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Justice Sheikh Hassan Arif

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Supreme Court of Bangladesh

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4. Mr. Justice Syed Mahmud Hossain
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Sl. No	Case No	Key Word	Short Ratio
			been discharged on the same ground, especially when the same Bench had decided earlier that the employees of Pubali Bank Limited are not in the service of the Republic or of any Corporation, National Enterprise or Local Authority.
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3 SCOB [2015] AD 1

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha, Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO.54 OF 2007.
(From the judgment and order dated 7.2.2007 passed by the High Court Division in Criminal Miscellaneous No.5938 of 2005.)

Prof. Dr. Motior Rahman:	...Appellant
=Versus=	
The State and another :	...Respondents
For the Appellant:	Mr. Rafique-ul-Huq, Senior Advocate, instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.
For Respondent No.1:	Mr. Diliruzzaman, D.A.G., instructed by Mr. B. Hossain, Advocate-on-Record.
For Respondent No.2:	Mr. Khondaker Saiful Huq, Advocate, instructed by Mr. Md. Nurul Islam Chowdhury, Advocate-on-Record.

Date of hearing: 28th January, 2015.

Date of Judgment:28th January, 2015.

Difference between cheating and breach of contract:
In every case of cheating there is implicit agreement between the parties. The vital factor to be considered is whether at the time of agreement there was intention to carry out the terms of the contract or not. If there is nothing to show that there was no intention at the time of agreement which was arrived at, but the failure to fulfill the terms of the agreement was the subsequent event, the offence of cheating cannot be said to have been committed. It would only be a case of breach of contract. ...(Para 8)

Penal Code, 1860
Section 39 and 491:

Section 39 of the Penal Code defines the term voluntary, means a willful omission to attend on the employer. Such willful omission must arise from something more than mere careless or negligence. It must be an omission of which the employee is conscious though he may not advert to the consequence. The legal contract must take shape of service for the helpless master or employer, for example, a curator of a lunatic, or a

doctor and a nurse employed in the hospital, who may render himself liable to the penalty under this section if he agreeing to look after the patient, voluntarily deserts the patient or omits to attend the patient.

The complainant was not the one who is neither a lunatic nor a bodily incapable person or has been suffering from a disease for which he has entered into a contract with the appellant to take care of him and in that view of the matter, the offence alleged in the complaint does not attract section 491 of the Penal Code. ...(Para 9 &10)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. This appeal by leave is from a judgment of the High Court Division declining to quash the proceeding in C.R. Case No.5179 of 2004 pending in the Court of Metropolitan Magistrate, Dhaka.

2. Relevant facts which gave rise to the initiation of the proceeding are that the respondent made a complaint before the Chief Metropolitan Magistrate, Dhaka against the appellant alleging, inter alia, that complainant attended the respondent's chamber, a reputed surgeon, for treatment of fistula. The respondent upon examination advised him to get admitted into BIRDEM hospital for operative treatment. Complainant accordingly admitted into the hospital and in due course he was taken to the operation theater, when he noticed that the respondent was not present and that another surgeon Dr. Abdullah Al-Amin was taking preparation for conducting operation. Complainant thereupon declined to undergo operation under Dr. Abdullah Al-Amin, when the attending nurse and other physicians told him that Dr. Abdullah was conducting such type of operation. The complainant refused to undergo operation under Dr. Abdullah but he was forcibly applied anesthesia and later on he came to know that Dr. Abdullah Al-Amin conducted his operation and in the consent letter, it was mentioned that his consent was taken. Complainant alleged that the respondent by exploiting his fame and name collected patients by giving assurance that he would conduct operation but in fact he never conducted such operation and thus, he had committed the offence of breach of trust, which act constituted offences punishable under sections 406/420/491 and 337 of the Penal Code.

3. The learned Chief Metropolitan Magistrate took cognizance of the offences punishable under sections 420/491 of the Penal Code against the appellant. The appellant then moved the High Court Division for quashment of the proceeding. The High Court Division was of the view that the allegations in the complaint petition prima-facie disclose offences punishable under the aforesaid provisions of the Penal Code and that since the appellant had not exhausted the other remedy available to him, the proceeding could not be quashed at such stage.

4. Mr. Rafiqe-ul-Huq, learned counsel appearing for the appellant argues that the allegations made in the complaint even if they are taken to be true, no criminal offence discloses at all against the appellant far less a dispute of civil nature, and the High Court Division has failed to comprehend that aspect of the matter. It is further argued that since the ingredients of initial deception are absent in the complaint petition, inasmuch as, admittedly the respondent was given operative treatment at a public hospital like BIRDEM as an indoor patient, the High Court Division erred, therefore, in law in not interfering with the

proceeding. It is added that the High Court Division has also committed a fundamental error in finding that the facts alleged in the complaint disclose an offence punishable under section 491 of the Penal Code without assigning proper reasons. On the other hand Mr. Khondaker Saiful Huq, learned counsel appearing for the respondent, argues that the High Court Division is perfectly justified in holding the view that the allegations made in the complaint disclose prima-facie offences against the respondent.

5. Now the first question to be examined is whether on the facts disclosed in the complaint that on assurance of the appellant that he would conduct the operation of the complainant, the latter admitted into BIRDEM but the operation was conducted by an another surgeon without his consent by force, such assurance gave rise to initial deception for constituting an offence of cheating.

6. Section 415 defines cheating and under this provision a person is said to cheat another when he induces the person so deceived to deliver any property to him or to consent that he shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. On a plain reading of the complaint it does not disclose that the appellant had induced the complainant with dishonest intention to deliver any property to him or to do or omit to do anything which act or omission causes or likely to cause damage or harm to the complainant in body, mind, reputation or property.

7. Admittedly, the respondent had undergone operative treatment in a public hospital. It is not the case of the complainant that the appellant advised the respondent to get admitted into his private clinic where he would conduct operation and in violation of the contract or the representation, he was compelled to undergo operation through an unqualified or novice surgeon, which caused damage to any organ or that by such operation various complications cropped up, by which, the complainant had suffered both physically or mentally or that any harm had caused to him. There is no allegation of monetary transaction between the appellant and the complainant over the operation. Neither the appellant had derived any undue advantage by such operation nor the complainant had suffered any loss or damage. In the absence of those elements, the initial deception which is a constituent for committing an offence of cheating is totally absent. There is allegation that there was misrepresentation by the appellant for which the complainant was deceived. This is merely an allegation and even if it is assumed that there was such misrepresentation for, mere words of commendation do not amount to warrantee. It attracts the civil law. In the absence of any undue advantage being derived, the question of misrepresentation does not arise. A misrepresentation is given to any person to do any act or to refrain from doing any act or to omit to do anything with an object to deriving any undue advantage. Here as observed above, the appellant had derived no financial or any sort of benefit by reason of giving the complainant advice to get admitted into BIRDEM for operation. Rather, it could be said that the complainant had gained benefit by the operative treatment given at BIRDEM through Dr. Abdullah. He was fully cured of his fistula ailment. More so, the complainant did not make any allegation that Dr. Abdullah Al-Amin was not a reputed surgeon for the disease he was suffering from.

8. Even if it is assumed that there was contract between the complainant and the appellant that the appellant would conduct the operation upon the complainant if the latter had admitted into BIRDEM, a mere breach of contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the

intention of the accused at the time of alleged inducement which must be judged by his subsequent act. In every case of cheating there is implicit agreement between the parties. The vital factor to be considered is whether at the time of agreement there was intention to carry out the terms of the contract or not. If there is nothing to show that there was no intention at the time of agreement which was arrived at, but the failure to fulfill the terms of the agreement was the subsequent event, the offence of cheating cannot be said to have been committed. It would only be a case of breach of contract. As observed above, there was no intention to deceive the complainant. Admittedly by reason of the operation being done by Dr. Abdullah Al-Amin no consequence resulted from that operation, and therefore, the act of the appellant, even if there be any, does not attract the offence of cheating.

9. The second question of is whether the complaint discloses an offence punishable under section 491 of the Penal Code. Section 491 refers to a case where one who is helpless or is incapable of taking care of himself by reason of youth or unsoundness of mind or of disease or of bodily weakness, enters into a contract with another to attend on or to supply the wants of the employer, who after accepting the engagement deserts the employer voluntarily. To hold the person liable under this section, he must not be a general servant or domestic help, but the one who is specially retained or employed for the supervision of the helpless employer. A domestic help or a servant may be given such engagement, but for such engagement his general duties does not make him amenable to this section. To constitute the offence if the person employed to attend on or to supply the wants of the employer, voluntarily omits to attend him or to supply his wants, though he may not actually withdraw himself from the service of the employer. Section 39 of the Penal Code defines the term voluntary, means a wilful omission to attend on the employer. Such willful omission must arise from something more than mere careless or negligence. It must be an omission of which the employee is conscious though he may not advert to the consequence. The legal contract must take shape of service for the helpless master or employer, for example, a curator of a lunatic, or a doctor and a nurse employed in the hospital, who may render himself liable to the penalty under this section if he agreeing to look after the patient, voluntarily deserts the patient or omits to attend the patient.

10. The complainant was not the one who is neither a lunatic nor a bodily incapable person or has been suffering from a disease for which he has entered into a contract with the appellant to take care of him and in that view of the matter, the offence alleged in the complaint does not attract section 491 of the Penal Code. The High Court Division has totally overlooked that aspect of the matter. The other ground on which the High Court Division has declined to interfere with the proceeding is non-exhaustion of alternative remedy. This is not a legal ground for, after taking cognizance of the offences, the accused person can move the High Court Division challenging the legality of the proceeding on any of the grounds available under section 561A of the Code of Criminal Procedure. In view of the above, we find that the allegations made in the complaint do not attract offences punishable under sections 420/491 of the Penal Code and therefore, the initiation of the proceeding is a sheer abuse process of the court. Appeal is allowed. The proceeding is quashed.

3 SCOB [2015] AD 5

APPELLATE DIVISION

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

CIVIL PETITION FOR LEAVE TO APPEAL NO.1536 OF 2010
(From the judgment and order dated the 4th day of June, 2009 passed by the High Court Division in First Appeal No.328 of 1994)

Immam Hossain Sawdagor being dead his heirs: Mosammat Rasheda Begum and others	. . . Petitioners
-Versus-	
Abul Hashem and others	. . . Respondents
For the Petitioners	Mr. A. J. Mohammad Ali, Senior Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record
For Respondent Nos.1-4	Mr. Sheikh Mohammad Morshed, Advocate instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record
For Respondent No.5	Mr. Md. Firoz Shah, Advocate-on-Record
For Respondent Nos.6-8	Not represented
Date of Hearing	The 15th day of June, 2015

Third party right to file an appeal:
Even a third party can file an appeal in case he is affected by a decree passed in a suit. ...(Para 11)

Service of Summons:

The High Court Division was not also factually correct in finding that summons of the suit was not served upon defendant No.3, as report of the process server clearly showed that summons of the suit was served upon defendant No.3 by hanging and he gave report to that effect. Merely because the fact of service of summons upon defendant No.3 was not recorded in the order sheet, it may be through inadvertence which did not make the report of the process server as regards service of summons upon defendant No.3 ineffective or *nonest*. ...(Para 13)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This petition for leave to appeal has been filed against the judgment and decree dated the 4th day of June, 2009 passed by the High Court Division in First Appeal No.328 of 1994 allowing the same.

2. Facts necessary for disposal of this petition are that respondent Nos.1-4 as plaintiffs filed Other Class Suit No.167 of 1990 in the Court of Subordinate Judge, First Court, Chittagong for the following reliefs:

> "ক) বাদীগণ ১৬/০১/৭৯, ১৮/০১/৭৮ ও ২০/০১/৭৯ ইংরজী তারিখর চট্রগ্রাম সদর সাব রেজিষ্ট্রী অফিসর যথাক্রম ৫৫৮, ৬৬৫, ৬৬৬ ও ৭৬৩ নং কবলামূল মৃত হাজী ইমাম শরীফ হইত তপশীল বর্ণিত জমি খরিচ করিয়া তাহাত আইনঃ স্বত্ব অর্জন করিয়াছ ঘোষনা মর্ম উক্ত জমিত তাহাদর দখল স্হিরতরর ডিক্রী দেওয়ার আদশ হয়।
>
> খ) ৩নং বিবাদী ও মৃত হাজী ইমাম শরীফ এর মধ্য কথিত সম্পাদিত ও রেজিষ্ট্রিকৃত ৩০/০১/৭৩ ইংরজী সনর ৬ ও ৭ নং বন্টননামা দলিল বেআইনী যোগাযাগী, পন্ড, অকার্যকর এবং তৎমূল তফসিল বর্ণিত জমিত বাদীগনর স্বত্বর কোন ব্যাঘাত হয় নাই এবং তদ্বারা ৩নং বিবাদী কোন রকম স্বত্ব দখল অর্জন করন নাই মর্ম ডিক্রী দেওয়ার আদশ হয়।
>
> গ) ১ ও ২ নং বিবাদীর চট্রগ্রাম ১ম সাব জজ আদালতর ১৯৮৮ সনর ৮০ নং মামলায় ৩নং বিবাদীর বিরুদ্ধ ডিক্রীমূল তফশীল বর্ণিত জমিত বাদীগনর স্বত্ব দখলর কোন হানি হয় নাই মর্ম ডিক্রী দেওয়ার আজ্ঞা হয়।
>
> ঘ) চিরস্হায়ী নিষধাজ্ঞার দ্বারা বিবাদীগণক তপশীল বর্ণিত জমিত বাদীগনর দখল কোন রুপ হস্তফপ ও ব্যাঘাত সৃষ্টি না করার জন্য নিষধাজ্ঞার ডিক্রী দেওয়ার আজ্ঞা হয়।
>
> ঙ) অত্র মামলা চলাকালীন সময় বিবাদীগণ বাদীগণক গায়র জোর বাদীগণক তপশীল বর্ণিত জমি বা ইহার কান অংশ হইত বে-দখল করিল তাহার দখল পুনরুদ্ধারর ডিক্রী দেওয়ার আদশ হয়।
>
> চ) মামলার খরচ প্রতিদ্বন্দ্বিতাকারী বিবাদীগনর বিরুদ্ধ ডিক্রী দেওয়ার আদশ হয়।
>
> ছ) বাদীগণ অন্য যে, যে প্রতিকার আইনঃ পাইত পারন তাহা ডিক্রী দেওয়ার আদশ হয়।"

3. The suit was contested by defendant Nos.1 and 2 by filing written statement. Though defendant Nos.4 and 5 filed written statement, they did not contest the suit ultimately.

4. The trial Court by the judgment and decree dated 12.06.1994 dismissed the suit. Against the judgment and decree of the trial Court, the plaintiffs filed First Appeal No.328 of 1994 before the High Court Division. A Division Bench of the High Court Division by the impugned judgment and decree allowed the appeal and sent the suit back to the trial Court for fresh trial with the direction upon it to proceed with the suit after service of summons upon defendant No.3 on the finding, *inter alia*, that the order sheets showed that summons of the suit was not served upon the defendant. The High Court Division further held that as summons of the suit was not served upon defendant No.3, the judgment and decree passed by the trial Court was a nullity. The High Court Division did not at all enter into the merit of the case of the plaintiffs though the appeal was filed by them against the judgment and decree of the trial Court dismissing the suit.

5. Being aggrieved by and dissatisfied with the judgment and decree of the High Court Division, the heirs of defendant No.3 have filed this petition for leave to appeal as he died in the meantime.

6. Mr. A. J. Mohammad Ali, learned Counsel, for the petitioners submits that the plaintiffs having felt aggrieved by the judgment and decree of the trial Court dismissing the suit, preferred the first appeal in question, so the High Court Division as the last Court of fact was obliged to see whether the trial Court committed any error factually and legally in dismissing the suit, but it without directing its attention in that respect made out a third case

that as summons of the suit was not served upon defendant No.3, the judgment and decree passed in the suit was a nullity. He further submits that when defendant No.3 appeared in the first appeal and made no compliant as to the non-service of summons upon him, the High Court Division ought not to have sent the suit to the trial Court for service of summons of the suit afresh upon him and then to proceed with the suit and it should have disposed of the appeal on merit. The impugned judgment and decree calls for interference by this Court.

7. Mr. Sheikh Mohammad Morshed, learned Advocate who entered caveat on behalf of the plaintiff-respondents, on the other hand, supported the impugned judgment and decree. He submits that as summons of the suit was not served upon defendant No.3, the hearing of the suit should not have commenced, the High Court Division rightly remanded the suit to the trial Court and no interference is called for with the impugned judgment and decree.

8. As stated earlier, the plaintiffs' suit was dismissed and the appeal was filed by them. Let us see what the points were taken before the High Court Division on behalf of the appellants. In the memorandum of appeal as many as 16(sixteen) grounds were taken and not a single ground was taken as to the non-service of summons upon defendant No.3 for which the proceedings of the suit could be said to be illegal and the judgment and decree passed therein a nullity. At the time of hearing the appeal, no such point was also urged either by the learned Advocate for the appellants or by the learned Advocates for the defendant-respondents (besides respondent No.3, respondent No.2 also contested the appeal). The submission made by the learned Advocate for the appellants as noted in the impugned judgment and decree were as under:

> "Mr. SK. Md. Morshed, learned Advocate, appearing for the appellant placed the ground taken by him in the memo of appeal, and thereafter submitted that the plaintiffs proved his (sic, it would be their) case by oral and documentary evidence, but the trial court without appreciating the evidences on record, exhibited documents and plaintiffs case dismissed the suit. He draws our attention to the ground no.14, and submits that the suit was wrongly dismissed on the finding that it was bad for defect of parties. He submits that the heirs of the original owners, as well as defendant no.3, were parties in the suit, and there being no case that any other person has had got any interest in the suit land, there is no defect of parties in the suit. He submits that the defendant no.3, was served with summons but did not appear in the suit and the suit was accordingly taken up for exparte hearing, and draws our attention to the order sheet of the court below and submits that the plaintiffs of the suit submitted the requisites for the service of summons on the defendant and the summons were issued by registered post, and also by process server, by the order dated 10.11.90 and it was fixed for the return of service, thereafter on 2.2.91. He referring to the report of the process server from the L.C. record submits that the summons was issued against the defendant no.3 and it was served by hanging and there is report of the process server to that effect. Beside this the summons were also served under registered post, and that the presumption in such event is, that the summon was duly served and the trial Court on the failure of the defendant no.3 in appearing in the suit proceeded with the suit against the defendant no.3 for exparte disposal, and there was no wrong committed by the trial Court in proceeding of the suit against the defendant No.3 exparte. The defendant being served with the process duly did not appear in the suit, and consequently it was decided against defendant no.3 exparte. The defendant no.3 is the respondent no.3, in the appeal, and he on receipt of the notice of the appeal entered appearance in the appeal by engaging learned Advocate."

9. So, from the submissions made before the High Court Division on behalf of the appellants, it is rather clear that they insisted very much that summons of the suit was served upon defendant No.3, in both ways, by the process server as well as by registered post.

10. Interestingly, though the High Court Division found that summons of the suit was not served upon defendant No.3, but defendant No.3 who was respondent No.3 in the appeal appeared through his lawyer, Mr. Md. Asadullah and did not make any complaint or grievance about non-service of summons of the suit upon him. Rather his learned Advocate made a candid submission as noted in the impugned judgment to the effect *"appearing for the respondent no.3 admitted in his oral submission that the defendant no.3 had knowledge about the suit, but he did not contest the suit. But, he being served with notice in the appeal, appeared to contest the appeal and he will make submissions on the law point for the respondent, defendant no.3, in the suit. . . . He made submission about his entitlement to submit on the law point in the appeal, and he next submits that the appeal is the continuation of the suit, though, the defendant opted not to contest the suit, but now, the suit having been dismissed by judgment and decree impugned in the appeal, he submits, that the plaint of the suit is not maintainable, and the trial Court rightly dismissed the suit."* The very submission of the learned Advocate for respondent No.3 quoted above, *prima facie* shows that summons of the suit was served upon him, but he chose not to appear in the suit and contest the same. But that does not mean that defendant No.3 cannot contest the appeal. He has every right to contest the appeal regarding the factual aspect of the case as well as the legal aspect which followed from the evidence on record. In the Code of Civil Procedure (the Code), there is no provision that a defendant, who did not appear in the suit in spite of service of summons upon him and did not file any written statement, cannot contest an appeal filed against the decree passed in a suit on the evidence on record.

11. In the context, it may be stated that even a third party can file an appeal in case he is affected by a decree passed in a suit. But unfortunately, the High Court Division did not accept the said submission of the learned Advocate for defendant No.3-respondent on the view *"As we have found from the record that the summons was not served on the defendant no.3 and that the defendant did not enter in the suit the submission of the learned Advocate for the respondent no.3 in the appeal that the defendant no.3 opted not to contest the suit is not tenable in the facts on record, which is against the scheme of the Code of Civil Procedure. The defendant being served with the process of summons in the suit, or having knowledge of the suit is to enter appearance in the suit, and answer the plaint, should be in attendance in the Court house in person or by his pleader. Under the Rule requires the attendance of the defendant on being served with summons. In this case, the submission of learned Advocate that the defendant opted not to contest in the suit is not contemplated in the Order 9 of the Code of Civil Procedure the consequence of his non appearance in the suit has to be followed."*

12. In taking the above view, the High Court Division totally failed to consider the legal position that in Order IX, rules 6(1)(a) and 11 of the Code, the consequences of non-appearance of a defendant on the date fixed for hearing the suit, in case summons was served upon him, have been clearly spelt out; the consequence is that the suit would be heard *ex-parte* against the defaulting defendant. That actually happened in the instant case. Defendant Nos.1 and 2, 4 and 5 appeared in the suit and filed separate written statement. As defendant Nos.4 and 5 did not contest the suit ultimately, the suit was dismissed on contest against defendant Nos.1 and 2 and *ex-parte* against the other defendants including defendant No.3. But the High Court Division without considering the provisions of rules 6(1)(a) and 11 of

Order IX of the Code considered rule 1 of Order IX only and thus fell in an error in refusing the learned Advocate for defendant-respondent No.3 in making submission on the point of law.

13. The High Court Division was not also factually correct in finding that summons of the suit was not served upon defendant No.3, as report of the process server clearly showed that summons of the suit was served upon defendant No.3 by hanging and he gave report to that effect. Merely because the fact of service of summons upon defendant No.3 was not recorded in the order sheet, it may be through inadvertence which did not make the report of the process server as regards service of summons upon defendant No.3 ineffective or *nonest*. Moreso, it further appears that summons of the suit was also sent to defendant No.3 by registered post in compliance with the provisions of Order V, rule 19B of the Code. When attention of Mr. Morshed was drawn to the fact that he did not make any submission before the High Court Division as to the non-service of summons upon defendant No.3, rather he insisted that summons of the suit was served upon him, he submitted that even if no submission was made, the Appellate Court was under an obligation to see the entire record and be satisfied whether summonses of the suit were served upon the defendants before the commencement of the trial of the suit. We failed to understand any logic behind the said submission of Mr. Morshed. The Code enjoins that the plaintiffs are to take necessary step in the suit for service of summons upon the defendants and the objection, as to the non-service of notice, if any, can be taken only by the defendant(s). Mr. Morshed himself made submission before the High Court Division by pointing out from the lower Court's record that there was report of the process server with the record that he served summons upon defendant No.3 as per provision of rules17-19 of the Code, he could not make a reverse submission before this Court just to support the impugned judgment and decree. And such attempt shows that somehow the plaintiffs were interested to get a fresh trial of the suit by the trial Court to fill up the lacuna in their case as pointed out by the trial Court in its judgment and decree. Further defendant No.3 appeared before the High Court Division in the appeal and his learned Advocate made the submission that the defendant had knowledge about the suit, but he opted not to appear in the suit and wanted to contest the appeal on the point of law through his learned Advocate which, in effect, proved that defendant No.3 accepted the factual position that summons of the suit was duly served upon him; the question of service of summons upon the defendant afresh did not arise at all.

14. In the context, it may be stated that Mr. Mustafa Neaz Mohammad, learned Advocate for respondent No.2 also made submission that summons of the suit was duly served upon defendant No.3. He further submitted that the trial Court rightly dismissed the suit and there was no illegality in the judgment and decree of the dismissal. Therefore, the High Court Division was totally wrong in sending the suit on remand to the trial Court for hearing the same afresh after service of summons upon defendant No.3. It further appears that the plaintiffs and defendant Nos.1 and 2 adduced evidence both oral and documentary in support of their respective case and the trial Court on consideration of the evidence on record dismissed the suit, the plaintiff filed the appeal against such dismissal, so it was incumbent upon the High Court Division as the last Court of fact to see whether the trial Court was correct in dismissing the suit, instead it sent the suit on remand to the trial Court on a point which was never urged by any of the parties in the appeal. In passing the impugned judgment and decree, the High Court Division also failed to consider the legal proposition that even a suit is heard *ex parte*, the plaintiff cannot get a walk over and he has to prove his own case.

15. For the discussions made above, the impugned judgment and decree cannot be sustained in law.

16. Be that as it may, since the High Court Division did not enter into the merit of the appeal and sent the suit on remand to the trial Court for fresh hearing on the erroneous view of the facts and the law as pointed out hereinbefore and we have heard both the parties, we consider it proper to send the appeal back to the High Court Division for hearing the same afresh and dispose of the same in accordance with law on the evidence on record.

17. Accordingly, this petition is disposed of in the following terms:

> The impugned judgment and decree of the High Court Division is set aside. The appeal is sent back to the High Court Division for hearing afresh and dispose of the same in accordance with law on the evidence on record.

18. The first appeal shall be heard and disposed of by the Bench presided over by Nozrul Islam Chowdhury, J. within 2(two) months from the date of receipt of this judgment.

3 SCOB [2015] AD 11

APPELLATE DIVISION

PRESENT
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali

CIVIL APPEAL NO.34 of 2007
(From the judgment and order dated 23.04.2005 passed by the High Court Division in Civil Revision No.4693 of 2003.)

Md. Abdus Sobhan Munshi
.....Appellant
=Versus=
Sreemati Komada Daishya and others
.....Respondents

For the Appellant : Mr. M. M. Hoque, Advocate instructed by Mr. Md. Nawab Ali, Advocate-on-Record.

For Respondent Nos.2-4,8, 10,16 and 18-20 : Mr. Sasthy Sarker, Advocate instructed by Mr. Taufique Hossain, Advocate-on-Record.

For Respondent Nos.1, 5-7, 9,11-15 and 17 : Mr. Bivash Chandra Biswas, Advocate-on-Record.

Date of hearing : 15.04.2014 and 23.04.2014.

Date of judgment : 24.04.2014

Hindu Law
Legal necessity for transferring land:
It is true that in this kabala dated 02.03.1997 it has been mentioned that for performing the Shradhya ceremonies of her parents Komoda sold this land to the plaintiff. But this recital only in the document is not enough to prove that actually there was legal necessity for transferring this land by Komoda-who, admittedly, had life interest only in the land in question. Evidence is necessary to prove that actually there was legal necessity for transferring this land by Komoda. ...(Para 15)

J U D G M E N T

Nazmun Ara Sultana, J.:

1. This Civil Appeal by leave, at the instance of the plaintiff, has arisen from the judgment and order dated 23.04.2005 passed by the High Court Division in Civil Revision No.4693 of 2003 discharging the rule and affirming the judgment and decree dated 05.07.2003 passed by the learned Additional District Judge, 2nd Court, Bogra in Partition Appeal No.95 of 2002 affirming the judgment and decree dated 31.03.2002 passed by the learned Senior Assistant Judge, Sherpur, Bogra in Partition Suit No.103 of 1997 dismissing the suit.

2. The present appellant, as plaintiff, instituted Title Suit No.103 of 1997 in the court of the learned Assistant Judge, Sherpur, Bogra for partition of ejmali property. His case, in short, is that the divisible land measuring an area of 4.48 acres of land of C.S. Khatian No.5 of mouza Bhadaikuri-as described in the schedule to the pliant originally belonged to Kokan Pramanik @ Khokan Pramanik-who died leaving behind widow Sreemati Sharashati Dashya and three daughters Bamoni, Komela and Komoda. Then Sreemati Sharashati Dashya died and her interest devolved upon her three daughters Bamoni, Komela and Komoda. Then Bamoni died leaving behind two sisters Komela and Komoda. Thereafter, Komela died

leaving behind Komoda, the defendant No.1. Komoda while owning and possessing this land sold 1.50 acres of land to the plaintiff by registered kabala dated 02.03.1997 for legal necessity. In that kabala Jogeswar (the defendant No.5)-son of the defendant No.1 became a witness. The plaintiff, after purchasing the said 1.50 acres of land, requested the defendants to effect partition but they refused and hence the suit.

3. The defendant Nos.2, 3, 4 and 8, 16, 18, 19 and 20, by filing a separate written statements, contested the suit. The defendant Nos.1 and 5 filed written statement admitting the case of the plaintiff.

4. The case of the defendant Nos.2,3,4 and 8 is that the C.S recorded tenant Kokan Pramanik @ Khokan Pramanik died leaving behind one son Gakul, three daughters Bamoni, Komela and Komoda and a widow Sreemati Sharashati Dashya. Subsequently Gakul died and his interest devolved upon Sreemati Sharashati who acquired life interest in the property left by Kokan Pramanik @ Khokan Pramanik and Gakul. Thereafter Sharashati relinquished her claim in favour of her three daughters' sons. The three daughters of Sharashati also relinquished their claim in favour of their sons. Komoda's two sons namely Dijebar and Subash left for India after transferring their share to Jogeswar. The plaintiff had no right, title and possession in the suit land.

5. The case of the defendant No.16 is that C.S. recorded tenant-Kokan Pramanik @ Khokan Pramanik died leaving behind son-Gakul and three daughters Bamoni, Komela and Komoda. Thereafter Gakul died leaving behind Bamoni's son-Nikhil who sold .34 acre of land to the defendant No. 16 by kabala dated 17.03.1980.

6. The case of the defendant No.18, in short, is that Kokan Pramanik @ Khokan Pramanik died leaving behind wife-Sharashati Dashya, three daughters Bamoni, Komela and Komoda and one son-Gakul. Thereafter Gakul died and his share devolved upon Sharashati Dashya who having life interest relinquished her claim in favour of the sons of her three daughters.

7. The case of the defendant Nos.19 and 20 is that Kokan Pramanik @ Khokan Pramanik died leaving behind son-Gakul, three daughters Bamoni, Komela and Komoda and widow-Sharashati. Gakul died and Sharashati got life interest in the property. Thereafter Sharashati died leaving behind sons of her three daughters.

8. The trial court, on consideration of evidence adduced by both the parties, dismissed the suit on the ground that the plaintiff had failed to prove that Komoda, vendor of the plaintiff, sold the suit land for legal necessity.

9. Being aggrieved, the plaintiff preferred Partition Appeal No.95 of 2002 and the appellate court dismissed the appeal affirming the judgment of the trial court. The plaintiff then moved the High Court Division in revisional jurisdiction and obtained rule which, after hearing, was discharged by the impugned judgment and order.

10. Leave was granted to consider the submissions of the learned Advocate for the leave-petitioner which has been stated in the leave granting order as quoted below:

> "The learned Advocate for the petitioner submits that the trial court without proper consideration of the evidence on record held that the plaintiff failed to prove that Komoda transferred the suit land for legal necessity but P.Ws.1 and 2 categorically stated that Komoda transferred her interest in the suit land for legal necessity and D.W.1 Jogeswar son of Komoda also stated that Komoda transferred the suit land in favour of the plaintiff for legal

> necessity but the High Court Division and courts below did not consider the material evidence on record on the point and as a result there has been miscarriage of justice. He next submits that the appellate court most illegally held that Komoda had no right under Hindu law to transfer the suit land in favour of the plaintiff and as such the finding of the appellate court was affirmed by the High Court Division without any legal basis."

11. Mr. M. M. Hoque, the learned Advocate appearing for the plaintiff-appellant has made submissions to the effect that in this suit it has been proved that the suit land originally belonged to Kokan Pramanik @ Khokan Pramanik and he died leaving behind widow Sreemati Sharashati Dashya and three daughters, namely, Bamoni, Komela and Komoda. The learned Advocate has argued also that if the defendants' case is believed that Kokan Pramanik @ Khokan Pramanik had a son also, namely, Gakul, but admittedly this Gakul died at his infancy and as such his mother-Sreemati Sharashati Dashya acquired life interest in the property in question at the death of her son Gakul. The learned Advocate has contended that in any way it is admitted that Sreemati Sharashati Dashya acquired life interest in the land in question and she died leaving three daughters Bamoni, Komela and Komoda only. The learned Advocate has submitted also that the defendants' further case that Sreemati Sharashati Dashya relinquished her interest in the land in question in favour of the sons of her three daughters is not acceptable at all; that this alleged surrender of the suit property by Sreemati Sharashati Dashya in favour of the sons of her three daughters was not permissible at all under any law and in the circumstances, at the death of Sreemati Sharashati Dashya, her three daughters acquired life interest in the suit property. The learned Advocate has argued that there is no denying of the fact that both Bamoni and Komela died leaving Komoda and in the circumstances Komoda alone acquired life interest in the entire property in question and she, for legal necessity, transferred 1.50 acres of land to the plaintiff by a registered deed in the year 1997 and thus the plaintiff acquired valid right, title and interest in this 1.50 acres of land. The learned Advocate has argued also that the plaintiff has adduced sufficient evidence to prove that Komoda transferred this land to the plaintiff for legal necessity and that the evidence of D.W.1 Jogeswar also has proved that Komoda transferred this land to the plaintiff for legal necessity. The learned Advocate has contended that in the circumstances all the courts committed great error and also injustice in disbelieving the plaintiff's case that Komoda sold 1.50 acres of land to him for legal necessity. The learned Advocate has argued that this Division, on proper assessment of evidence on record, will find that Komoda sold 1.50 acres of land to the plaintiff for legal necessity and, therefore, will allow this appeal.

12. Mr. Sasthy Sarker and Mr. Taufique Hossain the learned Advocates for contesting respondents have made submissions supporting the impugned judgment and order. They have advanced arguments mainly to the effect that the defendant No.1 Komoda did not get any right, title, interest or possession in the suit land, that the sons of all the three daughters of Sreemati Sharashati Dashya and Kokan Pramanik @ Khokan Parmanik got the suit land long before from Sreemati Sharashati Dashya and since then they had been possessing the suit land and that the khatians also were prepared in their names and they have also transferred the major portion of the suit land to the contesting defendants. The learned Advocates have argued also that the plaintiff could not prove at all that Komoda sold 1.50 acres of land to the plaintiff for legal necessity; that though it has been alleged from the side of the plaintiff that Komoda sold this land to the plaintiff for performing Shradhya of her parents but this very story is not believable at all; that from the own statement of the plaintiff himself it has been proved that Komoda's father died long 50/60 years before and Komoda's mother Sreemati Sharashati Dashya died long 5/6 years before and that in the circumstances

it is not believable that Komoda sold this land to the plaintiff to perform Shradhya of her parents-who died long ago.

13. We have considered the submissions of the learned Advocates of both the sides and gone through the impugned judgment and order of the High Court Division, those of the appellate court below and the trial court and also the evidence on record.

14. From the above stated facts of the case and the submissions advanced from both the sides it is evident that in this suit moot question to be answered is whether Komoda had any legal necessity to sell 1.50 acres of land to the plaintiff by the kabala dated 02.03.1997.

15. It is true that in this kabala dated 02.03.1997 it has been mentioned that for performing the Shradhya ceremonies of her parents Komoda sold this land to the plaintiff. But this recital only in the document is not enough to prove that actually there was legal necessity for transferring this land by Komoda-who, admittedly, had life interest only in the land in question. Evidence is necessary to prove that actually there was legal necessity for transferring this land by Komoda (**vide Promode Kumar Roy Vs. Benodini Halder 21 DLR 673**).

16. However, it appears that in this suit there is no cogent evidence at all to prove that Komoda actually sold this land to the plaintiff for legal necessity i.e. for performing Shradhya of her parents. In this suit the plaintiff has examined 2 witnesses only including himself. The P.W.1 is the plaintiff himself and P.W.2 is the cousin of the plaintiff-who and the plaintiff together were accused in a criminal case. This P.W.2 is aged only 30 years. So, these 2 witnesses are highly interested witnesses. Without corroboration from other disinterested witnesses the evidence of this P.W.1 and P.W.2 cannot be relied on at all. It appears that the D.W.1 Jogeswar-the son of Komoda also has deposed in this suit supporting the case of the plaintiff that Komoda sold this land to the plaintiff for performing the Shradhya of her parents. But this D.W.2 also is a highly interested witness. He is the son of Komoda and became a witness in the kabala of the plaintiff. So, this D.W.1 also cannot be relied on at all. On the other hand all the other four D.Ws. deposed before the court denying this case of the plaintiff that Komoda sold this land to the plaintiff for performing Shradhya of her parents. It appears that the trial court, on proper examination and assessment of all these evidence, rightly found that it had not been proved at all that Komoda sold the suit land to the plaintiff for performing Shradhya of her parents and that she actually performed Shradhya of her parents. We find no reason to differ with these findings and decision of the trial court. It is also not believable that Komoda sold this land to perform Shradhya of her father-who admittedly died long 50/60 years before and of her mother-who also died long 5/6 years before depriving the reversioners. So we are unable to accept this story itself that Komoda sold this land to the plaintiff for performing the Shradhya of her parents.

17. The observation of the appellate court to the effect that Sreemati Sharashati Dashya surrendered the land in question to the next reversioners and as such Komoda had no right under Hindu law to transfer this land is not correct. We have already found that this defence case that Sreemati Sharashati Dashya surrendered the land left by Kokan Pramanik @ Khokan Pramanik to the next reversioners is not acceptable at all. However, this finding of the appellate court below does not affect the decision that Komoda-the defendant No.1 had no legal necessity to transfer the suit land to the plaintiff.

18. However, from the above discussion it is evident, that the trial court dismissed the suit of the plaintiff rightly and both the appellate court below and the High Court Division affirmed this judgment of the trail court rightly.

19. So, this appeal fails.

20. Hence, it is ordered that this appeal be dismissed on contest against the contesting respondents and ex-parte against the rest without any order as to cost.

3 SCOB [2015] AD 16

APPELLATE DIVISION

PRESENT
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque

CIVIL PETITION FOR LEAVE TO APPEAL NOS.2080-2081 OF 2010.
(From the judgment and order dated 26.04.2010 passed by the High Court Division in First Appeal No.322 of 2003 and First Appeal No.343 of 2003)

S. N. Kabir .... Petitioner
(In both the cases)

-Versus-

Mrs. Fatema Begum and others
... Respondents
(In both the Cases)

For the Petitioner. (In both the cases)	Mr. Mahmudul Islam, Senior Advocate, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.	For Respondent No.1. (In C. P. No.2080/10)	Mr. Abdul Wadud Bhuiya, Senior Advocate, instructed by Mr. Md. Zainul Abedin, Advocate-on-Record.
		For Respondent No.1. (In C. P. No.2081/10)	Mr. Mahbubey Alam, Senior Advocate, instructed by Mr. Md. Zahihur Islam, Advocate-on-Record.
		Respondent No.2. (In both the cases)	Not represented.
		Date of Hearing	The 16th February, 2014.

Preamble of a statute:

The preamble cannot control the meaning and expression when the meaning of the expression is clear and ambiguous. The aid of the preamble can be taken if the meanings of the words to be interpreted are not clear and ambiguous. ...(Para 20)

Land Reforms Ordinance,1984
Section 5:

The words 'immoveable property' occurring in section 5 of the Ordinance include both agricultural and non-agricultural properties. There is no scope for encroaching upon the domain of legislature by importing the words 'rural area' in section 5 and addition of such words will amount to legislation by the judiciary which is not at all permissible. ...(Para 23)

J U D G M E N T

SYED MAHMUD HOSSAIN, J:

1. Both the civil petitions for leave to appeal are directed against the judgment and order dated 26.04.2010 passed by the High Court Division in First Appeal No.322 of 2003 heard analogously with F. A. No.343 of 2003 dismissing the appeals and affirming the judgment and decree dated 05.08.2003 passed by the learned Joint District Judge, Second Court, Dhaka in Title Suit No.270 of 2002 and judgment and decree dated 17.09.2003 passed by the learned Joint District Judge, Third Court, Dhaka in Title Suit No.149 of 2002 rejecting the plaints of both the suits.

2. Both the civil petitions for leave to appeal arising out of the common judgment and order between the same parties and involving common question of law and fact having been heard together are disposed of by this single judgment.

3. The facts leading to the filing of both the civil petitions for leave to appeal, in brief, are :

The plaintiff instituted Title Suit No.149 of 2002 and Title Suit No.270 of 2002 for declaration that he is the owner of the suit property and that the defendant-wife is his benamdar and is not the owner thereof. The plaintiff's case, in short, is that he married defendant No.1, Mrs. Fatema Begum who is a simple house wife had no source of income and dependent on the plaintiff-husband. The plaintiff being an industrialist and with motive to get income tax relief purchased the suit property being urban property in the "benami" of defendant No.1 and that the plaintiff purchased the suit property with his own money and he has been residing in the suit property with his family treating the same as his own property. Defendant No.1 knew that the plaintiff purchased the suit property in the "benami" of defendant No.1 who was claiming ownership of the suit property at the behest of her father and brother. Hence, the suit has been filed by the plaintiff for declaration of title in the suit property.

4. Defendant No.1 contested the suit by filing an application under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint, contending, inter alia, that under the provision of section 5 of the Land Reforms Ordinance,1984 (hereinafter referred as "the Ordinance"), the suit of the plaintiff is barred as benami transaction is prohibited.

5. The plaintiff filed written objection against defendant's application for rejection of the plaint. His case is that the suit property is urban property and that the Land Reforms Ordinance,1984 has been promulgated with the object to reform the land relating to land tenures, land holding and transfer with a view to maximizing production and ensuring a better relationship between land owners and bargaders and the provisions of the entire Ordinance are relating to agricultural and cultivable land holding and transfers and not relating to urban land, and the provisions of section 5 of the said Ordinance do not apply to non-agricultural urban land transfer, and the application of defendant No.1 for rejection of the plaint is liable to be rejected.

6. The trial Court by the judgments and orders dated 17.09.2003 and 05.08.2003 rejected the plaints of both the suits.

7. Being aggrieved by and dissatisfied with the judgments and orders dated 17.09.2003 and 05.08.2003 passed by the trial Court, the plaintiff preferred First Appeal Nos.322 and 343 of 2003 before the High Court Division. The learned Judges of the High Court Division, upon hearing the parties in both the appeals, by its judgment and order dated 26.04.2010 dismissed both the appeals.

8. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the plaintiff has filed these civil petitions for leave to appeal before this Division.

9. Mr. Mahmudul Islam, learned Senior Advocate, appearing on behalf of the leave-petitioner in both the petitions, submits that if the Land Reforms Ordinance,1984 is considered as a whole, it will appear that prohibition of benami transaction of "immoveable property" applies only in respect of agricultural land and that the High Court Division having considered the provision of section 5 of the Ordinance in particular, came to the finding that section 5 of the Ordinance applies to both agricultural and non-agricultural land. He further submits that section 5 of the Ordinance undoubtedly relates to agricultural land and the purpose of the Ordinance is to maximize production and to that end, provision has been made for stable and satisfactory relationship between agricultural land owners and bargaders and the expression "immoveable property" cannot be said to be unambiguous and there is a doubt as to whether in dealing with agricultural land, the legislative authority at all intended to bring non-agricultural land within the mischief of section 5 of the Ordinance and as such, the impugned judgment should be set aside.

10. Mr. Abdul Wadud Bhuiyan, learned Senior Advocate, appearing on behalf of respondent No.1 in Civil Petition for Leave to Appeal No.2080 of 2010 and Mr. Mahbubey Alam, learned Senior Advocate, appearing on behalf of respondent No.1 in Civil Petition for Leave to Appeal No.2081 of 2010, on the other hand, support the impugned judgment delivered by the High Court Division.

11. We have considered the submissions of the learned Senior Advocate, perused the impugned judgment and the materials on record.

12. Benami transactions which have been in vogue in the Indian Sub-Continent for centuries denote a transaction which is done by a person without using his own name, but in the name of another. Acquiring and holding property and even carrying on business in names other than those of real owners or in fictitious names did not contravene any provision of law and therefore, Courts had given effect to such transactions. In benami transaction, the Benamdar has no beneficial interest in the property or business that stands in his name. He only represents the real owner as his trustee. In benami transactions, the presumption is that a person who pays money is the real owner and not the person in whose name the property is purchased. Earlier men purchased properties in benami to cajole or shield themselves against the creditors. There was also the need for defrauding by making secret transactions. Fear of confiscation also led to benami holdings. Besides, these arrangements were aimed at evading the law.

13. This old age practice was given a go-by by section 5 of the Land Reforms Ordinance,1984. Before addressing the submissions of the learned Advocate for the petitioner, it is necessary to go through the provision of section 5 as incorporated in Chapter-

3 of the Ordinance under the caption "Prohibition of Benami Transaction of Immoveable Property" as under:

> "5.(1) No person shall purchase any immovable property for his own benefit in the name of another person.
>
> (2) Where the owner of any immovable property transfers or bequeaths it by a registered deed, it shall be presumed that he has disposed of his beneficial interest therein as specified in the deed and the transferee or legatee shall be deemed to hold the property for his own benefit, and no evidence, oral or documentary, to show that the owner did not intend to dispose of his beneficial interest therein or that the transferee or legatee hold the property for the benefit of the owner, shall be admissible in any proceeding before any Court or authority.
>
> (3) Where any immoveable property is transferred to a person by a registered deed, it shall be presumed that such person has acquired the property for his own benefit, and where consideration for such transfer is paid or provided by another person it shall be presumed that such other person intended to pay or provide such consideration for the benefit of the transferee, and no evidence, oral or documentary, to show that the transferee hold the property for the benefit of any other person or for the benefit of the person paying or providing the consideration shall be admissible in any proceeding before any Court or authority."

14. The expression "immoveable property" is to be construed in its proper context to ascertain whether the expression is clear and unambiguous. In order to construe "immoveable property" as mentioned in section 5 of the Ordinance, all the sections of the Ordinance are to be considered. The expression immoveable property cannot be considered in isolation in the context of section 5 of the Ordinance. For proper construction, the preamble and the short title of the Ordinance are also to be considered. The preamble of the Ordinance runs as under:

> "Whereas it is expedient to reform the law relating to land tenure, land holding and land transfer with a view to maximising production and ensuring a better relationship between land owners and bargadars."

15. If the preamble is considered in isolation, then the submission made by Mr. Mahmudul Islam carries much force. Now let us see what role is played by the preamble in construing a statue.

16. According to ***Maxwell*** "when possible, a construction should be adopted which will facilitate the smooth working of the scheme of the legislation"-***Interpretation of Statutes*** 12th edition at page 201.

17. In the case of ***Attorney General vs. H.R. H. Prince Earnest Gugustus of Hanover (1957) All E.R. Pg.49, Law Lord Viscount Simonds*** observed that as under:

> "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

On the one hand, the proposition can be accepted that

".....it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms."

"I quote the words of ***CHITTY,L.J.,*** which were cordially approved by ***Lord Davey in Powell V. Kempton Park Racecourse Co., Ltd(1)([1899] A.C 143 at p.185).*** On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statue or of any other document before he has read the whole of it. Until he has done so, he is not entitled to say that it, or any part of it, is clear and unambiguous."

18. In the case of ***Amin Jute Mills Vs. Bangladesh 29 DLR(SC)85,*** it has been observed paragraphs 9 and 11 as under:

"It is now well-recognized, in this regard that although there was previously some difference of opinion among the distinguished jurists in England, the long title of an Act which is set out at its head giving the general purpose of the Act as well as the preamble of an Act which also recites the main object of the Act are part of the Act. One of the basic rules of interpretation of a statute is that to understand the meaning of a particular provision of an Act one is to read the Act as a whole each part shedding light on the other and the following observation of Lord Wright in the case of ***Jennings Vs. Kelly decided by the House of Lords and reported in 1940 A.C. 206 same case (1939) All. E.R. 464*** may be referred in this connection."

"The proper course is to apply the broad general rule of construction, which is that section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest."

".....If the words of a substantive provision of an Act are precise and unambiguous then the meaning thereof should not be restricted and controlled by taking recourse to the title or preamble of the Act. Lord Halsbury, L.C. in his speech in the case of Powell Vs. The Kempton Park Race Course Company Limited (1899) A.C. 143 at page 157 clearly stated the law in this regard in the following words;

"Two propositions are quite clear-one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment."

Lord Davey dwelt on this question further in his separate speech in the same case and made the following observation at page 185 of the Report:

"undoubtedly'....I quote from Chitty L.J.'s Judgment words with which I cordially agree...it is a settled Rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.....There is however another Rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature."

19. In the case of ***Anwar Hossain Chowdhury Vs. the Government of Bangladesh, 41 DLR (AD)165,*** this Division in paragraph 489 of the report quoted with approval the

observation of the Indian Supreme Court in the case of ***Sreemoti Indira Gandhi Vs. Rajnarain reported in AIR 1975 (SC)2299*** as follows:

> "The preamble, though a part of the Constitution is neither a source of power nor a limitation upon that of the ideological aspirations of the peoples……"

20. From the cases cited above, it appears that the preamble cannot control the meaning and expression when the meaning of the expression is clear and ambiguous. The aid of the preamble can be taken if the meanings of the words to be interpreted are not clear and ambiguous.

21. Having gone through the preamble, we find that the preliminary object of the legislative authority is to bring about reformation of the lands in rural area. The preamble must be read with sub-section (1) of section 1 which provides that this Ordinance may be called the Land Reforms Ordinance,1984. The legislative authority was conscious in not using the word "agriculture" before Land Reform Ordinance. What is important to note here is that the word "land" has not been defined in section 2 of the Ordinance. But in clause-(c) of section 2 'barga land' has been defined. Had the legislative authority the intention to deal with agricultural land only, it would not have defined "barga land".

22. Sub-section (1) of section 5 of the Ordinance provides that no person shall purchase any immoveable property for his own benefit in the name of another person. Sub-section (2) of section 5 of the Ordinance provides that where the owner of any immoveable property transfers or bequeaths it by a registered deed, the presumption would be that he has disposed of his beneficial interest therein and the transferee or legatee shall be deemed to hold the property for his own benefit and that no evidence either oral or documentary to show that the seller did not intend to dispose of his beneficial interest therein or the transferee or legatee holds the property for the benefit of the owner and that such evidence shall not be admissible in any proceeding before any Court or authority. Sub-section (3) of section 5 provides that where any immovable property is transferred to a person by a registered deed, it shall be presumed that such person has acquired the property for his own benefit and no oral and documentary evidence to show that the transferee holds the property for the benefit of another person paying or providing the consideration shall be admissible in any proceeding before any Court or authority.

23. The language of section 5 of the Ordinance is plain and unambiguous and it is remarkable by itself. This section must be read in conjunction with sub-section (1) of section 1 of the Ordinance, which provides that this Ordinance may be called the "Land Reforms Ordinance." While describing the (naming) Ordinance, the legislative authority was conscious in not using the word "agriculture" before the word, 'land'. This Ordinance has been divided into six chapters. Chapter-1 containing sections 1 to 3 relates to preliminary; chapter-II containing section 4 relates to limitation on acquisition of agricultural land; chapter-III comprising section 5 relates to prohibition of benami transaction of immoveable property; chapter-IV comprising sections 6 and 7 relates to homesteads in 'rural area', chapter-V consisting of sections 8-18 relates to agricultural land and resolution of dispute between the land owners and bargadars and chapter-VI containing sections 20, 21 and 22 relates to miscellaneous. Having gone through all the sections of the Ordinance, in general, and section 5, in particular, we are of the view that there is no scope for reading the words 'rural area' in section 5 of the Ordinance. From the cases cited before, it appears that the preamble cannot be used to control the enactments themselves where they are expressed in clear and unambiguous terms. The aid of preamble can only be taken when the meanings of

the words to be interpreted are not clear and unambiguous. Therefore, the words 'immoveable property' occurring in section 5 of the Ordinance include both agricultural and non-agricultural properties. There is no scope for encroaching upon the domain of legislature by importing the words 'rural area' in section 5 and addition of such words will amount to legislation by the judiciary which is not at all permissible.

24. The Supreme Court of Pakistan in the case of ***Md. Ismail Vs. the State, 21 DLR (SC)161 observed in paragraph 15*** that the function of the Court is interpretation, not legislation in the following terms:

> "15. The purpose of the construction or interpretation of a statutory provision is no doubt to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation however drastic inconvenient the result, for, the function of the Courts is interpretation, not legislation."

25. The Indian Supreme Court in the case of ***Commissioner of Income Tax, Kerala Vs. Tara Agencies*** reported in (2007)6 Supreme Court Cases 429 held in paragraph 58 of the report (P.447) as follows:

> "58. ***In Union of India Vs. Deoki Nandan Aggarwal,*** a three Judge Bench of this Court held that it is not the duty of the Court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The Court cannot rewrite the legislation for the reason that it had no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there."

26. From the cases cited above, it appears that the function of the Courts is interpretation, not legislation and that Courts cannot add words to a statute or read words into it which are not there.

27. Before promulgation of this Ordinance, the benami transactions were prevalent both in rural, urban or municipal areas. It was the intention of the legislative authority that the system, if prohibited, would be prohibited both in rural and urban or municipal areas. Though most of the provisions of the Ordinance relate to rural areas, that will not alter the meaning of the provisions of section 5 which cannot be restricted to rural areas only.

28. Because of benami transactions, multifarious litigations crop up across the country. Moreover, the persons having the possession of black money take advantage of benami transactions by purchasing property in the names of their nearest relatives and such transactions increase corruption in the society. So, the legislative authority had the intention to say good-bye to benami transactions once and for all.

29. Benami transactions have been prohibited in India by the Benami Transactions (Prohibition and the Right of Recovery Property) Ordinance,1988 followed by the Benami Transactions (Prohibition) Act,1988 and therefore, in India benami transactions are not permissible both in rural and urban areas. We, however, got rid of benami transactions by the Land Reforms Ordinance, 1984.

30. The findings arrived at and the decision made by the High Court Division are based on proper appreciation of law and fact.

31. In the light of the findings made before, we do not find any substance in these civil petitions for leave to appeal. Accordingly, both the petitions are dismissed.

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Appellate Division

PRESENT
Madam Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali

CIVIL PETITION FOR LEAVE TO APPEAL NO. 1659 OF 2013
(From the judgment and order dated 17th of June, 2012 passed by the High Court Division in Writ Petition No.9031 of 2010.)

Pubali Bank Limited	... Petitioner
= Versus =	
Md. Abdur Rashid Miah and others	... Respondents
For the Petitioner	:Mr. Mahmudul Islam, Senior Advocate, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record
The Respondents	:Not represented
Date of hearing & judgement	:The 18th of November, 2014

Ambit of article 102(5) of the Constitution:
The bank concerned being a company under the Companies Act, does not come within the ambit of article 102(5) of the Constitution. So, we are of the view that the Rule in the instant case ought to have been discharged on the same ground, especially when the same Bench had decided earlier that the employees of Pubali Bank Limited are not in the service of the Republic or of any Corporation, National Enterprise or Local Authority. ... (Para 8)

Public Servants (Retirement) Act 1974:
The subsequent amendment to the Public Servants (Retirement) Act 1974 will not be automatically incorporated in the Service Regulations of the Bank, until and unless the Bank chooses to adopt the same by amending the relevant Service Regulations.
... (Para 8)

There was no finding that the petitioners had any such legal right to have their period of service extended up to 59 years of their age. Indeed, in our view the Bank giving such benefits to its employees by means of a circular post dates the writ petitioners' superannuation and is, therefore, not applicable in their case. ...(Para 9)

JUDGMENT

MUHAMMAD IMMAN ALI, J:

1. The delay of 393 days in filing the civil petition for leave to appeal is hereby condoned.

2. This civil petition for leave to appeal is directed against the judgment and order dated 17.06.2012 passed by the High Court Division in Writ Petition No. 9031 of 2010 disposing of the Rule.

3. The facts of the instant case, in brief, are as follows:

The Writ petitioners (respondents herein) were Freedom Fighters and appointed in different posts by Pubali Bank Limited in the year 1973. The writ petitioner No. 1, 2 and 3 went on Leave Preparatory to Retirement (L.P.R.) on 31.03.2009, 30.04.2009 and 31.12.2008 respectively and their L.P.R. period had expired on 30.03.2010, 29.04.2010 and 30.12.2009 respectively. The Public Servants (Retirement) Act, 1974 was amended by the Public Servants (Retirement) Act, 2010 adding inter alia section 4A, which provides for extension of the period of service to public servants who were freedom fighters from 57 to 59 years of age. The writ petitioners who were on LPR claimed that they would get the benefit of the provision since the law provided that they would be taken out of LPR and would continue to serve up to the 59th year.

4. Pubali Bank Ltd., writ respondent No. 6, petitioner herein, in its affidavit in opposition claimed that the writ petitioners were not public servants as they were under the employment of a private bank and as such the principle of master and servant was applicable and matters relating to their service was not amenable to the writ jurisdiction, and therefore the writ petition was not maintainable. Moreover, since the bank is not a statutory corporation or a local authority, the employees were bound by the Pubali Bank (Employees) Service Regulations, 1981 which in fact adopted certain provisions from the Public Servants (Retirement) Act, 1974, but the subsequent amended provisions of 2010 have not been incorporated in the Bank's Service Regulations and hence are not applicable to the writ petitioners.

5. The High Court Division heard the parties and upon consideration of the submissions and materials on record, by the impugned judgment and order, disposed of the Rule suggesting that the Pubali Bank Limited may consider to allow the petitioners to serve in their respective posts from 57 to 59 years. The Pubali Bank is now before us with the instant civil petition for leave to appeal.

6. Mr. Mahmudul Islam, learned Senior Advocate appearing on behalf of the petitioner submits that the writ petitioners relied upon a circular of the Pubali Bank Ltd. dated 31.01.2012 by which the benefits under section 4A of the Public Servants (Retirement) (Amendment) Act, 2010 were given to employees of Pubali Bank Ltd, who were freedom fighters. However, he points out that the said circular was effective from 01.01.2012, whereas the writ petitioner's LPR period expired long before that. The learned Advocate further submits that, Pubali Bank Ltd, being a private bank, the writ petition was not maintainable as held by the same Bench of the High Court Division in Writ Petition No. 6017 of 2010 wherein judgement was delivered on 13.03.2011 holding that since Pubali Bank Limited was a private bank, the writ petition was not maintainable. He points out further that in the

impugned judgement their Lordships of the High Court Division did not decide the question of maintainability of the writ petition, but as a pious wish suggested that since the Board of Directors of the writ respondent Bank had decided to extend the service period of employees from 57 to 59 years, "for the cause of justice, equity and fair play the Pubali Bank Limited may also consider to allow the petitioners to serve their respective posts from 57 to 59 years."

7. No one has appeared on behalf of the respondents.

8. We have decided earlier in ***Md Anwarul Alam*** **Vs.** ***Government of Bangladesh*** in ***Civil Petition for Leave to Appeal No. 227 of 2012,*** which arose out of Writ Petition No. 6017 of 2010, that the bank concerned being a company under the Companies Act, does not come within the ambit of article 102(5) of the Constitution. So, we are of the view that the Rule in the instant case ought to have been discharged on the same ground, especially when the same Bench had decided earlier that the employees of Pubali Bank Limited are not in the service of the Republic or of any Corporation, National Enterprise or Local Authority. Moreover, we accept the submission of Mr. Mahmudul Islam that the writ petitioners will not get the benefit of the Bank's circular dated 31.01.2012 since the writ petitioners' LPR period had expired prior to the circular coming into force. We also accept that the subsequent amendment to the Public Servants (Retirement) Act 1974 will not be automatically incorporated in the Service Regulations of the Bank, until and unless the Bank chooses to adopt the same by amending the relevant Service Regulations.

9. Finally, we find that in this case the learned Judges of the High Court Division merely expressed their wish that the Bank may consider allowing the petitioners to serve up to their age of 59 years since the Board of Directors of the Bank had decided to extend the service period of its employees from 57 to 59 years. However, there was no finding that the petitioners had any such legal right to have their period of service extended up to 59 years of their age. Indeed, in our view the Bank giving such benefits to its employees by means of a circular post dates the writ petitioners' superannuation and is, therefore, not applicable in their case.

10. With the above observations the instant civil petition for leave to appeal is disposed of.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NO.2495 OF 2010.
(From the judgment and order dated 22.07.2010 passed by the High Court Division in Writ Petition No.1251 of 2010)

Pachimanchol Gas Company Limited	Petitioner.
=Versus=	
Md. Nuruzzaman and others.	Respondents.

For the Petitioner :	Mr. Mahbubey Alam, Senior Advocate with (Mr. Tanjib-ul-Alam, Advocate), instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondents :	Mr. A.M. Mahbubuddin, Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

Date of hearing and judgment: 30-07-2015

"পশ্চিমাঞ্চল গ্যাস কোম্পানী লিমিটেড এর চাকুরী প্রবিধানমালা (সংশোধিত ২০০৫)"
Applicability of Service Rules:
The petitioner got appointment in 1997, that is, long before the promulgation of the Service Rules of 2005. So he is entitled to get benefit of the Service Rules under which he got his appointment, that is, he is entitled to get the benefits as provided in Service Rules of 1988 and his service would be regulated under the said provision of law. ...(Para 8)

J U D G M E N T

Hasan Foez Siddique, J:

1. This petition for leave to appeal is directed against the judgment and order dated 22.07.2010 passed by the High Court Division in Writ Petition No.1251 of 2010 making the Rule absolute.

2. Relevant facts for the disposal of this petition, in short, are that the writ petitioner is an employee of Paschimanchal Gas Company Limited, a Subsidiary of the Petrobangla. He got his appointment on 05.10.1997 as a Sub-Assistant Engineer in the Jalalabad Gas

Transmission and Distribution System Limited, another Subsidiary of petrobangla. He was transferred to Paschimanchal Gas Company Limited, Nakla, Sirajgonj. He joined there on 05.08.2010 as a Sub-Assistant Engineer. He was promoted to the post of Sub-Divisional Engineer on 20.09.2004. At present, he has been performing his duties at Bhagabari Regional Office, Paschimanchal Gas Company Limited. On 15th November 1988, the Ministry of Power Energy and Mineral Resources published a gazette notification regarding the Service Rules, 1988 for all employees of the Petrobangla including its subsidiary company. In Writ Petition Nos.403 of 1989 and 496 of 1989 the High Court Division declared the criteria mentioned in item No.15 and 16 of Column No.06 of said Rules illegal. Against which Petrobangla preferred Civil Petition for Leave to Appeal which was dismissed. Thereafter, Petrobangla in its 17th meeting held on 11.11.1993 took a resolution to follow the judgment and order of the High Court Division and accordingly amended the provision of the service rules inserting the provisions that educational qualification of three years Diploma Engineer and the employees who had been appointed before making the service rules of Petrobangla, 1988 is relaxable. Thereafter, all on a sudden on 06.06.2005 in the 352nd Board Meeting of the Board of Directors of Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) passed a resolution regarding unified model service rules for employees of its companies. On 21.08.2005, the Board of Directors of Paschimanchal Gas Company Limited, in its 72nd meeting took a resolution adopting a new service Rules namely "পশ্চিমাঞ্চল গ্যাস কোম্পানী লিমিটেড এর চাকুরী প্রবিধানমালা (সংশোধিত ২০০৫)" following the Petrobangla Service Rules of the employees providing the provisions to the effect that the provision of experience of 6 years in the category mentioned (serial No.14) and 4 years experience in the category of serial No.13 instead of 3 years experience and also providing minimum qualification of Bachelor degree provided in serial No.12 for the promotion to the next higher posts.

