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Justice Md. Zakir Hossain

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## Supreme Court of Bangladesh

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# Supreme Court of Bangladesh

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**Justice Hasan Foez Siddique**
**Chief Justice of Bangladesh**

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## ***Message***

An independent, impartial and effective judiciary is the sine qua non for a democratic society proclaiming rule of law. As an important organ of the State, judiciary has the ultimate responsibility to enforce and upgrade rule of law. Through the power of judicial review, the judiciary of Bangladesh plays pivotal role in establishing and promoting rule of law in the country.

The judiciary, with its system of laws and institutions, is responsible for the protection of the rights of individuals to live, work and enjoy fundamental freedoms. In this sense, the judiciary forms the foundation of social justice and equality, which is essential for good governance. The incorporation of Bill of Rights in our Constitution, conferment of the power of judicial review and the power to enforce fundamental rights have enabled our judiciary to play a profoundly catalytic role. By expanding the frontiers of judicial review, and by being creatively proactive, the judiciary has drawn upon the resources in our Constitution to promote social change towards social justice.

Article 111 of the Constitution of Bangladesh proclaims the doctrine of binding judicial precedent. Under Article 112, all executive and Judicial authorities are mandated to act in aid of the Supreme Court. Our courts have provided vital judicial precedents in different areas of law. In addition to other principles of law, the doctrine of legitimate expectation in Bangladesh has developed through such judicial precedents.

For determining the real position of law, it is indispensible to be acquainted with the day-to-day legal developments with the help of a reliable source so that individuals concerned, with law's application in practical life, can knowledgeably contribute to the society and uphold justice. The Supreme Court Online Bulletin

(SCOB) endeavors to act as a vast archive of the landmark decisions of the Supreme Court of Bangladesh. By compiling the important judgments of the Appellate Division and the High Court Division, SCOB is providing ready case references to the members of legal community and the people at large. This online bulletin has made it a lot easier for the interested legal minds to get access to the most recent and important judicial pronouncements for free. SCOB has been designed to have the widest appeal to those interested in law and will surely provide an opportunity for them to keep abreast of the leading cases of the Supreme Court of Bangladesh.

I sincerely believe that this online publication will render immense help to the judges, lawyers, researchers, academicians, students and policy makers by providing them with the opportunity to educate and inform themselves about the most significant and recent legal principles enunciated by the Supreme Court through its different judgments.

In conclusion, I would like to extend my appreciation to the editors, Mr. Justice Sheikh Hassan Arif and Mr. Justice Md. Zakir Hossain, and the research team for their tireless efforts in publishing SCOB. I look forward to the continued and unwavering success of this reliable online law report.

Hasan Foez Siddique

**Justice Hasan Foez Siddique**

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## Appellate Division

# 16 SCOB [2022]
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## High Court Division

# Cases of the Appellate Division

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|---|---|---|---|
| 1. | **Bangladesh and ors**<br>Vs.<br>**Radiant Pharmaceuticals Ltd**<br><br>*(Hasan Foez Siddique, CJ)*<br><br>16 SCOB [2022] AD 1<br><br>**Key words** : Constitution of Bangladesh, article 128; Income Tax Ordinance 1984, sections 120, 121A, 163; Audit Report; Comptroller and Auditor General; Revenue | The respondent, a pharmaceuticals company, filed its Income Tax return upon which the concerned Local Office of the CAG conducted an audit after assessment by the DCT and found some irregularities in respect of assessment of the respondent's income. Accordingly, the audit team submitted report to the Commissioner of Taxes claiming that the government suffered a revenue loss of Tk.1,39,750/- for such irregularities. On the basis of such report, the concerned Inspecting Additional Commissioner issued a notice under section 120 of the Income Tax Ordinance, 1984 upon the respondent. Being aggrieved, the respondent filed a writ petition before the High Court Division and obtained Rule Nisi. The High Court Division made the Rule absolute holding that though it is the power of the CAG or local office of the CAG to audit on the files in the tax department in order to check the receipts/refunds of public funds, it has got no authority to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. If the auditor is allowed to do so, the entire purpose for incorporating the provisions under Section 120 and/or 121A of the Ordinance will be frustrated. Appellate Division, on the contrary, analyzing article 128 of the Constitution of Bangladesh and section 120 and 163(3)(g) of the Income Tax Ordinance, 1984 set aside the judgment and order of the High Court Division holding that the audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is | **Constitution of Bangladesh, article 128 and Income Tax Ordinance, 1984 section 120 and 163 (3)**<br>**Whether audit report has any bearing upon the subjective opinion of assessing officer:**<br>The Audit Department has been invested with the authority to inspect the accounts of Revenue Department. The Comptroller and Auditor General is authorized to direct any of his officers to conduct audit of tax receipts or refunds under section 163 (3)(g) of the Income Tax Ordinance. The High Court Division has opined that the CAG has got no jurisdiction to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. This view of the High Court Division is erroneous inasmuch as if the audit report does not have any bearing in the subjective opinion of the assessing officer, the very purpose of auditing pursuant to article 128 of the constitution is to be frustrated. If no action can be taken against any irregularities detected through auditing of accounts, auditing itself becomes unnecessary. In the instant case, for example, concerned DCT has allowed financial expenses of an amount of Tk. 575,49,249/- as demanded by the assessee which was not supported by annual report etc. and the audit report has detected this irregularity. If this irregularity as detected by the audit report does not trigger any proceeding under section 120 of the Income Tax Ordinance, 1984, the power conferred to the CAG under section 163(3)(g) of the same Ordinance becomes fruitless. |

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| | | correct or not and therefore the opinion of the High Court Division is erroneous. | |
| 2. | **Govt. of Bangladesh and ors**<br>Vs.<br>**Md. Saiful Islam & ors**<br><br>*(Hasan Foez Siddique, J)*<br><br>16 SCOB [2022] AD 8<br><br>**Key Words:**<br>Work-charged employee; daily wage employee; pensionary benefit; regularizing service | The respondents are work-charged employees under different government departments who filed different Writ Petitions in the High Court Division and obtained directions upon the writ respondents-petitioners to regularize/absorb their service in the revenue set up. The Government and others preferred different Civil Petitions for Leave to Appeal which were dismissed as being time barred. Thereafter, the government and others filed these review petitions. Disposing of all the review petitions the Appellate Division observed that the service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit. Citing different measures taken by the different State Governments of India for work-charged employees, the Appellate Division further observed that the Government should formulate a policy instrument for giving pensionary and other benefits to the work-charged employees who have served without break for a considerable period of time i.e for 20 years or more. | **The service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit:** Work-charged employees have not only been deprived of their due emoluments during the period they served on less salary but have also been deprived from the pensionary benefits as if services had not been rendered by them though the Government has been benefitted by the services rendered by them. The concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The concept of equality as envisaged in the constitution is a positive concept which cannot be enforced in a negative manner. Therefore, the service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit, inasmuch as, pension is not a charity, rather, it is the deferred portion of compensation for past service. |
| 3. | **Md. Mehedi Hasan @ Rajib and anr**<br>Vs.<br>**The State**<br><br>*(Hasan Foez Siddique, J)*<br><br>16 SCOB [2022] AD 17<br><br>**Key Words:**<br>Dying declaration; Section 162 (2) of the Code of Criminal Procedure; | Two appellants were convicted for commission of offence punishable under sections 302/34 of the Penal Code and they were sentenced to death by the trial Court. The High Court Division confirmed the conviction and sentence awarded by the trial Court. There was a dying declaration made by the victim and recorded by the I/O of the case. The Appellate Division found that both the dying declaration and its | **Evidence Act 1872, section 32(1) read with section 162(2) of Code of Criminal Procedure, 1898 Whether a dying declaration recorded by an Investigating Officer is admissible in evidence:** In view of the testimonies of the PW-16 S.I. Moazzem Hossain and P.Ws. 4, 5 and 18 we do not find any reason to disbelieve the dying declaration of the victim (exhibit-4). It is true that when a police-officer in course of investigation examines any person supposed to be acquainted with the facts and circumstances of the case, |

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| | | contents have been proved by 4 PWs and the testimonies of PW-1 and PW-2 to be corroborative to the dying declaration. The Appellate Division held that the learned Courts below upon proper consideration of the testimonies of the witnesses and dying declaration of the victim found the appellants guilty of the charge levelled against them. However, considering that the appellants are in death cell for about 14 years, it commuted the sentence of the appellants from death to one of imprisonment for life with fine. | the substance of that examination falls under the category of statement recorded under section 161 of the Code of Criminal Procedure and that statement is not admissible in evidence. But in view of the section 162 (2) of the Code of Criminal Procedure a dying declaration recorded by an Investigating Officer does not lose its special evidentiary value and can be sole basis for awarding conviction. Unlike recording of a confessional statement law does not require that a dying declaration shall be recorded by certain prescribed persons for the very reason that a dying man may not have sufficient time in his hand for his declaration to be recorded by a prescribed person. |
| 4. | **Md. Abdul Awal Khan**<br>Vs.<br>**The State**<br><br>*[Syed Mahmud Hossain, CJ (Minority view)]*<br><br>*[Muhammad Imman Ali, J (Majority view)]*<br><br>16 SCOB [2022] AD 22<br><br>**Key Words:**<br>Section 342 of Code of Criminal Procedure, 1898; Section 24 and 27 of Evidence Act, 1872; Wife killing case; Extra judicial confession | In the instant case the wife of the Appellant Awal Khan found dead at his dwelling house and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. There was no eyewitness of the occurrence. Trial Court believing the statement of P.Ws. 1, 4, 5 and 6 that the appellant confessed his guilt before them and accordingly the chen dao which was allegedly used to murder the victim was recovered from his shop, convicted the accused and sentenced him to death. High Court Division confirmed the death sentence of the appellant. The Appellate Division, however, by majority decision came to the conclusion that the extrajudicial confession allegedly made by the appellant is inadmissible in evidence inasmuch as that was made in presence of police; that the recovery of the dao at the pointing out of the appellant is admissible evidence in view of section 27 of the Evidence Act but there was no legal evidence on record to show that the said dao was used to deal the blows upon the victim; that the appellant used to stay in his shop | **Per Mr. Justice Syed Mahmud Hossain, CJ:**<br>**Burden of proof in wife killing case:**<br>What is more surprising to note here is that the appellant has not provided any reasonable explanation as to the cause of the death of his wife although in wife killing case, the condemned-appellant is under the obligation to do so. He has given all contradictory suggestions to the witnesses imputing allegations that the victim was a lady of lose character having illicit connection with others. In a misogynistic society, character assassination of women is a regular feature. In the case in hand even after death victim's soul will not rest in peace because her two sons will know that their mother was a lady of questionable character. The condemned-appellant has failed to discharge his obligation by not explaining the cause of death of his wife in his house.<br><br>**Per Mr. Justice Muhammad Imman Ali, J Honorable Author Judge of the Majority Decision:**<br>**Section 106 of the Evidence Act, 1872:**<br>With regard to the victim's death while in the custody of her husband, the evidence on record shows that the appellant used to stay at his shop. There was no evidence that on that night he was sleeping in his own house. Hence, there is sufficient explanation from the |

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| | | at night and nobody saw him staying with his wife at the night of occurrence and therefore he does not require to explain as to how his wife met her death and the incriminating evidence in the depositions of the prosecution witnesses being not placed before the appellant in accordance with law the examination of the appellant under section 342 of the Code of Criminal Procedure was not lawfully done by the trial Court and as such, the trial was vitiated. Honorable Chief Justice Mr. Justice Syed Mahmud Hossain, however, differed with the majority in above mentioned points except the point of admissibility of extra judicial confession in presence of police. Consequently the appellant was acquitted. | appellant that he was not present in the house when his wife was attacked, and provision of section 106 of the Evidence Act are not applicable in the facts of the instant case. |
| 5. | **Masum Billah alias Md. Masum Billah**<br>**Vs.**<br>**The State**<br><br>*(Muhammad Imman Ali, J)*<br><br>16 SCOB [2022] AD 36<br>**Key Words:**<br>Commutation of death penalty; Section 302 of Penal Code | This case involves killing of a child and causing grievous injury on the head of the mother of the child while both the victims were sleeping in their bedroom. There was no eye witness in this case. After arrest the appellant gave a confessional statement. The Appellate Division found the confessional statement of the Appellant voluntary and true and also held that there was no sudden provocation to bring the offence within the category of culpable homicide not amounting to murder and therefore, confirmed the findings of the Courts below as to the conviction of the appellant. But considering, among others, the peculiar circumstances that the appellant out of grudge dealt stone blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly, commuted appellant's death penalty to imprisonment for life. | Commutation of death Penalty: According to the confessional statement, the appellant out of grudge dealt the blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly. Taking that into consideration and all other aspects we are of the opinion to commute the sentence of death to imprisonment for life. |

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| 6. | **Md. Anwar Sheikh**<br>Vs.<br>**The State**<br><br>*( Md. Nuruzzaman, J)*<br><br>16 SCOB [2022] AD 40<br><br>**Key Words:**<br>Wife killing case; Commutation of death penalty; Section 342 of the Code of Criminal Procedure | In the instant case after 5 days' search the dead body of the wife of the appellant was found in the septic tank of the house. There was no eyewitness of the murder. The appellant himself joined the search and at the same time tried to mislead others saying that the Jinn or Genie (some sort of supernatural creatures) picked up the victim in their realm. The victim was a simple woman who did not have any enmity with anyone. The Appellate Division assessing evidence found that the appellant failed to discharge his obligation to explain how his wife had met with her death as at the time of occurrence she was under his custody. Further, the Appellate Division though concurred with the finding of the High Court Division as to the conviction of the appellant, it commuted the sentence of death on the ground, inter alia, that if the appellant is handed down death penalty his two sons will become orphans. | **Section 342 of the Code of Criminal Procedure, 1898 Husband is duty bound to explain his wife's death when his wife dies in his custody and he can explain it in his 342 statement:**<br>From the testimonies of the PWs. 1, 8 and 9 it was proved beyond all reasonable doubt that the instant appellant left the PW.1's house with his wife Nasima Begum Aka Bahana along with their two sons before the alleged killing of her. This event eventually proved that Nasima alias Bahana before her death was in undeniably in the custody of her husband, the instant appellant. On 01-05-2006, it was reported that she was missing. On 06-05-2006, her corpse was recovered from the septic tank of her husband. The appellant in his confessional statement admitted aforesaid recovery. He not only knows the recovery of corpse, rather, knows about the killing, even though, he falsely searched for Nasima with other inmates of the house only to show publicly that Nasima was really missing which was not fact. The appellant's such a pretext undoubtedly proved that he was fully aware about the murder. …the instant appellant as the husband is solely responsible and duty bound to explain as to how and when his wife, Nasima Begum alias Bahana was died. He was miserable failed to explain, even if, he was examined under section 342 of the Code of Criminal Procedure to that effect. |
| 7. | **Bangladesh and another**<br>Vs.<br>**Sayed Mahabubul Karim**<br><br>*( Md. Nuruzzaman, J)*<br><br>16 SCOB [2022] AD 46<br><br>**Key Words:**<br>Rule 34, 1st Part of the Bangladesh Service Rules; Doctrine of estoppels, waiver and acquiescence; void ab intio | Question arose in this case as to whether the petitioner-respondent who left for Japan for higher training with the leave of the Government for 6 months and availed a further leave of another 3 (three) months as leave outside Bangladesh and joined in his post after 7 years 7 months 24 days being absent from service during this time without any leave from the competent authority, have ceased to be a government servant in accordance with Rule 34, 1st Part of the Bangladesh Service Rules, in spite of the fact that he was initially permitted to rejoin in the post and worked there for about 1 year and 7 months. The Administrative Appellate Tribunal decided that by accepting the joining of the | **Rule 34, 1st Part of the Bangladesh Service Rules:**<br>It is unambiguous from the phraseology of the rule 34 of the BSR that when continuous absence from work exceeds five years, be the absence with or without leave; the service of a Government servant will come to an end. Yet, the Government and only the Government may make a diverse conclusion upon taking into consideration any special state of affairs. Consequently, this mechanical ceasing of the service is subject to the ability of the Government to take a different decision in the light of out of the ordinary situation. |

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| | | respondent-petitioner the Director General of Industry and Labour Wing retrospectively approved his unauthorized leave and the Government waived its right to reject the rejoining of the petitioner in service. The Appellate Division held that the Director General was not empowered to act under rule 34 and therefore, his act of allowing the respondent rejoining in service was not only without lawful authority but also void ab intio. The Court also held that the doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions and as such, though the respondent has served for about 1 year and 7 months after rejoining in the service, that cannot be deemed to be a waiver by the government against the clear statutory provision embodied in rule 34. | |
| 8. | **Monir Ahmed**<br>Vs.<br>**The State**<br><br>*(Obaidul Hassan, J)*<br><br>16 SCOB [2022] AD 51<br><br>**Key Words:**<br>Section 302 of the Penal Code; Confessional Statement; Section 164 of the Code of Criminal Procedure | This is a case of brutal killing of a 11-year-old boy for ransom by his uncle and uncle's cohorts in which the dead body of victim could not be found due to cutting it into pieces and throwing them in the water body connected with sea. There was no eyewitness to the occurrence. Appellant made a confessional statement. The Appellate Division examining the confessional statement of the appellant found it to be voluntary and true and also found that the circumstantial evidence unerringly pointing to the guilt of the appellant but considering the length of period spent by the appellant in the condemned cell and other circumstances commuted his sentence of death to one of imprisonment for life. | **Section 164 of the Code of Criminal Procedure:**<br>It is well settled that the confessional statement can be the sole basis of conviction if it is made voluntarily and it is true. In the instant case, the confessional statement of the appellant is voluntary and true and it was rightly found to be so by both the trial Court and the High Court Division. It is true that there is no eye witness in the instant case, but the inculpatroy, true, and voluntary confessional statement of the convict-appellant, and the circumstances are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellant in committing murder of the victim Rashed. |
| 9. | **Md. Shukur Ali and others**<br>Vs.<br>**The State**<br><br>*(Obaidul Hassan, J)*<br><br>16 SCOB [2022] AD 62<br><br>**Key Words:**<br>Section 9(3) of the Nari | This is a case of gang rape and murder. There was no eyewitness. Appellants were suspected of being involved with the commission of crime. Police arrested appellant Mamun and Azanur who gave confessional statements describing vividly the role played by them and other co-accused, namely, Shukur and Sentu in committing the crime | **Section 30 of the Evidence Act:**<br>We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the makers of the confessional statements vividly have stated the role played by other co-accused in the rape incident and murder of the deceased which is also |

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|---|---|---|---|
| | O Shishu Nirjaton Daman Ain, 2000; Confessional Statement; Section 164 of the Code of Criminal Procedure; Section 8 and 30 of Evidence Act; Due process; Crime control | which was supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses regarding the marks of injury on the body of the deceased. The Appellate Division held that in such case the non-confessing accused persons can be equally held liable like Azanur and Mamun for murdering the deceased after committing rape. The Court further observed that, the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial and adverse inferences may be drawn upon silence on part of those who have been so incriminated by the confession of the co-accused. However, the Appellate Division maintained the death sentence of the appellant Shukur Ali who inflicted fatal knife injuries to the deceased and commuted the sentence of death of other appellants to imprisonment for life. | supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses particularly the deposition of P.Ws.1,2,3,10,11,12,14 and 18 regarding the marks of injury on the body of the deceased. Every case should be considered in the facts and circumstances of that particular case. In light of the facts and circumstances of the present case, we are of the view that the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial. (Emphasis added). Thus, the accused namely Shukur and Sentu are equally liable like Azanur and Mamun for murdering the deceased after committing rape. |
| 10. | **Abdur Rashid being dead his heirs Md Hossain & ors.**<br>Vs.<br>**Nurul Amin & ors**<br><br>*(Borhanuddin, J)*<br><br>16 SCOB [2022] AD 77<br><br>**Key Words:**<br>Section 90 and 96 of the State Acquisition and Tenancy Act; pre-emptory right; | The question came up for consideration in this case whether after transfer by pre-emptee-opposite party no.1 to co-sharer opposite party no.6 the pre-emptory right of the pre-emptor exists or not. The Appellate Division examining section 90 and 96 of State Acquisition and Tenancy Act and the view taken by their lordship in the case of 50 C.W.N. 806 as well as 35 DLR 238 and also distinguishing the facts of 35 DLR (AD) 225 held that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated. | **<u>Section 96 of the State Acquisition and Tenancy Act:</u>**<br>We have no hesitation to hold that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated as because the subsequent transfer is subject to the right available against the original transfer and the subsequent transferee would be impleaded as party in the pre-emption proceeding and he would be entitled to get the consideration and compensation money as deposited by the pre-emptor. |

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| 11. | **Commissioner, Customs, Excise and VAT Com. & ors.**<br>Vs.<br>**Perfect Tobacco Co. Ltd**<br><br>*(Borhanuddin, J)*<br><br>16 SCOB [2022] AD 84<br><br>**Key Words:**<br>Section 42(1) (Ka) of the VAT Act; maintainability of writ; Article 102 of the Constitution | The respondent filed a writ petition in the High Court Division challenging an adjudication order of the writ respondent no. 2 wherein he imposed penalty of Tk. Tk.43,00,000/- for evasion of VAT of Tk. Tk.25,02,464/- by the respondent. High Court Division made the Rule absolute. Appellate Division, however, following the decision reported in 18 BLC (AD) (2013) 144 examined the question of maintainability of the writ petition first, and held that writ is not maintainable in the instant case as the respondent had impugned an adjudication order passed by the Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act. The Appellate Division then without going into the merit of the case set aside the judgment and order of the High Court Division holding that the respondent still can seek relief in proper forum resorting to section 14 of the Limitation Act. | **Section 42(1) (Ka), 42(2) (Ka) of the VAT Act read with article 102 of the Constitution:**<br>Any person aggrieved by the decision or order passed by the Commissioner, Additional Commissioner or any VAT Official lower in the rank of the Commissioner or Additional Commissioner can prefer appeal to the forum prescribed in the section. In the instant case the writ-petitioner impugned adjudication order dated 15.08.2007 passed by the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act and section 42(2)(Ka) mandates that 10% of the demanded VAT is to be deposited at the time of filing of the appeal. When there is a statutory provision to avail the forum of appeal against an adjudication order passed by the concern VAT Official then the judicial review under Article 102(2) of the constitution bypassing the appellate forum created under the law is not maintainable. |
| 12. | **Minaz Ahmed and another**<br>Vs.<br>**Arif Motahar and others**<br><br>*(M. Enayetur Rahim, J)*<br><br>16 SCOB [2022] AD 89<br><br>**Key Words:**<br>Money Laundering Protirodh Ain, 2012; Anti-Corruption Commission Act, 2004; Money Laundering Protirodh Bidhimala, 2019; Bail by a Magistrate in a case triable by Special Judge | The question came up for consideration in the instant petition is- whether in a case under the Money Laundering Protirodh Ain, 2012 the Magistrate has jurisdiction to deal with the application for bail of an accused as he has no jurisdiction to take cognizance of an offence under the said Ain. The Appellate Division held that under the Money Laundering Protirodh Ain, 2012 beside the Anti-Corruption Commission, Police as well as other agency/organization of the government is empowered to investigate a case but as per schedule, (gha), of Anti-Corruption Commission Act, 2004 and schedule 01 to the Money Laundering Protirodh Bidhimala, 2019 the Commission is authorized to investigating those cases which relate to bribe and corruption | **Jurisdiction of Special Judge in cases initiated by any agency other than the Anti-corruption Commission under the Money Laundering Protirodh Ain:**<br>The Special Judge appointed under the provision of Act of 1958 has no jurisdiction to deal with a case initiated under Money Laundering Protirodh Ain by any other investigation agency other than the case initiated by the Commission before taking cognizance.<br><br>**Jurisdiction of the Magistrate in cases initiated by any agency other than the Anti-corruption Commission under the Money Laundering Protirodh Ain:**<br>Thus, before submitting report as per provision of section 173 of the Code of Criminal Procedure and taking cognizance of the offence by a Special Judge appointed under the Act of 1958 i.e. at the pre-time stage an accused has |

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| | | only. The other offences under the Ain have to be investigated by the CID or any other agency(s) as prescribed in the schedule of the said Bidhimala, 2019. On the other hand, the other investigation agency(s) as per Upa bidhi 7 of bidhi 51 of the Bidhimala, 2019 shall follow the provisions of Code of Criminal Procedure while carrying out the investigation. The Special Judge has no jurisdiction to deal with a case initiated under Money Laundering Protirodh Ain by any other investigation agency other than the Anti Corruption Commission before taking cognizance. Thus, before submitting report as per provision of section 173 of the Code of Criminal Procedure and taking cognizance of the offence by a Special Judge at the pre-trial stage an accused has every right to move all kinds of applications including the application for bail before the Magistrate concerned where the case is pending and record lies. As per provision of section 497 of the Code of Criminal Procedure the Magistrate concerned has got the jurisdiction to deal with the matter in accordance with law. It also opined that in the absence of any express or implied prohibition in any other special Law or Rule, the Magistrate concerned may entertain, deal with and dispose of any application for bail of an accused under section 497 of the Code of Criminal Procedure. | every right to move all kinds of applications including the application for bail before the Magistrate concerned where the case is pending and record lies. And as per provision of section 497 of the Code of Criminal Procedure the Magistrate concerned has got the jurisdiction to deal with the matter in accordance with law.<br><br>**Section 497 and 498 of the Code of Criminal Procedure:**<br>In the absence of any express or implied prohibition in any other special Law or Rule, the Magistrate concerned may entertain, deal with and dispose of any application for bail of an accused under section 497 of the Code of Criminal Procedure. In case of rejection of his application for bail he may move before the Court of Sessions by filing a Criminal Miscellaneous Case under section 498 and thereafter in case of failure before the Court of Sessions, he can move under section 498 of the aforesaid Code for bail before the High Court Division. |
| 13. | **DG, Health Directorate & ors**<br>Vs.<br>**Dr. Md. Tajul Islam & ors**<br><br>*(M. Enayetur Rahim, J)*<br><br>16 SCOB [2022] AD 100<br><br>**Key Words:**<br>Legitimate Expectation; Recruitment; Government policy; vested right | In the instant case writ petitioners-respondents in response to the advertisement published by the concerned authority for appointment in a project applied accordingly and sat for written and viva voce examination in 2003. However, the said appointment process was eventually stopped and postponed. The project eventually ended without appointing them in the said posts. Now the writ petitioners-respondents have sought for appointment in another project | **Mere participation in the written and viva voce examination, ifso facto, does not create any vested right in favour of the writ petitioners-respondents to be appointed:**<br>The writ petitioners-respondents did not have acquired any legal right to be appointed in HPSP project and now they cannot claim to be appointed in new project i.e. Alternative Medical Care (AMC) Operational Plan (OP) as of right without participating in recruitment process. The writ petitioners-respondents participated in |

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| | | which has started in 2017 after a long period of closure of earlier project. They claim that since they had participated in the written and viva voce examination earlier and in the new project there are vacant posts, they have a legitimate expectation to be appointed directly in the said post. The High Court Division made the Rule absolute directing the authority concerned to fill up the posts advertised in the new project if the writ petitioners are selected in earlier appointment process and if they are not otherwise disqualified as per the present circular in any manner. The Appellate Division, however, set aside the judgment and order passed by the High Court Division holding that the writ petitioners-respondents did not have acquired any legal right to be appointed in the earlier project and now they cannot claim to be appointed in new project. Referring to its earlier judgments reported in 71 DLR (AD) 395 and 72 DLR (AD) 188 the Appellate Division reiterated that the doctrine of legitimate expectation can neither preclude legislation nor invalidate a statute enacted by the competent legislature. When the government changes policy, if it is not malafide or otherwise unreasonable, the doctrine of legitimate expectation cannot defeat the changed policy. | the examination for appointment under HPSP project in the year 2003 and having regard to the fact that the said appointment process was postponed and cancelled and on the plea of their participation in the earlier written and viva examination, no legal and vested right has been created in favour of the writ petitioners-respondents to be appointed to the posts as allegedly vacant in the new project. Mere participation in the written and viva voce examination, ifso facto, does not create any vested right in favour of the writ petitioners-respondents to be appointed automatically in the newly created posts in subsequent project. |
| 14. | **Eriko Nakano**<br>Vs.<br>**Bangladesh and others**<br><br>*(Krishna Debnath, J)*<br><br>16 SCOB [2022] AD 107<br><br>**Key Words:**<br>Custody of minor children; Article 7, 12, 20 and 21 of the Convention on the Rights of Child; Guardians and Wards Act, 1890; best interest of the child; | A Bangladeshi father, namely, Imran Sharif taking his two minor girl children aged about 9 and 11 years came from Japan without informing their mother with whom the father had a strained relationship. They had another girl child born in their wedlock aged about 7 years, but the father left her in her mother's custody. A case regarding custody of the children was pending in the family Court of Japan but no prohibitive order about leaving Japan was issued by the Court. When the mother of the Children came to know that their father had taken them in Bangladesh, keeping the third child in the custody of her | **<u>The court must look for the best interests of the minors:</u>**<br>The court must look for the best interests of the minors and the petitioner in the present case being the mother of these two minor daughters left each and every effort for their best interest. It was decided in the case Abu Bakar Siddique vs SMA Bakar reported in 38 DLR(AD)106 that "welfare of the child would be best served if his custody is given to a person who is entitled to such custody."<br><br>**<u>It is the Family Court who has the jurisdiction to settle the question of custody of a minor:</u>**<br>Considering the aforesaid facts and |

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| | enforceability of provisions of international instruments | grandfather the mother left Japan for Bangladesh and filed a Writ Petition in the High Court Division of the Supreme Court of Bangladesh for the custody of the children. The father also filed a case before a competent Family Court of Bangladesh for custody of the Children which was pending at the time of adjudication of this petition. The High Court Division ordered that the children will remain in their father's custody and the mother shall have right to visit their children. The High Court Division further ordered that the father will have to pay a certain amount of money to the mother for coming Bangladesh and visiting her children after interval of a certain period. Against the order the mother filed this petition. The Appellate Division considering the relevant international and domestic law and decision of the apex court of this sub-continent in similar matter held that in such case the object of the Court would be to see how the best interest of the children is protected. It also held that the appropriate forum for deciding the dispute of custody of the children is the Family Court before which a case is already pending ordered the Family Court to complete the trial of the case within three months. It also set aside the order of the High Court Division and placed the children in the custody of their mother with a visitation right of their father until the suit in family court is disposed of. It also clarified that judgment in this petition will have no bearing upon the decision to be reached at by the learned Assistant Judge/Senior Assistant Judge while disposing of the family suit. | circumstances we are of the view that removal of the detainees from the custody of their mother petitioner is without lawful authority and they are being held in the custody of respondent No.5 in an unlawful manner and the High Court Division passed the judgment beyond the scope of law which required to be interfered. In this case only Family Court has the jurisdiction to settle the question of custody of a minor. The Family Court will look into the cases referred by the parties and come to a finding in whose custody the welfare of the detainees will be better protected. |

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| 1. | **Spice Television Private Ltd**<br>Vs.<br>**Bangladesh & ors**<br><br>(*Md. Ashfaqul Islam, J)*<br><br>16 SCOB [2022] HCD 1<br><br>**Key Words**:<br>Article 102(2)(a)(i) of the Constitution of the People's Republic of Bangladesh; writ mandamus; Legitimate expectation; section 55 and 56 (8) of the Bangladesh Telecommunication Act, 2001; | The petitioner after obtaining permission from Ministry of Information for running a Satellite Television Channel made an application to the Bangladesh Telecommunication Regulatory Commission (BTRC) praying for allocating frequency for running the Television Channel under the name and style Spice TV. BTRC upon receiving the application from the petitioner, issued letters requesting (a) the Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI to furnish their opinion/clearance. The Director General, DGFI and the Director General, NSI provided their clearances. But Ministry of Home Affairs did not provide the same. As a result, BTRC did not allocate frequency to the petitioner on a permanent basis but allowed it to import transmission equipments and also allocated frequency of 6 Megahertz from 5.850-6.425 Gigahertz, on a temporary basis. It is at this stage the petitioner filed the instant writ petition and obtained the Rule and order of direction. The argument of the petitioner was that under section 55 of the Bangladesh Telecommunication Act, 2001, allocation of frequency is under the exclusive authority of Bangladesh Telecommunication Regulatory Commission and in section 56(8) of the said Act a prescribed time limit has been provided within which the Commission shall dispose of an application for license or frequency or a technical acceptance certificate. The High Court Division accepted the argument and held that BTRC was absolutely in a position to take a decision in the matter in question. The Court also found that this particular case is guided by the principle of reasonableness so far legitimate expectation is concerned and directed BTRC to do the needful in terms of the Rule in accordance with law. | **Section 55 and 56(8) of বাংলাদেশ টেলিযোগাযোগ নিয়ন্ত্রণ আইন, ২০০১, authority of Bangladesh Telecommunication Regulatory Commission (BTRC) in granting license:**<br><br>What we have seen in the instant case that from the very beginning though the respondent No. 3 (Bangladesh Telecommunication Regulatory Commission (BTRC)) tried its best to do the needful for obtaining clearance from the three agencies, two of which had already given their clearance but the added respondent No. 4, Ministry of Home Affairs did not accord any clearance though there was repeated request by the respondent No. 3. There is no denying that respondent No. 3 had all along the good intention in this regard....On a plain reading of the laws we have found that respondent No. 3 was absolutely in a position to take a decision in the matter in question. |

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| 2. | **Md Mahboob Murshed**<br>Vs.<br>**Bangladesh & ors**<br><br>**(***Zubayer Rahman Chowdhury, J)*<br><br>16 SCOB [2022] HCD 7<br><br>**Key Words**:<br>Article 102 of the Constitution of the People's Republic of Bangladesh; ultra vires; Rule 300 of the Bangladesh Service Rules, Part I; the due process; resignation; forfeiture; doctrine of severability | The constitutional validity of Rule 300 of the Bangladesh Service Rules, Part I was challenged in the instant Writ Petition by a former Additional District Judge, who had tendered his resignation from service. Having completed nineteen years of service as a Judicial Officer, the petitioner applied for his pension and other benefits, which was approved by the Ministry of Law, Justice and Parliamentary Affairs. But the office of the Comptroller and Auditor General, Bangladesh issued a Memo stating that the petitioner was not entitled to receive any pension since his service stood forfeited by dint of Rule 300(a) of the Bangladesh Service Rules, Part I. The petitioner sought relief under the Writ jurisdiction of the High Court Division. The High Court Division held that the Rule 300(a) of the Bangladesh Service Rules, Part I, so far as it relates to "forfeiture of pension in the event of resignation from service" is ultra vires to the Constitution on the ground that an employee with an unblemished service record cannot be treated on the same scale as an employee who has been found guilty of some misdemeanour and therefore dismissed from service. Two different categories of persons cannot be subjected to the same treatment, although there is a gross distinction between 'resignation' and 'dismissal'. However, the Court found that the remaining part of Rule 300 (a) and Rule 300 (b) are valid. | **A person who tenders resignation from service, should also be entitled to receive pension, depending on the length of his/her service:**<br>Although the maximum tenure of service required for being entitled to full pension is 25 years or more, depending on the person's age at the time of entry into Government service, nevertheless, a sliding scale is provided for the person who retires before completing 25 years of service. By the same corollary, a person who resigns from service before reaching the age of superannuation should also be entitled to receive pension depending on the number of years of service rendered by such person. Although 'retirement' and 'resignation' are two distinct nomenclatures, in reality, they achieve the same purpose by bringing to an end the long standing, formal relationship between an employer and an employee ; in the former case, through operation of law and in the latter case, upon one's own volition. On a similar note, a person who tenders resignation from service, should also be entitled to receive pension, depending on the length of his/her service.<br><br>Rule 300(a) of the Bangladesh Service Rules, Part I, so far as it only relates to "forfeiture of pension in the event of resignation from service" is declared to be *ultravires* the Constitution. However, the remaining part of Rule 300 (a) and Rule 300 (b) remains unaffected and valid. |
| 3. | **SHOHOZ-SYNESIS-VINCEN JV**<br>Vs.<br>**CPTU & ors**<br><br>*(Farah Mahbub, J)*<br><br>16 SCOB [2022] HCD 25<br><br>**Key Words**:<br>Article 102 of the Constitution of the People's Republic of | A tender was floated for Bangladesh Railway for design, develop, supply, install, commission, operate, maintain and transfer of technology of online based Bangladesh Railway Integrated Ticketing System (BRITS). SHOHOZ-SYNESIS-VINCEN JV a joint venture participated in the tender. The Tender Evaluation Committee (TEC) declared 5(five) tenderers as technically responsive including | **Section 29 and 30 of the Public Procurement Act, 2006 read with Rules 56 and 57 of the Public Procurement Rules, 2008:**<br><br>Section 29 of the Act, 2006 (Act No.24 of 2006), however, provides the right to file complaint to the authority concerned (সংশ্লিষ্ট ক্রয়কারী প্রশাসনিক কর্তৃপক্ষের নিকট) under Section 30 of the said Act on the context as prescribed under Rule 56 of the Rules, 2008. In view of Rule 57(1) of the Rules of |

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| | Bangladesh ; Rules 8, 36(3) 56, 57, 60, 98, 102 of the Public Procurement Rules, 2008; Sections 29, 30 of the Public Procurement Act, 2006 | the present petitioner as well as respondent No.09. Subsequently, the TEC after evaluation of the financial proposals of the technically responsive 5(five) tenderers declared the petitioner as the final responsive tenderer. Accordingly, notification of award was issued. In the meanwhile, the respondent No.9 filed a complaint before the authority concerned under Rule 57(1) and (2) of the Public Procurement Rules, 2008 alleging irregularities and illegalities in the process of evaluation of tender by the TEC. Later, the respondent No.9 filed a complaint before the Review Panel-2 under Rule 57(12) of the same Rules. The petitioner as well as the respondents concerned appeared and contested the said complaint of the respondent No.9. However, upon hearing the respective contending parties the Review Panel 2 allowed Review Petition and recommended for re-tender. The petitioner challenged the decision of the Review Panel-2 before the High Court Division. The High Court Division held that the respondent no. 9 did not bring the complaint within the time prescribed by law and as such the complaint is barred by limitation. It also found that the Review Panel-2 did not provide any finding as to the point of limitation in its decision which is not maintainable. | 2008 said complaint has to be filed/made within the period as stipulated in Schedule 2 of the said Rules i.e., within 7(seven) calendar days of receipt of knowledge of the complaint which gives rise to the cause of action. In other words, the complainant in his petition of complaint has to disclose the date of cause of action in order to compute the period of limitation. |
| **4.** | **Abedun Nessa**<br>Vs.<br>**Jaher Sheikh and others**<br><br>*(Md. Rezaul Hasan, J)*<br><br>16 SCOB [2022] HCD 37<br><br>**Key Words**:<br>Cancellation of a deed; Requirements in case of execution of a deed; Section 102 of the Evidence Act; Custom; Section 18 of the Limitation Act, 1908 | This is a suit for cancellation of deed in which the main contentions of the plaintiffs are that, the disputed Nadabinama deed was not executed within the knowledge of the plaintiff No. 3 who was minor at the time of execution of the said deed and he did not go to the concerned Sub-Registrar's office for execution or registration of the deed. Further, before obtaining signature of the plaintiff Nos. 1 and 2 in the said Nadabinama, it was not read out, nor explained to them. Their signatures were obtained by misleading them about the contents of the deed saying that it was a deed for partition, to be | **<u>Reading out a document to the executants before execution, is an usage and custom having the force of law:</u>**<br><br>The requirement to read out a document to the executants before execution, is an usage and custom followed from the time immemorial. This custom, having the force of law, requires to record the fact in a deed, that the same was read out and explained to the executants, so that it can be inferred that they have executed the deed voluntarily and |

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| | | prepared on amicable settlement of their respective share in the suit property. The trial court dismissed the suit but the appellate court allowing the appeal, reversed the judgment and decree of the trial court. The defendant-respondent, as the petitioner, preferred civil revision before the High Court Division. High Court Division on assessment of evidence of DW-3 held that the disputed deed was not read out to the plaintiffs who were illiterate rural people before receiving their signatures on it as the executants. It also held that the requirement to read out a document to the executants before execution is a usage and custom having the force of law. High Court Division also found that the findings of the appellate Court relating to limitation and burden of proof are correct and as such it discharged the Rule. | having understood the contents of the same. Unless a deed is read out to the executants, it cannot be said that they had understood its contents and had voluntary executed the same. However, there might be exception to this Rule and this might not be fatal in each case and the application of this Rule will depend upon the facts and circumstances peculiar to each case. |
| **5.** | **The State and others**<br>Vs.<br>**Md. Shaheb Ali and others**<br>*(Krishna Debnath, J)*<br><br>16 SCOB [2022] HCD 45<br><br>**Key Words**: Recording of confessional statement u/s 164 of the Code of Criminal Procedure; "শিশু আইন, ২০১৩"; Sections 4,34,102(2)(kha) of "শিশু আইন, ২০১৩" ;The Childrens Act, 1974; Sections 2,6(1),6(2),51,52 of the Childrens Act, 1974; Confessional statement of a co-accused | In this case a boy of class VI was murdered and another boy of 8 years old witnessed it from a hiding place. Two of the accused made confessional statements which were not properly recorded by the concerned Magistrate. He did not alert them that they would not be remanded to Police custody if they failed to confess. He did not fill up the relevant columns properly. Furthermore, he did not make any certificate in column 8 of the confessional statement. The High Court Division held that when an eye witness categorically narrated the occurrence corroborating the confessional statements and other evidence on record, these types of omissions while recording confessions cannot be considered as fatal defects. High Court Division also modified the sentence of the convicts on consideration of their tender age. | **When an eyewitness corroborates the occurrence, some omission in recording confessional statements cannot be considered as fatal defects:**<br>It is true that learned Magistrate P.W-11 Kazi Abed Hossen did not record the confessional statement under Section 164 of the Code of condemned-prisoner Sumon properly. He did not alert him that he would not be remanded to Police custody if he failed to confess or he did not fill up the relevant columns properly. Furthermore he did not make any certificate in column 8 of the confessional statement but we think this type of omission cannot be considered as fatal defect in this particular case when P.W-6 Md.Shakil the only eye witness of the case categorically narrated the occurrence and this statement was not challenged by defence. Moreover, P.W-6's statement corroborated the statements of P.W-5, 9, 13, 14 and 15 who stated that in their presence condemned-prisoner Sumon detected the dead body of deceased Injamul from place of occurrence. |

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| 6. | Sadrul Huq being dead his heirs & ors.<br>Vs.<br>Farhana Firdousi & anr<br><br>*(Sheikh Hassan Arif, J)*<br><br>16 SCOB [2022] HCD 62<br><br>**Key Words**:<br>Family Court Ordinance 1985; The Muslim Family Laws Ordinance 1961: Section 17A and 17B of Registration Act 1908; Transfer of Property of Act 1882; dower | Respondent No.1 as plaintiff filed a suit for partition claiming her unpaid dower on the basis of the nikahnama in column 16 of which her father-in-law transferred .09 acre of land as dower on behalf of his son. The trial Court decreed the suit in favour of the plaintiff and gave her saham of the said .09 decimal land. On appeal, the High Court Division considered, among others, whether such transfer of land by the father of the husband as against dower or portion of dower, as made at Clause 16 of the nikahnama, may be effected and enforced under the Muslim Law and the law of the land? Examining the relevant provisions of the Family Court Ordinance 1985, the Muslim Family Laws Ordinance 1961, Registration Act 1908 and Transfer of Property of Act 1882 and considering the opinions of the amici curiae the High Court Division held that landed property in question was rightly taken to be a form of portion of dower to be transferred in favour of the plaintiff and the father of the husband was allowed under the Islamic law to undertake or to transfer the said land in lieu of certain portion of the said dower money in favour of his daughter-in- law but such transfer cannot be effected in view of provisions of sections 17A and 17B of the Registration Act, 1908. The only way open to the plaintiff is to file a suit for dower in the Family Court. Thereafter, the High Court Division set aside the judgment of the trial court but allowed the plaintiff to withdraw the suit from the appellate stage with a permission to file the same before the correct forum, namely the Family Court established under the Family Court Ordinance, 1985. | **Form of dower and who may undertake to pay the dower in Islamic law:**<br>From the above opinion of the said islamic scholars, it appears that the landed property, being a valid property under Islam, may take the form of dower under Islamic principles, and anyone, including the father of the husband, may undertake to pay or transfer such dower. Therefore, it appears that the landed property in question was rightly taken to be a form of portion of dower to be transferred in favour of the plaintiff and that the father of the husband, namely defendant No.1, was allowed under the Islamic law to undertake or to transfer the said land in lieu of certain portion of the said dower money in favour of his daughter-in-law. |
| 7. | **Md. Atiqur Rahman & anr**<br>Vs.<br>**Bangladesh & ors**<br><br>*(Md. Nazrul Islam Talukder, J)*<br><br>16 SCOB [2022] HCD 70<br><br>**Key Words**:<br>Sections 19 and 20 of | The writ petitioners purchased the case land through the court by way of sale certificate and the learned judge of the Execution Court handed over possession of the land to the petitioners by way of writ for delivery of possession. Challenging the said sale, several writ petitions and leave petitions were filed and ultimately all of them were discharged and dismissed. The writ petitioners as | **Evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004:**<br><br>With reference to the legal decision taken in the case of Sonali Jute Mills Ltd Vs. ACC reported in 22 BLC (AD) 147, the submission of the learned Advocate for the ACC is that sub-section(1) and (2) of section-19 |

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| Sl. No. | Name of the Parties and Citation | Summary of the case | Key Ratio |
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| | the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure; mala fide; abuse of discretionary power; Rule 3(5) of the Anti-Corruption Commission Rules, 2007; Evasion of registration fees | auction purchasers having failed to mutate their names against their purchased property filed a Writ Petition against RAJUK and the said Rule was made absolute. Then RAJUK filed a Civil Petition for Leave to Appeal before the Appellate Division against the said judgment of the High Court Division and the same was dismissed with a finding that the writ petitioners have legally purchased the case property through Court and their title has become unassailable. Thereafter, ACC issued notices against the writ petitioners under sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure for their alleged evasion of registration fees and other duties for registering the deed of sale. The writ petitioners have challenged the legality of the said notices in the instant writ petition. The High Court Division examining relevant laws and rules and considering the facts of the case found that there was no evasion of registration fees in this case and allegation of evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004 and therefore impugned notices have been issued with mala fide intention and in exercise of abuse of discretionary power which have been made/issued without lawful authority and are of no legal effect. | have given wide jurisdiction to the Commission to inquire into and investigate any allegations whatsoever as covered in its schedule and in doing so, the ACC may direct any authority, public or private to produce relevant documents. But the allegation under the instant inquiry which is admittedly initiated on the allegation as stated in the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.05 with regard to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004 rather it may come under the purview of Section 63A of the Registration Act, 1908 and under the provision of Stamp Act, 1899 and thus the said case law is not applicable to the case of the petitioners. It appears from the annexures of the writ petition that the subsequent sale between the petitioners and the Respondent No.4 was also held by a Court of law pursuant to a decree of specific performance of contract and thus there is no scope of taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and stamp fees at all. |
| **8.** | **মোহাম্মদ জহিরুল ইসলাম** বনাম **বাংলাদেশ সরকার ও অন্যান্য**<br><br>(*বিচারপতি মোঃ আশরাফুল কামাল*)<br><br>16 SCOB [2022] HCD 84<br><br>**Key Words**: | নির্ধারিত সময়ের পরে বিকাল ৪.০০ ঘটিকায় ১৯৮ জন যাত্রী নিয়ে বিগত ইংরেজী ০২.০৪.২০১৭ তারিখে বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষের মালিকানাধীন জাহাজ *"ভাষা শহীদ সালাম"*, যাত্রীসহ কুমিরা ঘাট থেকে সন্দীপের গুপ্তছড়া ঘাটের উদ্দেশ্যে যাত্রা শুরু করে এবং সন্ধ্যা ৬.১০ মিনিটে গুপ্তছড়া ঘাটে নোঙ্গর করে। ঘাটের কাছে সাগরের গভীরতা কম থাকায় জাহাজ জেটিতে ভিড়তে পারে না। তাই ঘাটে নামতে লাল বোটে উঠতে | ১। সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক প্রদত্ত মৌলিক অধিকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ (Proved infringement) হলে সাংবিধানিক আদালত তথা হাইকোর্ট বিভাগ সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় ক্ষতিপূরণ প্রদান করতে এখতিয়ারসম্পন্ন।<br><br>২। সাংবিধানিক আদালত তথা হাইকোর্ট বিভাগ কর্তৃক সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় এ অধিকার প্রাইভেট আইন (Private Law)-এ প্রদত্ত ক্ষতিপূরণের দাবী আদায়ের অধিকারের অতিরিক্ত হিসেবে গণ্য হবে। |

# Cases of the High Court Division

| Sl. No. | Name of the Parties and Citation | Summary of the case | Key Ratio |
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| | অনুচ্ছেদ ৩২, বাংলাদেশ সংবিধান; ক্ষতি পূরণ; কঠিন দায়; Strict liability; Vicarious Liability; অবহেলা (Negligence) | হয় যাত্রীদের। তখন সন্ধ্যা হয়ে গেছে। দুটি লাল বোটের সাহায্যে যাত্রী নামানোর পর তৃতীয় বোট যাত্রী নিয়ে যাওয়ার পথে প্রচন্ড ঢেউয়ে বোট ডুবে ১৮ জন যাত্রী মৃত্যুবরণ করে। এই ঘটনায় প্রতিপক্ষগণের দায়িত্বে অবহেলার কারণে ক্ষতিগ্রস্ত পরিবারসমূহকে যথাযথ ক্ষতিপূরণ প্রদানের নির্দেশনা প্রার্থনায় এই রীট পিটিশনটি দাখিল করা হয়। শুনানী অন্তে হাইকোর্ট বিভাগ মত প্রদান করে যে, সংবিধানের ৩২ অনুচ্ছেদে প্রদত্ত বেঁচে থাকার অধিকারের প্রমাণিত হরণ হলে সাংবিধানিক আদালত ক্ষতিপূরণ প্রদান করতে পারে যা প্রাইভেট আইনে দাবী আদায়ের অতিরিক্ত হিসাবে গণ্য হবে। সাংবিধানিক আইনে সরকার বা সরকারী কর্তৃপক্ষ তাদের অধীনস্ত কর্মকর্তা বা কর্মচারীদের দায়িত্বে গাফিলতির জন্য ক্ষতিপূরণ দিতে বাধ্য। তবে সরকার এই সমপরিমাণ টাকা দায়িত্বে গাফিলতির জন্য দায়ী সংশ্লিষ্ট কর্মকর্তা, কর্মচারী এবং ঠিকাদারদের কাছ থেকে আইনগত পদ্ধতিতে আদায় করে সরকারী কোষাগারে জমা দিবেন। হাইকোর্ট বিভাগ এছাড়াও মত প্রকাশ করে যে, ক্ষতিপূরণের আদেশ দেয়ার পরে প্রায়ই দেখা যায় যে, প্রতিবাদীগণ ক্ষতিপূরণের টাকা দিতে কালক্ষেপন করেন। সেজন্য ক্ষতিপূরণের মামলায় ব্যাংক রেট হারে ক্ষতিপূরণের সাথে সুদ প্রদানের বাধ্যবাধকতা থাকা প্রয়োজন। অতপর হাইকোর্ট বিভাগ ৯ দফা নির্দেশনাসহ ১৮টি পরিবারের প্রতিটি পরিবারকে ১৫ লক্ষ টাকা করে ক্ষতিপূরণএবং ক্ষতিপূরণের অতিরিক্ত হিসেবে মামলা দায়েরের তারিখ থেকে শুরু করে ক্ষতিগ্রস্তদের একাউন্টে ক্ষতিপূরণের টাকা জমা হওয়া পর্যন্ত প্রচলিত ব্যাংক রেট তথা ৮% হারে সুদ পরিশোধের জন্য প্রতবিাদীগণকে নির্দেশনা প্রদান করেন। | ৩। সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক পূরণযোগ্য ক্ষতির অপরাধ সংগঠিত হলে ভিকটিম তথা মৃত ব্যক্তির পরিবারের যেকোন সদস্য অথবা তাহাদের পক্ষে যেকোন ব্যক্তি জনস্বার্থে হাইকোর্ট বিভাগে সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় ক্ষতিপূরণ চেয়ে মামলা দায়ের করতে হকদার।<br><br>৪। সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক পূরণযোগ্য ক্ষতির অপরাধ সংশ্লিষ্ট কর্মকর্তা-কর্মচারী কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠান সমূহের কঠিন দায়বদ্ধতা (Strict liability)।<br><br>৫। ১৮টি পরিবারের প্রতিটি পরিবারকে ১৫ লক্ষ টাকা করে মোট ১৮ x ১৫,০০,০০০ = ২,৭০,০০,০০০/= (দুই কোটি ৭০ লক্ষ টাকা মাত্র) টাকা যার অর্ধেক BIWTC (৮নং প্রতিবাদী) এবং অর্ধেক CDC যা ৯নং প্রতিবাদী চেকের মাধ্যমে ক্ষতিগ্রস্থ পরিবারের কাছে অত্র রায় প্রাপ্তির ৩০ কর্মদিবসের মাধ্যমে হস্তান্তর করবে এবং ক্ষতিপূরণের অতিরিক্ত হিসেবে মামলা দায়েরের তারিখ থেকে শুরু করে ক্ষতিগ্রস্থদের একাউন্টে ক্ষতিপূরণের টাকা জমা পর্যন্ত প্রচলিত ব্যাংক রেট তথা ৮% হারে সুদ প্রতিবাদীগণ পরিশোধ করবে।<br><br>৬। দরখাস্তকারী মোঃ জহিরুল ইসলাম এবং বিজ্ঞ এ্যাডভোকেট আব্দুল হালিমকে ক্ষতিগ্রস্ত ব্যক্তিগণের পক্ষে জনস্বার্থে অত্র মামলা দায়েরের জন্য বিশেষ ধন্যবাদ জ্ঞাপন করা হলো।<br><br>৭। অত্র রায় ও আদেশের অনুলিপি বাংলাদেশের সকল পাবলিক ও প্রাইভেট বিশ্ববিদ্যালয়ের আইন বিভাগের চেয়ারম্যান বরাবরে ই-মেইলে এর মাধ্যমে প্রেরণের জন্য নির্দেশ প্রদান করা হলো।<br><br>৮। অত্র রায় ও আদেশের অনুলিপি অধস্তন আদালতের সকল বিচারককে ই-মেইল এর মাধ্যমে পাঠানোর জন্য সুপ্রীম কোর্টের রেজিষ্ট্রার জেনারেলকে নির্দেশ প্রদান করা হলো।<br><br>৯। অত্র রায় ও আদেশের অনুলিপি Judicial Administration Training Institute (JATI)-তে পাঠানোর জন্য সুপ্রীম কোর্টের রেজিষ্ট্রার জেনারেলকে নির্দেশ প্রদান করা হলো। |
| **9.** | **M Nazim Uddin & anr**<br>Vs.<br>**Bangladesh & ors**<br><br>*(Md. Mozibur Rahman Miah, J)* | The petitioners, paternal grandparents of the minor children, filed this Writ petition after death of their son (father of the minors), seeking a direction to produce them before the Court so that the High Court Division can be satisfied that the minors are | **<u>Section 25 and 17 of Guardian and Wards Act, 1890:</u>**<br><br>In this aspect, we have also meticulously gone through the provision employed in section 25 of Guardian and Wards Act, 1890. The |

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| Sl. No. | Name of the Parties and Citation | Summary of the case | Key Ratio |
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| | 16 SCOB [2022] HCD 128<br><br>**Key Words**:<br>Custody of minor children; visitation right; Section 25 and 17 of Guardian and Wards Act, 1890; Article 102 of the Constitution of the People's Republic of Bangladesh; | not being held in their mother's custody without lawful authority. Mother of the minor children contested the Rule and it transpired that between the parties suit for custody of the minor children is pending in Family Court in which Family Court issued various orders providing visitation right to the petitioners. But the claim of the petitioners was that even after such orders by the Court the mother of the minors did not let them to visit the minor children and therefore they were compelled to file the Writ Petition. The High Court Division talking with the minor children found that the minor children enjoy the company of their mother and have very cold relationship with the petitioner no.1. The High Court Division held that in deciding such cases "welfare of the minor" has to be given paramount importance and consequently decided that welfare of the minor children will be best served in the custody of their mother until disposal of the suit for custody pending in the Family Court. But petitioners can visit her house on mutual consent and understanding with the mother of the children and can meet them at any place, date and time on agreement but having no binding effect on the mother. It also directed the Family Court to complete the trial of the family suit expeditiously. | essence of such provision also denotes the welfare of a minor child in case of giving custody of his/her person or property. Section 17(2) of the Act ibid also reiterates the factors to be considered by the court in appointing guardian where in sub-section (3) has vested right upon the court to consider the issue of custody in case the minor is old enough to form an intelligent preference to stay. And that preference is to be assumed by the court considering surrounding circumstance. In both sections only "welfare of the minor" has been given paramount importance. |
| **10.** | **The State & ors**<br>**Vs.**<br>**Md. Rafiqul Islam & ors**<br><br>*(Mohammad Ullah, J)*<br><br>16 SCOB [2022] HCD 138<br><br>**Key Words**:<br>Section 302/34 of Penal Code; Section 342 of Code of Criminal Procedure; Time, place and manner; sufficiency of circumstantial evidence; motive; | In the instant case the dead body of the victim was recovered with a scarf around his neck. 3/4 days earlier a misunderstanding took place between the victim and a local female member and her husband centering their daughter which subsequently took a grave form. A death threat was openly given to the deceased by the accused persons. The informant suspected that the murder was the result of that dispute. The prosecution relied upon the circumstantial evidence. The trial Court found the accused guilty and accordingly sentenced them. The High Court Division, however, found that the prosecution had failed to prove the time, place and manner of and | **<u>The rule as regards sufficiency of circumstantial evidence:</u>**<br>The rule as regards sufficiency of circumstantial evidence to be the basis of conviction is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of his guilt. If the circumstances are not proved beyond reasonable doubt by reliable and sufficient evidence and if at all proved but the same cumulatively do not lead to the inevitable conclusion or hypothesis of the guilt of the accused alone but to any other reasonable hypothesis compatible with the innocence of the accused then it will be a case of no evidence and the accused should be |

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| Sl. No. | Name of the Parties and Citation | Summary of the case | Key Ratio |
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| | | motive for the occurrence and adduced circumstantial evidence could not point to the guilt of the accused beyond any reasonable doubt. Consequently accused persons secured acquittal. | given benefit of doubt. If there is any missing link in the chain of circumstances, the prosecution case is bound to fail. In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond a reasonable doubt. If the witness examined to prove the circumstances are found to be unreliable or their evidence is found to be unacceptable for any other reason the circumstances cannot be said to have been proved and therefore there will be no occasion to make any inference of guilt against the accused. Circumstantial evidence required a high degree of probability, from which a prudent man must consider the fact that the life and liberty of the accused person depend upon his decision. All facts forming the chain of evidence must point conclusively to the guilt of the accused and must not be capable of being explained on any other reasonable hypothesis. Where all the evidence is circumstantial it is necessary that cumulatively its effect should be to exclude the reasonable hypothesis of the innocence of the accused. |
| **11.** | **Md. Shahbuddin Alam**<br>**Vs.**<br>**Bangladesh Bank & ors**<br><br>*(Muhammad Khurshid Alam Sarkar, J)*<br><br>16 SCOB [2022] HCD 151<br><br>**Key Words**:<br>Section 17(8) of the Banking Companies Act, 1991; Section 43 of the Companies Act, 1994; Section 3, 5 and 6 of the Artharin Adalat Ain 2003; Bangladesh Bank Rescheduling Guidelines; Directorship; guarantor; borrower | The petitioner is the Managing Director and shareholder of a Borrower-Company, which borrowed money from a lender Bank. But due to failure of regular payment of the loan money by the Borrower-Company, it accrued a huge amount of loan liability. For rescheduling, the petitioner agreed to deposit a certain amount of money as down payment but did not deposit it fully. In view of such situation, the lender Bank issued a letter to the Borrower-Company represented by petitioner requesting him to deposit rest of the down payment as per Bangladesh Bank requirement contained in Bangladesh Bank Rescheduling Guidelines. But the petitioner did not take any positive step regarding payment of the said down payment. Under such circumstances, the Bangladesh Bank served a notice upon the petitioner asking him to repay the loan availed by the Borrower-Company mentioned in the said notice by and | **<u>Section 17 of the Banking Companies Act:</u>**<br>It is to be noticed from the language employed in sub-Sections 1, 2 & 3 of Section 17 of the Banking Companies Act that vacancy of directorship occurs the moment any of the events enumerated in clauses (a) to (c) of sub-Section 1 of Section 17 of the Banking Companies Act takes place, for, neither any of the sub-Sections of Section 17 of the Banking Companies Act nor any other provisions of the Banking Companies Act seek to halt the proceedings under Section 17 of the Banking Companies Act on the plea of filing a representation to the lender Bank or to the Bangladesh Bank or to any other authority.<br><br>The submissions advanced by the learned Advocate for the petitioner that the petitioner being not the loanee, that is to say that the petitioner being merely a guarantor of the loanee, his directorship in a scheduled Bank should not be taken away by |

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| | | within 2 (two) months with a threat that, in default, the post of the petitioner as a Director of the Mercantile Bank would stand vacated as per Section 17 of the Banking Companies Act. The petitioner then filed an application under section 17(8) of the Banking Companies Act, 1991 read with section 43 of the Companies Act, 1994 in respect of his directorship and shares in the Mercantile Bank Ltd and challenged the propriety and legality of termination of his directorship in the said Bank. The High Court Division after elaborate discussion of the relevant provisions of the Banking Companies Act, 1991 and the Artharin Adalat Ain, 2003 dismissed the petition stating that the directorship of any scheduled bank shall vacant when a director takes loan for himself or stands as a guarantor of another borrower. The court also differentiated between the provisions of Section 17 of the Banking Companies Act and of Section 5 of the Artharin Adalat Ain. The court imposed an exemplary cost for abusing the process of the Court upon the petitioner. | invoking the provisions of Section 17 of the Banking Companies Act, is completely misconceived. The laws herald very stoutly that a Director of any scheduled Bank whenever would be found to be either as the 'defaulter loanee' or as the 'defaulter guarantor', proceedings against the aforesaid Director under Section 17 of the Banking Companies Act would be initiated. |
| **12.** | **The State**<br>Vs.<br>**Rasu Kha**<br><br>*(Shahidul Karim, J)*<br><br>16 SCOB [2022] HCD 161<br><br>**Key Words**:<br>Section 302 of Penal Code; strangulation; drowning; confessional statement; prolonged police custody; time, place, manner; impartial arbiter | In the instant case trial Court handed down death penalty to the accused on the basis of his confessional statement. High Court Division, on the other hand, found the confessional statement untrue inasmuch as medico-legal evidence runs counter to the manner of commission of offence described in confessional statement. High Court Division also found that the learned trial judge had based his findings on some hypotheses not established by evidence on record and contrary to the findings of the post mortem report. Therefore, the High Court Division rejected the death reference and acquitted the accused. | **<u>In a criminal case time, place and manner of occurrence are required to be strictly proved beyond reasonable doubt:</u>**<br>It is to be noted that in a criminal case time, place and manner of occurrence are the 3(three) basic pillars upon which the foundation of the case stand on and the same are required to be strictly proved beyond reasonable doubt by the prosecution in a bid to ensure punishment for an offender charged with an offence. If in a given case any one of the above 3(three) pillars is found lacking or proved to be untrue then it will adversely react upon the entire prosecution story. The same thing has happened in the instant case inasmuch as according to the prosecution story the deceased woman was killed by drowning, whereas as per medico-legal evidence furnished by P.W.11 Dr. Habibur Rahman, the victim was killed by strangulation and thereafter her dead body was abandoned in the water. The inquest-report also does bear out the aforesaid |

# Cases of the High Court Division

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| | | | cause of death of the victim woman. Therefore, it is clear like anything that the prosecution has miserably failed to prove the manner of occurrence of the incident. Viewing from this angle there is no hesitation in saying that the confession alleged to have been made by accused Rasu Kha is not true so far as it relates to the manner of occurrence of the incident in concerned. |
| **13.** | **Abdul Hye & anr**<br>Vs.<br>**The State & anr**<br><br>*(Zafar Ahmed, J)*<br><br>16 SCOB [2022] HCD 178<br><br>**Key Words**:<br>Section 463, 464, 466, 471 and 109 of Penal Code; forgery; abetment; Section 237 and 238 of Code of Criminal Procedure, 1898 | The trial Court found the petitioners guilty under section 466, 468, 471, 420 read with Section 34 of the Penal Code and sentenced them to suffer imprisonment of various length with fine. Appellate Court affirmed the conviction and sentence. On revision, a single Bench of the High Court Division found the petitioners not guilty of forgery but guilty of abetting forgery under section 466/109 of the Penal Code. Charge was not framed against the petitioners under section 466/109 of Penal Code. The High Court Division explaining section 237 and 238 of the Code of Criminal Procedure held that these two sections are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Moreover, the High Court Division found the petitioners guilty under section 471 of the Penal Code but on a different reasoning than that of Courts below. It held that the petitioners used the forged document in Writ Petition No. 9008 of 2005 as Annexure-C which is evident from the judgment passed by the Appellate Division in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340) and as such had committed offence punishable under section 471 of the Penal Code. However, the High Court Division found the petitioners not guilty under sections 468 and 420 of Penal Code. Consequently the Rule was discharged with modification of sentences of the petitioners. | **<u>Section 466 read with Section 109 of the Penal Code:</u>**<br>In the case in hand, the prosecution though failed to prove that the petitioners made the forged government memo, but facts and circumstances clearly point out that they are instrumental in getting the false memo. In such a situation, there is nothing in law to prevent them from being guilty of abetting the offence of making the forged government memo (exhibit-4). Hence, they should be convicted under Section 466 read with Section 109 of the Penal Code, not under Section 466 alone<br><br>**<u>Sections 237 and 238 of the Code of Criminal Procedure:</u>**<br>The petitioners were not charged with abetting the offence. Sections 237 and 238 of the Cr.P.C. are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Accordingly, this Court takes the view that the petitioners are guilty for abetting the offence of making forged government memo. |

# Cases of the High Court Division

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| 14. | **State & anr**<br>Vs.<br>**Md. Mostafa Sarder & anr**<br><br>*(Bhishmadev Chakrabortty, J)*<br><br>16 SCOB [2022] HCD 188<br><br>**Key Words**:<br>Strangulation; hanging; protrusion of tongue; haematoma; ligature mark; Section 45 of the Evidence Act, 1872 | In the instant case the conviction was wholly based on medical evidence, i.e., on the experts' opinion. But the High Court Division found that the medico-legal evidence (autopsy report) was inconsistent with the homicidal death and the report differs from the opinion of renowned authors of forensic experts. High Court Division held that the necropsy report and the evidence of doctor are not a gospel of truth or sacrosanct. These may be scrutinized and rejected by the Court, if found contradictory with the symptoms found on the dead body and oral evidence of witnesses. In the result, it set aside the judgment and order of the trial Court and acquitted the accused. | The prosecution case that the victim was made senseless on torture or murdered earlier and thereafter her body was suspended at the place and in the manner to screen the offence is not at all believable because it is not based on rationality:<br>As per inquest the height between the suspended point and the wooden ceiling was 4½ (four and a half) feet and the victim was 5 (five) feet tall. A rafter (রুয়া) of a tin shed house is one of a series of slopped wooden structural members that extend from the ridge or hip to the wall plate, downslope perimeter or eave and that are designed to support the roof shingles, roof dock and its associated load. As per sketch map, the lower part of the rafters of the occurrence house were slopping and down to the wall plate to fix roof of tin on it which is common in this country. Therefore, in case of self hanging from the rafter, it was possible for the victim to receive a strike/blow on her head from it resulting haematoma and intracranial haemorrhage which has been found in the autopsy. It may be noted here that no other external injury was found on the person of the deceased. If the condemned-prisoner assaulted the victim or strangulated her by force, there could have been some marks of violence or other injuries such as scratch mark on the throat or other parts of the body. It was almost impossible for the condemned-prisoner to take the victim's body on the entresol of the house through a ladder or stair generally used in such a tin shed house after making her senseless. Therefore, the prosecution case that the victim was made senseless on torture or murdered earlier and thereafter her body was suspended at the place and in the manner to screen the offence is not at all believable. It may further be noted here that the doctor found one of the cause of victim's death by strangulation and it was antemortem. If she was hanged after her death as stated in the FIR and found by the trial Judge, the ligature mark found around the neck would be of postmortem, it would not in any case be antemortem. |

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| 15. | **The State**<br>Vs.<br>**Md. Shohag Howlader & anr**<br><br>*(SM Kuddus Zaman, J)*<br><br>16 SCOB [2022] HCD 206<br><br>**Key Words**:<br>Post Mortem Report; Inquest Report; Section 164 of the Code of Criminal Procedure; Section 302 of Penal Code; Confessional statement | In this death reference there was no eyewitness. Prosecution case relied upon two confessional statements made by two accused. In the confessional statements accused claimed that they had caused the death of the victim by strangulation. But the Inquest Report and the Post Mortem Report, though supportive of each other, did not support the statement of the confessing accused. In accordance with the post mortem report the cause of death was hemorrhagic shock. The High Court Division thus believing the confessional statements to be untrue and considering the other evidence adduced against the accused to be insufficient to prove their guilt beyond reasonable doubt, acquitted the accused. | **Section 164 of the Code of Criminal Procedure, 1898:**<br>It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily, truthfulness will be determined by the trial Court: While recording a confessional statement a Judicial Magistrate is not required to investigate as to the truthfulness or correctness of the statement being made before him by the accused. It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily free from any form of coercion or undue influence. Determination of truthfulness or correctness of confessional statement of an accused is the duty of the learned judge of the trial court. The trial Court shall perform above duty by examining the confessional statement in the light of facts and circumstances of the case and by comparing the same with other legal evidence on record. When more than one accused person of a case give separate confessional statements the trial Court shall also examine if above statements are mutually supportive or those suffer from material contradictions. |
| 16. | **City Bank Ltd**<br>Vs.<br>**Court of 1st JDJ & Artha Rin Adalat & anr**<br><br>***(Md. Zakir Hossain, J)***<br><br>16 SCOB [2022] HCD 217<br><br>**Key Words**:<br>Section 33(1) and 33 (4) of the Artha Rin Adalat Ain, 2003; mortgage property; auction sale; functus officio; stare decisis; per incuriam; Section 20, 33(7), 57 of the Artha Rin Adalat Ain, 2003; Right of redemption; foreclosure | After obtaining decree in an Artha Rin case the petitioner- decree holder Bank got a certificate of ownership in respect of mortgaged property issued by the Executing Court. After registration of the certificate of ownership the executing Court disposed of the execution case. Thereafter, the judgment-debtor filed an application to get back the property by depositing the outstanding dues of the decretal amount. Upon hearing, the Executing Court allowed the petition. Challenging the legality and propriety of the said order, the petitioner-decree holder-Bank moved the High Court Division and obtained the Rule. The main argument for petitioner was that after disposing of the execution case the Executing Court has become functus officio and therefore, allowing the application submitted by the judgment-debtor to get back his property was an illegality. The High Court Division | **Section 20, 33(7), 57 of the Artha Rin Adalat Ain, 2003:**<br>The contention of the learned Advocate of the petitioner that upon issuance of the certificate under section 33(7) of the Ain, 2003, the Executing Court has nothing to do but to dispose of the execution case finally is not based on any rationality. For the sake of argument, if the Court becomes functus officio, how later on the Court will entertain another execution case or any other application for handing over possession if it remains with the judgment-debtor. The Court may correct its own mistakes by invoking, the umbrella provision, embodied under section 57 of the Ain, 2003 to do justice and to undo injustice despite the provisions of section 20 of the Ain, 2003. It has to remember that the provisions of section 20 of the Ain, 2003 is neither absolute nor sacrosanct nor untouchable. The parties to the suit cannot and should not suffer for the mistake committed by the Court itself. On perusal of the entire edifice |

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| | | found that the execution case was not legally disposed of, as possession of the mortgaged property had not been made over to the decree holder, therefore, the Court had not become functus officio in entertaining the application filed by the judgment-debtor. Moreover, the petitioner-Bank did not file any mortgage suit to foreclose down the right of redemption of the mortgagor. In such case right of redemption exists unless the mortgaged property is sold on auction or that right is barred by limitation. In the instant case, auction was not held in accordance with law and the mortgaged property was not sold on auction, therefore, the right of redemption of the judgment-debtor was not extinguished. Thereafter, giving twelve points direction the High Court Division discharged the Rule. | of the Ain, 2003, it becomes visible to us that the Code of Civil Procedure, 1908 shall be applicable subject to not being inconsistent with the provisions of the Ain, 2003. The Adalat may review its own order by invoking section 57 of the Ain, 2003 with extreme circumspection in an exceptional case. |

**16 SCOB [2022] AD 1**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Hasan Foez Siddique**
**Chief Justice**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CIVIL PETITION FOR LEAVE TO APPEAL NO.2365 of 2020**
(From the judgment and order dated 10.03.2016 passed by the High Court Division in Writ Petition No.5151 of 2015)

**Government of Bangladesh, represented by the Secretary, Internal Resources Division, Ministry of Finance, Secretariat Building, Ramna, Dhaka and others** **...Petitioners.**

**=Versus=**

**Radiant Pharmaceuticals Ltd., represented by its Managing Director, Masrur Ahmed, son of Late Mahbub Uddin Ahmed, House No.22, Road No.2, Dhanmondi, Dhaka.**

**...Respondent.**

| | | |
|---|---|---|
| For the Petitioners | : | Mr. Sk. Md. Morshed, Additional Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record. |
| For the Respondent | : | Mr. Yousuf Hossain Humayun, Senior Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-on-Record. |

Date of judgment: The 4th January, 2022

## Editors' Note

The respondent, a pharmaceuticals company, filed its Income Tax return upon which the concerned Local Office of the CAG conducted an audit after assessment by the DCT and found some irregularities in respect of assessment of the respondent's income. Accordingly, the audit team submitted report to the Commissioner of Taxes claiming that the government suffered a revenue loss of Tk.1,39,750/- for such irregularities. On the basis of such report, the concerned Inspecting Additional Commissioner issued a notice under section 120 of the Income Tax Ordinance, 1984 upon the respondent. Being aggrieved, the respondent filed a writ petition before the High Court Division and obtained Rule Nisi. The High Court Division made the Rule absolute holding that though it is the power of the CAG or local

office of the CAG to audit on the files in the tax department in order to check the receipts/refunds of public funds, it has got no authority to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. If the auditor is allowed to do so, the entire purpose for incorporating the provisions under Section 120 and/or 121A of the Ordinance will be frustrated. Appellate Division, on the contrary, analyzing article 128 of the Constitution of Bangladesh and section 120 and 163(3)(g) of the Income Tax Ordinance, 1984 set aside the judgment and order of the High Court Division holding that the audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is correct or not and therefore the opinion of the High Court Division is erroneous.

**Key Words**
**Constitution of Bangladesh, article 128; Income Tax Ordinance 1984, sections 120, 121A, 163; Audit Report; Comptroller and Auditor General; Revenue**

**Constitution of Bangladesh, article 128 and Income Tax Ordinance, 1984 section 120 and 163 (3)**
**Whether audit report has any bearing upon the subjective opinion of assessing officer:**

**The Audit Department has been invested with the authority to inspect the accounts of Revenue Department. The Comptroller and Auditor General is authorized to direct any of his officers to conduct audit of tax receipts or refunds under section 163 (3)(g) of the Income Tax Ordinance. The High Court Division has opined that the CAG has got no jurisdiction to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. This view of the High Court Division is erroneous inasmuch as if the audit report does not have any bearing in the subjective opinion of the assessing officer, the very purpose of auditing pursuant to article 128 of the constitution is to be frustrated. If no action can be taken against any irregularities detected through auditing of accounts, auditing itself becomes unnecessary. In the instant case, for example, concerned DCT has allowed financial expenses of an amount of Tk. 575,49,249/- as demanded by the assessee which was not supported by annual report etc. and the audit report has detected this irregularity. If this irregularity as detected by the audit report does not trigger any proceeding under section 120 of the Income Tax Ordinance, 1984, the power conferred to the CAG under section 163(3)(g) of the same Ordinance becomes fruitless.**

**...(Para 14)**

**Income Tax Ordinance, 1984 section 120 and 163 (3)**
**Audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is erroneous or not:**

**Going through the provision of section 120 of the Income Tax Ordinance, 1984 we find that the Inspecting Joint Commissioner may call for and examine the record of any proceeding under this Ordinance if he considers that any order passed therein by the Deputy Commissioner of Taxes is erroneous in so far as it is prejudicial to the interests of revenue. Provisions of section 120 of the Income Tax Ordinance, 1984 read with section 163(3)(f) and(g) of the same Ordinance lead us to irresistible conclusion that**

**audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is erroneous or not. The audit report better equips the Inspecting Joint Commissioner to apply his discretion to detect errors committed by Deputy Commissioner of Taxes. Therefore, the allegation that the auditors of the CAG have acted like supervisory officers of concerned assessing officer is devoid of any substance. ...(Para 15)**

## JUDGMENT

**Hasan Foez Siddique, CJ:**

1. Delay in filing this civil petition for leave to appeal is condoned.

2. This civil petition for leave to appeal is directed against the judgment and order dated 10.03.2016 passed by the High Court Division in Writ Petition No.5151 of 2015 making the Rule Nisi absolute.

3. Facts, necessary for the purpose of disposal of this civil petition for leave to appeal, in a nutshell, are:

The petitioner, being a private Limited Company and engaged in the business of pharmaceuticals, filed its Income Tax return for the assessment year 2011-2012 along with computation of income fully supported by books of accounts audited by an independent and reputed firm of chartered accountants. That, thereupon, after completion of the assessment by the DCT, the concerned Local Office of the Controller and Accountant General (CAG) ( writ-respondent No.6) conducted an audit on the concerned files of the petitioner lying with the tax department, and, in the said audit, some irregularities in respect of assessment of the petitioner's income were detected. Accordingly, the audit team submitted report to the concerned Commissioner of Taxes. It is stated that, on the basis of such report of the local office of the CAG, the concerned Inspecting Additional Commissioner (writ-respondent No.3) issued the impugned notice dated 08.03.2015 purportedly under Section 120 of the Income Tax Ordinance, 1984 asking the petitioner to remain present in a hearing on 24.03.2015 along with the concerned papers and documents contending, *inter alia*, that the proceedings under section 120 were to be initiated pursuant to said audit report on the basis of some allegations, namely that (i) the financial expenses for an amount of Tk.5,75,69,249/- as demanded by the assessee and allowed by the concerned DCT was not supported by annual report etc; (ii)interest expenses for an amount of Tk.58,75,072/- should have been added as income proportionately; (iii) that the amount claimed and shown by the assessee being Tk.10,20,45,202/- on account of marketing and promotional expenses should have been treated as commission and, accordingly, advance income tax was deductable therefrom in view of the provisions under Section 53E of the said Ordinance for an amount of Tk.9,20,45,202/- and (iv) the unsecured loan obtained by the assessee for an amount of Tk.3,72,50,000/- in the income year 2007-2008 having not been returned or refunded within a period of 03(three) years, the same should have been treated as taxable income for the

assessment year 2011-2012,and, on this account, the revenue suffered a loss of Tk.1,39,750/- Pursuant to such notice, the petitioner, vide its letter dated 24.03.2015, sought an adjournment, and, thereafter, vide another letter dated 31.03.2015, sought the copy of the said audit report as referred to in the impugned notice. However, it is stated that, the petitioner did not get any positive response.

4. Being aggrieved by such actions of the writ-respondents, the writ-petitioner filed a writ petition before the High Court Division and obtained Rule Nisi.

5. The Rule was opposed by the concerned Commissioner of Taxes by filing an affidavit-in-opposition.

6. The learned Judges of the High Court Division upon hearing the Rule by the judgment and order dated 10.03.2016 made the Rule absolute.

7. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the writ-respondents as the leave-petitioners filed this civil petition for leave to appeal before this Division.

8. Mr. Sk. Md. Morshed, learned Additional Attorney General, appearing on behalf of the leave-petitioners, submits that the High Court Division has committed an error of law in holding that Comptroller and Auditor-General of Bangladesh (CAG) has no power and no jurisdiction to make any direction for holding audit though the provisions of section 163(3)(f) and (g)of the Income Tax Ordinance,1984 have authorized the Comptroller and Auditor-General of Bangladesh (CAG) to audit the tax receipts. He further submits that this Division in the case of National Board of Revenue, represented by its Chairman, Segunagicha, Ramna, Dhaka and others vs. Singer Bangladesh Limited and others in Civil Petitions for Leave to Appeal Nos.3726, 3728-3729, 3732, 3734, 3736-3745 and 3747 of 2015, observed that the Comptroller and Auditor-General of Bangladesh (CAG) has jurisdiction to direct its officers to audit tax receipts or refunds.

9. Mr. Yousuf Hossain Humayun, learned Senior Advocate, appearing on behalf of the respondents, supporting the impugned judgment and order delivered by the High Court Division submitted that auditors of the CAG had clearly exceeded their jurisdiction by acting like supervisory officers of the concerned assessing officer. When concerned assessing officer allowed some expenses and did not treat some expenses as commissions, the local office of the CAG had expressed the opinion that the DCT should have treated those expenses as commission which indicates that they were in fact not conducting an audit but were performing the functions of either the Commissioner of Tax or Inspecting Joint Commissioner of Taxes under sections 121A and 120 respectively of the Income Tax Ordinance, 1984. Therefore, the proceedings initiated vide impugned notice under section 120 of the Income Tax Ordinance, 1984 suffer from lack of jurisdiction and cannot stand in

the eye of law.

10. We have heard the learned Additional Attorney General appearing for the petitioners and the learned Senior Advocate appearing for the respondent.

11. The moot question in this case as to whether notice issued under section 120 of the Income Tax Ordinance, 1984 pursuant to the audit report of the concerned Local Office of the Comptroller and Auditor-General of Bangladesh (CAG) is lawful or not and whether the Comptroller and Auditor General has any jurisdiction to direct any of his officers to audit tax receipts or refunds.

12. We have gone through the provisions of section 163(3)(f) and (g) of the Income Tax Ordinance,1984. Contents of the said provisions are as follows:

> "163. Statement, returns, etc., to be confidential.-
>
> (1)...
>
> (2)...
>
> (3) The prohibition under sub-section (1) shall not apply to the disclosure of-
>
> (a)...
>
> .....
>
> .....
>
> (f) any particulars to the Comptroller and Auditor-General of Bangladesh for the purpose of enabling him to discharge his functions under the Constitution;
>
> (g) any particulars to any officer appointed by the Comptroller and Auditor-General of Bangladesh or the Board for the purpose of auditing tax receipts or refunds."

13. The above provisions of law self-explanatory and they provide that the Comptroller and Auditor-General of Bangladesh (CAG) has jurisdiction of auditing tax receipts and / or refunds. The High Court Division has held that though it is the power of the CAG or local office of the CAG to audit on the files in the tax department in order to check the receipts/refunds of public funds in view of Clause (g) of sub-section (3) of Section 163 of the said Ordinance and express its opinion in their reports to be submitted before the President for laying down the same before the Parliament in view of the provisions under Article 128 of the Constitution, it has got no authority to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. If the auditor is allowed to do so, the entire purpose for incorporating the provisions under Section 120 and/or 121A of the Ordinance will be frustrated.

14. In NBR vs. Singer Bangladesh and others referred to above, this Division observed that "the audit department has power to inspect the accounts of the Revenue Department since the Auditor General has been invested with such power under article 128 of the

constitution". The Audit Department has been invested with the authority to inspect the accounts of Revenue Department. The Comptroller and Auditor General is authorized to direct any of his officers to conduct audit of tax receipts or refunds under section 163 (3)(g) of the Income Tax Ordinance. The High Court Division has opined that the CAG has got no jurisdiction to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. This view of the High Court Division is erroneous inasmuch as if the audit report does not have any bearing in the subjective opinion of the assessing officer, the very purpose of auditing pursuant to article 128 of the constitution is to be frustrated. If no action can be taken against any irregularities detected through auditing of accounts, auditing itself becomes unnecessary. In the instant case, for example, concerned DCT has allowed financial expenses of an amount of Tk. 575,49,249/- as demanded by the assessee which was not supported by annual report etc. and the audit report has detected this irregularity. If this irregularity as detected by the audit report does not trigger any proceeding under section 120 of the Income Tax Ordinance, 1984, the power conferred to the CAG under section 163(3)(g) of the same Ordinance becomes fruitless.

15. Going through the provision of section 120 of the Income Tax Ordinance, 1984 we find that the Inspecting Joint Commissioner may call for and examine the record of any proceeding under this Ordinance if he considers that any order passed therein by the Deputy Commissioner of Taxes is erroneous in so far as it is prejudicial to the interests of revenue. Provisions of section 120 of the Income Tax Ordinance, 1984 read with section 163(3)(f) and(g) of the same Ordinance lead us to irresistible conclusion that audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is erroneous or not. The audit report better equips the Inspecting Joint Commissioner to apply his discretion to detect errors committed by Deputy Commissioner of Taxes. Therefore, the allegation that the auditors of the CAG have acted like supervisory officers of concerned assessing officer is devoid of any substance.

16. It has been further held in National Board of Revenue vs. Singer Bangladesh and others (supra) that-

> "If the Audit Department finds any irregularity in the process of collection of revenue through cheques, chalans on comparison with other documents and relevant laws, it may ask the Revenue Department to furnish the documents for satisfying itself as to whether the realisation of VAT, Tax etc. is in accordance with law. Therefore, VAT authority has power to issue notice upon any person or organization in any form if it finds that there is evasion of VAT under section 55(1) of the Ain of 1991."

17. The above decision of this Division squarely applies to the case in hand also.

18. In *S. Subramaniam Balaji vs. State of Tamil Nadu and Ors, (2013) 9 SCC 659,* the Supreme Court of India held that the CAG is the constitutional functionary appointed under Article 148 of the Constitution and its main role is to audit the income and expenditure of the Government, government bodies and State run corporations. But in *Association of Unified Tele Services Providers and Ors vs. Union of India, (2014) 6 SCC 110*, question arose as to whether CAG has power and authority to audit the accounts of private telecom licensees because of the fact that licence fee payable under the licence agreement has to be credited into the Consolidated Fund of India in the form of receipts. The Supreme Court of India analysing pertinent constitutional and legislative provisions and case laws ((2013) 9 SCC 659, (2013) 1 SCC 393 and (2013) 7 SCC 1) came to the conclusion that unless the underlying records which are in the exclusive custody of the service providers are examined by CAG it would not be possible to ascertain whether the Union of India, as per the agreement, has received its full and complete share of Revenue, by way of license fee and spectrum charges. The Supreme Court further opined that CAG in that process, is not actually auditing the accounts of the UAS service providers as such, but examining all the receipts to ascertain whether the Union is getting its due share by way of license fee and spectrum charges, which it is legitimately entitled to, by way of Revenue Sharing.

19. The above decision implies that wherever income and expenditure of public money is involved, the CAG has power and authority to conduct audit to ascertain the propriety, legality and validity of it.

20. In view of our decision as referred to above and the provisions of section 163(3)(f) and (g)of the Income Tax Ordinance,1984, we are of the view that the High Court Division was not correct to hold that the proceedings as initiated vide impugned notice under section 120 of the Income Tax Ordinance, 1984 and actions taken pursuant to that notice suffer from lack of jurisdiction.

21. Since both the parties are present in this civil petition and have argued at length before us, we are not inclined to grant leave which will cause delay in disposal of the matter.

22. Accordingly, this civil petition for leave to appeal is disposed of and the impugned judgment and order dated 10.03.2016 passed by the High Court Division in Writ Petition No.5151 of 2015 is hereby set aside.

**16 SCOB [2022] AD 8**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain,**
**Chief Justice**
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CIVIL REVIEW PETITION NO. 404 OF 2019**
(From the judgment and order dated 21.01.2019 passed by the Appellate Division in Civil Petition for Leave to Appeal No.850 of 2018)
**WITH**
**CIVIL REVIEW PETITION NO. 07 OF 2020**
(From the judgment and order dated 25.10.2018 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 2135 of 2018)
**WITH**
**CIVIL REVIEW PETITION NO. 30 OF 2020**
(From the judgment and order dated 25.10.2018 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 2133 of 2018)
**WITH**
**CIVIL REVIEW PETITION NO. 42 OF 2020**
(From the judgment and order dated 25.10.2018 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 2134 of 2018)
**WITH**
**CIVIL REVIEW PETITION NO. 62 OF 2020**
(From the judgment and order dated 25.10.2018 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 2138 of 2018)

**Government of Bangladesh represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Ramna, Dhaka and others : …..Petitioner**
**(In C.R.P.Nos.404/19)**

**Government of Bangladesh represented by the Senior Secretary, Ministry of Public Administration, Secretariat Building, Ramna, Dhaka and others : ..…Petitioner**
**(In C.R.P.Nos. 42 & 30 of 2020)**

**Executive Engineer (Administration) Directorate of Public Works, Dhaka : …..Petitioners**
**(C.R.P.No.07 of 2020)**

**Government of the People's Republic of Bangladesh, represented by the Secretary,**

**Ministry of Public Administration, Secretariat Building, Bangladesh Secretariat, Police Station- Shahbagh,Dhaka** : **…..Petitioner (In C.R.P.No. 62 of 2020)**

**=Versus=**

**Md. Saiful Islam and others** **…..Respondents. (C.R.P.No.404/19)**

**Md. Anwar Hossain and others** **…..Respondents. (C.R.P.No.42/20)**

**Md. Sohidullah and others** **…..Respondents. (C.R.P.No.07/20)**

**Md. Khokon and others** **…..Respondents. (C.R.P.No.30/20)**

**Md. Nur Hosen and others** **…..Respondents (C.R.P.No.62/20)**

| | | |
|---|---|---|
| For the Petitioner (In all the petitions) | : | Mr. A.M. Amin Uddin, Attorney General with Mr. Sk. Md. Morshed, Additional Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record. |
| For the Respondents (In C.R.P.Nos.404/19,42,7 and 30/20) | : | Mr. Murad Reza, Advocate instructed by Mr. Zainul Abedin, Mr. Md. Abdul Hye Bhuiyan, and Ms. Madhu Maloti Chowdhury Barua, Advocate-on-Record. |
| Respondent (In C.R.P.No.62/20) | : | Not represented. |

Date of hearing and judgment : 25.11.2021

## Editors' Note

The respondents are work-charged employees under different government departments who filed different Writ Petitions in the High Court Division and obtained directions upon the writ respondents-petitioners to regularize/absorb their service in the revenue set up. The Government and others preferred different Civil Petitions for Leave to Appeal which were dismissed as being time barred. Thereafter, the government and others filed these review petitions.

Disposing of all the review petitions the Appellate Division observed that the service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit. Citing different measures taken by the different State Governments of India for work-charged employees, the Appellate Division further observed that the Government should formulate a policy instrument for giving pensionary and other benefits to the work-charged employees who have served without break for a considerable period of time i.e for 20 years or more.

**Key Words**
Work-charged employee; daily wage employee; pensionary benefit; regularizing service

**Characteristics of work-charged employees:**
**Work-charged employee is the one who is engaged temporarily and his appointment is made as such, from the very beginning of his employment till the completion of the specified work. Work-charged employees constitute a distinct class and they cannot be equated with any other category or class of employees much less regular employees. Further, the work-charged employees are not entitled to the service benefits which are admissible to regular employees under the relevant rules or policy framed by the employer. ...(Para 11)**

**The service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit:**
**Work-charged employees have not only been deprived of their due emoluments during the period they served on less salary but have also been deprived from the pensionary benefits as if services had not been rendered by them though the Government has been benefitted by the services rendered by them. The concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The concept of equality as envisaged in the constitution is a positive concept which cannot be enforced in a negative manner. Therefore, the service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit, inasmuch as, pension is not a charity, rather, it is the deferred portion of compensation for past service. ...(Para 14)**

**To ensure Socio-economic justice the Government should formulate a policy instrument for giving pensionary and other benefits to the work-charged employees:**
**After receiving continuous service for 20 years from a work-charged employee without break, if he is left in uncertainty over his future, that is wholly denying socio-economic justice and completely contrary to Fundamental Principles of State Policy as enumerated in part II of our Constitution. The Government should formulate a policy instrument for giving pensionary and other benefits to the work-charged employees who have served without break for a considerable period of time i.e for 20 years or more. All the authorities should take immediate appropriate action in that behalf.**
**...(Para 16)**

## JUDGMENT

**Hasan Foez Siddique, J:**

1. Delay in filing these review petitions is condoned.

2. The Government and others have filed Civil Review Petition Nos.42 of 2020, 404 of 2019, 30 of 2020, 07 of 2020 and 62 of 2020. All these review petitions have been heard together and they are being disposed of by this common judgment and order since facts and laws involved in these cases are identical.

3. The respondents as writ petitioners filed different Writ Petitions in the High Court Division and obtained directions upon the writ respondents to regularize/absorb their service

in the revenue set up. The Government and others preferred different Civil Petitions for Leave to Appeal which were dismissed as being time barred. Thereafter, they have filed these review petitions.

4. Mr. A.M. Aminuddin, learned Attorney General appearing for the petitioners in all the petitions, submits that the writ petitioner-respondents are work-charged employees of the Housing and Public Works Department. They have no legal or vested right to be absorbed/regularized in the revenue set up and that the High Court Division exceeded its jurisdiction directing the writ respondent-petitioners to absorb them in the revenue set up. Learned Attorney General, relying upon the decisions in the case of Secretary, Ministry of Fisheries and Livestock and others Vs. Abdul Razzak and others reported in 71 DLR (AD) 395 and BRDB V. Asma Sharif and others reported in 72 DLR(AD) 188, submits that a temporary employee or a casual wage worker if continued for a time beyond the term of his appointment, would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as per Rules. He submits that merely because some others had been regularized does not give any right to the respondents. An illegality cannot be perpetuated.

5. Mr. Murad Reza, learned Advocate appearing for the writ petitioner-respondents in all the review petitions submits that the writ petitioner-respondents have been working for a period of about 30 years and that initially they had been working in Muster Roll basis and, thereafter, they were engaged as work-charged employees for about 20 years and the writ petitioner-respondents have been receiving their salaries in National Pay Scale and that they got time scale as well. In such view of the matter, the High Court Division rightly directed the writ respondent-petitioners to absorb/regularize their service in the revenue set up.

6. From the writ petitions, it appears that all the writ petitioner-respondents initially started work as Muster Roll employees under Housing and Public Works Department and, thereafter, they were appointed as work-charged employees and have been getting salaries in the National Pay Scale. In an office order dated 16.11.2000 (Annexure B to Writ Petition No.9480 of 2013) it was stated that, "প্রধান প্রকৌশলী, গণপূর্ত অধিদপ্তর, ঢাকার স্মারক নং-আর ১৬৮/সিই(৩)/৯৯/৪৮৫/(১৬০) তাং ১৫/১১/২০০০ ইং এর নির্দেশ মেতাবেক অত্র মূল আওতাধীন বিভাগ সমূহে বিভিন্ন পদে নিয়োজিত যে সকল মাষ্টার রোল কর্মচারীর চাকুরী কাল ১৫/১১/২০০০ ইং পর্যন্ত ১৩(তের) বৎসর পূর্ণ হয় তাহাদেরকে নিম্নবর্ণিত শর্ত সাপেক্ষে তাহাদের নামের পার্শ্বে উল্লেখিত পদে জাতীয় বেতন স্কেল/৯৭ এর প্রাপ্য সুবিধাদিসহ সম্পূর্ণ অস্থায়ী মতে কার্যভিত্তিক প্রতিষ্ঠানে আনয়ন করা হইল।" In the said letter it was further stated, "কার্যভিত্তিক কর্মচারীদের নিয়োগ, পদত্যাগ, ছাটাই এবং বেতন ভাতাদি ইত্যাদি সি.পি.ডব্লিউ.ডি কোডের ধারা ১০, ১১ ও ১২ দ্বারা পরিচালিত হইবে।"

7. Clauses 10,11 and 12 of the Central Public Works Department (CPW) Code run as follows:

> "10. Temporary establishment includes all such non-permanent establishment, no matter under what titles employed, as is entertained for the general purposes of a division or sub-division, or for the purpose of the general supervision, as distinct from the actual execution, of a work or works. Work-charged establishment includes such establishment as is employed upon the actual execution, as distinct from the general supervision, of a specific work or of sub-works of a specific project or upon the subordinate supervision of departmental labour, stores and machinery in connection with such a work or sub-works. When employees borne on the temporary establishment are employed on work of this nature, their pay should, for the time being, be

charged direct to the work. The entertainment of work-charged establishment is subject to the rules laid down by the Governor General in respect of the entertainment of temporary establishment generally. If the entertainment of work-charged establishment is contemplated in connection with any work, the cost should invariably be shown as a separate sub-head of the estimate for that work.

11. Members of the temporary and work-charged establishments, who are engaged locally, are on the footing of monthly servants. If they are engaged for a specific work, their engagement lasts only for the period during which the work lasts. If dismissed, otherwise than for serious misconduct, before the completion of the work for which they were engaged, they are entitled to a month's notice or a month's pay in lieu of notice; but, otherwise, with or without notice, their engagement terminates when the work ends. If they desire to resign their appointments they must give a month's notice of their intention to do so, failing which they will be required to forfeit a month's pay in lieu of such notice. The terms of engagement should be clearly explained to men employed in the circumstances mentioned above.

(emphasis supplied)

12. Superintending Engineers and Divisional Officers may, subject to limits of pay of Rs. 250 and Rs. 100 per mensem, respectively, for each post, and to any general or special restrictions which the minor local Government may impose, sanction the entertainment of temporary and work-charged establishment subject to the conditions that, in the case of temporary establishment, provision for the purpose exists in the budget and that, in the case of work-charged establishment, provision for the same has been made in a separate sub-head of the sanctioned estimate. Provided, further, that the pay of no such temporary or work-charged post shall exceed the prescribed rates in cases where such rates have been definitely laid down by a higher authority for any particular class of posts."

8. Mr. Reza relied upon notification of the Ministry of Cabinet Affairs Establishment Division, Regulation wing-1 communicated under memo NO.SGA/RI/IS-33/69/71(350) Date: Dacca, 28 March 1969. In that notification it was stated:

"Sub: **Conversion of temporary posts into permanent ones and contingent and work-charged staff into regular establishment.**

In supersession of all previous orders on the subject noted above, Government have been pleased to decide in consultation with the Finance Department as follows:-

1. All temporary class-III and class-IV posts of permanent nature, which have been in existence for five years or more, may be converted into permanent ones in consultation with the Finance Department.
2. All posts in class-III and class-IV, which are paid from contingency and continuing for ten years or more may be brought into regular establishment in consultation with Finance Department.
3. Fifty percent of the non-gazetted posts in the work-charged establishment existing for ten years or more may be brought into regular establishment in consultant with Finance Department.

All Departments and Directorates are requested to take up the question of converting the temporary posts into permanent ones and bringing the posts

paid from contingency and 50% of the posts in the work-charged establishment into regular establishment on the principle enunciated in items 1, 2 and 3 respectively in consultation with the Finance Department.

9. In the notification communicated under Memo No. Esib/RI/S-46/72/55 dated 21 April 1972 it was stated,

"Sub: **Conversion of temporary posts into permanent ones and contingent and work-charged staff into regular Establishment.**

1. The Government under Memo. No **SGA/R1/1S-33/69/71(350),** dated 28.03.1969 (copy enclosed) issued orders for conversion of certain temporary posts into permanent ones and contingent and workcharged staff into regular establishment. It appears that these decisions have not been fully implemented as a result of which the employees concerned have not yet got the benefit of the said decisions. It has, therefore, been decided that the decisions referred to above should be implemented immediately. It has further been decided that the conversion as decided earlier, of the posts which have been in existence for 5/l0 years or more, should be done with effect from the date the posts were created and the employees should be absorbed against the posts with effect from the date of their appointment. In absorbing the employees the persons who have the longest period of service and are retiring or are on the verge of retirement should be given preference so that they get retirement benefit on retirement under the President's Order No 14 of 1972.

2. The persons who having already retired since the promulgation of the President Order No 14 of 1972 should also be given the benefit of absorption into regular establishment by issue of orders retrospectively and giving retirement benefits provided they had the prescribed length of service.

3. The Ministry of Finance has been consulted."

10. The question is whether the service rendered as daily wage employee and work-charged employee can be absorbed in revenue set up as of right and whether the High Court Division can issue mandamus directing the employer to absorb them in the revenue set up.

11. Work-charged employee is the one who is engaged temporarily and his appointment is made as such, from the very beginning of his employment till the completion of the specified work. Work-charged employees constitute a distinct class and they cannot be equated with any other category or class of employees much less regular employees. Further, the work-charged employees are not entitled to the service benefits which are admissible to regular employees under the relevant rules or policy framed by the employer. In the case of State of Rajasthan V. Kunji Raman reported in AIR 1997 SC 693, it was observed by the Supreme Court of India:

> "A work-charged establishment thus differs from a regular establishment which is permanent in nature. Setting up and continuance of a work-charged establishment is dependent upon the Government undertaking a project or a scheme or a 'work' and availability of fund for executing it. So far as employees engaged on work-charged establishments are concerned, not

> only their recruitment and service conditions but the nature of work and duties to be performed by them are not the same as those of the employees of the regular establishment. A regular establishment and a work-charged establishment are two separate types of establishments and the persons employed on those establishments thus form two separate and distinct classes. For that reason, if a separate set of rules are framed for the persons engaged on the work-charged establishment and the general rules applicable to persons working on the regular establishment are not made applicable to them, it cannot be said that they are treated in an arbitrary and discriminatory manner by the Government. It is well-settled that the Government has the power to frame different rules for different classes of employees."

12. Similarly, in the case of State of Himachal Pradesh V. Suresh Kumar Verma reported in AIR 1996 SC 1565 it was observed,

> "It is settled law that having made rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules.
>
> It is seen that the project in which the respondents were engaged had come to an end and that, therefore, they have necessarily been terminated for want of work. The Court cannot give any directions to re-engage them in any other work or appoint them against existing vacancies. Otherwise, the judicial process would become other mode of recruitment dehors the rules.
>
> .....
>
> Under these circumstances, the view of the High Court is not correct. It is accordingly set aside. It is mentioned that the respondents have become overaged by now. If they apply for any regular appointment by which time if they become barred by age the State is directed to consider necessary relaxation of their age to the extent of their period of service on daily wages and then to consider their cases according to rules, if they are otherwise eligible."

13. The work-charged, daily wage and contingent paid employees are generally hired for a short time to execute a specific work. But quite a large number of such employees have been working for indefinite time spans stretching over years. Since the writ petitioner respondents have been working for a long time, it shows that the posts they were occupying were permanent in nature and not casual or temporary. It further indicates that the services of the respondents are not only required but also beneficial to the department. The persons employed as work-charged employees perform identical functions and discharge their duties as good as men on the regular establishment and, therefore, differential treatment to them may be considered as discriminatory dealings with them. Given the lengths of service actually rendered by them, those posts have to be considered to be of permanent nature.

14. Work-charged employees have not only been deprived of their due emoluments during the period they served on less salary but have also been deprived from the pensionary benefits as if services had not been rendered by them though the Government has been

benefitted by the services rendered by them. The concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The concept of equality as envisaged in the constitution is a positive concept which cannot be enforced in a negative manner. Therefore, the service rendered by work-charged employees for a considerable period, like 20 years or more, may be considered to be permanent employees and they may be qualified for grant of pensionary benefit, inasmuch as, pension is not a charity, rather, it is the deferred portion of compensation for past service. The Supreme Court of India observed in All India Reserve Bank Retired Officers Assn. v. Union of India, 1992 Supp (1) SCC 664 as under:

> "The concept of pension is now well known and has been clarified by this Court time and again. It is not a charity or bounty nor is it gratuitous payment solely dependent on the whim or sweet will of the employer. It is earned for rendering long service and is often described as deferred portion of compensation for past service. It is in fact in the nature of a social security plan to provide for the December of life of a superannuated employee. Such social security plans are consistent with the socioeconomic requirements of the Constitution when the employer is a State within the meaning of Article 12 of the Constitution..."

15. After toiling for the benefit of the government and the people of this country continuously for a considerable amount of time, i.e. for 20 or more years, if the government leave a work-charged employee to face the wrath of unpaid, uncertain and bleak retirement period, and we turn a blind eye to his miserable condition, that would be totally unethical and wholly contrary to constitutional philosophy of socio-economic justice. The Supreme Court of India in Robert D'Souza vs. The Executive Engineer, Southern Railway and another, AIR 1982 SC 854 has observed:

> "We would be guilty of turning a blind eye to a situation apart from being highly unethical, wholly contrary to constitutional philosophy of socio-economic justice if we fail to point out that Rule 2501 which permits a man serving for 10, 20, 30 years at a stretch without break being treated as daily-rated servant, is thoroughly opposed to the notions of socio-economic justice and it is high time that the Railway Administration brings this part of the provision of the Manual, antequarian and antidiluvian, in conformity with the Directive Principles of State Policy as enunciated in Part IV of the Constitution.
>
> .....
>
> ....the appellant, a daily-rated workman, continued to render continuous service for 20 years which would imply that there was work for a daily-rated workman everyday for 20 years at a stretch without break and yet his status did not improve and continued to be treated as daily-rated casual labour whose service can be terminated at the whim and fancy of the local satraps. It is high time that these utterly unfair provisions wholly denying socio-economic

> justice are properly modified and brought in conformity with the modern concept of justice and fair play to the lowest and the lowliest in Railway Administration."

16. We are of the same view that after receiving continuous service for 20 years from a work-charged employee without break, if he is left in uncertainty over his future, that is wholly denying socio-economic justice and completely contrary to Fundamental Principles of State Policy as enumerated in part II of our Constitution. The Government should formulate a policy instrument for giving pensionary and other benefits to the work-charged employees who have served without break for a considerable period of time i.e for 20 years or more. All the authorities should take immediate appropriate action in that behalf.

17. In India in order to protect the interest of the work-charged employees Rules have been framed in different names in different States. For example, rule 2(c) of the Madhya Pradesh (Work Charged and Contingency Paid Employees) Pension Rules, 1979 have given status of a "permanent employee" to a work-charged employee who has completed fifteen years of service in such capacity. Under rule 4 such permanent employees have been given benefit of pension and gratuity available to regular employees of the State under the Madhya Pradesh New Pension Rules, 1951 and the Madhya Pradesh Civil Services (Pension) Rules, 1976. One thing, however, is to be borne in mind that mere attainment of status of a permanent employee by a work-charged employee does not ipso facto make him a regular employee if he is not regularized/absorbed in the revenue set up (See State of Madhya Pradesh and Ors. Vs. Amit Shrivas, AIR 2020 SC 4541: (2020)10 SCC 496). The Chhattisgarh Civil Services (Medical Attendance) Rules, 2013 and the Andhra Pradesh Integrated Medical Attendance Rules, 1972 have included persons employed in the work-charged establishment to be eligible for receiving facilities under these rules. The Orissa Civil Services (Compassionate Grant) Rules, 1964 have been made applicable to all State Government servants including the work charged, job-contract and contingency paid employees other than daily-rated employees. Under these rules the family of a Government servant shall be eligible to "Compassionate Grant" in the event of death of the Government servant while in service.

18. In a welfare State a Government by the people and for the people should not return the work-charged employees at the end of the day with empty hand. A political society which has a goal of setting up of a welfare State, should introduce welfare measure wherein benefit is grounded on "considerations of State obligation to its citizens who having rendered service during the useful span of life must not be left to penury in their old age." It is the obligation of the State to take steps so that their lives do not fall in total ruination. For that reason, separate Rules are required to be framed for the persons who have been working as work-charged employees, if necessary, for protecting their future interest so that they do not fall in total disaster at the end of their work.

19. With the observation made above, all the petitions are disposed of.

**16 SCOB [2022] AD 17**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain,**
**Chief Justice**
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CRIMINAL APPEAL NO.21 OF 2014.**
(From the judgment and order dated 07.05.2013 and 13.05.2013 passed by the High Court Division in Death Reference No. 101 of 2007 with Criminal Appeal No.6843 of 2007 with Jail Appeal Nos.51 and 52 of 2008)

**Md. Mehedi Hasan alias Rajib and another ...Appellants**
**=Versus=**
**The State ...Respondent**

| | | |
|---|---|---|
| For the Appellants | : | Mr. Md. Munsurul Haque Chowdhury, Senior Advocate instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record. |
| For the Respondent | : | Mr. Bashir Ahmed, Deputy Attorney General (with the leave of the Court). |
| Date of hearing and judgment | : | 15.11.2021 |

**Editors' Note**
Two appellants were convicted for commission of offence punishable under sections 302/34 of the Penal Code and they were sentenced to death by the trial Court. The High Court Division confirmed the conviction and sentence awarded by the trial Court. There was a dying declaration made by the victim and recorded by the I/O of the case. The Appellate Division found that both the dying declaration and its contents have been proved by 4 PWs and the testimonies of PW-1 and PW-2 to be corroborative to the dying declaration. The Appellate Division held that the learned Courts below upon proper consideration of the testimonies of the witnesses and dying declaration of the victim found the appellants guilty of the charge levelled against them. However, considering that the appellants are in death cell for about 14 years, it commuted the sentence of the appellants from death to one of imprisonment for life with fine.

**Key Words**
Dying declaration; Section 162 (2) of the Code of Criminal Procedure;

**Evidence Act 1872, section 32(1) read with section 162(2) of Code of Criminal Procedure, 1898**
**Whether a dying declaration recorded by an Investigating Officer is admissible in evidence:**
**In view of the testimonies of the PW-16 S.I. Moazzem Hossain and P.Ws. 4, 5 and 18 we do not find any reason to disbelieve the dying declaration of the victim (exhibit-4). It is**

**true that when a police-officer in course of investigation examines any person supposed to be acquainted with the facts and circumstances of the case, the substance of that examination falls under the category of statement recorded under section 161 of the Code of Criminal Procedure and that statement is not admissible in evidence. But in view of the section 162 (2) of the Code of Criminal Procedure a dying declaration recorded by an Investigating Officer does not lose its special evidentiary value and can be sole basis for awarding conviction. Unlike recording of a confessional statement law does not require that a dying declaration shall be recorded by certain prescribed persons for the very reason that a dying man may not have sufficient time in his hand for his declaration to be recorded by a prescribed person. ...(Para 14)**

## JUDGMENT

**Hasan Foez Siddique, J:**

1. These two appellants, namely, Md. Mehedi Hasan alias Rajib and Md. Shafiqul Islam alias Pappu were convicted for commission of offence punishable under sections 302/34 of the Penal Code and they were sentenced to death by Druto Bichar Tribunal, Rajshahi in Druto Bichar Tribunal Case No.22 of 2007 arising out of G.R. No.631 of 2006 corresponding to Rangpur Kotwali P.S. Case No.18 dated 07.08.2006.

2. Prosecution case as it appears from the testimony of P.W.1 Md. Rabiul Islam, in short, is that the occurrence took place on 06.08.2006 at about 23.15 hours in front of the rented house of the victim Zakir Hossain at Kerani Para, Rangpur. The appellant Mehedi Hasan Rajib had affair with Lovely, younger sister of PW-1. She was given in marriage with him. After marriage, they started their conjugal life. During their conjugal life Mehedi Hasan Rajib used to torture Lovely both mentally and physically. He was drug addicted. On 17.07.2006, Rajib entered his house and scolded Lovely. He also tore off a curtain of the house and smashed few things. Lovely informed this matter to her mother and elder brother Babar. Babar went Kerani Para and finding Rajib there asked about the cause of his such irrational behavior. At this, Rajib got enraged and started speaking abusive language towards him. At that time, victim Md. Zakir Hossain, elder brother of the informant, reached there and slapped Rajib twice. Rajib then threatened victim Zakir of severe consequences. On 06.08.2006, at about 23.15 hours, when Zakir Hossain reached in front of his house by a rickshaw after closing his shop and paid fare of rickshaw, Rajib called him saying that he wanted to talk. When victim Zakir was about to enter into the veranda of his house, Rajib stabbed him from behind. Zakir tried to prevent the attack with his right hand for which his right thumb was severely injured. One unidentified associate of Rajib stabbed Zakir in his chest causing serious cut injury. Then appellant Pappu fired a pistol at the upper side of the left rib of Zakir. At that time Zakir screamed seeking help. PW-1 hearing the scream, rushed to the spot and saw appellants Rajib and Pappu and another unidentified accomplice of them who were fleeing away. Hearing the sound of firing Apel, Babu, Jewel, Azad and many other people immediately rushed to the spot. Victim Zakir then narrated the facts to them and the names of the two appellants, but could not identify the third perpetrator. Victim Zakir was then taken to Rangpur Medical College Hospital by an ambulance. He received primary treatment there but as his condition was deteriorating, doctors referred him to Dhaka Medical College Hospital for better treatment. While he was on the move for Dhaka Medical College Hospital, he succumbed to his injuries. However, victim Zakir gave a dying declaration before his death and that was recorded by Sub-Inspector Moazzem Hossain of Rangpur Kotowali Thana.

3. PW-1 informant Md. Rabiul Islam lodged the FIR at about 04.35 hours on 07.08.2006. Police holding investigation submitted charge sheet against the appellants for commission of offence punishable under sections 302/34 of the Penal Code. The case was ultimately tried by the Druto Bichar Tribunal, Rajshahi.

4. The prosecution examined 19 witnesses in support of its case and defence examined none.

5. From the trend of cross-examination of the prosecution witnesses, it appears that the defence case was of innocence and that the appellants had been implicated in the case falsely.

6. The Tribunal after examining the prosecution witnesses and recording the statements of the appellants under section 342 of the Code of Criminal Procedure and hearing the parties, found the appellants guilty under sections 302/34 of the Penal Code and sentenced them as aforesaid. Against which, the appellants preferred Criminal Appeal No.6843 of 2007 and Jail Appeal Nos.51 and 52 of 2008. The Tribunal sent the case record to the High Court Division for confirmation of sentence of death which was registered as Death Reference No. 101 of 2007.

7. The High Court Division by the impugned judgment and order accepted the death reference and dismissed the criminal appeal and jail appeals. Thus, the appellants have preferred this criminal appeal.

8. Mr. Munsurul Haque Chowdhury, learned Senior Counsel appearing for the appellants, submits that in this case there is no eyewitness of the occurrence and the learned Courts below, mainly relying upon the dying declaration of the victim, convicted and sentenced the appellants. He submits that the order of conviction and sentence as awarded by the learned courts below relying upon the dying declaration is highly inappropriate and that the appellants are entitled to get benefit of doubt. He further submits that the sentence awarded by the trial Court and affirmed by the High Court Division is at any rate too severe. The High Court Division, considering the facts and circumstances of the case, ought to have commuted the sentence of the appellants from death to one of imprisonment for life.

9. On the other hand, Mr. Bashir Ahmed, learned Deputy Attorney General appearing for the State, submits that the instant killing was a pre-planned and pre-concerted murder of an unfortunate victim and before his death the victim vividly described the names of the killers in his dying declaration and P.W.2 wife of the victim in her testimony also stated that she could identify the appellants at the time of occurrence. In such view of the matter, the learned courts below rightly convicted and sentenced the appellants.

10. We have heard the learned Counsel of the appellants and learned Deputy Attorney General on behalf of the respondent and perused the impugned judgment and other materials on record.

11. In the instant case, it appears that the occurrence took place at about 11.25 p.m. on 06/08/2006. Before his death victim Zakir made a dying declaration which was recorded by S.I. Md. Moazzem. The contents of the said dying declaration run as follows:

''১১। ভিকটিমের মৃত্যুকালীন জবানবন্দীঃ

সূত্রঃ- কোতয়ালী থানার জি,ডি নং-৩৫৫ তাং-০৬/০৮/২০০৬ সংক্রান্ত মোঃ জাকির হোসেন ওরফে জামিল পিতা- মৃঃ আব্দুল মজিদ ওরফে মন্টু, সাং-কেরানীপাড়া, কোতয়ালী, রংপুর। পরে কোতয়ালী থানার মামলা নং-১৮ তাং-০৭/০৮/০৬ ধারা-৩০২/৩৪ দঃবিঃ

আমি ০৬/০৮/০৬ তাং রাত ১১.২৫ সময় বাড়ীতে ফিরছিলাম। এমন সময় রাজীব ডাক দেয়। পাশ থেকে পাপ্পু বাহির হয়ে ফায়ার করে ছোট পিস্তল দিয়ে। রাজীব লম্বা ছোরা দ্বারা চোট মারে। আমার চিৎকার শুনে আমার স্ত্রী গেট খুলে বের হয় এবং দেখে।

| উপস্থিত স্বাক্ষী | লিপিবদ্ধকারী |
|---|---|
| ১। মোঃ শহিদুল ইসলাম মিজু<br>পিঃ আঃ মতিন সরকার<br>কলেজ রোড়, হাবিব নগর<br>রংপুর | মোঃ মোয়াজ্জেম হোসেন<br>এস,আই<br>০৭/০৮/০৬<br>০০.৫০মিঃ |
| ২। মোঃ সুলতান আলম বুলবুল<br>পিতা-মরহুম ইউসুফ উদ্দিন<br>জেলরোড়-রংপুর। | |

আমার সম্মুখে উপরোক্ত জবানবন্দি লিপিবদ্ধ করা হইল।"

12. In his testimony PW-16 S.I. Md. Moazzem Hossain, who was the Investigating Officer of the case, stated that on 07.08.2006 he recorded the dying declaration of victim Zakir in presence of Dr. A. Mannan and other witnesses. He proved the said dying declaration (exhibit-4) and his signature on it (exhibit-4/3). P.W.4 Shahidul Islam Mizu was present at the time of recording the dying declaration of the victim. In his testimony PW-4 stated that the police recorded the dying declaration of the victim in which Zakir alias Jamil stated that when he was returning his house and reached in front of it, Rajib called him. Accordingly, he stopped. Rajib then inflicted a 'knife' blow upon him. He tried to prevent this blow with his right hand and in consequence his right thumb was severely cut. At that time, Pappu shot him with a pistol. Jamil raised alarm and his wife rushed to the place of occurrence and found the appellants fleeing away. PW-4 proved his signature in the dying declaration which was marked as exhibit 4/1. P.W.5 Md. Sultan Alam is also a witness in the dying declaration. He said in his testimony that he was present at the time of recording of dying declaration of victim Zakir Hossain alias Jamil. In his testimony he gave identical statement that victim Jamil said that while he was returning home Rajib stopped him in front of his house and inflicted a 'knife' blow on his person. He tried to prevent it for which his right thumb was cut. At that time Pappu shot him. This witness proved his signature in the said dying declaration which was marked as exhibit-4/2.

13. P.W.18 Dr. Khandker A. Mannan, in his testimony stated that at the time of recording dying declaration of the victim, he was present and hearing the declaration as recorded by the S.I. Moazzem Hossain he put his signature on it (exhibit-4/4).

14. In view of the testimonies of the PW-16 S.I. Moazzem Hossain and P.Ws.4, 5 and 18 we do not find any reason to disbelieve the dying declaration of the victim (exhibit-4). It is true that when a police-officer in course of investigation examines any person supposed to be acquainted with the facts and circumstances of the case, the substance of that examination falls under the category of statement recorded under section 161 of the Code of Criminal Procedure and that statement is not admissible in evidence. But in view of the section 162 (2) of the Code of Criminal Procedure a dying declaration recorded by an Investigating Officer does not lose its special evidentiary value and can be sole basis for awarding conviction. Unlike recording of a confessional statement law does not require that a dying declaration shall be recorded by certain prescribed persons for the very reason that a dying man may not have sufficient time in his hand for his declaration to be recorded by a prescribed person.

15. This Court in the case of **Nurjahan Begum vs. The State** reported in **42 DLR (AD) 130** held that the statement of a person about the cause of his death or circumstances leading to his death is substantive evidence under section 32 (1) of the Evidence Act, and if by careful examination it is found to be reliable, then it may by itself be the basis for conviction even without corroboration.

16. In the instant case, both the dying declaration and its contents have been proved by PWs.4, 5, 16 and 18. Furthermore, it appears from the testimonies of PW-1 informant Md. Rabiul Islam and P.W.2 Most. Ishrat Jahan, wife of the victim, that hearing outcry both of them rushed to the place of occurrence and found the appellants fleeing away. Testimonies of these two witnesses corroborated the dying declaration. We do not see any reason to disbelieve the testimonies of these witnesses. The learned Courts below upon proper consideration of the testimonies of PWs. 1, 2, 4, 5, 16 and 18 and dying declaration of the victim Zakir found the appellants guilty of the charge levelled against them.

17. Mr. Munusurul Haque Chowdhury, learned Senior Counsel, lastly submits that considering the facts and circumstances of the case and that the appellants are in death cell for about 14 years the sentence awarded to them may be commuted to imprisonment for life. We find force in the submissions made by Mr. Chowdhury.

18. Accordingly, the appeal is dismissed. The judgment and order of conviction awarded by the trial Court and affirmed by the High Court Division is hereby maintained. However, the sentence of the appellants is commuted from death to one of imprisonment for life and they are ordered to pay a fine of Tk.50,000/- each, in default, to suffer rigorous imprisonment for 1 (one) year more. The appellants shall get benefit of section 35A of the Code of Criminal Procedure in calculation of their sentence and other remissions as admissible under the Jail Code.

19. The Jail Authority is directed to shift the condemned prisoners from death cell to normal cell for serving out rest of their sentence.

**16 SCOB [2022] AD 22**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain, Chief Justice.**
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Abu Bakar Siddiquee**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CRIMINAL APPEAL NO.27 OF 2016 WITH JAIL PETITION NO.09 OF 2014**
(From the judgment and order dated the 25th day of February, 2014 passed by the High Court Division in Death Reference No.86 of 2008 with Jail Appeal No.865 of 2008).

**Md. Abdul Awal Khan** **……Appellant/Petitioner (In both the cases)**

**-Versus-**

**The State** **…… Respondent (In both the cases)**

| | |
|---|---|
| For the Appellant/Petitioner (In both the cases) | Mr. Md. Helal Uddin Mollah Advocate, instructed by Syeda Maimuna Begum, Advocate–on-Record |
| For the Respondent (In both the cases) | Mr. A.M. Amin Uddin Attorney General with Mr. Biswajit Deb Nath Deputy Attorney General Instructed by Mr. Haridas Paul and Ms. Shirin Afroz Advocates–on-Record |
| Date of Hearing | The 7th & 13th day of July, 2021 |
| Date of judgement | The 14th day of July, 2021 |

**Editors' Note**
In the instant case the wife of the Appellant Awal Khan found dead at his dwelling house and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. There was no eyewitness of the occurrence. Trial Court believing the statement of P.Ws. 1, 4, 5 and 6 that the appellant confessed his guilt before them and accordingly the *chen dao* which was allegedly used to murder the victim was recovered from his shop, convicted the accused and sentenced him to death. High Court Division confirmed the death sentence of the appellant.

The Appellate Division, however, by majority decision came to the conclusion that the extrajudicial confession allegedly made by the appellant is inadmissible in evidence inasmuch as that was made in presence of police; that the recovery of the *dao* at the pointing out of the appellant is admissible evidence in view of section 27 of the Evidence Act but there was no legal evidence on record to show that the said *dao* was used to deal the blows upon the victim; that the appellant used to stay in his shop at night and nobody saw him staying with his wife at the night of occurrence and therefore he does not require to explain as to how his wife met her death and the incriminating evidence in the depositions of the prosecution witnesses being not placed before the appellant in accordance with law the examination of the appellant under section 342 of the Code of Criminal Procedure was not lawfully done by the trial Court and as such, the trial was vitiated. Honorable Chief Justice Mr. Justice Syed Mahmud Hossain, however, differed with the majority in above mentioned points except the point of admissibility of extra judicial confession in presence of police. Consequently the appellant was acquitted.

**Key Words**
**Section 342 of Code of Criminal Procedure, 1898; Section 24 and 27 of Evidence Act, 1872; Wife killing case; Extra judicial confession**

**Minority View**

**Per Mr. Justice Syed Mahmud Hossain, CJ:**

**Burden of proof in wife killing case:**
**What is more surprising to note here is that the appellant has not provided any reasonable explanation as to the cause of the death of his wife although in wife killing case, the condemned-appellant is under the obligation to do so. He has given all contradictory suggestions to the witnesses imputing allegations that the victim was a lady of lose character having illicit connection with others. In a misogynistic society, character assassination of women is a regular feature. In the case in hand even after death victim's soul will not rest in peace because her two sons will know that their mother was a lady of questionable character. The condemned-appellant has failed to discharge his obligation by not explaining the cause of death of his wife in his house.**
**...(Paras 22 and 23)**

**Sections 24 and 27 of the Evidence Act, 1872:**
**It is of course true that the extra judicial confession made by the appellant before the witnesses in presence of the police is not admissible. But the fact remains that the chen/dao was recovered by the police from ceiling of the shop of the appellant at his instance in presence of the witnesses. Such recovery is admissible under section 27 of the Evidence Act. ...(Para 25)**

**Section 342 of Code of Criminal Procedure, 1898:**
**When a literate accused person re-calling witnesses cross-examine them, he is not at all prejudiced by minor defects in recording his statement under section 342 of the Code of Criminal Procedure:**
**Having gone through statement recorded under section 342 of the Code of Criminal Procedure, I find that the statement was not recorded specifying the evidence adduced by individual witnesses but it cannot be said that the appellant was prejudiced in any way by such minor omission because he is a literate person and at his instance P.Ws.5, 6**

**and 7 were recalled. After recalling the aforesaid witnesses they were again cross-examined none other than by the appellant himself. Therefore, I am of the view that the condemned-appellant being a literate person and the witnesses having been examined in his presence, he was not at all prejudiced by such a minor defect in recording his statement under section 342 of the Code of Criminal Procedure. ...(Para 32)**

**Majority Decision**

**Per Mr. Justice Muhammad Imman Ali, J Honorable Author Judge of the Majority Decision:**

**Section 342 of Code of Criminal Procedure, 1898:**
**We also find some merit in the submission of the learned Advocate appearing on behalf of the appellant that the examination of the appellant done by the trial court under section 342 of the Code of Criminal Procedure was not conducted properly as the incriminating evidence in the depositions of the prosecution witnesses were not placed before the appellant in accordance with law. Hence, we are of the opinion that the examination of the appellant under section 342 of the Code was not lawfully done by the trial Court. So, the trial conducted by the court below is liable to be vitiated.**
**...(Para 53)**

**Section 24 of the Evidence Act, 1872:**
**The learned trial Judge appears to have taken into consideration the alleged admission by the appellant in presence of P.Ws 2,3,4 and 5 but failed to appreciate that if there was such an admission, it was made when the appellant was accompanied by the police and hence inadmissible under section 24 of the Evidence Act. The conviction and sentence were thus not based on legal evidence. ...(Para 63)**

**Section 106 of the Evidence Act, 1872:**
**With regard to the victim's death while in the custody of her husband, the evidence on record shows that the appellant used to stay at his shop. There was no evidence that on that night he was sleeping in his own house. Hence, there is sufficient explanation from the appellant that he was not present in the house when his wife was attacked, and provision of section 106 of the Evidence Act are not applicable in the facts of the instant case. ...(Para 64)**

## JUDGMENT

**Syed Mahmud Hossain, CJ: (Minority view)**

1. I have had the advantage of going through the judgment written by my brother Muhammad Imman Ali,J. and I respectfully differ with the findings and decision arrived at by him. Therefore, I have decided to write a separate judgment.

2. This criminal appeal is directed against the judgement and order dated 23, 24 and 25.02.2014 passed by the High Court Division in Death Reference No.86 of 2008 heard along with Jail Appeal No.865 of 2008 confirming the death sentence passed by the learned Additional Sessions Judge, First Court, Gazipur by the judgment and order dated 20.08.2008 in Sessions Case No.3 of 2005 arising out of Kaligonj Police Station Case No.7 dated 16.07.2004 corresponding to G.R. No.278 of 2004 under section 302 of the Penal Code.

3. The facts leading to the filing of this criminal appeal, in brief, are:

The informant's daughter Nargis was given in marriage to condemned-appellant Awal Khan about 8 years back. The couple was blessed with 2 children. The condemned-appellant, Awal Khan had a stationery shop half a mile away from his house and used to sell mobile phones and other articles. Condemned-Appellant Awal Khan was in Saudi Arabia for 6 years. He returned and opened several businesses. On many occasions he used to sleep in his shop at night. On 16.07.2004 at about 6 A.M. the informant got news that his daughter had been murdered in her husband's house. Getting this news, the informant along with his wife went to the house of the appellant and found the dead body of their daughter in her room. As per the statement made in F.I.R. the Condemned-appellant Awal Khan was in his shop, and he came to his house at 4 A.M. and saw his wife dead and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. Informant Ibrahim Dewan lodged FIR with Kaligonj Police Station, Gazipur, on 16.07.2004 stating that the murder was committed by unknown persons.

4. Police after investigation prima facie found the appellant involved with the murder and submitted charge sheet against him under section 302 of the Penal Code.

5. After the framing of charge learned Additional Sessions Judge, First Court, Gazipur, held the trial, examined 7 witnesses, and upon assessing the evidence found the appellant guilty under section 302 of the Penal Code and sentenced him to death.

6. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was registered as Death Reference No.86 of 2008.

7. Before the High Court Division, Jail Appeal No.865 of 2008 was preferred by condemned prisoner Md. Abdul Awal Khan, which was heard along with the death reference.

8. By the impugned judgment and order of conviction and sentence, the High Court Division accepted the reference and dismissed the jail appeal, and thereby maintained the judgment and order of conviction and sentence passed by the trial Court in Sessions Case No.3 of 2005.

9. Being aggrieved by and dissatisfied with judgment and order of conviction and sentence passed by the High Court Division, the condemned-appellant preferred Criminal Appeal No. 27 of 2016 and also filed Jail Petition No.9 of 2014 before this Division.

10. The instant criminal appeal and jail petition were heard by this Division using virtual means under the provisions of the আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০।

11. Mr. Helal Uddin Mollah, learned Advocate, appearing on behalf of the condemned-appellant submits that the circumstantial evidence is not knitted together to sustain the conviction and as such the judgment and order passed by the High Court Division should be set aside. He then submits that there is no eye-witness to the alleged occurrence and the prosecution depends on the circumstantial evidence. He further submits that the High Court Division on misreading and non-reading of evidence, non-consideration of materials on record and misconstruction of law, facts and circumstances of the case most illegally upheld the judgment and order passed by the trial Court confirming the death sentence and as such

the impugned judgment and order should be set aside. He further submits that the examination of the condemned-appellant under section 342 of the Code of Criminal Procedure was not in accordance with law. The depositions of the witnesses were placed in lump before the condemned-appellant without specifying the names of the witnesses and as such, the impugned judgment and order should be set aside. He then submits that the seized chen/*dao* did not contain blood stain and does not connect the condemned-appellant with the murder and as such the judgment and order passed by the High Court Division is liable to be set aside. He lastly submits that there is no place of occurrence marked in the sketch map and index in the investigation report submitted by the Investigating Officer which creates doubt about the place of occurrence and as such the judgment and order is liable to be set aside.

12. Mr. A.M. Amin Uddin, learned Attorney General, appeared on behalf of the State-respondent but no concise statement was filed on behalf of the respondent. According to Order XIX, rule 3 of the Supreme Court of Bangladesh (Appellate Division) Rules,1988 no submission could be advanced on behalf of the respondent if he does not submit concise statement but Sub-article (3) of article 64 of the Constitution provides that in performance of his duties, the Attorney General shall have the right of audience in all courts of Bangladesh. Therefore, the Appellate Division Rules cannot preclude the learned Attorney General from appearing in this appeal. The learned Attorney General submits that admittedly deceased Nargis was murdered in the house of her husband condemned-appellant Awal Khan who was under the obligation to explain the cause of her death. But no reasonable explanation was furnished by her husband Awal Khan and contradictory defence case was made out during trial and as such, the order of conviction and sentence should be maintained. He further submits that chen/*dao* alleged to have been used while murdering the deceased Nargis was recovered from the bamboo made ceiling of the shop of the appellant and that the condemned-appellant brought out the chen/*dao* from ceiling of the shop in presence of the witnesses. He continues to submit that the condemned-appellant did not explain why the chen/*dao* borrowed by the condemned-appellant from P.W.2, Md. Osman Gani, the Immam of the Mosque adjacent to his shop was kept on the ceiling. He further submits that P.W.2, Md. Osman Gani, the Immam of the Mosque was independent and disinterested witness and his evidence should not be discarded very lightly. He lastly submits that though the statement of the appellant under section 342 of the Code of Criminal Procedure was not recorded properly, the condemned-appellant being a literate person and being present before the Court had the opportunity to hear the evidence of the witnesses and therefore, such defect has not prejudiced the condemned-appellant in any way.

13. We have considered the submissions of the learned Advocate for the condemned-appellant and the learned Attorney General for the State-respondent, perused the impugned judgment and the evidence on record. Admittedly, the deceased Nargis was done to death in the residence of her husband condemned-appellant Awal Khan. It is also true that there is no eye-witness to the occurrence. But the fact remains that the occurrence took place in the house of the condemned-appellant Awal Khan and it is not expected that, even if, the inmates had witnessed the occurrence, they would come forward to depose against the appellant Awal Khan. The informant stated in the FIR that the appellant was in his shop during the time of occurrence and he did not disclose any suspicion about the appellant's involvement in the occurrence but P.W.2, the Immam of the Mosque in no uncertain terms stated that on the night of the occurrence, the condemned-appellant was in his house and the police arrested him from there. In cross-examination, he denied the suggestion as under:

> "আসামী রাতে দোকান হইতে আসিয়া ঘর দরজা ভাংগা দেখিয়া আওয়াল ডাকাতির কথা বলে এবং ডাকাতরা তার বউকে মারিয়া যায় কথা আওয়াল বলে-তা সত্য না।"

14. The Mosque is adjacent to the shop of the condemned-appellant and as such, P.W.2, the Immam of the Mosque is the most competent witness to say whether the condemned-appellant on the night of occurrence was in the shop or not.

15. The police went to the shop of the condemned-appellant accompanying him and the condemned-appellant himself unlocked his shop and brought out the dao/chen from the ceiling of the shop in presence of P.W.3 Afzal, who identified the dao/chen and he also put his signature on the seizure list.

16. P.W.4, Abul Kashem Moral also stated that police came to the shop of Awal Khan along with him who opened the door and brought out the chen/dao from ceiling of the shop. He identified the chen/dao and put his signature on the seizure list (exhibit-2) and his signature thereon as exhibit-2/1.

17. P.W.5, Md. Mozammel Hoque Master also stated that police seized chen/dao which was produced by Awal Khan and that it was about 12½ inch long including the handle and the 'chen' was about 7 inch long excluding the handle. This witness stated that the police prepared the seizure list of the chen/dao and he also proved the seizure list (exhibit-3) and his signature thereon as 3/1. Therefore, the prosecution was able to prove beyond reasonable doubt that the chen/dao which was borrowed by the condemned-appellant from P.W.2, the Immam of the Mosque, was brought out by the condemned-appellant himself from the ceiling of his shop.

18. It is contended that the chen/dao did not contain any blood stain and that the tip of the chen/dao was broken and it contained soil on its body.

19. The condemned-appellant is not such a fool that he would keep the doa/chen on the ceiling of his shop containing blood stain. Therefore, it is apparent that prior to keeping it on the ceiling he had cleaned the chen/dao.

20. P.W.7, Dr. Md. Salman found 7 injuries on the body of the deceased. Five of those injuries were bone deep cut injuries and two other injuries were penetrating injuries measuring 4 cm and 5 cm deep. Suggestion was made to P.W.7 that more than one person and more than one weapon was involved in the attack upon the victim, to which he replied that he did not know.

21. Admittedly, a *chen/dao* is a sharp cutting weapon and that the injuries inflicted on the deceased were bone deep cut injuries and as such, the tip of the chen was broken. Before breaking of the tip of the chen, it is possible to make penetrating injuries measuring 4 cm and 5 cm deep. No question was put to P.W.2, the Immam of the Mosque, that when the chen was borrowed from him, whether the tip of the chen was broken or not. Therefore, it can be concluded that the appellant borrowed the chen when the tip of the chen was not broken. The appellant has not explained why the chen was kept on ceiling of the shop which is not normally done. No explanation was given why the chen was hidden on the ceiling. Normally it is kept in a place accessible for its use.

22. What is more surprising to note here is that the appellant has not provided any reasonable explanation as to the cause of the death of his wife although in wife killing case, the condemned-appellant is under the obligation to do so. He has given all contradictory

suggestions to the witnesses imputing allegations that the victim was a lady of lose character having illicit connection with others. In a misogynistic society, character assassination of women is a regular feature. In the case in hand even after death victim's soul will not rest in peace because her two sons will know that their mother was a lady of questionable character.

23. The condemned-appellant has failed to discharge his obligation by not explaining the cause of death of his wife in his house.

24. In this connection reliance may be placed on the case of *Depok Kumar Sarkar vs. State ,40 DLR (AD)139* where it has been held at para 17 that the deceased was admittedly living with the appellant at the relevant time and thus he was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial. The consideration is bound to be different in a case like this.

25. It is of course true that the extra judicial confession made by the appellant before the witnesses in presence of the police is not admissible. But the fact remains that the chen/dao was recovered by the police from ceiling of the shop of the appellant at his instance in presence of the witnesses. Such recovery is admissible under section 27 of the Evidence Act.

26. As regards recovery of chen/dao at the instance of the condemned-appellant from the ceiling of his shop, I would like to rely on the case of *Abdus Samad Vs. The State, (1964)16 DLR (SC)261.* It has been held in the above case that the remains of the dead body were found from a very lonely place where no person would ordinarily go to search for clues to the child missing from the town four miles away, a reason has to be found why the police went to that place at all, and no other reason is offered than that the accused himself led them to that place.

27. In the case of *Khalil Mia Vs. State (1999)4 BLC (AD)223,* it has been held that at the showing of the accused some wearing apparels were recovered from a ditch behind BBI Jute Mills and that the condemned-prisoner himself recovered the articles getting down to the ditch while in police custody. The recovery of other wearing apparels and toiletries of the deceased at the showing of the condemned-prisoner while in police custody leads to the irresistible conclusion that the condemned-prisoner had the most intimate relationship with the deceased and that wearing apparels and toiletries of the deceased must have been either in the possession of the condemned-prisoner or within his knowledge as to where those articles were. These recoveries are admissible in evidence under section 27 of the Evidence Act.

28. Relying on these cases cited above, I am of the view that the recovery of chen/dao by the condemned-appellant is a relevant fact and is admissible under section 27 of the Evidence Act. This piece of evidence also supports the other evidence on record.

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

30. Mr. Md. Helal Uddin Mollah, learned Advocate for the condemned-appellant, submits that statement of the condemned-appellant under section 342 of the Code of Criminal Procedure was not recorded in accordance with law and such defect is not curable and as such, the condemned-appellant is entitled to be acquitted of the charge levelled against him.

31. In the case in hand, 342 statement was recorded twice one on 07.05.2008 and the other on 24.06.2008 which was the actual 342 statement of the condemned-appellant under the Code of Criminal Procedure. The 342 statement is quoted below:

"আপনার বিরুদ্ধে রাষ্ট্রপক্ষের অভিযোগ এই যে, আপনি গত ইং ১৬/৭/০৪ তারিখ রাতে গাজীপুর কালীগঞ্জ থানাধীন সাইলদিয়া গ্রামের আপনার বসত ঘরে আপনার স্ত্রী নারগীসকে ছেনদা দ্বারা কোপাইয়া নির্মমভাবে খুন করিয়াছেন। এ ব্যাপারে মৃতার পিতা থানায় এজাহার করিলে পুলিশ মামলাটি তদন্ত করিয়া আপনার বিরুদ্ধে আনীত অভিযোগ প্রাথমিকভাবে প্রমানিত হইলে দন্ড বিধি ৩০২ ধারায় অভিযোগ পত্র দাখিল করে। তদন্তকালে আপনি উক্ত খুনের ঘটনার সাথে নিজের সম্পৃক্ততার কথা পুলিশের নিকট স্বীকার করিয়াছেন।

পরে মামলাটি অত্রাদালতে বদলী হইলে একই ধারায় চার্জ গঠন করিয়া উহা প্রকাশ্য আদালতে পাঠ ও ব্যাখ্যা করিয়া আপনাকে শুনানো হইলে আপনি নিজেকে নির্দোষ দাবী করেন এবং বিচার প্রার্থনা করেন। তৎপ্রেক্ষিতে রাষ্ট্রপক্ষ আপনার বিরুদ্ধে আনীত অভিযোগ প্রমানার্থে ৭ জন সাক্ষীকে আদালতে হাজির করিয়া তাহাদের জবানবন্দি রেকর্ড করে এবং আপনার পক্ষ থেকে সাক্ষীদের জেরা করা হয়। সাক্ষ্য গ্রহণ শেষে যথাযথ পদ্ধতি অনুসরণ পূর্বক গত ৭/৫/০৮ ইং তারিখে আপনাকে ফৌজদারী কার্যবিধির ৩৪২ ধারায় পরীক্ষা করা হয়। জবাবে আপনি নির্দোষ দাবী করিয়া পি, ডব্লিউ-৫ মোঃ মোজাম্মেল হক মাষ্টার, পি, ডব্লিউ-৬ নং মোঃ আবু বকর সিদ্দিক ও পি, ডব্লিউ-৭ ডাঃ মোহাম্মদ সালমান কে রিকল করতঃ পুনরায় জেরা করার সুযোগ প্রার্থনা করেন। আদালত আপনার প্রার্থনা মঞ্জুর পূর্বক উল্লেখিত সাক্ষীদের রিকল করে এবং আপনার পক্ষ থেকে উক্ত সাক্ষীদের জেরা করা হইয়াছে। আপনি আদালতে উপস্থিত থাকিয়া সাক্ষীদের জবানবন্দি ও জেরা শুনিয়াছেন। সাক্ষীরা আপনি উক্ত হত্যাকান্ড সংগঠিত করিয়াছে বলিয়া সুনির্দ্দিষ্ট এবং সুস্পষ্টভাবে সাক্ষ্য প্রদান করিয়াছেন। এখন আপনার বিরুদ্ধে আনীত অভিযোগ এবং গৃহীত সাক্ষ্যের ভিত্তিতে-

প্রশ্নঃ- আপনার জবাব কি?

উত্তরঃ- নির্দোষ।

প্রশ্নঃ- আপনি সাফাই সাক্ষী দিবেন?

উত্তরঃ- না।

প্রশ্নঃ আপনি লিখিত বা মৌখিকভাবে কিছু বলবেন কি?

উত্তরঃ না।"

32. Having gone through statement recorded under section 342 of the Code of Criminal Procedure, I find that the statement was not recorded specifying the evidence adduced by individual witnesses but it cannot be said that the appellant was prejudiced in any way by such minor omission because he is a literate person and at his instance P.Ws.5, 6 and 7 were recalled. After recalling the aforesaid witnesses they were again cross-examined none other than by the appellant himself. Therefore, I am of the view that the condemned-appellant being a literate person and the witnesses having been examined in his presence, he was not at all prejudiced by such a minor defect in recording his statement under section 342 of the Code of Criminal Procedure.

33. In this connection reliance may be placed on the case of The *State vs Md. Zakir Hossain (2018)23 BLC (AD)150* where Muhammad Imman Ali,J. stated in paragraph 21 as under:

> "An issue was raised by the advocate for the respondent, Rayhan that his attention was not drawn to his confessional statement when he was examined under section 342 of the Code. In this regard the fundamental issue is whether the accused was

> prejudiced by the omission to bring to his notice the fact that he had made a confessional statement implicating himself in the offence charged. The High Court Division considered several decisions where it had been held that "incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 of the CrPC otherwise it would cause a miscarriage of justice". The learned Advocate for the appellant has referred to the decision in the case of Mezanur Rahman vs State, 2 BLC (AD) 27, where it was held that the accused was aware of the fact that he had made a confessional statement and the magistrate had also deposed in respect of the recording of the confessional statement, and hence the accused was not prejudiced by the omission to specifically bring to his notice the confessional statement."

Reliance may also be placed on the case of 28 DLR (SC) 35 and 1 BLC (HCD) 345.

34. Relying on the cases referred to above, I am inclined to hold that the condemned-appellant was not at all prejudiced because of the minor omission made by the learned Additional Sessions Judge while recording the statement under section 342 of the Code of Criminal Procedure.

35. It is the defence case that on the night of occurrence, the appellant came to his house at 4 A.M. It is of course true that a person can come to his house at any time and it cannot be questioned by anybody but in the case in hand what prompted the appellant on the fateful night to come to his house at 4 A.M. had not been explained. It is not the defence case that on getting information of murder of his wife he rushed to his house. This fact also indicates that the appellant was in fact, responsible for causing the death of his wife.

36. Therefore, I am of the view that the prosecution has been able to prove the charge under section 302 of the Penal Code against the condemned-appellant beyond all reasonable doubt. As regards the sentence, I am of the view that there was rancorous relationship between the husband and wife which resulted in the death of the wife. When bitter relationship exists between the husband and wife for a long time capital sentence of death should not be inflicted in such a case.

37. Therefore, the sentence of death passed by the trial Court and affirmed by the High Court Division should be commuted to imprisonment for life.

38. Accordingly this criminal appeal is dismissed and the sentence of death passed by the trial Court and confirmed by the High Court Division is commuted to imprisonment for life and to pay a fine of Tk.50,000/-, in default, to suffer rigorous imprisonment for 1 (one) year more.

39. Jail Petition No.09 of 2014 is dismissed in the light of the judgment delivered in Criminal Appeal No.27 of 2016.

**Muhammad Imman Ali, J (Majority view):**

40. This criminal appeal is directed against the judgement and order dated 25.02.2014 passed by the High Court Division in Death Reference No.86 of 2008 heard along with Jail Appeal No.865 of 2008 confirming the death sentence passed by the learned Additional Sessions Judge, First Court, Gazipur in Sessions Case No.3 of 2005 convicting the appellant under section 302 of the Penal Code sentencing him to death in connection with Kaligonj Police Station Case No.7 dated 16.07.2004 corresponding to G.R. No.278 of 2004.

41. The facts of the case, in brief, are that informant's daughter Nargis was the wife of appellant Awal Khan and out of their wedlock 2 children were born. Appellant Awal Khan had a stationary shop half mile away from his house and he used to sell mobile phones with other articles. Appellant Awal Khan was in Saudi Arabia for 6 years. He returned and opened several businesses. On many occasions he used to sleep in his shop at night. On 16.07.2004 at about 6 A.M. the informant got news that his daughter has been murdered in her husband's house. Getting this news, the informant along with his wife went to the house of the appellant and found the dead body of their daughter in her room. Appellant Awal Khan was in his shop, and he came to his house at 4 A.M. and saw his wife dead and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. Informant Ibrahim Dewan lodged FIR with Kaligonj Police Station, Gazipur, on 16.07.2004 stating the murder was committed by unknown persons.

42. Police after investigation submitted charge sheet against accused Md. Abdul Awal Khan under Section 302 of the Penal Code.

43. After framing charge learned Additional Sessions Judge, First Court, Gazipur, held the trial, examined 7 witnesses, and upon assessing the evidence found the appellant guilty under section 302 of the Penal Code and sentenced him to death.

44. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was registered as Death Reference No.86 of 2008.

45. Before the High Court Division, Jail Appeal No.865 of 2008 was preferred by condemned prisoner Md. Abdul Awal Khan, which was heard along with the death reference.

46. By the impugned judgement and order, the High Court Division accepted the reference and dismissed the jail appeal, and thereby maintained the judgement and order of conviction and sentence passed by the trial Court in Sessions Case No. 3 of 2005.

47. Hence, Criminal Appeal No. 27 of 2016 was filed before this Division and the condemned prisoner also filed Jail Petition No.9 of 2014.

48. The instant criminal appeal and jail petition were heard by this Division using virtual means under the provisions of the আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০।

49. Mr. Helal Uddin Mollah, learned Advocate appearing on behalf of the appellant submitted that there is no eye witness of the alleged occurrence. The circumstantial evidence is not knitted together to sustain the conviction, as such the judgement and order passed by the High Court Division is liable to be set aside. He also submitted that the High Court

Division due to misreading, non-reading, non-consideration of materials on record and misconstruction of law, facts and circumstances of the case most whimsically passed the judgement and order upholding the judgement and order passed by the trial Court confirming the death sentence, as such the judgement and order is liable to be set aside. He submitted that the informant in his FIR stated that "জামাই দোকানে ছিল" । There is no witness regarding "last seen" of the accused in connection with the occurrence, as such the judgement and order is liable to be set aside. He submitted that examination of the accused under section 342 of the Code of Criminal Procedure was not in accordance with law. No deposition of any P.W.s was placed before the accused as such the judgement and order is liable to be set aside. He further submitted that the police seized no wearing clothes of the deceased, and no blood-stained earth was seized from the place of occurrence. The *dao* seized was not blood stained and does not connect the appellant with the murder, as such the judgement and order of is liable to be set aside. The learned Advocate lastly submitted that there is no place of occurrence marked in the sketch map and index which creates doubt about the place of occurrence, as such the judgement and order is liable to be set aside.

50. Mr. A.M. Amin Uddin, learned Attorney General and Mr. Biswajit Debnath, learned Deputy Attorney General appeared for the State. It was submitted on behalf of the State that when the victim is killed while in the custody of her husband then the burden is upon the husband to explain how his wife met her death. The evidence is clear that the victim was killed in the bedroom inside her husband's house. Therefore, there can be no doubt she was in his custody at the time when she was killed. It was further submitted that the *dao* used for the killing was recovered from the shelf in the shop of the appellant at his pointing out. The learned Attorney General submitted that the facts and circumstances point to the guilt of the appellant and hence the impugned judgement does not call for any interference by this Division.

51. We have considered the submissions of the learned Advocate for the appellant and the learned Attorney General for the State, perused the impugned judgement and order of the High Court Division and other connected papers on record.

52. It appears that there is no eyewitness of the alleged occurrence. Moreover, there is no witness regarding the appellant being last seen with the victim in connection with the occurrence. The informant stated in his FIR that the appellant was in his shop during the time of occurrence, and he did not disclose any suspicion about the appellant's involvement. Later, the appellant was arrested by the police upon suspicion. According to the statement of P.Ws. 1, 4, 5 and 6 the appellant confessed his guilt before them and accordingly the *chen dao* which was used to murder his wife was recovered from his shop. The appellant refused to give any confessional statement when he was brought before the Magistrate. We note that if extra-judicial confession had been made, it was done in the presence of the police and is therefore not relevant under section 24 of the Evidence Act and cannot be the basis of conviction. The recovery of the *dao* at the pointing out of the appellant is admissible evidence in view of section 27 of the Evidence Act. However, there is no legal evidence on record to show that the said *dao* was used to deal the blows upon the victim.

53. We also find some merit in the submission of the learned Advocate appearing on behalf of the appellant that the examination of the appellant done by the trial court under section 342 of the Code of Criminal Procedure was not conducted properly as the incriminating evidence in the depositions of the prosecution witnesses were not placed before the appellant in accordance with law. Hence, we are of the opinion that the examination of

the appellant under section 342 of the Code was not lawfully done by the trial Court. So, the trial conducted by the court below is liable to be vitiated.

54. With regard to the evidence on record, the police recovered the *chen dao* with which the appellant is alleged to have killed his wife. The *dao* belonged to the Imam of the Mosque Mohammad Osman Goni (P.W.2) and it was recovered from the shelf inside the shop of the appellant at his pointing out. Md. Mozammel Hoque Master (P.W.5) was a witness to the seizure of the *dao*. In his cross examination he stated that he along with others including the Imam (P.W.2) went inside the shop of the appellant. Therefore, the seizure of the *dao* would have been done in the presence of the Imam (P.W.2). However, P.W.2 in his cross examination categorically stated that he did not see the recovery of the *dao*. Abul Kashem Moral (P.W.4) who also witnessed the recovery of the *dao* and was a witness to the seizure list stated that the seizure list was prepared 2/3 days later and that there was no identification marked on the *dao*. From the seizure list (exhibit-3) relating to the *dao* it appears that the *dao* had some soil on its body and the tip was broken. There is no evidence of any blood stain on the *dao* and in fact PW5 and the Investigating Officer stated in their respective cross examination that the *chen dao,* which was recovered did not have any blood stain. Hence, there appears to be some doubt whether the *dao* recovered was in fact used as the weapon to kill the victim. It was also not produced in Court at the time of cross examination of the prosecution witnesses. Had it been produced, then it could have been elicited whether there was any trace of blood on the *dao* and whether it was capable of causing penetrating injury with the tip of it having been broken. Doubts thus created will go to the benefit of the accused-appellant.

