niko's fees for himself. This was how the $500,000 consultancy fee (approximately Tk. 300,00,000) paid by respondent No.5 to Nationwide (owned by Mr. Salim Bhuiyan) was distributed. Even though the confessional statement of Mr. Salim Bhuiyan had subsequently retracted the truth of Mr. Salim Bhuiyan's statement is supported by other documentary evidence, bank records, pay orders, and most importantly the own admissions of respondent No.4.

12. On 23.06.2011 the respondent No.5 entered into a plea bargain with Canadian Crown Prosecution and admitted to certain acts of corruption in an Agreed Statement of Facts which reveals the following undisputed facts:

- Niko Canada (respondent No.5) is a Canadian public company which owns 100% of Niko Resources Caymans, which is a holding company. Niko Resources Caymans in turn owns 100% of Niko Bangladesh (respondent No.4) which is incorporated in Barbados.
- Niko Canada directly and indirectly provided improper benefits to a Bangladeshi public official in order to further the business objectives of Niko Canada and its subsidiaries.
- Niko Bangladesh provided the use of a vehicle costing one hundred and ninety thousand nine hundred and eighty four Canadian dollars ($190,984) to Mr. AKMMosharraf Hossain, the Bangladeshi State Minister for Energy and Mineral Resources in order to influence the Minister in dealings with Niko Bangladesh within the context of ongoing business dealings. Niko Canada acknowledged that, having funded Niko Bangladesh's acquisition of the vehicle and knowing that Niko Bangladesh delivered it as aforesaid, Niko Canada was responsible under Canadian criminal law principles for the act.
- Additionally, Niko Canada paid the travel and accommodation expenses for Minister AKM Mosharraf Hossain to travel from Bangladesh to Calgary to attend the GO EXPO oil and gas exposition, and onward to New York and Chicago, so that the Minister could visit his family who lived there, the cost being approximately$5000.Mr. AKM Mosharraf Hossain was accompanied by Mr. Salim Bhuiyan.
- On 31.12.2004, after procurement of the JVA, Niko Bangladesh began drilling operations in the Chattak-2 gas field. On 07.01.2005 an explosion occurred at the Chattak-2 gas well in the Tengratila gas field in north-eastern Bangladesh. While no people were killed, there was significant damage to the surrounding village. As an

example, a school that was located meters from the location is no longer usable. The gas fire burned for weeks and many people were forced to evacuate.

- The result was a large amount of negative press for the Niko family of companies and for the government of Bangladesh as many rumours began to circulate about the fairness of the entire JVA award process.
- Niko Bangladesh (respondent No.4) had still yet to negotiate the GPSA with Petrobangla (respondent No. 2).
- Mr. Qasim Sharif was Niko's in-country agent in Bangladesh until signing of the JVA with BAPEX in October 2003 at which time he became employed by Niko Canada as the President of Niko Bangladesh. Mr. Qasim Sharif described the bribe to former State Minister AKM Mosharraf as a "gift" and "a commonplace part of doing business in Bangladesh" and stated that "these things are done all the time" and "they give these sorts of things in these situations".
- A second major explosion occurred at Tengratila gas field on 24.06.2005.
- Niko Canada agreed to pay a fine of eight million two hundred and sixty thousand Canadian dollars ($8,260,000) plus the 15% Victim Fine Surcharge totaling nine million four hundred ninety nine thousand Canadian dollars ($9,499,000.00).
- It was agreed by Niko Canada that the "fine reflects that Niko Canada made these payments in order to persuade the Bangladeshi Energy Minister to exercise influence to ensure that Niko was able to secure a gas purchase and sales agreement (i.e. the GPSA) acceptable to Niko, as well as to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts, which represented potentially very large amounts of money."

13. The drilling operations of the respondent No.4 in the Chattak gas field, procured through the JVA, caused two massive blowouts leading to substantial damage to the gas fields, the environment, and the health of the people in the surrounding areas. No adequate compensation has yet been paid by the respondents No.4 or No.5 for the 2005 blowouts. On the contrary till the issuance of the Rule and interim order dated 09.05.2016 respondent No.5, through its subsidiary, had been carrying out its operations and businesses in Bangladesh, including the operations of the Block 9 PSC for which it had initially been assessed by Arthur Anderson to be the least qualified bidder.

14. On 16.06.2016 the respondent No.4 filed an application for vacating the interim order dated 09.05.2016. On 24.07.2016 the petitioner filed an application for direction for production of evidence obtained through the Mutual Legal Assistance processes between Bangladesh, Canada, and the United States. On 01.08.2016 the respondent No.4 filed an affidavit-in-opposition to the application of the petition for direction for production of evidence. On 11.08.16 the petitioner filed an application for addition of party of a consultant to the Bangladesh Anti-Corruption Commission (ACC). On 14.08.16 the respondent No.4 filed an affidavit-in-opposition to the application of the petitioner for addition of party. On 30.03.2017 the respondent No.4 filed an application for the discharge of Rule for *res judicata*. On 02.04.2017 the respondent No.1 filed an affidavit-in-opposition against the application for discharging the Rule. On 04.04.2017, the petitioner filed an affidavit-in-opposition against the application for discharge of the Rule. On 07.05.2017 Mr. Moudud Ahmed filed an application for addition of party. On 12.07.2017 the respondent No.1 filed a supplementary affidavit to the affidavit dated 02.04.2017. Through these applications, the petitioner, respondent No.1, and respondent No.4 have all brought to our attention documents and information which are relevant for the disposal of the Rule. All the applications had been kept on the record for disposal at the time of the hearing of the Rule. On 24.08.16 the respondent

No.4 filed an application to treat all its applications as its affidavit-in-opposition contesting the Rule.

15. The respondent No. 1 entered appearance by filing an affidavit-in-opposition to the application for the discharge of the Rule but did not contest the Rule. However, the respondent No.1 brought to our attention important evidence and documents gathered through Mutual Legal Assistance ("MLA") arrangements between Bangladesh, Canada, and the United States. Respondent No. 2 and No.3 did not file any affidavits in opposition contesting the Rule. The respondents No.5 also did not file any affidavit-in-opposition contesting the Rule.

16. The case of the petitioner as set out in the petition, in short, is as follows:

That the respondent No.5, having the least financial or technical capacity of seven bidders in the PSC bid round in 1997, eventually managed to procure the JVA for its subsidiary, respondent No.4,through a non-competitive and non-transparent process by resorting to fraud, bribery, and corruption. In 2011 the respondent No.5 entered into a plea bargain with the Canadian Crown Prosecution and pleaded guilty to providing illegal gratification to Bangladesh State Minister for Energy AKM Mosharraf Hossain to further the business objectives of its subsidiaries. It was admitted that the respondents No. 4 and No.5 gave a motor vehicle as bribe to the then State Minister for Energy. Respondent No.5 also admitted to paying bribes in the form of personal travel expenses for the State Minister for Energy. In exchange of the guilty plea, the Canadian authorities did not pursue the other charges of corruption. The Bangladesh Anti-Corruption Commission ("ACC") has pending criminal cases against several individuals including Mr. Qasim Sharif (the former President of the respondent No. 4), Mr. Salim Bhuiyan (agent for respondent No.4 and No.5), Mr. Giasuddin Al Mamoon (sub-agent for respondent No.4 and No.5), the former State Minister for Energy Mr. AKM Mosharraf Hossain (recipient of the bribes from respondents No.4 and No.5), and former Prime Minister Begum Khaleda Zia. The evidence in the ACC case and the evidence from the Canadian authorities show that the procurement of the JVA and GPSA was through corruption. In January 2005 the respondent No.4 started drilling operations in Chattak and caused two successive blowouts resulting in loss and damage which has now been estimated to be over United States Dollar one billion (US$1,000,000,000). Bangladesh Environment Lawyers Association ("BELA") had filed writ petition No. 6911 of 2005 before this Hon'ble Court seeking a rule, *inter alia*, as to why the JVA should not be treated as being nullity in the eye of law. The facts presented in the writ petition No. 6911 of 2005 dealt with the procedural aspects of execution of the JVA and BELA could not provide any evidence of corruption as the evidence was not available at that time. A judgment dated 17.11.2009 was passed in writ petition No. 6911 of 2005 stating that "Niko cannot avoid its responsibility of giving adequate compensation for the losses caused by two successive blowouts" and that the "Rule succeeds in part" and it was also stated that "Niko is directed to pay compensation money as per the decision taken in the money suit now pending in the Court of the Joint District Judge or as per mutual agreement among the parties. The respondents are restrained by an order of injunction from making any payment to respondent No. 10 (Niko Resources Bangladesh Limited). This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier."

17. In spite of the two successive blowouts in 2005 and despite not giving adequate compensation the respondent No. 4 yet again managed to procure the GPSA through corruption.

18. Following the judgment dated 17.11.2009,which prevented any payments being made to the respondent No.4 till disposal of the pending money suit for compensation for the blowouts, the respondent No. 4 in 2010 filed two arbitration cases against respondents No.2 and No.3 before the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") being ICSID Case Nos. ARB/10/11 and ARB/10/18seeking payment for the gas supplied from Feni gas field and a declaration of non-liability of respondent No.4 (Niko Bangladesh)for the 2005 blowouts at the Chattak gas fields. On 19.08.2013 the ICSID tribunals issued a Decision on Jurisdiction where it relied on the judgment in writ petition No. 6911 of 2005 dated 17.11.2009 to conclude that there was no impropriety in the procurement of the JVA or GPSA. In paragraph 404 of the Decision on Jurisdiction the ICSID tribunals noted that a witness for the respondent No. 4referred to the BELA proceedings (i.e. writ petition No. 6911 of 2005) stating that the case concluded "that the contracts (i.e. the JVA and GPSA) were awarded properly and that they are valid". Surprisingly, he was not contradicted by the respondents No. 2 and No.3 or their witnesses.

19. At the outset, Mr. Tanjib-ulAlam, learned Advocate, appearing on behalf of the petitioner, submits that no evidence of corruption was produced before the ICSID tribunals by the counsel of the respondents No.2 and No.3 at the time of issuance by the ICSID tribunals of a Decision on Jurisdiction dated 19.08.2013 and by this inaction the respondents No.2 and No.3 have acted against the public interest of Bangladesh with the *mala fide* intention of conferring undue benefits to the respondent No.4.

20. The petitioner further submits that respondent No. 5, which committed the acts of corruption in Bangladesh, has continued to own and retain 60% of the interest in the Block 9 PSC gas field operated by Tullow Bangladesh Limited for which it had been declared to be the least qualified, both financially and technically, of all seven bidders assessed by the Arthur Anderson report dated 28.09.1997 submitted to the respondent No.2. The respondent No. 5, through Tullow Bangladesh Limited, continued to receive payments from respondent No. 2 despite not having paid the adequate compensation for the 2005 blowouts till these payments were stopped by the Rule and interim order dated 09.05.2016.

21. Mr. Tanjib-ulAlam submits that admittedly the respondents No. 4 and No.5 have committed acts of corruption in the procurement of the JVA and GPSA. The procurement of the JVA and GPSA, through bribery and corruption, renders the JVA and GPSA void *ab initio* under section 23 of the Contract Act. He submits that the respondents should not be allowed to give effect to the JVA and GPSA procured through corruption since "an opportunity to carry on a business dishonestly is barred under section 23 of the Contract Act in as much as the same is opposed to the public policy particularly when the transaction is with the Government" as observed by the Appellate Division of the Supreme Court of Bangladesh in *Ummu Kawsar Salsabil v Shams Corporation (Pvt) Ltd. &Ors*, 5 BLD (AD) 263 (1985).

22. Mr. Tanjib-ulAlam submits that the admitted facts show that the respondent No. 4 and respondent No.5 have violated a number of provisions of the Penal Code including offences related to public servants under sections 161-165, abatement under sections 107-119, criminal conspiracy under section 120, as well as offences under section 5 of the Prevention

of Corruption Act, 1947.The US Dollar four million (US$ 4,000,000)Consultancy Agreement between Stratum and respondent No.4 admittedly was aimed to facilitate the payment of gratification to Bangladesh Government officials. Furthermore, under the Nationwide Agreement, Mr. Salim Bhuiyan was admittedly paid US$ five hundred thousand (US$ 500,000) by respondents No.4 and No.5 as gratification for his exercise of influence over Bangladeshi Government officials. The US$4 million Consultancy Agreement, under which US$ 2.93 million was paid on 21.10.03 i.e. five days after the execution of the JVA dated 16.10.03,is admitted by Niko to have been used for making a payment of US$500,000 to Mr. Salim Bhuiyan for his influence and ability to obtain meetings with Bangladeshi Government officials. These admissions by the respondent No. 4 of payments to Stratum (owned by Mr. Qasim Sharif) and then to Mr. Salim Bhuiyan are admitted facts which taint the JVA and GPSA with corruption and render them void *ab initio*. In addition, the Stratum Management Contract clearly violated sections 161-165 of the Penal Code since it expressly stated that the respondent No. 4 would pay Stratum for "payments made to expedite or secure the performance" by Bangladesh public officials for "issuance of permits or licenses required for" the Niko Project. Respondent No.4 admits that these payments were made and banking records show that US$ 2.93 million out of the $5 million was paid 5 days after the execution of the JVA. Furthermore, the agreement with Nationwide (owned by Mr. Salim Bhuiyan) constitutes violation of section 163 of the Penal Code since Mr.Bhuiyan obtained the payment of US$500,000from Niko for his exercise of "personal influence" over Bangladeshi Government officials. Respondent No.4blatantly admits to paying US$500,000 immediately after the JVA for Mr. Bhuiyan's influence and ability to arrange meetings with Bangladeshi Government officials which enabled the JVA to be procured.

23. Mr. Tanjib-ul Alam submits that there is no *res judicata* of the present petition with the pending ICSID cases or the previous writ petition No. 6911 filed by BELA. This petition arises from a different cause of action and there is no uniformity of parties. The parties in the present writ petition are not the same parties before the pending ICSID arbitration cases, in particular respondent No.5 (which admitted to the acts of corruption) is not a party to the ICSID proceedings and neither is respondent No.1. In addition, there is no *res judicata* since the ICSID tribunals have not issued any final award or judgment. There is also no *res judicata* of the present petition with the previous judgment in writ petition No. 6911 of 2005 since that judgment did not look into the issue of corruption and BELA did not produce any evidence of corruption. BELA tried to show that the process of granting of the exploration rights in Chattak East, which was not a marginal/abandoned field, to Niko under the JVA was improper since the process was non-transparent and without any competitive bidding. However, without any evidence of corruption, it was not possible to reach the conclusion that the JVA was executed in bad faith, through misuse of power, or in an improper manner rendering the JVA illegal and without any legal effect.

24. Mr. Tanjib-ul Alam next submits that the respondent No.4 has argued before the ICSID tribunals that those tribunals do not have the power to carry out judicial review of Bangladesh Government actions under Article 102 of the Bangladesh Constitution. Thus, respondent No.4 cannot at the same time argue that the Bangladesh Supreme Court should also not exercise its powers of judicial review. Such a position is not maintainable since that would mean, in this case, no court or tribunal would have the power to review the *ultra vires* exercise of government authority tainted by corruption. The judicial review powers of the Bangladesh Supreme Court also cannot be exercised by the ICSID tribunals since they have no powers to freeze or confiscate the proceeds of crime that are now being enjoyed by the respondents No.4 and No.5 in Bangladesh. ICSID tribunals may only issue a pecuniary award

and cannot punish corruption or declare invalid the unlawful exercise of executive powers. The proper and effective forum for the determination of issues such as unlawful exercise of executive authority tainted by bribery and corruption of Bangladesh Government officials is the Bangladesh Supreme Court applying Bangladeshi law under Article 102 of the Bangladesh Constitution. In other words, the ICSID tribunals do not provide an equally efficacious remedy to the remedy provided under Article 102. In particular, the petitioner, respondent No.1, and respondent No. 5 (which admitted to acts of corruption) are not parties before the ICSID arbitration tribunals. The ICSID arbitration cases only relate to "investment disputes" which form the subject matter of such claims and only apply to parties to the dispute, i.e. Niko Bangladesh Limited (respondent No.4), BAPEX (respondent No.3), and Petrobangla (respondent No.2). ICSID has no jurisdiction over Niko Canada (respondent No.5) which has admitted to corruption before the Canadian courts or the Bangladesh Government officials who issued the *ultra vires* instructions to enter the JVA and GPSA. Thus, the pending ICSID arbitration cases have no effect on the constitutional powers exercised under Article 102 of the Bangladesh Constitution to judicially review *ultra vires* government actions tainted by corruption. The ICSID tribunals' decisions, as opposed to awards, are also not binding on national courts of any sovereign country exercising constitutional powers. Even ICSID awards are not final since they can be stayed and are subject to review or annulment proceedings.

25. In the affidavit in opposition dated 02.04.2017 the respondent No. 1 has produced substantial evidence of corruption gathered by Bangladesh through Mutual Legal Assistance (MLAs) requests between the Royal Canadian Mounted Police (RCMP) in Canada, the Federal Bureau of Investigation (FBI) in the United States, and the Anti-Corruption Commission (ACC) in Bangladesh. The investigation of the corruption of respondent No.4 and No.5 was initiated by the Canadian law enforcing authorities in 2005. The initial RCMP investigation began in June 2005 after an official from Canada's Department of Foreign Affairs and International Trade (DFAIT) alerted RCMP to the possible violations of the Canadian Corruption of Foreign Public Officials Act by respondents No.4 and No.5. The RCMP started investigation and had sent a letter of request to Bangladesh for investigation and legal assistance. That investigation was joined by the United States Department of Justice, through the FBI, since one of the prime actors in the corruption scheme, Mr. Qasim Sharif, was a U.S. citizen and transferred a large part of the proceeds of crime to the United States. The ACC has charged several individuals in criminal cases under the laws of Bangladesh for offences committed in Bangladesh. The criminal trials are ongoing and so is the international co-operation of the law enforcing authorities in Bangladesh, Canada, and the United States to bring the criminals to book.

26. Mr. Mahbubey Alam, learned Attorney General, appearing on behalf of the respondent No.1 submits the evidence of corruption that has been produced before us has to be given due consideration. He submits that a conclusive case has been established from the evidence that show that respondents No.4 and No.5 obtained the JVA and GPSA through corruption. He submits that the international investigation conducted by various law enforcing agencies discovered that respondent No. 4 had entered into a Consultancy Agreement with Stratum Development Limited and agreed to pay United States Dollar four million within 15 days of execution of the JVA. Another Management Services Contract dated 01.10.2003 was signed between respondent No. 4 and Stratum fifteen days before the JVA was executed under which respondent No.4 agreed to pay a monthly fee of US$20,000 for payment of bribes to Bangladesh Government officials which is described in paragraph 6 of the Management Service Contract as "payments made to expedite or secure the

performance by a foreign (i.e. Bangladeshi) public official of any act of a routine nature that is part of the foreign public official's duties or functions, such as issuance of permits or licenses" required for the projects of the respondent No.4 and respondent No.5 in Bangladesh.

27. Mr. Mahbubey Alam submits that the head of the RCMP investigation, Corporal Duggan, concluded that Niko, through Mr. Salim Bhuiyan, had agreed to pay to Mr. Giasuddin Al Mamoon, a friend of Mr. Tarique Rahman, son of the former Prime Minister Khaleda Zia, "$1million if he helped ensure the success of the JVA". Once the JVA was executed Mr. Qasim Sharif (President of Niko Bangladesh) arranged for part payment totaling Taka three crore (approximately US$ 500,000) into the Standard Chartered Bank account of Mr. Salim Bhuiyan who also had "political clout" with the State Minister for Energy Mr. AKM Mosharraf Hossain. The RCMP conducted interviews of Mr. Mamoon during 01.11.2008 and 02.11.2008 during which Mr. Mamoon admitted that Mr. Qasim Sharif of Niko offered him $1 million for assisting Niko's projects in Bangladesh. Mr. Mamoon also stated that fifty percent of his power is because he is the "friend of Tarique Rahman". Mr.Mamoon admitted that the pay order dated 07.01.2004 for Taka one crore eight lac (Tk. 10,800,000) received by him from Mr. Salim Bhuiyan was part payment for his assistance for the Niko projects. On 15.01.2008 Mr. Salim Bhuiyan provided a statement by which he admitted that he acted as middleman to facilitate cash payments from Mr. Qasim Sharif of Niko to Mr. AKM Mosharraf Hossain, former State Minister for Energy and Mr. Giasuddin Al Mamoon. After procurement of the JVA Mr. Qasim Sharif paid Mr. Salim Bhuiyan 3 crore taka into his Standard Chartered Bank in Gulshan. From that money Mr. Bhuiyan paid Mr. Mamoon Taka one crore eight lac taka by pay order and additional Taka seventy two lac by cash. He also paid Taka sixty lac to then State Minister for Energy Mr. AKM Mosharraf Hossain and retained the remaining Taka sixty lac taka for himself.

28. Mr. MahbubeyAlam further submits that the trail of bribe payments has been traced by the RCMP, FBI, and the ACC all the way from Niko Canada, to Niko Caymans Island, to Niko Barbados's First Caribbean International Bank, to Stratum Development Limited's Union Bancaire Privée (UBP) account in Switzerland, to Mr. Salim Bhuiyan's Standard Chartered Bank account, and finally to Mr. Giasuddin Al Mamoon and the State Minister for Energy Mr. AKM Mosharraf Hossain.

29. Mr. Mahbubey Alam finally submits that there were also payments to the then Law Minister Mr. Moudud Ahmed which were discovered by the law enforcing authorities. Mr. Moudud Ahmed had provided a legal opinion that Chattak East was a marginal/abandoned field based on which the JVA was granted to the respondent No.4 while at the same time "Moudud Ahmed and Associates" was acting a legal advisor to respondent No. 4 and provided a similar opinion. Law enforcing officers discovered that respondent No.4 made payments of US$6,065 to Moudud Ahmed on 12.10.2000 and another payment of US$ 8,315 on 15.01.2002.

30. Mr. Rokanuddin Mahmud, appearing on behalf of respondent No. 4 submits first and foremost that there are currently two ICSID arbitration cases pending where the ICSID tribunals are looking at the corruption issue. Bangladesh is a party to the ICSID Convention and has international obligations under the ICSID Convention which should be taken into consideration before proceeding with the matter. Mr. Mahmud submits that the ICSID tribunals have issued a decision declaring their exclusive jurisdiction over the validity of the JVA and GPSA and decisions of ICSID tribunals have the same binding effect as a judgment

of the Appellate Division of the Supreme Court of Bangladesh due to operation of Article 53 and Article 54 of the ICSID Convention.

31. Mr. Mahmud then submits that the Rule suffers from *res judicata* since the same issue had been previously decided in the writ petition No. 6911 of 2005. The Rule was made absolute in part by judgment and order dated 17.11.2009 where the Hon'ble High Court Division held that "we do find that the JVA was not obtained by flawed process by resorting to fraudulent means". As such the same issue cannot be agitated over and over and there is no scope of revisiting the same issue of the validity of the JVA which has been settled in writ petition No. 6911 of 2005.

32. Mr. Mostafizur Rahman Khan also appearing on behalf of the respondent No. 4, firstly submits that the Rule has become infructuous. The respondent No.4 in its affidavit in opposition states that the writ petition was filed on 09.05.2016 on the essential allegation that the respondents No.1-3 (i) failed to treat the JVA and GPSA as void *ab initio* on account of having been procured through corruption, (ii) failed to seek adequate compensation from respondents No.4 and No.5 for losses caused by two successive blowouts in 2005 and (iii) continued to make payments to Respondent No.5 circumventing the judgment and order in writ petition No. 6911 of 2005. Mr. Khan submits that before the writ was field on 09.05.2016, respondents No.3 had filed a Memorial on Damages on 25.03.2016 before ICSID tribunals in ICSID Case Nos. ARB/10/11 and ARB/10/18 seeking, *inter alia*, a declaration that respondent No. 4 procured the JVA through alleged corruption, dismissal of all of the respondent No.4's claims, and compensation for losses for the blowouts to the tune of US$118 million for the respondent No.3 and US$896 million for respondent No.1 along with between US$8.4 million to 8.6 million for survey, etc. of environment and health related loss. The respondent No.1 and No.2 also filed Money Suit No. 224 of 2008 now pending in the Court of the 1st Joint District Judge, Dhaka against the respondent No.4, two of its officers, and the contractor engaged by respondent No.4 to control the blowouts seeking compensation of an amount of Tk. 746,50,83,973. Mr. Khan submits that the ICSID tribunals have already held hearings on the issue of corruption and, based on his experience with previous decisions issued, a decision on the corruption issue from the ICSID tribunals is expected within a couple of months.

33. Mr. Khan's next submission is that the allegations of fraud and corruption raised in this writ petition are disputed questions of facts. He states that only the admitted facts can be relied upon. The allegations in the charge sheet of the ACC and the allegations of the RCMP in Corporal Duggan's affidavit cannot be relied upon as evidence of the crime of corruption. They are merely investigation materials which cannot be treated as evidence of corruption.

34. Mr. Khan further submits that the retracted confessional statement of Mr. Salim Bhuiyan, or RCMP's video interview of Mr. Giasuddin Al Mamoon cannot be relied upon as evidence of corruption against the respondents No.4 and No.5 without giving them the opportunity to cross-examine Mr. Bhuiyan and Mr. Mamoon. These statements thus also cannot be proof of evidence of corruption.

35. Mr. Khan also submits that the disposal of the writ at this time will be premature. He submits that the Rule should be made absolute after the ICSID tribunals issue a decision on the corruption issue and at the time of the enforcement of a final ICSID award before the Bangladesh courts. He further submits that the Rule should also be made absolute only after the trials in the pending criminal cases, initiated by the ACC concerning the alleged

corruption in the Niko project, have been completed. If the ICSID tribunals find corruption and if the Bangladesh criminal courts find corruption then the High Court Division of the Supreme Court will be able to give a final judgment on the corruption issue. The writ petition should be held in abeyance till then, since, otherwise there may arise conflicting judgments from different courts.

36. Mr. Khan makes a submission that even if the allegations of corruption are accepted, the trail of money stops at Mr. Giasuddin Al Mamoon. He argues that Mr. Salim Bhuiyan and Mr. Mamoon were both businessmen and the payments made from Mr. Salim Bhuiyan to Mr. Mamoon could be for some other business instead of the Niko projects. He claims that there is no evidence of direct payment to a Bangladesh public official from Niko. The evidence of payments to State Minister AKM Mosharraf Hossain by Mr. Salim Bhuiyan is only in the charge sheet and in Mr. Salim Bhuiyan's confessional statement which has subsequently been retracted.

37. Mr. Khan then submits that the Agreed Statement of Facts only related to the 2005 period but the JVA was signed on 16.10.2003. There is no agreed statement in relation to the procurement of the JVA and as such the admitted acts of corruption would not invalidate the JVA. Respondents No.4 or No.5 have never admitted to any corruption in relation to the JVA. He further notes that in the Agreed Statement it is admitted that Niko Canada (respondent No.5) made the payment to the Bangladeshi Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement (GPSA) acceptable to Niko, as well as to ensure that Niko was dealt fairly in relation to claims for compensation for blowouts. Mr. Khan admits to the payment to the Energy Minister for the GPSA but argues that the invalidity of the GPSA cannot affect the validity of the JVA since they are two separate contracts. He then submits that even though it is admitted payments were made to the State Minister for Energy the Canadian Crown prosecution was unable to prove that any influence was obtained as a result of providing the benefits to the Minister. He submits that the GPSA was obtained in 2006 and not during the 2005 period for which respondent No.5 has admitted to the corruption. Thus, there is no causal link between the 2005 corruption and the GPSA in 2006.

38. Mr. Khan's final submission is that the JVA and GPSA are commercial contracts entered into by respondent No. 3 and respondent No.2 respectively as corporate entities. These contracts are not sovereign contracts entered into by the State of Bangladesh and thus they cannot be the subject of judicial review.

39. Mr. Tanib-ul Alam, in reply, submits that the issue in the writ petition is in essence the validity of the Government's decision to award the JVA and GPSA. The rendering of the JVA and GPSA void *ab initio* is ancillary to the finding that the exercise of the Government powers was procured by corruption and *ultra vires*. In addition, since the JVA and GPSA were approved by the Government and could not have been executed without Government approval there is no scope of treating them merely as commercial contracts. In addition, the ICSID tribunals have recognized that they have no powers over third parties or the courts of Bangladesh exercising jurisdiction even in the ICSID tribunals' own decision. The jurisdiction of the ICSID tribunals in this case is purely based on contract and the state of Bangladesh is not a party to the pending ICSID arbitration cases. Public law issues such as corruption and judicial review of Government actions tainted by corruption are strictly speaking outside the ambit of these ICSID arbitration cases and the jurisdiction of the ICSID tribunals, especially since the contracts containing the arbitration clauses are void *ab initio*

and thus never existed. For this reason, the ICSID tribunals should defer to the Supreme Court of Bangladesh's findings in this writ petition. Corruption goes to the root of the contracts and renders the arbitration clauses in the contracts null and void, leaving the ICSID tribunals without any jurisdiction.

40. Mr. Tanjib-ul Alam further submits that Article 53 and Article 54 of the ICSID Convention does not support the submissions of the respondent No.4 that a decision of an ICSID tribunal has the same binding effect as a judgment of the Appellate Division of the Supreme Court of Bangladesh. If the JVA and GPSA are void *ab initio* then the pending ICSID arbitration cases are without any legal basis and enforcement of any eventual ICSID award would be against the public policy of Bangladesh.

41. Mr. Tanjib-ul Alam submits that the respondents No.4 and No.5 in their submissions, as well as in the Agreed Statement, have admitted that bribes were paid for obtaining the GPSA. They also admit to the charge that they paid bribes to retain their investments in Bangladesh, which must refer to the retention of the JVA. Niko admits that it arranged for trips to Canada for Mr. AKM Mosharraf Hossain who was accompanied by Mr. Salim Bhuiyan. Niko also admits that Mr. Salim Bhuiyan's function was to arrange meetings with Bangladeshi Government officials by using his social status for which he was paid US$500,000. It is admitted that it was Mr. Salim Bhuiyan who was effective in breaking the deadlock regarding Chattak East and granting the JVA to the respondent No.4 through the use of his influence and abilities. This admission alone constitutes violations of sections 162 and 163 of the Penal Code. The submission of the respondent No.4 that the trail of money stops at Mr. Giasuddin Al Mamoon does not help the respondent No.4 since direct payment to Government officials is not required for corruption. In any event everyone in Bangladesh knows what power Mr. Giasuddin Al Mamoon wielded during the period concerned. Adverse inferences can easily be drawn from payments during that period to a politically influential person such as Mr. Mamoon. Most importantly, during none of the submissions made by the respondent No.4 has corruption been denied and no evidence has been produced to rebut the substantial evidence of corruption that has been produced.

42. Mr. Tanjib-ul Alam finally submits that just rendering the JVA and GPSA void *ab initio* will not suffice to compensate Bangladesh for the loss and damages caused by the blowouts in 2005. The assets of respondent No.5, which instigated, abetted, and perpetrated the corruption to obtain and retain its investments in Bangladesh, has to be seized. These assets include the shareholding interests of respondent No.5 in Tullow Bangladesh Limited concerning Block-9 PSC which should be attached and seized as proceeds of crime as well as to provide adequate compensation for the 2005 blowouts.

43. We have considered the submissions of the learned advocate for the petitioner Mr. Tanjib-ul Alam, the learned Attorney General Mr. Mahbubey Alam, and the learned Advocates for the respondent No. 4 Mr. Rokanuddin Mahmud and Mr. Mustafizur Rahman Khan. We have also perused the writ petition, applications, and affidavits in opposition filed by the parties, perused the relevant annexures annexed thereto, and considered the legal authorities and texts provided.

44. The point for adjudication in the instant writ petition is whether during the period 2003 to 2006, the respondent No.4 and No.5 had set up a corrupt scheme for obtaining benefits from the Government of Bangladesh and was able to procure the Joint Venture

Agreement (JVA) and Sale Agreement for the Sale of Gas from Feni Gas Field (GPSA) through corrupt and fraudulent means.

45. The Constitution of Bangladesh entrusts the Executive branch of the Government with the sacred duty of the guardianship and management of State properties. In exercise of this function the Government officials have to exercise their executive powers with integrity, honesty, transparency, accountability, and, most importantly, in public interest. The Executive has constitutional powers to enter into or award public contracts but all such powers must be exercised in public interest only and cannot be influenced by extraneous factors such as illegal gratifications or personal benefits. If the exercise of Executive powers is tainted by extraneous factors such as personal benefits or gratifications, or procured through fraud and corruption, then such actions are *ultra vires* and liable to be declared to be done without lawful authority and of no legal effect, i.e. void *ab initio*. Any contract arising from the *ultra vires* exercise of Government power is liable to be declared void *ab initio*.

46. It is admitted that the JVA and GPSA were in fact granted to the respondent No.4 without any competitive bid in a non-transparent manner. Open competition and transparency are means of ensuring the public contracts are given to the best qualified person, at the best price, and not for the personal benefits of vested quarters. It appears that in this situation the entire processes of the granting of the JVA and GPSA to the respondent No.4 were tainted by clandestine consultancy agreements, illicit payments of exorbitant consultancy fees, and illegal gratifications being paid to Government officials and politically influential persons. In 1997 the respondent No.5 had been assessed to be the least qualified bidder and thus failed to qualify in the competitive bids conducted for granting of gas fields through Production Sharing Contracts, including Block 9 PSC. The respondentNo.5 then decided to enter the Bangladesh energy market through the back door by using so-called consultancy agreements by which it agreed to make illegal payments of gratifications to Bangladesh Government officials. It is shocking that the President of respondent No. 4, Mr. Qasim Sharif, who also acted as a conduit for payment of gratification to Government officials and politically influential persons in Bangladesh, would be quoted in the Agreed Statement by respondent No. 5 as stating that the payments of bribes to the then State Minister for Energy was to obtain and retain business interests and such a payment of bribe was "a commonplace part of doing business in Bangladesh" and a "cost of doing business". Even if bribery is considered commonplace it does not make it legal nor can it be considered a legitimate cost of doing business.

47. Corruption is a menace that must be eradicated and cannot ever be condoned under any circumstance. The Appellate Division of the Bangladesh Supreme Court has clearly observed in ***Abdul Mannan Khan vs. Government of Bangladesh***, Civil Appeal No. 139 of 2005 along with Civil Petition for Leave to Appeal No. 596 of 2005 paragraphs 1419:

> "If there is any natural stigma on our nation, it is corruption … In fact, corruption is taking the shape of a menace; all development works are being hindered because of corruption for which good governance is also suffering a setback. Because of corruption, the bulk of the poor people of the country are deprived of their due share in the development of the country. And we all should create social awareness against corruption as well as put resistance against corruption".

48. Government contracts procured for the benefit of private parties through bribery and corruption are clearly against the "public policy" of Bangladesh and such contracts are rendered without lawful authority, of no legal effect, and void *ab initio*. Corruption, being a

public policy issue, is not something that can be confirmed or condoned by a court as it is forbidden by law and is a crime. Contracts granting rights over properties of the State which have been procured by corruption, and benefits derived from such corruptly procured public contracts are to be treated as "proceeds of crime" and liable to be confiscated and returned back to the State. In ***Biswanath Bhattacharya vs. Union of India*** (UOI) AIR2014SC1003, the Supreme Court of India discussed the confiscation of proceeds of crime:

> "41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth."

49. The scheme of corruption set up by the respondents No. 4 and No.5 during 2003-2006 was for the payment of hidden consultancy fees amounting to millions of dollars received in Swiss bank accounts of companies incorporated in offshore jurisdictions, for the layering of those clandestine payments though different companies in offshore places such as Barbados and Cayman Islands, and for eventual payments of illegal gratification to politically influential people for their ability to "obtain and arrange" meetings with Bangladeshi Government officials, as was admittedly done by Mr. Salim Bhuiyan, or to "assist in the execution" of the JVA by making payments to Bangladeshi Government officials to "expedite and secure" the performance of official duties of Government officers, as was admittedly done by Mr. Qasim Sharif. Under the laws of Bangladesh this set up of the respondents No.4 and No.5 cannot be treated as anything other than a scheme for bribery and corruption. This scheme has been unearthed by the international law enforcing authorities in Canada, United States, and Bangladesh acting in close co-operation for the purposes of fighting the global menace of corruption.

50. The respondent No.4 has submitted that the Rule has become infructuous since the Respondents No.2 and No.3 has already taken steps against the Respondent No.3 and brought claims before the ICSID Tribunal and in a money suit claiming compensation for the blowouts. This submission is somewhat misconceived. The Rule has three parts - (i) why the JVA should not be declared to be void *ab initio;* (ii) why the GPSA should not be declared to be void *ab initio* and (iii) why the assets of respondents No.4 and No.5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 PSC should not be attached and seized to provide adequate compensation for the 2005 blowouts. Neither the pending ICSID arbitration cases nor the money suit offers an equally efficacious remedy to the remedy of a writ jurisdiction. Under Article 102 (2) (ii), if we are satisfied that no other equally efficacious remedy is provided by law, on the basis of an application of any person aggrieved, we may make an order declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic, has been done or taken without lawful authority and is of no legal effect. The respondent No.4 itself argued before the relevant ICSID tribunals that ICSID does not have the power to carry out judicial review of Bangladesh Government actions as exercised by us under Article 102 of the Bangladesh Constitution. Respondent No.4 cannot at the same time argue that we should also not exercise our powers of judicial review. We agree that the respondent No.4 cannot be allowed to blow hot and cold at the same time. The position of the respondent No.4 is not maintainable since that would lead to an unacceptable situation where no court or tribunal would have the power to review the *ultra vires* exercise of government authority tainted by corruption. The judicial review powers of the Bangladesh Supreme Court also cannot be exercised by an ICSID tribunal since ICSID tribunals have no powers to seize the proceeds of

crime being enjoyed by the respondents No.4 and No.5 in Bangladesh. ICSID tribunals may only issue a pecuniary award but cannot punish corruption or declare invalid unlawful exercise of executive powers. The proper forum for the determination of issues such as unlawful exercise of executive authority tainted by bribery and corruption of Bangladesh Government officials is the Bangladesh Supreme Court applying Bangladeshi law under Article 102 of the Bangladesh Constitution. ICSID tribunals may benefit from our finding and there does not need to be any conflict since we are not infringing on the jurisdiction of the ICSID tribunals. However, it may be noted that the corruption and illegality is at the heart of the contracts containing the arbitration agreements. If enforcement of any final arbitral award is sought in Bangladesh the Bangladeshi courts, at the time of making a decision whether to enforce an award arising from such contracts, would have to balance the public policy considerations of giving effect to the illegal contracts with the public policy consideration of recognizing the finality of ICSID arbitral awards. Regarding the third part of the Rule, it is clear that respondent No.5 (Niko Canada), the parent company which actually pleaded guilty to acts of corruption in Bangladesh and which initiated the corruption scheme, is not even party to the pending cases before the ICSID tribunals. The ICSID tribunals have no powers over the assets of respondent No.5 in Bangladesh. For these reasons, we cannot agree with the respondent No.4 that the Rule is infructuous.

51. The respondent No.4 also submits that the allegations in the writ petition are disputed questions of facts. We are of the view that we do not need to rely on any disputed question of fact in this situation since, in addition to admitting to making payments of bribes to the then State Minister for Energy AKM Mosharraf Hossain for obtaining and retaining business interests in Bangladesh for its subsidiaries, the respondent No.4brazenly admits to making payments of over US$ 4 million to Mr. Qasim Sharif and US$ 500,000 to Mr. Salim Bhuiyan for their services in making "payments to Government officials" and for "arranging meetings with Government officials". Despite the many layers used to hide the payments and the channeling of these payments through numerous offshore bank accounts, the law enforcing agencies in Bangladesh, Canada, and the United Stated must be commended for their united and effective work in tracing the trail of the corrupt payments from Niko Canada (respondent No.5), through Barbados bank of respondent No.4, then through Swiss bank account of Niko's agent and President Mr. Qasim Sharif, to Mr. Salim Bhuiyan, and finally to the eventual recipients in Bangladesh. Having been caught red handed the respondent No.4 attempts to classify these corrupt payments as legitimate consultancy fees paid for services such as arranging meetings with Government officials and payments to expedite the performance of official functions. These payments are clearly illegal under the laws of Bangladesh. If these kinds of payments were permitted by law, then there would have been no way of checking corruption. All payments of bribes would have been packaged as payment of consultancy fees.

