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Editors
Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

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Dr. Md. Zakir Hossain
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Research Associate

Md. Shamim Sufi
Research and Reference Officer
(Senior Assistant Judge)
Appellate Division

Head Note
Md. Shamim Sufi

Contact:
scob@supremecourt.gov.bd

Supreme Court of Bangladesh

Honorable Judges of the Appellate Division

1. Mr. Justice Md. Abdul Wahhab Miah
   Honorable Judge, Appellate Division
   Performing the functions of the Chief Justice of Bangladesh
2. Mr. Justice Syed Mahmud Hossain
3. Mr. Justice Muhammad Imman Ali
4. Mr. Justice Hasan Foez Siddique
5. Mr. Justice Mirza Hussain Haider

Honorable Judges of the High Court Division

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2. Mr. Justice Syed A.B. Mahmudul Huq
3. Mr. Justice Tariq ul Hakim
4. Madam Justice Salma Masud Chowdhury
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14. Mr. Justice Md. Fazlur Rahman
15. Mr. Justice Moyeenul Islam Chowdhury
16. Mr. Justice Md. Emdadul Huq
17. Mr. Justice Md. Rais Uddin
18. Mr. Justice Md. Emdadul Haque Azad
19. Mr. Justice Md. Ataur Rahman Khan
20. Mr. Justice Syed Md. Ziaul Karim
21. Mr. Justice Md. Rezaul Haque
22. Mr. Justice Sheikh Abdul Awal
23. Mr. Justice S.M. Emdadul Hoque
24. Mr. Justice Mamnoon Rahman
25. Madam Justice Farah Mahbub
26. Mr. Justice A.K.M. Abdul Hakim
27. Mr. Justice Borhanuddin
28. Mr. Justice M. Moazzam Husain
29. Mr. Justice Soumendra Sarker
30. Mr. Justice Abu Bakar Siddiquee

31. Mr. Justice Md. Nuruzzaman

32. Mr. Justice Md. Moinul Islam Chowdhury

33. Mr. Justice Obaidul Hassan

34. Mr. Justice M. Enayetur Rahim

35. Madam Justice Naima Haider

36. Mr. Justice Md. Rezaul Hasan (M.R. Hasan)

37. Mr. Justice Md. Faruque (M. Faruque)

38. Mr. Justice Md. Shawkat Hossain

39. Mr. Justice F.R.M. Nazmul Ahasan

40. Madam Justice Krishna Debnath

41. Mr. Justice A.N.M. Bashir Ullah

42. Mr. Justice Abdur Rob

43. Mr. Justice Quazi Reza-ul Hoque

44. Mr. Justice Md. Abu Zafor Siddique

45. Mr. Justice A.K.M. Zahirul Hoque

46. Mr. Justice Jahangir Hossain

47. Mr. Justice Sheikh Md. Zakir Hossain

48. Mr. Justice Md. Habibul Gani

49. Mr. Justice Gobinda Chandra Tagore

50. Mr. Justice Sheikh Hassan Arif

51. Mr. Justice J.B.M. Hassan

52. Mr. Justice Md. Ruhul Quddus

53. Mr. Justice Md. Khasruzzaman

54. Mr. Justice Farid Ahmed

55. Mr. Justice Md. Nazrul Islam Talukder

56. Mr. Justice Bhabani Prasad Singha

57. Mr. Justice Md. Akram Hossain Chowdhury

58. Mr. Justice Md. Ashraful Kamal

59. Mr. Justice S.H. Md. Nurul Huda Jaigirdar

60. Mr. Justice K.M. Kamrul Kader

61. Mr. Justice Md. Mozibur Rahman Miah

62. Mr. Justice Mustafa Zaman Islam

63. Mr. Justice Mohammad Ullah

64. Mr. Justice Muhammad Khurshid Alam Sarkar

65. Mr. Justice A.K.M. Shahidul Huq

66. Mr. Justice Shahidul Karim

67. Mr. Justice Md. Jahangir Hossain

68. Mr. Justice Abu Taher Md. Saifur Rahman

69. Mr. Justice Ashish Ranjan Das

70. Mr. Justice Mahmudul Hoque

71. Mr. Justice Md. Badruzzaman

72. Mr. Justice Zafar Ahmed

73. Mr. Justice Kazi Md. Ejarul Haque Akondo

74. Mr. Justice Md. Shahinur Islam

75. Madam Justice Kashefa Hussain

76. Mr. Justice S.M. Mozibur Rahman

77. Mr. Justice Amir Hossain

78. Mr. Justice Khizir Ahmed Choudhury

79. Mr. Justice Razik-Al-Jalil

80. Mr. Justice Bhishmadev Chakrabortty

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1.	Bangladesh Vs. Md. Ataur Rahman & ors. 9 SCOB [2017] AD 1	Article 102 of the Constitution; Warrant of Precedence	Warrant of Precedence being arbitrary, irrational, whimsical and capricious is subject to judicial review: The High Court Division having considered the respective status and positions of different constitutional functionaries and the persons in service of the Republic rightly held that though impugned Warrant of Precedence is a policy decision of the Government yet "in the absence of evidence of any discernible guidelines, objective standards, criteria or yardsticks upon-which the impugned Warrant of Precedence is ought to be predicated, we feel constrained to hold that the said Warrant of Precedence cannot shrug off the disqualification of being arbitrary, irrational, whimsical and capricious and is, therefore, subject to judicial review under Article 102 of the Constitution."
2.	Mohammad Zafar Iqbal & ors Vs. Bangladesh & ors 9 SCOB [2017] AD 25	Acquisition and Requisition of Immovable Property Ordinance, 1982, Section 3; Preservation of the memory of the martyrs; East Pahartali mass graveyard; Colourable exercise of power	The law gives the Deputy Commissioner to acquire any property if he is satisfied that the property is needed for public purpose. In the notice the Deputy Commissioner specifically mentioned the purpose for which the notice was served that it was for the public purpose of Baddyabhumi. This order clearly spelt out the actual existence of requirement for a public purpose within the meaning of section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982. If the reason for the issuance of the notice of acquisition was not one contemplated by law, the initiation of the proceedings would be void. It is the Deputy Commissioner who is primarily the judge of the facts which would attract section 3 of the ordinance. This opinion cannot be replaced by any other authority.

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3.	Bangladesh Vs. Md. Mizanur Rahman 9 SCOB [2017] AD 37	The Code of Civil Procedure, 1908 Rules: 1 and 2 of Order XVIII; Pleadings	In the instant case, the defendant did not admit the case of the plaintiff and filed written statement denying the plaintiff's claim that the suit property was an abandoned property, so it was the plaintiff who had the right to begin the hearing of the suit as per provision of rule 1 of order XVIII of the Code. Rule 2(1) of the Code has clearly provided that on the day fixed for hearing of the suit the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove, the other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case. Therefore, there was no scope on the part of the plaintiff to avoid examination of witness and state the facts of the plaint at the hearing of the suit.
4.	Rabeya Khatoon & ors Vs. Jahanara & ors 9 SCOB [2017] AD 40	Mohamedan Law of Bequest	Bequest by a Mohamedan to his heir of any quantum of property requires the consent of his other heirs after his death to be valid. But a bequest by a Mohamedan to any stranger (other than his heir) upto one-third of the surplus of his property which remains after payment of his funeral expenses and debts is valid and does not require consent of the heirs of the testator. Bequest to a stranger over and above one-third of the property of the testator which remains after payment of funeral expenses and debts of the testator requires the consent of the heirs of the testator after his death to be valid.
5.	Bangladesh & ors Vs. Professor Nurul Islam & anr 9 SCOB [2017] AD 46	Meaning of right to life; Constitution of Bangladesh Articles 18(1), 31 and 32; Smoking and Tobacco Product Usage Control Act, 2005	No one has any right to endanger the life of the people which includes their health and normal longevity of an ordinary healthy person. Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes amongst others protection of health and normal longevity of an ordinary human

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			being. It is the obligation of the State to discourage smoking and consumption of tobacco materials and the improvement of public health by preventing advertisement of tobacco made products. Though the obligation under Article 18(1) of the Constitution cannot be enforced, State is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and longevity of a man free from threats of man-made hazards. Right to life under the aforesaid Articles of the Constitution being fundamental right it can be enforced by this Court to remove any unjustified threat to health and longevity of the people as the same are included in the right to life.
6.	NTRCA & anr Vs. Lutfor Rahman & ors 9 SCOB [2017] AD 62	Show cause notice; Cancelling appointment	It is patent from the records that all the respondents went through the rigorous process of selection and were appointed in their respective post. They were served with notices cancelling their appointment without issuing any show cause notice. The respondents joined their posts and served accordingly for more than nine months at the time of filing their writ petition. We are of the view that without issuing any show cause notice the petitioners could not lawfully cancel the letter of appointment of the respondents.
7.	Biman Bangladesh Airlines & ors Vs. Al Rojoni Enterprise 9 SCOB [2017] AD 66	Carriage by Air (International Convention) Act, 1966 Rule 29 of the first schedule Read with section 29 of the Limitation Act	The High Court Division committed an error of law in holding that the date on which carriage stopped was the date on which the carrier defendants admitted its failure to deliver its goods finally and offered payment of compensation in lieu of the goods. The time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, that is, on 22.01.1999. Since the suit was filed on 24.05.2001

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			apparently the same was barred by limitation in view of special limitation provided in Rule 29 of the first schedule of the Carriage by Air (International Convention) Act, 1966 read with section 29 of the Limitation Act.
8.	BGMEA Vs. Bangladesh & ors 9 SCOB [2017] AD 70	Joladhar Ain 2000(Act XXXVI of 2000); Environment Conservation Act, 1995	The transfer/allotment of the water body by EPB to BGMEA and consequently the change of the nature and character of the said water body ("Joladhar") by BGMEA is completely violative of the said two laws and as such the violators are liable to be punished with imprisonment and fine and such illegal construction is liable to be demolished for which BGMEA or any other person is not liable to get any compensation.

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1.	ILFSL Vs. The Commissioner of Taxes 9 SCOB [2017] HCD 1	Income Tax Ordinance 1984 Article 5A of the 3rd Schedule	It appears that the leasing company being the owner of the leased out asset, used the asset for the purpose of business, i.e. leased out the property using the same as business assets and as such attracted by the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984. It appears that the first appellate authority did not consider as to the ownership of the vehicle remaining with lessor and not with the lessee and further that the lessor deals in the business of leasing out the vehicle to the lessee who operates the vehicle for his business. But the business of the lessor remains in the status of using the vehicle for the purpose of business of lease. Therefore these two pre-condition having been fulfilled in the instant case, the Assessee-applicant is entitled to the normal depreciation allowance and the initial depreciation allowance on the vehicle it has leased out to different lessee, being their customer.
2.	Md. Nur Islam Vs. Securities and Exchange Commission & ors. 9 SCOB [2017] HCD 6	Securities and Exchange Ordinance, 1969, Section 17, 26; non-speaking order	On consideration of the materials on record, it appears to us that the impugned order dated o8. 12. 2011 can not be said to be unlawful merely because it is without elaborate reasoning and non-speaking one. The impugned order appears to be otherwise sustainable.
3.	Mainul Hossain & anr Vs. Bangladesh & ors. 9 SCOB[2017]HCD 11	The principles of natural justice; audi alteram partem; nemo debet esse judex in propria causa; duty to act fairly; right to a fair hearing; principle of reasonableness	The authority cancelled the lease of the petitioners and in the same breath called upon them to appear before the authority on 12.04.2011 with necessary valid papers, if any. What we are driving at boils down to this: the authority ought to have afforded the petitioners an opportunity of being heard first and thereafter on perusal of the inquiry report and other materials,

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			the authority could have cancelled the lease of the petitioners with reference to the case land; but the authority chose to cancel the lease of the petitioners by keeping them in the dark and thereafter asked them to appear before the authority on a certain future date with their valid papers, if any. To be precise, there is no point in affording the petitioners an opportunity of being heard after cancellation of the lease. Generally speaking, the hearing of the petitioners by the authority should have been a pre-decisional phenomenon; it should not be a post-decisional phenomenon.
4.	State & ors vs. Md. Sukur Ali & ors 9 SCOB[2017]HCD 18	Code of Criminal Procedure, 1898 Section 164; Penal Code, 1860 Section 304	Whenever it is noticed that, all the legal mandatory formalities in recording the confessional statement are duly observed and the Magistrate; who recorded the confessional statement is satisfied that the confession is voluntary and free from all taint-in that case, such confession can be the sole basis of conviction of the confessing accused.
5.	Md. Komar Uddin Vs. State & another 9 SCOB[2017]HCD 28	Negotiable Instruments Act, 1881, Section 138, 141	The learned advocate appearing on behalf of the convict-appellant took me to the postal receipt and strenuously argued that the postal seal reveal that the same has been received by the postal clerk on 23.03.2008 where as the postal clerk put his signature on the same showing receiving date as 12.03.2008. He further adds that those anomalies are sufficient to show that the postal receipt has been created for the purpose of this case. I have gone through the postal receipt and seen that the anomalies of those dates are palpable on the face of such receipt. It is the receiving clerk of the post office who made all those anomalies, is the best person who can say as to why and under what compelling circumstances

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			he put this date under his signature and also as to why he put seal showing another date and without examining him, it is not possible to arrive at a concrete decision in this respect. In such a state of affairs the court can arrived such a decision which favoured the convict-appellant. Thus, I have no option but to hold that the convict-appellant is entitled to get benefit of the doubt regarding such service of notice.
6.	Raghib Rauf Chowdhury Vs Bangladesh & ors 9 SCOB[2017]HCD 34	Constitution of Bangladesh, Article 65, 95; Appointment process of Judges in the higher judiciary; Consultation with the Chief Justice	In the process of selecting the persons for elevation to the High Court Division the Chief Justice may, if feels indispensably necessary consult or share his view with at least two of his senior most brother Judges in the Appellate Division and two of the senior most Judges of the High Court Division as well in forming 'opinion' and also to ensure the recommendation appropriate, effective and transparent. After advancing the recommendation expressing opinion by the Chief Justice there should not be any room to disapprove or censure it unless the persons recommended is found by the executive to have an antecedent involving anti-state or anti-social subversive activities. The fate of the recommendation of the Chief Justice expressing opinion should not be sealed and scrapped for no justified reason, in view of observation made in the 'ten judges case' by the Appellate Division of our Supreme Court.
7.	State & ors Vs. Mufti A. Hannan & ors 9 SCOB[2017]HCD 52	Code of Criminal Procedure, 1898 Section 164; Evidence Act, 1872 Section 10, 17, 30; Retraction of the confession; Penal Code, 1860 Section 120A; Cognizance of	Recording of a statement of an accused beyond the period of office hour can not be a plea to hold that the said statement is not true and voluntary. If the said statement is found that same was recorded by the concerned Magistrate having compiled with all the provisions of law then there is no room to say that the said statement is not true

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		Offence	and voluntary.
8.	Mahmudur Rahman Vs Bangladesh & ors 9 SCOB[2017]HCD 119	Constitution of Bangladesh Article 35; Code of Criminal Procedure, 1898 Section 198, 403, 526, 561A; Penal Code, 1860 Section 500 and 501	In view of above facts and circumstances of the case, since, apparently and admittedly, no prosecution has been concluded against the petitioner and that the petitioner has neither been convicted or acquitted in any criminal case for the offence in question, namely, the offices punishable under Sections 500 and 501of the Penal Code, we are of the view that, the petitioner does not have any case before this Court under writ jurisdiction to invoke Article 35(2) of the Constitution or other provisions of the Constitution or Code of Criminal Procedure. Besides, since the petitioner does not have any particular case of enforcement of fundamental rights under any of the above mentioned Articles, the writ petition is not maintainable.
9.	Rokeya Begum Bina & ors Vs. Habib Ahsan & ors 9 SCOB[2017]HCD 127	Code of Civil Procedure, 1908 Order 7, Rule 11; Registration Act, 1908 Section 17B	It is crystal clear from the reading of the plaint that as per sub-clause (ii) of Clause (a) of Section 17B of the Registration Act, the plaintiff –opposite parties nor present the contract for sale itself for registration within six months from the date of coming into force of that section i.e. 1st July, 2005 neither instituted a suit for specific performance of the contract within six months next after the expiry of the period mentioned in clause (a). So, after the expiry of the period mentioned in clause (b) of section 17B, the contract for sale (affidavit dated 03.04.1995) in question stand void.
10.	Hossain Ali & ors Vs. Bangladesh & ors 9 SCOB[2017]HCD 132	State Acquisition and Tenancy Rules, 1955 Rule 31, 42, 42A; Record of Rights;	The Settlement Officer appointed with the additional designation of Assistant Settlement Officer may at any time before final publication of the record-of-rights exercise his jurisdiction under

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		Jurisdiction of Settlement Officer	rule, 42 of the Rules, 1955.
11.	Osman Gazi Chowdhury Vs. Artha Rin Adalat & anr 9 SCOB[2017]HCD 140	Artharin Adalat Ain, 2003, Section 6, 19, 41; Maintainability of Writ Petition against a decree or post-decree order passed by Artharin Adalats	It is the clear intention of the Legislature that a party to an Artharin Suit if aggrieved by a decree, must prefer an appeal. Since the Ain, 2003 is a special law with an overriding provision over other laws and has prescribed a special procedure, there is no scope to bypass the appellate forum, if the forum under Section 19(2) of the Ain, 2003 against an exparte decree is already not availed of by the party.
12.	Shetu International Pvt. Ltd & ors Vs. Artha Rin Adalat-2, Dhaka & anr 9 SCOB[2017]HCD 157	Artha Rin Adalat Ain, 2003, Section 6(2), 7(1)	The word 'Bc¡ma' as appears in the context of Section 7(1) bears reference to a scenario emerging when the Court which in its considered opinion thinking it just and expedient for a notice to be published in a national daily and in a local newspaper, if there be any, for ends of justice, and making an order to publish a notice at the cost of the plaintiff. But in the present case the plaintiff –Respondent No.2 itself took step under section 7(1) of the Act on its own motion on the date fixed for return of summons and acknowledgement receipt after service upon the defendants without waiting for the report of the Process Server and Order of the Court to that effect. It is noted that the summons in a suit shall be served by the Process Server simultaneously through postal department, and in evidence of the sending of the summons through post the postal receipt thereof must be tagged with the record. But in the present case no summons was served through Process Server or by post nor any attempt was made to serve the notice/ summons upon the defendants. Moreover, no Order has been passed by the Court necessitating publication of summons in the daily newspaper. Rather publication in the newspaper

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			ensued at the behest of and as desired by the plaintiff which, in this Court's view is contrary to the provisions of Section 7(1) of the Act.
13.	Md. Mohitur Rohman Choudhury & ors Vs. Md. Abdul Kuddus Miah & ors 9 SCOB[2017]HCD 163	Limitation Act, 1908 Section 15; Code of Civil Procedure, 1908 Order IX rule 13	Application for execution of a final decree or order is to be made within 3 (three) years from the date mentioned in 2nd Column of Article 182 of the Limitation Act subject to some exceptions as detailed in the 3rd Column read with provisions of section 15 of the Act inasmuch as Article 182 makes no provision for fresh limitation from a final order passed on an application under Order IX rule 13 of the Code. In other words if no stay order or injunction is passed staying the operation of the decree or order under section 15 or no situation arises as per the 3rd Column of Article 182 the decree or order would keep open for execution and time would run from the date of final decree or order. A bare reading of Article 182 of the limitation Act also suggests that an application under order IX rule 13 of the code does not come within the meaning of applications mentioned in clause 5 of column 3 of Article 182 of the Limitation Act to save limitation. Accordingly, pendency of a case under Order IX rule 13 of the Code of Civil Procedure for setting aside an ex-parte decree cannot extend the period of limitation for filing execution case.
14.	Kazi Helall Islam & ors Vs. Kazi Roksana Islam & ors 9 SCOB[2017]HCD 167	Code of Civil Procedure, 1908, Order 40 Rule 1: Partition Suit	As we have mentioned before there is a prima-facie apprehension of danger to the property, which is apparent under the circumstances. Moreover, since the suit land is in possession and control of the defendant-appellants it is quite probable that pending final determination of the rights of the parties, the party in possession and control might abuse such possession

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			and control and the sisters may be deprived of their rights. Alienation of mesne-profits which in this case are primarily the rents received by the defendants from the tenants in the disputed property may also result in wastage of the property and therefore entails a source of danger of alienation of the property before final determination of the rights of the parties to the Partition Suit. Upon such considerations we feel that the Court below judiciously and by exercising its discretion very correctly granted the prayer of the plaintiffs under Order 40 Rule 1 for appointment of receiver to the suit property.
15.	Zobeda Khatoon & anr Vs. State & anr 9 SCOB[2017]HCD 173	Criminal Law Amendment Act, 1958 Section 6; Code of Criminal Procedure, 1898, Section 222; Framing of Charge	It also appears from the FIR that the alleged occurrence took place in between January 2004 to November 2006. The lodging of the FIR and framing of charge covering the whole period is permissible under the provisions of law of sections 6 (IB) of the Criminal Law Amendment Act, 1958. A single case can be filed and trial may be proceeded by framing charge for more offences, which has been done in the present case. The provisions of section 222 (2) of the Code is no manner of application in this case.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Muzammel Hossain
-Chief Justice
Mr. Justice Surendra Kumar Sinha
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Hasan Foez Siddique
Mr. Justice A.H.M. Shamsuddin Choudhury

CIVIL APPEAL NO.41 OF 2011
(From the judgment and order dated 04.02.2010 passed by the High Court Division in Writ Petition No.11685 of 2006.)

Bangladesh, represented by the Cabinet Secretary, Cabinet Division, Bangladesh Secretariat, Dhaka, 1000. **.....** Appellant

Versus

Md. Ataur Rahman and others: **.....**Respondents

For the Appellant : Mr. Abdur Rob Chowdhury, Senior Advocate,instructed by Mrs. Sufia Khatun, Advocate - on-Record.

For the Respondent No.1: Mr. Rokanuddin Mahmud, Senior Advocate, with Mr. Asaduzzaman, Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocateon- Record.

For the Respondent No.2: Mr. Murad Reza, Additional Attorney General, instructed by Mrs. Mahmuda Begum, Advocate-on-Record.

For the Respondent No.3: Mr. Murad Reza, Additional Attorney General, instructed by Mr. Nawab Ali, Advocateon- Record.

Date of hearing : The 6th January, 2015, 8th January, 2015 , 9th January, 2015 and 11th January, 2015.

Date of Judgment: 11th January, 2015.

Article 102 of the Constitution
Warrant of Precedence being arbitrary, irrational, whimsical and capricious is subject to judicial review:

The High Court Division having considered the respective status and positions of different constitutional functionaries and the persons in service of the Republic rightly held that though impugned Warrant of Precedence is a policy decision of the Government yet "in the absence of evidence of any discernible guidelines, objective standards, criteria or yardsticks upon-which the impugned Warrant of Precedence is

ought to be predicated, we feel constrained to hold that the said Warrant of Precedence cannot shrug off the disqualification of being arbitrary, irrational, whimsical and capricious and is, therefore, subject to judicial review under Article 102 of the Constitution." ... (Para 50)

Members of the judicial service are not holders of the constitutional posts but they being public servants are in the service of the Republic:

Ends of justice would be best served if the District Judges and equivalent judicial officers are placed in the same table of the Warrant of Precedence along with the Secretaries and equivalent public servants. There is no denying that members of the judicial service (i.e., the subordinate judiciary) are not holders of the constitutional posts but they being public servants are in the service of the Republic and the nature of their service is totally different from the civil administrative executives. District Judges and holders of the equivalent judicial posts are the highest posts in the subordinate judiciary. In view of the provisions of the Article 116A of the Constitution all persons employed in the judicial service and all magistrates exercising judicial functions shall be independent in the exercise of their judicial functions, so it is immaterial to say that members of judicial service or the subordinate judiciary are above the senior administrative and defence executives. …(Para 62)

The High Court Division as well as the Appellate Division is competent enough to give necessary directions to follow the mandate of the Constitution:

When there is a deviation from the constitutional arrangements or constitutional arrangements have been interfered with or altered by the Government or when the Government fails to implement the provisions of Chapter II of Part VI of the Constitution and instead follow a different course not sanctioned by the Constitution, the High Court Division as well as the Appellate Division is competent enough to give necessary directions to follow the mandate of the Constitution. This means the Apex Court of the Country is competent to issue directions upon the authorities concerned to perform their obligatory duties whenever there is a failure on their part to discharge their duties. … (Para 68)

Civil awards holders and holders of gallantry awards of Bir Uttam should be included in the Warrant of Precedence:

The Warrant of Precedence of the neighbouring countries include the holders of highest civil awards, however the impugned Warrant of Precedence of our country does not include such dignitaries, who are not constitutional or public functionaries. As such, it is expected that those dignitaries who have been honoured or decorated with civil awards, e.i., Shadhinata Padak, or Ekhushey Padak, and those valiant freedom fighters who have been honoured with gallantry awards of Bir Uttam should be included in the Table of the impugned Warrant of Precedence in such order as deemed appropriate.

… (Para 69)

The impugned Warrant of Precedence being based on utter irrationality and arbitrariness is to be modified and amended in the following manner:

> **1) As the Constitution is the supreme law of the land, all constitutional functionaries shall be placed first in order of priority in the Table of the impugned Warrant of Precedence.**

2) Members of judicial service holding the posts of District Judges or equivalent posts of District Judges shall be placed at Serial No.16 in the Table along with the Secretaries to the Government and equivalent public servants in the service of the Republic.

3) Additional District Judges or holders of equivalent judicial posts shall be placed at the serial number 17 immediately after the District Judges.

… (Para 70)

JUDGMENT

Md. Muzammel Hossain, CJ:

1. This appeal, by leave, is directed against the impugned judgment and order dated 04.02.2010 passed by a Division Bench of the High Court Division in Writ Petition No.11685 of 2006 making the Rule absolute in modified form declaring the impugned Warrant of Precedence 1986 without lawful authority and of no legal effect and directing the writ Respondent No.1 to prepare a new Warrant of Precedence on the basis of the eight-point directives within 60(sixty) days of receipt of the judgment placing the District Judges, Additional District Judges, Chief Judicial Magistrates and Chief Metropolitan Magistrates in the same table above the Chiefs of Staff of the Defence Service of Bangladesh in the Warrant of Precedence.

2. The facts for disposal of this appeal, in brief, are that the writ petitioner-respondent No.1 while serving as an Additional District and Sessions Judge and holding the Office of Secretary-General of Bangladesh Judicial Service Association filed writ petition No.11685 of 2006 under Article 102 of the Constitution challenging Warrant of Precedence, 1986 (revised up to 12.04.2000), issued vide Cabinet Division's Notification No.CD-10/1/85-Rules/161, dated 11.09.1986 by the Writ respondent No.1, the appellant placing the members of judicial service and Constitutional posts equally with or subordinating them to the employees of the Republic particularly to the administrative cadres, in contravention to the spirit of the Constitution. A Division Bench of the High Court Division heard the petition and being satisfied issued Rule Nisi on the following terms:

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned Warrant of Precedence issued vide Cabinet Division's Notification No.CD-10/1/85- Rules/161, dated 11.09.1986 as revised up to 12.04.2000 (Annexure-A to the writ petition) equating with or subordinating District Judges and other judicial officers equivalent to the rank of District Judges to the concerned officers of the administrative and other cadres therein should not be declared to have been issued without lawful authority and to be of no legal effect and why the respondents should not be directed to place District Judges and other judicial officers holding the rank of District Judges are on a par with the holders of Constitutional posts and above he positions of the persons in the service of the Republic in the aforesaid Warrant of Precedence and/or such other or further order or orders passed as to this Court may seem fit and proper."

3. It has been stated that the writ petitioner filed the writ petition in his capacity as a concerned, affected and aggrieved person to protect the interest of indefinite number of people of Bangladesh and to uphold the Rule of Law by way of public interest litigation and

to prevent illegal and arbitrary placement of the members of the judicial service and the Constitutional Office holders in inappropriate places in the Warrant of Precedence in derogation of their dignity and status in public perception. The writ petitioner being committed to the welfare of the Republic and to uphold the Rule of Law brought the petition "pro bono public" challenging the impugned Warrant of Precedence.

4. It has been further stated that in the table of the impugned Warrant of Precedence, the Chief Justice of Bangladesh being the head of the judicial organ has been placed at Serial No.4. Some Constitutional office holders like the Attorney General for Bangladesh, Comptroller and Auditor-General and Ombudsman have been placed at Serial No.15, while the members of the different services of the Republic like the Cabinet Secretary, the Chiefs of Staff of the Army, Navy and Air Force and the Principal Secretary to the Government have been placed at Serial No.12 in the said table. District Judges have been placed at Serial No.24 equating them with the Deputy Commissioners who are the mid-level employees of the Republic. The impugned Warrant of Precedence does not provide for any rational basis and as such it is arbitrary. In the scheme of our Constitution, the post of the District Judge is the highest post of the Bangladesh Judicial Service. The required qualification for appointment to the post of the District Judge is 15 (fifteen) years service including two years experience as an Additional District Judge. In spite of the directions given by the Appellate Division in the case of Secretary, Ministry of Finance Vs. Masdar Hossain and others reported in 52 DLR (AD) 82 (hereinafter referred to as Masdar Hossain's case) the Government had failed to introduce a separate pay scale for the members of the judicial Service. The initial pay scale of a District Judge being at grade 3 of the National Pay Scale of 2005. The members of the other tiers of the Judicial service are Additional District Judge, Joint- District Judge, Senior Assistant Judges and Assistant Judges.

5. It has been further contended by the writ petitioner that the Judicial Service is not 'service' in the sense of employment. The Judges are not employees. As members of the Judiciary, they exercise the sovereign judicial power similarly as the members of the cabinet exercise the executive power and the members of the Legislature exercise the legislative power of the Republic. In a democracy such as ours the Executive, the Legislature and the Judiciary constitute the three pillars of the State and by such a conception, it is intended to be conveyed that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. Those who exercise the State powers are the Ministers, the Legislators and the Judges but not the members of their staff who implement or assist in the implementation of their decisions. So in that view of the matter, the members of the Judicial Service cannot be equated with the administrative executives: rather as the holders of the State power, they are on a par with political executives and legislators. Judicial independence cannot be secured by making mere solemn proclamations about it; rather, it has to be secured both in substance and in practice.

6. The society has stake in ensuring the independence of the judiciary and no price is too heavy to secure it. Subordinate courts occupy a special place in the Constitution under Articles 114 to 116A. The recruitment and the conditions of service of the members of the Judicial Services are regulated by the Rules made by the President under Article 115 of the Constitution. Since as per Note: 1 of the impugned Warrant of Precedence, the order therein is to be observed for State and ceremonial occasions as well as for all purposes of the Government, has disparaged the position of judicial officer in the estimation of the people. It is necessary for them in the public interest and in the interest of justice to be seen to be of a rank sufficient to command obedience to their judgments and orders. As the Warrant of

Precedence has an effect on the public psyche, it should necessarily reflect the rank, status and precedence of the District Judges properly. So the relative ranking of the functionaries in the table of the Warrant of Precedence is of a significant nature, and not merely of a ceremonial nature. This in fact, affects the ability of the District Judges and other judicial officers to perform their function effectively and independency without virtually being or being seen to be inferior to certain categories of civil servants. The placement of the District Judges at Serial No.24 in the table of the impugned Warrant of Precedence is derogatory to the dignity of their office and is violative of Article 31 of the Constitution. The impugned Warrant of Precedence fails to appreciate the dignity of all Constitutional posts such as the Judges of the Supreme Court of Bangladesh, Attorney General, Comptroller and Auditor General, Members of Parliament and Members of the Judicial Service of the Republic. They cannot be compared with the servants of the Republic and the members of the Civil Service and the Armed Forces in Particular. Hence, the impugned Warrant of Precedence is liable to be struck down as being arbitrary, *malafide* and *ultra vires* the Constitution.

7. The Writ respondent Nos.1 and 3 contested the Rule by filing affidavits-in-opposition making similar statements of facts.

8. The substance of their claim is that Chapter I of Part IX of the Constitution deals with the Service of Bangladesh generally; persons belonging to the Judicial Service are not members of the civil executive service, though they are in the service of the Republic, does not mean or imply that they enjoy higher status than that of the person's belonging to the Defence Service, Local Government Service and Civil Executive Service. The service condition stipulated under Articles 133 and 135 of he Constitution do equally apply to the judicial officers as well as the civil executive officers. Therefore, civil executive officers are also within the scheme of the same Constitution and they may certainly be different in respect of powers and functions from judicial officers. But for that reason, civil executive officers cannot be treated as inferior to judicial officers and vice versa. Different services like Defence Service, Local Government Service, Judicial Service and all other services of the Republic have been duly considered, contemplated, recognized and dealt with at different places and under different articles of the Constitution, as were deemed appropriate by the framers of the Constitution keeping in mind the broad principles of separation of powers in the scheme of the Constitution.

9. Nowhere in the Constitution, it has been contemplated that the judicial Service shall enjoy a higher rank and status or position than other services of the Republic. It is contended the terms and conditions of services of the Constitutional functionaries are regulated and determined by special laws, and not by Rules, as mandated by Article 147 of the Constitution. The attempt of the Writ petitioner to raise the judicial officers to the level of he Constitutional functionaries is an unscrupulous attempt to undermine the dignity, status and position of the Constitutional functionaries. Since the judicial officers are persons in the service of the Republic, the District Judges have been rightly and properly placed at Serial No.24 in the table of the impugned Warrant of Precedence. District Judges hold district-level posts like Deputy Commissioners and at the district level, they have been shown at the highest serial number above Civil Surgeons and Superintendents of Police. Deputy Secretaries to the Government are national-level posts and for that reason; they have been shown at Serial No.25 not as being within their respective charge. It is an unfounded claim that District Judges being the highest post-holders in the Bangladesh Judicial Service are on the same footing like political executives and legislators. Such a claim has no legal or constitutional basis.

10. A Division Bench of the High Court Division by the judgment and order dated 04.02.2010 made the Rule absolute in a modified form with eight-point directives upon the writ respondent-appellant to make a new Warrant of Precedence in accordance with the directives within a period of 60 days from the date of receipt of a copy of the judgment and order and to place the District Judges, Members of the Judicial Service holding equivalent judicial posts of the District Judges, Additional District Judges, Chief Judicial Magistrates and Chief Metropolitan Magistrates in appropriate places in the Table of new Warrant of Precedence. The appellant was also directed to submit an affidavit-of-compliance along with the copy of the new Warrant of Precedence by 13.05.2010.

11. The Division Bench further held that the writ petitioner had *locus standi* to file the writ petition which was filed in the nature of pro bono public litigation, and the writ petitioner was a person aggrieved within the meaning of Article 102 of the Constitution; that the Warrant of Precedence cannot shrug off the disqualification of being arbitrary, irrational, whimsical and capricious and is subject to the judicial review; that members of the judicial service are not the creatures of the Constitution but of law and that they are not Constitutional functionaries; that the members of the judicial service are persons in the service of the public; that the administrative executive is always at the beck and call of the political executives but a judicial officer is independent in the discharge of his function subject to the provisions of the Constitution as postulated by Article 116A; that the Chiefs of Defence Services are subject to the control of the political executives; that the Warrant of Precedence has to be observed for all purposes of the Government and that placement of the District Judges above the Administrative and Defence Executives in the table thereof is all the more necessary with an eye to uphold their rank, priority and status in public perception and that the impugned Warrant of Precedence is fundamentally different from those of India, Pakistan and USA and the impugned Warrant of Precedence is a type by itself.

12. Being aggrieved by and dissatisfied with the impugned judgment and order dated 04.02.2010 passed by the High Court Division the appellant preferred the instant appeal by leave of this court.

13. Leave was granted to consider the following grounds:

> "I. Because civil executive officers are also within the scheme of the Constitution and as such, they may certainly be different in respect of powers and functions from judicial offices, but for that reason, they cannot be treated as inferior or subordinate to judicial officers, nor the judicial offices be equated with or treated as subordinate or inferior to civil executive offices considering the nature and jurisdictional function.
>
> II. Because neither any constitutional nor any legal right of the writ petitioner has been violated by the impugned Warrant of Precedence seeking redress under Article 102 of the Constitution and that in framing the impugned Warrant of Precedence, the executive government follows the age old principles, conventions and traditions considering the functions and authority of respective office(s)/person(s) in the governance of the affairs of the State and different neighbouring countries Warrant of Precedence have also been taken into consideration and that no illegality has been committed by placing the District Judges at serial No.24 of the Warrant of Precedence with other persons(s) of the same rank and status and the High Court Division acted

beyond the jurisdiction in making the rule absolute directing the respondent No.1 to make a new Warrant of Precedence placing the District Judges, members of judicial service holding equivalent judicial posts of District Judges, Additional District Judges, Chief Judicial Magistrates and Chief Metropolitan Magistrates in the table above the Chiefs of Army, Navy and Air Force and the Secretaries to the government while it remained silent about other class of officers of the same rank and status employed in the service of the Republic.

III. Because the Warrant of Precedence as promulgated by the President of the Republic under the authority of Rule 7 as specified in schedule at Serial No.7 of the Rules of Business 1996, involves the policy decision of the government to be observed for State and ceremonial occasions as well as government purposes as a matter of protocol which is neither amenable to judicial review under Article 102 of the Constitution nor it is justifiable and that the writ petitioner cannot be said to have been aggrieved in his power, function, position and authority by the impugned Warrant of Precedence and no public interest is involved in the matter.

IV. Because the members of the subordinate judiciary are not holders of constitutional posts and they are very much in the service of the Republic and subject to various Acts and Rules as are applicable to members of other civil service and the High Court Division committed an error of law by treating the members of the judicial service at par with the political executives and legislators and above the administrative and defence executives.

V. Because the members of judicial service are also public servants and employees in the service of the Republic and that the Public Servant (Retirement) Act, 1974, the Provident Fund Act, 1925, Government Servants (Discipline and Appeal) Rules, 1985 and Government Servant Conduct Rules, 1979 are equally applicable to the members of judicial service and the High Court Division committed grave error passing the impugned judgment without any rationale causing indiscipline in the governance of the State and affecting harmonious relationship and polity among the three organs of the State namely the Executive, the Legislature and the Judiciary."

14. Mr. Abdur Rob Chowdhury, the learned Senior Advocate appearing for the appellant submits that claiming precedence by one organ of the State over other organs is against the letter and spirit of separation of powers as a Constitutional principle and may amount to interference with the other organs of the State violating rule of law. He contends that the Warrant of Precedence is the prerogative of the President who is the head of the State and thus the directives of the High Court Division are derogative to the name, fame and dignity of the President. There is no distinction between political and administrative executive in our Constitutional dispensation, inasmuch as, as per Article 55(2) of the Constitution, the executive power of Republic vests in the Prime Minister not in the Cabinet. It is an unreasonable proposition that there is a parity in between the members of lower judicial service and the political executives or legislators, inasmuch as, a member of the judicial service in that case stands on the same footing like that of Ministers and in such case if a member of judicial service wants to hold an executive office, he or she needs to be appointed not below the rank of a Minister.

15. Mr. Abdur Rob Chowdhury then submits that the members of judicial service should not be equated with political executives and other Constitutional post holders, who hold the distinct constitutional offices and their terms and conditions of service being regulated and determined, not by rules, but by special Acts of Parliament and that before entering upon their offices, they require to subscribe oaths under Article 148 of he Constitution. Merely because an administrative action of the executive may be tested by judicial review does not mean that the judiciary enjoys higher status over the executive branch. The separation of judiciary from the executive or for that matter the independence of judiciary does not mean that the judiciary is above of the executive branch but that the judiciary is independent in the exercise of its judicial functions. The civil service as a whole is a part of the executive and subordinate to the political executives as the subordinate judiciary is also a part of total judiciary in a similar manner.

16. Mr. Abdur Rob Chowdhury submits that the judgment of the High Court Division is based on misconception about nature and purpose of the Warrant of Precedence which is only used for State and ceremonial occasions. The officials mentioned in the warrant of Precedence are expected to attend the reception line at the airport when the President and the Prime Minister is leaving for and coming back from foreign trips and if the District Judges and equivalent post holders are placed above the Cabinet Secretary and the Chiefs of Army, Navy and Air force, it would be obligatory for them to attend the ceremony which would be against historical precedent.

17. Mr. Abdur Rob Chowdhury further submits that the Warrant of Precedence does not indicate or affect the rank, pay and status of a public servant, no public servant including a District Judge has a right to be placed in any particular place in the Warrant of Precedence. The Secretaries of the Government are functioning all over the country and as such they may not be confined to any special area but the District Judges, the Deputy Commissioner, the District Superintendent of Police are in administrative charge of a local area and that the High Court Division did not properly construe the purpose and objective in determining their order in the table of Precedence; in the USA and in the Common Wealth countries like Australia, the precedence of Governors are fixed in relation to their State but the officials of Ministry and Departments of Government are decided in relation to their work for the entire country.

18. The final submission of Mr. Abdur Rob Chowdhury is that the Legislature, the Executive and the judiciary all have their own broad spheres of operation, ordinarily it is not proper for any of these organs of the State to encroach upon the domain of another otherwise the delicate balance in the Constitution will be upset and there will be reaction and indiscipline. The impugned Warrant of Precedence was made by the President of the Republic after careful consideration of the practice followed in the neighbouring countries as also in the USA and the Commonwealth countries. The High Court Division in their directives for making a new Warrant of Precedence by placing the District Judges and other equivalent judicial officers above the Cabinet Secretary/Principal Secretary and the Chiefs of Army, Navy and Air Force has exceeded the historically validated restraint and overlooked the customs and practices followed in other countries.

19. Mr. Murad Reza, the learned Additional Attorney General appearing on behalf of the respondent nos.2 and 3 has adopted the submissions of Mr. Abdur Rob Chowdhury, the learned Senior Advocate for the appellant. The learned Additional Attorney General submits that civil executive officers are also within the scheme of the Constitution and that they may

certainly be different in respect of powers and functions from judicial officers, but for that reason, they cannot be treated as inferior or subordinate to judicial officers and as such the impugned judgment and order passed by the High Court Division is liable to be set aside. He then submits that by the impugned Warrant of Precedence neither constitutional nor any legal right of the writ petitioner has been violated and that no illegality has been committed by placing the District Judges at Serial No.24 of the Warrant of Precedence with other persons of the same rank and status and that the High Court Division acted without lawful authority in making the Rule absolute directing the appellant No.1 to make new Warrant of Precedence placing the District Judges and members of the Judicial Service holding equivalent judicial posts of District Judges in the Table above the Chiefs of Army, Navy and Air force and the Secretaries to the Government. The learned Additional Attorney General also submits that the impugned Warrant of Precedence is for State and ceremonial occasions and as such the expressions "as well as for all purpose of the Government" in note No.1 be deleted. Therefore he contends that after such deletion there is no reason for the respondent No.1 to be aggrieved.

20. Mr. Murad Reza, the learned Additional Attorney General further submits that in framing the impugned Warrant of Precedence the appellant follows the age old principles, conventions and traditions considering the functions and authority of respective officers in the service of the Republic and also different neighbouring countries' Warrant of Precedence and as such no illegality is committed by placing the District Judges at Serial No.24 of the Warrant of Precedence. The learned Additional Attorney General submits that the Warrant of Precedence as promulgated by the President of the Republic involves the policy decision of the Government which is not amenable to judicial review under Article 102 of the Constitution and as such impugned judgment and order passed by the High Court Division is liable to be set aside.

21. On the other hand Mr. Rokanuddin Mahmud, the learned Senior Advocate appearing for the respondent No.1 submits that the appellant has admitted that the judicial officers cannot be equated with or treated as subordinate or inferior to civil executive officers considering the nature and jurisdictional function and as such placing the District Judge at Serial No.24 of the impugned Warrant of Precedence is admittedly illegal, arbitrary and without any lawful authority for which the High Court Division rightly passed the impugned judgment.

22. Mr. Rokanuddin Mahmud, learned Senior Advocate submits that the equal application of the provisions of the Public Servants (Retirement) Act 1974, the Provident Fund Act, 1925, Government Servants Conduct Rules, 1979 to the members of judicial service and civil executive officers cannot be a ground to place the District Judges at Serial No.24, inasmuch as, those provisions are applicable to all the government servants including those who are not even included in the impugned Warrant of Precedence.

23. His further submission is that the impugned Warrant of Precedence is not only for the purpose of expecting the officials to attend the reception line at the airport when the President and the Prime Minister is leaving for and coming back from foreign trips inasmuch as note No.1 of the impugned Warrant of Precedence has clearly stated that it is for all purposes of the State and as such the High Court Division correctly passed the impugned judgment.

24. Mr. Mahmud, the learned Advocate appearing for the respondent no.1 submits that the High Court Division did not commit any wrong in holding that the petitioner is a member

of the Judicial Service and the secretary General of Bangladesh Judicial Service Association who by way of invoking the Writ Jurisdiction of the High Court Division under Article 102 of the Constitution has brought to the notice of the Court a public wrong or a public injury and that is not doubt justiciable and his membership of the Judicial Service and office hold with the Bangladesh 'Judicial Service Association' eminently equip him both with the sufficiency of interest and the insight and ability to file a pro bono publico litigation and the petitioner is a 'person aggrieved' within the meaning of Article 102 of the Constitution. The High Court Division has not committed any wrong in holding that a policy decision of the Government is not subject to judicial review under Article 102 of the Constitution unless it is arbitrary, whimsical and capricious and in the instant case the absence of evidence of any discernible guidelines, objective standards, criteria or yardsticks upon which the impugned Warrant of Precedence is or ought to be predicated is very much apparent and as such the Court felt rightly constrained to hold that the Warrant of Precedence cannot shrug off the disqualification of being arbitrary, irrational, whimsical and capricious and is, therefore, subject to judicial review under Article 102 of the Constitution.

25. Mr. Mahmud then submits that the High Court Division has not committed any wrong in holding that the Appellate Division in the decision in Masdar Hossain's case in paragraph 44 has adopted the findings and observations made by the Indian Supreme Court in the case of All India Judges' Association reported in AIR 1993 SC 2493 for which the natural corollary is that the Appellate Division has declared a law to the effect that the members of the Judicial Service are on a par with the political executives or the legislators and above the administrative executives which is binding upon the High Court Division in view of the mandate of Article 111 of our Constitution and as such the impugned judgment is maintainable.

26. He contends that the Appellate Division on 09.08.2009 observed in Masdar Hossain Case that "It should be noted that the attitude of the supposed parallelism of the Judicial Service with the Executive Service is not the intention of the relevant provisions of the Constitution. The notion of such parallelism that existed in the past has been abandoned by the framers of the Constitution and the constitutional reality has to be materialized in the relevant areas including pay and allowances of the members of the Judicial Service" and as such in view of the above observation, the impugned judgment is maintainable.

27. His further contention is that in course of hearing *interlocutory* matter on 08.12.2009 in Masdar Hossain's case, the learned Attorney General verbally submitted that he would do his best to highlight the legal position in this regard to the concerned authorities of the Government that the Pay Scale of the highest post of the Judicial Service should be re-fixed having regard to the recommendation of the Judicial Service Pay Commission and should not be below the Grade No.1 of the National Pay Scale" and as such in view of the above findings, the impugned judgment is maintainable.

28. Mr. Rokanuddin Mahmud further submits that the three organs of the State, namely the Executive the Legislature and the Judiciary are respectively headed by the Prime Minister, the Speaker and the Chief Justice and these three organs are to perform their respective functions within the bounds set by the Constitution. As the political executives, that is to say, the Ministers including the Prime Minister exercise the executive power of the Republic, the legislators exercise the legislative power while Judges of both the Higher Judiciary and the Subordinate Judiciary exercise the judicial power of the Republic and as such the impugned judgment passed with the above finding is absolutely maintainable.

29. He again contends that in the case of Mujibur Rahman (Md.) Vs. Government of Bangladesh, 33 DLR (AD) 111, it was held in paragraph 71 that both "the Supreme Court and the Subordinate Courts are the repository of judicial power of the State" and the High Court Division rightly held in the impugned judgment that constitutionally, functionally and structurally, judicial service stands on a different level from the civil administrative executive service of the Republic while the function of the civil administrative executive service is to assist the political executives in formulation of policies and in execution of the policy decisions is the Government of the day, the function of the judicial service is neither of them and it is an independent arm of the Republic which sits on judgment over parliamentary, executive and quasi-judicial actions, decision is and orders and as such to equate and to put on the same plane the judicial service with the civil administrative executive service is to treat two unequal as equals and hence the impugned judgment is maintainable.

30. His further contention is that the High Court Division has rightly held that there is no gainsaying of the fact that the Constitution has accorded special status to the constitutional incumbents for which their priority comes first in the Warrant of Precedence and the status of the constitutionally recognized and referred post-holders, though public functionaries, is ingrained in the scheme of the Constitution. So in terms of priority their placement should follow that of the constitutional incumbents and the priority of other public functionaries should be fixed depending on their relative status.

31. Mr. Mahmud again contends that the High Court Division has rightly found that the current Warrant of Precedence in India has not been challenged by any quarter and as such the priority or status of the District Judges of India has not been reflected therein as per the 'ratio' decided in the case of All India Judges' Association and that cannot be a ground to refrain from assailing the impugned Warrant of Precedence in view of the sound jurisprudential base emanating from Masdar Hossain's case in our own jurisdiction and hence the impugned judgment is maintainable and the appeal is liable to the dismissed. The High Court Division has correctly found that from a bare reading of the Table of the impugned Warrant of Precedence, it is evident that some constitutional and public functionaries have been placed together at different serial numbers haphazardly, arbitrarily, irrationally, inequitably and unreasonably inasmuch as the Cabinet Secretary, the Principal Secretary to the Government and the Chiefs of Staff of the Army, Navy and Air Force have been bracketed together at serial No.12; but stunningly enough, some constitutional office-holders like the Members of Parliament have been placed at Serial No.13, and the Attorney-General, Comptroller and Auditor-General and Ombudsman have been placed at Serial No.15.

32. Mr. Mahmud finally submits that the High Court Division has not committed any wrong in holding that under the constitutional scheme, the Prime Minister, the Speaker and the Chief Justice respectively head the three organs of the State, the scheme appears to have been accorded recognition in the previous Warrant of Precedence of 1975 to the extent of the Speaker and the Chief Justice being placed at the same Serial No.4 but it appears that quite inexplicably, that arrangement has been disturbed in the impugned Warrant of Precedence where the position of the Chief Justice has been downgraded by placing the Speaker at Serial No.3 without any justifiable reason and as such the impugned judgment is maintainable.

33. We have considered the submissions of Mr. Abdur Rob Chowdhury on behalf of the appellant, Mr. Rokanuddin Mahamud with Mr. Asaduzzaman on behalf of the respondent

No.l, Mr. Murad Raza, learned Additional Attorney General on behalf of the respondent nos.2 and 3, perused the impugned judgment and order, and the materials on record.

34. In determining the *locus standi* of the writ petitionerrespondent No.1 the High Court Division having referred to Article 102 of the Constitution observed that except for an application for habeas corpus or quo warranto a writ petition in the nature of certiorari, mandamus or prohibition can be filed by a person aggrieved. The High Court Division referred to the English case of Exparte Sidebotham (1880) 14 Ch.D.458 wherein the court defined an aggrieved person is a person "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something". It has been rightly noticed that the apex courts of the sub-continent were influenced by the English decisions. However, in the case of Mian Fazal Din v. Lahore Improvement Trust, 21 DLR (SC) 225, the Supreme Court of Pakistan had taken somewhat liberal view to the following effect : ".....the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense; but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty, which if not performed or performed in a manner not permitted by law, would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise." The High Court Division rightly noticed that with the increase of governmental functions the English Courts found the necessity of liberalizing the rule on *locus standi* view to preserve the integrity of the rule of law in the cases of R.V. Metropolitan Police Commissioner ex p. Blackburn [1968] 1 All E.R. 763, Blackburn v. Attorney-General [1971] 2 All E.R. 1380 and of R.V. Metropolitan Police Commissioner ex p. Blackburn [1973] All E.R. 324 wherein the duty owed by the public authorities was to the general public and not to an individual or to a determinate class of persons and the applicants were found to have *locus standi* as they had 'sufficient interest' in the performance of the public duty. The Supreme Court of India in the case of S.P. Gupta and others v. President of India and others reported in AIR 1982 SC 149 observed "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is, by reason of poverty, helplessness of disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application..... seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."

35. In the case of Bangladesh Sangbadpatra Parishad Vs- Bangladesh and others reported in 43 DLR (AD) 126, the Association of news paperowners as the petitioners challenged an award delivered by the Wage Board. In this case public interest litigation was not involved. The news paper-owners were competent to challenge the award themselves. The Appellate Division held that the Association of the news paper-owners had no *locus standi* to file the case. However, in the case of Bangladesh Retired Government Employees' Welfare Association Vs. Bangladesh reported in 46 DLR (HCD) 426, the High Court Division held that the Retired Government Employees' Welfare Association had a *locus standi* to file the case observing that: "Since the Association has an interest in ventilating the common grievance of all its members who are retired Government employees, in our view, this Association is a 'person aggrieved'....."

36. In the instant case the High Court Division observed: "The expression 'person aggrieved' means a person who even without being personally affected has sufficient interest in the matter in dispute. When a public functionary has a public duty owed to the public in general, every citizen has sufficient interest in the performance of that public duty." In the case of Dr. Mohiuddin Faroque v. Bangladesh reported in 49 DLR (AD)1, Mostafa kamal, CJ observed: "48.....the traditional view remains true, valid and effective till to-day in so far as-individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved, it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102."

37. In the said case B.B. Roy Chowdhury,J observed: "In this backdrop the meaning of the expression "person aggrieved" occurring in the aforesaid clauses (1) and (2) (a) of Article 102 is to be understood and not in an isolated manner. It cannot be conceived that its interpretation should be purged of the spirit of the Constitution as clearly indicated in the Preamble and other provisions of our Constitution, as discussed above. It is unthinkable that the framers of the Constitution had in their mind that the grievances of millions of our people should go unredressed, merely because they are unable to reach the doors of the court owing to abject poverty, illiteracy, ignorance and disadvantaged condition. It could never have been the intention of the framers of the Constitution to outclass them. In such harrowing conditions of our people in general if socially conscious and public-spirited persons are not allowed to approach the court on behalf of the public or a section thereof for enforcement of their rights the very scheme of the Constitution will be frustrated. The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government, or a local authority in not fulfilling its constitutional or statutory obligations. It does not however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries."

38. It appears that the writ petitioner-respondent No.1 is a member of the judicial service and the Secretary-General of Bangladesh judicial Service Association. He averred that he is conscious of his duty as a citizen in consonance with Article 21 of the Constitution and to ensure the prevention of illegal and unconstitutional encroachments upon the civil rights of the indefinite number of people or citizen of Bangladesh he is interested in the welfare of those people of the Republic and aware of the fundamental rights enshrined in Articles 27 and 31 of the Constitution. In view of the statements made in the writ petition the writ petitioner-respondent No.1 having sufficient interest feels aggrieved by the impugned Warrant of precedence and accordingly he filed the writ petition in his capacity as a concerned, affected and aggrieved person to protect the interest of indefinite number of people of Bangladesh and to uphold the rule of law by way of public interest litigation and to prevent illegal and arbitrary placement of the constitutional functionaries and the members of

the judicial service in inappropriate places in the Warrant of Precedence in derogation of their dignity and status in public perception. The writ petitioner does not appear to be either an officious by-stander or an interloper or a busy body to invoke writ jurisdiction under Article 102 of the Constitution to bring to the notice of the High Court Division a public wrong or a public injury which is justiciable. The High Court Division having relied on the principles enunciated in the case of secretary, Ministry of Finance v. Md. Masdar Hossain and others 52 DLR (AD) 82, Kazi Mokhlesur Rahman v. Bangladesh and another. 26 DLR (AD) 44 and Ekhushey Television Ltd. and others v. Dr. Chowdhory Mahmood Hasan and others, 54 DLR (AD) 130 rightly held that it is a probono publico litigation and the writ petitioner being a person aggrieved within the meaning of Article 102 of the Constitution has *locus standi* to invoke the writ jurisdiction.

39. On the question of judicial review of the impugned warrant of precedence the High Court Division observed as under:

> "In judicial review, the Court is concerned with the question whether the impugned action is lawful or unlawful and the basic power of the court in relation to an illegal decision is to quash it. If the matter has to be decided again, it must be done by the original deciding authority. The court exercises the power of judicial review on the basis that powers can be validly exercised only within their limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the constitution or the laws. The court also exercises the power of judicial review if an impugned action or decision is *malafide* and in case of violation of fundamental rights. Judicial review is a common law remedy in England. In 'Administrative Law", by H.W.R. Wade, 6th edition, it has been mentioned at page 280 "The courts of law have inherent jurisdiction, as a matter of common law, to prevent administrative authorities from exceeding their powers or neglecting their duties." The power of judicial review conferred by Article 102 in our jurisdiction is a basic feature of the constitution and in view of the decision in Anwar Hossain Chowdhury's case (1989) BLD (Special Issue)1, it cannot be taken away or curtailed even by amendment of the Constitution."

40. The High Court Division has taken the above views on consideration of the cases of Apex Court including the case of Dr. Mohiuddin Farooque V. Bangladesh, 49 DLR(AD)1. In the case of Mohiuddin Farooque, this Division observed:

> "The expression 'person aggrieved' means a person who even without being personally affected has sufficient interest in the matter in dispute. When a public functionary has a public duty owed to the public in general, every citizen has sufficient interest in the performance of that public duty."

41. We fully endorse the views taken by the High Court Division.

42. We have to decide whether the civil executive officers are within the scheme of the constitution and whether judicial officers are different in respect of powers and functions from the civil executive officers and whether the civil executive officers can be treated as inferior or subordinate to the judicial officers or vice versa. In Masder Hossain's case the Appellate Division having considered the provisions and scheme of the constitution held that Chapter II of Part VI of the Constitution contains provisions for the subordinate judiciary and that judicial service is quite separate and distinct from the executive service of the Republic. This court observed: "The judicial service has a permanent entity as a separate service altogether and it must always remain so in order that Chapter II of Part VI is not rendered

nugatory." The members of the subordinate judiciary are independent in the exercise of their judicial functions while members of the administrative executive service carries out the decisions of the political executives and they are not independent in the discharge of their duty and therefore, the members of the administrative executive service or members of the other services cannot be placed on a par with the members of the judicial service or subordinate judiciary either constitutionally or functionally. Therefore, there is no difficulty in holding that though civil executive officers being in the service of the Republic are within the scheme of the Constitution they are different in respect of powers and functions from the judicial officers. In the scheme of the Constitution and in view of the judgment passed in Masder Hossain's case we have no hesitation in holding that the members of the judicial service cannot be treated subordinate to the administrative executives and vice versa.

43. In view of this Division's decision in Masder Hossain's case that judicial service is a separate service altogether from the administrative executive service and independent in the discharge of its judicial function and in view of our finding that writ petitioner-respondent No.1 being a member of the judicial service is an aggrieved person to uphold the legal rights of the writ petitioner-respondent no.1 and other judicial officers which have been violated by the impugned Warrant of precedence placing the constitutional functionaries and the members of the judicial service i.e. the District judges and other judicial officers below their status and positions in derogation of their dignity and status in public perception.

44. In this connection the High Court Division held that 'The three organs of the State, namely, the Executive, the Legislature and the Judiciary are headed by the Prime Minister, the Speaker and the Chief Justice respectively and the three organs are to perform their respective functions within the bounds set by the Constitution. The political executives, that is to say, the Ministers including the Prime Minister exercise the executive power of Republic. The legislators exercise the legislative power while the Judges of both the Higher Judiciary and the Subordinate Judiciary exercise the judicial power of the Republic. It must not be lost sight of the fact that in the case of Mujibur Rahman (Md) ...V... Government of Bangladesh, 33 DLR (AD) 111, it was held in paragraph 71 that both "the Supreme Court and the Sub-ordinate Courts are the repository of judicial power of the State." Constitutionally, functionally and structurally, judicial service stands on a different level from the civil administrative executive services of the Republic. While the function of the civil administrative executive services is to assist the political executives in formulation of policies and in execution of the policy decisions of the Government of the day, the function of the judicial service is neither of them. It is an independent arm of the Republic which sits on judgment over parliamentary, executive and quasi-judicial actions, decisions and orders. To equate and to put on the same plane the judicial service with the civil administrative executive services is to treat two unequals as equals".

45. The High Court Division has rightly held the functions of the three organs of the state which are independent in the performance of its respective fields. Mr. Murad Reza, learned Additional Attorney General fails to repel the observations of the High Court Division.

46. We have perused the Warrant of Precedence of the neighbouring countries. In India the president's Secretariat by notification dated 26- 07-1979 issued the following table with respect to the rank and precedence of the persons named therein, the relevant entries of which have been stated below:-

Serial No.

"1. President.

2. Vice-President.
3. Prime Minister.
4. Governors of states within their respective states.
5. Former Presidents.
5A.....
6. Chief justice of India. speaker of the Lok Sabha
7. Cabinet Minister of the union...
7A.....
8. .....
9. judges of the Supreme Court .
9A.....
10. .....
11. Attorney General, Cabinet Secretary.....
12. Chiefs of Staff holding the rank of full General of equivalent rank.
13. .....
17. Chairman, Central Administrative Tribunal.
.....
Chairman, union service Commission.

18.....
23. Army commander/ Vice Chief of the Army Staff or equivalent in other in other Services.
.....
Secretary to the president.
Secretary to prime Minister.
24. .....
26. Joint secretaries to the Government of India and officers of equivalent rank, officers of the rank equivalent rank.
Note 1: The order in this Table of Precedence is meant for state and Ceremonial occasions and has no application in the day-to-day business of the Government.....
....."

47. The Warrant of Precedence for Pakistan is a protocol list at which Government of Pakistan functions and officials are seated according to their rank and office. The relevant entries in the table is modified on 13-11-2010 as under:

Article No. "1. President of Pakistan.
Prime Minister of Pakistan
. .....
2. Speaker of the National Assembly of Pakistan.
.....
3. Chief justice of the Supreme Court of Pakistan Senior Federal Ministers.
.....
4..... .....
Attorney General to the Government of Pakistan (If of the Status of Federal Minister).
5. .....
6. Chief of the Army Staff.
Chief of the Naval Staff.
Chief of the Air Staff.
7. .....
8. .....

9. .....
10. Advisors/Special Assistants to the Prime Minister Secretaries General to the Federal Government.
.....
11. Envoys Extraordinary and Ministers Plenipotentiary.
12. judges of the Supreme Court of Pakistan.
.....
.....
17. Attorney General for Pakistan.
.....
24. Senior joint Secretaries/joint Secretaries to the Federal Government.
.....
25.....
26. Deputy Director General intelligence Bureau.
.....
District and Session judge.
.....
Additional District and Session judges.
..... 29.....
Extra Assistant Commissioners/ Deputy District officers.
judicial Magistrate/Civil judge.
Deputy Superintendents of Police.
30.....

"The Order of Precedence in Sri Lanka the protocol list at which Sri Lanka government officials are seated according to their rank. This is not the list of succession.

- The President
- The Prime Minister
- The Speaker of the Parliament
- .....
- .....
- .....
- The Chief justice
- .....
- .....
- .....
- Members of the Parliament of Sri Lanka. There is no established order of precedence over members of parliament in general, although each party has its internal ranking.
- Attorney General
- Judges of the Supreme Court of Sri Lanka
- .....
- .....
- .....

"The following is the Australia Table of Precedence:
1. The Queen of Australia (Elizabeth II)
2. The Governor-General of Australia
3. .....

4. The prime Minister
5. The president of the Senate and the Speaker of the House of Representatives in order of appointment:
6. The Chief Justice of Australia
7. .....
8. Members of the Federal Executive Council:
Ministers.....
22. The Chief of the Defence Force
23. .....
24. Members of parliament (see list of Australian Senators and list of members of the Australian House of Representatives)
25. Judges of Federal courts and Deputy Presidents of the Australian Conciliation and Arbitration Commission in order of appointment.
26. .....
.....
39. The Secretaries of Departments of the Australian public Service and their peers.
1. Vice-Chief of the Defence Force.
2. Chief of the Army.
3. Chief of the navy.
4. Chief of the Air Force.
42.....”

48. It has been found that in those countries their Warrant of Precedence are different from that of Bangladesh. Because in the notes, in serial No.1 of the impugned Warrant of Precedence it has been stipulated that the order in the Warrant of Precedence is to be observed for State and ceremonial occasions as well as for all purposes of the Government. But the Warrant of Precedence of the neighbouring countries are not similar because in those countries the Warrant of Precedence are not being used for all purposes of the State. In view of the above, the High Court Division has rightly held that ‘this is perhaps the only instrument of the government for determination of one’s relative status in the eyes of the public’. The High Court Division having analyzed the impugned Warrant of Precedence found that the Chief Justice has been downgraded to Serial No.4 without any justifiable reason while the Speaker has been upgraded to Serial No.3 of the impugned Warrant of Precedence though in the Warrant of Precedence of 1975 both of them were placed at Serial No.4.

49. It is to be noted that Vice-President was placed at Serial No.2 and the Prime Minister was placed Serial No.3 of the Table of the Warrant of Precedence of 1975. Because of the abolition of the post of Vice- President the post of Prime Minister was upgraded to Serial No.2 and the Speaker was upgraded to Serial No.3 alone keeping the Chief Justice in Serial No.4 thereby degrading the position of the Chief Justice which is not contemplated in the Constitution. The Chief Justice should be placed at Serial No.3 of the impugned Warrant of Precedence along with the Speaker. Similarly the Judges of the Appellate Division should be placed at Serial No.7 and those of the High Court Division as well as the Attorney General be placed at Serial No.8. The Members of Parliament, the Comptroller and Auditor General and Ombudsman should be placed at Serial No. 12. The Chairman of the Public Service Commission should also be placed at Serial No.15 in the impugned Warrant of Precedence. We hope that the Government shall act accordingly in the light of the above observation.

50. The High Court Division rightly found that many constitutional functionaries are not placed in proper place of the table of the Warrant of Precedence but the Cabinet Secretary and other senior administrative executives and some other functionaries have been placed above them and bracketed at Serial No.12, but some constitutional functionaries like the Members of Parliament have been placed at Serial No.13, and the Attorney General, Comptroller and Auditor-General and Ombudsman have been placed at Serial No.15, and the Chairman of the Public Service Commission has been placed at Serial No.16, in derogation of their status and position as envisaged in the Constitution. The High Court Division having considered the respective status and positions of different constitutional functionaries and the persons in service of the Republic rightly held that though impugned Warrant of Precedence is a policy decision of the Government yet "in the absence of evidence of any discernible guidelines, objective standards, criteria or yardsticks upon-which the impugned Warrant of Precedence is ought to be predicated, we feel constrained to hold that the said Warrant of Precedence cannot shrug off the disqualification of being arbitrary, irrational, whimsical and capricious and is, therefore, subject to judicial review under Article 102 of the Constitution."

51. We do not accept the contention of Mr. Abdur Rob Chowdhury and Mr. Murad Reza that the object of determining the warrant of precedence in relation to their work for the entire country. We also fully endorse the views that the Warrant of Precedence being a policy decision of the government which is not amenable under Article 102 of the Constitution. This warrant of precedence no doubt carries the status, benefits and other facilities. Unless and until an officer attains certain status, he is not entitled to use a vehicle or accommodation. In the administrative services as soon as an officer is promoted to the rank of Joint Secretary, he is entitled to use a vehicle and such other status and benefits. If such officer is promoted to the post of Additional Secretary, he will get corresponding higher benefits than a Joint Secretary and a Secretary to the Government is getting much higher benefits than an Additional Secretary. This will be evident from the following fact.

52. When this judgment was being prepared, the Ministry of Public Administration by notification dated 29th January, 2015 published under the heading "*cwaKvicvß miKwi KgKZv‡`i mÿgy³ we‡kl AwMg Ges Mwo †mev bM`vqb bxwZgvjv, 2014 (ms‡kvwaZ) |*"

53. In the definition clause;

(*M*) *Òcwa Kvicvß KgKZvÓ A_-*

(*A*) *miKv‡ii hyM¥-mwPe, AwZiw³ mwPe I mwPe,*

(Av) we.wm.Gm. (BKbwgK) K¨vWv‡ii hyM¥-cavb ev Z`aŸ KgKZv, †jwRm‡jwUf I msm` welqK wefv‡Mi hyM¥-mwPe (WvdwUs) †_‡K Z`aŸ chv‡qi KgKZv hviv miKwi hvbevnb Awa`ßi n‡Z mve¶wYK e¨env‡ii Rb¨ Mwoi myeav cvß Z‡e Dwjwl Z c`mg‡n Pz³‡Z ev †cl‡Y wb‡qwRZ KgKZve„Ë Gi Aš—f³ n‡e bv;

54. Paragraph 4 provides the qualification for availing special advance facilities which are as under:

"4| we‡kl AwMg myeav cwßi †hvM¨Zv |Ñ(1) G bxwZgvjvi Aaxb we‡kl AwMg myeav cwßi Rb¨ msNókó KgKZv‡K mve¶wYK Mwo e¨env‡ii cwaKvicvß KgKZv n‡Z n‡e|

(2) †Kvb cwaKvicvß KgKZv Mwo †mev bM`vq‡bi †PK D‡Ëvjb Ki‡j wZwb Zv cZ¨vnvi Ki‡Z cvi‡e bv| Gi e¨Z¨q n‡j kZKiv 15 fvM nv‡i mÿ c`vb Ki‡Z n‡e|

(3) bxwZ 4 (1) I (2) Gi wb¤ewYZ ‡¶‡Î †Kvb GKRb cwaKvicvß KgKZv G bxwZgvjvi Aaxb Mwo µ‡qi Rb¨ we‡kl AwMg myeav cv‡eb, h_v t

(K) cwaKvicvß KgKZvi cvc¨Zv hZw`b _vK‡e ZZw`‡bi g‡a¨ Av‡e`b Ki‡Z cvi‡eb| Z‡e gÄyi Av‡`k Rwii Zwi‡L n‡Z PvKyix Aek¨B GK eQi _vK‡Z n‡e;

(L) bxwZgvjv Rwiicj, †Kvb cwiaKvicvß KgKZv miKwi hvbevnb Awa`ßi n‡Z Mwo myeav MnY Ki‡j I Mwo †mev bM`vq‡bi Av‡e`b Ki‡Z cvi‡eb| wKš we‡kl AwMg MnYcwiK Mwo µ‡qi cj hvbevnb Awa`ßi Mwo e¨venv‡ii myeav Avi envj _vK‡e bv|"

55. Under paragraph 6 provisions have been made for affording advance amount for purchasing a vehicle as under:

"6| we‡kl AwMg gÄyix kZ|Ñ(1) miKv‡ii c‡¶ Rbckvmb gš¿Yvjq G bxwZgvjvi Aaxb Mwo µ‡qi AwMg gÄyixKvix KZc¶ e‡j we‡ewPZ n‡e|

(2) cwiaKvicvß KgKZve„Ë cwiwkó-ÔKÕ di‡g AwM‡gi Av‡e`b h_vh_ KZc‡¶i gva¨‡g Rbckvmb gš¿Yvj‡qi mwPe eivei `wLj Ki‡eb|

(3) bxwZ 6 (1) I G bxwZgvjvi Ab¨vb¨ D‡Ïk¨ cÖYK‡í miKvi Rbckvmb gšÍv‡qi Abyôv‡j c‡qvRbxq ev‡RU eivÏ Ki‡e|

(4) miKvi GKRb cwiaKvicvß KgKZv‡K Mwo µq Ges Gi Avbyw½K Ab¨vb¨ LiPwÎ `vhgb †iwR‡÷kb, wdU‡bm, U¨v· †Uv‡Kb BZ¨vw` mKj LiP wbev‡ni Rb¨ GKKvjxb mÿgyª AwMg wn‡m‡e m‡ev"P 25,00,000/- (cuPzk j¶) UvKv c`vb Ki‡Z cvi‡e| G Qvov evRvi g‡j¨i mv‡_ m½wZ †i‡L hyª m½Z mgq Aši Aši miKvi we‡kl AwM‡gi cwigvY cybt wbaviY Ki‡Z cvi‡e|

(5) bxwZ 6 (2) Gi Aaxb Av‡e`bKvix‡`i ga¨ n‡Z †R¨ôZv Abyôv‡i we‡kl AwMg gÄyix Ki‡Z n‡e,Z‡e G‡¶‡Î Aemi Mg‡bi ev wc.Avi.Gj. wbKUeZx KgKZv‡`i AMwaKvi c`vb Ki‡Z n‡e|

(6) ‡Kvb KgKZv Zvi mgM PvKzwiKv‡j 01 (GK) ev‡ii †ekx G bxwZgvjvi Aaxb †Kvb AwMg MnY Ki‡Z cvi‡e bv|"

56. In the definition clause *"cwiaKvicvß KgKZv"* means Joint Secretary, Additional Secretary, Secretary and some other officers of similar ranks who are entitled to full time use of a vehicle. Those officers will be entitled to advance amount of money for purchasing a vehicle. In paragraph 10 it is stated that such officers shall be entitled to Tk.45,000/- per month for the maintenance, fuel, diver's salary etc. The advance amount shall be adjusted by one hundred twenty equal installments and after such adjustment such officer shall be entitled to own the car free from all encumbrances. Such facilities are not given to a judicial officer. Therefore, though the Warrant of Precedence is a policy decision of the Government, it is used for all purposes of the Government. It also carries with status, benefits and perks. Mr. Rokonuddin Mahmood submitted that the District Judges are not entitled to use the VIP lounge in the Air Ports in Bangladesh while leaving the country and entering into the country, whereas the Joint Secretaries and other officers holding the similar status are using those benefits. On our query in this regard, the learned Additional Attorney General fails to give any reply as to whether the submissions of Mr. Mahmood is correct or not. In the absence of repelling the submission, we may accept the submission of Mr. Rokonuddin Mahmood. It is very unfortunate to note that the District Judges who are holding the highest post in the subordinate judiciary are not given the status and such benefits, they are legally entitled to.

57. On the question of the placement of the District Judges in the Table of Warrant of Precedence the High Court Division has made a distinction between the Judges of the higher judiciary and the lower judiciary and held as under:

> "In that regard, we note that in Article 152(1) of the Constitution, 'Judicial service', 'the service of the Republic' and 'District Judge', amongst others, have been defined. "Judicial service" means a service comprising persons holding judicial posts not being posts superior to that of a District Judge. 'The service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic. "District Judge" includes Additional District Judge."

> "The logic that the District Judges and Deputy Commissioners being district level officials have been equated with and bracketed together at serial No. 24 in the Table of the impugned Warrant of Precedence is fallacious for simple reason that the District Judges wield the state-authority. Again, Deputy Secretaries to the Government being national-level post holders have been placed below the Deputy Commissioners at serial No. 25 in the Table. So we think, the impugned Warrant of Precedence has no sound basis."

58. As regards the placement of the District Judges at serial No. 24 in the Table while the Judges of the High Court Division at serial No. 9, the High Court Division held that this placement has no rational basis. It observed :

> "Judges of the High Court Division have been placed at serial No. 9, though District Judges have been placed at serial No. 24 in the Table of the impugned Warrant of Precedence. But when a District Judge is appointed a Judge of the High Court Division under Article 95(1) of the Constitution, he makes a quantum leap from serial No. 24 to serial No. 9. The non-placement of the District Judges at a serial number in close proximity to that of the Judges of the High Court Division is in absolute disregard of the constitutionally recognised potential of upward mobility is really astounding."

59. Mr. Murad Reza, the learned Additional Attorney General was unable to give any satisfactory reply in this regard. The placement of those two offices as above is clear indicative that it was an arbitrary exercise of discretionary power. Article 95(2)(b) provides that a Judge of the Supreme Court shall be appointed by the President if he has, for not less than ten years, held judicial office in the territory of Bangladesh'. At present a judicial officer cannot become a District Judge unless he has minimum twenty years in the judicial service.

60. The District Judges being the highest post in the judicial service cannot be equated with or placed at par with administrative and defence executives at serial No.24 in the Warrant of Precedence and thereby the position and status of the District Judges have been degraded for all practical purposes. It will not be out of place to mention here that in view of this pronouncement, the observations made by this Division on 14.03.2013 in Civil Appeal No. 79 of 1999 stands reviewed. In fact, that order was made in order to remove the anomaly relating to the payment of salaries and other benefits to the Judges of the subordinate judiciary in pursuance of the Judicial Pay Commission Report that was not implemented for a long time. But by this pronouncement, the status of District Judges are upgraded equivalent to the status of the Secretaries to the Government accordingly, the District Judges and equivalent judicial officers will be entitled to the status and other benefits on the basis of the direction given below.

61. It has already been noticed that the impugned Warrant of Precedence is to be observed for all purposes of the Government. The placement of District Judges at Serial No.24 in the Table is derogatory to the dignity and status of the District Judges.

62. In view of the above discussions and findings it would not be proper to place the District Judges and members of judicial service holding equivalent judicial posts in the Table above the Chiefs of Defence Services. Rather ends of justice would be best served if the District Judges and equivalent judicial officers are placed in the same table of the Warrant of Precedence along with the Secretaries and equivalent public servants. There is no denying that members of the judicial service (i.e., the subordinate judiciary) are not holders of the

constitutional posts but they being public servants are in the service of the Republic and the nature of their service is totally different from the civil administrative executives. District Judges and holders of the equivalent judicial posts are the highest posts in the subordinate judiciary. In view of the provisions of the Article 116A of the Constitution all persons employed in the judicial service and all magistrates exercising judicial functions shall be independent in the exercise of their judicial functions, so it is immaterial to say that members of judicial service or the subordinate judiciary are above the senior administrative and defence executives.

63. In this context, it is pertinent to state here that the three organs of the State, namely, the executives, legislatures and judiciary, are to perform their respective functions within the perimeters set by the Constitution. For observing harmonious relationship amongst the three organs of the State, the Constitution recognises and gives effect to the concept of equality among the three organs of the State and the concept of check and balances. Therefore, the impugned Warrant of Precedence should be framed in such a manner so as to reflect the concept of equality amongst the three organs of the State.

64. As regards the eight-point directives issued by the High Court Division an argument has been advanced that the judiciary cannot issue such directives upon the writ respondent No.1 for making a new Warrant of Precedence. In the facts and circumstances of the case, it has to be taken into consideration that the directives issued by the High Court Division cannot be issued to follow in verbatim and in that view of the matter, the impugned Warrant of Precedence should be modified and the eight-point directives of the High Court Division should also be modified because in the present case the aforesaid deviation from the constitutional arrangement has been made in the impugned Warrant of Precedence by placing some of the constitutional functionaries and the members of the judicial service inappropriate places in the Warrant of Precedence in derogation of their dignity and status. This Warrant of Precedence is illogical will be evident from the fact that the Attorney General has been placed at serial No. 15, below the posts of some civil and other executives. He is the chief law officer of the country. In India the Attorney General has been placed together with the Cabinet Secretary and above the Chiefs of staff holding the rank of full General. In Sri Lanka he has been placed above the Judges of the Supreme Court. In view of these anomaly the High Court Division rightly held that ‘a bare reading of the Table of the impugned Warrant of Precedence, it is evident that some constitutional and public functionaries have been placed together at different serial numbers haphazardly, arbitrarily, irrationally, inequitably and unreasonably.’

65. In this context we may profitably refer to the decisions of the apex courts of the sub-continent. In the case of Secretary, Ministry of Finance Vs. Masdar Hossain, 52 DLR(AD)82, an argument was made by the learned Attorney-General that the judiciary cannot direct the Parliament to adopt legislative measures or direct the President to frame Rules under the proviso to Articles 133 of the Constitution. Mustafa Kamal, C.J. has rightly held relying upon certain decisions of this Court that-

> “Although we shall depart in some ways from the direction given by the High Court Division, we think that in the present case there is a constitutional deviation and constitutional arrangements have been interfered with and altered both by the Parliament by enacting the Act and by the Government by issuing various Orders in respect of the judicial service. For long 28 years after liberation sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution remains unimplemented. When Parliament and the executive, instead of implementing the provisions of Chapter II of

> Part VI follow a different course not sanctioned by the Constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course. This exercise was made by this Court in the case of Kudrat-e-Elahi Panir Vs. Bangladesh, 44 DLR(AD) 319. We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution. The Supreme Court of Pakistan too, consistent with the mandate contained in Article 175 of the present Constitution of Pakistan, to secure the separation of the judiciary from the executive, issued directions in the nature of adoption of legislative and executive measures in the case of Government of Sindh Vs. Sharaf Faridi, PLD 1994 SC 105."

66. In the case of All India Judges' Association V. union of India, AIR 1993 SC 2493, Supreme Court of India observed:

> "However, it cannot be contended that pending such essential reforms, the overdue demands of the judiciary can be overlooked. As early as in 1958, the Law Commission of India in its 14th report on the System of Judicial Administration in this country made certain recommendations to improve the system ....."

67. The report made recommendations in respect of various aspects of the service conditions of the judicial officers and also emphasised that there was no connection between the service conditions of the judiciary and those of the other services .....

> "These recommendations were made to improve the system of justice and thereby to improve the content and quality of justice administered by the Courts. The recommendations were made in the year 1958. Over the years the circumstances which impelled the said recommendations have undergone a metamorphosis. Instead of improving, they have deteriorated making it necessary to update and better them to meet the needs of the present times."
>
> "Although the report made the recommendations in question to further the implementation of the Constitutional mandate to make proper justice available to the people, the mandate has been consistently ignored both by the executive and the legislature by neglecting to improve the service conditions. By giving the directions in question, this Court has only called upon the executive and the legislature to implement their imperative duties. The Courts do issue directions to the authorities to perform their obligatory duties whenever there is a failure on their part to discharge them. The power to issue such mandates in proper cases belongs to the Courts. As has been pointed out in the judgment under review, this Court was impelled to issue the said directions firstly because the executive and the legislature had failed in their obligations in that behalf. Secondly, the judiciary in this country is a unified institution judicially though not administratively. Hence uniform designations and hierarchy, with uniform service conditions are unavoidable necessary consequences. The further directions given, therefore, should not be looked upon as an encroachment on the powers of the executive and the legislature to determine the service conditions of the judiciary. They are directions to perform the long overdue obligatory duties."

68. When there is a deviation from the constitutional arrangements or constitutional arrangements have been interfered with or altered by the Government or when the Government fails to implement the provisions of Chapter II of Part VI of the Constitution and instead follow a different course not sanctioned by the Constitution, the High Court Division as well as the Appellate Division is competent enough to give necessary directions to follow the mandate of the Constitution. This means the Apex Court of the Country is competent to issue directions upon the authorities concerned to perform their obligatory duties whenever there is a failure on their part to discharge their duties. It is stipulated that the order in the impugned Warrant of Precedence is to be observed for State and ceremonial occasions as well as for all purpose of the Government. Therefore, it cannot be said that the impugned Warrant of Precedence involves the Policy Decision of the government rather it has deviated, altered or interfered with the constitutional arrangements or envisaged a different course not sanctioned by the Constitution.

69. At this point, we feel constrained to observe that the Warrant of Precedence of the neighbouring countries include the holders of highest civil awards, however the impugned Warrant of Precedence of our country does not include such dignitaries, who are not constitutional or public functionaries. As such, it is expected that those dignitaries who have been honoured or decorated with civil awards, e.i., Shadhinata Padak, or Ekhushey Padak, and those valiant freedom fighters who have been honoured with galantry awards of Bir Uttam should be included in the Table of the impugned Warrant of Precedence in such order as deemed appropriate.

70. In view of the foregoing discussions, observations and findings the appeal is disposed of and the eight-points directives issued by the High Court Division are hereby modified, and the impugned Warrant of Precedence being based on utter irrationality and arbitrariness is to be modified and amended in the following manner:

1) As the Constitution is the supreme law of the land, all constitutional functionaries shall be placed first in order of priority in the Table of the impugned Warrant of Precedence.

2) Members of judicial service holding the posts of District Judges or equivalent posts of District Judges shall be placed at Serial No.16 in the Table along with the Secretaries to the Government and equivalent public servants in the service of the Republic.

3) Additional District Judges or holders of equivalent judicial posts shall be placed at the serial number 17 immediately after the District Judges. Accordingly, the appeal is disposed of with expunction, modification, observations and findings as stated above.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Hasan Foez Siddique
Mr. Justice A.H.M. Shamsuddin Choudhury

CIVIL APPEAL NO.58 OF 2012
(From the judgment and order dated 16.1.2011 passed by the High Court Division in Writ Petition No.9927 of 2008.)

Mohammad Zafar Iqbal and others
Vs.
Bangladesh and others

For the Appellants:
Mr. Manjill Murshid, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.

For Respondent Nos.1: Mr. Murad Reza, Additional Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on- Record.

For Respondent No.5: Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For Respondent Nos.2-4: Not Represented.

Date of hearing: 4th March, 2014.

Acquisition and Requisition of Immovable Property Ordinance, 1982
Section 3:
The law gives the Deputy Commissioner to acquire any property if he is satisfied that the property is needed for public purpose. In the notice the Deputy Commissioner specifically mentioned the purpose for which the notice was served that it was for the public purpose of Baddyabhumi. This order clearly spelt out the actual existence of requirement for a public purpose within the meaning of section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982. If the reason for the issuance of the notice of acquisition was not one contemplated by law, the initiation of the proceedings would be void. It is the Deputy Commissioner who is primarily the judge of the facts which would attract section 3 of the ordinance. This opinion cannot be replaced by any other authority. ...(Para 13)

The order of revocation does not reveal the purpose for such revocation. This shows that the decision communicated by the respondent No.1 was a colourable exercise of power. Before proceeding with the acquisition process the acquiring authority obtained Ministry of Planning Commission's approval. The High Court Division also observed that a portion of the mass graveyard is located on the extended under construction academic building of the USTC. Therefore, the conclusion arrived at by the High Court Division that the location of East Pahartali mass graveyard is a disputed question of fact is a self contradictory finding. To say otherwise, the High Court Division made this observation without application of its judicial mind. ...(Para 14)

The preservation of the memory of the martyrs and the national heros is necessary:
A mausoleum for the memory of martyrs of the war of liberation is normally constructed on the site where the martyrs were killed and buried. This site cannot be shifted to another site. It is because a monument is built on the killing spot with a view

to remember the memories of martyrs who sacrificed their lives for the independence of the country. The preservation of the memory of the martyrs and the national heros is necessary because this would remind our next generation the cruel assassination and mass killing by the Pakistani occupation army with their accomplices and also to show the outsiders that this is the evidence of our history of liberation war. If this memory is erased from the memory of our next generation, the very cause for which martyrs had sacrificed their lives would be fruitless. ... (Para 20)

We are satisfied that the impugned order revoking the acquisition proceedings is nothing but sheer arbitrary abuse of the power and this cannot be legally sustainable in law. The High Court Division has totally ignored that aspect of the matter. The High Court Division in the premises, fell in an error in not interfering with the impugned order of the revocation of the acquisition proceedings initiated for the constitution of the monument at the site of the mass graveyard. The High Court Division also made conflicting findings and this has caused due to non application of judicial mind. The action of the respondents cannot be sustainable in law and the same is liable to be interfered with. ...(Para 31)

JUDGMENT

Surendra Kumar Sinha, J:

Prelude:

1. Admittedly during nine months of the historic struggle for national liberation, the Pakistani Occupation Army along with their collaborators such as the Rajakars, Al-sams, Shanti Committee, Biharis created a reign of terror in this country by killing *en masse* intellectuals, professionals, litterateur, journalists, students, members of the minority community, women and freedom fighters and dumped their dead bodies at different mass graveyards all over the country. Gary J. Bass wrote, Lt. General A.A.K. Niazi, who soon became the millitary commander in East Pakistan, would later frankly write of 'killing of civilians and a scorched-earth policy' condemning 'a display of stark cruelty, more merciless than the massacres .... by Changes (Genghis) Khan .... or at Jallianwala Bagh by the Bitish General Dyer'. (The Blood Telegram, page 70). General Niazi admitted the 'indiscriminate use of force' that 'earned for the military leaders names such as, 'Changez Khan' and 'Butcher of East Pakistan (Ibid). 'Although Pakistani forces had concentrated on Awami League activists, "Hindus Seem (to) bear brunt to general reign of terror". (Ibid P.72). Desaix Myers, a brash young development official, says, 'I was running around Chittagong in my white car, going up to millitary guys, saying, 'I've heard rumors about young guys violating women, and I know that you as a disciplined officer would not want that to get out to the international press'. We felt we had displomatic immunity. It just didn't seem that risky at the time' (Ibid). Myers wrote a desolate letter home to his friends lamenting what he had seen in a small, improvished Hindu village in the country side. The Army had 'lined up people from their houses, shot down the lines, killing close to six hundred'. (Ibid). "AT THE WHITE HOUSE, KISSINGER'S AIDES WERE SHAKEN BY BLOOD'S reporting. 'It was a brutal crackdown', says Winston Lord, Kissinger's special assistant, who says he read some of the cables. 'In retrospect, he did a pretty good reporting job, says Samuel Hoskinson, about Blood. 'He was telling power in Washington what power in Washington didn't want to hear." (Ibid, P.73).

2. 'The more the news from East Pakistan accumulates, the more harrowing it becomes. Senseless murder, hysterical cruelty and what trust be a creeping fear run like a current throughout this packed mass of human beings. All this the distant observer may assume despite the protests of East Pakistan Government at some of the stories that have been given circulation. By now the picture is a little more clear and a great deal more gruesome. Enough first-hand reports from Dacca(Dhaka) itself and from some of the major towns have come into confirm that what is happening is far worse than what might have been expected in a war of East Pakistan resisting the forces of the Central Government in their demand of independence. The accounts pilling up make conditions in East Pakistan sound only too much like the massacres that broke out between Muslims and Hindus in the months leading up to the partition of India'. (Bangladesh Document, Pages 391-391).

3. Such devilish exultation of devastating large and furious ethnic cleansing were never found in the history. It is detected after a thorough survey later on by different organizations, social workers, historians that about three million people were butchered by them. It was also revealed that in some cases citizens were buried alive with hellish cruelty and brutal exultation. The Government of Bangladesh, Ministry of Liberation War Affairs undertook a project pro-forma, annexure-G, for construction of monuments at 9 slaughter places of 1971 and their preservation initially at a cost of Tk.597.36 (in lakh). The main objective of the project is to conserve and to develop slaughter places used by occupied army and their local accomplices during war of liberation. It was pointed out that thousands of heroic sons of this soil were victims of genocide unleashed by the occupied forces in different clean places scattered through of the country in 1971. Of them, 9 places have been chosen to develop under this project and serial No.5 is the "killing spot at East Pahartali of P.S. Panchlaish, District-Chittagong.

4. The project was aimed for preservation of "national tradition" of historical memory and preservation of killing spot used for genocide by Pakistani occupied army and their local aids during great war of independence as a symbol of patriotism to inspire the consciousness of nationality and preservation of memory of the national heros through construction of monuments. The main objective of the project is 'to conserve and develop slaughter places used by the occupied army and their local accomplices during war of liberation. Thousands of heroic sons of the soil were victims of genocide unleashed by the occupied forces in different killing places scattered throughout the country in 1971'. While explaining the nature of benefits from the project it was pointed out that 'The unvaluable contribution made by the victim(s) of brutal forces genocide during the war of liberation through which People's Republic of Bangladesh emerged as an independent and sovereign state, will be exposed to the whole nation as well as to the world. Thousands of people of all ages from different corners of the country and also from abroad will visit the project area and this would be an important and attractive tourist centre in international standard. This will inspire the people of the country and uphold the glory and dignity of Bangladesh in the world'.

5. It was pointed out that independence of Bangladesh through great war of independence was the best achievement in the history of Bangalees during the last thousand years. The Bangalees were to face cruel assassination and mass killing of the Pakistani barbarous occupying army in this life and death war of independence. It was further observed that "This monument to be built in the killing spot bring the blood of great proud of unparalled sacrificing lives of freedom fighters hero Bangalees for the independence, in one side and in another side the memory of unbearable misdeed of killing men by the Pakistani occupying beast, the rust of the civilized world, its collaborator Rajakar, Al-bodor, Al-shams, some part

of the Biharis and members of Peace Committee will remain as evidence of the history and will motivate the people with purity, sanctity and honesty and strength through generation to generation".

6. Thereafter three models of the proposed monuments were selected through countrywide competition. The then Prime Minister approved the model which stood first according to recommendation of the expert committee. Subsequently, the Prime Minister's office advised to take initiative for acquiring land under private ownership by letter under memo dated 20th December, 1998, written by the Ministry of Cultural Affairs. In the selection process first decision was taken for preservation of killing spots situated at 8 places in 6 districts of Bangladesh and to construct monuments on those places. In the inter ministerial meeting held on 7th January, 2001, decision was taken to construct monument at 9 places. Estimates have been received from 7 Deputy Commissioners in respect of area of land and determination of its price. Then Prime Minister promised implementation of the project without delay in a freedom fighters convention at Paltan Moydan on 23rd March, 2002, on the occasion of national day. Besides, decision was taken for processing approval of the project in interministerial meeting held in the Ministry of Liberation War Affairs on 5th March, 2002. The project was approved by the Planning Commission on 24th August, 2002, with an estimated costs as mentioned above. The former Prime Minister declared to undertake such project during discussion with Projanma-71 and subsequently Prime Minister's office advised to take initiative for acquiring land under private ownership.

Facts:

7. The Ministry of Cultural Affairs on proper survey located B.S. Plot Nos.152 and 153 measuring an area of 1.754 acres of land under East Pahartali mouza as the location of mass graveyard and decided to acquire the said plots and issued notices under section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982 upon the owners to file objections, if there be any, for construction of war memorial monument on 8th September, 2003. The authority directed the requiring body to deposit Tk.94,00,000/- for payment as compensation to the affected persons. Pursuant thereto, the requiring body deposited the money.

8. University of Science and Technology (USTC), the respondent No.5, instituted Other Class Suit No.217 of 2002 in the Second Court of Joint District Judge, Chittagong seeking its right, title and interest in respect of those two plots on the averments inter alia that it had purchased the same by deed dated 19th May, 2002, from the recorded owners for the purpose of establishing USTC and started cleaning and preparing ground for construction of seven storey outdoor-indoor hospital complex under the name Shahid Zia-ur Rahman Complex and it also submitted a plan to the Chittagong Development Authority (CDA) for approval. It is further stated that when the expansion of the project was on going, local police suddenly stopped the construction works which constituted the cause of action for filing the suit. After institution of the suit it prayed for interim injunction and the court passed an interim order of injunction on 28th November, 2002. The matter ultimately came up to the High Court Division in Civil Revision No.1891 of 2003 and the proceedings of the suit was stayed by order dated 15th November, 2003.

9. In the mean time 5 kathas of land near the disputed plots were donated for the construction of a monument by the owners on the request of the Mayor of the Chittagong City Corporation. During the intervening period, the USTC continued its construction works on the disputed plots as it appeared from its statements. The Executive Engineer, Chittagong

Public Works Department by its letter under memo dated 31st May, 2003, sent detailed information and design of the proposed work of memorial monument at East Pahartali mass graveyard site. Accordingly, the appellant No.2, son of a martyr lodged a complaint to the area commander of Chittagong Cantonment. The CDA also prohibited the USTC to make any constructions on the site of war mass graveyard. The CDA did not approve the plan and advised the USTC to obtain clearance from the Ministry of Liberation War stating that the site was earmarked for memorial monument and 'no objection' of the Ministry of Liberation War was required to construct its building at the site of mass graveyard. After discussions with the representative of the USTC, the said Ministry intimated that the monument would be constructed on 20 decimals of land to be donated by respondent No.5 in favour of the Ministry of Liberation war. Accordingly, USTC donated 20 decimals of land by a registered deed. Pursuant thereto the Ministry of Liberation War by letter under memo dated 22nd December, 2005, intimated the acquiring authority that a decision was taken to construct the memorial monument on 20 decimals of land donated by the USTC.