3. Challenging the said provisions, the writ petitioner filed writ petition and obtained instant Rule.

4. The writ respondent No.4 contested the writ petition, contending, inter alia, that the judgment and order referred to and annexed to the writ petition as mentioned above are not applicable to the present writ petitioner respondent No.1. Since he has accepted the Service Rules of 2005 by accepting Selection Grade, he could not approbate and reprobate by filing the writ petition. The date of appointment of the petitioner could not be used as a ground to challenge the new Service Rules of 2005 regarding the provision of experience and minimum qualification.

5. The High Court Division hearing the parties made the Rule absolute.

6. Mr. Mahbubey Alam, learned Senior Counsel appearing on behalf of the petitioner, submits that since the petitioner accepted the benefit of the Service Rules of 2005, he is not entitled to challenge any provision of the said Rule.

7. Mr. A.M. Mahbubuddin, learned Senior Counsel appearing for the respondent, submits that since the writ petitioner got his appointment before enforcement of Service Rules 2005 and under the provision of Service Rules of 1988, the terms and conditions as provided in Service Rules 2005 would not operate as a bar to get benefit, which he was entitled under the Service Rules of 1988.

8. There is no dispute that the petitioner got appointment in 1997, that is, long before the promulgation of the Service Rules of 2005. So he is entitled to get benefit of the Service

Rules under which he got his appointment, that is, he is entitled to get the benefits as provided in Service Rules of 1988 and his service would be regulated under the said provision of law.

9. The High Court Division rightly held that the provision of Service Rules of 2005 are to be effective in respect of the appointment of the employees who have been appointed on 21.01.2005 or onward.

10. We do not find any wrong in the judgment and order of the High Court Division.

11. Accordingly, this petition is dismissed.

Cases of the High Court Division

SL No.	Case No. and Citation	Key Words	Ratio
1.	First Appeal No.464 of 2012 Citation: 3 SCOB [2015] HCD 1	Registration Act,1908 Section 22A Lunacy Act, 1912 Section 18	In view of the aforesaid amendment vide Registration Act,1908 (Act No.XXV of 2004) there is hardly any scope left for anyone to raise a question of forgery of a registered document since the photographs of both the executants are pasted on every instrument and the parties shall sign and put their left impression across their photographs in the instrument. More so, it is no bodies case that the photographs available in the impugned instrument or Heba deed is not the photographs of Kazi Shahidul Islam the father of the plaintiff Nos.1-3 and 5. Under such circumstances the allegation of forgery of the document in question can safely be brushed aside.
2.	Writ Petition No. 6324 of 2013 & Suo Moto Rule No. 19 of 2013 (Arising out of WP No. 6324/13). with Writ Petition No. 6791 of 2013. Citation: 3 SCOB [2015] HCD 13	Khulna University Act 1990 Section 28 (5):	When the law specifically used the words "প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠতার ভিত্তিতে এবং ভাইস চ্যান্সলর কর্তৃক নির্দিষ্ট ভাবে অধ্যাপকদের মধ্যে উহার ডীন পদ আবর্তীত হইবে" we hold that the post of Dean will rotate firstly among the Disciplines, according to its seniority of being set up/established, and then also among the senior Professors of each Discipline of the school. Thus so far the two interpretations given by the two Ministries are concerned we are of the view that the subsequent interpretation dated 06.03.2013 given by the Ministry of Education is more rational, reasonable and acceptable for the purpose interpretation of section 28 (5) of the Act.
3.	I.T. Ref: Application No. 306 of 2013 With I.T. Ref. Application No. 307 of 2013 With I.T. Ref: Application No. 308 of 2013 And I.T. Ref: Application No. 309 of 2013 Citation: 3 SCOB [2015] HCD 21	Income Tax Ordinance 1984 Section 75, 93, 94	A return filed under the normal procedure of section 75 of the Income Tax Ordinance 1984 has to be assessed within the period of limitation of six month, so also the ropening procedure against deemed assessment under the Self Assessment Scheme has to be confined to the period of limitation of two years. No proceeding for assessment of any return can be taken after the period for limitation and any such proceeding initiated shall be a nullity.

SL No.	Case No. and Citation	Key Words	Ratio
4.	WRIT PETITION NO. 144 OF 2008 Citation: 3 SCOB [2015] HCD 37	Constitution of Bangladesh Article 102 Commercial contract Statutory contract Arbitration	The writ petition is not maintainable on two counts,- firstly, due to the reason that the dispute arose out of simple commercial contract and not out of statutory contract and secondly, there is no scope to avail writ jurisdiction as there is an equal efficacious alternative forum to settle the dispute through amicable settlement under clause 54.1, adjudication under clause 54.2 and arbitration under clause 54.3 of section 3 of the GCC between the parties.
5.	WRIT PETITION NO. 2515 of 2012 Citation: 3 SCOB [2015] HCD 42	Constitution of Bangladesh Article 40 Cancellation of license Right of the citizen	In the case in hand cancellation of license was indeed an unbridled arbitrary outcome of executive feat which certainly had indulged in excesses. The act has a curtailing effect upon Article 40 of the Constitution in particular. It has flouted Article 40 of the Constitution directly. The Constitution being the Supreme law of the land the framers of the same in their wisdom have made some provisions protecting the right of the citizen. To do lawful business or trade subject to restriction of law is one of those provisions which cannot be curtailed or throttled in any manner by any authority.
6.	Writ Petition No. 8967 of 2014 Citation: 3 SCOB [2015] HCD 47	Abandoned Buildings (Supplementary Provision) Ordinance, 1985 Court of Settlement Barred by limitation	In our view, the petitioner had rightly approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, as his case was found to be barred by limitation and since he had no other equally efficacious remedy to enforce his rights, the petitioner was entitled to invoke the writ jurisdiction.
7.	WRIT PETITION NO. 8925 OF 2012 Citation: 3 SCOB [2015] HCD 52	Constitution of Bangladesh Article 102 and 42 অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১: Alternative remedy Protection of fundamental right	It is a settled proposition of law that an aggrieved party may invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution straightaway provided the action impugned is malafide, even though there may be an alternative remedy available for him. Since we have found that the inclusion of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a vested property is malafide, the instant writ petition, as we see it, is maintainable. Besides, it has been clearly, categorically and unequivocally held in the decision in the case of the Government of Bangladesh represented by the Ministry of Works and

SL No.	Case No. and Citation	Key Words	Ratio
			another…Vs…Syed Chand Sultana and others reported in 51 DLR (AD) 24 that the writ-petitioners can come directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. So our definite finding is that the petitioners can come directly to the High Court Division for protection of their right to property as contemplated by Article 42 of the Constitution of Bangladesh, even though an alternative forum, that is to say, অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইব্যুনাল is available for necessary legal redress.
8.	Civil Revision No. 706 0f 1998 Citation: 3 SCOB [2015] HCD 59	Deed of gift Physical possession Paper transaction	There is nothing on record to show that Promoth Nath was a man of unsound mind or that plaintiff had any relationship with Promoth Nath whatsoever so as to take him to the Sub-Registry office and to fraudulently get the kabala executed by Promoth Nath. Defendants never raised any question on this aspect in any manner. The above statement of the executant considered with the rent receipts showing payment of rent for the suit land by the plaintiff for the years 1981 to 1994 and the fact of silence of the two sons of Promoth Nath (defendant No.1 and 2) in not challenging plaintiff's kabala and the fact of physical possession of the plaintiffs lead me to conclude that plaintiffs' purchase is genuine and that their kabala dated 07.06.1980 was acted upon and that the earlier deed of gift dated 10.01.1979 purportedly made by Promoth Nath in favour of his son was a mere paper transaction so far the suit land is concerned.
9.	Civil Revision No. 879 of 2006 Citation: 3 SCOB [2015] HCD 68	Final court of fact Reassess the evidence Findings of the trial court	The appellate court being last and final court of fact will have to discuss and reassess the evidence on record independently while reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence to arrive at his own independent finding. The findings of the trial court should not be easily disturbed as a matter of course and before reversing the findings and decisions of the trial court the appellate court should think twice or more than twice.

SL No.	Case No. and Citation	Key Words	Ratio
10.	Death Reference no. 50 of 2010 Citation: 3 SCOB [2015] HCD 74	Penal Code, 1860 Section 302 How to attach weight to the testimony of witness	Sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.
11.	ADMIRALTY SUIT NO. 17 of 2015 Citation: 3 SCOB [2015] HCD 93	Trade Marks Act, 2009 Section 102	When rectification proceeding is pending before this court, Suit for infringement of Trademark pending in the Court below should be stayed in view of Section 102 of the Trade Marks Act, 2009.
12.	ফৌজদারী বিবিধ মামলা নং ২০৮৫৯/২০১০ Citation: 3 SCOB [2015] HCD 98	**ফৌজদারী কার্যবিধি ৫৬১এ ধারা**	**ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান অনুযায়ী দন্ডিত আদেশ বাতিলের ক্ষেত্রে তিনটি বিষয়ই বিবেচনায় প্রাধান্য পাইবে, যথা; "আইনগত সাক্ষ্য প্রমানের অভাব" এবং "আদালত গঠনে ত্রুটি"** (Quoram-non-judice) **এবং "আইনের অপব্যবহার যাহার ফলে ন্যায় বিচার ব্যাহত।"**
13.	WRIT PETITION NO. 3203 of 2004 Citation: 3 SCOB [2015] HCD 108	Value Added Tax Act, 1991 Section 9 Clause-Gha of Rule 22(1) of the VAT Rules, 1991	Since the admitted allegation against the petitioners is that in spite of the increase of price of the raw materials as reflected from the concerned bills of entries and assessment orders thereon, the petitioners did not make any corresponding increase in the declared price of the finished products and since such circumstance was not evidently mentioned under any clauses from Clauses-'Ka' to 'Ta' under sub-section (1) of Section 9, we do not find as to how the directions of the concerned officers for readjusting the current account register of the petitioner, or for depositing certain amount through treasury challan,

SL No.	Case No. and Citation	Key Words	Ratio
			was amenable to the alterative remedy of written objection in view of the provisions under sub-section (2ka) of Section 9.
14.	Criminal Appeal No. 1041 of 1997 Citation: 3 SCOB [2015] HCD 116	Case of drug/narcotics Chemical examination Chemical expert	In the present case being a case of drug/narcotics, it was incumbent on the prosecution to get the seized phensedyl examined by a chemical expert to prove that the seized articles were actually *madak drobyo/*drug and under what category of *madak drobyo/*drug it fell. Absence of such chemical examination and contradictions between the two sets of prosecution witnesses, casted a shadow of doubt over the prosecution case.
15.	Criminal Revision No.263 of 2012 Citation: 3 SCOB [2015] HCD 119	Druta Bichar Tribunal Act, 2002 Section 10	In this case remarkably the government does not deny the fact of failure of conclusion of trial of the Druta Bichar Tribunal Case No.07 of 2006 within the stipulated time. As per the provision of section 10 of the Druta Bichar Tribunal Act, 2002, the trial of a Druta Bichar Tribunal Case is to be concluded within 135 days from the date of receipt of the case for trial. No option for the court is left therein except sending the case back to the original court in the event of failure on the part of the tribunal to conclude trial of the case within the stipulated period.
16.	Criminal Appeal No. 300 of 1998 Citation: 3 SCOB [2015] HCD 122	Evidence Act, 1872 Section 3 Evidence of business partners	There is no reason why the evidence of the business partners should be discarded simply because they belonged to a construction firm. They came before the Court and testified to the occurrence. They were fully cross-examined by the defence. Their evidence is also evidence with the meaning of Section 3 of the Evidence Act. The prosecution witness Nos. 2, 4, 6 and 7 are material witnesses though they are business partners of the P.W. No. 5, the informant but cannot be considered as interested witness. There is no reason that the testimony of P.W. Nos. 2, 4, 5, 6 and 7 can be discarded or liable to be flung to the wind simply because they happened to be business partners.
17.	Writ Petition No. 3709 of 2015 Citation: 3 SCOB [2015] HCD 132	Code of Civil Procedure, 1908 Section 136; Order XXXVIII, Rule 5 Attachment	The Court below has power to order attachment of property situated beyond the local limit of the Court. But the Court passing the Order of attachment cannot directly attach property outside its own

SL No.	Case No. and Citation	Key Words	Ratio
			jurisdiction and it can only ask the Court in whose jurisdiction the property actually situated to carry out the order of attachment and complete the formalities of attachment. In the present case this Court finds that the Impugned Order passed by the Adalat was sent directly by the Court without sending the same to the District Court for compliance where the property situates. Therefore, the Impugned Order from the face of it is found to be palpably illegal and invalid in law as contained in Section 136 of the Code.
18.	WRIT PETITION NO.28 of 2015 Citation: 3 SCOB [2015] HCD 137	VAT Act, 1991 Section 55 and 56	Section 56 cannot be construed or interpreted in an isolated manner. Section 55 and 56 must be read together and from a perusal of the same, it is evident that Section 56 is mandatorily preceded by Section 55 of the VAT Act,1991 which prescribes the issuance of a Show- Cause Notice followed by other procedures and which is exhaustively laid out in the whole Section. The prescription said out in Section 55(1) (2)(3) are mandatory and no action or initiative can be taken or resorted to for realization of any unpaid, less paid or otherwise evaded etc amount, whatsoever under the provisions of Section 56 of the VAT Act, 1991, unless and until firstly the procedure laid out in Section 55 of the VAT Act has been exhausted by the authorities concerned. The principle of law is that Section 56 automatically presupposes a notice under section 55(1) of the Act, followed by the procedure laid out in Sub-section 2 & 3 of the said section 55 and which the respondents cannot avoid under any circumstances.
19.	Writ Petition No. 846 of 2012 Citation: 3 SCOB [2015] HCD 143	Constitution of Bangladesh Article 102; Doctrine of the legitimate expectation	Doctrine of the legitimate expectation ensures the circumstances in which, the expectation may be ensured or denied and among others the following grounds may also be taken in order to get a remedy under article 102 of the Constitution:- firstly there must be a promise or assurance from the employer or the authority that the incumbent would be assimilated at the end or during the tenure of his service; secondly - the past practice of 'আত্মীকরণ' for other persons of similar status has been followed consistently.

SL No.	Case No. and Citation	Key Words	Ratio
20.	WRIT PETITION N0. 10011 of 2013 & WRIT PETITION N0. 10023 of 2013 Citation: 3 SCOB [2015] HCD 150	Writ of certiorari Certiorari jurisdiction	In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject- matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an Appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.
21.	Criminal Revision No.132 OF 2012 Citation: 3 SCOB [2015] HCD 158	Penal Code, 1860 Section 161 Prevention of Corruption Act, 1947 Section 5(2)	The offence under section 161 of the Penal Code relates to take illegal gratification by any public servant, while offence under section 5(2) of Act II of 1947 speaks of criminal misconduct by the same if he by corrupt and illegal means abusing his position as public servant obtains for himself any pecuniary advantage. The offences of the above sections are quite different and a person may be punished in each section separately and independently.

3 SCOB [2015] HCD 1

High Court Division
(Civil Appellate Jurisdiction)

First Appeal No.464 of 2012

Begum Monowara
...Appellant.

Vs.

Engineer Kazi Tanvir Shahid and others.
... Respondents

Mr.Sk. Md. Morshed, Advocate.
..for the appellant.

Mr.Zakir Hossain Bhuiyan, Advocate.
..for the respondents.

Heard on : 15.02.15,16.02.15, 18.02.15, 19.02.15.

Judgment on : 23.02.2015, 25.02.2015, 01.03.2015.

Present :
Mr.Justice Nozrul Islam Chowdhury
And
Mr. Justice Amir Hossain.

Registration Act, 1908
Section 22A:
In view of the aforesaid amendment vide Registration Act,1908 (Act No.XXV of 2004) there is hardly any scope left for anyone to raise a question of forgery of a registered document since the photographs of both the executants are pasted on every instrument and the parties shall sign and put their left impression across their photographs in the instrument. More so, it is no bodies case that the photographs available in the impugned instrument or Heba deed is not the photographs of Kazi Shahidul Islam the father of the plaintiff Nos.1-3 and 5. Under such circumstances the allegation of forgery of the document in question can safely be brushed aside. ...(Para 37)

Judgment

Nozrul Islam Chowdhury, J:

1. This appeal is directed against the judgment and decree dated November12, 2012 passed by the learned Joint District Judge, 1st Court, Faridpur in Title Suit No. 05 of 2012, at the instance of the defendant as appellant.

2. Facts in a nutshell, giving rise of this appeal are that the respondents as plaintiffs instituted Title Suit No. 05 of 2012 before the Joint District Judge,1st Court, Faridpur impleading the appellant as defendant seeking a decree that the registered Heba Bil Ewaz bearing registration No.2128 dated 29.06.2011 as described in the schedule Ka of the plaint is a forged, fraudulent ,collusive one which has been created upon undue influence and the same is not binding upon the plaintiffs; the suit was instituted by the plaintiffs stating inter alia that the land and building described in schedule Kha to the plaint originally belonged to Mr.Kazi Shahidul Islam who was a business man as well as an industrialist; said Kazi Shahidul Islam while acting as Chairman of Confident Salt Ltd. he became mentally disturbed and as he was growing older he became a mental patient and was administered treatment at different times at Mental Health Institute under its Assistant Professor

Dr.Mahadeb Chandra Mondall who having found Mr.Shahidul Islam a mental patient, he was advised to be hospitalized but said Kazi Shahidul Islam was taken to the house situated at the land described in the Kha schedule of the plaint and the plaintiffs employed three persons to take care of said Kazi Shahidul Islam who are Sherina,Younus Ali and Idris Ali for full time care of the said patient Kazi Shahidul Islam; while Kazi Shahidul Islam was living in the said house as aforesaid, breathed his last on 24.08.2011 leaving behind the plaintiff Nos.1-3 and 5 as four sons and plaintiff No.4 as his widow; the defendant No.1 is not in any way successor-in interest of late Kazi Shahidul Islam although she had a visiting term in the house described in the schedule Kha to the plaint since she was a sister, therefore, she also took part in taking care of said Kazi Shahidul Islam; it was also disclosed in the plaint that the plaintiff Nos.3 and 5 including the wife i.e plaintiff No.4 used to pay occasional visit to said Kazi Shahidul Islam with a view to lookafter the said patient ; at one stage on 26.11.2011 the care taker Younus Ali disclosed to the plaintiff No.5 that defendant No.1 along with her husband disclosed for the first time on 20.11.2011 that they are ready to come and reside in the house described in the schedule Kha to the plaint (herein after referred to as the suit house) upon removing the care takers employed therein to which the care taker expressed their reluctance to vacate the house but at one stage the defendant No.1 and her husband disclosed that the suit property along with the land had already been transferred in their favour by a registered deed of gift executed by Kazi Shahidul Islam, therefore, as per the said deed the defendant No.1 is the legitimate owner of the said suit property such a claim as made by the defendant No.1 and her husband was communicated to plaintiff No. 5 by Younus Ali whereupon a certified copy of disputed Heba deed was obtained by the plaintiff on 7-12-2011 and then the plaintiff's derived their definite knowledge about the same on 07-12-2011 ; it was also disclosed in the plaint that Kazi Shahidul Islam had lost his mental balance he had been suffering from mental decease of serious nature as such was not in a position to transfer a valuable property like the suit land along with building situated thereon in favour of the defendant No.1 depriving his four sons and wife who are the legitimate claimants of the property ; Kazi Shahidul Islam did not transfer the suit property in favour of defendant No.1 by way of Heba Bil Ewaz deed rather he had been residing in the same till his death, the plaint also discloses that the plaintiffs have been in possession of the suit land and building through their three employees and for taking care of their predecessor Kazi Shahdiudl Islam and possession of the suit property was never handed over to defendant No.,1 pursuant to registered deed of Heba which has been created fraudulently by way of undue influence and deception, therefore, the said Heba Bil Ewaz is void and sham transaction; it was also alleged in the plaint that Kazi Shahidul Islam never used Kazi Nurul Amin with his name although as a matter of fact signature available in the Heba deed described in schedule Ka to the plaint contained the name Kazi Nurul Amin Shahidul Islam, therefore, the said deed of Heba is illegal void forged and fraudulent as such liable to be declared void. Hence, the suit for a decree declaring that the Heba nama deed bearing registration No.2128 dated 29.06.11 as described in schedule Ka to the plaint in respect of the land and property described in schedule Kha to the plaint is illegal void forged and fraudulent as also collusive and not binding upon the plaintiff.

3. The suit was instituted on 15.01.2012 and during pendency of the suit on 07.06.12 the plaintiff came up with an application for amendment of the plaint and by the said petition of amendment the plaintiffs disclosed various qualifications acquired by the plaintiff Nos.1-3 and that plaintiff No.4 was serving as a Doctor and after retirement she has been serving in a Clinic known ''Ma O Shishu'' at Chittagong, it has also been disclosed in the said amendment petition that the conjugal life of Kazi Nurul Amin with plaintiff No.4 was a happy and peaceful one. It was also disclosed in the amendment petition that it was at the

instance of defendant No.1 along with the other brothers and sisters in connivance with the employees of Kazi Shahidul Islam he was driven to a life which was immoral and unsocial and in course of such a position in his life Kazi Shahidul Islam became absolutely imbalanced mentally; it was also disclosed in the said amendment that Kazi Shahidul Islam invested about 2.50 crores taka in the building situated in the suit land which is also indicative of his mental imbalance; the amended plaint also disclosed various types of financial help advanced by Kazi Shahidul Islam in favour of his other brothers and sisters and other descendants depriving the plaintiffs.

4. The defendant No.1 Begum Monowara entered appearance upon filing written statement denying the material allegations made in the plaint contending inter alia that the suit land and building in other words the suit property admittedly belonged to Kazi Shahidul Islam and in the final B.S khatian No.7506 the name of Kazi Shahidul Islam was wrongly printed as Kazi Nurul Amin Shahidul Islam, despite such wrong recording of the name of Kazi Shahidul Islam his title in the suit property was never clouded and the plaintiffs also instituted the instant suit admitting the said khatian since they have never challenged the said wrong recording of the name in the said khatian No. 7506. It was also disclosed in the written statement that admittedly plaintiff No.2 has been residing in the U.S.A in the plaint his name has been used by an interested quarter, plaint has been filed with false personation and the plaintiffs had/have never been in possession of the suit land and building and that Kazi Shahidul Islam was an engineer by profession who eventually became an industrialist and ultimately it is an admitted position that he was the Chairman of Confident Salt Ltd and he remained as such till his death. Besides, Kazi Shahidul Islam was the Managing Director of Confident Salat from 2002-2009 and he was also the Managing Director of Total Gas Ltd. He had also served as Managing Director of Confident Cement Ltd from 1993-96, besides, he was also connected with various social, religious and philanthrophic organization spending huge amount in running all those organizations; Kazi Shahidul Islam as a matter of fact passed his time to defray lavish expenses incurred by his wife and sons at which when he expressed reluctance, he was kidnapped by the plaintiffs in collusion with each other and his mobile phone was seized from him as a result the Deputy General Manager as also Manager of the Company lodged a G.D Entry bearing No.1407 dated 27.07.09 in respect thereof. It was also disclosed in the written statement that at the connivance of Dr. Mohadeb Chandra Mondal a collegue in the profession of plaintiff No.4, the plaintiffs wanted to establish that Kazi Shahidul Islam was mentally imbalanced person. Kazi Shahidul Islam had been living with his family members that is the plaintiffs from 1.11.2004 to July 2009 at a rental house in Chittagong city despite mental torture perpetrated upon him by the plaintiffs at that stage with the advice of the well wishers he had to shift to the house at Kamarkhali residence described in schedule Kha to the plaint where the defendant No.1 along with his brother's and brother's wife and their children had been living and while living as such at his village home Kazi Shahidul Islam died in the said house on 24.08.2011; it was also disclosed in the written statement that relationship between the plaintiff No.4 and Kazi Shahidul Islam was not at all happy one and the plaintiff Nos.1-3 and 5 having sided with the plaintiff No.4, rendered the normal life of Kazi Shahidul Islam a miserable one, exercising undue influence upon him as a result Kazi Shahidul Islam was compelled to confer executive power of Confident Salt upon the plaintiff No.1 who having misused the power caused the company a huge financial loss as a result Kazi Shahidul Islam had to sell a good number of shares of his company to makeup the loss but plaintiff No.1 left for Australia with the sale proceed of the shares of the company by way of misappropriation as a result Kazi Shahidul Islam had to live in isolation of his family since 2009 upto his death inconsequence of family feud ensued among the member of the family; thereafter at the advice of his other relations Kazi Shahidul Islam had

to shift to the suit land and building where he breathed his last peacefully and while he was living at his village house he had also constructed a two storied building for residential purpose during his life time; the allegation of mental derailment and other disorders have been falsely attributed to Kazi Shahidul Islam by the plaintiff's only with a view to grab the land and building involved in the suit land and it is only with a view to enjoy a peaceful life Kazi Shahidul Islam had to transfer ownership and possession of the suit property in favour of his beloved sister the defendant No.1, which was done by him voluntarily keeping himself in good health and conscience and the acknowledgement was made in presence of Sheikh Abu Taleb and Shamsur Rahman two prominent persons belonging to he said locality, pursuant whereupon a registered deed of Heba Bil Ewaz was executed by Kazi Shahidul Islam in favour of defendant No.1 on 29-06-2011 by virtue of a registered deed bearing registration No.2128 followed by delivery of possession thereof and in execution and registration of the said deed no influence or practice of fraud was ever indulged upon him as alleged in the plaint; it was also disclosed in the written statement that the said act of gift and handing over possession was made by Kazi Shahidul Islam voluntarily knowing full well about the consequence thereof rather within full knowledge of the plaintiffs. After the gift was completed the defendant No.1 kept said Kazi Shahidul Islam her younger brother with her in the said house maintaining motherly affection with him till his death and the defendant No.1 has been in possession and enjoyment of the said suit land and property ever since the date of execution of the registered deed of Heba.

5. In course of trial the learned Joint District Judge framed as many as five issues of which issue No.4 being very much relevant we feel it proper to quote the same which reads as under:-

৪. আরজির খ তফসিল বর্ণিত জমি বাবদ ক তফসিল বর্ণিত হেবা দলিল অবৈধ বেআইনী, ভুয়া, তজকী, জাল, যোগসাজশী ভাবে সৃষ্ট মর্মে উহা বাদীগনের উপর বাধ্যকর কিনা এবং উহা রহিতব্য কিনা?

6. At the trial the plaintiffs adduced four witnesses in support of their case, the defendant also examined four witnesses for their defence and upon conclusion of the trial the learned Joint District Judge,1st Court, Faridpur by his judgment dated 19.11.2012 decreed the suit being Title Suit No.05 of 2012 . The defendant having felt aggrieved by the aforesaid judgment and decree passed by the trial court brought this appeal before this court.

7. Mr.Sk. Morshed the learned Advocate appearing for the appellant submits at the very outset that Ext.3 the medical certificate is not admissible in evidence particularly for the purpose of showing Kazi Shahidul Islam was of unsound mind at the time of execution of the Heba deed Ext.1 particularly in view of the provision of Lunacy Act 1912 in as much as P.W.2 Dr. Mahadeb Chandra Mondal was not a Medical Officer as contemplated under sub-section (7) of Section 3 of the Lunacy Act 1912 (Act IV/1912) ,therefore, the decision arrived at by the trial court on the basis of Ext.3 is not sustainable as such the impugned judgment and decree on the basis whereof is liable to be set aside.

8. Mr. Sheikh Morshed also submits that the impugned judgment and decree having not been inconformity with the facts, circumstances, evidence, and materials on record the same is liable to be set aside.

9. The learned Advocate for the appellant submits further that under the facts and circumstances of the case it was incumbent upon the trial court to frame an issue as to whether Kazi Shahidul Islam the executants of the Heba Bil Ewaz in question was of unsound mind at the relevant time of execution of deed but in view of conspicuous absence of

any such issue in the suit the trial court misdirected itself in arriving at erroneous decision in the suit, therefore, the impugned judgment and decree is liable to be set aside.

10. Mr.Morshed having pointed out section 91 of the Evidence Act submits that the impugned judgment and decree is violative of the provision of section 91 of the Evidence Act which excludes admission of oral evidence as against the documentary evidence and the presumption available therein, therefore, the impugned judgment and decree is liable to be set aside.

11. Referring to the section 92 of the Evidence Act the learned Advocate for the appellant submits that a registered document of transfer has got a presumptive value of correctness thereof which unless rebutted with tangible evidence, ought to have been accepted by the trial court and a contrary view is not sustainable in law, therefore, the impugned judgment and decree is liable to be set aside.

12. The learned Advocate for the appellant submits further that under the facts and circumstances of the case the evidence of Dr.Mahadeb Chandra Mondal ought to have been discarded by the trial court as also the medical certificate Ext.3 dated 06.11.2009 and the contrary view is not sustainable in law.

13. The learned Advocate for the appellant submits lastly that the registered document Ext.1 as produced by P.W.1 and Ext.Ka produced by the defendants namely registered Heba deed executed by Kazi Nurul Amin Shahidul Islam in favour of Begum Monowara dated 29.06.2011 carries presumption of correctness of the instrument made therein and the plaintiffs having not been able to dislodge the correctness of the instrument made thereby the learned Joint District Judge ought to have accepted the same as genuine one and a contrary view as in the impugned judgment and decree is not sustainable in law.

14. To substantiate the aforesaid submissions the learned Advocate for the appellant placed reliance in the case of Shishir Kanti Paul Vs. Noor Mohammad and others reported in 55DLR (AD) 39.

15. The learned Advocate for the appellant submits lastly that Ext.1 being a registered deed of gift under section 16 of the Registration Act (XVI/1908) in as much as it being a registered document under section 16 of the Registration Act strong presumption attached to it that the registration process were regularly and honestly carried out. The said presumption is all the more strong by now in view of the recent amendment of the Registration Act where the law requires that the photographs of the executants has to be pasted with the body of the document itself and in substantiating the submission the learned Advocate for the appellant placed reliance in the case of Abani Mohan Saha Vs. Assistant Custodian (SDO) Vested Property, Chandpur and others reported in 39 DLR (AD) 223.

16. On the other hand, Mr.Zakir Hossain Bhuiyan the learned Advocate appearing on behalf of the respondents submits that Ext.2 series and 3 clearly shows that Kazi Shahidul Islam was suffering from dementia with behavioral problem and the defendant having not been able to show anything to the contrary by cross-examining the said witnesses it ought to be accepted.

17. To substantiate the said submission the learned Advocate for the respondents placed reliance in the case of State Vs.Shiraj Ali reported in 24 DLR 69 and the case of

Gholam Yusaf Vs. The Crown reported in PLD 1953 Lahore 213.

18. The learned Advocate for the respondents submits further that the evidence of possession led by D.W.1 having been made beyond the pleadings such evidence is not admissible in evidence as per provision of Order 6 Rule 7 of the Code of Civil Procedure.

19. To substantiate his submission the learned Advocate placed reliance in the case of Nil Sena Singh Vs.Radha Mohan Singh and others reported in 58 DLR 239, Wares Khan and another Vs.Haji Sufi Fazal Ahmed and others reported in 2 BLC 376 and the case of Md.Ibrahim Vs. Md.Alauddin and others reported in 27 DLR 413.

20. The learned Advocate for the respondents submits further that not a single witness was examined to make the gift reliable ,therefore, an adverse presumption as to the credibility of the said gift is warranted in the facts and circumstances of the case. The learned Advocate for the respondents place reliance in the case of Younusco K.Textile Ltd. Vs. Jamuna Knitting and Dyeing Ltd. and others reported in 12 BLC 202.

21. It is also submitted by the learned advocate for the respondents that the possession of the suit land having not been delivered to the defendant No.1 the impugned gift is liable to be declared void and incomplete within the meaning of section 152 of Molla's Muhammada Law and in substantiating his submission the learned Advocate placed reliance in the case of Bibi Riajan Khatoon and others Vs.Sadrul Alam reported in AIR 1996 Patna 156. The learned Advocate for the respondents submits further that the defendant failed to adduce any tangible evidence showing that the deed of gift has ever been acted upon and in the absence of such evidence the gift was not complete both under Mohammadan Law and Transfer of Property Act to substantiate his such submission placed reliance in the case of Bangladesh Vs. Shirely Anny Ansari reported in 6 BLC 85.

22. Mr. Zakir Hossain Bhuiyan, the learned Advocate appearing for the respondents also assailed the very execution and the process of registration of Ext.1 and for that matter Ext.Ka deed of gift placing reliance in the case of Feroza Mojid and another Vs.Jibon Bima Corporation reported in 39 DLR (Ad) 78 and in the case of Sheikh Haji Musa Hakkani Vs. Kazi Md.Abdul Mojid reported in 7 BLC 534.

23. With a view to appreciate the submissions made by the learned Advocates from both sides, we feel it proper to refer the depositions of the witnesses recorded by the trial court and in doing so we find that plaintiff No.5 Kazi Tanjib Shahid figured as P.W.1 who deposed that the suit land appertaining to B.S plot No.7662 corresponding to R.S plot No. 4749 of D.P Khatian No.35 originally belonged to his father Kazi Shahidul Islam and defendant No.1 is the full sister of his father and his father become mentally imbalanced for which treatment was administered at home and abroad and his father having shifted to his village home where he built up a luxurious house encircled by boundary walls; it was also deposed by P.W.1 that they had also engaged three persons for taking care of his father at village home and on the death of his father he along with his three brothers and their mother became the legal heirs of Kazi Shahidul Islam; this witness also disclosed that on 26.11.2011 the defendant No.l asked the three labours engaged by them to vacate the house and claimed that she had got the house and the land gifted by her brother Kazi Shahidul Islam in her favour thereafter on 07.12.2011 they obtained a certified copy of the registered deed and came to know for the first time that his father has transferred the suit property in favour of his sister defendant No.1 i.e the aunt of P.W.1; this witness also deposed that the said Heba Bil Ewaj deed was

executed on 29.06.2011 in favour of defendant No.1 and his father did not execute or register the said deed voluntarily rather taking advantage of his mental derailment the said deed was obtained; this witness also produced the Heba Bil Ewaz deed executed in favour of defendant No.1 on 29.06.2011 by Kazi Shahidul Islam vide registered deed No.2128 marked as Ext.1.During cross-examination this witness asserted that the executant of Ext.1 is not his father and his father is not the executant of the disputed deed ; this witness also disclosed that his father was an industrialist and the signature available in the body of the deed is not the signature of his father; this witness also admitted that no proceeding was drawn before any court in connection with mental derailment of his father and no question was raised in their institutions(industries) about the same ;this witness also disclosed before the court as under :-

‘ আমার পিতা বিবাহ বহির্ভূত অনৈতিক সম্পর্কে লিপ্ত ছিল।’

24. This witness denied the suggestion that they used to avoid their father Kazi Shahidul Islam as a result he had to shift to his village home to lead a peaceful life and that this witness and his other brothers did not take care of their father till his death at his village home; this witness also denied the suggestion that it was defendant No.1 who used to take care of Kazi Shahidul Islam untill his death; this witness also denied the suggestion that defendant No.1 had been living in the disputed house ever since the gift was made by her brother Kazi Shahidul Islam till date; this witness also admitted that he participated in the Zanaza of his father and after Zanaza they returned back to Dhaka and that on the date of Zanaza the defendant No.1 and her son was also present; this witness also admitted that there was a Milad Mahfil at the disputed house which he had came to know lateron; this witness also admitted during his cross-examination that it is his father who appointed Younus,Shirin and Idris as his attendants in the disputed house; this witness also denied the suggestion that prescription of Dr. Mahadeb Chandra Mondal were created for the purpose of the suit and that Dr. Mahadeb Chandra Mondal (P.W.2) never administered treatment to Kazi Shahidul Islam.

25. P.W.2 Dr. Mahadeb Chandra Mondal figured as P.W.2 for the plaintiffs who is an Assistant Professor of National Mental Health Institute and he was there in the year 2008 – 2009; this witness produced Ext.2 series i.e five prescriptions; he also produced a certificate issued by him on 6.11.2009 marked as Ext.3; during cross-examination this witness disclosed that he administered treatment to Kazi Shahidul Islam as private patient ; this witness also admitted during cross-examination that he did not advise for hospitalization of Kazi Shahidul Islam in a mental hospital; he admitted further that at the asking of the son of the Kazi Shahidul Islam he issued the certificate (Ext.3)

26. P.W.3 is Md Younus Ali Sheikh claiming to be a neighbor of the disputed house and he was engaged as a care taker in the disputed house on monthly salary of taka 6000/00 ; this witness also disclosed as under :-

‘’ কাজী শহিদুল ইসলাম অসুস্থ ছিল এবং আমি শুনেছি যে, তার কিডনি ও লিভার খারাপ এবং ডায়াবেটিস আছে এবং আর ও কিছু রোগ নাকি ছিল।’’

27. This witness also testified that on 20-11-2011 defendant No.1 asked him to vacate the house claiming that her brother Kazi Shahidul Islam had gifted the house to her; this witness made self contradictory statement in his deposition as under :-

‘‘১নং বিবাদী থাকলেও আমি বাড়ী ছাড়ি নাই এবং ১ নং বিবাদী নালিশী বাড়ীতে আসে নাই।’’

28. This witness also admitted in cross-examination that on August 24,2011 Shahidul Islam died at his own residence and at the time of his death his sons or his wife were not

present before him; this witness also admitted that monthly electric bill comes at taka 10,000/= and he does not know who pays the electric bills; this witness denied the suggestion that he was not at all a caretaker of the house.

29. P.W.4 Shirin Sultana; she claims to be a house maid for last six years and she testified that Shahidul Islam used to behave normally and sometimes abnormally; during her cross-examination she admitted that she used to work at the disputed house for two years; this witness also admitted that Shahidul Islam used to go for shopping sometimes; this witness also deposed as under :-

'' আমি যে কয়দিন নালিশী বাড়ীতে থেকেছি যেই কয় দিন আমি শহিদুল ইসলাম এর খারাপ কিছু দেখি নাই ও ভালই দেখেছি..... ..... ১নং বিবাদী মাঝে মাঝে বাড়ীতে আসত এবং শহিদুল ইসলামকে দেখাশুনা করত এবং তাদের ভাই বোনের মধ্যে ভাল সর্ম্পক ছিল। শহিদুল ইসলাম আমাদের সাথে কোন পাগলামী করে নাই .....নালিশী বাড়ীতে এখন কে থাকে বা না থাকে তা জানি না। নালিশী বাড়ীতে তার ছোট ভাইয়ের বউ থাকে। যে কয়দিন কাজ করেছি আমার বেতন শহিদুল ইসলাম দিয়েছে।১নং বিবাদী নালিশী বাড়ীতে থাকত।''

30. Of the four witnesses adduced by the defendant Monowara Begum the defendant No.1 figured as D.W.1 who deposed that Kazi Shahidul Islam had many other properties besides the suit house and he was a proprietor of Confidence Salt, Lotus Gas and Confident Cement including many other sister concerneds who was also a philanthropist and was connected with many other religions and social organizations; his four sons and his wife used to live a lavish life but they did not take care of Shahidul Islam rather used to behave ill with him and at one stage Shahidul Islam was kidnapped by them as a result a G.D Entry was lodged by the member of staffs of his company; wife of Shahidul Islam was a Doctor therefore with the aid of Dr. Mahadeb Chandra Mondal (P.W.2) she collected a certificate showing Kazi Shahidul Islam as a mentally derailed person therefore he had to take shelter at his village home to live a peaceful life and on 24.08.2011 he breathed his last at his village home at Kamerkhali and this is because of unbearable behaviour of the plaintiffs towards Kazi Shahidul Islam he had been living separately from the year 2009 at his village home; the plaintiffs made an endeavor to show Kazi Shahidul Islam a mentally derailed person although as a matter of fact he was of sound mental health although he had some physical problems for which he had to go abroad on his own for treatment without any aid from any other and after shifting at his village home the plaintiffs did never take any step for his well being or nursing and at that stage Kazi Shahidul Islam used to call his sister D.W.1 for his nursing another brother of Kazi Shahidul Islam named Kazi Zahid Hossain his wife and children also used to take care of Kazi Shahidul Islam while he was residing at his village home; at one stage Shahidul Islam proposed to make a Heba deed in respect of suit property in her favour on 05.12.2010 in presence of her uncle , brother Murad, Taleb and Shafiur Rahman and she accepted the said offer and possession was handed over in her favour; thereafter Kazi Shahidul Islam himself got the Heba deed executed and registered on 29-06-2011 and the deed was made by him voluntarily without any influence from any quarter; she also deposed that her brother Kazi Shahidul Islam gifted saving certificate to his brother's wife amounting to taka fifty lacs and to his niece saving certificate worth of taka fifty lacs and also arranged fixed deposit in favour of the plaintiffs besides, he had property worth cores; the plaintiffs were fully aware of deed of Heba in favour of D.W.1; this witness denied the material allegations made in the plaint by the plaintiffs; this witness also produced the registered Heba deed bearing registration No.2128 dated 29-06-2011 marked as Ext.Ka; she also produced a memorandum dated 25.09.12 issued from কেন্দ্রিয় মাদকাসক্ত নিরাময় কেন্দ্র, তেজগাঁও Industrial Area, Dhaka 1208 showing that P.W.2 had been working as a medical

officer of that centre since 19.03.2003 up to 13.07.2009; this witness also produced the personal information of P.W.2 Ext.Ga series; during cross examination this witness disclosed that her in laws house situate at a distance of 30 Kilometer from the suit property; during cross-examination the plaintiffs could not dislodge her from the stand taken in the examination in chief.

31. D.W.2 Rafiqaul Alam the deed writer who computed the Heba deed dated 29-06-2011 bearing registration No.2128 and he put his signature on the same which has been marked as Ext.Ka(1) ; this witness deposed about the execution of the deed in the language as under :-

'' কাজী নুরুল আমিন শহিদুল ইসলাম সাহেবের নির্দেশে আমি দলিলটি ড্রাফট করি এবং আমি তাকে চিনতাম কমিশনে নাঃ দলিলটি রেজিষ্ট্রি হয়। দাতা নিজেই দলিলটি পড়েছিল এবং দলিলের ড্রাফটি ও দাতা নিজে করে দিয়েছিল এবং আমি সেভাবে সাজিয়েছি।আমার সামনেই দাতা দলিল পড়ে দেখে দলিলে স্বাক্ষর করেছিল।''

32. This witness also deposed that he himself filed the application for Commission on the very day on which date it was registered and the draft copy of the deed was prepared by the executant himself; during cross-examination the plaintiffs could not dislodge this witness from the stand he had taken during his examination in chief.

33. D.W.3 Kazi Motiul Islam is a first cousin of the executant of the Heba deed namely, Kazi Nurul Amin Shahidul Islam who deposed that his cousin Shahidul Islam executed the Heba deed in favour of his sister Monowara Begum (D.W.1) and he knows about the same and he is also an educated person; he testified further that he is also a witness No.1 of the deed in question; he is also an identifier he also admitted the signature available in the deed marked Ext.Ka(2). He also testified possession of Monowara Begum in the suit property. During cross examination the plaintiffs could not elucidate anything to the contrary as disclosed in his examination in chief.

34. D.W.4 Abu Taleb a friend of Kazi Shahidul Islam who deposed that from 05.12.2010 the date of proposal of gift, Monowara Begum has been in possession of the suit property. During cross-examination he disclosed further that he along with Shahidul Islam were reading in the same school at Arpara and he was aged about 68/69 ; while deposing in the court this witness also disclosed in his cross-examination that in the ground floor of the building younger brother of Shahidul Islam lives in.

35. These are the deposition in substance available in the case.

36. We have heard the learned Advocates from both sides perused the materials on record including the depositions of the witnesses wherefrom it transpires that the suit as framed is one for a declaration that the Heba deed dated 29.06.2011 bearing registration No. 2128 executed by Kazi Shahidul Islam in favour of defendant No.1 is a forged, fraudulent and collusive one which is not binding upon the plaintiffs and the same is liable to be cancelled on the ground that it is forged as well it is fraudulent and collusive. Under such circumstances the first question is as to whether the deed in question is a forged one as alleged by the plaintiffs or not and in dealing with such a question we feel it proper to refer the deposition of P.W.1 in this regard. আমার পিতা স্বেচ্চায় না দলিল টি রেজিষ্টি দেয় নাই তার মানসিক ভারসাম্য হীনতার সুযোগে দলিল করে নেওয়া হয়েছে. The aforesaid assertion having been made by the plaintiff No.5 who figured as P.W.1 in the suit, it is evident that the plaintiffs while standing on the dock did not stick to their plea of forgery of the document in question rather they have candidly admitted the execution yet they are maintaining the plea that the deed was executed at a stage of mental

imbalance of his father. It appears further that the plaintiffs have other reasons to resile from the stand taken earlier about the forgery of the document and that is mainly because of the reason of amendment of the Registration Act 1908 (Act No.XVI/1908) where section 22A has been inserted by the amendment Act No.XXV/2004 which came into force from July 01, 2005 and the deed in question was registered on 29.06.2011. In this connection we feel it proper to quote the newly inserted section 22A of the Registration Act which reads as follows :-

> ''22A.Instrument of transfer-(1) Every instrument of transfer required to be compulsorily registered under this Act shall contain the particulars necessary to convey the intention of the parties, complete descriptions of the properties to be transferred and nature of the transaction.
>
> (2) Photographs of both the executant and the recipient shall be pasted on every instrument and the parties shall sign and put their left thumb impression across their photographs in the instrument.
>
> (3) The government shall, within three months of coming into force of the Registration (Amendment) Act 2004 by notification in the official Gazette, prescribe a format for the purpose of this section.''

37. In view of the aforesaid amendment vide Registration Act,1908 (Act No.XXV of 2004) there is hardly any scope left for anyone to raise a question of forgery of a registered document since the photographs of both the executants are pasted on every instrument and the parties shall sign and put their left impression across their photographs in the instrument. More so, it is no bodies case that the photographs available in the impugned instrument or Heba deed is not the photographs of Kazi Shahidul Islam the father of the plaintiff Nos.1-3 and 5. Under such circumstances the allegation of forgery of the document in question can safely be brushed aside. In this connection referring to the case of Abani Mohan Saha Vs. Assistant Custodian (SDO) Vested Properties reported in 39 DLR(AD) 223 where it has been held by our Apex Court as under :-

> ''If the question whether the deed of gift is genuine or not the simple answer is, it being a registered document under section 16 of the Registration Act strong presumption attached to it as the Privy Council stated in 33 I.A 60. ''

38. The aforesaid judgment was delivered on February 20,1986 by our Appellate Division and subsequently upon insertion of section 22A in the Registration Act by Registration (Amendment) Act, 2004 (Act No.XXV/2004) the presumption of correctness as observed above, becomes stronger then the one it was available before the aforesaid amendment, therefore, we can safely conclude that the question of forgery of Ext.Ka(by the plaintiffs) or for that matter Ext.`1 (by the defendant) does not arise at all in the instant suit.

39. The next question remains to be assessed as to whether the aforesaid document is a fraudulent and collusive one and in dealing with such a question we find that the plea taken by the plaintiffs that their predecessor Kazi Shahidul Islam was a mentally derailed person and taking advantage of such derailment the defendant No.1 brought the said deed executed in her favour. It is a settled principle of law by now that the plaintiffs have to prove their own case and the weakness of the defendant, if any, does not go in favour of the plaintiff in a suit therefore the plaintiff with a view to prove the mental derailment of their predecessor Kazi Shahidul Islam they had to bank upon solely on the evidence of P.W.2 and the certificate issued by the said witness Dr.Mahadeb Chandra Mondal which has been marked as Ext.3. On a close scrutiny of the evidence of P.W.2 we find that Dr.Mahadeb Chandra Mondal P.W.2 had no authority whatsoever to issue a certificate of mental derailment of Kazi Shahidul

Islam the predecessor of the plaintiffs particularly in view of the provision of Lunacy Act 1912 where section 18 of the said Act provides that every medical certificate under this Act (Lunacy Act) shall be made and signed by a medical practitioner or a medical officer, as the case may be, and shall be in the form prescribed and the term medical officer has been defined under sub-section (7) of Section 3 of the said Act which reads as under :-

> (7)'' medical officer'' means a gazetted medical officer in the service of the (Republic), and includes a medical practitioner declared by general or special order of the Government to be a medical officer for the purpose of this Act.''

40. From the provision of law as disclosed above, it is evident that P.W.2 was not qualified to be treated as a medical officer as contemplated under the Lunacy Act, 1912 as such he was not at all competent to issue a certificate as per Ext.3, therefore, Ext.3 under no stretch of imagination can form the basis of a finding that Kazi Shahidul Islam was a mentally derailed person at the relevant time. Besides, being the position of the law as aforesaid on a close scrutiny of Ext.3 a certificate dated 06.11.2009 issued by P.W.2 Dr. Mahdeb Chandra Mondal, we find that in the said certificate two words such as "behavioral problem" had been inserted subsequently after issuance of the said certificate which is apparent from the body of the said Ext.3 clearly indicating that the said two words have been inserted beyond the margin of the said certificate and the said two words had been inserted with a motive to show the aggravated mental position of Kazi Shahidul Islam who was then aged about 62 years. The aforesaid Act i.e subsequent insertion of two words in the certificate is a pointer in the affirmative to the claim of the defendant that P.W.2 Dr. Mahadeb Chandra Mondal being the colleague (in the same profession) of plaintiff No.4 who is also a doctor by profession and that Ext.3 has been collusively created for the purpose of this suit, therefore, the claim of the defendant as aforesaid cannot be altogether brushed aside and the said Ext.3can not form any basis of a correct finding in the instant suit as to the state of mind of Kazi Shahidul Islam at the relevant time, therefore, the allegations of the plaintiffs against the deed in question namely Ext.Ka or for that matter Ext.1 appears to be unfounded on any of the two grounds taken in the plaint, therefore, brushed aside.

41. On a scrutiny of the materials on record we have also noticed that the plaintiffs having taken recourse to an amendment of plaint, did not hesitate to impute bad moral character to their dead predecessor namely father of plaintiff No.1-3 and 5 and husband of plaintiff No.4 and this was done only with a view to grab the property already transferred by their predecessor in favour of defendant No.1 vide Ext. KA and for that matter Ext.1. On a close scrutiny of Ext. Ka or 1 we have seen the photographs of Kazi Nurul Amin Shahidul Islam pasted on the body of the instrument as per the newly inserted section 22A of the Registration Act wherefrom it is also evident that the gentleman appears to be of sound health with strong physic who put both the LTI and signature touching the pasted photograph. Therefore, in our considered opinion, we find that the document Ext.KA or 1 is a genuine instrument of transfer. On a close scrutiny of the depositions of D.W.2 Rafiqul Alam deed writer who computed Ext.KA /1 who emphatically asserted that he drafted the document at the order of Kazi Shahidul Islam and he used to know him and draft of the deed was prepared by the executants and as per the said draft D.W.2 computed the deed who having gone through the deed put his signature over the same in his presence. We have also noticed that the assertion made as above, could not be assailed by the plaintiffs during his cross-examination ,therefore, we are of the considered opinion further that the instrument Ext.KA/1 was executed by Kazi Nurul Amin Shahidul Islam voluntarily as such we find substance in this appeal.

42. In view of the factual aspect of the case stated above and in view of the amendment of

the Registration Act in the year 2004 and having gone through the decisions cited by the learned Advocate for the Respondents Mr.Zakir Hossain Bhuiyan, we find that the facts involved in those cited cases are clearly and distinctly discernible as such not applicable in this appeal.

43. In view of what has been stated above, we find substance in the appeal, therefore, the same is allowed without any order as to costs and the impugned judgment and decree dated November 12, 2012 passed in Title Suit No. 05 of 2012 by the learned Joint District Judge, 1st Court, Faridpur is hereby set aside and in consequence Title Suit No.05 of 2012 stands dismissed.

3 SCOB [2015] HCD 13

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 6324 of 2013
&
Suo Moto Rule No. 19 of 2013
(Arising out of WP No. 6324/13).
with
Writ Petition No. 6791 of 2013..

Dr. Md. Sarwar Jahan and others,
(Petitioners in W.P. No. 6324/13 & Suo Moto Rule no. 19/13).
With
Dr. Md. Yasin Ali
(Petitioner in W.P. No. 6791/13)

-Versus-

Khulna University, represented by the Vice Chancellor, Khulna University and others,
...Respondents in both writ petitions.

Dr. Shahdeen Malik Advocate,
...for petitioner in W.P. No. 6324/13.

Mr. Ruhul Quddus Kazol with
Mr. Harun Ar Rashid and
Mr. Md. Humayon Kabir, Advocates,
...for Petitioner in W.P. No.6791/13.

Mr. Shamim Khaled Ahmed, Advocate
...for Respondents No. 2 and 3(in both the Rules and the Suo Moto Rule no. 19/13.

Mr. Ruhul Quddus Kazol with
Mr. Harun Ar Rashid and
Mr. Md. Humayon Kabir, Advocates,
...For Respondents No.6 to 8, 10 & 11 (In WP No. 6324/13).

Heard on 27.11.2014
Judgment on 02.12.2014.

Present:
Mr. Justice Mirza Hussain Haider
&
Mr. Justice Md. Ataur Rahman Khan.

Khulna University Act 1990
Section 28 (5):
When the law specifically used the words "প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠতার ভিত্তিতে এবং ভাইস চ্যান্সলর কর্তৃক ॥b॥ `ó ভাবে অধ্যাপকদের মধ্যে উহার ডীন পদ আবর্তীত হইবে" we hold that the post of Dean will rotate firstly among the Disciplines, according to its seniority of being set up/established, and then also among the senior Professors of each Discipline of the school. Thus so far the two interpretations given by the two Ministries are concerned we are of the view that the subsequent interpretation dated 06.03.2013 given by the Ministry of Education is more rational, reasonable and acceptable for the purpose interpretation of section 28 (5) of the Act. ...(Para 21)

Judgment

MIRZA HUSSAIN HAIDER, J.

1. When a good number of teaching staff, specifically the teachers of the life science school of the khulna University, started boycotting class examination on the event of appointment of Professor Dr. Samir Kumar Sadhu as the Dean of the Life Science School of

Khulna University, Causing a dead lock in the academic atmosphere, 31 Teachers of different Disciplines of the said University, finding no solution, came forward with Writ Petitions No. 6324 of 2013 and obtained Rule on 20.06.2013 in the following terms:

> *" Let a Rule be issued calling upon the respondent to show cause as to why they shall not be directed to take all necessary steps to hold all the scheduled examinations of the Khulna University in accordance with the Academic Calendar of the University from 23rd June 2013 and / or pass such other or further order or orders as to this Court may seem fit and proper."*

2. Thereafter, on an application filed by the petitioners this Court on 10.07.2013 directed the respondents to hold term-2 Examination of the Life Science School of the said University within three weeks and perform all other academic and administrative duties relating to holding of examinations including setting and moderating the question papers by the concerned teachers of the said Life Science School of the said University. In the said order dated 10.07.2013, this Court also observed that the reasons of such boycotting classes and examinations by the teachers, which was continuing for last several months creating havoc in the University premises forcing the students to go for hunger strike in protest of the aforesaid conduct of the teachers, is due to the appointment of Professor Dr. Samir Kumar Sadhu as the Dean of the life science school.

3. Under such circumstances, this Court on 10.07.2013, along with the aforesaid direction also issued Suo Motu Rule No.19 of 2013 in the following terms:

> *" Suo Moto Rule be issued upon the respondents to justify as to how and under what authority Professor Dr Samir Kumar Sadhu has been appointed as Dean of the said school within 03(three) weeks from date."*

4. Thereafter, one Dr. Md. Yasin Ali, Professor of Agrotechnology Discipline , Khulna University Khulna, filed Writ Petition no. 6791 of 2013 challenging the appointment of Dr. Samir Kumar Sadhu, Professor of Pharmacy Discipline as Dean of the Life Science School, vide impugned Memo no. Khu:Bi/ Prosha-83/95 dated 07.03.2013 (Annexure-E) and accordingly, Rule was issued on 14.7.2013 in the following terms:

> *" Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned Office Order dated 07.03.2013 under memo No. Khu.Bi/ Prosha-83/ 95 (Annexure-E) issued under the signature of Respondent no.3 appointing respondent no.4 Namely Dr. Samir Kumar Sadhu, Professor of Pharmacy Discipline, Life Science School, Khulna University as Dean of Life Science School of the said University without complying with the provision of Section 28(5) of the Khulna University Act, 1990 should not be declared to have been issued without lawful authority and of no legal effect and further to show cause as to why the respondents should not be directed to appoint the petitioner as Dean of Life Science School, Khulna University as per the said provision of law and / pass such other or further order or orders as to this Court may seem fit and proper."*

5. The aforesaid three Rules being issued relating to the same subject matter, all are taken up for hearing analogously and disposed of by this single judgment.

6. The background of the Rules have already been stated hereinabove.

7. The petitioner in Writ Petition no. 6791 of 2013 claimed that being appointed as Lecturer in the Agrotechnology Discipline, of the Life Science School, under the Khulna

University, he joined the said post and was performing his duties as such to the satisfaction of the authority concerned. Thereafter, he was promoted to the post of Assistant Professor, Associate Professor and then promoted to the post of Professor of the said University on 26.11.2005 vide Memo no. Khu:Bi:Prosha-136/97-1226 dated 11.12.2005 and accordingly the petitioner, on 11.12.2005, joined as the Professor and since then he has been discharging his duties with full satisfaction of the authority concerned (Annexure- A-1). The respondent no. 3 prepared a seniority list of the Professors of different disciplines of Khulna University (Annexure-C) which was forwarded to the Dean of Science, Engineering and Technology School, Khulna University wherein the petitioner has been placed in Serial no.12. It is stated that in the meantime, Professor Dr. Md. Mizanur Rahman Bhuiyan the earlier Dean of Life Science School being sent on retirement, the petitioner become entitled to be appointed as Dean of the Life Science School, of the Khulna University pursuant to the explanation/interpretation of under Section 28(5) of the Khulna University Act, 1990 given by the Ministry of Law, Justice and Parliamentary Affairs obtained by respondent No.1 for Respondent No.2 on 29.12.2009 (Annexures D and D-1). But without complying with the provision of law and the explanation given by the concerned Ministry on Section 28(5), Dr. Samir Kumar Sadhu Professor of Pharmacy Discipline of the Life Science School, Khulna University (Respondent no.4) has been appointed as Dean of the Life Science School, vide impugned Memo dated 07.03.2013 (Annexure-E) instead of appointing the Senior Professor i.e. the petitioner.

8. Under such, circumstances the petitioner on 30.06.2013, served a notice demanding justice upon the respondent no.2, through his learned advocate, requesting him to appoint the petitioner as Dean of the Life Science School, Khulna University upon cancelling the earlier appointment of Professor Dr. Samir Kumar Sadhu (Annexure-F). But having received no reply to the same, the petitioner was compelled to file this writ petition under Article 102 of the Constitution and obtained the Rule on 14.07.2013 as mentioned above.

9. All the Rules being served upon the respondents, the Khulna University, represented by its Vice Chancellor, (Respondent no. 1 in Writ Petition no. 6324 of 2013 and Respondent no.2 in Writ Petition no. 6791 of 2013) entered appearance and filed affidavit in opposition denying the material allegations of the writ petitions and contending inter alia that under section 28(5) of the Khulna University Act, 1990 the petitioner in Writ Petition no. 6791 of 2013 is not eligible for appointment as Dean of the said school pursuant to the latest clarification issued from the office of the Chancellor through the Secretary of the Chancellor, who is no less than the Secretary of the Ministry of Education, modifying the earlier clarification given by the Ministry of law, Justice and Parliamentary Affairs on 29.12.2009. Thus there is no illegality committed by the respondent authority in appointing Professor Dr. Samir Kumar Sadhu, as the Dean of the said school. According to the said affidavit in opposition of the University-authority , the earlier clarification given by the Ministry of Law, Justice and Parliamentary Affairs in 2009 has been modified by further clarification/explanation by the Chancellor's Office i.e. the Ministry of Education vide Letter dated 6.03.2013, as such the Rule should be discharged.

10. In Writ Petition no. 6324 of 2013, the respondent- University authority filed an affidavit of compliance stating that pursuant to the direction dated 10.07.2013, the respondent authority held term-2 Examination of the Life Science School of Khulna University within time and are performing all other academic and administrative duties relating to holding of examinations including setting and moderation of question papers by the concerned teachers of the said School in accordance with the schedule declared in the

Academic Calendar of the University. In the said affidavit the respondent authority annexed certain papers in support of the claim that appointment of Professor Dr. Samir Kumar Sadhu as the Dean was made in accordance with law and without violating any provision of law.

11. However, on the face of affidavit of compliance as to holding of examinations on the schedule as per directions of this Court Dr. Shahdeen Malik, the learned advocate appearing on behalf of the petitioners in Writ Petition no. 6324 of 2013 submits that with the compliance of the direction, the purpose of the Rule has already been served and the students of the University are being allowed to sit in the examinations according to the academic calendar of the University and since the appointment of Dr. Sadhu has not been challenged in this writ petition there is nothing left for adjudication in this Rule. Dr. Malik on the question of Suo Moto Rule No. 19 of 2013 regarding justification of appointment of Professor Dr. Samir Kumar Sadhu, as Dean of the Life Science School, submits that on the face of two different interpretations given by the Ministry of Law in 2009 and the other one by the Chancellor's Secretariat i.e. the Secretary of the Ministry of Education, who is ex officio Secretary to the Chancellor in 2013, it has become essential for this Court to interpret Section 28(5) of the Khulna University Act 1990. Thus he submits that it would be judicious if the Court gives the correct interpretation on the said provision of law, for ends of justice, which will automatically give a fruitful result to the smooth functioning of the Khulna University.

12. Since the subject matter of the Suo Moto Rule no. 19 of 2013 and the subject matter of Writ Petition no. 6791 of 2013 are same it would be wise to discuss the submissions advanced by both the parties in Writ Petition no. 6791 of 2013.