52. Regarding the submission of the respondent No.4 that some of the evidence cannot be relied upon because the respondent No.4 has not been allowed to cross-examine Mr. Giasuddin Al Mamoon, Mr. Salim Bhuiyan, or Corporal Duggan, who all made statements adverse to respondent No.4, we are of the view that it is not necessary for us to rely on these statements since there are other undisputed facts and evidence such as bank records, contracts for payments to Government officials, and the own admissions of respondent No.4 that establish the entire chain of corrupt payments. Furthermore, we have noted the admissions of the respondents No. 4 and No.5 regarding the payments made in 2005 to State Minister AKM Mosharraf Hossain in order to get the GPSA as well as in 2003 to Mr. Salim Bhuiyan for arranging meetings for procurement of the JVA. The undisputed facts and the undisputed

documentary evidence is adequate for us to reach the inevitable conclusion that the JVA and GPSA were procured by corruption, through the set up of a corrupt scheme during the period 2003 to 2006, thus rendering the JVA and GPSA without law authority and of no legal effect, i.e. *void ab initio*.

53. We also cannot agree with the argument of the respondent No.4 that the disposal of the writ petition is premature and that we have to wait for the pending ICSID cases and the criminal cases to finish before we may dispose the Rule. Regarding the pending criminal cases, we are not getting into the merits of the allegations against the individuals concerned since that is the task of the criminal court where ACC's criminal case is pending. Mr. Mahbubey Alam, the learned Attorney General has submitted that payments were made to Mr. Moudud Ahmed while he was holding the office of the Law Minister and issued a legal opinion for his former client, Niko. The alleged conflict of interest for Mr. Moudud Ahmed, in issuing a legal opinion as Law Minister in favour of a former client, and then also receiving payments into his bank account from that client, is for Mr. Ahmed to answer in the pending criminal case. Similarly, allegations of the payments received by the other accused including Mr. AKM Mosharraf Hossain, Mr. Qasim Sharif, Mr. Salim Bhuiyan, and Mr. Giasuddin Al Mamoon are for them to defend in the pending criminal case where the standard of proof is beyond reasonable doubt, the burden of proof is on the prosecution, and the witnesses and accused can all be cross-examined. We find no merit in the argument that a writ petition challenging the improper use of Executive powers has to wait for a pending criminal case against the Government officials who have also been criminally charged for criminal misconduct arising from the same facts. If that argument was valid then the ICSID tribunals would also have to wait till completion of the criminal cases till making any finding of corruption. The finding of corruption is not the exclusive domain of the criminal courts or arbitral tribunals, though only criminal courts may impose criminal sanctions.

54. We also find no merit in the argument that a writ petition has to be kept in abeyance till the arbitration cases concerning investment disputes, between respondent No.4 on one side and respondent Nos. 2 and No.3 on the other, are completed. Article 102 grants us the power and duty to declare void *ab initio* any public contract or project obtained by the abuse of power, bribery, and corruption. The clearly admitted facts, along with the undisputed documents showing the trail of payments, and Niko's own admissions of making payments of "consultancy fees" to agents to influence Bangladesh Government officials establish the fact of corruption which would render the JVA and GPSA void *ab initio*. We are of the view that respondent No.4 and No.5 clearly engaged in corruption. We also note from the ICSID tribunals' decision on jurisdiction that the ICSID tribunals relied on the judgment in writ petition No. 6911 of 2005 to find jurisdiction, when no evidence of corruption was produced either before the ICSID tribunals or the High Court Division Bench issuing the judgment in writ petition No. 6911 of 2005. We trust the ICSID tribunals would similarly find our findings and observations in this writ petition useful and give it due regard, particularly since the validity of the JVA and GPSA are governed by the laws of Bangladesh.

55. The respondent No.4 has taken us through the decision of the ICSID tribunals regarding their exercise of exclusive jurisdiction dated 19.07.2016. The respondent No.4 has also noted that Bangladesh is a party to the ICSID Convention and thus all organs of the state of Bangladesh, including national courts, are bound by that decision on exclusive jurisdiction dated 19.07.2016. The respondent No.4 points to Article 54 of the ICSID Convention as the basis for making their argument. Article 54(1) of the ICSID Convention states:

> "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

56. Mr. Khan has referred to Article 54 of the ICSID Convention to argue that the decision dated 19.07.2016, issued after the issuance of the Rule on 09.05.2016, is binding on us as an organ of the State of Bangladesh. Mr. Mahmud has also referred to Article 54 of the ICSID Convention to submit that the decision dated 19.07.2016is to be treated as a final judgment of the Appellate Division of the Supreme Court of Bangladesh. However, these arguments appear misconceived and misleading for a number of reasons. The ICSID tribunals do not provide an equally efficacious remedy as that provided under Article 102 of the Constitution of Bangladesh. In particular, the petitioner, respondent No.1 (Ministry of Energy and Mineral Resources) and respondent No. 5 (Niko Canada, which pleaded guilty to acts of corruption in Canada) are not before the ICSID tribunals. The ICSID arbitration cases only relate to "investment disputes" which forms the subject of such claims and only apply to parties to the dispute, i.e. Niko Bangladesh Limited (respondent No.4), BAPEX (respondent No.3), and Petrobangla (respondent No.2). ICSID has no jurisdiction over Niko Canada (respondent No.5) which has admitted to corruption before the Canadian courts or the Ministry of Energy (respondent No.1) which issued the *ultra vires* instructions to enter the JVA and GPSA. Thus, the pending ICSID arbitration cases have no effect on our constitutional right and duty to judicially review *ultra vires* government actions tainted by corruption. A leading commentator on ICSID, Christopher Schreuer, states in his book, The ICSID Convention: A Commentary, 2nd Edition, Cambridge University Press:

> "The binding nature of the [ICSID] award is inherent in the concept of arbitration. It is often expressed in terms of *res judicata.* Since arbitration is based on an agreement between the parties and this agreement includes a promise to abide by the resulting award, the award's binding force is based on the maxim *pactasuntservanda* (p. 1099, para 10)
>
> Consent to [ICSID arbitration] by a constituent subdivision or agency [such as respondent No. 2 or No.3] of a State does not amount to consent by the host state itself (see Art. 25, paras. 311-318). Since it is the constituent subdivision or agency that is party to the proceeding under these circumstances, the effect of the [ICSID] award's binding force under Art. 53 would be upon that entity. The host state, not being a party to the proceeding, would not be subject to obligation under Art. 53 [of the ICSID Convention]. (p. 1100, para 14)
>
> Only final awards under the [ICSID] Convention (see Art. 48, paras. 22-30) are subject to recognition and enforcement. Decisions preliminary to awards such as decisions upholding jurisdiction under Art. 4, decisions recommending provisional measures under Art. 47, and procedural orders under Art. 43 and 44 are not awards. They are not by themselves subject to recognition and enforcement (p. 1125, para 30).
> …
> The obligation to enforce extends only to the pecuniary obligations imposed by the award. It does not extend to any other obligation under the award such as restitution or other forms of specific performance or an injunction to desist from certain course of action (p. 1136, para 72).

57. It is clear that the decision dated 19.07.2016, issued after the issuance of the Rule on 09.05.2016, is not a final award. In fact, no award has yet been issued by the ICSID tribunals. There is no support for the proposition that the ICSID tribunals' decisions are binding on us in our exercise of the powers of judicial review. We note that even ICSID awards may be reviewed or annulled by the ICSID system and only the pecuniary obligations imposed by a final award are treated as binding on the parties to the arbitration cases. In this case there is no award to enforce as yet. Thus, we cannot agree with the respondent No.4 that the writ petition should be kept in abeyance till the time of the enforcement of any final ICSID award.

58. In another authoritative book called *Guide to ICSID Arbitration* published by Kluwer Law International, and authored by Reed, Paulsson, and Blackaby it has been noted in Chapter 5, page 97:"An ICSID award binds only the parties to the dispute, not third parties. Not all ICSID decisions are awards, let alone final awards. Procedural decisions are not final awards".

59. In ***Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*** (ICSID Case No. ARB/98/8), one of the first ICSID tribunals to issue a "decision" stated:

> "The conclusions of the Tribunal … in relation to other matters which were submitted to the Tribunal for its decision in the course of the proceedings, were published in the form of "Decisions", to be incorporated into our Final Award by reference in due course. The Tribunal adopted this course because the ICSID Arbitration Rules contain no provisions which permit or even contemplate "Partial" or "Interim" awards, and, indeed, it seemed to the Tribunal that the Rules contemplated only one, Final Award. The course which the Tribunal adopted was not challenged or objected to by either party".

60. For these reasons we find no merit in the arguments of the respondent No.4 that the decision dated 19.07.2016 is binding on us in the same way as a judgment of the Appellate Division of the Supreme Court.

61. Mr. Khan argues that, even if the allegations are accepted, there is no corruption since the trail of payments stop at Giasuddin Al Mamoon. We cannot agree with this submission that there has to be a direct payment to a Bangladesh Government official for there to be corruption. This submission is not supported by the laws of Bangladesh, particularly the Penal Code. We note that section 162 of the Penal Code deals with "Taking gratification, in order, by corrupt or illegal means, to influence public servant". Under section 162 of the Penal Code private individuals, such as Mr. Salim Bhuiyan or Mr. Giasuddin Al Mamoon, taking bribes to influence a public servant by corruption or illegal means is a crime. Similarly, section 163 of the Penal Code deals with "Taking gratification, for exercise of personal influence with public servant". Taking or giving gratification to private individuals for their personal influence with public servants is also a crime. Thus, under the laws of Bangladesh there is no requirement that only direct payments to a Government official can constitute corruption. It would be sufficient if the gratification is extracted on a promise of exercise of personal influence with an official, to bring the offence within the mischief of this section 163 of the Penal Code. Proof of actual exercise of personal influence with an official is not necessary. The US$ 500,000payment admittedly made by respondents No.4 and No.5 to Mr. Salim Bhuiyan for his so-called ability to "arrange meetings" with Government officials

through his social and political connections would clearly falls under the prohibitions of sections 162 and 163 of the Penal Code. Similarly, if the payment trail reaches Mr. Giasuddin Al Mamoon, then those payments were clearly for his exercise of personal influence and political clout over Bangladeshi Government officials. Mr. Mamoon openly claims that 50% of his power came from being a close friend of Mr. Tarique Rahman, son of the former Prime Minister Khaleda Zia. Mr. Mamoon has also been convicted of money laundering along with his close friend and business associate, Mr. Tarique Rahman. These facts, though not vital or essential for disposal of the Rule, support the totality of the evidence of the corrupt scheme set up by the respondents No.4 and No.5 to acquire their investments in Bangladesh during 2003 to 2006.

62. We cannot agree with the submission of the respondent No.4 that the Agreed Statement of Facts cannot be relied upon since it only related to the 2005 period while the JVA was signed in 2003 and the GPSA in 2006. Mr. Khan submits that there is no causal link between the admitted corruption and the JVA or GPSA. However, it is clear and admitted in the Agreed Statement that Niko Canada (respondent No.5) made the payment to the Bangladeshi Energy Minister AKM Mosharraf Hossain to exercise his influence to ensure that respondent No.4 was able to secure a gas purchase and sales agreement (GPSA) acceptable to Niko, as well as to ensure that Niko was dealt fairly in relation to claims for compensation for blowouts. It is particularly important to note that the respondent No.5 pleaded guilty to the charges that "Niko Canada did, in order to obtain and retain an advantage in the course of business" provide bribe to Bangladesh officials. These words "obtain" and "retain" are significant. They imply that the bribe in 2005 was paid not only to "obtain" a future benefit such as the GPSA in 2006 but also to "retain" a past benefit such as the JVA in 2003. Corruption payments does not have to be simultaneous with the benefits procured. Bribe payments may be made for a past benefit, a future benefit, or to retain a benefit. We are unable to agree that bribery alone would not taint the procurement process of the JVA and GPSA but there must be shown that the bribery simultaneously and actually caused the benefit being bestowed to the bribe giver. If that was the law then many corrupt actors would be able to get away with corruption merely by taking the bribe at a time before or after the illegal benefit was bestowed or stating that the bribery did not actually cause the benefit being bestowed.

63. The Penal Code of Bangladesh clearly defines what constitutes bribery. Section 161 of the Penal Code deals with "Public servant taking gratification other than legal remuneration in respect of an official act". Under section 161 of the Penal Code any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act amounts to bribery. Giving anything whose value is estimable in money is bribery. Under section 161 three things are necessary to constitute bribe – (i) the receiver of bribe must be a public servant; (ii) he must receive or solicit an illegal gratification; and (iii) it must be received as a motive or reward for doing an official act which he is empowered to do. There is no need to show, as the respondent No.4 argues that the bribes paid to State Minister AKM Mosharraf Hossain actually influenced his decisions to act in favour of Niko. In addition, the Stratum Management Services Contract is clearly in violation of section 161 since its stated aim was to make payments to Bangladesh Government officials for the procurement of Niko's projects in Bangladesh. There is no need to additionally show, as the respondent No.4 suggests, that these payments of bribes in fact influenced the Government officials who received the bribes. If that was the case, no one would be able to show corruption since one would need to go into the mind of the recipient of the bribe to determine if that person was influenced by the bribe. Respondent No.4 and No.5

were parties to and aided and abetted the commission of these crimes in Bangladesh to illegally procure the JVA and GPSA. The respondents No.4 and No.5 have clearly also committed the offences of abatement under the Penal Code by entering into agreements with Stratum and Nationwide for the procurement of the JVA. Just the act of offering a bribe is an offence, regardless of whether the official accepts the offer.

64. We find no merit in Mr. Khan's submission that the JVA and GPSA are commercial contracts entered into by respondent No. 3 (BAPEX) and respondent No. 2 (Petrobangla) as corporate entities and therefore these contracts are not sovereign contracts entered into by the State of Bangladesh which may be subjected of judicial review. We do not agree with these submissions since the JVA and GPSA were clearly executed through the exercise of Executive authority to grant rights over public resources to a private party, respondent No.4. The respondent Nos. 2 and No.3 clearly fall within the definition of "statutory public authority" under Article 152 of the Constitution.

65. We cannot agree with the submissions of Mr. Mahmud and Mr. Khan that the writ petition is not maintainable due to *res judicata* effect of the judgment in writ petition No. 6911 of 2005. *Res judicata* requires uniformity of causes of action and parties. The petition before the Supreme Court of Bangladesh arises from a different cause of action and there is no uniformity of parties. There was no cause of action arising from the corruption and bribery in writ petition No. 6911 of 2005. The parties in the present writ petition are also not the same parties.

66. In light of this background, from the undisputed facts and evidence presented, it is clear to us that respondents No.4 and No.5 engaged in corruption in procuring their investments and exploration rights in Bangladesh during the period 2003 to 2006. There was corruption not just under the laws of Bangladesh Penal Code but even according to World Bank's own definition of corruption. The World Bank's Integrity Vice Presidency defines corruption as follows:

> "A corrupt practice is the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party.
> *Example:* A supplier agrees to pay "kickbacks" to a senior government official through an agent it hires as a sub consultant to perform "business development and marketing" services but without any deliverables. This agent is connected to a senior government official who is demanding a "commission" from every bidder as the official has influence over the bid evaluation committee and can steer the award of the contract to any bidder willing to pay. This supplier builds in the kickback amount as a percentage of the contract value, and pays for it from the funds it receives from the World Bank Group-financed project. Project financing costs are artificially inflated by these practices, and the supplier recovers costs by providing less expensive and lower quality goods.

67. The World Bank's definition of corruption does not require a direct payment to a Government official, the same way sections 162-163 the Bangladesh Penal Code does not make it a requirement that the payment has to be made to a Government official. In this case, the respondents No.4 admits that its parent, respondent No.5,agreed to and did pay Mr. Salim Bhuiyan US$ 500,000 for his social and political connections and his ability to arrange meetings with senior government officials in Bangladesh. Mr. Bhuiyan performed these services without any tangible deliverables, other than getting Government approvals for Niko's projects. The admitted payments made to agents and Government officials in

Bangladesh were clearly built into the prices of the contracts entered into by respondent No.5 through its subsidiaries. The eventual prices to be paid by Bangladeshi consumers for the gas to be supplied by respondent No.5 were thus artificially inflated by these corrupt payments, to take into account the fees paid to Niko's on the ground agents and Bangladeshi government officials.

68. The JVA and GPSA are also void *ab initio* under the Contract Act. Section 23 of the Contract Act clarifies what considerations and objects are lawful and what are not. Section 23 states:

"The consideration or object of an agreement is lawful, unless-

- it is forbidden by law; or
- is of such a nature that, if permitted, it would defeat the provisions of any law; or
- is fraudulent; or
- involves or implies injury to the person or property of another; or
- the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

69. The JVA and GPSA having been procured by corruption would be void under section 23 of the Contract Act as being opposed to "public policy". Bribery and corruption are anathema to the concepts of rule of law and accountability and clearly against the "public policy" of Bangladesh. Public contracts procured by corruption are obviously against the "public policy" of Bangladesh. Mr. Mahmud has submitted since the JVA and GPSA has already been performed and gas has already been supplied to respondent No. 2, the only option here is to provide restitution to the respondents No.4 and No.5 for the gas supplied. We cannot agree that a party which engages in corruption and illegally procures natural resources belonging to the State, through payments of unlawful gratification to public officials or payments to politically powerful persons for their influence over government officials, can benefit from such illegal conduct or that the courts should assist them in enjoying the fruits of their crimes. It is a well-established legal principle that no one can benefit from one's own wrong. In such a situation we see no scope of offering any restitution or benefit to the respondent No.4 or No.5 from the JVA GPSA and GPSA which are in fact proceeds of crime and are not contracts which can be protected under the laws of Bangladesh. We are of the view that the JVA and GPSA, being procured through corruption, are contrary to the laws of Bangladesh and cannot be protected by any court of law.

70. In ***K N Enterprise v Eastern Bank Limited*** 63 DLR (2011) 370 paragraph 36 it was stated:

> "…there is an old maxim, "*ex turpi causa non orituractio*" i.e. a person cannot found an action on his own fraudulent behavior. There is another old maxim, "*frausominacorrumpit*" meaning …fraud vitiates everything."

71. In ***Engineer Mahmudul-ul Islam and others v. Government of the People's Republic of Bangladesh and others***, 2003 23 BLD 80, in a judgment upheld by the Appellate Division, the High Court Division of the Bangladesh Supreme Court stated:

> "36. …A decision of the State may not be permitted to be challenged in a Court of Law but the implementation of such decision by the executive authority of the State without due diligence, without due application of mind, without reasonableness,

> without fairness, with arbitrariness and or in favour of a private party against public interest is liable to be challenged in the Court of Law. Any misuse of power by any executive benefiting a private party in dealing with any State property is both unreasonable and against public interest. Every activity of the government has a public element in it and it must therefore be guided by public interest and with reason. If the government awards a contract or leases out any of its property or grants any targets, the same is liable to be tested for its validity on the ground of reasonableness and public interest and if fails it would be unconstitutional and invalid. A government functionary, as mentioned above, cannot act as it pleases in dealing with State properties or largess in its absolute and unfettered discretion. When a government action is found to be unreasonable or lacking in the quality of public interest, such action is invalid."

72. The price of corruption is high for the victims of the corruption. Corruption is a cancer for our society which has to be eradicated if we are to obtain full measure of benefit of our economic progress. The dire consequences of corruption for the people of Bangladesh have been painfully made evident in this case. Gas fields had been handed over to respondents No.4 and No.5, who had failed to qualify through a competitive bidding process, in exchange of payments of a few million dollars to a handful of greedy and corrupt individuals. The eventual blowouts and the destruction of two gas fields have caused damages of over US$ 1 billion. Unfortunately, respondents No.4 and No.5 are yet to pay for their crimes committed about 14 years ago.

73. Greed of a few should not be allowed to trump over the interest of the public. A clear message of deterrence needs to be sent out to the corrupt investors and their agents. Investors should be made aware that if they break the laws of Bangladesh by indulging in corruption then their investments would not be protected by the laws of Bangladesh. Corrupt investors not only harm the people of Bangladesh but also harm the genuine interests of honest investors who are forced out of the market by the corrupt players.

74. The clear and convincing evidence of corruption produced before us is the product of international law enforcement co-operation through the use of Mutual Legal Assistance (MLAs) arrangement between Bangladesh, Canada, and the United States under the United Nations Convention Against Corruption ("UNCAC"). Radha Ivory, a leading commentator on the issues of corruption and asset recovery, has stated in the book *Corruption, Asset Recovery, and the Protection of Property in Public International Law,* published by Cambridge University Press at pp. 101-102: "that state parties to the anti-corruption treaties signaled their willingness to prosecute and punish local misuses of power or office for private gain. Simultaneously, they identified the conduct that generates or involves assets that may become the subject of cooperative confiscation efforts under those conventions or related MLATs. …States are required or encouraged to ensure that persons may be deprived of illicit wealth, to assist each other with such confiscations, and to cooperate when disposing of confiscated assets". Radha Ivory also notes at pp. 122-123 that "the anti-corruption treaties expressly require their state parties to empower their competent authorities, judicial or executive, to identify, restrain, and permanently remove illicit wealth belonging to an offender or a third party. … state parties possess considerable discretion to determine when and how they regard either fact [i.e. the offence and the connection between the thing and the offence] as established."

75. Bangladesh is a party to the United Nations Convention against Corruption (UNCAC). UNCAC require their state parties to enable confiscation of instrumentalities, proceeds, and property of corresponding value to proceeds of convention offences. UNCAC calls for national efforts to criminalize conduct and prevent criminals from gaining profit, the most frequent motivation for the crime. An effective deterrent against corruption is the seizure, confiscation and return of the proceeds of corruption. UNCAC contains elaborate mechanism and procedure for seizure, confiscation and return of assets. The relevant provisions of Article 31 UNCAC provides:

> "***Article 31. Freezing, seizure and confiscation***
>
> 1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
>
> 2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
>
> 3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.
>
> 4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
>
> 5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
>
> 6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
>
> 7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
>
> 8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
>
> 9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.
>
> 10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party."

(**Emphasis given**)

76. As a legally binding international anti-corruption agreement, UNCAC provides a comprehensive set of measures to be implemented by state parties to prevent, combat, and

prosecute corruption. On ratification, the UNCAC created legal obligations for Bangladesh and those have to be enforced through the Executive branch and/or the Judiciary of Bangladesh. Thus, Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime. Article 51 of the UNCAC makes the return of assets which are proceeds of crime a fundamental principle of the UNCAC. As such all proceeds of crime acquired by the respondents No.4 and No.5, through the use of a corrupt scheme, are to be returned to the state of Bangladesh. Article 53 mandates provisions for the direct recovery of corruption assets, including laws permitting private civil causes of action to recover damages owed to victim states and the recognition of a victim state's claim as a legitimate owner of stolen assets. Article 54 requires State Parties to give effect to any confiscation order for corruption proceeds issued in another State Party, and to "consider taking such measures as may be necessary to allow confiscation…without a criminal conviction."

77. We find support for our decision to confiscate the assets of the respondents No.4 and No.5 in the principles laid down in UNCAC.

78. In ***Dr. Mobashir Hassan and Others vs. Federation of Pakistan*** PLD 2010 Supreme Court 265 the Supreme Court of Pakistan, while discussing the corruption and confiscation, agreed with the following:

> "129. …A perusal of UN Convention Against Corruption indicates that the state had responsibility to develop and implement or maintain effective, coordinated anti-corruption policies; to take measures to prevent money laundering; to take measures for freezing, seizure and confiscation of proceeds of crime, derived from offences established in accordance with the Convention, or the property the value of which corresponds to that of such proceeds, property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention, etc.; State parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to' corruption; as well as affording to one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to the offences covered by the Convention; prevention and detection of transfers of proceeds of crime."

79. In ***Biswanath Bhattacharya vs. Union of India*** *(UOI)* AIR (2014) SC 1003, the Supreme Court of India discussed the confiscation of proceeds of crime:

> 41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

80. It may be noted that according to the Arthur Anderson Report dated 28.09.1997 Niko was the least qualified of all the companies which were competing to get exploration rights to the Block 9 PSC gas fields. Niko Canada (respondent No.5) nonetheless eventually ended up with the same exploration rights in the form of 60% ownership of Block 9 PSC after it had set up the corrupt scheme during 2003 to 2006. The respondent No.5 clearly benefitted from this

corrupt scheme. Otherwise, there is no explanation as to how respondent No.5, which was found to be the least qualified of seven bidders for the PSC Block 9 in 1997, eventually ended up with obtaining 60% of the exploration rights to the same Block 9. The preponderance of evidence of corruption leads us to the conclusion that but for the corrupt scheme in place the respondent No.5 could not have obtained its exploration rights in Bangladesh. We are of the view that respondent No.5 should be deprived of its properties in Bangladesh which they have obtained through bribery and corruption. Respondent No.5 has clearly already benefitted from the crimes committed in the form of exploration and production rights under the JVA, GPSA, and the Block 9 PSC. The value of the benefit obtained by respondent No.5 include all direct and indirect payments made to the respondent No.5 in relation to the JVA, GPSA, and the Block 9 PSC. Respondent No.5 unlawfully benefitted by obtaining property of the State through the commission of offences under the Penal Code. The direct and indirect assets of the respondent No. 5 which are within the jurisdiction of Bangladesh and are, thus, subject to seizure and confiscation.

81. We are mindful that any seizure, confiscation and return of assets leading to the deprivation of property without compensation is to be implemented with great caution. Nonetheless, in this particular situation, our task has been greatly facilitated by the blatant admissions of corruption by both the respondents No.4 and No.5, the evidence of the trail of the corrupt payments uncovered by several international law enforcing agencies working together, and the contracts entered into by Niko which manifestly aim to facilitate corruption of Bangladesh public officials. The consultancy contracts are clear evidence that a corrupt scheme was set up by which regular payments were being made by the respondent No.5 to Bangladesh officials and politically influential people for the business benefits of its subsidiaries in Bangladesh. These manifest and flagrant violations of the laws of Bangladesh render all the investments of the respondent No.5 in Bangladesh tainted by corruption.

82. We are of the view that there are also a number of public policy reasons for the assets of respondents No.4 and No.5 to be seized, confiscated, and returned back to the state of Bangladesh, the ultimate victim of the corruption. The aims of the confiscation are to recover the proceeds of crime, return the assets to the State, deny criminals the use of ill-gotten assets, and deter and disrupt further criminality.

83. The primary purpose of confiscation of the assets of the respondents No.4 and No.5 is to prevent them from financially benefitting from the fruits of their illicit actions. This deprivation is an important aspect of the penalty imposed on respondents No.4 and No.5 for engaging in corrupt practices in Bangladesh. The confiscation of the assets will also deter others from engaging in similar corruption in keeping with the old adage ‘crime does not pay’. It is morally wrong to let the corrupt enjoy their ill-gotten wealth. The corrupt cannot be allowed to live handsomely off the profits of their crimes while millions of law-abiding citizens work hard to earn a living. The confiscation of the assets of respondents No.4 and No.5 is thus important for the confidence of the public in the rule of law.

84. The confiscation and return of the assets to the State will result in some form of restorative justice. The people and the state would be able to obtaining at least some financial benefit or compensation from the scourge of the crime of corruption committed by the respondents No.4 and No.5. Hardship and suffering has been inflicted by the respondents No.4 and No.5 on the citizens such as the victims of the 2005 blowouts. The return of the assets to the State would also help to reimburse the State for the human and financial

resources expended in fighting and pursuing the corrupt activities of respondents No.4 and No.5.

85. Confiscation of these assets prevents the assets being used to fund further bribery and corruption. Given the culture of corruption within the companies and the scheme of corruption that was set up by the respondent No.4 and No.5, and in light of the audacity with which they dismissed the payments of bribes as normal business practices, there is no guarantee that similar practices would not be attempted again. Criminals are becoming more and more sophisticated while states such as Bangladesh have to work hard to fight them within the constraints of the limited resources of a developing nation. Corrupt international companies hide behind corporate veils and depend heavily upon the barriers of sovereignty to shield themselves and the evidence of their crimes from detection. Companies such as the respondent No. 4 and No.5 which orchestrate transnational crimes and then disperse and conceal the proceeds of their illicit activities the world over cannot be allowed to continue to act with impunity while committing fraud and corruption. In this particular case, the international community of the law enforcing agencies through mutual legal assistance has managed to uncover the sophisticated corruption scheme of the respondents No.4 and No.5. It has been established that the properties of respondents No.4 and No.5 in Bangladesh were obtained as a result of their general criminal conduct through the setting up of a scheme of corruption. In such a situation, there is a duty upon us to confiscate these assets.

86. Politically influential persons and Government officials who illegally enrich themselves through the abuse of power, and unscrupulous investors who facilitate such corruption, deprive the State of its property and hinder the economic development of the country. The laws of Bangladesh envisage the creation of a fair and just society in which crime does not pay. The Constitution under Article 102 empowers us with the duty to ensure that this vision is achieved by declaring any *ultra vires* exercise of Government authority of no legal effect and also declaring void any resultant contract procured through illegal acts such as corruption.

87. The Agreed Statement in paragraph 2 states that the respondent No. 5 provided the bribes to Bangladesh's State Minister of Energy "in order to further the business objectives of Niko Canada and its subsidiaries". The preponderance of evidence of corruption leads us to conclude that the assets of the respondent No.5 and its subsidiaries in Bangladesh, obtained through the corrupt scheme in place from 2003 to 2006, are to be treated as tainted by corruption and proceeds of crime. As such all the assets of the subsidiaries of No.5 including the assets and rights under the JVA, assets and rights under the GPSA, and the assets and shareholding interests in Block-9 PSC are attached and seized. These assets of the respondent No.4 and No.5 are being seized as proceeds of crime as well as to provide compensation to the victims of the 2005 blowouts.

88. The respondent No.1 is directed accordingly to take necessary steps to return these assets of the respondent No.4 and No.5 to the State. The rights and assets of respondents No.4 and No.5, being obtained through corruption, are ill-gotten wealth and unlawfully obtained from the State of Bangladesh. Respondents are directed to ensure that none of Niko's ill-gotten assets can be dissipated, transferred, or sent out of Bangladesh. The purpose is to strip respondent No.4 and No.5 of any benefits obtained through corruption.

89. The respondents No.1, No.2 and No.3 are being directed to expeditiously seek adequate compensation for the damages caused by the 2005 blowouts and also take necessary

steps to recover any proceeds of crime that may have already been siphoned off or taken out of Bangladesh by the respondent No.4 and No.5. To this end, the respondent No.1 are directed to effectively and expeditiously pursue the long pending Money Suit and seek adequate compensation from respondents No. 4 and No.5 for the damages caused by the 2005 blowouts. The respondents No.1, No.2, and No.3are further directed to take steps to recover the value of the benefit obtained by the respondent No.4 and No.5 through the bribery and corruption, including recovery of all direct and indirect payments received by the respondents No.4 and No.5 from Bangladesh as a result of their corruption. No payments can be made to respondent No.4 and No.5 by the respondents No.1, No.2 or No. 3 till these steps are completed.

90. The respondent No.1 is further directed to seize and cancel the exploration rights of respondent No.5 or any of its subsidiaries obtained though corruption during the period 2003 to 2006, including the rights under the JVA, GPSA and the Block 9 PSC and either develop these gas fields themselves or, if not possible, reallocate them to competent companies through a fair, transparent and open bidding process.

91. In light of the above, we conclude that from 2003 till 2006 the respondents No.4 and No.5 had set up a corrupt scheme to illegally obtain gas exploration rights in Bangladesh. Based on the undisputed facts, we find that the JVA and GPSA have been procured by corruption and thus render them void *ab initio*. The rights and assets of the respondent No.5 in Block 9 PSC, for which respondent No.5 was found to be the least qualified of seven bidders in 1997, have also been obtained through this corrupt scheme and are thus being seized and confiscated as proceeds of crime as well as to provide compensation for the 2005 blowouts. All the rights, assets, and property of the respondent No. 4 and No.5 in Bangladesh, obtained from the State through the corrupt scheme, shall revert back to the State.

92. In view of the above observations, we are inclined to hold that the Rule deserves merit and is bound to succeed.

93. Accordingly, the Rule is made absolute. The Joint Venture Agreement for The Development and Production of Petroleum From the Marginal/Abandoned Chattak and Feni Fields ("JVA") dated 16.10.2003 between the respondents No.3 and No.4 is declared to be without lawful authority and of no legal effect and thus void *ab initio* and the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between the respondents No.2, as Buyer, and a joint venture between respondents No.3 and No.4, as Seller, are also declared to be without lawful authority and of no legal effect and thus void *ab initio*. The assets of respondents No.4 and No.5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 are hereby attached.

94. There is, however, no order as to costs.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 3450 of 2004

Md. Nurul Islam and others
……. Petitioners.
Vs.
Charge Officer and Appeal officer and others.
……Respondents.
With
Writ Petition No. 3451 of 2004.
Md. Delwar Hossain and another.
……. Petitioners.
Vs.
Charge Officer and Appeal Officer and others.
……Respondents.

Mr. A.F. Hassan Ariff, Senior Advocate
with
Mr. Kamal Ul Alam, Senior Advocate
with
Dr. Md. Iqbal Karim, Advocate
… For the petitioner in both writ petitions.
Mr. Manzill Murshid, Advocate
..For the respondent no.4 in both writ petitions.

Heard on 13.08.2017, 23.10.2017, 24.10.2017, 29.10.2017, 05.11.2017, 03.12.2017 and 03.01.2018.
Judgment on: 14.01.2018.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Md. Badruzzaman

Nullity of Record of Rights:

We are in fact taken aback with surprise when we see that a government official has been empowered by this Rule 42 to nullify the course of parent law and send it back to an earlier stage for hearing afresh. The reason for such surprise is, when an Act of parliament has provided some specified forums for disposal of particular issues and has provided sequential steps to be taken one after another before different forums up to the Appellate Division of the Supreme Court of Bangladesh, an official like a revenue officer, appointed with the additional designation of Settlement Officer, can nullify everything before final publication of record of rights.
When the government even does not have any power to nullify or reverse the course of parent law, since such power has not been delegated to government by the parent law, we are of the view that, even with the existence of Rule 42 empowering such revenue officer to nullify such course of parent law, any such exercise of power by such revenue officer shall be nothing but a nullity in the eye of law. … (Para 22)

It has to be borne in mind that, since S.A. and R.S. Khatians were prepared long ago, such presumption will lose its weight with the passage of time. On the other hand, though the respondent No. 4 did not raise objections as regards alleged mistake in preparation of Mouza Maps of Lala Sharai Mouza and Kafrul Mouza during the said two surveys, it is not debarred from raising such objections in the subsequent survey. … (Para 24)

It appears from the very record that, apparently, the said Settlement Officer, vide order dated 10.07.2003, reversed the course of parent law from its concluded stage to a lower stage. Not only that, the said Settlement Officer also gave an additional leverage in favour of the respondent no.4 to present its case again before another Appellate Officer of same rank. This order has made several interferences into the normal course to be taken or followed under SAT Act, 1950, namely:

(a) It did not allow final publication of City Khatian in the normal course after disposal of appeals by the Appellate Officer

(b) It allowed the respondent No.4 to avoid the Land Survey Tribunals constituted under Section 145A of the SAT Act, 1950. Rather, it allowed respondent no.4 to avail of another forum under Rule 42 contrary to the relevant provisions of parent law.

(c) It deprived the petitioners of their legal and legitimate expectation and rights to have the concerned City Khatians finally published in their names as owners in respect of the said lands.

(d) For all practical purposes, by this order, the Settlement Officer has already expressed his view regarding merit of the case and as such left nothing for the 2nd Appellate Officer to hear and decide the dispute.

(e) Pursuant to this order of the concerned Settlement Officer under Rule 42, the subsequent Appellate Officer has virtually set aside the order passed by the First Appellate Officer, who is of equal rank like him.

While this Court has repeatedly held that, the delegatee of power cannot go beyond the power of delegation, it appears that, there cannot be any better example than this case that how a power, not permitted by parent law, may be delegated and as to how a delegatee can exceed its limit of power given by the parent law. Here, the delegatee, namely the concerned Settlement Officer, has reversed the normal course of parent law and thereby sat over the first appellate order like a higher authority, in particular when the higher authority as provided by law against such order is the Land Survey Tribunal, which is empowered by parent law to determine those issues as raised by respondent no.4 after final publication of City Khatian. … (Para 25, 26)

Judgment

SHEIKH HASSAN ARIF, J

1. Since the questions of law and facts involved in the aforesaid two writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this common judgment.

2. Rules in the aforesaid writ petitions were issued in similar terms, namely calling in question the order dated 14.03.2004 passed by the Charge Officer and Appeal Officer, Dhaka Settlement, Dhaka Appeal Court, Settlement Office, Tejgaon, Dhaka (respondent no.1) in allowing Appeal No. 65105 of 2002 and Appeal No. 65096 of 2002 (Annexure-G) as preferred by the Military Estate Officer, Dhaka Cantonment, Dhaka (respondent no.4) upon

rehearing the appeals pursuant to the order of the Settlement Officer in exercise of power under Rule 42 of the Tenancy Rules, 1955.

Background Facts:

3. Short back ground facts, relevant for the disposals of the aforesaid Rules, are as follows:

In Writ Petition No. 3450 of 2004, the case of the petitioners is that, the landed property being .1650 acres of land on C.S. Plot No. 321 of C.S. Khatian No. 162 and S.A. Plot No. 321 under S.A. Khatian No. No.172 under Kafrul Mouza, J.L. No. 268, P.S. Cantonment (now Kafrul) (in short, "the said orperty") originally belonged to one Rahim Box. After his death, the said property was transferred to his son Wahed Box Bepari, and after the death of Wahed Box Bepari, the ownership of the said property fell on his only son Khaleque Box Bepari. That, subsequently, on 30.01.1929, the said Khaleque Box Bepari sold the said property to Lal Mohon Maisal, Ananta Lal Maisal and Mohesh Lal Maisal, all sons of Malike Lal Maisal, through registered sale deed No. 862 dated 30.01.1929. Thereafter, the said property was transferred by the said Maisal brothers in favour of one Jolekha Bibi, wife of Haji Ahmed Ali, vide registered deed Nos. 1958 and 1959, both dated 11.05.1945. Accordingly, the R.S. Khatian, namely R.S. Khatian No. 390 with corresponding Plot No.5160, was recorded in the name of said Jolekha Bibi. That, during the life time of Joleka Bibi, she made a Heba in favour of her son Chand Miah by registered deed No. 20566 dated 13.07.1977 transferring land measuring 77 decimals from the same plot. Thereafter, the said Chand Miah made another Heba in favour of his wife Joysa Khatun in respect of land therefrom measuring 10 decimals by another registered deed No. 2014 dated 27.06.1985. Thereafter, the said Chand Miah and his wife Joysa Khatun together transferred the said land measuring .1650 acres in favour of their five sons, namely the petitioners, by Heba Deed No.3757 dated 19.041994. Subsequently, when the City Survey in Dhaka area started in 1995, the said land was recorded in the name of the petitioners in the Draft City Khatian No. 1839 with corresponding Plot No. 4587. It is stated that, after such transfer and record of their rights, the petitioners have been possessing the said land, and, with the approval of RAJUK and Cantonment Board, they have constructed building thereon and have been paying gas, electricity, WASA bills etc. regularly.