55. The evidence shows that seven deep injuries were inflicted upon the victim, which would naturally have caused spurts of blood to stain the clothes of the assailant. The appellant was at the scene of the occurrence from 4 AM. There was no evidence to suggest that his clothes were blood-stained or that he had changed his clothes or that he had washed the stained clothes.

56. Moreover, there was no seizure list to show how and when and from where the blood-stained clothes of the victim were recovered. With so many deep cut/penetrating injuries, it would be expected that the wearing apparel of the victim would also be cut. Bur there was no evidence in that regard.

57. The evidence of Dr. Md. Salman (P.W.7) in juxtaposition with the postmortem report (exhibit-6), shows that there were seven injuries on the body of the deceased. Five of those injuries were bone-deep cut injuries and two other injuries were penetrating injuries, 4cm and 5cm deep. It was suggested to P.W.7 that more than one person and more than one weapon was involved in the attack upon the victim, to which he replied that he did not know.

58. A *chen dao* when used as a weapon for the purpose of attacking someone would not create a penetrating wound, particularly since the tip of the *dao* was broken. It appears,

therefore, that a *dao* was not the only weapon used to inflict injur1ies upon the victim. Hence, there appears to be a serious doubt about the allegations as made out in the prosecution case.

59. The learned Judge of the trial Court observed that it was proved that the accused tied up the hands and feet of the victim before dealing blows upon her because there was no evidence of any injury on her hands. This is clearly surmise and conjecture of the learned Judge which is not supported by any evidence of on record. The learned Judge also observed that the accused admitted his guilt in the presence of P.Ws 3, 4, 5 and 6 and that there was no reason to disbelieve these witnesses. However, we find from deposition of the witnesses that the accused is alleged to have admitted having killed his wife when he was brought back to the village by the police. Any such admission in the presence of police should have been left out of consideration by the learned trial Judge. We find that P.W.5 categorically stated in his cross-examination that at the time of his arrest the accused did not admit the murder. Thus, the conclusion arrived at by the learned trial Judge were palpably erroneous, based on irrelevant evidence.

60. We note from the deposition of the informant (PW1) that the appellant is his nephew. Hence, the appellant and the victim were first cousins before their marriage, which took place 8/9 years prior to the occurrence, according to PW2, the Imam. The couple have two children and there is no allegation of any quarrel between them. We also find from the evidence on record that P.Ws 3, 4, and 5, whose evidence was relied upon by the learned trial Judge to convict the accused-appellant, stated in their evidence that the accused was a good person. There was no suggestion from any quarter that the appellant had a bad relationship with his wife or anyone else.

61. Md. Mozammel Haque Master (PW5) stated in his cross examination that the appellant admitted to the I.O. in the presence of himself, Kashem Member (PW4) and Afzal(PW3) that he killed his wife due to an illicit relationship with his sister-in-law and killed his wife because she protested. Such admission cannot be considered since if it was done in the presence of the police then it is irrelevant evidence.

62. On the other hand, it is admitted that there was some incident relating to the victim's sister Nasrin, who was married off from another house instead of from the house of her father (the informant). The defense suggestion was that Nasrin had been abducted by Kabir Dewan, Awlad Hossain and Musharraf and that the appellant brought her back and as a result due to that occurrence an enmity had developed and the said Kabir Dewan, Awlad Hossain and Musharraf came back to take revenge on the appellant, and not finding him in the house they killed his wife. In our view such circumstance cannot be brushed aside, and it goes in favour of the appellant.

63. The learned trial Judge appears to have taken into consideration the alleged admission by the appellant in presence of P.Ws 2,3,4 and 5 but failed to appreciate that if there was such

an admission, it was made when the appellant was accompanied by the police and hence inadmissible under section 24 of the Evidence Act. The conviction and sentence were thus not based on legal evidence.

64. With regard to the victim's death while in the custody of her husband, the evidence on record shows that the appellant used to stay at his shop. There was no evidence that on that night he was sleeping in his own house. Hence, there is sufficient explanation from the appellant that he was not present in the house when his wife was attacked, and provision of section 106 of the Evidence Act are not applicable in the facts of the instant case.

65. In the facts and circumstances discussed above we find that the doubt created by the evidence on record indicate the innocence of the convict appellant. The judgement of conviction and sentence awarded by the trial Court is not based on a proper assessment of the evidence on record. There was no legal evidence on which to base the conviction of the appellant. The High Court Division fell into the same error as the trial Court.

66. Accordingly, Criminal Appeal No.27 of 2016 is allowed by majority decision. The impugned judgement of the High Court Division as well as that of the trial Court are set aside. The convict appellant Md. Abdul Awal Khan, son of Aziz Khan of village, Saildia, Police Station-Kaligonj, District, Gazipur is acquitted of the charge levelled against him and his conviction and sentence are set aside. Let him be set at liberty forthwith if he is not wanted in connection with any other case.

67. Jail petition No.09 of 2014 is disposed of in the light of the judgement delivered in Criminal Appeal No. 27 of 2016.

**68. Hasan Foez Siddique, J:** I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

**69. Abu Bakar Siddique, J:** I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

**70. Md. Nuruzzaman, J:** I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

**71. Obaidul Hassan, J:** I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

**Courts Order**

80. The appeal is allowed and the jail petition is disposed by majority decision.

**16 SCOB [2022] AD 36**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CRIMINAL APPEAL NO.142 OF 2014 WITH JAIL PETITION NO.22 OF 2014**
(From the judgement and order dated the 2nd day of July, 2014 passed by the High Court Division in Death Reference No. 42 of 2009 with Jail Appeal No.430 of 2009).

| | |
|---|---|
| **Masum Billah alias Md. Masum Billah** | **Appellant/Petitioner (In both the cases)** |
| **-Versus-** | |
| **The State** | **. . . Respondent (In both the cases)** |
| For the Appellant (In Crl. A. No. 142 of 2014) | Mr. Mansurul Haque Chowdhury Senior Advocate Instructed by Mr. Zainul Abedin Advocate–on-Record |
| For the Petitioner (In Jail P. No.22 of 2014) | Not represented |
| For the Respondent (In Crl. A. No. 142 of 2014) | Mr. Biswajit Debnath, Deputy Attorney General Instructed by Mr. Haridas Paul Advocate–on-Record |
| For the Respondent (In Jail P. No.22 of 2014) | Not represented |
| Date of hearing and judgement | The 7th day of December, 2021 |

## Editors' Note

This case involves killing of a child and causing grievous injury on the head of the mother of the child while both the victims were sleeping in their bedroom. There was no eye witness in this case. After arrest the appellant gave a confessional statement. The Appellate Division found the confessional statement of the Appellant voluntary and true and also held that there was no sudden provocation to bring the offence within the category of culpable homicide not amounting to murder and therefore, confirmed the findings of the Courts below as to the conviction of the appellant. But considering, among others, the peculiar circumstances that the appellant out of grudge dealt stone blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly, commuted appellant's death penalty to imprisonment for life.

**Key Words**
**Commutation of death penalty; Section 302 of Penal Code**

**Commutation of death Penalty:**
**According to the confessional statement, the appellant out of grudge dealt the blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly. Taking that into consideration and all other aspects we are of the opinion to commute the sentence of death to imprisonment for life. ...(Para 17)**

## JUDGMENT

**Muhammad Imman Ali, J:**

1. Delay of 140 days in filing Criminal Appeal No.142 of 2014 is hereby condoned.

2. This criminal appeal was preferred against the judgement and order dated 02.07.2014 passed by the High Court Division in Death Reference No.42 of 2009 heard along with Jail Appeal No.430 of 2009 accepting the reference and dismissing the jail appeal thereby maintaining the judgement and order of conviction and sentence passed by the Additional Metropolitan Sessions Judge, Court No.4, in Sessions Case No.205 of 2006 under section 302 of the Penal Code sentencing the appellant to death.

3. The prosecution case, in brief, is that the convict-appellant Md. Masum Billah being the nephew of informant Delowar Hossain used to stay in the rented house of the informant but he was ousted from the said rented house as his moral character deteriorated. Thereafter, the convict-appellant was trying to cause harm to the informant by using slang language and also uttered threat to teach good lesson. About 10 days before occurrence, the convict-appellant threatened the informant by unutterable slang language. On 10.09.2005 at about 6.45 A.M, the informant went to work leaving his wife and minor daughter in his rented house. On the same day at about 5.00 P.M. he was informed by Rehana Begum (PW5) another Sub-lessee of the house through mobile phone that the door of the western room was found shut from inside but the lock of the front door was found broken and the household articles of the rooms were found vandalised. At about 6.15 P.M. he along with other inmates broke open the lock, entered into the bedroom and found his wife and daughter lying injured on the bed, bleeding profusely. He took his wife and minor daughter to the hospital but the Doctor declared his daughter, Farzana dead and found his wife's condition to be serious. She was admitted to the hospital. The informant suspected the convict-appellant and lodged FIR. The wife of the informant, after being released from hospital disclosed the name of the convict-appellant as the assailant. The convict-appellant remained absconding till he was arrested by the Police, and after Police remand he made a confessional statement before the Magistrate.

4. The police investigated the case, visited the place of occurrence, prepared sketch map, seized *alamots* and prepared seizure list, recorded statements of the witnesses under section 161 of the Code of Criminal Procedure (the Code). The accused made a confessional statement which was recorded under section 164 of the Code of Criminal Procedure. After investigation, on 31.10.2005 police submitted charge sheet against the appellant under sections 302/307/325/380/411 of the Penal Code.

5. After submission of police report the case record was transmitted to the Court of learned Metropolitan Sessions Judge, Chattogram and it was registered as Sessions Case No.205 of 2006. Ultimately, the trial was held by the learned Additional Metropolitan Sessions Judge, Court No.4, who framed charge against the condemned prisoner under Sections 325, 302 and 380 of the Penal Code. The charges were read over to the sole accused to which he pleaded not guilty and claimed to be tried.

6. During trial the prosecution examined 17 witnesses and they were cross examined. After completion of the evidence the accused was examined under Section 342 of the Code of Criminal Procedure whereupon he again pleaded his innocence and produced three defence witnesses.

7. Upon hearing the parties and considering the evidence and materials on record the Additional Metropolitan Sessions Judge, 4$^{th}$Court, Chattogram by the judgement and order dated 16.06.2009 convicted the accused Masum Billah under section 302 of the Penal Code for the murder of Farzana Akter Emu and sentenced him to death with fine of Tk.1,000/-.

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 convict-appellant, which was registered as Death Reference No.42 of 2009. Before the High Court Division, the convict-appellant Masum Billah preferred Jail Appeal No.430 of 2009, which was heard along with the death reference.

9. By the impugned judgement and order, the High Court Division accepted the reference and dismissed Jail Appeal No.430 of 2009 confirming the judgement and order of conviction and sentence passed by the trial Court.

10. Hence, the instant criminal appeal was filed before this Division.

11. Mr. Mansurul Haque Chowdhury, learned Senior Advocate appearing on behalf of the appellant submitted that the conviction and sentence is bad in law and facts and the prosecution did not prove the case beyond reasonable doubt but the Court awarded the sentence of death and as such the judgement of the High Court Division is liable to be set aside. He further submitted that the prosecution witnesses did not disclose the case properly as they all are not the eye witnesses of the fact but only on the basis of the circumstantial evidences the learned Judge awarded the capital punishment of death. He also submitted that the learned Judge did not consider the defence case and the witnesses at all and ignoring the witnesses awarded the capital punishment for death which is not sustainable in law. He further submitted that the confessional statement of the appellant, if believed, shows that he had no intention to deal any blow on the child victim and, therefore, he had no intention to cause her death. He lastly submitted that the appellant's sentence of death may be commuted to imprisonment for life.

12. Mr. Biswajit Debnath, learned Deputy Attorney General appearing on behalf of the respondent made submission in support of the impugned judgement and order of the High Court Division. He also submitted that this is a cold blooded killing of a child and also causing grievous injury on the head of the mother of victim Farzana while both the victims were sleeping in their bedroom. He further submitted that the appellant being outsider intentionally entered into the bedroom of the victims and caused stone (puta) blow on the head of victim Khadiza Begum (mother of the deceased child) first and thereafter, dealt a stone blow on the head of deceased victim Farzana Akter Emu, and receiving such blow the victim died instantaneously. He further submitted that there is no defence case by which the

act of the appellant can be considered within the exceptions as provided in Section 300 of the Penal Code. He submitted that the confessional statement made by the appellant if it is read together with the evidence of PW2, clearly and unambiguously proves beyond doubt that the appellant entered into the occurrence house with an intention to kill PW2 and inflicted the blow with a stone (puta) and thereafter caused blow on the head of the victim Farzana who died and thereafter the victim Khadiza Begum after taking treatment in the hospital for 18 (eighteen) days was released and as such the sentence as awarded against the appellant is liable to be sustained.

13. We have considered the submissions of the learned Advocate on behalf of the appellant and the learned Deputy Attorney General for the State, perused the impugned judgement and order of the High Court Division and other connected papers on record. It transpires that the convict-appellant had made a confessional statement regarding the facts of this case. The Magistrate who recorded the statement was examined in Court as PW3 who has recorded the said statement after complying with all the mandatory requirements of law as provided in sections 164 and 364 of the Criminal Procedure Code. During cross-examination there was nothing to suggest that the said statement was not voluntary and true. The defence witnesses DW1, DW2 and DW3 also deposed that the appellant had admitted to them the fact of causing blow on the head of victim Khadiza Begum with a stone (puta). It appears to us that the said statement made by the appellant is voluntary and true.

14. In the instant case the fact of sudden provocation and other considerations to bring an act of commission of offence within the category of culpable homicide not amounting to murder are absent. In the instant case it has been well proved by the evidence of PW2 as well as by the confessional statement of the appellant that the appellant with a view to strike blows on the head of the victim entered into the occurrence room and dealt blows without being provocated by the victims. Nothing is available on record to justify the act of the appellant.

15. Regarding the sentence imposed upon the convict-appellant, the learned Advocate prayed for commuting the sentence of death to one of imprisonment for life.

16. Mr. Mansurul Haque Chowdhury, pointed out that appellant has suffered in the condemned cell for about 12 years and has been suffering for a much longer period in custody, since he faced the trial. He has no previous conviction according to the charge sheet and does not pose any threat to society.

17. According to the confessional statement, the appellant out of grudge dealt the blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly. Taking that into consideration and all other aspects we are of the opinion to commute the sentence of death to imprisonment for life.

18. In the result the appeal is dismissed. The sentence of death of the appellant Masum Billah alias Md. Masum Billah, son of Abdus Salam Akond, of Village-West Baniakhali, Police Station-Sharankhola, District-Bagerhat is commuted to imprisonment for life and also to pay a fine of Tk.50,000/-(fifty thousand), in default, to suffer rigorous imprisonment for 2(two) years more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence and other remission as admissible under the Jail Code.

19. Jail Petition No.22 of 2014 is disposed of in the light of the judgement passed in Criminal Appeal No.142 of 2014.

**16 SCOB [2022] AD 40**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CRIMINAL APPEAL NO. 112 OF 2013 WITH JAIL PETITION NO.21 OF 2013**
(From the judgment and order dated 21.04.2013 passed by the High Court Division in Death Reference No.10 of 2008 with Criminal Appeal No.915 of 2008 and Jail Appeal No.175 of 2008)

**Md. Anwar Sheikh** **… Appellant/Petitioner**
**In both the cases)**

=VERSUS=

**The State** **… Respondent**
**(In both the cases)**

| | |
|---|---|
| For the Appellant /Petitioner (In both the cases) | : Mr. A.S.M. Khalequzzaman, Advocate, instructed by Ms. Shahanara Begum, Advocate-on-Record |
| For the Respondent: (In Crl. Appl. No.112 of 2013) | : Mr. S. M. Monir, Additional Attorney General, (appeared with the leave of the Court) |
| For the Respondent: (In Jail P. No.21 of 2013) | : Not represented |
| Date of hearing and judgment on | : The 2nd November, 2021 |

**Editors' Note**
In the instant case after 5 days' search the dead body of the wife of the appellant was found in the septic tank of the house. There was no eyewitness of the murder. The appellant himself joined the search and at the same time tried to mislead others saying that the Jinn or Genie (some sort of supernatural creatures) picked up the victim in their realm. The victim was a simple woman who did not have any enmity with anyone. The Appellate Division assessing evidence found that the appellant failed to discharge his obligation to explain how his wife had met with her death as at the time of occurrence she was under his custody. Further, the Appellate Division though concurred with the finding of the High Court Division as to the conviction of the appellant, it commuted the sentence of death on the ground, *inter alia*, that if the appellant is handed down death penalty his two sons will become orphans.

**Key Words**
Wife killing case; Commutation of death penalty; Section 342 of the Code of Criminal Procedure

**Section 342 of the Code of Criminal Procedure, 1898**
**Husband is duty bound to explain his wife's death when his wife dies in his custody and he can explain it in his 342 statement:**

**From the testimonies of the PWs. 1, 8 and 9 it was proved beyond all reasonable doubt that the instant appellant left the PW.1's house with his wife Nasima Begum Aka Bahana along with their two sons before the alleged killing of her. This event eventually proved that Nasima alias Bahana before her death was in undeniably in the custody of her husband, the instant appellant. On 01-05-2006, it was reported that she was missing. On 06-05-2006, her corpse was recovered from the septic tank of her husband. The appellant in his confessional statement admitted aforesaid recovery. He not only knows the recovery of corpse, rather, knows about the killing, even though, he falsely searched for Nasima with other inmates of the house only to show publicly that Nasima was really missing which was not fact. The appellant's such a pretext undoubtedly proved that he was fully aware about the murder. …the instant appellant as the husband is solely responsible and duty bound to explain as to how and when his wife, Nasima Begum alias Bahana was died. He was miserable failed to explain, even if, he was examined under section 342 of the Code of Criminal Procedure to that effect.**

**...(Paras 19 and 20)**

**JUDGMENT**

**Md. Nuruzzaman, J:**

1. This criminal appeal at the instance of the accused appellant is directed against the judgment and order dated 21.04.2013 passed by the High Court Division in Death Reference No.10 of 2008 with Criminal Appeal No.915 of 2008 and Jail Appeal No.175 of 2008 confirming the death reference and dismissing the criminal appeal and jail appeal and thereby affirming the judgment and order dated 12.02.2008 passed by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Faridpur, convicting the accused appellant under section 11(Ka)/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) (shortly, 'Ain') and sentencing him to death with a fine of taka 1,000/- (Taka one thousand) in Nari-O-Shishu Nirjatan Case No.101 of 2006 arising out of Modhukhali P.S. Case No.05 dated 06.05.2006 corresponding to G.R. No.62/2006.

2. Prosecution case, in brief, is that the informant's daughter namely victim Nasima Begum alias Bahana, was given in marriage to the accused Anwar about 10 years ago and Bahana gave birth to two sons. The victim, wife of the accused appellant Anwar was slightly crippled in left hand and right leg from her birth. After marriage, the accused persons often used to beat and torture her for dowry and send the victim back to her father's house. The informant gave cash Tk.80,000/-(Taka eighty thousand) on several occasions to the accused Anwar. Moreover, the informant arranged a job for Anwar as a guard in a company in Dhaka. But torturing the victim continued. On 01.05.2006 at about 9.00 A.M., the accused Anwar along with his wife and kids came to the house of the informant and demanded Tk.10,000/- for dowry. But the father-in-law of Anwar i.e. the informant refused to fulfill the demand. Consequently, the accused Anwar left father-in-law's house with his wife and sons. At that night at about 11.45 hours, the informant heard from an unknown van driver that the victim Bahana was untraceable. On getting the message, the informant along with some persons rushed to the house of Anwar and inquired about the victim. But Anwar could not give satisfactory reply. The informant learnt from the local people that Anwar beat the victim.

Thereafter, she became unconscious and on 06.05.2006, the informant came to know from one Alam member that a dead body had been found in the septic tank. Accordingly, the informant intimated the matter to the Modhukhali Police Station. Subsequently, Police came to the spot and recovered the dead body of the victim from the place of occurrence and the informant identified the dead body of the victim. Hence, one Md. Abul Hossain (P.W.1), father of the victim as informant lodged a First Information Report (shortly, "FIR") on 06.05.2006 against the accused persons including the accused appellant under sections 11(Ka)/30 of the Ain before the Officer-in-Charge of Modhukhali Police Station, Faridpur. Accordingly, Modhukhali Police station Case No.05 dated 06.05.2006 corresponding to G.R. No.62 of 2006 under sections 11(Ka)/30 of the Ain was started against the accused persons including the accused appellant. Hence the case.

3. The police, completing the investigation, submitted Charge-sheet No.71 dated 03.08.2006 under sections 11(Ka)/30 of the Ain against the accused appellant and two others.

4. The case record was transmitted to the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Faridpur (in short, the 'Tribunal') and was renumbered as Nari-O-Shishu Case No.101 of 2006.

5. The Tribunal framed charge against the accused appellant including 5(five) others under sections 11(Ka)/30 of the Ain. The said charge was read over and explained to them to which they pleaded not guilty and claimed to be tried in accordance with law.

6. The prosecution examined as many as 12(twelve) witnesses to prove its case and they were cross-examined by the defence. But the defence examined none.

7. After closing the prosecution evidences, the accused persons including the accused appellant were examined under section 342 of the Code of Criminal Procedure, 1898. Repeating their innocence and termed the evidences as false and declined to adduce any evidence in their favour.

8. The defence case as has been derived from the trend of cross-examination is of complete innocence and false implication.

9. After conclusion of trial, the Tribunal upon considering the evidence and other materials on record by its judgment and order dated 12.02.2008 convicted the accused appellant Md. Anwar Sheikh and Md. Awal Sheikh under section 11(Ka)/30 of the Ain and sentenced them to death with a fine of taka 1,000/- (Taka one thousand)only.

10. The Tribunal following the provision of section 374 of the Code of Criminal Procedure sent the death reference with connected case records to the High Court Division for confirmation of death sentence which was registered as Death Reference No.10 of 2008.

11. Feeling aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 12.02.2008 passed by the Tribunal, the condemned appellant preferred the above mentioned Criminal Appeal and jail appeal before the High Court Division. The High Court Division, upon hearing both the parties and in consideration of the evidence on record, accepted the Death Reference No.10 of 2008 in part and dismissed the criminal appeal and jail appeal and thereby affirmed the judgment and order of conviction and sentence of the Tribunal by its judgment and order dated 21.04.2013.

12. Feeling aggrieved by the judgment and order dated 21.04.2013 of the High Court Division, the condemned appellant preferred the instant Criminal Appeal No.112 of 2013 along with Jail Petition No.21 of 2013 before this Division.

13. Mr. A.S.M. Khalequzzaman, the learned Advocate appearing on behalf of the condemned appellant in both the cases submits that there is no eye witness in the case and the prosecution witnesses are not reliable. He further submits that there is no independent and direct evidence in this case. He next submits that the trial Court as well as the High Court Division convicted and sentenced the condemned appellant merely upon conjecture and surmise, not upon legal evidences on record. He also submits that according to the statement of the condemned appellant Anwar Sheikh under section 164 of the Code of Criminal Procedure, Helena is the vital witness of this case but she was not examined; that is why, who is the actual murderer that was not ventilated lawfully. He next submits that the Tribunal fell into error of law in finding the condemned appellant Anwar guilty of the charges leveled against him as the prosecution has miserably failed to prove the case beyond reasonable doubt. He submits that the allegation of killing the deceased Bahana is not believable and the condemned appellant has been implicated by the informant out of suspicion. The tainted relationship sought to be proved as a motive of the offence but such motive was not proved by cogent and credible evidence. He emphasizes that the sentence of death passed upon the condemned appellant is extremely harsh and severe. He added that the death sentence should not be passed as routine and this is not a case in which sentence of death is warranted. He finally submits that the statement of condemned appellant Anwar Sheikh and witness Batashi Begum under 164 of the Code of Criminal Procedure are not corroborative with each other and, as such, those statements are not acceptable. The evidence of the prosecution witnesses are highly contradictory and discrepant and the prosecution case palpably suffers from its inherent improbabilities and, as such, the impugned judgment and order of the High Court Division is bad in law and, hence the same is liable to be set aside.

14. Mr. S.M. Monir, the learned Additional Attorney General appearing on behalf of the State-respondent in Criminal Appeal No.112 of 2013 with leave of the Court submits that the prosecution had successfully established its case beyond any reasonable doubt and the ingredients of the aforesaid special provision of law having been attracted, the Tribunal duly found that the accused appellant had committed the offence. He further submits that there is no reason to disbelieve the witnesses nor the defence could shake the credibility of the witnesses. The story of the case clearly and exclusively suggests the involvement of the condemned appellant Anwar with the offence, that is, the condemned appellant Anwar tainted his relationship with the deceased over the demand of dowry. The accused appellant Anwar was demanding a proportionately large amount which the father of the victim was unable to pay. In this regard, the learned Additional Attorney General contends that the victim was an innocent village housewife who did not have any enmity with anyone and that the defence has also failed to produce any evidence on that count. The alleged occurrence also took place after 10 years of the marriage as meted out by the condemned appellant Anwar. The learned Additional Attorney General in this regard insists that a close reading of the statements of the Prosecution Witnesses will also suggest that the condemned appellant Anwar is solely responsible for the murder of the victim. He finally submits that the Tribunal committed no error in law or facts in passing the judgment and order of conviction and sentence against the condemned appellant Anwar and, therefore, there is no justifiable reason to interfere with the impugned judgment and order passed by the Tribunal.

15. We have considered the submissions of the learned Advocate and the learned

Additional Attorney General of the respective parties. Perused the impugned judgment of the High Court Division and connected other materials on record.

16. Now let us evaluate the evidence on record, circumstances the case, and decision of the High Court Division, whether order of conviction is justified or any error which calls for interference by this Division.

17. From the depositions of the PW 1, 2, 3, 4, 8, 9, 10, 11 it clearly transpired that the dead body of the deceased Nasima Begum alias Bahana was recovered from the septic tank of her husband Md. Anwar Sheikh, the instant appellant. It was too approved from the inquest report and testimony of PW 6's deposition.

18. There was no sign of personal or social or kinfolk-rivalry with the deceased Nasima Begum also known as (in short, aka) Bahana with anyone of her neighbouring area as it appears from the evidences adduced that could make such a heinous murder indictment of her life. In fact, we too endorse with the High Court Division's observation that she was a simple and innocent country housewife. Consequently, all the suspicions of the alleged murder focused on the inhabitants of her husband or in-laws house.

19. From the testimonies of the PWs. 1, 8 and 9 it was proved beyond all reasonable doubt that the instant appellant left the PW.1's house with his wife Nasima Begum Aka Bahana along with their two sons before the alleged killing of her. This event eventually proved that Nasima alias Bahana before her death was in undeniably in the custody of her husband, the instant appellant. On 01-05-2006, it was reported that she was missing. On 06-05-2006, her corpse was recovered from the septic tank of her husband. The appellant in his confessional statement admitted aforesaid recovery. He not only knows the recovery of corpse, rather, knows about the killing, even though, he falsely searched for Nasima with other inmates of the house only to show publicly that Nasima was really missing which was not fact. The appellant's such a pretext undoubtedly proved that he was fully aware about the murder. But he has measurably failed to take any step to save her life.

20. As such, the instant appellant as the husband is solely responsible and duty bound to explain as to how and when his wife, Nasima Begum alias Bahana was died. He was miserable failed to explain, even if, he was examined under section 342 of the Code of Criminal Procedure to that effect. Moreover, it was proved from the testimonies of the PW 1, 2, 3, 4, 8 that the present appellant not only concealed the fact of his wife's death but also misled them saying that the Djinn or Genie (some sort of supernatural creatures) picked up Nasima Begum aka Bahana in their realm. In addition he too Join the search with his in-laws along with others present. Moreover, he continued his misleading tricks even in his exculpatory confessional statement incriminating his uncle co-accused Awal for the victim's murder.

21. As a result, concurring with the courts below we opine that it is the accused appellant who has committed the murder of his wife Nasima Begum aka Bahana.

22. From the conscientious reading of the judgment of the High Court Division it appears that the High Court Division affirmed the conviction of the present appellant on the settled cardinal principle enunciated by this division on the killing of wife cases. The principle enunciated by this Division in the case of Abdul Motaleb Howlader Vs. the State reported in 5 MLR(AD)(2000) 362 it was held that-

> "It is well settled that ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned-prisoner was living with his wife in the same house he was under an obligation to

explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing death in question."

23. Now, let us rethink the very fact that the brooding horror of hanging, tortures the present appellant detained in the condemn cell of jail for almost 14 years. There is no material shown by the State to indicate that the appellant cannot be reformed and is a continuing threat to the society. It is of course true that a period of anguish and suffering is an inevitable consequence of sentence of death.

24. In the case of Nalu vs State reported in 17 BLC(AD)(2012)204 this Division undertook young age, absence of any sort of Previous Conviction or Previous Record (PC/PR) of the offender and elongated staying in the condemn cell as Mitigating Circumstances and commuted the offender's death gallows verdict to an imprisonment for life verdict.

25. In the case of Syed Sajjad Mainuddin Hasan vs State, 70 DLR (AD) (2018) 70] and Ataur Mridha alias Ataur Petitioner Vs the State, [15 SCOB (2021) (AD) 1, Criminal Review Petition No. 82 of 2017] this Division applied some modern sentencing tools such as Aggravating Circumstances, Mitigating Circumstance, Rarest of the Rare Test and Comparative Proportionality Test in disposing murder cases.

26. The killing of the victim was certainly terrible, however, there appears a few Mitigating Circumstance in the instant case, and these may be described as follows-

i) the deceased left 02 kids alive of 05 and 01 years of age. If the appellant, that is the father of the said kids executed these kids of the circumstances will become orphans;

ii) the present appellant detained in the condemn cell of jail for almost 14 years;

iii) there is no Previous Conviction or Previous Record (PC/PR) of the offender;

iv) in the present case the impression of offence on society, state etc. are limited to a certain locality and no such cross country effect was recorded in any way;

v) absence of any material to believe that if allowed to live he poses a grave and serious threat to the society.

27. Accordingly, we opine that though there is no uncertainty that the appellant has committed a repulsive crime, even so for this we believe that internment for life will serve as sufficient punishment and penitence for his actions. We believe that there is hope for reformation, rehabilitation. Hence, we are inclined to impose imprisonment for life instead of capital punishment.

28. In the result, the Criminal Appeal no. 112 of 2013 is dismissed with modification of sentence.

29. The sentence of death of the appellant, Md. Anwar Sheikh, son of Saken Sheikh, of Village-Mirapara, Police Station-Madhukhali, District-Faridpur to suffer imprisonment for life and also to pay a fine of Tk. 10,000/= (ten thousand), in default, to suffer rigorous imprisonment for 06 (six) months more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence.

30. The concerned Jail Authority is directed to shift the appellant to the regular jail from condemned cell forthwith.

31. Jail Petition No.21 of 2013 is disposed of in the light of the judgment delivered by this Division in Criminal Appeal No.112 of 2013.

**16 SCOB [2022] AD 46**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Borhanuddin**
**Ms. Justice Krishna Debnath**

**CIVIL APPEAL NO.234 OF 2014**
(From the judgment and order dated 18.01.2011 passed by the Administrative Appellate Tribunal in A.A.T. Appeal No.83 of 2009)

**Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Planning, Planning Division, Sher-E-Bangla Nagar, Dhaka and another ..... Appellants**

**=VERSUS=**

**Sayed Mahabubul Karim ..... Respondent**

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|---|---|
| For the appellants | :Mr. Md. Jahangir Alam, Deputy Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record |
| For the Respondent | :Mr. S. N. Goswami, Senior Advocate, instructed by Ms. Madhu Malati Chowdhury Barua, Advocate-on-Record |
| Date of hearing | :20-04-2022 and 17-05-2022 |
| Judgment on | :The 18th May, 2022 |

**Editors' Note**
Question arose in this case as to whether the petitioner-respondent who left for Japan for higher training with the leave of the Government for 6 months and availed a further leave of another 3 (three) months as leave outside Bangladesh and joined in his post after 7 years 7 months 24 days being absent from service during this time without any leave from the competent authority, have ceased to be a government servant in accordance with Rule 34, 1st Part of the Bangladesh Service Rules, in spite of the fact that he was initially permitted to rejoin in the post and worked there for about 1 year and 7 months. The Administrative Appellate Tribunal decided that by accepting the joining of the respondent-petitioner the Director General of Industry and Labour Wing retrospectively approved his unauthorized leave and the Government waived its right to reject the rejoining of the petitioner in service. The Appellate Division held that the Director General was not empowered to act under rule 34 and therefore, his act of allowing the respondent rejoining in service was not only without lawful authority but also void *ab intio*. The Court also held that the doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions and as such, though the respondent has served for about 1 year and 7 months after rejoining in the service, that cannot be deemed to be a waiver by the government against the clear statutory provision embodied in rule 34.

**Key Words**
**Rule 34, 1st Part of the Bangladesh Service Rules; Doctrine of estoppels, waiver and acquiescence; void *ab intio***

**Rule 34, 1st Part of the Bangladesh Service Rules:**
**It is unambiguous from the phraseology of the rule 34 of the BSR that when continuous absence from work exceeds five years, be the absence with or without leave; the service of a Government servant will come to an end. Yet, the Government and only the Government may make a diverse conclusion upon taking into consideration any special state of affairs. Consequently, this mechanical ceasing of the service is subject to the ability of the Government to take a different decision in the light of out of the ordinary situation. ...(Para 14)**

**What is void *ab initio*, that cannot be validated later in any way:**
**However, the Administrative Appellate Tribunal miserably failed to notice that in the instant case there found no application of the said "special circumstances of the case" by the Government. Rather the then Director General applied the said "special circumstances of the case' concerning the unauthorized leave of absence of the respondent for 07 years and 07 months and 24 days from his work. As the Director General was not empowered to act under rule 34, his alleged application of the said "special circumstances of the case' was not only without lawful authority but also void *ab intio*. What is void *ab initio*, that cannot be validated later in any way. ...(Para 17)**

**No estoppel against law:**
**Doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions. ...(Para 18)**

## JUDGMENT

**Md. Nuruzzaman, J:**

1. This Civil Appeal, by leave, has arisen out of the judgment and order dated 18.01.2011 passed by the Administrative Appellate Tribunal in A.A.T. Appeal No.83 of 2009 allowing the appeal.

2. The respondent herein, as petitioner, filed A.T. case No.203 of 2007 under section 4(2) of the Administrative Tribunal Act, 1980 before the Administrative Tribunal No.1, Dhaka challenging the order dated 25.09.2007 declaring that petitioner has ceased to be in the employment of the Government with effect from 23.03.1998.

3. Facts leading to filing of this civil appeal, in short, are that he joined service on 30.01.1989 as a Statistical Investigator under the Director General of Bangladesh Bureau of Statistics and since then he discharged his duty sincerely and honestly to the satisfaction of all concerned. That the petitioner was granted Ex-Bangladesh leave for higher training in Japan from 23.09.1997 to 20.06.1998. But due to some unavoidable circumstances he could not return home in time. Eventually, he returned home on 15.02.2006 and joined duty on 16.02.2006 and since then he served in his original capacity and as usual, drew salary and other attending service benefits and in this way, the petitioner served the Government for 1 year and 7 months. Suddenly, on 16.03.2006, the opposite party No.2 served a show cause notice upon the petitioner alleging unauthorized absence from service for more than 5 years

and asked him to show cause as to why he shall not be declared to have ceased to be a Government employee. The petitioner submitted his written statement explaining the circumstances necessiting his absence from duty for the relevant period. On consideration of the facts and circumstances, the opposite party No.2, Director General, Bureau of Statistics accepted his explanation and allowed him to join his duty in pursuance of which the petitioner has already served the Government for about 1 year and 7 months. The petitioner has contended that since the Government allowed the petitioner to join service and served for a period of 1 year and 7 months only on receiving salary and other attending benefits, the Government is now legally estopped from challenging the petitioner's position as a Government employee as the plea of the petitioner's unauthorized absence from duty was earlier condoned by the Government. It was contended that the petitioner, in the facts and circumstances of the case, must be regarded to be in service and, as such, the impugned order declaring him to be not in the employment of the Government has been illegal and inoperative.

4. The opposite parties contested the case by filing written statement denying the material allegations of the petition contending, inter-alia that on due consideration of the prevailing facts and circumstances of the case, the petitioner was rightly regarded as out of Government employment on cogent reasons and consequently the petitioner was not entitled to get any relief in this case.

5. On conclusion of the trial, the Administrative Tribunal-1, Dhaka considering the evidences and documents on record dismissed the A.T. Case No.203 of 2007 by its judgment and order dated 11.03.2009.

6. Feeling aggrieved, by the judgment and order of the Administrative Tribunal, Dhaka, the petitioner as appellant preferred A.A.T. Appeal No.83 of 2009 before the Administrative Appellate Tribunal, Dhaka, which upon hearing the parties, by its judgment and order dated 18.01.2011 allowed the appeal and thereby set aside the judgment and order of the Administrative Tribunal-1, Dhaka and the impugned order dated 25.09.2009 declaring that the petitioner has ceased to be in the employment of the Government with effect from 23.03.1998 is struck down being illegal and arbitrary. The petitioner must be regarded to be in service as usual but he shall not be entitled to any salary for the period during which he remained absent from duty. He may, however, be entitled to other service benefits as permissible under the law. The authority is hereby directed to give appellant-petitioner Syed Mahbubul Karim a suitable assignment promptly.

7. Feeling aggrieved by the impugned judgment and order dated 18.01.2011 passed by the Administrative Appellate Tribunal, Dhaka, the present petitioner filed the instant civil Petition for leave to appeal before this Division and obtained leave which, gave, rise to the instant appeal.

8. Mr. Md. Jahangir Alam, the learned Deputy Attorney General appearing on behalf of the appellants submits that the respondent being absent in service without any leave from the competent authority for more than 5 years having ceased to be Government servant under Rule 34, 1st Part of the Bangladesh Service Rules, the Administrative Appellate Tribunal erred in law in allowing the appeal. He further submits that the respondent having left for Japan for higher training with the leave of the Government for 6 months and having availed a leave of another 3(three) months as leave outside Bangladesh and he having joined in his post on 16.02.2006 after the expiry of 7 years 7 months 24 days, the same period being absolutely

unauthorized, the Administrative Appellate Tribunal erred in law allowing the appeal and, as such, the impugned judgment and order passed by the Administrative Appellate Tribunal, Dhaka is liable to be set aside.

9. Mr. S. N. Goswami, the learned Senior Advocate appearing on behalf of the respondent made submissions in support of the impugned judgment and order of the Administrative Appellate Tribunal, Dhaka. He submits that the learned Administrative Tribunal was manifestly wrong in disallowing the respondent's case without properly considering the material facts of the case and the law bearing on the object and, as such, the Administrative Appellate Tribunal rightly passed the impugned judgment. Hence, the instant appeal may kindly be dismissed.

10. We have considered the submissions of the learned Deputy Attorney General for the appellants and the learned Senior Advocate for the respondent. Perused the impugned judgment of the Administrative Appellate Tribunal and connected other materials on record.

11. Leave was granted to examine whether-

> I. the petitioner-respondent being absent in service without any leave from the competent authority for more than 5 years having ceased to be government servant under Rule 34, 1st Part of the Bangladesh Service Rules, the Administrative Appellate Tribunal erred in law in allowing the appeal and
>
> II. the petitioner-respondent having left for Japan for higher training with the leave of the Government for 6 months and having availed a leave of another 3 (three) months as leave outside Bangladesh and he having joined in his post on 16.02.2006 after the expiry of 7 years 7 months 24 days the same period being absolutely unauthorized, the Administrative Appellate Tribunal erred in law in allowing the appeal.

12. Admittedly, the respondent-petitioner left for Japan for higher training with the leave of the Government for 06 (six) months and availed a leave of another 03 (three) months as leave outside Bangladesh. But due to some self explained unavoidable circumstances he could not return home in time. Eventually he returned home on 15.02.2008 and joined duty on 16.02.2006 and his joining was retrospectively accepted by the Director General of Industry and Labour Wing of Bangladesh Statistic Bureau by retrospectively approving his abovementioned unauthorized leave 07 years 07 months 24 days as leave without pay directly on 22.03.2006. Since then he served in his original capacity and as usual, drew salary and other attending service benefits and in this way the petitioner served the government for 1 year and 7 months.

13. The pivotal law in this regard is Rule 34 of the Bangladesh Service Rules (in short, BSR), Part-I, which provides as follows:

> "Unless Government in view of the special circumstances of the case shall otherwise determine, after five years continuous absence from duty, elsewhere than on foreign service in Bangladesh whether with or without leave, a Government servant ceases to be in Government employ."

14. It is unambiguous from the phraseology of the rule 34 of the BSR that when continuous absence from work exceeds five years, be the absence with or without leave; the service of a Government servant will come to an end. Yet, the Government and only the Government may make a diverse conclusion upon taking into consideration any special state

of affairs. Consequently, this mechanical ceasing of the service is subject to the ability of the Government to take a different decision in the light of out of the ordinary situation.

15. True that in such situation, theoretically, the Government might make a different conclusion upon taking into consideration any special circumstances.

16. The Administrative Appellate Tribunal decided this issue on a single point that by accepting the joining of the respondent-petitioner on 22.03.2006 by the Director General of Industry and Labour Wing retrospectively approving his abovementioned unauthorized leave, the Government waived its right to reject the rejoining of the petitioner in service on 16.02.2006 as such impliedly misconceived that the said Director General on behalf of the Government exercised its mandate "special circumstances of the case" under rule 34 of BSR.

17. However, the Administrative Appellate Tribunal miserably failed to notice that in the instant case there found no application of the said "special circumstances of the case" by the Government. Rather the then Director General applied the said "special circumstances of the case' concerning the unauthorized leave of absence of the respondent for 07 years and 07 months and 24 days from his work. As the Director General was not empowered to act under rule 34, his alleged application of the said "special circumstances of the case' was not only without lawful authority but also void ab intio. What is void ab initio, that cannot be validated later in any way.

18. Doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions as this Division observed in the case of Siddique Ahmed v. Government of Bangladesh, reported in 65 DLR (AD) 8-

> "the plea of waiver or acquiescence is not available in respect of violation of any law. If it is violated, the Court is bound to say so, no matter when it is raised."

19. It was maintained in the case of Md. Mahmudul Haque vs. Government of Bangladesh and Ors. reported in 13ADC(2016)738 as follows-

> "The Administrative Appellate Tribunal also failed to consider that there could not be estoppel, waiver and acquiescence against the law."

20. Similar views was expressed in the case of Jamuna Television Ltd. and Another vs. Government of Bangladesh and Others reported in 34 BLD (AD) 33-

> "The position of law is well settled that the Government may be estopped from refusing any representation made by it on the basis of which any person has acted to his detriment. There is no estoppel against statute or there is no application of estoppel to prevent the performance of any constitutional or statutory duty."

21. The same view was Md. Shahidul Haque Bhuiyan and Ors. vs. The Chairman First Court of Settlement and Ors. reported in LEX/BDAD/0337/2015-

> "While considering a statutory provision there can be no estoppel against statute. The doctrine of 'approbate and reprobate' is only a species of estoppel; it applies only to the conduct of the parties. As in the case of estoppel it cannot operate against the provisions of a statute."

22. Consequently, we opine that the Administrative Appellate Tribunal erred in law in interfering with the judgment and order of the Administrative Tribunal.

23. As such, the appeal is allowed. The judgment of the Administrative Appellate Tribunal is set aside and the judgment of the Administrative Tribunal is restored without any order as to cost. The Government is at liberty in taking initiative for refunding the amount paid to the respondent-petitioner as pay and allowances.

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**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CRIMINAL APPEAL NO.6 OF 2013**
(From the judgment and order dated 27.11.2012 passed by the High Court Division in Death Reference No.39 of 2007 with Jail Appeal No.541 of 2007).

**Monir Ahmed** **:** **.....Appellant**

-Versus-

**The State** **:** **.....Respondent**

For the appellant **:** Mr. Zulhash Uddin Ahmed, Advocate, instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.

For the Respondent **:** Mr. Biswajit Debnath, Deputy Attorney General, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.

Date of hearing and judgment : The 3rd day of November, 2021.

**Editors' Note**
This is a case of brutal killing of a 11-year-old boy for ransom by his uncle and uncle's cohorts in which the dead body of victim could not be found due to cutting it into pieces and throwing them in the water body connected with sea. There was no eyewitness to the occurrence. Appellant made a confessional statement. The Appellate Division examining the confessional statement of the appellant found it to be voluntary and true and also found that the circumstantial evidence unerringly pointing to the guilt of the appellant but considering the length of period spent by the appellant in the condemned cell and other circumstances commuted his sentence of death to one of imprisonment for life.

**Key Words**
Section 302 of the Penal Code; Confessional Statement; Section 164 of the Code of Criminal Procedure

**Section 164 of the Code of Criminal Procedure:**
**It is well settled that the confessional statement can be the sole basis of conviction if it is made voluntarily and it is true. In the instant case, the confessional statement of the appellant is voluntary and true and it was rightly found to be so by both the trial Court and the High Court Division. It is true that there is no eye witness in the instant case, but the inculpatroy, true, and voluntary confessional statement of the convict-appellant, and the circumstances are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellant in committing murder of the victim Rashed. ...(Paras 40 & 41)**

**JUDGMENT**

**Obaidul Hassan, J.**

1. This Criminal Appeal No.06 of 2013 is directed against the judgment and order dated 27.11.2012 passed by a Division Bench of the High Court Division in Death Reference No.39 of 2007 and Jail Appeal No.541 of 2007 accepting the Death Reference while dismissing the appeal and thereby upholding the judgment and order of conviction and sentence dated 31.05.2007 passed by the Court of Additional Sessions Judge, 1st Court, Chittagong in Sessions Case No.497 of 2006 (hereinafter referred to as the trial Court) corresponding to G.R. No.235 of 2005 arising out of Banskhali Police Station Case No.05(10)05 under sections 302/34/201 of the Penal Code convicting the accused-appellant under section 302 of the Penal Code and sentenced him to death by hanging.

2. The prosecution case, in short, is that on 05.10.2005 at 3:00 pm, the deceased Mohammad Rashed, Son of the informant Sharifa Khatun, a student of a Hafezi Madrasha, where he was learning the Hoily Quran, aged about 11 years was taken away by his full uncle, the accused Monir Ahıned from his house to Chambol village saying that he was going to see a bride and he wanted Rashed to accompany him. At that time, Rashed's father was staying in Saudi Arabia. The informant Sharifa Khatun on good faith allowed Rashed to go with the accused Monir Ahmed. But on that day at night about 9:00 pm when Monir Ahmed came back alone Sharifa Khatun asked him about her son whereon the accused Monir Ahmed answered that Rashed went to his aunt's house. But subsequently they came to know that Md. Rashed did not go to the house of his aunt (fufu). Thereafter, Sharifa Khatun along with the family members of the deceased searched for him. But all in vain. They received a phone call from a Nokia Mobile set bearing No.0173-604000 with which some one talked with Sharifa Khatun asking her to pay Tk.2,00,000.00 in exchange of her son and also advised her to go to Bandarban Hill Tracts for taking back her son. But on searching, it was found that the mobile call came from Vadalia Harun Bazar under Union-Sorol, Police Station-Banskhali. After that, the informant came to Banskhali Police Station and filed a diary about kidnapping of her son. Banskhali Police accepted the diary as First Information Report (FIR) and filed case No.5 of 2005 dated 09.10.2005. Subsequently, it came to light that the accused Monir Ahmed stated that he with the help of Bodi Alam son of Ahasan Ahmed, Kalim Uddin, son of Oli Ahmed, Salim Uddin, son of Oli Ahmed all of Village-Middle Sorol, Union-Sorol, Upazila-Banskhali on 07.10.2005 took Rashed in an abandoned brick field at present a fish-project of Ashraf Ali, son of Yakub Ali at North Sorol. There they killed Rashed plunging him into the water. After that they separated two hands, two legs and head from the dead body of the deceased and put the cut pieces of the dead body in a sack and dropped it in a canal named Jalkadar having link with the sea.

3. On receipt of 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.05 dated 17.01.2006 of Banshkhali Police Station under sections 364/385/302/201/34 of the Penal Code against them.

4. During trial charge under sections 302/201/34 of the Penal Code was framed against the accused-persons. The charge was read over and explained to the accused-persons to which they pleaded not guilty and claimed to be tried. To substantiate the case the prosecution examined as many as 11(eleven) witnesses, but the defence examined none.

5. On the closure of the evidence of the prosecution witnesses, the convict-appellant

Monir Ahmed was examined under section 342 of the Code of Criminal Procedure, 1898 to which he pleaded innocence and he informed the Tribunal that he would not adduce any evidence on his behalf. The other accused-persons being absconding they could not be examined under section 342 of the Code of Criminal Procedure.

6. The defence case as it appears from the trend of cross-examination is that the appellant is innocent and has been falsely implicated in this case and the accused-appellant is not involved with the offence as alleged by the prosecution.

7. After trial, on hearing the learned Advocates for both the sides and on perusal of the evidence and materials on record found the accused person guilty and convicted him under section 302 of the Penal Code.

8. Death sentence proceeding has been submitted to the High Court Division by way of Reference by the trial Court and the reference has been noted as Death Reference No.39 of 2007. Being aggrieved by the judgment and order of the trial Court, the convict Monir Ahmed preferred Jail Appeal No.541 of 2007 before the High Court Division.

9. The High Court Division by its judgment and order dated 27.11.2012 accepted the Death Reference and dismissed the Criminal Appeal affirming the judgment and order dated 31.05.2007 passed by the Additional Sessions Judge, 1st Court, Chattogram.

10. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the High Court Division dated 27.11.2012, the convict-appellant preferred Criminal Direct Appeal before this Division.

11. Mr. Zulhash Uddin Ahmed, learned Advocate appearing for the appellant has taken us through the FIR, the charge sheet, testimonies of the witnesses, the judgment and order passed by the Tribunal and the appellate Court (High Court Division), connected materials on record and submit that the High Court Division failed to consider that the judgment and order of conviction is bad in law as well as in facts and, as such, the impugned judgment and order of conviction is liable to be set aside. He further submits that the High Court Division failed to consider that the judgment and order of conviction is based on surmise and conjecture and not on legal evidence and, as such, the impugned judgment and order of conviction is liable to be set aside. He also submits that the High Court Division failed to consider that the judgment and order of conviction has been passed by the trial Court without applying its judicial mind as the case was not proved by the prosecution witnesses beyond reasonable doubt and, as such, the impugned judgment and order of conviction is liable to be set aside. He next submits that during trail the prosecution examined as many as 11 prosecution witnesses, but all the witnesses disowned the prosecution case and none of the witnesses witnessed the occurrence and, as such, the impugned judgment and order of conviction is liable to be set aside. Moreover, he submits that there is no evidence against the appellant except confessional statement, but the same cannot be used against the appellant without corroboration and cannot be basis of conviction and it is not an evidence as per section 3 of the Evidence Act, 1872 and, as such, the impugned judgment and order of conviction is liable to be set aside.

12. Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the respondent-the State, made his submissions supporting the judgment and order passed by the High Court Division and prays for dismissal of the appeal.

13. Now, to ascertain whether the prosecution has been able to prove the charge against the appellant Monir Ahmed, let us examine and analyze the depositions of the witnesses adduced by the prosecution.

14. P.W.1, the informant Sharifa Khatoon stated in her deposition that on 05.10.2005 her son Md. Rashed aged about 11 years came from Madrasha at 12:00 o'clock noon. At that time her husband was staying in Saudi Arabia. The accused Monir Ahmed came to her and wanted to take the victim Md. Rashed with him for seeing his bride at east Chambol. She allowed Md. Rashed to go with the accused Monir Ahmed. On that day at night at about 9:00 pm the accused Monir Ahmed came back to his home alone. On her query, the accused Monir Ahmed told that the victim Rashed had gone to his aunt's house. But on the next day, on query, in the house of aunt of Rashed it was found that Rashed did not go there. While search was going on everywhere for Rashed a call from mobile phone came to her demanding Tk.2,00,000.00 in exchange of Rashed and it was advised to her to pay the money in the hill district of Bandarban. After that, she made a G.D. Entry in the Banshkhali Police Station, which was treated as the FIR of the case. This witness proved the FIR of the case as Exhibit-1 and her signature therein as Exhibit-1/1.

15. During cross-examination she stated that their house and that of Monir Ahmed situated side by side. She allowed Rashed to go with Monir Ahmed believing that Rashed would come back. Two days later she lodged the FIR of the case. She put her signature on the seizure list. This witness denied the defence suggestion that the accused Monir Ahmed was not involved in the occurrence or that he did not accompany her son or that she deposed falsely.

16. P.W.2, Amena Begum, stated in her deposition that after coming back from Madrasha on Wednesday one day before last Ramadan accused Monir Ahmed took the victim Rashed away on the pretext of seeing his bride. Four days later the accused Monir Ahmed demanded Tk.2,00,000.00 as ransom for the release of Rashed. The accused Monir Ahmed admitted himself in the Police Station that he killed Rashed cutting into pieces. This witness identified the accused Monir Ahmed on the dock.

17. During cross-examination she stated that she was the full aunt of the victim Rashed. This witness further stated that on her query Rashed told her that he was going with his uncle Monir Ahmed to see his bride. This witness denied the defence suggestion that she deposed falsely.

18. P.W.3, Habibur Rahman, stated in his deposition that he was the Ward Member of Ward No.2, Gundamara Union Parishad No.9, Banshkhali, Chattogram. The Officer-in-Charge of the Police Station along with some fishermen numbering 8/10 and the accused Monir Ahmed were present on the embankment beside his home. At the instruction of the accused Monir Ahmed they were trying to recover the dead body. From Asar' to Esha' prayer the fishermen and some other people tried to recover the dead body of the deceased from the water, but failed. So, they decided to try once again in the next morning. Police came back on the next morning with the accused Monir Ahmed. Again they tried to recover the dead body, but in vain. At that time 500/600 people were present there. When they confirmed that the dead body was not dropped in that water they asked the accused Monir Ahmed to say the exact place where he dropped the dead body of the victim Md. Rashed. At that time accused Monir Ahmed told before people that if he was released then he would tell the truth. At the

assurance of the people the accused Monir Ahmed took them to the brick field of Rashid Mia situated to the north of Sorol Union. Beside that a Fish Project was there. Showing a place to them the accused Monir Ahmed told that after killing Rashed they cut his two hands, two legs and the head and put the cut pieces of the dead body in a plastic sack and dropped it under a *Nashi*(Culvert), which was situated in between Fish-Project and the sea. The neighbouring people told that at the time of tide when the sack of the dead body entered into the fish project, the owner of the Fish-Project pulled out the sack into the sea at the time of ebb. For 8/9 days the surrounding people saw the middle part of the dead body floating in the sea water. This witness identified the accused Monir Ahmed on the dock.

19. During cross-examination he stated that the accused Monir Ahmed disclosed that his two cousins were also involved in the alleged occurrence. He did not know the name of the owner of the project. This witness denied the defence suggestion that the accused Monir Ahmed did not tell anything to police or them.

20. P.W.4, Banshi Ram Jaladas deposed that he was waiting for fish putting his net in the sea. The time was in the previous Ramadan. Prior to one day before last Ramadan at 3 p.m. the Union Parishad Member and the Police called him. The Officer-in-Charge showed him the accused Monir Ahmed who was kept in tied up condition in a Taxi. The accused Monir Ahmed said that with a fishing boat he plunged the dead body of the deceased Rashed into the sea. As per showing of the accused Monir Ahmed they tried to recover the dead body of the deceased from water with the help of net and anchor but did not find the dead body. At night at about 8:00 pm police left the place taking Monir Ahmed with them. Next day in the morning they again searched the dead body of the victim in the sea, but did not find it. This witness identified the accused on the dock.

21. During cross-examination this witness denied the defence suggestion that the accused Monir Ahmed did not tell them about dropping the dead body in the sea.

22. P.W.5, Soor Ahmed stated in his deposition that when he was catching fish in the moon light he saw a human dead body in a floating condition without hands, legs and head entering into the Fish-Project. Seeing that he became panicked and informed the union parishad member. He again returned to the fish project and saw that the dead body was carried away by the ebb tide in the sea. Subsequently, he heard that the dead body was of a boy. He saw his mother. Police recorded his statement.

23. During cross-examination this witness stated that it was moonlit night. He denied the defence suggestion that he did not see the dead body entering into the Fish Projector that he deposed falsely.

24. P.W.6, Oli Ahmed stated in his deposition that the accused Monir Ahmed took the victim Rashed to his house on the first day of Ramadan prior to the last Ramadan and told him that he went to his house to see him. After taking Seheri, on the pretext of offering Morning Prayer he went away taking the victim Rashed with him. Subsequently, he heard from police that the accused Monir Ahmed killed Rashed.

25. During his cross-examination this witness stated that the accused Monir Ahmed was his full nephew.

26. P.W.7, Noor Mohammad Mazumder, Upazilla Magistrate, Banshkhali stated in his

deposition that on 23.11.2005 he was attached to Bashkhali Upazailla as the Upazilla Magistrate. On that date after observing all legal formalities and giving sufficient time for speculation to the accused Monir Ahmed, he recorded his confessional statement under Section 164 of the Code of Criminal Procedure. This witness proved the confessional statement of the accused Monir Amed as Exhibit-2 and his signatures therein as Exhibits-2/1, 2/4 and identified the signature of the accused Monir Ahmed therein as Exhibit-3. This witness identified the accused Monir Ahmed on the dock. This witness further deposed that on 27.11.2005 he recorded the statement of Oli Ahmed under section 164 of the Code of Criminal Procedure. This witness proved the statement as Exhibit-4, his signatures therein as Exhibits-4/1, 4/2 and identified the LTI of Oli Ahmed as Exhibit-5.

27. During cross-examination this witness stated that he gave 3(three) hours time for speculation before making confessional statement to the accused Monir Ahmed. There were no police personnel where the accused was kept. This witness denied the defence suggestion that there were marks of injury on the person of the accused or that he was not given sufficient time for speculation.

28. P.W.8, Sultan Ahmed deposed that the house of the accused persons Karimulla and Salimulla were situated at Sorol. The occurrence took place one year back. The defence declined to cross-examine this witness.

29. P.W.9, S.I. Md. Shafiqul Islam one of the investigating officer of the case deposed that on the basis of complaint of the informant the Officer-in-Charge after recording the case on 09.10.2005 under section 364 of the Penal Code and entrusted him with the charge of investigation of the case. During investigation he visited the place of occurrence, drew Sketch Map thereof with Index, seized mobile phone by which the accused demanded ransom from the informant, recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure, tried to recover the victim and to arrest the accused. On 21.10.2005 the accused Monir Ahmed surrendered to him. He tried to recover the dead body of the victim taking the accused with him. As per showing of the accused Monir Ahmed he visited the 2nd place of occurrence an old brick field presently fish-project of Ashraf Ali situated at north Sorol. He got recorded the confessional statement of the accused Monir Ahmed under section 164 of the Code of Criminal Procedure as per desire of the accused Monir Ahmed. On 23.10.2005 the accused Monir Ahmed made confessional statement under section 164 of the Code Criminal Procedure before a Magistrate. In his confessional statement the accused Monir Ahmed stated that he along with the accused-persons Badi Alam, Salim Uddin and another Salim Uddin took the victim Rashed(11) on 07.10.2005 with them at night to the 2nd place of occurrence and killed him dipping into the water. Thereafter, they separated two hands, two legs and head from the dead body of the victim-deceased by inflicting dao blows. Thereafter, they put the cut pieces of the dead body of the victim in a sack and dropped it in a canal Jalkadar by name. As per the statement of the accused they searched for the dead body of the deceased in Jalkadar canal and in the sea, but nowhere the dead body was found. He also tried to arrest the other accused-persons. After investigation *prima-facie* case under sections 364/385/302/201/34 of the Penal Code being made out beyond reasonable doubt against the accused-persons he sent memorandum of evidence to his higher authority. In the event of his transfer elsewhere he handed the docket of the case over to the officer-in-charge. This witness identified the accused Monir Ahmed on the dock. This witness further deposed that the first place of occurrence was the house of Fechu Mia situated at Munkir Char under Banshkhali Police Station. This witness proved first Sketch Map as Exhibit-6, his signature therein as Exhibit-6/1, the Index as Exhibit-7, his signature thereon as Exhibit-7/1, the 2nd

place of occurrence as Exhibit-8, his signature thereon as Exhibit-8/1, the Index thereof as Exhibit- 9, his signature thereon as Exhibit 9/1. This witness further proved the seizure list dated 10.10.2005 under which he seized a Nokia mobile set bearing No.0173604000 as Exhibit-10. This witness further deposed that he gave mobile phone to the custody of its owner. This witness proved the deed of custody as Exhibit-11 and his signature thereon as Exhibit-11/1.

30. During his cross-examination this witness stated that S.I. Moshiur Rahman submitted the charge sheet. He produced the accused Monir Ahmed before the Court of Magistrate on 23.10.2005 and collected confessional statement at 1:30 pm. Taking the accused Monir Ahmed with him he tried to recover the dead body of the deceased from the deep sea. The informant put her signature in English. This witness denied the defence suggestion that he tortured the accused Monir Ahmed mentally and physically keeping him in his custody or that the accused Monir Ahmed made confessional statement under section 164 of the Code of Criminal Procedure as being tutored by him or that he deposed falsely.

31. P.W.10, Russel Kanti Nath stated in his deposition that the occurrence took place $1^{1}/_{2}$ year back. After coming back from school he sat in the mobile phone shop of his father Sunil Kanti Roy. At 12:00 noon, a person came to make a mobile call. He gave mobile call to a number as supplied by that person. Thereafter, taking the mobile phone the person went out of the shop. He followed him. That person told over mobile phone that he was talking from Bandarban and that if he was paid Tk.2,00,000.00 she would get back her son. Thereafter, paying him Tk.4.00 that man went away. 7/8 days later police came to their shop and apprehended his father and seized the mobile phone. This witness proved his signature on the seizure list as Exhibit-10/2 and identified the seized mobile phone as material Exhibit-I. This witness further deposed that the bearded man with cap on his head standing on the dock was that person (i.e. the accused).

32. During his cross-examination this witness stated that at the time of occurrence he was the student of in class-IX. At that time his father was in their house. The name of their shop was 'Sunil Store'. Police examined him. This witness denied the defence suggestion that he deposed as tutored by Amin Chairman.

33. P.W.11, S.I. Md. Mosiur Rahman stated in his deposition that on 30.12.2005 he was attached to Banshkhal Police Station as S.I. On 09.10.2005 the Officer-in-Charge entrusted him with the charge of remainder of the investigation after transfer of his previous Investigating Officer S.I. Shafiqul Islam. During his investigation he perused the docket of the case and found that his previous investigating officer visited the place of occurrence, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure, seized the alamats of the case, arrested the accused Monir Ahmed, got recorded his statement under section 164 of the Code of Criminal Procedure and made attempt to arrest the other accused-persons. This witness further deposed that after investigation *prima-facie* case having been made out against the accused-persons Monir Ahmed, Badi Alam, Kalimuddin and Salim Ullah, his previous investigating officer submitted Memorandum of Evidence(ME) under sections 364/385/302/201/34 of the Penal Code against them. As per the memo No.141 (2)2, dated 05.01.2006 of S.P, Chattogram he submitted charge-sheet No.05 dated 17.01.2006 of Banshkhali Police Station under sections 364/385/302/201/34 of the Penal Code.

34. During his cross-examination this witness stated that on 30.12.2005 he received the

docket of the case and submitted charge-sheet on 17.01.2006. He denied the defence suggestion that he did not take out investigation of the case or that without taking out investigation the charge sheet was submitted in this case as per instruction of Amin Chairman or that he deposed falsely.

35. These are the witnesses produced by the prosecution. Among the witnesses P.W.1 is the mother of the deceased victim and informant of the case, P.W.2 is full aunt of the victim, P.W.3 is the ward member of ward No.2, Gundamara Union Parishad No.2, Banshkhali, P.Ws.4 and 5 are fishermen of the locality, P.W.6 is the full uncle of the victim, P.Ws. 7, 9 and 11 are the official witnesses, P.W.8 is a charge sheeted witness and P.W.10 is a shopkeeper of the locality.

36. Now let us see how far the prosecution has been able to prove the allegation brought against the convict-appellant. P.W.1, the informant stated in her deposition that on 05.10.2005 her son Md. Rashed aged about 11 years came from Madrasha at 12:00 o'clock noon. The accused Monir Ahmed came to her and wanted to take the victim Md. Rashed with him for seeing his bride at east Chambol. She allowed Md. Rashed to go with the accused Monir Ahmed. On that day at night at about 9:00 pm the accused Monir Ahmed came back to his home alone. On her query, the accused Monir Ahmed told that the victim Rashed had gone to his aunt's house. But on the next day, on query, in the house of aunt of Rashed it was found that Rashed did not go there. While search was going on everywhere for Rashed a call from mobile phone came to her demanding Tk.2,00,000.00 in exchange of Rashed and it was advised to her to pay the money in the hill district of Bandarban. After that, she made a G.D. Entry in the Banshkhali Police Station, which was treated as the FIR of the case. This witness proved the FIR of the case as Exhibit-1 and her signature thereon as Exhibit-1/1. P.W.2 supported P.W.1. P.W.3 is the Member of Ward No.2, Gundamara Union Parishad stated in his evidence that the accused Monir Ahmed plunged a boy into water taking him by a boat that from the time of 'Asar' prayer to 8:00 pm the dead body of the deceased was searched with the help of net at the place as showed by the accused Monir Ahmed, but the dead body was not found; that in the following morning with the accused Monir Ahmed they searched for the dead body, but it was not found; that at their assurance that he would be released, the accused Monir Ahmed took them to the brick field of Rashid Mia situated at Sorol Union that by showing a place, the accused Sorol admitted that at that place first of all he cut the hands of Rashed, then cut the two legs, then cut the throat and having put the cut pieces of the dead body in a sack plunged it into water under a Nasi (culvert) situated between the sea and the fish-project. People near the canal saw the middle part of the dead body to float in the sea for 8/9 days. P.W.4, Banshi Ram Jaladas stated in his evidence that at 3:00 pm at Ramadan before last at the instruction of the accused Monir Ahmed they tried to recover the dead body of the deceased from water with the help of net and anchor but could not; that next day in the morning they searched for the dead body in the sea but failed. P.W.5, Soor Ahmed stated in his evidence that on Thursday of Ramadan before last at night while he was catching fish saw a human dead body without legs, hands and head was floating and entered into the fish-project, which was subsequently carried away by ebb tide; that he saw the mother of the deceased boy. P.W.6, Oli Ahmed stated in his evidence that on the first day of Ramadan the

accused Monir Ahmed took the victim Rashed to his house. P.W.10, Russel Kanti Nath stated in his evidence that about 1(one) year back at 12:00 o'clock noon a person came to their mobile phone shop at Haron Bazar and giving a phone number asked him to give a call to a number which he did; that after gave the call the person went out of their shop and told the person on the other side that he was talking from Bandarban and that if he was paid Tk.2,00,000.00 he would release her son; that 7/8 days later police came and seized the mobile set. He identified the accused Monir Ahmed to be the person to have talked with their mobile set.

37. P.W.9, Md. Shafiqul Islam, one of the Investigating Officer of the case stated in his evidence that during investigation he visited the place of occurrence, drew sketch maps thereof with indexes recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure, made attempt to recover the dead body of the victim taking the accused Monir Ahmed with him; that he got recorded the confessional statement of the accused Monir Ahmed under section 164 of the Code of Criminal Procedure in which the accused Monir Ahmed on 07.10.2005 at dead of night by plunging into the water of fish-project i.e. the second place of occurrence he killed the victim, separated his legs, hands and head from the body by inflicting dao blows; that after investigation *prima-facie* case having been made out against the accused persons S.I. Masiur Rahman submitted charge sheet in this case. P.W.11, S.I. Masiur Rahman the charge sheet submitting investigating officer stated in his deposition that after taking over the charge of investigation he perused the docket of the case and found that the previous investigating officer visited the place of occurrence, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure, got recorded the statement of the accused Monir Ahmed under section 164 of the Code of Criminal Procedure, seized alamats of the case and submitted the charge sheet of the case. From the foregoing discussion and the observation made earlier, it is crystal clear that the prosecution has been able to prove the allegation against the convict-appellant beyond all reasonable doubts.

38. In the instant case, the convict-appellant Monir Ahmed made confessional statement before the learned Magistrate under section 164 of the Code of Criminal Procedure, 1898.

39. The confessional statement of Monir Ahmed reads as follows:

> "পূর্ব পরিকল্পনা মত আমি আমার চাচাত ভাই শাহ আলমের ছেলে রাশেদকে বাড়ির পাশে রাস্তা থেকে আমার বউ দেখতে বলে আমার মামার বাড়ি মধ্যম সরলে নিয়ে যাই। সেখানে পূর্ব পরিকল্পনা মত আমার মামাত ভাই সলিম ও কলিম উদ্দিন ও মামার বাড়ির পাশের বাড়ির বদিউল আলম অপেক্ষায় ছিল। সে দিন ছিল ৫/১০/০৫ ইং। সে দিন দুপুর ২ টার দিকে রাশেদকে নিয়ে যাই। আমাদের ৪ জনের পরিকল্পনা মতে আমার প্রবাসী চাচাত ভাই শাহ আলম থেকে ২,০০,০০০/= (দুইলক্ষ) টাকা চাঁদা পাওয়ার জন্য। বুধবার রাতে ৫/১০/০৫ ইং রাতে রাশেদ সহ আমার বাড়িতে সেহেরী খাই। তারপর বৃহস্পতিবার সকালে বদিউল আলমের ঘরে নিয়ে রাশেদের মুখ হাত পা বেঁধে বদিউল আলমের একটি রুমে আটকে রাখে। এ ঘটনা বদিউল আলমের পরিবারের লোকজন দেখে বাঁধা দিলে তাদেরকে বদিউল আলম কেটে ফেলবে বলাতে তারা চুপ মেরে যায়। তারপর বৃহস্পতিবার দিন আমি বাড়িতে ফিরে আসি। রাশেদের বাড়িতে অবস্থা

জানার জন্য। আমাকে বাড়িতে রাশেদ সম্পর্কে আমার পরিবারের লোকজন ও রাশেদের মা জিজ্ঞাসাকালে আমি অস্বীকার করি। তারপর দিন শুক্রবারে সরল আসামী বদিউল আলম হারুন বাজারে এসে একটি মোবাইল থেকে রাশেদের মাকে বলে ২,০০,০০০/= টাকা দেয়ার জন্য ফোন করে। ফোন করে টাকা পাওয়ার আশা না থাকায় এবং আমাকে রাশেদকে নিয়ে আসার বিষয় সন্দেহ করায় শুক্রবার দিন রাতে রাশেদকে বস্তায় ভর্তি করে আমরা বদিউল আলমের বাড়ি থেকে উত্তর পশ্চিমে পুকুর ইটের ভাটা পানিতে ডুবাইয়া মেরে পরে দা দিয়ে মাথা হাত পা টুকরা টুকরা করে বস্তায় ভরে সুইজ গেটের মাঝে ছুড়ে ফেলে দেয়। তারপর রাত ১/২ টার দিকে বদিউল আলমের বাড়িতে আমরা ৪ জন রাত্রি যাপন করে পরদিন আর বাঁচতে পারব না ভেবে যে যার মত পালিয়ে যাই। আমি শহরে মাঝিরঘাটে সারাদিন থাকি তারপর দিন কুতুবদিয়া যাই। সেখানে বড় ভাইয়ের সংগে ফোনে কথা বলে জানি যে, এলাকার লোক আমাকে পিটায়ে মারবে তাই ২১/১০/০৫ ইং সকাল ১০টায় থানায় এসে ধরা দিই।"

40. From the deposition of P.W.7, Noor Mohammad Mazumder, Upazila Magistrate, Banshkhali and on perusal of confessional statement, it appears that the statement was recorded by the learned Magistrate following all the provisions required by law to be followed at the time of recording the confessional statement. P.W.7 stated that the confessional statement made by Monir Ahmed was done voluntarily and the same was true. The appellant Monir Ahmed made confessional statement incriminating himself. It is well settled that the confessional statement can be the sole basis of conviction if it is made voluntarily and it is true. In the instant case, the confessional statement of the appellant is voluntary and true and it was rightly found to be so by both the trial Court and the High Court Division.

41. It is true that there is no eye witness in the instant case, but the inculpatroy, true, and voluntary confessional statement of the convict-appellant, and the circumstances are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellant in committing murder of the victim Rashed.

42. In performing our duties, this court is charged with the task of not only assessing the facts against the law, but also considering the impacts of judgments that are pronounced and any assessment made on the overall justice system.

43. In the light of the discussions, we may conclude that the prosecution has been able to prove the charge against the appellant beyond reasonable doubt and the trial Court has rightly convicted and sentenced the appellant to death and the confirmation thereof by the High Court Division is justified. We find no cogent reason to interfere with the judgment and order passed by the High Court Division.

44. Mr. Zulhash Uddin Ahmed, the learned Advocate appearing for the appellant lastly drew our attention regarding the age of the appellant and submits that the appellant Monir Ahmed is not habitual offender and has been languishing in the condemned cell for more than fifteen years and considering his length of confinement in the condemned cell the sentence of death may be reduced.

45. In this regard, it is pertinent to mention the observation of their Lordships U.U. Lalit and two other honorable Judges of the Supreme Court of India made in the case of ***Arvind Singh Vs. The State of Maharastra, AIR 2020 SC 2451, Para-98*** that "(i) The extreme penalty of death need not be inflicted except in gravest case of extreme culpability. (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'. (iii) Life imprisonment is the Rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight age and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

46. From the materials on record, it appears that the appellant is in the condemned cell for more then 15(fifteen) years suffering the pangs of death. It was held in the case of ***Nazrul Islam (Md) vs. State*** reported in **66 DLR (AD) 199** that**, "*Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."*** In view of the decisions cited above as well as the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellants be commuted to one of imprisonment for life.

47. The Criminal Appeal No.6 of 2013 is **dismissed with modification of sentence**. The sentence of death of the appellant, namely, Monir Ahmed of Village-Monkirchar, Police Station-Banskhali, District-Chattogram is commuted to imprisonment for life and also to pay a fine of Tk.10,000.00(ten thousand), in default, to suffer rigorous imprisonment for 6(six) months more. However, he will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence and other remission as admissible under the Jail Code.

48. The concerned jail authority is directed to move the appellant to the regular jail from the condemned cell forthwith.

**16 SCOB [2022] AD 62**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain, *Chief Justice***
**Mr. Justice Muhammad Imman Ali**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**CRIMINAL APPEAL NO.127 OF 2014 WITH JAIL APPEAL NO.26 OF 2014 AND JAIL APPEAL NO.29 OF 2014**
(From the judgment and order dated 11.05.2014 passed by the High Court Division in Death Reference No.07 of 2009 with Criminal Appeal Nos.616, 670 and 698 of 2009 with Jail Appeal Nos.155-159 of 2009).

| | | |
|---|---|---|
| **Md. Shukur Ali and another** | **:** | **.....Appellants (In Crl. A. No.127 of 2014)** |
| **Mamun** | **:** | **.....Appellant (In Jail Appeal No.26 of 2014)** |
| **Sentu and another** | **:** | **.....Appellants (In Jail Appeal No.29 of 2014)** |
| | -Versus- | |
| **The State** | **:** | **.....Respondent (In all the appeals)** |

| | | |
|---|---|---|
| For the appellants (In Crl.A. No.127 of 2014) | : | Mr. S.M. Shahjahan, Advocate with Mr. Ragib Rouf Chowdhury, Advocate, instructed by Ms. Shahanara Begum, Advocate-on-Record. |
| For the appellants (In Jail A. Nos.26 & 29 of 2014) | : | Mr. S.M. Aminul Islam, Advocate. |
| For the Respondent (In all the appeals) | : | Mr. Biswajit Debnath, Deputy Attorney General, instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record. |
| Date of Hearing and Judgment | : | The 18th day of August, 2021. |

**Editors' Note**
This is a case of gang rape and murder. There was no eyewitness. Appellants were suspected of being involved with the commission of crime. Police arrested appellant Mamun and Azanur who gave confessional statements describing vividly the role played by them and other co-accused, namely, Shukur and Sentu in committing the crime which was supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses regarding the marks of injury on the body of the deceased. The Appellate Division held that in such case the non-confessing accused persons can be equally held liable like Azanur and Mamun for murdering the deceased after committing rape. The Court further observed that, the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that

confessional statement by any sort of evidence either direct or circumstantial and adverse inferences may be drawn upon silence on part of those who have been so incriminated by the confession of the co-accused. However, the Appellate Division maintained the death sentence of the appellant Shukur Ali who inflicted fatal knife injuries to the deceased and commuted the sentence of death of other appellants to imprisonment for life.

**Key Words**
Section 9(3) of the Nari O Shishu Nirjaton Daman Ain, 2000; Confessional Statement; Section 164 of the Code of Criminal Procedure; Section 8 and 30 of Evidence Act; Due process; Crime control

**Section 164 of the Code of Criminal Procedure and Section 8 of the Evidence Act:**
**It is true that there is no eye witness in the instant case, but the inculpatory, true, and voluntary confessional statements of two accused, and the circumstances particularly long absconsion by Shukur and Sentu are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellants Shukur, Sentu, Mamun and Azanur in the alleged rape and murder thereof. ...(Para 63)**

**Due process vis-a-vis crime control consideration:**
**In performing our duties, this court is charged with the task of not only assessing the facts against the law, but also considering the impacts of judgments that are pronounced and any assessment made on the overall justice system. With modern criminal justice mechanism, the right against self-incrimination is one that stands as a cornerstone. As such, confessions by a co-accused are generally inadmissible against the accused in a concerned case. However, in our duties of administering justice, we are sometimes faced with a case that forces us to consider aspects of larger policy at play. The balance between crime control and due process models of justice is such a consideration that requires reassessment with changing times and upon the fact of each case. The case before us is one of such a heinous crime, where measures of control are made far more necessary, to ensure that justice can be brought to the victim in question. As such, while due process is still of utmost importance; crime control considerations must be made as well. ...(Para 64, 65 and 66)**

**Adverse inferences may be drawn upon silence on part of those incriminated:**
**The principle of the right against self incrimination is also accompanied by the principle that upon silence on part of those incriminated, adverse inferences may be drawn at any stage of the trial and pre-trial procedures. When the co-accused, Azanur and Mamun put forth their confessions, incriminating the accused Shukur and Sentu, they had the opportunity to present their accounts of the events in question. Their refusal to adduce defence witness and to give any statement, allows this Court to draw an adverse inference against them, in conjunction with the inferences drawn from the period of their absconcion. ...(Para 68 and 69)**

**Section 30 of the Evidence Act:**
**We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the makers of the confessional statements vividly have stated the role played by other co-accused in the rape incident and murder of the deceased which is also supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses particularly the deposition of**

**P.Ws.1,2,3,10,11,12,14 and 18 regarding the marks of injury on the body of the deceased. Every case should be considered in the facts and circumstances of that particular case. In light of the facts and circumstances of the present case, we are of the view that the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial. (Emphasis added). Thus, the accused namely Shukur and Sentu are equally liable like Azanur and Mamun for murdering the deceased after committing rape.**

**...(Para 70)**

**JUDGMENT**

**Obaidul Hassan, J.**

1. This Criminal Appeal No.127 of 2014 with Jail Appeal Nos.26 and 29 of 2014 is directed against the judgment and order dated 11.05.2014 passed by a Division Bench of the High Court Division in Death Reference No.07 of 2009 with Criminal Appeal Nos.616, 670 and 698 of 2009 with Jail Appeal Nos.155-159 of 2009 accepting the Death Reference while dismissing all the appeal and thereby upholding the judgment and order of conviction and sentence dated 04.02.2009 passed by the learned Nari O Shishu Nirjatan Daman Tribunal, Kushtia (hereinafter referred to as the Tribunal/trial Court) in Nari O Shishu Nirjatan Case No.147 of 2004 arising out of Daulatpur Police Station Case No.26 dated 27.03.2004 corresponding to G.R. No.69 of 2004 convicting the appellants under section 9(3) of the Nari O Shishu Nirjatan Daman Ain, 2000 (hereinafter referred to as the Ain, 2003) and sentenced them to death by hanging and to pay a fine of Tk.1,00,000.00 each.

2. The prosecution case, in short, is that one Md. Abdul Aziz alias Jhunu, father of the deceased Sabina Khatun lodged First Information Report (shortly, the FIR) with Daulatpur Police Station. Alleging that on the evening of 25.03.2004 his daughter Sabina Khatun (13) went to the house of neighbor Muna Mondal to watch television. As she did not return home, the inmates of Sabina's house went to the said residence to search for Sabina. One Rubina, wife of Azanur told them that the victim went away from their residence just after evening. They also looked for Sabina in every house of the village, but could not trace her. On 27.03.2004 at about 05:30 pm the informant came to know that a dead body has been found in the field of Lalnagar. Being informed, the informant, his wife, Hasina; daughter, Bedana; son, Mulluk Chand; along with other villagers, went to the place of occurrence and saw the naked dead body of Sabina Khatun, her mouth was fastened with her orhna. They saw several injury marks on her chest, both the thighs and sharp cutting injury on her private organ. Her body was partially decomposed and spreading bad smell. Later on, they came to know that one Samad first saw the dead body at the place of occurrence where he went to pluck buds of tobacco flowers. The informant suspected that the accused Mamun, Azanur, Sentu and others had raped and killed his daughter. On the basis of the said first information lodged by the informant, Daulatpur Police Station Case No.26 dated 27.03.2004 corresponding to G.R. No.69 of 2004 under section 9(3) of the Ain, 2000 was started.

3. Officer-in-Charge Md. Faruk Ahmmed started to investigate the case. On his transfer Sub-Inspector (SI), Md. Nabir Hossen investigated the case and finally when S.I. Md. Nabir Hossain was transferred S.I. Md. Mosaddek Hossen Khan completed the investigation and submitted charge sheet. The investigating officer visited the place of occurrence and prepared the Inquest Report of the dead body in the presence of witnesses, prepared the sketch map with index, seized the alamots and examined the witnesses under section 161 of the Code of

Criminal Procedure, 1898. He duly sent the body of the deceased to the Kushtia General Hospital for Postmortem. The postmortem examination of the victim was done by a group of doctors, they were Dr. Ashok Kumar Saha, Dr. Arbinda Pal, Dr. Saleh Ahmmed and Dr. Abdus Salam. Ultimately, on conclusion of investigation of the case, the Investigating Officer submitted charge sheet being No.108 dated 25.07.2004 against the accused Azanur Rahman, Mamun, Shukur, Kamu (Kamrul) and Sentu under section 9(3) of the Ain, 2000.

4. Later, the case was duly sent to the Tribunal for trial. The learned Judge of the Tribunal on taking cognizance of the offence against the accused persons under section 9(3) of the Ain, 2000 framed charge against them. On being read over and explained the charge to the accused persons, they pleaded not guilty and asked for a trail. To substantiate the case the prosecution examined as many as 18 (eighteen) witnesses, but the defence examined none.

5. On the closure of the evidence of the prosecution witnesses, the convict-appellants were examined under section 342 of the Code of Criminal Procedure, 1898 whereupon they pleaded innocence. They informed the Tribunal that they would not adduce any evidence on their behalf.

6. The defence case as it appears from the trend of cross-examination is that the appellants are innocent and have been falsely implicated in this case out of enmity and personal grudge and the accused appellants are not involved with the offence of committing rape on the deceased Sabina, and murdering her. The accused Sentu, son of Tizabuddin, is the brother of Montu. Sentu is not named in the FIR. It is also the case of the defence is that from the date of occurrence the accused persons were very much present in the locality and they did not flee-away. The victim was not at all subjected to the commission of rape by the appellants. The confessional Statements of accused Mamun and Azanur are not true and voluntary. Owing to merciless torture and enticement of the police the accused persons were compelled to give involuntary confessional statements.

7. During the course of trial, the prosecution produced as many as 18 witnesses including the Medical Officer and the Investigating Officer. The trial Court after considering the evidence and materials on record found the accused persons Sentu, Mamun, Azanur Rahman, Shukur and Kamu (Kamrul) guilty under section 9(3) of the Ain, 2000 and sentenced them to death by its judgment and order dated 04.02.2009.

8. Death sentence proceeding has been submitted to the High Court Division by way of Reference by the Tribunal and the Reference has been noted as Death Reference No.07 of 2009. Being aggrieved by the judgment and order of the Tribunal, the convicts Shukur, Kamu alias Kamrul and Sentu preferred Criminal Appeal No.616 of 2009, convict Azanur Rahman preferred Criminal Appeal No.670 of 2009, convict Mamun preferred Criminal Appeal No.698 of 2009 before the High Court Division. Convict Mamun, Azanur Rahman, Md. Shukur Ali, Kamu alias Kamrul and Sentu presented petition of appeals from jail, which have been numbered as Jail Appeal Nos.155, 156, 157, 158 and 159 of 2009 and the same were heard with Death Reference No.07 of 2009.

9. The High Court Division by its judgment and order dated 11.05.2014 accepted the Death Reference and dismissed all the Criminal Appeals and Jail Appeals affirming the judgment and order passed by the Nari O Shishu Nirjatan Daman Tribunal, Kushtia.

10. Being aggrieved by, and dissatisfied with the judgment and order of conviction and

sentence passed by the High Court Division dated 11.05.2014, the convict-appellants, namely, Md. Shukur Ali, Sentu, Mamun and Azanur Rahman preferred Criminal Appeal with Jail Appeal before this Division.

11. Mr. S. M. Shahjahan, the learned advocate appearing along with Mr. Raghib Rouf Chowdhury, the learned Advocate, appearing for the appellants in Criminal Appeal No.127 of 2014, Mr. S.M. Aminul Islam, the learned advocate, appearing for the appellants in Jail Appeal Nos.26 and 29 of 2014, have taken us through the FIR, the inquest report, the postmortem report, the charge sheet, testimonies of the witnesses, the judgment and order passed by the Tribunal and the appellate Court (High Court Division), connected materials on record and submit that the High Court Division failed to consider that the judgment and order of conviction is bad in law as well as in facts and, as such, the impugned judgment and order of conviction is liable to be set aside. They further submit that the High Court Division failed to consider that the judgment and order of conviction is based on surmise and conjecture and not on legal evidence and, as such, the impugned judgment and order of conviction is liable to be set aside. They also submit that the High Court Division failed to consider that the judgment and order of conviction has been passed by the Tribunal without applying its judicial mind as the case was not proved by the prosecution witnesses beyond reasonable doubt and, as such, the impugned judgment and order of conviction is liable to be set aside. They next submit that during trail the prosecution examined as many as 18 prosecution witnesses, but all the witnesses disowned the prosecution case and none of the witnesses witnessed the occurrence and, as such, the impugned judgment and order of conviction is liable to be set aside. Moreover, they submit that there is no evidence against the appellants except exculpatory confessional statements made by co-accused, but the same cannot be used against the appellants without corroboration and cannot be basis of conviction and it is not an evidence as per section 3 of the Evidence Act, 1872 and, as such, the impugned judgment and order of conviction is liable to be set aside. They added that the High Court Division failed to consider that in the judgment and order of conviction passed by the learned Judge of the Nari O Shishu Nirjaton Daman Tribunal it was not considered that out of 18 witnesses P.Ws.10 and 11 deposed about the searching of the appellants, but their evidence was not supported by P.Ws.1,11, 6,13 and they deposed that at the time of occurrence three witnesses were present, but P.Ws.1,2,6 and P.W. 13 did not support this story. Rather those evidence were contradicted by P.Ws.6 and 13, P.W.6 in his cross-examination stated that "আমি আসামীদের সন্দেহ করি না and P.W.13 in his cross-examination stated that "আসামীদের বাড়িতে আমরা কেহ যাই নাই।" So it appears that there is no circumstantial evidence against the appellants and, as such, the impugned judgment and order of conviction is liable to be set aside. They also submit that the High Court Division failed to consider that in passing the judgment and order of conviction, the learned Judge of the Nari O Shishu Nirjaton Daman Tribunal did not consider that the confessional statement must be left out of consideration as it was contradicted by medical evidence. The absence of spermatozoa in the private organ of the deceased throws doubt on the prosecution story of rape. They also submitted that the doctor stated that the cause of death was strangulation, but confession do not disclose the same and, as such, the impugned judgment and order of conviction is liable to be set aside. Besides, they submit that there is no evidence against the appellants except confession of co-accused which is not substantial evidence in convicting appellants without any other corroborative evidence, moreover it appears from the record that the victim went to watch television in a house, but the owner of that house was not examined and the witnesses Kanchan and Hasina and other witnesses did not disclose the name of the appellants in their evidence and the circumstantial evidence also did not prove the involvement of the appellants and, as such, the impugned judgment and order of conviction is liable to be set aside. They again submitted that the confession of

accused Mamun and Azanur Rahman were not made voluntarily and those are not true as no certificate was issued by the statement recording Magistrate in this regard and, as such, the said confession is a nullity in the eye of law and, as such, the impugned judgment and order of conviction is liable to be set aside.

12. They further submit that the allegation against the appellants does not come under section 9(3) of the Nari O Shishu Nirjaton Daman Ain, 2000 as the doctor opined that the death was due to asphyxia as a result of above mentioned injuries, caused by strangulation which was ante-mortem and homicidal in nature with rape, but the rape was not proved by any other evidence including medical certificate and, as such, the impugned judgment and order of conviction is liable to be set aside. Finally, they submit that the learned Magistrate recorded confessional statement of the two accused, but did not follow the prescribed procedure as mentioned in section 364 of the Code of Criminal Procedure, 1898 and, as such, the confessional statements are not admissible evidence resulting a judgment invalid.

13. Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the respondent-the State, made his submissions supporting the judgment and order passed by the High Court Division and prays for dismissal of the appeal.

14. Now, to ascertain whether the prosecution has been able to prove the charge against the appellant Md. Shukur Ali, Mamun, Sentu and Azanur Rahman, let us examine and analyze the depositions of the witnesses adduced by the prosecution.

15. P.W.1, the informant Abdul Aziz @ Jhunu deposed that they saw several injury marks on the body of the deceased and the dead body was partially decomposed. He further stated that they suspected the involvement of accused Azanur, Mamun, Sentu and others as they were missing since the occurrence of the crime.

16. During cross-examination he stated that he heard that deceased had gone to watch television. The occurrence took place in the evening of Thursday and they found the dead body on Saturday afternoon. The informant and others suspected that the accused Mamun, Azanur, Sentu and others had raped and killed his daughter. The police prepared the inquest report before filing of the case. He identified the FIR and his thump impression.

17. P.W.2, Rokeya Khatun, wife of Nuna (Muna), a neighbour of the deceased, stated that around 8:00 pm Sabina's father told her that Sabina was missing. She heard that dead body of the deceased Sabina was found on Saturday afternoon and there were some marks of injury on her body.

18. The cross-examination of the witness was declined by the defence.

19. P.W.3, Kanchon (Kazoli), stated that the dead body of the deceased was found from a Tobacco field of Dharonggari and there were injury marks on her body.

20. The cross-examination of the witness was declined by the defence.

21. P.W.4, Hasina Khatun, the mother of deceased Sabina, stated that on the date of occurrence the deceased Sabina went to the house of Muna to watch television. They searched for her as she did not return home. Two days after the occurrence, they found the naked dead body of the deceased in a tobacco field. There were several injury marks on her

body and her orhna was wrapped round her face over her mouth.

22. During cross-examination she stated that she heard from local people that accused Azanur and Mamun had been arrested.

23. P.W.5, Md. Fazlur Rahman, deposed that after returning home from Allardarga he heard hue and cry from the field and also heard a dead body was found, he informed the police and went to the place of occurrence with the police. He saw the dead body in the tobacco field. The police prepared the inquest report and his signature so endorsed thereon and marked as exhibits-1 and 1/1 respectively.

24. The defence declined to cross-examine this witness.

25. P.W.6, Rahidul Islam, deposed that he heard about the disappearance of Sabina and subsequently after two days the dead body was found from a tobacco field. He also heard that accused Azanur and Mamun were arrested. He heard that accused Kamrul, Shukur and Sentu were also with them.

26. P.W. 7, Bishoyot Ali, deposed that he heard about the disappearance of Sabina and subsequently her dead body was found. He stated that he went to place of occurrence with police and saw the dead body. His signature so endorsed in the inquest report, has been marked as exhibit-1/2.

27. The cross-examination of the winess was declined by the defene.

28. P.W.8, Helal Uddin, deposed that he went to the tobacco field and saw the dead body of deceased Sabina. He identified his signature on the inquest report which was marked as exhibit-1/3.

29. The defence had declined to cross-examine the witness.

30. P.W.9, Abdul Goni, father of accused Kamrul, deposed that the inquest report was prepared in his presence and his signature so endorsed thereon has been marked as exhibit-1/4.

31. The cross-examination of the witness was declined by the defence.

32. P.W.10, Md. Mulluk Chand, deposed regarding the date, time and place of occurrence. He stated that before the occurrence the deceased went to the dwelling house of neighbour Muna Mondal to watch Television and went missing. They searched for the deceased at different places. They suspected the involvement of the accused Azanur, Mamun, Shukur, Sentu and Kamrul. He identified the accused persons in the dock of the court. He deposed that they did not find the accused persons at their houses on that day and because of this reason they suspected their involvement with the occurrence. He deposed that on March 27, 2008 the dead body of the deceased was found from the tobacco field of Dharonggari. They saw the naked dead body having several injuries on it. He heard that the accused Azanur and Mamun had been arrested at Kushtia. Accused Mamun and Azanur made confessional statements.

33. During cross-examination, he stated that they had searched the respective houses of

the five accused. He denied defence suggestion that out of enmity and grudge the accused persons had been implicated in the instant case.

34. P.W.11, Alauddin, stated that the accused Azanur, Mamun, Sentu, Kamrul and Shukur were also missing. He stated that the five accused persons also went to watch television. They searched for the deceased from door to door. He stated that they saw the naked dead body of the deceased with several injuries which was found on March 27, 2004 at about 5:30 pm lying in the tobacco field of Dharonggari. He stated that after being arrested the accused Mamun and Azanur admitted their guilt to the police.

35. During cross-examination, he stated that his father-in-law told him that the accused had gone to watch television. He deposed that they searched for the deceased at many houses including the houses of the accused persons. He stated that the accused persons were inhabitants of the same village.

36. P.W.12, Zabed Ali, stated that on March 25, 2007 at about 6:00/7:00 pm the deceased went to the neighbor's house to watch television and thereafter went missing. He searched for the deceased at different houses. On hearing being found a dead body, he went to the place of occurrence on March 27, 2004 and saw the naked dead body of the deceased with several injuries.

37. The defence declined to cross-examine this witness.

38. P.W.13, Md. Zainal Haque, had been declared hostile and was cross-examined by the prosecution and he deposed that at the time of searching for the deceased accused Azanur, Shukur, Mamun, Sentu and Kamrul were not with the villagers.

39. P.W.14, Dr. Ashok Kumar Saha, deposed that on March 28, 2004 he was performing his duty at General Hospital, Kushtia as Emergency Medical Officer. A Medical Board was constituted consisting 4 members where he was the president and other three members were Dr. Arbinda Pal, Dr. Saleh Ahmed and Dr. A. Salam. After conducting the Autopsy the Board noted their findings as under:

I. Body partially decomposed and distended with Maggat formation with loss of epidermis with burst abdomen with expulsion of coils of intestine.

II. One continuous ligature mark at the middle of the throat size 1" in breath with knot a tie.

III. One incised penetrating injury on front of the right side of the chest, size 2" x $1\frac{1}{2}$" up to chest cavity.

IV. Two incised penetrating injury on front of the left side of the chest, size 2" x $1\frac{1}{2}$" up to abdominal cavity.

V. Four incised penetrating injury on anterior abdominal wall, size $2\frac{1}{2}$" x $1\frac{1}{2}$" up to abdominal cavity.

VI. One incised penetrating injury on inner aspect of left thigh up size $1\frac{1}{2}$ " x $1\frac{1}{2}$ " x $\frac{2"}{3}$.

VII. One incised injury on inner aspect of right thigh up, size $2\frac{1}{2}$" x $\frac{2"}{3}$.

VIII. One lacerated injury in vagina on right wall size 1" x 1" mucus membrane.

40. On dissection: Antemortem blood clot and tissue laceration and congestion were seen associated with the injured/places stated above trachea congested both lung are injured, liver

injured, stomach injured. Brain is soften. High vaginal swab was taken and sent for pathological examination for spermatozoa. But no spermatozoa was found.

41. After conclusion of the autopsy the Doctors opined as under:
‘‘In our opinion the cause of death was due to asphyxia as a result of above mentioned injuries, caused by strangulation which were ante-mortem and homicidal in nature with rape’’.

42. This witness proved the postmortem report and his signature so endorsed thereon and marked as exhibits-2 and 2/ 1 respectively. He also identified the signatures of Dr. Arbinda, Dr. Saleh Ahammad and Dr. Abdus Salam which were marked as exhibits-2/2,2/3 and 2/4 respectively.

43. During cross-examination he deposed that they found evidence of rape on the dead body. He further deposed that they found the injury in the inner part of the vagina of the deceased which may have been caused due to rape.

44. P.W.15, Md. Nabirul Islam, stated that when he was on duty on March 29, 2004 as 1st Class Magistrate at Kushtia Collectorate, he recorded the confessional statement of accused Azanur and Mamun under section 164 of the Code of Criminal Procedure, 1898 and he followed the provisions of section 364 of the Code of Criminal Procedure, 1898. He found the confessional statements of the accused were true and voluntary. He proved the confessional statements and his signature so endorsed thereon and marked as exhibits-3,3/1,3/2,3/3 and 3/4 respectively. His signature and signature of the accused were marked as exhibits-4,4/1,4/2,4/3 and 4/4 respectively.

45. P.W.16, Md. Nabir Hossen, stated that on April 04, 2004 he took the charge of investigation of the case on transfer of the Officer-in-Charge Faruk Ahmmed and perused the case docket, autopsy report. Subsequently, he handed over the C.D to S.I. Musaddek on his transfer.

46. The cross-examination of the witness was declined by the defence.

47. P.W.17, Md. Mosaddek Hossen Khan, deposed that as the final Investigating Officer he took the charge of investigation of the case on April 22, 2004. He perused the case docket including sketch map, index, deposition of witnesses and confessional statements of the accused Mamun and Azanur. He recorded statements of some witnesses. He submitted charge sheet No.108 dated July 07, 2004 against the accused persons finding prima facie ingredients of crime.

48. During cross-examination he deposed that he compared the confessional statements of the accused persons with autopsy report.

49. P.W.18, Faruk Ahmmed is one of the three Investigating Officers of the case. He stated that on oral presentation of the informant he wrote the FIR. He also identified the thumb impression of the informant. He prepared the inquest report of the deceased, his signature so endorsed thereon has been marked as exhibits-1 and 5/1 respectively. He stated that he sent the FIR for recording. He also deposed that he as Officer -in-Charge signed the FIR as exhibit-5 and he identified his signature thereon as exhibit-5/1. He also stated that Mosharrof Hossain as duty officer filled up the FIR form as exhibit-6 and he identified his signature thereon as exhibit-6/1. He took up the case for investigation; visited the place of occurrence; prepared sketch map thereof with index and his signature so endorsed thereon has been marked as exhibits-7,7/1, 8 and 8/1 respectively. He duly sent the dead body to the

morgue for autopsy. He deposed that the mouth of the victim was fastened with orhna. He recorded the statement of 4 witnesses. He arrested accused Azanur, Mamun and Sentu and produced them to the learned Magistrate for recording their confessional statements. He stated that the tobacco plants were three or four feet tall.

50. During cross-examination he stated that he did not seize blood stained mud of place of occurrence. He stated that he found some injures on the dead body of the deceased. He did not mark any apparent injury marks. He suspected that the deceased was murdered after commission of rape.

51. These are the witnesses adduced by the prosecution. On scrutinising the depositions of the witnesses, the features appeared that the deceased Sabina went to watch television to the neighboring house and went missing. On searching, the naked dead body of the deceased was found in the tobacco field with marks of injuries on her chest, thigh and private organ. From the postmortem report, the cause of death was found due to asphyxia caused by strangulation which was ante-mortem and homicidal in nature with rape.

52. In the instant case, two appellants namely Mamun and Azanur Rahman made confessional statement before the Magistrate under section 164 of the Code of Criminal Procedure, 1898.

53. The confessional statement of Mamun reads as follows:

> "সাবিনাদের বাড়ি থেকে আমাদের বাড়ি কিলো দূরে তিজার প্রামানিক এর ছেলে সেন্টুর সাথে সাবিনার ভালবাসা ছিল। সাবিনার বান্ধবী কাঞ্চন (পিং-রবজেল মন্ডল)কে সেন্টু বলে সাবিনাকে সাবিনাদের বাড়ির পাশের তামাকের ক্ষেতে ডেকে আনতে বলে। সেন্টুর সাথে তার বন্ধু কামু (পিং- গনি মাস্টার) ছিল। ২৫/৩/২০০৪ তারিখ বৃহস্পতিবার রাত ৭/৮ দিকে কাঞ্চন সাবিনাকে ডেকে এনে দিয়ে বাড়িতে চলে যায়।সাবিনা,সেন্টু ও কামু তামাক ক্ষেতের মধ্যে বসে গল্প করতে থাকে। রাত হয় তারা সাবিনা বাড়িতে রাখতে যায়। বাড়ির কাছে গিয়ে সাবিনাকে খোঁজাখুঁজি হচ্ছে জেনে আবার মাঠের মধ্যে নিয়ে আসে। সেন্টু সাবিনাকে বলে চল বিয়া করব। সে সেন্টু ও সাবিনাকে বসিয়ে রেখে কামু টাকা আনার নাম করে বাড়িতে যাওয়ার কথা বলে শুকুর (পিং-কইরুদ্দিন মন্ডল)কে ডেকে আনে। কামু ও শুকুর আজানুর কে ডাকতে আসে। কামু আজানুরকে বলে চল মাঠের মধ্যে কাজ আছে। ওরা তিনজন এসে আমাকে ডাকে। বলি যেতে পারব না। তারা পীড়াপীড়ি করায় তাদের সাথে গেলাম। ৪ জন সাবিনা ও সেন্টুর কাছে পৌঁছানোর পর কামু সাবিনার মুখ চেপে ধরে। সেন্টু সাবিনার ওড়না দিয়ে সাবিনার মুখ বাধে। শুকুর সাবিনাকে কাধে করে তামাকের ক্ষেতের মধ্যে আনে। সেন্টু সাবিনার দুই হাত চেপে ধরে রাখে। কামু মুখ চেপে ধরে শুকুর সালোয়ার ও কামিজ টেনে ছিড়ে গা থেকে খুলে ফেলে। শুকুর সাবিনার সাথে খারাপ কাজ করে। শুকুরের হয়ে গেলে সে সাবিনার মুখ চেপে ধরে তখন কামু সাবিনার সাথে কারাপ কাজ করে। শুকুর ও কামু দুই হাত চেপে ধরে রাখে তখন সেন্টু সাবিনার সাথে খারাপ কাজ করে। সেন্টু উঠে দাঁড়ানোর পর আজানুর খারাপ কাজ করে। তারপর আমি খারাপ কাজ করি। আমি যখন করি তখন সাবিনা হাত পা এড়িয়ে দেয়।মনে হয় অজ্ঞান হয়ে গিয়েছিল। শুকুর তার কোমরের থেকে একটা চাকু বের করে। আমি ও আজানুর জিজ্ঞাসা করি চাকু কি করবি? বলে খুন করে ফেলতে হবে। আমরা বাধা দি। তখন আমাদের শুকুর লাথি মারে। আমরা একটু সরে গিয়ে চোখ ঢেকে ফেলি। শুকুর চাকু দিয়ে আরও কয়টি কোপ দেয় তা অন্ধকার বুঝতে পারিনি। সাবিনাকে ধর্ষণ করার পরে যে যার মত পালিয়ে যাই।"

54. The confessional statement of Azanur Rahman reads as follows:

> "২৫/৩/২০০৪ তারিখে রাত্রি ১১ টা সাড়ে ১১ টার দিকে আমাকে শুকুর ও কামু এসে ডাকে। বলে মাঠে যেতে হবে। বলি কেন? বলে কাজ আছে। পীড়াপীড়ী করে আমাকে নিয়ে মামুনের বাড়ীতে যায়। মামুনকেও ডেকে নেয়।মাঠের মধ্যে গিয়ে আমি সেন্টু ও সাবিনাকে দেখি। তারা পাশাপাশি বসেছিল। আমি কামুর কাছে জানতে পারি কাঞ্চনের মাধ্যমে TV দেখার নাম করে সাবিনাকে কামু ও সেন্টু ডাকায় আনে। সাবিনাকে দিয়ে কাঞ্চন চলে যায়। আমাদের ডেকে আনার পর কামু হাঠৎ সাবিনার মুখ চেপে ধরে। সেন্টু সাবিনার ওড়না দিয়ে সাবিনার মুখ বেধে ফেলে। শুকুর, কামু ও সে মিলে সাবিনাকে পেড়ে ফেলে। শুকুর সাবিনার জামা পায়জামা টেনে ছিড়ে নেংটা করে ফেলে। সেন্টু মুখ চেপে ধরে রাখে। দুই হাত চেপে ধরে কামু। শুকুর দুই পা দুই হাত দিয়ে ধরে সাবিনার সাথে খারাপ কাজ করে। শুকুরের হাতে বড় নখ আছে। তা দিয়ে সাবিনার দুধে জোড়ে টান দেয়। শুকরের কাজ হয়ে গেলে কামু সাবিনার উপর চড়ে খারাপ কাজ করতে থাকে। শুকুর গিয়ে মুখ চেপে ধরে। কামুর হয়ে যাওয়ার পরে সেন্টু খারাপ কাজ করে।তখন কামু গিয়ে সাবিনার হাত দুইটা ধরে। তখন মেয়েটা আর নড়াচড়া করছিল না। সেন্টুর হয়ে যাওয়ার পর আমি দাড়িয়ে ছিলাম। আমাকে শুকুর খারাপ কাজ করতে বলে তখন আমার পেন্টের চেইন খুলে সাবিনার সাথে কারাপ কাজ করি। তারপর আমি ওঠার পরে মামুনকে খারাপ কাজ করার জন্য শুকুর বলে। তখন মামুন খারাপ কাজ করে। সাবিনা সেন্টু খারাপ কাজ করার সময় থেকে গা এড়িয়ে দিয়ে অজ্ঞান হয়ে যায়, আমি এবং কামু যখন খারাপ কাজ করি তখন তার

জ্ঞান ছিল না। সবার খারাপ কাজ হয়ে যাওয়ার পর শুকুর তার কোমড় থেকে চাকু বের করে। চাকু হঠাৎ শাট করে। আমি বলি কি করছিস? সে বলে একে খুন করব। আমি বাধা দি। তখন আমাকে গালি দিয়ে লাথি মারে। মামুন বাধা দিলে তাকেও লাথি মারে।আমরা ভয়ে একটু দুরে গিয়ে দাড়াই। শুকুর চাকু মারছে এই শব্দ শুনতে পাই। সাবিনা একবার শুধু `উ, করে শব্দ করে। তার কোন শব্দ পাইনি।শুকুর বলে বাড়ি যায়। আমরা ভয়ে পালিয়ে যাই। আমি আর মামুন শুক্রবারে জীব বাসে ঢাকা যাই। ঘুরে ফিরে কোন কাজ না পেয়ে ঐ দিনই রাত ৯টার বাসে কুষ্টিয়া চালের বর্ডার এ আমার খালার বাড়িতে যাই। পরে আমার ভাই এসে পুলিশের হাতে ধরিয়ে দেয়।"

55. In the inquest report regarding the marks of injury on the dead body of the deceased it has been mentioned that there were seven marks of injuries with sharp knife on her chest, 2 marks of injuries on her thighs and one mark of injury on her private organ and his mouth was fastened with orhna. It is also mentioned that deceased was raped before murder.

56. The injuries found on the dead body of the deceased after autopsy, have been mentioned in the preceding paragraphs during discussion of the evidence of P.W.14 the doctor, who held the postmortem.

57. So, the nature of injuries found in the inquest report as well as in the postmortem report and in the inculpatory confessional statements made by Mamun and Azanur Rahman corroborate one another. The inculpatory confessional statements of Mamun and Azanur Rahman vividly narrated the circumstances how they committed rape and thereafter killed the deceased. The confessional statements support the inquest report as well as the postmortem report.

58. From the deposition of P.W.15, Md. Nabirul Islam, Magistrate, 1st Class, and on perusal of confessional statements, it appears that the statements were recorded by the learned Magistrate following all the provisions required by law to be followed at the time of recording the confessional statements. P.W.15 stated that the confessional statements made by Mamun and Azanur were done voluntarily and it was true. The appellants Mamun and Azanur made confessional statements incriminating themselves along with Shukur, Sentu and Kamrul. Now, the question arises whether the confessional statements of Mamun and Azanur can be used against Shukur and Sentu.

59. Section 30 of the Evidence Act, 1872 provides that as follows:

> "30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession."

60. The ingredients of this section are that:

I. More persons than one are to be tried jointly for the same offence.

II. One of such persons has to make confessional statement affecting himself and others. and

III. Such confession can be taken into consideration by the Court against others as well as the maker of the confession.

61. In the instant case, the appellants Mamun and Azanur made inculpatory confessional

statements which vividly narrated the crime committed by all of them. They made the inculpatory confessional statements incriminating themselves along with other co-accused and the defence failed to prove any personal enmity or grudge of Mamun and Azanur with the non-confessing appellants Shukur, Sentu and Kamu. Moreover, P.Ws.1,10 and 11 gave evidence to the effect that they suspected the involvement of all the accused in the occurrence as they were missing after the occurrence and appellants Mamun and Azanur were arrested on such suspicion. In their confessional statements, both of them in a voice narrated the role played by themselves and other accused persons in the occurrence and there is no inconsistency in their statements which leads us to believe the confessional statements of Mamun and Azanur involving Shukur and Sentu in the said occurrence are true.

62. Moreover, the deposition of P.Ws.1,10 and 11 regarding the absconding of Shukur and Sentu along with Mamun and Azanur after the occurrence took place, provides strong corroboration to the confessional statements of Mamun and Azanur. Besides, the postmortem report and the depositions of the witnesses clearly it reveals that there was sign of rape on the victim girl and accordingly, the appellants Mamun and Azanur confessed about the role played by all of them at the time of committing rape. The confessional statements of Mamun and Azanur are not contradictory rather they in a voice categorically stated the acts committed by each of them.

63. It is true that there is no eye witness in the instant case, but the inculpatroy, true, and voluntary confessional statements of two accused, and the circumstances particularly long absconsion by Shukur and Sentu are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellants Shukur, Sentu, Mamun and Azanur in the alleged rape and murder thereof.

64. In performing our duties, this court is charged with the task of not only assessing the facts against the law, but also considering the impacts of judgments that are pronounced and any assessment made on the overall justice system.

65. With modern criminal justice mechanism, the right against self-incrimination is one that stands as a cornerstone. As such, confessions by a co-accused are generally inadmissible against the accused in a concerned case. However, in our duties of administering justice, we are sometimes faced with a case that forces us to consider aspects of larger policy at play.

66. The balance between crime control and due process models of justice is such a consideration that requires reassessment with changing times and upon the fact of each case. The case before us is one of such a heinous crime, where measures of control are made far more necessary, to ensure that justice can be brought to the victim in question. As such, while due process is still of utmost importance; crime control considerations must be made as well. (Emphasis added)

67. As such, the considerations of the use of a co-accused's confession, where supported by corroborating evidence, in the face of an overwhelming presence of circumstantial

evidence, must be made. In this instance, the accused's absconsion prior to trial, suggests an intent to obstruct justice. Corroborative evidence presented by the prosecution shows that there is sufficient reason to suggest that the co-accused's accounts of the events are likely to be true. It is therefore, that this court is of the opinion that in order to pursue a model of crime control in this regard, this court is willing to admit, in such rare instances, the confession of a co-accused as incriminating evidence against the other accused. Albeit, such evidence is still circumstantial.

68. The principle of the right against self incrimination is also accompanied by the principle that upon silence on part of those incriminated, adverse inferences may be drawn at any stage of the trial and pre-trial procedures. (Emphasis added)

69. When the co-accused, Azanur and Mamun put forth their confessions, incriminating the accused Shukur and Sentu, they had the opportunity to present their accounts of the events in question. Their refusal to adduce defence witness and to give any statement, allows this Court to draw an adverse inference against them, in conjunction with the inferences drawn from the period of their absconcion.

70. We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the makers of the confessional statements vividly have stated the role played by other co-accused in the rape incident and murder of the deceased which is also supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses particularly the deposition of P.Ws.1,2,3,10,11,12,14 and 18 regarding the marks of injury on the body of the deceased. Every case should be considered in the facts and circumstances of that particular case. In light of the facts and circumstances of the present case, we are of the view that the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial. (Emphasis added). Thus, the accused namely Shukur and Sentu are equally liable like Azanur and Mamun for murdering the deceased after committing rape.

71. We are also of the view that confession of Azanur and Mamun and the inculpatory facts furnished by the circumstances appearing from the evidence as discussed above are incompatible with the innocence of the appellant Shukur and Sentu.

72. In consideration of the matters discussed above, we are of the view that the deceased Sabina was raped before murder. The post mortem report shows that her death was due to asphyxia caused by strangulation which was ante-mortem and homicidal in nature with rape. The marks injuries found on her body as well as the discovery of naked dead body which was supported by the witnesses i.e. P.Ws.1,2, 4,5,10 and 11 clearly indicate that she was raped before murder. It is a strong circumstantial evidence that the deceased was raped before murder by the appellants.

73. In the light of the discussions we may conclude that the prosecution has been able to prove the charge against all the appellants beyond reasonable doubt and the Tribunal has rightly convicted and sentenced the appellants to death and the confirmation thereof by the High Court Division is justified. We find no cogent reason to interfere with the judgment and order passed by the High Court Division.

74. In the instant case, it is found that the deceased Sabina was a girl of 13 years and she had a relation with Sentu. On the date of occurrence, the deceased went to meet with Sentu. At one moment Sentu along with other appellants, namely Shukur Ali, Mamun and Azanur to fulfill their nefarious desire raped Sabina and thereafter, Appellant Shukur Ali killed the deceased with a knife which he brought with him. Before killing, appellant Shukur Ali stabbed Sabina with the knife on the different parts of her body including on her private organ which resulted to her harrowing death.

75. Mr. S.M. Shahjahan learned advocate appearing for the appellant Shukur lastly drew our attention regarding the age of the appellants and submits that Shukur Ali was very young at the time of offence, the other appellants were also of very tender age, considering their age the sentence of death may be reduced.

76. In this regard it is pertinent to mention the observation of his Lordship H.L. Dattu former Honorable Chief Justice of India & two other honorable judges of the Supreme Court made in the case of ***Mofil Khan Vs State of Jharkhand, (2015) 1 SCC 67, Para-20*** that *"Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a threefold purpose–punitive, deterrent and protective."*

77. Regarding appropriate panishment and sentence his Lordship Mr. Justice P. Sathasivam, J. in the case of **Ahmed Hussain Vali Mohammed Saiyed Vs. State of Gujarat, (2009) 7 SCC 254, Paras 99 & 100** observed that *"Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."*

78. We are of the view that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence on the judiciary. It is the duty of the Court to award appropriate sentence considering the gravity of the offence. Considering the nature and gravity of the offence committed by the appellant Shukur Ali, we are of the view that the cruelty and violence with which he killed Sabina, the ends of justice demands his death sentence.

79. From the materials on record, it appears that the appellants Sentu, Mamun and Azanur are in the condemned cell for more then 12(twelve) years suffering the pangs of death. It was held in the case of ***Nazrul Islam (Md) vs. State*** reported in **[66 DLR (AD) 199]** that**, "*Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."*** In view of the decision cited above as well as the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellants Sentu, Mamun and Azanur be commuted to one of imprisonment for life.

80. Accordingly, the Criminal Appeal No.127 of 2014 is **dismissed.** The sentence of death of the appellant in respect of condemned-prisoner, namely Md. Shukur Ali is maintained.

81. The sentence of death in respect of the appellant condemned-prisoner, namely, Sentu, son of Tijabuddin, Village-Lalnagor, Police Station-Daulatpur, District-Kushtia is commuted to imprisonment for life and also to pay a fine of Tk.50,000.00(fifty thousand), in default, to suffer rigorous imprisonment for 02(two) years more. He will get the benefit of section 35(A) of the Code of Criminal Procedure, 1898 in calculation of his sentence. The concerned Jail Authority is directed to shift the appellant to the normal jail from the condemned cell forthwith.

82. Jail Appeal No.26 of 2014 is **dismissed with modification of sentence.**

83. The sentence of death of appellant condemned-prisoner, namely, Mamun, son of Sirajul Pramanik of Village-Lalnagor, Police Station-Daulatpur, District-Kushtia is commuted to imprisonment for life and also to pay a fine of Tk.50,000.00(fifty thousand), in default, to suffer rigorous imprisonment for 02(two) years more. However, he will get the benefit of section 35(A) of the Code of Criminal Procedure, 1898 in calculation of his sentence. The concerned jail authority is directed to shift the appellant to the normal jail from the condemned cell forthwith.

84. Jail Appeal No.29 of 2014 is **dismissed with modification of sentence.**

85. The sentence of death of appellant condemned-prisoner, namely, Azanur Rahman, son of Talemuddin Mondal, Village-Lalnagor, Police StationDaulatpur, District-Kushtia is commuted to imprisonment for life and also to pay a fine of Tk.50,000.00(fifty thousand), in default, to suffer imprisonment for 02(two) years more. He will get the benefit of section 35(A) of the Code of Criminal Procedure in calculation of his sentence. The concerned jail authority is directed to shift the appellant to the normal from the condemned cell forthwith.

86. Jail Appeal No.29 of 2014 in respect of the appellant Sentu is redundant in the light of the judgment in Criminal appeal No.127 of 2014.

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**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Borhanuddin**
**Ms. Justice Krishna Debnath**

**CIVIL APPEAL NO. 02 OF 2005**
(From the judgment and order dated 09.07.2002 passed by the High Court Division in Civil Revision No.714 of 1998).

**Abdur Rashid, Opposite Party No. 6 being dead his heirs Mohammad Hossain and others. ……...Appellants**

=Versus=

**Nurul Amin alias Abu Taher and others. ……...Respondents**

| | | |
|---|---|---|
| For the Appellants. | : | Mr. Md. Abdun Nur, Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record. |
| For Respondent No.1. | : | Mr. Khaair Ezaz Masud, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record. |
| Respondent Nos. 2-56 | : | Not represented. |
| Date of Hearing | : | The 8th and 16th February, 2022 |
| Date of Judgment. | : | The 23rd February, 2022 |

**Editors' Note**
The question came up for consideration in this case whether after transfer by pre-emptee-opposite party no.1 to co-sharer opposite party no.6 the pre-emptory right of the pre-emptor exists or not. The Appellate Division examining section 90 and 96 of State Acquisition and Tenancy Act and the view taken by their lordship in the case of 50 C.W.N. 806 as well as 35 DLR 238 and also distinguishing the facts of 35 DLR (AD) 225 held that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated.

**Key Words**
Section 90 and 96 of the State Acquisition and Tenancy Act; pre-emptory right;

**Section 96 read with section 90 of the State Acquisition and Tenancy Act:**
**On perusal of proviso to Sub-section (1) of Section 96 of the State Acquisition and Tenancy Act it appears that the right of pre-emption is not available to a co-sharer tenant or tenants holding land contiguous to the land transferred unless he is a person to whom transfer of the holding or the portion or share thereof, as the case may be, can be made under section 90. ...(Para 16)**

**Our apex court denied right of pre-emption in the case when the vendee retransferred the land to the vendor and the right is barred by the principle of estoppel, waiver and acquiescence. ...(Para 17)**

**Section 96 of the State Acquisition and Tenancy Act:**

**We have no hesitation to hold that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated as because the subsequent transfer is subject to the right available against the original transfer and the subsequent transferee would be impleaded as party in the pre-emption proceeding and he would be entitled to get the consideration and compensation money as deposited by the pre-emptor. ...(Para 23)**

**JUDGMENT**

**Borhanuddin, J:**

1. This appeal by leave has been filed against the judgment and order dated 09.07.2002 passed by a Single Bench of the High Court Division in Civil Revision No.714 of 1998 making the Rule absolute against the judgment and order dated 18.09.1997 passed by the Sub-Ordinate Judge, 1st Court, Laxmipur, in Miscellaneous (Pre-emption) Appeal No.38 of 1996 affirming the judgment and order dated 24.09.1996 passed by the Senior Assistant Judge, Laxmipur, dismissing the Miscellaneous Case No.47 of 1993 filed under Section 96 of the State Acquisition and Tenancy Act, 1950.

2. Relevant facts for disposal of the appeal are that the respondent No.1 herein as pre-emptor-petitioner filed the miscellaneous case on 05.07.1993 stating interalia that one Boli Mia @ Boli Mohammad was the original owner of the case land who died leaving behind one son Suja Mia and the said Suja Mia died leaving behind pre-emptor Nurul Amin @ Abu Taher, Vendor-opposite party Sekandar Mia and opposite party nos.3-5 as heirs; Suja Mia transferred $43\frac{1}{2}$ acres of land to the pre-emptor-petitioner by heba deed dated 18.02.1982 and thus the pre-emptor became a co-sharer of the holding by inheritance as well as on the basis of the heba deed; The pre-emptor had been serving in the Saudi Arabia since before the disputed transfer; Vendor-opposite party no.2 Sekandar Mia is the full brother of the pre-emptor-petitioner; Dispute relating to land exists between the brothers; The vendor opposite party no.2 transferred the case land to the pre-emptee-opposite party no.1 without serving statutory notice to the co-sharers; After returning home from Saudi Arabia, the pre-emptor came to know from his brother-in-law Noor Nabi on 12.05.1993 that the pre-emptee-opposite party no.1 disclosed to him that he has purchased the case land from the vendor-opposite party no.2; Knowing about the said transfer, the pre-emptor on search procured certified copy of the kabala deed from the Maizdi Sub-register Office though the case land situated within the territorial jurisdiction of Laxmipur Sub-register Office; Getting definite information, the pre-emptor filed application under section 96 of the State Acquisition and Tenancy Act for pre-emption affirming that the pre-emptee-opposite party no.1 is a stranger to the case land and the pre-emptor has got less than 60 bighas of land. By amending plaint of the case it is further stated that the subsequent transfer dated 21.06.1992 by the pre-emptee-opposite party no.1 infavour of the opposite party no.6 (predecessor of the appellants herein) is collusive and sham transaction.

3. That the pre-emptee-opposite party No.1 contested the case by filing written objection contending interalia that the application for pre-emption is not maintainable, barred by limitation and also barred by the principle of estoppel, waiver and acquiescence. His specific case in brief is that the vendor-opposite party no.2 sold the case land to him in consultation with the pre-emptor and his karjokarok Noor Nabi; The vendor sold the land for sending the

pre-emptor to Saudi Arabia; The vendor by executing and registering kabala deed transferred the land to the pre-emptee-opposite party no.1; Thereafter, for necessity of money the pre-emptee-opposite party no.1 transferred the land to the opposite party no.6 Abdur Rashid on 21.06.1992 who is a co-sharer of the holding and as such the application for pre-emption is liable to be rejected.

4. The trial Court on consideration of the evidence on record held that the application for pre-emption is not time barred and transfer by the vendor to the pre-emptee was beyond the knowledge of the pre-emptor-petitioner. But the trial Court held that since the case land had been transferred by the pre-emptee-opposite party no.1 to the opposite party no.6, a co-sharer of the holding, the application for pre-emption is not maintainable.

5. Being aggrieved, the pre-emptor-petitioner as appellant preferred miscellaneous appeal in the Court of the learned District Judge, Laxmipur, which was on transfer ultimately heard and disposed of by the learned Sub-ordinate Judge, 1st Court, Laxmipur, who after hearing the parties affirmed the judgment of the trial Court that pre-emption is not tenable against a co-sharer.

6. Feeling aggrieved, the pre-emptor-appellant as petitioner moved before the High Court Division by filing revisional application and obtained Rule. After hearing the parties and perusing evidence on record, a Single Bench of the High Court Division made the Rule absolute by setting aside the judgment and order of the Courts below.

7. Having aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, successors of the co-sharer opposite party no.6 (who expired during pendency of the case before the trial Court) preferred instant civil petition for leave to appeal.

8. Leave was granted on the ground that prior to the filing of miscellaneous case on 05.07.1993 the pre-emptee transferred the case land to the co-sharer of the holding opposite party no.6 (in the miscellaneous case) on 21.06.1992 and as such no right of pre-emption was in existence on the date of filing of the miscellaneous case seeking pre-emption against the pre-emptee-opposite party and also on the ground that the High Court Division failed to consider the question of maintainability of the case on the background of the fact that when the miscellaneous case was filed against the pre-emptee he had no subsisting interest in the land sought to be pre-empted.

9. Mr. Md. Abdun Nur, learned Advocate appearing for the appellants submits that prior to the filing of the miscellaneous case on 05.07.1993 the pre-emptee transferred the case land to the opposite party no.6 (in the miscellaneous case) on 21.06.1992 who was undeniably a co-sharer in the holding and as such no right of pre-emption was available on the date of filing of the miscellaneous case seeking pre-emption against the pre-emptee-opposite party and thus the High Court Division erred in law in not holding that the miscellaneous case is not tenable in the eye of law. Relying on the decision passed in the case of Hafiz Ahmed Vs. Ahmedur Rahman & others, reported in 48 DLR 170, learned Advocate also submits that 'the vendor and the vendee are permitted to avoid accrual of the right of pre-emption by all lawful means and the vendee may sell the property to a rival pre-emptor with preferential or equal right to defeat the right for pre-emption of another co-sharer'. In support of his submissions, learned Advocate referred to the case of Shafi Khan Vs. Mannujan Hossain, reported in 35 DLR(AD)225 and the case of Hafiz Ahmed vs Ahmedur Rahman and others, reported in 48 DLR 170.

10. On the other hand, Mr. Khair Ezaz Masud learned senior Advocate appearing on behalf of the respondent no.1 submits that the subsequent transfer is subject to right available against the original transfer whether the transfer was made before or after filing of the pre-emption application and as such pre-emptor's application for pre-emption merits success, although the vendee-opposite party no.1 transferred the case land to his father opposite party no.6 Abdur Rashid who was a co-sharer in the holding by purchase, before the filing of the application for pre-emption. In support of his submissions, learned Advocate referred to the case of Hajera Bibi Vs. Noor Jahan Begum and others, reported in 35 DLR 238 and the case of Girija Nath Kundu Vs. Ahamad Ali Sardar and others reported in 50 C.W.N. 806.

11. Heard the learned Advocates, perused the evidence on record as well as the decisions cited by the learned Advocate for the parties. It appears that the trial Court though arrived at a finding that the pre-emptor had no knowledge about the disputed transfer and the case is not barred by limitation but dismissed the case holding that the opposite party no.6 was a co-sharer in the case land since before the transfer on 21.06.1992 as such prayer for pre-emption is not tenable.

12. The Appellate Court below affirmed the judgment of the trial Court that the miscellaneous case for pre-emption is not maintainable against a co-sharer inasmuch as opposite party No.6 admittedly was a co-sharer in the holding.

13. We have meticulously gone through the judgment passed by the High Court Division. The High Court Division in disposing of the civil revision decided two points of law.

14. The first one is whether the application for pre-emption is barred by limitation or not. The High Court Division after thorough discussions arrived at a finding that the miscellaneous case was filed within the time inasmuch as no statutory notice was served upon the pre-emptor-co-sharer and the pre-emptee disclosed about the transfer to the brother-in-law of the pre-emptor on 25.05.1993 and thereafter the pre-emptor on search procured certified copy of the deed from the Maizdi Sub-register Office on 27.05.1993 though the case land is situated within the territorial jurisdiction of Laxmipur, Sub-register Office.

15. The 2nd point which is vital and relevant to decide the controversy in the present case as to whether after transfer by pre-emptee-opposite party no.1 to co-sharer opposite party no.6 the pre-emptory right of the pre-emptor exists or not. The High Court Division after discussing the case reported in 48 DLR 170 and the case reported in 50 C.W.N. page 806 and also the case reported in 35 DLR 238 concurred with the views taken by their lordships in the case of Hajera Bibi Vs. Noor Jahan Begum and others, reported in 35 DLR 238 and thus made the Rule absolute by setting aside the judgment and order passed by the Courts below.

16. On perusal of proviso to Sub-section (1) of Section 96 of the State Acquisition and Tenancy Act it appears that the right of pre-emption is not available to a co-sharer tenant or

tenants holding land contiguous to the land transferred unless he is a person to whom transfer of the holding or the portion or share thereof, as the case may be, can be made under section 90. Again, Sub-section (10) of Section 96 provides that right of the pre-emption is not available in the following cases:

*(a) a transfer to a co-sharer in the tenancy whose interest has accrued otherwise than by purchase; or*

*(b) a transfer by exchange or partition; or*

*(c) a transfer by bequest or gift (including Heba but excluding Heba-bil-Ewaj for any pecuniary consideration) in favour of the husband or wife or the testator or donor, or of any relation by consanguinity within three degrees of the testator or donor; or*

*(d) a simple or complete usufructuary mortgage, or, until a decree or order absolute for foreclosure is made, a mortgage by conditional sale; or*

*(e) a Waqf in accordance with the provisions of the Muhammadan Law; or*

(f) *a dedication for religious or charitable purposes without any reservation of pecuniary benefit for any individual.*

17. Apart from this, our apex court denied right of pre-emption in the case when the vendee retransferred the land to the vendor and the right is barred by the principle of estoppel, waiver and acquiescence.

18. We have also gone through the judgment and order passed in the cited cases. In the case of Shafi Khan Vs. Mannujan Hossain reported in 35 DLR (AD) 225 referred by the learned Advocate for the appellants is a case of reconveyance wherein the land under pre-emption was sold by one Abdul Bari Khan to his nephew Ayesh Khan and the said Ayesh Khan retransferred the land to said Abdul Bari Khan one month before filing of the application for pre-emption as such this Division allowed the appeal by setting aside the orders allowing pre-emption. In that case, this Division observed that:

*"In the instant case, the learned Judges of the High Court Division placed reliance mainly on the decisions in the case of Girija Nath Kundu Vs. Ahamad Ali Sardar & others and Sk. Lokman Ali Vs. Abdul Motalib & another, both reported in 50 C.W.N, the former at page 806 and the latter at page 807, decided by two different single Benches of the Calcutta High Court. But it is found that in neither of these two cases there was any reconveyance or re-sale to the original vendor, but the lands were retransferred to different persons other than the original vendor."*

19. So it is clear that the Apex Court distinguished between the circumstance *'reconveyance and re-sale* to the original vendor' and 'retransfer to different persons other than the original vendor'. Provisions relating to pre-emption in the case of *'reconveyance and re-sale to the original vendor'* and 'retransfer to different person other than the vendor' are not same. On perusal of the case of Hajera Bibi Vs. Noor Jahan Begum and others reported in 35 DLR 238 it appears that the petitioner Hajera Bibi was a co-sharer in the holding and

opposite party No.3 Abdul Khaleque transferred the case land by registered kabala to opposite party no.2 Syed Habibur Rahman and by another registered kabala opposite party no.3 Abdul Khaleque transferred a portion of land under khatian No.165 to opposite party Syed Mohibur Rahman. Opposite party no.3 Abdul Khaleque was also a co-sharer of the holding. Opposite party no.2 Syed Habibur Rahman was a stranger who transferred his purchased land to opposite party No.1 Noor Jahan Begum (opposite party no.10 in the said pre-emption case) on 26.08.1972. Thereafter, on 17.09.1973 the petitioner filed application under section 96 of the State Acquisition and Tenancy Act for pre-emption depositing consideration money. In that case the contention of the opposite party No.1 Noor Jahan Begum was that since Syed Habibur Rahman already transferred his interest to Noor Jahan Begum before filing of the application for pre-emption by the petitioner Hajera Bibi and as such the application for pre-emption was not maintainable and barred by limitation. The trial Court dismissed the case on the ground of limitation and the Appellate Court below held that since Syed Habibur Rahman sold the case land to Noor Jahan Begum before filing of the application for pre-emption the miscellaneous case is not maintainable. In deciding the case a Single Bench of the High Court Division referring the judgment of Civil Appeal no.50 of 1982 (Shafi Khan Vs. Mannujan Hossain) observed that:

> *"In the judgment, the appellate Division has referred to the cases of Girija Nath Kundu and Sheikh Lokman Ali referred to earlier and has distinguished the facts of the case before it from the facts of those two cases on the ground that in neither of the cases there was any 'reconveyance or re-sale' to the original vendor but the lands were 're-transferred' to different persons other than the original vendor. In the instant case before me also there was no 'reconveyance or re-sale' of the lands sought to be pre-empted to the original vendor but the lands were transferred to another stranger Nurjahan Begum. The Appellate Division has not disapproved the decisions of Girija Nath Kundu and Sheikh Lokman Ali and has made a distinction between these two cases and the case before it. I, with respect, agree with the principle of law laid down in those two reported cases. Following decision of Shiekh Lokman Ali in which case also the second transfer was made before an application for pre-emption was made, I hold that the petitioner Hajera Bibi's right to pre-empt subsists even though the second transfer was made before her filing of the application for pre-emption. In this view of the matter, I agree with the learned Advocate for the petitioner Mr. Khondakar Mahbubuddin Ahmed that the Courts below have taken an erroneous view of law and there has been an error of law apparent of the face of the record."*

20. In the instant case before us the Appellate Court below placed reliance in the case reported in 48 DLR 170, wherein it is observed that:

> *"The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right."*

21. In the 48 DLR case one Nazamat Ali gifted the case land to his daughter-in-law

Najuma by a deed of gift dated 31.01.1980 who gifted the same to her husband by another deed of gift dated 07.04.1980. Thereafter, the pre-emptor Ahmedur Rahman filed application for pre-emption on 30.03.1981 claiming himself as a co-sharer. It appears that his lordship in passing the judgment reported in 48 DLR 170 quoted the aforementioned portion from the case of Bishan Singh, reported in AIR 1958(SC)838. In deciding the case reported in 48 DLR 170 his lordship refused the prayer for pre-emption mainly on the ground that the impugned deed was deed of gift and the same was not pre-emptable. In the case of Girija Nath Kundu Vs. Ahamad Ali Sardar, reported in 50 C.W.N. 806, his lordship observed:

> *"As soon as a transfer of a share in a holding is effected a right to pre-empt immediately accrues to the co-sharer tenants and any subsequent transferee of the property must take it subject to that right. If at any time after an application for pre-emption has been made it comes to the notice of the co-sharer applicants for pre-emption that the property has been again transferred there is nothing in the section as it stands, to prevent the subsequent transferee from being made a party to the proceedings, as was done in the case with which we are now dealing, and it seems to me that section 26F(5) of the Act was expressly framed to provide that in certain suitable cases the money which had been deposited might be paid to a subsequent transferee."*

22. In deciding the case reported in 35 DLR 238 his lordship taking into consideration of the above cited decision and an unreported case of Shafi Khan Vs. Mannujan Hossain (Civil Appeal No.50 of 1982), subsequently reported in 35 DLR(AD)225, observed as under:

> *"The petitioner Hajera Bibi's right to pre-empt subsists even though the second transfer was made before her filling of the application for pre-emption."*

23. In the present case the vendor-opposite party Sekandar Mia sold the case land to pre-emptee-opposite party Feroj Mia who was a stranger in the case land and said Feroj Mia transferred the land to opposite party no.6 Abdur Rashid, predecessor of the present appellants, on 21.06.1992 who was a co-sharer in the holding as such considering the view taken by their lordship in the case of 50 C.W.N. 806 as well as 35 DLR 238 and also distinguishing the facts of 35 DLR (AD) 225, we have no hesitation to hold that even after subsequent transfer by the stranger pre-emptee to another co-sharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated as because the subsequent transfer is subject to the right available against the original transfer and the subsequent transferee would be impleaded as party in the pre-emption proceeding and he would be entitled to get the consideration and compensation money as deposited by the pre-emptor.

24. Considering the facts and circumstances of the case and for the reasons stated above, we are of the view that the High Court Division rightly and legally passed the impugned judgment and order dated 09.07.2002 in Civil Revision No.714 of 1998.

25. Accordingly, the appeal is dismissed.

26. However, without any order as to costs.

**16 SCOB [2022] AD 84**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Borhanuddin**
**Ms. Justice Krishna Debnath**

**CIVIL PETITION FOR LEAVE TO APPEAL NO.140 of 2019.**
(From the judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.1649 of 2012).

**Commissioner, Customs, Excise and VAT Commissionerate, Jassore and others. .....Petitioners**

-Versus-

**M/S. Perfect Tobacco Company Ltd., represented by its Managing Director. .....Respondent**

| | | |
|---|---|---|
| For the Petitioners. | : | Mr. Sk. Md. Morshed, Additional Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record. |
| For the Respondent | : | Mr. Raziuddin Ahmed, Advocate instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record. |
| Date of Hearing | : | The 4th April, 2022. |

**Editors' Note**
The respondent filed a writ petition in the High Court Division challenging an adjudication order of the writ respondent no. 2 wherein he imposed penalty of Tk. Tk.43,00,000/- for evasion of VAT of Tk. Tk.25,02,464/- by the respondent. High Court Division made the Rule absolute. Appellate Division, however, following the decision reported in 18 BLC (AD) (2013) 144 examined the question of maintainability of the writ petition first, and held that writ is not maintainable in the instant case as the respondent had impugned an adjudication order passed by the Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act. The Appellate Division then without going into the merit of the case set aside the judgment and order of the High Court Division holding that the respondent still can seek relief in proper forum resorting to section 14 of the Limitation Act.

**Key Words**
Section 42(1) (Ka) of the VAT Act; maintainability of writ; Article 102 of the Constitution

**Section 42(1) (Ka), 42(2) (Ka) of the VAT Act read with article 102 of the Constitution:**
**Any person aggrieved by the decision or order passed by the Commissioner, Additional Commissioner or any VAT Official lower in the rank of the Commissioner or Additional Commissioner can prefer appeal to the forum prescribed in the section. In the instant case the writ-petitioner impugned adjudication order dated 15.08.2007 passed by the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act**

**and section 42(2)(Ka) mandates that 10% of the demanded VAT is to be deposited at the time of filing of the appeal. When there is a statutory provision to avail the forum of appeal against an adjudication order passed by the concern VAT Official then the judicial review under Article 102(2) of the constitution bypassing the appellate forum created under the law is not maintainable. ... (Paras 13, 14 & 15)**

**Section 14 of the Limitation Act:**

**However, the respondent can still avail the statutory forum of appeal under section 42 of the VAT Act taking recourse of section 14 of the Limitation Act. Since we already held that the writ petition is not maintainable as such refrained from going into merit of the case. ...(Para 26)**

**JUDGMENT**

**Borhanuddin, J:**

1. Delay of 982 days in filing this civil petition for leave to appeal is hereby condoned.

2. Challenging the judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.1649 of 2012, present petitioners preferred instant civil petition for leave to appeal.

3. Brief facts are that M/S. Perfect Tobacco Company Limited being petitioner filed Writ Petition No.1649 of 2012 stating inter alia that the petitioner company used to produce different brands of lower-segment and mid-segment cigarettes but due to lack of demand and financial losses the management closed its production from 17.05.2006 and subsequently transferred shares of the company to the present owners complying all legal formalities under the companies act; The new management of the petitioner company filed an application on 26.02.2011 before the writ-respondent no.3, Divisional Officer, Customs, Excise and VAT Division, Kushtia, to amend the address of the company and type of business in the Value Added Tax (hereinafter referred as 'VAT') registration certificate; On 11.04.2011 the petitioner company received a letter from the Revenue Officer, Customs, Excise and VAT Circle, Kushtia, to the effect that only after receipt of the outstanding dues the VAT registration certificate can be amended; Then the petitioner company came to know that on the basis of a report submitted by the VAT registration officer a show cause notice dated 31.05.2006 was issued upon the company demanding evaded VAT of Tk.25,02,464/-; The petitioner company replied the notice denying the allegation and prayed for withdrawal of the demand but writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia, without considering the documents submitted by the petitioner most arbitrarily passed the impugned order (Annexure 'E' to the writ petition) directing the petitioner to deposit an amount of Tk.69,02,464/-. The present owner of the petitioner company filed an application on 03.05.2011 before the writ-respondent no.3 stating interalia that there was a huge amount of bank liabilities and the present owner purchased the company on the basis of a tri-partite agreement by paying all the bank liabilities but received no response from the respondents and as such constrained to invoke writ jurisdiction.

4. A Division Bench of the High Court Division issued Rule Nisi upon the respondents and by an interim order stayed operation of the impugned order.

5. The writ-respondent no.1 contested the rule by filing an affidavit-in-opposition denying the averments made by the petitioner and stating interalia that the investigation team of the

VAT authority found evasion of VAT by the Petitioner Company and representative of the company's Managing Director was present at the time of hearing on 11.06.2007 who admitted company's liability as detected by the investigation team. After hearing representative of the company, respondent no.2 passed the adjudication order on 15.08.2007, which is impugned in the writ petition.

6. Upon hearing the parties a Division Bench of the High Court Division made the Rule absolute declaring the impugned adjudication order dated 15.08.2007 as illegal and of no effect.

7. Feeling aggrieved, the writ-respondents as petitioners preferred instant civil petition for leave to appeal before this Division.

8. Mr. Sk. Md. Morshed, learned Additional Attorney General appearing for the present petitioners at the very outset submits that the writ petition against the impugned adjudication order is not maintainable inasmuch as the adjudication order is an appealable order under section 42 of the VAT Act.

9. On the other hand Mr. Raziuddin Ahmed, learned Advocate for the respondent submits that though the evaded VAT was determined at Tk.25,02,464/- but by the adjudication order the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Circle, Kushtia imposed penalty arbitrarily and illegally for the evaded VAT at Tk.43,00,000/- and as such the petitioner had no other alternative but to avail writ jurisdiction against the impugned adjudication order.

10. Heard the learned Additional Attorney General for the petitioners and learned Advocate for the respondent. Perused the papers/documents contained in the paper book.

11. Our apex court in the case of TaeHung Packaging (BD) Limited and others Vs. Bangladesh and others, reported in 18 BLC (AD) (2013) 144, held:

> *"When the question of maintainability of a writ petition is raised by the contesting respondents, it is the first and foremost duty of the learned judges to decide the said question first. If the writ petitions are found not maintainable, then it will be sheer wastage of court's valuable time to consider and discuss the merit of the case."*

12. Section 42 of the VAT Act provides forum for statutory appeal which runs as follows:

> ৪২। আপীল-(১) ''যে কোন মূল্য সংযোজন কর কর্মকর্তা বা যে কোন ব্যক্তি মূল্য সংযোজন কর কর্মকর্তার এই আইন বা কোন বিধির অধীন প্রদত্ত কোন সিদ্ধান্ত বা আদেশ দ্বারা সংক্ষুব্ধ হইলে তিনি উক্ত সিদ্ধান্ত বা আদেশের বিরুদ্ধে, পণ্যের সরবরাহ বা প্রদত্ত সেবার ক্ষেত্রে ধারা ৫৬ এর অধীন প্রদত্ত কোন আটক বা বিক্রয় আদেশ অথবা পণ্য আমদানির ক্ষেত্রে Customs Act এর section ৮২ বা section 98 এর অধীন কোন আদেশ ব্যতীত, উক্ত সিদ্ধান্ত বা [আদেশ প্রদানের বা, ক্ষেত্রমত, আদেশ জারির] [নব্বই দিনের] মধ্যে,
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> (ক) উক্ত সিদ্ধান্ত বা আদেশ অতিরিক্ত কমিশনার বা তদনিম্নের কোন মূল্য সংযোজন কর কর্মকর্তা কর্তৃক প্রদত্ত হইয়া থাকিলে, কমিশনার (আপিল) এর নিকট;
>
> (খ) উক্ত সিদ্ধান্ত বা আদেশ কমিশনার, কমিশনার (আপিল) বা তাঁহার সমমর্যাদার কোন মূল্য সংযোজন কর কর্মকর্তা কর্তৃক প্রদত্ত হইয়া থাকিলে, Customs Act এর section 196 এর অধীন গঠিত [Customs, Excise and মূল্য সংযোজন কর Appellate Tribunal, অত:পর Appellate Tribunal বলিয়া উল্লিখিত, এর নিকট; এবং
>
> (গ) উক্ত সিদ্ধান্ত বা আদেশ Appellate Tribunal কর্তৃক প্রদত্ত হইয়া থাকিলে, বাংলাদেশ সুপ্রীম কোর্টের হাইকোর্ট বিভাগের নিকট;]

আপিল করিতে পারিবেন।

.....

.....

(২) যদি কোন ব্যক্তি কোন পণ্য বা সেবার উপর প্রদেয় মূল্য সংযোজন করের দাবী সম্পর্কিত অথবা এই আইনের অধীন আরোপিত কোন অর্থদন্ড সম্পর্কিত কোন সিদ্ধান্ত বা আদেশের বিরুদ্ধে উপ-ধারা (১) এর অধীন আপিল করার ইচ্ছা করেন, তাহা হইলে তাহাকে, তাহার আপিল দায়ের করার কালে [আপিলটি-

[(ক) কমিশনার (আপিল) এর নিকট দায়ের করা হইলে, দাবীকৃত কর এর দশ শতাংশ বা দাবীকৃত কর না থাকিলে আরোপিত অর্থদন্ডের দশ শতাংশ]; [এবং]

(খ) কমিশনার বা তাঁহার সমমর্যাদার কোনো মূল্য সংযোজন কর কর্মকর্তার আদেশের বিরুদ্ধে Appellate Tribunal এ দায়ের করা হইলে, [দাবীকৃত কর এর দশ শতাংশ বা দাবীকৃত কর না থাকিলে আরোপিত অর্থদন্ডের দশ শতাংশ] ;"

13. From the above provision of law it is evident that any person aggrieved by the decision or order passed by the Commissioner, Additional Commissioner or any VAT Official lower in the rank of the Commissioner or Additional Commissioner can prefer appeal to the forum prescribed in the section.

14. In the instant case the writ-petitioner impugned adjudication order dated 15.08.2007 passed by the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act and section 42(2)(Ka) mandates that 10% of the demanded VAT is to be deposited at the time of filing of the appeal.

15. When there is a statutory provision to avail the forum of appeal against an adjudication order passed by the concern VAT Official then the judicial review under Article 102(2) of the constitution bypassing the appellate forum created under the law is not maintainable.

16. Article 102 of the constitution provides as under:

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

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

.....

....."

17. It is apparent from Article 102 (2) of the constitution that the High Court Division may give directions or orders under Article 102 (1) of the constitution where there is no other equally efficacious remedy provided by law.

18. Our Apex Court in the case of TaeHung Packaging (BD) Limited and others Vs. Bangladesh and others, reported in 18 BLC (AD) (2013) 144, held:

*"The consistent views of this Division are that if any alternative remedy is available, the judicial review by the High Court Division in writ jurisdiction is not available with the exception that where the vires of a statutory provision is challenged or where the alternative remedy is not efficacious exercise of such power may be justified."*

19. It is also held:

*"In exercising the power of judicial review the High Court Division does not assume the function of an appellate authority."*

20. Section 42(4) of the VAT Act provides that:

"[(৪) উপ-ধারা (১) বা, ক্ষেত্রমত, উপ-ধারা (১ক) এর অধীন আপীল দায়ের হইবার পর [১(এক) বৎসরের মধ্যে] কমিশনার (আপিল) বা, ক্ষেত্রমত, [২(দুই) বৎসরের মধ্যে] Appellate Tribunal কর্তৃক আপিল নিষ্পত্তি করিতে হইবে:

তবে শর্ত থাকে যে, উক্ত সময়সীমার মধ্যে আপিলটি নিষ্পত্তিক্রমে সিদ্ধান্ত প্রদান করা না হইলে উহা কমিশনার (আপিল) বা, ক্ষেত্রমত, Appellate Tribunal কর্তৃক মঞ্জুর করা হইয়াছে বলিয়া গণ্য হইবে।]"

21. In view of the time frame prescribed by section 42(4) of the VAT Act it cannot be said that the remedy under section 42 of the Act is not efficacious.

22. The respondent had an adequate remedy under the VAT Act which he could avail of. The respondent did not avail the appellate forum under the statute which was competent to decide all questions of fact and law.

23. It is pertinent to mention here that Clause (2) of Article 102 of our Constitution empowers the High Court Division to interfere with any proceeding if satisfied that there is 'no other equally efficacious remedy is provided by law.' But though Article 226 of the Constitution of India provides no such restrictions for the High Courts in India to invoke writ jurisdiction even in presence of equally efficacious remedy in any case of violation of fundamental rights and the Supreme Court of India has also been given similar power with the exception that under Article 32 the sole object is the enforcement of the fundamental rights guaranteed by the Constitution whereas, under Article 226 of the High Courts have been invested with a wider power relating to the enforcement of fundamental rights as well as ordinary legal rights, still Indian Supreme Court is very cautious in exercising the right where there is an alternative remedy.

24. In the case of Champalal Binani Vs. the Commissioner of Income Tax, West Bengal & others, reported in AIR 1970(SC)645, the Indian Supreme Court observed that:

*"Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is ex-facie with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petition."*

25. From the reasons stated above, we are of the view that the writ petition is not maintainable without exhausting the statutory forum of appeal provides under section 42 of the VAT Act.

26. However, the respondent can still avail the statutory forum of appeal under section 42 of the VAT Act taking recourse of section 14 of the Limitation Act. Since we are already held that the writ petition is not maintainable as such refrained from going into merit of the case.

27. Accordingly, the civil petition for leave to appeal is disposed of.

28. Judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.1649 of 2012 is set aside.

29. No order as to cost.

**16 SCOB [2022] AD 89**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Hasan Foez Siddique, CJ**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**
**Mr. Justice Borhanuddin**
**Mr. Justice M. Enayetur Rahim**
**Ms. Justice Krishna Debnath**

**CRIMINAL PETITION FOR LEAVE TO APPEAL NO.214 OF 2022**
(From the order dated the 5th day of December, 2021 passed by the High Court Division in Criminal Revision No.2330 of 2021)

**Minaz Ahmed and another . . . Petitioners**

**-Versus-**

**Arif Motahar and others . . . Respondents**

| | | |
|---|---|---|
| For the Petitioners | : | Mr. Murad Reza, Senior Advocate with Mr. Md. Khurshid Alam Khan, Senior Advocate instructed by Mr. Md. Shafiqul Islam Chowdhury, Advocate-on-Record |
| For the Respondents Nos.1-2 | : | Mr. Rokonuddin Mahmud, Senior Advocate with Mr. Mostafizur Rahman Khan, Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record |
| For the Respondents Nos.3-4 | : | Not represented |
| Date of Hearing and Judgment | : | The 10th day of March, 2022 |

**Editors' Note**
The question came up for consideration in the instant petition is- whether in a case under the Money Laundering Protirodh Ain, 2012 the Magistrate has jurisdiction to deal with the application for bail of an accused as he has no jurisdiction to take cognizance of an offence under the said Ain. The Appellate Division held that under the Money Laundering Protirodh Ain, 2012 beside the Anti-Corruption Commission, Police as well as other agency/organization of the government is empowered to investigate a case but as per schedule, (gha), of Anti-Corruption Commission Act, 2004 and schedule 01 to the Money Laundering Protirodh Bidhimala, 2019 the Commission is authorized to investigating those cases which relate to bribe and corruption only. The other offences under the Ain have to be investigated by the CID or any other agency(s) as prescribed in the schedule of the said Bidhimala, 2019. On the other hand, the other investigation agency(s) as per Upa bidhi 7 of bidhi 51 of the Bidhimala, 2019 shall follow the provisions of Code of Criminal Procedure while carrying out the investigation. The Special Judge has no jurisdiction to deal with a case initiated under Money Laundering Protirodh Ain by any other investigation agency other than the Anti Corruption Commission before taking cognizance. Thus, before submitting report as

per provision of section 173 of the Code of Criminal Procedure and taking cognizance of the offence by a Special Judge at the pre-trial stage an accused has every right to move all kinds of applications including the application for bail before the Magistrate concerned where the case is pending and record lies. As per provision of section 497 of the Code of Criminal Procedure the Magistrate concerned has got the jurisdiction to deal with the matter in accordance with law. It also opined that in the absence of any express or implied prohibition in any other special Law or Rule, the Magistrate concerned may entertain, deal with and dispose of any application for bail of an accused under section 497 of the Code of Criminal Procedure.