10. On receipt of the said intimation, the acquiring authority by letter under memo dated 31st May, 2006, revoked the acquisition proceedings and directed the Ministry of Liberation War to take back Tk.94,00,000/- deposited earlier. This order of the acquiring body has been challenged by the appellants, who are heirs of martyrs by a writ petition in the High Court Division. Their claim is that the said decision is arbitrary, malafide and issued with collateral purpose of conferring undue benefit to the USTC. They further claimed that the decision to revoke the acquisition proceedings has been taken on the influence of the USTC authority and that this decision has been taken for giving undue advantage to the USTC to perpetuate its abuse of power and total disregard to the public interest in persevering the site of the mass graveyard as enshrined in Article 24 of the Constitution. USTC denied the allegations made in the petition and claimed that after revocation of the acquisition proceedings, the CDA approved the plan of the USTC and thereupon it constructed a building on the said plots and that the concerned Ministry directed for construction of the memorial monument on the site of land donated by it.

Findings:

11. The High Court Division observed that on the day of issuance of rule no cause of action in respect of the first component of the rule existed since the Ministry of Land accorded approval of the order of revocation of the acquisition proceedings on 18th February, 2008, as the rule was issued on 14th December, 2008, and that the mausoleum on the gifted land and the academic building of USTC are almost complete. It was further observed that the location of the East Pahartali mass graveyard is a disputed question of fact. However, the High Court Division observed that the amendment of the project proforma by the Planning Commission is definitely an act of revision of the earlier decision of the Government and concluded by observing that "We strongly feel that in spite of the existence of the under construction academic building of the USTC on the disputed property, it is always at the discretion of the Executive to initiate a new process of acquisition of the East Pahartali mass graveyard from its identification and conservation. That exclusively belongs to the province of the Executive. If need be, the Government may appoint high-powered committee for proper identification and conservation of all war must graveyards across the country."

12. Leave was granted to consider whether the revocation of the acquisition proceedings tantamount to giving undue advantage to the USTC in total disregard to the public interest in preserving the site of mass graveyard; secondly, whether the action of the respondents was arbitrary and malafide; and thirdly, whether the High Court Division has considered the

conservation of the mass graveyard located at East Pahartali Mouza appertaining to B.S. Plot Nos. 152 and 153 while maintaining the revocation order.

Reasons and decisions:

13. There is no dispute that the mass graveyard of the martyrs of the war of liberation is located at East Pahartali. It is also not disputed that an acquisition proceedings was initiated for acquisition of B.S. Plot Nos.152 and 153 measuring an area of 1.754 acres of land for the purpose of preservation of national tradition of historical memory and the preservation of killing spot used for genocide by the Pakistani occupation army and their collaborators during the war of liberation as a symbol of patriotism to inspire the consciousness of nationality through the construction of a monument. The notices upon the owners of the land were also issued in order to enable them to file objection against such acquisition. It is also not disputed that the requiring body in pursuance of the requisition of the acquiring body deposited Tk.94,00,000/- for payment of compensation to the affected persons within the stipulated time. These admitted facts manifestly suggested that before proceeding with the acquisition process, the acquiring body surveyed the area and after ascertaining and satisfying the location formed its opinion to acquire B.S. Plot Nos.152 and 153. The law gives the Deputy Commissioner to acquire any property if he is satisfied that the property is needed for public purpose. In the notice the Deputy Commissioner specifically mentioned the purpose for which the notice was served that it was for the public purpose of Baddyabhumi. This order clearly spelt out the actual existence of requirement for a public purpose within the meaning of section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982. If the reason for the issuance of the notice of acquisition was not one contemplated by law, the initiation of the proceedings would be void. It is the Deputy Commissioner who is primarily the judge of the facts which would attract section 3 of the ordinance. This opinion cannot be replaced by any other authority.

14. The order of revocation does not reveal the purpose for such revocation. This shows that the decision communicated by the respondent No.1 was a colourable exercise of power. Before proceeding with the acquisition process the acquiring authority obtained Ministry of Planning Commission's approval. The High Court Division also observed that a portion of the mass graveyard is located on the extended under construction academic building of the USTC. Therefore, the conclusion arrived at by the High Court Division that the location of East Pahartali mass graveyard is a disputed question of fact is a self contradictory finding. To say otherwise, the High Court Division made this observation without application of its judicial mind.

15. During the pendency of the writ petition the High Court Division directed to hold an inquiry for ascertaining the disputed location of the mass graveyard. A Kanungo of the office of the Land Acquisition Officer was deputed for the purpose, who submitted a report in which he could not pin-point the location of East Pahartali mass graveyard and submitted a conflicting report. The High Court Division based its decision relying upon it. It committed a fundamental error in arriving at such conclusion in failing to consider that before the USTC came to the scene, there was no dispute about the location of East Pahartali mass graveyard on plot Nos.152 and 153 and the authority after ascertaining the location proceeded with the acquisition process. This location, under no stretch of imagination was determined by experts having expertise in the field since the Ministry of Liberation Affairs is the competent authority on the subject and the Planning Commission had accorded approval of the project on being satisfied with the documents submitted with it.

16. What's more, even if it is assumed that there is dispute about the exact location of the East Pahartali mass graveyard, the ascertainment of the same ought not to have been given upon an employee like a kanungo of the Land Acquisition Office. It ought to have directed to hold inquiry by specialized persons in the field through the Ministry of Liberation War or through the Curator of national museum or the archaeology department. The decision should not be based on a report of a third class employee like a kanungo since the USTC had raised objection about the exact location of East Pahartali mass graveyard. It is under this juncture, we felt it desirable to ascertain the exact location. Accordingly, we directed the Secretary, Ministry of Liberation War Affairs to constitute an expert committee including one person each from the appellants and the USTC excluding the appellant No.2 Gazi Salauddin, against whom there was objection from the side of the USTC to ascertain and pin-point the exact location of East Pahartali mass graveyard and to report before this Division.

17. In pursuance of this direction, the concerned ministry constituted a seven member committee. USTC did not raise any objection against any of the members of the committee. On perusal of the annexures submitted with the report, we noticed that the committee had examined 20 persons. Mr. Kazi Aminul Islam is the son of a martyr who stated that B.S. Plot Nos.152 and 153 are the disputed site where the Pakistani army and their collaborators killed his father; that though he along with his brother Kazi Anwarul Islam was taken with his father, incidentally he along with his brother had survived and that he saw the incident of killing. Mr. Mahbubul Alam also stated that he saw the dead bodies of martyrs in the disputed plots where the USTC has undertaken construction of Zia Pratisthan. Mr. Abdul Quddus is a freedom fighter and he also stated that on the disputed plots the USTC has undertaken construction. Zahed Ahmed is the son of a martyr who corroborated the said statements. Same are the statements with respect to A.K.M. Sorowar Kamal, Gazi Taher Uddin and other persons. Some of them are freedom fighters and all of them stated in unisom that their near ones were killed and burried on the disputed plots where the USTC has undertaken construction of one of its buildings.

18. The expert committee in its report stated that after inspection of the mass graveyard area, a public hearing was held and in the said hearing eye witnesses of different areas were present and gave evidence including the members of martyrs, the freedom fighters and national professor Dr. Nurul Islam made statements. Dr. Nurul Islam told the committee that on one side of the mass graveyard the USTC donated 20 decimals of land to the Ministry of Liberation War where the monument was being constructed. Upon perusal of the statements of the witnesses, it was ascertained that the East Pahartali mass graveyard was known to the local people as "Jallad Khana"; that the USTC's under construction building is the exact location of mass graveyard; that the Ministry of Cultural Affairs' constituted committee decided in 1999 to construct the monument on the land earmarked as Baddyabhumi (mass graveyard); that the local people mentioned it as 'Jallad Khana' since 1971 and that the survivors from 10th November incident also located the area as mass graveyard. The concluding findings are reproduced below;

(1) 1999 mv‡j ms¯'wZ. gšYvjq KZ©K MwVZ KwgwU ¯'vbwU ea¨fwg wn‡m‡e wPwýZ K‡i RvqMv AwaMnY I ¯§wZ¯¤ wbgv‡Yi wm×vš Íbq|

(2) 2000 mv‡j miKvi GB Rwg AwaMn‡Yi Rb¨ 94 jÿ UvKv eivÏ K‡i|

(3) PÆMvg K¨v›Ub‡g›U I ¯'vbwU msiÿ‡Yi Rb¨ D‡`¨vM MnY K‡i| wKš, miKvi D‡`¨vM MnY Kivq Zviv Avi AMmi nqwb|

(4) gy³hy× hv`yNi D‡Øva‡bi mgq G ea¨fwg †_‡K gwU msMn K‡i wb‡q hvq|

(5) ¯'vbxq RbMY 1971 mvj †_‡K GB ¯'vbwU‡K Rjv`Lvbv wn‡m‡e AwfwnZ KiZ|

(6) 1971 mv‡j hviv GB GjvKvq emevm Ki‡Zb I †h `ßvRb e¨w³ 10 b‡f¤i nZ¨vKvÛ †_‡K †evSv †M‡Qb Zviv, GB ¯vbwU‡K ea¨fwg wn‡m‡e wPwýZ K‡i‡Qb|
(7) MYïbvbxi mgq mevB GK‡hv‡M `we K‡ib GB ¯vbwU ea¨fwg Ges Zv msiÿY K‡i hv‡Z knx`‡`i cwZ k×v I Zv‡`i i‡ni gvM‡di vZ Kvgbv Kiv hvq Zvi Rb¨ c‡qvRbxq e¨e¯v MnY Ki‡Z n‡e|
(8) Rwgi gwjK GB ¯vb †_‡K ea¨fwgi ¯§iZ msiÿ‡Yi Rb¨ cwiPvjbv Rwg `vb K‡ib|
(9) Wvt bi‡j Bmjvg wb‡RB ea¨fwg ¯§iZ msiÿ‡Yi Rb¨ 20 kZvsk Rwg `vb K‡i‡Qb|

19. This report was signed by the members of the committee including professor Sams Ud-doha, Registrar, USTC who is also a member of the fact finding committee of East Pahartali mass graveyard location. Therefore, there is no scope on the part of the USTC to dispute the correctness and impartiality in locating the exact spot of the mass graveyard. Though the USTC contested the leave petition through its learned counsel by filing caveat, and the investigation was also conducted in its presence, it did not file any concise statement and also did not contest the appeal. This conduct of the USTC sufficiently indicated that it having realized that one of its extension buildings is being constructed on the site of mass graveyard, as no fruitful purpose would be served to contest the matter it refrained from contesting the appeal. More so, the acquiring body before proceeding with the acquisition process on being satisfied that the East Pahartali mass graveyard is located on B.S. Plot Nos.152 and 153, decided to acquire those plots. This satisfaction of the acquiring body is corroborated by the investigation report by the fact finding committee. This fact has been admitted by the USTC's founder Dr. Nurul Islam and its Registrar. There is no gainsaying that the gift of 20 decimals of land as made by the USTC was not bonafide rather it was made with a view to frustrate the acquisition process. If it was convinced that the mass graveyard was not located on the disputed plots, no question had arisen at all on its part to donate this area of land for the purpose of construction of mausoleum. It could have prayed for a local investigation in its suit for ascertaining the dispute by excavating the site when there was no construction thereon.

20. A mausoleum for the memory of martyrs of the war of liberation is normally constructed on the site where the martyrs were killed and burried. This site cannot be shifted to another site. It is because a monument is built on the killing spot with a view to remember the memories of martyrs who sacrificed their lives for the independence of the country. The preservation of the memory of the martyrs and the national heros is necessary because this would remind our next generation the cruel assassination and mass killing by the Pakistani occupation army with their accomplices and also to show the outsiders that this is the evidence of our history of liberation war. If this memory is erased from the memory of our next generation, the very cause for which martyrs had sacrificed their lives would be fruitless. The University may shift its academy building to another place but the location of a mass graveyard cannot be shifted because the history of our glorious liberation struggle lies in it, and the sentiments of the heirs of martyrs and the freedom fighters are enshrined in it.

21. A country's civilization can be traced from its past history. In Egypt the great civilization which produced the Pyramids and Sphinx and many other things which we cannot go into now. In China we can trace vast periods of time during which it grew into a great central empire and developed writing and silk-making and many beautiful things. In India at the old civilization represented now by the ruins of Mohenjo-Daro in the Indus valley; and the Dravidian civilization. If we see the relics of Mohenjo-Daro and Harappa, there can be little doubt that there lie many such buried cities and other remains of the handiwork of ancient men in between these two areas; that in fact, this civilization was widespread over large part of India. Sir Johan Marshall tells us one thing that 'stands out

clear and unmistakable both at Mohenjo-daro and Harappa is that the civilization hitherto revealed at these two places is not an ancient civilization, but one already age-old and stereotyped on Indian soil, with many millenniums of human endeavour behind it. Thus India must henceforth be recognized, along with Persia, Mesopotamia, and Egypt, as one of the most important areas where the civilizing process were initiated and developed'.

22. There is no gainsaying that a historical site is so valuable to a nation that needs no further elaboration and the same should be preserved in the manner the relics are preserved in a museum. It is worth in this juncture to mention some remarks of Jawahralal Nehru, 'Indeed, to learn history one should have as many maps and as many pictures as possible; pictures of old buildings, ruins, and such other remains of those times as have come down. These pictures fill up the dry skeleton of history and make it live to us. History, if we are to learn anything from it, must be successions of vivid images in our mind, so that when we read it, we can almost see events happening. It should be a fascinating play which grips us, a comedy sometimes, more often a tragedy, of which the stage is the world, and the players are the great men and women of the past.

23. 'Pictures and maps help a little to open our eyes to this page out of history. They should be within reach of every boy and girl. But better even than pictures is a personal visit to the ruins and remains of old history. It is not possible to see all of these, for they are spread out all over the world. But we can always find some remains of the past within easy reach of us, if we keep our eyes wide open. The big museums collect similar remains and relics. In India there are plenty of remains of past history, but of the very ancient days there are very few. Motenjo-Daro and Harappa are perhaps the only instances so far ..... Or, go nearer still, to the old Ashoka pillar in our city of Allahabad or Prayag. See the inscription carved on it at the bidding of Ashoka, and you can almost hear his voice across 2000 years'. (Glimpses of world history, P.31-32)

24. A mausoleum is an external free-standing building constructed as a monument enclosing the interment space or burial chamber of a deceased person or people. A mausoleum may be considered a type of tomb or the tomb may be considered to be within the mausoleum. Historically, mausolea were, and still may be, large and impressive constructions for a deceased leader or other persons of importance. In the Roman Empire, these were often ranged innecropoles or along roadsides: the via Appia Antica retains the ruins of many private mausolea for miles outside Rome. A mausoleum encloses a burial chamber either wholly above ground or within a burial vault below the superstructure. This contains the body or bodies, probably within sarcophagi or interment niches.

25. In the United States, the term may be used for a burial vault below a larger facility, such as a church. In 2010, a woman was discovered to have exhumed her deceased husband and twin sister, and was keeping the remains in her Wyalusing, Pennsylvania home. Notable mausolea are; Mausoleum of Mohammad V; The Dr. John Garang De Mabior Mausoleum in Juba, South Sudan; Agostinho Neto's Mausoleum in Luanda, Angola; Kwame Nkrumah Mausoleum; Marien Ngouabi's mausoleum in Brazzaville, the Republic of Congo; The Pyramids of ancient Egypt and Nubian pyramids are also types of mausolea; Abdel Nasser Mosque, is the Mausoleum of Gamal Abdel Nasser, in Cairo, Egypt.; Taj Mahal at Agra, India; Humayun's tomb at Delhi, India; Mausoleum of the First Qin Emperor biggest underground mausoleum; the pyramids of ancient China are also types of mausolea; Mausoleum of Genghis Khan in Ordos City, Inner Mongolia; Tomb of Jahangir at Shahdara, near Lahore, Pakistan; Mausoleum of Mao Zedong, Beijing, National Chiang Kai-shek

memorial Hall, Taipei; Quezon memorial, in Quezon City, Philippines; Hamilton Mausoleum at Hamilton in Scotland; Mausoleum of Augustus in Rome, Italy; Abraham Lincoln's tomb in Spring Field, Illinois; Eaton Mausoleum, Toronto, Ontario; The Meiji Jingu Shrine in Tokyo are amongst a few around the globe.

26. The findings of High Court Division that the first component of the rule non-existed on the day of issuance of the rule are inconsistent and based on non-application of judicial mind. It failed to notice that the appellant had challenged the revocation of the acquisition proceedings on the ground that the USTC authority on prevailing upon the Ministry of Liberation War secured the order of revocation arbitrarily with malafide motive and for collateral purpose, and that the writ petition was not for enforcement of the policy of the Government. It was field for the purpose of preserving the spot of glorious history of liberation war and the sacrifice made by potential people as victims of war criminals atrocity are to be commemorated through the establishment of a monument. It has stressed upon the technicalities of the language used in the rule issuing order without looking at the totality of the cause for which the appellant sought judicial review. I have pointed out earlier that the object of the project is to conserve and develop slaughter places used by the Pakistani occupation army and their cohorts, and this will expose to the whole nation as well as the world the brutal orgies demonstrated by them during our liberation struggle period.

Arbitrary and malafide act:

27. It is on record that the Ministry of Liberation War Affairs, the respondent no.1, selected the disputed site for construction of a mausoleum for the memory of the martyrs of War on being satisfied that mass graveyard is located there. Initially it did not accord approval of the USTC's plan for construction of academic building when the CDA sought its opinion. However, at later stage the USTC raised objection in the selection of the site and made a representation with a proposal to construct the mausoleum on a chunk of land to be donated by it near the site of mass graveyard. Thereafter, for reasons not known, the respondent No.1 made a u-turn and approved the CDA's proposal for approval of the USTC's building construction plan. It did not assign any reason for reversing its earlier decision. It ignored the historical importance of the construction of the monument on the exact location. There are allegations of collusion and arbitrary exercise of power in revoking the acquisition proceedings against the respondent No.1. Except the USTC, none including the Ministry of Liberation War Affairs filed affidavitin- opposition refuting the allegations. Therefore those allegations must be taken as true. The very conduct of the respondents irresistibly indicated that the decision was taken on being prevailed upon by the USTC.

28. The project description consists components such as (i) main stambha, (ii) circular wall, flag stand and alter with base, (iii) central yard, (iv) main entrance, (v) alter for expressing esteemed greeting stating that PWD had already implemented a similar project at Rayer Bazar Baddyabhumi. This shows that the project was taken by citing the Rayer Bazar Baddyabhumi as model and the monument will be constructed in the similar manner. If that being so, it is difficult to adhere to the opinion that such project can be implemented on 20 decimals of land. If the Rayer Bazar baddyabhumi project was taken as the model, the authority was justified in undertaking to implement the project on 1.754 acres of land and in no case, such project can be implemented on 20 decimals of land. The latter decision is thus arbitrary and taken in colourable exercise of power is apparent from the above fact.

29. The other findings of the High Court Division that the amendment of the project pro-forma by 'the Planning Commission is definitely an act of revision of the earlier decision of

the government' and that this revision of the earlier decision 'cannot be termed as irrational or arbitrary or unreasonable in any view of the matter' are not only misleading but also contrary to the material on record. On the one hand it held that the mausoleum has been 'constructed on the disputed property though those are not fully complete as yet' and on the other breath it observed that 'we have no hesitation in holding that the provision of Article 24 are not judicially enforceable'. It failed to consider that the Government had already approved the project and the appellants are not seeking a direction for taking measures for the protection against disfigurement, damage or removal of monuments project in accordance with Article 24. The High Court Division has arrived at such conclusion basing on the language of the rule issuing order without looking at the dispute in controversy.

30. The crux of the matter is whether the revocation of the acquisition proceedings on the representation of the USTC and the shifting of the site of monument from B.S. Plot Nos.152 and 153 was bonafide or malafide. If the action of the respondents is found arbitrary and malafide, the judicial review of the decision of the Government is permissible and there cannot be any doubt about it. Secondly, the observation that 'inspite of the existence of the under-construction academic building of the USTC on the disputed property, it is always at the discretion of the Executive to initiate a new process of acquisition of the East Pahartaly mass graveyard for its identification and conservation' and direction to appoint a high proved committees for proper identification of the mass graveyard speak volume that the High Court Division though satisfied that the mass graveyard is located on the disputed plots, was somehow shirk its responsibility in resolving the main issue in controversy and allowing the USTC to complete the construction works on the disputed plots so that in no case the monument could be constructed on the site of mass graveyard. It has already found that a portion of the mass graveyard is located at the USTC extension building. If the USTC is allowed to complete its construction, the investigation as pointed out for locating the mass graveyard would be a futile attempt after the completion of the USTC building. There is no need at all to ascertain this fact since it has already been ascertained.

Conclusion :

31. In view of the statements made in the plaint that it had started clearing and preparing ground work for construction of the building, there is no dispute that till the date of institution of the suit on 28th November, 2002, no construction of the extended building was started. After securing order of injunction it had negotiated with the Ministry of Liberation War to abandon the project and ultimately it convinced the Ministry to shift the site of the project in exchange of 20 decimals of land to be donated by it for the construction of the monument. Thereafter on the basis of a letter issued by the Ministry, the CDA had approved the plan on 4th May, 2003. The appellants asserted that they had no knowledge at all about this secret negotiations and as soon as they came to know about the decision, they moved the High Court Division on 14th December, 2008. This conduct of the USTC sufficiently proved that it had prevailed upon the concerned Ministry with ulterior motive to drop the acquisition proceedings. In view of what stated above, we are satisfied that the impugned order revoking the acquisition proceedings is nothing but sheer arbitrary abuse of the power and this cannot be legally sustainable in law. The High Court Division has totally ignored that aspect of the matter. The High Court Division in the premises, fell in an error in not interfering with the impugned order of the revocation of the acquisition proceedings initiated for the constitution of the monument at the site of the mass graveyard. The High Court Division also made conflicting findings and this has caused due to non application of judicial mind. The action of the respondents cannot be sustainable in law and the same is liable to be interfered with. Thus we find merit of the appeal.

32. Accordingly, we issue a writ and direct that the decision of the respondent Nos.1-3 in revoking the order of acquisition of land located at East Pahartali appertaining to B.S. Plot Nos.152 and 153 under police station Khulshi, Chittagong by memo dated 31st May, 2006 and the memos dated 22nd December, 2005 and 18th May, 2006 are declared to have been issued without lawful authority and of no legal effect. The respondent Nos.1-3 are hereby directed to proceed with the acquisition proceedings in accordance with law. However, we would like to observe that the acquisition notice should be issued upon the USTC which has already purchased the disputed land in question and is entitled to the compensation. The appeal is allowed without any order as to costs.

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APPELLATE DIVISION

PRESENT

Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Mohammad Imman Ali

CIVIL APPEAL NO. 39 of 2006
(From the Judgment and orders dated 22-06-2005 passed by the High Court Division in Civil Revision No. 923 of 2003)

The Government of Bangladesh, represented by Chairman Abandoned Property Management Board -- Appellant

Versus

Md. Mizanur Rahman -- Respondent

For the Appellant : Mr. Biswajit Deb Nath, Deputy Attorney General, instructed by Mr Zainul Abedin, Advocate-on-record

For Respondent No.1 : Mr. Syed Mahbubar Rahman, Advocate-on-record

Respondent Nos.2-7 : Not represented

Date of Hearing : The 12th May, 2015

The Code of Civil Procedure, 1908
Rules: 1 and 2 of Order XVIII:
In the instant case, the defendant did not admit the case of the plaintiff and filed written statement denying the plaintiff's claim that the suit property was an abandoned property, so it was the plaintiff who had the right to begin the hearing of the suit as per provision of rule 1 of order XVIII of the Code. Rule 2(1) of the Code has clearly provided that on the day fixed for hearing of the suit the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove, the other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case. Therefore, there was no scope on the part of the plaintiff to avoid examination of witness and state the facts of the plaint at the hearing of the suit. … (Para 7)

Pleading of the plaintiff is not evidence:
As no witness was examined, no statement was made before the Court in relation to matters of fact under inquiry, that means, the facts stated in the plaint were not stated before the court on the date fixed for hearing of the suit and, in fact, it was only the pleading of the plaintiff and not the evidence which was before the Court. Therefore, in the absence of any evidence, the trial Court could not decree the suit. … (Para 9)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This appeal, by leave, is from the Judgment and order dated 18-6-2005 passed by a Single Bench of the High Court Division in Civil Revision No.5259 of 2002 discharging the Rule.

2. The appellant, the Government of the Peoples Republic of Bangladesh, represented by the Chairman, Abandoned properties Management Board, filed Title Suit No.62 of 1997 in the Court of Assistant Judge, 6th Court, Dhaka for declaration that the exparte decree passed in Title Suit No.103 of 1996 of the same Court was illegal, void and not binding upon it. Eventually the suit was transferred to the Court of Additional Assistant Judge, 5th Court, Dhaka and was renumbered as Title Suit No.27 of 1999.

3. The defendant filed written statement to contest the suit. Surprisingly at the hearing of the suit, none of the parties examined any witness and no document was filed and proved in accordance with law, even then the trial Court decreed the suit. On appeal the Appellate Court allowed the appeal by its judgment and decree dated 02.07.2002 and dismissed the suit. Against the judgment and decree of the Appellate Court, the plaintiff preferred Civil Revision No.923 of 2003 before the High Court Division. A learned Judge of the Single Bench by the impugned judgment and order discharged the Rule. Leave was granted in Civil Petition for Leave to Appeal No.1151 of 2005 giving rise to this appeal.

4. Heard Mr. Biswajit Deb Nath, learned Deputy Attorney General for the appellant and Syed Mahbubar Rahman, learned Advocate-on-record for respondent No.1.

5. The High Court Division discharged the Rule on the findings:

> "It is found that neither the plaintiff-petitioner nor the defendant opposite party examined their witnesses or adduced any evidence to prove their respective case. Despite this position the trial Court decreed the suit in favour of the plaintiff-petitioner on the basis of a photostat copy of one page Bangladesh Gazette holding that the suit property is an abandoned property even though the photostat copy of the said Gazette was not proved and marked exhibit in court by the plaintiff-petitioner. It is also found that the plaintiff-petitioner filed the instant suit for a declaration without seeking any declaration as to his legal character or right to property to the suit land. The present suit was therefore not maintainable being hit by section 42 of the Specific Relief Act. The appellate Court therefore rightly dismissed the suit setting aside the judgment and decree passed by the trial Court. The impugned judgment and decree therefore deserve no interference by this Court"

6. It is an elementary legal principle that pleading is not the evidence and the facts stated in the plaint must be owned by the plaintiff even a suit is heard exparte, but admittedly none was examined on behalf of the plaintiff and therefore, the facts stated in the plaint were not owned. In this regard, we may refer to the provisions of rules 1 and 2 of Order XVIII of the Code of Civil Procedure (the Code) which are as under:

> "1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts

alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

2(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case".

7. In the instant case, the defendant did not admit the case of the plaintiff and filed written statement denying the plaintiff's claim that the suit property was an abandoned property, so it was the plaintiff who had the right to begin the hearing of the suit as per provision of rule 1 of order XVIII of the Code. Rule 2(1) of the Code has clearly provided that on the day fixed for hearing of the suit the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove, the other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case. Therefore, there was no scope on the part of the plaintiff to avoid examination of witness and state the facts of the plaint at the hearing of the suit.

8. According to the Evidence Act, "Evidence" means and includes-

"(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry: such statements are called oral evidence:
(2) all documents produced for the inspection of the Court, such documents are called documentary evidence".

9. And as no witness was examined, no statement was made before the Court in relation to matters of fact under inquiry, that means, the facts stated in the plaint were not stated before the court on the date fixed for hearing of the suit and, in fact, it was only the pleading of the plaintiff and not the evidence which was before the Court. Therefore, in the absence of any evidence, the trial Court could not decree the suit.

10. We also failed to understand how the Chairman of Abandoned property Management Board could file the suit representing the Government of Bangladesh for the relief aforementioned. The learned Deputy Attorney General failed to show any provision of law under which a suit of the instant nature could be maintained at the instance of the Chairman of the Abandoned Property Management Board.

11. In view of the above, we find no illegality with the judgment and order of the High Court Division and no merit in the appeal. Accordingly, the appeal is dismissed, However, no order as to costs.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Md. Nizamul Huq

CIVIL APPEAL NO. 72 OF 2009
(From the judgment and order dated 21.03.2006 passed by the High Court Division in Civil Revision No.966 of 2002)

Most. Rabeya Khatoon being dead her heirs: Md. Abdur Rakib Sarker and others	:	.....Appellants. (In all the appeals)

Versus

Jahanara alias Shefali Bewa being dead her heirs: Salma Akter alias Most. Maya Khatun and others	:	.....Respondent. (In C.A. No.72/09)

For the Appellants. (In all the appeals)	:	Mr. Rokanuddin Mahmud, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For the Respondent No.1 (In all the appeals)	:	Mr. Mahabuby Alam with Mr. Probir Neogi, Senior Advocates, instructed by Mr. Zainul Abedin, Advocate-on-Record
For the Respondent No.2-10 (In all the appeals)	:	Exparte
Date of Hearing.	:	30.08.2016, 31.08.2016, 01.09.2016, 23.11.2016 06.12.2016 and 07.12.2016
Date of Judgment.	:	The 14th December, 2016

Mohamedan Law of Bequest:
Bequest by a Mohamedan to his heir of any quantum of property requires the consent of his other heirs after his death to be valid. But a bequest by a Mohamedan to any stranger (other than his heir) upto one-third of the surplus of his property which remains after payment of his funeral expenses and debts is valid and does not require consent of the heirs of the testator. Bequest to a stranger over and above one-third of the property of the testator which remains after payment of funeral expenses and debts of the testator requires the consent of the heirs of the testator after his death to be valid. ...(Para 11)

JUDGMENT

NAZMUN ARA SULTANA, J:

1. This civil appeal, by leave, is directed against the judgment and order dated 21.03.2006 passed by a Single Bench of the High Court Division in Civil Revision No.966 of 2002 making the Rule absolute reversing the judgment and decree dated 18.04.1999 passed by the learned District Judge, Sirajganj in Other Class Appeal No.89 of 1999 dismissing the appeal affirming the judgment and decree dated 30.04.1994 passed by the learned Subordinate Judge, Sirajganj in Other Class Suit No.39 of 1989 dismissing the suit.

2. The above mentioned Other Class Suit No.39 of 1989 was filed by two wives, one daughter and two other relations of Late Haji Moniruddin Sarker praying for declaration that the Wasiyatnama dated 21.03.1988 purportedly executed by Haji Moniruddin Sarker in favour of the defendant Nos.1-5 and the plaintiff No.2 is forged, fabricated, antedated, null and void and not binding upon the plaintiffs. The plaintiffs' case, in short, is that the suit property belonged to Haji Moniruddin Sarker. That the plaintiff Nos.1 and 2 are his two widows, the plaintiff No.3 is his daughter through his second wife Mst. Jahanara Khatoon-the plaintiff No.2, the defendant No.1 is his first wife, the defendant Nos.2, 4 and 5 are his daughters by his first wife and the defendant No.3 Md. Abdur Rakib is his grand son through his first daughter Ms. Rabeya Khatoon, the defendant No.2. That since his second wife Mst. Jahanara Khatoon-the plaintiff No.1 refused to give consent to the third marriage of Haji Moniruddin Sarker, he drove her out of the house with her daughter, the plaintiff No.3 and the plaintiff Nos.1 and 3 then made a complaint to the then Martial Law authority who, on making inquiry, instructed Haji Moniruddin Sarker to transfer share of his property in favour of plaintiff Nos.1 and 3. Haji Moniruddin Sarker accordingly executed and registered three kabala deeds on 21.11.1982 transferring some property in favour of his second wife and her daughter, the plaintiff Nos.1 and 3. That Haji Moniruddin Sarker subsequently obtained signatures of plaintiff Nos.1 and 3 on blank papers on the plea that those would be necessary for other purposes, but subsequently it transpired that Haji Moniruddin Sarker converted the said signed blank papers into a 'Nadabipatra' dated 21.11.1982 showing that the plaintiff Nos.1 and 3 relinquished their shares in the property of Haji Moniruddin Sarker. That after the death of Haji Moniruddin Sarker, on 08.04.1988 the plaintiffs filed Succession Case No.55 of 1988 wherein the contesting defendants filed a written statement disclosing about the Wasiyatnama and on inquiry the plaintiffs came to know about the said forged and antedated document which was created after the death of Haji Moniruddin Sarker and thus the plaintiffs have been compelled to file the suit.

3. The defendant Nos.1 and 3, the first wife and grand son respectively of Haji Moniruddin Sarker contested the suit by filing written statement. Their material case was that Haji Moniruddin Sarker had no male issue from the first and the second wife and as such he married the plaintiff No.2 as his third wife. That the plaintiff Nos.1 and 3 filed Complaint Case No.55 of 1981 before the Union Parishad for maintenance which was decreed for an amount of Tk.12,900/- and Haji Moniruddin Sarker paid the said amount to plaintiff Nos.1 and 3. Subsequently, the plaintiff Nos.1 and 3 filed complaint before the District Martial Law authority and Haji Moniruddin Sarker being pressurized transferred some properties by registered kabalas in favour of his second wife, the plaintiff No.1 and her daughter Mst. Maya Khatoon alias Salma Akter, the plaintiff No.3. That the plaintiff Nos.1 and 3 also executed and registered a deed of 'Nadabipatra' on 21.11.1982 relinquishing all their shares in the property of Haji Moniruddin Sarker. That Haji Moniruddin Sarker, during his life time,

transferred about .17 acre of land to Baitul Mokadda Mosque and he used to look after the affairs of the said Mosque as Mutwalli during his life time. That Haji Moniruddin Sarker disclosed also that after his death his grand son Md. Abdur Rakib, the defendant No.3 would look after the affairs of the said Mosque. That Haji Moniruddin Sarker sold out 2 bighas of land for an amount of Tk. 72,000/- and kept the entire amount with the Rupali Bank, Shahajadpur Branch and thereafter Haji Moniruddin Sarker executed the Wasiyatnama on 21.03.1988. That Haji Moniruddin Sarker appointed his grand son, the defendant No.3 Md. Abdur Rakib as executor of that Wasiyatnama. According to the Wasiyatnama the plaintiffs or defendants are not entitled to receive any money of the said bank account which was dedicated to Dariapur Baitul Mokaddes Jame Mosque for its remaining construction works. That Haji Moniruddin Sarker died on 08.04.1988 and thereafter, as per the terms of the Wasiyatnama, his grand son Md. Abdur Rakib, the defendant No.3, as the executor of that 'Wasiyatnama' got the said Wasiyatnama registered on 08.10.1988. That the plaintiff Nos.4 and 5 are not legal heirs of Haji Moniruddin Sarker. That the suit is liable to be dismissed with cost.

4. The defendant No.5, Mst. Mohera Khatoon alias Nabia Khatoon, one of the daughters of Haji Moniruddin Sarker through his first wife, the defendant No.1 also filed a separate written statement contending that the Wasiyatnama dated 21.03.1988 is forged, fraudulent and void; that the defendant No.3 Abdur Rakib created this Wasiyatnama in collusion with the deed writer. This defendant No.5, however, ultimately did not appear and contest the suit.

5. The trial Court dismissed the suit on making findings to the effect that the plaintiff Nos.4 and 5 were not the heirs of Haji Moniruddin Sarker, that the suit was bad for defect of party for not impleading the members of the managing committee of Dariapur Mddhayapara Baitul Mokaddas Mosque as parties in this suit, that the plaintiff Nos.1 and 3 relinquished their interest in the property left by Haji Moniruddin Sarker and that the impugned Wasiyatnama was a genuine one and Haji Moniruddin Sarker executed the said Wasiyatnama. The appellate Court below affirmed these findings and decision of the trial Court.

6. In revision the High Court Division, though did not differ with the findings of the Courts below to the effect that the impugned Wasiyatnama was genuine and Haji Moniruddin Sarker himself executed the same, decreed the suit declaring the impugned Wasiyatnama invalid. The High Court Division made observations to the effect that according to Mahomedan Law a bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator and that a Mahomedan cannot by will dispose of more than $\frac{1}{3}$ of the surplus of his estate after payment of his funeral expenses and debts and that bequests in excess of the legal one-third cannot take effect, unless the heirs consent thereto after the death of the testator. The High Court Division made observations thus "… … … Mahomedan Law clearly indicate that a Mahomedan is not permitted to dispose of by will more than a third of the surplus of his estate after payment of funeral expenses and debts and bequest in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator … … …". "… … … it is mandatory under the Mahomedan Law that unless an heir or heirs express their clear consent to a bequest after the death of the testator, such bequest is not legal and valid … … …...".

7. Being aggrieved by this judgment and order of the High Court Division the contesting defendants preferred Civil Petition for Leave to Appeal No.1246 of 2006 before this Division

and this Division granted leave to appeal to consider the submissions of the learned Advocate for the defendant-leave-petitioners to the effect

> that Dariapur Baitul Mokaddes Jame Mosque is a Waqf property and the defendant No.3, leave petitioner is not a legal heir of the testator Haji Moniruddin Sarker but a stranger, and the property bequeathed to this Mosque and the defendant No.3 did not exceed the legal one-third of the property of the testator and as such no consent of the heirs of the testator was necessary at all to make the bequest in favour of Mosque and defendant No.3 valid inasmuch as a Muslim can bequeath up to one-third of his property to strangers without the consent of his heirs; that the High Court Division without taking into consideration the fact that the defendant No.3 and the mosque were not heirs of the testator and without determining the quantum of the bequeathable one-third of the total estate of the testator was wrong in holding that the Wasiyatnama in question was invalid; that the validity of Wasiyatnama in question cannot be determined without first determining the size of the total estate of the testator and also the quantum of the bequests to the Mosque and the defendant No.3 Leave petitioner and hence the High Court Division was wrong in declaring the Wasiyatnama invalid.

8. Mr. Rokanuddin Mahmud, the learned Senior Advocate appearing for the appellants has made argument before us to the effect that the High Court Division was wrong in interpreting the Mahomedan Law as regards will. The learned Advocate has argued that the High Court Division though considered the relevant provisions of Mahomedan Law but has failed to interpret the same properly and consequently arrived at a wrong decision; that according to Mohamedan Law a bequest by a Mohamedan to a stranger, i.e., other than his heir, upto one-third of his property remains after payment of his funeral expenses and debts, does not require consent of the heirs of the testator to be valid; that admittedly the defendant No.3 of the original suit namely Md. Abdur Rakib Sarker, one of the present appellants, was not an heir of Haji Moniruddin Sarker at the time of his death since the mother of the defendant No.3, the daughter of Haji Moniruddin Sarker, was alive at that time. The learned Advocate has argued that this very important fact escaped the notice of the learned Judge of the High Court Division in declaring the impugned Wasiyatnama illegal and invalid. The learned Advocate has made submission to the effect also that in this Wasiyatnama Haji Moniruddin Sarker dedicated some money to a Mosque which also is not an heir of Haji Moniruddin Sarker. The learned Advocate has read out also the relevant provisions of Mahomedan Law and has argued that according to these provisions of Mahomedan Law any bequest of any quantum of property to an heir requires consent of other heirs of the testator after his death to be valid, but any bequest to any stranger i.e. not an heir, upto one-third of the surplus of the estate of the testator which remains after payment of his funeral expenses and debts, does not require consent of other heirs to be valid. The learned Advocate has submitted that in this case the defendant No.3 Md. Abdur Rakib Sarker was given much less than the legal one-third of the property of the testator Haji Moniruddin Sarker by this impugned Wasiyatnama and the Mosque also was given some cash money only by this Wasiyatnama which is also much less than the legal one-third of the testator's property and therefore this impugned Wasiyatnama is valid at least to the extent of the property given to the defendant No.3 and the Mosque. In support of this argument Mr. Rokanuddin Mahmud has furnished a written statement of the properties showing the total quantum of the property of the testator Haji Moniruddin Sarker and also the quantum of the properties bequeathed to two wives and 3 daughters of the testator Haji Moniruddin Sarker and also to the defendant

No.3 Md. Abdur Rakib Sarker and has argued that this written statement of the properties clearly shows that Md. Abdur Rakib Sarker was given only 1.40 acres of land by this impugned Wasiyatnama whereas, the total quantum of the land bequeathed by this Wasiyatnama was $12.70\frac{3}{4}$ acres out of total $37.93\frac{1}{2}$ acres of land of the testator Haji Moniruddin Sarker. Mr. Rokanuddin Mahmud has argued that the High Court Division did not bother even to find out what quantum of property was given to this defendant No.3 by the impugned Wasiyatnama. Mr. Rokanuddin Mahmud has concluded his argument making submissions to the effect that the law is that a bequest to any body other than an heir of the testator of any property not exceeding the legal one-third of the property of the testator is valid without the consent of the heirs of the testator and as such the impugned Wasiyatnama so far as it relates to the property given to the defendant appellant Md. Abdur Rakib Sarker and also the Mosque is valid.

9. Mr. Mahabuby Alam with Mr. Probir Neogi, the learned Senior Advocates appearing for respondent No.1 though made some submissions before us supporting the impugned judgment and order of the High Court Division but the learned Advocates could not deny the legal position that according to the Mahomedan Law a Mahomedan can bequeath upto legal one-third of his property to any body other than his heir without the consent of his heirs. The learned Advocates for the plaintiff-respondents have also examined the written statement of the properties furnished from the side of the appellants showing the quantum of the properties bequeathed to different persons by the impugned Wasiyatnama and ultimately conceded the facts that the defendant No.3 Md. Abdur Rakib Sarker was not an heir of Haji Moniruddin Sarker and he was given much less than legal one-third of the property left by the testator Haji Moniruddin Sarker by this impugned Wasiyatnama.

10. In this circumstances, we do not require to make any elaborate discussion at all. For clarification we should quote here the relevant provisions of Mahomedan Law. According to Mahomedan Law,

> "A bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share" (vide paragraph 117 of MULLA's Principles of Mahomedan Law).

> "A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator" (paragraph 118 of MULLA's Principles of Mahomedan Law).

11. In view of the above quoted provisions of Mahomedan Law, it is evident that bequest by a Mahomedan to his heir of any quantum of property requires the consent of his other heirs after his death to be valid. But a bequest by a Mahomedan to any stranger (other than his heir) upto one-third of the surplus of his property which remains after payment of his funeral expenses and debts is valid and does not require consent of the heirs of the testator. Bequest to a stranger over and above one-third of the property of the testator which remains after payment of funeral expenses and debts of the testator requires the consent of the heirs of the testator after his death to be valid.

12. In the present case it is now an admitted fact that the defendant No.3 Md. Abdur Rakib Sarker being the son of the living daughter of the testator was not an heir of the testator Haji Moniruddin Sarker. Admittedly at the time of death of Haji Moniruddin Sarker (also) his daughter, the mother of this defendant No.3 Md. Abdur Rakib Sarker was alive. By the impugned Wasiyatnama this defendant No.3, who was not an heir of the testator Haji Moniruddin Sarker, was given much less than one-third of the property of Haji Moniruddin Sarker which remained after payment of his funeral expenses and debts. The learned Advocates for the plaintiff-respondents ultimately have conceded this legal position that the impugned Wasiyatnama, so far as it relates to the property given to the defendant No.3 Md. Abdur Rakib Sarker, is valid.

13. By this impugned Wasiyatnama the Dariapur Baitul Mokaddes Jame Moszid was given some money kept in a Bank account. The learned Advocates for the plaintiff-respondents have conceded also that the bequest of this money to the Mosque also is valid.

14. So, from the above discussion, it is evident that this Civil Appeal requires to be allowed in part.

15. Accordingly, it is ordered

> that this Civil Appeal be allowed in part on contest against the contesting respondents and ex-parte against the rest without any order as to costs. The Wasiyatnama in question, so far as it relates to the property given to the appellant Md. Abdur Rakib Sarker and also the money given to Dariapur Baitul Mokaddes Jame Moszid for its remaining construction work is declared to be valid.

16. The impugned judgment and order of the High Court Division stands modified accordingly.

9 SCOB [2017] AD 46

APPELLATE DIVISION

PRESENT
Mr. Justice Surendra Kumar Sinha
-Chief Justice
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider
Mr. Justice Mohammad Bazlur Rahman

CIVIL APEAL Nos.204-205 of 2001

(From the judgment and order dated 07.02.2000 passed by the High Court Division in Writ Petition Nos.1825 and 4521 of 1999)

Government of Bangladesh and others	:	.....Appellants (In all the appeals)

Versus

Professor Nurul Islam	:	.....Respondent (In C.A. No.204/01)
Al-haj Nur Mohammad	:	.....Respondent. (In C.A. No.205/01)

For the Appellants. (In all the appeals)	:	Mr. Ekramul Haque, Deputy Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record
For the Respondents (In all the appeals)	:	Ex-parte
Date of Hearing	:	The 1st March, 2016
Date of Judgment	:	The 1st March, 2016

Meaning of right to life:
Right to life is not only limited to protection of life and limbs but also extends to the protection of health, enjoyment of pollution free water and air, bare necessaries of life, facilities for education, maternity benefit, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent to human dignity. ... (Para- 52)

Constitution of Bangladesh
Articles 18(1), 31 and 32:
No one has any right to endanger the life of the people which includes their health and normal longevity of an ordinary healthy person. Articles 31 and 32 of the Constitution

not only means protection of life and limbs necessary for full enjoyment of life but also includes amongst others protection of health and normal longevity of an ordinary human being. It is the obligation of the State to discourage smoking and consumption of tobacco materials and the improvement of public health by preventing advertisement of tobacco made products. Though the obligation under Article 18(1) of the Constitution cannot be enforced, State is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and longevity of a man free from threats of man-made hazards. Right to life under the aforesaid Articles of the Constitution being fundamental right it can be enforced by this Court to remove any unjustified threat to health and longevity of the people as the same are included in the right to life.

... (Para-54)

When the right to life of the people is at stake, the legislature is under the obligation to enact law to protect such right as per directives of the Court. As such the question of encroaching upon the domain of the legislature by the Court does not arise. ... (Para-56)

Smoking and Tobacco Product Usage Control Act, 2005:
What we are observing daily is that the provisions of this Act and the Rules made thereunder are not being properly implemented particularly as regards prohibition of smoking in public places and selling of tobacco products to minors. We have also noticed that in public places, the facilities relating to smoking such as ashtrays, matches, lighters are kept. It has become necessary to save our posterity from the curse of tobacco addiction and to inform them about the Smoking and Tobacco Product Usage Control Act, 2005 as amended by the Smoking and Tobacco Usage (Control) Amended Act, 2013 and also the Rules made thereunder. Therefore, we are inclined to give four more directives in addition to the directives given by the High Court Division.

I. The law enforcing agencies are directed to implement the provision of section 4 of the Act, which provides that no person shall smoke in any public place and public transport and that if any person smokes in contravention of sub-section (1) shall be punishable with fine not exceeding three hundred taka and the penalty shall be doubled for each subsequent violation.

II. The law enforcing agencies are directed to ensure that no one can sell tobacco product to a minor as per sub-section (1) of section 6(a) and subsection (2) thereof provided if any person contravenes the provision of sub-section (1) he shall be punishable with fine which may extend to five thousand taka and if a person contravenes the provisions more than once, every time the amount of fine shall be doubled.

III. The owner, proprietor of a public place shall ensure that no person smokes in that place. Ashtrays, matches, lighters and other things designed to facilitate smoking are not to be provided in public place where smoking is prohibited altogether.

IV. The Ministry of Education, the Ministry of Primary and Mass Education and the National Curriculum Textbook Board (NCTB) are directed to incorporate a chapter in the curriculum of schools and intermediate colleges about the adverse effect of smoking and also about the latest law in this regard.

... (Para-68)

JUDGMENT

SYED MAHMUD HOSSAIN, J:

1. Both the appeals, by leave, are directed against the judgment and order dated 07.02.2000 passed by the High Court Division in Writ Petition Nos. 1825 and 4521 of 1999 making the Rules absolute with direction.

2. Both the appeals involving similar questions of laws and facts having been heard together are now disposed of by this single judgment.

3. The facts, leading to the filing of these civil appeals, in a nutshell, are:

Professor Nurul Islam is a National Professor and the President of 'ADHUNIK'(Amara Dhumpan Nibaran Kori),which is registered under Voluntary Social Welfare Organization Registration & Control Ordinance,1961, working and lobbying for anti-smoking causes. The writ-petitioner obtained Rule from the High Court Division as to why section 3 of the 'Tamakjato Shamogri Biponon Niontrener Jonno Pronito Ain 1988' (aj¡LS¡a p¡jÑËhfZZ ‡eu¿নের জন্য প্রণীত আইন,১৯৮৮) should not be enforced properly and why should not be directed to enact, in the light of the Ordinance No.16 of 1990, for the prohibition of all forms of tobacco advertisement.

4. The case of the writ-petitioner is that section 3(1) of 'Tamakjatio Shamogri Biponon Niontrener Jonno Pronito Ain' provides for a statutory warning that the smoking is dangerous for health and the warning must be printed on packet or canned tobacco based products on a prominent and distinct space of the container of the packet, which would be easily readable and understood. Similarly, section 3(2) of the said Act states that no advertisement of tobacco based products shall be published, broadcast or displayed without having the said warning in easily readable and understood Bengali engraved, written or printed on a prominent part of the advertisement. In breach of section 3(1) of the statute, the companies engaged in tobacco business are printing the statutory warning in obscure corners of tobacco packets and containers and publish the warning in such small size that it is barely readable. In advertisements with moving images in the movie theatres and those broadcast on television the statutory warnings are shown so briefly and without any voice that they have little or no effect on the viewers.

5. It is accepted not only by the medical researchers but also by tobacco industries in developed countries that tobacco consumption leads to fatal diseases such as cancer, lung and heart diseases causing about 3.5 million deaths each year and one million of deaths occur in developing countries like Bangladesh. Global tobacco epidemic is predicted to claim premature death of some 250 million children and adolescents at present, a third of these shall occur in developing countries. By 2020 it is predicted that the tobacco will become the leading death and disability, killing more than 10 million people annually. The writ-petitioner further stated that the passive smoking also has dangerous effect on health. It was accepted that great majority of rural people in Bangladesh, who consume tobacco based products are illiterate and completely unaware of the dangers and the harm of consuming them. Even if, the statutory warning is written on a distinct space of the packets, it would not make any sense to the illiterate consumers. Considering the dangers of consuming tobacco products, mere enforcement of section 3 of the Act,1988 would be useless unless the manufacturing, consumption and promotion of tobacco related products are prohibited. Although smoking is

in decline in the industrialized world the consumption of cigarettes rose by 67% in developing countries between 1970 and 1994 and tobacco related deaths in developing countries will rise from one million in a year to seven million in a year by 2030. A similar Writ Petition No. 4521 of 1999 was filed by Al-haj Nur Mohammad against manufacture, sale and advertisement of tobacco products.

6. The writ-respondents entered appearance to oppose the Rules and made submissions to controvert the materials on record made in the writ petitions.

7. The learned Judges of the High Court Division upon hearing the parties by the judgment and order dated 07.02.2000 made the Rules absolute with direction.

8. Feeling aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the writ-respondents as the leave petitioners have filed Civil Petitions for Leave to Appeal Nos.670 and 667 of 2000 before this Division and obtained leave in both the civil petitions on 29.03.2001, resulting in Civil Appeal Nos.204 and 2005 of 2001.

9. Mr. Ekramul Haque, learned Deputy Attorney General, appearing on behalf of the appellants of both the civil appeals, submits that the High Court Division in exercise of its jurisdiction under Article 102 of the Constitution cannot direct the legislature to pass any law unless there has been positive violations of the Constitution and there is a necessity to rectify the wrong and that Parliament having not passed any law in violation of any provision of the Constitution cannot be directed to pass any law in a specified field and that the High Court Division is indirectly requiring the Parliament to pass any law by giving direction to the Government and as such, the impugned judgment should be set aside.

10. None appeared on behalf of the respondents.

11. We have considered the submissions of the learned Deputy Attorney General, perused the impugned judgment and the materials on record.

12. Before entering into the merit of the appeals, it would be pertinent to go through the grounds, for which, leave was granted in both the appeals. The grounds are quoted below:

(i) For that in the absence of any law in derogation of the fundamental rights ensured by the Constitution for the rectification of which the Court can give direction, the High Court Division was in error of law in giving direction compliance of which necessitates legislation and thus indirectly requiring Parliament to pass laws.

(ii) For that the High Court Division was in error in not taking into consideration that Parliament has not passed any law which is in derogation of the right to life and Parliament which has plenary jurisdiction to decide what law to be passed and as such the High Court Division cannot give direction to the Government to do things which will require backing of law.

(iii) For that the learned judges of the High Court Division has been grossly in error of law in relying too liberally on the Principles of State Policy incorporated in Articles 11 and 18 of the Constitution without appreciating that such principles are not to be enforced in disregard of the social realities and that they are not to be judicially enforced.

(iv) For that the High Court Division has failed to appreciate that under the constitutional dispensation, the legislature should remain left with the task of looking after the questions involved in the matter and in that view, it has acted in disregard of the intent and purport of Article 47(1)(f) of the Constitution.

(v) For that in consideration of the existing laws on the subject in question and the policies and principles enshrined in the Constitution, it is the legislature that should be left to the job of looking for the occasion to bring in necessary ban and/or restriction to meet the problem.

13. The High Court Division observed that the Fundamental State Policy enshrined particularly in Articles 11 and 14 of the Constitution shall be a guide to the interpretation of the Constitution and the laws of the country to enforce fundamental rights of citizens. The High Court Division found that the effect of advertisement of tobacco based products is definitely designed to the detriment of right to life of the citizens, particularly the younger generation which is guaranteed by Articles 31 and 32 of the Constitution and they are entitled to protection of law from being exposed to the hazards of cigarette smoking through advertisements. The High Court Division observed that in view of the fundamental state policy enshrined in Article 18 providing for raising of the level of nutrition and the improvement of quality of public health, as its primary duties, and in particular shall adopt effective measures to prevent consumption of alcoholic and other intoxicating drinks and of drugs which are injurious to health and the provision in Article 11 providing for the dignity and worth of human person which although are not judicially enforceable they are the inviolable fundamental principles of state policy and shall he applied by the State in the making of laws and shall guide the interpretation of the Constitution and the laws of the country. The High Court Division therefore held that the writ-respondents and the authorities performing the functions in connection with the affairs of the Republic that advertisement in any form of Cigarette, Bidi, tobacco related products must not be continued in any manner in Newspapers, Magazines, Signboards or in any electronic medias like Television/Radio beyond the period of the existing contract/agreement with the manufacturers or their agents. The said authorities were duty bound to see that any other authority, private or public does not flout the direction in any manner. The High Court Division made the following specific directions:

a) The government shall take steps phase by phase to stop production of tobacco leaves in tobacco growing Districts of Bangladesh, giving subsidy to the farmers, if possible and necessary to produce other agricultural products instead of tobacco and for rehabilitation of the tobacco workers engaged in tobacco production, if possible with alternative beneficial jobs.

b) The Government shall restrict issuance of license for setting up tobacco industry or Bidi factory and direct the existing tobacco and Bidi Companies to switch over to some other industry to prevent production of Cigarette, Bidi and other tobacco related products, specifying a reasonable period for the purpose.

c) To prohibit importation of Cigarette or tobacco related product within a reasonable period and meanwhile to impose heavy tax for the import and to print the statutory warning legibly in bold words in Bengali.

d) The Government, the concerned Ministry of the Broadcasting Television Authority, Newspaper of Bill-Board authority or any other agencies engaged in

advertisement shall not advertise or telecast any cigarette/bidi related advertisement or commercials and shall not undertake any show/program/propagating cigarette/bidi smoking among the citizens. This direction shall be effective/after the expiry of the existing contract of advertisement between them and the manufactures or their agents.

e) The Government and/or any concerned authority shall not undertake or encourage any promotional ventures like "Voyage or Discovery" and those shall be strictly prohibited.

14. The Government shall direct the appropriate authorities to take steps prohibiting smoking in public and public places like Train, Railway Station, Bus, and Station, Ferry-Ghat, Steamer in any public gathering/meeting/assembly making the atmosphere noxious to health taking resort to strict complacence with the existing provisions of Sections 278, 133, 188, of the Penal Code.

15. **Leading cause of death, illness and impoverishment**

The tobacco epidemic is one of the biggest public health threats the world has ever faced, killing around 6 million people a year. More than 5 million of those deaths are the result of direct tobacco use while more than 600000 are the result of non-smokers being exposed to second-hand smoke.

16. Nearly 80% of the more than 1 billion smokers worldwide live in low- and middle-income countries, where the burden of tobacco-related illness and death is heaviest.

17. Tobacco users who die prematurely deprive their families of income, raise the cost of health care and hinder economic development.

18. In some countries, children from poor households are frequently employed in tobacco farming to provide family income. These children are especially vulnerable to "green tobacco sickness", which is caused by the nicotine that is absorbed through the skin from the handling of wet tobacco leaves.

19. **Surveillance is key**

Good monitoring tracks the extent and character of the tobacco epidemic and indicates how best to tailor policies. Only 1 in 3 countries, representing one third of the world's population, monitors tobacco use by repeating nationally representative youth and adult surveys at least once every 5 years.

20. **Second-hand smoke kills**

Second-hand smoke is the smoke that fills restaurants, offices or other enclosed spaces when people burn tobacco products such as cigarettes, *bidis* and water-pipes. There are more than 4000 chemicals in tobacco smoke, of which at least 250 are known to be harmful and more than 50 are known to cause cancer.

21. **There is no safe level of exposure to second-hand tobacco smoke**

- In adults, second-hand smoke causes serious cardiovascular and respiratory diseases, including coronary heart disease and lung cancer. In infants, it causes sudden death. In pregnant women, it causes low birth weight.
- Almost half of children regularly breathe air polluted by tobacco smoke in public places.

- Second-hand smoke causes more than 600 000 premature deaths per year.
- In 2004, children accounted for 28% of the deaths attributable to second-hand smoke.

22. Every person should be able to breathe tobacco-smoke-free air. Smoke-free laws protect the health of non-smokers, are popular, do not harm business and encourage smokers to quit.

23. Over 1.3 billion people, or 18% of the world's population, are protected by comprehensive national smoke-free laws.

24. **Tobacco users need help to quit**
Studies show that few people understand the specific health risks of tobacco use.

25. Among smokers who are aware of the dangers of tobacco, most want to quit. Counselling and medication can more than double the chance that a smoker who tries to quit will succeed.

26. National comprehensive cessation services with full or partial cost-coverage are available to assist tobacco users to quit in only 24 countries, representing 15% of the world's population.

27. There is no cessation assistance of any kind in one quarter of low-income countries.

28. **Picture warnings work**
Hard-hitting anti-tobacco advertisements and graphic pack warnings – especially those that include pictures – reduce the number of children who begin smoking and increase the number of smokers who quit.

29. Graphic warnings can persuade smokers to protect the health of non-smokers by smoking less inside the home and avoiding smoking near children. Studies carried out after the implementation of pictorial package warnings in Brazil, Canada, Singapore and Thailand consistently show that pictorial warnings significantly increase people's awareness of the harms of tobacco use.

30. Only 42 countries, representing 19% of the world's population, meet the best practice for pictorial warnings, which includes the warnings in the local language and cover an average of at least half of the front and back of cigarette packs. Most of these countries are low- or middle-income countries.

31. Mass media campaigns can also reduce tobacco consumption by influencing people to protect non-smokers and convincing youths to stop using tobacco.

32. Over half of the world's population live in the 39 countries that have aired at least 1 strong anti-tobacco mass media campaign within the last 2 years.

33. **Bans on tobacco advertising, promotion and sponsorship can reduce tobacco consumption.**

- A comprehensive ban on all tobacco advertising, promotion and sponsorship could decrease tobacco consumption by an average of about 7%, with some countries experiencing a decline in consumption of up to 16%.

- Only 29 countries, representing 12% of the world's population, have completely banned all forms of tobacco advertising, promotion and sponsorship.
- Around 1 country in 3 has minimal or no restrictions at all on tobacco advertising, promotion and sponsorship.

34. **Taxes discourage tobacco use**

Tobacco taxes are the most cost-effective way to reduce tobacco use, especially among young and poor people. A tax increase that increases tobacco prices by 10% decreases tobacco consumption by about 4% in high-income countries and about 5% in low- and middle-income countries.

35. Even so, high tobacco taxes is a measure that is rarely implemented. Only 33 countries, with 10% of the world's population, have introduced taxes on tobacco products so that more than 75% of the retail price is tax. Tobacco tax revenues are on average 269 times higher than spending on tobacco control, based on available data.

36. **Illicit trade of tobacco products must be stopped**

The illicit trade in tobacco products poses major health, economic and security concerns around the world. It is estimated that 1 in every 10 cigarettes and tobacco products consumed globally is illicit. The illicit market is supported by various players, ranging from petty peddlers to organized criminal networks involved in arms and human trafficking.

37 Eliminating illicit trade in tobacco will reduce the harmful consumption of tobacco by restricting availability of cheap, unregulated alternatives and increasing overall tobacco prices. Critically, this will reduce premature deaths from tobacco use and raise tax revenue for governments. Stopping illicit trade in tobacco products is a health priority, and is achievable. But to do so requires improvement of national and sub-national tax administration systems and international collaboration, such as ratification and implementation of the Protocol to Eliminate the Illicit Trade in Tobacco Products, an international treaty in its own right, negotiated by parties to the WHO Framework Convention on Tobacco Control (WHO FCTC).

38. While publicly stating its support for action against the illicit trade, the tobacco industry's behind-the-scenes behaviour has been very different. Internal industry documents released as a result of court cases demonstrate that the tobacco industry has actively fostered the illicit trade globally. It also works to block implementation of tobacco control measures, such as tax increases and pictorial health warnings, by misleadingly arguing they will fuel the illicit trade.

39. **WHO response**

The WHO Framework Convention on Tobacco Control entered into force in February 2005. Since then, it has become one of the most widely embraced treaties in the history of the United Nations with 180 Parties covering 90% of the world's population.

40. The WHO Framework Convention is WHO's most important tobacco control tool and a milestone in the promotion of public health. It is an evidence-based treaty that reaffirms the right of people to the highest standard of health, provides legal dimensions for international health cooperation and sets high standards for compliance.

41. In 2008, WHO introduced a practical, cost-effective way to scale up implementation of provisions of the WHO Framework Convention on the ground: MPOWER. Each MPOWER measure corresponds to at least 1 provision of the WHO Framework Convention on Tobacco Control.

42. **The 6 MPOWER measures are:**

- Monitor tobacco use and prevention policies
- Protect people from tobacco use
- Offer help to quit tobacco use
- Warn about the dangers of tobacco
- Enforce bans on tobacco advertising, promotion and sponsorship
- Raise taxes on tobacco.

43. The WHO FCTC Protocol to Eliminate the Illicit Trade in Tobacco Products requires a wide range of measures relating to the tobacco supply chain, including the licensing of imports, exports and manufacture of tobacco products; the establishment of tracking and tracing systems and the imposition of penal sanctions on those responsible for illicit trade. It would also criminalize illicit production and cross-border smuggling. **(extracted from WHO Website)**

44. Though the case of ***Dr. Mohiuddin Farooque Vs. Bangaldesh, represented by the Secretary, Ministry of Commerce, Government of the People's Republic of Bangladesh, Bangladesh Secretariat and others, 48 DLR 438*** is different from the case in hand, the principle expounded in that case may be taken into consideration in respect of the case in hand. In the aforesaid reported case, respondent No.6 Danish Condensed Milk Bangladesh Limited imported 500 metric tons of skimmed milk powder from Holland. Upon clearance of the consignment radiation test was made and found 133 Bq radiation per kilogram which was above the minimum approved radiation level of 95 Bq and was opined that the consignment in question should not be marketed. Therefore, Secretary General of Bangladesh Environmental Lawyers' Association (BELA) filed a writ petition in public interest as consumption of imported food item containing radiation level above the acceptable limit is injurious to public health. Therefore, the writ petitioner prayed that the respondents be directed to take measure for sending back the said milk powder to the exporter. The High Court Division on the fact of the said case held as under:

> "It is the primary obligation of the State to raise the level of nutrition and the improvement of public health by preventing use of contaminated food, drink, etc. Though that obligation under Article 18(1) of the Constitution cannot be enforced state is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and normal longevity of a man free from threats of man-made hazards unless that threat is justified by law. Right to life under the aforesaid Articles of the Constitution being a fundamental right it can be enforced by this Court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life."

45. According to Article 31 of the Constitution, to enjoy the protection of the law, and to be treated 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. According to Article 32 no person shall be deprived of life or personal liberty save in accordance with law. Therefore, right to life is a fundamental

right subject to law of the land. In the absence of any interpretation of right to life in our jurisdiction we have to see what meaning was given by the superior Courts of other countries to right to life. Fifth Amendment to the Constitution of the United States of America declares: "No person shall be deprived of his life, liberty or property without due process of law. Fourteen Amendment also imposes similar limitation on the state. In the case of ***Munn Vs. Illinois (1877) 94 US 113*** in his dissenting judgment **Field J:** interpreted "life" under the aforesaid provisions of the US Constitution as follows:

> "Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of any eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

46. According to Article 21 of the Indian Constitution: "No person shall be deprived of life or personal liberty except according to procedure established by law.

47. Indian Supreme Court interpreted the right to life under the aforesaid Article 21 of the Indian Constitution similar to our Article 32 in several cases. The cases of ***Francis Coralie V. Union Territory of Delhi reported in AIR 1981 SC 746,*** right to life under Article 21 of the Indian Constitution has been interpreted in the following words:

> "But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

48. In the case of ***Bandhua Mukti Morcha V. Union of India reported in AIR 1984 SC 802***, Supreme Court of India while interpreting Article 21 of the Indian Constitution further extended the meaning of right to life as made in the earlier case in the following words:

> "....It must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."

49. In the case of ***Vincent V. Union of India reported in AIR 1987 SC 990*** learned Judge delivering the judgment in that case quoted with approval interpretation of right to life made by the Indian Supreme Court in the **Bandhua Mukti Morcha** case held:

> "A healthy body is the very foundation for all human activities. .....In a welfare state, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health..... Maintenance and improvement of public health have a rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution markers envisaged."

50. In the case of ***Vikram Deo Singh V. State of Bihar reported in AIR 1988 SC 1782*** it was further held:

> "We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to quality of life consistent with his human personality. The right to life with human dignity is the fundamental right of every Indian citizen."

51. In the case of ***Subash Kumar Vs. the State of Bihar reported in AIR 1991 SC 420*** it was further held:

> "Right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life."

52. From the cases, cited above, it appears that right to life is not only limited to protection of life and limbs but also extends to the protection of health, enjoyment of pollution free water and air, bare necessaries of life, facilities for education, maternity benefit, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent to human dignity.

53. If the right to life under Articles 31 and 32 of the Constitution means right to protection of health and normal longevity of an ordinary human being endangered by the use of tobacco and tobacco products then it cannot be said that fundamental right to life of a person has been threatened or endangered.

54. Article 18(1) of the Constitution says that the State shall regard the rising of level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcohol and other intoxicating drinks and of drugs which are injurious to health. Though the aforesaid provision cannot be enforced by the Court it can be seen for interpreting the meaning of right of life under Articles 31 and 32 of the Constitution. A man has natural right to enjoyment of healthy life and longevity up to normal expectation of life of an ordinary human being. Enjoyment of healthy life and normal expectation of longevity is threatened by diseases, natural calamities and human actions. When a person is grievously hurt or injured by another his life and longevity are threatened. Similarly when a man smokes which is injurious to his health he suffers ailments and his life and normal expectation of longevity are threatened. It is the natural right of a man to live free from all man-made hazards of life and such right has been guaranteed under the aforesaid Articles 31 and 32 of the Constitution subject to law of the land. No one has any right to endanger the life of the people which includes their health and normal longevity of an ordinary healthy person. Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes amongst others protection of health and normal longevity of an ordinary human being. It is the obligation of the State to discourage smoking and consumption of tobacco materials and the improvement of public health by preventing advertisement of tobacco made products. Though the obligation under Article 18(1) of the Constitution cannot be enforced, State is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and longevity of a man free from threats of man-made hazards. Right to life under the aforesaid Articles of the Constitution being fundamental right it can be enforced by this Court to remove any unjustified threat to health and longevity of the people as the same are included in the right to life.

55. The meaning of most commonly saying "health is wealth" is very simple and easy. It means our good health is the real wealth of our life which gives us good physique and mind and enables us to enjoy whole life by managing its all challenges. Good health promotes a good mental, physical and social health. The true face of a smoking is disease, death and horror-not the glamour and sophistication the pushers in tobacco industry try to portray.

56. Therefore, the High Court Division was perfectly justified in issuing directives to protect health and longevity of people because consumption of tobacco products is universally accepted to be harmful to health. When the right to life of the people is at stake, the legislature is under the obligation to enact law to protect such right as per directives of the Court. As such the question of encroaching upon the domain of the legislature by the Court does not arise.

57. In order to discourage smoking and usage of tobacco products Bangladesh has signed the Framework Convention on Tobacco Control (FCTC) on 16th June, 2003 and ratified the same on 10th May, 2004 in 56th Conference of World Health Organization.

58. For the purpose of implementing the rules of the said Convention in Bangladesh, it was expedient and necessary to control smoking and production, usage, sale-purchase and advertisement of tobacco products. Therefore, Smoking and Tobacco Products Usage (Control) Act, 2005 (Act II of 2005) was enacted by the Parliament.

59. When the impugned judgment was pronounced, the Tobacco Products Sale/Control Act,1988 (Act 45 of 1988) was in force. But the same law could not give the desired result as most of the consumers of tobacco were illiterate and they were not aware of the fundamental affect of consuming tobacco based product. Government being aware of this situation promulgated Ordinance No.16 of 1990 but unfortunately that Ordinance was not placed before the Parliament and ultimately it died a natural death.

60. Subsequently, the Parliament has passed the Smoking and Tobacco Product Usage (Control) Act, 2005 (Act No.11 of 2005 which was amended by the Smoking and Tobacco Usage (Control) (Amendment Act, 2013). In addition, Government also framed the Smoking of Tobacco Product Usage (Control) Rules, 2006 under the Act of 2005. A revolutionary change has been made in respect of prohibition on advertisement of tobacco product and on prohibition of smoking in public place and public transport by the Act of 2005 as amended till 2013 and the Rules made thereunder. Directive D, E and F of the impugned judgment were implemented in full and directive No. C was implemented in part.

61. Section 5 of the Act provides for prohibition on advertisement of tobacco product, which provides as under:

> "5. **PROHIBITION ON ADVERTISEMENT AND PROMOTION AND CONTROL OF SPONSORSHIP OF TOBACCO PRODUCTS-** (1) No person shall–
>
> (a) publish or cause to be published advertisement of tobacco products in any print or electronic media, books published in Bangladesh, leaflet, handbill, poster, printed paper, billboard or signboard or in any other way;
>
> (b) give or propose to give any sample of tobacco products to the public, for the purpose of enticing to buy tobacco products, either free or at a reduced price.

(c) give or cause to be given any donation, prize, stipend or sponsorship of any program for the purpose of advertisement or promoting the usage of tobacco products;

(d) publish or cause to be published advertisement of tobacco or tobacco products in any cinema hall, print or electronic media or web page;

(e) broadcast, display or describe or cause to be broadcasted, displayed or described any scene of using any tobacco products in any cinema, drama, or documentary produced in Bangladesh or produced in abroad but available and broadcasted in Bangladesh through television, radio, internet, stage show or any other public media; However, if it becomes necessary for the sake of story of a cinema, the scene of using tobacco products may be displayed provided that written warning about the harmful effects of tobacco products shall be displayed on the screen, according to the rules;

(f) produce, sale or distribute or cause to be produced, sold or distributed the cover, packet or box which is similar to the cover, packet or box of a tobacco product;

(g) display tobacco products advertisements at the point of sales, in any way.

Explanation- To fulfil the objective of sub-section (1), "advertisement of tobacco products" means conducting any kind of commercial programs for encouraging the direct or indirect usage of tobacco or tobacco products.

(2) Nothing of article (e) of subsection (1) shall be applicable for the anti-smoke health related educational campaigns.

(3) No person shall use or cause to be used the name, sign, trademark, or symbol of any producer of tobacco or tobacco product, or entice any other person to use these if they participate in any social development work under the Corporate Social Responsibility programs or bear its expenses;

(4) If any person contravenes the provisions of this section he shall be punishable with imprisonment for a term not exceeding three months or a fine which may extend to one lakh taka, or both and if he contravenes the provisions more than once, every time the amount of fine or punishment shall be doubled.

62. Therefore, having gone through section 5 of the Act we find that there is blanket prohibition of advertisement and promotion and control of sponsorship of tobacco product. Sub-section (4) of this section provide that he, who contravenes the provision of section shall be punishable with imprisonment for a term not exceeding three months or a fine which may be one lakh taka or both and he, who contravenes the provision of this section more than once every time the amount of fine or punishment shall be doubled.

63. Section 4 of the Act provides for prohibition of smoking in public place and public transport. Sub-section (1) of section 4 provides that subject to the provision of section 7 no person shall smoke in any public place and public transport and that if any person smokes in contravention of the provision of sub-section (1) shall be punishable with fine not exceeding fifty taka.

64. Sub-section (2) of section 4 provides that if any person smokes in contravention of the provision of sub-section (1), he shall be punishable with fine not exceeding three hundred take and the penalty shall be doubled for each subsequent violation.

65. Section 8 of the Act provides that outside the area marked or designed as a smoking area under section 7, the owner, caretaker or controlling person or manager of every public place shall in one or more places in the said area and the owner, caretaker or controlling

person or manager of the public transport shall in the concerned transport arrange to display a notice "Refrain from Smoking, it is a punishable offence" in Bangla and in English language.

66. Directive-C of the impugned judgment was implemented in section 10 of the Act. Section 10 runs as follows:

> "10. **PICTORIAL WARNINGS ETC. ABOUT HEALTH AND OTHER HARMS ON THE BODY OF PACKETS OF THE TOBACCO PRODUCTS-** (1) Health warnings shall be printed on top of both sides of the packet, cover, carton or box of tobacco products, covering at least 50% of the total area of each main display area or if the packets do not have two main sides in that case covering at least 50% of the main display area, with colored pictures and accompanying text, according to the act, about the harms caused by the use of tobacco products and these shall be printed in Bengali.
>
> (2) The following warnings shall be printed on the packet, cover, carton or box of tobacco products, i.e.
> (i) For smoked tobacco products:-
> (a) Smoking causes throat and lung cancer;
> (b) Smoking causes respiratory problems;
> (c) Smoking causes stroke;
> (d) Smoking causes heart disease;
> (e) Second-hand smoke causes harms to the fetus;
> (f) Smoking causes harms to the fetus.
> (ii) For smokeless tobacco products:-
> (a) Consumption of tobacco products causes mouth and throat cancer;
> (b) Consumption of tobacco products causes harms to the fetus.
> (iii) Any other warning prescribed by law.
>
> (3) All packets, covers, cartons and boxes sold in Bangladesh shall carry the statement: "Sales allowed only in Bangladesh" and no tobacco products may be sold in Bangladesh without this statement.
>
> (4) Packets, cartons, boxes, or covers of tobacco products shall not use brand elements (such as: light, mild, low-tar, extra, ultra, etc.) to create false impression about its impact and risk on public health.
>
> (5) The printing methods on the packets, cartons, boxes, or covers of tobacco products of pictorial warnings described in subsection (2) and the statements described in sub-section (3) shall be determined by law.
>
> (6) If any person contravenes the provisions of this section he shall be punishable with imprisonment for a term not exceeding six months or a fine which may extend to two lakh taka, or both and if he contravenes the provisions more than once, every time the amount of fine or punishment shall be doubled.

67. According to sub-section (6) of section 10 if anybody contravenes the provisions of this section shall be punishable with imprisonment for a term not exceeding six months or a fine which may extend to two lakh taka or both or if he contravenes the provisions more than once, every time fine or punishment shall be doubled.

68. What we are observing daily is that the provisions of this Act and the Rules made thereunder are not being properly implemented particularly as regards prohibition of smoking in public places and selling of tobacco products to minors. We have also noticed that in public places, the facilities relating to smoking such as ashtrays, matches, lighters are kept. It has become necessary to save our posterity from the curse of tobacco addiction and to inform them about the Smoking and Tobacco Product Usage Control Act, 2005 as amended by the Smoking and Tobacco Usage (Control) Amended Act, 2013 and also the Rules made thereunder. Therefore, we are inclined to give four more directives in addition to the directives given by the High Court Division.

I. The law enforcing agencies are directed to implement the provision of section 4 of the Act, which provides that no person shall smoke in any public place and public transport and that if any person smokes in contravention of sub-section (1) shall be punishable with fine not exceeding three hundred taka and the penalty shall be doubled for each subsequent violation.

II. The law enforcing agencies are directed to ensure that no one can sell tobacco product to a minor as per sub-section (1) of section 6(a) and sub-section (2) thereof provided if any person contravenes the provision of sub-section (1) he shall be punishable with fine which may extend to five thousand taka and if a person contravenes the provisions more than once, every time the amount of fine shall be doubled.

III. The owner, proprietor of a public place shall ensure that no person smokes in that place. Ashtrays, matches, lighters and other things designed to facilitate smoking are not to be provided in public place where smoking is prohibited altogether.

IV. The Ministry of Education, the Ministry of Primary and Mass Education and the National Curriculum Textbook Board (NCTB) are directed to incorporate a chapter in the curriculum of schools and intermediate colleges about the adverse effect of smoking and also about the latest law in this regard.

69. There is nothing on record to show that the Government has taken any measure to implement directives (a) and (b) of the impugned judgments. Directives (a) and (b) are reproduced again as under:

"a) The government shall take steps phase by phase to stop production of tobacco leaves in tobacco growing Districts of Bangladesh, giving subsidy to the farmers, if possible and necessary to produce other agricultural products instead of tobacco and for rehabilitation of the tobacco workers engaged in tobacco production, if possible with alternative beneficial jobs.

b) The Government shall restrict issuance of license for setting up tobacco industry or Bidi factory and direct the existing tobacco and Bidi Companies to switch over to some other industry to prevent production of Cigarette, Bidi and other tobacco related products, specifying a reasonable period for the purpose."

70. Therefore the concerned authorities of the Government are directed to start implementing directives (a) and (b) of the judgment of the High Court Division.

71. Accordingly, both the civil appeals are dismissed with the directives and direction made in the body of the judgment.

72. Let a copy of the judgment be communicated to the Secretary, Ministry of Education, the Secretary, Ministry of Primary and Mass Education and the Chairman, National Curriculum Textbook Board (NCTB) each for information and necessary action.

9 SCOB [2017] AD 62

APPELLATE DIVISION

PRESENT
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A. H. M. Shamsuddin Choudhury

CIVIL PETITION FOR LEAVE TO APPEAL NOS. 251-255 OF 2012
(From the judgement and order dated 25th of August, 2011 passed by the High Court Division in Writ Petition Nos. 2464, 2679 and 2680-2682 of 2011)

Non-Government Teacher's Registration and Certification Authority (NTRCA) and another	... Petitioners (in all cases)
Versus	
Lutfor Rahman and another	... Respondents (in C.P. No. 251 of 2012)
Pulack Chakma and another	... Respondents (in C.P. No. 252 of 2012)
Faizar Ahman and another	... Respondents (in C.P. No. 253 of 2012)
Md. Mustaque Ahmed and another	... Respondents (in C.P. No. 254 of 2012)
Md. Shaiful Islam and another	... Respondents (in C.P. No. 255 of 2012)

For the Petitioner (in all cases)	:Mrs. Sufia Khatun Advocate-on-Record,
For Respondent No. 1 (in C.P. No.251,253 & 255 of 2012)	:Mrs. Madhu Malaty Chowdhury Barua, Advocate-on-Record on behalf of Mr. Md. Nawab Ali, Advocate-on-Record
For Respondent No. 1 (in C.P. No.252 & 254 of 2012)	: Mr. Syed Mahbubar Rahman Advocate-on-Record
Respondent No. 2 (in all cases)	: Not represented
Date of hearing & judgement	:The 12th of April, 2015

Without issuing any show cause notice the petitioners could not lawfully cancel the letter of appointment of the respondents:

It is patent from the records that all the respondents went through the rigorous process of selection and were appointed in their respective post. They were served with notices cancelling their appointment without issuing any show cause notice. The respondents

joined their posts and served accordingly for more than nine months at the time of filing their writ petition.

We are of the view that without issuing any show cause notice the petitioners could not lawfully cancel the letter of appointment of the respondents.

... (Para 13 &14)

JUDGMENT

MUHAMMAD IMMAN ALI, J:-

1. These five civil petitions for leave to appeal are directed against the judgement and order dated 25.08.2011 passed by a Division Bench of the High Court Division in Writ Petition Nos. 2464, 2679 and 2680-2682 of 2011 making the Rules absolute.

2. The facts of all petitions are almost same except the date of joining of the respondents in their respective post on their first appointment. These petitions are heard together and they are dealt with by this single judgement.

3. The facts relevant for disposal of the petitions are that the writ respondent No. 2 (petitioner herein) in his official capacity published a circular in "the Daily Samakal" on 16.02.2010 and "the Daily Jugantor" on 20.02.2010 to appoint persons in some posts in the office of the Non-Government Teachers Registration and Certification Authority (NTRCA). The respondents had applied for the post of Assistant Director in the NTRCA complying all the formalities and, accordingly, admit cards were issued inviting the respondents to sit in the examination for selection. Ultimately, the 5 (five) respondents were selected through written examination followed by viva-voce for the post of Assistant Director in the NTRCA, and upon their selection the Chairman of NTRCA issued appointment letters to respondent Lutfor Rahman vide Memo No. বেশিনিক/১ম শ্রেণীর কর্মকর্তা নিয়োগ/ ২৫৫/২০১০/৩৭৬ dated 13.06.2010, to respondent Pulack Chakma vide Memo No. বেশিনিক/১ম শ্রেণীর কর্মকর্তা নিয়োগ/ 255/2010/379 dated 13.06.2010, to respondent Faizar Ahmed vide Memo No. বেশিনিক/১ম শ্রেণীর কর্মকর্তা নিয়োগ/ 255/2010/377 dated 13.06.2010, to respondent Md. Mustaque Ahmed vide Memo No. বেশিনিক/১ম শ্রেণীর কর্মকর্তা নিয়োগ/ ২৫৫/২০১০/৩৭৫ dated 13.06.2010, and to respondent Saiful Islam vide Memo No. বেশিনিক/১ম শ্রেণীর কর্মকর্তা নিয়োগ/ ২৫৫/২০১০/৩৭৪dated 13.06.2010.

4. Pursuant to the said appointment letters, respondent Lutfor Rahman submitted his joining letter on 16.06.2010 which was duly accepted by the Chairman, NTRCA(petitioner No. 1) and he was appointed on the same day in the post of Assistant Director (Service and Co-ordination) at Administration and Finance Wing of NTRCA. Respondent Pulock Chakma submitted his joining letter to the Chairman, NTRCA on 21.06.2010 and after acceptance of the same he was appointed in the post of Assistant Director (Certificate) at Evaluation and Certificate Wing of the NTRCA on the same date. Respondent Faizar Ahmed, Md. Mustaque Ahmed and Md. Shaiful Islam submitted their joining letters to the Chairman, NTRCA on 15.06.2010 and after acceptance of the same, respondent Faizar Ahmed and Mustaque Ahmed were posted as Assistant Director at Evaluation of Examination and Certificate Wing and respondent Shaiful Islam in the post of Assistant Director at Administration and Finance Wing of NTRCA on 16.06.2010.

5. The respondents had been performing their respective duties to the satisfaction of the authority and all others concerned from the date of their joining. The Secretary of NTRCA

wanted police verification reports of the respondents from the Superintendent of Police of their respective district. The office of the Superintendent of Police in compliance of the said letter verified the character of the respondents and submitted report accordingly. All of a sudden, on 14.03.2011 the petitioner No. 2 by his order (Annexure-E to the writ petition) cancelled the appointment of the respondents. The respondents moved the Ministry of Education to redress their grievances but in vain. The respondents, before joining in the NTRCA, had been working in different posts, and they duly applied for the post of Assistant Director in the NTRCA after leaving their jobs and they were duly appointment in accordance with law. Hence, the impugned order cancelling the appointments of the respondents is illegal. No show cause notices were served upon the writ petitioners-respondents before issuing the impugned order. Thus the arbitrary action of the petitioner No. 2 is nothing but malice in law which was passed with an ulterior motive to cause harm to the respondents. The respondents filed five separate writ petitions and obtained Rule.

6. The Rules were opposed by the petitioner Nos. 2 and 3 by filing affidavit-in-opposition contending, *inter alia*, that the former Chairman of NTRCA violating the rule Nos. 4, 5 (2) (Ka) and (Kha) of the Service Rules (Officers and Employees) of NTRCA, 2009 (in short, the Service Rules) had appointed the respondents. There is provisions in rule 4 of the Service Rules that the authority in order to appoint an employee in the NTRCA will constitute a Selection Committee (h¡R¡C L¢j¢V) and without the approval of such ""h¡R¡C L¢j¢V'' there would be no appointment in the NTRCA. Rule 5(2) (Ka) and (Kha) of the Service Rules also provides that no person will be appointed in any post of NTRCA until and unless he is found physically fit by a medical officer or medical board appointed by the authority for the said purpose, and also, there would be no appointment without verification of his character by the agency having competent jurisdiction to do the same. In this particular case there was no such ""h¡R¡C L¢j¢V'' and there was no recommendation from the ""h¡R¡C L¢j¢V'' for the appointment of the respondents. As such, the appointment of the respondents was illegal and the former Chairman, who appointed the respondents, had no jurisdiction to appoint them. As soon as the said violation of the provisions of the Service Rules was detected their appointments were cancelled duly by the Executive Board of NTRCA in its 32nd meeting, which was duly approved by the 35th meeting of the said Board of NTRCA. Pursuant to the said decision the impugned order was issued canceling the appointments of the respondents. So the Rules should be discharged.

7. After hearing the parties, by the impugned judgement and order dated 25.08.2011, the Rules were made absolute. Hence, the writ respondents as petitioners filed the instant civil petitions for leave to appeal.

8. Mrs. Sufia Khatun, learned Advocate-on-Record appearing on behalf of the petitioners submits that the Service Rules require that appointment of staff or officer in the NTRCA must be made by a selection committee (h¡R¡C L¢j¢V), but in this case there was no recommendation of the ""h¡R¡C L¢j¢V'' in respect of the respondents. She submits that the appointment of the respondents by the former Chairman, without the recommendation of the selection committee, was illegal and, therefore, their appointments were rightly cancelled. She submits that the cancellation of the appointment of the respondents was agreed in a resolution of the Executive Board of NTRCA in its 32nd meeting which was approved in the 35th meeting of the Board. She submits that the High Court Division erred in law in not considering the fact that the respondents were appointed illegally.

9. Mrs. Madhu Malati Chowdhury Barua learned Advocate-on-Record appears for respondent No. 1 in Civil Petition for Leave to Appeal Nos. 251,253 and 255 of 2012 and Mr. Syed Mahbubar Rahman, learned Advocate-on-Record appears for respondent No. 1 in Civil Petition for Leave to Appeal Nos. 252 and 254 of 2012. Both submit in support of the impugned judgement and order of the High Court Division.

10. We have considered the submissions of the learned Advocates for the parties concerned, perused the impugned judgement and other connected papers on record.

11. It appears from the materials on record that the respondents applied for their respective post in response to the advertisement for the vacancies mentioned, and after fulfilling all the requirements of the selection procedure, including appearing in the competitive written and viva voce examinations. They were duly issued their appointment letters after medical examination and police verification. It transpires that the appointment of the respondents was subsequently cancelled without issuing any show cause notice.

12. The High Court Division observed that before issuing the impugned order cancelling the appointment of the writ petitioners no show cause notice was served upon them and that the principles of natural justice has been seriously violated and ignored.

13. It is patent from the records that all the respondents went through the rigorous process of selection and were appointed in their respective post. They were served with notices cancelling their appointment without issuing any show cause notice. The respondents joined their posts and served accordingly for more than nine months at the time of filing their writ petition.

14. We are of the view that without issuing any show cause notice the petitioners could not lawfully cancel the letter of appointment of the respondents.

15. We find that the impugned judgement does not suffer from any illegality or infirmity and does not call for any interference. Accordingly, the civil petitions for leave to appeal are dismissed.

9 SCOB [2017] AD 66

APPELLATE DIVISION

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

CIVIL APPEAL NO. 137 OF 2010

(From the judgment and decree dated 26.11.2008 passed by the High Court Division in First Appeal No.28 of 2004.)

Biman Bangladesh Airlines And others	:	Appellants
Versus		
Al Rojoni Enterprise	:	Respondent
For the Appellants	:	Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent	:	Syed Mahbubar Rahman, Advocate-on-Record.

Date of hearing and judgment: 23.11.2016

Carriage by Air (International Convention) Act, 1966
Rule 29 of the first schedule
Read with section 29 of the Limitation Act:

The High Court Division committed an error of law in holding that the date on which carriage stopped was the date on which the carrier defendants admitted its failure to deliver its goods finally and offered payment of compensation in lieu of the goods. The time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, that is, on 22.01.1999. Since the suit was filed on 24.05.2001 apparently the same was barred by limitation in view of special limitation provided in Rule 29 of the first schedule of the Carriage by Air (International Convention) Act, 1966 read with section 29 of the Limitation Act. ...(Para 7)

JUDGMENT

Hasan Foez Siddique, J:

1. This appeal is directed against the judgment and decree dated 26.11.2008 passed by the High Court Division in First Appeal No.28 of 2004 reversing those dated 23.10.2003 passed by the learned Joint District Judge, 3rd Court, Dhaka in Money Suit No.21 of 2001.

2. The short facts, for the disposal of this appeal, are that the plaintiff respondent is a Proprietorship Firm carrying business of importing and selling of watch. In due course, it purchased spare parts of watch from Hong Kong worth of USD 18,911.00 equivalent to Bangladeshi Tk.12,10,000/-, which weighed around 322 Kgs. and were packeted in 9 cartoons. Those goods were booked in Hong Kong to be delivered in Dhaka through Bangladesh Biman, vide air-way bill No.997-8632-1653 dated 21.01.1999, scheduled to carry those goods through BG Flight No.079 on 22.01.1999. But those goods did not reach in Dhaka through the scheduled flight and, consequently, the Biman authority could not deliver those goods. The plaintiff-respondent repeatedly demanded to get delivery of goods. The defendants enquired into the matter but whereabouts of goods could not be detected. The defendants offered to pay compensation in terms and conditions laid down in the contract provided in Air-way bill assessing at USD 6400.00 on calculation of the loss goods weighing around 322 Kgs, the declared weight of the undelivered goods, at the rate of USD 20.00 per Kg. The compensation amount offered was equivalent to Bangladeshi Tk.3,15,560.00 as per the prevailing conversion rate, vide defendant's letters dated 19.08.1999 and 08.09.1999, against the claim of compensation made by the plaintiff for Tk.16,98,000.00. The offer was not acceptable to the plaintiff-respondent. Hence, was the suit.

3. The defendant-appellants contested the suit by filing written statement contending, that the suit was barred by limitation and that there was no cause of action for filing the suit. The plaintiff was entitled to get compensation @ USD 20.00 per Kg. on the declared weight of the goods. It was not entitled to get its claimed amount, which was calculated on the basis the alleged price of the goods since the plaintiff did not declare the price of the goods at the time of booking. The plaintiff was abide by the terms and conditions of the contract laid down in Air-way bill and also as per the provisions of the Carriage by Air (International Convention) Act, 1966.

4. The trial Court, on consideration of the evidence on record, dismissed the suit. The plaintiff preferred First Appeal in the High Court Division. The High Court Division, by the impugned judgment and decree, allowed the appeal upon setting aside the judgment and decree of the trial Court and decreed the suit for a sum of Tk.21,19,917.60/- together with interest @ 8% per annum. Thus, the defendant-appellant has preferred this appeal getting leave.

5. Mr. Kamal-Ul-Alam, learned Senior Counsel appearing for the appellants, submits that the instant suit was barred by limitation in view of Rule 29 of the First Schedule of the Carriage by Air (International Convention) Act, 1966, the High Court Division erred in law in decreeing the suit. He submits that the High Court Division erred in law in drawing conclusion that the rate of USD 20/- per kg. as stipulated in the Airway bill would vary with market price of gold prevailing at the relevant time inasmuch as in view of the contract of carriage contained in the Airway bill if the goods were lost, the carrier's liability would not exceed USD 20/- per kg. and that the said rate of USD 20/- per Kg. was based on USD 42.22 per ounce of gold and no market rate of gold otherwise than the rate stipulated in the Airway bill could be applied in calculating the compensation payable to the respondent.

6. It appears from the pleading and evidence on record that plaintiff-respondent booked 9 cartons of spare parts of watch weighed 322 Kg. through BG Flight No.079, Biman Bangladesh Airlines vide Air-way Bill No.997-8632-1653 dated 22.01.1999 from Hongkong. After arrival of the Biman on 22.01.1999, the plaintiff sent its representative on 24.01.1999 to

collect the said goods from cargo office of the Airport but related office informed the representative of the plaintiff that the goods booked had not yet been reached in Airport. On 15.02.1999, the plaintiff wrote a letter to the Manager of Biman to get delivery of imported goods and the Assistant Manager of Airport Terminal intimated the plaintiff by a letter dated 18.02.1999 that the booked goods had not been reached. On 24.02.1999, Airport authority intimated the plaintiff that the imported goods were loaded in B.G. 079 dated 22.01.1999 vide flight pallet No.PAJ 9588 but those had not been reached in the Airport. In the plaint, the plaintiff admitted that on 18.02.1999 the Biman authority, in writing, intimated the plaintiff that the goods had not been reached in Dhaka. The plaintiff further stated, *"Bnvi DË‡i wegvb KZ¢¶ ev`x dvg‡K Zv‡`i 24-2-1999Bs Zwi‡Li c‡Îi gva¨‡g Rvbvb †h D‡jwLZ †gwb‡dó Abyhvqx †`Lv hvq †h weR-079/22-1-99Bs Zwi‡Li dvB‡U c¨v‡jU bs wcG‡R 9588 weR G‡Z gvj¸wj †jvW Kiv nBqv‡Q Ges H c¨v‡jUUv XvKvq †cŠ‡Q‡Q Z‡e gvjvgvj¸wj XvKvq †cŠ‡Q bvB|* " The period of limitation for claiming damages has been provided in Rule 29 of the First Schedule of the Carriage by Air (International Convention) Act, 1966 (the Act), which runs as follows:

> 29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

7. As per terms of the Contract, that is, the Air-way bill as well as Rule 29 quoted above, it appears to us that the limitation for right to get damages would be extinguished if no action is taken within 2 years from the date of arrival at the destination or from the date on which the air craft ought to have arrived, or from the date on which the carriage stopped. The High Court Division held that the date on which the carriage stopped was in the instant case the date on which the defendant admitted its failure to deliver the goods finally and offered payment of compensation in lieu of the goods. Rule 13(3) of schedule B of the First schedule of the Act provides that if the carrier admits the loss of the goods or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage. In view of specific provision of Rule 13(3) it was immaterial that the defendant purportedly admitted the loss of the goods on 19.08.1999 and offered the plaintiff compensation in lieu thereof since the time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, i.e. on 22.01.1999. From the materials on record of this case, it appears that the goods "ought to have arrived" on 22.01.1999 and the carrier through which the goods was supposed to be carried to the destination arrived as per schedule on 22.01.1999. The instant suit has been filed on 24.05.2001. The High Court Division held that the date on which the carriage stopped provided in Rule 29 of First Schedule of the Act corresponding to clause 12.3 of the Airway Bill mean "refusal by the carrier or its agent to deliver the goods" inasmuch as the term 'the date on which the carriage stopped' is to be interpreted as the date when in normal course of event the goods arrived. The contract of carriage seized to exist and the goods are actually delivered to the consignee whereby the carrier is no longer 'in charge' of the actual custody and control of the goods within the meaning of Rule 18 of the First Schedule of the Act. In the instant case since good never 'arrived at the destination' there being no actual delivery thereon to the respondent, it be said that there was a date when the carriage stopped. The High Court Division committed an error of law in holding that the date on which carriage stopped was the date on which the carrier defendants admitted its failure to deliver its goods finally and offered payment of compensation in lieu of the goods. The time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, that is, on 22.01.1999. Since the suit was filed on 24.05.2001 apparently the same was barred by limitation in view of special limitation provided in Rule 29 of the first schedule

of the Carriage by Air (International Convention) Act, 1966 read with section 29 of the Limitation Act.