4. **In Writ Petition No. 3451 of 2004**, the case of the petitioner's is that, the landed property measuring .0660 acres under C.S. Khatian No. 168, C.S. Plot No. 321 and S.A. Khatian No. 172, S.A. Plot No. 321, J.L. No. 268, P.S. Cantonment (now Kafrul) ("the said property") originally belonged to one Rahim Box and, subsequently, after his death, the ownership of the said property fell on his son Wohed Box Bepari. That, after the death of the said Wohed Box Bepari, the ownership of the said property fell on his son Khaleque Box Bepari. Subsequently, the said Khaleque Box Bepari sold the said property to Lal Mohon Maisal, Ananta Lal Maisal and Mohesh Lal Maisal, all sons of Malike Lal Maisal, through registered sale deed No. 862 dated 30.01.1929. That, thereafter, the said Maisal brothers sold the said property in favour of Jolekha Bibi, wife of Haji Ahmed Ali, by two registered deeds being Nos. 1958 and 1959, both dated 11.05.1945. During life time of the said Joleka Bibi, she made Heba in respect of the land measuring .0660 acres in favour of her son Sona Miah son of Haji Ahmed Ali. That the said Sona Miah had one wife and seven sons, two daughters, and, after his death, the said property of Sona Miah fell on his said wife, sons and daughters. The said sons and daughters of Sona Miah, represented by their mother Rahima Khatun, being appointed as guardians of the minor children in Case No. 27 of 1985 of the 2nd Court of

Munshif, Dhaka, transferred the said land measuring .0660 acres in favour of the petitioner No.1 by three registered Sale Deeds being Nos. 9201, 9202 and 9203 all dated 27.06.1987. On the other hand, Chand Miah, son of Haji Ahmed Ali, being owner of .0355 acre land on the said plot also transferred his portion of land in favour of the wife of petitioner No.1, Mrs. Nargis Hossain, vide registered Sale Deed No. 9202 dated 27.06.1987. Accordingly, the petitioner No.1 in total purchased .0660 acres land from the said plot vide three registered sale deeds and the petitioner No. 2 purchased .0355 acres vide one sale. Thus, it is stated, the petitioners became owners of total land of an area of .0995 acres. The petitioner No.1, accordingly, got his name mutated in S.A. Khatian No. 172/1/1 for his portion of land and petitioner No.2 got her name mutated in S.A. Khatian No. 172/2/5 for her portion of land. Thus, they have been possessing the said land and, with the approval of the RAJUK and Cantonment Board, they have constructed buildings thereon and have been paying utility bills to different utility suppliers like City Corporation, WASA etc. That, when the City Survey in Dhaka area started in 1995, the petitioners name were also published in respect of the said land in the Draft City Khatian No. 1644 with corresponding Plot No. 4559 under Kafrul Mouza.

5. Further common case of the petitioners in the instant writ petitions is that, in respect of their said land, Tasdik Khatians (Field Survey Khatians) were prepared by the concerned Revenue Officer being Tasdik Khatian No. 4568 corresponding Plot No. 4587 and Tasdik Khatian No. 4539, corresponding Plot No. 4559, and, subsequently, the said records were followed by draft khatian published in the said City Jorip, being City Jorip D.P. Khatian No.1839 with corresponding Plot No. 4587 under Kafrul Mouza in respect of the land in Writ Petition No. 3450 of 2004 and Draft City Jorip Khatian No.1644 with corresponding Plot No. 4559 under Kafrul Mouza in respect of land in Writ Petition No. 3451 of 2004. Being aggrieved by such draft publications, the Military Estate Officer of Dhaka Cantonment (respondent No.4) filed objection before the concerned Revenue Officer in view of the provisions under Section 144 of the State Acquisition and Tenancy Act, 1950 (in short, "SAT Act, 1950") read with Rule 30 of the Tenancy Rules, 1955 (in short, "the said Rules"). The concerned Revenue Officer (Objection Officer) then disposed of the said objections along with other objections in respect of the nearby lands and affirmed the said draft publication in favour of the petitioners. Being aggrieved by such order of the Objection Officer, respondent no.4 preferred appeals, being Appeal Case Nos. 65105 and 65096 of 2002, before the concerned Revenue Officer appointed with the Additional Designation of Settlement Officer in view of the provisions under Section 144 of the SAT Act, 1950 read with Rule 31 of the SAT Rules, 1955. Thereupon, the concerned Revenue Officer dismissed the said appeals along with other similar appeals preferred by the same respondent vide a common order dated 30.04.2002 (in short, "Appeal Order"). Being aggrieved by this order of dismissal of appeals, respondent No.4 lodged an objection before the Director General, Directorate of Land Records and Surveys (respondent no.3) with a prayer for rehearing of all appeals including the appeals in question. The said Director General then referred the matter to the concerned Settlement Officer, who, vide order dated 10.07.2003, brought all the appeals including the appeals in question to the stage of re-hearing upon setting aside the said Appeal Order in purported exercise of power under Rule 42 of the Tenancy Rules, 1955 and, accordingly, assigned one Md. Shamsul Arefin, Charge Officer, Dhaka Settlement, to re-hear the said appeals with the assistance of some other Assistant Settlement Officers and concerned officers. Thereafter, the said appeals were reheard by the said Settlement Officer Mr. Md. Shamsul Arefin, who, vide impugned order dated 14.03.2004, allowed both the appeals in question along with other appeals in favour of respondent no.4 and thereby directed for final publication of Khatian under City Jorip in the name of respondent no.4 in respect of the said

lands and other lands concerned. The said Settlement Officer, by the same order, also directed publication of City Jorip Final Khatian showing the names of the petitioners and other appeal-respondents in Column No. 9 of the said Khatian as 'possessors'. Being aggrieved by such order of the Settlement Officer, the petitioners moved the instant writ petitions and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, vide ad-interim orders dated 06.07.2004, stayed operation of the said impugned order (Annexure-G) for a period of 06 (six) months, which was subsequently extended time to time.

6. The Rules have been opposed by respondent no.4 by filing affidavits-in-opposition. The case of respondent No.4 is that, the lands in question as well as other disputed nearby lands fall within Mouza-Lala Sharai comprising C.S. Plot No. 621 and the said lands were acquired during World War II by the then government in L.A. Case No.32/49-50 in exercise of power under Rule 75A(2) of the Defense of India Rules, 1937 for the purpose of establishing Tejgaon, Kormitola Air field and, accordingly, the same was published in the gazette notification on 20.08.1946. That, subsequently, while S.A. records and R.S. records were prepared, some portion of the said C.S. plot No. 621 of Lala Sharai Mouza was mistakenly included in the Kafrul Mouza at the time of preparation of map and that the said mistake continued with the resultant anomalies in recording the names of the vendors of the petitioners in the corresponding S.A. and R.S. Khatians showing them as owners of the said lands, though the said lands always belonged to the Cantonment. That, since some lands of Lala Sharai Mouza, owned by cantonment Board, including the lands in question, have been shown as lands of Kafrul Mouza and wrongly recorded in the names of the predecessors of the petitioners who did not have any title to transfer the said properties in favour of the petitioners, it raised objection at the objection stage during City Survey and, since the said objection was wrongly rejected by the concerned objection officer, it preferred the said appeals before the Appeal Officer concerned and that the said Appeal Officer dismissed those appeals in collusion with the petitioners. Therefore, it is stated, this respondent made representations to the Director General of Land Survey, who, upon verification of all concerned maps as well as concerned documents, referred the matters to the concerned Settlement Officer, who then passed the said order under Rule 42 of the Tenancy Rules, 1955 cancelling the Appeal Order and thereby directing rehearing of the said appeals. Therefore, according to this respondent, since the 2nd Appellate Officer corrected the said mistakes in mouza demarcation in connection with the publication of record of rights through Draft City Jorip Khatian by the impugned order, this Court does not have anything to do in respect of the same. Referring to an earlier judgment of a Division Bench of this Court in Writ Petition No. 859 of 2004 along with other writ petitions, it is stated by this respondent that, similar issues were already heard by a Division Bench of this Court and Rules issued therein were discharged.

7. **Previous Hearing**:

The Rules issued in the instant writ petitions were heard by a Division Bench of this Court presided over by her Lordship Justice Salma Masud Chowdhury. The said Bench, vide judgment dated 09.09.2014, made the Rules therein absolute mainly on the ground that, Rule 42 or 42A of the SAT Rules, 1955 does not empower the Settlement Officer to sit or act as an appellate authority over an appellate order passed under Rule 31 of the SAT Rules, 1955 and then set aside the said appellate order or direct the appellate officer to hear appeal afresh in respect of a particular holding. It was also held that, the appellate officer is also not empowered to re-hear an appeal which was finally disposed of by an earlier Appellate Officer of same rank. In reaching such conclusion, the said division bench referred to similar views adopted by other Division Benches of this Court in Writ

Petition Nos. 2672 of 2005, 3797 of 2003, 6971 of 2004, 6262 of 2005, 1512 of 2006 and 1513 of 2006. Being aggrieved by such judgment of the said Division Bench, respondent no.4 preferred Civil Petition for Leave to Appeal, being CPLA No.186-187 of 2016, before the Appellate Division of this Court, whereupon a Bench of our Appellate Division, presided over by his Lordship (as he then was) Mr. Justice Md. Abdul Wahhab Miah, set aside the said judgment of the High Court Division with the following observation:

"From the impugned judgments and orders, it appears that the High Court Division after noting down the case of the writ-petitioner without noticing the case of the writ-respondent as stated by him in the affidavit-in-opposition, particularly, the fact that the land in question was acquired in L.A Case No.32/49-50 under rule 75A (2) of the Defense of India Rules,1937 for Tejgaon-Kurmitola Air field during World War II which was published in Calcutta Gazette on 10th July,1946 and that the land in question "fall within Mouza Lala Sharai comprising C.S Plot No.621" made the Rule Nisi absolute .

It further appears that the High Court Division did not at all decide the factual aspect of the case and it went only by the legal point, namely, respondent Nos.1 and 2 had no jurisdiction to reopen the matter under "Rule 42 or 42A of the Rules 1955". We are of the view that the factual aspect of the case ought to have been looked into by the High Court Division as well whatever might be its worth, in deciding the propriety of the decision of writ respondent No.1 and approved by writ-respondent No.2.

In view of the above, we find no other alternative but to send the writ petitions back to the High Court Division for hearing afresh and for disposal considering both the factual and the legal aspects of the case. Accordingly, these petitions are disposed of in the following terms:

The impugned judgments and orders of the High Court Division passed in the respective writ petition are set aside. The writ petitions are sent back to the High Court Division for hearing afresh and for disposal in accordance with the law considering both the factual and the legal aspects of the case".

8. Accordingly, with the above observation and order of the Appellate Division, the instant two writ petitions have been sent to this Bench for hearing and disposal.

Submissions:

9. During hearing before this Bench, Mr. A.F. Hassan Ariff, Mr. Kamal Ul Alam and Dr. Md. Iqbal Karim, learned advocates appearing for two sets of petitioners in the instant two writ petitions, have made the following submissions:

1) That since the C.S., S.A. and R.S. Khatians have already been published finally in respect of the said lands in the names of the predecessors of the petitioners and since the petitioners have constructed building on the said lands with the prior approval of RAJUK and Cantonment Board and, accordingly, have been possessing the same for long time upon payment of concerned utility bills, the Appellate Officer, after re-hearing of the said appeals, committed gross illegality in directing final publication of City Jorip Khatian showing respondent no.4 and the petitioners as owner and possessor respectively;

2) Since the Objection Officer as well as the first Appellate Officer concerned exercised their jurisdiction conferred on them by the statute, namely Section 144 of the SAT Act, 1950 read with Rules 30 and 31 of the Tenancy Rules, 1955, the Settlement Officer concerned did not have any authority or jurisdiction to sit over the said first Appellate Order or to direct rehearing the said appeals upon cancelling the said appellate order, the same being clearly contrary to the relevant provisions under Chapter XVII and XVIIA of the SAT Act, 1950.

3) Since the parent law, namely SAT Act, 1950, has provided specific forum to raise objections before the Land Survey Tribunals constituted under Section 145 A of the said SAT Act as against appellate order passed under Rule 31 of the SAT Rules, 1955, the Order of the Settlement Officer for rehearing of the said appeals sitting on the first Appellate Order as well as rehearing of the said appeals by the subsequent Appellate Officer and allowing the same by the impugned order are ex-facie without jurisdiction inasmuch as that the same have directly contravened the very basis of SAT Act, 1950, in particular the provisions under Chapter XVI, XVII and XVIIA of SAT Act in that the same have deprived the petitioners of their legitimate and legal rights to have their names being recorded as owners in the City Jorip Khatian to be published finally and as such the same have prevented the normal course of law, namely the legal obligation of respondent no.4 to raise objections before the Land Survey Tribunals against the said final publication of City Jorip Khatian in petitioners' name;

4) By referring to the Land Ministry notification dated 12.04.2009, as published in Bangladesh Gazette on 16.04.2009, as annexed to the Supplementary-affidavit of the petitioners as Annexure-H series, learned advocates submit that, it is apparent from the said gazette that the final publication of City Jorip Khatians in respect of the lands in question are yet to be done. Therefore, according to them, the respondent no. 4 still has the option to go to the Tribunal to lodge their complaints against the Order of the first Appellate Officer after final publication of City Jorip Khatians in view of the provisions under sub-section (7) of Section 144 of the SAT Act, 1950. Therefore, they submit, this Court should set aside the subsequent appellate order passed by the concerned Appellate Officer and restore the case to its original stage, namely the stage of the order of the First Appellate Officer and then to allow the concerned revenue officer to make final publication of City Jorip Khatians in petitioners' name in respect of the said land so that the law of the land can take its own usual course;

5) As regards acquisition of the land in question and other lands by the government during World War II, learned advocate submits that, the petitioners, by making specific statement in the supplementary-affidavit, have denied the said acquisition. Learned advocates submit that, the acquired lands by the then government during World War II are separate lands from the petitioners' one.

10. As against above submissions, Mr. Manzill Murshid, learned advocate appearing for the respondent no.4, has drawn this Court's attention to various field- maps as prepared during preparation of S.A. Records, R.S. Records and City Jorip Records in respect of the said lands. Showing those maps, learned advocate submits that, some portion of lands from Lala Sharai Mouza have apparently been included in the Kafrul Mouza wrongly during preparation of S.A. Khatians and R.S. Khatians, and this mistake having been continued for long time, it was incumbent upon the respondent no.4 to raise objection during objection

stage at the time of preparation of City Jorip Record of Rights bringing those facts and mistakes to the concerned Objection Officers as well as the first Appellate Officer. However, he submits that, the said facts of acquisition of the said lands as well as the mistakes committed at the time of preparation of S.A. and R.S. Khatians could not be appreciated properly by the said Objection Officer and first Appellate Officer which compelled the respondent no.4 to bring the said issues to the attention of the Director General of Land Survey resulting in an order passed by the Settlement Officer under Rule 42 of the Tenancy Rules, 1955 for rehearing of the said Appeals after setting aside the First Appellate order so that the said mistakes could be corrected. Therefore, he submits, no illegality has been committed either by the said Land Director, Settlement Office or by the subsequent Appellate Officer and as such this Court does not have anything to do with the impugned order passed by the Second Appellate Officer by which the name of the respondent no.4 was directed to be published in the Final City Jorip Khatian in respect of the said lands as owner. Further referring to a Pentagram as annexed to the supplementary-affidavit of respondent no.4 dated 11.12.2017 (Annexure 6 series), Mr. Murshid submits that, the encroachment of lands of Lala Sharai Mouza by demarcating the boundary of Kafrul Mouza is apparent from such Pantograph Map. Therefore, this Court should not interfere into the impugned order passed by the subsequent Appellate Officer.

Deliberations of the Court:

11. Since our Appellate Division in CPLA No. 186-187 of 2016, vide order dated 02.04.2017, has specifically directed this Bench to consider the factual aspects of the case along with the legal aspects, let us first start with the factual aspect.

12. It appears from materials on record that, admittedly, during preparation of S.A. Khatian and R.S. Khatian, the record of rights in respect of lands in question were published in the names of the predecessors of the petitioners. The specific averments in respect of such fact, as made by the petitioners in the writ petitions and supplementary-affidavits to the writ petitions, have not been denied by the contesting respondent No. 4. Therefore, in so far as the facts of publication of S.A. and R.S Khatians in respect of the lands in question are concerned, there is no other factual aspect except the allegation by respondent No. 4 that the said Khatians were published wrongly by ignoring the fact that the lands in question and some other adjacent lands were acquired by the government during World War II for establishment of Tejgaon-Kurmitola Airfield. In this regard, the respondent no.4 has made specific reference to a gazette notification dated 10.07.1946 as published in Calcutta Gazette dated 20.08.1946. It appears from the said gazette, as annexed to the affidavit-in-opposition of the respondent no.4 as Annexure-1, that certain Plot Numbers of C.S. Khatian have been mentioned therein as acquired lands. As against above averment of the respondent no.4, the petitioners have specifically stated that, the lands acquired by the then government are separate lands than the lands of the petitioners and that the petitioners' lands were never acquired.

13. As against this contrary statement of facts as regards acquisition of lands in question, this Court is of the view that, this particular factual aspect of the case cannot be determined under writ jurisdiction inasmuch as that, the same can only be determined in a trial by examining concerned and relevant evidences to be adduced by the parties. This factual aspect also cannot be determined finally by the concerned Revenue Officers empowered for preparation of record of rights, in particular for preparation of City Jorip Khatians etc., in exercise of their power under Chapter XVII of the SAT Act, 1950 as the same is a title

dispute and as such needs final adjudication by a competent Civil Court. It has long been settled by this Court that, preparation of record of rights or revision of record of rights mainly concerns the possession of the land for the purpose of collection of revenue by the government from the individual or person in possession of the said land and in such process title may be determined summarily. Therefore, though the Appellate Division has opined for consideration of factual aspects of the instant writ petitions (though not specified by the Appellate Division), this Court is of the view that, this factual aspect of the case cannot be determined by the High Court Division under writ jurisdiction. The petitioners and the respondents have not also, or cannot, come before this Court for determination of this factual aspect. Rather, the petitioners have come before this Court challenging the order passed by the subsequent Appellate Officer pursuant to an order given by the Settlement Officer under Rule 42 of the Tenancy Rules, 1955. Therefore, except the above mentioned factual issue, this Court is of the view that, we can only dispose of the Rules in the instant writ petitions considering other factual aspects as well as the concerned/relevant provisions of laws. For this reason, we need to examine the relevant provisions of law.

14. It appears from the provisions under State Acquisition and Tenancy Act, 1950 ("SAT Act, 1950") that, after whole-sale acquisition of land-receiving-interest of the Jaminders by operation of Section 3 of the said Act, the government has initiated preparation of record of rights during Pakistan era, in particular for preparation of Compensation Assessment Rolls in view of the provisions under Part-IV of the SAT Act, 1950. This record of rights, as prepared during Pakistan Ara, is commonly known as S.A. Khatians. Under Chapter-IV of Part IV of SAT Act, 1950, detailed provisions have been made as regards all steps in such process, namely draft publication of record of rights, disposal of objections thereto and appeals therefrom and then for final publication of record of rights. Section 78 of the SAT Act, 1950, under Chapter XI, has empowered the government to make Rules for carrying out the purpose of Parts II, III and IV of the said Act. However, maintenance and revision of records of rights, subsequent to such publication of S.A. Khatians, is covered by another chapter, namely Chapter XVII under Part-V of the SAT Act, 1950. Similar provisions have been made under this Chapter as well for revisions and preparation of record of rights, namely from disposal of objections to the publication of draft Khatians as well as publication of final Khatian, after disposal of appeals against the same. Section 152 of the SAT Act, 1950 has empowered the government to make Rules for carrying out the purposes of this Part, namely Part V, and, accordingly, the government has made and published Tenancy Rules, 1955 ("SAT Rules, 1955"), in particular the provisions under Chapter-VI and VII of the said Rules, for the purpose of carrying out the works to be done for maintenance and revision of record of rights. Since we are concerned with the revision of record of rights in the cases in hand, we will concentrate on the said issue and law applicable thereto as provided by SAT Act, 1950 and Tenancy Rules, 1955.

15. Section 144 of the SAT Act, 1950 is the relevant parent law in this regard. It provides that, the government may, in any case if thinks fit, make order directing the record of rights, in respect of any district, part of a district or local area, be prepared or revised by a Revenue Officer in accordance with the Rules as may be made by the government. Once such order of the government is passed through Official Gazette under sub-section (4) of Section 144, the Revenue Officer concerned shall start related works for preparation and revision of record of rights. The stages for such preparation or revision of record of rights are mentioned in Rule 27 of the Tenancy Rules, 1955, which have their source of authority in the parent law under Section 144. In such revision as well as preparation of record of rights, the Revenue Officer shall record particulars of the lands as provided by sub-section (4) and (4A) of Section 144 of

the said Act and Rule 26 of said Rules, and accordingly, publish a draft record of rights so prepared or revised and consider objections to such draft publication in respect of any entry made therein or omissions therefrom. This position is provided by sub-section (5) of Section 144. Once such objection is disposed of, any person aggrieved by such disposal of objection by the Revenue Officer, may prefer an appeal to the prescribed revenue authority not below the rank of Assistant Settlement Officer.

16. Therefore, it appears that, the stages of publication of draft record of rights and disposal of objections thereto followed by appeal against such disposal are provided by statutory provisions. Therefore, this authority of preparation of publication of draft record of rights and disposal of objections thereto followed by appeals are conferred on the concerned revenue officer by statute. Sub-section (7) of Section 144 further provides that, once such appeal is disposed of, the Revenue Officer shall finally frame the record and shall cause such record to be finally published in the prescribed manner and that such publication shall be conclusive evidence that the record has been duly prepared or revised under this Section. Under sub-section (8) of the Section 144, the Revenue Officer shall also make a certificate stating the fact of such publication and the date thereof and shall date and subscribe the same with his name and official title. Again, Section 144A, which has been inserted in the SAT Act, 1950 by East Pakistan Ordinance No. 8 of 1967, has given a presumptive value to such record of rights which has been published finally under sub-sections (7) and (8) of Section 144. It provides that, every entry in the record of rights, prepared or revised under Section 144, shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect. These stages of preparation of record of rights and their legal impact have been covered by the statute in such a sanctified way that, even the jurisdiction of Civil Court has been excluded from interfering therein (See Section 144B).

17. Now, what is the remedy for any person who is aggrieved even by disposal of appeal by the concerned Revenue Officer? This has been provided by the provisions under Chapter XVIIA of the SAT Act, 1950. Under this Chapter, the government shall constitute Land Survey Tribunals comprising of judges of the rank of Joint District Judges. Sub-section (6) of Section 145A has made it clear that, any person aggrieved by such final publication of last revised record of rights as prepared under Section 144, may, within one year from the date of such publication or from the date of the establishment of the Land Survey Tribunal, whichever is later, file a suit in such Tribunal. Such suit may also be admitted even with a delay of one more year, as provided by sub-section (7) of Section 145A. According to sub-section (8) of Section 145A, the Tribunal is empowered and competent to declare the impugned record of rights to be incorrect and further direct the concerned office to correct the record of rights in accordance with its decision and may also pass such order as may be necessary. The matter does not end there, the statute even provided further forums like the Land Survey Appellate Tribunal (see Section 145B) and even the Appellate Division of the Supreme Court of Bangladesh (see Section 145C), for addressing the grievances of the parties against the judgments of the Tribunal. Bedsides, under the said Chapter, the Tribunal has been given the power of the Civil Courts in accordance with the Code of Civil Procedure, 1908 for disposal of disputes between the parties as regards publication of record of rights, along with the ouster of jurisdiction of Civil Courts in respect of last revised record of rights, within the territorial limits of such Tribunals (see Sections 145 D and 145K).

18. As stated above, the forums for disposal of objections/appeals/suits by the concerned revenue officers and Land Survey Tribunals are created by the statute. The Rules framed

under Section 152 of the SAT Act, 1950, in respect of matters falling under Part-V of the said Act, have been framed only for the practical working of those provisions. By such Rule making delegated power, the government has not been conferred with any authority to create any forum which can nullify the result of those disposals by the Objection Officers, Appeal Officers, Land Survey Tribunals etc. as the same will be direct contrary to, and violation of, the parent provisions of law. Even if such provision is made under any Rules framed under the parent law authorizing a particular Revenue Officer to nullify such result of objections and appeals, this Court is of the view that, such Rules or delegated legislature will also become nullity as the same will be hit by the principle of "delegatus non potest delegare", meaning the delegatee cannot go beyond the power of delegation. Not only that, if not permitted by the parent law, delegator also cannot delegate his such power in favour of the delegatee.

19. Now, let us examine what Rules have been framed by the government for the working of the said parent provisions as mentioned above. It appears from Chapter-VII of the Tenancy Rules, 1955 that, this Chapter covers the area of revision of record of rights under Section 144 of the SAT Act, 1950. Under this Chapter, some particulars are to be recorded in the record of rights as provided in Rule 26. Amongst such particulars, it is the responsibility of the Revenue Officer to determine the boundaries of the lands held by each tenant or occupant [See Rule 26(1) (c)]. Under Rule 27, various stages are provided as a guideline for the revenue officer to be followed in the revision of such record of rights and such stages include the erection of boundary marks, a preliminary record-writing (Khanapuri), local explanation (Bujharat), attestation, publication of draft record, disposal of objections, filing of appeals and disposal thereof, preparation and publication of final records in accordance with the procedures as prepared by the concerned settlement department under the title 'Technical Rules and Instruments of the Settlement Department' as modified time to time (See Rule 28). Once such attestation is done, the concerned Revenue Officer shall publish a draft record of rights under Rule 29 of the Tenancy Rules, 1955 and invite objections to the entries in such draft publication. The Revenue Officer then hear the objections under Rule 30 and, in hearing such objections, he may summarily decide regarding ownership or possession of the land or of any interest in the land. After disposal of objection, anyone aggrieved by such disposal order, will be entitled to prefer appeal before the Revenue Officer appointed with the additional designation of Settlement Officer, who is commonly known as Appeal Officer, as provided by Rule 31 of the said Tenancy Rules. After disposal of such appeals, the revenue officer shall proceed to frame the final record of rights and publish the same followed by certificate issued by him certifying the fact of such publication and a gazette notification by the government declaring that such publication has been done (See Rules 33 and 34).

20. Again, Chapter-VIII of the Tenancy Rules, 1955 has purportedly conferred or clarified some powers of the Revenue Officer concerned, Rule 36, under the said chapter, has provided that the revenue officer shall have the power to take down evidence in accordance with the provisions under the Code of Civil Procedure and has the power to enter upon the land and demarcate and prepare a map of the same. In doing so, the Revenue Officer is vested with the power of Assistant Superintendent of Survey and a Deputy Collector (Deputy Commissioner) as conferred on them under the Bengal Survey Act, 1875 (See Rule 37) and such Revenue Officer, appointed with the Additional Designation of Settlement Officer or Assistant Settlement Officer, shall also have all powers exercisable by a Civil Court in the trial of suits under Code of Civil Procedure (See Rule 39). While Rules 40 and 41 have provided some administrative powers of the concerned Revenue Officers for making over some matters to the Assistant Settlement Officer for disposal of the same as well as transfer

of case from one Assistant Settlement Officer to another Assistant Settlement Officer, Rules 42 and 42A have conferred some special powers on such Revenue Officer appointed with the Additional designation of the Settlement Officer. While Rule 42A has empowered such revenue officer to direct excision of any entry in the record of rights before its final publication if it is found that such entry has been procured by fraud, Rule 42 has empowered him to direct that any portion of the proceedings referred to in Rules 28 to 32, in respect of any district, part of a district or local area, be cancelled and that the proceedings be taken up fresh from such stage as he may direct.

21. Since this special power of the Revenue Officer concerned is the crux of disputes between the parties in the instant writ petitions, let us quote the same for ready reference:

> ***"42. Special Power of Revenue-officer appointed with the additional designation of Settlement Officer:-*** *A Revenue-officer appointed with the additional designation of 'Settlement Officer' may, at any time before the publication of final record-of-rights, direct that any portion of the proceedings referred to in rules 28 to 32 in respect of any district, part of a district, or local area, shall be cancelled and that the proceedings shall be taken up fresh from such stage as he may direct."*

22. It appears from this provision that, though the statutes, in particular Section 144 of the SAT Act, 1950 as well as the provisions under Chapter XVII A of the said Act, have provided different forums for disposal of objections, appeals as well as grievances against appellate orders, this Rule 42 has empowered the Revenue Officer concerned, appointed with the additional designation of the Settlement Officer, to cancel or reverse such course of law and direct that such proceedings shall be taken afresh from a particular lower stage and that such power may be exercised before final publication of record of rights in respect of any district, part of a district or local area. We are in fact taken aback with surprise when we see that a government official has been empowered by this Rule 42 to nullify the course of parent law and send it back to an earlier stage for hearing afresh. The reason for such surprise is, when an Act of parliament has provided some specified forums for disposal of particular issues and has provided sequential steps to be taken one after another before different forums up to the Appellate Division of the Supreme Court of Bangladesh, an official like a revenue officer, appointed with the additional designation of Settlement Officer, can nullify everything before final publication of record of rights. Though this Rule 42 has not been challenged in the instant two writ petitions, we have been compelled to make our above observation as regards the power of the revenue officer under said Rule in particular when the special facts and circumstances of the present cases have been brought to our notice. When the government even does not have any power to nullify or reverse the course of parent law, since such power has not been delegated to government by the parent law, we are of the view that, even with the existence of Rule 42 empowering such revenue officer to nullify such course of parent law, any such exercise of power by such revenue officer shall be nothing but a nullity in the eye of law. This position has been indirectly addressed by the High Court Division in various cases and, in those cases, the High Court Division has set aside the order of the subsequent Appellate Officer as passed pursuant to an order under Rule 42 empowering him to re-hear the appeal. References may be made to **Romisa Khanam vs. Bangladesh, 61 DLR-18 and unreported Writ Petition No. 6224 of 2003 along with two others (Shamsuddin Ahmed and others vs. Bangladesh and others)**. In the above mentioned two cases, the said Division Benches have also referred to various other cases and decisions of this Court and the Courts of this subcontinent and finally held that, the revenue officer concerned, appointed with the additional designation of Settlement Officer, does not

have any power to sit over an appellate order passed by the Appellate Officer under Section 144 of the SAT Act, 1950 read with Rule 31 of the Tenancy Rules, 1955.

23. Let us now embark ourselves on the instant cases before us. It appears from records that, admittedly, the S.A. Khatian and R.S. Khatian in respect of the lands in question were published and recorded in the names of the predecessors of the petitioners. While the said S.A. Khatian was prepared after enactment of SAT Act, 1950, under Chapter IV, Part-IV of the said Act, the Cantonment authority (respondent No. 4) did have the option to raise objections against draft publication as well as to file appeals against disposal of such objection. But, admittedly, no such objections were made by the respondent No. 4. It is the case of respondent No. 4 that the mistake was first committed at the time of preparation of S.A. Khatian followed by same mistake at the time of preparation of R.S. Khatian, in particular in demarcating the boundary of Lala Sharai Mouza and Kafrul Mouza. According to it, while such demarcation was made during preparation of S.A. Khatian, some lands of Lala Sharai Mouza were shown within the boundary of Kafrul Mouza and thereby the respondent No. 4 lost some lands in favour of the petitioners or their predecessors and other parties. After liberation of Bangladesh, when R.S. Khatian was prepared, respondent no.4 again got another opportunity to raise objection and file appeals against disposal of such objections. But it did not raise any such objection for reasons best known to it. Now with the publications of two Khatians, namely S.A. Khatian and R.S. Khatian, this Court is of the view that, such khatians have acquired legal presumption as to its correctness as well as correctness of entries made therein until such legal presumption, in view of the provisions under Section 144A of the SAT Act, is proved to be wrong or incorrect by contrary evidence.

24. However, it has to be borne in mind that, since S.A. and R.S. Khatians were prepared long ago, such presumption will lose its weight with the passage of time. On the other hand, though the respondent No. 4 did not raise objections as regards alleged mistake in preparation of Mouza Maps of Lala Sharai Mouza and Kafrul Mouza during the said two surveys, it is not debarred from raising such objections in the subsequent survey. Therefore, when they raised such objection for the first time during City Survey of Dhaka City as started in 1995, such objections as well as procedures for disposal of such objections had to be done mainly in accordance with the provisions of parent law as well as the Rules framed for proper working of such parent law. Accordingly, when it raised objections against publication of Draft City Khatian No. 1839 (in Writ Petition No. 3450 of 2004) and Draft City Khatian No. 1644 (in Writ Petition No. 3451 of 2004) showing the petitioners as owners of the lands in question under corresponding plot No. 4587 and 4559 respectively of Kafrul Mouza, the said objections along with other objections by the respondent no.4 were disposed of by the concerned Revenue Officer in view of the provisions under Section 144 of the SAT Act read with Rule 30 of the Tenancy Rules, 1955. When such objections were disposed of against the claim of the respondent no.4, they also preferred appeals before the Appellate Officer, again under the said provisions of Section 144 of SAT Act read with Rule 31 of SAT Rule, 1955. However, when the said appeals were dismissed, under the usual course of law, they were required to wait for the final publication of the City Khatians in respect of the said lands and then to file objections by way of suits before the Land Survey Tribunal constituted under Section 145A of the SAT Act. But, for the reasons best known to them again, they opted for a very peculiar option which is unknown to the parent law. Instead of going to the Tribunal with a suit after final publication of the City Khatians in respect of the said lands, they filed a representation to the Director General of Land Survey (respondent no.3) raising the same objections as they have made before the Objection Officer as well as Appeal Officer. On the basis of such objection, the Director General of Land Survey has transferred the file to the

concerned Settlement Officer. It appears from the order of the said Settlement Officer dated 10.07.2003 (Annexure-5 to the supplementary-affidavit of respondent no.4 dated 02.11.2017) that, the Settlement Officer has set aside the first appellate order of the Appeal Officer in thirty appeal cases including the concerned Appeal Case No. 65105 of 2002 and Appeal Case No.65096 of 2002 in exercise of its purported power under Rule 42 of the Tenancy Rules, 1955 (written as EBT Rules, 1950) and ordered the said appeals to be taken up afresh from the appeal stage and, accordingly, directed one Mr. Md. Shamsul Abedin, the Charge Officer of Dhaka Settlement office, to re-hear the said appeals with the assistance of some other officials. Pursuant to such order, the said appeals were re-heard by another Appeal Officer of the same rank and the said appeal officer, vide impugned order dated 14.03.2004, allowed the said appeals and, accordingly, directed for publication of the City Khatian in respect of the said lands showing the respondent no. 4 as owner and the petitioners as possessors of the said lands.

25. Therefore, it appears from the very record that, apparently, the said Settlement Officer, vide order dated 10.07.2003, reversed the course of parent law from its concluded stage to a lower stage. Not only that, the said Settlement Officer also gave an additional leverage in favour of the respondent no.4 to present its case again before another Appellate Officer of same rank. This order has made several interferences into the normal course to be taken or followed under SAT Act, 1950, namely:

(f) It did not allow final publication of City Khatian in the normal course after disposal of appeals by the Appellate Officer

(g) It allowed the respondent No.4 to avoid the Land Survey Tribunals constituted under Section 145A of the SAT Act, 1950. Rather, it allowed respondent no.4 to avail of another forum under Rule 42 contrary to the relevant provisions of parent law.

(h) It deprived the petitioners of their legal and legitimate expectation and rights to have the concerned City Khatians finally published in their names as owners in respect of the said lands.

(i) For all practical purposes, by this order, the Settlement Officer has already expressed his view regarding merit of the case and as such left nothing for the 2nd Appellate Officer to hear and decide the dispute.

(j) Pursuant to this order of the concerned Settlement Officer under Rule 42, the subsequent Appellate Officer has virtually set aside the order passed by the First Appellate Officer, who is of equal rank like him.

26. While this Court has repeatedly held that, the delegatee of power cannot go beyond the power of delegation, it appears that, there cannot be any better example than this case that how a power, not permitted by parent law, may be delegated and as to how a delegatee can exceed its limit of power given by the parent law. Here, the delegatee, namely the concerned Settlement Officer, has reversed the normal course of parent law and thereby sat over the first appellate order like a higher authority, in particular when the higher authority as provided by law against such order is the Land Survey Tribunal, which is empowered by parent law to determine those issues as raised by respondent no.4 after final publication of City Khatian.

27. Admittedly, the City Khatians concerned have not yet published finally. Therefore, this Court is of the view that, the respondent no.4 still has an option to raise appropriate objections before the Land Survey Tribunal constituted under the law once the concerned City Khatians are published finally. Now, the respondent no.4 has tried to impress upon this Court to follow the course adopted by a Division Bench of this Court in **Writ Petition No. 859 of 2004 along with some other writ Petitions (Ahmuda Akhter Khanam and others vs. Government of Bangladesh and others)** [Annexure-4 to the affidavit-in-opposition]. It appears that, in those writ petitions, Rules were issued in respect of similar nearby lands and the same were discharged on the ground that the City Khatians in respect of the lands in question in those writ petitions had already been finally published. This Court is of the view that, the ratio adopted by that Bench is not applicable in the facts and circumstances of the instant writ petitions, in particular when the admitted position in the present cases is that the final publication of City Khatian is yet to be done and this factual position is apparent from Notification dated 12.04.2009 as published in Bangladesh Gazette on 16.04.2009 (Annexure-A series to the supplementary-affidavit of the petitioner). Therefore, in line with the ratio declared by this Court in above referred **Romisa Khanam case** and other cases, this Court is of the view that, the concerned Settlement Officer did not have any authority to sit over the appellate order passed by the first Appellate Officer in respect of the lands in question in the instant writ petitions and, accordingly, since the impugned order dated 14.03.2004 has been passed after rehearing of the appeals concerned pursuant to such order of the Settlement Officer, the said impugned order cannot stand in the eye of law. Accordingly, we find merit in the Rules in so far as the petitioners are concerned and, thus, the same should be made absolute.

28. In the result, the Rules are made absolute. The impugned order dated 14.03.2004 (Annexure-G) are hereby declared to be without lawful authority and is of no legal effect in so far as the petitioners are concerned. Parties, in particular respondent no.4, is at liberty to file suits before the Land Survey Tribunal constituted under Section 145A of the SAT Act, 1950 and ventilate their grievances only after final publication of the City Khatians concerned showing the petitioners as owners in possession of the respective lands. Concerned Revenue Officials are directed to make final publication of the concerned City Khatians within a period of 30(thirty) days from receipt of the copy of this judgment.

29. Communicate this.

10 SCOB [2018] HCD

HIGH COURT DIVISION

Death Reference No.64 of 2011

The State
Vs.
Md. Saiful Islam and another
...Condemned -prisoners
with
Criminal Appeal No.7223 of 2011

Md. Saiful Islam and another
... Appellants

Vs.
The State
... Respondent

Mr. Md. Moniruzzaman (Rubel), Deputy Attorney General with
Mr. Abul Kalam Azad Khan,
Syeda Sabina Ahmed and
Ms. Marufa Akhter, Assistant Attorney Generals
... for the State

Mr. SM Shajahan with
Mr. Afil Uddin Ahmed and
Ms. Sabrina Zarin, Advocates
... for the appellants

Judgment on 17-18.01.2018

Bench:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakrabortty

Code of Criminal Procedure, 1898
Section 164:
Discrepancy between medical evidence and confessional statement:
In view of the above two cases of Indian jurisdiction, we can rely on the confessions of two accused, even if it gets partial support from the medical evidence. ..... However, the two accused themselves confessed commission of rape and subsequent murder of the victim and if these are believed to be true and voluntary, we do not have any reason not to rely on their confessions. … (Para 33)

Judgment

Md. Ruhul Quddus, J:

1. This Death Reference under section 374 of the Code of Criminal Procedure has been made by the Judge, Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah for confirmation of sentence of death awarded upon the condemned-prisoners Md. Saiful Islam and Md. Arif Hossain by judgment and order dated 25.06.2008 passed in Nari-o-Shishu Nirjatan Damon Tribunal Case No. 04 of 2009 arising out of Moheshpur Police Station Case No. 23 dated 26.06.2008 corresponding to G R No. 112 of 2008 under section 9(3) of the Nari-o-Shishu Nirjatan Daman Ain (Act VIII of 2000). The learned Judge also imposed fine of Taka 1, 00,000/- upon each convict. The condemned-prisoners jointly preferred a regular appeal being Criminal Appeal No. 7223 of 2011 challenging the selfsame judgment and order. Both the matters have been heard together and are disposed of by this judgment.

2. The informant Torab Ali lodged a first information report (FIR) with Moheshpur police station, Jhenaidah on 26.06.2008 at about 9:45 am alleging, *inter alia,* that his daughter Alpana Khatun, a minor girl of 7 years was missing till 1.00 pm on the previous day. On the following day at about 7.00 am Moyna Begum (PW 2) saw her dead body in a jute field owned by Moshiur Rahman at village Shibanandapur. On receipt of the news he along with some other villagers rushed the jute field and saw her dead body lying. Her neck was encircled with some jute plants and her right eyeball was extracted. It was presumed that some unknown miscreants took her to the jute field with an ill motive and killed her. It was also suspected that before death, she was raped.