13. Mr. Ruhul Quddus, the learned advocate appearing on behalf of the petitioner submits, firstly, that pursuant to the Letter dated 22.04.2007 of the Khulna University, the Ministry of Education requested the Ministry of Law, Justice and Parliamentary Affairs to give opinion to resolve the problems as to the applications of section 24(1)(Ga), 24(1)(Gha), 28(5) and 29(3) of the Khulna University Act, 1990 and accordingly, the Ministry of Law, referring to the clarification sought by the Khulna University, gave an opinion which had been in practice before Professor Dr. Samir Kumar Sadhu was appointed as Dean of the said school . It clearly shows that the Vice Chancellor would appoint the Dean of the Faculty/ School by rotating the said post among the Senior Professors of the said School and as such the writ petitioner being Senior in all respect to Professor Dr. Samir Kumar Sadhu, although he is from another Discipline, he is eligible to be appointed as Dean of the Life Science School. In this respect he referred to Annexures C and D, respectively to the writ petition, which is the seniority list, prepared and sent to different persons for their perusal and opinion. This list, according to him, has been made in 2006 wherein the petitioner's name appears in serial no. 12 in respect of seniority and the name of Professor Dr. Sadhu has not been incorporated therein. As such he submits that the petitioner is senior to Dr. Sadhu. Lastly, he submits that the interpretation which has been given by the Ministry of Law, Justice and parliamentary Affairs in 2009 should prevail upon all further explanation/interpretation given by any other authority as such the Rule should be made absolute and the authority should be directed to appoint the petitioner as Dean of the Life Science School.

14. Mr. Shamim Khaled Ahmed, the learned advocate appearing on behalf of the University authority (Respondent no.2 in Writ Petition no. 6791 of 2013), on the other hand, relying on annexures appended to the affidavit of compliance filed in Writ Petition no. 6324 of 2013 submits that the question raised in this writ petition encircles interpretation of

Section 28 (5) of the Khulna University Act, 1990 as the opinion of the Ministry of Law dated 29.12.2009 regarding the said provision does not clearly indicate anything as to rotating the post of Dean among all the Professors of all the Disciplines rather the said opinion/explanation indicates that the post of Dean shall rotate within the Senior professors of the said School only. In this respect, he submits that such explanation has created confusion among the mind of the professors of other Disciplines of the said Faculty/School which has been established subsequently in different years. In this respect, he drew our attention to Annexure-5 to the affidavit of compliance and submits that seven Disciplines under the Life Science School have been established in different years from 1992 to 1999. As such, there is less scope of promotion from the Disciplines which have been established subsequently. Thus under the explanation of the Ministry of Law dated 29.12.2009 the post of Dean of the said school would rotate only among the Professors of Forestry and Wood Technology disciplines, Fisheries and Marine Resource Technology discipline; Biotechnology and Genetic Engineering discipline and Agro- technology discipline, which have been established much earlier, in 1992 to 1996. Whereas the Environmental science and Pharmacy discipline (Dr. Sadhu's discipline) both being established in 1997 the Professors of these two disciplines being juniors to earlier established disciplines, will never get any chance of becoming the Dean of the said School. Such position created frustration among the Professors of other disciplines which have been established at a later state. As such further explanation in respect of section 28 (5) of the Act of 1990 was sought for by the University authority from the Chancellor's Secretariate. Accordingly, it has been opined in 2013 by the Chancellor's Secretariat, that the system of rotating the post of Dean of each School of the Khulna University, as provided for in Section 28(5) of the Khulna University Act, 1990, will mean rotation among the Disciplines as well as among the Senior Professors of each Discipline. Pursuant to the said explanation, since all the senior professors of each discipline would get a chance to be appointed as the Dean of all schools the frustration caused earlier in the mind of the Professors of other Disciplines established subsequently has been removed. In this respect he submits that the language used in Section 28(5) of the said Act, 1990 "প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠতার ভিত্তিতে এবং ভাইস চ্যান্সলর কর্তৃক নি¯`ó ভাবে অধ্যাপকদের মধ্যে উহার ডীন পদ আবর্তীত হইবে ó clearly indicates that the post of Dean will rotate among the Disciplines first then among the Senior Professors of each Discipline which will not create any frustration in the mind of any professor of any Discipline as each and every professor of each and every Discipline would get a chance to be the Dean of each school in his life time. He further submits that since section 28(5) of the said Act 1990 specifically empowered the Vice Chancellor to appoint a Dean, from among the senior professors of all Disciplines by rotation, unlike the Dhaka University wherein the post of Dean is an elected post, the Vice Chancellor of Khulna University is required to exercise the said power more judiciously so that none of the Professors of either of the disciplines is left out in respect of being appointed as the Dean of the said School. In this respect he further submits that the interpretation/explanation/clarification given by the Ministry of Education by its latter dated 06.03.2013 clearly indicates that any Discipline which does not have any professor, that Discipline shall not get any chance to be appointed in the post of Dean of the said School. The explanation in the said letter further indicates that if no other professor is found from any other Disciplines then the first Discipline having adequate number of professors would get a chance to be appointed as Dean and in the said explanation it has further been stated that any Senior Professor, who has once been appointed as Dean will not be considered to be appointed as Dean on a subsequent time rather the next Senior Professor of that particular Discipline will be appointed. Accordingly, Mr. Ahmed submits that this opinion given by the Chancellor's Office through the Ministry of Education, is more rational, reasonable and

judicious in nature for which there should not be any grievance from any Discipline and as such, prays for discharging the Rule.

15. Lastly, referring to Annexure 12 and 13(dated 15.09.2013and 09.04.2014 respectively) to the supplementary affidavit in opposition filed in Writ Petition no. 6324 of 2013, Mr. Ahmed submits that since Mr. Sadhu on 15.09.2013 resigned from the post of Dean of the Life Science School, the University Authority by letter dated 09.04.2014, signed by the Registrar of the Khulna University, accepted the same and on the face of such vacancy the Vice Chancellor of the University is working as the Dean in charge of the said Faculty/School. So the grievance of the petitioner of writ petition No. 6791 of 2013 in respect of the appointment of Dr. Sadhu, who is allegedly junior to him, is no more in existence. As such all the Rules have become infructuous. Thus the University authority will have to give fresh appointment in the post of Dean of the Life Science School as per interpretation given by the Court.

16. Having gone through the entire facts and circumstances as well as the law referred to by the parties, as stated hereinabove, we find that a simple question has been raised in these Rules which relates to explanation/ interpretation/ Clarification of Section 28(5) of the Khulna University Act, 1990. Rather which of the two interpretations given by the Ministry of Law Justice and Parliamentary Affairs, in 2009 and the interpretation given by the Chancellor's office through the Ministry of Education on 06.03.2013 is the correct or more rational/judicious. In this respect we need to see section 28(5) of the University Act, 1990 which reads as follows:

> ২৮(১) বিশ্ববিদ্যালয়ে প্রাথমিক পর্যায়ে নিম্নবর্ণিত স্কুলসমূহ থাকিবে, যাহা স্কুল সংশ্লিষ্ট ডিসিপ্লিন এবং অধ্যয়ন- ক্ষেত্র ও ইনস্টিটিউট সমন্বয়ে গঠিত হইবে, যথাঃ-
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> (৫) প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠতার ভিত্তিতে এবং ভাইস চ্যান্সলর কর্তৃক নির্দিষ্টভাবে অধ্যাপকদের মধ্যে উহার ডীন পদ আবর্তীত হইবে এবং তিনি দুই বৎসরের মেয়াদে তাহার পদে বহাল থাকিবেন "।

17. Side by side the two explanations/ clarifications given by the Ministry of Law, Justice and Parliamentary Affairs in 2009 as well as by the Chancellor's Office, through Secretary Ministry of Education on 6.3.2013, as appears from Annexure 8 to the affidavit in compliance, filed by Respondent No. 1 in writ petition No . 6324 of 2013 also annexed as Annexure D(1) in writ petition No. 6791 of 2013 and explanation from the Chancellor's Secretariat dated 6.3.2013 Annexure E to writ petition No. 6791 of 2013 which has been replaced by Annexure 10 to the affidavit of compliance filed in writ petition No. 6324 of 2013 relating to section 28(5) of the Act of 1990 reads as follows:

"১৬। খুলনা বিশ্ববিদ্যালয়ের ভাইস চ্যান্সেলর, খুলনা বিশ্ববিদ্যালয় আইন, ১৯৯০ এর ১৪(১) (গ) , ২৪(১) (ঘ) , ২৮(৫) এবং ২৯ (৩) ধারাসমূহ প্রয়োগের ক্ষেত্রে সমস্যা উদ্ভুত হওয়ায় উক্ত ধারাসমূহের ব্যাখ্যা / স্পষ্টিকরণ / দিকনির্দেশনা চেয়ে শিক্ষা মন্ত্রণালয়ে একটি পত্র প্রেরণ করেন । তদপ্রেক্ষিতে প্রত্যাশী মন্ত্রণালয় নিম্নোক্ত বিষয়সমূহের উপর মতামত যাচনা করেছেঃ

(১).....

(২).....

(৩) ধারা ২৮(৫) অনুসারে প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠাতার ভিত্তিতে এবং ভাইস চ্যান্সেলর কর্তৃক নির্দিষ্টভাবে অধ্যাপকদের মধ্যে উহার ডীন পদ আবর্তিত হবে এবং তিনি ২ বছর মেয়াদে তার পদে বহাল থাকবেন। এক্ষেত্রে প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠাতার ভিত্তিতে বলতে সকল ডিসিপ্লিনের সকল অধ্যাপগণের মধ্যে নির্দিষ্টভাবে অধ্যাপকগণের মধ্যে অর্থাৎ জ্যেষ্ঠতার ভিত্তিতে আবর্তিত হবে না বিভিন্ন ডিসিপ্লিনের মধ্যে আর্থ্যৎ একবার যে ডিসিপ্লিন থেকে ডীন পদ পেয়েছে সেই ডিসিপ্লিন বাদ দিয়ে অন্য ডিসিপ্লিন গুলোর মধ্যেকার অধ্যাপকগনের মধ্যে জ্যেষ্ঠতার ভিত্তিতে হবে;

(৪).....

১৭। আইনগত মতামতঃ

(গ) নোট -১৬ (৩) বিষয়ে মতামতহ হচ্ছে ধারা ২৮ (৫) এ উল্লেখ করা হয়েছে যে , প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠাতার ভিত্তিতে এবং ভাইস - চ্যান্সেলর কর্তৃক নির্দিষ্টভাবে অধ্যাপকদের মধ্যে উহার ডীন পদ আবর্তিত হইবে এবং তিনি দুই বতসরের মেয়াদে তাহার পদে বহাল থাকিবেন।" এখানে প্রত্যেক স্কুলের বিভিন্ন ডিসিপ্লিনের মধ্যে জ্যেষ্ঠতার ভিত্তিতে বলতে সকল ডিসিপ্লিনের সকল অধ্যাপকদের মধ্যে জ্যেষ্ঠদতার ভিত্তিতে আবর্তিত হবে।"

18. On the other hand the explanation given by the Chancellor's Office through Secretary Ministry of Education on 6.3.2013 (Annexure 10) reads as follows:

" প্রত্যেক স্কুলের ডিসিপ্লিনসমূহের মধ্যে ডীনের পদ আবর্তিত হবে ঃ এক্ষেত্রে ডিসিপ্লিনসমুহের প্রতিষ্ঠা সনের ক্রমানুযায়ী একটি ডিসিপ্লিনের পর অন্য ডিসিপ্লিনের জ্যেষ্ঠ অধ্যাপকের কাছে ডীনের পদ যাবে । যে ডিসিপ্লিনে অধ্যাপক নেই সেখানে ডীন মনোনয়নের সুযোগ থাকবে না। এক্ষেত্রে প্রতিষ্ঠার দিক থেকে প্রথম ডিসিপ্লিন থেকে পুনরায় ডীন মনোনীত হবেন। তবে জ্যেষ্ঠতম অধ্যাপক যিনি ইতোপূর্বে ডীন হয়েছেন তার বদলে পরের জেষ্ঠ্য অধ্যাপক ডীন হবেন "

শিক্ষা মন্ত্রণালয়ের ২৯ ডিসেম্বর ২০০৯ তারিকের শিম/শাঃ ১৭/২ আইন -২/২০০৭/৭৪৫ সংখ্যক পত্রের মাধ্যমে খুলনা বিশ্ববিদ্যালয় আইন, ১৯৯০ - এর ২৮ *(৫)* ধারার ব্যাখ্যা এতদ্বারা বাতিল করা হলো।"

19. One thing is required to be mentioned here that the explanation given by the Ministry of Law on 29.12.2009 if followed then many of the Professors of other Disciplines established lately shall be deprived of getting any chance of being appointed to the post of Dean of any Faculty/School of the University. This can not be the intention of the law makers. From the affidavit in opposition it appears that when the previous Dean of Life Science school, Dr. Mizanur Rahman Bhuiyan, was sent on retirement, a vacuum was created in respect of appointment of the Dean from among the Professors of other Disciplines who were eligible. In this respect the earlier opinion created frustration in the mind of the professors of other disciplines which were established lately. Accordingly, the University authority, to prevent the frustration from among the Professors of subsequently established Disciplines requested the Chancellor's office through the secretary Ministry of Education, who acts as the Chancellor's Secretary to re-assess the same and give further opinion on Section 28(5). Accordingly, on 6.3.2013 explanation has been given as stated above.

20. On perusal of section 28(5) of the Act 1990 it appears that the law provides *"c‡Z¨K ¯‹zj i we‡fb wWwmc‡bi g‡a¨ †R¨ôZvi wfwË‡Z Ges fvBm P¨vÝj i KZK…wb`ó fv‡e Aa¨vcK‡`i g‡a¨ Dnvi Wxb c` AveZvZ nB‡e."*(underlined for emphasis) and since the word *"g‡a¨Ó* has been used twice one

after the words "*c‡Z¨K ¯‹zj i we‡fb Wvwmc‡bi Ó* and then after the words "*Ges fvBm P¨vÝj i KZK wb`ó fv‡e Aa¨vcK‡`i Ó* and since it appears further that the words "*c‡Z¨K ¯‹zj i we‡fb Wvwmc‡bi g‡a¨ †R¨ôZvi wfwË‡Z*" has been used first we are of the view that the post of Dean would first rotate among each Discipline on the basis of its seniority i.e year of establishment and then again among the Senior Professors of each Discipline of the School. Not on the basis of combined list of all Professors of all disciplines of the School. If the later meaning is given then the post of Dean will be rotating only among the Senior Professors of the entire School and a discipline being set up in 1992, definitely, will have larger number of senior professors than those set up subsequently. Thus if the appointment rotates only among the Senior Professors of the entire School then the senior professors of other Disciplines established or set up subsequently, will not get any chance of becoming the Dean probably in their life time.

21. On a comparative study of the Khulna University Act 1990 with Dhaka University Act it appears that the post of Dean of different Disciplines/ Faculties of Dhaka University are appointed by election and there is no chance/ opportunity of rotating the said post among the Professors of different Departments/Disciplines rather then by election, whereas in the said Act of 1990 it appears that the legislature intentionally/purposefully used the aforesaid term "*c‡Z¨K ¯‹zj i we‡fb Wvwmc‡bi g‡a¨ †R¨ôZvi wfwË‡Z.....*" not "*c‡Z¨K ¯‹zj i we‡fb Wvwmc‡bi Aa¨vcK‡`i g‡a¨ †R¨ôZvi wfwË‡Z*" so that each and every professor of each and every discipline gets an opportunity to be appointed as Dean. Thus, what appears to us, is that the Vice Chancellor shall appoint a Senior Professor as a Dean of a particular School / Faculty who will function for two years and such nomination/appointment will be made on the basis of rotation of the post among the Disciplines as well as among the Senior Professors of each Discipline. In that view of the matter, one Discipline, which has been set up on an earlier date, may have good number of Professors then the Discipline which has been set up on a latter date, then the Professors of an older discipline having more senior professors will get the benefit than the professors of a subsequently set up discipline, who will not get any chance. That can not be the intention of the legislature. Thus when the law specifically used the words "*c‡Z¨K ¯‹zj i we‡fb Wvwmc‡bi g‡a¨ †R¨ôZvi wfwË‡Z Ges fvBm P¨vÝj i KZK.wb`ó fv‡e Aa¨vcK‡`i g‡a¨ Dnvi Wxb c` AveZxZ nB‡e*" we hold that the post of Dean will rotate firstly among the Disciplines, according to its seniority of being set up/established, and then also among the senior Professors of each Discipline of the school. Thus so far the two interpretations given by the two Ministries are concerned we are of the view that the subsequent interpretation dated 06.03.2013 given by the Ministry of Education is more rational, reasonable and acceptable for the purpose interpretation of section 28 (5) of the Act. As such we find substance in the submissions made by the learned advocate for the University authority. Accordingly we do not find any merit in the Rule issued in Writ Petition no. 6791 of 2013.

22. In the result, the Rule issued in Writ Petition No. 6791 of 2013 is discharged.

23. With the compliance filed by the respondent No. 1 in Writ Petition No. 6324 of 2013 pursuant to the Rule issuing order and the subsequent order dated 10.07.2013 the Rule is disposed of.

24. Consequently, Suo Muto Rule No. 19 of 2013 is also disposed of.

25. However there will be no order as costs.

3 SCOB [2015] HCD 21

High Court Division
(Special Original Jurisdiction)

I.T. Ref: Application No. 306 of 2013
With
I.T. Ref. Application No. 307 of 2013
With
I.T. Ref: Application No. 308 of 2013
And
I.T. Ref: Application No. 309 of 2013

Mrs. Shahana Parvin,
Proprietor M/S. Al-Madina Traders,
40/1A, Moulovibazar, Dhaka.
....Assessee-Applicant.

Versus

The Commissioner of Taxes,
Taxes Zone-02, 2nd 12 Storied Building 1st floor, Segunbagicha, Dhaka.

Mr. Mosharaf Hossain, Adv. with
Mr. Md. Shafiqul Islam, Adv

....For the Assessee-applicant.

Mr. S. Rashed Jahangir, D.A.G. with
Ms. Nurun Nahar, AAG and
Ms. Nasrin Parvin, AAG

...For I.T. Department.

Heard on: 19.10.14 & 27.10.2014.
And
Judgment on: The 9th & 16th November, 2014.

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

Income Tax Ordinance 1984
Section 75:
A return filed under the normal procedure of section 75 of the Income Tax Ordinance 1984 has to be assessed within the period of limitation of six month, so also the ropening procedure against deemed assessment under the Self Assessment Scheme has to be confined to the period of limitation of two years. No proceeding for assessment of any return can be taken after the period for limitation and any such proceeding initiated shall be a nullity. ...(Para 37)

Section 93 and 94:
Since the assessment year for 2004-2005 shall expire on 30th June, 2005 and the assessment has to be made thereafter within six months *i.e.* within 31st December, 2005 under the provision of section 94(1) of the Income Tax Ordinance 1984. So far the commencement of limitation is concerned under the provision of section 93(3) of the Income Tax Ordinance 1984 it shall commence from 1st July, 2005 and will expire on 30th June 2010. Therefore, the reopening of the assessment under the provision of

section 93(1) of the Income Tax Ordinance 1984 for the assessment year 2004-2005 after the expiry of the limitation period was a palpable illegality and that being a question of law the Taxes Appellate Tribunal was required to consider the same. ...(Para 38)

Judgment

A.F.M. Abdur Rahman,J:

1.These 4(four) instant Income Tax Reference Applications, preferred by the Assessee-applicant Mrs. Sahana Perveen, having been related to the similar question of law arising out of similar factual aspects, were heard analogously and now disposed of by this single judgment.

2. Income Tax Reference Application No. 308 of 2013 is related to assessment year 2004-2005 and the Assessee-applicant challenged the legality and propriety of the order passed by the Taxes Appellate Tribunal as to the assessment of tax liability made by the DCT concern and affirmed by the 1st Appellate Authority.

3. Income Tax Reference Application No. 307 of 2013 is though also related to assessment year 2004-2005 but a different question is involved as to the legality and propriety of the imposition of penalty under section 128 of the Income Tax Ordinance 1984 against the Assessee-applicant on the ground of concealment of income in the return of the assessment year 2004-2005.

4. Income Tax Reference Application No. 309 of 2013 is related to assessment year 2005-2006 which has been preferred against the legality and propriety of the assessment of tax liability made by the DCT concern and affirmed by the 1st Appellate Authority and ultimately directed to the legality and propriety of the decision made by the Taxes Appellate Tribunal.

5. Income Tax Reference Application No. 306 of 2013 is similarly though also related to assessment year 2005-2006 but a different question is involved as to the legality and propriety of the imposition of penalty under the provision of section 128 of the Income Tax Ordinance 1984 on the ground of concealment of income in the return of the assessment year 2005-2006.

6. Facts of the Cases:

An accumulated reading of the four Income Tax Reference Applications reveals that the Assessee-applicant is a business woman and proprietor of M/S. Al Madina Traders, which deals in trading of oil and sugar in the whole sale market. The Assessee-applicant derives its income from the said business and also from the house property. The assessee-applicant is a regular assessee of income tax, holding TIN.113-100-1059/Circle-14. The Assessee-applicant submitted its income tax return for the assessment year 2004-2005 and 2005-2006 under the normal procedure of section 75 and under the self assessment scheme as provided in section 83(A) of the Income Tax Ordinance 1984 respectively, on 06.10.2004 and within the statutory time respectively, showing an income of Tk. 97,650.00 and Tk. 3,07,950.00 respectively for the assessment year 2004-2005 and 2005-2006 which was assessed by the DCT concern on 20.10.2004 for the assessment year 2004-2005. The receipt for self

assessment return for the assessment year 2005-2006 was issued on the day of filing of the return under section 83(A) of the Income Tax Ordinance 1984 which as per the provision of the said section became deemed assessment order. But although the National Board of Revenue did not select the Self Assessment return of the assessee-applicant under the provision of section 83A(2) of the Income Tax Ordinance 1984, nevertheless the Central Intelligence Cell (CIC) of the National Board of Revenue taken up the matter for themselves and sent the income tax file of the assessee-applicant to the Inspecting Additional Commissioner of Taxes, (IACT), Range-1, Taxes Zone-2, Dhaka, on 24.2.2011, directing the said authority to reopen the assessment of the assessee-applicant for both the assessment years of 2004-2005 and 2005-2006 on the basis of its obtaining information regarding concealment of income. Thereafter, the Inspecting Additional Commissioner of Taxes (IACT) taken step for complying the said direction and ultimately approved the proposal sent by the DCT concern for reopening of the income tax cases for the assessment year 2004-2005 on 15.3.2011 and 2005-2006. Thereafter, the DCT concern without serving any notice either under section 93 or under section 83(1) of the Income Tax Ordinance 1984 for hearing of the reopened case, disposed off the case of the said two assessment years under the provision of section 84 of the Income Tax Ordinance 1984, on the ground of non-appearance of the assessee-applicant purportedly adopting the procedure of best judgment as provided in section 84 of the Income Tax Ordinance 1984 and ascertained the income of the Assessee-applicant exparte, at an amount of Tk. 24,40,754.00 for the assessment year 2004-2005 and Tk. 70,67,608.00 for the assessment year 2005-2006.

7. Being aggrieved with and highly dissatisfied by the said order of assessment by the DCT concern for the assessment year 2004-2005 and 2005-2006, the Assessee-applicant, preferred first appeal before the Commissioner of Taxes (Appeal) for those two assessment years being আয়কর আপীলপত্র নং- ৬,৭/সার্কেল-৪০/২০১১-২০১২, which were heard analogously by the Appellate Additional Commissioner of Taxes, Appellate Range-4, Appellate Zone-2, Dhaka, and that being an unsuccessful one, the Assessee-applicant preferred 2nd appeal before the Taxes Appellate Tribunal, being ITA No. 2270 of 2012-2013 for the assessment year 2004-2005 and ITA No. 2271 of 2012-2013 for the assessment year 2005-2006. Those two appeals were heard by the Division Bench No. 1, Dhaka, of the Taxes Appellate Tribunal, Dhaka, analogously and the same were disposed off by the order dated 27.3.2013 by which, although the Taxes Appellate Tribunal set aside the order of the assessment, but remanded the case to the DCT concern for making fresh assessment.

8. Being aggrieved with and highly dissatisfied by the said order of the Taxes Appellate Tribunal, the Assessee-applicant preferred the instant two Income Tax Reference Applications being Income Tax Reference Application No. 308 of 2013 and 309 of 2013.

9. It has been further alleged that one Mr. Sarwar Hossain Chowdhury, Deputy Director General, Central Intelligence Cell, Dhaka asked the assessee-applicant to come to his office with her husband for verification of some papers and documents submitted by them to the taxes department. In pursuant to the said instruction, the assessee-applicant with her husband went to the officer of the Central Intelligence Cell whereupon the Director General of CIC directed the assessee applicant to make payment at the minimum at Tk. 1,00,000,00.00 (one cror) for both for herself and her husband through pay order on that day, otherwise the Central Intelligence Cell shall file criminal case under section 165 and 166 of the Income Tax Ordinance 1984 against the assessee-applicant and her husband were detained till end of the day at their office and thereafter finding no other alternative the assessee-applicant was

compelled to make payment of an amount of Tk. 50,00,000.00 in her own income tax file through pay order and thereafter the assessee-applicant and her husband were released.

10. It has been asserted in the identical language in Income Tax Reference Application No. 307 of 2013 and Income Tax Reference Application 306 of 2013 that after the assessment of tax liability of the Assessee-applicant, after reopening the same most illegally, purportedly under the provision of section 93 of the Income Tax Ordinance 1984 for the assessment 2004-2005 and 2005-2006, the DCT concern initiated proceeding under section 128 of the Income Tax Ordinance 1984 for imposition of penalty upon the Assessee-applicant on the ground of concealment of income and thereafter without serving any notice under section 130 of the Income Tax Ordinance 1984, passed his order under the provision of section 128 of the Income Tax Ordinance 1984, imposing penalty of Tk. 2,53,095.00 for the assessment year 2004-2005 and Tk. 8,24,105.00 for the assessment year 2005-2006.

11. Being aggrieved with and highly dissatisfied by the said imposition of penalty, the Assessee-applicant preferred two appeals before the Commissioner of Taxes (Appeal) for those two assessment years, being আয়কর আপীলপত্র নং- ৮,৯/সার্কেল-৪০/২০১১-২০১২ which were heard by the Appellate Additional Commissioner of Taxes, Appellate Range-4, Appellate Zone-2, Dhaka, who heard both the appeals analogously and rejected the appeals by his order dated 15.11.2005 affirming the order of the DCT concern regarding the imposition of penalty.

12. Being aggrieved with and highly dissatisfied by the said order, the Assessee-applicant preferred two appeals before the Taxes Appellate Tribunal, being ITA No. 2272 of 2012-2013 for the assessment year 2004-2005 and ITA No. 2273 of 2012-2013 for the assessment year 2005-2006 against the imposition of penalty. But the Taxes Appellate Tribunal although set aside the order of imposition of penalty but remanded the case to the DCT concern to make penalty order consequent to revised assessment order which may be passed on remand by the DCT concern for the assessment year 2004-2005 and 2005-2006 as decided off in the ITA no. 2270 of 2012-2013 and ITA No. 2271 of 2012-2013.

13. Being aggrieved with and highly dissatisfied by the said order, the Assessee-applicant preferred the instant two Income Tax Reference Applications being Income Tax Reference Application 306 of 2013 and Income Tax Reference Application 307 of 2013, questioning the legality and propriety of the order passed by the Taxes Appellate Tribunal.

14. Claim of the Taxes Department:

15. Pursuant to the service of notice, the learned Assistant Attorney General Ms. Nurun Nahar and Nasrin Parvin appeared on behalf of the Taxes department and submitted affidavit-in-reply in four of the Income Tax Reference Application, out of which two being in Income Tax Reference Application No. 308 of 2013 and 309 of 2013 wherein it has been asserted that the Deputy Commissioner of Taxes reopened the income tax cases of the Assessee-applicant for the assessment year 2004-2005 and 2005-2006 under the provision of section 93 of the Income Tax Ordinance 1984, as he had obtained clear, explicit and definite information of tax evasion by the Assessee-applicant as informed by the Central Intelligence Cell (CIC) of the National Board of Revenue. In order to deduce the true income of the Assessee-applicant the DCT concern passed the revised assessment order under section 93 of the Income Tax Ordinance 1984. In addition to the above, the case was thoroughly investigated by the Central Intelligence Cell (CIC) of the National Board of Revenue and the assessment order passed by the DCT concern under section 93 of the Income Tax Ordinance 1984 was

based upon the finding of the said investigation. As the Assessee-applicant failed to disclose the amount of income for the concern income year and evaded the rightful amount of tax, the DCT being informed by the Central Intelligence Cell (CIC) and equipped with prior approval of the concerned Inspecting Additional Commissioner of Taxes (IACT) reopened the income tax cases of the assessee-applicant for those assessment years 2004-2005 and 2005-2006. That being in accordance with law, the first appellate authority did not interfere with the assessment orders. But although the Taxes Appellate Tribunal set aside the assessment order but correctly and lawfully remanded these two cases to the DCT concern for making revised assessment and therefore the question as has been formulated in the instant two Income Tax Reference Applications are not lawful and as such not required to be answered in negative and in favour of the Assessee-applicant.

16. The taxes department also submitted affidavit-in-reply in Income Tax Reference Applications No. 306 of 2013 and Income Tax Reference Applications No. 307 of 2013 and so far the question of imposition of penalty are concerned it has been asserted in the affidavit-in-reply that after completion of the assessment under section 93 of the Income Tax Ordinance 1984, the DCT concern rightly imposed the penalty upon the evaded portion of income of the Assessee-applicant for those two assessment years under the provision of section 128 of the Income Tax Ordinance 1984 and therefore the question in respect of imposition of penalty made in these two Income Tax Reference Applications, being Income Tax Reference Application No. 307 of 2009 and Income Tax Reference Application No. 306 of 2013 relating to assessment years 2004-2005 and 2005-2006 are not required to be answered in negative and in favour of the Assessee-applicant.

17. The learned Advocate Mr. Mosharaf Hossain represented the Assessee-applicant while the learned Assistant Attorney General Ms. Nasrin Parvin conducted hearing on behalf of the taxes department at the time of hearing of these four Income Tax Reference Applications.

18. Argument of the Assessee-Applicant:

The learned Advocate Mr. Mosharaf Hossain at the very out set has drawn the attention of this court to the fact that the assessee-applicant submitted her income tax return for the assessment year 2004-2005 under the normal procedure under section 75 of the Income Tax Ordinance 1984 and further submitted her income tax return for the assessment year 2005-2006 under the Universal Self Assessment Scheme of section 83A of the Income Tax Ordinance 1984. But the DCT concern and both the appellate authorities most callously mentioned in their respective order that both the return was filed under the self assessment scheme, which mislead him while he was drafting the substantive petition in Income Tax Reference Application No. 308 of 2013 relating to assessment year 2004-2005 and accordingly he mentioned the same in Income Tax Reference Application No. 308 of 2013. But later it appears that such assertion not being correct, the commission of error in Income Tax Reference Application 308 of 2013 is required to be amended and accordingly he preferred a supplementary-affidavit annexing the photocopy of the certified copy of the return for the assessment year 2004-2005 and stated the correct fact as to the provision of statute relied upon for filing the income tax return for the assessment year 2004-2005.

19. The learned Advocate Mr. Mosharaf Hossain while taken this court through the assessment order made by the DCT concern for the assessment year 2004-2005 and the order for imposition of penalty for that assessment year, drawn the attention of this court to the fact that the DCT concern did not apply his mind at all in the case since he has mentioned, in the

assessment order, that the return was submitted under the normal procedure, but mentioned in the order for imposition of penalty that the return was submitted under the Self Assessment Scheme. So also the 1st Appellate Authority and the Taxes Appellate Tribunal were so negligent in making the same error. These apparent negligent assertions clearly proved the fact that the DCT concern and these two appellate authorities did not make justice to the assessee-applicant and the DCT concern with an ulterior motive re-opened the finalized assessment order of the assessee-applicant for the assessment year 2004-2005.

20. The learned Advocate Mr. Mosharaf Hossain while taken this court through the assertion made in assessment order, concerning the assessment years 2004-2005 and 2005-2006, strenuously argued that the return was submitted by the Assessee-applicant for the assessment year 2004-2005 on 6.10.2004 which was assessed by the assessment order dated 20.10.2004 and the Assessee-applicant upon complying the demand notice served under section 135 of the Income Tax Ordinance 1984 paid the due tax and accordingly the same became past and closed transaction after the statutory period of limitation of five years. But the assessment order later made purportedly under section 93 of the Income Tax Ordinance 1984, beyond the knowledge of the assessee-applicant, itself shows that the Central Intelligence Cell (CIC) of the National Board of Revenue in order to reopen the said past and closed assessment, initiated a proceeding on 24.2.2011 apparently after six years and upon the said initiation of file by the Central Intelligence Cell (CIC) of the National Board of Revenue, the Inspecting Additional Commissioner of Taxes, Range-1, Taxes Zone-2, Dhaka, initiated his file in this respect on 15.3.2011 and thereafter, although it has been asserted in the assessment order that notice under section 83(1) and 79 of the Income Tax Ordinance 1984 was served upon the Assessee-applicant, but practically no such notice was even served upon the Assessee-applicant, for which the DCT concern illegally invoked its power under the provision of section 84 of the Income Tax Ordinance 1984 and passed the order under the purported Best Judgment Procedure.

21. The learned Advocate Mr. Mosharaf Hossain contends that the reopening of the assessment for the assessment year 2004-2005 was barred by limitation under the provision of section 93(3)(B) of the Income Tax Ordinance 1984, which provides that no such past and closed transaction can be reopened after the expiry of five years.

22. The learned Advocate Mr. Mosharaf Hossain next argued that a proceeding barred by limitation if proceeded will be treated as *void ab-initio* and that being a question of law is always opened to be considered by the court, so also by the taxes appellate tribunal. But the Taxes Appellate Tribunal did not at all notice that the entire proceeding being barred by limitation should, not only liable to be set aside but also should be nullified as barred forever. That not being done by the tribunal, the said issue is required to be considered by this court and accordingly the Assessee-applicant formulated the question in the instant Income Tax Reference Application No. 308 of 2013 for making an answer in negative and in favour of the assessee-applicant.

23. The learned Advocate Mr. Mosharaf Hossain further argued that the Taxes Appellate Tribunal being the final authority in appeal in the Taxes department is empowered to dispose of any case by itself, if all the evidence is adequately available before it. The question of limitation being apparent on the face of the record, the Taxes Appellate Tribunal was adequately equipped to dispose off the same by itself and not to make remand of the case to the DCT concern and therefore the question as has been formulated by the Assessee-applicant

in Income Tax Reference Application No. 308 of 2013 is required to be answered in negative and in favour of the Assessee-applicant.

24. The learned Advocate Mr. Mosharaf Hossain while taken this court through the assessment order regarding the assessment year 2005-2006 drawn the attention of this court to the fact that admittedly the return was submitted under the provision of section 83(A) of the Income Tax Ordinance 1984 known as universal Self Assessment Scheme. Any return filed under the provision of universal self assessment scheme, as provided under section 83A of the Income Tax Ordinance 1984, as prevailing at the relevant period, if compliant with the provision of the said section, the DCT concern usually issues receipt, which deemed to be the finalization of the assessment for that relevant assessment year. In the instant case admittedly the DCT concern issued the receipt against the submission of return under the provision of section 83A(1) of the Income Tax Ordinance 1984, which became deemed finalized assessment order. That deemed finalized assessment order can only be reopened under the provision of section 83A(2) of the Income Tax Ordinance 1984 only by the National Board of Revenue if it selects the said return on random basis and to direct the DCT concern to make audit and thereafter if required to proceed for reopening of the case. But in the instant case the assessment order for the assessment year 2005-2006 made purportedly under section 93 of the Income Tax Ordinance 1984, clearly established the fact that such procedure was not adopted by the National Board of Revenue and the DCT concern has re-opened the same on 24.2.2011on the initiation of Central Intelligence Cell (CIC). Although the assessment order asserted that notice under the provision of section 93 of the Income Tax Ordinance 1984 was served upon the Assessee-applicant, but practically no such notice was ever served upon the Assessee-applicant and that being the case, the revised assessment order passed by the DCT concern, purportedly under the provision of Best Judgment Procedure provided in section 84 of the Income Tax Ordinance 1984 is palpable illegal.

25. The learned Advocate Mr. Mosharaf Hossain strenuously argued that non-compliance of substantive procedure of law is a question of law and therefore the highest appellate authority in the taxes department were required to consider the same, especially the issue that the past and closed assessment order for the assessment year 2005-2006 was reopened not under the proper procedure of law and was liable to be set aside for ever. But the Taxes Appellate Tribunal wrongfully remanded the case to the DCT concern for a further revised assessment. This being a palpable illegality this court is required to consider the same under the provision of law.

26. The learned Advocate Mr. Mosharaf Hossain further contends that in the case of assessment year 2004-2005 clear illegality was committed by the Taxes Appellate Tribunal, in as much as that neither the question of non-compliance of procedure of law was considered, nor the question of limitation for reopening any such assessment order passed under the provision of section 83(2) of the Income Tax Ordinance 1984 was at all considered and as such the question, as has been formulated by the Assessee-applicant in this Income Tax Reference Application No. 309 of 2013, is required to be answered in negative and in favour of the Assessee-applicant.

27. The learned Advocate Mr. Mosharaf Hossain while finally advanced his argument in respect of the imposition of penalty against the assessee-applicant under the provision of section 128 of the Income Tax Ordinance 1984, involved in Income Tax Reference Application No. 307 of 2013 relating to assessment year 2004-2005 and Income Tax Reference Application No. 306 of 2013 relating to assessment year 2005-2006, strenuously

argued that although the Taxes Appellate Tribunal set aside the order of imposition of penalty by the DCT concern as affirmed by the CT(Appeal), yet the order of remand is a palpable illegality since the tribunal did not notice that the invocation of power under section 93 of the Income Tax Ordinance 1984 for reopening of the assessment order for the assessment year 2004-2005 and 2005-2006 was barred by limitation and as such the direction for reassessment made by the tribunal is an infractuous order. So also the remand of the issue of imposition of penalty by the DCT concern is also infected with the same fate and therefore the remand order for imposition of penalty, not being lawful, as decided in so many cases in this court, cannot stand on the facts and circumstances of the case, which ought to be considered by the Taxes Appellate Tribunal and therefore the order of remand to the DCT concern for imposition of penalty after further assessment cannot stand on the provision of law and therefore the question as has been formulated in this respect is required to be answered in negative and in favour of the Assessee-applicant.

*28. **Arguments of the taxes department.***

On the other hand the learned Assistant Attorney General Ms. Nasrin Parvin while taken this court through the assessment order strenuously argued that the Central Intelligence Cell (CIC) under the National Board of Revenue is amply empowered to dig out any fact of concealment of income by any assessee of income tax. The Assessee-applicant having concealed his income for the assessment year 2004-2005, the Central Intelligence Cell (CIC) obtained the information of such concealment and initiated the file for reopening of the assessment for the assessment year 2004-2005 and 2005-2006 and therefore no question of limitation arises at all. Because, the Central Intelligence Cell (CIC) has empowered to initiate file to reopen any case for the purpose of collection of revenue for the state.

29. The learned Assistant Attorney General Ms. Nasrin Parvin further strenuously argued that since the Assessee-applicant concealed her income, the DCT concern lawfully re-opened the assessment order under the provision of section 93 of the Income Tax Ordinance 1984. That being not illegal under the provision of section 93(3)(B) of the Income Tax Ordinance 1984, the question which have been formulated by the Assessee-applicant in these two Income Tax Reference Application being No. 308 of 2013 and 309 of 2013 are not required to be answered in negative and in favour of the Assessee-applicant.

30. The learned Assistant Attorny General Ms. Nasrin Pervin further argued that as the Taxes Appellate Tribunal set aside the imposition of fine upon the impugned assessment order, it has correctly remanded the same to the DCT concern for imposition of penalty upon the revised assessment, which not being illegal, the question formulated in the two Income Tax Reference Application No. 307 of 2013 and Income Tax Reference Application No. 306 of 2013 is not required to be answered in negative and in favour of the assessee-applicant.

31. We have heard the learned Advocate and perused the materials on record.

32. Deliberation of the court:

In Income Tax Reference Application No. 308 of 2013 the DCT concern in the body of the assessment order mentioned that the return for the assessment year 2004-2005 was submitted under the normal procedure i.e. under the provision of section 75 of the Income Tax Ordinance 1984. But at column No. 7 of the assessment order it has been mentioned that the assessment is made under section 83A of the Income Tax Ordinance 1984, which being absurd proves the non application of mind and the negligence in making assessment order by

the concerned DCT. Further the 1st Appellate Authority and the Taxes Appellate Tribunal committed the same mistake and passed their order on the mistaken view. This court upon perusing annexure-F found that the return for the assessment year 2004-2005 was submitted under the normal procedure, i.e. under section 75 of the Income Tax Ordinance 1984. This commission of error by all the lower authorities is serious in nature which has effected adversely the assessment of tax liability of the assessee applicant. However, the Assessee-applicant formulated the following question seeking opinion from this court;

(i) In the circumstances and on the facts, whether the Taxes Appellate Tribunal, was justified maintaining unauthorized ex-parte assessment order and subsequent appeal order passed by the first appellate authority.

(ii) In the circumstances and on the facts whether the Taxes appellate Tribunal Division Bench Dhaka-1 is justified maintaining ex-parte assessment order and the order of first appeal ignoring the provision of section 94(1A) of the Income Tax Ordinance 1984 regarding limitation of assessment.

(iii)In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1 was justified directing the DCT concerned to make assessment again.

(iv)In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1, was justified maintaining the proceeding under section 93 of the Income Tax Ordinance 1984 as made by the DCT and subsequently was confirmed by the first appellate authority.

(v) In the circumstances & facts, whether the Taxes Appellate Tribunal was justified maintaining the assessment order u/s 93/94 of the ordinance for the assessment year 2004-2005 which is barred by limitation.

33. The pertinent question practically raised in Income Tax Reference Application No. 308 of 2013 is regarding the issue of legality of assessment under section 93 of the Income Tax Ordinance 1984 after the period of limitation. It has been asserted that the assessment of the tax liability of the assessee-applicant for the assessment year 2004-2005 was basically assessed on 20.10.2004 and the DCT concern re-opened the same through the approval of the IACT on 15.03.2011 and accordingly it has been argued that since the provision of section 93(3)(B) of the Income Tax Ordinance 1984 provided for limitation of five years from the end of the assessment year as to reopening of any assessed return under the provision of section 93 of the Income Tax Ordinance 1984, the re-assessment made by the DCT is palpable illegal. This has prompted this court to examine the provision of entire section 93 of the Income Tax Ordinance 1984, which is reproduced below for better appreciation;

34. ***Income Tax Ordinance 1984***

Section 93: Assessment in case of income escaping assessment, etc.—

1) If, for any reason, any income chargeable to tax for any assessment year has escaped assessment or has been under assessed or has been assessed at too low a rate or has been the subject of excessive relief or refund under this Ordinance, the Deputy Commissioner of Taxes may issue a notice to the assessee containing all or any of the requirements which may be included in a notice under section 77 and may proceed to assess or determine, by an order in writing, the total income of the assessee or the tax payable by him, as the case may be, and all the provisions of this Ordinance shall, so far as may be, apply accordingly:

2) No proceeding under sub-section (10 shall be initiated unless definite information has come into the possession of the Deputy Commissioner of Taxes [and

he has obtained] the previous approval of the Inspecting Joint Commissioner in writing to do so, except in a case where a return has not been filed under section 75 or 77.

3) A notice under sub-section (1) may be issued by the Deputy Commissioner of Taxes,-

(a) In any case in which he has reason to believe that the assessee or any other person on his behalf has not filed a return under section 75 or 77, at any time;

(b) In any case in which he has reason to believe that the assessee has for any assessment year concealed the particulars of his income or furnished inaccurate particulars thereof or omitted or failed to disclose all material facts necessary for the assessment for such year, within [five years] from the end of the assessment year for which the assessment is to be made.

Provided that in a case where a fresh assessment is made for any assessment year in pursuance of an order [sections 120, 121A, 156 or 159], the period of [five years] a referred to in this clause shall commence from the end of the year in which the fresh assessment is made;

(c) in any other case, within two years from the end of the assessment year for which the assessment is to be made.

4) In computing the period of limitation for the purpose of making an assessment or taking any other proceedings under this Ordinance, the period, if any, for which such assessment or other proceedings has been stayed by any court, tribunal or any other authority, shall be excluded.

5) Notwithstanding anything contained in-subsection (3) where an assessment or any order has been annulled, set aside, cancelled or modified, the concerned income tax authority may start at which such annulment, setting aside, cancellation or modification took place, and nothing contained in this Ordinance shall render necessary the re-issue of any notice which has already been issued or the re-furnishing or refiling of any return, statement or other particulars which has already been furnished or filed, as the case may be.

35. Under the aforesaid provision of section 93 of the Income Tax Ordinance 1984, prevailing during the relevant period, the Deputy Commissioner of Taxes is empowered to issue any notice under section 93 of the Income Tax Ordinance 1984 if he has reason to belief that the Assessee-applicant has for any assessment year concealed the particulars of his income. But that has been limited under the provision of sub-section (3) to five years from the end of the assessment year for which the assessment is to be made. In the instant case of Income Tax Reference application No. 308 of 2013, related to assessment year 2004-2005, the return under the provision of section 75 of the Income Tax Ordinance 1984 was admittedly submitted on 6.10.2004, whereupon under the provision of section 94 of the Income Tax Ordinance 1984, the DCT concern was liable to assess the said return within six months from the end of the assessment year in which the income was first assessable. The entire provision of section 94 of the Income Tax Ordinance 1984 is reproduced below for better understanding, which reads as follows;

36. ***Income Tax Ordinance 1984***

Section 94. Limitation for assessment.

(1) Subject to the provisions of sub-sections (2) and (3), no order of assessment under the provisions of this Chapter in respect of any income shall be made after the expiry of six months from the end of the assessment year in which the income was first assessable]

[1A) Notwithstanding anything contained in sub-section (1), no order of assessment under sub-section (2) of section 82B, [sub-section (3) of section 82BB] or sub-section (2) of section 83A shall be made

(a) after the expiry of two years from the end of the assessment year in which the income was first assessable; or

(b) after the expiry of the period of fifteen months from the end of the month in which the return is submitted, whichever is earlier]

(IB) Notwithstanding anything contained in sub-section (1) or (1A) no order of assessment under section 107C of this Ordinance shall be made after the expiry of three years from the end of the assessment year in which the income was first assessable.

(2) Notwithstanding anything contained in sub-section (1) assessment under section 93 may be made-

a) In the cases falling under section 93(3)(a) and (b), within [two years] from the end of the year in which notice under the said sub-section was issued; and.

b) In the cases falling under section 9393)(c), within [one year] from the end of the year in which notice under the said sub section was issued.

(3) Notwithstanding anything contained in this section, limiting the time within which any action may be taken or any order or assessment may be made, order or assessment, as the case may be, to be made on the assessee or any other person in consequence of, or to give effect to, any finding or direction contained in an order under [section 120,121A, 156, 161, or 162] or, in the case of a firm, an assessment to be made on a partner of a firm in consequence of an assessment made on the firm [shall be made within thirty days] from the date on which the order was communicated and such revised order shall be communicated to the assessee within thirty days next following:

[Provided that where an order of assessment has been set aside by any authority in that case the assessment shall be made within forty five days from the date on which the order was communicated to him.

***Explanation I.-** Where, by an order under [sections 120, 121A 156, 159, 161 or 162], any income is excluded from the total income of the assessee for an another assessment year shall, for the purposes of this section, be deemed to be one made in consequence of, or to give effect to, any finding or direction contained in the said order.*

***Explanation II:** where, by an order under [sections 120, 121A 156, 159, 161 or 162] any income is excluded from the total income of one person and held to be the income of another person, an assessment of such income of such other person, shall, for the purposes of this section, be deemed to be one made in consequence of or to give effect to, any finding or direction contained in the said order.*

(4) Where the Deputy Commissioner of Taxes fails to give effect to any finding or direction contained in an order referred to in sub-section (3) within the period stipulated therein, such fails of the Deputy Commissioner of Taxes shall be construed as misconduct.

37. The aforesaid provision of limitation is a imperative one. A return filed under the normal procedure of section 75 of the Income Tax Ordinance 1984 has to be assessed within the period of limitation of six month, so also the re-opening procedure against deemed assessment under the Self Assessment Scheme has to be confined to the period of limitation of two years. No proceeding for assessment of any return can be taken after the period for limitation and any such proceeding initiated shall be a nullity.

38. But in the instant case the Central Intelligence Cell (CIC) of the National Board of Revenue initiated to investigate the concealment of income of the Assessee-applicant by initiating a file on 24.2.2011, upon which the DCT concern purportedly taken approval from the Inspecting Additional Commissioner of Taxes (IACT) on 15.3.2011 and thereafter the DCT served the notice under section 93 of the Income Tax Ordinance 1984, which is beyond the statutory period of limitation of five years. Since the assessment year for 2004-2005 shall expire on 30th June, 2005 and the assessment has to be made thereafter within six months *i.e.* within 31st December, 2005 under the provision of section 94(1) of the Income Tax Ordinance 1984. So far the commencement of limitation is concerned under the provision of section 93(3) of the Income Tax Ordinance 1984 it shall commence from 1st July, 2005 and will expire on 30th June 2010. Therefore, the reopening of the assessment under the provision of section 93(1) of the Income Tax Ordinance 1984 for the assessment year 2004-2005 after the expiry of the limitation period was a palpable illegality and that being a question of law the Taxes Appellate Tribunal was required to consider the same.

39. But it appears that such a vital question of law was not even noticed by the Taxes Appellate Tribunal, which although set aside the order of assessment, for the assessment year 2004-2005, but erroneously remanded the case to the DCT concern for revised assessment. A time barred assessment cannot be revitalized by the order of the tribunal and that being not sustainable under the provision of law, this court is required to answer the question related to the same in negative and in favour of the Assessee-applicant.

40. Turning to Income Tax Reference Application No. 309 of 2013 it appears that the Assessee-applicant formulated the similar questions of law seeking opinion from this court, which are as follows;

> *(i) In the circumstances and on the facts, whether the Taxes Appellate Tribunal, was justified maintaining unauthorized ex-parte assessment order and subsequent appeal order passed by the first appellate authority.*
>
> *(ii) In the circumstances and on the facts whether the taxes appellate Tribunal Division Bench Dhaka-1 is justified rejecting the appeal of the assessee applicant ignoring the provision under section 83A of the Income Tax Ordinance 1984 specifically selection of return for the purpose of audit.*
>
> *(iii)In the circumstances and on the facts whether the Taxes appellate Tribunal Division Bench Dhaka-1 is justified maintaining ex-parte assessment order and the order of first appeal ignoring the provision of section 94(1A) of the Income Tax Ordinance 1984 regarding limitation of assessment.*
>
> *(iv)In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1 was justified directing the DCT concerned to make assessment again.*
>
> *(v) In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1, was justified maintaining the proceeding under section 93 of the Income Tax Ordinance 1984 as made by the DCT and subsequently was confirmed by the first appellate authority.*

41. In the instant case it appears from the Assessment order Annexure-A for the assessment year 2005-2006 that admittedly the Assessee-applicant submitted its return on 19.9.2005 under the provision of section 83A of the Income Tax Ordinance 1984 known as Self Assessment Scheme, prevailing at the relevant period. The provision of section 83A(2) of the Income Tax Ordinance 1984 provides for selecting such return by the National Board

of Revenue for the purpose of audit upon some condition precedent and to direct DCT concern to reassess the same, if so required upon holding the audit. The provision of section 83A of the Income Tax Ordinance 1984, prevailing at the relevant time, is reproduced below for better appreciation;

42. ***Income Tax Ordinance 1984***
Section 83A. Self assessment.-

1) Notwithstanding anything contained in this Ordinance, where the return of income for any income year filed by an assessee, in accordance with the rules for self assessment made by the Board for that year or any instructions or orders issued thereunder, the Deputy Commissioner of Taxes shall receive such return himself or cause to be received by any other official authorized by him and issue a receipt of such return with signature and official seal affixed thereon and the said receipt shall be deemed to be an order of assessment under section 82 for the assessment year for which the return is filed.

2) Notwithstanding anything contained in sub-section (1) and section 93, the Board or any authority subordinate to the Board, if so authorized by the Board in this behalf, may select, in the manner to be determined by the Board, of the returns filed under sub-section (1) and refer the returns so selected to the Deputy Commissioner of Taxes for the purpose of audit and the Deputy Commissioner of Taxes shall thereupon proceed, if so required, to make the assessment under section 83 or section 84, as the case may be:

3) .....

4) .....

5) Notwithstanding anything contained in this section the Deputy Commissioner of Taxes may initiate proceedings under section 93 if definite information regarding concealment of income comes to his possession.

43. In the instant case the provision of section 83A(2) of the Income Tax Ordinance 1984 was admittedly not invoked by the National Board of Revenue at the due point of time, rather the DCT concern upon the investigation made by the Central Intelligence Cell (CIC) of the National Board of Revenue, initiated proceeding under section 93 of the Income Tax Ordinance 1984 to reopen the said return, which was earlier treated as deemed to have been finalized the tax liability of the Assessee-applicant, upon grant of receipt, under the provision of section 83A(1) of the Income Tax Ordinance 1984. But as the provision of section 83A was amended by the Finance Act 2003 inserting sub-section (5) providing the applicability of the provision of section 93 of the Income Tax Ordinance 1984, the DCT concerned was on bounden duty to follow the terms and condition of the provision of section 93 of the Income Tax Ordinance 1984, if the DCT desires to invoke such provision. The prime consideration for invoking the provision of section 93 is the definite information came to the possession of the DCT concerned. Here in this case it appears that the DCT concerned relied upon investigation report sent by the Central Intelligence Cell (CIC) which found bank deposit was not disclosed in the self assessment return, upon which DCT assessed the tax liability of the assessee applicant. But further appears that the taxes appellate tribunal found that the DCT concern although reopened the deemed finalized assessment order under the provision of section 93 and assessed the tax liability of the assessee-applicant for that assessment year, yet the DCT concern did not issue any notice under section 93 of the Income Tax Ordinance 1984 upon the assessee-applicant and as such the assessment made by the DCT concern under section 93 of the Income Tax Ordinance 1984 is not sustainable and accordingly the Taxes Appellate Tribunal set aside the assessment made by the DCT concern. But

surprisingly the Taxes Appellate Tribunal remanded the case to the DCT concern for fresh assessment after serving notice under section 93 of the Income Tax Ordinance 1984. This order of remand is a palpable illegality, since in the meantime the authority to reopen the deemed finalized assessment is infested with limitation under the provision of section 93(3)(b) of the Income Tax Ordinance on the date of remand order, which was passed on 27.03.2013. Therefore, the questions formulated in this respect are required to be answered in negative and in favour of the Assessee-applicant.

44. In Income Tax Reference Application No. 307 of 2013 and Income Tax Reference Application No. 306 of 2013 the Assessee-applicant formulated identical questions of law challenging the legality and propriety of the imposition of penalty under section 128 of the Income Tax Ordinance 1984 in the following language;

(i) In the circumstances and on the facts, whether the Taxes Appellate Tribunal, was justified maintaining unauthorized ex-parte assessment order u/s 128 of the ordinance and subsequent appeal order passed by the first appellate authority.

(ii) In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1 is justified maintaining separate ex-parte assessment order u/s 128 and the order of first appeal.

(iii)In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1, was justified maintaining the separate proceeding under section 128 of the Income Tax Ordinance 1984.

45. The DCT concern upon assessing the tax liability of the Assessee-applicant for the assessment years 2004-2005 and 2005-2006 under the provision of section 93 of the Income Tax Ordinance 1984, found that the Assessee-applicant has concealed his income for those two assessment years and accordingly the DCT concern has initiated a proceeding under the provision of section 128 of the Income Tax Ordinance 1984 for imposition of penalty. The provision of section 128 of the Income Tax Ordinance 1984 reads as follows;

46. ***Income Tax Ordinance 1984***

Section 128. Penalty for concealment of income-

(1) Where, in the course of any proceeding under this Ordinance, the Deputy Commissioner of Taxes, the Appellate Joint Commissioner, [the Commissioner (Appeals) or the Appellate Tribunal is satisfied that any person has, either in the said proceeding or in any earlier proceeding relating to an assessment in respect of the same income year,-

a) concealed particulars of his income or furnished inaccurate particulars of such income; or

b) understated the value of any immovable property in connection with its sale or transfer with a view to evading tax

[he or it shall impose upon such person a penalty of ten percent] of tax which would have been avoided had the income as returned by such person or as the case may be, the value of the immovable property as stated by him been accepted as correct.

Provided that if the concealment referred to in clause (a) and (b) of this sub-section or sub-section (2) is detected after a period of more than one year from the year in which the concealment was first assessable to tax, the amount of penalty shall increase by an additional ten percent for each preceding assessment year.

Provided that where concealment referred to in this sub-section is in a case where the assessment of tax was made by the assessee himself in accordance with any rule

made in this behalf and accepted by the Deputy Commissioner of Taxes as correct, the words "two and a half times" occurring in this sub-section shall be read as "five times]

(2) For the purpose of sub-section (1), concealment of particulars of income or furnishing of inaccurate particulars of income shall include-

a) The suppression of any item of receipt liable to tax in whole or in part, or

b) Showing any expenditure not actually incurred or claiming any deduction therefor.

[(2A) Notwithstanding anything contained in sub-section (1) and (2), in a case where a certificate is issued by a chartered accountant as to the correctness of the total income of an assessee under the first proviso to section 82 it is subsequently discovered by the Deputy Commissioner, the Appellate Additional Commissioner, the Commissioner (Appeal) or the Appellate Tribunal that the chartered accountant wilfully or knowingly withheld any information relating to the particulars of such income, he or it may impose upon such chartered accountant a penalty of a sum not exceeding two and a half times the amount of tax which would have been avoided had the total income as certified by such chartered accountant been accepted as correct.

(3) Notwithstanding anything contained in sub-section (1) and (2), in a case where a certificate is issued by a chartered accountant as to the correctness of the total income of an assessee under the [first or the second proviso] to section 82 it is subsequently discovered by the Deputy Commissioner of Taxes, the Appellate Joint Commissioner, the Appellate Additional Commissioner, the Commissioner (Appeal) or the Appellate Tribunal that the chartered accountant willfully or knowingly withheld any information relating to the particulars of such income, he or it may impose upon such chartered accountant a penalty of a sum not exceeding two and a half times the amount of tax which would have been avoided had the total income as certified by such chartered accountant been accepted as correct.

47. In this respect this court in the case of Abul Kalam-Vs-The Commissioner of Taxes in Income Tax Reference Application No. 397 of 2010 heard and disposed off along with Income Tax Reference Application No. 398 of 2010, Income Tax Reference Application No. 399 of 2010 and Income Tax Reference Application No. 400 of 2010, decided that issue of imposition of penalty has to be decided in the original proceeding either under the provision of section 93 of the Income Tax Ordinance 1984 or in any other relevant proceeding and no further step under the provision of section 128 of the Income Tax Ordinance 1984 could be taken without first deciding the issue of imposition of penalty in the original proceeding.

48. But in the instant case the DCT concern simultaneously with the initiation of reopening of the case under the provision of section 93 of the Income Tax Ordinance 1984, commenced the proceeding under the provision of section 128 of the Income Tax Ordinance 1984, although no concealment of tax could be imagined before the proceeding under section 93 of the Income Tax Ordinance 1984 is concluded. Therefore, imposition of penalty under the provision of section 128 of the Income Tax Ordinance 1984 upon the Assessee-applicant for the two assessment years are palpable illegality which was required to be considered by the Taxes Appellate Tribunal, which erroneously remanded the proceeding under the provision of section 128 of the Income Tax Ordinance 1984 to the DCT concern. Therefore, the question as has been formulated in respect to this issue is required to be answered in negative and in favour of the Assessee-applicant.

49. Under the reasoning and discussion as above, this court finds merit in these four Income Tax Reference Applications which are required to be allowed by answering the questions, as have been formulate by the Assessee-applicant in negative and in favour of the Assessee-applicant.

50.In the result, these four Income Tax Reference Applications are allowed.

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

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

3 SCOB [2015] HCD 37

HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 144 OF 2008

Mark Construction Limited
Represented by the Managing Director 56, Inner Circular Road (VIP Road) Eastern Trade Centre
12th Floor, Room No. 1-3
Naya Paltan, Dhaka-1000

… Petitioner

Versus

Chief Engineer (Project),
Rural Electrification Board
Dhaka and others
… Respondents

Mr. Md. Zakir Hossain
… For the petitioner

Mr. A. B. Siddique
… For respondents No. 1

Heard on the 12th & 18th August
And
Judgment on the 18th August, 2015

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

Constitution of Bangladesh
Article 102:
The writ petition is not maintainable on two counts,- firstly, due to the reason that the dispute arose out of simple commercial contract and not out of statutory contract and secondly, there is no scope to avail writ jurisdiction as there is an equal efficacious alternative forum to settle the dispute through amicable settlement under clause 54.1, adjudication under clause 54.2 and arbitration under clause 54.3 of section 3 of the GCC between the parties. ... (Para 13)

Judgment

Zinat Ara, J:

1. On an application under article 102 of the Constitution, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned letters being স্মারক নং পবিবো /তপ্র (ডি) /এনআরজি-২৩/২০০৭/৮৬৪, স্মারক নং পবিবো /তপ্র(ডি) /এনআরজি-২৫ /২০০৭ /৮৬৫ and স্মারক নং পবিবো /তপ্র(ডি) /এনআরজি-২৮ /২০০৭ /৮৬৬ all of dated 09.12.2007 (Annexures-O, O-1 and O-2 to the Writ Petition) issued by respondent No. 2, should not be declared to have been issued without lawful authority and are of no legal effect and/or pass such other or further order or orders as to this court may seem fit and proper.