8. Since the suit was barred by limitation, though the defendants admitted the damage caused and offered compensation in view of terms of contract, that is, terms of Airway-bill, we are of the view that it is unnecessary to discuss the second point raised the Mr. Alam.

9. Accordingly, the appeal is allowed. The judgment and decree of the High Court Division is hereby set aside.

9 SCOB [2017] AD 70

APPELLATE DIVISION

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

CIVIL PETITION FOR LEAVE TO APPEAL NO.1162 of 2013.
(From the judgment and order dated 03.04.2011 passed by a Division Bench of the High Court Division in Suo Moto Rule No. 19 of 2010**).**

President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA) : .....Petitioner.

Versus

Government of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Dhaka and others. : .....Respondents.

For the Petitioner.	:	Mr. Rafique-Ul-Huq, Senior Advocate (with Mr. Quamrul Huq Siddique, Advocate), instructed by Mr. Bivash Chandra Biswas, Advocate-On-Record.
Respondents.	:	Not Represented.
Date of Hearing.	:	The 2nd June, 2016.

Joladhar Ain 2000(Act XXXVI of 2000)
Sections 5 and 8:
The BGMEA has constructed a fifteen storied commercial complex on the "Begun Bari Khal" and "Hatir jheel lake" which is natural waterbody (cvKvwZK Rjvavi) as has been specifically admitted in the schedule to the transfer deed, Annexure-K-2 as well as in the government record and in the Master Plan of the Dhaka City, as Lake/Jolashoy/Doba. As such from the above provision of law, the class or the nature and character of the same cannot be changed nor can be used in any other manner/purpose nor can the same be leased out, rented or transferred by anybody. The law further provides that any person changing the nature and character of such "Joladhar" (water body), in violation of section 5 of the said Act of 2000, shall be dealt with in accordance with law as provided in section 8. Since BGMEA has constructed the multi-storied commercial building upon the said waterbody in violation of the law such illegal construction/obstruction must be demolished for which the BGMEA or any other

person, notwithstanding anything contained in any other law, cannot claim any compensation as provided in Section 8(2) of the Joladhar Ain 2000. ...(Para 17)

Joladhar Ain 2000(Act XXXVI of 2000)
Sections 2(Cha), 3, 5 and 8:
And
Environment Conservation Act, 1995
Section 2(ka ka), 2(Ka), 6 (Uma) and 15:

We perused the Dhaka Metropolitan Development Plan, VOL-II Urban Area Plan (1995-2015) published in the Gazette notification vide SRO No. 91-AIN/1997 on 05.04.1997, commonly known as "Proposed Master Plan", wherein the "Begumbari Khal" has been recorded and recognized as a "Joladhar". Side by side the registered deed in favour of EPB executed by the Bangladesh Railway Annexure K-2, in its schedule clearly mentioned the transferred property as "Doba"-(waterbody) which attracts Section 2(Cha) of the "Joladhar Ain 2000" as well as section 2(ka ka) of the Environment Conservation Act. As such pursuant to the non-obstante clause incorporated in section 3 of the "Joladhar Ain 2000" as well as section 2Ka of the Environment Conservation Act 1995, both the laws shall prevail over any other law prevailing in the country for the time being in force. Thus the prohibition imposed by section 5 of the Joladhar Ain and section 6 (Uma) of the Environment Conservation Act shall automatically come into operation and any violation of the said prohibition shall be dealt with in accordance with section 8 of the "Joladhar Ain," as well as section 15 of the Environment Conservation Act 1995. In such view of the matter the transfer/allotment of the water body by EPB to BGMEA and consequently the change of the nature and character of the said water body ("Joladhar") by BGMEA is completely violative of the said two laws and as such the violators are liable to be punished with imprisonment and fine and such illegal construction is liable to be demolished for which BGMEA or any other person is not liable to get any compensation. ...(Para 19)

JUDGMENT

MIRZA HUSSAIN HAIDER, J:

1. This civil petition for leave to appeal is directed against the judgment and order dated 03.04.2011, passed by the High Court Division, in Suo Moto Rule No. 19 of 2010, making the Rule absolute.

2. Facts leading to filing of this Civil Petition for Leave to Appeal in brief, are:

A news item, published in an English Vernacular "the Daily New Age" on 02.10.2010, under the caption " No Plan to demolish unauthorized BGMEA Building soon" was brought to the notice of a Division Bench of the High Court Division which is constructed/erected on part of the "Begunbari Khal" and "Hatirjheel Lake", two natural water bodies, situated in their present location since time immemorial and remained undisturbed even after the construction of Tongi Diversion Road, and Panthapath in last four/five decades. The said two waterbodies are connected with the river Buriganga, through canals, which play a pivotal role, like many other water bodies in and around the historic Dhaka City, in keeping the capital safe from water logging and flood during heavy monsoon. Now the said two

Khal/lakes are the only living water-bodies in the memory of the inhabitants of Dhaka. It reveals from the materials on record that to protect the said two waterbodies from the grabbers, the Government took up a huge project involving more than TK. 1,480 crores, through the Rajdhani Unnayan Kartipakkhiya (RAJUK), long ago, and thereby save, restore and preserve the remnant of the Begumbari Khal and Hatirjheel Lake as much as possible; the said project, known as "Hatirjheel-Begunbari Project", consists of beautification of the same, providing water based amusement facilities and construction of circular roads in and around the said two lakes/waterbodies so that the city dwellers get a breathing place. But the Bangladesh Garments Manufacturers and Exporters Association(BGMEA) in the name of constructing its own office Complex joined the land grabbers and accordingly it managed permission from the Government as well as from the RAJUK to build a 15 storied building on the said waterbodies. Accordingly it constructed the said building defying all the laws of the land and thereby eclipsing the said waterbodies, and thereby restricting/depriving the people to have the full enjoyment of the facilities supposed to be provided in the said waterbodies under the project. The illegal construction was opposed by cross section of people including, environmental activists, Engineers, architects, physicians, educationists and general people who had been crying hard to save and protect the said waterbodies from the very beginning of the construction of the said BGMEA building.

3. Under such circumstances, the said Division Bench of the High Court Division issued a Suo Moto Rule on 03.10.2010 calling upon (1) the Government of Bangladesh, represented by the Secretary, Ministry of Housing and Public works, (2) Chairman, Rajdhani Unnayan Kartripakkha (RAJUK), (3) President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA), Hatirjheel, Dhaka, (4) Authorized Officer (Building Construction) RAJUK, Dhaka, (5) Deputy Commissioner, Dhaka and (6) Commissioner, Dhaka Metropolitan Police, to show cause as to why "they should not be directed to take necessary and appropriate steps in accordance with law to demolish the BGMEA Building located at Hatirjheel, Dhaka, being an unauthorized construction, and as to why they should not be directed to take appropriate steps against the concerned officials for failing to discharge their respective duties in accordance with law and/ or pass such other or further order or orders as to this Court may seem fit and proper."

4. The Rule being served upon the aforesaid respondents, only the BGMEA entered appearance and contested the Rule by filing affidavit in opposition stating inter alia that an application was tabled before the Authorized Officer of the RAJUK seeking approval of the plan to erect a 15 storied building on 0.66 acre of land at 23/1 Panthapath Link Road at Kawran Bazar Area, Dhaka which is owned by the said respondent as being an allottee of the Export Promotion Bureau (EPB). Accordingly an approval of site plan of BGMEA for the construction of a multistoried building complex was issued under the signature of the Secretary, RAJUK on 14.07.2003 pursuant to a decision taken in a general meeting of RAJUK subject to certain conditions. The RAJUK thereafter by another letter dated 20.08.2006 asked the BGMEA to remove the unauthorized constructions/structures from the place which were suppose to be kept vacant and also directed BGMEA to pay a sum of TK. 12,50,000/- as penalty for commencing construction of the work before procuring approval. It is stated that the building was ultimately constructed on the said allotted land after obtaining lawful approval from the RAJUK and all other authorities. The said respondent claims that the construction has been done wholly in accordance with the Building Construction Act, 1952 without any objection from any quarter and no other authority raised any aspersion as to violation of any law in constructing the said building.

5. By filing a supplementary affidavit in opposition the BGMEA stated that initially 0.66 acre of land from several plots of mouzas Boromoghbazar and Begunbari was allotted pursuant to an agreement between BGMEA and EPB dated 07.05.2001. Clause 2 of the said agreement stipulates that in the event of any dispute on the title of the land, the responsibility shall lie on the EPB. However, the BGMEA was handed over possession of 0.63 acre of land from CS Plots No. 208 and 209 and 0.03 acre of land from CS Plot No. 105 and the building has been constructed on the aforesaid 0.63 acre of land on Plots No. 208 and 209 leaving 0.241 acres on the northern side vacant which was contiguous to CS Plot No. 105 on which Begunbari canal/lake is situated. It is further stated that the aforesaid land along with many other lands initially belonged to the Bangladesh Railway out of which 5.555 acres of land were transferred to EPB by the Government of Bangladesh represented by the General Manager Bangladesh Railway vide registered deed dated 17.12.2006 out of which only 0.66 acre of land has been allotted to BGMEA by the EPB. The BGMEA paid full consideration money amounting to TK.43,56,86,274.00 to the EPB in installments. Thus the BGMEA has full right, title, interest and possession in the land in question whereupon after obtaining required permissions/approvals from all concerned authorities, including RAJUK, constructed the said 15 storied building according to the approved plan. As such there is no illegality.

6. When the Rule was made ready, the said Bench of the High Court Division requested a number of Government, Semi Government, Autonomous and private bodies related and concerned with environmental and other laws of the land, to assist the Court. Amongst them the Bangladesh Environmental Lawyers' Association (BELA)filed certain documents for consideration of the Court in respect of the land in question as well as construction of the said building by the BGMEA. It appears from the said documents that total 40 kathas of land were purportedly sold to the Export Promotion Bureau(EPB) out of which the EPB allotted a portion of the same to BGMEA directing to exclude 2.8 kathas from construction as the same would adversely impede implementation of the "Hatirjheel Begunbari Project" as well as Begunbari canal. The said quantum of excluded land was subsequently reduced to 2.41 kathas for the purpose of protecting the said canal and the project. It further appears from those papers that merely a land use permit was accorded to the BGMEA for construction but it was never accorded with actual permission for construction nor the building construction plan was ever approved by the RAJUK under the Building Construction Act 1952 and rules framed thereunder in 1996. It further appears that the Building Construction Committee of RAJUK in its meeting dated 14.7.2003 resolved to conditionally approve the plan submitted by BGMEA but as a matter of fact no approval letter has been issued because of persistent failure of the BGMEA to fulfill the conditions attached. The BGMEA did not pay any heed to the directions of the RAJUK requiring to refrain from any construction work before obtaining final approval. Admittedly the RAJUK imposed penalty for unauthorized construction violating the law as well as the land use permission and thereby BGMEA was compelled to demolish the illegal construction prior to final approval. However, from the papers and documents of the concerned authorities BELA and other experts contended that the BGMEA not only deviated from the plan but also continued with the unauthorized construction beyond the sanction of law. Hence they prayed for passing appropriate direction to demolish the said unauthorized construction of BGMEA.

7. The RAJUK also filed its own and independent pleading by way of affidavit in opposition stating that the BGMEA constructed the building in question upon violating the Building Construction Act 1952 as well as "*gnvbMix, wefvMxq kni I †Rjv kn‡ii GjvKv mn †`‡ki mKj †c‡i GjvKvi †Ljvi gvV, Dby¾ ¯vb, D`¨vY Ges cvKwZK Rjvavi msi¶‡bi Rb¨ cYxZ AvBb*", (Act XXXVI of 2000). RAJUK further stated that 0.66 acre of land out of 6.12 acres was proposed

to be leased out to BGMEA by EPB pursuant to the nod of the Ministry of Commerce. Accordingly, the EPB executed a deed extending permission to BGMEA only to use the land, attaching stipulation therein that it would be open to BGMEA to take necessary plan to construct a multistoried building wherein the RAJUK took objection to the use of 5.23 kathas of land as the same was linked with the proposed Hatirjheel-Begunbari project for development of the lake. But eventually RAJUK agreed to accede to the proposition that 2.41 kathas of land could be arranged for the development of the proposed project. However, RAJUK emphasized that the BGMEA could not acquire any title over the land by virtue of the said agreement.

8. On this backdrops the said Division Bench of the High Court Division directed the Deputy Commissioner, Dhaka, to depute an official with all relevant papers relating to the Begunbari canel as well as the Hatirjheel-Begunbari project to consider whether the BGMEA had title over the said land to construct such multistoried structure in violation of different laws of the land, which overshadowed the question of approval given by different authorities. In compliance thereof, the Deputy Commissioner, Dhaka, turned up with volume of dockets retained by the District Administration Office. When the same were placed before the High Court Division none of the parties, including BGMEA, raised any objection as to the authenticity of any of those documents.

9. Under such circumstances upon hearing a good number of experts including the learned Attorney General, and others as amici curiea and upon considering all the documents placed before it and considering the facts and circumstances and the connected laws of the land made the said Suo Moto Rule absolute by judgment and order dated 03.04.2011, holding that the 15 storied building constructed by BGMEA has been done on the water body illegally which is contrary to the master plan as well as the development plan of the Dhaka City in violation of Act XXXVI of 2000 and such construction cannot be allowed to remain in its position. Accordingly, the authority concerned was directed to demolish the said unauthorized building within 90 days. The High Court Division further held that 'the money invested by the BGMEA in the construction of the said building can never be a ground to allow it to stay upright'. Thus it has ordered that 'the BGMEA must return the money to those who bought flats/spaces in the said unauthorized building, as those transactions stand vitiated, within 12 months from the date of receipt of the claim. The flats/spaces buyers, can however, not, claim interest, because, they are guilty of contributory negligence as they had actual or constructive knowledge about BGMEA's bareness of title and the illegality as to the construction of the said building'.

10. Being aggrieved by and dissatisfied with the said judgment and order of the High Court Division the President, BGMEA filed this civil petition for leave to appeal before this Division and obtained order of stay from the learned Judge in Chamber.

11. Mr. Rafique-ul Haque, the learned Senior Counsel appearing with Mr. Quamrul Huq Siddique, learned Counsel, on behalf of the petitioner extraneously submits that the BGMEA had nothing to do with the transfer of the land in question as the Export Promotion Bureau(EPB), pursuant to the approval of the Government through the Ministry of Commerce, allotted the said land in favour of the BGMEA for constructing its office building and accordingly an agreement between EPB and BGMEA was executed on 7.5.2001, pursuant to which, the BGMEA upon obtaining clearance from all concerned authorities obtained the plan approved by the RAJUK and constructed the said building on the said piece of land by investing more than several crores of taka within the knowledge of everybody and

as such the impugned judgment and order of the High Court Division directing to demolish the said building is without lawful authority and of no legal effect. He next submits that h by investing huge amount of money the BGMEA has constructed the said building and many office spaces/flats have been sold to several other persons who are running their business/offices for more than a decade. As such demolition of the said building will not only act harshly upon the petitioner but also equally affect the flats/office space owners. He submits that the petitioner will get the benefit of section 43 of the Transfer of Property Act if the transfer by EPB appears to be fraudulent or otherwise nor the transfer of the said land to BGMEA shall be invalidated/affected under section 53C of the Transfer of Property Act or Section 52A of the Registration Act as the agreement dated 7.5.2001 is not a deed of conveyance purporting to transfer the title of the said land and the construction of the office building of the BGMEA is, of course, for public purpose as the members of the Association employed more than 45 lacs of workers. Thus demolition of the said building will affect more than 4/5 crores of people of the country resulting in reduction of the GDP to a great extent. He next submits that the finding of the High Court Division that 'the BGMEA and the Export Promotion Bureau made a conspiracy to illegally grab the Government's land' is not based on any material on record; rather the Government, through the Ministry of Commerce, decided to allot the land in question in favour of the BGMEA in 1988. He further submits that since the BGMEA has paid fine, ten times of the prescribed fees, to the RAJUK under Section 3B(5)(d) of the Building Construction Act, 1952 the BGMEA is entitled to receive the approval of the plan. The learned Counsel further submits that after the land being allotted to the BGMEA and the construction being started upon complying with all the directives of the RAJUK and for a single violation the BGMEA having paid penalty to the RAJUK and thereafter the plan having been approved by the RAJUK consequently the construction being completed in accordance with the approved plan there is no violation of section 3 and as such the order of demolishing the said building for alleged unauthorized construction is not tenable in law. Lastly, it is submitted that since the BGMEA does not fall within the criteria of Section 3B(5) of the Building Construction Act, who would be directed to dismantle/demolish the said building and since necessary fees/fines/penalties has already been paid by the BGMEA there is no scope of passing any order of demolishing the building under Section 3B(5) of the Building Construction Act. Thus the High Court Division failed to appreciate that the land in question was neither in the Begunbari Khal nor a wetland (Jaladhar), nor the building has been constructed illegally upon obstructing the Hatirjheel Project, and as such erred in directing to demolish the said building. Hence, the impugned judgment and order is liable to be set aside.

12. From the facts as stated above and on consideration of the materials on record it appears that the BGMEA claimed that in 1988 the Government of Bangladesh decided to construct World Trade Centre. Accordingly, 6.12 acres of land situated on six different mouzas namely, (1) Rajar Bagh (2) Shahar Khilgaon (3) Boro Moghbazar (4) Begun Bari (5) Bagh Noadda and (6) Kawran, which were originally acquired for the Railway Department vide LA Case No. 16/59-60 along with many other lands, were decided to be transferred to the Ministry of Commerce. Subsequently, the Ministry of Commerce through Export Promotion Bureau decided to allot some of the said 6.12 acres of land to BGMEA for constructing its Office Complex. Thereafter on 17.12.2006 a deed of conveyance was executed and registered by the Bangladesh Railway in favour of the Export Promotion Bureau (EPB), wherein 5.55 acres of land, instead of 6.12 acres covering the aforesaid mouzas, which is admittedly "Doba" (Jolashoy), was handed over to the Export Promotion Bureau for which consideration money was to be paid in five installments. Interestingly, from the record it appears that five years earlier to the said transfer and handing over possession of

the said land, the Export Promotion Bureau, on 7.5.2001 entered into an agreement with BGMEA to hand over possession of 0.66 acre of land out of the said 5.55 acres. So it is clear that Export Promotion Bureau did not have any right, title, interest and possession over the property in question before the transfer of the same by the Bangladesh Railway on 17.12.2006. Thus a question arises as to how the Export Promotion Bureau could enter into an agreement with BGMEA and hand over possession of the same in favour of BGMEA before it could have acquired any right, title, interest and possession of its own. Moreover, from Annexure- K-2, the registered deed of transfer dated 17.12.2006 by Railway to EPB, it appears that in the schedule the land/property transferred to BGMEA has been described as 'Doba'. The term "†Wvev" (Doba) means "Joladhar", (water body), the nature and character of which cannot be changed into any other class or such water body cannot be transferred, let out or used in any other manner as provided in section 5 of "Joladhar Ain" (Act XXXVI of 2000) as well as in section 6 Uma of the Bangladesh Poribesh Shongrokkhon Ain 1995". Thus the so called transfer cannot, under any circumstances, be protected under any law not even under Sections 43 or 53C of the Transfer of Property Act as well as under section 52A of the Registration Act, as claimed by Mr. Huq. Thus we express our great anxiety as to how the "Doba" (waterbody) could be transferred/allotted to BGMEA for constructing a 15 storied building upon changing its nature and character in violation of the abovenoted laws, moreso when admittedly the Export Promotion Bureau did not obtain any right, title, interest or possession of the same.

13. On consideration of the materials on record and the chronology of facts as stated above, it is clear that admittedly BGMEA constructed the building on a place which is covered by CS Plot No. 208 of Mouza Boro Mogh Bazar; CS Plot No. 1 of Mouza "Baag Noadda" and CS Plot No. 105 of Mouza "Begunbari", which, admittedly, have been classified as "Doba" means "Jolashoy" (*Rjvkq*) as apparent from the schedule of the EPB's registered transfer deed dated 17.12.2006. Under Section 2(Cha) of the "*gnvbMix , wefvMxq kni I †Rjv kn‡ii GjvKv mn †`‡ki mKj †cŠi GjvKvi †Ljvi gvV , Db¥y³ ¯'vb, D`¨vY Ges cvKwZK Rjvavi msi¶‡bi Rb¨ cYxZ ABb*", (Act XXXVI of 2000)(in short "Joladhar Ain", 2000) a "Jolashoy" (*Rjvkq*) falls within the definition of "Prakkitik Joladhar" (*cvKwZK Rjvavi)* which retains rain water and/ or other water. Any transfer of such Jaladhar or any change of its nature, creating obstruction/ construction of any sort on such "Joladhar" (water body) is prohibition under Section 5 of the "Joladhar Ain 2000" and section 8 of the said Ain deals with punishment for creating such obstruction or changing the nature and character of such water body and/or for violation of the said law which is a special law with a non-obstante clause in section 3. Section 2(cha), 3, 5 and 8 of the said Ain of 2000 read as follows:

> "*2 | msÁv |- wewa ev cm‡½i cwic¯'† Kvb wKQyi bv _vK‡j, GB AvB‡b*
>
> .....
>
> *P) "cvKwZK Rjvavi ÔÔ A_ b`x ,Lvj, wej, `xN, SYv ev Rjvkq wnmv‡e gv÷vi c¨v‡b wPwýZ ev miKvi, ¯'vbxq miKvi ev †Kvb ms¯'v KZ„K miKwi †M‡R‡U cÁvcb Øviv ,eb¨v cevn GjvKv wnmv‡e †NwlZ †Kvb RvqMv Ges mjj cwZb Ges e„ó i cwZb avi Y K‡i Ggb †Kvb fwgI Gi Aš—f³ n‡e;"*
>
> *"3 | AvB‡bi cvavb¨ | - AvcvZZt ejer Ab¨ †Kvb AvB‡b hvnv wKQyB _vKzk bv †Kb, GB AvBb I Z`ax‡b cYxZ wewai weavbvejx KvhKi _wK‡e |"*
>
> *"5| †Ljvi gvV, Db¥y³ ¯'vb, D`¨vb I cvKwZK Rjvav‡ii †kwY cwieZ‡b evav-wb‡la |- GB AvB‡bi weavb Abyhvqx e¨ZxZ, †Ljvi gvV, Db¥y³ ¯'vb, D`¨vb Ges cvKwZK Rjvavi wnmv‡e wPwýZ RvqMvi †kYx cwieZb Kiv hv‡e bv ev D³ i¡c RvqMv Ab¨ †Kvb fv‡e e¨envi Kiv hv‡e bv ev Aby¡c e¨venv‡ii Rb¨ fvov , BRviv ev Ab¨ †Kvb fv‡e n¯'vši Kiv hv‡e bv|*
>
> *e¨vL¨v: GB avivi D‡ÏK¨ c÷YK‡í †Kvb D`¨vbi †gŠwjK ˆewkó¨ bó nq Gi¡c Zvi e„¶ iwR wbab‡K D`¨vbwU †kwY cwieZbi¡c MY¨ Kiv n‡e|"*

"8 | kwZ©, BZ¨wr` |- (1) †Kvb e¨w³ GB AvB‡bi †Kvb weavb j•Nb Ki‡j wZwb AbwaK 5 erm‡ii Kviv`‡Û ev AbwaK 50(cÂvk) nvRvi UvKv A_©`‡Û A\_ev Dfq `‡Û `Ûbxq n‡eb|

(2) aviv 5 Gi weavb j•Nb K†i hw` †Kvb RvqMvq ev RvqMvi Aswe‡k‡li †kYx cwieZb Kiv nq , Zv nB‡j msiwkó KZ…©c¶ †bwUk Øviv Rwgi gwjK‡K A\_ev weavb j•NbKvix e¨w³‡K †bwU‡k D‡jwLZ RvqMvi †kYx cwieZ©‡bi Kv‡R evav c`vb Ki‡Z cvwi‡e Ges wbawiZ c×wZ‡Z Abbyªgw`Z wbgvYKvh ‡f‡½ †dwjevi wb‡`©k w`‡Z cvwi‡e Ges Ab¨‡Kvb AvB‡b hvnv wKQz \_vKzK bv †Kb, D³ i|c ‡f‡½ †djvi Rb¨ †Kvb ¶wZc~iY c‡`q nB‡e bv |

(3) GB AvB‡bi weavb j•Nb K‡i hw` †Kvb wbgvYKvh m¤úbœ`Z ev AeKvVv‡gv ˆZwi n‡q _v‡K †mB mKj AeKvVv‡gv Av`vj‡Zi Av‡`‡k msiwkó KZ…©c‡¶i eive‡i ev‡RqvßnB‡e"|

14. On the other hand section 2(Ka Ka), (Cha), 6 Umma and 12 of *ÔÔ evsjv‡`k cwi‡ek msi¶Y AvBb 1995*" *(*the Environment Conservation Act 1995) read as follows:

ÔÔ 2| msÁv |- wel‡q A_ev cm‡½i cwicš’ †Kvb wKQz bv _vwK‡j GB AvBb,

(KK) ÔÔRjvavi ÕÕ A_ b`x, Lvj, wej, nvIo, evIo, `xwN, cyKzi , SYv ev Rjvkq wnmv‡e miKwi fyg †iK‡W wPwýZ fwg ev miKvi , ¯'vbxq miKvi ev miKwi †Kvb ms¯'v KZ…K miKwi †M‡R‡U cÁvcb Øviv †NvwlZ †Kvb Rjvfwg, eb¨v cevn GjvKv , mjj cwb I eyóóªi cwb avviY K‡i Ggb †Kvb fwg |

(P) ÔÔ cwi‡ek msi¶Y ÕÕ A_ cwi‡e‡ki wewfb Dcv`v‡bi ¸bMZ I cwigvb MZ gvb Dbqb Ges ¸bMZ I cwigvbMZ gv‡bi AebwZ †iva ÕÕ ;

6O| Rjvavi m¤úwKZ evav- wb‡la | - AvcvZZt ejer Ab¨ †Kvb AvB‡b hvnv wKQz _vKzK bv †Kb , Rjvavi wn‡m‡e wPwýZ RqMv fivU ev Ab¨ †Kvb fv‡e †kwY cwieZb Kiv hvB‡e bv

Z‡e kZ _v‡K †h, Acwinvh RvZxq ¯v‡_ Awa`ß‡ii QvocÎ MnY µ‡g Rjvavi m¤úwKZ evav- wb‡la wkw_j Kiv hvB‡Z cv‡i|

ÔÔ 12| cwi‡ek MZ QvocÎ | - gnvcwiPvj‡Ki wbKU nB‡Z, wewaØviv wbawiZ c×wZ‡Z, cwi‡e‡kMZ QvocÎ e¨wZ‡i‡K †Kvb GjvKvq †Kvb wkí cwZôvb ¯'vcb ev cKí MnY Kiv hvB‡e bv;

Z‡e kZ _v‡K †h miKvi KZ…K mgq mgq ÎZ`yÏ‡k¨ wbawiZ †kYxi wkí cwZôvb ev cK‡íi †¶‡Î GB avivi †Kvb wKQz c‡hvR¨ n‡e bv |"

15. Section 12 has been amended in 2010 upon incorporating a few sub sections but the mandatory provision of obtaining Environment clearance certificate has not been touched.

16. On the other hand under Rule 7 of the *ÔÔcwi‡ek msi¶Y wewagvjv 1997ÕÕ (*Environment Conservation Rules 1997) all industries/establishments and projects have been classified into four categories, considering the graveness of such establishment/project's impact on the environment. The projects having/causing minimum impact on the environment have been classified in "Green" class and projects having/causing more serious impact have been classified gradually in Orange- Ka, Orange-Kha and Red class considering the graveness of impact on environment. In schedule 1 (Prepared under Rule 7(2) of the said Rules) commercial establishment/project has been categorized/classified in "Orange Kha" class for which, there is mandatory requirement of obtaining, the Site Clearance Certificate at the very first step and then the Environment Clearance Certificate as provided in Rule 7(4). Rule 7(4) of the said Rules of 1997 reads as follows:

ÔÔ 7| (4) Kgjv - K, Kgjv L Ges jvj †kYx fy³ c¯—weZ wkí cwZôvb I cK‡íi †¶‡Î mec_g Ae¯'vbMZ Ges Zrci cwi‡ek MZ QvocÎ c`vb Kiv nB‡e |

Z‡e kZ _v‡K †h, †Kvb wkí cwZôvb ev cK‡íi Av‡e`b µ‡g Ges gnvcwiPvjK hw` Dchy³ g‡b K‡ib, Zvnv nB‡j wZwb D³ wkí cwZôvb ev cKí‡K Ae¯'vb MZ QvocÎ c`vb e¨wZ‡i‡K mivmwi cwi‡ek MZ QvocÎ c`vb Kwi‡Z cvwi‡eb|"

17. From the facts stated above admittedly the BGMEA has constructed a fifteen storied commercial complex on the "Begun Bari Khal" and "Hatir jheel lake" which is natural

waterbody (cvKwZK Rjvavi) as has been specifically admitted in the schedule to the transfer deed, Annexure-K-2 as well as in the government record and in the Master Plan of the Dhaka City, as Lake/Jolashoy/Doba. As such from the above provision of law, the class or the nature and character of the same cannot be changed nor can be used in any other manner/purpose nor can the same be leased out, rented or transferred by any body. The law further provides that any person changing the nature and character of such "Joladhar" (water body), in violation of section 5 of the said Act of 2000, shall be dealt with in accordance with law as provided in section 8. Since BGMEA has constructed the multi-storied commercial building upon the said waterbody in violation of the law such illegal construction/obstruction must be demolished for which the BGMEA or any other person, notwithstanding anything contained in any other law, cannot claim any compensation as provided in Section 8(2) of the Joladhar Ain 2000. On the other hand the non-obstante clause of section 6 Uma of the Environment Conservation Act also provides clear prohibition in such construction/erection of any building on the waterbody (cvKwZK Rjvavi). In the case of Union of India and others Vs. Kamath Holiday Resort Pvt. Ltd (AIR 1996 SC 1040) some land of reserved forest area were leased out to set up a "snack bar" and a restaurant to cater to the needs of the tourists visiting the forest which was objected to by the Conservator of Forest, as the same would affect the forest. The Supreme Court of India, relying on section 2 of the Forest Act 1980, observed that 'the Conservator of Forest was legal inasmuch as there was restriction on the de-reservation of forest or use of forest land for non forest purpose'. However, relying on section 3 of the said Act the Supreme Court made a balance between the environment and necessity/demand of other use of the forest. But in our country there is no such provision of balancing in either of the aforesaid laws. Rather the Environment Conservation Act of 1995, in proviso to section 12 has given exemption to the government for setting up specific class of industrial establishments/projects. The BGMEA building is neither a specified class of industrial establishment nor a government project, rather it is wholly a commercial establishment for the benefit of the BGMEA, a private body.

18. In respect of making construction on low lying areas which protects the Dhaka City during heavy rain or flood from being totally submerged, a project named as "Modhumoti Model Town", a new proposed township has been declared to be illegal. The earth filling and initial construction work of the said project has been declared to be in violation of the Environmental and other laws of the land by the Appellate Division of the Supreme Court of Bangladesh(65 DLR(AD)181 Metro Makers and Developers Ltd Vs. BELA). So any project undertaken in violation of any law can never get the approval. In the aforesaid case, the apex Court held "the object of Joladhar Ain is to protect "Prakkitik Joladhar" mainly for the purpose of proper drainage of flood and rain water in the Dhaka City and under the law conversion of Prakkitik Joladhar to undertake a project cannot be allowed as that would not be consistent with the purpose of law…."

19. In the present case admittedly the "Begunbari Khal" and the "Hatirjheel" are natural waterbodies ("Prakkitik Joladhar"), as the same has been included in the Dhaka Metropolitan Development Plan, Vol-II (Urban area plan (1995-2005) which drains $\frac{1}{3}$ of the Dhaka city's storm and waste water side by side retains the rain water and the same is to provide the water based recreational opportunities in a fairly location. So implementation of any commercial building changing the nature and character of the said waterbodies ("Prakkitik Joladhar") in violation of "Joladhar Ain" is completely without lawful authority. Such construction is in violation of the mandatory provision of the said law as well as of the Environment Conservation Act 1995. Moreover, in similarity with section 2(Cha) of the "Joladhar Ain"

section 2(ka ka) of the Environment Conservation Act 1995 has also defined "Joladhar" as ÔÔRjvavi ÕÕ A_ b`x, Lvj, wej, nvIo, evIo, `xwN, ckvZ, SYv ev Rjvkq wnmv‡e miKwi fvlg †iK‡W wPwýZ fwg ev miKvi, ¯vbxq miKvi ev miKwi †Kvb ms¯v KZ„K miKwi †M‡R‡U cÁvcb Øviv †NwlZ †Kvb Rjvfwg, eb¨v cevn GjvKv, mjj cwlb I e„wói cwlb avivY K‡i Ggb †Kvb fwg | So the aforesaid two laws have spelt out that any area/place marked/recognized/recorded as "Joladhar" in any gazette notification published by the government fall within the definition of "Joladhar". In this regard we perused the Dhaka Metropolitan Development Plan, VOL-II Urban Area Plan (1995-2015) published in the Gazette notification vide SRO No. 91-AIN/1997 on 05.04.1997, commonly known as "Proposed Master Plan", wherein the "Begumbari Khal" has been recorded and recognized as a "Joladhar". Side by side the registered deed in favour of EPB executed by the Bangladesh Railway Annexure K-2, in its schedule clearly mentioned the transferred property as "Doba"-(waterbody) which attracts Section 2(Cha) of the "Joladhar Ain 2000" as well as section 2(ka ka) of the Environment Conservation Act. As such pursuant to the non-obstante clause incorporated in section 3 of the "Joladhar Ain 2000" as well as section 2Ka of the Environment Conservation Act 1995, both the laws shall prevail over any other law prevailing in the country for the time being in force. Thus the prohibition imposed by section 5 of the Joladhar Ain and section 6(Uma) of the Environment Conservation Act shall automatically come into operation and any violation of the said prohibition shall be dealt with in accordance with section 8 of the "Joladhar Ain," as well as section 15 of the Environment Conservation Act 1995. In such view of the matter the transfer/allotment of the water body by EPB to BGMEA and consequently the change of the nature and character of the said water body ("Joladhar") by BGMEA is completely violative of the said two laws and as such the violators are liable to be punished with imprisonment and fine and such illegal construction is liable to be demolished for which BGMEA or any other person is not liable to get any compensation.

20. On the second count, when a property is transferred, two laws, namely, the Transfer of Property Act, 1882 and the Registration Act, 1908 come into operation to validitate such transfer. Transfer, under the Transfer of Property Act, includes transfer of title, transfer of interest and transfer of possession. But when the transferor has not acquired any right, title, interest and possession in any property and got his name recorded in the government record under section 143 of the State Acquisition and Tenancy Act 1950, he can never sell or lease out such property in any manner, through deed of sale/lease agreement/sale agreement as provided in section 53C of the Transfer of Property Act and also under section 52 of the Registration Act. In the present case admittedly the Export Promotion Bureau did not acquire any right, title, interest or possession, on the property in question before 17.12.2006 and having not gotten its name recorded in the record pursuant to such transfer, the alleged transfer by the EPB, through agreement dated 7.5.2001 in favour of BGMEA, which is five years prior to the EPB's acquisition of title, if any, is not at all a valid transfer in the eye of law. Thus the Export Promotion Bureau had no right/authority to transfer/allot or handover possession of the property in question in favour of the BGMEA or any other person/authority before any title being vested upon it. The agreement dated 7.5.2001, on the basis of which the BGMEA constructed the commercial complex building, itself is a nullity and no right, not to speak of title or interest, ever accrued upon the BGMEA as the agreement was entered into before EPB obtained right, title and interest on the property in question. Such transfer/allotment is void under the aforesaid two laws. As such, when the transfer/allotment itself is without lawful authority rather void, obtaining no objection/clearance certificate from any authority or approval of the plan from the RAJUK will not cure the illegality. Moreso, when admittedly, the construction of the BGMEA commercial building in question has been completed before the transfer was made by the Bangladesh Railway to the Export Promotion

Bureau the construction of the BGMEA commercial building complex on the said land is not only unauthorized but also illegal and void which cannot be cured under any law as claimed by Mr. Hoque under the principle that illegality committed at the very inception cannot be cured by any subsequent action whether valid or not.

21. On the other hand since the Export Promotion Bureau did not acquire any title on the property in question, which are natural waterbodies, before 17.12.2006, which is again not a valid transfer in accordance with section 53C of the Transfer of Property Act 1982 as well as section 52 of the Registration Act 1908, and also under section 5 of the Joladhar Ain, 2000, the purported transfer/allotment of the same pursuant to certain memos issued by the Ministry and by an unregistered agreement by EPB in 2001 is totally a vacuous move which was neither a sale nor a lease within the meaning of the aforesaid two laws. As such the construction on such natural waterbodies/property by BGMEA, a private organization without having any legal/valid right, title on the same, is not only illegal but is the result of pernicious acts of inexonerable fraud and deceit.

22. Again from Annexure-C-7 dated 07.01.2003 (Annexed to the writ petition) it appears that the office of the Deputy Director of the Department of Environment, issued the same captioned as "*Ae¯vbMZ Qvoc Î*" meaning "site clearance certificate" not "*cwi‡ekMZ Qvoc Î*" meaning "Environmental clearance certificate" which is required to be obtained from the Director General of the Department of Environment after the conditions contained in the "*Ae¯vbMZ Qvoc Î*" are fulfilled for the purpose of constructing any structure/ building/establishment or any industrial/commercial establishment or a project on any land within Bangladesh as per section 12 of the Environment Conservation Act 1995 read with Rule 7(4) of the Environment Conservation Rules 1997. From the language of Section 12 of the Environment Conservation Act 1995 it is clear that no construction of any project can be undertaken without obtaining the Environment Clearance Certificate "(*cwi‡ekMZ Qvoc Î*)" from the Director General of Environment not 'site clearance certificate'(*Ae¯vbMZ Qvoc Î),* which is rather one of the preconditions to obtain the Environment clearance certificate. Reading Rule 7(4) of the Environmental Conservation Rules 1997 it appears that "*Ae¯vbMZ Qvoc Î*" (site clearance certificate) is required to be obtained in respect of industrial/commercial establishment/project which are classified/categorized in class Orange 'Ka' Orage-Kha and Red.' Under schedule-I,(prepared under Rule 7(2) of the aforesaid Rules of 1997) Hotel, multistoried commercial/apartment building have been classified/categorized in class "Orange Kha" which requires site clearance certificate before obtaining Environment Clearance Certificate. The petitioner's building admittedly being a fifteen storied commercial building requires both "*Ae¯vbMZ Qvoc Î*" as well as "*cwi‡ek MZ Qvoc Î*" which the petitioner failed /did not care to obtain as per requirement of law. In the absence of any environment clearance certificate(*cwi‡ek MZ Qvoc Î*) obtained from or issued by the Director General of the Department of Environment, no commercial establishment/project can be set up or built as provided in Section 12 read with Rule 7(4) as quoted before.

23. Admittedly, the petitioner's project does not fall within the criteria of the proviso of Section 12 and the petitioner also did not produce any paper to take benefit of the said proviso. As such the construction of the commercial building complex of the BGMEA, on the water body/reservoir(Joladhar) which never belonged to the petitioner, at any point of time, is completely illegal and such construction is violative of Section 5 of the "Joladhar" Ain, 2000" as well as Sections "6 Uma" and 12 of the Environment Conservation Act 1995.

24. Apart from the illegality of transfer by EPB and construction of the BGMEA building on the said transferred water body, as stated above, the construction of the said building is also illegal for being violative of section 3 of the Building Construction Act 1952 as well as Rules framed thereunder. Section 3 of the Building Construction Act, 1952 imposed restriction, with non-obstante clause, on construction or re-construction of any building etc. without obtaining previous sanction/approval of the authorized officer of RAJUK. Rule 3(I) of the Building Construction Rules, 1996 contemplates filing of application in prescribed form for obtaining prior sanction/approval from the Authorized Officer. Prescribed Form has been defined in Rule 2(cha) of the said Rules which has been described in schedule 1 to the said Rules. On perusal of schedule 1 it appears that along with the particulars of the land, proof of ownership of the land is required to be submitted. Schedule 1, serial 3(*R*), reads as follow:

> *"(R) Av‡e`bKvix / Av‡e`bKvixMY wK m‡Î mvB‡Ui Rwg ARb Kwiqv‡Qb (gwnjKvbvi cgvYcÎ `wLj Kwi‡Z nB‡e)"*

25. So, the proof of ownership/title of the applicant over the land in question is a mandatory requirement to obtain sanction of plan from the RAJUK. Earlier we have already found that the EPB did not acquire title, whatsoever, before handing over the possession of land in question to the BGMEA in 2001 nor it got its name mutated in the record of rights, thus there is a question of vesting title on the BGMEA. As such it has/had no scope of submitting the title documents along with the plan. So there is no scope for the RAJUK to approve or sanction the building construction plan, and RAJUK in its affidavit stated that it did not finally approve the plan. In this score also the BGMEA building/office Complex has been constructed in violation of the Building Construction Act, 1952.

26. Considering all these aspects we do not find any reason to interfere with the impugned judgment and order of the High Court Division which is well reasoned and based on proper appreciation of facts and circumstances as well as the law. As such we have no hesitation to hold that the BGMEA building complex has been constructed by the petitioner illegally in violation of all the laws of the land which cannot stay upright rather the same deserves to be demolished at once. Thus the contention of Mr. Rafiqul Huq that the defect in title or in constructing the said building can be cured under section 43 of the Transfer of Property Act, or section 3B(5)(d) of the Building Construction Act 1952 or under any other law, is not at all sustainable.

27. Accordingly we do not find any merit in this civil petition. Hence, the civil petition for leave to appeal is dismissed.

28. The petitioner is directed to demolish the building namely, "BGMEA Complex" situated on the water body of "Begunbari khal" and "Hatirjheel lake" at once, at its own costs, in default the RAJUK is directed to demolish the same within 90 days from the date of receipt of this judgment and realize the entire demolition costs from the petitioner, BGMEA.

29. However other operative parts of the impugned judgment and order are maintained.

30. Let a copy of this order be communicated to RAJUK at once for taking appropriate steps.

9 SCOB [2017] HCD 1

High Court Division
(Special Original Jurisdiction)

I.T. Ref: Application No. 39 of 2011

International Leasing and Financial Services Limited
Vs.
The Commissioner of Taxes, Taxes Zone-LTU, Dhaka

Mr. Abdus Salam Mamun, Adv.
...For the Assessee-applicant.

Mr. Saikat Basu, AAG with
Ms. Nasrin Parvin, AAG
...For I.T. Department.

Heard on: 07.09.2014, 10.9.2014 & 12.11.2014
And
Judgment on: 11.12.2014

Present:
Justice A.F.M. Abdur Rahman
And
Justice Md. Emdadul Haque Azad

Income Tax Ordinance 1984
Article 5A of the 3rd Schedule:
It appears that the leasing company being the owner of the leased out asset, used the asset for the purpose of business, i.e. leased out the property using the same as business assets and as such attracted by the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984.
It appears that the first appellate authority did not consider as to the ownership of the vehicle remaining with lessor and not with the lessee and further that the lessor deals in the business of leasing out the vehicle to the lessee who operates the vehicle for his business. But the business of the lessor remains in the status of using the vehicle for the purpose of business of lease. Therefore these two pre-condition having been fulfilled in the instant case, the Assessee-applicant is entitled to the normal depreciation allowance and the initial depreciation allowance on the vehicle it has leased out to different lessee, being their customer. ... (Para 13 & 14)

Judgment

A.F.M. Abdur Rahman, J:

1. Failing to impress the Taxes Appellate Tribunal as to the entitlement of the assessee-applicant to depreciation of the vehicle put on lease, under the provision of 3rd Schedule of the Income Tax Ordinance 1984, the Assessee-applicant, International Leasing and Financial Services Limited, preferred the instant Income Tax Reference Application, under the provision of section 160(1) of the Income Tax Ordinance 1984 challenging the legality & propriety of the order passed by the Taxes Appellate Tribunal with the following formulated question;

> *A. Whether on the facts and in the circumstances the amendment of the Ordinance No. XXVI of 1984 (i.e. the Income Tax Ordinance, 1984) made by the Finance Ordinance, 2007 and came into force from the 1st day of July, 2007 inserting*

the paragraph (4) after the paragraph (3) in the Third Schedule providing: "(4) No allowance under this paragraph shall be made for a leasing company on such machinery, plant, vehicle or furniture given to any lease on financial Lease" is applicable in the instant return whose income year has commenced from the 1st day of January, 2006 and completed on the 31st day of December, 2006 and the business carried on according to the provisions of the Finance Act 2006.

B. On the facts and in the circumstances whether the applicant is entitled to the initial and normal depreciation allowances as were admitted to it under the Finance Act 2006.

C. Whether on the facts and in the circumstances the Taxes Appellate Tribunal, Division Bench-5, Dhaka, is justified to dispose of the appeal of the applicant without entering into the merit and without considering the legal aspect of the case especially without deciding as to whether the Finance Ordinance, 2007 that has come into force from 01.07.2007 is applicable in the instant case and affirming those of the commissioner of Taxes (Appeal), i.e. the appellate authority who dismissed the appeal on wrong interpretation of law.

2. ***Facts of the case:***

It has been asserted in the instant Income Tax Reference Application that the Assessee-applicant being admittedly a leasing company leased out different machineries and vehicles to its customers and derives income from the lease money, obtained from the lessees and is a regular income tax payer, holding TIN. 210-200-5100/Audit wing, Dhaka. In course of business, the Assessee-applicant submitted its income tax return for the assessment year 2007-2008 under the provision of Self Assessment Scheme, as provided in section 82BB of the Income Tax Ordinance 1984, showing a net loss of Tk. 8,06,01,364.00 and obtained the deemed assessment order. But the said return was selected for audit purpose by the National Board of Revenue, under the provision of section 82BB(3) of the Income Tax Ordinance 1984. The DCT concerned upon audit and further assessment enhanced the income of the Assessee-applicant at an amount of Tk. 18,70,54,662.00, against which the Assessee-applicant preferred appeal before the 1st Appellate Authority, being BuLl Bf£mfœ ew-253,263/Hm¢VCE/2008-2009, which having been failed, the Assessee-applicant preferred second appeal before the Taxes Appellate Tribunal, being ITA No. 1095 of 2009-2010. The Taxes Appellate Tribunal upon hearing and disposing of the Appeal remanded the tax case to the first appellate authority to dispose off the same on three specific points. The first appellate authority upon receiving the said remand order, registered the same as BuLl Bf£mfœ ew-17/Hm¢VCE/2009-2010(¢ljjä), but did not allow the relief to the Assessee-applicant for which the Assessee-applicant preferred further appeal to the Taxes Appellate Tribunal, being I.T.A. No. 91 of 2010-2011, which having been failed substantially, the Assessee-applicant preferred the instant Income Tax Reference Application with the formulated question as aforementioned.

3. ***Claim of the Taxes Department:***

Upon service of the notice of the instant Income Tax Reference Application, the learned Assistant Attorney General Ms. Nasrin Parvin along with the learned Assistant Attorney General Mr. Saikat Basu, appeared on behalf of the Taxes Department and filed affidavit-in-reply, wherein it has been claimed that the Taxes Appellate Tribunal was legally justified in law in upholding the order of the DCT concern and the CT(Appeal) regarding grant of normal depreciation and initial depreciation. Because, the change made to depreciation allowance by the Finance Ordinance 2007, was certainly applicable for the assessment year 2007-2008. The said Finance Act 2007 has not been applicable retrospectively, but

prospectively on the assessment year 2007-2008 and therefore the instant Income Tax Reference Application is not maintainable.

4. The learned Advocate Mr. Abdus Salam Mamun, represented the Assessee-applicant, while the learned Assistant Attorney General Mr. Saikat Basu argued on behalf of the Taxes Department at the time of hearing of the Income Tax Reference Application.

5. ***Argument of the Parties:***

These three questions brought before this court seeking opinion, appears to be of the same issue, whether the Finance Act 2007, which came into force from 1st day of July, 2007, inserting Paragraph-4 after Paragraph-3 in the 3rd Schedule of the Income Tax Ordinance 1984, is applicable to the Assessee-applicant for the assessment year 2007-2008, with further issue that even if the same is applicable whether the amended provision of law can be applied in the case of the Assessee-applicant company, which is admittedly a leasing company.

6. The learned Advocate Mr. Abdus Salam Mamun, appearing on behalf of the Assessee-applicant argued that the income year of the assessee-applicant relating to the assessment year 2007-2008 having been concluded on 31.12.2006, it was entitled to the initial depreciation of Tk. 38,36,304.00 and normal depreciation of Tk. 69,03,42,203.00 on the vehicle it has leased out to different lessee, under the provision of prevailing law of the period. But that being not considered by the audit team which dealt the audit at the initial stage, upon which the DCT concern disallowed the depreciation to the Assessee-applicant, was taken to the first appellate authority, which since failed to grant any relief to the Assessee-applicant the same issue was taken to the Taxes Appellate Tribunal, which directed the First Appellate Authority to dispose off the issue on specific points, upon which the First Appellate Authority in BuLl Bf£mfœ ew-17/Hm¢VCE/09-10(¢ljjä) decided as 1 ew Bf¢š relating to the said issue which is totally erroneous. But the Taxes Appellate Tribunal without considering the error in the impugned order, mechanically passed an order for which the assessee-applicant is highly prejudiced for which all the question as have been formulated in the instant Income Tax Reference Applications are required to be answered in negative and in favour of the assessee-applicant.

7. On the other hand the leaned Assistant Attorney General Mr. Saikat Basu argued that the assessee-applicant is not entitled to the initial depreciation since the machineries and the vehicle leased out by the assessee-applicant are not used by itself for the purpose of its business and as such the Taxes Appellate Tribunal did not commit any illegality for which the questions formulated herein, is not required to be answered in negative and in favour of the Assessee-applicant.

8. ***Deliberation of the Court.***

The issue of entitlement of the assessee-applicant to initial and normal depreciation on the plant, machinery and vehicle leased out by the assessee-applicant leasing company has been dealt with by the 1st appellate authority in the following manner;

> *"1 ew Bf¢šx For that the DCT erred in law as well as in facts in No. 1 allowing depreciation on leased assets claimed in the Income year ended on 31.12.2006 corresponding to the assessment year 2007-2008 as under.*
> *Initial Depreciation Tk. 38,36,304.00*
> *Normal Depreciation Tk.69,03,42,203.00*

করদাতা কোম্পানী কর্তৃক লীজ হিসাবে প্রদত্ত বিভিন্ন প্রকার স্থায়ী সম্পদের উপর initial depreciation Hhw Normal depreciation অনুমোদন না করার বিরুদ্ধে। নথি পরীক্ষা করে দেখা যায় যে, উপকl Ljnejl করদাতার নিজস্ব স্থায়ী সম্পদের উপর অবচয় অনুমোদন করলেও লীজ দেওয়া সম্পদের ক্ষেত্রে করদাতার দাখিলকৃত computation sheet H cjhLa initial hj normal অবচয় অনুমোদন করে নাই। তৃতীয় তফসীলের ৫এ অনুচ্ছেদে initial depreciation allowance এর ক্ষেত্রে উল্লেখ করা হয়েছে---in which such building, machinery or plant is used by the assessee----" এবং ২(১) অনুচ্ছেদে normal depreciation এর ক্ষেত্রে বলা হয়েছে "----providede in respect of any building, machinery, plant or furniture owned by an assessee and used for the purpose of business or profession carried a by him paljw mLS ØføaC fËje Ljl Assets এর ক্ষেত্রে অবচয় প্রদান আইনানুগ নয়। কারণ করদাতা লীজ হিসাবে প্রদত্ত Assets নিজের ব্যবসার জন্য ব্যবহার করেন না, লীজ গ্রহীতা করে। লীজদাতা লীজ এ্যাসেট এর মুল্যের উপর instalment (Interest+Principal) গ্রহন করে। অতএব এক্ষেত্রে ডিসিটির গৃহীত কার্যক্রম আইনানুগ ও যৌক্তিক হওয়ায় তা বহাল রাখা হলো।"

9. This opinion of the first appellate authority was mechanically affirmed by the Taxes Appellate Tribunal in ITA No. 91 of 2010-2011, without examining as to its legality and propriety. The language of disposal of the issue by the Taxes Appellate Tribunal reads as follows;

> *"Heard both the parties and gone through the assessment order, appeal order and examined the records. We have also considered the argument as put forward by the ld. A.R. The ld. C.T(A) aptly described the reason for not allowing depreciation on leased properties in his order. Considering these the order of the ld. C.T(A) is fair and reasonable. So we have no valid ground to interfere with the order of the ld. C.T(A) and the same is upheld."*

10. But it appears that the opinion of the first appellate authority is a total misconception of law since the first appellate authority did not consider the aspect of lease wherein the title of the lessor in the leased out assets has not been transferred to the lessee, so long the lease is in existence, which is a pre-condition of allowing the normal depreciation and initial depreciation as well. The provision of Article-2(1) of the 3rd Schedule of the Income Tax Ordinance 1984, prevailing during the period, deals in with the matter of allowing depreciation, which reads as follows;

11. ***Income Tax Ordinance 1984***

Article-2(1): Allowance for depreciation.—

(1) In computing profits and gains from business or profession, an allowance for depreciation shall be made in the manner hereinafter provided in respect of any building, machinery, plant or furniture owned by an assessee [or bridge or road or fly over of physical infrastructure undertaking] and used for the purposes of business or profession carried on by him.

(Highlighted by us)

12. The aforesaid provision says about ownership of the assets should lie with the assessee in order to grant the depreciation. In case of any lease, the ownership is always lying with the lessor, herein the leasing company, the assessee-applicant holding the ownership. Similarly, the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984 provides that the 'user' is the prime consideration to allow the depreciation of the assets. The provision of Article 5(A) of the 3rd Schedule of the Income Tax Ordinance 1984 reproduced below for better appreciation;

Income Tax Ordinance 1984

Article-5A: Initial depreciation allowance.—

(1) Where any building has been newly constructed or any machinery or plant has been installed in Bangladesh after the thirtieth day of June, 2002, an amount by way of initial depreciation allowance in respect of the year of construction or installation or the year in which such building, machinery or plant is used by the assessee for the first time for the purpose of his business or profession or the year in which commercial production is commenced, whichever is the later, shall be allowed at the following rates, namely:--

(a) In the case of building – ten per cent of the cost thereof to the assessee;

(b) *In the case of machinery or plant other than ships or motor vehicles not plying for hire– twenty-five percent of the cost thereof to the assessee.*

(2) *Nothing contained in sub-paragraph (1) shall apply in the case of—*

(a) Any motor vehicle not plying for hire, and

(b) Any machinery or plant which has previously been used in Bangladesh.

(3) *The provisions of paragraph 2 and 3 shall, so far as may be, apply to this paragraph as they apply to the said paragraph.*

(underlined by us)

13. It appears that the leasing company being the owner of the leased out asset, used the asset for the purpose of business, i.e. leased out the property using the same as business assets and as such attracted by the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984.

14. It appears that the first appellate authority did not consider as to the ownership of the vehicle remaining with lessor and not with the lessee and further that the lessor deals in the business of leasing out the vehicle to the lessee who operates the vehicle for his business. But the business of the lessor remains in the status of using the vehicle for the purpose of business of lease. Therefore these two pre-condition having been fulfilled in the instant case, the Assessee-applicant is entitled to the normal depreciation allowance and the initial depreciation allowance on the vehicle it has leased out to different lessee, being their customer. This aspect being a legal aspects were required to be considered by the Taxes Appellate Tribunal independently which having failed, this court is inclined to answer the formulated question in negative and in favour of the Assessee-applicant.

15. In the result, the instant Income Tax Reference Application is allowed.

16. The questions as have been formulated by the Assessee-applicant in the Income Tax Reference Applications are answered in negative and in favour of the Assessee-applicant.

17. However, there shall be no order as to cost.

9 SCOB [2017] HCD 6

HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 538 OF 2012

Md. Nur Islam
Vs.
Securities and Exchange Commission and others

Mr. Tanjib-ul Alam
…..For the petitioner.

Mr. Probir Neogi with
Mr. Suvra Chakravorty
…..For respondent No.1

Heard on the 29th November, 2nd & 8th December
And
Judgment on the 9th December, 2015

Present:
Ms. Justice Zinat Ara
And
Mr. Justice A.K.M. Shahidul Huq

Securities and Exchange Ordinance, 1969
Section 17:
In the instant case, after following due process of law and the principle of national Justice i.e. show cause notice was issued to the petitioner to explain his position, opportunity was also given for personal hearing before the penal order was passed. Moreover, the penal order has been passed elaborately considering the materials on record i.e. the confessional statement and explanation of the petitioner, the investigation report and the evidence on record. The said order has been affirmed by the quasi judicial body in revision/review. … (Para 15)

Securities and Exchange Ordinance, 1969
Section 26:
On consideration of the materials on record, it appears to us that the impugned order dated o8. 12. 2011 can not be said to be unlawful merely because it is without elaborate reasoning and non-speaking one. The impugned order appears to be otherwise sustainable. … (Para 16)

Judgment

Zinat Ara, J:

1. In this Rule Nisi, the petitioner has called in question the legality of the order under Memo No. SEC /Enforcement/ 908/2011/789 dated 08.12.2011(Annexure- A to the writ petition) passed by Respondent No.2 rejecting the revisional application dated 20.09.2011 preferred by the petitioner under section 26 (1) of the Securities and Exchange Ordinance,

1969 (hereinafter referred to as the Ordinance) against the Penal Order being Order No. SEC/Enforcement/908/2011/ 569 dated 06.09.2011.

2. **Admitted facts.**

The petitioner-Md. Nur Islam, was the Secretary of a company namely, Beach Hatchery Limited (hereinafter stated as the Company). He had been working there for 18 years. At the instruction of the Securities and Exchange Commission (hereinafter stated as SEC), vide letter No. SEC/ Surveillance/2003-0041/369 dated 21.09.2010, regarding unusual share trading of the Company, respondent No.3, the Chief Executive Officer, Dhaka Stock Exchange Limited (shortly, DSE) conducted an investigation hearing on 26.10.2010 at Monitoring, Investigation and Compliance Department of DSE. After investigation hearing was conducted, DSE sent letter No. DSE/LC/20-10/Inv/ 3458 dated 26.10.2010 to the Company informing about the outcome of hearing and requested the Chairman of the Company to inform about the action taken against the persons, who were involved in the illegal selling of unclaimed bonus shares of the Company. Thereafter, following issuance of the said letter SEC sent letter No.SEC/Surveillance/2003-0041/413 dated 08.11.2010 to the Company quoting the investigation report and requesting the Managing Director of the Company to comment on the findings as quoted. Whereupon, the Managing Director of the Company informed the Director of SEC vide letter No. BHL/HO/2010-591 dated 23.12.2010 that the Company management duly investigated the matter and found that entire illegal share trading has been conducted by the Company's Computer Operator of Shares Department Md. Abdul Alim without involvement of any other executive/officer of the Company. After the investigation report was submitted by DSE, SEC issued a show cause-cum-hearing notice being Notice No. SEC/Enforcement/908/2011/133 dated 07.03.2011 to the petitioner to explain his position and to appear before SEC for hearing. The petitioner submitted written explanation to the show cause-cum-hearing notice. Upon hearing and considering the petitioner's written explanation dated 21.04.2011, eventually, respondent No.2 issued a penal order being SEC/ Enforcement /908/ 2011/ 570 dated 06.09.2011 (annexure-E to the writ petition) on the basis of petitioner's written confession given to the investigation team.

3. Being aggrieved by penal order No. SEC/ Enforcement/ 908/2011/569 dated 06.09.2011 issued by SEC, the petitioner filed a revisional application dated 20.09.2011 but the said application was rejected by the impugned order dated 08.12.2011 and thereby, upheld penal order dated 06.09.2011.

4. **The petitioner's Case**

The Managing Director of the Company by letter dated 23.09.2010 informed that only Computer Operator of Shares Department namely Abdul Alim was involved in illegal trading of bonus shares of 21,000 of the share-holders of the Company; that the petitioner's confession was forcibly obtained by Md. Kh. Asadullah of DSE; that the petitioner was not involved in the alleged illegal share transaction but the transfer of shares was done behind his back by Md. Abdul Alim; that inspite of petitioner's explanation about the facts, penal order was passed unlawfully against him; that the review petition of the petitioner was rejected without considering the facts and circumstances of the case unlawfully.

5. **Respondent No. 1's Case.**

Respondent No. 1, SEC contested the rule by filing an affidavit-in-opposition controverting and denying the statements made in the writ petition contending, inter alia, that the petitioner was the Secretary of the Company and was the authorized person of Md. Abdul Alim being Proforma respondent No.5 of the writ petition; that the petitioner operated two

accounts in the Company, one account was operated in his own name and the other in the name of Abdul Alim; that Abdul Alim, the Computer Operator of the Shares Division of the Company, holding BO Account No. 1201570026013352 client code-17110 used to transfer the bonus shares of various clients to his account upon discussion with the petitioner; that the petitioner embezzled Tk. 8,50,000/- and Abdul Alim also embezzled Tk.4,50,000/- out of the total illegal share sell proceeds of the Company; that investigation was conducted by DSE legally; that the investigating team after investigation and considering the petitioner's own confession and the material on record, submitted investigation report against the petitioner and Abdul Alim; that penal order was passed by SEC after following the legal Procedure; that the revision order has also been passed legally though not an elaborate one; that in the facts and circumstances of the case, the rule is liable to be discharged.

6. Mr. Tanjib-ul Alam, the learned Advocate for the petitioner, takes us through the writ petition, the connected materials on record, the impugned order dated 8.12.2011, the relevant provision of section 26(1) of the Ordinance and submits that the order passed by SEC is neither elaborate nor a speaking one and therefore, the same is unlawful. He next submits that the revisional authority has not considered that the penal order was passed against the petitioner merely on the basis of his confessional statement obtained forcibly. He further submits that impugned order has been passed without appreciating the facts and circumstances of the case. He also submits that respondent No.2 also failed to appreciate that the Chairman of the Company by a letter dated 15.9.2012 had informed that upon inquiry, only Abdul Alim was found responsible for illegal transaction of 21,000 bonus shares. He lastly submits that respondent No.2 has not applied his judicial mind in passing the impugned order and therefore, the impugned order is liable to be struck down.

7. In reply, Mr. Probir Neogi, the learned Advocate for respondent No.1-SEC, takes us through affidavit-in- opposition, the investigating report, penal order dated 06.09.2011, the impugned order and contends that the petitioner only challenged the order of revision without challenging the original penal order and so, the writ petition is not maintainable. He next contends that from the investigating report, it transpires that both Abdul Alim and the petitioner were involved in the unlawful transaction of bonus shares. He further contends that admittedly, show cause-cum-hearing notice was served upon the petitioner for violation of the provision of section 17(a) of the Ordinance, he gave reply to the show cause-cum-hearing notice and upon hearing, and penal order was passed by describing the evidence in details with statements of witnesses. He also contends that at the time of passing the penal order, confession of the petitioner, the other evidence, the petitioner's reply, etc. were duly considered by the authority. He next contends that it is true that the revisional order is a short order and not an elaborate order but, for that reason, the impugned order ought not to set-aside if, on consideration of the materials on record, it is seen that the order so passed is sustainable. Mr. Neogi lastly contends that the order has been passed by an executive authority in quasi judicial capacity and so, affirmation of the original order without reasoning cannot be set aside, if it is found lawful.

8. In support of his submissions, Mr. Neogi has relied in the decisions of the cases of Saeeda Yasmin and others vs. Capital Service Center Ltd. and others, reported in 57 DLR (AD) 189 and Government of Bangladesh represented by the Secretary, Ministry of works vs. Md. Jajil and others, reported in 48 DLR (AD)10.

9. In reply, Mr. Tanjib-ul Alam, the learned Advocate for the petitioner, submits that the decisions as reported in 57 DLR (AD) 189 and 48 DLR (AD)10 are not applicable in the facts and circumstances of the instant case.

10. Examination of the Record

We have examined the writ petition, affidavit-in opposition and the annexure thereto and the relevant provision of section 26 of the Act. We have also carefully studied the decisions as referred to by Mr. Probir Neogi.

11. **Deliberation of the Court.**

To examine the legality of the impugned order, the said order (annexure-A to the writ petition) is quoted below for better understanding:-

> "…….This refers to your letter no. Nil dated NIL against penal order no. SEC/ Enforcement/ 908/2011/569 dated September 06, 2011.
>
> The Commission has considered your request as review petition under section 26 of the Securities and Exchange Ordinance, 1969 and rejected the review petition against above mentioned penal Order and decided to uphold it's earlier decision of penalty……."

12. From the impugned order, it is evident that it is neither an elaborate one nor with reasoning.

13. From the decision as referred to by Mr. Neogi as reported in 48 DLR (AD) 10, it transpires that their lordships of the Appellate Division decided as under:

> "The **High Court Division was not a Court of appeal required to make determination of facts on its own. It could interfere with the findings of a tribunal of fact under its extraordinary jurisdiction under Article 102, only if it could be shown that the tribunal had acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the complaining party or that it had acted malafide or in violation of any principle of natural justice. In the absence of any of these conditions the interference by the High Court Division will itself be an act of without jurisdiction.** This precisely has happened in the present case and therefore this appeal must succeed."
>
> (Bold, emphasis given)

14. In 57 DLR (AD) 189 case, it was decided by the Appellate Division as under:

> "The order of the trial Court as well as of the **High Court Division is not an elaborate one assigning reasoning in detail in support of the order so passed. The law is now settled that merely because an order of a Court is not an elaborate one or that is not speaking one as should have been but for that the same is not liable to be set aside if on consideration of the materials on record it is seen that the order so passed is sustainable.** We have perused the plaint sought to be amended and the application filed seeking amendment of the plaint as well as the other materials on record. The amendment so sought in major part is formal one and the rest is elaboration of the facts already averred in the plaint."
>
> (Bold, emphasis given)

15. In the instant case, after following due process of law and the principle of national Justice i.e. show cause notice was issued to the petitioner to explain his position, opportunity was also given for personal hearing before the penal order was passed. Moreover, the penal order has been passed elaborately considering the materials on record i.e. the confessional statement and explanation of the petitioner, the investigation report and the evidence on record. The said order has been affirmed by the quasi judicial body in revision/review.

16. On consideration of the materials on record, it appears to us that the impugned order dated o8. 12. 2011 can not be said to be unlawful merely because it is without elaborate reasoning and non-speaking one. The impugned order appears to be otherwise sustainable.

17. Therefore, the principle as enunciated the above mentioned cases are applicable in the instant case.

18. In view of the discussions made in the forgoing paragraphs vis-a-vis the law, we find no merit in the arguments of Mr. Alam and we find merit and force in the arguments of Mr. Neogi.

19. Accordingly, we find no merit in the Rule.

20. In the result, the rule is discharged without any order as to cost.

21. Communicate the Judgment to respondents No. 1 & 2 at once.

9 SCOB [2017] HCD 11

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO.4396 OF 2011

Mainul Hossain and another
Vs.
Bangladesh and others

Dr. A. K. M. Ali with
Ms.Nigar Sultana, Advocates
.....For the petitioners.

Mr. Md. MotaherHossain (Sazu), DAG
with
Ms. Purabi Rani Sharma, AAG and
Mr. A.B.M. Mahbub, AAG
.....For the respondent no. 1.

Heard on
09.04.2015,22.04.2015&23.04.2015.
Judgment on 30.04.2015.

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

The principles of natural justice:
The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. These principles are classified into two categories-(i) a man cannot be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of these principles vary with the varying circumstances and those cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application. ... (Para 12)

In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. ... (Para 13)

An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially,

in accordance with the classic authorities and Ridge…V... Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. ... (Para 14)

The principle of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute. ... (Para 17)

The basic principle of fair procedure is that before taking any action against a man, the authority should give him notice of the case and afford him a fair opportunity to answer the case against him and to put his own case. The person sought to be affected must know the allegation and the materials to be used against him and he must be given a fair opportunity to correct or contradict them. The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party. ... (Para 18)

The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. ... (Para 21)

The authority cancelled the lease of the petitioners and in the same breath called upon them to appear before the authority on 12.04.2011 with necessary valid papers, if any. What we are driving at boils down to this: the authority ought to have afforded the petitioners an opportunity of being heard first and thereafter on perusal of the inquiry report and other materials, the authority could have cancelled the lease of the petitioners with reference to the case land; but the authority chose to cancel the lease of the petitioners by keeping them in the dark and thereafter asked them to appear before the authority on a certain future date with their valid papers, if any. To be precise, there is no point in affording the petitioners an opportunity of being heard after cancellation of the lease. Generally speaking, the hearing of the petitioners by the authority should have been a pre-decisional phenomenon; it should not be a post-decisional phenomenon. ... (Para 24)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioners, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned Memo No. 29(22) dated 06.04.2011 issued by the respondent no. 4 as evidenced by Annexure-'D' to the writ petition should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioners, as set out in the Writ Petition, in short, is as follows:

The petitioners being landless husband and wife applied for lease of the Government khas land and accordingly, a Settlement Case being No. 104 of 1991-1992 was initiated and after inquiry, the Government decided to give settlement of the case land in favour of the petitioners. Thereafter the petitioners duly deposited the necessary salami and other dues. At a subsequent stage, the authority executed a registered deed

of kabuliyat in favour of the petitioners on 03.07.1996 for 99(ninety-nine) years in respect of the case land under certain terms and conditions. The petitioners got delivery of possession of the case land in due course, constructed a house in one portion and planted trees in the other portion thereof. However, a separate Khatain being No. 1958 of Mouza Devidwar was opened in the name of the petitioners pertaining to the case land. While the petitioners have been in possession of the case land pursuant to the registered deed of kabuliyat dated 03.07.1996, they received the impugned notice bearing Memo No. 29(22) dated 06.04.2011 under the signature of the respondent no. 4 issued at the instance of the respondent no. 3 showing cancellation of its settlement. Hence the Rule.

3. The respondent no. 1 has contested the Rule by filing an Affidavit-in-Opposition. His case, as set out in the Affidavit-in-Opposition, in short, runs as follows:

The case land is a river. Unfortunately a vested quarter of the local Land Administration provided wrong information about the nature of the case land and recommended to lease out the same to the petitioners. Thereafter the District Krishi Khas Land Management and Settlement Committee of Comilla approved the proposal for leasing out the case land in favour of the petitioners. But subsequently it transpired that the case land is actually a river and by that reason, the District Krishi Khas Land Management and Settlement Committee headed by the Deputy Commissioner, Comilla cancelled the lease of the petitioners and others lawfully and in the interest of the Government. As such, the Rule is liable to be discharged.

4. In the Supplementary Affidavit-in-Opposition filed on behalf of the respondent no. 1, it has been stated that the lease of the case land was cancelled by the Deputy Commissioner of Comilla on 29.06.2004 on the basis of a resolution of the District Krishi Khas Land Management and Settlement Committee, Comilla.

5. At the outset, Ms. Nigar Sultana, learned Advocate appearing on behalf of the learned Advocate Dr. A. K. M. Ali for the petitioners, submits that admittedly the authority granted lease of the case land in favour of the petitioners on 03.07.1996 for a period of 99(ninety-nine) years; but regrettably the lease was cancelled without affording them an opportunity of being heard and that being so, the impugned Memo dated 06.04.2011 cancelling the lease of the petitioners is without lawful authority and of no legal effect.

6. Ms. Nigar Sultana also submits that the case land is a silted up portion of a river and as per law, the same was recorded in the Khas Khatian No. 1 as a dried-up river which was fit for cultivation and regard being had to its nature, it was leased out to the petitioners as landless cultivators and in the absence of any complaint by any quarter about the misuse of the case land by the petitioners, the impugned order cancelling the lease of the petitioners is malafide and of no legal effect.

7. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that the petitioners obtained lease of the case land on the basis of an erroneous report filed by the local Land Administration Authority and as the case land is a part of the river, the same should not have been granted lease in favour of the petitioners; but having resort to collusion and fraud, the lease of the case land in favour of the petitioners was brought into existence.

8. Mr. Md. Motaher Hossain (Sazu) also submits that when the authority came to know that the lease of the case land was granted in favour of the petitioners on the basis of misleading information and through collusion, the authority recalled the lease-granting order and cancelled the lease of the petitioners by the impugned Annexure-'D' to the writ petition and in such view of the matter, it cannot be said that the cancellation of the lease of the petitioners is not sustainable at all.

9. We have heard the submissions of the learned Advocate Ms. Nigar Sultana and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and perused the Writ Petition, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and relevant Annexures annexed thereto.

10. The main grievance of the learned Advocate for the petitioners Ms. Nigar Sultana is that the petitioners were condemned unheard prior to issuance of the impugned order dated 06.04.2011 (Annexure-'D' to the writ petition) cancelling the lease of the petitioners and in this perspective, the impugned order dated 06.04.2011 is without lawful authority and of no legal effect.

11. Indisputably the principle of "Audi Alteram Partem" was not adhered to before cancellation of the lease of the petitioners in respect of the case land by the impugned order dated 06.04.2011 (Annexure-'D' to the writ petition). Now a pertinent question arises: what legal consequences will ensue for not following the principle of "Audi Alteram Partem" in this regard? This question must be answered for proper and effectual adjudication of the Rule.

12. The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. These principles are classified into two categories-(i) a man cannot be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of these principles vary with the varying circumstances and those cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application.

13. Lord Atkin in R. Vs. Electricity Commissioners ([1924] 1 KB 171) observed that the rules of natural justice applied to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. The expression 'having the duty to act judicially' was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord Reid, however, freed these rules from the bondage in the landmark case of Ridge…Vs... Baldwin ([1964] AC 40). But even before this decision, the rules of natural justice were being applied in our

country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute. In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. In this context, reliance may be placed on the cases of The University of Dacca and another…Vs…Zakir Ahmed, 16 DLR (SC) 722; Sk. Ali Ahmed…Vs…The Secretary, Ministry of Home Affairs and others, 40 DLR (AD)170; Habibullah Khan…Vs…Shah Azharuddin Ahmed and others, 35 DLR(AD)72; Hamidul Huq Chowdhury and others…Vs…Bangladesh and others, 33 DLR 381 and Farzana Haque….Vs…The University of Dhaka and others, 42 DLR 262.

14. In England, the application of the principles of natural justice has been expanded by introducing the concept of 'fairness'. In Re Infant H (K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. It is sometimes thought that the concept of 'acting fairly' and 'natural justice' are different things, but this is wrong as Lord Scarman correctly observes that the Courts have extended the requirement of natural justice, namely, the duty to act fairly, so that it is required of a purely administrative act (Council of Civil Service Union…Vs...Minister for the Civil Service [1984] 3 All E.R. 935). Speaking about the concept, the 'acting fairly' doctrine has at least proved useful as a device for evading some of the previous confusions. The Courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and Ridge…V... Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. The Indian Supreme Court has adopted this principle holding "….this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands" (Swadeshi Cotton Mills…V... India, AIR 1981 SC 818).

15. The English Courts have further expanded the horizon of natural justice by importing the concept of 'legitimate expectation' and holding that from promise or from established practice, a duty to act fairly and thus to comply with natural justice may arise. Thus the concepts of 'fairness' and 'legitimate expectation' have expanded the applicability of natural justice beyond the sphere of right. To cite a few examples, not only in the case of cancellation of licence which involves denial of a right, but also in the case of first-time grant of licence and renewal of licence, the principle of natural justice is attracted in a limited way in consideration of legitimate expectation. An applicant for registration as a citizen, though devoid of any legal right, is entitled to a fair hearing and an opportunity to controvert any allegation levelled against him. An alien seeking a visa has no entitlement to one, but once he has the necessary documents, he does have the type of entitlement that should now be protected by due process, and the Government should not have the power to exclude him summarily.

16. In the case of Chingleput Bottlers…Vs...Majestic Bottlers reported in AIR 1984 SC 1030, the Indian Supreme Court has made certain observations which create an impression that the rules of natural justice are not applicable where it is a matter of privilege and no right or legitimate expectation is involved. But the application of the rules of natural justice is no longer tied to the dichotomy of right-privilege. It has been stated in "Administrative Law" by H.W.R. Wade, 5th edition at page-465: "For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether the legal power is being

exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Governmental power in a manner which is fair …" In the American jurisdiction, the right-privilege dichotomy was used to deny due process hearing where no right was involved. But starting with Gonzalez…Vs...Freeman (334 F. 2d 570), the Courts gradually shifted in favour of the privilege cases and in the words of Professor Schwartz, "The privilege-right dichotomy is in the process of being completely eroded" ("Administrative Law", 1976, Page-230). Article 31 of our Constitution incorporating the concept of procedural due process, the English decisions expanding the frontiers of natural justice are fully applicable in Bangladesh.

17. In English law, the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the American jurisdiction. Following the English decisions, the Courts of this sub-continent have held that the principle of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute.

18. The basic principle of fair procedure is that before taking any action against a man, the authority should give him notice of the case and afford him a fair opportunity to answer the case against him and to put his own case. The person sought to be affected must know the allegation and the materials to be used against him and he must be given a fair opportunity to correct or contradict them. The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party.

19. It is often said that malafides or bad faith vitiates everything and a malafide act is a nullity. What is malafides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held, "It is commonplace to state that malafides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra…Vs…Secretary to the Government of W.B, AIR 1964 Cal 265)

20. To render an action malafide, "There must be existing definite evidence of bias and action which cannot be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be malafide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act" (Punjab…Vs… Khanna, AIR 2001 SC 343).

21. The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. According to Lord Greene, an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture…Vs… Wednesbury Corporation [1948] 1 KB 223)

22. Reverting to the case in hand, it is an indubitable fact that the principle of "Audi Alteram Partem" was not adhered to prior to cancellation of the perpetual lease of the case land by issuing the impugned Annexure-'D' dated 06.04.2011. From our above discussions, it is manifestly clear that the petitioners were entitled to a fair hearing before cancellation of the lease by the authority. In other words, the authority did not act fairly by not affording the

petitioners an opportunity of being heard before issuance of the impugned Annexure-'D' dated 06.04.2011.

23. However, the impugned Annexure-'D' dated 06.04.2011 is quoted below verbatim:

"গণপ্রজাতন্ত্রী বাংলাদেশসরকার
দেবিদ্বার পৌর ভূমি অফিস
দেবিদ্বার, কুমিল্লা

p¡lLew 29(22) a¡¢lMx 06/04/2011

¢houx 104/91-৯২ নং বন্দোবস্ত মামলা প্রসঙ্গে।

HC মর্মে জানানো যাচ্ছে যে, ১৯৮ নং দেবিদ্বার মৌজা ১১২৬ দাগে ec£ ®nËl i¢j ®Sm¡ L¢o M¡p S¢j hÉhØq¡fe¡ J বন্দোhÙ L¢j¢Vl আদেশে বাতিল করা হয়েছে। কিন্তু আপনী/আপনারা সরকারি ভূমিতে যত্রতত্রভাবে মাটি ভরাট করে plL¡¢l i¢jl r¢a p¡dZ করিতেছেন। k¡q¡ f§ËmaE¢aj¡m¡l f¢lf¿z

AaHh, h¢Za ¢বষয়ে নোটিশ f§ËçÍl fl BN¡¢j 12/4/11 Cw a¡¢lM pL¡m 10 O¢VL¡l pju h¢Za দাগের ভূমির আলোকে k¢c ®L¡e ®hd L¡NSfœ থাকে তা নিয়ে নিম্নü¡r lL¡l£l অফিসে Ef¢Øqa b¡L¡l Se£ বলা হলো।

f§ËLx মাইনুল হোসেন
¢fw Se¡h Bm£
p¡w- ®c¢hà¡l

ü¡/-
6/4/11
(মোঃ Bhm হাসেম)
CE¢eue i¢j pqL¡l£ LjLa¡
দেবিদ্বার পৌর ভূমি অফিস
দেবিদ্বার, কুমিল্লা।"

24. From a bare reading of Annexure-'D' dated 06.04.2011, it appears that the authority cancelled the lease of the petitioners and in the same breath called upon them to appear before the authority on 12.04.2011 with necessary valid papers, if any. What we are driving at boils down to this: the authority ought to have afforded the petitioners an opportunity of being heard first and thereafter on perusal of the inquiry report and other materials, the authority could have cancelled the lease of the petitioners with reference to the case land; but the authority chose to cancel the lease of the petitioners by keeping them in the dark and thereafter asked them to appear before the authority on a certain future date with their valid papers, if any. To be precise, there is no point in affording the petitioners an opportunity of being heard after cancellation of the lease. Generally speaking, the hearing of the petitioners by the authority should have been a pre-decisional phenomenon; it should not be a post-decisional phenomenon.

25. In view of the foregoing discussions, we are led to hold that because of violation of the principle of "Audi Alterm Partem", the impugned order cancelling the lease of the petitioners is malafide and in this perspective, it cannot be sustained in law. The Rule, therefore, succeeds.

26. Accordingly, the Rule is made absolute without any order as to costs. The impugned Memo No. 29(22) dated 06.04.2011 (Annexure-'D' to the writ petition) cancelling the lease of the petitioners in respect of the case land is declared to be without lawful authority and of no legal effect. Be that as it may, the authority may decide the matter afresh in accordance with law by affording the petitioners an opportunity of being heard, if it is so advised.

9 SCOB [2017] HCD 18

HIGH COURT DIVISION

Death Reference No. 39 of 2010
With
Criminal Appeal No.3904 of 2010
With
Jail Appeal No. 183 of 2010

The State and others
Vs.
Md. Sukur Ali and others

Mr. A.K.M. Zahirul Huq, D.A.G with
Mr. Md. Aminur Rahman Chowdhury and
Mr. Shah Abdul Hatem, A.A.Gs
..… For the State

Mrs. Hasna Begum, Advocate
… For the appellant

Heard On: 05.07.15 and 06.07.15.
And
Judgment on: 06.07.15, 07.07.2015

Present:
Mr. Justice Soumendra Sarker
And
Mr. Justice A.N.M. Bashir Ullah

Code of Criminal Procedure, 1898
Section 164:
Whenever it is noticed that, all the legal mandatory formalities in recording the confessional statement are duly observed and the Magistrate; who recorded the confessional statement is satisfied that the confession is voluntary and free from all taint-in that case, such confession can be the sole basis of conviction of the confessing accused. ... (Para 31)

Penal Code, 1860
Section 304:
As we have come across from the evidence on records that there was no pre-plan or premeditation from the side of the convict-appellant to kill his wife, we have the reason to hold such a view that there was a provocation from the side of the deceased prior to the occurrence of killing her by her husband Sukur Ali and definitely on the hit of the moment the deceased Mehbuba was killed by throatling. It is evident as we have already spelt out earlier that the relationship between the husband and wife was not good. Hence; the premeditation of killing the victim Mehbuba from the side of the condemned-prisoner prior to the occurrence of killing her is absent. In this circumstance of the case it amounts to culpable homicidal not amounting to murder, under the ambit of section 304 (Part-I) of the Penal Code. ... (Para 33)

JUDGEMENT

Soumendra Sarker, J:

1. This reference under section 374 of the Code of Criminal Procedure has been made by the learned Additional Sessions Judge, Bogra for confirmation of the sentence of death passed on the condemned-prisoner Sukur Ali in Sessions Case No.327 of 2006 arising out of

Dup Chachia Police Station Case No. 08 dated 10.06.2006 corresponding to G.R. No.45 of 2006 (Dup) under sections 302/201 of the Penal Code.

2. The condemned-prisoner Md. Sukur Ali also filed a Criminal Appeal and a Jail Appeal being No. 3904 of 2010 and 183 of 010 respectively against the said conviction and sentence in which the convict-prisoner was convicted and sentenced to death under section 302 of the Penal Code.

3. The reference and appeals have been heard together and are being disposed of by this single judgment.

4. The prosecution case; in a nutshell can be stated thus, one Md. Ohidul Islam, Officer-in-Charge of Dhupchachia Police Station under Bogra District lodged the First Information Report with the same police station contending *inter alia*, that on 10.06.2006 at about 9.35 p.m. one Aynal Bepari, a Member of Dharsun Union Parishad brought a message to the police station on which a G.D. entry being No.367 dated 10.06.2006 was made in the concerned Dupchachia police station to the effect that a dead body of an unknown woman is floating in a canal which is locally known as "Iramoti Khal". On that G.D. Entry the informant Md. Ohidul Islam, Officer-in-Charge of Dupchachia police station accompanied by other police constables started for the place of occurrence at about 11.00 a.m. and going to the place of occurrence they found the dead body of an unknown woman floating in the water of the aforesaid canal. Thereafter, the informant managed to get a dead body under his control and possession and then prepared the Inquest Report of the dead body. Subsequently, he sent the dead body for postmortem. At that time the persons present therein could not recognize the dead body. The wearing apparels of the dead body were a red coloured blouse, black "breasheer" and red coloured two petticoats. Finding the symptom of the dead body the informant realized that the woman was killed by throatling. After lodging the ejahar the informant took up the investigation of the case and during his investigation he took some snaps of the dead body. Subsequently; on 26.06.2006 the son of deceased namely Khokon and brother of the deceased Sirajul Islam finding the wearing apparels of the dead body could recognize the dead body as mother of Khokon namely 'Mehbuba'. The I.O. during his investigation as investigating officer recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure and apprehended the accused of the case Sukur Ali on 12.07.2006 at 1.00 a.m. The accused Sukur Ali confessed his guilt by disclosing that the victim Mehbuba happens to be his second wife. On 08.06.2006 in the name of treatment calling the victim Mehbuba he went to the place of occurrence '*Iramoti'* canal side and thereafter, killed Mehbuba by throatling. To conceal the dead body he immersed the body into the water of that canal. Thereafter, the investigating officer went to the place of occurrence again with the accused Sukur Ali who identified the place of occurrence and again confessed his guilt stating that he personally killed his wife Mehbuba. Thereafter the accused Sukur Ali was placed before a Magistrate, First Class for recording his statement under section 164 of the Code of Criminal Procedure. The accused person confessed his guilt voluntarily before the Magistrate and the Magistrate recorded his statement accordingly. After closer of investigation the investigating officer submitted charge sheet against the accused of the case Sukur Ali under section 302/201 of the Penal Code being charge-sheet No.54 dated 09.08.2006. While the case was ready for trial it was sent to the learned Sessions Judge, Bogra who transmitted the same to the Court of learned Additional Sessions Judge, Bogra and the learned Additional Sessions Judge framed charge under sections 302/201 of the Penal Code which was read over to the accused in bengali at which he pleaded not guilty and claimed to be tried.

5. After the close of evidence from the side of the prosecution who were 18 in numbers, the accused person was examined under section 342 of the Code of Criminal Procedure. At that time also the condemned-prisoner i.e. the accused of this case Sukur Ali pleaded him innocent and claimed to be tried.

6. From the trend of cross-examination of the witnesses and examination of the condemned-prisoner under Section 342 of the Code of Criminal Procedure the case of the condemned-prisoner Sukur Ali is such that he is innocent and in no way connected with the killing of his wife Mehbuba, who after marriage lead immoral life, as the result of which the relationship between the convict-appellant and the deceased Mehbuba was not good and that the victim Mehbuba might have been killed by any unknown miscreants, not by the convict-appellant Sukur Ali.

7. After trial of the original Sessions Case being No.327 of 2006 the learned Additional Sessions Judge considering the evidence and the materials on record as well as facts and circumstances of the case finding the convict-appellant guilty, convicted him under section 302 of the Penal Code and sentenced him to death.

8. Out of the said judgment and order of conviction and sentence this Death Reference No.39 of 2010 has arisen out and the condemned-prisoner himself has preferred a Criminal Appeal being No. 3904 of 2010 and Jail Appeal No. 183 of 2010 against the said judgment and order of conviction and sentence and all of these are taken up together for hearing and disposal of by this single judgment.

9. Mrs. Hasna Begum, the learned Advocate appearing as State Defence lawyer in support of the convict-appellant submits that the convict-appellant Sukur Ali, son of late Md. Rostom Ali Bepari has been languishing in the condemned-cell since 16.06.2010 and in the jail custody from 12.07.2006 but in fact there is no eye-witness of the occurrence in this case and the confessional statement of the convict-appellant Md. Sukur Ali is not true and voluntary and there exist some discrepancy in the confessional statement of the accused with that of the other materials on record. The learned counsel of the defence further submits that admittedly the dead body of the victim Mehbuba was highly decomposed and for the said reason it was not possible for the doctor to ascertain the actual cause of death. Besides this; there is no ocular evidence that the dead body belonged to the victim of this case Mehbuba who happens to be the wife of the convict-appellant Md. Sukur Ali and the son of the deceased, Md. Khokon despite identified the dead body as of his mother Mehbuba, but he was not present at the time of occurrence and there was no relationship between the son the witness No.3 Md. Khokon with his mother the victim Mehbuba. The learned defence counsel lastly argued that the instant case is not a case of culpable homicide amounting to murder under section 302 of the Penal Code rather it falls within the purview of culpable homicide not amounting to murder under the ambit of section 304 of the Penal Code, as because from the evidence on records it is evident that under certain provocation and hit of the moment the convict-appellant Sukur Ali out of grudge killed his wife Mehbuba by throattling.

10. Mr. A.K.M. Zahirul Huq, the learned Deputy Attorney General with Mr. Md. Aminur Rahman Chowdhury and Mr. Shah Abdul Hatem the learned Assistant Attorney Generals although appeared on behalf of the State but on behalf of all of them Mr. Md. Aminur Rahman Chowdhury, the learned Assistant Attorney General argued, and during that controverting the argument of the learned State Defence lawyer submits that the prosecution of this case beyond all shadow of doubt has been able to prove their case and there exist

sufficient legal evidence to hold such a view that the convict-appellant of this case Sukur Ali is fully responsible for the death of his 2nd wife Mehbuba who on the date of occurrence in the manner and in the place as stated in the FIR killed his wife brutally in a pre-planed way by throatling after calling her from the residence of her parents. The learned Assistant Attorney General Mr. Md. Aminur Rahman Chowdhury further submits that this is not a case of culpable homicide not amounting to murder inasmuch as the convict-appellant Sukur Ali with a cool head and conspiracy committed the offence of killing his wife and there is no evidence that the convict-appellant was compelled to resist him and at the time of resistance the occurrence took place inadvertently from his side, rather; it is in the evidence that the victim Mehbuba along with her husband the convict-appellant Sukur Ali used to reside in the residence of Mehbuba's parents and on the date of occurrence i.e. on 08.06.2006 the convict-appellant with an intention to kill his wife called his wife from that residence in the name of court and thereafter coming to the place of occurrence which is a bank of a canal "*Iramoti Khal"* by name by throatling killed his wife and thereafter to conceal the dead body dragged the body into the water of that canal. The learned Assistant Attorney General also submits that immediately after apprehension of the convict-appellant on 12.07.2006 at 1.00 a.m. he was produced before the Magistrate, 1st Class on the same date at 10.00 a.m. for recording the confessional statement of the convict-appellant under section 164 of the Code of Criminal Procedure and it is very well on the record that there is no remand order or allegation of torture, threat, coercion or provocation before recording the statement of the convict-appellant Sukur Ali and all the legal formalities were duly complied with by the learned Magistrate and the confession recording Magistrate (P.W.8) being satisfied that the statement of the convict-appellant is true and voluntarily recorded the same under section 164 of the Code of Criminal Procedure and the said confessional statement being true and voluntary is enough for conviction of the condemned-prisoner under section 302 of the Penal Code and the learned Additional Sessions Judge accordingly convicted the present-appellant Sukur Ali thereunder rightly & legally. The learned Assistant Attorney General referring two decisions of our Apex Court reported in 15 BLC (AD) 127 and 1985 BLD(AD)10 lastly submits that the convict-appellant of this case cannot escape from the liability of killing his wife Mehbuba in the manner stated within the contents of the ejahar and from the evidence it is clear that the husband of the victim the present- convict-appellant Sukur Ali alone with a guilty mind committed the offence of killing his wife and after commission of the offence being repented confessed his guilt voluntarily before the Magistrate, 1st Class which is reflected during his examination under section 342 of the Code of Criminal Procedure when he did not raise any such plea that, prior to his confession before the Magistrate there was any torture, threat, coercion or provocation upon him by any body or by police and therefore, the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Bogra should be upheld.

11. In view of the aforesaid submissions from both the parties let us now examine the evidence on record as adduced from the sides of the parties. In the instant case prosecution have examined as many as 08 witnesses including the doctor who did postmortem of the dead body and the learned Magistrate who recorded the statement of the convict-appellant under section 164 of the Code of Criminal Procedure and on the contrary the defence examined none but cross-examined the P.Ws.

12. The witness No.1, i.e. P.W.1 of this case is Md. Ohidul Islam the Officer-in-charge of Dupchachia Police Station who in his testimony before the Court testified that on 10.06.2006 he was serving as Officer-in-Charge of Dupchachia Police Station under Bogra District. On the said date at about 9.35 a.m. one Aynul Hoque Member informed him through mobile

phone that ½ (half) km. away from his residence an unknown dead body of a woman is floating in the water of *Iramoti* canal. After getting this information; he recorded a G.D. entry being No.367 and thereafter started for the place of occurrence with his companion Sub-Inspector Abdul Karim and police force. P.W.1 further states that at about 11.00 a.m. he reached to the place of occurrence and found the dead body. Taking the dead body from water he made inquest report of the same which was identified by him and marked as Exhibit-1. Thereafter, he sent the dead body for postmortem to Shahid Ziaur Rahman Medical College Morgue. P.W.1 also testified that finding the dead body it was presumed to him that the woman might have been killed by throatling. This witness took some snaps of the dead body. He identified the pictures which have been marked as Exhibits-3 series. This witness lodged ejahar with his Police Station Dupchachia and that has been identified by him and the ejahar has been marked as Exhibit-2. P.W.1 himself took up the investigation of the case and after taking investigation he visited the place of occurrence, prepared sketch map and index. Thereafter, he recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. P.W.1 testified that the son of the accused namely Md. Khokon (P.W.3) identified the dead body as his mother after finding the pictures and wearing apparels. On 12.07.2006 the convict-appellant Sukur Ali was arrested at 1.00 a.m. and at the time of interrogation the condemned-prisoner Sukur Ali confessed his guilt stating that he himself killed his wife Mehbuba who was his second wife. In the name of treatment calling the victim Mehbuba from the residence they went to the place of occurrence which is situated beside a canal namely "*Iramoti Khal"* and he killed his wife therein by throatling. Hearing the confession of the condemned-prisoner Sukur Ali this witness went to the place of occurrence with Sukur Ali who identified the place in where he committed the offence of killing his wife. P.W.1 further stated that he sent Sukur Ali before a Magistrate, 1st Class, for recording his statement under section 164 of the Code of Criminal Procedure. P.W.1 identified the sketch map and index of the place of occurrence which has been marked as Exhibits-8 & 8/1. This witness in the last portion of the examination-in-chief testified that after investigation as the case was proved against the condemned-prisoner Sukur Ali he submitted charge sheet No.54 on 09.08.2006 under sections 302 and 364/201 of the Penal Code. This witness identified the condemned-prisoner in the accused dock.