3. The police investigated the case and submitted a charge sheet on 16.11.2008 against the condemned-prisoners under sections 7 and 9(3) of the Act VIII of 2000. In the meantime, the condemned-prisoners were arrested on 02.07.2008 on secret information given by a source of police. At about 10.00 am on the following day both of them were produced before the concerned Judicial Magistrate and they made separate confessions involving themselves in her murder following rape. The Judicial Magistrate accordingly recorded their confessions. Subsequently they filed applications for retraction of the confessions on the grounds that the police under duress and torture had extracted those confessions, and that they did not make it voluntarily.

4. Eventually the case was sent to the Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah and the learned Judge thereof framed charge against both of them under sections 7 and 9(3) of the Act VIII of 2000 by order dated 09.03.2009. The charge was read over to them and they pleaded not guilty claiming justice.

5. The prosecution in order to prove its case examined twelve witnesses. Of them PW1 Md. Torab Ali, the informant stated that his daughter Alpana Khatun was a 7 year old minor girl. She went outside the home at about 12 o'clock on 25.06.2008. The occurrence took place at the jute field of Moshiur Rahman within Shibanandapur Mouza. Despite searching from 2.00 pm they could not trace her anywhere. They started searching again at the following morning. At one stage Moyna Begum communicated him that Alpana's dead body was lying in the jute field. They rushed there and saw the dead body without the right eyeball. Her neck was encircled with some jute plants. He along with the local Chairman Fakir Ahmed (PW 5) and Zahangir (PW 4) went to the police station and lodged the FIR. The police came to the spot and sent the dead body for holding autopsy. During investigation the Investigating Officer (IO) seized some jute plants, a paste coloured half pant wore by the victim, a white polythene bag with 15 berries and half portion of a blade stained with blood.

6. In cross-examination, he stated that the accused Saiful and Arif came to the spot to see the dead body. They were arrested six days after the occurrence from their respective houses at about 2.00 am. There were two groups in their village. One belonged to Jamaat-e-Islami led by the local Chairman Fakir Ahmed where he himself was involved and the accused belonged to BNP. He denied the defence suggestion that according to the instruction of the Chairman he deposed falsely.

7. PW 2 Moyna Begum, a relation to the informant stated that the occurrence took place about three years back. On a Wednesday the victim Alpana was missing. On Thursday morning her dead body was found in the jute field of Mashiur Rahman. Her eyeball was extracted and neck was encircled with jute plants. She was presumably raped before she was

killed. Her pant was put off and chest was open. On receipt of the information, the police came and held inquest on the dead body and thereafter sent it for autopsy.

8. In cross-examination she denied the defence suggestion that the accused persons belonged to her rival group or that they were falsely implicated at the instance of the local Chairman, who was also their rival.

9. PW 3 Muchhaddi Molla, a 75 year old man stated that the informant was his grand son-in-law. The occurrence took place three years back. He saw the victim's dead body in the jute field. Her eyeball was extracted. As he could not sustain the brutality, he came back home. Subsequently, the police arrested Arif and Saiful. They were taken to the house of the Chairman and he (PW 3) went there. They confessed their guilt in presence of all.

10. PW 4 Zahangir Alam, another relation to the informant stated that the occurrence took place before three years. The victim Alpana was missing from one Wednesday. At early morning on Thursday, her dead body was found in the jute field. His (PW 4's) wife Moyna Begum first saw the dead body. Her (victim's) neck was encircled with jute plants and eyeball was extracted. A poly bag with some berries was lying beside the dead body. The police came and prepared an inquest report. After arrest, the accused were brought to the house of the Chairman, where they confessed their guilt in presence of the local people. PW 4 himself was present there.

11. In cross-examination he stated that at the time of recovery of the dead body, the half pant wore by the victim was stained with blood. Police shifted the dead body to a nearby jackfruit garden. He denied the defence suggestion that because of relationship with the informant he deposed falsely.

12. PW 5 Fakir Ahmed, the local Chairman stated that the occurrence took place on 25.06.2008. He received the news that victim Alpana was missing. At the following morning he heard that the dead body was found in the jute field of Moshiur Rahman. He went there and saw many people. The victim's neck was encircled with jute plants and her right eye was extracted. The dead body was semi-naked. Her half pant was pulled down to knee. The police on suspicion arrested Saiful and Arif and brought them to his house at the time of *esha* prayer. On interrogation, they confessed their guilt in presence of the local people. In cross-examination he stated that he saw several scratch marks on the dead body. He denied the suggestions that the accused were beaten at his house or that they made the extra-judicial confessions because of beating.

13. PW 6 Md. Golam Kabir stated that at the material time on 31.07.2008 he was posted to Jhenaidah as a Magistrate of first class. He recorded the confessional statements made by Saiful Islam and Arif Hossain under section 164 of the Code complying with the provisions of the law. After recording, the confessions were read over to them and finding those to have been correctly recorded, they put signatures there. To be on the safe side, their signatures were taken on each and every page of the recorded confessions. He asserted that they had made the confessions voluntarily and without any influence or allurement. After recording the same they were sent to jail custody. He proved the confessional statements and his signatures thereon as exhibits 2 and 3 series. In cross-examination he stated that he recorded their statements separately and they were kept in his chamber, not under police. The accused persons made applications for retraction on 27.08.2008, which were kept in record.

14. PW 7 Mizanur Rahman, a local seizure list witness stated that he knew both the informant and victim. He also knew the accused Arif and Saiful. The occurrence took place on 26.06.2008. The dead body was found in the jute field of Mashiar. He went to the spot and saw the dead body. Her neck was encircled with jute fibers and right eye was uprooted. Her half pant was pulled down. A police personal seized the jute plants, half pant and ploy bag with some berries under a seizure list. He proved the said seizure list and his signature there (vide exhibits 4 and 4/ka) and also proved the articles as material exhibits I-III.

15. PW 8 Badar Uddin stated that the occurrence took place before three years. In the afternoon of a day he heard that Alpana was missing. On the following day he came to know about recovery of her dead body. He went to the place of occurrence (PO) and saw the dead body. The police came, prepared an inquest report and took his signature there. He exhibited the inquest report with his signature (vide exhibits: 5 and 5/1). He further stated that the police also seized some jute plants, half pant of the victim and a poly bag with some berries under a seizure list. He was made a witness thereto. He also proved his signature on the seizure list.

16. PW 9 Md. Hafizur Rahman stated that Alpana was missing on 25.06.2008. On the following day her dead body was found in the jute field of Mashiur. On the previous day (meaning 25.06.2008) he saw Arif and Saiful to talk with Alpana under a berry tree.

17. In cross-examination he (PW 9) stated that the police arrested and took him to the police station and released him there from. On that very day, he made a statement to the police that he saw them under the tree. He also made a statement to the Magistrate stating the same fact and denied the suggestion that the police tortured him and compelled him to make such statement. On recall he proved his statement made before the Magistrate and his signature there.

18. PW 10 Md. Abdul Hakim, the 2nd IO stated that he was assigned for investigation of the case on 09.02.2008 and conducted the investigation in part. The previous IO Sub-Inspector Shafiqur Rahman conducted the 1st part of the investigation. During investigation of his (PW 10's) part, he visited the PO, recorded statements of four witnesses under section 161 of the Code, collected the autopsy report, prepared the memo of evidence and submitted the charge sheet on 13.11.2008. On recall, he (PW 10) further stated that the previous IO Shafiqur Rahman was on a foreign mission. He (Shafiqur Rahman) had also visited the PO and prepared sketch map with the index. He proved the sketch map, index and the signatures of the previous IO as he (PW 10) knew his signature and hand writing.

19. In cross-examination he stated that before submission of the charge sheet he perused the case docket. He further stated that Saiful and Arif were produced before the Court on 03.07.2008. A half portion of blade stained with blood was recovered from a bamboo clump at the showing of the accused. He proved the seizure list under which the half blade was seized and the signature of the 1st IO there and also proved the recovered blade as a material exhibit.

20. PW 11 Dr. Md. Mostafizur Rahman stated that the dead body of the victim was brought at Jhenaidah Hospital morgue on 26.06.2008. He along with the Members of a Medical Board conducted autopsy on the dead body of the victim and prepared an autopsy report. He proved the report and his signature there. While conducting autopsy they found her right eyeball extracted from the orbital cavity. They also found clotted blood and

congestion in the surrounding tissue, multiple scratch marks at the right iliac region and multiple scratch marks of different size and shape on different parts of her body. He (PW 11) lastly opined that the death was due to hemorrhage and shock as a result of the injuries and those were antemortem and homicidal in nature. No sign of recent sexual intercourse was found, but sign of sexual violence was there.

21. In cross-examination he stated that no symptom of strangulation was found on the dead body and denied the defence suggestion that extraction of eyeball required an expert person. He further stated that the death was due to extraction of the right eyeball as well as hematoma at the parietal region of the scalp.

22. PW 12 Md. Shahidul Haque stated that he recorded the FIR, filled up the FIR form, put his signature there and assigned Sub-Inspector Shafiqur Rahman to investigate the case. After his transfer, Sub-Inspector Abdul Hakim was assigned to complete the investigation.

23. After closing the prosecution evidence, the learned Judge of the Tribunal examined the accused under section 342 of the Code bringing the abstracts of the incriminating evidence and the confessions into their notice, to which they reiterated their innocence and submitted written statements in their defence. They, however, did not examine any defence witness. In the statement of accused Saiful Islam he took the plea that after being arrested by the police he was severely tortured and threatened of cross-fire and he made the confession in order to save his life. Co-accused Arif Hossain made a similar statement in his defence.

24. After conclusion of trial the learned Judge of the Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah found both the accused guilty of offence under section 9(3) of the Act VIII of 2000 and accordingly convicted and sentenced them to death by hanging and also imposed fine of Taka 1,00,000/- each giving rise to the instant Death Reference and the connected criminal appeal.

25. Mr. Md. Moniruzzaman, learned Deputy Attorney General appearing for the State submits that the brutal murder of an innocent child following rape has been proved by the prosecution evidence and two confessions made by the condemned-prisoners themselves. They were arrested on 02.07.2008 and on the following morning they were produced to the concerned Magistrate, where they confessed their guilt voluntarily. The learned Magistrate on proper observance of all procedural law recorded the confessions. He himself deposed on oath affirming the confessions and proved the same. Besides, a local and independent witness (PW 9) deposed supporting their presence under the berry tree and talking with the victim at the material time. After their arrest, half portion of a blade stained with blood was recovered from a bamboo clump at the showing of one of the accused. By the said blade victim's eyeball was extracted. This is an offence, degree of culpability of which cannot be expressed in words. The confessions have been affirmed on oath by the recording Judicial Magistrate and satisfactorily corroborated by the evidence of PW 9 as well as recovery of the blood stained blade. The time and place of occurrence has also been corroborated by other prosecution witnesses. This is a fit case for confirmation of death.

26. Mr. SM Shajahan, learned Advocate for the condemned-prisoners as well as the appellants in the connected criminal appeal at the very outset submits that in view of the autopsy report (exhibit-7) read with the evidence of PW 11, the allegation of offence under section 9 (3) or any other penal provision of the Act VIII of 2000 has not been proved in this

case and on that count the Nari-o-Shishu Nirjatan Daman Tribunal had no jurisdiction to try the case.

27. Mr. Shahjahan further submits that the socalled confessions of the accused disclose that they had killed the victim by throttling after committing rape on her. But the autopsy report shows no sign of recent sexual intercourse and no mark of strangulation was found on the dead body. The autopsy report was affirmed by the conducting Doctor (PW 11) himself. He also stated in cross-examination that no symptom of strangulation was found and affirmed that no sign of resent sexual intercourse was found. When the confessions are contrary to the evidence of the Doctor (PW 11) as well as the autopsy report, it cannot be relied on for conviction and sentence of death. On this point Mr. Shajahan refers to the case of Mizazul Islam alias Dablu vs The State, 41 DLR (AD) 157 and two other cases of Indian jurisdiction, namely, Jagmal and another vs Emperor, AIR 1948 Allahabad 211 and Union Territory of Mizoram vs Vanalallawama alias Lallaoma 1977 CRLJ 1831.

28. Mr. Shahjahan then submits that the confessions were retracted by both the condemned-prisoners within a short time and at the time of their examination under section 342 of the Code they furnished two separate statements stating under what circumstances they were compelled to make the confessions. But the trial Judge without considering the statement of the accused made under section 342 of the Code and their retraction applications, passed capital sentence upon two young men having no criminal track record and thereby committed gross illegality.

29. Mr. Shahajahan lastly submits that it appears from the record as well as the cross-examination of PW 9 Hafizur Rahman that he was also arrested on 02.07.2008, but instead of producing him to the Magistrate for confession he was allured to make an statement under section 164 of the Code as a witness. It gives an indication that the present appellants were victimized and the criminal liability of one was shifted to another. The time of arrest of the accused as stated by the prosecution witnesses is also contradictory, and the story of extracting one's eyeball by half of a blade is absurd. The *challan,* by which the dead body was sent to the morgue for autopsy shows that the victim was wearing a red half pant, but the seizure list prepared on the same day and evidence of PW 1 shows that it was paste coloured. Therefore, the evidence and other prosecution materials are inconsistent and contradictory regarding colour of the half pant wore by the victim, commission of rape and her murder by throttling and extraction of eyeball by a half blade, which makes the case seriously doubtful and as such the appellants are entitled to be acquitted on benefit of doubt, and the conviction and sentence passed by the trial court would defeat justice.

30. In reply to the submission advanced by Mr. Shahjahan on the point of 'inconsistency' between the confessions and autopsy report read with the evidence of PW 11, learned Deputy Attorney General submits that sometimes in case of discrepancy between medical evidence and evidence of a witness, the court should try to find out the truth and should not throw away the prosecution case only on the ground of such discrepancy. Similarly if an accused gives partial wrong description in his confession, it cannot be a ground of his acquittal. In support of his contention learned Deputy Attorney General refers to the cases of Mohanlal and others vs The State, AIR 1961 Rajasthan 24 and Bangaru Reddy, AIR 1940 Mad 699.

31. We have considered the submissions of the learned Advocates of both the sides, perused the evidence and other materials on record, consulted the relevant provisions of law and gone through some decisions on the points involved including the cited cases. In the case

of Mizazul Islam alias Dablu as cited by the learned Advocate for the appellants, the confessional statement made by the condemned-prisoner directly contradicted the evidence of the injured-victim (PW 4) who was also an eyewitness to the main part of occurrence and as such the Appellate Division did not rely on the confession and acquitted the condemned-prisoner who was convicted on the basis of such confession. In the present case there is no eyewitness. It is solely based on circumstantial evidence read with the confessions of the co-accused and as such distinguishable with the case cited. This is correct that there are some discrepancies in the medical evidence regarding commission of rape on the victim and mode of killing her by throttling. A medical report may not be correct in each and every autopsy. There might be hundred of reasons for not furnishing a correct autopsy report. Sometimes it happens because of negligence of conducting Doctor or his callousness, or lack of knowledge and sometimes they do it deliberately under the influence of the defence. In the case of Mohanlal and others vs The State, AIR 1961 Rajasthan 24 it has been observed:

> *"It should also be borne in mind that some times, the Medical Officers also do not bestow sufficient care while performing examinations and their opinions may not be properly formed on account of inadequate or defective examinations or lack of complete knowledge. It is, therefore, hardly fair to expect a complete and perfect correspondence between the medical evidence and the eye-testimony.*
>
> *"Naturally, therefore, the court must carefully examine the discrepancies and if it is reasonably open to arrive at a substantial and true version of the prosecution case, the courts should not adopt the easy course of throwing away the prosecution case on the alleged discrepancies between the medical evidence and the eye-testimony. Applying the above test to the present case, it can safely be assumed that the statement of Girraj to the effect that no injury was caused after the injured had fallen down cannot be deemed to be correct and is only the result of imperfect memory on his part and the prosecution case on that basis cannot at all be held unreliable.*
>
> *"The portion of Girraj's statement that no injury was received after Gulley fell down is not acceptable, but from this, it does not follow that his entire statement should be discarded on that ground with the help of medical evidence. The lower court was quite competent to accept the substantial part of his testimony. Gulley's statement, ambiguous though it may be does not necessarily imply that he received no injuries after he fell down.*
>
> *"The medical evidence cannot be, therefore, invoked to discredit his testimony. Further, I find no justification to doubt the presence of Roopsingh at the time of the incident. The lower court has explained the statements of Girraj and Gulley about the arrival of Roopsingh and for the reasons mentioned by it with which I am in agreement, I hold that Roopsingh is a reliable eye-witness. His evidence is quite consistent with medical evidence. In my opinion, the trial Judge has rightly accepted the prosecution case and I do not see any good reasons to differ from the appraisement of the evidence by the lower court."*

32. In a Death Reference for confirmation of death sentence awarded on a condemned-prisoner named Bangaru Reddy reported in AIR 1940 Madras 699, Burn, J observed:

> *"The doctor found a continuous ecchymosed mark all round the woman's neck below the thyroid cartilage. Such a mark would not be likely to be produced by strangulation with the fingers and thumbs. In such cases it is generally possible to distinguish marks of the thumbs and fingers separately. This however is not sufficient for acquitting the appellant. The mere fact that the accused in his confession has*

given a wrong or an incomplete description of way in which he brought about the woman's death is not a reason for finding him not guilty. The evidence of the doctor was that there were marks of fingers and thumps on the woman's neck and to that extent his evidence does agree with the confession of the accused."

33. In view of the above two cases of Indian jurisdiction, we can rely on the confessions of two accused, even if it gets partial support from the medical evidence. It has already been established by the evidence of PWs 2-5 and 7 that the chest of the victim was open and her half pant was pulled down to the knee. According to the autopsy report (vide exhibit-7) there were signs of sexual violence on her dead body and her hymen was ruptured. According to the inquest report (vide exhibit-5), there was sign of blood at her vagina and marks of scratches below the navel and different places of her body. PW 4 noticed blood on her half pant. All these are suggestive of commission of rape on her. It has also been settled that emission of semen or complete penetration is not necessary in all cases of rape. In the present case, the victim was a minor girl of 7 years of age. It is presumed that no sexual organ was developed on her person and complete penetration of male organ into her vagina was not possible, which could lead the Doctor to arrive at an anomalous conclusion. It further appears from the confessions that at the time of consecutive rape, the condemned-prisoners pressed her mouth and after commission of rape, she was looking like dead. So her death may have caused by asphyxia also. But it does not appear from the autopsy report read with the evidence of the Doctor (PW 11) whether he had conducted autopsy from that angle. However, the two accused themselves confessed commission of rape and subsequent murder of the victim and if these are believed to be true and voluntary, we do not have any reason not to rely on their confessions. On this point we can rely on another decision of our jurisdiction, namely, State vs Shukur Ali, 9 BLC 238. In that case the medical report did not support the prosecution case of rape followed by murder, but disclosed sexual violence on the victim. Even in the confession made by the accused, he did not confess his guilt in support of the prosecution case of rape followed by murder. Still the High Court Division held him guilty of offence of rape as well as murder. In so doing S K Sinha, J (as his lordship then was) observed:

"Admittedly the victim girl was only 7 years old at the time of commission of the offence. Under such circumstances her genital organ was not developed and matured for penetration of the male organ. The congestion as found on the vulva and the sign of sexual violence as notified by PW 19 is sufficient at arrive at the conclusion that there has been an attempt to commit rape before the death of Sumi and therefore, the High Court Division has found that the prosecution has been able to prove charge under section 6(2) of the Nari-o-Shishu Nirjatan Damon (Bishesh Bidhan) Ain, 1995 against the condemned-prisoners."

34. The decision passed in Shukur Ali's case (*ibid*) was subsequently upheld by the Appellate Division. In another case of State vs Shahidul Islam alias Shahid and others reported in 58 DLR 545 the High Court Division referring to 56 DLR (AD) 81 reiterated:

"…to constitute rape complete penetration is not essential and even partial or slightest penetration with or without emission of semen and rupture of hymen or even an attempt of penetration is sufficient to prove rape. Presence of spermatozoa is also not at all necessary to prove rape if there are other evidences including injuries on private part and signs of violation and other symptoms are found." (emphasis supplied)

35. The above mentioned two cases, one of Shukur Ali and another of Shahidul Islam alias Shahid and others clearly match the case in hand.

36. Let us examine whether the confessions made by the accused were true and voluntary. It appears that the accused were arrested on 02.07.2008 at about 8.45 pm and produced before the concerned Judicial Magistrate at about 10.00 am on 03.07.2008 i.e. within the shortest possible time. Even without going on remand, they made the confessions.

37. For better appreciation of the manner of description and contents of the confessions, that made by Saiful Islam is reproduced below:

"Awg Rx eZ_Kc_eKKh w©šxwG© G G dg wG†¥G GvG ¥L wa i! w"# iv$%"x '_Z wi(v wg)'G l wa va *"xG v'+,v-. /©v' ,"# w© AwGO1wxv-g&- Av3GG gv w$"# Av'+. va *"xG v'd l wa vgRv-Av'+. l- vgRv'+Gx4v# Av5 v©vx61wxv- gv- xvGv Av4%/v7 vG" v418v v-g" d G1 4v-v0 v- :i#/ Z_h i+G; vg ©aw-4. x© Av5 v' "© gv8v# ©vGv iw< " "R =">. l /g# Awg ? AwGO iw< "G Av5 v' v'+!w. Av5 vAvgv' G!v' v'+ @4 Av'/. x© Av5 v g© @ A"G=@6 "G va "*"x gv9©v' w"# Awg $"g ABC wG. l /g# AwGO Av5 vGg© @ G"©w-4. Avgv6 v dB ?#vG GAwGO ABC "GAvGAwg Av5 vGg© @ AvG. g© @ AG4vg,v'x vDva G"x v v'G. AwG"OG v :ABC; dB ?#vG GAv5 vGg© +"$ w"# w© gGvG gx "# R"+. xv- " iw< Gx© Av5 v' R4vwa" g"G Ow4. ?Gg&¥ ?#vG GAvgvG v'x 8v v i! w"#Av5 vG!v @© x64 ?Ggv8vGw" -i"4 wE"gGw" +"$ Ow4. Avgv' G " G v'x GF v$"#,v#. l- GF AvgGv va"*"xGAv-"4G/v'8 g"+ Ow4. x© Av5 vG R4vwa" gvGvG GAvgGv va Rv- v$"# w@# w"#w-4vg. Gw / v'4 R$gG 4v va"*"x 4vd ©"x,v# x© Awg /vAvG 4v " G/v'8 4vd ©"x,v-. 4vd "© AvgvG gv8v (Gw-4. gvB,v'x i9"x v v'G / ¥†Gwi 8v vG @v Gw-4vg. l- AvgvG vB †%v'GwF g4 iv iwJ"

38. The confession made by another condemned-prisoner Arif Hossain is quoted below:

"...(a vRx e'_Kc_eKKh w©šxwG© iAiv'G. i4vKLKK (wa vG/g# Awg Avgv' G gv'>G Avgvg w" G va *x ©"x,v-. va *"xG v'+,"#/v-06 1w7 v'dg gM41/v7 vG" v418v v-g" d G1 4v-v0 v- l G/v'8 ©v 4. N/g# v'd- Awg" G vgRv'+Gw"@Av5 v1wxv- xvGv Av4%/v7 vG" v418v v-g" d G1 4v-v0 - vg ©a"x w©. Av5 v' "© Avgv' G " G g" Oiw< v'R. AvgGv " GA vg GvG ¥Av5 vGg© @ A"G=@6 "G w/ivJ R$gG gwd="GG va *"xG g"A¥w"#,v#. Awg g© @ AvG AvG/v-06 $"g A vg :ABC; "G./v-06 4G v ?#vG GAvgvG? A vg GvG-P+v #. xv-/v-06 Av5 vGg© @ A"GAvGAwg A vg :ABC; vG. v dB ?#vG G/v-06 Av5 vGg© +"$ #. x© w© g"#wa $#gGvG gx "# R"+. xv- AvgGv R4v @ A"GAv5 v' "g"G Ow4. g&6 ?#vG G/v-06 i! w"#Av5 vG!v @© x64 0"4. /v-06 N i! iv$%x w"#wR"#w-4. vG v'xG GF (v'/G/v'8 g"+ Ow4. g&6 ?#vG G va Rv- w"#Av5 vG R4v w@# Gw©. xvG G @6@v iv$%x @4 Awa. Gw / v'4 A ¥v¥4v' G/v'8 Awg? 4vd ©"x,v-."

39. The above quoted two confessions are consistent with each other in material particulars. These have been corroborated by recovery of the blood stained blade from a bamboo clump at the showing of accused Saiful. According to the evidence of PW 9 Hafizur Rahman, the condemned-prisoners and victim Alpana were seen together on 25.06.2008 under a berry tree, which circumstantially corroborates the confessions. The evidence of PWs 1 and 2 and other villagers, recovery of the dead body and description of the inquest report further corroborate their confessions so far it relates to time and place of occurrence, and position and description of the dead body.

40. The condemned-prisoners are simple villagers having no political, social, financial influence in the society. They are not so highly placed that the Magistracy, Police and local Union Parisad would stand together to get them convict in a false case and for that purpose extract confessions from them. PW 6 Md. Golam Kabir, a Judicial Magistrate in his evidence proved the confessional statements. He asserted in his evidence that he did it observing the

legal and procedural formalities and further asserted that the accused made the confessions voluntarily, with full sense and without any promise or hope. After recording the same it was read over to them and they put their signatures on full understanding of the contents thereof. In cross-examination he denied the defence suggestion that they were compelled to make the confessions on physical torture by the police. There is also a hand written memorandum of the recording Magistrate to that effect. In such a position we have every reason to hold that the confessions made by the accused were true and voluntary, which can be safely relied on for awarding conviction and sentence on the accused.

41. For further satisfaction, we have also gone through the case docket, examined the time of arrest of the accused and photograph of the victim kept in record. We are satisfied that the accused persons were arrested at 8.45 pm on 02.07.2008, they were taken to the house of the local Chairman and there from to the police station. On the following day they made the confessions before a Judicial Magistrate. We are also satisfied that the half pant of the victim was actually paste coloured. Because of staining by blood it may look like red and that is why the police personal who wrote the *challan* mentioned it to be red. Even it could have been wrongly written as red out of bonafide mistake. Nevertheless when the death of the victim and recovery of her dead body from the jute field are not disputed, the question of colour of the half pant, which she wore, does not matter in determining the complicity of the appellants or to determine the facts that she was killed and her dead body was found. Many of the witnesses, namely, PWs 2-5 and 7 stated in their evidence that at the time of recovery of the dead body they saw her half pant was pulled down and the upper part of her body was open. PW 4 stated that he had noticed blood on her pant. The inquest report shows blood at her vagina and marks of scratches below navel and many other places of her body. These all are suggestive of commission of rape on her. So because of the minor discrepancy in the colour of half pant or time of arrest of the accused, the prosecution case cannot be thrown away.

42. It may be pertinent to mention that the plain thinking simple villagers sometimes misconstrue the calling of any person by the police to a police station. It happens because of the demeanor of the constable, who is assigned to call the person. But from the context of the present case and statement of PW 9 made in his cross-examination, it seems that he was taken to the police station to make statement about the occurrence. So taking advantage of his unclear/misconceived statement there is no scope to argue that the case was concocted and the appellants were falsely implicated there.

43. This is correct that the condemned-prisoners are young men and having no criminal record. But the proved facts are that the victim was a defenceless minor girl of 7 years of age, the condemned-prisoners forcefully raped her one after another, killed her for no reason and extracted her right eyeball only to mislead and camouflage the occurrence. The gravity of offence and its nature i.e inhumanity in commission of the rape and murder and brutality on a dead body by extracting eyeball of the deceased are so aggravating that cannot be overweighed by the mitigating circumstances of their youth age or a clean previous record. Under the circumstances, we think this is a fit case of death sentence. It would set an example of deterrent punishment against the heinous offence and bring confidence of the sufferer people on criminal justice system.

44. Accordingly, the Death Reference is accepted and the sentence of death awarded upon the condemned-prisoners is confirmed. The criminal appeal is dismissed and the impugned judgment and order of conviction and sentence are maintained as it is.

45. Send down the lower Court's record.

10 SCOB [2018] HCD

HIGH COURT DIVISION

Death Reference No.03 of 2010.

The State
... Petitioner
Vs.
Md. Manik
... Condemned-Prisoner

Mr.Farhad Ahmed, DAG
Mr.Md.Moniruzzaman Rubel, DAG
Mr.Delowar Hossain Somadder, DAG
Mr.Nizamul Haque Nizam, AAG
... Petitioner
Mrs.Sarker Tahmeena Begum, Advocate
... for the informant
with
Criminal Appeal No.416 of 2010.
Md. Manik
... appellant
Vs.
The state
Mr.Khondaker Mahbub Hossain, Adv.
... for the appellant
with
Criminal Appeal No.664 of 2010.
Md.Alauddin
... appellant
Vs.
The state
Mr.Munsurul Haque Chowdhury, Adv.
... for the appellant
with
Criminal Appeal No.917 of 2010.
Anwar Hossain @ Anwar
... appellant
Vs.
The state
Mr.Abdul Kader Bhuiyan, Advocate
... for the appellant
with
Criminal Appeal No.1378 of 2010.
Nurul Islam Munshi
... appellant
Vs.
The state
Mr.Yousuf Hossain Humayun, Advocate
with
Mr.S.M.Rezaul Karim, Advocate
... for the appellant
with
Criminal Appeal No.1070 of 2010.
Jony Ghosh @ Jona
... appellant
-Versus-
The state
Mr.A.M.Mahbub Uddin, Advocate
... for the appellant
and
Jail Appeal No.60 of 2010.
Md.Manik
... appellant
-Versus-
The State
No one appear
... for the appellant
Heard on:11.11.15, 12.11.15,15.11.15, 18.11.15, 19.11.15, 22.11.15, 23.11.15, 24.11.15 &25.11.2015.

Judgment on: 07.12.15& 08.12.2015.

Present:
Mr.Justice Bhabani Prasad Singha
And
Mr.Justice S.M. Mozibur Rahman

Code of Criminal Procedure, 1898
Section 164:
On perusal of the confessional statements, no irregularities or illegalities in recording the statements are found. So, there is no difficulty to come to a finding that the

confessional statements of the condemned-accused-prisoner and the other convict-accused-persons are voluntary and true and that the said statements may well form the basis for conviction of the accused-persons. … (Para 56)

Retraction of confessional statement:
It has already been found that the confessional statements as made by the accused-persons are true and voluntary. It is the settled law that "Confessional statement whether retracted or not, if found voluntary can form the sole basis of conviction of the maker. ... (Para 57)

Judgment

Bhabani Prasad Singha,J:

1. This Death Reference has been made by the Judge, Speedy Tribunal No.4, Dhaka for confirmation of death sentence imposed upon the condemned-accused-prisoner Md.Manik under sections 302/201/34 of the Penal Code read with sections 7, and 8/30 of the Nari-O-Shishu Nirjatan Daman Ain,2000 (Amended in 2003) vide his judgment and order of conviction and sentence dated 24.01.2010 passed in Druta Bichar Tribunal Case No.04 of 2009 arising out of Keraniganj P.S. Case No.28 dated 26.02.2009 corresponding to G.R. Case No.53 of 2009. By the said judgment and order of conviction and sentence, the trial Court found the convict-accused-persons Johni Ghosh @ Johna, Anwar Hossain @ Anwar, Md. Alaudin and Nurul Islam Munshi under sections 7,8/30of the Nari-O-Shishu Nirjatan Daman Ain,2000 (Amended in 2003) sentencing them to suffer imprisonment for life and to pay a fine of Tk.1,00,000/00, in default, to suffer rigorous imprisonment for one year more each under section 7 of the Ain and to suffer imprisonment for life and to pay a fine of Tk.1,00,000/00, in default, to suffer rigorous imprisonment for one year more under section 8 of the Ain each and to suffer imprisonment for life and to pay a fine of Tk.1,00,000/00, in default, to suffer rigorous imprisonment for one year more under section 8 of the Ain each making the sentences to run simultaneously.

2. Asagainst the said judgment and order, the condemned–accused-Prisoner Md.Manik Mia preferred Criminal Appeal No.416 of 2010 under section 14 of the Druta Bichar Tribunal Ain,2002 and Jail Appeal No.60 of 2010, the convict-accused Md. Alauddin preferred Criminal Appeal No.664 of 2010 under section 14 of the Druta Bichar Tribunal Ain, the convict-accused Anwar Hossain preferred Criminal Appeal No.917 of 2010 under section 14 of the Druta Bichar Tribunal Ain,2002 the convict-accused-Nurul Islam Munshi preferred Criminal Appeal No.1378 of 2010 and the convict-accused Jhoni Ghosh @ Jona preferred Criminal Appeal No.664 of 2010 under section 14 of the Druta Bichar Tribunal Ain,2002. The Death Reference and the Criminal Appeals being cropped up from the self-same judgment and order of conviction and sentence and the common question of law and facts being involved in the Death Reference and the Criminal Appeals, those have been heard analogously and are being disposed of by this single consolidated judgment.

3. The prosecution case, in short, is that Anamika Ghosh, the daughter of the informant Sudharam Ghosh aged about 9 (nine) years was a student of Class-III of Pacific Kinder Garten School of west Bamansur. On 26.02.2009 at 11.30 a.m. she went to the school to appear in the examination. After examination she was returning home with her cousin Toma Ghosh and her friend Sadia. At 1.40 p.m. when they reached in front of the Bamansur

Graveyard then an unknown man came to her from a yellow taxicab which was there from before. That man called Anamika and told her that he was performing business with her father. He told that he would go to their residence telling her to accompany him. At that time, two other persons were there inside the taxicab. When Anamika reached near the taxi cab, those persons forcibly dragged her into the taxi cab and kidnapped her away. Thereafter, another unknown person told Toma and her friend Sadia to inform Anamika's house about the kidnapping of Anamika. Then, they went to the house of Anamika and informed about theact of kidnapping. On 27.02.2009 at 12.00 'O' clock, the nephew of the informant received a mobile phone call by which some one demanded 10.00 (ten) lakh taka as ransom money for release of Anamika saying that if his demand is not met, he would kill Anamika. On 27.02.2009 at night, once again the inmates of the house of the victim Anamika received another mobile phone call by which they were told to send said money to Gabtoli. Thereafter, on 28.02.2009 at 8.00 a.m., the accused-persons once again made mobile phone call to send the said ransom money. After bargaining the ransom money was fixed at Tk.2.10 lakhs. The kidnappers asked the informant to send the ransom money at a place behind the Atibazar Cinema Hall. Accordingly, the informant sent the said money. Thereafter, the kidnappers informed that they received the ransom money saying that they would return the victim Anamika within a short time. Thereafter, on 01.03.2009, police found the dead body of Anamika in a paddy field under Shibaloy Police Station, Manikganj and sent news to the informant. The informant and others identified the dead body to be of Anamika. The kidnappers i.e. the accused-persons kidnapped the victim Anamika from the place of occurrence, demanded ransom for her release and even after realization of ransom money killed the victim Anamaika.

4. On receipt of the First Informant Report (hereinafter referred to as the FIR) of the case police took up investigation of the case and after investigation prima-facie case having been made out against the accused-persons, submitted Charge Sheet No.91 dated 25.04.2009 of Keraniganj P.S. under sections 302/201/34 of the Penal Code read with sections 7 and 8/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (amended in 2003) against them.

5. During trial, the accused-persons stood charged under sections 302/201/34 of the Penal Code read with sections 7 and 8/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (amended in 2003).

6. To substantiate its case the prosecution in all examined as many as 22 (twenty two) witnesses. On the other hand, the defence examined none.

7. On the closure of the evidence of the prosecution the accused-persons were examined under section 342 of the Code of Criminal Procedure to which they once again pleaded innocence informing the tribunal that they would not adduce any evidence on their behalf.

8. The defence case, as it transpires from the trend of cross examination of the prosecution witnesses is the denial and the plea of innocence in the alleged occurrence.

9. After trial, on hearing the learned Advocates for the parties and on perusal of the evidence on record and on consideration of the facts and circumstances of the case and so also on observation the material exhibits, the learned trial judge came to the finding that the prosecution had been able beyond all shadow of doubt to bring home the charge as brought against the accused-persons and accordingly, convicted and sentenced the accused-persons by the impugned judgment and order of conviction and sentence as aforesaid.

10. Mr. Delowar Hossain Somadder, the learned Deputy Attorney General (DAG) representing the State submits at the very outset that the learned trial court was well founded in convicting and sentencing the condemned-accused-prisoner and the other convict-accused-persons by the impugned judgment and order and as such, it does not warrant interference by this Court; that the confessional statement as made by the accused-persons are not only true but also voluntary; that there was no illegality or irregularity in recording the confessional statements of the accused-persons. The learned DAG further submits that the impugned judgment and order should be affirmed and the Criminal Appeals and the Jail Appeal as preferred against the judgment and order of the trial Court convicting and sentencing the condemned-prisoner and the other convict-accused-persons should be dismissed. The learned DAG prays for acceptance of the Death Reference. The learned DAG also referred the case laws reported in 44 DLR (AD) at page 287, 18 BLD (AD) at page 254, 8 BLC at page 501 and 16 BLC at page 579.

11. Advocate Mr. Khondaker Mahboob Hossain representing the condemned-accused-prisoner Md.Manik in Criminal Appeal No.416 of 2010 submits that all the five accused-persons were involved in the alleged occurrence; that the entire case depends on confessional statements; that this accused had no intention to kill the victim deceased; that although the four other convict accused-persons have been sentenced to suffer imprisonment for life, this condemned-prisoner alone is sentenced to death. Finally, the learned Advocate stating the offence to be a heinous one submits that this accused being of young age having children justice demands that the death sentence as awarded to him may be commuted and it may be altered to a sentence of imprisonment for life. The learned Advocate also referred the case law reported in 66 DLR (AD) at page 199.

12. Advocate Mr. Munsurul Haque Chowdhury representing the convict-accused-appellant Md. Alauddin in Criminal Appeal No.664 of 2010 submits that this convict-accused is not an FIR named accused; that on the bass of the information of the Pw20Toma only, this accused-appellant has wrongly been implicated in this case; that the informant had no direct knowledge about the alleged kidnapping; that there is no eye witnesses in this case; that the Pw 20 Toma did not say as to what role this accused played in the alleged occurrence; that the confessional statement of this accused is not true and voluntary; that he was in no way connected with the alleged kidnapping and killing of the victim; that the allegation against this convict-accused-appellant being not proved beyond reasonable doubt, he may be acquitted. The learned Advocate lastly submits that if the impugned judgment and order of conviction and sentence is upheld and confirmed, the sentence as awarded to this convict accused-appellant may be commuted awarding lesser sentence.

13. Advocate Mr.Yusuf Hossain Humayun representing the convict-accused-appellant Nurul Islam in Criminal Appeal No.1378 of 2010 submits that the name of this accused does not appear in the FIR and that he has been falsely implicated in this case on the basis of the confessional statements of the co-accused-persons; that the confessional statement of this convict-accused is not true and voluntary; that the prosecution could not prove the charge against this convict-accused-appellant. Lastly, stating that the alleged occurrence is a very touchy, unfortunate and pathetic one, the learned Advocate submits that in the facts and circumstances of the case the imprisonment for life as awarded to this convict-accused is not justified.

14. Advocate Mr. A.M.Mahboobuddin Khokan representing the convict-accused-appellant Johni Ghosh @ Johna in Criminal Appeal No.1070 of 2010 submits that this accused is not an FIR named accused although he is a local man; that no physical act or no means rea in the alleged occurrence is proved against this accused-appellant; that there is nothing with regard to demanding ransom and realization of the same against this accused-appellant; that the findings of the trial Court that the confessional statement as made by this accused-appellant is true and voluntary is not correct; that keeping a mobile phone by this accused is not an offence; that recording of the confessional statements of all the accused-persons and completion of recording the same at the same time is not believable; that the confessional statement of this accused-appellant has not been recorded properly and that by the confessional statement of the accused Johni Ghosh itself, he cannot be convicted; that the accused Anwar Hossain did not implicate this convict-accused appellant in the alleged occurrence. The learned Advocate lastly submits that although the alleged occurrence is a heinous one, the prosecution could not bring home the charge as brought against this convict-accused-appellant and hence, the Criminal Appeal as filed by him may be allowed and he may be acquitted on setting aside the impugned judgment and order of conviction and sentence as passed against him.