**Key Words**
Money Laundering Protirodh Ain, 2012; Anti-Corruption Commission Act, 2004; Money Laundering Protirodh Bidhimala, 2019; Bail by a Magistrate in a case triable by Special Judge

**Jurisdiction and function of a Sessions Judge and a Special Judge is quite distinguishable and one cannot exercise the jurisdiction of other though sometimes judge may be the same person:**

**In the instant case, admittedly, the case is under investigation i.e. at the pre-trial stage and pending before the Chief Metropolitan Magistrate, Dhaka. Metropolitan Magistrate concerned granted bail to the accused respondents during the period of investigation, against which victim-petitioners moved an application before the Metropolitan Sessions Judge, Dhaka, not before the Metropolitan Senior Special Judge, Dhaka. The learned Metropolitan Sessions Judge had dealt with the matter as miscellaneous case as Sessions Judge. Court of Sessions for every session's division, in particular Dhaka Metropolitan area has been established by the government as per provision of section 7 of Code of Criminal Procedure, whereas Special Judge and Special Court have been set up under the provision of Act of 1958. A Sessions Judge acts under the provisions of Code of Criminal Procedure, whereas the Special Judge acts under the provisions of Act of 1958. Thus, jurisdiction and function of a Sessions Judge and a Special Judge is quit distinguishable and one cannot have the jurisdiction to exercise other jurisdiction though sometimes judge may be a same person.**

**...(Paras 24 and 25)**

**Section 435 of the Code of Criminal Procedure:**

**In view of the above specific provision as contemplated in the Code of Criminal Procedure, if anyone is aggrieved by an order including granting bail to an accused passed by a Magistrate, he ought to have preferred a revisional application before the Court of Sessions, if so advised or desired, as the order is revisable one. We have no hesitation to hold that a specific statutory provision cannot be overridden by so-called usual practice. When there is specific Provision of Law to ventilate a grievance particular in that event an authorized practice cannot be appreciated and endorsed.**

**...(Paras 30 and 31)**

**Jurisdiction of Special Judge in cases initiated by any agency other than the Anti-corruption Commission under the Money Laundering Protirodh Ain:**

**The Special Judge appointed under the provision of Act of 1958 has no jurisdiction to deal with a case initiated under Money Laundering Protirodh Ain by any other investigation agency other than the case initiated by the Commission before taking cognizance. ...(Para 41)**

**Jurisdiction of the Magistrate in cases initiated by any agency other than the Anti-corruption Commission under the Money Laundering Protirodh Ain:**

**Thus, before submitting report as per provision of section 173 of the Code of Criminal Procedure and taking cognizance of the offence by a Special Judge appointed under the Act of 1958 i.e. at the pre-time stage an accused has every right to move all kinds of applications including the application for bail before the Magistrate concerned where the case is pending and record lies. And as per provision of section 497 of the Code of Criminal Procedure the Magistrate concerned has got the jurisdiction to deal with the matter in accordance with law. ...(Para 44)**

**Section 497 and 498 of the Code of Criminal Procedure:**

**In the absence of any express or implied prohibition in any other special Law or Rule, the Magistrate concerned may entertain, deal with and dispose of any application for bail of an accused under section 497 of the Code of Criminal Procedure. In case of rejection of his application for bail he may move before the Court of Sessions by filing a Criminal Miscellaneous Case under section 498 and thereafter in case of failure before the Court of Sessions, he can move under section 498 of the aforesaid Code for bail before the High Court Division. ...(Para 46)**

## JUDGMENT

**M. Enayetur Rahim, J:**

1. Feeling aggrieved by and dissatisfied with the order dated 05.12.2021 passed by a Division Bench of the High Court Division in Criminal Revision No.2330 of 2021 recalling and vacating the order dated 22.11.2021 of the same Bench, the victim-petitioners have filed this leave petition.

2. At the instance of one Al Amin Hossain, Assistant Superintendent of Police, Organized Crime Unit (Financial Crime), Bangladesh Police, CID, Dhaka, Khilkhet Police Station case No.39 dated 28.02.2021 corresponding to G.R. Case No.79 of 2021 has been initiated against the present accused Respondent Nos.1 and 2 and another for allegedly committing offence under section 4(2)/ 4(3) of the Money Laundering Protirodh Ain, 2012.

3. In the First Information Report, it is alleged that the accused respondent Arif Motahar, Kabir Reza and another in the year of 2005 made advertisements in various print and electronic media in the United Kingdom for the purpose of raising investment from non-resident Bangladeshis living in the United kingdom to the amount of 100 crores for the construction of the hotel named "Dhaka Regency Hotel and Resort Ltd." in the Khilkhet area of Dhaka. It was stated in those advertisements that out of 100 crores, so far 52% shares had already been invested, and that investors were required for the remaining 48% shares. Investors would be able to purchase one block of shares for the amount of GBP 25000 (twenty-five thousand British pounds) equivalent to BDT 29,00,000 (taka twenty nine lac, at the then prevailing exchange rate in 2005). The accused, dishonestly and for fraudulent purposes, divided the total share capital of the company into 337 blocks, fixing the price of each block at GBP 25000 equivalent to BDT 29,00,000. The accused persons claimed to have had already invested in 177 blocks at that time and advertised for investment in the remaining 160 blocks. It was further stated in the advertisements that, those who would purchase one block of shares worth GBP 25000 would be made directors, and those who purchase four such blocks would be made senior directors, as well as they would get other benefits.

Subsequently, being attracted by the various benefits described in the advertisements, 119 non-resident Bangladeshis living in the United Kingdom transferred funds from the United Kingdom in to various amounts from 2005 to various personal/ company bank accounts held in the names of the accused persons for the purpose of investment in the said hotel construction. However, when the said hotel came into operation, the investors found that against Tk.29 lac paid up by each investor in accordance with the contract, each investor was allotted only 1,74,000 shares of value of Tk.10 each, the total value of which stands at Tk.17,40,000. The remaining shares worth of Tk.11,60,000 in each block, instead of being allotted to the investors, was fraudulently misappropriated through collusion by the accused persons. In this way, the accused persons criminally misappropriated the amount of BDT 18,00,97,425 (taka eighteen crore ninety seven thousand four hundred and twenty-five). In 2005 the accused persons entered into a bayna agreement with RAJUK Kormochari Kollyan Shomiti to buy land and $7^{th}$ to $15^{th}$ floor of the building, the total project cost being taka 42.6 crores for construction of the said hotel, whereas the accused persons had falsely advertised in various media that the total cost of the project was taka 112.5 crores. The accused persons also falsely claimed in the said advertisements that they had already invested taka 58.5 crores corresponding to 52% of the total share value of the project, and wanted to sell the remaining 48% of the total share. It is found that the total contract amount under the agreement with RAJUK Kormochari Kollyan Shomiti, only taka 6 crores was paid by the accused persons, and the remaining amount under the contract was paid from funds collected from the investors. The accused persons in collusion with each other misappropriated the amount of BDT 18,00,97,425 (taka eighteen crore ninety-seven thousand four hundred and twenty-five) and thereby committed offence of Money Laundering.

4. The investigation officer on 04.03.2021 made a prayer before the Chief Metropolitan Magistrate, Dhaka to show the accused-respondents arrested in the present case who were earlier arrested in connection with Khilkhet Police Station Case No.08(12) of 2020 and the learned Metropolitan Magistrate allowed the said application by his order dated 08.03.2021 and thereby, the accused-respondents have been shown arrested. On 18.03.2021 the accused-respondents made a prayer for bail before the Chief Metropolitan Magistrate, Dhaka and the learned Metropolitan Magistrate concerned by the order on the same day enlarged them on bail.

5. Being aggrieved by and dissatisfied with the said order of granting bail to the accused respondents, the present victim-petitioners filed an application for cancellation of bail of the said accused vide Miscellaneous Case No.6012 of 2021 before the Metropolitan Sessions Judge, Dhaka. The learned Metropolitan Sessions Judge, Dhaka after hearing the said Miscellaneous Case by its order dated 26.09.2021 rejected the same and maintained the order of bail passed by the Metropolitan Magistrate, Dhaka.

6. Thereafter, the present victim-petitioners moved an application under section 10(A) of the Criminal Law Amendment Act,1958 vide Criminal Revision No.2330 of 2021 before the High Court Division. A Division Bench of the High Court Division on 22.11.2021 issued a Rule and also stayed the operation of the order dated 26.09.2021 passed by the Metropolitan Sessions Judge till disposal of the Rule and the accused-respondents were directed to surrender before the Chief Metropolitan Magistrate, Dhaka within a period of 02(two) weeks from the date of receipt of the order by him.

7. The High Court Division also directed the Metropolitan Magistrate concerned who granted bail to the accused-respondents to explain his position as to under what authority and

what provision of law, he enlarged the accused-respondents on bail.

8. The accused-respondents on coming to know about the said order filed an application before the Bench concerned of the High Court Division for re-calling and vacating the said order and after hearing the respective parties, the High Court Division by the impugned order dated 05.12.2021 recalled and vacated the order dated 22.11.2021.

9. Thus, the victim-petitioners have preferred this criminal petition for leave to appeal before this Division.

10. Mr. Murad Reza and Mr. Md. Khurshid Alam Khan, learned Senior Advocates, appearing on behalf of the petitioners submit that in a case under the Money Laundering Protirodh Ain, 2012 the Magistrate has no jurisdiction to deal with the application for bail of an accused as he has no jurisdiction to take cognizance of an offence under the said Ain of 2012 and thus, the Metropolitan Magistrate acted illegally in assuming the jurisdiction of a Special Judge and granting bail to the accused-respondents.

11. It is further submitted that in a criminal case once a matter has been decided on merit and judgment or order as the case may be signed, it cannot be recalled, altered or reviewed except to correct clerical error. The court after signing and pronouncing its judgment or order becomes *functus officio* and has no power thereafter to review it so as to add or alter such judgment or order in any manner. Any such alteration or addition, if made would be without jurisdiction and a nullity. The High Court Division has failed to appreciate the said legal aspect while passing the impugned order which is liable to be interfered by this Division.

12. It is also contended by the learned Advocates for the petitioners that the moment High Court Division stayed the order of bail granted to the accused-respondents by the learned Magistrate, they became fugitive from law and the fugitive have no *locus standi* to file any application and not entitled to obtain a judicial order defying the process of the Court. It is an essential condition for the administration of justice that the fugitive should surrender before the Court of law before seeking any kind of redress as against his grievance and as such the application for recalling and vacating the earlier order is not maintainable. The High Court Division has also failed to appreciate this vital legal issue while passing the impugned order.

13. Mr. Rokonuddin Mahmud, learned Senior Advocate, appearing on behalf of the accused-respondents submits that the High Court Division by its order dated 22.11.2021 directed the accused-respondents to surrender before the Chief Metropolitan Magistrate, Dhaka within a period of 02(two) weeks from the date of receipt of the said order by him and the respondents before expiry of the said period filed the application for re-calling and vacating the order dated 22.11.2021 before the High Court Division and as such it cannot be said that the respondents were fugitive. High Court Division in passing the impugned order rightly held that, the respondents approached before the Court with the application for re-calling and vacating before expiry of the period of time frame given by the High Court Division, which indicates that the respondents are still not fugitive from justice.

14. Mr. Mahmud further submits that the learned Magistrate did not act illegally in granting bail to the accused-respondents considering the allegation and facts and circumstances of the present case having his jurisdiction.

15. We have considered the submissions of the learned Advocates for the respective

parties, perused the orders passed by the High Court Division including the impugned order and other materials available on record as well as the relevant provision of laws.

16. Having regard to the fact that the instant case has been initiated by an officer of Organized Crime Unit (Financial Crime) Bangladesh Police, CID with the Khilkhet Police Station which has been registered as Police Case and gave rise to G.R. No.79 of 2021. The learned Metropolitan Magistrate by his order dated 18.03.2021 enlarged the accused-respondents on bail. Two of the victims, the present petitioners of the case preferred Miscellaneous Case being No. 6012 of 2021 before the Metropolitan Sessions Judge, Dhaka against the said order of granting bail.

17. The victim-petitioners having failed to succeed in the said Miscellaneous Case has filed an application under section 10(1A) of the Criminal Law Amendment Act,1958 **(hereinafter referred to as Act of 1958)** before the High Court Division, which gave rise of the Criminal Revision No.2330 of 2021.

18. Section 10 and 10(1A) of the Act of 1958 runs as follows;

> **10. Appeal, revision and transfer of cases –** [1][(1) An appeal from the judgment of a Special Judge shall lie to –
> (a) the High Court Division, if the Special Judge is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge;
> [2] [(b) * * * * * *]
> (1A) the Court to which an appeal lies under sub-section (1) shall also have powers of revision.] **(Underline supplied)**

19. In the instant case the victim petitioners have preferred an application under section 10(1A) of the Act of 1958 before the High Court Division against the order passed in a Miscellaneous case by the learned Metropolitan Sessions Judge, Dhaka.

20. Section 2(c ) of the Act of 1958 defined '**Special Judge**' as under:

> "Special Judge' means a Special Judge appointed under sub-section (1) of section 3."

21. Sub-section (1) of section 3 of the Act of 1958 speaks that- 'The Government shall, by notification in the official Gazette, appoint as many Special Judges as may be necessary to try and punish offences specified in the schedule.

22. In section 4 of the Act of 1958, the jurisdiction of a Special Judge has been mentioned which is as under:

> "4. Jurisdiction of Special Judges and cognizance of the cases by them.-(1) A Special Judge shall have jurisdiction within such territorial limits as may be fixed by the Government by notification in the official gazette and may take cognizance of any offence committed or deemed to have been committed within such limits and triable under this Act upon receiving a complaint of facts which constitute such offence or upon a report in writing of such facts made by any police officer.
> (2) where two or more Special Judges have jurisdiction, wholly or partly in the same territorial limits, the Government, shall, by notification in the official Gazette, declare one of them to be the Senior Special Judge for that area [and notwithstanding anything contained in sub-section (1), such Senior Special Judge shall have exclusive jurisdiction to take cognizance of all offences triable under this Act committed or deemed to have been committed within that area.]

> (3) An offence shall be tried by the Special Judge within the territorial limits of whose jurisdiction it was committed or deemed to have been committed, or where there are more Special Judges then one having jurisdiction within the same territorial limits, [by the Special Judge to whom the case is transferred] by the Senior Special Judge:
> Provided that the Senior Special Judge may, by order in writing, transfer, at any stage of the trial, any case from the court of one Special Judge to the Court of another Special Judge having jurisdiction within the same territorial limits.
> (4) When an offence triable under this Act, is committed outside Bangladesh, it shall for the purposes of this Act, be deemed to have been committed within the territorial limits of the jurisdiction of the Special Judge in which the person [committing the offence is found or was ordinarily residing before he left Bangladesh]."

23. In view of the provision of section 4(1) of the Act of 1958 it is crystal clear that a Senior Special Judge or Special Judge, as the case may be shall assume its jurisdiction under the said Act upon receiving a complaint of facts which constitute such offence or upon a report in writing of such facts made by any police officer.

24. In the instant case, admittedly, the case is under investigation i.e. at the pre-trial stage and pending before the Chief Metropolitan Magistrate, Dhaka. Metropolitan Magistrate concerned granted bail to the accused respondents during the period of investigation, against which victim-petitioners moved an application before the Metropolitan Sessions Judge, Dhaka, not before the Metropolitan Senior Special Judge, Dhaka. The learned Metropolitan Sessions Judge had dealt with the matter as miscellaneous case as Sessions Judge.

25. Court of Sessions for every session's division, in particular Dhaka Metropolitan area has been established by the government as per provision of section 7 of Code of Criminal Procedure, whereas Special Judge and Special Court have been set up under the provision of Act of 1958. A Sessions Judge acts under the provisions of Code of Criminal Procedure, whereas the Special Judge acts under the provisions of Act of 1958. Thus, jurisdiction and function of a Sessions Judge and a Special Judge is quit distinguishable and one cannot have the jurisdiction to exercise other jurisdiction though sometimes judge may be a same person.

26. In the instant case the Metropolitan Sessions Judge, Dhaka has dealt the miscellaneous case for cancellation of bail of the accused respondents as Sessions Judge assuming jurisdiction of Court of Sessions, though the case is under Money Laundering Protirodh Ain, 2012 which is at pre-trial stage.

27. The Court asked the learned Advocates for the victim-petitioners that under what provision of law they had filed the Miscellaneous Case before the Metropolitan Sessions Judge challenging the order of granting bail to the accused respondents by a Magistrate, which is a revisable order. The learned Advocates for the victim-petitioners replied that it is the practice of the court below that application for cancellation of bail used to register as Miscellaneous Case.

28. We are unable to appreciate and endorse the above submission of the learned Advocates for the victim-petitioners.

29. Section 435 of the Code of Criminal Procedure speaks as follows:

> "435(1) the High Court Division or any Sessions Judge Power to call [,[***], may call for and examine the record of any proceeding for records of before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself of himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior court and may, when calling for such record, direct that the execution of any sentence be suspended and , if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.
> Explanation-all Magistrates, **[whether executive or judicial],** shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section."

30. In view of the above specific provision as contemplated in the Code of Criminal Procedure, if anyone is aggrieved by an order including granting bail to an accused passed by a Magistrate, he ought to have preferred a revisional application before the Court of Sessions, if so advised or desired, as the order is revisable one.

31. We have no hesitation to hold that a specific statutory provision cannot be overridden by so-called usual practice. When there is specific Provision of Law to ventilate a grievance particular in that event an authorized practice cannot be appreciated and endorsed.

32. Learned Advocates for the victim-petitioners argued that in a case under Money Laundering Protirodh Ain, the Magistrate has got no authority to deal with an application for bail and to grant an accused on bail and that as per section 13 of the said Ain only Special Judge is empowered to deal with the matter of bail.

33. We feel to address, the above legal issue because different Benches of the High Court Division on the question of granting bail at the pre trial stage under various special laws have expressed divergent views.

34. Under the Money Laundering Protirodh Ain, 2012 [section 2(R) and schedule] beside the Anti-Corruption Commission **(hereinafter referred to as the Commission)**, on behalf of Bangladesh Police Criminal Investigation Department (CID) as well as other agency/organization of the government or more than one agency jointly are authorized and empowered to investigate a case.

35. However, as per schedule, (gha), of Anti-Corruption Commission Act, 2004 and schedule 01 to the Money Laundering Protirodh Bidhimala, 2019 **(hereinafter referred to as Bidhimala, 2019)** the Commission is authorized to investigating those cases under Money Laundering Protirodh Ain which relates to bribe and corruption (ঘুষ ও দুর্নীতি সংক্রান্ত) only. The other predicated offences under Money Laundering Protirodh Ain have to be investigated by the CID or any other agency(s) as prescribed in the schedule of the said Bidhimala, 2019.

36. Upon scrutiny of Anti-Corruption Act, 2004, Money Laundering Protirodh Ain, 2012 and Bidhimala, 2019 it transpires that the investigation procedure of the Commission is to some extent different from other agencies.

37. For investigation of a case under Money Laundering Protirodh Ain, the Commission is bound by its own Rules i.e. rule 10 of the Anti Corruption Rules 2007 which is as follows:

> "১০। অপরাধের তদন্তকার্যক্রম গ্রহণ, সম্পন্ন ও প্রতিবেদন দাখিল।-(১) এই বিধির অধীন-

(ক) কমিশনের প্রত্যেক জেলা কার্যালয় প্রত্যেক সিনিয়র স্পেশাল জজের অধিক্ষেত্রাধীন এলাকা ভিত্তিক একটি করিয়া তফসিলের ফরম-২ক অনুযায়ী তদন্ত রেজিস্ট্রার সংরক্ষণ করিবে;

(খ) কমিশনের নির্দেশপ্রাপ্ত কর্মকর্তা অপরাধ সংঘটনের স্থানীয় অধিক্ষেত্রসম্পন্ন সিনিয়র স্পেশাল জজের এলাকার দায়িত্বপ্রাপ্ত কমিশনের জেলা কার্যালয়ে আইনের তফসিলভুক্ত অপরাধ সংঘটনের তথ্য সম্বলিত এজাহার দাখিল করিবেন;

(গ) সংশ্লিষ্ট জেলা কার্যালয় সংশ্লিষ্ট সিনিয়র স্পেশাল জজের এলাকার জন্য নির্ধারিত তদন্ত রেজিস্ট্রারে এজাহারে বর্নিত তথ্যাদি অন্তর্ভূক্ত করিবে এবং তদন্ত কার্যক্রমের জন্য প্রয়োজনীয় সংখ্যক কপি সংরক্ষণ করিয়া তফসিলের ফরম-২খ সহ মূল এজাহারটি সংশ্লিষ্ট সিনিয়র স্পেশাল জজের নিকট প্রেরণ করিবে;

(ঘ) সংশ্লিষ্ট সিনিয়র স্পেশাল জজ তদন্তের স্বার্থে কোন আদেশ প্রদানের প্রয়োজন এবং তদন্ত প্রতিবেদন প্রাপ্তিসাপেক্ষে পরবর্তী ব্যবস্থা গ্রহণের জন্য উক্ত এজাহার সংরক্ষণ করিবেন;

(ঙ) বিধি ১৩ এর উপ বিধি (৩) এর অধীন সিনিয়র স্পেশাল জজ কর্তৃক প্রেরিত অভিযোগ সংশ্লিষ্ট এলাকার দায়িত্বপ্রাপ্ত কমিশনের জেলা কার্যালয় প্রাপ্ত হইলে এই উপ-বিধির দফা (খ) এ বর্ণিত মতে ব্যবস্থাদি গ্রহণ করিবে;

(চ) কমিশন যে কোন সূত্রে প্রাপ্ত তথ্যের ভিত্তিতে যদি এই মর্মে সন্তুষ্ট হয় যে, আইনের তফসিলভুক্ত কোন অপরাধ সংঘটিত হইয়াছে বলিয়া বিশ্বাস করিবার মত যথেষ্ট কারণ রহিয়াছে তাহা হইলে সরাসরি এজাহার দায়েরের জন্য উহার সংশ্লিষ্ট কোন কর্মকর্তাকে নির্দেশ প্রদান করিতে পারিবে।" (Underlines supplied)

38. From the above provision of law it is manifested that the Commission after lodgment of an FIR ought to have sent it to the Senior Special Judge, under whose jurisdiction the alleged offence was committed and the learned Senior Special Judge upon receiving such FIR shall give direction for investigation, and he has also the jurisdiction to direct an officer of the Commission to lodge an FIR on the basis of a complaint filed before it, if he satisfied so, and shall take necessary steps subject to the investigation report i.e. at the pre-trial stage before taking cognizance of the case the Senior Special Judge has the jurisdiction to deal with the matter.

39. On the other hand the other investigation agency(s) as per Upa bidhi 7 of bidhi 51 of the Bidhimala, 2019 the investigating officer shall follow the provisions of Code of Criminal Procedure. Upa Bidhi 7 of bidhi 51 of the above Bidhimala, 2019 is as follows:

"৫১। তদন্ত।-(১) তদন্তকারী সংস্থা অনুসন্ধানান্তে নিজস্ব সংস্থার একজন কর্মকর্তাকে তদন্ত কর্মকর্তা হিসাবে মনোনয়ন প্রদান করিবে, তবে শর্ত থাকে যে, কোনো তদন্তকারী সংস্থা কর্তৃক তদন্ত কর্মকর্তা নিয়োগ করা হইলে এবং পরবর্তীতে যৌথ তদন্ত দল গঠন করার প্রয়োজন অনুভূত হইলে, বিএফআইইউকে তাহা লিখিতভাবে অনুরোধ করিবে।

(২). . . . . ।

(৩). . . . . ।

(৪). . . . . ।

(৫). . . . . ।

(৬). . . . . ।

(৭) এই বিধিমালার অধীন কোনো অভিযোগের তদন্তকার্য সম্পাদনের ক্ষেত্রে তদন্ত কার্যে দায়িত্বপ্রাপ্ত কর্মকর্তা দৈনিক ভিত্তিতে তাহার তদন্তকার্যের অগ্রগতি সম্পর্কে The Code of Criminal Procedure, 1898 (Act No.V of 1898) অনুযায়ী তদন্তের ক্ষেত্রে ব্যবহৃত কেস ডায়েরি প্রস্তুত ও সংরক্ষণ করিবেন।" (underlines supplied)

40. For these two different procedures for investigation under the same law i.e. Money Laundering Protirodh Ain, 2012 by different investigation agencies Sometimes confusions arises among the all concerned, which needs to be resolved.

41. The Special Judge appointed under the provision of Act of 1958 has no jurisdiction to deal with a case initiated under Money Laundering Protirodh Ain by any other investigation

agency other than the case initiated by the Commission before taking cognizance.

42. The moot question is whether during investigation of a case i.e. at the pre-trial stage before taking cognizance by a Special Judge under Money Laundering Protirodh Ain by an agency other than the Commission, the accused is entitled to move an application for bail or for any remedy before the Magistrate concerned where the case record lies who used to pass necessary orders for the purpose of investigation, including the order of remand.

43. We have already noticed that Upa bidhi 7 of bidhi 51 of the Bidhimala, 2019 has made Code of Criminal Procedure applicable during investigation period for the cases initiated by the agencies/organisations other than the Commission.

44. Thus, before submitting report as per provision of section 173 of the Code of Criminal Procedure and taking cognizance of the offence by a Special Judge appointed under the Act of 1958 i.e. at the pre-time stage an accused has every right to move all kinds of applications including the application for bail before the Magistrate concerned where the case is pending and record lies. And as per provision of section 497 of the Code of Criminal Procedure the Magistrate concerned has got the jurisdiction to deal with the matter in accordance with law.

45. For the sake of argument, if Magistrate is found to be lacking in authority and power to entertain and dispose of an application for bail of an accused in a case under the Money Laundering Protirodh Ain or any other special Law at the pre-trial stage, then how can the Magistrate pass an order for police remand of an accused under section 167 of the Code of Criminal Procedure and pass various necessary orders for the purpose of investigation at that stage? An accused cannot be remediless at pre-trail stage i.e. before taking cognizance by a Special Judge or Tribunal as the case may be.

46. In the absence of any express or implied prohibition in any other special Law or Rule, the Magistrate concerned may entertain, deal with and dispose of any application for bail of an accused under section 497 of the Code of Criminal Procedure. In case of rejection of his application for bail he may move before the Court of Sessions by filing a Criminal Miscellaneous Case under section 498 and thereafter in case of failure before the Court of Sessions, he can move under section 498 of the aforesaid Code for bail before the High Court Division.

47. It is pertinent to mention here that granting or refusal of bail to an accused is the discretion of a Magistrate or Judge concerned. However, such discretion has to be applied judiciously upon consideration of the gravity of an offence and keeping in mind the provision for granting bail as laid down in that particular law, if any.

48. Section 13 of the Money Laundering Protirodh Ain, 2012 makes provisions of granting bail, which is as follows:

> "১৩। জামিন সংক্রান্ত বিধান।- এই আইনের অধীন অভিযুক্ত কোন ব্যক্তিকে জামিনে মুক্তি দেওয়া যাইবে, যদি-
> (ক) তাহাকে জামিনে মুক্তি দেওয়ার আবেদনের উপর অভিযোগকারী পক্ষকে শুনানীর সুযোগ দেওয়া হয়; এবং
> (খ) তাহার বিরুদ্ধে আনীত অভিযোগে তিনি দোষী সাব্যস্থ হওয়ার যুক্তিসঙ্গত কারণ রহিয়াছে মর্মে আদালত সন্তুষ্ট না হন; অথবা
> (গ) তিনি নারী, শিশু বা শারীরিকভাবে বিকলাঙ্গ এবং তাহাকে জামিনে মুক্তি দেওয়ার কারণে ন্যায় বিচার বিঘ্নিত হইবে না মর্মে আদালত সন্তুষ্ট হন।"

49. The above provision speaks that, 'আদালত' is the competent authority to consider the

prayer of bail of an accused under Money Laundering Protirodh Ain, 2012.
As per section ২ (জ) of the Money Laundering Protirodh Ain, 2012 'আদালত' means 'স্পেশাল জজ এর আদালত'.

50. We have already observed that in view of section 4(1) of the Act of 1958 the Special Judge shall assume its jurisdiction upon receiving a complaint of fact which constitute such offence or upon a report in writing of such facts made by any police officer. After taking cognizance of any offence punishable under the Money Laundering Protirodh Ain, 2012, if an accused files an application for bail, then the Senior Special Judge/Special Judge concerned will hear and dispose of the same in accordance with the provision of section 13 of the Money Laundering Protirodh Ain, 2012. However, because of different procedure of investigation as mentioned and discussed earlier the cases which are being initiated by the Commission, the Courts of Magistrates have got no jurisdiction to deal with the same in any manner rather as per rule 10 of the Anti-Corruption Rules, 2007 the Special Judge has got every jurisdiction to deal with the case including bail matter after its initiation.

51. Having discussed as above we are of the view that in the cases initiated by the agency(s)/ organization(s) other than the Commission at the pre-trial stage before taking cognizance by the Special Judge, the Magistrate concerned is not powerless to entertain the application for bail of an accused under Money Laundering Protirodh Ain, 2012.

52. However, in granting bail to an accused under Money Laundering Protirodh Ain, the Magistrate concerned or the Special Judge, as the case may be, has to follow the guidelines as laid down in section 13 of the said Ain.

53. Keeping in mind the relevant provision of laws as discussed above couple with the facts and circumstances of the present case, we are constrained to hold that since the order dated 26.09.2021 was passed by the learned Metropolitan Sessions Judge, Dhaka in a Miscellaneous Case, not by a Special Judge appointed under the Act of 1958, the application under section 10(1A) of the Act of 1958 is not amenable before the High Court Division against said order.

54. Thus, the application under section 10(1A) of the Act of 1958 filed by the victim-petitioners against an order passed by the Metropolitan Sessions Judge before the High Court Division is absolutely misconceived one and the High Court Division at the time of issuance of the Rule has failed to take notice of it and to appreciate this legal aspect and thereby, erroneously issued the Rule and passed various ad-interim orders including the impugned order.

55. Since the application under section 10(1A) of the Act of 1958 filed by the victim-petitioners is not amenable in the High Court Division and the High Court Division wrongly applied its jurisdiction, thus the Rule issuance order and all the orders including the impugned order passed by the High Court Division, in the said Rule is nullity in the eye of law and are liable to be interfered with.

56. Accordingly, this leave petition is disposed of.

57. The Rule issued by the High Court Division in Criminal Revision No.2330 of 2021 is discharged and all the orders including the impugned order passed by the High Court Division is set aside.

58. However, the victim-petitioners are not precluded to proceed with the matter in accordance with law.

**16 SCOB [2022] AD 100**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Hasan Foez Siddique, CJ**
**Mr. Justice Obaidul Hassan**
**Mr. Justice M. Enayetur Rahim**

**CIVIL PETITION FOR LEAVE TO APPEAL NO.333 OF 2020 WITH CIVIL PETITION FOR LEAVE TO APPEAL NOS.531 and 3451 OF 2019.**
(From the judgment and order dated the 25th day of July, 2019 passed by the High Court Division in Writ Petition Nos.7755 of 2017 and 12035 of 2014)

**Director General (DG), Directorate General of Health and Service, Mohakhali, Dhaka and another** **…….....Petitioner**
**(In C.P. No.333 of 2020)**

**Bangladesh, represented by the Secretary, Ministry of Health and Family Welfare, Dhaka and others** **…….....Petitioner**
**(In C.P. No.531 of 2019)**

**Dr. Abu Saeed and others** **…….....Petitioner**
**(In C.P. No.3451 of 2019)**

***-Versus-***

**Dr. Md. Tajul Islam and others** **.....Respondents**
**(In C.P. Nos.333 of 2020, and 3451 of 2019)**

**Dr. Abdul Karim and others** **.....Respondents**
**(In C.P. No.531 of 2019)**

For the Petitioners (In C.P. No.333 of 2020) : Mr. Ruhul Quddus, Advocate instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record

For the Petitioners (In C.P. No.531 of 2019) : Mr. A.M. Aminuddin, Attorney General with Mr. Biswajit Debnath, Deputy Attorney General instructed by Mr. Md. Helal Amin, Advocate-on-Record

For the Petitioners (In C.P. No.3451 of 2019) : Mr. Mohammad Ali Azom, Advocate-on-Record

For the Respondent No.1 (In C.P. No.333 of 2020) : Mr. Nozrul Islam Chowdhury, Senior Advocate instructed by Ms. Shahanara Begum, Advocate-on-Record

For the Respondent Nos.2-42 (In C.P. No.333 of 2020) : Not represented

For the Respondent Nos.1-2 (In C.P. No.531 of 2019) : Mr. Md. Bodroddoza, Senior Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record

| | | |
|---|---|---|
| For the Respondent (In C.P. No.3451 of 2019) | : | Mr. Nozrul Islam Chowdhury, Senior Advocate instructed by Ms. Shahanara Begum, Advocate-on-Record |
| Date of Judgment | : | The 03rd day of April, 2022. |

**Editors' Note**

In the instant case writ petitioners-respondents in response to the advertisement published by the concerned authority for appointment in a project applied accordingly and sat for written and viva voce examination in 2003. However, the said appointment process was eventually stopped and postponed. The project eventually ended without appointing them in the said posts. Now the writ petitioners-respondents have sought for appointment in another project which has started in 2017 after a long period of closure of earlier project. They claim that since they had participated in the written and viva voce examination earlier and in the new project there are vacant posts, they have a legitimate expectation to be appointed directly in the said post. The High Court Division made the Rule absolute directing the authority concerned to fill up the posts advertised in the new project if the writ petitioners are selected in earlier appointment process and if they are not otherwise disqualified as per the present circular in any manner. The Appellate Division, however, set aside the judgment and order passed by the High Court Division holding that the writ petitioners-respondents did not have acquired any legal right to be appointed in the earlier project and now they cannot claim to be appointed in new project. Referring to its earlier judgments reported in 71 DLR (AD) 395 and 72 DLR (AD) 188 the Appellate Division reiterated that the doctrine of legitimate expectation can neither preclude legislation nor invalidate a statute enacted by the competent legislature. When the government changes policy, if it is not malafide or otherwise unreasonable, the doctrine of legitimate expectation cannot defeat the changed policy.

**Key Words**

Legitimate Expectation; Recruitment; Government policy; vested right

**Mere participation in the written and viva voce examination, *ifso facto*, does not create any vested right in favour of the writ petitioners-respondents to be appointed:**

**The writ petitioners-respondents did not have acquired any legal right to be appointed in HPSP project and now they cannot claim to be appointed in new project i.e. Alternative Medical Care (AMC) Operational Plan (OP) as of right without participating in recruitment process. The writ petitioners-respondents participated in the examination for appointment under HPSP project in the year 2003 and having regard to the fact that the said appointment process was postponed and cancelled and on the plea of their participation in the earlier written and viva examination, no legal and vested right has been created in favour of the writ petitioners-respondents to be appointed to the posts as allegedly vacant in the new project. Mere participation in the written and viva voce examination, *ifso facto*, does not create any vested right in favour of the writ petitioners-respondents to be appointed automatically in the newly created posts in subsequent project. ...(Para 17)**

**Any appointment by passing the relevant Rules of the concerned authority should be treated as back door appointment and such appointment should be stopped. ...(Para 21)**

**We have no hesitation to hold that the writ petitioners-respondents have no legal and**

**vested right to be appointed as of right in the posts as has been sought by them on the plea that they had earlier participated in the written examination and viva voice for the similar posts. The claim of the writ petitioner-respondents appears to be very fanciful having no legal basis. ...(Para 23)**

**Judgment contrary to the law settled by the Appellate Division has no binding effect:**
**Having perused the said judgments we have no hesitation to hold that the observations/directions made in the said writ petitions are not based on sound principle of law and the law settled by this Division. Since, the judgments passed by the High Court Division in the above two writ petitions are not in accordance with law, thus those have no binding effect and persuasive value on any authority; rather said judgments are void *ab initio*. May be, by virtue of the above two judgments some persons have got appointment by the concerned authority but it is our considered view that this act is to be treated as passed and closed transaction. ...(Para 26)**

**It has to be borne in mind that the function or duty of a Court is not to do charity; rather it has to act in accordance with law to ensure justice. If an aspirant candidate or a participant of a particular selection process is provided job later on without participation in later selection process as decided by the concerned authority then this will create havoc in regular selection process and eligible and meritorious candidates will be deprived from getting job. ...(Para 28)**

## JUDGMENT

**M. Enayetur Rahim, J:**

1. Common questions of law and facts are involved in these Civil Petition for Leave to Appeal and thus, those have been heard together and are being disposed of by this common judgment.

2. The facts, relevant for disposal of these leave petitions, in short, are that the writ petitioners-respondents are general practitioner for several years after obtaining degree either Bachelor of Unani Medical and Surgery (BUMS) or Bachelor of Ayurvedic Medicine and Surgery (BAMS) under the University of Dhaka. The writ petitioners-respondents according to the publication dated 03.07.2003 under memo No. স্বাস্থ্য অধিঃ/হোঃ দেঃ বিঃচিঃ/ এইচ পি এস পি/নিয়োগ/০২-০৩/১২৪৭১ dated 28.06.2003 and also according to the advertisement for appointment published in the Daily Ittefaq applied for being appointed for the posts of Unani Medical Officer, Ayurvedic Medical Officer and Homeopathic Medical Officers with some other candidates and sat for written and viva voce examinations on 18.07.2003. In total 137 candidates were qualified and succeeded in the written examination and accordingly they appeared in the viva voce examination on 20.07.2003.

3. But instead of publishing the final result another advertisement for appointment to the same post in the form of advertisement for re-appointment (পুনঃ নিয়োগ বিজ্ঞপ্তি) by memo No. স্বাস্থ্য অধিঃ/হোঃ দেঃ বিঃচিঃ/এইচ পি এস পি/ নিয়োগ/০২-০৩/১২৭৩/১ dated 15.10.2003 was published in the daily Ittefaq on 23.10.2003 and in that advertisement it was declared that the previous written and viva voice examination had been cancelled and the candidates who sat for the previous written examination on 18.07.2003 would only be eligible to sit for the upcoming examination; however said examination was also cancelled and vide another notification the

advertisement for re-appointment was also suspended and their recruitment process was also suspended although they made several representations before the authority concerned for completing their appointment process but all their efforts went in vein.

4. Eventually, the Director Homeo and Deshoj Chikitsha, Alternative Medical Care, Directorate General of Health Services (DGHS) vide memo No.8278/1(1) dated 26.02.2012 forwarded a letter to the concerned Ministry for relaxing the age limit of the candidates up to 45 years and also to consider the applications of the candidates who sat for written and viva voce examination initiated in 2003 and the concerned Ministry in response to the above letter issued a letter under Memo No.761 dated 13.11.2012 to consider the age limit of the candidates who sat for written and viva-voce examination in 2003 and in the meantime on 12.11.2012 some qualified candidates also made representation to the Director General of Health & Family Welfare to consider the case of the candidates who sat in the written examination in 2003.

5. Thereafter, the Director, Homeo and Deshoj Chikitcha and the line Director (AMC) DGHS vide Memo No.91 dated 17.09.2012 sought for approval for Draft recruitment Rules and Man Power enclosing the structure of operational Plan (OP) mentioning the available post of medical officer in Unani and Ayurvedic and in the said forwarding the authority concerned strongly recommended to consider the application/appointment process for the candidates whose written examination were held and thereafter suspended.

6. However, without considering the recommendation, the authority concerned made an advertisement for appointing some persons afresh to the aforesaid posts in the Daily Prothom Alo on 12.03.2013 in which the pending recruitment process was not at all considered.

7. Challenging the said advertisement, some of the candidates who passed in the written examination and participate in viva voce moved before the High Court Division preferring 02(two) separate writ petitions, writ petition No.3474 of 2013 and writ petition No.12035 of 2014 and the different Division Benches of the High Court Division after hearing the said writ petitions made the Rule absolute directing the authority concerned to fill up the posts advertised in the Operation Plan (OP) of Alternative Medical Care (AMC), January-2017 to June-2022 as per Rule, if the writ petitioners are selected in earlier appointment process and if they are not otherwise disqualified as per the present circular in any manner.

8. Being aggrieved by and dissatisfied with the impugned judgments the Respondents as petitioners have preferred C.P. No.333 of 2020 and C.P. No.531 of 2019. The leave petitioners in C.P. No.3451 of 2019 were not party in the writ petitioners; however, being aggrieved by the impugned judgment passed in writ petition No.7755 of 2017 they have preferred the same.

9. Mr. A.M. Amin Uddin, learned Attorney General, appearing for the leave petitioners in C.P. No.531 of 2019 submits thatthe judgment and order passed by the High Court Division in making the Rule absolute clearly shows non-application of judicial mind having failed to appreciate that the writ petitioners-respondents have any locus-standi to file the writ petition as they were not finally selected in appointment process.

10. He further submits that the High Court Division while passing the judgment and order failed to appreciate that the writ petitioners-respondents were the candidates of appointment process for the year 2003 which appointment process was postponed by the authority

concerned and eventually the tenure of the stipulated project was expired and subsequently while a new project is beginning then some post have been created for which an advertisement for fresh recruitment was published in the year 2013 and the writ petitioners-respondents did not challenge that advertisement feeling aggrieved the same. The advertisement dated 28.06.2003 was published for appointment in Alternative Medical Care (AMC) operational plan under 4th Health Population and Nutrition Sector Program (HPSP) and the written examination was held on 18.07.2003 but in the meantime duration of the said HPSP project has been expired and as a result there is no existence of the project at all and eventually a new project has been started for the year January 2017-June 2022 for which the writ petitioners- respondents have sought for appointment without participating in the recruitment process and the High Court Division failed to consider this factual and legal aspects and as such committed serious error in making the Rules absolute.

11. Mr. Ruhul Quddus, learned Advocates, appearing for the petitioners in C.P No.333 of 2020 adopted the submissions made by the learned Attorney General.

12. However, Mr. Md. Nozrul Islam Chowdhury, learned Senior Advocate, appearing for the respondents in C.P. No.333 of 2020 and C.P. No.3451 of 2019 and Mr. Bodroddoza, learned Senior Advocate, appearing for the respondents in C.P. No.531 of 2019 have made identical submissions that the writ petitioners-respondents have got legitimate expectation to be appointed in the posts in question, and that some of candidates who appeared in the examination held in the year 2003 have already appointed by the concerned authority in the respective posts pursuant to the judgment of the High Court Division passed in writ petition No.3474 of 2013 and writ petition No.12035 of 2014,

13. Learned Advocates for the writ petitioners-respondents further submits that the writ petitioners-respondents were not parties in the writ petition Nos.3474 of 2013 and 12035 of 2014 but still they have their right to be appointed in vacant posts as their examination earlier held by the concerned authority for those posts and as in the judgment passed in the above two writ petitions there is a direction for appointing the writ petitioners in those posts if they are not disqualified otherwise and also regarding the number of the vacant posts and as they have the qualification as required, and as they also appeared in the same written and viva voce examination like as the writ petitioners-respondents, regarding all aspects, they may be considered with the writ petitioners in appointing to those posts if any are not disqualified otherwise which has been affirmed by the Appellate Division and it would be more appropriate to uphold the order of the High Court Division.

14. We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgments and other materials as available on record.

15. In the instant case writ petitioners-respondents in response to the advertisement made on 28.06.2003 by the concerned authority for appointment of Unani Medical Officer, Ayurvedic Medical Officer and Homeopathic Medical Officers applied for the said posts and sat for written and viva voce examination on 18.07.2003 and 20.07.2003 respectively. However, the said appointment process was eventually stopped and postponed. Thereafter, the writ petitioners-respondents made several representations to various authorities to complete the appointment process and to give them appointment in their respective posts.

16. It appears that the advertisement dated 28.06.2003 was published for appointment in 4th Health, Population and Nutrition Sector Program (HPSP) project and at present there is no

existence of said project and now the writ petitioners-respondents have sought for appointment in Alternative Medical Care (AMC) Operational Plan (OP) for year January-2021-June 2022 under 4th Health, Population and Nutrition Sector Program (HPNSP) project which has been started after a long period of earlier HPSP project. The HPSP project has already been ended and closed.

17. The writ petitioners-respondents did not have acquired any legal right to be appointed in HPSP project and now they cannot claim to be appointed in new project i.e. Alternative Medical Care (AMC) Operational Plan (OP) as of right without participating in recruitment process. The writ petitioners-respondents participated in the examination for appointment under HPSP project in the year 2003 and having regard to the fact that the said appointment process was postponed and cancelled and on the plea of their participation in the earlier written and viva examination, no legal and vested right has been created in favour of the writ petitioners-respondents to be appointed to the posts as allegedly vacant in the new project. Mere participation in the written and viva voce examination, *ifso facto*, does not create any vested right in favour of the writ petitioners-respondents to be appointed automatically in the newly created posts in subsequent project.

18. Learned Advocates for the writ petitioners-respondents have tried to convince us that since the writ petitioners had participated in the written and viva voce examination earlier and in the new project there are vacant posts, the writ petitioners have a legitimate expectation to be appointed directly in the said post.

19. With regard to the application of '**legitimate expectation principle**' this Division in the case of **Secretary, Ministry of Fisheries and Livestock and others Vs. Abdul Razzak and others** reported in 71 DLR (AD), Page-395 has observed as follows:

> "Before applying the principle, the Courts have to be cautious. It depends on the facts and recognized general principles of administrative law applicable to such facts. A person, who bases his claim, on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation, that is, he has *locus standi* to make such claim. Such claim has to be determined not according to the claimant's perception but in the public interest.
>
> The doctrine of legitimate expectation can neither preclude legislation nor invalidate a statute enacted by the competent legislature. The theory of legitimate expectation cannot defeat or invalidate a legislation which is otherwise valid and constitutional. Legitimate expectations must be consistent with statutory provisions. The doctrine can be invoked only if it is founded on the sanction of law. (Hear statutory words override any expectation, however well-founded.
>
> It is open to the Government to frame, reframe, change or re-change its policy. If the policy is changed by the Government and the Court do not find the action malafide or otherwise unreasonable, the doctrine of legitimate expectation does not make the decision vulnerable. The choice of policy is for the decision maker and not for the Court."
>
> (underlines supplied to give emphasis)

20. The above view has also been reiterated in the case of **The Director General, represented by Bangladesh Rural Development Board (BRDB), Dhaka Vs. Asma Sharif, Shariatpur and others**, reported in 72 DLR (AD), Page-188.

21. In the above case this Division has held that any appointment by passing the relevant Rules of the concerned authority should be treated as back door appointment and such

appointment should be stopped.

22. It further held that:

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

23. In view of the above observations of this Division we have no hesitation to hold that the writ petitioners-respondents have no legal and vested right to be appointed as of right in the posts as has been sought by them on the plea that they had earlier participated in the written examination and viva voice for the similar posts. The claim of the writ petitioner-respondents appears to be very fanciful having no legal basis.

24. Learned Advocates for the respondents-writ petitioners having referred to the judgment passed in writ petition No.3475 of 2013 and writ petition No.12035 of 2014 have tried to convince us that pursuant to judgment of the said cases by the concerned authority has filled up the post by appointing the said writ petitioners in the respective posts and thus, these the writ petitioners-respondents may be treated equally.

25. We have gone through the findings of the judgment of the said writ petitions as quoted in the impugned judgments.

26. Having perused the said judgments we have no hesitation to hold that the observations/directions made in the said writ petitions are not based on sound principle of law and the law settled by this Division. Since, the judgments passed by the High Court Division in the above two writ petitions are not in accordance with law, thus those have no binding effect and persuasive value on any authority; rather said judgments are void *ab initio*. May be, by virtue of the above two judgments some persons have got appointment by the concerned authority but it is our considered view that this act is to be treated as passed and closed transaction.

27. It is pertinent to mention here that in 2003 advertisement was made for appointment of 07(seven) Uninani Medical Officer, 06(six) Ayurvedic Medical Officer and 07(seven) Homeopathic Medial Officer i.e., in total for 20 posts. But now 35+06=41 persons by filing two separate writ petitions are seeking jobs in the newly created posts on the plea that they had participated in the selection process pursuant to the above advertisement though they were not finally selected and the High Court Division allowed the prayer of them. This kind of relief is beyond the scope of law and also ridiculous.

28. It has to be borne in mind that the function or duty of a Court is not to do charity; rather it has to act in accordance with law to ensure justice. If an aspirant candidate or a participant of a particular selection process is provided job later on without participation in later selection process as decided by the concerned authority then this will create havoc in regular selection process and eligible and meritorious candidates will be deprived from getting job.

29. Having considered and discussed as above, we find merit in the leave petitions and thus, the impugned judgments and orders passed by the High Court Division are set aside.

30. Accordingly, all the leave petitions are disposed of.

31. Judgments and orders passed by the High Court Division are hereby set aside.

**16 SCOB [2022] AD 107**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Hasan Foez Siddique, CJ**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**
**Mr. Justice Borhanuddin**
**Ms. Justice Krishna Debnath**

**CIVIL PETITION FOR LEAVE TO APPEAL NO. 233 OF 2022 WITH CONTEMPT PETITION NO. 31 OF 2021**
(From the Judgment and order dated 21.11.2021 passed by the High Court Division in Writ Petition No. 6592 of 2021)

| | | |
|---|---|---|
| **Eriko Nakano, Tokyo, Japan.**<br>**Japanese Passport No. TS 2795566** | **:** | **.....Petitioner**<br>**(In both the cases)** |
| | **-Versus-** | |
| **Bangladesh, represented by the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Ramna, Dhaka-1000 and others.** | **:** | **.....Respondents**<br>**(In C.P. No. 233 of 2022)** |
| **Imran Sharif** | **:** | **.....Respondent**<br>**(In Contempt P. No. 31 of 2021)** |

| | | |
|---|---|---|
| For the Petitioner<br>(In both the cases) | : | Mr. Ajmalul Hossain, Senior Advocate with Mr. Ahsan-ul-Karim, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record. |
| For Respondent No. 5 | : | Mr. Fida M. Kamal, Senior Advocate with Mrs. Fouzia Karim, Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-Record. |
| For Respondent<br>(In Contempt Petition No. 31 of 2021) | : | Not represented. |
| Respondent Nos. 1-4 & 6-8<br>(In C.P. No. 233 of 2022) | : | Not represented. |
| Date of Hearing | : | The 13th February, 2022 |

**Editors' Note**
A Bangladeshi father, namely, Imran Sharif taking his two minor girl children aged about 9 and 11 years came from Japan without informing their mother with whom the father had a strained relationship. They had another girl child born in their wedlock aged about 7 years, but the father left her in her mother's custody. A case regarding custody of the children was

pending in the family Court of Japan but no prohibitive order about leaving Japan was issued by the Court. When the mother of the Children came to know that their father had taken them in Bangladesh, keeping the third child in the custody of her grandfather the mother left Japan for Bangladesh and filed a Writ Petition in the High Court Division of the Supreme Court of Bangladesh for the custody of the children. The father also filed a case before a competent Family Court of Bangladesh for custody of the Children which was pending at the time of adjudication of this petition. The High Court Division ordered that the children will remain in their father's custody and the mother shall have right to visit their children. The High Court Division further ordered that the father will have to pay a certain amount of money to the mother for coming Bangladesh and visiting her children after interval of a certain period. Against the order the mother filed this petition. The Appellate Division considering the relevant international and domestic law and decision of the apex court of this sub-continent in similar matter held that in such case the object of the Court would be to see how the best interest of the children is protected. It also held that the appropriate forum for deciding the dispute of custody of the children is the Family Court before which a case is already pending ordered the Family Court to complete the trial of the case within three months. It also set aside the order of the High Court Division and placed the children in the custody of their mother with a visitation right of their father until the suit in family court is disposed of. It also clarified that judgment in this petition will have no bearing upon the decision to be reached at by the learned Assistant Judge/Senior Assistant Judge while disposing of the family suit.

**Key Words**
Custody of minor children; Article 7, 12, 20 and 21 of the Convention on the Rights of Child; Guardians and Wards Act, 1890; best interest of the child; enforceability of provisions of international instruments

**Enforceability of provisions of international instruments in Bangladesh:**
**With regard to enforceability of provisions of international instruments, we may refer to the decisions in Hossain Muhammad Ershad V. Bangladesh and others, reported in 21 BLD(AD) 69, where it was held that "the court should not ignore the international obligations which the country undertakes by signing the instruments." ...(Para 23)**

**The court must look for the best interests of the minors:**
**The court must look for the best interests of the minors and the petitioner in the present case being the mother of these two minor daughters left each and every effort for their best interest. It was decided in the case Abu Bakar Siddique vs SMA Bakar reported in 38 DLR(AD)106 that "welfare of the child would be best served if his custody is given to a person who is entitled to such custody." ...(Para 27)**

**It is the Family Court who has the jurisdiction to settle the question of custody of a minor:**
**Considering the aforesaid facts and circumstances we are of the view that removal of the detainees from the custody of their mother petitioner is without lawful authority and they are being held in the custody of respondent No.5 in an unlawful manner and the High Court Division passed the judgment beyond the scope of law which required to be interfered. In this case only Family Court has the jurisdiction to settle the question of custody of a minor. The Family Court will look into the cases referred by the parties and come to a finding in whose custody the welfare of the detainees will be better protected. ...(Para 28)**

## JUDGMENT

**Krishna Debnath, J:**

1. This Civil Petition for Leave to Appeal is directed against the order dated 21.11.2021 passed by the High Court Division in Writ Petition No. 6592 of 2021.

2. The Facts of the case in short, are that, Eriko Nakano, the petitioner of this case is a doctor of Oncology in St. Luke's International University, Tokyo, Japan. She is also a licensed doctor of the United States of America. On 11.07.2008 the petitioner married respondent No. 5 Imran Sharif. The marriage was solemnized both in Japanese and Muslim culture. During their wedlock three daughters were born. Nakano Jasmine Malika alias Jasmine Malika Sharif (detainee No.1) is the eldest daughter aged 11 years, Nakano Laila Lina alias Laila Lina Sharif (detainee No. 2) is the second daughter aged 9 years and the youngest daughter Nakano Sonia Hana is about 7 years old. Aforesaid three daughters were enrolled at the American School in Japan (ASIJ).

3. Since 2020, a difference of opinion got started with them due to purchase a home in the name of petitioner's father.

4. On 21.01.2021 respondent No.5 picked up the minor daughters Nakano Jasmine and Nakano Laila while they were returning from their school. On 28.01.2021 the petitioner filed a complaint before the Family Court, Tokyo, Japan for the custody of the said two minor daughters. On 09.02.2021 respondent No. 5 made an application for issuance of general passports for their two minor daughters on the false plea that the passports had accidentally been thrown out with the rubbish. On 17.02.2021 respondent No. 5 received new passports of the minor daughters (detainee Nos. 1 and 2) and on the next day respondent No. 5 left Japan for Dubai, United Arab Emirates taking the minor daughters with him. Subsequently, respondent No. 5 brought the minor daughters to Bangladesh.

5. On 31.05.2021 the Family Court, Tokyo, Japan pronounced the judgment and granted custody of the minor daughters to the petitioner and further ordered to hand over the minor daughters to the petitioner.

6. On 21.07.2021 the petitioner came to Bangladesh and made all efforts to take the detainees from the custody of respondent No. 5 but to no avail.

7. Therefore, the petitioner had to file the instant Writ Petition and a Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to bring the minor detainees who are held in the custody of the respondent Nos. 5 and 6 before this court so that this court may satisfy itself that the minors are not being held in custody without lawful authority or in an unlawful manner and/or pass such other or further order or orders as to this court may seem fit and proper.

8. Respondent No. 5 has filed affidavit-in-opposition and so many supplementary affidavits denying all the material allegations in the Writ Petition. His case, in short, is that according to Section 2 of the Bangladesh Citizenship (Temporary Provisions) Order, 1972, (Presidents Order No. 149 of 1972) the two minors shall be deemed to be the citizens of Bangladesh. The two minors willingly and voluntarily decided to accompany their father to come into Bangladesh. They did not want to stay with the petitioner getting fear of being sent to petitioner mother's ancestral village. In 2020 the petitioner sent the minor daughters to her

ancestral village for 08(eight) months, when the respondent could not have any meaningful contact with them. In December 2020, the petitioner again wanted to send them to her ancestral village but this time Jasmine vehemently refused and as a result the petitioner demonstrated excessive anger and venom towards the children and the respondent. At a stage the respondent had realized that he could not stay in Japan as the petitioner was threatening to file a number of fraudulent cases against him. The respondent has also received eviction notice and he was also forbidden to meet his youngest daughter, Sonia by the petitioner.

9. While in Tokyo both the minor daughters were in constructive custody of their father (respondent No. 5), the first custody case was initiated against him by the petitioner. There was no order that the minor daughters cannot stay with the father, as such there was no violation of any court's order by respondent No. 5.

10. At present the minors are studying in Canadian International School, Dhaka. They had willingly accompanied their father in Bangladesh. They are old and mature enough to express their preference or opinion.

11. A Family Suit being No. 247 of 2021 is pending before the 2nd Additional Assistant Judge and the Family Court, Dhaka which has the jurisdiction to determine the welfare and best interest of the children by conducting trial with evidence as well as by listening to the opinion of the children. The minor daughters are not unlawfully or illegally kept under his custody as an interim order of custody on 28.02.2021 was passed by a competent Family Court of Bangladesh.

12. In Japan respondent No. 5 was in a vulnerable position and he realized that as a foreigner he would not have any chance to a fair trial in the Japanese Court and the Japanese Court usually does not provide custody to a foreigner and also the visitation right of the aggrieved party cannot be enforced under Japanese legal system. Having stated the above facts respondent No. 5 has sought for discharging the Rule.

13. The High Court Division upon hearing both the parties on 21.11.2021 passed the following orders:-

i) the Rule shall remain pending;

ii) the minors, namely Jasmine and Laila will remain in the custody of their father until further order; however, the father will not be allowed to take the minors outside of Bangladesh;

iii) the petitioner mother shall have the visitation right always; the respondent shall have to pay the travel cost and other expenditures for 10(ten) days for staying in Bangladesh to the petitioner after each 04(four) months; in other occasions the mother will bear her own cost.

iv) during visit and stay of the petitioner in Bangladesh the minors will be with her exclusively; however, the respondent father shall have the visitation right in those days;

v) the respondent is directed to pay taka 10(ten) lacks to the petitioner for travel cost and her staying in Bangladesh for last 04(four) months;

vi) Parties are at liberty to mention the matter before the court at any time if any of them violate the court's order and also wellbeing of the minors are not protected by the respondent;

vii) Deputy Directors, Social Welfare Office, Dhaka is directed to visit and meet the minors once in a month and to submit a report before this court after each three months regarding the condition of the minors;

viii) During stay of the mother in Japan; the respondent shall make arrangement for video call between the mother and the minor daughters after each 15(fifteen) days at the convenient time of the parties.

14. Being aggrieved by and dissatisfied with the order of the High Court Division dated 21.11.2021, on 05.12.2021, the petitioner filed Civil Miscellaneous Petition No. 695 of 2021 before this Court. On 12.12.2021 this Division upon hearing both the parties directed the father (respondent No.5) to handover the children to the petitioner (the mother) by 8 pm on 12.12.2021 upto 15.12.2021. At about 10 pm on 12.12.2021 the counsel of respondent No. 5 informed that they are not going to handover the minor daughters to the petitioner. On 13.12.2021 the petitioner filed a contempt petition No.31 of 2021 against respondent No. 5 before this court. On 15.12.2021 this Court passed an order in following terms:-

"The daughters will remain with the mother until 3rd January 2022. However, the father will enjoy only visitation right between 9 am to 9 pm. The children will attend school regularly"

15. On 03.01.2022 this court adjourned the mater till 23.01.2022 and directed the petitioner to file a regular Civil Petition for Leave to Appeal. Hence the present petition.

16. Mr. Ajmalul Hossain learned senior Advocate appearing for the petitioner submits that the detainees were illegally removed from the custody of their mother (the petitioner) while they were in Tokyo, Japan. He further submits that on 21.01.2021 the respondent (father of the children) picked up the minors while they were returning from their school and on 09.02.2021 he applied for new passports for them. On 17.02.2021 the respondent received new passports of the minor daughters and next day he left Japan for Bangladesh with the minor daughters. Mr. Hossain further submits that before that on 28.01.2021 the petitioner filed a complaint before the Family Court, Tokyo, Japan and on 31.05.2021 this Court granted the custody of the minor daughters to the petitioner. But during pendency of that case without the consent of the petitioner and without giving any notice to the Family Court Japan the respondent removed the detainees from the custody of the petitioner. By doing so, respondent No.5 has taken law in his own hand without waiting for adjudication of the custody and welfare of the children in an appropriate forum i.e the Family Court of Japan. The High Court Division fell into a serious error of fact and law while passed the impugned judgment and order, he submits.

17. Mr. Fida M Kamal, learned senior Advocate for respondent No.5, on the other hand submits that two minor girls willingly and voluntarily decided to come Bangladesh with their father. He further submits that while they were residing in Tokyo both the minor daughters were in constructive custody of their father and in Family Case for custody there was no order that the minors cannot stay or leave Japan with their father, so there was no violation of any courts order by respondent No. 5. He lastly submits that the minor daughters are not willing to stay with their mother (petitioner) and they are mature enough to express their preference and opinion.

18. Admittedly, the detainees are 9 & 11 year old girl children. It also appears that the father respondent No. 5 without the consent of the mother petitioner removed the girls to Bangladesh from Japan. It is also admitted that at that time a Family Case for custody was

pending among the parties but respondent No. 5 did not take any permission to bring the children in Bangladesh though there was no injunctive order against him.

19. It appears that in this case the marriage between the parties was solemnized both in Japanese and Muslim culture. The spouses lived Japan for years and during their wedlock three girl children were begotten and as such they all have the intimate ties with the concerned country as to the wellbeing of the spouses and the welfare of the three children.

20. On 28.01.2021 the petitioner filed a complaint before the Family Court, Tokyo and on 31.05.2021 the Family Court Tokyo pronounced the judgment and granted custody of the minor daughters to the petitioners and between this two dates respondent no. 5 removed two minor girls to Bangladesh. Additionally, respondent no. 5 received new passports stating that the earlier passports had accidentally been thrown out with the rubbish. Thus respondent no. 5 displayed a singular lack of respect for law and deprived the State of Japan, his matrimonial home from serving wellbeing and securing welfare of the children.

21. We find support of this contention in a case of Indian Supreme Court namely Surinder Kaur Sandhu v. Harbax Singh Sandhu and ors. MANU/SC/0184/1984 where it was held that "Ordinarily jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the wellbeing of the spouses and the welfare of the offsprings of marriage." It was also held in the aforesaid case that "the wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping, of his wife."

22. If we read Article 7, 12, 20 and 21 together with other Articles of the Convention on the Rights of Child, it is seen that the best interests of the children have been given the status of paramount consideration. It has been envisaged in Article 7 of the CRC that the children shall have the right to be cared for by his or her parents. It also has been enshrined in Article 12 of the CRC that the child who is capable of forming his views shall have the right to express the views in all matters affecting his or her interests. Article 20 of the CRC enunciates that the State shall give the assistance and protection to those children who are temporarily or permanently deprived of staying in their family environment. In Article 21 of the CRC, the best interests of the children have been given the status of paramount consideration. In this connection we may refer Mainul Islam Chowdhury and Ors vs Rumana Foiz and Ors. LEX/BDAD/0060/2018 where it was held that "the principles of international law which guide us in case of custody of children are found in the Convention on the Rights of the Child which provides that the best interests of the child shall be a primary consideration when dealing with all matters concerning any child. The concept is not new since a similar provision exists in the Guardians and Wards Act, 1890, which provides for any order to be made under that law if the court is satisfied that it is for the welfare of the minor that an order should be made. Hence, all courts of law are bound to keep in mind these salutary provisions of law when dealing with custody, access and other matters which impact the lives of children."

23. With regard to enforceability of provisions of international instruments, we may refer to the decisions in Hossain Muhammad Ershad V. Bangladesh and others, reported in 21 BLD(AD) 69, where it was held that "the court should not ignore the international obligations

which the country undertakes by signing the instruments."

24. In the light of the decisions of the case Queen vs Gyngall (1893) 3 QBD 232: Walter vs Walter 55 Cal 730: Saraswathi vs Dhanakoti 48 (Mad) 299 it was decided in the case Abdul Jalil v. Sharon reported in 50 DLR (AD) 1998, 55 "It is now well settled that the term 'welfare' must be read in the largest possible sense as meaning that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do. The moral and religious welfare of the child must be considered as well as its physical wellbeing. Nor can ties of affection be disregarded."

25. The best interest of the child can only be understood well when sufficient evidences are taken. In this connection we may refer the case Abdul Jalil v. Sharon reported in 50 DLR (AD) 1998, 55 where it was held that "it is difficult for us in this Habeas Corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined"

26. In the present case the petitioner came to Bangladesh and made all the desperate efforts to take the minor daughters in her custody but failed. In the case of Abdul Jalil vs Sharon reported in 50 DLR(AD) 1998, 55 it was held that "Normally the minor children should be with their mother as long as she does not earn any disqualification for such custody and if there is a breach of this normal order brought about by a unilateral act of the father or anybody on his behalf, the aggrieved mother has the right to move the High Court Division under Article 102 of the Constitution for immediate custody of the children which may be ordered in the interest and for the welfare of the children."

27. The court must look for the best interests of the minors and the petitioner in the present case being the mother of these two minor daughters left each and every effort for their best interest. It was decided in the case Abu Bakar Siddique vs SMA Bakar reported in 38 DLR(AD)106 that "welfare of the child would be best served if his custody is given to a person who is entitled to such custody."

28. Considering the aforesaid facts and circumstances we are of the view that removal of the detainees from the custody of their mother petitioner is without lawful authority and they are being held in the custody of respondent No.5 in an unlawful manner and the High Court Division passed the judgment beyond the scope of law which required to be interfered. In this case only Family Court has the jurisdiction to settle the question of custody of a minor. The Family Court will look into the cases referred by the parties and come to a finding in whose custody the welfare of the detainees will be better protected.

29. It appears from the record that the custody of the minor children, particularly in this case in which the detainees are 9 & 11 year old girl children and their mother is a Japanese well settled doctor and their father being a well settled person is a Bangladeshi by birth and also a citizen of America, the paramount consideration is the welfare of the minors and not the legal right of this and that particular party.

30. In the result and for the reasons stated, we pass the following order:-

i) 1. Nakano Jasmine Malika @ Jasmine Malika Sharif 2. Nakano Laila Lina @ Laila Lina Sharif aged about 11(eleven) years and 9(nine) years respectively in the

custody of writ respondent No. 5 Imran Sharif is declared to be unlawful and they are being held in his custody in an unlawful manner.

ii) Considering the facts and circumstances of the case and interest of the Children, the Children namely 1. Nakano Jasmine Malika @ Jasmine Malika Sharif and 2. Nakano Laila Lina @ Laila Lina Sharif will not be taken out of the jurisdiction of this Court save and except with leave of this court.

iii) It is directed that the detainees shall remain in custody of their mother-Eriko Nakano pending disposal of the Family Suit No. 247 of 2021 at present, pending in the Court of Assistant Judge, Second Additional Court, Family Court, Dhaka.

iv) The Family Court concerned is directed to conclude the Family Suit No. 247 of 2021 within 3(three) months from the date of receipt of this order.

v) It is made clear that the observations which have been made by us are only for the limited purpose of engaging summary inquiry for consideration in the petition of Habeas corpus and will be of no assistance to either party in the custody proceedings pending in the Family Court which indeed will be decided on its own merits.

vi) The impugned judgment and order of the High Court Division is hereby set aside.

vii) The father will have the right to visit the children at a convenient agreed time, place and period.

viii) The leave petition is accordingly disposed of.

ix) The Contempt Petition No. 31 of 2021 is accordingly redundant.

**16 SCOB [2022] HCD 1**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**
WRIT PETITION NO. 3141 of 2019

**Spice Television Private Limited**
…….....Petitioner
-Versus-
**Government of Bangladesh and others**
..... Respondents

Mr. Moudud Ahmed, Senior Advocate
with
Mr. Syed Tazrul Hossain, Advocate
…..... For the petitioner

Mr. A.K.M Alamgir Parvez Bhuiyan, Advocate
…… For the respondent No. 3

Heard on 17.08.2020, 20.08.2020, 25.08.2020, 27.08.2020, 03.09.2020 and Judgment on 13.09.2020

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

**Editors' Note:**
The petitioner after obtaining permission from Ministry of Information for running a Satellite Television Channel made an application to the Bangladesh Telecommunication Regulatory Commission (BTRC) praying for allocating frequency for running the Television Channel under the name and style Spice TV. BTRC upon receiving the application from the petitioner, issued letters requesting (a) the Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI to furnish their opinion/clearance. The Director General, DGFI and the Director General, NSI provided their clearances. But Ministry of Home Affairs did not provide the same. As a result, BTRC did not allocate frequency to the petitioner on a permanent basis but allowed it to import transmission equipments and also allocated frequency of 6 Megahertz from 5.850-6.425 Gigahertz, on a temporary basis. It is at this stage the petitioner filed the instant writ petition and obtained the Rule and order of direction. The argument of the petitioner was that under section 55 of the Bangladesh Telecommunication Act, 2001, allocation of frequency is under the exclusive authority of Bangladesh Telecommunication Regulatory Commission and in section 56(8) of the said Act a prescribed time limit has been provided within which the Commission shall dispose of an application for license or frequency or a technical acceptance certificate. The High Court Division accepted the argument and held that BTRC was absolutely in a position to take a decision in the matter in question. The Court also found that this particular case is guided by the principle of reasonableness so far legitimate expectation is concerned and directed BTRC to do the needful in terms of the Rule in accordance with law.

**Key Words:**
Article 102(2)(a)(i) of the Constitution of the People's Republic of Bangladesh; writ mandamus; Legitimate expectation; section 55 and 56 (8) of the Bangladesh Telecommunication Act, 2001

**Constitution of Bangladesh, Article 102(2)(a)(i):**

**This is a writ in the nature of mandamus. A direction has been sought by the petitioner upon the respondent No. 3. Let us have a clear idea what constitution has mandated under Article 102(2)(a)(i) :- It says "on the application of any person aggrieved, make an order- (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do." The writ of mandamus as enshrined in the Constitution enjoins how in a given situation authority should act in accordance with law. This is the elementary principle of writ mandamus. ...(Para 13)**

**Section 55 and 56(8) of বাংলাদেশ টেলিযোগাযোগ নিয়ন্ত্রণ আইন, ২০০১, authority of Bangladesh Telecommunication Regulatory Commission (BTRC) in granting license:**

**What we have seen in the instant case that from the very beginning though the respondent No. 3 (Bangladesh Telecommunication Regulatory Commission (BTRC)) tried its best to do the needful for obtaining clearance from the three agencies, two of which had already given their clearance but the added respondent No. 4, Ministry of Home Affairs did not accord any clearance though there was repeated request by the respondent No. 3. There is no denying that respondent No. 3 had all along the good intention in this regard....On a plain reading of the laws we have found that respondent No. 3 was absolutely in a position to take a decision in the matter in question.**

**...(Paras 14 and 16)**

**Criteria to satisfy a claim of the legitimate expectation:**

**Moreover, this particular case is also guided by the principle of reasonableness so far legitimate expectation is concerned. We unequivocally and respectfully agree with the decision of Dhaka City Corporation vs. Firoza Begum 65 DLR AD 145 where our Appellate Division set up 12 criteria to satisfy a claim of the legitimate expectation. In the case in hand, as we have found that out of those criteria, (iv) and (v) shall apply. Criteria No. (iv) says : " An expectation to be legitimate must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation and a Minister cannot found an expectation that an independent officer will act in a particular way or an election promise made by a shadow Minister does not bind the responsible Minister after the change of the government." Criteria No. (v) says : " A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of the principles of natural justice and not taken in public interest." Therefore, considering the overall aspect it is our considered view that before the agog of wait ends in whimper on the part of the petitioner, the respondent No. 3 should immediately act in accordance with law in the manner as mentioned above by taking appropriate steps.**

**...(Paras 17to 20)**

## JUDGMENT

**Md. Ashfaqul Islam, J:**

1. This Rule under adjudication, issued on 14.03.2019, at the instance of the petitioner, was in the following terms:-

*"Let a Rule Nisi calling upon the Respondents to show cause as to why the respondent No.3 should not be directed to allocate frequency in favour of the petitioner's Television Channel named Spice Television Limited (Spice TV) as prayed for by its applications dated 27.08.2017 received on 30.08.2017 and 12.02.2019 (Annexure-B and B-1) and/or such other or further order or orders passed as to this court may seem fit and proper."*

2. At the time of issuance of the Rule the respondent No. 3, the Chairman, Bangladesh Telecommunication Regulatory Commission (BTRC) was directed to dispose of the petitioner's application dated 27.08.2017 received on 30.08.2017 and 12.02.2019(Annexure-B and B-1) within 1 (one) month.

3. Relevant facts leading to the Rule are detailed below:

The petitioner is a private Limited Company registered with Joint Stock Company under the Companies Act. Petitioner filed an application before the respondent No. 1, the Secretary, Ministry of Information for running a Satellite Television Channel and after considering all the necessary papers and the relevant provisions of law no objection Certificate was given to it by the respondent No. 1 under signature of respondent No. 2, Senior Assistant Secretary, Ministry of Information on 09.08.2017. After obtaining the said permission the petitioner made an application to the respondent No. 3 on 27.08.2017 praying for allocating frequency for running the Television Channel under the name and style Spice TV. As the application was not considered the petitioner filed another application through email on 12.02.2019 which was duly received by the respondent No. 3. Since no decision was taken thereof, the petitioner sent notice demanding Justice on 24.02.2019 (Annexure-'C'). It has been stated that in the permission Annexure-'A' dated 09.08.2017 a condition was given (condition No. 8) as under:

''(৮) প্রযোজ্য ক্ষেত্রে বিটিআরসিসহ সংশ্লিষ্ট মন্ত্রণালয়/সংস্থার অনাপত্তি গ্রহণ করতে হবে।''

In Condition No. 16 it is written

''(১৬) অনাপত্তি প্রদানের তারিখ থেকে ০১(এক) বছরের মধ্যে পূর্ণাঙ্গ সম্প্রচার শুরু করতে হবে।''

4. Be it mentioned that upon receiving the application of the petitioners dated 27.08.2017 the respondent No. 3 issued a letter dated 20.09.2017 requesting (a) the Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI to furnish their opinion/clearance over the matter within a period of 60 days. The Director General, DGFI provided their clearance in April, 2018. Thereafter, respondent No. 3 issued another letter dated 20.05.2018 requesting again (a) Ministry of Home Affairs and (b) the Director General, NSI to provide their opinion/ clearance over the matter within a period of 15 days. Accordingly, the Director General, NSI provided clearance on 20.05.2018. Respondent No. 3 then again issued another letter dated 10.10.2018 requesting Ministry of Home Affairs to accord clearance within 15 days.

5. It has been stated in the affidavit of compliance dated 20.05.2019 that even though respondent No. 3 did not allocate frequency to the petitioner on a permanent basis but in pursuance of a decision dated 13.12.2017 taken in the 210$^{th}$ meeting of the commission, the respondent No. 3 allowed the petitioner to import transmission equipments and also allocated frequency of 6 Megahertz from 5.850-6.425 Gigahertz, on a temporary basis. It is at this at this stage the petitioner filed the instant writ petition and obtained the Rule and order of direction as aforesaid.

6. Mr. Moudud Ahmed, the learned Senior Advocate appearing with Mr. Syed Tazrul Hossain, the learned Advocate for the petitioner after placing the petition and all the relevant annexures and materials on record submits that in addition to the steps taken as narrated above the respondent No. 3 received the order on 15.04.2019 and issued a letter dated 12.05.2019 requesting the Ministry of Home Affairs to provide clearance within 15 days so that the respondent No. 3 could comply with the order of this Division. He submits that respondent No. 3 in its 215th meeting dated 24.07.2018 sent a letter to the concerned security agencies by giving a deadline of 15 days for the last time clearly mentioning that in case of failure it will be deemed that they have no objection in allocating frequency in favour of the petitioner.

7. Next he submits that respondent No. 3 in its 221st meeting dated 03.12.2018 discussed the matter and took three decisions; (ka) to send a reminder letter within 30 days; (Kha) if no opinion is received within 30 days, to issue a letter giving a deadline of 30 days for the last time; (ga) if no opinion is received within 04 (four) months, then the matter shall again be presented to the Commission for decision (as it could be found from affidavit of compliance).

8. He further submits that on 20.05.2020 Ministry of Homes was added as the respondent No. 4 at the instance of the petitioner following which respondent No. 3 by its letter dated 25.07.2020 once again requested the Ministry of Homes to provide clearance within 15 days (as it could be seen from the affidavit of compliance dated 25.08.2020). In the said compliance, as he submits it could be seen that respondent No. 3 received a letter dated 23.08.2020 from the respondent No. 4, Ministry of Home Affairs which stated that the matter was under investigation and after completion of the investigation soon they would provide their opinion. Under the circumstances the learned Senior Advocate Mr. Ahmed submits that though respondent No. 3 with all its good intention gave several reminders to the Ministry of Home Affairs but Ministry of Home Affairs on different pretext did not comply with the same.

9. The learned Senior Advocate finally submits that in section 55 of the Bangladesh Telecommunication Act, 2001, allocation of frequency is under the exclusive authority of Bangladesh Telecommunication Regulatory Commission that is respondent No. 3 itself. In section 56(8) of the said Act of 2001, it has been clearly stated that there is a prescribed time limit within which the Commission shall dispose of an application for license or frequency or a technical acceptance certificate. But in the instant case 3 years have gone passed since the petitioner placed his application for allocation of frequency and till date respondent No. 3 has failed to allocate the frequency without any lawful reason. The learned Counsel relied in the case of Ekushey Television Ltd and others vs. Dr. Chowdhury Mahmud Hasan and others reported in 55 DLR AD 130. He has also cited 46 DLR AD 148 and 65 DLR AD 145 both on the ground of legitimate expectation that has been considered by our Hon'ble Appellate Division in support of his contention.

10. On the other hand Mr. A.K.M Alamgir Parvez Bhuiyan, the learned Advocate appearing for the respondent No. 3 by filing affidavit-in-opposition and affidavit of

compliance submits that the respondent No. 3 has done everything for providing permanent frequency to the petitioner. First of all on 20.09.2017 requested (a) Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI. Though the Director General, DGFI and the Director General, NSI accorded clearance in April 2018 and May 2018 respectively but Ministry of Home Affairs even after their repeated request did not give the clearance sought by the respondent No. 3. Under this situation he submits that respondent No. 3 is eagerly waiting for the clearance of the Ministry of Home Affairs who featured is the added respondent No. 4 in the writ petition.

11. We have heard the learned Senior Advocate Mr. Moudud Ahmed appearing for the petitioner and A.K.M Alamgir Parvez Bhuiyan, the learned Advocate appearing for the respondent No. 3 at length and considered their submissions carefully. We have also perused the petition, all the documents, Annexures, affidavit-in-opposition and affidavit of compliance and other materials on record meticulously.

12. The only question that faces this Division in this writ petition is whether under the facts and circumstances respondent No. 3 acted in accordance with law as mandated under the Constitution.

13. This is a writ in the nature of mandamus. A direction has been sought by the petitioner upon the respondent No. 3. Let us have a clear idea what constitution has mandated under Article 102(2)(a)(i) :- It says "on the application of any person aggrieved, make an order- (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do." The writ of mandamus as enshrined in the Constitution enjoins how in a given situation authority should act in accordance with law. This is the elementary principle of writ mandamus.

14. What we have seen in the instant case that from the very beginning though the respondent No. 3 tried its best to do the needful for obtaining clearance from the three agencies, two of which had already given their clearance but the added respondent No. 4, Ministry of Home Affairs did not accord any clearance though there was repeated request by the respondent No. 3. There is no denying that respondent No. 3 had all along the good intention in this regard.

15. Relevantly let us now quote Section 55 of **বাংলাদেশ টেলিযোগাযোগ নিয়ন্ত্রণ আইন, ২০০১** :-

> **৫৫। (১) কোন ব্যক্তি লাইসেন্স ব্যতিরেকে বাংলাদেশের ভূখণ্ডে বা আঞ্চলিক সমুদ্রসীমায় বা উহার উপরস্থ আকাশসীমায় বেতার যোগাযোগের উদ্দেশ্যে কোন বেতার যন্ত্রপাতি স্থাপন, পরিচালনা বা ব্যবহার করিবেন না বা কোন বেতার যন্ত্রপাতিতে কমিশন কর্তৃক বরাদ্দকৃত বেতার ফ্রিকোয়েন্সি ব্যতীত অন্য কোন ফ্রিকোয়েন্সি ব্যবহার করিবেন না।**

**(২) উপ-ধারা (১) এর অধীন প্রয়োজনীয় লাইসেন্স ইস্যুকরণ এবং বেতার ফ্রিকোয়েন্সি বরাদ্দের একক এখ্তিয়ার থাকিবে কমিশনের।**

Further section 56(8) states :

**(৮) বেতার যন্ত্রপাতির লাইসেন্স, বেতার ফ্রিকোয়েন্সি বরাদ্দ বা কারিগরী গ্রহণযোগ্যতা সনদ প্রাপ্তির জন্য কমিশনের নিকট আবেদন করিতে হইবে, এবং কমিশন, আবেদনটি প্রাপ্তির ৭ (সাত) দিনের মধ্যে উহার মন্তব্যসহ (যদি থাকে) উহা কমিটির নিকট প্রেরণ করিবে এবং ৩০ (ত্রিশ) দিনের মধ্যে প্রয়োজনীয় অনুসন্ধানের পর কমিটি তত্সম্পর্কে উহার সুপারিশ ও মন্তব্যসহ কমিশনের নিকট পেশ করিবে।**

16. On a plain reading of the laws we have found that respondent No. 3 was absolutely in a position to take a decision in the matter in question. In the reported decision of 55 DLR AD 26 as referred to above in paragraph 38, our Hon'ble Appellate Division has observed as under:

> "The counsel for the Ekushey TV Ltd. has submitted that it has filed an application with regard to the TV Licence with Bangladesh Telecommunication Regulatory Commission established under the Bangladesh Telecommunication Act, 2001. Our judgment will have no bearing in considering the application by Ekushey for licence by the said Commission which is free to decide in accordance with law."

17. Moreover, this particular case is also guided by the principle of reasonableness so far legitimate expectation is concerned. We unequivocally and respectfully agree with the decision of Dhaka City Corporation vs. Firoza Begum 65 DLR AD 145 where our Appellate Division set up 12 criteria to satisfy a claim of the legitimate expectation. In the case in hand, as we have found that out of those criteria, (iv) and (v) shall apply.

18. Criteria No. (iv) says: " An expectation to be legitimate must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation and a Minister cannot found an expectation that an independent officer will act in a particular way or an election promise made by a shadow Minister does not bind the responsible Minister after the change of the government."

19. Criteria No. (v) says: "A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of the principles of natural justice and not taken in public interest."

20. Therefore, considering the overall aspect it is our considered view that before the agog of wait ends in whimper on the part of the petitioner, the respondent No. 3 should immediately act in accordance with law in the manner as mentioned above by taking appropriate steps.

21. In the result, the Rule is made absolute. The respondent No. 3 is directed to do the needful in terms of the Rule in accordance with law at the earliest preferably within 2(two) months on receipt of this Judgment and order.

Communicate at once.

**16 SCOB [2022] HCD 7**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**
**Writ Petition No. 5323 of 2016**

| | |
|---|---|
| **Md. Mahboob Murshed**<br>…… Petitioner | Mr. Mahboob Murshed, Advocate<br>…. In person |
| -Versus- | |
| **Bangladesh, represented by the Secretary, Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs, Dhaka and others**<br>……Respondents | Mr. Sk. Shaifuzzaman, DAG with<br>Ms. Abantee Nurul, AAG,<br>Ms. Rokeya Akther, AAG and<br>Ms. Afroza Nazneen Akther, AAG<br>…….. For Respondent No. 4<br>Date of Hearing : 19.11.2020, 23.11.2020, 07.12.2020 & 11.01.2021<br>Date of Judgment : 18.03.2021 |

**Present:**
**Mr. Justice Zubayer Rahman Chowdhury**
And
**Ms. Justice Kazi Zinat Hoque**

**Editors' Note:**
The constitutional validity of Rule 300 of the Bangladesh Service Rules, Part I was challenged in the instant Writ Petition by a former Additional District Judge, who had tendered his resignation from service. Having completed nineteen years of service as a Judicial Officer, the petitioner applied for his pension and other benefits, which was approved by the Ministry of Law, Justice and Parliamentary Affairs. But the office of the Comptroller and Auditor General, Bangladesh issued a Memo stating that the petitioner was not entitled to receive any pension since his service stood forfeited by dint of Rule 300(a) of the Bangladesh Service Rules, Part I. The petitioner sought relief under the Writ jurisdiction of the High Court Division. The High Court Division held that the Rule 300(a) of the Bangladesh Service Rules, Part I, so far as it relates to "forfeiture of pension in the event of resignation from service" is *ultra vires* to the Constitution on the ground that an employee with an unblemished service record cannot be treated on the same scale as an employee who has been found guilty of some misdemeanour and therefore dismissed from service. Two different categories of persons cannot be subjected to the same treatment, although there is a gross distinction between 'resignation' and 'dismissal'. However, the Court found that the remaining part of Rule 300 (a) and Rule 300 (b) are valid.

**Key Words:**
Article 102 of the Constitution of the People's Republic of Bangladesh; ultra vires; Rule 300 of the Bangladesh Service Rules, Part I; the due process; resignation; forfeiture; doctrine of severability

**Rule 300 of the Bangladesh Service Rules, Part I:**
**It is important to note that prior to dismissal from service, as a mandatory requirement of law, a person has to be given a show-cause notice, usually followed by a departmental**

**enquiry. This is commonly known as 'the due process', whereby the person concerned is afforded an opportunity to explain his/her position. However, in the case of resignation from service, there is no such requirement. Merely upon tendering resignation from service, a person loses his right to pension forthwith. There is no provision for holding an enquiry, let alone issuance of any show cause notice to the person concerned, which is tantamount to non-compliance with the right to be treated in accordance with law.**
**...(Para 13)**

**Generally understood, resignation means cessation or discontinuation of a person's service with the employer. The act of resignation is a unilateral act on the part of the employee, tendered in writing to the employer. It formally brings to an end the relationship between an employer and an employee. That being the universally accepted position, can resignation from service be deemed to be an offence or misdemeanor? Does any law or rule forbid an employee from resigning? Has any punishment been prescribed, either in our legal system, or for that matter, in any other legal system, for an employee who has resigned from service? In such context, how can a person who has tendered his resignation from service (for whatever reason) be visited with such a drastic form of punishment which deprives him of his hard earned pension to which he has become entitled by rendering service to the employer for a considerable period of time? Can such a rule be said to be in consonance with our Constitution? Obviously, the answer has to be in the negative. To hold otherwise would be contrary to the intent and spirit of our Constitution. ...(Para 14)**

**<u>Rule 300 of the Bangladesh Service Rules, Part I read with article 27 and 31 of the Constitution:</u>**
**By virtue of Rule 300(b), a privilege is being granted to those who take up another pensionable job subsequent to their resignation from service. Hence, the issue of discrimination is manifest in Rule 300(b). However, persons not taking up any pensionable job post resignation lose their pension forthwith by operation of Rule 300(a). In our view, this is discrimination and is, therefore, hit by Article 27 of the Constitution. Additionally, the immediate and automatic forfeiture of pension without issuing any notice or observing any legal procedure is also hit by Article 31 of the Constitution. ...(Para 15)**

**Although classification per se is permitted both by law and under the Constitution, it has to be reasonable. However, what is 'reasonable' has to be determined in the context of the society and should not be based on some hypothetical analysis, totally unconnected with the realities of life. ...(Para 23)**

**<u>The primary purpose of pension:</u>**
**A pension is a quantified sum of money that is paid by the employer to the employee, upon the retirement of the employee, in consideration of the service rendered so as to enable the employee to defray the living expenses and to meet the basic necessities of life. The primary purpose of pension is to ensure that an employee, who has given the best part of his/her life in the service of the employer, has some means to fall back on during old age, when he/she is no longer able to work. ...(Para 30)**

**Employment, in our view, is a two way traffic. While the employer cannot be forced to retain an employee who is either inefficient, incompetent or even unruly and can**

**therefore be terminated with proper notice or even be dismissed (in appropriate cases), at the same time, an employee has a similar right to tender his resignation from service. ...(Para 34)**

**<u>Unless expressly excluded, the principle of natural justice shall apply in all cases:</u>**
**We are mindful of the argument advanced by the learned DAG to the effect that as the forfeiture of the petitioner's pension was on account of Rule 300(a) of BSR, the petitioner is now estopped from challenging the same. However, in contracts relating to service, there is a clause whereby employers can terminate the service of an employee upon giving due notice, although the employee is deemed to have been aware that his service could be terminated by the employer upon giving due notice. Can it be said that the employee is therefore estopped from challenging the termination order in a Court of law? There are a plethora of decisions to the effect that despite such a provision in a contract of employment, the concerned employee is entitled to be given a show cause notice before issuance of the termination order. This, no doubt, is in consonance with the well-settled principle of natural justice. By the same corollary, it can be said that although he concerned official is bound by the Service Rules, that cannot, ipso facto, negate the application of the principle of natural justice. It is now universally accepted and well-settled that unless expressly excluded, the principle of natural justice shall apply in all cases. ...(Para 35)**

**In the case in hand, the forfeiture of the petitioner's pension together with past service has very serious legal and practical ramification. It is an admitted position that the petitioner had served for long nineteen year in the Judicial service holding various positions and in doing so, he had invariably, at some point in time, exercised Sessions power. If, and as Rule 300(a) provides, his past service is forfeited, what would be its practical implication? Let me elaborate. The petitioner, while exercising Sessions power in a case under section 302 of the Penal Code, might have had, in all likelihood, imposed either capital punishment or a sentence of imprisonment for life. In either event, as a mandatory requirement, the appeal by the appellant would have travelled upto the Appellate Division of the Supreme Court, where it had either been allowed or dismissed by the Apex Court. In the event of an appeal involving capital punishment or imprisonment for life being dismissed, the judgment passed by the petitioner would stand affirmed. However, as in the present case, if the petitioners' past service stands forfeited on account of his resignation from service, what would be the fate of such an appeal decided by the Apex Court? Would it stand annulled as well? If so, Rule 300 (a) of BSR would have the effect of nullifying a judgment upheld by the highest Court of the country. This would give rise to an absurd scenario. Can such a position be even conceived, far less accepted? The answer is an empathic no. (Para 36)**

**It is now well settled that a 'discriminatory act' is also "arbitrary". ...(Para 43)**

**We reiterate that despite our extensive research, we could not come across a single law or rule, either in our jurisdiction or for that matter in any other jurisdiction, where resignation has been classified or defined as an offence or misconduct. ...(Para 45)**

**<u>Doctrine of severability:</u>**
**It is now well settled through judicial pronouncements that when any particular law or Rule is challenged as being ultravires the Constitution, if the offending part can be segregated from the rest of the section or rule, then the proper course of action is to**

**strike down the offending part without striking down the entire section or rule. This is commonly referred to as the "doctrine of severability". ...(Para 50)**

**<u>A person who tenders resignation from service, should also be entitled to receive pension, depending on the length of his/her service:</u>**
**Although the maximum tenure of service required for being entitled to full pension is 25 years or more, depending on the person's age at the time of entry into Government service, nevertheless, a sliding scale is provided for the person who retires before completing 25 years of service. By the same corollary, a person who resigns from service before reaching the age of superannuation should also be entitled to receive pension depending on the number of years of service rendered by such person. Although 'retirement' and 'resignation' are two distinct nomenclatures, in reality, they achieve the same purpose by bringing to an end the long standing, formal relationship between an employer and an employee ; in the former case, through operation of law and in the latter case, upon one's own volition. On a similar note, a person who tenders resignation from service, should also be entitled to receive pension, depending on the length of his/her service. ... (Para 53)**

**<u>Article 31 of the Constitution:</u>**
**A right or privilege, once granted, and that too by the Government, cannot subsequently be curtained or taken away merely by issuing another order, since a presumption of correctness is attached to such executive actions and/or orders, meaning thereby that all necessary formalities, both legal and official, had been observed. It is now well settled that every administrative action prejudicially affecting a person's right, privilege or interest must be preceded by issuance of a notice to the person concerned. This is also a constitutional mandate, as stipulated in Article 31 of the Constitution, which requires every action affecting a citizen's right to be taken "in accordance with law and only in accordance with law." This vital pre-requisite was totally ignored in the instant case and on that count, the impugned action of the concerned respondent cannot be sustained. ...(Para 58)**

**Rule 300(a) of the Bangladesh Service Rules, Part I, so far as it only relates to "forfeiture of pension in the event of resignation from service" is declared to be ultravires the Constitution. However, the remaining part of Rule 300 (a) and Rule 300 (b) remains unaffected and valid. ...(Para 60)**

## JUDGMENT

**Zubayer Rahman Chowdhury, J :**

1. The constitutional validity of Rule 300 of the Bangladesh Service Rules, Part I is being challenged by the instant Rule, issued upon an application filed under Article 102(2) of the Constitution by the petitioner, a former Additional District Judge, who had tendered his resignation from service. In deciding the issue, this Court is being led into an unchartered territory in that although a period of fifty years has elapsed since the independence of the country, this particular Rule appears to have remained unchallenged; at least that appears to be the factual position, given the dearth of any reported or unreported decision on the issue.

2. A short narration of the facts leading to issuance of the instant Rule is called for. The petitioner joined the Bangladesh Judicial Service in December, 1991 as an Assistant Judge

and he was eventually promoted to the post of Additional District Judge. In January 2010, the petitioner joined the United Nations Development Program (briefly, 'UNDP') on lien for a period of one year. Upon completion of the same, he applied for extension of the period of lien, but it was not granted by the concerned respondent. Subsequently, the petitioner tendered his resignation from the post of Additional District Judge.

3. Having completed nineteen years of service as a Judicial Officer, the petitioner applied for his pension and other benefits, which was approved by Memo dated 02.03.2015, as evident from Annexure A. Subsequently, respondent no. 5, being an official of the office of the Comptroller and Auditor General, Bangladesh (briefly, 'CAG') issued the impugned Memo dated 25.03.2015, as evidenced by Annexure B, stating that the petitioner was not entitled to receive any pension since his service stood forfeited by dint of Rule 300(a) of the Bangladesh Service Rules, Part I. Being aggrieved thereby, the petitioner moved this Court and obtained the instant Rule challenging the legality of the Memo dated 25.03.2015 as well as the constitutional validity of Rule 300 of Bangladesh Service Rules (briefly, 'BSR'), Part I. At the same time, the petitioner has prayed for issuance of a direction upon the concerned respondents to provide him with pension and other benefits to which he is entitled under the law.

4. The petitioner appears in person in support of the Rule, while the same is being opposed by respondents no. 2, 3, 4 and 5 by filing an affidavit-in-opposition. The petitioner has also filed two supplementary affidavits.

5. Mr. Md. Mahboob Murshed, the petitioner appearing in person, submits that although the Ministry of Law, Justice and Parliamentary Affairs had granted his pension benefits, subsequently respondent no. 5 issued the impugned Memo stopping his pension benefits, which is arbitrary and malafide. He submits forcefully that during the course of his service career, there was never any complaint against him and therefore, in the absence of any adverse or negative remarks in his service record, there is no legal ground to deprive him of his pension and other related benefits.

6. Mr. Murshed refers to Rule 300(a) of the Bangladesh Service Rules and submits that although the Rule provides for forfeiture of "past service", it is silent with regard to the issue of "pension". He further submits that Rule 300 (a) provides that apart from resignation, if a person is dismissed or removed from service for misconduct, insolvency, insufficiency or fails to pass a prescribed examination, the past service will stand forfeited. According to Mr. Murshed, it is apparent that a person whose service record is unblemished and has simply resigned from service is being treated at par with a person who has been dismissed or removed from service for misconduct, inefficiency etc. He submits forcefully that treating these two different categories of persons on the same scale is not only improper, it is also violative of the equality clause guaranteed under the Constitution. Referring to Rule 300 (b), the learned Advocate submits that when a person takes up another appointment after his resignation, the resignation so tendered shall not be deemed to be a resignation from public service. According to Mr. Murshed, discrimination is apparent in Rule 300(b) itself.

7. Mr. Murshed submits that the Judicial service is separate and distinct from any other service in the Republic. He submits that Rule 300 (a) is inapplicable to Judicial Officers as because if a Judicial Officer resigns from service, it will not only deprive him of his pension benefits, but it will also forfeit all the judgments rendered by the concerned Judicial Officer during the tenure of his service. Referring to the Service Rules of the University of Dhaka,

Mr. Murshed submits that if any teacher of the University resigns from service, he/she is entitled to receive full pension. Mr. Murshed submits that the University of Dhaka, being an autonomous body, is also subject to the very same Constitution. He contends the forfeiture of pension cannot stand the test of reasonableness; rather it is arbitrary and violative of Articles 27 and 31 of the Constitution.

8. Mr. Sk. Shaifuzzaman, the learned Deputy Attorney General (briefly, DAG) appearing along with Ms. Abantee Nurul, Ms. Rokeya Akther and Ms. Afroza Nazneen Akther, the learned Assistant Attorney Generals in opposition to the Rule submits that as the petitioner resigned from service, he was not entitled to receive any pension by operation of law. He submits that although the petitioner was initially granted his pension and other benefits, it was done inadvertently. However, the office of the CAG had rightly pointed out this aspect of the case and accordingly, the concerned respondent declined to grant his pension. The learned DAG submits that pension is only granted to an official or employee upon completion of the tenure of service. Referring to Rule 300(a) of the 'BSR', the learned DAG submits forcefully that in the event of resignation from service, the past service stands forfeited and there is no scope to grant pension. He submits that the instant Rule is misconceived and therefore, the same is liable to be discharged.

9. In the backdrop of the factual matrix noted above, we are called upon to examine the relevant legal and constitutional provisions.
Rule 300 of the Bangladesh Service Rules reads as under :

> "বিধি-৩০০। (এ) সরকারী চাকরি হইতে পদত্যাগ করিলে, অথবা অসদাচরণ, দেউলিয়া, বয়সের কারণ ব্যতীত অদক্ষতা, অথবা নির্ধারিত পরীক্ষায় উত্তীর্ণ হইতে না পারার কারণে চাকরি হইতে বরখাস্ত বা অপসারণ করা হইলে পূর্ব চাকরি বাজেয়াপ্ত হইবে।
>
> (বি) অন্য কোন পেনশনযোগ্য চাকরিতে যোগদানের উদ্দেশ্যে চাকরি হইতে পদত্যাগ করিলে, উক্ত পদত্যাগ সরকারী চাকরি হইতে পদত্যাগ হিসাবে গণ্য হইবে না।"

The English version reads as follows :

> "Rule 300 (a) : Resignation of the public service, or dismissal or removal from it for misconduct, insolvency, inefficiency not due to age, or failure to pass a prescribed examination entails forfeiture of past service.
>
> (b) Resignation of an appointment to take up another appointment, service is which counts, is not a resignation of the public service.

10. On a perusal of Rule 300(a), it appears that the Rule envisages two situations; firstly, if a person resigns from public service, it will entail forfeiture of his past service and secondly, if a person is dismissed or removed from service for misconduct, insolvency, inefficiency (not due to age) or if such person fails to pass a prescribed examination, it will also entail forfeiture of past service. Rule 300(b) provides that if resignation is tendered to take up another pensionable job or service, in such event, the resignation so tendered shall not be deemed to be a resignation from public service. In other words, Rule 300(b) allows an employee who has resigned, but takes up another employment under the Government, to receive his pension benefits. However, the same privilege is not extended to an employee who has resigned, but did not take up any other employment under the Government.

11. For a proper understanding of the issue before us, we are required to examine the provisions of Rule 300 minutely. It appears that there are two key words in the said Rule, namely 'resignation' and 'forfeiture'. It is to be noted that the term 'pension' is absent in the Rule.

> Now, let us examine closely the term 'forfeiture'.
> The term forfeiture, according to Webster Dictionary, means "The loss of rights, property or money by way of penalty".
>
> Lexico defines the term as "the loss or giving up of something as a penalty for wrongdoing".
>
> Merriam – Webster dictionary defines the term as "the loss of property or money because of a breach of a legal obligation."
>
> Cambridge Dictionary defines the term as "the loss of rights, property or money, especially as a result of breaking a legal agreement."

12. In other words, forfeiture is a form of censure or punishment occasioning loss of some valuable right or property. Generally, a person is censured or punished when he has committed any offence or, at the very least, any misdemeanour. As is evident from Rule 300(a) of BSR, it is applicable to two categories of persons - (i) a person who has resigned from service without any stigma being attached to his name and (ii) a person who has been dismissed from service on account of being guilty of misconduct. To put it plainly, an employee with an unblemished service record is being treated on the same scale as an employee who has been found guilty of some misdemeanour and therefore dismissed from service. It is apparent that two different categories of persons are being subjected to the very same treatment, although there is a gross distinction between 'resignation' and 'dismissal'.

13. It is important to note that prior to dismissal from service, as a mandatory requirement of law, a person has to be given a show-cause notice, usually followed by a departmental enquiry. This is commonly known as 'the due process', whereby the person concerned is afforded an opportunity to explain his/her position. However, in the case of resignation from service, there is no such requirement. Merely upon tendering resignation from service, a person loses his right to pension forthwith. There is no provision for holding an enquiry, let alone issuance of any show cause notice to the person concerned, which is tantamount to non-compliance with the right to be treated in accordance with law.

14. Let us now examine the term 'resignation'. Generally understood, resignation means cessation or discontinuation of a person's service with the employer. The act of resignation is a unilateral act on the part of the employee, tendered in writing to the employer. It formally brings to an end the relationship between an employer and an employee. That being the universally accepted position, can resignation from service be deemed to be an offence or misdemeanor? Does any law or rule forbid an employee from resigning? Has any punishment been prescribed, either in our legal system, or for that matter, in any other legal system, for an employee who has resigned from service? In such context, how can a person who has tendered his resignation from service (for whatever reason) be visited with such a drastic form of punishment which deprives him of his hard earned pension to which he has become entitled by rendering service to the employer for a considerable period of time? Can such a

rule be said to be in consonance with our Constitution? Obviously, the answer has to be in the negative. To hold otherwise would be contrary to the intent and spirit of our Constitution.

15. Each and every person, who resigns from service, form a single category or class. By virtue of Rule 300(b), a privilege is being granted to those who take up another pensionable job subsequent to their resignation from service. Hence, the issue of discrimination is manifest in Rule 300(b). However, persons not taking up any pensionable job post resignation lose their pension forthwith by operation of Rule 300(a). In our view, this is discrimination and is, therefore, hit by Article 27 of the Constitution. Additionally, the immediate and automatic forfeiture of pension without issuing any notice or observing any legal procedure is also hit by Article 31 of the Constitution.

16. At this juncture, let us examine the relevant constitutional provisions.

Article 27 of the Constitution reads as under:

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

Article 31 of the Constitution of the states as under:

"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."

17. On a careful reading of the Articles, it emerges that the Legislature had clearly intended that the citizens should be treated equally by and under the law. It is indeed pertinent to note that the term "equal" has occurred twice in Article 27, thereby indicating both the relevance and importance of the equality clause. Equally important is the fact that both Article 27 and Article 31 find a place in Part III of the Constitution, which relates to 'Fundamental Rights". As has been stated by noted Jurist Mahmudul Islam :

> "This article more than others firmly embodies the concept of rule of law the establishment of which is one of the prime objectives of the Constitution."
>
> [Constitutional Law of Bangladesh, Third Ed, at page 146]

18. Let us now refer to another relevant Article, namely Article 26 of the Constitution, which reads as under :

> "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."

19. A plain reading of Article 26 indicates that all the laws that existed before coming into force of the Constitution, to the extent of their inconsistencies, shall become void on the commencement of the Constitution. Furthermore, the State has been categorically restricted from enacting any laws which are inconsistent with the provisions of Part III relating to Fundamental Rights.

20. Equal protection, a sacred constitutional right, embodied as one of the 'Fundamental Rights' in our Constitution, mandates that each and every person is to be treated as equal in the eye of law and be entitled to enjoy the same privilege and also bear the same obligation as

the other person, similarly circumstanced. The concept of equal treatment of citizens, similarly placed, is not novel. In the early part of the twentieth century, in the case of Southern Railway Co. vs Greene [216 US 400 (1909)], the United States Supreme Court held:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation". (per Day, J)

21. Much later, a similar view was also expressed in the case of State of Jammu & Kashmir Vs. T. N. Khosa (AIR 1974 SC 1) in the following words:

> "Equality is for equals, that is to say the those who are similarly circumstanced are entitled to an equal treatment".
>
> (per Chandrachud, J, as the learned Chief Justice then was)

22. In our own jurisdiction, in the case of Director General, NSI vs. Md. Sultan Ahmed, reported in 1 BLC (AD) (1996) 71, while negating the Governments' action in treating two Government officials differently, both of whom had earlier been retrenched but subsequently absorbed in Government service, the Supreme Court observed :

> "In spite of some amount of dubiousness on the part of the Government as regards the absorption of the respondent we have thought it just and proper to extend the benefit of doubt in favour of the respondent, for, otherwise, it will amount to endorsing a double standard on the part of the executive Government giving a benefit to a particular person and denying the same to another although they are otherwise equal."
>
> (per A.T.M. Afzal, CJ)

23. Although classification per se is permitted both by law and under the Constitution, it has to be reasonable. However, what is 'reasonable' has to be determined in the context of the society and should not be based on some hypothetical analysis, totally unconnected with the realities of life. As has been so aptly stated in the case of Kerala Hotel and Restaurant Association vs. State of Tamil Nadu, reported in AIR 1990 SC 913, and I quote :

> "Reasonableness of the classification has to be decided with reference to the realities of life and not in the abstract."
>
> (per J.S. Verma, J, as the learned Chief Justice then was)

24. In the case of Kasturi Lal vs. State of J & K, reported in AIR 1980 SC 1992, it was held:

> "..... the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights."
>
> (per Bhagwati, J, as the learned Chief Justice then was)

25. During the course of hearing, Mr. Murshed has referred to the case of Asger Ibrahim Amin vs. Life Insurance Corporation of India ('LIC'), reported in (2016) 13 SCC 797, where the Supreme Court of India held that the appellant was entitled to receive pension although he had resigned from service. However, in the case of Senior Divisional Manager, LIC vs. Sree Lal Meena, reported in (2015) 17 SCC 43, the decision rendered in Asger Ibrahim's case was called into question, consequent upon which the matter was referred to a larger Bench. A three Judge Bench of the Supreme Court of India, by their judgment reported in (2019) 4 SCC 479, overruled the decision taken in Asger Ibrahim's case.

26. It would perhaps be relevant to refer to the aforementioned cases briefly. In Asger Ibrahim Amin's case, the appellant had resigned from service in 1991 after twenty three years of service on the ground of family circumstances and indifferent health. Subsequently after the introduction of the Life Insurance Corporation of India (Employee) Pension Rules 1995, which was given retrospective effect from November, 1993, the appellant approached LIC to inquire whether he was entitled to receive pension under the new Rules of 1995, which was answered in the negative. However, in 2011, the appellant sent a legal notice to LIC and subsequently approached the High Court, but his application was dismissed against which he preferred an appeal before the Supreme Court. While allowing the appeal, the Court held:

> "The Appellant ought not to be deprived of pension benefits merely because his styled his termination of service as "resignation" or because there was no provision to retire voluntarily at that time."

27. Subsequently, in the case of Senior Divisional Manager, LIC vs. Sree Lal Meena, referred to above, a larger Bench of the Supreme Court of India made a distinction between resignation and voluntary retirement and overruled the decision in Asger Ibrahim Amin's case holding that:

> "What a most material is that the employee in this case had resigned. When the pension Rules are applicable, and an employee resigns, the consequences are forfeiture of service under Rule 23 of the Pension Rules."

28. Later, in 2019, in the case of BSES Yamuna Power Limited vs. G.C. Sharma and another (Civil Appeal No. 9076 of 2019), a Division Bench of the Supreme Court of India endorsed the judgment passed in Lal Meena's case holding that where an employee has resigned from service, there arises no question as to whether he has 'voluntarily retired' or 'resigned'. The decision to resign is materially distinct from the decision to seek voluntary retirement. In that case, the Court held that the decision passed earlier in Asger Ibrahim's case was incorrect as "it removes the important distinction between resignation and voluntary retirement".

29. It has to be noted that in Asger Ibrahim's case, the Court considered the 'resignation' of the appellant as 'voluntary retirement' and allowed the appeal. However, both the larger Bench and another Division Bench of the Supreme Court of India held that terming resignation as voluntary retirement was incorrect and further endorsed Rule 23 of the Service Rules of LIC which provides that in the event of resignation, the pension of the employee was to be forfeited. It is important to note that the legality of the Rule 23 was not challenged in any of the aforesaid cases. However, in the instant case, the petitioner has challenged the legality of Rule 300 of BSR which provides for forfeiture of the pension in the event of resignation from service. In that view of the matter, the decisions referred to above are clearly distinguishable from the present case before us.

30. At this juncture, it is perhaps pertinent to examine the term 'pension'. The term pension is well defined and requires no further elaboration. Briefly stated, a pension is a quantified sum of money that is paid by the employer to the employee, upon the retirement of the employee, in consideration of the service rendered so as to enable the employee to defray the living expenses and to meet the basic necessities of life. The primary purpose of pension is to ensure that an employee, who has given the best part of his/her life in the service of the employer, has some means to fall back on during old age, when he/she is no longer able to work. Can it be said that this particular class or group of people are not affected by the

gradual and sharp rise of the living index coupled with the decline in the purchasing power of essential commodities? It is an undeniable scenario that prevails in today's society.

31. Almost a century earlier, in Dodge vs. Board of Education of Chicago, [302 U.S. 74 (1937)] the United States Supreme Court held:

> "A pension is closely akin to wages in that it concept of payment provided by an employer, is paid inconsideration of past service and serves the purpose of helping the recipient meet the expenses of living." (per Roberts, J)

32. In the case of D. Prasad vs. State of Bihar, reported in AIR 1971 SC 1409, the Supreme Court of India, while endorsing its earlier decisions on the issue of pension, held:

> "In our opinion, the right to get pension is "property" and by withholding the same, the petitioner's fundamental rights guaranteed under Arts. 19 (1) (f) and 31 (1) are affected." (per Vaidialingam, J)

33. In this context, we may also refer to the case of Smt. Bhagwanti vs. Union of India and Smt. Sharada Swamy vs. Union of India, reported in AIR 1989 SC 2088, wherein the first petitioner was the widow of an ex Army Subhedar and the second petitioner was the wife of a retired railway employee. Admittedly, both the petitioners married the respective husbands after their retirement from service. Following the death of their husbands, both the petitioners applied to the Government seeking payment of family pension, which was rejected on the ground that the definition of "Family", as provided in the Central Civil Service (Pension) Rules 1972, provides that family includes husband or wife, as the case may be, provided the marriage took place before retirement of the concerned employee. In deciding the matter, the Supreme Court of India acknowledged that the definition of family, as provided in the Rules, excluded the spouse where the marriage had taken place after retirement of the concerned employee. While allowing the cases, the Court directed the Government to extend the 'family pension' to the respective petitioners, thereby expanding the definition of 'family' by including the widows of retired employees, who had married such employees post-retirement. In a pragmatic decision, the Court held:

> "Considered from any angle, we are of the view that two limitations incorporated in the definition of 'family' suffer from the vice of arbitrariness and discrimination and cannot be supported by nexus or reasonable classification."
>
> (per Ranganath Misra, J, as the learned Chief Justice then was).

34. Employment, in our view, is a two way traffic. While the employer cannot be forced to retain an employee who is either inefficient, incompetent or even unruly and can therefore be terminated with proper notice or even be dismissed (in appropriate cases), at the same time, an employee has a similar right to tender his resignation from service and there may well be various reasons for doing so. Let me cite an example. A person belonging to a business family, having a good academic background, may choose to take up Government service. Having served for several years as a Government servant, there may arise a situation whereby he is required to devote full time to the family business in the absence of any person to look after the said business. In such circumstances, the person concerned may have to resign from Government service for family and/or personal reason. However, by dint of Rule 300(a) of BSR, the pension would stand forfeited.

35. We are mindful of the argument advanced by the learned DAG to the effect that as the forfeiture of the petitioner's pension was on account of Rule 300(a) of BSR, the petitioner is now estopped from challenging the same. However, in contracts relating to service, there is a

clause whereby employers can terminate the service of an employee upon giving due notice, although the employee is deemed to have been aware that his service could be terminated by the employer upon giving due notice. Can it be said that the employee is therefore estopped from challenging the termination order in a Court of law? There are a plethora of decisions to the effect that despite such a provision in a contract of employment, the concerned employee is entitled to be given a show cause notice before issuance of the termination order. This, no doubt, is in consonance with the well-settled principle of natural justice. By the same corollary, it can be said that although he concerned official is bound by the Service Rules, that cannot, ipso facto, negate the application of the principle of natural justice. It is now universally accepted and well-settled that unless expressly excluded, the principle of natural justice shall apply in all cases. As Professor A. W. Bradley and Professor K. D. Ewing had stated:

> "With the growth of governmental powers affecting an individual's property or livelihood, natural justice served to supplement the shortcomings of legislation".
>
> (Constitutional and Administrative law, 14th Ed, page 743)

36. In the case in hand, the forfeiture of the petitioner's pension together with past service has very serious legal and practical ramification. It is an admitted position that the petitioner had served for long nineteen year in the Judicial service holding various positions and in doing so, he had invariably, at some point in time, exercised Sessions power. If, and as Rule 300(a) provides, his past service is forfeited, what would be its practical implication? Let me elaborate. The petitioner, while exercising Sessions power in a case under section 302 of the Penal Code, might have had, in all likelihood, imposed either capital punishment or a sentence of imprisonment for life. In either event, as a mandatory requirement, the appeal by the appellant would have travelled upto the Appellate Division of the Supreme Court, where it had either been allowed or dismissed by the Apex Court. In the event of an appeal involving capital punishment or imprisonment for life being dismissed, the judgment passed by the petitioner would stand affirmed. However, as in the present case, if the petitioners' past service stands forfeited on account of his resignation from service, what would be the fate of such an appeal decided by the Apex Court? Would it stand annulled as well? If so, Rule 300 (a) of BSR would have the effect of nullifying a judgment upheld by the highest Court of the country. This would give rise to an absurd scenario. Can such a position be even conceived, far less accepted? The answer is an empathic no. I am reminded of the judicious words of one of the most distinguished jurists, Lord Coke, Chief Justice, pronounced more than four centuries ago in Dr. Boham's case [(1610) 8 Co. Rep 113b] to the effect that the Court could declare an Act of Parliament void if it was "against common right and reason".

37. Similarly, in Ipswich Tailors case, reported in (1614) 11 Co. Rep 53, the Rule imposing certain restrictions in pursuing the trade of a tailor was set aside, once again by Lord Coke, CJ, on the ground of being "against the liberty and freedom of the subject". Sir William Wade, one of the most distinguished Jurists of the modern era, observed:

> "The principle of reasonableness applies just as much to the making of rules and regulations as it does to other administrative action".
>
> (Administrative Law, Eleventh Ed, H.W.R. Wade & C.F. Forsyth, at pg 350).

38. In our considered view, inequality is writ large in Rule 300(a) of BSR, plain and simple. Not only is it devoid of any reason or logic, it is also an affront to common sense to say that a person, having an unblemished service record, should be barred from receiving pension and other benefits, merely because he/she has resigned from Government service. Can it be said that these two classes of persons, i.e., persons resigning from service and

persons being dismissed from service form a common class? To treat a person who has simply tendered his resignation from service in the same bracket as a person who has been dismissed or removed from service for misconduct tantamounts to punishing a person although he has not committed any offence. This is not only violative of the right to be treated in accordance with law, it is also violative of the equality clause, both of which are embodied in our Constitution as Fundamental Rights. To do so would be to condemn the good and reward the indolent. Obviously, that could never be the legislative intent. Relying on a decision of the US Supreme Court, passed in Traux vs Raich [(1915)239 US 33], noted Jurist Mahmudul Islam observed:

> "The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same locality or class are exempt." (Constitutional Law of Bangladesh, Third ed. page 177)

39. The noted Jurist further observed (at page 145) :

> "Equal protection of law means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment of privileges or imposition of liabilities".

40. In the case of Connolly vs Union Sewer Pipe Co. (1901) 184 US 540, the United States Supreme Court held:

> "The equality clause requires that no impediment should be interposed in the pursuits of anyone except as applied to the same pursuits by others under similar circumstances and that no greater burdens in engaging in a calling should be laid down upon one than are laid upon others in the same calling or condition." (per Harlan, J).

41 In the case of Caldwell vs Mann [157 Fla. 633 (1946), the Florida Supreme Court held:

> "where a law or Rule imposes restriction on a group or class of person which is different from those imposed upon another group or class under similar conditions with no rational or logical basis for such classification, it would tantamount to violation of the equality clause". (per Buford, J)

42. One of the Fundamental Rights guaranteed by our Constitution is the right to be treated in accordance with law and only in accordance with law (Article 31). This is akin to the American concept of due process, which is one of the most fundamental and universally accepted concepts that requires a person to be appraised of the charge levelled against him and be given an opportunity to reply to the same, generally in writing and/or by appearing before an enquiry committee, and thereafter, if found guilty, be visited with the legal consequence which the relevant law or rule prescribes.

43. It is now well settled that a 'discriminatory act' is also "arbitrary". There are a preponderance of decisions where the Courts have consistently equated 'discrimination' with 'arbitrariness'. I am fortified in my view by two decisions - one from the Supreme Court of Canada and the other from the UK Supreme Court. In the first instance, the Supreme Court of Canada held that "the power to make byelaws does not include a power to enact discriminatory provisions". (Re. City of Montreal and Arcade Amusements Inc. (1985) 18 DLR ($4^{th}$) 161). A similar tone is echoed in the case of Bank Mellat vs. HM Treasury, reported in (2013) UKSC 39, where the Supreme Court held :

> "A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of it being discriminatory in some respect that is incapable of objective justification". (per Lord Sumption)

44. As Prof. A.W. Bradley and Prof. K.D. Ewing observed :

> "What a constitutional guarantee of equality before the law may achieve is to enable legislation to be invalidated which distinguishes between citizens on grounds which are considered irrelevant, unacceptable or offensive".
> (Constitutional and Administrative Law, 14th Ed. at page 98)

45. We reiterate that despite our extensive research, we could not come across a single law or rule, either in our jurisdiction or for that matter in any other jurisdiction, where resignation has been classified or defined as an offence or misconduct.

46. In deciding the constitutionality of any law, we often look into the intent of the Legislature and construe its correct interpretation. In my view, we also need to look at the 'fairness' of the law or rule that is under consideration. Ever since Lord Denning propagated the theory of 'legitimate expectation' more than half a century ago in Schmidt vs Secretary of Home Affairs [(1966) All ER], it has been applied liberally by the Courts in the common law countries. However, there appears to have been a significant shift from the earlier position, so much so that in Lloyd vs McMahon (1987) AC 625, Lord Templeman has referred to it as a 'catchphrase' and considered the term as an exposition of the Court's duty 'to act fairly'. In fact, Courts are now inclined to examine such issues on the scale of "administrative fairness".

47. In the case of Re Preston [1985 AC 835 (HL)], Lord Scarman stated :

> "the principle of fairness has an important place in the law of judicial review"

48. On a similar note, I find no reason as to why the constitutionality of any law cannot be judged on the scale of "legislative fairness". In other words, the Courts ought to examine whether any particular Act or Rule stands contrary to the Fundamental Rights, thus operating unjustifiably to the prejudice or detriment of the citizens. I am fortified in my view by the decision of the Supreme Court of India, rendered in the case of A. L. Karla vs. P & E Corp. of India Ltd., reported in AIR 1984 SC 1361, where the Court held:

> "Wisdom of the legislative policy may not be open to judicial review but when the wisdom takes the concrete form of law, the same must stand the test of being in tune with the fundamental rights and if it trenches upon any of the fundamental rights, it is void as ordained by Art. 13." (per D. A. Desai, J)

49. In our own jurisdiction, the Apex Court, in Bangladesh Krishi Bank vs Meghna Enterprise, reported in 50 DLR (AD) (1998) 194, held :

> "The subordinate legislation must be knocked down when it comes in conflict with the fundamental rights as guaranteed under the Constitution." (per Latifur Rahman, J, as the learned Chief Justice then was)

50. Reverting to the case in hand, the petitioner has challenged Rule 300 of the BSR as being unconstitutional. It is now well settled through judicial pronouncements that when any particular law or Rule is challenged as being ultravires the Constitution, if the offending part can be segregated from the rest of the section or rule, then the proper course of action is to strike down the offending part without striking down the entire section or rule. This is commonly referred to as the "doctrine of severability".

51. There is yet another important issue which requires deliberation. It relates to the quantum of pension to which the petitioner is entitled. Generally, pension is payable to a Government servant upon his retirement from service. However, the quantum of pension depends on the length of service. This is evident from the Circular (স্মারক পত্র) dated 04.11.1996, annexed as Annexure M to the supplementary affidavit dated 23.10.2019, filed on behalf of the petitioner. It reads as under :

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
অর্থ মন্ত্রণালয়
অর্থ বিভাগ
প্রবিধি শাখা-১
স্মারক পত্র

নং অম(বিধি-১)৩পি-২৮/৮৫/১০৬, তারিখ ৪-১১-১৯৮৯ ইং / ২০-৭-১৩৯৬ বাং

বিষয় ঃ সরকারী কর্মকর্তা/কর্মচারীদের পেনশনের পরিমাণ এবং উহার হার নির্ধারণ প্রসংগে।

এই মর্মে জানান যাইতেছে যে, অর্থ বিভাগের ৫-৭-৮৯ইং/২১-৩-৯৬ বাং তারিখের নং অমি/বিধি-১/৩পি-২৮/৮৫/৬১ সংখ্যক স্মারক পত্রের ক্রমধারায় প্রচলিত পেনশন টেবলটি নিম্নবর্ণিতভাবে সংশোধন করা হইল ঃ-

| পেনশনযোগ্য চাকুরীকাল | পেনশনের পরিমাণ |
|---|---|
| ১০ বৎসর | ৩২% |
| ১১ ” | ৩৫% |
| ১২ ” | ৩৮% |
| ১৩ ” | ৪২% |
| ১৪ ” | ৪৫% |
| ১৫ ” | ৪৮% |
| ১৬ ” | ৫১% |
| ১৭ ” | ৫৪% |
| ১৮ ” | ৫৮% |
| ১৯ ” | ৬১% |
| ২০ ” | ৬৪% |
| ২১ ” | ৬৭% |
| ২২ ” | ৭০% |
| ২৩ ” | ৭৪% |
| ২৪ ” | ৭৭% |
| ২৫ ” | ৮০% |

২। এই আদেশ ০১-৭-১৯৮৯ ইং তারিখ হইতে কার্যকর বলিয়া গণ্য হইবে।

৩। এই স্মারক পত্রে যে সংশোধনের উল্লেখ করা হইয়াছে, সেই মর্মে সংশ্লিষ্ট বিধিও অনুরূপভাবে সংশোধতি হইয়াছে বলিয়া গণ্য হইবে।

(আতাউল করিম)
যুগ্ম -সচিব"

52. However, the table now stands as under, having been amended by Memo dated 04.11.1989, issued by the Finance Division, Government of Bangladesh :

| পেনশনযোগ্য চাকরিকাল | বিদ্যমান পেনশনের পরিমান | পুনঃ নির্ধারিত পেনশনের পরিমান |
|---|---|---|
| ৫ বছর | - | ২১ % |
| ৬ বছর | - | ২৪% |
| ৭ বছর | - | ২৭% |
| ৮ বছর | - | ৩০% |
| ৯ বছর | - | ৩৩% |
| ১০ বছর | ৩২% | ৩৬% |
| ১১ বছর | ৩৫% | ৩৯% |
| ১২ বছর | ৩৮% | ৪৩% |
| ১৩ বছর | ৪২% | ৪৭% |
| ১৪ বছর | ৪৫% | ৫১% |
| ১৫ বছর | ৪৮% | ৫৪% |
| ১৬ বছর | ৫১% | ৫৭% |
| ১৭ বছর | ৫৪% | ৬৩% |
| ১৮ বছর | ৫৮% | ৬৫% |
| ১৯ বছর | ৬১% | ৬৯% |
| ২০ বছর | ৬৪% | ৭২% |
| ২১ বছর | ৬৭% | ৭৫% |
| ২২ বছর | ৭০% | ৭৯% |
| ২৩ বছর | ৭৪% | ৮৩% |
| ২৪ বছর | ৭৭% | ৮৭% |
| ২৫ বছর এবং তদূর্ধ্ব | ৮০% | ৯০% |

53. As is apparent from the aforesaid table, although the maximum tenure of service required for being entitled to full pension is 25 years or more, depending on the person's age at the time of entry into Government service, nevertheless, a sliding scale is provided for the person who retires before completing 25 years of service. By the same corollary, a person who resigns from service before reaching the age of superannuation should also be entitled to receive pension depending on the number of years of service rendered by such person. Although 'retirement' and 'resignation' are two distinct nomenclatures, in reality, they achieve the same purpose by bringing to an end the long standing, formal relationship between an employer and an employee ; in the former case, through operation of law and in the latter case, upon one's own volition. On a similar note, a person who tenders resignation from service, should also be entitled to receive pension, depending on the length of his/her service.

54. In the instant case, the petitioner's application seeking payment of his pension and gratuity, following his resignation from service, was approved by the Government through the Memo dated 02.03.2015, which reads as under :

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
আইন ও বিচার বিভাগ
বিচার শাখা-৪।

নং-১০.০০.০০০০.১২৮.০১৩.০১.২০১৫-৩৬৫ তারিখ ঃ ০২-০৩-২০১৫ খ্রিঃ

প্রেরক ঃ মোশতাক আহাম্মদ
সিনিয়র সহকারী সচিব।

প্রাপক ঃ প্রধান হিসাব রক্ষণ কর্মকর্তা,
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়,
সিজিএ ভবন, সেগুনবাগিচা, ঢাকা।

বিষয় ঃ একালীন পেনশন ও আনুতোষিক মঞ্জুর প্রসঙ্গে।

উপর্যুক্ত বিষয়ে আইন কমিশনের অবসরপ্রাপ্ত মূখ্য গবেষণা কর্মকর্তা (অতিরিক্ত জেলা জজ) জনাব মোঃ মাহবুব মোরশেদ এর এককালীন পেনশন ও আনুতোষিকের আবেদন সরকার মঞ্জুর করেছে।

জনাব মোঃ মাহবুব মোরশেদকে মাসিক মূল বেতন ২৯,৭৫০/- টাকা হিসাবে ২৯,২৬,২৮৪/৩৭ (উনত্রিশ লক্ষ ছাব্বিশ হাজার দুইশত চুরাশি টাকা সাঁইত্রিশ পয়সা) টাকা এককালীন আনুতোষিক প্রদানের মঞ্জুরী জ্ঞাপন করা হল। যদি পরবর্তী কালে দেখা যায় তাঁর নিকট সরকারের কোন পাওনা রয়েছে, তবে তিনি তা ফেরত প্রদান করতে বাধ্য থাকবেন।

বর্ণিত অবস্থায় জনাব মোঃ মাহবুব মোরশেদ যাতে স্বল্প সময়ের মধ্যে এককালীন আনুতোষিক পেতে পারেন সে বিষয়ে প্রয়োজনীয় ব্যবস্থা গ্রহনের জন্য স্বাক্ষরিত পেনশন ফরমসহ অন্যান্য কাগজাদি নির্দেশিত হয়ে প্রেরণ করা হল।

স্বা/-
২/৩/১৫ ইং
(মোশতাক আহাম্মদ)
সিনিয়র সহকারী সচিব"

55. However, vide Memo dated 25.03.2015, respondent no. 5, in a most arbitrary manner, returned the petitioner's case to the Ministry stating:

> "১। সরকারী চাকুরী হতে পদত্যাগ করলে পূর্বচাকুরীকাল বাজেয়াপ্ত হবে অর্থাৎ পেনশনের জন্য গননা যোগ্য হবে না (বি, এস, আর ১ম খন্ডের বিধি- ৩০০ সেকশেন-৩)।"

56. The petitioner's application seeking payment of pension and gratuity following his resignation from service was not only approved by the Government, it was officially communicated to him by the Ministry of Law, Justice & Parliamentary Affairs vide Memo dated 05.03.2015. However, without any further intimation to the petitioner, the office of the 'CAG' issued the impugned Memo on 25.03.2015 contending that the petitioner was not entitled to receive pension by the Government.

57. The manner in which the impugned Memo was issued leaves much to be desired. To begin with, the conduct of the concerned respondent was not only arbitrary and therefore malafide (as has been decided in so many cases), it was also in gross violation of the principle of natural justice since no prior notice was given to the petitioner, although the impugned order had the effect of taking away a benefit/privilege that had already been granted to the petitioner by the Government.

58. A right or privilege, once granted, and that too by the Government, cannot subsequently be curtained or taken away merely by issuing another order, since a presumption of correctness is attached to such executive actions and/or orders, meaning thereby that all necessary formalities, both legal and official, had been observed. It is now well settled that every administrative action prejudicially affecting a person's right, privilege or interest must be preceded by issuance of a notice to the person concerned. This is also a constitutional mandate, as stipulated in Article 31 of the Constitution, which requires every action affecting a citizen's right to be taken "in accordance with law and only in accordance with law." This vital pre-requisite was totally ignored in the instant case and on that count, the impugned action of the concerned respondent cannot be sustained. In view of the foregoing discussion, we are inclined to hold that Rule 300 (a) of the Bangladesh Service Rules, so far as it relates only to "forfeiture of pension in the event of resignation from service" is contrary to and violative of the provisions enshrined in Part III of the Constitution.

59. In the result, the Rule is made absolute in part.

60. Rule 300(a) of the Bangladesh Service Rules, Part I, so far as it only relates to "forfeiture of pension in the event of resignation from service" is declared to be ultravires the Constitution. However, the remaining part of Rule 300 (a) and Rule 300 (b) remains unaffected and valid.

61. Consequentially, the impugned Memo dated 25.03.2015, as evidenced by Annexure B, issued by respondent no. 5, is declared to have been issued without lawful authority and accordingly, the same is set aside.

62. The concerned respondents are hereby directed to calculate the pension and other benefits due to the petitioner, on the basis of the length of his service and grant the same to him within a period of 90 (ninety) days from the date of receipt of the certified copy of the judgment passed today.

63. There will be no order as to cost.

**16 SCOB [2022] HCD 25**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**
WRIT PETITION NO. 2455 OF 2021

**Shohoj Limited-Synesis IT Limited-Vincent Consultancy (Pvt) Limited, JVC (SHOHOZ-SYNESIS-VINCEN JV), through its Constituted Attorney Vincent Consultancy (Pvt.) Limited, represented by its Managing Director.**
...Petitioner
Vs.
**Central Procurement Technical Unit(CPTU) and others.**
...Respondents

Mr. Murad Reza, Senior Advocate with Mr. Shyamal Kanti Mandal, Advocates
..... For the Petitioner

Mr. A.M. Amin Uddin, learned Attorney General with Mr. Samarendra Nath Biswas, D.A.G. with Mr. Md. Abul Kalam Khan Daud, A.A.G. with Mrs. Rehana Sultana, A.A.G with Mr. Md. Ali Akbar Khan, A.A.G and Mrs. Nurunnahar, A.A.G.
….For the respondent-government.

Mr. Md. Taherul Islam, Advocate with Mr. Jamilur Rahman Khan, Advocate
..... For the respondent Nos.6-8.

Mr. A.F. Hasan Ariff, Senior Advocate with Mr. Meah Mohammed Kausar Alam, Advocate
..... For the respondent No.9

Heard on 08.12.2021, 12.01.2022 and 19.01.2022. Judgment on 27.01.2022.

**Present:**
**Ms. Justice Farah Mahbub.**
**And**
**Mr. Justice S.M. Maniruzzaman**

**Editors' Note:**
A tender was floated for Bangladesh Railway for design, develop, supply, install, commission, operate, maintain and transfer of technology of online based Bangladesh Railway Integrated Ticketing System (BRITS). SHOHOZ-SYNESIS-VINCEN JV a joint venture participated in the tender. The Tender Evaluation Committee (TEC) declared 5(five) tenderers as technically responsive including the present petitioner as well as respondent No.09. Subsequently, the TEC after evaluation of the financial proposals of the technically responsive 5(five) tenderers declared the petitioner as the final responsive tenderer. Accordingly, notification of award was issued. In the meanwhile, the respondent No.9 filed a complaint before the authority concerned under Rule 57(1) and (2) of the Public Procurement Rules, 2008 alleging irregularities and illegalities in the process of evaluation of tender by the TEC. Later, the respondent No.9 filed a complaint before the Review Panel-2 under Rule 57(12) of the same Rules. The petitioner as well as the respondents concerned appeared and contested the said complaint of the respondent No.9. However, upon hearing the respective contending parties the Review Panel 2 allowed Review Petition and recommended for re-tender. The petitioner challenged the decision of the Review Panel-2 before the High Court Division. The High Court Division held that the respondent no. 9 did not bring the complaint within the time prescribed by law and as such the complaint is barred by limitation. It also found that the Review Panel- 2 did not provide any finding as to the point of limitation in its decision which is not maintainable.

**Key Words:**
Article 102 of the Constitution of the People's Republic of Bangladesh ; Rules 8, 36(3) 56, 57, 60, 98, 102 of the Public Procurement Rules, 2008; Sections 29, 30 of the Public Procurement Act, 2006

**Section 29 and 30 of the Public Procurement Act, 2006 read with Rules 56 and 57 of the Public Procurement Rules, 2008:**
**Section 29 of the Act, 2006 (Act No.24 of 2006), however, provides the right to file complaint to the authority concerned (সংশ্লিষ্ট ক্রয়কারী প্রশাসনিক কর্তৃপক্ষের নিকট) under Section 30 of the said Act on the context as prescribed under Rule 56 of the Rules, 2008. In view of Rule 57(1) of the Rules of 2008 said complaint has to be filed/made within the period as stipulated in Schedule 2 of the said Rules i.e., within 7(seven) calendar days of receipt of knowledge of the complaint which gives rise to the cause of action. In other words, the complainant in his petition of complaint has to disclose the date of cause of action in order to compute the period of limitation. ...(Para 31)**

**Review Panel has to give specific findings on the point of limitation:**
**Since in the first complaint dated 30.11.2020 (Annexure-VIII) respondent No.9 did not disclose the date of knowledge giving rise to the cause of action hence, it is barred by limitation. Hence, taking into cognizance of the office letter dated 23.11.2020 by the Review Panel-02, as being introduced by the respondent No.9 for the first time while filing appeal on 28.12.2020 in order to escape limitation without giving specific findings on the first complaint dated 30.11.2020 on point of limitation is also not maintainable. ...(Para 39)**

## JUDGMENT

**Farah Mahbub, J:**

1. In this Rule Nisi, 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 judgment and order dated 13.01.2021 passed by the respondent Nos. 2-4, Review Panel-2, as constituted by the respondent No.1 i.e., Central Procurement Technical Unit(CPTU), Implementation Monitoring and Evaluation Division, in Review Petition No.075/2020 allowing the review and recommending for re-tender(Annexure-F to the writ petition), should not be declared to have been passed without lawful authority and hence, of no legal effect.

2. Pending hearing of the Rule, the operation of the said judgment and order dated 13.01.2021 passed by the respondent Nos. 2-4 was stayed by this Court for a prescribed period.

3. Challenging the said interim order of stay passed in the instant writ petition the respondent No.9, the 3$^{rd}$ lowest tenderer, preferred Civil Petition for Leave to Appeal No.783 of 2021 before the Appellate Division. However, the Hon'ble Judge-in Chamber of the Appellate Division upon hearing the respective contending parties vide order dated 18.03.2021 directed the parties concerned to maintain *status quo*. Ultimately, said Civil Petition for Leave to Appeal was disposed of by the Appellate Division vide order dated 04.04.2021 with direction upon this Court to hear and dispose of the Rule within a prescribed period with continuity of the order of *status quo* granted earlier by the Hon'ble Judge-in chamber. Pursuant to the said order this matter has been heard by this Court and is being disposed of vide this judgment.

4. Facts, in brief, are that the petitioner is a reputed joint venture company who has earned name and fame in home and abroad. All the partners of the said joint venture company participated in various tenders floated by the Government of the People's Republic of Bangladesh and after evaluation by the concerned department they became responsive. Ultimately, on receipt of Notification of Award, issued by the authority concerned, they had successfully completed their contractual obligations with satisfaction of the concerned authority.

5. With a view to adapt to modern technology, to improve facilities for the passengers and as of policy matter, the respondent No.8 floated a tender on behalf of Bangladesh Railway, by publishing Invitation for Tender(IFT) in their official website as well as in "The Daily Jugantor" including other national dailies on 23.01.2020 under Invitation Reference No.54.01.2600.007.18.013.19-45 for design, develop, supply, install, commission, operate, maintain and transfer of technology of online based Bangladesh Railway Integrated Ticketing System(BRITS) by providing all necessary hardware, software, accessories, stationeries and limited managed service. Accordingly, invitation had been made to the aspiring tenderers to participate in the tender process by submitting their respective offer following the instructions as contained in the respective tender documents [(Annexure-A-A(4) respectively].

6. Shohoj Limited, Synesis IT Limited and Vincen Consultancy (Pvt.) Limited entered into a joint venture in the name of SHOHOZ-SYNESIS-VINCEN JV, the petitioner, wherein Shohoj Limited is the leading partner for the purpose of submission of its offer in response to the said invitation for tender and completion of the respective work (Annexure-B). The petitioner being interested to participate in the said tender process accordingly, filed an application to the respondent No.8 along with its illustrative experience profile as well as its brochures in order to prove that the firm is a reputed, reliable ICT enabled service provider. It also submitted authentic documents and different membership certificates in order to show its general experience in IT sector. The petitioner further enclosed completion certificates of certain government and semi-government works showing its capability to accomplish the respective work in connection with the tender in question(Annexure-C).

7. Meanwhile, the Tender Evaluation Committee (in short, TEC) was formed by the authority concerned for evaluation of the tender. Said committee ultimately declared 5(five) tenderers as technically responsive including the present petitioner as well as respondent No.09. Subsequently, the TEC after evaluation of the financial proposals of the aforesaid technically responsive 5(five) tenderers on 18.11.2020, declared the petitioner as the final responsive tenderer. Accordingly, the respondent No.7 being the President of TEC submitted the evaluation report along with the procurement proposal of the said committee to the respondent No.6 vide Memo No. 54.01.2600. 007.18.013.19-135 dated 23.03.2020 [Annexure-3(a) of the affidavit in opposition filed by the respondent Nos.6-8], who on receipt thereof forwarded all relevant documents to the respondent No.5 vide Memo No. 54.01.2600.007.18.013.19-438(Annexure-D-1) dated 23.11.2020 with a view to take necessary steps as per Rule 36(3)(Ka)(2)(Aa) of the Public Procurement Rules, 2008(in short, the Rules,2008). The respondents concerned having agreed with the said proposal had issued notification of award on 03.12.2020 in favour of the petitioner (Annexure-D-3).

8. In the meanwhile, the respondent No.9 filed a complaint before the authority concerned under Rule 57(1) and (2) of the Rules,2008 alleging irregularities and illegalities in the process of evaluation of tender by the TEC. Subsequently, said respondent also filed writ

petition No.9423 of 2020 before this Court challenging Memo No. 54.01.2600.007.18.013.1919-433 dated 22.11.2020 issued by the respondent No.6 declaring the the petitioner as the responsive tenderer with recommendation to award contract in its favour. Having found *prima facie* substance this Court issued a Rule Nisi on 06.12.2020 and also stayed all further proceeding/steps so had been taken pursuant to Memo No. 54.01.2600.007.18.013.1919-433 dated 22.11.2020. Being aggrieved Civil Miscellaneous Petition for Leave to Appeal Nos.795 and 2362 both of 2020 were filed by the Ministry of Railway and the petitioner before the Appellate Division of the Supreme Court of Bangladesh. However, the Appellate Division having found no legal infirmity in the said impugned order dated 06.12.2020 passed in writ petition No. 9423 of 2020 dismissed both the petitions vide order dated 07.01.2021(Annexures-VI and VII of the affidavit in opposition filed by the respondent No.9). Later, on 28.12.2020 the respondent No.9 filed a complaint before the respondent Nos.2-4, the Review Panel-2 under Rule 57(12) of the Rules,2008 regarding irregularities and illegalities in the evaluation process of tender by TEC (Annexures- E and E-1 respectively). The petitioner as well as the respondents concerned appeared and contested the said complaint of the respondent No.9. However, upon hearing the respective contending parties the respondent Nos.2-4 vide the impugned judgment and order dated 13.01.2021 allowed Review Petition No.075/2020 and recommended for re-tender(Annexure-F).

9. Being aggrieved by and dissatisfied with, the petitioner has filed the instant application and obtained the present Rule Nisi.

10. In support of the assertions so made by the petitioner respondent Nos.6-8, the Procuring Entity entered appearance by filing affidavit in opposition stating, *inter alia,* that Bangladesh Railway (in short, BR) in the year 1994 started computer ticketing system. Now, the said ticketing system has been re-named as Centrally Computerized Seat Reservation and Ticketing System. BR has been adopting the said ticketing system by appointing service provider in a systematic tender process in an interval of 5(five) years. However, upon obtaining expert opinion from Bangladesh University of Engineering and Technology (BUET) and Bangladesh Computer Council(BCC) it initiated tender process for appointment of service provider by issuing tender notification on 23.01.2020, which was published on 26.01.2020 in the respective daily newspapers. Subsequently, the authority concerned of BR incorporated 4(four) addendums to the aforesaid tender and fixed 23.03.2020 as the last date for submission of tender document [Annexures- 2,2(a)-2(c) respectively]. Though, 52 tenderers purchased tender notification but ultimately, 9(nine) tenderers submitted their respective offer. However, due to the effect of Covid-19 pandemic the aforementioned last date was extended and ultimately, the whole process of tender was resumed in June, 2020. Meanwhile, a 7(seven) members Tender Evaluation Committee(TEC) was approved by the Secretary, Ministry of Railways as per Rule 8 of the Rules,2008. At the same time, Technical Sub-Committee(TSC) was also constituted by the TEC for aiding and assisting the main committee as per Rule 8(14) of the Rules,2008. In the meanwhile, the period of tender validation period was extended upto 23.11.2020.

11. Subsequently, the TEC submitted their report in due compliance of law after scrutinizing the tender documents submitted by the respective tenderers where they found 5(five) of them as responsive participants. Said technical evaluation report was duly approved on 08.09.2020 by the Director General of BR, respondent No.6. The TEC later on opened the financial proposals of the technically responsive 5(five) tenderers and prepared a joint-evaluation report based on technical as well as financial proposal and sent the same to the respondent No.6 for final evaluation. On 23.11.2020, the purchase proposal was forwarded to

the respondent No.5 by the respondent No.6 for final approval as per Rule 36 of the Rules, 2008. On receipt thereof Bangladesh Railway issued notification of award in favour of the petitioner on 03.12.2020 as per Rule 102 of Rules, 2008 [Annexures- 3, 3(a)-3(c) respectively].

12. Respondent No.9 entered appearance by filing affidavit in opposition controverting the assertions so made by the petitioner as well as the respondent Nos.6-8 stating, *inter alia*, that respondent No.9 is a private company limited by shares, incorporated under the relevant laws of Bangladesh which is engaged in the business of providing Information Technology(in short, IT) services to different international and local government offices/agencies, specially by developing necessary software for web based atomization system with data entry, report generation, data analysis services, online library management with digital archive system, digital ID card management system, store management system, sales management system and also online based integrated ticketing system to its respective customers. Said respondent, however, has been providing services to Bangladesh Railway by operating and maintaining a Centralized Computerized Seat Reservation and Ticketing System(in short, CCSRTS).

13. For adapting modern technology, to improve facilities for the passengers and as of policy matter the authority concerned of BR floated a tender by publishing Invitation for Tender in their official website and in "The Daily Jugantor" and other national dailies on 23.01.2020 under Invitation Reference No. 54.01.2600.007.18.013.19-45 for design, develop, supply, install, commission, operate, maintain and transfer of technology of online based Bangladesh Railway Integrated Ticketing System(in short, BRITS) by providing all necessary hardware, software, accessories, stationeries and limited managed service and thereby invited the interested tenderers to participate in the tender process by submitting their respective offer following the instructions contained in the tender document.

14. With a view to participate in the aforesaid tender, the respondent No.9 procured the tender document from the office of the respondent No.8 and after fulfilling all required formalities submitted the same on 23.03.2020. Thereafter, Tender Evaluation Committee(TEC) was formed for evaluation of the tender and afterwards a TSC was also formed on 02.07.2020 as per Rule 8(14) of Rules,2008 to assist TEC for technical evaluation of the tender documents submitted by the respective tenderers. Subsequently, the TSC upon scrutinizing the technical proposals submitted by 9(nine) tenderers submitted its report on 20.08.2020 opining, *inter alia*, that without submission of proven documents Spectrum-BAL-Electro Craft JV, one of the tenderers, had submitted vendor's declaration as to its capability to issue 06 million tickets every year. So far the petitioner is concerned said committee observed that the petitioner submitted documents to able to issue approximately 40(forty) lacs tickets in a year against the essential requirement of issuing 50(fifty) lakh ticket per year. Regarding the respondent No.9 the TSC observed that respondent No.9 clearly met all essential requirements of the tender(Annexure-III). With the aforesaid observations, the TSC submitted its report to TEC on 20.08.2020. Further to the said report, respondent No.7 conducted an inquiry as to the authenticity of the certificate/declaration submitted by the respective tenderers against the requirement of issuing 50(fifty) lakh tickets per year. Accordingly, the respondent No.7, with a view to verify the authenticity of those certificates, wrote office letter to the concerned institutions, who issued certificates to the respective tenderers in this regard with request to send e-mail from their own domain within 01.10.2020. On receipt thereof, the respondent No.7 submitted a negative report on 12.10.2020 regarding the petitioner and Spectrum-BAL-Electro Craft JV. Thereafter, the TEC evaluated the technical proposals submitted by the 7(seven) tenderers and declined the proposals of 2(two) others as they failed to comply the essential requirements. The TEC, ignoring the aforesaid

observations of the TSC and the respondent No.8, evaluated the technical proposals of 7(seven) tenderers including the petitioner and Spectrum-BAL-Electro Craft JV and declared 5(five) tenderers as technically responsive.

15. Further, it has been stated that at the time of opening and evaluation of the financial offers of the respective tenderers on 10.11.2020, the TEC only declared the service charge per ticket offered by the tenderers but no information was given to the tenderers regarding the itemwise financial offers. Accordingly, the TEC evaluated the financial proposals of the technically responsive 5(five) tenderers and after evaluation, on 18.11.2020 submitted report in favour of the petitioner.

16. The respondent No.7, being the President of TEC submitted the evaluation report dated 18.11.2020 along with the procurement proposal to the respondent No.6 vide Memo No. 54.01.2600.007. 18.013.19-433 dated 22.11.2020. The respondent No.6 on accepting the aforesaid report and procurement proposal of TEC on 22.11.2020 issued a certificate thereon under Rule 97(8) of the Rules,2008 vide Memo No. 54.01.2600.007.18.013.19-438 dated 23.11.2020 and submitted the procurement proposal vide Memo No. 54.01. 2600. 007. 18.013.19-437 dated 23.11.2020 before the Secretary, Ministry of Railway, respondent No.5 to finalize the same.

17. Meanwhile, pursuant to Memo dated 23.11.2020 issued by the respondent No.6, present respondent contacted the office of the respondent No.8. On 28.11.2020, said respondent came to learn that gross irregularities and illegalities took place during evaluation of the tender by the TEC. Accordingly, the respondent No.9 lodged a complaint on 30.11.2020(Annexure-VIII) before the respondent No.8 under Rule 57(1) and (2) of the Rules,2008 with a prayer to take necessary corrective measures as per Rule 57(3) of the said Rules,2008. Despite receipt of the said complaint, the respondents in an arbitrary manner proceeded with the aforesaid tender process for issuance of Notification of Award and to execute contract in favour of the petitioner, without affording any opportunity to avail and exhaust the remedies available for the said respondent under the Act,2006 and Rules,2008.

18. Finding no other alternative remedy respondent No.9 as petitioner filed writ petition No.9423 of 2020 before this Court whereupon a Rule Nisi was issued vide order dated 07.12.2020 along with an interim order of stay of all further proceedings of the aforesaid tender till 07.01.2021 (Annexure-IV). Challenging the aforesaid interim order passed in writ petition No. 9423 of 2020 the respondent No.5 and others preferred Civil Miscellaneous Petition for Leave to Appeal No.795 of 2020 before the Appellate Division. Upon hearing the respective parties the Hon'ble Judge-in- Chamber of the Appellate Division was pleased to pass "No Order" on 23.12.2020. Subsequently, the respondent No.5 and others as well as the petitioner filed Civil Petition for Leave to Appeal Nos.2431 and 2362 both of 2020 before the Appellate Division. After hearing the respective contending parties the Appellate Division dismissed both the petitions vide order dated 07.01.2021 (Annexures-V-VII respectively).

19. In the meanwhile, the respondent No.8 having not responded to the complaint filed by the respondent No.9 within 5(five) working days from the date of receipt thereof as per Rule 57(4) of the Rules,2008 a complaint was lodged on 07.12.2020(Annexure-IX) by the present respondent before the respondent No.6, being the Head of Procuring Entity, as per Rule 57(5) of the Rules,2008, but there was no reply thereof. Accordingly, the respondent No.9 lodged a complaint on 15.12.2020 before the Secretary, Ministry of Railway, respondent No.5(Annexure-X) as per Rule 57(9) of the Rules,2008, but again there was no response to

the aforesaid complaint. Under the circumstances, respondent No.9 filed appeal before the CPTU on 28.12.2020 (Annexure-XI) with prescribed fess and security deposit following the time frame as prescribed in Schedule-2 of the Rules,2008. Said appeal was heard by the Review Panel No.2, respondent Nos. 2-4 on 06.01.2021 and 10.01.2021 respectively. During the course of hearing, the BR and the petitioner appeared and submitted their respective written submissions. After hearing the parties and on consideration of the written submissions of the respective contending parties, the Review Panel-2, CPTU vide judgment and order dated 13.01.2021 disposed of the appeal with direction for re-tender.

20. Mr. Murad Reza, the learned Senior Advocate appearing on behalf of the petitioner submits that the complaint so made by the respondent No.9 to the tender issuing authority is, in fact, barred by limitation under Rule 57(1)and (2) read with Schedule 2 of the Public Procurement Rules,2008. In support of the said contention he submits that the tender in question was opened on 10.11.2020 and that the respondent No.9 filed complaint under Rule 57(1)and (2) of the said Rules,2008 before the Joint Director General(Operation), BR on 30.11.2020 (Annexure-VIII of the affidavit in opposition filed by respondent No.9) stating, *inter alia*, that they came to know that the petitioner was declared technically responsive on 10.11.2020, the day when the tender was opened. In this regard, he submits that as per Rule 57(1) read with Schedule 2 of the Rules,2008 an aggrieved person has to lodge complaint before the procuring entity within 7(seven) calendar days of knowledge of the event giving rise to cause of action. Respondent No.9, he submits, had knowledge that the petitioner was found technically responsive on 10.11.2020 since such declaration was made in the presence of the representatives of the respective tenderers. But they did not challenge the said findings of the procuring authority within time. Despite the said position of facts the Review Panel-02 has declared that the complaint filed by the respondent No.9 is in due compliance of the Rules,2008.