13. In reply to cross-examination the complainant as well as investigating officer of the case testified at a stage that he is the complainant as well as the investigating officer before whom for the 1st time one Aynal Hoque Member of the P.O. village gave an information about a floating dead body. Subsequent to that, the son of the deceased Mehbuba, Khokon and the brother of the deceased Sirajul identified the dead body. This witness during his deposition states at a stage in reply to a question of the defence that during his investigation he came to learn that Sukur Ali and Mehbuba are husband and wife and they used to reside in the residence of Mehbuba's parents. In a reply to another question on the place of occurrence the investigating officer (P.W.1) categorically testified that the place of occurrence is situated beside *Iramoti* canal of Dupchachia Police Station and the condemned-prisoner Sukur Ali himself identified the same in his presence.

14. The witness No.2 of the prosecution (P.W.2) is Aynal Hoque Bepari. This witness testified that on 10.06.2006 finding the dead body in a canal he informed the matter to one Bablu Member and thereafter the inquest report of the dead body was prepared in his presence and he put a signature therein. P.W.2 identified his signature in the inquest report which has been marked as Exhibit-1/2. During cross-examination P.W.2 stated at a stage that finding the dead body of the deceased it was presumed that the dead body is decomposed.

15. P.W.3 Md. Khokon testified that the deceased Mehbuba was his mother and he along with his mother used to reside in the residence of his maternal grand father and after the death of his (P.W.3) father, the accused Sukur Ali married his mother Mehbuba when she was widow. This witness further testifies that Sukur Ali was a carpenter in the village and prior to the date of occurrence Sukur Ali beat his mother Mehbuba and on 08.06.2006 in the name of "Kabiraj" Sukur Ali called his mother from the residence and after that his mother did not return. On the following day while his grand mother asked Sukur Ali about the where-abouts of Mehbuba, Sukur Ali being very much afraid of was trembling. Thereafter, this witness along with others of the locality started searching of Mehbuba and on 10.06.2006 from a newspaper he came to know about a dead body & then going before the dead body he identified the body as of his mother 'Mehbuba'.

16. In a reply to cross-examination P.W.3 testified at a stage that his mother prior to the occurrence used to live with his step-father Sukur Ali in the same residence and finding the wearing apparels of the dead body along with pictures of that; he could recognize the body as of his mother Mehbuba.

17. P.W.4 Md. Shamsuddin was tendered from the side of the prosecution and defence cross-examined him. During cross-examination P.W.4 testified that he had two daughters namely Mehbuba and Mahima & P.W.3 Khokon is the son of Mehbuba's first husband. This witness further testified that for the second time Mehbuba got herself married with Sukur Ali who was a carpenter. They used to reside in the residence of this witness and on the date of occurrence in the name of doctor Sukur Ali taking his wife from his (P.W.4) residence killed her daughter Mehbuba.

18. P.W.5 Nurunnahar during her deposition testified before the learned trial court that she knows both the parties & on 08.06.2006 the occurrence took place and prior to that Mehbuba and Sukur Ali were husband and wife and they lived together. This witness further states that she is a lady Member of the locality. She testified that prior to the occurrence there was a hassle between Mehbuba and Sukur Ali.

19. P.W.6 Nowroz Islam is a hear-say witness of this case.

20. P.W.7 is Doctor Md. Rezaul Karim, Lecturer, Forensic Medicine, Shahid Ziaur Rahman Medical College Hospital, Bogra. This witness in his testimony testified that on 11.06.2006 he did the postmortem and after that he gave his report, which reads as follows:

> "Body was decomposed, Bruise black in colour over the skin just below right mandible on dissection bruise & haematoma just below the skin, fracture of the thyroid cartilage-congestion of larynx trachea. All injuries are ante mortem. In my opinion, death was due to asphyxia resulting from throatling which was ante mortem & homicidal in nature."

21. This witness identified the postmortem report which has been marked as Exhibit-4.

22. The last witness of this case P.W.8 is Md. Mostafizur Rahman Mridha. This witness during his deposition before the Court testified that on 12.07.2006 he was Magistrate, 1st Class in Bogra. In connection of G.R. Case No.45 of 2006 (Dhupchacia) he recorded the confessional statement of this condemned-prisoner Sukur Ali under section 164 of the Code of Criminal Procedure. This witness identified the statement of condemned-prisoner and his signature therein which has been marked as Exhibit-5, 5/1 and 5/2 respectively.

23. During cross-examination Magistrate Mostafizur Rahman testified at a stage that he was satisfied at the time of recording the confessional statement of the condemned-prisoner that the confession is true and voluntary and prior to recording of the confessional statement he has complied with all the legal formalities. He also rendered more than three hours time for reflection of the condemned-prisoner prior to statement and thereafter recorded the statement in the language of the condemned-prisoner.

24. Apart from the oral evidence of this case, the confessional statement which has been marked as Exhibit-5 go to show that the condemned-prisoner Md. Sukur Ali in his confession which was recorded under section 164 of the Code of Criminal Procedure states as follows:

> "আমি অনুমান এক বৎসর আগে জয়পুরহাট কালাই থানাধীন ঘটনাস্থল প্রথমে সামসুদ্দিনের মেয়ে মেহবুবাকে নিকাহ করি। সংসার জীবনে তার সাথে আমার কলহ বিবাদ হয়। আমার স্ত্রী মেহবুবা অবাধ্য হয়ে ইচ্ছামত ঘোরাফিরা করে। পতিতা/দেহ ব্যবসায় জড়িয়ে পড়ে। আমি নিষেধ করিলে মেহবুবা আমাকেও বিভিন্ন হুমকি ভয় দেখাতে থাকে। আমি ২য় বিয়ে করলে ১ম স্ত্রী আদালতে আমার বিরুদ্ধে ফৌজদারী মামলা করে। গত ৮/৬/০৬ তারিখে ধার্য তারিখ থাকায় আমি আদালতে হাজিরা দিতে আসলে মেহবুবাও কোর্টে আসে আমি দেখি। কোর্ট না বসায় আমি মেহবুবা ট্রেনে করে শ্বশুর বাড়ীর দিকে চলে যাই। বেলা ৪/৫ টার দিকে আমরা আলতাফ নগর রেলষ্টেশনে দুজনে নেমে কিছুক্ষণ উভয়ের মধ্যে ঝগড়া ঝাটি হওয়ায় কিছুক্ষণ অপেক্ষা করিলাম, তারপর দুজনে ভটভটি চড়ে চৌমুহনীর দিকে যাই। চৌমুহনীতে মেহবুবার এক মামার বাড়ীতে আসে বলে রওয়ানা হই। আমাকে এক গ্রামে ফেলে আমাকে বসিয়ে রেখে মেহবুবাকে গ্রামের মধ্যে চলে যায়। অনুমান ২$\frac{1}{2}$ ঘন্টা পরে মেহবুবা আসে। আমার সাথে পুনরায় ঝগড়ায় লিপ্ত হয়। এক পর্যায়ে গ্রামের মাঠের রাস্তায় মেহবুবা হঠাৎ আমার গলার কলারে ধরলে আমিও তার গলায় চিপে ধরি। মেহবুবা পরে যায়। আমি তার মাথায় ও মুখে পানি দিতে থাকি আর কথা বলে না। দেখি সে মারা গিয়াছে। আমি মেহবুবার মৃত দেহ ফেলে রেখে তৎক্ষনাৎ আমার শ্বশুরবাড়ীর পাশে মেম্বারের বাসাতে যাই। শ্বাশুড়ী জিজ্ঞাসা করে মেহবুবা কোথায় আমি উত্তর না দিয়ে চলে যাই। মেহবুবা সব সময় লাল ছায়া ডবল পড়ত এবং লাল রংয়ের ব্লাউজ কালো রংয়ের ব্রেসিয়ার পড়ে ছিল। আমি ভুল করেছি, মাফ চাই। "

25. Having gone through the above mentioned statement along with other material evidence on records; we find that in the instant case despite there is no eye-witness of the occurrence, even then; there is a confessional statement from the side of the condemned-prisoner Sukur Ali which was recorded by a Magistrate, 1st Class, the witness No.8 of this case and against this substantive evidence of the prosecution, the defence has declined to produce any paper or adduce any witness to disproof or deny the prosecution's contention/case. Besides this; during examination of the condemned-prisoner under section 342 of the Code of Criminal Procedure all the incriminating evidence specially the confessional statement of him was pointed out and due attention of the accused was taken prior to recording of this reply, but the confessing accused Sukur Ali in his reply raised no objection or such claim that his confession was obtained by any threat, torture, coercion or provocation. The important matter which is transpired from his examination under section 342 of the Code of Criminal Procedure is such that he raised no complain or allegation with regard to his confessional statement in which he directly involved himself in the occurrence of killing his wife Mehbuba. The fact remains that, if it is found that the confessional statement of the accused is true and voluntary it is enough for conviction of the confessing accused. The incriminating evidence in the instant case as we have come across is such that, prior to the date of occurrence the condemned-prisoner Sukur Ali and his wife the deceased Mehbuba used to reside in the residence of Mehbuba's parents. It is also within evidence and proved conclusively by sufficient cogent, credible evidence that on the date of occurrence i.e. on 08.06.2006 the condemned-prisoner Sukur Ali prior to the death of his wife Mehbuba was

with him and the husband and wife were coming from Bogra town together and reached to the place of occurrence which is a bank of a canal "*Iramoti Khal"* by name.

26. On careful scrutiny over the evidence on record it is noticed that all the P.Ws were thoroughly cross-examined from the side of the defence but none of them appears to have been discredited and except some minor discrepancies which were natural, the evidence of the witnesses appears to be sound and cogent. The learned trial court during disposal of the case discussed the evidence on record vividly and evaluated the same in it's true perspective and arrived at a concrete decision that on the date, in the manner and in the place as stated from the side of the prosecution the condemned-prisoner Sukur Ali killed his wife Mehbuba by throatling. It is also noticed from the papers on record that the police after apprehension of the condemned-prisoner Sukur Ali within 30 hours produced him before P.W.8 Magistrate, 1st Class Md. Mostafizur Rahman Mridha for recording his confessional statement and on perusal of the confessional statement of the condemned-prisoner which has been marked as exhibit-5 we have the reason to inclined such a view that the Magistrate who recorded the statement of the condemned-prisoner, before his recording; complied with the mandatory provisions of sections 164 and 364 of the Code of Criminal Procedure and we find nothing to disbelieve the learned Magistrate who was examined as P.W.8. Besides this; from the papers on records it is apparent that after arrest police did no act of fear in the mind of the condemned-prisoner Sukur Ali prior to his confessional statement under section 164 of the Code of Criminal Procedure. The condemned-prisoner also did not raise any allegation on torture, threat, provocation or coercion from the side of the police or any body before recording of his confessional statement.

27. Consulting the evidence it further transpires that, the Autopsy Report is consistent with the prosecution case as well as investigating officer of this case and the cause of death which was given by the postmortem done doctor, Dr. Md. Rezaul Karim is identical with the symptom of the dead body and it is well established that the deceased of this case died due to throatling and after that; the dead body was dragged into the water of a canal to conceal the same.

28. Scanning the evidence on record it also appears that, there was a bitter relationship between the husband and wife prior to the date of occurrence and on the date of occurrence also i.e. on 08.06.2006 there was an altercation between Sukur Ali and the deceased Mehbuba. It is also within record that at the time of occurrence initially the wife Mehbuba tied of the collar of her husband Sukur Ali at the stage of altercation between them and thereafter the condemned-prisoner Sukur Ali by throatling killed his wife. Therefore, obviously it can be easily held that the condemned-prisoner prior to commission of the offence was not in cool brain, rather; there was a provocation from the side of the victim Mehbuba which led him to kill the victim. Apart from this; we have come across from the evidence on record that the condemned-prisoner married twice and his first wife filed a criminal case against him.

29. It is a fact that in the instant case there is no eye witness which is very natural inasmuch as the occurrence is nothing but a wife killing case. The fact remains that prior to the date of occurrence both the victim as well as her husband the condemned-prisoner lived together as husband and wife in a same residence and it has come into evidence from the testimony of the father of the deceased who is P.W.4 Md. Samsuddin that from his residence prior to occurrence the condemned-prisoner Sukur Ali took away his second wife the victim Mehbuba. It is true that; there is no eye-witness of the occurrence but undisputedly the

deceased was the wife of the condemned-prisoner and she was living in the house of her parents with her husband the condemned-prisoner Sukur Ali as husband and wife. It is also in the evidence as testified by the prosecution witnesses No. 3 and 4 that the condemned-prisoner Sukur Ali took away the deceased on 08.06.2006 from the house of her parents on the plea of treatment from a doctor and subsiquent to that the dead body of the deceased was found in the water of a canal. In the case of ***Hamidur Rahman (Ms.) -vs.-Sate***, 15 BLC(AD)127, their lordships held such a view that in the facts and circumstances of like nature the accused of a case cannot escape from his liability.

30. Let us now look into the next incriminating substantive evidence of this case *viz.* the confessional statement of the condemned-prisoner Sukur Ali (Exhibit-5).

31. Whenever it is noticed that, all the legal mandatory formalities in recording the confessional statement are duly observed and the Magistrate; who recorded the confessional statement is satisfied that the confession is voluntary and free from all taint-in that case, such confession can be the sole basis of conviction of the confessing accused. In the case of ***ABM Nazmus Sakib Ashik –vs.- State***, 12 BLC(AD)203 their lordships has given much importance on the satisfaction of the Magistrate who recorded the confession of the accused as to the voluntariness and spontaneous nature of the confession of the accused. Hence, it appears that the acceptability of a confession depends on the satisfaction of the confession recording Magistrate.

32. In the instant case; the confessional statement of the accused Sukur Ali inasmuch as is free from any legal lacking, this is no doubt a direct piece of evidence to hold such a view that the condemned-prisoner committed the offence of killing his wife Mehbuba and such confessional statement of the accused can easily be relied on for the purpose of conviction and no further corroboration is necessary as it relates to the confessing accused himself since it is voluntary and also true. The trial court here has believed that the confession is voluntary and free from taint. So, there is no legal bar on the court for ordering conviction. Accoridingly, here in this case; the learned trial court i.e. Additional Sessions Judge, Bogra finding the convict-appellant guilty under section 302 of the Penal Code sentenced him thereunder to death.

33. It is a fact; that as we have come across from the evidence on records that there was no pre-plan or premeditation from the side of the convict-appellant to kill his wife, we have the reason to hold such a view that there was a provocation from the side of the deceased prior to the occurrence of killing her by her husband Sukur Ali and definitely on the hit of the moment the deceased Mehbuba was killed by throatling. It is evident as we have already spelt out earlier that the relationship between the husband and wife was not good. Hence; the premeditation of killing the victim Mehbuba from the side of the condemned-prisoner prior to the occurrence of killing her is absent. In this circumstance of the case it amounts to culpable homicidal not amounting to murder, under the ambit of section 304 (Part-I) of the Penal Code. Under this section punishment to be awarded when the injury is made with the intention of causing death. From the materials on record and nature of injury caused in this case, it is not difficult to hold that the condemned-prisoner assaulted his wife Mehbuba with intention of causing death inasmuch as it is obvious from the face of the papers that due to asphyxia resulting from throatling the deceased Mehbuba died instantly on the place of occurrence. Hence; this occurrence clearly lies under part-I of section 304 of the Penal Code. [*Ref. State –vs.- Abdul Barek 54 DLR(AD)28, Nasir Howlader –vs.- State 56 DLR 151*].

34. In the instant case; meanwhile we have noticed that the condemned-prisoner Sukur Ali is in jail custody since 12.07.2006 and it appears that the condemned-prisoner have a poor economic social background, as reflected from the factual aspects of the case and it is already referred to above that the offence committed by the condemned-prisoner Sukur Ali was not under premeditation and in this context it appears that the learned Additional Sessions Judge, Bogra during passing the order of conviction and sentence has failed to appreciate the actual facts of the case as well as proposition of law which is incorporated in section 302 and section 304 of the Penal Code.

35. It is an appropriate case where the offence under section 302 of the Penal Code is liable to be turned into an offence under section 304 of the Penal Code and the factual aspects of the case lead us to believe that the sentence of death as awarded by the trial Judge is liable to be commuted to the imprisonment for life under the purview of section 304 (Part-I) of the Penal Code.

36. In the result, this Death Reference No.39 of 2010 is rejected with modification of sentence from death to imprisonment for life and the connected appeal and Jail Appeal are dismissed. The conviction of sentence is altered under section 304 (Part-I) from section 302 of the Penal Code. The punishment of death sentence is hereby commuted and substituted by imprisonment for life. Accordingly, the conviction of the condemned-prisoner Md. Sukur Ali is upheld and the death sentence be reduced to imprisonment of life.

37. The term of imprisonment would be counted under the provision laid down in section 35A of the Code of Criminal Procedure.

38. Communicate the judgment and order immediately and send down the lower Court’s records at once and inform all concerned.

9 SCOB [2017] HCD 28

HIGH COURT DIVISION
Criminal Appellate Jurisdiction

Criminal Appeal No. 6785 of 2011

Md. Komar Uddin
Vs.
The State and another

Mr. A.T.M. Mizanur Rahman, with
Ms. Ayesha Siddiqua and
Ms. Sultana Razia, Advocates.
... For the convict-appellant.

Mr. Mohammad Ali Zinnah, Advocate
... For the respondent No. 2.

Mr. Abdullah Al Mamun, D.A.G. with
Mrs. Delwara Begum (Bela), A.A.G
...For the State.

Heard on: 13.8.2015
And
Judgment on: 01.11.2015

Present:
Mr. Justice Abu Bakar Siddiquee

Negotiable Instruments Act, 1881
Section 138:
The learned advocate appearing on behalf of the convict-appellant took me to the postal receipt and strenuously argued that the postal seal reveal that the same has been received by the postal clerk on 23.03.2008 where as the postal clerk put his signature on the same showing receiving date as 12.03.2008. He further adds that those anomalies are sufficient to show that the postal receipt has been created for the purpose of this case. I have gone through the postal receipt and seen that the anomalies of those dates are palpable on the face of such receipt. It is the receiving clerk of the post office who made all those anomalies, is the best person who can say as to why and under what compelling circumstances he put this date under his signature and also as to why he put seal showing another date and without examining him, it is not possible to arrive at a concrete decision in this respect. In such a state of affairs the court can arrived such a decision which favoured the convict-appellant. Thus, I have no option but to hold that the convict-appellant is entitled to get benefit of the doubt regarding such service of notice. ... (Para 27)

Judgment

Abu Bakar Siddiquee, J.

1. This Criminal appeal is directed against the judgment and order of conviction and sentence dated 29.09.2011 passed by the learned Additional Sessions Judge, 1st Court, Kishoreganj in Sessions Case No. 194 of 2008 arising out of C.R. Case No. 53(1)08 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 6(six) months and to pay a fine of Tk. 4,00,000/- (Four lac).

2. The fact, relevant for disposal of this appeal may briefly be stated as follows:

> One Md. Kowser Miah lodged the petition of complaint before the judicial Magistrate, Cognizance Court No. 2, Kishoregonj as informant alleging inter-alia that he had a partnership business with the convict-appellant who used to take loan from the complainant and on 05.10.2007, accused-appellant took loan of Tk. 2,00,000/- (Two lac) from him in presence of other witnesses. It has been further alleged that with a view to secure such loan money, the convict-appellant executed a cheque on 20.11.2007 being cheque No. 03037511223 against his current account No. 441 of Agrani Bank, Patia Bazar Branch. The complainant- respondent presented the cheque in his own account on 08.01.2008 in the relevant bank for collection of the money from the relevant bank which has been bounced due to insufficient of fund and bank authority issued a dishonoured slip to that effect. Thereafter it has been alleged that the complainant-respondent asked the convict-appellant to pay such loan money whereupon he again requested him to present cheque to the bank and after presentation, the same has been further bounced. Thereafter complainant-respondent issued a legal notice on 13.02.2008 through his learned lawyer by registered post. It has been further that the convict-appellant did not repay the loan money within stipulated time in the legal notice and as such the respondent No. 2 (complainant) was constrained to file the complaint petition.

3. On receipt of such complaint, Learned Magistrate after examined the complainant (respondent No. 2) under Section 200 of the Code of Criminal Procedure and duly issued processes against the convict-appellant who subsequently appeared before the Court and obtained the bail. Thereafter, Magistrate sent the case record to the Court of Sessions Judge for the purpose of holding trial.

4. The learned Sessions Judge on receipt of the record took cognizance of the offence and transferred the case record to the Additional Sessions Judge, 1st Court, Kishoregonj for holding trial who on receipt of the same, framed a formal charged on completion of all formalities read over the same to him whereupon he pleaded not guilty of the offence and claimed to be tried.

5. During the course of trial the prosecution examined as many as 5(five) witnesses.

6. On the other hand, the defence examined none.

7. On closure of the evidence the learned Trial Court examined the convict-appellant under Section 342 of the Code of Criminal Procedure whereupon he abjured his guilt.

8. On conclusion of the trial, the learned trial court found the convict-appellant guilty of the offence and attributed the order of conviction as stated above.

9. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction, the convict-appellant preferred this appeal which has been contested by the respondent No. 2.

10. Mr. A.T.M. Mizanur Rahman, the learned Advocate appearing on behalf of the convict-appellant strenuously argued that no legal notice was ever served upon the convict-appellant and as such their arose no cause of action in this case under Section 138 of the

Negotiable Instruments Act, 1881. He further adds that the charges and evidence does not disclose about it of the notice under provision B of the Section 138 of the Negotiable Instruments Act, 1881 and as such the cognizance and the commencement of trial is violative to the provision of Section 141(b) of the Negotiable Instruments Act.

11. On the other hand, Mr. Mohammad Ali Zinnah, the learned Advocate appearing on behalf of the respondent No. 2 strenuously argued that all the prosecution witnesses have supported the case mentioning time, place and manner of the occurrence and as such the impugned judgment and order of conviction is liable to be affirmed.

12. Mr. Abdullah Al Mamun, the learned Deputy Attorney General appearing on behalf of the State supported the respondent No. 2.

13. I have heard the learned Advocates for both the parties and perused materials available on record.

14. Let me proceed to examine the evidence and other materials of the case and see therefrom as to how far the prosecution has been able to prove its case.

15. P.W. 1, Md. Kowser Miah deposed that he is the complainant in this case and he had a partnership business with the convict-appellant who used to take loan from him. He further deposed that the convict-appellant took loan of Tk. 2,00,000/- on 05.10.2007 and on being asked he issued a cheque for the purpose of securing such loan money. He further adds that the complainant-respondent presented the cheque against his account for encashment and his bank authority sent the same to the relevant bank for collection of money but the same has been bounced due insufficient fund. He further deposed that the complainant-respondent thereafter issued a legal notice asking him to pay the loan money within the stipulated period but the convict-appellant did not pay any heed to it and as such the complainant was compelled to file this case. The complainant-respondent produced petition of complaint before the Trial Court which has been marked as exhibt-1 and he further produced the impugned cheque which has been marked as exhibti-2. Thereafter he deposed that he produced dishonoured slip which has been marked as exhibit-3 by the Trial Court thereafter he prays for appropriate action against the convict-appellant.

16. In course of cross-examination it is admitted by him that the convict-appellant filed another case of cheque dishonour against him on demanding of Tk. 45,000/- He further deposed that there is no witness who can depose in his favour for taking loan from him. He further deposed that he cannot say as to whether the convict-appellant lodged a GDE before the Police Station on 22.07.2007 for purpose of loosing his cheque book. He further deposed that he presented the cheque against his current account in Agrani Bank Patia Bazar Branch the number of which is No. 81. He denied the suggestion put to him during the course of cross-examination.

17. P.W. 2, Mirja Ali deposed that both parties are known to him and the convict-appellant took loan a tune of Tk. 2,00,000/- from the complainant-respondent with a view to secure such loan the convict-appellant executed a cheque. Thereafter he deposed that the complainant-respondent presented the cheque before bank which has been subsequently dishonoured and as a result of which the complainant-respondent was compelled to file the case.

18. In course of cross-examination, he deposed that the transaction was made in his presence and he has not gone to the bank on the date of presentation of such cheque. Thereafter he deposed that he is not only a small trader but also a cultivator and has been rendering his business of insecticide materials. He also deposed that the complainant-respondent is also insecticide trader. He further deposed that the convict-appellant issue such cheque on sitting in the house of the complainant-respondent who himself brought out such cheque and at that time Anwar, Tarek and Harun was present and excepting those persons, one Mahatab Uddin was present who subsequently had died. It is admitted by him that homestead of convict-appellant is nine mile far from his house and the convict-appellant is his son and they have been living in the same mess. Thereafter he denied the suggestion put to him during the course of cross-examination.

19. P.W. 3, Anwar Jaman deposed that both the parties are known to him and the convict-appellant took loan of Tk. 2,00,000/- from the complainant-respondent on execution of a cheque of likely amount. Thereafter he deposed the complainant-respondent presented the cheque before the relevant bank for encashment which has been dishonoured for insufficient fund and as such the complainant-respondent was compelled to file this case.

20. In course of cross-examination, it is admitted by him that he is a vegetable trader and his homestead is half mile away from the house of the complainant-respondent who is an insecticide trader. Thereafter it is admitted by him that the convict-appellant is a partner of the complainant-respondent and they had a good relationship before filing this case. Thereafter it is admitted by him that the convict-appellant entered into a contract for repayment at the time of taking such loan and he executed a cheque in favour of the complainant-respondent with a view to secure such loan money. Thereafter he deposed that on the day presentation of the cheque, he had not gone to the bank concerned. He denied the fact that the convict-appellant gave any loan from the complainant-respondent. Thereafter he denied other suggestion put to him during the course of cross-examination.

21. P.W. 4, Haron-or-Rashid deposed that both the parties are known to him he identified the convict-appellant on dock. Thereafter he deposed on 05.11.2007 the convict-appellant took loan of Tk. 2,00,000/- from the complainant-respondent and that view to secure such loan he executed a cheque in favour of the complainant-respondent whow subsequently presented the cheque before the bank concern for encashment but the same has been bounced due to insufficient of fund.

22. In course of cross-examination, he deposed that after procurement of such cheque, the complainant-respondent presented the same with the relevant bank and he was not present at the time of such presentation. It is admitted by him that he is a electrician and he has a shop of electric materials and Gayanpur is one mile far from Sharapchar Bazar Committee and the president of bazar committee is Advocate Osman Gani. Thereafter he deposed that there is no relation in between him and complainant and he never took loan from the complainant. He also deposed that he cannot say as to whether the complainant-respondent made any correspondence with bazar committee. He denied the suggestion during the course of cross-examination.

23. P.W. 5, Faridul Hoque is the Bank Manager deposed that he was attached to the relevant bank at the relevant time. Thereafter he deposed that on 05.11.2007 the convict-appellant took loan for a tune of Tk. 2,00,000/- from the complainant on executing a cheque for the purpose of securing such loan money. Thereafter he deposed that complainant

presented the cheque before the relevant bank for encashment but the same has been bounced for insufficient of fund.

24. In course of cross-examination, he deposed that the complainant-respondent himself rushed to the bank for presentation of the cheque. He also deposed that he has not gone with the plaintiff at the time of going to the bank. Thereafter he deposed that he cannot say as to whether the convict-appellant issued any legal notice to the complainant-respondent. He denied the suggestion put to him during course of cross-examination.

25. The learned Advocate appearing on behalf of the convict-appellant took me to the averment No. 11 and ground No. 6 of the memo of appeal and strenuously argued that no legal notice has been ever served upon the convict-appellant and as such the proceeding and trial was violative to the provision of Section 141 (B) of the Negotiable Instruments Act. He further adds that the document regarding service of notice upon the convict-appellant was not being proved by the prosecution formally and as such there is no reason to believe that legal notice was ever served upon the convict-appellant. In this regard he took me to the copy of legal notice wherefrom it is seen copy of legal notice was kept in the lower Court Record but the same has not been produced before the trial court for admitting the same in evidence and also revealed that no exhibit seal has been put upon such copy of legal notice. It further alleged that no acknowledgement due has been filed in this case.

26. Learned Advocate appearing on behalf of the complainant-opposite-party argues that the complainant filed a postal receipt before the trial court and the same has been kept in the lower court record. He further adds the receipt itself shows that the legal notice has been issued in favour of the convict-appellant in his correct address court shall presumed that legal notice has been served properly. I have gone through postal receipt and it is seen that no exhibit mark has been endorsed on such postal receipt so asto evident that the same was at all entered into the evidence for the purpose of the adjudication of the case. Learned Advocate appearing on behalf of the complainant-opposite-party strenuously argued that the court has made a mistake for non endorsing the same as an exhibit and for that reason the complainant cannot be suffered and on the basis of postal receipt, this Appellate Court can concluded the fact that the since legal notice has been issued in the correct address of the convict-appellant and as such the same has been served properly.

27. The learned advocate appearing on behalf of the convict-appellant took me to the postal receipt and strenuously argued that the postal seal reveal that the same has been received by the postal clerk on 23.03.2008 where as the postal clerk put his signature on the same showing receiving date as 12.03.2008. He further adds that those anomalies are sufficient to show that the postal receipt has been created for the purpose of this case. I have gone through the postal receipt and seen that the anomalies of those dates are palpable on the face of such receipt. It is the receiving clerk of the post office who made all those anomalies, is the best person who can say as to why and under what compelling circumstances he put this date under his signature and also as to why he put seal showing another date and without examining him, it is not possible to arrive at a concrete decision in this respect. In such a state of affairs the court can arrived such a decision which favoured the convict-appellant. Thus, I have no option but to hold that the convict-appellant is entitled to get benefit of the doubt regarding such service of notice. For the sake of argument it I hold the court have made mistake in admitting the same as evidence in that case those anomalies lead to me to hold that the postal receipt has been created for the purposes of the case.

28. Having considered these facts and circumstances and evidence on record it appears to me that complainant-opposite-party measurably failed that the legal notice ever served upon the convict-appellant. Thus, I have no option but to opined that the cognizance and the proceeding and the trial is nothing but violative of Section 141 (B) of the Negotiable Instruments Act.

29. Mr. Abdullah Al Mamun, learned Deputy Attorney General appearing on behalf of the State strenuously argued that since trial Court have made a mistake in admitting those piece of paper in evidence the case may be sent back to the Trial Court for holding the trial afresh. But the anomalies on the face of the postal receipt creates a doubt regarding its genuineness. Thus, I am of the opinion that sending back the case to the trial court for holding fresh trial will be a futile exercise.

30. Having considered the facts, circumstances, evidence and other materials on record, I have no other alternative but interfere in the case.

31. Thus, there is merit in the appeal.

32. In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 29.09.2011 passed by the learned Additional Sessions Judge, 1st Court, Kishoreganj in Sessions Case No. 194 of 2008 is hereby set aside**.**

33. The order of bail granted earlier by this Court is hereby vacated.

34. The convict-appellant is permitted to withdraw the amount which was deposited by him at the time of filing this appeal. The learned Judge of the Trial Court is directed to refund the said amount to the convict-appellant within 30(thirty) days from the date of receipt of this judgment.

35. Let a copy of this judgment along with L.C.Rs. be sent to the concerned court at once.

9 SCOB [2017] HCD 34

High Court Division
(Special Original Jurisdiction)

WRIT PETITION NO.4403 OF 2010

Raghib Rauf Chowdhury
Vs.
Bangladesh and others

Mr. Hassan M.S. Azim, Advocate with Mr. Raghib Rauf Chowdhury, Advocate (In person), Mr. Mirza Al-Mahmood, Advocate .....For the petitioner

Mr. Mahbubey Alam, Attorney General (Appeared as requested by the Court)

Dr. Kamal Hossain, Senior advocate, Mr. Rokunuddin Mahmud, Senior advocate, Mr. Shafique Ahmed, Senior advocate & Mr. A.F. Hasan Ariff, Senior advocate ....Amicus curiae

Heard on 31.03.2016, 10.05.2016, 12.05.2016, 19.05.2016, 26.05.2016, 12,06.2016, 27.07.2016, 04.08.2016 & 28.08.2016

Judgment on 13.04.2017

Present:
Mr. Justice Obaidul Hassan
And
Madam Justice Krishna Debnath

Constitution of Bangladesh
Article 65:
By Article 65 of the Constitution the parliament has been vested with the legislative power of the Republic. The parliament can delegate its power to any person or authority by an Act of parliament, to make orders, rules, regulations, bye-laws or other instruments having legislative effect. From a plain reading of this article it reveals that unless and until the parliament delegates its power to any authority or any department within the limit of the country they cannot make any Rule. Thus, from the aforesaid article it is clear that the parliament is the sole authority to enact a rule or law and the parliament and only the parliament can delegate its powers to any authority to formulate, regulations, or any guidelines. ...(Para 37)

Constitution of Bangladesh
Article 65:
As per article 65, it is the absolute power of the parliament to enact law which is completely an independent organ of the State, which consists of the elected representatives of the country. It is well settled that this Court cannot direct the parliament to enact any law. ...(Para 41)

Constitution of Bangladesh
Article 95:
In Article 95(2)(a)&(b) the requisite qualification for being recruited in the higher judiciary as a Judge has been mentioned. Now it is the responsibility of the Chief

Justice to select the candidate and to suggest the President in the form of recommendation to appoint them in the higher judiciary. There is ample opportunity for the Chief Justice to select the proper persons having sufficient legal acumen and competence for the higher judiciary. ...(Para 44)

The Chief Justice is the key person in forming opinion as to eligibility of persons for appointment in the higher judiciary of our country. Expressing opinion by the Chief Justice thus inevitably forms part of the appointment process of Judges in the higher judiciary. ...(Para 48)

By the judgment in 'ten judges case' our Supreme Court has already rendered its considered view regarding the binding effect of 'consultation' with the Chief Justice by the President in appointing judges in the higher judiciary. Thus, we concede that there is no scope to direct the respondents to formulate guidelines to regulate appointments of judges in the High Court Division of the Supreme Court. This kind of direction to formulate guidelines for appointing the Judges in the higher judiciary shall only undermine the power of the Chief Justice which has been vested upon him by the Constitution itself and by pronouncement of judgment in the ten Judges case as well as Masder Hossain case. ...(Para 52)

In the process of selecting the persons for elevation to the High Court Division the Chief Justice may, if feels indispensably necessary consult or share his view with at least two of his senior most brother Judges in the Appellate Division and two of the senior most Judges of the High Court Division as well in forming 'opinion' and also to ensure the recommendation appropriate, effective and transparent. After advancing the recommendation expressing opinion by the Chief Justice there should not be any room to disapprove or censure it unless the persons recommended is found by the executive to have an antecedent involving anti-state or anti-social subversive activities. The fate of the recommendation of the Chief Justice expressing opinion should not be sealed and scrapped for no justified reason, in view of observation made in the 'ten judges case' by the Appellate Division of our Supreme Court. ...(Para 57)

Judgment

Obaidul Hassan, J.

1. The petitioner being a lawyer of this Court filed this writ petition under Article 102 of the Constitution of the People's Republic of Bangladesh as a Public Interest Litigation (PIL) in public interest with a view to uphold the 'Supremacy of the Constitution' and 'Rule of Law' for ensuring independence of the judiciary from other organs of the State. As a practicing lawyer of this Court he has become concerned about the recruitment process of the learned Judges in the High Court Division of the Supreme Court of Bangladesh which has given rise to serious criticisms in the recent past resulting in erosion of dignity and prestige of and respect for this lofty institution in the estimation of the general public to the great loss of the entire nation. By filing this writ petition the petitioner prayed for a direction upon the respondents to frame guidelines in respect of the process of selection of persons for being appointed as Judges of the Supreme Court of Bangladesh and published the same in Bangladesh Gazette Extraordinary in order to bring transparency and competitiveness in such process under the Constitution by causing a wider pool of applicants to be considered through public notifications inviting applications as mandated by the settled principles of separation

of independence of judiciary being the basic structure of the Constitution. On 06.06.2010 a Rule was issued on the following term:

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why guidelines should not be framed in respect of the process of selection of persons for being appointed as Judges of the Supreme Court of Bangladesh and publish the same in Bangladesh Gazette Extraordinary in order to bring transparency and competitiveness in such process under the Constitution by causing a wider pool of applicants to be considered through public notifications inviting applications as mandated by the settled principles of separation and independence of judiciary being the basic structure of the Constitution 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.1 was directed to inform this Court as to the process or system which has been followed till date for selection of persons for being appointed as Judges of the Supreme Court of Bangladesh within a period of one month from date. But unfortunately no report has yet come from the office of the respondent no.1 in this regard. Subsequently, on 04.03.2014 when the matter came up in the cause list for hearing, this Court appointed senior counsels namely Dr. Kamal Hossain, Mr. Rafiq-Ul-Haque, Mr. Moudud Ahmed, Mr. Mahmudul Islam, Mr. Rokunuddin Mahmud and Mr. Ajmalul Hossain as amicus curiae in this case. Mr. Mahbubey Alam, the learned Attorney General was also requested to assist the Court with regard to the issue raised in this Rule. Subsequently, on 17.02.2016 this matter was sent to this Bench from the office of the Hon'ble Chief Justice to hear and dispose of the same. On 23.02.2016 this Bench appointed Mr. Shafique Ahmed and Mr. A.F. Hasan Arif, the two learned senior advocates as amicus curiae in addition to the amicus curiaes appointed earlier. Mr. Moudud Ahmed, the learned senior advocate was appointed as amicus curiae but he expressed his inability to appear before this Bench in this matter for his personal difficulties. On the other hand Mr. Mahmudul Islam died before hearing of the Rule commenced. However, the learned senior advocates Dr. Kamal Hossain, Mr. Rokonuddin Mahmud, Mr. Shafique Ahmed, Mr. A.F. Hasan Arif and Mr. Mahbubey Alam, the learned Attorney General appearing before this Court gave their valuable opinion in this regard to come to a correct finding.

3. Mr. Hassan M.S. Azim, the learned advocate appearing on behalf of the petitioner submitted that one of the most important cardinal aspects of the independence of judiciary is that "the process of appointment of judges is not subject to control or influence by or of other organs of the State so that judgments can be delivered without fear or favour." He further submitted that the Constitution has clearly set down through the provisions of the Supreme Judicial Council (now defunct), the procedure for removal of the Judges of the Supreme Court, but the procedure for appointment has been dealt within broader terms and manner mentioned in Articles 94,95,97 and 98 of the Constitution. As per the Constitution the power of appointment of the Chief Justice and other Judges and both the Divisions of the Supreme Court is conferred by Articles 95 and 98 of the Constitution on the President i.e. the executive. In the matter of appointment of the Judges of both the Divisions of the Supreme Court the President is required to act on the advice of the Prime Minister under Article 48(3) of the Constitution. The Constitution as originally framed contained provision requiring the President to consult the Chief Justice in the matter of appointment of the Additional and Permanent Judges. Article 95 deals with the appointment of Regular/Permanent Judges to the High Court Division and the Appellate Division and Article 98 deals with the appointment of

the Additional Judges to the High Court Division and Ad-hoc Judges to the Appellate Division of the Supreme Court. But this provision for consultation was omitted by the 4th Amendment of the Constitution. In other words the constitutional requirement of consultation by the President i.e. the executive with the Chief Justice was done away with by the 4th amendment of the Constitution. Nevertheless, over the years, the practice of consultation with the Chief Justice of Bangladesh by the President regarding appointment of Judges of the Supreme Court turned into a continuous and unbroken convention. In such view of the matter, the Appellate Division in the case of Ministry of Justice vs. Md. Idrisur Rahman reported in 7 LG(2010) AD 17 held that "independence of judiciary being a basic structure of the Constitution, prior consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of judiciary and the same requirement of an effective consultation is as good as any other provisions of the Constitution and binding upon the executive."

4. He further submitted that though it is now a settled law that prior effective consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the Constitution, yet the process of selecting persons for being appointed as Judges of the Supreme Court somewhat lacks in transparency. Though the High Court Division vide the analogous judgment and order dated 17.07.2008 passed in Writ Petitions No.3217, 2975 and 1543 of 2003 categorically held that the proposal and process for appointment of Judges to the Supreme Court in both the High Court Division and the Appellate Division should be initiated from the Chief Justice of Bangladesh and also that the President of the republic shall have no right to directly initiate the process for appointment of Judges to the Supreme Court by passing the Chief Justice of Bangladesh, but the President/Government shall have the right of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court, but in appeal in the case of Ministry of Justice vs. Md. Idrisur Rahman, reported in 7 LG (2010)AD 17 the Appellate Division did not overrule this decision of the High Court Division, either impliedly or expressly. Hence, initiation of the process for appointment of Judges to the Supreme Court is to be done by the Chief Justice of Bangladesh. But there are no guidelines as to how the Chief Justice shall initiate the process or for that matter how the President/Government shall exercise the right of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court. Had there been some definite guidelines then the aspirant advocates could have pursued the different avenues following guidelines.

5. There cannot be any denial of the fact that a wider pool of strong candidates from all backgrounds can only lead to a healthier competition and the candidates who succeed will need to be even better resulting in appointment of truly qualified independent Judges. He further submits that due to such lack of definite guidelines, Judges are being appointed through a very weak system of selection. A culture of nepotism has also been developed in the system in respect of the suggestions being made by the executive, undoubtedly favouring persons with similar political ideologies and political connection with the ruling party which has the consequence of a section of the Bar opposing such appointments on a regular basis, which is also for nothing but political differences. As a result, the experience in the recent past has not been very pleasant for the nation. Even events like boycotting of Court also took place in the highest judiciary of the country resulting endless misery of the litigant public.

6. He further submitted that appreciating such dearth in the system, the President during the ruling of Non-Party Caretaker Government promulgated Supreme Judicial Commission Ordinance, 2008 (hereinafter referred to as the Ordinance). The Ordinance was published in

the Bangladesh Gazette Extraordinary on Sunday, March 16, 2008 providing matters for appointment of Judges in both the Appellate Division and the High Court Division of the Supreme Court of Bangladesh. It provided for constitution of a Supreme Judicial Commission for selection and recommendation of names to the President of the Republic for appointment as Additional Judges and Judges of the High Court Division and Judges of the Appellate Division of the Supreme Court. Subsequently, the said Ordinance was challenged by one Mr. Md. Idrisur Rahman, an Advocate of the Supreme Court, as being *ultra vires* of Articles 7,22,94,111 and 112 of the Constitution by way of filing a writ petition being Writ Petitions No.3228 of 2008 before this Court. In the said writ petition the Rule Nisi was issued. Subsequently, the Hon'ble Chief Justice by his order dated 18.06.2008 constituted a larger Bench consisting of their Lordships Mr. Justice Mohammed Abdur Rashid, Madam Justice Nazmun Ara Sultana and Mr. Justice Md. Asfaqul Islam who heard and disposed of the Rule. On 30.06.2008, when the Rule came up for hearing, their Lordships issued a notice contemplated under Order XXVIIA of the Code of Civil Procedure to the learned Attorney General to appear and assist the Court in the interpretation of relevant provisions of the Constitution regarding Judges of the Supreme Court of Bangladesh.

7. He also submitted that the respondents-government appeared and filed an affidavit in opposition sworn on 08.06.2008 and supplementary affidavit, it was asserted that the Ordinance was not inconsistent with the independence or separation of judiciary, but aimed at fair and sound appointment to the posts of the Supreme Court Judges from amongst the qualified persons on the basis of objective satisfaction and not depending on subjective satisfaction of the executive organ of the State. In order to prevent political motivated choices, which happened in the recent past and in order to invite the actual qualified persons for appointment to the post of the Supreme Court Judges, the Ordinance was promulgated by the President to safeguard the public interest. After hearing both sides the High Court Division was pleased to make the Rule absolute in part by majority 2:1 by the judgment and order dated 07.08.2008 declaring subsection (4) of section 9 of the Supreme Judicial Commission Ordinance, 2008 (Ordinance No.VI of 2008) void.

8. Thereafter, against the said judgment and order dated 07.08.2008 passed by the High Court Division in Writ Petition No.3228 of 2008, the writ petitioner preferred Civil Appeal No.331 of 2008 before the Appellate Division under Article 103(2)(a) of the Constitution. The said appeal was, however disposed of by the Hon'ble Appellate Division vide judgment and order dated 22.04.2009 holding, inter alia, that since by the time the appeal came up for hearing the said Ordinance of 2008 had lapsed as it had not been approved by the Parliament and therefore the appeal had become infractuous. The said judgment and order dated 22.04.2009 passed by the Appellate Division in Civil Appeal No.331 of 2008 has been reported in 7 ADC (2010) 174 (Md. Idrisur Rahman vs. Bangladesh and another).

9. He further submitted that the United Kingdom has already introduced a system of inviting applications by public advertisement, as was the case when judges were appointed to the UK Supreme Court recently. They have moved away from the traditional system for better results in public interest through establishment of a National Judicial Appointment Commission (JAC). He also submitted that the old tried and tested system though was not very transparent, yet there cannot be any denial to the fact that it had delivered many outstanding judges from the cream of a respected profession. There is, however, currently an overall consensus in Bangladesh that in today's political conditions, the power of appointment of Judges cannot be restored back to the government in any manner.

10. Mr. Azim, further submitted that independence of judiciary is a basic structure of the Constitution. An independent judiciary is absolutely indispensable for ensuring the rule of law. Wrong appointment of Judges have affected the image of the Court. He also submitted that in any system of dispensation of justice, much depends upon the personality of judges; the most well-drafted codes and laws would prove to be illusive if those concerned with construing and implementing those laws are lacking in right caliber. A person appointed not on merit, but because of favoritism or other ulterior considerations can hardly command real and spontaneous respect of the Bar.

11. He also submitted that often the length of time taken in the hearing of a case depends upon the up-take of the judge, his capacity to quickly grasp the points of law and facts and his ability to wade through the maze of facts and legal propositions to the crucial point. He further submitted that the selection of a person on considerations other than of merit has far-reaching repercussions. Such a Judge would naturally not receive cooperation from members of the Bar, who would be no strangers to his capacity, the full measure of co-operation which is needed for the proper administration of justice; nor would a Judge so appointed generally have the amount of confidence in himself which alone can contribute to the efficient discharge of his duties. Thus, the effect of wrong or improper appointment is felt not only for the time being; its repercussions are felt long thereafter. It also quite often has the effect of dissuading other suitable persons from subsequently accepting offers for appointment. It, therefore, becomes essential to eliminate, as far as possible, the chances of favoritism and plug other loopholes with a view to ensure that in future person of the right caliber are appointed and that the consideration which might weigh should be of merit alone. He also submitted that while deciding a case filed against the formation of a Supreme Judicial Commission by the Caretaker Government in 2007, a Larger Bench of this Court found in the case of Md. Idrisur Rahman vs. Bangladesh, reported in 60 DLR 714, that *"Appointment of judges of the Supreme Court is alleged to have been politicized in recent past, which has been severely questioned and criticized .....There are sufficient admitted evidence and circumstances, which satisfied the President who thought it expedient to take immediate action....."*

12. Mr. Azim finally submits that for the greater interest of the judiciary and for upholding a free fair and biseless judicial system in the country there should be a guideline to recruit candidates having excellent background of education and legal competency.

13. No one appears on behalf of the respondents.

14. Mr. Mahbubey Alam, the learned Attorney General appeared in this case being asked by this Court to appear and he submits that the service rendered by the Judges of the apex Court is not a service of the republic. As per constitutional provision the Judges are appointed, thus no application is required to be invited to fill-up the vacancy of the Judges of the Supreme Court. As per provision of Article 98 of our Constitution if the President is satisfied the number of the Judges of a Division of the Supreme Court should be for the time being increased the President may appoint one or more duly qualified persons to be additional Judges of that Division. There is no any fixed number of posts for the Supreme Court Judges. It is absolutely the prerogative of the President of the Republic to appoint Judges in the apex Court. Thus, Constitution itself says how President would be satisfied regarding competency of the persons who are eligible to be appointed as Judge of the Supreme Court. Like other services of the Republic no application should be sent to the President of the Republic or to the Chief Justice of the country. He further submits that the Constitution itself

has described the qualification of the Judges. As per Article 95(2)(a) a person to be appointed a Judge if he has practice as an Advocate of the Supreme Court for at least 10 years and as per Article 95(2)(b) any person who has served as a Judicial Officer for not less than 10 years, held judicial office in the territory of Bangladesh; or has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

15. He also submits that the qualification of a candidate has been described in the aforementioned Article and if anyone is considered qualified by the President as per Article 95(2)(a) or 95(2)(b) the President can appoint him as a Judge of the highest Court. He further submits that the qualification as described in the said Article are disjunctive, either of the qualification mentioned in Article 95(2)(a)(b)(c) is required for being appointed as a Judge of the Supreme Court, if the Hon'ble President of the Republic does not get any suitable candidate who fulfills the requirement of the Article 95(2)(a) or 95(2)(b) then he can go for next option described in Article 95(2)(c). Till this date no such situation arose. Furthermore, our legislature does not think it necessary to enact any law as per Article 95(2)(c) for appointment of the Judges of the Supreme Court. Since the parliament is the sole authority to enact law, it is better to leave it to them because as the house of people's representative the parliament is the competent authority to think what law should be enacted for the benefit of the country. This Court has no jurisdiction to direct the parliament to enact any law. However, he candidly submits that this Court can make observation how the present selection process can be improved, but no rule or guideline is necessary as Constitution itself has given the guideline.

16. He further submits that since after being appointed as an additional Judge of the Supreme Court under Article 98 of our Constitution the Judge is made confirmed as per provision of Article 95. As per Article 95 the President appoints someone as Judge of the Supreme Court after due consultation with the Chief Justice. It is absolutely clear that the Chief Justice has a vital role finally in appointing the Judges of the Supreme Court. Since the Chief Justice has a pivotal role he can advice the President to appoint the competent persons in the apex Court as a Judge. The Chief Justice has the scope to see the qualities of the additional Judges who were appointed under Article 98 of the Constitution and if he does not give any recommendation to anyone the President shall not appoint him as a Judge of the Supreme Court because the Chief Justice is the only person who is competent to know whether the additional Judge appointed earlier could prove his competence to be confirmed as a permanent Judge of the Supreme Court. Thus the system as has been going on in our country cannot be said flawed. He candidly submits that it becomes flawed only when personal interest of the Chief Justice or the persons who are in the helm of the affairs, supersede the other legal qualification of the prospective candidates.

17. Mr. A.F. Hasan Ariff, the learned senior advocate appearing in this case as Amicus Curiae, he submits that the provision of Article 95(1)(2)(a)(b)(c) should be read conjunctively. Article 95(2)(c) is a complementary provision, it is to be read along with Article 95(2)(a) and (b). He candidly submits that direction to enact law to the parliament cannot be given but a direction to the Government can be given to take immediate steps to frame a Rule or a guideline to appoint the Judges of the Supreme Court in the light of observation. This Court is competent enough to make an observation how a guideline should be prepared by the government and in that observation it can be said that if government makes any Rule for appointment of the Judges of the apex Court it must be consulted with the Chief Justice before framing it finally. He also submits that during Caretaker Government a Supreme Judicial Council was formed to appoint the competent persons as a Judge in the

apex Court. The Supreme Judicial Council was formed by an Ordinance, same was challenged before this Court. The provision of section 9(4) of the said Ordinance was declared void by majority view in a judgment reported in ***60 DLR (HCD) 714*** saying that:

> *"the provision of the Ordinance as laid down in section 9(4) which empowers the President to reject the recommendation of the Commission for reasons to be recorded, which would be final, is indeed, unconstitutional. Definitely this particular provision is inconsistent with the Constitutional provision and Convention for the appointment of the Judges of the Supreme Court. It flouts the main object of securing primacy of the Commission's decision. To make the Ordinance effective this section is a bar for the reasons stated above. I declare this section 9(4) of the Ordinance void."*

18. Since the Ordinance was not placed before the parliament ultimately it died its natural death. He further submits that it is the desire of the people of the country to make a guideline to appoint the competent persons in the highest judiciary. The Ministry of Law, Justice and Parliamentary Affairs has failed to perform their duties. Qualification, selection and appointment must be guided by a legal instrument of the Constitution. Thus the Rule or guideline to appoint the Judges of the apex Court is necessary.

19. He submits that since the government is mandated to form a Rule vide Article 95(2)(c) and for the last 45 years they have not done so, this Court may give a direction to the government to frame a Rule for this purpose. In Masder Hossain case reported in ***52 DLR (AD) Page-82, Para-73*** it has been mentioned that observation if given by this Court expressing its wish to frame a guideline or Rule the government should follow it. As per Masder Hossain case this Court is competent to give a direction upon the government to frame a guideline or Rule.

20. Mr. Shafique Ahmed, the learned senior advocate appearing in this case as another Amicus Curiae submits that since there is no any provision in our Constitution for inviting any application from the competent persons to recruit them as a Judge of the Supreme Court as per the petitioner's demand the Chief Justice or the persons who are in the helm of the affairs should ask for application is not at all permissible. The Supreme Court Judge is not a person employed in the service of the republic, so like other services of the republic no application should be called for.

21. He further submits that the qualification, experience and other qualities regarding legal acumen of a candidate should be seen by the Chief Justice. Unless he recommends anyone for the post, the President/Government cannot give appointment. As per judgment pronounced in 10 Judges' case the legal acumen is to be seen by the Chief Justice and the other antecedent would be seen by the government. Thus the competency of a person can only be seen by the Chief Justice. How the Chief Justice will know about the legal acumen it depends absolutely upon him. He is to find out the way. He may take opinion from his fellow brothers or from the senior advocates from the Bar or directly he can ask any person who according to him is competent to be a Judge of the Supreme Court to appear before him for interview. Thereafter, he can give consultation to the President/Government to appoint the said person as a Judge of the Supreme Court.

22. He also submits that since there is no any appointment guideline for the recruitment of the Judges of the highest judiciary other then the provision of Article 95(2)(a)(b). This Court can direct the government to fulfill the Constitutional mandate as per Article 95(2)(c).

Finally, he submits that practically no one submits any application to the Chief Justice or to the government expressing his intention to be elevated to the Bench.

23. He further submits that since for such high position no application should be invited like other jobs, but the intending candidate may give their CV in the website of the Supreme Court so that it comes to the notice of the Hon'ble Chief Justice.

24. He further submits that now a days it has become very difficult to appoint competent person as a judge of the Supreme Court as the salary structure of the judges of the apex Court is very low in comparison to judges of the higher judiciary of the neighbouring countries. Thus, for attracting the brilliant candidates in judgeship of the higher judiciary government should think to increase the salary of the judges. A lawyer who becomes eligible to be elevated earns a lofty amount of money during his practice as a lawyer. If the government or the Chief Justice thinks to get his service in the judiciary as a Judge he should be given a good salary though which may not be equal to the earning of a lawyer of his stature. He also submits that still it is possible to bring the good lawyer having good academic background and competency as a lawyer to serve the higher judiciary if their salary structure can be made attractive.

25. Dr. Kamal Hossain, the learned senior advocate another Amicus Curiae submits that the process that has been followed in the appointment of Judges in South Asia for over one hundred years is that the appointment is made after consultation with the Hon'ble Chief Justice. He also submits that consultation with the Hon'ble Chief Justice before appointment of a judge absolutely necessary for the independence of the judiciary, which is one of the basic features of the Constitution. The consistent practice of consultation with the Hon'ble Chief Justice has been established for over a century in the subcontinent, in particular. Since the fourth amendment of 1975 till February, 1994 and thereafter the Constitution process can be said to have established as a constitutional convention, which has become integral part of the Constitution.

26. He further submits that reason behind the constitutional convention of consultation with the Hon'ble Chief Justice is no less than the preservation of the independence of the judiciary, because a Judge should be appointed or confirmed on the basis of the performance, and his performance should be seen from his judgments which can be seen by the Hon'ble Chief Justice. Dr. Kamal citing a decision in the case of ***Md. Shamsul Huda & others Vs. Bangladesh and others*** reported in ***17 BLT (HCD) 2009 page-109*** submits that the process of consultation in the appointment of Judges is needed in order to uphold the independence of judiciary for, it was realized that the independence of judiciary is not possible by only safeguarding merely by providing security tenure and other conditions of preventing influence of political pressure in making appointments. To avoid this eventuality it is necessary that the process of appointment should be initiated by the Hon'ble Chief Justice of Bangladesh and not by the Executive. But still the appointment is being initiated by the executive and the Hon'ble Chief Justice is consulted on the basis of list of candidates provided by the executive.

27. Dr. Kamal submits that in the present writ petition the petitioner has prayed for framing of guidelines for process of selection which would be fair and impartial by enabling selection by public notification and appointment through a process which is transparent and impartial and competitive. He further submits that in this regard such process of selection would to safeguarding the independence of judiciary. He further submits that the issue of framing guidelines has merit considering by the Court taken into account the developments

already made in this regard in this country and other neighbouring countries and the view expressed in the judicial decisions pronounced by our apex Court.

28. Mr. Rokonuddin Mahmood, the learned senior advocate appearing in this case as another Amicus Curiae submits that as per the provision of Constitution there is no any provision to frame any guideline for appointment of the Judges of the apex Court. He questioned when constitution has not given any scope to frame any guideline, under what authority guideline, can be framed. He further submits that if any guideline at all necessary it is the parliament who can decide. This Court is not in a position to make any rule. As per Article 95(2) it has been mentioned that who are the persons qualified to be appointed as the Judge of the Supreme Court and Article 95(1)(2) clearly said that what is the qualification of the person to be appointed as a Judge of the apex Court. As per Article 95(1) the Chief Justice shall be appointed by the President and the other Judges shall be appointed by the President after consultation of the Chief Justice. So whether consultation is at all given by the Chief Justice to the President or what consultation took place before the President and the Chief Justice can never be questioned to any Court or authority. Thus, the Constitution has given mandate to the President and the Chief Justice to make appointment of the Judges in the apex Court.

29. Mr. Rokonuddin Mahmood further submitted that now it is the responsibility of the Chief Justice to give consultation to the President regarding the suitable candidates. Because, he is the person who has opportunity to know about the competency of the lawyers and other Judges working in the lower judiciary. It is up to the Chief Justice how he will take information regarding the particular person. In what mechanism the candidates should be selected absolutely depends upon the Chief Justice. He may consult with his fellow brothers, or he may ask the person who at his estimation eligible to be elevated to the Bench to appear before him for interview. He also submits that in this writ petition Secretary, Ministry of Law, Justice and Parliamentary Affairs, Registrar General, Supreme Court of Bangladesh have been made respondents. But neither of these respondents has the authority to make any Rule or to frame any law or guideline to appoint the Judges of the apex Court of the country. Thus, the writ petition is not maintainable, it is absolutely misconceived application.

30. He further submits that the Constitution rules out the advertisement for the post of judges of the higher judiciary. The petitioner by filing this writ petition sought to limit the power of the President and Chief Justice and they wanted to bind the President and Chief Justice to work under a frame work. Their prayer is absolutely contrary to the constitutional provision as mentioned in Article 95(2)(a)(b). The Court cannot enlarge the scope of Article 95 nor can limit the scope of the same, only the parliament has the authority to bring any change in the Constitution or to make any law in conformity with the provision of the Constitution.

31. He further submits that as per Article 95(2)(c) it has been mentioned that a person should have "such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court." If any law is to be enacted it is the parliament's prerogative to do so, the Supreme Court cannot direct the parliament to make any law. Making a law is the exclusive jurisdiction of the parliament. As per Article 65 (1) the authority of legislative powers has been vested to the parliament only. Thus, if this Court makes any rule or guidelines it will be contrary to the provision of Article 65(1) of the Constitution.

32. He also submits that even as per Article 142 of the Constitution any provision of the Constitution may be amended by way of addition, alteration, substitution or repeal by Act of

Parliament. Thus, it is very clear from the constitutional provisions that this Court has no power to make any guideline or rule for appointing the apex Court Judges extending the provision mentioned in the Article 95(2)(a)(b)&(c). He also submits that as per Article 119 the election commission, another constitutional body has been given power to conduct elections of Members of Parliament, elections to the office of the President and some other jobs. In 119(2) the Election Commission has been given power to do such functions in addition to those mentioned in Article 109(1)(a)(b) as may be prescribed by this Constitution or by any other law. The more elections other then parliament and the President election are being held in our country as per law which has been enacted by the parliament. Thus, the absolute power to make any guideline or law or rule vests upon the parliament only. He further submits that as per Article 66(2)(g) it has been mentioned that a person is disqualified for such election (parliament) by or under any law. In this Article from (a)-(f) it has been mentioned about the criterions of disqualifications of a person to contest the parliament election. As per Article 66(2)(g) it has been further mentioned that any person may be declared disqualified for such election by or under any law. Thus a law must be enacted to make any person disqualified by the authority of the parliament not by the Election Commission.

33. He further submits that Article 95 is the basic structure of the Constitution. Only as per Article 48 (3) at the time of appointing Chief Justice, the President does not need to consult with the Prime Minister, but other than the appointment of the Chief Justice and the Prime Minister, the President is under obligation in exercising his all functions to take advice of the Prime Minister. Thus, when the apex Court Judges are being appointed after due consultation with the Chief Justice it goes to the Prime Minister and the Prime Minister has a role to give advice to the President and after being advised the President appoints a Judge of the Supreme Court. So as per our Constitution a Judge is being appointed by the President after being consulted by the Chief Justice and also by the Prime Minister. As per proviso of Article 48(3) it is provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into any Court.

34. Thus, it is clear that the apex Court Judges are being appointed by the President after consultation with the Chief Justice and the Prime Minister. This Court cannot give them any guideline to follow. The Supreme Court cannot limit the power of the President, Chief Justice or Parliament to do the work within a frame work given by it. This kind of the action of the Supreme Court would be termed as unconstitutional.

35. We have gone through the application and considered the submissions of the learned advocate for the petitioner and the Amicus Curiaes. In the writ petition, the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Registrar (now Registrar General), Supreme Court of Bangladesh, Principal Secretary of the Prime Minister Office and the Cabinet Secretary had been made respondents. None of the respondents turned to the Court to contest the Rule. However, we are to decide whether this Court can direct the respondents to frame guidelines in respect of process of selection of persons for being appointed as Judges of the Supreme Court of Bangladesh.

36. As per Article 95 of our Constitution the Judges shall be appointed by the President after consultation with the Chief Justice. In the original Constitution of 1972 the said provision was there. But after amending the Constitution by the 4th amendment the provision of consultation with the Chief Justice by the President was taken away. Thereafter the said provision has again came into force by the Constitution 15th Amended Act, 2011. Article 95(2) has described the qualification for appointment of judges. In the said Article it has been

said that "a person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and – (a) has, for not less than ten years, been an advocate of the Supreme Court; or (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court. There is a provision of appointment of an Additional Judges of the Supreme Court which has been envisaged in the Article 98 of the Constitution which runs as follows:

> "*Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period:*
>
> *Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."*

37. The words "duly qualified persons" are not defined in the said Article. But in article 95(2) the disqualification of a person for being appointed as a judge has been articulated. If we go through the articles 95 and 98 together we can easily find what is the requisite qualification of a person to be elevated as a judge of the Supreme Court of Bangladesh. By Article 65 of the Constitution the parliament has been vested with the legislative power of the Republic. The parliament can delegate its power to any person or authority by an Act of parliament, to make orders, rules, regulations, bye-laws or other instruments having legislative effect. From a plain reading of this article it reveals that unless and until the parliament delegates its power to any authority or any department within the limit of the country they cannot make any Rule. Thus, from the aforesaid article it is clear that the parliament is the sole authority to enact a rule or law and the parliament and only the parliament can delegate its powers to any authority to formulate, regulations, or any guidelines.

38. The question is whether Supreme Court can direct the Government (the respondents) to frame any guideline. The respondents no.1, Secretary, Ministry of Law, Justice and Parliamentary Affairs has no any power to formulate the guideline for recruitment of the judges of the higher judiciary neither the Registrar General, Principal Secretary of the Prime Minister or the Cabinet Secretary has such power to frame any guideline or rules for appointment the judges of the higher judiciary.

39. The Supreme Court is established under the provision of article 94 of the Constitution. The provision of article 94 of the Constitution runs as follows:

> *"(1) There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.*
>
> *(2) The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other judges as the president may deem it necessary to appoint to each division.*
>
> *(3) The Chief Justice, and the Judges appointed to the Appellate Division, shall sit only in that division, and the other Judges shall sit only in the High Court Division.*
>
> *(4) Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions."*

40. Now question is what is judicial function? The High Court Division of the Supreme Court works under the provision of the High Court Rules and the Appellate Division works under the provision of Appellate Division Rules. The High Court Division has the power to issue certain order and directions etc. under the provision of Article 102 of the Constitution. As per the provision of Article 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." But the petitioner has not come up before us to enforce any of the fundamental rights guaranteed under part III of the Constitution.

41. As per article 65, it is the absolute power of the parliament to enact law which is completely an independent organ of the State, which consists of the elected representatives of the country. It is well settled that this Court cannot direct the parliament to enact any law. But nevertheless the Supreme Court has been vested with the power by the Constitution to review any act of the legislature or executive to see whether the act done is consistent with spirit of the Constitution or not. If it is found that the action of the parliament or executive is in contrary to the Constitution the Supreme Court's High Court Division has the power to declare the said action unconstitutional. In fact this power is the power of the people of the country. The Supreme Court always exercises such judicial power on behalf of the people. The people will always remain the focal point of concern.

42. The respondents in this petition are neither the part and parcel of the parliament, they are executives working under the government. The government executives are not at all vested with any power by the parliament to make any guidelines or regulation or Rule what so ever. So this Court cannot direct the respondents to make any rule or guidelines for appointing the persons in the higher judiciary. The petitioner during his submission submitted that if this Court is reluctant to give any such direction upon the respondents to frame a guideline, it can give some observations to be followed by the concerned authorities in appointing the person as a Judge of the higher judiciary. In this regard the petitioner referred decisions in the cases of Vishaka vs. State of Rajsthan, AIR 1997 SC 3011, Destruction of Public and Private Properties vs. State of AP AIR 2009 SC 2266, Delhi Jal Board vs. National Campaign for Dignity and Rights of Sewerage & Allied Workers (2011) 8 Supreme Court Cases 568 and BLAST vs. Bangladesh, 55 DLR 363 where it has been observed that in absence of any particular law the Court can give direction to the government to take some measures in the light of directions.

43. In the above cases their Lordships considering the inadequacy of law and inadequacy of sufficient protection for the sewerage workers and others gave directions upon the concerned authority to take measure. But in the case in hand the petitioner prayed for a direction upon the respondents to formulate a guideline for appointing the judges of the apex Court. Since as per Constitution there is a provision of consultation with the Chief Justice before making any appointment in the higher judiciary, there is ample scope for the Chief Justice to select the competent persons for the higher judiciary.

44. In Article 95(2)(a)&(b) the requisite qualification for being recruited in the higher judiciary as a Judge has been mentioned. Now it is the responsibility of the Chief Justice to select the candidate and to suggest the President in the form of recommendation to appoint them in the higher judiciary. There is ample opportunity for the Chief Justice to select the

proper persons having sufficient legal acumen and competence for the higher judiciary. In ten judges case their Lordships held that:

> *"Consultation with the Chief Justice with primacy of his opinion in the matter of appointment of judges and the addition of judiciary is an essential part of independence of judiciary which is ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is not conflict with Article 48(3) of the Constitution."*

45. By Article 48(3) the President takes advice from the Prime Minister. Since it has been held in the case of ***Bangladesh & ors vs. Md. Idrisur Rahman, Advocae & ors*** reported in ***29 BLD (AD) 79*** that the opinion of the Chief Justice will get primacy, it absolutely depends upon the Chief Justice to select the proper persons for the higher judiciary. In the said case it has also been held that:

> *"the convention of consultation with the Chief Justice in the matter of appointment of Judges under Articles 95 and 98 of the Constitution has hardened and matured into a rule of law having been recognized and acted upon by all the 'actors' in the matter and therefore is binding upon the executive."*

46. The eligibility of the Judges has been mentioned in the Article 95(2). Inspite of that the petitioner by filing this writ petition wanted to give a guideline how the persons who are in the helm of affairs should act and what should be a criterion for the persons to be recruited in the higher judiciary. Since the opinion of the Chief Justice has been made mandatory for the executive, presumably it can be said that the Chief Justice being the head of the judiciary, one of organs of the Stae will recruit the proper persons in the higher judiciary having proper legal background i.e. sufficient knowledge of law, man of dignity and integrity. The petitioner's submission is that for the sake of independence of judiciary the recruitment process of the Judges of the higher judiciary must be free from all political influences. It is his apprehension that since vide Article 48(3) of the Constitution there is a provision to take advice from the Prime Minister, the President is bound to listen his/her advice, thus there might be political influence in the process of recruitment of the Judges in the higher judiciary. In this regard Mr. Justice Abdul Matin in the case of ***Bangladesh & ors vs. Md. Idrisur Rahman, Advocate & ors*** reported in ***29 BLD (AD) 79*** has said that "therefore the expression *"independence of judiciary"* is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept by and under the provision of the Constitution. We find no existing provision of the Constitution either in Articles 98 or 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore, the advice of the Prime Minister is subject to the other provision of the Constitution that is Article 95, 98, 116 of the Constitution.

47. The independence of judiciary has also been held to be a basic structure of our Constitution, in the case of ***Anwar Hossain Chowdhury and other vs. Bangladesh*** reported in ***41 DLR (AD) 165*** wherein it was held as under:

"This point may now be considered. Independence of judiciary is not an abstract conception. Bhagwati, J: said "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective." He said that the Judges must uphold the core principle of the rule of law which says-"Be you ever so, the law is above you."

"The above is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and other vs. President of India and others AIR 1982 SC at Page 152)."

"Independence of the judiciary, a basic structure of the Constitution, is also likely to be jeoparised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixe age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matter of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a "Spineless Judges" in the words of President Roosevelt, such a person can hardly be an independent Judge."

"The judiciary is a cornerstone of our Constitution, playing a vital role in upholding the rule of law. Government must be conducted in accordance with the law and for there to be confidence that this happens in practice, the law must be administered by a judiciary that is independent of government. The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive."

48. But in the concluding part of the judgment in the aforesaid case it has been held too that the opinion of the Chief Justice shall have the primacy over the executive. Therefore, it may be reiterated that the Chief Justice is the key person in forming opinion as to eligibility of persons for appointment in the higher judiciary of our country. Expressing opinion by the Chief Justice thus inevitably forms part of the appointment process of Judges in the higher judiciary. In different countries including India and Pakistan Judges of the higher judiciary are appointed by the President in 'consultation' with the Chief Justice.

49. Recently the government of India introduced a Commission meant to select persons for appointment in the higher judiciary. But the same was challenged and eventually Indian Supreme Court scarped the idea of forming 'Commission' contemplating different mechanism and provisions for appointing judges in the higher judiciary and thus in India still the primary task of recommending persons for appointment in the higher judiciary remains in the dominion of the Chief Justice and other Judges. Also in the advanced countries like Australia, Canada etc the appointment process in the higher judiciary is almost alike, having some differences.

50. Nobody will disagree that 'merit' and 'integrity' must be considered as 'prime criteria' for appointment of judges to the higher judiciary indeed. According to **Justice Kuldip Singh** of the Supreme Court of India *"....the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility."*

51. The task of recommendation on part of the Chief Justice by selecting potential persons for appointment through assessing the above criteria thus plays a significant responsibility. Since the convention of consultation with the Chief Justice in appointing Judges in our higher judiciary under Articles 95 and 98 of the Constitution has been matured into a rule of law and since the 'actors' move on to act principally upon it the 'recommendation' initiated by the Chief Justice should be based on due, effective and transparent assessment. It has been envisaged in Article 95 of our Constitution that the President is required to consult the Chief Justice in respect of appointing judges in the Supreme Court. But however, the term 'consultation' would not diminish the 'primary role' of the Chief Justice in judicial appointments in the higher judiciary.

52. By the judgment in 'ten judges case' our Supreme Court has already rendered its considered view regarding the binding effect of 'consultation' with the Chief Justice by the President in appointing judges in the higher judiciary. Thus, we concede that there is no scope to direct the respondents to formulate guidelines to regulate appointments of judges in the High Court Division of the Supreme Court. This kind of direction to formulate guidelines for appointing the Judges in the higher judiciary shall only undermine the power of the Chief Justice which has been vested upon him by the Constitution itself and by pronouncement of judgment in the ten Judges case as well as Masder Hossain case. People of the country always expects that the man of integrity, having capability to express and man of personality should be appointed in the higher judiciary. In this regard his Lordship ***J.S. Verma, J.*** in the case of ***Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441*** has observed that:

> *"....only those persons should be considered fit for appointment as judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior judge. The collective wisdom of the constitutional functionaries involved in the process of appointing superior judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry. It is not unlikely that the care and attention expected from them in the discharge of his obligation has not been bestowed in all cases. It is, therefore, time that all the constitutional functionaries involved in the process of appointment of superior judges should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made. This is not difficult to achieve."*

53. However, the matter in hand prompts us to express view of our own that undeniably the judiciary in true sense meets public expectations on both counts—selection of judges and performance of judges. To achieve the objective of an independent judiciary the selection

process of judicial appointment in the higher judiciary needs to be designed in such a manner as to guarantee the selection of highly qualified, honest and eligible person. This Court wants to believe that if the existing system fails to work properly, our legislatures will come forward to enact a charter into the Constitution or make proper law as hinted by Article 95(2)(c) which shall elevate the higher judiciary to a rare dignity which will command the respectful obedience of the people of Bangladesh. Undoubtedly it can be said that the existing process of recommending the persons to be appointed as High Court Judge by the Chief Justice reflects due fairness and transparency. According to **Justice V.R. Krishna Iyer** *"Not one bad robe should be allowed to tarnish a great institution."*

54. In view of deliberation made herein above and to respond to the public aspiration the existing selection process could be made more effective, improved, transparent and realistic by taking the following matters into account as 'eligibility criteria', if considered appropriate and rational by the Honourable Chief Justice before he moves on to recommend a person or the pool of persons for appointment as Judge or Judges of the High Court Division, having regard to the provisions envisaged in Article 95(2) of our Constitution:

(a) a person, a citizen of Bangladesh having sincere allegiance to the fundamental principles of the State Policy, i.e., nationalism, socialism, democracy and secularism as mentioned in Article 8 of the Constitution and also the spirit of the war of liberation through which the nation achieved its independence in 1971. A person should not be recommended for appointment if his antecedent does not appear balanced with the above principles and the spirit;

(b) a person to be recommended must have brilliant academic profile, towering level of professional skill, legal acumen and integrity;

(c) Mechanism of providing Curriculum Vitae of intending persons in the website of the Supreme Court may be installed so that the Chief Justice, on initial consideration of the same, if wishes may ask a person or persons to appear before him for an interview along with his assets and liability statement—which may substantially facilitate the process of appropriate recommendation through effective, transparent and impartial impression;

(d) A person achieves professional skill and efficiency with the passage of time he spends in his professional arena and thus naturally age of the intending person should be one of key considerations of recommendation. In the 80th report of the Law Commission of India regarding the matter of appointment of Judges observed—for a Judges' maturity is an essential element. Professional maturity comes with years' brilliant uptake being no substitute. Conceding with this observation we are of the view that minimum age of a person intending to be selected for appointment as a Judge of the Supreme Court should be 45 years;

(e) To ensure high level of quality selection the Advocates enrolled in the Appellate Division should be prioritized for recommendation by the Chief Justice. However, in a very exceptional case the Advocates enrolled in the High Court Division having wide range practicing experience with honesty and sincerity may be considered in recommending their elevation to the High Court Division;

(f) The judges working in the sub-ordinate judiciary having judicial working experience of less than three(03) years in the capacity of District &

Sessions Judge should not be considered for recommendation for appointing in the higher judiciary; and

(g) Also the merit and integrity must be the prime criteria while recommending the persons working in the sub-ordinate judiciary. It should be borne in mind that a person of high brilliance having no integrity is rather treacherous for any institution.

55. In addition to the above thoughts as we consider more supportive for recommending a person for appointment in the higher judiciary we also opt to add further view of our own that to attract the brilliant lawyers for appointing in the higher judiciary the remuneration of Judges of the Supreme Court should be made as smart as possible. The monthly remuneration of a Jude of the High Court Division and the Appellate Division of our Supreme Court should be parallel to that being received by the Judges of other jurisdiction of the Sub-Continent. Robust remuneration must make the eligible lawyers enthused to place him under consideration for recommendation.

56. Before we depart, we are forced to note that it is regrettable that the respondents did not come to this Court to extend assistance in resolving the issues of controversy. Their assistance would have profitably focused more light on the issues. However, the writ petitioner's prayer to direct the respondents to formulate guidelines for the purpose of regulating the process of appointing judges in the higher judiciary is misconceived. Despite this final decision we think that the existing system of appointment can be made more improved by the Chief Justice of the country as he is the best and prime person to evaluate as to which lawyers and the judicial officers working in the sub-ordinate judiciary are truly eligible to be elevated to the Bench—and we mean it.

57. In the process of selecting the persons for elevation to the High Court Division the Chief Justice may, if feels indispensably necessary consult or share his view with at least two of his senior most brother Judges in the Appellate Division and two of the senior most Judges of the High Court Division as well in forming 'opinion' and also to ensure the recommendation appropriate, effective and transparent. After advancing the recommendation expressing opinion by the Chief Justice there should not be any room to disapprove or censure it unless the persons recommended is found by the executive to have an antecedent involving anti-state or anti-social subversive activities. The fate of the recommendation of the Chief Justice expressing opinion should not be sealed and scrapped for no justified reason, in view of observation made in the 'ten judges case' by the Appellate Division of our Supreme Court.

58. With the above observations, the Rule is **disposed of.**

59. Let a copy of this judgment be communicated to all concerned including all respondents at once.

Krishna Debnath, J.

60. I agree.

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HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Death Reference No.135 of 2008
With
Criminal Appeal No.03 of 2009
With
Criminal Appeal No.468 of 2009
With
Criminal Appeal No.9345 of 2015
(arising out of Jail Appeal No.92 of 2009)
With
Jail Appeal No.71 of 2009
With
Jail Appeal No.72 of 2009
With
Jail Appeal No.73 of 2009
With
Jail Appeal No.92(A)/2009

The State and others
Vs.
Mufti A. Hannan Munshi alias Abul Kalam and others

Mr. Mahbuby Alam, Attorney General with
Mr. Sheikh A.K.M Moniruzzaman,DAG
Mr. Bashir Ahmed, A.A.G and
Mr. Md. Shahidul Islam Kha,AAG and
Mr. Mia Sirajul Islam, AAG
----For the State
Ms. Hasna Begum, Advocate
---State Defence Lawyer
(In Death Reference No.135 of 2008)
Mr. A.K.M Faiz, Advocate
--- For the Appellant
(In Criminal Appeal No.03 of 2009)
Mr. Mohammad Ali, Advocate
--- For the Appellants
(In Criminal Appeal No.468 of 2009
and Criminal Appeal No.9345 of 2015)

Heard on 06.01.2016, 07.01.2016, 13.01.2016, 14.01.2016, 20.01.2016, 21.01.2016, 27.01.2016, 28.01.2016, 03.02.2016 & Judgment on 11th February, 2016.

Present:
Mr. Justice M. Enayetur Rahim
And
Mr. Justice Amir Hossain

Code of Criminal Procedure, 1898
Section 164:
Recording of a statement of an accused beyond the period of office hour can not be a plea to hold that the said statement is not true and voluntary. If the said statement is found that same was recorded by the concerned Magistrate having compiled with all the provisions of law then there is no room to say that the said statement is not true and voluntary. ...(Para 223)

Evidence Act, 1872
Section 17:
'Confessions' a terminology used in the criminal law is a species of 'admissions' as defined in Section 17 of the Evidence Act. An admission is a statement-oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. Broadly speaking, confession is an admission made at any time by a person charged with crime, stating or

suggesting an inference that he committed the crime. A confession or an admission is evidence against its maker if its admissibility is not excluded by some provision of law. ...(Para 236)

A confession is admissible provided it is free and voluntary but it does not mean that a mere bald assertion by the accused that he was threatened or tortured or that an inducement was offered to him, can be accepted as true without any thing more. The suggestion must be rejected when there is no material whatsoever to hold that the prisoner was threatened or beaten and the story of torture is, on the face of it incredible. ... (Para 238)

It is also well settled that judicial confession, if is found to be true and voluntary, can be formed basis of conviction as against the maker of the same. ... (Para 239)

Admisibility of Photostat Copies of originals in evidence:
It will be pertinent to mention here that in the instant case most of the documentants exhibited by the prosecution are the Photostat Copies of originals including exhibit 9 and 9(Ka), the confessional statements of accused Ripon and Bipul. The defence did not rasied any objection as to the genuineness of those documents and without any objection those were marked as exhibits. However, the concerned persons of those documents proved the genuineness of the same. As such, those documents are admissible in evidence. ... (Para 252)

Retraction of the confession:
It is well settled proposition of law that the retraction of the confession was wholely immaterial once it was found that it was voluntary as well as true. ... (Para 254)

In this sub-continent it is by now well settled proposition that the maxim '*falsus in uno, falsus in omnibus* [false in one thing, false in everything] is not a sound rule of practice and it should not be applied mechanically. Therefore, it is the duty of the Court, in case where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutiny the rest of his evidence with care and caution. If the remaining evidence is trustworthy and substratum of the prosecution case remains in fact then the court should uphold the prosecution case to the extent it is considered safe and trustworthy. Courts have, however to attempt to separate the chaff from the grain in every case. They can not abandoned this attempt on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot be reasonably carried out. ... (Para 279)

It is the settled proposition of law that in a joint trial where more persons than one are being tried jointly for the same offence, a confession made by any of them affecting himself and any of his co-accused can be taken into consideration by the Court not only against the maker of the confession but also against the co-accused, it may not be an evidence within the strict meaning of the term but it can be used to lend assurance to other evidence on record. ... (Para 287)

Section 10 of the Evidence Act clearly provides special provision that in a case of conspiracy the confession of a co-accused can be used as evidence against other co-accused. ...(Para 290)

It is the duty of the Court to examine the confession carefully and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.

...(Para 298)

Penal Code, 1860
Section 120A:
The criminal conspiracy doctrine only requires overlapping chains of agreement that link the physical perpetrator to the accused. However, the lack of a direct agreement between the defendant and the physical perpetrator is no bar to applying the conspiracy doctrine as long as the chain of overlapping agreements connects them. ...(Para 302)

Conspiracy to commit crime by itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punish, considering their overt acts, independent of the conspiracy. The agreement does not come to an end with its making, but would endure till it is accomplished or abandoned or proved abortive. Being a continuing offence, if any acts or omissions which constitute an offence are done the conspirators continue to be parties to the said conspiracy. The agreement continues in operation and therefore in existence until it is discharged or terminated by completion of its performance or by abandonment or frustration. ...(Para 311)

Mere omission in not mentioning the details description of the house [exhibit 8(Kha)], where the accused persons used to stay, meet and hatch conspiracy to implement their plan and policy and from where accused Ripon and Bipul collected grenades, does not destroy the prosecution case in any manner. ...(Para 329)

It is also well settled in our jurisdiction that the Court of Sessions or the High Court Division has no jurisdiction to interfere with the discretion of the Magistrate in the matter of taking cognizance of any offence irrespective of the facts whether the offence is triable by Court of Session or not. ...(Para 338)

The Appellate Division in the case of Mr. Haripada Biswas Vs. The State and another, reported in 6 BSCR (AD), page-83 also held that Court of Session is precluded from talking cognizance offence as a Court of original jurisdiction. ...(Para 339)

It is by now well settled that cognizance of offence can be taken only once either by the Magistrate or by the Sessions Court. ...(Para 341)

It is well settled that the prosecution is not bound to examine each and every witnesses cited in the charge-sheet. Public prosecution has to take decision in that regard in a fair manner. If the prosecution felt that its case has been well established through the witnesses examined, it cannot be said that non-examination of some persons rendered its version vulnerable. ...(Para 345)

Judgment

M. Enayetur Rahim,J:

1. The Death Reference No.135 of 2008 has been made by the Druta Bichar Tribunal, Sylhet for confirmation of the death sentence of 1. Mufti A. Hannan Munshi @ Abul Kalam, son of late Noor Mohammad Munshi of Village-Hiron, Police Station-Kotalipara, District-Gopalgonj, 2. Sharif Shahidul Alam @ Bipul, son of Md. Hemayet Hossain Patwary of Village-Moishadi, Police Station and District-Chandpur and 3. Md. Delwar Hossain @ Ripon, son of Abu Yousuf of Village Konagaon, Police Station-Kulaura, District-Moulavibazar.

2. The condemned prisoners and two other appellants namely Mufti Moinuddin @ Abu Jandal @ Masum Billah @ Moin @ Khaza and Mohibullah @ Mofizur Rahman @ Mofiz @ Ovi **[herein after referred as accused]** were put on trial before the Druta Bichar Tribunal, Sylhet in Druta Bichar (Session Case No.14 of 2007) and charges were framed against them under sections 120B/111/302/326/114/34 of the Penal Code. The Druta Bichar Tribunal having found guilty 1. Mufti A. Hannan Munshi @ Abul Kalam, 2. Sharif Shahidul Alam @ Bipul, and 3. Md. Delwar Hossain @ Ripon on the charges under sections 120B/302/109/ 111/114/326 of the Penal Code and sentenced them to death and also to pay a fine of Tk.10,000/-(ten thousand) and sentenced accused Mohibullah alias Mofizur alias Mofiz alias Ovi and Mufti Moinuddin alias Abu Jandal to suffer imprisonment for life with a fine of Taka 10,000/- in default to suffer rigorous imprisonment for 02(two) years.

3. Being aggrieved by the judgment and order of conviction and sentence Mufti A. Hannan Munshi, Mohibullah @ Mofijur Rahman @ Mofi @ Ovi and Sharif Shahidul Alam @ Bipul have preferred Criminal Appeal No.468 of 2009 and Jail Appeal Nos. 71 of 2009, 92(A) of 2009 and 73 of 2009, Md. Delwar Hossain @ Ripon has filed Criminal Appeal No.3 of 2009 and Jail Appeal No. 72 of 2009 and Mufti Mohinuddin @ Abu Jandal @ Masum Billah @ Khaza has preferred Criminal Appeal No.9345 of 2015 and Jail Appeal No.92 of 2009 respectively before this Court.

4. Prosecution Case

The prosecution case, in short, is that on 21.05.2004 at about 12.30 P.M. The High Commissioner of the United Kingdom to Bangladesh Mr. Anwar Chowdhury went to the 'Shrine' **[herein after referred as Mazar]** of Hazrat Shahjalal (R:) in order to perform Jumma prayer therein. Having completed Jumma prayer while he was coming out from the Mazar and reached near the main gate a frightening explosion was taken place thereon and smokes brought out; after removal of the smokes the High Commissioner was found injured with the splinters of bomb. Due to explosion of bomb three persons died in the Sylhet Osmani Medical College Hospital when they were under treatment and several persons were injured and some 40/45 injured persons including the British High Commissioner were taken into the Osmani Medical College Hospital for treatment. The police upon searching the place of occurrence seized some splinters of grenade and some other alamats.

5. Over the incident an FIR was lodged by the PW-8 S.I. Prodip Kumar Das and on the basis of the same Kotwali Police Station Case No.64 dated 21.05.2004 was started.

6. The case was investigated by the CID and after investigation the CID submitted a charge sheet on 07.06.2007 against four persons namely Mufti Abdul Hannan Munshi alias

Abul Kalam, Mohibullah alias Mofizur Rahman alias Mofiz alias Ovi, Sharif Shahidul Alam alias Bipul and Md. Delwar Hossain alias Ripon under sections 120B/326/302/34/109/114/ 111 of the Penal Code. Eventually, a supplementary charge sheet was submitted on 11.03.2008 by the investigating officer recommending prosecution for Mufti Moinuddin alias Abu Jandal Alias Masum Billah along with the earlier charge sheeted accused persons under sections 120B/326/302/34/109 /114/111 of the Penal Code.

7. Commencement of the trial and procedural history and defence case

The case being ready for trial the case record was transferred to the court of Sessions Judge, Sylhet and it received the case record on 05.07.2007 and the case was numbered as Sessions case no.469 of 2007.

8. Eventually, the case was transferred to the court of Druta Bichar Tribunal, Sylhet by the order of the Ministry of Home Affairs.

9. The Druta Bichar Tribunal, Sylhet duely framed charge against the accused persons to which they pleaded not guilty and claimed to be tried.

10. At the time of the trial the prosecution in all examined 56 witnesses.

11. The defence cross-examined the prosecution witnesses but did not adduce any defence witness.

12. However, at the time of examination under 342 of the Code of Criminal Procedure the respective accused persons by filing written statement claimed that they were innocent and they had got no connection with the alleged occurrence.

13. However, the case of the defence, in short, is that the accused are innocent and they have been implicated in the case falsely and the alleged confessional statements made by accused Abdul Hannan Munshi, Sharif Shahidul Alam, Delwar Hossain alias Ripon were not true and voluntary and they compelled to make such statement due to inhuman torture during prolong police remand.

14. On conclusion of the trial the learned Druta Bichar Tribunal found guilty to accused persons and awarded the above conviction and sentence to them.

15. Evidence adduced by the prosecution

P.W-1 Md. Shamsuzzaman deposed that on 21.05.2004 he was serving at police office, Sylhet. On that day at about 11.05 hours he along with constable Raboti Ranjan Chakma, Yasin Miah, Nitai Chandra Deb, Subinoy Chandra Deb vide C.C No.4083 dated 21.05.2004 went to the Mazar of Hazrat Shahjalal (R:) to maintain law and order situation as British High Commissioner to Bangladesh was supposed to come there to offer Jumma prayer. Having reached there at about 11.20 hours he found S.I Alamgir Hossain, S.I Prodip Kumar Das of Kotwali Police Station and he reported to them about their presence. S.I Alamgir Hossain deputed him and Constable Netai Chandra Deb for the security of the vehicle of British High Commissioner and constable Yasin, Raboti and Subinoy were also given responsibility for the security in different places of Mazar area. At about 12.40 P.M. British High Commissioner arrived at the Mazar premises. He along with his accompanied constables was guarding the vehicle of the High Commissioner which was 14/15 cubits away from the main gate of the Mazar. After offering Jumma prayer at about 13.14 hours when High

Commissioner Mr. Anwar Chowdhury came near to the Mazar gate at that time, he heard a big sound and the people out of fear were started moving here and there. At that time 40/50 people having received injury fell down on the earth. British High Commissioner to Bangladesh Mr. Anwar Chowdhury and Deputy Commissioner, Sylhet Abul Hossain also fell down on the earth having received injuries. Then they took steps to send Mr. Anwar Chowdhury to Sylhet Osmani Medical College Hospital by his car. In the meantime the Superintendent of Police, Office-in-Charge of Kotwali Police Station and other members of the mobile party made arrangement to send the injured persons to the hospital. At the instruction of the High Officials he along with other forces cordoned the place of occurrence. Due to bomb explosion A.S.I Kamal Uddin, Rubel and an unknown person died. Later on he came to know that the name of the unknown person was Habil Mia.

16. Accused Delwar Hossain alias Ripon declined to cross-examine the said witness.

17. In cross-examination by other accused persons he stated that the bomb explosion took place at about 13.40 hours and he was nearer to the car of the High Commissioner. The car was 103/12 cubits away from main gate.

18. P.W-2 Md. Jahangir Alam deposed that at the time of the occurrence he was serving as a driver in I.T.I British College. On 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. Having offered Jumma prayer when he was coming out and reached near to the main gate at about 1.40 P.M then he heard a big sound of explosion. He received injuries on his right heel and left leg by the splinters; so many people were also injured. The local people took him to Mohanagar clinic and thereafter, he was taken to Osmani Medical College Hospital where he saw British High Commissioner to Bangladesh Mr. Anwar Chowdhury and Deputy Commissioner Abul Hossain along with other injured persons. He was admitted in Sylhet Medical college hospital on 21.05.2004 and was discharged from the hospital on the following day i.e. on 22.05.2004.

19. Defence declined to cross-examine the said witness.

20. P.W-3 Police Constable Netai Chandra Deb deposed that on 21.05.2004 he was serving in R.R.F at Sylhet and on that day under the leadership of Nayek Md. Shamsuzzaman they went to the Mazar of Hazrat Shahjalal (R:) for the security of British High Commissioner to Bangladesh Mr. Anwar Chowdhury who was supposed to come to the Mazar. S.I Alamgir Hossain and S.I. Prodip Kumar Das assigned their duties. He along with Nayek Shamsuzzaman was given duty for the security of the vehicle of the High Commissioner. They took position in front of the gate and Constable Raboti Ranjon Chakma, Yasin Mia and Subinoy Deb were deputed at the front side of the lane. At about 12.45 hours British High Commissioner in Bangladesh came to the Mazar and he and Nayek Shamsuzzaman were guarding the vehicle of the High Commissioner which was 10-15 cubits away from the main gate. At about 13:40 hours he heard a big sound and saw smokes and the people were started moving here and there. Having seen British High Commissioner to Bangladesh injured they made arrangement to send him to hospital by his car. After such explosion the Superintendent of Police along with some mobile parties came to the place of occurrence and the place of occurrence was cordoned by them. Later on he came to know that A.S.I Kamal Uddin, Rubel Ahmed and Habil Mia succumbed to bomb injuries and so many persons were also injured.

21. Defence declined to cross-examine the said witness.

22. P.W-4 Police Constable Raboti Ranjon Chakma deposed that on 21.05.2004 under the leadership of Nayek Shamsuzzaman they went to the Mazar of Hazrat Shahjalal (R:) for giving security to the British High Commissioner to Bangladesh. Having reached there S.I Alamgir Hossain and S.I Prodip Kumar assigned their duties. Nayek Shamsuzzaman and Constable Netai Chandra Dey were given responsibility for guarding the vehicle of the High Commissioner. He and Constable Subinoy and Yasin were deputed in front of the lane. The High Commissioner in Bangladesh came to the Mazar at about 12.45 hours and after offering Jumma prayer at about 13.40 hours when he was coming out and reached near to the main gate then he heard a sound of explosion of bomb and saw the people to move here and there. British High Commissioner to Bangladesh and Deputy Commissioner, Sylhet, Abul Hossain along with many others received injuries. They took step to send the injured persons in the hospital. As per the instruction of High Officials they cordoned the place of occurrence. Later on he came to know that A.S.I Kamal Uddin, Rubel Ahmed and Habil Mia succumbed to bomb injuries and at the evening British High Commissioner to Bangladesh was sent to Dhaka by Helicopter

23. Defence did not cross-examine the said witness.

24. P.W-5 Yasin Miah deposed that on 21.05.2004 he was serving in police line, Sylhet. On that day under the leadership of Nayek Samsuzzaman he along with other forces went to the Mazar of Hazrat Shahjalal (R:) for the security of British High Commissioner to Bangladesh. On reaching there S.I Alamgir Hossain and S.I Prodip Kumar Das assigned their duties. Nayek Shamsuzzaman and Constable Netai were given responsibility for guarding the vehicle of the High Commissioner and Constable Subinoy Kumar Deb and Reboti Kumar Chakma and he was given duty in front of the lane. While they were on duty at about 12.45 hours British High Commissioner came to the Mazar by his car. After offering Jumma prayer when he was coming out and reached near the main gate then he heard a sound of explosion and the people present there were started moving here and there. So many people including High Commissioner Mr. Anwar Chowdhury and Deputy Commissioner Abul Hossain received injuries. The injured persons were sent to different hospitals. He along with other police forces cordoned the place of occurrence as per the instruction of the higher authority. Eventually, he came to know that A.S.I Kamal Uddin and Rubel succumbed to bomb injuries and on that day at the evening the High Commissioner was sent to Dhaka by Helicopter.

25. Defence declined to cross-examine the said witness.

26. P.W-6 Salam Mia deposed that on 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. British High Commissioner Mr. Anwar Chowdhury along with other officials also came to Mazar for offering Jumma prayer. After completion of Jumma prayer when he reached at main gate of Mazar at 1.40 P.M he heard a big sound of bomb explosion and he received splinter injuries on his right knee and waist. He was admitted to Sylhet Osmani Medical College Hospital and after getting treatment for four days he was released from the hospital. Three persons succumbed to bomb injuries and 50/60 persons were also injured including the British High Commissioner and the Deputy Commissioner, Sylhet.