15. Advocate Mr.Abdul Kader Bhuiyan representing the convict-accused-appellant Md. Anwar Hossain in Criminal Appeal No.917 of 2010 submits that this convict-accused appellant is not an FIR named accused; that none of the prosecution witnesses identified this accused in their evidence; that excepting his confessional statement, no prosecution witness said about his involvement in the alleged occurrence of kidnapping, demanding of ransom or killing of the victim against this convict-accused-appellant; that the confessional statement of this accused is not true and voluntary; that the trial Court wrongly convicted and sentenced this convict-accused-appellant and as such, the impugned judgment and order so far as it relates to this convict-accused-appellant is not maintainable. The learned Advocate lastly prays for acquittal of this convict-accused appellant.

16. In order to appreciate the respective arguments of the learned Advocates, we would now discuss the evidence adduced by the prosecution in support of its case.

17. The P.W. 1, the informant Sudharam Ghosh, the father of the victim Anamika Ghosh stated in his deposition that the occurrence took place on 26.02.2009. His daughter Anamika Ghosh aged about 9 years was a student of Class-III in Bamansur Kinder Garten School. On 26.02.2009 she had examination in that school. After appearing in the examination while she was returning home at 1.40 p.m. and when reached the road in the eastern side of Bamansur graveyard with his niece Toma Ghosh and Sadia, her friend, a taxicab was standing there at the place of occurrence. In that taxicab there were three persons including the driver. At the time of occurrence a person came down from the taxicab and told Anamika that he used to perform business with her father and that he would go to their house and asked her to take them to their house. Thereafter, those three persons dragged his daughter forcibly into the taxicab, kidnapped her away and speedily went towards the south. At that time, Toma and Sadia were standing. At that time, an unknown person standing there told Toma that the accused-persons kidnapped Toma away. He asked her to go home and inform the house of Toma quickly about the kidnapping. The hair of his daughter Anamaika was curly. She was 3' feet high. Her complexion was fair. Her body was slim. She was wearing school dress, she had blue shirt, was wearing white and navy blue shirt, put on cads, had I.D. card, had a pencil box containing pencils and hardboard, she was wearing half-pant and school shoes etc. The victim was accompanied by Toma Ghosh and Sadia. The victim having not found on

frantic search, he lodged the First Information Report (FIR) of the case with Keraniganj P.S. on 26.02.2009 at 9.30 p.m. This witness proved the FIR as Exhibit-1 and his signature therein as Exhibit-1/1. This witness further deposed that on 27.02.2009 at 12 'O' clock noon, a mobile phone call came to the house of his nephew demanding Tk.10.00 lakhs as the ransom money for the release of the victim saying that if the demand was not met, the victim would be killed and that if the demand was met, the victim would be released. In that phone neither the identity of the caller nor his address was given. Thereafter, on 27.02.2009 at 8.00 p.m. again a mobile phone call came asking to take the money to Gabtoli. They forthwith informed the Keraniganj P.S. about the occurrence and the phone call. Thereafter, on 28.02.2009 at 8.00 a.m. in the morning another phone call came and he was asked to make the payment on that very date, otherwise, they would kill the victim. At that time, the ransom money was settled at Tk.2.10 lakhs. He was asked to keep the money at a place behind the Ati Bazar Cinema Hall and he was also asked not to inform the police of the matter. After consultation among the brothers, for the safety of the victim, they sent Tk.2.10 lakhs through his brother Nanda Gopal Ghosh. Thereafter, the accused-persons acknowledged receipt of the money over mobile phone saying that he would get back his daughter. They, thereafter, kept searching for his daughter. On the following day i.e. on 01.03.2009 at about 9.30 a.m. in the morning an information came over mobile phone from the Officer-in-Charge, Shibaloy P.S. to the effect that the dead body of a 8/9 year old girl was found and that she had a tie in a shopping bag wherein the name of the school of the victim was written. From the shop when the Officer-in-Charge was informed about the mobile phone number of his brother Durga Charan, the officer-in-charge informed about the dead body to Durga Charan. Thereafter, his brother Durga Charan informed them about the occurrence whereon they informed Keraniganj the police station of the occurrence. Thereafter, they went to Shibaloy P.S. with the police of Keraniganj P.S. From there they went to the morgue of Manikganj Sadar Hospital and identified the dead body of the victim Anamika Ghosh. After Post Mortem Examination on the dead body of the deceased, they brought the dead body to their house on 01.03.2009 and cremated it. In his cross on behalf of the accused Manik this witness stated that he used to reside at Shikaritola in his paternal house. The FIR of the case was written in the Police Station. He did not mention the name of any accused in the FIR. His daughter went to the school at about 11.30 a.m. On that date she had examination. His niece Toma and Sadia gave him information about the occurrence. On 27.02.2009 at 12 'O' clock noon, the kidnappers demanded Tk.10.00 lakhs as ransom. He paid Tk.2.10 lakhs as ransom. The money was kept at an open place behind the cinema hall. 30 minutes after the money was kept, the accused-persons informed that they received the ransom money. In the mobile phone of his nephew Pradip Ghosh, the accused-persons acknowledged the receipt of the ransom money. At about 2.00 p.m., he saw the dead body of his daughter. This witness denied the defence-suggestions that he did not go to Shibaloy P.S. or Hospital or the dead body was not of his daughter or that he knew the accused Manik from before or that the accused Manik was not involved in the occurrence of kidnapping and murder or that he falsely deposed in the case. In his cross on behalf of the accused Alauddin this witness stated that the name of the accused Alauddin was not there in the FIR. He knew Alauddin from before. This witness denied the defence-suggestions that Alauddin was not present at the time of kidnapping or that he did not demand ransom money or that he falsely implicated the accused Alauddin in the case or that his niece did not mention the name of the accused Alauddin. In his cross by the accused Johni Ghosh@ Johna this witness stated that his daughter was kidnapped at 1.40 p.m. He heard about the occurrence from Sadia as well. The FIR was written as per his oral version. He did not mention the names of the accused-persons in the FIR. In total three persons kidnapped his daughter. His daughter was nine years of age. After he sent message to the Police Station, police came to his residence at 10.00 p.m. This

witness denied the defence–suggestions that the accused Johni Ghosh was not involved in the alleged occurrence or that his confessional statement was procured through torture or that he deposed falsely. In his cross on behalf of the accused Anwar Hossain this witness stated that he heard about the occurrence of kidnapping from Toma and Sadia at day time. It was written in the FIR that an unknown person told Toma that her sister was kidnapped away. On the following day i.e. on 27.02.2009 at about 12 'O' clock noon in the mobile phone of his nephew Tk.10.00 lakhs as ransom was demanded saying that if the demand was not met, the victim would be killed. This witness denied the defence-suggestions that Toma and Sadia did not see anything or that he did not tell the aforesaid facts to police or that the accused Anwar was not involved in the alleged occurrence of killing and realization of ransom money or that he did not collect the ransom money or that he deposed falsely.

18. The P.W. 2 Sree Nanda Gopal Ghosh stated in his deposition that his niece Anamika Ghosh and Toma werethe students of kinder Garten School. On 26.02.2009 they had examination. As usual, on that date at about 11.30 a.m. they went to school. After appearing in the examination while Anamika, Toma and Sadia were returning home at 1.40 p.m. and reached in front of the gate of west Bamansur graveyard, an yellow taxicab was standing there. From the taxicab a person came down and asked Anamika about her father's name. Then his niece disclosed her name to be Anamika. Then said person told Anamika that he used to perform business with her father and also told that he would go to their residence. Saying that, said man took his niece into the taxicab and went towards the south. A person standing beside the taxicab told Toma that his sister Anamika was kidnapped away. After he came to know about the kidnapping of Anamika from his niece they made search for Anamika and on search, she was not being found, his brother went to the police station and filed a case. On 27.02.2009also they made search for Anamika. On that date at about 12.00'o'clock noon a mobile phone call came to the mobile phone of his nephew Surajit and was asked as to whether they lost anything. Then Surajit Ghose told that the daughter of his maternal uncle was missing. Then that man informed that Anamika was with them. They would talk to his maternal uncle. His nephew gave the mobile phone to his elder brother and the kidnappers demanded Tk.10.00 lakhs as ransom money. The kidnappers instructed his elder brother not to inform police of the occurrence and said that if police was informed, they would kill Anamika. When his elder brother asked as to he how would find so much money, the kidnappers switched off the mobile phone. The number of the mobile phone was 017461362688. The mobile phone number of his nephew was 017124425045. Subsequently, the ransom money was settled at Tk. 2.10 lakhs through negotiation. The kidnappers asked to reach the ransom money to Gabtoli. Thereafter, at 8.00 a.m. in the morning, the kidnappers once again made mobile phone call and told them that if ransom money was not paid on that very day they would kill the victim Anamika. When they asked as to where they would make the payment, the kidnappers told them that would let them know later where to make the payment. At about 3.00 p.m., the kidnappers made mobile phone call once again and asked to realize the money at once. Then to save the life of his niece they all together collected Tk.2.10 lakhs. The kidnappers instructed them to keep the money in a bush behind the Ati Bazar Cinema Hall. Accordingly, they kept the money there. Half an hour after that, the kidnappers acknowledged the receipt of the ransom money saying that they would release Anamika nearby their house. Till the dusk, the kidnappers kept their mobile phone switched off. After payment of money, they made search for Anamika here and there and sat beside their house at night for Anamika. On the following day at about 9.00 a.m. in the morning, a mobile phone came to his elder brother Durga Charan Ghosh from Shibaloy Police Station and he was informed that the dead body of an unknown girl was found and that in an identity card, the name of 'Pacific Kinder Garten School' was written. Hearing that, his elder brother

Sudharam Ghosh and Durga Charan Ghosh went to Shibaloy Police Station Manikganj taking the Police of Keranigang Police Station and they identified the dead body of Anamika. The dead body was cremated. After 6/7 days, the accused Johni Ghosh was arrested. Hearing that, he went to the house of the accused Johni Ghosh. Police recovered the mobile phone from Johni Ghosh by which the kidnappers made correspondences. Johni Ghosh admitted that he alongwith other accused-persons kidnapped away Anamika, realized ransom money and killed her and that the accused-persons Manik, Alauddin, Anwar and Nur Islam and Narayan were involved in the alleged occurrence. This witness identified the aforesaid accused-persons in the dock. In his cross by the accused Manik, this witness stated that the distance between his shop and his residence was about 2-3 kilometers. On the date of occurrence there was examination of the victim in the school. At 11.00/11.30 a.m. in the morning the examination started and was finished at 1.10 p.m. On 27.02.2009 he went to the police station. The kidnappers demanded ransom money from his elder brother on 27.02.2009 at about 12.0' clock noon. They all together paid 2.10 lakhs as ransom money. He kept the ransom money in a bush of Kalmilota. The money was kept in a shopping bag. This witness denied the defence-suggestions that he did not keep the ransom money in a bush or that he along with his brother paid money to the police officer, to beat up the accused Anwar or that he falsely implicated the accused Manik and Anwar in the case. In his cross on behalf of the accused Johni Ghosh, this witness stated that he made statement to police at his residence. The mobile phone number of his nephew was 01724425045 and the mobile phone number of the kidnappers was 017461131262. At the time of arrest of the accused Johni Ghosh, Mona Ghosh along with others were also present. Anamika and Toma themselves went to the school. This witness denied the defence-suggestions that the house of Toma Ghosh and Johni were adjacent to each other or that due to enmity, the accused Johni Ghosh was falsely implicated in the case or that he deposed falsely. In his cross on behalf of the accused Alauddin this witness stated that he saw the accused-Alauddin on 07.03.2009 in the Police Station. This witness denied the defence-suggestions that the statement made by him to the police and before the Court are different or that he falsely stated the name of the accused Alauddin.

19. The P.W.3 Constable Md.Ali Hossain deposed that on 01.03.2009 vide G.D.No.23 of Shibaloy P.S., he took the dead body of a 8/9 years old girl to the morgue vide C.C. No.01/09 dated 01.03.2009. After post mortem examination, he made over the dead body along with some alamats viz. a pair of cads a blue colour half pant, a yellow white colour banianetc.to the police station. He made over the dead body to the guardians of the deceased. This witness proved the C.C. as Exhibit-2, his signature therein as Exhibit 2/1,Chalan as Exhibit-3and his signature therein as Exhibit-3/1. This witness identified the materials as Material Exhibits-I series. This witness stated in his cross at the time of holding inquest he was not present. Excepting carrying of the dead body, he knew nothing.

20. The P.W.4 Sree Durga Charan Ghosh stated in his deposition that his niece Toma and Anamika were the students of class-III in the 'West Bamansur Pacific Kinder Garten School'. On 26.02.2009 at about 11.30 a.m. they went to the school. On that date they had examination. On their way back to home after appearing in the examination, when they came in front of the gate of West Bamansur graveyard, a yellow taxicab with 3 persons was standing there. From the taxicab, a person came out and called Anamika and asked her about her father's name, In reply, Anamika told that her father's name was Sudharam Ghosh. Then, that Man told Anamika that he used to perform business with her father and that he would go to their residence. Saying that, by way of enticing, that man took Anamika into the taxicab and kidnapped her away. At that time a man was standing there who asked Toma to tell her

father that Anamika was kidnapped away. Toma informed the inmates of her house of the occurrence. After going to his home he saw that everybody was crying. On asking, Toma disclosed about the occurrence of kidnapping away of the victim Anamika. Then they searched for Anamika at different places but did not find her. His brother went to the police station and lodged the FIR of the case. On 27.02.2009 in the morning, a mobile phone call came to his nephew and was asked as to whether they lost anything. In reply, his nephew informed that the daughter of his maternal uncle was lost. Then the kidnappers said that they would talk to his maternal uncle. Then his nephew gave the mobile phone to his elder brother. Then the kidnappers told his brother that the victim was with them and that if they were paid Tk.10.00 lakhs as ransom money, they would release her. Then his brother said from where he would pay so much money to which the kidnappers told that he had to pay the entire Tk.10.00 lakhs, otherwise, they would kill the victim. The kidnappers also asked not to inform the occurrence to police. When the informant said that he would not be able to pay Tk.10.00 lakhs, rather, he would pay less than that, the accused-persons switched off the mobile phone. They supplied the mobile phone number of the kidnappers to the police. The number of the mobile phone was 01746136288. Then police advised them to keep conversation with the kidnappers. At dusk, the kidnappers once again made mobile phone call. Then the ransom money was settled at Tk. 2.10 lakhs through negotiation. The kidnappers asked to take the money to Gabtoli and to send Tk.200/-to their mobile phone. When his brother told that at this time of night it would not be possible to take money to Gabtoli then the accused-persons switched off the mobile phone. On 28.02.2009 in the morning the kidnappers once again made mobile phone call for the ransom money. His brother replied that out of fear they did not take the money. At about 3.00 p.m. on that date the kidnappers made mobile phone call saying that if their demand was not met by that day they would kill the victim. Thereafter, the kidnappers asked to take the money behind the Ati Bazar Cinema Hall. Then they all together collected the ransom money and sent it through his younger brother Nanda Gopal Ghosh considering the safety of life of the victim. Half an hour after that when his brother came keeping the ransom money at the place as mentioned by the kidnappers, the Kidnappers acknowledged that they received the same saying that they would release the victim in their area. Thereafter, they searched for the victim girl up to late night but did not find her. On 01.03.2009 in the morning the Officer-in-Charge, Shibaloy police station informed him over mobile phone that the dead body of a 8/9 year old girl was found with a shopping bag. The bag was of 'Nandan Fabrics' at Savar. By that mobile phone call the Officer-in-Charge informed that in the tie of the victim the name of 'Pacific kinder Garten School' was written. The Officer-in-Charge asked as to whether there was any school in the name of 'Pacific Kinder Garten', then his brother-in-law Sanjib Ghosh, the owner of 'Nandan Fabrics' informed that the niece of Durga Charan was lost 2 days back. Then, his brother–in-law gave his mobile-phone number to the Officer-in-Charge. The Officer-in-charge informed them over mobile phone that in a paddy field situated at Dutrabazar area under Shibaloy Police Station the dead body of a 8/9 year old girl was found and that the name of 'Pacific kinder Garten School' was written in the tie she was wearing. In view of said information he along with his brother Sudharam went to Shibaloy P.S by a baby taxi and there from went to Manikganj Sadar Hospital taking two police personnel with them and identified the dead body at the morgue. After post morterm examination they brought the dead body to their house and cremated it. On 07.03.2009 at dusk they heard that the killers of the victim Anamika were arrested by police of Keranigang Police Station. Hearing that, he went to the house of the accused Manik, whereon query, the accused Manik admitted that they kidnapped away Anamika and that he collected the ransom money through his nephew Anwar. He also admitted that they killed Anamika by throtling and buried her dead body in a paddy field under heaps of soil; that police recovered Tk.1,27,000/- out of the realized ransom money

from his house; that the accused-persons Johni Ghose, Alauddin, Nurul Islam, Anwar Hossain and Narayan were also involved in the alleged occurrence. Police seized the mobile phone used at time of kidnapping and seized and recovered money from the accused Manik under a Seizure-List. This witness proved the Seizure-List as Exhibit-4 and his signature therein as Exhibit-4/1 and identified the alamats viz. a mobile phone and recovered money as Material Exhibits-II and III series. This witness further deposed that the local people did postering for death sentence of the accused-persons. The mobile phone number of his nephew Surajit Ghose was 01720425045. After the SIM and the posters were deposited in the police station, police seized them under a Seizure-List. This witness proved the Seizure List as Exhibit-5 and his signature therein as Exhibit-5/1 and the seized alamats viz. SIM and posters as Material Exhibits-iv and v series. This witness further stated that in connection with the case he made statement to a Magistrate under section 164 of the Code of Criminal Procedure. This witness proved the statement he made before the Magistrate as Exhibit-6 and his signature therein as Exhibit-6/1. This witness further stated that police examined him. This witness identified the accused-persons in the dock. In his cross on behalf of the accused Johni Ghose this witness stated that one month after the arrest of the accused-persons he made statement to police. At the time of kidnapping of Anamika, Toma and Sadia were with her. The number of his mobile phone was 01716643222. He himself came to the Sadar Hospital and identified the dead body of Anamika. After he informed the police station of the occurrence, police recorded the FIR. This witness denied the defence-suggestions that his niece Anamika used to remain absent from the school or went to an unknown place or that the accused Manik did not mention the name of the accused Johni Ghosh as one of perpetrators of the alleged occurrence. In his cross on behalf of the accused Manik this witness stated that he read up to class-IX. The accused-persons themselves acknowledged the receipt of the ransom money over mobile phone. This witness denied defence-suggestions that the accused Manik had enmity regarding business with the informant or that he deposed falsely. In his cross on behalf of the accused Alauddin this witness denied the defence-suggestions that he did not tell the name of Alauddin to the Magistrate. In his cross on behalf of the accused Anwar this witness stated that after all the accused-persons were arrested, many people including his brother went to the police station. This witness denied the defence-suggestions that the accused Anwar was innocent or that he had been implicated falsely in the case.

21. The P.W.5 Kazi Abdur Razzak deposed that on 01.03.2009 he heard that dead body of a child was found in the IRRI field of Duturabari village under his union. He thereafter went to the IRRI field to see the dead body of a child. Then they informed the local police beat about that whereon the Officer-in-Charge of the police station along with police came there and recovered the dead body of the child and took photographs of the dead body. The deceased female child was wearing a school dress and a tie at her neck with the monogram of a kinderGarten School. The child had shocks with shoe at her feet and there was a school bag as well. Police seized those articles under a Seizure-List which he attested as a witness. This witness proved the Seizure-List as Exhibit-7, his signature therein as Exhibit-7/1 and identified the recovered materials as Material Exhibit-VI series. In his cross on behalf of the accused Manik this witness stated that the place from where the dead body was recoveredwas150 yards away from the road. He himself gave information about the dead body to the police station. The victim child was wearing school dress. The school bag was beside her. This witness denied the defence–suggestions that he did not either see the recovery of the dead body or seizure of the alamats. The other accused-persons declined to cross examine this witness.

22. The P.W.6 Md.Mojibor Rahman stated in his deposition that on 01.03.2009 he saw the dead body of a girl on the road after going to a place named Dhuturabari. At that time, 1000/1500 people were present. Police and the Officer-in-charge were also present. He saw blue shirt tie, white shocks on the dead body of the deceased. There was a bag beside the dead body. He himself saw the seized articles. He attested the Seizure-List. This witness proved his signature in the Seizure-List as Exhibit-7/2. This witness identified the seized alamats in the Court. In his cross on behalf of all the accused-persons this witness stated that he saw the dead body on the road. This witness denied the defence-suggestions that he was not present at the place of occurrence or that he did not see recovery of the seized alamats.

23. The P.W.7 Shyam Dulal Ghosh deposed that his niece Anamika and Toma as usual went to the school. On 26.02.2009 after appearing in the examination when they were returning home, a taxicab and three persons were standing at the west Bamansur graveyard. His niece Anamika, Toma and Sadia came there together. Then a person asked Anamika as to what was her father's name. In reply, Anamika disclosed that her father's name was Sudharam Ghosh. Then, that person told Anamika that he used to perform business with her father and insisted Anamika to take him to her father and enticed her to board the taxicab and went towards the south taking Anamika. At that time, another person was standing there. That person told Toma that Anamika was kidnapped away and that she should tell her father about this. Then, Toma came to their house crying and told that Anamika was kidnapped with a taxicab. Hearing that crying started in their house. Then they searched for Anamika at different places of their village but did not find her. After dusk, they filed case in the police station. After filing of the case police came to their house and made enquiries. On the following day at about 8.00 a.m. in the morning, a mobile phone came to his nephew Surajit and the kidnappers asked as to whether they had lost anything. In reply Surajit told that the daughter of his maternal uncle was kidnapped away yesterday. Then, kidnappers asked Surajit to give the mobile phone to this maternal uncle. When Surajit give the mobile phone to his brother, the father of Anamika, the kidnappers asked him as to whether he lost something. In replay, his brother said that his daughter did not return home from the school and that she was kidnapped away. Then, the kidnappers disclosed that his daughter was with them and that he had to pay Tk.10.00 lakhs to them as ransom money for the release of the victim Anamika. Then his brother told where from he would find so much money. Then through negotiation the ransom money was fixed at Tk.2.10 lakhs. The kidnappers held out threat to the effect that if the police was informed of the occurrence they would kill Anamika. They asked his brother to take the money to Gabtoli. Then, his brother expressed his inability to take the money to Gabtoli at such a time of night. Then, the accused-persons switched off the mobile phone. On the following day i.e. on 28.03.2009 at 8.00 a.m. in the morning the kidnappers asked to keep the money ready saying that they would take the money from a nearby place. Thereafter, at about 3.00/3.30 p.m. the kidnappers made mobile phone call once again asking to keep the money under a bush behind Ati Bazar Cinema Hall. Then they all brothers together collected Tk.2.10 lakhs and sent the money through their younger brother Nanda Gopal. When Nanda Gopal came back after keeping the money at the place as instructed by the accused-persons, they acknowledged the receipt of the money saying that after dusk they would release Anamika somewhere near their house. Thereafter, they searched for Anamika for the whole night but did not get her. On 01.03.2009 a mobile phone call from Shibaloy P.S. came to the mobile of his brother informing that the dead body of a 8/9 year old young girl of a Kinder garten School was found. Then they went to Shibaloy Police Station where from they went to the hospital and his brother identified the dead body of the victim. After post morterm examination, they cremated the dead body. About 5/6 days after that they came to know that police arrested the accused-persons who killed Anamika.

The accused-persons Johni Ghosh, Manik, Alauddin along with some others were arrested. Postering was made in respect of killing of Anamika. They gave the mobile phone number from which call came to them in the police station. They also deposited poster, mobile and SIM which police seized under a Seizure-List which he attested as a witness. This witness proved his signature in the Seizure-List as Exhibit-5/2 and identified the accused-persons in the dock. In his cross on behalf of the accused Manik this witness that the number of the mobile phone as mentioned in the seizure-list was 017204250. Out of Tk.2.10 lakhs ransom money, he himself paidTk.40,000/-.This witness denied the defence-suggestions that he did not go anywhere for recovery of Anamika or that he deposed falsely. In his cross on behalf of accused Alauddin this witness stated that he made statement to police station on 29.03.2009 after dusk. He did not see Alauddin to demand toll. This witness denied the defence-suggestions that the accused Alauddin did not kidnap the victim or that he deposed falsely. In his cross on behalf of the accused Johni Ghose this witness stated that the accused-kidnappers did not disclose their names at the time of making mobile phone calls. This witness denied the defence-suggestions that he deposed falsely as per instruction of his brother. In his cross by the accused Nurul Islam this witness stated that he came to know after arrest of the accused-persons that the house of the accused Narayan was situated at a distance of ¼ mile from their house. This witness denied the defence-suggestions that driver Nurul Islam was not involved in the alleged occurrence. This witness was not cross examined on behalf of the accused Anwar.

24. The P.W.8 Sadhu Ghosh stated in his deposition that on 26.02.2009 Anamika and Toma Ghosh went to 'Pacific kinder garten School' as usual. While they were coming back home from the school and reached beside west Bamansur graveyard, the victim Anamika was kidnapped away by a taxicab. At that time a person standing there asked Toma to go home and inform her father and uncle that Anamika had been kidnapped away. Hearing the news, inmates of their house searched for Anamika but she was not found. On that date at night the father of Anamika went to the police station and filed the case. On 27.02.2009, a mobile phone call came to the cousin of Anamika to the effect that they had kidnapped away Anamika. Through the mobile phone the kidnappers demanded Tk.10.00 lakhs as ransom money for release of the victim Anamika. Subsequently, the ransom money was fixed at Tk.2.10 lakhs through negotiation. The accused-persons asked to keep the ransom money behind a cinema hall. Nanda Dulal Ghosh, the younger brother kept the money at the place as instructed by the kidnappers. The kidnappers acknowledged the receipt of the money assuring that they would return Anamika. Then they kept waiting for Anamika and searched for her but she was not found. On 01.03.2009 a mobile phone call came from Shibaloy Police Station to the effect that the dead body of a girl child was found. Thenthe father and the uncle of Anamika Ghose went to Manikganj taking police with them and there, they identified the dead body of Anamika and brought the dead body to their house. Seeing the dead body, the local people became very sad. They cremated the dead body. 5/7 days after that police arrested the accused Johni Ghosh. Police recovered a mobile phone from Johni Ghosh. Police seized the mobile phone under a Seizure-List. On query, Johni Ghosh admitted that he himself, Manik, Alauddin, Anwar, Narayan and the driver kidnapped away the victim and killed her. This witness proved the Seizure List as Exhibit-8 and his signature therein Exhibit-8/1. This witness identified the seized mobile phone in the Court. This witness further deposed that the seized mobile phone was used in the act of kidnapping. This witness identified the accused-persons excepting the accused Narayan in the dock. This witness also identified the seized mobile phone as Material Exhibit-VII. This witness further deposed that police examined him. In his cross on behalf of the accused Anwar this witness stated that the informant was his neighbor. This witness denied the defence-suggestions that the accused-

Anwar was not involved in the alleged occurrence or that he deposed falsely. In his cross on behalf of the accused Manik this witness stated that he told police about 5 accused-persons. This witness denied the defence-suggestions that he deposed falsely as instructed by the informant. In his crosson behalf of the accused Alauddin this witness stated that did not see who kidnapped Anamika away. This witness denied the defence-suggestions that he did not see the arrest of the accused-Alauddin.In his cross on behalf of the accused Johni Ghosh this witness stated thehe put his signature in a written paper. This witness denied the defence-suggestions that at the time of seizure of the mobile phone he was not present or that the accused Johni Ghosh did not tellthat Alauddin, Manik himself and driver killed Anamika or that he deposed falsely.

25. The P.W.9 Dr. Md. A.Halim Molla statedin his deposition that on 01.03.2009 he was attached to Manikganj Sadar Hospital as the R.M.O. On that date having received the dead body of a8/9 year old girl through constable Ali Hossain they held post morterm examination on the dead body of the deceased byconstituting a Medical Board. He was one of the members of board. At the time of post mortem examination they foundmud inside the nose and mouth cavity of the deceased and also found both hands clinched. During post mortem examination they found following injuries on the person of the deceased.

I. "One large lacerated wound on lower part of the left arm and left elbow measuring approximately 4" x 3" x bone depth.
II. A lacerated wound on palm of right. Hand measuring 2" x 1" x muscle depth.
III. Three bruises on right lateral aspect of upper neck.
IV. One bruise on left side of neck.
V. Trachea-congested and mud present. Lungs found congested."

In their opinion the cause of death was Asphyxia resulting from suffocation which was antemortem and Homicidal in nature.

26. This witness proved the Post Morterm Examination Report as Exhibit-9 and his signature therein as Exhibit-9/1 and also proved his signature in the Chalan as Exhibit-3/2. In his cross on behalf of all the accused-persons this witness stated that injuries on the left elbow and on the palm of therighthand of the deceased were found. On analysis of all aspects they gave opinion with regard to the death of the deceased. This witness denied the defence-suggestions that death of the deceased was accidental in nature or that he submitted a formal report.

27. The P.W.10 S.I. Md. Lutfur Rahman deposed that on 01.03.2009 he was attached to Shibaloy P.S. On that date vide G.D.No.23 dated 01.03.2009 he recovered the dead body of a8/9 year old girl. He held inquest on the dead body of a female child. He sent the dead body to the morgue for autopsy through constable Ali Hossain by a Chalan. This witness proved the Inquest Report as Exhibit-10 and his signature therein as exhibit-10/1. This witness also proved his signature in the Chalan as Exhibit-3/3. This witness further deposed that he found a blue colour skirt, white colour shocks, blue colour tie in which "Pacific Kinder Garten" was written, a yellow colour shopping bag with the name 'Nandan Fabrics', a black colour cap a black colour hand glove, a maroon colour handkerchief with the dead body. At the time of sending the dead body the deceased girl was wearing a yellow white colour banian, a blue colour half paint and a pair of white cad. He seized those materials under a Seizure List. This witness proved his signature in the Seizure-List as Exhibit-7/3. This witness also identified the alamats in the Court. This witness further deposed that as per the requisition of the I.O.S.I. Shahadat he visited the place of occurrence, drew sketch map thereof with index separately and recorded the statements of the witnesses under section 161 of the Code of

Criminal Procedure. After getting the Post Morterm Examination Report with alamats, he sent all the seized alamats along with the Post Examination Report and other papers with a memorandum to Keraniganj Police Station. This witness proved the Sketch Map of the place of occurrence with index as Exhibits-11 and 12 and his signatures therein as Exhibits-11/1 and 12/1. In his cross on behalf of the accused Manik this witness stated that at about 9.00 a.m. the information came. As per instruction of the Officer-in-Charge he started for the place of occurrence from the police station at 9.30 a.m. in the morning and reached the place of occurrence at 10.00 a.m. The dead body was lying in a paddy field. Public brought the dead body from the paddy field to the pucca road. He prepared the Inquest Report on the road. The time of seizure was written to be 10.30 a.m. This witness denied the defence-suggestions that he did not get the alamats as mentioned in the Seizure-List with the dead body or that he deposed falsely.

28. The P.W.11 Md. Akkas Ali deposed that he had a pharmacy at Naya Kandi Nali Bazar. On 16.06.2009 police of karanigong police station went to 'Mondol Studio' and got photographs of the deceased and showed the photos to him. Those photos were in the Court. Police seized the photos under a Seizure-List. This witness proved the Seizure-List as Exhibit-13 and his signature therein as Exhibit-13/1. This witness also identified the photosas Material Exhibits-VII series. In his cross on behalf of all the accused-persons this witness stated that before seizure of the photos, those were shown to him. The photos were of a 8/9 year old girl. This witness denied the defence-suggestions that photos were not seized in his presence.

29. The P.W.12 Ratan Kumar Mondol stated in his deposition he was the owner of 'Mondol Studio' situated at Nali Bazar. On 01.03.2009 at about 10.00/10.30 a.m. he was called by the Paturia Police Bit to take snaps of a dead a body at Dutura village. He shot snap of a the dead body girl of 8/9 year old. On 06.04.2009 two police personnel of Keranigong Police Station went to his studio and got printed 3 (three) copies of the photo and seized the photos under a Seizure-List. He attested the same. This witness proved his signature in the Seizure-List as Exhibit-13/2 and identified the photos in the Court. He himself snapped the shots. In his cross on behalf of all the accused-persons this witness stated that police examined him. Before putting his signature in the Seizure List he read it. The witness denied the defence-suggestions that he did not take photos of the deceased or did not print them or that he deposed as per instruction of the police.

30. The P.W.13 Ahmadul Huda stated in his deposition that he was the manager of 'United Residential Hotel'. On 26.02.2009 at 9.30 p.m. a person named Badsha Mia giving identify of a girl of 8/9 year old to be his sister Shiuli stayed in their hotel. Saidman said he was from Tangail. He gave them booking in the room no.301 of the hotel. On 26.03.2009 police came to his hotel and asked as to whether one Badsha Mia and Shiuli stayed in his hotel or not. Perusing the register, he informed police that on 26.02.2009 a man stating his name to be Badsha Mia stayed in his hotel with a 8/9 year old girl giving her identity to be his sister Shiuli. Police seized the Register of the hotel under a Seizure-List which he attested as a witness. This witness proved the Seizure-List as Exhibit-14 and his signature therein as Exhibit-14/1. After seizure of the register, it was given to his custody. This witness proved the Deed of Custody as Exhibit-15 and his signature therein as exhibit 15/1. This witness further deposed thatas per the order of the Court he brought the Register Book to the Court. In the serial number 21 of the page number 176 of the Register Book the name of the boarder was stated to be Badsha Mia of Motogram, Tangail, Sadar District-Tangail. The name of Shiuli was also written there. As per the register the border came to the hotel at 9.30 p.m.

This witness proved the Register Book as Material Exhibit-IX. This witness identified the accused Badsha Mia in the dock stating that he was wearing a red-black banian when he came to the hotel.This witness further stated in his deposition that he saw the little girl on that day. When Badsha Mia took the girl to the hotel the girl was covered with a towel and that she was sleeping. In his cross on behalf of all the accused-persons this witness stated that he was serving in the hotel as the manager since 15.08.2007. He himself filled up the columns of the register. In the Register Book the names of Badsha Mia and Shiuli were there and that Shiuli wasshown to be the sister of Badsha Mia. He himself wrote the register. This witness denied the defence-suggestions that he was not the Manager of the hotel or that he created a Register Book or that on 26.03.2009 no room was vacant or that he deposed falsely.

31. The P.W.14 Md. Rajib deposed that he was the Supervisor of 'United Residential Hotel' situated at Savar. On 26.02.2009 at about 9.30 p.m. a taxicab driver came and asked as to whether there was any vacant room. On his asking, the driver informed that a child with her brother would stay in the hotel. Then he took them to the manager. A person gave his identity to be Badsha Mia and told the name ofa8/9 year old girl to be Shiuli. They stayed in the room no.301 of the hotel. On his shoulder the person took the girl to the room in sleeping condition. This witness identified the photo of the girl as Material Exhibit-VIII saying that the girl was brought by Badsha to the hotel. This witness identified the driver i.e. the accused Nurul Islam Munshi stating that he was wearing a lungi. The accused who was wearing red-black colour banian today (i.e. on the date of deposition of this witness) gave his identity to be Badsha (accused Manik). Police seized the Register of the hotel under a Seizure-List which he attested as a witness. When the accused wearing the red-black banian present in the dock was asked by the Court as to what his name was he disclosed his name to be Manik and that the accused who was wearing a lungi on asking by the Court disclosed his name to be Nur Islam. This witness proved his signature in the Seizure-List as Exhibit-14/2. This witness further deposed that police examined him. In his cross on behalf of all the accused-persons this witness stated that he made statement to police. This witness denied the defence-suggestions that the accused-persons as mentioned by him did not go to their hotel or that he identified the accused-persons as per showing of the informant-side or that he deposed falsely.

32. The P.W.15 Md. Nurul Islam stated in his deposition that he was the member of ward no.4 of Sakta Union Parishad. The informant was a resident of that ward. On 26.02.2009 at 3.00 p.m. he went to the house of Swapan Ghose and came to learn that Anamika, the daughter of the informant was kidnapped away with a yellow taxicab from the road of west Bamansur graveyard. Hearing the news, he went to the house of the informant. The niece of Swapan, a 8/9 year old girl, on query, disclosed that the kidnappers told her to tell her father that Anamika was hijaiked away. He saw the inamates of the house crying. He gave them consolation and asked them to search for the taxi. On that day at dusk he once again went to the house of the informant and on query, came to learn that Anamika was not found. Then he advised them to inform the police station of the matter. On that very day they went to the police station and filed the case. At night, police officer came. Thereafter, on 27.02.2009 he went to the house of the informant at about 10.00/11.00 a.m. and came to learn that kidnappers demanded Tk.10.00 lakhs as ransom money for the release of the victim girl holding out threat to the effect that if the demand was not met they would kill the girl. The kidnappers also held out threat to the effect that if the matter was informed to any one they would kill the victim Anamika. Thereafter, he went once again to the house of the informant on 27.02.2009 and on query, came to learn that the informant paid Tk.2.10 lakhs at a place behind the Ati Bazar Cinama Hall as per the instruction of the kidnappers. The kidnappers

informed that they would release the girl at 7.00-8.00 p.m. They kept waiting for Anamika but she was not found. On 01.03.2009 while he was going to the Upazilla Parishad he saw the informant and his brother with police in a police van. On his query, they informed him that a dead body was recovered at Manikgonj. At night he heard that the dead body of Anamika was brought to the house of the informant. Then he went to the house of the informant and the dead body was creamated. On 07.01.2009 at 7.30-8.00 p.m., a police officer went to the gate of the house of the accused Manik at Shikaritola. He also went there.On query, Manik admitted that by kidnapping Anamika, they killed her and he took Tk.1.27 lakhs from the realized ransom money. Police recovered said Tk.1.27 lakhs and the Motorola mobile phone used in the act of kidnapping from the accused Manik. On query,the accused Manik disclosed that the accused-persons Alauddin, Johni, Anwar, Narayan and taxicab driver (the accused Md. Nurul Islam Munshi) were involved in the occurrence of kidnapping. Police seized said the Tk.1.27 lakhs of ransom money and the Motorolla mobile phone under a Seizure-List which he attested as a witness. This witness proved his signature in the Seizure-List as Exhibit-4/2. This witness further stated in his deposition that police examined him. He made statement to a Magistrate regarding the occurrence. This witness proved the statement made to the Magistrate by him as Exhibit-16 and his signature therein as Exhibit-16/1. This witness identified the accused-persons whose name he stated in his deposition. In his cross by the accused Manik, this witness stated that he made statement to police. He gave information of the kidnapping to the chairman 7.00 p.m. He went to the place from where Anamika was kidnapped. Anamika was known to him from before. Swapan told him that ransom money was demanded over mobile phone. After the dead body was brought from Manikgonj he went to the house of Sudharam Ghosh. The accused Manik was known to him from before. At about 7.00-7.30 p.m. he signed the Seizure-List. This witness denied the defence-suggestions that in his statement under section 164 of the Code of Criminal Procedurehe did not say about his going to the house of the accused Manik or that the accused did not say that the accused-persons Alauddn, Narayan, Johni, Anwar and the driver were not involved in the occurrence or that Tk. 1.27 lakhs of ransom money or the mobile set was not recovered from the accused Manik. In his cross on behalf of the accused Johni this witness stated that he did not see directly the occurrence of kidnapping. This witness denied the defence-suggestions that he was not present at the time of seizure of the Motoralla mobile phone or that he signed in a blank paper. In his cross on behalf of the accused Nurul Islam Munshi, this witness stated that the accused Narayan had committed suicide. This witness denied the defence-suggestions that Nurul accused Islam Munshi was not involved in the alleged occurrence. In his cross on behalf of the accused Anwar this witness stated that knowing about the occurrence the local M.P. came. He signed the statement he made to the Magistrate. This witness denied the defence-suggestions that the accused Manik did not mention the name of the accused Anwar or that he deposed falsely. In his cross on behalf of the accused Alauddin this witness stated that police recorded his statement as narrated by him.