21. He also submits that as per ITT clause 29.1, following the opening of the tenders until issuance of Notification of Award the tenderer shall, unless requested to provide clarification to its tender or unless necessary for submission of the complaint, communicate with the concerned procuring entity pursuant to Rule 31 of the Rules,2008. In the instant case, he submits, the respondent Nos.9 in its complaint petition stated, *inter alia*, that they came to know about many irregularities in the evaluation of the technical and financial proposals of the petitioner and Spectrum-BAL-Electro Craft JV while carrying out an "*investigation*" at BR on 28.11.2020 without stating what those irregularities are, or the basis for their allegation. While passing the impugned order dated 13.01.2021 the respondent Nos.2-4 has taken into cognizance of the said knowledge of the respondent No.9 about the alleged irregularities in the evaluation of the technical and financial proposals from office letter dated 23.11.2020. At the same time, said authority concerned has given legal mandate to the independent "investigation" being conducted by the respondent No.9 without any back up support of law; whereas, in the complaint dated 30.11.2020 filed by the respondent No.9 under Rule 57(1) and (2) the date of opening of the financial proposals i.e., 10.11.2020 has been referred to as the date of cause of action and that in the said complaint there was no reference to the so-called office letter of the respondent No.6 dated 23.11.2020. 22. 22. Thus, he submits, it is evident on the face of record that the complaint dated 30.11.2020 made by the respondent No.9 before the procuring entity/review panel is barred by limitation.

22. He further submits that under the Act of 2006 and the Rules,2008 the Review Panel is only empowered to 'advise' and 'recommend' the concerned authority. In the instant case, he submits, Review Panel-2 acted *malafide* and in gross violation of Rule 60(3)(ka) (uma) and

(cha) of the Rules,2008 in declaring that the offer of the petitioner and that of the other responsive tenderer i.e. Spectrum Ltd. (who was not made a party in the said review petition) could not be technically as well as financially responsive. In this regard, he goes to submit that the Review Panel-2 has also acted beyond their jurisdiction and stepped into the shoes of the TEC in assessing and evaluating the technical proposal of the petitioner and that of the Spectrum Ltd. in declaring their offer as technically non responsive when the TEC declared them as responsive tenderer. Accordingly, he submits that the impugned judgment and order dated 13.01.2021 passed by the Review Panel-02, respondent Nos.2-4 is liable to be declared to have been passed without lawful authority and hence, is of no legal effect.

23. Mr. A.M. Amin Uddin, the learned Attorney General appearing on behalf of the respondent-government at the very outset submits that despite the fact that the complaint dated 30.11.2020 filed by the respondent No.9 before the procuring entity, the respondent No.8 was barred by limitation under Rule 57(1) read with Schedule-2 of the Rules,2008 the Review Panel-02 taking cognizance of the office letter dated 23.11.2020 issued by the respondent No. 6, being introduced for the first time in the said appeal, has declared the tender process in question illegal without giving any findings on point of limitation. On that score alone, he submits that the impugned judgment and order dated 13.01.2021 passed by the said Review Panel-02 is liable to be knocked down as being not maintainable in the eye of law. In support he has referred the decision of the case of ***VA Tech WABAG Ltd.*** Vs. ***Bangladesh*** reported in ***17 BLC(HCD)568***.

24. Mr. Md. Taherul Islam, the learned Advocate appearing for the respondent Nos.6-8 adopts the submissions so have been advanced on behalf of the respondent-government.

*25. Per contra*, Mr. A.F. Hasan Ariff, the learned Senior Advocate appearing on behalf of respondent No.9 submits that once a complaint is filed before the authority concerned, as prescribed under the Act,2006 it becomes an incumbent duty upon the said authority to raise the issue of limitation, if there be any. Since none of the authorities concerned of Bangladesh Railway have raised the said issue hence, now they are estopped from raising objection before the Review Panel-02 on the ground of limitation. Moreso, he goes to submit, since Review Panel-02 is not a *quasi* judicial forum having the trapping of a court but a domestic dispute resolution body constituted under the Act,2006 to give "mycvwik" only on the respective dispute; as such, it is not required to follow the norms and practices which are being followed/observed by the judicial forum. Accordingly, he submits that for not giving detailed observations and findings on the issue of limitation will not go to render the impugned order dated 13.01.2021 nugatory.

26. He also submits that the respondent No.9 filed complaint before the appropriate authorities as prescribed under the Act,2006 and the Rules,2008, being aggrieved by the decision of Bangladesh Railway to find the petitioner as final responsive tenderer, by gross miscalculation and supporting-fabrication of the format of the financial proposal of the tender in question violating the said Act,2006 as well as the Rules,2008. Hence, the concerned respondents have denied the rightful position of the respondent No.9 being the lowest tenderer with highest ranked scores both technically and financially which exhort the cause of action by itself.

27. Lastly, he submits that in the impugned judgment and order dated 13.04.2021 the Review Panel-2, CPTU has catagorically found that the petitioner and Spectrum Ltd. are technically and financially non-responsive; that being so, the respondent No.9 became the

responsive tenderer with lowest price and as such, is entitled to get the work order under Rule 98(3)(ka) and Rule 102(13) of the Rules, 2008. Accordingly, he submits that this Rule being devoid of any substance is liable to be discharged.

28. The moot contention of the petitioner is that the complaint so made by the respondent No.9 to the concerned administrative authority of the Procuring Entity under Section 29 of the Public Procurement Act,2006 (in short, Act,2006) read with Rule 57(1) and Schedule 2 of the Public Procurement Rules,2008(in short, Rules, 2008) is barred by limitation, for, in the petition of complaint filed before the respondent No.8, Joint Director General(Operation), Bangladesh Railway(in short, BR) on 30.11.2020 (Annexure-VIII of the affidavit in opposition) the respondent No.9 did not disclose the date of their knowledge of the event giving rise to their cause of action. Moreover, the Review Panel-2 of the CPTU, respondent Nos.2-4 while passing the impugned judgment and order dated 13.01.2021 (Annexure-F to the writ petition) did not make any specific findings on the said objection/issue of limitation being raised categorically both by Bangladesh Railway(the procuring entity) as well as the petitioner, who has been issued Notification of Award on 03.12.2020(Annexure-D-3) by the respondent No.8 having been approved by the competent authority.

29. As appears from record, in response to the invitation for tender under reference No.54.01. 2600.007.18.013.19-45 dated 23.01.2020 for design, develop, supply, install, commission, operate, maintain and transfer of technology of online based Bangladesh Railway Integrated Ticketing System 9(nine) tenderers participated in the tender, out of which 8(eight) were joint venture company including the petitioner and the respondent No.9. On 23.03.2020, the date so fixed for opening of tender the Tender Opening Committee(TOC) "দরপত্র উন্মুক্তকরণ কমিটি" after giving opinion on the technical proposal of the respective tenderers in the presence of their representatives sent the same before the Tender Evaluation Committee (in short, TEC). At the same time the TOC had also sent the financial proposal of those tenderers in sealed condition to the respondent No.7(Annexure-3a of the affidavit in opposition of the respondent Nos.6-8). The TEC after scrutinizing all relevant records in connection with the technical proposal of the respective tenderers found 5(five) tenderers responsive and accordingly, numbers were duly allocated under ITT clause 32.5 of the tender data sheet with certification under Rule 8(13)(kha) of the Rules,2008 dated 08.11. 2020. Subsequent thereto on 10.11.2020 the financial proposal of those technically responsive 5(five) tenderers were opened and evaluated by the TEC in the presence of their representatives with allocation of marks under ITT clause 17. Ultimately, in view of ITT clause 32.4 of Section II: Tender Data Sheet, by aggregating the respective marks(75% under technical evaluation and 25% under financial evaluation) the petitioner scored 78.9497, Spectrum JV 73.8618 and Computer Network System Limited i.e., respondent No.9 scored 69.8400. Accordingly, on conclusion of evaluation of both head the TEC submitted its recommendation on 18.11.2020 with certification under Rule 8(13)(kha) of the Rules, 2008, which was duly forwarded by the respondent No.7 to the respondent No.6 i.e., Director General, Bangladesh Railway vide office memo dated 22.11.2020 for taking necessary steps (Annexure-D to the writ petition). The respondent No.6 with due notification that-"বিবেচ্য ক্রয়/সংগ্রহ চুক্তির প্রস্তাব প্রক্রিয়াকরণে বাংলাদেশ রেলওয়ে কর্তৃক ক্রয়/সংগ্রহ/চুক্তি সংক্রান্ত প্রচলিত আইন ও বিধি/প্রবিধান পুরোপুরি অনুসরণ করা হয়েছে এবং বিবেচ্য প্রস্তাবটি সংশ্লিষ্ট আইন ও বিধি/বিধানের পরিপন্থী নয়। এক্ষেত্রে প্রচলিত নিয়ম নীতির কোন ব্যত্যয় ঘটেনি।

সুপারিশকৃত দরদাতার প্রস্তাবের সাথে Tender ডকুমেন্টের সম্পূর্ণ সামঞ্জস্য রয়েছে। উপস্থাপিত সংশ্লিষ্ট কাগজপত্রের সাথে Tender ডকুমেন্টের সম্পূর্ণ সামঞ্জস্য রয়েছে। সংশ্লিষ্ট কাগজপত্রে বর্ণিত তথ্যাদি সুস্পষ্টভাবে প্রতিফলিত হয়েছে কোন বস্তুনিষ্ঠ/উল্লেখযোগ্য তথ্য অনুল্লিখিত নেই। " forwarded the records to the Secretary, Ministry of Railway, respondent No.5 on 23.11.2020 for approval(Annexure-D-1). After being approved

by the authority concerned notification of award was duly issued in favour of the petitioner on 03.12.2020 (Annexure-D-3 to the writ petition).

30. From the above, it is apparent that since technical as well as financial proposal of the respective bidders including the petitioner and the respondent No.9 were opened in the presence of their representatives on 23.01.2020 and 10.11.2020 respectively hence, it becomes obvious that on 10.11.2020 they came to learn/ know the offers of all the respective tenderers.

31. Section 29 of the Act, 2006 (Act No.24 of 2006), however, provides the right to file complaint to the authority concerned (সংশ্লিষ্ট ক্রয়কারী প্রশাসনিক কর্তৃপক্ষের নিকট) under Section 30 of the said Act on the context as prescribed under Rule 56 of the Rules, 2008. In view of Rule 57(1) of the Rules of 2008 said complaint has to be filed/made within the period as stipulated in Schedule 2 of the said Rules i.e., within 7(seven) calendar days of receipt of knowledge of the complaint which gives rise to the cause of action. In other words, the complainant in his petition of complaint has to disclose the date of cause of action in order to compute the period of limitation.

32. For ready reference Section 30(1) of the Act, 2006 and Rule 57(1) along with Schedule 2 of the Rules,2008 are quoted below:-

" ধারা ৩০(১) **প্রশাসনিক কর্তৃপক্ষের নিকট অভিযোগ দায়ের, আপীল, ইত্যাদি**।- (১) ধারা ২৯ এর অধীন দায়েরতব্য প্রতিটি অভিযোগ সংশ্লিষ্ট ক্রয়কারীর প্রশাসনিক কর্তৃপক্ষের নিকট দায়ের করিতে হইবে এবং উক্তরূপে কোন অভিযোগ দায়ের হইলে, উক্ত কর্তৃপক্ষ উহা বিবেচনাক্রমে নির্ধারিত সময়সীমার মধ্যে উহা নিষ্পত্তি করিবে।"

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

"তফসিল-২"

| | অভিযোগসমূহের প্রশাসনিক পুনরীক্ষণের (Administrative Review) সময়ঃ |
|---|---|
| ৫৭(১) | যে পরিস্থিতির কারনে অভিযোগের উদ্ভব হইয়াছে তদ্বিষয়ে বিষয়ে অবগত হইবার ৭(সাত) পঞ্জিকা দিবসের মধ্যে। |

33. In the instant case, the respondent No.9 being aggrieved with the decision of the TEC to declare the petitioner and another as technically responsive filed complaint before the respondent No.8 on 30.11.2020 under Rule 57(1) and (2)(Annexure-VIII); before the respondent Nos.6 on 07.12.2020 under Rule 57(5)(Annexure-IX); and before the respondent No.5 on 15.12.2020 under Rule 57(5) of the Rules, 2008 (Annexure-X) on similar contention stating, *inter alia*, - "গত ২৩ শে জানুয়ারী ২০২০ তারিখে আপনার দপ্তর কর্তৃক টেন্ডার নাম্বার ৫৪.০১.২৬০০. ০০৭.১৮.০১৩.১৯-৪৫ এর মাধ্যমে উপরোক্ত বিষয়ের টেন্ডার আহবান করা হয়। যার প্রেক্ষিতে গত ২৩ শে মার্চ ২০২০ তারিখে ০৯ (নয়) টি প্রতিষ্ঠান টেন্ডার সমূহের প্রস্তাব দাখিল করে। তারই ধারাবাহিকতায় গত ১০ই নভেম্বরে ২০২০ তারিখে রেলভবনস্থ সম্মেলন কক্ষে প্রস্তাবিত আর্থিক প্রস্তাবনা উন্মুক্ত করা হয়। যেখানে ক) সহজ লিমিটেড-ভিনসেন লিমিটেড-সিনেসিস লিমিটেড জেভি এবং খ) স্পেকট্রাম-বিজনেস অটোমেশন- ইলেকট্রোক্রেফট জেভি প্রতিষ্ঠানদ্বয় সমূহকে কারিগরীভাবে রেসপনসিভ বিবেচনা করে প্রতিষ্ঠানদ্বয় এর আর্থিক প্রস্তাব সমূহও উন্মুক্ত করা হয়। ..... উপরোক্ত অত্যাবশ্যকীয় শর্ত অনুযায়ী ক) সহজ লিমিটেড জেভি এবং খ) স্পেকট্রাম ইনিজনিয়ারিং লিমিটেড জেভি প্রতিষ্ঠানদ্বয় তাদের প্রস্তাবনায় এরূপ কাজের কোন বৈধ অভিজ্ঞতার সনদ প্রদান করতে পারেনি বলে আমরা জানতে পেরেছি, তা সত্ত্বেও ITT 7.1(a) এর শর্ত লঙ্ঘন করে উক্ত প্রতিষ্ঠানদ্বয়কে নন-রেসপনসিভ ঘোষনা না করে অন্যায়ভাবে রেসপনসিভ ঘোষনা করে পরবর্তীতে তাদের আর্থিক প্রস্তাবসমূহ উন্মুক্ত করা হয়েছে। ..... পিপিআর ২০০৮ এর ধারা ৫৭(৩) অনুযায়ী সংশোধনমূলক পরবর্তী ব্যবস্থা গ্রহন করার জন্য আপনার নিকট অনুরোধ জ্ঞাপন করছি।"

34. In all those petitions, the respondent No.9 has categorically admitted that the financial offers of the respective tenderers including the petitioner and respondent No.9 were opened

by the committee concerned on 10.11.2020 in the presence of their representatives for having been found technically responsive by the TEC on 08.11.2020(Annexure-3b of the affidavit in opposition of the respondent Nos.6-8). It is, thus, apparent that neither in the first complaint dated 30.11.2020 nor in the subsequent complaints so made before the concerned authorities the respondent No.9 had disclosed their date of knowledge giving rise to the cause of action.

35. Vide Section 30(2) of the Act, 2006 the party concerned is entitled to prefer appeal before the Review Panel if he is aggrieved with the decision of the "প্রশাসনিক কর্তৃপক্ষ", the administrative authority or if said authority fails to give decision within the prescribed period as provided under the Rules,2008.

36. The respondent No.9 filed appeal before the CPTU on 28.12.2020 (Annexure-XI of the affidavit in opposition of the respondent No.9) on similar contention having receipt no decision of the authority concerned within the prescribed period without disclosing the date of knowledge giving rise to cause of action. Said respondent in its appeal before the Chairperson of the Review Panel for the first time gave reference of the office letter dated 23.11.2020 issued by the respondent No.6 stating, *inter alia:*-

" ..... এখানে উল্লেখ্য যে, ১০/১১/২০২০ তারিখে দরপত্রের আর্থিক প্রস্তাব সকল দরদাতার সামনে উন্মুক্ত করা হলেও সে সময় শুধুমাত্র টিকেট প্রতি সার্ভিস চার্জের দর প্রকাশ করা হয়, কিন্তু দরপত্রদাতাদের প্রস্তাবিত আর্থিক প্রস্তাবের আইটেমওয়াইজ বিস্তারিত কোন তথ্য প্রদান করা হয় নি। পরবর্তীতে বাংলাদেশ রেলওয়ের মহাপরিচালক কর্তৃক ২৩/১১/২০২০ ইং তারিখের পত্র মারফত পিপিআর-২০০৮ এর বিধি ৯৭(৮) অনুযায়ী দরপত্র প্রস্তাব চূড়ান্ত করিবার জন্য সচিব, রেলপথ মন্ত্রণালয় বরাবর প্রত্যয়ন প্রদান করা হয়। উক্ত প্রত্যয়ন পত্র প্রেরণের পরিপ্রেক্ষিতে ক্রয়কারীর কার্যালয়ে অনুসন্ধান করে দরদাতাদের কারিগরি এবং আর্থিক প্রস্তাব সমূহ এবং এর মূল্যায়নের ব্যাপারে ২৮/১১/২০২০ ইং তারিখে সহজ লিমিটেড জেভি ও স্পেকট্রাম লিমিটেড জেভির দাখিলকৃত কারিগরি ও আর্থিক প্রস্তাব বিষয়ে বেশ কিছু অনিয়ম এবং অসংগতিমূলক তথ্য পাওয়ায় ৩০/১১/২০২০ ইং তারিখে পিপিএ-২০০৬ এর ধারা-২৯ এবং পিপিআর-২০০৮ এর বিধি ৫৬, ৫৭ অনুযায়ী ক্রয়কারী বরাবর অভিযোগ দাখিল করি।"

37. As has been observed earlier, in the petition of complaint dated 30.11.2020 (Annexure-VIII) there is no reference of the office letter dated 23.11.2020 nor in the other complaints so filed by the respondent No.9 under Rule 57(5) and (7) of the Rules, 2008. The same has been introduced by the respondent No.9 for the first time in the appeal so filed before the Review Panel-02 on 28.12.2020 with a view to cover the period of limitation.

38. Said issue of limitation has been categorically agitated before the Review Panel-02 by the respondent Nos.6-8 as well as the petitioner. The Review Panel-02 while framing specific issues on other objections being raised by the respondent No.9 did not frame specific issue on the period of limitation. Rather, taking into cognizance of the office letter dated 23.11.2020 has ultimately rejected the tender in question without giving any specific findings whatsoever that the first complaint filed under Rule 57(1) and (2) was filed within time or was filed beyond 7(seven) calendar days. Relevant part of the impugned order dated 23.11.2020 is quoted below :

"**১ নং বিচার্য বিষয়ের আলোকে আলোচনা/পর্যালোচনা ও সিদ্ধান্ত**

বাদী তার আবেদনের সঙ্গে যে সমস্ত কাগজপত্র দাখিল করেছেন তা পর্যালোচনায় দেখা যায় যে, প্রতিপক্ষের অনৈতিক ও পক্ষপাতমূলক কার্যকলাপের প্রেক্ষিতে সমূহ ক্ষতির সম্ভাবনা দেখা দেওয়ায় বাদী পাবলিক প্রকিউরমেন্ট আইন, ২০০৬ এর ধারা এবং পাবলিক প্রকিউরমেন্ট বিধিমালা, ২০০৮ এর বিধি ৫৬(৯)(১১) অনুসরণে অভিযোগ করার অধিকার প্রাপ্ত হয়ে প্রশাসনিক স্তরের প্রাথমিক অবস্থায় ক্রয়কারী কর্তৃপক্ষ (HOPE) বরাবর গত ৩০/১১/২০২০ তারিখে প্রতিকার প্রাপ্তির লক্ষ্যে আবেদন পেশ করেন। অতঃপর ক্রয়কারী কার্যালয় প্রধান ... বরাবর ০৭/১২/২০২০ তারিখে এবং সংশ্লিষ্ট মন্ত্রণালয়ের সচিব বরাবর ১৫/১২/২০২০ তারিখে আবেদন করেছেন দেখা যায়। ইতোমধ্যে বিবাদী পক্ষকে চুক্তি স্বাক্ষর হতে বিরত রাখার জন্য তিনি মহামান্য হাইকোর্ট বিভাগেও রিট পিটিশন আবেদন পেশ করে স্থগিতাদেশ প্রাপ্ত হয়েছেন। পাবলিক প্রকিউরমেন্ট বিধিমালা, ২০০৮ এর বিধি ৫৭(১) হতে (১২) অনুসরণে তিনি গত ২৮/১২/২০২০ তারিখে আপিল আবেদন পেশ করেছেন। এদিকে মহাপরিচালক কর্তৃক বিগত ২৩/১১/২০২০ তারিখে মন্ত্রণালয়ের সচিব বরাবর যে প্রস্তাব পেশ করেছেন তা জানার পর বাদীপক্ষ

তথা প্রশাসনিক স্তরে আবেদন পেশ করতে শুরু করেছেন দেখা যায়। পিপিএ, ২০০৬ এবং পিপিআর, ৫৭ অনুসরণ করেই বাদপক্ষ সমুদয় আবেদন পেশ করেছেন। কাজেই ৩ ও ৪ নং বিবাদীর যুক্তিসমূহ এ ব্যাপারে গ্রহণযোগ্য নয় মর্মে বিবেচনা করে ১ নং বিচার্য বিষয় আবেদনকারীর অনুকূলে বিবেচনা করা হলো।"

39. Be that as it may, since in the first complaint dated 30.11.2020(Annexure-VIII) respondent No.9 did not disclose the date of knowledge giving rise to the cause of action hence, it is barred by limitation. Hence, taking into cognizance of the office letter dated 23.11.2020 by the Review Panel-02, as being introduced by the respondent No.9 for the first time while filing appeal on 28.12.2020 in order to escape limitation without giving specific findings on the first complaint dated 30.11.2020 on point of limitation is also not maintainable.

40. Said observations of ours find support in the decision of the case of ***VA Tech WABAG Ltd.*** Vs. ***Bangladesh*** reported in ***17 BLC(HCD)568*** where it has been observed by one of the Benches of this Division, *inter alia*:

"*The Review Panel in the aforesaid manner has stated that the appeal preferred before the Review Panel has been within time. There is no specific finding that the first complaint filed under Rule 57 of the PPR has been made within time or Project director has committed error of law in disallowing the formal complaint holding that the same was filed beyond 7 calendar days.*

*41. Since the petitioner of writ petition No.10380 of 2011 admitted in the Annexure-1 that during the opening of the offers the other bidder JLEPCL-DCLJA has been identified to have submitted swift copy of Bank Guarantee from Shanghi Pudong Development Bank, Nanjing Branch, China and advised through Islami Bank Bangladesh Ltd. Kawran Bazar Branch, Dhaka Ref No.001 dated 29.06.2011 'without any risk responsibility and engagement on our part and in the formal complaint Annexure-1 as lodged by the VA Tech Wabag Ltd. mentioned the said fact and did not disclose anything so far their alleged date of knowledge is concerned, we have no hesitation to hold that the statement made on 29.08.2011 before the Chairman, BSCIC regarding dated knowledge is a creation of "after thought" only to get escape from limitation."*

[Emphasis given]

42. In view of our above observations and findings, we find it redundant to make observations on the merit of the instant case.

43. Considering the facts and circumstances of the case, observations and findings so made above we find substance in the instant Rule.

44. In the result, the Rule is made absolute.

45. The impugned judgment and order dated 13.01.2021 passed by the respondent Nos. 2-4, Review Panel-2, as constituted by the respondent No.1, Central Procurement Technical Unit(CPTU), Implementation Monitoring and Evaluation Division in Review Petition No.075/2020 allowing the review and recommending for re-tender(Annexure-F to the writ petition), is hereby declared to have been passed without lawful authority and hence, is of no legal effect.

46. There will be no order as to costs.

47. Communicate the judgment and order at once.

**16 SCOB [2022] HCD 37**

**HIGH COURT DIVISION**
Civil Revision No. 1538 of 2018

**Abedun Nessa**
...Defendant-Respondent-Petitioner
-Vs-
**Jaher Sheikh and others**
...Plaintiffs-Appellants -Opposite Parties

Mr. Faisal Mahmud Faizee with Mr. Sarker Muhammad Al Amin, Advocates.
…For the petitioner

Mr. Mohammad Ali Zinnah, Advocate.
....For the Opposite Party Nos. 1-3, 5(Ka), 6-8.

Heard on 17.08.2021, 22.08.2021, 23.08.2021, 24.08.2021 and Judgment on 26.08.2021

**Present:**
**Mr. Justice Md. Rezaul Hasan**

**Editors' Note:**
This is a suit for cancellation of deed in which the main contentions of the plaintiffs are that, the disputed *Nadabinama* deed was not executed within the knowledge of the plaintiff No. 3 who was minor at the time of execution of the said deed and he did not go to the concerned Sub-Registrar's office for execution or registration of the deed. Further, before obtaining signature of the plaintiff Nos. 1 and 2 in the said *Nadabinama*, it was not read out, nor explained to them. Their signatures were obtained by misleading them about the contents of the deed saying that it was a deed for partition, to be prepared on amicable settlement of their respective share in the suit property. The trial court dismissed the suit but the appellate court allowing the appeal, reversed the judgment and decree of the trial court. The defendant-respondent, as the petitioner, preferred civil revision before the High Court Division. High Court Division on assessment of evidence of DW-3 held that the disputed deed was not read out to the plaintiffs who were illiterate rural people before receiving their signatures on it as the executants. It also held that the requirement to read out a document to the executants before execution is a usage and custom having the force of law. High Court Division also found that the findings of the appellate Court relating to limitation and burden of proof are correct and as such it discharged the Rule.

**Key Words:**
Cancellation of a deed; Requirements in case of execution of a deed; Section 102 of the Evidence Act; Custom; Section 18 of the Limitation Act, 1908

**Reading out a document to the executants before execution, is an usage and custom having the force of law:**
**The requirement to read out a document to the executants before execution, is an usage and custom followed from the time immemorial. This custom, having the force of law, requires to record the fact in a deed, that the same was read out and explained to the executants, so that it can be inferred that they have executed the deed voluntarily and having understood the contents of the same. Unless a deed is read out to the executants, it cannot be said that they had understood its contents and had voluntary executed the same. However, there might be exception to this Rule and this might not be fatal in each**

**case and the application of this Rule will depend upon the facts and circumstances peculiar to each case. ...(Para 20)**

**Section 18 of the Limitation Act, 1908:**

**The appellate court has rightly held that the limitation period will be counted from the date of knowledge, which is as per provisions of section 18 of the Limitation Act, 1908. The appellate court has accurately found that the suit is not barred by limitation, because the limitation period shall be counted from the date of knowledge of this impugned *Nadabinama* deed obtained by practicing fraud upon the executants and that the plaintiffs have derived knowledge about the contents of the disputed deed on the date of obtaining certified copy on 20.05.1998. ...(Para 22)**

**Section 102 of the Evidence Act 1872, burden of proof:**

**As regards the burden to prove the fact that the impugned deed was obtained from executants by misleading them, the trial court has held that the burden of proof lied upon the plaintiffs, since, the plaintiffs disowned the *Nadabinama* deed. The appellate court was of the view that, this burden lied on the defendants. Having considered the provisions of section 102 of the Evidence Act, 1872, in the light of the facts and circumstances of this case, I am of the considered view that the burden to prove genuineness of this disputed *Nadabinama* deed lied upon the defendants, once the genuineness of the said deed has been denied by the plaintiffs. It is the defendant, who want from the court to believe their case that the *Nadabinama* (deed of surrender) was a genuine deed and it is they would loss in the trial court if the deed was not proved to be genuine one. The law of evidence would not facilitate forgery by unlawfully putting the burden on the victims of forgery. Therefore, finding of the appellate court on this issue is correct. ...(Para 23)**

## JUDGMENT

**Md. Rezaul Hasan, J.**

1. This Rule has been issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 18.04.2018 (decree signed on 26.04.2018), passed by the Special District Judge, Jamalpur, in Other Appeal No.2 of 2002, allowing the appeal and thereby reversing the judgment and decree dated 11.09.2001 (decree signed on 17.09.2001), passed by the Assistant Judge, Islampur, Jamalpur, in Other Class Suit No.55 of 1998, should not be set-aside and/or pass such other order or orders passed as to this Court may seem fit and proper.

2. Facts, relevant for disposal of the Rule, in brief, are that one Jaher Sheikh and others, as plaintiffs, filed Other Class Suit No.55 of 1998, before the court of Assistant Judge, Islampur, Jamalpur, against Most. Abedun Nessa, wife of Kalu Sheikh and the Government of Bangladesh, represented by the Deputy Commissioner, Jamalpur, in which they have prayed for cancellation of the deed No.1628 dated 12.03.1982, registered in the office of the Sub-Rgistrar, Islampur, Jamalpur. The main contentions of the plaintiffs are that, the disputed *Nadabinama* (or the deed of surrender), was not executed within the knowledge of the plaintiff No. 3 Sundor Ali, who was minor at the time of execution of the disputed deed and that, the plaintiff did not go to the concerned Sub-Registrar's office for execution or registration of any *Nadabinama* deed and that before obtaining signature of the plaintiff Nos. 1 and 2 of the said *Nadabinama*, it was not read out, nor explained to the plaintiff Nos. 1 and 2. It has been further stated in paragraph No. 2 of the plaint that, the signatures of the

plaintiffs Nos. 1 and 2 of the said *Nadabinama* was obtained by misleading them about the contents of the deed saying that it was a deed for partition, to be prepared on amicable settlement of their respective share in the suit property, lying under the joint R.O.R. Khatian, marked as exhibit 1, 2 and 2(Ka). I have gone through averments made in the plaint, which is maintained in the L.C.R.

3. The defendant No. 1, Abedul Nessa, had appeared and contested in this suit by filing written statements, denying all material allegations made in the plaint and further stating her case at paragraph No. 12 of the written statements. I have also gone through the statement made in the written statement, which is lying in LCR. The Government was made pro-forma defendant, but the Government did not contest in this suit.

4. The plaintiffs had examined 3 witnesses namely, P.Ws. 1-3, to prove the case of the plaintiffs and had also produced and proved certain documents, marked as exhibit 1, 2, 2(Ka) and 3, in support of their case. On the other hand, the defendants had examined 5 witnesses namely, D.Ws. 1-5, to support their case. The defendant's side proved certain documents, marked as exhibit "Ka" to "Cha" series.

5. The trial court, after hearing the parties and having assessed the evidences on record, had dismissed the suit, vide its judgment and decree dated 11.09.2001 (decree signed on 17.09.2001).

6. Against the said judgment and decree of the trial court, the plaintiffs preferred Other Appeal No.2 of 2002, before the District Judge, Jamalpur, which was heard by the Special District Judge, Jamalpur. In appeal, one Mizanur Rahman, Assistant Record Keeper, *Mohafezkhana*, Mymensingh, was examined as A.P.W.-1. The appellate court, after hearing the parties and having considered the evidences on record, has allowed the appeal, reversed the judgment and decree of the trial court, vide the impugned judgment and decree dated 18.04.2018 (decree signed on 26.04.2018).

7. Being aggrieved by and dissatisfied with the said judgment and decree of the appellate court, the defendant-respondent, as the petitioner, has filed this application under section 115(1) of the Code of Civil Procedure, 1908, and obtained the present Rule.

8. Learned Advocates Mr. Faisal Mahmud Faizee and Mr. Sarker Muhammad Al Amin appeared on behalf of the petitioner. Mr. Faizee, having placed the revisional application and other materials on record, mainly submits that, the trial court has found that, the suit is barred by limitation, but the appellate court has taken a view different from that of the trial court, without giving any specific finding. Referring to the deposition of P.W. 3, who was an attesting witness, the learned Advocate submits that, the attesting witness was not supposed to know whether the impugned *Nadabinama* deed was read over to the executants (plaintiff Nos. 1 and 2). He also submits that, there is no law that requires that a deed must be read out to the executants before it is signed by them. As regards the credibility of the D.W. 1, with reference to his deposition, the learned Advocate submits that, the fake deed that the D.W. 1 had narrated as genuine in his deposition, was not relevant for the purpose of this case in as much as that deed was not the disputed deed. He mainly emphasises that, there was no case of forgery about the disputed deed. Besides, he further submits that, in their deposition the plaintiff's witnesses had nowhere stated that this impugned *Nadabinama* deed was obtained from the executants by making any misrepresentation. He also adds to his submission that, the plaintiff ought to have proved that they were mislead by the defendant No. 1 in obtaining

the *Nadabinama* deed. He continues that, the impugned deed was executed by the plaintiffs Nos. 1 and 2 knowing fully well that it was a *Nadabinama* and that, the plaintiff Nos. 1 and 2 did not come before the court to depose that the disputed *Nadabinama* deed was obtained by misleading them. Therefore, he submits, the judgment and decree passed by the trial court was passed on proper appreciation of the evidence on record, but the findings of the appellate court are not based on proper appreciation of evidence before him and that the appellate court's findings are wrong and, as such, he sums up that, the appellate court has committed grave error of law in passing the impugned judgment and decree and that has resulted in error in the said decision, occasioning failure of justice. He concludes that, this Rule has merit and the same may kindly be made absolute.

9. On the contrary, Mr. Mohammad Ali Zinnah, the learned Advocate appearing on behalf of the opposite party Nos. 1-3, 5(Ka), 6-8, submits that, it is an admitted position that, the plaintiff No. 3, Md. Sundor Ali was a minor at the time of execution of the *Nadabinama* deed on 12.03.1982. It is also an admitted position that no guardian was appointed by any competent court, nor any sale permission was obtained on behalf of the plaintiff No. 3, to execute the impugned *Nadabinama* deed or any other deed. He also submits that, the trial court by its judgment and decree dated 11.09.2001 has dismissed the entire suit without any decision as regards the right and interest of the minor. He next submits that, the P.W. 1 Md. Sundor Ali (plaintiff No.3) is a party to the suit and is competent to depose as per section 120 of the Evidence Act and, in his deposition, he has made it clear that other plaintiffs are his brothers and he has gave deposition on their behalf. Therefore, the P.W. 1 has narrated the entire case of the plaintiff and has proved the R.O.R. khatians, which were marked as exhibit 1, 2 and 2(Ka) and he has also proved the certified copy of the impugned *Nadabinama* deed, exhibit 3. The learned Advocate further submits that, this P.W. 1 has disclosed the entire case and nothing to discredit him at the time of cross-examination. The learned Advocate also submits that, the P.W. 3 Nazimul has clearly stated in his deposition that, "৮০ সনের মাঠ জরীপের রেকর্ড বিষয়ে শালিশ দরবার হয়। পরে বন্টন দলিলের কথাবার্তা হয়।" Therefore, the learned Advocate submits that, this evidence adequately proved the fact that the signature of the plaintiff Nos. 1 and 2 were obtained, on the disputed deed, by misrepresentation that it was a deed for partition. The learned Advocate has referred to paragraph No. 3 of the plaint and submits that, it has been clearly stated in paragraph No. 3 that the impugned *Nadabinama* deed was obtained by misleading the plaintiffs and that none of the executants went to the Sub-Registrar's Office to execute the said *Nadabinama* deed and that there was no reason, whatsoever, to give a *Nadabinama* in respect of their own property. The learned Advocate next points out that, in paragraph No. 3 of the plaint it has been stated that, "দলিল পড়িয়া শুনানো হয় নাই" and that, "১/২ নং বাদীগন অপরাপর মোকাবেলা বাদীগণের অনুমতিতে বন্টন পত্র দলিল মূলে ছাহাম মোতাবেক সুবিধাজনক ভাবে জমি জমার বিরোধ মিটাইবার জন্য ১নং বিবাদীর প্রস্তাবে সম্মত হইয়াছিল এবং আপোষ বন্টন দলিল হইতেছে মর্মে ১/২ বাদী উক্ত দলিলে টীপ স্বাক্ষর দিয়াছিল" The learned Advocate further submits that, in the plaint, filed in the year 1998, this case has been specifically stated and the witnesses of the plaintiffs have clearly proved their case by adducing oral and documentary evidences, marked as exhibit 1, 2, 2(Ka) and 3. Referring to the impugned *Nadabinama* deed No. 1628 dated 12.03.1982, which is a certified copy (Ext. 3, the original copy of Ext.- Kha of the defendant), the learned Advocate points out that, in the very deed, it has neither been recorded, nor the disputed deed was read out to the plaintiff. In this connection, the learned Advocate also refers to the deposition of D.W. 3, who is one of the attesting witness and submits that, during his cross-examination the D.W. 3 has deposed that, "দলিল সম্পাদনের সময়ে সাব রেজিস্ট্রারের সম্মূখে আমি যাই নাই। দলিল পড়িয়া শুনাইয়াছে কিনা আমি জানি না। যখন টিপ দস্তখত এস. আর সাহেবের সামনে নেয়া হয় তখন আমি ছিলাম। পরে বলে আমি এস.আর সাহেবের সামনে ছিলাম না। টিপ বাহিরে নিয়াছে।" Accordingly, the learned Advocate submits that,

it has been clearly proved that, the impugned deed was not at all read out or explained to the executants, who are illiterate and unable to read (as it will be evident from their unevenly signatures made on the impugned deed). Therefore, he emphasises that, the signatures of these two illiterate executants were taken on the *Nadabinama* without reading this document to them and by misleading them that this deed was a deed of partition, as has been clearly stated in paragraph No. 3 of the plaint and proved by the P.W. Nos.1-3. He next submits that, as per exhibit 1 and 2 and 2(Ka), which are the 3 R.O.R. khatians, the defendant No. 1 is a co-sharer in the said khatian. Therefore, the parties are required to be in peaceful possession and question to write out *Nadabinama* deed, for no reason and no consideration in respect of the plaintiff's own property, is very absurd case. The learned Advocate for the opposite party next submits that, this D.W. 1 Md. Kalu Sheikh is not at all credible witness and has no respect for a court of law, nor any fear about the consequence of making false statement before the court on oath. He points out that, this D.W. 1 has deposed in the trial court on oath and the trial court has doubted his credibility about his deposition that the deed dated 19.12.1920 was genuine. Yet, the trial court has believed the deposition of D.W. 1 and the trial court ought to have cancelled the said fake deed dated 19.12.1920. The learned Advocate next submits that, the plaintiff-appellant had called for the relevant volume of deed No.3739 dated 19.12.1920, before the appellate court. Accordingly, one Mizanur Rahman, Record Keeper of *Mohafezkhana* of the concerned office has appeared before the appellate court and deposed before the appellate court and produced the concerned volume and has shown a deed of similar number and date, from volume No. 37 page 177-178, and proved that, this deed produced and proved by the D.W. 1 before the trial court and marked as exhibit "Ga (1)" was fake. Hence, he submits that this D.W.1, who is the main witness of the defendant and her husband is an out and out liar, which was and guilty of the offence of forgery and contempt of court for producing a false and fabricated document [(Ext. Ga(1)] in order to obtain the judgment in their favour, but the trial court has placed reliance on D.W. 1 in dismissing the suit. He next pointed out that, the appellate court has considered the issue of limitation and, having examined the case of the parties as well as the entire evidence in its totality, the appellate court has held that, the limitation period will be counted from the date of knowledge, which is as per provisions of section 18 of the Limitation Act, 1908. Hence, the appellate court has found that, the suit is not barred by limitation, since the limitation period shall be counted from the date of knowledge of this impugned *Nadabinama* deed obtained by practicing fraud upon the executants. He also submits that, knowledge of the plaintiffs about the contents of this deed have acquired from the date of obtaining certified copy of the said deed in as much as the plaintiffs had no other means to know about it's contents before getting the certified copy. The learned Advocate adds to his submission that, the fraud vitiates everything as well as no one can take advantage of his own fraud. As regards the burden of proof by misleading the executants, the learned Advocate submits that, it was their onus to prove that the impugned *Nadabinama* deed was executed by the executants having knowledge of it's contents, as per provisions of section 101 and 102 of the Evidence Act, 1872. He submits that, the trial court has most illegally and wrongly held that the burden of proof lying upon the plaintiffs. Since, the plaintiffs disowned the *Nadabinama* deed, therefore, it has been wrongly decided by the trial court that, the burden of proof lied on the plaintiffs. On the contrary, the appellate court has held that, the burden to proof *Nadabinama* that the deed was executed having knowledge and understanding of it's contents was on the defendant No. 1 and they have failed to prove whereas, the plaintiffs have proved their specific case as stated in paragraph No. 3 of the plaint. He next submits that, appellate court has passed the impugned judgment on proper appreciation of evidences and has discussed all the relevant evidences independently and has decided all the issues on the basis of the evidence on record. He, therefore, prays for discharging the Rule with exemplary cost.

10. I have heard the learned Advocates for both the parties, perused the impugned judgments as well as pleadings of the parties, the evidences and other materials on record.

11. The crux of this case is as to whether the impugned *Nadabinama* deed No. 1628 dated 12.03.1982 was executed by the plaintiff Nos. 1 and 2 having any knowledge about the contents or having understood the contents of the said deed. In other words, as to whether the said deed was obtained by misleading the plaintiffs Nos. 1 and 2 saying that it was a deed of partition. Moreover, this question has to be answered in the context that the executants were illiterate, as is evident from the unevenly signatures of the executants, put on the disputed deed. It is apparent from their signatures that they were totally illiterate rural people.

12. It is proved by exhibit 1, 2, 2(Ka) and 3 that, the plaintiffs and the defendant No. 1 are co-sharers under the said ROR Khatians and it is natural that the plaintiffs would prefer a fair partition, amongst them and the defendant, in respect of the property covered by the ROR khatians, exhibit 1, 2, 2(Ka) and 3.

13. The plaintiff No. 3 Md. Sundor Ali was a minor at the time of execution of the *Nadabinama* deed on 12.03.1982. It is also an admitted position that no guardian was appointed by any competent court, nor any sale permission was obtained on behalf of the plaintiff No. 3 to execute the impugned *Nadabinama* deed or any other deed. The trial court by its judgment and decree dated 11.09.2001 has dismissed the entire suit without any decision as regards the right and interest of the minor. P.W. 1 Md. Sundor Ali (plaintiff No.3).

14. P.W. 1, Sundor Ali is a party to the suit and was competent to depose as per section 120 of the Evidence Act, 1872, and in his deposition, the P.W. 1, has made it clear that other plaintiffs are his brothers and he has given deposition on their behalf and there was no conflict of interest amongst them.

15. Therefore, the P.W. 1, as a co-plaintiff, has narrated the entire case of the plaintiffs as has been stated in the plaint, signed by all plaintiffs, and has proved the R.O.R. khatian, which was marked as exhibit 1, 2 and 2(Ka) and he has also proved the certified copy of the impugned *Nadabinama* deed exhibit 3. The P.W. 1 has disclosed the entire case and nothing could be extracted to discredit in the course of his cross-examination.

16. The P.W. 3 Nazimul has clearly stated in his deposition that, "৮০ সনের মাঠ জরীপের রেকর্ড বিষয়ে শালিশ দরবার হয় পরে বন্টন দলিলের কথাবার্তা হয়।" Therefore, this oral evidence adequately prove the fact that the impugned *Nadabinama* deed was obtained by misleading them and that none of the executants went to the Sub-Registrar's Office to execute the said *Nadabinama* deed, as stated in paragraph No. 3 of the plaint that, "দলিল পড়িয়া শুনানো হয় নাই" and that, "১/২ নং বাদীগন অপরাপর মোকাবেলা বাদীগণের অনুমতিতে বন্টন পত্র দলিল মূলে ছাহাম মোতাবেক সুবিধাজনক ভাবে জমি জমার বিরোধ মিটাইবার জন্য ১নং বিবাদীর প্রস্তাবে সম্মত হইয়াছিল এবং আপোষ বন্টন দলিল হইতেছে মর্মে ১/২ বাদী উক্ত দলিলে টীপ স্বাক্ষর দিয়াছিল"

17. The plaint has been filed in the year 1998. The certified copy of the impugned *Nadabinama* deed No. 1628 dated 12.03.1982 has been proved and marked as exhibit-3, while the original copy the said deed has been proved by the defendants and marked as exhibit- Kha. In the very deed, it has been recorded at the end that, "প্রকাশ থাকে যে, এই দলিল

নাদাবীকৃত দলিল। অনুমান মূল্য মং ১০০/০০ টাকা হইতে পারে। তাহাই আমরা স্বেচ্ছায় স্বজ্ঞানে অত্র নাদাবীকৃত দলিল লেখাইয়া ও সম্পাদন করিয়া রেজিস্ট্রারীর জন্য দাখিল করিলাম।" It has not been recorded here that, the disputed deed was read out to the plaintiffs before receiving their signatures on it as the executants.

18. In this connection, the deposition of D.W. 3, who is one of the attesting witness is relevant to reproduce. During his cross-examination he has deposed that, "দলিল সম্পাদনের সময়ে সাব রেজিস্ট্রারের সম্মুখে আমি যাই নাই। দলিল পড়িয়া শুনাইয়াছে কিনা আমি জানি না। যখন টিপ দস্তখত এস. আর সাহেবের সামনে নেয়া হয় তখন আমি ছিলাম। পরে বলে আমি এস.আর সাহেবের সামনে ছিলাম না টিপ সরকার বাহিরে নিয়াছে।" On the other hand, I have found from the unevenly signatures, put by the executants on the disputed deed (Ext. "Kha") that the executants were illiterate rural people.

19. As such, it has been proved by above mentioned evidence that the signatures, on the disputed *Nadabinama* deed, of these two illiterate executants were taken without reading out or explaining the same document to them and by misleading them that this deed was a deed of partition, as has been clearly stated in paragraph No. 3 of the plaint and proved by the P.W. Nos.1-3 as well as by the facts and circumstances on this case.

20. I am also of the opinion that the requirement to read out a document to the executants before execution, is an usage and custom followed from the time immemorial. This custom, having the force of law, requires to record the fact in a deed, that the same was read out and explained to the executants, so that it can be inferred that they have executed the deed voluntarily and having understood the contents of the same. Unless a deed is read out to the executants, it cannot be said that they had understood its contents and had voluntary executed the same. However, there might be exception to this Rule and this might not be fatal in each case and the application of this Rule will depend upon the facts and circumstances peculiar to each case.

21. From the deposition of P.W. 1 Kalu Sheikh, husband of the defendant No. 1, it appears that she is the second wife of the D.W. 1. This D.W. 1, Kalu Sheikh, is not at all credible witness. He has placed and proved, on oath, a deed dated 19.12.1920 in the trial court. The trial court had suspected the genuineness of this deed dated 19.12.1920. Yet, the trial court has placed reliance upon the deposition of D.W. 1, in dismissing the suit. The plaintiff-appellant had to call for the relevant volume of deed No. 3739 dated 19.12.1920, before the appellate court, to discredit the D.W. 1. Accordingly, one Mizanur Rahman, Record Keeper of the concerned *Mohafezkhana* has appeared before the appellate court and deposed before the appellate court and has produced the concerned volume. He has shown a deed of similar number and date, from volume No. 37 page 177-178, and proved that the deed of the same number and date, as produced and proved by the D.W. 1 before the trial court and marked as exhibit "Ga (1)", was fake. Hence, this D.W.1, who is the main witness of the defendant, was not at all credible witness and the judgment of the trial court, based mainly on his deposition, has been rightly reversed by the appellate court.

22. I also find that, the appellate court has considered the issue of limitation and having examined the case of the parties as well as the entire evidences, in its totality, the appellate court has rightly held that the limitation period will be counted from the date of knowledge, which is as per provisions of section 18 of the Limitation Act, 1908. The appellate court has accurately found that the suit is not barred by limitation, because the limitation period shall be counted from the date of knowledge of this impugned *Nadabinama* deed obtained by practicing fraud upon the executants and that the plaintiffs have derived knowledge about the contents of the disputed deed on the date of obtaining certified copy on 20.05.1998.

23. As regards the burden to prove the fact that the impugned deed was obtained from executants by misleading them, the trial court has held that the burden of proof lied upon the plaintiffs, since, the plaintiffs disowned the *Nadabinama* deed. The appellate court was of the view that, this burden lied on the defendants. Having considered the provisions of section 102 of the Evidence Act, 1872, in the light of the facts and circumstances of this case, I am of the considered view that the burden to prove genuineness of this disputed *Nadabinama* deed lied upon the defendants, once the genuineness of the said deed has been denied by the plaintiffs. It is the defendant, who want from the court to believe their case that the *Nadabinama* (deed of surrender) was a genuine deed and it is they would loss in the trial court if the deed was not proved to be genuine one. The law of evidence would not facilitate forgery by unlawfully putting the burden on the victims of forgery. Therefore, finding of the appellate court on this issue is correct.

24. In the light of the deliberation recorded above, I am of the considered opinion that, the judgment and decree passed by the appellate court, in the fact and circumstances of this case, is absolutely lawful one and the same has resulted in no error, nor any failure of justice. The impugned judgment and decree passed by the appellate court is based on proper appreciation of evidences and the appellate court has discussed all the relevant evidences independently. I find no misreading or non-reading of any evidence in passing the impugned judgment and decree of the appellate court.

25. This Rule has no merit and the same should be discharged.

26. In the result, the Rule is discharged.

27. The impugned judgment and decree dated 18.04.2018 (decree signed on 26.04.2018), passed by the Special District Judge, Jamalpur, in Other Appeal No.2 of 2002, allowing the appeal and thereby reversing the judgment and decree dated 11.09.2001 (decree signed on 17.09.2001), passed by the Assistant Judge, Islampur, Jamalpur, in Other Class Suit No.55 of 1998, is hereby upheld.

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

29. Let a copy of this judgment along with the Lower Court's Record be sent down to the concerned Courts at once.

**16 SCOB [2022] HCD 45**

**HIGH COURT DIVISION**

Death Reference No. 60 of 2014 with Criminal Appeal No. 5628 of 2014 and Jail Appeal No. 136 of 2014 with Criminal Appeal No. 5640 of 2014 and Jail Appeal No. 134 of 2014 with Criminal Appeal No. 6082 of 2014 with Jail Appeal No. 137 of 2014

**The State and others**
Vs.
**Md. Shaheb Ali and others**

Dr. Md. Bashir Ullah, D.A.G with
Mr. SM Shahajahan, Advocate to assist the State with
Mr. Raja Kamrul Islam, A.A.G with
Mr. Md. Shamim Khan, A.A.G with
Mr. Al Mamun, A.A.G
…... For the State

Mr. A.K.M. Fazlul Huq Khan Farid, Senior Advocate with
Mr. Md. Abu Taher Miah, Advocat with
Mr. Saifur Rahman Rahi, Advocate
…For the condemned-prisoner-appellant
(In Criminal Appeal No. 5628 of 2014 and Jail Appeal No. 136 of 2014)

Dr. Saifuddin Mahmud, Advocate
... For the condemned-prisoner-appellant
(In Criminal Appeal No. 5640 of 2014 and Jail Appeal No. 134 of 2014)

Mr. Md. Hafizur Rahman, State Defence lawyer
...For the condemned-prisoner Md Ibrahim Hossain Sumon

Heard on 04.12.2019, 05.12.2019, 09.12.2019, 15.12.2019, 02.01.2020, 12.01.2020

Judgment on 27.08.2020 & 17.09.2020

**Present:**
**Ms. Justice Krishna Debnath**
And
**Mr. Justice Muhammad Mahbub Ul Islam**

**Editors' Note:**
In this case a boy of class VI was murdered and another boy of 8 years old witnessed it from a hiding place. Two of the accused made confessional statements which were not properly recorded by the concerned Magistrate. He did not alert them that they would not be remanded to Police custody if they failed to confess. He did not fill up the relevant columns properly. Furthermore, he did not make any certificate in column 8 of the confessional statement. The High Court Division held that when an eye witness categorically narrated the occurrence corroborating the confessional statements and other evidence on record, these types of omissions while recording confessions cannot be considered as fatal defects. High Court Division also modified the sentence of the convicts on consideration of their tender age.

**Key Words:**
Recording of confessional statement u/s 164 of the Code of Criminal Procedure; "শিশু আইন, ২০১৩"; Sections 4,34,102(2)(kha) of "শিশু আইন, ২০১৩" ;The Childrens Act, 1974; Sections 2,6(1),6(2),51,52 of the Childrens Act, 1974; Confessional statement of a co-accused

**Confessional statement of a co-accused:**
**It is the established legal principle that the statement under Section 164 of the Code can not be used against any other co-accused without any aid of further corroborative evidence and circumstances. ...(Para 44)**

**When an eyewitness corroborates the occurrence, some omission in recording confessional statements cannot be considered as fatal defects:**

**It is true that learned Magistrate P.W-11 Kazi Abed Hossen did not record the confessional statement under Section 164 of the Code of condemned-prisoner Sumon properly. He did not alert him that he would not be remanded to Police custody if he failed to confess or he did not fill up the relevant columns properly. Furthermore he did not make any certificate in column 8 of the confessional statement but we think this type of omission cannot be considered as fatal defect in this particular case when P.W-6 Md.Shakil the only eye witness of the case categorically narrated the occurrence and this statement was not challenged by defence. Moreover, P.W-6's statement corroborated the statements of P.W-5, 9, 13, 14 and 15 who stated that in their presence condemned-prisoner Sumon detected the dead body of deceased Injamul from place of occurrence. ...(Para 60)**

**Section 6 of the Children Act, 1974:**

**In this case it appears that at the time of framing charge Nahid was not below the age of 16 years. We find that in view of the aforesaid legal provision, the Judge of the Trial Court has not committed any illegality and as such we do not find that the judgment and order of the Trial Court invites our interference as it does not suffer from any legal infirmity, upon this point. ...(Para 71)**

**Section 100 of শিশু আইন, 2013:**

**The case in our hand, the impugned judgment and order of conviction and sentence was pronounced on 28.08.2014, that is after the pronouncement of "শিশু আইন, 2013". So, Section 100(2) (Kha) of "শিশু আইন, 2013" is applicable in this case. According to the 100(2)(kha) of "শিশু আইন, 2013" this case is deemed to be a "অনিষ্পন্ন কার্যাদি" and "যতদর সম্ভব এই আইনের বিধান অনুসারে নিষ্পন্ন করিতে হইবে;" means at the time of pronouncement of judgment the Trial Court must have followed this direction of law. ...(Para 74)**

## JUDGMENT

**Krishna Debnath, J:**

1. This Reference under Section 374 of the Code of Criminal Procedure ("Code") has been placed before us for confirmation of the death sentence of condemned-prisoners (1) Shaheb Ali, (2) Md. Ibrahim Hossain Sumon and (3) Nahid Islam@ Nahid passed by the learned Judge of the Additional Sessions Judge, 2nd Court, Gazipur in Session Case No. 357 of 2009 arising out of Tongi Police Station Case No. 22 of 2007 dated 19.10.2007 corresponding to G.R Case No. 969 of 2007 convicting the aforesaid condemned-prisoners under Sections 302/34 of the Penal Code and sentencing them to death.

2. Criminal Appeal No. 5640 of 2014, 5628 of 2014 and Jail Appeal No. 134 of 2014, 136 of 2014 have been filed by condemned-prisoners Shaheb Ali and Nahid Islam. Jail Appeal No. 137 of 2014 has been filed by Ibrahim Hossain Sumon. On the other hand Criminal Appeal No. 6082 of 2014 has been filed by Md. Hannan against the aforesaid judgment and order sentencing him to suffer rigorous imprisonment for 07(seven) years and to pay a fine of Tk. 20,000/-(twenty thousand) in default to suffer rigorous imprisonment for 03(three) months more under Section 201 of the Penal Code. But appellant Hannan was not present at the time of hearing this reference. All aforesaid Criminal Appeals and Jail Appeals were taken up together and heard along with the aforesaid death reference for disposal.

3. Relevant story of the prosecution for disposal of the case, in short, is that deceased Injamul a student of class VI on 17.10.2007 at 5.00 PM went out for walking with his friends but did not return back. The informant, mother of deceased Injamul P.W-2 Sajeda and others searched him various places but failed. On 18.10.2007 at about 5.30 PM some unknown persons informed Sajeda over a mobile phone No. 01721982426 that Injamul is now in their possession and they asked ransom. Injamul's mother tried to talk with her son but she found switched off their aforesaid mobile phone. Then the informant P.W-1 Md. Mubarrak Akanda, the brother-in-law of deceased Injamul lodged a FIR on 19.10.2007 at 11.35 PM with Tongi Police Station. Hence the case.

4. The Investigating Officer investigated the case. In the meantime the kidnappers demanded ransom of Tk. 10,00,000/- from P.W-2 Sajeda Begum, the mother of deceased Injamul up to 26.10.2007 through mobile call and the Informant informed the matter to the RAB. During investigation condemned-prisoners Md. Ibrahim Hossain Sumon and Nahid Islam Anik made judicial confessions under Section 164 of the Code which was recorded by the Judicial Magistrate. On completion of investigation Police submitted charge sheet against the aforesaid condemned-prisoners and convict-appellant under Sections 302/201/109/34 of the Penal Code. Thereafter observing all legal formalities learned Sessions Judge took cognizance against the aforesaid accuseds and transferred the case to Additional Sessions Judge, Court No. 2, Gazipur for trial and disposal. Thereafter observing all legal formalities learned Judge of the Trial Court framed charge against the condemned-prisoners and convict-appellant under Sections 302/201/109/34 of the Penal Code. The charge was read over and explained to the condemned-prisoners and convict- appellant to which they pleaded not guilty and claimed to be tried.

5. Prosecution examined as many as 15 (fifteen) witnesses in support of the case. Learned Judge of the trial Court on consideration of the evidences on record convicted and sentenced the condemned-prisoners and convict-appellant as aforesaid.

6. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence condemned-prisoners and convict-appellant preferred aforesaid Criminal Appeals and Jail Appeals.
We will now proceed to discuss the evidences.

7. P.W-1 Md. Mobarrak Akanda is the informant of the case. He was the brother-in-law of deceased Injamul at the time of occurrence. He narrated the FIR story. He stated that on 17.10.2007 at about 5.00 PM his brother-in-law Injamul went to play from their house but did not come back. They searched for him but failed. On 18.10.2007 his mother-in-law received a mobile call, they asked for ransom and switched their mobile off. He lodged the FIR and asked RAB to help. The kidnappers asked them to go to Azampur. The informant, accused Saheb Ali, Civil dressed Police and RAB tried to go there. But at that time kidnappers stated to his mother-in-law that they will not send back Injamul as there are many people with her. They came back to house. But Police out of suspicion arrested accused Shaheb Ali. The kidnappers also said that Shaheb Ali is a man of their group. The kidnappers then asked them to go to 'choydana', Malek's house. They informed this to Police. Police then arrested accused Sumon from that place and arrested accuseds Nahid and Hannan. He stated that Ibrahim Hossain Sumon and Nahid made confessional statements before the Magistrate. He identified them on dock. He further stated that accused Sumon and Nahid took them to Auchpara, Moktar Bari Road and to point out the dead body of Injamul in an abandoned

house of Zubaer. Police and RAB recovered that body and prepared inquest report and seizure list in his presence.

8. P.W-2 Sajeda Begum is the mother of deceased Injamul. She stated that on 17.10.2007 she was staying in her daughter-in-law's house. At 8.00 PM she came back to her house. Injamul was not in the house. They searched for him. On 18.10.2007 at about 5.30 PM she received an unknown call. They asked for Tk. 10,00,000/-, she started to cry, they switched off their mobile phone. On 19.10.2007 they lodged the FIR. As per directions of kidnappers they went to Azampur. Accuseds Shaheb Ali was with them. But at that time Shaheb Ali refused to go to the spot. She asked Shaheb Ali to return back Injamul from the kidnappers. At that time kidnappers made a mobile call to her and refused to send back Injamul. She requested Shaheb Ali to take the entire money and to return back Injamul, but he refused. The following day kidnappers made a call to her and asked her why she did not give the money to Shaheb Ali. On 24.10.2007 Police arrested Shaheb Ali. They ordered them to go to Board Bazar area to return back Injamul. On 26.10.2007 her daughter and one Halim went there. But they refused. On 26.10.2007 accused Hannan was arrested. On 27.10.2007 Police went to an abandoned house of Jubaer at Auchpara with accuseds Hannan, Sumon and Nahid and recovered her son Injamul's dead body.

9. In cross examination she stated that it is not a fact that kidnappers did not make any call to her and did not ask to her that why she did not give ransom money to Shaheb Ali.

10. P.W-3 Soheli Akhtar Dipa is the elder sister of deceased Injamul. She stated that on 17.10.2007 she and her mother went to her father-in-laws house at about 3.00 PM. At about 8.00 PM her mother came back to her house and saw Injamul was not there. Her mother called her. On 18.10.2007 at about 5.30 PM her mother received an unknown call. They stated that Injamul was staying with them and they demanded Tk. 10 lac as ransom. On 19.10.2007 her ex-husband P.W-1 Mubarrak Akand lodged the FIR. The kidnappers called her mother and demanded money and ordered to go to Azampur BRAC market. Her mother and accused Shaheb Ali went there. But ultimately Shaheb Ali refused to go with her and said to her mother that the kidnappers may be recognized him. On the following day kidnappers called her mother but she received the call. They said that her mother helped to arrest Shaheb Ali who is their elder brother and she did not do the right. They ordered them to come to Board Bazar. She informed the Police and RAB. They refused to take ransom. On 27.10.2007 Police recovered the dead body of Injamul.

11. In cross-examination she stated that there was no dispute in between Shaheb Ali and them. She stated that she did not recognize any voice of accuseds in telephone.

12. P.W-4 Shafiuddin Mollah is the father of deceased Injamul. He stated that he was in Lebanon in the year 1981 to 2009. On 17.10.2007 her wife called him and said that Injamul was missing. On 18.10.2007 her wife told that kidnappers asked ransom and they kidnapped Injamul. His wife collected Tk. 6 lac and ornaments. The kidnappers told her to come Azampur. His wife and Shaheb Ali went there but after some time Shaheb Ali refused to go to the spot. Shaheb Ali stated to his wife that kidnappers will recognize him. His wife requested Shaheb Ali to return back his son Injamul and receive money and ornaments. In the meantime Shaheb Ali was arrested by the Police. Police arrested Hannan, Sumon and Nahid also and recovered the dead body of his son from an abandoned house of Jubaer at Auchpara. On 28.10.2007 he came to Bangladesh.

13. In cross-examination he stated that they had no enmity with Shaheb Ali but Shaheb Ali asked some money to her wife one week before the occurrence.

14. P.W-5 Md. Rial is the uncle of deceased Injamul. He stated that on 17.10.2007 mother of Injamul said that Injamul was not in the house. On 18.10.2007 she stated that some kidnappers kidnapped Injamul and demanded Tk. 10,00,000/- as ransom. On 21.10.2007 they were going to Azampur to pay ransom but at one stage accused Shaheb Ali refused to go. Shaheb Ali said that the kidnappers will recognize him. In the meantime kidnappers called to Injamul's mother that they will not return back Injamul as there are many people with her. They came back and her sister Injamul's mother went to Shaheb Ali's house and requested him to take money and return back Injamul. Shaheb Ali refused but said he will try. After 2/1 days kidnappers ordered them to go to Board Bazar area. Injamul's sister P.W-3 Dipa, cousin Mukul went there. They and Police were standing inside the spot with civil dress. But kidnappers refused to take money. On 26.10.2007 Police arrested accused Hannan, Nahid, Sumon and recovered dead body of deceased Injamul.

15. In cross examination he stated that in his presence Shaheb Ali refused to go to the spot and said that kidnappers will recognize him.

16. P.W-6 Md. Shakil is a 12 years old boy. He stated that, "ঘটনার তারিখ ১৭/১০/২০০৭ ইং। আমি সেদিন মার্বেল খেলছিলাম। সুমন আমাকে বলে ইনজামুলকে ডেকে আনতে। আমি ইনজামুলকে দোকানের সামনে দাঁড়িয়ে থাকতে দেখি। আমি ইনজামুলকে বলি যে, সুমন তাকে এয়ারগান নিতে ডাকছে। ইনজামুল তখন নাহিদ ও সুমনের কাছে যায়। ইনজামুল তখন কলম ও কাগজ আনতে তাদের বাসায় যায়। সে কাগজ ও কলম আনে ও আমাকে বাসায় যেতে বলে। ইনজামুল ও আমাদের বাসা পাশাপাশি। ইনজামুল, সুমন, নাহিদ, একটি ভাঙ্গাচুড়া বাড়ীঘরে যায়। বাড়িটি ভাঙ্গা চোরা। আমি এয়ারগান দিয়ে পাখি মারা দেখার জন্য পাশে একটি রুমে দাঁড়িয়ে ছিলাম। ঘরের একটি ছিদ্র দিয়ে আমি তাকিয়ে দেখছিলাম। সুমন ইনজামুলের মায়ের মোবাইল নম্বর জিজ্ঞেস করছিল ও সুমন উক্ত নম্বরটি কাগজে লিখছে। সুমন প্রথমে নাহিদের গলায় রশি দিয়ে বলে কেমন লাগে? তারপর সুমনের গলায় রশি দেয় নাহিদ এবং জিজ্ঞেস করে কেমন লাগে? তারপর সুমন ও নাহিদ মিলে ইনজামুলের গলায় রশি দেয়। ইনজামুল গলায় ব্যাথা লাগছে বলে ছেড়ে দিতে বলে। কিন্তু সুমন ও নাহিদ আরও জোরে টান দেয়। তখন ইনজামুল মাটিতে পড়ে যায়। সুমন ও নাহিদ তখন ইনজামুলকে হাত ধরে টেনে হিছড়ে অন্য ঘরে নিয়ে যায়। ইনজামুল তখন কোন কথা বলতে পারেনি। ইনজামুলকে মাটিতে শুইয়ে দিয়ে প্রথমে বালু ও পরে ইট দেয়। আমি তখনও কিছু বুঝতে পারিনি। তখন প্রায় রাত হয়ে যাচ্ছিল। আমি ওয়াল বেয়ে যাবার সময় শব্দ পেয়ে সুমন আসে। সুমন আমাকে বলে যে, আমরা যা যা করেছি তা তুই দেখছিস। তুই কাউকে বললে ইনজামুলের মতো তোকেও মেরে ফেলবো। আমি বলেছি যে, আমি কাউকে বলবোনা। ওরা আমাকে বসিয়ে রাখে। রাত অনেক হলে আমি বাড়ি চলে যাই। উক্ত ঘটনা ভয়ে আমি কাউকে বলিনি। সুমন ও নাহিদ ধরা পড়ার পর উক্ত ঘটনা আমি দেখেছি বললে পুলিশ আমাকে নিয়ে থানায় যায় ও পরে কোর্টে আনে। আমি ম্যাজিস্ট্রেটের কাছে সব ঘটনা বলেছি। সুমন ও নাহিদ অদ্য ডকে দাঁড়ানো আছে।"

In cross examination he stated that "ঘটনার ২/৩ দিন পর পুলিশ আমাকে ধরেছে। আমি ম্যাজিস্ট্রেটের কাছে ঘটনা বলেছি। যা বলেছি তা স্মরণ আছে। সাহেব আলী সুমনকে ২,০০০/- টাকা দিয়েছে কিনা, নাহিদকে ৫৪০/- টাকা ও আমাকে ৫০/- টাকা দেবার কথা ম্যাজিস্ট্রেটের নিকট বলেছি কিনা স্মরণ নেই। আমি পুলিশকে বলেছি যে, সাহেব আলী সুমন ও নাহিদকে কি যেন বলাবলি করছিল। ঈদের আগে সাহেব আলী সুমন ও নাহিদকে একলক্ষ টাকা দিতে চায় একথা পুলিশের নিকট বলেছি। আমি আরও বলেছি যে, প্রথম প্লান করে ভুতের বাড়ীতে ঐ প্লান করা সময় আমি ওদের পাশেই ছিলাম।

সত্য যে, আমিই ইনজামুলকে ডেকে এনেছিলাম। আমি ম্যাজিস্ট্রেটের নিকট বলেছি যে, আমি চুপ করে চলে যাই। পাশের বাড়িতে যাই কিনা মনে নেই। ইনজামুলের মানিব্যাগ নেবার কথা, মোবাইল নম্বর মিলানোর জন্য ফোন করার কথা ইত্যাদি বলেছি। সুমন বলে যে, ইনজামুল তাকে ৩০০/- টাকা দিয়েছে। আমি বলেছি টাকা দিয়েছে নাকি তাকে মেরে ফেলেছো। সুমন ও নাহিদ আমাকে উত্তরা

ব্র্যাক মার্কেটে নিয়ে যায়, একথা বলেছি। আসামী সুমন ও নাহিদ ঘটনার পর আমাকে সব সময় তাদের কাছে রাখতো। আমি শেরপুর জেলা থেকে এসেছি। আমার মায়ের সাথে এসেছি। মা বলেছে আজ কোর্টে সাক্ষী দিতে হবে। মা ঢাকায় কাজ করে।
সত্য নয় যে, সে ইনজামুলের বাসায় কাজ করে। আমি নানা নানীর সাথে শেরপুর থাকি। সত্য নয় যে, আমি একজন ভাসমান টুকাই।
সত্য যে, আজ আমি ইনজামুলের বাবার গাড়ীতে এসেছি। আমি এর আগেও একদিন কোর্টে এসেছিলাম। আমার মায়ের সাথে এসেছিলাম। সত্য নয় যে, আমি ইনজামুলের খুনের সহিত জড়িত একজন। সত্য নয় যে, খুনীদের বাঁচানোর জন্য মিথ্যা সাক্ষ্য দিলাম।"

17. P.W-7 Shah Md. Mojahidul Islam stated that in his presence Police arrested Hannan and Sumon. They recovered a 'Sprint Mobile' from Hannan and a 'simcard' of 'warid' from Sumon. They prepared seizure list in his presence and he signed on it. He heard that accuseds demanded ransom with that mobile and simcard and killed Injamul. He identified accuseds Hannan and Sumon on dock.

18. P.W-8 Hazi Khalilur Rahman Mollah is the elected commissioner of the place of occurrence. He stated that on 26.10.2007 at about 10/10.30 AM RAB recovered a mobile phone from Hannan and warid sim from Sumon in his presence.

19. P.W-9 Md. Nashir Uddin Molla stated that in his presence Police/RAB recovered the dead body of Injamul. Police prepared inquest report in his presence and he signed on it.

20. P.W-10 Iqbal Hossain, Sub Inspector of Police stated that on 25.10.2007 he was posted in RAB-11, Company-2 Shimultoli, Gazipur. He collected call lists from informant and arrested accused Hannan. He identified the phone numbers from which accuseds demanded ransom from the mother of victim Injamul. Then they arrested Sumon and recovered simcard. They identified the dead body of Injamul and they stated the plan and occurrence vividly. Police/RAB recovered the dead body from an abandoned house of Jubaer.

21. In cross examination he stated that it is not a fact that recovered mobile phone was not Hannan's phone.

22. P.W-11 Kazi Abed Hossen, 1st Class Magistrate, Gazipur stated that, in his presence Police/RAB recovered the dead body of Injamul. Police prepared the inquest report and he signed on it.

23. He stated that on 28.10.2007 at about 3.00 PM he recorded the confessional statement of condemned-prisoner Sumon under Section 164 of the Code after complying with all legal formalities.

24. He further stated that on 28.10.2007 at 12.00 PM he recorded the confessional statement of condemned-prisoner Nahid under Section 164 of the Code after complying with all legal formalities.

25. In cross-examination he stated that it is not a fact that he did not record the statements properly. He further stated that it is not a fact that at the time of recording the confessional statement accused Nahid was a minor boy and for that reason he did not mention his age in the form.

26. P.W-12 Dr. Md. Saifuddin was working in the Gazipur Sadar Hospital as a Medical Officer. He stated that on 27.10.2007 a Medical Board held the Post Mortem of deceased Injamul. He was a member of the Board. He found the following injuries:-
1. One continuous ligature mark around the neck. Breadth of the ligature mark 1.5 Cm.

27. He opined that in their opinion death was due to asphyxia resulting from ligature strangulation which was antemortem and homicidal in nature.

28. P.W-13 Nasir Uddin, Sub-inspector was serving in RAB 11, Shimultoly on 19.10.2007. On 20.10.2007 informant of the case, mother and sister of deceased Injamul came to their office and complained that some kidnappers demanded ransom and kidnapped Injamul. They verified the matter, collected the phone numbers and arrested Hannan from Gias Manson Garments Factory. They arrested Sumon also and recovered the simcard and confirmed that they used this mobile set and simcard and demanded ransom from Injamul's mother. They disclosed the name of Shaheb Ali. On 27.10.2007 in presence of the Magistrate they recovered the dead body of Injamul. He identified the mobile set and simcard and accused Sumon and Hannan on dock.

29. In cross examination he stated that it is not a fact that he did not recover the mobile phone set and simcard from them.

30. P.W-14 Al-amin stated that in his presence dead body of Injamul was recovered and he raised and brought the dead body in Morgue.

31. P.W-15 Md. Alam Chand, Sub-Inspector of Police is the Investigation Officer who investigated the case. He stated that during investigation he visited the place of occurrences and prepared the sketch map with index. He examined the witnesses of the case and recorded their statements under Section 161 of the Code. Mother of the victim P.W-2 Sajeda Begum informed this matter to RAB. He arrested accused Shaheb Ali. They and RAB jointly arrested accused Hannan and Sumon and recovered a mobile phone and simcard. They demanded ransom from Injamul's mother. Accused Sumon told that on 17.10.2007 they killed Injamul. They went to the place of occurrence and in presence of Magistrate they raised the dead body of Injamul, prepared inquest report, seizure list. Informant and mother of the victim identified the dead body. He arrested accused Nahid. He sent accused Sumon and Nahid before Magistrate for recording their confessional statement under Section 164 of the Code. He collected the Post Mortem report. He stated that after scrutinizing all the papers connected with the instant case and observing all the formalities he submitted charge sheet against the accuseds under Sections 302/201/109/34 of the Penal Code on 12.09.2008.

32. These are all the evidences of the prosecution in support of the charge against the condemned-prisoners.

33. In this case condemned-prisoners Ibrahim Hossain Sumon and Nahid Islam made confessional Statements before Magistrate 1st Class under Section 164 of the Code. To have a better view of the matter, we would like to quote the statements of the accuseds which reads as under :-

**Confessional statement of Ibrahim Hossain Sumon**

"আমি মালেকের বাড়ী গিয়ার ফ্যাশনে চাকরি করি। অফিস থেকে আসার সময় রাত ৮.০০ টায় পাশের মোড়ে দেখি সাহেব আলী সিগারেট খাচ্ছে। রিকসা ছেড়ে দিয়ে হেঁটে যাচ্ছিলাম। সাহেব আলী তাকে বলে যে, ঈদের (অপাঠ্য) কবে তোদের। আগামীকাল (পরদিন) দেখা করতে বলে। ভুতের

বাড়ীতে। পরদিন নাহিদ ও শাকিলকে নিয়ে যাই। আমরা যাওয়ার পর সাহেব আলী আসে। শাকিলকে পাঠিয়ে দিতে বলে। বলে যে, তোরে এমন টাকা আমি দেব যে জীবনে তোর আর চাকরি করতে হবে না। আমার ১টা কাজ করে দিবি। ১ লক্ষ টাকা বলে। পরে আরও ২০,০০০/- টাকা বাড়ায় দিতে বলে। তখন আমরা রাজি হই। আমরা কি কাজ জিজ্ঞেস করি। তখন ২০০০/- টাকা খেতে দেয়। তখন বলে ১টা ছেলেকে মেরে ফেলতে বলে। জিজ্ঞেস করি কে? সে বলে ইনজাম। মেরে ফেলার সাথে সাথে তুই টাকা পাবি। এ কথাগুলি ঈদের ৪/৫ দিন আগে। ১দিন পর দেখি যে জায়গায় মারার কথা সেখানে বালি ফেলতেছে। গাছগুলিও কাটে। আমি আর নাহিদ তখন বাউন্ডারিটার ভিতরে ঠিক করি। আমি শাকিল, নাহিদ জায়গাটা দেখি। শাকিলকে বলিনি (অস্পষ্ট)? পরদিন ইট আনি ও বালু বাউন্ডারির সাথেই ছিল। পরদিন আরো কিছু পোলাপান নিয়ে জায়গাটা তৈরী করি। শাকিলের (ছেঁড়া) তাদের বলি যে, খেলা করছি। ০৩ দিন ধরে করি। নাহিদ ০২ দিন করে। আমি আর শাকিল সবসময় কাজ করি। সাহেব আলী ঈদের দিন মারতে বলে। আমরা না করায় ১৬ তাং শাকিলকে পাঠায় ০১ বার। তখন পায়নি। এসে পড়ে । ১৭ তাং আমরা ২ টায় ইনজামের বাসার সামনে যাই। কাইয়ুম ও তার বন্ধু ছিল। ওরা জানেনা। শাকিলকে ও সাহীনকে পাঠাই। ২.৩৫ এ ওরা নিয়ে আসে। কাইয়ুমরা গার্মেন্টস পর্যন্ত এসে বাসায় যায়। শাকিল আর নাহিদ যায়। আমি কলম, কাগজ আনি। দেয়াল টপকায় যাই। ইনজামের বাসার নম্বর চাই। নাহিদ চায়। নাহিদকে দেই। শাকিলকে পাঠিয়ে দেই। নাহিদ প্রথমে গলায় পেচায়। ইনজাম ও আমি একদিকে করে ধরি খেলার ছলে। পরে ইনজামকে খেলার ছলে ধরি। আমি আর ছাড়িনি। ইনজামকে পেচাই। তার জায়গায় কেবল নাহিদ ধরে। আমি ধরেই থাকি। নাহিদ টাইট দেয়া শুরু করে। সুতার রশি। সে ছেড়ে দিতে বলে। আমরা ধরে থাকি। সে বসে পড়ে। আমরাও বসে পড়ি। সে ছাড়ানোর চেষ্টা করে। পরে চোখ বন্ধ করে । জিহ্বা অল্প বের করে মারা যায়। পাশের রুমে রাখি। লতাপাতা গুলি (অস্পষ্ট)। নাহিদ বসা লাশের কাছে। আমি হাত ধরি, নাহিদ পা ধরে। পূর্ব পশ্চিমে শোয়াই। লতাগুলি দেই। মানি ব্যাগ নেই। বালি দেই। দুই লাইন ইট বিছাই। তারপর বালি দেই। জুতা পাশের পানিতে ফেলি কচুরিপানার উপর। শাকিল দেখে কিন্তু আমরা জানতাম না সে যে দেখছে। মানি ব্যাগে ২৩২/- ছিল। শাকিল ও বাচ্চাদের খাওয়াতে নেই। টেলিফোনের দোকান থেকে ওরা বাসায় ইনজামুলকে চায়। ঈদ মোবারক দিতে বলে।

পরদিন ১৮/১০/২০০৭ অফিস যাই। হান্নানকে সব খুলে বলি। সন্ধ্যা ৬.০০ টায় ইনজামের বাসায় হান্নান তার মোবাইল থেকে call করে। ইনজামের আম্মাকে বলে আপনার ছেলে আমাদের কাছে। চট্ট গ্রাম থেকে বলছি। টাকা লাগবে। সংখ্যা বলেনি। সাথে সাথে call আসে। সে সীম খুলে রাখে। পরদিন শুক্রবার। নাহিদকে নিয়ে ৪ টায় হান্নানের বাসায় আসি। ৭.০০ টায় তাকে পাই। তাকে call দিতে বলি। সে বলে SIM ভেঙ্গে ফেলেছি। এক দোকানদারের কাছে ২০০ টাকা পেতাম। ৯০ টাকা খাই। বাকী টাকা WARID এর SIM নেই। নাহিদ ১টা মোবাইল আনে। পরে শুনি হানিফের । call দেই। ১০ লাখ চাই। পরদিন সকালে call দেই। টাকা চাই। তারা প্রমাণ চায়। জুতার কথা বলি। গিয়ে দেখি চুরি হয়েছে। ৩ লাখ দিতে চায়। নাহিদ না করে। পরে সব দিতে চাইলে নাহিদ বলে, আল্লার জবান আমি ফিরায় দিব। House Building এ যেতে বলে নীল শাড়ি পড়ে। পরে কাল শাড়ি পরে আসতে বলে। সাথে ১ জন পাঞ্জাবী পড়া আসতে বলে। ১ ঘন্টা আগে call দেই। ৫.৩০ এ আবার call দেই। পরে সাহেব আলী call দেয়। বলে যে, সাবধানে থেকো। আরো ক'জন লোক আসছে। নেমে মার্কেট থেকে ভিতরে যাই। আমি লুকিয়ে call দেই। বেশি লোক আনছেন কেন? শাকিল সাথে ছিল। পরদিন অফিসে যাইনি। Spot এর কাছে এসে (ছেঁড়া) পাই। সেখানে গিয়ে দেখি গন্ধ এখান থেকেই আবার ইট দেই। রাতে call দেই। নাহিদ বলে। ৪ লাখে সুবিধা পাইছেন। এখন ৭ লাখ দিবেন। সোমবার টাকা দিবে বলে। পরদিন অফিসে গিয়ে হান্নানকে বলি। হান্নান call দেয়। সে গালি দেয়। পরদিন বৃহস্পতিবার ইনজামের বোন কথা বলে। ৫ লাখে রাজি হয়। রাতে call দেই। ইনজামের গলা শুনতে চায়। কাজি রুহুল আমিনকে ঠিক করি। শুক্রবার ২৬ তাং হান্নানের মোবাইলে কম শোনা যায় বলে সে No এ call করি। বোর্ড বাজার টাকা আনতে বলি। রুহুল বলে দীপা আপু আমাকে নিয়ে যান। ভালো লাগেনা। আমরা চলে আসি। রাত ৮ টায় ছাদে যাই। পরে হান্নানকে ৯ টার দিকে RAB Police ধরে। ১ ঘন্টা পর উপরে এসে আমাকে SI নাসির ধরে। আমি রাত ৩ টায় RAB ও Police কে জায়গা দেখাই। আমরা সাহেব আলীর কাছে টাকা চেয়েছিলাম। দিবে বলে দেয়নি।"

**Confessional Statement of Nahid Islam**

"সাহেব আলী ভূতের বিল্ডিং এ ডাকে। ঈদের ২/৩ দিন আগে। বলে ১ টা ছেলেকে মারতে হবে। ঈদের দিনে। আমি বলি কেউ (অস্পষ্ট) পারে না। ১ লক্ষ ২০,০০০/- ঠিক হয়। কাজের পরদিন দিবে।

আগে ২০০০/- দেয়। ১৭/১০/০৯ শাকিল ডাক দেয়। ৩.১৫ টায় ইনজাম বেড়ায়। আমি, সুমন সে ও শাকিল এক সাথে যাই। সুমন কলম, প্যাড আনতে যায়। তারে ঢুকাই ঐ Spot এ। নম্বর নেই ইনজা-মর মায়ের। রশি বের করি। সুমন আগে আমার গলায় দেয়। সুমন একদিকে, ইনজাম আরেকদিকে। কথা বলতে পারি না। ছাড়ে। পরে ইনজামকে বলে । আমি ১ দিকে, সুমন ১ দিকে। প্রথমে ১ টা প্যাচ তারপর ২ জন জায়গা বদলি করে আর ১ টা প্যাচ দেই। হাত দিয়ে নিষেধ করে, পড়ে যায়। ১৫/২০ মিঃ ধরে ২ জন ধরে রাখি। সে তারপর ছাড়লে ঘর ঘর শব্দ করে। পরে আবার ধরি। মারা যায়। পাশের রুমে রাখি। আমি পায়ে ধরি, সুমন হাতে ধরে ঐ রুম থেকে এ রুমে নিয়ে আসি। আমার খারাপ লাগছিল। ছেড়ে দিতে বলি। সুমন বলে ছাড়লে আমরা মরব। লতাপাতা দিয়ে ঢাকি। বালু দিতে আসি। শাকিল আসে পরে। আমরা বালি দিতে বলি। আমি ইট দেই। পরে বালি দেই। পরদিন আবার ইট দেয়। আমি ছিলাম না। আমাকে ৫৬০ টাকা সুমন দেয়। ২,০০০/-থাকে। দোকানে গিয়ে চা বিস্কুট (ছেঁড়া) মারার দিন। ২/৩ দিন পর দেখা হয়। পচা গন্ধ পাই। সাকিল, সুমন ও আমি এবং কিছু বাচ্চা মিলে বালি দেই। পানি দেই। আমি নানার বাসায় যাই। এসে শুনি ডিম ভাজি করে ওখানে ভাত, ওরা ভাত খাবে। আমি খাইনি। এসে দেখি শাকিলরা সিগারেট খায় বলে মোর্শেদরা তাকে মারে। ওয়ারিদের মোবাইল কার্ড কেনে। আমাকে কথা বলতে বলে। সুমন বলে ১০ লাখ। তার আগে আমি বলি। ওর মা রাজি হয়। আজমপুর ব্রাক মার্কেট ঘুরাই টাকা দেয়ার নামে। অনেক মানুষ। রেল লাইনে বসি। সাহেব আলীকে ধরছে দেখি। এরপর সুমনরা কি করছে বলছে জানি না। ইনজামের মানি ব্যাগ নিয়ে আমাকে দেয়। আমি ড্রেনে ফেলী।"

34. Dr. Md. Bashir Ullah, learned Deputy Attorney General with Mr. Raja Kamrul Islam, learned Assistant Attorney General with Mr. Md. Shamim Khan, learned Assistant Attorney General with Mr. Al Mamun, learned Assistant Attorney General appearing on behalf of the State placed before us the FIR, Charge Sheet, the depositions of the witnesses, Post Mortem report, seizure list, confessional statement of Sumon and Nahid made under Section 164 of the Code, judgment and other relevant materials on record.

35. Dr. Md. Bashir Ullah, learned Deputy Attorney General submits that the learned Trial Court rightly relied upon the above mentioned evidences including confessional statements made under Section 164 of the Code of condemned-prisoner Nahid and Sumon, evidences of recovery the dead body of deceased Injamul, mobile messages and relevant simcard with mobile set and other evidences arrived at a correct decision against the aforesaid condemned-prisoners and convict-appellant. Learned Deputy Attorney General also referred the cases of 47 DLR(AD)(1995) Abdul Munem Chowdhury @ Momen vs. State, 17 BLC(2012)176 State vs. Ripan Howlader and another, 46 DLR(1994)461 Bimal Das vs. The State, 47DLR(1995) 542 Baktiar Hossain vs. State, 14BLD(AD)(1994)218 Bimal Das vs. The State, 19 DLR(1967) 573 Hari Pada Debnath and another vs. The State, 15DLR(1973)41 The State vs. Badiuzzaman and another, 23 BLD(AD)(2003) 187 Mona Alias Zillur Rahman vs. The State.

36. Mr. SM Shahajahan, learned Advocate assists the State. He submits that it appears from record that the confessional statements of Nahid and Sumon were duly recorded by P.W-11 learned Magistrate Mr. Kazi Abed Hossain. The confessing accuseds did not report to the Magistrate about any torture by the Police and no such allegation of torture has been recorded by the Magistrate. He further submits that accused Nahid was adult as per law at the time of recording the confessional statement and these statements are fully inculpatory in nature, as well as voluntary and true. He further submits that with the aid of corroborative evidences of P.W-1, P.W-2, P.W-3 and P.W-6 learned Trial Court rightly relied upon the confessional Statements of Nahid and Sumon and arrived at a correct aforesaid decision against the condemned-prisoners and appellants.

37. Dr. Saifuddin Mahmud, learned Advocate appearing on behalf of condemned-prisoner Shaheb Ali submits that condemned-prisoner Shaheb Ali did not confess his guilt under

Section 164 of the Code. He submits that the conviction can be based on co-accused's judicial confession if it is established that it is true and voluntary and is substantiated by other evidences, whether direct or circumstantial and materials on record. But in this case he submits, P.W-11 Kazi Abed Hossain, learned Magistrate 1st Class did not observe the formalities of section 164 and 364 of the Code at the time of recording the confessional statements of co-accuseds Sumon and Nahid. He further submits that in this case learned Judge of the Trial Court failed to asses the truthfulness of the confessional statement of co-accuseds and for that reason except this questionable confessional statements of co-acuseds, without aid of other direct or circumstantial evidences against condemned-prisoner Shaheb Ali, it is unsafe to convict under Section 302 of the Penal Code and thus the impugned judgment and order of conviction and sentence is liable to be set aside. He also refered the case of 21 DLR(SC)(1969) Md. Ramzan vs. Nasir Hossain and another.

38. Mr. Md. Hafizur Rahman Khan, learned State Defence Lawyer on behalf of condemned-prisoner Ibrahim Hossain Sumon submits **firstly,** that the so-called confessional statement was not properly recorded by learned Magistrate **secondly**, at the time of occurrence P.W-6 Md. Shakil was a boy of 8 years old only, and it is unsafe to believe his statement, **thirdly**, the Investigating Officer P.W-15 Md. Alam Chand did not properly seized the so-called call list, **fourthly**, it appears that Sumon was arrested on 26.10.2007 at 7/8 PM but produced before Magistrate on 28.10.2007 at 12.10 PM **fifthly**, condemned-prisoner-appellant Sumon retracted his so-called confession on 13.12.2007 just after 45 days. **Lastly**, he submits that the learned Judge of the Trial Court misinterpreted, misread and misunderstood the oral evidence as well as so-called confessional statement and documentary evidence in the case and erred in convicting and sentencing the condemned-prisoner Sumon on such misreading and misapplication of evidence and as such the impugned judgment is liable to be set aside in respect of condemned-prisoner Ibrahim Hossain Sumon.

39. Mr. A.K.M. Fazlul Huq Khan Farid, learned Senior Advocate with Mr. Md. Abu Taher Miah, learned Advocate with Mr. Saifur Rahman Rahi, learned Advocates appearing on behalf of condemned-prisoner-appellant Nahid Islam submit **firstly,** that Nahid was a minor boy at the time of occurrence, **secondly** at the time of recovery the dead body of deceased Injamul, he was not present in the place of occurrence, **thirdly** P.W-6 was a minor boy but learned Judge did not examine him that he is capable to give any evidence on dock. **Lastly,** Mr. Farid submits that the learned Magistrate failed to record his so-called confessional statement under Section 164 of the Code properly and as such the judgment and order of conviction and sentence is liable to be set aside in respect of Nahid.

40. Now in view of submissions and counter submissions of the learned Deputy Attorney General, learned State Defene Lawyer and learned Advocate of the condemned-prisoner-appellants Nahid and Shaheb Ali as above, let us review the relevant evidences and materials on record and scan the attending circumstances of the case to arrive at a correct decision as to whether the learned Judge was justified in passing the impugned judgment and order of sentence.

41. It has been established by the evidences of P.W-12 Dr. Md. Saifuddin Ahmed and other witnesses that Injamul was murdered as alleged by the prosecution and this is not disputed by the defence. The material point which called for determination is whether the condemned-prisoners or any of them committed the said murder in furtherance of their common intention.

42. This is undeniably a case of gruesome murder of a young boy the unfortunate Injamul. It appears that the learned Judge of the Trial Court considering the **(a)** judicial confession of condemned-prisoners Sumon and Nahid made under Section 164 of the Code, **(b)** P.W-6 Md. Shakil's statement, who is an eye witness of the occurrence **(c)** statements of P.W-1,2,3 and others **(d)** recovery of the dead body of Injamul which was detected by condemned-prisoner Sumon and convict-appellant (now absconding) Md. Hannan, **(e)** recovery of simcard and mobile set from Sumon and Hannan found them guilty as aforesaid.

43. Firstly, let us see whether learned Judge of the Trial Court considering the facts, circumstances and evidences, convicted the condemned-prisoner-appellant Shaheb Ali correctly or not.

44. Admittedly, condemned-prisoner-appellant Shaheb Ali did not confess his guilt. It is the established legal principle that the statement under Section 164 of the Code can not be used against any other co-accused without any aid of further corroborative evidence and circumstances. In this case co-accused Sumon categorically stated in his statement made under Section 164 of the Code that "আমি মালেকের বাড়ী গিয়ার ফ্যাশনে চাকরি করি। অফিস থেকে আসার সময় রাত ৮.০০ টায় পাশের মোড়ে দেখি সাহেব আলী সিগারেট খাচ্ছে। রিকসা ছেড়ে দিয়ে হেঁটে যাচ্ছিলাম। সাহেব আলী তাকে বলে যে, ঈদের (অপাঠ্য) করে তোদের। আগামীকাল (পরদিন) দেখা করতে বলে। ভুতের বাড়ীতে। পরদিন নাহিদ ও শাকিলকে নিয়ে যাই। আমরা যাওয়ার পর সাহেব আলী আসে। শাকিলকে পাঠিয়ে দিতে বলে। বলে যে, তোরে এমন টাকা আমি দেব যে জীবনে তোর আর চাকরি করতে হবে না। আমার ১টা কাজ করে দিবি। ১ লক্ষ টাকা বলে। পরে আরও ২০,০০০/- টাকা বাড়ায় দিতে বলে। আমরা তখন রাজি হই। আমরা কি কাজ জিজ্ঞেস করি।তখন ২০০০/- টাকা খেতে দেয়। তখন বলে ১টা ছেলেকে মেরে ফেলতে বলে। জিজ্ঞেস করি কে? সে বলে ইনজাম। মেরে ফেলার সাথে সাথে তুই টাকা পাবি।"......"সাহেব আলী ঈদের দিন মারতে বলে।"
Condemned-prisoner Nahid in his statement made under Section 164 of the Code also stated that "সাহেব আলী ভুতের বিল্ডিং এ ডাকে। ঈদের ২/৩ দিন আগে। বলে ১ টা ছেলেকে মারতে হবে। ঈদের দিনে। আমি বলি কেউ (অস্পষ্ট) পারেনা। ১ লক্ষ ২০,০০০/- ঠিক হয়। কাজের পরদিন দিবে। আগে ২০০০/- দেয়।"

45. In this case P.W-1 Md. Mobarrak Akanda the informant of the case stated on dock that the kidnappers asked them to go to Azampur. The informant, accused Shaheb Ali and others tried to go there. But kidnappers stated to his mother-in-law P.W-2 Sajeda Begum that they did not send back Injamul as there are many people with her. The kidnappers also said to her that Shaheb Ali is a man of their group. It appears from record that accused Shaheb Ali did not deny this statement that it is not a fact that Shaheb Ali is a member of kidnapper's group.

46. P.W-2 Sajeda Begum, the mother of deceased Injamul stated on dock that "তারা আমাকে টাকা ও গহনা নিয়ে উত্তরা আজমপুর ব্রাক মার্কেটে যেতে বলে এবং উক্ত স্থানে বাথরুমের জলছাদে টাকা ও গহনা রেখে আসতে বলে। তারা আমাকে কালো শাড়ি পড়ে যেতে বলে কিন্তু আমি কালো শাড়ি পড়ে যাইনি। আমি একা টাকা নিয়ে যেতে সাহস না পেলে আসামী সাহেব আলীর বড় ভাই সেলিমকে সাথে নিয়ে যেতে চাই। কিন্তু সেলিম আমার সাথে যায়নি। সাহেব আলীকে আমার সাথে পাঠায়। আমি ও সাহেব আলী একটি রিকসায় উঠি। সামনেই সাহেব আলীর মেজ ভাই তাদের দোকানে বসা ছিল। সাহেব আলী ও তার মেজ ভাই পরস্পর চোখ ইশারা দিলে উহা আমি দেখে ফেলি। অতপর কলেজ গেটে সি, এন,জি ভাড়া করি। আমি ও সাহেব আলী উত্তরা আজমপুর পর্যন্ত গেলে সাহেব আলী আমাকে জানায় মার্কেটে কথিত স্থানে সে যাবে না। আমি না যাবার কারণ জিজ্ঞাসা করলে সে জানায় যে, ওখানে গেলে অপহরণকারীরা তাকে চিনে ফেলবে। আমি তখন সাহেব আলীকে বলি যে, তোমাকে তারা চিনলে তুমিও তাদের চেন। আমি টাকা দিব। তুমি ইনজামুলকে ফেরৎ আন। আমি কোনদিন কারো কাছে মুখ খুলবো না। তারপর সাহেব আলী রাজী হয় এবং ব্র্যাক মার্কেটে যাই।

তখন একটি ফোন করে অপহরণকারীরা বলে যে, এত লোক এনেছেন কেন? আপনার টাকা নিব না। আপনার ছেলের সার্ট প্যান্ট পাঠিয়ে দেব। আপনার ছেলের শরীরের কোন পশমও দেখতে পাবেন না। আমি তখন টাকা ফেরৎ নিয়ে বাসায় চলে আসি। আমি তখন টাকার ব্যাগ নিয়ে সাহেব আলীদের বাসায় ঢুকি। সেখানে তার একটি ঘরে ঢুকে আমি সাহেব আলীকে অনুরোধ করি টাকার ব্যাগটি রাখতে এবং আমার ছেলেকে ফেরৎ দিতে। কিন্তু সাহেব আলী টাকার ব্যাগ রাখেনি। আমি টাকার ব্যাগ নিয়ে বাসায় চলে আসি। পরদিন অপহরণকারীরা আমার মোবাইলে মিস কল দেয়। আমি তাদের কল দিলে তারা নিজেরা বলে যে, সাহেব আলী টাকার ব্যাগ কেন রাখেনি এবং তাদের কেন টাকা দেয়নি।"

47. She stated that after coming back from Azampur, Police arrested Shaheb Ali. She further stated that, "আসামীরা গ্রেফতার হবার পূর্বে আমাকে ফোনে বলে যে, "আপনি খুব চালাক হয়ে গেছেন। আপনি আমাদের লোক ধরিয়ে দিয়েছেন। তাদের লোক কে জানতে চাইলে তারা জানায় যে, সাহেব আলী তাদের বড়ভাই।" Condemned-prisoner Shaheb Ali did not deny this specific statement of P.W-2 Sajeda Begum also.

48. P.W-3 Shoheli Akhter Dipa, elder sister of deceased Injamul corroborated the statements of P.W-1 and P.W-2. She stated that "অপহরণকারীরা আম্মুর কাছে আবার টাকা চায়। আমার আম্মুকে উত্তরা আজমপুর ব্র্যাক মার্কেটে যেতে বলে । আমার আম্মু আসামী সাহেব আলীকে নিয়ে উক্ত স্হানের দিকে রওনা করে। সাহেব আলী অর্ধেক রাস্তায় গিয়ে বলে যে, সে আর যাবে না। কেননা অপহরণকারীরা তাকে চিনে ফেলবে। আম্মু বলে যে, আমার সাথে গেলে তোমার অসুবিধা হ-বে না। আমার আম্মু আজমপুরে উক্ত স্হানে পৌঁছার পূর্বেই তার মোবাইলে ফোন আসে যে, ঐদিন তারা টাকা নিবেনা। অন্যদিন নিবে। এরপর আমার মা বাসায় চলে আসে। এর পরপরই আম্মুর মোবাইলে আবার ফোন আসে ঐ ফোনটি আমি রিসিভ করি। অপহরণকারীরা বলে যে আম্মু কাজটি ভালো করেনি। কারণ তাদের বড় ভাইকে ধরেছে। আমি জিজ্ঞাসা করেছি তাদের বড় ভাই কে, তারা বলে যে তাদের বড় ভাই সাহেব আলী।"

49. In cross examination Shaheb Ali did not deny her aforesaid statement specifically. Thus she corroborated the evidences of P.W-1 and P.W-2.

50. In the case of **Babar Ali Mollah vs. State, reported in 44 DLR (AD) 10** it was held that a confession made by co-accused in a joint trial for the same offence affecting himself and others may be taken into consideration and the confession of such an accused may lend assurance to other evidence.

51. In the case of **Lutfun Nahar Begum vs. State reported in 27 DLR(AD)29** it was held that confession of an accused can not be treated as substantive evidence against another accused but it can only be used to lend assurance to other evidence.

52. It appears from the above confessional statements and the statement of P.W- 15 Md. Alam Chand, the Investigating Officer that P.W-1, P.W-2 and P.W-3 have corroborated each other regarding the act of Shaheb Ali at the time of occurrence. There is no reason to disbelieve their statements.

53. We find that the learned Judge of the Trial Court with the aid of facts and circumstancial evidences from record particularly the corroborated statements of P.W-1, P.W-2 and P.W-3 rightly relied upon the confessional statements of above mentioned co-accuseds Nahid and Sumon that condemned-prisoner-appellant Shaheb Ali was the mastermind and he indirectly participated in commission of murder of Injamul which was pre-planed and very much clear.

54. Considering the facts, circumstances and evidences on record, we find that the prosecution has been able to prove the charge against the condemned-prisoner-appellant Shaheb Ali beyond all reasonable doubt.

55. Now let us see whether the Judge of the Trial Court convicted Ibrahim Hossain Sumon correctly or not.

56. It appears that condemned-prisoner Ibrahim Hossain Sumon made a confessional statement under Section 164 of the Code and P.W- 11 Kazi Abed Hossen, learned Magistrate recorded that statement. It further appears that this confessional statement is an in-culpatory statement. It is now well settled that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same.

57. In this case P.W-6 Md. Shakil is the star witness of the prosecution case, though he was a boy of about 8 years old at the time of occurrence. He categorically and specially stated how and when deceased Injamul was killed by Sumon and Nahid. After 4 years he specifically narrated the occurrence on dock. He stated that "ঘরের একটি ছিদ্র দিয়ে আমি তাকিয়ে দেখছিলাম। সুমন ইনজামুলের মায়ের মোবাইল নম্বর জিজ্ঞেস করছিল ও সুমন উক্ত নম্বরটি কাগজে লিখছে। সুমন প্রথমে নাহিদের গলায় রশি দিয়ে বলে কেমন লাগে? তারপর সুমনের গলায় রশি দেয় নাহিদ এবং জিজ্ঞাসা করে কেমন লাগে? তারপর সুমন ও নাহিদ মিলে ইনজামুলের গলায় রশি দেয়। ইনজামুল গলায় ব্যাথা লাগছে বলে ছেড়ে দিতে বলে। কিন্তু সুমন ও নাহিদ আরও জোরে টান দেয়। তখন ইনজামুল মাটিতে পড়ে যায়। সুমন ও নাহিদ তখন ইনজামুলকে হাত ধরে টেনে হিছড়ে অন্য ঘরে নিয়ে যায়। ইনজামুল তখন কোন কথা বলতে পারেনি। ইনজামুলকে মাটিতে শুইয়ে দিয়ে প্রথমে বালু ওপরে ইট দেয়। আমি তখনও কিছু বুঝতে পারিনি। তখন প্রায় রাত হয়ে যাচ্ছিল। আমি ওয়াল বেয়ে যাবার সময় শব্দ পেয়ে সুমন আসে। সুমন আমাকে বলে যে, আমরা যা যা করেছি তা তুই দেখছিস। তুই কাউকে বললে ইনজামমুলের মতো তোকেও মেরে ফেলবো। আমি বলেছি যে, আমি কাউকে বলবোনা। ওরা আমাকে বসিয়ে রাখে। রাত অনেক হলে আমি বাড়ী চলে যাই। উক্ত ঘটনা ভয়ে আমি কাউকে বলিনি। সুমন ও নাহিদ ধরা পড়ার পর উক্ত ঘটনা আমি দেখেছি বললে পুলিশ আমাকে নিয়ে থানায় যায় ও পরে কোর্টে আনে। আমি ম্যাজিষ্ট্রেটের কাছে সব ঘটনা বলেছি। সুমন ও নাহিদ অদ্য ডকে দাঁড়ানো আছে।"

58. But none of the accuseds including Sumon and Nahid challenged the narration of the occurrence as above by P.W-6 Shakil. They did not attract P.W-15 Md. Alam Chand, the Investigating Officer that P.W-6 Md. Shakil did not disclose above narration of occurrence before him under Section 161 of the Code.

59. Furthermore, it appears that in presence of condemned-prisoner Sumon Police/RAB recovered the dead body of Injamul and P.W-5 Md. Rial, P.W-9 Md. Nashir Uddin Molla, P.W-13 Md. Nasir Uddin, P.W-14 Alamin and P.W-15 Md. Alam Chand specifically stated that in their presence Police and RAB recovered the dead body of deceased Injamul from the place of occurrence and condemned-prisoner Sumon was present there and he detected the place of occurrence and dead body of Injamul.

60. It is true that learned Magistrate P.W-11 Kazi Abed Hossen did not record the confessional statement under Section 164 of the Code of condemned-prisoner Sumon properly. He did not alert him that he would not be remanded to Police custody if he failed to confess or he did not fill up the relevant columns properly. Furthermore he did not make any certificate in column 8 of the confessional statement but we think this type of omission cannot be considered as fatal defect in this particular case when P.W-6 Md.Shakil the only eye witness of the case categorically narrated the occurrence and this statement was not

challenged by defence. Moreover, P.W-6's statement corroborated the statements of P.W-5, 9, 13, 14 and 15 who stated that in their presence condemned-prisoner Sumon detected the dead body of deceased Injamul from place of occurrence.

61. Considering the facts, evidences and circumstances of the case in this regard, we are of the view that the prosecution has been able to prove the charge against condemned-prisoner Ibrahim Hossain Sumon beyond all reasonable doubt.

**62. Now let us discuss about Nahid Islam's sentence.**

It appears from record that Nahid Islam confessed his guilt and made a confessional statement under Section 164 of the Code before learned 1st Class Magistrate P.W-11 Md. Abed Hossen. It appears that learned Magistrate P.W-11 Kazi Abed Hossen did not record this statement properly. He did not comply the mandatory provision of law though this type of omission can not be considered as fatal defect in this particular case when P.W-6 the 12 years old eye witness categorically and specifically narrated the occurrence that Sumon and Nahid actively participated to kill deceased Injamul. Defence did not deny or challenge this narration. Furthermore, P.W-5, 9, 13, 14 and 15 stated that they were present at the time of recovery the dead body of Injamul in presence of accused Sumon, Police and RAB. So, we can safely presume that the condemned-prisoner-appellant Nahid Islam actively participated in the killing of deceased injamul.

63. Mr. A.K.M. Fazlul Huq Khan Farid, learned Advocate with Mr. Md. Abu Taher Miah, learned Advocate with Mr. Saifur Rahman Rahi, learned Advocate appearing on behalf of condemned-prisoner-appellant Nahid Islam submit that the trial was illegal because the convict petitioner was below the age of 16 years at the time of his trial which was held with other adult persons, which is barred under Section 6(1) of the Children Act, 1974 and Mr. Farid submits that the condemned-prisoner-appellant Nahid should have tried as a Juvenile offender under Section 6 of the Childrens Act, 1974.

64. Section 6(1) and 6(2) of the said Act reads as follows:-

> 6. (1) "Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for, any offence together with an adult.."
>
> 6. (2) "If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provisions of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult."

65. Child has been defined in section 2(f) of that Act which reads as follows:

> 2(f) "child" means a person under the age of sixteen years, and when used with reference to a child sent to a certified institute or approved home or committed by a Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during that period."

66. But it appears from record that Nahid was arrested on 28.10.2007 and the learned Magistrate sent him to Tongi Kishore Sanshodhan Centre on 13.12.2007. It further appears from order No. 11 dated 05.01.2010 of Trial Court that, "আসামী নাহিদ এর পক্ষে কিশোর উন্নয়ন কেন্দ্র টংগী গাজীপুর হইতে স্মারক নং ৮৯২ তাং ১৭/১২/০৯ ইং সালে জানান যে, এই

আসামীকে কিশোর উন্নয়ন কেন্দ্রে রাখা অসুবিধা হচ্ছে। তাই গাজীপুর কারাগারে প্রেরণের জন্য আ-বেদন করিয়াছে। দেখিলাম। প্রার্থনা মঞ্জুর। আসামী নাহিদকে গাজীপুর কারাগারে অন্তবর্তীকালীন হাজতী চালান সহ প্রেরণ করা হোক।"

67. Learned Judge of the Trial Court framed charge against Nahid Islam, Ibrahim Hossain Sumon, Shaheb Ali and Hannan under Sections 302/201/109/34 of the Penal Code on 05.01.2010.

68. The relevant law was amended later on by adding sub-section (1) with Section 6 and it was enacted that if at the time of trial, the offender is not below the age of 16 years at the time framing charge for trial can be held together with adult and no separate trial is necessary.

69. Section 4 of the "শিশু আইন, 2013" reads as follows:-
"৪। বিদ্যমান অন্য কোন আইনে ভিন্নতা যাহা কিছুই থাকুক না কেন, এই আইনের উদ্দেশ্য পূরণ কল্পে, অনূর্ধ ১৮(আঠারো) বৎসর বয়স পর্যন্ত সকল ব্যক্তি শিশু হিসেবে গণ্য হইবে।"

70. It appears from order No. 11 dated 05.01.2010 of the Trial Court that on 05.01.2010 charge was framed and at that time condemned-prisoner Nahid was admittedly a boy of below 18 years. But "শিশু আইন, 2013" came into force from 21 August, 2013.

71. In this case it appears that at the time of framing charge Nahid was not below the age of 16 years. We find that in view of the aforesaid legal provision, the Judge of the Trial Court has not committed any illegality and as such we do not find that the judgment and order of the Trial Court invites our interference as it does not suffer from any legal infirmity, upon this point.

72. Now let us discuss the "শিশু আইন, 2013". It appears that "শিশু আইন, 2013" came into force from 21 August, 2013 and this judgment was pronounced on 28.08.2014 after the pronouncement of "শিশু আইন, 2013".

73. Section 100 of the "শিশু আইন, ২০১৩" reads as follows:_

১০০। (১) এই আইন কার্যকর হইবার সঙ্গে সঙ্গে Children Act, 1974 (Act No. XXXIX of 1974), অতঃপর উক্ত Act বলিয়া উল্লিখিত, রহিত হইবে।

(২) উপ-ধারা (১) এর অধীন রহিত হওয়া সত্ত্বেও উক্ত Act এর অধীন-

(ক) কৃত কাজ-কর্ম বা গৃহীত ব্যবস্থা এই আইনের অধীন কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে;

**(খ) এই আইন কার্যকর হইবার তারিখে অনিস্পন্ন কার্যাদি, যতদুর সম্ভব, এই আইনের বিধান অনুসারে নিস্পন্ন করিতে হইবে;**

74. The case in our hand, the impugned judgment and order of conviction and sentence was pronounced on 28.08.2014, that is after the pronouncement of "শিশু আইন, 2013". So, Section 100(2) (Kha) of "শিশু আইন, 2013" is applicable in this case. According to the 100(2)(kha) of "শিশু আইন, 2013" this case is deemed to be a "অনিষ্পন্ন কার্যাদি" and "যতদর সম্ভব এই আইনের বিধান অনুসারে নিষ্পন্ন করিতে হইবে;" means at the time of pronouncement of judgment the Trial Court must have followed this direction of law.

75. There is no doubt that the condemned-prisoner–appellant Nahid has committed a heinous offence and the prosecution has been able to prove this beyond reasonable doubt. But section 52 of the Children Act, 1974 read with Section 51 provides that upon conviction, a child offender cannot be sentenced to death, imprisonment for life or imprisonment and may only be committed to a certified institute for detention for a period not less than 02(two) and not more than 10(ten) years.

76. No matter how heinous the offence, a child offender can not be sentenced to death or imprisonment for life (section 51). Even upon conviction of offences carrying the death penalty or imprisonment for life, the sentence that may be awarded is detention in a certified institute for a period between two and ten years [section 52]. S/he may only be sentenced to imprisonment in exceptional cases to a maximum period of ten years [first and second provisos to Section 51]

77. On the otherhand section 34 of "শিশু আইন, 2013" reads as follows:-

> ৩৪। (১) কোন শিশু মৃত্যুদন্ড বা যাবজ্জীবন কারাদন্ডে দন্ডনীয় কোন অপরাধে দোষী প্রমাণিত হইলে শিশু-আদালত তাহাকে অনূর্ধ্ব ১০(দশ) বৎসর এবং অনূন্য ৩(তিন) বৎসর মেয়াদে আটকাদেশ প্রদান করিয়া শিশু উন্নয়ন কেন্দ্রে আটক রাখিবার জন্য আদেশ প্রদান করিতে পারিবেন:

78. So, considering the above discussion we have decided that Section 100(2)(kha) of শিশু আইন, 2013 is applicable upon condmned-prisoner Nahid Islam.

**79. Let us discuss about Md. Hannan's sentence**

Admittedly, Md. Hannan did not confess his guilt. It appears from record that he filed an Appeal and after being enlarged on bail for a limited period, he absconded and did not turn up to press the appeal. We have decided to dispose of his appeal as well as on merit for ends of justice. It appears that P.W-1, P.W-2, P.W-4 and P.W-5 stated that on 26.10.2007 Police arrested appellant Hannan and Sumon. P.W-7, P.W-8, P.W-10, P.W-13 and P.W-15 in a voice stated that Police and RAB jointly arrested Hannan and Sumon and recovered a mobile phone and simcard and they confirmed that they used this mobile set and simcard and demanded ransom from deceased Injamul's mother. It further appears that Hannan and Sumon identified the place of occurrence and in presence of the Magistrate, Police/RAB recovered the dead body of Injamul. P.W-13 also identified the mobile set and simcard and accused Sumon and Hannan on dock. So, considering the aforesaid facts, evidences and

circumstances of the case we are of the view that the prosecution has been able to prove the charge against absconded-appellant Hannan beyond all reasonable doubt.

80. Considering the facts and circumstances of the case stated above it appears that prosecution has been able to prove the case. But it appears that there is no eye witness that Md. Shaheb Ali killed deceased Injamul. He did not confess his guilt. On the otherhand we have given our anxious thought to the age of the condemned-prisoner Ibrahim Hossain Sumon was 20 years old at the time of occurrence. In the light of the discussion regarding sentence, we are of the view that, in the facts and circumstances of the case, justice will be sufficiently met if the sentence of death is commuted to one of imprisonment for life. Accordingly, the sentence of condemned-prisoners (1) Md. Shaheb Ali and (2) Ibrahim Hossain Sumon are modified to imprisonment for life.

81. On the premises of discussion made above and reasons canvased, the orders are as follows:-

The Death Reference No. 60 of 2014 is **rejected**. The death sentence in respect of (1) Md. Shaheb Ali and (2) Ibrahim Hossain Sumon are commuted to imprisonment for life and to pay a fine of Tk. 20,000/-(twenty thousand) in default to suffer rigorous imprisonment for 03(three) months more. The Criminal Appeal No. 5640 of 2014, Jail Appeal No. 134 of 2014 and Jail Appeal No. 137 of 2014 are **dismissed with modification** of sentence. Criminal Appeal No. 5628 of 2014 and Jail Appeal No. 136 of 2014 are **dismissed with modification** of the death sentence and conviction reducing to 10 years as per section 100(2)(M) of the শিশু আইন, 2013 to the period he has already served out.

82. Condemned-prisoner-appellant Nahid Islam be set at liberty at once if he is not wanted in connection with any other case.

83. Criminal Appeal No. 6082 of 2014 is **dismissed.** Convict appellant Md. Hannan is directed to surrender before the Trial Court within 30 days from the date of the receipt of this judgment by the Trial Court in order to serve out the remaining period of his sentence, failing which the Trial Court will issue warrant of arrest against him.

84. Let this order of rejection of the Reference be communicated to the Jail Authority for information and compliance.

85. Send down the lower Court record with a copy of this judgment at once for necessary action in accordance with law.

**16 SCOB [2022] HCD 62**

**HIGH COURT DIVISION**
**(Civil Appellate Jurisdiction)**

First Appeal No. 207 of 2013

**Sadrul Huq being dead his legal heirs Ziaul Haque and others.**
... Defendant-Appellants.
Vs.
**Farhana Firdousi and another.**
...Plaintiff-Respondents.

Mr. Surojit Bhattacharjee, Advocate
(Appearing Virtually).
…For the Appellants.
Mr. M. Ali Murtaja, Advocate
(Appearing Virtually).
….For the Respondent No.1.

Mr. A.F. Hassan Ariff, learned senior counsel with
Mr. Mufti Md. Abdullah and
Dr. Md. Abu Saleh Patwary
.....Appearing virtually as Amici Curiae.

Heard on 08.08.2021, 09.08.2021, 16.08.2021, 17.08.2021, 06.09.2021 and 19.09.2021.
Judgment on: 26.09.2021.

**Present:**
**Mr. Justice Sheikh Hassan Arif**
**And**
**Mr. Justice Ahmed Sohel**

**Editors' Note:**
Respondent No.1 as plaintiff filed a suit for partition claiming her unpaid dower on the basis of the nikahnama in column 16 of which her father-in-law transferred .09 acre of land as dower on behalf of his son. The trial Court decreed the suit in favour of the plaintiff and gave her saham of the said .09 decimal land. On appeal, the High Court Division considered, among others, whether such transfer of land by the father of the husband as against dower or portion of dower, as made at Clause 16 of the nikahnama, may be effected and enforced under the Muslim Law and the law of the land? Examining the relevant provisions of the Family Court Ordinance 1985, the Muslim Family Laws Ordinance 1961, Registration Act 1908 and Transfer of Property of Act 1882 and considering the opinions of the *amici curiae* the High Court Division held that landed property in question was rightly taken to be a form of portion of dower to be transferred in favour of the plaintiff and the father of the husband was allowed under the Islamic law to undertake or to transfer the said land in lieu of certain portion of the said dower money in favour of his daughter-in- law but such transfer cannot be effected in view of provisions of sections 17A and 17B of the Registration Act, 1908. The only way open to the plaintiff is to file a suit for dower in the Family Court. Thereafter, the High Court Division set aside the judgment of the trial court but allowed the plaintiff to withdraw the suit from the appellate stage with a permission to file the same before the correct forum, namely the Family Court established under the Family Court Ordinance, 1985.

**Key Words:**
Family Court Ordinance 1985; The Muslim Family Laws Ordinance 1961: Section 17A and 17B of Registration Act 1908; Transfer of Property of Act 1882; dower

**Form of dower and who may undertake to pay the dower in Islamic law:**

**From the above opinion of the said islamic scholars, it appears that the landed property, being a valid property under Islam, may take the form of dower under Islamic principles, and anyone, including the father of the husband, may undertake to pay or transfer such dower. Therefore, it appears that the landed property in question was rightly taken to be a form of portion of dower to be transferred in favour of the plaintiff and that the father of the husband, namely defendant No.1, was allowed under the Islamic law to undertake or to transfer the said land in lieu of certain portion of the said dower money in favour of his daughter-in- law. ...(Para 4.5)**

**Section 5 of the Family Court Ordinance, 1985 and Section 10 of the Muslim Family Law Ordinance, 1961:**

**In this regard, we have examined the provisions of the Family Court Ordinance, 1985. It appears from the relevant provisions of the said Ordinance that the same is a special law by which a special Court, namely Family Court, has been established and that the provisions of the said law have been given overriding effect over any other law found to be inconsistent. As per Section 5 of the said Ordinance, the jurisdiction of the Family Court has been conferred relating to or arising out of all or any of the following matters, namely (a) dissolution of marriage (b) restitution of conjugal rights (c) dower (d) maintenance (e) guardianship and custody of children. Therefore, it appears that a wife is entitled to file a suit claiming a decree of dower before the Family Court established under the Family Court Ordinance, 1985. The term 'dower' has not been defined either by the Muslim Family Law Ordinance, 1961 or by the Family Court Ordinance, 1985. However, Section 10 of the Muslim Family Law Ordinance, 1961 provides that where no details about mode of payment of dower are specified in the nikahnama for the marriage contract, the entire amount of dower shall be presumed to be payable on demand. ...(Para 4.8)**

**Section 17A and 17B of the Registration Act, 1908; Transfer of immovable property through nikahnama not registered under Registration Act, 1908 is void:**

**As per Clause 16 of the said nikahnama, it appears that the father of the husband has transferred the said .09 decimal land, as mentioned in the schedule-2 to the plaint, in favour of the plaintiff. However, the admitted position is that this nikahnama, though registered under the Muslim Marriage and Divorce (Registration) Act and Rules made thereunder, it has not been registered as per the provisions of Registration Act, 1908 and the transfer has not been made as per the provisions of Transfer of Property Act, 1882. Therefore, such transfer has become void in so far as the Registration Act, 1908 and the relevant provisions of the Transfer of Property Act, 1882 are concerned.**

**...(Para 4.10)**

**For realization of dower Family Court established under Section 4 of Family Court Ordinance, 1985 is the right forum:**

**Since the land in question is the portion of dower as paid or purportedly transferred in favour of the plaintiff by the father of her husband, this Court is of the view that the forum as chosen by the plaintiff to realize such dower was not the correct forum under the law of the land. As our country has special law, namely Family Court Ordinance, 1985, the provisions of which will have effect irrespective of any contrary provisions in any other law including the Registration Act, 1908 and the Transfer of Property Act, 1882, the plaintiff should have taken recourse to the provisions of the said special law**

**and should have filed a suit for dower under the provisions of the said Ordinance before the Family Court established under Section 4 of the said Ordinance.**

**...(Para 4.11)**

**When plaintiff chooses wrong forum, he/she should be given a chance to withdraw the said suit even at the appellate stage to file the same before the right forum:**

**Since the plaintiff in the present case has chosen a wrong forum, namely filed a partition suit before a civil Court having territorial jurisdiction, we are of the view that the plaintiff should be given a chance to withdraw the said suit at this appellate stage to file the same before the Family Court, as established by the Family Court Ordinance, 1985, for seeking a decree of dower in respect of the said property. Since we have already held that the land in question can be treated as dower, we are of the view that the plaintiff should be allowed to withdraw the suit at this appellate stage with a permission to file the same before the correct forum, namely the Family Court established under the Family Court Ordinance, 1985. ...(Para 4.13)**

## JUDGMENT

**Sheikh Hassan Arif, J:**

1. This appeal, at the instance of the defendant Nos.1 and 2 in Title Suit No. 14 of 2009, is directed against judgment and decree dated 14.02.2013 passed in the said title suit by the Second Court of Joint District Judge, Sunamgonj thereby decreeing the partition suit in favour of the plaintiff-respondent No.1.

2. **Back Ground Facts:**

2.1 Facts, relevant for the disposal of the appeal, are that the respondent No.1, as plaintiff, filed the said Title Suit No. 14 of 2009 before the Second Court of Joint District Judge, Sunamgonj seeking a decree of partition in respect of properties mentioned in the first schedule to the plaint and thereby seeking shaham in respect of .09 acre land out of the said first schedule land as mentioned in second schedule to the plaint.

2.2 The case of the plaintiff, in short, is that the property mentioned in the first schedule under S.A Plot No. 1890 and 1891, under S.A Khatian No. 315 along with other lands originally belonged to Gonga Charan Biswas. On his death, defendant Nos. 4-9 became owner of the said property by inheritance. That the said defendant Nos. 4-9, while in possession as owner, transferred .05 acre and .04 acre land under S.A Dag No. 1890 vide two registered kabala, namely Kabala No.4792 dated 01.12.1987 and Kabala No.4916 dated 07.12.1987. Thereafter, the said defendant Nos. 4-9 sold the remaining land under S.A Plot No. 1890, namely in total 27 decimal land, in favour of defendant Nos.1-3 vide different kabalas. That the land under S.A plot No. 1891 under S.A Khatian No. 315 along with other plots were also sold by defendant Nos. 4-9 in favour of defendant Nos. 1 and 2 vide different registered kabala. Accordingly, the said properties were recorded in the name of defendant Nos. 1-3 during revisional survey primarily under Tasdik Khatian No. 3048, under Plot No. 3098.

2.3 That upon proposal of marriage between the plaintiff and defendant No.3, as came through common relatives, the plaintiff and defendant No.3 got married to each other vide registered kabinnama dated 11.07.2005 with a fixed dower of Tk. 5,00,001. That out of the said fixed dower, Tk. 2,00,000/- was shown to be realized as against ornaments and furniture, Tk. 2,00,001 remained to be paid on demand. That, as against the remaining dower of Tk. 1,00,000/-, defendant No.1 (father of defendant No.3) transferred .09 acre land under S.A Plot No. 1890, as mentioned under second schedule

to the plaint, by writing at Clause No.16 of the kabinnama. That in Clause No.11 of the kabinnama, defendant No.1 signed as a witness. That the said .09 acre land is under common possession of the plaintiff along with defendant Nos.1 and 3. That the plaintiff has not yet got the said Tk. 2,00,001/- as against the dower on demand. That while the plaintiff and defendant No.3 were in conjugal life, defendant No.3 left for England and stopped any communication with the plaintiff since February 2008. Under such circumstances, when the plaintiff contacted defendant No.1 (father of defendant No.3), defendant No.1 told the plaintiff that defendant No.3 would never take plaintiff to England. The plaintiff then demanded the remaining portion of the dower including the said .09 decimal land, which was refused by the defendant No.1. Under such circumstances, the plaintiff filed the said suit seeking saham in respect of the said .09 decimal land.

2.4 The suit was contested by defendant Nos.1 and 2 (parents of defendant No.3) denying the material statements in the plaint and thereby contending that the defendant No.1 never wrote anything on the kabinnama in question as regards transfer of the said .09 decimal land and that the kabinnama was registered even before solemnization of the marriage between the plaintiff and defendant No.3. That the defendant Nos. 1 and 2 purchased the said land along with other lands under S.A Plot No. 1890 and 1891 and they have muted 15 decimal land vide Mutation Case No. 84/ 90-91 and 11 decimal land vide Mutation Case No. 70/ 2007. That the suit land is the purchased land of these defendants and that they have residence thereon. That the defendant No.1 signed the kabinnama out of innocence and the kazi of the marriage in question was brought by the father of the plaintiff. That the defendant No.1 had already transferred .09 decimal land from other plot in favour of the plaintiff. That the statement at Clause No.16 in the kabinnama was written by the kazi concerned under the influence of the plaintiff's father as regards transfer of .09 decimal land under S.A Plot No. 1890 and that the defendant No.1 never transferred any such land through the said kabinnama.

2.5 Upon such contesting pleadings, the Court below framed issues in the following terms:

(1) Whether the suit is maintainable in its present form?
(2) Whether the suit suffers from defect of parties?
(3) Whether the plaintiffs have right, title, interest and possession in the suit land?
(4) Whether all properties have been brought into the common hotchpotch of the partition suit?
(5) Whether the plaintiff is entitled to get a preliminary decree of partition?

2.6 During trial, the plaintiff produced three witnesses (P.Ws. 1-3) and certain documentary evidences which were marked as Exhibits 1-5. On the other hand, the defendant No.1 deposed himself as D.W.1 and produced certain documentary evidences which were marked as Exhibits Ka-Cha series. Thereupon, the Court below, after hearing the parties, decreed the suit in favour of the plaintiff and, accordingly, gave saham of the said .09 decimal land mentioned in schedule 2 in favour of the plaintiff. Being aggrieved by such preliminary decree, the defendant Nos.1 and 2 have preferred this appeal, but have not sought any order of stay for staying operation of the judgment passed by the Court below.

2.7 The appeal is contested by plaintiff-respondent No.1 through learned advocate Mr. M. Ali Murtaja.

3. **Submissions:**

3.1 Mr. Surojit Bhattacharjee, learned advocate appearing for the appellants, after placing the entire impugned judgment and the nikahnama in question, namely Exhibit-3, submits

that the statement in Clause-16 of the kabinnama could not be proved by the plaintiffs before the Court below to be the statement of the defendant No.1 and as such, according to him, the Court below committed gross illegality in decreeing the suit and, thereby, giving saham in favour of the plaintiff in respect of the property mentioned in Clause 16 of the said kabinnama. He further submits that even if the statement at Clause No. 16 of the kabinnama is taken to be proved by the plaintiffs, the plaintiff cannot claim any saham in the property in question inasmuch as that such statement, even if made by defendant No.1, did not transfer any immovable property as per the provisions of Section 123 of the Transfer of Property Act, 1882. By referring to Exhibit-3 again, learned advocate for the appellants submits that the said statement in Clause- 16 of the kabinnama cannot be taken to be a contract for sale either, as any contract for sale of immovable property has to be registered in view of the mandatory provisions under Section 17A and 17B of the Registration Act, 1908, as amended by vide Act No. 25 of 2004.

3.2 Mr. Bhattacharjee further submits that in view of the provisions under Rule 19 of the Muslim Marriage and Divorce Registration Rules, 1975, the nikahnama is registered between two parties, namely husband and wife. Therefore, only these two parties may give commitment as regards dower. Therefore, according to him, even if it is found that the father of the husband, namely defendant No.1, who was a mere witness in the marriage, declared anything or transferred anything by way of the said kabinnama, such transfer cannot be implemented as because he was not a party to the marriage. He further submits that it is the husband who is responsible for anything as against dower and as such defendant No.1, being admittedly not the husband or party to the marriage, cannot be held responsible for payment of any dower or any portion of dower.

3.3 As against above submissions, Mr. M. Ali Murtaja, learned advocate appearing for the plaintiff-respondent, submits that anyone can give commitment on behalf of the husband to pay the dower money and, in this case, since the father of the husband, namely defendant No.1, declared transfer of the land in question in favour of the plaintiff as against the remaining portion of Tk. 1,00,000/- of the dower money, the Court below has rightly decreed the suit and thereby gave saham in respect of the said property in favour of the plaintiff.

4. **Deliberations, Findings and Orders of the Court**:

4.1 Some important questions with religious sensitivity have arisen in this appeal, namely:

(1) Whether the father of the husband may pay the dower money or may under-take to pay the dower money or portion of dower money on behalf of his son (husband) given that as per the law, namely Muslim Marriage and Divorces (Registration) Rules, 1975, he is not directly a party to such marriage?

(2) Whether on behalf of a party to the marriage, any person may undertake to transfer land instead of the dower money or what may be the form of dower?

(3) Whether such transfer of land by the father of the husband as against dower or portion of dower, as made at Clause 16 of the nikahnama, may be effected and enforced under the Muslim Law and the law of the land?

4.2 Considering such religious sensitivity and complex issue of law of the land, we have requested two Islamic scholars of Bangladesh Islami Foundation and a senior counsel of this Court to assist us as Amici Curiae. Accordingly, on our request, Mr. Mufti Md. Abdullah, Mufti Bangladesh Islamic Foundation, Baitul Mukarram, Dhaka and Dr. Md.

Abu Saleh Patwary, Muffassir and Deputy Director, Bangladesh Islamic Foundation, Baitul Mokarram, Dhaka have provided assistance by their scholarly views through virtual connectivity. After their such assistance, Mr. A.F. Hassan Ariff, learned senior counsel, has also assisted us as Amicus Curiae to resolve the issue of law of the land as against such religious context. In addition to their oral submissions, both the above named Islamic Scholars have also submitted their opinion in writing.

4.3 It may be noted that the opinion of both the scholars were unanimous and we have not found any major difference in between their opinion. According to them, a dower may be in any form: cash, kind or in the form of property or any other valuables, and it is the right of the wife and obligation of the husband to pay or transfer the dower in favour of the wife at the time of marriage or thereafter. According to them, it is the dictate of Allah as well as Hazrat Muhammad (SM) that the dower must be paid by the husband and unless and until it is paid, it will remain as the loan or liability on the husband.

4.4 The said scholars have further stated unanimously that the liability to pay dower may be under-taken by the father, brother or any relatives or anyone else on behalf of the husband and it could be paid in the form of cash, valuables and land etc. The gist of their opinion is that any property or valuables, which are valid in Islam, may take the form of dower and anyone can undertake to pay or transfer such dower.

4.5 From the above opinion of the said islamic scholars, it appears that the landed property, being a valid property under Islam, may take the form of dower under Islamic principles, and anyone, including the father of the husband, may undertake to pay or transfer such dower. Therefore, it appears that the landed property in question was rightly taken to be a form of portion of dower to be transferred in favour of the plaintiff and that the father of the husband, namely defendant No.1, was allowed under the Islamic law to undertake or to transfer the said land in lieu of certain portion of the said dower money in favour of his daughter-in- law. Probably, considering this aspect of the Islamic principle, Clause-16 of the nikahnama has been incorporated in the standard nikanama form, which runs as follows:

"১৬।বিশেষ বিবরণ ও পক্ষগণের মধ্যে চুক্তিসূত্রে নির্ণীত মূল্যসহ কোন সম্পত্তি সম্পূর্ণ দেনমোহর বা উহার অংশ বিশেষের পরিবর্তে প্রদত্ত হইয়াছে কিনা?----------

১৭. বিশেষ শর্তাদী থাকিলে ----------"

4.6 Admittedly, the appellant (defendant No.1) signed the said nikahnama as a witness, although he is disputing the statement made by him under Clause No. 16. Now the question is even if he has made such statement as regards transfer of .09 decimal land in favour of the plaintiff, whether such transfer may be valid transfer under the law of the land.

4.7 The admitted position is that the nikahnama was registered on 11.07.2005, i.e., after the enforcement of the Amending Act No. 25 of 2004 thereby incorporating Sections 17A and 17B in the Registration Act, 1908. Therefore, according to Mr. A.F. Hasan Ariff, learned senior counsel, such transfer, being not registered under the Registration Act, 1908, would become void as per the said Act and Transfer of Property Act, 1882. According to him, such statement of defendant No.1 may also not be taken as a contract for sale of land, as, after such amendment, such contract of sale in respect of immovable property has to be registered mandatorily and in case of non-registration, such contract would become void. However, by referring to the provisions of the Family Court Ordinance (Ordinance No. 18 of 1985), in particular Sections 3 and 5 of the said

Ordinance, he submits that the proper recourse, as should have been taken by the plaintiff, was to file a suit for dower before the Family Court.

4.8 In this regard, we have examined the provisions of the Family Court Ordinance, 1985. It appears from the relevant provisions of the said Ordinance that the same is a special law by which a special Court, namely Family Court, has been established and that the provisions of the said law have been given overriding effect over any other law found to be inconsistent. As per Section 5 of the said Ordinance, the jurisdiction of the Family Court has been conferred relating to or arising out of all or any of the following matters, namely (a) dissolution of marriage (b) restitution of conjugal rights (c) dower (d) maintenance (e) guardianship and custody of children. Therefore, it appears that a wife is entitled to file a suit claiming a decree of dower before the Family Court established under the Family Court Ordinance, 1985. The term 'dower' has not been defined either by the Muslim Family Law Ordinance, 1961 or by the Family Court Ordinance, 1985. However, Section 10 of the Muslim Family Law Ordinance, 1961 provides that where no details about mode of payment of dower are specified in the nikahnama for the marriage contract, the entire amount of dower shall be presumed to be payable on demand.

4.9 Now, in Exhibit 3, namely the nikahnama in question, the mode of payment of dower has been stated clearly, namely that the total dower money is Tk. 5,00,001/- and Tk. 2,00,001/- out of the said Tk. 5,00,001/- was determined as the dower on demand and Tk. 2,00,000/- was determined as portion of dower money realized as against ornaments and furniture. At Clause-16 of the said nikahnama (Exhibit 3), a statement is claimed to have been made by the defendant No.1 (father of the husband), who has admittedly signed the nikahnama as a witness, as regards transfer of 9 decimal land. The entire clause-16 in exhibit-3 along with the said statement is quoted below:

> "১৬।বিশেষ বিবরণ ও পক্ষগণের মধ্যে চুক্তিসূত্রে নির্ণীত মূল্যসহ কোন সম্পত্তি সম্পূর্ণ দেনমোহর বা উহার অংশ বিশেষের পরিবর্তে প্রদত্ত হইয়াছে কিনা? বাবত নং ১০০০০০/=(স্টেশন সাব রেজিষ্ট্রার দিরাই-সুনামগঞ্জ। আমি ছদরুল হক, আমার খরিদা দলিল নং-৪৭৯২ তাং ১/১২/৮৭ ইং ও দলিল নং ৪৯১৬ তাং ৭/১২/৮৭ ইং মোট পরিমান (৫+৪) =৯ নয় শতাংশ জায়গা, থানা-দিরাই, জেলা- সুনামগঞ্জ, মৌজা-চান্দপুর, জে,এল, নং ৯৯, খতিয়ান নং সাবেক-৩১৫, ডি,পি, খতিয়ান-৬২৮ সাবেক দাগ-১৮৯০ বর্তমান দাগ-৩০৯৮ বাড়ী রকম ভূমি আমার পুত্র বধুকে দিলাম।"

4.10 Therefore, as per Clause 16 of the said nikahnama, it appears that the father of the husband has transferred the said .09 decimal land, as mentioned in the schedule-2 to the plaint, in favour of the plaintiff. However, the admitted position is that this nikahnama, though registered under the Muslim Marriage and Divorce (Registration) Act and Rules made thereunder, it has not been registered as per the provisions of Registration Act, 1908 and the transfer has not been made as per the provisions of Transfer of Property Act, 1882. Therefore, such transfer has become void in so far as the Registration Act, 1908 and the relevant provisions of the Transfer of Property Act, 1882 are concerned. Does it mean that the plaintiff does not have any remedy as against the said dower money of Tk. 1,00,000/- in payment of which her father-in-law, namely defendant No.1, transferred certain portion of land in her favour?

4.11 As stated above, as per the opinion of the aforementioned Islamic scholars, such transfer of land is valid dower as per Islamic principle. However, since the land in question is the portion of dower as paid or purportedly transferred in favour of the plaintiff by the father of her husband, this Court is of the view that the forum as chosen by the plaintiff to realize such dower was not the correct forum under the law of the land. As our country has special law, namely Family Court Ordinance, 1985, the provisions of which will

have effect irrespective of any contrary provisions in any other law including the Registration Act, 1908 and the Transfer of Property Act, 1882, the plaintiff should have taken recourse to the provisions of the said special law and should have filed a suit for dower under the provisions of the said Ordinance before the Family Court established under Section 4 of the said Ordinance.

4.12 In this regard, we have also examined the decision of a single bench of this Court as relied upon by the Court below in decreeing the suit, namely the decision of this Court in **Altab Hossain vs. Aziza Begum, 17 BLC (2012) -71**. In the said case, this Court opined that the plaintiff therein could have filed suit for partition seeking saham in respect of total quantity of the property as given by her late husband by the said registered kabinnama as portion of dower. However, transfer in question in that case by way of a registered kabinnama was done on 14.08.1975 i.e. long before coming into force of the aforementioned amendment to the Registration Act and Transfer of Property Act vide Act No. 25 of 2004. Since the newly incorporated provisions under Section 17A and 17B of the Registration Act and the newly incorporated provisions in the Transfer of Property Act did not have existence at that time, or were not considered in the said case, we are of the view that the decision therein is not applicable in the facts and circumstances of the present case.

4.13 Since the plaintiff in the present case has chosen a wrong forum, namely filed a partition suit before a civil Court having territorial jurisdiction, we are of the view that the plaintiff should be given a chance to withdraw the said suit at this appellate stage to file the same before the Family Court, as established by the Family Court Ordinance, 1985, for seeking a decree of dower in respect of the said property. Since we have already held that the land in question can be treated as dower, we are of the view that the plaintiff should be allowed to withdraw the suit at this appellate stage with a permission to file the same before the correct forum, namely the Family Court established under the Family Court Ordinance, 1985. Since learned advocate appearing for the plaintiff-respondent No.1, in the course of hearing, has made such prayer, we hold that this Court should allow the plaintiff to withdraw the suit with a permission to institute a fresh suit seeking decree of dower in respect of the said land, as mentioned in schedule 2 to the plaint, before the competent Court, namely the Family Court established under Family Court Ordinance, 1985.

4.14 Accordingly, the impugned judgment and decree are hereby set-aside. Let the suit filed by the plaintiff-respondent No.1 be withdrawn. The plaintiff-respondent No. 1 is permitted to file a fresh suit within a period of 04 (four) months from receipt of the copy of this judgment in respect of the same land, as mentioned in schedule -2 to the plaint, seeking a decree of dower before the Family Court concerned under the Family Court Ordinance, 1985.

5. With the above orders, observation, and directions, the appeal is disposed of.

6. Before we depart, we express our gratitudes to the aforementioned Islamic scholars and learned senior counsel, who appeared as Amici-Curiae before this Court and assisted us to reach a proper decision.

7. Communicate this.

8. Send down the Lower Court Records.

**16 SCOB [2022] HCD 70**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**
Writ Petition No. 3829 of 2019

**Md. Atiqur Rahman, Director, Jamuna Bank Limited and Chairman, Standard Group Limited and Standard Stitches Limited and another**
..... Petitioners.

Vs.

**Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs and others.**
..... Respondents.

Mr. Probir Niogi, Senior Advocate with
Mr. Md. Muniruzzaman, Advocate
Ms. Anita Gazi Rahman, Advocate,
..... For the Petitioners.

Mr. A.K. M Amin Uddin, D.A.G with
Ms. Anna Khanom Koli, A.A.G and
Mr. Md. Shaifour Rahman Siddique, A.A.G
..... For the Respondent.
Mr. M.A. Aziz Khan, Advocate,
.....For the Anti-Corruption Commission.

Heard on 11.07.2019, 16.01.2020, 23.9.2021 and Judgment on 28.9.2021

**Present:**
**Mr. Justice Md. Nazrul Islam Talukder**
And
**Mr. Justice S.M. Mozibur Rahman**

**Editors' Note:**
The writ petitioners purchased the case land through the court by way of sale certificate and the learned judge of the Execution Court handed over possession of the land to the petitioners by way of writ for delivery of possession. Challenging the said sale, several writ petitions and leave petitions were filed and ultimately all of them were discharged and dismissed. The writ petitioners as auction purchasers having failed to mutate their names against their purchased property filed a Writ Petition against RAJUK and the said Rule was made absolute. Then RAJUK filed a Civil Petition for Leave to Appeal before the Appellate Division against the said judgment of the High Court Division and the same was dismissed with a finding that the writ petitioners have legally purchased the case property through Court and their title has become unassailable. Thereafter, ACC issued notices against the writ petitioners under sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure for their alleged evasion of registration fees and other duties for registering the deed of sale. The writ petitioners have challenged the legality of the said notices in the instant writ petition. The High Court Division examining relevant laws and rules and considering the facts of the case found that there was no evasion of registration fees in this case and allegation of evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004 and therefore impugned notices have been issued with mala fide intention and in exercise of abuse of discretionary power which have been made/issued without lawful authority and are of no legal effect.

**Key Words:**
Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure; mala fide; abuse of discretionary power; Rule 3(5) of the Anti-Corruption Commission Rules, 2007; Evasion of registration fees

**When any legal issue is finally decided by the apex Court of the country, any initiative to re-open the same issue by any authority of the government or statutory authority like ACC in the name of exercise of discretionary power without prior approval of the Court, is absolutely mala fide and abuse of discretionary power. ...(Para 26)**

**It is true that the ACC is empowered by law to inquire into any allegation whatsoever as covered in its schedule and in doing so may direct any authority, public or private to produce relevant documents but the same must be bona fide and lawful in nature. ...(Para 27)**

**From the statements of the complaint, it is evident that the ACC was clearly informed about the purchase and handing over possession of the case land through court and thus the notices upon the purchasers of the said sale bringing an allegation as ''যমুনা ব্যাংক লিঃ এর সাবেক চেয়ারম্যান জনাব আরিফুর রহমান, বর্তমান চেয়ারম্যান মোশারফ হোসেন ও পরিচালক জনাব আতিকুর রহমান এর বিরুদ্ধে জমি ক্রয় করে ০১ কোটি টাকার দলিল রেজিষ্ট্রেশন ফি ও ট্যাক্স ফাঁকি দেয়ার অভিযোগ" are not bona fide rather mala fide and also infringement of the fundamental right of property of the petitioners as guaranteed by the Constitution. ...(Para 28)**

**<u>Rule 3(5) of the Anti-Corruption Commission Rules, 2007:</u>**
**As per Rule 3(5) of the Anti-Corruption Commission Rules, 2007, the ACC shall not directly go for conducting inquiry in respect of complaints which have not been found to be prima-facie correct and true by the Scrutiny Committee, but in the present case the impugned notices have been issued upon the petitioners neither without holding any initial scrutiny, nor examining the context of the complaint thoroughly which causes the un-necessary consumption of the valuable time of the court as well as harassing the citizens without any reason. ...(Para 29)**

**<u>Evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004:</u>**
**With reference to the legal decision taken in the case of Sonali Jute Mills Ltd Vs. ACC reported in 22 BLC (AD) 147, the submission of the learned Advocate for the ACC is that sub-section(1) and (2) of section-19 have given wide jurisdiction to the Commission to inquire into and investigate any allegations whatsoever as covered in its schedule and in doing so, the ACC may direct any authority, public or private to produce relevant documents. But the allegation under the instant inquiry which is admittedly initiated on the allegation as stated in the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.05 with regard to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004 rather it may come under the purview of Section 63A of the Registration Act, 1908 and under the provision of Stamp Act, 1899 and thus the said case law is not applicable to the case of the petitioners. It appears from the annexures of the writ petition that the subsequent sale between the petitioners and the Respondent No.4 was also held by a Court of law pursuant to a decree of specific performance of**

**contract and thus there is no scope of taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and stamp fees at all.**

**...(Para 30)**

**Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure:**

**It appears from the record that the ACC in the name of exercising discretionary power issued the impugned notices hurriedly during pendency of Writ Petition 1087 of 2019 directing the petitioners to appear before the ACC to make statements with respect to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and other taxes at the time of purchase of the land in question, which is tantamount to interference in the administration of justice that cannot escape characterization of a mala fide act having something in the mind of the Respondent No.3 and that is why we have no hesitation to say that the impugned notices have been issued abusing of the discretion and thus the same are liable to be interfered with by this Court.** **...(Para 34)**

**JUDGMENT**

**Md. Nazrul Islam Talukder, J:**

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, the Rule Nisi was issued calling upon the respondents to show cause as to why the impugned notices dated 19.03.2019 under Memo No.00.01.0000.502.01. 007. 19/10746 and Memo No.00.01.0000.502.01. 007. 19/10745 respectively under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure issued by the Respondent No.3 (Annexure-Q and Q-1) directing the petitioners to appear and make statement regarding evasion of registration fees and taxes at the time of purchase and registration of the land in question, before the Respondent No.3 following the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.5, shall not be declared to have been passed/issued 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. The facts leading to issuance of the Rule Nisi are as follows:

(a) that Bangladesh Shilpa Rin Sangstha (in short BSRS), now Bangladesh Development Bank Limited (in short BDBL) filed Miscellaneous Case No.15 of 1987 before the Court of learned District Judge, Dhaka under the provision of President Order No.128 of 1972 against the Respondent No.5's Company namely the United Trading Corporation Limited for realization of its loan. By an order dated 25.08.1989, the learned trial Judge attached the schedule property before the judgment. Thereafter the said Miscellaneous Case No.15 of 1987 was transferred to the Court of learned Subordinate Judge and the Artha Rin Adalat, Dhaka, 2nd Court and the same was renumbered as Title Suit No. 01 of 1999. The suit was decreed on 24.05.1999 in favour of the successor of BSRS i.e. Bangladesh Development Bank Limited (hereinafter referred to as BDBL). The aforesaid fact is evident from the judgment and decree dated 24.05.1999 passed in Title Suit No.1 of 1999 which are annexed with the writ petition and marked as Annexure-A and A-1.

(b) that on 31.05.1999, BDBL filed Artha Execution Case No.18 of 1999 for an amount of Tk.3,62,83,864.84/- (three crore sixty two lac eighty three thousand eight hundred sixty four taka eighty four paisa) only and the attached scheduled land was sold at a price of Tk. 25 crore to the petitioners namely Standard Stitches Limited and Standard Group Limited and one Md. Arifur Rahman and the Respondent No.4 under Section 38 of the Artha Rin Adalat Ain, 2003 and accordingly, the execution Court executed a registered sale certificate dated 27.02.2013 in favour of the purchasers and delivered possession of the suit land to the purchasers on 20.05.2014 pursuant to the Sale Certificate No. 5 dated 27.02.2013 through writ for delivery of possession. The aforesaid fact is evident from the sale certificate being No.05 dated 27.02.2013 which is annexed with the writ petition and marked as Annexure-B. At the time of registration of sale certificate, the authority concerned realized Tk. 75,000,000/- as registration fees, stamp fees and other fees from the petitioners.

(c) that Rajhani Unnayon Kartipakkha (hereinafter referred to as RAJUK) filed Writ Petition No.4800 of 2014 before the High Court Division challenging the above mentioned sale and obtained a Rule Nisi and order of stay of all further proceedings of the Artha Execution Case No.18 of 1999; against the said order of stay, the petitioners filed Civil Petition For Leave To Appeal No.1225 of 2014 before the Appellate Division of the Supreme Court of Bangladesh and considering the delivery of possession of the suit land to the petitioners, on 20.07.2014, the Appellate Division passed an order of status-quo in respect of possession and position of the land in question till disposal of the Rule. The aforesaid fact is evident from the certified copy of the order dated 20.07.2014 which is annexed with the writ petition and marked as Annexure-C.

(d) that a Division Bench of the High Court Division of the Supreme Court of Bangladesh upon hearing the parties discharged the Rule by the judgment and order dated 04.04.2016 and against the said judgment and order, the RAJUK preferred Civil Petition For Leave To Appeal No.3269 of 2016 and after hearing, the Appellate Division dismissed the same by the judgment and order dated 03.08.2017. The aforesaid fact is evident from the judgment and order dated 04.04.2016 and 03.08.2017 which are annexed with the writ petition and marked as Annexure-D and D-1.

(e) that one Khandaker Nazrul Islam Khokon being third party filed Writ Petition No.7156 of 2014 before the High Court Division challenging Miscellaneous Case No.15 of 1987 and the High Court Division issued Rule which reads as under:

"why the entertainment and adjudication of the Miscellaneous Case No.15 of 1987 of the Subordinate Judge and Artha Rin Adalat No.2 at Dhaka by the Respondent No.1 filed by the Respondent No.2 under Article 33 of the Bangladesh Shilpa Rin Sangstha Order 1972 vide Annexure-F, H and I(1) and why consequently negotiate sale of petitioner property being holding No.54 Mohakhali Commercial Area within the City of Dhaka through the process of Artha Jari Case No.18 of 1999 of the

2nd Artha Rin Adalat of Dhaka arising out of Miscellaneous Case No.15 of 1987 of the Court of Subordinate Judge and Artha Rin Adalat No.2 at Dhaka vide Annexure-I and J shall not be declared to have been passed without lawful authority and is of no legal effect"; thereafter a Division Bench of the

High Court Division upon hearing the parties discharged the said Rule by the judgment and order dated 16.03.2016. The aforesaid fact is evident from the judgment and order dated 16.03.2016 which is annexed with the writ petition and marked as Annexure-E.

(f) that another individual named Faisal Morshed Khan as third party also filed Writ Petition No.5196 of 2013 challenging Order No.111 dated 07.04.2013 rejecting the application of the petitioner on 31.03.2013 for stay of further proceeding in relation to sale, transfer or handover of the suit land and Order Nos.102, 103 and 104 passed by the learned Judge of the 2nd Court of Artha Rin Adalat, Dhaka transferring the suit land to the petitioners of this instant case and obtained a Rule Nisi and order of stay of all further proceeding of the Artha Jari Case No.18 of 1999; against the said order of stay, the petitioners filed a Civil Petition For Leave To Appeal No.1241 of 2013 before the Appellate Division of the Supreme Court of Bangladesh and the Appellate Division passed an order staying the above mentioned order of the High Court Division till disposal of the Rule by the judgment and order dated 13.11.2013; subsequently a Division Bench of the High Court Division upon hearing the parties discharged the Rule by the judgment and order dated 21.07.2016. The aforesaid fact is evident from the judgment and order dated 13.11.2013 and 21.07.2016 which are annexed with the writ petition and marked as Annexure-F and F-1.

(g) that the petitioners and another purchaser i.e. Respondent No.4 filed an application before the Rajdhani Unnayon Kartipakkho (RAJUK) for mutating their names for the case land pursuant to the above mentioned sale of the Court but without getting any response from RAJUK, the petitioners filed Writ Petition No.6637 of 2016 before the High Court Division and obtained a Rule Nisi; subsequently on contested hearing, a Division Bench of High Court Division made the Rule absolute by the judgment and order dated 07.09.2016 considering and discussing all the issues and directed the RAJUK to mutate the name of the petitioners in respect of the case land within 60 days. The aforesaid fact is evident from the judgment and order dated 07.09.2016 which is annexed with the writ petition and marked as Annexure-G.

(h) that for not complying with the judgment and order as to direction of High Court Division, the petitioners filed Contempt Petition No.82 of 2017 before the High Court Division and the High Court Division directed the RAJUK to comply with its earlier judgment and order dated 07.09.2016 passed in Writ Petition No.6637 of 2016 within 2(two) months without fail by the order dated 10.10.2017. The aforesaid fact is evident from the order dated 10.10.2017 which is annexed with the writ petition and marked as Annexure-H.