27. The defence declined to examine the said witness.

28. P.W-7 Shahidul Islam Khokon deposed that he was working in Rainbo Tailors at Jindabazar area of Sylhet. On 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for

offering Jumma prayer. After completion of the prayer at about 1.40 P.M when he was coming out from the Mazar and reached near the main gate he heard a big sound of explosion of bomb and saw black smokes. British High Commissioner Mr. Anwar Chowdhury also came to the Mazar for offering Jumma prayer. He [P.W-7] having received injuries fell down on the earth. He was admitted in Osmani Medical College Hospital and on the following day he was released from the hospital. About 50/60 persons were injured including the British High Commissioner and Deputy Commissioner, Sylhet due to bomb explosion.

29. Defence declined to cross-examine the said witness.

30. P.W-8 Prodip Kumar Das deposed that on 21.05.2004 he was serving at Kotwali Police Station, Sylhet. On that day he along with S.I Alamgir, Shamsuzzaman, Raboti Ranjon, Nitai Chandra, Subinoy Dey and Yeasin were on duty at the Mazar of Hazrat Shahjalal (R:). At about 12.15 hours Deputy Commissioner, Sylhet Abul Hossain came to that place and waited for British High Commissioner Mr. Anwar Chowdhury. At about 12.30 hours British High Commissioner along with his protection party came to the Mazar area. The High Commissioner along with Deputy Commissioner Abul Hossain entered into the Mazar premises. Having completed Jumma prayer at about 13.40 hours when they were coming out from the Mazar and reached near the main gate and exchanging greetings with the people present there then an explosion took place with a big sound. Having found the British High Commissioner injured he [P.W-8] with the help of other police forces having rescued the High Commissioner boarded him to his car. Deputy Commissioner Abul Hossain, S.I Alamgir, S.I Abdur Rahman, A.S.I Kamal Uddin, Constable Jibon Mia, body guard of Deputy Commissioner also became seriously injured. He informed about the incident to the higher authorities and having received the information DIG, Superintendent of Police, officer-in-charge of Kotwali Police Station and the mobile parties came to the place of occurrence and they took steps for sending the injured persons to Sylhet Osmani Medical College Hospital and other hospitals. Ruble succumbed to his injuries while he was under treatment. 40/50 other injured persons were also admitted in the hospital including Abdul Hai Khan, President of District Bar Association. Immediate after the incident the occurrence place was cordoned by the police force and the police recovered various alamats including a small steel made olive colour handle which was being used as handle of grenade, some splinters, steel made paths, bloodstained caps(toopie) etc. S.I Fazlul Haque prepared the seizure list in presence of the witnesses. The unknown persons with an ill motive and plan in order to kill British High Commissioner exploded the bomb. He lodged the First Information Report, exhibit-1, with the Kotwali Police Station. He proved his signatures on it as exhibit-1/1-1/5. Eventually, A.S.I Kamal Uddin and an unknown person succumbed to bomb injuries. Later on he came to know the name of the unknown person as Habil Mia. S.I Md. Younus Mia filled up the FIR form and he knew the hand writing of said Younus Mia. He proved the ejahar form and two signatures of S.I Md. Younus Mia on it as exhibit-1(Ka) and 1(Ka)/1-2 and the signature of S.I Md. Younus Mia on the FIR exhibit-1/6-8.

31. In cross-examination by accused Delwar Hossain Ripon he stated that in the FIR no name was mentioned as suspected accused. He could not known the total area of the Mazar of Hazrat Shahjalal (R:); so many people were present in the Mazar on that day but he could not say the actual number of them. He did not receive any injury. Besides the police force of Kotwali Police Station other 20-25 police personnel's were also on duty. He was not with the High Commissioner when he offered 'Fatiha' in the Mazar. He heard the sound of explosion at about 1.40 P.M but he could not remember from which side of him the sound occurred. He lodged the FIR with the police station. He denied the defence suggestions that he did not

know the hand writing of A.S.I Md. Younus Mia and the place of occurrence was not shown by him to the investigating officer. When the High Commissioner was exchanging greetings with people his force was on duty outside the gate.

32. P.W-9 Constable Subinoy Deb deposed that on 21.05.2004 he was in the Sylhet police line and at about 11.00 hours under the leadership of Nayek Shamsuzzaman they went to the Mazar of Hazrat Shahjalal (R:) for the security of the British High Commissioner. Having reached there they reported their presence to S.I Alamgir and Prodip Kumar of Kotwali Police Station. Then they assigned duty to Nayek Shamsuzzaman and Constable Netai for guarding the vehicle of the High Commissioner and he along with Raboti and Yasin were assigned duty in front of the lane. The High Commissioner after offering Jumma prayer at about 1.40 P.M when he came near the Mazar gate then a bomb explosion took place and the people present there started running here and there. With the help of protection party they sent the High Commissioner to the Osmani Medical College hospital as he received injuries. Deputy Commissioner, Sylhet Abul Hossain and Mr. Abdul Hai Khan, the President of District Bar Association, along with 40/50 persons were also injured. The injured persons were sent to different hospitals for their treatment. As per the instructions of higher authority they cordoned the place of occurrence. Later on he came to know that A.S.I Kamal Uddin, Rubel Ahmed and Habil Mia succumbed to bomb injuries. British High Commissioner was sent to Dhaka in the evening by Helicopter for his better treatment.

33. In cross-examination by accused Delwar Hossain Ripon he stated that he along with Raboti Ranjon Chakma, Yeasin Mia were on duty in front of the interception of Rajar Goli (lane). They were 150/200 yards away from the car of the High Commissioner.

34. In cross examination by other accused he stated that having heard the sound of explosion they rushed to the place of explosion.

35. P.W-10 Noor-e-Alam Al-Kowsar deposed that at the time of the occurrence he was a student of class VI of Shahjalal Jamia Islamia Kamil Madrasha. On 21.05.2004 at about 12.55 hours he went to the Mazar of Hazrat Shahjalal (R:) for offering of Jumma prayer. After offering Jumma prayer when he came near the eastern gate of the Mazar he heard a sound of bomb explosion at about 1.40 P.M. He received injuries and fell down on the earth. His father was with him who took him in Sylhet Osmani Medical College Hospital. He admitted in the hospital and on the following day he was released from the hospital. The British High Commissioner, Deputy Commissioner, Sylhet and President of the Bar Association were also received injuries.

36. In cross-examination by accused Md. Delwar Hossain Ripon, he stated that after 5/6 months of the alleged occurrence the police recorded his statement at the police station. The other accused declined to cross-examine him.

37. P.W-11 Md. Giash Uddin, a rikshaw puller, deposed that on 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. After offering Jumma prayer at about 1.40 P.M when he came near the main gate then an explosion took place and he received injuries on his left heel and thigh. The local people took him to Osmani Medical College Hospital. He admitted in ward no.4. On the following day the hospital authority released him. The police took his statement and so many people were injured due to the occurrence.

38. In cross-examination by accused Delwar Hossain Ripon he could not say how long after the occurrence the police recorded his statement. The other accused declined to cross-examine the said witness.

39. P.W-12 Md. Abdul Hai Khan deposed that he is the President of the Sylhet District Bar Association and also the President in the year 2004. On 21.05.2004 at 9.30 A.M he received British High Commissioner to Bangladesh Mr. Anwar Chowdhury at Sylhet Airport. At that time the Deputy Commissioner and Superintendent of Police, Sylhet were also present. The High Commissioner expressed his desire to offer Jumma prayer at the Mazar of Hazrat Shahjalal (R:). From the Airport the High Commissioner went to the High Commission Office situated at Sylhet and he accompanied the High Commissioner**.** Thereafter, he went to his house. At about 12.25 hours he along with Deputy Commissioner Abul Hossain received the High Commissioner at Mazar gate. The High Commissioner at first offered 'Fatiha' and thereafter offered Jumma prayer. He was with him. After completing the Jumma prayer the High Commissioner had been exchanging greetings with the people present there and he along with the High Commissioner was moving towards the main gate. At about 1.40 P.M he heard a big sound and sensed hot on his body and fell down on the earth and the High Commissioner fell on his body. At that time the High Commissioner uttered 'save my life'. Thereafter, he with the help of others took British High Commissioner in his car and took him to Sylhet Osmani Medical College Hospital. He also received injuries on his right and left leg. Due to such injuries he used to take treatment in abroad till date. The High Commissioner is his relative. A.S.I Kamal Uddin, Rubel Ahmed and Abul Mia succumbed to bomb injuries and another 60/70 persons were injured. The grenade was exploded with a view to kill the British High Commissioner. He at first took treatment in Sylhet Osmani Medical College Hospital and thereafter Bangkok and Kolkata.

40. The defence declined to cross examine him.

41. P.W-13 Abdul Mukit deposed that he was the Manager of Hotel Azmir, a residential hotel. On 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. After offering prayer when he reached near the main gate at about 1.40 P.M he heard a big sound of bomb explosion. He received injuries on his leg and belly. He was taken to Osmani Medical College Hospital by the local people. Having got treatment for 04 days he was sent to Dhaka for better treatment. Eventually, he came to know that British High Commissioner and Deputy Commissioner, Sylhet along with 50/60 persons were seriously injured and 03(three) persons died.

42. In cross-examination by accused Delwar Hossain Ripon he stated that he could not remember the number of injured persons who were under treatment in the ward with him. He became senseless and he regained his sense at 12.00 at night. On 23.05.2004 police recorded his statement.

43. In cross-examination by other accused he stated that in each Friday he used to go to Mazar to offer Jumma prayer. On the day of occurrence there were 5/6 thousand Musullies.

44. P.W-14 Md. Sadrul Alam deposed that on 21.05.2004 at about 1.05 hours he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. After offering prayer and 'Jiarat' when he was coming out he saw the British High Commissioner surrounded by many people. At about 1.40 P.M when he reached near the main gate of the Mazar a bomb explosion took place and he received injuries on his leg, chest and belly. The local people

took him to Osmani Medical College Hospital. He was under treatment in ward number-4. Thereafter, he came to know that High Commissioner and the Deputy Commissioner, Sylhet were also injured among 50/60 others.

45. In cross-examination by accused Delwar Hossain Ripon he stated that two days after the occurrence police recorded his statement. He denied the defence suggestion that he did not state before the I.O that he received injury on his chest.

46. In cross-examination by other accused he stated that hearing a sound of explosion he lost his sense and after 2/3 hours he regained his sense.

47. P.W-15 Mofazzal Hossain alias Kachu Peer deposed that on 21.05.2004 in his presence the police prepared a seizure list of various alamats including an olive coloured steel made small handle, two paths of steel, some splinters, burnt cloths, five toopies including two bloodstained toopies, a bloodstained Panjabi, a bloodstained stoking, 11 shoes, two pens and some blood. He proved the seizure list and his signature as exhibit-2, and 2/1. He also proved the seized alamats material exhibits-I,II-II(i),III-series, IV-IV(i), V- series, VI-VI(4), VII, VIII, IX-IX(10), X-X(i) XI.

48. In cross-examination by accused Mufti Moinuddin, he stated that the seized goods were not available before the Court. The other accused declined to cross-examine the said witness.

49. P.W-16 Md. Muhibur Rahman deposed that on 21.05.2004 he was working as the staff reporter of the Daily Jugberi and at present he is working as the staff reporter of the Daily Jalalabad. On 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer as well as performing his professional duty. He shacked his hand with the British High Commissioner. After ending the Jumma prayer he was following the British High Commissioner and when the High Commissioner reached near the main gate of the Mazar at about 1.30 P.M he heard explosion of bomb and as a result the smokes broke out in surrounding area. He received injuries on both legs and on right arm. He also lost his sense. The local people took him to Osmani Medical College Hospital and he was under treatment for 18 days in ward number-4. His right leg was also operated. Till date he has been suffering due to such injuries. Later on he came to know that due to bomb explosion the British High Commissioner Mr. Anwar Chowdhury, Deputy Commissioner, Sylhet Abul Hossain and President District Bar Association Abdul Hai Khan were also injured among 40/50 others.

50. In cross-examination by accused Delwar Hossain Ripon, he stated that he went to Mazar area at about 11.40 hours. He had the knowledge that British High Commissioner would come there. He denied the various suggestions put by the defence including that he did not say to the investigating officer that he shacked his hand with the British High Commissioner and he received injuries on his legs.

51. In cross-examination by other accused he stated that he met with the High Commissioner before Jumma prayer. He could not ask the High Commissioner whether his visit was official or private.

52. P.W-17 H. M. Khokon Rana deposed that on 21.05.2004 he was in Sylhet and working in a N.G.O and resided in a mess. On that day at about 1.05 hours he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. After ending of the prayer he saw

a gathering near the main gate and also saw the British High Commissioner Mr. Anwar Chowdhury. He was behind the High Commissioner when High Commissioner reached near the main gate at about 1.40 P.M. At that time a bomb explosion took place. He received injury on his right leg and fell down on the ground. At that time the British High Commissioner Mr. Anwar Chowdhury, Deputy Commissioner Abul Hossain and so many people were also injured. The locals made arrangement for sending him to Osmani Medical College Hospital. On 26.05.2004 he got release from the Hospital. Thereafter, he took better treatment outside the Hospital. Later on he came to know that due to bomb explosion S.I of police Kamal Uddin, Rubel Ahmmed and Habil Mia died.

53. In cross-examination by accused Delwar Hossain Ripon this witness stated that police took his statement and he was 04 cubits away from the main gate of the Mazar. There were around 5/7 thousands people. He did not see the bodies of the dead persons. He also stated that the explosion might be suicidal.

54. In cross examination by other accused he stated that he was in the Hospital for four days and police recorded his statement after 4/5 days.

55. P.W-18 Md. Jibon Mia deposed that he was the body guard of Deputy Commissioner Abul Hossain. On 21.05.2004 at about 12.55 hours he along with the Deputy Commissioner went to the Mazar of Hazrat Shahjalal (R:) and waited for the British High Commissioner. Eventually, the Deputy Commissioner received the High Commissioner and thereafter they entered into the Mosque for offering Jumma prayer. After completing prayer the High Commissioner was moving towards the main gate and exchanging greetings with the local people and at that time he and the Deputy Commissioner also with him. At about 1.40 P.M when they reached near the main gate of the Mazar a bomb explosion took place with a big sound. The High Commissioner Anwar Chowdhury, Deputy Commissioner Abul Hossain and he along with others received injures. He and Deputy Commissioner were admitted in Noorjahan Clinic. Later on he was taken to Osmani Medical College Hospital. Eventually, he came to know that A.S.I Kamal Uddin, Rubel Ahmed and Habil Mia died and so many people were injured. He released from the hospital on the following day.

56. In cross-examination by accused Delwar Hossain Ripon this witness stated that the investigating officer took his statement twice including on the day of occurrence. He denied the defence suggestion that the police did not record his statement on the day of occurrence and he at first made his statement on 23.05.2004 before the police. Deputy Commissioner took treatment in Noorjahan Clinic Hospital and it was situated on the eastern side of the Mazar. He heard that the High Commissioner was taken to Medical College Hospital. He took the Deputy Commissioner to Noorjahan Clinic. He had no knowledge who blasted the bomb.

57. The other accused declined to cross-examine him.

58. P.W-19 Motiur Rahman, another seizure list witness, deposed that on 22.05.2004 at about 10.20 A.M in his presence police seized some materials including dust, broken pieces of tiles, a piece of bone of a human body and a round ring. He proved the said seizure list and his signature on it as exhibit-2(Ka) and 2(Ka)/1 and proved the alamats as material exhibits-XII, XIII, XIV and XV.

59. In cross-examination by accused Mufti Mainuddin he stated that the pieces of tiles and other alamats were not before the Court.

60. P.W-20 Sarkoum Yousuf Amanullah deposed that he was serving as the Mutwalli of the Mazar of Hazrat Shahjalal (R:) for 30 years. On 21.05.2004 at about 10.00 A.M he went to Tajpur village for personal reason. At about 2.00 P.M he came to know that a bomb explosion took place in the Mazar and so many people were injured. At about 4.00 P.M he came to Sylhet town and heard that the British High Commissioner, Deputy Commissioner, Sylhet and Advocate Abdul Hai were injured along with others and two persons died and later another named Habil Mia also died. On 20.05.2004 he came to know that the British High Commissioner would come to the Mazar on 21.05.2004.

61. In cross-examination by accused Delwar Hossain Ripon he stated that there were hostels and Madrasha at the Mazar premises. In cross examination by other accused he stated that the Mazar authority did not take any security measure for the High Commissioner.

62. P.W-21 Cherag Ali deposed that he has been serving as the Chowkider of the Mazar of Hazrat Shahjalal (R:). On 22.05.2004 at about 10.20 A.M in his presence the police after seizing some broken pieces of tiles, dust, a piece of human bone, a ring, prepared a seizure list and he put signature on it. He proved the seizure list as exhibit-2(Ka)/2 and material exhibits-XII, XIII, XIV and XV respectively.

63. In cross-examination by accused Md. Delwar Hossain Ripon he stated that the sized ring was small in size. He put his signature on the seizure list as per the instruction of the police. The other accused declined to cross-examine the said witness.

64. P.W-22 Sallik Mia deposed that on 21.05.2004 at about 4.45 hours when he came out after seeing his nephew, who was injured by bomb explosion, he saw a dead body outside the ward and he put his signature on the inquest report as the Daroga asked him to do so. He proved the photostat copy of the inquest report and his signature on it as exhibit-3 and 3/1. Later on he came to know that it was the dead body of Habil Mia.

65. In cross-examination by accused Md. Delwar Hossain Ripon he stated that having seen the dead body he put his signature on the inquest report. He saw the dead body covered by white cloths. He did not see the injuries on the body of the deceased.

66. In cross-examination by Mufti Moinuddin he stated that he was a witness of the inquest report and he did not know about the identity of Habil Mia at the time of preparing the same.

67. P.W-23 Mir Md. Mizanur Rahman deposed that on 21.05.2004 he went to Sylhet Osmani Medical College Hospital to see his cousin Abdus Salam who was injured by bomb blast. On that day at about 4.35 P.M at the 3rd floor in front of ward no.4 in his presence police prepared inquest report of a dead body and he put his signature on it. He proved the inquest report as exhibit-3 and his signature on it exhibit-3/2. On the following day he came to know that it was the dead body of Habil Mia of village Baistila.

68. In cross-examination by Md. Delwar Hossain Ripon he deposed that the dead body was covered by white cloths and he put his signature on it as the police asked him. He did not

know the name of deceased Habil Mia. He further stated, in cross examination by accused Mufti Moinuddin, that he did not know the person who prepared the seizure list.

69. P.W-24 Shoyeb Ahmmed deposed that Rubel Ahmed was his younger brother. On 21.05.2004 at about 5.35 P.M. he succumbed to bomb injuries which took place in the Mazar of Hazrat Shahjalal (R:) when he was under treatment as Sylhet Osmani Medical College Hospital. He identified the dead body of Rubel. The dead body was injured allover. Police prepared the inquest of the dead body. He put his signature on it. He proved the photostat copy of the said inquest report as exhibit-3(Ka) his signature as exhibit-3(Ka)/1.

70. In cross-examination he stated that the original copy of the inquest report is not available at present. He could not know the names and addresses of other witnesses of the inquest report.

71. P.W-25 Dr. Sheikh Emdadul Haque deposed that on 22.05.2004 he was serving as a lecturer in Sylhet MAG Osmani Medical College Hospital. On that day at about 10.15 hours he held the autopsy of deceased Rubel as identified by Constable Motiur Rahman. He found the following injuries on the body of the deceased:

1. Multiple punctured wound on abdomen, chest, neck with irregular margin with scorching, tattooing and blackening measuring about 1/4" X1/4" X1/4" X cavity depth (about twenty).
2. One incised looking wound on right front to partial region 2"X1/4" X scalp depth.

72. On dissection of the body the above injuries were found. There was tattooing, scorching and blackening of external injuries due to splinters injuries.

73. P.W-25 opined that the death was due to neurogenic shock and hemorrhage which was due to above mentioned injuries which was antemortem and homicidal in nature.

74. Weapon used the splinters of bombs.

75. He proved the autopsy report and his signature as exhibit-4 and 4/1.

76. On very that day he also held autopsy of an unknown person and found following injuries on his body:

1. Multiple punctured wound on chest, abdomen, lower abdomen, pelvic region, thighs, both arms & forearms with irregular margin, scorching, tattooing & blackening measuring ¼"X1/6"X1/4"X to cavity depth.
   On dissection of the body above mentioned injuries were found. There was tattooing, scorching, blackening of the external injuries due to splinters effect.
   He opined that the cause of the death was due to hemorrhagonic shock which was due to above mentioned injuries which was ante mortem & homicidal in nature due to bomb blasting effect.

77. He proved the said report of autopsy as exhibit-4(Ka) and his signature as exhibit-4(Ka)/1.

78. He also held the autopsy of A.S.I Kamal Uddin and found the following injuries on his body.

1. Multiple lacerated injuries on both thighs & legs in different sizes 6”X2”X skin muscle depth with scorching, blackening & tattooing with communicated fracture of right tibia & fibula.
2. Multiple punctured wound with stitched on right maxillary, temporal region and ear and also in face, lt. side of chest, lower abdomen 1/6”X1/6”X1/6” to different (Illegible).
3. Stitched wound on abdomen 5”X1/4”X stitched.

On dissection of the body was found the above mentioned injuries. There was tattooing, scorching & blackening of external injuries due to splinters effects.

The death was due to hemorrhage shock which was due to above mentioned injuries which was ante mortem and homicidal in nature due to bomb blasting effect.

79. He proved the said report of autopsy as exhibit-4(Kha) and his signature as exhibit-4(Kha)/1.

80. In cross-examination he stated that the father’s name of Rubel was Lildar Ali of village Bhatipara, Police Station-Dhiry, District-Sunamgong. He held the autopsy of deceased Rubel at about 10.15 hours on 22.05.2004. The injuries were caused by the splinters of bombs. He denied the defence suggestion that the blackening used to cause if injuries caused from short place. He could not say the size of the bomb as he was not a blasting expert. The second dead body was brought by Constable Motiur Rahman and death was due to bomb blasting effect. He further stated that A.S.I Kamal Uddin also succumbed to bomb blasting injures. He saw bomb in 1971 during the liberation war. He denied the defence suggestion that he did not held the post mortem properly.

81. In cross-examination by Mufti Moinuddin he stated that he held the post mortem of the three deceased persons. The police brought the dead bodies.

82. P.W-26 Md. Motiur Rahman, a police Constable, deposed that he took the dead bodies of A.S.I Kamal Uddin, Rubel Ahmed and an unknown person to the forensic department of MAG Osmani Medical College Hospital from the varanda of Ward No.4 and in presence of the Doctor he identified the dead bodies. He handed over the dead body to their respective relatives. He handed over the dead bodies of Rubel and another unknown person on 22.05.2004 to their relaties.

83. In cross-examination by accused Delwar Hossain Ripon he stated that dead body of the unknown person was received by his brother-in-law. He denied the defence suggestion that the unknown dead body was not taken by his relatives.

84. P.W-27 Mashuk Ahmed deposed that since 1997 he has been residing at Hawapara, Sylhet Town taking rent of a house and doing business at Bandor Bazar area. He used to offer Jumma prayer in the Mazar of Hazrat Shahjalal (R:). On 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. After ending of the Jumma prayer at about 1.40 P.M he saw that the British High Commissioner to Bangladesh and Deputy Commissioner, Sylhet along with others were moving towards the main gate. At this stage he heard a big sound of bomb blasting. He received injuries on his two legs and belly and fell down on the ground. He was taken to Osmani Medical College Hospital and admitted there for treatment. He was under treatment in the said hospital up to 25.04.2004. Due to bomb

explosion British High Commissioner to Bangladesh and Deputy Commissioner, Sylhet received injury among other 50/60 persons.

85. In cross-examination by accused Delwar Hossain Ripon he stated that the investigation officer recorded his statement after two days of the occurrence. He denied the defence suggestion that the investigating officer never recorded his statement. In cross examination by other accused persons he stated that having heard the sound of bomb explosion he lost his sense.

86. P.W-28 Mamunur Rashid deposed that he knew deceased Rubel. On 21.05.2004 said Rubel received bomb injuries at the Mazar of Hazrat Shahjalal (R:) and he succumbed to his injuries while he was under treatment in Osmani Medical College Hospital. On 21.05.2004 at about 5.35 P.M in his presence police prepared the inquest report of deceased Rubel. He proved the inquest report and his signature on it as exhibit-3(ka) and 3(ka)/2.

87. In cross-examination by accused Md. Delwar Hossain Ripon he stated that he saw the dead body at the time of preparing the inquest report and he put his signature on the inquest report as the police asked him.

88. P.W-29 Md. Farid Uddin deposed that A.S.I Kamal Uddin was his nephew. He died when he was under treatment at Sylhet Osmani Medical College Hospital having injured by bomb explosion at the Mazar of Hazrat Shahjalal (R:). Having heard the said information he went to Osmani Medical College Hospital and found the dead body of his nephew. On 23.05.2004 at about 11.45 hours police prepared the inquest of the dead body of A.S.I Kamal Uddin. He put his signature on the inquest report. He proved the inquest report as exhibit-3(kha) and his signature 3(Kha)/1.

89. In cross-examination by accused Delwar Hossain Ripon he stated that beside three others he put signature on the inquest report. He saw the dead body covered by white cloths. The dead body was taken to police line and after completing the 'Namaz-e-Janaja' the dead body was handed over to them.

90. P.W-30 Md. Golam Mostafa Sarkar deposed that A.S.I Kamal Uddin was his brother-in-law. He received injuries by blasting of bomb on 21.05.2004 at the Mazar of Hazrat Shahjalal (R:) and he succumbed to his injuries when he was under treatment at Osmani Medical College Hospital. On 23.05.2004 at about 4.00 A.M in his presence the police prepared the inquest report of the dead body and he put his signature on it. He proved the inquest report as exhibit-3(Kha) and his signature on it as exhibit-3(Kha)/2.

91. In cross-examination by accused Delwar Hossain Ripon he stated that witness Farid Uddin is the uncle of his wife.The dead body of A.S.I Kamal Uddin was taken to police line and after completion of his 'Namaz-e-Janaja' the dead body was handed over to them.

92. In cross-examination by other accused persons he stated that he was serving at the office of Upazila Nirbahi Officer and hearing the information about the incident they came to Osmani Medical College Hospital by a microbus.

93. P.W-31 Surat Ali deposed that he was a photo journalist of the Daily Sylhet Bani. He on 21.05.2004 went to the Mazar of Hazrat Shahjalal (R:) for covering the news of visiting British High Commissioner to Bangladesh. After ending of Jumma prayer at about 1.40 hours

when the British High Commissioner and Deputy Commissioner, Sylhet came near the main gate, an explosion took place with a high sound. He was beside them. He received injuries on his head, eye, cheek and hand. He was admitted in Sylhet Osmani Medical College Hospital and on 25.05.2004 he was released from the hospital. Thereafter, he took treatment in different places privately. His left portion of the body is still paralyzed. In the hospital he came to know that so many people were injured due to bomb blast.

94. In cross-examination by accused Delwar Hossaion Ripon he stated that after 21 days police asked him about the occurrence. He did not see who blasted the bomb. He was 10 cubits away from the British High Commissioner. He could not say how many people were in between the High Commissioner and him. He went to the Mazar to perform his professional duty. He further stated that two persons died on the spot. He could not say whether the bomb was exploded by a suicidal squad. He did not collect the information how many police forces were there for the security of the British High Commissioner.

95. In cross examination by other accused persons he stated that he is a photo journalist. He used to use niko-108 brand camera. After the occurrence he did not found his camera and other papers kept with him.

96. P.W-32 Md. Kawsar Ahmed deposed that on 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering Jumma prayer. After completing the prayer when he was coming out he saw that British High Commissioner was moving towards the main gate and there were so many people. At about 1.40 P.M a bomb exploded with high sound. He received injury on his leg. The local people took him in Sylhet Osmani Medical College Hospital. He was under treatment at bed no.2 ward no.4 upto 02.06.2004. Thereafter, he took treatment at Dhaka. His leg is still abnormal and he could not work without the help of 'stick' (lathi). Due to bomb explosion three persons died and so many people were injured including the British High Commissioner and Deputy Commissioner, Sylhet.

97. In cross-examination by accused Delwar Hossain Ripon he stated that at the time of occurrence he lost his sense and he regained sense on the following day in the hospital. Two persons of DGFI came to him. The investigating officer took his statement after 2/3 days and after four months a CID official took his statement.

98. He denied the defence suggestion that neither the investigating officer nor the CID official recorded his statement. He was 10/12 cubits away from the main gate when the bomb was exploded. The High Commissioner was 8/9 cubits away from him and in between them so many people were there.

99. P.W-33 Md. Aziz Ahmed deposed that A.S.I Kamal Uddin was his cousin and 21.05.2004 he came to know that A.S.I Kamal Uddin having received bomb injuries at the Mazar of Hazrat Shahjalal (R:) was taken to Sylhet Osmani Medical College Hospital. Having gone there he found the dead body of A.S.I Kamal Uddin at ward no.4, 3rd floor of the Hospital. At about 4.00 A.M the police prepared the inquest report of the dead body.

100. In cross-examination by accused Md. Delwar Hossain he stated that he saw punctured wound on the body of the deceased. He along with Farid Member and brother-in-law Golam Mostafa came to the hospital and also was present at the time of preparation of the inquest.

101. In cross-examination by other accused persons he stated that having heard the information that A.S.I Kamal Uddin received injuries by bomb explosion they came to the Hospital by hireing a microbus at about 3.00 A.M.

102. P.W-34 Md. Rifatur Rahman deposed that on 21.05.2004 at about 5.35 P.M in his presence the Police prepared the inquest of deceased Rubel. He put his signature on it. He proved the inquest report of Rubel and his signature on it as exhibit- 3(Ka)/3. He found so many punctured wounds on the body of the deceased Rubel. Rubel became injured due to bomb explosion at the Mazar of Hazrat Shahjalal (R:). On that day British High Commissioner Mr. Anwar Chowdhury, among others, was present there.

103. In cross-examination by other accused persons he stated that Rubel was his neighbour and at about 4.00 P.M they came to know that Rubel having received bomb injury was under treatment in the Hospital.

104. P.W-35 Dr. Jahir Ahmed deposed that Mr. Anwar Hossain Chowdhury the British High Commissioner to Bangladesh admitted in Sylhet Osmani Medical College Hospital on 21.05.2004 and on the same day he was released from the Hospital. On very that day at about 2.00 P.M he was examined at surgical unit-1 and on his body following injuries were found;

Right lower limb:

1. On extensive lacerated injury of about 3”X1/2”X muscle depth present in the middle of the right culf muscle with compressing hematoma impairing the circulation of leg.
2. There is also a lacerated injury of about 2”X1/2”X muscle depth presents in the back of right culf muscle containing splinter.
3. There are multiple penetrating injuries by splinter through out the right lower limb with active bleeding.

Left lower limb:

4. Multiple penetrating splinter injury about 10 in number present in the left lower limb.

105. He further deposed that the injuries were grievous caused due to explosion of bomb and the age of injuries were one and half an hour later. He issued certificate to that effect. He proved the said certificate exhibit-5 and his signature as exhibit 5/1.

106. In cross-examination by accused Mufti Hannan, Ovi and Bipul he stated that he did not give treatment to the patient. He issued the certificate on 07.02.2007 consulting with the register of the hospital.

107. In cross examination by accused Delwar Hossain Ripon he stated that he had no personal knowledge other then issuing the certificate.

108. P.W-36 Abdun Noor deposed that deceased Habil Mia was his brother-in-law. His father’s name was Md. Taher Ali of village-Purba Baistila, Police Station-Sylhet Sadar, District-Sylhet and his age was about 35 years. On 21.05.2004 he came to the Mazar of Hazrat Shahjalal (R:) with 'Sinni' as he was blessed with a child. Having not returned in the house they had been making search for him and through television news they came to know that three persons died due to bomb blast at the Mazar of Hazrat Shahjalal (R:). Then they went to the Sylhet Osmani Medical College Hospital at night. On the following day his autopsy was held. Having found the dead body they identified deceased Habil and they

received the dead body by putting signature on the receipt (Qjmje). He proved the Photostat copy of the receipt and his signature on it as exhibit-6 and 6/1.

109. At that time his brother-in-law Tara Mia a Member of Ward No.3 Khadimnagar Union Parishad, was present.

110. In cross-examination by accused Delwar Hossain he stated that his house is 10/12 miles away from the place of occurrence. He did not come at the Mazar on the day of occurrence. The house of deceased Habil Mia is 01(one) kilometer away from his house. Habil Mia used to do agriculture work. He came to know about the blasting of bomb from the locals and television news. He had no knowledge whether Habil Mia received injury due to suicidal explosion. One and half year back a Daroga went to him. He could not say the date, month and year of it. He denied the defence suggestion that no police went to him. Having received the summons he came to the Court.

111. In cross-examination by other accused persons he stated that his house and his brother-in-law's house is situated in the same ward. The age of his nephew is now about four and half years. He did not know whether the death of Habil Mia was registered. He denied the defence suggestion that Habil Mia died long before the alleged occurrence.

112. P.W-37 Md. Tara Mia stated that he knew Habil Mia who was the husband of his sister-in-law. His father's name was Md. Taher Ali village-Purba Baistila, Police Station-Sadar, District-Sylhet. Purba Baistila village is situated within Ward No.3 of Khadimnagar Union. He is an elected member. Habil Mia went to the Mazar of Hazrat Shahjalal (R:) on 21.05.2004 as he got child but he did not return to the house. At the evening they came to know that bomb explosion took place in the Mazar. On the following day they came to know that autopsy of two dead persons was held but the dead body of one was not identified. Then he along with his brother-in-law Abdun Noor went to Osmani Medical College Hospital and identified the dead body of Habil Mia, who was earlier unidentified. Abdun Noor received the dead body of Habil Mia signing on a receipt. He proved the receipt and his signature as exhibits 6, 6/2.

113. In cross-examination by accused Md. Delwar Hossain he stated that he had no document to show that Habil Mia is the husband of her sister-in-law. Habil Mia did not inform anything to him before coming to the Mazar. Having gone to the house of Habil Mia he came to know that he went to the Mazar with 'Sinni'. They did not submit the voter list of Habil Mia. But he could be able to submit the voter list of Habil Mia. He was not present when inquest or autopsy was taken place. He made statement after one and half months of the alleged occurrence. In the house of the Habil Mia police recorded his statement. He could not remember whether Abdun Noor was present at that time. Parents and wife of Habil Mia are still alive.

114. In cross-examination by the other accused persons he stated that he could not remember whether he made any statement before the police. He identified deceased Habil Mia. His parents were in the house and they are pious persons. He denied the defence suggestion that the parents of the Habil Mia refused to identify the unknown dead body as their son Habil Mia. He had no knowledge whether the explosion was suicidal in nature. He denied the suggestion that the police compelled him to identify the unknown dead body as the dead body of Habil Mia.

115. P.W-38 Md. Anwar Hossain deposed that 28.12.2006 he was working at Sylhet Kotwali Police Station as A.S.I. As per the requisition of CID pursuant to the inquiry slip, he went to village Baistila on 28.12.2006 and having made inquiry he came to know that Habil Mia died due to bomb explosion at the Mazar of Hazrat Shahjalal (R:) on 21.05.2004.

116. In cross-examination by accused Abdul Hannan, Ovi and Bipul he stated that during his inquiry he examined 06(six) persons. He denied the defence suggestion that with a malafide intention they had tried to identify dead body of an unknown person as Habil Mia. He could not ask the local Chairman whether the death of Habil Mia was registered in his office. He denied the defence suggestion that Habil Mia was not the person who died due to bomb explosion.

117. P.W-39 Md. Akter Hossain deposed that on 09.01.2007 he was in service at Sylhet Kotwali Hospital and for verification of the information slip he verified the address of accused Sharif Shahidul Islam @ Bipul and found that his address was 14/1 Santibagh, Police Station Kotwali, District-Sylhet and he had a wife and a child aged about one and half year. From them he came to know that accused Sahidul Alam hailed from village-Muhishadi under Police Station-Chandpur Sadar, District-Chandpur. He submitted the report on 09.01.2007. He interrogated the wife of accused Shahidul Alam and his brother-in-law.

118. In cross-examination he stated that in his report he did not state anything whether Sharif Shahidul Alam @ Bipul was in abroad for a long time. He got information that accused Sharif Shahidul Islam @ Bipul was a contractor. He had no knowledge whether accused Shahidul Alam resided at 14/1 Shantibagh for doing his job.

119. P.W-40 Md. Jalal Ahmed deposed that he was a mason. On 21.05.2004 he went to the Mazar of Hazrat Shahjalal (R:) for offering prayer and at about 1.45 hours a bomb was exploded near the main gate when the British High Commissioner exchanging greetings with the people present there. He received injury by the splinter of bombs and later on admitted in the Sylhet Osmani Medical College Hospital where he was under treatment for 7/8 days.

120. In cross-examination by Delwar Hossain Ripon he stated that he was in the western side from the main gate. He did not see the British High Commissioner. On the following day the police took his statement.

121. P.W-41 Sattajit Barua deposed that on 21. 05.2004 he was serving as S.I in Sylhet Kotwali Police Station. Having heard the news of bomb explosion at the Mazar of Hazrat Shahjalal (R:) he went to Osmani Medical College Hospital and at about 4/5 P.M he found a person dead in Ward No.4. As per instruction of the officer-in-charge he prepared the inquest of the said dead body at about 16.35 hours. At about 17.15 hours he having gone to the morgue prepared the inquest of deceased Rubel. Thereafter, the dead body was sent for autopsy. He proved the photostat copy of inquest report as exhibit-3, 3(Ka), his signature-3/3, 3(Ka)/4.

122. The defence declined to cross-examine the said witness.

123. P.W-42 Md. Fazlul Alam deposed that on 21.05.2004 he was serving as S.I in Sylhet, Kotwali Police Station. On 21.05.2014 at about 15.10 hours pursuant to the G.D entry No.1493 he went to the Mazar of Hazrat Shahjalal (R:) and having found a olive coloured small handle (allegedly handle of grenade) 02 still paths having notched, some splinters,

pieces of cloths, 05 toopies (cap), a bloodstained, Panjabi, 11 shoes of different colours, bloodstained earth and prepared seizure list of those. He proved the seizure list as exhibit-2 his signature on it as exhibit-2/2.

124. In cross-examination he stated that he did not mention in the seizure list as to the length and wide of the Mazar premises. He did not seize the bloodstained plaster and tiles. He prepared the seizure list and he had knowledge about the grenade and it has handle. He found splinters on the body of the victims.

125. In cross examination by accused Mufti Moinuddin he stated that the seized goods were before the court and he identified the round shape splinters. He denied the defence suggestion that those alamats were not of the grenade. He also denied the defence suggestion that he did not seize any alamats from the place of occurrence.

126. P.W-43 Md. Sirajul Islam deposed that A.S.I Kamal Uddin was his brother-in-law. Hearing his death news by bomb explosion he went to Sylhet Osmani Medical College Hospital on 23.05.2004 and going there he found the dead body of A.S.I. Kamal Uddin at bed number 13, Ward No.4. In his presence at about 3.45 A.M the police prepared inquest report of deceased Kamal Uddin. He put his signature on the inquest report as exhibit-3(Kha) and his signature on it as exhibit-3(Kha)/3.

127. The defence declined to cross-examine the said witness.

128. P.W-44 Debojit Singh deposed that on 31.05.2007 the investigating officer of the case Munshi Atikur Rahman produced witness Md. Abul Kalam Azad for recording his statement under section 164 of the Code of Criminal Procedure and he recorded his statement. He read over the same before him and he put his signature on it.

129. In cross-examination by accused Delwar Hossain he stated that he did not ask the witness how many days he was in police custody. He did not give any certificate that said witness made the statement voluntarily and truly. He further stated that it could not be possible for him to say after giving statement where the witness used to go.

130. In cross-examination by other accused he stated that the said witness disclosed his name as Md. Abul Kalam Azad son of late Md. Alamgir of 1557 Purba Nandipara, Khilgaon, Dhaka. He recorded the statement following the legal procedure. He did not ask the said witness whether he made the statement due to the pressure of police.

131. P.W-45 Dr. Md. Kamrul Alam deposed that on 21.05.2004 he was serving as the Assistant Registrar of Sylhet Osmani Medical College Hospital. One Shamim son of Shamsar Uddin of Bianibazar, Sylhet at about 4.10 P.M admitted into the hospital receiving serious injury on his left leg. Dr. A.K.M Salim and Dr. Mahmud operated him and his left leg was cut off as his leg was totally damaged. He issued the certificate exhibit-5(Ka). He proved his signature on it as exhibit 5(Ka)/1.

132. P.W-46 S.A. Newazi deposed that on 21.05.2004 he was serving as the Officer-in-Charge of Sylhet, Kotwali Police Station. He investigated the case from 21.05.2004 to 30.05.2004. He visited the place of occurrence, prepared the index, sketch map, and took steps to prepare the inquest of the dead persons. On 22.05.2004 at 10.20 A.M he prepared the seizure list. The concerned police officer seized some alamats material exhibit-XII-XV and

prepared the seizure list as exhibit-2(Ka). He proved the sketch map, index and his signature on those as exhibit-8(Ka) and 8/1 and 8(Ka)/1. He recorded the statement of some witnesses and arrested some suspected persons. Eventually, he handed over the case record to CID official Munshi Atikur Rahman.

133. In cross-examination he stated that ejahar was lodged on 17.25 hours. Immediate after the occurrence he went to the place of occurrence. After lodging of the First Information Report he again visited the place of occurrence. He arrested 09 persons as suspect and the said persons were recommended for discharge. He got the information regarding the visit of British High Commissioner Mr. Anwar Chowdhury from police station.

134. P.W-47 Md. Noor-e-Alam Siddique deposed that on 16.10.2006 he was serving as Magistrate, 1st Class, Sylhet collectorate. On that day S.I Md. Iqramul Haque produced accused Md. Sharif Shahidul Alam @ Bipul and Md. Delwar Hossain Ripon. He having allowed them sufficient time for reflection recorded their respective statements under section 164 of the Code of Criminal Procedure observing all the legal formalities. After recording the respective statements he read over the same to them and they put their signatures on those. He proved the statement made by accused Md. Sharif Shahidul Alam @ Bipul and accused Md. Delwar Hossain Ripon as exhibit-9, 9(ka) and his signature on it as exhibit-9/1-9/5 and 9(ka)/1-9(ka)6.

135. In cross-examination by accused Delwar Hossain he stated that he could not remember whether on that day he was in charge of cognizance court. He recorded his statement in his office. The accused were brought to him at 7.00 A.M and the office hour was 9.00 A.M-4.00 P.M. He did not make the query whether the said accused persons made any statement with regard to the occurrence before the police. He having satisfied as to the statement made by the accused person, gave certificate. He denied the defence suggestions that the police having written the statement of the accused handed over the same to him and he did not record any statement of them. He did not ask the said accused how many days were they in police custody before making such statement. He denied the defence suggestion that the accused made complain before him that they were tortured when they were in police custody. It was recorded that the accused were produced before the court from RAB-9, Head Quarter Office. The accused were given time for reflection in his chamber. He denied the defence suggestion that he was under the control of armed police. He also denied the various suggestions put by the defence that he did not give any certificate as per provision of section 164 of the Code of Criminal Procedure and he had no knowledge whether accused Ripon filed any application for retraction of his statement.

136. P.W-48 Md. Abul Kalam Azad deposed that since in the year 2000 he had a tea stall beside the Badda main road. From the first part of the year 2002 a bearded man used to come to his tea stall and took tea and discussed about Islam religion. The said person used to say that in the country antisocial activities like wine, gambling oppression on the women were going on and it had been destroying the image of Islam. He was impressed to hear the said words. He asked him about his residence and he disclosed that he would take him to his house. In this way the said person off and on came to his tea stall and they used to talk each other and eventually, he came to know that the name of said person was Ahsan Ullah and he hailed from Faridpur. In the first part of 2003, one day, he took him in a Madrasa inside Badda DIT project. Some Mowlana used to come in that house and he used to serve them tea and other foods. The persons who used to come there were Mufti Abdul Hannan, Abu Jandal, Mofiz, Ratan, Mowlana Abu Jafar. They used to talk about an organization named ‘Harkatul

Zihad'. In the first part of 2004, one day, he along with Ahsan Ullah, Mufti Abdul Hannan, Mofiz and Abu Jandal while talking in that house at that time a tall man came there and Ahsan Ullah giving him [PW-48] a note of Tk.50/- asked to take tea and '*Chanachur'*. Having taken tea and '*Chanachur'* while he served the same before them at that time the said tall man was saying that the innocent people were being killed due to bomb explosion. From there talking he also came to know that the name of the tall man was Bipul and he was from Sylhet. Bipul also said that because of the killing of innocent people the image of their party was being lost. Then Mufti Hannan said from now they would kill the persons belonging to 'Awami League'. Then Bipul told how they would implement the said task. At that time Ahsan Ullah asked him [PW-48] to clean the cups and he went to nearby washroom and from there he heard that Mufti Hannan was telling that there were grenades with him and they would use it on the leaders of 'Awami League'. Mufti Hannan also said that in a suitable time he would supply grenade to them to kill the leaders of 'Awami League' in Sylhet. Thereafter, one after another they all left the house. He returning Tk.15/- to Ahsan Ullah also left the house. Thereafter, he used to go to the house of Ahsan Ullah and Ahsan Ullah also used to come to him. In the month of April 2004 one day at the evening he along with Ahsan Ullah, Mofiz, Abu Jandal were talking and at that time Bipul along with another came there with a box of computer. Ahsan Ullah through mobile phone informed someone that Bipul had come. Thereafter, he came to know that the name of another person was Ripon. Ahsan Ullah having finished talking through mobile brought 04(four) *packets* from wall cabinet and handed over those to Bipul and thereafter Bipul and Ripon having kept those in side the computer box and hurriedly left the place. Later on he also came out from the said house. After one and half months he heard that grenade attack was taken place in the Mazar of Hazrat Shahjalal (R:) at Sylhet and 3/4 persons were killed and so many people including British High Commissioner to Bangladesh Anwar Chowdhury was injured. Then he could remember that Ahsan Ullah supplied Bipul 04(four) packets containing grenade. Thereafter, he closed his tea stall and went to hiding and also stopped to go to the house of Ahsan Ullah. Later on he came to know that Mufti Abdul Hannan, Bipul and Ripon were arrested by the police. He made statement before the Magistrate. He identified Mufti Abdul Hannan Munshi, Mafiz, Bipul and Ripon present in the dock.

137. In cross-examination by accused Delwar Hossain he could not say how long the Badda main road was. The tea stall was his own. He could not say the nature of shops situated opposite side to his shop as those were about one mile away from his shop. He could not say the name of said shop owners. The person (Ahsan Ullah) who used to come to his tea stall discussed about the 'Islam'. There was no holding number of his tea stall. He on 23.03.2007 gave the statement in the CID office. Thereafter, he did not meet the police. He could not say how many days he went to the alleged house. He could not say the holding number of the said house. He had no other source of income except the income of the said tea stall. He could not say the exact date of delivery of the packets. He stated that the packets were like the packet of 'Bulb'. He stayed about two hours in Malibagh CID office and possibly he put a signature on a paper. He denied the defence suggestions that he deposed as tutored by the prosecution and he was a managed witness. At present he has no shop as the police removed his shop and he owns a house at 1557, East Nandipara, Khilgaon.

138. In cross-examination by other accused persons he stated that when Ahsan Ullah came to his tea stall other customers also used to present there. Before went to hiding he did his business of tea stall. The house where Ahsan Ullah took him was situated inside the DIT Project and the said house appeared to see like a 'Madrasa'. He did not ask Ahsan Ullah how many students were in the said 'Madrasa'. The room where he went was square in seize but

he could not say the measurement of the same. He denied the defence suggestions that he deposed falsely and he was a source of police and he had no tea stall as he stated in deposition.

139. On re-call by the prosecution he further deposed that he knew accused Abu Jandal and Mufti Moinuddin. The design of the house was like a 'Mosque' and it was inside DIT Project. He found Mufti Hannan, Moinuddin @ Abu Jandal, Ratan, Mofiz and Mowlana Abu Jafor. He knew them as he was introduced before them. He used to serve tea and foods to them.

140. He identified accused Abu Jandal along with other accused persons present in the dock.

141. In cross-examination by accused Ripon he stated that he could not know the father's name of accused Ripon and his village home. He voluntary stated that on the last occasion Ripon went there with Bipul. He denied the defence suggestion that he did not know accused Ripon.

142. In cross-examination by accused Abu Jandal he stated that he did not know the father's name and the address of Abu Jandal. He denied the suggestion that CID officer Jubar identified Abu Jandal to him when he was on dock.

143. P.W-49 Md. Shafiq Anwar stated that on 19.11.2006 he was serving as the Metropolitan Magistrate at Dhaka and in connection with Ramna Police Station Case No.201 of 2004 accused Mufti Abdul Hannan Munshi was produced before him for recording his statement under section 164 of the Code of Criminal Procedure. He observing all the formalities recorded the statement of said accused. He proved Photostat copy of the said statement as exhibit 9(kha), his 25 signatures on it 9(kha)/1-9(kha)/25. He recorded the statement by following of the provision of section 164 and 364 of the Code of Criminal Procedure. He put his signature on the memorandum and he believed that the statement was true and voluntary.

144. He also identified the signatures of Mufti Abdul Hannan as exhibits-9(kha)/26-9(kha)/48.

145. In cross-examination by accused Delwar Hossain he stated that he recorded the statement of accused Mufti Abdul Hannan in connection with a Ramna Police Station Case. A CID inspector produced accused Abdul Hannan before him. He sent accused Abdul Hannan to jail after recording his statement. He denied the defence suggestions that he did not send the accused Abdul Hannan into the jail after recording the statement and he recorded the statement violating the provision of sections 164 and 364 the Code of Criminal Procedure.

146. On behalf of the other accused person all most similar suggestions were put to the said witness which he denied.

147. P.W-50 Md. Abdul Awal Chowdhury deposed that on 21.05.2004 he was serving as S.I in Kotwali Police Station, Sylhet and while he was on patrol duty in Sylhet town, the officer-in-charge through wireless message asked him whether British High Commissioner to Bangladesh was in the Consulate office of High Commission at Kumarpara. Then he went to

consulate office at Kumarpara and came to know that British High Commissioner Mr. Anwar Chowdhury would go to the Mazar of Hazrat Shahjalal (R:) at 12.30 P.M for offering Jumma prayer. Thereafter, he escorted British High Commissioner Mr. Anwar Chowdhury on the way to Mazar and after reaching Mazar he again came to his patrol duty. After completion of the Jumma prayer at about 1.40 P.M. while he was on duty in front of Noorjahan Clinic he heard a big sound and saw that the people were running here and there and he also found so many injured persons. Thereafter, he took step to send Mr. Anwar Chowdhury and Deputy Commissioner Abul Hossain who were injured to Sylhet Osmani Medical College Hospital and informed the said fact to the higher authority. Later on he came to know that three persons died and many people were injured due to bomb explosion.

148. In cross-examination by Delwar Hossain Ripon, he stated that the Officer-in-Charge asked him to know about the program of British High Commissioner at about 10.00 A.M and he came to know about the program of British High Commissioner from his personal assistant and prior to that the Officer-in-Charge did not know about the program of British High Commissioner.

149. In cross examination by other accused this witness stated that he had no knowledge whether some persons were arrested from the place of occurrence on the same day. He took British High Commissioner and the Deputy Commissioner to the Sylhet Osmani Medical College Hospital along with S.I Shah Alam.

150. P.W-51 Md. Sabiur Rahman deposed that on 23.05.2004 while he was serving as S.I in Sylhet Kotwali Police Station at about 4.00 A.M at night he prepared the inquest of deceased Kamal Uddin at Ward No.4, Bed No.13 with the help of electric light and sent the dead body through Constable Motiur Rahman to morgue. When he prepared the inquest report he found that the belly of the deceased was covered by bandage. He proved the said inquest report as exhibit-3(ka) and his signature on it 3(kha)/4. On 22.05.2004 at about 8.00 A.M he seized bloodstained shirt of injured Abdul Mukit, bloodstained lungi of injured Nurul Islam, bloodstained lungi of injured Jubair Ahmed and a bloodstained trouser of injured Surut Ali. He proved the seizure list as exhibit-2(ka) and his signature on it 2/(Kha)/1. He also identified the alamats as material exhibit-VI, VII and VIII.

151. In cross-examination by accused Delwar Hossain Ripon he stated that at the time of preparation of inquest report so many people were present but he did not know them personally.

152. P.W-52 Md. Shah Alam deposed that on 21.05.2004 he was serving as O.C of D.S.B. On 21.05.2004 at about 12.30 A.M he came to know that British High Commissioner would come to the Mazar of Hazrat Shahjalal (R:) for offering Jumma Prayer. The higher authority asked him to deploy D.S.B officers and forces in the Mazar area. He along with office assistant Sirajul Islam went to the Mazar area. After ending of Jumma prayer he was waiting for the British High Commissioner outside the Mazar. British High Commissioner after offering prayer and 'Fateha' started to move towards the main gate. He was accompanied by Deputy Commissioner, A.S.I of D.S.B Kamal Uddin along with other forces. At about 13.40 hours a big sound took place near the newly constructed Mazar gate and having received injury many persons fell down on the earth. He informed the said fact to the higher authority through wireless message and took step to send the injured persons to the hospital. British High Commissioner Mr. Anwar Chowdhury and Mr. Abdul Hai Khan, President of District Bar Association also received injuries.

153. In cross-examination by accused Delwar Hossain Ripon he stated that D.S.B office received the tour program of British High Commissioner on 20.05.2004 at the evening and said fact was intimated on the same day to the officer-in-charge of Kotwali Police Station. He did not see in which floor the British High Commissioner offered Jumma prayer. When the big sound took place he was behind 6/10 yards away from the High Commissioner inside the compound. He went to the Mazar before starting 'Khutba' with Sirajul Islam. When the sound took place Deputy Commissioner and his Gunman, D.S.B Gunman A.S.I Kamal Uddin and another Gunman Abdur Rahman were present there. 20/30 persons were present when the explosion took place and it was not possible for him to mention all the names who were present in front of British High Commissioner. There were thousands of people inside and outside the Mazar. At that time no police personnel was with him. He could not see where the Deputy Commissioner was taken. Noorjahan Clinic is 400/500 cubits away from the place of occurrence. He did not leave the place of occurrence. He had no knowledge whether the explosion was suicidal.

154. In cross-examination by other accused persons he further stated that in the main program of British High Commissioner there was no program for visiting the Mazar. He had no knowledge whether at the instance of Abdul Hai Khan that program was eventually added. Abdul Hai Khan was with the British High Commissioner when the High Commissioner was coming out from the Mazar. He had no knowledge whether one Habibur Rahman was arrested from the Mazar gate after the occurrence. He had no knowledge whether British High Commissioner went to Mazar as his personal visit.

155. P.W-53 Munsi Atiqur Rahman the investigation officer in his deposition stated that he was served at the Assistant Police Super of CID from April 1993 to April 2007. He was entrusted for investigation of the case of Sylhet Kotwali Police Station Case No.64 dated 21.05.2004 vide CID Office Memo No. CA/Sylhet/PD-11-04/10419/1(4) dated 27.05.2004. Having received the case docket from the previous investigating officer he consulted with the same along with the collected papers, visited the place of occurrence and recorded the statements of the informant and other witnesses including the injured persons under section 161 of the Code of Criminal Procedure. He arrested some persons as suspect out of them Sharif Shahidul Alam Bipul and Delwar Hossain had made confessional statement under section 164 of the Code of Criminal Procedure.

156. He forwarded them before the concerned Magistrate for recording their respective statements under section 164 of the Code of Criminal Procedure. He collected the confessional statement of Mufti Abdul Hannan made before the Metropolitan Magistrate of Chief Metropolitan Magistrate Court, Dhaka in connection with another case. He visited the house where conspiracy had taken place. The house is being No.53, road No.12, DIT extension road, Badda, Dhaka. He prepared map and index of the said house. He recorded the statement of witness Abul Kalam Azad [PW-48] and produced him before the Magistrate to record his statement under section 164 of the Code of Criminal Procedure. He proved the map and index of the place of conspiracy as exhibits-8(kha), 8(Ga) and his signature on it as exhibits-8(Kha)/1 and 8(Ga)/1. He did not prepare the sketch map and index of the place of occurrence as he found those correct which was prepared by the earlier investigating officer.

157. During his investigation he learnt from the statements of the accused persons and other materials that accused Mufti Abdul Hannan had taken training in Afganistan and he participated in the war and after his return from there he formed an organization named 'Bangladesh Harkatul Jihad Al-Islami' among the persons who went to Afganistan for

fighting to establish Islamic Rule. Accused Mufti Abdul Hannan and his accomplices blasted bombs in different places of the country including at 'Ramna Batmul' and in Jessore in the program of 'Udichi'. In 1996, when the Awami League formed Government, High Court Division having issued a Suo-muto Rule stopped to give 'Fatwa' by the 'Alims'. Beside an incident also took place in Brahmanbaria regarding the activities of NGO (Non Government Organization) and so many Islamic Scholars including Fazlul Haque Amini and Shykhul Hadith were arrested and because of such activities 'Harkatul Zihad' believed that the Awami League was the enemy of Islam and agent of India. In the month of July, 2002 in order to kill the then Prime Minister Sheikh Hasina, Mufti Hannan took an attempt planting 'mine' near the helipad and stage of the public meeting at Kotalipara, Gopalgonj. But their plan was not successful. However, a case being Kotalipara Police Station Case No. 5(7) 2004 was started against Mufti Abdul Hannan and others. Eventually, he also sent Mowlana Abu Syed and others with bombs in order to kill Ex-Prime Minister Sheikh Hasina while she visited Sylhet. Mowlana Abu Syed and his associates having failed to kill Sheikh Hasina went to the house of Dr. Refat and while they tried to defuse the bombs then their associates Abu Musa @ Musa Morol and Lokman succumbed to injuries.

158. In the first part of 2004 accused Shahidul Alam Bipul, leader of Sylhet area, met with Mufti Abdul Hannan at his house 53, Badda and at that time accused Mohibur Rahman @ Mafiz @ Ovi, Abu Jandal, Ahsan Ullah Kazal were present along with Mufti Abdul Hannan and they discussed about their future plan and they decided to attack on the leaders and workers of Awami League in order to kill them using grenade. Accused Abdul Hannan asked accused Sharif Shahidul Alam to resist the leader of Awami League at Sylhet area and he told them that in appropriate time he would supply grenade. In the month of April,2004 accused Shahidul Islam, accused Sharif Shahidul Islam, Bipul and Delwar Hossain Ripon came to the Madrasha of accused Abdul Hannan at 53, Badda. Accused Abu Jandal having taken consent from accused Abdul Hannan supplied 04(four) grenades to Bipul and Ripon in presence of Ahsan Ullah Kazal, Abu Jandal and Mohibullah. Bipul and Ripon carried the said grenades to Sylhet inside a computer box. On coming to know about the information that on 21.05.2004 British High Commissioner would come Sylhet and accused Bipul informed the said fact to accused Abdul Hannan. The American and British were involved in attacking various Muslim countries and if they would kill British High Commissioner it would be a tremendous job for them and accordingly, they plan to kill British High Commissioner.

159. In furtherance of their plan, on 21.05.2004 accused Sharif Shahidul Islam Bipul asked accused Delwar Hossain Ripon to come at the Mazar of Hazrat Shahjalal (R:) with grenade and accordingly at about 12.30 A.M Ripon came there with grenade and they met there. Accused Bipul and Ripon also offered Jumma prayer along with the other 'Musallies' and followed the movement of British High Commissioner. After completion of the prayer when British High Commissioner started moving towards the main gate and exchanging greetings with the people present there at that time at the instruction of accused Sarif Shahidul Alam Bipul accused Delwar Hossain Ripon having open the pin of the grenade threw the same aiming British High Commissioner. The grenade was blasted causing big sound. British High Commissioner and Deputy Commissioner, Sylhet along with 50/60 persons were injured. Three persons including one A.S.I, who was on duty, were died.

160. Having completed investigation he submitted two separate charge sheets against the accused persons, one was under sections 120B/326/302/34/109/ 114/111 of the Penal Code and another was under sections 3/4/5/6 of the Explosive Substances Act.

161. In cross-examination by accused Delwar Hossain Ripon he stated that the occurrence took place on 21.05.2004 at about 13.40 hours and on that day FIR was lodged at about 17.25 hours. He submitted the charge sheet on 07.06.2007. He further stated that he visited the place of occurrence. While the occurrence took place his place of service was at Dhaka. The previous investigating officer arrested 09 (nine) persons being suspected them and he arrested 11 persons. He recommended 18 suspected persons for discharged. The owner of house number 53, road number 12 of Badda was Colonel Golam Rabbani. He recorded his statement under section 161 of the Code of Criminal Procedure but he did not cite him as a witness in the charge sheet. The house was three storied building and the owner of the house also resided in the house. He denied the defence suggestion that he did not cite him as a witness as had he been examined he would not support the prosecution story. He did not record the statement of British High Commissioner Anwar Chowdhury and cite him as a witness due to protocol reasons. He also did not record the statement of Deputy Commissioner Abul Hossain. He tried to record his statement but he did not find him. He denied the defence suggestion that he did not cite Abul Hossain, Deputy Commissioner, Sylhet as a witness as he would not support the prosecution story. He found witness Md. Abul Kalam Azad on 20.03.2007 at his house and he recorded his statement under section 161 of the Code of Criminal Procedure on that day at about 19.00 hours and he did not know him previously. One day after, he produced the said witness before the Magistrate to record his statement. He did not preserve any photograph of witness Abul Kalam. He had a tea stall previously; he did not ask him what he was doing at the time of recording his statement. He did not see the tea stall. He denied the defence suggestion that witness Abul Kalam was a hired witness. He did not seize any documents with regard to *'Harkatul Zihad Al-Islami Bangladesh'*. He denied the suggestions that his statement regarding the 'Fatwa' and explosion of bombs were imaginary. He did not record the statement of the witnesses under section 164 of the Code of Criminal Procedure. He forwarded accused Delwar Hossain Ripon before Magistrate to record his statement but he did not remember who produced him before the Magistrate. Accused Ripon was produced before the Magistrate on 16.10.2006 through Inspector Md. Eqramul Haque. Md. Eqramul Haque was not cited as a witness. He arrested accused Delwar Hossain Ripon on 04.09.2006 and he was on remand for 10(ten) days in between 04.09.2006 to 16.10.2006. Then he was taken to remand in connection with another case. Thereafter, he was again taken on remand on 15.10.2006. He could not say whether he took him again on remand. He did not see to hand over the grenades to accused Bipul and Ripon by accused Abdul Hannan. He denied the defence suggestions that accused Ripon never took any grenade from any one and the attack on British High Commissioner was imaginary. He received the report of ballastic expert done by Scotland Yard, where it has been held that the alamats were of Urges grenade. He had no knowledge whether accused Ripon was under 40 days remand and he was tortured during his remand. He also denied the suggestion that in presence of the police and RAB the statement of Ripon was recorded and accused Ripon was innocent.

162. In cross-examination by other accused person he stated that Mufti Hannan was known as a kind man in his locality. He had no knowledge when accused Abdul Hannan was arrested. But he on 24.03.2007 submitted an application to show him arrest in this case. He had no knowledge whether accused Abdul Hannan was on remand for 77 days before he making his confessional statement and after recording his statement he was also on remand for 100 days. Mufti Hannan was not taken remand in this case. He denied the defence suggestion that Mufti Hannan was compelled to make the statement as he was tortured when he was on remand and his statement was recorded in presence of RAB. A.S.I Md. Enamul Haque produced Bipul before the Magistrate. He was taken remand in total for 12 days. He

had no knowledge whether Bipul was on remand for 40 days. During his investigation he did not investigate about the working place of Bipul. He had no knowledge whether Bipul was a contractor of a Mobile Phone Company. He denied the defence suggestion that Bipul was implicated in the case at the instance of his rival business group. He denied the suggestion that having created false confessional statement he implicated accused Abdul Hannan and Bipul in this case and he investigated the case in a perfunctory manner. He denied the defence suggestions that accused Abdul Hannan, Bipul and Ovi were not at all involved with the alleged occurrence and they did not make any conspiracy and Mufti Hannan did not supply any grenade to anyone. The accused did not know each other.

163. On re-call he further deposed that having found the address of accused Abu Jandal he filed supplementary charge sheet. He proved the expert report done in United Kingdom regarding the seized alamats, which was forwarded to him by the Ministry of Home Affairs exhibit-X series and proved the forwarding and respective signature of concerned officer y-y(3).

164. In cross-examination by accused Ripon he stated that he did not cite any one from the Ministry of Home Affairs as witness to prove exhibits-X and Y. He denied the suggestion that exhibit-Y is not related with regard to the alamats of explosive. He did not examine British High Commissioner to Bangladesh Mr. Anwar Chowdhury due to legal complication. Abu Jandal was not arrested by him. In his investigation he did not assert from where Mufti Hannan got the grenades. He denied the defence suggestion that Mufti Moinuddin is not Abu Jandal and he was not a member of *'Harkatul Zihad'*.

165. In cross-examination he stated that accused Bipul made his statement before the Magistrate as per his prayer but Hannan and Ovi did not make any statement in connection with this case.

166. He denied the suggestion that accused Mohibullah alias Mofiz was not Ovi despite he had been implicated in the case. He investigated the case with regard to the grenade attack on 21.04.2004 in Dhaka for sometimes. He also denied the suggestion that without investigating the case he submitted the charge sheet implicating the accused Hannan, Ovi and Ripon.

167. P.W-54 Dr. Mohammad Abdul Gaffar deposed that on 21.05.2004 he was serving at Osmani Medical College Hospital, Sylhet. On call he used to treat the patient in Noorjahan Hospital. On 21.05.2004 at about 2.45 hours after the Jumma prayer on call he went to Noorjahan Hospital by its vehicle and treated Abul Hossain, Deputy Commissioner, Sylhet. He was also treated by Professor Dr. D.E. Raza Chowdhury. He found superficial injury of soft tissue on different parts of his body and fracture on leg. He gave plaster on the leg of the victim and later on he issued certificate on 07.06.2007 consulting with the record of the Clinic. He proved the said certificate and his signature as exhibit-10 and 10(1). In the certificate they mentioned about 07(seven) injuries. The cause of injuries was bomb blast and fracture of Rt. Tibia, Fibula probably due to fall. The victim was referred to Dhaka, Combined Military Hospital for better treatment. He also proved the signature of Dr. D.E. Raza Chowdhury exhibit-9(2). The victim was treated as an outdoor patient.

168. In cross-examination by accused Delwar Hossain Ripon he stated that at the relevant time he resided at the old quarter of Medical College which is 1 (one) kilometer away from Noorjahan Hospital. Around 1.45 P.M he was called on. At first Dr. Raja treated victim Abul

Hossain. Fracture might have caused as he fell down on the ground and he did not found any injury of grenade on his body. Dr. Raja is still in the Sylhet. The other accused declined to cross-examine him.

169. P.W-55 Sunil Kumar Karmakar deposed that while he was in Faridpur Kotwali Police Station he inquired about accused Ahsan Ullah @ Hasan @ Kazal whether he was alive or death. The brother of Ahsan Ullah informed him that he had died but they did not get his dead body. He proved his report and his signature on it as exhibit-11 and 11(1).

170. In cross-examination by accused Delwar Hossain Ripon he stated that he did not submit the death certificate of deceased Ahsan Ullah.

171. P.W-56 Md. Juber, Police Inspector, CID, deposed that on 21.02.2008 at the instruction of higher authority he took the responsibility for further investigation of the case and he submitted charge sheet against accused Mufti Moinuddin alias Abu Jandal as he found his address. Earlier his address was not found and he was not charge sheeted. He filed supplementary charge against Mufti Abdul Hannan, Mohibullah @ Mofizur Rahman @ Ovi, Sharif Shahidul Islam, Delwar Hossain Ripon and Mufti Moinuddin @ Abu Jandal under sections 120(B) 326/302/34/109/114/111 of the Penal Code.

172. From the record of Motijheel Police Station Case No.97(A) of 2004 he came to know about accused Abu Jandal. During his investigation he found that Abu Jandal was an active leader of 'Harkatul Jihad'. Accused Mufti Abdul Hannan and Sharif Shahidul Alam and Bipul in their respective statements under section 164 of the Code of Criminal Procedure stated that in the first part of 2004 in a Madrasa situated at Badda, Dhaka they took part in a conspiracy and when the grenades were supplied accused Abu Jandal was present. He identified accused Abu Jandal present in the dock.

173. During his investigation he did not visit the place of occurrence and he did not prepare any map or index. He verified the statement of the witnesses under section 161 of the Code of Criminal Procedure. He denied the defence suggestion that the statement under section 164 of the Code of Criminal Procedure made by accused Delwar Hossain Ripon was not voluntary. He did not produce accused Ripon before the Magistrate for recording the statement under section 164 of the Code of Criminal Procedure. There was no material to file charge sheet against accused Ripon.

174. In cross-examination by accused Mufti Moinuddin alias Abu Jandal he stated that previously he was not charge sheeted as his address could not be traced out. He examined the statement under section 161 of the Code of Criminal Procedure and the statements under section 164 of the Code of Criminal Procedure made by the concerned accused persons and he did not fell necessary to visit the place of occurrence and collect the alamats afresh.

175. He denied the defence suggestion that Mufti Moinuddin was not known as Abu Jandal. He did not go to the permanent address of Mufti Moinuddin but the local police after verified the same submitted report. He denied the defence suggestion that in order to satisfy the government he submitted the charge sheet. He did not file any documents whether Mufti Moinuddin was a leader of 'Harkatul Jihad'.

176. In examination by the court he informed that the grenade which was used was not possible to manufacture by any private person. He had no knowledge whether the other agencies of the Government investigated about the source of grenades.

177. Those are the evidence available on record.

178. Submissions on behalf of accused Mufti Abdul Hannan Munshi, Sharif Shahidul Alam alias Bipul, Mufti Moinuddin alias Abu Jandal and Mohibullah alias Mofiz.

179. Mr. Mohammad Ali, the learned Advocate has appeared for accused Mufti Abdul Hannan, Shahidul Alam alias Bipul, Mufti Moinuddin alias Abu Jandal and Mohibullah alias Mofiz.

180. Mr. Ali submitted that in the instant case after submission of the charge sheet when the case record was transferred to the court of Sessions, the learned Sessions Judge, Sylhet having received the case record on 05.07.2007 fixed the date on 12.07.2007 for hearing on cognizance matter but eventually the learned Sessions Judge without taking cognizance of the offences against the accused persons proceeded with trial and framed charge against them and concluded the trial and as such the trial is illegal and in not taking cognizance in accordance with law the whole trial has been vitiated.

181. Mr. Ali referring to the evidence of P.W. 47, the Magistrate who recorded the alleged confessional statement of accused Md. Sharif Shahidul Alam Bipul [exhibit-9] submitted that the accused was produced before the Magistrate for recording the statement under section 164 of the Code of Criminal Procedure from the custody of RAB personnel beyond the period of office hour after a prolong remand and the Magistrate without comply the provision of sections 164 of 364 of the Code of Criminal Procedure recorded his statement [exhibit 9] and thus the said statement cannot be said true and voluntary and it has got no evidentiary value and as such the Tribunal erred in law in convicting accused Sharif Shahidul Alam Bipul relying on exhibit 9, the alleged confessional statement made by him.

182. Mr. Ali further submitted that exhibit 9(kha), a Photostat copy of the alleged confessional statement of Mufti Abdul Hannan, was not made in connection with the present case, rather, it was made in connection with Ramna (Dhaka Metropolitan area) Police Station case no.46(4)2001. As such said confessional statement cannot be used and considered as evidence in this case. In support of his submission he referred to the case of State vs. Md. Khurshed Alam and others, reported in 17 BLC, page 10. He also submitted that alleged confessional statement [9(kha)] was the result of prolonged remand and in human torture. Further, in recording the said statement the Magistrate (PW-49) also did not comply the provision of section 164 and 364 of the Code of Criminal Procedure. Thus, the alleged confessional statement is not true and voluntary and is not admissible in evidence. To substantiate the above submission he referred to the cases of State Vs. Raza Abdul Majid and others, reported in 1 BLC, page-144, Chunnu Vs. State, reported in 65 DLR, page-127, Belal alias Bellal and 2 others Vs. State, reported in 54 DLR, page-80, the State vs. Ali Hossain, reported in 18 BlD, page-655, Nurul Islam vs. The State, reported in 28 BLD, page-114.

183. Mr. Ali referring to the evidence of PW-48 submitted that the said witness is a hired and managed witness. For the purpose of this case the prosecution having tutored him produced before the court. Moreover, the investigating officer recorded his statement after

long laps of time and this inordinate delay in examining the important prosecution witness creates a serious doubt as to the truth of the prosecution case. In fact he was a source of Police and his contradictory and inconsistence evidence makes the whole prosecution case doubtful and he cannot be said a trustworthy and reliable witness and his evidence must be left out for consideration.

184. Mr. Ali also submitted that the investigation officer investigated the case in a perfunctory manner and that the prosecution withheld so many vital witnesses, which presumed that had they been examined they would not support the prosecution case and non examination of the vital witnesses creates adverse presumption as to the veracity of the prosecution case. The prosecution also failed to prove the place of conspiracy and ingredients of conspiracy. He referring to exhibit 8(kha), the sketch map of alleged house of conspiracy submitted that in the said sketch map house number, road number and other particulars have not been mentioned therein.

185. Mr. Ali submitted that the Tribunal most illegally convicted accused Mufti Moinuddin and Mohibullah relaying on the retracted, involuntary and untrue statements made by co-accused Mufti Abdul Hannan, Sharif Shahidul Alam alias Bipul. It is well settled proposition of law that confession of a co-accused cannot be the sole basis to convict another accused. In this case there is no corroborative evidence to lend support to the said confessional statement.

186. Mr. Ali lastly submitted that the prosecution miserably failed to prove its case beyond doubt and there is no legal evidence to convict the above accused persons and as such the impugned judgment and order of conviction and sentence is liable to be set aside and they deserve acquittal.

187. **Submission on behalf of accused Md. Delwar Hossain Ripon-**

Mr. A.K.M Faiz, the learned Advocate appearing for the accused Delwar Hossain Ripon refrained himself to make submission on merit. He submitted only on the point of sentence. He referring to the cases of State Vs. Romana Begum alias Noma, reported in 66 DLR (AD), page-183, Giasuddin Vs. State, reported in 54 DLR (AD), page-146, Nurul Haque Kazi Vs. State 52, reported in 7 BLC (AD), page-52, Rahmat Ali Vs. State, reported in 18 BLC (AD), page-109 submitted that considering the suffering of death agony of the accused in the condemned cell for the last 08(eight) years, his age and having no previous Criminal record the sentence of death may be commuted and altered.

188. **Submissions on behalf of the State-**

Mr. Mahbubey Alam, the learned Attorney General, Mr. Sheikh A.K.M. Moniruzzaman, the learned DAG, Mr. Basir Ahmed, the learned AAG, Mr. Md. Shahidul Islam Khan, the learned AAG and Mr. Md. Sirajul Haq Miah, the learned AAG have appeared on behalf of the State.

189. Mr. Sheikh A.K.M Moniruzzaman, the learned DAG having placed the evidence, impugned judgment and order of conviction and sentence and other materials on record submitted that the prosecution by adducing cogent, reliable and trustworthy evidence has proved the charges brought against the accused persons beyond reasonable doubt. He submitted that a good number of prosecution witnesses were the victims of the occurrence

and as such they are the most competent, natural and credible witnesses and the defence has failed to shake their respective evidence in any manner.

190. He further submitted that it is now well settled proposition of law that conviction on the basis of a confessional statement upon the maker can be very much based even if the confessional statement had been retracted at a later stage.

191. Further, confession of a co-accused can be taken into consideration and on the strength of that confession another co-accused can be convicted if it is corroborated by any other evidence, both direct and circumstantial. In the instant case P.W-47 Md. Noor-e-Alam Siddique, the Magistrate, who recorded the confessional statement under section 164 of the code of Criminal Procedure of accused Md. Sharif Shahidul Alam alias Bipul and Md. Delwar Hossen therefore, [exhibit 9 and 9(Ka)] and [P.W-49] Mr. Shafiq Anwar, who recorded the confessional statement of accused Mufti Abdul Hannan Munshi [exhibit 9 Kha], in their respective deposition categorically and consistently deposed that they had recorded the statements complying the mandatory provisions of law as provided in section 164 and 364 of the Code of Criminal Procedure and the respective accused persons made the said statements voluntarily. As such, exhibits 9, (9ka) and 9 (Kha) are enough to convict its makers and the other accused-persons whose name they had been disclosed.

192. Refuting the submission of Mr. Mohammad Ali, the learned Advocate for the defence, the learned DAG submitted that PW-48 was a natural and competent witness. His evidence corroborated exhibits 9, 9(Ka) and 9(Kha) and thus the learned trial Judge did not commit any error or illegality in awarding the conviction and sentence to the accused persons. Minor discrepancies, if any, in the evidence of PW-48 do not makes the prosecution case fatal.

193. Mr. Basir Ahmed, the learned AAG, mainly submitted on legal issues. He referring to the case of **Firozuddin Basheeruddin and others Vs. State of Kerala, reported in (2001) 7 SCC page-596** submitted that regarding admissibility of evidence, loosened standards prevail in conspiracy trial and in such a case declaration by one conspirator, made in furtherance of a conspiracy is admissible against co-conspirator. Hearsay evidence is also admissible in conspiracy prosecution.

194. Mr. Ahmed having referred to the case of **State of Maharasthra Vs. Kamal Ahmed Mohammad Vakil Ansari and others, reported in (2013) 12 SCC, page-17** submitted that 9(Kha), the confessional statement of accused Mufti Abdul Hannan under section 164 of the Code of Criminal Procedure made in another case is also admissible in the present case, particularly when he was charged for the offence of conspiracy and accused in both the cases. He further submitted that in a case of conspiracy confession of co-accused, even without corroboration, can be taken into consideration.

195. Mr. Mahbubey Alam having referred to the case of **Sevaka Perumal Vs. State of Tamil Nadu reported in (1991) 3 SCC page-471** Submitted that the trial Court having considered the gravity of the offence rightly and justly awarded the capital punishment. He submitted that it is the duty of the Court to award proper sentence having regard to the nature of the offence and manner in which it was executed or committed.

196. Mr. Alam further submitted that in the instant case in the name of Holy religion ‘Islam’ the accused persons attacked on British High Commissioner to Bangladesh Mr.

Anwar Chowdhury aming to kill him by blasting grenade and in the said incident 03(three) persons died and more than 50(fifty) persons were injured including the High Commissioner.

197. The terrorist act of the accused persons to achieve something by illegal means is an offence against the society as well as State and as such there is no scope to take any lenient view in awarding the sentence.

198. Heard the learned Advocates for the respective parties.

199. We have also perused the evidence and others materials of record as well as the impugned judgment and order of conviction and sentence.

200. Let us now decide whether the impugned judgment and order of conviction and sentence passed by the Druta Bichar Tribunal, Sylhet is justifiable.

201. **Whether the prosecution has been able to prove the time, place and manner of the occurrence-**

On scrutiny of the evidence of PW-2, PW-6, PW-7, PW-10, PW-11, PW-13, PW-14, PW-16, PW-17, PW-27, PW-31, PW-32, PW-40 it appears that all the said witnesses in a similar voice categorically and consistently corroborating each others testified that on 21.05.2004 they went to the Mazar of Hazrat Shajalal (R:) for offering Jumma Prayer and the British High Commissioner to Bangladesh Mr. Anwar Chowdhury at about 12.40 hours came to the Mazar of Hazrat Shajalal (R:) for offering Jumma prayer. After completing Jumma prayer when the said witnesses and the British High Commissioner and his other companions were coming out from Mazar premises and reached near the main gate then a bomb explosion with a big sound took place. As a result, the said witnesses received injuries and eventually they all were admitted in Sylhet Osmani Medical College Hospital and got treatment for various days in the hospital. The said witnesses also testified that due to bomb explosion the British High Commissioner Mr. Anwar Chowdhury, Deputy Commissioner Sylhet, Mr. Abul Hossain also received injuries and 03(three) persons died.

202. PW-1, PW-3, PW-4, PW-5, PW-8, PW-9, the police personnel, who were on the duty at the Mazar area for the security of British High Commissioner they also corroborating each other deposed that on 21.05.2004 before Jumma prayer they went to the Mazar of Hazrat Shajalal (R:) for the security of the British High Commissioner Mr. Anwar Chowdhury who was supposed to come to the Mazar for offering Jumma prayer. At about 12.40 hours the British High Commissioner reached at the Mazar area and he was received by the Deputy Commissioner, Sylhet. Having completed Jumma prayer when the British High Commissioner along with his companions were coming out form Mazar premises and reached near the main gate then an explosion of bombs with a big sound took place and the British High Commissioner, Deputy Commissioner, Sylhet, Advocate Abdul Hai (PW-12) along with 40/50 people were injured. The said witnesses having rescued the British High Commissioner sent him to Osmani Medical College Hospital for treatment. They had also taken steps with the help of the local people to sent the injured persons to the hospital.

203. PW-12 Advocate Abdul Hai, a relative of British High Commissioner Mr. Anwar Chowdhury and president of Sylhet District Bar Association, who accompanied the High Commissioner also in same manner narrated about the occurrence. He also received injuries

due to bomb explosion and treated home and abroad and still he has been suffering for such injuries.

204. PW-24, PW-28, PW-34 proved exhibit 3(Ka), the inquest report of deceased Rubel. The said witnesses deposed that victim Rubel having received bomb injuries on 21.05.2004 at the Mazar premises of Hazarat Shajalal (R:) while he was under treatment at Osmani Medical College hospital on very that day at about 05.35 hours he succumbed to his injuries. The said witness identified the dead body of deceased Rubel in the Sylhet Osmani Medical College Hospital.

205. PW-29 (uncle of deceased A.S.I Kamaluddin), PW-30 (Brother-in-law of deceased Kamaluddin), PW-33 (Cousin of deceased Kamaluddin) proved exhibit 3(Kha), the inquest report of deceased A.S.I Kamaluddin. The said witnesses corroborating each other testified that having received the information that A.S.I Kamaluddin became injured due to bomb explosion at the Mazar premises of Hazrat Shajalal (R:) they came to Osmani Medical College Hospital and found the dead body of A.S.I Kamaluddin at word No.4, situated at 3rd floor of the hospital. In presence of them the police prepared the inquest report of deceased Kamaluddin.

206. PW-36 (brother-in-law of deceased Habil Miah), PW-37 (husband of sister-in-law of Habil Miah) proved exhibit-6, the receipt by which they had taken the dead body of Habil Miah. The said witnesses stated that on 21.05.2004 Habil Miah went to the Mazar of Hazrat Shajalal (R:) to fulfill his 'Manat'. But he did not return to home and from the television news they came to know that bomb explosion took place at Mazar premises and three persons died over the incident. Then in the night they went to Osmani Medical College Hospital and there they identified the dead body of Habil Miah and also found that his post-mortem had already been completed.

207. PW-25, Mr. Sheikh Emdadul Haque, the doctor, who held the autopsy of deceased A.S.I Kamaluddin, Rubel Miah and an unknown person (Habil Miah) proved exhibit-4, post-mortem report of deceased Rubel Miah, exhibit-4 (Ka), post-mortem report of deceased an unknown person (Md. Habil Mia) and exhibit-4(Kha), postmortem report of A.S.I Kamaluddin respectively.

208. In those reports he categorically and consistently opined that the injuries found on the dead bodies of the deceased (tattooing, scotching and blackening) were ante-mortem and homicidal in nature due to bomb blasting effect.

209. P.W-35, Dr. Jahir Ahmed, proved the medical certificate exhibit-5. From the said certificate it appears that British High Commissioner to Bangladesh Mr. Anwar Bakat Chowdhury was treated in the Osmani Medical College Hospital on 21.05.2004 at about 2.00 P.M in Surgical Unit No.1. Multiple penetrating injuries by splinter throughout the right and lower limb with active bleeding were found among other injuries.

210. P.W-54 Dr. Mohammad Abdul Gaffer proved exhibit-10, the Medical Certificate of Deputy Commissioner Sylhet Abul Hossain.

211. The British Police also came to Bangladesh and visited the place of occurrence at the Mazar of Hazrat Shah Jalal (R:), during their visit they collected some alamats, photographs from the spot for the purpose of examination and forensic examination whether the blasted

articles were grenade or other thing. The alamats seized by local police also handed over to them for examination.

212. Those alamats were examined in the forensic Explosives Laboratory, Defence Science and Technology Laboratory, Fort Hatstead, Sevenoaks, Kent TNI47BP.

213. Forensic case officer Sarah Louise Lancaster in his report [exhibit-x] opined to the effect:

> "SUMMARY AND CONCLUSIONS
> Based upon my examinations, the information provided and having studied the printed copies of the scene photographs, it is my opinion that the damage near the Hazrat Shahjalal Mosque and injuries described were caused by the explosion of an anti-personnel grenade.
> The items collectively included metal (Most likely steel) spheres/balls from a functioned grenade, explosively damaged, drab/brown coloured, plastics fragments, which probably originated form a grenade body and/or grenade fuze and a conventional fly-off lever from a grenade fuze. Trace quantities of the high explosive PETN were found on the explosively damaged plastics fragments in items NF/20 and RB/1. Such residues are consistent with having resulted from, for example, the detonation of a grenade containing a PETN based explosive composition. Item as/3 comprised a pair of severely damaged and bloodstained trousers, parts of which were peppered with small holes that were likely formed by explosively propelled metal spheres similar to those contained within items NF/5, NF/6 and NF/7".
> **AND**
> "Although the type of grenade cannot be conclusively and unequivocally identified, the appearance of the lever shows that it most likely originated from an ARGES type grenade such as the HG 84 or an ARGES licensed produced grenade. An example of an Inert Arges HG 84 grenade (disassembled and less any explosives components) is shown in photographs 9 and 10. The grenade lever shown in these photographs is similar in size and general appearance to the lever contained in item NF/19. As with other Arges designes, this type of grenade consists of a plastic body that contains steel balls and a filling of PETN high explosive.
> It may also be of interest to note that, according to the literature, the Pakistan Ordnance Factories (POF) plastic hand grenade is a licensed produced Arges model known as the 84-P2A1 grenade, which consists of a plastic body that contains approximately 5000 steel balls and a plasticized PETN explosive composition.
> As demonstrated at the scene, the explosion of such a hand grenade could cause damage to property and would be likely to result in death or very serious injuries to persons in the proximity of the explosion. Persons within range of the fast moving shrapnel could also suffer serious injuries".

214. If we consider this report, exhibit-X, coupled with the oral evidence of the above witnesses and the post mortem reports exhibits 4, 4(Ka) and 4(Kha) we have no hesitation to hold that the prosecution has been successfully able to prove that on 21.05.2004 after Jumma prayer the offenders exploded grenade aiming British High Commissioner to Bangladesh Mr. Anwar Chowdhury when he was leaving Mazar premises having completed Jumma prayer and because of such grenade explosion he along with 40/50 others were injured and 03(three) others succumbed to their injuries.