33. The P.W.16 Md. Ashik stated in his deposition that he used to work as a security guard in a restaurant. 6/7 months before from now at 8.00/8.30 p.m. a taxicab came in front of the restaurant. At that time a lady was sitting in the taxicab. Then 4/5 police personnel dragged the driver out of the taxicab. 6/7 days after that police examined him. This witness was declared hostile by the prosecution. In his cross by the prosecution this witness stated that he signed the Seizure-List in respect of the mobile phone of the said taxicab driver. He did not know whether the name of the driver was Nurul Islam Munshi but he knew that the driver was apprehended. In his cross on behalf of the accused-persons this witness stated that he did not know as to why the taxicab driver was arrested.

34. The P.W.17 Arju Mia Benu stated in his deposition that he was the neighbor of the informant Sudharam Ghose. On 26.02.2009 at about 4.00-4.30 p.m. he came to know from Swapan that his niece Anamika was kidnapped away with a taxicab from in front of Bamansur graveyard. On 27.02.2009 he went to the house of Sudharam Ghosh and heard that the kidnappers demanded Tk.10.00 lakhs as ransom money for release of the victim. On 28.02.2009 at 5.00-6.00 p.m. he came to know that the ransom money was settled at Tk.2.10 lakhs and that the ransom money was paid behind the Ati Bazar Cinema Hall. On 01.03.2009 the dead body of Anamika was found at a place under Shibaloy Police Station. At 8.30 p.m. he saw the dead body of Anamika at the house of Sudharam Ghosh. Hearing that the accused Manik was arrested he went to his house. Many people in front of his house asked Manik with regard to the occurrence to which he admitted that he himself, Alauddin, Johni, Anwar and Narayan kidnapped the victim. He accompanied the police and the member to the house of the accused Manik.Police recovered Tk.1.27lakhs of the ransom money from an almunium pot in the house of the accused Manik and also recovered a mobile phone and seized the money and the mobile phone under a Seizure-List. 98 nos. of Tk.1,000/- and 58 nos. of 5,000/- were recovered. He attested the Seizure-List. This witness proved his signature in the Seizure-List as Exhibit-4/3. This witness further deposed that thereafter police went to the house of the accused Anwar. They also accompanied police. There, police recovered a mobile phone and seized it under a Seizure-List. This witness proved the Seizure-List as Exhibit-17 and his signature therein as Exhibit-17/1. This witness further deposed that he made statement to a Magistrate. This witness proved the statement as Exhibit-18 and his signature therein as Exhibit-18/1. This witness also identified the accused-persons in the dock and identified the Motorola mobile phone as Maternal Exhibit-X. In his cross on behalf of the accused Manik this witness stated that he made statement to a Magistrate. He saw recovery of ransom money and a mobile phone. This witness denied the defence-suggestions that he did not go to the house of the accused Manik or that the Motorola mobile phone was not recovered in his presence or that he deposed falsely. In his cross on behalf of accused Johni Ghose this witness stated that the accused Johni Ghose was known to him. The accused named Narayan committed suicide. This witness denied the defence-suggestions that no money was seized and his presence or that being influenced by the informant he deposed falsely. In his cross on behalf of the accused Nurul Islam Munshi this witness stated that Narayan was known to Anamika and she used to call him ‘kaka’. In his cross on behalf of the accused Alauddin this witness stated that a female Magistrate recorded his statement. This witness denied the defence-suggestions that he did not say the facts he said today to the Magistrate. In his cross on behalf of the accused Anwar this witness stated that he put his signature in the statement after he made it to the Magistrate. This witness denied the defence-suggestions that he stated the name of the accused Anwar as tutored by the informant or that the accused Manik did not mention the name of accused Anwar.

35. The P.W.18 Rabindra Nath Modak stated in his deposition that the informant was his neighbour. He was a baby taxi driver. On 26.02.2009, hearing that Anamika was not being found he went to the house of the informant and came to learn that while Anamika was returning home from school and reached at the west Bamansur graveyard she was kidnapped away in a taxicab by some persons. At that time her Younger sister Toma was with her. After going to the house, Toma informed about the occurrence. Thereafter, on search, Anamika having not found her father lodged the FIR in the police station. On the following day the kidnappers demanded Tk.10.00 lakhs as ransom money for release of the victim. Thereafter, through negotiation the ransom money was fixed at Tk.2.10 lakhs. On 28.02.2009 the brother of the informant went behind Ati Bazar Cinema Hall and kept the ransom money as instructed by the kidnappers. The kidnappers acknowledged the receipt of the ransom money

saying that they would release the victim Anamika. But they did not release the victim at night. On 01.03.2009 he came to know that the dead body of Anamika was found at a place under Shibaloy P.S. The father and uncles of Anamika brought her dead body from there with police. He was present at the time of cremation of the dead body of Anamika.6/7 days after that he heard that the accused Anwar was apprehended. Hearing that he went to house of the accused Anwar where a mobile phone was recovered from him by police and police seized the mobile phone under a Seizure-List. He attested the seizure-list. This witness proved his signature in the Seizure-List as Exhibit-17/2. This witness identified seized mobile in the Court. This witness further deposed that on query, the accused Anwar disclosed that as per instruction of his maternal uncle he brought the ransom money. His maternal uncle paid him Tk.5,000/- as share. He also came to know that the accused-persons Alauddin, Manik, Johni, Anwar, Narayan and a driver kidnapped away Anamika. Police examined him. This witness identified the accused-persons in the dock. In his cross on behalf of the accused Manik this witness stated that he used to ply baby taxi from Atibazar to Kalabagan. This witness denied the defence-suggestions that the victim Anamika was not kidnapped away from Brahmonsur graveyard or that the kidnappers did not claim Tk.1,00,000/- lakhs as ransom money or that the kidnappers were not paid Tk.2.10 lakh as ransom money or that the accused-Anwar did not inform that the accused-persons Alauddin, Johni, Nurul Islam and Manik were also involved in the alleged occurrence or that he deposed falsely. In his cross on behalf of the accused Anwar this witness stated that at about 6.30-7.00 p.m. he signed the Seizure-List or that he did not go to the house of the accused Anwar or that he did not see the recovery of mobile phone or that he deposed falsely. In his cross on behalf of the accused Johni Ghosh this witness stated that he did not go for searching Anamika. The accused Johni Ghosh was known to him from before. The distance of the house of the accused Anwar from his house was ½ mile. This witness denied the defence-suggestions that the accused Johni Ghosh searched for Anamika or that being influenced by the informant he deposed falsely. In his cross on behalf of the accused Alauddin this witness stated that he made statement to police. This witness denied the defence-suggestions that the accused Alauddin was not involved in the alleged occurrence of kidnapping. In his cross on behalf of the accused Nurul Islam this witness stated that he heard that the accused Narayan committed suicide voluntarily. The victim Anamika was known to him. This witness denied the defence-suggestions that he deposed as tutored by police or the informant.

36. The P.W.19 Md. Abul Naser, the principal, 'Pacific Kinder Garten School', Bamonsur Karanigonj, Dhaka, stated in his deposition that there was examination in the Pacific Kinder Garten Schoolon 26.02.2009. After examination Anamika Ghosh and Toma Ghose were returning home with other students. On that day as Anamika did not return home, her guardian came to their school and informed that Anamika did not return home. Thereafter, at 3.00-3.30 p.m. he came to know that while Anamika was returning home from school she was kidnapped away. Hearing that, he went to the place of occurrence and so also to the house of the informant. After going there, he came to know about the occurrence. On the following day he came to know from the guardians that kidnappers demanded ransom money for release of Anamika. He also came to know that through negotiation with the kidnappers ransom money was paid to them. Thereafter, on 01.03.2009 he came to know that the dead body of Anamika was found at a place under Shibaloy Police Station. He along with his two colleagues came to the house of Anamika. Police examined him. Anamika appeared in the examination as a student of class-III in their school. Her roll number was 33 and her section was Zenia. Before she was kidnapped she appeared in 5 examinations. He brought the answer scripts dated 22.02.2009, 23.02.2009, 24.02.2009.25.02.2009and 26.02.2009 to the Court. He identified the answer scripts as Exhibits-I/A series. This witness further stated he

brought the attendance register of section-Zenia, class-III. According to that register Anamika was present in the school. This witness proved Register as Exhibit-20. In his cross on behalf of the accused the Manik this witness stated that class of the school usually started at 9.00 a.m. and continued up to 5.20 p.m. Anamika was a child. At 3.00-3.30 p.m. he came to know about kidnapping of Anamika from father Durga. He heard about payment of ransom money. To mark sorrow for the death of the victim he suspended class of his school for one day. Police examined him in the school. This witness denied the defence-suggestions that being influenced by the informant he brought the register of the school or that no occurrence as narrated by him took place.

37. The P.W.20 Toma Ghosh (8) being a minor girl of 8 years of age, the trial Court tested her understanding ability first by putting some questions to her to the effect that what was the name of her school, what class, she read in and how many brothers and sister she had to which she replied that she was a student of Pacific Kinder Garten School, she read in class-III and that she had 2 brothers and one sister. Thereafter, the trial Court recorded her deposition. In her deposition Pw20 Toma Ghosh stated that on 26.02.2009 she along with Anamika went to the school to appear in the examination. After examination she along with Anamika and Sadia were returning home. When they reached near the graveyard then a person asked Anamika as to what was her name. In reply, Anamika said her name to be Anamika. Thereafter, the man asked Anamika's father's name. In reply Anamika told that her father's name was Sudharam Ghosh. That person told Anamika that he used to perform business with her father and he requested Anamika to take him to their residence. At that time a person was standing in front of the taxicab. Anamika was taken away by the taxicab. The person standing in front of the taxicab asked her as to what was her relation with Anamika to which she told him that Anamika was her cousin sister. The man told her that her sister was kidnapped away and she sould tell her father and uncle about the act of kidnapping. Then she came to their house and informed her father and uncle about the kidnapping. Police came at night and examined her. Police examined her on the following day as well pointing to the accused no.4 standing from the west to the east in the dock this witness stated that said person in the dock made query to her on the date of occurrence. On query by the Court, said accused no.4 standing in the dock disclosed his name to be Alauddin. This witness further deposed that the kidnappers killed her sister and she saw her dead body. She sought justice for the killing of the victim Anamika. This witness was not cross examinedon behalf of accused-persons Anwar and Manik. In her cross on behalf of the accused Alauddin this witness stated categoricallythat none identified the accused Aladdin in to her. She herself identified him. The accused Alauddin was standing on the road. On that date the subject was social science. This witness denied the defence-suggestions that neither she or Anamika went to school for appearing in the examination. This witness also denied the defence-suggestions that her father identified the accused Alauddin to her. This witness was not cross examined on behalf of the accused Nurul Islam. In her cross on behalf of the accused Johni Ghosh when she was asked as to who used to sat beside her in the class, this witness became morose. In her cross on behalf of the accused Johni Ghosh this witness also stated that they started for the school at 11.30 a.m. This witness denied the defence-suggestions she was not a student of class-III.

38. The P.W.21 Nazia Nahid stated in her deposition that on 08 .03.2009 while she was the Metropolitan Magistrate, 3rd Court, Dhaka, recorded the confessional statement of the accused Manik after observing all formalities under sections 164 and 364 of the Code of Criminal Procedure. After recording the statement she read over the statement to the accused to which he put his signature in the statement admitting the contents thereof to be true. She appended certificate to the effect that the statement was true and voluntary. This witness

proved the confessional statement of the accused Manik as Exhibit-21, her signatures therein as Exhibits-21/1 series and the signatures of the accused Manik therein as Exhibits-22 series.

39. This witness further deposed that on 08.03.2009she recorded the confessional statement of the accused Anwar after observing all the formalities under sections 164 of the Code of Criminal Procedure. After recording the statement she read over the statement to the accused to which he put his signature therein admitting the contents thereof to be true. She appended certificate to the effect that the statement was true and voluntary. This witness proved the confessional statement of the accused Anwar as Exhibit-23, her signatures therein as Exhibits-23/1 series and the signatures of the accused Anwar therein as Exhibits-24 series.

40. This witness further deposed that on 08.03.2009she recorded the confessional statement of the accused Md. Alauddin after observing all the formalities under sections 164 of the Code of Criminal Procedure. After recording the statement she read over the statement to the accused to which he put his signature therein admitting the contents thereof to be true. She appended certificate to the effect that the statement was true and voluntary. This witness proved the confessional statement of the accused Md. Alauddin as Exhibit-25, her signatures therein as Exhibits-25/1 series and the signatures of the accused Anwar therein as Exhibits-26 series.

41. This witness further deposed that on 08.03.2009she recorded the confessional statement of the accused Johni Ghosh after observing all the formalities under sections 164 of the Code of Criminal Procedure. After recording the statement she read over the statement to the accused to which he put his signature therein admitting the contents thereof to be true. She appended certificate to the effect that the statement was true and voluntary. This witness proved the confessional statement of the accused Md. Alauddin as Exhibit-27, her signatures therein as Exhibits-27/1 series and the signatures of the accused Md. Alauddin therein as Exhibits-28 series.

42. This witness further deposed that on 08.03.2009she recorded the confessional statement of the accused Nurul Islam after observing all the formalities under sections 164 of the Code of Criminal Procedure. After recording the statement she read over the statement to the accused to which he put his signature therein admitting the contents thereof to be true. She appended certificate to the effect that the statement was true and voluntary. This witness proved the confessional statement of the accused Nurul Islam as Exhibit-29, her signatures therein as Exhibits-29/1 series and the signatures of the accused Nurul Islam therein as Exhibits-30 series.

43. This witness further deposed that on 09.03.2009 she recorded the statement of the witness Md. Kamruzzaman under section 164 of the Code of Criminal Procedure. After recording the statement she read over the statement to the witness to which he put his signature therein admitting the contents thereof to be true. This witness proved the statement of the witness Md. Kamruzzaman as Exhibit-32 and her signature therein as Exhibit-31/1.

44. This witness further deposed that on 09.03.2009 she recorded the statement of the witness Md. Alam under section 164 of the Code of Criminal Procedure. After recording the statement she read over the statement to the witness to which he put his signature therein admitting the contents thereof to be true. This witness proved the statement of the witness Md. Alam as Exhibit-31 and her signature therein as Exhibit-32/1.

45. This witness further deposed that on 08.04.2009 she recorded the statements of the witnesses Md. Nurul Islam, Sree Durga Charan and Arzoo Mia under section 164 of the Code of Criminal Procedure. This witness proved the statements of the said witnesses as Exhibits-6, 16 and 18 and her signatures therein as Exhibits-6/2, 16/2 and 18/2.

46. In her cross on behalf of the accused Md. Alauddin this witness stated that she did not fill up some part of the statement. Her peon brought the accused to her. In paragraph no.6 she took the statement of the accused. This witness denied the defene-suggestions that she did not give sufficient time for speculation to this accused or that the accused did not make any confessional statement. In her cross on behalf of the accused Nurul Islam this witness stated that this witness stated that she started recording the statements at 3.00 p.m. This witness denied the defence-suggestion that she did not give sufficient time for speculation making statement to this accused. In her cross on behalf of the accused Johni Ghosh this witness stated that after recording the statements of the confessing accused-persons they were sent to the jail at 6.00 p.m. She explained the subjects of the column no.5 to the accused. After recording the statement of the accused when it was read over to him he put his signature therein admitting the contents to be true. This witness denied the defence-suggestions that she did not comply with the provisions of sections 164 and 364 of the Code of Criminal Procedure or that the accused did not put his signature in the statement in his presence. In her cross on behalf of the accused Anwar this witness stated that the time of completion of recording the statement was not noted in the statement. This witness denied the defence-suggestions that the accused-parsons did not make confessional statements or that the statements were not voluntary or product of torture. In her cross on behalf of the accused Manik this witness stated that in the statement of this accused the name of the peon Borhan was written. This witness denied the defence-suggestions that the signature appearing in the name of Manik was not his or that she did not give sufficient time for speculation to this accused or that the accused Manik did not make the statement voluntarily or that she did not record the statement properly.

47. The P.W.22 S.I. Md. Shahadat Hossain Khan, the investigating Officer of the case stated in his evidence that on 26.02.2009 he was attached to Karnaiganj P.S. as an S.I. On that after starting the case the Officer-in-Charge (O.C.) entrusted the charge of investigation with him. The signature of the O.C. was known to him. This witness proved the FIR Form as Exhibit-33 and the signature of the O.C. therein as Exhibit-33/1. This witness further deposed that during investigation he visited the place of occurrence, drew Sketch Map thereof with index, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. This witness proved the Sketch Map of the place of occurrence and the Index as Exhibits-34 and 35 and his signatures therein as Exhibits-34/1 and 35/1. This witness further deposed that on 27.02.2009 after the FIR was lodged, the kidnappers demanded Tk.10.00 lakhs as ransom money over mobile phone. He collected the call list of the mobile phone. With that mobile phone the kidnappers made communication with the concerned mobile phone on 28.02.2009. He collected the call list of the said mobile phone and perused it. On 01.03.2009 the informant came to the police station and informed that the Officer-in-Charge of Shibaloy P.S. informed him over mobile phone that a dead body of an unknown 9 year old girl was found and that on the said dead body there were school dress and tie where 'Pacific Kinder Garten' was written. On the basis of that information he himself, the informant and his brother started for Shibaloy P.S. On the way, they came to know that the dead body was taken to Manikganj Sadar Hospital. They went to Manikganj Sadar Hospital where the informant identified the dead body to be of his daughter Anamika. After post mortem examination on the dead body of the victim they came to Keraniganj P.S. along with the dead

body and relevant papers. He handed the dead body of the deceased to the informant for cremation. On 28.02.2009 the mobile phone of the kidnappers being switched off, he collected the IMEI of the mobile phone. He collected the call list of the mobile phone and perused it. On 07.03.2009 he arrested the accused Nurul Islam Munshi from in front of Gulshan-2 Top Capi Hotel. He arrested the said accusedwith a taxicab. He recovered the mobile set he was keeping and seized it. The number of the mobile was 0192475331. He seized the taxi-cab as well. This witness proved the Seizure List as Exhibit-36 and his signature therein as Exhibit-36/1. This witness further deposed that he brought the accused Nurul Islam Munshi to Karaniganj PS. and interrogated him. On query, this accused disclosed the names of the other accused-persons involved in he alleged occurrence. As per the information given by this accused, he arrested the accused-persons Johni Ghosh, Alauddin, Manik and Anwar Hossain. On 07.03.2000 he recovered a Huawei Mobile set from the accused Johni Ghosh. He recovered the SIM bearing no. 01196137697 used in the mobile. From the accused Anwar he recovered a Motorolla Mobile set having SIM no. 01197178619 and seized it. As per the admission and showing of the accused Manik he recovered Tk.1, 27,000/00 of the ransom money kept in a silver pot from the rack of the residence of the accused of the accused Manik. Among the recovered money there were 98 nos. of 1,000/00 taka note, 58 nos. of 500/00 taka note. He recovered the Motorola Mobile Set C 168 having SIM no. 01919459324 used by the accused Manik under a Seizure List. This witness proved his signatures in the Seizure Lists as Exhibit-8/2, 17/3 and 4/4. He sent the accused-persons to the Court for recording their confessional statements. The accused-persons Md. Manik, Johni Ghosh@ Johna made confessional statements voluntarily. He perused the Post Mortem Examination Report along with other papers. On 26.03.2009 at 11.40 a.m. he seized the Boarder Register Book from the Manager of United Residential Hotel. On perusal of the said Register Book, it appears that by changing his name to be Badsha and giving identity of the victim to be Shiuli he came to the hotel. This witness proved his signature in the Seizure List in respect of the Register Book as Exhibit-14/3. This witness further deposed that he gave the Register Book to the custody of the manager. On 2903.2009 he seized a Motorolla Mobile Model C.E.-0168 bearing SIM No. 01720425045 under Seizure List as presented by the brother of the informant. The kidnappers made correspondences with the said mobile phone. On 06.04.2009 at 15.10 hours he seized full and half size photo graphs of the victim Anamika Ghosh from the Nalabazar Model Digital Studio and Audio centre. This witness proved his signature in the Seizure List as Exhibit-13/3. This witness further deposed that he sent five witnesses to record their statement under section 164 of the Code of Criminal Procedure. After investigation, prima-facie case having been made out against the accused-persons Md. Manik, Johni Ghosh @ Johna, Anwar Hossain @ Anwar, Noor Islam and Md. Alauddin, he submitted Charge Sheet No.91 dated 25.04.2009 under sections 7/8/30 of the Nari-O-Shishu Nirjatan Daman Ain,2000 (Amended in 2003) and under sections 302/201/34 of the Penal Code against them. This witness identified the accused-persons in the dock arrested by him in connection with the case. In his cross on behalf of the accused Manik this witness stated that he joined his service on 10.03.2006 and joined Keranigang Police Station in July, 2008. He went to the place of occurrence on 27.02.2009 at 10.45 a.m. 'B' of the Sketch Map was Bamansur Graveyard. He advised the informant to file the case. He recorded the statement of the witness Ashique on 13.03.2009. He recorded the statement of Toma Ghosh on 27.02.2009. He took her to the place of occurrence at 12.05 p.m. On that date, he recorded the statement of Sadia as well on that date. Toma Ghosh used to prosecute her studies in 'Bamansur Pacific Kinder Garten'. He recorded the statements of the witnesses Md. Abu Nasir Uddin, Sadhu Ghosh and Md. Rajib on 04.03.2009, 10.03.2009 and 26.03.2009 respectively. The witness Md. Rajib stated in his statement that the accused Manik stayed in the hotel mentioning his name to be Badsha and mentioning the name of the victim to be

Shiuli. About 8 days after the occurrence, the accused-persons were arrested. On 07.03.2009 he first of all arrested the accused Nurul Islam from 'Gulshan Topcapi Restaurant'. He arrested the accused Manik on 07.03.2009 at 17.30 hours from his residence at Shikaritola. At the time of arrest when the accused Manik tried to decamp he sustained injury. He got the accused medically treated. At the time of arrest of the accused Manik, his mother and wife were in the house. He went to 'Pacific Kinder Garten', the school of Anamika Ghosh. Abu Naser was the head of the school. The dead body of the victim was recovered from a paddy field. He perused the Inquest Report. He recovered ransom money and Motorola mobile set bearing no.01919459324. Giving the name of Badsha, the accused Manik stayed in the hotel. He prepared the deed of custody. This witness denied the defence-suggestions that Naser was not the principal of the school or that the money which he recovered from the accused Manik was not the ransom money or that he did not take out the investigation properly. In his cross on behalf of the accused Alauddin this witness stated that he arrested the accused Alauddin on 07.03.2009 at 17.30 hours from his house. After arrest of the accused Manik, he disclosed the names of the other accused-persons. This witness denied the defence-suggestions that the accused Alauddin was not involved in the alleged occurrence or that he compelled the accused Alauddin to make confessional statement by torture or that his investigation was not proper. In his cross on behalf of the accused Johni Ghosh this witness stated that during investigation he went to the place of occurrence situated at Bamansur. Toma identified the place of occurrence to him. On 28.03.2009 the informant informed that he was called from a mobile phone. This witness denied the defence-suggestions that out of presumption he involved the accused Johni Ghosh in the case or that by way of torture he compelled the accused Johni Ghosh to make confessional statement or that the accused Johni Ghosh was innocent or that he deposed falsely. In his cross on behalf of the accused Noor Islam, this witness stated that during investigation he seized a taxicab bearing no. Dhaka Metro: Ka-111440. The accused Noor Islam admitted that with the said taxi-cab the victim Toma was taken to 'United Residential Hospital' at Savar. This witness denied the defence-suggestions that the accused Nurul Islam did not drive the taxicab or that by way of torture confessional statement of the accused Nurul Islam was procured or that being influenced, he entangled the accused Nurul Islam in the case.

48. So, this is the evidence adduced by the prosecution to substantiate its case. Now, on scrutiny of the evidence on record, let us see as to whether the prosecution had been able beyond all shadow of doubt to bring home the charge as brought against the condemned-accused-prisoner and the other convicted-accused-persons and also to find out whether the impugned judgment and order of conviction and sentence is sustainable in law.

49. From the evidence of the Pw1 Sudharam Ghosh, the Pw2 Sree Nanda Gopal Ghosh, the Pw4 Sree Durga Charan Ghosh, the Pw7 Shyam Dulal Ghosh, the Pw8 Sadhu Ghosh, the Pw13 Ahmadul Huda, The Pw14 Rajib, the Pw15 Md. Nurul Islam, the Pw17 Arzoo Mia, the Pw18, the Pw19 Md. Abul Naser, the Pw20 Toma Ghosh (8), it is evident that on 26.02.2009 at 1.40 p.m., while the victim deceased Anamika Ghosh along with the Pw20 Toma Ghosh (8) and Sadia were returning home after appearing in the examination in the 'Bamansur Kinder Garten School' reached in front of the road of 'West Bamansur Graveyard', the accused-persons kidnapped Anamika Ghosh away by a yellow taxicab and subsequently, the dead body of the victim Anamika Ghosh was found in a paddy field under Shibaloy Police Station, Manikganj on 01.03.2009. On 27.02.2009, the accused-persons demanded Tk.10.00 lakhs as ransom money for the release of the victim Anamika Ghosh which was settled at Tk.2.10 lakhs through negotiation. The informant paid the money through the Pw2 Nanda Lal Ghosh. The accused Anwar Hossain collected the money as per instruction of the accused

Manik and that the accused Anwar Hossain received Tk.5,000/00 for collection of the money. The accused-parsons acknowledged the receipt of the money through mobile phone call assuring that they would return the victim Anamika Ghosh to her father. In the process the accused Md. Manik stayed in the 'United Residential Hotel' at Savar giving his false name to be Badhsa Mia and that of Anamika to be Shiuli. Despite realizing the ransom money, instead of returning the victim Anamika to her father, the informant, the accused Md. Manik killed her and to conceal the dead body of the victim buried it under heaps of soil in a IRRI paddy field. On 01.03.2009 the dead body, of the victim Anamika was recovered. After 5/6 days of the recovery of the dead body the accused-persons were arrested and a part of the ransom money i.e. Tk.1,27,0000/00 was recovered from the residence of the accused Manik as per his admission and showing and that the mobile phone sets used in the act of killing were recovered. The accused-persons Manik, Johni Ghosh admitted that the accused-persons Manik, Johni Ghosh, Alauddin, Anwar, Nurul Islam kidnapped away the victim Aanamika Ghosh and subsequently, killed her. The Pw3 Md. Ali Hossain took the dead body of the deceased to the morgue for autopsy. This witness identified the alamats viz, a pair of cads, blue colour half pant and yellow white banyan the victim was wearing at the time of occurrence. The Pw5 Kazi Abdur Razzak went to the IRRI paddy field on the basis of information and saw the dead body of the victim-child wearing school dress. As per his information police came and took photoss of the dead body and seized the alamats viz, tie with school-monogram, white shoes and white shocks, a school bag of the victim-girl. The pw6 Md. Majibar Rahman in his evidence stated that on 01.03.2009 he saw the dead body of the victim-girl; that the navy blue shirt, tie, white shoes, shocks the victim was wearing at the time of occurrence and the bag of the victim were seized in his presence. The pw9 Dr. Md. Halimullah held post mortem examination on the dead body of the victim-deceased. This witness stated in his evidence that in their opinion the death of the deceased was due to Asphyxia resulting from suffocation which was ante mortem and homicidal in nature. Said statement of the Pw9 support the confessional statement of the condemned-prisoner Manik that by throttling he killed the victim Anamika.The Pw10 S.I. Md.Lutfor Rahman recovered the dead body of the victim-deceased and held inquest on the body, sent the dead body of the deceased for autopsy, seized the alamats viz. blue colour skirt, white colour shocks, blue colour tie with the inscription 'Pacific Kinder Garten', the victim-girl was wearing at the time of the occurrence and a white colour shopping bag, a blue colour cap, a black colour cap under seizure list, visited the place of occurrence, recorded statements of some of the witnesses and sent the dead body for autopsy. The Pw11 Md. Akkas Ali the seizure list (Exhibit-13) witness in respect of the three photoss (Material Exhibits-VII series) of the victim-deceased, stated in his cross that before seizure of the photos those were shown to him. The Pw12 Ratan Kumar Mondol took photoss of the victim with his camera and printed the photoss. This witness proved the seizure list in respect of the photoss of the victim-deceased and identified those in the Court. The Pw20 Toma Ghosh (8) a direct eye-witness to the alleged occurrence gave a vivid description of the alleged occurrence in her evidence stating specifically that the victim was kidnapped away in her presence from the place of occurrence by a taxicab. This witness identified the accused persons Manik and Alauddin in the dock. Further, the Pw20 Toma Ghosh being a minor girl of 8 years of age she was not supposed to know the accused-persons Manik and Alauddin from before. The Pw21 Nazia Nahid recorded the confessional statements of the five accused-persons. She stated in her evidence that after observing all legal formalities she recorded the confessional statements of the accused-persons; that after the confessional statements were recorded she read over the statements to the accused-persons whereon they put their signatures therein admitting the statements to be true; that she appended certificates to the effect that the statements were voluntary and spontaneous; that there was no allegation of torture, influence or coercion by

police for making the confessional statements; that she rightly forwarded the accused-persons to the jail custody after recording their statements. In this case an objection was raised on behalf of the defense to the effect that in all the confessional statements the starting time of recording the statements was stated to be 3.00 p.m. and the sending time of the accused-persons to the jail custody was stated to be 6.00 p.m.'; that recording of the five confessional statements at the same time and the recording of the statements at the same time i.e. 6.oo p.m. is absurd and as such, the confessional statements cannot be believed. From the materials on record, it transpires that five accused-persons were forwarded to the Magistrate by a single forwarding. Further, The Pw21 stated categorically in her cross that she recorded the statements one by one. So, the question as to how she recorded the confessional statements of the five accused-persons at the same time does not arise. From her evidence it is found that no police personnel was present at the time of recording the statements, rather, only a peon was present. The accused-persons were brought to her at 12 'O' clock noon. So, if she gave 3.00 hours' time for speculation to the accused-persons, naturally she started recording the statements at 3.00 p.m. On perusal of the confessional statements of the accused-persons, it appears that the statements are very short. So, it was very much possible for the Pw21 to record the confessional statements of the five accused-persons within the span of three hours' time. The Pw22, the Investigating Officer S.I. Md. Shahadat Hossain Khan stated in his evidence that during investigation he visited the place of occurrence, drew sketch map thereof with index, recorded the statements of the witnesses, did mobile tracking of the accused-persons, got the confessional statements of the accused-persons recorded under section 164 of the Code of Criminal Procedure by a Magistrate, recovered a portion of ransom many worth Tk.1,27,000/00 as per admission and showing of the accused Manik from his residence, seized the alamats of the case and that after investigation prima-facie case having been made out against the accused-persons, submitted charge sheet against them. From the evidence of the Pw22, he appears not to have committed any illegality or irregularity in taking out investigation of the case. Further, from the cross examination of the Pws, the accused-persons could not extract anything favourable to them.

50. In this case, apart from the evidence of the prosecution witnesses, there are the inculpatory confessional statements of the condemned-prisoner Md. Manik Mia, the convict accused-persons Md. Anwar Hossain, Md. Alauddin, Johni Ghosh and Md. Nurul Islam.

51. The condemned-prisoner Md Manik Mia in his confessional statement gave a vivid description of the perpetration of the alleged occurrence with reference to time, place and manner thereof. Said condemned-prisoner stated in his confessional statement that "as per the pre-plan they picked up the victim girl from the school and detained her. Narayan, Johna (Johni) and Alauddin were with him. With the girl he boarded in a hotel and demanded ransom money from the father of the victim girl for her release. The father of the girl paid them Tk.2.10 lakhs as ransom money as per their claim. He got Tk.2.10 lakhs. After getting the money he went to Aricha Road taking the girl with him. He wanted to release the girl but Narayan told him that the girl could identify him and as such, she should be killed. In this way, holding out treat in different ways they took the girl to Paturia. While taking the girl to a paddy field in his lap, the girl fell down and screamed. When the girl screamed, he killed her by throttling. Thereafter, they buried the girl under soft wet earth and came back and communicated with each others. Money was with him. After expenditure, he had Tk.1.07 lakhs with him."

52. The convict-accused Md. Anwar Hossain stated in his confessional statement that "the accused Manik was his maternal uncle. He informed him about the plan and asked him to

fetch the money (ransom money). On the first date the accused Manik could not kidnap the girl. Sitting for a long time, he came back. On the following day they went to kidnap the girl. In the evening of Thursday, he made mobile phone call to Manik whereon he informed that Narayan brought the girl and went away and that the girl was with her. On the following day i.e. on Friday, Manik made a mobile phone call asking him to fetch money from near 'Ati Bazar'. On that date he came back due to presence of police. On Saturday at 4.00 p.m. he brought Tk. 2.10 lakhs from near 'Ati Bazar Hall'. On the following day Manik paid him Tk.5,000/00."

53. The convict-accused Md. Alauddin stated in his confessional statement that "Manik proposed him to kidnap the daughter of Sudha Babu. In this way, Narayan chalked out the plan. First of all he became afraid. Manik asked him to keep a look at the area saying that they will do the main task. In this way, one day Manik and Narayan went near the school of the girl with a transport. He along with Johni remained in the area and gave all informations to Manik. On that day they could not kidnap the girl. On the following day Manik and Narayan went to the school to bring the girl. They were in their house. Near the grave yard, on the pretext of going to the father's house of the girl, they kidnapped the victim by a transport. Through mobile phone to Manik, he came to know about the occurrence of kidnapping. At 9.00 p.m. Manik informed him that Narayan had decamped as the girl could identify him. They then chalked out plan that either they would take poison or return the girl. He then made phone call to Manik. Then Manik had the girl with him. Manik did not disclose his location. He asked Manik to bring the girl. In reply, Manik disclosed that he brought the ransom money through his nephew. Thereafter, Manik met him at Bamansur dam and disclosed that he killed the girl."

54. The convict-accused Johni Ghosh @ Johna stated in his confessional statement that." they (the accused-persons) chalked out plan to the effect that they would kidnap the daughter of Sudha Babu and would demand ransom money from him. He along with Alauddin gave all informations about the girl from the locality. Manik and Narayan chalked out plan to kidnap the girl from the school. The accused-persons Manik and Narayan Kidnapped away the victim girl from in front of the graveyard. Firstly, although they did not agree to the plan, subsequently agreed to the plan when Manik said that they would kidnap the girl, realize Tk.10.00 lakhs from Sudha Babu and that they would have to give information only. At the time of kidnapping they were in the locality. Thereafter, Manik himself kept the girl and money. Manik collected the ransom money through his nephew. Manik made mobile phone call to Alauddin and informed that he had killed the girl. He came to know it from Alauddin."

55. The convict-accused Md Nurul Islam stated in his confessional statement that "on the date of occurrence, the accused-persons Manik and Narayan hired his taxi. At Tk.5,000/00 he entered into an agreement with Manik that he would reach them to Mymensingh. He started with them for Mymensingh. The girl was the niece of Narayan. Thereafter, seeing police near Tangail, they came back to Savar. Narayan escaped by Savar-Bypass. Leaving Manik and the girl at a hotel in Savar, he went away at 9.00 p.m. Manik paid him Tk.3,000/00 and Tk. 500/00 for gas. Thereafter, on Thursday Manik paid him another Tk.1,000/00. Subsequently, getting mobile phone call from a madam when he came to take the madam, he was apprehended by police."

56. On perusal of the three confessional statements of the aforesaid accused-persons, it is crystal clear that said statements corroborate each other and that they are just reflection of one another. From the materials on record, it is also found that after commission of the

offence, out of repentance, the accused Narayan committed suicide which suggests the truth of the commission of the occurrence by the accused-persons. The pw21, the recording Magistrate annexed certificates to the effect that after the accused-persons were given three hours' time for speculation, their confessional statements were recorded which appeared to her to be true. It appears further from the confessional statements that at any stage of recording the confessional statements, it did not appear to the pw21 that the statements were not voluntary (Reference: the clause no.9 of the statements) and she also appended certificates to the effect that the five confessional statements were voluntary. On perusal of the confessional statements, it further transpires that before making confessional statements the accused-persons did not make any complaint of torture, coercion or inducement against police. It also transpires that the accused-persons were produced before the Magistrate within 24 hours of their arrest and that they were not even required to be taken on remand. Immediately after their production before the Magistrate, they made confessional statements. So, there arise no question of torturing or adopting any coercive measure to secure the confessional statments from the accused-persons. On perusal of the confessional statements of the condemned-accused-prisoner and the other convict-accused-persons, it further transpires that they made the statements implicating themselves directly in the occurrence. As stated earlier, the Pw 21 Nazia Nahid, the recording Magistrate stated in her evidence that in compliance with the provisions of law she recorded the confessional statements of the confessing accused-persons; that she certified the confessional statements are true and voluntary; that the confessing accused-persons put their signatures in the confessional statements in her presence. Remarkably, in this case no suggestions whatsoever was given on behalf of the defence to the pw21 to the effect that under duress, torture, intimidation or by inducement the confessional statements of the accused-persons were secured. On perusal of the confessional statements, no irregularities or illegalities in recording the statements are found. So, there is no difficulty to come to a finding that the confessional statements of the condemned-accused-prisoner and the other convict-accused-persons are voluntary and true and that the said statements may well form the basis for conviction of the accused-persons. In the case of Islamuddin (Md) alias Din Islam versus The State reported in 13 BLC (AD)at page 81 in our Apex Court held that" It is now the settled principle of law that judicial confession if is found to be true and voluntary can form the sole basis of conviction against the maker of the same".

57. In view of the discussion made so far, this court finds that the confessional statements (Exhibits-21, 23, 25,27,27) of the condemned-accused-prisoner and the other convict-accused-persons are true, inculpatory and voluntary and said statements are sufficient to find them guilty in this case. From the record, it appears that the accused Manik retracted his confessional statement on 26.04.2008, the accused Alauddin retracted the confessional on 27.04.2009, the accused Anwar retracted confessional statement on 27.04.2009, the accused Anwar retracted confession on 27.04.2009 stating that police by force extracted the confessional statements. The said retraction petitions show that said petitions did not come through the concerned Jailor. Retraction petitions of the accused-petitioners Alauddin and Anwar have been written by their learned Advocates, not by the said Accused-persons. Further, said retraction-petitions having been made 1 ½ months after making the confessional statements, they are nothing but the result of afterthought and cannot be accepted. It has already been found that the confessional statements as made by the accused-persons are true and voluntary. It is the settled law that "Confessional statement whether retracted or not, if found voluntary can form the sole basis of conviction of the maker (Reference: Hazrat Ali and another versus State)."