(i) that the Rajdhani Unnayan Kartipakkha (RAJUK) preferred a Civil Petition For Leave To Appeal No.4124 of 2017 before the Appellate Division against the judgment and order dated 07.09.2016 passed in Writ Petition No.6637 of 2016 regarding direction for mutating the name of the petitioners and after hearing the parties, the Appellate Division dismissed the same by the judgment and order dated 01.04.2018 holding the view that the respondents i.e. the present petitioners legally purchased the property through the Court and their title has become unassailable. The aforesaid fact is evident from the judgment and order dated 01.04.2018 which is annexed with the writ petition and marked as Annexure-I.

(j) that in the meantime, the Respondent No.4 entered with an registered agreement for sale being No.4186 dated 09.05.2016 for 3662.75 ajutangsha of above mentioned land with the petitioners namely Standard Group Limited and Standard Stitches Limited receiving Tk.12,50,00,000/- (twelve crore fifty lac) as earnest money out of total consideration of Tk.13,00,00,000/- (Thirteen crore).

(k) that on repeated request of the petitioners, the Respondent No.4 failed to execute and register the sale deed as agreed; thus the petitioners were constrained to institute a suit for specific performance of contract before the Court of learned Joint District Judge, 1st Court, Dhaka being Title Suit No.559 of 2016 against the Respondent No.4 for execution of sale deed. The aforesaid fact is evident from the plaint which is annexed with the writ petition and marked as Annexure-J.

(l) that during pendency of the said suit, on 21.11.2016, the Respondent No.5 filed an application under Order 1 Rule 10(2) of the Code of Civil Procedure for addition of party stating, *inter alia*, that there was an earlier unregistered agreement with the Respondent No.5 and on the basis of the said agreement, the Respondent No.4 is bound to register the sale deed of the suit land in favour of him; subsequently the application was withdrawn by filing another application dated 26.01.2017 and in both the applications, it was stated that the Respondent No.4 took Tk.35,00,00,000/- from the Respondent No.5 for his business purpose. The aforesaid fact is evident from the application for addition of party dated 22.11.2016 and order dated 26.01.2017 which are annexed with the writ petition and marked as Annexure-K and K-1.

(m) that the Respondent No.5 entered with an registered agreement for compromise being No.2720 dated 12.04.2018 with the petitioners receiving Tk.1 crore, gave up his all claims and made an undertaking that he has no grievance against the above mentioned transfer between the petitioners and Respondent No.4 and he will not make any complaint or allegation against the petitioners in connection with the above mentioned transfer. The aforesaid fact is evident from the photocopy of the registered agreement for compromise which is annexed with the writ petition and marked as Annexure-L.

(n) that the above mentioned Suit No.559 of 2016 was decreed on compromise on 28.02.2017 and the petitioners filed Title Execution Case No.07 of 2017 and the learned executing Court, Joint District Judge, 1st Court, Dhaka executed and registered the sale deed being No.3578 dated 22.05.2017 and since then the petitioners being the owners have been enjoying the said land within the knowledge of all concerned. The aforesaid fact is evident from the judgment and decree dated 20.02.2017 and 27.02.2017, order dated 16.05.2017 and the registered sale deed being No.3578 dated 22.05.2017 which are annexed with the writ petition and marked as Annexure-M, M-1, M-2 and M-3.

(o) that on 11.12.2018, the Respondent No.5 with ulterior motive and in order to make unnecessary harassment filed an application along with two paper cuttings before the Respondent No.2 against the petitioners for penal action alleging evasion of stamp duty and registration fee against the registration of above mentioned deed while executing and registering the same through the Court of law. The aforesaid fact is evident from the application dated 11.12.2018 which is annexed with the writ petition and marked as Annexure-N.

(p) that on the basis of the above mentioned application, the Respondent No.3 issued the impugned notices dated 20.01.2019 (Annexure-O and O-1) under Section 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure directing the petitioners to appear before the Respondent No. 03 along with documents with respect to the land of Plot No.54, Mohakhali Commercial Area, Dhaka. The aforesaid fact is evident from the notices dated 20.01.2019 under Memo Nos.2297 and 2298 which are annexed with the writ petition and marked as Annexure-O and O-1.

(q) that on 20.01.2019, the petitioners filed two applications before the Respondent No.3 seeking for one month time to collect the relevant papers and documents and thereafter the Respondent No.3 extended the time till 31.01.2019 and issued two notices dated 27.01.2019 under Memo Nos.3003 and 3005 (Annexure-P and P-1) directing the petitioners to appear before him along with documents with respect to the land of Plot No.54, Mohakhali Commercial Area, Dhaka. The aforesaid fact is evident from the notices dated 27.01.2019 under Memo Nos.3003 and 3005 which are annexed with Writ Petition No.1087 of 2019 and marked therein as Annexure-P and P-1.

(r) That on the basis of the above mentioned application (Annexure-N), the Anti-Corruption Commission earlier issued two notices dated 20.01.2019 and 27.01.2019 under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 in the name of the petitioners' two companies namely Standard Group Limited and Standard Stitches Limited respectively regarding the above mentioned purchase of the land.

(s) That the petitioners' two companies namely Standard Group Limited and Standard Stitches Limited being petitioners filed a writ petition being No.1087 of 2019 against the above mentioned notices dated 20.01.2019 and 27.01.2019 and after preliminary hearing in presence of the learned Advocate for the Anti-Corruption Commission, a Division Bench of this Division was pleased to issue Rule Nisi and stay the operation of the above mentioned notices for a period of 03 months by an order dated 11.02.2019. The aforesaid fact is evident from Annexure-P to the writ petition.

(t) That during pendency of the above mentioned writ petition, the Anti-Corruption Commission under signature of the Respondent No.3 issued a further notice dated 19.03.2019 under Memo No.00.01.0000.502.01.007.19/10745 and Memo No. 00.01.0000.502.01.007.19/10745 respectively under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure issued by the Respondent No.3 directing the petitioners to appear and make statement regarding evasion of registration fees and taxes for purchasing land before the Respondent No.3 following the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.5. The aforesaid is evident from Annexure-Q and Q1 to the writ petition.

(u) That on 28.03.2019, the petitioners filed two applications before the Respondent No.3 requesting her to stay all further proceeding of the impugned notices till disposal of the above mentioned writ petition and after receiving of the said application, the Respondent No.3 orally directed the petitioners to appear before her on 08.04.2019 with the documents. The aforesaid is evident from Annexure-R and R-1 to the writ petition.

3. Being aggrieved by the impugned notices, the petitioners approached this court with an application under Article 102 of the Constitution and obtained this Rule along with an order of stay of operation of the impugned notices.

4. At the very outset, Mr. Probir Niogi, the learned Senior Advocate along with Mr. Md. Muniruzzaman, Advocate and Ms. Anita Gazi Rahman, Advocate for the petitioners, submits that the petitioners and the Respondent No.4 purchased the case land through the Court of law and the Rajdhani Unnayan Kartipakkha (RAJUK) and 2 others filed 3 Writ Petitions being Nos.4800 of 2014, 7156 of 2014 and 5196 of 2013 challenging the legality of the said sale and all the writ petitions were discharged; thereafter the RAJUK preferred Civil Petition For Leave To Appeal No.3269 of 2016 against of the judgment and order of Writ Petition No.4800 of 2014 and the same was dismissed on 03.08.2017; thereafter the petitioners and the Respondent No.4 filed Writ Petition No.6637 of 2016 for direction upon the RAJUK to mutate their names; subsequently the said Rule was made absolute by the judgment and order dated 07.09.2016 and for non-compliance of the said order, the petitioners filed Contempt Petition being No.82 of 2017 against the RAJUK and obtained a further order of direction; subsequently against the said judgment and order dated 10.10.2017, the RAJUK preferred Civil Petition For Leave to Appeal being No.4124 of 2017 and the same was dismissed on 01.04.2018 with a finding that the respondents i.e. the present petitioners and Respondent No.4 legally purchased the case property through Court and their title has become unassailable and as such, the impugned notices directing the petitioners to appear and make statement regarding evasion of registration fees and taxes for purchasing land before the Respondent No.3, are illegal, without jurisdiction and without lawful authority and are of no legal effect.

5. He next submits that the Respondent No.4 purchased a portion of the case property through the Court and agreed to sell his portion to the petitioners by executing an agreement for sale and receiving earnest money; subsequently he denied to execute the sale deed by receiving the remaining consideration and thereby the petitioners filed a suit for specific performance of contract and obtained a decree and pursuant to the said decree, Title Execution Case being No.07 of 2017 was filed and then the learned Judge of the executing Court, Joint District Judge, 1st Court, Dhaka executed and registered the sale deed being No.3578 dated 22.05.2017 and thus there is no scope to re-open the same in the name of inquiry without permission of the Court and therefore the impugned notices are illegal, without jurisdiction and without lawful authority and are of no legal effect.

6. He then submits that the Stamp Act, 1899 and the Registration Act, 1908 have provided certain provisions for realizing unpaid duties or revenues if any, but provided no provision for filing any criminal proceeding under the provision of the Penal Code or under the provision of the Prevention of Corruption Act, 1947 for realizing unpaid duties or revenues and therefore, the impugned notices are liable to be declared illegal and without lawful authority and are of no legal effect.

7. He further submits that under Section 63A of the Registration Act, 1908, the unpaid amount of duties for the deed not properly valued shall be realized from the concerned registering officer and under the provision of the Stamp Act, 1899, there are provision for realizing the revenues but without complying with those provisions of law, the Respondent No.3 most illegally with mala fide intention started the process of inquiry against the petitioners pursuant to the application filed by the Respondent No.5 and therefore, the impugned notices are liable to be declared without lawful authority and are of no legal effect.

8. He additionally submits that the sale deed was executed and registered by a competent court of law pursuant to a decree of specific performance of contract and as such, without any order of the concerned court, there is no scope to proceed with the realization of shortage of payment of stamp duty or tax if any and therefore, the impugned notices of the Respondent No.3 to proceed with the inquiry pursuant to the application (Annexure-N) filed by the Respondent No.5 are liable to be declared without lawful authority and are of no legal effect.

9. He candidly submits that the Registration Act, 1908 and the Stamp Act, 1899 are not included in the schedule of the Durniti Damon Commission Act, 2004 and therefore the impugned notices of the Respondent No.3 to proceed with the inquiry pursuant to the application (Annexure-N) filed by the Respondent No.5 are liable to be declared without lawful authority and are of no legal effect.

10. Mr. Niogi, with reference to Clause 5.73 of the Constitutional law of Bangladesh (3rd edition) by Mahamudul Islam, submits that "*a mala fide exercise of discretionary power is bad as it amounts to abuse of discretion";* in support of his submission, Mr. Niogi has referred to a legal decision taken in the case of Nur Mohammad Vs. Mainuddin Ahmed, reported in 39 DLR(AD), wherein it was held that "*power conferred by or under any law must not be exercised mala fide or for collateral purpose. The mala fide act is an act without jurisdiction;"* and then Mr. Niogi has also referred to a legal decision taken in the case of Mohammad Ali Vs. Burma Eastern reported in 38 DLR(AD) 41 wherein it was decided that "*a mala fide act is by its nature an act without jurisdiction. No legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power".*

11. Mr. Niogi vigorously submits that as per Rule 3(5) of the Anti-Corruption Commission Rules, 2007, the ACC shall not directly go for conducting inquiry in respect of complaints which have not been found to be prima facie correct and true by the Scrutiny Committee, but in the present case, the impugned notices have been issued upon the petitioners on the basis of a complaint filed by the Respondent No.5 without satisfying itself as to the prime-facie correctness of the allegation.

12. Mr. Niogi further points out that the allegations made in the petition of complaint do not come within the purview of the scheduled offence of the ACC Act, 2004 and further, the provision of the Registration Act, 1908 and the Stamp Act, 1899 are available for realizing the shortage of payment of duties and taxes if any as alleged in the petition of complaint of the Respondent No.5.

13. Mr. Niogi lastly submits that it appears from the petition of complaint of the Respondent No.5 that the Respondent No.2 has prior knowledge about the sale of the case land through the Court, thus the notices have been issued by exercising the discretion arbitrarily taking mala fide intention.

14. On the other hand, Mr. M.A. Aziz Khan, the learned Advocate appearing on behalf of the Anti-Corruption Commission (ACC) has contested the Rule and submitted affidavit-in-opposition denying the statements and grounds taken in the writ petition and categorically submits that the impugned notices dated 19.03.2019 under Memo No.00.01.0000.502.01. 007. 19/10746 and Memo No.00.01.0000. 502.01. 007. 19/10745 respectively under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure issued by

the Respondent No.3 (Annexure-Q and Q-1) directing the petitioners to appear and make statement regarding evasion of registration fees and taxes for purchasing land before the Respondent No.3 following the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.5, were issued for fact finding inquiry for discovering the truth which will go to assist the Commission either to proceed further by lodging an F.I.R or to keep the complaint with the record if found to be without any basis and as such, since the impugned notices are the parts of fact finding process under the relevant law, the writ petition is not at all maintainable.

15. He next submits that it is by now a settled law that sub-section (1) and (2) of Section 19 of the ACC Act, 2004 have given wide jurisdiction to the Anti-Corruption Commission to inquire into and investigate any allegations whatsoever as covered in its schedule and in doing so, the Commission may direct any authority, public or private, to produce relevant documents and the person concerned shall be bound to comply with the direction.

16. He then submits that the impugned notices dated 19.03.2019 under Memo No.00.01.0000.502.01. 007. 19/10746 and Memo No.00.01.0000.502.01. 007. 19/10745 respectively under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure issued by the Respondent No.3 (Annexure-Q and Q-1) directing the petitioners to appear and make statement regarding evasion of registration fees and taxes for purchasing land before the Respondent No.3 following the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.5, have been issued in respect of an allegation of evading registration fees and taxes at the time of registration of the sale deed through corruption and hence, such allegations clearly fall within the schedule offence of the Anti-Corruption Commission Act, 2004.

17. He candidly submits that the allegation of '*mala fide* exercise of power by the Anti-Corruption Commission' as raised by the petitioners is baseless inasmuch as no facts showing the allegation of malice to have a basis have been narrated by the writ petitioners anywhere in the writ petition or in the supplementary affidavits and hence, the allegation of lack of jurisdiction because of malice in fact is not tenable in the facts and circumstances of the case.

18. He additionally submits that the impugned notices were issued *bona fide* as a fact finding process and to hear the story of the writ petitioners and the writ petitioners had ample opportunity to appear before the Commission and present their cases with documents and the writ petitioners by submitting applications for extension of time had in fact accepted the position that they would appear before the Commission and submit their cases and relevant documents.

19. He vigorously submits that the allegations against the writ petitioners being ''যমুনা ব্যাংক লিঃ এর সাবেক চেয়ারম্যান জনাব আরিফুর রহমান, বর্তমান চেয়ারম্যান মোশারফ হোসেন ও পরিচালক জনাব আতিকুর রহমান এর বিরুদ্ধে জমি ক্রয় করে ০১ কোটি টাকার দলিল রেজিষ্ট্রেশন ফি ও ট্যাক্স ফাঁকি দেয়ার অভিযোগ" are very serious in nature and the same requires a thorough inquiry in order to decipher the veracity of those allegations and as such, the Rule Nisi issued in the instant writ petition is liable to be discharged for ends of justice so as to allow the Commission to discharge its functions as per law.

20. He then points out that the Anti-Corruption Commission has the authority to questioning any person about the correctness of its documents as a fact finding process and

unless and until any legal action is initiated on the basis of the said findings, there is no scope to review the matter in writ jurisdiction and thus the writ petition is a pre-matured one; in support his submission, the learned Advocate has referred to a legal decision taken in the case of Sonali Jute Mills Ltd Vs. ACC reported in 22 BLC(AD) 147 wherein it was held that "sub-section(1) and (2) of the 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, the ACC may direct any authority, public or private to produce relevant documents".

21. He lastly submits that the submission of the learned Advocate for the writ petitioners is that the Commission has already come to know about the relevant facts through the instant writ petition is a dangerous proposition inasmuch as if such proposition is accepted, then every time if there is a notice issued by the Anti-Corruption Commission under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004, the same will trigger filing of a writ petition which will open a floodgate and in the facts and circumstances of the instant case, there is no justification for allowing anyone to trigger that floodgate to open and considering all the aspects of this matter, the Rule may be discharged.

22. The Respondent No.5 Md. Sekender Ali Moni has also submitted affidavit-in-opposition stating, *inter-alia*, that the present deponent filed the application dated 11.12.2018 to the Anti-Corruption Commission neither with ulterior motive nor in order to harass the petitioner but out of grudge and resentment derived from non-cooperation of Mr. Atiqur Rahman, the Chairman of Standard Group Limited and Standard Stitches Limited, in recovery of outstanding debts from the sale proceeds of land received by the friend of the present respondent, Mr. Md. Arifur Rahman, the vendor of land who is impleaded in the instant writ petition as Respondent No.4; that the Respondent No.5 was unable to conceive that the consequence of the application dated 11.12.2018 would be so harassing to Mr. Md. Atiqur Rahman, who is the Chairman of Standard Group and Standard Stitches and Chairman (former Director) of Jamuna Bank Limited with whom the present deponent has no enmity and for this consequence of the application, the present deponent feels discomfort and feeling so the present deponent on 08.07.2019 filed an application to the Anti-Corruption Commission seeking for withdrawal of the application of the present deponent dated 11.12.2018 and the present deponent also sworn an affidavit to that effect on the same day. The aforesaid fact is evident from the application and affidavit dated 08.07.2019 which are annexed with the affidavit-in-opposition filed by the Respondent No.5 and marked as Annexure 1 and 1-A.

23. Mr. A.K.M Amin Uddin, DAG along with Mrs. Anna Khanom Koli, AAG and Mr. Md. Shaifour Rahman Siddique, AAG appearing on behalf of the Respondent No.1, has adopted the submissions made by the learned Advocate for the Anti-Corruption Commission.

24. We have gone through the writ petition, the supplementary affidavits and the affidavit-in-oppositions submitted by the Respondent Nos.2 and 5 and perused all the materials annexed therewith. We have also heard the learned Advocates for the writ petitioners, the Anti-Corruption Commission, the Respondent No.5 and the learned Deputy Attorney-General for the respective parties and considered their submissions to the best of our wit and wisdom.

25. On perusal of the record, it appears that admittedly the writ petitioners purchased the case land through the court by way of sale certificate and the learned judge of the Execution Court handed over possession of the land to the petitioners by way of writ for delivery of

possession. Challenging the said sale, several writ petitions and leave petitions were filed and ultimately all of them were discharged and dismissed. The writ petitioners as auction purchasers having failed to mutate their names against their purchased property filed Writ Petition No. 6637 of 2016 against RAJUK and the said Rule was made absolute by a Division Bench of this Division. Then RAJUK filed Civil Petition For Leave To Appeal No. 4124 of 2017 before the Appellate Division against the said judgment of the High Court Division and the same was dismissed on 01.04.2018 with a findings that the writ petitioners have legally purchased the case property through Court and their title has become unassailable. Thus the matter at hand is a judicially decided one and subsequent questioning about the said documents of purchase without reviewing the same is violative of the right of property of a citizen as guaranteed under Article 42 of the Constitution. Though during pendency of the instant Rule Nisi, review petition was filed by RAJUK being No. 247 of 2019, but the same was dismissed on 16.01.2020.

26. It may be mentioned that when any legal issue is finally decided by the apex Court of the country, any initiative to re-open the same issue by any authority of the government or statutory authority like ACC in the name of exercise of discretionary power without prior approval of the Court, is absolutely mala fide and abuse of discretionary power. The aforesaid view finds support in Clause 5.73 of the Constitutional law of Bangladesh (3rd edition) by Mahamudul Islam, wherein it is stated that "*a mala fide exercise of discretionary power is bad as it amounts to abuse of discretion";* The aforesaid view is also supported by a legal decision taken in the case of Nur Mohammad vs. Mainuddin Ahmed case reported in 39 DLR(AD), wherein it was held that "*power conferred by or under any law must not be exercised mala fide or for collateral purpose. The mala fide act is an act without jurisdiction;"* and similar view has been expressed in the legal decision taken in the case of Mohammad Ali Vs. Burma Eastern reported in 38 DLR(AD) 41 wherein it was decided that "*a mala fide act is by its nature an act without jurisdiction. No legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power".*

27. It is true that the ACC is empowered by law to inquire into any allegation whatsoever as covered in its schedule and in doing so may direct any authority, public or private to produce relevant documents but the same must be bona fide and lawful in nature. In affidavit-in-opposition, the ACC has stated that the impugned notices were issued on the basis of the complaint made by the Respondent No.5.

28. Now let us see the said complaint (Annexure- N) annexed to the writ petition. On the 1st page of the complaint, it is stated that ''আরিফুর রহমানের নামে ১ বিঘার কিছু বেশি অংশ ও আতিকুর রহমান ও মোশারফ হোসেনের ফার্মের নামে ১ বিঘার কিছু বেশি অংশ আদালতে সেটেলমেন্ট সেলের মাধ্যমে ক্রয় করেন". It is further stated on the said page that ''আদালত কর্তৃক জমি রেজিষ্ট্রেশন ও দখল বুঝাইয়া দেওয়ার পর আমি চেকগুলি নিয়ে ব্যাংকে গেলে সবগুলি চেকই বাউন্স হয়।" So, from the statements of the complaint, it is evident that the ACC was clearly informed about the purchase and handing over possession of the case land through court and thus the notices upon the purchasers of the said sale bringing an allegation as ''যমুনা ব্যাংক লিঃ এর সাবেক চেয়ারম্যান জনাব আরিফুর রহমান, বর্তমান চেয়ারম্যান মোশারফ হোসেন ও পরিচালক জনাব আতিকুর রহমান এর বিরুদ্ধে জমি ক্রয় করে ০১ কোটি টাকার দলিল রেজিষ্ট্রেশন ফি ও ট্যাক্স ফাঁকি দেয়ার অভিযোগ" are not bona fide rather mala fide and also infringement of the fundamental right of property of the petitioners as guaranteed by the Constitution.

29. Further, as per Rule 3(5) of the Anti-Corruption Commission Rules, 2007, the ACC shall not directly go for conducting inquiry in respect of complaints which have not been

found to be prima-facie correct and true by the Scrutiny Committee, but in the present case the impugned notices have been issued upon the petitioners neither without holding any initial scrutiny, nor examining the context of the complaint thoroughly which causes the un-necessary consumption of the valuable time of the court as well as harassing the citizens without any reason.

30. With reference to the legal decision taken in the case of Sonali Jute Mills Ltd Vs. ACC reported in 22 BLC (AD) 147, the submission of the learned Advocate for the ACC is that sub-section(1) and (2) of section-19 have given wide jurisdiction to the Commission to inquire into and investigate any allegations whatsoever as covered in its schedule and in doing so, the ACC may direct any authority, public or private to produce relevant documents. But the allegation under the instant inquiry which is admittedly initiated on the allegation as stated in the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.05 with regard to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and other duties for registering a deed of sale does not come within the schedule offences of the Anti-Corruption Commission Act, 2004 rather it may come under the purview of Section 63A of the Registration Act, 1908 and under the provision of Stamp Act, 1899 and thus the said case law is not applicable to the case of the petitioners. It appears from the annexures of the writ petition that the subsequent sale between the petitioners and the Respondent No.4 was also held by a Court of law pursuant to a decree of specific performance of contract and thus there is no scope of taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and stamp fees at all. Apart from these, during pendency of the Rule, the Respondent No.5 has withdrawn his complaint from the ACC and filed affidavit before this Court in support of the petitioners and thus the complaint itself has become susceptible.

31. It may be noted that on the basis of the application (Annexure-N) filed by the Respondent No.5, the Anti-Corruption Commission earlier issued two notices dated 20.01.2019 and 27.01.2019 under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure directing the petitioners' two companies namely Standard Group Limited and Standard Stitches Limited respectively to appear before the Respondent No.3 along with the documents with respect to Plot No.54, Mohakhali Commercial Area, Dhaka.

32. Being aggrieved the same, the petitioners' two companies namely Standard Group Limited and Standard Stitches Limited being petitioners filed Writ Petition being No.1087 of 2019 against the above mentioned notices dated 20.01.2019 and 27.01.2019 and after preliminary hearing in presence of the learned Advocate for the Anti-Corruption Commission, a Division Bench of this Division was pleased to issue Rule Nisi and stay the operation of the above mentioned notices for a period of 03 months by an order dated 11.02.2019. Subsequently, the period of stay was extended by this Court time to time.

33. During pendency of the above mentioned writ petition, the Anti-Corruption Commission under signature of the Respondent No.3 issued a further notice dated 19.03.2019 under Memo No.00.01.0000.502.01.007.19/10745 and Memo No. 00.01.0000.502.01.007.19/10745 respectively under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure issued by the Respondent No.3 directing the petitioners to appear and make statement with respect to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and taxes for purchasing land before the Respondent No.3 following the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.5.

34. It appears from the record that the ACC in the name of exercising discretionary power issued the impugned notices hurriedly during pendency of Writ Petition 1087 of 2019 directing the petitioners to appear before the ACC to make statements with respect to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and other taxes at the time of purchase of the land in question, which is tantamount to interference in the administration of justice that cannot escape characterization of a mala fide act having something in the mind of the Respondent No.3 and that is why we have no hesitation to say that the impugned notices have been issued abusing of the discretion and thus the same are liable to be interfered with by this Court.

35. Having considered all the facts and circumstances of the case, the submissions advanced by the learned Advocates for the respective parties and the propositions of law cited and discussed above, we find merit in this instant Rule.

36. Accordingly, the Rule is made absolute.

37. In consequence thereof, the impugned notices dated 19.03.2019 under Memo No.00.01.0000. 502.01.7.19/10746 and Memo No.00.01.0000. 502.01. 007. 19/10745 respectively issued by the Respondent No.3 (Annexure-Q and Q-1) under Sections 19 and 20 of the Anti-Corruption Commission Act, 2004 and Rule 20 of the Anti-Corruption Commission Rules, 2007 read with Section 160 of the Code of Criminal Procedure directing the petitioners to appear and make statements with respect to taking possession of RAJUK plot unlawfully creating forged documents and evasion of registration fees and taxes at the time of purchase and registration of the land in question, before the Respondent No.3, following the application dated 11.12.2018 (Annexure-N) filed by the Respondent No.5, are declared to have been made/issued without lawful authority and are of no legal effect.

38. Communicate the judgment and order to the Chairman, Anti-Corruption Commission and other respondents at once.

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**হাইকোর্ট বিভাগ**
**(বিশেষ মূল অধিক্ষেত্র)**

রীট পিটিশন নং ৫৫০৮/২০১৭

**মোহাম্মদ জহিরুল ইসলাম**
.....দরখাস্তকারী
-বনাম-
**বাংলাদেশ সরকার ও অন্যান্য**
..... প্রতিপক্ষগণ

এ্যাডভোকেট আব্দুল হালিম
.....দরখাস্তকারী পক্ষে
এ্যাডভোকেট মোঃ ওবায়দুর রহমান
---১নং প্রতিপক্ষ পক্ষে
এ্যাডভোকেট সাইফুর রশিদ
----৮ নং প্রতিপক্ষ পক্ষে
এ্যাডভোকেট এম,জি, মাহমুদ (শাহীন)
--- ৯ নং প্রতিপক্ষ পক্ষে

এ্যাডভোকেট ওয়ায়েস আল হারুনী, ডেপুটি এটর্নী জেনারেল সংগে
এ্যাডভোকেট আশেক মোমিন, ডেপুটি এটর্নী জেনারেল
এ্যাডভোকেট ইলিন ইমন সাহা, সহকারী এটর্নী জেনারেল
এ্যাডভেকোট সায়রা ফিরোজ, সহকারী এটর্নী জেনারেল
এ্যাডভোকেট মাহফুজুর রহমান লিখন, সহকারী এটর্নী জেনারেল
এ্যাডভোকেট হাফিজুর রহমান, সহকারী এটর্নী জেনারেল
এ্যাডভোকেট আফিফা বেগম, সহকারী এটর্নী জেনারেল
এ্যাডভোকেট লাকী বেগম, সহকারী এটর্নী জেনারেল
.....রাষ্ট্র পক্ষে

শুনানীর তারিখ ঃ ১৯.০২.২০২০, ০৯.০৩.২০২০, ২৭.০১.২০২১ এবং রায় প্রদানের তারিখ ঃ ৩০.০৬.২০২১

**উপস্থিতঃ**
**বিচারপতি মোঃ আশরাফুল কামাল**
**এবং**
**বিচারপতি রাজিক আল জলিল**

## Editors' Note:

নির্ধারিত সময়ের পরে বিকাল ৪.০০ ঘটিকায় ১৯৮ জন যাত্রী নিয়ে বিগত ইংরেজী ০২.০৪.২০১৭ তারিখে বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষের মালিকানাধীন জাহাজ *''ভাষা শহীদ সালাম''*, যাত্রীসহ কুমিরা ঘাট থেকে সন্দীপের গুপ্তছড়া ঘাটের উদ্দেশ্যে যাত্রা শুরু করে এবং সন্ধ্যা ৬.১০ মিনিটে গুপ্তছড়া ঘাটে নোঙ্গর করে। ঘাটের কাছে সাগরের গভীরতা কম থাকায় জাহাজ জেটিতে ভিড়তে পারে না। তাই ঘাটে নামতে লাল বোটে উঠতে হয় যাত্রীদের। তখন সন্ধ্যা হয়ে গেছে। দুটি লাল বোটের সাহায্যে যাত্রী নামানোর পর তৃতীয় বোট যাত্রী নিয়ে যাওয়ার পথে প্রচন্ড ঢেউয়ে বোট ডুবে ১৮ জন যাত্রী মৃত্যুবরণ করে। এই ঘটনায় প্রতিপক্ষগণের দায়িত্বে অবহেলার কারণে ক্ষতিগ্রস্ত পরিবারসমূহকে যথাযথ ক্ষতিপূরণ প্রদানের নির্দেশনা প্রার্থনায় এই রীট পিটিশনটি দাখিল করা হয়। শুনানী অন্তে হাইকোর্ট বিভাগ মত প্রদান করে যে, সংবিধানের ৩২ অনুচ্ছেদে প্রদত্ত বেঁচে থাকার অধিকারের প্রমাণিত হরণ হলে সাংবিধানিক আদালত ক্ষতিপূরণ প্রদান করতে পারে যা প্রাইভেট আইনে দাবী আদায়ের অতিরিক্ত হিসাবে গণ্য হবে। সাংবিধানিক আইনে সরকার বা সরকারী কর্তৃপক্ষ তাদের অধীনস্ত কর্মকর্তা বা কর্মচারীদের দায়িত্বে গাফিলতির জন্য ক্ষতিপূরণ দিতে বাধ্য। তবে সরকার এই সমপরিমাণ টাকা দায়িত্বে গাফিলতির জন্য দায়ী সংশ্লিষ্ট কর্মকর্তা, কর্মচারী এবং ঠিকাদারদের কাছ থেকে আইনগত পদ্ধতিতে আদায় করে সরকারী কোষাগারে জমা দিবেন। হাইকোর্ট বিভাগ এছাড়াও মত প্রকাশ করে যে, ক্ষতিপূরণের আদেশ দেয়ার পরে প্রায়ই দেখা যায় যে, প্রতিবাদীগণ ক্ষতিপূরণের টাকা দিতে কালক্ষেপন করেন। সেজন্য ক্ষতিপূরণের মামলায় ব্যাংক রেট হারে ক্ষতিপূরণের সাথে সুদ প্রদানের বাধ্যবাধকতা থাকা প্রয়োজন। অতপর হাইকোর্ট বিভাগ ৯ দফা নির্দেশনাসহ ১৮টি পরিবারের প্রতিটি পরিবারকে ১৫ লক্ষ টাকা করে ক্ষতিপূরণএবং ক্ষতিপূরণের অতিরিক্ত হিসেবে মামলা দায়েরের তারিখ থেকে শুরু করে ক্ষতিগ্রস্তদের একাউন্টে ক্ষতিপূরণের টাকা জমা হওয়া পর্যন্ত প্রচলিত ব্যাংক রেট তথা ৮% হারে সুদ পরিশোধের জন্য প্রতবিাদীগণকে নির্দেশনা প্রদান করেন।

**গুরুত্বপূর্ণ শব্দাবলীঃ**:
অনুচ্ছেদ ৩২, বাংলাদেশ সংবিধান; ক্ষতি পূরণ; কঠিন দায়; Strict liability; Vicarious Liability; অবহেলা (Negligence)

অনুচ্ছেদ ৩২, বাংলাদেশ সংবিধানঃ

বেঁচে থাকার অধিকারের প্রমাণিত হরণ হলে সাংবিধানিক আদালত ক্ষতিপূরণ প্রাদান করবেঃ

**সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক tortius তথা পূরণযোগ্য ক্ষতির অপরাধ সম্পাদনের কারণে ক্ষতিগ্রস্থ ব্যক্তি প্রাইভেট আইনের আওতায় তার দাবী সাধারণত উত্থাপন করেন। কিন্তু সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক প্রদত্ত অধীকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ হলে সাংবিধানিক আদালত ক্ষতিপূরণ প্রাদান করবে। ক্ষতিগ্রস্থ ব্যক্তি তথা মৃত ব্যক্তির বেঁচে থাকার অধিকারে প্রমাণিত হরণের উপরিল্লিখিত সাংবিধানিক দাবী উত্থাপনের পাবলিক আইনে প্রদত্ত অধিকারটি প্রাইভেট আইনে প্রদত্ত দাবী আদায়ের সুযোগের অতিরিক্ত হিসেবে গণ্য হবে। ...(প্যারা ৫১)**

**রাষ্ট্রের কর্মকর্তা-কর্মচারী কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহের কার্য বা আদেশ দ্বারা কোন ব্যক্তি বেঁচে থাকার সংবিধান প্রদত্ত মৌলিক অধিকার হরণ করা হলে উক্ত হরণ সংশ্লিষ্ট রাষ্ট্রের কর্মকর্তা-কর্মচারী বা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহের কঠিন দায় (Strict liability)। ...(প্যারা ৫৪)**

**যেখানে ভিকটিমের তথা মৃত ব্যক্তির মৌলিক অধিকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ হবে সেখানে আদালত সংক্ষুব্ধ ব্যক্তির দাবী এ কারণে এড়িয়ে চলার নীতি অনুসরণ করবেন না যে, সংক্ষুব্ধ ব্যক্তি দেওয়ানী আদালতে মোকদ্দমা দায়েরের সুবিধাপ্রাপ্ত। ...(প্যারা ৫৫)**

টর্ট তথা ক্ষতিপূরণ আইনে ভিকারিয়াস লায়াবিলিটি **(Vicarious Liability)** নীতিটি সাংবিধানিক আইনে মৌলিক অধিকার ভংগের ক্ষেত্রেও সমভাবে প্রযোজ্য। সাংবিধানিক আইনে ক্ষতিপূরণের নীতিটি বর্তমানে সুপ্রতিষ্ঠিত। সাংবিধানিক আইনে সরকার বা সরকারী কর্তৃপক্ষ তাদের অধীনস্থ কর্মকর্তা বা কর্মচারীদের দায়িত্বে গাফিলতির জন্য ক্ষতিপূরণ দিতে বাধ্য। তবে সরকার এই সমপরিমাণ টাকা দায়িত্বে গাফিলতির জন্য দায়ী সংশ্লিষ্ট কর্মকর্তা, কর্মচারী এবং ঠিকাদারদের কাছ থেকে আইনগত পদ্ধতিতে আদায় করে সরকারী কোষাগারে জমা দিবেন। এই নীতিটির ফলে সরকারী কোষাগার থেকে ক্ষতিপূরণ দিলেও দায়িত্বে অবহেলা যে সব কর্মকর্তা বা কর্মচারী করেছে তাদের কাছ থেকে এই টাকা আদায় করে সরকারী কোষাগারে জমা দেয়া হবে।
...(প্যারা ৫৬)

**সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক কোন ব্যক্তিকে তার জীবন হতে বঞ্চিত করা যাবে না। এটি বাংলাদেশে অবস্থিত প্রত্যেক ব্যক্তির মৌলিক অধিকার। সংবিধান এখানে নাগরিক শব্দটি ব্যবহার করে নাই, করেছে 'ব্যক্তি' শব্দটি। অর্থাৎ বাংলাদেশের নাগরিকসহ বাংলাদেশে অবস্থিত বৈধ অবৈধ যে কোন ব্যক্তিকে বাংলাদেশ নামক রাষ্ট্র সুরক্ষা প্রদান করবে। বাংলাদেশে অবস্থিত প্রত্যেক ব্যক্তির জীবনের সুরক্ষা প্রদান করে প্রদত্ত মৌলিক অধিকার হলো রাষ্ট্রর "কঠিন দায়" তথা "Strict Liability"।
...(প্যারা ৬৩)**

ক্ষতিপূরণের আদেশ দেয়ার পরে প্রায়ই দেখা যায় যে, প্রতিবাদীগণ ক্ষতিপূরণের টাকা দিতে কালক্ষেপন করেন। ক্ষতিপূরণের টাকা পরিশোধে বিলম্বের দ্বারা ভুক্তভোগীদেরকে এক ধরণের অজানা আশংকার মাঝে নিমজ্জিত করে রাখা হয়। সেজন্য ক্ষতিপূরণের মামলায় ব্যাংক রেট হারে ক্ষতিপূরণের সাথে সুদ প্রদানের বাধ্যবাধকতা থাকা প্রয়োজন। ক্ষতিপূরণ একটি দেনার মতো, একটি ঋণের মতো যা সুদসহ পরিশোধিত হয়। ...(প্যারা ৬৫)

**সন্দীপের গুপ্তছড়া ঘাটে লাল বোট ডুবে ১৮ জন যাত্রীর মৃত্যু ৮ ও ৯নং প্রতিপক্ষদ্বয়ের অবহেলায় সংঘটিত হয়েছে যা প্রমাণিত সত্য এবং উক্ত "অবহেলা (Negligence)" আইনসংগত কর্তৃত্ব ব্যতিরেকে করা হয়েছে বিধায় উক্ত "অবহেলা (Negligence)" এর কোন আইনগত কার্যকারিতা নাই মর্মে ঘোষণা করা হলো এবং ১৮ জন মৃত ব্যক্তির পরিবারকে ক্ষতিপূরণ প্রদান ৮ ও ৯নং প্রতিপক্ষদ্বয়ের করণীয় কার্যহেতু উক্ত ক্ষতিপূরণ প্রদানের নির্দেশ প্রদান করা হলো। আমরা, অতঃপর, নিম্নে বর্ণিত আদেশ এবং নির্দেশনাসমূহ প্রদান করলামঃ**

**১। সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক প্রদত্ত মৌলিক অধিকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ (Proved infringement) হলে সাংবিধানিক আদালত তথা হাইকোর্ট বিভাগ সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় ক্ষতিপূরণ প্রদান করতে এখতিয়ারসম্পন্ন।**

**২। সাংবিধানিক আদালত তথা হাইকোর্ট বিভাগ কর্তৃক সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় এ অধিকার প্রাইভেট আইন (Private Law)-এ প্রদত্ত ক্ষতিপূরণের দাবী আদায়ের অধিকারের অতিরিক্ত হিসেবে গণ্য হবে।**

**৩। সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক পূরণযোগ্য ক্ষতির অপরাধ সংগঠিত হলে ভিকটিম তথা মৃত ব্যক্তির পরিবারের যেকোন সদস্য অথবা তাহাদের পক্ষে যেকোন ব্যক্তি জনস্বার্থে হাইকোর্ট বিভাগে সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় ক্ষতিপূরণ চেয়ে মামলা দায়ের করতে হকদার।**

**৪। সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক পূরণযোগ্য ক্ষতির অপরাধ সংশ্লিষ্ট কর্মকর্তা-কর্মচারী কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠান সমূহের কঠিন দায়বদ্ধতা (Strict liability)।**

**৫। ১৮টি পরিবারের প্রতিটি পরিবারকে ১৫ লক্ষ টাকা করে মোট ১৮ x ১৫,০০,০০০ = ২,৭০,০০,০০০/= (দুই কোটি ৭০ লক্ষ টাকা মাত্র) টাকা যার অর্ধেক BIWTC (৮নং প্রতিবাদী) এবং অর্ধেক CDC যা ৯নং প্রতিবাদী চেকের মাধ্যমে ক্ষতিগ্রস্থ পরিবারের কাছে অত্র রায় প্রাপ্তির ৩০ কর্মদিবসের মাধ্যমে হস্তান্তর করবে এবং ক্ষতিপূরণের অতিরিক্ত হিসেবে মামলা দায়েরের তারিখ থেকে শুরু করে ক্ষতিগ্রস্থদের একাউন্টে ক্ষতিপূরণের টাকা জমা পর্যন্ত প্রচলিত ব্যাংক রেট তথা ৮% হারে সুদ প্রতিবাদীগণ পরিশোধ করবে।**

**৬। দরখাস্তকারী মোঃ জহিরুল ইসলাম এবং বিজ্ঞ এ্যাডভোকেট আব্দুল হালিমকে ক্ষতিগ্রস্ত ব্যক্তিগণের পক্ষে জনস্বার্থে অত্র মামলা দায়েরের জন্য বিশেষ ধন্যবাদ জ্ঞাপন করা হলো।**

**৭। অত্র রায় ও আদেশের অনুলিপি বাংলাদেশের সকল পাবলিক ও প্রাইভেট বিশ্ববিদ্যালয়ের আইন বিভাগের চেয়ারম্যান বরাবরে ই-মেইলে এর মাধ্যমে প্রেরণের জন্য নির্দেশ প্রদান করা হলো।**

**৮। অত্র রায় ও আদেশের অনুলিপি অধস্তন আদালতের সকল বিচারককে ই-মেইল এর মাধ্যমে পাঠানোর জন্য সুপ্রীম কোর্টের রেজিষ্ট্রার জেনারেলকে নির্দেশ প্রদান করা হলো।**

**৯। অত্র রায় ও আদেশের অনুলিপি Judicial Administration Training Institute (JATI)-তে পাঠানোর জন্য সুপ্রীম কোর্টের রেজিষ্ট্রার জেনারেলকে নির্দেশ প্রদান করা হলো।**

**...(প্যারা ৬৯)**

রায়

**বিচারপতি মোঃ আশরাফুল কামালঃ**

১. দরখাস্তকারী মোহাম্মদ জহিরুল ইসলাম কর্তৃক গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ১০২(২) এর অধীন দরখাস্ত দাখিলের প্রেক্ষিতে বিগত ইংরেজী ১৩.০৪.২০১৭ তারিখে প্রতিপক্ষগণের উপর কারণ দর্শানোপূর্বক নিম্নোক্ত উপায়ে রুলটি ইস্যু করা হয়েছিলঃ-

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the inactions and/negligence of the respondents causing the capsize of a little "red boat" on 02.04.2017 of Guptacharagut, Sandwip, Chittagong leaving 23 people including 4 children drowned and dead and many others injured as reported on 4th April, 2017 by the leading daily newspaper Prothom Alo (Annexure-A) should not be declared as without lawful authority and is of no legal effect and as to why the respondents should not be directed to employ modern sea truck and boats equipped with life jackets and other safety materials for passengers for carrying them from Chittagong, Kumiraghat to Saddwipghat and also the respondents should not be directed to compensate the bereaved families and/or pass such other or further order or orders as to this Court may seem fit and proper.
>
> The Rule is returnable within 4(four) weeks.
>
> The petitioner is directed to put in requisites for service of notice upon the respondents through registered post and in usual course."

২. অত্র রুলটি নিষ্পত্তির লক্ষ্যে, ঘটনার সংক্ষিপ্ত বিবরণ এই যে-

সীতাকুন্ডের কুমিরা ঘাট থেকে সি-ট্রাকে (ছোট জাহাজ) করে বঙ্গোপসাগরে ১৬ কিলোমিটার পথ (সন্দ্বীপ চ্যানেল নামে পরিচিত) পাড়ি দিলেই সন্দ্বীপ। বিগত ইংরেজী ০২.০৪.২০১৭ তারিখের স্রোতের কারণে সী-ট্রাক কুমিরা ঘাটে আসতে বিলম্ব হয়, ফলে ছাড়তেও বিলম্ব হয়। নির্ধারিত সময়ের পরে বিকাল ৪.০০ ঘটিকায় ১৯৮ জন যাত্রী নিয়ে বিগত ইংরেজী ০২.০৪.২০১৭ তারিখে বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষের মালিকানাধীন জাহাজ *''ভাষা শহীদ সালাম''*, যার মাস্টার অফিসার ছিল মোঃ শহীদুল্লাহ (কোড নং- ১১২৫০), যাত্রীসহ কুমিরা ঘাট থেকে সন্দীপের গুপ্তছড়া ঘাটের উদ্দেশ্যে যাত্রা শুরু করে সন্ধ্যা ৬.১০ মিনিটে সী-ট্রাকটি গুপ্তছড়া ঘাটে নোঙ্গর করে। ঘাটের কাছে সাগরের গভীরতা কম থাকায় জাহাজ জেটিতে ভিড়তে পারে না। তাই ঘাট থেকে দেড়শ গজ দূরে সি-ট্রাক থেকে নৌকায় তথা লাল বোটে উঠতে হয় যাত্রীদের। তখন সন্ধ্যা হয়ে গেছে। দুটি লাল বোটের সাহায্যে যাত্রী নামানোর পর

তৃতীয় বোট যাত্রী নিয়ে কিনারার দিকে যাওয়ার পথে প্রচন্ড ঢেউয়ে বোট ডুবে ১৮ জন যাত্রী মৃত্যুবরণ করে। প্রতিপক্ষগণের উপরিল্লিখিত দায়িত্বে অবহেলা আইনসংগত কর্তৃত্ব ব্যতিরেকে করা হয়েছে এবং এর কোন আইনগত কার্যকারিতা নাই মর্মে ঘোষণা চেয়ে এবং কুমিরা ঘাট থেকে গুপ্তছড়া ঘাটে যাত্রী সাধারণের যাতায়াতের জন্য লাইফ জ্যাকেট এবং অন্যান্য নিরাপত্তা সামগ্রীসহ আধুনিক সী-ট্রাক এবং বোট প্রদানের জন্য প্রতিপক্ষকে যথাযথ নির্দেশনা প্রদানের প্রার্থনায় এবং ক্ষতিগ্রস্থ পরিবারকে যথাযথ ক্ষতিপূরণ প্রদানের নির্দেশনা প্রার্থনায় অত্র রীট পিটিশনটি দাখিল করে দরখাস্তকারী রুলটি প্রপ্ত হন।

৩. ৮নং প্রতিপক্ষ এবং ৯নং প্রতিপক্ষ হলফান্তে জবাব দাখিল করেন।

৪. দরখাস্তকারী পক্ষে বিজ্ঞ এ্যাডভোকেট আব্দুল হালিম বিস্তারিতভাবে যুক্তিতর্ক উপস্থাপন করেন। অপরদিকে ১নং প্রতিপক্ষ পক্ষে বিজ্ঞ এ্যাডভোকেট মোঃ ওবায়দুর রহমান, ৮ নং প্রতিপক্ষ পক্ষে বিজ্ঞ এ্যাডভোকেট সাইফুর রশিদ এবং ৯ নং প্রতিপক্ষ পক্ষে বিজ্ঞ এ্যাডভোকেট এম,জি, মাহমুদ (শাহীন) বিস্তারিতভাবে যুক্তিতর্ক উপস্থাপন করেন।

৫. অত্র রীট পিটিশন এবং এর সাথে সংযুক্ত সকল সংযুক্তি বিস্তারিতভাবে পর্যালোচনা করা হলো। ৮ এবং ৯নং প্রতিপক্ষের হলফান্তে জবাব এবং এর সাথে সংযুক্ত সকল সংযুক্তি পর্যালোচনা করা হলো। বিজ্ঞ এ্যাডভোকেটগণের যুক্তিতর্ক বিস্তারিতভাবে শ্রবণ করা হলো।

৬. গুরুত্বপূর্ণ বিধায় বিআইডব্লিউটিসি কর্তৃক বিগত ইংরেজী ২৩.০৪.২০১৭ তারিখে স্বাক্ষরিত গত ০২.০৪.২০১৭ ইং তারিখে সন্দ্বীপ গুপ্তছড়া ঘাটে সী-ট্রাক হতে যাত্রী নামার পর লাল বোট ডুবে মর্মান্তিক দুর্ঘটনার তদন্ত প্রতিবেদনটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-C**

বিআইডব্লিউটিসি
বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচল প্রতিষ্ঠান)
১৮, স্ট্যান্ডরোড, সদরঘাট, চট্টগ্রাম।

**বিষয়ঃ গত ০২.০৪.২০১৭ ইং তারিখে সন্দ্বীপ গুপ্তছড়া ঘাটে সী-ট্রাক হতে যাত্রী নামার পর লাল বোট ডুবে মর্মান্তিক দুর্ঘটনার তদন্ত প্রতিবেদন।**

অফিস আদেশ নং-বাঃ বিঃ ১০/২০১৭ ইং তারিখ- ০৩.০৪.২০১৭ ইং এবং সূত্র নং-১৫৬.০৫.০২.০৫৮.২০১৭/২০৫, তারিখ- ০৩.০৪.২০১৭ ইং মোতাবেক গঠিত কমিটি সরেজমিনে পরিদর্শন পূর্বক উপর্যুক্ত বিষয়ে তদন্ত কাজ সম্পন্ন করেন যাহা নিম্নে পেশ করা হলো।
১। কমিটি সরেজমিনে পরিদর্শন করে এতদ্ বিষয়ে সংশ্লিষ্ট ও প্রত্যক্ষদর্শীর নিম্নলিখিত লোকজনের লিখিত জবানবন্দি।
৬। **কমিটি মতামতঃ** গত ০২.০৪.২০১৭ইং তারিখে সংগঠিত দুর্ঘটনার বিষয়ে সী-ট্রাকের কর্মরত নাবিকদের কোন দায়িত্বে অবহেলা পাওয়া যায় নাই। উভয় পাড়ে বোট কন্ট্রাকটর যাত্রী উঠানামার দায়িত্ব থাকায় উক্ত দুর্ঘটনায় তিনি তার দায়িত্ব এড়াতে পারেন না, যদিও তিনি বাধ্য হয়ে খাস আদায়কারীর বোট ব্যবহার করেছেন বলে জানিয়েছেন। তাছাড়া সী ট্রাক চার্টারার যাত্রী উঠানামার বিষয়ে সার্বিক নিরাপত্তার ব্যাপারে প্রয়োজনীয় ব্যবস্থা গ্রহণ করা উচিত ছিল। লাল বোটটি সী ট্রাক হতে যাত্রী নিয়ে কিনারের দিকে যাওয়ার সময় বড় ঢেউয়ের আঘাতে যাত্রীগণ একদিকে জড়ো হওয়ায় কাত হয়ে বোটটি ডুবে যায়। প্রসঙ্গত ঐ দিন আবহাওয়া দপ্তর হতে কোন সিগনাল না থাকলেও সাগর মাঝারি ধরনের উত্তাল ছিল। এ দুর্ঘটনাটি প্রাকৃতিক, এককভাবে কেউ দায়ী বলে কমিটি মনে করেন না। জানামতে সী-ট্রাকের ভাড়ার সাথে নৌকা ভাড়া ও খাস আদায়কারীর টোল নিয়ে নেয়া হয় তারপরও বোটের মাঝি মাল্লারা যাত্রীদের থেকে বকশিশের নামে অতিরিক্ত অর্থ আদায় করেন তাহা কোনভাবে কাম্য নহে, তাহা বন্ধ করা অতীব জরুরী। তাছাড়া যাত্রী উঠানামায় ব্যবহৃত নৌকাগুলি সংশ্লিষ্ট দপ্তর হতে ফিটনেস নিতে হবে এবং কোন অবস্থায় অতিরিক্ত যাত্রী বহন করতে পারবেন না। সী-ট্রাকে উঠানো ও নামানোর সময় প্রত্যেক যাত্রীকে অবশ্যই লাইফ জ্যাকেট, পরিধান করাইতে হবে এবং বোটে অতিরিক্ত লাইফ বয়া রাখতে হবে। সন্দ্বীপের জনগণের স্বার্থে বিআইডব্লিউটিএ, বিআইডব্লিউটিসি ও জেলা পরিষদের সমন্বয় এর মাধ্যমে ঘাট পরিচালনা করা প্রয়োজন। সংশ্লিষ্ট কর্তৃপক্ষকে যাত্রীদের উঠানামার জন্য পর্যাপ্ত সুযোগ সুবিধার ব্যবস্থা গ্রহণ করা

এবং রাতে প্রয়োজনীয় আলোর ব্যবস্থা করা প্রয়োজন। ঘাটে যাতে কোন মাসেলম্যান দ্বারা যাত্রী হয়রানি না হয় সেদিকে লক্ষ্য রাখা উচিত বলে কমিটি মনে করেন।
সংযুক্তিঃ ১৮ (আঠার) কপি।

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| স্বা/ অস্পষ্ট | স্বা/ অস্পষ্ট | স্বা/ অস্পষ্ট |
| ২৩.০৪.২০১৭ | ০৩.০৪.২০১৭ | ২৩.০৪.২০১৭ |
| (মোঃ মাহবুবুর রহমান খাঁন) | (মোঃ ফয়সাল আলম চৌধুরী) | (মোঃ আবুল কালাম খাঁন) |
| উপসহকারী প্রকৌশলী | ব্যবস্থাপক (বাণিজ্য/যাত্রী) | ব্যবস্থাপক (বাণিজ্য/যাত্রী) |
| সদস্য | সদস্য | সদস্য |

৭. গুরুত্বপূর্ণ বিধায় উপজেলা নির্বাহী অফিসার, সন্দ্বীপ কর্তৃক সন্দ্বীপ চ্যানেলে লাল বোট ডুবিতে মৃত ব্যক্তির নামের বিগত ইংরেজী ০৫.০৪.২০১৭ তারিখে স্বাক্ষরিত তালিকাটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-D**

**সন্দ্বীপ চ্যানেলে লাল বোট ডুবিতে মৃত ব্যক্তির তালিকা**

| ক্রমিক নং | নিখোজ ব্যক্তির নাম | পিতার নাম | ঠিকানা |
|---|---|---|---|
| ১. | বড়দা জলদাশ | মনমোহন জলদাশ | পৌরসভা ২নং ওয়ার্ড, সন্দ্বীপ। |
| ২. | সালাউদ্দিন | খোরশেদ আলম | বাউরিয়া, ৪নং ওয়ার্ড |
| ৩. | সচিন্দ্র জলদাশ | শ্রী হরি জলদাশ | পৌরসভা ৯নং ওয়ার্ড |
| ৪. | আবদুল হক | মৃত সেরাজুল হক | গ্রাম- দক্ষিণ রাজাবাজার, ইকরাম মুন্সির বাড়ী, থানা- সেনবাগ, জেলা- নোয়াখালী। |
| ৫. | হাফেজ আমিন রসুল | কারি আবদুল হালিম | পৌরসভা ৪নং ওয়ার্ড, গ্রাম- হরিশপুর, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| ৬. | মোঃ শামসুল আলম শাহিন | নুর আহমদ | গ্রাম- সিকদার পাড়া, ইউনিয়ন সাবরং, উপজেলা- টেকনাফ, জেলা- কক্সবাজার। |
| ৭. | মোঃ কামরুজ্জামান | মোঃ রবজেল হোসেন | গ্রাম- সড়াতলা, ডাকঘর- খালিশপুর, উপজেলা- মহেশপুর, জেলা- ঝিনাইদহ। |
| ৮. | মাইনুদ্দীন | আমিনুল ইসলাম | গ্রাম- কাছিয়াপাড়, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| ৯. | হাফিজ উল্লাহ | মৃত ছবি হাজি | গ্রাম- মুছাপুর, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| ১০. | নিজাম উদ্দিন | মোস্তফা | বাউরিয়া, ২নং ওয়ার্ড, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| ১১. | তানজিম মোঃ জোবায়েদ | পিতা- নুরুল আমিন | গ্রাম- আমিরাবাদ, উপজেলা- লোহাগাড়া, জেলা- চট্টগ্রাম। |
| ১২. | মাস্টার ওসমান গনি | ফজলুল হক | গ্রাম- রহমতপুর, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| ১৩. | মাষ্টার ইউছুফ | নুর আলম | গ্রাম- রহমতপুর, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| ১৪. | মাকসুদুর রহমান | মোঃ আজিজ | মুছাপুর, ওয়ার্ড নং- ০৭, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |

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| **১৫.** | মাষ্টার মোঃ আনোয়ার হোসেন সিপন | মৃত মাষ্টার আজহারুল হক | গ্রাম- মগধরা, ওয়ার্ড নং- ১, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| **১৬.** | মোঃ তাওসিন | মোঃ মুসলিম | গ্রাম- মুছাপুর, ২নং ওয়ার্ড, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| **১৭.** | নিহা | মোঃ মুসলিম | গ্রাম- মুছাপুর, ২নং ওয়ার্ড, উপজেলা- সন্দ্বীপ, জেলা- চট্টগ্রাম। |
| **১৮.** | হারুন অর রশিদ | মৃত শাসুদ্দিন আহমদ | গ্রাম- দেউচালি, ইউনিয়ন শ্রীরাবচর, উপজেলা- বাজিতপুর, জেলা- কিশোরগঞ্জ। |

স্বা/- অস্পষ্ট
০৫.০৪.১৭
(মোঃ গোলাম জাকারিয়া)
উপজেলা নির্বাহী অফিসার
সন্দ্বীপ, চট্টগ্রাম।

৮. গুরুত্বপূর্ণ বিধায় সর্বশেষ হাল নাগাদ বিগত ইংরেজী ০৯.০৮.২০১৭ তারিখের উপকূলীয় গতিপথ ও টাইম টেবিল নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-G**

উপকূলীয় গতিপথ-বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন করপোরেশন-গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

সর্বশেষ হাল নাগাদ ৯ আগস্ট ২০১৭

**উপকূলীয় গতিপথ**

**উপকূলীয় জাহাজ সমূহের গতিপথ**

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| **চট্টগ্রাম-হাতিয়া-সন্দ্বীপ উপকূলীয় সার্ভিস (সপ্তাহের ৪দিন)**<br>**চট্টগ্রাম হতেঃ**<br>শনিবার/সোমবার/বুধবার/বৃহস্পতিবার<br>**হাতিয়া হতেঃ**<br>রবিবার/মঙ্গলবার/বৃহস্পতিবার/শনিবার | কুমিরা-গুপ্তচরা সার্ভিস (দৈনিক)<br>হাতিয়া-বয়ারচর সার্ভিস (দৈনিক)<br>মনপুরা-শশীগঞ্জ সি-ট্রাক সার্ভিস (দৈনিক)<br>ইলিশা-মজুচৌধুরীর হাট সি-ট্রাক সার্ভিস (দৈনিক)<br>বরিশাল-মজুচৌধুরীর হাট সি-ট্রাক সার্ভিস (দৈনিক)<br>টেকনাফ-সেন্টমার্টিন সি-ট্রাক সার্ভিস (দৈনিক, শান্ত মৌসুম) |

**টাইম টেবিল**

| **জাহাজ ছাড়ার সময়** | | **জাহাজ পৌঁছার সময়** | |
|---|---|---|---|
| **স্থান/ঘাট** | **সময়/ঘটিকা** | **স্থান/ঘাট** | **সময়/ঘটিকা** |
| চট্টগ্রাম | ০৯.০০ | হাতিয়া | ১৫.৩০ |
| হাতিয়া | ০৯.০০ | চট্টগ্রাম | ১৫.৩০ |
| গুপ্তচরা | ০৯.০০ | কুমিরা | ১১.৩০ |
| কুমিরা | ১৪.০০ | গুপ্তচরা | ১৫.৪৫ |
| হাতিয়া | ১১.০০ | বয়ারচর | ১২.৩০ |
| বয়ারচর | ১৩.০০ | হাতিয়া | ১৪.৩০ |
| মনপুরা | ১১.০০ | শশীগঞ্জ | ১২.৩০ |
| শশীগঞ্জ | ১৩.০০ | মনপুরা | ১৫.৩০ |
| চরচেঙ্গা | ০৯.০০ | বয়ারচর | ১০.০০ |
| বয়ারচর | ১৩.০০ | চরচেঙ্গা | ১৫.০০ |
| মজুচৌধুরীর হাট | ০৫.০০ | বরিশাল | ১১.০০ |

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| মির্জাকালু | ১০.০০ | আলেকজান্ডার | ০৯.০০ |
| ইলিশা | ০৯.০০ | মজুচৌধুরীর হাট | ১২.০০ |
| বরিশাল | ০৭.০০ | মজুচৌধুরীর হাট | ১১.৪৫ |
| মজুচৌধুরীর হাট | ১২.০০ | বরিশাল | ১৭.১৫ |

৯. গুরুত্বপূর্ণ বিধায় জেলা পরিষদ, চট্টগ্রাম কর্তৃক বিগত ইংরেজী ২৩.০৭.২০১৯ তারিখের পত্রটি নিম্নে অবিকল অনুলিখন হলো।

**Annexure- H**

জেলা পরিষদ
চট্টগ্রাম।
www.spchittagong.org

স্মারক নং- জেপ/চট্ট/২০১৯/V-26(D)-৪১৮, তারিখ- ২৩.০৭.২০১৯ খ্রিঃ

বিষয়ঃ কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটের তথ্য প্রদান প্রসঙ্গে।

সূত্রঃ আপনার ২৩.০৪.২০১৯ তারিখের আবেদন।

উপর্যুক্ত বিষয় ও সূত্রের পরিপ্রেক্ষিতে জানানো যাচ্ছে যে, চট্টগ্রাম জেলা পরিষদ মালিকানাধীন সীতাকুন্ড-সন্দ্বীপ উপজেলাস্থ কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটের চাহিত তথ্য নিম্ন মোতাবেক প্রেরণ করা হলোঃ

১। চট্টগ্রাম জেলা পরিষদ কর্তৃক বিগত ০২.০৪.২০১৭ তারিখ জনাব এস, এম আনোয়ার হোসেন, পিতা- মৃত বাদশা মিয়া সুকানী, সাং- মগধরা, থানা- সন্দ্বীপ, জেলা- চট্টগ্রাম তারিখ কুমিরা-গুপ্তছড়া ঘাটটির খাস আদায়কারী হিসেবে নিয়োজিত ছিলেন।

২। চাহিত তথ্যে লালবোটের বিষয়ে জানতে চাওয়া হয়েছে। কিন্তু লাল বোটের বিষয়ে জেলা পরিষদ অবগত নয় বা জেলা পরিষদের ইজারা অনুমতি পত্রে লাল বোটের বিষয়ে কোনরূপ অনুমোদন দেয়া হয় নাই।

৩। জাহাজ হতে মানুষজন কুলে নামানোর বিষয়ে জেলা পরিষদের কোন ভূমিকা নাই। কারণ জাহাজগুলো বিআইডব্লিউটিসির অধীন। সেই জাহাজগুলো তাদের অধীনেই পরিচালিত হয়। জাহাজ যাত্রী পারাপারে বিআইডব্লিউটিসির সাথে জেলা পরিষদের কোন সম্পৃক্ততা নাই। যতদূর জানা যায় ঘাটটিতে বিআইডব্লিউটিসি কর্তৃক নিয়োগকৃত কমিশন এজেন্টের মাধ্যমে জাহাজ হতে যাত্রী আরোহন-অবতরণ ও আনুষাঙ্গিক কাজ গুলো সম্পাদন করা হয়।

৪। দূর্ঘটনায় মৃত ১৮ জন মানুষের তালিকা এতদসঙ্গে সংযুক্ত করা হলো।

৫। জেলা প্রশাসক, চট্টগ্রাম কর্তৃক একটি তদন্ত কমিটি গঠন করা হয়েছিল। কিন্তু কমিটির কোন প্রতিবেদন জেলা প্রশাসক থেকে এ দপ্তরে পাঠায়নি। সুতরাং, এ দপ্তরে প্রতিবেদনের কোন কপি নাই।

স্বা/- অস্পষ্ট
২৩.০৭.১৯
(মোহাম্মদ মনিরুল ইসলাম)
সিনিয়র সহকারী প্রকৌশলী
জেলা পরিষদ, চট্টগ্রাম
ও
দায়িত্বপ্রাপ্ত কর্মকর্তা
তথ্য অধিকার আইন ২০০৯
জেলা পরিষধ, চট্টগ্রাম
ফোনঃ ০৩১-৬৩২৯৬৮।

মোহাম্মদ জহিরুল ইসলাম
ব্যরিষ্টার হালিম এন্ড এসোসিয়েটস
বাদশাহ প্লাজা (৫ম তলা)

২০, রিংরোড, বাংলা মোটর
ঢাকা।

১০. ৮ নং প্রতিপক্ষের পক্ষে

গুরুত্বপূর্ণ বিধায় বিআইডব্লিউটিসি কর্তৃক বিগত ইংরেজী ০২.০৪.২০১৭ তারিখে সন্দ্বীপ গুপ্তছড়া ঘাটে সী-ট্রাক হতে যাত্রী নামার পর লাল বোট ডুবে মর্মান্তিক দুর্ঘটনার বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন কর্পোরেশনের তিন সদস্য বিশিষ্ট কমিটি কর্তৃক প্রদত্ত তদন্ত প্রতিবেদনের অনুলিপি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-1**

বিআইডব্লিউটিসি
বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচল প্রতিষ্ঠান)
১৮, স্ট্রান্ড রোড, সদরঘাট, চট্টগ্রাম।

বিষয়ঃ গত ০২.০৪.২০১৭ ইং তারিখে সন্দ্বীপ গুপ্তছড়া ঘাটে সী-ট্রাক হতে যাত্রী নামার পর লাল বোট ডুবে মর্মান্তিক দুর্ঘটনার তদন্ত প্রতিবেদন।

অফিস আদেশ নং বাঃ বিঃ ১০/২০১৭ ইং তারিখ ০৩.০৪.২০১৭ ইং এবং সুত্র নং ১৫৬.০৫.০২.০৫৮.২০১৭/২০৫ তারিখ ০৩.০৪.২০১৭ ইং মোতাবেক গঠিত সরেজমিনে পরিদর্শন পূর্বক উপর্যুক্ত বিষয়ে তদন্ত কাজ সম্প ন্ন করেন যাহা নিম্নে পেশ করা হলো।

১। **কমিটি সরেজমিনে পরিদর্শন করে এতদ বিষয়ে সংশ্লিষ্ট ও প্রত্যক্ষদর্শীর নিম্নলিখিত লোকজনের লিখিত জবানবন্দি পাওয়া যায়ঃ** সর্ব জনাব (১) মোঃ ইকরাম উদ্দিন, সী-ট্রাক চার্টারার (২) মাহমুদুর রহমান মান্না, বোট কন্ট্রাকটর, (৩) মোঃ শহীদ উল্লাহ, কোড নং- ১১২৫০, মাষ্টার অফিসার, এসটি ভাষা শহীদ সালাম (৪) ভয়ন রঞ্জন চাকমা যন্ত্রচালক, এসটি ভাষা শহীদ সালাম (৫) আঃ কাইয়ুম সুকানী, এসটি ভাষা শহীদ সালাম (৬) নাজমুল ইসলাম সুমন, মগবরা, সন্দ্বীপ, প্রত্যক্ষদর্শী (৭) এস এস বাবুল মগধরা, সন্দ্বীপ, প্রত্যক্ষদর্শী (৮) সেলিম উদ্দিন, মগধরা, সন্দ্বীপ প্রত্যক্ষদর্শী (৯) রফিকুল হক, হারামিয়া সন্দ্বীপ, প্রত্যক্ষদর্শী।

২। **ঘটনার বিবরনঃ** প্রাপ্ত তথ্য উপাত্ত বিচার বিশ্লেষণ করে দেখা যায় ঐ দিন অর্থাৎ ০২.০৪.২০১৭ইং তারিখে আবহাওয়া অফিস হতে কোন সংকেত প্রদর্শিত হয় নাই। তবুও সাগর মাজারি অশান্ত ছিল। আবহাওয়া জনিত কারণে এবং জোয়ার ভাটার প্রভাবে ঐ দিন সী-ট্রাক নির্ধারিত সময়ের পর বিলম্বে আনুমানিক সন্ধে ০৬:৩০ মিঃ গুপ্তছড়া ঘাটে আসে এবং নিরাপদ নোঙ্গর করে লাল বোট দিয়ে যাত্রী নামানো শুরু হয়। ২ বোটে যাত্রী নামার পর ৩য় বোটে যাত্রী নিয়ে কিনারে যাওয়ার পথে লাল বোট ডুবে দুর্ঘনাটি সংঘঠিত হয়।

৩। **জবানবন্দিঃ** জনাব ইকরাম উদ্দিন, সী-ট্রাক চার্টারার তার জবান বন্দিতে জানান, স্রোতের কারণে সী-ট্রাক কুমিরা ঘাটে আসতে বিলম্ব হয় এবং ছাড়তে বিলম্ব হয়। বিকাল ০৪:০০ ঘটিকায় কুমিরা হতে ১৯৮ জন যাত্রী নিয়ে সন্দ্বীপের গুপ্তছড়া ঘাটের উদ্দেশ্যে যাত্রা করে এবং সন্ধে ০৬:১০ মিনিটে গুপ্তছড়া ঘাটে যথারীতি নোঙ্গর করে। ২টি লাল বোট এর সাহায্যে যাত্রী নামানের পর ৩য় বোট যাত্রী নামিয়ে কিনারের দিকে আসার পথে প্রচন্ড ঢেউয়ে বোট টি ডুবিয়ে যায় এবং মর্মান্তিক দুর্ঘটনা ঘটে। তিনি আরও জানান যাত্রী নামানোর দায়িত্ব বোট কন্ট্রাকটরের তবে ডুবে যাওয়া ত্রুটি জেলা পরিষদের খাস আদায় করীর বলে জানান। যাত্রীদের কাছ থেকে অতিরিক্ত বোট ভাড়া আদায় করা হয় বলে তিনি শুনেছেন। দুর্ঘটনার পর তিনি মোবাইল ফোনে প্রয়োজনীয় দিক নির্দেশনা দিয়ে প্রয়োজনীয় ব্যবস্থা গ্রহণ করেছেন। দুর্ঘটনার বিষয়ে কে দায়ী বলে প্রশ্ন করা হলে তিনি জানান ফিটনেস বিহীন অনুমোদিত বোট দিয়ে খাস আদায় কারী যাত্রী উঠানামা করায় এবং বড় ঢেউয়ের আঘাতে দুর্ঘটনা ঘটতে পারে। তাছাড়া জেলা পরিষদের উদাসীনতাও থাকতে পারে।

৪। জনাব মাহমুদুর রহমান মান্না, বোট কন্ট্রাকটর তার লিখিত জবান বন্দিতে জানান যে, ঐ দিন অথ্যাৎ ০২.০৪.২০১৭ইং তারিখে সাগর উত্তাল ছিল এবং সী-ট্রাক গুপ্তছড়া ঘাটে আসতে বিলম্ব ঘটে। তাছাড়া ঘাট ইজারাদার জনাব আনোয়ার হোসেন এর লাল বোট দিয়ে লোকজন উঠা নামা করার সময় অবৈধভাবে বখশিস নেয়ার জন্য বিলম্ব ঘটায় এই দুর্ঘটনায় ঘটতে পারে। তিনি আরও জানান ঐ দিন সী-ট্রাকে মোট ৩টি সিংগেল ট্রিপ দিয়াছেন। গুপ্তছড়া ঘাটে জনাব ইকরাম উদ্দিন ফরহাদ সাহেবের বোট দিয়ে যাত্রী উঠা নামার ব্যবস্থা করার কথা থাকলেও জনাব আনোয়ার হোসেন, জেলা পরিষদের খাস আদায়কারীর লাল বোট দিয়ে যাত্রী উঠানামা করতেন এবং পরবর্তীতে জনাব আনোয়ার হোসেন জনাব ফরহাদ থেকে নৌকা ভাড়া নিয়ে নিতেন। তিনি জানান কুমিরা ঘাটে জেলা পরিষদের ইজারাদারদের বাঁধার কারনে বাধ্য হয়ে জনাব জগলুল হোসেন নয়ন, পিতা রেজাউল করিম, কুমিরা, আমাকে আর্থিকভাবে সহযোগীতা করায় তাকে সংযুক্ত করি, অথ্যাৎ তার লাল বোট দ্বারা সী-ট্রাকে যাত্রী ও মালামাল উঠানামা করেন। তিনি ও ফরহাদ সাহেবের মধ্যে একটি দ্বি-পাক্ষিক চুক্তি ও জবান বন্দির সাথে সংযুক্ত করেন।

সী-ট্রাক ভাষা শহীদ সালামের ভারপ্রাপ্ত মাষ্টার কর্মকর্তা তাহার জবান বন্দিতে জানান গত ০২.০৪.২০১৭ইং তারিখে সকাল ১১:০০ ঘটিকায় সন্দ্বীপের গুপ্তছড়া ঘাটে যাত্রী ও মালামাল বোঝাই নিয়ে কুমিরার উদ্দেশ্যে যাত্রা করেন এবং মাঝ নদীতে আসার পর জাহাজের প্রপেলায় জাল পেছিয়ে ইঞ্জিন কম চলে এবং জোয়ারের অত্যাধিক স্রোতের কারণে ১৪৩৫ ঘঃ কুমিরা এসে পৌছায়। পরবর্তিতে পাখার জাল কেটে ১৬০০ ঘঃ কুমিরা হতে যাত্রী বোঝাই নিয়ে গুপ্তছাড়া উদ্দেশ্যে যাত্রা করে সন্ধে ১৮১০ ঘঃ গুপ্তছড়া পৌছে নিরাপদে নোঙ্গর করে। বিলম্ব জাহাজ ছাড়ার বিষয়ে প্রশ্ন করা হলে তিনি জানান চার্টার পার্টির নির্দেশে তিনি বিলম্বে সী-ট্রাক ছেড়েছেন। ২টি নৌকা যাত্রী নামার পর ৩য় নৌকা যাত্রী নিয়া কিনারের দিকে যাওয়ার সময় জাহাজ হতে কিছুদূর যাওয়ার পর লাল বোটটি ডুবিয়া যায়। তখন তিনি জাহাজ এর নোঙ্গর উঠাইয়া ডুবন্ত নৌকার কাছাকাছি যায় এবং লাইফ বয়া ছাড়িয়া যাত্রী উদ্ধার কাজে নিয়োজিত হন। তিনি ৫ জন যাত্রী জাহাজে উঠিয়েছেন বলে জানান, পাশে আর কোন যাত্রী না থাকায় অত্যন্ত ঝুকিপূর্ণ ভবে যাত্রীদের কথা বিবেচনা করে কিনারে চড়ায় উঠাইয়াদেন এবং বাকী যাত্রী নিরাপদে নামাইয়া দেন। যতক্ষণ পানি ছিল ততক্ষন চার্জ লাইট জ্বালাইয়া রাখেন এবং ভাটার পানি কমে যাওয়ার পর চার্জ লাইট নিভাইয়া দেন তিনি জানান। এসটি ভাষা শহীদ সালামের ভারপ্রাপ্ত যন্ত্র চালক জনাব জ্ঞান রঞ্জন চাকমা ও হুইল সুকানীসহ অন্যান্য নাবিকগণ একই বক্তব্য প্রদান করেন।

৫। কামিটির পর্যবেক্ষন ও মুল্যায়নঃ কমিটি সরেজমিনে পরিদর্শন করেও প্রাপ্ত তথ্য উপাত্ত বিচার বিশ্লেষণ করে দেখা যায় যে, গত ০২.০৪.২০১৭ইং তারিখে এসটি ভাষা শহীদ সালাম চার্টার পার্টির নির্দেশ মোতাবেক মাষ্টার কর্মকর্তা যথারীতি সন্দ্বীপ গুপ্তছড়া ঘাট হতে কুমিরার উদ্দেশ্যে যাত্রা করেন এবং জোয়ারের অত্যাধিক স্রোত থাকায় বিলম্বে কুমিরা ঘাট পৌঁছেন। তারপর যাত্রী ও মালামাল নিয়ে সন্ধে ১৮৩০ ঘঃ সন্দ্বীপ গুপ্তছড়া ঘাটে নোঙ্গর করে নৌকা দিয়ে যাত্রী নামানো শুরু করেন। উভয় পাড়ে যাত্রী নিরাপদে উঠানামা করার জন্য বোট কন্ট্রাকটর নিয়োগ দেওয়া হয়েছে যা হোক গুপ্তছড়া নোঙ্গর করার পর ২টি বোট যাত্রী নিরাপদে নামার পর ৩য় ট্রিপে লাল বোটে সী-ট্রাক থেকে যাত্রী নিয়ে কিছুদূর যাওয়ার পর লাল বোটটি ডুবে এই মর্মান্তিক দুর্ঘটনা ঘটে। দুর্ঘটনার হতাহতদের জন্য কমিটিও মর্মাহত এবং মহান রাব্বুল আলামিনের নিকট তাদের জন্য দোয়া প্রার্থন করি। ঐ দিন আবহাওয়া অফিস হতে কোন সংকেত প্রদর্শিত হয় নাই। তবে প্রত্যক্ষদর্শীরা জানিয়েছেন সাগর মাঝারি ধরনের উত্তাল ছিল। সী-ট্রাক এসটি সালাম অতিরিক্ত যাত্রী ছিল না এবং নিরাপদে আপ ডাউন ট্রিপ করেছেন তাছাড়া দুর্ঘটনার পর মাষ্টার তার উপর অর্পিত দায়িত্ব যথাযথ পালন করেছেন বলে প্রতীয়মান হয়েছে। জেলা পরিষদের খাস আদায়কারী ও তার সমর্থকদের দৌরাত্যে সী-ট্রাক চার্টারার ও বোট কন্ট্রাকটর এক রকম অসহায় বলে প্রতিয়মান হয়। যার ফলে বাধ্য হয়ে তারা ঐ পক্ষের (অস্পষ্ট আদায়কারীর) সাথে আপোস রক্ষার মাধ্যমে সী-ট্রাক পরিচালনা ও বোট পরিচালনা করে আসছিল অথ্যাৎ উভয় পাড়ে খাস আদায়কারীর লাল বোট ব্যবহার করেছেন অথচ মহামান্য হাইকোর্টের রায়ে ছিল সী-ট্রাকে তাদের নিজস্ব ব্যবস্থাপনায় যাত্রী উঠানামা করবে তাতে কোন প্রকার বাঁধা দেয়া যাবে না। খাস আদায়কারী নির্দিষ্ট হারে যাত্রীদের টোল আদায় করবেন কিন্তু বাস্তবতা ভিন্ন। কুমিরা ও গুপ্তছড়া ঘাটে যে সব লাল বোট গুলো চলে সেগুলো যাত্রী পরিবহনে অনুপযোগী এই বোট গুলোতে জীবন

রক্ষকারী কোন সরঞ্জাম থাকে না এবং প্রায়ই ওভার লোড যাত্রী নিয়ে থাকেন। যে সব বোটের যাত্রী ও মালামাল পরিবহন করা হয় সে সব বোটগুলোর সংশ্লিষ্ট দপ্তর হতে সেইফটি সনদ নিতে হয়, যাহা কুমিরা ও গুপ্তছড়া ঘাটে যাত্রী উঠানামা ব্যবহৃত কোন বোটেরেই সনদ নাই, অধিকাংশ বোট Buoyaney tank ভাঙ্গা যাহা আরও বিপদজনক। যাহা কুমিরা ও গুপ্তছড়া ঘাটে যাত্রী উঠামানা ব্যবহৃত কোন বোটেরেই সনদ নাই, অধিকাংশ বোট Buoyaney tank ভাঙ্গা যাহা আরও বিপদজনক। ফিটনেস বিহীন অনুমোদিত বোট যাতে যাত্রী ও মালামাল পরিবহন করতে না পারে তার জন্য সংশ্লিষ্ট বিভাগে কঠোর নজরদারী প্রয়োজন। বিআইডব্লিউটিসি সেই ব্রিটিশ আমল থেকে উপকূলীয় ও দ্বীপাঞ্চলে জনগনের স্বার্থে যাত্রী পরিবহনে নিরলসভাবে সেবা দিয়ে আসছে এবং বর্তমান গণতান্ত্রিক সরকারে ও এতদ বিষয়ে কঠোর নির্দেশনা রয়েছে এবং তারই আলোকে শুধুমাত্র সন্দ্বীপ কুমিরা সার্ভিসে চলাচলের জন্য অত্যন্ত আরামদায়ক ও নিরাপদে ভ্রমণের জন্য ৫০০ যাত্রী ধারণক্ষমতা সম্পন্ন একটি উন্নত মানের আধুনিক যাত্রীবাহি জাহাজ তৈরি চলমান, আশা করা যাচ্ছে খুব সহসা তাহা সার্ভিসে আসবে এবং সারা বৎসর তাহা সার্ভিসে থাকবে। ইহাতে সন্দ্বীপের লোকজনের যাতায়াত নিরাপদ ও সুবিধাজনক হবে।

সন্দ্বীপ গুপ্তছড়া ঘাটে খাস আদায়কারী জনাব আনোয়র হাসেনের লাল বোট দিয়ে যাত্রী উঠানামা করেছেন তাহা প্রত্যক্ষদর্শীদের লিখিত জবান বন্দিতে প্রমাণিত। লাল বোটের মাঝি মাল্লারা হলেনঃ ১। জাহাঙ্গীর আলম, পিতা মোঃ নুরুল আলম, বেড়ীবাধ মগধরা, সন্দ্বীপ, ২। আহিদ, পিতা সুফিয়ান, ওয়ার্ড নং- ১, বেড়ীবাধ, মগধরা, সন্দ্বীপ, ৩। শিপন, পিতা কামাল উদ্দিন সওদাগর, কামাল উদ্দিন সদোগরের নতুন বাড়ী মদধরা, সন্দ্বীপ। খাস আদায়কারী জনাব আনোয়ার হোসেনের সাথে বার বার সেলফোনে যোগাযোগ করা হলেও তিনি জবানবন্দী দিতে ও কমিটিকে সহযোগিতা করতে অপারগতা প্রকাশ করেন।

৬। কমিটির মতামতঃ গত ০২.০৪.২০১৭ইং তারিখে সংগঠিত দুর্ঘটনার বিষয়ে সী-ট্রাকের কর্মরত নাবিকদের কোন দায়িত্ব অবহেলা পাওয়া যায় নাই। উভয় পাড়ে বোট কন্ট্রাকটর যাত্রী উঠানামার দায়িত্ব থাকায় উক্ত দুর্ঘটনায় তিনি তার দায়িত্ব এড়াতে পারেন না, যদিও তিনি বাধ্য হয়ে খাস আদায়কারীর বোট ব্যবহার করেছেন বলে জানিয়েছেন। তাছাড়া সী-ট্রাক চার্টারার যাত্রী উঠানামার বিষয়ে সার্বিক নিরাপত্তার ব্যাপারে প্রায়োজনীয় ব্যবস্থা গ্রহণ করার উচিত ছিল। লাল বোটটি সী-ট্রাক হতে যাত্রী নিয়ে কিনারের দিকে যাওয়ার সময় বড় ঢেউয়ের আঘাতে যাত্রীগণ একদিকে জড়ো হওয়ায় কাত হয়ে বোটটি ডুবে যায়। প্রসঙ্গত ঐ দিন আবহাওয়া দপ্তর হতে কোন সিগনাল না থাকলেও সাগর মাঝারি ধরনের উত্তাল ছিল। **এ দুর্ঘটনাটি প্রাকৃতিক, এককভাবে কেউ দায়ী বলে কামিটি মনে করেন না।** জানামতে সী-ট্রাকের ভাড়ার সাথে নৌকা ভাড়া ও খাস আদায়কারীর টোল নিয়ে নেয়া হয় তারপরও বোটের মাঝি মাল্লারা যাত্রীদের থেকে বকশিশের নামে অতিরিক্ত অর্থ আদায় করেন তাহা কোনভাবে কাম্য নহে, তাহা বন্ধ করা অতীব জরুরী। তাছাড়া যাত্রী উঠানামার ব্যবহৃত নৌকাগুলি সংশ্লিষ্ট দপ্তর হতে ফিটনেস নিতে হবে এবং কোন অবস্থায় অতিরিক্ত যাত্রী বহন করতে পারবেন না। সী-ট্রাকে উঠানো ও নামানের সময় প্রত্যেক যাত্রীকে অবশ্যই লাইফ জ্যাকেট পরিধান করাইতে হবে এবং বোটে অতিরিক্ত লাইফ বয়া রাখতে হবে। সন্দ্বীপের জনগনের স্বার্থে বিআইডবিণ্টউটিএ, বিআইডবিণ্টউটিসি ও জেলা পরিষদের সমন্বয় এর মাধ্যমে ঘাট পরিচালনা করা প্রয়োজন। সংশ্লিষ্ট কর্তৃপক্ষকে যাত্রীদের উঠানামার জন্য পর্যাপ্ত সুযোগ সুবিধার ব্যবস্থা গ্রহণ করা এবং রাতে প্রয়োজনীয় আলোর ব্যবস্থা করা প্রয়োজন। ঘাটে যাতে কোন মাসেলম্যান দ্বারা যাত্রী হয়রানি না হয় সে দিকে লক্ষ্য রাখা উচিত বলে কমিটি মনে করেন।

সংযুক্তঃ ১৮ (আঠারো) কপি।

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| স্বাঃ অস্পষ্ট | স্বাঃ অস্পষ্ট | স্বাঃ অস্পষ্ট |
| ২৩.০৪.২০১৭ | ২৩.০৪.২০১৭ | ২৩.০৪.২০১৭ |
| (মোঃ মাহবুবুর রহমান খাঁন) | (মোঃ ফয়সাল আলম চৌধুরী) | (মোঃ আবুল কালাম খাঁন) |
| উপ-সহকারী প্রকৌশলী | ব্যবস্থাপক (বাণিজ্য/যাত্রী) | ব্যবস্থাপক (মেরিন) |
| সদস্য | | আহবায়ক |

সদস্য

১১. গুরুত্বপূর্ণ বিধায় চট্টগ্রাম জেলা পরিষদের মালিকানাধীন কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাট অংশে বিআইডব্লিউটিএ কর্তৃক নির্মিত স্থাপনাসমূহ পরিচালনার নিমিত্তে বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন (বিআইডব্লিউটিএ)এবং জেলা পরিষদ, চট্টগ্রামের মধ্যে বিগত ইংরেজী ০২.১২.২০১৪ তারিখে স্বাক্ষরিত সমঝোতা স্মারকটি নিম্নে অবিকল অনুলিখন হলোঃ

চট্টগ্রাম জেলা পরিষদের মালিকানাধীন কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাট অংশে বিআইডবিণ্ঢউটিএ কর্তৃক নির্মিত স্থাপনাসমূহ পরিচালনা নিয়ে বিআইডবিণ্ঢউটিএ এবং জেলা পরিষদ, চট্টগ্রামের মধ্যে সমঝোতা স্মারক

Memorandum of Understanding (MOU)

১ম পক্ষঃ বাংলাদেশ অভ্যন্তরীন নৌ-পরিবহন কর্তৃপক্ষ (BIWTA)- পক্ষে চেয়ারম্যান

২য় পক্ষঃ জেলা পরিষদ, চট্টগ্রাম-পক্ষে-প্রশাসক

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| ১. | ভূমিকা | কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটটি সুদীর্ঘকাল যাবৎ চট্টগ্রাম জেলা পরিষদ কর্তৃক পরিচালনা ও ইজারা প্রদানের মাধ্যমে জনগণের ফেরী পারাপারের সুবিধাদি প্রদান করা হচ্ছে। ইজারার মাধ্যমে আহরিত রাজস্ব দ্বারা চট্টগ্রাম জেলা পরিষদ সন্দ্বীপ ও সীতাকুন্ড উপজেলাসহ সমগ্র চট্টগ্রাম জেলার উন্নয়ন ও কল্যাণমূলক কর্মকান্ড সম্পন্ন করে আসছে। বিগত ২০১০-২০১১ অর্থবছরে জেলা পরিষদ সন্দ্বীপ বাসীর ফেরী পারাপারের সুবিধার জন্য জেটি নির্মাণ প্রকল্প বাস্তবায়ন করে। প্রকল্পটি সমাপ্তি শেষে বাংলাদেশ সরকারের মাননীয় প্রধানমন্ত্রী শেখ হাসিনা বিগত ফেব্রুয়ারী ২০১২ সনে সেটি উদ্বোধন করেন। উদ্বোধনকালে মাননীয় প্রধানমন্ত্রী শেখ হাসিনা সন্দ্বীপ বাসীর ফেরী পারাপারের সুবিধার জন্য ষ্টীমার সার্ভিস চালুর ঘোষণা দেন।<br><br>অপরদিকে নিরাপদ যাত্রী পারাপারের সুবিধার্থে বাংলাদেশ অভ্যন্তরীন নৌ-পরিবহন কর্তৃপক্ষ জেলা পরিষদের মালিকানাধীন কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটের কুমিরা ও গুপ্তছড়া অংশে পৃথক পৃথকভাবে দু'টি গ্যাংওয়ে, টার্মিনাল, ওয়েটিং শেড, পার্কিং ইয়ার্ড প্রভৃতি নির্মাণ করে একজন ব্যক্তিকে সাময়িক ইজারা প্রদান করে। এতে জেলা পরিষদ, চট্টগ্রাম ও BIWTA এর মধ্যে ফেরীঘাট পরিচালনা নিয়ে দ্বন্দের সৃষ্টি হয়। BIWTA কর্তৃক নির্মিত গ্যাংওয়ের ইজারা গ্রহনকারী ব্যক্তি মহামান্য হাইকোর্টে জেলা পরিষদ, চট্টগ্রামকে Respondent করে ১১৫১৭/২০১৩নং রীট মামলা দায়ের করে। দীর্ঘদিন শুনানীর পর উক্ত রীট পিটিশনটি গত ৩০ মার্চ ২০১৪ খ্রিঃ তারিখের ডিসচার্জ হয়।<br><br>BIWTC এর কমিশন এজেন্ট কর্তৃক অধিক মুনাফা ও অতিরিক্ত ভাড়া আদায়ের কারনে যাত্রী হয়রানীসহ সন্দ্বীপ বাসীর ফেরী পারাপারে দুর্দশা বেড়ে যায়। কমিশন এজেন্ট নিয়োগের বিরুদ্ধে মহামান্য হাইকোর্টে চলমান আরো কয়েকটি মামলায় আদালত কর্তৃক প্রদত্ত নিষেধাজ্ঞা এবং জেলা পরিষদ মালিকানাধীন কুমিরা ফেরীঘাটে BIWTC কর্তৃক ষ্টীমার সার্ভিস চালুর বিষয়টি চ্যালেঞ্জ করে জেলা পরিষদ মহামান্য সুপ্রীম কোর্টের হাইকোর্ট বিভাগে ২টি মামলা আনয়ন করে। মামলা ২টি বিচারাধীন থাকায় BIWTC কর্তৃক ষ্টীমার সার্ভিস চালু রাখার বিষয়ে আইনগত জটিলতা দেখা দেয়।<br>ইতোমধ্যে ফেরী পারাপারে সন্দ্বীপ বাসীর দুর্দশা লাঘবে মাননীয় প্রধানমন্ত্রীর ঘোষণার সফল বাস্তবায়ন, যাত্রী সাধারণের নিরাপদ যাতায়াতের সুবিধা এবং সরকারী ২টি প্রতিষ্ঠানের মধ্যে |

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| | | বিরাজমান অচলাবস্থা নিরসনের লক্ষ্যে BIWTC'র ষ্টীমার সার্ভিস জেলা পরিষদের মাধ্যমে পরিচালনার জন্য চট্টগ্রাম জেলা পরিষদ BIWTC বরাবরে আবেদন করে। তাছাড়া একটি সমন্বিত প্রক্রিয়ার মাধ্যমে ফেরীঘাট পরিচালনার লক্ষ্যে চট্টগ্রাম জেলা পরিষদ কর্তৃপক্ষ BIWTA'র গ্যাংওয়ে, টার্মিনাল, ওয়েটিং শেড, পার্কিং ইয়ার্ড প্রভৃতি ব্যবহারের অনুমতি চেয়ে BIWTA বরাবরে পত্র প্রেরণ করে। তদ্প্রেক্ষিতে গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের মাননীয় নৌ-পরিবহন মন্ত্রণালয়ের দায়িত্বপ্রাপ্ত মাননীয় মন্ত্রী জনাব শাহজাহান খান, এমপি গত ২২ ফেব্রুয়ারী, ২০১৪ খ্রিঃ তারিখ কুমিরা মগধরা-গুপ্তছড়া ফেরীঘাটটি পরিদর্শন করেন। মাননীয় মন্ত্রীর তাৎক্ষনিক সিদ্ধান্তের ফলে ২৩ ফেব্রুয়ারী, ২০১৪ খ্রিঃ তারিখ থেকে কুমিরা-মগধরা-গুপ্তছড়া রুটে চট্টগ্রাম জেলা পরিষদের মাধ্যমে BIWTC'র মাধ্যমে ষ্টীমার সার্ভিস চালু হয়।<br>BIWTC এবং চট্টগ্রাম জেলা পরিষদের মধ্যে ফেরীঘাট নিয়ে সৃষ্ট জটিলতা নিরসনকল্পে গত ৯ মার্চ ২০১৪ খ্রিঃ তারিখ মাননীয় নৌ-পরিবহন মন্ত্রণালয়ের দায়িত্বপ্রাপ্ত মাননীয় মন্ত্রী জনাব শাহজাহান খান, এমপি'র সভাপতিত্বে নৌ-পরিবহন মন্ত্রণালয়ের সভাকক্ষে এক আন্তঃমন্ত্রণালয় সভা অনুষ্ঠিত হয়। উক্ত সভায় সন্দ্বীপ থেকে নির্বাচিত মাননীয় সংসদ সদস্য জনাব মাহফুজুর রহমান মিতা, সীতাকুন্ড থেকে নির্বাচিত মাননীয় সংসদ সদস্য জনাব দিদারুল আলম, BIWTA'র চেয়ারম্যান ডঃ মোঃ শামছুদ্দোহা খন্দকার, নৌ-পরিবহন মন্ত্রণালয়ের অতিরিক্ত সচিব, জনাব মোঃ আলাউদ্দিন, চট্টগ্রাম জেলা পরিষদের প্রশাসক জনাব মোহাম্মদ আবদুস সালাম, স্থানীয় সরকার বিভাগের যুগ্মসচিব, জনাব পরিমল কুমার দেব সহ উভয় মন্ত্রণালয়ের কর্তকর্তাবৃন্দ উপস্থিত ছিলেন। সভায় আলাপ-আলোচনার শেষ পর্যায়ে জেলা পরিষদের প্রশাসক জেলা পরিষদের মালিকানাধীন ফেরীঘাটের জায়গায় BIWTA কর্তৃক নির্মিত টার্মিনাল ও গ্যাংওয়ে ২টি জেলা পরিষদের মাধ্যমে পরিচালনার বিষয়ে সম্মতি প্রদানের জন্য মাননীয় নৌ-পরিবহন মন্ত্রীকে অনুরোধ জানান। এ প্রেক্ষিতে মাননীয় মন্ত্রী গ্যাংওয়ে, টার্মিনাল, ওয়েটিং শেড, পার্কিং ইয়ার্ড প্রভৃতি ব্যবহারের জন্য জেলা পরিষদ BIWTA কে কি পরিমান অর্থ প্রদান করবে তা জানতে চান। জবাবে প্রশাসক, জেলা পরিষদ, চট্টগ্রাম জানান টার্মিনাল ও গ্যাংওয়ের ব্যবহার ফি বাবদ জেলা পরিষদ BIWTA কে বছরে ৪০.০০ (চল্লিশ) লক্ষ টাকা প্রদান করবে। তবে ঘাটের ইজারা কার্যক্রম পরিচালনা করবে জেলা পরিষদ।<br>বিস্তারিত আলোচনান্তে আন্তঃমন্ত্রণালয় সভায় নিম্নলিখিত সিদ্ধান্ত গৃহীত হয়ঃ |
| | | ১) BIWTA কে ব্যবহার ফি বাবদ বার্ষিক ৪০.০০ (চল্লিশ) লক্ষ টাকা প্রদানের শর্তে সমঝোতা স্মারকের মাধ্যমে জেলা পরিষদ, চট্টগ্রাম এ ঘাট ব্যবস্থাপনা করবে। |
| | | ২) চট্টগ্রামস্থ সীতাকুন্ড ও সন্দ্বীপ উপজেলার অন্তর্গত কুমিরা-গুপ্তছড়া নৌ-টার্মিনাল এলাকার রাস্তাঘাট জেলা পরিষদ, চট্টগ্রাম নির্মাণ ও সংস্কার করবে। |
| | | ৩) চট্টগ্রামস্থ সীতাকুন্ড ও সন্দ্বীপ উপজেলার অন্তর্গত কুমিরা-গুপ্তছড়া জেটিঘাট এলাকায় নির্মিত গ্যাংওয়ে, টার্মিনাল, পার্কিং ইয়ার্ড প্রভৃতি স্থাপনাসমূহ BIWTA কর্তৃক মেরামত ও সংরক্ষণ করা হবে। |
| | | ৪) BIWTA ও জেলা পরিষদের মধ্যে এ ঘাট নিয়ে রুজুকৃত |

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| | | মামলা স্ব-স্ব উদ্যোগে প্রতিষ্ঠান ২টি প্রত্যাহার করে নেবে। |
| ২. | **উদ্যোক্তা** | BIWTA এবং জেলা পরিষদ, চট্টগ্রাম এই সমঝোতা স্মারক চুক্তির উদ্যোক্তা হিসেবে গণ্য হবে। |
| ৩. | **মেয়াদকাল ও নবায়ন** | প্রাথমিকভাবে এই সমঝোতা স্মারক চুক্তির মেয়াদ হবে ৬ (ছয়) বছর। জেলা পরিষদ, চট্টগ্রাম প্রতিবছর ৩০ জুলাই তারিখের মধ্যে ৪০.০০ (চল্লিশ) লক্ষ টাকা BIWTA কে পরিশোধ করবে। তবে চুক্তির মেয়াদকালে প্রতি ৩ (তিন) বৎসর পর পক্ষদ্বয় আলোচনার মাধ্যমে টার্মিনাল ও গ্যাংওয়ের ব্যবহার ফি হ্রাস/বৃদ্ধি করতে পারবে। ৬ (ছয়) বছর অতিবাহিত হওয়ার পূর্বেই পক্ষদ্বয় পুনরায় আলোচনার মাধ্যমে সমঝোতা স্মারকের চুক্তির মেয়াদ বাড়াতে পারবে। |
| ৪. | **ফেরীঘাট ইজারা, ব্যবস্থাপনা ও তত্ত্বাবধান** | ২য় পক্ষ জেলা পরিষদ কর্তৃক কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাট ইজারা ব্যবস্থাপনা কার্যক্রম পরিচালিত হবে এবং ইজারাদার নিয়োগ করবে। |
| ৫. | **ফেরীঘাট ও জেটি সংলগ্ন এলাকার ভৌত অবকাঠামো উন্নয়ন** | (ক) যাত্রী সাধারণের চলাচল নিরাপদ ও নির্বিঘ্ন করতে ১ম পক্ষ BIWTA চট্টগ্রামস্থ সীতাকুন্ড ও সন্দ্বীপ উপজেলার অন্তর্গত কুমিরা-গুপ্তছড়া এলাকায় BIWTA কর্তৃক নির্মিত আরসিসি জেটি ও সহায়ক স্থাপনাসমূহ নির্মাণ, মেরামত ও সংরক্ষন করবে। |
| | | (খ) ২য় পক্ষ জেলা পরিষদ, চট্টগ্রাম সীতাকুন্ড ও সন্দ্বীপ উপজেলার অন্তর্গত কুমিরা-গুপ্তছড়া ফেরীঘাটের উভয় পাশের এলাকার রাস্তাঘাট নির্মাণ, মেরামত ও সংরক্ষন করবে। |
| | | (গ) এছাড়া অন্য কোন ভৌত অবকাঠামো নির্মাণ, মেরামত ও সংরক্ষনসহ উন্নয়নমূলক কাজের প্রয়োজন হলে উভয়পক্ষ আলোচনার মাধ্যমে নিজ নিজ স্থাপনাসমূহের নির্মাণ, মেরামত, সংরক্ষন ও উন্নয়নমূলক প্রকল্পের কাজ বাস্তবায়ন করবে। |
| ৬. | **অর্থ পরিশোধ** | আন্তঃমন্ত্রণালয় সভার সিদ্ধান্ত মোতাবেক ১ম পক্ষের নির্মিত টার্মিনাল ও গ্যাংওয়ের ব্যবহার ফি বাবদ ২য় পক্ষ সর্বমোট ৪০ (চল্লিশ) লক্ষ টাকা ১ম পক্ষকে পরিশোধ করবে। প্রদেয় টাকার উপর ভ্যাট ও আয়কর পরিশোধের প্রমাণক ২য় পক্ষ (জেলা পরিষদ) ১ম পক্ষ (BIWTA) এর নিকট দাখিল করবে।<br><br>উল্লেখ্য যে, ২০১৩-১৪ অর্থ বছরের এপ্রিল-জুন/২০১৪ মেয়াদের হারাহারি মতে এবং ২০১৪-১৫ অর্থ বছরের সমুদয় অর্থ ৩১ ডিসেম্বর ২০১৪ তারিখের মধ্যে ২য় পক্ষ (জেলা পরিষদ) ১ম পক্ষ (BIWTA) কে পরিশোধ করবে। |
| ৭. | **সমঝোতা স্মারক সংশোধনের ক্ষমতা** | উভয় পক্ষের সম্মতিক্রমে এই সমঝোতা স্মারকের যে কোন অনুচ্ছেদ বা শর্ত সম্পূর্ণ বা আংশিক পরিবর্তন, পরিবর্ধন বা প্রতিস্থাপন করা যাবে। তবে কোন বিষয়ে পক্ষদ্বয় একমত হতে না পারলে আন্তঃ মন্ত্রণালয় সভার মাধ্যমে সিদ্ধান্ত গ্রহন করা যেতে পারে। এখানে বিশেষভাবে উল্লেখ্য যে, এককভাবে কোন পক্ষ কর্তৃক এই সমঝোতা স্মারকের কোন অনুচ্ছেদ বা শর্ত সম্পূর্ণ বা আংশিক পরিবর্তন, পরিবর্ধন বা প্রতিস্থাপন করা যাবে না। |
| ৮. | **উদ্ভুত সমস্যা নিরসন** | ফেরীঘাট পরিচালনা ও ষ্টীমার সার্ভিস ব্যবস্থাপনার ক্ষেত্রে কোনরূপ সমস্যা দেখা দিলে উভয় পক্ষ পারস্পারিক আলোচনার মাধ্যমে প্রয়োজনে নিয়ন্ত্রনকারী কর্তৃপক্ষের পরামর্শ মোতাবেক সমস্যার নিষ্পত্তি করবে। |
| ৯. | **রুজুকৃত মামলা উত্তোলন/প্রত্যাহার** | ১ম ও ২য় পক্ষের মধ্যে বিরাজমান মামলাসমূহ স্ব-স্ব উদ্যোগে উত্তোলন বা প্রত্যাহার করে নিবে। |

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|---|---|---|
| **১০.** | **সমঝোতা স্মারকের চুক্তিতে স্বাক্ষর** | উপযুক্ত মূল্যমানের নন জুডিশিয়াল ষ্ট্যাম্পের ২ (দুই) কপিতে সমঝোতা স্মারক লিখিত ও স্বাক্ষরিত হবে। স্বাক্ষরিত সমঝোতা স্মারকের এক কপি ১ম পক্ষের নিকট এবং অপর কপি জেলা পরিষদ, চট্টগ্রামের নিকট সংরক্ষিত থাকবে। |

উভয় পক্ষের সম্মতিক্রমে অদ্য ০২.১২.২০১৪ খ্রিঃ তারিখ রোজ মঙ্গলবার আমরা নিম্নস্বাক্ষরকারীদ্বয় স্ব-স্ব প্রতিষ্ঠানের পক্ষে এই সমঝোতা স্মারক স্বাক্ষর করিলেক।

স্বা/- অস্পষ্ট
০২.১২.২০১৪
চেয়ারম্যান
বাংলাদেশ অভ্যন্তরীন নৌ পরিবহন কতৃপক্ষ
(BIWTA)
১৪১-১৪৩ মতিঝিল, বা/এ, ঢাকা-১০০০।
(১ম পক্ষ)

স্বা/- অস্পষ্ট
০২.১২.১৪ইং
প্রশাসক
জেলা পরিষদ, চট্টগ্রাম।
(২য় পক্ষ)

**সাক্ষী**

১। নাম ঃ মফিজুল রহমান
পিতার নামাঃ পরিচালক (বন্দর)
ঠিকানাঃ BIWTA

২। নামঃ মোহাম্মদ শাহজাহান সিরাজ
পিতার নামঃ মরহুম অব্দুল গনি মজুমদার
ঠিকানাঃ উপ-পরিচালক (বন্দর)
বিআইডব্লিউটিএ

১। নাম ঃ রবীন্দ্র শ্রী বড়ুয়া
পিতার নামাঃ প্রধান নির্বাহী কর্মকর্তা
ঠিকানাঃ জেলা পরিষদ, চট্টগ্রাম।

২। নামঃ
পিতার নামঃ
ঠিকানাঃ

১২. গুরুত্বপূর্ণ বিধায় স্থানীয় সরকার, পল্লী উন্নয়ন ও সমবায় মন্ত্রণালয়ের বিগত ইংরেজী ১১.০৮.২০১৫ তারিখের পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
স্থানীয় সরকার, পল্লী উন্নয়ন ও সমবায় মন্ত্রণালয়
স্থানীয় সরকার বিভাগ
জেলা পরিষদ অধিশাখা

স্মারক নং- ৪৬.০৪২.০১৪.১৮.০২.০৮৩.২০১২-৩৩৭৩, তারিখ- ১১.০৮.২০১৫ খ্রিঃ

বিষয়ঃ কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাট পরিচালনা সংক্রান্ত জেলা পরিষদ, চট্টগ্রাম ও বিআইডব্লিউটিসির মধ্যকার সম্পাদিত দ্বি-পাক্ষিক সমঝোতা স্মারকের বিষয়ে আইনগত মতামত প্রদান সংক্রান্ত।

সূত্রঃ ১। আইন-১ অধিশাখার স্মারক নং- ৪৬.০২১.০০৪.০০.০০.০০১.২০১৪-৪৪, তাং- ১৬.০৭.২০১৫ খ্রিঃ
২। চট্টগ্রাম জেলা পরিষদের স্মারক নং- জেপ/চট্ট/VII(b)4/২০১৫/১৭৯, তাং- ১৬.০৪.২০১৫ খ্রিঃ

উপর্যুক্ত বিষয়ে কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাট পরিচালনা সংক্রান্ত জেলা পরিষদ চট্টগ্রাম ও বিআইডবিঅউটিসির মধ্যকার সম্পাদিত দ্বি-পাক্ষিক সমঝোতা স্মারকটি পরবর্তী প্রয়োজনীয় ব্যবস্থা গ্রহনের জন্য নির্দেশক্রমে এতদসঙ্গে প্রেরণ করা হলো।

স্বাক্ষর/- অস্পষ্ট
১১.০৮.১৫
(জুবাইদা নাসরীন)
উপসচিব
ফোনঃ- ৯৫৭৫৫৬৮
Email-Lgzp@lgd.gov.bd

প্রধান নির্বাহী কর্মকর্তা
জেলা পরিষদ, চট্টগ্রাম।

**অনুলিপি-জ্ঞাতার্থে/কার্যার্থেঃ**

১। প্রশাসক, জেলা পরিষদ, চট্টগ্রাম।
২। সহকারী সচিব, আইন-২, শাখা, বাংলাদেশ সচিবালয়, ঢাকা।
৩। কম্পিউটার প্রোগামার, স্থানীয় সরকার বিভাগ, বাংলাদেশ সচিবালয়, ঢাকা (ওয়েব সাইটে প্রকাশের জন্য।)

১৩. গুরুত্বপূর্ণ বিধায় বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন করপোরেশন এর বিগত ইংরেজী ০৫.০৩.২০১৫ তারিখের পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

বি আই ডব্লিউ টি সি
বাংলাদেশ অভ্যন্তরীন নৌ-পরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচলের প্রতিষ্ঠান)
৫, দিলকুশা বানিজ্যিক এলাকা, ঢাকা- ১০০০।

**যাত্রী সার্ভিস ইউনিট**

সূত্র নং- ১৮.১৫১.১৫২.০০২.১২৮.২০১২/২৩৩, তারিখঃ ০৫.০৩.২০১৫ খ্রিঃ।

বিষয়ঃ দ্বি-পাক্ষিক চুক্তিনামা সম্পাদন প্রসংগে।

সূত্র নং- জেপ/চট্ট/২০১৪/২৩৮/৯৩০, তারিখ- ২২.১২.২০১৪

উপর্যুক্ত বিষয়ে সূত্রোক্ত পত্রের প্রেক্ষিতে জানানো যাচ্ছে যে, বিজ্ঞ আইন উপদেষ্টার প্রস্তাবিত অনুচ্ছেদটি (কপি সংযুক্ত) বাদ দিয়ে স্বারকটি (চুক্তি পত্রটি) চূড়ান্ত করার জন্য কর্তৃপক্ষ সিদ্ধান্ত প্রদান করেন। তবে জেলা পরিষদ পক্ষগনের মধ্যে সম্পাদিত চুক্তির সুবিধা মহামান্য সুপ্রীম কোর্টের আপিল বিভাগের বিচারাধীন Civil Petition No. 2723 of 2012 Civil Petition No. 2722 of 2012 মামলাদ্বয় গ্রহণ করতে চায় তা হলে সংস্থা তার বিরুদ্ধে আপত্তি প্রদানের অধিকার সংরক্ষণ করে।

অতএব কর্তৃপক্ষের সিদ্ধান্ত মোতাবেক বিজ্ঞ আইন উপদেষ্টার প্রস্তাবিত অনুচ্ছেদ বাদ দিয়ে চুক্তি পত্রটি চূড়ান্ত করার প্রয়োজনীয় ব্যবস্থা গ্রহনের জন্য অনুরোধ করা হলো।

স্বাক্ষর/- অস্পষ্ট
(এম, এ, মতিন)
উপ-মহাব্যবস্থাপক(বাণিজ্য/যাত্রী)
ফোন-৯৫৬১১৫৮
ই-মেইলঃ info@biwtc.gov.bd

প্রধান নির্বাহী কর্মকর্তা
জেলা পরিষদ
চট্টগ্রাম।

অনুলিপিঃ-

১। মহাব্যবস্থাপক (বাণিজ্য/যাত্রী ও ফেরী) বিআইডব্লিউটিসি, ঢাকা।
২। উপ-মহা ব্যবস্থাপক (বাণিজ্য), বিআইডব্লিউটিসি, চট্টগ্রাম।
৩। সহ-মহা ব্যবস্থাপক (বাণিজ্য), বিআইডব্লিউটিসি, চট্টগ্রাম।
৪। সহ-মহা ব্যবস্থাপক (হিসাব), বিআইডব্লিউটিসি, চট্টগ্রাম।
৫। দপ্তর লিপি।

অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য সয়যুক্ত আইন উপদেষ্টার মতামত

জেলা পরিষদ, চট্টগ্রাম এর মালিকানাধীন কুমিরা-মগধরা-গুপ্তছড়া রুটে নৌ-যান পরিচালনা সংক্রান্তে জেলা পরিষদ, চট্টগ্রাম ও বিআইডব্লিউটিসি'র মধ্যকার সমঝোতা স্মারক

বিআইডব্লিউটিসি, ৫, দিলকুশা বাণিজ্যিক এলাকা, ঢাকা- ১০০০

..... প্রথম পক্ষ

জেলা পরিষদ, চট্টগ্রাম

..... দ্বিতীয় পক্ষ

গত ২২ ফেব্রুয়ারী ২০১৪ তারিখে নৌ-পরিবহন মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মাননীয় মন্ত্রী জনাব মোঃ শাজাহান খান, এম.পি চট্টগ্রাম-৩ (সীতাকুন্ড) সংসদীয় আসনের মাননীয় সংসদ সদস্য, চট্টগ্রাম-৪ (সন্দ্বীপ) সংসদীয় আসনের মাননীয় সংসদ সদস্য, চট্টগ্রাম জেলা পরিষদের মাননীয় প্রশাসক জনাব মোহাম্মদ আবদুস সালাম, বিআইডব্লিউটিসি ও বিআইডব্লিউটিএ এর মাননীয় চেয়ারম্যান মহোদয়গন এবং চট্টগ্রাম জেলা পরিষদের প্রধান নির্বাহী কর্মকর্তা জনাব সৈয়দা সারোয়ার জাহান, সন্দ্বীপ উপজেলা পরিষদের সম্মানিত উপজেলা চেয়ারম্যান ও উপজেলা নির্বাহী অফিসার, স্থানীয় গন্যমান্য ব্যক্তিবর্গ এবং সংশ্লিষ্ট দপ্তরসমূহের ঊর্ধ্বতন কর্মকর্তাবৃন্দ চট্টগ্রাম জেলা পরিষদের মালিকানাধীন কুমিরা-মগধরা-গুপ্তছড়া ঘাট পরিদর্শন করেন। পরিদর্শন শেষে মন্ত্রী মহোদয় সন্দ্বীপ উপজেলাস্থ জেলা পরিষদ ডাকবাংলোতে এক সভায় চট্টগ্রাম জেলা পরিষদের মালিকানাধীন কুমিরা-মগধরা-গুপ্তছড়া রুটে বিডব্লিউটিসির সী ট্রাক/স্টীমার সার্ভিস চালু করার বিষয়ে কতিপয় সিদ্ধান্ত প্রদান করেন। জনস্বার্থে গৃহীত যৌথ সভার সিদ্ধান্ত ক্রমে জেলা পরিষদ, চট্টগ্রামের আবেদনের প্রেক্ষিতে বিআইডব্লিউটিসি'র চেয়ারম্যান মহোদয়ের তাৎক্ষনিক অনুমোদনক্রমে কুমিরা মগধরা-গুপ্তছড়া সার্ভিসে সম্পূর্ণ সাময়িকভাবে বিআইডব্লিউটিসি ও জেলা পরিষদ, চট্টগ্রামের যৌথ তদারকিতে নৌ-যান পরিচালনা সংক্রান্ত শর্তাবলী নিম্নরূপঃ

**শর্তাবলী**

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| ১. | চুক্তির মেয়াদকাল গত ২৩ ফেব্রুয়ারি ২০১৪ তারিখ থেকে কার্যকর হয়েছে মর্মে গণ্য হবে এবং পরবর্তী ০১ (এক) বছর পর্যন্ত বলবৎ থাকবে, যা মেয়াদ সমাপনান্তে নবায়ন করা যাবে। |
| ২. | কুমিরা-মগধরা-গুপ্তছড়া সার্ভিসে একপথে চলাচলের সময় যাত্রী প্রতি ৮০.০০ (আশি) টাকা নির্ধারণ করা হয়েছে। তন্মধ্যে যাত্রী প্রতি ৭০/- (সত্তর) টাকা বিআইডব্লিউটিসি এবং অবশিষ্ট ১০.০০ (দশ) টাকা জেলা পরিষদ, চট্টগ্রাম প্রাপ্য হবে যা আহরিত ৮০/- টাকার (আশি টাকা) ১২.৫০% মাত্র । |
| ৩. | সংস্থার নির্ধারিত হারে যাত্রী ও মালামালের ভাড়া বিআইডব্লিউটিসি আদায় করতে পারবে। কোন পরিস্থিতিতে বিআইডব্লিউটিসি ও জেলা পরিষদের যৌথ সিদ্ধান্ত ব্যতিরেকে যাত্রী ও মালামালের ভাড়া নির্ধারিত ভাড়ার অতিরিক্ত ভাড়া আদায় করা যাবে না । |
| ৪. | কুমিরা-মগধরা-গুপ্তছড়া সার্ভিসে নিয়োজিত নৌ-যানে সকল প্রকার মালামাল উঠানামার হ্যান্ডলিং চার্জ বিআইডব্লিউটিসি'র নির্ধারিত প্রতি ৫০(পঞ্চাশ) কেজি (১/২ অর্ধ কুইন্টাল) মালামালের জন্য প্রতি কেজি ২.০০ (দুই) টাকা হারে শিপার/কনসাইনীদের নিকট হতে আদায় করা যাবে। আদায়কৃত অর্থ হতে চট্টগ্রাম জেলা পরিষদ ১২.৫০% (বারো দশমিক পাঁচ শূণ্য) ভাগ অর্থ পাবে । |
| ৫. | কুমিরা-গুপ্তছড়া সার্ভিসে যাত্রী ও মালামাল পারাপারের জন্য চট্টগ্রাম জেলা পরিষদ নিজস্ব খরচে ছাপানো টিকেটের মাধ্যমে যাত্রী প্রতি নৌকা ভাড়া ১০.০০(দশ) টাকা (প্রতি ঘাটের জন্য) হারে আদায় করতে পারবে । |
| ৬. | কুমিরা-গুপ্তছড়া সার্ভিসে বিআইডব্লিউটিসি'র নৌ-যানে বিআইডব্লিউটিসি ও জেলা পরিষদ, চট্টগ্রামের নিয়োজিত প্রতিনিধি টিকেট চেকিং ও টাকা আদায়ের কাজে নিয়োজিত থাকবে। অন-বোর্ডে টিকেট বিক্রয় ও চেকিং রেজিষ্টারে উভয় পক্ষের নিয়োজিত কর্মচারী/প্রতিনিধির তারিখ যুক্ত স্বাক্ষর থাকবে । |
| ৭. | জেলা পরিষদ, চট্টগ্রাম কর্তৃক বিআইডব্লিউটিসি'র নৌ-যানের অন-বোডে টিকেট চেকিং এর কাজে নিয়োজিত প্রতিনিধি'র বিস্তারিত বিবরণ ছবি সহ বিআইডব্লিউটিসি, চট্টগ্রাম বরাবরে দাখিল করতে হবে। এ ছাড়া নৌ-যানের অন-বোর্ডে কর্তব্যরত |

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| | জেলা পরিষদ, চট্টগ্রাম এর মনোনীত প্রতিনিধির পরিচয় পত্র থাকতে হবে । |
| ৮. | কুমিরা-গুপ্তছড়া সার্ভিসে নিয়োজিত নৌ-যানটি আপাততঃ প্রতিদিন ০১(এক)টি রাউন্ড ট্রিপ সম্পন্ন করবে। তবে পরবর্তীতে উভয় পক্ষের আলোচনা সাপেক্ষে প্রয়োজনবোধে ট্রিপ সংখ্যা ০২ (দুই) ট্রিপ রাউন্ড করা যেতে পারে । |
| ৯. | নৌ-যানের জ্বালানী ও মেরামত সংক্রান্ত আনুষাঙ্গিক সকল ব্যয়-ভার বিআইডব্লিউটিসি বহন করবে। জ্বালানী সংগ্রহের জন্য প্রয়োজনে নৌ-যানকে চট্টগ্রাম আসতে হবে। এক্ষেত্রে ট্রিপ বিঘ্নিত হতে পারে। তবে বিষয়টি বিআইডব্লিউটিসি'র স্থানীয় কর্তৃপক্ষ যথাসম্ভব নির্দিষ্ট সময়ে যাত্রী সাধারনের নিকট প্রচারের সুবিধার্থে জেলা পরিষদ চট্টগ্রামকে অবহিত করবে। |
| ১০. | যাত্রী প্রতি টিকেট বিক্রিত দৈনিক আয়ের টাকা সংস্থার খাতে জমা হবে। জেলা পরিষদ, চট্টগ্রাম পাক্ষিক অথবা মাসিক ভিত্তিতে বিল দাখিলের মাধ্যমে যাচাই বাছাই পূর্বক বিআইডব্লিউটিসি'র চট্টগ্রামস্থ আঞ্চলিক অফিস যাত্রী প্রতি ১০.০০ (দশ) টাকার বিল চেকের মাধ্যমে জেলা পরিষদ, চট্টগ্রাম বরাবরে পরিশোধ করবে। সরকার কর্তৃক আরোপিত হারে ভবিষ্যতে আরোপ হতে পারে প্রযোজ্য কর/শুল্ক কমিশন বিল হতে কর্তন করা হবে। |
| ১১. | শুধুমাত্র নগদ ভাড়া গ্রহণ করে ই এফ টি'র মাধ্যমে মালামাল (বিস্ফোরক/অবৈধ দ্রব্যাদি ছাড়া) বুক করা যাবে। কুমিরা-মগধরা-গুপ্তছড়া সার্ভিসে নিয়োজিত নৌ-যানে যাত্রী উঠা-নামার সার্বিক ব্যবস্থা জেলা পরিষদ, চট্টগ্রাম কর্তৃক করা হবে। নৌ-যানে যাত্রী ও মালামাল উঠা-নামার ক্ষেত্রে কোন প্রকার ক্ষয়ক্ষতির জন্য বিআইডব্লিউটিসি দায়ী থাকবে না। |
| ১২. | কুমিরা-মগধারা-গুপ্তছড়া সার্ভিসে যাত্রী ও মালামালের নির্ধারিত ভাড়ার হারের তালিকা ০২(দুই)টি বড় আকারের সাইন বোর্ড দিয়ে বিআইডব্লিউটিসি ও জেলা পরিষদ, চট্টগ্রাম এর মনোগ্রাম সহকারে তৈরী করে জনগণ যাতে সহজে দেখতে পান এমন উন্মুক্ত স্থানে জেলা পরিষদ, চট্টগ্রামকে নিজ খরচে স্থাপন করতে হবে । |
| ১৩. | কুমিরা-গুপ্তছড়া সার্ভিসে নিয়োজিত নৌ-যানে বিনা টিকিটে যাতে কোন যাত্রী আরোহন করতে না পারে তা উভয় পক্ষকে নিশ্চিত করতে হবে। বিনা টিকেটে কোন যাত্রী আরোহন করলে অথবা যাতায়াত করলে সংশ্লিষ্ট উভয় পক্ষে প্রতিনিধির বিরুদ্ধ স্ব স্ব প্রতিষ্ঠান কর্তৃক ব্যবস্থা গ্রহণ করতে হবে। |
| ১৪. | জেলা পরিষদ, চট্টগ্রাম কর্তৃক ০২ (দুই) টি ইঞ্জিন চালিত বড় নৌকা নৌযানে যাত্রী ও মালামাল উঠা নামার জন্য নিয়োজিত রাখতে হবে। নৌকার সমস্ত ব্যয়ভার জেলা পরিষদ, চট্টগ্রাম কর্তৃক বহন করতে হবে । |
| ১৫. | কুমিরা-গুপ্তছড়া সার্ভিসে অবস্থান কালীন নৌ-যানে যাত্রী ও মালামাল উঠা-নামার সার্বিক নিরাপত্তার ব্যবস্থা জেলা পরিষদ, চট্টগ্রামকে করতে হবে । |
| ১৬. | যাত্রীক ত্রুটি, প্রাকৃতিক দূর্যোগ ইত্যাদি কারণ কিংবা করপোরেশনের অথবা রাষ্ট্রীয় প্রয়োজনে যে কোন মুহূর্তে সার্ভিস হতে নৌ-যান প্রত্যাহার করা যাবে। সে ক্ষেত্রে বিষয়টি বিআইডব্লিউটিসির স্থানীয় কর্তৃপক্ষ যথাসম্ভব নির্দিষ্ট সময়ে যাত্রী সাধারণের নিকট প্রচারের সুবিধার্থে জেলা পরিষদ, চট্টগ্রামকে অবহিত করবে । |
| ১৭. | প্রাকৃতিক দূর্যোগ, যান্ত্রিক গোলযোগের কারণে নৌ-যান মেরামতে থাকার জন্য ট্রিপ বাতিল হতে পারে। এ ব্যাপারে কোন প্রকার আপত্তি/অজুহাত গ্রহণযোগ্য হবে ন । |
| ১৮. | কুমিরা-মগধরা-গুপ্তছড়া সার্ভিসের জন্য প্রযোজ্য সংস্থার যাবতীয় নিয়ম-কানুন মেনে চলতে হবে । |
| ১৯. | উভয় পক্ষকে কুমিরা-মগধরা-গুপ্তছড়া সার্ভিসে দৈনন্দিন আয় বৃদ্ধির প্রচেষ্টা অব্যাহত রাখতে হবে । |
| ২০. | কুমিরা-মগধরা-গুপ্তছড়া সার্ভিসে নৌযান চলাচলরত যাত্রী ও মালামালের ভাড়া আদায়ের তদারকি সংক্রান্ত দায়িত্ব জেলা পরিষদ, চট্টগ্রাম ব্যতিত অন্য কারো নিকট হস্তান্তর করা যাবে না । |
| ২১. | দ্বি-পাক্ষিক চুক্তিনামার কোন শর্ত নিয়ে বিরোধ দেখা দিলে বিআইডব্লিউটিসি কর্তৃপক্ষ ও জেলা পরিষদ, চট্টগ্রাম যৌথভাবে আলোচনার মাধ্যমে সিদ্ধান্ত গ্রহণ করবে। |

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| | চুক্তিপত্রে কোন শর্ত নিয়ে আলোচনার মাধ্যমে উভয় পক্ষ কর্তৃক মতৈক্য পৌছাতে না পারলে সেক্ষেত্রে আন্তঃমন্ত্রণালয়ের সিদ্ধান্তের জন্য স্ব স্ব কর্তৃপক্ষ বিষয়টি সংশ্লিষ্ট মন্ত্রণালয়ের প্রেরণ করবে। আন্তঃ মন্ত্রণালয় সভার সিদ্ধান্ত চূড়ান্ত বলে বিবেচিত হবে। |

প্রথম পক্ষ
চেয়ারম্যান
বিআইডব্লিউটিসি
৫, দিলকুশা বাণিজ্যিক এলাকা
ঢাকা- ১০০০।
স্বাক্ষর/-
প্রথম পক্ষ

দ্বিতীয় পক্ষ
প্রশাসক
জেলা পরিষদ, চট্টগ্রাম।

দ্বিতীয় পক্ষ

১৪. গুরুত্বপূর্ণ বিধায় বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন কর্পোরেশন (বিআইডব্লিউটিসি) কর্তৃক ভারপ্রাপ্ত কর্মকর্তা সন্দ্বীপ ও সীতাকুন্ড থানা বরাবরে প্রেরিত বিগত ইংরেজী ০৫.০১.২০১৭ তারিখের পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

Annexure-5

বিআইডব্লিউটিসি
বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচল প্রতিষ্ঠান)
৫, দিলকুশা বাণিজ্যিকএলাকা, ঢাকা-১০০০।

**"যাত্রী সার্ভিস ইউনিট"**

সূত্র নং ১৮.১৫১.১৫২.০০২.১৭৩.০০১.২০১৬/৩৮ তারিখ-০৫.০১.২০১৭ ইং

বিষয়ঃ- কুমিরা গুপ্তছড়া রুটে চার্টারে নিয়োজিত সী-ট্রাক ভাষা শহীদ জব্বার ও ভাষা শহীদ সালাম সুষ্ঠভাবে পরিচালনা প্রসঙ্গে।

উপর্যুক্ত বিষয়ে কুমিরা-গুপ্তছড়া নৌ-রুটে যাত্রীদের নিরাপদ পারাপারের স্বার্থে সী-ট্রাক ভাষা শহীদ জব্বার ও সী-ট্রাক ভাষা শহীদ সালাম চার্টারে নিয়োজিত করা হয়। কিন্তু বর্নিত রুটে অবৈধ ও ঝঁকিপূর্ণ স্পীড বোট, ফিশিং বোট, কাঠের ট্রালার চলাচল করায় একদিকে যেমন সী-ট্রাক সমূহ সুষ্ঠুভাবে পরিচালনা ব্যাঘাত সৃষ্টি হচ্ছে, অন্যদিকে যানমালের ক্ষয় ক্ষতির আশংখ্যা করা হচ্ছে। এ বিষয়ে মহামান্য সুপ্রীম কোর্টের আপীল বিভাগের রায় কার্যকর করার জন্য মহা-পরিচালক, সমুদ্র পরিবহন অধিদপ্তর ও মহা-পরিচালক, বাংলাদেশ কোষ্টগার্ড কে প্রয়োজনীয় ব্যবস্থা গ্রহনার্থে ইতোমধ্যে পত্রের মাধ্যমে অনুরোধ করা হয়েছে। তথাপিও বর্নিত অনিবন্ধিত ও ফিটনেস বিহিনী নৌযান সমূহের চলাচল বন্ধ হচ্ছে না। উল্লেখ্য কুমিরা-গুপ্তছড়া নৌ-রুটে প্রতিদিন নৌযান সার্ভিস চালু করনের বিষয়ে মাননীয় প্রধান মন্ত্রীর প্রতিশ্রুতি রয়েছে (কপি সংযুক্ত)।

অতএব, কুমিরা-গুপ্তছড়া রুটে যাত্রীদের নিরাপদ পারাপারের স্বার্থে মাননীয় প্রধানমন্ত্রীর প্রতিশ্রুতি বাস্তবায়নের লক্ষ্যে যাতে সী-ট্রাক সমূহ সুষ্ঠুভাবে পরিচালনা করা যায়, সে আলেকে অবৈধ বোট চলাচল বন্ধ করা সহ মহামান্য সুপ্রীম কোর্টের আপীল বিভাগের রায় কার্যকর করার নিমিত্তে বর্নিত রুটে পুলিশ টহল জোরদার করার প্রয়োজনীয় ব্যবস্থা গ্রহন করার জন্য অনুরোধ করা হলো।

স্বাঃ অস্পষ্ট
০৫.০১.২০১৭
(এন,এস,এম শাহাদাত আলী)
মহা-ব্যবস্থাপক(বাণিজ্য/যাত্রী ও ফেরী)
বিআইডব্লিউটিসি, ঢাকা।

১। ভারপ্রাপ্ত কর্মকর্তা
সন্দ্বীপ থানা, চট্টগ্রাম।

২। ভারপ্রাপ্ত কর্মকর্তা
সীতাকুন্ড থানা, চট্টগ্রাম।

অনুলিপিঃ (জ্যেষ্ঠতার ভিত্তিতে নহে)
১। মহা-পরিচালক, বাংলাদেশ কোষ্ট গার্ড, আগারগাঁও সদর দপ্তর, ঢাকা।
২। মহা-পরিচালক, নৌ-পরিবহন অধিদপ্তর, ১৪১-১৪৩, মতিঝিল বা/এ, ঢাকা-১০০০
৩। পরিচালক (বাণিজ্য), বিআইডব্লিউটিসি, ঢাকা।
৪। জেলা প্রশাসক, জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম।
৫। পুলিশ সুপার, পুলিশ সুপারের কার্যালয়, চট্টগ্রাম।
৬। জনাব মোহাম্মদ ইকরাম উদ্দিন, প্রোপাইটরঃ মেসার্স হক ট্রেডার্স, গ্রামঃ মগধরা পোষ্টঃ উত্তর মগধরা, ওয়ার্ড নং-১, সন্দ্বীপ, চট্টগ্রাম।
৭। দপ্তর লিপি।

স্বাঃ অস্পষ্ট
০৫.০১.২০১৭
মহা-ব্যবস্থাপক(বাণিজ্য/যাত্রী ও ফেরী)
বিআইডব্লিউটিসি, ঢাকা।

১৫. গুরুত্বপূর্ণ বিধায় বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন কর্পোরেশন (বিআইডব্লিউটিসি) কর্তৃক বাংলাদেশ কোষ্ট গার্ড ও সমুদ্র পরিবহন অধিদপ্তর বরাবরে বিগত ইংরেজী ৩০.১১.২০১৬ তারিখে প্রেরিত কুমিরা গুপ্তছড়া রুটে সুষ্ঠুভাবে সী-ট্রাক পরিচালনার স্বার্থে প্রয়োজনীয় সহযোগীতা চেয়ে পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**ANNEXURE-5(ক)**

বিআইডব্লিউটিসি
বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচল প্রতিষ্ঠান)
৫, দিলকুশা বাণিজ্যিকএলাকা, ঢাকা-১০০০।

নং ১৮.১৫১.১৫২.০০২.১৭৩.০০১.২০১৬/১১৬৭ তারিখ-৩০/১১/২০১৬

বিষয়ঃ কুমিরা-গুপ্তছড়া নৌ-রুটে সুষ্ঠভাবে সী-ট্রাক পরিচালনার স্বার্থে প্রয়োজনীয় সহযোগিতা প্রদান।

উপর্যুক্ত বিষয়ে চট্টগ্রামের কুমিরা-গুপ্তছড়া নৌ-রুটে রেজিষ্ট্রেশন বিহীন স্পীডবোট, ফিশিং বোট, মালবাহী বোট দ্বারা ঝুঁকিপূর্ণভাবে যাত্রী ও মালামাল পরিবহন করা হচ্ছে। যাত্রীদের নিরাপদ যাতায়াতের স্বার্থে দূর্ঘটনামুক্ত নিরাপদ নৌ চটলাচল ব্যবস্থা গড়ে তোলার লক্ষ্যে একাধিক সী-ট্রাকের ব্যবস্থা গ্রহণের জন্য সমুদ্র পরিবহন অধিদপ্তর ইতোমধ্যে বিআইডব্লিউটিসিকে পত্র প্রেরণ করে।

০২। উক্ত রুটে মামলাজনিত দীর্ঘদিনের আইনী প্রক্রিয়া শেষে গত ১৩/০৬/২০১৬ তারিখে মহামান্য সুপ্রীম কার্টের আপীল বিভাগ রায় প্রদান করে। রায় অনুযায়ী কুমিরা-গুপ্তছড়া নৌ-রুটের ঘাট পরিচালনা ও ব্যাবস্থাপনার দায়িত্ব চট্টগ্রাম জেলা পরিষদের এবং নৌ রুটে যাত্রী ও মালামাল পরিবহনের দায়িত্ব বিআইডব্লিউটিসির। সে আলোকে যাত্রীদের নিরাপদ যাতায়াতের

স্বার্থে চার্টারার এর মাধ্যমে পরিচালনার জন্য বিআইডব্লিউটিসি সী-ট্রাক ভাষা শহীদ জব্বার ও সী-ট্রাক ভাষা শহীদ সালাম বর্ণিত রুটে নিয়োজিত করেছে।

০৩। রেজিস্ট্রেশন বিহীন ঝুঁকিপূর্ণ বোট দ্বারা কুমিরা-গুপ্তছড়া রুটে যাত্রী ও মালামাল পরিবহন করায় সরকারি সী-ট্রাক সুষ্ঠুভাবে পরিচালনায় ব্যাঘাতসহ যাত্রীদের নিরাপদ যাতায়াতে জটিলতার সৃষ্টি হচ্ছে। তাছাড়া যে কোন সময় দূর্ঘটনার কারণে যাত্রীদের জানমালের ক্ষয়ক্ষতি হতে পারে। উল্লিখিত রুটে ঝুঁকিপূর্ণ বোট দ্বারা যাত্রী ও মালামাল পারাপারে ইতোমধ্যে অনেক প্রাণহানির দৃষ্টান্ত রয়েছে।

০৪। এমতাবস্থায় মহামান্য সুপ্রিম কোর্টের রায় বাস্তবায়নের লক্ষ্যে এবং চার্টারে পরিচালিত বিআইডব্লিউটিসির সী-ট্রাক দ্বারা যাতে সুষ্ঠুভাবে নিরাপদে যাত্রী ও মালামাল পরিবহন করা যায় তার প্রয়োজনীয় প্রশাসনিক সহযোগিতা সহ কুমিরা-গুপ্তছড়া রুটে ঝুঁকিপূর্ন বোট চলাচল বন্ধের প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য নির্দেশক্রমে সবিনয় অনুরোধ করা হলো।

সংযুক্তঃ মহামান্য সুপ্রীম কোর্টের রায় ০৪ (চার) পাতা।

স্বাঃ অস্পষ্ট
(জেসমিন অরা বেগম)
সচিব (অঃদাঃ)
বিআইডব্লিউটিসি, ঢাকা।
ফোনঃ ৯৫০২৫৬১
secretary@biwtc.gov.bd

১। মহা-পরিচালক
বাংলাদেশ কোষ্ট গার্ড, প্রধান কার্যালয়,
আগারগাও, ঢাকা।

২। মহা-পরিচালক
সমুদ্র পরিবহন অধিদপ্তর
১৪১-১৪৩ মতিঝিল, বা/এ, ঢাকা-১০০০।

অনুলিপিঃ
১। মাননীয় মন্ত্রীর একান্ত সচিব, নৌ-পরিবহন মন্ত্রণালয়, বাংলাদেশ সচিবালয়, ঢাকা।
২। মাননীয় মন্ত্রীর একান্ত সচিব, স্বরাষ্ট্র মন্ত্রণালয়, বাংলাদেশ সচিবালয়, ঢাকা।
৩। জেলা প্রশাসক, জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম।
৪। পুলিশ সুপার, পুলিশ সুপারের কার্যালয়, চট্টগ্রাম।
৫। সচিব মহোদয়ের একান্ত সচিব, নৌ-পরিবহন মন্ত্রণালয়, বাংলাদেশ সচিবালয়, ঢাকা।
৬। চেয়ারম্যান মহোদয়ের একান্ত সচিব, বিআইডব্লিউটিসি, ঢাকা-চেয়ারম্যান মহোদয়ের সদয় জ্ঞাতার্থে।
৭। দপ্তর লিপি।

স্বাঃ অস্পষ্ট
৩০.১১.১৬
সচিব (অঃদাঃ)

১৬. গুরুত্বপূর্ণ বিধায় বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন কর্পোরেশন (বিআইডব্লিউটিসি) কর্তৃক কোষ্ট গার্ড বরাবরে বিগত ইংরেজী ০৫.০১.২০১৭ তারিখে প্রেরিত পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-5(খ)**

বিআইডব্লিউটিসি
বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচল প্রতিষ্ঠান)

৫, দিলকুশা বাণিজ্যিকএলাকা, ঢাকা-১০০০।

**"যাত্রী সার্ভিস ইউনিট"**

সূত্র নং ১৮.১৫১.১৫২.০০২.১৭৩.০০১.২০১৬/৩৭ তারিখ-০৫.০১.২০১৭ ইং।

বিষয়ঃ কুমিরা-গুপ্তছড়া রুটে চার্টারে নিয়োজিত সী-ট্রাক ভাষা শহীদ জব্বার ও ভাষা শহীদ সালাম সুষ্ঠভাবে পরিচালনা প্রসঙ্গে|

উপর্যুক্ত বিষয়ে কুমিরা-গুপ্তছড়া নৌ-রুটে যাত্রীদের নিরাপদ পারাপারের স্বার্থে সী-ট্রাক ভাষা শহীদ জব্বার ও সী-ট্রাক ভাষা শহীদ সালাম চার্টারে নিয়োজিত করা হয়। কিন্তু বর্নিত রুটে অবৈধ ও ঝঁকিপূর্ণ স্পীড বোট, ফিশিং বোট, কাঠের ট্রালার চলাচল করায় একদিকে যেমন সী-ট্রাক সমূহ সুষ্ঠুভাবে পরিচালনা ব্যাঘাত সৃষ্টি হচ্ছে, অন্যদিকে যানমালের ক্ষয় ক্ষতির আশংখা করা হচ্ছে। এ বিষয়ে এবং মহামান্য সুপ্রীম কোর্টের আপীল বিভাগের রায় কার্যকর করার জন্য মহা-পরিচালক, সমুদ্র পরিবহন অধিদপ্তর ও মহা-পরিচালক, বাংলাদেশ কোষ্টগার্ডকে প্রয়োজনীয় ব্যবস্থা গ্রহনার্থে ইতোমধ্যে পত্রের মাধ্যমে অনুরোধ করা হয়েছে। তথাপিও বর্নিত অনিবন্ধিত ও ফিটনেস বিহিন নৌযান সমূহের চলাচল বন্ধ হচ্ছে না। উল্লেখ্য কুমিরা-গুপ্তছড়া নৌ-রুটে প্রতিদিন নৌযান সার্ভিস চালু করনের বিষয়ে মাননীয় প্রধান মন্ত্রীর প্রতিশ্রুতি রয়েছে (কপি সংযুক্ত)।

অতএব, কুমিরা-গুপ্তছড়া নৌ-রুটে যাত্রীদের নিরাপদ পারাপারের স্বার্থে মাননীয় প্রধানমন্ত্রীর প্রতিশ্রুতি বাস্তবায়নের লক্ষ্যে যাতে সী-ট্রাক সমূহ সুষ্ঠুভাবে পরিচালনা করা যায়, সে আলেকে অবৈধ বোট চলাচল বন্ধ করা সহ মহামান্য সুপ্রীম কোর্টের আপীল বিভাগের রায় কার্যকর করার নিমিত্তে বর্নিত রুটে কোষ্টগার্ড টহল জোরদার করার প্রয়োজনীয় ব্যবস্থা গ্রহন করার জন্য অনুরোধ করা হলো।

স্বাঃ অস্পষ্ট
(এন,এস,এম শাহাদাত আলী)
মহা-ব্যবস্থাপক(বাণিজ্য/যাত্রী ও ফেরী)
বিআইডব্লিউটিসি, ঢাকা।

জোনাল কমান্ডার
কোষ্টগার্ড (পূর্বজোন)
মৎস্য বন্দর, চট্টগ্রাম।

**অনুলিপিঃ (জ্যেষ্ঠতার ভিত্তিতে নহে)**

১। মহা-পরিচালক, বাংলাদেশ কোষ্ট গার্ড, আগারগাঁও সদর দপ্তর, ঢাকা।
২। মহা-পরিচালক, নৌ-পরিবহন অধিদপ্তর, ১৪১-১৪৩, মতিঝিল বা/এ, ঢাকা-১০০০
৩। পরিচালক (বাণিজ্য), বিআইডব্লিউটিসি, ঢাকা।
৪। জেলা প্রশাসক, জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম।
৫। পুলিশ সুপার, পুলিশ সুপারের কার্যালয়, চট্টগ্রাম।
৬। জনাব মোহাম্মদ ইকরাম উদ্দিন, প্রোপাইটরঃ মেসার্স হক ট্রেডার্স, গ্রামঃমগধরা পোষ্টঃ উত্তর মগধরা, ওয়ার্ড নং-১, সন্দ্বীপ, চট্টগ্রাম।
৭। দপ্তর লিপি।

স্বাঃ অস্পষ্ট
০৫.০১.২০১৭
মহা-ব্যবস্থাপক(বাণিজ্য/যাত্রী ও ফেরী)
বিআইডব্লিউটিসি, ঢাকা।

১৭. গুরুত্বপূর্ণ বিধায় বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন কর্পোরেশন (বিআইডব্লিউটিসি) কর্তৃক উপজেলা নির্বাহী অফিসার সন্দ্বীপ ও সীতাকুন্ড বরাবরে প্রেরিত বিগত ইংরেজী ০৫.০১.২০১৭ তারিখের পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-5(গ)**

বিআইডব্লিউটিসি
বাংলাদেশ অভ্যন্তরীণ নৌপরিবহন করপোরেশন
(অভ্যন্তরীণ জাহাজ চলাচল প্রতিষ্ঠান)
৫, দিলকুশা বাণিজ্যিকএলাকা, ঢাকা-১০০০।

**"যাত্রী সার্ভিস ইউনিট"**

সূত্র নং- ১৮.১৫১.১৫২.০০২.১৭৩.০০১.২০১৬/৩৬ তারিখ-০৫.০১.২০১৭ ইং।

**বিষয়ঃ কুমিরা-গুপ্তছড়া রুটে চার্টারে নিয়োজিত সী-ট্রাক ভাষা শহীদ জব্বার ও ভাষা শহীদ সালাম সুষ্ঠভাবে পরিচালনা প্রসঙ্গে।**

উপর্যুক্ত বিষয়ে কুমিরা-গুপ্তছড়া নৌ-রুটে যাত্রীদের নিরাপদ পারাপারের স্বার্থে সী-ট্রাক ভাষা শহীদ জব্বার ও সী-ট্রাক ভাষা শহীদ সালাম চার্টারে নিয়োজিত করা হয়। কিন্তু বর্নিত রুটে অবৈধ ও ঝঁকিপূর্ণ স্পীড বোট, ফিশিং বোট, কাঠের ট্রালার চলাচল করায় একদিকে যেমন সী-ট্রাক সমূহ সুষ্ঠুভাবে পরিচালনা ব্যাঘাত সৃষ্টি হচ্ছে, অন্যদিকে যানমালের ক্ষয় ক্ষতির আশংখ্যা করা হচ্ছে। এ বিষয়ে মহামান্য সুপ্রীম কোর্টের আপীল বিভাগের রায় কার্যকর করার জন্য মহা-পরিচালক, সমুদ্র পরিবহন অধিদপ্তর ও মহা-পরিচালক, বাংলাদেশ কোষ্টগার্ডকে প্রয়োজনীয় ব্যবস্থা গ্রহনার্থে ইতোমধ্যে পত্রের মাধ্যমে অনুরোধ করা হয়েছে। তথাপিও বর্নিত অনিবন্ধিত ও ফিটনেস বিহিন নৌযান সমূহের চলাচল বন্ধ হচ্ছে না। উল্লেখ্য কুমিরা-গুপ্তছড়া নৌ-রুটে প্রতিদিন নৌযান সার্ভিস চালু করনের বিষয়ে মাননীয় প্রধান মন্ত্রীর প্রতিশ্রুতি রয়েছে (কপি সংযুক্ত)।

অতএব, কুমিরা-গুপ্তছড়া রুটে যাত্রীদের নিরাপদ পারাপারের স্বার্থে মাননীয় প্রধানমন্ত্রীর প্রতিশ্রুতি বাস্তবায়নের লক্ষ্যে যাতে সী-ট্রাক সমূহ সুষ্ঠুভাবে পরিচালনা করা যায়, সে আলেকে অবৈধ বোট চলাচল বন্ধ করা সহ মহামান্য সুপ্রীম কোর্টের আপীল বিভাগের রায় কার্যকর করার নিমিত্তে বর্নিত রুটে ম্যাজিস্ট্রেট তদারকি জোরদার করার প্রয়োজনীয় ব্যবস্থা গ্রহন করার জন্য অনুরোধ করা হলো।

স্বাঃ অস্পষ্ট
(এন,এস,এম শাহাদাত আলী)
মহা-ব্যবস্থাপক(বাণিজ্য/যাত্রী ও ফেরী)
বিআইডব্লিউটিসি, ঢাকা।

১। উপজেলা নির্বাহী অফিসার
সীতাকুন্ড উপজেলা, চট্টগ্রাম।

২। উপজেলা নির্বাহী অফিসার,
সন্দ্বীপ উপজেলা, চট্টগ্রাম।

**অনুলিপিঃ (জ্যেষ্ঠতার ভিত্তিতে নহে)**

১। মহা-পরিচালক, বাংলাদেশ কোষ্ট গার্ড, আগারগাঁও সদর দপ্তর, ঢাকা।
২। মহা-পরিচালক, নৌ-পরিবহন অধিদপ্তর, ১৪১-১৪৩, মতিঝিল বা/এ, ঢাকা-১০০০
৩। পরিচালক (বাণিজ্য), বিআইডব্লিউটিসি, ঢাকা।
৪। জেলা প্রশাসক, জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম।
৫। পুলিশ সুপার, পুলিশ সুপারের কার্যালয়, চট্টগ্রাম।
৬। জনাব মোহাম্মদ ইকরাম উদ্দিন, প্রোপাইটরঃ মেসার্স হক ট্রেডার্স, গ্রামঃমগধরা পোষ্টঃ উত্তর মগধরা, ওয়ার্ড নং-১, সন্দ্বীপ, চট্টগ্রাম।
৭। দপ্তর লিপি।

স্বাঃ অস্পষ্ট

০৫.০১.২০১৭
মহা-ব্যবস্থাপক(বাণিজ্য/যাত্রী ও ফেরী)
বিআইডব্লিউটিসি, ঢাকা।

১৮. গুরুত্বপূর্ণ বিধায় নৌ-পরিবহন অধিদপ্তর কর্তৃক বিগত ইংরেজী ২১.১২.২০১৬ তারিখে জেলা প্রশাসক ও পুলিশ সুপার চট্টগ্রাম এবং অভ্যন্তরীণ জাহাজ পরিদর্শক বরাবরে প্রেরিত পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-5(ঘ)**

**গণপ্রজাতন্ত্রী বাংলাদেশ সরকার**
নৌ পরিবহন অধিদপ্তর
১৪১-১৪৩ মতিঝিল বা/এ (৮ম তলা)
ঢাকা-১০০০

নং - ০১৮.১৭০.৪১৩.০২২.০০.৬১.২০১৬/৯৬৯৮ তারিখঃ- ২১/১২/২০১৬খ্রিঃ

মহাপরিচালক
বাংলাদেশ কোস্ট গার্ড
আগারগাঁও প্রশাসনিক এলাকা
শেরে-ই-বাংলানগর, ঢাকা-১২০৭
(দৃঃ আঃ - পরিচালক, অপারেশন্স)

**বিষয়ঃ** **কুমিরা-গুপ্তছড়া নৌ-রুটে সুষ্ঠুভাবে সী-ট্রাক পরিচলনার স্বার্থে প্রয়োজনীয় ব্যবস্থা গ্রহণ প্রসঙ্গে।**

সূত্রঃ বিআইডব্লিউটিসি এর পত্র নং- ১৮.১৫১.১৫২.০০২.১৭৩.০০১.২০১৬/১১৬৭ তারিখঃ- ৩০/১১/২০১৬ খ্রিঃ

উপরোক্ত বিষেয়ে সূত্রোক্ত পত্রে দেখা যায় কুমিরা-গুপ্তছড়া নৌ-রুটে রেজিষ্ট্রেশন বিহীন স্পীডবোট, ফিশিং বোট এবং মালবাহী বোট দ্বারা ঝুঁকিপূর্ণভাবে যাত্রী ও মালামাল পরিবহন করা হচ্ছে। রেজিষ্ট্রেশন বিহীন বোট দ্বারা কুমিরা-গুপ্তছড়া নৌরুটে যাত্রী ও মালামাল পরিবহন করায় সারকারি সী-ট্রাক সুষ্ঠুভাবে পরিচালনায় ব্যাঘাতসহ যাত্রীদের নিরাপদ যাতায়াতের প্রতিবন্ধকতা সৃষ্টি হচ্ছে। তাছাড়া অবৈধ ও রেজিষ্ট্রেশন বিহীন নৌযান দ্বারা যাত্রী পরিবহনের কারণে যে কোন সময় অনাকাঙ্খিত দূর্ঘটনা ঘটতে পারে।

কুমিরা-গুপ্তছড়া নৌ-রুটে যাত্রীদের জানমালের নিরাপত্তার স্বার্থে চার্টারার এর মাধ্যমে পরিচালনার জন্য বিআইডব্লিউটিসি'র মালিকানাধীন সার্ভে ও রেজিষ্ট্রেশন সনদ প্রাপ্ত সী-ট্রাক ভাষা শহীদ জব্বার ও সী-ট্রাক ভাষা শহীদ সালাম চলাচল করছে এবং উক্ত নৌরুটে যাত্রীদের নিরাপদ যাতায়াতের বিষয়ে মহামান্য সুপ্রিমকোর্টের একটি নির্দেশনা রয়েছে।

এমতাবস্থায় এতদসংগে সংযুক্ত মহামান্য সুপ্রিমকোর্টের রায় বাস্তবায়নের লক্ষ্যে এবং চার্টারার এর মাধ্যমে পরিচালিত বিআইডব্লিউটিসি'র সী-ট্রাকসহ বৈধ নৌযান যাতে সুষ্ঠুভাবে নিরাপদে যাত্রী ও মালামাল পরিবহন করতে পারে তার প্রয়োজনীয় সহযোগিতা প্রদানসহ রেজিষ্ট্রেশনবিহীন স্পীডবোট, ফিশিং বোট, কাঠের মালবাহী বোট দ্বারা যাত্রী ও মালামাল পরিবহন করতে না পারে তার প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য অনুরোধ করা হলো।

সংলগ্নীঃ বর্ণনামতে।

স্বাঃ অস্পষ্ট
কমডোর এম জাকিউর রহমান ভূঁইয়া,
ওএসপি,বিএসপি, পিএসসি,বিএন
মহাপরিচালক