215. **Let us now discuss whether the confessional statements under section 164 of the code of criminal procedure made by accused Md. Sharif Shahidul Alam @ Bipul, Md. Delwar Hossain Ripon and Mufti Abdul Hannan Munshi [exhibit-9, 9(Ka) and 9(Kha)] are true and voluntary and can be the sole basis to convict them.**

216. The confessional statement made by accused Md. Sharif Shahidul Alam @ Bipul [exhibit-9] runs as follows:

"আমার বাবা ফেঞ্চুগঞ্জ সার কারখানায় চাকুরী করতেন। আমি ছোট থেকে ফেঞ্চুগঞ্জ pi l কারখানায় বড় হই। ১৯৮৯ সালে ফেঞ্চুগঞ্জ সার কারখানার স্কুল হতে এস,এস,সি ১৯৯১ সালে ফেঞ্চুগঞ্জ ডিগ্রী কলেজ হতে উচ্চ মাধ্যমিক পাশ করি। এম,সি কলেজে বি, এস, সি ভর্তি হই। ফেঞ্চুগঞ্জ সার কারখানায় থাকাকালই আমি নিয়মিত নামাজ পড়তাম। মসজিদে যেতাম। ১৯৯৪ সালে ফেঞ্চুগঞ্জের স্থানীয় লোক মহিদুল ইসলাম প্রিন্স আরো কয়েকজন লোককে নিয়া আসর নামাজের পর মসজিদে বয়ান করে। অন্যান্যরা হলেন মাওলানা আব্দুর রউফ (ভালুকা (A fi¡WÉ), j¡Jmiei (®Rsi) Bx L¢lj, j¡Jmiei B ëm j¢ae, ¯puc Bm£jz ai¡ phiC হরকাতুল জিহাদ আল ইসলামী বাংলাদেশ নামক সংগঠনের সদস্য। তারা আফগানিস্তানের jpmj¡নদের নির্যাতনের বিষয়ে বয়ান করে। আমি তাদের বয়ানে উদ্বুদ্ধ হই। আমি তাহাদেরকে বলি আমি কিভাবে আপনাদের সংগঠনের সাথে কাজ করতে পারি। তখন তারা আমাকে জানায় যে, সিলেট শহরের জিন্দা বাজারস্থ বায়তুল আমান জামে মসজিদে তাদের অফিস। আমি পরবর্তীতে সেখানে যোগাযোগ করি। আমি উক্ত সংগঠনের কাজকর্ম শুরু করি। ১৯৯৫ সালের দিকে ফেঞ্চুগঞ্জ খেলার মাঠে ২০ দিনের ১টি প্রশিক্ষন হয়। আমি সহ লোকাল ১৫ জন লোক (কখনো কম কখনো বেশী) প্রশিক্ষন নেই। খেলার শারীরিক কসরত হতো। বরিশালের সাইদ এই প্রশিক্ষন পরিচালনা করে।

১৯৯৬ সালে লালখান বাজারে হরকাতুল জেহাদের প্রশিক্ষন দেখি, উখিয়াতে একটি গ্রামে যাই, আরাকান মুসলমানদের AhÙi ®c¢M, Vi¡Li f¡upi, Li¡fs ®Qi¡fs piqikÉ L¢lz

এই সময় হরকাতুল জিহাদের নেতা মাওলানা শেখ ফরিদ কবি শামসুর রহমানকে হত্যার নির্দেশ দিলে দলে মতবিরোধ তরী হয়। আমাদের মূল লক্ষ্য ছিলো নির্যাতিত মুসলমানদের সহযোগীতা করা। কিন্তু সংস্থi j¡W fk¡u Bjl¡ ®k Qic¡ তুলতাম তা কিছু কিছু নেতা যথাযথ উদ্দেশ্যে ব্যবহার না করে ব্যক্তিগত উদ্দেশ্যে ব্যবহার করার কারণে তাদের সাথে দুরত্ব তৈরী হয়। মুফতি হান্নান মুন্সী সংগঠনের কর্মকান্ড পরিচালনা করার জন্য দলের আমীর মুফতি আঃ হাই এর নিকট টাকা চাইলে তিনি টাকা দেয়ার আশ্বাস দিলেও পরে টাকা না দেয়ায় তাদের মধ্যে মত বিরোধ তৈরী হয়।

আমি ১৯৯৯ সালে লিবিয়া চলে যাই। ২০০২ সালে আমার মা মারা যায়। ঐ বছর ডিসেম্বর মাসে আমি দেশে ফিরে আসি। ২০০১ সালে আমার বাবা সার কারখানার চাকুরী হতে অবসর গ্রহণ করলে আমাদের পরিবার ফেঞ্চুগঞ্জের পাঠ চুকিয়ে স্থায়ী ভাবে গ্রামের বাড়ীতে বসবাস করতে থাকি। আমি ও বাড়ীতে চলে যাই।

আমার বাবা তখন গ্রামের বাড়ীতে ঘরবাড়ী নির্মান করছিলেন। আমি কিছুদিন এই সব দেখা শুনা করি। ২০০৩ সালে আমি আলী এন্টারপ্রাইজ নামক একটি নির্মান প্রতিষ্ঠানে যোগ দেই। আমার এক বন্ধু আঃ কুদ্দুসের সাথে পাথরের ব্যবসায় নামি। সোয়াইনঘাটের বিজন কান্দিতে পাথরের ব্যবসায় টাকা বিনিয়োগ করি। ঢাকায় আমার মামার সাথে রিকন্ডিশন গাড়ীর এবং গার্মেন্টের এর পরিত্যাক্ত মালামালের ব্যবসা করি।

বিদেশ যাওয়ার পূর্বে হরকাতুল জিহাদের কর্মী থাকার সময় আমার মুফতি হান্নান মুন্সীর সাথে পরিচয় ছিলো। বিদেশ হতে ফেরার পর ২০০৩ সালের মাঝামাঝি কোন একসময় ঢাকায় পুনরায় আমাদের যোগাযোগ হয়। তার সাথে সংগঠনের বর্তমান অবস্থা নিয়া বিস্তারিত আলোচনা হয়। সে জানায় হরকাতুল জিহাদ তখন ২/৩ ভাবে বিভক্ত। আমি তার বাসায় যাই। তখন এই বাসায় মুফতি হান্নানের ভাই অভি, লিটন এবং লম্বা দাড়িওয়ালা ২/৩ জন ছিলো। তিনি আমাকে পুনরায় সংগঠনের কাজ করার জন্য বলে। ঐ সময় দেশের বিভিন্ন স্থানে বোমা হামলা হচ্ছিল। কর্মীদের সাথে আলোচনায় বুঝতে পারি এগুলি মুফতি হান্নানের কাজ। আমি তাকে বলি এগুলি করে কোন ফল আসবে না। বরং দেশে সহিংসতা সৃষ্টি হচ্ছে।

আমরা কিভাবে কাজ করব এ বিষয়ে একটি সিদ্ধান্ত নেয়ার জন্য আমি তার সাথে আলোচনা করি। আমাদের মাঝে আলোচনা হয় যে, এই দেশে আওয়ামীলীগই সবচেয়ে বেশী ইসলাম বিদ্বেষী কাজ করে। কওমী মাদ্রাসা বন্ধ করে দিয়েছে। ফতোয়া বন্ধ করেছে। ভারতের চর হিসাবে কাজ করছে। আমাদের দেশের আলেম ওলেমাদের গ্রেফতার করছে। এই হিসাবে আওয়ামীলীগ ইসলাম এবং মুসলমানদের উপর অত্যাচার করছে। আমাদের আলোচনায় সিদ্ধান্ত হয় যে, আওয়ামীলীগের নেতাদের আক্রমন করে তাদের প্রতিহত করতে হবে। মুফতি হান্নান এ বিষয়ে সম্মতি দেন।

আমরা কিভাবে তাদের প্রতিহত করব এ বিষয়ে জানতে চাইলে মুফতি হান্নান জানান, যে, তার নিকট গ্রেনেড আছে। তিনি আমাদেরকে দিবেন। তার কথামত রাহী মোহাম্মদ কাজল অভির পার্শ্বঘেরা কাঠের ওয়ালে কাঠের ওয়াড্রপের ভিতর হতে গ্রেনেড বের করে অভির নিকট দেয়। অভি মুফতি হান্নানকে দেয়। আমি প্রথম বারের মতো গ্রেনেড দেখি।

আমাদের আলোচনা শেষে আমাকে সিলেটের আওয়ামীলীগ নেতাদের উপর আক্রমন এবং তাদের প্রতিহত করার জন্য jgta qi¤¢e আমাকে বলে।

কুলাউড়ার রিপন ভাই আমাদের সংগঠনের কর্মী তার সাথে আমার পূর্ব হতে পরিচয় আছে। আমি, রিপন ভাই ২০০৪ সালের এপ্রিল মাসের দিকে ঢাকায় যাই। আমি মুফতি হান্নানের মেরুল বা—ার অফিসে যাই। রিপন ভাইকে আসতে বলি। এরপর আমি কিছু সময়ের জন্য বাইরে যাই। সন্ধ্যার দিকে রিপন ভাই একটি কম্পিউটার কিনে ঐ বাসায় নিয়ে আসে। ঐ সময় সেখানে রাহী মোহাম্মদ কাজল, অভি ওরফে মফিজ উপস্থিত ছিলো। আমি কাজলকে গ্রেনেডের কথা বলি। সে মুফতি হান্নানের অনুমতি নিয়া রুমের ভেতর হতে গ্রেনেড নিয়া আসে, অপর ১ জন কাজী খাটোমতো, বয়স ২০/২২, মুখে হালকা দাড়ি, নাম মমিন তার হাতে দেয়। সে ৪টি শক্ত কাগজের প্যাকেটে ৪টি গ্রেনেড আমার হাতে দেয়। আমি ও রিপন ভাই গ্রেনেড ৪টি কম্পিউটারের মনিটরের কার্টুনে রাখি। রাত্রের ট্রেনে সিলেট আসি। সেখানে নেমে রিপন ভাই গ্রেনেড সহ কম্পিউটারের কার্টুন দিয়ে রিক্সা যোগে তার মেসে যায়। আমি টীলাপাড়াস্থ আমার মেসে চলে B¢pz

2০০৪ সালের মে মাসের ২১ তারিখ বৃটিশ হাই কমিশনার সিলেট আসবেন-এর আগের দিন সকালে আবু আবদুল্লাহ পরিচয়ে সংগঠনের একজন কর্মী আমাকে মোবাইলে জানায় সে বলে আমাকে আপনি চিনবেন না। বৃটিশ হাই কমিশনার সিলেট যাচ্ছে। একটু খেয়াল রাখবেন। এর অনুমান $\frac{1}{2}$ 0¥Vj fl ®jiqi¢jc LiSল আমাকে মোবাইল ফোনে বলে যে, বৃটিশ হাইকমিশনার আসতেছে, তাকে দাওয়াত দিতে হবে। দাওয়াত খাস সংগঠনের ভাষায় আমরা বুঝি আক্রমন করা। আমরা চিন্তা ভাবনা করে দেখি যে, বৃটিশ হাইকমিশনার সিলেটে আসলে অবশ্যই হযরত শাহজালাল (রঃ) এর মাজার আসবেন। ঐ সময় বৃটিশ বাহিনী ইরাকে (অপাঠ্য) আক্রমন করে মুসলমানদের উপর নির্যাতন করছিলো। বৃটিশ হাই কমিশনারকে হত্যা করতে পারলে সংগঠনের পক্ষে একটি বড় ধরনের কাজ হবে বিশ্বাস করি। বৃটিশ হাইকমিশনারের উপর গ্রেনেড হামলার সিদ্ধান্ত নেই।

পরের দিন শুক্রবার ১২.০০/১২.৩০ টার সময় রিপন ভাই আমাকে ফোন করে। জানায় যে মাজারে আছে। B¢jJ l¦j হতে কিছুক্ষনের মধ্যে মাজারে আসি। রিপন ভাইকে জিজ্ঞাস করি জিনিষ এনেছে কিনা। সে জানায় এনেছে। আমরা মসজিদের খোলা চত্বরে লস্কর গাছের নিকট জুমার নামাজ আদায় করি। নামাজ শেষে আমরা মসজিদের সিড়ির নিকট আসি। আমি বৃটিশ হাইকমিশনারের খোজে মূল মাজারের নিকট যাই। তাকে না পেয়ে নীচে নেমে আসি। ২ জন আলোচনা করে সিদ্ধান্ত নেই যে, বৃটিশ হাইকমিশনার যেখানেই থাকুক না কেন মূল গেইট দিয়েই যাবেন। আমরা মূল গেইটের নিকট চলে আসি। কিছুক্ষন পর বৃটিশ হাইকমিশনার লোকজনের সাথে হ্যান্ডশ্যাক করতে করতে এগিয়ে আসে। দেখতে পাই। আমার নির্দেশে রিপন ভাই গ্রেনেডের পিন খুলে বৃটিশ হাইকমিশনারের উদ্দেশ্যে ছুড়ে মারে। ৩/৪ সেকেন্ড এর মধ্যে গ্রেনেড বিস্ফোরিত হয়। আমরা অন্যান্য লোকজনের সাথে দৌড়াইয়া মূল রাস্তায় চলে আসি। চৌহা–j হতে রিক্সা যোগে টীলাগড় আমরা মেসে চলে আসি।

ফোনে ঘটনা মুফতি হান্নান কে জানাই। মুফতি বলে যে, ভাল কাজ করেছ। পরে পত্র পত্রিকায় দেখতে পাই যে, উক্ত গ্রেনেড হামলার কারনে পুলিশ সহ ৩জন নিহত হয়, বৃটিশ হাইকমিশনার, জেলা প্রশাসক সহ বহু লোক আহত হয়। রিপন ভাই তার নিকট থাকা অপর গ্রেনেডটি আমার নিকট হস্তান্তর করে।

জুলাই মাসের মাঝামাঝি সময়ে আমি হুমায়ুন কবীর হিমুদের বাসায় সন্ধ্যার সময় বসে সাংগঠনিক Lbjhja¡ hm¢Rmjz তখন ঐ রুমে ফখরুল ইসলাম ফাহিম উপস্থিত ছিলেন। তারা ২জন আমাদের সংগঠনের কর্মী। আমি রিপনকে তার নিকট রক্ষিত অবশিষ্ট গ্রেনেড ২টি নিয়ে আসতে বলি। সে বাসার কাছে রাস্তায় গ্রেনেড দুটি আমাকে দেয়। আমি তা হিমুর নিকট হস্তান্তর করি। হিমু তা বক্স খাটের বক্সে রেখে দেয়।

০৭/০৮/০৪ তারিখে সিলেটের গুলশান সেন্টারে আওয়ামীলীগ কর্মী সম্মেলনে মেয়র বদরউদ্দিন কামরান উপস্থিত থাকবেন মর্মে জানতে পারি। উক্ত কর্মী সম্মেলনে মেয়রের উপর গ্রেনেড হামলার বিষয় আগের দিন সন্ধ্যায় হিমুদের বাসায় আসি। হিমু ও ফাহিম আলাপ আলোচনা করি। হামলার সিদ্ধান্ত নেই। বিষয়টি মুফতি হান্নানকে মোবাইল ফোনে জানাই। অনুমতি নেই। সিদ্ধান্ত হয় হিমুর কাছে থাকা ০২টি গ্রেনেড নিয়া গুলশান সেন্টারে যাবে। মেয়রের উপর ফাহিম গ্রেনেড হামলা করবে। হিমু সার্বিক তত্ত্বাবধান করবে। আমি উপস্থিত থাকব। সিদ্ধন্ত মতে হিমু ও ফাহিম গ্রেনেড নিয়া গুলশান সেন্টারে যায়। গুলশান সেন্টারের উল্টা দিকের মসজিদে মাগরিবের নামাজ পড়ে। আমি রুম হতে মাগরিবের নামাজ আদায় করে গুলশান সেন্টারের উদ্দেশ্যে রওনা হই। পথে মোবাইলে হিমুকে তাদের অবস্থান জানতে চাই। তারা জানায় যে, তারা গুলশান সেন্টারে আছে। একটু পর হিমু আমাকে জানায় মেয়র কামরান সাহেব বের হয়ে দোকান হতে পান খেয়ে চলে গেছে। আমি তার কাছে দাড়ানো ছিলাম। তাই হামলা করা সম্ভব হয় নাই। আমি বলি আওয়ামীলীগের অন্যান্য নেতারা আছে। আমি বলি আমি আসতেছি।

একটু পর জিন্দাবাজার পয়েন্ট হতে তালতলী রাস্তার মুখে ফাহিমের সাথে দেখা হয়। সে জানায় তারা হামলা করেছে। B¢j hm ¢qj ®Libiuz ®p Sieiu ¢qj দোকানে পেপার কিনতেছে। আমি হিমুকে ফোন করে জিন্দাবাজার পয়েন্টে বনফুল মিষ্টির দোকানে আসতে বলি। ঐ সময় আমাদের সংগঠনের অপর কর্মী সাইদ আমার সাথে ছিলো। সেও আমাদের নিকট গ্রেনেড থাকার বিষয়, হামলার বিষয়ে জানত। হিমু আসলে আমরা মিষ্টি ও অন্যান্য খাবার কিনে

(অপাঠ্য) করে হিমুদের বাসায় চলে যাই। তাদের বাসার ছাদে বসে মিষ্টি ও অন্যান্য নাস্তা খাই। হামলার বিস্তারিত বিবরণ শুনি। টেলিফোনে মুফতি হান্নানকে জানিয়ে দেই।

২০০৪ সালের ডিসেম্বর মাস আওয়ামীলীগের এম,পি জেবুন্নেছা হকের বাসায় মহিলা আওয়ামীলীগের কর্মীদের একটি সভা হবে জানতে পারি। এবার আগের দিন সন্ধ্যার পরে ফাহিমকে হিমুদের বাসায় আসতে বলি। সে আসে। আমরা একত্রে শলা পরামর্শ করি, সভায় গ্রেনেড হামলার সিদ্ধান্ত নেই। টেলিফোনে মুফতি হান্নানকে জানাই। তার অনুমতি নেই। ২৪ ডিসেম্বর আমার বিবাহের দিন ধার্য ছিলো। সিদ্ধান্ত হয় যে, ফাহিম এবং হিমু হিমুর নিকট থাকা শেষ গ্রেনেডটি দিয়ে মহিলা এম.পির বাসায় আওয়ামীলীগের কর্মী সম্মেলনে হামলা করবে। ঘটনার দিন আমরা বিবাহের অনুষ্ঠানিকতা শেষ করে ৩.০০/৩.৩০ ঘটিকায় হিমুকে ফোন করি। সে জানায় যে, ফাহিম সহ ঘটনাস্থল তাতী পাড়ায় পৌঁছেছে। আমি বলি আমি আসছি। আমি সাইদ সহ মোটর সাইকেল যোগে বন্ধুদের বাসায় মিষ্টি বিতরনের জন্য বের হই। ০৪.০০ টার সময় তাতীপাড়া পৌছে জেবুন্নেছা হকের বাসার রাস্তার মোড়ে স্কুলের কাছে পিলারের নিকট হিমুকে দেখতে পাই। ফাহিমকে জেবুন্নেছা হকের বাসায় ঢোকার মুখে রাস্তায় পাই।

আমি বুঝতে পারি সব কর্মী তখনো পৌছে নাই। আমি ইশারা দিয়ে চলে আসি। আমি আর সাইদ বায়তুল আমান jসজিদে আসরের নামাজ পড়ে নীচে নেমে দেখি তাতী পাড়া ঢোকার রাস্তার মুখ সাদা পোশাকের লোকজন বন্ধ করে দিয়েছে। বুঝতে পারি হামলা হয়েছে। আমি সাইদ সহ বাসায় চলে আসি। সন্ধ্যার পর শিবগঞ্জে হিমুদের বাসায় যাই। হিমু ও ফাহিমের নিকট হামলার বিস্তারিত বিবরণ শুনি। টেলিফোনে মুফতী হান্নানcL 0Ve¡ Si¢e¡Cz

২০০৫ সালের ডিসেম্বর মাস টালীগড় এলাকায় সাজ্জাদুর রহমান স্মৃতি ব্যাডমিন্টন প্রতিযোগীতার উদ্বোধন করবেন মেয়র বদরউদ্দীন কামরান। ২/৩ দিন আগে হতে মাইকে বিষয়টি ব্যাপক ভাবে প্রচারিত হয়। আমি ২য় বার মেয়রের উপর হামলার পরিকল্পনা করি। ইতোপূর্বে রিপন ভাই বৃটিশ হাই কমিশনারের উপর হামলার পরে অবশিষ্ট গ্রেনেডটি আমাকে দিয়াছিলেন আমি তা এম.টি কলেজে আমার নির্মান কাজে ব্যবহৃত বাশ, কাঠ ও অন্যান্য মালামালের গোডাউনে রেখেছিলাম। ঘটনার দিন সন্ধ্যার সময় আমি ফাহিমকে গ্রেনেডটি দেখাই। ফাহিম গ্রেনেডটি নিয়ে আসে। আমি এম.সি কলেজে যে বিল্ডিংয়ের নির্মান কাজ করছিলাম তার ছাদে বসে আমি, ফাহিম ও হিমু শলাপরামর্শ করি। সিদ্ধান্ত হয় যে, ফাহিম টালীগড় এলাকায় পরিচিত। তাকে লোকজন চিনে ফেলতে পারে। হিমু অনুষ্ঠান স্থলে গিয়ে মেয়রের উপর হামলা চালাবে। আমি হিমুকে গ্রেনেড দিয়ে দেই। ফাহিম ও হিমু হামলার উদ্দেশ্যে টালীগড়ের অনুষ্ঠান স্থলের দিকে চলে k¡uz

আমি হোন্ডা দিয়ে কলেজ হতে বের হয়ে অনুষ্ঠান স্থলে ২/৩ টা চক্কর দিয়ে আমার বাসার সামনে রাখা পাথরের ডিবির উপর বসি। কিছুক্ষনের মধ্যেই আমার মেঝের সামনের রাস্তায় গাড়ীর ভীড় জমে যায়। আমি বুঝতে পারি পরিকল্পনা মোতাবেক হামলা হয়েছে।

আমি বাসায় যাওয়ার পথে ফাহিমকে ফোন করি। সে জানায় তারা অনুষ্ঠান স্থলে পৌছে মেয়রকে হত্যার উদ্দেশ্যে গ্রেনেড ছুড়ে মেরে ছিলো। কিন্তু গ্রেনেডটি বিস্ফোরিত হয়নি। পরের দিন ফাহিম ও হিমুর নিকট হতে বিস্তারিত জানি। ”
[Underlines supplied]

217. The confessional statement made by accused Md. Delwar Hossain Ripon [exhibit-9(ka)] runs as follows:

‘‘আমি ১৯৯৮ সাল কুলাউড়া উপজেলার ব্রাহ্মণ বাজারের জালালবাদ উচ্চ বিদ্যালয় হতে এস.এস.সি পাশ করে সিলেটে আসি। মদন মোহন কলেজে এইচ.এস.সি ভর্তি হই। এইচ, এস, সিতে পড়াকালীন সময়ে মাশরুর নামের একজনের সাথে আমার পরিচয় হয়। আমি প্রায়ই বন্দর বাজার মসজিদে জোহর, আছর নামাজ পড়তাম। সেও ঐ মসজিদের নিয়মিত মুসল্লী ছিলো। মসজিদে প্রায়ই তার সাথে দেখা হতো। এই ভাবেই পরিচয় হয়। সে আমাকে জিহাদী দাওয়াত দেয়। বিভিন্ন প্রকার ইসলামী বই দেয়। সে আমাকে বলে যে, তার (ছেড়া) আমি স্বেচ্ছায় তাকে ৫০/১০০ টাকা দিতাম। তখন (ছেড়া) বই কিনেও পড়তাম। আমি তাকে জিজ্ঞাসা করি এক (ছেড়া) নেতা কে, সে বলে বিপুল নামে তাদের একজন সাথী আছে। মাশরুরের সাথে পরিচয়ের প্রায় ৩ মাস পর আমি তাকে ১০০০/- V¡L¡ d¡l ®cCz ®p আমার টাকা পরিশোধ না করায় তার সাথে সম্পর্ক খারাপ হয়। আমি পরে আর তার সাথে যোগাযোগ করি নাই।

আমি উচ্চ মাধ্যমিক পাশ করে ম্যানেজম্যান্ট-এ অর্নাস পড়তে থাকি মদন মোহন কলেজে। ঐ সময় আমি জিন্দাবাজারস্থ নাইনটিন জীমে নিয়মিত যেতাম। সেখানেই শরীফ সাহেদুল আলম বিপুলের সাথে আমার পরিচয় হয়। বিপুলের সাথে আলাপ পরিচয়ের পর জানতে পারি যে, মাশরুর ইতোপূর্বে যে বিপুলের কথা বলেছে এই সেই বিপুল। সে আমাকে জিজ্ঞাসাবাদে স্বীকার করে যে, সে আগে ঐ সংগঠনে জড়িত ছিলো। সে আমাকে বলে যে, মার্কিন, বৃটিশরা, ইসরাইলরা বিভিন্ন দেশে মুসলমানদের উপর নির্যাতন করেছে। সে আমাকে ইসলামী জেহাদে উদ্ভুদ্ধ করে।

আমি তার সাথে ২বার ঢাকাস্থ মেরুল বা—¡l HLV¡ h¡p¡u k¡Cz HV¡ L¡l h¡p¡ Si¢e e¡z l বাসায় কাউকে আমি চিনতাম না । একজন লোককে নাম পরিচয় জিজ্ঞাসা করলে সে বলে এই সব ঠিক না।

আমি যখন বিপুলের সাথে ২য় বার ঢাকায় যাই, এলিফ্যান্ট রোড হতে আমার বন্ধু মাহবুবু এর জন্য ১টি কম্পিউটার কিনি। বিপুল আমাকে ফোনে জানায় আমরা একসাথে সিলেট যাব। আমি যেন মেরুল বা—¡l l h¡pায় চলে আসি।

আমি কম্পিউটার কিনে দুপুরের দিকে ঐ বাসায় আসি, বিপুল বাসায় ছিলো না। সে বিকালের দিকে বাসায় আসে। বিপুল আমাকে ৪টা প্যাকেট দেয়। আমি বলি এগুলি কি? সে জানায় এইগুলি গ্রেনেড। সিলেট নিয়ে যেতে হবে। সিলেটে আমাদের কাজ আছে। আমি আর বিপুল গ্রেনেডের প্যাকেট গুলি কম্পিউটারের মনিটরের বক্সে ঢুকাই। উপবন ট্রেনে করে সিলেট নিয়ে আসি। আমি আমার মুরিদ বাজারস্থ এসে চলে আসি। প্যাকেট গুলি বের করে আমার ড্রায়ারে রাখি। কম্পিউটার আমার বন্ধুকে দিয়ে দেই।

অনুমান ০২(দুই) মাস প্যাকেট গুলি আমার নিকট ছিলো। ঘটনার দিন সন্ধ্যায় বিপুল আমাকে মোবাইলে জানায় যে, BNtমীকাল বৃটিশ হাইকমিশনার সিলেটে আসতেছে। তার উপর একটা গ্রেনেড নিতে হবে। আমি যেন মাজারে এসে তাকে বৃটিশ হাইকমিশনারের প্রোগ্রাম জানাই। আমি পরের দিন ১২.৩০ ঘটিকার দিকে মাজারে আসি। বৃটিশ হাইকমিশনারের মাজারে আসবেন মর্মে জানতে পারি, বিপুলকে জানাই।

5/7 ‡j‡eV fl ‡hfm Bসে। আমাকে জিজ্ঞাসা করে জিনিস (গ্রেনেড) এনেছি কিনা। আমি জানাই এনেছি। আমরা একত্রে বাজারের সামনের চত্বরে নামাজ পড়ি। নামাজ শেষে আমরা মসজিদের সিড়ি পর্যন্ত আগাইয়া যাই। আমি সিড়ির কাছে থাকি, বিপুল মাজারের দিকে যায়। একটু পর ফিরে আসে। আমরা প্রধান গেইটের নিকট চলে আসি। বৃটিশ qাইকমিশনারের গাড়ি মাজারের মূল গেইটে ছিলো। আমাদের বিশ্বাস ছিলো সে এদিক দিয়েই যাবে। একসময় বৃটিশ হাইকমিশনার লোকজনের সাথে হ্যান্ডশেক করতে করতে গেইটের দিকে আগাইয়া আসে। আমি ও বিপুল প্রধান গেইটের সামনে দাড়াই। বিপুল আমাকে গ্রেনেডের পিন খুলে ছুড়ে মারতে বলে, সামনেঅনেক লোক ছিলো, আমি বলি আমিতো সামনে কিছু দেখতে পাচ্ছি না। সে বলে দেখার দরকার নাই। তুমি পিন খুলে ছুড়ে মার। আমি তার কথামত প্যান্টের পকেট হতে ১টি গ্রেনেড বের করে পিন খুলে ছুড়ে মারি। আমি ৫/৭ ফিট দুর হতে গ্রেনেড ছুড়ে মারি। মারার সাথে সাথেই বিকট শব্দে তা বিস্ফোরন হয়।

B‡j আর বিপুল দোড়াইয়া মেইন রোডে চলে আসি, টালীগঞ্জস্থ বিপুলের মেসে যাই। আমার নিকট থাকা অপর গ্রেনেডটি তাকে দেই। এর মাস/দেড় মাস পর আমাকে বিপুল ফোন করে বলে যে, আমার নিকট থাকা অপর ২টি গ্রেনেড দিয়ে আসতে। আমি তার কথামতো আমার নিকট থাকা ২টি গ্রেনেড শিবগঞ্জের ১টি বাসার কাছে l¡Ù¡u a¡l নিকট দিয়ে চলে আসি। এরপর মাঝে মধ্যে বিপুলের সাথে দেখা সাক্ষ্যাত হতো। এই বিষয়ে আর কোন আলাপ হয়নি আমার সাথে।

গ্রেনেড ছুড়ে মারার সময় আমার মধ্যে একটা জোস কাজ করতেছিলো। ছুড়ে মারতেই হবে। এই গ্রেনেডের ক্ষমতা কি । কি ক্ষয়ক্ষতি হবে এ সম্পর্কে আমার কোন ধারনা ছিলো e¡z”

[Underlines supplied]

218. The confessional statement made by accused Mufit Abdul Hannan Munshi [exhibit-9(Kha)] runs as follows:

“আমি একজন মাদ্রাসার শিক্ষক। আমি প্রথমে নিজ গ্রামের প্রাইমারী স্কুলে ৫ম শ্রেনী পর্যন্ত পড়াশুনা করে পরে গ্রামের j¡â¡p¡u fs¡öe¡ öl¦ L‡l। ১৯৭৫ সালে গহর ডাংগা মাদ্রাসায় কোরআন শরীফ হেফজ শুরু করে ১৯৭৯ সালে শেষ করি। কিছুদিন শর্সিনা আলিয়া মাদ্রাসায় লেখা পড়া করে মাস কয়েক পর দেওবন্ধ মাদ্রাসায় চলে যাই। সেখানে জামাতি লাইন লেখাপড়া আরম্ভ করে ১৯৮৭ সালে দাওরা হাদিস লেখা পড়া কালে আলী গড় বিশ্ববিদ্যালয়ে ইসলামকি ষ্টাডিজ-এ এম.এ. পাশ করি। ১৯৮৭ সালে দেশে এসে পুনরায় লেখাপড়া করার জন্য পাকিস্তানে যাই। সেখানে জামিয়া ইউসুফ বিন নুরিয়া মাদ্রাসা করাচী নিউ টাউনে আল কোরআন, আল হাদিস ও ফেকা শাস্ত্রে পড়া শুনা করার জন্য ১৯৮৮ সালে ভর্তি হই। সেখানে এক মাদ্রাসায় ০৩ বছর লেখাপড়া চলাকালে রমজানের ছুটির সময় আফগানিস্থানে আফগানদের পক্ষে যুদ্ধ করতে যাই। সেখানে ১৫ দিন যুদ্ধের ট্রেনিং করি। সেখানে পক্তিয়া প্রদেশের মোন্ত শহরে যুদ্ধ শুরু হয়। ঐ যুদ্ধে আমাদেরকে যোগদান করার আহ্বান জানালে আমরা প্রায় এক হাজার লোক উক্ত শহরে রমজান মাসের ১ তারিখে যুদ্ধে অংশ গ্রহণ করি। সেখানে প্রায় ২ লক্ষ লোক অংশগ্রহন করে। যুদ্ধ চলাকালে রমজানের ১৫ তারিখে মোন্ত শহরের বতন কেল্লা নামক স্থানে আমি যুদ্ধে আহত হই। আমি পাকিস্তানের পেশোয়ারে কুয়েতি আল হেলাল হাসপাতালে ভর্তি L‡l ‡Q‡Lvp¡ Ll¡ qu। সেখানে যুদ্ধে মাওলানা ওবায়দুল্লাহ (কুমিল্লা), হাসান (চ–N‡Ï), j¡Jm¡e¡ Bh jp¡ (L‡jõ¡), p¡m¡E‡Ÿe (Q–গ্রাম) ও আরও অনেক লোক ছিল। ঐ হাসপাতালে ১০ মাস চিকিৎসার পর পুনরায় করাচী মাদ্রাসায় চলে আসি। দুইমাস পর পুনরায় ঐ হাসপাতালে চিকিৎসার জন্য যাই। চিকিৎসা শেষে দুই মাস পর আবার করাচী এসে লেখা পড়া শেষ করে ১৯৯৩ সালে দেশে আসি।

আফগান যুদ্ধ ১৯৯২ সালে শেষ হয়। ইতিমধ্যে বাংলাদেশের কিছু যোদ্ধা ১৯৮৯/১৯৯০ সালে দেশে ফেরৎ এসে হরকাতুল জেহাদ আল ইসলামী বাংলাদেশ নামে একটি ইসলামী দল গঠন করে। Eq¡l fËaù¡a¡ nq‡c Bhcl lqj¡e ফারুকী। পরে উনি আফগানস্থানে যেয়ে শহীদ হন। আমি নিজ গ্রামের মাদ্রাসায় কিছুদিন শিক্ষকতা করি। পরে কোটালী পাড়া ঘাঘর বাজারে কোটালীপাড়া আদর্শ ক্যাডেট মাদ্রাসা নামে একটি মাদ্রাসা স্থাপন করি। ১৯৯৪ সালে গহর ডাংগা মাদ্রাসায় হরকাতুল জেহাদের নেতা মুফতি শফিকুর রহমান, মুফতি আবদুল হাই, মাওলানা আবদুর রউফ, মাওলানা সাইদুর রহমান প্রমুখ নেতা গহরডাংগা মাদ্রাসায় মিটিং করলে উক্ত মিটিংয়ে আমি দাওয়াত পেয়ে সেখা‡e ®k¡Nc¡e

করি এবং ওদের কথায় উদ্ভুদ্ধ হয়ে হরকাতুল জেহাদ পার্টিতে যোগদান করি। আমাকে থানা লেভেলে প্রচার সম্পাদক হিসাবে নিয়োগ দেয়া হয় এবং আমি হরকাতুল জেহাদের পক্ষে নিজ থানা এলাকায় কাজ করতে থাকি। আমাদের ২/৩টি থানা মিলে আমীর ছিলেন সাইদুর সিলেটী। আমাদের দলের উদ্দেশ্যে ছিল দেশের ভিতর প্রশিক্ষন প্রাপ্ত হয়ে দেশের বাইরে কোন মুসলমানদের উপর অত্যাচার হলে সেখানে গিয়ে যুদ্ধে অংশ গ্রহন করে মুসলমানদের সাহায্য করা। এভাবে আমাদের দেশের কওমী মাদ্রাসায়, স্কুল, কলেজ ও বিশ্ববিদ্যালয়ে অনুমান ২ লক্ষ লোক প্রশিক্ষণ নিয়েছে বলে মনে হয়। আমি ১৯৯৫ সালে যশোর শহরে মুরশিদিয়া মহিলা মাদ্রাসা স্থাপন করি। ওখানে ১(এক) বছর থাকার পর ১৯৯৬ সালে দেশে ফেরৎ আসি এবং পুনরায় ক্যাডেট মাদ্রাসায় এসে শিক্ষকতা আরম্ভ করি। ঐ বছরই আল ফারুক ইসলামিক ফাউন্ডেশন নামে একটি এন.জি.ও স্থাপন করি। আমি এরপর হতে ঢাকা হরকাতুল জেহাদের অফিস খিলগাঁও, তালতলার অফিসে যাতায়াত শুl¦ L¢l Hhw ¢h¢iæ¢j¢Vw-এ যোগদান করি। আমাদের সংগঠনের পত্রিকা ছিল জাগো মুজাহিদ। ঐ সব মিটিং-এ পবিত্র কোরআন শরীফে জেহাদ সম্পর্কিত আয়াত এবং হাদিসের উপর আলোচনা করে সবাইকে জেহাদে উদ্ভুদ্ধ করা হত। আমরা ইতিমধ্যে আরাকানের জেহাদী সংগঠন আর.এস. ও এবং আর. এফ.এ সংগঠনে আমাদের তরফ হতে যোদ্ধা প্রেরণ করি। দেশে অনৈসলামিক কাজ বন্ধ করায়ও আমাদের দলের মৌখিক ¢pÜ¡¿ ¢Rmz

১৯৯৯ সালের ফেব্রুয়ারী মাসের শেষের দিকে মোহাম্মদপুর বাস ষ্ট্যান্ডে সুপার মার্কেট হতে ভিতরের দিকে একটি রোডে আমাদের অফিসে ৪/৫ জন মিলে একটি আলোচনা সভা হয়। সেখানে মওলানা আবদুর রউফ (রাজৈর), হাফেজ জাহাঙ্গীর বদর (দোহার), হাফেজ ইয়াহিয়া (সিলেট), মওলানা আবু বকর (সিলেট), মওলানা সাব্বির (বগুড়া) সহ বাগের হাটের আবু মুসা সহ আরো ২/১ জন উপস্থিত ছিল। সভায় পত্রিকায় উদীচি শিল্প গোষ্টি যশোর শহরে মাস ব্যাপী একটি অনুষ্ঠান করবে বলে জানি। বাংলাদেশে উদীচির উলঙ্গ গান-hjজনা বন্ধ করার বিষয়ে আলোচনা করে আমাদের উদ্দেশ্যে দলের আমীর মুফতী শফিকুর রহমানকে জানানোর সিদ্ধান্ত হয়। ঐ দিনই মাগরেবের পর মুগদা অফিসে আমরা সবাই যেয়ে আমীর মুফতি শফিকুর রহমান, মুফতি আবদুল হাই (দাউদ কান্দি), সাইদুর রহমান (ফেনী) কে হাজির পেয়ে সেখানে উদীচির উলঙ্গ গান বাজনা বন্ধ করার বিষয়ে আলোচনা আরম্ভ করি এবং হাফেজ ইয়াহিয়া আলোচনা করে বলেন যে, আমরা পত্রিকা মারফত জানতে পেরেছি যে, যশোর উদীচি শিল্প গোষ্ঠী মাস ব্যাপী একটি অনুষ্ঠান আয়োজন করেছে। উদীচির গানের অনুষ্ঠান বন্ধ করার বিষয়ে আমীর সাহেবকে জানালে তিনি বলেন যে, এভাবে কোন কাজ হবে না। আপনারা সরেজমিনে তদন্ত করে আমাকে জানান। তখন মওলানা আবু বকর ও আবু মুসা ও সাব্বিরের উপর তদন্তের ভার দেয়া হয়। ঐ ৩ জন যশোর উদীচির গানের অনুষ্ঠানের তদন্ত করে আমীর সাহেবকে মুগদার অফিসে জানালে আমীর সাহেব আমাদের সবার উপস্থিতিতে মওলানা সাব্বির এবং আবু মুসাকে বলেন যে, তোমরা qjmLj-পাতলা ২(দুই)টি বোমা তৈরী করে রাখবে এবং দেখবে যদি যশোর উদীচির গান চলে তবে সেখানে ব্যবহার করবে। এ কথার পর আমরা সবাই চলে যাই। আমি আমার বাড়ীতে ছিলাম।

গত ১৯৯৯ সালের মার্চ মাসের ৫ তারিখ মওলানা আবদুর রউফ সাহেব আমাকে যশোরে আসতে বলেন। আমি নড়াইল হয়ে বেলা ৩.০০ টার দিকে যশোরে যাই। খুরশিদিয়া মহিলা মাদ্রাসায় অবস্থান করি। নুরানী মাদ্রাসায় আসরের নামাজ পড়ি। মাগরেবের কিছুক্ষন পূর্বে আবু মুসা, সাব্বির, মওলানা রউফের সাথে মাদ্রাসায় দেখা হয়। আবু মুসা জানায় যে, আমার নির্দেশ মোতাবেক বোমা নিয়ে এসেছি এবং মাদ্রাসার শিক্ষক মুফতী শামসুল হকের বাসায় রেখেছি সেখানে আবুল হোসেন আছে। এখন রউফ সাহেব যেভাবে বলেন সেভাবে কাজ হবে। আমি বলি যে, আমার এখানে থাকার প্রয়োজন আছে কি-না? তখন সাব্বির বলে দরকার আছে। এরপর মহিলা মাদ্রাসায় মুফতি শামসুল হকের বাসায় আবু মুসা ও সাব্বির যায়। রউফ সাহেব বলেন যে, কাজ করতে হলে লোক প্রয়োজন। সেখানে আবু সাহেবের নাম প্রস্তাব হলে মুফতী শামসুল হক বলেন যে, আবুল হোসেন উচা এবং লম্বা। সেখানে গেলে চোখে পড়বে। একাজের জন্য লোক আসতে বলা হয়েছে। তারা আসতেছে। মুফতী শামসুল হকের সাথে আবু মুসা এবং সাব্বির উদীচির অনুষ্ঠানে বোমা বিস্ফোরনের বিষয় যোগাযোগ করেছিল। আমি ও মাওলানা আবদুল রউফ আমার মাদ্রাসার রুমে ছিলাম। আবু মুসা এসে জানায় যে, অনুষ্ঠানে বোমা পাতার জন্য লোক আসছে। তাদের নাম জিজ্ঞাসায় জানতে পারি আবদুল্লাহ ও ওয়ালিউর রহমান আসতেছে। আবদুল্লাহর বাড়ী চ–গ্রামে বয়স ১৬/১৭ বছর ও ওয়ালির রহমানের বাড়ী যশোর, চাচড়া ®j¡s hup 19/20 বছর। তাদেরকে বোমা দেওয়ার বিষয়ে আবু মুসা অনুমতি চায়। তখন মওলানা আঃ রউফ সাহেব তাদেরকে বোমা পোতার অনুমতি দিয়ে লোক দুটিকে প্রয়োজনীয় নির্দেশ দিয়ে বোমা সহ উদীচির গানের অনুষ্ঠানে প্রেরণ করে। রাত ১২.৩০/১.০০ টার সময় উদীচির গানের অনুষ্ঠানে বোমা বিস্ফোরিত হয়। ১০/১২ জে ®mjL j¡l¡ যায় ও শাতধিক লোক আহত হয়। রাতে আমি আমার রুমে ছিলাম। মওলানা রউফ ও মুসাব মোড়ল, আবুল হোসেন, সাব্বির, শামসুল হক এর বাসায় ছিল। রউফ সাহেব, ওয়ালিউর রহমান ও আবদুল্লহ কে বোমা দিয়ে উদীচির অনুষ্ঠানে প্রেরণ করার পর আমি ঢাকার গাড়িতে মাগুরা চলে আসি।

বাংলাদেশ আওয়ামীলীগ ১৯৯৬ সালে রাষ্ট্রীয় আইনানুযায়ী দেশে প্রখ্যাত আলেমগন ইসলামী আইনানুযায়ী দেশে প্রচলিত বিচার ব্যবস্থার বাইরে দেশের বিভিন্ন সমস্যার বিষয়ে কোরআন ও হাদিসের আলোকে ফতোয়া দিয়ে বিভিন্ন জায়গায় অনুষ্ঠান করে। তাতে আওয়ামী সরকার বাধা দিলে উক্ত ফতোয়ার বিচারের বিরুদ্ধে হাইকোর্টে মামলা করলে হাইকোর্ট ফতোয়া দেয়া অবৈধ ঘোষণা করে। যাতে আলেম ওলামাদের ভবিষ্যতে ফতোয়া দেওয়া বন্ধ হয়ে যায়।

হাইকোর্টের রায় এখনও বলবৎ আছে। এছাড়া ব্রাহ্মণবাড়ীয়ায় একটি ফতোয়া জনিত ইসলামী জলসায়ে পুলিশ দিয়ে হামলা করে ইসলামী জলসা পন্ড করে দেয়। এর প্রতিবাদ করলে ৬(ছয়) জনকে গুলি করে হত্যা করে এবং বহু লোক আহত হয়। সেখানে বিখ্যাত আলেম মুফতী ফজলুল হক আমিনী সহ অনেককে গ্রেফতার করা হয়। এছাড়া বিভিন্ন কারণে মিরপুর ১১নং মহিলা মাদ্রাসা হতে প্রিন্সিপাল মওলানা শাফায়াত সহ ৪জনকে গ্রফতার করে জেল খানায় প্রেরণ Ll¡ quz ®j¡q¢jcfl lqj¡¢eu¡ j¡â¡p¡u He.¢S.J Hl HLটি ঘটনায় নুর মসজিদের ভিতরে মুসল্লীদের হামলা কালে সেখানে বাদশা নামক এক পুলিশ মারা যায় এবং অনেক মুসল্লী আহত হয়। এঘটনায় সাইখুল হাদিসসহ মাদ্রাসার শতাধিক ছাত্র গ্রেফতার হয়। এসব ঘটনায় দেশের আলেম ওলামারা মনে করেন যে, আওয়ামী লীগ ইসলাম বিদ্বেষী এবং এরা ভারতের দালাল হিসাবে করে ইসলাম ধ্বংস করার কাজে লিপ্ত। এ প্রেক্ষিতে ২০০০ সালের জুলাই মাসের প্রথমে মোহম্মদপুর সুপার মার্কেটের পার্শ্বে পূর্বের অফিসে মওলানা আব্দুর রউফ, মাওলানা সাবির আহমদ, হাফেজ ইয়াহিয়া, মওলানা আবু বকর, আবু মুসা ও আরো কয়েকজনের উপস্থিতিতে একটি আলোচনা সভা হয়। সভায় সিদ্ধান্ত qu ®k, Bওয়ামী লীগের নেতা কর্মীদের উপর হামলা করে তাদের প্রতিহত করে আলেম সমাজ তথা দেশ ও ইসলামকে বাঁচাতে হবে। এ সিদ্ধান্ত আমীর মুফতী শফিকুর রহমানকে মুগদা অফিসে যেয়ে মুফতী আঃ হাই ও আরো কয়েকজনের উপস্থিতিতে সিদ্ধান্ত জানানো হয়। উনি জবাবে জানান যে, তিনি হরকাতুল জেহাদের আরও কর্মকর্তাদের সাথে আলোচনা করে সিদ্ধান্ত জানাবেন। পরবর্তীতে দলের আমেলা (প্রেসিডিয়াম সদস্য) মওলানা আঃ রউফ, শেখ ফরিদ, হাফেজ ইয়াহিয়া, মওলানা আবু বকর, মওলানা সাব্বির আহম্মদ, মুফতী আঃ হাই এর উপস্থিতিতে মুফতী শফিকুর রহমান আওয়ামী লীগকে প্রতিহত করার সিদ্ধান্ত দেয়। উক্ত নেতাগন আমাদেরকে নিয়ে মুগদার ঐ অফিসে আমি, আবু মুসা, মওলানা আঃ রহমান, জাহাঙ্গীর বদর সহ কয়েকজন বসে আলোচনা করে। আলোচনা শেষে কোটালী পাড়ায় শেখ হাসিনা দরিদ্র বিমোচন কর্মসূচীর সভায় গেলে তাকে হত্যা করার জন্য বোমা পাতার সিদ্ধান্ত হয়। সে মোতাবেক ইয়াহিয়া বিস্ফোরক সংগ্রহ করে খুলনায় আবু মুসা ও সাব্বিরের নিকট দিবে সিদ্ধান্ত হয়। বোমা তৈরীর অন্যান্য সরঞ্জাম আবু মুসা এ সাব্বির স্থানীয় ভাবে সংগ্রহ করবে সিদ্ধান্ত হয়। সবকিছু সংগ্রহ শেষ হলে আবু মুসা, মওলানা সাব্বির বোমার সরঞ্জাম সহ ঘটনার ৪/৫ দিন পূর্বে গোপালগঞ্জে আমার সাবান কারখানায় আসে। ১৬ এবং ১৭ জুলাই ২০০০ তারিখ রাতে আমার সাবান কারখানার ভিতরে পর্দা ঘেরা রুমে বসে আমার উপস্থিতিতে আবু মুসা, সাব্বির, নুর ইসলাম (আবার p¡h¡e L¡lM¡e¡l Lj¤Q¡l£) ®p jpmj¡e f¡s¡ BJu¡j£ m£N ®ea¡ Q¡e ¢ju¡l h¡s£ ®L¡V¡m£ f¡s¡ Hl h¡p¡l e£Q তলায় ভাড়া থাকত। তারা দুটি বোমা ফিটিং করে। ১৯ তারিখ সন্ধ্যার পর সাবান কারখানার কর্মচারী তারেক, হাসান, নুর ইসলাম, সাব্বির ও রাশেদ ড্রাইভার সাবান কারখানার গাড়ীতে করে বোমা দুটি নিয়ে কোটালীপাড়ায় যায় ও আমার সাবান বিক্রীর দোকানে জড়ো হয়। আমি ও আবু মুসা মোটর সাইকেলে করে কোটালী পাড়ায় যাই। রাত ১২.০০ টার পর আমার নির্দেশে নুর ইসলাম, তারেক, মুসা, সাব্বির মিলে গর্ত করে একটি বোমা স্টেজের পূর্ব পার্শ্বে ওয়াল ও রাস্তার পর পুকুরের কিনারে রাখে। বোমাটির তার একটি টং চার দোকানের নীচ দিয়ে পুকুরে রাখে। অপর একটি বোমা হেলিপ্যাডের কাছে রাস্তায় পূর্ব পার্শ্বে গর্ত করে পুতে রাখে। বোমার তার পুকুরের মধ্য নিয়ে রাখে। আমি ও রাশেদ রাস্তায় দাড়িয়ে পাহারা ও বোমা পাতার তদারকী করি। বোমা পাতার গর্ত করাকালে ২ জন ভ্যান চালক রাস্তার পার্শ্ব দিয়ে যাওয়ার সময় গর্ত করা দেখতেছিল। বোমা পাতা শেষ হলে ফজরের আজান হয়। আমরা সবাই গোপালগঞ্জে চলে আসার সময় পথে ফজরের নামাজ পড়ি। আমি বোমা পাতার সংবাদ আমীর সাহেবকে দেয়ার জন্য ঢাকা আসি। আমি মুফতী শফিকুর রহমান ও আবদুল হাইকো কোটালীপাড়ায় শেখ হাসিনার সভার কাছে বোমা পাতার সংবাদ দিয়ে কিছু প্রয়োজনীয় মালামাল কিনে গোপালগঞ্জে চলে যাই। গোপালগঞ্জে পৌছে জানতে পারি যে, আমাদের পাতা বোমার মধ্যে মঞ্চের কাছের বোমাটি পুলিশ উদ্ধার করেছে। এ সংবাদে আমি পরে ব্রিফ কেস নিয়ে কাপড় চোপড় সহ পুনরায় ঢাকা চলে আসি। আসার সময় আমি কর্মচারীদেরকে কারখানায় থেকে কাজ করতে বলি।

ঢাকা মহানগরীর দায়িত্বে থাকা আমাদের সংগঠনের রনাঙ্গন শিল্প গোষ্ঠীর সভাপতি হাফেজ আবু তাহের, ঢাকার jJm¡e¡ ®nM g¢lc Hl ¢eLV 1m¡ °hn¡খ রমনা বটমুলে গানের অনুষ্ঠান চলাকালে অনুষ্ঠান বন্ধ করার লক্ষ্যে বোমা বিস্ফোরন করার জন্য প্রস্তাব আসে। শেখ ফরিদ মোহম্মদপুর শিয়া মসজিদ ও রহমানিয়া মাদ্রাসার মাঝামাঝি স্থানে মহানগর অফিসে আসে। মওলানা আবদুর রউফ, ইয়াহিয়া, সাব্বির, জাহাঙ্গীর বদর, আবু বকর এবং আমি ও আরও কয়েকজনের উপস্থিতিতে শেখ ফরিদের মাধ্যমে তাহেরকে রমনা বটমুলে ১লা বৈশাখ (২০০১) অনুষ্ঠানে বোমা বিস্ফোরনের আদেশ দেয়া হয়। তাহের তার লোক নিয়ে কাজ করবে। এরপর বিষয়টির উপর আলোচনাক্রমে সিদ্ধান্ত হয় যে, বিষয়টি দলের আমীর মুফতী শফিকুর রহমানের অনুমতি ছাড়া করা ঠিক হবে না। যা করতে হয় তার অej¢a নিয়ে করতে হবে। এরপর শেখ ফরিদ, আবু বকর ও জাহাঙ্গীর বদর বিষয়টি নিয়ে আমীর সাহেবের নিকট আলোচনা করে অনুমতি নেয়ার জন্য যায়। পরে আমি শেখ ফরিদের নিকট জানতে পারি যে, আমীর সাহেব এভাবে অনুমতি দিয়েছে যে, হালকা বিস্ফোরণ ঘটাতে হবে, যাতে লোকজনের ক্ষতি না হয়। আরো জানতে পারি যে, আমীর সাহেব বোমা তৈয়ার দায়িত্ব দেয়। সাব্বির, জাহাঙ্গীর বদর এর উপর এরা বোমা তৈরী করে তাহেরকে দিবে। নির্দেশ মোতাবেক ওরা বোমা তৈরী করে তাহেরকে দেয়। তাহের, হাসান (ঢাকা কলেজে পড়ে) ওমর ফারুক (ঢাকা কলেজে পড়ে) ও আরও ৪/৫ জনকে দিয়ে রমনা বটমূলে ১লা বৈশাখের গানের অনুষ্ঠান চলাকালে বোমা পেতে বিস্ফোরন ঘটায়। ঐ বিস্ফোরনে লোকজন হতাহত হয়।

২০০১ সালে আমাদের সংগঠনের কর্মী সিলেটের জাফর (ফেঞ্চুগঞ্জ) এর মাধ্যমে জানতে পারি যে, শেখ হাসিনা নির্বাচনী জনসভা করার জন্য সিলেটে যাবেন। তার জনসভায় বোমা পাতার জন্য আলোচনা হয়। উক্ত আলোচনা ®j¡qম্মদপুর নুরানী মাদ্রাসার অফিসের সামনে হয়। উক্ত আলোচনায় আমি ছাড়াও মওলানা আবু সাইদ (গফর গাঁও), আবু মুসা, লোকমান (খুলনা), আবু বকর (সিলেট), ডালিম (চ–N‡), Jh¡ucõ¡q (®ge‡), el Cpm¡j (Mme¡) R¡S¡ কয়েকজন উপস্থিত ছিল। জন সভায় আলোচনাক্রমে শেখ হাসিনার সিলেটের জন সভায় বোমা হামলা করে তাকে হত্যা করার সিদ্ধান্ত হয় এবং উক্ত কাজের জন্য বোমার সরঞ্জাম সংগ্রহ করে সিলেটে নেবার দায়িত্ব দেয়া হয় মওলানা সহিদ, আবু মুসা, লোকমান, আবু বকর ও ডালিমকে। তাদের সাথে আবু সাইদ, নুর ইসলাম, ওবায়দা (ফেনী) ও আরো ২/১ জন যায়। এরা সিলেটে যেয়ে ডাক্তার রেফার ল্যাবের কর্মচারী আলালের মাধ্যমে তার বাসায় যেয়ে উঠে। তারা সিলেটে যেয়ে শেখ হাসিনার সভায় বোমা বিস্ফোরনের সুযোগ না পেয়ে ডাক্তার রেফার বাসায় যেয়ে বোমা খোলার সময় বিস্ফোরন ঘটে। তাতে আবু মুসা ও লোকমান মারা যায় এবং কয়েকজন আহত হয়।

আমাদের সংগঠনের মনির বাড়ী গাজীপুর। আমাকে পল্টনের অফিসে এসে জানায় যে, তাজ উদ্দিন নামে তাদের আত্মীয় আছে। সে বায়তুল মোকারম এর উত্তর গেটে দেখা করতে বলেছে। কিছু গুরুত্বপূর্ন কথা আছে। আমি ও মনির ২০০৩ সালের শুরুতে একদিন বিকাল বেলা বায়তুল মোকারম যেয়ে আসরের সময়ে উত্তর গেটে তাজউদ্দীনের সাথে দেখা L¢lz aMe Lb¡h¡র্তা বলায় জানতে পারি সেও জেহাদের হিতাকাঙ্খী। সে এ বিষয়ে পাকিস্তানের মাদ্রাসায় লেখা পড়া করেছে। সে প্রস্তাব করে যে, কিছু মালামাল (গ্রেনেড) দেশের বাইরে পাঠাবে। তাজউদ্দীন বলেন সব আলোচনা এখন দরকার নাই। আমরা আবার বসবো। সে আমাকে বলে যে, আগামীকাল মোহাম্মদপুর সুপার মার্কেটে আসেন। সে আমাকে বলে যে, আগামীকাল মোহাম্মদপুর সুপার মার্কেটে আসেন। তখন থেকে আমাকে নিয়ে আলোচনা করবেন। আমি পরের দিন মোহাম্মদপুর বাসষ্ট্যান্ডের কাছে সুপার মার্কেটে যাই। যেখান থেকে তাজউদ্দীন আমাকে নিয়ে তার মোহম্মদপুর গ্লাস ফ্যাক্টরীর কাছে ভাড়া করা বাসায় নিয়ে যায়। সেখানে নীচ তলায় ২টি রুম আছে। তার একটি রুমে আমাকে নিয়ে একটি কাগজের কার্টুন দেখিয়ে বলে যে, এর মধ্যে গ্রেনেড আছে। এগুলি কলকাতা পাঠাবো। কলকাতায় পাঠানোর দায়িত্ব আমাকে দেয়। সেখান থেকে তাজউদ্দীনের লোক অন্যত্র নিয়ে যাবে। আমি যেহেতু আফগানিস্তানের যুদ্ধে ছিলাম এবং পাকিস্তানে লেখাপড়া করেছি তাই সে আমাকে বিশ্বাস করেছে। গ্রেনেড পাঠানোর বিষয়ে আমি বলি যে, দেখি লোকজন জোগাড় করতে পারি কিনা? এরপর আমি চলে আসি। মওলানা আবু সাইদ মোহম্মদপুর নুরানী মাদ্রাসায় শিক্ষকতা করতো। আমি তার সাথে দেখা করে বিষয়টি জানাই এবং লোক দিয়ে গ্রেনেড পাঠাতে পারবো বলি। p¡Cc p¡হেব বলেন যে, তাজউদ্দীনকে সে চিনে এবং তার সাথে দেখা করালে তিনি আলোচনা করবেন। একদিন পর সাইদ ভাইকে নিয়ে তাজউদ্দীনের সাথে যোগাযোগ করলে তিনি ধানমন্ডির একটি হাসপাতালে তার আত্মীয় চিকিৎসাধীনে থানায় ঐ হাসপাতালে দেখা করতে বলেন। আমি ও সাইদ সাহেব মাগরীবের নামাজের সময় ঐ q¡সপাতালে তাজউদ্দীনের সাথে দেখা করে গ্রেনেড পাঠানোর বিষয় আলোচনা করি। তাজউদ্দীন বলেন যে, অল্প অল্প করে সামনে (গ্রেনেড) নিয়ে এক জায়গায় জমা করতে হবে। সেখানে তার লোক বিদেশে নিয়ে যাবে। সাইদ ভাই বলেন যে, পরে পরে এগুলি নিয়ে যাওয়া রিক্স আছে। একবার বর্ডারে নিয়ে গেলে রিক্স কম থাকে। ওখান থেকে অল্প করে নিয়ে বিদেশে যাওয়া যাবে। আমি তখন আবু জান্দাল (নড়াইল) মাল (গ্রেনেড) প্রেরণের জন্য চেষ্টা করিতে বলি। সে তার এক বন্ধু বাড়ী সাতক্ষীরাকে লাইন করতে বলে। তখন সে জানায় যে, তার ভগ্নি পতির কোলকাতা বাড়ী। সাতক্ষীরায় থাকে। সে তাকে নিয়ে আসতে পারবে। সে বিশ্বাসী লোক। জান্দালকে আমি বলি তার বন্ধুর ভগ্নিপতিকে ঢাকায় নিয়ে আসতে বললে তাকে ঢাকায় নিয়ে আসে। তার সাথে মালামাল (গ্রেনেড) বিদেশে পাঠানোর বিষয়ে আলাপ করে বলে যে, ঢাকা হতে মালামাল (গ্রেনেড) নিতে হবে। তাজউদ্দীন বলে আপনি থাকবেন আপনার লোকও থাকবে। aMe ®p I¡S‡ quz ¢hou¢V a¡SEŸ‡নকে জানিয়ে আলোচনার প্রস্তাব করলে সে সেখানে সোবাহান বাগ ডেন্টাল কলেজের হোষ্টেলের সামনে একটি বড় মসজিদে আসতে বলে। সেখানে যেয়ে তাজউদ্দীনের সাথে লোকটিকে আলাপ করিয়ে দিলে মালামাল প্রেরনের বিষয়ে উভয়ে রাজী হয়। এরপর তারা চলে গেলে তাজউদ্দীন, আবু জান্দাল ও আমি b¡¢Lz a¡SEŸ‡e বলে যে, মালামাল বহনের জন্য আমি দুটো ব্যাগ দিচ্ছি এগুলো নিয়ে যান। আমাকে ও আবু জান্দালকে নিয়ে চকবাজারে তাজউদ্দীনের তার কারখানায় যায়। সেখান হতে আমাদেরকে মোটা কাপড়ের দুটো ব্যাগ দেয়। আমরা ব্যাগ নিয়ে বা—া অফিসে আসি। তাজউদ্দীন তার মতো চলে যায়। তাজউদ্দীন পরের দিন আমাদেরকে তার যে রুমে মালামাল ছিল সে রুমে যেতে বলে। আমরা বলি সুপার মার্কেটে আমরা থাকবো। ওখান থেকে আমাদেরকে নিয়ে যেতে বলি। পরের দিন জোহরের পর আমি ও আবু জান্দাল মোহম্মদপুর সুপার মার্কেটে আমরা থাকবো। ওখান থেকে আমাদেরকে নিয়ে যেতে বলি। পরের দিন জোহরের পর আমি ও আবু জান্c¡m ®j¡q¢jcfl সুপার মার্কেটে গেলে সেখান হতে তাজউদ্দীন আমাদেরকে তার বাসায় নিয়ে যায়। তাজউদ্দীন তার বাসায় পেটি খুলে গ্রেনেডের কাপড়ের ব্যাগ সহ প্রথম ৩টি ব্যাগ দেয়। প্রতি ব্যাগে ৮টি করে গ্রেনেড ছিল। আমরা বলি প্রতি ব্যাগে ০২টি করে দেন। তখন আরো একটি গ্রেনেড ভর্তি ব্যাগ দেয়। মোট ৩২ টি গ্রেনেড ব্যাগে রাখা হয়। ব্যাগটিতে গ্রেনেড রাখার পর ভর্তি না হওয়ায় কাপড় চোপড় দিয়ে ভর্তি করতে বলি এবং আরও বলি যে, আমি বারে বারে আসতে পারবো না। তাছাড়া এখন সাতক্ষীরা যাবার গাড়ী পাওয়া যাবে না। সকালে আবু জান্দাল ও সাতক্ষীরার লোকটি এসে গ্রেনেড নিয়ে যাবে। টাকা পয়সা ভাড়া যা লাগে দিয়ে দিতে বলে আমি চলে আসি। আবু জান্দাল ও সাতক্ষীরার লোকটি পরের দিন

মালামাল (গ্রেনেড) সাতক্ষীরা নিয়ে যায়। তাজউদ্দীন মালামাল (গ্রেনেড) সাতক্ষীরা রাখার জন্য বলে এবং বলে যে, তার লোক গ্রেনেড বিদেশে নিয়ে যাওয়ার লোক ঠিক করতেছে। আবু জান্দাল ও সাতক্ষীরার লোকটি আরJ ¢LR মালামাল নিয়ে সাতক্ষীরা জমা করতে থাকে। কত গ্রেনেড নেয় তার পরিমান আমার জানা নাই। ইতি মধ্যে ভারতের কোলকাতার একজন লোকের সাথে তাজউদ্দীনের সরাসরি যোগাযোগ হয়। পরে আবু জান্দালকে দিয়ে ৩২টি গ্রেনেড মোহম্মদপুর থেকে hj—ায় মাদ্রাসার একটি কক্ষে ওয়াল ওয়ার ড্রপের মধ্যে রেখে দেই। কেননা ইতিমধ্যে বর্ডারের সাথে আপাততঃ আমাদের সাময়িক বিচ্ছিন্ন হয়েছিল।

সিলেটের বিপুল আমাদের হরকাতুল জেহাদের সদস্য এবং সিলেটের নেতা ছিল। সে ১৯৯৯ সালে লিবিয়া চলে যায়। ২০০২ সালের ডিসেম্বরে দেশে ফেরৎ এসে ২০০৩ সালে আমিন বাজারের সাইদ নামে এক ব্যক্তির নিকট হতে আমার ¢WLjনা নিয়ে আমার বা—ার মাদ্রাসার অফিসে দেখা করে এবং সংগঠনের কাজের বিষয়ে আলোচনা করে। ২/৩ দফায় এ রকম আলোচনার পর ২০০৪ সালের প্রথমদিকে সংগঠনের জেহাদের কাজের বিষয় আলোচনার সময় বলে যে, সংগঠনের কাজ করতে হলে আমাদের কিছু মালামাল (গ্রেনেড) দরকার। তখন আমি বলি যে, ইসলামী ঐক্য জোট হতে আমাদেরকে বলা হয়েছে যে, দেশে বোমাবাজী হয়ে লোকজন মারা গেলে সরকারের দুর্নাম হয়। বোমাবাজী সম্পূর্ণ ভাবে নিষেধ করে দিয়েছে। তবে আমার কাছে কিছু গ্রেনেড আছে যেহেতু আমাদের সংগঠন আওয়ামীলীগের বিরুদ্ধে কাজ করে তাই সিলেট এলাকায় আওয়ামীলীগ নেতাদের উপর আক্রমন করার জন্য বিপুলকে সময় মত আমাদের নিকট হতে গ্রেনেড নেওয়ার জন্য বলি। এরপর সে চলে যায়। বিপুল ২০০৪ সালের ফেব্রুয়ারী মাসের প্রথম দিকে সুনামগঞ্জের হাফেজ নাইমুর রহমানকে ঢাকায় গ্রেনেড নেবার জন্য পাঠায় এবং আমাকে টেলিফোনে জানায়। নাঈম আমার অফিসে আসলে আহসান উল্লাহ কাজল ও মফিজুর রহমান ওরফে অভি তার সাথে কথা বলে। জোহরের নামাজের পর আমি অফিসে যাই। ৪/৫ মিনিট পর কাজল নাইমকে আমার রুমে নিয়ে আসে। তার সাথে পরিচয় হবার পর আমি বলি আপনি যে, জিনিসের জন্য আসছেন বিপুল আমাকে বলেছে। কাজল আপনাকে ০৫টি গ্রেনেড দিবে। আপনি জিনিস নিয়ে চলে যাবেন। ২০০৪ সালের এপ্রিল মাসের দিকে বিপুল ও রিপন আমার ঢাকার বা—ার অফিসে আসে। কাজল আমাকে ফোনে জানায় যে, বিপুল ও রিপন গ্রেনেড নিতে এসেছে। কাজলকে বলি অফিসে আর কে আছে? কাজল বলে যে, মফিজ ও মঈন ওরফে জান্ডাল ভাই আছে। আমি বিপুলকে ০৪টি গ্রেনেড দেবার জন্য কাজলকে নির্দেশ দেই। কাজল বিপুলকে ০৪টি গ্রেনেড দিয়ে আমাকে জানায়। আমার সরবরাহ করা গ্রেনেড দিয়ে বিপুল ও রিপন সিলেট হযরত শাহ জালাল (রঃ) এর দরগায়ে বৃটিশ হাইকমিশনারকে হত্যা করার জন্য গ্রেনেড নিক্ষেপ করে তাতে ০৩ জন jjIj kju Hhw 60/70 Se Bqa quz এছাড়া গ্রেনেড দিয়ে বিপুল, হেমায়েত ও ফাহিম সিলেট শহরে হোটেল গুলশie চত্বরে মেয়র কামরান সাহেবকে হত্যা করার জন্য এবং জেবুন্নেসার বাসায় জেবুন্নেসাকে হত্যা করার জন্য গ্রেনেড নিক্ষেপ করে । সেখানেও লোকজন হতাহত হয়। গ্রেনেড নিক্ষেপের ফলাফল বিপুল আমাকে টেলিফোনে জানায়।

উল্লেখ্য যে, আমাদের সংগঠনের জন্য চ–গ্রামের ইউনুস বিন শরীফ (বাংলাদেশী নাগরিক সৌদিতে থাকেন), মুফতী শফিকুর রহমান (ভৈরব), আঃ হাই আল হারভী (কুমিল্লা) এরা বিদেশে থেকে ফান্ড এনে আমাদেরকে টাকা পয়সা যোগান দিত। ঐ টাকা পয়সা দিয়ে বাংলাদেশের ভিতর ও বাইরে থেকে অস্ত্র গোলাবারুদ ক্রয় করা হত এবং মায়ানমারের আরকানের ছজঘ এবং ছউঘ-কে সহযোগীতা করা হত। এই আমার hš²hÉz”

[Underlines Supplied]

219. Accused Delwar Hossain Ripon, Sharif Shahidul Alam Bipul and Mufti Abdul Hannan after long laps of time at the fag end of the trial that is on 07.12.2008, 15.12.2008 and 04.12.2008 respectivly by filing separate applications retracted their statements stating *inter-alia* that while they were on police remand they were seriously tortured and compelled to make such statements before the concerned Magistrates. At the time of examination under section 342 of the code of criminal procedure the said accused persons also reiterated their above assertions made in the application for retraction.

220. PW-47, Md. Noor-e-Alam Siddique, the Magistrate who recorded the statement of accused Md. Sharif Shahidul Alam @ Bipul and Delwar Hossain Ripon, testified that he having complied the mandatory provisions of law recorded the statement of said accused persons. He categorically testified to the effect:

“তাহাদেরকে চিন্তাভাবনার জন্য পর্যাপ্ত সময় প্রদান করি এবং বিধিমোতাবেক যথাযথ সতর্কতা ও অভয়বাie¡ fËae করি। তাহারা স্বেচ্ছায় দোষ স্বীকারমূলক বিবৃতি প্রদান করায় আমি তাহাদের উভয়ের বিবৃতি সঠিক ভাবে ও যথাযথভাবে লিপিবদ্ধ করি এবং বিবৃতি লিপিবদ্ধ করিবার পর লিপিবদ্ধকৃত বিবৃতি তাহাদেরকে পাঠ ও ব্যাখ্যা করিয়া শোনাইলে তাহারা উভয়ে শুদ্ধস্বীকারে নিজ নিজ বিবৃতিতে স্বাক্ষর করেন এবং তৎপর আমি উক্ত লিপিবদ্ধকৃত বিবৃতিতে ü¡r l fËae L¢lz”

221. PW-47 was corss-examined by the accused persons and he denied the defence suggestions that he recorded the statements violating the mandatory provision of section 164 of the Code of Criminal Procedure. The defence failed to shake his testimonies in any manner. The learned defence Advocate having drawn our attention to exhibit-9(ka) submitted that the Magistrate recorded the said statement beyond the period of his office hour and as such it also created doubt about its character of truth and voluntariness.

222. It appears from exhibit 9(Ka) that accused Delwar Hossain Bipul was produced before the Magistrate (PW-47) at 7.00 A.M. The Magistrate having given 03(three) hours time for reflection to the said accused recorded his statement and sent him to central jail, Sylhet at 11.00 A.M. As such there is no scope to say that the Magistrate recorded the statement of accused Bipul prior to the office hour.

223. Further, recording of a statement of an accused beyond the period of office hour can not be a plea to hold that the said statement is not true and voluntary. If the said statement is found that same was recorded by the concerned Magistrate having compiled with all the provisions of law then there is no room to say that the said statement is not true and voluntary.

224. From exibit-9 and 9(ka) it also appears that before recording the statements under section 164 of the code of Criminal procedure of the respective accused persons the Magistrate (PW-47) asked the following question to the concern accused persons:

"01z	আমি পুলিশ নই, ম্যাজিষ্ট্রেট জানেন কি?	E: qÉ¡
02z	আপনি দোষ স্বীকার করতে বাধ্যনন, জেনেও দোষ স্বীকার করবেন কি?	E: qÉ¡ LIhz
03z	আপনার স্বীকারোক্তি আপনার বিরুদ্ধে সাক্ষ্য হিসাবে ব্যবহৃত হতে পারে তা জেনেও দোষ স্বীকার করবেন কি?	E: ‰SÅLIhz
04z	স্বীকারোক্তি প্রদানের জন্য আপনাকে কেউ কোন প্রকার ভয়ভীতি, লোভ দেখিয়েছে কি?	উ: না। স্বেচ্ছায় বলব।
05z	আপনি স্বীকার না করলেও আপনাকে আর পুলিশের Remand-এ দেয়া হবে না। তা জানার পরও দোষ স্বীকার করবেন কি?	E: S¡ÅLIhz
06z	আপনি সত্য বলবেন কি?	E: S¡Åhmhz"

225. It also evident that the Magistrate having completed the recording of the respective statements certified to the effect:

"আসামীকে তার কথিত মতে কাঃ বিঃ ১৬৪ ধারা মূলে লিখিত জবানবন্দি স্বীকারোক্তিমূলক জবানবন্দি পাঠ করে ও ব্যাখ্যা করে শুনানো হল। আসামী সত্য ও শুদ্ধ স্বীকার স্বাক্ষর করলেন।"

226. The Magistrate also filled up column no.8 in the following manner:

"আসামীকে বাহ্যিকভাবে আমার নিকট সুস্থ মনে হয়েছে।"

227. And the Magistrate filled up column No.9 on the following manner:

"আসামীকে ০৩ (তিন) ঘন্টার অধিক সময় দেওয়ার পর সে স্বেচ্ছায় এই স্বীকারোক্তিমূলক জবানবন্দি প্রদান করেন।"

228. In view of the above, there is hardly any scope to say that the Magistrate recorded the statements of the accused Bipul and Ripon violating the mandatory provisions of law. And as such we have no hesitation to hold that the confessional statements made by accused Bipul and Ripon under section 164 of the Code of Criminal Procedure are true and voluntary.

229. PW-49, recorded the statement of accused Mufti Abdul Hannan. He testified that he recorded the statement of accused Mufti Abdul Hannan, exhibit-9(Kha), in connection with Dhaka Metropolitan Ramna Police Station Case No.46(4)2001. And he having observed all the legal requirements as provided in section 164 and 364 of the Code of Criminal Procedure recorded the said statement. After recording the said statement he in the memorandum put his signature.

230. He further testified to the effect:

"আমার বিশ্বাস হইয়াছে আসামী স্বেচ্ছায়, স্বজ্ঞানে ও নিঃশর্তে এবং বিনা প্ররোচনায় এই স্বীকারোক্তিমূলক জবানবন্দি প্রদান করিয়াছে।"

231. In cross examination the defence failed to shake the above positive assertion of the PW-49.

232. From exahibit-9(Kha) it also appears that before recording the said statement he put the following questions to accused Mufti Abdul Hannan;

" 01z	আমি পুলিশ নই, একজন ম্যাজিস্ট্রেট জানেন কি?	Ex Si‡ez
02z	আপনি স্বীকারোক্তি দিতে বাধ্যনন, জানেন?	Ex Si‡ez
03z	যদি স্বীকারোক্তি দাও তবে তোমার বিরুদ্ধে যেতে পারে-সাজা হতে পারে জান?	Ex Si‡ez
04z	a‡j ®Le স্বীকারোক্তি দিবে?	Ex ki Si‡e a¡C hmhz
05z	অন্যের শেখানো কথায় স্বীকারোক্তি দিবে নাতো?	Ex e¡z
06z	আপনি প্রকৃত পক্ষে যা জানেন তাই বলবেন তো?	Ex S¡Z
07z	পুলিশ আপনাকে শারিরীক ও মানষিক ভাবে নির্যাতন করে নাই তো?	Ex e¡z
08z	আপনি স্বেচ্ছায়, সজ্ঞানে, নিঃশর্তে নির্ভয়ে বিনা প্ররোচনায় স্বীকারোক্তি দিবেন তো?	Ex ‡SZ¨Ei z
09z	আপনি স্বীকারোক্তি দিন আর নাই দিন আপনাকে আর পুলিশ হেফাজতে নেয়া হবে না।	Ex hTm¡jz"

233. It also reveals from exhibit 9(Kha) that after recording the said statement PW-49 had given certificate to the following manner:

"এই মর্মে প্রত্যয়ন করা যাচ্ছে যে, আমি আসামীকে বুঝিয়ে দিয়েছি যে, আমি একজন ম্যাজিস্ট্রেট-f‡mn eCz ki বলবে স্বেচ্ছায় বলবে। খনশঢ়তর ক্ষনপরনঃভষশ এর জন্য আসামীকে ০৩(তিন) ঘন্টার সময় দেওয়া হয়। অতঃপর তার জবানবন্দি রেকর্ড করা হয়। জবানবন্দি রেকর্ডের সময় আসামী শাররিক ও মানসিক ভাবে সুস্থ ছিল। আমার বিশ্বাস আসামী স্বেচ্ছায় তার বক্তব্য প্রদান করেছে।

স্বীকারোক্তি লিপিবদ্ধ করার পর আসামীকে তা পড়ে শুনানো হলে সে, সত্য স্বীকারে স্বাক্ষর করে।"

234. PW-49 filled up the column no. 8 to the following manner:

"আসামীর দেহে কোন জখম বা নির্যাতনের চিহ্ন ছিল না। সে শারিরীক ও মানসিকভাবে সুস্থ ছিল। Mantel reflexion এর জন্য আসামীকে ০৩(তিন) ঘন্টা সময় দেওয়া হয়। অতঃপর তার জবানবন্দি রেকর্ড করা হয়। আসামী দৃষ্টিসীমার মধ্যে কোন পুলিশ ছিল না। আমার বিশ্বাস আসামী স্বেচ্ছায় তার স্বীকারোক্তি দিয়াছে।"

235. In view of the above, we have also no hesitation to hold that the confessional statement under section 164 of the Code of criminal procedure made by accused Mufti Abdul Hannan is true and voluntary.

236. It is true that the expression '**confession'** has not been defined in the Evidence Act. 'Confessions' a terminology used in the criminal law is a species of 'admissions' as defined

in Section 17 of the Evidence Act. An admission is a statement-oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. Broadly speaking, confession is an admission made at any time by a person charged with crime, stating or suggesting an inference that he committed the crime. A confession or an admission is evidence against its maker if its admissibility is not excluded by some provision of law.

237. On careful examination of exhibit-9(Kha) it appears that in the confessional statement accused Mufti Abdul Hannan confessed his guilt in committing similar nature of different offences in different places.

238. It will be pertinent to reitarate the well settled principle that a confession is admissible provided it is free and voluntary but it does not mean that a mere bald assertion by the accused that he was threatened or tortured or that an inducement was offered to him, can be accepted as true without any thing more. The suggestion must be rejected when there is no material whatsoever to hold that the prisoner was threatened or beaten and the story of tortur is, on the face of it incredible.

239. It is also well settled that judicial confession, if is found to be true and voluntary, can be formed basis of conviction as against the maker of the same. [Reference: Islam Uddin Vs State, 13 BLC(AD), Page-81; State vs. Abdul Kader alias Mobile Kader, 67 DLR (AD), Page-6].

240. It was argued by the learned Advocate for accused Abdul Hannan that the statement of Mufit Abdul Hannan was not made in connection with present case and as such the same is not admissible in evidence.

241. It is true that exhibit 9(Kha) was made by accused Abdul Hannan in connection with Dhaka Metropolitan Ramna Police Station Case No. 46(4)2001.

242. It appears from the record that said confessional statement was sent to the investigating officer of the present case [PW-53] by the office of GRO (South), Chief Metropolitan Magistrate Court, Dhaka vide memo no.607-41 dated 14.01.2007 and the concerned Magistrate of the Court of Chief Judicial Magistrate, Sylhet had endorsed the same.

243. Section 63 of the Evidence Act runs as follows:

63. Secondary evidence-Secondary evidence means and includes-

(1) certified copes given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral account of the contents of a document given by some persons who has himself seen it.

244. Law clearly provides that photostat copy of its original being the secondary evidence is admissible in evidence.

245. In the case of **State of Maharashtra Vs Kamal Ahmed Mohammad Vakil Ansary, reported in (2013)12 SCC page-17**, it has been held that confessional statement made by the accused in a case would be admissible in another case, if he is an accused in both the cases.

246. Similar view has been expressed by the Supreme Court of India in the case of **State of Gujarat Vs Mohd. Atik and others, reported in AIR 1998 SC, page-1686**.

247. In the above case it has been held that if the requirements of law are satisfied the confession becomes admissible in evidence and it is immaterial wheather the confession was recorded in one particular case or in a different case.

248. In the case of **Syed Mohammad Ibrahim and others Vs State of Karnataka.**

[Source: https://indiankanoon.org/doc/73469817/] the accused persons of the said case were put on trial in 04(four) cases where bombs were blasted at 04(four) different places. Syed Hasanuzzaman one of the accused of the case made confessional statement which is common to all 04(four) cases. The certified copies were obtained from those original and same were produced and marked in 03(three) other cases. The **High Court of Karnataka at Bengaluru** held that:

> "In such circumstances law provides for production of secondary evidence. The certified copies are obtained from the same court and they are marked in 03(three) other cases, which is permissible in law and the secondary evidence is admissible in evidence. Therefore we do no find any substance in the contention of the learned council for the accused that the original were not producing and hence secondary evidence is inadmissible in evidence."

249. In the instant case PW-49 the recording Magistrate himself proved the Photostat copy of the original [exhibit-9(Kha)] and the signatures of him and accused Abdul Hannan respectively thereon. Moreover, on behalf of accused Abdul Hannan the veracity of the said document had never been challenged. The accused only in a belated stage retracted the same stating that the same was the out put of prolonged remand and torture.

250. It is well settled that the document having been marked as an exhibit without objection became admissible in evidence. **[Referrence: Abdullah Vs. Abdul Karim, 20 DLR (SC) page-205]**

251. Having discussed and considered as above, we are of the view that exhibit-9(Kha) is very much admissible in evidence.

252. It will be pertinent to mention here that in the instant case most of the documentants exhibited by the prosecution are the Photostat Copies of originals including exhibit 9 and 9(Ka), the confessional statements of accused Ripon and Bipul. The defence did not rasied any objection as to the genuineness of those documents and without any objection those were marked as exhibits. However, the concerned persons of those documents proved the genuineness of the same. As such, those documents are admissible in evidence.

253. The learned defence Advocate has tried to impress us that the accused persons who made the alleged confessional statement subsequently retracted those and at the time of examination under section 342 of the Code of Criminal procedure they categorically stated that the said statements were obtained by torture.

254. It is well settled proposition of law that the retraction of the confession was wholely immaterial once it was found that it was voluntary as well as true. **[Reference: Joygun Bibi Vs State 12 DLR (SC) page-156, Abdul Jalil and others Vs State, 1985 BLD page-137, State Vs Rafiqul Islam 55 DLR page-61].**

255. In a recent case, **State Vs. Abdul Kader alias Mobile Kader, reported in 67 DLR (AD) Page-6**, the Appellate Division held that retraction of a confession has no bearing whatsoever if it was voluntarily made so far the maker is concerned.

256. As such the argument advanced by the learned Advocate for the accused persons that a retracted confession can not be admissible in evidence has no legs to stand**.**

257. Whether, PW-48 Md. Abul Kalam Azad is a credible and trust worthy witness- Mr. Mohammad Ali the learned Advocate for the defence has tried to convince us that PW-48 is not a credible and trustworthy witness. He was examined by the investigating officer long after three years of the alleged occurrence and his contradictory statement makes him unrealiable and his evidence should be left out of consideration.

258. If, we scan the evidence of PW-48 coupled with the confessional statements made by accused Sharif Shahidul Alam Bipul, Md. Delwar Hossain @ Ripon and Mufti Abdul Hannan [exhibit-9, 9(Ka) and 9(Kha)] then it would be crystal clear that PW-48 corroborate the incriminating and material parts regarding the offence of the said statements.

259. PW-48 testified that:

> ‘‘২০০৪ইং সনের এপ্রিল মাসের প্রথম দিকে একদিন সন্ধ্যার পর আহসান উল্লাহ, মুফিজ, আবু জান্দাল ও আমি ঐ বাসাতে বসিয়াই কথা বার্তা বলিতেছিলাম। ঐ সময় বিপুল আসে এবং বিপুলের সহিত আরও একজন লোক আসে। ঐ লোকটির হাতে কম্পিউটারের একটি বাক্স ছিল। তখন আহসান উল্লাহ কাহাকে যেন মোবাইল ফোনের মাধ্যমে বলে বিপুলরা আসিয়াছে। পরে জানিতে পারি বিপুলের সাথে আসা কম্পিউটারের বাক্সসহ লোকটির নাম রিপন। আলাপ ®no করিয়া আহসান উল্লাহ খাটের উপর উঠিয়া কাঠের ওয়াল কেবিনেটের মধ্য হইতে ছোট ছোট ৪টি কাগজের প্যাকেট বাহির করিয়া বিপুলকে দেয় এবং তার বিপুল ও রিপন প্যাকেট ৪টি কম্পিউটারের বাক্সের মধ্যে রাখিয়া তাড়াহুড়া করিয়া বাক্স বন্ধ করিয়া বাক্স সহ সেখান হইতে চলিয়া যায়। ইহার কিছুক্ষন পর আমি সেখান হইতে চলিয়া আসি। ইহার প্রায় দেড়মাস পরে শুনি সিলেট হযরত শাহ জালাল (রঃ) মাযারে গ্রেনেড হামলা হইয়াছে এবং ৩-4 Se ®mjL jjlj গিয়াছে ও ব্রিটিশ হাই কমিশনার আনোয়ার চৌধুরী সহ অনেক লোকজন আহত হইয়াছে। তখন আমি অনুমান করি আহসান উল্লাহ কর্তৃক বিপুলের নিকট ৪টি প্যাকেটে গ্রেeX ‡Rmz''

260. Accused Sharif Shahidul Alam Bipul in his confessional Statement [exhibit-9] stated that:

> ‘‘আমি, রিপন ভাই ২০০৪ সালের এপ্রিল মাসের দিকে ঢাকা যাই। আমি মুফতি হান্নানের মেরুল বা—ার অফিসে যাই। রিপন ভাইকে আসতে বলি। এরপর আমি কিছু সময়ের জন্য বাইরে যাই। সন্ধ্যার দিকে রিপন ভাই একটি কম্পিউটার কিনে ঐ বাসায় নিয়ে আসে। ঐ সময় সেখানে বারি মোহাম্মদ কাজল, ওভি ওরফে মফিজ উপস্থিত ছিল। আমি কাজলকে গ্রেনেডের কথা বলি। সে মুফতি হান্নানের অনুমতি নিয়ে রুমের ভিতর হতে গ্রেনেড নিয়ে আসে, তারপর একজন কাজী খাটো মতো, বয়স ২০/২২ মুখে হালকা দাড়ি নাম মমিন তার হাতে দেয়। সে ৪টি শক্ত কাগজের প্যাকেটে ৪টি গ্রেনেড আমার হাতে দেয়। আমি ও রিপন ভাই গ্রেনেড ৪টি কম্পিউটারের মনিটরের কার্টুনে রাখি। রাতে সিলেটে আসি।’’

261. Accused Delwar Hossain alias Ripon in his confessional Statement [exhibit-9(Ka)] stated that:

> ‘‘আমি যখন বিপুলের সাথে দ্বিতীয় বার ঢাকাই যাই, এলিফ্যান্ট রোড হতে আমার বন্ধু মাহবুবের জন্য একটি কম্পিউটার কিনি। বিপুল আমাকে ফোনে জানায় আমরা একসাথে সিলেট যাবো। আমি যেন মেরুল বা—¡l l hjpju চলে আসি। আমি কম্পিউটার কিনে দুপুরের দিকে ঐ বাসায় আসি। বিপুল বাসায় ছিল না। সে বিকালের দিকে বাসায় আসে। বিপুল আমাকে ৪টা প্যাকেট দেয় আমি বলি এগুলি কি? সে জানায় এগুলি গ্রেনেড, সিলেট নিয়ে যেতে হবে, সিলেটে আমাদের কাজ আছে। আমি আর বিপুল গ্রেনেডের প্যাকেট গুলি কম্পিউটারের বক্সে ঢুকাই। উপবন ট্রেনে করে সিলেটে নিয়ে আসি। আমি মুরিদ বাজারস্থ ম্যাসে চলে আসি। প্যাকেটগুলি বের করে আমার ড্রয়ারে রাখি।’’

262. Accused Abdul Hannan in his confessional Statement [exhibit-9(Kha)] stated that:

> ‘‘২০০৪ সালের এপ্রিল মাসের দিকে বিপুল ও রিপন আমার ঢাকার বা—ার অফিসে আসে। কাজল আমাকে ফোনে জানায় যে, বিপুল ও রিপন গ্রেনেড নিতে এসেছে। কাজলকে বলি অফিসে আর কে আছে? কাজল বলে যে, মফিজ ও মঈন ওরফে জান্দাল ভাই আছে। আমি বিপুলকে ৪টি গ্রেনেড দেওয়ার জন্য কাজলকে নির্দেশ দেই। কাজল বিপুলকে ৪টি গ্রেনেড দিয়ে আমাকে জানায়। আমার সরবরাহ করা গ্রেনেড দিয়ে বিপুল ও রিপন সিলেট হযরত শাহজালাল (রঃ) cINju thEDn qjC কমিশনারকে হত্যা করার জন্য গ্রেনেড নিক্ষেপ করে তাতে ৬০/৭০ জন আহত হয়। এছাড়া গ্রেনেড দিয়ে বিপুল হেমায়েত ও ফাহিম সিলেট শহরে হোটেল গুলশান চত্তরে মেয়র কামরান সাহেবকে হত্যা করার জন্য এবং জেবুন নেছার বাসায় জেবুন নেছাকে হত্যার জন্য গ্রেনেড নিক্ষেপ করে সেখানেও লোকজন হতাহত হয়। গ্রেনেড নিক্ষেপের ফলাফল বিপুল আমাকে টেলিফোনে জানায়।’’

263. The above assertions made in the confessional statements by the said accused persons are corroborative of the evidence of PW-48, who is an independent witness. PW-48 in his deposition categorically stated that while he was doing business of tea stall in Badda main road Ahasanullah Kajal (now dead) used to come to his tea stall and they developed a relationship and he used to visit the house inside Badda DIT project where said Ahsanullah Kajal resided. In the said house he saw the other accused persons and they used to talk about their organizational plan and policy.

264. In an evening of the month April, 2004 accused Bipul and Ripon came to the house situated at Badda where Ahsanullah Kajal and other accused resided and Ahasanullah Kajal having taken permission from accused Abdul Hannan through mobile phone supplied 04 grenades to Bipul and Ripon in presence of accused Mofij alias Ovi and Moin alias Abu Jandal. PW-48 witnessed the said supply of grenades by Ahsanullah Kajal to Bipul and Ripon. And they took the said grenades to Sylhet keeping the same in a computer box.

265. The defence by cross examining the said witness failed to shake his evidence on the above material point.

266. It is true that belated examination of a witness by the investigating officer usually creates a doubt about the veracity of the said witness. But it is now well settled position that mere deley in examination of particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon the circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. **[Reference: (2011) 3 SCC, page-654, Sheoshankr Singh Vs State of Jharkhanth]**

267. In the said case it has also been held that:

> “In a case where the investigating officer had no such information about any particular individual being an eye witness to the occurrence, mere delay in examining such a witness would not ipso facto render the testimony of the eye witness suspect or affect the prosecution version.”

268. In the case of **Prithvi (Minor) Vs Mam Raj, reported in (2004) 13 SCC, page-279**, it has been held that:

> "The judgments merely point out that unexplained delay in recording the statement gives rise to a doubt that the prosecution might have engineered it to rope the accused into the case. Delay in recording the statement of the witness can occur due to various reasons and can have several explanations. It is for the Court to assess the explanations and if satisfied accept the statements of the witness." [Underlines supplied]

269. The delay in examination of a witness is a veriable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the investigating officer being pre-occupied in serious matters, the investigating officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same which may require his attention urgently and importantly, etc.

270. In the case of **Banti alias Guddu Vs State of Maddha Pradesh reported in [(2004) 1 SCC, page-114]** it has been held that:

> "Unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage. It cannot be laid down as a rule of universal application that if there is a delay in examination of a particular witness the prosecution version becomes suspects. It would depend on several factors."

271. In the case of **State Vs. Mobile Kader, reported in 67 DLR (AD), page-6**, it has been held that:

> "It is true that section 157 of the Evidence Act stipulates that the statement of fact by a witness should be made to competent authorily at or near the time when the fact to which the statements relates took place. What should be the span of time of making such statement by a witness is basically a question of fact and no hard and fast rule can be laid down in that regard. It would vary from case to case and upon the peculiar circumstances of a particular case under which delay in recording the statement of a witness about the fact which he knew or knows might be caused. And mere delay in recording the statement of a witness by the investigation officer cannot be the sole ground to discard his evidence, if he withstands the test of cross-examination and thus appears to be treethful witness."

272. In view of the above proposition of law and the facts, circumstances and nature of the present case, particularly the offence of Criminal Conspiracy, examination of the PW-48 in a belated stage *ifso facto* does not render his evidence unreliable and shakey.

273. Mr. Mohammad Ali the learned Advocate for the defence has drawn our attention to some discrepancies/inconsitancies of the evidence of PW-48 and PW-53, the investigating officer.

274. PW-48 in his cross-examination stated that:

> ''আহসান উল্লাহ আমাকে যে বাড়িতে লইয়া যায়, ঐ বাড়িটি ডি,আই,টি প্রজেক্ট এর ভিতর এবং বাড়িটি দেখিতে মাদ্রাসার মতো।''

275. On recall he eventually, stated that:

"আমি আহসান উল্লাহ ভাইয়ের সহিত ঢাকা বা—া ডি.আই.টি প্রজেক্টের ভিতরে মসজিদের মতো ডিজাইন করা তিন am¡ ¢h¢ôw Hl aa£u am¡l hjp¡u mCu¡ kiuz"

276. He further stated that:

"আমি পুলিশের নিকট ঘটনা সম্পর্কে ২৩/০৩/২০০৭ইং তারিখে জবান বন্দি দিয়াছি মালিবাগ সি.আই.ডি অফিসে বসিয়া। ইহার পর পুলিশের সহিত আমার দেখা হয় নাই। আমি আজকের আগে আর সাক্ষ্য প্রদান করি নাই।"

277. But PW-53 the investigating officer in his cross examination stated that:

"সাক্ষী মোঃ আবুল কালাম আজাদকে আমি তার বাড়িতে পাই ২০/০৩/২০০৭ইং তারিখে। ঐ দিন তাহার বাড়িতে আমি তাহার জবানবন্দি ফৌঃ কাঃ ১৬১ ধারার অধিনে লিপিবদ্ধ করি।"

278. Now the question is whether these inconsistencies or contradictions of the evidence of PW-48 make his entire evidence unreliable.

279. In this sub-continent it is by now well settled proposition that the maxim '***falsus in uno, falsus in omnibus*** [false in one thing, false in everything] is not a sound rule of practice and it should not be applied mechanically. Therefore, it is the duty of the Court, in case where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutiny the rest of his evidence with care and caution. If the remaining evidence is trustworthy and substratum of the prosecution case remains in fact then the court should uphold the prosecution case to the extent it is considered safe and trustworthy. Courts have, however to attempt to separate the **chaff from the grain** in every case. They can not abandoned this attempt on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot be reasonably carried out. **[Reference: AIR 1972 SC 2020 (Sohorab Vs. State of M.P); AiR 1980 SC 1322 (Bhimrao Vs. State of Mahrashtra); 29 DLR Sc 221 (Ekabbar Khan Vs. State); 8 DLR F.C 69 (Adalat Vs. The Crown)].**

280. In the case of **Ugar Ahir and others Vs. the State of Bihar, [AIR 1965(SC), page-277]** the Supreme Court of India has observed to the effect:

> "It is, therefore, the duty of the court to scrutinize the evidence carefully and; in terms of the felicitous metaphor, separate the grain from the chaff. But it can not obviously disbelieve the substratum of the prosecution case or the materials parts of the evidence and reconstruct a story of its own out of the rest."

281. In the case of **Nadodi Jayaraman Vs. the State of Tamil Nadu, [1993 CrLJ, page-426(SC)] the Supreme Court of India** has observed that:

> "The fact that a witness has not told the truth in one or two particulars will not make his entire evidence unreliable."

282. In the case of **Sukha and others Vs. the State of Rajastan, [AIR 1956 SC, 513] the Supreme Court of India** has opined that:

> "Where one part of the prosecution story is disbelieved, there is no bar in law to accept by the court of another part of that story and to base conviction there on."

283. Indian Supreme Court in the case of **State of Rajastan Vs. Smt. Kalki and another [AIR 1981, SC 1390]** has observed that:

> "Immaterial discrepancies do not affect the conclusion one way or the other."

284. In the case of **Abdul Khaleque Vs. the State, [1983 P CrLJ 898 SC [AJ&K] the Pakistan Supreme Court** has held that:

> "Evidence of prosecution witnesses on main story found to be truthful and of quality which could safely be relied upon."

285. Having considered the above propositions coupled with the testimonies of PW-48, it is our considered opinion that PW-48 is a most competent, crediable and trust worthy witness. There is no scope to brush aside his entire evidence due to some minor descripencies on immaterial point. We have already observed that PW-48 corroborated the incriminating parts of exhibit-9, 9(Ka) and 9(Kha).

286. Can the confessional statements made by accused Mufti Abdul Hannan, Sharif Shahidul Alam @ Bipul be used and relied in convicting the other accused namely Mufti Moinuddin alias Abu Jandal and Mohibullah alias Mofizur Rahman alias Ovi?

287. It is the settled proposition of law that in a joint trial where more persons than one are being tried jointly for the same offence, a confession made by any of them affecting himself and any of his co-accused can be taken into consideration by the Court not only against the maker of the confession but also against the co-accused, it may not be an evidence within the strict meaning of the term but it can be used to lend assurance to other evidence on record.

288. Section 30 of the Evidence Act is as follows:

> "**30. Consideration of proved Confession affecting person making it and others jointly under trial for same offence**—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 of such persons as well as against the person who makes such confession."
>
> [Explanation-"Offence," as used in this section includes the abetment of, or attempt to commit, the offence[36].]

289. In the case of **State Vs Abdul Kader alias Mobile Kader, reported in 67 DLR (AD) Page-6** our Appellate Division has been held that:

> "When more than one person 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 such persons as well as against the person who makes such confession.

290. However, Section 10 of the Evidence Act clearly provides special provision that in a case of conspiracy the confession of a co-accused can be used as evidence against other co-accused.

291. Section 10 of the Evidence Act runs as follows:

> **"10. Things said or done by conspirator in reference to common design**—where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of

proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

292. From the statements of accused Mufti Abdul Hannan [Exhibit-9(Kha)] and accused Shahidul Alam Bipul [Exhibit-9] it appears that they disclosed the names of accused Mofiz alias Ovi and Moin alias Abu Jandal. The said accused persons used to come to the house where Ahsanullah resided and when Ahsanullah supplied 04(four) grenades to accused Bipul and Ripon, they were also present there.

293. PW-48 also testified that he saw accused Mofiz alias Ovi and Moin alias Abu Jandal in the house of Ahsanullah and they used to talk about their organization namely, 'Harkatul Jihad' and their plan and policy. And said accused were also present when Ahsanullah supplied grenades to Ripon and Bipul in an evening of first part of April, 2004.

294. In the case of Major Bazlul Huda Vs. State (Popularly Known as Bangabandhu Marder Case), reported in 62 DLR (AD), page-1 our Appellate Division has held to the effect:

"When specific acts done by each of the accused have been established showing their common intention they are admissible against each and every other accused. Though an act or action of one accused cannot be used as evidence against other accused but an exception has been carved out in section 10 of the Evidence Act in case of Criminal Conspiracy. If there is reasonable ground to believe that two or more persons have conspired together in the light of the Language used in 120A of the Penal Code, the evidence of acts done by one of the accused can be used against the other."

295. In criminal law a party is not generally responsible for the acts and declarations of other unless they have been expressly directed, or assented to by him; "*nemo reus est nisi mens sit rea*". This section, however, is based on the concept of agency in cases of conspiracy. Conspiracy connotes a partnership in crime or actionable wrong. A conspirator is considered to be an agent of his associates in carrying out the objects of the conspiracy and anything said, done or written by him, during the continuance of the conspiracy, in reference to the common intention of the conspirators, is a relevant fact against each one of his associates, for the purpose of proving the conspiracy as well as for showing that he was a party to it. Each is an agent of the other in carrying out the object of the conspiracy and in doing anything in furtherance of the common design. [Underlines Supplied to give emphasis]

296. In the case of **Mohd. Khalid Vs. State of West Bangal, reported in (2002) 7 SCC, page-334**, it has been observed that:

"Where trustworthy evidence establishing all links of circumstantial evidence is available the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration. It can in some cases be inferred from the acts and conduct of the parties."

297. In the said case it has been further held that:

"No doubt, in the case of conspiracy there cannot be any direct evidence. The essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely

available. Therefore, the circumstances proved before, during and after the occurrences have to be considered to decide about the complicity of the accused".

298. It is the duty of the Court to examine the confession carefully and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.

299. Having considered the above propositions of law together with sections 10 and 30 of the Evidence Act, the exhibit-9, 9(Ka) and 9(Kha) and evidence of PW-48, we have no hesitation to hold that the trial Court rightly and lawfully found guilty to accused Mufti Moinuddin alias Abu Jandal alias Moin and Mofizur Raman alias Mofiz alias Ovi.

'Criminal conspiracy' and proof of standard

300. In the case of **Firozuddin Basheeruddin Vs. State of Kerala, reported in (2001) 7 SCC, page-596** it has been held that:

"Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions, any declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions." [Underlines supplied]

'**Criminal conspiracy'** has been defined in section 120A of the Penal Code. Section 120A of the Penal Code runs as follows:

"**120A. Definition of criminal conspiracy** When two or more persons agree to do, or cause to be done:-

(1) An illegal act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation— it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

301. The recognized definition of a criminal conspiracy is an agreement between two or more persons to engage in an unlawful act. 'Conspiracy', an inchoate offence, refers to an act of agreeing to commit a substantive crime to further plan and policy.

302. The criminal conspiracy doctrine only requires overlapping chains of agreement that link the physical perpetrator to the accused. However, the lack of a direct agreement between the defendant and the physical perpetrator is no bar to applying the conspiracy doctrine as long as the chain of overlapping agreements connects them.

303. The act of 'agreement' is to be inferred from act and conduct of the accused-amid, prior or subsequent to the commission of the principal offence.

304. In the case of **Major Bazlul Huda vs. State [Popularly known as Bangabandhu murder case]** his Lordships Justice Surendra Kumar Sinha **[62 DLR (AD), page-1; para 173]** has opined to the effect:

> "An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence. In pursuance of the criminal conspiracy if the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences. It is not required to prove that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime since from its very nature a conspiracy is hatched in secrecy direct evidence of a criminal conspiracy to commit a crime is not available otherwise the whole purpose may frustrate in most cases only the circumstantial evidence which is available from which an inference giving rise to the commission of an offence of conspiracy may be legitimately drawn."