58. In this case, the confessional statements of the accused-persons, the evidence of the Pws including the evidence of the Pw 20 Toma Ghosh, direct eye-witness to the alleged occurrence and the statements of the witnesses i.e. the Pw4 Sree Durga Charan Ghosh, the Pw 15 Md. Nurul Islam and the Pw 17 Md. Arzoo Mia under section 164 of the Code of Criminal Procedure corroborated the prosecution case. From the evidence on record, it is also seen that mentioning falsely his name to be Badsha and falsely mentioning the name of the victim Anamika to be Shiuli, the accused Manik boarded a hotel at Savar. The accused Nurul Islam assisted the accused Manik saying that a brother with his sister would stay in the hotel. From the materials on record, it is also found that the accused-persons ManiK, Narayan, Johni and Alauddin chalked out plan of kidnapping the victim sitting at Shikaritola and that the taxi driver who entered into a contract with the accused Manik to take them with the victim to Mymensingh at Tk.5,000/00 also was involved in the kidnapping. The day before the occurrence, all the accused-persons waited for kidnapping the victim but could not kidnap the victim on that date. On the following day, they succeeded in kidnapping the victim girl. The accused-persons Alauddin and Johni Ghosh were involved in the alleged occurrence is manifest from the confessional statements of these accused-persons and the statements under section 164 of the Code of Criminal Procedure of three witnesses i.e. the pw4, the pw15 and the Pw 17 and the evidence of the eye-witness Toma. From the evidence of the Pw2 Sree Nanda Gopal Ghosh, the Pw4 Sree Durga Charan Ghosh, the Pw8 Sadhu Charan Ghosh and the Pw15 Nurul Islam, it appears that in addition to making the confessional statements, the accused-persons Johni Ghosh and Manik also made extra judicial confessions. The Pw 2 Sree Nanda Gopal Ghosh stated in his evidence that the accused Johni admitted that they themselves kidnapped Anamika, the victim and that the accused-persons Manik, Alauddin, Nurul Islam and Narayan were also involved in the alleged occurrence. The Pw 4 Sree Durga Charan Ghosh stated in his evidence that in their presence, the accused Manik admitted that they kidnapped Anamika; that he collected the ransom money through his nephew, the accused Anwar and that they killed the victim Anamika by throttling at a place under Shibaloy P.S. This witness further stated that the accused ManiK disclosed the names of the accused-persons Johni Ghosh, Alauddin, Nurul Islam and Narayan also to be involved in the alleged occurrence. The Pw 8 Sadhu Charan Ghosh stated in his evidence that the accused Johni Ghosh in his presence stated that he himself, Manik, Alauddin, Anwar , Narayan and the driver together kidnapped the victim Anamika, realized ransom money and killed her. It is the established principle of law that a conviction can be rested on extra judicial confession subject to the fact that such statements are corroborated by other materials on record.(Reference: the case of State versus Moslem reported in 55 DLR at page 116). In this case the materials on record support the extra-judicial confessional statements of the accused-persons. It is also the established principle of law that extra-judicial confession can form a basis for conviction if found voluntary and true (Reference: case of Nausher Ali Sarder and others versus the State reported in 39 DLR (Ad) at page 194). This Court finds nothing to disbelieve the evidence of the Pw 2, the Pw4, the Pw8 and the Pw 15 with regard to the extra-judicial confession made by the aforesaid accused-persons. In this case the truth and voluntariness of the extra-judicial confessions made by the accused-persons was not challenged by the defence.

59. In this case although the dead body of the victim Anamika as recovered from a IRRI paddy field was stated to be of an unknown girl. But subsequently, her father and relatives identified the dead body to be of the victim Anamika. So, there is no doubt that the dead body as recovered was none other than that of Anamika, the victim.

60. From the materials on record, it is found that all the accused-persons in committing the alleged occurrence acted in concert and that they had a general intention shared by them united with a common purpose to commit the offence and as such, all the accused-persons are equally guilty for the commission of the alleged offence.

61. From the evidence on record, it further transpires that the accused-persons Manik, Naryan and Nurul Islam kidnapped the victim Anamika away by a taxicab and started for Mymensingh; that on the way when they reached near Tangail, seeing Police on the road, returned back and took the victim to a hotel at Savar and that the accused Alauddin assisted them in committing the offence by remaining present at the place of occurrence and by asking Toma to inform the matter of kidnapping to the house of the victim. Further, the accused-persons Alauddin and Johni Ghosh assisted the commission of offence by taking part in chalking out plan of kidnapping and by playing the role of the informers.

62. In this case, naturally, the names of the accused-persons were not mentioned as the case is one of kidnapping and so also in view of the fact that the informant was not present at the time of occurrence. Subsequently, through investigation and confessional statements of the accused –persons, their names came out. From the materials on record, it transpires that the accused-persons Manik, Narayan, Johni. Alauddin chalked out plan to kidnap the victim sitting at Shikaritola and that the accused Manik was the master mind of the kidnapping and killing of the victim. The other accused-persons gave assistance to the accused Manik in perpetrating the occurrence playing their respective role in the occurrence. The accused Johni and Alauddin directly participated in the alleged occurrence by taking part in planning, assisting and worked as the infromers with regard to the movement of the victim and keeping watch at the locality. At the time of the occurrence the accused Alauddin stood beside the taxicab at the place of occurrence and saying Toma, the Pw20 (8) that the victim Anamika was kidnapped away asked her to inform the house of Toma about the kidnapping. The Pw20, as stated earlier, in her evidence identified him in the dock amongst the other accused-persons. The Pw20 categorically stated in her cross on behalf of this accused that none identified the accused Alauddin to her. The accused Anwar was aware of the alleged occurrence from before as per the information given to him by his maternal uncle, the accused Manik. He fetched the ransom money of Tk.2.10 lakhs from behind 'Atibazar Cinema Hall' as per the instruction of the accused Manik and also got a share of Tk.5,000/00 from it. Subsequently, the taxi-cab driver Nurul Islam got involved in the kidnapping. When the accused Nurul Islam, the taxicab driver saw the other-accused-persons kidnap the victim, his moral duty was to inform the law enforcing agency of the occurrence and obstruct the other accused-persons from committing the offence, instead, he assisted the accused-persons to kidnap the victim-girl which is manifest from the fact that on the way to Mymensingh when they saw police near Tangail, he took back his taxi-cab and took the victim and the other accused-persons to Savar. It also appears from the materials on record that the accused Nurul Islam Munshi, the driver of the taxi cab was arrested first in the case and he mentioned the name of the accused Md. Manik and after tracking the call list of mobile phone of Manik, the other accused-persons were also arrested one by one. As a driver of the taxi cab, the accused Nurul Islam Munshi could have saved the life of the victim-girl but he did not do that. He entered into a contract with the accused Md. Manik at Tk. 5,000/00 as fare to reach them to Mymensingh. For allurement of the said money he took part in the alleged occurrence. Said accused also made arrangement for stay of the accuse Manik and the victim Anamaika in a hotel at Savar giving their false identity as brother and sister and giving their false names to be Badsha and Shiuli.

63. So, from the evidence on record, it is crystal clear that on 26.02.2009 at about 1.40 p.m. while the victim Anamika Ghosh was returning home after appearing in the examination in 'Bamansur Kindergarten School', the accused-persons kidnapped her away by a taxicab; that thereafter, the accused-persons demanded Tk.10.00 lakhs as ransom money for her release which was settled at Tk.2.10 lakhs through negotiation; that as per the demand of the accused-persons, the father of the victim paid Tk.2.10 lakhs to the accused-persons as ransom money; that even after the payment of Tk.2.10 lakhs as ransom money , the accused-persons did not release the victim, rather, the accused Manik killed the victim by throttling and buried her body under heaps of soil and that the other accused-persons in furtherance of their common intention took part in the act of kidnapping and killing.

64. In view of the discussion made here above, and so also on perusal of the evidence on record and observation of the decisions as cited by the learned Advocates, this Court is led to find that on 26.02.2009 at about 1.40 p.m. the accused-persons kidnapped away the victim-deceased Anamika Ghosh from the road in front of Bamansur graveyard gate while she was going home after appearing in the examination, demanded Tk.10.00 lakhs as ransom money from the father of the victim girl and that even after realization of Tk.2.10 lakhs as ransom money, instead of releasing the victim, killed her ruthlessly in a gruesome and relentless manner. This Court is also led to find that the trial court rightly found the accused Manik guilty under sections 7/8 of the Nari-O-Shishu Nirjahatan Daman Ain, 2000 (Amended in 2003) read with sections- 302/201 of the Penal Code and found the other accused-persons guilty under section 7/8/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended in 2003).

65. In this case, the victim Anamika was a minor, innocent girl of 8/9 years of age and a student of Class III of a Kinder Garten School who was kidnapped in a pre-planned way for realization of ransom money by the accused-persons and that even after realization of the ransom money, the condemned-accused-prisoner Md. Manik killed her by throttling relentlessly and after killing the girl buried her dead body under heaps of soil in a IRRI Paddy field to conceal evidence. The aforesaid acts of the condemned-accused-prisoner and the other convict-accused-persons defeat the brutality of the medieval age and the said acts are against humanity. The condemned-accused-prisoner and the other convict-accused-persons are the real threat to the humanity and the society. For the said loath some and heartless act of the condemned-accused-prisoner, he deserves capital punishment in this case. There are no mitigating or extenuating circumstances in this case in favour of the condemned-accused-prisoner. In this regard, the case of Md. Ershad Ali Sikder versus The State reported in 9 MLR (AD) at page 355 may be referred. In the said case our apex Court held that the sentence of death is the appropriate sentence where the death is caused with extreme brutality. So, according to this Court, the only punishment which the condemned-prisoner deserves in this case is the capital sentence i.e. the death sentence.

66. In the light of discussion made here above, and so also on consideration of the facts and circumstances of the case we find that the trial Judge was perfectly justified in passing the impugned judgment and order awarding death sentence to the condemned–accused-prisoner Md. Manik and imprisonment for life to the other convict-accused-persons. In view of the shocking and gruesome manner in which the condemned-prisoner caused to happen the occurrence, this Court finds no extenuating or mitigating circumstances to commute the death sentence as awarded to him.

67. In the result, the Death Reference is accepted and the judgment and order of conviction and sentence dated 24.01.2010 passed in Druta Bichar Tribunal Case No.04 of 2009 arising out of Keraniganj P.S. Case No. 28 dated 26.02.2009 corresponding to G.R. Case No.530 of 2009 is hereby upheld and affirmed. The condemned-accused-prisoner Md. Manik be hanged by his neck till he is dead.

68. Consequently, the Criminal Appeal No.416 of 2010, the Criminal Appeal No.664 of 2010, the Criminal Appeal No.917 of 2010, the Criminal Appeal No.1378 of 2010, the Criminal Appeal No.1070 of 2010 and the Jail Appeal No.60 of 2010 are hereby dismissed.

69. The trial Court is directed to pay the realized ransom money worth Tk.1,27,000/- to the informant.

70. Let the lower Court's record along with a copy of this judgment be sent down at once.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)

Criminal Miscellaneous Case No. 44496 of 2016

Md. Shamim Howlader
---Convict –Petitioner (In Jail)

Vs.

The State
---Opposite-Party

Mr. Dewan Abdun Naser with
Mr. Md. Moniruzzaman Siraji, Advocates
…. For the petitioner

Mr. Md. Khurshedul Alam, D.A.G
…..For the opposite party

Heard and Judgment on 10.08.2017.

Present:
Mr. Justice Md. Rezaul Haque
And
Mr. Justice Muhammad Khurshid Alam Sarkar

Code of Criminal Procedure, 1898, Section 561A:
Section 561A the legislature enacts a special law relating to criminal offences with a view to combating the same in the society to a tolerable stage by smoothly concluding the trials of the cases under the said special law within the stipulated time. But, because of the tendency of the accused persons to remain in abscondence at the trial stage, they compel the trial Courts to delay the completion of the trial and, ultimately, the scheme of the special law gets frustrated. Until and unless the accused-turn-convicts are made to realize that non-preferring of appeals within the statutory period of 30 (thirty) days has a severe consequence of depriving themselves of the opportunity of challenging the trial Court's verdict, the tendency of the accused persons and their lawyers as to taking the matter lightly shall not be changed. They, at present, take it for granted that after being arrested by the police, if they file an application under Section 561A CrPC, stating some concocted reasons, they would be able to overcome the hurdle. This Court views the above prevailing situation of our country to be a fatal disease which eventually would cause collapse of the administration of criminal justice system of Bangladesh.
… (Para 14)

No application of a convict, who did not/could not prefer appeal within 30 (thirty) days under Section 561A of the CrPC, shall be entertained unless s/he satisfies this Court that s/he is a bonafide petitioner and s/he has come before this Court in clean hands, on top of showing that the case is one of no evidence or the trial Court did not have the jurisdiction to try the case (without jurisdiction) or the trial Court was not properly constituted (coram-non-judice). … (Para 16)

In order to establish the claim of bonafides, a petitioner shall be required to satisfy this Court that because of her/his peculiar personal circumstance, such as, (i) s/he was in prison in connection with another case without being notified about the case in question, (ii) s/he was attending the trial Court regularly from custody/jail, but s/he was not produced before the trial Court on the date of delivery of Judgment and, consequently,

could not file appeal within the stipulated time, (iii) her/his health condition was so fragile that s/he could not communicate with her/his lawyer or s/he could not authorise any one by putting her/his signature on the Vokalatnama for preferring appeal and (iv) for some other unavoidable circumstances, which would appear to be plausible to the High Court Division, s/he could not prefer appeal within the stipulated time. In other words, the petitioner shall be required to satisfy the High Court Division that s/he was not negligent in dealing with his/her case in the Special Tribunal and s/he did not designedly make any commonplace statement in the application under Section 561A CrPC as a device for attracting this Court's jurisdiction. … (Para 17)

If s/he takes a plea that s/he remained absent in the trial as per the advice of the lawyer, s/he must substantiate his/her statement by bringing an allegation of professional negligence to the Bar Council first and, then, file an application under Section 561A of the CrPC. … (Para 18)

On receiving the record (নথি) from the Magistrate, if the accused, who is on bail, does not turn up before the Tribunal, the Tribunal must fix a date for the appearance of the accused. If the accused, then, does not appear before the Tribunal on the fixed date, then the Tribunal shall direct the surety to produce the accused. After exhausting the above steps, if the accused does not turn up, then the Tribunal shall proceed to complete the trial as expeditiously as possible.

After pronouncement of the judgment and order of conviction and sentence, the Tribunal shall remind the learned Advocate of the accused that the accused will get only 30 (thirty) days to prefer an appeal, failing which, no application under Section 561A of the CrPC shall be entertained by the High Court Division. The learned Judge of the Tribunal, then, shall ensure that the learned Advocate of the accused-turn-convict has understood the cautionary directive outlined by this Court hereinabove that if the learned Advocate does not inform his client about the conviction and his right of preferring appeal within 30 (thirty) days, then the learned Advocate puts him/herself at a risk of facing the allegation of professional negligence in carrying out her/his duties.

The learned Judge of the Tribunal, then, shall record in the Order Sheet that s/he has brought to the notice of the learned Advocate the above cautionary directive.
… (Para 19)

Judgment

Muhammad Khurshid Alam Sarkar, J:

1. At the instance of the above named convict-petitioner (hereinafter referred to as the petitioner), this application has been filed in an expectation to set aside the Judgment and Order dated 24.04.2016 passed by the Special Tribunal No. 6, Barisal in Special Tribunal Case No. 40 of 2009, which has arisen out of Uzirpur Police Station Case No. 28 dated 29.03.2009 corresponding to G.R No. 74 of 2009, convicting the petitioner under Section 25-B(2) of the Special Powers Act, 1974 and sentencing him to suffer rigorous imprisonment for 7(Seven) years and to pay a fine of Tk. 5,000/- (Five Thousand), in default, to suffer rigorous imprisonment for additional 3 (three) months, by invoking this Court's power of quashment under Section 561A of the Code of Criminal Procedure, 1898 (CrPC).

2. The prosecution case, in short, is that the informant Anower Hossain, Sub-Inspector (S.I.) of Company-1, RAB-D, Barisal, lodged a First Information Report (FIR/Ejahar) alleging, *inter alia*, that on 29.03.2009 at about 17.30 hours when his force was on special duty, he got secret information that the accused-persons (the petitioner and another, named - Md Jahurul Howlader), having brought illegal narcotics (Madok Drobbya) through the border area of Jessore, were selling the same at their homestead in the Barisal City. On the basis of the said information, the informant-party raided the house of the petitioner but he along with his cohort managed to flee away. Then, upon searching, the raiding party recovered 107 bottles of phensidyle and lodged this FIR. On the basis of the said FIR, Uzirpur Police Station Case No. 28 dated 29.03.2009 was started and, after investigation, the police submitted charge sheet on 30.04.2009 in G.R No. 74 of 2009. Thereafter, the case was transferred to the Special Tribunal No. 1 and Sessions Judge, Barisal, who then assigned Special Tribunal No. 6 of Barisal to conduct trial of the case. The trial Court framed charge against the petitioner under Section 25B(2) of the Special Powers Act, 1974 (shortly, Special Powers Act). At the end of trial, the trial Court by its Judgment and Order dated 24.04.2016 convicted the petitioner under Section 25B(2) of the Special Powers Act and sentenced him to suffer rigorous imprisonment for 7(Seven) years as well as imposed a fine of Tk. 5,000/- (five thousand), in default, to suffer rigorous imprisonment for 3(three) months more. However, he did not prefer appeal within 30(thirty) days against the said Judgment and Order of conviction and sentence, for, he was absconding from the trial after being enlarged on bail by the trial Court.

3. Mr. Dewan Abdun Naser, the learned Advocate appearing on behalf of the convict-petitioner, submits that the allegations which have been brought against the petitioner have no basis at all, as the prosecution witnesses are interested, biased and hostile in nature and their testimonies are not only uncorroborated, but are full of discrepancies and contradictions and, moreover, the witnesses having not been properly examined by the trial Court, this case is to be seen as a case of no evidence. In support of the above submissions, Mr. Dewan Abdun Naser refers to the cases of Mofazzal Hossain Mollah Vs State 45 DLR(AD) 175, Md Sher Ali Vs State 46 DLR(AD) 67 and Pannu Mollah Vs State 56 DLR(AD) 142. Mr. Naser then humbly submits that even for the sake of argument if the allegations are accepted to be true, the quantum of sentence awarded has been too harsh in ratio with the nature of allegations and the deposition made by the witnesses. With regard to the failure of the petitioner to prefer an appeal within the 30 days of the Judgment and Order, he contends that after the occurrence on 29.03.2009, he was arrested on 07.03.2010 and, thereafter, he having been granted bail on 28.09.2010, was regularly attending the trial Court for nearly two years and when no witnesses were turning up, he was advised by his learned Advocate that there was no need to remain present in the Court and, under this impression, he did not attend the Court any further and, eventually, when he was arrested by the police on 13.08.2016, he came to know that his case has been ended up on 24.04.2016 vide the impugned Judgment and Order. He draws our attention to the fact that the petitioner has been languishing in jail for one year for no fault of his own but for the wrong advice of the learned Advocate of the trial Court, because had he been present on the date of pronouncement of the Judgment, there was no reason to enlarge him on bail by the appellate Court. He, then, humbly submits that the petitioner being a poor and illiterate person does not possess the knowledge about the procedures of a criminal trial and, thus, his Miscellaneous Case under Section 561A of the CrPC deserves to be considered positively by this Court, as was done in the case of Nesar Ahmed Vs Bangladesh 49 DLR(AD) 111. In a bid to cross the required thresholds set out by the larger Bench of this Court in the case of Alamgir Hossain Vs State 49 DLR 630, he refers to the cases of Jahangir Alam Vs State 56 DLR (AD) 217 and Zoad Miah Vs State 10 BLC(AD) 168 and professes

that the *ratio* laid down by the larger Bench does not bear any binding force after the pronouncement of the above two AD-cases because of the operation of Article 111 of the Constitution. By advancing the above contentions and making his arguments, he prays for making the Rule absolute.

4. Per contra, Mr. Md. Khurshedul Alam, the learned Deputy Attorney General on behalf of the State by placing Section 30 read with 34B of the Special Powers Act, submits that the Rule is liable to be discharged outright only on the ground of maintainability of this petition, as the petitioner did not prefer any appeal within 30 days of the delivery of the Judgment and, moreover, he having been enlarged on bail by the trial Court remained in abscondence for six years and filed this application only after being captured by the police. He emphatically submits that the petitioner in the past has abused the privilege of bail and, now, he is not eligible to invoke the extra-ordinary jurisdiction of this Court under Section 561A of the CrPC. In an endeavour to substantiate his submissions, he refers to a decision passed by a larger Bench of this Court in the case of Alamgir Hossain Vs State 49 DLR 630.

5. Having heard the learned Advocate for the petitioner and learned Deputy Attorney General and upon going through the petition along with its annexures and the relevant laws and decisions placed before us, it appears to us that the first & foremost question to be decided by this Court is whether the petitioner is entitled to invoke Section 561A of the CrPC towards showing this Court that this is a case of no evidence. In other words, whether this Court is competent to see and examine the evidence of the case in exercising its discretionary power under Section 561A of the CrPC.

6. From a plain reading of Section 34B of the Special Powers Act, it appears that the law heralds that the provisions of this law shall have an overriding effect over all the general laws of Bangladesh. Section 30 of the Special Powers Act stipulates that an appeal against any Order, Judgment or Sentence of a Special Tribunal is to be preferred within 30 (thirty) days. Furthermore, from the reading of the relevant provisions of the Limitation Act, 1908, namely, Sections 3, 5 and 29, we find that no Court is empowered to extend the time-limitation stipulated in the special laws for preferring appeal, save and except deducting the days taken in procuring certified copy or the time spent for being in a wrong forum, as was held in the case of Sharifa Begum Vs Bangladesh 325 LNJ 2016(1). With the above clear and unambiguous provisions of laws in place, there is no need of detailed interpretation of the above laws by this Court to come to the conclusion that when a special law prescribes a time-limit for preferring appeal, no appeal can be filed after the expiry of the said time-limitation. Now, this Court requires to analyze the facts & circumstances of the cases referred to by the learned Advocate for the petitioner in order to see whether a convict's application under Section 561A of the CrPC challenging the conviction and sentence is maintainable after expiry of the stipulated period for preferring appeal, by applying the *ratio* laid down in the cited cases in the backdrop of non-availability of any other statutory provisions.

7. In the case of Mofazzal Hossain Mollah Vs State 45 DLR (AD) 175, the accused after being convicted by the trial Court, unsuccessfully moved the appellate Court and the revisional Court. Thereafter, the convict invoked this Court's jurisdiction under Section 561A of the CrPC and the Appellate Division laid down a *ratio* that upon exhausting all the tiers prescribed in the CrPC, such as, trial, appellate and revisional fora, if a convict invokes extraordinary jurisdiction of the High Court Division under Section 561A of the CrPC, this Court is well empowered to entertain an application under the aforesaid provision to see whether the case is of no evidence. In the cited case, the petitioner having exhausted all the

fora had showed his bonafides before resorting to Section 561A of the CrPC and, thus, the *ratio* of the cited case is not applicable in this case.

8. In the case of Sher Ali Vs State 46 DLR(AD) 67, when the informant's Naraji application was rejected by the Magistrate, the same was allowed by the learned Sessions Judge in revision. Against the Sessions Judge's order, when the accused approached the High Court Division invoking its jurisdiction under Section 561A of the CrPC, the High Court Division took a view that the High Court Division is not empowered to entertain any application against any Judgment and Order passed by the Sessions Judge in any revisional case. The Apex Court, at Para 8 of this reported case, upon reiterating the principle set out in the case of Mofazzal Hossain Mollah Vs State 45 DLR(AD) 175 confirmed that "*The inherent power under Section 561A can be invoked at any stage of the proceeding, even after conclusion of trial, if it is necessary to prevent the abuse of the process of the Court or otherwise to secure the ends of justice*". In the light of the fact that, in the present case, the petitioner has directly invoked the inherent power of this Court without first approaching the appellate and/or revisional forum, there is no scope to apply the *ratio* of the case of *Sher Ali* 46 DLR(AD) 67 in this case.

9. In the case of Pannu Mollah Vs the State, the convict-petitioner having unsuccessfully moved the application under Section 561A of the CrPC preferred an appeal before the Appellate Division for setting aside the conviction under Section 19(a) and (b) of the Arms Act, 1878 and the Apex Court allowed the appeal upon appreciation of the evidence of the case. From a minute reading of the above reported Judgment, it surfaces that the issue of maintainability of an application under Section 561A CrPC was not agitated before the Appellate Division and, for that reason, the Apex Court did not have the opportunity to examine the issue. However, from perusal of the other 2 (two) cases referred to by the learned Advocate for the petitioner, namely, Jahangir Alam Vs State 56 DLR (AD) 217 and Zoad Miah Vs State 10 BLC(AD) 168, it appears to us that although the issue of maintainability of the application under Section 561A of the CrPC was raised in these two cases, but the Appellate Division without dwelling on the said issue simply opted to examine the evidence of the witnesses and, upon finding no legal evidence against the convicts, set aside their conviction and sentence.

10. In an endeavour to properly adjudicate upon the issue of competency and standing of an absconding-convict in invoking Section 561A CrPC, we undertook a research on the case laws on this point and it revealed that only the Larger Bench Case (Alamgir Hossain Vs State 49 DLR 630) has specifically delved deep into this issue towards resolving the legal position of a convict, who having been absconded at the time of pronouncement of Judgment of a case tried by the Special Tribunal, did not or could not prefer an appeal within the prescribed time of 30 (thirty) days. In the said case, the Larger Bench held that when an absconding-convict comes with clean hands before the High Court Division resorting to the extra-ordinary jurisdiction under Section 561A CrPC and makes out a clear case of no evidence or *coram-non-judice*, then this Court may entertain the absconding-convict's application under 561A CrPC to secure the ends of justice. The argument advanced by the learned Advocate for the petitioner that the Appellate Division's above two Judgments were passed after the Larger Bench's case was reported in the law journal and, therefore, the presumption would be that the Apex Court upon ignoring the *ratio* laid down by the Larger Bench has entertained the absconding-convict's application under Section 561A CrPC and, accordingly, the decisions of the Appellate Division being subsequent in point of time is the law of the land as per Article 111 of our Constitution - does not hold good.

11. In our opinion, the law laid down by the larger Bench in the case of Alamgir Hossain Vs State 49 DLR 630 still operates as a good law inasmuch as the Appellate Division did not have any occasion to specifically examine this point in any case. In the cases of Jahangir Alam Vs State 56 DLR (AD) 217 and Zoad Miah Vs State 10 BLC(AD) 168, the Appellate Division has set aside the convict's conviction simply on the basis of evidence without dealing with the issue of legal position; meaning standing/competency, of an absconding-convict. Had the Appellate Division examined the issue, there would have been an occasion for our Apex Court either to approve the *ratio* laid down by the Larger Bench of the High Court Division in the case of Alamgir Hossain Vs the State 49 DLR 630 or to settle the new criterion for invoking Section 561A of the CrPC by a convict who was absconding during the trial and at the time of delivery of Judgment and subsequently he did/could not avail the opportunity of preferring appeal within the statutory period of 30 (thirty) days.

12. It has been a common phenomenon of the accused persons to abstain from attending the Court during the trial inspite of serving the notice of the summons/warrant upon them and sometimes even after publishing the notice in the newspapers in compliance with the provisions of Section 87 & 88 of the CrPC or as per the provisions of the special laws. In some cases, before the date of pronouncement of the Judgments, the accused persons purposefully remain incommunicado and when the trial Court passes Judgment and Order of conviction and sentence, they opt to be in abscondence until arrested by the law enforcing agencies. Thereafter, at the time of filing applications under Section 561A CrPC, they, in some cases, come up with a plea that they were not aware of their case and, in some cases, it is their excuse that the concerned trial Court Advocate has advised them that they do not need to attend the Court any more. The plea of their Advocate's ill-advice cannot be taken into consideration by this Court until they can show that they have filed a complaint against the said Advocate for giving wrong advice or, at least, they satisfy this Court that after approaching this Court they are preparing to lodge a complaint to the Bar Council against their trial Court Advocate. However, if it is found that the accused, having been granted bail by the Magistrate, did not turn up to the trial Court and the trial Court proceeded with the trial without taking the measures for the appearance of the accused, in that scenario, a presumption may be had in favour of the convict that as a lay-person he cannot be held to have been aware of the fact that the trial of her/his case has been assigned to a different Court unless s/he is advised by her/his Advocate who was engaged at the Magistrate's Court, as was held in the case of Nesar Ahmed Vs Bangladesh 49 DLR (AD) 111. In the case in hand, however, the *ratio* of the above case does not apply in view of the fact that this petitioner was aware of transmission of his case from the Magistrate's Court to the trial Court and attended the trial Court on a few occasions. The petitioner's contention of being unaware of the subsequent development of his case due to his lawyer's negligence could have been considered by us, had he proved the said claim by filing a complaint against the learned Advocate who conducted his case in the trial Court towards convincing us that he has come up before this Court with clean hands.

13. In our way of scrutiny, we find that the petitioner, after being granted bail, could have availed the opportunity of filing an application for showing his presence (Hazira) through his learned Advocate on condition of appearing before the trial Court as and when required, but he has not filed any such application before the trial Court. In this era of advanced mobile technology, when most of the poor persons of our country, including a rickshaw-puller, is habituated in keeping contact with his family members and acquaintances over mobile, any one with ordinary prudence would hardly believe that the petitioner was not taking update on

his case from his lawyer. Had it truly been the case that the Advocate kept the petitioner in the dark, the petitioner would have allowed this Court to issue show cause notice upon the learned Advocate of the trial Court as to why he should not be referred to the Bar Council for adjudication of the allegation of professional negligence brought against him by the petitioner -when this Court wanted to do so during the hearing of this Rule. Therefore, from the manner of dealing with his case, it can be safely concluded that the petitioner intentionally abstained from attending the trial of the case and was adamant to remain in abscondence till he was arrested by the police. We, thus, find the allegation against the trial Court Advocate to be a commonplace statement designedly made to attract this Court's jurisdiction under Section 561A of the CrPC.

14. The legislature enacts a special law relating to criminal offences with a view to combating the same in the society to a tolerable stage by smoothly concluding the trials of the cases under the said special law within the stipulated time. But, because of the tendency of the accused persons to remain in abscondence at the trial stage, they compel the trial Courts to delay the completion of the trial and, ultimately, the scheme of the special law gets frustrated. Until and unless the accused-turn-convicts are made to realize that non-preferring of appeals within the statutory period of 30 (thirty) days has a severe consequence of depriving themselves of the opportunity of challenging the trial Court's verdict, the tendency of the accused persons and their lawyers as to taking the matter lightly shall not be changed. They, at present, take it for granted that after being arrested by the police, if they file an application under Section 561A CrPC, stating some concocted reasons, they would be able to overcome the hurdle. This Court views the above prevailing situation of our country to be a fatal disease which eventually would cause collapse of the administration of criminal justice system of Bangladesh.

15. Given the propensity of the accused persons and their learned Advocates in ignoring or lightly taking the legal requirement of remaining present in the Court-room on each of the dates of the trial, this Court feels it pertinent to lay down the following directives for the benefit of the accused-turn-convicts as well as for their trial-Court-Advocates.

16. No application of a convict, who did not/could not prefer appeal within 30 (thirty) days under Section 561A of the CrPC, shall be entertained unless s/he satisfies this Court that s/he is a bonafide petitioner and s/he has come before this Court in clean hands, on top of showing that the case is one of no evidence or the trial Court did not have the jurisdiction to try the case (without jurisdiction) or the trial Court was not properly constituted (coram-non-judice).

17. In order to establish the claim of bonafides, a petitioner shall be required to satisfy this Court that because of her/his peculiar personal circumstance, such as, (i) s/he was in prison in connection with another case without being notified about the case in question, (ii) s/he was attending the trial Court regularly from custody/jail, but s/he was not produced before the trial Court on the date of delivery of Judgment and, consequently, could not file appeal within the stipulated time, (iii) her/his health condition was so fragile that s/he could not communicate with her/his lawyer or s/he could not authorise any one by putting her/his signature on the Vokalatnama for preferring appeal and (iv) for some other unavoidable circumstances, which would appear to be plausible to the High Court Division, s/he could not prefer appeal within the stipulated time. In other words, the petitioner shall be required to satisfy the High Court Division that s/he was not negligent in dealing with his/her case in the

Special Tribunal and s/he did not designedly make any commonplace statement in the application under Section 561A CrPC as a device for attracting this Court's jurisdiction.

18. If s/he takes a plea that s/he remained absent in the trial as per the advice of the lawyer, s/he must substantiate his/her statement by bringing an allegation of professional negligence to the Bar Council first and, then, file an application under Section 561A of the CrPC.

19. As part of this Court's duty under Article 109 of the Constitution, the following guideline is laid down for the learned Judges of the Special Tribunals who shall mandatorily follow these guideline in conducting the cases under special laws:

i. On receiving the record (bw_) from the Magistrate, if the accused, who is on bail, does not turn up before the Tribunal, the Tribunal must fix a date for the appearance of the accused. If the accused, then, does not appear before the Tribunal on the fixed date, then the Tribunal shall direct the surety to produce the accused. After exhausting the above steps, if the accused does not turn up, then the Tribunal shall proceed to complete the trial as expeditiously as possible.
ii. After pronouncement of the judgment and order of conviction and sentence, the Tribunal shall remind the learned Advocate of the accused that the accused will get only 30 (thirty) days to prefer an appeal, failing which, no application under Section 561A of the CrPC shall be entertained by the High Court Division. The learned Judge of the Tribunal, then, shall ensure that the learned Advocate of the accused-turn-convict has understood the cautionary directive outlined by this Court hereinabove that if the learned Advocate does not inform his client about the conviction and his right of preferring appeal within 30 (thirty) days, then the learned Advocate puts him/herself at a risk of facing the allegation of professional negligence in carrying out her/his duties.
iii. The learned Judge of the Tribunal, then, shall record in the Order Sheet that s/he has brought to the notice of the learned Advocate the above cautionary directive.

20. In the result, the Rule is discharged. The bail granted earlier by this Court, at the time of issuance of Rule, is hereby recalled and the convict-petitioner is directed to immediately surrender before the learned Chief Judicial Magistrate, Barisal to complete the remaining period of the sentence awarded by trial Court.

21. However, this Court is of the opinion that this is an appropriate case for issuance of a certificate in favour of the convict-petitioner under Article 103(2)(a) of the Constitution, for, an important question of law as to interpretation of Article 111 is involved in this case, namely, whether the decisions given by the Appellate Division in the cases of Jahangir Alam Vs State 56 DLR (AD) 217 and Zoad Miah Vs State 10 BLC(AD) 168, wherein the Apex Court set aside the conviction of the absconding-convict without touching the issue of standing of a convict in filing an application under Section 561A CrPC, impliedly bears any force of law to entertain a convict's application under Section 561A CrPC in the backdrop of having a clear-cut guideline on the issue through a Judgment passed by the larger Bench of the High Court Division in the case of Alamgir Hossain Vs State 49 DLR 630.

22. Office is directed to send down the Lower Court Record (LCR) along with a copy of this Judgment and Order at once to the learned Chief Judicial Magistrate, Barisal.

23. The Registrar General of the Supreme Court of Bangladesh is directed to disseminate a copy of this Judgment to all the Courts of Sessions of Bangladesh so that they can be acquainted with the cautionary directive spelt out in this Judgment and the guideline set out by this Court to be followed by the learned Judges who conduct criminal trials under the Special laws.

10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7953 OF 2015.

Md. Nur Hossain and others.

……. Petitioners

Vs.

Bangladesh and others.

……Respondents

Mr. Sheikh Mohammad Zakir Hossain, Advocate

…….For the petitioners

Mr. Mintu Kumar Mondal, Advocate

... For respondent No. 5

Mr. Rashed Zahangir, D.A.G

... For respondent No.2

Heard on: 28.02.2017,12.03.2017, 19.03.2017,02.04.2017and 3.04.2017.

Judgment on: 13.04.2017.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Md. Badruzzaman

Constitution of the People's Republic of Bangladesh, Article 102(1):
The issue whether under Article 102(1) judicial review of a decision of authority relating to terms and conditions of service of a person serving in the Republic is maintainable is no longer a res integra.
Bangladesh vs. Sontosh Kumar Saha, 21 BLC (AD) 94 relied. **… (Para 12)**

Equality before Law:
There shall be no discrimination to persons within the same class and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. All who are equal are equal in the eye of law which means that it will not accord favoured treatment to persons within the same class. The concept of equality before law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike.

Bangladesh vs. Sontosh Kumar Saha, 21 BLC (AD) 94, Jibendra Kishore Achary vs. Province of East Pakistan, 9 DLR (SC) 21, Sheikh Abdus Sabur vs. Returning Officer, 41 DLR (AD) 30 and Indira Gandhi vs. Raj Narayan, AIR 1975, (SC) 2279 relied.
… (Para 21)

Equal pay for Equal work:
It is true that the principle of "Equal pay for Equal work" is not expressly declared by our Constitution to be a fundamental right. Article 20(1) proclaims that everyone shall be paid for his work based on the principle 'from each according to his abilities, to each according to his work' as a directive principle of State Policy. But the principle "Equal pay for Equal Work" has assumed the status of fundamental right in service jurisprudence having regard to the constitutional mandate of equality in Articles 27 of the Constitution.

Carew and Company Limited vs. Chairman, Labor Court, 50 DLR 396, Bangladesh vs. Shamsul Haq, 59 DLR (AD) 54 and Bangladesh Biman Corporation vs. Rabia Bashri Irene and others, 8 MLR (AD) 223 relied. **… (Para 27)**

Judgment

Md. Badruzzaman, J

1. Initially, rule *nisi* was issued on 18.08.2015 in the following terms:

"Let a rule *nisi* be issued calling upon the respondents to show cause as to why they should not be directed to pay salary of Tk. 14,540.00 (Fourteen Thousand Five Hundred and Forty) to the petitioners for the post of Sub-Assistant Engineer, Drafts Men (Sub-assistant Engineer) fixed by the National Pay Scale-2009 (BDT 8.000.00-14,540,00) for 2nd Class Gazetted Officer and/or pass such other or further order or orders as to this Court may seem fit and proper."

2. Thereafter, vide order dated 19.01.2016, supplementary rule *nisi* was issued in the following terms:

"Let a supplementary rule nisi be issued calling upon the respondents to show cause as to why the Circular dated 19.11.1994 bearing Memo No. সম(বিধি-২) পদোন্নতি-২৭/৯৪-১৬৪ published in the Establishment Manual (Vol-2) (Annexure-H) and Circular issued by the respondent No.1 dated 03.12.1994 bearing Memo No. অনু/অবি/(বাস্ত-৪) ডিপ্লো-২০/৯২(অংশ)/৬৯ Annexure-H-1 of the writ petition) shall not be declared ultra vires and without lawful authority for being discriminatory and *mala fide* and is of no legal effect."

3. The case of the petitioners in brief, is that, the petitioners are government servants. Initially, they joined in the post of Work Assistant, Estimator and Surveyor in different offices under Local Government Engineering Department (LGED) under the Ministry of Local Government, Rural Development and Co-operatives. After completion of at least 15 years of their service and having been successful in departmental promotion examinations, they were promoted to the post of Sub-Assistant Engineer (SAE) between 2003-2009. By an office order dated 24.09.2006 (Annexure-C), respondent No. 3 (Ministry of Local Government, Rural Development and Co-operatives) fixed salary of Tk. 5100-280-760, EB 30-10360/- as per National Pay Scale 2005 for the Sub-Assistant Engineers who have been promoted to the said post from the post of Surveyor, Work-Assistant and Estimator. But said decision of Respondent No. 3 could not be implemented for the petitioners because of the barrier made in the impugned Circular dated 26.08.1995 (Annexure-H) issued by the Ministry of Establishment in which the post of Sub-Assistant Engineers having diploma in engineering degree have been upgraded to 2nd Class post followed by another impugned Circular dated 03.12.1994 (Annexure-H-1) issued by the Ministry of Finance (respondent No. 1) re-fixing pay scale of Tk. 2300-4480/- from Tk. 1725-3725/- as per National Pay Scale 1991, corresponding to Tk. 5100-10360/- as per National Pay Scale 2005.

4. Since the petitioners have been serving as Sub-Assistant Engineers, it is stated, they are entitled to the same status and pay scale which have been given to the Sub-Assistant Engineers having diploma in engineering degree but they are not getting the equivalent scale which was accorded by Circular dated 19.11.1994 and Circular dated 3.12.1994 for the Sub-Assistant Engineers. Therefore, it is stated, the decisions of the respondents in giving higher pay scale and status to SAOs having diploma-in-engineering degree depriving other Sub-Assistant Engineers of getting such status and benefit are discriminatory and ultra vires to

Articles 27, 29 and 31 of the Constitution. The petitioners, being Sub-Assistant Engineers, agitated their grievance to the respondents by several representations in particular representation dated 18.01.2015 followed by a notice demanding justice dated 01.02.2015 praying for granting equal pay scale and status at par with Sub-Assistant Engineers having diploma-in-engineering degree and to do justice to them but the respondents did not pay any heed to their grievances.

5. In the above factual background, the petitioners have come up with this writ petition and obtained the rule and supplementary rule as quoted above.