**অনুলিপিঃ অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য**

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| ১। জেলা প্রশাসক, জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম। | উল্লেখিত এলাকায় ভ্রাম্যমান আদালত পরিচালনা করার নিমিত্তে সংশ্লিষ্টদের প্রয়োজনীয় নির্দেশনা প্রদানের জন্য অনুরোধ করা হলো। |
| ২। পুলিশ সুপার, পুলিশ সুপারের কার্যালয়, চট্ট গ্রাম। | উল্লেখিত এলাকায় বিজ্ঞ ম্যাজিস্ট্রেট কর্তৃক ভ্রাম্যমান আদালত পরিচালনায় সহায়তা প্রদান করার জন্য অনুরোধ করা হলো। |
| ৩। পরিদর্শক, অভ্যন্তরীণ জাহাজ পরিদর্শনালয়, চট্টগ্রাম। | ভ্রাম্যমান আদালত পরিচালনায় সার্বিক সহায়তা প্রদানের জন্য বলা হলো। |

১৯. গুরুত্বপূর্ণ বিধায় বিগত ইংরেজী ০৪.০১.২০১৭ তারিখে কুমিরা-গুপ্তছড়া নৌ-রুটে সুষ্ঠভাবে সী-ট্রাক পরিচালনার স্বার্থে প্রয়োজনীয় ব্যবস্থা গ্রহণ প্রসংগে প্রেরিত পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-5(ঙ)**

নং-৪৪.০৮.২৬৮০.০২০.৫০.০০১.১৭.২০ ২১ পৌষ ১৪২৩ / ০৪ জানুয়ারী ২০১৭

**কুমিড়া-গুপ্তছড়া নৌরুটে সুষ্ঠভাবে সী-ট্রাক পরিচালনার স্বার্থে প্রয়োজনীয় ব্যবস্থা গ্রহণ প্রসঙ্গে।**

ক। নৌ পরিবহন অধিদপ্তর পত্র নং-০১৮.১৭০.৪১৩.০২২.০০.৬১.২০১৬/৯৬৯৮ তারিখ- ২১ ডিসেম্বর ২০১৬ (সকলকে নহে)।

১। শিরোনামে বর্ণিত বিষয়ে চট্টগ্রামের কুমিরা-গুপ্তছড়া নৌরুটে যাত্রীদের নিরাপদ যাতায়াতের স্বার্থে দুর্ঘটনা মুক্ত নিরাপদ নৌ চলাচল ব্যবস্থা গড়ে তোলার লক্ষ্যে নৌ পরিবহন অধিদপ্তর কর্তৃক সূত্র ''ক'' মারফত মহাপরিচালক বাংলাদেশ কোষ্ট গার্ড বাহিনী বরাবর অনুরোধ করা হয়। এতদপ্রেক্ষিতে, বিগত ২৪ ডিসেম্বর ২০১৬ জোনাল কমান্ডার পূর্ব জোন এর সভাপতিত্বে কুমিরা ঘাটে নিম্নলিখিত প্রতিনিধিবর্গের উপস্থিতিতে একটি সভা অনুষ্ঠিত হয়ঃ

| ক্রমিক নং | নাম ও পদবী | মোবাইল নং | মন্তব্য |
|---|---|---|---|
| ১। | কমান্ডার এস এম নঈম উদ্দীন (এইচ), পিএসসি, বিএন (পি, নং-৯৬৩) | ০১৭৬৬৯০১৮০ | সভাপতি |
| ২। | সাঃ লেঃ এম এ হাশেম (এসডি) (কম) বিএন (পি, নং-২৪৬৫) | ০১৭৬৬৬৯০১৮৮ | স্টেশান কমান্ডার |
| ৩ | ম্যাজিস্ট্রেট মোঃ সাব্বির ইকবাল | ০১৭১০৮৭৬১৫৬ | জেলা পরিষদ সচিব |
| ৪। | সজীব বড়ুয়া | ০১৮১৯১৭১৬৩৬ | জেলা পরিষদ প্রকৌশলী |
| ৫। | মোঃ শেখ মোখলেছুর রহমান মুকুল | ০১৫৫৬৩৪৫২১৯ | সি-ট্রাক ইজারাদার |
| ৬। | মোঃ ইকরাম উদ্দিন | ০১৭১১৩১০৮৫২ | |
| ৭। | মোঃ নাছির উদ্দিন | ০১৯৩০৬৮৫১৩০ | |
| ৮। | মোঃ জামাল উদ্দিন | - | স্পিড বোট মালিক |
| ৯। | মোঃ কামরুল হোসেন | - | |
| ১০। | মোঃ জগলুল হোসেন নয়ন | - | |
| ১১। | মোঃ মহিউদ্দিন | - | |

২। সভায় সংশ্লিষ্ট সকলের সাথে আলোচনা, মাননীয় মহামান্য সুপ্রিম কোর্টের রায়, নৌ পরিবহন অধিদপ্তর, বিআইডব্লিউটিসি, জেলা পরিষদ চট্টগ্রামসহ অন্যান্য সংস্থার বিভিন্ন পত্রাদি পর্যালোচনা করে নিম্নলিখিত তথ্যাদি জানা যায়ঃ

ক। কুমিরা-গুপ্তছড়া ঘাটের পরিচালনা ও ব্যবস্থাপনার দায়িত্ব চট্টগ্রাম জেলা পরিষদের।

খ। সভায় উপস্থিত জেলা পরিষদের প্রতিনিধি জানান জনাব এস এম আনোয়ার হোসেনকে কুমিরা গুপ্তছড়া ফেরিঘাটে দৈনিক ৭৫,০০০/০০ টাকা প্রদান সাপেক্ষে টোল আদায়কারী হিসেবে নিয়োগ দেওয়া হয়েছে।

গ। উক্ত ঘাট হতে বিভিন্ন প্রকার নৌযান, যেমন-সি-ট্রাক, স্পিড বোট, মালবাহী বোট, যাত্রীবাহী বোট ও ফিশিং বোট পরিচালনা করা হয়ে থাকে। উক্ত ইজারা গ্রহণকারীরা বিভিন্ন নৌযান থেকে নির্দিষ্ট হারে টোল আদায় করে থাকেন।

ঘ। সি-ট্রাকের পরিচালনাকারী এবং স্পিড বোট মালিক সমিতির প্রতিনিধি, উভয় পক্ষ বৈধভাবে যাত্রী পরিবহন করছে বলে সভায় দাবি করে।

ঙ। এ পর্যায়ে সভাপতি বোট মালিক সমিতির নিকট হতে সমুদ্রপথে বোট পরিচালনার প্রয়োজনীয় কাগজ পত্রাদি দেখতে চাইলে তারা নিম্নলিখিত কাগজ পত্রাদি উপস্থাপন করেনঃ

(১) সার্ভে সনদ।
(২) বিআইডব্লিউটি এর অর্থ বিভাগের সনদ।
(৩) কার্গো বোটের সেফটি ইকুইপমেন্ট সনদ।

চ। উক্ত কাগজপত্রাদি পর্যালোচনা করে নিম্নলিখিত অসামঞ্জস্যতাসমূহ পরিলক্ষিত হয়ঃ

১। মহাপরিচালক ডিপার্টমেন্ট অব শিপিং এর স্বাক্ষরের সাথে তার প্রকৃত স্বাক্ষরের মিল নেই।

২। স্বাক্ষরের নিচে মহাপরিচালকের সীলমোহর নেই।

৩। স্পিড বোট মালিকগণ বোটের কোন রেজিষ্ট্রেশন সনদ দেখাতে পারেন নাই। এছাড়া তারা কোন কাগজপত্রের মূল কপি সভায় উপস্থাপন করতে পারে নাই।

৩। উপরোক্ত অসামঞ্জস্য নথি পত্রাদিসমূহ সম্পর্কে বোট মালিক সমিতির সভাপতির নিকট জিজ্ঞাসা করা হলে তিনি কাগজ পত্র তৈরির জন্য ১৫ দিনের সময় দেওয়ার জন্য অনুরোধ করেন যা গ্রহণযোগ্য হয়নি। সভায় উপস্থাপিত নথি পত্রাদিসমূহ ভুয়া এবং বানানো বলে প্রতীয়মান হয়েছে।

৪। বর্তমানে কোষ্ট গার্ড বাহিনীর পূর্ব জোনে নৌ পরিবহন অধিদপ্তর এবং বিআইডব্লিউটিসি কর্তৃক ইস্যুকৃত প্রকৃত রেজিষ্ট্রেশন সার্ভে সনদ এবং অন্যান্য নিরাপদ নৌযান পরিচালনার জন্য প্রয়োজনীয় কাগজ পত্র সম্পর্কে সম্যক ধারনা প্রাপ্ত কোন কর্মকর্তা বা নাবিক নিয়োজিত নেই। এ প্রেক্ষিতে, উল্লেখিত অবৈধ রেজিষ্ট্রেশন বিশিষ্ট সি-ট্রাক, ফিশিং বোট অন্যান্য বোটে কাগজ পত্রাদি সঠিকতা যাচাইয়ের জন্য এক সপ্তাহের জন্য নৌ পরিবহন অধিদপ্তর থেকে একজন ম্যাজিষ্টেট অথবা পরিদর্শক নিয়োগ করা হলে তার উপস্থিতিতে উক্ত বোটসমূহ চেক করা হলে এ ধরনের অবৈধ নৌযান বন্ধ হবে বলে প্রতীয়মান। সেক্ষেত্রে কোষ্ট গার্ড কর্তৃক প্রয়োজনীয় সকল ধরণের সহায়তা প্রদান করা হবে।

৫। উপরোক্ত বর্ণনার আলোকে, কুমিরা-গুপ্তছড়া নৌরুটে রেজিষ্ট্রেশনবিহীন সি-ট্রাকসহ অন্যান্য নৌযান চলাচল এবং যাত্রী-মালামাল বহন রহিত করণের লক্ষ্যে নৌ পরিবহন অধিদপ্তর হতে

একজন ম্যাজিস্ট্রেট/পরিদর্শক অস্থায়ীভাবে কোষ্ট গার্ড পূর্ব জোনে প্রেরণ করা হলে তার সহায়তায় উল্লেখিত রেজিষ্টেশনবিহীন নৌযানসমূহ চেক করা হলে বর্ণিত নৌরুটে সুষ্ঠুভাবে সি-ট্রাক পরিচালনা করা সম্ভব বলে প্রতীয়মান।

৬। সদয় অবগতি ও পরবর্তী কার্যক্রমের জন্য প্রেরণ করা হলো।

স্বাঃ অস্পষ্ট
কামাল আলম
কমান্ডার বিএন
পক্ষে পরিচালক

বিতরণঃ
বহিস্থঃ
কার্যঃ
মহাপরিচালক — ফ্যাক্স মারফত
নৌ পরিবহন অধিদপ্তর
১৪১-১৪৩ মতিঝিল বা/এ, (৮ম তলা), ঢাকা-১০০০
অবগতিঃ

জোনাল কমান্ডার পূর্ব জোন — ফ্যাক্স মারফত
বাংলাদেশ কোষ্ট গার্ড বাহিনী
মৎস্য বন্দর, চট্টগ্রাম
অন্তস্থঃ
অবগতিঃ

মহাপরিচালকের সচিবলয় — সদয় অবগতির জন্য
উপ-মহাপরিচালকের কার্যালয়

২০. গুরুত্বপূর্ণ বিধায় নৌ পরিবহণ অধিদপ্তর কর্তৃক বিগত ইংরেজী ২৪.০১.২০১৭ তারিখের অফিস আদেশটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-5(চ)**

**গণপ্রজাতন্ত্রী বাংলাদেশ সরকার**
নৌ পরিবহণ অধিদপ্তর
১৪১-১৪৩ মতিঝিল বা/এ (৮ম তলা)
ঢাকা- ১০০০
নং- ০১৮.১৭০.৪১৩.০২২.০০.৬১.২০১৬/৬১১, তারিখ- ২৪.০১.২০১৭খ্রিঃ

**অফিস আদেশ**

কোষ্ট গার্ড সদর দপ্তর হতে প্রাপ্ত এতদসংগে সংযুক্ত পত্র নং- ৪৪.০৮.২৬৮০.০২০.৫০.০০১.১৭.২০ তারিখ- ০৪.০১.২০১৭ এর প্রেক্ষিতে এবং মহামান্য সুপ্রীকোর্টের রায় বাস্তবায়নের লক্ষ্যে চার্টারার এর মাধ্যমে পরিচালিত বিআইডব্লিউটিসির সী-ট্রাকসহ বৈধ নৌযান যাতে সুষ্ঠুভাবে নিরাপদে যাত্রী ও মালামাল পরিবহন করতে পারে এবং রেজিষ্ট্রেশনবিহীন স্পীডবোট, ফিশিং বোট, কাঠের মালবাহী বোট দ্বারা যাত্রী ও মালামাল পরিবহন করতে না পারে এই বিষয়ে কোস্ট গার্ড এর সাথে সমন্বয় করে চট্টগ্রাম জেরার কুমিরা-গুপ্তছড়া নৌরুটে মোবাইল কোর্ট পরিচালনার জন্য নিম্নোক্ত কর্মকর্তাদের নির্দেশ প্রদান করা হলো।

সংলগ্নীঃ বর্ণনামতে।

কমডোর সৈয়দ আরিফুল ইসলাম, (ট্যাজ),
এনডিসি,পিএসসি, বিএন
মহাপরিচালক।

বিতরণঃ

১। জনাব বদরুল হাসান লিটন
স্পেশাল অফিসার মেরিন সেফটি ও নির্বাহী ম্যাজিস্ট্রেট
নৌপরিবহন অধিদপ্তর, ঢাকা।

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| ২। জনাব মোঃ জসীম উদ্দিন পাটোয়ারী<br>সহকারী পরিচালক, নাবিক ও প্রবাসী শ্রমিক কল্যান পরিদপ্তর ও পরিদর্শক (অঃ দাঃ)<br>অভ্যন্তরীন জাহাজ পরিদর্শনালয়, চট্টগ্রাম। | ভ্রাম্যমান আদালত পরিচালনায় সার্বিক সহায়তা প্রদানের জন্য বলা হলো। |

**অনুলিপিঃ অবগিত ও প্রয়োজনীয় ব্যবস্থা গ্রহনের জন্য**

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| ১। জেলা প্রশাসক, জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম। | উল্লিখিত এলাকায় বিজ্ঞ ম্যাজিস্ট্রেট কর্তৃক ভ্রাম্যমান আদালত পরিচালনার সময় সংশ্লিষ্টতের সহযোগীতা করার প্রয়োজনীয় নির্দেশনা প্রদানের জন্য অনুরোধ করা হলো। |
| ২। পুলিশ সুপার, পুলিশ সুপারের কার্যালয়, চট্টগ্রাম। | উল্লিখিত এলাকায় বিজ্ঞ ম্যাজিস্ট্রেট কর্তৃক ভ্রাম্যমান আদালত পরিচালনার সময় সংশ্লিষ্টতের সহযোগীতা করার প্রয়োজনীয় নির্দেশনা প্রদানের জন্য অনুরোধ করা হলো। |

৩। জোনাল কমান্ডার পূর্ব জোন, বাংলাদেশ কোস্ট গার্ড বাহিনী, মৎস বন্দর, চট্টগ্রাম।

**অনুলিপিঃ অবগতির জন্য**

১। মহাপরিচালক, বাংলাদেশ কোস্ট গার্ড, আগারগাঁও প্রশাসনিক এলাকা, শেরে-ই-বাংলানগর, ঢাকা- ১২০৭।
(দঃ আঃ- পরিচালক, অপারেশন্স)

২। পরিচালক, নাবিক ও প্রবাসী শ্রমিক কল্যান পরিদপ্তর, চট্টগ্রাম।

২১. ৯নং প্রতিপক্ষের পক্ষে

গুরুত্বপূর্ণ বিধায় জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম কর্তৃক সন্দ্বীপ গুপ্তছড়া ঘাটে নৌকাডুবিতে প্রাণহানির ঘটনার সাত সদস্য বিশিষ্ট কারণ অনুসন্ধান কমিটির তদন্ত প্রতিবেদন এবং বিগত ইংরেজী ০৮.০৮.২০১৭ তারিখের ফরোয়াডিং পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-1**

**গণপ্রজাতন্ত্রী বাংলাদেশ সরকার**
জেলা প্রশাসকের কার্যালয়
চট্টগ্রাম
www.chittagong.gov.bd

স্মারক নং ০৫.৪২.১৫০০.৫০১.০০০.০০.১৭.৩৯ তারিখ ০৮.০৮.২০১৭

সূত্রঃ বিজ্ঞ জেলা ম্যাজিস্ট্রেট, চট্টগ্রাম মহোদয়ের কার্যালয়ের ১১.০৪.২০১৭ তারিখের ৪৯৬/জেএম সংখ্যক স্মারক।

উপযুক্ত বিষয়ে সুত্রোক্ত স্মারকের প্রেক্ষিতে গঠিত কমিটি কর্তৃক গত ০২.০৪.২০১৭ তারিখ আনুমানিক সন্ধ্যা ০৬.৩০ টায় সন্দ্বীপ চ্যানেল গুপ্তছড়া এলাকায় বিআইডব্লিউটিসি এর অধীনে চার্টারের মাধ্যমে পরিচালিত সী ট্রাক হতে যাত্রী সাধারণদের উপকূলীয় তীরে স্থানীয় লালবোটের মাধ্যমে পারাপারকালে সী ট্রাকের সাথে ধাক্কা খেয়ে যাত্রীবাহী বোট ডুবে গিয়ে ১৮ জন যাত্রীর প্রাণহানির ঘটনার তদন্তের নিমিত্ত দুর্ঘটনাস্থল সন্দ্বীপ গুপ্তছড়া ঘাট এলাকা সরজমিনে পরিদর্শন করা হয়। দুর্ঘটনায় পতিত হওয়া উদ্ধারকৃত যাত্রী সহ প্রত্যক্ষদর্শীদের জবানবন্দী গ্রহণ করা হয় এবং দুর্ঘটনায় পতিতদের উদ্ধারে সহায়তায় এগিয়ে আসা উদ্ধারকর্মীদের দেয়া তথ্য প্রমাণ সর্বোপরি সংগৃহীত তথ্যাদির ভিত্তিতে প্রস্তুতকৃত প্রতিবেদন মহোদয়ের সদয় অবগতি ও পরবর্তী কার্যার্থে এসাথে সংযুক্ত করে প্রেরণ করা হলো।

সংলগ্নীঃ ৪ (চার) ফর্দ্দ।

স্বাঃ অস্পষ্ট
০৮.০৮.১৭
(মোঃ মমিনুর রশিদ)
অতিরিক্ত জেলা ম্যাজিষ্ট্রেট
চট্টগ্রাম
ও
আহবায়ক, তদন্ত কমিটি।

বিজ্ঞ জেলা ম্যাজিষ্ট্রেট,
চট্টগ্রাম।

**সন্দ্বীপ চ্যানেলে গুপ্তছড়া ঘাটে নৌকাডুবির কারণ অনুসন্ধানের তদন্ত প্রতিবেদন তদন্ত কমিটি গঠনের প্রেক্ষাপটঃ**

গত ০২.০৪.২০১৭ খ্রিঃ তারিখ সন্ধ্যা আনুমানিক ৭ঃ৩০ ঘটিকার সময় সন্দ্বীপ চ্যানেলে একটি ছোট বোট গুপ্তছড়া ঘাটের অদুরে অবস্থারত সন্দ্বীপগামী যাত্রী বোঝাই বিআইডব্লিউটিসি'র সী-ট্রাক হতে ৫০-৫৫ জন যাত্রী উঠিয়ে গুপ্তছড়া ঘাটে নামিয়ে দেওয়ার জন্য রওয়ানা দেওয়ার সাথে সাথে উক্ত সী-ট্রাকের সাথে ধাক্কা লেগে ডুবে যায়। দুর্ঘটনা পরবর্তী উদ্ধার তৎপরতার মাধ্যমে ৩০ জনকে জীবিত উদ্ধার করা সম্ভব হয় এবং ১৮ জনের মৃতদেহ পাওয়া যায়।

উক্ত দুর্ঘটনার পরিপ্রেক্ষিতে জেলা প্রশাসকের কার্যালয়, চট্টগ্রাম এর ১১.০৪.২০১৭ খ্রিঃ তারিখের ০৫.৪২.১৫.০০.৫০২.৭০. ০০১.১৭-৪৯৬ নং স্মারকেএ তদন্ত কমিটি গঠিত হয় যার রূপরেখা নিম্নরূপঃ

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| অতিরিক্ত জেলা ম্যাজিষ্ট্রেট, চট্টগ্রাম | আহবায়ক |
| উপজেলা নির্বাহী অফিসার, সন্দ্বীপ | সদস্য |
| পুলিশ সুপার, চট্টগ্রাম এর প্রতিনিধি | সদস্য |
| কোষ্টগার্ড, চট্টগ্রাম এর প্রতিনিধি | সদস্য |
| উপ-পরিচালক, ফায়ার সার্ভিস ও সিভিল ডিফেন্স, চট্টগ্রাম এর প্রতিনিধি | সদস্য |
| বিআইডব্লিউটিসি, চট্টগ্রাম এর প্রতিনিধি | সদস্য |
| জেলা পরিষদ, চট্টগ্রাম এর প্রতিনিধি | সদস্য |

সূত্রোক্ত স্মারকের নির্দেশনা মোতাবেক কমিটি ৩০.০৪.২০১৭ খ্রিঃ তারিখ বেলা ১০:০০ ঘটিকায় সরেজমিনে কুমিরা-গুপ্তছড়া রুটের দুর্ঘটনা ও আশেপাশের এলাকা সরেজমিনে পরিদর্শন করে উক্ত ঘাট এলাকায় উপস্থিত ব্যক্তিবর্গের বক্তব্য শুনে এবং বেলা আনুমানিক ১২:০০ ঘটিকায় উপজেলা নির্বাহী অফিসার, সন্দ্বীপ এর কার্যালয়ে সংশ্লিষ্টদের বক্তব্য শ্রবণ করে এবং প্রাসঙ্গিক জিজ্ঞাসাবাদ করার মাধ্যমে তদন্ত কার্য সম্পন্ন করে। তদন্তকালে নিম্ন-স্বাক্ষরকারীর সাথে উপস্থিত ছিলেন উপজেলা নির্বাহী অফিসার, সন্দ্বীপ মোঃ গোলাম জাকারিয়া, ওসি সন্দ্বীপ জনাব মুহাম্মদ শামছুল ইসলাম (পুলিশ সুপার, চট্টগ্রাম এর প্রতিনিধি), লেফটেন্যান্ট খলিলুর রহমান কোস্টগার্ড, চট্টগ্রাম এর প্রতিনিধি), কুমিরা ফায়ার সার্ভিস ও সিভিল ডিফেন্স এর সিনিয়র স্টেশন অফিসার জনাব আবদুল্লাহ হারুন পাশা (উপ-পরিচালক, ফায়ার সার্ভিস ও সিভিল ডিফেন্স, চট্টগ্রাম এর প্রতিনিধি, বিআইডব্লিউটিসি, চট্টগ্রাম এর উপ-মহাব্যবস্থাপক (বাণিজ্য) জনাব গোপাল চন্দ্র মজুমদার (বিআইডব্লিউটিসি, চট্টগ্রাম এর প্রতিনিধি) এবং চট্টগ্রাম জেলা পরিষদের সচিব জনাব শাব্বির ইকবাল (জেলা পরিষদ, চট্টগ্রাম এর প্রতিনিধি)। এ ছাড়াও স্থানীয় জনপ্রতিনিধি, গণ্যমান্য ব্যক্তিবর্গ, দুর্ঘটনায় আহত যাত্রী, প্রত্যক্ষদর্শী ও দুর্ঘটনা পরবর্তী উদ্ধারকার্যে সংশ্লিষ্ট ব্যক্তিবর্গ উপস্থিত থেকে তাদের বক্তব্য পেশ করেন ও ঘটনার বর্ণনা দেন।

**কমিটির উদ্দেশ্যঃ**

তদন্ত কমিটি নিম্নোক্ত উদ্দেশ্যে তদন্ত কার্য পরিচালনা করে–

১। দুর্ঘটনার কারণ অনুসন্ধান

২। দুর্ঘটনার জন্য দায়ী ব্যাক্তিবর্গকে চিহ্নিতকরণ

৩. সংশ্লিষ্ট এলাকায় এ ধরণের দুর্ঘটনা প্রতিরোধের লক্ষ্যে সুপারিশ প্রণয়ন

৪। সম্ভাব্য ক্ষয়ক্ষতি নিরূপণ

৫।

**কমিটির কর্ম–পদ্ধতিঃ**

কমিটি ৩০.০৪.২০১৭ খ্রিঃ তারিখ বেলা ১০:০০ ঘটিকায় সরেজমিনে কুমিরা-গুপ্তছড়া রুটের দুর্ঘটনা ও আশেপাশের এলাকা সরেজমিনে পরিদর্শন করে উক্ত ঘাট এলাকায় উপস্থিত ব্যক্তিবর্গের বক্তব্য শুনে এবং বেলা ১২:০০ ঘটিকায় উপজেলা নির্বাহী অফিসার, সন্দ্বীপ এর কার্যালয়ে সংশ্লিষ্টদের বক্তব্য শ্রবণ করে এবং প্রাসঙ্গিক জিজ্ঞাসাবাদ করার মাধ্যমে তদন্ত কার্য সম্পন্ন করে।

**ঘটনার বর্ণনাঃ**

ঘটনা সংশ্লিষ্টদের বক্তব্যে জানা যায় যে, ঘটনার দিন উত্তাল ঝড়ো আবহাওয়ার মাধ্যে বেলা আনুমানিক ৫:৩০ ঘটিকার সময় বিআইডব্লিউটিসির সী-ট্রাকটি সীতাকুন্ডের কুমিরা ঘাট হতে আনুমানিক ১৮০ জন যাত্রী নিয়ে সন্দ্বীপের উদ্দেশ্যে রওয়ানা দিয়ে সন্ধ্যা আনুমানিক ৭:০০ ঘটিকার সময় গুপ্তছড়া ঘাটের অদুরে থামে। অতঃপর সী-ট্রাক হতে যাত্রীদের ছোট বোটে উঠিয়ে গুপ্তছড়া ঘাটে নামিয়ে দেওয়ার কাজ শুরু হয়।

**সন্দ্বীপ চ্যানেলে গুপ্তছড়া ঘাটে নৌকাডুবির কারণ অনুসন্ধানের তদন্ত প্রতিবেদন**

২ ট্রীপ নামানোর পর ৩য় ট্রীপে আনুমানিক ৭:৪৫ মিনিটের সময় যাত্রী উঠানো শুরু হয়। প্রায় ৫০-৬০ জন যাত্রী উঠানোর পর বোটটি ঘাটের উদ্দেশ্যে রওয়ানা দেওয়ার পরপরই ঝড়ো আবহাওয়ায় উত্তাল সাগরে প্রচন্ড ঢেউয়ের তোড়ে সী-ট্রাকের সাথে ধাক্কা খায় এবং উল্টে সী-ট্রাকের নীচে চলে যায়। ঝড়ো আবহাওয়ায় অন্ধকারে দুর্ঘটনা কবলিত যাত্রীরা আর্ত-চিৎকার করলেও তাৎক্ষনিকভাবে কোন সহযোগিতা পাননি। সী-ট্রাক হতে কোন বয়া বা লাইফ জ্যাকেট ছোঁড়া হয়নি, এমনকি কোন আলোও ফেলা হয়নি। ফলে ১৮ জন ডুবে মারা যায় যাদের মৃতদেহ পরবর্তীতে ভিন্ন ভিন্ন উপকূলে ভেসে আসে এবং ৩০ জনকে জীবিত উদ্ধার করা সম্ভব হয়। স্থানীয় উপজেলা প্রশাসনের নেতৃত্বে পরিচালিত উদ্ধার তৎপরতায় পুলিশ, কোস্টগার্ড, চট্টগ্রাম জেলা পরিষদের ঘাটের খাস আদায়কারী এবং স্থানীয় জনগণ অংশ নেন।

**ঘটনাস্থলের সার্বিক পরিস্থিতি ও পরিবেশঃ**

সন্দ্বীপ চ্যানেল সংশ্লিষ্ট কুমিরা-গুপ্তছড়া ঘাটে যাত্রী ও মালামাল পরিবহন বিষয়ে ৩টি সরকারি কর্তৃপক্ষের কার্যক্রম বিদ্যমান। এ ৩টি কর্তৃপক্ষ হলো চট্টগ্রাম জেলা পরিষদ, BIWTA এবং BIWTC। ঘাটের মালিকানা নিয়ে এ ৩টি পক্ষের দাবি থাকলেও মাননীয় নৌ-পরিবহন মন্ত্রী শাজাহান খাঁন এর মধ্যস্থতায় এবং মহামান্য সুপ্রীম কোর্টের রায়ের মাধ্যমে তা সুরাহা হয়েছে। ঘাটে জেলা পরিষদ কর্তৃক কুমিরা ঘাটে একটি জেটি নির্মিত হয়েছে দেখা যায়। তাছাড়া সন্দ্বীপ এবং কুমিরা অংশে জেলা পরিষদ কর্তৃক সংযোগ সড়ক নির্মিত হয়েছে দেখা যায়। কুমিরা অংশের সংযোগ সড়কে ঢেউয়ের তোড়ে ভাঙ্গণ ধরায় জেলা পরিষধ কর্তৃক রিটেনিং ওয়ালসহ মেরামত কার্য চলমান আছে দেখা যায়। ঘাটের কুমিরা ও গুপ্তছড়া অংশে BIWTA কর্তৃক ২টি গ্যাংওয়ে নির্মিত হয়েছে দেখা যায়। গুপ্তছড়া অংশের গ্যাংওয়েটির সামনের দিকে প্রায় অর্ধেক অংশ ভেঙ্গে যাওয়ায় ব্যবহার অযোগ্য অবস্থায় আছে। তাছাড়া কুমিরার অংশে BIWTA কর্তৃক একটি বহুতল চার্মিনাল নির্মিত আছে যাতে জেলা পরিষদ ও BIWTC পরিচালিত নৌযানের টিকিট কাউন্টার বিদ্যমান। জেলা পরিষদ ও মধ্যে সম্পাদিত ০২.১২.২০১৪ খ্রিঃ তারিখের সমঝোতা স্মারক অনুসাষে জেলা পরিষদ কর্তৃক BIWTA'র টার্মিনাল গ্যাংওয়ে ব্যবহৃত হচ্ছে। বিনিময়ে বাৎসরিক ভাড়া হিসেবে জেলা পরিষদ BIWTA কে বাৎসরিক ৪০ লক্ষ টাকা দিচ্ছে। আবার মহামান্য সুপ্রীম কোর্ট কর্তৃক প্রদত্ত জেলা পরিষদও বিআইডব্লিউটিসি'র মধ্যে চলমান রীট ৮৭০৩/২০০৯ ও রীট ২৩১/২০১০ হতে উদ্ভুত সিভিল পিটিশন ২৭২৩/১২ ও ২৭২২/১২ এর যুগপথ রায়ে কুমিরা-গুপ্তছড়া ঘাটের মালিকানা জেলা পরিষদের মর্মে ঘোষণা করেছে। তবে জেলা পরিষদকে টোল প্রদান সাপেক্ষে উক্ত রুটে BIWTC সী-ট্রাক পরিচালনা করতে পারবে এবং সেক্ষেত্রে BIWTC কর্তৃক সী-ট্রাকে যাত্রী ও মালামাল উঠা নামায় জেলা পরিষদ কোন রকম প্রতিবন্ধকতা সৃষ্টি করতে পারবে না মর্মে রায়ে উল্লেখ আছে। জেলা পরিষদ খাস আদায়কারী এস এম আনোয়ার হোসেন চৌধুরীর মাধ্যমে ঘাট পরিচালনা করেছে এবং উক্ত খাস আদায়কারী সী-ট্রাক সার্ভিস বোট এবং স্পীড বোটের মাধ্যমে যাত্রী ও মালামাল পরিবহন করেছে। অপর দিকে বিআইউব্লিউটিসি জনৈক মোঃ ইকরাম উদ্দিনকে সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাকটর নিয়োগ করে কুমিরা-গুপ্তছড়া রুটে মালামাল ও যাত্রী পরিবহনের অনুমতি দেয়। যেহেতু এ রুটে সী-ট্রাক হতে সরাসরি ঘাটে মালামাল ও যাত্রী উঠানামা করার মত পল্টন নাই সেহেতু ছোট বোটে করে উক্ত সী-

ট্রাকে যাত্রী ও মালামাল উঠানামা করার জন্য জনৈক মোহাম্মদ মাহামুদুর রহমান মান্নাকে গুপ্তছড়া ঘাটের জন্য বোট কন্ট্রাকটর নিয়োগ দেয়। এ সার্বিক পরিস্থিতিতে কুমিরা-গুপ্তছড়া রুটে জেলা পরিষদের পাশাপাশি বিআইডব্লিউটিসি কর্তৃক যাত্রী ও মালামাল পরিবহন করা হচ্ছে।

**সাক্ষ্য প্রমাণাদি পর্যালোচনাঃ**

ঘটনার দিন দুর্ঘটনা কবলিত বোটটি BIWTC'র কমিশন এজেন্ট কাম বোট কন্ট্রাকটর মোঃ ইকরাম উদ্দিন এবং BIWTC'র বোট কন্ট্রাকটর মাহমুদুর রহমান (মান্না)'র যৌথ পরিচালানাধীন ছিল। বিআইডব্লিউটিসি কর্তৃপক্ষ মোঃ মাহমুদুর রহমান মান্নাকে ২৯.০৬.২০১৬ খ্রিঃ তারিখে ০১.০৭.২০১৬ খ্রিঃ হতে ৩০.০৬.২০১৭ খ্রিঃ তারিখ পর্যন্ত মেয়াদের জন্য কুমিরা-গুপ্তছড়া ঘাটের বোট কন্ট্রাকটর নিয়োগ করে। নিয়োগপত্রের ৪নং শর্তে উল্লেখ আছে "কুমিরা-গুপ্তছড়া ঘাটে জাহাজ অবস্থানকালীন সময় জাহাজে যাত্রী ও মালামাল উঠানোর সার্বিক নিরাপত্তার ব্যবস্থা করতে হবে। যাত্রী ও মালামালের কোনরূপ ক্ষয়ক্ষতি হলে আপনি সম্পূর্ণরূপে দায়ী থাকাসহ ক্ষতিপূরণ দিতে বাধ্য থাকবেন।" আবার উক্ত নিয়োগপত্রের ২ নং শর্তে উল্লেখ আছে "BIWTC'র চট্টগ্রামস্থ সহ-মহাব্যবস্থাপক(মেরিন) কর্তৃক অনুমোদিত আপনার ০৪ (চার) টি ইঞ্জিন চালিত বড় নৌকা জাহাজে যাত্রী ও মালামাল উঠানামার জন্য আপনার নিজ দায়িত্বে নিয়োজিত রাখতে হবে। নৌকার সমস্ত ব্যয় আপনার কর্তৃক বহন করতে হবে। "

ঘটনার দিন দুর্যোগপূর্ণ আবহাওয়া থাকায় সাগর খুব উত্তাল ছিল। দুর্যোগপূর্ণ আবহাওয়ার কারণে এর ৪ (চার) দিন পূর্ব হতে জেলা পরিষদ ইজারাদার কর্তৃক উক্ত ঘাটে নৌযান পরিচালনা বন্ধ রাখা হয়েছিল। সন্দ্বীপ চ্যানেলে ইতোপূর্বে স্বাভাবিক আবহাওয়াতেও বিকাল ৩ (তিন) টার পর সী-ট্রাক পরিচালনার নজীর নাই মর্মে জেলা পরিষদ ও বিআইডব্লিউটিসি কর্তৃপক্ষ জানান।

BIWTC কর্তৃক মোঃ ইকরাম উদ্দিনকে চট্টগ্রাম-গুপ্তছড়া (সন্দ্বীপ) উপকূলীয় কোস্টাল সার্ভিসের গুপ্তছড়া (সন্দ্বীপ) কোস্টাল ঘাটের কমিশন এজেন্ট কাম বোট কন্ট্রাকটর হিসেবে ২৩.০৯.২০১৬ হতে ২২.০৯.২০১৭ খ্রিঃ পর্যন্ত মেয়াদের জন্য ১৭.০৮.২০১৬ খ্রিঃ তারিখের ১৮.১৫১.১৫২.০০২.১৬০.২০১৫/৮০৫ নং স্মারকে নিয়োগ করা হয়। নিয়োগপত্রের ১৪ নং শর্তে উল্লেখ আছে, "গুপ্তছড়া ঘাটে জাহাজ অবস্থানকালীন জাহাজে যাত্রী ও মালমাল উঠানামার সার্বিক নিরাপত্তার ব্যবস্থা করতে হবে। কোনরূপ ক্ষয়ক্ষতি হলে আপনি সম্পূর্ণরূপে দায়ী থাকবেন।" উক্ত নিয়োগপত্রের ১৯ নং শর্তে আছে "BIWTC'র চট্টগ্রামস্থ সহ-ব্যবস্থাপক (মেরিন) কর্তৃক অনুমোদিত আপনার ০২ (দুই) টি ইঞ্জিন চালিত বড় নৌকা জাহাজে যাত্রী ও মালামাল উঠানামার জন্য আপনার নিজ দায়িত্বে নিয়োজিত রাখতে হবে। নৌকার সমস্ত ব্যয় আপনার কর্তৃক বহন করতে হবে।"

কুমিড়া-গুপ্তছড়া ঘাট নিয়ে মহামান্য সুপ্রীম কোট অব বাংলাদেশ সিপি-২৭২২/২০১২ এবং ২৭২৩/২০১২ এর ১৩ মার্চ খ্রিঃ তারিখের রায়ে নিম্নরূপ নির্দেশনা দিয়েছেন-

> "The Ferry Ghat, namely Guptachora-Kumira Ghat belongs to the Zilla Parishad and it shall be under its'control and management, but BIWTC shall be at liberty to ply vessel, namely, Sea- tructs and if they ply their vessel, they shall pay tolls for the same to the Zilla Parishad and in that case the Zilla Parishad shall not in any way disturb the BIWTC in loading and unloading the passengers and goods of BIWTC by the sea trucks."
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> "BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট মোহাম্মদ ইকরাম উদ্দিন এবং কুমিরা-গুপ্তছড়া ঘাটের বোট কন্ট্রাক্টর মোঃ মাহমুদুর রহমান (মান্না)'র মধ্যে স্বাক্ষরিত ১৩.০৪.২০১৬ খ্রিঃ তারিখের সমঝোতা স্মারকের ৩ নং শর্তে উল্লেখ আছে "বিআইডব্লিউটিসি কর্তৃক বোট কন্ট্রাক্টর নিয়োগপ্রাপ্ত হইয়া আমরা উভয় পক্ষ চট্টগ্রাম জেলার সীতাকুন্ড/সন্দ্বীপ থানাধীন (কুমিরা-গুপ্তছড়া) সার্ভিসে চলাচলকারী বিআইডব্লিউটিসি'র সকল যাত্রী এবং মালামাল উঠানামা ও ঠিকদার সংক্রান্ত সকল প্রকার ব্যবসা আমরা উভয় পক্ষের সহযোগিতায় পরিচালনা করিব।"

সরেজমিন তদন্তের সময় প্রত্যক্ষদর্শীদের সাক্ষ্য গ্রহণ করা হয়। তাদের মধ্যে ২ জন দুর্ঘটনা কবলিত বোটের মধ্যে থেকেও বেঁচে যান। তারা হলেন জনাব নুরুল ইসলাম, কনস্টেবল, বিপি-১১৪, সন্দ্বীপ থানা এবং মোঃ নুরুল হুদা, সহকারী শিক্ষক, উজিরপুর সরকারি প্রাথমিক বিদ্যালয়, সন্দ্বীপ। তাঁরা সাক্ষ্যে জানান, BIWTC 'র সী-ট্রাকটি সীতাকুন্ডের কুমিরা ঘাট হতে যাত্রী নিয়ে সন্দ্বীপের উদ্দেশ্যে রওয়ানা দিয়ে সন্ধ্যা আনুমানিক ৭:০০ ঘটিকার সময় গুপ্তছড়া ঘাটের অদুরে থামে। অতঃপর সী-ট্রাক হতে যাত্রীদের ছোট বোটে উঠিয়ে গুপ্তছড়া ঘাটে নামিয়ে দেওয়ার কাজ শুরু হয়। ২ ট্রীপ নামানোর পর ৩য় ট্রীপে আনুমানিক ৭:৪৫ মিনিটের সময় যাত্রী উঠানো শুরু হয়। প্রায় ৫০-৬০ জন যাত্রী উঠানোর পর ঘাটের উদ্দেশ্যে রওয়ানা দেওয়ার পরপরই ঝড়ো আবহাওয়ায় অন্ধকারে দুর্ঘটনা কবলিত যাত্রীরা আর্ত-চিৎকার করলেও তাৎক্ষণিকভাবে কোন সহযোগিতা পায়নি। সী-ট্রাক হতে কোন বয়া বা লাইফ জ্যাকেট ছোঁড়া হয়নি এমনকি কোন আলোও ফেলা হয়নি।

**তদন্তে উদঘাটিত বিষয়ঃ**

BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ ইকরাম উদ্দিন, পিতা- মৃত মাষ্টার মাসুছুল হক, গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না), প্রোঃ মেসার্স দিবা এন্টারপ্রাজ, গ্রাম- বাউরিয়া, পোস্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর চরম দায়িত্ব অবহেলা ও নিয়োগপত্রের শর্ত লঙ্ঘনের কারণে এ দুর্ঘটনা এবং ১৮ জনের প্রাণহানি ঘটছে। যেখানে কুমিরা-গুপ্তছড়া রুটে অনুকূল আবহাওয়ায়ও ২ ট্রিপের বেশি কখনও পরিচালনা করা হয় না (বিশেষ ব্যবস্থা গ্রহণ পূর্বক কেবলমাত্র ঈদের আগে ও পরে ২ দিন করে করা হয়) এবং বিকাল ৩টার পরে কোন ট্রিপ পরিচালনা করা হয় না, সেখানে BIWTC এর সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর চরম বৈরী আবহাওয়ার মধ্যেও যাত্রী সাধারণের জানমালের ঝুঁকি নিয়ে ঘটনার দিন ৩ (তিন) ট্রিপ যাত্রী সী-ট্রাকে করে আনা নেওয়া করে এবং শেষের ট্রিপটি বিকাল ৫ (পাঁচ) টার পওে ধারণ ক্ষমতার প্রায় ৩ (তিন) গুণ যাত্রী বোঝাই কওে পরিচালনা করে। নিয়োগেপত্রে যেকানে যাত্রী সাধারণের নিরাপত্তা বিধানের কথাটি উল্লেখ আছে সেখানে নিরাপত্তার বিষয়টি চরম অবহেলা করা হয়। ঝড়ো আবহাওয়ায় সন্ধ্যা ৭:৩০ ঘটিকায় সী-ট্রাকটি গুপ্তছড়ার অদুওে পৌঁচার পর অন্ধকারে উত্তাল সাগরে কোন লাইফ জ্যাকেট ছাড়াই ধারণ ক্ষমতার দ্বিগুণেরও বেশি যাত্রী ছোট বোট উঠিয়ে দেওয়পা হয়। কোন আলো ফেলা হয়নি, এমনকি বোট সী-ট্রাকের নিচে তলিয়ে যাওয়ার পর অসহায় ডুবন্ত যাত্রী সাধারণ আর্ত-চিৎকার করে লাইফজ্যাকেট ও বয়া চাইলে সী-ট্রাক থেকে কোন সাড়া দেওয়া হয়নি। সর্বোপরি দুর্ঘটনা কবলিত যাত্রীদের উদ্ধার তৎপরতায় কোন অংশই নেয়নি। কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর ও বোট কন্ট্রাক্টর উভয়ের নিয়োগের শর্তে পর্যাপ্ত ছোট বোটের ব্যবস্থা করে সী-টপ্রাক যাত্রী উঠানামার কথা উল্লেখ থাকলেও ঘটনার দিন কেবল একটা ছোট (স্থানীয় ভাষায় লাল বোট) বোটে করে পর্যায়ক্রমে যাত্রী নামানোর চেষ্টা চালানো হয়। এটি সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর বোট কন্ট্রাক্টর কর্তৃক কর্তব্যে চরম অবহেলা ও ঠান্ডা মাথায় যাত্রী সাধারণকে মৃত্যুর মুখে ঠেলে দেওয়ার সামিল।

**ক্ষয়ক্ষতি নির্ধারণঃ**

দুর্ঘটনায় ১৮ জনের মৃত্যু ঘটে। এ প্রাণহানি অর্থের মাপকাঠিতে পরিমাপযোগ্য নয়।

**দায়-দায়িত্ব নির্ধারণঃ**

BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কামিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ আকরাম উদ্দিন, পিতা- মৃত মাষ্টার সামছুল হক, গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না), প্রোঃ মেসার্স দিবা এন্টারপ্রাইজ, গ্রাম- বাউরিয়া, পোস্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর চরম দায়িত্ব অবহেলা ও নিয়োগপত্রের শর্ত লঙ্ঘনের কারণে এ দুর্ঘটনা এবং ১৮ জনের প্রাণহানি ঘটেছে।

**মতামতঃ**

সার্বিক তদন্তে উদঘাটিত বিষয়াদির পরিপ্রেক্ষিতে কামিটির মতামত নিম্নরূপঃ

১. BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ ইকরাম উদ্দিন, পিতা- মৃত মাষ্টার সামছুল হক, গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না), প্রোঃ মেসার্স দিবা এন্টারপ্রাইজ, গ্রাম- বাউরিয়া, পোস্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর চরম দায়িত্ব অবহেলা ও নিয়োগপত্রের শর্ত লঙ্ঘনের কারণে এ দূর্ঘটনা এবং ১৮ জনের প্রাণহানি ঘটেছে।

২. কুমিরা -গুপ্তছড়া রুটে যাত্রী ও মালামাল পরিবহনের ক্ষেত্রে জেলা পরিষদের খাস আদায়কারী এবং BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর ও বোট কন্ট্রাক্টর এর কার্যক্রমের মধ্যে সমন্বয় নাই।

**সুপারিশঃ**

১. ১৮ জন যাত্রীর মৃত্যুর জন্য দায়ী BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ ইকরাম উদ্দিন, পিতা- মৃত মাষ্টার সামছুল হক. গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না), প্রোঃ মেসার্স দিবা এন্টপারপ্রাইজ, গ্রাম- বাউরিয়া, পোষ্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর বিরুদ্ধে রাষ্ট্র কর্তৃক উপযুক্ত ধারায় মামলা রুজু করে তাদেরকে দৃষ্টান্তমূলক শাস্তির আওতায় আনা।

২. নিয়োগপত্রে বার্ণিত শর্ত লঙ্ঘনের দায়ে সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ ইকরাম উদ্দিন, পিতা- মৃত মাষ্টার মসামছুল হক, গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না) প্রোঃ মেসার্স দিবা এন্টারপ্রাইজ, গ্রাম- বাউরিয়া, পোস্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর বিরুদ্ধে BIWTC কর্তৃক চুক্তি বাতিলসহ যথাযথ শাস্তিমূলক ব্যবস্থা গ্রহণ।

৩. ভবিষ্যতে স্ব স্ব এজেন্টগণকে জেলা পরিষদ ও BIWTC কর্তৃক যথাযথ তদারকি।
৪. কুমিরা-গুপ্তছড়া ঘাটটি মাহমান্য হাইকোর্টের নির্দেশনা মোতাবেক একক কর্তৃত্বে ও নিয়ন্ত্রণে পরিচালনা।

স্বা/-অস্পষ্ট (আবদুল্লাহ হারুন পাশা) সিনিয়র স্টেশন অফিসার কুমিরা ফায়ার স্টেশন, চট্ট গ্রাম

স্বা/-অস্পষ্ট (মুহাম্মদ শামছুল ইসলাম) অফিসার ইন চার্জ, সন্দ্বীপ থানা, চট্টগ্রাম

স্বা/-অস্পষ্ট (লে. খলিলুর রহমান) বি,এন, কোস্ট গার্ড, চট্টগ্রাম।

স্বা/-অস্পষ্ট (গোপাল চন্দ্র মজুমদার) উপ-মহাব্যবস্থাপক (বাণিজ্য) BIWTC, চট্টগ্রাম।

স্বা/-অস্পষ্ট (মোঃ গোলাম জাকারিয়া) উপজেলা নির্বাহী অফিসার, সন্দ্বীপ, চট্টগ্রাম।

স্বা/-অস্পষ্ট (শাব্বির ইকবাল) সচিব, জেলা পরিষদ, চট্টগ্রাম।

স্বা/-অস্পষ্ট (মোঃ মমিনুর রশিদ) অতিরিক্ত জেলা ম্যাজিস্ট্রেট, চট্টগ্রাম।

২২. গুরুত্বপূর্ণ বিধায় জেলা পরিষদ, চট্টগ্রাম কর্তৃক বিগত ইংরেজী ০৬.১১.২০১৩ তারিখে চট্টগ্রাম জেলা পরিষদ মালিকীয় সন্দ্বীপ-সীতাকুন্ড উপজেলাধীন কুমিরা-মগধরা-গুপ্তছড়া ফেরী ঘাটের খাস আদায়কারী নিয়োগ প্রসঙ্গের প্রেরতি পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-2**

**জেলা পরিষদ**
**চট্টগ্রাম।**

স্মারকনং জেপ/চট্ট/২৩২/১৩-১৪/২৪৫৭ তারিখঃ ০৬ নভেম্বর ২০১৩

প্রাপকঃ জনাব এস এম আনোয়ার হোসেন
পিতাঃ মৃত বাদশা মিয়া সুকানী
সাং- মগধরা, থানা-সন্দ্বীপ
চট্টগ্রাম।

বিষয়ঃ চট্টগ্রাম জেলা পরিষদ মালিকীয় সন্দ্বীপ-সীতাকুন্ড উপজেলাধীন কুমিরা-মগধরা-গুপ্তছড়া ফেরী ঘাটেরর খাস আদায়কারী নিয়োগ প্রসঙ্গে।

সূত্রঃ অত্র পরিষদ কর্তৃক আহবানকৃত ৩১.১০.২০১৩ তারিখের উন্মুক্ত ডাক।

উপরিউক্ত বিষয় ও সূত্রের প্রেক্ষিতে কর্তৃপক্ষের নির্দেশনা অনুযায়ী গঠিত খাস আদায় কমিটি কর্তৃক জেলা পরিষদ মালিকীয় বিষয়োক্ত ফেরীঘাটের দৈনিক খাস আদায়ের নিমিত্তে সূত্রোক্ত ডাক অনুষ্ঠিত হয়। উক্ত ডাকে আপনি দৈনিক ৭৫০০০/- (পঁচাত্তর হাজার) টাকার ডাক প্রদান করে সর্বোচ্চ ডাককারী হিসাবে বিবেচিত হন। তৎপ্রেক্ষিতে খাস আদায় কমিটি কর্তৃক আপনাকে সর্বোচ্চ ডাককারী হিসেবে নিম্নবর্ণিত শর্তসাপেক্ষে খাস আদায় কার্যক্রম পরিচালনার জন্য নিয়োগ করার সর্বসম্মতিভাবে সিদ্ধান্ত গ্রহণ করা হয়েছে।

**শর্তাবলীঃ**

১। উক্ত ঘাটের দখল আগামী ০৭.১১.২০১৩ খ্রিঃ হতে দৈনিক ৭৫০০০/- (পঁচাত্তর হাজার) টাকা ধার্য করা হলো। ০২ মাসের জামানত বাবদ ৪৫০০০০০/- (পঁয়তাল্লিশ লক্ষ) টাকা ও ০১ মাসের অগ্রিম বাবদ ২২,৫০,০০০/- (বাইশ লক্ষ পঞ্চাশ হাজার) টাকা এবং উল্লেখিত অর্থের ১৫% ভ্যাট বাবদ ১০,১২,৫০০/ (দশ লক্ষ বার হাজার পাঁচশত) টাকা ৫% উৎসে কর বাবদ ৩,৩৭,৫০০/- (তিন লক্ষ সাইত্রিশ হাজার পাঁচশত) টাকা; সর্বমোট ৮১,০০,০০০/- (একাশি লক্ষ) টাকা ‘‘প্রধান নির্বাহী কর্মকর্তা, জেলা পরিষদ, চট্টগ্রাম’’ এর নামে পে-অর্ডার মূলে আগামী ১৪.১১.২০১৩ খ্রিঃ তারিখের মধ্যে অবশ্যই অত্রাফিসে জমা প্রদান করতে হবে।

২। ঘাটে অননুমোদিত নৌযান ব্যবহার করা যাবে না। অনুমোদিত নৌযানের মাধ্যমে যাত্রী ও মালামাল পারাপারের ব্যবস্থা করতে হবে।

৩। প্রতি মাসের খাস আদায়ের টাকা অগ্রিম হিসাবে মাস শুরু হওয়ার সাত দিন পূর্বে পে অর্ডার আকারে জেলা পরিষদে জমা করতে হবে।

৪। খাস আদায় প্রক্রিয়ার/ঘাট পরিচালনায় ব্যর্থ হলে কিংবা পরিষদের পাওনা যথাসময়ে পরিশোধ করা না হলে আপনার নিকট হতে দায়িত্ব প্রত্যাহার করে নেয়া হবে এবং গচ্ছিত জামানত বায়েয়াপ্ত এবং আপনার নিকট অত্র পরিষদের পাওনা (যদি থাকে) তা আদায়ের জন্য প্রয়োজনীয় আইনানুগ ব্যবস্থা গ্রহণ করা হবে। এ ব্যাপারে কোন ওজর আপত্তি চলবে না।

৫। খাস আদায় ব্যবস্থা সম্পূর্ণ সাময়িক এবং যে কোন সময় কোন প্রকার কারণ দর্শানো ব্যতিরেকে বাতিল করার এখতিয়ার চট্টগ্রাম জেলা পরিষদ কর্তৃপক্ষ সংরক্ষণ করেন। সে ক্ষেত্রে জেলা পরিষদের বিরুদ্ধে কোন প্রকার মামলা মোকদ্দমা করা যাবে না মর্মে অঙ্গিকার নামায় সুস্পষ্টভাবে উল্লেখ থাকতে হবে।

৬। জেলা পরিষদ কর্তৃক অনুমোদিত টোল-ট্যাক্স অনুযায়ী খাস আদায়ে আপনি বাধ্য থাকবেন। ঘাটের উভয় পার্শ্বে টোল চার্ট সাইন বোর্ড আকারে টাঙ্গিয়ে দিতে হবে।

৭। সরকারী প্রচলিত বিধি মোতাবেক ভ্যাট ও আয়কর পরিশোধ করতে হবে।

৮। ঘাটে ব্যবহার্য নৌযানের ফিটনেস, (অস্পষ্ট) পারমিট ইত্যাদি হালনাগাদ থাকা সংক্রান্ত ডকমেন্টের সত্যায়িত ফটোকপি।

৯। নৌযানে বয়া, লাইফ জ্যাকেটসহ পর্যাপ্ত পরিমানে জীবন রক্ষাকারী প্রয়োজনীয় সরঞ্জাম রাখার ব্যবস্থা থাকার প্রমাণাদি।

উপরিউক্ত শর্তাবলী যথাযথভাবে প্রতিপালন পূর্বক ফেরীঘাট পরিচালনার ব্যবস্থা গ্রহণের জন্য আপনাকে অনুরোধ করা হলো।

স্বা/- অস্পষ্ট
০৬.১১.১৩
(সবুজ কুমার বড়ুয়া)
আহবায়ক, খাস আদায় কমিটি
ও
উপ-সহকারী প্রকৌশলী
জেলা পরিষদ, চট্টগ্রাম।

**অনুলিপি সদয় জ্ঞাতার্থে ও কার্যার্থে বিতরন করা হলোঃ**

১। কমিশনার, চট্টগ্রাম বিভাগ, চট্টগ্রাম।
২। পরিচালক, স্থানীয় সরকার বিভাগ, চট্টগ্রাম বিভাগ, চট্টগ্রাম।
৩। প্রধান নির্বাহী কর্মকর্তা, জেলা পরিষদ, চট্টগ্রাম।
৪। চেয়ারম্যান, উপজেলা পরিষদ, সীতাকুন্ড/সন্দ্বীপ, চট্টগ্রাম।
৫। সচিব, জেলা পরিষদ, চট্টগ্রাম।
৬। উপজেলা নির্বাহী অফিসার, সীতাকুন্ড/সন্দ্বীপ, চট্টগ্রাম।
৭। ভারপ্রাপ্ত কর্মকর্তা, সীতাকুন্ড থানা/সন্দ্বীপ থানা, চট্টগ্রাম।
৮। সহকারী প্রকৌশলী, জেলা পরিষদ, চট্টগ্রাম।
৯। জনাব আবুল কাসেম (সাময়িক পরিচালনাকারী, কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাট), দক্ষিণ শীলতপুর, সীতাকুন্ড, চট্টগ্রাম।

উল্লেখিত পত্রের মর্মানুসারে জেলা পরিষদ মালিকীয় কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটটি নতুন নিয়োগপ্রাপ্ত খাস আদায়কারী জনাব এস এম আনোয়ার হোসেনকে বুঝিয়ে দিয়ে অত্র পরিষদের পাওনা পরিশোধের জন্য তাকে বলা হলো।

২৩. গুরুত্বপূর্ণ বিধায় চট্টগ্রাম জেলা পরিষদ মালিকীয় কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটের দখল হস্তান্তর/গ্রহণ সংক্রান্ত পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-3**

চট্টগ্রাম জেলা পরিষদের স্মারকনং-জেপ/চট্ট/২৩২/১৩-১৪/২৪৫৭ তারিখঃ ০৬ নভেম্বর, ১৩ এর মর্মানুসারে সীতাকুন্ড সন্দ্বীপ উপজেলাধীন চট্টগ্রাম জেলা পরিষদ মালিকীয় কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটের দখল নিম্ন স্বাক্ষরকারী কর্তৃক অদ্য ০৭ নভেম্বর ১৩ তারিখে পূর্বাহ্নে হস্তান্তর/গ্রহণ করা হলো।

| ফেরীঘাটের দখল হস্তান্তরকারী | ফেরীঘাটের দখল গ্রহণকারী |
|---|---|
| স্বাক্ষর অস্পষ্ট | স্বাক্ষর অস্পষ্ট |
| ১.১১.২০১৩ | ৭.১১.২০১৩ |
| (সবুজ কুমার বড়ুয়া) | (এস,এম, আনোয়ার হোসেন) |
| আহবায়ক খাস আদায় কমিটি | পিতা-মৃত বাদশা মিয়া সুকানী |
| ও | সাং-মগধরা |
| উপ-সহকারী প্রকৌশলী | থানা-সন্দ্বীপ |
| জেলা পরিষদ, চট্টগ্রাম। | জেলা-চট্টগ্রাম। |

২৪. গুরুত্বপূর্ণ বিধায় বিগত ইংরেজী ০৫.১১.২০১৩ তারিখে সম্পাদিত অঙ্গীকারনামাটি নিম্নে অবিকল অনুলিখন হলোঃ

**Annexure-4**

**অঙ্গীকারনামা**

আমি এস, এম, আনোয়ার হোসেন এই মর্মে জানাচ্ছি যে, চট্টগ্রাম জেলা পরিষদ মালিকীয় কুমিরা-মগধরা-গুপ্তছড়া ফেরীঘাটটি সাময়িক খাস আদায় প্রক্রিয়ার মাধ্যমে পরিচালনার জন্য আমাকে খাস আদায়কারী হিসেবে নিয়োগ করার প্রক্রিয়া চলছে। আমি উক্ত ফেরীঘাটের খাস আদায়কারী হিসেবে নিয়োগপ্রাপ্ত হলে এই মর্মে অঙ্গীকার করছি যে, নিম্নোক্ত শর্ত মতে খাস আদায় করব এবং ফেরীঘাট২ পরিচালনা করব।

**শর্তাবলীঃ**

১। স্টিমার সার্ভিস চালু করার জন্য অনুমোদন দেয়ার সংশ্লিষ্ট কর্তৃপক্ষ হতে অনুমোদন পাওয়ার সঙ্গে সঙ্গে উল্লেখিত ঘাটে স্টিমার চালু করার প্রয়োজনীয় ব্যবস্থা করব।

২। জেলা পরিষদ স্মারকনং জেপ/চট্ট/২৪৪৮, তারিখ ৩১.১০.২০১৩ মূলে প্রদত্ত সকল নিয়ম ও শর্তাবলী যথাযথভাবে মেনে চলব এবং আরোপিত শর্ত ও নির্দেশ অনুযায়ী ঘাট পরিচালনা মাশুল আদায় ও ধার্যকৃত হারে অর্থাৎ দৈনিক ৭৫,০০০/- (পঁচাত্তর হাজার) টাকা, ১৫% ভ্যাট বাবদ ১১,২৫০/ (এগার হাজার দুইতশ পঞ্চাশ) টাকা, ৫% ভ্যাট বাবদ ৩,৭৫০/- (তিন হাজার সাতশ পঞ্চাশ) টাকা পরিশোধ কবর এবং পত্রানুযায়ী দুই মাসের জামানত বাবদ ৫৪,০০,০০০/- (চুয়ান্ন লক্ষ) এবং ১ মাসের অগ্রিম বাবদ ২৭,০০,০০০ (সাতাশ লক্ষ) টাকা, সর্বমোট ৮১,০০,০০০/- (একাশি লক্ষ) টাকা প্রধান নির্বাহী কর্মকর্তা, জেলা পরিষদ, চট্টগ্রাম এর নামে জমা প্রদান করব। সরকারী বিধি মোতাবেক অন্যান্য বিধানসমূহ মেনে চলব।

০৩। ঘাট পরিচালনা ও যাত্রী পারাপারে আমি সংশ্লিষ্ট কর্তৃপক্ষের অনুমোদিত জলযান ব্যবহার নিশ্চিত করব এবং অত্র অঙ্গীকারনামা সাথে (সংযুক্তি) পরিষদের অনুমোদিত টোল চার্ট অনুযায়ী মাশুল আদায় করব এবং টোল চার্ট ঘাটের উভয় পার্শ্বে জনসাধারণের দর্শনীয় স্থানে সাইন বোর্ড আকারে টাঙ্গিয়ে রাখব। এছাড়া যাত্রী পারাপারে সকল প্রকার প্রয়োজনীয় পদক্ষেপ গ্রহণ করতে বাধ্য থাকব।

০৪। প্রতি মাসের খাস আদায়ের অর্থ অগ্রিম হিসেবে মাস শুরু হওয়ার ০৭ (সাত) দিন পুর্বে পে অর্ডার আকারে জেলা পরিষদে জমা করতে বাধ্য থাকব, অন্যথায় আমার বিরুদ্ধে জেলা পরিষদ কর্তৃক যে কোন আইনগত ব্যবস্থা গ্রহণ করা যাবে।

০৫। খাস আদায়ের মাধ্যমে ঘাট পরিচালনা করার অনুমতি প্রদান করে চট্টগ্রাম জেলা পরিষদ কর্তৃক প্রদত্ত পত্রের মর্মানুযায়ী যে কোন নিয়ম ও শর্তাবলী পালনে ব্যত্যয় ঘটলে চট্টগ্রাম জেলা পরিষদ কর্তৃপক্ষ/ খাস আদায় কমিটি আমার নিয়োগাদেশ তাৎক্ষনিকভাবে বাতিলপূর্বক ইতোপূর্বে জমাকৃত জামানতের সমুদয় অর্থ বাজেয়াপ্ত করতে পারবে।

০৬। খাস আদায় সম্পূর্ণ সাময়িক বিধায় যে কোন সময় কোন কারণ দর্শানো ব্যতিরেকে আমার কার্যাদেশ বাতিল করার এখতিয়ার চট্টগ্রাম জেলা পরিষদ কর্তৃপক্ষ সংরক্ষণ করবেন। সে ক্ষেত্রে জেলা পরিষদের বিরুদ্ধে আমি কিংবা আমার পক্ষে কেউ কোন প্রকার মামলা করবে না মর্মে অঙ্গীকার করছি।

০৭। যাত্রী পারাপারে দুর্ঘটনাজনিত সকল দায়-দায়িত্ব আমি (অস্পষ্ট) করতে বাধ্য থাকব।

০৮। যাত্রী সাধারনের জানমাল রক্ষার্থে আি নৌ নিরাপত্তা আইন যথারীতি মেনে চলব। যাত্রীদের নিরাপত্তার কথা বিবেচনা করে আবহাওয়া অধিদপ্তর কর্তৃক কোন সতর্ক সংকেত জারী করা হলে যাত্রী/ মালামাল পারাপার হতে সম্পূর্ণরূপে বিরত থাকব। তবে তজ্জন্য কোনরূপ ক্ষতি পূরণ জেলা পরিষদ কর্তৃপক্ষের নিকট দাবী করতে পারব না।

০৯। সর্বোপরি যে কোন প্রকার দৈব ঘটনায় জেলা পরিষদ থেকে কোন ক্ষতি পূরণ দাবী করব না।

আমি সুস্থ মস্তিষ্কে স্বজ্ঞানে অদ্য ০৫.১১.২০১৩ তারিখ সাক্ষীগণের উপস্থিতিতে অত্র অঙ্গীকারনামা স্বাক্ষরক্রমে সম্পাদন করলাম।

স্বাক্ষর/- অস্পষ্ট
প্রধান নির্বাহী কর্মকর্তা
জেলা পরিষদ, চট্টগ্রাম।

স্বাক্ষর/- অস্পষ্ট
(এস,এম, আনোয়ার হোসেন)
পিতা-মৃত বাদশা মিয়া সুকানী
সাং-মগধরা
থানা-সন্দ্বীপ, চট্টগ্রাম।

সাক্ষীঃ

১। আবদুল বাকের, মরহুম আহাম্মদ (অস্পষ্ট) সাং- মুছাপুর সন্দ্বীপ, চট্টগ্রাম।

২। আবুল বাশার, পিং মৃত সিরাজুল (অস্পষ্ট)
সাং-মগধরা, সন্দ্বীপ, চট্টগ্রাম।

**২৫. কমডোর এস, এম, জাকিউর রহমান ভূইয়া, মহাপরিচালক, নৌ পরিবহন অধিদপ্তর স্বাক্ষরিত বিগত ইংরেজী ২১.১২.২০১৬ তারিখের পত্রে তিনি বলছেন যে,** "উপরোক্ত বিষেয়ে সূত্রোক্ত পত্রে দেখা যায় কুমিরা-গুপ্তছড়া নৌ-রুটে রেজিষ্ট্রেশন বিহীন স্পীডবোট, ফিশিং বোট এবং মালবাহী বোট দ্বারা ঝুঁকিপূর্ণভাবে যাত্রী ও মালামাল পরিবহন করা হচ্ছে। রেজিষ্ট্রেশন বিহীন বোট দ্বারা কুমিরা-গুপ্তছড়া নৌরুটে যাত্রী ও মালামাল পরিবহন করায় সারকারি সী-ট্রাক সুষ্ঠুভাবে পরিচালনায় ব্যাঘাতসহ যাত্রীদের নিরাপদ যাতায়াতের প্রতিবন্ধকতা সৃষ্টি হচ্ছে। তাছাড়া অবৈধ ও রেজিষ্ট্রেশন বিহীন নৌযান দ্বারা যাত্রী পরিবহনের কারণে যে কোন সময় অনাকাঙ্খিত দূর্ঘটনা ঘটতে পারে।"

**২৬. কামাল আলম, কমান্ডার বাংলাদেশ নৌবাহিনী স্বাক্ষরিত বিগত ইংরেজী ০৪.০১.২০১৭ তারিখের পত্রের ৪নং প্যারায় বলেন যে,** "৪। বর্তমানে কোষ্ট গার্ড বাহিনীর পূর্ব জোনে নৌ পরিবহন অধিদপ্তর এবং বিআইডব্লিউটিসি কর্তৃক ইস্যুকৃত প্রকৃত রেজিষ্ট্রেশন সার্ভে সনদ এবং অন্যান্য নিরাপদ নৌযান পরিচালনার জন্য প্রয়োজনীয় কাগজ পত্র সম্পর্কে সম্যক ধারনা প্রাপ্ত কোন কর্মকর্তা বা নাবিক নিয়োজিত নেই। এ প্রেক্ষিতে, উল্লেখিত অবৈধ রেজিষ্ট্রেশন বিশিষ্ট সি-ট্রাক, ফিশিং বোট অন্যান্য বোটে কাগজ পত্রাদি সঠিকতা যাচাইয়ের জন্য এক সপ্তাহের জন্য নৌ পরিবহন অধিদপ্তর থেকে একজন ম্যাজিষ্টেট অথবা পরিদর্শক নিয়োগ করা হলে তার উপস্থিতিতে উক্ত বোটসমূহ চেক করা হলে এ ধরনের অবৈধ নৌযান বন্ধ হবে বলে প্রতীয়মান। সেক্ষেত্রে কোষ্ট গার্ড কর্তৃক প্রয়োজনীয় সকল ধরণের সহায়তা প্রদান করা হবে।"

**২৭. গুপ্তছড়া ঘাট নৌকা ডুবিতে প্রাণহানীর ঘটনার বিষয়ে জেলা প্রশাসক, চট্টগ্রাম কর্তৃক ০৭ (সাত) সদস্য বিশিষ্ট অনুসন্ধান কমিটির তদন্ত প্রতিবেদনে দায়-দায়িত্ব নির্ধারণ করে বলা হয় যে,** "BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কামিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ আকরাম উদ্দিন, পিতা- মৃত মাষ্টার সামছুল হক, গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না), প্রোঃ মেসার্স দিবা এন্টারপ্রাইজ, গ্রাম- বাউরিয়া, পোস্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর চরম দায়িত্ব অবহেলা ও নিয়োগপত্রের শর্ত লঙ্ঘনের কারণে এ দুর্ঘটনা এবং ১৮ জনের প্রাণহানি ঘটেছে।" এবং মতামত প্রদান করে বলা হয় যে, "সার্বিক তদন্তে উদঘাটিত বিষয়াদির পরিপ্রেক্ষিতে কামিটির মতামত নিম্নরূপঃ ১. BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর মোহাম্মদ ইকরাম উদ্দিন, পিতা- মৃত মাষ্টার সামছুল হক, গ্রাম- মগধরা, পোষ্ট- উত্তর মগধরা, থানা- সন্দ্বীপ, চট্টগ্রাম এবং বোট কন্ট্রাক্টর মাহমুদুর রহমান (মান্না), প্রোঃ মেসার্স দিবা এন্টারপ্রাইজ, গ্রাম- বাউরিয়া, পোস্ট- দোজানগর, থানা- সন্দ্বীপ, চট্টগ্রাম এর চরম দায়িত্ব অবহেলা ও নিয়োগপত্রের শর্ত লঙ্ঘনের কারণে এ দূর্ঘটনা এবং ১৮ জনের প্রাণহানি ঘটেছে। ২.কুমিরা -গুপ্তছড়া রুটে যাত্রী ও মালামাল পরিবহনের ক্ষেত্রে জেলা পরিষদের খাস আদায়কারী এবং BIWTC কর্তৃক নিয়োগকৃত সী-ট্রাকের কমিশন এজেন্ট কাম বোট কন্ট্রাক্টর ও বোট কন্ট্রাক্টর এর কার্যক্রমের মধ্যে সমন্বয় নাই।"

The Inland Shipping Ordinance, 1976 এর ধারা ৪৪ নিম্নে অবিকল অনুলিখন হলোঃ

*"44. (1) A shipping casualty shall be deemed to occur when-*

*(a) any inland ship is lost, wrecked, abandoned or materially damaged;*

*(b) any loss of life or property ensues by reason of any casualty happening to or on board any such ship: or*

*(c) any such ship causes loss or material damage to any other inland ship or property or person on board that ship."*

২৮. রেড বোট উল্টে ১৮ জন নিরীহ যাত্রীর প্রাণহানী Inland Shipping Ordinance, ১৯৭৬ এর ধারা ৪৪ উপ-ধারা (১) মোতাবেক *"Shipping casualty"* তথা নৌ-দূর্ঘটনা।

**Inland Shipping Ordinance 1976 এর ৪৫ ধারা নিম্নে অবিকল অনুলিখন হলোঃ**

*"45. (1) Upon the receipt of a report of shipping casualty under section 44, the 45/ Upazilla Nirbahi Office/shall-*

*(a) forthwith hold or cause to be held an inquiry respecting the shipping casualty, and*

*(b) within seven days, submit to the Government and to the District Magistrate a report stating the facts and circumstances of the casualty together with his observations, if any, as to the reasons of and responsibilities for the casualty,"*

**২৯. ধারা ৪৫ মোতাবেক *Shipping casualty-*** তথা নৌ-দূর্ঘটনার বিষয়ে অবহিত হওয়ার পর তথা প্রতিবেদন প্রাপ্ত হওয়ার পর উপজেলা নির্বাহী কর্মকর্তা তথা প্রতিবাদী নং ৫-এর আইনগত দায়িত্ব হল সাথে সাথে উক্ত দূর্ঘটনার বিষয়ে অনুসন্ধান করবেন এবং ৭ দিনের মধ্যে সরকারের নিকট এবং জেলা ম্যাজিস্ট্রেটের নিকট প্রতিবেদন দাখিল করবেন। কিন্তু উপজেলা নির্বাহী কর্মকর্তা তথা ৫নং প্রতিবাদী এ ধরনের কোন প্রতিবেদন প্রদান করেনি। উপজেলা নির্বাহী কর্মকর্তা ১৮ জন যাত্রীর প্রাণহানী হয়েছে (Annexure-C, D, and H) মর্মে প্রতিবেদন দিয়েছেন দীর্ঘদিন পর।

**৩০. বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষ (BIWTC) আদেশ ১৯৭২ (১৯৭২ সালের ২৮ নং আদেশ) এর ধারা ১২ নিম্নে অবিকল অনুলিখন হলোঃ**

"12 (1) It shall be the function of the Corporation to provide safe and efficient shipping and water transport services on coastal and inland water routes and to carry out all forms of activities connected with or ancillary to such shipping and water transport.

(2) Without prejudice to the generality of the foregoing provision the corporation shall, in particular, have power-

(a) to acquire, charter, hold or dispose of vessels;

(b) to operate inland and coastal oil tankers.

**(c) to operate passenger and cargo services including lighterage on coastal and inland waters;**

**(d) to operate ferry services;**

(e) to establish and maintain dockyard and repair workshop;
**(f) to do all other things connected with or ancillary to any of the matters referred to in sub-clause (a) to (e)"**

৩১. বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষ (BIWTC) আদেশ ১৯৭২ (১৯৭২ সালের ২৮ নং আদেশ) এর উপরিল্লিখিত ধারা ১২ সহজ সরল পাঠে এটি কাঁচের মত পরিষ্কার যে, বাংলাদেশের সকল উপকূলীয় এবং অভ্যন্তরীণ নৌপথের সকল প্রকার পণ্য ও যাত্রী জাহাজযোগে পরিবহন বা নৌপরিবহন এর যাবতীয় দায়-দায়িত্ব আইন মোতাবেক বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষের।

৩২. Inland Shipping Ordinance, 1976 অধ্যাদেশটি জারী করা হয়েছে "To provide for the survey, registration and contral of navigation of vessels plying on inland waters." অর্থাৎ সার্ভে, নিবন্ধন এবং অভ্যন্তরীণ নৌ পরিবহন চলাচলকারী জাহাজসমূহের নিয়ন্ত্রণের নিমিত্তে। উক্ত অধ্যাদেশের ধারা ৫৪ নিম্নে অবিকল অনুলিখন হলোঃ

"54. No inland ship engaged in carrying passengers shall proceed on any voyage or be used for any service for mercantile purposes-
(a) unless she has a valid route permit granted by the Government or an authority authorised by it in this behalf and an approved time-table;
(b) except in the route allocated by, and in accordance with the terms and conditions of, such route permit; and
(c) without printed tickets or receipts showing payment of fares for carriage of passengers and freights for carriage of goods which shall be issued in such manner as may be prescribed."

৩৩. উপরিল্লিখিত ধারা ৫৪ মোতাবেক কোন জাহাজ বানিজ্যিক উদ্দেশ্যে কিংবা যাত্রী পরিবহনে সরকারী অনুমোদন, চলাচলের রুট বরাদ্দ এবং সময়সূচী ছাড়া চলতে পারবে না।

৩৪. গুরুত্বপূর্ণ বিধায় Inland Shipping Ordinance, 1976 অধ্যাদেশের ধারা ৬০ নিম্নে অবিকল অনুলিখন হলোঃ

"60. (1) Where the Government or an authority authorised by it in this behalf so directs, the owner of an inland ship shall, subject to the approval of such authority, publish as often as may be necessary and put on sale to the public tables showing-
(a) times of sailing from different places of the ship,
(b) fares for carriage to different places of passengers of different classes, and
(c) freights for carriage to different places of goods of different descriptions.
(2) The owner and master of every inland ship in respect of which the tables referred to in sub-section (1) have been published shall cause a copy of the same to be affixed on some conspicuous part of the ship and kept so affixed so long as they remain in force and the ship is in use so that the content of the tables may be easily read by all persons on board the ship.
(3) Notwithstanding the provisions of sub-section (1) an authority authorised by Government in this behalf, may publish for sale to the members of the public consolidated time and fare-tables in respect of any or all classes of inland ship; and such tables shall contain the information required under clauses (a), (b) and (c) of sub-section (1).

৩৫. **বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষ (BIWTC)** এর ওয়েবসাইটে (Annexure-G) দৃষ্টে এটি স্পষ্ট প্রতীয়মান যে, কুমিরা ঘাট থেকে গুপ্তচরা ঘাটে জাহাজ চলাচলের সময়সূচি স্পষ্টভাবে বর্ণিত আছে। ধারা ৫৪ মোতাবেক প্রদত্ত সময়সূচী কুমিরা ঘাট থেকে জাহাজ ছাড়ার সময় ২টা এবং গুপ্তচরা ঘাটে পৌছার সময় ১৫.৪৫ তথা বিকাল ৩.৪৫ ঘটিকা নির্ধারিত। অথচ স্বীকৃত মতেই ঘটনার দিন জাহাজটি নির্ধারিত সময়ের অনেক পরে তথা ২ ঘন্টা পরে তথা দুপুর ৪.০০ ঘটিকায় ছাড়ে এবং গুপ্তচরা ঘাটে পৌঁছায় সন্ধ্যা ৬.১০ ঘটিকায়।

৩৬. জাহাজটি গুপ্তচরা ঘাটে পৌঁছানোর কথাছিল পৌনে চারটায় অর্থাৎ বিকেলে কিন্তু সেটা পৌছালো সন্ধ্যা ৬.১০ ঘটিকায়। সন্ধ্যা ৬.১০ ঘটিকায় পৌঁছানোর কারণে সূর্যের আলোহীন অবস্থায় লালবোটে উঠতে প্যাসেঞ্জারগণ বাধ্য হয়। **বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষ (BIWTC) এর** জাহাজ ৩.৪৫ ঘটিকায় ঘাটে পৌছালে সূর্যের অলোতে রেড বোটে করে যাত্রীরা নিরপাদে তীরে উঠতে পারত। উপরিল্লিখিত ধারা ১২ উপধারা (২)(গ) এবং (ঙ) মোতাবেক বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষ (BIWTC) এর দায়িত্ব ছিল নিজস্ব জাহাজে করে যাত্রীদেরকে তীরে পৌছানো। সেটি তারা না করে অবৈধ রেড বোটে যাত্রীদের উঠতে বাধ্য করে।

৩৭. রেড বোট ডুবে গিয়ে ১৮জন যাত্রীর করুণ মৃত্যুর বিষয়ে প্রতিবাদী নং ৮ তথা BIWTC একটি তদন্ত কমিটি গঠন করে এবং উক্ত তদন্ত প্রতিবেদনে (Annexure-C) ৮নং প্রতিবাদী নির্দিষ্ট কোন ব্যক্তি বা কর্তৃপক্ষের কোনরূপ গাফিলতি পায় নাই।

৩৮. বিগত ইংরেজী ২৩.০৭.২০১৯ তারিখের পত্র (Annexure-H) মোতাবেক চট্টগ্রাম ডিস্ট্রিক্ট কাউন্সিলের (CDC) তথা প্রতিবাদী নং ৯ গুপ্তচরা ঘাটের নিয়ন্ত্রণকারী কর্তপক্ষ। নিয়ন্ত্রণকারী কর্তৃপক্ষ হিসেবে প্রতিবাদী নং ৯ গুপ্তচরা ঘাটের ইজারা জনাব এস. এম. আনোয়ার হোসেইন নামে এক ব্যক্তিকে প্রদান করেছিলো। vicarious liability নীতির অধীনে কন্ট্রাক্টরের অবহেলা মূল মালিকের তথা ৮নং প্রতিপক্ষের তথা ৯নং প্রতিপক্ষের অবহেলা বলে গণ্য।

৩৯. BIWTC-র তদন্ত প্রতিবেদন অনুযায়ী (Annexure-C) রেড বোটের পরিচালনা ও নিয়ন্ত্রণ CDC তথা চট্টগ্রাম ডিসট্রিক্ট কাউন্সিলের। অপরদিকে, BIWTC এর আইনগত দায়িত্ব হলো জাহজে বহনকারী যাত্রীদেরকে নিরাপদে তীরে পৌঁছে দেয়া। অর্থাৎ বড় জাহাজ থেকে ছোট নৌকা বা লঞ্চে করে যাত্রীদেরকে তীরে পৌঁছানোর আইনগত দায়িত্ব BIWTC-এর উপর ন্যাস্ত। আইন BIWTC কে তার যাত্রীদের নিরাপদে এবং সতর্কতার সাথে তীরে পৌছে দেয়ার দায়িত্ব অর্পণ করেছে। এক্ষেত্রে BIWTC তার উপর অর্পিত অইনগত দায়িত্ব পালনে চরম ব্যর্থতার পরিচয় দিয়েছে।

৪০. CDC বা চট্টগ্রাম ডিসট্রিক্ট কাউন্সিল এবং BIWTC উভয়ের আইনগত দায়িত্ব পালনে চরম ব্যর্থতা এবং গাফিলতির কারণে ১৮ জন নিরীহ লোককে প্রাণ দিতে হয়েছে। ১৮ জন নিরীহ ব্যক্তির প্রাণ তথা জীবনের অধিকার লংঘনের জন্য BIWTC এবং CDC দায়ী প্রমাণিত।

৪১. BIWTC তার তফশিলভুক্ত সময় (time-table) অনুযায়ী তথা নির্ধারিত সময় থেকে আড়াই ঘণ্টা সময় দেরীতে জাহাজ ছাড়ে এবং সন্ধ্যা ছয়টায় গুপ্তচরা ঘাটে পৌঁছায়। নির্ধারিত সময়ে জাহাজ না ছাড়া এবং নির্ধারিত সময়ের আড়াই ঘন্টা পরে গুপ্তচর ঘাটে পৌঁছানো BIWTC এবং CDC এর চরম গাফিলতি প্রমাণ করে। সন্ধ্যা ছয়টায় গুপ্তচরা ঘাটে পৌঁছালেও, রেড বোটে উঠতে যাত্রীদেরকে বাধ্য করলেও BIWTC এবং CDC যাত্রীদেরকে কোন ধরতের লাইফ জ্যাকেট প্রদান করেনি বা নিরাপত্তা ব্যবস্থা নিশ্চিত করেনি (Annexure-C)।

৪২. গুপ্তচরা ঘাটের নিয়ন্ত্রণ **চট্টগ্রাম ডিসট্রিক্ট কাউন্সিল (CDC)**কে BIWTC প্রদান করে এবং গুপ্তচরা ঘাটে CDC-র ঠিকাদাররা রেড বোটগুলো পরিচালনা করে। সুতরাং CDC রেড বোটের ওপর দায় চাপিয়ে দায় এঁড়াতে পারে না। BIWTC নিজস্ব জাহাজ/নৌকা/লঞ্চে করে নিরাপদে যাত্রীদেরকে তীরে পৌঁছাতে চরম ব্যর্থতার পরিচয় দিয়েছে। একই ভাবে CDC গুপ্তচরা ঘাটের নিয়ন্ত্রণকারী কর্তৃপক্ষ হয়েও রেড বোটের কথা অস্বীকার করছে। CDC এবং BIWTC-উভয়ে ১৮ জন নিরীহ যাত্রীর প্রাণহানীর জন্য দায়ী।

৪৩. উপরিল্লিখিত নথিপত্র বিচার বিশ্লেষণে এটি কাঁচের মত স্পষ্ট যে, বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্পোরেশন কর্তৃক প্রদত্ত সময় অনুযায়ী চট্টগ্রামের কুমিরা থেকে সন্দীপের গুপ্তছড়া ঘাটে যাওয়ার জন্য বিগত ইংরেজী ০২.০৪.২০১৭ তারিখের সময়সূচী ছিল কুমিরা থেকে ১৪.০০ ঘটিকায় ছাড়ার সময় এবং গুপ্তছড়া ঘাটে পৌছার সময় ছিল ১৫.৪৫। সুতরাং এটি সকল পক্ষ কর্তৃক স্বীকৃত যে, আনুমানিক প্রায় দুই ঘন্টা অধিক সময় পর সী-ট্রাকটি কুমিরা ঘাট থেকে ছাড়ে এবং নির্ধারিত সময়ের দুইঘন্টা পর সী-ট্রাকটি গুপ্তছাড়া ঘাটে পৌছায়। এটি মনে রাখতে হবে যে, গুপ্তছড়া ঘাটটি আধুনিক সুযোগ-সুবিধা বঞ্চিত একটি ঘাট। এই ঘাটে বিদ্যুতের কোন ব্যবস্থা নেই। সংগত কারণেই, গুপ্তছড়া ঘাটে সন্ধ্যার অনেক পূর্বেই তথা ১৫.৪৫ মিনিট সময় তথা বিকেল ৩.৪৫ ঘটিকায় সী-ট্রাক পৌছানোর সময় নৌপরিবহন কর্পোরেশন নির্ধারণ করে দিয়েছিলেন, যাতে সন্ধ্যার পূর্বেই যাত্রী নামানোর কাজ সম্পন্ন করা সম্ভব হয়। সুতরাং সী-ট্রাকটি বিকেল ৪.০০ ঘটিকায় ছাড়লে এটি সন্ধ্যার সময় পৌছবে এটিই স্বাভাবিক এবং সন্ধ্যার সময় বিদ্যুৎবিহীন এবং আধুনিক সুযোগ-সুবিধা বিহীন গুপ্তছড়া ঘাটে দূর্ঘটনা ঘটাটাই স্বাভাবিক। তাহলে বিকেল ৪.০০

ঘটিকায় কুমিরা থেকে সী-ট্রাকটি ছাড়াটাই ছিল CDC এবং BIWTC এর প্রচন্ড দায়িত্ব অবহেলা এবং এই দায়িত্ব অবহেলা স্বীকৃত।

৪৪. মোহাম্মদ গোলাম জাকারিয়া, উপজেলা নির্বাহী অফিসার, সন্দ্বীপ, চট্টগ্রাম কর্তৃক বিগত ইংরেজী ০৫.০৪.২০১৭ তারিখে স্বাক্ষরিত তালিকা অনুযায়ী লাল বোট ডুবিতে ১৮ জন ব্যক্তি মৃত্যুবরণ করেছেন।

৪৫. Strict Liability and Doctrine of Res Ipsa Loquitor:

সাংবিধানিক আইনে ক্ষতিপূরণের নীতি সম্পর্কে *Strict Liability and Doctrine of Res Ipsa Loquitor* নীতির উপর গুরুত্ব আরোপ করার প্রয়োজনীয়তা রয়েছে। ***Pushpabhai Purshottam Udeshi & Others v. M/s. Ranjit Ginning & Pressing Co. (P) Ltd. & Anr.,*** (1977) 2 SCC 745 নামক ভারতীয় সুপ্রীম কোর্টের রায়ে ভারতীয় সুপ্রীম কোর্ট নিম্নোক্তভাবে নীতিটি ব্যাখ্যা করে:

> "6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states: "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part ....."

৪৬. ভারতের সুপ্রীমকোর্ট বিখ্যাত ***D. D. Basu v Union of India*** (1997) 1 SCC 416 নিম্নরূপ অভিমত ব্যক্ত করেনঃ

> "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, of may have been the bread winner of the family."

৪৭. প্রাইভেট আইন (Private law) হলো আইনের সে সকল অংশ যা রাষ্ট্রের সহিত সম্পর্কহীন কিন্তু ব্যক্তির সহিত ব্যক্তির সম্পর্ক নিয়ে কাজ করে। সম্পত্তি সংক্রান্ত আইন, অছি আইন, পারিবারিক আইন, চুক্তি আইন, বাণিজ্যিক আইন, টর্ট বা পূরণযোগ্য ক্ষতি আইন এর অন্তর্ভূক্ত।

৪৮. পাবলিক আইন (Public law) হলো আইনের সে সকল অংশ যা সংবিধান, সরকারের অঙ্গসমূহ ও রাষ্ট্রের সহিত ব্যক্তি বা ব্যক্তিবর্গের সম্পর্ক নিয়ে কাজ করে। এর অন্তর্ভূক্ত হচ্ছে সাংবিধানিক আইন, প্রশাসনিক আইন, কর আইন ও ফৌজদারী আইন।

৪৯. টর্ট বা অন্যায় হলো অন্য ব্যক্তি বা ব্যক্তিদের সম্পত্তি বা তার বা তাদের খ্যাতির একটি অনপরাধমূলক ক্ষতি যা ইচ্ছাকৃত কাজ বা অবহেলার কারণ ঘটে থাকে। অপর কথায় অন্যায় হলো এমন যা কোন ব্যক্তি বা ব্যক্তিরা করেন বা করতে ব্যর্থ হন, যার ফলে অন্য কোন ব্যক্তি বা ব্যক্তিদের ক্ষতি হয় এবং সে ক্ষতির জন্য সে ব্যক্তি বা ব্যক্তিদের বিরুদ্ধে আইনী ব্যবস্থা নেয়া যায়।

৫০. আইন কমিশন কর্তৃক প্রণীত আইন শব্দকোষ এর ১২৮২ পৃষ্ঠায় বলা হয়েছে যে, Tort n. পূরণযোগ্যক্ষতি বি., যে কাজ করা বা না করার ফলে কোনো ব্যক্তির বৈধ ব্যক্তিগত অধিকার অনিষ্টকরভাবে লঙ্ঘিত হয়। ইহা চুক্তি-বহির্ভূত এমন এক ক্ষতি যাহার দেওয়ানি প্রতিকার ক্ষতিপূরণের মাধ্যমে প্রদান করা হয়। কোনো ব্যক্তি আইনগতভাবে যে-কর্তব্য সম্পন্ন করিতে বাধ্য, তাহা না করিবার ফলে কোনো ব্যক্তির ক্ষতি হইলে, তাহা টর্ট বা পূরণযোগ্য ক্ষতি বলিয়া গণ্য হয় এবং ক্ষতিগ্রস্ত ব্যক্তি ক্ষতিপূরণ পাইবার প্রার্থনা করিতে পারেন। অবহেলার দ্বারা কোন ব্যক্তির শরীর আঘাতপ্রাপ্ত হইলে অথবা তাঁহার সম্পত্তি ক্ষতিগ্রস্ত হইলে তাহার জন্য ক্ষতিপূরণ প্রদানের ব্যবস্থার সঙ্গেই টর্ট বা পূরণযোগ্য-ক্ষতি সংক্রান্ত আইন প্রধানত সংশ্লিষ্ট। ইহা অন্য প্রকারের স্বার্থও সংরক্ষণ করে। যেমন, সুনাম (defamation দ্র.), ব্যক্তি স্বাধীনতা (assault ও false imprisonment দ্র.), সম্পত্তির স্বত্ব (conversion ও trespass দ্র.), সম্পত্তির ভোগাধিকার (nuisance দ্র.), ও বাণিজ্যিক স্বার্থ (intimidation, conspiracy ও passing off দ্র.)। কতিপয় শিথিল-অযোগ্য টর্ট বা পূরণযোগ্য ক্ষতি ব্যতীত অন্য ক্ষেত্রে সাধারণত ইহা অবশ্যই দেখাইতে হইবে যে, স্বেচ্ছাকৃত বা অবহেলাজনিত ক্ষতি করা হইয়াছে। টর্টের দ্বারা ক্ষতি করা হইয়াছে দেখাইতে পারিলে বেশিরভাগ ক্ষেত্রে তাহা আদালতযোগে প্রতিকারযোগ্য। কিন্তু যে-ক্ষেত্রে টর্টের প্রধান উদ্দেশ্য ক্ষতিপূরণ করা নয় এবং অধিকার-সংরক্ষণ (যেমন, অনধিকারপ্রবেশের ক্ষেত্রে) সে-ক্ষেত্রে ক্ষতির প্রমান ব্যতীত তাহা আদালতযোগে প্রতিকারযাগ্য। যে-ব্যক্তি টর্ট বা পূরণযোগ্য-ক্ষতিকর কর্ম করিয়াছেন তিনি প্রধানত তাহার জন্য দায়ী (টর্ট বা পূরণযোগ্য ক্ষতির অপরাধী)। কিন্তু প্রতিনিধিত্বমূলক দায়ের বিধান-অনুসারে কোন ব্যক্তির টর্ট বা পূরণযোগ্য ক্ষতির জন্য অপর কোন ব্যক্তি দায়ী হইতে পারেন। টর্ট বা পূরণযোগ্য ক্ষতির প্রদান প্রতিকার হইতেছে ক্ষতিপূরণ, কিন্তু কতিপয় ক্ষেত্রে পূনরাবৃক্তি রোধের জন্য নিষেধাজ্ঞা লাভ করা যায়। ইহার অপর প্রতিকার হইতেছে স্বাবলম্বন ও পুনরুদ্ধার। সকল দেওয়ানি ক্ষতিই টর্ট নয়। সে-দেওয়ানি ক্ষতির কোন প্রতিকার নাই, তাহা টর্ট নহে। টর্টের আইন বলিয়া কিছু নাই, বরং কতকগুলি কাজ করা বা না করার ফলাফল কতিপয় শর্তাধীনে প্রতিকার ঘোষিত হইয়াছে, যাহা টর্ট আইন হিসাবে বিবেচিত। ইংল্যান্ডে প্রচলিত টর্ট আইনের দিক নির্দেশনা, সুবিচার, সুনীতি ও সুবিবেচনার অনুষঙ্গরূপে ব্রিটিশ ভারতে এবং বাংলাদেশের আদালতে টর্ট বিবেচনা করা হয়। সুবিচার, ন্যায়পরায়ণতা ও সুবিবেচনা বলিতে দেশীয় সমাজ ও অবস্থার পরিপ্রেক্ষিতে ইংল্যান্ডের আইনকে বুঝিতে হইবে।

৫১. সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক tortius তথা পূরণযোগ্য ক্ষতির অপরাধ সম্পাদনের কারণে ক্ষতিগ্রস্থ ব্যক্তি প্রাইভেট আইনের আওতায় তার দাবী সাধারণত উত্থাপন করেন। কিন্তু সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক প্রদত্ত অধীকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ হলে সাংবিধানিক আদালত ক্ষতিপূরণ প্রাদান করবে। ক্ষতিগ্রস্থ ব্যক্তি তথা মৃত ব্যক্তির বেঁচে থাকার অধিকারে প্রমাণিত হরণের উপরিল্লিখিত সাংবিধানিক দাবী উত্থাপনের পাবলিক আইনে প্রদত্ত অধিকারটি প্রাইভেট আইনে প্রদত্ত দাবী আদায়ের সুযোগের অতিরিক্ত হিসেবে গণ্য হবে।

৫২. কঠিন বাস্তবতার বিষয়ে আদালত তার বাস্তব জ্ঞান ও সচেতনতার চোখ বন্ধ রাখতে পারে না। অপরাধীর শাস্তি ভিকটিমের তথা ক্ষতিগ্রস্থ ব্যক্তির পরিবারকে উল্লেখ করার মত সান্তনা দেয় না। প্রতিকার হিসেবে যথাযথ আর্থিক ক্ষতিপূরণ আদালত কর্তৃক প্রদানেই সম্ভবত সবচেয়ে উৎকৃষ্ট এবং একমাত্র কার্যকর প্রতিবিধান যা ক্ষতিগ্রস্থ ব্যক্তির বা ভিকটিমের বা মৃত ব্যক্তির পরিবারের ক্ষতে মলম লাগানোর মতো।

৫৩. বর্তমান মোকদ্দমায় লাল বোটে ডুবে ১৮ জন যাত্রীর মৃত্যুর জন্য দায়ী ৮ ও ৯নং প্রতিপক্ষ তথা বাংলাদেশ অভ্যন্তরীণ নৌ পরিবহন কর্তৃপক্ষ (BIWTC) এবং চট্টগ্রাম ডিস্ট্রিক কাউন্সিল (CDC) কর্তৃক প্রমাণিত পূরণযোগ্য ক্ষতি সাধনের কারণে প্রাইভেট আইনের আওতায় ক্ষতিপূরণের দাবীর অতিরিক্ত হিসেবে পাবলিক আইনের আওতায় ক্ষতিপূরণ পাওয়ার হকদার।

৫৪. রাষ্ট্রের কর্মকর্তা-কর্মচারী কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহের কার্য বা আদেশ দ্বারা কোন ব্যক্তি বেঁচে থাকার সংবিধান প্রদত্ত মৌলিক অধিকার হরণ করা হলে উক্ত হরণ সংশ্লিষ্ট রাষ্ট্রের কর্মকর্তা-কর্মচারী বা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহের কঠিন দায় (Strict liability)।

৫৫. যেখানে ভিকটিমের তথা মৃত ব্যক্তির মৌলিক অধিকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ হবে সেখানে আদালত সংক্ষুব্ধ ব্যক্তির দাবী এ কারণে এড়িয়ে চলার নীতি অনুসরণ করবেন না যে, সংক্ষুব্ধ ব্যক্তি দেওয়ানী আদালতে মোকদ্দমা দায়েরের সুবিধাপ্রাপ্ত।

৫৬. টর্ট তথা ক্ষতিপূরণ আইনে ভিকারিয়াস লায়াবিলিটি (Vicarious Liability) নীতিটি সাংবিধানিক আইনে মৌলিক অধিকার ভংগের ক্ষেত্রেও সমভাবে প্রযোজ্য। সাংবিধানিক আইনে ক্ষতিপূরণের নীতিটি বর্তমানে সুপ্রতিষ্ঠিত। সাংবিধানিক আইনে সরকার বা সরকারী কর্তৃপক্ষ তাদের অধীনস্থ কর্মকর্তা বা কর্মচারীদের দায়িত্বে গাফিলতির জন্য ক্ষতিপূরণ দিতে বাধ্য। তবে সরকার এই সমপরিমাণ টাকা দায়িত্বে গাফিলতির জন্য দায়ী সংশ্লিষ্ট কর্মকর্তা, কর্মচারী এবং ঠিকাদারদের কাছ থেকে আইনগত পদ্ধতিতে আদায় করে সরকারী কোষাগারে জমা দিবেন। এই নীতিটির ফলে সরকারী কোষাগার থেকে ক্ষতিপূরণ দিলেও দায়িত্বে অবহেলা যে সব কর্মকর্তা বা কর্মচারী করেছে তাদের কাছ থেকে এই টাকা আদায় করে সরকারী কোষাগারে জমা দেয়া হবে।

৫৭. বাংলাদেশে সাংবিধানিক আইনে ক্ষতিপূরণের নীতিটি প্রথম গ্রহণ করা হয় ২৯.০৫.২০১২ তারিখে মাননীয় আপীল বিভাগ কর্তৃক বাংলাদেশ বনাম নুরুল আমিন এবং অন্যান্য (3 CLR (AD) (2015) 410) মোকদ্দমায়। উক্ত মোকদ্দমায় তৎকালীন মাননীয় প্রধান বিচারতি মোঃ মোজাম্মেল হোসেইন বলেন যে,

> **"**46. In awarding and determination of compensation of High Court Division, in an appropriate case if it deems necessary, may take evidence to clear any disputed question of facts or pass any direction or orders to hold an inquiry by a District Judge for removing any controversy as was done in the case reported in (1993) 2 SCC 746. Having considered the development of the law regarding compensatory jurisprudence with reference to the experience in India, Ireland, Privy Council and the Court of Appeal in New-Zealand, 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 Articel 102 of the Constitution, which is an instrumentality and a mechanism, containing both substantive and procedural provisions "to realise the objectives, purposes, polices, 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 victims disability or personal circumstance.**"**

৫৮. অতঃপর জেড. আই. খান পান্না বনাম রাষ্ট্র (4 CLR (2016) 265) মোকদ্দমায় অত্র বিভাগ কর্তৃক সাংবিধানিক আইনে ক্ষতিপূরণের নীতিটি গ্রহণ করে বিগত ইংরেজী ১৩.০৯.২০১৫ তারিখে সিদ্ধান্ত প্রদান করা হয় যে,

> **"70.** The Courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A court of law can not give blind eye of stark realities. Mere punishment of the offender can not give much solace to the family of the victim. A civil action for damages is a long drawn out and cumbersome judicial process. So monetary compensation by way of redress is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds.
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> **71.** In the light of the above deliberations and decisions, it is clear that though there is no express provision in the Constitution of India for grant of compensation to the victims by the State for the infringement of their right to life and personal liberty guaranteed under Article 21 of the Constitution of India, yet the Supreme Court of India has judicially evolved that such victims are entitled to get compensation under public law in addition to the remedies available under private law.

**72.** Speaking about Bangladesh jurisdiction, we have not come across any judicial pronouncement of the Apex Court that has awarded compensation to the victims by the State out of the State coffers for illegal and unconstitutional actions of the public functionaries as yet.

**73.** The Indian decisions adverted to above have a persuasive value. We find no reason whatsoever to disagree with the 'ratios' enunciated by different High Courts of India and the Indian Supreme Court with regard awarding of compensation to the victims by the State on account of violations of human rights by the public functionaries. In substance, we are in respectful agreement with the Indian decisions that have evolved a Jurisprudence of Compensation for the benefit of the victims of torture or the dependants/family members of the deceased in case of custodial deaths under writ jurisdiction, apart from any claim for damages in any action for tort under private law."

৫৯. অতঃপর সিসিবি ফাউন্ডেশন বনাম সরকার (5 CLR (2017) 278) মোকদ্দমায় অত্র বিভাগ কর্তৃক সাংবিধানিক আইনে ক্ষতিপূরণের নীতিটি গ্রহণ করে বিগত ইংরেজী ১৮.০২.২০১৬ তারিখে অভিমত প্রদান করা হয় যে,

"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."

৬০. উক্ত মোকদ্দমায় আরো অভিমত প্রদান করা হয় যে,

"98. 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."

৬১. সিসিবি ফাউন্ডেশন বনাম সরকার মোকদ্দমায় প্রদত্ত উপরিল্লিখিত রায়ের বিরুদ্ধে সরকার CIVIL PETITION FOR LEAVE TO APPEAL NO. 3929 OF 2017 WITH C. P. NO. 3987 OF 2017 দাখিল করলে মাননীয় আপীল বিভাগ লীভ প্রদান না করে সরাসরি খারিজ করে দেন (6 CLR (AD) (2018) 282)।

৬২. অতঃপর ক্যাটরিনা মাসুদ বনাম কাসেদ মিয়া (70 DLR (2018) 349) মোকদ্দমায় অত্র বিভাগ কর্তৃক সাংবিধানিক আইনে ক্ষতিপূরণের নীতিটি গ্রহণ করে বিগত ইংরেজী ০৩.১২.২০১৭ তারিখে অভিমত প্রদান করা হয় যে,

"197. So, the principle followed in Bangladesh Beverage case and the criteria applied was the potential income of the decessed 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 Nishadd Binghamputra Masud on account of loss of their dependancy is reasonable, in that Tareque had a monthly income of Taka 2,50,000 and the claim is for 100 (one hundred months) i.e. total amount of Taka 2,50,00,000."

৬৩. সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক কোন ব্যক্তিকে তার জীবন হতে বঞ্চিত করা যাবে না। এটি বাংলাদেশে অবস্থিত প্রত্যেক ব্যক্তির মৌলিক অধিকার। সংবিধান এখানে নাগরিক শব্দটি ব্যবহার করে নাই, করেছে 'ব্যক্তি' শব্দটি। অর্থাৎ বাংলাদেশের নাগরিকসহ বাংলাদেশে অবস্থিত বৈধ অবৈধ যে কোন ব্যক্তিকে বাংলাদেশ নামক রাষ্ট্র সুরক্ষা প্রদান করবে। বাংলাদেশে অবস্থিত প্রত্যেক ব্যক্তির জীবনের সুরক্ষা প্রদান করে প্রদত্ত মৌলিক অধিকার হলো রাষ্ট্রর ''কঠিন দায়'' তথা ''Strict Liability''।

৬৪. আলোচ্য মোকদ্দমায় ১৮ জন ব্যক্তি তাঁদের জীবন হতে বঞ্চিত হয়েছেন। ১৮ জন ব্যক্তির মৌলিক অধিকার তথা বেঁচে থাকার অধিকার হরণ করা হয়েছে। উপরোল্লিখিত আলোচনায় এটি কাঁচের মত স্পষ্ট যে, স্বীকৃত মতেই প্রতিপক্ষ ৮ এবং ৯ এর অবহেলার কারণেই ১৮ জন ব্যক্তির মৃত্যু হয়েছে।

৬৫. ক্ষতিপূরণের আদেশ দেয়ার পরে প্রায়ই দেখা যায় যে, প্রতিবাদীগণ ক্ষতিপূরণের টাকা দিতে কালক্ষেপন করেন। ক্ষতিপূরণের টাকা পরিশোধে বিলম্বের দ্বারা ভুক্তভোগীদেরকে এক ধরণের অজানা আশংকার মাঝে নিমজ্জিত করে রাখা হয়। সেজন্য ক্ষতিপূরণের মামলায় ব্যাংক রেট হারে ক্ষতিপূরণের সাথে সুদ প্রদানের বাধ্যবাধকতা থাকা প্রয়োজন। ক্ষতিপূরণ একটি দেনার মতো, একটি ঋণের মতো যা সুদসহ পরিশোধিত হয়।

৬৬. ক্ষতিপূরণের সাথে সুদ দেয়ার উপরে **New India Assurance Co. Ltd. v. Satendar and Ors** (Civil Appeal No. 4725/2006) (2006) 13 SCC 60 মোকদ্দমার রায়ে ভারতীয় সুপ্রীম কোর্ট ৯ বছর বয়সী একটি শিশুকে প্রদত্ত ক্ষতিপূরণের সাথে ৭.৫% হারে সুদ প্রদান করেন। ভারতীয় সুপ্রীমকোর্ট **State of Hariyana and Another vs. Jasbir Kaur and Others** মামলায়ও (Civil Appeal No. 3523 of 2003) (2003) (7) SCC 484) একইভাবে ক্ষতিপূরণের সাথে ৯% সুদ যোগ করেন। এছাড়াও **Barshan and Others vs. Union of Inda** (1999) DLT 432; 1999 (49) DRJ 655; ACJ 578 মামলার একটি ঢাকনাবিহীন ম্যানহোলে পতিত হয়ে স্কাতার সিংহ নামে এক ব্যক্তি মৃত্যুবরণ করায় দিল্লী হাইকোর্ট উক্ত মামলায় ক্ষতিপূরণের সাথে ১২% সুদ ধার্য করেন যা পিটিশন দায়েরের তারিখ থেকে পরিশোধ না হওয়া পর্যন্ত জমা করতে হবে। একইভাবে **Varindra Prasad v. B.S.E.S. Rajdhani Power Ltd. (WP No. 8924/2007)** মামলায় দিল্লী হাইকোর্ট অজয় কুমার নামক DESU কলোনীর ১০ বছরের একটি ছেলে সরকারী ভবনের ছাদ ধসে মারা গেলে সাংবিধানিক অইনে ১৫,২৬,০০০ টাকা ক্ষতিপূরণ দেয় এবং উক্ত ক্ষতিপূরণের সাথে ৯% হারে সুদ প্রদানের নির্দেশ দেয়। একইভাবে **Subramanium and another vs. Delhi Metro Rail Corporation** (WP No ৫০২৪/২০০১) মামলায় লালু নামে ৮ বছরের একটি ছেলে ড্রেনে ডুবে মারা যাওয়ায় দিল্লী হাইকোর্ট ৬,৯৯,১৪০ টাকা ক্ষতিপূরণের সাথে ৯% হারে সুদ প্রদানের নির্দেশ দেয়। একইভাবে **Ram Kishore v. Municipal Corporation of Delhi 2007(97) DRJ 445; (2007) AD (delhi) 441** মামলার দিল্লী হাইকোর্ট ক্ষতিপূরণ প্রদানের সাথে ৬% হারে সুদ প্রদানের নির্দেশনা দেয় যা রিট মামলা দায়েরের সময় থেকে পরিশোধ না করা পর্যন্ত পরিশোধযোগ্য।

৬৭. উপরিল্লিখিত আলোচনা ও পর্যালোচনায় আমাদের অভিমত অত্র রুলটি চূড়ান্ত যোগ্য।

৬৮. অতএব, আদেশ হয় যে, অত্র রুলটি চূড়ান্ত করা হলো।

৬৯. সন্দীপের গুপ্তছড়া ঘাটে লাল বোট ডুবে ১৮ জন যাত্রীর মৃত্যু ৮ ও ৯নং প্রতিপক্ষদ্বয়ের অবহেলায় সংঘটিত হয়েছে যা প্রমাণিত সত্য এবং উক্ত **"অবহেলা (Negligence)"** আইনসংগত কর্তৃত্ব ব্যতিরেকে করা হয়েছে বিধায় উক্ত **"অবহেলা (Negligence)"** এর কোন আইনগত কার্যকারিতা নাই মর্মে ঘোষণা করা হলো এবং ১৮ জন মৃত ব্যক্তির পরিবারকে

ক্ষতিপূরণ প্রদান ৮ ও ৯নং প্রতিপক্ষদ্বয়ের করণীয় কার্যহেতু উক্ত ক্ষতিপূরণ প্রদানের নির্দেশ প্রদান করা হলো। আমরা, অতঃপর, নিম্নে বর্ণিত আদেশ এবং নির্দেশনাসমূহ প্রদান করলামঃ

১। সংবিধানের অনুচ্ছেদ ৩২ মোতাবেক প্রদত্ত মৌলিক অধিকার তথা বেঁচে থাকার অধিকারের প্রমাণিত হরণ (Proved infringement) হলে সাংবিধানিক আদালত তথা হাইকোর্ট বিভাগ সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় ক্ষতিপূরণ প্রদান করতে এখতিয়ারসম্পন্ন।

২। সাংবিধানিক আদালত তথা হাইকোর্ট বিভাগ কর্তৃক সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় এ অধিকার প্রাইভেট আইন (Private Law)-এ প্রদত্ত ক্ষতিপূরণের দাবী আদায়ের অধিকারের অতিরিক্ত হিসেবে গণ্য হবে।

৩। সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক পূরণযোগ্য ক্ষতির অপরাধ সংগঠিত হলে ভিকটিম তথা মৃত ব্যক্তির পরিবারের যেকোন সদস্য অথবা তাহাদের পক্ষে যেকোন ব্যক্তি জনস্বার্থে হাইকোর্ট বিভাগে সংবিধানের অনুচ্ছেদ ১০২ এর আওতায় ক্ষতিপূরণ চেয়ে মামলা দায়ের করতে হকদার।

৪। সরকারী কর্মকর্তা-কর্মচারীগণ কর্তৃক কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠানসমূহ কর্তৃক পূরণযোগ্য ক্ষতির অপরাধ সংশ্লিষ্ট কর্মকর্তা-কর্মচারী কিংবা রাষ্ট্রের প্রতিষ্ঠান বা প্রতিষ্ঠান সমূহের কঠিন দায়বদ্ধতা (Strict liability)।

৫। ১৮টি পরিবারের প্রতিটি পরিবারকে ১৫ লক্ষ টাকা করে মোট ১৮ x ১৫,০০,০০০ = ২,৭০,০০,০০০/= (দুই কোটি ৭০ লক্ষ টাকা মাত্র) টাকা যার অর্ধেক BIWTC (৮নং প্রতিবাদী) এবং অর্ধেক CDC যা ৯নং প্রতিবাদী চেকের মাধ্যমে ক্ষতিগ্রস্থ পরিবারের কাছে অত্র রায় প্রাপ্তির ৩০ কর্মদিবসের মাধ্যমে হস্তান্তর করবে এবং ক্ষতিপূরণের অতিরিক্ত হিসেবে মামলা দায়েরের তারিখ থেকে শুরু করে ক্ষতিগ্রস্থদের একাউন্টে ক্ষতিপূরণের টাকা জমা পর্যন্ত প্রচলিত ব্যাংক রেট তথা ৮% হারে সুদ প্রতিবাদীগণ পরিশোধ করবে।

৬। দরখাস্তকারী মোঃ জহিরুল ইসলাম এবং বিজ্ঞ এ্যাডভোকেট আব্দুল হালিমকে ক্ষতিগ্রস্ত ব্যক্তিগণের পক্ষে জনস্বার্থে অত্র মামলা দায়েরের জন্য বিশেষ ধন্যবাদ জ্ঞাপন করা হলো।

৭। অত্র রায় ও আদেশের অনুলিপি বাংলাদেশের সকল পাবলিক ও প্রাইভেট বিশ্ববিদ্যালয়ের আইন বিভাগের চেয়ারম্যান বরাবরে ই-মেইলে এর মাধ্যমে প্রেরণের জন্য নির্দেশ প্রদান করা হলো।

৮। অত্র রায় ও আদেশের অনুলিপি অধস্তন আদালতের সকল বিচারককে ই-মেইল এর মাধ্যমে পাঠানোর জন্য সুপ্রীম কোর্টের রেজিষ্ট্রার জেনারেলকে নির্দেশ প্রদান করা হলো।

৯। অত্র রায় ও আদেশের অনুলিপি Judicial Administration Training Institute (JATI)-তে পাঠানোর জন্য সুপ্রীম কোর্টের রেজিষ্ট্রার জেনারেলকে নির্দেশ প্রদান করা হলো।

৭০. অত্র রায় ও আদেশের অবিকল অনুলিপি প্রয়োজনীয় ব্যবস্থা গ্রহণের নিমিত্তে সকল পক্ষকে দ্রুত অবহিত করা হোক।

**16 SCOB [2022] HCD 128**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**
WRIT PETITION NO. 8978 OF 2021

**M Nazim Uddin, son of late Md. Hafizuddin Mandal of House No. 14, Road No. 13, Sector-4, Police Station-Uttara East, Dhaka-1230 and another**
… Petitioners

-Versus-

**Bangladesh represented by the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Shahbag, Dhaka-1000 and others**
… Respondents

Ms. Fawzia Karim Firoze with Mr. Quazi Maruful Alam and Ms. Feroza Pervin, Advocates
…For the petitioners
Ms. Sadia Tasnim, Advocate
…For the respondent no. 7

Heard on 26.05.2022
Judgment on 08.06.2022.

**Present:**
**Mr. Justice Md. Mozibur Rahman Miah**
And
**Mr. Justice Khizir Hayat**

**Editors' Note:**
The petitioners, paternal grandparents of the minor children, filed this Writ petition after death of their son (father of the minors), seeking a direction to produce them before the Court so that the High Court Division can be satisfied that the minors are not being held in their mother's custody without lawful authority. Mother of the minor children contested the Rule and it transpired that between the parties suit for custody of the minor children is pending in Family Court in which Family Court issued various orders providing visitation right to the petitioners. But the claim of the petitioners was that even after such orders by the Court the mother of the minors did not let them to visit the minor children and therefore they were compelled to file the Writ Petition. The High Court Division talking with the minor children found that the minor children enjoy the company of their mother and have very cold relationship with the petitioner no.1. The High Court Division held that in deciding such cases "welfare of the minor" has to be given paramount importance and consequently decided that welfare of the minor children will be best served in the custody of their mother until disposal of the suit for custody pending in the Family Court. But petitioners can visit her house on mutual consent and understanding with the mother of the children and can meet them at any place, date and time on agreement but having no binding effect on the mother. It also directed the Family Court to complete the trial of the family suit expeditiously.

**Key Words:**
Custody of minor children; visitation right; Section 25 and 17 of Guardian and Wards Act, 1890; Article 102 of the Constitution of the People's Republic of Bangladesh;

**Custody of minor children:**

**Claiming of custody or of visitation right cannot be a matter of right and acquire by exerting force whatever the age of the minors may be. It totally depends on the welfare of the minors and that of the free wishes of the minor until and unless, the person whose custody the minor is staying loses his/her right. ...(Para 34)**

**Section 25 and 17 of Guardian and Wards Act, 1890:**

**In this aspect, we have also meticulously gone through the provision employed in section 25 of Guardian and Wards Act, 1890. The essence of such provision also denotes the welfare of a minor child in case of giving custody of his/her person or property. Section 17(2) of the Act ibid also reiterates the factors to be considered by the court in appointing guardian where in sub-section (3) has vested right upon the court to consider the issue of custody in case the minor is old enough to form an intelligent preference to stay. And that preference is to be assumed by the court considering surrounding circumstance. In both sections only "welfare of the minor" has been given paramount importance. ...(Para 36)**

**JUDGMENT**

**Md. Mozibur Rahman Miah, 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 respondent no. 7 (mother to the detenues) to show cause as to why she should not be directed to produce the detenues, minor girl, "Delisha Jahan Arikha" date of birth, 16.05.2011 and minor boy, "Jawad Al Zubair" date of birth, 13.09.2013 daughter and son of Most. Jannat Ara Khatun (respondent no. 7-mother) and late Niaz Mohammad Ashfaque-Ul Alam (only son of the petitioners) unlawfully detained by the said respondent no. 7 at an unknown location and bring them before this court in person directing the respondent no. 4 to assist this court by instructing the respondent no. 7 to bring the detenues so that, this court can be satisfied that the minors are not being held in custody without lawful authority or in unlawful manner and/or pass such other or further order or orders as to this court may seem fit and proper.

2. At the time of issuance the rule, this court also directed the respondent no. 7, mother of the minor children to produce them before this court in person on 21.11.2021.

3. The salient facts so have been figured in the instant writ petition are:

The petitioners are paternal grandparents of the detenues (hereinafter referred to as minor children) named, "Delisha Jahan Arikha" and "Jawad Al Zubair". Since their only son and the father of the minors children died on 27.08.2020 getting infected with Covid-19, the petitioner no. 1 and his wife petitioner no. 2 are now the legal guardian of the minor children as per Islamic principle of guardianship and are concerned of their well-being and have sufficient interest to file this writ petition. It has been stated that, petitioner's son, late Mr. Niaz Mohammad Ashfaque-Ul Alam (Father of the minor children) and respondent no. 7 (mother of the minor children) got married on 19.11.2009 following Islami Sharia fixing dower at taka 37,00,001/-. Thereafter, above 2(two) children were born out of the wedlock. On 29.08.2019, all of a sudden the respondent no. 7- mother went to the school of the minor children and submitted a false application stating that, both of them would be travelling abroad for medical purpose and picked up the minor children from the school and took them with her to her parents' house without consulting the late father of the children or the petitioners or notifying the whereabouts of the two children. It is worthwhile to mention here

that, the late father of the detenues divorced the respondent no. 7 that came into effect on 08.09.2019. However, during the lifetime, the father of the minor children on 15.10.2019 had filed a suit being Family Suit No. 906 of 2019 against the respondent no. 7 in the 5th Additional Assistant Judge and the Family Court, Dhaka claiming custody of the minor children. However, on an application under section 16A of the Family Courts Ordinance, 1985, the learned Judge on 20.11.2019 passed an interim order holding that, the minor children would be staying with their late father, every week for 2 days, i.e. from Friday 9.00 a.m. to Saturday 9.00 p.m. That order was however challenged by the respondent no. 7 in Family Appeal No. 223 of 2019 and the previous order was then modified maintaining that, 2nd and 4th Friday every month, the late father will visit his two minor children from 09.00 a.m. to 06.00 p.m. at a convenient place to be chosen by both parties. However, against the said order, the late father of the children filed a Civil Revision being Civil Revision No. 979 of 2020 before this court and the order passed earlier was modified on 16.08.2020 whereby late father was allowed to keep the minor children in his custody from 9.00 a.m. to 6.00 p.m. on 2nd and 4th Friday every month but unfortunately, the late father died on 27.08.2020 from Covid-19 before enjoying the fruit of the said order. It has further been sated that, before the demise of the father of the minor children, the petitioners had requested the respondent no. 7, mother and her family to allow the minor children to meet their father one last time but it was not heeded to. Even after the death of the late father of the minor children, the petitioners kept on requesting the respondent no. 7-mother and her family to allow the minor detenues to meet the petitioners and spend some time alone but to no avail.

4. Therefore, finding no other alternative, the petitioners have compelled to file another suit being Family Suit No. 782 of 2020 before the Assistant Judge, 5th Additional Court and Family Court, Dhaka where they submitted an application under 16A of the Family Court Ordinance, 1985 praying for an interim custody of the minor children only for a day in a week. The Family Court then by order dated 26.11.2020 allowed the petitioners to stay with the minor children from Friday 10.00 a.m. to Saturday 10.00 a.m. and the said order is reproduced below:

> "... পরবর্তী আদেশ না দেওয়া পর্যন্ত নাবালকদ্বয়কে সপ্তাহে ০১ দিন শুক্রবার সকাল ১০.০০ ঘটিকায় গ্রহণ ও শনিবার সকাল ১০.০০ ঘটিকায় বিবাদী মায়ের নিকট ফেরত প্রদান করবেন। ..."

5. But as the respondent no. 7 tried to avoid the said order of the Family Court, the petitioners then brought the matter to the notice of it and sought assistance of the police to enforce the order. Then, the Family Court by order dated 06.01.2021 modified its earlier order and debarred any third party except for the paternal grandparents of the minor children to be present at the time of their visitation. The said order in verbatim is as under:

> *"আদালতের ২৬.১১.২০২০ ইং তারিখের দাদা দাদীর সাথে দেখা করার আদেশ বলবৎ রাখা হলো। তবে শর্ত থাকে যে- দাদা দাদীর কথায় নাবালকদ্বয়ের উপস্থিতির সময় ফুপা-ফুপি বা অন্য কোনো তৃতীয় ব্যক্তি যার উপস্থিতিতে নাবালক বা নাবালিকার নিরাপত্তায় বিঘ্ন ঘটতে পারে তাদের উপস্থিত থাকা বারিত করা হলো। এ ক্ষেত্রে বিবাদী নিজে নাবালকদ্বয়কে তার দাদা দাদীর বাসায় পৌছে দিবে এবং দিয়ে নিজে নিশ্চিত হবে বাসায় দাদা দাদী ব্যতিরেকে তৃতীয় কোন ব্যক্তির উপস্থিতি নেই এবং পরবর্তীতে বাদী অর্থাৎ দাদা নাবালকদ্বয়কে তার মাতার বাসায় মাতার কাছে পৌছে দিবে।"*

6. However, against the said order, the respondent no. 7 took an appeal being Family Appeal No. 08 of 2021 before the court of District Judge, Dhaka and the said Appellate Court by order dated 21.01.2021 modified the order of the Family Court holding that:

> *"অত্র পারিবারিক আপীলটি উভয় পক্ষের সম্মতিতে পরিবর্তীত আকারে মঞ্জুর করা হলো। বিজ্ঞ নিম্নাদালত কর্তৃক প্রদত্ত বিগত ০৬.০১.২০২১ তারিখের আদেশটি পরিবর্তীতে আকারে সংশাধোন পূর্বক প্রতি সপ্তাহের শুক্রবার সকাল ১০ ঘটিকায় সময় রেসপনডেন্ট পক্ষ (নাবালকদ্বয়ের দাদা) একজন মহিলা আইনজীবীর উপস্থিতিতে আপীলকারী (মা)*

*এর নিকট হতে রেসপনডেন্ট (দাদা) এর বাসায় নিয়ে আসবেন এবং রাত ০৮.০০ ঘটিকার মধ্যে রেসপনডেন্ট পক্ষ (দাদা) নিজ দায়িত্বে আপীলকারী (মা) এর কাছে পৌছে দিবেন।"*

7. It has further been stated that, though the appeal was allowed with the consent of the parties, yet the respondent no. 7, mother filed a petition for review on 16.02.2021 being Family Review No. 77 of 2021 challenging the order stating that, she did not confer any authority on her lawyer to make consent on her behalf. However, the said review is still pending. It has also been stated that, even then the petitioners in compliance with the order of the Appellate Court, went to the house of respondent no. 7, mother to see the minor children when she and her father called journalists and cameramen from different news channel and those of hooligans of that area and threatened the petitioners with dire consequences and thus created a hostile environment which cast a negative impact on the nascent mind of the minor children and ultimately returned. Thereafter, the petitioners filed a series of General Diaries (GD) and applications to the Family Court below but it served no positive outcome and hence, the petitioners have filed the instant writ petition and obtained the rule and an interim direction made upon the respondent no. 7 to produce the minor children before this court, which has been complied with.

8. Ms. Fawzia Karim Firoze along with Mr. Quazi Maruful Alam, the learned counsels appearing for the petitioner upon taking us to the writ petition at the very outset submits that, in absence of the late father of the minor children, the petitioner no. 1 is their legal guardian and as such denying their custody and visitation rights, is totally illegal, unlawful and as such, the minor children should be set at liberty to be with the petitioners.

9. The learned counsel next submits that, the late father of the minor children fought to his last breath to get the custody of his children in the subordinate court and to the Hon'ble High Court Division and got favourable order but the respondent no. 7-mother on different excuses kept on debarring access of the minor children to their late father and now grandparents just to satisfy her personal grudge and as such, the minor children should be set at liberty to be with the petitioners.

10. The learned counsel further contends that, it is an unprecedented and inhuman approach denying all human values and humanity that, the respondent-mother did not allow the minor children to see the dead body of their late father- the only son of the petitioners which raises a big question about the morality, humanity, ethics and values of the respondent-mother which manifests that, the welfare of the children cannot be secured to a person who is unable to show minimum level of humanity even to a dead person and as such, the minor children should be set at liberty to be with the petitioners.

11. The learned counsel next contends that, the welfare of the children, general, moral and that of spiritual upbringing are being materially hampered due to the unlawful detention of the minor children with respondent-mother and her family.

12. When we pose a question to the learned counsel for the petitioners to show us the authority to the effect that, in absence of the father, the paternal grandparents are entitled to the custody of the minor child. In response to that, the learned counsel has referred a decision held in the case of *Haroon Rashid-vs-Additional District Judge of the Lahore High Court reported in 2018 MLD 1793* where in paragraph no. 6, it has been observed that, the maternal grandmother can be given visitation schedule in case of mother of a minor died over their

father and then submits that, the said principle is equally applicable in the facts and circumstances of the instant case.

13. The learned counsel in that connection further adds that, under the Guardian and Wards Act, 1890 the grandparents herein the petitioners are the legal guardian of the minor children in absence of their father and thus under no circumstances, can custody of the minor children be given in favour of their mother.

14. The learned counsel lastly contends that, the petitioners' lawful custody to the minor children in absence of their father is being denied by the respondent no. 7-mother unlawfully and in that respect, the learned counsel has thus placed her reliance on the decision in the case of *Abdul Jalil and others-Vs-Sharon Laily Begum reported in 50 DLR (AD) 55*. Insofar in regard to set a third place giving visitation right to the petitioners, the learned counsel has also referred an unreported judgment dated 08.03.2021 of the Appellate Division passed in civil petition for leave to appeal no. 942 of 2020 and finally prays for make the rule absolute.

15. On the flipside, Ms. Sadia Tasnim, the learned counsel appearing for the respondent no. 7 very robustly opposes the contention of the learned counsel for the petitioners and submits that, writ itself is not maintainable as the minor children have legally been staying with their mother, respondent no. 7 which can in no way be termed as without lawful authority.

16. The learned counsel by referring to paragraph no. 21 to the writ petition has also intensified the above submission contending that, since the respondent no. 7 with her two minor children attended a birthday party at hotel 'Westin' in the evening on 13.09.2021 hosted by the petitioner no. 1 on the order of the lower court so there has been no earthly reason to find that, the custody of the minor children with the respondent no. 7 be without lawful authority.

17. The learned counsel goes on to submit that, since the late father of the minor children divorced this respondent and before that, the children went through tormented situation and endured how their mother had been subjected to torture physically and mentally by their late father even without any resistance by the petitioners rather they gave indulgence to their late son to perpetuate such inhuman act on their mother so they got fearful whenever they came across with the petitioners and therefore, there is no point to give visitation right to the petitioners.

18. The learned counsel further submits that, the female child is close to attain puberty and at this juncture, physical presence of the respondent- mother with her is indispensible to dispel fear at this age of biological changes by morally boosting her but if visitation right is given at the residence of the petitioners or to stay with them, even for a certain time against her will, she will again go through mental trauma and therefore, petitioners are not entitled to any visitation right at their place or elsewhere.

19. By refuting to the contention of the learned counsel for the petitioner that, respondent no. 7 and her father had called journalists and photographers and local hoodlums when the petitioner no. 1 went to visit the minor children at the house of respondent no. 7, the learned counsel then asserts that, rather respondent no. 7 cordially greeted him (the petitioner no. 1) at her house but the minor children got scared seeing the petitioner no. 1 as they harkened back the harrowing event perpetrated by the their father

on their mother in presence of the said petitioner and hence the minor children may not be forced to be with the petitioners which might cause permanent mental injury affecting their normal growth. In regard to the submission of the learned counsel for the petitioners to give them visitation right even in a third place and that of the decision cited in that regard of the Appellate Division passed in civil petition for leave to appeal no. 942 of 2020, the learned counsel submits that, home is the only perfect place where the bond of relation can only be deepened and since such endeavour could not be materialized at home then in the birthday party celebrated at a hotel as revealed, so certainly the children will feel uncomfortable if any third place giving visitation right to the petitioners is given by this Hon'ble court, so the contention of the learned counsel for the petitioners to allow visitation right of the petitioners in a third place cannot be any viable option and thus not sustainable.

20. The learned counsel wrapped up her submission contending that, father is the legal guardian of a minor child but in the instant case, the unfortunate children lost their father prematurely and now their only shelter in the earth are left with their loving mother who has not yet married a second husband for the sake of welfare and upbringing of her minor children and has now become the legal guardian in absence of their deceased father and hence, the petitioners cannot force to have visitation right of the minor children as they have no regard to the petitioners and literally don't feel comfortable of their presence and thus prays for discharge of the rule.

**Deliberations**

21. We have considered the submission so advanced by the learned counsels for the petitioners and that of the respondent no. 7.

22. There has been no denying the fact that, the family suit being Family Suit No. 782 of 2020 filed by the petitioners under section 5 of the Family Courts Ordinance, 1985 is now pending before the Assistant Judge, 5th Additional Court and Family Court, Dhaka over the custody of the minor children. It is also admitted that, in regard to interim custody (or visitation right) finally the appellate court below (in Family Appeal No. 08 of 2021) vide order dated 21.01.2021 directed to bring the minor children by the petitioners from the house of the respondent no. 7 in presence of a lady Advocate at 10.00 a.m. every Friday of the month and to return to the house of the respondent no. 7 by 08.00 in the night also by the petitioners. However, that order is now under challenge by the respondent no. 7 in Family Review No. 77 of 2021.

23. It is the contention of the learned counsel for the petitioners that, even to give effect of the said order of the appellate court below, the petitioners went to the house of respondent no. 7 but the said order could not be implemented due to non-cooperation of the respondent no. 7 and her parents who exerted threat when they went to visit their grandchildren which actually compelled them to file this writ petition. During the midst of hearing placed at the bar, we even heard the petitioner no. 1 and respondent no. 7 personally finding them in the court-who traded blame to each other in regard to the situation stemmed from the visitation of the minor children. However, from the trend of the submission placed by the learned counsel for the contending parties, we assume that, the petitioners are now asking for visitation right of the minor children only whatever manner it be which actually brings the point-in-issue in a narrow space for adjudication of the instant rule.

24. In course of hearing, we also felt it expedient to converse the minor children and then asked the respondent no. 7 to produce them by 4.00 p.m. on 26.05.2022 at our office chamber. At that, the learned counsel for the petitioners urged the court not to converse the minor children in presence of their mother-respondent no. 7. We did so and accordingly, they were produced and at first place, we talked to the children in a playful manner which were mostly revolved around their education, their hobby, their daily routine and mode of transportation and the person accompanied them to and from their school. After that, we asked the petitioner no. 1 to join the conversation at our office chamber and moment he stepped into the room and greeted the children, they did not respond and remained calm. At this, when the petitioner tried to intimate himself with the children by reminding them about the gift he presented in the last birthday, both the children even kept silent. At this, we asked the children whether they knew the petitioner no. 1 and wanted to visit his house, they just nodded their head but declined to visit him. During ten minutes of stay at our chamber, the petitioner no. 1 had tried to impress the children to stay with him at any place at their will reminiscing happy moment of last birthday party at hotel Westin, but they did not utter a single word. At this, we asked the children why they were behaving so as the petitioner no. 1 adored them too much, then the girl child retorted that, he (petitioner no. 1) misbehaved with her mother when she lived with their late father at his house. As the children did not seem to have intimate with the petitioner no.1 and rather kept on feeling uncomfortable with the presence of the petitioner no. 1 and rather turned back their face from the petitioner no. 1, we then found it ungraceful for him and requested him to leave our chamber. Then we allowed respondent no. 7 in our chamber and as soon as she stepped into the room the male child jumped into her lap and it seemed to us that, both the children heaved a sigh of relief and started chatting with each other even without our intervention. At this, we wanted to know from her, respondent no. 7, how she would afford the cost in upbringing the minor children as she seemed to be a house maker, she then replied that, she already got herself involved with the business of her father and she needed no cooperation from the petitioner no. 1 to maintain her children. At the same time, she also said that, if the petitioner no. 1 voluntarily came forward assisting the minor children for their maintenance and cost of education she will accept that. Insofar as regard to visitation right of the petitioner no. 1 of the minor children, she assured that, petitioner no. 1 can visit her children at her residence but she was not in a mental position to allow the children to go to his house reasoning that, if they go there they will be traumatized remembering past painful event perpetrated on her by her late husband in presence of the petitioners. She further pleaded that, in absence of her late husband vis-à-vis the late father of the minor children, the visitation of the children by the petitioners at that house is rather an inhuman demand.

25. Basically, going by a slew of decisions passed on the issue of custody of minor child in our jurisdiction, we find that, the case in hand is a bit different from those of the common cases over claiming custody as well as visitation right of minor children. The case in hand, not the father of the children rather their paternal grandparents are seeking visitation right. In such an exceptional circumstances, we asked the learned counsel for the petitioners to refer authority where such right has been given to grandparents over their mother but the learned counsel failed to come up with any decision of this court or Appellate Division rather frankly submitted that she tried her best but failed to find any authority over that issue. However, at the fag-end of the hearing, the learned counsel has supplied us with an unreported decision of the Appellate Division dated 08.08.2021 passed in civil petition for leave to appeal no. 942 of 2020 related to giving visitation right in a third place then at the time of passing the Judge, a decision of Lahore High Court in regard to providing custody to a maternal grandparent discussed above.

26. On going through the first judgment, we find that, father of the minor children was directed to let her mother visit to the minor children at Westin hotel- a third place which the father had violated for none but for non-cooperation of the minor children. The fact figured in the said judgment appears to be totally different with the present one. Because, in the judgment referred, the children were old enough and at an impressionable age of 15 and 13 who kept on disrespecting their mother even at the third place (in presence of a lady Advocate appointed by the Appellate Division) ostensibly for taking second husband by their mother and sometimes the children had left the venue during visitation hour which their father actually could not control.

27.In line with the above decision, the learned counsel kept on harping for selecting a third place and to give visitation right to the petitioner no. 1 in the context of failure in carrying out such right at the residence of respondent no. 7 earlier.

28. But ironically, what we experienced ourselves with the attitude of the children shown to the petitioner no. 1 at our chamber does not impel to assume, it would serve any positive outcome if any third place is set giving visitation right to the petitioners. At our official chamber, the petitioner no. 1 had to leave his grandchildren (detenues) heartbroken and during his short stay, he tried his level best to impress the minor children but went in vein. However, only for that, we don't come to any conclusion negating such right of the petitioners because such attitude of the minor children towards in petitioner no. 1 could change with time but thing is that, at this stage, we don't find any convincing ambiance to select a third place giving visitation right to the petitioner no. 1.

29. Then again, in regard to giving short custody or visitation right of the grandparents over the mother, the decision cited of Lahore High Court is found to be totally distinguishable with the present case. In the cited case, the maternal grandmother was given custody over the father considering love, affection and maximum interaction with her which is totally absent in the instant case given the foregoing discussion where we found that a hostile atmosphere in regard to relationship let alone happy one among the petitioners and the minor children are now persisting.

30. The learned counsel for the petitioners has also relied upon a decision reported in *50 DLR (AD) 55 (Abdul Jalil and others-Vs-Sharon Laily Begum)*. In the said decision, two paramount *ratios* have been set at rest in regard to giving custody of a minor child which runs as under:

> *"**In a proceeding for Custody** of child it is not the rights of the parties but the rights of the child which are at issue.*
> *In the circumstances, we have come to the conclusion that the custody issue be decided upon evidence as to where the interest and welfare of the children actually lie. The High Court Division has not done it and we consider it inexpedient in the facts of the present case to decide the issue merely on the basis of affidavits and submissions."*
>
> *"**Normally the minor children** should be with their mother as long as she does not earn any disqualification for such custody and if there is a breach of this normal order brought about by a unilateral act of the father or anybody on his behalf, the aggrieved mother has the right to move the High Court Division under Article 102 of*

*the Constitution for immediate custody of the children which may be ordered in the interest and for the welfare of the children."*

31. In the second part of the cited decision, our Appellate Division has already settled that writ in habeas corpus in maintainable in claiming custody of a minor child if circumstance deserves so as quoted therein and then propounded that the wellbeing of the children would be best served with the mother and since the male child (in the cited decision mentioned above) had attained an impressionable age of 12 years his custody was then given to his father and all other three female children with their mother. In the face of the said settled proposition of our apex court, we have no hesitation to conclude that, the said decision rather goes in favour of the case of the respondent no. 7 as the facts described by the petitioners in the instant writ petitioner clearly runs opposite to the observation and finding of the said decision as the petitioners is not the father of the minor children, having no nexus with the facts cited in the decision.

32. [***][1]

33. We perceive that, the petitioners' want to forget their lost son embracing their grandchildren and look up their fond memory of their deceased son in the minor children and ready to do whatever the children require and thus pleaded for their pleasant company. We are not brushing aside the said sentiment. But in various decisions of our Appellate Division it has consistently been propounded that, to decide the custody of a minor child, it is none other than the welfare and wellbeing of the minor children which will be the determinant factor. So, the utmost priority to decide the issue of custody of a child vis-à-vis visitation right has to be determined only basing on the welfare of a child and of his/her happy upkeeping, herein the detenues.

34 . At the same time, we do not draw the line on visitation rights of the petitioners to their grandchildren. But it must be done basing on a cordial and mutual understanding among the contending parties and good wishes and free will of the minor children something we find it to be absent in the instant case at this moment. Under no circumstances, can the petitioners claim to have such visitation "as of right" and force the respondent no. 7 or the minor children to give such right against the free will of the minor children. Claiming of custody or of visitation right cannot be a matter of right and acquire by exerting force whatever the age of the minors may be. It totally depends on the welfare of the minors and that of the free wishes of the minor until and unless, the person whose custody the minor is staying loses his/her right. Even though it is presumed that their choice, desire or wishes to stay has got no basis at their tender age but both of them are found to be old enough to from an intelligent preference. (underlined by us for supplying emphasis).

35. Because, it has not been found from the record and that of the submission of the learned counsels of the parties that, the children were well-behaved with the petitioner no. 1

[1] *Expunged vide order dated 25 July 2022 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 1838 of 2022*

and co-operate with him whenever he visited them either in the house of the respondent no. 7 or a hotel let alone at our official chamber even in absence of their mother. At this, the learned counsel for the petitioners showed us some photographs where the petitioners, respondent no. 7 and her minor children sat together. However, the photographs do not show the reality of actual relationship as found from the hearing.

36. In this aspect, we have also meticulously gone through the provision employed in section 25 of Guardian and Wards Act, 1890. The essence of such provision also denotes the welfare of a minor child in case of giving custody of his/her person or property. Section 17(2) of the Act ibid also reiterates the factors to be considered by the court in appointing guardian where in sub-section (3) has vested right upon the court to consider the issue of custody in case the minor is old enough to form an intelligent preference to stay. And that preference is to be assumed by the court considering surrounding circumstance. In both sections only "welfare of the minor" has been given paramount importance.

37. On top of that, centring the substantive issue, a family suit is still pending before the family court who will finally decide whose custody the welfare of the minors children will be best served in absence of their father- which is also the essence of the first part of the decision reported in 50 DLR (AD) 55.

38. With the cumulative discussion and observation made hereinabove, we are of the view that, welfare of the minor children will be best served in the custody of respondent no. 7. But petitioners can visit her house on mutual consent and understanding with the respondent no. 7 and to meet the minor children at any place, date and time on agreement but having no binding effect on the respondent no. 7.

**Finding**

39. In the result, the rule is disposed of with above observations.

40. It is however declared that, the detenues named, Delisha Jahan Arikha and Jawad Al Zubair are not held in custody without lawful authority or in an unlawful manner rather the custody of the minor children with respondent no. 7 stands lawful.

41. The minor children named, Delisha Jahan Arikha and Jawad Al Zubair will remain in the custody of the respondent no. 7 till disposal of Family Suit No. 782 of 2020.

42. The learned Judge, 5th Additional Assistant Judge and Family Court, Dhaka is directed to dispose of Family Suit No. 782 of 2020 as expeditiously as possible.

43. However, the respondent no. 7 is hereby directed not leave the country with the said minor children without prior permission of the said Family Court.

44. Let a copy of this judgment be communicated to the learned Judge, 5th Additional Assistant Judge and Family Court, Dhaka forthwith.

**16 SCOB [2022] HCD 138**

**HIGH COURT DIVISION**

Death Reference No. 103 of 2016 with Criminal Appeal No. 7463 of 2016 with Criminal Appeal No. 7532 of 2016 with Criminal Appeal No. 7897 of 2016 with Jail Appeal No. 290 of 2016 with Jail Appeal No. 291 of 2016 with Jail Appeal No. 292 of 2016 with Jail Appeal No. 293 of 2016 with Jail Appeal No. 294 of 2016 with Jail Appeal No. 295 of 2016

**The State and others**
-Versus-
**Md. Rafiqul Islam and others**

Mr S. M. Abul Hossian with Ms Sahida Noor Nahar, Advocates
….For the condemned prisoner and appellant in Criminal Appeal No. 7463 of 2016.

Mr Golam Abbas Chowdhury with Mr Md. Aminul Islam and Mr Md. Muslim Uddin Bhuiyan, Advocates
….For the condemned prisoners and appellants in Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016.

Mr Md. Bashir Ullah, DAG with Mr Mohammad Shafayet Zamil, AAG with
Mr Md. Shamim Khan, AAG
....For the State in Criminal Appeal Nos. 7463 of 2016, 7532 of 2016, 7897 of 2016 and Jail Appeal Nos. 290 of 2016, 291 of 2016, 292 of 2016 and 293 of 2016, 294 of 2016 and 295 of 2016 and Death Reference No. 103 of 2016.

Heard on 21.03.2022,22.03.2022 & 23.03.2022.
Judgment on 29.03.2022.

**Present:**
**Mr. Justice Mohammad Ullah**
And
**Mr. Justice Md. Atoar Rahman**

**Editors' Note:**
In the instant case the dead body of the victim was recovered with a scarf around his neck. 3/4 days earlier a misunderstanding took place between the victim and a local female member and her husband centering their daughter which subsequently took a grave form. A death threat was openly given to the deceased by the accused persons. The informant suspected that the murder was the result of that dispute. The prosecution relied upon the circumstantial evidence. The trial Court found the accused guilty and accordingly sentenced them. The High Court Division, however, found that the prosecution had failed to prove the time, place and manner of and motive for the occurrence and adduced circumstantial evidence could not point to the guilt of the accused beyond any reasonable doubt. Consequently accused persons secured acquittal.

**Key Words:**
Section 302/34 of Penal Code; Section 342 of Code of Criminal Procedure; Time, place and manner; sufficiency of circumstantial evidence; motive;

**<u>Prosecution to prove time, place and manner:</u>**
**In the instant case, the rickshaw puller was a vital witness, but he was not produced before the Court by the prosecution. No GD entry was lodged about the alleged threat made by the accused persons. From the evidence of the informant (brother of the**

**deceased), it appears that he had no knowledge about by whom his brother was taken away from the street and murdered him when the victim allegedly at night following 09.02.2001 was going to his uncle's house at Narindi from Chalar Bazar through a rickshaw. In the following morning, the dead body of the victim was found in Singua Fakir Sahabuddin Girls High School with a scarf around his neck. It is not clear from the evidence as adduced by the prosecution that under what circumstances, wherefrom and when the deceased started for Narindi from Chalar Bazar through a rickshaw and wherefrom he was missing. So, the prosecution failed to prove time, place and manner of occurrence having produced reliable evidence and this case is based on unlinked circumstantial evidence. ...(Para 53)**

**Section 342 of the Code of Criminal Procedure, 1898:**
**Incriminating evidence if not drawn to the attention of the accused persons that causes gross miscarriage of justice:**
**In the instant case, it appears that incriminating evidence or circumstances sought to be proved against the accused persons were not drawn to the attention of the accused persons during examination under section 342 of Cr.PC caused a gross miscarriage of justice. The prosecution examined 11(eleven) witnesses as P.Ws but during the examination of the accused persons under section 342 of Cr.PC, the learned Judge mentioned that the prosecution examined 10(ten) witnesses inasmuch as the incriminating evidence was not drawn to the attention of the accused persons which caused a gross miscarriage of justice. ...(Para 54)**

**The rule as regards sufficiency of circumstantial evidence:**
**The rule as regards sufficiency of circumstantial evidence to be the basis of conviction is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of his guilt. If the circumstances are not proved beyond reasonable doubt by reliable and sufficient evidence and if at all proved but the same cumulatively do not lead to the inevitable conclusion or hypothesis of the guilt of the accused alone but to any other reasonable hypothesis compatible with the innocence of the accused then it will be a case of no evidence and the accused should be given benefit of doubt. If there is any missing link in the chain of circumstances, the prosecution case is bound to fail. In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond a reasonable doubt. If the witness examined to prove the circumstances are found to be unreliable or their evidence is found to be unacceptable for any other reason the circumstances cannot be said to have been proved and therefore there will be no occasion to make any inference of guilt against the accused. Circumstantial evidence required a high degree of probability, from which a prudent man must consider the fact that the life and liberty of the accused person depend upon his decision. All facts forming the chain of evidence must point conclusively to the guilt of the accused and must not be capable of being explained on any other reasonable hypothesis. Where all the evidence is circumstantial it is necessary that cumulatively its effect should be to exclude the reasonable hypothesis of the innocence of the accused. ...(Para 55)**

**It is the established principle that the circumstances to be related upon by the prosecution must be fully established and the chain of evidence furnished by the circumstances should be so far complete as not to leave any reasonable ground for a**

**conclusion consistent with the innocence of the accused. The prosecution should have to prove various links in the chain of evidence to connect the accused and must clearly be established. The complete chain must be such as to rule out a reasonable likelihood of the innocence of the accused. The court is required to satisfy its test to prove a case on circumstantial evidence. Firstly, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. Secondly, those circumstances must be of a definite tendency are unerringly pointing toward the guilt of the accused, and thirdly, the circumstances taken cumulatively should follow a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. ...(Para 56)**

**It is a settled law that suspicion or doubt however strong might be, cannot be the basis of conviction. ...(Para 59)**

**<u>When to prove motive in a criminal case:</u>**
**In criminal cases, the prosecution is not required to prove the motive behind the crime but if the prosecution assigned the motive behind the crime, it must prove it.**
**...(Para 62)**

## JUDGMENT

**Mohammad Ullah, J:**

1. This Reference has been made by the learned Additional Sessions Judge, 1st Court, Gazipur (Trial Court) to this Division under section 374 of the Code of Criminal Procedure for confirmation of the death sentence awarded upon condemned prisoners (1) Md. Rafiqul Islam, son of Abdur Razzak, (2) Anar Hossain, son Shamsuddin Sheikh, (3) Selim, son of Nizam Uddin Sheikh, (4) Noyon, son of Bashir Uddin Sheikh, (5) Atikul Islam, son of Abdur Razzak and (6) Alam Sheikh, son of Shamsuddin Sheikh. The Trial Court having found the condemned prisoners guilty of the offence punishable under sections 302 and 34 of the Penal Code convicted them under section 302 of the Penal Code and sentenced them thereunder to death with a fine of taka 10,000/-(ten thousand) each, by the judgment and order dated 09.08.2016 in Session Case No. 181 of 2003. The Trial Court also having found the appellants Anwara Begum (now deceased), Abdul Motaleb and Sheikh Shamsuddin guilty of the offence punishable under sections 302 and 34 of the Penal Code convicted them under section 302 of the Penal Code and sentenced them thereunder to suffer rigorous imprisonment for life with a fine of taka 10,000/-(ten thousand) each, by the above mentioned judgment and order dated 09.08.2016. Against the said judgment and order of conviction and sentence dated 09.08.2016, passed by the learned Additional Sessions Judge, 1st Court, Gazipur in Session Case No. 181 of 2003, the condemned prisoners Selim, Md. Rafiqul Islam, Atikul, Noyon, Alam Sheikh (now deceased), and Anar Hossain preferred Jail Appeal Nos. 290 of 2016, 291 of 2016, 292 of 2016, 293 of 2016, 294 of 2016 And 295 of 2016 respectively. Against the impugned judgment and order of conviction and sentence dated 09.08.2016 the condemned prisoners Rafiqul Islam, Anar Hossain, Noyon, Atikul Islam and Alam Sheikh (now deceased) preferred regular Criminal Appeal No. 7532 of 2016, convict-appellants Most. Anwara Begum (now deceased), Abdul Motaleb and Sheikh Shamsuddin preferred regular Criminal Appeal No. 7897 of 2016, while condemned prisoner Selim preferred regular Criminal Appeal No.7463 of 2016.

2. As the Death Reference No. 103 of 2016 as well as the above-numbered appeals have arisen out of the self-same judgment and order have been taken up together for hearing and being disposed of by this single judgment.

3. The prosecution case, in short, is that the informant Md. Asaduzzaman (P.W.1) aged about 28 years, son of Jasim Uddin (P.W.5) of village Gagtia Uttar Para, Police Station-Kapasia, District-Gazipur lodged a First Information Report (FIR) on 10.02.2001 at 1:30 pm with the Officer-in-Charge, Kapashia Police Station, Gazipur alleging, *inter alia,* that his younger brother Sanaullah, aged about 20 years, on 09.02.2001 at about 10:00 pm went to Chalar Bazar after finishing his dinner and therefrom for personal reasons he started for his uncle's house located at Narindi village under Monohordi Police Station. On the following day on 10.02.2001 at about 7:00 am the informant came to know from the public that the dead body of his brother Sanaullah was lying on the floor in Singhua Fakir Sahabuddin Girls High School with a scarf around his neck. Having been informed about the incident, the informant along with his brother Atiqul Islam (P.W.3), uncle Babul Mia (P.W.7), neighbour Hafijuddin, uncle Khabiruddin, another uncle Nasiruddin (P.W.9), one Siddiqur Rahman, and 20/25 others went inside the said classroom and found his brother lying therein wearing a red tracksuit and a scarf around his neck. After touching the body, the informant realised that his brother had passed away. From the nose of the deceased foam was coming out and his whole body was covered in dust and two T-shirts of the deceased were also found torn. Before 3/4 days of the incident a misunderstanding took place between the informant's brother and the local female member convicted Anwara and her husband convicted Motaleb regarding their daughter Mariam which subsequently took a grave form. A death threat was openly given to the deceased by the accused persons. The informant suspected that the accused persons namely Md. Rafiqul Islam, Atiqul, Abdul Motaleb, Anwara (now deceased), Alam Sheikh (now deceased), Anar Hossain, Shamsuddin Sheikh, Bashir Uddin (now deceased), Nizam Uddin Sheikh (now deceased), Selim, Noyon and Kamal (now deceased) strangled his brother to death taking him forcibly from the road to Monohordi. After the incident, the informant inferred from the attitude of the accused persons that they were indeed the murderers.