2. The petitioner, Mark Construction Limited, is a company engaged in the business of construction. The Office of the Rural Electrification Board (hereinafter stated as REB) published a notice inviting tenders for construction work of 21 items including the works of constructions of office-cum-ware house building, 'D' type building and 'F-2' type building at Barabo, Sonargoan, Narayangonj. The petitioner participated in the said tenders and its tenders were accepted. Thereafter, award was given in favour of the petitioner for three separate works, namely, office-cum-ware house building, 'D' type building and 'F-2' type building. After the award, the petitioner found that the construction site was not ready for construction and even earth filling was not started. So, on 01.02.2007, the petitioner filed three separate applications to REB expressing that it would execute the 10% performance guarantees after preparation of the construction site. The Superintending Engineer (Project) of REB by letter dated 06.02.2007 requested the petitioner to execute performance guarantees for the works as per the terms and conditions of the award. In the circumstances, the petitioner on 22.02.2007 filed an application to the Executive Engineer, REB to hand over the site for construction, but without any result. Eventually, the petitioner under compelling situation had to execute performance guarantees for three works and by separate three letters, he informed the Superintending Engineer (Project), REB that he has executed three performance guarantees for the aforesaid works. Thereafter, Contract Agreements for three works were signed between the petitioner and REB with certain terms and conditions. The duration of the project was upto June, 2008 and the notification of award was issued on 28.01.2007 for three construction works. Though the petitioner executed performance guarantees and applied for handing over the site for constructions, but without any result. Under the circumstances, the petitioner could not start the construction works, as the site was not handed over to it for the purpose of constructions. Thereafter, the petitioner repeatedly requested in writing to the authority to hand over possession of the construction site and then submitted applications stating that the price of construction materials has been enhanced 30% higher since execution of the Contract Agreements and so, prayed for enhancing the rate of construction works upto 20%, otherwise it would not be possible for it to do the construction works. It also prayed for return of the performance guarantees with compensation, but REB did not take any step. The petitioner filed applications to REB for handing over possession of the construction site and for enhancement of rate of construction works repeatedly, but without action. Eventually, on 09.12.2007, Superintending Engineer (Project), REB issued a letter to the petitioner to start construction works and to take necessary steps in this regard, failing which the performance guarantees i.e. security money would be encashed and action would be taken against the petitioner from participation in any tender. REB committed breach of contract causing serious damage to the petitioner intentionally and they are going to encash the 10% performance guarantees unlawfully violating the terms and conditions of the Contract Agreement malafide.

3. In the backdrop of the aforesaid facts and circumstances, the petitioner filed this writ petition and obtained the Rule.

4. The petitioner filed a supplementary affidavit mostly re-iterating the same facts and further stating that REB on 13.11.2007, wrote a letter for construction of one-storied building and gave such proposal, but it was not possible for the petitioner to do so and the petitioner, in reply to the said letter, informed the same to REB on 13.11.2007 and requested them to return the performance guarantees. The petitioner also annexed the copy of the Contract Agreement executed between the petitioner and REB.

5. Respondent No. 1 filed an affidavit-in-opposition as well as a supplementary affidavit-in-opposition controverting the statements made in the writ petition contending, inter-alia, that the construction site was low and 14 feet earth filling was necessary before any construction and so, site could not be handed over to the petitioner within seven days from the date of execution of performance guarantees by the petitioner. The petitioner filed the writ petition without resorting to the provisions of adjudication as per clause 54.2 and arbitration as per clause 54.3 of section 3 of the General Conditions of Contract (the GCC, in brief) and without exhausting the said provisions of adjudication and arbitration, the instant writ petition is not maintainable and therefore, the Rule is liable to be discharged.

6. Mr. Md. Zakir Hossain, the learned Advocate for the petitioner, takes us through the writ petition, the supplementary affidavit thereto and the connected materials on record and submits that the petitioner repeatedly asked for handing over the site for the construction works, but the respondents did not hand over the site to the petitioner within seven days from the date of signing of the Contract Agreement between the parties as per clause 21.1 of the GCC. In this connection, he has referred to clause 21.1 of the GCC (Annexure-Q to the supplementary affidavit). He submits that although the respondents did not hand over the site to the petitioner as per the GCC, but they have unlawfully asked the petitioner to construct part of the construction works only after nine months from execution of the Contract Agreement between the parties, though the petitioner informed them for enhancing the rate of construction works, as, within this period, the price of construction materials had grown up. He next submits that the respondents, without considering the petitioner's repeated representations and applications, unlawfully issued the impugned order for encashment of performance guarantees and therefore, the Rule is liable to be made absolute.

7. In reply, Mr. A. B. Siddique, the learned Advocate for respondent No. 1, contends that from the GCC, it is evident that in case of any dispute arose between the parties relating to the Contract Agreement, there is a provision of amicable adjudication as per Clause 54.2. There is also a provision of arbitration as per Clause 54.3 under section 3 of the GCC. He next contends that the petitioner had equal efficacious remedy in the forums of adjudication/arbitration as per clauses 54.2 and 54.3 of section 3 of the GCC, but the petitioner has not availed those forums and therefore, the instant writ petition is not maintainable and the Rule is, thus, liable to be discharged.

8. We have examined the writ petition, the supplementary affidavit thereto, the affidavit-in-opposition and supplementary affidavit-in-opposition thereto and the connected materials on record.

9. There is no dispute that the petitioner participated in the tender and obtained work orders for construction of office-cum-ware house building, 'D' type building and 'F-2' type building. Admittedly, the Contract Agreement was executed between the parties on 28.02.2007. There is no dispute that the petitioner repeatedly asked the respondents not to execute performance guarantees before handing over the site to it. There is also no dispute that after execution of the Contract Agreements, it was found that the site, on which the construction had to be made, needs 14 feet earth filling. Further, the respondents could not hand over possession of the site to the petitioner for construction works for nine months after execution of the Contract Agreement for no fault of the petitioner. It is also admitted that though the petitioner was awarded the construction works, but the respondents, eventually, asked it to make construction of a one-storied building and did not ask it to complete all the

construction works and that was also within a very short period. Admittedly, in the circumstances, the petitioner refused to work inasmuch as, meanwhile, the price of construction materials had grown up and the petitioner also asked for return of the security (the rest performance guarantees).

10. Under clause 21.1 of the GCC, the employer shall give possession of the site to the contractor within seven days from the date of performance security or after signing of the Contract Agreement.

11. In the instant case, though the petitioner submitted performance guarantees and signed the Contract Agreement, but violating the said clause, REB failed to hand over the possession of the site to the petitioner for the construction works. Therefore, the aforesaid action of REB cannot be said to be lawful.

12. Be that as it may, from clauses 54.1, 54.2 and 54.3 of section 3 of the GCC, it transpires that there are provisions for amicable settlement of dispute under clause 54.1 between the petitioner and REB. Similarly, there is provision of adjudication under clause 54.2 of the GCC between the petitioner and REB relating to decision taken by the Superintending Engineer of REB in writing. There is also another provision of arbitration under clause 54.3 of the GCC which reads as under:-

> "54.3 Arbitration
>
> (a) If either of the Party is dissatisfied with the decision, or if the Adjudicator fails to give a decision within twenty-eight (28) days of a dispute being referred to, then either of the Parties may, within twenty-eight (28) days of such reference, give notice to the other party, with a copy for information to the Adjudicator, of its intention to commence arbitration.
>
> (b) The arbitration shall be conducted in accordance with the Arbitration Act (Act 1 of 2001) of Bangladesh as at present in force."

13. Thus, it appears that the writ petition is not maintainable on two counts,- firstly, due to the reason that the dispute arose out of simple commercial contract and not out of statutory contract and secondly, there is no scope to avail writ jurisdiction as there is an equal efficacious alternative forum to settle the dispute through amicable settlement under clause 54.1, adjudication under clause 54.2 and arbitration under clause 54.3 of section 3 of the GCC between the parties. For the aforesaid reasons, there is no scope to avail writ jurisdiction.

14. Mr. Md. Zakir Hossain, the learned Advocate for the petitioner, submits that the petitioner is now willing to settle the dispute through amicable settlement/adjudication /arbitration under clauses 54.1/54.2/54.3 of section 3 of the GCC.

15. In the above facts and circumstances, we are of the view that the Rule may be disposed of without going into the merit of the case unnecessarily.

16. Accordingly, the Rule is disposed of with liberty to the petitioner to approach the respondents to settle the dispute through amicable settlement/adjudication/arbitration as per clauses 54.1/54.2/54.3 of section 3 of the GCC within thirty days from the date of receipt of the certified copy of the judgment by the petitioner.

17. The respondents are directed not to encash the performance guarantees/security within the aforesaid period of thirty days.

18. If the petitioner avails the aforesaid forums within the aforesaid period, the respondents shall not encash the performance guarantees, failing which, the respondents may proceed in the matter further in accordance with law.

19. No costs.

20. Communicate the judgment to respondent No. 1 at once.

3 SCOB [2015] HCD 42

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION NO. 2515 of 2012

Eastern Money Changer
…… Petitioner.

-Versus-

Bangladesh Bank and others
… Respondents.

Mr. Masood Reza Sobhan with Mrs. Fatema S. Chowdhury, Mr. A.F.M. Saiful Karim, Advocates.

… For the petitioner.

Mr. Md. Abdun Nur with
Mr. Md. Hafizur rahman, Advocate.

… For the respondents.

Judgment on 06 March, 2014.

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Ashraful Kamal

Constitution of Bangladesh
Article 40:
In the case in hand cancellation of license was indeed an unbridled arbitrary outcome of executive feat which certainly had indulged in excesses. The act has a curtailing effect upon Article 40 of the Constitution in particular. It has flouted Article 40 of the Constitution directly. The Constitution being the Supreme law of the land the framers of the same in their wisdom have made some provisions protecting the right of the citizen. To do lawful business or trade subject to restriction of law is one of those provisions which can not be curtailed or throttled in any manner by any authority.
... (Para 16)

Judgment

Md. Ashfaqul Islam,J:

1. Eastern Money Changer, a Partnership Concern challenging the cancellation of license issued by the respondent No.1 Bangladesh Bank moved this Writ Petition and obtained the present Rule under the following terms:-

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned Memo No.EEPD (LDA) 144/538/2012-168, 169 dated 05.03.2012 issued by the respondent No.1 under the signature of the respondent No. 3 Deputy General Manager, Bangladesh Bank canceling the Money Changer License No.বৈমুনী (অবা)১৪৪/৯৮-২৫০৫ dated 19.10.1998 (Annexure- "B") shall not be declared to have been issued without lawful authority and is of no legal effect."

2. Facts relevant for disposal of the Rule, inter alia, are that the petitioner is a partnership firm and has been running its business as Money Changer since 1998 after obtaining License No. বৈমুনী (অবা)১৪৪/৯৮-২৫০৫ dated 19.10.1998. His License has been renewed time to time. Respondent No. 1 Bangladesh Bank on 5.3.2012 issued Memo No.EEPD (LDA)

144/538/2012-168, 169 dated 05.03.2012 under the signature of the respondent No. 3 Deputy General Manager Foreign Exchange Policy Department Bangladesh Bank canceling the petitioner's said license (Annexure- "B").

3. In the petition it has been stated that in strict compliance of all the provisions of Foreign Exchange Regulation Act, 1947 the petitioner had been running its business. On 05.12.2011 a team led by the Joint-Director of the respondent No. 1 inspected the petitioner firm's premises and found that out of many only three separate transactions on separate dates were not recorded in the register of books of accounts from 1st to 5th of December, 2011. It has also been stated that the register of books of accounts were updated at once by recording the three transactions as mentioned above in respect of endorsements for travel purpose. By Annexure-"C" the petitioner explained books of accounts.

4. All of a sudden on 02.01.2012 the petitioner firm received a notice alleging irregularities found in inspection on 05.12.2011 and called for explanation from the petitioner on the same within seven days further asking him as to why his license would not be cancelled (Annexure- "D"). The petitioner firm accordingly on 11.01.2012 submitted its explanation to the respondents stating that the allegations made in the notice were not true and there were no latches whatsoever on the part of the firm (Annexure-"E"). It has been also stated that the license which was issued in the year 1998 to the petitioner allowed him to deal with all foreign currencies. The petitioner's long standing business extending over a period of 15 years remained unblemished except an occurrence at the behest of the petitioner's employees which was also handled by him with promptitude. That being the situation the petitioner impugns the Memo in question that has cancelled his license to do business as a Money Changer on the ground that the same has the curtailing effect on the fundamental rights of the petitioner as enshrined in Article 40 and 31 of the Constitution in particular and as such the same should be declared to have been issued with lawful authority and is of no legal effect.

5. Mr. Masood Reza Sobhan, the learned Counsel appearing with Mrs. Fatema S. Chowdhury, the learned Advocate for the petitioner after placing the petition and the relevant Annexures with it pressed into service several grounds. Their bone of contention is that the impugned notice has been issued without assigning any lawful reason and even without referring to any of the terms of the license or any of the provisions of Foreign Exchange Regulation Act 1947 which is arbitrary and malafide action of the respondents having curtailing effect upon the fundamental right of the petitioner guaranteed under the Constitution. Mr. Sobhan also argues that the license can be cancelled under section 3(2) (iii) of the Foreign Exchange Regulation Act 1947 (hereinafter referred to as Act) if Bangladesh Bank seems it fit to be done in a given situation. But this unfettered right, as he submits, should be exercised sparingly with due caution.

6. Mr. Sobhan placed reliance on the decision of Bangladesh vs. Tajul Islam reported in 49 DLR (AD) 177 in support of his contention. Highlighting the observations made in the said decision that the license is a legal privilege guaranteed under law and not a charity on a technical requirement or an ideal ceremony rather a mandate, he submits that a wrong has been committed exfacie by canceling the license of the petitioner. Mr. Sobhan concludes by submitting that the act of the respondent by which the license of the petitioner has been cancelled certainly is an act tainted with unbridled and capricious decision of the respondents which certainly had indulged in excessess. Therefore, he submits that in all fairness this Rule

should be made absolute declaring the order impugned against to be illegal and without any lawful authority.

7. Mr. Md. Abdun Nur, the learned counsel appearing on behalf of the respondent Bangladesh Bank by filing affidavit-in-opposition and supplementary affidavit-in-opposition, on the other hand, opposes the Rule and submits that Eastern Money Changer is not a legal person and as such writ petition is not maintainable on that score. It has been stated in affidavit-in-opposition that the license was issued to the petitioner with condition that it will follow the instructions of the Bangladesh Bank. He also placed reliance on FE Circular No.02 dated 14.01.1997 in this context wherein it has been stated in Clause 6 as under:

"ক্রয় বিক্রয়ের বিস্তারিত বিবরণ সঠিক এবং সম্পূর্ণ ভাবে হিসাব বহিতে সংরক্ষণ করিতে হইবে। সকল রেকর্ডপত্র ও হিসাব বহি সমূহ নির্দেশিত হওয়া মাত্র বাংলাদেশ ব্যাংকের পরিদর্শকগণের নিকট উপস্থাপনের জন্য প্রস্তুত রাখিতে হইবে।"

8. He submits that in utter disregard the petitioner has defaulted to comply with the said Circular. Consequently he was served with the show cause notice calling for explanation on 05.10.2011. There was also a repetition of such act. Lastly he contends that the petitioner was not up-to date in maintaining its register books wherefrom false interpolation etc was detected. The enquiry team found that the petitioner manipulated Encashment Certificate No.1420 dated 01.12.2011 where there was a insertion of U.S.$ 4,000 manipulating of U.S.$ 2,000/- But corresponding payment in Bangladeshi taka remained unchanged for Tk.1,55,000/- which prima facie proves their true manipulation from the side of the petitioner. It has been also alleged that manipulation of this kind has also been done in other certificate No.10733 dated 03.12.2011 (Annexure-4, 4-A and 4-B). He submits that though the petitioner gave explanation to the notice of the respondent Bangladesh Bank but it does not hold good being bereft of any legal support or sanction. The petitioner was given ample opportunity to reply the show cause notice and as such no question of violation of his fundamental right as submitted by the learned counsel of the petitioner can be resorted to in the instant petition for which the Rule is liable to be discharged outright.

9. That being the position the only question that needs to be addressed in this petition is whether under the facts and circumstances and the relevant laws on the subject the cancellation of the license of the petitioner has been justified.

10. We have heard the learned counsel of both sides at length and considered their submissions. We have also perused the papers and documents submitted by the parties carefully.

11. On the question of maintainability of the instant Writ Petition the law is well settled. Writ petition can be well founded against the partnership concern. This proposition of law is no longer a resintegra and needs no elaboration. Further in Bangladesh Telecom (Pvt.) Ltd. Vs T & T 48 DLR (AD) 20 it was held that a Writ petition cannot be resisted when a licence granted in exercise of statutory power.

12. In order to appreciate the central issue before us it would be worthwhile to quote the pertinent law by which the license of the petitioner has been cancelled. Section 3(2)(III) of the Foreign Exchange Regulation Act 1947 states:

"3. Authorized dealers in foreign exchange-

(1)The Bangladesh Bank may, on application made to it in this behalf, authorize any person to deal in foreign exchange.

(2) As authorization under this section.

(i) May authorize dealing in all foreign currencies or may be restricted to authorizing dealings in specified foreign currencies only.

(ii) May authorize transactions of all descriptions in foreign currencies or may be restricted to authorizing specified transactions only.

iii) May be granted to be effective for a specified period of within specified amounts, and may in all cases be revoked for reasons appearing to if sufficient by the Bangladesh Bank."

13. On a plain reading of section it reveals that in a fit case Bangladesh Bank certainly can take any decision for revoking license of any person which has been issued for a fixed period. The right reserved under law unquestionably is unfettered and absolute right. But when we glean the entire scenario of the case a question pertinently comes to our mind whether the manner by which the license of the petitioner had been cancelled was well justified in exercising its jurisdiction under the quoted law. The answer would be clarified upon the discussion of another vital aspect which has been unveiled by my brother Justice Md. Ashraful Kamal. He pointed out that there are some remedial provisions in the Act itself viz, section 23 read with section 22 and section 19 which the respondents under the situation could have resorted to and could very well proceed against the petitioner instead of canceling his license. I also endorse my brother's view.

14. The Constitution of ours, which is the Supreme law of the land has protected and guaranteed some fundamental rights of the citizen. The provisions of the Constitution are self executing. Article 40 of the constitution in particular have a positive bearing on the issue which states:

"Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful"

Further Article 31 says:

"To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of very 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"

15. In the decision referred to above our Appellate Division while upholding the decision of this Division declaring cancellation of a license under section 14(1) of the Immigrant Ordinance, 1982 to be illegal observed:

"A license in a commercial sense is not a charity done to a person but a privilege accorded generally on payment of a fee. Under section 10 of the Ordinance a licensee is required to pay "such security and fee as may be prescribed". The respondent paid Taka 5 lakh as security which was liable to be forfeited upon cancellation of the license. So, the cancellation of a license is a serious matter adversely touching a person's pecuniary interest, more than that, it affects a fundamental right of a citizen to conduct any lawful trade or business subject to certain restrictions imposed by law. The Court would always insist that an authority exercising such a drastic power of cancellation acts strictly according to law and always with fairness."

16. In the case in hand cancellation of license was indeed an unbridled arbitrary outcome of executive feat which certainly had indulged in excesses. The act has a curtailing effect upon Article 40 of the Constitution in particular. It has flouted Article 40 of the Constitution directly. The Constitution being the Supreme law of the land the framers of the same in their wisdom have made some provisions protecting the right of the citizen. To do lawful business or trade subject to restriction of law is one of those provisions which can not be curtailed or throttled in any manner by any authority. In the case of Chairman REB v Abdul Jalil 3 B LC (AD) 79 upholding the decision of the High Court Division reported in Abdul Jalil v REB 45 DLR 24, the Appellate Division maintained that the decision taken by Rural Electrification Board (REB) barring all ex-employees of the Board from participating in any tender is unreasonable as offended to Article 40 of the Constitution.

17. Inevitably this mandate of the Constitution deserves protection by our interference in the context of the case. Lord Denning also preached the same ideal when he said "Silence in not an option when things are ill-done". [R. Vs Metropolitan Police Commissioner (1968) 2 All.E.R-139] we are not oblivious but alive to that saying.

18. Fortified with the decisions of the Appellate Division as referred to above, in particular 49 DLR (AD) 177 all of which are binding on us and conjunct with the observations of our own we are of the view that the act of the respondents canceling the license of the petitioner has been done without lawful authority having no legal effect.

19. In the result, the Rule is made absolute. The order impugned against is declared to have been issued without lawful authority and is of no legal effect and as such set aside.

20. Communicate this order at once.

3 SCOB [2015] HCD 47

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 8967 of 2014

Abdul Jalil Biswas
…… Petitioner

-Versus-

Bangladesh, represented by the Secretary, Ministry of Housing and Public Works Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Ramna, Dhaka and others.
……Respondents

Mr. M.I. Farooqui, Senior Advocate with
Mr. M. Sadequr Rahman, Advocate with
Ms. Najneen Nahar, Advocate
…. For the petitioner.
Mr. Md. Shahidul Islam, DAG with
Mr. Sukumar Biswas, AAG
…… For the Respondents

Date of Hearing : 21.04.2015 & 22.04.2015
Date of Judgment : 23.04.2015

Present:
Mr. Justice Zubayer Rahman Chowdhury
And
Mr. Justice Mahmudul Hoque

Abandoned Buildings (Supplementary Provision) Ordinance, 1985
In our view, the petitioner had rightly approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, as his case was found to be barred by limitation and since he had no other equally efficacious remedy to enforce his rights, the petitioner was entitled to invoke the writ jurisdiction. ...(Para 23)

Judgment

Zubayer Rahman Chowdhury, J:

1. By the instant Rule, the petitioner seeks to challenge the enlistment of the property, being House No. B/10, Block E, Zakir Hossain Road, Mohammadpur, Dhaka in the 'Kha' list of Abandoned Buildings published in the Bangladesh Gazette Extra Ordinary dated 23.09.1986 (at page no. 9764 (19) at serial no. 4) as well as the judgment dated 13.02.2014 passed by the 1st Court of Settlement, Dhaka in Case No. 25 of 2005 dismissing the same.

2. The Rule is being opposed by respondent no. 1 (Government of Bangladesh) by filing an affidavit-in-opposition.

3. Relevant facts necessary for disposal of the Rule are that the property in question, measuring more or less 144 square yards and located at Plot No. B/10, Block E, Zakir Hossain Road, Mohammadpur, Dhaka with a house built thereon (hereinafter referred to as

the property) was allotted to one Abdul Wahab Tarafder on 23.12.1959 for a period of 99 years on certain terms and conditions. Upon execution of the said Lease Deed, being Lease No. 606 dated 21.01.1960 the vacant possession of the property was handed over to Abdul Wahab Tarafder, who subsequently sold the same to the petitioner by registered Sale Deed No. 5222 dated 11.06.1964 and the possession of the said property was also handed over to the petitioner.

4. Upon purchasing the said property, the petitioner obtained approval of a plan for constructing a two storied building thereon from the then DIT (presently RAJUK) on 06.12.1968, which was subsequently revised on 07.02.1980 and instead, an approval was obtained for constructing a four storied building on the said property. At the relevant time, as the petitioner was serving as an Officer of the then State Bank of Pakistan (now Bangladesh Bank), he obtained a loan from the Bank by mortgaging the said property with the Bank.

5. While being the absolute owner and possessor, the petitioner mutated his name in respect of the said property and also obtained gas, electricity and WASA connection therein. At the time of RS and Dhaka City Survey, the petitioner's name was duly recorded in the RS and Dhaka City Khatians.

6. The petitioner retired from service on 31.10.1992 as Deputy General Manager of Bangladesh Bank. Whilst he was in peaceful possession, occupation and enjoyment of the said property, it was listed in the Kha list of Abandoned Buildings, which was published in the Official Gazette on 23.09.1986. However, no notice was issued upon the petitioner prior to such enlistment. Subsequently on 14.08.1988, the petitioner came to know for the first time from one of his friend, a Senior Advocate of this Court, that the property in question has already been enlisted by the Government in the 'Kha' list of Abandoned Buildings.

7. Upon receiving the information, the petitioner filed an application on 25.08.1988 under section 7 of the Abandoned Buildings (Supplementary Provision) Ordinance, 1985 before the Court of Settlement, Dhaka for exclusion of the said property from the Kha list of Abandoned Buildings along with a prayer for condonation of delay, which was numbered as Case No. 25 of 2005. Upon hearing the parties, the First Court of Settlement, Dhaka by judgment dated 13.02.2014, dismissed the petitioner's case on the ground of limitation. Being aggrieved thereby, the petitioner moved this Court and obtained the instant Rule along with an order of stay.

8. Mr. M.I. Farooqui, the learned Senior Advocate appears with Mr. M. Sadequr Rahman and Ms. Najneen Nahar, the learned Advocates in support of the Rule, while the same is being opposed by Mr. Md. Shahidul Islam, the learned Deputy Attorney General appearing with Mr. Sukumar Biswas, the learned Assistant Attorney General and Ms. Mahfuza Begum, the learned Assistant Attorney General.

9. At the very outset, Mr. Farooqui refers to Annexure H, being the impugned judgment dated 13.02.2014 and submits that the Court of Settlement, Dhaka had dismissed the petitioner's case solely on the ground of limitation, although it found that all the documents relating to the property were in the possession of the petitioner, which had also been marked as Exhibits.

10. Mr. Farooqui submits that no notice was served upon the petitioner, although issuance of notice is mandatory prior to enlistment of a property as an abandoned building. However,

according to Mr. Farooqui, this mandatory provision of law has not been complied with, causing serious prejudice to the petitioner. Mr. Farooqui further submits that there was no basis whatsoever on the part of the Government for including the petitioner's property in the Kha list.

11. Referring to Annexure B, Mr. Farooqui submits that the Deed of Sale, which was executed on 11.07.1964, was marked as Exhibit No. 2 before the 1st Court of Settlement, Dhaka without any objection. Referring to Annexure C, Mr. Farooqui submits that it is evident therefrom that the petitioner had mortgaged the property with the Bank for the purpose of obtaining a loan. Referring to the schedule of property described in the loan documents, Mr. Farooqui submits that it is the very same property which has been sought to be enlisted by the Government as an abandoned building.

12. Mr. Farooqui submits that the petitioner deposed as PW 1 before the Court of Settlement, Dhaka and duly proved all the relevant documents in respect of the said house, which were marked as Exhibits 2-12 without any objection from the Government. However, the Court of Settlement, Dhaka dismissed the case mainly on the ground of limitation. Mr. Farooqui submits that although the Constitution has guaranteed the right to property, however, such right was being attempted to be curtailed without following the due process of law. In support of his contention, Mr. Farooqui has referred to the decisions reported in 45 DLR 1993 576, 49 DLR 1997 108 and 51 DLR (AD) (1999) 24.

13. On the other hand, Mr. Md. Shahidul Islam, the learned Deputy Attorney General (briefly, the DAG) appearing in opposition to the Rule submits that the property was correctly enlisted in the 'Kha' list. He further submits that the Court of Settlement, Dhaka had rightly dismissed the suit on the ground of limitation since the petitioner failed to avail the remedy, if any, within the statutory period. The learned DAG submits forcefully that the original lessee Abdul Wahab Tarafder had left the house uncared for during the war of liberation in 1971 and therefore, it was rightly enlisted as an abandoned building, as his whereabouts could not be traced.

14. The learned DAG submits that the present Deed of Sale, executed between Abdul Wahab Tarafdar and the petitioner on 11.06.1964, was invalid in the eye of law, being violative of clause 3 of the original Deed of Allotment, whereby the original allottee was precluded from selling or transferring the property unless a period of 10 years had been completed. Therefore, according to the learned DAG, the purported transfer from the original allottee in favour of the petitioner was illegal and consequently, it did not vest any ownership upon him and therefore, the enlistment of the said property by the Government in the 'Kha' list was rightly done. The learned DAG further contended that the petitioner did not file any utility Bills in respect of the said house to prove his occupation and possession therein between March 1971 and February 1972.

15. Lastly, the learned DAG submits that P.O. 16 of 1972 and Ordinance LIV of 1985, being special laws, the Court of Settlement, Dhaka had rightly held the suit to be barred by limitation. In support of his contention, the learned DAG had referred to the decisions reported in 48 DLR (AD) 10, 49 DLR AD 161, 57 DLR AD 167, 59 DLR AD 165, 61 DLR AD 15, 63 DLR (AD) 1, 1 BCL HD (2013) 8 and 3 BLC AD 42.

16. Refuting the contention advanced by the learned DAG that the property in question could not be transferred by the original allottee before the expiry of 10 years from the date of

allotment, the learned Advocate for the petitioner submits that there was a provision in the said Deed whereby the original allottee had the option to pay the full price of the property at any time during the subsistence of the lease and thereafter transfer the same. According to Mr. Farooqui, as the original allottee had paid the full price of the property in the meantime, the said transfer was valid in the eye of law.

17. We have perused the instant application together with the documents annexured thereto. We have also considered the submissions advanced by the learned Advocates of the contending sides.

18. In the instant case, Abdul Wahab Tarafder, who was an employee of the then State Bank of Pakistan, was allotted the house in question in 1960. Subsequently, while being in possession and occupation of the house, he transferred the same by executing a Deed of Sale dated 11.06.1964 in favour of Abdul Jalil Biswas, the present petitioner, who has been in occupation and possession of the property since then.

19. Ordinance LIV of 1985, namely The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 empowers the Government to enlist any property as an Abandoned Building which has been abandoned by its owner or occupier. However, in doing so, the Government is required to observe certain procedures including issuance of notice upon the owner or occupier prior to enlistment of the property as an "Abandoned Building". In the instant case, the property was enlisted in the Kha list, thereby implying that it was not vacant, but was occupied by some persons, who may or may not be the real owner. Nevertheless, a notice under section 5(1) (b) of the Ordinance of 1985 was required to be issued in the prescribed Form upon the owner/occupant before the property could be enlisted in the Kha list of Abandoned Buildings.

20. It is to be noted that although the Government appeared before the Court of Settlement, Dhaka and contested the case, not a single scrap of paper or document was filed to show that notice had been served upon the petitioner. It is also to be noted that the issues raised by the learned DAG appearing on behalf of the Government was neither raised nor agitated before the Court of Settlement, Dhaka.

21. In this context, we may profitably refer to the case of Zobon Nahar and other v. Bangladesh, reported in 49 DLR (1997) 108, where the facts of the case and the issues involved therein were very similar to the matter on hand. In that case, the Court held:

> "More so, where a statute requires a notice to be given before taking any action, service of notice to the concerned party, in that case becomes mandatory and failure to comply with this requirement renders such action ultra vires. We have already seen that both Articles 7 of the President's Order 16 and section 5 (1) (b) of the Ordinance 54 of 1985 require notice to be issued upon the person whose property is declared an abandoned property or enlisted in the 'Kha' list, but no such notice had been issued and served upon the petitioner in violation of the aforesaid provisions of law even though the petitioners have always been in possession of the case property."

22. The learned DAG submits that the petitioner had approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, having failed to achieve any positive result in the said Court, he has now invoked the writ jurisdiction. According to the learned DAG, the petitioner cannot do so as he has

already exhausted his available remedy before the Court of Settlement, which had found the suit to be barred by limitation.

23. In our view, the petitioner had rightly approached the Court of Settlement, Dhaka for releasing the property in question from the Kha list of Abandoned Buildings. However, as his case was found to be barred by limitation and since he had no other equally efficacious remedy to enforce his rights, the petitioner was entitled to invoke the writ jurisdiction. We are fortified in our view by the decision referred to earlier, reported in 49 DLR (1997) 108, where it was also held:

> "The right to enforce a fundamental right is another fundamental right which gives the petitioner right to move this court even though his application was rejected by Settlement Court on the ground of limitation ."
>
> (per K.M. Hassan, J, as he then was)

24. In the case of Government of Bangladesh v. ATM Mannan and others, reported in 1 BCL AD (2003) 8, referred to by the learned DAG, the Apex Court, while dealing with the issues of notice in respect of a property included the "Kha' list of Abandoned Buildings, held that since it was an official Act, the service of notice shall be presumed "to have been regularly performed", under section 114 (e) of the Evidence Act. While expressing our respectful agreement with the decision of the Apex Court, it is to be noted that in the aforesaid case, notice was admittedly served upon the occupant of the house. However, in the present case, there is no document to show that there was any service of notice upon the petitioner.

25. Be that as it may, having regard to the facts and circumstances of the case and having considered the submission advanced by the learned Advocate of both the sides and last but not least, in due deference to the decision referred to above, with which we express our utmost and respectful agreement, we are inclined to hold that the instant Rule merits positive consideration.

26. Accordingly, the Rule is made absolute.

27. The judgment dated 13.02.2014 passed by the 1st Court of Settlement, Dhaka in Case No. 25 of 2005 dismissing the same is set aside.

28. The respondent nos. 1, 2 and 3 are hereby directed to take positive steps to exclude the property namely, House No. B/10, Block- E, Zakir Hossain Road, Mohammadpur, Dhaka from the 'Kha' list of Abandoned Buildings, within a period of 60 (sixty) days from the date of receipt of the certified copy of the judgment passed today.

29. There will be no order as to cost.

30. The office is directed to communicate the order and send down the lower Court's record at once.

3 SCOB [2015] HCD 52

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 8925 OF 2012

Manabendra Chakrabarty and others
.....Petitioners
-Versus-

The Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Ramna, Dhaka and others
..... Respondents

Mr. A. B. Roy Chowdhury, Advocate
.....For the petitioners.

Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Mr. A.B.M. Mahbub, AAG
…..For the respondent no. 4.

Heard on 12.02.2015, 15.02.2015 and 08.03.2015.
Judgment on 15.03.2015.

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

Constitution of Bangladesh
Article 102 and 42
And
অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১:
It is a settled proposition of law that an aggrieved party may invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution straightaway provided the action impugned is malafide, even though there may be an alternative remedy available for him. Since we have found that the inclusion of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a vested property is malafide, the instant writ petition, as we see it, is maintainable. Besides, it has been clearly, categorically and unequivocally held in the decision in the case of the Government of Bangladesh represented by the Ministry of Works and another…Vs…Syed Chand Sultana and others reported in 51 DLR (AD) 24 that the writ-petitioners can come directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. So our definite finding is that the petitioners can come directly to the High Court Division for protection of their right to property as contemplated by Article 42 of the Constitution of Bangladesh, even though an alternative forum, that is to say, অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইব্যুনাল is available for necessary legal redress. ...(Para 20)

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 Gazette Notification dated 06.05.2012 published under the authority of the respondent no. 2 showing Holding Nos. 16, 16/A, 16/B, 16/C, 16/D and 16/E, Dinanath Sen Road, Gandaria, Dhaka belonging to the petitioners at serial nos. 468 and 618 in 'Ka' Schedule of the said Notification as a vested property pursuant to E. P. Case No. 152 of 1966 and E. P. M. C Case No. 1057 of 1961 (Annexure-'J' 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 case property consisting of Dhaka Municipal Holding Nos. 16, 16/A, 16/B, 16/C, 16/D and 16/E, Dinanath Sen Road, Dhaka was originally owned and possessed by one Tarak Bandhu Chakrabarty. Accordingly, the concerned C. S. and S. A. Khatians were correctly prepared in his name. Anyway, on 18.08.1931, he executed a will in favour of his 5(five) sons. Thereafter, he died on 30.05.1964 and his 4th son, namely, Hemendra Kumar Chakrabarty being the executor of the will filed Probate Case No. 21 of 1967 on 06.11.1968 in the Court of District Judge, Dhaka stating that under the will, no one of the sons was given any proprietary right; but only a right of residence and if any of his sons quit, the abandoned portions of the case property would be possessed by others who would be residing there; but they would not be entitled to let out the same to anybody or induct any stranger therein. However, the Additional Deputy Commissioner (Revenue) and Assistant Custodian of Enemy Property (Lands and Buildings), Dhaka declared the case property as an enemy property by his order dated 20th June, 1967. As such, Hemendra Kumar Chakrabarty, grandfather of the petitioners, filed Writ Petition No. 366 of 1967 before the then Dhaka High Court, East Pakistan under Article 98 of the Constitution of the Islamic Republic of Pakistan, 1962 stating that under the will executed by Tarak Bandhu Chakrabarty, Hemendra Kumar Chakrabarty had an exclusive right and possession in the case property and in this perspective, the order of the Assistant Custodian treating the same as an enemy property is illegal. Hemendra Kumar Chakrabarty further stated in the earlier Writ Petition No. 366 of 1967 that the Municipal Holding No. 16 was leased out to one Afazuddin; but on his objection, the lease in favour of Afazuddin was cancelled on 20.06.1967 and by the same order, the case property was treated as an enemy property and the authority asked Hemendra Kumar Chakrabarty to deposit the lease money in order to take lease of the property in question. Eventually the Rule issued in the Writ Petition No. 366 of 1967 was made absolute by the then Dhaka High Court by its judgment and order dated 17th December, 1969. Subsequently the Assistant Custodian of Enemy Property (Lands and Buildings) and Additional Deputy Commissioner (Revenue), Dhaka released the entire case property from the list of enemy properties by issuing 2(two) Memos dated 05.06.1970 and 24.06.1972. Moreover, the Deputy Commissioner, Dhaka released the same by his Memo No. জেঃপ্রঃঢাঃ/অর্পিত/২৬১৮(৩) ২০০৮ dated 28.08.2008. In due course, Mutation Khatian was made in the names of Santosh Kumar Chakrabarty, Sudhir Kumar Chakrabarty, Ziban Kumar Chakrabarty and Nabo Kumar Chakrabarty, sons of Hemendra Kumar Chakrabarty and being the grandsons of Hemendra Kumar Chakrabarty, the petitioners have been possessing the case property on the basis of the probated will and they have been paying rent to the Government in respect thereof. At one stage, the petitioner no. 4 Jitendra Kumar Chakrabarty, son of late Jiban Kumar Chakrabarty, brought Title Suit No. 291 of 2004 in the 1st Court of Joint District Judge, Dhaka for partition of the case property and allotment of separate sahams by metes and bounds against the present petitioner nos. 1, 2, 3, 5, 6 and 7 and subsequently the suit was decreed in part in respect of the case property on the strength of a solenama dated 30.01.2005. Having obtained a part decree in Title Suit No. 291 of 2004, the petitioners have been possessing the case property and got their names mutated in the

records of the Government and have been paying rent to the Government in respect of the same. While the petitioners have been owning and possessing the case property as per the terms and conditions of the solenama dated 30.01.2005 filed in Title Suit No. 291 of 2004, the respondent no. 2 published a Gazette Notification on 06.05.2012 showing the case property as a vested property along with other properties of Dhaka District under Schedule 'Ka'. The listing of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a vested property is without lawful authority and of no legal effect.

3. The respondent no. 4 has contested the Rule by filing an Affidavit-in-Opposition. His case, as set out in the Affidavit-in-Opposition, in short, is as follows:

4. The owner of the case property left Bangladesh for India during the communal disturbance of 1947 and the same became an evacuee property. In 1961, the Government took over the management of the case property vide E.P.M.C. Case No. 1057 of 1961 and the same was leased out to its existing occupants. The Assistant Custodian and Additional Deputy Commissioner (Revenue), Dhaka can not release the case property from the list of enemy/vested properties. Over and above, the Municipal Holding No. 16/D, Dinanath Sen Road, Gandaria, Dhaka appears to have been allotted to one Abdus Salam long before the promulgation of the Defence of Pakistan Ordinance, 1965 and the Defence of Pakistan Rules, 1965. The treatment of the case property as an enemy/vested property vide Gazette Notification dated 06.05.2012 in 'Ka' Schedule is valid and lawful. As such, the Rule is liable to be discharged.

5. At the outset, Mr. A. B. Roy Chowdhury, learned Advocate appearing on behalf of the petitioners, submits that by filing Writ Petition No. 366 of 1967 before the then Dhaka High Court, East Pakistan, the grandfather of the petitioners, namely, Hemendra Kumar Chakrabarty challenged the order dated 20th June, 1967 passed by the Additional Deputy Commissioner (Revenue) and Assistant Custodian, Enemy Property (Lands and Buildings), Dhaka treating the case property as an enemy property and after final hearing, the Rule issued therein was made absolute and in that view of the matter, the case property can not be treated as an enemy/vested property and its inclusion in 'Ka' Schedule in the Gazette Notification dated 06.05.2012 is ex-facie without lawful authority and of no legal effect.

6. Mr. A. B. Roy Chowdhury further submits that by Memo No. 2020 E. P. dated 05.06.1970 and by Memo No. 1575 H. P. dated 24.06.1972 (Annexures- 'E' and 'E-1' to the writ petition), the Assistant Custodian of Enemy Property (Lands and Buildings) and Additional Deputy Commissioner (Revenue), Dhaka released the case property from the list of enemy/vested properties and finally by Memo No. জেঃপ্রঃঢাঃ/অর্পিত/২৬১৮(৩) ২০০৮ dated 28.08.2008 (Annexure- 'E-2' to the writ petition), the Deputy Commissioner, Dhaka clearly held that in spite of release of the case property by the Ministry of Land, it was enlisted as an enemy/vested property through inadvertence and he directed the Assistant Commissioner (Land), Kotwali Circle, Dhaka to do the needful and given this scenario, it does not lie in the mouth of the Government to say that the case property is an enemy/vested property.

7. Mr. A. B. Roy Chowdhury next submits that in view of the provisions of Section 6(ka) of অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ and the judgment and order dated 17.12.1969 passed in the Writ Petition No. 366 of 1967 (Annexure-'D' to the writ petition), the case property can not be enlisted as an enemy/vested property.

8. Mr. A. B. Roy Chowdhury further submits that as the Government released the case property from the list of enemy/vested properties, it is bound by promissory estoppel and that being so, it cannot deny the right, title and interest of the petitioners in the case property. In support of this submission, Mr. A. B. Roy Chowdhury has drawn our attention to the decision in the case of Nasir Hossain (Md)…Vs…Bangladesh represented by the Secretary, Ministry of Housing and Public Works, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Dhaka and others reported in 49 DLR (HCD) 557.

9. Mr. A. B. Roy Chowdhury also submits that since the treatment of the case property as an enemy/vested property is malafide, the petitioners did not approach the concerned অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইব্যুনাল, ঢাকা and this is why, the petitioners came directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. To buttress up this submission, Mr. A. B. Roy Chowdhury has adverted to the decision in the case of the Government of Bangladesh represented by the Ministry of Works and another…Vs…Syed Chand Sultana and others reported in 51 DLR (AD) 24.

10. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 4, submits that the authority rightly and lawfully treated the case property as an enemy/vested property as per the Official Gazette dated 06.05.2012 and no exception can be taken thereto in this regard.

11. We have heard the submissions of the learned Advocate Mr. A. B. Roy Chowdhury and the counter-submission of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and perused the Writ Petition, Affidavit-in-Opposition and relevant Annexures annexed thereto.

12. Indisputably Hemendra Kumar Chakrabarty, son of late Tarak Bandhu Chakrabarty and grandfather of the petitioners filed Writ Petition No. 366 of 1967 in the then Dhaka High Court challenging the order dated 20th June, 1967 passed by the Additional Deputy Commissioner (Revenue) and Assistant Custodian, Enemy Property (Lands and Buildings), Dhaka treating the case property as an enemy property and ultimately the Rule issued therein was made absolute by the judgment and order dated 17.12.1969. Subsequent to the judgment and order dated 17.12.1969 rendered in Writ Petition No. 366 of 1967 (Annexure- 'D' to the writ petition), the Assistant Custodian of Enemy Property (Lands and Buildings) and Additional Deputy Commissioner (Revenue), Dhaka issued Memo No. 2020 E. P. dated 05.06.1970 and Memo No. 1575 H. P. dated 24.06.1972 (Annexures- 'E' and 'E-1' to the writ petition) releasing the case property from the list of enemy/vested properties. In this respect, the most vital document appears to be the Memo No. জেঃপ্রঃঢাঃ/অর্পিত/২৬১৮(৩) ২০০৮ dated 28.08.2008 issued by the Deputy Commissioner, Dhaka addressing the Assistant Commissioner (Land), Kotwali Circle, Dhaka (Annexure- 'E-2' to the writ petition).

13. For proper and effectual adjudication of the Rule, the Annexure- 'E-2' dated 28.08.2008 may be quoted below verbatim:

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
জেলা প্রশাসকের কার্যালয়, ঢাকা।
(অর্পিত সম্পত্তি শাখা)

স্মারক নং- জেঃপ্রঃঢাঃ/অর্পিত/ ২০০৮- তাং-

বিষয়ঃ সূত্রাপুর থানাধীন ১৬, ১৬/এ, ১৬/সি এবং ১৬/বি, ১৬/ডি, ১৬/ই, দীন নাথ সেন রোডস্থ ভি,পি কেস

নং ১৬৯/৬৬ ভূক্ত সম্পত্তি অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত হওয়ার পরিপ্রেক্ষিতে নামজারী ও
জমাভাগ পূর্বক ভূমি উন্নয়ন কর গ্রহন প্রসংগে।

সূত্রঃ সহকারী কমিশনার (ভূমি), কোতয়ালী সার্কেল এর স্মারক নং- সঃকঃভূঃ/কোত/২০০৬-৬৭৫ (সং)
তারিখঃ ০৭/১২/২০০৬ ইং এবং কোতয়ালী সার্কেলের নামজারী জমাভাগ কেস নং- ২০৭৩/৮৫-৮৬।

সূত্র উল্লেখিত স্মারকের পরিপ্রেক্ষিতে তাহাকে অবহিত করা যাচ্ছে যে, বিষয়ে বর্ণিত ভি,পি কেসভূক্ত সম্পত্তি ভূমি মন্ত্রণালয়ের ০৪/০৪/৭০ ইং তারিখের ৯৩৪-৪০৭/৬৭ ইপি নং স্মারক এবং ১২/০৬/৭২ ইং তারিখের ৫৩৩-ইপি ৪০৭/৬৭ নং স্মারকে অর্পিত সম্পত্তির তালিকা হতে দরখাস্তকারীগংদের পূর্বশুরী হেমেন্দ্র কুমার চক্রবর্তী এর বরাবরে অবমুক্ত করা হয়েছে (কপি সংযুক্ত)। অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ এ বলা আছে যে, অর্পিত সম্পত্তির তালিকা হতে ইতিপূর্বে অবমুক্তকৃত সম্পত্তি প্রত্যর্পন তালিকায় অর্ন্তভূক্ত হবে না। কিন্তু বর্ণিত সম্পত্তি ইতিপূর্বে ভূমি মন্ত্রণালয় হতে অবমুক্ত হলেও ভুলবশতঃ অর্পিত সম্পত্তির প্রত্যর্পন তালিকায় অর্ন্তভূক্ত করা হয়েছে।

এমতাবস্থায় ভূমি মন্ত্রণালয় কর্তৃক বর্ণিত হোল্ডিং সমূহের অবমুক্তকৃত সম্পত্তি দরখাস্তকারীগনের নামে নামজারী জমাভাগ পুনঃবহাল পূর্বক ভূমি উন্নয়ন কর গ্রহনের জন্য নির্দেশ প্রদান করা হলো।

সংযুক্তঃ বর্ণনা মতে.....ফর্দ্দ।

স্বা/-
(কামাল উদ্দিন)
জেলা প্রশাসক
ঢাকা।
ফোন নং-৯৫৫৬৬২৮

সহকারী কমিশনার (ভূমি),
কোতয়ালী সার্কেল, ঢাকা।

স্মারক নং- জেঃপ্রঃঢাঃ/অর্পিত/২৬১৮(৩) ২০০৮- তাং- ২৮/৮/০৮

অবগতির জন্য অনুলিপি প্রেরন করা হলোঃ

১। উপ-সচিব, শাখা-৬, ভূমি মন্ত্রণালয়, বাংলাদেশ সচিবালয়, ঢাকা। ইহাতে তাহার কার্যালয়ের ৩০/০৬/২০০৮ ইং তারিখের ভূঃ মঃ/শা-৬/অর্পিত/ঢাকা/অবমুক্তি/৯৩/২০০৭-৪৩১ নং স্মারকের সহিত যোগসূত্র আছে।
২। ইউনিয়ন ভূমি কর্মকর্তা, সুত্রাপুর, ঢাকা।
৩। মানবেন্দ্র চক্রবর্তী গং, ১৬ নং দীন নাথ সেন রোড, সূত্রাপুর, ঢাকা।

স্বাক্ষর
২৭/৮/০৮
(কামাল উদ্দিন)
জেলা প্রশাসক
ঢাকা।
ফোন নং- ৯৫৫৬৬২৮''

14. From a bare reading of the Annexure- 'E-2' dated 28.08.2008, it transpires that the case property had already been released in favour of Hemendra Kumar Chakrabarty and the same was erroneously listed as a vested property. Taking the Annexure- 'E' series and considering them in conjunction with the judgment and order dated 17.12.1969 rendered in Writ Petition No. 366 of 1967 (Annexure- 'D'), we are left with no option but to hold that the case property is not an enemy/vested property and erroneously the same was listed as a vested property as is apparent from Annexure- 'E-2' to the writ petition. This being the position, the Government cannot now make a volte-face and say that the case property is an enemy/vested property. It seems that Mr. A. B. Roy Chowdhury has rightly contended that the Government is bound by promissory estoppel and that being so, it cannot deny the right and interest of the petitioners in the case property (49 DLR (HCD) 557). On this point, we are at one with Mr. A. B. Roy Chowdhury.

15. Although it has been argued on the side of the respondent no. 4 that the case property is an enemy/vested property and the Government leased out some portions thereof to different persons including one Abdus Salam; yet strangely enough, no paper or document has been annexed to the Affidavit-in-Opposition in support thereof. What we are driving at boils down to this: the respondent no. 4 has signally failed to substantiate his case by annexing the necessary papers or documents. In such a posture of things, we have no hesitation in holding that the case of the respondent no. 4 has no legs to stand upon and as such it stands discarded. As a natural corollary thereto, we can not accept the submission of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) that the case property is a vested property.

16. It is an indubitable fact that the petitioners did not approach the concerned অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইব্যুনাল in Dhaka for necessary legal redress for inclusion of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012. According to the learned Advocate Mr. A. B. Roy Chowdhury, as the treatment of the case property as a vested property is clearly malafide, he invoked the writ jurisdiction of the High Court Division under Article 102 of the Constitution by filing the instant writ petition.

17. It is often said that malafides or bad faith vitiates everything and a malafide act is a nullity. Now a pertinent question arises: what is malafides or bad faith? 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)

18. 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).

19. Reverting to the case in hand, there is no gainsaying the fact that the case property was released from the list of enemy/vested properties by Annexures- 'E' and 'E-1' and subsequently by Annexure- 'E-2', the Government necessarily admitted that the listing of the case property as a vested property was through inadvertence. The release of the case property from the list of enemy/vested properties as evidenced by Annexures- 'E' and 'E-1' was in consequence of the judgment and order dated 17.12.1969 rendered in the earlier Writ Petition No. 366 of 1967 (Annexure- 'D'). The Annexure- 'E-2' clinched the whole matter.

20. Taking the entire gamut of the situation enumerated above and in the facts and circumstances of the case, a man of ordinary prudence will necessarily come to the conclusion that the authority concerned was prompted by malafides or bad faith in including the case property in 'Ka' Schedule as a vested property in the Gazette Notification dated 06.05.2012. In this context, we feel tempted to say that it is a settled proposition of law that an aggrieved party may invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution straightaway provided the action impugned is malafide, even though there may be an alternative remedy available for him. Since we have found that the inclusion of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a

vested property is malafide, the instant writ petition, as we see it, is maintainable. Besides, it has been clearly, categorically and unequivocally held in the decision in the case of the Government of Bangladesh represented by the Ministry of Works and another…Vs…Syed Chand Sultana and others reported in 51 DLR (AD) 24 that the writ-petitioners can come directly to the High Court Division for protection of their fundamental right, even though an alternative remedy is available. So our definite finding is that the petitioners can come directly to the High Court Division for protection of their right to property as contemplated by Article 42 of the Constitution of Bangladesh, even though an alternative forum, that is to say, অর্পিত সম্পত্তি প্রত্যর্পন ট্রাইব্যুনাল is available for necessary legal redress.

21. Section 6(ka) of অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ contemplates that প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভূক্ত করা যাইবে না, যথাঃ- (ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি. As the then Dhaka High Court made the Rule absolute in Writ Petition No. 366 of 1967 and held the treatment of the case property as an enemy property without lawful authority, the provisions of Section 6(ka) of অর্পিত সম্পত্তি প্রত্যর্পন আইন, ২০০১ will, for certain, come into play in this case. On this count also, the inclusion of the case property in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 as a vested property cannot be sustained in law.

22. From the foregoing discussions and regard being had to the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

23. Accordingly, the Rule is made absolute without any order as to costs. The inclusion of the case property at serial nos. 468 and 618 in 'Ka' Schedule of the Gazette Notification dated 06.05.2012 pursuant to E. P. Case No. 152 of 1966 and E. P. M. C. Case No. 1057 of 1961 (Annexure-'J' to the writ petition) is declared to be without lawful authority and of no legal effect.

3 SCOB [2015] HCD 59

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 706 0f 1998

Sree Monohar Chandra Biswas & others
.....Petitioners.
Sreemati Laxmi Rani Sikder & others.
....Opposite parties.

Mr. Goutam Kumar Roy, Advocate.
For the petitioners.

Mr. Kalipada Mridha, Advocate.
For the opposite parties.

Heard on**:** The 27th November, 7th and 8th December, 2014, 11th, 12th and 14th January, 2015.

Judgment on **:** The 31st March, 2015.

Present:
Justice Md. Emdadul Huq

Deed of Gift:
There is nothing on record to show that Promoth Nath was a man of unsound mind or that plaintiff had any relationship with Promoth Nath whatsoever so as to take him to the Sub-Registry office and to fraudulently get the kabala executed by Promoth Nath. Defendants never raised any question on this aspect in any manner.
The above statement of the executant considered with the rent receipts showing payment of rent for the suit land by the plaintiff for the years 1981 to 1994 and the fact of silence of the two sons of Promoth Nath (defendant No.1 and 2) in not challenging plaintiff's kabala and the fact of physical possession of the plaintiffs lead me to conclude that plaintiffs' purchase is genuine and that their kabala dated 07.06.1980 was acted upon and that the earlier deed of gift dated 10.01.1979 purportedly made by Promoth Nath in favour of his son was a mere paper transaction so far the suit land is concerned.
... (Para 58 & 59)

Judgment

Md. Emdadul Huq, J:

1. The Rule issued in this Civil Revision is about sustainability of the judgment and decree dated 26-01-1998 by which the learned Additional District Judge, Magura allowed Title Appeal No. 182 of 1996 and thereby dismissed Title Suit No. 89 of 1994 on reversing the judgment and decree dated 7-10-1996 passed by the learned Assistant Judge, Mahammadpur, Magura in the said suit in favour of the plaintiff-petitioners.

2. **Plaintiffs Case:** In the above noted suit the petitioners as plaintiffs prayed for the following three relieves:

(1) declaration of their title to and conformation of possession over the suit land measuring 20 decimals as described in the schedule to the plaint,

(2) a declaration that the two transfer documents in respect of the suit land being the deed of gift dated 10-01-1979 purportedly executed by Promoth Nath in favour of his son being defendant No. 2, Amal Kumar and the registered kabala dated 27-07-1994 executed by defendant No. 2 in favour of his brother's wife being Laxmi Rani, defendant No. 2(ka), are collusive, void and not binding upon the plaintiffs, and

(3) for a permanent injunction restraining the defendants from disturbing plaintiffs possession over the suit land.

3. The plaintiffs claim that they have purchased the suit land by a kabala dated 07.06.1980 executed by the original owner Promotha Nath being the father of defendant Nos. 1 and 2. Since purchase, plaintiffs have been in continuous possession and paid rent to the Government. But, in the 1st part of Jasitha, 1401 B.S., the defendant Nos. 1 and 2 threatened to dispossess the plaintiffs and to sell out the suit land. Later on, plaintiffs came to know that defendant Nos.1 and 2 have created a false and collusive transfer deed dated 27.07.1994 in favour of defendant No. 2(ka) being wife of defendant No.1 on the basis of a deed of gift dated 10.01.1979 purportedly executed by their father Promoth Nath in favour of one of his son being defendant No.2. Hence the suit.

4. **Case of defendant No. 2(ka).** This defendant, Laxmi Rani, is the wife of defendant No. 1 Subodh Kumar. She was impleaded in the suit as added defendant on the basis of one of two the disputed transfer documents being the kabala dated 27-07-1994 executed in favour of her by her husband's brother defendant No. 2 Amal Kumar.

5. This defendant admits the original ownership of Promoth Nath Sikder. But she denies title and possession of the plaintiffs by virtue of plaintiffs kabala dated 07-06-1980. She contends that the suit is not maintainable and that it is barred by limitation and bad for defect of party.

6. She claims that her father- in- law Promoth Nath, by a registered deed of gift dated 10-01-1979, transferred the suit land along with other lands in favour of his son Amal Kumar (defendant No.2) from whom she has purchased the suit land and other lands by a kabala dated 27-07-1994. Since then she has been possessing the suit land through a bargader named Abdul Khaleque.

7. **Deliberation at the hearing in Revision:** At the hearing of this Revision, Mr. Goutam Kumar Roy, the learned advocate for the petitioner-plaintiffs, submits that the appellate Court failed to consider that this suit was instituted on 07.07.1994 and that the contesting defendant No. 2(ka) claims the suit land after institution of the suit on the basis of the kabala dated 22.07.1994 and therefore this transfer is hit by section 52 of the T.P.Act, 1882 (**shortly the Act, 1882**).

8. Mr. Roy, the learned advocate next submits that the appellate Court also failed to consider that defendant No.1, being vendor of defendant No.2 (ka) never contested the suit nor did appear as a witness to support the case of the alleged gift by his father in favour of himself or to support the subsequent transfer in fvour of his brother's wife being the contesting defendant No.2 (ka).

9. Mr. Roy, the learned advocate, further submits that the appellate court also failed to consider that the plaintiffs have produced sufficient and credible evidence to prove their title

and possession and that the alleged deed of gift dated 10-01-1979 by the original owner in favour his son (defendant No.2) was never acted upon.

10. In support of his submission Mr. Roy, the learned advocate, refers to the cases of Abdul Mazid Howladar and others vs. Lehaj Uddin Howlader and others reported in 16 B.L.D (AD)(1996), page-197 and to the case of Afaz Uddin Molla and others vs. Moyez Uddin reported in 1985 BLD(AD), page-54.

11. **In reply** Mr. Kalipada Mridha, the learned advocate for the opposite party defendant No. 2(ka), submits that the appellate Court, upon discussion of the oral and documentary evidence on record, rightly held that the deed of gift dated 10-01-1979 executed by the admitted owner Promoth Nath in favour of his son (defendant No.2) was a deed prior to that of plaintiffs' kabala dated 27-06-1980 and therefore no title passed on to the plaintiffs.

12. Mr. Mridha,, the learned advocate, next submits that the possession of defendant No.2(ka) has been proved by credible witnesses and therefore no interference from this Court is necessary on those questions of fact.

Findings and decisions in Revision:

13. The impugned judgment passed by the appellate Court is one of reversal. So I have perused all the materials on record including the judgments passed by the courts below and the evidence adduced by the parties.

14. Admittedly the suit land belonged to Promoth Nath which is further evidenced by the exparte decree obtained by Promoth Nath in Title Suit No. 461 of 1968 (Exhibit-1-1(ka) in respect of correction of the S.A. record wrongly prepared in the names of one Mohiuddin and others.

15. Both the parties claim their title and possession as the successor-in-interest of the admitted owner Promoth Nath. The plaintiffs claim the suit land on the basis of the kabala dated 07.06.1980 (Exhibit-2) executed by Promoth Nath himself. On the other hand, claim of the defendant No.2(ka) is based on the gift deed that was executed by the same owner before the kabala of the plaintiffs i.e. by the deed of gift dated 10-01-1979 (Exhibit-ka) in favour of defendant No. 2 being the son of Promoth Nath. Defendant further claims that she purchased the suit land the kabala dated 27.07.1994 from the said son of Promotha Nath.

16. So the principal issue before this court is whether plaintiffs have acquired any title to the suit land by virtue of their kabala dated 07-06-1980 which is subsequent to the disputed deed of gift dated 10-01-1979 in favour of defendant's vendor.

17. On this question of fact, the trial Court has endeavored to decide as to whether the respective title documents of the parties was acted upon and accordingly focussed its discussion on the possession aspect.

18. The trial Court, with reference to the statements of the P.Ws. and D.Ws., recorded findings to the effect that the plaintiffs could prove their possession by producing credible oral evidence and also the rent receipts (Exhibit- 3 and 3(ka). The trial Court disbelieved the D.Ws. upon recorded reasons that D.Ws. 1-4 were interested witnesses and D.W. 5 made statements contradictory to those of D.W.1 being husband of the contesting defendant No.2(ka).

19. On the contrary, the appellate Court recorded a finding that the deed of gift dated 10-01-1979 executed by Promoth Nath in favour of his son defendant No. 2 being vendor of defendant No. 2(ka) is a document prior to that of plaintiffs' kabala dated 07-06-1980 and therefore the deed of gift is to be pre-sumed as valid unless the plaintiffs can prove that the said gift deed was fraudulent.

20. I agree with the above reasoning of the appellate court with regard to the presumptive value of the said deed of gift and plaintiff's burden to disprove it. In discharging the said burden, plaintiffs appears to endeavored to prove their possession over the suit land.

21. But the appellate court discarded credibility of the P.Ws. on the reason that they have made statements contradictory to one another with regard to the relevant aspects of plaintiffs' possession, namely whether the plaintiffs particularly plaintiff No.1 (P.W.1) himself cultivated the suit land or through the bargardar, and the time of cultivation and the person who actually ploughed the land.

22. The appellate Court further recorded a finding that the plaintiff No. 1 as P.W. 1 could not state the date of the alleged threat and the cause of action of the suit.

23. Thus it is evident that the oral evidence with regard to possession is part of the material evidence on the fact-in-issue. The findings of the appellate court as the last court on the question of fact is to be generally taken as correct, unless such finding suffers from the defect of non consideration or misreading of material evidence.

24. On perusal of the evidence on record, it is revealed that the appellate court has not only misread the evidence on record but also recorded distorted version of the deposition of the P.Ws. This will be clear from the following discussion.

25. The appellate Court has recorded the following findings (*underlines added*):

> "*বাদী..... আরজিতে বলিয়াছেন নিজ চাষাবাদে নালিশী জমি দখল করে। অথচ জেরায় বলিয়াছেন নিজ হাতে নালিশী জমি চাষ করি না। নালিশী জমিতে প্রথমে দখলে যাওয়া তখন নালিশী জমিতে কি ফসল ছিল, কে ফসল করে, নালিশী জমির ফসল বাদী কর্তৃক ভাগ নেওয়া, বর্তমানে নালিশী জমিতে কি ফসল আছে, এর পূর্ববর্তী কয় এক বছরে কি ফসল কে কিভাবে বুনে ও তোলে, নালিশী জমি কাহার দ্বারা চাষ করা হয় এই সব বিষয়ে পি ডব্লিউ, ১,২,৩ ও ৪ এর জেরায় অনেক পার্থক্য পরিলক্ষিত হয়। পি ডব্লিউ ৩ এবং ৪ জেরায় বলিয়াছেন নালিশী জমি চাষ করে তবিবর অথচ পি, ডব্লিউ, ১ এবং ২ তবিবর নালিশী জমি চাষ করে তাহা বলে নাই*"।

26. The above findings of the appellate Court is the result of misreading and non-consideration of the text of the deposition of the P.Ws. as quoted below.