305. In the case of **Naline Vs. State by D.S.P, C.V.I, S.I.T, Channai, reported in (1999) 5 SCC, page-253** it has been held that:

> "Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

306. In the said case it has been further observed:

> "In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for wsuch offences even if some of them have not actively participated in the commission of those offences." [Underlines supplied]

307. In the case of **Mohd. Khalid Vs. State of West Bangal, reported in (2002) 7 SCC, page-334** it has been held that:

> "The encouragement and support which co-conspirators give to one another rendering enterprise possible which, if left to individual effort would have been impossible, furnish the ground for visiting conspirators an abettor with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (American Jurisprudence, Vol. II, Sec. 23, P.559). For an offence punishable under

section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

No doubt, in the case of conspiracy there cannot be any direct evidence. The ingredients of the offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused." [Underlines supplied]

308. The Supreme Court of India in the case of **YASH PAL MITTAL V. STATE OF PUNJAB** reported in **(1977)4 SCC 540** had observed as follows:

"The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of action with one object to achieve the goal and of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators." [Underlines supplied]

309. CONSPIRACY As A CONTINUING OFFENCE

310. In **HALSBURY'S LAW OF ENGLAND**, third edition, vol. 10, page 327, para 602, while dealing with continuing offence it was stated as under:

"A criminal enterprise may consist of continuing act which is done in more places than one or of a series of acts which are done in several places. In such cases, though there is one criminal enterprise, there may be several crimes, and a crime is committed in each place where a complete criminal act is performed although the act may be only a part of the enterprise."

311. Conspiracy to commit crime by itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punish, considering their overt acts, independent of the conspiracy. The agreement does not come to an end with its making, but

would endure till it is accomplished or abandoned or proved abortive. Being a continuing offence, if any acts or omissions which constitute an offence are done the conspirators continue to be parties to the said conspiracy. The agreement continues in operation and therefore in existence until it is discharged or terminated by completion of its performance or by abandonment or frustration.

312. Lord Pearson explaining the meaning of the term conspiracy has held that:

> "A conspiracy involved an agreement express or implied. A conspiratorial agreement is not a contract, not legally binding because it is unlawful. But as an agreement it has its three stages, namely, (1) making or formation; (2) performance or implementation; (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirator can be prosecuted even though no performance had taken place. But the fact that the offence of conspiracy is complete at the stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (termination) by completion of its performance or by abandonment or frustration or, however, it may be."
>
> **[Source: Syed Mohammad Ibrahim and others Vs. State of Karnataka. https://indiankanoon.org.doc./73469817/]**

313. In the case of **KEHAR SINGH AND ORS. V. THE STATE (DELHI ADMINISTRATION)** reported in **AIR 1988 SC 1883 ATP. 1954**, it has observed as under:

> "275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. . . . . .
>
> It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. <u>The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient</u>."
>
> [Underlines supplied]

314. **Object of the conspiracy and the offence committed in this particular case**

315. On scanning the confessional statement of accused Abdul Hannan [exhibit 9(Kha)] it appears that in his statement he had given a vivid description about their organisational (Harkatul Jihad Al Islami Bangladesh) object, plan and policy. In his statement he categorically stated that while he had been studying at Karachi in Pakistan, he having taken training participated in Afgan war to protect the interest of Muslims and in a fighting he received injury and he was admitted in a hospital at Peshwar in Pakistan. So many people from Bangladesh participated in the said war. The people who participated in the Afgan war having returned from Afganistan formed an organisation namely 'Harkatul Jihad Al Islami Bangladesh'. He joined in the said organisation and became a top leader of it. The said organisation also sent some members of it to Arakan for participating in the war for RSO and

RFA. In order to protect the image of Islam, as per the decision of the said organisation, they attacked by blasting bombs on the cultural program organised by 'Udichi Shilpi Goshti', a progressive cultural organisation, in Jessore and due to such bomb attacked 10/12 persons died and more than hundred peoples were injured. In the month of July, 2000 they had taken a decision to attack the leaders of Awami League in order to save the 'Alims (Islamic Scholars)' of the country as well as the 'Islam'. Due to some actions taken by the Awami League Government against the Islamic Scholars it was their belief that Awami League was against Islam and Islamic Scholars as well as the agent of India. Pursuant to the said decision they had taken several attempts to kill Awami League Chief Sheikh Hasina, particularly in the month of July, 2000 at Kotalipara under district Gopalganj and in 2001 at Sylhet when she went there for holding public meeting. They had also attacked on the cultural program celebrating 'Pohela Boishakh' at Ramna Batmul. To achieve their common object and design they supplied bombs and grenades in the different parts of the country through their organisational men and made several attempts to kill local Awami League leaders in Sylhet. They used to collect arms, ammunitions, explosives and money from outside and inside the country and they also helped RSO and RFO groups of Arakanees in Mayanmar.

316. Accused Sharif Shehidul Alam alias Bipul in his confessional statement [exhibit-9] stated that in the year 1994 he joined with the activities of 'Harkatul Jihad Al Islami Bangladesh' in Sylhet and in 1995 he along with 15 others took training in Fenchuganj and in the year 1996 he saw the training program of the members of Harkatul Jihad at Lalkhan Bazar and he knew accused Mufti Abdul Hannan. Eventually, he went to Lebia taking job and having returned from Lebia in the year 2003, he made contract with accused Mufti Abdul Hannan and he went to the house of Mufti Abdul Hannan at Badda, Dhaka where he saw accused Ovi, Moin and others. On discussions among them, they had taken decision to attack on the leaders of the Awami League terming them as the enemy of Islam. They also believed that the Britain and America were also against Islam.

317. Accused Delwar Hossain Ripon in his confessional statement [exhibit-9(Ka)] also stated that accused Bipul instigated him to join in the said organisation in order to participate in 'Jihad' saying that the Muslims in the different parts of the world were being oppressed by the America, Britain and Israil.

318. If we consider the above statements of the accused persons together with the evidence of PW-48 then object, plan, policy and design of the accused persons would be crystal clear. On the plea to protect Islam the accused persons and their organisation namely 'Harkatul Jihad Al Islami Bangladesh' had hatched conspiracy to annihilate the leaders of Awami League, the political party which led the liberation struggle and war of independence of Bangladesh and a secular force of the country, including it's Chief Sheikh Hasina terming them as 'the enemy of Islam' and 'agent of India'. They also took stand against the Bangali culture terming the same as anti Islam. Pursuant to their common plan, policy and design they took several attempts to kill Awami League Chief Sheikh Hasina and the other leaders of Awami League and attacked on the cultural activists in the different parts of the Country. They also attacked on the cultural program organized by Udichi at Jessor and in the program of 'Pohela Boishakh' at Ramna Batmul.

319. In the instant case in furtherance of their common plan, policy and design the accused had attacked on the British High Commissioner to Bangladesh Mr. Anwar Chowdhury on the day of occurrence by blasting grenade in order to kill him when he was coming out from the premises of the Mazar of Hazrat Shahjalal (R:) after offering Jumma

prayer and as a result of such grenade explosion 03(three) persons died and about 50/60 persons including the British High Commissioner were injured.

320. We have already discussed about the propositions of law regarding criminal conspiracy and its continuation. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. In a case of conspiracy it does not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trappings of the mischief of criminal conspiracy. As such, we have no hesitation to hold that all the accused are liable for committing the offence to have been committed in this particular case.

321. **Whether any omission or any defect done by the investigating officer in the investigations render the entire prosecution case doubtful-**

322. Mr. Mohammad Ali, the learned Advocate for the accused referring to exhibit-8(Kha), the sketch map of the house from where grenades were supplied and the accused persons were used to stay, argued that the investigating officer investigated the case in a perfunctory manner. From the said document it appears that in the sketch map of the alleged house he did not mention the holding number, road number and other descriptions of the same.

323. It is true that PW-49 the investigating officer in the said sketch map [exhibit-8(Kha)] did not mention the proper address of the house in question. But if we consider the confessional statement of the accused persons, exhibit-9, 9(Ka) and 9(Kha) and the evidence of PW-48 then it will be clear that the alleged house is situated inside the Badda DIT project. PW-53 the investigating officer in examination in Chief as well as in cross-examination categorically stated that he interrogated the owner of the said house which is Road No.12, Holding No.53, DIT extension road, Badda and he visited the said house.

324. In the case of **Dhanaj Sing Vs. State of Punjab, reported in [2004] 3 SCC, page-654** it has been held:

> "5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."
> (Underlines supplied)

325. In the case **Sathi Prashad Vs. State of Uttar Pradesh, reported in (1972) 3 SCC, page-63** it has also been held that:

> "It is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored."

326. In the case of **State of Karnataka Vs. Kyarappa Reddy, reported in (1999) 8 SCC, page-714** it has been held that:

> "It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise

> the criminal trial will plummet to the level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officers suspicious role in the case." (Underlines supplied)

327. In the case of **Ram Bali Vs. State Uttar Pradesh, reported in (2004) 10 SCC, page-598** it has been held that:

> "In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective." (Underlines supplied)

328. In the case of **Dayal Sing Vs. State of Uttranchal, reported in (2012) 8 SCC, page-263** it has been held that:

> "During the course of the trial, the learned presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well."

329. Having considered the above principles of law, we are led to hold that mere omission in not mentioning the details description of the house [exhibit 8(Kha)], where the accused persons used to stay, meet and hatch conspiracy to implement their plan and policy and from where accused Ripon and Bipul collected grenades, does not destroy the prosecution case in any manner.

330. However, no suggestion was put to the investigating officer by the defence with regard to exhibit 8(Kha) and the said document was exhibited without any objection and same was unchallenged by the defence.

331. **Whether the trial has been vitiated it not taking cognizance by the learned Sessions Judge**

332. The learned defence Advocate was argued that in the instant case the learned Sessions Judge, Sylhet having received the case record without taking cognizance of the offences against the accused persons proceeded with the trial and framed charged against the accused persons and thereby the trial has been vitiated.

333. Section 193 of the Code of Criminal Procedure speaks of cognizance of offences by the Court of Session and provides as follows:

> "193. **Cognizance of offences by Courts of Session**- Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been sent to it by a Magistrate duly empowered in that behalf."

334. It is pertinent to mentioned here that by way of amendment of law the words 'unless the case has been sent to it' has been inserted in place of the words 'unless the accused has been committed to it'.

335. In the case of **Dharampal Vs. State of Hariana, reported in (2014) 3 SCC, page-306**, it has been held that:

> The key words in the section are that "no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code". The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate, the second condition is that only after the case had been committed to it, could the Court of Session taken cognizance of the offence exercising original jurisdiction. Although, an attempt has been made by Mr. Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.
>
> . . . . . .
>
> It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction.
>
> . . . . . .
>
> Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge." (Underlines supplied)

336. In the said case it has been held that cognizance of offence can be taken only once either by Magistrate or by the Sessions Court.

337. In the case of **R.N Agarwal Vs. R.C Bansal and others, reported in (2015) 1 SCC page-48**, it has also been held that:

> "Thus, on a pain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted."

338. It is also well settled in our jurisdiction that the Court of Sessions or the High Court Division has no jurisdiction to interfere with the discretion of the Magistrate in the matter of taking cognizance of any offence irrespective of the facts whether the offence is triable by Court of Session or not [Reference: **Abdul Matin Vs. The State, reported in 42 DLR page-286**]

339. The Appellate Division in the case of **Mr. Haripada Biswas Vs. The State and another, reported in 6 BSCR (AD), page-83** also held that Court of Session is precluded from talking cognizance offence as a Court of original jurisdiction.

340. In the instant case from the records it appears that the concerned Magistrate having accepted the charge sheet on 26.06.2007 and thereby taken cognizance of the offences against the persons recommended for prosecution sent the case record to the learned Sessions Judge as per provision of section 205C of the Code of Criminal Procedure and thereafter, the learned Sessions Judge proceeded with the case and framed charge against the persons sent to him by the Magistrate duly empowered.

341. It is by now well settled that cognizance of offence can be taken only ones either by the Magistrate or by the Sessions Court. In the instant case the learned Judge of trial Court framed charges against the accused persons in presence of them and same were read over and explained to them and at the time of examination of the accused persons under section 342 of the Code of Criminal Procedure the learned trial Judge has brought all the incriminating pieces of evidence and materials to the notice of the concerned accused persons, adduced by the prosecution. Thus, the accused persons were not prejudiced in any manner in the trial. As such, the submissions of the learned Advocate for the accused that the trial has been vitiated, is not at all tenable in law.

342. Is the prosecution bound to examine all the witnesses cited in the charge-sheet?

343. Mr. Mohammad Ali, the learned defence Advocate also argued that in the instant case the prosecution failed to examine some of the vital witnesses namely, Mr. Anwar Chowdhury, the British High Commissioner to Bangladesh, Abul Hossain, the Deputy Commissioner, Sylhet and colonel Golam Rabbani, the owner of the house in question at Badda, Dhaka.

344. PW-53, the investigating officer in his cross-examination stated he did not examine Mr. Anwar Chowdhury, the British High Commissioner to Bangladesh due to protocol reasons.

345. However, it is well settled that the prosecution is not bound to examine each and every witnesses cited in the charge-sheet. Public prosecution has to take decision in that regard in a fair manner. If the prosecution felt that its case has been well established through the witnesses examined, it cannot be said that non-examination of some persons rendered its version vulnerable.

346. Whether the trial Court awarded appropriate sentence to the concerned accused persons

347. Mr. A.K.M Faiz, the learned defence Advocate, for accused Delwar Hossain Ripon submitted that the sentence of death awarded to the accused is very harsh and he prayed for commutation of sentence considering his age, no criminal antecedent and agony of death in condemn cell for last 8(eight) years.

348. From the evidence and materials on record we have already found that all the accused persons were the active members of an organisation namely ‘Harkatul Jihad Al Islami Bangladesh’. Their organized criminal activates clearly show that they belonged to an

organised group and to achieve their goal they also had resorted terrorist activities exploding grenades and bombs targeting innocent peoples and by their such activities innocent persons were being killed.

349. "Terrorism by nature is difficult to define. Acts of terrorism conjure up emotional responses in the victims (those hurt by the violence and those affected by the fear) as well as in the practitioners. Even the U.S. Government cannot agree on one single definition. The old adage "one man's terrorist is another man's freedom fighter" is still alive and well. Listed below are several definitions of terrorism used by the Federal Bureau of Investigation:

> "Terrorism is the use or threatened use of force designed to bring about political change." *Brian Jenkins*
>
> "Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted." *Walter Laqueur*
>
> "Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience." *James M. Poland*
>
> "Terrorism is the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a Government, individuals or groups, or to modify their behavior or politics."- *Vice-President's Task force, 1986.*
>
> "Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives" *FBI definition."*
>
> [**Source: Mohd. Khalid Vs. State of W.B. (2002) 7 SCC page-334**]

350. In the case of **Yakub Abdul Razzak Memon, reported in (2013) 13 SCC page-433,** his Lordship's Justice P. Sathasivm has made following observations with regard to the terrorism:

> "Terrorism is a plague for a nation or society that should be eradicated."
>
> And
>
> "Terrorism is abhorred and condemned by all the religions of the world."
>
> And
>
> "Terrorism is a global phenomenon in today's world."
>
> And
>
> "Terrorism means use of violence when its most important result is not merely the physical and mental damage to the victim but the prolonged physiological effect if produces or has the potentiality of producing such effect on the society as a whole. Terrorism is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of people at large or any section thereof and it is a totally abnormal phenomenon. Terrorism is distinguishable from other forms of violence as in terrorism the deliberate and systematic use of coercive intimidation is used." [Underlines supplied]

351. We cannot overlooked and ignored the facts and circumstances that in the recent past in our country some interested and vested quarters in order to achieve their illegal goals and objects had taken resort of terrorist activities, sometimes on the plea of protecting 'Islam religion' and sometimes in guise of political programs. And to implement their evil design they killed so many innocent people exploding grenades and bombs in public places as well as public and private transports and caused damage to buildings including educational institutions, railway, roads, bridges etc by setting fire. The evil forces also targeted Bangali

culture and attacked on different cultarul programs in different places of the country. As such, to protect the interest of the society**,** innocent people and the State, the offenders of terrorism must be awarded adequate punishment. There is no scope to show any leniency to the offenders of such type of organised crimes.

352. In the case of **Sevaka Perumal Vs. State of Tamil Nadu, reported in (1991) 3 SCC page-471,** it has been observed:

> "9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of order should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that, "State of criminal law continues to be- as it should be- decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation of sentencing process be stern where it should be, and tempered with mercy where it warrants being. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep seated personal rivalry may not call for penalty of death. But an organized crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh Vs. State of M.P., this Court while refusing to reduce the death sentence observed thus: (SCC P.82, para-6)
>
> "[I]t will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.
>
> Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc." [Underlines supplied]

353. The Crime of terrorism deserves to be evaluated as 'crimes of serious gravity'

354. **In the case of Yakub Abdul Razzak Memon Vs. State of Maharastra, (2013) SCC, page-434** it has been observed that:

> "The crime of terrorism is in itself and aggravating circumstances as it carries a "Special stigmatization" due to the deliberate form of inhuman treatment it represents and the severity of the pain and suffering inflicted.
>
> The "Vulnerability of the victims" and "the depravity of the crimes" constitute additional aggravating circumstances.

> The manner of its execution and its design is at a level of extreme atrocity and cruelty."

355. Our Appellate Division in the case of **Abdul Quader Mollah Vs. the Chief Prosecution, International Crimes Tribunal, Dhaka (in Review Petition No. 1718 of 2013)** has been observed to the effect:

> "It was further observed that while considering the punishment to be given to an accused person, the court should be alive not only to the right of the perpetrator, but also rights of the victims of the crime and the society's reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused person."

356. Having considered the above propositions, facts and circumstance of the present case, gravity and nature of the offence, the conduct of all the accused, we do not find any mitigating factors to commute the sentence of any the accused persons as awarded by the trial Court.

357. **Islam: unjust killing and Terrorism**

Almighty Allah says in the Holy Qur'an [Surah-5, Al-Ma'idah: Verse-32]-

> "Whoever kills a person [unjustly], except as a punishment for murder or [as a prescribed punishment for spreading] disorder in the land, it is as if he killed all of humanity."

358. This verse uses the word 'person' [nafs], which is a general expression that gives the verse a broad-based application.

359. In Surah-4, An-Nisa: Verse 29 & 30 Almighty Allah also says-

> "And do not kill yourselves (nor kill one another). Surely, Allah is most merciful to you. And whoever commits that through aggression and injustice, we shall cast him in to fire, and it is easy for Allah."

360. Islam not only outlaws the killing of any Muslim but the whole of humanity, without any discrimination on the basis of caste, colour, race or religion. <u>One can appreciate the value and inviolability of human life in Islam by realizing that the act of killing a human being has been equated with slaughtering the entire human race. So in other words unjust killing is completely forbidden, no matter what religion, language or citizenship is held by the victim. This is a sin as grave as killing the whole of humanity</u>. [Underlines supplied to give emphasis]

361. The Prophet Muhammad [S.M] categorically forbade people to provide help or material support to terrorists. He ordered to isolate them and deny them any numerical strength, financial assistance and moral support. Abu Hurayra reported that the Prophet Muhammad [S.M] said:

> "If any one helps in the murder of a believer-even if with only a few words he will meet Allah with the words written on his forehead: hopeless of Allah's mercy."
>
> **[Source: Fatwa on Terrorism and Suicide Bombings; written by Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri; published by Minhaj-ul-Quran International (U.K), 292-296 Romford Road, London U.K, Page-65]**

362. This Hadith contains a strict warning to those who masterminds terrorist acts and misinterprets the Holy Qur'an by brainwashing youth with glad tidings of Paradise for murdering peaceful civilians.

363. Thus, the criminal acts and conspiracy of explosion of bombs and grenades and killing of innocent people by the accused persons are also violative of the injunctions of Holy Qur'an and prophetic traditions.

364. **Conclusion**

Having considered and discussed as above, we are led to hold that the prosecution has been able to prove the charges brought against the accused persons beyond doubt and the learned Judge of the trial Court in assessing and evaluating the evidence and materials on records did not commit any error or illegality which can be interfered by us. The trial Court upon proper appreciation of evidence, gravity of the offence and role of the each accused persons in committing the particularly offence rightly awarded the conviction and sentence to the accused.

365. In the result, the Death Reference No.135 of 2008 is hereby accepted. The Judgment and order of conviction and sentence dated 23.12.2008 passed by the Druta Bichar Tribunal, Sylhet in Druta Bichar (Sessions) case No.14 of 2007 arising out of G.R. Case No.415 of 2004 corresponding to Kotwali Police Station Case No.64 dated 21.05.2004 is hereby affirmed. The Criminal Appeal nos. 03 of 2009, 468 of 2009, 9345 of 2015 are dismissed. Accordingly, the Jail Appeal nos. 71 of 2009, 72 of 2009, 73 of 2009, 92(A) of 2009 filed by respective accused are disposed of.

366. Send down the lower Court records along with a copy of this Judgment and order to the trial Court for further necessary actions.

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High Court Division
(Special Original Jurisdiction)

Writ Petition No. 970 of 2010

Mahmudur Rahman
Vs.
Bangladesh and others

Mr. A.J. Mohammad Ali with
Mr. Ehsan A. Siddiq with
Mr. Imran Siddiq, Advocates
…… For the petitioner

Mr. Mahbubey Alam, Attorney General with
Mr. Pratikar Chakma, A.A.G with
Mr. Shuchira Hossain, A.A.G with

Mr. Mizanur Rahman Khan Shaheen, A.A.G with
Mr. Mohammad Shaiful Alam, A.A.G
…For the respondent No.1
Mr. Md. Billal Hossain, Advocate
…For respondent No.25

Heard on 01.08.2017 and 22.10.2017

Judgment on: 05.11.2017

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Md. Badruzzaman

Constitution of Bangladesh
Article 35:
It appears from the above quoted provision of the Constitution that, a guarantee has been provided in favour of any person not to be prosecuted and punished for the same offence more than once. Therefore, the very condition to attract this provision is that, a person has to be first prosecuted and punished. The admitted position in this case is that, the petitioner was yet to be prosecuted and/or punished in any of the impugned criminal cases when he moved this writ petition. Thus, the very words of the Constitution under Article 35(2) make it clear that the said provisions was or is not attracted in so far as those criminal cases are concerned. ...(Para 9)

Code of Criminal Procedure, 1898
Section 403:
The provisions under the Code of Criminal Procedure under Section 403 have given protection to a person in respect of previous acquittal as well. According to sub-section (1) of Section 403 of the Code Criminal Procedure, when a person has already been tried by a Court of competent jurisdiction for an offence and the said person has been convicted or acquitted of such offence, till such conviction or acquittal remains operative, he cannot be tried again for the same offence. Therefore, it appears that, the statutory provisions under the Code of Criminal Procedure has given wider protection to a person than the Constitutional provision in so far as the issue of double jeopardy is concerned. ...(Para 10)

Constitution of Bangladesh
Article 35:
And
Code of Criminal Procedure, 1898
Section 198:
It is true that, by filing various cases against an individual in different districts, the personal liberty of that individual is somehow jeopardized and, on that point, learned advocate for the petitioner has raised the issue of another fundamental right of the petitioner as guaranteed by the Constitution under Article 32. However, it appears from the said very provision of Article 32 that, the said right of liberty in favour of a person is granted subject to the provisions of law. Therefore, when we are examining the fundamental rights of the petitioner guaranteed under the Constitutions, we cannot ignore the fundamental rights of the people of this country or the individuals who have filed those criminal cases feeling aggrieved by the said reports, in particular when every complainant has stated in their respective petition of complaint as to how they became aggrieved by such publication of reports in the said news paper. Therefore, under writ jurisdiction, we cannot assume that the said complainants were in fact not aggrieved personally. If we hold the view that they were not aggrieved personally, we would be preventing them from proving their cases before the Trial Court by adducing evidences. Therefore, this Court is of the view that, the issue whether the said complainants were in fact personally aggrieved or not, can only be decided in the trial by the Courts before which the impugned proceedings are pending. In that view of the matter, we do not find any substance in the submissions of the learned advocate for the petitioner in so far as the provisions under Section 198 of the Code of Criminal Procedure is concerned.
...(Para 11)

Code of Criminal Procedure, 1898
Section 526:
It further appears from materials on record that, because of various criminal cases, the petitioner is required to move from one district to another district to defend those cases. The Code of Criminal Procedure, under Section 526, has given a solution to such inconvenience. This provision has conferred wide power on the High Court Division to transfer any criminal case from one district to another or even to transfer the same to itself for hearing. Therefore, it is always open to the petitioner to approach the High Court Division under the said provision seeking a transfer order of those cases to one particular district to avoid his potential inconveniences. ...(Para 12)

Code of Criminal Procedure, 1898
Section 561A:
If the petitioner feels that the impugned criminal cases have been filed to victimize him for political reason or that the statements in those complaint cases do not disclose any offence, the petitioner also has an option to approach the High Court Division for quashing the same under section 561A of the Code of Criminal Procedure. This provision under Section 561A of the Code of Criminal Procedure has also given wide power on the High Court Division to pass any order for preventing abuse of the process of criminal Courts. ...(Para 12)

Constitution of Bangladesh
Article 35 and 102:
And
Penal Code, 1860
Section 500 and 501:
In view of above facts and circumstances of the case, since, apparently and admittedly, no prosecution has been concluded against the petitioner and that the petitioner has neither been convicted or acquitted in any criminal case for the offence in question, namely, the offices punishable under Sections 500 and 501of the Penal Code, we are of the view that, the petitioner does not have any case before this Court under writ jurisdiction to invoke Article 35(2) of the Constitution or other provisions of the Constitution or Code of Criminal Procedure. Besides, since the petitioner does not have any particular case of enforcement of fundamental rights under any of the above mentioned Articles, the writ petition is not maintainable. ...(Para 13)

Judgment

SHEIKH HASSAN ARIF, J:

1. Rule Nisi was issued calling upon the respondents to show cause as to why further proceedings of the cases filed against the petitioner in the Courts of different districts on the selfsame allegation of publication of a defamatory news in daily " Amar Desh" on 17.12.2009, being Complaint Registrar Case No. 400C of 2009 pending before the Chief Judicial Magistrate, Natore; Complaint Registrar Case No.1693C of 2009 pending before the Chief Judicial Magistrate, Chittagong; Complaint Register Case No.309C of 2009 pending before the Chief Judicial Magistrate, Joypurhat; Complaint Register Case No.580 of 2009 pending before the Chief Judicial Magistrate, Comilla; Complaint Register Case No.933 of 2009 pending before the Chief Judicial Magistrate, Comilla; Complaint Register Case No.622 of 2009 pending before the Chief Judicial Magistrate, Comilla; Complaint Register Case No.1375 of 2009 pending before the Chief Judicial Magistrate, Bogra; Complaint Register Case No.600C of 2009 pending before the Chief Judicial Magistrate, Naogaon; Complaint Register Case No.470C of 2009 pending before the Chief Judicial Magistrate, Narail; Complaint Register Case No.812C of 2009 pending before the Chief Judicial Magistrate, Khulna; Complaint Register Case No.411 of 2009 pending before the Chief Judicial Magistrate, Khagraccharia; Complaint Register Case No.485C of 2009 pending before the Chief Judicial Magistrate, Jamalpur; Complaint Register Case No.517 of 2009 pending before the Chief Judicial Magistrate, Pabna; Complaint Register Case No.728 of 2009 pending before the Chief Judicial Magistrate, Magura; Complaint Register Case No.503C of 2009 pending before the Chief Judicial Magistrate, Sirajgonj; Complaint Register Case No.1459C of 2009 pending before the Chief Judicial Magistrate, Jessore; Complaint Register Case No.514 of 2009 pending before the Chief Judicial Magistrate, Rangpur; Complaint Register Case No.917C of 2009 pending before the Chief Judicial Magistrate, Jhenaidah; Complaint Register Case No.810C of 2009 pending before the Chief Judicial Magistrate, Lakshmipur; Complaint Register Case No.768C of 2009 pending before the Chief Judicial Magistrate, Brahmanbaria; Complaint Register Case No.805Cof 2009 pending before the Chief Judicial Magistrate, Gaibandha; Complaint Register Case No.6687 of 2009 pending before the Chief Metropolitan Magistrate, Dhaka; and Complaint Register Case No.706 of 2009 pending before the Chief Judicial Magistrate, Tangail, should not be declared to have been commenced and continued without lawful authority and are of no legal effect.

2. Short facts, relevant for the disposal of the Rule, are that, the petitioner, at the relevant time, was the Chairman of Amar Desh Publications Ltd., the Publisher of Daily Amar Desh. He was also the acting editor of the said daily which, according to him, was one of the fastest growing news papers in the country. That he was the Chairman of the Board of Investment, Bangladesh during a period from December, 2001 to October 2006 and he performed his duties as the Chairman the said Board very successfully. That he was also the Energy Advisor to the Government of Bangladesh during a period from June, 2005 to October, 2006. It is stated that, on 17.12.2009, Mr. M. Abdullah, Special Correspondent of the said newspaper, Daily Amar Desh, investigated, researched, prepared and published a report in the said daily in relation to the allegations of corruption committed by Dr. Tawfique-e-Elahi Chowdhury, an Advisor to the Prime Minister and Sajib Wajed Joy, son of the Prime Minister. In the said report, it was published that the Ministry of Power and Energy was investigating allegations of corruption of Dr. Chowdhury and Mr. Joy in relation to accepting bribes of USD five million for awarding a contract to Chevron, a United States based oil company. It is further stated that, the said report was based on the correspondence between the Ministry of Power and Energy and Petrobangla. After publication of the said report on 17.12.2009, the daily received a rejoinder from the Ministry of Power and Energy and the said rejoinder was accordingly published verbatim in the said daily. However, it is stated, being furious by such report in the said daily, 23 individuals, as complainants in 21 districts, filed 23 complaint registrar cases against the petitioner and two others alleging defamation punishable under Sections 500 and 501 of the Penal Code. Accordingly, the said cases were registered as Complaint Registrar Case No. 400C of 2009 pending before the Chief Judicial Magistrate, Natore; Complaint Registrar Case No.1693C of 2009 pending before the Chief Judicial Magistrate, Chittagong; Complaint Register Case No.309C of 2009 pending before the Chief Judicial Magistrate, Joypurhat; Complaint Register Case No.580 of 2009 pending before the Chief Judicial Magistrate, Comilla; Complaint Register Case No.933 of 2009 pending before the Chief Judicial Magistrate, Comilla; Complaint Register Case No.622 of 2009 pending before the Chief Judicial Magistrate, Comilla; Complaint Register Case No.1375 of 2009 pending before the Chief Judicial Magistrate, Bogra; Complaint Register Case No.600C of 2009 pending before the Chief Judicial Magistrate, Naogaon; Complaint Register Case No.470C of 2009 pending before the Chief Judicial Magistrate, Narail; Complaint Register Case No.812C of 2009 pending before the Chief Judicial Magistrate, Khulna; Complaint Register Case No.411 of 2009 pending before the Chief Judicial Magistrate, Khagraccharia; Complaint Register Case No.485C of 2009 pending before the Chief Judicial Magistrate, Jamalpur; Complaint Register Case No.517 of 2009 pending before the Chief Judicial Magistrate, Pabna; Complaint Register Case No.728 of 2009 pending before the Chief Judicial Magistrate, Magura; Complaint Register Case No.503C of 2009 pending before the Chief Judicial Magistrate, Sirajgonj; Complaint Register Case No.1459C of 2009 pending before the Chief Judicial Magistrate, Jessore; Complaint Register Case No.514 of 2009 pending before the Chief Judicial Magistrate, Rangpur; Complaint Register Case No.917C of 2009 pending before the Chief Judicial Magistrate, Jhenaidah; Complaint Register Case No.810C of 2009 pending before the Chief Judicial Magistrate, Lakshmipur ; Complaint Register Case No.768C of 2009 pending before the Chief Judicial Magistrate, Brahmanbaria; Complaint Register Case No.805Cof 2009 pending before the Chief Judicial Magistrate, Gaibandha; Complaint Register Case No.6687 of 2009 pending before the Chief Metropolitan Magistrate, Dhaka; and Complaint Register Case No.706 of 2009 pending before the Chief Judicial Magistrate, Tangail.

3. It is further stated that, the said Dr. Tawfique-e-Elahi Chowdhury himself filed a complaint register case on 19.01.2010 against the petitioner, being Complaint Register Case

95 of 2010 before the Chief Metropolitan Magistrate, Dhaka and cognizance was taken therein. Therefore, according to the petitioner, in total 24 criminal cases are now pending against him in 21 Districts in relation to the same allegation and same offence. After cognizance was taken in the said cases, the petitioner obtained ad-interim anticipatory bail from the High Court Division in all the 24 criminal cases including the impugned 23 complaint registered cases. Thereafter, the petitioner has moved this Court with this writ petition challenging the proceedings of the impugned 23 complaint register cases and obtained the aforesaid Rule. At the time of issuance of the Rule, this Court, vide ad-interim order dated 02.02.2010, stayed further proceedings of the said cases for a period of 03 (three) months, which was extended time to time.

4. The Rule is opposed by the Government (respondent No. 1) by filing affidavit-in-opposition, mainly contending that, the petitioner has no case before this Court under writ jurisdiction and that the case of the petitioner does not attract the provisions under Article 35(2) of the Constitution. It is further stated by the respondent that, since the petitioner, through its news paper, published defamatory news against the leader of Bangladesh Awami League and the son of the said leader, the followers and leaders of the party have been defamed and as such some of them, being personally aggrieved, filed the impugned cases in their respective districts.

5. Mr. A.J. Mohammad Ali, leaned senior counsel appearing for the petitioner, submits that, initiation of more than one criminal case in respect of same offence, punishable under Sections 500 and 501 of the Penal Code, is not permitted by law and the Constitution. According to him, by filing these criminal cases, fundamental rights of the petitioner to be treated in accordance with law and his personal liberty, as guaranteed under Articles 31 and 32 of the Constitution, have been grossly violated. He submits that, if the impugned proceedings are not quashed by this Court, the petitioner will be victim of double jeopardy which is prohibited by Article 35(2) of the Constitution, which is also an important fundamental rights of the petitioner guaranteed by the Constitution. Further referring to the provisions under Sections 179 and 198 of the Code of Criminal Procedure, learned advocate submits that, since the act of publication of the said report in the said news paper was done from Dhaka, only case that could be proceeded against the petitioner was the case which was filed before the Chief Metropolitan Magistrate, Dhaka. Therefore, according to him, other cases on the self same allegations, which have been filed in 21 other districts, cannot proceed against the petitioner. Learned advocate further submits that, the report in question, even if treated as defamatory report, the alleged defamation is caused not to the complainants of those criminal cases but to the Prime Minister and her son. Therefore, according to him, the complainants in those impugned criminal cases, under no circumstances, may be treated as aggrieved persons as provided by Section 198 of the Code of Criminal Procedure. Learned advocate further submits that, even if no conviction and punishment have yet been imposed in the impugned cases against the petitioner, this Court should interfere into those criminal cases when it is clear before this Court that there is every possibility in those criminal cases that they will jeopardize the fundamental rights of the petitioner as guaranteed under Article 35(2) of the Constitution.

6. As against above submissions, Mr. Mahbubey Alam, learned Attorney General appearing for respondent no.1, has placed the news items in question, which are annexed to the writ petition as Annexures-A and B. Mr. Alam then submits that, by these reports, not only the Prime Minister or her son was defamed, rather, according to him, the entire political party led by Sheikh Hasina has been defamed. Therefore, according to him, when the leader

of the said political party, Bangladesh Awami League, and her son have been defamed in such malicious way, all the followers of the said political party and their leaders have become personally aggrieved. Therefore, since the reputation of the very political party have been undermined or the leaders of the said political party have been defamed, it cannot be said that the followers of the said political party are not personally aggrieved. Further referring to the relevant Articles in the Constitution as well as the provisions under Sections 526 and 561A of the Code of Criminal Procedure, learned Attorney General submits that, the very writ petition challenging the impugned proceedings is not maintainable inasmuch as that the petitioner has equally efficacious alternative remedy under the said provisions before the Criminal Benches of this Court.

7. It appears from the materials on record that, admittedly, 24 criminal cases have been filed against the petitioner in 21 different districts in respect of the same reports published in the Daily Amar Desh on 17.12.2009 and 19.12.2009 (Annexures A and B). It is apparent from the very reading of the said reports that, the Prime Minister at the relevant time (who was also the President of Bangladesh Awami League), her son and one Advisor to the Prime Minister were the subject matter of the said reports by which the news paper wanted to project that they were directly or indirectly involved in corruption. The further admitted position is that, these reports prompted some supporters of Bangladesh Awami League in different districts to file the impugned criminal cases against the petitioner and some other individuals who were involved in publishing the said reports. When the petitioner moved this writ petition, the said criminal cases were pending before the said Courts and, these, he obtained ad-interim anticipatory bail from the High Court Division in connection with those cases. Therefore, at the time of issuance of the Rule, no prosecution could proceed against the petitioner in those criminal cases and that the said criminal cases could not reach their ends to have a result of conviction or acquittal against him because of the ad-interim order passed in the instant writ petition.

8. Against above factual backdrop, since the petitioner has mainly tried to invoke Article 35(2) of the Constitution, which is one of the most important fundamental rights guaranteed by the Constitution in favour of a person, let us quote the same for ready reference:

> "35. (1)…….
> *(2) No person shall be prosecuted and punished for the same offence more than once.*
> (3)……
> (4)……
> (5)……
> (6)……..."

(Underlines supplied)

9. It appears from the above quoted provision of the Constitution that, a guarantee has been provided in favour of any person not to be prosecuted and punished for the same offence more than once. Therefore, the very condition to attract this provision is that, a person has to be first prosecuted and punished. The admitted position in this case is that, the petitioner was yet to be prosecuted and/or punished in any of the impugned criminal cases when he moved this writ petition. Thus, the very words of the Constitution under Article 35(2) make it clear that the said provisions was or is not attracted in so far as those criminal cases are concerned.

10. While examining the similar provisions of the Indian Constitution under Article 20(2), the Supreme Court of India has repeatedly declared this position in respect of the principle of double jeopardy. It is held by the Indian Supreme Court in **O.P. Dahiya Vs. Union of India (2003), 1SCC-122** that, when a person is neither convicted nor acquitted on the charges against him in the first trial, a trial in such a case would not be amount to double jeopardy. Though the protection in respect of double jeopardy in USA and UK are wider than the constitutional protection in our Subcontinent, namely in India, Bangladesh and Pakistan, and in those countries the protection is given even in respect of acquittal (see the 5th amendment to the US Constitution), the protection as provided by the Constitutions of this subcontinent (India, Pakistan and Bangladesh) is narrower than those countries in that the protection is given only in respect of previous prosecution and conviction and not for previous acquittal for the same offence. However, the provisions under the Code of Criminal Procedure under Section 403 have given protection to a person in respect of previous acquittal as well. According to sub-section (1) of Section 403 of the Code Criminal Procedure, when a person has already been tried by a Court of competent jurisdiction for an offence and the said person has been convicted or acquitted of such offence, till such conviction or acquittal remains operative, he cannot be tried again for the same offence. Therefore, it appears that, the statutory provisions under the Code of Criminal Procedure has given wider protection to a person than the Constitutional provision in so far as the issue of double jeopardy is concerned.

11. It is true that, by filing various cases against an individual in different districts, the personal liberty of that individual is somehow jeopardized and, on that point, learned advocate for the petitioner has raised the issue of another fundamental right of the petitioner as guaranteed by the Constitution under Article 32. However, it appears from the said very provision of Article 32 that, the said right of liberty in favour of a person is granted subject to the provisions of law. Therefore, when we are examining the fundamental rights of the petitioner guaranteed under the Constitutions, we cannot ignore the fundamental rights of the people of this country or the individuals who have filed those criminal cases feeling aggrieved by the said reports, in particular when every complainant has stated in their respective petition of complaint as to how they became aggrieved by such publication of reports in the said news paper. Therefore, under writ jurisdiction, we cannot assume that the said complainants were in fact not aggrieved personally. If we hold the view that they were not aggrieved personally, we would be preventing them from proving their cases before the Tribal Court by adducing evidences. Therefore, this Court is of the view that, the issue whether the said complainants were in fact personally aggrieved or not, can only be decided in the trial by the Courts before which the impugned proceedings are pending. In that view of the matter, we do not find any substance in the submissions of the learned advocate for the petitioner in so far as the provisions under Section 198 of the Code of Criminal Procedure is concerned. In this regard, we have also examined the provisions under Section 179 of the Code of Criminal Procedure as raised by the learned advocate for the petitioner. Upon examining that provision, it appears that, the same does not have any application in respect of the impugned proceedings.

12. It further appears from materials on record that, because of various criminal cases, the petitioner is required to move from one district to another district to defend those cases. The Code of Criminal Procedure, under Section 526, has given a solution to such inconvenience. This provision has conferred wide power on the High Court Division to transfer any criminal case from one district to another or even to transfer the same to itself for hearing. Therefore, it is always open to the petitioner to approach the High Court Division under the said

provision seeking a transfer order of those cases to one particular district to avoid his potential inconveniences. Thus, on that point as well, we are of the view that, the petitioner has no case before this Court. On the other hand, if the petitioner feels that the impugned criminal cases have been filed to victimize him for political reason or that the statements in those complaint cases do not disclose any offence, the petitioner also has an option to approach the High Court Division for quashing the same under section 561A of the Code of Criminal Procedure. This provision under Section 561A of the Code of Criminal Procedure has also given wide power on the High Court Division to pass any order for preventing abuse of the process of criminal Courts.

13. In view of above facts and circumstances of the case, since, apparently and admittedly, no prosecution has been concluded against the petitioner and that the petitioner has neither been convicted or acquitted in any criminal case for the offence in question, namely, the offices punishable under Sections 500 and 501of the Penal Code, we are of the view that, the petitioner does not have any case before this Court under writ jurisdiction to invoke Article 35(2) of the Constitution or other provisions of the Constitution or Code of Criminal Procedure. Besides, since the petitioner does not have any particular case of enforcement of fundamental rights under any of the above mentioned Articles, the writ petition is not maintainable.

14. Regard being had to the above facts and circumstances of the case, we do not find any merit in the Rule and as such the same should be discharged.

15. In the result, the Rule is discharged. The ad-interim order, if any, thus stands recalled and vacated.

16. Send down the L.C.R.

17. Communicate this.

Md. Badruzzaman, J:

18. I agree.

9 SCOB [2017] HCD 127

HIGH COURT DIVISION

Civil Revision No. 915 of 2015

Rokeya Begum Bina and others
Vs.
Habib Ahsan (Hobi) and others

Mr. Md. Shafiqul Islam Dhali, Advocate
with
Ms. Mariam Begum, Advocate
Ms. Umme Kulsum, Advocate
.....For the petitioners

Mr. Kingshuk Das, Advocate
.....For the opposite parties

Heard on: 12.05.2016, 19.05.2016, 25.05.12016
and Judgment on: 01.06.2016.

Present:
Mr. Justice Soumendra Sarker
And
Mr. Justice Md. Ashraful Kamal

Code of Civil Procedure, 1908
Order 7, Rule 11:
The trial Court can exercise the power under Order 7 Rule 11 of the Code of Civil Procedure at any stage of the suit before registering the plaint or after issuing summons to the defendants at any time before the conclusion of the trial. ...(Para 15)

For the purposes of deciding an application under clauses (a) and (b) of Order 7 Rule 11 of the Code, the averments in the plaint are germane; the pleas taken by the defendants in the written statement would be wholly irrelevant. ...(Para 16)

Registration Act, 1908
Section 17B:
It is crystal clear from the reading of the plaint that as per sub-clause (ii) of Clause (a) of Section 17B of the Registration Act, the plaintiff –opposite parties nor present the contract for sale itself for registration within six months from the date of coming into force of that section i.e. 1st July, 2005 neither instituted a suit for specific performance of the contract within six months next after the expiry of the period mentioned in clause (a). So, after the expiry of the period mentioned in clause (b) of section 17B, the contract for sale (affidavit dated 03.04.1995) in question stand void. ...(Para 22)

Judgment

Md. Ashraful Kamal, J:

1. This Rule was issued calling upon the opposite party Nos. 1-3 to show cause as to why the judgment and order dated 02.03.2015 passed by the Joint District Judge, Court No. 2, Munshigonj in Title Suit No. 600 of 2012 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Brief facts, necessary for the disposal of this Rule, are as follows;

Opposite party Nos. 1-3 had filed Title Suit No. 600 of 2012 in the Joint District Judge, Court No. 2, Munshigonj for a declaration of Title in respect of land measuring 171 decimals against the petitioners and others contending *inter alia* that one Rajjab Ali Mollah was the owner of the suit land. The said Rajjab Ali Mollah died living behind 2 (two) sons and 1 (one) daughter namely Abdul Aziz Mollah, Abdul Majid Mollah and Masuda Khatun respectively and accordingly they became the owners of the land in question. Thereafter, A. Aziz Mollah sold his portion to A. Mozid Mollah vide sale deed No. 24917 dated 25.08.1977. After that Abdul Aziz Mollah entered into an oral agreement with his three sons plaintiffs (opposite parties herein) for sale by taking Tk. 2 (two) lac from them as consideration money and handed over possession to them. In respect of the aforesaid oral agreement for sale, Abdul Aziz Mollah made an affidavit on 03.04.1995. But, due to the death of the said Abdul Aziz Mollah, the plaintiff did not get the registered Kabala in respect of the said land in question. In the meantime on 21.01.2001, Masuda Khatun orally gifted her portion to the plaintiffs and accordingly handed over the possession of the same. In this way the plaintiffs opposite parties are became the owner of the land in question by purchase and oral gift. When the plaintiffs are enjoying their right, title and interest over the property in question peacefully, then on 19.09.2012, the defendants-petitioners pronounced in the locality that they are the owners of the property in question and they will dispossess the plaintiffs – opposite parties from the suit land. Hence the instant suit.

3. The defendants–petitioners by filling written statements contesting the suit denying the material allegations of the plaint contended *inter alia* that the plaintiffs and defendant Nos. 9-10 are full brothers and sisters and defendant No.8 is their mother, on the other hands defendant Nos. 2-7 are full brothers and sister and defendant No.1 is their mother. Abdul Majid Mollah, the predecessor of both the parties was the owner of the property in question. He died living behind the plaintiffs and the defendant Nos. 1-10 as his heirs and they have been possessing the said property in Ejmali. The plaintiffs falsely mutated their names and collusively obtained a chairman certificate as they are the only heirs of late Abdul Majid Mollah. Against the said mutation, the defendant Nos. 1-7 had filed an objection and accordingly plaintiffs so called mutation was cancelled. The suit land is Ejmali one. Abdul Majid Mollah did not transfer or hand over the possession of the suit land to anyone at his life time or did not make any oral agreement in respect of the suit land and so called affidavit of Masuda Khatun dated 21.01.2002 is also false and fabricated one.

4. Thereafter, the Defendant Nos. 1-7 filed an application under Order 7 Rule 11 of the Code of Civil Procedure, for rejection of the plaint. The plaintiffs contested the said application by filing written objection. After hearing the said application for rejection of the plaint, the learned Joint District Judge, Court No. 2, Munshigonj rejected the same on 02.03.2015.

5. Being aggrieved by the said judgment and order dated 02.03.2015 passed by the Joint District Judge, 2nd Court, Munshigonj in Title Suit No. 600 of 2012, the defendants-petitioners preferred this revisional application and obtained the present Rule.

6. Mr. Md. Shafiqul Islam Dhali, with Ms. Mariam Begum and Ms. Umme Kulsum, the learned Advocates appearing for the defendant-petitioners submits that the plaintiffs have not taken step according to the Registration Act, (Amendment) 2004 as the basis of their claim is an unregistered oral agreement and on that basis they filed the present suit for Specific Performance of Contract. Mr. Islam submits that there is no written agreement between

Abdul Jalil Mollah and the plaintiff in respect of the suit land. So, according to the section 17(A) of the Registration Act no title has passed in favour of the plaintiffs in respect of suit land in question.

7. He also submits that the plaintiffs stated in the paragraph No. 10 of the plaint that, "(10) অন্তেঃ আঃ মজিদ মোল্লা নালিশী তফসিল বর্ণিত দাগের সম্পত্তিতে .... ১৬ অংশে মালিক স্বত্ববান ও ভোগ দখলকার থাকাবস্থায় তাহার নগদ টাকার আবশ্যক হওয়ায় তাহার ৩ পুত্র যথা হাবিব আহসান (হবি), মোঃ মোশারফ হোসেন (মনির হোসেন), কামরুল হাসান এর নিকট হইতে ১-৭ নং বিবাদীগনের মধ্যস্থতায় নগদ ২,০০,০০০/- (cC mr) ViLi h¢Tui ¢eui ¢hNa 04.04.1995 ইং তারিখে লৌহজং সাব রেজিষ্ট্রি অফিসের মাধ্যমে সাব কবলা দলিল সম্পাদনে ও রেজিষ্ট্রি করিয়া দেওয়ার অঙ্গীকার করেন। যাহা Bëm j¢S ®j¡õ¡l Ù£, fœ, Le¡NZ Ab¡v 1-৭ নং বিবাদীগন বিগত ০৩.০৪.৯৫ ইং তারিখের নোটারী পাবলিক ঢাকা এর সম্মুখে হলফনামার মাধ্যমে স্বীকার করেন।" - that means before the date of execution, the affidavit was shown which is really impossible. He also submits that it is apparent from the plaint that the so-called affidavit is false, fabricated and created one.

8. He also submits that according to section 17B of the Registration Act, the so called affidavit dated 03.04.1995 has no legal force. He finally submits that in the schedule of the plaint boundary of the suit property is vague and unspecified and hence the suit is barred by section 42 of the Specific Relief Act. Moreover, the plaint in question filed with the insufficient court- fees.

9. Mr. Kingshok Das the learned Advocate appearing for the opposite parties submits that though it is suit for declaration by away of adverse possession accordingly suit is not barred under section 17(B) of the Registration Act as a result the application under section 7 rule 11 of the Code of Civil Procedure cannot be sustainable. He further submits that the schedule of the suit property specified with proper boundaries. He finally submits that the father of the plaintiffs took money from the plaintiffs for consideration of the property in question and handed over the possession of the suit property.

10. Order VII rule 11 describes the procedure for rejection of plaint. It is necessary to quote Order VII rule 11 of the Code of Civil Procedure which runs as follows:-

"11. The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law.

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not exceed twenty-one days].

[(e) where any of the provisions of rule 9 (1A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so.]

11. On a plain reading of the aforesaid rule it is evident that the plaint shall be rejected on certain grounds: -

a. If it does not disclose a cause of action or relief claimed is undervalued, but the plaintiff did not correct it within the time allowed;

b. or insufficiently stamped, but the plaintiff did not supply the deficit within the time allowed ;
c. or it is barred by any law;
d. or process fees together with postal charges for serving summons upon the defendant has not been paid along with the plaint.

12. In the case of Burmah Eastern Ltd. Vs. Burmah Eastern Employees Union reported in 18 DLR (Dhaka)-709. In that case Mr. Justice Murshed held that apart from the question of Order 7 Rule 11 of the Code of Civil Procedure, the Court can also exercise its inherent power in order to stop harassing the other party.

13. Justice Murshed has held as follows;

"The principles involved as twofold: in the first place, it contemplates that a still born suit should be properly buried, at its inception, so that no further time is consumed on a fruitless litigation. Secondly, it gives plaintiff a chance to retrace his steps, at the earliest possible moment, so that, if permissible under law, he may found a properly constituted case.

Order 7 Rule 11 of the Code, as quoted above enumerates certain categories under which the Court is called upon to reject a plaint, but, it is obvious that they are not exhaustive. It appears from the language of rule 11 of Order 7 that it requires that an incompetent suit should be laid at rest at the earliest moment so that no further time is wasted over what is bound to collapse as not being permitted by law."

14. For deciding an application under Order 7 Rule 11 of the Code of Civil Procedure, the relevant fact which need to be looked into are the averments in the plaint.

15. The trial Court can exercise the power under Order 7 Rule 11 of the Code of Civil Procedure at any stage of the suit before registering the plaint or after issuing summons to the defendants at any time before the conclusion of the trial.

16. For the purposes of deciding an application under clauses (a) and (b) of Order 7 Rule 11 of the Code, the averments in the plaint are germane; the pleas taken by the defendants in the written statement would be wholly irrelevant.

17. The basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint. If on a meaningful and not formal reading of the plaint it is manifestly fictitious and meritless in sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code.

18. The real object of the Order 7 Rule 11 of the Code of Civil Procedure is to keep out of Courts irresponsible suits. If it is found that the suit is an abuse of the process of the court in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7 Rule 11 of the Code can be exercised.

19. Question is whether a real cause of action has been set out in the plaint. Clever drafting created illusion are not permitted in law and a clear right to use should be shown in the plaint.

20. The Court should always be vigilant for scrutinizing the pleadings and materials placed before it to ascertain whether the litigation is frivolous or maintainable at all. The Court must exercise its powers at every stage in order to nip frivolous cases.

21. Coming to the case at hand, the plaintiff-opposite parties claiming the schedule property to the plaint on the basis of unregistered contract for sale (affidavit dated 03.04.1995). In this regard it is necessary to quote Section 17B of the Registration Act which was inserted after section 17 by Act No. XXV of 2004, section 4, (with effect from 1st July, 2005), which runs thus:

"17B. Effect of unregistered contract for sale executed prior to section 17A becomes effective – (1) Where a contract for sale of immovable property is executed but not registered prior to coming into force of section 17A-

(a) the parties to the contract shall, within six months from the date of coming into force of that section,-

(i) Present the instrument of sale of immovable property under the contract for registration, or

(ii) present the contract for sale itself for registration; or,

(b) either of the parties, if aggrieved for non-compliance with any of the provisions mentioned in clause (a), shall, notwithstanding anything contained to the contrary in any law for the time being in force as to the law of Limitation, institute a suit for specific performance or recession of the contract within six months next after the expiry of the period mentioned in clause (a), failing which the contract shall stand void.

(2) The provision of sub-section (1) shall not apply to any contract for sale of immovable property on the basis of which a suit has been instituted in civil court before coming into force of section 17A."

22. It is crystal clear from the reading of the plaint that as per sub-clause (ii) of Clause (a) of Section 17B of the Registration Act, the plaintiff –opposite parties nor present the contract for sale itself for registration within six months from the date of coming into force of that section i.e. 1st July, 2005 neither instituted a suit for specific performance of the contract within six months next after the expiry of the period mentioned in clause (a). So, after the expiry of the period mentioned in clause (b) of section 17B, the contract for sale (affidavit dated 03.04.1995) in question stand void.

23. In such a fact situation, in our considered opinion, the court below has fallen into error of law resulting in an error in his decision occasioning failure of justice in rejecting the application under Order 7 rule 11 of Code of Civil Procedure and as such the impugned order is liable to be set aside. If the present suit is allowed to proceed further it is only consume the time, energy and money of all the parties concern, thereafter, this court cannot allowed such frivolous malafidy proceedings continuing further.

24. In the result, the Rule is made absolute. The judgment and order dated 02.03.2015 passed by the Joint District Judge, 2nd Court, Munshigonj in Title Suit No. 600 of 2012 holding the suit to be maintainable is set aside and the plaint is rejected under Order 7 Rule 11 of the Code of Civil Procedure. There is no order as to costs.

25. Communicate this judgment and order at once.

Soumendra Sarker, J:

26. I agree.

9 SCOB [2017] HCD 132

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 4912 of 2003

Hossain Ali alias Hassan Ali Matbar and others
Vs.
Bangladesh and others

Mr. Md. KhairulAlam, Advocate
….For the Petitioner

Mr. SashankaShekharSarker, DAG with
Mr. Arobinda Kumar Roy, A.A.G and
Mr. Shafiqul IslamSiddique, A.A.G
….For the Respondent No.2

Heard on: The 5th& 13th April, 2015
Judgment on: The 30th April, 2015

Present:
Mr. Justice ShamimHasnain
And
Mr. Justice Mohammad Ullah

State Acquisition and Tenancy Rules, 1955
Rule 31, 42, 42A:
Effect of misquotation or non-mentioning of a particular provision:
In the instant case, after disposal of the appeal under rule 31 of the Rules, 1955 an application was filed before the Settlement Officer at Dhaka mentioning rule 42A of the Rules, 1955 at the instance of the respondent no. 5 praying for hearing of the four appeal cases or taking a decision afresh as mentioned above. Rule 42A of the Rules, 1955 grants power to the Revenue Officer with the additional designation of the Settlement Officer to hear and dispose of any application filed alleging fraud. In the instant case the application as has been filed by the respondent no. 5 mentioning rule 42A is a misconceived one. The Revenue Officer after disposal of the appeal under rule 31 may at any time before final publication of the record-of-rights initiate a proceeding afresh at the stage he may direct. That power of the Revenue Officer has been given under rule 42 of the Rules, 1955. In the instant case, we hold that the application as has been filed by the respondent no. 5 should not be treated as an application under rule 42A of the Rules, 1955 rather it should be considered as an application under rule 42 thereof. It is to be noted here that misquoting of rule or non-mentioning of a particular section in the concerned application does not preclude the Settlement Officer to act under the applicable provision of the S.A.T. Act and Rules thereof for the purpose of arriving at a correct decision with regard to the final publication of the record-of-rights. … (Para 17)

Record of Rights:
The record-of-rights neither creates nor destroys title. It is merely a record of physical possession at the time when it is prepared. … (Para 19)

Jurisdiction of Settlement Officer:
The Settlement Officer appointed with the additional designation of Assistant Settlement Officer may at any time before final publication of the record-of-rights exercise his jurisdiction under rule, 42 of the Rules, 1955. … (Para 20)

Judgment

Mohammad Ullah, J:

1. This *Rule Nisi* was issued calling upon the respondents to show cause as to why the notices dated 10.04.2003 issued under the signature of the respondent no. 4, Charge Officer and Assistant Settlement Officer (Appeal Officer-in-Charge) for re-hearing of Appeal Case Nos. 62948 to 62951 all of 2002 (as contained in Annexure-I, I-1, I-2, and I-3) in respect of D.P.Khatian No. 1645 should not be declared to have been issued without lawful authority and of no legal effect.

2. The Rule was directed to be heard along with Writ Petition No. 4027 of 2003. Since the record of the aforesaid Rule could not be placed before this Bench at the time of hearing, the Rule issued in the said writ petition will be heard and disposed of subsequently by a separate judgment, if the same has not been disposed of in the meantime.

3. It is stated in the writ petition that84.09 acres of land under C.S.Plot No. 565 appertaining to C.S. Khatian No. 107 of Mouza Keranigonj at present Tejgaon Industrial Area originally belonged to the respondent no. 5,Bhawal Raj Court of Wards Estate in 16 annas permanent Zamindary rights and accordingly C.S. Khatian was prepared in the name of Bhawal Raj Court of Wards Estate. The petitioners became the owners of 59.36 acres of land out of 84.90 acres by way of settlement from Bhawal Raj Court of Wards Estate in the year 1941 to 1943 corresponding to 1348 B.S. to 1351 B.S. with the permission of the Board of Revenue vide office Memo Nos. 21 of 1347 B.S. and 15 of 1349 B.S. through 6(six) separate Settlement Cases being No. 48(M) of 1349 B.S., S.Case No. 49/T of 1350 B.S., L.S. Case No. 270(M) of 1350 B.S., L.S. Case No. 117/50(M) of 1349 B.S., S.Case No. 215(5)M of 1349 B.S. and L.S. Case No. 37(M) of 1350, Annexure-B, B-1, B-2, B-3, B-4 and B-5.

4. After taking the aforesaid settlement the petitioners had been paying rent to the Bhawal Raj Court of Wards Estate and got rent receipt from the Estate accordingly, Annexure-C series. Since the petitioners sold some portion of the land out of 59.36 acres, the S.A. record was correctly prepared in the names of the petitioners in respect of the land under S.A. Khatian Nos. 508, 511, 512, 554, 648, 655, 663, 666, 675, 695, 703, 680, Annexure-D series. Thereafter, after the acquisition of the land of the Zaminders on cessation of the Zamindery system the rent receiving interest of the Mouza was acquired by the Government under section 3 of the State Acquisition and Tenancy Act, 1950 (hereinafter referred to as "the S.A.T. Act") Accordingly, the petitioners paid rent to the Government up to 1997, Annexure-E series. It has also been stated that the petitioners have been possessing and enjoying 41.24 acres of land through different tenants. During the recent Mahanagar Survey Operation the draft record-of-rights (Tasdik Stage) was prepared in the name of the petitioners in accordance with rule 29 of the State Acquisition and Tenancy Rules, 1955 (hereinafter referred as "the Rules, 1955"), Annexure- F series. The respondent no. 5, Bhawal Raj Court of Wards Estate filed 4 objection cases being nos. 263 to 266 all of 2000 under rule 30 of the Rules, 1955 for removing the name of the petitioners as appeared against the respective possession in their respective case lands in the draft record-of-rights challenging their tenancy; the Revenue Officer after hearing the parties rejected the objection cases of the respondent no. 5, vide order dated 17.1.2002 Annexure-G.

5. Being aggrieved by the aforesaid rejection order, the respondent no. 5 preferred four appeals being nos. 62948 to 62951 all of 2002 under rule 31 of the Rules, 1955 before the

appellate authority who after hearing the parties rejected the appeals vide judgment and order dated 10.02.2002, Annexure-H. According to the petitioners after delivery of the judgment of the appellate authority, the draft record-of-rights was finally published in the name of the petitioners under section 144(7) of the S.A.T Act read with rules 32 and 33 of the Rules, 1955, Annexure-K to the supplementary affidavit dated 8.4.2015. The respondent no.5, Bhawal Raj Court of Wards Estate made an application mentioning rule 42A of the Rules, 1955 before the Settlement Officer at Dhaka against the aforesaid appellate order for cancellation of the same and for hearing of the appeals as contained in Annexure-1 to the affidavit-in-opposition filed by the respondent no.5. Accordingly, the revenue authority on 10.4.2003 issued four notices under the signature of the respondent no. 4, Charge Officer and Assistant Settlement Officer(Appellate Officer-in-Charge) upon the petitioners for hearing of the aforesaid appeals afresh, fixing the date for hearing on 24.4.2003.

6. This Writ Petition is directed challenging the legality and propriety of the notices of hearing of the appeal cases as issued by the respondent no. 4.At the time of issuance of the Rule this Court vide order dated 20.07.2003 stayed further proceedings of the appeal cases no. 62948 to 62951 all of 2002 then pending before the respondent no. 4 till disposal of the Rule.

7. This Rule is contested by the respondent no. 2, Director Land Records and Survey and respondent no. 5, Bhawal Raj Court of Wards Estate, represented by its Manager through Mr. Sashanka Shekhar Sarker, learned Deputy Attorney General and Mr. Manzill Murshid, learned Advocate respectively who also filed two separate affidavits-in-opposition.

8. Mr. Md. Khairul Alam, learned Advocate appearing on behalf of the petitioners upon placing the relevant provisions of the rules incorporated under Chapter VII of the Rules, 1955submits that the Appellate Officer has not been given any power whatsoever to re-hear the appeal cases under rule 31 of the Rules, 1955 which had earlier been disposed of on final adjudication pursuant to which City Survey Khatian had been prepared and finally published under section 144(7) of the S.A.T. Act read with rules32 and 33 of the Rules, 1955, in the names of the petitioners, and as such the impugned notices as issued by the respondent no. 4 Appellate Authority without setting aside the earlier order dated 10.02.2002 was absolutely without jurisdiction. He further argues that pertinency of rule 42 of the Rules, 1955 is limited to a period prior to publication of the final record-of-rights under section 144(7) of the Act. He submits that on the face of the final publication of the record-of-rights in the name of the petitioners, the respondent no. 4 had no jurisdiction to hear the appeal cases except for a challenge of the said decision under section 145A of the Act before the Land Survey Tribunal constituted under S.A.T. Act and as such the respondent no. 5 could not invoke jurisdiction even under rule 42A of the Rules, 1955 for rehearing the decision of the Appellate Authority, afresh. In support of his submissions Mr. Alam, cited the decision in the case of *Bhawal Raj Court of Wards Estate represented by its Manager vs. Rashida Begum and others* reported in 14 MLR(AD) 2009 and *Md. Aftab Ali Sheikh vs. Director of Land Records and Survey and others* reported in 58 DLR 397.

9. On the other hand, Mr. Sashanka Shekhar Sarker, learned Deputy Attorney General appearing on behalf of the respondent no. 2, drawing our attention to Annexure-2,a letter issued under Memo No. 31.03.2692 022.44.001 14-217 dated 27.5.2015 by the Zonal Settlement Officer, Dhaka, submits that the record-of-rights has not yet been finally published and notified in the official Gazette in the names of the petitioners in respect of Khatian No. 1645 in view of the provisions of rules, 32, 33 and 34 of the Rules, 1955 and as

such the Revenue Officer with the additional designation of Settlement Officer can invoke the jurisdiction to initiate a proceeding afresh from such stage as he may direct under rule 42 of the Rules, 1955.

10. Mr. Manzill Murshid, learned Advocate appearing on behalf of the respondent no. 5, Bhawal Raj Court of Wards Estate adopted the submissions of the learned Deputy Attorney General appearing on behalf of the respondent no.2.

11. We have perused the petition and the annexures thereto, the impugned notices and the relevant provisions of law and considered the submissions of the learned Advocates for the respective parties.

12. The question which requires to be determined is whether the respondent no. 4, Charge Officer, Dhaka Settlement is empowered under the provisions of Rules, 1955 to adjudicate the appeal cases which had earlier been heard and disposed of under the provisions of rule 31. It appears that the petitioners got settlement of the land in question from the C.S. recorded tenant i.e. Bhawal Raj Court of Wards Estate under six Settlement cases. Initially they paid rent to the Estate and after enactment of the S.A.T. Act when Zamindery system was abolished and the rent receiving interest vested in the Government under section 3 of the S.A.T. Act vide publication of notification no. 2773 L.R. dated 26.2.1952 and the said notification being published in the Dhaka Gazette on 24.3.1952 whereby it was declared that all rent receiving interest vested in the Government with effect from 14.4.1952,the petitioners paid the rent to the Government Estate up to 1997. During S.A. Survey Operation the name of the petitioners were correctly recorded in the S.A. Khatian, as produced by the petitioner, without any objection from any quarter. But when R.S. record-of-rights had not been prepared and published in the name of the petitioners, they filed Title Suit No. 191 of 2005 for correction of the said record-of-rights and some other ancillary reliefs in the Court of Joint District Judge and Arbitration Court, Dhaka wherein they got decree as prayed for vide judgment and decree dated 12.09.2013.Against the said judgment and decree dated 12.09.2013, defendant of the suit as appellant preferred First Appeal before this Court which is now pending for disposal. The petitioners have been owning and possessing their respective case land as tenants on payment of rates and rent initially to the Bhawal Raj Court of Wards Estate and subsequently to the Government after cessation of the the Zamindery system. During recent Mahanagar Survey Operation, Revenue Authority prepared the draft record-of-rights in respect of the land in question in the names of the petitioners under the provisions of rule 29 of the Rules, 1955. The respondent no. 5 Bhawal Raj Court of Wards Estate thereafter filed the aforesaid objection cases under rule 30 of the Rules, 1955 for removing the names of the petitioners from the draft record-of-rights; the revenue authority after hearing the parties rejected the objection cases of the respondent no. 5.The respondent no. 5 moved the appellate authority under rule 31 of the Rules, 1955 unsuccessfully. The respondent no. 5, Bhawal Raj Court of Wards Estate represented by its Manager filed an application on 10.04.2013 mentioning rule 42A of the Rules, 1955 for hearing the appeal cases afresh. Accordingly, the impugned notices have been issued and served upon the petitioners mentioning section 19(2) of the Act, 1950 read with rule 31of the Rules, 1955 for taking a decision afresh about the record-of-rights in question.

13. Section 144 of the S.A.T. Act states that the Government may, in any case if it thinks fit, make an order directing that the record-of-rights in respect of any district, part of a district or local area be prepared or revised by a Revenue-Officer in accordance with such rules as may be made by the Government in this behalf.

14. Chapter VII of the Rules, 1955 deals with the procedure to be adopted by the Revenue Officer for revision of record-of-rights under section 144 of the S.A.T. Act. According to rule 27, ten stages are involved in preparation of the revision of record-of-rights. Among these stages six to ten concern attestation, publication of draft record, disposal of objections, filing of appeals and disposal thereof and preparation and publication of final record-of-rights. After completion of attestation in accordance with the Rules, 1955 and instructions of the settlement department under rule 28, the Revenue Officer, is required to provide opportunity for raising objections, if any regarding the ownership or possession of land or of any interest in the land; while disposing of the objection, the Revenue Officer shall record the brief decision. Rule 28 sets out the procedure of the work, up to attestation. Rule 29 states that after completion of attestation the Revenue Officer shall publish the draft record-of-rights by placing it for public inspection during a period of not less than one month at such convenient place as he may determine informing the persons concerned about the last date of filing objections under rule 30. Rule 30 prescribes procedure for making or giving objection in respect of draft publication of record-of-rights; whereas rule 31 provides the forum for preferring appeal against the order passed under rule 30. Before passing the final order on such an appeal the contending parties shall be afforded the opportunity to present their part of the case. After disposal of appeal under rule 31, the Revenue Officer shall have to take initiative for final publication of the record-of-rights on obtaining necessary permission from the Government to be issued by general or special order for the purpose of printing of the same in manuscript according to rule 32. Under rule 33 the Revenue Officer shall publish the final record-of-rights within 30(thirty) days from the date of receipt of the general or special order of the Government. Rule 34 provides procedure for issuing certificate stating the facts of such final publication. The Government is empowered by sub-rule (2) of Rule 34 to declare notification in the official Gazette that the record-of- rights has been finally published with regard to an specific area for every village and such notification shall be conclusive proof of such publication. Rule 35 speaks about presumption as to the correctness of the record-of-rights. When a record-of-rights is finally published under rule 33, the publication shall be conclusive evidence that the record has been duly revised under section 144 of the S.A.T. Act. Every entry in a record-of-rights finally published shall be presumed to be correct until it is rebutted on taking evidence before the appropriate civil court.

15. Chapter VIII of the Rules, 1955 deals with the power of the Settlement Officer in revising record-of-rights under section 144 of the S.A.T. Act. In accordance with rule 36, a Revenue Officer appointed with or without additional designation of the Settlement Officer or Assistant Settlement Officer for Revision of a record-of-rights under Chapter XVII of the Act within any district, part of a district or local area, shall have the power to revise the same upon following the procedure as laid down in the Code of Civil Procedure, 1908 for the trial of suit; and to enter upon any land included within the area in respect of which an order under section 144 of the Act has been made to survey, demarcate and prepare a map of the same. Rule 40 empowers the Settlement Officer to initiate proceedings relating to objections under rule 30 and appeals under rule 31 for disposal by any Assistant Settlement Officer subordinate to him. Rule 41 empowers the Settlement Officer to withdraw cases from the file of any Assistant Settlement Officer or Revenue Officer subordinate to him relating to any of the proceedings under Chapter VII and to dispose of the same by himself or by transfer them to any other Assistant Settlement Officer or Revenue Officer subordinate to him for disposal. However, rule 42 provides special power to the Revenue Officer appointed with the additional designation of the Settlement Officer who may at any time before publication of the final record-of-rights direct that any portion of proceedings referred to in rules 28 to 32 in

respect of any district, part of a district or local area shall be cancelled and to take up the proceeding afresh from such stage as he may direct. Pursuant to a complaint or on receipt of an official report the Revenue Officer with the additional designation of Settlement Officer has jurisdiction to correct a fraudulent entry in the record-of-rights upon consulting the relevant records and making other inquiries as he may deem necessary and direct excision of the fraudulent entry as per the provision of rule 42A. However, before such excision the contending parties shall be notified giving opportunities of personal hearing. Under rule 42B the Revenue Officer shall make correction of obvious errors i.e. arithmetical or clerical before final publication of the record-of-rights. Rule 44 empowers the Director of Land Records and Surveys to discharge all the aforesaid functions of a Revenue Officer as empowered under the aforesaid Rules including rules 40 to 42.

16. The provisions of rules 42 and 42A are reproduced below for ready reference:

*42.**"Special power of Revenue-officer appointed with the additional designation of Settlement Officer**: A Revenue–officer appointed with the additional designation of 'settlement officer' may, at any time before the publication of final record-of-rights, direct that any portion of the proceedings referred to in rules 28 to 32 in respect of any district, part of a district, or local area, shall be cancelled and that the proceedings shall be taken up fresh from such stage as he may direct."*

*42A. **Correction of fraudulent entry before final publication of record-of-rights**- The Revenue-officer, with the additional designation of 'Settlement Officer' shall, on receipt of an application or on receipt of an official report for the correction of an entry that has been procured by fraud in record-of-rights before final publication thereof, after consulting relevant records and making such other enquiries as he deems necessary, direct excision of the fraudulent entry and his act in doing so shall not be open to appeal, at the same time, the Revenue-officer shall make the correct entry after giving the parties concerned a hearing and recording his finding in a formal proceeding for the purpose of future reference.*

17. On a perusal of both the provisions it appears that rule 42 grants special power to the Revenue Officer to cancel any portion of the proceedings referred to in rules28 to 32 in respect of any district, any part of a district or local area, and direct the proceedings to be taken up afresh from such stage as he may direct. The word "proceedings" as appearing in rule 42 is to be understood considering the context of each case. In the instant case, after disposal of the appeal under rule 31 of the Rules, 1955 an application was filed before the Settlement Officer at Dhaka mentioning rule 42A of the Rules, 1955 at the instance of the respondent no. 5 praying for hearing of the four appeal cases or taking a decision afresh as mentioned above. Rule 42A of the Rules, 1955 grants power to the Revenue Officer with the additional designation of the Settlement Officer to hear and dispose of any application filed alleging fraud. In the instant case the application as has been filed by the respondent no. 5 mentioning rule 42A is a misconceived one. The Revenue Officer after disposal of the appeal under rule 31 may at any time before final publication of the record-of-rights initiate a proceeding afresh at the stage he may direct. That power of the Revenue Officer has been given under rule 42 of the Rules, 1955. In the instant case, we hold that the application as has been filed by the respondent no. 5 should not be treated as an application under rule 42A of the Rules, 1955 rather it should be considered as an application under rule 42 thereof. It is to be noted here that misquoting of rule or non-mentioning of a particular section in the concerned application does not preclude the Settlement Officer to act under the applicable provision of the S.A.T. Act and Rules thereof for the purpose of arriving at a correct decision with regard to the final publication of the record-of-rights.

18. The contention of the learned Advocate for the petitioners to the effect that final publication of the record-of-rights was made in the name of the petitioners under Khatian No. 1645 under section 144(7) of the Act read with rules 31 and 32 of the Rules, 1955 has been controverted by the learned Deputy Attorney General (D.A.G.) Mr. Sashanka Shekhar Sarker. He produced a letter dated 27.4.2015 under the signature of the Zonal Settlement Officer, Dhaka, on behalf of the respondent no. 2 by way of an affidavit-in-reply dated 09.04.2015, which is reproduced below.

"The Government of the People's Republic of Bangladesh"
Zonal Settlement Office, Dhaka
28, Shahid Tejuddin Ahmed Sarani
Tejgaon, Dhaka-1208.

Memo no-31.8.2692022.44.001.14-217 dt. 27.4.15

Sub: An official report in respect of City Jarip Khatian no-1645belong to Mouza Tejgaon Industrial Area, J.L.No. 06, Police Station-Tejgaon, District-Dhaka.

Ref: 1. A letter from the office of the Attorney General for Bangladesh under the signature of assistant attorney General Mr. Arobinda Kumar Roy.
2. Instruction of Director General, Department of Land Records and Surveys.

Following the above mentioned letter it is stated that Khatian no-1645 belong to Mouza Tejgaon Industrial Area, J.L. No. 06, Police Station-Tejgaon, district-Dhaka has not yet been finally published and notified by Gazette under section 32, 33 and 34 of the East Bengal Tenancy Rules, 1955 due to pending Civil Suit No. 211/2001 and Writ Petition No. 4912 of 2003.

signed illegible
27.04.15
Zonal Settlement Officer
Dhaka
Phone: 9131573

Mr. Arobinda Kumar Roy
Assistant Attorney General
Office of the Attorney General for Bangladesh

19. On a perusal of the aforesaid letter as produced by the learned D.A.G. before this Court, it appears that in fact no final record-of-rights has been prepared under Khatian No. 1645 in the name of the petitioners having regard to the provisions of rules 32, 33 and 34 of the Rules, 1955. It cannot, therefore, be said that the record-of-rights had been finally published in the name of the petitioners as contended by the learned Advocate for the petitioners. Moreover, from Annexure-2, Gazette Notification dated 12th April, 2009, it appears that final publication of the record-of-rights had been made except D.P. Khatian No. 1645 along with some other Khatians in respect of Mouza Tejgaon Industrial Area. This being so, for the purpose of arriving at a correct decision about the final publication of the record-of-rights we can easily infer that the final publication of the record-of-rights has not been published in the name of the petitioners with regard to the draft Khatian No. 1645

incompliance with rules32 and 33 of the Rules, 1955. The draft record-of-right shall accordingly not be conclusive evidence of its publication under section 144 of the Act, 1950. We should however refrain from making any observations in respect of title of the property in question inasmuch as the First Appeal is awaiting disposal before this Court on a similar point. Moreover, the record-of-rights neither creates nor destroys title. It is merely a record of physical possession at the time when it is prepared. With regard to the decisions as referred to by the learned Advocate for the petitioners we find the same not applicable in the context of the present facts and circumstances of the case and accordingly the same are not discussed.

20. In view of what has been stated above and considering the relevant provisions of law we are of the view that the Settlement Officer appointed with the additional designation of Assistant Settlement Officer may at any time before final publication of the record-of-rights exercise his jurisdiction under rule, 42 of the Rules, 1955. Having regard to the aforesaid observations and decisions, we find no merit in this Rule.

21. Accordingly, the Rule is discharged, however, there will be no order as to costs.

22. The order of stay granted at the time of issuance of the Rule stands vacated.

23. The Revenue Officer appointed with the additional designation of Settlement Officer may take a decision afresh about the disputed publication of the concerned record-of-rights in view of the provisions of rule 42 of the Rules, 1955.

24. In doing so, the respondent no. 4 is directed to dispose of the matter pending before him in accordance with the relevant provisions of laws within the shortest possible of time preferably within 3 (three) months from the date of receipt of the judgment of this court.

9 SCOB [2017] HCD 140

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 3363 of 2013

Osman Gazi Chowdhury
Vs.
Artha Rin Adalat, 4th Court, Dhaka and another

Mr. S.N. Goswami, Advocate
...For the petitioner
Mr. Mohammad Saiful Karim with
Mr. Md. Musharraf Hussain, Advocates
...For respondent no. 2

Heard on 03.09.2015, 15.09.2015, 09.12.2015, 13.12.2015 and Judgment on 27.01.2016.

Present:
Mr. Justice Md. Emdadul Huq
&
Mr. Justice Muhammad Khurshid Alam Sarkar

Section 19(1) of the Artharin Adalat Ain, 2003:
Whether the Artharin Adalats should go for *ex-parte* disposal;
From the language employed in Section 19(1) of the Ain, 2003, the literal meanings of the language gives us two situations, namely; on the date of hearing if the defendant does not register his/her presence before the Adalat by filing Hazira (Av`vjZ Abyôv¯Z _vwK‡j) or if after recording his/her presence in paper, s/he is found absent when the case is taken up for hearing (Wvwmwe`‡K Dcv¯Z cvIqv bv †M‡j), to proceed towards disposal of a case *exparte*. However, the spirit that derives from the provision of Section 19(1) of the Ain, 2003 is that if the Adalat finds that the manner and style of conducting the case by the defendant is to avoid or refrain from hearing (ïbvbx bv Kiv), the Adalat should go for *exparte* disposal of the suit. ...(Para 14)

Section 6(4) of the Artharin Adalat Ain, 2003:
Whether plaint/WS is to be considered by the Adalat in *exparte* disposals;
Section 6(4) of the Ain, 2003 mandates the Adalat to dispose of an Artharin suit *exparte* or instantly by simply considering the plaint (prepared under affidavit) or written statement (made with affidavit) and the documents filed therewith, upon treating all of them as substantive evidence and, thus, pleadings with affidavits is the focal-point of this provision and any formal examination of witnesses has got less emphasis in the Ain, 2003. ... (Para 22)

Section 6(4) of the Artharin Adalat Ain, 2003:
Whether the plaint or W/S or both should be considered in *ex-parte* disposal;
The expression "qmge¡j¡kš² BIS‡ hj¡ Sh¡h" incorporated in Section 6(4) of the Ain, 2003 has been used in the context of "কোন মামলা একতরফাসূত্রে বা তাৎক্ষনিক নিষ্পত্তির ক্ষেত্রে" ...(Para 26)

Section 19(6) of the Artharin Adalat Ain, 2003:
For application of the above expression in an *exparte* disposal situation, when the word "hj¡" (or) would be read as the disjunctive one, an unworkable situation would arise for

the Adalat. Because, in that event the Adalat shall have to consider either the plaint only or the written statement only in the backdrop of impossibility of disposal of a suit solely on the basis of written statement. Furthermore, disposal of a suit solely based on the written statement will render the provisions of Section 19(6) of the Ain, 2003 nugatory. ...(Para 27)

Artharin Adalat Ain, 2003
Section 6(4) and 19(1):
On the contrary, if the word "hj" (or) employed in Section 6(4) of the Ain, 2003 is read as a conjunctive word in an *exparte* disposal situation, it will mean that even if the defendant is absent, the Adalat must consider both the plaint and written statement making the provisions of Section 19(1) of the Ain 2003 redundant, for, this Section requires *exparte* disposal (একতরফাসূত্রে) in the absence of defendant. ...(Para 29)

Artharin Adalat Ain, 2003
Section 19(1):
When in an Artharin suit the defendant-side would not participate in the hearing, what would the Adalat do with the written statement? The normal presumption would be that by his non-participation in the hearing he was not placing before the Adalat his claims, which were raised in the written statements. And keeping this scenario in mind, the Legislature made the provision in Section 19(1) of the Ain, 2003 for the Adalat to dispose of the suit *exparte* (একতরফাসূত্রে). The expression "একতরফাসূত্রে" in Section 19(1) of the Ain, 2003 has been purposefully employed debarring the Adalat from considering the defendant's case. ...(Para 34)

Artharin Adalat Ain, 2003
Section 6(4):
The above analysis on the different provisions of the Ain, 2003, which had been carried out in an effort to lay down a workable statutory interpretation, leads us to take a view that the meaning of the expression "qmge¡j¡kš² BIS‡ hj Shjh" employed in Section 6(4) of the Ain, 2003 is that the plaint (made with affidavit) is to be considered and where necessary the written statement (made under affidavit) is also to be considered. Hence, in Bangla the following expression "হলফনামা যুক্ত আরজী এবং যথাযথ ক্ষেত্রে বিবাদীর হলফনামাযুক্ত জবাব" would sound more appropriate. ...(Para 35)

Artharin Adalat Ain, 2003
Section 19(2):
The Legislature has eased the task of restoration of an Artharin suit for an alleged loan-defaulter by incorporating the above provisions. Because of the percentage of deposit being only 10% of the decretal amount, the time-limitation of filing the application being sufficient (30 days from the date of knowledge of passing the *exparte* decree plus further 15 days for deposit) and the mode of payment being flexible, for, it is permissible to pay in cash or submit bank draft, pay order, cheque and any other negotiable instrument, it would not be irrational to view these conditions as affordable for an aggrieved party. ...(Para 38)

Artharin Adalat Ain, 2003
Section 41:
No writ is maintainable against a decree or post-decree order passed by Artharin Adalats:
It is the clear intention of the Legislature that a party to an Artharin Suit if aggrieved by a decree, must prefer an appeal. Since the Ain, 2003 is a special law with an overriding

provision over other laws and has prescribed a special procedure, there is no scope to bypass the appellate forum, if the forum under Section 19(2) of the Ain, 2003 against an *exparte* decree is already not availed of by the party. ...(Para 41)

Writ is maintainable against a pre-decree order passed by Artharin Adalat.
The only exception is that before passing the decree, if a party to an Artharin Suit feels aggrieved by an order, writ jurisdiction may be invoked as has been held in the case Sonali Bank Ltd Vs Asha Tex International 20 BLC 185. However, after passing a decree, if the party of an Artharin Suit, becomes aggrieved by any type of order, there is no forum other than preferring an appeal under Section 41 of the Ain, 2003.
...(Para 42)

For time-barred Artharin Cases, with 50% deposit of the decretal amount, a writ petition may be entertained:
When an aggrieved party to an Artharin suit, when comes with clean hands and his move is a bonafide one directed at examining a clear-cut factual issue or legal point and not to frustrate the Artharin suit, and files a writ petition by making a 50% down payment of the decretal amount to the lender Bank/financial institution and furnishes detailed reasons for not being able to prefer an appeal within the prescribed time, in the aforesaid rarest of rare situations, this Court by exercising its 'special jurisdiction' under Article 102(2)(a)(ii) of the Constitution may entertain the application, for, being barred by limitation there is no other forum for the aggrieved party. ...(Para 45)

About 10 (ten) years ago, our Apex Court (in the case of BADC -Vs-Artharin Adalat 59 DLR(AD) 6) urged the learned Advocates of this Court to be susceptive in filing a writ petition against any decree of the Artharin Adalat. But unfortunately the learned members of the Bar are coming up with the said writ petitions indiscriminately and thereby causing wastage of valuable time of this Court which is overwhelmingly overburdened with huge backlog of cases. ...(Para 47)

Suggestions for Artharin Adalats of Bangladesh:
The overall suggestion for the Adalat is that the Ain, 2003 is aimed at expeditious disposal of the Bank's/Financial Institution's claim for recovery of money which is, in fact, the money of the State. If the Adalat, after putting its best effort to serve the notice upon the defendant/s, is satisfied that the notice has been served properly, it should proceed towards the disposal of the suit. The Adalat should bear in mind that while there are unscrupulous defendant/s to delay the disposal of the Artharin suits and thereby frustrate the scheme of the Ain, 2003, however, there are also bonafide defendant/s who might be victimised by the Adalat's inconsiderate hurriedness. The Adalat being in a better position to assess the above issues/factors from the manner and style of conducting the case by the defendant-side, it should pass appropriate order as per the demand of the circumstances invoking its inherent power under Section 57 of the Ain, 2003. The bottomline for the Adalat is to ensure fair justice for the parties to the suit and, in doing so, when the Adalat shall endeavour to protect the interest of a clean and bonafide defendant, the Adalat shall also not allow the cunning loan-defaulters to abuse the process of the Adalat. To save a vulnerable defendant from the unreasonable demand of the Banks/Financial Institutions and also to save the defendant's property from selling at a shockingly low-price, which very often takes place in connivance with the staff of the Bank/Financial Institution and the concerned

Court staff, if needed, the Adalat may exercise its inherent power recording the detailed reasons to substantiate its order. ...(Para 50)

Observations for Law Commissions:
The Commission may make the following proposals to the Legislature;

(1) In order to remove the ambiguity in the phrase "*njdbvgvhy³ AviRx ev Reve*", the same may be replaced by the following expression "*njdbvgvhy³ AviRx Ges h_vh_ †¶‡Î wee`¨vi njdbvgvhy³ Reve*" with an "Explanation" of the word "*h_vh_‡¶‡Î*" to be incorporated underneath of the Sub-Section 6(4) of the Ain, 2003. "*h_vh_‡¶‡Î*" means when the Adalat is required to dispose of an Artharin Suit under the provisions of Section 19(6) of the Ain, 2003 in the absence of the plaintiff and defendant, it shall consider the case of the defendant as well, if the written statement (made under affidavit) and any other documents have been filed.

(2) The word '*GKZidvmsÎ*', as occurs in section 19(1) of the Ain, 2003 should be given a definition clarifying that when the defendant upon appearing in the suit files written statement and after framing issue does not attend hearing, the Adalat shall consider only the case of the plaintiff and ignore the written statement and issues framed.

(3) Section 19 (1) of the Ain, 2003 should prescribe two more reasons for proceeding with *exparte* disposal. The first reason should be "ধারা ৭ এর কার্যক্রম *m¤úb nIqvi ci hw` cieZx wbawiZ Zwi‡L wee`¨v bv Av‡m*" and, thereafter, the present two reasons would come and, then, the last reason should be incorporated in the following phrase "*gvgjvi †h †Kvb chv‡q hw` wee`¨v cici wZb evi mg‡qi Av‡e`b K‡i*".

...(Para 51)

Observation for JATI:
We further feel that the Judicial Administration Training Institute (JATI) should undertake a training program for the learned judges who are presiding over the Artharin Adalats with an aim to familiarize them with the interpretation of the different provisions of the Ain, 2003 so as to ensure that all the Adalats of the land use and take uniform meaning of the provisions of the Ain, 2003 and thereby help minimize preferring appeal or filing writs against the orders passed by them. ...(Para 52)

Judgment

MUHAMMAD KHURSHID ALAM SARKAR, J:

1. This Rule was issued calling upon the respondents to show cause as to why the *exparte* decree dated 22.04.2012, passed by the Artha Rin Adalat, 4th Court, Dhaka in Artha Rin Suit no. 124 of 2010, should not be declared to have been passed without lawful authority and is of no legal effect.

2. Succinctly, the facts of the case, as stated in this writ petition, are that on 04.08.2010, the ICB Islami Bank Ltd (hereinafter referred to as respondent no. 2 or "the Bank") as plaintiff instituted Artharin Suit no. 124 of 2010 against the present petitioner impleading him as defendant for realization of the Bank's loan of Tk. 8,10,09,374/- (eight crore ten lacs nine thousand three hundred and seventy four). The petitioner-defendant, upon receipt of the summons, appeared before the Artharin Adalat (hereinafter referred to as "the Adalat") on

03.11.2010 and, then, on 09.03.2011 he filed a written statement. Thereafter, a mediator was appointed by the Adalat on 28.03.2011, and 31.05.2011 was fixed for submission of the report by the Mediator. Thereafter, on 24.08.2011 the issues for the suit were framed, fixing 25.09.2011 for peremptory hearing. On 20.03.2012 the P.W.1 Abu Jafar gave his deposition before the Adalat and 10.04.2012 was fixed for further hearing when the petitioner made a prayer for adjournment of the hearing, but the Adalat rejected the prayer and ordered that the *exparte* judgment and decree shall be pronounced on 22.04.2012. On the said scheduled date for pronouncement of *exparte* judgment and decree, the petitioner came up with an application for recalling the previous order, by which the date for delivery of *exparte* judgment and decree was ordered. But the Adalat rejected the petitioner's application and decreed the suit *exparte*.

3. Being aggrieved with the said order of *exparte* judgment and decree dated 22.04.2012, the petitioner by invoking Article 102 of the Constitution approached this Court and obtained the instant Rule.

4. The Rule is contested by the Bank (respondent no. 2) through filing an affidavit-in-opposition containing typical general denials to the statements of the writ petition. The Bank's core contention is that the petitioner's intention was to protract disposal of the suit by making prayer for adjournments one after another before the Adalat and the suit has rightly been decreed *exparte.*

5. Mr. S. N. Goswami, the learned Advocate appearing for the defendant-petitioner, takes us through the impugned judgment and decree dated 22.04.2012 intandem with the plaint, written statement and the application for recalling the order fixing the date of delivery of *exparte* judgment and submits that the impugned *exparte* judgment and decree has been passed by the Adalat without applying its judicial mind inasmuch as since on the same day the petitioner filed the application for recalling the previous order with an expectation to enable him deducing his deposition, the Adalat ought to have entertained and allowed the application. He terms the Adalat's *exparte* judgment and decree to be an outcome of its whimsical and arbitrary thoughts and actions given that since the said application was filed on the same day with a prayer for cross-examining the D.W.1, the Adalat could have adjudicated upon the suit justly on the basis of the witnesses' deposition and cross-examination. He refers to the order portion of the impugned *exparte* decree and submits that the impugned order has been passed by the Adalat mechanically without discussing the averments of the plaint, written statement and the contention of the deposition made by the PW 1. In an effort to substantiate his submissions on this point, he places provision of Section 6(4) of the Artha Rin Adalat Ain, 2003 (Ain, 2003) and submits that whenever any Adalat would consider to pass an *exparte* decree, it is incumbent upon the Adalat that it shall go through the averments made in the plaint and the written statement and also examine the documents submitted by the parties. He alleges that the Adalat, without going through the plaint, the written statement and without looking at the documents and papers submitted before it, hurriedly disposed of the case by pronouncing an *exparte* decree simply by making a cursory findings that those have been considered. In support of his above submissions, the learned Advocate for the petitioner refers to the cases of Pabna Mental Hospital Vs Tossadek Hosain & others 13 BLC(AD)91, Rupali Bank Ltd and others Vs Tafazal Hossain and others 44 DLR (AD) 260 and Arfanuddin Akand and another Vs Artharin Adalat 15 BLT(HCD) 243.

6. With regard to the issue of maintainability of this writ petition on the ground of bypassing the appellate forum, Mr. Goswami refers to the case of (i) Collector of Customs, Chittagong Vs M. Hannan 10 BLD (AD) 216, (ii) Tafijul Huq Sarker Vs Bangladesh 4 MLR (AD) 19, (iii) Bangladesh Vs Iqbal Hasan Mahmud Tuku 60 DLR (AD) 147 and (iv) Mayor, Chittagong City Corporation Vs Md. Jahangir Faruk and other 14 BLT (AD) 24 and submits that in spite of the availability of forum of appeal, the present writ petition is to be held maintainable on the strength of the *ratio* laid down in the afore-referred cases.

7. By making the aforesaid submissions, the learned Advocate for the defendant-petitioner prays for making the Rule absolute.

8. Per contra, Mr. Mohammad Saiful Karim, the learned Advocate appearing on behalf of respondent no. 2 (plaintiff), at the very outset, places the provisions of Section 19 (2), 19(3) & 19(4) of the Ain, 2003 and submits that the writ petition is not maintainable as the petitioner did not avail himself of an opportunity for restoration of the suit by depositing 10% of the decretal amount within 30(thirty) days before the concerned Adalat No. 4, Dhaka. He next reads Section 41 of the Ain, 2003 and submits that he had also the option to prefer an appeal against the impugned judgment and decree and could have agitated all the issues before the appellate Court. By taking us through the order sheets of the Adalat, he seeks to impress upon this Court that the petitioner was never willing to proceed with the trial of the suit as he persistently tried to prolong the disposal of the suit and finally when the learned Judge of the Adalat came to realise the ill motive of the cunning petitioner as to dillydallying the disposal of the suit, the concerned Adalat has rightly passed the *exparte* decree and, therefore, he submits that there is no illegality in passing the impugned order.

9. In support of his submissions as to non-maintainability of this writ petition, he refers to the following cases; (i) Zahirul Islam Vs National Bank 46 DLR (AD) 191, (ii) Gazi M. Towfiq Vs Agrani Bank 54 DLR (AD) 6, (iii) BADC Vs Artharin Adalat 59 DLR (AD) 6, (iv) ACC Vs Enayetur Rahman 64 DLR (AD) 14 and (v) Sonali Bank Ltd Vs Asha Tex International 20 BLC 185.

10. We have heard the learned Advocates for both the sides at length, perused the writ petition, the affidavit-in-opposition, examined the materials on record as well as the relevant laws and decisions, and considered the same very carefully.

11. The apparent legal issues require to be considered by this Court are; whether the Adalat's decision to dispose of the suit *exparte* is lawful, secondly whether the petitioner's allegation against the trial Court as to non-consideration of his written statement as well as the issues that were already framed is true, in other words, whether the trial Court has failed to apply the provisions of Section 6(4) of the Ain, 2003 in passing the impugned *exparte* decree and thirdly whether in the backdrop of operation of the provisions of Sections 19(2) and 41 of the Ain, 2003, the present writ petition is maintainable.