4. Accordingly, Kapasia Police Station Case No.7 dated 10.02.2001, under sections 302 and 34 of the Penal Code was recorded which subsequently gave rise to G.R. Case No. 37 of 2001.

5. The police during investigation into the case, visited the place of occurrence, prepared a sketch map along with index thereof, examined the witnesses under section 161 of the Code of Criminal Procedure and arrested 7(seven) accused persons, upon completion of the investigation having found a prima-facie case, the Investigating Officer submitted Police Report against twelve suspected persons including the condemned prisoners and convict-appellants recommending their trial under sections 302 and 34 of the Penal Code.

6. After submission of the charge sheet, the case record was transmitted to the court of Sessions Judge, Gazipur wherein Session Case No. 181 of 2003 was recorded. Thereafter the same were transferred to the learned Additional Sessions Judge, 1st Court, Gazipur for trial and disposal who framed charges against all the accused persons including condemned prisoners and the appellants under sections 302 and 34 of the Penal Code and the same were read over and explained to the accused persons, present in Court, to which they pleaded innocence and claimed to be tried.

7. The prosecution to bring home the charges against the accused persons examined in total 11(eleven) witnesses as P.Ws who were cross-examined by the defence. Thereafter, the accused persons, present in the Court, were examined under section 342 of the Code of

Criminal Procedure to which they further claimed innocence and expressed their unwillingness to produce any defence witness.

8. The defence version of the case, as it appears from the trend of the cross-examination of the prosecution witnesses, is that the accused persons are innocent and have falsely been implicated in the case.

9. The learned Additional Sessions Judge, 1st Court, Gazipur after considering the evidence on record having found the condemned prisoners and the appellants guilty under sections 302 and 34 of the Penal Code convicted and sentenced by the impugned judgment and order dated 01.08.2016 and made the reference for confirmation of the death sentence, imposed upon the condemned prisoners as aforesaid.

10. Being aggrieved by and dissatisfied with the impugned judgment and order the convict-appellants have preferred the above jail appeals and regular appeals.

11. Mr. Md. Bashir Ullah learned Deputy Attorney General appears for the State to support the reference as made by the learned Additional Sessions Judge, 1st Court, Gazipur and to oppose the appeals.

12. The learned Deputy Attorney General (DAG) taking us to the FIR, 161, 342 and the evidence on record submits that the condemned prisoners and the appellants in furtherance of their common intention have murdered the victim and as such the impugned judgment and order of conviction and sentence are not liable to be interfered with by this Court and the reference is deserve to be accepted.

13. The learned DAG having placed the evidence on record submits further that the prosecution upon producing reliable, credible and impartial witnesses proved the charge beyond reasonable doubt and, as such, the conviction and sentence as passed by the Trial Court should not be interfered with by this Court.

14. The learned DAG again submits that the circumstantial evidence is more convincing and cogent than the evidence of the eyewitness.

15. He adds that a witness can tell a lie but a circumstance does not.

16. The learned DAG in this regard seeks to rely on the decision in the case of the State Vs. Md. Aynul Haque reported in BCR (2004) 220.

17. The learned DAG also submits that the Trial Court drew the attention of the accused persons to the main incriminating pieces of evidence against them and mere omission on the part of the Trial Court to specifically draw the attention of the accused persons to the incriminating evidence does not always cause prejudice to them.

18. The learned DAG in this regard seeks to rely on the decision in the case of Mezanur Rahman and others Vs. The State reported in 16BLD(AD)(1996)293. With this submission, he prays for acceptance of the Death Reference and dismissal of the Appeals.

19. On the other hand, Mr Golam Abbas Chowdhury, learned Advocate appearing for the condemned prisoners and appellants in Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016

submits that it is a case of subsequent embellishment. It is a case of no evidence and no link among the circumstantial evidence has been proved by the prosecution. A vital witness, rickshaw puller, had not come to the Court for which the circumstantial evidence could not be linked to the crime and murder of the deceased Sanaullah.

20. Mr Md. Aminul Islam, learned Advocate appearing for the condemned prisoners as well as the appellants in Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016 submits that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime but in the instant case, the prosecution failed to prove the connection between the accused and the crime and hence based on such circumstantial evidence the conviction and sentence is a serious miscarriage of justice.

21. The learned Advocate in support of his above submission places reliance on the case of Balwinder Singh Vs. State of Punjab, reported in AIR 1996 (Supreme Court) 607.

22. In this regard, he also relied upon the decisions in the cases of State Vs. Arman Ali and others, reported in 42 DLR (AD) (1990) 50 and the case of Sree Robindra Nath Roy @ Rabindra and another Vs. The State, reported in 17 MLR (AD) 253.

23. The learned Advocate having relied upon the principle made in the aforesaid reported cases submits further that in a case of circumstantial evidence, the circumstances must be conclusive in nature and if two inferences are possible from the circumstantial evidence, one pointing to the guilt of the accused and the other also plausible that the commission of the crime was the act of someone else, the circumstantial evidence would not warrant for conviction of the accused.

24. The learned Advocate having placed a decision of Indian Jurisdiction, reported in AIR (2020) (Supreme Court) 180, submits that when the evidence adduced against the accused persons does not form a complete chain connecting them with the crime the accused persons are entitled to get benefit of the doubt.

25. He next submits that it is a well-settled principle that suspicion however strong cannot be a substitute for proof of a murder charge.

26. The learned Advocate in this regard relied on a decision in the case of Swapan Vs. The state reported in 1MLR 205.

27. The learned Advocate lastly submits that the examinations of the condemned prisoners under section 342 of the Code having been done perfunctorily has seriously prejudiced them as incriminating evidence or circumstances sought to be proved against them was not put to their notice during examination under section 342 causing gross miscarriage of justice.

28. In support of his above submission, the learned Advocate places reliance on the case of the State Vs. Monu Miah and others reported in 54 DLR(AD) (2002)60.

29. Mr Moslim Uddin Bhuiyan, learned Advocate for the condemned prisoners as well as the appellants in Criminal Appeal No. 7532 of 2016 and 7897 of 2016 submits that P.Ws. 3, 4, 7 and 9 in their statements, recorded under section 161 of the Code of Criminal Procedure, did not mention about the threat and searching of the victim on 09.02.2001 in the evening by

the accused persons and their evidence before the Court are beyond their previous statements made to the Investigation Officer which ought to have been taken into consideration by the Trial Court but in the instant case, the Trial Court without considering such discrepancy convicted the condemned prisoners and appellants which should be interfered with by this Court.

30. In support of his above submission, the learned Advocate places reliance on the case of the State Vs. Abdul Aziz and another reported in 23DLR (1971) 91 wherein it has been held that-

*"When the defence fails to use the previous statement of a witness for contradicting him under section 161 of the Code of Criminal Procedure the Judge can himself put questions under section 165 of the Evidence Act in order to bring the discrepancies on record.*

31. Mr S.M. Abul Hossain learned Advocate appearing for the condemned prisoner Selim submits that the FIR, Statements, recorded under section 161 of the Code, charge sheet and evidence of the prosecution have not been corroborated with each other and, as such, based on such unlinked circumstantial evidence the conviction and sentence are not well-founded and liable to be set aside.

32. The learned Advocate submits further that vital witnesses namely Farida, Abul Hossain, Abdus Samad Sardar, Siddiqur Rahman, Habibur Rahman, Ashraf Ali, Khokon Mia, Jahangir Alam, Kiron Mia, Golam Mostafa, Afaz Uddin, Manik Mia, Nobi Mia, Akbar Ali Majhi and Habibullah were not examined by the prosecution.

33. The learned Advocate submits that if those vital witnesses were examined by the prosecution they would not have supported the prosecution case.

34. The learned Advocate again submits that there is no legal evidence available on record to support the conviction and sentence as awarded against condemned prisoners and he prays for rejection of the Death Reference as well as acquittal of the condemned prisoners.

35. The learned Advocate finally submits that there is no legal evidence available on record to justify the death sentence as awarded to condemned prisoner Selim.

36. With the above submissions, all the learned Advocates for the condemned prisoners and the appellants pray for allowing the appeals as well as rejection of the death reference and pray for acquittal of the condemned prisoners and the appellants.

37. It appears from the record that the condemned prisoner Alam Sheikh was one of the appellants in Criminal Appeal No. 7532 of 2016 who died on 05.10.2021 and convict Most. Anwara Begum one of the appellants in Criminal Appeal No. 7897 of 2016 also died on 16.09.2019. In such facts and circumstances, the Death Reference and Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016 would be abated so far it relates to the condemned prisoner Alam Sheikh and appellant Most. Anwara Begum.

38. To appreciate the arguments set forth by the learned Advocates of the contending parties we are to see the evidence adduced by the prosecution in justifying the death sentences as well as in awarding the life sentences.

39. For coming to a proper decision about the sustainability of the impugned judgment and order of conviction and sentence we need to assess and examine the evidence on record keeping in view of the charge framed. Accordingly, the relevant evidence on record are briefly discussed below.

40. It has already been mentioned that the prosecution produced and examined as many as 11(eleven) witnesses in order to prove the charge. Of them P.W. 1 Md. Asaduzzaman is the brother of the victim Sanaullah and the informant of the case; P.W. 2 Tara Miah at the relevant time was a member of the Managing Committee of the school; P.W. 3 Md. Atiqul Islam is the elder brother of the deceased Sanaullah and a brother of the informant, P.W. 4 Golam Mostafa is a neighbour; P.W.5 Md. Jashim Uddin is the father of the deceased Sanaullah; P.W. 6 Habibur Rahman is cousin of the deceased and at the time of the incident he was a student of class II. P.W. 7 Md. Babul Miah is the uncle of the deceased and also a seizure-list witness; P.W. 8 Dr Md. Haider Ali Khan who held the post-mortem of the body of the deceased; P.W. 9 Nasir Uddin alias Khokon is the uncle of the informant; P.W.10 Md. Mojibor Rahman Sub Inspector of Police who investigated the case and P.W. 11 Ismail Hossain is the maternal uncle of the deceased.

41. The P.W. 1 Md. Asaduzzaman, brother of the deceased and son of the P.W. 5 Md. Jashim Uddin deposed that accused Anwara and her husband Motaleb along with other accused persons made a complain to the father of the informant (P.W. 5) about the alleged outraged of modesty of their daughter Mariam by the deceased Sanaullah and at that time they threatened that they will pass judgment by themselves. He again deposed that accused Motaleb on 09.02.2001 went to his father's house and threatened them saying that might is right (জোর যার মুল্লুক তার). After that accused Motaleb left their home and in the morning of the following day, the dead body of Sanaullah was found in a schoolroom. But from the evidence of P.W. 5, father of the P.W. 1 (informant) we do not find such threat allegedly given by the accused Anwara and Motaleb, even P.W. 5 did not say that the accused Anwara and Motaleb at any point of time went to their house and threatened them with a dire consequence about the alleged outraged of modesty of Mariam, daughter of the accused Anwara and Motaleb.

42. P.W. 2 Tara Mia being a member of the Managing Committee of the school testified that the accused Anwara had made a compliant against the deceased Sanaullah to the Head Master of the School and after investigation they found that the allegation was false. He stated in his examination in cross that-

ডকে উপস্থিত আসামীদের চিনি। ডকে দাড়ানো আসামীরা সানাউল্লাকে হত্যা করেছে এই কথা আমি শুনি নাই।

So, this P.W. 2 had no knowledge about the assailants of the deceased Sanaullah.

43. P.W. 3 Md. Atiqul Islam, elder brother of the deceased Sanaullah and also a brother of the informant, though stated that on 09.02.2001 at 8.00 pm accused Selim, Motaleb, Rafiqul and Alam were searching for the whereabouts of the victim Sanaullah, but this P.W. 3, when made statement to the Investigation Officer, recorded under section 161 of the Code of Criminal Procedure, did not say as such, so inference can be drawn that the said accused persons did not search for the whereabouts of the deceased Sanaullah.

44. P.W. 4 Md. Golam Mostafa stated about searching for the deceased Sanaullah by accused Rafiqul and his companion accused Alam Sheikh, Anar Hossain and he told that fact

of searching to the uncle of deceased Md. Babul Mia, P.W. 7 but P.W. 7 did not say so in his evidence.

45. P.W. 6 Habibur Rahman on the date of occurrence was a student of class II. From his evidence, it appears that he had no knowledge about the assailants of the deceased Sanaullah.

46. P.W. 7 Md. Babul Mia, uncle of the deceased, stated the fact of threat, given by some of the accused persons, saying that "might is right". This P.W. 7 stated in his cross-examination that he was present at Salish held about the alleged outraged of modesty of daughter of accused Motaleb and Anwara, but from the evidence of the P.W. 2, a member of the Managing Committee and other evidence on record we do not find that he was at all present at so-called Salish allegedly held regarding misunderstanding about Mariam daughter of accused Anwara and Motaleb.
In his cross-examination, he again said that –
আসামীরা সানাউল্লাহকে মারিয়াছে উহা আন্দাজ করিয়া বলিয়াছি। সানাউল্লাহকে আসামীরা ডাকিয়া নিয়া গিয়াছে, কিংবা সানাউল্লাহকে আসামীরা খুন করিয়াছে ইহা আমাকে কেউ বলে নাই।
So, from the evidence of this P.W. 7, it appears that in fact, he had no knowledge about the killing of the deceased Sanaullah.

47. P.W. 8 Dr Md. Ali Haider held post-mortem of the body of the deceased Sanaullah; who found the following injuries on the dead body.

"(1) One circular Bruise around the neck having five cm breadth.
(2) One Abrasion back of the neck on the left side (3 X 1) cm.
(3) Swelling over the centre of the forehead (2 X 1) cm."

Finally, P.W. 8 made his opinion about the death of Sanaullah that "Death was due to asphyxia resulting from strangulation which was Ante-mortem and Homicidal in nature".

48. P.W. 9 Nasir Uddin alias Khokon, uncle of the informant, though in his examination-in-chief stated that he along with accused Motaleb went to Chalar Bazar on Friday evening and accused Atiqul, Rafiqul, Motaleb, Noyon, Kamal, Alam along with 7/8 persons were searching about the whereabouts of deceased Sanaullah.

49. However, we have meticulously examined the evidence of P.W. 9 and have seen his statement made to the Investigation Officer during the investigation of the case, recorded under section 161 of the Code of Criminal Procedure, wherefrom it transpires that he did not say as such about searching the whereabouts of the victim Sanaullah by the accused persons.

50. P.W. 10 Md. Mojibor Rahman, Sub-Inspector of Police was the Investigating Officer of the case who arrested 7(seven) accused persons and on his prayer, the accused persons were taken into remand but they did not say anything about the killing of deceased Sanaullah nor make any statement under section 164 of the Code of Criminal Procedure, even the accused persons did not make any extra-judicial confessional statement about the occurrence. He visited the place of occurrence and prepared a sketch map and index. He prepared an inquest report and sent the dead body for post-mortem report.

51. After investigation, he submitted charge sheet against all the accused persons having been found prima facie case against them punishable under sections 302/34 of the Penal Code. He produced and proved the sketch map Exhibit-5, his signature therein Exhibit-5/1, the index Exhibit-6, his signature therein marked Exhibit-6/1, the seizure list Exhibit-7, his signature therein Exhibit-7/1, another seizure list dated 13.02.2001 Exhibit-8 and his

signature therein Exhibit-8/1. He also produced an application filed by accused Anwara Begum to the Headmaster of the school which was marked as Exhibit-9.
In his cross-examination, this P.W. 10 stated that-

> "Deceased রাত্র ১০ টায় চালার বাজার যায়। সেখান থেকে মনোহরদী চাচার বাড়ীর দিকে রওনা হয়। deceased এর বাড়ী হইতে চালার বাজার কতদুরে জানা নাই। তদন্ত কালে রিক্সা ওয়ালাকে পাই নাই।..... .....
> আসামীদের গ্রেফতার করিয়াছিলাম এবং Remand এর আবেদন করি। আসামী আতিকুল ও মোতালেবকে Remand এ নেই। কিন্তু তাহারা মামলার ঘটনার বিষয়ে কিছুই স্বীকার করে নাই। পরে আরও ২ জনকে Remand এ নেই। তাহারাও অপরাধের কথা স্বীকার করে নাই। আসামীদের নিকট হইতে কিছু তথ্য পাওয়া গিয়াছে। মর্মে উল্লেখ আছে। বাদী পক্ষের কারও কাছ থেকে কোন আলামত পাই নাই। পুলিশের কনষ্টেবল এর নিকট হইতে লাশের গায়ের আলামত পাওয়া যায়। আমি ২১ জনের জবানবন্দী ফৌঃ কাঃবিধির ১৬১ ধারামতে রেকর্ড করি। উক্ত সাক্ষীদের মধ্যে কেহ Deceased সানাউল্লাহকে হত্যা করিতে দেখিয়াছে মর্মে কোন সাক্ষী নাই। deceased সানাউল্লাহকে কে রিক্সা থেকে নামাইয়া হত্যার ঘটনাস্হল স্কুলে নিযা. যাইতে দেখার কোন সাক্ষীও আমি পাই নাই।

52. P.W. 11 Ismail Hossain, maternal uncle of the deceased, stated that he found the dead body of victim Sanaullah in a room of Hatibandha Primary School under Gaktia Union with a scarf around his neck. But the other evidence on record shows that the dead body of deceased Sanaullah was found on a floor in Singhua Fakir Sahabuddin Girls High School.
In his cross-examination, he stated that-

> সানাউল্লাহ কিভাবে মারা যায় জানি না । মারা যাওয়ার খবর পাইয়া আমিও গেছি আরো অনেক লোক গেছে।

So, from the evidence of this P.W. 11 it transpires that in fact, he had no knowledge about the cause of death of victim Sanaullah, even in his deposition he mentioned a different place than the real place of occurrence.

53. In the instant case, the rickshaw puller was a vital witness, but he was not produced before the Court by the prosecution. No GD entry was lodged about the alleged threat made by the accused persons. From the evidence of the informant (brother of the deceased), it appears that he had no knowledge about by whom his brother was taken away from the street and murdered him when the victim allegedly at night following 09.02.2001 was going to his uncle's house at Narindi from Chalar Bazar through a rickshaw. In the following morning, the dead body of the victim was found in Singua Fakir Sahabuddin Girls High School with a scarf around his neck. It is not clear from the evidence as adduced by the prosecution that under what circumstances, wherefrom and when the deceased started for Narindi from Chalar Bazar through a rickshaw and wherefrom he was missing. So, the prosecution failed to prove time, place and manner of occurrence having produced reliable evidence and this case is based on unlinked circumstantial evidence.

54. In the instant case, it appears that incriminating evidence or circumstances sought to be proved against the accused persons were not drawn to the attention of the accused persons during examination under section 342 of Cr.PC caused a gross miscarriage of justice. The prosecution examined 11(eleven) witnesses as P.Ws but during the examination of the accused persons under section 342 of Cr.PC, the learned Judge mentioned that the prosecution examined 10(ten) witnesses inasmuch as the incriminating evidence was not drawn to the attention of the accused persons which caused a gross miscarriage of justice. We find support of our aforesaid view, in the case of Mizanul Islam @ Dablu Vs. the State, reported in 41 DLR (AD) 157, wherein it was held that-

> *"Incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 of Cr.PC otherwise it would cause a miscarriage of justice to the great prejudice of the accused."*

Let us address the principle of circumstantial evidence from our jurisdiction as well as Indian decisions.

55. The rule as regards sufficiency of circumstantial evidence to be the basis of conviction is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of his guilt. If the circumstances are not proved beyond reasonable doubt by reliable and sufficient evidence and if at all proved but the same cumulatively do not lead to the inevitable conclusion or hypothesis of the guilt of the accused alone but to any other reasonable hypothesis compatible with the innocence of the accused then it will be a case of no evidence and the accused should be given benefit of doubt. If there is any missing link in the chain of circumstances, the prosecution case is bound to fail. In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond a reasonable doubt. If the witness examined to prove the circumstances are found to be unreliable or their evidence is found to be unacceptable for any other reason the circumstances cannot be said to have been proved and therefore there will be no occasion to make any inference of guilt against the accused. Circumstantial evidence required a high degree of probability, from which a prudent man must consider the fact that the life and liberty of the accused person depend upon his decision. All facts forming the chain of evidence must point conclusively to the guilt of the accused and must not be capable of being explained on any other reasonable hypothesis. Where all the evidence is circumstantial it is necessary that cumulatively its effect should be to exclude the reasonable hypothesis of the innocence of the accused.

56. It is the established principle that the circumstances to be related upon by the prosecution must be fully established and the chain of evidence furnished by the circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The prosecution should have to prove various links in the chain of evidence to connect the accused and must clearly be established. The complete chain must be such as to rule out a reasonable likelihood of the innocence of the accused. The court is required to satisfy its test to prove a case on circumstantial evidence. Firstly, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. Secondly, those circumstances must be of a definite tendency are unerringly pointing toward the guilt of the accused, and thirdly, the circumstances taken cumulatively should follow a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The Indian Supreme Court held the essential ingredients to prove guilty of an accused person by circumstantial evidence which are: (1) The circumstances from which the conclusion is drawn should be fully proved; (2) the circumstances should be conclusive in nature; (3) all the facts so established should be consistent only with the

hypothesis of guilt and inconsistent only with the hypothesis of guilt and inconsistent with the innocence and (4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused.

57. It appears that a misunderstanding was existing between the parties before the occurrence over the alleged outrage of modesty of Mariam daughter of convict Motaleb and Anwara by deceased Sanaulla.

58. In this connection, the time gap that occurred between the discovery of the dead body of the victim and the lodging of the FIR needs to be noticed. The informant got the information about the death of his brother Sanaullah at about 7.00 am on 10.02.2001 and the FIR was lodged after 8 hours of such information. Thus, it appears that 8 hours of time was available under the disposal of the informant for consultation and deliberation. But the informant did not mention anything in the FIR about the threat allegedly given by the accused persons saying that "might is right" and alleged searching in the evening on 09.02.2001 about the whereabouts of victim Sanaullah by the accused persons.

59. So, prosecution evidence about the threat and search for the victim Sanaullah in the evening on 09.02.2001 appears to be subsequent embellishment and nothing else. In the FIR itself, it is noted that the accused persons are suspected to be the murderer of the brother of the informant. It is a settled law that suspicion or doubt however strong might be, cannot be the basis of conviction.

60. The trial Court has misconceived the principle of dealing with circumstantial evidence. It appears that none of the circumstantial evidence referred by the trial Court in his judgment points conclusively to the guilt of the condemned prisoners as well as the appellants. Therefore, such circumstantial evidence being not compatible with the conviction of the condemned prisoners as well as the appellants cannot form the basis of conviction.

61. A criminal trial is not like a fairy tale as one is free to give flight to one's imagination and fantasy. It concerns itself with the question of whether the accused arranged at trial is guilty of the crime with which he is charged. Crime is evil in real life and the product of the interplay of different human emotions. In arriving at the conclusion of the guilt of the accused, the court has to judge the guilt by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. Although benefits of reasonable doubt should be given to the accused. Of course, the court at the same time rejects evidence that ex-facie is unreliable and too artificial.

62. In criminal cases, the prosecution is not required to prove the motive behind the crime but if the prosecution assigned the motive behind the crime, it must prove it. But in the instant case, though the prosecution assigned a motive behind the cause of death of deceased Sanaullah, it failed to prove such motive beyond a reasonable doubt.

63. About the decisions, as referred to by the learned DAG, we find the same is not applicable in the context of present facts and circumstances of the case in hand and accordingly the same is not discussed. On the other hand, we find a good deal of force in the submissions, as well as the decisions, referred to by the learned Advocates for the condemned prisoners and respective appellants.

64. Thus, having considered the entire evidence on record, facts and circumstances, we are of opinion that order of conviction is not sustainable in law.

65. In the result, the Death Reference No. 103 of 2016 in respect of condemned prisoners (1) Md. Rafiqul Islam, son of Abdur Razzak (2) Anar Hossain, son of Shamsuddin Sheikh (3) Selim, son of Nizam Uddin (4) Noyon, son of Bashir Uddin and (5) Atiqul Islam, son of Abdur Razzak is rejected. The order of conviction and sentence passed by the learned Additional Sessions Judge, 1st Court, Gazipur in Sessions Case No. 181 of 2003 is hereby set aside and the condemned prisoners and the appellants are found not guilty to the charge levelled against them and they are set at liberty forthwith if not wanted in any other case.

66. The Death reference, Jail Appeal No. 294 of 2016 as well as Criminal Appeal No. 7532 of 2016 so far relates to condemned prisoner Alam Sheikh being abated at his death during the pendency of the appeal.

67. The Criminal Appeal No. 7897 of 2016 so far relates to the convict-appellant Anwara Begum being also abated at her death.

68. The Criminal Appeal No. 7532 of 2016 preferred by the convict-appellants Rafiqul Islam, Anar Hossain, Noyon, Atiqul Islam is allowed. Similarly Criminal Appeal No. 7897 of 2016 preferred by convict-appellant Abdul Motaleb and Sheikh Shamsuddin is allowed and Criminal Appeal No. 7463 of 2016 preferred by convict-appellant Selim is also allowed.

69. The Jail Appeal Nos. 290 of 2016, 291-293 of 2016 and 295 of 2016 are hereby allowed.

70. Let the lower Court's records along with a copy of this judgment be sent to the Court concerned forthwith for necessary action.

**16 SCOB [2022] HCD 151**

**HIGH COURT DIVISION**

**(STATUTORY ORIGINAL JURISDICTION)**

Company Matter No. 342 of 2018

**Md. Shahbuddin Alam**
…… Petitioner
-Versus-

**Bangladesh Bank and others**
…. Respondents

Mr. Shah Monjurul Hoque with
Mr. Palash Shcndra Roy and
Dr. Syeda Nasrin, Advocates
……..For the Petitioner

Mr. Mahbubey Alam, Senior Advocate
with
Ms. Farhana Ershad Chowdhury,
Advocate
…..For the respondent no. 1

Mr. Samir Sattar, Advocate
…..For the respondent no. 4

Mr. Shafiqul Kabir Khan, Advocate
…..For the respondent no. 6

The 21th May, 2019

**Present:**
**Mr. Justice Muhammad Khurshid Alam Sarkar**

**Editors' Note:**
The petitioner is the Managing Director and shareholder of a Borrower-Company, which borrowed money from a lender Bank. But due to failure of regular payment of the loan money by the Borrower-Company, it accrued a huge amount of loan liability. For rescheduling, the petitioner agreed to deposit a certain amount of money as down payment but did not deposit it fully. In view of such situation, the lender Bank issued a letter to the Borrower-Company represented by petitioner requesting him to deposit rest of the down payment as per Bangladesh Bank requirement contained in Bangladesh Bank Rescheduling Guidelines. But the petitioner did not take any positive step regarding payment of the said down payment. Under such circumstances, the Bangladesh Bank served a notice upon the petitioner asking him to repay the loan availed by the Borrower-Company mentioned in the said notice by and within 2 (two) months with a threat that, in default, the post of the petitioner as a Director of the Mercantile Bank would stand vacated as per Section 17 of the Banking Companies Act. The petitioner then filed an application under section 17(8) of the Banking Companies Act, 1991 read with section 43 of the Companies Act, 1994 in respect of his directorship and shares in the Mercantile Bank Ltd and challenged the propriety and legality of termination of his directorship in the said Bank. The High Court Division after elaborate discussion of the relevant provisions of the Banking Companies Act, 1991 and the Artharin Adalat Ain, 2003 dismissed the petition stating that the directorship of any scheduled bank shall vacant when a director takes loan for himself or stands as a guarantor of another borrower. The court also differentiated between the provisions of Section 17 of the Banking Companies Act and of Section 5 of the Artharin Adalat Ain. The court imposed an exemplary cost for abusing the process of the Court upon the petitioner.

**Key Words:**
Section 17(8) of the Banking Companies Act, 1991; Section 43 of the Companies Act, 1994; Section 3, 5 and 6 of the Artharin Adalat Ain 2003; Bangladesh Bank Rescheduling Guidelines; Directorship; guarantor; borrower

**Section 17 of the Banking Companies Act:**

**The directorship of any scheduled Bank shall be vacant on the following events; (i) if a Director of a Scheduled Bank does not pay the loan, or interest thereof, taken by him from any Bank/Financial Institutions, (ii) when a Director of any scheduled Bank places him/herself as a guarantor to any loan taken by a third person and the said Director of the scheduled Bank fails to repay the loan money after receiving notice from the Bangladesh Bank, and (iii) if a Director of any scheduled Bank fails to carry out/complete the duty and responsibility undertaken by him. In other words, when a Director of any scheduled Bank either takes loan for himself or stands as a guarantor of another loanee, and if the loan remains unpaid despite issuance of notice by the Bangladesh Bank under Section 17 of the Banking Companies Act, his/her directorship may be vacated without exhausting the formalities set out in sub-Sections (2) & (3) of Section 17 of the Banking Companies Act. ...(Para 17)**

**Section 17 of the Banking Companies Act:**

**It is to be noticed from the language employed in sub-Sections 1, 2 & 3 of Section 17 of the Banking Companies Act that vacancy of directorship occurs the moment any of the events enumerated in clauses (a) to (c) of sub-Section 1 of Section 17 of the Banking Companies Act takes place, for, neither any of the sub-Sections of Section 17 of the Banking Companies Act nor any other provisions of the Banking Companies Act seek to halt the proceedings under Section 17 of the Banking Companies Act on the plea of filing a representation to the lender Bank or to the Bangladesh Bank or to any other authority. ...(Para 19)**

**The submissions advanced by the learned Advocate for the petitioner that the petitioner being not the loanee, that is to say that the petitioner being merely a guarantor of the loanee, his directorship in a scheduled Bank should not be taken away by invoking the provisions of Section 17 of the Banking Companies Act, is completely misconceived. The laws herald very stoutly that a Director of any scheduled Bank whenever would be found to be either as the 'defaulter loanee' or as the 'defaulter guarantor', proceedings against the aforesaid Director under Section 17 of the Banking Companies Act would be initiated. ...(Para 20)**

**Section 17 of the Banking Companies Act and Section 5 of the Artharin Adalat Ain:**

**The provisions of Section 17 of the Banking Companies Act and the provisions of Section 5 of the Artharin Ain provide completely different course of actions for the 'defaulter loanee' and 'defaulter guarantor'. In other words, while the provisions of Section 17 of the Banking Companies Act aims at vacating the directorship of a person of a scheduled Bank, Section 5 of the Artharin strategies about recovery of outstanding loan from the borrower, mortgagor and guarantor. Thus, the submissions of the learned Advocate for the petitioner that without going for recovery of loan by invoking the provisions of the Artharin Ain from the Borrower-company at first, commencement of any proceedings under Section 17 of the Banking Companies Act is not legal, appears to me to be completely without any substance. ...(Para 21)**

**JUDGMENT**

**Muhammad Khurshid Alam Sarkar, J:**

1. By filing this application under Section 17(8) of the Banking Companies Act, 1991 (Banking Companies Act) read with Section 43 of the Companies Act, 1994 (briefly, the

Companies Act), Md. Shahbuddin Alam (the petitioner) prays for setting aside the proceedings and all orders, decisions made in the proceedings under Section 17 of the Banking Companies Act initiated by the respondent nos. 1-5 against the petitioner in respect of his directorship and shares in the Mercantile Bank Ltd (the respondent no.6) vide memo no. BRPD(R-2)651/9(26)Ga/2018-6676 dated 10.09.2018 issued under the signature of the respondent no. 2. The petitioner also challenges the propriety and legality of the termination of the directorship of the petitioner in the Mercantile Bank Ltd and, thereby, allowing the petitioner to remain as the Director of the Mercantile Bank Ltd.

2. In the petition, it is averred that the petitioner is a businessman, and a Director and shareholder of the Mercantile Bank Limited, which is a banking company incorporated under the Banking Companies Act. He is holding, as of the date, 1,21,83,522 shares of Tk. 10.00 (ten) each in the capital of the Mercantile Bank Limited. The petitioner is also the Managing Director and shareholder in the capital of the respondent no. 7 (hereinafter referred to as the 'Borrower-Company'), which is also a company limited by shares and incorporated under the Companies Act. The respondent no. 1 is the Bangladesh Bank, which is established as the central Bank by the Bangladesh Bank Order, 1972 and the regulatory body of all banking companies in Bangladesh. The respondent nos. 2 and 3 are the responsible officials of the Banking Regulation and Policy Department (BRPD) of the Bangladesh Bank and the respondent no. 4 (hereinafter referred to either as the One Bank or the lender Bank) is a banking company regulated under the Banking Companies Act and the respondent no. 5 is the responsible official of the Khatungonj Branch of the respondent no. 4. In the course of business, the respondent no. 4 through its Khatungonj Branch, Chattogram sanctioned various credit facilities viz, Time Loan, Term Loan, SLC/CLC/ Acceptance, LTR, BG, etc., in favour of the Borrower-Company upon obtaining adequate securities vide different sanction letters. The said facilities were from time to time renewed, reviewed, converted and rescheduled, as and when the situation warranted. Lastly, under a review/restructuring arrangement vide Sanction Letter dated 29.09.2016, the following arrangements were made by the respondent no. 4; a) the liabilities of the Borrower-Company under Time Loan and OD were converted into a Term Loan of TK. 21.13 crore, b) existing Term Loan liability of Tk. 20.39 crore was reviewed, and c) existing SLC/ULC/Acceptance, Time Loan, LTR, BG facilities were cancelled.

3. Thereafter, the Borrower-Company from time to time requested the lender Bank to sanction new credit line and, thereby, to facilitate the Borrower-Company to repay the aforesaid stuck-up liabilities smoothly. However, despite repeated persuasions, the lender Bank did not extend any kind of co-operation whatsoever to the Borrower-Company. Besides, the lender Bank refrained from opening any L/C which caused a huge setback in continuing its regular business. Since the company's business fully depends upon import from abroad/local market by way of opening the L/C, the stoppage of opening any new L/C facility by the lender Bank placed the business of the Borrower-Company in complete deadlock. Recently, time and again, the Borrower-Company vide its letters dated 14.02.2018, 13.03.2018, 28.03.2018, 23.04.2018, 16.05.2018, 27.06.2018, 23.07.2018 requested the lender Bank either to re-fix its liability waiving interest and allow 2(two) years' time to repay the loan, or to reschedule the liability for adjustment purpose. At the same time, the Borrower-Company requested the lender Bank to sanction fresh working capital. In order to approve the said proposal, the Borrower-Company paid off Tk. 1.40 crore as down payment. Although the lender Bank on principle agreed to reschedule the liability of the Borrower-Company, nonetheless, without paying any heed to the business dilemma of the Borrower-Company, they put preconditions to pay additional Tk. 2.35 crore as down payment and to

provide with additional security in the form of mortgage. In such situation, the Borrower-Company vide its letter dated 27.08.2018 requested the lender Bank to fix its liability as of 20.07.2018 and provide its Board approval as to the agreed rescheduling in order to facilitate the Borrower-Company to pay the balance down payment. The said representation of the Borrower-Company is still pending for consideration and decision by the lender Bank.

4. It is stated that while the Borrower-Company has been in active negotiation with the lender Bank with regard to the re-scheduling and/or adjustment of the liabilities as aforesaid, at an utter dismay, on 24.09.2018 the petitioner received the impugned Memo No. BRPD(R-2)651/9(26)Ga/2018-6676 dated 10.09.2018 from the respondent no. 1 under the signature of the respondent no. 3 intimating the notice dated 16.08.2018 of the lender Bank under Section 17 of the Banking Companies Act asking the petitioner to repay the loan availed by the Borrower-Company mentioned in the said notice by and within 2 (two) months with a threat that, in default, the post of the petitioner as a Director of the Mercantile Bank would stand vacated as per Section 17 of the Banking Companies Act. The petitioner submitted his representation in writing to the respondent no. 1 on 09.10.2018, i.e. within the period prescribed by Section 17(2) of the Banking Companies Act having categorically explained the situation and his legal standing in respect of the contents of the notice issued by the lender Bank with a humble request not to proceed with the proceeding under Section 17 of the Banking Companies Act. The petitioner also requested (a) to advise the respondent no. 3 to rescind its notice dated 16.08.2018, and (b) to direct the lender Bank to provide its Board approval as to the agreed rescheduling to pay off the Borrower-Company's liability smoothly. The respondent no. 1 received the said representation on 09.10.2018 and meanwhile, 15 (fifteen) days had already elapsed, but they did not give any decision within the time prescribed by Section 17(3) of the Banking Companies Act. In such situation, the petitioner filed Writ Petition no. 13846 of 2018 in the High Court Division challenging the legality of the Memo no. BRPD(R-2)651/9(26)Ga/2018-6676 dated 10.09.2018 and hearing of the motion is yet to be concluded. However, the petitioner, after being advised that it was a misconceived application, has decided not to proceed with the aforesaid Writ Petition 13846 of 2018 and filed the instant application before the Company Bench.

5. By filing two separate affidavits-in-opposition, the Bangladesh Bank (the respondent no.1) and the One Bank Ltd, the lender Bank (the respondent no. 4) are contesting this matter. Their common contentions are that the petitioner is the Managing Director and shareholder of the Borrower-Company, which borrowed money from the lender Bank through different credit facilities and also by furnishing various securities in favour of the lender Bank. But due to failure of regular payment of the loan money by the Borrower-Company, it accrued a huge amount of loan liability. In such a stagnant situation, the petitioner, in a meeting held on 09.07.2018 with the lender Bank, agreed to deposit Tk. 2.35 crore as down payment which is only 5% against the petitioner's loan outstanding of 46.37 crore as on 30.06.2018 and accepting the said meeting as successful negotiation, the lender Bank issued letter dated 17.07.2018 requesting the petitioner to deposit the said down payment and to complete mortgage formalities of 38 decimals of land as agreed earlier. But the respondent no. 4 received only Tk. 0.45 crore through PO on 25.07.2018. In view of such situation, the lender Bank issued a letter under memo dated 31.07.2018 to the Borrower-Company represented by the Managing Director (petitioner) requesting him to deposit rest of the down payment of Tk. 2.54 crore at the earliest as per Bangladesh Bank requirement contained in Bangladesh Bank Rescheduling Guidelines, failing which the Bank would be constrained to take necessary legal action against the petitioner. But the petitioner did not take any positive step regarding payment of the said down payment and, under the circumstances, the Bangladesh Bank

served the notice as per provision of Section 17 of the Banking Companies Act upon the petitioner vide Memo No. BPRD(R-2)651/9(26) Ga/2018-6676 dated 10.09.2018 having enclosed the notice dated 16.08.2018 issued by the lender Bank. It is stated that the petitioner having received the said notice on 24.09.2018 issued an acknowledgment receipt which has been duly forwarded by the respondent no.6 (Mercantile Bank Ltd.) to the respondent no.1 through memo dated 25.09.2018.

6. Thereafter, the petitioner submitted his representation in writing to the respondent no. 1 on 09.10.2018 which was duly received by the respondent no. 1 on 09.10.2018. Having received the said representation of the petitioner, the Bangladesh Bank informed the lender Bank about the said reply and sought further clarification about the service of notice under Section 17 of the Banking Companies Act. The lender Bank then under Memo dated 21.10.2018 furnished its explanation regarding service of notice under Section 17 of the said Act. Thereafter, the Bangladesh Bank gave its decision on 29.10.2018. Having received the said notice dated 29.10.2018 through Chittagong Central Jail Authority, the petitioner acknowledged receipt of the letter on 13.11.2018 and the said receipt has been forwarded by the Mercantile Bank under the memo dated 20.11.2018 to the Bangladesh Bank for taking necessary measures. Thereafter, the lender Bank issued the letter dated 22.11.2018 requesting Bangladesh Bank to take a decision commensurate with the notice served by the said Bank through Bangladesh Bank upon the petitioner as per law. Subsequently, Bangladesh Bank issued a letter under Memo dated 29.11.2018 upon the petitioner imitating that the post of the petitioner as a Director of the respondent no.6 stood vacated as per Section 17 of the Banking Companies Act with effect from 24.11.2018 and Section 17(5) of the Banking Companies Act shall come into effect to realize the dues of the lender Bank.

7. Mr. Shah Manjurul Haque, the learned Advocate appearing for the petitioner takes me through Section 17 of the Banking Companies Act and submits that the proceedings under Section 17 of the Banking Companies Act being a recovery process, the petitioner should not be removed from the position of the Director of the Mercantile Bank. In an effort to substantiate his above count of submissions, he places Sections 3 & 5 of the Artharin Adalat Ain, 2003 (henceforth would be referred to as the Artharin Ain) and submits that Section 3 of the Artharin Ain heralds that the provisions of the Artharin Ain shall prevail over any other law including the Banking Companies Act and Section 5 of the Artharin Ain provides that all recovery process for recovery of loan of any financial institution must be commenced through filing of the Artharin Suit in the Artharin Adalat established under the Artharin Ain and, as such, the lender Bank cannot commence recovery process under Section 17 of the Banking Companies Act, instead of commencing recovery process under the Artharin Ain.

8. Mr. Haque then contends that evidently the proceeding is started centering around the loan taken by the Borrower-Company. He emphatically contends that the loan is not taken by this petitioner; he is merely a guarantor. By placing the provisions of Section 6(5) of the of the Artharin Ain, he submits that the commencement of the proceedings under Section 17 of the Bank Companies Act in order to recover the aforesaid loan from the petitioner is a nullity inasmuch as Section 6(5) of the Artharin Ain makes it mandatory that in any Artharin Suit the principal debtor's asset shall be attracted first in recovering the loan and then the assets of the third-party mortgagor and thereafter the assets of the third-party guarantor will be attracted and, accordingly, in the present scenario, the Borrower-Company being the principal debtor, the Suit for recovery of money through filing the Artharin Suit to be filed against the Borrower-Company at first and, as such, at the moment there is no scope to attract the assets of the petitioner in recovering the loan of the said Borrower-Company.

9. He submits that the impugned proceedings under Section 17 of the Banking Companies Act have been commenced on the ground that the Borrower-Company is the interested concern (স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠান)) of the petitioner, but the said ground does not come within the purview of Section 17 of the Banking Companies Act. He further submits that the Banking Companies Act was enacted by the Parliament in the year 1991 and the Artharin Ain has been passed by the Parliament in the year 2003 and, therefore, after enactment of the Artharin Ain containing mandatory recovery process in Section 5, the recovery process contained in Section 17 of the Banking Companies Act has become a residuary process and, as such, it cannot be invoked without first exhausting the mandatory recovery process under Section 5 of the Artharin Ain. By making the above submissions, the learned Advocate for the petitioner prays for allowing this application.

10. Mr. Mahbubey Alam, the learned Senior Advocate appearing for the respondent no.1 before this Court, submits that, since the petitioner is the Managing Director and shareholder of the Borrower-Company and since the petitioner stood as the guarantor by furnishing various securities in favour of the lender Bank, the liability having not been paid by the petitioner, the respondent no.1 lawfully commenced a proceeding under Section 17 of the Banking Companies Act against the petitioner in respect of his directorship and shares in the respondent no. 6-Bank.

11. Mr. Alam, the learned Senior Advocate appearing for the respondent no.1, then takes me through sub-Sections (1) to (5) of Section 17 of the Banking Companies Act and submits that these provisions are relating to vacation of the office of the Directors of the scheduled Banks in Bangladesh and, that is why, the present proceeding has been initiated as an independent proceeding and it does not have any nexus with the provisions of the Artharin Ain. By referring to the case of Abdullah Ahsan Vs Bangladesh Bank 20 BLD 2000 (AD) 260, he submits that our Apex Court has laid down the *ratio* that Section 17 of the Banking Companies Act deals with vacating the office of Director of the Bank in the event of non-payment of outstanding loan taken by the director himself or non-payment of loan by a borrower for whom the Director of a Bank has stood as a guarantor and this has nothing to do with the proceedings for realization of the outstanding loan liability.

12. Against the contention advanced by the learned Advocate of the petitioner that Bangladesh Bank did not give its decision upon the petitioner's representation under Section 17(2) of the Banking Companies Act within the statutory period as provided in Section 17(3) of said Act, the learned Senior Advocate submits that respondent no.1 gave its decision on 29.10.2018, which is well within the prescribed period of receiving of the representation of the petitioner as per Section 17(3) of the Banking Companies Act.

13. In adverting to the arguments made by the learned Advocate of the petitioner to the effect that after enactment of the Artharin Ain containing mandatory recovery process in Section 5, the recovery process contained in Section 17 of the Banking Companies Act has become a residuary process, the learned Senior Advocate for the respondent no.1 submits that Section 17 of the Banking Companies Act does not contradict or contravene or infringe any provision of the Artharin Ain. He submits that the liability having not been paid by the petitioner, the amount due to the lender Bank shall be realized by adjusting share value of the petitioner and the amount which would remain due after the adjustment shall be regarded as public due and thus shall be recovered by filing proceedings under Public Demands Recovery

Act, 1913 (PDR Act). By making the aforesaid submissions, the learned Senior Advocate for the respondent no.1 prays for dismissing the instant petition with an exemplary costs.

14. After perusing the instant petition and affidavits-in-opposition with their annexures, hearing the learned Advocates for both the sides, it transpires that, factually, there is no issue to be adjudicated upon in this case, except the issue that the petitioner's latest application dated 09.10.2018 has not been replied by the respondent no.1. However, upon carrying out a scrutiny of the papers annexed by the respondent no.1, it appears to me that the Bangladesh Bank upon receiving the aforesaid letter dated 09.10.2018 forwarded the same to the lender Bank and, thereafter, upon receiving the explanation from the lender Bank the same was communicated to the petitioner who was in jail at that relevant point of time. It further appears to me that the lender Bank and the Bangladesh Bank, thereafter, dealt with the representation of the petitioner within the time prescribed in the Banking Companies Act. Therefore, the statements made by the petitioner that proceeding under Section 17 of the Banking Companies Act has been initiated without disposing of the petitioner's latest application, appears to me to be untrue.

15. And, upon reading the relevant statutory laws as well as the case laws placed before this Court in an endeavour by the parties to apply the same into the facts of this case, it appears to this Court that the following legal issues are to be adjudicated upon by this Court; (i) when a shareholder-cum-Director of a scheduled Bank stands as a guarantor of a Borrower-Company, whether his directorship in a scheduled Bank is liable to be vacated due to the Borrower-Company's failure to pay off the loan, (ii) whether the respondent nos. 1-4 were competent to commence proceedings under Section 17 of the Banking Companies Act without first going for recovery of loan from the Borrower-Company invoking the provisions of Artharin Ain.

16. For adjudication upon the above issues, it would be useful if I can be familiar with the provisions of Section 17 of the Banking Companies Act which are as follows;

> **17. Vacation of office of director.-** (1) If any director of a banking company fails to-
> (a) pay any advance or loan received from the said banking company or any other banking company or any financial institution or any installment thereof or interests thereon, or
> (b) pay any amount due from him on account of any guarantee given by him, or
> (c) accomplish any duty to be accomplished by him and the responsibility for which he has undertaken in writing,
> and the said banking company or financial institution directs him by a notice through the Bangladesh Bank to pay the said advances, loans, installments, interests or guaranteed money or to accomplish the said duties and he fails to make such payments and accomplish those duties within two months after receipt of the direction, the office of director shall stand vacant with the expiry of the said period.
> (2) Whoever has received a notice under sub-section (1) may, within thirty days from the receipt of the notice, send, in writing, his statements on the relavant subject, if any, to the Bangladesh Bank, and also transmit a copy thereof to the banking company or financial institution, as the case may be.
> (3) The Bangladesh Bank shall, within fifteen days from the receipt of the statement under sub-section (2), give its decision thereon.
> (4) The decision of the Bangladesh Bank made under sub-section (3) shall be final.
> (5) Where the office of a director falls vacant under this section, the amount due to the banking company concerned shall be realised by adjusting the share value of the

person who was director against the office fallen vacant and the amount which still remains due after such adjustment shall be deemed to be public demand and be recoverable under the Public Demands Recovery Act, 1913.

(6) Where the office of a director of a banking company or financial institution falls vacant under this section, the person who was the director against the office fallen vacant, shall not be eligible to become director of the said banking company or financial institution or any other banking company or financial institution within a period of one year from the date of full payment of the dues to the concerned banking company or financial institution.

(7) If a director of any banking company receives a notice under sub-section (1), he shall not transfer any share held in his name in the company wherein he was engaged as a director until payment of all his dues to the concerned bank or financial institution.

(8) No action, order or decision taken under this section shall be called in question in any court or tribunal other than the court having jurisdiction under Section 3 of the Companies Act, 1994. (underlined by me)

17. From a plain reading of the provisions of clauses (a) to (c) of sub-Section 1 of Section 17 of the Banking Companies Act, my simple understanding is that the directorship of any scheduled Bank shall be vacant on the following events; (i) if a Director of a Scheduled Bank does not pay the loan, or interest thereof, taken by him from any Bank/Financial Institutions, (ii) when a Director of any scheduled Bank places him/herself as a guarantor to any loan taken by a third person and the said Director of the scheduled Bank fails to repay the loan money after receiving notice from the Bangladesh Bank, and (iii) if a Director of any scheduled Bank fails to carry out/complete the duty and responsibility undertaken by him. In other words, when a Director of any scheduled Bank either takes loan for himself or stands as a guarantor of another loanee, and if the loan remains unpaid despite issuance of notice by the Bangladesh Bank under Section 17 of the Banking Companies Act, his/her directorship may be vacated without exhausting the formalities set out in sub-Sections (2) & (3) of Section 17 of the Banking Companies Act.

18. To put the provisions of Section 17(1)(b) of the Banking Companies Act more specifically, all that this Court records here are that after issuance of notice to the defaulter Bank-Director, who has stood as a guarantor of a Borrower-Company or for a third party, when the Bangladesh Bank asks the defaulter-Bank Director to pay the loan and if the loan is not paid within two months, then the office of the defaulter-Bank Director falls vacated. Although there is a provision in sub-Section (2) of Section 17 of the Banking Companies Act to allow 30 days time to explain the Bank Director's position, but the vacancy of the office of the Bank Director shall take place, after two months of receipt of the notice under Section 17(1) of the Banking Companies Act, whether or not the Bangladesh Bank timely deals with the application of the defaulter-Bank Director's written representation filed under Section 17(2) of the Banking Companies Act.

19. After being acquainted with the provisions of Section 17 of the Banking Companies Act, I may now take up the first legal issue as framed by me hereinabove, namely, whether directorship/office of the petitioner, who is a shareholder-cum-Director of a scheduled Bank and having stood as a guarantor of the Borrower-Company has failed to pay off the loan of the Borrower-Company, is liable to be vacated. Upon meticulously going through the annexures appended to the instant application and its affidavits-in-opposition, it transpires that after issuance of notice by the lender Bank through the Bangladesh Bank to the petitioner

(who has placed himself as the guarantor for the loan taken by the Borrower-Company) for paying off the loan taken by the Borrower-Company (for whom the petitioner has stood as guarantor), the petitioner admittedly failed to pay off the Borrower-Company's loan and, consequently, after two months of receipt of the aforesaid notice, the petitioner's office of Director has fallen vacant. Although the petitioner made a written representation under sub-Section (2) of Section 17 of the Banking Companies Act within time explaining his position, the petitioner's explanation were found to be unsatisfactory by the lender Bank and the Bangladesh Bank (respondent nos. 1-4) and, accordingly, the Bangladesh Bank rejected the petitioner's representation within the time stipulated in sub-Section (3) of Section 17 of the Banking Companies Act. The decision given by the Bangladesh Bank being final, the law would obviously take its own course under Section 17(5) of the Banking Companies Act. It is to be noticed from the language employed in sub-Sections 1, 2 & 3 of Section 17 of the Banking Companies Act that vacancy of directorship occurs the moment any of the events enumerated in clauses (a) to (c) of sub-Section 1 of Section 17 of the Banking Companies Act takes place, for, neither any of the sub-Sections of Section 17 of the Banking Companies Act nor any other provisions of the Banking Companies Act seek to halt the proceedings under Section 17 of the Banking Companies Act on the plea of filing a representation to the lender Bank or to the Bangladesh Bank or to any other authority.

20. From a bare reading of the provisions of Section 17 of the Banking Companies Act, it appears to me that the wordings and expressions of the law are so unambiguous that anyone with ordinary prudence would be able to understand the meaning of the provisions of Section 17 of the Banking Companies Act and, therefore, the submissions advanced by the learned Advocate for the petitioner that the petitioner being not the loanee, that is to say that the petitioner being merely a guarantor of the loanee, his directorship in a scheduled Bank should not be taken away by invoking the provisions of Section 17 of the Banking Companies Act, is completely misconceived. The laws herald very stoutly that a Director of any scheduled Bank whenever would be found to be either as the 'defaulter loanee' or as the 'defaulter guarantor', proceedings against the aforesaid Director under Section 17 of the Banking Companies Act would be initiated.

21. Now, let me take up the second issue, namely, whether the respondent nos. 1-4 were competent to commence proceedings under Section 17 of the Banking Companies Act without first going for recovery of the loan from the 'Borrower-Company' invoking the provision of the Artharin Ain. For adjudication upon this issue, I have read the Preamble and other relevant provisions of the Artharin Ain and, side by side, that of the Banking Companies Act and it appears to me that the scheme of these two statutes are distinct and, further, the provisions of Section 17 of the Banking Companies Act and the provisions of Section 5 of the Artharin Ain provide completely different course of actions for the 'defaulter loanee' and 'defaulter guarantor'. In other words, while the provisions of Section 17 of the Banking Companies Act aims at vacating the directorship of a person of a scheduled Bank, Section 5 of the Artharin strategies about recovery of outstanding loan from the borrower, mortgagor and guarantor. Thus, the submissions of the learned Advocate for the petitioner that without going for recovery of loan by invoking the provisions of the Artharin Ain from the Borrower-company at first, commencement of any proceedings under Section 17 of the Banking Companies Act is not legal, appears to me to be completely without any substance.

22. With the above findings of fact and examination of legal issues, this matter is liable to be dismissed with an exemplary costs of Tk. 10,00,000/- (ten lacs).

23. Before parting with this Judgment, I find it pertinent to record the reasoning for slapping a cost of Tk. 10,00,000/- in dismissing this matter. At the time of admission of this matter, this Court was not inclined to admit it making an observation in the open-Court that interpretations on Section 17 of the Banking Companies Act has been given by this Court on numerous occasions against the 'defaulter loanee' or the 'defaulter guarantor', and, therefore, there being no issue to be examined by this Court by admitting an application under Section 17 of the Banking Companies Act, admission of this matter shall simply add a case to the huge backlog of works of this Court causing wastage of its invaluable working hours. Nevertheless, the learned Advocate for the petitioner was persistently insisting upon this Court by putting his best effort to pursue this Court that there are some nexus with the provisions of Artharin Ain and the provisions of Section 17 of the Banking Companies Act and for examination of the aforesaid issue the matter should be admitted. Against the aforesaid backdrop, this Court admitted the matter with a verbal condition that the petitioner may be given an opportunity to place his case at length on the condition that upon hearing the learned Advocate for the petitioner, if this Court expresses its views against the petitioner, it shall be the duty for the petitioner not to proceed with this matter and shall non-prosecute the same at his own initiative and, further, if the learned Advocate finds any difficulty to non-prosecute this matter, at that event a cost Tk. 10,00,000/- (ten lacs) shall be slapped upon the petitioner.

24. With the above preconditions this matter was admitted and the learned Advocate for the petitioner was allowed to make his submissions as lengthy as he wished and eventually when he was informed by this Court that this case is going to be dismissed with a cost of Tk. 10,00,000/- as this Court found no substance in the instant matter, the petitioner opted to receive a detailed Judgment. The petitioner's above attitude amply suggests that he is adamant to squander further time of the Apex Court, even at the expense of paying an exemplary costs, wherefrom it transpires that the petitioner's option of invocation of Section 17 of the Banking Companies Act is nothing but clearly a deliberate step of abusing the process of this Court and, thus, this Court is of the view that the petitioner deserves to be slapped with an exemplanary cost.

25. In the light of the *ratio* laid down hereinabove, I find no substance in the instant matter.

26. In the result, the Company Matter No. 342 of 2018 is dismissed with a cost of Tk. 10,00,000/- (ten lacs) to be paid by the petitioner in the national exchequer by way of submitting Treasury Challan within 30 (thirty) days. The interim Orders and Direction passed by this Court at the time of admission of this matter is hereby vacated.

**16 SCOB [2022] HCD 161**

**HIGH COURT DIVISION**

Death Reference No.34 of 2015 with Jail Appeal No.77 of 2015

**The State**
....…….. Petitioner
Vs.

**Rasu Kha**
...……. Condemned-Prisoner

Mr. Md. Ashaque Momin, D.A.G with
Mr. Shaheen Ahmed Khan, D.A.G. with
Mrs. Kazi Shahanara Yeasmin, D.A.G. with
Mr. Mehadi Hasan, A.A.G with
Mrs. Ayesha Flora, A.A.G
....……. For the State

Mrs. Nargis Aktar, State Defence Lawyer
…….. For the Condemned-Accused

Heard on 02.03.2020, 08.03.2020, 09.03.2020, 10.03.2020 and Judgment 11.03.2020

**Present:**
**Mr. Justice Shahidul Karim**
And
**Mr. Justice Md. Akhtaruzzaman**

**Editors' Note:**
In the instant case trial Court handed down death penalty to the accused on the basis of his confessional statement. High Court Division, on the other hand, found the confessional statement untrue inasmuch as medico-legal evidence runs counter to the manner of commission of offence described in confessional statement. High Court Division also found that the learned trial judge had based his findings on some hypotheses not established by evidence on record and contrary to the findings of the post mortem report. Therefore, the High Court Division rejected the death reference and acquitted the accused.

**Key Words:**
Section 302 of Penal Code; strangulation; drowning; confessional statement; prolonged police custody; time, place, manner; impartial arbiter;

**Untrue confession is not tenable in law:**
**From the aforesaid discussions it transpires palpably that the unknown deceased woman was killed by strangulation (শ্বাসরোধ), not by drowning (চুবিয়ে) as was disclosed by accused Rasu Kha in his confessional statement. Thus, it is clear that the deceased victim woman was killed not in the manner as was stated by accused Rasu Kha which has miserably exposed the untrue character of his alleged confession rendering the veracity of the same highly questionable as well as untenable in law. ...(Para 66)**

**In a criminal case time, place and manner of occurrence are required to be strictly proved beyond reasonable doubt:**
**It is to be noted that in a criminal case time, place and manner of occurrence are the 3(three) basic pillars upon which the foundation of the case stand on and the same are required to be strictly proved beyond reasonable doubt by the prosecution in a bid to ensure punishment for an offender charged with an offence. If in a given case any one of the above 3(three) pillars is found lacking or proved to be untrue then it will adversely**

**react upon the entire prosecution story. The same thing has happened in the instant case inasmuch as according to the prosecution story the deceased woman was killed by drowning, whereas as per medico-legal evidence furnished by P.W.11 Dr. Habibur Rahman, the victim was killed by strangulation and thereafter her dead body was abandoned in the water. The inquest-report also does bear out the aforesaid cause of death of the victim woman. Therefore, it is clear like anything that the prosecution has miserably failed to prove the manner of occurrence of the incident. Viewing from this angle there is no hesitation in saying that the confession alleged to have been made by accused Rasu Kha is not true so far as it relates to the manner of occurrence of the incident in concerned. ...(Para 67)**

**Conjecture or hypothesis however strong it might be, cannot be the substitute for evidence:**

**In our criminal justice delivery system there is no scope to lean on hypothesis or conjecture instead of proof of the manner of occurrence by sufficient evidence to find out the guilt of an accused charged with an offence. It is the settled principle of law that conjecture or hypothesis however strong it might be, cannot be the substitute for evidence. In such a backdrop, it can be concluded that the learned judge of the court below erred in law in adjudging the culpability of the accused in the killing incident of the deceased woman by the impugned judgment and order which has utterly failed to withstand the legal scrutiny. ...(Para 69)**

**Under no circumstances, a judge should abandon his high place of impartial arbiter and assume the role of a prosecutor, however altruistic its motive may be:**

**Having ignored the medico-legal evidence the trial court also presumed that the scar marks and other injuries found on the person of the victim woman are of old nature. But, on the basis of those scar marks including other injuries found on the chest and female organ of the victim woman P.W.11 Dr. Habibur Rahman categorically opined that the victim woman was subjected to rape before her death. In such a scenario, without any tangible materials, there is left no room for the learned Additional Sessions Judge to presume that those injury and bite marks were old in character. It is to be recalled that a judge is considered to be an impartial and neutral arbiter. Under no circumstances, he should abandon his high place of impartial arbiter and assume the role of a prosecutor, however altruistic its motive may be. ...(Para 73)**

**Confession of the accused was preceded by a prolonged police custody which has seriously affected the involuntary character of the same:**

**It is undeniable that accused Rasu Kha was first arrested on 06-08-2009 from Gazipur Bazar in connection with another case filed with Faridgonj P.S. Chandpur and thereafter, he was shown arrested in the instant case on 15-10-2009 while he was also under police custody in connection with the earlier one and further that he was again taken on remand in the present case and eventually, he was produced before the relevant Magistrate court on 18-10-2009 by the investigation officer (P.W.6) with a prayer for recording his confession. Materials on record also do bear out the aforesaid factual events of the case. Therefore, it is patent that the confession of the accused was preceded by a prolonged police custody which has seriously affected the involuntary character of the same. ...(Para 75)**

**It is to be noted further that charge of murder must be proved to the core beyond doubt by consistent and reliable evidence. When there is departure from the manner of**

**occurrence as alleged by the prosecution found in the evidence during trial, the veracity of the prosecution case becomes doubtful and in such a case conviction and sentence cannot be sustained in the eye of law. ... (Para 78)**

## JUDGMENT

**Shahidul Karim, J.**

1. This death reference under section 374 of the Code of Criminal Procedure (for short, the Code) has been submitted by the learned Additional Sessions Judge, Chandpur for confirmation of the death sentence awarded to condemned-accused Rasu Kha. By the impugned judgment and order dated 22-04-2015, the learned Additional Sessions Judge of the court below convicted accused Rasu Kha under Sections 302 and 201 of the Penal Code and sentenced him there under to death along with a fine of Tk.50,000/- and 7 (seven) years rigorous imprisonment along with a fine of Tk.10,000/-, in default, to suffer imprisonment for 1(one) year more respectively in Sessions Case No.156 of 2010, arising out of Chandpur P.S. Case No.19 dated 18-12-2008, corresponding to G.R. No.547 of 2008 and thereafter, submitted the entire proceedings of the case for confirmation of the death sentence imposed upon the accused. Against the aforesaid judgment and order of conviction and sentence, condemned-accused Rasu Kha has also preferred Jail Appeal No.77 of 2015.

2. Since the death reference and the connected Jail Appeal sprouted from the same judgment and order of conviction and sentence, they have been heard together and are being disposed of by this single judgment.

3. The prosecution case arose out of an infernal incident in which an unknown forlorn young woman aged about 18-19 years was done to death by strangulation (শ্বাসরোধ) and thereafter her cadaver was abandoned in the river.

4. The prosecution case as projected in the FIR as well as unfurled during trial, in brief, is that P.W.6 S.I. Md. Nazrul Islam, while working at Chandpur Model Police Station, on 18-12-2008, received an information over mobile phone from Md. Zakir Hossain, Member of Ward No.7, Chandpur Police Station that the dead body of an unknown woman aged about 19 years was found floating on the western bank of Dakatia River near the house of one Abdur Rasid Mizi of Sobahanpur village under Bagadi Union Parishad No.8. Having received such news, P.W.6 along with other police personnel rushed to the spot on the strength of a G.D. being No. 756 dated 18-12-2008. After reaching the spot P.W.6 found the dead body of an unknown young woman with her both hands tied from behind to her respective legs with a torn part of yashmak. Except head, the entire body of the deceased woman was found floating in the river. Eventually, the dead body was recovered from the river whereupon P.W.6 held inquest of the same and obtained signature of the witnesses present there and sent it for autopsy through Constable Abdur Rob vide Chalan Exhibit No.3. P.W.6 also seized two parts of a pink coloured scarf and a part of pink coloured veil which were found beside the dead body vide seizure list Exhibit No.2. Thereafter, P.W.6 being informant lodged the formal FIR with Chandpur Police Station which gave rise to Chandpur Police Station Case No. 19 dated 18-12-2008.

5. After lodgment of the case, the task of investigation was entrusted to P.W.13 S.I. Chironjib Das who, during investigation, visited the place of occurrence, prepared sketch map thereof along with index, examined witnesses under section 161 of the Code and circulated the photographs of the deceased woman to different nearby police stations in order

to ascertain her whereabouts and also obtained the post-mortem report. Eventually, having failed to unearth the real perpetrator of the crime as well as the identity of the deceased victim, P.W.13 submitted final report as true (FRT) being No. 427 dated 27-06-2009 under section 302/34 of the Penal Code.

6. While the matter was awaiting for order before the concerned Judicial Magistrate Court, accused Rasu Kha made a confessional statement in connection with Faridgonj Police Station Case No. 15 dated 15-07-2009, corresponding to G.R. No. 122 of 2009, wherein he unravelled the killing incident of the instant case and also made a detailed account of other crimes already committed by him in respect of other women.

7. Having received such information, on the prayer of the concerned police, the learned Magistrate directed to cause further investigation in the instant case, whereupon the task thereof was endowed with P.W.6 S.I. Md. Nazrul Islam who, during investigation, again visited the place of occurrence, examined some witnesses and recorded their statements under section 161 of the Code and also interrogated accused Rasu Kha upon taking him on remand. Since, on preliminary quizzing, accused Rasu Kha admitted to his guilt, P.W.6 made necessary arrangements for recording his confession by a competent Magistrate. Eventually, having found prima-facie incriminating materials P.W.6 submitted charge-sheet against accused Rasu Kha under Sections 302/201 of the Penal Code.

8. At the commencement of the trial, the accused was indicted under the aforesaid Sections of law to which he abjured his guilty and expressed his desire to face trial.

9. In order to prove the charge the prosecution adduced as many as 13 witnesses who were cross-examined by the defence.

10. After closure of the prosecution witnesses, the accused was called upon to enter into his defence under section 342 of the Code while he repeated his innocence and also declined to adduce any evidence.

11. The defence case that could be gathered from the trend of cross-examination of the prosecution witnesses is of complete innocence and false implication. The further case of the defence is that the confession of the accused is not voluntary and true rather it was extracted from him by applying 3$^{rd}$ degree method.

12. Eventually, upon taking hearing from both sides and on an appraisal of the evidence and materials on record, the learned Additional Sessions Judge came to the conclusion that the prosecution has been able to bring home the charge mounted against the accused to the core and accordingly, convicted and sentenced him in the manner as noted at the outset.

13. Feeling aggrieved thereby, the condemned accused has preferred the instant Jail Appeal being No.77 of 2015. As we have already noticed, the learned Additional Sessions Judge has also submitted the entire proceedings of the case for confirmation of the death sentence imposed upon the accused.

14. Mr. Shaheen Ahmed Khan with Mr. Md. Ashaque Momin, learned Deputy Attorneys General along with Mr. Mehadi Hasan, learned Assistant Attorney General appearing on behalf of the State and in support of the death reference at the incept has shouldered the painstaking task of placing the FIR, charge-sheet, charge, deposition of witnesses, inquest as

well as post-mortem report, confessional statement of the accused, impugned judgment and order of conviction and sentence including other materials available in the paper book and then submits emphatically that the prosecution has been able to prove the charge levelled against the accused by some cogent and trustworthy evidence. According to him, the occurrence took place in a remote area of a village and that too during the night time and, as such, it was not possible on the part of the prosecution to adduce any eye witnesses of the occurrence leading to the incident of murder of the deceased victim following which the prosecution had no other option but to rely on the circumstantial evidences. He further contends that accused Rasu Kha admitted his guilt in committing the murder of the deceased victim by drowning which has also got support and corroboration from the inquest as well as post-mortem report. He next submits that the facts narrated by accused Rasu Kha in his confessional statement also received corroboration from the seizure list (Exhibit No.2) as well as from the 2(two) photographs of the deceased woman (Exhibit Nos.6 and 7). The relevant Magistrate who penned down the confession has also proved the authenticity as well as the veracity of the confession by giving evidence in the court as P.W.12 and further that the accused did not raise any objection whatsoever regarding the nature and character of the confession while he was being examined under section 342 of the Code, the learned Deputy Attorney General further added. Finally, he submits that having considered the confessional statement together with the surrounding facts and circumstances of the case the learned Additional Sessions Judge rightly and correctly found the culpability of accused Rasu Kha in the killing incident of the unknown deceased woman and accordingly convicted and sentenced him thereunder by the impugned judgment and order which, being well founded both in law and facts, does not call for any interference by this Court.

15. Per contra, Mrs. Nargis Aktar, learned State Defence Advocate appearing on behalf of condemned-appellant Rasu Kha has strenuously assailed the impugned judgment and order of conviction and sentence contending that the prosecution has miserably failed to bring home the charge brought against the accused by adducing some impregnable, trustworthy and unblemished evidence as there is no eye witnesses of the occurrence leading to the incident of murder of the deceased victim. She has tried to impeach the veracity of the impugned judgment and order on the following counts:

1. that the confessional statement of the condemned-accused was preceded by prolong police custody which has rendered the same involuntary in nature and therefore, no reliance can be placed upon it;
2. that as per inquest and post mortem report, the victim was killed by strangulation **(শ্বাসরোধ),** whereas in his confession the accused gave out that he killed an unknown girl by drowning which is totally incongruous to the medico-legal evidence suggesting that the confession of the accused is not true so far the cause of death is concerned;
3. that as per doctor′s (P.W.11) opinion, the victim girl was killed by strangulation **(শ্বাসরোধ)** and further that she did not died from drowning;
4. that as per confession, the accused had sexual intercourse with the deceased victim with her consent, whereas according to medico-legal evidence (Exhibit No.10), the victim girl was subjected to rape;
5. that the circumstances of the case do not also bear out the confession of the accused inasmuch as the occurrence came to pass in the middle part of December i.e. in winter season but no such winter garments were recovered either from the place of occurrence or from the body of the deceased victim; and
6. that the investigation of the case was done in a shoddy manner in that the I.O. did not take any positive step to verify the facts narrated by the accused in his confession

and further that even the identity of the deceased victim woman has remained undisclosed.

16. Mrs. Nargis finally submits that the prosecution has hopelessly failed to bridge the accused with the alleged offence in spite of that the learned Additional Sessions Judge most illegally convicted and sentenced him for the alleged killing of the unknown deceased victim by the impugned judgment and order which is liable to be scrapped being devoid of any substance. In support of her submission, the learned State Defence Advocate has relied upon the decisions reported in 36 DLR 185, 54 DLR 80 and 5 MLR (HC) 133.

17. In order to appreciate the aforesaid rival submissions put forward by both the parties, we are required to advert to and scrutinize the relevant evidences on record together with the facts and circumstances of the case by juxtaposing the prosecution case with that of the defence version of the story.

18. In his evidence P.W.1 Md. Yunus Mizi, an inhabitant of P.O. village Sobahanpur says that in the morning of 18-12-2008 while he was in his residence, he came to learn that the dead body of an unknown woman was found lying on the bank of Dakatia River at Sobahanpur village. Having heard such news, he along with others went to the spot and found the dead body of an unknown woman aged 18/19 years with her both hands tied from behind to her respective legs and further that some part of the dead body was found on the ground and the rest part was floating in the water. The whereabouts of the woman could not be known instantly. Eventually, police appeared at the spot and took away the dead body for autopsy. After a long interval, he came to learn through newspaper that accused Rasu Kha killed the woman upon bringing her from Dhaka.

19. In reply to cross-examination P.W.1 states that he knew nothing about the death of the victim woman and further that he did not hear the name of accused Rasu Kha from any ocular witness.

20. NP.W.2 Md. Yusuf is another resident of P.O. village. This witness was tendered by the prosecution.

21. In reply to cross-examination P.W.2 simply discloses that he saw the dead body of a woman, but he did not know her whereabouts.

22. In his testimony P.W.3 Md. Harun Patwary, another inhabitant of P.O. village says that in the morning of 18-12-2008 while he was in his homestead, he got news that the dead body of an unknown woman aged about 18/19 years was found lying on the bank of Dakatia River running through their village. On receiving such news, he went to the spot and found the dead body of a woman with her both hands tied to her respective legs from behind with parts of scarf and veil. Nobody could identify the woman immediately. Eventually, police appeared in the scene and held inquest (Exhibit No.1) of the dead body and obtained his signature thereto (Exhibit No.1/1). On 18-12-2008 police seized the aforesaid parts of scarf and yashmak with which the hands and legs of the victim woman were tied up vide seizure list Exhibit No.2 and obtained his signature thereto. Ultimately, police took away the dead body to morgue.

23. In reply to cross-examination P.W.3 divulges that he knew nothing except seeing the dead body on the bank of Dakatia River.

24. P.W.4 Shahid Bepari is also an inhabitant of P.O. village. This witness unveils identical story like P.Ws.1 and 3 so far the factum of seeing the dead body of an unknown woman on the bank of Dakatia River with her both hands fastened to her respective legs from behind is concerned. This witness also proves the inquest-report drew up by the police including the factum of seizure of yashmak and scarf found on the spot.

25. In reply to cross-examination P.W.4 states that he received the death news on a foggy morning and further that he did not know anyone named Abid Mal in their locality. He could not say as to who killed the victim woman since he did not witness the incident. The place of occurrence is about $\frac{1}{2}$ mile away from his (P.W.4) residence. This witness further states that vessels are used to ply the P.O. River.

26. P.W.5 Zafar Ullah Kha is another resident of P.O. village. This witness was also tendered by the prosecution for cross-examination.

27. In reply to cross-examination P.W.5 asserts that he came to learn from public conversation that a dead body was found lying on the western bank of Dakatia River at Sobahanpur village whereupon he visited the spot and found a lot of people there. He was in Chandpur Jail. This witness further states that sand carrying trawlers are used to run through Dakatia River and that he did not know the whereabouts of the victim woman.

28. P.W.6 S.I. Md. Nazrul Islam is the informant as well as final investigation officer of the case. In his testimony this witness gives out that on 18-12-2008 while he was posted at Chandpur Model Police Station, Md. Zakir Hossain, Member of ward No.7 informed him over mobile phone that the dead body of an unknown woman was found lying on the western bank of Dakatia River located on the eastern side of the homestead of one Abdur Rashid Mizi, whereupon he entered the news in a G.D. entry being G.D. No.756 dated 18-12-2008 and thereafter, proceeded to the spot where he found the cadaver of an unknown woman with her both hands tied to her respective legs from behind and further that the upper part of the dead body was found grounded while the remaining portion was seen floating in the water. Eventually, he drew the inquest of the corpse upon pulling it up on the road and obtained signatures of the witnesses thereto and sent it to morgue for post-mortem examination through constable A. Rob vide challan Exhibit No.3 and also seized 2(two) parts of a pink coloured scarf and yashmak vide Exhibit No.2. Eventually, after returning back he filed the FIR (Exhibit No.4) with Chandpur P.S. This witness proves the FIR form and the signature of the then officer-in-charge, Nurul Amin appearing thereon as Exhibit Nos.5 and 1/5 respectively since he was acquainted with the handwritings of the latter. This witness proves the 2(two) photographs of the victim woman which were captured by him as Exhibit Nos.6 and 7 and also identified the seized scarf and veil in the court as Material Exhibit Nos.I and II.

29. In reply to cross-examination P.W.6 unfurls that the occurrence came to pass at any time from 17-12-2008 to 18-12-2008. In the night of occurrence he was not on duty. Having visited the spot, he found the dead body of a woman, aged about 19 years, with her hands and legs tied up. Member Zakir made a phone call to the police station. He (P.W.6) did not find any letter alongside the dead body. At the time of lodgment of the case, he did not know as to who committed the murder.

30. Record reveals that P.W.6 S.I. Nazrul Islam was again examined on 13-06-2013 by the learned judge of the court below as investigation officer of the case figuring him out as

P.W.6. In his subsequent testimony this witness claims that the previous investigation officer of the case submitted final report as true (FRT) being No.427 dated 27-06-2009 under section 302/34 of the Code which was pending before the concerned court for acceptance. In the meantime, accused Rasu Kha was nabbed by the police of Faridgonj P.S. in connection with another case in which he gave confessional statement while he also unveiled his other criminal activities. After obtaining a copy of the said confession, it was found that the relevant accused unralleved the story of the instant case following which the investigation of the instant case was resumed by the court concerned on the payer of the officer-in-charge and thereafter, the task of investigation was handed over to him. During investigation, he (P.W.6) consulted the case docket, visited the place of occurrence and also verified the sketch map along with index thereof but he did not draw the same as it was found correct. Moreover, he examined some witnesses and jotted down their statements, interrogated accused Rasu Kha and another accused after taking them on demand. On quizzing, accused Rasu Kha confessed to his guilt disclosing that the name of the victim woman is Shahida whom he brought to Chandpur from Dhaka Cantonment area and thereafter killed her after committing rape. Following which, he (P.W.6) took necessary measures to get the confessional statement of accused Rasu Kha recorded by a competent Magistrate. Eventually, having found prima-facie incriminating materials, he submitted charge-sheet against Rasu Kha under section 302/201 of the Penal Code.

31. In reply to cross-examination P.W.6 states that the colour of the veil of the victim woman was pink and further that a torn part of the same was used to fasten her up. It was not mentioned in the inquest report that the victim woman was clad in a yashmak. Rather, as per inquest-report, the pink coloured veil was found floating beside the dead body. A photographer of studio took the photographs of the dead body and that witnessing the same accused Rasu Kha admitted that he murdered her. He could not trace out the existence of the alleged victim Shahida by sending inquiry slips to Tangail and Kalihati P.S as disclosed by the accused in his confession. This witness further says that he did not send any inquiry slip to the permanent address of the victim woman as disclosed by accused Rasu Kha in his confession. P.W.6 denied the defence suggestions that accused Rasu Kha did not make any confession out of his own will rather it was extracted from him by torture or that the investigation was done in a shoddy manner.

32. P.W.7 Abid Mal is another resident of P.O. village. This witness also divulges in his evidence that on 18-12-2008 he was in his residence while he got information that a dead body was found lying in Dakatia River. Having received such news, at around 10/10.30 am he went to the spot and found the dead body of an unknown woman, aged 18/19 years, with her both hands fastened to her respective legs from behind. Police appeared in the scene, prepared inquest-report, seized wearing apparels of the deceased woman and eventually went away along with the dead body. He (P.W.7) heard that accused Rasu Kha killed the unknown victim.

33. In reply to cross-examination P.W.7 says that he did not know accused Rasu Kha and further that he did not witness the incident of killing. This witness also states that he could not tell whether any letter or mobile was found or not along with the dead body.

34. P.W.8 Billal Mal was tendered by the prosecution.

35. In his cross-examination P.W.8 simply says that at around 10.45 am in the morning he went to the bank of the river wherein he found the cadaver of a woman. P.W.8 denied the defence suggestion that he has been working as a police source.

36. P.W.9 Md. Zakir Hossain Hiru is a teacher by profession. In his testimony this witness unfurls that in the morning of 18-12-2008 he came to learn that the dead body of a woman was found on the bank of Dakatia River at Sobahanpur village. Being secretary of the community police, he then went to the spot and found the cadaver of an unknown woman including police personnel as well as a huge number of people. After preparation of inquest report, police took away the dead body to morgue. He (P.W.9) could not say as to who killed the woman.

37. In reply to cross-examination P.W.9 states that the spot is 1(one) kilometer away from his residence. He has been serving as a madrasha teacher. He did not know as to who is the killer.

38. P.W.10 Siraj Mridha was also tendered by the prosecution for cross-examination. This witness in fact disclosed nothing new in his cross-examination except the factum of knowing the incident as well as the matter of taking away the dead body by the police.

39. P.W.11 Dr. Habibur Rahman is the relevant doctor who on 18-12-2008 carried out post-mortem examination of the dead body of an unknown woman and found the following injuries on dissection:
One continuous diffuse swelling in the neck, abrasion over both wrist joint, subcutaneous tissue of neck, trachea and esophagus congested; blood clot in muscle spaces of neck and both lungs highly congested. Injuries of variable size were found in vagina with clotted blood. All blood clots resist on washing.

40. According to him, death of the deceased woman was caused due to asphyxia resulting from strangulation which was ante-mortem and homicidal in nature and further that the injuries found in the genitalia consistent with rape before the murder of the victim.

41. This witness proves the post-mortem report including his signature appearing thereon as Exhibit Nos.10 and 1/10.

42. In reply to cross-examination P.W.11 discloses that he did not find any mark of injury in the ankle of the dead body. On physical appearance he mentioned the age of the deceased as about 19 years, but no x-ray was done. The woman was killed by strangulation and her lungs were found congested. The victim woman did not die from drowning. Rather, the victim was killed by strangulation and thereafter, her dead body was abandoned in the water. Presence of water could have been traced in the lung, if she was killed by drowning. Several injuries of variable size were found in the vagina of the deceased victim and further that the blood found was not the outcome of menstruation. There was alamat that the deceased woman was subjected to rape. P.W.11 denied the defence suggestion that the post-mortem report is faulty.

43. P.W.12 Abdur Rahman is the concerned Magistrate who penned down the confession of accused Rasu Kha. In his testimony this witness claims that on 18-10-2009 he recorded the confession of accused Rasu Kha after complying with all legal formalities. He gave the

accused sufficient time for reflection and made him understand the questionnaires as set-forth in column 5 and 6 of the confession recording form. After being fully aware of the consequences, the accused made confessional statement out of his free will and further that no marks of injuries were found on the person of the accused, whereupon he (P.W.12) gave note to that effect under column 8. This witness further states that after recording the confession, he read it over to the accused who put his signature thereto admitting the same to be correct. P.W.12 proves the confession including his signature appearing thereon as Exhibit Nos.1/8 to 6/8.

44. In reply to cross-examination P.W.12 says that accused Rasu Kha was arrested on 06-08-2009 from Gazipur Bazar. This witness denied the defence suggestion that accused Rasu Kha did not make any confession to him.

45. P.W.13 Chiranjib Das is the first investigation officer of the case. In his testimony this witness unfurls that on 18-12-2008, upon receiving the task of investigation, he visited the place of occurrence and prepared sketch map along with index thereof, examined witnesses and recorded their statements under section 161 of the Code, sent the photographs of the deceased victim along with inquiry slip to the nearest police stations in a bid to find out her whereabouts and also consulted the post-mortem report after obtaining the same. Having failed to find out the whereabouts of the deceased victim as well as that of her actual assailant including the underlying reason of the incident, he submitted final report as true (FRT) being No.427 dated 27-06-2009 under section 302/34 of the Penal Code. This witness proves the sketch map including his signature appearing thereon as Exhibit Nos.9 and 1/9.

46. In reply to cross examination P.W.13 states that he did not know the accused and further that he could not unveil the name of the assailant.

47. These are all the evidences that had been adduced by the prosecution to prove the charge levelled against the accused.

48. Now, the only point for consideration in this case is, whether the impugned judgment and order of conviction and sentence is sustainable in law or not.

49. From a careful scanning of the evidence and materials on record it is patent that in the morning of 18-12-2008 the dead body of an unknown woman, aged about 18-19 years, was found floating on the bank of Dakatia River at Sobahanpur village under Chandpur Model Police Station whereupon, on information, P.W.6 S.I. Md. Nazrul Islam rushed to the spot along with other police personnel and held inquest of the dead body which was marked as Exhibit No.1. Let us now have a peep at Exhibit No.1 in order to ascertain what injury or injuries were found on the cadaver of the deceased victim at the initial stage of the case and what the apparent cause of death was.

50. The relevant portion of Exhibit-1 runs as follows:

> আমি এস, আই মোঃ নজরুল ইসলাম সংগীয় কং ৪৯৮ আঃ রব সহ সূত্রে বর্ণিত ডায়রী মোতাবেক অদ্য ইং ১৮-১২-২০০৮ তাং ১১/৪৫ মিঃ সময় ৮ নং বাগাদী ইউনিয়নস্থ ৭ নং ছোবাহানপুর গ্রামে আঃ রশিদ মিজির বাড়ীর পূর্ব দিকে অনুমান ৫০০ গজ দূরে ডাকাতিয়া নদীর পশ্চিম পার্শ্বে থুতনী পানির উপরে মাটিতে, শরীরের বাকী অংশ পানির ভীতর ভাসমান ডান হাত ডান পায়ের সাথে বাম হাত বাম পায়ের গিরার সাথে মিষ্টি গোলাপী রং এর বোরকা ছেড়া কাপড় দ্বারা বাধা অবস্থায় উপর করা অবস্থায় স্থানীয় চেয়ারম্যান মোহাম্মদ আলী

পাঠান ও দফাদার ছৈয়দ আহম্মেদ দ্বয়ের দেখানো মতে পাইয়া সুরতহাল রিপোর্টের বাম পার্শ্বে উল্লেখিত স্বাক্ষীদের মোকাবেলায় সুরতহাল রিপোর্ট তৈয়ার করিতে আরম্ভ করিলাম। থানার লাশ বহনকারী মোঃ হারুন অর রশিদ পিং মৃত মারফত আলী সাং নিউট্রাক রোড মোল্লা বাড়ী ও স্হানীয় দফাদার ছৈয়দ আহম্মদ ৮ নং বাগাদী ইউনিয়নদের সহায়তায় নদীর পাড়ে ছোবহানপুর গ্রামের কাচা রাস্তার উপর উত্তর শিয়রী অবস্হায় পাংটর উপর সোয়াইয়া দেখিতে পাই যে মৃতার বয়স অনুমান ১৯ বৎসর মাথার চুল কালো লম্বা অনুমান ১(এক) হাত মুখমন্ডল গোলাকার লম্বা অনুমান ৫′ ঃ ১‘ পাঁচ ফুট ১ ইঞ্চি চোখ বোজা ঠোঁট খোলা সামান্য পড়নে লাল সুতী ছাপা কাপড় গায়ে লাল ব্লাউজ লাল রং এর পেডিকোর্ট হাত দুই খানীর কব্জী সোজা বাধনের দাগ দেখা গেল। স্হানীয় উপস্হিত মহিলা নুরজাহান বেগম (৩২) ও রাশিদা বেগম (৪০) দ্বয়ের সহায়তায় ওলট পালট করে দেখার সময় মৃতার জনিদ্বার ফোলা দেখা গেল তলপেট সামান্য ফাপা। ইহা ছাড়া শরীরে অন্য কোথাও কোন আঘাত বা চিহ্ন পাওয়া গেল না। (Emphasis put).

51. Regarding cause of death it has further been stated in Exhibit-1 that:

প্রাথমিকভাবে অনুসন্ধান কালে মনে হইতেছে যে কোন দুষ্কৃতকারী উক্ত অজ্ঞাতনামা মেয়েটিকে অন্যত্র হইতে ফুসলাইয়া নিয়া আসিয়া তাহার পড়নের বোকরার কাপড় দ্বারা হাত পা বেধে শ্বাস রোধ করে হত্যা করিয়াছে বলিয়া মনে হইতেছে। তদুপরী ও মৃতার মৃত্যু সঠিক কারণ নির্নয় করা প্রয়োজন এবং সে মৃত্যুর পূর্বে ধর্ষিতা কিনা তাহা নির্নয় করা প্রয়োজন।
(Underlining is ours).

52. From the aforesaid discussions it appears manifestly that the dead body of an unknown young woman was found with her both hands tied to her respective legs from behind with a torn piece of veil and that the apparent cause of death of the victim woman was strangulation **(শ্বাসরোধ).**

53. It is on record that the cadaver of the unknown deceased was sent to Chandpur Sadar Hospital through Constable No.498 Abdur Rob for autopsy vide challan Exhibit No.3. Materials on record further go to show that P.W.11 Dr. Md. Habibur Rahman, while posted as emergency medical officer at Chandpur Sadar Hospital, on 18-12-2008, held autopsy of the corpse of the unknown deceased victim and found the following injuries:-

"1) one continuous diffused swelling in neck;
2) one abrasion present in both forearm near wrist joint; and
3) One bite mark present in each breast.

Moreover, the tongue of the victim woman was found protruded as well as bitten by teeth and further that external injuries of variable size were also found in her vagina.

54. On extensive dissection throughout the whole body including head, neck, thorax, abdomen, one continuous diffuse swelling was found present in the neck, abrasion was found over both wrist joints, subcutaneous tissue of neck, trachea & esophagus were found congested, blood clot was found in muscle spaces of neck. Both lungs were found highly congested, injuries of variable size were found in vagina with blood clots. All blood clots resist on washing.

55. According to him, death was caused due to asphyxia resulting from strangulation which was ante-mortem & homicidal in nature. On the basis of the injuries found in the genitalia P.W.11 further opined that those were consistent with rape before murder of the deceased woman.

56. P.W.11 proves the post-mortem report and his signature appearing thereon as Exhibit Nos.10 and 1/10 respectively.

57. We do not find any earthly reason to disbelieve or to hold a different view with that of P.W.11 so far the cause of death of the deceased victim is concerned. The defence also did not raise any objection regarding the aforesaid matters while cross examining the relevant witnesses i.e. P.W.6 and P.W.11 including others. Rather, in reply to cross-examination P.W.11 asserts that:

> শ্বাসরোধ করে মেয়েটিকে হত্যা করা হয়েছে। Lungs congested ছিল। মেয়েটি পানিতে ডুবে মারা যায় নাই। মেয়েটিকে শ্বাসরোধ করে হত্যা করে পানিতে ফেলেছে। Injuries of variable size present in vagina, ঐ রক্ত period এর রক্ত ছিল না।

58. In such a backdrop, we have no other option but to hold that the unknown deceased woman was killed by strangulation **(**শ্বাসরোধ**)** and before that she was subjected to violation.

59. Now, the paramount question that calls for our determination is who is or are responsible for the gruesome murder of the unknown deceased woman.

60. It is indisputable that in the instant case there is no eye witness of the occurrence leading to the incident of ravishment of the unknown deceased woman followed by her murder by strangulation **(**শ্বাসরোধ**).** Even, the prosecution has also failed to bring to the fore any incriminating circumstances which can hook-up accused Rasu Kha in the killing incident of the unknown woman, except his confessional statement (Exhibit No.8).

61. The mainstay, as it appears, in embroiling accused Rasu Kha in the killing incident of the unknown deceased woman is his confessional statement. It is by now well settled that an accused can be found guilty and convicted solely banking on his confession, if the same is found to be true, voluntary and inculpatory in nature. Let us now scrutinize the confession of accused Rasu Kha (Exhibit No.8) with a searching eye to see for ourselves whether the same has satisfied the aforesaid criterion or not.

62. The relevant portion of the confession of accused Rasu Kha (Exhibit No.8) reads as under:

> .....এর সূত্র ধরে আমি গত বৎসরের ডিসেম্বর মাসে ছোবহানপুর গ্রামে ডাকাতিয়া নদীতে চুবাইয়া আমি সাহিদাকে মারি। সাহিদার সাথে আমার পরিচয় হয় ঢাকা এয়ার পোর্ট এলাকার রেলওয়ে ষ্টেশনে। সাহিদা একজন ভাসমান দেহ ব্যবসায়ী ছিল। সে ক্যান্টমেন্ট এলাকায় নৌ বাহিনীর সদর দপ্তর এর গেটের অপর পাশে জঙ্গলে ও ষ্টেশন এলাকায় ঘুরে ফিরে দেহ ব্যবসা করত। সাহিদার সাথে আমি অর্থের বিনিময়ে তার দেহ ভোগ করি। এভাবে ১০/১২ দিন অতিবাহিত হতেই আমি তাকে বিয়ের প্রস্তাব দেই। আমি সাহিদাকে আমার দেশের বাড়িতে নিয়ে আসার প্রস্তাব দিলে সে খুশি হয়ে রাজী হয়। আমি চিন্তা করতে থাকি সাহিদাকে চাঁদপুরের কোথায় আনা যায়। তখন মনে পড়ল আবিদ মালের বাড়ির নিকটস্হ ডাকাতিয়া নদীর পাড় তখন উক্ত জায়গাটি মনে মনে নির্ধারন করি। এই জায়গা পছন্দ করার কারন হচ্ছে আবিদ মালের ৩/৪ টি গরু আছে। উক্ত গরু গুলি চুরি করার ফন্দিতে আমি পূর্বেই আবিদ মালের বাড়িতে এক দিন এসে তার মেয়ের নিকট থেকে পুরো নাম ঠিকানা সংগ্রহ করে নিয়ে ছিলাম। আবিদ মালের ছেলে বিল্লাহ সাং ছোবহানপুর থানা ও জেলা চাঁদপুর লিখে একপক্ষ করে অন্য পক্ষে সাহিদার নাম লেখে আর্থিক লেনদেন বিষয়ক একটি বানোয়াট ষ্ট্যাম্প তৈরী করি। এই ষ্ট্যাম্পটি অন্য একজন লোককে দিয়ে লিখেছি। ষ্ট্যাম্প সাহিদার ঠিকানা লিখেছে। সাহিদা পিতা চান মিয়া সাং ফরমজ থানা- দৌলতপুর, জেলা-খুলনা।
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> ঘটনার আগের দিন ১৭-১২-২০০৯ ইং তারিখ পূর্ব সিদ্ধান্ত অনুযায়ী সাহিদাকে এয়ার পোর্ট ষ্টেশনে থাকতে বলি। আমি এয়ারপোর্টে এসে সাহিদাকে নিয়ে ট্রেন যোগে কমলাপুর রেলষ্টেশনে আসি। রেললাইন পথ ধরে আমি পায়ে হেটে সায়দাবাদ আসি। সায়েদাবাদ এসে খাওয়া দাওয়া করি। সাহিদাকে নিয়ে সুপার গাড়িতে করে অনু ৩/৪ ঘটিকার সময় ঢাকা হতে চাঁদপুরের উদ্দেশ্যে রওয়ানা করি। রাত্র অনুমান ৯ঃ০০ ঘটিকার সময় আমরা চাঁদপুর এসে

পৌঁছাই। চাঁদপুর বাসষ্ট্যান্ডে নেমে রিক্সা যোগে ইচলী চলে যাই। সেখান থেকে খেয়া পার হয়ে আবার রিক্সা যোগে বাগদী চৌরাস্তায় যাই। সেখানে মসজিদের সন্নিকটে রিক্সা থেকে নেমে পাশের মুদি দোকানে যাই । দোকান থেকে ০১টি রুটি ৪টি কলা এবং ১ বোতল পানি কিনে বায়ে বাঘড়া বাজারের একটু সামনে রাস্তা দিয়ে একটু সামনে হেটে ডাকাতিয়া নদীর কাছাকাছি যাই। নদীর পাড় ধরে হেটে আবিদ আলীর বাড়ির সোজা গিয়ে কিছু খড় বিছানো জায়গায় আমি এবং সাহিদা বসি। সেখানে সাহিদার সাথে দৈহিক মেলামেশা করি। আমি ফুর্তি আমোদ করার পর বলি যে, সাহিদা আমাদের বাড়ি নদীর ঐ পাড়। যে বাড়িটি দেখা যায় এটা আমাদের। এখানে এত রাত্রে কোন নৌকা বা নৌযান পাওয়া যাবে না তোমাকে মাথায় করে নদী পার হতে হবে। তুমি কান্নাকাটি করব না কিংবা কোন কারনে চিৎকার দিবা না। তখন সাহিদা রাজী হয় । আমি সাহিদার বোরকা এবং ওড়না দিয়ে ডান হাত ডান পায়ের সাথে এবং বাম হাত বাম পায়ের সাথে বেধে পাঁজকোলে করে কোমড় সমান পানিতে নিয়ে সাহিদাকে পানিতে চুবিয়ে মেরে ফেলি। সাহিদার মাথা ধরে পানিতে চাপ দিয়ে ঠুয়া দিয়ে ধরে পানিতে চুবিয়ে মারি। লাশ পানিতে রেখে দেই। পরিকল্পনা অনুসারে মৃতা সাহিদার দেহে পূর্বে হাত সৃজিত ষ্ট্যাম্পখানা রেখে দেই যেন আবিদ মাল ও তার ছেলেকে সন্দেহ করে। এ পরিকল্পনা করেছি যেন সাহিদা হত্যা মামলায় আবিদ মাল ও তার ছেলে বিল্লাল জড়িয়ে পড়ে। আবিদ মালের বিরুদ্ধে এই হত্যা মামলায় জড়িত করতে পারলে আবিদ মালের গরু গুলি চুরি করে নিয়ে নিতে পারব। সাহিদাকে পানিতে চুবিয়ে হত্যা করে বাগাদী বাজার হয়ে বাঘড়া বাজারে চা দোকানে চা খাই। তখন রাত্র অনুমান ৩.৪৫-৪ টা হবে। সেখান থেকে ফরিদগঞ্জ মুখী গাড়ীতে ফাস্ট টীপে করে আমি ঢাকায় রওয়ানা হই। উক্ত হত্যা সংঘটনের পর কোন ভয় ভীতি লাগেনি ..... (Emphasis added).

63. From the aforesaid narration it is apparent that accused Rasu Kha gave a detailed account as to how he got acquainted with one Shahida (alleged victim) and brought her to the place of occurrence by giving false assurance of marriage, had sexual inter-course with her consent and eventually, with a view to implicate one Abid Mal and his son Billal in the incident, killed her by dipping into the water of Dakatia River upon fastening her both hands to respective legs from behind.

64. P.W.12 Md. Abdur Rahman is the relevant Magistrate who jotted down the confessional statement of accused Rasu Kha. According to him, accused Rasu Kha made confessional statement out of his own will without raising any question about the nature of the same. But the story given by accused Rasu Kha in his confessional statement does not get any support or corroboration either from the inquest report or from the medico-legal evidence furnished by P.W.11 so far the cause of death of the deceased woman is concerned. According to the confession of accused Rasu Kha, he killed alleged victim Shahida by dipping her into the water of Dakatia River after fastening her both hands and legs together from behind. If it had happened as such in that event water should and must have been detected in the abdomen as well as lungs of the deceased woman which could easily be visible on outward looking. But, mysteriously, it had not happened so as because nothing was mentioned as such either in the inquest-report (Exhibit No.1) or in the post-mortem report (Exhibit No.10) of the deceased woman. Rather, in both of the said reports it was mentioned that the victim girl was killed by strangulation **(শ্বাসরোধ).**

65. It would not be out of place to note that the words শ্বাসরোধ করে মারা and পানিতে চুবিয়ে মারা are completely 2(two) different manner of causing death of a person and that both of the two cannot go hand in hand. It is on record that during post-mortem examination the tongue of the deceased victim was found protruded. Moreover, continuous diffused swelling mark was also found in the neck of the deceased victim and her trachea, esophagus and both lungs were also found highly congested and no water was found either in her lung or abdomen. In this context, we may profitably refer to the evidence of P.W.11 who categorically stated that:

"…..শ্বাসরোধ করে মেয়েটিকে হত্যা করা হয়েছে। lungs congested ছিল। মেয়েটি পানিতে ডুবে মারা যায় নাই। মেয়েটিকে শ্বাসরোধ করে হত্যা করে পানিতে ফেলেছে। পানিতে ডুবে মারা গেলে lung এ পানি থাকতে পারে।
(Underlining is ours).

66. From the aforesaid discussions it transpires palpably that the unknown deceased woman was killed by strangulation (শ্বাসরোধ), not by drowning (চুবিয়ে) as was disclosed by accused Rasu Kha in his confessional statement. Thus, it is clear that the deceased victim woman was killed not in the manner as was stated by accused Rasu Kha which has miserably exposed the untrue character of his alleged confession rendering the veracity of the same highly questionable as well as untenable in law.

67. It is to be noted that in a criminal case time, place and manner of occurrence are the 3(three) basic pillars upon which the foundation of the case stand on and the same are required to be strictly proved beyond reasonable doubt by the prosecution in a bid to ensure punishment for an offender charged with an offence. If in a given case any one of the above 3(three) pillars is found lacking or proved to be untrue then it will adversely react upon the entire prosecution story. The same thing has happened in the instant case inasmuch as according to the prosecution story the deceased woman was killed by drowning, whereas as per medico-legal evidence furnished by P.W.11 Dr. Habibur Rahman, the victim was killed by strangulation and thereafter her dead body was abandoned in the water. The inquest-report also does bear out the aforesaid cause of death of the victim woman. Therefore, it is clear like anything that the prosecution has miserably failed to prove the manner of occurrence of the incident. Viewing from this angle there is no hesitation in saying that the confession alleged to have been made by accused Rasu Kha is not true so far as it relates to the manner of occurrence of the incident in concerned.

68. The learned Additional Sessions Judge of the Court below has also noticed the aforesaid discrepancies found in the manner of the occurrence of the prosecution story. Nevertheless, he tried to patch up the matter giving reasoning in paragraph 46 of the impugned judgment which reads as under:

রসু খা তার স্বীকারোক্তিতে মেয়েটিকে মাথায় ধরে পানিতে চুবিয়েছে বললেও সে তার গলায় চেপে ধরে নাই তা বলে নাই। ময়না তদন্ত রিপোর্টে ও সুরতহাল রিপোর্টে মেয়েটির গলায় যে দাগ দেখা যায় তাতে মেয়েটিকে শ্বাসরোধ করে হত্যা করা হয়েছে দেখা যায়। মেয়েটিকে শ্বাসরোধ করার সময় বা পানিতে চুবিয়ে মারার সময় তার গলায় চেপে ধরে চুবানো ও অস্বাভাবিক নহে। ফলে ভিকটিম মেয়েটিকে পানিতে চুবায়ে শ্বাসরোধ করে মারার সময় তার গলায় আসামী রসু খা চাপ দিয়ে ধরেনি তা বিশ্বাস করার কোন সুযোগ নাই। ভিকটিমকে মারার উদ্দেশ্যেই তার হাত পা বেঁধে সতর্কতা অবলম্বনের পর রসু খা তার পক্ষে যেভাবে দ্রুত ও সহজে মারা সম্ভব সেভাবেই মেয়েটির মৃত্যু ঘটিয়েছে মর্মে বিশ্বাস করা গেল। (Emphasis put).

69. The aforementioned observations of the trial court are totally based on surmises and conjecture which is completely unacceptable. In our criminal justice delivery system there is no scope to lean on hypothesis or conjecture instead of proof of the manner of occurrence by sufficient evidence to find out the guilt of an accused charged with an offence. It is the settled principle of law that conjecture or hypothesis however strong it might be, cannot be the substitute for evidence. In such a backdrop, it can be concluded that the learned judge of the court below erred in law in adjudging the culpability of the accused in the killing incident of the deceased woman by the impugned judgment and order which has utterly failed to withstand the legal scrutiny.

70. The observations made by the learned Additional Sessions Judge touching the factum of fastening of both the hands of the victim woman with her respective legs from behind also appears to be wide of the mark. As per confession of accused Rasu Kha, for crossing the

Dakatia River conveniently, he tied up both the hands and legs of the victim woman with parts of veil and scarf from behind. The above story sounds like an old wives tale inasmuch as the same does not stand to reason at all. In normal course of business it is hard to carry a person on head after fastening his hands and legs from behind. Normally, the hands and legs of sacrificial animals are being tied up together at the time of slaughtering so that they cannot put much resistance. It is very much unusual and unthinkable as well that a living person can be held with his/her hands and legs pinioned together from behind. Even, no such forged stamp paper was found and recovered along with the cadaver of the deceased woman as was delineated by accused Rasu Kha in his confessional statement. These discrepancies have also exposed the vulnerability of the confession alleged to have been made by the accused and thereby making in the prosecution case highly doubtful and shaky as well.

71. Incidentally, we may also note that according to the confession of accused Rasu Kha, before the alleged murdering incident he had sexual intercourse with the deceased woman on consensus basis, whereas as per medico-legal evidence, the victim woman was subjected to ravishment. On this count also the confession of accused Rasu Kha does not align with the medico-legal evidence rendering the same unworthy of credence.

72. From a close perusal of the materials on record it further reveals that the learned Additional Sessions Judge observed in para 41 and 42 of the impugned judgment that the scar marks including other marks of injuries as was found on the private organ and chest of the deceased woman are the act of salaciousness of other customers while they were having sex with her which is the clear manifestation of her being a prostitute and further that the victim woman had sexual intercourse with accused Rasu Kha on consensus basis. For felicity of discussion, we may quote the relevant paragraphs in verbatim which read as under:

> (৪১) আসামী রসু খার স্বীকারোক্তি মতেই ভিকটিম (সাহিদা) ভাসমান দেহ ব্যবসায়ী ফলে জীবিকার প্রয়োজনে ভিকটিম বহু বার বহু জনকে দেহদান করেছে অনুমিত হয়। তার সকল দেহদানই স্বেচ্ছা মূলক ছিল বা লোভী দেহ ভোগীরা দেহ ভোগ করে কেহই যাতনা বা নির্যাতন ভিকটিমকে করেনি তদ্রুপ নিশ্চিত হওয়া যায় না। উদ্ধারকৃত ১৮/১৯ বৎসরের ভিকটিম মেয়েটি যৌনদারে বহু আঘাতের চিহ্ন, ময়না তদন্ত রিপোর্টে বুকে কামড়ের দাগ, এই সমস্ত চিহ্ন অজ্ঞাত নামা ১৮/১৯ বৎসরের মেয়েটির দুঃখ ময় সংগ্রামী জীবনে হিংসা, নির্যাতন, লোভীদের শিকারের এক করুন বর্ননা। যা থেকে মেয়েটি দেহ দানের পেশায় ছিল বা রসু খার ভাষায় দেহ ব্যবসায়ী ছিল রসু খার এই স্বীকারোক্তির সত্যতা পাওয়া যায়।
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> (৪২) আসামীর স্বীকৃত মতে ভিকটিম একজন ভাসমান দেহ ব্যবসায়ী হওয়ায় এবং রসু খা তার নিয়মিত গ্রাহক ও ভোগী হওয়ায় হয়তো নিজেকে এই অল্প বয়সে বিপদ সংকুল কঠিন পেশা থেকে বাঁচার আশায় রসু খাকে বিশ্বাস করে বিয়ের স্বপ্ন পুরনের জন্য তার সাথে ঢাকা থেকে চাঁদপুর এসে ঘটনাস্থলে ডাকাতিয়া নদীর পাড়ে ঘটনার গভীর রাতে রসু খার চাহিদা নির্দেশ মতে রসু খাকে যন্তুষ্ট রাখার লক্ষ্যে তার সাথে দৈহিক মেলামেশা করা অস্বাভাবিক নয়। ডাকাতিয়া নদীর পাড়ে ঘটনার রাত্রে ভিকটিম মেয়েটির সাথে আসামী রসু খা দৈহিক মেলামেশা করার বিশ্বাস করা যায়। ঐ দৈহিক মিলনে মেয়েটির সম্মতি ছিল না বা রসু খা তাকে জোর পূর্বক বা প্রাণের ভয় দেখিয়ে সেখানে দৈহিক মিলনে বাধ্য করেছে তন্মর্মে কোন সাক্ষ্য স্বীকারোক্তি পাওয়া যায় না। ফলে ভিকটিম মেয়েটিকে রসু খা ধর্ষন করেছে তা প্রমানিত হয়নি।

73. The above observations made by the court below run counter to the evidence and materials or record in that as per medico-legal evidence, the deceased victim was subjected to rape which also got support and corroboration from the attending circumstances of the case, particularly the bite marks including other injuries found on the breast and private organ of the victim woman. Moreover, having ignored the medico-legal evidence the trial court also presumed that the scar marks and other injuries found on the person of the victim woman are of old nature. But, on the basis of those scar marks including other injuries found on the chest and female organ of the victim woman P.W.11 Dr. Habibur Rahman categorically opined that the victim woman was subjected to rape before her death. In such a scenario, without any tangible materials, there is left no room for the learned Additional Sessions Judge to presume

that those injury and bite marks were old in character. It is to be recalled that a judge is considered to be an impartial and neutral arbiter. Under no circumstances, he should abandon his high place of impartial arbiter and assume the role of a prosecutor, however altruistic its motive may be.

74. It would not be out of place to notice that the learned Additional Sessions Judge did not at all properly take into stock of the absurdity as well as surrealistic story as depicted by accused Rasu Kha in his confessional statement regarding lashing down of both the hands and legs of the victim woman at the back. It has already been observed that lashing down of both the hands and legs of a living person from behind is very difficult task and unusual as well. Moreover, had the victim woman be alive then, she must have put resistance by raising her voice or otherwise when she found that her both legs and hands are being tied up in a very unusual manner with the help of her torn veil and scarf by the accused which any prudent man would certainly do being swayed by natural instinct. Furthermore, the story of crossing the river as made out by the accused in his confession also sounds like a cock and bull story inasmuch as it is the most easiest and convenient way to cross a river by a person along with another adult one upon taking the latter within the lap of the former rather by lashing down both hands and legs in an unusual manner at the back. Having considered the pros and corns of the case together with the attending facts and circumstances, we are of the view that in a bid to fix the accused with the responsibility of the murder of the deceased woman such type of bizarre story was told by the accused in his confession which is against the course of normal behavioural pattern of human conduct. More so, the medico-legal evidence also does not bear out the facts disclosed by the accused in his confession including the observations made by the trial judge on the above score.

75. It is undeniable that accused Rasu Kha was first arrested on 06-08-2009 from Gazipur Bazar in connection with another case filed with Faridgonj P.S. Chandpur and thereafter, he was shown arrested in the instant case on 15-10-2009 while he was also under police custody in connection with the earlier one and further that he was again taken on remand in the present case and eventually, he was produced before the relevant Magistrate court on 18-10-2009 by the investigation officer (P.W.6) with a prayer for recording his confession. Materials on record also do bear out the aforesaid factual events of the case. Therefore, it is patent that the confession of the accused was preceded by a prolonged police custody which has seriously affected the involuntary character of the same.

76. There is another aspect of the case which we cannot ignore at all. It is true that in the instant case no charge was framed against accused Rasu Kha for committing rape on the person of the deceased victim. Nevertheless, since it had happened in the course of the same transaction we need to put focus on the said issue in order to find out the veracity of the entire incident. As per confession, alleged victim Shahida was a prostitute and accused Rasu Kha had sexual intercourse with her at different times. Eventually, he (accused) coxed her into coming with him to the spot by giving false assurance of marriage and thereafter, he had sexual intercourse with her on consensus basis and eventually he killed her. But, it is curious to note that during post-mortem examination marks of violence was found on the private organ of the unknown deceased girl as a result P.W.11 opined that the victim girl was subjected to rape. In this connection, we may refer to the post-mortem report (Exhibit No.10) wherein it has clearly been mentioned that external injuries of variable sizes were found in the vagina of the victim woman and there was also bite marks in her each breast. We have already observed that the post-mortem report is found to be true and the defence has failed to belittle the facts stated therein. Moreover, this post-mortem report has been submitted on behalf of the prosecution and therefore, there is no scope to challenge the veracity of the

same on its side. In such a scenario, if the statements made in (Exhibit No.10) can be regarded as true in that event the story depicted by accused Rasu Kha in his confessional statement becomes a nullity inasmuch as literally 'rape' and ' sexual intercourse with consent' are 2(two) different words meaning different situations. More so, as per confession, the victim girl was a prostitute and accused Rasu Kha satisfied his carnal desire with her on consensus basis. If so, in that case also there is no possibility of leaving any injury mark on the private organ of the deceased victim. On this view point also the veracity of the confession of the accused appears to be highly doubtful and unbelievable.

77. The weird story as has been given by accused Rasu Kha in his confessional statement concerning tying up of both hands of the unknown deceased woman to her respective legs from behind also runs counter to the normal behavioural pattern of human being. From the proved facts and circumstances of the case it can be presumed that the unfortunate unknown deceased victim was first subjected to violation and then she was killed by strangulation and eventually, her dead body was thrown into the river after tying up her both hands to respective legs from behind.

78. It is to be noted further that charge of murder must be proved to the core beyond doubt by consistent and reliable evidence. When there is departure from the manner of occurrence as alleged by the prosecution found in the evidence during trial, the veracity of the prosecution case becomes doubtful and in such a case conviction and sentence cannot be sustained in the eye of law.

79. From the evidence and materials on record it further reveals that the investigation officer of the case did not carry out the investigation diligently and efficiently, rather it was done in a floppy manner inasmuch as the I.O. did not make any sincere endeavor to bring to light the whereabouts of the unknown deceased victim woman and further that he also did not make any attempt to verify the facts as alleged to have been disclosed by accused Rasu Kha in his confessional statement. The performance of the investigation officer in collecting incriminating evidences and materials is not at all satisfactory but highly deplorable.

80. In the aforementioned premises, we are of the dispassionate view that the prosecution has hopelessly failed to bring home the charge brought against accused Rasu Kha to the core and that the learned Additional Sessions Judge has most illegally found him guilty under Sections 302 and 201 of the Penal Code and accordingly convicted and sentenced him there under by the impugned judgment and order which is liable to be knocked down being contrary to law and evidence on record.

81. Accordingly, the death reference is rejected.

82. The judgment and order of conviction and sentence dated 22-04-2015 passed in Sessions Case No.156 of 2010 is set aside.

83. Condemned-prisoner Rasu Kha is found not guilty of the charge levelled against him and he is acquitted of the same.

84. The authority concerned is directed to release accused Rasu Kha immediately, if he is not wanted in connection with any other case.

85. The connected Jail Appeal being No.77 of 2015 is allowed.

86. Send down the L.C. Records along with a copy of the judgment to the court concerned forthwith.

**16 SCOB [2022] HCD 178**

**HIGH COURT DIVISION**
**(Criminal Revisional Jurisdiction)**

**Criminal Revision No. 2304 of 2018**

**Abdul Hye and another**
Vs.
**The State and another**

Mr. S. M. Mahbubul Islam, Advocate
…… for the Convict-petitioners
Mr. Sk. Md. Morshed,
Additional Attorney General with
Ms. Jesmin Sultana Shamsad, DAGs
Ms. Yesmin Begum Bithi, DAGs
Mr. Apurbo Biswas and
Mr. Md. Alauddin, AAGs
…… for the opposite party No. 1

Heard on: 26.01.2021, 02.02.2021, 09.02.2021, 23.02.2021 and 01.03.2021

**Present:**
**Mr. Justice Zafar Ahmed**

**Editors' Note:**
The trial Court found the petitioners guilty under section 466, 468, 471, 420 read with Section 34 of the Penal Code and sentenced them to suffer imprisonment of various length with fine. Appellate Court affirmed the conviction and sentence. On revision, a single Bench of the High Court Division found the petitioners not guilty of forgery but guilty of abetting forgery under section 466/109 of the Penal Code. Charge was not framed against the petitioners under section 466/109 of Penal Code. The High Court Division explaining section 237 and 238 of the Code of Criminal Procedure held that these two sections are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Moreover, the High Court Division found the petitioners guilty under section 471 of the Penal Code but on a different reasoning than that of Courts below. It held that the petitioners used the forged document in Writ Petition No. 9008 of 2005 as Annexure-C which is evident from the judgment passed by the Appellate Division in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340) and as such had committed offence punishable under section 471 of the Penal Code. However, the High Court Division found the petitioners not guilty under sections 468 and 420 of Penal Code. Consequently the Rule was discharged with modification of sentences of the petitioners.

**Key Words:**
Section 463, 464, 466, 471 and 109 of Penal Code; forgery; abetment; Section 237 and 238 of Code of Criminal Procedure, 1898

**Trial Court cannot hold something to be forged unless evidence is adduced to that effect:**
**In this regard, it is relevant to mention that an opinion of the Ministry of Law, Justice and Parliamentary Affairs was attached to the memo dated 14.08.2005 (exhibit-4) in which opinion was given in favour of mutating the tea estate in the name of the petitioner No. 1. The trial Court held that the said opinion was also forged. Be that as it may, the prosecution never alleged that the opinion in question was forged. It did not**

**produce any evidence to that effect. Therefore, the finding of the trial Court cannot be sustained. ...(Para 23)**

**Section 463 and 464 of Penal Code:**

**Evidences of P.W.11 clearly establish that the memo in question (exhibit-4) was a false document within the definition of making a false document given in the 1st clause of Section 464. Undoubtedly, an attempt was made to grab the tea estate by mutating it in the names of the petitioners by using a false document which is an act forgery within the meaning of Section 463. ...(Para 26)**

**If a document is not tendered in evidence, mere reference of it is not sufficient for holding it to be a legal evidence:**

**Both the Courts below held that the petitioners created the forged government memo (exhibit-4) and accordingly, found them guilty of the offence under Section 466 of the Penal Code. .... In this regard, the trial Court referred to and relied upon an inquiry report dated 06.04.2005 prepared by the Additional Divisional Commissioner (Revenue), Sylhet Division and the judgment passed in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340). P.W.7 referred to the inquiry report, but it appears that neither any of the witnesses tendered the said report in evidence nor the maker of the report was examined as a witness. Therefore, the inquiry report is not a piece of evidence. So far as the judgment passed by the Appellate Division is concerned, suffice it to say that the trial Court must come to a finding of its own based on the legal evidences on record. The issue in the reported judgment being different, the same has no bearing upon the issue in hand *i.e.* whether the petitioners created the forged memo (exhibit-4). ...(Para 27)**

**Section 466 read with Section 109 of the Penal Code:**

**In the case in hand, the prosecution though failed to prove that the petitioners made the forged government memo, but facts and circumstances clearly point out that they are instrumental in getting the false memo. In such a situation, there is nothing in law to prevent them from being guilty of abetting the offence of making the forged government memo (exhibit-4). Hence, they should be convicted under Section 466 read with Section 109 of the Penal Code, not under Section 466 alone. ...(Para 29)**

**Sections 237 and 238 of the Code of Criminal Procedure:**

**The petitioners were not charged with abetting the offence. Sections 237 and 238 of the Cr.P.C. are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Accordingly, this Court takes the view that the petitioners are guilty for abetting the offence of making forged government memo. ... (Para 29)**

**Section 471 of the Penal Code:**

**Using a document as genuine when the document is known to be a forged document is the gravamen of the offence under Section 471 of the Penal Code. To constitute an offence of use of a forged document as contemplated by Section 471, it is sufficient to establish that it is used in order that it may ultimately appear in evidence or that it is used dishonestly or fraudulently. Therefore, in order to bring a person within the purview of Section 471, it is enough if he files a forged document, which he knows or**

**has reason to believe to be a forged document (*Ramavtar Missir vs Rajindra Singh*, (1961) 2 CrLJ 139). The convict-petitioners abetted in making the forged memo (exhibit-4). They dishonestly used the said forged memo in the writ petition. Therefore, they are guilty of the offence under Section 471 of the Penal Code. ...(Para 31)**

## JUDGMENT

**Zafar Ahmed, J:**

1. The instant revision is directed against the judgment and order dated 09.08.2018 passed by the Judge, Jananirapatta Bignokari Aparadh Daman Tribunal and Special Sessions Judge, Sylhet in Criminal Appeal No. 41 of 2017 dismissing the appeal and affirming the judgment and order dated 02.02.2017 passed by the Chief Metropolitan Magistrate, Sylhet in Kotwali G.R. No. 1146 of 2005 arising out of Kotwali Police Station (P.S.) Case No. 12 dated 02.11.2005 convicting the petitioners under Section 466, 468, 471, 420 read with Section 34 of the Penal Code and sentencing them to suffer rigorous imprisonment for 06 years and to pay fine of Tk. 10,000/- each, in default to suffer simple imprisonment for 03 months for the offence under Section 466; rigorous imprisonment for 06 years and to pay fine of Tk. 10,000/- each, in default to suffer simple imprisonment for 03 months for the offence under Section 468; rigorous imprisonment for 01 year for the offence under Section 420; and rigorous imprisonment for 01 year for the offence under Section 471.

2. The appellate Court below did not mention whether the sentences of imprisonment shall run concurrently or consecutively. The trial Court directed to run all the sentences concurrently.

3. The convict-petitioner No.1 Abdul Hye is the son of the convict-petitioner No. 2 Ragib Ali. The then Assistant Commissioner of Land, Sadar Thana, Sylhet, namely S.M. Abdul Kader (P.W.9) is the informant of the case.

4. Prior to lodgment of the instant F.I.R, the informant filed another case being Kowali P.S. Case No. 117 dated 27.09.2005 (G.R. No. 974 2005) against the petitioners and others wherein the accused persons except one Pankaj Kumar Gupta, who was acquitted of the charges, were convicted under Sections 467, 468, 420 and 471 of the Penal Code. The appeal against the said order of conviction is now pending before the lower appellate Court.

5. Earlier, in Writ Petition No. 9008 of 2005 the High Court Division quashed the proceedings of both P.S. Case Nos. 117 dated 27.09.2005 and 12 dated 02.11.2005 (instant case). In Civil Appeal No. 163 of 2009, the Appellate Division on 19.01.2016 set aside the judgment passed in the writ petition. The judgment of the apex Court was reported in 24 BLT (AD) (***Bangladesh vs. Abdul Hye and others***).

6. The prosecution case, as stated in the F.I.R., in short, is that Baikuntha Chandra Gupta gifted all his movable and immovable properties including Tarapur Tea Estate situated at Sadar Police Station under Sylhet district in favour of the Deity Sree Sree Radha Krishna Jieu on 02.07.1915 by a registered deed. Since then the tea estate is being treated as debutter property.

7. It has been further stated in the F.I.R. that by dint of a general power of attorney being No. 11586 dated 07.08.1988 the absolute authority to manage the tea estate was given to the

petitioner No.1 Abdul Hye. Thereafter, another special power of attorney being No. 14141 dated 12.11.1988 was obtained from the Shebait of the tea estate, namely Pankaj Kumar Gupta and on the basis of the same Rabeya and others executed a registered bainanama being deed No. 12140/1988 for sale of the tea estate to the petitioner No.1. The Shebait of the tea estate applied to the government for permission to transfer the tea estate. The Ministry of Land, vide memo No. Bhu:Ma:/Sha-8/Khajob/53/89/446 dated 12.10.1989 under the purported signature of an Assistant Secretary of the Ministry accorded permission to the Shebait to transfer the tea estate subject to the conditions contained therein. Pursuant to the said permission letter, on behalf of the Shebait one Dewan Mostak Majid executed a lease deed being No. 2395 dated 12.02.1990 for 99 years in favour of the petitioner No.1 in respect of the tea estate fixing the consideration at Tk. 12,50,000/- although the market value of the tea estate was not less than Tk. 800 crore. Subsequently, it was revealed, vide memo No. Bhu:Ma/Sha-8/Khajob/ 319/91/757 dated 12.09.2005 issued by the Ministry of Land that the earlier permission letter dated 12.10.1989 was created by forging the signature of the Assistant Secretary. Kotwali P.S. Case No. 117 dated 27.09.2005 was filed for the said forgery against the petitioners and others.

8. It has been further stated in the F.I.R. that some local persons made a representation dated 29.12.2004 to the Prime Minister of the country to protect the tea estate from the land grabber Ragib Ali (petitioner No.2). Being instructed by the Ministry of Land, the Additional Divisional Commissioner of Sylhet Division conducted an inquiry and submitted a report regarding various irregularities in respect of the tea estate and made recommendations to take specific steps.

9. Thereafter, on 20.08.2005 the office of the Deputy Commissioner, Sylhet as well as the informant received a letter being No. Bhu:Ma:/Sha-8/Khajob/399/91/170 dated 14.08.2005 (exhibit-4) shown to have been issued by the Ministry of Land under the purported signature of the Senior Assistant Secretary of the said Ministry (P.W.11) wherein it has been stated that the representation dated 29.12.2004 was false and baseless and that the inquiry report was inconsistent. The Deputy Commissioner was asked to mutate the properties of Tarapur Tea Estate. A copy of the opinion of the Ministry of Law, Justice and Parliamentary Affairs was attached to the said memo.

10. The specific prosecution case as stated in the F.I.R. is that the purported signature of the Senior Assistant Secretary contained in the memo dated 14.08.2005 (exhibit-4) was compared with signatures of the said Senior Assistant Secretary contained in other letters which were lying with the office of the Deputy Commissioner, Sylhet and inconsistency in the signatures was detected. In order to ascertain the genuineness of the said memo (exhibit-4), the Deputy Commissioner wrote a letter dated 24.08.2005 to the Ministry of Land. The Ministry, vide letter dated 31.10.2005 (exhibit-7) confirmed that the memo dated 14.08.2005 (exhibit-4) was forged. Accordingly, allegations were brought against the petitioners for the offence of forgery and other offences.

11. An Inspector of Police of PBI (P.W.6) investigated the case and submitted charge sheet being No. 132 dated 10.07.2016 under Sections 466, 468,471,420 read with Section 34 of the Penal Code against the convict-petitioners.

12. After submission of the charge sheet, the case was taken up for trial. Charge was framed against the petitioners under Sections 466, 468,471,420 read with Section 34 of the Penal Code which could not be read over to them as they were absconding. Subsequently,

they were arrested by police. The prosecution examined 11 witnesses. They were extensively cross-examined by the defence. The petitioners were examined under Section 342 of the Code of Criminal Procedure (in short, the 'Cr.P.C.') wherein they pleaded that they were innocent and wanted to examine witnesses in their defence. Accordingly, the defence examined 2 witnesses. The prosecution produced oral as well as documentary evidences to prove the case. The defence did not produce any documentary evidence.

13. The trial Court held that in order to misappropriate Tarapur Tea Estate, the petitioners forged two government memos, namely memo dated 12.10.1989 and memo dated 14.08.2005 (exhibit-4) respectively. The trial Court further held that the petitioners forged those memos for the purpose of cheating and fraudulently used them as genuine for illegal gain and thus, committed the offences under Sections 466, 468, 471, 420 and 34 of the Penal Code and accordingly sentenced them thereunder as stated above.

14. Being aggrieved, the petitioners preferred an appeal in the Court of Sessions Judge, Sylhet. The appeal was heard on transfer by the Special Judge and Jananirapatta Bignokari Aparadh Tribunal, Sylhet. The learned Judge of the Tribunal was pleased to dismiss the appeal upholding the conviction and sentence passed by the learned Magistrate. The lower appellate Court, though assigned its own observations, but ultimately did not interfere with the findings and reasons given in the judgment passed by the trial Court. Thereafter, the petitioners moved this Court challenging the judgment and order of dismissal of the appeal and obtained the instant Rule in the revision.

15. The learned Advocate for the petitioners, at the outset, submits that the memo dated 12.10.1989 was the subject matter of the earlier Kotwali P.S. Case No. 117 dated 27.09.2005. The learned Advocate further submits that in the instant case, the said memo was included in the description of the charge, but the prosecution did not make any attempt to prove by adducing any evidence that the memo was forged, yet both the Courts below held that the petitioners had forged the said memo dated 12.10.1989 and used it as genuine. In this regard the learned Additional Attorney General submits that in the case in hand the specific prosecution case is that the petitioners forged the memo dated 14.08.2005 (exhibit-4) and used it as genuine and therefore, both the Courts below ought to have confined to the points of determination with regard to the memo dated 14.08.2005 only. He further submits that the memo dated 12.10.1989 was referred to build up a scenario of forgery committed by the petitioners which culminated in forging the memo dated 14.08.2005 and using the same as genuine. Upon perusal of the evidences and material on records, it appears that a separate case was initiated for forgery with regard to the memo dated 12.10.1989. Since the commission of the offence of forgery with regard to the said memo is a distinct offence, I find substance in the submissions of the learned Additional Attorney General. Accordingly, in the instant revision the only issue for determination is whether the conviction and sentence passed by the Courts below relating to forgery of the memo dated 14.08.2005 (exhibit-4) by the petitioners and use of it as genuine by them is maintainable.

16. The learned Advocate for the petitioners next submits that in the instant case the charge was defective. The learned Additional Attorney General, on the other hand, refers to Sections 225 and 537 of the Cr.P.C. and submits that since the defence was not misled by the error in the charge, the same did not cause a failure of justice. The learned Advocate for the petitioners found it difficult to lay his hands on the argument.

17. The first question to be answered is whether the memo dated 14.08.2005 (exhibit-4) was forged. P.W.9 (the then Assistant Commissioner of Land, Sylhet Sadar and informant of the case) deposed that after receipt of the memo in question, the then Deputy Commissioner

of Sylhet raised a doubt about the genuineness of the same. He wrote a letter to the Ministry of Land for clarification. The Ministry, vide memo dated 31.10.2005 (exhibit-7) confirmed that the memo dated 14.08.2005 was forged.

18. For ready reference the memo dated 14.08.2005 (exhibit-4) is reproduced below:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
ভুমি মন্ত্রনালয়
শাখা নং-৮

নং-ভূম/শা-৮/খাজব/৩৯৯/৯১/১৭০ তারিখ: ৩০-০৪-১৪১২ সাং
১৪-০৮-২০০৫ ইং

প্রেরক ঃ শাহ মো: ইমাদাদুল হক
সিনিয়র সহকারী সচিব
ভূমি মন্ত্রনালয়।

প্রাপক ঃ জেলা প্রশাসক
সিলেট।

বিষয় ঃ তারাপুর চা বাগানের উপর অতিরিক্ত বিভাগীয় কমিশনার (রাজস্ব), সিলেট এর তদন্ত প্রতিবেদন সংক্রান্ত প্রসংগে।

সুত্র ঃ অতিরিক্ত জেলা প্রশাসক (রাজস্ব), সিলেট। সিনিয়র সহকারী কমিশনার, সিলেট। সহকারী কমিশনার (ভূমি), সদর উপজেলা, সিলেট, সমন্বয়ে গঠিত বিভাগীয় কমিশনারের কার্যালয়, সিলেট হইতে তদন্ত প্রতিবেদন দাখিল।

উপরোক্ত বিষয়ে সুত্রোল্লিখিত তদন্ত প্রতিবেদনে দেখা যায় অভিযোগকারী জনাব লাবলু মিয়া, হিরণ মিয়াম, বশির আহমদ এবং হাশিম মিয়া গত ২৯/১২/২০০৪ ইং তারিখে মাননীয় প্রধানমন্ত্রীর দপ্তর বরাবর যে আবেদন করিয়াছেন তাহা মিথ্যা ও ভিত্তিহীন বলিয়া প্রমানিত হইয়াছে। সিলেট জেলার সদর থানাধীন তারাপুর চা বাগানটির ইতিপূর্বে যে সকল মতামত, তদন্ত ও অন্যান্য প্রয়োজনীয় দলিলাদি সংগ্রহ করা হইয়াছে তাহার সংজ্ঞে বিভাগীয় কমিশানর কার্যালয় হইতে যে তদন্ত প্রতিবেদন তৈরী করিয়া মন্ত্রনালয়ে প্রেরণ করা হইয়াছে তাহাতে অসংগতি ও অসামাঞ্জস্য।

উক্ত তারাপুর চা বাগানটির নামজারীরর বিষয়ে আইন, বিচার ও সংসদ বিষয়ক মন্ত্রনালয়ের মতামতের সত্যায়িত ফটোকপি এতদসংগে প্রেরণ করা হইল। উল্লেখিত চা বাগানটি নামজারীর ব্যাপারে আইন, বিচার ও সংসদ বিষয়ক মন্ত্রনালয়ের মতামতের আলোকে পরবর্তীতে প্রয়োজনীয় কার্য্যক্রম গ্রহন করিবার জন্য অনুমতিক্রমের অনুরোধ করা হইল।

স্বাক্ষর
(শাহ মো: ইমদাদুল হক)
সিনিয়র সহকারী সচিব।

তারিখ: ৩০-০৪-১৪১২ সাং
১৪-০৮-২০০৫

19. The memo dated 31.10.2005 (exhibit-7) is also reproduced below:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
ভুমি মন্ত্রনালয়
শাখা নং-৮

নং-ভূঃমঃ/শা-৮/খাজব/৩১৯/৯১/৯১৯ তারিখ: ৩১/১০/২০০৫ ইং

প্রেরক ঃ শাহ মো ঃ ইমাদাদুল হক
সিনিয়র সহকারী সচিব

প্রাপক ঃ জেলা প্রশাসক
সিলেট।

বিষয় ঃ **তারাপুর চা বাগানের উপর অতিরিক্ত বিভাগীয় কমিশনার (রাজস্ব), সিলেট এর তদন্ত প্রতিবেদন এবং ভূমি মন্ত্রনালয়ের সিনিয়র সহকারী সচিব জনাব শাহ ইমদাদুল হকের স্বাক্ষরটির সাথে জেলা প্রশাসনে প্রাপ্ত অন্যান্য পত্রের স্বাক্ষরের সহিত অসামঞ্জস্য পরিলিক্ষিত হওয়া প্রসংগে।**

সুত্র ঃ তাহার স্মারক নং এস,এ/বন্দো/৫-৫/৯৯-০৫/২০৩৯, তারিখ ঃ ২৪০৮/২০০৫ ইং।

উপরোক্ত বিষয় ও সুত্রের বরাতে আদেশক্রমে জানানো যাইতেছে যে, ভূমি মন্ত্রনালয়ের ৮ নং শাখা হইতে ১৪/৮/২০০৫ ইং তারিখে কোন পত্রই ইস্যু/জারী করা হয় নাই এবং ১৭০ নং স্মারকে মাননীয় প্রধানমন্ত্রীর অনুমোদনক্রমে র‍্যাপিড এ্যাকশন ব্যাটালিয়ন (র‍্যাব-২) কে ঢাকা জেলায় ৭.০০ একর খাস জমি বন্দোবস্ত দেওয়া হইয়াছে। সুতরাং দেখা যাইতেছে যাচাইয়ের জন্য প্রেরীত ভূমি মন্ত্রনালয়ের ১৪/৮/২০০৫ ইং তারিখের ১৭০ নং স্মারকের কথিত পত্রটি জালিয়াতির মাধ্যমে সৃজন করা হইয়াছে। তারাপুর চা বাগানের জমি জবর দখলের মাধ্যমে আত্মসাৎ, মেডিকেল কলেজ ও মার্কেট নির্মাণ এবং হাউজিং প্লট বিক্রয়ের সাথে মিঃ আব্দুল হাই ও জনাব রাগীব আলী গং সরাসরি জড়িত। উক্ত ভুয়া পত্রটি স্বাথ-সংশ্লিষ্ট ও সংঘবদ্ধ দলেরই কাজ মর্মে প্রতীয়মান হইতেছে। ফলে উক্ত পত্র সৃজনের সহিত স্বার্থ সংশ্লিষ্ট ব্যক্তিদের বিরুদ্ধে সরকারী সম্পত্তি আত্মসাতের নিমিত্ত জাল-জালিয়াতির মাধ্যমে ভূয়া পত্র/সরকারী আদেশ সৃজনের দায়ে পৃথক ফৌজদারী মামলা রুজু করিবার জন্য অনুরোধ করা হইল। পরবর্তী অগ্রগতি মন্ত্রনালয়কে অবহিত করণের জন্যও অনুরোধ করা হইল।

**বিষয়টি জরুরী।**

সংযুক্ত ঃ ০২ ফর্দ।

স্বাক্ষর
(শাহ মো: ইমদাদুল হক)
সিনিয়র সহকারী সচিব।
তারিখ: ৩১/১০/২০০৫ ইং

20. The learned Advocate for the petitioners submits that neither the prosecution obtained opinion of the handwriting expert in respect of the disputed signature nor the trial Court took recourse to Section 73 of the Evidence Act, 1872 which provides for the direct comparison by the Court of the disputed signature with undisputed one. The learned Advocate submits that in the circumstances it cannot be said that the disputed signature contained in exhibit-4 has been proved beyond reasonable doubt as forged.

21. P.W.11 Shah Imdadul Huq, under whose purported signature the memo in question (exhibit-4) was shown to have been issued, categorically deposed before the Court that he did not sign the said memo and that the memo was created using his name and forging his signature. Memo dated 31.10.2005 (exhibit-7) issued under the purported signature of P.W.11 fortifies the fact that the signature contained in exhibit-4 was forged. Exhibit-7 was not challenged by the defence. In this regard, the trial Court observed, "…রাষ্ট্রপক্ষের গুরুত্বপূর্ণ সাক্ষী পি. ডব্লিউ-১, পি. ডব্লিউ-৯ ও পি. ডব্লিউ-১১ নির্দিষ্টভাবে আসামীদের বিরুদ্ধে যে জাল জালিয়তির অভিযোগ উত্থাপন করেছেন ঐ স্মারকপত্র বিষয়ে অর্থ্যাৎ ১৪/০৮/২০০৫ তারিখের কথিত স্মারকপত্র বিষয়ে এই ০৩ (তিন) জন সাক্ষীকে আসামীপক্ষ সুনির্দিষ্টভাবে কোন জেরা করেন নাই দু একটি সাজেশন দেয়া ছাড়া। যদিও ঐ সাজেশনগুলো এই সাক্ষীরা অস্বীকার করেছেন".

22. In view of the evidences and materials on record and reasons assigned by the trial Court I am of the view that examination of the disputed signature by an expert or comparison of the same with undisputed one by the Court was not at all necessary.

23. In this regard, it is relevant to mention that an opinion of the Ministry of Law, Justice and Parliamentary Affairs was attached to the memo dated 14.08.2005 (exhibit-4) in which opinion was given in favour of mutating the tea estate in the name of the petitioner No. 1.

The trial Court held that the said opinion was also forged. Be that as it may, the prosecution never alleged that the opinion in question was forged. It did not produce any evidence to that effect. Therefore, the finding of the trial Court cannot be sustained.

24. Section 463 of the Penal Code defines 'forgery'. Section 463 runs thus:

> 463. **Forgery—**Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intend to commit fraud or that fraud may be committed, commits forgery.

25. Section 464 of the Penal Code lays down provisions regarding 'making a false document'. For ready reference Section 464 is quoted below:

> 464. **Making a false document—** A person is said to make a false document—
> Firstly.-Who dishonesty or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or
> Secondly.-Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or
> Thirdly.-Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him he does not know the contents of the document or the nature of the alteration.

26. Evidences of P.W.11 clearly establish that the memo in question (exhibit-4) was a false document within the definition of making a false document given in the 1st clause of Section 464. Undoubtedly, an attempt was made to grab the tea estate by mutating it in the names of the petitioners by using a false document which is an act forgery within the meaning of Section 463.

27. Both the Courts below held that the petitioners created the forged government memo (exhibit-4) and accordingly, found them guilty of the offence under Section 466 of the Penal Code. In so doing, the appellate Court below observed, " আসামী-আপীলকারীরা তাহাদের বিরুদ্ধে আনা অভিযোগ এবং মামলার কার্যক্রম নিষ্ফল করার সকল অপচেষ্টা ক্রমাগতভাবে করিয়া গিয়াছেন। এইরুপ কার্যকলাপ দ্বারা এবং আসামীদের সুবিধা ভোগের বিবরন দ্বারা এবং চার্জশীট দাখিলের পর পলাতক হওয়ার দ্বারা ইহা সুনির্দিষ্টভাবে ইঙ্গিত করে যে, জাল-জালিয়াতিপূর্ণ কাগজপত্র এবং উহা দ্বারা প্রতারনা করার ক্ষেত্রে আসামী-আপীলকারীরা অতি দক্ষতা ও তৎপরতা দেখাইয়াছেন। উক্ত কার্যকলাপে আসামী-আপীলকারীদের অংশগ্রহন ছিল অতি সূষ্ট এবং সুনির্দিষ্ট". In this regard, the trial Court referred to and relied upon an inquiry report dated 06.04.2005 prepared by the Additional Divisional Commissioner (Revenue), Sylhet Division and the judgment passed in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340). P.W.7 referred to the inquiry report, but it appears that neither any of the witnesses tendered the said report in evidence nor the maker of the report was examined as a witness. Therefore, the inquiry report is not a piece of evidence. So far as the judgment passed by the Appellate Division is concerned, suffice it to say that the trial Court must come to a finding of its own based on the legal evidences on record. The issue in the reported judgment being different,

the same has no bearing upon the issue in hand *i.e.* whether the petitioners created the forged memo (exhibit-4).

28. The learned Advocate for the petitioners submits that since there is no evidence on record to show that the petitioners created the forged memo in question the Courts below wrongly convicted them under Section 466 of the Penal Code for forging the government memo.

29. It is true that the P.W.s could not state who created the forged memo (exhibit-4). Referring to the evidences of the P.W.s the lower appellate Court observed, "এজহারে বর্নিত চিঠিটা কাহার মাধ্যমে জাল এবং জাল চিঠি কিভাবে ডিসপ্যাচে আসিয়াছে ইহা কেহ বলিতে পারিবেন না মর্মে তাহারা জেরায় বলিয়াছেন". Be that as it may, evidences on record have established the facts that Tarapur Tea Estate was a debutter property; that it was being managed by the Shebait of the Deity before it was grabbed by the petitioners; that they managed to obtain a long term lease deed for 99 years in respect of the tea estate; that they thereupon established a Medical College, housing estate and a super market by damaging the tea plantations and utilized a portion of the tea estate for the purposes other than the purposes for which the property was dedicated to the Deity. Had the forgery in respect of the Government memo dated 14.08.2005 (exhibit-4) not been detected, the tea estate would have been mutated in the names of the petitioners. Therefore, the petitioners are unquestionably the beneficiaries of the forgery. D.W. Nos. 1and 2 are Assistant Managers of Malnichara Tea Estate owned by the petitioner No.2 Ragib Ali. Their evidences establish the facts that the petitioners are rich and influential persons. In the case in hand, the prosecution though failed to prove that the petitioners made the forged government memo, but facts and circumstances clearly point out that they are instrumental in getting the false memo. In such a situation, there is nothing in law to prevent them from being guilty of abetting the offence of making the forged government memo (exhibit-4). Hence, they should be convicted under Section 466 read with Section 109 of the Penal Code, not under Section 466 alone. The petitioners were not charged with abetting the offence. Sections 237 and 238 of the Cr.P.C. are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Accordingly, this Court takes the view that the petitioners are guilty for abetting the offence of making forged government memo (exhibit-4).

30. Now, I turn to the conviction of the petitioners under Section 471 of the Penal Code for using the forged memo as genuine. Referring to the evidences of P.W. Nos. 2, 3, 5, 7 and 10 the lower appellate Court observed that these P.W.s could not say how did the said forged memo reach the dispatch section of the office of the Deputy Commissioner, Sylhet or who sent the memo to the concerned office (জাল চিঠি কিভাবে ডিসপ্যাচে আসিয়াছে ইহা কেহ বলিতে পারিবেন না মর্মে তাহারা জেরায় বলিয়াছেন। ....এজাহারে বর্নিত জাল চিঠি কে, কিভাবে উক্ত দপ্তরে পৌঁছাইয়া দিয়াছেন ইহা জেরা কালে এই সাক্ষীরা সুনির্দিষ্ট করিয়া বলিতে পারেন নাই). The learned Advocate for the petitioners submits that having made these observations and without giving any cogent reason based on legal evidences, the appellate Court below committed illegality in upholding the conviction the petitioners under Section 471 of the Penal Code. The learned Additional Attorney General, on the other hand, submits that the petitioners used the forged memo (exhibit-4) in Writ Petition No. 9008 of 2005 as Annexure-C which is evident from the judgment passed by the Appellate Division in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340). Referring to the memo in question, the apex Court observed,

> "*It is alleged that this letter was procured by resorting forgery. On the other hand, writ petitioners claimed that the Ministry issued this letter. This being a disputed question of fact cannot be decided in a summary manner in writ jurisdiction".*

31. Using a document as genuine when the document is known to be a forged document is the gravamen of the offence under Section 471 of the Penal Code. To constitute an offence of use of a forged document as contemplated by Section 471, it is sufficient to establish that it is used in order that it may ultimately appear in evidence or that it is used dishonestly or fraudulently. Therefore, in order to bring a person within the purview of Section 471, it is enough if he files a forged document, which he knows or has reason to believe to be a forged document (***Ramavtar Missir vs Rajindra Singh***, (1961) 2 CrLJ 139). The convict-petitioners abetted in making the forged memo (exhibit-4). They dishonestly used the said forged memo in the writ petition. Therefore, they are guilty of the offence under Section 471 of the Penal Code.

32. At this juncture, the learned Additional Attorney General frankly and candidly submits that evidences on record and findings of the Courts below do not attract the provisions of Section 420 of the Penal Code and for this reason the conviction under Section 468 of the Penal Code (forgery for the purpose of cheating) cannot be sustained. I find substance in the submissions. Hence, the petitioners are acquitted of the charge under Sections 420 and 468 of the Penal Code.

33. In this case, unfortunately the prosecution did not make any attempt to unearth who actually made the forged government memo (exhibit-4) and who else were involved in the said act of forgery. The trial Court rightly observed that concerned employees of the local administration and others aided the petitioners in the entire process of forgery. The prosecution also failed to find out who sent the forged memo to the dispatch section of the office of the Deputy Commissioner, Sylhet. In this regard, the investigation conducted by police was perfunctory in nature. The investigating agency failed to undertake any real or effective effort to unearth or detect the other perpetrators involved in the forgery and in the transactions carried out with the forged memo. Considering all these aspects as well as the attending facts and circumstances of the case, in my view, rigorous imprisonment for 02 years 06 months is appropriate sentence for the offence committed under Section 466 read with Section 109 of the Penal Code. Rigorous imprisonment for 01 year for the offence under Section 471 is maintained. The sentence of fine is upheld.

34. Accordingly, orders of this Court are as follows:

Conviction and sentence of the petitioners under Section 466 of the Penal Code is modified. They are convicted under Section 466 read with Section 109 of the Penal Code and sentenced to suffer rigorous imprisonment for 02 years 06 months and also to pay a fine of Tk. 10,000/- each, in default to suffer simple imprisonment for 03 months more. Conviction and sentence of the petitioners under Section 471 of the Penal Code is affirmed, but both the sentences are directed to run concurrently.

35. The petitioners are acquitted of the charges under Sections 420 and 468 of the Penal Code. The convict-petitioners are directed to surrender before the Court concerned within 01 month from the date of receipt of this judgment to serve out the remaining portion of sentence of imprisonment, failing which the Court concerned shall take steps in accordance with law to secure the arrest of the petitioners.

36. In the result, the Rule is discharged with modification of conviction and sentence and with directions made above.

37. Send down the lower Court records (LCR) at once. Communicate the judgment and order to the Court concerned forthwith.

**16 SCOB [2022] HCD 188**

**HIGH COURT DIVISION**

Death Reference No. 87 of 2015 with
Criminal Appeal No. 7608 of 2020

**The State and another**
Vs.
**Md. Mostafa Sarder and another**

Ms. Kazi Shahanara Yeasmin, Deputy Attorney General with Mr. Zahid Ahammad (Hero) and Ms. Sabina Perven, Assistant Attorney Generals.
.....for the State
(In the reference and respondent in the appeal)

Mr. Mohammad Shishir Manir with
Mr. Mohammad Noab Ali, Advocates
.....for the convict-appellant
(In Crl. A. No. 7608 of 2020)

Judgment on 27.06.2021

**Present:**
**Mr. Justice S.M. Emdadul Hoque**
And
**Mr. Justice Bhishmadev Chakrabortty**

**Editors' Note:**
In the instant case the conviction was wholly based on medical evidence, i.e., on the experts' opinion. But the High Court Division found that the medico-legal evidence (autopsy report) was inconsistent with the homicidal death and the report differs from the opinion of renowned authors of forensic experts. High Court Division held that the necropsy report and the evidence of doctor are not a gospel of truth or sacrosanct. These may be scrutinized and rejected by the Court, if found contradictory with the symptoms found on the dead body and oral evidence of witnesses. In the result, it set aside the judgment and order of the trial Court and acquitted the accused.

**Key Words:**
Strangulation; hanging; protrusion of tongue; haematoma; ligature mark; Section 45 of the Evidence Act, 1872

**The prosecution case that the victim was made senseless on torture or murdered earlier and thereafter her body was suspended at the place and in the manner to screen the offence is not at all believable because it is not based on rationality:**
**As per inquest the height between the suspended point and the wooden ceiling was 4½ (four and a half) feet and the victim was 5 (five) feet tall. A rafter (রুয়া) of a tin shed house is one of a series of slopped wooden structural members that extend from the ridge or hip to the wall plate, downslope perimeter or eave and that are designed to support the roof shingles, roof dock and its associated load. As per sketch map, the lower part of the rafters of the occurrence house were slopping and down to the wall plate to fix roof of tin on it which is common in this country. Therefore, in case of self hanging from the rafter, it was possible for the victim to receive a strike/blow on her head from it resulting haematoma and intracranial haemorrhage which has been found in the autopsy. It may be noted here that no other external injury was found on the person of the deceased. If the condemned-prisoner assaulted the victim or strangulated**

**her by force, there could have been some marks of violence or other injuries such as scratch mark on the throat or other parts of the body. It was almost impossible for the condemned-prisoner to take the victim's body on the entresol of the house through a ladder or stair generally used in such a tin shed house after making her senseless. Therefore, the prosecution case that the victim was made senseless on torture or murdered earlier and thereafter her body was suspended at the place and in the manner to screen the offence is not at all believable. It may further be noted here that the doctor found one of the cause of victim's death by strangulation and it was antemortem. If she was hanged after her death as stated in the FIR and found by the trial Judge, the ligature mark found around the neck would be of *postmortem,* it would not in any case be *antemortem*. ...(Para 45)**

**<u>Protrusion of tongue is found in most of the hanging cases but not in strangulation:</u>**
**In the necropsy report (exhibit-4) the doctors found deceased's tongue protruded due to gas and PW8 doctor deposed 'জিব্বা আংশিকভাবে বাহির হইয়াছিল', which supports the inquest report. In that case, as per Reddy's book of 'Essentials of Forensic Medicine and Toxicology', 34th Edition, 2017 (Page 328, serial No. 13 of the table) the death was for hanging but not of strangulation. The tongue position in case of homicidal death by strangulation and in case of suicidal hanging as published in 'International Journal of Legal Medicine' further shows that in the survey they have found protrusion of tongue in most of the hanging cases but not in strangulation. ...(Para 46)**

**<u>The ligature mark in case of strangulation is commonly found round around the neck and in case of hanging eyes of the deceased are found closed according to the view expressed by experts:</u>**
**The ligature mark in case of strangulation is commonly found round around the neck but here it is found 'ill defined and anterior aspect of the neck'. Showing the condition of fracture of hyoid bone, Mr. Ahammad submits that Medical Jurisprudence speaks of fracture of hyoid bone common in strangulation but it is absent in hanging and from that point of view, the present case is purely a case of strangulation. We find in Modi's Medical Jurisprudence (20th and 22nd edition), that in case of strangulation larynx, trachea and hyoid bone (all) are often found fractured but it is rare in hanging. In this case only hyoid bone is found fractured. Moreover, Reddy in his Medical Jurisprudence, 34th Edition, 2017 (Page-328) found fracture of hyoid bone uncommon in strangulation but may occur in hanging. In view of the above position, the submission of Mr. Ahammad does not stand but supports the defence case of hanging. Moreover, in the inquest, the IO found the eyes of the deceased closed which according to the view expressed by Modi is also a sign that the victim's death was from handing. ...(Para 48)**

**<u>Section 45 of the Evidence Act, 1872:</u>**
**According to section 45 of the Evidence Act, a postmortem report is an expert opinion and if it is found corroborative to the injuries on the person of the deceased and supported by the evidence of doctor, it may be considered alone for basing conviction in the absence of any ocular evidence on record. ...(Para 49)**

**<u>Doctors should be cautious enough in holding autopsy in unnatural death cases:</u>**
**The prosecution further failed to prove the time of occurrence. It appears from the evidence and other materials on record that the dead body of Kohinoor was found in the place and manner after 3 (three) days of her missing. The doctor found most of the organs of the corpse decomposed and blister all over the body. But in the report they**

**did not wrote about the approximate time of death of the deceased. We find that the doctors very casually examined the corpse and held autopsy on it. They did not mention the condition of eyes and other necessary symptoms generally found internally and externally to determine the death. They should be cautious enough in holding autopsy in unnatural death cases. Their callousness in holding autopsy may result in miscarriage of justice. ...(Para 50)**

**Medical evidence is not sacrosanct and may be rejected by the Court, if found contradictory with the symptoms found on the dead body and oral evidence of witnesses:**

**It transpires from the evidence of witnesses that there was strained relation between the husband and wife for the second marriage of the condemned-prisoner. The fact of missing of the deceased wife before 3 (three) days of tracing her body hanged and the surrounding circumstances lead us to believe that she might have committed suicide at the place and in the manner for the reason of her husband's second marriage. The defence has been able to make out a specific and believable case of suicidal hanging by putting suggestions to the prosecution witnesses. The necropsy report and the evidence of doctor in support of strangulation and intracranial haemorrhage are not a gospel truth or sacrosanct. These may be scrutinized and rejected by the Court, if found contradictory with the symptoms found on the dead body and oral evidence of witnesses. ...(Para 52)**

## JUDGMENT

**Bhishmadev Chakrabortty, J:**

1. Learned Additional Sessions Judge, Court No. 1, Barishal has made this reference under section 374 of the Code of Criminal Procedure (Code) for confirmation of the sentence of death awarded upon the condemned-prisoner in terms of the judgment and order passed on 08.10.2015 in Sessions Case No. 208 of 2010 finding him guilty of offence under section 302 of the Penal Code. In addition to the sentence of death he was further sentenced to pay a fine of taka fifty thousand.