27. P.W. 1 being plaintiff No. 1 in the line of his plaint, stated in examination in chief as follows:

> "এই জমি দখল করি। আমরা উত্তর পাশ থেকে .২০ শতক খাই। নাম পত্তনের জন্য ৪৬১/৬৮ নং মামলার রায় ডিক্রি ১নং বিবাদীর কাছে চাইতে যাই। রায় ডিক্রি দেয় নাই। অন্যত্র হস্তান্তরের ও আমাদের বেদখলের ভয় দেখায়..... "।

28. "P.W. 1 stated in cross-examination as follows:

"..... নিজ হাতে জমি চাষ করিনা। লোকজন ও ছেলে চাষ করে। এই জমি নিজ চাষাবাদে আছে। আমি নিয়েছি ০৭.০৬.১৯৮০ সালে। জমিতে আমন ধান ছিলে। ধানের রাজভাগ দেয় ..... প্রমথনাথ নিজে ও তাহার ছেলেরা ফসল ভাগ করিয়া দেয়। রাজভাগ নেওয়া সাক্ষীরা দেখেছে। চলতি জরিপ ১৯৯৫ সালে শুরু হয়। চলতি জরিপ বাংলা ১৪০২ সালে শুরু হয়। জরীপের আগেই নাম পত্তন শুরু করতে যাই ইং ১৯৯৫ সালে। নাম পত্তন করিতে যাই তখন ১নং বিবাদীর কাছে কাগজপত্র চাই।..... ১ নং বিবাদী বলেছে জমি পাবেনা..... "

29. The above deposition of P.W. 1 clearly refers to the time of the alleged threat and the mode of his possession. He has stated the detailed manner of his cultivation, i.e. at the time of immediately after purchase from Promoth Nath and also at the subsequent times.

30. P.W. 2 শচীন্দ্র চন্দ্র পাঁড়ে is a resident of the suit village and owner of the contiguous land. In his examination in chief and cross examination on 22.07.1996, P.W. 2 supported possession of the plaintiffs. He stated as follows:

"নালিশী জমির পাশে আমার জমি আছে। বাদীরা এ জমি দখল করে । অমল লক্ষীরানী এ জমি খায় নাই। প্রমথ নাথ শিকদারের লেখা চিনি। দলিলে পমথ নাথের সই আছে।

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প্রমথ নাথ ১২/১৪ বছর এগ মারা যায় অনুমান । বর্তমানে দখল মনোহর বিশ্বাস (plaintiff/P.W.1) তাহার ১৫/১৬ বৎসর হয় দখল । মনোহর যখন জমি খরিদ করে তখন আউশ আমন ধান ছিল..... এ বৎসর আশ্বিন মাসে ধান কাটে মনোহরের ছেলে

..... এখন নালিশী জমিতে আউশ আমন আছে। ..... মনোহরের বড় ছেলে ধান বোনে। ধানের আগে খেসাড়ী কালাই। ..... খেসরীর আগে আউশ আমন ছিল।..... ঐ আউশ ধান কাটে হিমাংশু, সুধাংশু ও জনে কাটে। আউশ ধান কাটার সময় পাশে বিশ্ব তবিবর ছিল"।

31. P.W. 3 (সুধীর কুমার বিশ্বাস) and P.W. 4 Bishwa Nath Kumar are co-villagers of the plaintiffs. They made statements similar to those of P.W. 2 and supported plaintiffs possession from the time of their first possession and also the fact of their present possession and the fact that two persons named Harbilash and Tabibar were workers under plaintiff Monohor.

32. P.W.4 further stated in cross-examination as follows:

" সাক্ষী সুধীর (P.W.4) আমার চাচাতো ভাই। মনোহরের প্রথম দখল জানি তখন আমার বয়স ১৬/১৭ বছর। মনোহর যখন জমি নেয় তখন ধান ছিল জমিতে বৈশাখ মাসে ধানের বর্গা ভাগ মনোহরকে সুধীর বাবু ১নং বিবাদী"।

33. The misreading of the oral evidence of P.W.4 by the appellate court is evident with regard to its finding about the relationship of plaintiff and P.W. 4. The appellate court recorded a perverted finding that "পিডব্লিউ ৪ বাদীর চাচাত ভাই"

34. But P.W. 4 in fact stated that "সাক্ষী সুধীর (P.W. 3) আমার চাচাত ভাই" and P.W.4 no where stated his relationship with the plaintiff.

35. There is nothing on record to show that any of the three co-villagers (P.W. 2-4) are interested witness or their testimony can be otherwise discredited.

36. All the 4 P.W's consistently stated that plaintiffs have been in possession of the suit land since immediately after purchase from Promoth Nath 15/16 years ago i.e. in 1980, that at the time of purchase there was paddy on the land previously grown by Promoth Nath, that after harvest this paddy was divided between the vendor and the plaintiff, that at the time of such division, son of Promoth Nath himself i.e. Subodh (defendant No. 1) was present.

37. All the 4 P.W's consistently stated the manner of plaintiffs' possession that plaintiff himself cultivates the land with the help of his son and some time with the help of others like Harbilash and Tabibar. This aspect of the evidence was also misread by the appellate court.

38. On the contrary, D.W. 1 being Subodh Kumar (defendant No.1) and the husband of contesting defendant Laxmi Rani No.2(ka) deposed on behalf of Laxmi Rani. He made contradictory statement with regard to the mode of possession of his wife. In examination in chief, he stated that…… "আব্দুল খালেক বিশ্বাস এই জমির বর্গা করে তাহার মাধ্যমেই দখল করি। ……. অমল কুমারের (defendant No.2) দখল দেখেই লক্ষীরানী কিনেছে।"

39. But, in cross-examination D.W. 1 stated that "লক্ষীরানী কোন মাসে প্রথম দখলে যায় বলিতে পারিনা ……. লক্ষী রানী বর্গা দেয় নাই।".

40. D.W. 2 Abdul Khaleque stated that he had been cultivating the land as bargader under Laximi Rani for the last two years i.e. before his deposition on 31-08-1996 and before that he had been a bargaqdar under Amal Kumar.

41. D.W. 3 Probhash Kumar stated that Laximi Rani possesses the suit land through the bargader M¡-mL. But D.W.3 is silent asto whether this bargadar was ever in possession under the vendor Amal. However in cross –examination he stated that "২নং বিবাদীর শশুর আমার আপন খুড়তুতো ভাই। গত শ্রাবন আগে চৈত্র মাসে লক্ষীরানী আঃ খালেককে বর্গা দেয়……।", Which means that he is a close relative of defendant No.2 i.e. brother of D.W.1 and hence an interested intents.

42. D.W. 4 stated that he is a day laborer working at the house of Laximi Rani and that he, on behalf of Laxmi Rani collected paddy from bargadar Khaleque. This witness is clearly an interested witness.

43. D.W. 5 stated that he holds land near the suit land and that Laxmi Rani possess the suit land through bargader Khaleque and that before her, Amal used to possess the suit land. D.W.5 appears to be a disinterested witness but made statements which is vitally contradictory to D.W.1 with regard to bargader.

44. The vendor of Laxmi Rani being defendant No. 2 has not come up to contest the suit or to give testimony.

45. All the 5 D.W's (D.W.1-5) stated about possession of Laxmi Rani (defendant No. 2ka). But D.W. 1 husband Laxmi Rani clearly made contradictory statement about such possession through bargadar Abdul Khaleque (D.W.2), in that D.W. 1 denied cultivation through any bargadar "লক্ষীরানী বর্গা দেয় নাই".

46. Again the bargadar (D.W.2) claimed to be the bargadar under Laxmi Rani and also under her vendor Amal i.e. brother of D.W. 1. But all the other D.W's are silent about the bargadarship of Khaleque (D.W.1) under Amal.

47. Evidently the testimony of the D. W's are inconsistent and also condictory to the deposition of D.W.1.

48. The above discussion of the evidence on record clearly show that the appellate Court totally misread the material oral evidence on record and also recorded distorted version of material of the deposition of P.W's.

49. The trial Court recorded its finding correctly on the basis of the evidence on record with regard to possession.

50. I agree with the finding and decision of the trial Court that the plaintiffs have been able to prove their possession.

51. Apart from the aspect of physical possession of the plaintiff, the other important aspect of the scenario is that the plaintiffs are not in any way connected with the admitted owner Promoth Nath. So, in ordinary course, they are not expected to possess the suit land or to pay any rent or to have the custody of the rent receipts. The two rent receipts Exhibit- 2 and 2(ka) show that Monohor (plaintiff No.1) had paid rent for the suit land recorded in the name of Mohiuddin and others in the year 1981 and lastly paid rent in 1994. These two documents corroborate the fact of plaintiff's possession.

52. The rent receipts, Exhibit-3 and 3ka showing payment of rent by plaintiff No.1 (Monhor) in the name Mohiuddin Nw are consistent with the decree (Exhibit-2 and 2(ka) obtained by Promoth Nath against Mohiuddin and others in whose names the S.A record was wrongly prepared. The rent receipts and the decree are also consistent with the claim of the plaintiffs and statement of P.W.1 that they requested the defendants for delivering the copy of the decree for obtaining mutation in favour of this plaintiffs.

53. The other document being the deed of gift dated 10-01-1979 (Exhibit- Ka) shows that Promoth Nath made a gift in favour of his son Amal Kumar (defendant No.2) and thereby transferred 20 decimals out of the non disputed Plot No. 679 and 20 decimals out of the suit Plot No. 771. But the said donee has not contested the suit nor was he produced by the contesting defendant No. 2(ka) as a witness.

54. It is noted that the manner of recording the signature of Promoth Nath as the executant of the said deed of gift on various pages particularly of page No.2 and 3 raises a suspicion. Because location of the signatures on these two pages (No.2 and 3) show that there are uneven indenture around the three sides of the signatures indicating that the signatures might have been taken on the two blank pages and thereafter the writings were recorded. It is noted that page No.3 contains the description of the land transferred i.e. the suit land and another parcel of land. Such manner of signature is clearly different to the those of the first and the last page. This aspect of the signatures was not noticed by the courts below.

55. It is further noted that the particulars with regard to stamp vendor and the date of purchase of stamp of the said deed of gift further show that the 1st and last sheet of the document were purchased on 04-01-1979 and those of the aforesaid 2nd and third pages containing different manner of writing and signature were purchased on 22-12-1978 from a different vendor.

56. Such different dates on the stamp-papers by itself do not negate the validity of a document, but strengthens the suspicion expressed above.

57. The above suspicion is re-inforced when considered with the statement made by the same executant Promoth Nath in the affidavit portion of the plaintiff's kabala dated 19.06.1980 that "..... এই সম্পত্তি আমার হস্তান্তর করিবার অধিকার আছে". This significant statement clearly indicates that the executant has asserted that he had not previously transferred the suit land to any other person and thus Promoth Nath denied the truth of making gift of the suit land as claimed by the defendant.

58. There is nothing on record to show that Promoth Nath was a man of unsound mind or that plaintiff had any relationship with Promoth Nath whatsoever so as to take him to the Sub-Registry office and to fraudulently get the kabala executed by Promoth Nath. Defendants never raised any question on this aspect in any manner.

59. The above statement of the executant considered with the rent receipts showing payment of rent for the suit land by the plaintiff for the years 1981 to 1994 and the fact of silence of the two sons of Promoth Nath (defendant No.1 and 2) in not challenging plaintiff's kabala and the fact of physical possession of the plaintiffs lead me to conclude that plaintiffs' purchase is genuine and that their kabala dated 07.06.1980 was acted upon and that the earlier deed of gift dated 10.01.1979 purportedly made by Promoth Nath in favour of his son was a mere paper transaction so far the suit land is concerned.

60. The appellate court failed to consider the above material evidence on record and erroneously reversed the judgment of the trial court, and such reversal has occasioned failure of justice. So interference is necessary in this Revision.

61. The above view is supported by the principle laid down by the Appellate Division in the case of Md. Afazuddin Molla and others vs. Mayezuddin Sheikh being dead his heirs and others (1985 (BLD)(AD) page-55, para-16) and in a number of other subsequent cases.

62. I hold that the deed of gift dated 10.01.1979 and also the kabala dated 20.07.1994 executed by defendant No. 2 in favour of defendant No.2(ka) so far these documents relate to the suit land, are not binding upon the plaintiffs.

63. Accordingly I conclude that the impugned judgment and decree passed by the appellate Court is not sustainable and liable to be set aside and that of the trial Court is to be upheld.

64. However it appears that the trial court, in the order portion, did not record any declaration about the two disputed deeds. The order portion of the trial court should be in conformity with the correct findings of the trial court and should be accordingly modified.

65. In the result, the Rule is made absolute. The judgment and decree dated 26-01-1998 passed by the learned Additional District Judge, Magura in Title Appeal No. 182 of 1996 is hereby set aside. The judgment and decree dated 07-10-1996 passed by the learned Assistant Judge, Mohammadpur, Magura in Title Suit No. 89 of 1994 is hereby upheld with the modification in the order portion of the Judgment passed by the trial Court that the deed of gift dated 10-01-1979 executed by Promoth Nath in favour of defendant No. 2 Amal Kumar, so far it relates to the suit land, and the kabala dated 27-4-1974 executed by defendant No. 2

Amal Kumar in favour of defendant No. 2 (ka) Laximi Rani so far it relates to the suit land, are declared to be not binding upon the plaintiffs.

66. No order as to costs.

67. Send a copy of this Judgment along with the lower court records.

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High Court Division
(Civil Revisional Jurisdiction)

Civil Revision No. 879 of 2006

Zila Mahila Bisayak Karmakorta
Mahila Bisayak Adhidaptar, Pabna, Police Station and District- Pabna.

.....Petitioner.

Vs.

Principal, Mohila College, Ishuardi,
Police Station-Ishuardi, District- Pabna.

..... Opposite-Party.

Mr. Swapan Kumar Das, A.A.G.
..... for the petitioner.
Mr. Gazi Siddique Ahmed, Advocate.
..... for the opposite party.

Heard on 11.08.2015, 12.08.2015 and
Judgment on: 16.08.2015.

Present:
Mr. Justice Md. Rais Uddin

The appellate court being last and final court of fact will have to discuss and reassess the evidence on record independently while reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence to arrive at his own independent finding. The findings of the trial court should not be easily disturbed as a matter of course and before reversing the findings and decisions of the trial court the appellate court should think twice or more than twice. ... (Para 19)

Judgment

Md. Rais Uddin,J:

1. This Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 16.05.2005 passed by the learned Additional District Judge, 2nd Court, Pabna in Other Class Appeal No. 82 of 2002 allowing the appeal and reversing the judgment and decree dated 19.02.2002 passed by the learned Joint District Judge, 2nd Court, Pabna in Other Class Suit No. 405 of 1994 decreeing the suit, should not be set-aside.

2. The relevant fact giving rise to this Rule, in short, is that the petitioner as plaintiff instituted a suit praying for declaration of title in respect of the suit land contending, inter-alia, that the suit land and along with three storied building belonged to the Government as abandoned property under President order 16 of 1972 vide A/P Case No. 160 of 1973-1974 and it was permanently allotted by the Government to the Mohila Bisayak Adhidapter on 20.10.1979. The Ministry of Works handed over the delivery of possession to them (plaintiff) on 20.12.1979 for welfare of women of the locality. Thereafter, the plaintiff for the handicraft

and other purpose training of poor women constructed tinshed house in southern part of three storied building of allotted land. On the request of first lady of the then government a temporary office established for women college in the ground floor of western part of said allotted three storied building of the plaintiff and there was a talk that after finishing of college building at Naricha Mouza of an area of 09 bigha the said Mohila College office would transfer to that place from the place of plaintiff and on 28.12.1992 the defendant refused to transfer his temporary office from the suit land. Hence, the suit.

3. The defendant contested the suit by filing written statement denying the material allegations made in the plaint contending, inter-alia, that an application was filed on 15.11.1988 for establishment women college and upon which the Government formed an investigation committee and the said committee reported that no allotment was made in favour of plaintiff. The then president made commitment to establish Rawshan Ershad Mohila College on 28.08.1989 to the defendant in the suit land and upon which the Deputy Commissioner, Pabna issued a letter dated 28.10.1989 to the plaintiff and proposed for transferring their office from the suit land. Thereafter, Assistant Secretary, Ministry of Women Affairs issued a letter dated 13.10.1990 and directed the plaintiff to transfer their office from the suit land to Upazilla complex and also ordered to handover the possession of the same in favour of defendant. Thana Nirbahi Officer on 02.09.1992 directed the plaintiff to transfer his office in two rooms of Thana Parishad and the plaintiff did not comply the said order and filed this suit. The defendant college has been running since its establishment and the suit land owned by Muhammad Hossain and Nesab Ahmed and they constructed the three stored building. Md. Hossain died leaving one son Estiyak Hossain and the college established before construction of building and Nesab Ahmed gifted suit land to the college and Estiyak Ahmed also gifted his share to the college and suit land was not enlisted as abandoned property and plaintiff never got allotment of the suit land and in the circumstances prayed for dismissal of the suit.

4. At the trial, the plaintiff examined 1(one) witness and the defendant examined 3(three) witnesses in support of their respective cases.

5. The learned judge of the trial court after hearing the parties, considering the evidence and other materials on record decreed the suit by his judgment and decree dated 19.02.2002. Against the said judgment and decree the defendant preferred appeal before the learned District Judge, Pabna. On transfer it was heard and disposed of by the learned Additional District Judge, 2nd Court, Pabna who after hearing the parties and considering the materials on record allowed the appeal and set aside the judgment and decree of the trial court by his judgment and decree dated 16.05.2005.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and decree the plaintiff as petitioner moved this court and obtained the instant Rule.

7. Mr. Swapan Kumar Das, the learned Assistant Attorney General appearing for the petitioner has placed the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below and submits that the appellate court below erred in law in misreading the documents of the abandoned property filed by the plaintiff wherein clearly disclosed that suit land was enlisted as abandoned property and taken over possession by the government. He submits that the appellate court on misreading the cross-examination of D.W.1 and D.W.2 who admitted that suit land was allotted in favour of plaintiff by the government as abandoned property as such judgment of the appellate court is not sustainable

in law. He submits that the appellate court below misread and misconstrued the document filed by the plaintiff in respect of college building in Naricha Mouja and also misreading the evidence of D.W.1 and D.W.2 who admitted that original owners were Non-Bangolee. He further submits that the appellate court below has committed an error of law in disallowing the appeal relying the defendant case who are permissive temporary possession in respect of one room of the suit land with condition the defendant will vacate as soon as their building is ready in their permanent campus at Naricha Mouja. He lastly submits that the defendant earlier filed an application on 15.11.1988 to the plaintiff for one room for college office on temporary basis in the abandoned property and subsequently claimed the ownership by way of deed in the year 1998 during pendency of the suit which is not sustainable in law. In support of his contention he has referred the decision reported in: (1) 35 DLR(AD)182, (2) 11 DLR 316 and (3) 8 BLC(AD) 77.

8. Mr. Gazi Siddique Ahmed, the learned advocate appearing for the opposite party opposed the rule and submits that the appellate court being last and final court of facts on elaborate discussion of evidence and materials on record allowed the appeal and set aside the judgment and decree of the trial court and there is no misreading and non-consideration of the materials on record and as such there is no reason to interfere by this court in revision. He submits that the defendant college has been running in the suit land with name and fame in their own land obtained by two deeds of gift dated 09.12.1997 and 06.09.1998 and as such he prayed for discharged the rule. In support of his contention he has referred the decision reported in 55 DLR(AD)39.

9. In order to appreciate the submissions made by the learned advocates for the parties, I have gone through the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below very carefully.

10. Now the question calls for consideration whether the learned Judge of the court of appeal below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

11. On perusal of the record it appears that the plaintiff brought a suit for declaration of title claiming that the suit land on the basis of permanently allotted by government in favour of Mahila Bisayak Adhidaptar on 20.10.1979 as of abandoned property of the government and the Ministry of Works handed over the delivery of possession to the plaintiff on 20.12.1979 for the welfare of women of the locality and the plaintiff has been running their office in the suit land. The plaintiff has been enjoying and possessing the suit land for handicraft and training of poor women in the locality. The defendant claimed the suit land that they filed an application on 15.11.1988 for establishing the Women College upon which an investigating committee was formed. Thereafter, to establish Rawshan Ershad Mohila College the Deputy Commissioner, Pabna issued a letter on 28.10.1989 to the plaintiff for transferring their possession from the suit land. Thereafter, Assistant Secretary, Ministry of Women Affairs issued a letter on 13.10.1990 and also directed the plaintiff to transfer their office from the suit land to Upazilla Complex and directed to handover the possession in favour of the defendant.

12. It appears that the learned Judge of the trial court on elaborate discussions of the evidence, both, oral and documentary decreed the suit holding that the plaintiff has been proved his case by evidence and decreed the suit with the findings:

"ইহা প্রমানের জন্য বাদীপক্ষ নাঃ ভূমির সম্পর্কিত এ, পি, ১৬০/৭৩-৭৪ নং মোকদ্দমার নথি তলব করায় উক্ত নথি তলব করা হয়। তলবান্তে সংশ্লিষ্ট কার্য্যালয় হইতে নথিটি আদালতে উপস্থাপন করিয়াছে। তাহা পর্যালোচনা করিয়া দেখা যায় নাঃ সম্পত্তি ও তদুপরিস্থিত বিল্ডিং ২৩/১০/৭৯ ইং তাং ততকালীন রাষ্ট্রপতি মরহুম জিয়াউর রহমানের প্রতিশ্র"তি অনুযায়ী বাদী অফিস বরাবর স্থায়ী বন্দোবস্ত দেন এবং সে অনুযায়ী ১২/১২/৭৯ ইং তাং যুগ্ম সচিব, রাষ্ট্রপতি বিভাগ জেলা প্রশাসক, পাবনা বরাবর বরাদ্দ পত্র ইস্যুর নির্দেশ দেন। ২০/১২/৭৯ ইং তাং নাঃ ভূমি ও তদুপরিস্থিত বিল্ডিং বরাদ্দপূর্বক বাদী অফিস বরাবর দখল হস্তান্তর করে এবং ২৩/৭/৮০ ইং তাং ও ৮/১০/৮০ ইং তারিখে দখল হস্তান্তরিত হয়। উক্ত নাঃ ভূমির উপরিস্থিত বিল্ডিং-এ বাদী অফিস এখনও বিদ্যমান ডি, ডব্লিউ-১ আফরোজা বেগম জেরায় স্বীকার করিয়াছে। সুতরাং নাঃ ভূমি ও তদস্থিত বিল্ডিং পরিত্যাক্ত সম্পত্তি হিসাবে শহীদ রাষ্ট্রপতি জিয়াউর রহমানের প্রতিশ্র"তি অনুযায়ী ততকালীন সরকার বাদী অফিস বরাবর স্থায়ী বন্দোবস্ত দিয়া দখল হস্তান্তর করে তাহা প্রমানিত। বাদী উক্ত ভূমির উপরিস্থিত দালানে দখলকার আছে তাহাও প্রমানিত।"

13. It appears that the learned Judge of the trial court decreed the suit with the specific findings that the suit land declared as abandoned property and allotted on 20.12.1979 and possession was delivered on 27.07.1980 and 08.10.1980 in favour of the plaintiff on the basis of record of A.P. Case No. 160 of 1973-1974 also on the basis of exhibits-1, 1(ka), 1(kha), 1(ga), exhibit-2, 2(ka) which admitted by D.W.1. It appears that D.W.1 in cross-examination stated that-

"এই বিল্ডিং-এ মোট ২৪/২৫ টি রুম আছে। বাকী রুমগুলির মধ্যে দোতলা ও তিন তলা বন্ধ ছিল কিন্তু ১ম তলার পশ্চিম দিকে ৬টি রুমে মহিলা অধিদপ্তরের অফিস ছিল। এই বিল্ডিং ১০ শতক জমির উপর। মহিলা অধিদপ্তরের অফিস কলেজ প্রতিষ্ঠার আগে হইতে এই অফিসটি কবে হইতে আছে বলতে পারব না। এখনও ঐ রুম গুলিতে ঐ অফিস আছে।" She further stated that-"৯/১২/৯৭ ও ৬/৯/৯৮ ইং তারিখের দলিল সম্পর্কে আমার ব্যক্তিগত জ্ঞান আছে। ২টি দলিলই দানপত্র। নেছার আহম্মেদ ও ইশতিয়াক আহম্মেদের নামীয় কোন কাগজ দাখিল করি নাই। এই মামলা চলাকালে দলিল ২টি করা হয়।"

14. On close scrutiny it appears that the learned Judge of the trial Court had considered the evidence and materials on record in details in coming to its findings. The appellate court without discussing the evidence had abruptly reversed the findings of facts arrived at by the trial court without controverting the findings and assessing the evidence independently which is not a proper judgment of reversal. It further appears that the learned Judge of the appellate court allowed the appeal on the basis of evidence and documents filed by the defendant, namely, exhibits-ka deed No. 4915 dated 19.12.1997, exhibits-kha-deed No. 4313 dated 06.09.1998, deed of gift by Estiyak Ahmed and Nesar Ahmed during pendency of the suit. The learned Judge of the appellate court without reversing the specific findings of the trial court allowed the appeal on the basis of defence version is not proper judgment of reversal.

15. Now certain provisions of law are required to be referred to for having a better understanding of Section 6 of P.O. 16 of 1972.

> 6: No person shall, except in accordance with the provisions of this Order or any rules made thereunder, transfer any abandoned property in any manner or create any charge or encumbrance on such property, and any transfer made or charge or encumbrance created in contravention of this Order shall be null and void.

16. From a reading of the above provisions of law I find a clear proposition of law that transfer by private individual any abandoned property in any manner in contravention of this order shall be null and void.

17. In the instant case, the suit property was declared as abandoned property enlisted in A.P. Case No. 160 of 1973-1974 and settled in favour of the plaintiff and delivered possession to them. During pendency of the suit it was transferred by two deeds and as such deed of transfer being deed No. 4915 dated 12.12.1997, deed No. 4313 dated 06.09.1998 in favour of defendant null and void under section 6 of P.O. 16 of 1972.

18. It further appears that defendant for taking the office room applied on 15.11.1988 as abandoned property and subsequently created 02 deeds during pendency of the suit is barred by principle of estoppel, as enunciated in section 115 of the Evidence Act stand in the way of defendant to show and claim by purchase or gift wherein earlier claimed by allotment of abandoned property.

19. By now it is settled that the appellate court being last and final court of fact will have to discuss and reassess the evidence on record independently while reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence to arrive at his own independent finding. The findings of the trial court should not be easily disturbed as a matter of course and before reversing the findings and decisions of the trial court the appellate court should think twice or more than twice. In the instant case, I am of the view that specific findings of the trial court have not been reversed by the appellate court exercising its power which is mandatory provisions of law under Order XLI rule 31 of the Code of Civil Procedure. It further appears that the foundation of the defendant claim by filing an application on 15.11.1988 and subsequently Deputy Commissioner, Pabna issued a letter on 28.10.1989 to evict the plaintiff from the abandoned property and establish Mahila College to fulfill the assurance of the then President Ershad. During pendency of the suit the defendant has changed the basis of ownership by deeds of gift. Furthermore, D.W.1 admitted that plaintiff has been possessing the suit property from earlier to defendant and the defendant has changed basis of claim by 2 deeds of gift dated 19.12.1997 and 06.09.1998 which is departed to their earlier stand cannot go together. This view find support in the decision reported in 35 DLR(AD)182 and 8BLC(AD)77, referred by the learned Assistant Attorney General, wherein their lordship held:

> *"Expediency is not an unknown phenomenon in the legal arena, but the principles of approbation and reapprobation are also equally well known. A party to a suit after taking an exact stand in his plaint or written statement cannot so readily be allowed to depart from it on the ground that his opponent admitted the position which was opposite to his stand, justice and expediency cannot go together."*

2) Hajarilal Mondal and others Vs. Md. Mozaffor Bepari and others, reported in 8BLC(AD)77, wherein their lordship held:

> *"In is a settled principle of law that the lower appellate court being final court of fact will have to discuss and reassess the evidence on record independently while either reversing or affirming the findings of the trial court. In case of reversal it is more incumbent upon the appellate court to reassess the evidence on record and to arrive at his own independent finding. In the instant case we find that the specific findings of the trial court have not been reversed by the lower appellate court exercising its power under Order XLI rule 31 of the Code of Civil Procedure."*

20. I have gone through the decision cited by the learned advocate for the opposite party reported in 55 DLR(AD)39. I am respectful agreement with the principles enunciated therein. But the facts leading to that case is quite distinguishable to that of the instant case and therefore, to that effect I am also unable to accept his submissions.

21. In view of the discussions, decisions and reasons stated above, I am of the view that the judgment and decree passed by the lower appellate court cannot be sustained in law and are liable to be set aside. Thus, I find merit in the rule.

22. In the result, the Rule is made absolute. The judgment and decree dated 16.05.2005 passed by the learned Additional District Judge, in charge, 2nd Court, Pabna in Other Class Appeal No. 82 of 2002 are set aside and those of the trial court are restored and affirmed and the suit is thereby decreed. However, there will be no order as to costs.

23. The order of stay granted earlier by this Court stands vacated.

24. Let the Lower Court Records along with a copy of the judgment be sent to the court concerned at once.

3 SCOB [2015] HCD 74

High Court Division
(Criminal Appellate Jurisdiction)

Death Reference no. 50 of 2010

The State

Versus

Abul Kalam,

….. Condemned-prisoner

Mr. Forhad Ahmed, D.A.G. with
Mr. Bashir Ahmed, A.A.G. and
Mr. Kazi Md. Mahmudul Karim, A.A.G.
.... For the State.

Mr. M. Ashraf Ali, Advocate,
..... For the condemned prisoner
With
Criminal appeal no. 5149 of 2010

Abul Kalam,
….. Convict-appellant.
Versus
The State,
….. Respondent.

Mr. M. Ashraf Ali, Advocate
……. For the convict-appellant.

With

Jail appeal no. 256 of 2010

Abul Kalam,
……. Convict-appellant.
Versus

The State,
……..Respondent

No one appears,
…. For the convict-appellant.

Mr. Farhad Ahmed, D.A.G. with
Mr. Bashir Ahamed, A.A.G. and
Mr. Kazi Md.; Mahmudul Karim, A.A.G.
.... For the State-Respondent.

Heard on: 23-02-2015, 01-03-2015, 02-03-2015, 03-03-2015, 04-03-2015, 05-03-2015 and Judgment delivered on 08-03-2015

Present:
Mr. Justice Syed Md. Ziaul Karim
And
Mr. Justice Sheikh Md. Zakir Hossain

Penal Code, 1860
Section 302
Sentencing Discretion:
Sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice. ... (Para 96)

How to attach weight to the testimony of witness:
The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness. ... (Para 98)

Judgment

Syed Md. Ziaul Karim, J:

1.This death reference under Section 374 of the Code of Criminal Procedure (briefly as the Code) has been made by learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal no.2, Netrokona (briefly as Tribunal), for confirmation of death sentence of condemned-prisoner.

2. The learned Judge by the impugned judgment and order of conviction and sentence dated 04-08-2010, in Nari-O-Shishu Case no. 124 of 2002 convicted the condemned prisoner under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000(briefly as Ain 2000) and sentenced him to death by hanging and also to pay a fine of Tk.10,000/-.

3. By the above appeals the appellant (condemned prisoner) has challenged the legality and propriety of the aforesaid judgment and order of conviction and sentence.

4. This death reference and the above appeals having arisen out of a common judgment, these have been heard together and are being disposed of by this judgment.

5. The prosecution case as projected in the first information report (briefly as FIR) and unfurled at trial are that Kachan Akter alias Ambia aged about thirty five years (briefly as victim) (since deceased) was married with accused Abul Kalam(condemned prisoner)(briefly as accused). Since marriage the accused used to torture her for dowry. On 25-04-2002 the accused demanded Tk. 50,000/- to her as dowry. On her refusal to bring the same all the FIR named accused numbering five namely Abul Kalam, Abdus Salam, Helauddin, Salma Akter, Nazma Akter and mother of the other accused inflicted fist and leg blows upon her person causing swelling bleeding injuries. On the same day at 8.00 p.m. all the accused repeatedly assaulted her and accused Abul Kalam pressed her neck and strangulated her to death. Al Amin (P.W. 6) and Milon Mia(P.W.3) sons of victim (sons of her former husband) witnessed the occurrence. At the time of occurrence the victim was carrying for 4/5 months. After committing murder all the accused wrapped her neck by rope and poured poison and it was given out that the victim committed suicide. The incident was informed to the parent's, home of victim by Abul Kasem(P.W. 4). Having had heard the incident Md. Hossain Ali (P.W. 1) brother of victim rushed to Digjan (Naopara) conjugal home of victim. Later, the prosecution was launched by him as informant by lodging an FIR with the local Police Station which was recorded as Netrokona P.S. Case no. 36(4) of 2002, corresponding to G.R. no. 141(2) of 2002.

6. The Police after investigation submitted charge sheet under Section 11(ka) of the Ain, 2000 accusing three accused namely Abul Kalam, Abdus Salam and Helaluddin and other FIR named co-accused were let off.

7. Eventually, all the accused were called upon to answer the charge under Section 11(ka) of the Ain 2000 which was read over to them who pleaded not guilty and claimed to be tried.

8. In course of trial the prosecution in all produced nineteen witnesses out of twenty six charge-sheeted witnesses, of them examined sixteen witnesses and three witnesses were tendered by the prosecution and the defence examined none.

9. After closer of the prosecution case, the accused were examined under section 342 of the Code and again they repeated their innocence but led no evidence in defence.

10. The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication. It is divulged in defence that the victim committed suicide in the conjugal home and due to previous enmity and internal feud the accused were falsely implicated at the instance of local rivals.

11. After trial the learned Judge by the impugned judgment and order of conviction and sentence convicted only the accused Abul Kalam as aforesaid, however acquitted the other co-accused namely Abdus Salam and Helaluddin holding:

(a) The prosecution successfully proved the charge against the accused by corroborative evidence.

(b) The evidence against the accused was consistent, uniform and corroborative in nature and accused failed to explain the cause of death of the victim.

12. Feeling aggrieved by the impugned judgment and order of conviction and sentence the appellant preferred the instant appeals.

13. The learned Deputy Attorney General appearing for the State supports the reference and submits that it is a wife killing case and all the prosecution witnesses by corroborative evidence proved that the victim Kachan Akter alias Ambia died at the custody of her husband in her conjugal home. So the accused is under obligation to explain the cause of death. He adds that although in the postmortem report the doctor did not specifically opined the cause of death but from the ocular evidence it clearly indicates that the death was homicidal in nature as the body bore multiple injuries upon the cadaver. He further submits that P.Ws. 3 and 6 were the eye witnesses of assaulting the victim and P.W. 1 also stated that prior to the occurrence the accused used to torture the victim for the cause of dowry. He submits that the circumstances also proved that the accused had the complicity with the crime of murder of his wife and the learned Judge of the Court below after considering the materials on record rightly convicted the accused which calls for no interference by this Court.

14. In support of his contentions he refers the following cases:

(a) In the case of Ramnaresh and others Vs. The State of Chhattisgarh (2012)4, Supreme Court cases -257 at paragraph 52 wherein it was observed:

" It *is a settled principle of law that the obligation to put material evidence to the accused under Section 313 CrPC is upon the Court. One of the main objects of recording of a statement under this provision of CrPC is to give an opportunity to*

the accused to explain the circumstances appearing against him aswellas to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 CrPC, insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law. "

(b) In the case of State of U.P. Vs. Krishna Gopal and another (1988)4 Supreme Court Cases -302 wherein at paragraph -24 it was observed:

" It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudiced making any other evidence, including medical evidence, as the sole touch stone for the test of such credibility. The evidence must be tested for its inherent consistency and the interest probability of the story; consistency with the account of their witnesses held to be creditworthy ; consistency with the undisputed facts; the credit of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. "

(c) In the case of Dayal Singh and others Vs. State of Uttaranchal (2012)8 Supreme Court cases 263 wherein at paragraph 14 it was observed:

" This Court has repeatedly held that an eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness. "

(d) In the case of Abul Kalam Azad alias Ripon (Md) Vs. State 58 DLR(AD)-26 held:

" Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain (XVIII of 1995)

Section 10(1)

Even if there is no specific mention of demand of dowry in Material Exhibit I(c) but as the trial Court has observed on reading the writings in the diary in its entirety it cannot be said that the fact of torturing the victim for not meeting the demand of dowry was totally absent.

(e) In the case of Md. Abdul Majid Sarkar vs. The State 40 DLR-83 held:

"Penal Code (XLV of 1860)

Section 300, Exception 4 read with Evidence Act (I of 1872)

Section 105

S. 105 of the Evidence Act casts a burden upon the accused to prove the existence of circumstances bringing the case within any special exception or

provision contained in any other part of the Penal Code. There has been complete failure on the part of the defence to prove those circumstances.

The learned counsel sought to argue before us that Exception 4, to section 300 is attracted in the facts of the present case and as such the appellant ought to have been convicted for culpable homicide not amounting to murder. This argument can hardly be considered by us now when evidently no endeavor was made on behalf of the appellant to plead the aforesaid Exception at any stage earlier. Section 105 of the Evidence Act casts a burden upon the accused to prove " the existence of circumstances bringing the case.....within any special exception or proviso contained in any other part of the same (Penal) Code ". There has been a complete failure on the part of the defence to prove or bring on record those circumstances which would bring the case within the aforesaid Exception 4. Except the denied suggestion there is nothing on record to show that the offence was committed in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. In the absence of any foundation of fact it is now idle to suggest that Exception 4 is attracted. Indeed, as already noticed, it has never been argued before that the offence committed by the appellant was one of culpable homicide nor amounting to murder.

The learned counsel also made an argument that since the deceased died in the hospital admittedly 14 days after the occurrence, the nature of the injury was not obviously such as was likely to cause death and as such the appellant should have been convicted under section 304 Penal Code. "

15. The learned Advocate appearing for the convict appellant opposes the reference and seek to impeach the impugned judgment and order of conviction and sentence on five fold arguments:

Firstly: There is no specific evidence against the accused that he demanded dowry. Prior to the occurrence the victim did not disclose such facts of demanding dowry to her relations. So according to him the demand of dowry to her was not proved by evidence.

Secondly: The prosecution although produced two alleged eye witnesses namely PWs. 3 and 6 but their presence at the place of occurrence (briefly as P.O.) was doubtful inasmuchas the other witnesses in their evidence did not support the presence of such alleged eye witnesses.

Thirdly: The prosecution failed to produce the independent witnesses and all the witnesses were inter related. So their evidence should not be relied and if the independent witnesses be examined they would not have supported the prosecution case.

Fourthly Over the self same evidence one set of accused were acquitted and there is no cause to convict the rest one having considering the same evidence.

Fifth and lastly: The judgment and order of conviction and sentence based on misreading and non consideration of the evidence on record which cannot be sustained in the eye of law.

16. In support of his contentions he refers the following cases:

(a) In the case of The State vs. Mofazzal Hossain Pramanik 43 DLR(AD) 64(A) held:

" Burden of proving alibi in a wife-killing case-It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused-husband for absolving him of criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances

that would absolve him of criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence."

(b) In the case of C.K. Raveendran Vs. State of Kerala 2000 Supreme Court Cases (crl.) 108 held:

" Penal Code, 1860-Ss. 302 and 201- Uxoricide or suicide- The doctor issuing post-mortem certificate reserving his opinion as to the cause of death pending the result of chemic al analysis- In the final report issued on getting the report of Chemical Analyser, the doctor stating that it was not possible to say whether the injuries on the dead body were ante-mortem or post-mortem- The deceased was allegedly last seen in the company of the accused as long as 27 days before the dead body was found- In such circumstances, held, High Court erred to holding that the death was homicidal."

(c) In the case of Atahar and others Vs. State 62 DLR-302 held:

" Defence plea- There is a basic rule of criminal jurisprudence that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the view favorable to the accused. If we consider the entire evidence we can safely conclude that the prosecution has totally failed to prove its case, moreso the version put forward by the defence has a reasonable possibility of being true. Hence the accused is entitled to get benefit of doubt, not as a matter of grace but as a matter of right.

In the instant case, if we place defence version and its supporting evidence and circumstances and the prosecution case side by side in order to arrive at a correct decision, it will appear to us that the defence version of the case will come our prominently in order to defeat the prosecution case but the learned trial Court did not virtually outsider the defence version. If the defence put forward in alibi on behalf of the accused which seems to be true the accused is entitled to a verdict of benefit of doubt.

17. In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

18. Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

19. P.W.1 Md. Hossen Ali is the informant and elder brother of the victim. He is not the eye witness of the occurrence. He deposed that the victim was married with the accused before 5/7 years. On 12th Baishakh he came to learn from his relation Abul Kasem that all the accused in collaboration with each other murdered his sister Kachon. Accordingly he along with his other inmates rushed there and reached at the conjugal home of the victim at 3:00 p.m. and found the dead-body on the floor of the dwelling hut of accused Abul Kalam. He also found a mark of finger at the throat of victim, and multiple injuries on her person. At that time accused Abul Kalam and other inmates were absent. He came to learn from the neighbouring people that all the accused murdered the victim for the cause of dowry for Tk. 50,000/-. The accused used to torture the victim Kachon for dowry and to that effect the victim instituted criminal case. The victim had two children by accused Abul Kalam. He

informed the incident to the Police who happened at the scene of occurrence and held inquest upon the cadaver of the deceased. After autopsy the Police handed over the deadbody to them. He lodged the ejahar (Exhbt.1) and his signature on it Exhbt. 1/1. He proved the inquest report as Exhbt. 2 and his signature on it Exhbt. 2/1. He identified the accused on dock.

20. In cross-examination he stated that victim Kachon was the second wife of accused Abul Kalam, prior to her marriage with Kalam she was married with Hafiz before 20 years of the occurrence. Victim Kachon came to their home and asked for money for her husband Abul Kalam as dowry. Prior to the occurrence victim Kachon instituted a criminal case against accused Abul Kalam which was ended in a final report. He denied the suggestion that the accused did not assault Kachon for the cause of dowry and deposed falsely.

21. P.W. 2 Md. Hadiz, behai of victim. He deposed that he hailed from village Tenga. He heard about murder of victim Kachon from Alamin and rushed there and found the dead-body at the P.O. He did not find any inmates around the P.O. and heard from the locals that the victim Kachon was murdered by the accused on the previous night.

22. In cross-examination he stated that there were many houses around the P.O. and denied the suggestion that accused were not present at the P.O. and they did not commit the offence.

23. P.W. 3 Milon Mia, is the son of the victim by her former husband. He is eye witness of the occurrence. He deposed that accused Abul Kalam is the second husband of his mother victim Ambia . On 12th Baishakh at 8:00 p.m. on hearing hue and cry he and his brother Alamin went to the dwelling hut of accused Abul Kalam wherein they found that accused Salam, Kalam and Helal were assaulting their mother inside the hut of Kalam. Salam and Helal inflicted fist and leg blows on victim Ambia and Kalam dealt ruler blows on the different parts of Ambia. Thereafter Helal fell her down on the ground and Kalam pressed her neck then Salam and Helal dealt incriminate fist blows on the person of victim. At one stage mother of the accused told to eliminate the victim. Salma and Nazma, sisters of the accused chased the victim to the door. After sometime he and Alamin came to the hut of Kalam and found that Kalam is pressing her knee and Kalam throatling his mother who later succumbed to the injuries. He was examined by the I.O. He identified all the accused on dock.

24. In cross-examination he stated that he did not state to the I.O. about assaulting his mother by accused Salam and Helal inside the hut of Kalam. He found 15/20 persons assembled at the P.O. He did not go inside the P.O. however witnessed the occurrence from 200 cubits away. Because of extramarital relation between his mother and accused Kalam, his father drove her away. He denied the suggestion that the occurrence did not take place as stated by him.

25. P.W. 4 Abul Kasem is the behai of victim and not eye witness of the occurrence however heard the same. He deposed that after hearing the occurrence from Alamin he went to the hut of accused Kalam and found the dead-body of Kachon on the floor . Alamin told him that accused Kalam , Salam and Helal assaulted victim Kachon to death. At that time accused were found absent there. He was examined by the I.O.

26. In cross-examination he stated that he informed the informant about the incident and denied the suggestion that accused Kalam did not assault the victim for dowry and he was deposing falsely.

27. P.W. 5 Osman Goni, sister's husband of the victim and not the eye witness. He deposed that he heard the occurrence from Alamin that all the accused assaulted the victim Kachon. He rushed to the P.O. and did not find any accused.

28. In cross-examination he stated that he did not see the occurrence. Prior to the occurrence accused used to torture the victim Kachon for dowry and she narrated the same to them. He denied the suggestion that Alamin did not state anything to him about the death of Kachon by assaulting.

29. P.W.6 Alamin is the son of victim Kachon. His father name is Md. Hafizuddin. He deposed that on 12th Baishakh at 7:30 p.m. he along with his brother Milon went to the dwelling hut of Abul Kalam and found that Kalam, Salam and Helal dragging their mother. Abul Kalam sat at the chest and brought out the victim Kachon, all the accused assaulted her, at about 12:0 Clock at mid night victim succumbed to the injuries at the dwelling hut of Kalam. Accused Abul Kalam used to assault the victim Ambia for dowry so she filed a case against Abul Kalam, prior to the occurrence, he identified the accused on dock.

30. In cross-examination he stated that at the time of occurrence he along with his brother Milin were present at the P.O. He witnessed the occurrence standing 30 cubits away. One Sahid and 2/3 unknown persons also witnessed the occurrence. He denied that he did not state to the I.O. that accused Kalam sat on the chest of Kachon and murdered her and death of Ambia was natural death.

31. P.W. 7 Sahid Ali is the local witness. He was tendered by the prosecution however in cross-examination he stated that he did not see any injury on the person of victim Ambia. Accused Salam and Lat Mia took the victim in hospital for treatment. He did not see Milon and Alamin at the relevant time. He was operating husking machine at the P.O.

32. P.W. 8 Babul Mia. He was a rickshaw puller by profession. He carried the victim Kachon to the hospital by his rickshaw. Salam and Kalam also accompanied to the hospital. Subsequently Kalam told him that the patient died.

33. In cross-examination he stated that he was not the eye witness to the occurrence.

34. P.W.9 Abdur Rashid also local witness. He is not an eye witness to the occurrence. He disowned the prosecution case so he was declared hostile. He deposed that the victim died at the dwelling hut of the accused. On hearing hue and cry he rushed to the P.O. and found the wife of Kalam was lying on a bed in unconscious condition. He heard on the following day about the death of that lady at that stage he was declared hostile by the prosecution.

35. In cross-examination by the prosecution he denied the suggestion that accused Kalam murdered his wife Kachon and fled away and was deposing falsely.

36. In cross-examination by the defence he stated that there is a good relationship between the accused and victim. He had no knowledge about demanding dowry by the accused. He did not find any injury on the person of the victim. Accused Salam and Kalam

carried the deceased to the hospital. Later he heard that the victim died. He did not depose falsely.

37. P.W. 10 Siddiqur Rahman, is the local witness. He deposed that while he was returning home he heard the screaming at the dwelling hut of Abul Kalam. He rushed there and found that wife of Kalam was assaulted. He returned home, on the following day he heard about the death of the wife of Kalam and saw the victim there. He found the mark of injuries at the ear of deceased. Police also held inquest upon the cadaver and in inquest report he stood as one of the witness. He proved his signature as Exhbt. 2/2. The deceased died by torture of accused for the cause of dowry.

38. In cross-examination he stated that he was examined by the Police he denied the suggestion that the accused did not assault the victim for the cause of dowry and he was deposing falsely.

39. P.W. 11 Chand Mia was a local witness. He deposed that the victim Ambia was the wife of accused Kalam and found that she was taken to hospital by rickshaw of Babul wherein victim sat and suddenly she became senseless. She died at the hospital. He saw dead-body and present at the time of burial.

40. In cross-examination he stated that victim Ambia was the wife of Hafizuddin prior to the marriage with accused Abul Kalam. At the time of occurrence or prior to it, he did not find Milon and Alamin at the dwelling hut of Abul Kalam.

41. P.W. 12 Lat Mia was a rickshaw puller by profession. Victim Ambia was the wife of accused Kalam. He find the victim Ambia unconscious at the dwelling hut of Abul Kalam. He carried the victim to the hospital wherein she died. Brother of Ambia instituted the case.

42. In cross-examination he stated that he did not find any injury on the person of the victim. He did not hear about the beating of victim and there was a good relation between them. The informant instituted the case with ill motive.

43. P.W. 13 Idris, P.W. 14 Sarwar alias Sawar Ali, P.W. 16 Shah Alam were tendered by the prosecution and defence declined to cross-examine them.

44. P.W.15 Mustafa Mia is a local witness. He deposed that on 12th Baishak at 8:00 p.m. he found the victim was carried to the hospital. In the morning he heard that the victim Ambia wife of accused Abul Kalam died.

45. In cross-examination he stated that the victim Ambia used to fall in senseless. He did not find any injuiry upon the person of victim Ambia and there was a good relation between husband and wife. He did not hear about demanding dowry to victim Ambia.

46. P.W. 17 Md. Ratan Mia, he also a local witness. He saw that the victim was carrying to the hospital. He heard on the following day the victim died. He had no knowledge how the victim succumbed to the hospital.

47. P.W. 18 Dr. A.K.M. Rafiqul Islam. He was also examined as P.W.20. He deposed that at the relevant time he was posted as R.M.O. of Netrokona sadar hospital. He held autopsy upon the cadaver of victim Ambia and found the following injuries:

মৃতার দেহে ৪টি জখম পাই ঃ

1. One mark bite of seen on left arm.
2. Heamatoma seen in right arm.
3. Swelling with bruise seen on left scapular region.
4. Ecchymosis seen in left side of neck.
5. Post-mortem staining seen in different parts of the body.

উক্ত জখমের প্রেক্ষিতে আমি নিম্নরুপ মতামত প্রদান করিঃ

Opinion kept pending till the report of chemical analysis of preserved viscera. After receiving report he opined that " As poison was not detected in preserved in viscera report by chemical in analysis and injured mentioned in viscera report was not sufficient to cause of death. So cause of death of the deceased could not be ascertained. He proved the postmortem report as Exhbt. 7 and his signature as Exhbt. 7/1.

48. In cross-Examination he stated that he did not mention the age of injuries, it may cause before or after the death. The injuries were simple in nature. He denied the suggestion that the victim died by breathing problem.

49. P.W. 19 S.I. Md. Abdur Rashid Sarkar was investigating officer of this case. He deposed that on 26-04-2002 he was attached with Netrokona sadar Police Station. He received the FIR and filled up its form. He was entrusted for investigation. He visited the place of occurrence, prepared sketch map with index, held inquest upon the cadaver of victim Ambia. Then he sent the cadaver for autopsy. During investigation he examined witnesses. He collected a copy of FIR and final report of Netrokona sadar Police station case no. 17 dated 20-04-1998 instituted by victim Ambia under the Ain, 2000. He also collected the other criminal case instituted under section 11(kha), 30 of the Ain, 2000. After investigation he submitted charge sheet under section 11(Ka) of the Ain, 2000 accusing the condemned prisoner and two others as accused.

50. In cross-examination he stated that at the time of holding inquest he found marks of injuries at the neck. He did not find any serious injuries on her person. He denied that except Alamin and Milon no other person witnessed the occurrence, and occurrence was fictitious one.

51. These are all of the evidence on record adduced by the prosecution to prove the charge.

52. Now the question calls for consideration how far the prosecution could proved the charge against the appellants. Such question along with the submissions of the defence should be answered in the following manner:

53. In approaching and answering to the points drawn up, the cardinal principles of criminal jurisprudence in awarding conviction followed by sentence upon an indicted person demands meditation. A legal survey of law, appraisal of evidence, browsing eye on materials brought on record, analysis of fact and circumstance of the case, inherent infirmities disturbing and striking facts of prosecution case are also required to be taken into consideration. Rival contentions surged forward from both sides shall be also addressed and considered by us.

54. Fundamental principles of criminal jurisprudence and justice delivery system is the innocence of the alleged accused who should be presumed to be innocent until the charges are proved beyond reasonable doubt on the basis of clear, cogent and credible evidence and that onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence.

55. It is always to be remembered that justice delivery system cannot be carried away by heinous nature of crime or by gruesome manner in which it was found to have been committed and graver the charge is greater is the standard of proof required. It should also bear in mind that if the accused can create any doubts by adducing evidence or cross examining the PWs in the prosecution case, the accused is entitled to get benefit of doubt. It is conveniently observed that though sad, yet is a fact that in our country there is a tendency on the part of the people to rope in as many people as possible for facing trial in respect of any criminal case. It has been even found that innocent person, including aged infirm and rivals, are booked for standing on dock. Some are acquitted by the Court of first instance and some by appellate Court, but only having been in incarceration for years. Such efforts on the part of relatives of victim and other interested persons invariably is done and thus it becomes difficult on the part of a Court to find out the real culprit. Under such circumstances and in view of the prevalent criminal jurisprudential system, a judge is to find out the truth from a bundle of lies and to shift the grain out of chaff. A Judge does not preside over a criminal trial merely to see that no innocent person is punished. A Judge, also presides to see that guilty man does not escape. Both are public duties. Law therefore, cannot afford any favour other than truth and only truth.

56. *We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.*

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such asto exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

Inspite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence inspite of oath is of no avail.

57. On going to the evidence on record it transpires that the prosecution in all produced nineteen witnesses. Of them, examined sixteen witnesses and three witnesses were tendered by the prosecution and defence declined to cross-examine them.

58. P.W. 1 is the informant and elder brother of the victim. He heard the occurrence. P.Ws. 2, 3, 4, 5 and 6 are also relations of the victim. Of them, P.Ws. 3 Milon Mia and P.W. 6, Alamin witnessed the occurrence. P.Ws. 8,9,11, 12, 15, 17 found that the victim was carried to hospital by rickshaw. P.Ws. 9 and 10 were also local witnesses they found that the victim died at the homestead of the accused. P.Ws. 18 and 20 appeared to be the same witnesses who is doctor and held autopsy upon the cadaver. P.W. 19 is the investigating officer of this case. After concluding investigation he submitted charge-sheet accusing the condemner-prisoner and two others as accused.

59. On meticulous examination of the evidence on record it is evident that the case in our hand is absolutely rest upon the evidence of P.Ws. 3 and 6 who are the full brothers, sons of the victim and their father was Hafizuddin(former husband of the victim). Other witnesses were examined to corroborate them. P.W. 3 categorically stated that on 12th Baishakh he along with his brother Alamin(P.W. 6) on hearing hue and cry went to the house of accused Abul Kalam and found that accused namely Salam, Kalam and Helal were assaulting their mother inside the house. They repeatedly inflicted fist and legs blows upon the victim and at one stage victim fell down on the ground, then Kalam pressed her and sat on the chest and strangulated her to death. P.W. 6 Alamin who was also an eye witness of the occurrence corroborated the evidence of P.W.3 in respect of assaulting the victim. Other witnesses namely P.Ws. 2,4,5 also stated that they heard the occurrence about assaulting of the victim from Alamin. P.W. 18(same as PW. 20), Dr. A.K.M. Rafiqul Islam Sarker who held autopsy upon the cadaver categorically found four injuries on the persons of the victim. P.Ws. 8,11, 12, 15, 17 also found that the victim was carried to the hospital in serious injured condition although sons of the victim stated that the victim died in her conjugal home and other witnesses stated that on the way to the hospital she died. P.Ws. 9 and 10 were the local witnesses, they also corroborated the other evidence in respect of assaulting of the victim inside the house of accused. Although P.Ws.9 was declared hostile by the prosecution but he categorically stated that the victim died in the accused house. Therefore, we hold that assaulting the victim by causing injuries upon her person i.e. in accused Kalam's dwelling hut) and causing her death during custody of her accused husband Abul Kalam are consistent, uniform and corroborative with each other with all material particulars. There is absolutely no reason to disbelieve the consistent and corroborative evidence of those competent witnesses having no reason whatsoever to depose falsely against the accused appellant. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever. So the same are invulnerable to the credibility.

60. The doctor opined that the injuries inflicted upon the victim was not sufficient for causing death. We are unable to accept his opinion inasmuch as there are sufficient ocular evidence that the victim were mercilessly beaten by the three accused. Of them, accused Abul Kalam pressed her on the ground and sat on her chest and then strangulated her, consequently she succumbed to the injuries at the dwelling hut of accused Abul Kalam. Therefore we hold that the injuries inflicted upon the victim were severe in nature which were sufficient for causing death. In our country doctor may sometime cannot provide correct view regarding cause of death of victim, in such cases we are to rely upon the evidence of ocular eye witnesses, where ocular evidence is sufficient to come to an conclusion to determine the cause of death, then the ocular evidence shall prevail over the opinion of doctor. To that end in view that the opinion of the doctor should be left out of consideration.

61. On further meticulous examination of the evidence on record we find that prior to the occurrence the victim did not tell to any of the witness regarding demanding of dowry to her by her accused husband Abul Kalam. Although previously she instituted a criminal case against her husband Abul Kalam for demanding dowry, but the same was ended. With this regard we hold that, the said case was ended on its own merit but in the instant case there is no evidence on record that prior to the occurrence the victim disclosed to her relation that the accused (condemned prisoner) Abul Kalam demanded Tk. 50,000/- to her and for the cause of non payment of such dower money for Tk.50,000/- murdered her. With this regard we hold that the victim was murdered by her accused husband during his custody, but not for the cause of dowry.

62. After committing murder it was given out by the accused that the victim committed suicide by wrapping rope at her neck and taking poison.

63. Let us now consider the medico- legal feature coupled with the injuries found on the neck and person of the victim.

64. According to MODI's Text book of Medical Jurisprudence and Toxicology violent death resulting chiefly from asphyxia are hanging strangulation throttling, Suffocation and Drowning.

65. Hanging is a form of death produced by suspending the body with a continuous ligature mark round the neck. The mark is usually situated above the thyroid cartilage between the larynx and the chin and is directed obliquely upward following the line of the mandible (lower jaw) and interrupted at the back or may show an irregular impression of a knot, reaching the mastoid processes behind the ears towards the point suspension. On the contrary strangulation is a violent form of death which results from constructing the neck by means of a non-continuous ligature mark or any other means without suspending the body. Such ligature mark usually situated lowdown in the neck below the thyroid cartilage and encircling the neck horizontally and completed.

66. It is in page 192 of the Parikh's Textbook of Medical Jurisprudence and Toxicology. Fifth Edition.

> " *Whether death was due to hanging"*
>
> *It is not uncommon in India to kill a victim and then suspend his body (post mortem hanging) from a tree or rafter to mislead the relatives and the police. In such a case, a ligature mart is usually found. Therefore, when a person is found dead and his body suspended, no opinion can be given from the ligature mark alone. Death could be attributed to hanging if one finds(1) a ligature mark with petechial hemorrhages and ecchymoses into or around its substance, (2) marks of dribbled saliva, (3) tear of the intima of carotid arteries with extravasation of blood within their walls, (4) congestion and hemorrhage in the lymph modes above and below the ligature mark, (5) fracture or dislocation of cervical vertebra and (6) absence of fatal injuries and poisoning :*

67. It is in page 257 of the MODI's Medical Jurisprudence and Toxicology. Twenty Second Edition:

> *"(1) Whether death was caused by hanging "In India, it is a common practice that to kill a victim and then to suspend the body from a tree or a rafter to avert suspicion. It is, therefore, necessary to find out if hanging was the cause of death in*

suspended body. The presence of ligature mark alone is not diagnostic of death from hanging, inasmuch as, being a purely cadaveric phenomenon it may be produced if a body has been suspended after death. Often a body is suspended after murder to simulate suicidal hanging. In such cases, a close examination of the direction of the friction marks on the fibers of the rope at the point of suspension, may indicate whether the body was pulled up by some one else or dropped down by its weight. Casper has illustrated by experiments that a mark similar to the one observed in persons hanged alive can be produced if suspended within two hours or even a longer period after death. Besides, a similar mark may also be produced by dragging a body along the ground with a cord passed round the neck soon after death. However, one can safely say that death was due to hanging, if, in addition to the cord mark, there was dribbling of saliva from the angle of mouth, ecchymosis and slight abrasions around the ligature mark, laceration of the intima of the carotid arteries with extravasation of blood within their walls and the post mortem sings of asphyxia, besides if there are no evidence of a struggle, scratches and nail marks, fatal injuries or poisoning."

68. Therefore it appears that there are non-continuous ligature marks at the neck of deceased, which is the violent forms of death caused by strangulation. So in the present case the death of the deceased could not be attributed to hanging.

69. In the instant case the injuries inflicted upon the victim found by the doctor are consistent with the ocular evidence, which was antimortem and homicidal in nature. Moreover the injuries present on the dead-body of the deceased were not consistent with suicidal death due to hanging. The ligature mark on the neck was post-mortem. No symptom of suicidal hanging was present.

70. According to the medico legal evidence it has been conclusively proved that the victim Kachon Akter homicidally assaulted and strangulated to death.

71. Undisputedly the deceased, who was the wife of the accused, met with death in the conjugal home, while she was living with her accused husband. Presence of the accused in the house at the material time is not disputed. No plea of alibi has been taken. Moreover presence of the accused at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the irresistible inference would be that none besides him caused the death of the deceased. With this regard reliance may be placed in the cases of (1) Abdul Motaleb Howlader vs. State 5 MLR (AD) 362= 6 BLC(AD)1, (2) Elais Hossain vs. State, 54 DLR (AD) 78, (3) Golam Mortuza, vs. State, 2004 BLD (AD)201=9 BLC (AD)229, (4) Gouranga Kumar Shaha, vs. State 2 BLC (AD) 126, (5) Dipak Kumar Sarker, Vs. State 40 DLR (AD), 139, (6) State Vs. Mofazzal Pramanik, 43 DLR(AD)65, (7) State Vs. Shafiqul Islam, 43 DLR(AD) 92, (8) State Vs. Kalu Bepari, 43 DLR(AD) 249, (9) Shamsuddin vs. State, 45 DLR 587, (10) Abdus Salam vs. State, 1999 BLD 98, (11) Abdus Shukur Miah vs. State 48 DLR 228, (12) State vs. Afazuddin Sikder, 50 DLR 121, (13) Abul Kalam Molla vs. State 51 DLR 544, (14) Joynal Bhuiyan vs. State 52 DLR 179, (15) Fazar Ali vs. State, 5 MLR 351= 5 BLC 542, (16) State Vs. Azizur Rahman 2000 BLD 467= 5 BLC 405.