6. The rule is opposed by respondent No. 2, the Secretary, Ministry of Public Administration and respondent No. 5, Chief Engineer Local Government Engineering Directorate by filing separate affidavits-in-opposition. The case of respondent No. 2 is that, initially the petitioners were appointed as Work Assistant, Estimator and Surveyor having no diploma-in-engineering degree and through departmental examinations they were promoted to the post of Sub-Assistant Engineer. Before joining in the post of Sub-Assistant Engineer, the petitioners were well aware about the impugned Circulars dated 19.11.1994 and 3.12.1994 and their service conditions as Sub-Assistant Engineer and accordingly they joined in their respective posts and as such they cannot claim service benefit now equivalent to the service benefit and status at par with Sub-Assistant Engineers who possess diploma-in-engineering degree in accordance with the provision of the impugned circulars. It is further stated that since the petitioners are government servants and they have come before this Court in respect of their terms and conditions of their service, this writ petition is not maintainable in view of the provisions under Article 117 of the Constitution and their proper forum lies with the Administrative Tribunal constituted by the Administrative Tribunal Act 1980. It is further stated that the respondents issued the impugned circulars after following all legal formalities and in that view, the respondents did not commit any illegality. Accordingly, this rule is liable to be discharged.

7. The case of respondent No. 5 and that of respondent No. 2 is more or less same. Further case of respondent No. 5 is that the petitioners were appointed as Work Assistant, Estimator and Surveyor and then, through departmental examinations, they were promoted to the post of Sub-Assistant Engineer from 2003 and they have no diploma-in- engineering degree. The petitioners got promotion to the post of Sub-Assistant Engineer having known fully well about impugned circulars that they would not get equal pay scale and status at par with the Sub-Assistant Engineers having diploma-in-engineering degree and as such at this stage, the petitioners cannot claim that the impugned circulars are arbitrary and ultra vires the Constitution. The government, considering the constitutional as well as legal aspects of the matter, issued the impugned circulars because the educational qualification can be substantially reasonable ground for classification, and that the classification or alleged discrimination as has been occurred by the impugned notification is based on the doctrine of permissible criteria and intelligible differentia and thus intra vires the Constitution. Since the petitioners do not possess any diploma-in-engineering degree, they are not entitled to get same salary and status at par with Sub-Assistant Engineers who possess diploma-in-engineering degree.

8. Mr. Sheikh Mohammad Zakir Hossain, learned Advocate appearing for the petitioners, by drawing this Court's attention to the impugned Circular (Annexure-H to the application for issuance of supplementary rule), submitted that Annexure-H dated 19.11.1994 having been issued by the order of the Hon'ble President and duly notified in the official Gazette,

have the force of law within the meaning of Article 152 of the Constitution and since the writ petitioners have challenged the vires of the Circular on the ground of its constitutionality, this writ petition is maintainable. In support of this contention, he referred to the case of Bangladesh vs. Shafiuddin reported in 50 DLR (AD) 27, Bangladesh vs. Md. Shamsul Haq reported in 59 DLR (AD) 54 and Bangladesh vs. Sontosh Kumar Saha and others reported in 21 BLC (AD) 94.

9. Learned Advocate further submitted that, though as per law the persons similarly situated should be treated equally and equal opportunity should be given to those who stand on the same footing, but the impugned Circulars though upgraded the status of Sub-Assistant Engineers having diploma-in-engineering degree to 2nd Class with higher pay scale, left other Sub-Assistant Engineers and equivalents like the petitioners having had no diploma-in-engineering degree. Such classification being discriminatory is hit by Articles 27 and 29 of the Constitution and ultra vires. Accordingly, the impugned Circulars along with other circulars, orders etc. issued pursuant thereto are liable to be struck down and necessary direction should be given upon the respondents to provide similar status and pay scale to the petitioners as has been given to Sub-Assistant Engineers possessing diploma-in-engineering degree. In this connection, learned Advocate referred to the decision of the case of Bangladesh Biman Corporation vs. Rabiabashri Irene and others reported in 8 MLR (AD) 223, Carew and Company (BD) Limited vs. Chairman, Labaur Court reported in 50 DLR 396 and Municipal Corporation of Delhi vs. Gonesh Raj and another reported in 52 (1993) DIT 594.

10. As against the above submissions, Mr. Rashed Zahangir, learned Deputy Attorney General appearing for respondent No. 2, by drawing this Court's attention to Article 117 of the Constitution submitted that since the petitioners are government servants and the dispute relates to the terms and conditions of their service, the only forum available to them is before the Administrative Tribunal constituted under the provisions of Article 117 read with the provisions under Administrative Tribunal Act, 1980 and as such, this writ petition is not maintainable. Learned Deputy Attorney General, by referring to paragraph 29 of the case of Sheikh Abdus Sabur vs. Returning Officer and others reported in 41 DLR (AD) 30, submits that 'equality before law' is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may process but which are lacking in others. A single law, therefore, cannot he applied uniformly to all persons disregarding their basic differences with others and if these differences are identified, then the persons or things may be classified into different categories according to those distinctions; this is what is called 'permissible criteria' or "intelligible differentia" which have been done in the instant case. Learned Deputy Attorney General further submits that, Sub-Assistant Engineers, who have diploma-in-engineering degree and Sub-Assistant Engineers who have no diploma-in-engineering degree can not constitute one and single class and as such the classification made by the impugned circular is within the constitutional mandate and as such consistent with the provisions under the Constitution. Learned DAG further referred to the case of State of Mysore and another vs. P. Narasingo Rao, AIR1968 (SC) 349.

11. Mr. Mintu Kumar Mondal, learned Advocate appearing for the respondent No.5, adopted the submissions of the learned Deputy Attorney General. However, learned Advocate in addition, referred to a decision of the case of State of T.N and another vs. Mr. Alagappan and others reported in (1997) 4 SCC 401.

12. The issue whether under Article 102(1) judicial review of a decision of authority relating to terms and conditions of service of a person serving in the Republic is maintainable is no longer a *res integra*. On several occasions, this issue went up to the Apex Court. Finally, in Bangladesh vs. Sontosh Kumar Saha, 21 BLC (AD) 94, this issue has been settled in the following language:

> "In this issue, this court clearly observed that except challenging the vires of law or violation of fundamental rights, judicial review of a decision of authority relating to the terms and conditions of service under article 102(1) is not permissible."

13. It appears that Appellate Division finally fixed two criteria to maintain a writ petition for invoking judicial review under Article 102(1) by a person relating to his terms and conditions of service serving in the Republic i.e the aggrieved party have to challenge the vires of law or he/she must satisfy that his/her fundamental rights have been infringed. Now we will consider whether the petitioners have been successful in fulfilling any of two criterias.

14. It appears that the petitioners have challenged the vires of two Circulars (Annexure H and H-1). The first one (Annexure-H) was published on 19.11.1994 upgrading the status of Sub-assistant Engineers having diploma-in-engineering degree to second class leaving other Sub-assistant Engineers and equivalents and Annexure-H(1) has been issued on 03.12.1994 pursuant to Annexure-H, upgrading their pay scale from Tk. 1735-3725 to Tk.2300-4480 as per National Pay Scale 1991. Annexure-H is quoted below:

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R‡ Rxe
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ইঞ্জিনিয়ারিং-এ ডিপ্লোমাধারীe/Z7 a7* a/e ©e8 e3 eR*eZ: 7 eR9 ax eA; _e%†ce/ šahx=e
=eA/heZ_kh©-eš %a/e a* e$G3xwg$š>AAZ6 e2R A / 3eRa/4 h3e5eAZZax eRa*e/Z7 e
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15. Now question arises as to whether the impugned Circular dated 19.11.1994 have the force of law. It appears that the Circular was issued by the order of the Hon'ble President and published in the official Gazette of Government. Law has been defined in Article 152 of the Constitution which provides that "*law means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh*". Annexure-H having been issued by the order of the Hon'ble President and duly notified in the official Gazette, have the force of law within the meaning of Article 152 of the Constitution. Since the petitioners have challenged the vires of the Circular, this writ petition is maintainable (ref: Govt. vs. Md. Shamsul Huq, 59 DLR (AD) 54).

16. A bare reading of Annexure-H and H-1 suggests that the first one has classified the post of Sub-assistant Engineer and equivalents into two groups: firstly, who have diploma-in-engineering degree and secondly, who have no diploma-in-engineering degree and after such classification the Government upgraded the 1st group to 2nd Class Officers and pursuant to Annexure H the later one (Annexure-H-1) was issued upgrading their pay scale leaving the other group like the petitioners from getting such status and benefit.

17. Now question arises whether the respondents by issuing such circulars disregarded the guarantee of the Constitution in Article 27 that "all citizens are equal before law and are entitled to equal protection of law" and the impugned circulars are hit by the provision of Article 27 and thus ultra vires to the Constitution.

18. In Bangladesh vs. Touhid Uddin reported in 16 BLC (AD) 116 it is held:

"Avš-Gax e l ¢ xQG*eO-ve2Ra ¢ ah E exš Hše"a ešxIšnšl eZbxšs eR š >šn e"a aGee
/)eA / 3eE/ J3 ešxa©%e- eRa*xš e¢KaLeA/ heex%ša/ eA£ a%eAZ eMšaNe¢/ x QReP-QZRe
AG c a-¢S-GNe
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19. In Sontosh Kumar case [21 BLC(AD)94], our Appellate Division by analyzing a number of decisions of our jurisdiction and Indian jurisdiction explained equality before law and equal protection of law in respect of classification for the purpose of legislation and observed in paragraphs 162, 163 & 164 as follows:

"162. The expression equal protection of law or equality before law has to be interpreted in its absolute sense. All persons are equal in all respect disregarding different conditions and circumstances in which they are placed. Equal protection of law means all persons are equal in all cases. It means the persons similarly situated should be treated equally. The term equality is a dynamic concept with many aspect and diminution and it cannot be confined within traditional and doctrinaire limits. Indian Supreme Court taking into consideration Article 14 of the Constitution held that Article 14 does not forbid reasonable classification for the purposes of legislation. There can be permissible classification provided two conditions are satisfied namely; (a) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together for other left out of the group; (b) differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis. There cannot be any question of decimation on the ground of some acts providing for different set up and is must be taken to be a class by itself. The legislature has right to make such provision for its Constitution as it things fit subject always to the provisions of the Constitution. References in this connection are *EP Roy vs. TN, AIR 1974(SC)555, Maleka Gandhi vs. India, AIR 1970(SC)597, Romana Shetly vs. International Airport Authority, AIR 1979(SC)1628, Ajay Hashia vs. Khalid Mujud, AIR 1983 (SC)130, A L Kalra vs. P & N Corporation of India, AIR 1984(SC)1361, Sree Ram Kaishna Dal Mia vs. Sree SR Tendulkar, AIR 1958 (SC) 538, S. Azeez Basher vs. Union of India, AIR 1968(SC)662, Jibendra Kishore Achary vs. Province of East Pakistan, 9 DLR (SC)21 and Kazi Mohammed Akhtaruzzaman vs. Bangladesh, Writ Petition No.2252 of 2009 disposed of along with 3(three) other writ petitions, Sheikh Abdus Sabur vs. Returning Officer, 41 DLR (AD)30 and Bangladesh vs. Md. Azizur Rahman, 46 DLR(AD)19*.

163. In *Jibendra Kishore (supra)*, it has been observed, "It is not possible to formulate a comprehensive definition to the clause 'equal protection of law'; nevertheless, some broad propositions as to its meaning have been enunciated. One of these propositions is that equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes, in like circumstances, in their lives, liberty and property and in pursuit of happiness. Another generalization more frequently stated is that the guarantee of equal protection of the laws requires that all personal shall be treated alike, under like circumstances and conditions, both in the privileges confirmed and in the liabilities imposed. In the application of these principles, however, it has always been recognized that classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of the legislation. It is not for the Courts, in such cases, it is said, to demand from the legislature a scientific accuracy in the classification adopted. If the classification is relevant to the object of the Act, it must be upheld unless the relevancy is too remote or fanciful. A classification that proceeds on irrelevant consideration, such as differences in race, colour or religion will certainly be rejected by the Courts. Applying these tests to the present case, it cannot but be held that if, in consequence of abolishing the system of private rent for agricultural land, it also became necessary to make some provision for the outgoing landlords, the classification of the landlords in the basis of their net incomes at the time of their expropriation was a necessary, and not an unreasonable classification.

164. In *Sheikh Abdus Sabur (supra)*, this court held: "Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term 'protection of equal law' is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot be applied uniformly to all persons disregarding their basic differences with others; and if these differences are identified, then the persons or things may be dissatisfied into different categories according to those distinctions; this is what is called' permissible criteria' or "intelligible differentia". The legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit, has power a make classification on reasonable basis. Classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of 'equality' a classification, besides being based on intelligent differentia, must have reasonable nexus with the object the legislature intends to achieve by making the classification. A classification is reasonable if it aims at giving special treatment to a backward section of the population; it is also permissible to deal out distributive justice by taxing the privileged class and subsidizing the poor section of the people. The above views have been approved in *Azizur Rahman (supra)*."

(underlined by us)

20. In Smt. Indira Gandhi vs. Raj Narayan, AIR 1975, (SC) 2279 it was held that, "All who are equal are equal in the eye of law", meaning that it will not accord favoured treatment to persons within the same class."

21. The sum and substance of the observations made in aforesaid *Sontosh Kumar, Jibendra Kishore, Shaikh Abdus Sabur and Smt. Indira Gandhi (supra)* cases follows that there shall be no discrimination to persons within the same class and that persons similarly

situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. All who are equal are equal in the eye of law which means that it will not accord favoured treatment to persons within the same class. The concept of equality before law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike.

22. But the question is what does this ambiguous and crucial phrase 'similarly situated' mean ? Answer has been given in the case of *Mohammad Shujat Ali vs. Union of India, AIR 1974 SC 1631* saying that "Where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons or things similarly situated with respect to the purpose of the law. There should be no discrimination between one person or thing and another, if as regards the subject-matter of the legislation their position is substantially the same. This is sometimes epigrammatically described by saying that what the constitutional code of equality and equal opportunity requires is that among equals, the law should be equal and that like should be treated alike …" .

23. All employees standing on the same position (in this case Sub-Assistant Engineers and equivalents) make one class irrespective of their educational qualifications. According to the equality doctrine, no classification can be made among the employees holding same post for giving special status and benefits because of having special educational qualification or degree. In this case, as and when the petitioners were promoted to post of Sub-Assistant Engineer irrespective of their educational qualification, they grouped together with other Sub-Assistant Engineers having diploma-in-engineering degree and thus made one class. Sub-Assistant Engineers or equivalents cannot be classified into two groups namely Sub-Assistant Engineers having diploma-in-engineering degree in one group and Sub-Assistant Engineers and equivalents having no diploma-in-engineering degree in another group for the purpose of up-gradation of status and for giving special benefits or privileges to the 1st group and thereby depriving the other group of such status, benefits and privileges etc.

24. It appears that the Circular dated 19.11.1994 (Annexure-H to the application for supplementary rule) clearly made two classes of Sub-assistant Engineers and equivalents; first- Sub-assistant Engineer having diploma-in-engineering degree and second- Sub-assistant Engineer having no diploma-in-engineering degree by putting the words "ইঞ্জিনিয়ারিং-এ ডিপ্লোমাধারী" in the said circular and thereby upgraded the status of the 1st group as 2nd Class posts depriving the 2nd group of giving such status and benefit. This classification in the post of Sub-Assistant Engineer, on the face of it, is discriminatory and inconsistent with the previsions of Article 27 of the Constitution and thus ultra vires and void according to the provision under Article 26 (1) of the Constitution and, accordingly, the words "ইঞ্জিনিয়ারিং-এ ডিপ্লোমাধারী" employed in Annexure-H are liable to be struck down.

25. On the other hand, on perusal of Annexure-H-1 it appears that the same has been issued by the Ministry of Finance dated 03.12.1994 pursuant to Circular dated 19.11.1994 re-fixing the pay scale for Sub-Assistant Engineers having diploma-in-engineering degree from Tk. 1725 -3725 to Tk. 2300-4480 as per National Pay Scale 1991 leaving other Sub-Assistant Engineers and equivalents from getting such benefit.

26. It is the case of the petitioners that, after their promotion in the post of Sub-assistant Engineer or equivalent posts, they stood on the same footing or at par with Sub-assistant Engineers having diploma-in-engineering degree, but the government by the impugned Circular upgraded the pay scale for them by depriving the petitioners and equivalents from getting such increased salary and other service benefits and thereby they have been discriminated and thus the action of the respondents has violated the principle of "Equal Pay for Equal Work."

27. It is true that the principle of "Equal pay for Equal work" is not expressly declared by our Constitution to be a fundamental right. Article 20(1) proclaims that everyone shall be paid for his work based on the principle 'from each according to his abilities, to each according to his work' as a directive principle of State Policy. But the principle "Equal pay for Equal Work" has assumed the status of fundamental right in service jurisprudence having regard to the constitutional mandate of equality in Articles 27 of the Constitution. References in this connection are Carew and Company Limited vs. Chairman, Labor Court, 50 DLR 396, Bangladesh vs. Shamsul Haq, 59 DLR (AD) 54 and Bangladesh Biman Corporation vs. Rabia Bashri Irene and others 8 MLR (AD) 223.

28. In *Carew and Company Limited (supra)* it was held that "In such circumstances we fail to understand why the petitioner refused the similar benefits to the respondent Nos.2 to 22 when they became illegible under the agreement being promoted to the post of office assistants or equivalents and thus became entitled to get the scale. Giving benefit to some and denying the same to others under the same agreement and service condition, is not only illegal but also offends fundamental rights of the respondents guaranteed under Articles 28 and 29 of the Constitution. We, therefore, hold that in the aforesaid facts and circumstances the agreement is also applicable to the respondents."

29. In *Shamsul Haq (supra),* our Apex Court held: "The respondent and Personal Officers of the Secretariat having been similarly situated have been discriminated and cannot be treated differently and is repugnant to the equality doctrine and, under like circumstances and conditions, should be treated alike both in their rights and privilege.**"**

30. In *Bangladesh Biman Corporation* (supra) it was held: **"**Since one employees of the Corporation inter' se standing in the similar situation have not been treated in the similar manner or in other words have been treated differently from the others the contention of the writ-petitioners that they have been discriminated has rightly been found genuine by the High Court Division.**"**

31. Employees are entitled to receive equal pay who are discharging the same duties as their counterparts (Ref. Municipal Corporation of Delhi vs. Ganesh Razak and another, 52 (1993) DLT 594). The principle of equal pay for equal work must prevail and inequality in wages cannot be allowed to stand (U.P Rajya Sahakari Bhoomi Vikas Bank Ltd vs. Its Workmen, AIR 1990 SC 495).

32. It appears that, by order dated 03.12.1994 (AnnexureH-1), the Government amended "চাকুরী (বেতন ও ভাতাদি) 1997" re-fixing the pay scale of Tk. 2300-4480/- for the Sub-Assistant Engineer who possesses diploma-in-engineering degree leaving other Sub-Assistant Engineers and equivalents. This memo was issued pursuant to Annexure-H dated 19.11.1994 to giving financial benefit to the Sub-Assistant Engineers of the same class though as per constitutional mandate all service holders standing on the same class are entitled to same

service benefit and status. Accordingly, we are of the view that, the Administrative order dated 03.12.1994 upgrading the pay scale of Sub-Assistant Engineers having diploma-in-engineering degree leaving other sub-assistant engineers and equivalents based on extraneous or irrelevant consideration, discriminatory, actuated by *mala fides,* perverse and manifestly wrong and also liable to be struck down.

33. Now, question arises from which date the petitioners and left out sub-assistant engineers and equivalents would get the benefit of this judgment.

34. Since the impugned Circulars (Annexure-H and H-1) have come into force long back in 1994 but the petitioners have challenged those in a belated stage and since the implementation of our decision retrospectively may incur huge monetary involvement of the government exchequer, we are of the view that, this verdict would operate prospectively from the date of this judgment in respect of giving financial benefit to the left out sub-assistant engineers and equivalents of the Government functionary including the petitioners.

35. In view of the discussions made above, we find merit in this rule.

36. Accordingly, the rule is made absolute however, without any order as to costs.

37. Thus, the impugned Circulars dated 19.11.1994 (Annexure-H) and 03.12.1994 (Annexure-H-1), so far insertion of words "ইঞ্জিনিয়ারিং-এ ডিপ্লোমাধারী" therein, are declared ultra vires the Constitution, void and those words are struck-down from those Circulars prospectively with effect from today.

38. The respondents are directed to provide equal pay scale, status and other service benefits to the petitioners as have been provided by the impugned Circulars to the Sub-Assistant Engineers having diploma-in-engineering degree with effect from the date of pronouncement of this judgment within 60(sixty) days from the date of receipt of the copy of this judgment in accordance with law.

39. It is also declared that, this judgment would operate as a judgment in-rem in respect of all Sub-Assistant Engineers and equivalents serving under the Government functionaries.

40. Communicate a copy of this judgment at once.

10 SCOB [2018] HCD

High Court Division
(Civil Revisional Jurisdiction)

Civil Revision Case No. 2766 of 1998

Hayetullah being dead his heirs
1(a) Monowara Begum and others
..... Petitioners

Vs.

Abdul Khaleque and others
..... Opposite Parties

No one appears
.....For the Petitioners

Mr. Md. Mubarak Hossain with
Mr. Rajib Kanty Aich, Advocate
.....For the Opposite parties

Heard On: 10.05.2016 and 11.05.2016 and
Judgment on: 15.05.2016.

Present:
Mr. Justice Khizir Ahmed Choudhury

Evidence Act, 1872, Section 103:

In a civil proceeding both the parties have responsibility to prove their respective cases, although onus rests upon the plaintiff to prove his case but responsibility of the defendant is also there to substantiate his written statement's assertion as per section 103 of the Evidence Act. But the courts below shifted the responsibility to prove the case entirely upon the plaintiffs which cannot be sustained. … (Para 22)

Judgment

Khizir Ahmed Choudhury, J:

1. This Rule has been issued calling upon the opposite parties to show cause as to why the judgment and decree dated 28.08.1997 passed by Additional District Judge, 3rd Court, Comilla in Title Appeal No.111 of 1996 affirming the Judgment and decree dated 27.05.1996 passed by learned Senior Assistant Judge Judge, Comilla Sadar in Title Suit No.20 of 1995 should not be set aside and or pass such other or further order or orders as this Court may deem fit and proper.

2. That case of the plaintiff in brief is that Moharam Ullah was owner in possession of the suit khation No.207 measuring an area of 4.39 acres of land; before the C.S. operation started he died leaving behind one son Wazuddin and three daughters namely Joygun Bibi, Sonaban Bibi and Shahar Banu as his heirs and successors and they possessed and enjoyed their respective shares; in such a situation Sharbanu transferred 2nd schedule land to Aftab Ali by a sale deed dated 26.05.1924; In the C.S. record Wajuddin's name was recorded to the extent of 9 anna 12 gondas, Joygun and Sonaban Bibi to the extent of 3 gonda 4 anna each but Sharbanu's name was left out in C.S. Khatian as she transferred her share in the suit Khatian. Subsequently Joygun and Sonaban Bibi being owner in $\frac{1}{5}$ th share each acknowledging Sahar Bani as their sister transferred their respective shares to the added defendant Nos.37-50, but due to omission of the name of the Shahar Banu in C.S. Khatian, the defendant Nos.1-4 are claiming 2nd schedule land in the present survey

operation; In fact the predecessors of the plaintiff Nos.1-3 Azizullah and Md. Karim Baksh became owner in possession by purchasing .39 decimals of land in the 2nd schedule of the plaint by registered sale deed dated 11.04.1956 from Aftab Ali; S.A. record was prepared in the name of the plaintiffs vendors; Plaintiffs by dint of purchase and by inheritance have been possessing and enjoying the suit land growing seasonal crops therein for more than 12 years; mention may be made that Sahar Banu transferred her $\frac{1}{5}$th share in the suit jote measuring .12 decimals of land to Samiruddin and Wajuddin by registered sale deed dated 26.05.1924 and in turn Samiruddin and Wajuddin sold the same land to Samiruddin, brother Kafiluddin by a registered sale deed dated 26.05.1924 and subsequently defendant no.1-4 purchased the same land from Kafiluddin acknowledging Shahar Banu as Moharam Ullah's Daughter and Wajuddin's sister; that due to omission of recording Shahar Banu's name in C.S. Khatian, the defendant Nos.1-2 are denying the title of the plaintiffs in suit land stating that Shahar Banu was not the daughter of Moharam Ullah, as such cloud has been cast upon the title of the plaintiff in suit land and hence the suit. Co-plaintiffs have also admitted the ownership of the plaintiff and asserted that through amicable partition among the co-sharers, the suit land fell into the exclusive saham and allotment of the plaintiff Nos.1-3 and the co-plaintiffs got saham beyond the schedule of the plaint.

3. Defendant Nos.1-4 contested the suit by filing a written statement denying material allegation made in the plaint and claimed that the suit is not maintainable in its present form and manner and barred by limitation; that the Wajuddin's name was recorded in suit khatian to the extent of 9 anna 12 gonda and his two sisters Joygun and Shaharbanu 3 annas 4 gonda each under superior land lords Aftabuddin and others and Gour Chandra Roy as they took oral settlement; Joygun Bibi and Sonaban Bibi transferred their shares by transferring it to their brother Wajuddin and others; Wajuddin being owner as above transferred some portion of his land to his own sons and some portion to different persons in different dates and while he was in possession of his remaining lands died leaving behind 4 sons in Wasimuddin, Afsaruddin, Noor Mohammad and Moharam Ali; Moharam Ullah was not owner and possessor of the suit Jote and he had no daughter namely Shahar Banu and Shahar Banu had no Saleable right to transfer to Altab Ali and that no deed was registered acknowledging as owner; Altab Ali had also no saleable rights and deed dated 11.04.1966, 26.05.1924 and 11.04.1954 are all false, fabricated and unenforceable and by dint of those deeds the vendees or their successors got no possession; the plaintiff has no locustandi to file the suit; the defendant being the owner in possession of the suit land have recorded their names in R.S. Khatian and paid rent accordingly.

4. Both the parties led oral and documentary evidence. Plaintiff examined 5 witness while the defendant examined 2 witness and one Nepal Chandra was examined as Court witness. The plaintiffs produced documentary evidence which were marked as Exts. 1,1A, 2-2A, 2B-2B1, 2-2C, 3, 4-4A while the defendant side produced documentary evidence which were marked Ext. A, B-B1.

5. After hearing, the trial Court dismissed the suit on the ground that plaintiffs failed to substantiate that Moharam Ullah was the owner of C.S. Khatian No.207 and Shahar Banu was one of the daughter of Moharam Ullah and there is no proof that Moharam Ullah ever paid any rent and the rent receipt submitted by the plaintiff Ext.2. there is no mention of area of the suit land, C.S. record has been prepared in the name of the predecessor of the defendant. Shahar Banu could not substantiate his title over the suit land and plaintiffs also

failed to prove their possession, conversely the defendants have proved their possession and title over the suit land.

6. In the appeal the plaintiffs-appellants by filling an application under order 41 Rule 27 of the Code of Civil Procedure prayed for considering certain documents as additional evidence. The appellate Court concurred with the findings of the trial Court and further held that the application for additional evidence, by which the appellant has submitted certified copies of the registered deeds are not relevant for adjudication of the dispute.

7. No one appears on behalf of the petitioners when the matter is called on for hearing.

8. Mr. Md. Mubarak Hossain and Mr. Rajib Kanty Aich, learned advocates appeared for the opposite parties. Mr. Mobarak Hossain submits that the suit land is not specified in the plaint, only C.S. khatian has been mentioned but the subsequent khatians prepared in various stages have not been mentioned and as such in the absence of specification, the suit is barred under order 7 Rule 3 of the Code of Civil Procedure. He further submits that the plaintiffs could not prove their possession in the suit land and in a suit for declaration of title without proving title and possession of the plaintiff simple suit for declaration is not maintainable without prayer for recovery of khas possession. Mr. Mubarak further contended that the appellate Court disallowed the application filed by the plaintiff under order 41 Rule 27 of the Code of Civil Procedure rightly and reasonably finding no substance therein. He further submits that both the Courts below concurrently found that the plaintiffs could not substantiate their title and possession in the suit land, rather title and possession of the defendants have been found and as such concurrent finding of facts arrived at by the Courts below cannot be disturbed in the revisional application.

9. I have perused the evidence both oral and documentary adduced and produced by the parties and other materials kept in the record. From the rival contention it appears that the plaintiffs claimed that Moharam Ullah was jote tenant under the admitted owner Aftab Uddin and others who died leaving behind one son and 3 daughters namely Wazuddin, Joygun Bibi, Sonaban Bibi and Shahar Banu and on the death of Moharam Ullah said son and daughters inherited their respective shares. Conversely, defendants' case is that Wazuddin and his two sisters namely Joygun Bibi and Sonaban Bibi took settlement of the suit land from original landlord Aftabuddin and others and accordingly in the C.S. khatian No.207 their names have been duly recorded as tenant under the landlord. So it is very pertinent to ascertain who was tenant under the original landlord. In order to substantiate their claims, the plaintiffs submitted deed of sale dated 26.05.1924, exhibit-2 executed by Shaheban Bibi wherein it is stated that Moharam Ullah was tenant in the suit land. In the Certified copy of the sale deed dated 28.01.1924 it is also averred that Moharam Ullah was the owner of the suit land and on his death his daughters inherited and sold portion of the land of C.S. khatian No.207. The contention of the defendants are that Wazuddin and his two sister Joygun Bibi and Sonaban Bibi orally took settlement of the suit land from Aftabuddin and others and consequently their names were recorded in the C.S. khatian namely khatian No.207 and so it is proved that Wazuddin and two sisters actually took jote settlement. On perusal of aforesaid evidence it is apparent that the sale deeds submitted by the plaintiffs are very old and ancient document wherein Moharam Ullah was mentioned as tenant and as such evidentiary value of those documents cannot be denied and those are to be relied upon in comparison

to C.S. khatian which bears only presumptive value and as such it is certain that Moharam Ullah was tenant under the landlord and Shahor Banu was also one of his daughter. In the case of Lutful Karim and others Vs Shahidullah and others reported in 3 MLR AD 215, it is held that ***"Admittedly the documents are old documents of 50 years back and there is no evidence that the defendants willfully suppressed the said documents from production in court. The broad fact remains that the Trial Court also accepted the certified copies of the kabalas."***

10. It further appears that in the S.A. record suit land has been recorded in the name of Md. Azizullah and others under khatian No.316. Said Azizullah and others are successive transferees from Shahar Banu. On the other hand remaining land of the C.S. khatian No.207 has been recorded under khatian No.313, in the name of the defendants wherefrom it can be inferred that the land claimed by the plaintiffs by successive purchase from Shahar Banu is distinct and clearly identified. Although S.A. records does not provide conclusive evidence regarding title but it is conclusive as regards preparation and revision under Section 144A of the State Acquisition and Tenancy Act. In the case of Samsul Haque and others reported in 4 BLC page 178 it is held that,

> ***"Admittedly, both the SA Khatians as well as RS khatians in respect of the suit land stand in the names of the predecessors-in-interest of the plaintiff-opposite parties and also in some of their names. It is true that the SA records, in view of section 19(3) of the State Acquisition and Tenancy Act, do not provide conclusive evidence as regards title but it provides conclusive evidence as regards their preparation and revision. But entries in the SA records; in my opinion, provide a prima facie evidence as regards title."***

11. Although C.S. record of right carries a presumption regarding ownership but evidentiary value of record of right are always rebuttable presumption and in the event of conflict between the old record of right and recent record of right, recent record of right would prevail in as much as presumption of the record of right loses its weight with the passage of time. In the case of Fatema Khatun vs Fazil Miah reported in 21 BLD 14 it is held that,

> ***"The presumption attached to the State Acquisition Record of Right under section 144A of State Acquisition and Tenancy Act could not be rebutted by plaintiff though rebuttable evidences. In the event of conflict between old Record of Right and recent Record of Right, recent Record of Right would prevail in as much as presumption of Record of Right looses its weight with the passage of time and entry in the subsequent Khatian would be mere acceptable than the entry in the earlier Khatian. Support for this proposition of law is sought to be drawn from Abdul Hamid and others Vs. Abul Hossain Mir being dead his heirs Abdus Sobhan Mir and others, 35 DLR (HCD)295."***

12. Following the above analogy being consistently followed, it is apparent that presumption of C.S record has been merged with S.A record and the instant case S.A record has been prepared in the name of the predecessor of the plaintiffs which carries weight and evidentiary value as record of right has been prepared relying upon the title deed of the plaintiff. Another vital feature of the case is that land under C.S khatian No.207 has been recorded under more then one khatian during S.A record wherein the defendants are claiming land under S.A khatian No.313 and the plaintiffs are claiming 0.39 acres land under S.A khatian No.316 and admittedly defendants asserted that they have no claim in the land under khatian No.316. From the above scenarios it is crystal

clear that the suit land claimed by the plaintiff is distinct and beyond the claim of the defendants. D.W-1 in cross-examination stated that **"৪.৩৯ শতক সম্পত্তি নিয়ে আমাদের নামে ৩১৩ নং এস.এ খতিয়ান হয় তাহাতে ২/২$\frac{১}{২}$ একর সম্পত্তি আছে" "৩১৩ এস.এ খতিয়ানের বহির্ভূত সম্পত্তি দখলও করি নাই, খাজনাও দেই নাই"।** **D.W-2 Md. Abdul Awal stated that "নালিশা দাগের ভিন্ন অংশে ভিন্ন খতিয়ানে বাদিরা কিছু দখল করে" "বাদিদের জায়গা নালিশা দাগে ভিন্ন খতিয়ানে আCAvপাকিস্তানেরww g লে জরিপ হয়েছে তথায় বাদিগনের বাবা/জেঠাদের নাম হয়েছে। বাদির প্রদর্শিত ৩১৬ এস.এ খতিয়ানে বাদির বাবা/জেঠাদের নাম আছে। এছাড়া বাদিদের আর কোনও খতিয়ান নাই।"** admittedly the plaintiffs are claiming land under khatian No.316 but both the courts below failed to notice that vital aspect of the case and erroneously held that the plaintiffs failed to prove title in the suit land.

13. Both the plaintiffs and the defendants produced rent receipts in support of their respective claims, rent receipt submitted by the plaintiffs were marked Ext.4A wherein khatian No.316 has been mentioned. On the other hand the defendants submitted rent receipts out of which 3 are payment of rent purportedly to the original landlord Exts. B-B1 and B-2 and some rent receipt evidencing payment of rent to the government which were marked as Exts. B(B)-B(8). So far the rent receipt regarding the payment of rent to the government these are public documents and from those rent receipts both the parties tried to show that they have been paying rent to the government in respect of their respective shares. Regarding Exts. B, B1-B2 are concerned, those are private document and the trial Court without following the procedure admitted those documents as exhibits which cannot be relied upon and those documents have no evidentially value.

14. P.W.1 Md. Hayetullah in his evidence elaborately stated all relevants facts and supported plaint case. P.W.2 Abdul Wahab stated that he can recognize the suit land and since his coming of age have found plaintiffs' possession in the suit land. P.W.3 Abdul Khaleque also stated that he has seen the plaintiffs having possessed the suit land. P.W.4 Haji Abdul Ali Mollah who is the son of Altab Ali, the vendor of the suit land also stated that his father transferred the suit land to Azizullah and Karim Box by Ext.2B. P.W.5 Md. Sirajul Islam stated that Shahar Banu is his grandmother and Shahar Banu has got other sisters namely Sona Banu and Joygun Bibi. He further stated that Mohoram Ullah is the father of his grandmother and his grandmother succeeded property. One Nepal Chandra as deposed C.W.1 by producing volume of registered sale deed dated 22.03.1984.

15. D.W.1 Md. Habibullah stated that Aftabuddin, Gour Chandra and others where the original owners of the suit land which is not disputed by either of the parties. He denied Sahar Banu as the daughter of Moharam Ullah but he stated to have claimed land under khatian No.313 and beyond that khatian he has no claim. He further stated that apart from khatian No.313 there is another khatian being khatian No.316 regarding which he has no knowledge. He claimed that his grandfather Wazuddin had two sisters and they took oral settlement of the suit land but he was not present at the relevant time. D.W.2 Md. Abdul Awal stated that he can identify the suit land which is in possession of the defendants but he mentioned that plaintiffs are in possession in other part of the suit plot. He denied Shahar Banu as daughter of Moharam Ullah, but he admitted that plaintiffs land has been recorded in separate khatian being khatian No.316. He stated that Azizullah and others possessed 0.1 acres of land and thereafter the heirs of the recorded owners possessed the suit land. D.W.3 Abdul Kashem stated that suit land is being possessed by Habibullah and others, he disclosed is cross-examination that he does not know the boundary or owner of the nearby plots and he could not also disclose the biggest and smallest plots in the suit land.

16. From examination of the oral evidence of the parties it appears that plaintiff has got a distinct khatian being khatian No. 316 where the defendants have no claim, rather the specific claim of the defendants are that they have possessed land of khatain No.313. Besides,on perusal of the documentary evidence it appears that Shahar Banu transferred 1/5th share of C.S. khatain No.207 on 26.05.1924 to Altab Ali who transferred the same to Azizullah and others, predecessor of the plaintiff vide registered deed of sale dated 11.04.1956 and those documents being old and ancient its authenticity cannot be discarded altogether; rather the averments should be relied upon as the old document has got a sanctity of its own. It further appears that defendants have purchased certain portion of land from C.S. khatian No.207 by which the plaintiff intended to prove that the defendant's predecessors were aware about the title of the plaintiffs' predecessor in the suit land. One important aspect is that Altab Ali is the brother of original land lord Aftab Ali and aforesaid Shahar Banu transferred 1/5 share from khatain No.207 to Altab Ali by sale deed dated 26.05.1924.

17. Learned advocate for the opposite parties submits that suit land is not identified in the plaint. Upon perusal of the schedule of the plaint it appears that plaintiffs mentioned C.S. khatain No.207 along with suit plots. At the time of hearing plaintiff produced S.A. Khatian No.316 Ext.lA wherefrom it is evident that 59 decimals of land has been recorded in the said khatian. P.W.1 also claimed that plaintiffs are the owners of the khatian No.316. Order 7 Rule 3 of the Code of Civil Procedure reads as follows:

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

18. So from the description of the schedule of the plaint as well as the oral evidence suit land can be sufficiently identified which is under khatian No.316.

19. Regarding submission of the learned advocate for the opposite party that plaintiffs have no possession in the suit land and in the absence of prayer for recovery of khas possession the suit cannot be maintained it is evident that P.Ws. have substantiated their claim of title over the suit land as well as their possession. Further, D.W.2 admitted possession of the plaintiff in the land under Khatian No.316. Since the khatians are distinct and alltogether different and since defendants have no claim in khatain No.316, the possession of plaintiff in khatain No.316 cannot be denied, rather plaintiffs possession in the suit land is well established.

20. Regarding further submission of the learned advocate of the appellants that revisional Court cannot reassess the evidence arrived at by the Courts below, it is also fairly settled that if there is misreading, non-reading and non-consideration of evidence, then the Revisional Court can reassess the evidence in its true perspective. In the instant case it is found that both the Courts below found that the trial Court failed to consider and evaluate the evidence of the parties in its true perspective and as such those findings cannot be relied upon.

21. The Appellate Court should have considered the additional evidence as the documents filed with the application has bearing over the matter. In the instant case apart from the contents of the additional evidence the right, title and possession has been established from other evidence. Sale deed exhibit Nos. 2 and 2A executed by Saban Bibi whereby she transferred the suit land to Altab Ali which are very old document whose evidential value and veracity cannot be discarded outright. Further, Altab Ali transferred the suit land to the

predecessor of the plaintiff by sale deed dated 11.04.1966 exhibit 2B which is also an old document whose evidentiary value cannot be discarded alltogether. The trial Court ought to have relied upon those documents. The appellate Court also missed the evidenciary value of those documents.

22. In a civil proceeding both the parties have responsibility to prove their respective cases, although onus rests upon the plaintiff to prove his case but responsibility of the defendant is also there to substantiate his written statement's assertion as per section 103 of the Evidence Act. But the courts below shifted the responsibility to prove the case entirely upon the plaintiffs which cannot be sustained.

23. In the facts and circumstances I find merit in the rule. In the result, the rule is made absolute without any order as to costs. The judgment and decree of both the Courts below are set aside. The suit is decreed. Right, title and interest of the plaintiffs in the suit land is hereby declared.

24. No order as to cost.

25. Let a copy of this judgment be sent to the concerned Court.

26. Send down the lower Court's records.