2. Learned Judge further found him guilty under section 201 of the Penal Code and sentenced him thereunder to suffer rigorous imprisonment for seven years and to pay a fine of taka five thousand, in default, to suffer imprisonment for two months more. But, he acquitted two other co-accused who faced the trial under the same charges.

3. Against the aforesaid judgment and order of conviction and sentence, the condemned-prisoner preferred Jail Appeal No. 179 of 2015 through jail authority. The above jail appeal was subsequently converted into Criminal Appeal No. 7608 of 2020. Since the reference and the criminal appeal have arisen out of the same judgment and order, these have been heard together and are being disposed of by this judgment.

4. PW1, Md. Asmat Ali Sarder lodged a first information report (FIR) with Gournadi police station implicating his son-in-law Mostafa (condemned-prisoner) and four others as accused stating, *inter alia*, that the accused persons in a preplanned way murdered his daughter Mst. Kohinoor Begum (deceased) and suspended her body from a *rafter* (টিনের চালের রুয়ার সাথে) on the entresol (মাচা) of four roofed tinshed house of accused Mostafa. It was further contended in the FIR that accused Mostafa took accused Blue Begum his second wife and due to it there was serious strain between Mostafa and his daughter. He suspected

that all the accused named in the FIR led by Mostafa murdered his daughter and hanged the body with a scarf/muffler in the place and in the manner as stated hereinbefore and then decamped.

5. On the aforesaid allegation Gournadi police station case No. 05 dated 04.02.2010 corresponding to General Register No. 19 of 2010 under sections 302, 34 and 201 of the Penal Code against five accused including the condemned-prisoner was started.

6. Md. Shahjalal, a Sub-Inspector (SI) of police, investigated the case. In his turn, he arrested three accused named in the FIR including convict Mostafa and on collecting necessary materials for prosecution submitted a charge sheet under above noted sections of the Penal Code against three accused who were named in the FIR at serial Nos. 1,2 and 5. However, he did not send up Hasi Begum and Sarwar Paik in the charge sheet.

7. The record of the case was then sent to the Sessions Judge, Barishal. Learned Sessions Judge took cognizance of offence against the accused persons sent up in the charge sheet. Subsequently, he framed charges against all the three accused under the aforesaid sections of the Penal Code. The charges so framed were read over to the accused, to which they pleaded not guilty and claimed to be tried. The Sessions Judge then sent the record of the case for trial to the Additional Sessions Judge, Court No. 1, Barishal.

8. During trial, the prosecution examined 8 (eight) witnesses and they were cross examined by the defence. The defence case, as it transpires from the trend of cross examining the prosecution witnesses is that the accused were innocent, they did not commit the offence of murder and that the victim committed suicide by hanging.

9. On conclusion of examination of the prosecution witnesses, learned trial Judge examined the accused persons under section 342 of the Code. In the examination, they reiterated their innocence and demanded justice but did not examine any witness to support their defence. However, learned Additional Sessions Judge considering the evidence and other materials on record found accused Mostafa Sarder guilty of offences under sections 302 and 201 of the Penal Code and sentenced him thereunder to death, giving rise to this reference and the appeal.

10. Mr. Zahid Ahammad, learned Assistant Attorney General taking us through the evidence and other materials on record submits that the condemned-prisoner murdered his wife Kohinoor Begum brutally striking on the head and strangulating her and, thereafter, to screen the offence suspended her dead body from a rafter on the entresol of his dwelling house. Earlier, the victim made a General Diary Entry (GDE) with the concerned police station finding her life risky with the condemned-prisoner. Since the victim was found dead in the house of her husband, it was his duty to explain how she met with the death. The explanation of the husband as suggested to the prosecution witnesses that she has committed suicide was proved false by the medical evidence and autopsy report. In the report, the doctors opined that the death was due to the combined effect of intracranial haemorrhage and violent asphyxia resulting from strangulation, which was antemortem and homicidal in nature. The condemned-prisoner did not take the defence that he was not at home when the occurrence took place. The witnesses successfully proved the charges against him of committing the heinous offence. The learned trial Judge on sifting and assessing the evidence both oral and documentary correctly found him guilty of the offence of murder and sentenced

him to death. Since, the judgment and order of conviction and sentence is based on legal evidence, it should not be interfered with by this Court.

11. Mr. Mohammad Shishir Manir, learned advocate for the appellant advanced his argument only on the point that this was purely a case of suicidal hanging. Undoubtedly, the wife died in the house of her husband (condemned-prisoner) but he explained the death of his wife. The defence suggested the prosecution witnesses to that effect and made out a specific case that the victim committed suicide. Although, in the postmortem report the doctor opined the death as antemortem and homicidal in nature because of violent asphyxia and intracranial haemorrhage and supported in his evidence but the medical evidence is not sacrosanct. He refers to the evidence of PWs1-4 and 7 and submits that their evidence unequivocally proves that this is a case of suicide. All of them stated that they did not see the actual occurrence but they heard that the victim had committed suicide. Even PW2, daughter of the deceased and PW7, the son on oath did not bring any allegation against the condemned-prisoner. They in evidence stated that their mother had committed suicide, but their father was made accused on mere suspicion.

12. Mr. Manir then takes us through the postmortem report (exhibit-4) and submits that although the doctors abruptly concluded that the death was homicidal in nature but the signs and symptoms found in the dead body and recorded in the autopsy report proved it suicidal. If the evidence of witnesses is assessed carefully and considered with circumstantial evidence in juxtaposition with the expert report, a conclusion can safely be drawn that the victim has committed suicide. He refers the index of symptoms specified by the renowned forensic experts for drawing a comparison with the symptoms found in the autopsy report to prove the death as suicidal. Firstly, he refers to 'A Text Book of Medical Jurisprudence and Toxicology' by JP Modi, 24$^{th}$ Edition 2011, page 456 and pointed at serial Nos. 2,5,6,7,11 and 13 of the table of differences of symptoms between hanging and strangulation and submits that those indicate the instant death as suicidal. He relies on serial No. 6 of a similar table of KS Narayan Reddy's 'The Essentials of Forensic Medicine and Toxicology' 34$^{th}$ Edition, 2017, Page- 328 which tells fracture of hyoid bone is common in hanging but uncommon in strangulation.

13. Mr. Manir further takes us through the FIR and inquest report and submits that the body of the deceased was found partially hanging, i.e., it was hanged from a low point of suspension. According to Modi's Medical Jurisprudence and Toxicology (24$^{th}$ Edition, Chapter XIX, page 445) partial hanging is used for such cases in which the bodies are partially suspended, for those in which the bodies are sitting, kneeling, reclining, prone or any other posture. He produced some photographs printed in the above book and the provisions of Reddy's Forensic Medicine, 34$^{th}$ Edition, page 390 and submits that it is quite possible for a person to commit suicide by hanging partially and if the overall facts and evidence on record of this case are considered together with the medical jurisprudence, it would be conclusive that this is a case of partial hanging and suicidal in nature.

14. He then refers to the Medical Jurisprudence of JP Modi (24$^{th}$ Edition, Page- 589) to explain 'extradural haemorrhage' and submits that according to Modi 'extradural haemorrhage' is mostly traumatic and occurs between the skull and the dura mater and is caused by the rupture of the middle meningeal artery, diploic veins or dual venus sinuses. Admittedly, the distance between the rafter and wooden ceiling was four and a half feet and the victim's height was five feet and as such it was naturally possible to receive a blow on her head at the time of hanging resulting haematoma and extradural haemorrhage.

15. Mr. Manir further submits that in this case the conviction has been based solely on the autopsy report. Under section 45 of the Evidence Act, a postmortem report is an expert opinion, but it is not conclusive proof of the fact. The courts are at liberty to accept or reject this sort of opinion. It is established principle that statement of witnesses will prevail over the postmortem report, if the report contradicts with ocular evidence. In the case of Tomaso Bruno Vs. State of UP, (2015) 7 SCC 178, the trial Court found two Italian nationals guilty under sections 302 and 34 of the Penal Code on the charge of murder of another Italian by strangulation and were sentenced to suffer imprisonment for life. The High Court of Allahabad confirmed the conviction and sentence passed by the trial Judge, but on appeal the Supreme Court of India acquitted them and set aside the conviction and sentence. There it has been held-

> *"The Courts normally would look an expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such report are perfunctory and unsustainable. We agree that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion but such report is not a conclusive one".*

16. Mr. Manir urges to analyse the report of the case in hand, read it in conjunction with other evidence on record and to form final opinion as to whether the report is worthy of reliance or not. He refers to the cases of the State Vs. Tajel Sheikh, 19 BLC (AD) 178 and Habibur Rahman Vs. the State, 16 BLT 275 and submits that in the cited cases it has been held that the postmortem report is just like any other corroborative evidence. It cannot be accepted as a conclusive proof as to the cause of death of the deceased. In both the above cited cases our superior Court disbelieved the postmortem reports. It is well settled position of law that an expert's report is not sacrosanct. It may not be accepted when it contradicts with ocular evidence. The oral evidence in this case contradicts with the findings of postmortem report.

17. Mr. Manir refers an article published in the journal of Enam Medical College, volume 3 No. 2 of July 2013 titled as 'Violent Asphyxial Death: A Study in Dinajpur Medical College, Dinajpur' which shows that 88.5% of violent asphyxial death were due to hanging and 6.25% due to strangulation. The article published in the International Journal of Medical Toxicology and Forensic Medicine, 2013; 3(2): 48-57 titled as 'Study of Violent Asphyxial Death' shows that hanging (82.48%) is the most common encountered violent asphyxial death followed by drowning (14.43%) and strangulation (03.09%) and, therefore, most common form of violent asphyxial death are hanging but not strangulation. A Medical Study published in 'The International Journal of Legal Medicine [(2019)133:1279-1283]' shows that tongue protrusion is more common in hanging. The data of the above medical study shows that tongue of most of the bodies in case of hanging (32 out of 47) found protruded but less in strangulation (15 out of 47). The fracture of hyoid bone is also common in hanging but uncommon in strangulation according to the Medical Jurisprudence of Modi and Reddy.

18. Mr. Manir lastly submits that the GDE alleged to have been lodged by the victim with the concerned police station has not been brought before the Court as evidence. The IO of the case was dead during trial but the prosecution did not examine any other police officer as witness to prove the document and its content, and as such there is no scope to take into account the GDE for consideration. There is no ocular evidence against the appellant and the opinion of the doctor does not correlate with the internal and external symptoms found on the dead body of the victim, and as such it should be rejected. The judgment and order of

conviction and sentence relying solely on the medical evidence would be set aside and the appellant be acquitted of the charges levelled against him, he concludes.

19. In reply Mr. Ahammad, learned Assistant Attorney General takes us through the 'violent asphyxial death' and 'hyoid bone' from *Wikipedia*. He shows us the photographs of 'hyoid bone' printed there and submits that in this case the experts report about fracture of hyoid bone proves that the death of Kohinoor was not for hanging but of strangulation. In the reports the doctors clearly opined that the death was due to the combined effect of intracranial haemorrhage and violent asphyxia, resulting from strangulation and it was antemortem and homicidal in nature. He submits that for violent asphyxial death external force is to be applied upon the victim and that has been done here. The condemned-prisoner pressed the throat of the deceased with the muffler and consequently her hyoid bone was fractured. If the victim had committed suicide, there could be no reason of its fracture.

20. Mr. Ahammad then takes us through 'intracranial haemorrhage' which is also called 'epidural haemorrhage' from *Wikipedia* and *radiopaedia* with photographs and submits that in this case in the autopsy the doctor found extradural haemorrhage on the right parietal region. It was not possible to cause haemorrhage on the head of the victim without any external assault, strike or blow thereon. The victim herself cannot strike on her head to cause it. The condemned-prisoner being the husband had struck on victim's head before her death and suspended the body from the rafter of the house with the muffler.

21. He then refers to the Medical Jurisprudence of JP Modi (22nd Edition, page 270) and draws our attention at serial Nos. 6, 7 and 12 of differences of symptoms of hanging and strangulation and submits that in case of hanging bleeding from nose, mouth and ears are very rare, on the contrary bleeding from those organs in case of strangulation may be found. In case of hanging noncontinuous and oblique ligature mark is found high up of the neck and in case of strangulation ligature mark would be transverse. In the case in hand, the autopsy report matches with the above symptoms of strangulation. He further refers to serial No. 8 of the similar table of Modi's Medical Jurisprudence (20th Edition, Page-157) to show that fracture of hyoid bone is common in strangulation, which has been found in this case. He refers to the Medical Jurisprudence of Bakshi, 3rd Edition, 1980 (Page-182-184) where at serial No.15 the view expressed by Modi at serial No.14 (20th Edition) about the symptoms of strangulation of bleeding from mouth, nose and ear has been supported. At serial No. 14 of the Bakshi's table it has been opined that protrusion of tongue is absent or very little in the cases of hanging but in strangulation it is a common feature. He further refers to the Lyon's Medical Jurisprudence (11th Edition, Page 961) and submits that in case of strangulation the ligature mark would be openly transverse and in case of hanging it is ordinarily not. He adds that strangulation is always in favour of homicide.

22. Mr. Ahammad then submits that four months before the occurrence took place, the victim made a GDE with the concerned police station bringing allegation that her life was *at stake* with the condemned-prisoner. She was under a serious apprehension that she might have been killed at any time. PW5, Mst. Jesmin Begum in her evidence supported lodgment of the said GDE. No history of victim's previous attempt to commit suicide has been found and as such it was almost impossible for her to commit suicide. This is a cold blooded, premeditated and brutal murder, where the dead body of the victim wife was found in the house of the convict husband. The circumstantial evidence, medical evidence and evidence of the doctor are consistent with homicidal death of the ill fated victim. Mr. Ahammad refers to the cases of Ali Hossain Vs. the State, 15 BLD 307; Shah Alam Vs. the State, 5 BLC 492;

Abdullah Vs. Mst. Zulekha, PLD 1950 Peshwar 19 and Sabir Hossain and two others Vs. the State, 21 DLR (WP) Lahore 5 and relied on the *ratio* of those cases to put reliance of the autopsy report solely in the absence of any ocular evidence on record. He finally concludes that the judgment and order of conviction and sentence passed by the trial Court is based on legal evidence and it should be upheld.

23. To address the submissions of both the sides and to dispose of the reference as well as the appeal, let us go through the evidence of prosecution witnesses in brief.

24. PW1 Asmat Ali Sardar, informant and father of the deceased stated that the occurrence took place between 1.30 am to 2.00 am on 01.02.2010 at the house of accused Mostafa. He had lodged the *ejahar* implicating five persons as accused. His daughter (the deceased) had three issues. Accused Mostafa took Blue Begum as his second wife just two months before the occurrence. The relation between the accused husband and his daughter deteriorated for the reason of second marriage of the accused. The accused used to assault the victim. Accused No. 2, Hasi Begum at about 8.00 pm made a phone call to PW5 Jesmin and told her that victim Kohinoor had been found missing. He and his relations tried their best but could not find her out. He received the news of his daughter's death at about 1.30 pm on the day which was 3-4 days after her missing. He and his relations then and there rushed to the accused's house and found her body hanging partially from a rafter with a muffler on the entresol of the house. Later, police came there, brought down the dead body, held inquest, took it to the police station and, thereafter, he lodged the FIR. He proved the FIR and identified his thumb impression thereon. In cross-examination he stated that he found the body hanging at the house of accused Mostafa. The deceased was dissatisfied at the second marriage of her husband. He did neither see who killed his daughter nor did he know how she was murdered. He further stated that when he got the information of his daughter's death, he was working at a place four miles away from the occurrence house. He could not remember the van driver's name who took him to the house of occurrence. He was there about two and a half hours and in the meantime 100-125 people assembled there. A police officer wrote the *ejahar* but he could not remember his name. He denied the defence suggestion that his daughter committed suicide for the reason of her husband's second marriage. On recall for cross-examination by the defence he stated that when he went to the occurrence house, he found accused Mostafa, his daughter Nahida (PW2) and son Nayeem (PW7) there. He himself and PWs 2 and 7 were witnesses to the inquest. He did not find any injury on the person of the deceased. When he wanted to know about the cause of death, they told him that she committed suicide for the reason of second marriage of her husband.

25. PW2 Nahida Akter, daughter of the deceased stated that her mother was found missing on 01.02.2010. Thereafter, she found her hanging at about 11.00-11.30 am on 04.02.2010 at the entresol over the wooden ceiling of their dwelling house. At first she smelt stink and on search found the body hanging partially with a muffler from a rafter of their house. At her hue and cry, the neighbours rushed there and apprehended accused Lal Miah. Nobody murdered her mother. Police came, brought down the corpse and held inquest. She put her signature on the report. She proved the inquest report exhibit-1 and identified her signature thereon-1/1. She identified accused Lal Miah on the dock. In cross-examination she stated that it was not possible to see everything around the entresol from the floor of their house. The boundary of their house was enclosed with a fence. She saw her mother taking tablet at about 8.00-8.30 am on 01.02.2010. She had two brothers and they resided in the house of occurrence. About 100 people rushed to the occurrence house. The IO examined her under section 161 of the Code. She studied up to class ten but did not continue thereafter.

26. PW3 Kazi Sajal, a ward councillor of Gournadi Paurasava stated that the informant was his neighbour and he was a witness to the inquest. He proved his signature in the inquest as exhibit-1/2. He heard that Kohinoor committed suicide by hanging. In cross-examination he stated that the occurrence took place within the area under ward No. 3. He heard that Kohinoor had committed suicide by hanging with a rope.

27. PW4 Md. Shahjahan Bapery, a man from the locality stated that he received the news of victim's suicidal death by hanging and rushed to the occurrence house. He found the body lying at the courtyard of accused's dwelling house. Police held inquest on the corpse and took his signature on the report exhibit-1/3. After some days of occurrence, he went to the police station and put his signature in the seizure of wearing apparels of the deceased. He proved the seizure exhibit-2 and identified his signature thereon. He identified seized articles as material exhibit-I series. In cross-examination he stated that he heard that the victim committed suicide. He saw the dead body after a while of committing suicide.

28. PW5 Mst. Jesmin Begum, a daughter-in-law of PW1 and *bhabi* of the deceased stated that the occurrence took place between 8.00 am of 01.02.2010 to the noon of 04.02.2010 at the entresol of accused Mostafa's house. Informant Asmat Ali was her *chancha shwashur*. The victim was her sister-in-law (*nanod*). She and the informant resided at the same compound. Deceased Kohinoor was the first wife of accused Mostafa. Mostafa took Blue Begum as second wife without the permission of Kohinoor. Blue Begum was a bad lady and she made a plan to commit the murder. Accused Mostafa and Blue used to torture the victim. Kohinoor lodged a GDE with the concerned police station before four months of taking place the occurrence. She was at first found missing from the morning on 01.02.2010. Afterwards her dead body was found hanging at the entresol of Mostafa's house. They all reached there and smelt stink emitting from the dead body. Police also came there, held inquest on the corpse and she put her signatures on the report exhibit-1/4. She went to the police station with the informant and put her signature on the left side of the FIR. The informant put his thumb impression in the FIR. She proved the FIR exhibit-3 and identified her signature thereon. She identified the accused persons in the dock. In cross-examination she stated that the distance between her house and that of the accused would be three miles. She received the news of disappearance of the deceased and went to the house of occurrence on foot. A salish was held for the second marriage of accused Mostafa where Shahjahan, Kabir Talukder, Anis Talukder and Jalil Sarder were present. She denied the defence suggestion that Kohinoor committed suicide due to family crisis. She did not know whether there was any relation between Lal Miah and accused Mostafa Sardar. She further denied that wife of Lal Miah eloped with accused Mostafa and when Kohinoor learnt it, she committed suicide.

29. PW6 Md. Liakat Sardar, a cousin of the deceased stated that the occurrence took place within 20.00 hours of 01.02.2010 to 13.30 hours of 04.02.2010 at the entresol of the dwelling house of accused Mostafa. He identified the accused in the dock. He further stated that there was an illicit relation between Blue Begum and Mostafa and due to that, the relation between the deceased and Mostafa became strained. Mostafa used to torture Kohinoor and she told it to them. Mostafa took Blue Begum as his second wife and a salish was held for it. Kohinoor did not accept the second marriage of accused Mostafa. He received the news of victim's death through a message over cell phone. He then went to the occurrence house and found gathering there. He found the body of Kohinoor hanging from a rafter with a muffler on the entresol of the house. She was murdered in a preplanned way in order to make Mostafa's family life smooth with accused Blue Begum. In cross-examination he stated that he was not

present in the salish. Sajal Kazi, former member and Shahjahan member were present there. He found a good number of people at the occurrence house. He also found the local member and Chowkider there. He denied the defence suggestion that due to the second marriage of accused Mostafa, victim Kohinoor committed suicide.

30. PW7 Md. Nayeem Sardar, son of the deceased stated that the occurrence took place at about 1.00-2.00 am on 01.02.2010 in their dwelling house. The informant was his maternal grandfather and accused Mostafa was his father. He knew nothing about the death of his mother. He proved his signature in the inquest exhibit-1/5 and identified the accused in the dock. In cross-examination he stated that he used to run a shop and on the day of occurrence he was there. His maternal grandfather made his father accused in this case on mere suspicion.

31. PW8 Md. Aktaruzzman Talukder, Head of the Department of Forensic Medicine, Sher-e-Bangla Medical College Hospital, Barishal stated that he conducted postmortem examination of deceased Kohinoor at about 16.00 hours on 05.02.2010 and found the following injuries.

i) Ill defined broad transversely placed ligature mark on anterior aspect of neck.
ii) Haematoma on right parietal region.

32. On dissection, he found antemortem congestion and clotted blood around the injuries. He also found congestion present on either side of trachea with fracture of hyoid bone. Extradural haemorrhage was present on the right parietal region.

33. Death in their opinion was due to the combined effect of intracranial haemorrhage and violent asphyxia resulting from strangulation which was antemortem and homicidal in nature. He proved the autopsy report exhibit-4 and identified his signature thereon. In cross-examination he denied the defence suggestion that the victim committed suicide by hanging. He found the body partially decomposed and blister on it. He found the tongue protruded in part. He further denied the defence suggestion that he failed to find out the cause of death for holding postmortem examination after long days of victim's death or that the death was suicidal in nature.

34. We have considered the enlightening/inspiring submissions of both the sides, gone through the evidence and other materials on record.

35. It is admitted position of fact that the deceased was the wife of the condemned-prisoner. She was found missing from 01.02.2010. PW1 informant, PW2 the daughter of the deceased and PW6 a relative of the informant found the deceased hanging partially with a muffler from a rafter on the entresol of the convict's house. There is no dispute that the body of the deceased was found at her husband's house hanging at noon on 04.02.2010 and it was partially decomposed. Nobody had seen the occurrence of murder or of committing suicide. The daughter of the deceased PW2, Nahida Akter and the son PW7, Md. Nayeem Sarder while examined as witnesses did not bring any allegation against their father, the condemned-prisoner. PW1 informant, father of the deceased, PW2 daughter, PW3 a neighbour and ward councilor, PW4 a man from the locality and PW7 the son stated that they heard the victim had committed suicide. Even in the cross-examination PW1 stated that while he reached the occurrence house PWs 2 and 7 told him that the victim committed suicide for the second marriage of their father. In cross-examination PW7 stated that the informant filed the case against his father on suspicion. Thus the evidence of kith and kin as well of the neighbours support the defence case that the deceased has committed suicide.

36. Admittedly, the body of the deceased was found hanging at the house of the condemned-prisoner, who was her husband. According to the provisions of section 106 of the Evidence Act, a burden is imposed upon a husband to explain how his wife met with the death while she was under his custody. The explanation given in this case by suggesting the prosecution witnesses is that his wife committed suicide by hanging. On the other hand, the opinion given in the postmortem report (exhibit-4) and in the evidence of PW8, the doctor such defence case has been denied. Mr. Manir, learned advocate for the appellant has advanced his argument solely on the point that the external and internal injuries found on the person of the deceased are not consistent with the findings and decisions of antemortem and homicidal death. Rather, opinion of the renowned forensic experts on this point is against the opinion of the doctor given in this case. He also submits that doctor's opinion is not sacrosanct and the Court can reject it, if it is found contrary to the oral evidence and the other conditions described in forensic and medical jurisprudence.

37. Let us consider whether as per oral and documentary evidence, the death of Kohinoor was antemortem and homicidal in nature as has been argued by the learned Assistant Attorney General or it was suicidal as placed by the learned counsel of the appellant.

38. Admittedly, the body of the deceased was found at the place and in the manner as stated in the FIR. Oral evidence has been also led to that effect. The first question arises whether commission of suicide by partial hanging in the manner the deceased was found was at all possible. We find from the writings of renowned forensic experts like JP Modi and KSN Reddy and the photographs of numerous incidents of partial hanging that it was possible for the deceased to commit suicide in the manner her body was found. It depends upon the will, weight and position of the suicide (*felo-de-se*). It further depends on the height of the point of suspension and the material used for it. Here the suspended point was 4′ 6″ from the wooden ceiling, the deceased was 5″ tall and the material used for hanging was a muffler. In view of the above, it can be presumed that the victim's death may be for hanging partially, i.e., in the position she was found hanged. The findings of the learned Additional Sessions Judge that the victim could not commit suicide in the position she was found, is totally wrong and against the opinion of the renowned forensic experts.

39. The learned Assistant Attorney General and the learned advocate for the appellant both has referred the tables of symptoms of death for hanging and strangulation written by the renowned forensic jurists to show differences between the two usually found in a dead body. They have referred JP Modi's Medical Jurisprudence (three different editions), the Medical Jurisprudence of KS Narayan Reedy and of Bakshi and by showing the symptoms of differences of deaths for hanging and strangulation, they tried to establish their respective cases. For better appreciation the table of differences of symptoms in Modi's Medical Jurisprudence, 24th Edition, 2011 is reproduced below:

| **Hanging** | **Strangulation** |
|---|---|
| 1. Mostly suicidal. | 1. Mostly homicidal. |
| 2. Face-Usually pale and petechiae rare. | 2. Face-Congested, livid and marked with petechiae. |
| 3. Saliva-Dribbling out of the mouth down on the chin and chest. | 3. Saliva-No such dribbling. |
| 4. Neck-Stretched and elongated in fresh bodies. | 4. Neck-Not so. |
| 5. External signs of asphyxia, usually not | 5. External signs of asphyxia, very well marked (minimal if death due to vasovagal |

| **Hanging** | **Strangulation** |
|---|---|
| well marked.<br><br>6. Ligature mark-Oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard, yellow and parchment-like.<br>7. Abrasions and ecchymoses round about the edges of the ligature mark, rare.<br>8. Subcutaneous tissues under the mark-White, hard and glistening.<br>9. Injury to the muscles of the neck-Rare.<br>10. Carotid arteries, internal coasts ruptured in violent cases of a long drop.<br>11. Fracture of the larynx and trchea-Very rare and may be found that too in judicial hanging.<br>12. Fracture-dislocation of the cervical vertebrae-Common in judicial hanging.<br>13. Scratches, abrasions and bruises on the face, neck and other parts of the body-Usually not present.<br>14. No evidence of sexual assault.<br>15. Emphysematous bullae on the surface of the lungs-not present. | and carotid sinus effect).<br>6. Ligature mark-Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish.<br>7. Abrasions and ecchymoses round about the edges of the ligature mark, common.<br>8. Subcutaneous tissues under the mark-Ecchymosed.<br>9. Injury to the muscles of the neck-Common.<br>10. Carotid arteries, internal coats ordinarily ruptured.<br>11. Fracture of the larynx, trachea and hyoid bone.<br><br>12. Fracture-dislocation of the cervical vertebrae-Rare.<br>13. Scratches, abrasions fingernail marks and bruises on the face, neck and other parts of the body-Usually present.<br>14. Sometimes evidence of sexual assault<br>15. Emphysematous bullae on the surface of the lungs-May be present. |

*(emphasis supplied)*

40. KS Narayan Reddy in his book 'the Essentials of Forensic Medicine and Toxicology', 34th Edition, 2017 found the symptoms as under:

| **Trait** | **Hanging** | **Strangulation by ligature** |
|---|---|---|
| 1. Ligature Mark: | It is oblique, does not completely encircle the neck; usually seen high up in the neck between the chin and larynx. The base is pale | It is transverse, completely encircling the neck below the thyroid cartilage. The base in soft and reddish. |
| 2. Abrasions and ecchymoses: | hard and parchment-like.<br>About the edges of ligature mark not common. | About the edges of the ligature mark are common. |
| 3. Bruising: | Of the neck muscles less common. | Of the neck muscles are common<br>Not stretched or elongated. |
| 4. Neck: | Stretched and elongated. | Ecchymosed under the mark. |
| 5. Subcutaneous tissues: | White, hard and glistening under the mark. | |
| 6. Hyoid bone: | Fracture may occur. | Fracture is uncommon. |
| 7. Thyroid cartilage: | Fracture is less common | Fracture is more common. |
| 8. Larynx and trachea: | Fracture rare. | Fracture may be found |
| 9. Emphysematous bullae: | Not present on the surface of the lungs. | Very common on the surface of the lungs. |
| 10. Carotid arteries: | Damage may be seen. | Damage is very rare. |

| **Trait** | **Hanging** | **Strangulation by ligature** |
|---|---|---|
| 11. Face: | Usually pale and petechiae are not common. | Congested, lived and marked with petechiae. |
| 12. Signs of asphyxia: | External sings less marked. | External sings well-marked. |
| 13.Tongue: | Swelling and protrusion is less marked. | Swelling and protrusion is more marked. |
| 14. Saliva: | Often runs out of mouth. | Absent. |
| 15. Bleeding: | From the nose, mouth and ears not common | From the nose, mouth and ears common. |
| 16. Involuntary discharge: | Of faeces and urine less common. | Of faeces and urine more common. |
| 17. Seminal fluid: | At glans is more common. | At glans is less common. |

*(emphasis supplied)*

41. Modi in his Medical Jurisprudence, 22th Edition found the differences as under:

| **Hanging** | **Strangulation** |
|---|---|
| 1. Mostly Suicidal | 1.Mostly Homicidal |
| 2. Face-Usually pale and petechiae rare. | 2. Face-Congested, lived and marked with petechiae. |
| 3. Saliva-Dribbling out of the mouth down on the chin and chest. | 3. Saliva-No such dribbling. |
| 4. Neck-Stretched and elongated in fresh bodies. | 4. Neck-Not so. |
| 5. External signs of asphyxia, usually not well marked. | 5. External sings of asphyxia, very well marked (minimal if death due to vasovagal and carotid sinus effect). |
| 6. Bleeding from the nose, mouth and ears very rare. | 6. Bleeding from the nose, mouth and ears may be found. |
| 7. Ligature mark-Oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard, yellow and parchment-like. | 7. Ligature mark-Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish. |
| 8. Abrasions and ecchymoses round about the edges of the ligature mark, rare. | 8. Abrasions and ecchymoses round about the edges of the ligature mark, common. |
| 9. Subcutaneous tissues under the mark-White, hard and glistening. | 9. Subcutaneous tissues under the mark-Ecchymosed. |
| 10. Injury to the muscles of the neck-Rare. | 10. Injury to the muscles of the neck-Common. |
| 11. Carotid arteries, internal coats ruptured in violent cases of a long drop. | 11. Carotid arteries, internal coats ordinarily ruptured. |
| 12. Fracture of the larynx and trachea-Very rare and too in judicial hanging. | 12. Fracture of the larynx an trachea-Often found also hyoid bone. |
| 13. Fracture-dislocation of the cervical vertebrae-Common in judicial hanging. | 13. Fracture-dislocation of the cervical vertebrae-Rare. |
| 14. Scratches, abrasions and bruises on the face, neck and other parts of the body-Usually not present. | 14. Scratches, abrasions fingernail marks and bruises on the face neck and other parts of the body-Usually present. |
| 15. No evidence of sexual assault. | 15. Sometimes evidence of sexual assault. |
| 16. Emphysematous bullae on the surface | 16. Emphysematous bullae on the surface |

| **Hanging** | **Strangulation** |
|---|---|
| of the lungs-Not present. | of the lungs-May be present. |

*(emphasis supplied)*

42. In his Medical Jurisprudence, 20th Edition, 1977 Modi wrote the symptom of differences as under:

| **Hanging** | **Strangulation** |
|---|---|
| 1. Mostly Suicidal.<br>2. Ligature mark, oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard, yellow and parchment-like.<br>3. Abrasions and ecchymoses round about the edges of the ligature mark, rare.<br>4. No Evidence of sexual assault.<br>5. Subcutaneous tissues under the mark, while hard and glistening.<br>6. Injury to the muscles of the neck rare.<br>7. Carotid arteries, internal coats ruptured in violent cases of a long drop.<br>8. Fracture of the larynx and trachea, very rare and that too in judicial hanging.<br>9. Fracture-dislocation of the cervical, vertebrae, common in judicial hanging.<br>10. Scratches, abrasions and bruises on the face, neck and other parts of the body, usually not present.<br>11. Face, usually pale and petechiae rare.<br>12. Neck, stretched and elongated in fresh bodies.<br>13. External signs of asphyxia, usually not well marked.<br>14. Bleeding from the nose, mouth and ears very rare.<br>15. Saliva, running out of the mouth down on the chin and chest.<br>16. Emphysematous bullae on the surface of the lungs not present. | 1. Mostly homicidal.<br>2. Ligature mark horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish.<br>3. Abrasions and ecchymosis round about the edges of the ligature mark, common.<br>4. Sometimes evidence of sexual assault.<br>5. Subcutaneous tissues under the mark, ecchymosed.<br>6. Injury to the muscles of the neck, common.<br>7. Carotid arteries, internal coats ordinarily ruptured.<br>8. Fracture of the larynx and trachea, often found also hyoid bone.<br>9. Fracture-dislocation of the cervical vertebrae rare.<br>10. Scratches, abrasions finger nail marks and bruises on the face, neck and other parts of the body, usually present.<br>11. Face, congested, lived and marked with petechaie.<br>12. Neck, not so.<br>13. External signs of asphyxia, very well marked (minimal if death due to vasovagal and carotid sinus effect)<br>14. Bleeding from the nose, mouth and ears may be found.<br>15. Saliva, no such running.<br>16. Emphysematous bullae on the surface of the lungs, may be present. |

*(emphasis supplied)*

43. And finally Bakshi in his Medical Jurisprudence, 3rd Edition, 1980 showed the differences as under:

| **Hanging** | **Strangulation** |
|---|---|
| 1. Usually suicidal.<br>2. Ligature mark is oblique, non continuous, and high up in the neck.<br>3. Parchmentisation of the skin under the | 1. Mostly homicidal.<br>2. Ligature mark is transverse, continuous and lowdown in the neck.<br>3. Parchmentisation of the skin under the |

| **Hanging** | **Strangulation** |
|---|---|
| ligature mark in common.<br>4. Abrasions and ecchymoses on either side the ligature mark are rare or the least less conspicuous.<br>5. Subcutaneous tissues under the ligature mark are usually while, hard and parchment-like in appearance.<br>6. Internal coats of the carotid arteries are ruptured only in long drops.<br>7. Injury to the neck muscles is rare, except in long drops.<br>8. Fracture or dislocation of the cervical vertebrae is common in hanging with a long drop-especially in judicial hanging.<br>9. Signs of struggle such as abrasions, bruises and scratches on the face, forehead and other parts of the body are absent.<br>10. Face is usually pale and placid. Petechial baemorrhages are usually absent.<br>11. Neck may be stretched and elongated.<br>12. Signs of asphyxia may not be very marked.<br>13. Eyes are not very prominent and are usually closed.<br>14. <u>Protrusion of tongue is absent or very little</u>.<br>15. <u>Bleeding from the mouth, nose and ears is very rare</u>.<br>16. Dribbling of Saliva from the angle of the mouth vertically in a straightline on to the chest is common.<br>17. No emphysematous patches on the surface of the lungs under the visceral layers of pleurae are usually seen. | ligature mark is rare.<br>4. Abrasions and ecchymoses on either side of the ligature mark are very common and more conspicuous.<br>5. Subcutaneous tissues under the ligature mark are usually ecchymosed and not of parchmentised appearance.<br>6. Internal coats of the carotid arteries are ordinarily found ruptured.<br>7. Injury to the neck muscles is common.<br>8. Fracture or dislocation of the cervical vertebrae is very rare, if at all.<br>9. Sings of struggle such as abrasions, bruises and scratches on the face, forehead and other parts of the body are very common.<br>10. Face is usually congested, livid with petechial haemorhages under the skin.<br>11. Neck does not become stretched and elongated.<br>12. Signs of asphyxia are, as a rule very well-marked.<br>13. Eyes are usually prominent, injected and open.<br>14. <u>Protrusion of tongue is a common feature</u>.<br>15. <u>Bleeding from the mouth nose and ears may occur</u>.<br>16. Dribbling of saliva along the chest is unusual.<br>17. Emphysematous patches on the surface of the lungs under visceral layers of pleurae are common. |

*(emphasis supplied)*

44. From the above tables of symptoms of renowned forensic experts it is difficult to arrive at a conclusion plainly as to the cause of death of deceased Kohinoor. In the tables reproduced hereinbefore, displaying the difference of symptoms, the experts have used the terms- 'as found, common, uncommon, usually, unusual, rare, very rare, absent, may be, may not be, mostly' *et cetera*. The terms used there are not definite, but indicates that a specific symptom may be or may not be found in both the cases. Thus the opinion of the forensic experts about symptoms of strangulation and hanging are not conclusive or absolute to determine a particular case. Some symptoms in hanging are also common in strangulation with slight variation. In view of the above position, we have to scrutinise carefully the symptoms found in the body of the deceased and thereafter to tally whether most of the symptoms found in this case attracts hanging or strangulation as per tables. In the postmortem

examination the doctors found- (i) body partially decomposed (blister all over the body); (ii) mouth partially open; (iii) tongue outside mouth due to gas; (iv) bloodstained discharge from nose; (v) ill defined broad transversely placed ligature mark on anterior aspect of neck; (vi) haematoma on the right parietal region; (vii) extradural haemorrhage inside the region; (viii) fracture of hyoid bone; (ix) antemortem congestion and clot found corresponding to the above injuries and (x) congestions present on either side of trachea. If the above external and internal symptoms and injuries found on the person of the deceased are compared with the above quoted tables of differences shown by the forensic experts, most of them find support in favour of hanging. Serial Nos. 2,5,6,7,11 and 13 of the table of Modi's Medical Jurisprudence, 24th Edition, 2011 and serial Nos. 6 and 13 of similar table of Reddy's Midical Jurisprudence, 34 Edition, 2017 support the defence case of suicidal hanging. Although renowned forensic experts' opinion is not encyclopedia but while the defence raises question about homicidal death of the deceased and in the trial the autopsy report is challenged and public witnesses support the defence version of suicidal hanging and other surrounding circumstances create a reasonable confusion as to the cause of death, we may in the circumstances safely rely on the opinions of renowned forensic jurists like Modi, Reddy and Bakshi. Although, arguments made by the learned Assistant Attorney General relying on medical jurisprudence of Modi and Bakshi that the death was homicidal caused by intracranial haemorrhage and strangulation are being supported to some extent, but most of the treatise referred to above speck in favour of hanging and the death as suicidal.

45. In the inquest report, it appears that the IO did not find any external injury on the corpse. In the autopsy, the doctors found only a haematoma on the right parietal region. On dissection they found intracranial haemorrhage present inside the haematoma. Naturally, the question arises how the haematoma was caused resulting in extradural or intracranial haemorrhage. The learned Assistant Attorney General has vehemently argued that it could not be the victim's self inflicted injury. It was done by the condemned-prisoner and while she became senseless, she was strangulated and the body was suspended from the rafter and resultantly she died. We find from evidence and materials on record that the body was found on the entresol of the house hanging from a rafter under the tin shed roof. As per inquest the height between the suspended point and the wooden ceiling was 4½ (four and a half) feet and the victim was 5 (five) feet tall. A rafter (রুয়া) of a tin shed house is one of a series of slopped wooden structural members that extend from the ridge or hip to the wall plate, downslope perimeter or eave and that are designed to support the roof shingles, roof dock and its associated load. As per sketch map, the lower part of the rafters of the occurrence house were slopping and down to the wall plate to fix roof of tin on it which is common in this country. Therefore, in case of self hanging from the rafter, it was possible for the victim to receive a strike/blow on her head from it resulting haematoma and intracranial haemorrhage which has been found in the autopsy. It may be noted here that no other external injury was found on the person of the deceased. If the condemned-prisoner assaulted the victim or strangulated her by force, there could have been some marks of violence or other injuries such as scratch mark on the throat or other parts of the body. It was almost impossible for the condemned-prisoner to take the victim's body on the entresol of the house through a ladder or stair generally used in such a tin shed house after making her senseless. Therefore, the prosecution case that the victim was made senseless on torture or murdered earlier and thereafter her body was suspended at the place and in the manner to screen the offence is not at all believable. It may further be noted here that the doctor found one of the cause of victim's death by strangulation and it was antemortem. If she was hanged after her death as stated in the FIR and found by the trial Judge, the ligature mark found around the neck would be of *postmortem,* it would not in any case be *antemortem*.

46. In the necropsy report (exhibit-4) the doctors found deceased's tongue protruded due to gas and PW8 doctor deposed 'জিব্বা আংশিকভাবে বাহির হইয়াছিল', which supports the inquest report. In that case, as per Reddy's book of 'Essentials of Forensic Medicine and Toxicology', 34th Edition, 2017 (Page 328, serial No. 13 of the table) the death was for hanging but not of strangulation. The tongue position in case of homicidal death by strangulation and in case of suicidal hanging as published in 'International Journal of Legal Medicine' further shows that in the survey they have found protrusion of tongue in most of the hanging cases but not in strangulation.

47. In his Medical Jurisprudence, 22nd and 20th Edition, Modi in displaying the symptoms opined that blood in the nose, mouth and ear of a deceased may be found in case of strangulation and relying on it the learned Assistant Attorney General advanced his argument as blood stain discharge was found in the nose of victim. But in Modi's Medical Jurisprudence, 24th Edition, the experts have changed their views on that particular point and omitted it from the table of symptoms. This also goes against the prosecution.

48. The ligature mark in case of strangulation is commonly found round around the neck but here it is found 'ill defined and anterior aspect of the neck'. Showing the condition of fracture of hyoid bone, Mr. Ahammad submits that Medical Jurisprudence speaks of fracture of hyoid bone common in strangulation but it is absent in hanging and from that point of view, the present case is purely a case of strangulation. We find in Modi's Medical Jurisprudence (20th and 22nd edition), that in case of strangulation larynx, trachea and hyoid bone (all) are often found fractured but it is rare in hanging. In this case only hyoid bone is found fractured. Moreover, Reddy in his Medical Jurisprudence, 34th Edition, 2017 (Page-328) found fracture of hyoid bone uncommon in strangulation but may occur in hanging. In view of the above position, the submission of Mr. Ahammad does not stand but supports the defence case of hanging. Moreover, in the inquest, the IO found the eyes of the deceased closed which according to the view expressed by Modi is also a sign that the victim's death was from handing.

49. According to section 45 of the Evidence Act, a postmortem report is an expert opinion and if it is found corroborative to the injuries on the person of the deceased and supported by the evidence of doctor, it may be considered alone for basing conviction in the absence of any ocular evidence on record. But here, the injuries found on the body do not support the opinion passed in the report. We find no ocular evidence in this case. The evidence of PW1 shows that when he arrived at the occurrence house, he found the condemned-prisoner there. There could be no reason of his presence there, if he had been the murderer. On informant's (PW1) query PWs 2 and 7 told him that their mother had committed suicide. Most of the public witnesses except PW5 and PW6 (relations of the deceased) deposed that they heard of victim's committing suicide. Even PW2 and PW 7, daughter and son of the deceased respectively, who resided in the occurrence house, did not depose against the condemned-prisoner. Rather, they spoke in support of the defence case.

50. The prosecution further failed to prove the time of occurrence. It appears from the evidence and other materials on record that the dead body of Kohinoor was found in the place and manner after 3 (three) days of her missing. The doctor found most of the organs of the corpse decomposed and blister all over the body. But in the report they did not wrote about the approximate time of death of the deceased. We find that the doctors very casually examined the corpse and held autopsy on it. They did not mention the condition of eyes and other necessary symptoms generally found internally and externally to determine the death. They should be cautious enough in holding autopsy in unnatural death cases. Their callousness in holding autopsy may result in miscarriage of justice.

51. Although, the victim earlier lodged a GDE with the concerned police station bringing allegation that her life was *at stake* with the condemned-prisoner but it was not brought to the record as evidence. PW5 in her evidence stated about its lodgment. We find it in the case docket and scrutinized accordingly. It was lodged on 03.10.2009, i.e., four months before taking place the occurrence. In the said GDE some allegations have been brought against the condemned-prisoner. It only reflects previous conduct of the condemned-prisoner and by it at best a presumption can be raised against him. But presumption or suspicion, by itself, however strong it may be, cannot be the basis of conviction in the absence of any legal evidence against him.

52. It transpires from the evidence of witnesses that there was strained relation between the husband and wife for the second marriage of the condemned-prisoner. The fact of missing of the deceased wife before 3 (three) days of tracing her body hanged and the surrounding circumstances lead us to believe that she might have committed suicide at the place and in the manner for the reason of her husband's second marriage. The defence has been able to make out a specific and believable case of suicidal hanging by putting suggestions to the prosecution witnesses. The necropsy report and the evidence of doctor in support of strangulation and intracranial haemorrhage are not a gospel truth or sacrosanct. These may be scrutinized and rejected by the Court, if found contradictory with the symptoms found on the dead body and oral evidence of witnesses. The *ratio* of the cases cited by Mr. Manir applies here.

53. The journal of Enam Medical College Hospital about a Study of Dinajpur Medical College Hospital of 'Violent Asphyxial Deaths' and the journal of the Department of Forensic Medicine and Toxicology of the Government Medical College, Amritashar, India also support the case of suicidal hanging as has been argued by Mr. Manir.

54. Since, the conviction is wholly based on medical evidence, i.e., on the experts' opinion but we find the medico-legal evidence (autopsy report) inconsistent with the homicidal death and the report differs from the opinion of renowned authors of forensic experts, and as such we cannot rely on it. The cases cited by the learned Assistant Attorney General are quite distinguishable and do not match this case.

55. Judges' mind always swings, to be or not to be. In this particular case, while deciding the death of the deceased as to whether it was suicidal or homicidal, our mind/balance swings in favour of suicidal death by hanging instead of strangulation and intracranial haemorrhage. And in that case, the condemned-prisoner would obviously get its benefit. Therefore, we find merit in this appeal.

56. In the result, the reference is rejected and the Criminal Appeal is allowed. The judgment and order of conviction and sentence passed by the Additional Sessions Judge, Court No. 1, Barishal on 18.10.2015 in Sessions Case No. 208 of 2010 is hereby set aside. The condemned-prisoner Md. Mostafa Sarder, son of late Hatem Ali Sardar is acquitted of the charges levelled against him. He should be set at liberty forthwith, if not wanted in any other cases.

57. Before parting with this case, we would like to express our special thanks to both Mr. Ahammad, learned Assistant Attorney General and Mr. Manir, learned advocate for the appellant. They have enlightened us with their laborious and meritorious submissions and supplying us the necessary books, the provisions of *Wikipedia and radiopaedia t*o arrive at the decision.

58. Communicate the judgment and send down the lower Court records.

**16 SCOB [2022] HCD 206**

**HIGH COURT DIVISION**

Death Reference No.124 of 2016 with Jail Appeal No.327 of 2016 with Jail Appeal No.328 of 2016

**The State**
-Versus-
**Md. Shohag Howlader and another**

Mr. M.D. Rezaul Karim, D.A.G
with
Mr. Md. Mahfuzur Rahman, A.A.G
with
Mr. Md. Altaf Hossen Amani, A.A.G
with
Mr. Md. Shariful Islam, A.A.G
... *For the State.*

Mr. Md. Hafizur Rahman Khan*, State Defence Lawyer*
... For the Condemned-*Prisoner*
Mr. Md. Helal Uddin Mollah, with
Mrs. Syeda Farah Helal, Advocates
... *(For the* Condemned-Prisoner and *Jail Appeal No.328 of 2016)*

Heard on:27.03.2022
Judgment on:28.03.2022

**Present:**
**Mr. Justice S M Kuddus Zaman**
And
**Mr. Justice Mohammad Ali**

**Editors' Note:**
In this death reference there was no eyewitness. Prosecution case relied upon two confessional statements made by two accused. In the confessional statements accused claimed that they had caused the death of the victim by strangulation. But the Inquest Report and the Post Mortem Report, though supportive of each other, did not support the statement of the confessing accused. In accordance with the post mortem report the cause of death was hemorrhagic shock. The High Court Division thus believing the confessional statements to be untrue and considering the other evidence adduced against the accused to be insufficient to prove their guilt beyond reasonable doubt, acquitted the accused.

**Key Words:**
Post Mortem Report; Inquest Report; Section 164 of the Code of Criminal Procedure; Section 302 of Penal Code; Confessional statement

**When dead body of the victim is found in an open land mere pointing of the location of the dead body by an accused alone cannot be taken as a legal prove against him:**
**Three witnesses, namely P.W.3 Md. Ali, P.W.4 Mamun and P.W.5 Siraj have supported the evidence of P.W.11 S.I. Sultan Mahmud that at the showing of accused Bablu the dead body of victim Linkon was recovered. Undisputedly the dead body of victim Linkon was found in an open agricultural land which belonged to P.W.7 Mojibur. As such mere pointing of the location of the dead body by an accused alone cannot be taken as a legal prove that he committed the offence of murder unless above showing is supported by other legal evidence proving the complicity of the accused with the act of murder of victim Linkon. ...(Para 40)**

**Section 164 of the Code of Criminal Procedure, 1898:**

**It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily, truthfulness will be determined by the trial Court:**

**While recording a confessional statement a Judicial Magistrate is not required to investigate as to the truthfulness or correctness of the statement being made before him by the accused. It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily free from any form of coercion or undue influence. Determination of truthfulness or correctness of confessional statement of an accused is the duty of the learned judge of the trial court. The trial Court shall perform above duty by examining the confessional statement in the light of facts and circumstances of the case and by comparing the same with other legal evidence on record. When more than one accused person of a case give separate confessional statements the trial Court shall also examine if above statements are mutually supportive or those suffer from material contradictions. ...(Para 43)**

**Confessional statement if not found true cannot be given the status of legal evidence and cannot be a base for conviction:**

**It is crystal clear from above mentioned evidence of P.W.I Dr. Md. Shah Alam, P.W.11 S.I. Md. Sultan Mahmud, the Post Mortem report (Exhibit-8 and the Inquest report (Exhibit No.4) that the death of victim Linkon was caused due to loss of excessive blood for amputation of fingers of both hands and legs and other injuries as mentioned above and not by strangulation as have been stated by accused Bablu and Shohag in their respective confessional statement. Above confessions statements do not make any mention of above injuries let alone providing any explanation as who inflicted those injuries. Analyzing above ocular and documentary evidence on record in the light of the facts and circumstances of the case and the confessional statements made by accused Shohag and Bablu under section 164 of the Code of Criminal Procedure we are of the view that above confessional statements do not find any support from any other legal evidence on record. In above view of the materials on record we are unable to accept the confessional statements made by the accused Bablu and Shohag as true and give the same the status of legal evidence which can be the basis of an order of conviction and sentence. The learned Judge of the Druto Bichar Tribunal committed serious error in accepting above confessional statements as true and valid legal evidence which is not tenable in law. ... (Paras 51, 52 and 53)**

## JUDGMENT

**S M Kuddus Zaman, J:**

1. This Death Reference under section 374 of the Code of Criminal Procedure, 1989 (hereinafter referred to as the Case) has been submitted by the learned Bicharak(District and Sessions Judge), Druto Bichar Tribunal No.4, Dhaka for confirmation of the death sentence imposed upon the accused (1) Md. Shohag Howlader and (2) Md. Atabur Rahman @ Bablu under section 302/34 of the Penal Code in Druto Bichar Tribunal Case NO.05 of 2015 arising out of Palong P.S. Case No.33(6)13 corresponding to G.R. No.192 of 2013 vide judgment and order of conviction and sentence dated 07.09.2016.

2. As against the aforesaid judgment and order of conviction and sentence dated 07.09.2016, the condemned-prisoner Md. Shohag Howlader preferred Jail Appeal No.328 of

2016 and condemned-prisoner Md. Atabur Rahman @ Bablu prepared Jail Appeal No.327 of 2016.

3. The above mentioned Death Reference and the Jail Appeals have emerged out of the self-same judgment and order of conviction and sentence and the questions of law and facts involved in all above Reference and Appeals are same and hence, those have been heard together and are being disposed of by this single consolidated judgment.

4. In short, the prosecution case is that on 28.06.2013 at 0.15 hours P.W.1 Mozammel Kha lodged an FIR with Palong P.S. stating that on 25.06.2013 at 3.00 p.m. condemned-accused Shohag and Bablu and not sent up accused Babul abducted his son victim Md. Linkon along with motor cycle from his dwelling house. The mobile phone of victim Linkon was found switched off. One Arif informed that above accused-persons attempted to sale above motor cycle but failed and the motor cycle was recovered and kept in the Madaripur Police Station. It was apprehended that above accused-persons have murdered his son by administering narcotics to grab his motor cycle.

5. On the basis of above ejahar P.W.10 Abul Kashem Officer-in-Charge of Palong Police Station initiated Palong P.S. Case No.33 dated 28.06.2013. Accused Atabur Rahman Bablu was arrested by police from Lalbagh, Dhaka on 28.06.2013 at 07.00 a.m. and at his showing the dead body of victim Linkon was recovered. P.W.11 Md. Sultan Mahmud performed inquest of the dead body of victim Linkon and sent the same for post mortem examination.

6. The investigation of the case was assigned to P.W.11 Sultan Mahmud who in course of investigation visited the place of occurrence, prepared a sketch map of the same along with an index thereof, seized alamats by dint of seizure lists in presence of witnesses, produced accused Bablu and accused Shohag before P.W.8 Md. Aminul Islam, a judicial Magistrate, for recording of their confessional statements under section 164 of the Code of Criminal Procedure and recorded statement of witnesses under section 161 of the Code of Criminal Procedure. In the above investigation offence punishable under section 364/328/201/302/ 379/411/34 of the Penal Code having prima faci proved he submitted charge sheet No.172 dated 15.09.2013 against the condemned prisoners namely Sohag and Bablu and finding no address of accused Md. Babul did not send him to stand trial.

7. The learned Session Judge of Shariatpur framed charge against the condemned accused-persons namely Md. Sohag Howlader and Md. Atabur Rahman@Bablu under sections 364/328/302/201/379/411/34 of the Penal Code and read over the same to the accused-persons who pleaded not guilty and demanded trial.

8. The case was transferred to the learned Judge of Drubo Bichar Tribunal No.4, Dhaka for trial. At trial prosecution examined 11 witnesses who were cross examined by the defense. Documents and materials produced and proved by the prosecution were marked as Exhibit No. 1-13 series and Material Exhibit No. Ka.

9. On conclusion of recording of prosecution evidence both the accused-persons were examined separately under section 342 of the Code of Criminal Procedure in which the accused-persons reiterated their claim of not guilty and declined to adduce any evidence.

10. On consideration of facts and circumstances of the case and evidence on record the learned Judge of Druto Bichar Tribunal convicted accused Shohag and Bablu under section

302/34 of the Penal Code and sentenced them thereunder to death and also a fine of Tk.20,000/- each as mentioned above.

11. Mr. M.D. Rezaul Karim, the learned Deputy Attorney General appearing on behalf of the State submits that accused Bablu and Shohag called out victim Linkon from his house and subsequently his dead body was found at the showing of accused Bablu. Accused Babul and Shoghag both have given separate confessional statement under section 164 of the Code of Criminal Procedure to P.W.8 Md. Aminaul Islam a judicial Magistrate confessing their guilt in the commission of murder of victim Linkon by swallowing sleeping tablets and strangulation. P.W.8 Md. Aminul Islam has consistently stated in his evidence that he recorded above confessional statements of accused Bablu and Shohag on fulfillment of all legal requirements and those were made voluntarily. P.W.1 Mozammel Kha, P.W.2 Rashida Begum and P.W.3 Md. Ali Hossain Khan have given consistent and mutually corroborative evidence proving that above accused-persons called out victim Linkon from his home.

12. On consideration of above facts and circumstances of the case and legal evidence on record the learned Judge of the Tribunal has rightly held that the confessional statements given by above two accused-persons were true, mutually supportive and corroborated by others evidence on record and on the basis of above legal evidence rightly convicted the condemned accused-persons. This is a gruesome murder of an innocent young person and after above murder the dead body of the victim was dumped in an unrecognizable place. As such the learned Judge has rightly handed down the highest penalty against the condemned accused-persons as provided by law.

13. As such this Court may accept the reference made by the learned Judge of the Tribunal and dismiss both the appeals preferred by the condemned accused persons.

14. On the other hand, Mr. Md. Hafizur Rahman Khan, the learned Advocate appointed by the State for condemned-prisoner Babul submits that while giving evidence as P.W.1 informant Mozammel Kha did not mention that the accused-persons abducted victim Linkon. In the ejahar it has been stated that the Motor bike of victim Lincon was in the possession of accused Bablu and Shohag and they attempted to sale out the same. But above claim of the FIR remained not proved. There is no eye witness of the occurrence of murder of victim Lincon. It is true that accused Shohag and Bablu have made two separate confessional statements under section 164 of the Code of Criminal Procedure but those statements were extracted by physical torture and both the accused persons had retracted above confession.

15. The learned Judge committed serious illegality in convicting accused Bablu on the basis of the same. The learned Advocate lastly submits that no independent witness to the inquest report has corroborated the evidence of P.W.11 Md. Sultan Mahmud that the dead body of victim Linkon was recovered at the showing of accused Bablu. There is no legal evidence on record to prove the charge leveled against accused Bablu under section 302/34 of the Penal Code. As such, above death reference is liable to be rejected and the Jail Appeal preferred by condemned prisoner Bablu deserves to be allowed and condemned prisoner Bablu is entitled to be acquitted.

16. Mr. Md. Helal Uddin Mollah with Mrs. Syeda Farah Helal the learned Advocate for condemned-prisoner Shohag adopted the submissions made by the State appointed learned Advocate for co-accused Bablu and submitted that in this case there is only one piece of evidence against accused Shohag which is the confessional statement allegedly given by

accused Shohag under section 164 of the Code of Criminal Procedure before a judicial Magistrate. But above confessional statement of accused Shohag was obtained by torture and abuse and above confessional statement contradicts the confessional statement made by co-accused Bablu on materials points and above confessioanl statement is not true at all.

17. The learned Judge of the Tribunal most illegally accepted above confessional statement as true and voluntarily made and convicted and sentenced accused Shohag on the basis of the same which is not tenable in law. As such the Death Reference may be rejected and the Jail Appeal of convict Shohag may be allowed and he may be acquitted.

18. In order to appreciate the legal validity of the arguments advanced by the learned Advocates for the respective parties and to examine whether the trial Court was justified in passing the impugned judgment and order of conviction and sentence we turn to examine and discuss the evidence adduced by the prosecution in this case.

19. As mentioned above prosecution has examined 11 witnesses to bring home the charge brought under section 302/34 of the Penal Code against accused Bablu and Sohag.

20. P.W.1 Mozammel Kha is the father of victim Linkon and informant of this case. He stated that on 25.06.2013 at 3.00 p.m. accused Shohag and Bablu called out victim Linkon from his home. The mobile phone of victim Linkon was found switched off. Arif informed that the motor cycle of victim Linkon was kept in Madaripur police station. He went to above police station and identified motor cycle of his son. Accused Bablu was arrested by police and he confessed to have murdered his son and dumped his dead body beside a palm tree. Accused Shohag also confessed to have murdered his son by administering narcotics mixed milk and by strangulation. The witness proved the FIR, seizure list and his signatures on above documents which were marked as exhibit-1, 1/1, 2, 2/1, 3 and 3/1 respectively. In his cross-examination the witness denied that his son did not go with accused Shohag with his motor bike nor the accused-persons murdered his son or he gave false evidence.

21. P.W.2 Rashida Begum is the mother of victim Linkon. She stated that on 25$^{th}$ at about 3.00 p.m. accused Shohag and Bablu came to her home and took away victim Linkon riding his motor bike. On the next day Rasel disclosed that the match light of victim Linkon was in the possession of accused Bablu. Accused Bablu was arrested by police and he confessed to have murdered victim Linkon and at his showing the dead body of his son was recovered. Subsequently the maternal aunt and uncle of accused Shohag apprehended him and handed him over to police. Accused Sohag also confessed to the Magistrate that he had murdered victim Linkon by strangulation. In cross-examination she denied that Rasel did not mention to her that the match light of victim Linkon was in possession of accused Bablu.

22. P.W.3 Md. Ali Hossain Khan is the brother of P.W.1 Mozammel. He stated that he heard from P.W.1 Mozammel on 26.06.2013 that Accused Shohag and Bablu called out victim Linkon from his home. He heared that motor bike of victim Linkon was in Madaripur Police Station. He went there and found the Motor Bike of victim Linkon. Accused Bablu confessed to police and at his showing deed body of victim Linkon was found. Police prepared inquest report of the dead body of victim Linkon and seized wearing apparels of the victim and blood stained mud of the occurrence place by a seizer list and he gave signatures on above documents. The witness proved the inquest report, seizure list and his signature on above documents and those were marked as Exhibit No. 3, 3/1 and 3/2 respectively. In cross-

examination he stated that he heard of the occurrence at 5.00 p.m. on 26.06.2013 and the name of the accused persons were not mentioned in the inquest report.

23. P.W.4 Mamun Khan stated that on 26.06.2013 P.W.1 Mozammel stated to him that victim Linkon was missing and his mobile phone was switched off. He heard that a motor bike was found in the Madaripur Police Station. He went there and identified the motor cycle of victim Linkon. Police arrested accused Bablu and at his showing dead body of victim Linkon was recovered. Accused Bablu and Shohag murdered victim Linkon and dumped his dead body in the field. In cross-examination he stated that victim Linkon was his cousin brother. Accused Shohag is a poor man who lives in Dhaka for last 9 years. He denied that about two months before the date of occurrence victim Linkon went to Dhaka. No G.D.E was entered in the Police Station before institution of this case. He lastly stated that he did not burn the house of Accused Shohag by fire.

24. P.W.5 Siraj Baga is a village police and a witness to the inquest report of the dead body of victim Linkon. The witness proved his signature on the seizure list and the inquest report which were marked as Exhibit-2/3 and 4/2 respectively. In cross-examination he stated that he was a village police of Ward NO.7 and the dead body of victim Linkon was found in the ward of another Union Parishad.

25. P.W.6 Jashim Sarder is another witness to the inquest report of the dead body of victim Linkon. The witness proved his signature on the inquest report which was marked as Exhibit-4/3. He stated that at the time of occurrence accused Babul was present and he heard that accused Bablu and Shohag murdered victim Linkon by administering something with juice.

26. P.W.7 Mujibur Rahman Sarder stated that on 28.06.2013 the dead body of victim Linkon was found in his land. Police recovered above dead body at the showing of the person who dumped the same. He heard that accused Shohag and Bablu murdered victim Linkon by administering intoxicating substance. In cross-examination the witness stated that at 12.00 o'clock he came to know that above dead body was lying in his land.

27. P.W.8 Md. Aminul Islam is the judicial Magistrate who recorded confessional statements of accused Bablu and Shohag under Section 164 of the Code of Criminal procedure. He stated that the Investigation Officer produced before him accused Bablu on 02.07.2013 and he gave him enough time before accused Bablu voluntarily agreed to give a confessional statement. He recorded his statement and read over the same to the accused who endorsed the same as true and gave two signatures on the same. The witness proved above confessional statement, his signatures and the Signature of accused Bablu on the same which were marked as Exhibit-5 and 5/1 series respectively. The confessional statement of accused Bablu is reproduced below:

> ''গত ২৫/০৬/১৩ ইং সোহাগ এর সাথে আমি ও বাবুল শরীয়তপুর জেলার ডামুড্যা থানায় আসি। সেখানে সোহাগের শ্বশুর বাড়ী। আমাদের দুজনকে ঐ বাড়ি নেয় নি। দোকানে বসা থাকি। চা, সিগারেট খাই। তিনটার দিকে সোহাগ, লিংকনকে ফোন করে আসতে বলায় লিংকন গাড়ি (মোটর সাইকেল) নিয়ে আসে। কিছুক্ষন পর আমরা চারজন লিংকনের হোন্ডায় উঠে কিছদুর আসার পর একটা বাজারে আমাকে ও বাবুল -কে নামিয়ে দেয়। সোহাগ, লিংকন মোট সাইকেলের মেরামত করা লাগবে বিধায় মাদারীপুর চলে যায়। বাবুল সোহাগের কাছে কিছুক্ষন পর ফোন করে। আমাদের দুজনকে ফেরিঘাট আসতে বলায় আমরা একটা গাড়িতে ফেরিঘাট এসে অপেক্ষা করতে থাকি। সন্ধার পর সোহাগ লিংকন তার গাড়ী নিয়ে মাদারীপুর থেকে ফিরে এসে আমাদের দুইজনকে ও ঐ হুন্ডায় উঠাইয়া নেয়। কিছুদুর এসে একটা স্টীল ব্রীজ এর কাছে এসে বাবুল ঠান্ডা জুস নিয়ে আসে। সোহাগ টাকা দেয়। চারজনই চারটি জুস খাই। আর একটু সামনে এসে আমি একটা Sheikh সিগারেট খাই। লিংকন গাঁজার একটা স্টীক খায়। গাড়ী ঘুরিয়ে গ্রামের ভিতর দিয়ে একটা পাকা রাস্তায় ঢুকি আমরা। সিগারেট খাওয়ার পর লিংকনের গ্যাসলাইট আমার কাছে রাখি। লিংকন গাড়ী চালানো অবস্থায় সে পড়ে যাবে যাবে ভাব হয়। সে পড়ে যাওয়ার উপক্রম হলে সোহাগ হুন্ডা চালায় ও লিংকনকে আমাদের মাঝে রাখি। কিছুদুর গিয়ে হোন্ড থামিয়ে দেয় সোহাগ, সবাই নামি। রাস্তার উপর থেকে

লিংকনকে ধরাধরি করে পাটক্ষেতের পাশে নিয়ে যায় ওরা দুজন আমি, দাড়িয়ে থাকি রাস্তায়। আমাকে বাবুল ডাক দেয়। আমিও সেখানে যাই। লিংকনকে শোয়ানো অবস্থায় দেখি। আমি তার পা ধরে রাখি। বাবুল সোহাগ, শার্ট দিয়ে গলা পেচিয়ে লিংকনের মৃত্যু নিশ্চিত করে। আমরা তিনজন উঠে আসি। ঐ খান থেকে সোহাগ হোন্ডা চালিয়ে আমাদের দুজন সহ বাবুল এর নানী বাড়ী যাই। রাতে থেকে পরদিন সকালে মোস্তফাপুর, মাদারীপুর যাই আমরা। বাবুল ও সোহাগ হোন্ডা বিক্রির চেষ্টা করে। পুলিশ ও স্থানীয় লোকজন চ্যালেঞ্জ করে। তারা দুজনে একপর্যায়ে পালিয়ে যায়। হোন্ডা বিক্রি করতে পারেনি। আমাকে ও পরে পুলিশ জিজ্ঞাসাবাদ করে। আমাকে তারা আর ধরেনি। আমি পরে গাড়িতে করে ঢাকা চলেই যাই। মেসে উঠি। আমার কাছে লিংকনের দিয়াশলাই ছিল। মেসের একজন রাসেল আমাকে দিয়াশলাই এর কথা জিজ্ঞাসা করে। আমি মিথ্যা বলি। পরদিন সকালে উঠে কাজে যাই। এর পর ২৮/০৬/১৩ইং আমাকে পুলিশ ধরে লালবাগ থানায় নিয়ে যায়। পরে আমাকে পুলিশ শরীয়তপুর নিয়ে আসায় আমার দেখানো মতে লাশ ঐখানেই পায়। পুলিশ লাশ নিয়ে যায়। আমাকে থানায় নিয়ে আসে। এই আমার জবানবন্দি।"

28. The witness further stated that the investigating officer produced accused Shohag before him on 03.07.2013 and he gave the accused enough time for refreshment of memory. The accused voluntarily agreed to give a confessional statement and he recorded his confessional statement after fulfillment of all legal requirements. He read over above statement to the accused who accepted the same as true and gave two signatures on the same. The witness proved above confessional statement of accused Shohag and signatures of above accused and his six signatures on the same which were marked as Exhibit-6 and 6/1 series respectively. Above confessional statement of accused Shohag is reproduced below:

লিংকনের সাথে আমার কোন শত্রুতা ছিল না। ছিল ওর বাবার সাথে। সে এলাকায় বিচার শালিশী করত। কয়েকটা বিচারে আমার বিরুদ্ধে সিদ্ধান্ত দেয়। এরপর আমি ঢাকা চলে যাই বউ বাচ্চা সহ। সেখানে আমি অপরাধ জগতের সাথে জড়িয়ে যাই। ঘটনার কিছুদিন পূর্বে লিংকন ঢাকার লালবাগ আমি যে মেসে থাকি সেখানে যায়। সে আমার সাথে কাজ করবে বলে জানায়। আমার পূর্বের কথা মনে পরায় ওর দামী মোটর সাইকেল আছে জানালে আমার লোভ হয়। প্রতিশোধও নেয়া হবে মনে হওয়ায় আমি চিন্তায় থাকি। শ্বশুর বাড়ী ডামুড্যা থাকায় আমি শবে বরাতের পরদিন বাবুল, বাবলু সহ আমি ডামুড্যা আসি। লিংকনকে অন্য তথ্য দিয়ে ঐখানে আনি। ওর হোন্ডায় কাজ করানো দরকার হবে বলে জানালে আমি ও লিংকন সহ চারজন হোন্ডায় উঠি। বাবুল ও বাবলুকে আঙ্গারিয়া রেখে দুজনে মাদারীপুর যাই। কাজ করতে সময় লাগে। বাবুল ও বাবুলকে কাজীরটেক ফেরিঘাট এসে অপেক্ষা করতে বলি। কাজ শেষে এসে ঐ দুজন সহ চারজন হোন্ডায় উঠে টেকের হাট স্টীল ব্রিজের পর কালভাটের সামনে থামতে বলি। বাবুলকে একটি প্রান জুসে ঘুমের বড়ি মিলিয়ে মোট চারটি জুস আনতে বলি। জুস আনার পরে ঘুমের বড়ি মিশানোটা লিংকনকে খাওয়াই। এরপর বাবলু সিগারেট খায় ও লিংকনের সাথে থাকা গাজা খায়। খাওয়ার পর হোন্ডা চালিয়া আঙ্গারিয়া ব্রিজ পর্যন্ত এসে লিংকন খেতে চায়। আমি বলি সবাই মিলে আমার বাড়ি চল। লিংকন আমাদের তিনজন সহ হোন্ডা চালায়। তখন পিছনে এসে গোইয়াতলা রোডে ঢুকি। এক কিলোমিটার চালানোর পরে সে গাড়ি থামায় ও বলে আমি চোখে দেখিনা, ঘুম ঘুম আসে তখন আমি চালাই। মাঝখানে লিংকনকে নিয়ে (অপাঠ্য) বসে। গাড়ি চালিয়ে সরদার বাড়ি স্কুল পর্যন্ত আসি। লিংকন ইতিমধ্যে ঘুমিয়ে যায়। গাড়ি রাস্তায় দাড় করানো ছিল। তিনজন পরামর্শ করে লিংকন কে মারার সিদ্ধান্ত নিয়ে ফেলি ও তিনজনই চাপ দিয়ে ধরি। সময় নেওয়ায় লিংকনের শার্ট খুলে গলায় পেচ দিয়ে মেরে ফেলি। পাটক্ষেতের পাশে খেজুর গাছের গোড়ায় রেখে আসি। আশে পাশে তালগাছ ছিল। গাড়ি নিয়ে বাবুলের আত্মীয়ের (মামা বাড়ী) নড়িয়া বাড়িতে যাই। রাতে থেকে পরদিন সকালে মাদারীপুরের গোমস্তাপুর গিয়ে গাড়ি বিক্রির চেষ্টা করি। (অপাঠ্য) সাথে কথা বলি। পুলিশ তৎক্ষনাৎ আসায় আমি বুঝতে পেরে দৌড়ে পাশে যাই। গাড়ি ফেলে রেখে। সেখান থেকে ডামুড্যা হয়ে ঢাকা চলে যাই। এই আমার জবানবন্দি।

In his cross-examination the witness denied that accused Bablu and Shohag did not give confessional statements voluntarily and he recorded above statement according to the demand of police.

29. P.W.9 Dr. Md. Shah Alam performed Post Mortem Examination of the dead body of victim Linkon. He stated that he examined the dead body of victim Linkon on 28.06.2013 and sent viscera for chemical examination. On receipt of above chemical examination Report on 21.07.2013 he prepared final Post Mortem Examination report on 20.08.2013. The witness proved above Post Mortem Report and his signature on the same which were marked as Exhibit-8 and 8/1 respectively.

30. The relevant part of the Post mortem report of the dead body of victim Linkon is reproduced below:

'' ২= অসম-অবস্থান, আকার ও ধরনঃ

*"All toes of both lower Limbs were amputed. All fingers of left hand amuted 1st, 2nd and 5th fingers of right hand were amputed."*

Opinion: Death of victim Linkon was caused due to Haemorrhagic shock which was ante-mortem and homicidal in nature.

31. The result of Chemical Analysis of Parts of liver and kidney of the victim was as follows:

''ফলাফলঃ-

প্লাস্টিকের পাত্রে রক্ষিত ভিসারায় বিষ পাওয়া যায় নাই''।

32. In cross-examination he stated that the fingers of hands and legs of the victim were amputed. In the stomach of the victim no presence of sleeping pill was found.

33. P.W.10 K.M. Abul Kashem is the officer-in-charge of Palong Police Station and recording officer of this case. He stated that on receipt of the ejahar from P.W.1 Mozammel Kha he filed this case. The witness proved the ejahar form and his signature of the same which were marked as Exhibit-9 and 9/1 respectively.

34. P.W.11 Md. Sultan Mahbud, sub-inspector of Police is the investigating officer of this case. He also performed inquest of the dead body of victim Linkon. He stated that on receipt of the case record he visited two places of occurrence, prepared sketch maps of the same along with indexes thereof. The witness proved above Sketch Maps the and Indexes and his signatures of those documents which were marked as Exhibits 10, 10/1, 11, 11/1, 12, 12/1, 13 and 13/1 respectively. He further stated that he arrested accused Atabur Rahman Bablu and at his showing recovered the dead body of victim Linkon, performed inquest of the same and prepared an Inquest Report. He proved his signature on the inquest report which was marked as Exhibit-4/2. He further stated that accused Shohag and Bablu agreed to give confessional statements voluntarily and he produced them before the Judicial Magistrate who recorded their confessional statements. He seized some parts of the pant, shirt and belt of victim Lincon and mud of the place of occurrence by dint of two separate seizure lists. He proved his signatures on above documents which were marked as Exhibits-3/3 and 2/4 respectively. He could not find out the address of one accused. In his above investigation allegation having proved against accused Shohag and Bablu he submitted charge sheet against them. In cross-examination he stated that he could not recollect the date of arrest of accused Shohag. He took accused Shohag on remand for 5 days on 30.06.2013 and produced him before Judicial Magistrate on 03.07.2013 for recording his confessional statement. He denied that he obtained confessional statement of accused Shohag putting him in fear of death by crossfire. Victim Linkon had no mobile phone. He did not find that accused Shohag had any mobile phone. He found that before two months of the occurrence victim Linkon went to Dhaka due to deterioration of relation with his parents. In the charge sheet he designated accused shohag as a thief. But he did not find any case of theft against accused Shohag. During investigation he did not find any person namely, Arif, Rasel or Ajahar.

35. The inquest report prepared by this witness is reproduced below:

"বয়স অনুমান ১৮ বৎসর হইবে। উচ্চতা অনুমান ৫ ৬ হইবে।মৃতার দেহ অর্ধগলিত ও বিকৃত অবস্থায় পাওযা গেল। তাহার চোখ বাহির হওয়া ও জিহবা বাহির হওয়া। শরীর অত্যান্ত ফোলা অবস্থায় পাওয়া গেল। তাহার দুই হাতের আংগুল ও দুই পায়ের আংগুলের অগ্রভাগ কর্তন বলিয়া প্রতীয়মান হইল। গলায় অস্বাভাবিক ফুলা। তাহার পরিহিত জিন্সের

প্যান্ট শরীরের মধ্যে বসিয়া যাওয়া অবস্থায় পাওয়া গেল । পচন ও ফোলার কারনে তাহার শরীরের অন্যান্য চিহ্নগুলি নির্নয় করা সম্ভব হইল না । তাহার সাড়া শরীরের চামড়া পোড়া ও লালচের মত প্রতীয়মান হইল ।"

36. Above is all about the evidence oral and documentary adduced by the prosecution to prove the charge brought against accused Bablu and Sohag.

37. At the very outset it is to be mentioned that P.W.1 Mozemmel Kha while giving evidence in court has made a departure from the statement he made in the ejahar as to the abduction of victim Linkon by the accused persons. He merely stated that the accused persons took away victim Linkon along with his motor bike from his home at 3.00 p.m. on 25.06.2013. But P.W.11 Sultan stated in his cross examination that he found during investigation that about two month before the date of occurrence victim Linkon left his house and went to Dhaka due to detoriation of relation with his parents.

38. In the ejahar it has been stated that the motive behind the forcible abduction and murder of victim Linkon was to grab his motor bike. The accused-persons attempted to sale above motor bike in Madaripur but they failed due to resistance by local people and police. P.W.2 Rashida and P.W.3 Ali Hossain have in their evidence also mentioned about the motor bike of victim Linkon. In their confessional statements under section 164 of the Code of Criminal Procedure accused Shohag and Bablu have also mentioned about the motor bike of victim Linkon. But above motor bike was not produced in court nor any seizure list showing that above motor bike was recovered from the possession of the accused-persons was produced at trial. There is no evidence on record to show that the accused-persons were in possession of above Motorbike or they attempted to sale that Motorbike after demise of victim Linkon. The learned Advocate for condemned prisoner Sohag brought to our notice an unexhibited seizure list mentioned at page No.152 of the Paper book. Above document shows that a motorbike was found in an abandoned condition in front of Mostafapur Bus Counter of Madaripur and the same was seized pursuant to GDE No. 1222 dated 26.06.2013.

39. P.W.2 Rashida Begum mother of the victim stated in her evidence that one Rasel informed her that the match light of victim Linkon was in possession of accused Bablu. But above Rasel did not give evidence in this case as a P.W. nor above match light was seized and produced at trial. In his cross-examination P.W.11 S.I. Sultan Mahmud stated that during investigation he did not find any person namely Arif, Rasel or Ajahar.

40. It is not disputed that the dead body of victim Linkon was recovered on 28.06.2013 at 11.30 A.M. from the agricultural land of P.W.7 Mojibur Rahman Sarder. It has been alleged by P.W.11 S.I. Sultan Mahmud that above dead body was recovered at the showing of accused Bablu. P.W.4 Mamun, P.W.5 Siraj, P.W.6 Jasim, P.W.7 Mojibor and P.W.3 Md. Ali gave evidence on this point. P.W.3 Ali Hossain is the brother of the informant, P.W.4 Mamun is the cousin of victim Linkon and P.W.5 Siraj Baga is a village police of the ward adjacent to the place where the dead body of victim Linkon was found. Above three witnesses, namely P.W.3 Md. Ali, P.W.4 Mamun and P.W.5 Siraj have supported the evidence of P.W.11 S.I. Sultan Mahmud that at the showing of accused Bablu the dead body of victim Linkon was recovered. Undisputedly the dead body of victim Linkon was found in an open agricultural land which belonged to P.W.7 Mojibur. As such mere pointing of the location of the dead body by an accused alone cannot be taken as a legal prove that he committed the offence of murder unless above showing is supported by other legal evidence proving the complicity of the accused with the act of murder of victim Linkon.

41. In this case there is no eye witnesse who saw the commission of murder of victim Linkon. The prosecution has relied upon the confessional statements (Exhibit No.5 and 6) made by accused Shohag and Bablu before P.W.8 Aminul, a Judicial Magistrate to prove the guilt of both accused persons.

42. It is true that an order of conviction and sentence can be recorded on the basis of a confessional statement of an accused made under section 164 of the Code of Criminal procedure to a Magistrate if the same is made voluntarily and proved to be true. P.W.8 Md. Aminul Islam the Judicial Magistrate who recorded above two confessional statements stated that accused Bablu and Shohag gave above confessional statements voluntarily and he recorded their statements observing all legal requirements.

43. While recording a confessional statement a Judicial Magistrate is not required to investigate as to the truthfulness or correctness of the statement being made before him by the accused. It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily free from any form of coercion or undue influence. Determination of truthfulness or correctness of confessional statement of an accused is the duty of the learned judge of the trial court. The trial Court shall perform above duty by examining the confessional statement in the light of facts and circumstances of the case and by comparing the same with other legal evidence on record. When more than one accused person of a case give separate confessional statements the trial Court shall also examine if above statements are mutually supportive or those suffer from material contradictions.

44. As mentioned above in their two confessional statements accused Shohag and Bablu have mentioned repeatedly about the motor bike of victim Linkon as has been done by P.W.1 Mozammel Kha, P.W.2 Rashida Begum and P.W.3 Mohammad Ali Hossain Khan but above motor bike was not produced before the trial Court. As mentioned above the motor bike of victim Linkon was found in an abandoned condition in front of a Bus counter at Madaripur. There is no evidence on record to show that the accused persons were ever in possession of above Motor bike.

45. Both accused-persons have further stated in their respective confessional statement that sleeping tablets were mixed with juice and victim Linkon was made to consume the same. But P.W.9 Dr. Md. Shah Alam who performed Post Mortem examination of the dead body of the victim has stated in his evidence that no presence of any sleeping pill was found in the stomach of victim Linkon.

46. As to the manner of murder of victim Linkon accused Bablu has stated in his confessional statements that he caught hold of the leg of victim Linkon and accused Shohag and Babul ensured the death of the victim by pressing his neck with his shirt. But accused Shohag stated in his confessional statement that he and other two co-accused namely Babul and Bablu murdered the victim by pressing his neck with his shirt. Accused Shohag did not mention that accused Bablu caught hold of the leg of victim Linkon.

47. It turns out from above confessional statements (Exhibit No.5 and 6) of accused Bablu and Sohag that the death of victim Linkon was caused by strangulation. But two important documents of the prosecution the Inquest Report (Exhibit-4) which was prepared by P.W.11 S.I. Md. Sultan Mahmud and the Post Mortem Report (Exhibit-8) which was prepared by P.W.9 Dr. Md. Shah Alam do not support that the death of victim Linkon was caused by strangulation.

48. In the Inquest Report (Exhibit-4) it was found that the fingers of both the hands and legs of victim Linkon were amputed. There were unusual swelling mark on the neck. The skin of the whole body of the victim appeared to be brunt and of reddish color.

49. The Post Mortem Report (Exhibit-8) corroborates above findings as recorded in the Inquest Report. In the Post Mortem Report (Exhibit-8) it was stated that all toes of both lower limbs were amputed. All fingers of left hand were amputed. 1st, 2nd and 5th finger of right hand were amputed. In the opinion of the Post Mortem examiner death of victim Linkon was caused due to hemorrhagic shock which was ante mortem and homicidal in nature.

50. Hoemorrhagic shock may be resulted from absence of oxygen due to excessive loss of blood. In cross-examination P.W.9 Dr. Md. Shah Alam has supported above perception and stated that the death of victim Linkon was caused due to excessive loss of blood.

51. It is crystal clear from above mentioned evidence of P.W.I Dr. Md. Shah Alam, P.W.11 S.I. Md. Sultan Mahmud, the Post Mortem report (Exhibit-8 and the Inquest report (Exhibit No.4) that the death of victim Linkon was caused due to loss of excessive blood for amputation of fingers of both hands and legs and other injuries as mentioned above and not by strangulation as have been stated by accused Bablu and Shohag in their respective confessional statement. Above confessions statements do not make any mention of above injuries let alone providing any explanation as who inflicted those injuries.

52. Analyzing above ocular and documentary evidence on record in the light of the facts and circumstances of the case and the confessional statements made by accused Shohag and Bablu under section 164 of the Code of Criminal Procedure we are of the view that above confessional statements do not find any support from any other legal evidence on record.

53. In above view of the materials on record we are unable to accept the confessional statements made by the accused Bablu and Shohag as true and give the same the status of legal evidence which can be the basis of an order of conviction and sentence. The learned Judge of the Druto Bichar Tribunal committed serious error in accepting above confessional statements as true and valid legal evidence which is not tenable in law.

54. The prosecution has miserably failed to prove the charge leveled against accused Shohag and Bablu under section 302/34 of the Penal Code by legal evidence beyond reasonable doubt. As such, above conviction and sentence passed the learned Judge of the Druto Bichar Tribunal against accused Bablu and Sohag is not tenable in law and the accused persons are entitled to be acquitted.

55. In the result, the Death Reference is rejected and both the Jail Appeal being No.327 of 2016 and 328 of 2016 are allowed.

56. The impugned judgment and order of conviction and sentence dated 07.09.2016 passed by the learned Judge, Druto Bichar Tribunal No.4, Dhaka convicting the accused Shohag Howlader and Md. Atabur Rahman@ Bablu under section 302/34 of the Penal Code and sentencing them there under to death and also pay fine of Tk. 20,000/- is set aside.

57. Accused Md. Shohag Howlader and Md. Atabur Rahman@Bablu are acquitted of the charge mentioned above. Let them set at liberty if not wanted in any other case.

58. Let the lower court's record along with a copy of this judgment be transmitted down at once.

**16 SCOB [2022] HCD 217**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**
Writ Petition No. 6526 of 2013

**The City Bank Limited, Kushtia Branch, Kushtia**
.....Petitioner
-Versus-
**Court of First Joint District Judge, Artha Rin Adalat, Kushtia and another**
.....Respondents

Mr. Ahsanul Karim, with
Mr. Khairul Alam Choudhury, Advocates
...for the petitioner
Mr. Shasti Sarker, Advocate
...for the respondent No. 2
Heard on: 11.02.2021 and 25.02.2021
Judgment on: 02.03.2021

**Present:**
**Mr. Justice Abu Taher Md. Saifur Rahman**
And
**Mr. Justice Md. Zakir Hossain**

**Editors' Note:**
After obtaining decree in an Artha Rin case the petitioner- decree holder Bank got a certificate of ownership in respect of mortgaged property issued by the Executing Court. After registration of the certificate of ownership the executing Court disposed of the execution case. Thereafter, the judgment-debtor filed an application to get back the property by depositing the outstanding dues of the decretal amount. Upon hearing, the Executing Court allowed the petition. Challenging the legality and propriety of the said order, the petitioner-decree holder-Bank moved the High Court Division and obtained the Rule. The main argument for petitioner was that after disposing of the execution case the Executing Court has become *functus officio* and therefore, allowing the application submitted by the judgment-debtor to get back his property was an illegality. The High Court Division found that the execution case was not legally disposed of, as possession of the mortgaged property had not been made over to the decree holder, therefore, the Court had not become *functus officio* in entertaining the application filed by the judgment-debtor. Moreover, the petitioner-Bank did not file any mortgage suit to foreclose down the right of redemption of the mortgagor. In such case right of redemption exists unless the mortgaged property is sold on auction or that right is barred by limitation. In the instant case, auction was not held in accordance with law and the mortgaged property was not sold on auction, therefore, the right of redemption of the judgment-debtor was not extinguished. Thereafter, giving twelve points direction the High Court Division discharged the Rule.

**Key Words:**
Section 33(1) and 33 (4) of the Artha Rin Adalat Ain, 2003; mortgage property; auction sale; *functus officio; stare decisis*; *per* incuriam; Section 20, 33(7), 57 of the Artha Rin Adalat Ain, 2003; Right of redemption; foreclosure;

**Section 33(1) and 33 (4) of the Artha Rin Adalat Ain, 2003:**
**It transpires from the order sheets that the Executing Court did not comply with the provisions of section 33(1) of the Ain, 2003. It is a mandatory requirement to publish an auction notice in a widely circulated daily newspaper. The daily Destiny has not got no**

**existence at present and undisputedly, at the relevant time it was not a widely circulated daily newspaper. As the auction notice was not published in a widely circulated daily newspaper, therefore, prospective bidders could not participate in the bid. Moreover, the decree holder-Bank did not take any step under section 33(4) of the Ain, 2003 to sell out the mortgage property on auction and thereby, negated the provision of section 33(4) of the Ain, 2003. ...(Para 17)**

**Section 33 of the Artha Rin Adalat Ain, 2003**

**On meaningful reading of sub-sections (5), (7), (7Ka) and (7Kha) of section 33 of the Ain, 2003, it transpires that where the possession of property requires to be obtained through intervention of the Court, the decree holder has to file an application in writing to the Executing Court to hand over possession of the said property to the decree holder or the auction purchaser as the case may be and before handing over possession of the property, the Executing Court shall be reassured that it is the property which was lawfully mortgaged by its original owner against the loan liabilities or which was attached under the original title and possession of the judgment-debtor for execution of the decree. The provisions of sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated by the Artha Rin Adalat Ain (Amendment) Act, 2010 (Act XVI of 2010) in order to protect the property of the actual owner. In this case, admittedly, the possession of the mortgage property remains with the judgment-debtor. If the execution case is disposed of upon issuance of certificate of title, the decree holder will not be able to obtain the possession without the intervention of the Court. Therefore, the contention of the petitioner is that upon issuance of certificate of title under section 33(7) of the Ain, 2003, the Executing Court has become *functus officio* is fallacious and not based on cogent reasons. ...(Para 18)**

**Doctrine of *stare decisis* must not be applied at the cost of justice:**

**The doctrine of *stare decisis* which is the binding force of precedent may be destroyed if a statute is enacted inconsistent with the decision or if it is reversed or overruled by a higher Court or it is based on the doctrine of *per incuriam*. The doctrine of *stare decisis* should not be regarded as a rigid and inevitable doctrine, which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. The Court may, in an appropriate case, overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. Every case has to consider its own merit, peculiar facts and circumstances and therefore, in following the precedent, the Court must be very careful and cautious. ...(Para 24)**

**Section 20, 33(7), 57 of the Artha Rin Adalat Ain, 2003:**

**The contention of the learned Advocate of the petitioner that upon issuance of the certificate under section 33(7) of the Ain, 2003, the Executing Court has nothing to do but to dispose of the execution case finally is not based on any rationality. For the sake of argument, if the Court becomes *functus officio*, how later on the Court will entertain another execution case or any other application for handing over possession if it remains with the judgment-debtor. The Court may correct its own mistakes by invoking, the umbrella provision, embodied under section 57 of the Ain, 2003 to do justice and to undo injustice despite the provisions of section 20 of the Ain, 2003. It has to remember that the provisions of section 20 of the Ain, 2003 is neither absolute nor sacrosanct nor untouchable. The parties to the suit cannot and should not suffer for the mistake committed by the Court itself. On perusal of the entire edifice of the Ain, 2003, it becomes visible to us that the Code of Civil Procedure, 1908 shall be applicable**

**subject to not being inconsistent with the provisions of the Ain, 2003. The Adalat may review its own order by invoking section 57 of the Ain, 2003 with extreme circumspection in an exceptional case. ...(Para 25)**

**Section 52 of the Artha Rin Adalat Ain, 2003:**

**It persistently comes to our notice that Bank officials are very much reluctant to provide the bank statement containing the outstanding dues of the borrower even after issuance of the direction of the Court. This sort of attitude is tantamount to contempt of Court. In this circumstance, if bank official does not comply with the order of the court, then the court may proceed against them under section 52 of the Ain, 2003 or in an appropriate case, it may refer to the High Court Division for taking punitive measure against the delinquent officials. It is expected that Bank and Financial Institutions should comply with the order of the Court with utmost expedition. ...(Para 27)**

**Section 5 (2) of the Artha Rin Adalat Ain, 2003:**

**Right of redemption exists unless the mortgaged property is sold on auction or the right is barred by limitation:**

**It also appears from the record that admittedly, the petitioner-Bank filed Artha Rin Suit for recovery of loan money but did not file any mortgage suit under section 5(2) of the Ain, 2003. If the Bank or financial institute wishes to foreclose down the right of redemption of the mortgagor, then it has to file mortgage suit and in that case the decree awarded by the Adalat shall be preliminary decree and in all other cases, the decree awarded by the Court in a suit filed for recovery of loan money shall be the final decree. A suit to obtain a decree that a mortgagor shall be absolutely debarred from his right to redeem the mortgaged property is called a suit for foreclosure. In this case, the decree holder did not institute any mortgage suit for foreclosure. Right of redemption exists unless the mortgage property is sold on auction in accordance with the Ain, 2003 or barred by the Limitation Act, 1908. ...(Para 28)**

**As soon as auction sale is held in pursuance of the decree passed in a suit for recovery of loan money, the decree shall be final and accordingly, the right of redemption of the mortgage property be extinguished. In the instant case, auction was not held in accordance with law and the mortgage property was not sold on auction, therefore, it cannot be said that the right of redemption of the judgment-debtor has been extinguished. ...(Para 29)**

**To sum up, our final conclusion is as under:**

i. **Auction notice was not issued in accordance with the mandatory requirement of law and auction process was not conducted as per the provision of section 33(1) of the Ain, 2003 and therefore, issuance of certificate of ownership by the stroke of a pen by the Executing Court is patently illegal.**

ii. **In case of issuance of certificate under section 33(5) of the Ain, 2003, it is obligatory to exhaust the auction process under sub-sections (1) and (4) of section 33 of the Ain, 2003. If the certificate of title is issued upon without exhausting the procedure of section 33(4) of the Ain, 2003 that will make the said provision useless and nugatory. In such a case, the Bank or Financial Institutions by a show up auction process under section 33(1) of the Ain, 2003 will straight apply for a certificate of title with an ulterior**

**motive depriving the judgment-debtor from obtaining the actual market price of the property. So we hold the view that before issuance of certificate of title to the mortgage property or other property of the judgment-debtor, the Executing Court shall follow the provisions of sections 33(1) and 33(4) of the Ain, 2003 and after that it will fix the actual market price of the mortgage property or other property and succinctly be stated in the certificate of title so that the outstanding dues if any may be adjusted later on. In such a case, the Executing Court shall determine the actual market price of the mortgage property on the basis of a report from the Sub-Registrar of the local jurisdiction. Apart from the same, in certificate issuing order, the Executing Court shall state as to whether the decretal amount has been adjusted wholly, if not, the amount of outstanding dues should state therein. It repeatedly comes to our notice that the Executing Court mechanically allows the prayer of issuance of certificate of title. Mechanical issue of certificate of title is deprecated by this Court.**

iii. **The Court should not be tempted to follow the precedent of one case by matching color of another case. The Court should not be oblivious that a single significant or material fact may change the entire edifice of the case as no two cases are similar. Every case has to decide upon its own facts and peculiar circumstances, therefore, the Court has to incur infinite painstaking.**

iv. **The principle enunciated in the case reported in 15 BLT(HCD) (2007) 425 and 63 DLR (2011) 282 is based on sound reasonings and the same was strengthen and fortified by incorporating sub-sections 7Ka and 7Kha of section 33 by amended Act XVI of 2010.**

v. **Sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated in order to mending the lacuna of the provision of sub-sections 5, 7 and 9 of section 33 of the Ain, 2003. Moreover, in the case of Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others, supra, the case of 15 BLT (HCD) (2007) 425 was not considered.**

vi. **Section 33(9) of the Ain, 2003 provides that when the rights of possession and use of any property under sub-section (5) or the title of any property under sub-section (7) vests in favour of the decree holder, the suit for execution of the said decree shall, subject to the provisions of section 28, be finally disposed of. The word 'final' is not absolute. It has to be read with sections 28, 33(7Ka) and 33(7Kha) of the latest amended Ain, 2010. Therefore, we strongly hold the view that mere issuance of certificate under sections 33(5) and 33(7) of the Ain, 2003 is not enough to finally dispose of the execution case. If the possession of the mortgage property or other property attached by the Executing Court for realizing outstanding loan money remains with the decree holder, the Executing Court may dispose of the execution case in view of section 33(9) of the Ain, 2003. Resorting to literal meaning of section 33(9) of the Ain, 2003 will be a great concern and it may cause devastating consequence,**

**therefore, harmonious construction of the aforesaid provisions is sine qua non to fulfill the purpose of the legislature.**

**vii. As per the mandate of section 58 of the Ain, 2003, the Government may, by notification in the official gazette, make rules to give effect to the provisions of this Ain, 2003. Some provisions of the Ain, 2003, need more clarification and to give effect to the provisions therein for the smooth functioning of the Artha Rin Adalat. The Government may formulate comprehensive delegated legislations and the necessary forms like issuance of certificate of title, certificate of possession, enjoyment of usufructs and sale of the mortgage property etc. should be prescribed therein to do away with the confusions crept in the Ain, 2003.**

**viii. In view of section 5 of the Ain, 2003, it appears that two types of suits may be filed before the Artha Rin Adalat. One is mortgage suit for sale or foreclosure and the other is Artha Rin Suit for recovery of loan money. In the former suit, the Adalat shall pass preliminary decree and in the later suit, the Adalat shall pass final decree. A decree awarded by the Adalat in any suit instituted under the Ain, 2003 except mortgage suit under sub-section 3 of section 5 of the Ain, 2003, shall be deemed to be a preliminary decree of foreclosure in favour of the plaintiff financial institution; and as soon as the auction sale is held in continuation of the decree of the mortgage immovable property in favour of the plaintiff against the loan, the said preliminary decree shall be deemed to be the final decree, and the sale shall be final and the purchase shall be valid and thereafter, the judgment-debtor shall have no right to redeem the said mortgaged property.**

**ix. In this case, auction was not conducted in accordance with law. Moreover, no auction sale was held. Therefore, the right of redemption has not yet been extinguished by operation of the Ain, 2003 or the Limitation Act, 1908.**

**x. The petitioner Bank did not file any mortgage suit. Admittedly, it filed Artha Rin Suit for recovery of Tk. 5,20,370.62. Admittedly, the principal amount was Tk. 5,20,370.62 and execution case was filed for Tk. 6,51,888.82. The judgment-debtor on 03.12.2006 paid Tk. 2,00,000/-, on 12.12.2006 paid Tk. 95,000/-, on 13.12.2006 paid Tk. 4,00,000/-, on 17.09.2007 paid Tk. 21,000/- and on 08.10.2009 paid Tk. 2,00,000/- and as such the judgment-debtor deposited Tk. 9,16,000/-. The decree holder did not deny the same to the Executing Court. The decree holder-Bank could not submit any statement of accounts to show that those amounts were adjusted. Moreover, the judgment-debtor is ready to pay off the rest of the outstanding dues to protect his homestead. As the mortgage property has not been sold by auction, therefore, the right of redemption of the mortgage property has not yet been extinguished; the learned Judge of the Executing Court by applying his judicial conscience rightly passed the impugned order, which is laudable, hence, the same does not call for any interference.**

**xi. Title is legal ownership. Possession is physical control of the movable or immovable property. Possession is the prima facie evidence of ownership, called as nine out of ten points of law meaning that there is a presumption the possessor of a property or thing is owner of it and the other elements in order to have that property or thing must prove their title or better possessory right. Certificate of ownership or title equivalent to title deed. Title deed having no possession is only a paper transaction. Title deed is not acted upon unless possession is handed over to the title holder.**

**xii. It transpires from the record that the judgment-debtor-respondent No. 2 is engaged in furniture business in local district. In order to expand his business, he took loan of Tk. 3 lakhs later on extended upto 5 lakhs by mortgaging his last resort homestead measuring 0.1650 acres situated within the periphery of Kushtia District town on 10.03.2002. At the relevant time of issuance of certificate of ownership the value of the said property was more than one crore. The Executing Court assigning cogent and very convincing reasons allowed the application of the judgment-debtor. The main purpose of the Ain, 2003 is to realize the outstanding loan money of the Bank or any other Financial Institutions but not to snatch away the mortgage or any other property of the borrower.**

**...(Para 30)**

**JUDGMENT**

**Md. Zakir Hossain, J:**

1. At the instance of the petitioner, the *Rule Nisi* was issued calling upon the respondents to show cause as to why the impugned order No. 30 dated 18.03.2013 passed by the respondent No. 1, the learned Joint District Judge, 1st Court and Artha Rin Adalat, Kushtia in Artha Rin Execution Case No. 06 of 2008 directing the petitioner Bank to submit the account of outstanding dues of the respondent No. 2 to the respondent No. 1 Court within 15(fifteen) days and also directing the respondent No. 2 to make the payment thereafter within 30(thirty) days from the date of submission of the said account as a pre-condition for the purpose of setting aside order Nos. 13 and 14 dated 08.07.2009 and 24.05.2010 respectively passed by the respondent No. 1 Court in the said Execution Case No. 6 of 2008 shall not be declared to have been issued without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. At the time of the issuance of the *Rule*, this Court was pleased to stay the operation of further proceedings of the Execution Case No. 6 of 2008, now pending before the respondent No. 1 for a period of 3(three) months, which was subsequently extended from time to time by this Court.

3. Facts leading to the issuance of the *Rule* may be stated, in brief, as follows:

The petitioner- City Bank Ltd. instituted Artha Rin Suit No. 2 of 2008 before the Court of Joint District Judge, 1st Court and Artha Rin Adalat, Kushtia, the respondent No. 1, shortly called the Adalat, against the respondent No. 2 for realization of outstanding dues to the tune of Tk. 5,20,370.62 and interest thereon. Having received the summons, the respondents entered appearance in the suit and contested the same denying the material averments set out in the plaint. After conclusion of the trial, the Adalat was pleased to pass a decree to the suit

by its judgment and decree dated 15.06.2008. Accordingly, the decree was drawn and signed on 22.06.2008. Thereafter, the decree holder-Bank put the decree into execution by filing Artha Rin Execution Case No. 06 of 2008 and a notice was floated for selling out the mortgage property on auction but no auction was held. Thereafter, on the prayer of the decree holder-Bank, the Executing Court issued a certificate of ownership or title in respect of mortgage property under section 33(7) of the Artha Rin Adalat Ain, 2003, hereinafter shortly referred to the Ain, 2003. Then the Executing Court sent the copy of the certificate of title for registration and accordingly, the same was registered. After that the Executing Court by its order No. 13, dated 08.07.2009 disposed of the execution case in view of section 33(9) of the Ain, 2003. On 18.03.2013, the judgment-debtor filed an application to get back the property by depositing the outstanding dues of the decretal amount and the application was resisted by the decree holder-Bank. Upon hearing, the Executing Court was pleased to allow the petition filed under section 57 of the Ain, 2003 with some conditions stipulated in the operative portion of the impugned order. Challenging the legality and propriety of the said order, the petitioner-decree holder-Bank moved this Court and obtained the *Rule* and stay therewith.

4. Mr. Ahsanul Karim along with Mr. Khairul Alam Choudhury, the learned Advocate appearing on behalf of the petitioner, submits that the impugned order No. 30 dated 18.03.2013 directing the petitioner-Bank to submit account of outstanding dues of the respondent No. 2, the judgment-debtor for the purpose of setting aside order Nos. 13 and 14 dated 08.07.2009 and 24.05.2010 respectively passed by the Executing Court is *ex facie* illegal in view of section 20 of the Ain, 2003. He also submits that after issuance of certificate under section 33(7) of the Ain, 2003, the execution case was duly disposed of and as such, the Executing Court became *functus officio;* hence, the impugned order is *ex facie* illegal and liable to be turned down, otherwise, it will entail serious loss to the petitioner-Bank. He further submits that in view of the provisions of section 20 of the Ain, 2003, the Executing Court had got no jurisdiction to entertain the application as made by the judgment-debtor, nevertheless, the Executing Court most illegally entertained the same and passed the impugned order and therefore, the same suffers from serious illegality. He next submits that the Executing Court has got no jurisdiction to review its earlier order, if the judgment-debtor is aggrieved by the interim order passed by the Executing Court, he may seek remedy under section 44 of the Ain, 2003.

5. He also contends that since the petitioner-Bank acquired title in the mortgage property in accordance with law, therefore, such right cannot be taken away without due process of law and handing over of possession of the mortgage property is not pre-condition for conferring title therein.

6. He further contends that the principles enunciated by the High Court Division in the cases of ***International Finance Investment and Commerce Bank Limited v. M/S. Marinar Fashions Wear Pvt. Ltd. and others,*** reported in 15 BLT(HCD) (2007) 425 and ***Salma Begum v. Sonali Bank Limited and others,*** reported in 63 DLR (2011) 282 are in no way applicable to the facts and circumstances of the instant case at hand. In support of his argument, he relies on the cases of ***Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others,*** reported in 13 MLR (AD) (2008) 356; ***Bank Asia Limited v. Judge, Artha Rin Adalat, Chattogram and others,*** reported in 71 DLR (2019) 338 and ***Sheuly Khanam v. Artha Rin Adalat, 2nd Court, Dhaka and Others,*** reported in 17 BLC (2012) 579.

7. Finally, he submits that the Executing Court without conceiving the *ratio* enunciated by the Apex Court of the country most illegally and arbitrarily allowed the petition of the judgment-debtor, therefore, the same is liable to be turned down.

8. As against to this, Mr. Shasti Sarker, the learned Advocate appearing on behalf of the respondent No. 2, the judgment-debtor, submits that the learned Judge of the Executing Court after considering the facts and circumstances of the entire case and the *ratio* decided in the case of ***International Finance Investment and Commerce Bank Limited v. M/S. Marinar Fashions Wear Pvt. Ltd. and others,*** *supra* and ***Salma Begum v. Sonali Bank Limited and others,*** supra, rightly and legally allowed the application of the judgment-debtor. He next submits that the mortgage property is the homestead of the judgment-debtor, if the judgment-debtor is dispossessed from the mortgage property, he will be thrown to the street and it will entail serious loss and injury to the judgment-debtor. He further submits that the judgment-debtor paid more than the decretal amount and as per the direction issued by the Executing Court, the judgment-debtor is ready to pay the entire outstanding dues with interest thereon, but unfortunately, the decree holder-Bank did not pay heed to this and also did not submit any statement of accounts as directed by the Executing Court. In fine, he contends that the facts and circumstances of the case of ***Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others****,* supra is in no way applicable to the present case as there are significant differences between the facts and circumstances of the aforesaid cases.

9. Now the moot issues are:

i. Was the certificate of title or ownership under section 33(7) of the Ain, 2003 legally issued in the Artha Rin Execution Case No. 06 of 2008?
ii. Was the Artha Rin Execution Case No. 06 of 2008 duly disposed of after issuance of certificate of title under section 33(7) of the Ain, 2003?
iii. Is the Executing Court legally empowered to review its own order in an appropriate case?
iv. Has the right to redemption of the mortgage property of the judgment-debtor been extinguished?
v. Is the impugned order legally sustainable in the eyes of law?

10. In order to find out the answers of the aforesaid issues, we have meticulously perused the entire materials on record along with annexures and the submissions advanced by the learned advocates of the parties and the legal positions intricately involved in this case with seriousness as it deserves.

11. It transpires from order sheet of the Artha Execution Case No. 06 of 2008 that notice was floated in the Daily Destiny and Daily Andoloner Bazar fixing 18.06.2009 for auction sale of the mortgage property, but none participated in the bid. Thereafter, the Executing Court fixed the date of 08.07.2009 for taking step by the decree holder-Bank. On 08.07.2009 the decree holder-Bank filed an application under section 33(7) of the Ain, 2003 for issuance of certificate of ownership. Upon hearing, the Adalat allowed the prayer of the decree holder by its order No. 13 dated 08.07.2009. The relevant portion of the order may be stated thus:

> *অদ্য ডিক্রিদার পক্ষের পদক্ষেপ গ্রহণের জন্য দিন ধার্য্য আছে। ডিক্রিদার অর্থঋণ আইন ২০০৩ এর ৩৩(৭) ধারা মোতাবেক বিবরণী সম্পত্তির মালিকানাস্বত্ব ডিক্রিদার ব্যাংকের উপর ন্যাস্ত করার প্রার্থনা করিয়াছেন। দায়িকপক্ষ (প্রকৃতপক্ষে ডিক্রিদারপক্ষ) কর্তৃক অর্থঋণ আইন, ২০০৩ এর ৩৩(৭) ধারার আওতায় আবেদন দাখিল বিষয়ে বিজ্ঞ কৌশুলীর বক্তব্য শুনলাম। দায়িক পক্ষ ডিক্রিকৃত টাকা পরিশোধ না করায় এবং অর্থঋণ আইন, ২০০৩ এর ৩৩(১), (২) ও (৩) ধারার বিধান মোতাবেক টাকা আদায়ের পদক্ষেপ গ্রহণ করার সত্ত্বেও ডিক্রিকৃত টাকা আদায় করা সম্ভব হয়নি। ডিক্রিদার ব্যাংক পক্ষ অর্থঋণ আইন, ২০০৩ এর ৩৩(৪) ও (৫)*

*ধারার আওতায় কার্যক্রম গ্রহণের কোন পদক্ষেপ গ্রহণ না করে উক্ত বন্ধকি সম্পত্তি বাবদে মালিকানা চাওয়ার আগ্রহ প্রকাশ করে এ আবেদন দাখিল করিয়াছেন। সুতরাং ডিক্রিদার ব্যাংক এর প্রার্থনা মোতাবেক অর্থঋণ আইন, ২০০৩ এর ৩৩(৭) ধারার বিধান মোতাবেক দায়িক কর্তৃক ব্যাংক এর অনুকূলে বন্ধক দেওয়ার সম্পত্তির মালিকানা ডিক্রিদার ব্যাংক এর অনুকূলে ন্যাস্ত করণের ক্ষেত্রে কোন প্রতিবন্ধকতা নাই। এমতাবস্থায় ডিক্রিদার ব্যাংক কর্তৃক অর্থঋণ আইন, ২০০৩ এর ৩৩(৭) ধারার আওতায় দাখিলী আবেদন মঞ্জুর করা হলো। দায়িক পক্ষ কর্তৃক ব্যাংক এর অনুকূলে বন্ধকী তপশীল বর্ণিত সম্পত্তির মালিকানা ডিক্রিদার ব্যাংক এর অনুকূলে ন্যাস্ত হয়েছে মর্মে ঘোষণা করা হলো। তৎমর্মে ডিক্রিদার ব্যাংক এর অনুকূলে সনদপত্র ইস্যু করা হোক। প্রকাশ থাকে যে, উক্ত সনদপত্র তপশীল সম্পত্তির স্বত্বের দলিল হিসাবে বিবেচিত হবে। উক্তরূপ ইস্যুকৃত সনদপত্র রেজিষ্ট্রার জন্য সংশ্লিষ্ট সাব রেজিষ্ট্রারী অফিসে প্রেরণ করা হোক। তবে শর্ত থাকে যে, অর্থঋণ আদালত আইন, ২০০৩ এর ৩৩(৮) ধারার বিধান মোতাবেক কোন কর বা রেজিষ্ট্রী খরচ আদায় যোগ্য হবে না। এ মামলায় আর কিছুই করণীয় নাই। এ অবস্থায় অর্থঋণ আদালত আইন, ২০০৩ এর ৩৩(৯) ধারার বিধান মোতাবেক অত্র ডিক্রিজারী মোকদ্দমাটি চূড়ান্ত নিষ্পত্তি করা হলো।*

*(Underlined for emphasis)*

12. Thereafter, by order No. 14, dated 24.05.2010, the ownership certificate was transmitted to the concerned sub-registry office for registration. It appears from the order No. 15 dated 23.06.2010 that the aforesaid certificate was duly registered. Thereafter, the decree holder-Bank did not file any execution case within the stipulated time for recovery of possession. Undisputedly, possession remains with the judgment-debtor. In view of the provision of section 28(3) of the Ain, 2003, the second execution case is to file within 1 year from the date of dismissal or settlement of the first or previous execution case, failing which the same shall be barred by limitation.

13. On 23.09.2012, the judgment-debtor filed an application under section 57 of the Ain, 2003 for setting aside order No. 13, dated 08.07.2009 and order No. 14, dated 24.05.2010. Thereafter, as many as 13 days were fixed for disposal of the application, but due to the adjournment petitions from both the sides, the Executing Court could not dispose of the application filed by the judgment-debtor. It appears from the record that the judgment-debtor paid Tk. 9,16,000/- to the decree holder by five installments and accordingly, submitted deposit slips. The contention of the judgment-debtor is that the decree holder-Bank did not adjust the deposited amount with the outstanding dues. After that, the Executing Court passed the following order:

"...জমাকৃত টাকা দায়িকের দেনার সাথে সমন্বয় হয় নাই। উহা সমন্বয়ের আদেশ হওয়া আবশ্যক। ডিক্রিদার পক্ষের বিজ্ঞ আইনজীবী নিবেদন করেন যে, উহা সমন্বয় করা আছে। দায়িক পক্ষ দাবীর সমর্থনে ৪(চার) খানা জমা রশিদ দাখিল করেছে। দায়িকের জমা টাকা প্রকৃতপক্ষে সমন্বয় করা আছে কিনা তা নির্ধারণ করা ন্যায় সঙ্গত। কাজেই ন্যায় বিচারের স্বার্থে দায়িকের নিকট প্রকৃতপক্ষে কত টাকা পাওনা আছে এবং দায়িক কত টাকা পরিশোধ করেছে তার একটা পূর্ণাঙ্গ হিসাব বিবরণী দাখিলের জন্য ডিক্রিদার পক্ষকে নির্দেশ দেওয়া গেল।"

(Underlined for emphasis)

14. Despite the solemn order of the Executing Court, Bank officials on different pleas took time but unfortunately, failed to submit any complete statement of accounts. Upon hearing, the application of the judgment-debtor dated 23.09.2012, the Executing Court allowed the prayer of the judgment-debtor by impugned order dated 18.03.2013. In this respect, the relevant portion of the impugned order passed by the Executing Court may be stated below for better appreciation and understanding:

"অত্র মামলায় স্বীকৃত মতে নালিশী জমি নিলাম বিক্রয় করা হয় নাই, ডিক্রিদারপক্ষ নালিশী জমির দখল প্রাপ্ত হয় নাই এবং দায়িক নালিশী তপশীল বর্ণিত জমির বাড়ীতে পরিবার পরিজন নিয়ে বসবাস করছে। ডিক্রিদারের মূল উদ্দেশ্য টাকা আদায় করা। দায়িক যেহেতেু ডিক্রিদারের পাওনা সমুদয় টাকা সুদ-আসল ও মামলার যাবতীয় খরচ সহ পরিশোধে রাজী আছেন, সেহেতু দায়িকের বসত বাড়ী বিক্রি করে ডিক্রিদারের টাকা আদায়ের কোন আবশ্যকতা নাই। ন্যায় বিচারে দায়িক পক্ষের বিগত ২৩/০১/২০১২ইং তারিখের অর্থঋণ আদালত আইন-২০০৩

এর ৫৭ ধারার বিধান মতে আনীত দরখাস্ত আপাততঃ আংশিক মঞ্জুর করা হল। আগামী ১৫(পনের) দিনের মধ্যে দায়িকের নিকট পাওনা সমুদয় টাকার হিসাব অত্র আদালতে দাখিলের জন্য এবং দায়িক টাকা প্রদান করলে তা গ্রহণের জন্য ডিক্রিদারপক্ষকে নির্দেশ দেয়া গেল। ডিক্রিদার কর্তৃক প্রদত্ত হিসাব প্রাপ্তির পর পরবর্তী ৩০(ত্রিশ) দিনের মধ্যে ডিক্রিদারের পাওনা সমুদয় টাকা পরিশোধের জন্য দায়িক পক্ষকে নির্দেশ দেয়া গেল। দায়িক সমুদয় টাকা জমা প্রদান করলে অত্র আদালতের ০৮/০৭/২০০৯ ইং তারিখের ১৩ নং আদেশ ও ২৪/০৫/২০১০ইং তারিখের ১৪ নং আদেশ রদ রহিতের আদেশ প্রদান করা হবে। দায়িক নির্ধারিত সময়ের মধ্যে সমুদয় টাকা পরিশোধে ব্যর্থ হলে অত্র আদেশ অকার্যকর বলে গণ্য হবে। উভয় পক্ষকে জ্ঞাত করানো হউক।"

(Underlined for emphasis)

15. Having received the order of the Executing Court, the decree holder-Bank did not submit the statement of accounts showing the outstanding dues of the judgment-debtor, rather the decree holder-Bank took several times for submitting statement of accounts but eventually, failed to do the same. After that the decree holder-Bank filed this writ petition.

16. Provisions of section 33 of the Ain, 2003 is so dry and complex. It basically describes the provision as to the procedure of auction sale of mortgage property or any other property of judgment-debtor, issuance of certificate in favour to the decree holder to sale mortgage property or to possess and enjoy the *usufructs* therein, and to hand over possession of the mortgage property to the decree holder or auction purchaser as the case may be. In order to conceive the complex provisions of law, one needs to go through the relevant provisions in conjunction with each other to make the same crystal clear. In this juncture, we should mention the entire provisions of law, which may read as follows:

৩৩। **নিলাম বিক্রয়** ।- (১) অর্থ ঋণ আদালত ডিক্রী বা আদেশ জারীর সময় কোন সম্পত্তি বিক্রয়ের ক্ষেত্রে বাদীর খরচে বিজ্ঞপ্তি প্রচারের তারিখ হইতে অন্যূন ১৫ (পনের) দিবসের সময় দিয়া সীলমোহরকৃত টেন্ডার আহ্বান করিবে, উক্ত বিজ্ঞপ্তি কমপক্ষে বহুল প্রচারিত একটি বাংলা জাতীয় দৈনিক পত্রিকায়, তদুপরি ন্যায় বিচারের স্বার্থে প্রয়োজন মনে করিলে স্থানীয় একটি পত্রিকায়, যদি থাকে, প্রকাশ করিবে; এবং আদালতের নোটিশ বোর্ডে লটকাইয়া ও স্থানীয়ভাবে ঢোল সহরত যোগেও উক্ত বিজ্ঞপ্তি প্রচার করিবে।

(২) প্রত্যেক দরদাতা, উদ্ধৃত দর অনূর্ধ্ব ১০,০০,০০০ (দশ লক্ষ) টাকা হইলে উহার ২০%, উদ্ধৃত দর ১০,০০,০০০ (দশ লক্ষ) টাকা অপেক্ষা অধিক এবং অনূর্ধ্ব ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকা হইলে উহার ১৫% এবং উদ্ধৃত দর ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকা অপেক্ষা অধিক হইলে উহার ১০% এর সমপরিমান টাকার, জামানতস্বরূপ, ব্যাংক ড্রাফট বা পে-অর্ডার আদালতের অনুকূলে দরপত্রের সহিত দাখিল করিবেন।

(২ক) দরপত্র সরাসরি নির্দিষ্ট দরপত্র বাক্সে কিংবা রেজিস্ট্রীকৃত ডাকযোগে নির্ধারিত সময়ের মধ্যে নির্ধারিত কর্তৃপক্ষের নিকট প্রেরণের মাধ্যমে দাখিল করিতে হইবে।

(২খ) অনূর্ধ্ব ১০,০০,০০০ (দশ লক্ষ) টাকার উদ্ধৃত দর গৃহীত হইবার পরবর্তী ৩০ (ত্রিশ) দিবসের মধ্যে, ১০,০০,০০০ (দশ লক্ষ) টাকা অপেক্ষা অধিক এবং অনূর্ধ্ব ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকার উদ্ধৃত দর গৃহীত হইবার পরবর্তী ৬০ (ষাট) দিবসের মধ্যে এবং ৫০,০০,০০০ (পঞ্চাশ লক্ষ) টাকার অধিক উদ্ধৃত দর গৃহীত হইবার পরবর্তী ৯০ (নব্বই) দিবসের মধ্যে, দরদাতা সমুদয় মূল্য পরিশোধ করিবেন এবং তাহা করিতে ব্যর্থ হইলে আদালত জামানতের টাকা বাজেয়াপ্ত করিবেঃ

তবে শর্ত থাকে যে, সংশ্লিষ্ট ডিক্রীদার-আর্থিক প্রতিষ্ঠান লিখিত দরখাস্ত দাখিল করিয়া দায়িকের সুবিধার্থে সময়সীমা বর্ধিত করিবার জন্য অনুরোধ করিলে, আদালত এই উপ-ধারার অধীন নির্ধারিত সময়সীমার অনূর্ধ্ব ৬০ (ষাট) দিবস পর্যন্ত বর্ধিত করিতে পারিবে।

(২গ) ডিক্রীদারের পক্ষে যদি লিখিতভাবে আদালতকে এই মর্মে অবহিত করা হয় যে, উপ-ধারা (২) এর অধীন দাখিলকৃত দরপত্রে সম্পত্তির প্রস্তাবকৃত মূল্য অস্বাভাবিকভাবে অপর্যাপ্ত বা কম এবং আদালত যদি উহাতে একমত পোষন করে, তাহা হইলে আদালত, কারণ লিপিবদ্ধ করিয়া, উক্ত দর প্রস্তাব অগ্রাহ্য করিতে পারিবে।

(৩) উপ-ধারা (২খ) এর অধীনে জামানত বাজেয়াপ্ত হইলে উহার অর্থ ডিক্রীদারকে প্রদান করা হইবে, ডিক্রীকৃত দাবীর সহিত উক্ত অর্থ সমন্বয় করা হইবে, এবং অতঃপর আদালত, দ্বিতীয় সর্বোচ্চ দরদাতা কর্তৃক উদ্ধৃত দর এবং পূর্বে বাজেয়াপ্তকৃত জামানত একত্রে সর্বোচ্চ দরদাতা কর্তৃক উদ্ধৃত দর অপেক্ষা কম না

হইলে, উক্ত দ্বিতীয় সর্বোচ্চ দরদাতাকে সম্পত্তি নিলাম খরিদ করিতে আহ্বান করিবে; এবং দ্বিতীয় সর্বোচ্চ দরদাতা আহুত হইবার পর উপ-ধারা (২খ) এ নির্ধারিত সময়সীমার মধ্যে সম্পুর্ণ মূল্য পরিশোধ করিবেন এবং তাহা করিতে ব্যর্থ হইলে তাঁহার জামানত বাজেয়াপ্ত হইবে এবং জামানতের উক্ত অর্থ ডিক্রীদারকে ডিক্রীর দাবীর সহিত সমন্বয় করিবার জন্য প্রদান করা হইবে।

(৪) কোন সম্পত্তি উপ-ধারা (১), (২), (২ক), (২খ), (২গ) ও (৩) এর বিধান অনুসারে নীলামে বিক্রয় করা সম্ভব না হইলে, আদালত পুনরায় কমপক্ষে বহুল প্রচারিত ২(দুই)টি বাংলা জাতীয় দৈনিক পত্রিকায়, তদুপরি ন্যায় বিচারের স্বার্থে প্রয়োজন মনে করিলে স্থানীয় একটি পত্রিকায়, যদি থাকে, উপ-ধারা (১) এর অনুরূপ পদ্ধতিতে বিজ্ঞপ্তি প্রকাশ করাইয়া এবং আদালতের নোটিশ বোর্ডে নোটিশ টাংগাইয়া ও স্থানীয়ভাবে ঢোল সহরতযোগে সীলমোহরকৃত টেন্ডার আহ্বান করিবে; এবং বিক্রয় ও বাজেয়াপ্ত বিষয়ে উপ-ধারা (২), (২ক), (২খ), (২গ) ও (৩) এ উল্লিখিত বিধান অনুসরণ করিবে।

(৪ক) উপ-ধারা (১) ও (৪) এর অধীন পত্রিকার মাধ্যমে বিজ্ঞপ্তি জারী করিবার ক্ষেত্রে, বাদী লিখিতভাবে আদালতকে যে পত্রিকার নাম অবহিত করিবেন আদালত তদনুযায়ী উক্ত পত্রিকায় বিজ্ঞপ্তি প্রকাশ করাইবে।

(৫) কোন সম্পত্তি উপ-ধারা (১), (২), (২ক), (২খ), (২গ), (৩) ও (৪) এর বিধান অনুসারে বিক্রয় করা সম্ভব না হইলে, উক্ত সম্পত্তি, ডিক্রীকৃত দাবী পরিপূর্ণভাবে পরিশোধিত না হওয়া পর্যন্ত, দখল ও ভোগের অধিকারসহ ডিক্রীদারের অনুকূলে ন্যস্ত করা হইবে, এবং ডিক্রীদার উপ-ধারা (১), (২), (২ক), (২খ), (২গ), (৩) ও (৪) এর বিধান অনুসারে উক্ত সম্পত্তি বিক্রয় করিয়া অপরিশোধিত ডিক্রীর দাবী আদায় করিতে পারিবে, এবং আদালত ঐ মর্মে একটি সার্টিফিকেট ইস্যু করিবে।

(৬) ডিক্রীকৃত অংকের অতিরিক্ত অর্থ বিক্রয় বাবদ আদায় হইলে, উক্ত অতিরিক্ত অর্থ দায়িককে ফেরৎ প্রদান করিতে হইবে, এবং বিক্রীকৃত অর্থ ডিক্রীর দাবী অপেক্ষা কম হইলে অবশিষ্ট অর্থ বাবদ, ২৮ ধারার বিধান সাপেক্ষে, আরো জারীর মামলা গ্রহণযোগ্য হইবে।

(৬ক) উপ-ধারা (৫) ও (৬) এর বিধানে যাহা কিছুই থাকুক না কেন, যেক্ষেত্রে কোন সম্পত্তি, দখল ও ভোগের অধিকারসহ, ডিক্রিদারের অনুকূলে ন্যস্ত করা সত্বেও ডিক্রিদার উক্ত সম্পত্তি উপযুক্ত মূল্যে প্রকাশ্য নিলামে বিক্রয় করিতে অসমর্থ হন, সেক্ষেত্রে উক্ত সম্পত্তির নির্ধারিত মূল্য কিংবা যুক্তিসংগত আনুমানিক মূল্য বাদ দিয়া, ধারা ২৮ এর বিধান সাপেক্ষে, জারীর মামলা দায়ের করা যাইবে।

(৬খ) এই ধারায় ভিন্নতর যাহা কিছুই থাকুক না কেন, উপ-ধারা (৫) এর অধীন কোন সমপত্তি, দখল ও ভোগের অধিকারসহ, ডিক্রীদারের অনুকূলে ন্যস্ত হইবার ক্ষেত্রে, অনুরূপ ন্যস্ত হইবার ৬ (ছয়) বৎসরের মধ্যে উপ-ধারা (৭) এর অধীন ডিক্রীদারের পক্ষে আদালতের নিকট লিখিত আবেদন করিয়া উক্ত সম্পত্তির মালিকানা অর্জন করা যাইবে এবং তাহা না করা হইলে ৬ (ছয়) বৎসর উত্তীর্ণ হইবার সাথে সাথেই উক্ত সম্পত্তিতে ডিক্রীদারের মালিকানা স্বয়ংক্রিয়ভাবেই বর্তিত হইবে এবং সংশ্লিষ্ট আদালত হইতে তৎমর্মে ঘোষণা বা সনদ গ্রহণ করা যাইবে।

(৭) উপ-ধারা (৪) ও (৫) এর বিধান সত্ত্বেও, ডিক্রীদার, উল্লিখিত সম্পত্তি মালিকানাসত্ত্বে পাইতে আগ্রহী মর্মে আদালতের নিকট লিখিতভাবে আবেদন করিলে, আদালত, উপ-ধারা (১), (২), (২ক), (২খ), (২গ) ও (৩) এর বিধানাবলীর কোনরূপ হানি না ঘটাইয়া, উপ-ধারা (৪) ও (৫) এর কার্যক্রম অনুসরণ করা হইতে বিরত থাকিবে; এবং ডিক্রীদারের প্রার্থিতমতে উল্লেখিত সম্পত্তির স্বত্ব ডিক্রীদারের অনুকূলে ন্যস্ত হইয়াছে মর্মে ঘোষণা প্রদানপূর্বক তৎমর্মে একটি সনদপত্র জারী করিবে এবং জারীকৃত এইরূপ সনদপত্র সত্ত্বের দলিল হিসাবে গণ্য হইবে; এবং আদালত উহার একটি অনুলিপি সংশ্লিষ্ট স্থানীয় সাব- রেজিষ্ট্রারের অফিসে নিবন্ধনের জন্য প্রেরণ করিবে।

(৭ক) উপ-ধারা (৫) বা (৭) এর অধীন সম্পত্তির দখল আদালতযোগে প্রাপ্ত হওয়া আবশ্যক হইলে, ডিক্রীদারের লিখিত আবেদনের ভিত্তিতে আদালত ডিক্রীদারকে উক্ত সম্পত্তির দখল অর্পণ করিতে পারিবে।

(৭খ) উপ-ধারা (৭ক) এর অধীন ডিক্রীদারকে সম্পত্তির দখল অর্পণ করিবার পূর্বে আদালতকে পুনঃ নিশ্চিত হইতে হইবে যে, উক্ত সম্পত্তিই আইনানুগভাবে উহার প্রকৃত মালিক কর্তৃক ডিক্রীর সংশ্লিষ্ট ঋণের বিপরীতে বন্ধক প্রদান করা হইয়াছিল অথবা ডিক্রী কার্যকর করিবার লক্ষ্যে দায়িকের প্রকৃত স্বত্ব দখলীয় সম্পত্তি হিসাবে উক্ত সম্পত্তিই ক্রোক করা হইয়াছিল।

(৮) বর্তমানে প্রচলিত অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, উপ-ধারা (৭) এর অধীনে জারীকৃত সনদপত্র বাবদ কোন কর বা রেজিষ্ট্রেশন ফি আদায়যোগ্য হইবে না।

(৯) উপ-ধারা (৫) এর অধীনে সম্পত্তির দখল ও ভোগের অধিকার অথবা উপ-ধারা (৭) এর অধীনে সম্পত্তির স্বত্ত্ব ডিক্রীদারের অনুকূলে ন্যস্ত হইলে, ধারা ২৮ এর বিধান সাপেক্ষে, উক্ত ডিক্রী জারী মামলার চূড়ান্ত নিষ্পত্তি হইবে।

(Underlined for emphasis)

17. It transpires from the order sheets that the Executing Court did not comply with the provisions of section 33(1) of the Ain, 2003. It is a mandatory requirement to publish an auction notice in a widely circulated daily newspaper. The daily Destiny has not got no existence at present and undisputedly, at the relevant time it was not a widely circulated daily newspaper. As the auction notice was not published in a widely circulated daily newspaper, therefore, prospective bidders could not participate in the bid. Moreover, the decree holder-Bank did not take any step under section 33(4) of the Ain, 2003 to sell out the mortgage property on auction and thereby, negated the provision of section 33(4) of the Ain, 2003.

18. On meaningful reading of sub-sections (5), (7), (7Ka) and (7Kha) of section 33 of the Ain, 2003, it transpires that where the possession of property requires to be obtained through intervention of the Court, the decree holder has to file an application in writing to the Executing Court to hand over possession of the said property to the decree holder or the auction purchaser as the case may be and before handing over possession of the property, the Executing Court shall be reassured that it is the property which was lawfully mortgaged by its original owner against the loan liabilities or which was attached under the original title and possession of the judgment-debtor for execution of the decree. The provisions of sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated by the Artha Rin Adalat Ain (Amendment) Act, 2010 (Act XVI of 2010) in order to protect the property of the actual owner. In this case, admittedly, the possession of the mortgage property remains with the judgment-debtor. If the execution case is disposed of upon issuance of certificate of title, the decree holder will not be able to obtain the possession without the intervention of the Court. Therefore, the contention of the petitioner is that upon issuance of certificate of title under section 33(7) of the Ain, 2003, the Executing Court has become *functus officio* is fallacious and not based on cogent reasons. We may take a look at the other part of the coin, if possession remains with the decree holder, then upon issuance of certificate under sections 33(5) or 33 (7) the Executing Court may dispose of the Artha Rin Execution Case by invoking section 33(9) of the Ain, 2003 subject to the provision of section 28 of the Ain, 2003.

19. In the case of 13 MLR (AD) (2008) 356, the Executing Court attempted to sell the mortgage property in auction as per the provision of the Ain, 2003, but it could not be sold in auction for the reason that the prices offered by the bidders were too low. Thereafter, the decree holder-Bank filed an application under section 33(5) of the Ain, 2003 praying for issuing certificate in respect of mortgage property in favour of it and by the order dated 30.08.2006 the said prayer of the decree holder-Bank was allowed. After issuance of the certificate under section 33(5) of the Ain, 2003 in favour of the decree holder-Bank, the petitioner filed an application under sections 33(5), 44 and 57 of the Ain, 2003 praying for staying the auction sale of the mortgage property by the decree holder-Bank. The said application was registered as Miscellaneous Case No. 22 of 2007. By the impugned order No. 23, dated 19.08.2007 the learned Judge of the Artha Rin Adalat rejected the said application holding that since the mortgage property was auction-sold by the bank and since the execution case was disposed of finally, the court became functus officio and as such there was no scope to allow the application under sections 49(2), 44 and 57 of the Ain, 2003. Challenging the said order the judgment-debtor moved this Court and eventually failed and

thereafter, he went to the Appellate Division. Upon hearing, the Appellate Division summarily dismissed the CPLA No. 1542 of 2007. The aforesaid judgment was passed on 27.03.2008 before incorporating sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 by Act XVI of 2010. The facts and circumstances of the aforesaid case are significantly distinguishable from those of the instant case at hand.

20. The facts and circumstances of the case of ***Feroza Begum v. Artha Rin Adalat No. 4, Dhaka,*** reported in 36 BLD (AD) 31 are also distinguishable from the instant case at hand. In the aforesaid case, it was observed:

> *From the facts narrated above, it appears that the petitioner had a number of opportunities to pay off the decretal amount. She was a party in the execution case and had the opportunity to clear the bank's dues earlier. We find from the impugned judgment that the High Court Division verbally directed the petitioner to pay off at least some amount to show willingness of the petitioner to clear up the outstanding dues, which she failed. The clear finding of the High Court Division was that the writ petition in its present form is not maintainable. Nevertheless, an opportunity was given to the petitioner to clear the bank's dues, which she failed to do.*

21. In the case of ***Sheuly Khanam v. Artha Rin Adalat, 2nd Court, Dhaka,*** supra, this division did not consider the latest amendment of the Artha Rin Adalat Ain, 2003 so far it relates to sections 33(7ka) and 33(7Kha). Apart from the same, the very facts and circumstances of the case are quite distinguishable with those of the instant case.

22. In the case of ***International Finance Investment and Commerce Bank Limited v. M/S. Marinar Fashions Wear Pvt. Ltd. and others***, *supra*, the Author Judge was his Lordship Mr. Justice A.B.M. Khairul Haque (as his lordship was then). In the said case, it was held:

> *It appears that the decree-holder appellant filed an application praying for an Order to put the decree-holder into possession of the concerned property as it was allegedly obstructed by the judgment-debtor but the learned Judge, Artho Rin Court, dismissed the petition on the ground that on the issuance of the certificate of title in favour of the decree-holder, the execution case had already been disposed of and the Court has got nothing further to do in this respect. With respect, we are unable to agree with the said views of the learned Judge, Artho Rin Court. Sub-Section 7 envisages vesting of ownership of the property of the judgment-debtor upon the decree-holder. The said vesting of ownership includes delivery of possession of the property. Without the delivery of possession, the execution case cannot be disposed of.*

23. In the case of ***Salma Begum v. Sonali Bank Limited and others,*** supra, it was held-

*It is our view that the execution case does not come to an end with the issuance of a certificate under section 33(5) of the Artha Rin Adalat Ain, 2003. Rather, it remains alive till the possession of the property alleged to have been sold in auction, was handed over to the auction purchaser. This finding gets support from a decision reported in 15 BLT at page 425 wherein has been held that sub-section 7 of Artha Rin Adalat envisages vesting of ownership of the property of the judgment debtor upon the decree-holder. The said vesting of ownership includes delivery of possession of the property. Without the delivery of possession, the execution case cannot be disposed of.*

24. The doctrine of *stare decisis* which is the binding force of precedent may be destroyed if a statute is enacted inconsistent with the decision or if it is reversed or overruled by a higher Court or it is based on the doctrine of *per incuriam*. The doctrine of *stare decisis* should not be regarded as a rigid and inevitable doctrine, which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. The Court may, in an appropriate case, overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. Every case has to consider its own merit, peculiar facts and circumstances and therefore, in following the precedent, the Court must be very careful and cautious. In this respect, we are tempted to discuss the observations of Lord Denning in the matter of applying judicial precedent which have become *locus classicus*:

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*
>
> *...*
>
> *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

25. The contention of the learned Advocate of the petitioner that upon issuance of the certificate under section 33(7) of the Ain, 2003, the Executing Court has nothing to do but to dispose of the execution case finally is not based on any rationality. For the sake of argument, if the Court becomes *functus officio*, how later on the Court will entertain another execution case or any other application for handing over possession if it remains with the judgment-debtor. The Court may correct its own mistakes by invoking, the umbrella provision, embodied under section 57 of the Ain, 2003 to do justice and to undo injustice despite the provisions of section 20 of the Ain, 2003. It has to remember that the provisions of section 20 of the Ain, 2003 is neither absolute nor sacrosanct nor untouchable. The parties to the suit cannot and should not suffer for the mistake committed by the Court itself. On perusal of the entire edifice of the Ain, 2003, it becomes visible to us that the Code of Civil Procedure, 1908 shall be applicable subject to not being inconsistent with the provisions of the Ain, 2003. The Adalat may review its own order by invoking section 57 of the Ain, 2003 with extreme circumspection in an exceptional case.

26. In the case at hand, it is our considered view that the execution case has not legally been disposed of, as possession of the mortgage property had not been made over to the decree holder, therefore, the Court has not become *functus officio* in entertaining the application filed by the judgment-debtor. Admittedly, the petitioner-judgment debtor at first took loan of Tk. 3 lakhs and subsequently, it was extended upto 5 lakhs. Decree was passed to the tune of Tk. 5,20,370.62. The execution case was filed for recovery of Tk. 6,51,888.82 (decretal amount of Tk. 5,20,370.62 + interest Tk. 55,506.20 + costs of case including bill of Newspapers Tk. 76,012). The judgment-debtor in different installments paid Tk. 9,16,000/-. The payment of the judgment-debtor has not been denied by the decree holder. But the decree holder did not produce any statement of accounts to show as to whether the said amount was adjusted with the outstanding dues of the petitioner despite the order of the Executing Court. To protect his homestead, the judgment-debtor was ready to pay off the outstanding dues, but

unfortunately, the Bank officials having obtained the direction of the Court did not submit the statement of accounts showing outstanding dues.

27. It persistently comes to our notice that Bank officials are very much reluctant to provide the bank statement containing the outstanding dues of the borrower even after issuance of the direction of the Court. This sort of attitude is tantamount to contempt of Court. In this circumstance, if bank official does not comply with the order of the court, then the court may proceed against them under section 52 of the Ain, 2003 or in an appropriate case, it may refer to the High Court Division for taking punitive measure against the delinquent officials. It is expected that Bank and Financial Institutions should comply with the order of the Court with utmost expedition.

28. It also appears from the record that admittedly, the petitioner-Bank filed Artha Rin Suit for recovery of loan money but did not file any mortgage suit under section 5(2) of the Ain, 2003. If the Bank or financial institute wishes to foreclose down the right of redemption of the mortgagor, then it has to file mortgage suit and in that case the decree awarded by the Adalat shall be preliminary decree and in all other cases, the decree awarded by the Court in a suit filed for recovery of loan money shall be the final decree. A suit to obtain a decree that a mortgagor shall be absolutely debarred from his right to redeem the mortgaged property is called a suit for foreclosure. In this case, the decree holder did not institute any mortgage suit for foreclosure. Right of redemption exists unless the mortgage property is sold on auction in accordance with the Ain, 2003 or barred by the Limitation Act, 1908.

29. As soon as auction sale is held in pursuance of the decree passed in a suit for recovery of loan money, the decree shall be final and accordingly, the right of redemption of the mortgage property be extinguished. In the instant case, auction was not held in accordance with law and the mortgage property was not sold on auction, therefore, it cannot be said that the right of redemption of the judgment-debtor has been extinguished. In this respect, the provisions of sections 5(1), 5(2), 5(3) and 5(4) of the Ain, 2003 are placed hereunder for understanding the consequence of Mortgage Suit and Suit for recovery of loan money under the Ain, 2003.

> ৫। **আদালতের একক এখ্‌তিয়ার** ।- (১) অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, উপ-ধারা (৫) ও (৬) এর বিধান সাপেক্ষে, আর্থিক প্রতিষ্ঠানের ঋণ আদায় সম্পর্কিত যাবতীয় মামলা ধারা ৪ এর অধীন প্রতিষ্ঠিত, ঘোষিত বা গণ্য হওয়া অর্থ ঋণ আদালতে দায়ের করিতে হইবে এবং উক্ত আদালতেই উহাদের নিষ্পত্তি হইবে।
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> (২) এই আইনের অধীন আর্থিক প্রতিষ্ঠান, স্থাবর সম্পত্তি জামানত স্বরূপ বন্ধক গ্রহণপূর্বক প্রদত্ত ঋণের বিপরীতে উক্ত বন্ধকী স্থাবর সম্পত্তির বিক্রয় (Sale) বা নিষ্ক্রিয় সমাপ্তির (Foreclosure) উদ্দেশ্যে The Transfer of Property Act, 1882 (Act No. IV of 1882) এর section 67 এর অধীন এবং The Code of Civil Procedure, 1908 (Act No. V of 1908) এর Order XXXIV এর বিধান অনুযায়ী কোন বন্ধকী মামলা (Mortgage suit) দায়ের করিতে চাহিলে, উক্ত মামলাও এই আইনের অধীন প্রতিষ্ঠিত অর্থ ঋণ আদালতেই দায়ের করিতে হইবে; এবং এইরূপ ক্ষেত্রে The Code of Civil Procedure, 1908 এর বিধানসমূহ এই আইনের বিধানসমূহের সহিত, যতদূর সম্ভব, সমন্বয়ের মাধ্যমে প্রযোজ্য হইবে।
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> (৩) উপ-ধারা (২) এর অধীন আর্থিক প্রতিষ্ঠানকর্তৃক দায়েরকৃত মামলা নিষ্ক্রিয় সমাপ্তির (Foreclosure) উদ্দেশ্যে একটি বন্ধকী মামলা (Mortgage suit) হইলে, কেবলমাত্র সেই ক্ষেত্রে আদালত কর্তৃক প্রদত্ত ডিক্রী প্রাথমিক ডিক্রী (Preliminary decree) হইবে এবং অন্যান্য সকল ক্ষেত্রে ঋণ আদায়ার্থ দায়েরকৃত মামলায় আদালত কর্তৃক প্রদত্ত ডিক্রী চূড়ান্ত ডিক্রী (Final decree) হইবে।
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> (৪) The Transfer of Property Act, 1882 অথবা বর্তমানে প্রচলিত অন্য কোন আইনে বিপরীত যাহা কিছুই থাকুক না কেন, উপ-ধারা (৩) এর অধীন বন্ধকী মামলা ব্যতিরেকে, এই আইনের অধীন দায়েকৃত কোন মামলায়, আদালত কর্তৃক প্রদত্ত ডিক্রী বাদী আর্থিক প্রতিষ্ঠানের পক্ষে নিষ্ক্রিয় সমাপ্তির (Foreclosure) প্রাথমিক ডিক্রী হিসাবে গণ্য হইবে; এবং ঋণের বিপরীতে বাদীর অনুকূলে বন্ধকী স্থাবর সম্পত্তি ডিক্রীর ধারাবাহিকতায়

নিলাম বিক্রয় হওয়া মাত্রই উক্ত প্রাথমিক ডিক্রী চূড়ান্ত ডিক্রী হিসাবে গণ্য হইবে, এবং বিক্রয় চূড়ান্ত ও ক্রয় বৈধ গণ্য হইবে এবং অতঃপর উক্ত সম্পত্তি পুনরুদ্ধার করিবার কোনরূপ অধিকার (Right to redeem) বিবাদী-দায়িকের থাকিবে না।

(Underlined for emphasis)

30. To sum up, our final conclusion is as under:

i. Auction notice was not issued in accordance with the mandatory requirement of law and auction process was not conducted as per the provision of section 33(1) of the Ain, 2003 and therefore, issuance of certificate of ownership by the stroke of a pen by the Executing Court is patently illegal.

ii. In case of issuance of certificate under section 33(5) of the Ain, 2003, it is obligatory to exhaust the auction process under sub-sections (1) and (4) of section 33 of the Ain, 2003. If the certificate of title is issued upon without exhausting the procedure of section 33(4) of the Ain, 2003 that will make the said provision useless and nugatory. In such a case, the Bank or Financial Institutions by a show up auction process under section 33(1) of the Ain, 2003 will straight apply for a certificate of title with an ulterior motive depriving the judgment-debtor from obtaining the actual market price of the property. So we hold the view that before issuance of certificate of title to the mortgage property or other property of the judgment-debtor, the Executing Court shall follow the provisions of sections 33(1) and 33(4) of the Ain, 2003 and after that it will fix the actual market price of the mortgage property or other property and succinctly be stated in the certificate of title so that the outstanding dues if any may be adjusted later on. In such a case, the Executing Court shall determine the actual market price of the mortgage property on the basis of a report from the Sub-Registrar of the local jurisdiction. Apart from the same, in certificate issuing order, the Executing Court shall state as to whether the decretal amount has been adjusted wholly, if not, the amount of outstanding dues should state therein. It repeatedly comes to our notice that the Executing Court mechanically allows the prayer of issuance of certificate of title. Mechanical issue of certificate of title is deprecated by this Court.

iii. The Court should not be tempted to follow the precedent of one case by matching color of another case. The Court should not be oblivious that a single significant or material fact may change the entire edifice of the case as no two cases are similar. Every case has to decide upon its own facts and peculiar circumstances, therefore, the Court has to incur infinite painstaking.

iv. The principle enunciated in the case reported in 15 BLT(HCD) (2007) 425 and 63 DLR (2011) 282 is based on sound reasonings and the same was strengthen and fortified by incorporating sub-sections 7Ka and 7Kha of section 33 by amended Act XVI of 2010.

v. Sub-sections 7Ka and 7Kha of section 33 of the Ain, 2003 were incorporated in order to mending the lacuna of the provision of sub-sections 5, 7 and 9 of section 33 of the Ain, 2003. Moreover, in the case of **Sk. Mohiuddin v. Joint District Judge & Artha Rin Adalat No. 3, Dhaka and others**, supra, the case of 15 BLT (HCD) (2007) 425 was not considered.

vi. Section 33(9) of the Ain, 2003 provides that when the rights of possession and use of any property under sub-section (5) or the title of any property under sub-section (7) vests in favour of the decree holder, the suit for execution of the said decree shall, subject to the provisions of section 28, be finally disposed of. The word 'final' is not absolute. It has to be read with sections 28, 33(7Ka) and 33(7Kha) of the latest amended Ain, 2010. Therefore, we strongly hold the view that mere issuance of certificate under sections 33(5) and 33(7) of the Ain, 2003 is not enough to finally dispose of the execution case. If the possession of the mortgage property or other property attached by the Executing Court for realizing outstanding loan money remains with the decree holder, the Executing Court may dispose of the execution case in view of section 33(9) of the Ain, 2003. Resorting to literal meaning of section 33(9) of the Ain, 2003 will be a great concern and it may cause devastating consequence, therefore, harmonious construction of the aforesaid provisions is sine qua non to fulfill the purpose of the legislature.

vii. As per the mandate of section 58 of the Ain, 2003, the Government may, by notification in the official gazette, make rules to give effect to the provisions of this Ain, 2003. Some provisions of the Ain, 2003, need more clarification and to give effect to the provisions therein for the smooth functioning of the Artha Rin Adalat. The Government may formulate comprehensive delegated legislations and the necessary forms like issuance of certificate of title, certificate of possession, enjoyment of usufructs and sale of the mortgage property etc. should be prescribed therein to do away with the confusions crept in the Ain, 2003.

viii. In view of section 5 of the Ain, 2003, it appears that two types of suits may be filed before the Artha Rin Adalat. One is mortgage suit for sale or foreclosure and the other is Artha Rin Suit for recovery of loan money. In the former suit, the Adalat shall pass preliminary decree and in the later suit, the Adalat shall pass final decree. A decree awarded by the Adalat in any suit instituted under the Ain, 2003 except mortgage suit under sub-section 3 of section 5 of the Ain, 2003, shall be deemed to be a preliminary decree of foreclosure in favour of the plaintiff financial institution; and as soon as the auction sale is held in continuation of the decree of the mortgage immovable property in favour of the plaintiff against the loan, the said preliminary decree shall be deemed to be the final decree, and the sale shall be final and the purchase shall be valid and thereafter, the judgment-debtor shall have no right to redeem the said mortgaged property.

ix. In this case, auction was not conducted in accordance with law. Moreover, no auction sale was held. Therefore, the right of redemption has not yet been extinguished by operation of the Ain, 2003 or the Limitation Act, 1908.

x. The petitioner Bank did not file any mortgage suit. Admittedly, it filed Artha Rin Suit for recovery of Tk. 5,20,370.62. Admittedly, the principal amount was Tk. 5,20,370.62 and execution case was filed for Tk. 6,51,888.82. The judgment-debtor on 03.12.2006 paid Tk. 2,00,000/-, on 12.12.2006 paid Tk.

95,000/-, on 13.12.2006 paid Tk. 4,00,000/-, on 17.09.2007 paid Tk. 21,000/- and on 08.10.2009 paid Tk. 2,00,000/- and as such the judgment-debtor deposited Tk. 9,16,000/-. The decree holder did not deny the same to the Executing Court. The decree holder-Bank could not submit any statement of accounts to show that those amounts were adjusted. Moreover, the judgment-debtor is ready to pay off the rest of the outstanding dues to protect his homestead. As the mortgage property has not been sold by auction, therefore, the right of redemption of the mortgage property has not yet been extinguished; the learned Judge of the Executing Court by applying his judicial conscience rightly passed the impugned order, which is laudable, hence, the same does not call for any interference.

xi. Title is legal ownership. Possession is physical control of the movable or immovable property. Possession is the prima facie evidence of ownership, called as nine out of ten points of law meaning that there is a presumption the possessor of a property or thing is owner of it and the other elements in order to have that property or thing must prove their title or better possessory right. Certificate of ownership or title equivalent to title deed. Title deed having no possession is only a paper transaction. Title deed is not acted upon unless possession is handed over to the title holder.

xii. It transpires from the record that the judgment-debtor-respondent No. 2 is engaged in furniture business in local district. In order to expand his business, he took loan of Tk. 3 lakhs later on extended upto 5 lakhs by mortgaging his last resort homestead measuring 0.1650 acres situated within the periphery of Kushtia District town on 10.03.2002. At the relevant time of issuance of certificate of ownership the value of the said property was more than one crore. The Executing Court assigning cogent and very convincing reasons allowed the application of the judgment-debtor. The main purpose of the Ain, 2003 is to realize the outstanding loan money of the Bank or any other Financial Institutions but not to snatch away the mortgage or any other property of the borrower.

31. Having regard to the facts and circumstances of the entire case and intricate questions of law involved in this case, we are of the view that the *Rule* is devoid of any substance as all the moot issues stand decided against the petitioner-Bank. Consequently, the *Rule* shall fall through.

32. As a result, the *Rule* is discharged, however, without passing any order as to costs. The earlier order of stay granted by this Court thus stands vacated and recalled.

33. Let a copy of the judgment be sent down to the Court below at once.