72. In the case of Abul Hossain Khan vs. State 8 BLC(AD) 172, it is held-

> *" The un-denied position is that death of petitioner's wife occurred in the house of the petitioner. It is not the case of the petitioner that he was away from the home while death occurred to his wife or that some miscreants whom he could not resist caused death of his wife. The petitioner tried to explain the cause of death by stating that the deceased committed suicide by hanging. The explanation offered as to how death occurred to the petitioner's wife was found to be not correct because of the evidence of P.Ws. 12 and 13, the Medical Officers who held post-mortem examination of the dead-body of petitioner's wife. The Medical Officers have stated that cause of death of the victim was homicidal and not suicidal. Since death to the wife was caused while she was residing in the house of her husband, the convict petitioner, is competent to say how death occurred to his wife and that the explanation which he offered having been found untrue, the conviction and sentence that was passed by the learned Sessions Judge has rightly been affirmed by the High Court Division.*

73. The facts and circumstances of the above case are fully consistent with those of the case in our hand and as such the principle of law enunciated in that case is applicable in this case.

74. It is pertinent to point out that the accused has no obligation to account for the death for which he is placed for trial. The murder having taken place while the wife was with the custody of her husband, then the accused husband under Section 106 of the Evidence Act, is under obligation to explain how his wife had met with her death. In absence of any explanation coming from his side it seems, none other than the accused husband was responsible for causing death.

75. It is well settled that when it is established that the husband and wife were residing in the same house at the relevant time, the husband is duty bound to explain the circumstances how his wife met her death and in absence of any explanation coming form the husband, irresistible presumption is that it is the husband who is responsible for her death. In this regard reliance can be placed in the case of State Vs. Aynul Huq 9 MLR 393= 9 BLC 529. This view receives support in the case of Gouranga Kumar Saha vs. State 2 BLC (AD) 126. Abdul Mutaleb Howlader vs. State 5 MLR(AD)92= 6 BLC(AD)1, Dipok Kumar Sarkar vs. State reported in 40 DLR(AD) 139 and Sudhir Kumar Das alias Khudi Vs. State 60 DLR-261.

76. In the case State vs. Azam Reza 62 DLR(AD) 406 held:

> *" Wife killing case- The deceased was the wife of the accused who met with death in the bed-room of the accused, while she was living with the accused. The presence of the accused in the house of the material time is not disputed rather is supported and proved by evidence on record and the death of the deceased was within the special knowledge of the accused."*

77. On appraisal of the evidence on record therefore, we find that the evidence of the prosecution witnesses regarding staying of the victim with her accused husband at her conjugal home are consistent, uniform and corroborative with each other. There is absolutely no reason to disbelieve those competent witnesses, therefore, the same are invulnerable to the credibility.

78. The convict-appellant stood charged and convicted for offence of section 11(ka) of the Ain 2000. Section 11(ka) enjoins that if the husband of a woman or father, mother, guardian, relation or any other person on behalf of the husband for dowry cause death to a woman or ventures to cause death or causes hurt or have a try to cause hurt that husband, father, mother, guardian, relation or the person (a) shall stand sentenced to death for causing death or shall stand sentenced to imprisonment for life for mounting endeavour to cause death and in both the counts he shall be, also, liable to pay fine and (b) shall be sentenced to imprisonment for life causing hurt or be sentenced to rigorous imprisonment for a period not more than 14(fourteen) years and less than 5(five) years for striving to cause hurt and in both counts shall be liable to fine.

79. In order to attraction 11(Ka) of the Ain 2000, it is to be proved that death was caused in view of demand of dowry put forward from the side of husband or father, mother, guardian, or relation of the husband or any person for and on behalf of husband.

80. From circumstantial evidence it has come to light that convict-appellant had caused the death of deceased and a clear case of murder had been brought home to the door of appellant.

81. This takes us to a legal debate of fundamental character, which is,

i. Whether the convict-appellant can be graced with a verdict of acquittal when charge of section 11(ka) of the Ain of 2000 could not be pressed against him;

ii. When a clear case of murder has been established by circumstantial and medical evidence against him whether the convict-appellant can be convicted for the offence of murder punishable under section 302 of the Penal Code.

iii. Whether the case is required to be sent back to Tribunal or Court of sessions for fresh-trial.

82. Section 25 of The Ain of 2000 postulates that Tribunal defined section 2(Gha) shall be treated as Court of Sessions and Tribunal shall be able to exercise all powers of Sessions Court in holding trial of an offence.

83. Section 26 of The Ain 2000 enshrines that Tribunal so constituted shall be recorded as Nari-O--Shishu Nirjatan Daman Tribunal and shall be constituted with one Judge and Judge of Tribunal shall be appointed from amongst District and Sessions Judge to the Government, if necessary, shall appoint any District and Sessions Judge as Tribunal Judge in addition to his charge. Section 20 further enjoins that under the section Additional District and Sessions Judge shall, Also, stand included as District and Sessions Judge.

84. From the above it becomes manifestly clear that a Tribunal trying a case under the Ain of 2000 is, also, a Court of District and Sessions Judge. When a Judge sits in a Tribunal or Special Tribunal Case holding trial of an offence under a Statute or Special Statute is a Tribunal or Special Tribunal and a Judge when sits in Sessions Case trying an offence punishable under Penal sections of Penal Code sits as Sessions Judge.

85. The case is hand, although, tried by a Tribunal constituted under The Ain of 2000 that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as Additional District and Sessions Judge, as well as Nari-O-Shishu Nirjatan Daman Tribunal no.2. Judgment demonstrates that learned Additional District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-O-Shishu Nirjatan Daman Tribunal.

Fate of the convict-appellant and result of the case would have been the same whether it would have been tried either as a Nari-O-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 11(ka) of the Ain of 2000 was not attracted in respect of convict-appellant the offence of section 302 the Penal Code could be very much pressed into service against the convict-appellant, and he could be conveniently tried and convicted for offence of section 302 of the Penal Code.

86. In the case of Asiman Begum vs. The State 51 DLR(AD)-18 held:

"*When it is found after a full trial that there was a mis-trial or trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.*

It is found that there was no legal evidence to support the conviction then in that case it would be wholly wrong to direct a retrial because it would then be a useless exercise. Further, the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial."

87. As regards remand of the case, we may profitably refer the above decision in the case of Asiman Begum vs. state reported in 51 DLR(AD) 18 *wherein it has been decided that the remand order for trial of the case as a Sessions case in the particular circumstances of the case will be a mere formality because Nari-O-Shishu Case no.2 of 1996, although tried under Bishes Bidhan Ain, 1995 by a Bishesh Adalat, the presiding officer was no other than the Sessions Judge himself and, as such, it was unlikely that the result would be anything different if the case was tried by him as a Sessions case.* Appellate Division thus sent the appeal to High Court Division to consider the case on merit and to pass whatever order or orders it might think appropriate in the interest of justice.

88. In State vs. Abul Kalam , 5 BLC 230 one Abul Kalam stood convicted for offence of section 10(1) of The Ain of 1995 for murder of his wife for dowry by learned Sessions Judge and Special Tribunal no.1, Noakhali. Consequential sentence was death. Condemned-prisoner preferred Jail appeal and, also, regular Criminal appeal before High Court Division. There had been, also, Death Reference. A Division Bench of High Court Division heard Death Reference, Jail appeal and Criminal appeal together and disposed of those by a common Judgment. High Court Division found that there had not been cogent evidence asto committing murder for dowry and no evidence had been led as to the real cause of killing of wife by husband and held that the case did not come under section 10(1) of The Ain of 1995 and the case comes under section 302 of the Penal Code. The High Court Division further held that Sessions Judge, in fact, was the Special Tribunal no.1 who tired the case and for no fault of the accused the case had been tried as Special Tribunal case. High Court Division instead of sending the case back for fresh trial under Section 302 of The Penal Code by learned Sessions Judge disposed of the appeal. High Court Division altered conviction from section 10(1) of The Ain,1995 to one under section 302 of the Penal Code. Sentence of death was altered to one of imprisonment for life. The High Court Division in rendering decision took into account the case of Asiman Begum vs. State (Supra).

89. In the case of Shibu Pada Acharjee vs. State reported in 56 DLR 285, accused-appellant was convicted for offence of section 4© of The Ordinance of 1983 for commission of rape upon victim Ratna Rani but ingredients of section 4© of the Ordinance of 1983 could not be brought home to accused-appellant. In the case is had been laid down:

> *" To take the prosecution out of Court on a question of technicality, will be a travesity of Justice and technicality must bend to cause of justice inasmuch as ends of law is Justice."*

90. *Accused-appellant can be fastened for offence of section 376 of the Penal Code and conviction under section 4(c) of the Ordinance of 1983 can be altered to one of section 376 of The Penal Code.*

91. In the said case conviction under section 4(c) of The Ordinance of 1983 was altered to one of section 376 of the Penal Code.

92. In the case of The State vs. Mahbur Sheikh alias Mahabur ILNJ 139 i.e. I The Lawyers & Jurist 139 held:

> *" Since offence of murder punishable under section 302 of Penal Code was carried to the door of convict-appellant he can be very much convicted for offence of Section 302 of the Penal Code and as such we convert the offence of section 11(Ka) of the Ain 2000 to offence of section 302 of the Penal Code. Convict-appellant, thus stands convicted for offence of section 302 of the Code.*

93. In the event of sending the case either to Tribunal or Court of Sessions for fresh trial proceeding would be protracted which cannot be allowed in the interest of true dispensation of criminal Justice.

94. Since offence of murder punishable under section 302 of the Penal Code was carried to the door of convict-appellant he can be very much convicted for offence of section 302 of the Penal Code and as such we convert the offence of section 11(ka) of The Ain of 2000 to offence of section 302 of Penal Code. Convict-appellant, thus stands convicted for offence of section 302 of the Penal Code.

95. Legal debate stands solved in the following terms and language:

i. Convict-appellant Abul Kalam cannot be graced with a verdict of acquittal;
ii. Convict-appellant can be convicted for the offence punishable under section 302 of the Penal Code.
iii. Case is not required to be sent either to Tribunal or Court of Sessions for fresh-trial.

96. With regard to the sentence imposed upon convict-appellant we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.

97. The credit to be given to the statement of a witness is a matter not regulated by rule of procedure, but depends upon his knowledge of fact to which he testifies his disinterestedness,

his integrity and his veracity. Apportion of oral evidence depends on such variable in consistence which as a human nature can not be reduced as a set formula (40 DLR 58).

98. The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness.

99. Evidence of close relations of the victim cannot be discarded more particularly when close relations does not impair the same. Straightforward evidence given by witness who is related to deceased cannot be rejected on sole ground that they are interested in prosecution. Ordinarily close relation will be last person to screen real culprit and falsely implicate a person. So relationship far from being ground of criticism is often a sure guarantee of its truth (40 DLR 58).

100. In the light of discussions made above and the preponderant Judicial views emerging out of the authorities referred to above we are of the view that the impugned Judgment and order of conviction and sentence under section 11(ka) of the Ain 2000 suffers from legal infirmities, but the same will be proper under section 302 of the Penal Code. In respect of sentence of condemned prisoner Abul Kalam, we hold that he was aged about 38 years when he was examined under section 342 of the Code. Record indicates that he is not a hard criminal and has been languishing in the condemned-cell for about fifty five months with suffering of mental agony of death within the death-cell. Taking an account of aggravated and mitigating circumstances ends of justice will be met if the death sentence is altered to one of imprisonment for life. Condemned-prisoner Abul Kalam thus, stands sentenced to suffer imprisonment for life.

101. In the result:-

(a) Death reference no. 50 of 2010 is rejected;

(b) The impugned judgment and order of conviction and sentence dated 04-08-2010 passed by the learned Judge of Nari-O-Shishu Nirjatan Damon Tribunal no.2, Netrakona, is modified to the effect that the condemned-prisoner Abul Kalam is convicted under Section 302 of the Penal Code and sentenced to suffer imprisonment for life and also to pay a fine of Tk.10,000/- in default to suffer rigorous imprisonment for six months more.

102. In view of the provisions laid in section 35A(1) of the Code of Criminal Procedure the total period the condemned-prisoner Abul Kalam have been in custody before conviction in connection with this offence shall be deducted from the period of imprisonment for life awarded to him.

(c) Accordingly, Criminal appeal no. 5149 of 2010 and Jail appeal no. 256 of 2010 are allowed in part with modification of conviction and sentence in above terms.

103. The Office is directed to send down the records at once.

3 SCOB [2015] HCD 93

High Court Division
(Civil Revisional Jurisdiction)

CIVIL REVISION NO. 1204 OF 2012

Abul Khair Tabbaco and others
... Petitioners
-Versus-
Registrar of Taxes and others
... Opposite Party

Mr. Tanjib-ul-Alam, Advocate
..... For the Petitioners
Mr. A. M. Aminuddin, Advocate,
..... For Opposite Party
Heard on- 27.07.2015, 16.08.2015

Judgment dated: 23.08.2015

Present:
Mr.Justice Borhanuddin

Trade Marks Act, 2009
Section 102:
When rectification proceeding is pending before this court, Suit for infringement of Trademark pending in the Court below should be stayed in view of Section 102 of the Trade Marks Act, 2009. ... (Para 16)

Judgment

Borhanuddin, J:

1. This Rule has been issued calling upon opposite parties to show cause as to why order no.20 dated 23.02.2012 passed by the learned Additional District Judge, 2nd Court, Dhaka, in Title Suit No. 45 of 2010, 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. Facts relevant for disposal of the rule are that opposite party no.2 herein as plaintiff instituted Title Suit No.45 of 2010 in the Court of learned District Judge, Dhaka, praying for perpetual injunction against infringement of Trade Marks and passing off goods under the Trade Marks Act, 2009, impleading the petitioner as defendant no.1 contending interalia that the plaintiff company incorporate in Bangladesh having engaged in the business of manufacturing and marketing tobacco and registered proprietor of the brand and trademark BRISTOL with its design and get up; The Trade Mark has been registered in the office of the Registrar of Trade Marks as TM 25519 dated 21.06.1987 under Class 34; The name BRISTOL was first registered by the plaintiff in 1942 and thereafter with changing demand of the consumers, new packs of BRISTOL cigarettes were introduced; On 06.08.2009, plaintiff applied for Trade Mark registration of a new pack design of BRISTOL and obtained value added tax (hereinafter called 'VAT') approval in this regard; On 10.08.2010, plaintiff again applied for Trade Mark registration of a new pack design as BRISTOL; By virtue of long usage and registration of the mark BRISTOL in respect of cigarettes, plaintiff has acquired exclusive right over the trade mark BRISTOL alongwith its design, style and get up; Recently plaintiff came to know that the defendant no.1 distributing leaflets in various trade outlets across the country introducing a new product namely BRISDOL with almost same get up as plaintiff's product BRISTOL; Plaintiff requested defendant no.2 in writing with copies to the defendant no.3 and other concerned authorities not to grant approval of the Mushak-1 form of BRISDOL submitted by defendant no.1; Defendant nos.2 and 3 have not replied; In

the meantime, defendant no.1 started manufacturing and marketing similar goods by adopting BRISDOL as a trade mark with similar colour, design and get up; Defendant no.1 by using a deceptively and phonetically similar trade mark infringing trade mark of the plaintiff and also passing of their product as the product of plaintiff and thus infringing plaintiff's intellectual property right and causing irreparable loss and damage to the plaintiff; Hence, the suit.

3. Defendant no.1 filed written statement denying material allegations made in the plaint and contending interalia that the defendant is a limited company incorporated in Bangladesh under the Companies Act and engaged in the business of manufacturing and marketing various tobacco products in Bangladesh since 1998; In course of business, defendant adopted its trademark BRISDOL and started using the same on its product; On 27.09.2010, defendant applied to the Commissioner of Customs, Excise and VAT, Comilla Division for fixation of price of the goods contains 10 sticks in a pack and VAT authority determined and fixed the value vide memo dated 05.10.2010; Defendant applied to the Registrar of Trade Marks for a report whether any application pending for trademark similar to or identical with the defendant's trademark BRISDOL; No report was available indicating that there is any registered trademark BRISDOL; Following the search, defendant applied to the Registrar of Trademarks for registration of its trademark BRISDOL on 27.09.2010 and the same has been registered as Trademark Application No.136200 under class 34; Defendant's further applied for amendment of the application in prescribed form TM-16 on 13.10.2010; Following fixation of retail price by the VAT authority and by virtue of pending application before the Registrar of Trade Marks, defendant manufactured and marketed its products bearing the trade mark BRISDOL in the month of September, October 2010 and paid huge amount of revenue to the Government exchequer; Upon enquiry, defendant came to know that plaintiff applied for the first time on 19.08.2009 for fixation of price of cigarettes bearing the trademark BRISTOL containing 20 sticks in each pack; VAT authority in the course of price fixation process afforded a hearing wherein plaintiff confirmed that the trademark BRISTOL has not been used for the last 22 years which is apparent from averments of the plaint filed by the plaintiff; As such, plaintiff's trademark is liable to be struck off from the register; Though plaintiff obtained price declaration for BRISTOL in the month of September, 2009, it never marketed its product under the said brand name until the defendant produced and marketed its product with trade mark BRISDOL on 27.09.2010 and obtained price approval from the VAT authority on 05.10.2010; Defendant no.1 manufacturing and marketing its product under trade name of BRISDOL indentifying the same as a product of Abul Khair Tobaco Company Limited as such, there had not been any infringement of any trademark of the plaintiff inasmuch as the plaintiff had lost its trademark due to non use of the same for a long time; Furthermore, design and get up of the defendant's product is distinctive and dissimilar from that of the plaintiff's as such, there had not been any violation on the part of the defendant of any provision of the Trademarks Act, 2009; Defendant is the prior user of the trademark BRISDOL; Suit is liable to be dismissed.

4. On 23.03.2012, defendant no.1 filed an application in the suit under Section 102 of the Trademarks Act, 2009 read with section 10 of the Code of Civil Procedure praying for stay proceeding of the suit contending interalia that defendant no.1 being petitioner filed Trademarks Application No.5 of 2010 impleading the plaintiff as opposite party in the High Court Division of Bangladesh Supreme Court under Section 98(1) read with section 42(1)(Kha) of the Trade Marks Act, 2009, for rectification of the Register of Trade Marks by way of striking off the Trade Marks No.10335 in Class-34 and being application no.135119 dated 10.08.2010. Upon hearing the applicant, this Division issued rule and stayed operation of the Registration of Trademark no.10335 dated 11.11.1942, Trade Mark No.25519 dated

21.06.1987 and Trade Mark No.28744 dated 10.05.1989 in respect of BRISTOL under Class-34, for a period of 3(three) months vide order dated 31.10.2010. Being aggrieved, Opposite party no.2 of the application i.e. plaintiff of the Title Suit filed Civil Petition for Leave to Appeal No.2527 of 2010. After hearing the petitioner, Appellate Division stayed operation of the order passed by the High Court Division till 31.3.2011. As such, proceeding of Title Suit No.45 of 2010 for infringement of trademark is required to be stayed till disposal of the rectification proceeding pending in the apex court.

5. After hearing the parties and perusing relevant papers/documents, learned Additional District Judge, 2nd Court, Dhaka, rejected the application holding that Title Suit and Trademarks application are two different type of cases with separate relief.

6. Having aggrieved by and dissatisfied with the order, defendant no.1 as petitioner preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present rule with an order of stay.

7. Mr. Tanjib Ul Alam appearing with Mr. Md. Hassan Habib, learned advocate for the petitioner by filing supplementary affidavit annexing Trade Marks Application no.5 of 2010 with annexures appended thereof and the order passed by the Appellate Division in Civil Petition for Leave to Appeal No.2527 of 2010 submits that the court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned order without considering that the Title Suit for infringement of trademark is required to be stayed till disposal of the rectification proceeding regarding the trademark now pending in the High Court Division. He also submits that the court below committed an illegality in not considering that the matter in issue in Title Suit No.45 of 2010 is directly and substantially an issue in the Trade Marks Application no.5 of 2010 and as such, proceeding of Title Suit should be stayed till disposal of the Trade Marks Application by the High Court Division. He again submits that a suit for infringement of the trademark with regard to validity of registration between the parties should be stayed under Section 102 of the Trademarks Act, 2009, read with Section 10 of the Code of Civil Procedure when rectification proceeding regarding the same Trade Mark is pending in the higher court. He next submits that the fact that trademark application filed after institution of the suit is immaterial for the purpose of stay. He further submits that court can stay proceeding of a suit even if it does not come within the perview of section 10 of the Code of Civil Procedure for ends of justice to avoid unnecessary harassment to any party. In support of his submissions, learned Advocate referred to the case of Chandra Bhan Dembla Trading, Delhi, vs. Bharat Sewing Machine Co., Bikaner, reported in AIR 1982 Delhi, 230 and the case of Mst. Arifa Begum vs. Khulque Mohammad Naqvi, reported in 21 DLR (WP) 209.

8. On the other hand Mr. A. M. Aminuddin with Mr. M. Mushfiqur Rahman, learned advocates appearing for the opposite party no.2 submits that Appellate Division vide order dated 15.05.2013 passed in Civil Petition for Leave to Appeal No.2527 of 2010 send the Trade Marks Application no.05 of 2010 to this Division for early disposal on merit but the petitioner did not take any step for hearing of the application. He also submits that if the Title Suit is stayed till disposal of the Trade Marks Application then the opposite party no.2 shall suffer irreparable loss and injury inasmuch as Title Suit is filed for permanent injunction against infringement of trademark and passing of goods by the defendant no.1.

9. Heard the learned advocates. Perused revisional application, supplementary affidavit and annexures appended thereof.

10. It appears that upon hearing the Trade Marks Application no.5 of 2010 filed by the petitioner, this Division issued rule and also stayed operation of the registration of the opposite party no.2 relating to its product under trade name BRISTOL for a period of 3(three) months. Against the order, opposite party no.2 as petitioner filed Civil Petition for Leave to Appeal No.2527 of 2010 before the Appellate Division of this court and prayed for stay of the order passed by this Division. Upon hearing the petitioner, Hon'ble Judge-in-Chamber stayed order of this Division till 31.03.2011. After hearing the parties, Appellate Division disposed of the leave petition with following observation:

> *"Upon hearing the learned Advocate, we are of the view that the ends of justice would be best served, if the Rule itself is disposed of on merit by the High Court Division.*
>
> *Let this rule be heard and disposed of by the High Court Division as early as possible. The parties, if so advised may take steps for early disposal of the said Rule without any adjournment. However, the order of stay granted earlier by the learned Judge in Chamber be continued till disposal of the said Rule".*

11. It is apparent that inspite of said order by the Appellate Division, neither the petitioner nor the opposite party no.2 took step for disposal of the Trademarks Application no.5 of 2010.

12. Opposite party no.2 as plaintiff instituted Title Suit no.45 of 2010 for permanent injunction against infringement of the trademark and passing off goods under the Trade Marks Act, 2009, claiming defendant no.1 of the suit infringing plaintiff's intellectual property right and thereby causing irreparable loss to the plaintiff.

13. On the other hand, defendant no.1 of the suit i.e. present petitioner filed written statement denying the allegation contended that defendant is the prior user of the trademark BRISDOL, design and get up of the same is distinctive and different. Further contending that plaintiff did not use the trademark BRISTOL for a long period of 22 years as such, defendant's trademark is liable to be struck off from the register.

14. The petitioner filed Trade Marks Application no.5 of 2010 under Section 98(1) read with Section 42(1) l(Kha) of the Trade Marks Act, 2009 for rectification of the Register of Trade Marks. After filing written statement, defendant no.1 of the Title Suit filed an application under Section 102 of the Trade Marks Act, 2009 read with Section 10 of the Code of Civil Procedure to stay proceeding of the suit till disposal of the Trademark Application.

Section 102 of the Trade Marks Act runs as follows:

> *"102.* ***Stay of proceeding where the validity or registration of the trademark is questioned****-(1) Where in any suit for the infringement of a trademark, the defendant pleads that the registration of the plaintiff trademark is invalid; or the plaintiff pleads the invalidity of the registration of the defendant's trademark, the Court trying the suit hereinafter referred to as the Court, shall:*
>
> *(a) if any proceedings for rectification of the Register in relation to the plaintiffs or defendant's trademark are pending before the Registrar or the High Court Division, stay the suit pending the final disposal of such proceedings.*
>
> *(b) if no such proceedings are pending and the Registrar is satisfied that the plea regarding the invalidity of the registration of the plaintiffs or defendant's trademark is prima facie tenable, raise an issue regarding the same and adjourn the case for a period of 3(three) months from the date of framing of the issue in*

order to enable the party concerned to apply to the High Court Division for rectification of the Register."

15. Since plaintiff instituted Title Suit no.45 of 2010 praying permanent injunction against the defendant no.1 i.e. petitioner of the Trademark Application for infringement of Trade Mark and passing off goods under the Trade Marks Act and the defendant of said suit as applicant filed Trademark Application no.5 of 2010 before this Division under Section 98(1) read with Sections 48(1)(kha) of the Trade Marks Act, for rectification of the register of Trade Marks, I cannot agree with the finding of court below that Title Suit filed by the plaintiff and the Trademarks application filed by the defendant no.1 of the suit as applicant are two different type of cases and reliefs are also different.

16. It appears that Title Suit no.45 of 2010 and Trademarks Application no.05 of 2010 are between the same parties challenging Trademark of one another. Defendant no.1 stated in his written statement that plaintiff did not use the trademark for the last 22 years as such plaintiff's trademark is liable to be struck off from the register. Defendant no.1 of the suit as applicant filed Trade Marks Application no.05 of 2010 under Section 98(1) read with Section 42(1)(kha) of the Trade Marks Act, 2009, for rectification. Title Suit and Trade Marks Application arising out of same dispute between the same parties. Suit is for infringement of Trade Mark and Application is for rectification challenging validity of registration of Trade Marks of each other. When rectification proceeding is pending before this court, Suit for infringement of Trademark pending in the Court below should be stayed in view of Section 102 of the Trade Marks Act, 2009. I find support of this view in the case of Chandra Bhan Dembla Trading, Delhi, -Vs- Bharat Sewing Machine Co. Bikaner, reported in AIR 1982 DELHI 230, wherein it is held:

"A suit for infringement of trademarks in which the contest between the parties is with regard to validity of registration of each other, can be stayed when rectification proceedings regarding the trademarks are pending."

17. Under the facts and circumstances of the case and for the reasons stated above, I am of the view that Court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned order.

18. Accordingly, rule is made absolute.

19. Order dated 23.02.2012 passed by the learned Additional District Judge, 2nd Court, Dhaka, in Title Suit no.45 of 2010 is set aside.

20. Order of stay granted at the time of issue of the Rule and extended from time to time is herby vacated.

21. In view of the order passed by the Appellate Division, the parties are directed to take necessary step for early hearing of Trade Marks Application no.5 of 2010.

3 SCOB [2015] HCD 98

হাইকোর্ট বিভাগ
(ফৌজদারী বিবিধের অধিক্ষেত্র)

ফৌজদারী বিবিধ মামলা নং ২০৮৫৯/২০১০

মোঃ জুয়েল শিকদার
----দন্ডিত -দরখাস্তকারী।
বনাম
রাষ্ট্র
---- অপরপক্ষে।

দরখাস্তকারী পক্ষে কেহ হাজির নাই ।
জনাবা শাকিলা রওশন ডেপুটি এ্যাটর্নী জেনারেল
----- অপরপক্ষে।

শুনানী ও রায় প্রদানঃ ২৬ মে ২০১১ইংরেজি

উপস্থিতঃ
বিচারপতি জনাব এ,কে,এম ফজলুর রহমান
এবং
বিচারপতি জনাব শেখ মোঃ জাকির হোসেন

ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান অনুযায়ী দন্ডিত আদেশ বাতিলের ক্ষেত্রে তিনটি বিষয়ই বিবেচনায় প্রাধান্য পাইবে, যথা; "আইনগত সাক্ষ্য প্রমানের অভাব" এবং "আদালত গঠনে ত্রুটি" (Quoram-non-judice) এবং "আইনের অপব্যবহার যাহার ফলে ন্যায় বিচার ব্যাহত।"
...(প্যারা ৩১)

রায়

বিচারপতি শেখ মোঃ জাকির হোসেনঃ

১. ইহা ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান মতে সাজা বাতিলের প্রার্থনায় একখানা দরখাস্ত। ৪নং বিশেষ ট্রাইব্যুনাল, বরিশাল কর্তৃক বিশেষ ট্রাইব্যুনাল মামলা নং-৯৪/২০০৮ যাহার জি,আর মামলা নং-৬১৬/২০০৮, যাহা বরিশাল কোতয়ালী মডেল থানার মামলা নং-৪১ তারিখ ১৬.০৯.২০০৮ ইং হইতে উদ্ভূত, উক্ত মামলায় বিগত ২৬.১১.২০০৯ ইং তারিখে প্রদত্ত রায়ে ১৯৭৪ সনের বিশেষ ক্ষমতা আইনের ২৫বি(২) ধারার বিধান মতে দরখাস্তকারীকে দোষী সাব্যস্তক্রমে ৩ বৎসর সশ্রম কারাদন্ড সহ ১০০০/-টাকা জরিমানা, অনাদায়ে আরো ৪ মাসের সশ্রম কারাদন্ড রায়ের আদেশের বিরুদ্ধে দন্ডপ্রাপ্ত-দরখাস্তকারী ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান মতে অত্র বিবিধ মামলা দাখিল করেন। যাহার পরিপ্রেক্ষিতে অত্র আদালতের বিজ্ঞ একটি দ্বৈত বেঞ্চ কেন উল্লেখিত সাজার রায় বাতিল করা হইবে না তৎমর্মে অপরপক্ষের প্রতি কারণ দর্শানোসহ রুল জারী এবং রুল ইস্যুকালীন সময় ২১.০৭.২০১০ ইং তারিখে দন্ডপ্রাপ্ত-দরখাস্তকারীকে রুলটি নিস্পত্তি না হওয়া পর্যন্ত জামিনে মুক্ত থাকার আদেশ প্রদান করেন।

২. রুলটি নিস্পত্তির স্বার্থে রাস্ট্র পক্ষের মামলার সংক্ষিপ্ত ঘটনা এই যে, গোয়েন্দা শাখার এস,আই মোঃ জাহিদ হোসেন আসামী-দরখাস্তকারীকে ৫০ বোতল ভারতীয় ফেন্সিডিলসহ গ্রেফতার পূর্বক ১৬.০৯.২০০৮ ইং সকাল ৯.৩০ মিনিট কোতয়ালী মডেল থানা, বরিশাল মেট্রোপলিটন পুলিশ, বরিশাল হাজির হইয়া এই মর্মে এজাহার দাখিল করেন যে, গোয়েন্দা শাখার এমসিসি ৫৭৮, তারিখ ১৫/০৯/২০০৮ খ্রিঃ এবং জিডি নং-১৩৩, তারিখ ১৫/০৯/২০০৮ খ্রিঃ মোতাবেক সঙ্গীয় কং/৮৩৮ মোঃ হোসেন, কং/৮০৫ আনোয়ার হোসেন ও কং/৬৮৪ আরিফ হোসেকে নিয়া উল্লেখিত এমসিসি মোতাবেক বরিশাল মহানগর এলাকায় সঙ্গীয় ফোর্স সহ মাদক দ্রব্য উদ্ধার ও নিয়ন্ত্রণ অভিযান কালে অদ্য ১৬-০৯-২০০৮ ইং তারিখে ভোর ৫.০০ টার সময় গোপন সংবাদের ভিত্তিতে জানিতে পারে যে, আসামী তাহার রিক্সা যোগে ফেন্সিডিল লইয়া কাকাসুরা সড়ক দিয়া কাউনিয়ার দিকে আসিতেছে। উক্ত সংবাদের ভিত্তিতে উর্দ্বতন কর্তৃপক্ষকে অবহিত করিয়া সঙ্গীয়

ফোর্সসহ পুরানপাড়া ওয়ারিদ টাওয়ারের সামনে টেক্সটাইলের পিছনে কাকাসুরা সড়কে অবস্হান করাকালীন ভোর অনুমান ৫.৩০ সময় দরখাস্তকারী রিক্সা চালাইয়া আসিতে থাকাকালে তাহা থামানোর জন্য বলিবার সাথে সাথে দরখাস্তকারী পালানোর চেস্টা করিলে তাহাকে ধৃত করে এবং জিজ্ঞাসাবাদে সে জানায় যে তাহার রিক্সার গদির নিচে অবৈধ ফেন্সিডিল আছে, তখন দরখাস্তকারী তাহার সনাক্ত মতে ও নিজ হাতে সাক্ষীদের উপস্হিতিতে রিক্সার গদির নিচ হইতে ৫০ বোতল ফেন্সিডিল বাহির করিয়া দেয়। উক্ত ৫০ বোতল ফেন্সিডিল ও রিক্সা ভ্যানটি সাক্ষীদের উপস্থিতিতে জব্দ করে এবং জব্দতালিকায় স্বাক্ষর নেয়। ফেন্সিডিল এর গায়ে লেবেল যুক্ত ইংরেজিতে PHENSEDYL COUGHLWCTUSC এবং NICHOLAS PIRAMAL INDIA LIMITED 100 ML লেখা আছে। দরখাস্তকারী চোরাইপথে বাংলাদেশে নিষিদ্ধ ভারতীয় ফেন্সিডিল আনিয়া নিজ হেফাজতে রাখিয়া বরিশাল শহরে বিক্রয় করিয়া যুব সমাজকে ধ্বংস করিয়া আসিতেছে।

৩. অতঃপর উক্ত এজাহার এর ভিত্তিতে ১৯৭৪ সালের বিশেষ ক্ষমতা আইনের ২৫বি ধারায় বরিশাল কোতয়ালী মডেল থানায় মামলা নং ৪১ তারিখ ১৬.০৯.২০০৮ উদ্ভব হয়; যাহার জি,আর নম্বর-৬১৬/২০০৮। অতঃপর পুলিশ এর গোয়েন্দা শাখার এস,আই সৈয়দ আঃ মান্নান যথাযথ তদন্তের ভিত্তিতে ১০-১০-২০০৮ ইং তারিখে ১৯৭৪ সনের বিশেষ ক্ষমতা আইনের ২৫বি ধারায় অভিযোগপত্র দাখিল করেন যাহার নং-৪২৪। বিশেষ ট্রাইব্যুনাল মামলাটি আমলে নেন এবং মামলাটি বিশেষ ট্রাইব্যুনাল মামলা নং ৯৪/০৮ হিসাবে নিবন্ধন হয়। তৎপর বরিশাল ৪ নং বিশেষ ট্রাইব্যুনালে বিচারের জন্য বদলী হয়। বিশেষ ট্রাইব্যুনাল দরখাস্তকারীর বিরুদ্ধে ১৯৭৪ সনের বিশেষ ক্ষমতা আইনের ২৫বি(২) ধারায় অভিযোগ গঠন করেন, যাহা দরখাস্তকারীকে পড়িয়া শুনানো হইলে তিনি নিজকে নির্দোষ দাবী করিয়া ন্যায় বিচারের প্রার্থনা করেন।

৪. বিচারকালে অভিযোগ প্রমাণের জন্য রাষ্ট্র পক্ষে ৮জন সাক্ষীর মধ্যে ৬জন সাক্ষীকে পরীক্ষা করেন। তন্মধ্যে ৪নং সাক্ষীকে টেন্ডার ঘোষণা করা হয়।

৫. রাষ্ট্র পক্ষের ১নং সাক্ষীঃ মোঃ জাহিদ হোসেন, এস,আই, এজাহারকারী সাক্ষী। তিনি জবানবন্দীতে বলেন যে, ১৬.০৯.২০০৮ ইং তারিখ ভোর ৫.০০ টার সময় সঙ্গীয় ফোর্সসহ ডিউটিতে থাকাকালে পুরানপাড়া ওয়ারিদ টাওয়ারের সামনে ঘটনা ঘটে। গোপন সংবাদের ভিত্তিতে জানিতে পারে দরখাস্তকারী আসামী জুয়েল বিক্সাযোগে ফেন্সিডিল নিয়া যাইতেছে। তখন সঙ্গীয় ফোর্সসহ ঘটনাস্থলে হাজির হইলে আসামী জুয়েল পালানোর চেষ্টাকালে ধৃত হয়। জিজ্ঞাসাবাদে সে জানায় রিক্সার গদির নিচে ফেন্সিডিল আছে। সে ৫০ বোতল ফেন্সিডিল বাহির করিয়া দেন। অতপর জব্দতালিকা প্রস্তুত করিয়া জব্দতালিকায় সাক্ষীদের স্বাক্ষর নেন। এজাহার ও জব্দতালিকা প্রদর্শনী হিসাবে ট্রাইব্যুনালে চিহ্নিত মূলে দাখিল হয়। তিনি জেরাকালে রিক্সায় আরো যাত্রী ছিল তাহাদের ছাড়িয়া দিয়াছেন, দরখাস্তকারী মালের মালিক নহে সাক্ষীদের সামনে কোন মাল উদ্ধার হয় নাই এই সাজেশন অস্বীকার বলেন।

৬. রাষ্ট্র পক্ষের ২নং সাক্ষীঃ মোঃ হোসেন কং নং-৮৩৮, এস,বি বরিশাল। তিনি তাঁহার জবানবন্দীতে বলেন ১৫.০৯.২০০৮ ইং তারিখ এজাহারকারী ১নং সাক্ষী এস,আই জাহিদ হোসেন এর সঙ্গে ডিউটিতে ছিলেন। সংবাদ পাইয়া পুরানপাড়া ওয়ারিদ টাওয়ারের সামনে অবস্থান নেয়। ১৬.০৯.২০০৮ ইং তারিখ ভোর ৫.০০ টায় একটি রিক্সার গতিরোধকালে রিক্সাচালক পালানোর চেষ্টা করিলে তাহাকে আটক করে। সে ৫০ বোতল ফিন্সিডিল বের করিয়া দেয়। সেখানে জব্দতালিকা তৈয়ার করিয়া সাক্ষীদের স্বাক্ষর নেন। আসামী জুয়েল সিকদারকে ডকে সনাক্ত করেন। আসামী জুয়েল ধৃতকালে রিক্সার আরো যাত্রী ছিল, বিশেষ কারণে তাহাদের ছাড়িয়া দেওয়া হইয়াছে এই সাক্ষী আসামী পক্ষের এই সাজেশন অস্বীকার করেন।

৭. রাষ্ট্র পক্ষের ৩নং সাক্ষীঃ আনোয়ার হোসেন, কং নং-৮০৫ ডিবি, বরিশাল মেট্রোপলিটন পুলিশ, বরিশাল তাহার জবানবন্দীতে বলেন যে, গত ১৫.০৯.২০০৮ ইং তারিখে এজাহারকারী ১ং সাক্ষী এস,আই জাহিদ এর সঙ্গে ডিউটিতে ছিলেন। গোপন সংবাদের পরিপ্রেক্ষিতে ১৬.০৯.২০০৮ ইং তারিখ ভোর ৫.০০ মিনিটের সময় ওয়ারিদ টাওয়ারের কাছে যায় এবং একটি রিক্সার গতি রোধ করিয়া রিক্সাওয়ালাকে গ্রেফতার করে। রিক্সাওয়ালা ৫০ বোতল ফেন্সিডিল তার রিক্সার গদির নিচ

হইতে বাহির করিয়া দেয়। ফেন্সিডিল জব্দ করে, জব্দতালিকায় সাক্ষীদের স্বাক্ষর নেয়। আসামীকে ডকে সনাক্ত করেন। রিক্সায় আরো আরোহী ছিল তাহাদের ছাড়িয়া দেওয়া হইয়াছে আসামী পক্ষের এই সাজেশন তিনি অস্বীকার করেন।

৮. রাষ্ট্র পক্ষের ৪নং সাক্ষীঃ কং নং-৬৮৪ আরিফুর রহমানকে টেন্ডার ঘোষণা করা হয় এবং আসামী পক্ষ হইতে তাহাকে ডিকলাইন ঘোষণা করা হয় তথা জেরা করা হয় নাই।

৯. রাষ্ট্র পক্ষের ৫নং সাক্ষীঃ হেমায়েত হোসেন, জব্দতালিকার সাক্ষী এবং স্থানীয় ব্যক্তি। তাহার জবানবন্দীকালে তিনি বলেন যে, তিনি ব্যবসা করেন। ১৬.০৯.২০০৮ ইং তারিখে ভোর ৫.৩০ টার সময় আসামীর নিকট হইতে ৫০ বোতল ফেন্সিডিল উদ্ধার করিতে দেখেন। পুলিশ জব্দতালিকা প্রস্তুত করিয়া তাহার সই নেয়। তাহার সঙ্গে খলিলও সই করে। আসামী জুয়েলকে ডকে সনাক্ত করে। আসামী জুয়েল রিক্সাচালক সেহেতু তাহার রিক্সায় আরো যাত্রী ছিল কিনা তাহা তিনি দেখেন নাই, জেরায় তিনি তাহাই বলেন, তবে তিনি বলেন যে, উদ্ধারকৃত মালামাল তাহাকে দেখাইয়াছিল এবং জব্দতালিকা সই করার আগে তাহাকে পাঠ করিয়া শুনানো হইয়াছিল।

১০. রাষ্ট্র পক্ষের ৬নং সাক্ষীঃ এস,আই, সৈয়দ আঃ মান্নান, তদন্তকারী কর্মকর্তা হিসাবে সাক্ষ্য প্রদান করেন। তিনি তাহার জবানবন্দীকালে বলেন যে, তিনি মামলার ঘটনার সময় বরিশাল মেট্রোপলিটন পুলিশ, গোয়েন্দা শাখায় কর্মরত ছিলেন। ১নং সাক্ষী জাহিদ হোসেন এজাহারকারী। আই,ও হিসাবে তিনি ঘটনাস্থল সরেজমিনে পরিদর্শন করেন, ম্যাপ ও সূচীপত্র তৈয়ার করেন; ফৌজদারী কার্যবিধির ১৬১ ধারা মতে সাক্ষীদের জবানবন্দী লিপিবদ্ধ করেন। আসামীকে রিমান্ডে জিজ্ঞাসা করেন। আসামী ঘটনা স্বীকার করে। তদন্তে অভিযোগ প্রমানিত হওয়ায় ১৯৭৪ সালের বিশেষ ক্ষমতা আইনের ২৫বি ধারায় আসামীর বিরুদ্ধে ১০.১০.২০০৮ ইং তারিখে ৪২৪ নং অভিযোগপত্র দাখিল করেন। জেরাকালে বলেন, ফৌজদারী কার্যবিধির ১৬৪ ধারায় আসামীর জবানবন্দী রেকর্ড করে নাই। আসামী শুধুমাত্র রিক্সাচালক, অপর দুইজন পালাইয়া গেছে আসামীর নিকট হইতে কোন ফেন্সিডিল পাওয়া যায় নাই আসামী পক্ষের এই সাজেশন তিনি অস্বীকার করেন।

১১. সাক্ষীদের সাক্ষ্য সমাপ্তের পরে দরখাস্তকারীকে ফৌজদারী কার্যবিধির ৩৪২ ধারায় পরীক্ষা করা হয়। তখন ও দরখাস্তকারী নিজকে নির্দোষ দাবী করিয়া বিচার প্রার্থনা করেন এবং সাফাই সাক্ষী দিবে না বলিয়া জানায়। সাক্ষীদের জবানবন্দী, উভয়পক্ষের বিজ্ঞ আইনজীবীদের যুক্তিতর্ক সমাপ্তের পর বিশেষ ট্রাইব্যুনাল বিগত ২৬-১১-২০০৯ তারিখ আসামী-দরখাস্তকারীকে ১৯৭৪ সনের বিশেষ ক্ষমতা আইনের ২৫বি(২) ধারার অপরাধে অপরাধী সাব্যস্ত করিয়া ৩ বৎসর সশ্রম কারাদন্ড সহ ১০০০/-টাকা জরিমানা অনাদায় আরো ৪ মাসের সশ্রম কারাদন্ডের আদেশ প্রদান করেন।

১২. যেহেতু ১৯৭৪ সালের বিশেষ ক্ষমতা আইনের ৩০ ধারার বিধান অনুযায়ী নির্দ্দিষ্ট সময়ের মধ্যে অত্র আইনের আওতায় প্রদত্ত কোন ট্রাইব্যুনালের রায় বা আদেশের বিরুদ্ধে আপীল দায়ের না করা হইলে ১৯০৮ সালের তামাদি আইনের ৫ ধারার বিধান অনুযায়ী সময় বর্ধিত করার কোন সুযোগ না থাকায় দন্ডিত-দরখাস্তকারী উক্ত আদেশে ক্ষুব্ধ ও অসন্তষ্ট হইয়া উল্লেখিত সাজার রায় বাতিলের প্রার্থনায় ফৌজদারী কার্যবিধির ৫৬১এ ধারায় অত্র বিবিধ মামলা দাখিল করেন এবং যাহার পরিপ্রেক্ষিতে অত্র রুল ইস্যু হয় এবং রুল ইস্যুকালীন সময় তথা ২১.০৭.২০১০ ইং তারিখে রুল নিস্পত্তি না হওয়া পর্যন্ত দরখাস্তকারীকে অপ্রত্যাশিতভাবে জামিনে মুক্ত থাকার আদেশ প্রচার হয়।

১৩. শুনানীকালে রুলটি উপস্হাপন করার/রুলটির স্বপক্ষে বক্তব্য প্রদানের জন্য দরখাস্তকারীর পক্ষে কোন বিজ্ঞ আইনজীবী কিংবা দরখাস্তকারী নিজে আদালতে হাজির হন নাই। দরখাস্তকারী তাহার দরখাস্তে তর্কিত রায় তথা সাজা বাতিলের হেতুবাদ হিসাবে যে সব হেতুবাদ উল্লেখ করিয়াছেন তাহা মূলত, প্রথমতঃ মামলাটি সাক্ষ্যবিহীন মামলা (Case of no evidence)। দ্বিতীয়তঃ ৮ জন সাক্ষীর মধ্যে ৬ জন সাক্ষী পরীক্ষা করা হইয়াছে যে ক্ষেত্রে সাক্ষ্য আইনের ১১৪ জি ধারার বিধান অনুযায়ী দরখাস্তকারী অনুমানের সুফল পাইতে হকদার। তৃতীয়তঃ সকলেই পক্ষপাতমূলক সাক্ষী। চতুর্থতঃ বিশেষ ট্রাইব্যুনাল সম্পূর্ণ সাক্ষ্যাদি, নথিপত্র অনুধাবন, হৃদয়ঙ্গম এবং মূল্যায়ন করিয়া উহা বিচার বিশ্লেষণ করিতে ব্যর্থ হইয়াছেন বিধায় ন্যায় বিচার ব্যাহত হইয়াছে

সেহেতু তর্কিত সাজার রায় বাতিল হইবে। পঞ্চমতঃ রাস্ট্র পক্ষ যুক্তিসংগত সাক্ষ্য প্রমাণের ভিত্তিতে সন্দেহাতীত ভাবে মামলাটি প্রমান করিতে ব্যর্থ হইয়াছেন।

১৪. অপর দিকে অপরপক্ষে বিজ্ঞ ডেপুটি এ্যাটর্ণী জেনারেল হাজির হইয়া শুনানীকালে রুলটির চরম বিরোধিতা করেন। তিনি নিবেদন করেন যে বিশেষ ক্ষমতা আইন ১৯৭৪ এর ২৫বি (২) ধারায় সাজার বিরুদ্ধে একই আইনের ৩০ ধারার বিধান অনুযায়ী দরখাস্তকারীর আপীল করার সুযোগ ছিল, কেন দরখাস্তকারী সেই সুযোগ গ্রহণ না করিয়া ফৌজদারী কার্যবিধির ৫৬১এ ধারায় এই বিবিধ মামলা দায়ের করিয়াছেন, তাহার কোন ব্যাখ্যা তিনি তাহার দরখাস্তে দেন নাই। তাহা ছাড়া তিনি আরো নিবেদন করেন যে, ফৌজদারী কার্যবিধি ৫৬১এ ধারার বিধান অনুযায়ী সাজা বাতিল করার মত কোন অনিয়ম বা অসংগতি অত্র মামলা নাই। সকল সাক্ষীগণ তাহাদের জবানবন্দীতে উদ্ধারকৃত বাংলাদেশে নিষিদ্ধ ভারতীয় ফেন্সিডিল দম্ভিত-দরখাস্তকারীর দেখানো মতে তাহার নিজ হাতে নিজের নিয়ন্ত্রণাধীন নিজ রিক্সার গদির নিচ হইতে ভোর ৫.৩০ মিনিটের সময় বাহির করিয়া দিয়াছেন, তাহা সকল সাক্ষীগণ তাহাদের জবানবন্দীতে বলিয়াছেন ও পরস্পর পরস্পরকে সমর্থন করিয়াছেন এবং ঘটনার সত্যতা সন্দেহাতীতভাবে প্রমাণ করিতে সক্ষম হইয়াছেন। বিশেষ ট্রাইব্যুনাল সুব্যাখ্যাত, সুবিন্যস্ত বিচার বিশ্লেষণ, সাক্ষ্যাদি মূল্যায়ন ও কাগজপত্র পর্যালোচনা করিয়া সুচিন্তিত অভিমতের ভিত্তিতে তাহার এই রায় প্রদান করিয়াছেন, যাহা সাক্ষ্যবিহীন মামলা (Case of no evidence) বলিয়া অযৌক্তিক কারণে তথা ফৌজদারী কার্যবিধির ৫৬১এ ধারায় বাতিল হওয়ার অবকাশ নাই বিধায় রুলটি খারিজ হইবে এবং বিশেষ ট্রাইব্যুনালের রায় বহাল থাকার নিবেদন করেন।

১৫. অত্র মামলায় দরখাস্তকারী বাংলাদেশে নিষিদ্ধ ঘোষিত অবৈধ ভারতীয় তৈয়ারী ৫০ বোতল ফেন্সিডিল একান্ত নিজ দখলে রাখার অপরাধে ১৯৭৪ সালের বিশেষ ক্ষমতা আইনের ২৫বি(২) ধারার বিধান অনুযায়ী বিশেষ ট্রাইব্যুনাল কর্তৃক প্রদত্ত কারাদন্ডাদেশ ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান অনুযায়ী অত্র আদালতের অন্তর্নিহিত ক্ষমতা প্রয়োগ এর আওতায় বাতিলের প্রার্থনা করিয়াছেন। ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান অনুযায়ী আদালত কেবল মাত্র তখনই অন্তর্নিহিত ক্ষমতা প্রয়োগ করিয়া প্রদত্ত সাজা বাতিল করিতে পারেন যখন দেখেন যে, উক্ত সাজা আদালতের এখতিয়ারবিহীন অথবা কথিত ঘটনায় আসামী কর্তৃক কোন অপরাধ সংগঠিত হয় নাই; অথবা কোন আইনগত সাক্ষ্য প্রমাণাদি ছাড়া সাজা দেওয়া হইয়াছে যাহার ফলে ন্যায় বিচার ব্যাহত হইয়াছে। এক্ষেত্রে আমাদের সর্বোচ্চ আদালতের 46 DLR (AD)67, Sher Ali-vs, state মোকদ্দমার নজীর প্রণিধানযোগ্য; যেখানে সিদ্ধান্ত হয় যে,

> "This power may be exercised to quash a proceeding or even a conviction on conclusion of a trial, if the court concerned got no jurisdiction to hold the said trial, or the facts alleged against the accused do not constitute any criminal offence or the conviction has been based on 'no evidence' or otherwise to secure ends of Justice."

১৬. ফৌজদারী কার্যবিধির ৫৬১এ এর বিধান অনুযায়ী অন্তর্নিহিত ক্ষমতা প্রয়োগের মাধ্যমে সাজা বাতিলের ক্ষেত্রে আর একটি বিষয় গুরুত্বের সঙ্গে বিবেচনায় নিতে হইবে, তাহা হইল যদি বিচারিক আদালত কিংবা ট্রাইব্যুনাল এর গঠনে কোন ত্রুটি বিচ্যুতি তথা Quorum-non-judice এর অভিযোগ থাকে। এই ক্ষেত্রে আমাদের সর্বোচ্চ আদালতের 8 BLC (AD)176, Khoka Mollah vs-State মামলায় সিদ্ধান্ত হয় যে,

> "That if the conviction is based on no evidence, or if the trial court has no jurisdiction, which can be called corum-non-judice, the conviction is liable to be quashed in exercising the inherent power of this court under section 561A of the code of Criminal Procedure."

১৭. অত্র মামলায় দরখাস্তকারী বিচার কার্য সমাপ্তের পর প্রাপ্ত সাজা বাতিলের জন্য সাক্ষ্যবিহীন মামলা (Case of no evidence) হেতুবাদে ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান অনুযায়ী আদালতের অন্তর্নিহিত ক্ষমতা প্রয়োগের প্রার্থনা। দরখাস্তকারী যদি অপরাধ সংগঠন করিয়া থাকে এবং তদানুযায়ী বিচারিক আদালত যদি সাক্ষ্য প্রমাণ বিচার বিশ্লেষণ করিয়া অপরাধীকে সাজা প্রদান করিয়া

থাকে তাহা হইলে নতুন করিয়া সাক্ষ্য প্রমাণ গ্রহণ বা সাক্ষ্যাদি সত্য কি অসত্য তাহা বিচার বিশ্লেষণ পূর্বক আদালতের অন্তর্নিহিত ক্ষমতা প্রয়োগের মাধ্যমে সাজা বাতিলের সুযোগ এই ধারায় হাইকোর্টকে প্রদান করা হয় নাই। কেবলমাত্র বিচারিক আদালতেরই সেই ক্ষমতা আছে। এই ক্ষেত্রে আমাদের সর্বোচ্চ আদালতের 28 DLR(AD)38, Abdul Quader Chowdhury vs State মামলার নজীর প্রণিধানযোগ্য; যেখানে সিদ্ধান্ত হয় যে,

> "In exercising the jurisdiction under section 561A of the Code of Criminal Procedure the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained."

১৮. আমরা সর্ব প্রথমে সাক্ষীদের সাক্ষ্য পর্যালোচনা করিয়া দেখিব দরখাস্তকারীর দাবী মোতাবেক ইহা সাক্ষ্যবিহীন মামলা (Case of no evidence) কিনা?

১৯. রাষ্ট্র পক্ষের ১নং সাক্ষী এজাহারকারী, তিনি বলেন জব্দকৃত ফেন্সিডিল দরখাস্তকারীর রিক্সার গদির নিচ হইতে দরখাস্তকারী নিজ হাতে বাহির করিয়া দেন; তিনি তাহার চাক্ষুষ সাক্ষী। তিনি এজাহার, এজাহারে তাহার স্বাক্ষর, জব্দতালিকা এবং ৫০ বোতল ফেন্সিডিল, প্রদর্শনী ও বস্তু প্রদর্শনী হিসাবে আদালতে চিহ্নিত করেন। ১নং সাক্ষীকে সমর্থন করিয়া ২,৩,৫ নং সাক্ষীগণ ও একই ভাবে সাক্ষ্য দেন যে, উদ্ধারকৃত, নিষিদ্ধ ভারতীয় ৫০ বোতল ফেন্সিডিল দরখাস্তকারীর দেখানো মতে ঘটনার স্থান ও সময়ে তাহার নিজ রিক্সার গদির (সিটের) নিচ হইতে নিজ হাতে বাহির করিয়া দেন, তাহা সুস্পষ্ট প্রতীয়মান। ৫নং সাক্ষী একজন জব্দতালিকার সাক্ষী এবং স্থানীয় ব্যক্তি, তাহার বাসার সামনেই ঘটনাস্থল তিনিও চাক্ষুষ সাক্ষী। তিনি ১,২,৩ নং সাক্ষীগণের সাক্ষ্য পুরাপুরি সমর্থন করিয়াছেন। ৪নং সাক্ষীকে টেন্ডার ঘোষণা করা হইয়াছে, যাহার অর্থ হইতেছে পূর্ববর্তী সাক্ষী যে জবানবন্দী প্রদান করিয়াছে তাহাই পরবর্তী সাক্ষীর জবানবন্দী তথা ৪নং সাক্ষীর জবানবন্দী এবং দরখাস্তকারী পক্ষ উক্ত টেন্ডারকৃত সাক্ষীকে জেরা না করিয়া ডিক্লাইন্ড ঘোষণা করিয়াছেন, সেই ক্ষেত্রে প্রমানিত হয় যে, ৪নং সাক্ষী ৩নং সাক্ষীর জবানবন্দীর অনুরুপ জবানবন্দী প্রদান করিয়াছেন বিধায় ১,২,৩,৪ ও ৫নং সাক্ষী পরস্পর-পরস্পরকে সমর্থন করিয়া জবানবন্দী প্রদান করিয়াছেন। অভিযোগ পত্রে সংযুক্তিয় ৭নং সাক্ষী ফরমাল সাক্ষী যিনি সাক্ষ্য দিতে হাজির হন নাই, তিনি শুধুমাত্র প্রাথমিক তথ্য বিবরণী (এফ,আই,আর) ফরম পূরণ করিয়াছেন মাত্র। তাহার সাক্ষ্য মূল্যায়ন বিবেচ্য বিষয় নহে। ৮নং সাক্ষী মামলার তদন্তকারী কর্মকর্তা, যিনি বরিশাল মেট্রোপলিটন পুলিশ এর গোয়েন্দে শাখার একজন এস,আই, তিনি তাহার জবানবন্দতিে বলেন যে, ঘটনাস্থল সরেজমিনে পরিদর্শন করিয়া, ম্যাপ ও সূচীপত্র প্রস্তুত করিয়া ফৌজদারী কার্যবিধির ১৬১ ধারায় সাক্ষীদের জবানবন্দী লিপিবদ্ধ করিয়া, বিস্তারিত তদন্ত করিয়া ঘটনার সত্যতা প্রমাণিত পাইয়া অভিযোগপত্র দাখিল করিয়াছেন। তিনি অভিযোগ পত্র, অভিযোগ পত্রে তাহার স্বাক্ষর, ম্যাপ, সূচীপত্র ট্রাইব্যুনালে প্রদর্শনী হিসাবে চিহ্নিত করিয়াছেন।

২০. কোন সাক্ষীর সাক্ষ্যে ঘটনার স্থান, সময় ও জব্দকৃত ৫০ বোতল ফেন্সিডিল এর বিষয়ে সামান্যতম ত্রুটি বিচ্যুত ঘটে নাই, যাহা সাজাপ্রাপ্ত দরখাস্তকারীর একান্ত দখল ও নিয়ন্ত্রণ হইতে উদ্ধার করা হইয়াছে বলিয়া সংশ্লিস্ট সাক্ষ্য প্রমান হইতে সুস্পষ্ট প্রতীয়মান যাহা সুনির্দ্দিষ্টভাবে প্রমাণ করে বিশেষ ট্রাইব্যুনাল আইনগত সাক্ষ্য প্রমানের ভিত্তিতে দরখাস্তকারীকে সাজা প্রদান করিয়াছেন বিধায় দরখাস্তকারীর এই হেতুবাদ অযৌক্তিক। উপরোক্ত সাক্ষীদের সাক্ষ্যাদি বিচার বিশ্লেষণে সুস্পষ্ট প্রতীয়মান যে, অত্র মামলাটি/রায়টি কোন অবস্থায় সাক্ষ্যবিহীন মামলা (Case of no evidence) বলা যায় না।

২১. দরখাস্তকারীর "দ্বিতীয়" হেতুবাদ হচ্ছে সকল সাক্ষীকে পরীক্ষা করা হয় নাই, বিধায় ১৮৭২ সালের সাক্ষ্য আইনের ১১৪জি ধারার বিধান অনুযায়ী দরখাস্তকারী সুফল পাইতে হকদার এবং

তৃতীয়তঃ সকল সাক্ষীই পক্ষপাতমূলক সাক্ষী। বিষয় দুই আমরা একসঙ্গে বিচার বিশ্লেষণ করিব। সাক্ষ্য আইনের ১১৪জি ধারার মূল প্রতিপাদ্য বিষয় হইতেছে-যদি কোন পক্ষে সাক্ষ্য উত্থাপন করিতে পারিতেন কিন্তু উত্থাপন করেন নাই, তাহা হইলে স্বভাবতই অনুমান করা যায় যে যদি উক্ত সাক্ষী উত্থাপিত হইত তবে উহা তাহার বিপক্ষে যাইত। ফৌজদারী মামলার সাক্ষী উত্থাপনের ব্যর্থতার ফলে এই অনুমান করা হয় যে, উক্ত সাক্ষ্য উত্থাপিত হইলে যে পক্ষ সাক্ষ্য উত্থাপনের বিরত ছিলেন তাহার বিপক্ষে উহা কাজ করিত। অর্থাৎ এই মামলায় যেহেতু ৮ জন সাক্ষীর মধ্যে ৬ জন সাক্ষী উত্থাপন/পরীক্ষা করা হইয়াছে, বাকী ২ জন যদি উত্থাপন/পরীক্ষা করা হইত তাহা হইলে তাহা রাষ্ট্রের বিপক্ষে যাইত এবং এই সুবিধা দরখাস্তকারী পাইতেন এবং দরখাস্তকারী অভিযোগ হইতে অব্যাহতি পাইতেন। তবে উল্লেখ্য যে, অভিযোগ পত্রে উল্লিখিত ২জন অনুপস্থিত সাক্ষীর ১ জন তথা ৭নং সাক্ষী প্রাথমিক তথ্য বিবরণী (এফ,আই,আর) ফরম পূরণকারী, যিনি একজন ফরমাল সাক্ষী মাত্র। তাহার সাক্ষ্যের মূল্যায়ন মামলার কোন বিরুপ প্রভাব ফেলিত বলিয়া বিশ্বাস করার কোন কারণ নাই। মামলার/ঘটনার সত্যতা প্রমানের জন্য সকল সাক্ষীকে আদালতে সাক্ষ্য প্রদান করিতে হইবে তাহার বাধ্যবাধকতা নাই; সকল সাক্ষীকে উত্থাপনের অভাবে আসামী অব্যাহতি পাইবে তাহাও সঠিক নহে। এক্ষেত্রে 4 BLC 275 মামলার নজির উল্লেখযোগ্য, যেখানে সিদ্ধান্ত হয় যে,

> "Out of fifty-six charge sheet witnesses thirty-four witnesses had been examined in the instant case. Mere lact that prosecution failed to examine other witnesses cannot be a manifestation that such witnesses were unwilling to support prosecution case. Non production of such witnesses at the trial did not at all destroy the evidence produced and adduced by other witnesses. Condemned prisoners and appellants cannot get any benefit of section 114(g) of the Evidence Act. Moreover, now-a-days citizens of the land who are cited witnesses do not dare to stand in witness box to give testimony against the offenders and dot not want to invite enmity for fear of their lives and they also incur apprehension that they might even be snubbed out of the world."