12. Let us first take up the above first issue as to the lawfulness of the order by which the Adalat fixed the suit for *exparte* hearing. In this case, it is evident from the order-sheets that the very pattern of handling the suit by the defendant compelled the Adalat to record the following order on 10.04.2012;

27---10/4/12 --- A`¨ Gd.GBP Gi Rb¨ w`b awh¨ Av‡Q| ev`xc¶ nwRi| weev`xc¶ GK `iLv¯ `v‡qi Kwiqv ewbZ Kvi‡b mgq cv_bv Kwiqv‡Qb| ïbjvg| bw_ ch¨v‡jvPbvq †`Lv hvq weev`xc¶ BwZc‡e GKwaKevi mgq †bqvq, mg‡qi cv_bv bvgÄy¨| G¶bB c¯¿wZi wb‡`k

(wf.I.wc)| cieZx‡Z wee v`xc¶ †Kvb c`‡¶c ‡bq bvB| AvMvgx 22/8/12 wLt ZwiL GKZidv ï bvbx| (underlined by us)

13. The above order shows that the defendant's application for adjournment was rejected as he was trying to protract the disposal of the suit by seeking repeated adjournments on different occasions and, at the stage of giving oral evidence by the DW, when the Adalat took up the suit but the defendant-side did not participate in the hearing of the case *(cieZx‡Z ev`xc¶ †Kvb c`‡¶c †bq bvB)*, the matter was fixed for *exparte* judgment. Given the above scenario, we are to look at Section 19 of the Ain, 2003, which regulates the aspect of *exparte* disposal of an Artharin Suit.

d¡l¡-19z HLalg¡ ¢Xœ²¢ pÇf¢La ¢hd¡ez-

(1) j¡jm¡l öe¡e¢l Se£ d¡k কোন তারিখে ¢hh¡c¢ Bc¡mতে অনুপস্থিত থাকিলে, কিংবা মামলা শুনানীর জন্য Nq¢a qCh¡l fl X¡¢Lu¡ ¢hh¡c¢কে উপস্থিত পাওয়া না গেলে, Bc¡ma j¡jm¡ HLlag¡ pত্রে নিস্পত্তি করিবে।

14. From the language employed in Section 19(1) of the Ain, 2003, the literal meanings of the language gives us two situations, namely; on the date of hearing if the defendant does not register his/her presence before the Adalat by filing Hazira *(Av`vj‡Z Abyôv¯Z _wK‡j)* or if after recording his/her presence in paper, s/he is found absent when the case is taken up for hearing *(WwKqv wee`‡K Dc¯Z cvIqv bv †M‡j)*, to proceed towards disposal of a case *exparte*. However, the spirit that derives from the provision of Section 19(1) of the Ain, 2003 is that if the Adalat finds that the manner and style of conducting the case by the defendant is to avoid or refrain from hearing *(ï bvbx bv Kiv)*, the Adalat should go for *exparte* disposal of the suit.

15. Let us now see whether the conduct of the petitioner in dealing with the suit compelled the Adalat to go for *exparte* disposal. After scrutinizing the order-sheets of the suit, it transpires that the suit was registered on 04.08.2010 and when this petitioner was not appearing before the concerned Adalat, on 04.10.2010 by order no. 4 the Adalat fixed 20.10.2010 for pronouncing *exparte* decree of the suit. However, on 03.11.2010, the petitioner entered his appearance and filed an application, having prayed for time to submit written statement, which was allowed by the Adalat and, consequently, the suit was withdrawn from the status of *exparte* disposal. Since then, the petitioner sought for time on this or that plea on 3 (three) occasions (on 28.11.2010, 13.01.2011 & 08.02.2011) for filing written statement. Thereafter, in between the time of filing of the written statement (on 09.03.2011) and the framing of issues (on 24.08.2011), the petitioner applied for time on 15.06.2011 and 19.07.2011 and then the Adalat fixed a date for peremptory hearing on 15.11.2011, on which date the Bank was ready for hearing with its witness, but due to the petitioner's adjournment application the hearing did not take place. Thereafter, on 26.02.2012, when the petitioner prayed for adjournment, the Adalat allowed it with a cost of Taka 2000/- and on 20.03.2012 the Adalat took deposition of the PW1 fixing 10.04.2012 for further hearing. This time when the petitioner again came up with an application for adjournment, the Adalat listed the suit for *exparte* disposal. Thus, the Adalat, in fact, showed leniency to the petitioner in the light of the fact that, as per the provisions of Sections 16 & 17 of the Ain, 2003, although it is directory, the suit ought to have been disposed of within 170 days (under Section 16 # 20 days + under Section 17 # 150 days) from the institution of the suit.

16. Thus, it appears that the petitioner was trying to delay the disposal of the suit from the very beginning and the Adalat decided to go for *exparte* disposal when the petitioner was coming up with adjournment applications with an intention to refrain from participating in the hearing of the case. It is the legal duty of the trial Court that once deposition of any witness is

taken, it shall continue with the hearing of the suit without allowing any adjournment application. Therefore, we do not find any illegality in proceeding with the *exparte* disposal of the suit by the Adalat and, accordingly, we hold that the Adalat rightly fixed 22.04.2012 for *exparte* judgement.

17. After the foregoing conclusion as to the correctness of the Adalat in going for disposing of the suit *exparte*, we may now undertake the examination of the second issue as to whether the Adalat committed an error in not considering the written statement and in not disposing of the suit on the basis of the issues that had already been framed.

18. In order to examine the above issue, it would be profitable if we look at the impugned *exparte* judgement which is reproduced below:

> *22/4/12--- A`¨ GKZidv ïbvbxi Rb¨ w`b avh¨ Av‡Q| ev`x c¶ I weev`x c¶ nwRi| weev`x c¶ njdbvgv mn GK `iLv¯ `v‡qi Kwiqv †gvKÏgv GKZidv n‡Z D‡Ëvjb KiZt mv¶x‡K †Riv Kivi Abygwl cv_bv Kwiqv‡Qb|*
>
> *weev`xc¶ A_FY Av`vjZ AvBb 2003 Gi 57 Zrmn 151 avivi weavb g‡Z njdbvgv mn Aci GK `iLv¯ `v‡qi Kwiqv ewbZ Kvi‡b Bmjv‡gi kixqv †gvZv‡eK (e¨vswKs) Fb Av`vq Kivi Rb¨ ev`xc¶‡K wb‡`k c`v‡bi cv_bv Kwiqv‡Qb| bw_ †ck Kiv n‡jv| ïbjvg| bw_ ch©v‡jvPbvq †`Lv hvq †h, 1bs weev`x c¶ MZ 15/11/11 wL. Zwi L, 12/1/12 wL. Zwi L, 26/2/12 wL. Zwi L Ges me‡kl 10/4/12 wL. Zwi L mgq wb‡q‡Qb| A`¨ `iLv¯ `v‡qi Kwiqv GK-Zidv ïbvbx n‡Z D‡Ëvj‡bi cv_bv Kwiqv‡Qb| BwZg‡a¨ AvBb wbawiZ mgq AwZewnZ nIqvq `iLv¯ bvgÄyi Kiv n‡jv| ev`x c¶ wdwi³ Øviv `vMRcÎ `wLj Kwiqv‡Qb| bw_ †ck Kiv n‡jv|*
>
> *bw_ GKZidv ïbvbxi Rb¨ Mp¤xZ n‡jv| ev`xc‡¶i weÁ AvBbRxexi e³e¨ ïbjvg| Bnv D‡j-L¨ †h, A_FY Av`vjZ AvBb 2003 Gi 6(4) avivi weav‡b ev`xc¶ †gvKÏgv `v‡qiKv‡j AviwR I KvMRvw`i mv‡_ Gwd‡WweU `wLj Ki‡j †gvKÏgv GKZidv ev Zvr¶wbK wb¯úwËi †¶‡Î †Kvb mv¶x‡K cix¶v e¨w³‡i‡K njdbvgvhy³ AviwR `vwjwjK cgvbw` we‡klb Kwiqv ivq ev Av‡`k c`vb Kiv hvq| ev`xc¶ Gwd‡WweU mn AviwR `wLj K‡i‡Qb|*
>
> *AÎ †gvKÏgvi AviwR, ev`x c‡¶i `wLjx KvMRcÎ Ges bw_ chv‡jvPbv Kijvg| ev`x e¨vs‡Ki `vex AvBbvbyMfv‡e cgwbZ nq| d‡j ev`xc¶ cv_xZ cwZKvi cvB‡Z nK`vi|*
>
> *c`Ë †KvU wd mwVK|*
> *AZGe,*
> *Av‡`k nq †h,*
>
> *G †gvKÏgvwU weev`xM‡Yi wei“‡× GKZidv m‡Î LiPv mn MZ 30/6/10 wL. chš– 8,10,09,374/-* (আট কোটি দশ লক্ষ নয় হাজার তিনশত চুয়াত্তর) টাকার ডিক্রি হলো। ০১/০৭/10wL. *Zwi L †_‡K UvKv Av`vq bv nIqv chš– ev`xc¶ A_FY Av`vjZ AvBb 2003 Gi 50(2) avivq ewYZ mÿvmn cvß n‡e| weev`xc¶‡K ivq cPv‡ii 60 (IvU)* w`e‡mi gqv ডিক্রীকৃত টাকা সুদ *mn ev`xc‡¶i Abyk‡j cwi‡kv‡ai wb‡`k †`qv n‡jv| e¨_Zvq ev`x c¶ Av`vjZ †hv‡M AvBb I cwZ* মোতাবেক ডিক্রীকৃত টাকা আদায় করে নিতে পারবে।
>
> *‡gvKÏgv `v‡qi cieZx weev`xc¶ †Kvb UvKv Rgv c`vb Ki‡j, ev`xc¶‡K D³ UvKv ev` w`‡q* পরবর্তী কার্যক্রম গ্রহণ করার নির্দেশ দেয়া হলো|
>
> *Avgvi Kv_Z g‡Z gyÝZ I ms‡kvwaZ|* (underlined by us)

19. It is evident from the above-quoted impugned judgement and order that the learned Judge of the Adalat heard the defendant side's two applications; one is for withdrawing the suit from the list under the heading of "delivery for judgment" and the other application is for realization of loan under the Sharia Law, both of which were filed under Section 57 of the Ain, 2003 read with Section 151 of the Code of Civil Procedure (CPC), and the same were rejected by the Adalat on the ground that the applications were filed for delaying the disposal of the suit. Then the Adalat disposed of the case on consideration of the plaint made under

affidavit and the documents filed therewith. It is, however, evident that the Adalat did not consider the written statement, nor did it dispose of the suit upon examining the issues which the Adalat had framed upon receiving the written statement.

20. Now, the pertinent question comes up for examination is whether the Adalat was under a legal duty to consider the written statement of the defendant-petitioner, in a situation, when he failed to participate in the hearing of the case or purposefully refrained from attending the hearing of the case.

21. To have a resolution of the above query, we need to look at Section 6(4) of the Ain, 2003, which is quoted below :

> **"6z ¢hQ¡l fÜ¢a-** (1), (2), (3) .....
>
> (4) HC BCনের অধীন অর্থঋণ আদালতে মামলা নিস্পত্তির ক্ষেত্রে উপ-d¡l¡ (2) J (3)-Hl ¢hd¡e Aek¡u£ pwkš² qmge¡j¡ (Affidavit) মৌখিক সাক্ষ্য (substantive evidence) ¢qp¡বে গন্য হইবে, Hhw Bc¡ma ®L¡e j¡jm¡l HLalg¡ h¡ a¡vr¢eL ¢eØf¢šl ®rত্রে কোন সাক্ষীকে পরীক্ষা ব্যতিরেেL, - কেবল এইরুপ হলফনামা-যুক্ত আরজি বা লিখিত জবাব ও সংক্ষিপ্ত দালিলিক প্রমানাদি বিশ্লেষণ L¢lu¡ l¡u h¡ Bদেশ প্রদান করিবেz"
>
> (underlines added)

22. Our unambiguous understanding on the above provisions of the law is that Section 6(4) of the Ain, 2003 mandates the Adalat to dispose of an Artharin suit *exparte* or instantly by simply considering the plaint (prepared under affidavit) or written statement (made with affidavit) and the documents filed therewith, upon treating all of them as substantive evidence and, thus, pleadings with affidavits is the focal-point of this provision and any formal examination of witnesses has got less emphasis in the Ain, 2003.

23. Whether in the expression "qmge¡j¡kš² Bl S£ h¡ Sh¡h" incorporated in Section 6(4) of the Ain, 2003, the word "h¡" (or) is to be read as a conjunctive word or as a disjunctive word requires some examination and discussion for effective disposal of not only of this Rule, but also of the other cases with the similar background.

24. To carry out the above scrutiny, we need to look at the provisions of Sections 6(4), 13 and 19(1) of the Ain, 2003 side-by-side, for, Section 6(4) of the Ain, 2003 does not outline the procedure to be followed in a situation requiring *exparte* disposal or instant disposal and it is Section 13 of the Ain, 2003 which seeks to provide the grounds and procedures for instant *(Zvr¶wbK/Awej‡¤)* disposal of an Artharin suit and Section 19 of the Ain, 2003 outlines the reasons for taking up an Artharin suit for *exparte* disposal and also the procedures to be followed.

25. We would quote only the provisions of Section 13 of the Ain, 2003 herein under, as the other two Sections have already been embodied in this judgment hereinbefore. Section 13 of the Ain, 2003 reads as under:

> *13| (1) weev`x KZ¸K wjwLZ Reve `wLj nIqvi cieZx‡Z avh GKwU wbawiZ Zwi‡L Av`vjZ Dfq c¶‡K, hw` Dcw¯Z _v‡K, ïbvbx Kwiqv Ges AviwR I wjwLZ eYbv chv‡jvPbv Kwiqv gvgjvi wePvh welq, hw` _v‡K, MVb Kwi‡e; Ges hw` wePvh welq bv _v‡K, Av`vjZ Awej‡¤ ivq ev Av‡`k c`vb Kwi‡e|*
>
> *(2) Dc-avivi (1) G wbawiZ Zwi‡L, †Kvb ev Dfq c¶ hw` Abyfw¯Z _v‡K, Zvnv nB‡j Av`vjZ, AviwR I wjwLZ eYbv chv‡jvPbv Kwiqv gvgjvi wePvh welq, hw` _v‡K, MVb Kwi‡e; Ges hw` wePvh welq bv _v‡K, Av`vjZ Awej‡¤ ivq ev Av‡`k c`vb Kwi‡e|*

(3) gvgjvi †h †Kvb chv‡q, wjwLZ eYbvq wKsev Ab¨ †Kvbfv‡e weev`x KZ…K ev`xi AwfRi e³e¨ ¯xKZ…nBqv _wK‡j, Ges D³ i¡c ¯xKwZi wfË‡Z †hi¡c ivq ev Av‡`k cvB‡Z ev`x AwaKvix, ‡mi¡c ivq ev Av‡`k cv_bv Kwiqv ev`x Av`vj‡Zi wbKU `iLv¯ Kwi‡j, Av`vjZ, ev`x I weev`xi g‡a¨ we`¨gvb Acivci wePvh welq wb®úwËi Rb¨ A‡c¶v bv Kwiqv, Dchy³ ivq ev Av‡`k c`vb Kwi‡e|

(4) gvgjvi ïbvbxi Rb¨ avh c_g Zwi‡L A_ev gvgjvi †h †Kvb chv‡q hw` Av`vj‡Zi wbKU cZxqgvb nq †h, c¶Ø‡qi g‡a¨ NUbv A_ev AvBbMZ we‡q †Kvb weev` bvB, Zvnv nB‡j, Av`vjZ Awej‡¤ ivq ev Av‡`k c`vb Kwiqv gvgjv Pgvš–fv‡e wb®úwË Kwi‡e|

(underlined by us)

26. From a concurrent reading of the aforesaid three Sections, it appears to us that the expression "qmge¡j¡kš² BlSt hi Sh¡h" incorporated in Section 6(4) of the Ain, 2003 has been used in the context of "কোন মামলা একতরফাসূত্রে বা তাৎক্ষনিক নিষ্পত্তির ক্ষেত্রে" and, accordingly, we are to see whether the expression "qmge¡j¡kš² BlSt h¡ Sh¡h" relates only to a situation of *exparte* disposal or only to a situation of instant disposal.

27. For application of the above expression in an *exparte* disposal situation, when the word "h¡" (or) would be read as the disjunctive one, an unworkable situation would arise for the Adalat. Because, in that event the Adalat shall have to consider either the plaint only or the written statement only in the backdrop of impossibility of disposal of a suit solely on the basis of written statement. Furthermore, disposal of a suit solely based on the written statement will render the provisions of Section 19(6) of the Ain, 2003 nugatory. The said Section 19(6) of the Ain is quoted below:

19(6) Ab-ঋণ আদালত¢a th¡Q¡l¡d‡e ®L¡e j¡jm¡, h¡c‡l Aef¤Øq¢a h¡ hÉba¡ ®qa M¡¢lS Ll¡ k¡Cবে না, এবং এইরুপ ক্ষেত্রে Bc¡ma, e¢bতে উপস্হাপিত কাগজাদি পরীক্ষা করিয়া গুনাগুন বিশ্লেষণে মামলা নিষ্পত্তি করিবে।

28. From a plain reading of the above law it appears that this provision requires consideration of the plaintiff's case on merit, irrespective of the fact as to whether the plaintiff is present in the Adalat or not. The provision is about a situation where only the plaintiff is absent as reflected in the words "h¡c‡l Aef¤Øq¢a h¡ hÉba¡l ®qaz". It further speaks of "...e¡...e বিশ্লেষণে মামলা নিষ্পত্তি করিবে". From the practical view point, when the plaintiff is absent or fails to appear, two situations, namely (i) the plaintiff is absent but defendant is present or (ii) both the parties are absent, would arise. Given that Section 19(6) of the Ain, 2003 is silent about presence or absence of the defendant, an assessment is required to be made to know the real intention of Section 19(6) on the Ain, 2003. The straight-forward reply is that in both the situations, while it is mandatory for the Adalat to consider the plaintiff's case on merit, for, Section 6(4) of the Ain, 2003 dictates the Adalat to consider the plaint (made under affidavit) and the documents, it is discretionary for the Adalat whether to consider the defendant's case or not. Our view is that in disposing of a suit under Section 19(6) of the Ain, 2003, since there is no prohibition to consider the defendant's case in the event of the defendant's absence, the case of the defendant should also be considered, and not of the plaintiff alone. However, when the defendant is present his case is also to be considered either by way of production of formal evidence through witness or without examination of witnesses as stipulated in Section 6(4) of the Ain, 2003.

29. On the contrary, if the word "h¡" (or) employed in Section 6(4) of the Ain, 2003 is read as a conjunctive word in an *exparte* disposal situation, it will mean that even if the defendant is absent, the Adalat must consider both the plaint and written statement making the

provisions of Section 19(1) of the Ain 2003 redundant, for, this Section requires *exparte* disposal (একতরফাসূত্রে) in the absence of defendant.

30. Similarly, when the expression "qmge¡j¡kš² BIS£ h¡ Sh¡h" in the context of instant disposal situation, as occurs in Sections 6(4) (তাৎক্ষনিক নিষ্পত্তির ক্ষেত্রে) and 13(1), 13(2), 13(3) & 13(4) (*Av`vjZ Awej‡¤ ivq ev Av‡`k c`vb Kwi‡e)* of the Ain, 2003, would be applied, the Adalat would face the same dilemma, as discussed above in the event of *exparte* disposal, if the word "ev" (or) is taken in the conjunctive sense or disjunctive sense.

31. Thus, apparently there is a bit of lack of clarity in the provisions of Section 6(4) of the Ain, 2003 and it has inevitably become a bounden duty for this Court to interpret the provisions of Section 6(4) of the Ain, 2003 on the touchstone of the scheme of the Ain, 2003 and, thereby, attribute a cohesive meaning of it.

32. By Section 6(4) & 19(6) of the Ain, 2003 the Legislature has created a device for the Adalat that if the parties to the Artharin suit fail to produce witnesses for the purpose of proving their cases by way of formally stating it on the witness box, as in an ordinary Civil Case, or they do not want to face the hassle of attending the Court premise for giving evidence, they will be allowed to prove their respective cases by way of submitting documents. While Section 6(4) of the Ain, 2003 directs that in the event of absence of the defendant, the Adalat would dispose of a suit upon considering the plaint or/and written statement together with documentary evidence, Section 19(6) provides that due to the plaintiff's absence the Adalat cannot dismiss the suit, for, the law obliges the Adalat to consider the merit of the plaint with affidavit and also the documents filed in the Adalat.

33. The legislative intention behind enactment of this special law is to set up special Courts for recovery of the Banks'/Financial Institutions' loan from the defaulters. For achieving the target, the Legislature has sought to incorporate a short-cut procedure in disposing of the Artharin Suits and avoid lengthy procedures as being followed in the ordinary civil Courts. With this aim, the Legislature has provided the procedure for the Adalat to be followed in an *exparte* disposal scenario or instant disposal situation. An *exparte* disposal may be done, both, before and after receiving the written statement. If the suit is decreed *exparte* before receiving the written statement, then there is no difficulty in reading and applying the provisions of Sections 6(4) & 19(1) of the Ain, 2003. However, once the Adalat receives the written statement and the defendant's inaction or failure to pursue the suit compels the Adalat to opt for *exparte* disposal, then the question comes for consideration as to whether the Adalat should consider the written statement.

34. When in an Artharin suit the defendant-side would not participate in the hearing, what would the Adalat do with the written statement? The normal presumption would be that by his non-participation in the hearing he was not placing before the Adalat his claims, which were raised in the written statements. And keeping this scenario in mind, the Legislature made the provision in Section 19(1) of the Ain, 2003 for the Adalat to dispose of the suit *exparte* (একতরফাসূত্রে). The expression "একতরফাসূত্রে" in Section 19(1) of the Ain, 2003 has been purposefully employed debarring the Adalat from considering the defendant's case.

35. The above analysis on the different provisions of the Ain, 2003, which had been carried out in an effort to lay down a workable statutory interpretation, leads us to take a view that the meaning of the expression "qmge¡j¡kš² BIS£ h¡ Sh¡h" employed in Section 6(4) of the Ain, 2003 is that the plaint (made with affidavit) is to be considered and where necessary the

written statement (made under affidavit) is also to be considered. Hence, in Bangla the following expression "হলফনামা যুক্ত আরজী এবং যথাযথ ক্ষেত্রে বিবাদীর হলফনামা¡kš² Sh¡h" would sound more appropriate.

36. It is a finding of fact, this Court already arrived at hereinbefore by examining the background-events, that the petitioner's failure to participate in the hearing led the Adalat to proceed towards *exparte* disposal under Section 19(1) of the Ain, 2003. The facts of the case, thus, show that the Adalat has exercised its jurisdiction as a competent Court, so far the framing of issues and the passing of the *exparte* decree in the absence of the defendant are concerned and, therefore, we do not find that the Adalat had no jurisdiction to pass the impugned order and, thus, the *ratio* of the cited case of Pabna Mental Hospital Vs Tossadek Hossain & others 13 BLC (AD) 91, wherein the concerned State-functionary had exceeded its jurisdiction, and the case of Rupali Bank Ltd Vs Tafazal Hossain 44 DLR (AD) 260, wherein the civil Court had tried the suit without having jurisdiction, has no manner of application in the present case, and the case of Md. Arfanuddin akand & another Vs Artharin Adalat and others 15 BLT 243 is not applicable here in this case, for, the decision arrived at by the High Court Division is *per incurium* inasmuch the Court missed examination of Section 19 (1) of the Ain, 2003. In the instant case, thus, the Adalat was not under a legal duty to consider the case of the defendants as made out in the written statements or the issues that had been framed earlier.

37. Let us now deal with the issue of maintainability of this writ petition. In order to examine the said issue, we need to look at the provisions of Section 19(2), 19(3) & 19(4) of the Ain, 2003 which is quoted below:

> 19 (2) ®Lje j¡jm¡ HLalg¡ pœ² ডিক্রী হইলে, বিবাদী উক্ত একতরফা ডিক্রীর তারিœl Abh¡ Eš² HLalg¡ ¢Xœ²¢ pÇfœ অবগত হইবার ৩০ (ত্রিশ) দিবসের মধ্যে, উপ-ধারা (৩) এর বিধান সাপেœr, উক্ত একতরফা ডিক্রী রœcl Se¢ clM¡Ù¹L¢l ত পারিchez
>
> 19 (3) Ef-d¡l¡ (2) Hl ¢hdje Aekuú clM¡Ù¹c¡¢Mলের ক্ষেত্রে বিবাদীকে উক্ত দরখাস্ত দাখিœml তারিœl flha¢ 15 (fনের) দিবসের মধ্যে ডিক্রীকৃত অর্থের ১০% এর সমপরিমাণ টাকা h¡c¢l c¡h¢l ®pC f¢lj¡ণের জন্য স্বীকৃতিস্বরুপ নগদ সংশ্লিষ্ট আর্থিক প্রতিষ্ঠানe, Abh¡ S¡j¡ea-ül¦f hÉ¡wL XÊgV, ®f-AX¡l h¡ Ae¢ ®Lje fÐl eNc¡ueযোগ্য বিনিময় দলিল (Negotiable Instrument) BL¡রে জামানত হিসাবে আদালতে জমাদান করিœa qCবে।
>
> 19 (4) ***Dc-avi v (3) Gi weavb***মতে ডিক্রীকৃত অর্থেও ১০% এর সমপরিমাণ টাকা জমাদানের সংগে ***ms‡M `iLv¯—i*** মঞ্জুর হইবে, একতরফা ডিক্রী রদ হইবে এবং ***mvj- gvgjv Dnvi b¤i I bw_‡Z cÖvi¾wZ nB‡e, Ges Av`vjZ H g‡g GKwU Av‡`k wjwce× Kwi‡e; Ges AZtci gvgjvwU ‡h chv‡q GK Zid wb®úwË nBqwQj, H chv‡qi Ae¨ewnZ ceeZx chvq cwiPvwjZ nB‡e|***

38. It appears that the Legislature has eased the task of restoration of an Artharin suit for an alleged loan-defaulter by incorporating the above provisions. Because of the percentage of deposit being only 10% of the decretal amount, the time-limitation of filing the application being sufficient (30 days from the date of knowledge of passing the *exparte* decree plus further 15 days for deposit) and the mode of payment being flexible, for, it is permissible to pay in cash or submit bank draft, pay order, cheque and any other negotiable instrument, it would not be irrational to view these conditions as affordable for an aggrieved party.

39. In the case at hand, the impugned *exparte* judgment and decree has been passed on 22.04.2012 and the petitioner could have filed an application for restoration of the suit within 22.05.2012 with the opportunity of depositing the 10% of the decretal amount within next 15

(fifteen) days of filing the aforesaid application. The petitioner, instead of availing himself of the above route, opted to file the instant writ petition and that too was done after 1 (one) year of passing the impugned *exparte* judgment and decree. It is evident from the statement of the Bank that the Execution Case no. 110 of 2012, having been started on 24.09.2012, has its final disposal still awaiting and, in fact, issuance of the instant Rule has halted the further process of the Execution case, albeit there is no direction or injunction restraining its process.

40. The petitioner could also have sought remedy in the form of preferring an appeal under Section 41 of the Ain, 2003 within the time as prescribed therein. The appellate Court is competent to examine any factual issue and law point, including the issue of passing the impugned judgment and decree exceeding its jurisdiction, and take fresh or further evidence for effective disposal of an appeal. However, the petitioner purposefully refrained from availing himself of the aforesaid remedy. Section 41 runs as follows:

> “**d¡l¡-41z Bf£m c¡য়ের ও নিষ্পত্তি সম্পর্কিত বিশেষ বিধান**। -(1) j¡jm¡l ®L¡e f r, ®L¡e AbGZ Bc¡m-তের আদেশ বা ডিক্রী দ্বারা সংক্ষুব্ধ হইলে, k¢c ¢Xœ²La V¡L¡l f¢l j¡Z 50 (f ’¡n) mr V¡L¡ Aপেক্ষা অধিক হয়, তাহা হইলে Ef-d¡l¡ (2) Hl ¢hd¡e p¡পেক্ষে, পরবর্তী ৩০ (ত্রিশ) দিবসের jdÉ q¡Cকোর্ট ¢h i¡গে, Hhw k¢c ¢Xœ²La V¡L¡l f¢l j¡Z 50 (f ’¡n) mr V¡L¡ Abh¡ acAপেক্ষা কম হয়, তাহা হইলে জেলা জজ আদালতে আপীল করিতে পারিবেন।
>
> (২) আপীলকারী, ডিক্রীকৃত টাকার পরিমাZl 50% Hl pj f¢l j¡Z V¡L¡ h¡c£l c¡h£l Bw¢nL ü£L¢aül¦f eNc ¢Xœ²c¡l B¢bL fÐaù¡নে, অথবা বাদীর দাবী স্বীকার না করিলে, জামানতস্বরুপ ডিক্রী প্রদানকারী আদাল-তে জমা করিয়া উক্তরুপ জমার প্রমাণ দরখাস্ত বা আপীml ®jমোর সহিত আদালa c¡¢Mm e¡ L¢lলে, উপ-d¡l¡ (1) Hl Ad£e ®L¡e B f£m L¡k¡র্থে গৃহীত হইবে না।
>
> (3) Ef-ধারা (২) এর বিধান সত্ত্বেও, ¢hh¡c£-c¡¢uL C¢ajধ্যে ১৯(৩) ধারার বিধান মতে ১০% (দশ na¡wn) f¢l j¡Z V¡L¡ eNc Abh¡ S¡j¡ea ¢qp¡বে জমা করিয়া থাকিলে, অত্র ধারার অধীনে আপীল দায়েরl l ®rত্রে উক্ত ১০% (দশ শতাংশ) টাকা উপরি-E¢õ¢Ma 50% (f ’¡n na¡wn) V¡L¡ qCতে বাদ হইবে।
>
> (4), (5), (6)...”

41. It is the clear intention of the Legislature that a party to an Artharin Suit if aggrieved by a decree, must prefer an appeal. Since the Ain, 2003 is a special law with an overriding provision over other laws and has prescribed a special procedure, there is no scope to bypass the appellate forum, if the forum under Section 19(2) of the Ain, 2003 against an *exparte* decree is already not availed of by the party.

42. The only exception is that before passing the decree, if a party to an Artharin Suit feels aggrieved by an order, writ jurisdiction may be invoked as has been held in the case Sonali Bank Ltd Vs Asha Tex International 20 BLC 185. However, after passing a decree, if the party of an Artharin Suit, becomes aggrieved by any type of order, there is no forum other than preferring an appeal under Section 41 of the Ain, 2003.

43. The cases referred to by the learned Advocate for the petitioner are factually different in nature inasmuch as those did not arise out of any order or decree of an Artharin Suit. In the celebrated case of the Collector of Customs Vs Mr. A. Hannan 10 BLD (AD) 216, the appellate forum was held to be ‘not equally efficacious’ as the provision requires deposit of 50% of the penalty. But in the Artharin suits the required deposit is of the decretal amount and it is the money of the Bank/financial institution, as opposed to levying any duty or penalty. In the case of Tafijul Huq Sarker Vs Bangladesh 4 MLR (AD) 19, the appellate forum for a terminated Mutawalli was held to be not equally efficacious as the precondition for preferring an appeal is to hand over the charge first and, thus, the fact being completely different

bypassing the appellate forum was held to be justified in the said case. The *ratio* laid down in the case of Bangladesh Vs Iqbal Hasan Mahmeed Tuku 60 DLR (AD) 147 has been overruled by the Apex Court by their decision passed in the case of ACC Vs Enayetur Rahman 64 DLR (AD) 14. The case of Mayor, Chittagong City Corporation Vs Md Jahangir Faruk and others 14 BLT (AD) 24 is about dismissal of the writ petitioner who directly had invoked writ jurisdiction without preferring an appeal to the appellate authority and the said appellate authority, being an Administrative higher authority, the forum cannot be termed to be an equally efficacious forum in the backdrop of apparent *ex-facie* illegality in the dismissal order which was passed without carrying out any departmental proceeding. Thus, none of the said cases' *ratio* is applicable in this case.

44. Therefore, the writ petition is not maintainable, for, there are alternative efficacious remedies available to the petitioner. Our above view gets support from the principles laid down in the cases of (i) Zahirul Islam Vs National Bank 46 DLR (AD) 191, (ii) Gazi M. Towfiq Vs Agrani Bank 54 DLR (AD) 6, (iii) BADC Vs Artharin Adalat 59 DLR (AD) 6, (iv) Oriental Bank Vs AB Siddiq 13 BLC (AD) 144, (v) ACC Vs Enayetur Rahman 64 DLR (AD) 14 and (vi) Sonali Bank Ltd Vs Asha Tex International 20 BLC 185.

45. The petitioner has resorted to a wrong forum by invoking the writ jurisdiction of this Court. He cannot now avail himself of the remedy under Section 41 of the Ain, 2003, for, evidently he is out of time. Had this writ petition been filed within 30 (thirty) days of the decree, he could have enjoyed the benefit of the provisions of Section 14 read with Section 29 of the Limitation Act as was viewed by a Division Bench of the High Court Division in the case of Sharifa Begum Vs Bangladesh (Writ Petition no. 15331 of 2012) (unreported). However, it is our view that when an aggrieved party to an Artharin suit, when comes with clean hands and his move is a bonafide one directed at examining a clear-cut factual issue or legal point and not to frustrate the Artharin suit, and files a writ petition by making a 50% down payment of the decretal amount to the lender Bank/financial institution and furnishes detailed reasons for not being able to prefer an appeal within the prescribed time, in the aforesaid rarest of rare situations, this Court by exercising its 'special jurisdiction' under Article 102(2)(a)(ii) of the Constitution may entertain the application, for, being barred by limitation there is no other forum for the aggrieved party.

46. Before parting with the judgment, we find it proper to have a survey on the manner and style of handling the present case by the learned Advocate for the petitioner and thereby make an assessment as to whether he has performed his professional duty in conformity with the norms and etiquette of the legal profession in the backdrop of the Appellate Division's following observations made at Para 21 in the case of BADC Vs Artharin Adalat 59 DLR (AD) 6;

> Before we part, we would like to put it on record that in spite of the fact that the law in the matter has been settled long back, petitions are unnecessarily filed under Article 102 of the Constitution challenging the judgment of the Artharin Adalat without making any case covered under the aforesaid Article, not to speak of any ground touching fundamental rights of the petitioner. As a result, the superior Courts are wasting public time which should be discouraged by all concerned including the learned members of the Bar, who are as well officers of the Court.

47. About 10 (ten) years ago, our Apex Court urged the learned Advocates of this Court to be susceptive in filing a writ petition against any decree of the Artharin Adalat. But

unfortunately the learned members of the Bar are coming up with the said writ petitions indiscriminately and thereby causing wastage of valuable time of this Court which is overwhelmingly overburdened with huge backlog of cases.

48. More so, after obtaining the Rule on 29.04.2013 no step was taken by the petitioner to get the matter heard. It is only when the matter was sent to this Bench by the concerned office of this Court (Writ Section) to dispose of the Rule, did the learned Advocate for the petitioner appear on 19.08.2015 before this Court and the matter was fixed for hearing. However, since the date of fixing the matter for hearing, the learned Advocate for the petitioner was not appearing before this Court and, consequently, the matter was placed in the Daily Cause List under the heading 'For Order'. Thereafter, on the verbal promise of the learned Advocate for the petitioner that he shall assist this Court in disposing of the Rule, the matter was again taken back in the category of the items under the column "For Hearing". Since then, every day at the 'Mentioning Hour' the learned junior Advocate attached to Mr. S.N. Goswami was coming up with a prayer to 'pass over' the item on the ground of Mr. Goswami's engagement in the Appellate Division and eventually the matter was heard-in-part and adjourned to 15.09.2015. Thereafter, the learned Advocate for the petitioner took adjournment on several occasions by sending his junior on his personnel ground. In the meantime, the jurisdiction of this Bench changed from writ matters to criminal cases and the Hon'ble Chief Justice, upon receiving administrative note from this Bench, asked us to continue with the hearing of all the part-heard writ matters in addition to exercising the criminal jurisdiction. Accordingly, for nearly two weeks the matter was appearing in a separate Cause List and when the learned Advocate for the petitioner was not turning up, this Court informed the learned Advocate for the petitioner through the Bank's lawyer about this Court's intention to dispose of the Rule, whether or not the learned Advocate for the petitioner attend this Court to make any submissions. On 08.12.2015, Ms. Afsana Begum, the associate Advocate of the learned Advocate for the petitioner, prayed for time on the plea that Mr. Goswami wants to make some submissions on the issue of maintainability of the writ petition and on 09.12.2015 when the matter was taken up for hearing, neither the learned Advocate Mr. Goswami nor his junior Ms. Afsana Begum complied with their promise to attend the hearing and, under the circumstance, this Court fixed the next day for delivery of judgment and on 10.12.2015 when this Court took up the case for pronouncement of the judgment, unfortunately, no one was present, not even his junior, to receive the judgment. However, on 10.12.2015 pronouncement of the judgment could not be finished due to ending the working hour of the day and this Court had to adjourn the pronouncement of the rest of the judgment. Today, (27.01.2016) when this Court is about to accomplish the unfinished judgment, Ms. Afsana Begum, the learned junior to Mr. Goswami, appeared and placed some decisions in support of their argument on the issue of maintainability of this writ petition. The above pattern of handling the case by the learned Advocate for the petitioner amply suggests that the petitioner filed the instant writ petition for delaying the execution process through abusing the process of this Court and the above style of dealing with this case leads us to hold that the petitioner managed to resort to this extreme extent of abuse of the process of the highest Court with the assistance of the learned Advocate for the petitioner for which both of them deserve to be penalised by slapping exemplary costs to be paid from the pocket of the learned Advocate for the petitioner in addition to ordinary statutory costs to be paid by the petitioner, as was ordered in the case of Bandar Nagari Bahumukhi Samabay Samity Ltd Vs Bangladesh 5 ALR-2015 (1) 194. However, Given the fact that Mr. Goswami has showed this attitude for the first time before this Bench, we refrain from passing any order of payment of costs from his pocket, as was done in the case of AKM Asaduzzaman Vs Public Service Commission 4

ALR-2014(2)278. Accordingly, the petitioner shall pay the costs to be imposed upon him hereinafter.

49. There is something more to pen through before we quit this judgment. This is for the Artharin Adalats who are everyday dealing with the Ain, 2003 and, as a part of our obligation under Article 109 of the Constitution, it would be an incomplete job for this Court if we do not prescribe their tasks in clearer terms after making the above lengthy discussions and analysis, which may seem to be cumbersome to the readers, on the provisions of Sections 6(4), 13 and 19 of the Ain, 2003.

(i) In disposing of the *exparte* disposal of the Artharin suits, the Adalat must record its reasonings in detail. If the *exparte* disposal is required for the defendant's non-appearance after complying with the provisions of Section 7 of the Ain, 2003, the Adalat should give at least one chance to the defendant to enable the latter to register its presence in the suit and contest it.

(ii) Upon receiving the summons, when the defendant appears and seeks adjournment for filing written statement, the Adalat should not allow more than two adjournments and, accordingly, the Adalat should go for *exparte* disposal if the defendant approaches for third adjournment without submitting the written statement.

(iii) After filing the written statement and framing issues, when the date is fixed for peremptory hearing, the Adalat should not allow more than two adjournments and on the prayer for third-time adjournment for attending hearing, the Adalat should dispose of the suit *exparte*.

50. The overall suggestion for the Adalat is that the Ain, 2003 is aimed at expeditious disposal of the Bank's/Financial Institution's claim for recovery of money which is, in fact, the money of the State. If the Adalat, after putting its best effort to serve the notice upon the defendant/s, is satisfied that the notice has been served properly, it should proceed towards the disposal of the suit. The Adalat should bear in mind that while there are unscrupulous defendant/s to delay the disposal of the Artharin suits and thereby frustrate the scheme of the Ain, 2003, however, there are also bonafide defendant/s who might be victimised by the Adalat's inconsiderate hurriedness. The Adalat being in a better position to assess the above issues/factors from the manner and style of conducting the case by the defendant-side, it should pass appropriate order as per the demand of the circumstances invoking its inherent power under Section 57 of the Ain, 2003. The bottomline for the Adalat is to ensure fair justice for the parties to the suit and, in doing so, when the Adalat shall endeavour to protect the interest of a clean and bonafide defendant, the Adalat shall also not allow the cunning loan-defaulters to abuse the process of the Adalat. To save a vulnerable defendant from the unreasonable demand of the Banks/Financial Institutions and also to save the defendant's property from selling at a shockingly low-price, which very often takes place in connivance with the staff of the Bank/Financial Institution and the concerned Court staff, if needed, the Adalat may exercise its inherent power recording the detailed reasons to substantiate its order.

51. We feel it pertinent to opine that the Law Commission of Bangladesh should look into our observations as to the ambiguities of some phraseology used in Sections 6 (4), 13 of 19(1) of the Ain, 2003 and take necessary steps for incorporation of appropriate expressions or deletion thereto. The Commission may make the following proposals to the Legislature;

(1) In order to remove the ambiguity in the phrase "*njdbvgwhy³ AviRx ev Reve*", the same may be replaced by the following expression "*njdbvgwhy³ AviRx Ges h_vh_ †¶‡Î*

wee v`x i njdbvgvhy3 Reve" with an "Explanation" of the word "h_vh_‡¶‡Î" to be incorporated underneath of the Sub-Section 6(4) of the Ain, 2003. "h_vh_‡¶‡Î" means when the Adalat is required to dispose of an Artharin Suit under the provisions of Section 19(6) of the Ain, 2003 in the absence of the plaintiff and defendant, it shall consider the case of the defendant as well, if the written statement (made under affidavit) and any other documents have been filed.

(2) The word '*GKZidvm‡¶Î*', as occurs in section 19(1) of the Ain, 2003 should be given a definition clarifying that when the defendant upon appearing in the suit files written statement and after framing issue does not attend hearing, the Adalat shall consider only the case of the plaintiff and ignore the written statement and issues framed.

(3) Section 19 (1) of the Ain, 2003 should prescribe two more reasons for proceeding with *exparte* disposal. The first reason should be "ধারা ৭ এর কার্যক্রম সম্পন্ন nIqvi ci hw` cieZx wbawiZ Zwi‡L wee v`x bv Av‡m" and, thereafter, the present two reasons would come and, then, the last reason should be incorporated in the following phrase "gvgjvi †h †Kvb chv‡q hw` wee v`x cici wZb evi mg‡qi Av‡e`b K‡i".

52. We further feel that the Judicial Administration Training Institute (JATI) should undertake a training program for the learned judges who are presiding over the Artharin Adalats with an aim to familiarize them with the interpretation of the different provisions of the Ain, 2003 so as to ensure that all the Adalats of the land use and take uniform meaning of the provisions of the Ain, 2003 and thereby help minimize preferring appeal or filing writs against the orders passed by them.

53. With the above observations and direction, the Rule is discharged with a cost of Tk. 20,000/- (twenty thousand) to be paid by the petitioner in the national exchequer by way of submitting Treasury Challan within 30 (thirty) days from the date of receiving this judgment.

54. Office is directed to communicate this order to the learned presiding judges of all the Artharin Adalats functioning all over the Bangladesh so as to let them be acquainted with the above analysis on the Ain, 2003 and the *ratio* derived therefrom.

55. The Artharin Adalat, Court No. 4, Dhaka is directed to complete the execution process without any further delay.

56. Office is further directed to send a copy of this judgement to the Bangladesh Law Commission and the Director General, JATI for their perusal and necessary action.

MD. EMDADUL HUQ, J:

I agree.

9 SCOB [2017] HCD 157

High Court Division
(Special Original Jurisdiction)

Writ Petition No. 7966 of 2013

Shetu International Pvt. Limited & others
Vs.
Judge, Artha Rin Adalat No.2, Dhaka & another

Mr. Shamim Khaled Ahmed with
Mr. M. Mohiuddin Yusuf
… for the petitioners.

Mr. Nazmul Karim
.... for the Respondents No. 2.

Heard on 5.6.2014 & 28.10.2014
&
Judgment on 11th November, 2014.

Present:
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Mahmudul Hoque

Artha Rin Adalat Ain, 2003
Section 7(1):
The word 'Bc¡ma' as appears in the context of Section 7(1) bears reference to a scenario emerging when the Court which in its considered opinion thinking it just and expedient for a notice to be published in a national daily and in a local newspaper, if there be any, for ends of justice, and making an order to publish a notice at the cost of the plaintiff. But in the present case the plaintiff –Respondent No.2 itself took step under section 7(1) of the Act on its own motion on the date fixed for return of summons and acknowledgement receipt after service upon the defendants without waiting for the report of the Process Server and Order of the Court to that effect. It is noted that the summons in a suit shall be served by the Process Server simultaneously through postal department, and in evidence of the sending of the summons through post the postal receipt thereof must be tagged with the record. But in the present case no summons was served through Process Server or by post nor any attempt was made to serve the notice/ summons upon the defendants. Moreover, no Order has been passed by the Court necessitating publication of summons in the daily newspaper. Rather publication in the newspaper ensued at the behest of and as desired by the plaintiff which, in this Court's view is contrary to the provisions of Section 7(1) of the Act. ... (Para 15)

Artha Rin Adalat Ain, 2003
Section 6(2):
From a plain reading of the above quoted provisions, it is clear that all affidavits under Section 6(2) must be declaratory of conversance with and in attestation of the documents submitted in court in support of the claim of the Plaintiff. But in the present case this Court finds that the affidavit attached to the plaint is not so affirmed in accordance with the provisions of Section 6(2) of the Act and as such the ex parte decree passed on the basis of the said affidavit without examination of any witness and formal

proof of the documents is found to be wholly inadequate and shorn of all legal substratum. ... (Para 17)

Judgment

Mahmudul Hoque, J:

1. In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the petitioner calling upon the respondents to show cause as to why the impugned judgment and decree dated 17.01.2013 (Annexure-C) passed by the learned Judge of Artha Rin Adalat No.2, Dhaka in Artha Rin Adalat Suit No. 200 of 2012 should not be declared to have been passed 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. Facts in brief, are that the Petitioner No. 1 company availed of lease finance facilities amounting to Tk. 79,00,000/- and Tk-4,41,60,000/- from the Respondent No. 2 for a period of sixty months for procurement of generators, sub-stations and lay film plant in its establishment. The Respondent No. 2 further sanctioned a term loan amounting Tk. 1 crore for a period of forty eight months to meet the growing capital expenditures of the Petitioner No. 1 Company.

3. The Petitioner No. 1 had been paying the lease rentals and installments regularly to the Respondent no. 2 but by the end of 2006 the petitioner no. 1 faced business difficulties which caused huge financial lose resulting in failure in payment of lease rentals and installments to the Respondent no. 2. Consequentially, on the prayer of the Petitioner No. 1 the Respondent No. 2 rescheduled the loan at a revised rate. Accordingly, the Petitioner made regular payment till the end of the year 2009. However, during the Caretaker Government the business faced downward trend everywhere and as a matter of fact the Petitioner No. 1 again faced financial crisis and failed to maintain regular installment payments to the Respondent No.2.

4. The Petitioners approached the Respondent no. 2 to allow them more time in view of financial difficulties. The Respondent No. 2 assured that the time will be extended but the Respondent no. 2 instead of extending time disclosed that they already filed Artha Rin Suit against the petitioners for recovery of loan. Knowing the fact of filing of the Suit the petitioners through an advocate made a search in the concerned Adalat and came to know that the Suit was decreed ex parte against the petitioners. Thereafter, the petitioners obtained certified copy of the plaint and entire Order sheets of the Artha Rin Suit.

5. From the Order Sheet it is revealed that no notice/summon was served upon the petitioners about filing of the Suit and without proper service of the summons the Suit was decreed ex parte on 17.01.2013 against the petitioners beyond their knowledge. It is asserted that the petitioners have been prevented from appearing in the Suit on the failure of the Respondent no. 2 to arrange service of summons upon the petitioners as per provisions of law and also on the failure of the Respondent No. 1 Adalat to see that it is properly done before it took up the Suit for ex parte disposal.

6. Further, the case of the petitioners is that the Order Sheet of the Artha Rin Suit No. 200 of 2012 shows that though two separate addresses of the petitioner Nos. 2 and 3 are given in the cause title the Plaintiff-Respondent No. 2 only filed one set of usual summons with

requisites for service upon the Defendant-Petitioners. The postal receipts in evidence of posting of the summons to be served upon the Defendant-Petitioners has not been tagged in the Suit File of the Court. Order Nos. 2 and 5 dated 11.09.2012 and 04.11.2012 respectively are silent about this.

7. It is contended that 04.11.2012 being fixed for service return and acknowledgment receipts, the Respondent No. 2 did not file any postal receipts to prove at least that step was taken to effect service of summons by post upon the Defendant-Petitioners. The respondent no. 2 without following said procedure hurriedly on 04.11.2012, on its own initiatives took step under Section 7(1) of the Artha Rin Adalat Ain ("Act") to effect service of summons upon the petitioner and the court accepting the same fixed 07.01.2012 for filing copy of the newspaper showing publication of notice. The Court below by its Order dated 07.01.2013 considered due service of summons upon the defendant-Petitioners and fixed 17.01.2013 for ex parte hearing. On 17.01.2013 the Court without examining plaintiff's witness and based on the facts on affidavit decreed the Suit ex parte. The Petitioners now contend that the Respondent No. 1 Court acted without jurisdiction in purporting to pass the Impugned Order dated 17.01.2013 in Artha Rin Suit No. 200 of 2012 decreeing the Suit in favour of the Respondent no. 2 without proper service of summons upon the Defendant-Petitioners. At this stage the petitioners moved this Court by filing the instant Application under Article 102 of the Constitution challenging the Order and Decree dated 17.01.2013 passed by the Artha Rin Adalat and obtained the present Rule and Order of stay.

8. The Respondent No. 2 contested the Rule by filing an Affidavit-in-Opposition denying all the material allegations made in the petition contending inter alia that the Act is a special law and its provisions are to be strictly followed and that the provisions of the Code of Civil Procedure, 1908 shall be applicable in an Artha Rin Suit so far as those are not inconsistent with the provision of the said act. In so far as the summons of the Artha Rin Suit are concerned it is argued, that Section 7 of the Act, in derogation of the Code of Civil Procedure, requires simultaneous service of summons through process server and registered post with acknowledgement receipt due. The said Section 7 provides fifteen days time for return of summons after service allowing also for the court to arrange publication of the summons in newspapers if within fifteen days from the date of issuance the summons is not returned duly served or returned unserved before that period. The Respondents No.2 submits that in the instant case, the summons having not been returned duly served within fifteen days from the date of issuance, a publication on 19.11.2012 in a newspaper ensued as provided in Section 7(1) of the Act and as such there was no illegality in the process of service of summons. Consequently, therefore, the decree passed in favour of the Plaintiff-Respondent no. 2 is submitted to be in accordance with law.

9. It is also stated that since the Artha Rin Suit No. 200 of 2012 has already been disposed of by the Order and Decree dated 17.01.2013, the instant Writ Petition is not maintainable and the recourse available to the petitioners is either to set aside the Decree by filing an application under Section 19 or file an appeal under Section 41 of the Act.

10. Mr. Shamim Khaled Ahmed, learned Advocate appearing for the Defandants-Petitioners submits that the ex parte decree is a nullity in the eye of law as no attempt was made to serve the summons upon the Defendants- petitioners by the Plaintiff-Respondent No. 2. Referring to the Order Sheets of the Artha Rin Suit No. 200 of 2012, he further submits that the Orders do not show as to whether summons was served or returned unserved. Nothing, further is evident from the Order Sheets regarding service of summons either

through a process server or by post. Rather on the prayer of the plaintiff, the Court fixed 07.01.2013 for submission of the newspaper in court after publication of the summons and on that date the Suit was made ready, apparently, on the basis of publication of summons in the daily newspaper with 17.01.2013 fixed for ex parte hearing. Consequentially, the Suit being decreed ex parte on 17.01.2013, Mr. Ahmed argues this to be in violation of Section 7 of the Act and as such prays on behalf of the Petitioners to have the Impugned Decree declared illegal and without lawful authority. In support of his submissions Mr. Ahmed has referred to the case of Sonali Bank Ltd.-vs-Prime Global limited and others reported in 16 MLR(AD) 151.

11. Mr. Nazmul Karim, learned advocate appearing on behalf of the Plaintiff-Respondent No. 2 opposing the Rule submits that the summons was duly served upon the petitioners as per provisions of Section 7 and the Court below has passed the ex parte decree against the Defendants-Petitioners rightly and lawfully. He further submits that since the Suit has already been disposed of, the petitioners now have two options i.e. either to get the ex parte Decree set aside by filing an application under Section 19 or by filing an appeal under Section 41 of the Act, but not by filing the instant Writ Petition.

12. Heard the learned Advocates for the parties. Perused the Application, Affidavit-in-Opposition and the annexures annexed thereto.

13. By this Application the petitioner has challenged the legality of the Judgment and Decree dated 17.10.2013 passed ex parte by the Artha Rin Adalat No.2, Dhaka in Artha Rin Suit No. 200 of 2012. From a perusal of the Order Sheets it appears that the Suit was filed on 11.9.2012 with a deficit court fee. On the prayer of the plaintiff the Court allowed time thrice up to 16.10.2012 for depositing court fee vide Orders dated 11.9.2012, 1,10,2012 and 7.10.2012. By Order No.4 dated 16.10.2012 summons was issued for service upon the defendants fixing 4.11.2012 for return of summons and postal acknowledgement receipt after service. On the date fixed for return of summons, however, summons was not returned after due service upon the defendants as evident from Order No.5 dated 4.11.2012. Order No.4 dated 16.10.2012 shows that summons was issued for service of the same with 4.11.2012 fixed for return of the same. Order No.5 dated 4.11.2012 speaks about non-service of summons upon the defendants and non-return of acknowledgement receipt showing service of the same. Nothing has been mentioned regarding service of summons through Process Server or by post in the Order Sheet. Rather, the plaintiff of its own motion took step under Section 7(1) of the Act for publishing the summons in the daily newspaper. The Artha Rin Adalat on the same day passed an Order directing the Plaintiff to publish the said notice in the daily Noya Diganta fixing 7.1.2013 for submission of the newspaper in Court after publication of the summon. On 7.1.2013 the plaintiff submitted the newspaper in Court and the court made the Suit ready treating the summons served upon the defendants, apparently on the basis of publication of summons in the daily newspaper and fixed on 17.1.2013 for ex parte hearing. On the date fixed the Artha Rin Adalat heard the Suit and decreed the same ex parte without examination of any witness on the basis of an affidavit attached to the plaint sworn at the time of filing of the suit.

14. To appreciate the question raised in the instant Rule the relevant provisions regarding service of summons upon the defendants as contained in Section 7 of the Act, may be looked into. Section 7(1) relevantly runs thus:-

> Section 7:- (1) আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, বাদী আদালতের জারীকারক LaL Hhw fËç üiL¡lpq ®l¢Søl¡L ত ডাকযোগে প্রেরণের নিমিত্ত, আরজির সহিত সমন জারী l Se¢ pjcu amh¡e¡

আদালতে দাখিল করিবেন, এবং আদালত অবিলম্বে উহাদের একযোগে জারীর ব্যবস্থা করিবেন, এবং যদি সমন ইস্যুর ১৫ (পনের) দিবসের মধ্যে জারী হইয়া ফেরত না আসে, অথবা তৎপূর্বেই বিনা জারীতে ফেরত আসে, তাহা হইলে আদালত উহার, পরবর্তী ১৫ (পনের) দিবসের মধ্যে বাদীর খরচায় যে কোন একটি hým fËla hjwmj Sjaeu °c¢eL f¢œLju, Hhw acf রি একটি স্থানীয় পত্রিকায়, যদি থাকে, এবং আদালত যদি ন্যায় বিচারের স্বার্থে প্রয়োজনীয় মনে করে, বিজ্ঞাপন প্রকাশের মাধ্যমে সমন জারী করাইবেন, এবং অনুরুপ জারী আইনানুগ জারী মর্মে গণ্য হইবে।

15. The word 'Bcjma' as appears in the context of Section 7(1) bears reference to a scenario emerging when the Court which in its considered opinion thinking it just and expedient for a notice to be published in a national daily and in a local newspaper, if there be any, for ends of justice, and making an order to publish a notice at the cost of the plaintiff. But in the present case the plaintiff –Respondent No.2 itself took step under section 7(1) of the Act on its own motion on the date fixed for return of summons and acknowledgement receipt after service upon the defendants without waiting for the report of the Process Server and Order of the Court to that effect. It is noted that the summons in a suit shall be served by the Process Server simultaneously through postal department, and in evidence of the sending of the summons through post the postal receipt thereof must be tagged with the record. But in the present case no summons was served through Process Server or by post nor any attempt was made to serve the notice/ summons upon the defendants. Moreover, no Order has been passed by the Court necessitating publication of summons in the daily newspaper. Rather publication in the newspaper ensued at the behest of and as desired by the plaintiff which, in this Court's view is contrary to the provisions of Section 7(1) of the Act. This Court finds that the mere issuance of summons by the Court for service upon the defendants is not sufficient to necessitate and support the conclusion that summons sent for service without a report from the Process Server regarding service or non-service of summons and without the presence of postal receipts on record constitutes a due service of summons. Rather, in the absence of the Process Server's report and postal receipts showing sending of summons through post and also the absence of satisfaction of the Court about non-service of summons or of any Order of the Court requiring publication of notice in the daily newspaper, publication of notice at the instance of the plaintiff constitutes a mode of alternate service not within the contemplation of, as indeed, the spirit of the law. The Order Sheets of the Suit are found to be completely silent about the reasons for non service of summons upon the defendants.

16. Furthermore, it appears from the plaint that an affidavit was sworn by an Officer of the plaintiff institution at the time of filing of the Suit to the effect that he is conversant with the facts and the matter involved in the Suit, lacking short of the prescription for the affirmation of such affidavits spelt out in Section 6(2) of the Act thus:-

Section 6(2).- এই আইনের অধীন কোন মামলা আর্থিক প্রতিষ্ঠান কর্তৃক আরজি দাখিলের মাধ্যমে দায়ের করিতে হইবে, আরজির বক্তব্য এবং সংশ্লিষ্ট দালিলিক প্রমাণাদির সমর্থনে আরজির সহিত একটি হলফনামা (Affidavit) সংযুক্ত করিতে হইবে, আরজির সহিত প্রদেয় কোর্ট ফি (ad valorem) প্রদান করিতে হইবে Hhw cjMmLa Bl¢S যথাযথ হইলে আদালতের নির্ধারিত রেজিস্টারে উহা ক্রম অনুসারে অন্তর্ভুক্ত করিতে হইবে।

17. From a plain reading of the above quoted provisions, it is clear that all affidavits under Section 6(2) must be declaratory of conversance with and in attestation of the documents submitted in court in support of the claim of the Plaintiff. But in the present case this Court finds that the affidavit attached to the plaint is not so affirmed in accordance with the provisions of Section 6(2) of the Act and as such the ex parte decree passed on the basis of the said affidavit without examination of any witness and formal proof of the documents is found to be wholly inadequate and shorn of all legal substratum.

18. Since we have held on the fact of the ex parte decree passed against the Petitioner being without proper service of summons to be a nullity, the Judgment and Decree of the Court below is found not to be sustainable in law. This Court finds, in this regard, that due and proper as per the specific prescription of law, service of summons upon the defendants in a suit is a mandatory requirement. In the present case this Court finds that summons was not served properly upon the defendants and the Order Sheets of the Suit show nothing of any effort made on the part of the plaintiff as well as of the Court below to effect service of summons upon the Defendants. The Court below instead of taking proper step for service of summons upon the Defendants is found to have been more interested in disposing of the case hurriedly by publishing a notice in the newspaper in a manner wholly opposed to the true intent and provisions of law regarding service of summons. Consequentially, this error at the very initial stages is found to have marred the ensuing proceeding and the decree passed ex parte in such proceedings without proper service of summons as well as an inadequate affidavit is found to be one not good and sustainable in law.

19. In the facts and circumstances we, therefore, find merit in the application and substance in the Rule and we are, therefore, inclined to make the Rule absolute.

20. In the result, the Rule is made absolute, however, without any Order as to costs.

21. It is, hereby, declared that the Judgment and Decree dated 17.1.2013 passed by the Artha Rin Adalat, Court No.2, Dhaka in Artha Rin Suit No. 200 of 2012 is illegal, without lawful authority and of no legal effect and the same is, hereby, set aside.

22. The Artha Rin Adalat, Court No.2, Dhaka is hereby directed to dispose of the case in accordance with law within 6(six) months from the date of receipt a certified copy of this Judgment and Order, thereby, providing opportunity to the petitioners to place their case as per provisions of law.

23. The Order of Stay granted earlier at the time of issuance of the rule is, hereby, vacated.

24. Communicate a copy of this Judgment and Order to the Court concerned at once.

9 SCOB [2017] HCD 163

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6142 OF 2004

Md. Mohitur Rohman Choudhury and others
Vs.
Mr. Md. Abdul Kuddus Miah, Subordinate Judge and others

Mr. Md. Delwar Hossain with
Ms. Salma Begum, Advocate
...For the petitioners
Ms. Khursheed Jahan, Advocate
... For the respondent No. 5

Heard on: 16.03.2017, 22.03.2017 and 23.03.2017
Judgment on: 04.04.2017

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Md. Badruzzaman

Limitation Act, 1908
Section 15
And
Code of Civil Procedure, 1908
Order IX rule 13
Pendency of a case for setting aside an ex-parte decree cannot extend the period of limitation for filing of execution case:
Application for execution of a final decree or order is to be made within 3 (three) years from the date mentioned in 2nd Column of Article 182 of the Limitation Act subject to some exceptions as detailed in the 3rd Column read with provisions of section 15 of the Act inasmuch as Article 182 makes no provision for fresh limitation from a final order passed on an application under Order IX rule 13 of the Code. In other words if no stay order or injunction is passed staying the operation of the decree or order under section 15 or no situation arises as per the 3rd Column of Article 182 the decree or order would keep open for execution and time would run from the date of final decree or order. A bare reading of Article 182 of the limitation Act also suggests that an application under order IX rule 13 of the code does not come within the meaning of applications mentioned in clause 5 of column 3 of Article 182 of the Limitation Act to save limitation. Accordingly, pendency of a case under Order IX rule 13 of the Code of Civil Procedure for setting aside an ex-parte decree cannot extend the period of limitation for filing execution case. ...(Para 15)

Judgment

Md. Badruzzaman, J

1. This rule *nisi* was issued calling upon the respondents to show cause as to why Title Execution Case No. 4 of 1995 then pending in the 2nd Artha Rin Adalat, Dhaka should not be

declared as time barred, void and not binding upon the petitioner as being filed beyond the period of limitation of 3 (three) years under Artha Rin Adalat Ain, 1990.

2. Relevant facts for the purpose of disposal of this rule in brief, are that the petitioner No. 1 and predecessor of other petitioners availed of House Building Loan from respondent No. 5 Janata Bank Limited. Being defaulted in payment by them respondent No. 5 filed Title Suit No. 228 of 1986 in 1st Commercial Court, Dhaka for recovery of outstanding dues amounting to Tk. 6,60,020/- as on 30.09.1985. Thereafter, the case was transferred to Artha Rin Adalat No. 2, Dhaka and renumbered as Title Suit No. 337 of 1990. Ultimately the suit was decreed ex-parte in preliminary form on 18.08.1990 and final decree was drawn on 04.02.1992. The present petitioners thereafter, filed Miscellaneous Case No. 180 of 1992 under Order IX Rule 13 of the Code of Civil Procedure on 18.03.1992 for setting aside the ex-parte decree which was dismissed for default on 26.09.1992.

3. Thereafter, respondent No. 5 filed Title Execution Case No. 4 of 1995 on 31.08.1995 before the Adalat. During pendency of said execution case the petitioners on 17.07.2000 filed an application for dismissing the execution case as being time barred. Said application was rejected by the Adalat on 24.08.2000. The petitioners then filed an application for recalling the order dated 24.08.2000 which was also rejected vide order dated 09.01.2003. Thereafter, the petitioners again filed application for dismissing the execution case as being time barred which was also rejected by order dated 14.10.2004.

4. In the above factual background the petitioners (judgment debtors) have come up with this application and obtained the instant rule on 10.11.2004.

5. At the time of issuance of rule further proceedings of the execution case was stayed for a period of 3 (three) months which was, thereafter, extended by order dated 08.02.2005 till disposal of the rule.

6. The rule is opposed by respondent No. 5 by filing affidavit-in-opposition stating that the miscellaneous case which was filed under Order IX rule 13 of the Code was a continuation of the suit inasmuch as the execution case was filed after 2 years 11 months and 5 days from the date of disposal of the miscellaneous case which was covered by the provisions of Article 182(2) of the Limitation Act. As such, the execution case was not barred by limitation.

7. One Md. Moklasur Rahman also been added as respondent No. 6 by order dated 31.08.2015 but at the time of hearing none appears to oppose the rule on his behalf.

8. Mr. Md. Delwar Hossain, learned Advocate appearing for the petitioners by drawing our attention to Article 182 of the Limitation Act submits that Article 182 of the Limitation Act prescribes provisions for filing execution case within a period of 3 (three) years from the date of final decree or order passed in a suit with some exceptions provided in the said Article but the respondent bank without complying with the aforesaid provisions of law filed the execution case after 3(three) years 6(six) months and 26(twenty six) days from the date of final decree and as such the execution case is barred by limitation and accordingly continuation of the said execution case is an abuse of the process of the Court and liable to be rejected. Learned Advocate further submits that Article 182 of the Limitation Act prescribes no provision for fresh limitation from an order rejecting an application by the trial Court under Order IX rule 13 of the Code of Civil Procedure. Further referring to section 15 of the

Limitation Act , learned Advocate submits that since no order or injunction was passed by the Adalat in the miscellaneous case staying the operation of the decree no time can be excluded in calculating the period of limitation.

9. As against the above submission Miss. Khursheed Jahan, learned Advocate appearing for respondent No. 5 reiterates the contentions as has been stated in the affidavit-in-opposition.

10. We have heard the learned Advocates and perused the records. It appears that an ex-parte final decree was passed on 04.02.1992 against the petitioners. Thereafter, they filed a miscellaneous case under Order IX rule 13 of the Code of Civil Procedure for setting aside said ex-parte decree which was ultimately dismissed for default by order dated 26.09.1992. Respondent bank then filed Execution Case No. 4 of 1995 on 31.08.1995 i.e after 3(three) years 6(six) months and 26 (twenty six) days from the date of final decree.

11. Now question arises as to whether in view of the pending miscellaneous case under Order IX rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree limitation would be saved within the meaning of Article 182 of the Limitation Act, which determines the starting point of limitation.

12. In the case of Md. Abdur Rahim and others vs. Sree Sree Gredhari reported in 27 DLR 72 it is held that the Limitation Act prescribes that an application for execution is to be made within 3(three) years from the date mentioned in 3rd Column of Article 182. And if such application is not filed within the prescribed period the execution case would hit by the above Article. By adopting aforesaid view our Appellate Division in the case of Bangladesh Jatiya Samabaya Bank Limited vs. The Sangbad Daily Paper and others reported in 1983 BCR (AD) 418 expressed the same view. In a later case of ADC (Revenue), Pabna vs. Md. Abdul Halim Miah reported in 48 DLR (AD) 143 our Apex Court held as follows:

> " This Court, has however, already pronounced itself on this point in the case of Bangladesh Jatiya Samabaya Bank Ltd. vs. Sangbad Daily Paper and others, BCR 1983 (AD) 418. The said decision was given on consideration of the cases of Md. Abdur Rahim and others vs. Sree Sree Gredhari Jeo. 27 DLR (Dhaka) 72; Pingle Venkata Rama Reddy vs. Kakaria Buchanna and others, AIR 1963 Andhra Pradesh (FB) 1 and Lalji Raja and sons vs. Firm Hansraj Nathuram, AIR 1971 (SC) 974. This Court approved of the approach of the then Dhaka High Court in the afore-cited cases in 27 DLR (Dhaka) 72 and affirmed that both section 48 CPC and Article 182 (2) of the First Schedule of the Limitation Act provide the period of limitation for the execution of a decree. The Civil Procedure Code fixes the longest period whereas the Limitation Act fixes the earliest period to take the first step in execution and the subsequent steps known as steps-in-aid. This Court also affirmed the further view of the then Dhaka High Court that an application for execution has therefore to satisfy first Article 182 of the Limitation Act being the earliest period prescribed and then also section 48 CPC which prescribed the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail."

13. In similar case of the Comilla Banking Corporation Limited vs. Nanda Kumar Bhattacharjee reported in 1 PLR (Dacca) 215 by a majority view of three learned Judges held as follows :

> "The expression 'where there has been an appeal' cannot and does not include an appeal from an order rejecting an application under Order 9, Rule 13 of the Code of

Civil Procedure. Wide though literally the expression is, it cannot mean an appeal from any decree or any order passed between the parties in any suit or any proceeding. It is significant that Article 182 of Limitation Act makes no provision for fresh limitation from an order rejecting an application by the trial Court under Order 9, Rule 13 of the Code of Civil Procedure. If it had been intended that an appeal from an order rejecting an application would keep the decree open, it would have been provided also that an application to the trial Court to set aside an ex-parte decree would keep the decree open." (underlined by me)

14. Section 15 of the Limitation Act also provides as follows:

"15. Exclusion of time during which proceedings are suspended.- (1) In computing the period of limitation prescribed for any suit for application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded."

15. The above ratio and the provisions of section 15 of the Act clearly suggest that application for execution of a final decree or order is to be made within 3 (three) years from the date mentioned in 2nd Column of Article 182 of the Limitation Act subject to some exceptions as detailed in the 3rd Column read with provisions of section 15 of the Act inasmuch as Article 182 makes no provision for fresh limitation from a final order passed on an application under Order IX rule 13 of the Code. In other words if no stay order or injunction is passed staying the operation of the decree or order under section 15 or no situation arises as per the 3rd Column of Article 182 the decree or order would keep open for execution and time would run from the date of final decree or order. A bare reading of Article 182 of the limitation Act also suggests that an application under order IX rule 13 of the code does not come within the meaning of applications mentioned in clause 5 of column 3 of Article 182 of the Limitation Act to save limitation. Accordingly, pendency of a case under Order 1X rule 13 of the Code of Civil Procedure for setting aside an ex-parte decree cannot extend the period of limitation for filing execution case.

16. Admittedly, there was no order in the miscellaneous case staying operation of the final decree. The execution case was filed on 31.8.1995 which was beyond the period of 3 (three) years from 4.2.1992, the date of final decree. Accordingly, we are of the view that the execution case was barred by limitation.

17. In view of what we have stated above we find merit in this rule.

18. In the result, the rule is made absolute however, without any order as to costs.

19. The impugned execution proceeding as a whole is set aside as being time barred.

20. The order of stay granted earlier is hereby vacated.

21. Communicate a copy of this judgment at once.

Sheikh Hassan Arif, J

22. I agree

9 SCOB [2017] HCD 167

HIGH COURT DIVISION

First Miscellaneous Appeal No.105 of 2014
with
Civil Rule No.626(FM)/13

Kazi Helall Islam and others
Vs.
Kazi Roksana Islam and others

Mr. Mahbub Ali with
Mr. M. Ali Murtaza, Advocates,
------- For the defendant-appellants.
Mr. Md. Abdus Salam Mondal,
Advocate,
------ For the plaintiff-respondents.

Heard on : 08.05.2014 and
Judgment on : 11.05.2014.

Present :
Mr. Justice Nozrul Islam Chowdhury
And
Madam Justice Kashefa Hussain

Code of Civil Procedure, 1908
Order 40 Rule 1:
Order 40 Rule 1 of the Code of Civil Procedure may be invoked also in a partition suit due to "special circumstances such as danger to the property". ...(Para 9)

Code of Civil Procedure, 1908
Order 40 Rule 1:
As we have mentioned before there is a prima-facie apprehension of danger to the property, which is apparent under the circumstances. Moreover, since the suit land is in possession and control of the defendant-appellants it is quite probable that pending final determination of the rights of the parties, the party in possession and control might abuse such possession and control and the sisters may be deprived of their rights. Alienation of mesne-profits which in this case are primarily the rents received by the defendants from the tenants in the disputed property may also result in wastage of the property and therefore entails a source of danger of alienation of the property before final determination of the rights of the parties to the Partition Suit. Upon such considerations we feel that the Court below judiciously and by exercising its discretion very correctly granted the prayer of the plaintiffs under Order 40 Rule 1 for appointment of receiver to the suit property. ...(Para 12)

Code of Civil Procedure, 1908
Order 40 Rule 1:
The appellants had also submitted that the receiver is a third person and therefore he cannot be inducted into the affairs of a family dispute. Our finding upon this argument is that given that the receiver is a 'third person' in the literal sense, yet he is an officer of the Court and is appointed by the Court itself empowered under its discretionary power under Order 40 Rule 1 of the Code of Civil Procedure and therefore the appointment of receiver cannot be challenged only upon the ground of his being a 'third person' if other circumstances exist and call for his appointment under special circumstances and as

long as the Court grants the prayer for appointment of receiver correctly exercising its discretion, such appointment may not be called into question. ...(Para 16)

Judgment

Kashefa Hussain, J :

1. This Civil Miscellaneous appeal is directed at the instance of the defendant-appellant against the judgment and order dated 27.06.2013 passed by the Joint District Judge, Additional Court, (in charge) Dhaka, in Partition Suit No.45 of 2013 allowing the prayer for appointment of receiver for the suit properties.

2. The facts relevant for disposal of the appeal in a nutshell are that, the plaintiffs being sisters of the defendant brothers instituted Title Suit No.45 of 2013 for partition. During pendency of the suit at one stage upon the prayer of the plaintiffs the Court issued an order appointing receiver in the suit land under Order 40 Rule 1 of the Code of Civil Procedure as against which the defendants as appellants filed the instant miscellaneous appeal. The appellants having taken several grounds in the miscellaneous appeal including one that no strong prima-facie case exists for the appointment of receiver and that without consent of the parties in such appointment, specially where the suit property is a family property, such order of appointment of receiver cannot be lawfully sustained. The defendants have also stated that there is no allegations of imminent danger, wastage and destruction of the properties which are preconditions and criteria behind the principle of such an order and that the receiver appointed is a third person been brought into a family dispute and therefore the appointment of receiver cannot be sustained in the eye of law.

3. The defendant-appellants have stated that they had partitioned the suit land through mutual halafnama and that it was amicably partitioned through the halafnama deed dated 25.02.2001 and that all the co-sharers have received their respective saham and that other formalities were also exhausted subsequently. The defendant-appellants have also stated that some of the property including the share of the sisters were acquired by the government through L.A. Case No. 13 of 2007 and that the plaintiffs had even received compensation against the said acquisition and therefore since the suit land had already been partitioned, the plaintiff sisters cannot now claim anything from the suit land and that the suit land lawfully belongs to the defendant-appellants.

4. The plaintiff-respondents however had denied the claims made by the defendant-appellants and stated that it is admitted that a halafnama was executed on 25.01.2001 between the co-sharers, but the plaintiffs alleged that even though the halafnama was executed on 25.01.2001, but the said halafnama was never acted upon and subsequently the plaintiffs could never receive their share of the properly or the proceeds arising out of their portion of the suit land. They have asserted that subsequently on 04.01.2009 a heba declaration was made by the defendants in the plaintiff's favour but at the time of the heba declaration, the plaintiff-sisters had no knowledge of the fact that the land they had received had already, prior to the so-called 'heba' been acquired by the government through L.A. Case No.13 of 2007. The plaintiffs further alleged that the defendant-appellant brothers with the ulterior motive of depriving the plaintiff sisters, deliberately suppressed the entire fact of acquisition of the suit land by the government and since the suit land had already been acquired prior to the heba, hence, the plaintiffs are being deprived of their rights and lawful share to the suit property.

5. Mr. Mahbub Ali with Mr. M. Ali Murtoza, the learned Advocates appeared on behalf of the defendant-appellants while Mr. Md. Abdus Salam Mondal, the learned Advocate appeared on behalf of the plaintiff-respondents to oppose the appeal.

6. Mr. Mahbub Ali, the learned Advocate for the defendant-appellants submits that the property being already partitioned and the plaintiffs also having received their share of the saham, therefore they cannot claim anything more from the suit land which rightly belongs to the defendant-appellants only. He has also submitted that the order of appointment of receiver given by the trial Court cannot be sustained in law since there was no consent of parties. The learned Advocate also asserts that there is no apprehension of any imminent danger, wastage or destruction to the property. In support of his submission he has relied on the decision given by our Apex Court in the case of Faiz Ahmed Chowdhury & another –Vs- Beaktear Ahmed Chowdhury and others reported in 36 DLR (AD) 1984 page 97. The learned Advocate has also challenged the appointment of the receiver on the ground that the receiver is a third person and he cannot be brought into an internal dispute between family members in a partition suit.

7. On the other hand, Mr. Md. Abdus Salam Mondal, the learned Advocate appearing on behalf of the plaintiff-respondents submits that the sisters having been deprived of their share in the suit land have rightly and lawfully instituted the suit for partition inasmuch as that the defendant brothers have through collusion and suppression of facts and other devises tried to deprive the plaintiffs of the due shares to the suit property inherited from their father. He has also argued that the order appointment of receiver has been correctly issued within the ambit of law by the Court below under Order 40 Rule 1 of the Code of Civil Procedure and in support of his submissions he has relied upon a decision of this Court in the case of Nurul Hossain –Vs- Hasan Banu reported in 35 DLR (1983) page 29 from which case he has drawn an analogy with the case before us, submitting that appointment of receiver was also affirmed by this Court in that case and the facts and circumstances of the case is similar to the instant case.

8. We have heard the learned Advocates of both sides and perused the impugned order and the relevant documents available on record and gone through the decisions cited before us. Upon perusal of the records of the Civil Suit No.45 of 2013 for partition inter alia other documents placed before us, we find that the instant matter comprises basically of allegations and counter allegations against each other, that is, between the brothers and sisters which has given rise to the suit. After going through the records it appears that the suit properties comprising four schedules of land are rented out properties from which rents are received every month but the plaintiff sisters are not receiving anything out of the proceeds thereof. Now whether the plaintiffs can claim their share in the suit property and whether they have actually been deprived or not are eventually disputed matters of fact and have to be decided at the appropriate forum where the said suit is pending. Our considered opinion is that pending the suit, in the mean time to avoid any misappropriation of the proceeds of the rent or to avoid any other danger to the property or whatsoever, appointment of receiver is necessary to protect the subject matter of the suit and in the case it is only just and convenient to do so. We have considered the decision cited by the appellants in the case of Faiz Ahmed Chowdhury & another –Vs- Baktear Ahmed Chowdhury & others 36 DLR (AD) (1984) where the principle they have enunciated is as under :

> "Civil Procedure Code (V of 1908)
> Or. 40, r.1
> Partition Suit-Appointment of a receiver in respect of the property in partition suit – Not to be ordered except by the consent of the parties or due to some special circumstance such as danger to the property."

9. We have considered this decision and we have also taken note of the fact that in the case before us. Although 'consent' as such of the defendants was not taken but there is another situation contemplated of in the said decision, but which the learned Advocate for the defendant-appellants, while relying on this case overlooked and hence failed to appreciate that Order 40 Rule 1 of the Code of Civil Procedure may be invoked also in a partition suit due to "special circumstances such as danger to the property".

10. Though it is a general principle and which has also been decided by decisions given by our Apex Court, that as a general rule, appointment of receiver is not desirable in a partition suit and a party in a partition suit cannot claim appointment of receiver for the sole reason of there being a dispute in existence. In this context the principle enunciated by our Apex Court in the case of Shaheda Akhter Rina –Vs- Ayub Ali reported in 64 DLR (AD) (2020) is hereby quoted from para 21 of the judgment which reads as under :-

> "As a general Rule it is not proper to appoint a receiver in a suit for partition. Mere existence of a dispute cannot be a ground whatsoever for appointment of a receiver. "

11. Therefore though it is true that as a 'general rule' appointment of receiver is not desirable in a partition suit, but simultaneously it is also true that there are exceptions as opposed to the 'general rule' and these exceptions may be discerned from the particular situation and circumstance existing in a particular case and in our considered view, such an exception does exist in the case before us.

12. As we have mentioned before there is a prima-facie apprehension of danger to the property, which is apparent under the circumstances. Moreover, since the suit land is in possession and control of the defendant-appellants it is quite probable that pending final determination of the rights of the parties, the party in possession and control might abuse such possession and control and the sisters may be deprived of their rights. Alienation of mesne-profits which in this case are primarily the rents received by the defendants from the tenants in the disputed property may also result in wastage of the property and therefore entails a source of danger of alienation of the property before final determination of the rights of the parties to the Partition Suit. Upon such considerations we feel that the Court below judiciously and by exercising its discretion very correctly granted the prayer of the plaintiffs under Order 40 Rule 1 for appointment of receiver to the suit property. In coming to such finding we have also drawn support from the decision given by this Court in the case of Nurul Hossain -Vs- Hasan Banu reported in 35 DLR (1983) and which has been relied upon by the respondent.

13. The relevant portion of the judgment in 35 DLR (1983) page 28 reads thus :-

> " Civil Procedure Code (V of 1908)
> Or. 40
> Appointment of Receiver is called for when a co-sharer is put to such hardships that with out court's intervention remedy is not available.
>
> *Allegations of mismanagement, element of danger or apprehension of allenation and wasting of the property are important factors to be weighed by the Court but the apprehension must be well founded and must be such that without protection of the court the property in question will be wasted or dissipated.*

In the instant case, receiver was prayed for not only on the ground of wastage of damage but also on the ground that the plaintiffs who were female co-sharers had been kept out of enjoyment of the property and the defendants were appropriating all the rents of the tenanted premises from the tenants. Order 40 confers very wide powers on the Court to appoint a receiver and where it appears to the Court "to be just and convenient" the Court may appoint a receiver.

In a suit for partition of joint-family property it was proved that a co-owner admittedly entitled to a half share in a considerable portion of the properties in suit was being kept out of possession by the co-owner with the result that all supplies were cut off from his branch of the family, and although no case of waste might have been established against the co-owner in possession the case was eminently a proper one for the appointment of receiver.
The appointment of receiver is a discretionary matter. So long it is found that discretion has been properly, exercised by the Court below and has not been exercised in an improper, arbitrary or whimsical manner an order of appointment of receiver made by a Subordinate Court does not call for an interference by this Court. "

14. After perusal of the judgment we have discovered that in this case also an appointment of receiver was prayed for in a partition suit and the facts and circumstances of the case reported in 35 DLR (1983) here are very similar to the one we are dealing with at present.

15. Therefore placing our reliance in the decision cited above and taking other facts and circumstances into consideration, we are of the finding that there is a reasonable apprehension that the property might be facing danger of alienation, wastage, damage including other factors that may crop up and the plaintiffs might actually be put to severe hardship if the prayer for appointment of receiver is not granted.

16. The appellants had also submitted that the receiver is a third person and therefore he cannot be inducted into the affairs of a family dispute. Our finding upon this argument is that given that the receiver is a 'third person' in the literal sense, yet he is an officer of the Court and is appointed by the Court itself empowered under its discretionary power under Order 40 Rule 1 of the Code of Civil Procedure and therefore the appointment of receiver cannot be challenged only upon the ground of his being a 'third person' if other circumstances exist and call for his appointment under special circumstances and as long as the Court grants the prayer for appointment of receiver correctly exercising its discretion, such appointment may not be called into question.

17. Under the foregoing facts and circumstances we are of the considered view that the appointment of receiver given by the Joint District Judge in his impugned order dated 27.06.2013 has been correctly given and does not call for our interference. Therefore we find no substance in the appeal and accordingly the appeal is dismissed.

18. In the result, the appeal is dismissed and the connected Rule being Civil Rule No.626(FM)/13 stands discharged without any order as to costs.

19. Before we part with the records it is necessary to mention that the parties being co-sharers are at liberty to withdraw 40% out of the respective proportionate shares in the amount received and deposited by the receiver in the Court.

20. Communicate the order at once along with a copy of this judgment to the Court below immediately for information and necessary action.

Nozrul Islam Chowdhury, J :

21. I agree.

9 SCOB [2017] HCD 173

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

Criminal Revision No.259 of 2013

Zobeda Khatoon & another
Vs.
State & another

Mr. Shamsuddin Babul with
Mr. Kanai Lal Saha, Advocates
…for the petitioners

Mr. Mohammad Sazzad Hossain, Advocate
…for Opposite Party No.2

Heard on: 02.09.2015, 13.09.2015
Judgment on: 15.11.2015

Present:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakrabortty

Criminal Law Amendment Act, 1958
Section 6
And
Code of Criminal Procedure, 1898
Section 222:
It also appears from the FIR that the alleged occurrence took place in between January 2004 to November 2006. The lodging of the FIR and framing of charge covering the whole period is permissible under the provisions of law of sections 6 (IB) of the Criminal Law Amendment Act, 1958. A single case can be filed and trial may be proceeded by framing charge for more offences, which has been done in the present case. The provisions of section 222(2) of the Code is no manner of application in this case. … (Para 12)

Framing of Charge:
Where the allegation has been brought against the petitioners that they made the payment okay on some cheques by which the money was misappropriated, the cheques were essential alamots to prosecute the petitioners. In the absence of those, on which the petitioners were indicted with allegations that the payment was made in violation of the constitution of the Samity and also that they abetted the offence, the prosecution will not succeed in any manner. Moreover, we find that in the absence of seizing of those cheques as alamots, there was no sufficient materials before the Court to frame charge against the petitioners under the aforesaid sections. Moreover, the written statement of principal accused Nos.1 and 2 dated 14.12.2006 and 28.11.2007 before the departmental inquiry committee shows that they did not utter a single word implicating the petitioners.
In the aforesaid facts and circumstances, we find that the Special Judge framed charge against the petitioners under the aforesaid sections in violation of the settled principle of

law of framing charge. The Divisional Special Judge, Rajshahi framed charged against the petitioners, in the absence of sufficient materials against them before it.

… (Para 14 & 15)

Judgment

Bhishmadev Chakrabortty, J:

1. This Rule, at the instance of 2(two) accused in a criminal case, has been issued under section 439 of the Code of Criminal Procedure calling upon the opposite parties to show cause as to why the impugned order dated 03.02.2013, so far it relates to the petitioners, passed by the Divisional Special Judge, Rajshahi, in Special Case No.25 of 2011 arising out of Boalia Model Police Station Case No.28 dated 18.11.2008 corresponding to M.G.R. No.1030 of 2008, framing charge under sections 409/477 and 109 of the Penal Code read with section 5(2) of Act II of 1947, should not be set aside 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 further proceedings of the aforesaid Special Case, so far it was related to the petitioners, was stayed for a period of 6(six) months, which was extended from time to time. Lastly it was extended on 15.03.2015 for a further period of 1(one) year from the date of expiry which still subsists.

3. Briefly the facts, necessary for disposal of the Rule, are that A.Q.M. Mofakkharul Islam, Inspector, Railway on 18.11.2008 lodged an FIR making G.M. Iman Ali and M.K. Roy of Railway Nirapatta Bahini Kallyan Samity, West Zone, Rajshahi (in brief the Samity) as accused bringing allegation of misappropriation of Taka 12,75,538/- from the account of the Samity lying with the Bank. On the aforesaid allegation Boalia Police Station Case No.28 dated 18.11.2008 under sections 409/447A/109 of the Penal Code was started.

4. An Assistant Director of Anti-Corruption Commission, District Office, Rajshahi (briefly the A.C.C. Rajshahi) investigated into the allegation and submitted charge sheet against 6(six) accused including the petitioners under sections 409/477A/109 of the Penal Code read with section 5(2) of Act II of 1947. In the said charge sheet the petitioners have been shown as accused Nos. 5 and 6 respectively who were the Bank officials where the account of the Samity was lying. In the said charge sheet allegation brought against the petitioners are that petitioner No.1 being the manager of the said branch disbursed money amounting to Taka 4,11,000/- vide some cheques in the signature of one Monsur Rahman who was not the director of the said Samity and also of paying taka on four other cheques only on single signature of G.M. Iman Ali, which was not permitted by the constitution of the Samity. In the similar way petitioner No.2 during the period of 28.04.2005 to 27.06.2006 as bank official disbursed Taka 4,19,000/- by twelve cheques to the above persons and thus both of them abetted the offence of misappropriation done by G.M. Iman Ali and M.K. Roy.

5. In course of time the record of the case was transmitted to the Senior Special Judge, Rajshahi and numbered as Special Case 25 of 2011 (Raj). The Special Judge took cognizance of the offence against all the accused including the petitioners under the selfsame sections. Eventually the case was transferred to the Divisional Special Judge, Rajshahi for trial.

6. The petitioners appeared and obtained bail therefrom. Later on they filed an application under section 241A of the Code for their discharge, which was rejected on 08.11.2012.

Subsequently the learned Special Judge by the impugned order dated 03.02.2013 framed charge against the petitioners and others under sections 409/477A/109 of the Penal Code read with section 5(2) of Act II of 1947 which prompted the petitioners to file the instant revision before this Court.

7. Mr. Shamsuddin Babul, learned Advocate for the petitioners submits that according to the statement of the FIR the said Samity is a non-government and unregistered one. Accused G.M. Iman Ali and Mr. M.K. Roy, the then member secretary and director of the Samity respectively, had misappropriated the money in their personal capacity, and as such the allegation as made in the FIR do not come within the purview of section 409 of the Penal Code. At best the same may be an offence under section 406 of the Penal Code which is not a scheduled offence of the A.C.C. Act. The lodgment of the FIR referring the case to the A.C.C. for investigation and the investigation done by the Commission are all without jurisdiction, and as such charge against the petitioners under the aforesaid sections cannot be sustained in law. The informant had no authority to file the case to any Criminal Court according to the provisions of section 86 of the Samabaya Samity Ain, 2001. Mr. Babul further submits that the allegations brought against the petitioners do not disclose any offence under sections 409/477A/109 of the Penal Code read with section 5(2) of Act II of 1947, and as such the continuation of the proceeding is also illegal. The Samity being a non-government and unregistered and as the office bearers of the said Samity misappropriated the amount in their personal capacity, the initiation of the case under section 409 of the Penal Code is misconceived. The offence as alleged under the schedule of the A.C.C. Act is not tenable and the continuation of the proceeding being illegal, the very order of framing charge against the petitioners is liable to be set aside. The petitioners made payment in discharging their official duties and the allegation so brought against them do not disclose any offence. Mr. Babul further submits that in an internal audit of the Bank the petitioners were found innocent. The said report shows that the members of the Samity had misappropriated the money and as such the charge sheet implicating these petitioners is a perfunctory one. He also submits that specimen signatures of the newly elected committee to operate the account was sent to the Bank and accordingly, the petitioners paid the money on the cheques duly signed by them. The alleged misappropriation was done in between January 2004 to November 2006 covering a period of three years, but charge has been framed for the whole period of three years in violation of the mandatory provisions of law of section 222(2) of the Code which is not cureable.

8. Mr. Babul finally submits that it is evident from the body of the charge sheet that the Investigating Officer seized some documents, 13 (thirteen) in numbers, but the cheques by which the misappropriation was alleged to have been done, were not seized and no separate seizure list has been prepared. Even if the allegation made in the FIR, charge sheet and other materials are taken into consideration in their entirety, the prosecution will not succeed in proving case against the petitioners in the absence of those cheques as prosecution materials, and as such the continuation of the proceeding will be nothing but wastage of time and harassment.

9. Mr. Mohammad Sazzad Hossain, learned Advocate appearing on behalf of opposite party No.2, the A.C.C., submits that the learned Special Judge considering the contents of the FIR, charge sheet and other materials lying with the record, found strong *prima-facie* case against the petitioners and those being sufficient materials, rightly framed charge against them under the aforesaid sections. The question raised by the learned Advocate for the

petitioners may be decided at the trial by taking evidence of the witnesses, and as such the Rule is liable to be discharged.

10. We have heard the learned Advocates on behalf of the respective parties, perused the application, supplementary affidavit filed today, documents appended with the application and consulted with the relevant provisions of law.

11. It appears from the record that these petitioners were not named in the FIR. Only G.M. Iman Ali and M.K. Roy were made accused on the allegation that they being officials of the Samity had misappropriated the fund from the bank, but no allegation whatsoever was brought against the present petitioners in the FIR. It has been mentioned in the FIR that the Samity in question is a 'বেসরকারী সমিতি'. We are unable to ascertain whether the term as above means an unregistered Samity. The informant being Assistant Director of the Samity had every authority to file the present case under the aforesaid sections in criminal Court on the allegation of misappropriation of fund of the Samity. If the contention of learned counsel for the petitioners is taken into consideration that the Samity is an unregistered one, in that event the petitioner cannot take resort of any provision of law of Samabaya Samity Ain, 2001. Moreover, section 86 of the Ain, 2001 does not debar an aggrieved person to take shelter in criminal Courts, instead of lodging complaint to the Samabaya Samity authority. So, the submission made by the learned counsel for the petitioners to the effect that the informant was not authorised to file the case, bears no substance.

12. It also appears from the FIR that the alleged occurrence took place in between January 2004 to November 2006. The lodging of the FIR and framing of charge covering the whole period is permissible under the provisions of law of sections 6 (IB) of the Criminal Law Amendment Act, 1958. A single case can be filed and trial may be proceeded by framing charge for more offences, which has been done in the present case. The provisions of section 222(2) of the Code is no manner of application in this case. In the case of **State –vs- Ibrahim Ali, 66 DLR (AD) 33**, it has been held: "*Any number of offences punishable under the Criminal Law Amendment Act irrespective of the period over which the offence was committed, may be tried at one trial. All the offences committed over any length of period of time could be tried in one trial upon framing one charge.*"

13. But it appears from the record that the allegation made against the petitioners of making payment to accused Nos.1 and 2 on some cheques in violation of the constitution of the Samity. They paid money on the cheques on some of those the drawer put a single signature and on some of the cheques on signature of a person who was not authorized by the constitution of the Samity to sign in and withdraw the money. The allegation against the petitioners made in the charge sheet are that they disbursed money on those cheques and abetted the offence of misappropriation done by accused Nos. 1 and 2. It appears from the charge sheet that during investigation the Investigating Officer seized some documents, 13 (thirteen) in numbers, as alamots. On perusal of the list it is found that the alleged cheques were not at all seized. By the supplementary-affidavit the petitioners annexed an information slip of the instant case which transpires that no separate seizure list has been prepared.

14. In such a case, where the allegation has been brought against the petitioners that they made the payment okay on some cheques by which the money was misappropriated, the cheques were essential *alamots* to prosecute the petitioners. In the absence of those, on which the petitioners were indicted with allegations that the payment was made in violation of the constitution of the Samity and also that they abetted the offence, the prosecution will not succeed in any manner. Moreover, we find that in the absence of seizing of those cheques as

alamots, there was no sufficient materials before the Court to frame charge against the petitioners under the aforesaid sections. Moreover, the written statement of principal accused Nos.1 and 2 dated 14.12.2006 and 28.11.2007 before the departmental inquiry committee shows that they did not utter a single word implicating the petitioners.

15. In the aforesaid facts and circumstances, we find that the Special Judge framed charge against the petitioners under the aforesaid sections in violation of the settled principle of law of framing charge. The Divisional Special Judge, Rajshahi framed charged against the petitioners, in the absence of sufficient materials against them before it.

16. In view of the above, we find substance in the final argument made by the learned Advocate for the petitioners.

17. We find merit in this Rule and consequently, the Rule is made absolute.

18. The impugned order dated 03.02.2013 passed by the Divisional Special Judge, Rajshahi in Special Case No.25 of 2011 arising out of Boalia Model Police Station Case No.28 dated 18.11.2008 corresponding to M.G.R. No.1030 of 2008 framing charge under sections 409/477/109 of the Penal Code read with sections 5(2) of Act II of 1947, so far it relates to the accused-petitioners, is hereby set aside. The accused petitioners are hereby discharged from the aforesaid case. They are also discharged from their bail bonds.

19. The order of stay granted earlier stands vacated.

20. Communicate the judgment at once.