২২. দরখাস্তকারী পক্ষের সাজা বাতিলের অন্য আর্জি, সকল সাক্ষীই পক্ষপাতমূলক সাক্ষী সেহেতু ন্যায় বিচার ব্যাহত হইয়াছে। প্রতীয়মান যে, রাষ্ট্র পক্ষের ৫নং সাক্ষী জব্দতালিকার একজন সাক্ষী এবং তাহার ঠিকানা ঘটনা স্থানের পার্শ্বে। তিনি তাঁহার সাক্ষ্যে মামলার ঘটনা সম্পূর্ণ সমর্থন করিয়া অন্যান্য সাক্ষীদের সাক্ষ্য সমর্থন করিয়াছেন; তিনি একজন গুরুত্বপূর্ণ সাক্ষী এবং সম্পূর্ণ নিরপেক্ষ ব্যক্তি। তাঁহার সঙ্গে প্রতিবেশী কিংবা স্থানীয় লোক হিসাবে দরখাস্তকারীর কোন শত্রুতা ছিল এমন কোন সাক্ষ্য প্রমান জবানবন্দীতে আসে নাই। তিনি তাহার সাক্ষ্যে সুস্পষ্টভাবে উল্লেখ করিয়াছেন যে, ঘটনার দিন ভোর ৫.৩০ মিনিটের সময় দরখাস্তকারী আসামীর রিক্সার সিটের নিচ হইতে আসামী নিজ হাতে নিষিদ্ধ ঘোষিত ভারতীয় ৫০ বোতল ফেন্সিডিল বাহির করিয়া দেয়, যাহা তিনি দেখেন এবং তাহার সামনে জব্দতালিকা তৈয়ার হয়, তাহাকে পড়িয়া শুনানো হইলে, তিনি তাহাতে স্বাক্ষর করেন এবং জব্দতালিকায় সেই স্বাক্ষর তিনি ট্রাইব্যুনালে সনাক্ত করেন, যাহা প্রদর্শনী হিসাবে চিহ্নিত হয়। অন্য কোন সাক্ষী না থাকিলেও এই একমাত্র নিরপেক্ষ জব্দতালিকার সাক্ষীর সাক্ষ্যের ভিত্তিই ঘটনার সত্যতা প্রমাণ হইয়াছে মর্মে দরখাস্তকারীকে অভিযুক্ত করিলে আইনের কোন বরখেলাপ হইত না বা ন্যায় বিচার এর নীতি লঙ্ঘন হইত না বলিয়া আমরা বিশ্বাস করি।

২৩. ১৮৭২ সালের সাক্ষ্য আইনের ১৩৪ ধারায় মামলা/ঘটনা প্রমাণের জন্য কোন নির্দ্দিষ্ট সংখ্যক সাক্ষী পরীক্ষা করার কথা উল্লেখ নাই। যে কোন সংখ্যক সাক্ষী এমনকি ১ জন সাক্ষীর সাক্ষ্য দ্বারা ও ঘটনার সত্যতা প্রমান পাওয়া সম্ভব। উচ্চতর আদালতে এ বিষয়ে ভূরি ভূরি নজির রহিয়াছে। তন্মধ্যে আমাদের সর্বোচ্চ আদালতের Eusuf Sk. VS-Appellate Tribunal, 29 DLR S.C. 211, মামলার নজীর প্রণিধানযোগ্য। যেখানে সিদ্ধান্ত হয় যে,

> "The Evidence Act provides that no particular number of witnesses should in any case be required for the proof of any fact if the consensus of judicial opinion is that believed, conviction can be

based on the solitary evidence of a witness, of course if the veracity of the witness is not tainted in any manner. High court declined to interfere where the special Tribunal as well as the Appellate Tribunal felt satisfied and relied upon one witness to pass sentence of conviction."

২৪. পক্ষপাতমূলক সাক্ষী হইলেও তাহাদের সাক্ষ্যের উপর নির্ভর করিয়া আসামীকে সাজা দেওয়া বা আসামীকে দোষী সাব্যস্ত করিতে আইনতঃ কোন বাধা নাই। এ বিষয়ে 51 DLR 82 এর মামলায় গৃহিত সিদ্ধান্ত দেখা যাইতে পারে। তবে পক্ষপাতমূলক/Interested সাক্ষীদের সাক্ষ্যের মূল্যায়ন এর বিষয়ে আমাদের সর্বোচ্চ আদালতের 49 DLR (AD) 154, মামলায় গৃহিত সিদ্ধান্ত এখানে বিশেষভাবে প্রণিধানযোগ্য; যেখানে সিদ্ধান্ত হয় যে,

"A witness for the prosecution does not become partisan per se nor an eye witness can be disregarded merely because he has come to support the prosecution party. It was necessary to consider the whole evidence and them to assess the worth of the witnesses as a whole".

২৫. দরখাস্তকারীর দ্বিতীয় ও তৃতীয় হেতুবাদ ও উপরোক্ত আলোচনা ও সিদ্ধান্তের আলোকে বিবেচনার যোগ্য নয় বলিয়া আমরা বিশ্বাস করি।

২৬. দন্ডিত-দরখাস্তকারী তর্কিত রায়টি যেহেতু বিশেষ ট্রাইব্যুনাল কর্তৃক বিশেষ ক্ষমতা আইনের ২৫বি(২) ধারা মতে সেহেতু একই আইন ৩০ ধারা বিধান অনুযায়ী ৩০ দিনের মধ্যে দরখাস্তকারীর আপীল করার সুর্নিদ্দষ্ট ও সুস্পস্ট বিধান থাকা সত্বেও দরখাস্তকারী সেই সুযোগ গ্রহণ না করিয়া শুধুমাত্র বিলম্বের কারণে ফৌজদারী কার্যবিধির ৫৬১এ ধারায় অত্র আদালতের অর্ন্তনিহিত ক্ষমতা প্রয়োগের প্রত্যাশায় এই বিবিধ মামলা দায়ের করিয়াছেন অথচ বিলম্বের যে বিশেষ কোন কারণ বা বিশেষ কোন ব্যতিক্রম ঘটনা ছিল সেই ধরণের কোন ব্যাখ্যা দরখাস্তে উল্লেখ নাই। কিন্তু অত্র ধারায় সচারাচার ব্যতিক্রমধর্মী মামলা না হওয়ায় বিলম্বের কারণে বিবেচনামূলক অন্তর্নিহিত ক্ষমতা প্রয়োগ বা ন্যায় বিচার করিবার জন্য তর্কিত রায় বাতিলের কারণ হইতে পারে না। এই ক্ষেত্রে আমাদের সর্বোচ্চ আদালতের 57 DLR (AD) 102 এর নজির প্রণিধানযোগ্য; সেখানে সিদ্ধান্ত হয় যে,

"In the background of the facts this is not a case of exceptional nature calling for quashing on the ground at delay or for exercise of discretion or of doing complete Justice."

২৭. বিলম্বের হেতুবাদে ফৌজদারী কার্যপ্রণালী বাতিল সাধারণ কারণ বলিয়া ধরা হইলে এদেশের ফৌজদারী প্রশাসনে তথা ফৌজদারী আদালত/ট্রাইব্যুনালে বিচার ব্যবস্থার সমস্ত ধারণার উপর বিরুপ প্রভাব সৃস্টিসহ সার্বিক পরিবেশ পরিস্থিতি অরাজকতার দিকে ধাবিত হইবে। তাই যেই ক্ষেত্রে আইন সভা বিশেষ বিশেষ প্রয়োজনে জনস্বার্থে বিশেষ বিশেষ আইন প্রণয়ন করিতে বাধ্য হয়, সেই ক্ষেত্রে বিশেষত্বই সর্বাগ্রে প্রধান্য পাওয়া উচিৎ, অন্যথায় আইন প্রণয়নের মূল উদ্দেশ্যই ব্যাহত হইবে। এ ক্ষেত্রে আমাদের সর্বোচ্চ আদালতের 56DLR (AD) 120 এর নজির প্রণিধানযোগ্য; যেখানে সিদ্ধান্ত হয় যে,

"Once quashing of proceedings of criminal case on the ground of delay is made general that shall destroy the concept of administration of criminal Justice and finally lead to anarchy."

২৮. বিশেষ ট্রাইব্যুনাল তাহার রায়টি যে আংগিকে এবং বৃহত্তর সুবিন্যস্ত পরিসরে পর্যালোচনা ও পর্যবেক্ষণের আলোকে প্রদান করিয়াছেন তাহা সত্যই অত্যন্ত তথ্য সমৃদ্ধ, বস্তুনিষ্ঠ উৎকৃষ্ট রায়, আদালতের ভাষায় "Rich Judgment" যাহা কোন অবস্হাই দরখাস্তকারী বক্তব্য মতে সাক্ষ্যবিহীন মামলা (Case of no evidence) এর ফলোদয় বলার কোন অবকাশ নাই। বিশেষ

ট্রাইব্যুনাল যেখানে তাঁহার রায়, এজাহার, জব্দতালিকা, অভিযোগপত্র, সাক্ষীগণের সাক্ষ্য, উভয় পক্ষের বিজ্ঞ আইনজীবীদের বক্তব্য/যুক্তিতর্ক বিস্তারিত ও ক্রম বিন্যাসে সুবিস্তারিত আলোচনা, পর্যালোচনা ও প্রত্যেক সাক্ষীর সাক্ষ্য মূল্যায়নের ভিত্তিতে স্বতন্ত্র ও ভিন্ন আংগিকে প্রদান করিয়াছেন তাহাকে সাক্ষ্যবিহীন রায় বলা আইনের প্রতি অশ্রদ্ধারই বহিঃপ্রকাশ।

২৯. যেহেতু ইহা ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান মতে সাজা বাতিলের আবেদন সেহেতু আপীল মামলা শুনানীর আঙ্গিকে সার্বিক বিষয়াদি তন্ন তন্ন করিয়া বিবেচনা, পর্যালোচনা ও মূল্যায়ন করিয়া বিস্তারিত ব্যাখ্যাসহ বিচার বিশ্লেষণ করার অবকাশ না থাকায় আমরা বিস্তারিত ব্যাখায় যাইতে বাধাগ্রস্ত এই ক্ষেত্রে 46 DLR (AD),67 মোকদ্দমায় গৃহিত সর্বোচ্চ আদালতের সিদ্ধান্ত অনুসরণীয় সেখানে সিদ্ধান্ত হয় যে;-

> "The inherent power may be invoked independent of powers conferred by any other provisions of the Code. This power is neither appellate power, nor revisional power nor power of review and it is to be invoked for the limited purposes."

৩০. এই বিষয় আমাদের সর্বোচ্চ আদালতের 31 DLR (AD),69, Bangladesh–vs-Tan kheng Hock মামলার সিদ্ধান্তে ফৌজদারী কার্যবিধির ৫৬১এ ধারায় হাইকোর্টের অন্তর্নিহিত ক্ষমতা প্রয়োগের পূর্ণাঙ্গ দিক নির্দেশনা বিশদভাবে আলোচিত হইয়াছে, যাহার অংশ বিশেষ অত্র মামলার ক্ষেত্রে সম্পৃক্ত, তাহা উল্লেখ্য, যেখানে সিদ্ধান্ত হয় যে;

> "Section 561A does not confer a new power upon the High Court. All that this section does is that it declares that such inherent powers as the High Court may possess have not been taken away or abridged by any of the provisions of the Code of Criminal Procedure. The High Court is not given nor did it ever possess, unrestricted and undefined power to make any order, it might be pleased to consider, was in the interest of Justice. Its inherent powers are much controlled by principle and precedents as are its expressed powers conferred under the statute. The High Court can not exercise its inherent power unless it is absolutely necessary for carrying out the other provisions of the Code or for doing Justice, that is, to prevent abuse of the process of any court or otherwise to secure the ends of Justice. "

৩১. যদিও উপরোক্ত আলোচনা, উল্লেখিত নজীরগুলির সিদ্ধান্তের পরিপ্রেক্ষিতে ইহা সুস্পষ্ট প্রতীয়মান যে, ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধান অনুযায়ী দন্ডিত আদেশ বাতিলের ক্ষেত্রে তিনটি বিষয়ই বিবেচনায় প্রাধান্য পাইবে, যথা; "আইনগত সাক্ষ্য প্রমানের অভাব" এবং "আদালত গঠনে ত্রুটি" (Quoram-non-judice) এবং "আইনের অপব্যবহার যাহার ফলে ন্যায় বিচার ব্যাহত।" আমাদের উপরোক্ত আলোচনায় ও উল্লেখিত সিদ্ধান্তে ইহা সুস্পষ্ট প্রতীয়মান যে, অত্র মোকাদ্দমায় তাহার কোন ব্যত্যয় ঘটে নাই।

৩২. উপরোক্ত আলোচনার ভিত্তিতে ফৌজদারী কার্যবিধির ৫৬১এ ধারায় অন্তর্নিহিত ক্ষমতা সম্পর্কে সর্বোচ্চ আদালতের দিক নির্দেশনা সুস্পষ্ট হওয়া সত্বেও আমরা ফৌজদারী কার্যবিধির ৫৬১এ ধারার অর্পিত অন্তর্নিহিত ক্ষমতা প্রয়োগের ক্ষেত্রে আরো একটু বেশী অগ্রসর হইয়া অত্র মামলার বিষয়ে বিস্তারিত আলোচনা পর্যালোচনা করিতে বাধ্য হইয়াছি, কেননা অত্র রুল শুনানীকালে দরখাস্তকারী পক্ষে রুলটি সমর্থন করিয়া বক্তব্য উপস্থাপন করার কেহ ছিলেন না। সেই জন্য যাহাতে আবারও ন্যায় বিচার ব্যাহত হওয়ার অজুহাত উত্থাপিত না হয় তাই ন্যায় বিচারের স্বার্থেই ফৌজদারী কার্যবিধির ৫৬১এ ধারার দরখাস্তে দরখাস্তকারীর দন্ড/সাজা বাতিলের যে সকল হেতুবাদ দরখাস্তে উল্লেখ আছে তাহার সকলগুলি আমরা ধারাবাহিকভাবে মোটামুটি বিচার বিশ্লেষণ করিতে চেষ্টা

করিয়াছি এবং সে ক্ষেত্রেও দরখাস্তকারী চতুর্থ ও পঞ্চম হেতুবাদ এরও কোন যৌক্তিকতা খুঁজিয়া পাই নাই।

৩৩. তবে, সার্বিক বিবেচনায় বিশেষ ট্রাইব্যুনাল এর রায়ে কোন ত্রুটি বিচ্যুত কিংবা দরখাস্তকারীর ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিধানের আওতায় ইতিপূর্বে উল্লিখিত সর্বোচ্চ আদালতের সিদ্ধান্তের আলোকে কোন সুযোগ পাওয়ার অবকাশ আছে বলিয়া এই আদালত মনে করে না। বিশেষ ট্রাইব্যুনালের এই "উৎকৃষ্ট" (দরখাস্তকারীর নিকট তর্কিত) আদালতের ভাষায় "Rich Judgment" টি যদি "তথ্য সমৃদ্ধ বস্তুনিষ্ঠ উৎকৃষ্ট" রায় হইত, তথা দরখাস্তকারীর বোধগম্য ভাষায় প্রদত্ত হইত, তাহা হইলে দরখাস্তকারীকে হাইকোর্ট দেখিতে হইত না বা তাঁহাকে কেহ হাইকোর্ট দেখানোর দুঃসাহস করিত না, দরখাস্তকারীর বোধগম্য ভাষায় রায়টি প্রচারিত হইলে তাহার তথ্য উপাত্ত, পরিশেষে উপসংহারে প্রদত্ত সাজা কেন তাহকে প্রদান করা হইয়াছে, তিনি কি সত্যিই দোষী? উক্ত সাজা সঠিক কি বেঠিক? তাহা উপলব্ধি করিতে সক্ষম হইতেন। সেক্ষেত্রে হয়তবা দরখাস্তকারী এই অধিক্ষেত্রে সাজা বাতিলের আবেদন করিতেন না বা হাইকোর্টে আসিতেন না এবং বিশেষ ট্রাইব্যুনালের এই এত "তথ্য সমৃদ্ধ বস্তুনিষ্ঠ উৎকৃষ্ট" রায়টি বিচার প্রার্থীর নিকট সত্যই মূল্যায়িত হইত। আমাদের সমাজে প্রচলিত একটি প্রবচন আছে "বাংগালীকে হাইকোর্ট দেখানো" সময় পরিবর্তন হইয়াছে কিন্তু বাংগালীকে হাইকোর্ট দেখানোর প্রবণতা এখনও পরিবর্তন হয় নাই। যাহা অত্যন্ত দুঃখের এবং বেদনার! বিচারপ্রার্থীর বোধগম্য ভাষায় বিচার কার্য পরিচালনা না হওয়ায় এখনও বোধগম্যতার অভাবে বাংগালী স্বাধীনতার এত বৎসর পরও হাইকোর্ট দেখার করুণ অভিজ্ঞতার নাগপাশ হইতে বাহির হইতে পারেন নাই। এখনও হয় কথায় নয় কথায় বাংগালীকে হাইকোর্ট দেখানোর মত অবস্থার শিকার হইতে হয়, আর এই শিকারের টোপ হিসাবে তাঁহারাই ব্যবহৃত হন যাহাদেরকে গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের ৭নং অনুচ্ছেদে প্রজাতন্ত্রের সকল ক্ষমতার মালিক হিসাবে অভিহিত করা হইয়াছে। তাই জাতির জনক বঙ্গবন্ধু শেখ মুজিবর রহমান এর ১৫ ফেব্রুয়ারী ১৯৭১ সালে বাংলা একাডেমীর অনুষ্ঠানের উদ্বোধনী ভাষণের কথা আজও জাতিকে চরমভাবে নাড়া দেয়, সেদিন তিনি ঘোষণা দিয়াছিলেন;-

> "আমি ঘোষণা করছি আমাদের হাতে যেদিন ক্ষমতা আসবে সেদিন থেকেই দেশের সর্বস্তরে বাংলা ভাষা চালু হবে। বাংলা ভাষার পন্ডিতেরা পরিভাষা তৈরি করবেন তারপর বাংলা ভাষা চালু হবে, সে হবে না। পরিভাষাবিদরা যতখুশি গবেষণা করুন। আমরা ক্ষমতা নেয়ার সঙ্গে সঙ্গে বাংলা ভাষা চালু করে দেব। সে বাংলা যদি ভুল হয়, তবে ভুলই চালু হবে, পরে তা সংশোধন করা হবে।"

৩৪. বিচারপ্রার্থী তাঁহার নিজের বোধগম্য ভাষায় বিচার না পাওয়ায় বোধগম্যতার অভাবে সিদ্ধান্ত নিতে বিভ্রান্ত হওয়ায় আদালতগুলিতে এত মামলা মোকদ্দমার জট। এই জট খুলতে পারে শুধুমাত্র বিচার প্রার্থীদের বোধগম্য ভাষায় তাহাদের বিচারের বাণী প্রকাশ এবং প্রচার, তাহা না হইলে সেই চির পরিচিত মর্মবেদনার বানী বারবারই প্রতিধ্বনিত হইবে। "বিচারের বাণী নিভৃতে কাঁদে"। দরখাস্তকারী যদি নিজে তাহার এই দন্ডাদেশ নিজেই অনুধাবন বা হৃদয়াঙ্গম, সর্বোপরি বুঝিতে পারিতেন তাহা হইলে বর্তমান এখতিয়ারে তর্কিত রায় চ্যালেঞ্জ করিয়া এই মামলা দায়ের করা হইতে বিরত থাকিতেন বলিয়া আমরা বিশ্বাস করি।

৩৫. অতএব সার্বিক আলোচনা, পর্যালোচনা, উপরোক্ত নজীরগুলির সিদ্ধান্ত, বিশেষ ট্রাইব্যুনালের রায়, দরখাস্তকারীর দরখাস্তের বর্ণনা, হেতুবাদ, ফৌজদারী কার্যবিধির ৫৬১এ ধারার বিষয়বস্তু আমরা আন্তরিকতার সহিত অত্যন্ত নিবিড়ভাবে বিচার বিশ্লেষণ, মূল্যায়ন ও বিবেচনা করিয়া এমন কিছুই খুঁজিয়া পাই নাই যে, দরখাস্তকারীর বিরুদ্ধে রাষ্ট্রপক্ষ/অভিযোগকারী পক্ষ যুক্তিসংগত সন্দেহের উর্দ্ধে অভিযোগ প্রমাণ করিতে ব্যর্থ হইয়াছেন, যাহা সাক্ষ্যবিহীন মামলা (Case of no evidence) বলা যায় এবং বিশেষ ট্রাইব্যুনাল গঠন ত্রুটিপূর্ণ বা এখতিয়ার বহির্ভূত ছিল (Quoram-non-judice) এবং প্রদত্ত রায়ে এমন কোন ভুলভ্রান্তি কিংবা কোন অসংগতি পরিলক্ষিত হয় নাই, যাহাতে ফৌজদারী কার্যবিধির ৬৫১এ ধারার বিধান অনুযায়ী আইনের অপপ্রয়োগ কিংবা কোন সাক্ষ্য প্রমাণ ছাড়া রায় প্রদান করা হইয়াছে যাহার পরিপ্রেক্ষিতে দরখাস্তকারী ন্যায় বিচার হইতে (abuse of process of court or otherwise to secure the ends of Justice) বঞ্চিত হইয়াছেন।

৩৬. সর্বোপরি, আমাদের সর্বোচ্চ আদালতের 28 DLR (AD),38 এবং 31 DLR (AD),69, 46 DLR (AD),67 মামলার সিদ্ধান্ত ফৌজদারী কার্যবিধির ৫৬১এ ধারার ক্ষমতা প্রয়োগের ক্ষেত্র সুস্পষ্টভাবে মীমাংসিত হইয়াছে যাহা ইতিপূর্বে বিস্তারিত বর্ণিত হইয়াছে যাহা এখন ফৌজদারী কার্যবিধির ৫৬১এ ধারায় অন্তর্নিহিত ক্ষমতা প্রয়োগের ক্ষেত্রে সর্বোচ্চ আদালতের সিদ্ধান্ত অনুযায়ী বাধ্যতামূলক অনুসরণীয় নজীর হিসাবে প্রতিস্থাপিত। তাহার আলোকেই অত্র অধিক্ষেত্রে দরখাস্তকারীর কোন প্রতিকার পাওয়ার অবকাশ নাই বলিয়া আমরা স্থির সিদ্ধান্তে উপনীত হইয়াছি। এমতাবস্থায়, তর্কিত রায়ে হস্তক্ষেপ করার মত সামান্যতম হেতুবাদ আছে বলিয়া আমরা বিশ্বাস করি না, বিধায় রুলটি খারিজ হওয়া উচিৎ।

৩৭. অতএব,

ফলাফল,

উপরোক্ত অবস্থা, ঘটনা ও সিদ্ধান্তের আলোকে রুলটি খারিজ করা হইল, ২৬.১১.২০০৯ ইং তারিখে প্রদত্ত বিশেষ ট্রাইব্যুনাল নং ৪, বরিশাল, বিশেষ ট্রাইব্যুনাল মামলা নং-৯৪/২০০৮ ধারা ১৯৭৪ সালের বিশেষ ক্ষমতা আইন ২৫বি(২) যাহার জি,আর নং-৬১৬/২০০৩, যাহা বরিশাল মেট্রোপলিটন পুলিশ, কোতয়ালী মডেল থানার মামলা নং-৪১ তাং ১৬.০৯.২০০৮, হইতে উদ্ভূত, তাহার রায় ও সাজা বহাল রাখা হইল। সেই সংগে দরখাস্তকারীর জামিন বাতিল করা হইল। সাজাপ্রাপ্ত দরখাস্তকারীকে আদেশ প্রকাশের ১(এক) মাসের মধ্যে সাজার বাকী অংশ ভোগ করিবার জন্য বিশেষ ট্রাইব্যুনাল নং ৪, বরিশাল, আত্নসমর্পণ করিবার জন্য নির্দেশ প্রদান করা হইল। যদি স্বেচ্ছায় তিনি আদালতে আত্নসমর্পণ না করেন, তাহা হইলে আদালত তাহার বিরুদ্ধে গ্রেফতারী পরোয়ানা ইস্যু পূর্বক আটক করিয়া জেলে প্রেরণ করিবার ব্যবস্থা গ্রহণ করিবেন।

৩৮. অতিসত্ত্বর নথি সংশ্লিষ্ট আদালতে প্রেরণের নির্দেশ দেওয়া গেল।

3 SCOB [2015] HCD 108

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3203 of 2004

City Vegetable Oil Mils Ltd.
…... Petitioner.

-Versus-

Commissioner, Customs, Excise & VAT (Dhaka South), Segunbagicha, P.S.-Ramna, Dhaka and others
….. . Respondents

WRIT PETITION NO. 3205 of 2004

Asia Pacific Refinery Ltd.
…... Petitioner.

-Versus-

Commissioner, Customs, Excise & VAT (Dhaka South), Segunbagicha, P.S.-Ramna, Dhaka and others
….. . Respondents

Mr. Md. Mizanul Haque with
Mr. Hasan Rajib Prodhan, Advocates
..For the petitioner in both writ petitions.

Ms. Israt Jahan, D.A.G. with
Ms. Shuchira Hossain, A.A.G. with
Ms. Nurun Nahar, A.A.G
….For the Government in both writ petitions.

Heard on: 16.08.2015 and 26.08.2015.
Judgment on: 30.08.2015.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J.N. Deb Choudhury

Value Added Tax Act, 1991
Section 9:

Since the admitted allegation against the petitioners is that in spite of the increase of price of the raw materials as reflected from the concerned bills of entries and assessment orders thereon, the petitioners did not make any corresponding increase in the declared price of the finished products and since such circumstance was not evidently mentioned under any clauses from Clauses-'Ka' to 'Ta' under sub-section (1) of Section 9, we do not find as to how the directions of the concerned officers for readjusting the current account register of the petitioner, or for depositing certain amount through treasury challan, was amenable to the alterative remedy of written objection in view of the provisions under sub-section (2ka) of Section 9. ...(Para 11)

Value Added Tax Act, 1991
Section 9

And
Clause-Gha of Rule 22(1) of the VAT Rules, 1991:

Provisions under sub-section (2) of Section 9 provides that if someone takes rebate in the prohibited circumstances mentioned under sub-section (1), such rebate can be rejected by the concerned officer, who may also direct such person to do necessary adjustment in the current account register, namely Mushak-18, as required to be maintained in view of the provisions under Clause-Gha of Rule 22(1) of the VAT Rules, 1991. This sub-section (2) of Section 9 speaks about only for issuance of direction, not for direct action of adjustment in the current account register. ...(Para 12)

Judgment

SHEIKH HASSAN ARIF, J:

1. Since the questions of law and facts involved in the aforesaid two writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this single judgment.

2. **In Writ Petition No. 3203 of 2004**, Rule Nisi was issued asking the respondents to show cause as to why the demand notices issued by respondent no.2, vide nathi no. 4/VAT/Oil(3)91/Part-1/00/833 dated 27.05.2004, for Tk. 22,80,974.00, and vide nathi No. 4/VAT/Oil(3)91/Part-1/00/917 dated 06.06.2004 directing the petitioner to deposit VAT for an amount of Tk.35,41,498.66 through treasury challan or deduct the amounts from the current account register of the petitioner, and, at the same time, deducting the said amounts from the current account register of the petitioner on 30.05.2004 and 07.06.2004, (Annexures-C & D) should not be declared to be without lawful authority and are of no legal effect.

3. **In Writ Petition No. 3205 of 2004**, Rule Nisi was issued calling upon the respondents to show cause as to why the demand notice vide Nathi No.4(6)7/Musuk/Edible Oil/2000/940 dated 08.06.2004 (Annexure C) issued by respondent No.2 directing the petitioner to adjust the current account register, or deposit Tk. 52,93,805.18 through treasury challan, should not be declared to be without lawful authority and is of no legal effect.

4. **Back ground facts in Writ Petition No. 3203 of 2004:**

The petitioner, in this writ petition, is a private limited company and is engaged in the business of producing Edible Oil in the industry located at North Rupshi, Rupgonj, Narayangonj, having VAT Registration Number under the concerned VAT authority being Registration No.9271000384. The finished products of the petitioner's industry is 'Banshpathi', which is a special Type of vegetable oil. In the course of its business, the petitioner, in order to make payment of VAT, submitted value declaration on 17.12.2002 in respect of its product proposing value of per tin produced oil of 16 Kgs at Tk. 505.73 and Tk. 481.60 per cartoon having 16 Kgs of oil therein. Accordingly, the concerned Assistant Commissioner, Narsingdi Division, approved the value of the petitioner's finished product on 04.01.2003 at Tk. 573.00 per tin and Tk. 549.00 per cartoon. Thereupon, while the petitioner was paying VAT, the Superintendent of Rupgonj Circle, by letter vide Nathi No. 4/VAT/Oil(3)91/Part-1/00/833 dated 27.05.2004 informed the petitioner that as per report dated 26.05.2004 submitted by the Area VAT Officer of 'A' Circle, the petitioner had taken excess rebate of Tk. 22,40,978.00 in respect of a period from 02.09.2003 to 24.05.2004 on

account of raw materials, and, by the same letter, directed the petitioner to adjust the said amount in it's current account register. Again, on 05.05.2004, the same Superintendent, vide Nathi No. 4/VAT/Oil(3)91/Part-1/00/917, informed the petitioner that the inquiry team had detected that the petitioner took excess rebate of Tk. 35,41,498.66 in respect of a period from July, 2002 to August, 2003 on account of raw materials and, accordingly, directed the petitioner to adjust the said amount in the current account registrar. Thereafter, on 31.05.2004, the current account register of the petitioner was directly adjusted by deducting the said amount of Tk. 22,40,978.00 by making a reference to the aforesaid Nathi dated 27.05.2004, and on 07.06.2004, a further amount of Tk. 35,41,498.66 was also directly deducted in the current account register by making a reference to the aforesaid Nathi dated 06.06.2003. The above actions direct adjustments were also authenticated by the Superintendent of Customs concerned. Being aggrieved by such demands and actions, the petitioner served a notice demanding justice dated 12.06.2004, whereupon the respondent no. 2 informed the petitioner that the petitioner had alternative remedy against such actions under Section 9(2ka) and (2Kha) of the VAT Act, 1991. Thereafter, getting no positive response, the petitioner moved this Court and obtained the aforesaid Rule.

5. **Back ground facts in Writ Petition No. 3205 of 2004**

The petitioner in this writ petition is also a private limited company and engaged in the production of Edible Oil in the industry located at North Rupshi, Rupgonj, Narayangonj having VAT Registration No. 9271006734. The petitioner produces shortening, which is a special type of vegetable oil. In the course of usual business, the petitioner, on 13.08.20036, declared value of its product at Tk. 524/52 per cartoon containing16 Kgs therein and the said value declared by the petitioner was approved by the concerned Assistant Commissioner on 30.08.2003 fixing the value at Tk. 556.52 per cartoon. Accordingly, while the petitioner was paying VAT in accordance with law, it received demand notice from respondent no. 2 for Tk. 52,93,803.18 vide Nathi No. 4(6)7/Musuk/Edible Oil/2000/940 dated 08.06.2004 with a direction to pay the said amount through Treasury Challan, or deduct the amount in the current account register, on the allegation that it had taken excess rebate. The petitioner, thereupon, gave notice demanding justice on 12.06.2004 requesting cancellation/withdrawal of such demand, whereupon the respondent no.2, vide reply dated 14.06.2004, informed the petitioner that it had alternative remedy under Section 9(2Ka) and (2Kha) of the VAT Act, 1991. Being aggrieved by such action, the petitioner moved this Court and obtained the aforesaid Rule.

6. The Rules are opposed by respondent No. 4 by filing affidavit-in-opposition.

7. **Submissions:**

Mr. Md. Mizanul Haque Chowdhury, learned advocate appearing for the petitioners in both the writ petitions, submits that the main contention of the respondent is that the petitioner took excess rebate for the period mentioned in the notices by not making a fresh declaration of the increased value of the product followed by approval by the concerned officer after increase of the price of raw materials during the said period, though petitioner took rebate at such increased price of the raw materials under section 9 the VAT Act 1991. This being so, according to him, the respondents acted without jurisdiction in that in such a situation the respondent can only act through fixation of base-value under Rule 3 of the VAT Rules, 1991 and upon making demand in view of Section 55 of the VAT Act, 1991. Mr. Chowdhury further argues that only in two situations under the VAT Act, the current account

register of an individual or establishment may be directly adjusted by deducting certain amount therein by the concerned Officers, e.g., in cases falling under Section 9(1) and in cases falling under Section 56, for realization of unpaid VAT. However, according to him, the case of the petitioners do not fall under any of the categories either under Section 9(1) or under Section 56. Therefore, he submits, neither the petitioner had any alternative remedy in view of the provisions under sub-section (2Ka) of Section 9 nor it had any remedy to prefer any appeal against any demand under Section 55 as the demand made was not a demand under Section 55 after exhausting the procedures of fixing the base value in view of the provisions under Rule 3 of the VAT Rules, 1991. Therefore, according to the learned advocate, since the respondents acted without jurisdiction leaving the petitioner with no effications alternative remedy, this Court can interfere into such actions under writ jurisdiction.

8. As against this, Ms. Israt Jahan, learned Deputy Attorney General representing VAT authority, submits that since the petitioners took excess rebate, they did have alternative remedy to file written objection before the higher officials in view of the provisions under sub-section (2Ka) of Section 9 and as such the aforesaid writ petitions against adjustment of current account register by deducting certain amount therein by the concerned Vat officers or against direction to do such adjustment are not maintainable. Learned D.A.G. submits that the position of law on this point has already been settled by this Court in two writ petitions, namely in **Writ Petition Nos. 3261 of 2004** and **8525 of 2008**, wherein their Lordships held that the writ petitions were not maintainable against the actions of adjustment of current account register done by the VAT Officers under Section 9(2) of the VAT Act, 1991. In this regard, she has also drawn our attention to a general order of the National Board of Revenue (NBR), being General Order No. 48/Mushok/2010 dated 14.10.2000, wherein it has been ordered by the NBR that excess rebate taken in violation Section 9(1) can be rejected and adjusted by the concerned Superintendent of VAT of the concerned circle by adjusting the same (Mushok-18) upon visiting the production place or establishment of the concerned VAT payer, and that if the VAT payer is aggrieved by such action, he has alternative remedy of filing written objection before the higher VAT officer. According to her, relying on this general order, a Division Bench of this Court in Writ Petition No. 3261 of 2004, discharged the Rule holding that the writ petition was not maintainable.

9. **Deliberations of the Court:**

Since the issue of maintainability of the instant writ petitions has been raised very seriously by the respondent, the same is taken up first. Before starting, relevant portions of Section 9 of VAT Act, 1991 are quoted below:-

৯। **কর রেয়াত**। (১) করযোগ্য পণ্যের সরবরাহকারী, ব্যবসায়ী বা করযোগ্য সেবা প্রদানকারী প্রতি কর মেয়াদে তৎকর্তৃক সরবাহকৃত পণ্য বা প্রদত্ত সেবার উপর প্রদেয় উৎপাদন করের (output tax) বিপরীতে, **নিম্নবর্ণিত ক্ষেত্র ব্যতীত,** উপকরণ কর রেয়াত গ্রহণ করিতে পারিবেন, যথাঃ

(ক) অব্যহতি প্রাপ্ত পণ্য উৎপাদনে ব্যবহৃত উপকরণের উপর পরিশোধিত মূল্য সংযোজন কর;

(খ) টার্ণওভার করের আওতাভূক্ত করদাতার নিকট হইতে সংগৃহীত উপকরণের উপর পরিশোধিত টার্ণওভার কর;

(গ) পণ্য উৎপাদন বা সেবাপ্রদানে ব্যবহৃত উপকরণের উপর পরিশোধিত সম্পূরক শুল্ক;

(ঘ) প্রথমবার ব্যতীত অন্যকোনো দফায় পুনঃব্যবহারযোগ্য মোড়কের উপর পরিশোধিত মূল্য সংযোজন কর;

(ঙ) করযোগ্য পণ্য উৎপাদন বা করযোগ্য সেবাপ্রদানের সহিত সরাসরি সম্পৃক্ত হইলেও কোনো দালান-কোঠা বা অবকাঠামো বা স্থাপনা নির্মাণ, সুষমীকরণ, আধুনিকীকরণ, [প্রতিস্থাপন, সম্প্রসারণ,] পুনঃসংস্কারকরণ ও মোরামতকরণ, সকল প্রকার আসবাবপত্র, ষ্টেশনারী দ্রব্যাদি,

এয়ারকন্ডিশনার, ফ্যান, আলোক সরঞ্জাম, জেনারেটর ইত্যাদি ক্রয় বা মেরামতকরণ, স্থাপত্য পরিকল্পনা ও নকশা ইত্যাদির সহিত সংশ্লিষ্ট পণ্য এবং সেবার উপর পরিশোধিত মূল্য সংযোজন কর;

(চ) করযোগ্য পণ্য উৎপাদন বা সরবারহ বা করযোগ্য সেবাপ্রদানের সহিত সরাসরি সম্পৃক্ত এবং সম্পৃক্ত নহে এইরুপ স্থান বা স্থাপনায় ব্যক্তিগত এবং ব্যবসায়ে যৌথভাবে ব্যবহৃত টেলিফোন, টেলিপ্রিন্টার, ফ্যাক্স, ইন্টারনেট, ফ্রেইট ফরোয়ার্ডার্স, ক্লিয়ারিং ও ফরোয়ার্ডিং এজেন্ট, ওয়াসা, বিমা অডিট ও একাউন্টিং ফার্ম, যোগানদার, সিকিউরিটি সার্ভিসেস, আইন পরামর্শক, পরিবহন ঠিকাদার ঋণপত্র সেবা ও বিদ্যুৎ বিতরণ সেবার উপর পরিশোধিত মূল্য সংযোজন করের ষাট শতাংশের অতিরিক্ত মূল্য সংযোজন কর;

(ছ) ভ্রমন, আপ্যায়ন, কর্মচারীর কল্যান ও উন্নয়নমূলক কাজের ব্যয়ের বিপরীতে পরিশোধিত মূল্য সংযোজন কর;

[(ছছ) ধারা ৫ এর-

[(অ) উপ-ধারা (২) এ উল্লিখিত পণ্যের করযোগ্য মূল্যভিত্তির মধ্যে অন্তর্ভূক্ত নয় এমন উপকরণের বিপরীতে পরিশোধিত মূল্য সংযোজন কর;

(আ)উপ-ধারা (২) এর দ্বিতীয় শর্তাংশে উল্লিখিত ব্যবসায়ী কর্তৃক ক্রয়কৃত উপকরণের উপর পরিশোধিত উপকরণ কর;]]

(জ) ধারা ৫ এর উপ-ধারা (৪) এর বিধান অনুযায়ী কোনো নির্দিষ্ট সেবাপ্রদানকারী কতৃক ক্রীত উপকরণের উপর পরিশোধিত মূল্য সংযোজন কর;

[(জজ) ধারা ৫ এর উপ-ধারা (৪ক) এ উল্লিখিত ব্যবসায়ী কর্তৃক ক্রয়কৃত উপকরণের উপর পরিশোধিত উপকরণ কর;]

(ঝ) ধারা ৫ উপ-ধারা (৭) এর বিধান অনুযায়ী নির্ধারিত ট্যারিফ মূল্যের ভিত্তিতে পণ্য সরবরাহকারী কর্তৃক ক্রীত উপকরণের উপর পরিশোধিত মূল্য সংযোজন কর;

(ঞ) নিবন্ধন সংখ্যা, নাম ও ঠিকানা ব্যতীত অন্যকোনো নিবন্ধন সংখ্যা, নাম ও ঠিকানা সম্বলিত বিল অব এন্ট্রি বা চালানপত্রে উল্লিখিত উপকরণ কর; এবং

(ট) অন্যের অধিকারে, দখলে, তত্ত্বাবধানে রক্ষিত পণ্যের উপর পরিশোধিত মূল্য সংযোজন করঃ

[(১ক) মূলধনী যন্ত্রপাতির ক্ষেত্রে উপকরণ কর রেয়াত বিধি দ্বারা নির্ধারিত পদ্ধতিতে গ্রহণ করিতে হইবে।

(২) **উপ-ধারা (১) এ বর্ণিত ক্ষেত্রসমূহে** উপকরণ কর রেয়াত গ্রহরের অধিকার নাথাকা সত্ত্বেও কোনো ব্যক্তি উক্তরুপ কর রেয়াত গ্রহণ করিলে সংশ্লিষ্ট কর্মকর্তা, ধারা ৩৭ এ যাহা কিছুই থাকুক না কেন, গৃহীত রেয়াত নাকচ করিয়া চলতি হিসাব বা দাখিলপত্রে প্রয়োজনীয় সমন্বয় সাধনের **নির্দেশ দিতে পারিবেন।]**

[(২ক) এই আইনের অন্যান্য বিধানে যাহা কিছুই থাকুক না কেন, উপ-ধারা (২) এর অধীনে সংশ্লিষ্ট কর্মকর্তা কর্তৃক **প্রদত্ত নির্দেশের ফলে** কোনো ব্যক্তি সংক্ষুব্ধ হইলে, তিনি **উক্ত নির্দেশের** বিরুদ্ধে উক্ত সংশ্লিষ্ট কর্মকর্তার উর্ধ্বতন মূল্য সংযোজন কর কর্মকর্তার নিকট লিখিত আপত্তি উথথাপন করিতে পারিবেন।

(২খ) উপ-ধারা (২ক) এর অধীন কোনো লিখিত আপত্তি দাখিল করা হইলে, উক্ত কর্মকর্তা লিখিত আপত্তি দাখিলের তারিখ হইতে সাত কার্যদিবসের মধ্যে আপত্তি দাখিলকারী ব্যক্তিকে শুননির যুক্তিসংগত সুযোগ প্রদানপূর্বক, উহা নিষ্পত্তি করিবেন এবং উক্ত কর্মকর্তার অনুরুপ **কোনো আদেশ চুড়ান্ত হইবে।]**

(3)----------

(4) ----------

(Underlines supplied)

10. Thus, it appears from Section 9 of the VAT Act, 1991, that the supplier of goods, businessmen and providers of service are entitled to rebate on raw materials except in cases mentioned under different sub-clauses of sub-section (1) of Section 9. At the relevant time,

the prohibited circumstances in which such suppliers, businessmen or service providers would not get rebate were mentioned under Clauses-'Ka' to 'Ta' of sub-section (1). Sub-section (2) of Section 9 further provides that if anyone takes rebate under any of such prohibited circumstances mentioned under sub-section (1), where he does not have right to take such rebate, the concerned officer may reject such rebate and direct readjustment of the current account register in addition to taking action under Section 37. Again, while sub-section (2ka) of Section 9 provides that if the said person is aggrieved by such direction of the VAT officer, he is entitled to prefer written objection before the higher officer, sub-section (2kha) provides that the said higher officer is obliged to dispose of such written objection within seven working days upon giving opportunity of hearing to the said person and that the order disposing of such objection shall be the final order (B-cn Q¨s¡¿¹ qC-h).

11. Keeping the above contemplations of the Legislature, let us now examine the instant cases. It appears that the allegation in the present case, namely the allegation of not revising the base value of the finished products even in case of increase of the price of raw materials, evidently, does not come under any of the prohibited circumstances mentioned in Clauses-'Ka' to 'Ta' of sub-section (1) of Section 9. Which means, the Legislature, at the relevant time, did not contemplate such a situation of taking excess rebate by Vat prayer due to increase of price of the raw materials without revised price declaration being approved upon correspondingly increasing the price of the finished goods. Learned DAG has also failed to point out as to under what Clause of sub-section (1) of Section 9, the allegations labelled against the petitioners fall. Since the admitted allegation against the petitioners is that in spite of the increase of price of the raw materials as reflected from the concerned bills of entries and assessment orders thereon, the petitioners did not make any corresponding increase in the declared price of the finished products and since such circumstance was not evidently mentioned under any clauses from Clauses-'Ka' to 'Ta' under sub-section (1) of Section 9, we do not find as to how the directions of the concerned officers for readjusting the current account register of the petitioner, or for depositing certain amount through treasury challan, was amenable to the alterative remedy of written objection in view of the provisions under sub-section (2ka) of Section 9.

12. Provisions under sub-section (2) of Section 9 provides that if someone takes rebate in the prohibited circumstances mentioned under sub-section (1), such rebate can be rejected by the concerned officer, who may also direct such person to do necessary adjustment in the current account register, namely Mushak-18, as required to be maintained in view of the provisions under Clause-Gha of Rule 22(1) of the VAT Rules, 1991. This sub-section (2) of Section 9 speaks about only for issuance of direction, not for direct action of adjustment in the current account register. Further, according to sub-section (2Ka), if such person is aggrieved by any such direction of the concerned officer given under sub-Section (2), he may file a written objection against such direction before the higher Vat officer. However, as stated above, since the allegations against the petitioners in both the writ petitions do not fall under any of the prohibited circumstances mentioned under sub-section (1), it cannot be said that the petitioners took rebate in any of the said prohibited circumstances. This follows that, the impugned directions were not authorized by law and that the petitioners were not entitled to file any written objection against such directions. Since the Legislature has specifically provided the prohibited circumstances under which, if rebate is taken, the concerned officers can reject such rebate and issue direction under sub-section (2) to do necessary adjustment in the current account register, and the person against whom such direction has been given can file written objection against such direction before the higher officer, we do not see any scope, at the relevant time, for the petitioners to prefer any written objection before the higher

officer either against the impugned directions in both the writ petitions or against the direct actions of the concerned officers adjusting the current account register in Writ Petition No. 3203 of 2004. It further follows that since the direct actions of adjustment, as in Writ Petition No. 3203 of 2004, have not been authorized by the provisions under sub-section (2) of Section 9. Even if, for arguments' sake, the allegations against the petitioners fell in the prohibited circumstances mentioned under sub-section (1), the petitioner in Writ Petition No. 3203 of 2004 would not be able to prefer written objections before the higher vat officer inasmuch as that such avenue of filing written objections was only available against the directions but not against the direct actions of adjustment of current account register. Therefore, at the relevant time, the petitioners in fact did not have any efficacious alternative remedy. This being so, it is also not fathomable as to how the General Order No. 48/Mushak/2010 dated 14.12.2010 of NBR, as referred to by the learned DAG, can stand the test of law in so far as the same concerns the direct action of adjustment in the current account register.

13. In this regard, we have also examined the decisions of this Court as referred to by the learned DAG, namely the judgments in unreported Writ Petition Nos. 3261 of 2004 and 8525 of 2008. In Writ Petition No.3261 of 2004 (**Squire Toiletries vs. NBR**), the facts were different. In that case, the allegation against the petitioner was covered under Clause-(Neo) of sub-section (1) of Section 9. Considering that aspect, their Lordships in that writ petition concluded that the petitioners did not have entitlement to avail writ jurisdiction in view of the availability of the alternative remedy. On the other hand, the issue as regards the said officers authority to do direct adjustment under sub-section (2) of Section 9 was not raised or considered in that case. Again, since the judgment in Writ Petition No. 8525 of 2008 (**Aftab Automobiles Limited Case)** does not disclose as to under what prohibited circumstances of Clauses-'Ka' to 'Ta' of sub-section (1) of Section 9 the allegations in that case fell, we are not in a position to extract the relevant ratio from that decision to apply the same in the facts and circumstances of the present case. This being so, we are of the view that, the said decisions, though declared correct position of law, are not applicable in the facts and circumstances of the present cases.

14. Again, the fact that the allegations against the petitioner do not fall under any of the prohibited circumstances of sub-section (1) is further reflected in the amendment of Section 9 by inserting sub-clause-(AA) under Clause-(RR) of sub-section (1) of Section 9 by virtue of Finance Act, 2013, wherein the increase of price of raw materials beyond 7.5% and evasion of VAT by not reflecting the said increase in the declared price of the finished goods were inserted as one of the prohibited circumstances to which the concerned person is not entitled to rebate. However, at the relevant time when the impugned directions were given, namely in 2004, no such provisions of sub-clause (AA) was there under sub-section (1) of Section 9. In view of above position, we hold that the writ petitions are maintainable.

15. The admitted position is that the price of the raw materials, which were used by the petitioners in the production of the finished goods, were increased during the period as mentioned in the impugned notices. It is also true that the petitioners were required to make reflection of such increase of price of raw materials in the base value of the finished goods to be declared or revised by the petitioner followed by approval by the concerned officers in view of the provision under Rule-3 of VAT Rules, 1991. However, in the instant cases, the allegation is that the petitioner did not do such corresponding increase in the price declaration or that no revised price declarations was made. In such a situation, the question is whether the concerned officer can issue direction on the delinquent person for adjustment of current

account register or whether the officer can himself do such direct readjustment in the current account register by visiting the production site or establishment of such person. After examining the relevant provisions of law, it appears that the respondents can probably take such action only in one situation under Section 56, namely in the process of realization of demand under Section 56 in view of Clause (Ka) of sub-section (1) of Section 56. However, in exercising such power under Section 56, the concerned officer must proceed after exhausting the demand procedure as envisaged under Section 55 of the VAT Act followed by an adjudication order. On the other hand, under sub-section (2) of Section 9, the situations under which the respondents can give direction for adjusting the current account register must be covered by the prohibited circumstances mentioned in Clauses-'Ka' to 'Ta' of sub-section (1) of Section 9, which was totally absent in the facts and circumstances of the present cases. Since, in the present cases, the VAT officer admittedly acted under Section 9(2) and not under Section 56, the impugned directions and/or actions of the concerned officers were without jurisdiction as the prerequisite facts for exercising such jurisdiction as contemplated under Clauses-'Ka' to 'Ta' of sub-section (1) of Section 9 were totally absent. Therefore, we can safely hold that the impugned directions and/or actions were without jurisdiction.

16. Regard being had to the above facts and circumstances of the case, we are of the view that the Rules have substances and as such the same should be made absolute.

17. In the result, the Rules are made absolute. The impugned directions, to do adjustment etc. and/or actions of direct adjustment, in current account registers of the petitioners are thus, declared to be without lawful authority and are of no legal effect. Accordingly, such direct adjustments are knocked down. However, the respondents are at liberty to proceed in accordance with the provisions under Section 5 of the VAT Act, 1991 read with Rule-3 of the VAT Rules, 1991 in order to determine and/or approve the revised base value of the concerned products without any prejudice to the petitioners to take recourse to relevant provisions of law.

18. Communicate this.

3 SCOB [2015] HCD 116

High Court Division
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 1041 of 1997

Md. Rezaul Amin alias Neelo,
Son of Late Yunus Mia of Nazirpara, Police Station- Chandpur, Distrtict-Chandpur, at present Bangladesh Medical Hall, Chowdhury Ghat, Chandpur.

...Appellant

-Versus-

The State

...Respondent

No one appears for the appellant

Mr. Md. Jashim Uddin, Assistant Attorney General
... for the respondent

Judgment on 12.05.2015

Present:
Mr. Justice Md. Ruhul Quddus

In the present case being a case of drug/narcotics, it was incumbent on the prosecution to get the seized phensedyl examined by a chemical expert to prove that the seized articles were actually *madak drobyo*/drug and under what category of *madak drobyo*/drug it fell. Absence of such chemical examination and contradictions between the two sets of prosecution witnesses, casted a shadow of doubt over the prosecution case. ... (Para 15)

Judgment

Md. Ruhul Quddus, J:

1. This criminal appeal under section 410 of the Code of Criminal Procedure is directed against the judgment and order dated 30.04.1997 passed by the Sessions Judge, Chandpur in Sessions Case No. 4 of 1995 arising out of Chandpur Police Station Case No. 2 dated 06.07.1993 corresponding to G. R. No.80 of 1993 convicting the appellant under section 22(ga) of the Madak Drobyo Niontron Ain, 1990 and sentencing him thereunder to suffer rigorous imprisonment for 3 (three) years with a fine of Taka 5,000/- in default to suffer rigorous imprisonment for 06 (six) months more.

2. The informant Md. Shafiqur Rahman Mukul, a Sub-Inspector of police produced the arrested appellant and another to Chandpur police station on 06.07.1993 and lodged an *ejahar* alleging, *inter alia*, that on receipt of a secret information he along with some police forces ambushed near to Chowdhury Ghat Municipal Market at about 5.30 p.m. A rickshaw with a passenger came in front of a pharmacy named Bangladesh Medical Hall and delivered a packet to the appellant, the owner of the pharmacy. The informant with the forces rushed to the pharmacy and caught hold of the appellant and the rickshaw puller Siddique Mia. The passenger of the rickshaw, however, managed to escape. The appellant disclosed his name as

Tazul Islam and admitted that he was his partner in illegal business of phensedyl. The informant seized the packet and recovered 16 bottles of Indian phensedyl therefrom.

3. The informant himself was assigned for investigation, but before completion of the same, was transferred elsewhere and another Sub-Inspector of police named Sushil Chandra Das completed the investigation and submitted charge sheet against all the three accused under sections 20 (ga) of Madak Drobyo Niontron Ain, 1990.

4. The case being ready for trial was sent to the Court of Sessions Judge, Chandpur. The learned Sessions Judge by order dated 25.01.1995 framed charge against the accused, to which two of the accused including the appellant who were facing trial pleaded not guilty and claimed to be tried in accordance with law.

5. The prosecution in order to prove its case examined eight witnesses. After closing the prosecution evidence, the accused were examined under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence, but did not examine any witness in defense. However, the defense case as it appears from the trend of cross-examinations is that the police demanded illegal gratification from the appellant, but being refused had initiated the present case at the instigation of the neighboring medical shop-owners absolutely on false allegation.

6. After conclusion of hearing, the learned Sessions Judge pronounced the impugned judgment and order of conviction and sentence against the sole appellant and acquitted two other co-accused. Against the conviction and sentence, the appellant moved in this Court and subsequently obtained bail.

7. Mr. Md. Jashimuddin, learned Assistant Attorney General appearing for the State takes me through the evidence and other materials on record and submits that the case having been proved against the appellant beyond all reasonable doubts, the learned Sessions Judge rightly passed the judgment and order of conviction and sentence.

8. It appears that the P.W.1 Md. Safiqur Rahman Mukul, a Sub-inspector of police and leader of the raiding party supported the prosecution case and exhibited the *ejahar,* seizure list, sketch map etc. and his signatures thereon. He however, admitted in cross-examination that the seized phensedyl was not sent to the chemical expert for determination of its substance. P.W.2 Altaf Uddin Sarker a seizure list witness although supported the recovery of phensedyl form Bangladesh Medical Hall in brief, in cross-examination stated that he did not see any recovery therefrom and that he saw those phensedyl at Sumon Store and had signed the seizure list sitting at the said store.

9. P.W.3. Md. Noor Nabi, being a formal witness and Officer-in-Charge of the concerned police station, supported the prosecution case.

10. P.W.4 Md. Khalilur Rahman a shop-owner of Chandpur Municipal Super Market stated that at the time and date of occurrence he was staying at his shop, when the informant had gone to him and told that some phensedyl was recovered from the appellant. He did not know anything more and at this stage he was declared hostile.

11. P.W.5 M. A. Razzak Khondker was a local and independent witness stated that he did not see the occurrence. The Sub-Inspector of police told him that some phensedyl was

seized. He, however, did not see the accused. At this stage this P.W.5 was also declared hostile.

12. P.W.6 Nurul Islam Gazi another local and independent witness and a shop keeper of Municipal Hawkers Market stated that he also did not see anything and knew nothing about the occurrence. At this stage the prosecution declared him hostile.

13. P.W.7 Sidduque Ahmed, a Sub-Inspector of police and member of the raiding party supported the prosecution case in all materials particulars and did not disclose anything adverse.

14. P.W.8 Sushil Chandra Das, a Sub-Inspector of police and the second investigating officer, who submitted the charge sheet deposed in respect of his part of investigation.

15. From a careful assessment of evidence, it appears that only P.Ws.1 and 7, two members of the raiding party were the eye witnesses, who supported the prosecution case. But none of the local witnesses supported the prosecution case. In the present case being a case of drug/narcotics, it was incumbent on the prosecution to get the seized phensedyl examined by a chemical expert to prove that the seized articles were actually *madak drobyo/*drug and under what category of *madak drobyo/*drug it fell. Absence of such chemical examination and contradictions between the two sets of prosecution witnesses, casted a shadow of doubt over the prosecution case. There is nothing on record to presume that the local witnesses did not dare to depose against the appellant because of fear or that they had any special relation to favour him. The charge sheet also shows the previous crime record of the appellant to be nil.

16. In such a case, the appellant is entitled to benefit of doubt. The charge brought against him having not been proved beyond all reasonable doubts, the impugned judgment and order of conviction and sentence should not sustain. Thus I find merit in the appeal.

17. Accordingly, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 30.04.1997 passed by the Sessions Judge, Chandpur in Sessions Case No. 4 of 1995 arising out of Chandpur Police Station Case No. 2 dated 06.07.1993 corresponding to G. R. No.80 of 1993 is hereby set aside. The appellant is acquitted of the charge and released from his bail bond.

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High Court Division
(Criminal Revisional Jurisdiction)

Criminal Revision No.263 of 2012

Md. Feroj Miah and another
...Accused-Petitioners

-Versus-

The State
...opposite party

Mr. Alal Uddin, Advocate
... For the petitioners

Mr. Delowar Hossain Somaddar, D.A.G
... For the State

Heard on: 29.07.2015
Judgmenton:30.07.2015

Present:
Mr.Justice Bhabani Prasad Singha
And
Mr.Justice S.M. Mozibur Rahman

Druta Bichar Tribunal Act, 2002
Section 10:
In this case remarkably the government does not deny the fact of failure of conclusion of trial of the Druta Bichar Tribunal Case No.07 of 2006 within the stipulated time. As per the provision of section 10 of the Druta Bichar Tribunal Act, 2002, the trial of a Druta Bichar Tribunal Case is to be concluded within 135 days from the date of receipt of the case for trial. No option for the court is left therein except sending the case back to the original court in the event of failure on the part of the tribunal to conclude trial of the case within the stipulated period. ... (Para 9)

Judgment

Bhabani Prasad Singha, J:

1. This Rule was issued calling upon the opposite party to show cause as to why the impugned order no.182 dated 09.10.2011 passed by the Druto Bichar Tribunal No.2, Dhaka in Druta Bichar Tribunal Case No.07 of 2006 arising out of Uttara P.S. Case No.40 dated 29.01.2005 under sections 302/34/107/109/307/ 326/380/458/459/411 of the Penal Code 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. The facts leading to this Criminal Revision case under section 439 read with section 435 of the Code of Criminal Procedure, 1898 are that on 29.01.2005 at about 16.15 hours the informant Mrs. Sayda Hamid lodged an FIR in the local police station against the 5 FIR named accused-petitioners and 14/15 others under section 302 of the Penal Code stating, inter alia, that out of previous enmity over a road, on 29.01.2005, the FIR named 5 accused-persons and 14/15 others entered into the house of the informant cutting the grill and at one stage, attacked her husband and daughter Fasrhana and took away various articles including gold ornaments worth Tk.2,60,000/- only. The victims were taken in to Dhanmondi Central Hospital for treatment and from there they were referred to Bangabandu Medical Collage

Hospital for better treatment and there her husband died and her daughter was ultimately cured, hence the case.

3. After investigation police submitted charge sheet against 10 accused-persons including the accused-petitionersunder sections449/452/458/459/380/427/326/302/302/109/34 of the Penal Code.

4. Thereafter, the case was transferred to the Court of Metropolitan Sessions Judge, Dhaka and subsequently, was transferred to the Court of Druta Bichar Adalat No.2, Dhaka for trial and disposal. On 05.09.2012 an application was filed on behalf of the accused-petitioners to send the case records from the Court of Druta Bichar Adalat No.2, Dhaka to the Court of Metropolitan Sessions Judge, Dhaka stating that more than 170 working days have already expired in the Court of Druta Bichar Adalat No.2, Dhaka. After hearing the petition vide the impugned order dated 09.10.2011 the learned Judge of the Druta Bichar Adalat No.2, Dhaka rejected the said application.

5. It is against the impugned order dated 09.10.2011 the petitioners preferred this Criminal Revision Case under section 439 read with section 435 of the Code of Criminal Procedure and obtained the Rule.

6. Mr. Alal Uddin, the learned Advocate representing the accused-petitioners submits that the impugned order being bad in law and in fact is liable to be set aside; that Druta Bichar Adalat No.2, Dhaka although did not deny expiry of 170 days in holding trial of the case illegally rejected the said application. The learned Advocate prays for making the Rule absolute on setting aside the impugned order.

7. On the other hand, Mr. Delowar Hossain Somadder, the learned Deputy Attorney General representing the State opposed the Rule.

8. Heard the submissions of the learned Advocates representing the parties and perused the materials on record including the Annexues attached to the revisional application.

9. The record shows that on 23.05.2006, the record of the Druta Bichar Tribunal Case No.07 of 2006 was received by the learned Judge of the Druta Bichar Tribunal No.2, Dhaka. Order No.47 dated 27.11.2006 shows that 120 working days for disposal of the case was expired and that the learned Judge of the Druta Bichar Tribunal No.2, Dhaka extended another 15 days in view of that for trial of the case. Subsequently, 29.11.2006, 30.11.2006 and 04.12.2006 were fixed for hearing of the case. On 28.10.2010, the learned public prosecutor filed a petition for withdrawal of the case in respect of the accused-persons Joynal Abedin Molla, Shahin Molla, Sharif Molla, Humayun Kabir and Iqbal Siddique which was allowed vide order no.136 dated 03.01.2011 and the order no.136 dated 28.12.2010 was vacated. Challenging the order No.136 dated 03.01.2011, the accused-persons Joynal Abedin Molla, Shahin Molla, Sharif Molla, Humayun Kabir and Iqbal Siddique preferred Criminal Miscellaneous Case No.14653 of 2011 in the High Court Division and the proceedings of Druta Bichar Tribunal Case in respect of the said 3 accused-persons was stayed for six months from 29.05.2011. It is stated in the said order that the proceedings of the case will go on in respect of the other accused-persons as usual (Ref: Order No.164 dated 19.06.2011). On 05.09.2012 an application on behalf of the accused-persons Firoz Miah and Ali Ashraf Sarker was filed under section 10 of the Druta Bichar Tribunal Ain, 2002 praying for sending the case back to the original court as per section 4 of the Act stating that the trial of the case

could not be concluded within the stipulated time. In this case remarkably the government does not deny the fact of failure of conclusion of trial of the Druta Bichar Tribunal Case No.07 of 2006 within the stipulated time. As per the provision of section 10 of the Druta Bichar Tribunal Act, 2002, the trial of a Druta Bichar Tribunal Case is to be concluded within 135 days from the date of receipt of the case for trial. No option for the court is left therein except sending the case back to the original court in the event of failure on the part of the tribunal to conclude trial of the case within the stipulated period. The learned Advocate for the petitioners further submits that in Criminal Miscellaneous Case No.14653 of 2011 vide judgment dated 30.01.2014 the proceedings of Druta Bichar Tribunal Case No.07 of 2006 arising out of Uttara P.S. Case No.40 dated 29.01.2005 corresponding to G.R. Case No.40 of 2005 under sections 302/307/326/380/458/859/411/34/109 of the Penal Code in respect of the accused-persons Joynal Abedin Molla, Iqbal Hossain, Sharif has been quashed and they have been discharged from the case.

10. We perused the judgment passed in Criminal Miscellaneous Case No.14653 of 2011 bringing the record of that case from the record room and found truth in the submission of the learned Advocate for the accused-persons.

11. In view of the discussion made here above, we find merit in the instant Criminal Revision Case and we hold that the learned Judge of the Druta Bichar Tribunal No.2, Dhaka wrongly passed the order under challenge.

12. In the light of discussion made here above, we find merit in the instant Criminal Revision Case and as such, we are inclined to make the Rule absolute.

13. In the result, the Rule is made absolute. The impugned Order no.182 dated 09.10.2011 passed by the Druta Bichar Tribunal No.2; Dhaka in Druta Bichar Tribunal Case No.07 of 2006 is hereby set aside.

14. The interim order passed at the time of issuance of the Rule stands vacated.

3 SCOB [2015] HCD 122

High Court Division
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 300 of 1998

Zakir Khan and others
...Appellants

-Versus-

The State
...Respondent.

Mr. Sk. Atiar Rahman
...For the Appellants

Mr. MA Mannan Mohan D.A.G with
Mr. Nizamul Haque Nizam A.A.G and
Mr. Atiqul Haque Salim A.A.G.
…..For the State.

Heard on 02.04.2015, 08.04.2015, 09.04.2015, 12.04.2015 and Judgment on: 13.04.15

Present:
Mr. Justice Shahidul Islam
And
Mr. Justice K. M. Kamrul Kader

Evidence Act, 1872
Section 3:
There is no reason why the evidence of the business partners should be discarded simply because they belonged to a construction firm. They came before the Court and testified to the occurrence. They were fully cross-examined by the defence. Their evidence is also evidence with the meaning of Section 3 of the Evidence Act. The prosecution witness Nos. 2, 4, 6 and 7 are material witnesses though they are business partners of the P.W. No. 5, the informant but cannot be considered as interested witness. There is no reason that the testimony of P.W. Nos. 2, 4, 5, 6 and 7 can be discarded or liable to be flung to the wind simply because they happened to be business partners. ... (Para 32)

Judgment

K. M. Kamrul Kader, J.

1. This appeal has been preferred at the instance of 1. Zakir Khan, 2. Farid, 3. Shipon, and 4. Benjir Murshed Mridha, challenging the judgment and order of conviction and sentence dated 16.02.1998 passed by the learned Judge of Shantrash Mulak Aparadh Daman Tribunal, Narayangonj in Shantrash Mulak Aparadh Daman case No. 17 of 1994 convicting the appellants under Section 4 of the Shantrash Mulak Aparadh Daman Ain and sentencing them to suffer rigorous imprisonment for 14 (fourteen) years and to pay a fine of Taka 20,000/- each in default to suffer rigorous imprisonment for 2 (two) years more.

2. The prosecution case, in short, is that one Md. Shamyaun Kabir as informant lodged a First Information Report with the Fatullah Police Station, Narayangonj on 26.07.1994 alleging *interalia* that the informant alongwith his partners got the construction work of Daovog Banglabazar Government Primary School in the name of M/S. Kabir Construction and after receiving the work-order from the authority, they started construction work in the said school. On 24.07.94 at about 3.00 p.m. accused 1. Md. Zakir Khan, 2. Farid, 3. Banajir

Murshed and 4. Shipon alongwith 10/12 persons being armed with deadly weapons like pistol, short rifle, pipe gun etc. came to the place of occurrence and putting them in fear of death and demanded an amount of Taka 50,000/- as *chanda* (subscription) and ordered to stop the construction work. They also confined the informant and his partners and compelled them to pay an amount of Taka 20,500/-on spot. Thereafter, the informant and his partners informed the matter to Thana Nirbahi Officer and others. The Informant lodged the Ejahar on 26.07.1994 and the same was registered as Fatullah Police Station case No. 17 dated 26.07.1994, under Section 4 of the Shantrash Mulak Aparadh Daman Ain, 1992.

3. Inspector Md. Sirajul Islam, the Officer-in-Charge of the Fatullah Police Station as Investigating Officer investigated the case and on conclusion of the investigation and after finding *prima facie* case against these appellants, he submitted a charge sheet being No. 92 dated 10.09.1994 under Section 4 of the Shantrash Mulak Aparadh Daman Ain 1992.

4. Thereafter, the case record was transmitted to the Court of Shantrash Mulak Aparadh Daman Tribunal, Narayangonj, who took cognizance of the offence and the same was registered as Shantrash Mulak Aparadh Daman case No. 17 of 1994. At the commencement of the trial, the learned Judge of the Tribunal framed charge against the appellants under Section 4 of the Shantrash Mulak Aparadh Daman Ain, 1992 to which the appellant Banjir Murshed Mridha pleaded not guilty and claimed to be tired. The charge could not read over to the other accused persons as they are fugitive.

5. During trial the prosecution examined as many as 8 (eight) witnesses but the defence examined none. However, they cross examined the witnesses.

6. The defence case as it appears from the trend of cross examination are that the accused persons are innocent and they have been entangled in this case out of previous enmity and political rivalry between the supporters of two political parties and nothing has happened as alleged in the First Information Report and the accused are not involved with the alleged incident.

7. After conclusion of the taking evidence, the accused Zakir Khan was examined under Section 342 of the Code of Criminal Procedure to which he again pleaded not guilty and claimed to be tried. The other accused persons were not examined under Section 342 of the Code of Criminal Procedure as they are fugitive. After conclusion of the trial, the learned Judge of the Shantrash Mulak Aparadh Daman Tribunal, Narayangonj convicted and sentenced the appellants as aforesaid.

8. Having aggrieved by and dissatisfied with the judgment and order of conviction and sentence the appellants preferred this instant appeal before this Court.

9. Mr. Sk. Atiar Rahman, the learned Advocate for the convict appellants taking us through the entire evidence on record and submits at the very outset that in passing the impugned judgment and order the learned Judge of the Shantrash Mulak Aparadh Daman Tribunal, Narayangonj seriously failed to consider that the prosecution totally failed to prove their case by adducing reliable oral and documentary evidence. The learned Judge also failed to consider the defense case, which more probable that the appellants were falsely implicated in the instant case due to previous enmity and political rivalry between the supporters of two political parties. He further submits that all of the prosecution witnesses are interested witnesses and out of 8 (eight) prosecution witnesses, P.W. No. 1 is the Magistrate, P.W. No.

3 is the headmaster of the school and P.W. No. 8 is the investigating officer of the case. The prosecution witness Nos. 2, 4, 5, 6 and 7 are partners of the firm namely, M/S. Kabir Construction Ltd. P.W. No. 3 the headmaster of the school and the P.W. No. 4 Sharif Hossain Bhuiyan is a partner of the informant and proprietor of the construction firm did not support the prosecution case and they were declared hostile by the prosecution. Prosecution witnesses No. 2, 5, 6 and 7 are claim to be eye witness of the alleged occurrence but they made contradictory statement relating to the time, place and manner of the occurrence and they failed to corroborate each other on material points but the learned Judge of the Tribunal, relying upon unreliable and interested witnesses convicted these appellants. He also submits that during trial the prosecution examined 8 (eight) witnesses, out of 11 (eleven) charge sheeted witnesses. The charge sheet witnesses No. 7 Motiur Rahman and No. 8 Diman Kanti Borua are government officials and they witnessed the incident but they were not examined by the prosecution. There is no independent and disinterested witness in this case to prove the prosecution case and there is no explanation from the side of the prosecution as to why their non-production of any witness from surrounding area. Failure to produce vital witnesses and best evidence before the Court without any explanation or reason, attracts inevitable legal presumption that if they would have been examined, will not support the prosecution case and as such, an adverse presumption must be drawn against the prosecution for non-examination of such material and vital witnesses and they are entitled to get benefit of doubt under section 114(g) of the Evidence Act. He then submits that the conviction and sentence passed by the learned Tribunal Judge is unsafe and liable to be set aside and he prays for allowing the appeal. He lastly submits that the sentence is severe and harsh and if we uphold the impugned judgment and order of conviction and sentence then he prays for reduction of the sentence of the appellants in consideration of the manner, facts and circumstances of the case.

10. To substantiate his submission he place reliance on the decisions in the cases of *Sarafat Mondal @ Mander Mondal and others vs. State, 11 BLC (HD) 1, State vs. Sarowaruddin 5 BLC(2000) 451, Khairul @ Abul Kalam and another vs. State, Siddique Ahmed @ Md. Siddique and others vs. The State 1985 BLD, 203, The State vs. Md. Mukul @ Swapan 13 MLR (AD) 146, Abul Kalam and others vs. State 12 BLC(2007) 76 and Monu Sheikh & others vs. The State 12 BLT HCD)2004, 176.*

11. Mr. M. A. Mannan Mohan, the learned Deputy Attorney General appearing for the state having taken us through the materials on record make his submission supporting the conviction and sentence and opposing the appeal. He submits that all facts have been proved by the cogent, credible and reliable evidence of the prosecution witnesses. He also submits that the learned Judge of the Shantrash Mulak Aparadh Daman Tribunal, Narayangonj rightly found the appellants guilty under Section 4 of the Shantrash Mulak Aparadh Daman Ain, 1992. So the judgment and order of conviction and sentence do not call for any interference from this court. He further submits that the prosecution proved their case beyond reasonable doubt. There is no contradiction in their statements on any material point. The P.W. Nos. 2, 4, 6 and 7 are material witnesses though they are business partners of the P.W. No. 5 the informant but cannot be considered as interested witness. There is no reason that the testimony of P.W. Nos. 2, 4, 6 and 7 can be discarded or liable to be flung to the wind simply because they happened to be business partners of the P.W. No. 5 informant. The learned Judge rightly and correctly put reliance on the testimony of the P.W. Nos. 2, 5, 6 and 7 as they are eye-witness to the occurrence and convicted and sentenced these appellants as aforesaid. There is no illegality or irregularity in the said judgment and order of conviction and sentence, the prosecution witnesses corroborated with each other on material points and

the judgment and order of conviction and sentence should be upheld by this Court. Learned Assistant Attorney General further submits that all the P.Ws. proved their case by adducing reliable oral and documentary evidence. The investigating officer investigated the case properly and fairly. The learned Judge, after perusing the materials on record rightly convicted these appellants and as such, the appeal preferred by these appellants should be dismissed.

12. Before entering into the merit of this appeal, let us discuss the prosecution witnesses one after another.

13. P.W. No.1, Md. Amir Hossain, the Magistrate, 1st class cognizance Court, Narayangonj deposed that on 08.09.1994 he recorded the statement of the witnesses Fida Hasan Khan, Sharif Hossain Bhuiyan, Monir Hossain Bhuiyan and Jahir Hossain Bhuiyan under section 164 of the Code of Criminal Procedure and these are marked as exhibits- 1 to 4 and his signatures marked as exhibits 1/1, 2/1, 3/1 and 4/1 and the signatures of the witnesses marked as exhibits- 1/2, 2/2, 3/2 and 4/2 respectively.

14. During cross examination this witness deposed that the investigating officer send these witnesses for recording their statements. He denied the suggestion that the statements of the witnesses are not made voluntarily.

15. During cross examination by the State Defence Lawyer that this witness deposed that he complied with the provision of sections 164 and 364 of the Code of Criminal Procedure. He denied the suggestion that he did not complied the provision of law, at the time of recording the statement of witnesses.

16. P.W. No. 2, Md. Zahir Hossain Bhuiyan in his deposition deposed that on 17.07.1994, thereafter he stated that on 24.07.1994 at about 3.00 p.m. they were working at Banglabazar Primary School. He is a contractor. He also deposed that on the alleged date of occurrence, they were constructing the roof of the said school and in the construction side his partners namely Fida Hasan Khan, Monir Hossain Bhuiyan and Work Assistant Dhiman Babu and Assistant Engineer Abdul Mannan were present. At that time, accused Farid, Morshed and Zakir Hossain Khan alongwith 10/12 accused persons came to the place of occurrence and ordered to stop the construction work. Thereafter, on gun point they took his partner Fidha Hasan Khan and Monir Hossain to a room and 10/12 terrorist, who were waiting outside demanded an amount of Taka 50,000/= as *chanda*. He also deposed that after few moments later, Monir Hossain and Fidha Hasan Khan came out from the said room and informing them that the accused Morshed, Farid and Zakir Khan took away an amount of Taka 20,000/= from them . He identified the accused Morshed on dock. This witness also deposed that he made statement before the Magistrate, 1st class cognizance, Narayangonj, on 08.09.1994. He identified his signature on it, which marked as exhibit-4/2.

17. During cross examination by the accused Benjiar Morshed this witness deposed that his firm name is M/S. Zahir Traders and Monir Hossain Bhuiyan, Fida Hasan Khan, Sharif Hossain Bhuiyan, Sumayaun Kabir and Arshaduzzaman are his partners. They got this construction work under the firm namely M/S. Kabir Construction. They are six partners in the construction firm. They were present at the time of alleged incident. This witness admitted that at the time of alleged occurrence the guard was not present, however, the headmaster of the school was present there. He also deposed that on the alleged date of occurrence the school was closed due to strike. He deposed that on that day, there are 20/25

workers were working at the construction side. The accused persons assaulted the chief mason and one labour. The labours also witnessed the incident, the name of the chief mason is Mannan Miah however, he could not disclose the name of the other labours. This witness also admitted that three accused persons took away an amount of Taka 20,000/- as *chanda*, but he did not witness this incident as they are inside the room. The accused persons stayed at the place of occurrence near about one and half hours. The accused persons also guarded the main gate of this school. As the accused persons left the place of occurrence, they informed the incident to the Upazila Nirbahi Officer on 24.07.1994 and Informant Kabir lodged this First Information Report on 24.07.1994 or 25.07.1994. This witness also deposed that they informed about the incident to the member of the school committee, local Chairman and other renowned person of the locality. He made statements to the learned Magistrate as well as the investigating officer. He denied the suggestion that he did not made any statement to the investigating officer that the accused person forcibly took his partners into a room and the accused persons did not put them in fare of death. He denied the suggestion that they lodged false and fabricated allegation against the accused Banjir Morshed and the accused Morshed holding arms in his hand. He denied the suggestion that the accused Morshed did not extort any money and he is innocent. He denied the suggestion that Sumayaun Kabir is an accused of a murder case.

18. The State Defence Lawyer adopted the cross examination of the accused Morshed. During cross examination the State defence lawyer, this witness admitted that the informant Sumayaun Kabir is a politician. He could not disclose whether accused Jahir Hossain and others joined in BNP alongwith 5,000 workers. He denied the suggestion that due to the political rivalry they lodged this instant case. He denied the suggestion that he deposed falsely in this case.

19. P.W. No. 3, Jahid Ali, is the headmaster of the Deobog Banglabazar Government Primary School, in his testimony, testified that the alleged occurrence took place on 24.07.1994 and on that day the construction work was carried out in his school. He was present at the school on that day, when the terrorist act was committed in his school. However, he did not witness this incident. He also deposed that after the incident police went to the school, however he could not recall what he said to the police. At this stage, he was declared hostile by the prosecution and cross examined him.

20. During cross examination by the prosecution he deposed that he did not know whether accused Farid, Morshed, Shipon and Jakir being armed with deadly weapon went to the school and demanded Chanda (Subscription) and stopped the construction work. He could not disclose that the accused persons took away an amount of Taka 20500/- from the owner of the firm. He denied the suggestion that at the instigation of the accused persons he suppressed the facts and deposed falsely in this case. The defence declined to cross examine him.

21. P.W.No.4, Md. Sharif Hossain Bhuiyan is the proprietor of M/S. Sharif Engineering and Building. This witness deposed that six friends namely Samayaun Kabir, Monir Hossain, Zahir Hossain, Asaduzzaman and this witness together run this business firm and they obtained a work-order for construction of the Banglabazaar Government primary School. The incident took place at about one year back. On that day, they are constructing the roof of the said school and at the afternoon, some young persons came to the place of occurrence and demanded *Chanda* and they also threatened them. His partners informed him that the terrorists took away an amount of Taka 20,000/- and assaulted them. However, he could not

disclose that who demanded the said *chanda* (subscription). At this stage he was declared hostile by the prosecution and cross examined him.

22. During cross examination by the prosecution he deposed that he could not recall what had happened on 24.07.1994 however, he heard that the accused Shipon, Morshed, Farid and Zakir Khan demanded *chanda*. He denied the suggestion that they demanded *chanda* and committed terrorist acts in his presence. He denied the suggestion that at the instigation of the accused persons, he deposed falsely in this case. He did not identify the accused on the dock. He did not witness the incident and the defence declined to cross examine him.

23. P.W.No.5, Md. Sumayaun Kabir is the informant of this case. During his deposition this witness deposed that the alleged incident took place on 24.07.1994. They obtained a work-order for construction of the Dovog Banglabazar Primary School. He also deposed that on the alleged date of occurrence, they are working to construct the roof of the said school, at that time, some terrorist came to the place of occurrence and stop the construction work in presence of the headmaster of the said school, the Thana Assistant Engineer and his partners namely Tusi, Monir, Mohan, Milon and Sharif. This witness deposed that they demanded an amount of Taka 50,000/= as *chanda* and they are holding different kinds of arms in their hand. He deposed that they in fear of the terrorists and under duress gave them an amount 20,500/- as *chanda,* as the terrorists also threatened them. He also deposed that the terrorists threatened the headmaster and other persons present there and as such they flee away from the place of occurrence. The accused Zakir Khan, Morshed, Shipon, Ruhel and some other terrorists demanded *chanda* and threaten them on different occasions. This witness also deposed that on the alleged date of occurrence the accused Zakir, Morshed, Ruhel, Shipon and some other terrorists being armed with deadly weapon came to the place of occurrence and demanded an amount of Taka 50,000/- as *chanda* and threaten them and they under duress gave them an amount of Taka 20,500/=. At that time, accused Zakir Khan was waiting outside the school. After the alleged incident they informed the matter to the Thana Nirbahi Officer (TNO) and Thana Engineer. Thereafter, on 26.07.1994 he lodged this First Information Report, which marked as exhibit -5 and his signature on it marked as exhibit-5/1. He identified the accused Zakir Khan on dock.

24. During cross examination by the accused Zakir Khan, this witness deposed that the accused Zakir lives in the Dovog area and the place of occurrence situated under the Fatullah Police Station. The house of accused Zakir Hossain is situated one mile away from the place of occurrence. This witness lived in chashara under Fatullah Police Station. This witness deposed that his firm name is M/S. Kabir Construction and the work-order was allotted to his firm. He alongwith other partners owned this firm. This witness also deposed that they started the construction work three months before the alleged incident. He admitted that this witness and accused Zakir Khan are not members of Awami league, however, they were members of Jatio Party, lateron accused Zakir Khan joined in B.N.P. He denied the suggestion that due to political dispute aroused between them, the accused Zakir joined the other political party. He denied the suggestion that he lodged this case on false allegations against the accused Zakir Khan due to political rivalry. He denied the suggestion that the accuseds did not demand any *chanda,* at the instigation of accused Zakir Khan.

25. P.W.No.6 Monir Hossain Bhuiyan, in his deposition deposed that the alleged occurrence took place on 24.07.1994, at the Devog Banglabazar primary School. On that day, the construction work was carried on at the said school and they were constructing the roof of the school. At that time, some terrorists came to the place of occurrence and demanded

chanda (subscription) and they behaved badly. This witness deposed that the terrorists also threatened them and under duress they compelled to give an amount of Taka 20,500/= to the terrorist. The terrorists demanded an amount of Taka 50,000/= as *chanda* (subscription), on that day. The accused Zakir Khan, Morshed, Shipon and other came to the place of occurrence and demanded the said *chanda* and they gave them an amount of Taka 20,500/=. None of them are present here. This witness also deposed that he made statement to the Magistrate and he identified his statement and signature on it. The defence declined to cross examine him.

26. P.W.No.7 Fida Hasan Khan, in his deposition deposed that the occurrence took place on 24.07.1994, at Devog Banglabazar Government primary School. This witness deposed that on the date of alleged occurrence they were constructing the roof of the said school, at that time, 10/12 accused persons came to the place of occurrence and demanded *chanda* (subscription) otherwise, they will stop the construction work. The terrorists demanded an amount of Taka 50,000/- as *chanda* and they compelled to pay an amount of Taka 20,500/= to the terrorist. This witness also deposed that on that day, the accused Zakir Khan, Shipon, Morshed, Farid and other came to the place of occurrence and demanded the said *chanda* (subscription) and they gave an amount of Taka 20,500/- to the terrorist. This witness also admitted that the accused persons are not known to him previously. He did not identify the accused on dock. He deposed that he made statement to the Magistrate and he identified his signature on it. During cross examination this witness deposed that the statement made before the Magistrate is similar to the testimony made in this case.

27. P.W.No. 8 Inspector Md. Sirajul Islam is the Investigating Officer of this case, deposed that on the alleged date and time of occurrence, he was working as Officer-in-Charge of the Fatullah Police Station. He filled up the FIR Form and identified his signatures on it, these are marked as exhibits- 6, 6(1) and 6(2) respectively. During investigation he visited the place of occurrence, prepared the sketch map with separate index. On conclusion of the investigation and finding *prima facie* case against the accused persons, he submitted the charge sheet being No. 92 dated 10.09.1994. He identified the sketch map, which marked as exhibit-7 and his signature on it marked as exhibit-7/1. He identified the index, which marked as exhibit -8 and his signature on it marked as exhibit 8/1.

28. During cross examination this witness deposed that there are houses in the neighbouring area to the place of occurrence. He denied the suggestion that he did not examine any witness of the neighbouring area and he recorded the statement of the witnesses of prosecution side only and submitted the charge sheet against the accused persons and he did not examine any person from the Ujir Ali High School, which situated beside the said primary school.

29. These are all the evidence available on record.

30. We have carefully considered the submissions of the learned Advocates appeared on both the sides, scrutinized the impugned judgment and order of conviction and sentence and evidence on record. We have categorically considered the depositions of all the prosecution witnesses. In the instant case, we find that the learned Judge convicted and sentenced the appellants on the basis of the evidence adduced by the Prosecution witness Nos. 2, 5, 6, 7 and 8.

31. The learned Advocates for the Appellants argued that whether or not all the prosecution witnesses are interested witnesses and the Prosecution witness Nos. 2, 4, 5, 6 and

7 are partners of the firm namely, M/S. Kabir Construction Ltd. and judgment and order of conviction and sentence passed by the trial Court against these appellants on the basis of the evidence of interested, inter-related and partisan witnesses is sustainable in law. The evidence of interested, inter-related and partisan witnesses must be closely scrutinized before it is accepted. We find support of this contention in the case of ***Nawabul Alam and ors. Vs. The State, 15 BLD (AD) 61*** wherein it is held:

> "*The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses, must be closely and critically scrutinized. They should not be accepted on their face value. Their evidence cannot be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinized with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implication an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence cannot be thrown out mechanically because of his interestedness, so his evidence cannot be accepted mechanically without a critical examination. As Hamoodur Rahman, J. (as his Lordship then was) observed in the case of* ***Ali Ahmed vs. State (14 DLR (SC) 81):***
>
> *"Prudence, of Course, requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon" (Para -10).*
>
> *…….The rule that, the evidence of interested witnesses requires corroboration is not an inflexible one it is a rule of caution rather than an ordinary rule of appreciation of evidence. The Supreme Court of Pakistan spelt out the rule in the case of* ***Nazir Vs. The State, 14 DLR (SC) 159****, as follows:*
>
> "*…….we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely, implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated alongwith the guilty the Court will in the case of an ordinary interested witness look for same circumstances that gives sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration.*
>
> *……The High court Division was obviously in the wrong in holding that no corroboration was necessary in this case. It failed to scrutinize the evidence of interested eye- witnesses and totally ignored the fact that the evidence of P.Ws. 3-5 having so many infirmities is by itself insufficient and unsafe to sustain any conviction on a capital charge and requires corroboration by either circumstantial or ocular corroborative evidence."*

32. We have perused the deposition of prosecution witnesses, wherefrom it transpires that the P.W. No. 1 is the Magistrate, P.W. No. 3 is the headmaster of the school and P.W. No.8 is the investigating officer of the case. The prosecution witness Nos. 2, 4, 5, 6 and 7 are partners of the firm namely, M/S. Kabir Construction Ltd. The prosecution witness Nos. 2, 5, 6 and 7 deposed in one voice and categorically stated that on 24.07.1994 at about 3.00 p.m. these

appellants alongwith 10/12 persons being armed with deadly weapons i.e. pistol, Kata rifle and pipe gun etc. came to the place of occurrence, where the informant and his partners were carried on their construction work. They came to the place of occurrence, stopped the construction work and demanded an amount of Taka 50,000/= and in doing so they also assaulted the some of the labours at the construction side and put them in fear of death, at this stage, they gave an amount of Taka 20,500/= to these terrorists. Thereafter, they informed the incident to the local administration and on 26.07.1994, the informant lodged this First Information Report to the Fatullah Police Station. On conclusion of taking evidence the learned Tribunal Judge convicted and sentenced the appellants. They narrated the incident in one voice that on the alleged date, time and place of occurrence these appellants committed the said offence, which attracts the provision of under Section 4 of the Shantrash Mulak Aparadh Daman Ain, 1992. They witnessed the incident and they have given consistent statements as to how the alleged occurrence took place. P.W. No. 3 the headmaster of the school and the P.W. No. 4 Sharif Hossain Bhuiyan a partner of the informant, though they were declared hostile by the prosecution but these witnesses indirectly supported the prosecution case. There is no reason why the evidence of the business partners should be discarded simply because they belonged to a construction firm. They came before the Court and testified to the occurrence. They were fully cross-examined by the defence. Their evidence is also evidence with the meaning of Section 3 of the Evidence Act. The prosecution witness Nos. 2, 4, 6 and 7 are material witnesses though they are business partners of the P.W. No. 5, the informant but cannot be considered as interested witness. There is no reason that the testimony of P.W. Nos. 2, 4, 5, 6 and 7 can be discarded or liable to be flung to the wind simply because they happened to be business partners.

33. The learned advocate for the appellants argued that there are some discrepancies in the evidence of the prosecution witnesses. He refers to the Prosecution witnesses Nos. 2, 5, 6 and 7, who are claim to be eye witness of the alleged occurrence but they made contradictory statement relating to the time, place and manner of the occurrence and they failed to corroborate each other on these material points. The learned Advocate for the appellants submits that its cast serious doubt about the credibility of the whole prosecution case. We find that these discrepancies do not amount to contradictions. Minor discrepancies are not materials that occur due to individual difference, where minor discrepancies, not going to the root of the matter or on the material point, these are found in the evidence of natural and probable witness, these discrepancies should not be over emphasized. Further, the decisions cited by the learned advocate for the appellants are not relevant to the facts and circumstances of this case. There is no discrepancy and contradiction in the evidence of prosecution witnesses. As such, we find that the learned Judge of the Shantrash Mulak Aparadh Daman Tribunal, Narayangonj rightly convicted these appellants.

34. Lastly, the learned Advocate for the appellants prays for reduction of the sentence, in consideration of the facts and circumstances of the case. He argued that although at the time of alleged occurrence the appellants were aged about 25-30 years old and the case was lodged in the year 1994 by this time 25 years have been elapsed and the accused persons are on their fifties to sixties now. Further, on the alleged date of occurrence, they did not seriously assaulted any person at the place of occurrence. He further submits that the sentence is severe and harsh. As such, he prays for reduction of their sentence. We have considered the submission made by the learned Advocate for the appellants. Record indicated that they are not habitual offenders and they cannot be at all characterized to be a menace to the society. We are of the view that justice will be better served if we reduce the sentence of the appellants.

35. **In the result, this appeal is dismissed with modification of sentence** and the appellants 1. Zakir Khan, 2. Farid, 3. Shipon and 4. Benjir Murshed Mridha are convicted under Section 4 of the Shantrash Mulak Aparadh Daman Ain, 1992 and the sentence is reduced from 14 (fourteen) years to 8 (eight) years and to pay fine of Taka 20,000/- each in default to suffer rigorous imprisonment for 2 (two) years more. The appellants are entitled to get the benefit as provided under Sub-Section (1) of Section 35 A of the Code of Criminal Procedure. The appellants are directed to surrender before the Shantrash Mulak Aparadh Daman Tribunal, Narayangonj within 30 (thirty) days from the date of receipt of this order failing which the learned Judge of the said Tribunal secure their arrest as per law.

36. Send down the lower courts records along with copy of the judgment and order to the court concern at once.

3 SCOB [2015] HCD 132

High Court Division
(Special Original Jurisdiction)

Writ Petition No. 3709 of 2015.

Hazi Mohammad Ali

… Petitioner.

-Versus-

Judge, Artha Rin Adalat No.3, Dhaka & others
… Respondents.

Mr. A.K.M.Asiful Haque, Advocate with Mr. Shaheen Akther
… For the petitioner.
Mr. M.Imtiaz Farooq
...For Respondent Nos. 2 & 3.

Heard on the 4th August, 2015
&
Judgment on the 6th August, 2015.

Present:
Mr. Justice Zubayer Rahman Chowdhury
And
Mr. Justice Mahmudul Hoque

Code of Civil Procedure, 1908
Section 136:
The Court below has power to order attachment of property situated beyond the local limit of the Court. But the Court passing the Order of attachment cannot directly attach property outside its own jurisdiction and it can only ask the Court in whose jurisdiction the property actually situated to carry out the order of attachment and complete the formalities of attachment. In the present case this Court finds that the Impugned Order passed by the Adalat was sent directly by the Court without sending the same to the District Court for compliance where the property situates. Therefore, the Impugned Order from the face of it is found to be palpably illegal and invalid in law as contained in Section 136 of the Code. ... (Para 11)

Order XXXVIII
Rule 5:
Before issuing an Order of attachment before judgment the Court must be satisfied that the defendant has been trying to frustrate the effect of the decree that might be passed against him by disposing of the property or removing it from the jurisdiction of the Court. It means that the Court must be satisfied not only to the effect that the defendant trying to dispose of the property or remove the same from its jurisdiction but also this disposal or removal is with the object of obstructing or delaying the execution of the decree that may be passed in Suit. This satisfaction, however, is to be judicial satisfaction and it must be based on some visible materials which are to be found in the Affidavit filed by the party or otherwise. But in the Impugned Order such satisfaction of the Court is totally absent, even not a single word has been written by the Court concerned why the attachment of the property before pronouncement of the judgment is necessary. In the absence of such satisfaction of the Court necessitating or warranting order of attachment has made the order wholly illegal and ineffective. ... (Para 12)

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 Order No.22 dated 22.03.2015 as evidenced by Annexure-F, passed by Artha Rin Adalat No.3, Dhaka in respect of the application filed by the Plaintiff Bank (Respondent No.3) for attachment of property under Order XXXVIII Rule 5 of the Code of Civil Procedure in Artha Rin Suit No. 2059 of 2013, now pending in the Artha Rin Adalat No.3, Dhaka shall 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 relevant for disposal of this Rule, in short, are that on an application of the Respondent N o.4, the Respondent No.3 Bank had sanctioned loan facilities in different form to the Respondent No.4. The Respondent No.4 Company availed and enjoyed the said loan facilities but failed to repay the same as per terms and conditions of the sanction letter. Resultantly, the Respondent No.3 Bank filed Artha Rin Suit No. 2059 of 2010 in the Court of Artha Rin Adalat No.3, Dhaka against the Petitioner and Respondent Nos. 4 and 5 for realization of Tk.22,71,91,645.34. In the said Artha Rin Suit the Petitioner as defendant filed written statement denying the claim of the Plaintiff-Bank. During pendency of the said Artha Rin Suit the Plaintiff Bank filed an application under Order XXXVIII Rule 5 of the Code of Civil Procedure ("Code") praying for attachment before judgment of the certain property owned by the Petitioner (Defendant No.3 in Suit). The Artha Rin Adalat upon hearing the said application directed the Petitioner to deposit money equivalent to the claim in Suit and asked the Petitioner to show cause why the property mentioned in the schedule to the application shall not be attached in the event of failure of the Petitioner to deposit money in court by its Order No.19 dated 22.1.2015 . The Petitioner, thereafter, filed show cause as directed by the Court denying the liability of the loan granted in favour of Respondent No.4 Company. Subsequently, the Artha Rin Adalat by the impugned order allowed the application under Order XXXVIII Rule 5 of the Code filed by the Respondent No.3 Bank and directed the Office to issue process of attachment fixing 5.5.2015 for return of the same. At this stage the Petitioner moved this Court by filing this application challenging the validity and propriety of the said Order and obtained the present Rule and Order of stay.

3. Respondent Nos.2 and 3 Bank contested the Rule by filing Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the Petitioner is a Director of the borrower Company and has furnished personal guarantee for the liability of the borrower company. Since the Petitioner was actively trying to dispose of the schedule property with the intent of obstructing recovery of the decretal amount that may be passed, the Bank filed application for attachment before judgment of the property owned by the Petitioner . It is also stated that the order of attachment has been passed by the Adalat upon contested hearing of the parties in suit and giving sufficient opportunities to the Petitioner and hence, the Court below rightly allowed the application for attachment and there is no illegality.

4. Mr. A.K.M.Asiful Haque with Ms. Shaheen Akther, the learned Advocates appearing for the Petitioner submit that, admittedly the property attached in the Artha Rin Suit is situated beyond the territorial jurisdiction of the Court. According to the learned Advocate for

the Petitioner the Court cannot attach properties situated beyond its local jurisdiction and as such the order of attachment passed by the Adalat is illegal and without lawful authority. It is also argued that there is no finding in the Impugned Order that the defendant was trying to dispose of the properties in question in order to obstruct or delay the execution of the decree that may be passed against the Petitioner nor there were any materials before the Adalat which might warrant such finding. Mr. Haque further submits that the Adalat in passing the Impugned Order of attachment utterly failed to note its satisfaction for attaching the property before delivery of judgment. It is also argued that the Impugned Order is a non-speaking Order as no reason has been given by the Adalat in attaching the property of the Petitioner. As such the Impugned Order is illegal and liable to be declared to have been passed without lawful authority. Mr. Haque in support of his submissions has drawn our attention to the provisions of Order XXXVIII rule 5 of the Code and referred to the Cases of Md. Shamsul Huda Vs. Mozammel Huq and others reported in 27 DLR 256, Islam steels Mills Ltd. Vs. Nirman International Ltd. reported in 50 DLR (AD) 21 and an unreported decision passed by this Division in Writ petition No. 10639 of 2011 in the case of R. M. Oil Refinery Ltd. Vs. Bangladesh, in which one of us was a party.

5. Mr. M. Imtiaz Farooq , the learned advocate appearing for the Respondent Nos. 2 and 3 submits that the Court to which an application for attachment is made before judgment in its discretion can make an order of attachment attaching the properties situated out side the local limit of the jurisdiction of that Court. Therefore, the court below has not committed any illegality and or error in law in attaching the property situated outside the local limit of the jurisdiction of the Court. Mr. Farooq also submits that before passing the Impugned Order attaching the property in question the Petitioner was asked to furnish sufficient security or to deposit the claim amount in the Court and was asked to show cause why the property in question shall not be attached before delivery of judgment in the event of failure to deposit the money in Court. But the Petitioner has failed to deposit the money as directed by the Court. Consequently, the Court upon affording sufficient opportunity to the Petitioner of being heard passed the Impugned Order attaching the property and there was no illegality in the order passed and by the Impugned Order the Petitioner is not in any way prejudiced or aggrieved. It is also argued that the Court has power to attach any property of the Defendant before Judgment as a whole or in part if it is in the opinion of the Court necessary for the interest of justice and to ensure smooth recovery of the money that may be decreed in favour of the Plaintiff in suit. In support of his submissions he has referred to the cases of Kanshi Ram Vs. Hindustan National Bank Ltd. reported in AIR 1928 Lahore, 376 and Firm Surajbali Ram Harakh Vs. Mohar Ali and others reported in AIR 1941 Allahabad, 212.

6. Heard the learned Advocates for the parties, perused the Application, Affidavit-in-Opposition and the Annexures annexed thereto.

7. To appreciate the submissions made by the learned Advocates appearing for both the parties the provisions of Order XXXVIII Rule 5 of the Code may be looked into which runs thus:

8. *R.5.* ***Where defendant may be called upon to furnish security for production of property****. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-*

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of

the jurisdiction of the Court,

the Court may direct the defendant, within the time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of he Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

9. On a close reading of the provisions as quoted above, it appears that the Court has power to attach the property before delivery of judgment, belonging to the Defendants if the Court is satisfied by Affidavit or otherwise that the Defendants, with intent to obstruct or delay the execution of any decree that might be passed against them is about to dispose of or remove the property belonging to him from the jurisdiction of the Court, may ask the Defendant either to furnish security of the claim amount or produce and place the property at the disposal of the Court. This power is no doubt very extensive and extraordinary, but it must be exercised sparingly and with utmost caution, otherwise it may become an instrument of oppression.

10. It appears that the property sought to be attached is not situated within the jurisdiction of the Court. Ordinarily the property sought to be removed must be within the jurisdiction of the Court but there is no clear provision in the law that the Court which passed the order attaching the property cannot attach the property situates beyond its local jurisdiction. In the Case reported in AIR 1941 and AIR 1928 it has been held that:

"the Court can attach before judgment property situates beyond the local limit and in that case the order of attachment made by the Court has to be sent to the District Court where the property is situated and the District Court on receipt of the order is to cause the attachment to be made by its own Office or by a Court subordinate to the District Judge and after making the attachment the District Court has to inform the Court which had ordered the attachment of its compliance. It is not open to the Court which should order the attachment of property outside its jurisdiction to send its order for compliance directly to any other Court except the District Court and without the intervention of the District Court would be unauthorized and invalid."

11. This Court is in full agreement with the above quoted findings and observations and accordingly this Court holds that the Court below has power to order attachment of property situated beyond the local limit of the Court. But the Court passing the Order of attachment cannot directly attach property outside its own jurisdiction and it can only ask the Court in whose jurisdiction the property actually situated to carry out the order of attachment and complete the formalities of attachment. In the present case this Court finds that the Impugned Order passed by the Adalat was sent directly by the Court without sending the same to the District Court for compliance where the property situates. Therefore, the Impugned Order from the face of it is found to be palpably illegal and invalid in law as contained in Section 136 of the Code.

12. From a perusal of the application filed under Order XXXVIII Rule 5 of the Code by the Respondent Bank, this Court finds that the statements made in the application are

completely vague and in general. In the said statement there was no reference to any complete facts from which it could be said that the Defendant was trying to dispose of his properties to defeat the claim of the Plaintiff which may be decreed. It is in this court's view that before issuing an Order of attachment before judgment the Court must be satisfied that the Defendant has been trying to frustrate the effect of the decree that might be passed against him by disposing of the property or removing it from the jurisdiction of the Court. It means that the Court must be satisfied not only to the effect that the defendant trying to dispose of the property or remove the same from its jurisdiction but also this disposal or removal is with the object of obstructing or delaying the execution of the decree that may be passed in Suit. This satisfaction, however, is to be judicial satisfaction and it must be based on some visible materials which are to be found in the Affidavit filed by the party or otherwise. But in the Impugned Order such satisfaction of the Court is totally absent, even not a single word has been written by the Court concerned why the attachment of the property before pronouncement of the judgment is necessary. In the absence of such satisfaction of the Court necessitating or warranting order of attachment has made the order wholly illegal and ineffective. For easy understanding of the facts noted above and the observations made, the Impugned Order passed by the Adalat may be looked into which runs thus:

" ২২। ২৩/০৩/২০১৫ - অদ্য আদেশের জন্য দিন ধার্য্য আছে। উভয়পক্ষ হাজিরা দিয়াছে। নথি পেশ করা হইল। শুনিলাম। ৩নং বিবাদীর ১৮/০২/২০১৫ তারিখের আবেদন নামঞ্জুর। বাদীপক্ষের দাখিলী ক্রোকের আবেদন মঞ্জুর। ক্রোকী পরয়ানা দাখিল সাপেক্ষে ইস্যু করা ইউক। আগামী ৫/৫/২০১৫ তারিখ ক্রোকী পরয়ানা ফেরত (ভিওপি)।"

13. From the face of the Impugned Order quoted above, it appears that it is a non speaking order and passed in a slipshod manner without recording any satisfaction of the Court.

14. Taking into consideration as above, this Court finds that the Impugned Order is to be seriously wanting legal insufficiency, devoid of any judicial satisfaction and thereby to be shorn of all validity and legal effect. Accordingly, this Court finds merit in the submissions of the learned Advocate for the Petitioner and in the Rule Nisi issued calling for interference by this Court.

15. In the result the Rule is made absolute. However, without any order as to costs.

16. The impugned Order No.22 dated 22.03.2015 as evidenced by Annexure-F, passed by Artha Rin Adalat No.3, Dhaka in respect of the application filed by the Plaintiff Bank (Respondent No.3) for attachment of property under Order XXXVIII Rule 5 of the Code of Civil Procedure in Artha Rin Suit No. 2059 of 2013, now pending in the Artha Rin Adalat No.3, Dhaka is hereby declared illegal and without lawful authority and thereby set aside.

17. The Order of stay granted at the time of issuance of the Rule is hereby recalled and stand vacated.

18. Communicate a copy of this Judgment to the Court concerned at once.

3 SCOB [2015] HCD 137

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION NO.28 of 2015

Md. Sarowar Alamgir
..... Petitioner

-Versus-

Government of the People's Republic of Bangladesh and others
..... Respondents

Md. Bahadur Shah, Advocate
…. For the petitioner

Mr. S.M. Moniruzzaman, D.A.G with
Mrs. Shuchira Hossain, and
Mr. S.M. Quamrul Hasan, A.A.Gs.
….For the Respondents.

Heard and Judgment on 23.02.2015.

Present:
Mr. Justice Md. Ashfaqul Islam
And
Madam Justice Kashefa Hussain

Value Added Tax Act, 1991
Section 55 and 56:
Section 56 cannot be construed or interpreted in an isolated manner. Section 55 and 56 must be read together and from a perusal of the same, it is evident that Section 56 is mandatorily preceded by Section 55 of the VAT Act, 1991 which prescribes the issuance of a Show- Cause Notice followed by other procedures and which is exhaustively laid out in the whole Section. The prescription said out in Section 55(1) (2)(3) are mandatory and no action or initiative can be taken or resorted to for realization of any unpaid, less paid or otherwise evaded etc amount, whatsoever under the provisions of Section 56 of the VAT Act, 1991, unless and until firstly the procedure laid out in Section 55 of the VAT Act has been exhausted by the authorities concerned. The principle of law is that Section 56 automatically presupposes a notice under section 55(1) of the Act, followed by the procedure laid out in Sub-section 2 & 3 of the said section 55 and which the respondents cannot avoid under any circumstances. ...(Para 16)

Judgment

Kashefa Hussain, J:

1. Rule Nisi was issued in the instant Writ Petition calling upon the respondents to show cause as to why the order dated 12.11.2014 passed by the office of the respondent no.3 under Nathi No. *5(13) KvwK/PÆ:/eÛ(mv:)/jvB:/04/2012/11312(35)* withholding the petitioner's Bin Number by way of Bin Lock (VAT) Lock (Annexure-C) should not be declared to have been made without lawful authority and is of no legal effect.

2. The petitioner is a businessman engaged inter-alia in the business of import and that the respondent no. 1. is the Secretary, Ministry of Finance, Internal Resource Division,

respondent No. 2 is the Chairman, National Board of Revenue and Respondent no.3 is the Commissioner of Custom Bond Commissionerate.

3. The fact of the case inter-alia is that the petitioner in course of his business had applied to the authorities for a Bond License and which was issued in his favour on 01.03.2012 being license No. *5(13) KveK/PÆ:/eÛ(mv:)/jvB:/04/2012/11312(35)* which is marked as Annexure-A in the Writ Petition. In course of his business the petitioner also obtained VAT Certificate from the concerned Authorities and after completion of all formalities he opened L/C being No.120814041356 dated 27.10.2014 for import of Accessories for 100% Export Oriented Readymade Garments. All of a sudden, the Commissioner Bond issued a letter under Nathi No. *5(13) KveK/PÆ:/eÛ(mv:)/jvB:/04/2012* dated 12.11.2014 withholding the petitioner's BIN (Business Identification Number) without issuing any show cause notice and without any prior demand by the Respondent.

4. Precisely, in the Rule direction has been sought against the respondents challenging the order dated 12.11.2014 passed by the office of the respondent no.3 withholding the petitioner's BIN by way of BIN Lock (VAT) Lock (Annexure-C)

5. For proper analysis let us first reproduce the impugned order Annexure -'C' of the Writ Petition which is quoted below:-

MbcRvZš¿x evsjv‡`k miKvi
Kv÷gm, eÛ Kwgkbv‡iU
42, Gg,Gg, Avjx †ivwW, jvjLvb evRvi, PÆMvg|

bw_ bs-5(13) KveK/PÆ:/eÛ(mv:)/jvB:/04/2012/11312(35) ZwiLt12.11.2014
‡ciK t Kwgkbvi
Kv÷gm eÛ Kwgkbv‡iU,
PÆMvg|

cvcK t Kwgkbvi
Kv÷g nvDm, XvKv/PÆMvg/†ebv‡cvj/gsjv/AvBwmwW/cvbMvu|
`wó AvKIY t wm‡÷g Gbwjó/†cvMvgvi/mnKvix †cvMvgvi/Ac‡ikb g¨v‡bRvi, Kv÷g
nvDm, XvKv/PÆMvg/†ebv‡cvj/gsjv/AvBwmwW/cvbMvu|

welqt <u>*cwZôv‡bi* BIN Lock *KiY*|</u>

Dchy³ wel‡qi cwZ Avcbvi m`q `wó AvKIYceK Rvbv‡bv hv‡"Q †h, wb‡¤§ Q‡K ewYZ e‡ÛW <u>*cwZôvbwUi* কার্যক্রম অতি ঝুঁকিপূর্ণ হওয়ায় সরকারী রাজস্বের স্বার্থে ও প্রতিষ্ঠানের নামে আমদানি রোধকল্পে সাময়িকভাবে প্রতিষ্ঠানটির Bin Lock *ivLvi Rb¨ Abyiva Kiv n‡jv*|</u>

cwZôv‡bi bvg I wVKvbv	*gmwK wbeÜb bs I ZwiL*	*eÛ jvB‡m›m bs I ZwiL*
‡gmvm †gŠ‡qb G›Uvi cvBR, `w¶b cvnvoZjx,d‡Zqvev`, †ijI‡q Rsk‡bi cwðg cv‡k, bw›`invU, nvUnvRvix, PÆMvg|	*c‡el 2121067235 Zvs-19/01/12 eZgvb 24221026322 ZwiL-28/11/2012*	*5(13) KveK/PÆ:/eÛ(mv:)/jvB:/04/2012 ZwiL-01/03/2012*

(Avãyj gvbvb wkK`vi)
Kwgkbvi

6. Mr. Bahadur Shah, Learned Advocate appeared on behalf of the petitioner while Learned Deputy Attorney General Mr. Moniruzzaman appeared on behalf of the respondents.

7. Affidavit in opposition has been filed on behalf of the respondents to oppose the rule.

8. Mr. Bahadur Shah, Learned Advocate opens his submissions contending that no prior notice in the form of show cause or whatsoever was ever issued by the respondents before issuance of the Impugned Notice relating to the sudden BIN locking. He submits that the petitioner was not given any opportunity of being heard before going for such a serious action. He drew our attention to the Impugned Notice i.e. Annexure-C of the Writ Petition. He particularly drew our attention to the fact that while the said Impugned Order being Notice dated 12.11.2014 passed by the Respondent No.3 informing him that his BIN has been locked, no Show Cause notice was ever issued prior to such Notice. He also draws our attention to the fact that if at all any prior notice was ever issued in the context, the number including the details of the notices **are** registered under would be mentioned in the upper part of the Order. The Learned Advocate assails that from the Impugned Order itself it is quite apparent that no show cause notice was served upon him and nowhere in the Impugned Notice is there any reference to any prior notice. He concludes that ,therefore, withholding and locking his BIN without issuing any show cause or any other demand is in utter disregard and in violation of the principles of Natural Justice guaranteed under Article 102 of the constitution and is also violative of the statutory provisions of section 55of the VAT Act, 1991.

9. Mr. Moniruzzaman, the Learned DAG on the other hand opposes the Rule by filing an Affidavit-in-Opposition on behalf of the respondent no.3. He submits that the petitioner obtained Bond facilities for manufacturing garments accessories to supply the same to 100% export-oriented Industries, but after releasing some of the consignments under bond facilities the petitioner without in-bonding those goods in violation of provisions of law sold the same in the local market .The Customs authority found shortage of 4030 bags of raw materials from the petitioner's warehouse .The learned DAG assails that Tax Evasion Case No. 12 of 2014 dated 15.07.2014 was filed by the Customs Authority against the petitioner and issued demand cum show-cause notice upon the petitioner on 30.09.2014 requesting to pay government revenue to the tune of Tk. 40,59,096.00 immediately. The learned DAG in support of his assertion attracts our attention to the photocopies of the said Tax Evasion Case, Statement of factory in-charge and demand notices which are marked as Annexures 1,2 and 3 in the affidavit in opposition.

10. We have heard the learned Advocates from both sides, examined the documents and the other materials on record. Upon scrutiny of the documents placed by the Learned DAG in support of his submissions, we are constrained to hold that the learned DAG's submissions are not tenable and acceptable in the instant case, given that, as is apparent from the records placed before us we have not found anything that might even indicate or imply that any of the 3 (three) notices and documents relate to the consignment concerned in the present Writ Petition , against which consignment non- payment of dues to the authority have given rise to the Impugned Order Locking the Petitioner's BIN. Though the Learned DAG has tried to impress upon us all the documents he has shown, particularly the Notice dated 30.09.2014 i.e. Annexure-1 of the Affidavit-In-Opposition and tried to persuade that the documents have a direct bearing with the impugned BIN locking notice issued upon the petitioner dated 12.11.2014, but in the light of the fact and circumstances, considering, that we have not found

any such indication or implication from the records before us that the Annexures he has drawn our attention to, are in any manner connected to the consignment related to the Impugned Order, as such we are of the opinion that the Impugned Notice is not in keeping with the relevant provisions of law, namely Sections 55 & 56 of the VAT Act,1991.

11. Mr. Bahadur Shah while making his submissions on behalf of the petitioner had taken us through the Impugned Order where he points out that there is no mention of any (*myŷ*) which in English generally means "connection or link" and which "*myŷ*" should normally precede before issuing any Notice of the sort impugned in the Writ Petition. He argues that said mention of any (*myŷ*) being absent in the Impugned Notice, is proof enough that no prior Show-Cause or any other Notice was ever issued to the Petitioner in this context. We are in full agreement with the submissions and the reasoning put forward by the Learned Advocate for the petitioner.

12. There is another point stated and alleged in Paragraph-4 of the Affidavit-In-Opposition and which the Learned DAG while making his submissions also tried to assail is that the petitioner had released some consignments under Bond facilities from the Chittagong Customs House but that without In-bonding the same in the office of the Respondents, the Petitioner had sold the goods in the local market.

13. Now, an allegation of this nature, if established amounts to a violation of Section 97 of the Customs Act, 1969. In pursuance of such an allegation we thoroughly scrutinized the records and which has led us to the Impugned Notice i.e. Annexure-'C' of the Writ Petition. We have read the notice, but contrary to the averments of the Learned DAG we have found that no allegation of this nature is mentioned anywhere in the said notice nor could the Respondents show us anything else from the records which could support their claim. Rather it is only stated in the Impugned Notice that "wb¤ ছকে বর্ণিত বন্ডেড প্রতিষ্ঠানটির কার্যক্রম অতি ঝুঁকিপূর্ণ *nIqvq miKvix ivR‡¯i ¯v‡_ I cwZôv‡bi bv‡g Avg`wb †ivaK‡í mvgwqKfv‡e cwZôvbwUi* Bin Lock *ivLvi Rb¨ Abyiva Kiv n‡jv*" The Respondents only mentioned in the Impugned Notice that the activities of the Petitioner is '*SwKc¥*', the word '*SwKc¥*' in English generally means "hazardous" or "risky". But the Respondents have omitted to state anything about the selling of the goods in open market as alleged by them and which the Learned DAG tenaciously tried to impress upon us in the Affidavit-in-Opposition, but they have not been able to satisfy us as to what led them to the conclusion that the activities of the petitioner is hazardous or risky '*SwKc¥*' ,and, therefore , such an offhand statement without explaining any reasons for their belief is unacceptable and cannot be sustained in law and we must ignore such allegations.

14. Now let us look into the relevant statutory provisions from VAT Act,1991 and which is reproduced below :-

55| Abv`vqx I Kg cwi‡kwaZ gy‡¨ ms‡hvRb Kiv Ab¨vb¨ [ïé I Ki] Av`vq]|*-(1) †h‡¶‡Î †Kv‡bv wbewÜZ ev wbeÜb‡hvM¨ e¨w³ ev Uvb Iev‡i Ki Gi AvIZvq Zwj Kvfy³ ev Zwj Kvfy³i †hvM¨ e¨w³, Z`KZ©K avivi 37 Gi Dc-avivi(2) G ewYZ GK ev GKwaK [Aciva msNU‡bi] Kvi‡Y A_ev fyjekZ : ev fyj e¨vL¨vi Kvi‡Y, mieivnKZ.cY¨ ev c`Ë †mevi Dci c‡`q-*

K. . . . . N (2)

(3) Dc-avivi (1) Gi Aaxb ïé I Ki c`v‡bi Rb¨ †hB e¨w³i wbKU nB‡Z `vex Kiv nq †mB e¨w³ D³ Dc-avivi Aaxb KviY `kv‡bv †bwU‡k Dwj wLZ mgq mxgvi g‡a¨ wj wLZfv‡e D³ `vexi wei‡× AvcwË Dìvcb Kwi‡j Zvnv‡K ïbwbi mÿhvM`vb Kwi‡Z nB‡e ; AZtci D³ e¨w³i DìvcZ AvcwË we‡ePbv Kwiqv mswkó gy‡¨ ms‡hvRb Ki KgKZv D³ AvcwË `wL‡ji [120 (GKkZ wek) w`‡bi] g‡a¨ ev †Kvb AvcwË `wLj Kiv bv nB‡j D³ Dc-avivi Aaxb †bwUk Rvixi Zwi‡Li 120 (GKkZ wek) w`‡bi g‡a¨ †bwU‡k `vexKZ.ïé I K‡ii cwigvY, c‡qvRb‡ev‡a,

cÖ‡qvRbxq ক্ষেত্রে চূড়ান্ত Kwi‡Z cwi‡eb, Ges D³ e¨w³ †bwU‡k `vexKZ.ev, †¶Î gZ, cÖ‡qvRbxwiZ ïé I Ki cwi‡kva Kwi‡Z ev¯—e¨ _vK‡eb|]

***56| miKv‡ii cvIbv Av`vq|-*** *(1) †h‡¶‡Î †Kvbv e¨w³i wbKU nB‡Z avhKvi †Kvb gÿ¨ ms‡hvRb Kiv ev, †¶Î gZ, gÿ¨ ms‡hvRb Ki I m¤úwK© ïé wKsev Av‡iwcZ †Kvb A_`Û wKsev GB Av‡bi ev †Kvb wewai Aaxb m¤úwË`Z †Kvb gÛj‡jKv ev Ab¨ †Kvb `wj‡ji Aax‡b `vexKZ.†Kvb A_ cvc¨ _v‡K †m‡¶‡Î (mnKvix Kwgkbvi c`ghv`vi wb‡¤ b‡nb Ggb †Kvb gÿ¨ ms‡hvRb Ki KgKZv wewa@vivi wbawiZ c×wZ‡Z)-*

K). . . . . Q)

[(1K) †Kvb e¨w³i wbKU nB‡Z Dc-avivi (1) G ewYZ cvIbv m¤úwK©i‡c Av`vq bv nIqv chš ev D³ i¡c cvIbvi AvBbvbyM wb¯úwË bv nIqv chš, mswkó KgKZv D³ e¨w³i wbeÜbc‡Îi KvhKwiZv ¯wMZ iwL‡Z cwi‡eb Ges mgy` e›`i, wegvb e›`i, Ab¨ †Kvb ïé †÷kb A_ev ïévaxb cY¨vMv‡i i¶Z †mB e¨w³i gwjKvbvaxb †Kvb c‡Y¨i Lvjvm কার্যক্রম বন্ধ রাখার জন্য সংশ্লিষ্ট *KZ©¶‡K wb‡`k c`vb Kwi‡Z cwi‡eb|*

e¨vLv : GB Dc-avivq ÔÔwbeÜbc‡Îi KvhKwiZv ¯wMZÕÕ A‡_ K¤úDUvivBRW wej Ae G›U c‡mwms wm‡÷g gÿ¨ ms‡hvRb Ki wbeÜb b¤i (BIN) *eÜ* (Lock) *Kwiqv ivLvI Aš—fy³ nB‡e|]*

15. From a close reading of both sections 55 and 56 of the VAT Act, 1991, it is clear that section 56 of the VAT Act, 1991 only sets out different modes of realizing the dues that may be owed to the Government by any person at a given time. Those dues could be the determined or ascertained amount of VAT or supplementary duties or it could be any penalty imposed upon any person from whom those may be due or the basis of any undertaking or bond "*gÛj‡jKv*" executed under this Act or any other law or by virtue of any demanded amount under any other deed or document that may be due from any person. As we already stated above, Section 56 only sets out the modes of realization of the dues from any person and such modes of realization are to be determined by Rules made in that behalf and the relevant corresponding rules to be followed when realizing dues under Section 56 of VAT Act, 1991 is Rule 43 of the VAT Rules 1991 where the rules to be followed in realizing dues is clearly set out.

16. But Section 56 cannot be construed or interpreted in an isolated manner. Section 55 and 56 must be read together and from a perusal of the same, it is evident that Section 56 is mandatorily preceded by Section 55 of the VAT Act, 1991 which prescribes the issuance of a Show- Cause Notice followed by other procedures and which is exhaustively laid out in the whole Section. The prescription said out in Section 55(1) (2)(3) are mandatory and no action or initiative can be taken or resorted to for realization of any unpaid, less paid or otherwise evaded etc amount, whatsoever under the provisions of Section 56 of the VAT Act, 1991, unless and until firstly the procedure laid out in Section 55 of the VAT Act has been exhausted by the authorities concerned. The principle of law is that Section 56 automatically presupposes a notice under section 55(1) of the Act, followed by the procedure laid out in Sub-section 2 & 3 of the said section 55 and which the respondents cannot avoid under any circumstances. The procedure in Section 55 (2) (3) must be at first complied with before proceeding to Section-56. But we regret to say that in the case before us, as is apparent from the records and the submissions made by both sides, the Respondents did not comply with the statutory provisions as set out in the VAT Act, 1991 and did not issue any notice to the petitioner prior to the Impugned Notice that is Annexure-C of the Writ Petition and have thereby transgressed the provisions of the statute in flagrant violation of the law leading to infringement of the fundamental rights of the Petitioner.

17. In support of our findings in the present case, we have upon a research in to the common laws come upon a decision of this Court in the case of Diamond Steel Products Co. -Vs- Customs reported in 11 BLC (2006) where the principle of law enunciated therein is very

much relevant to the context of the case we are dealing with at present and which is reproduced below.

> Value Added Tax Act (XXII of 1991)
>
> Section 55 and 56
>
> "The admitted position is that in issuing both the impugned demands neither the respondent No.1 nor the respondent No.2 did care to follow the provision of sub-section (1)" of section 55 of the VAT Act and without issuance of any show cause notice they have straightaway made the demand without giving any opportunity of being heard to the petitioner and also without passing any adjudication order. The demands in question appear to have been issued pursuant to the provision of section 56 of the Act but the respondent cannot resort to section 56 of the Act without complying with the provisions of section 55. Therefore, it appears that in issuing the impugned demands the respondents have acted illegally and beyond their jurisdiction and the demands therefore, do not withstand the scrutiny of law. Thus the demands are liable to be struck down as being illegal and without jurisdiction."

18. Under the facts and circumstances, our considered view is that issuing the notice, only directly informing the petitioner that his BIN has been locked temporarily without any prior Show-Cause or demand Notice is absolutely violative of the principles of Natural Justice granted under the constitution and is violative of his statutory rights prescribed under Section 55 of the Act,

19. Therefore, we find merits in the Rule.

20. In the result, the Rule is made absolute without any order as to costs. The notice impugned against is declared to have been made without lawful authority having no legal effect and hereby set aside.

21. Let a copy of this judgment be sent to the office of the Commission, Custom Bond Commissionerat, for future reference and guidance.

3 SCOB [2015] HCD 143

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 846 of 2012.

Md. Fazlul Hoque, son of late Munshi Karimul Hoque, Deputy Chief Planning Manager, Planning Cell, Code on. 10320, Bangladesh Inland Water Transport Corporation (BIWTC), 5 Dilkusha Commercial Area, Motijheel, Dhaka-1000
……..Petitioner.

-

-Versus-

Bangladesh Inland Water Transport Corporation (BIWTC), represented by its Chairman, 5 Dilkusha Commercial Area, Motijheel, Dhaka-1000 and others.

....Respondents.

Mr. Md. Ruhul Amin Bhuiyan, Advocate,
.....For the petitioner.

Mr. Kazi Mynul Hassan, Advocate
…….For the respondent No. 1.

Heard on: 11.08.2015, 18.08.2015
Judgment on: 25.08.2015.

Present:
Mr. Justice Tariq ul Hakim
And
Mr. Justice Md. Farid Ahmed Shibli

Constitution of Bangladesh
Article 102:
Doctrine of the legitimate expectation ensures the circumstances in which, the expectation may be ensured or denied and among others the following grounds may also be taken in order to get a remedy under article 102 of the Constitution:- firstly there must be a promise or assurance from the employer or the authority that the incumbent would be assimilated at the end or during the tenure of his service; secondly - the past practice of 'আত্মীকরণ' for other persons of similar status has been followed consistently.
... (Para 17)

Judgment

Md. Farid Ahmed Shibli, J:

1. This Rule Nisi was issued calling upon the respondents to show cause as to why the decision (Annexure-F) passed by the Board of Directors of the Bangladesh Inland Water Transport Corporation (hereinafter termed as "the Corporation") in its 311th meeting held on 19.12.2011 and the Office Order dated 05.11.2012 issued under the signature of Respondent No. 8 purporting to cancel the Petitioner's **'আত্মীকরণ'** or 'assimilation' in the post of Deputy Chief Planning Manager and placing his service back to the Accounts Division (Annexure-G)

should not be declared as without lawful authority and is of no legal effect and pass such other order or orders as the Court may deem fit and proper.

2. Factual scores relevant for the purpose of disposal of this Writ Petition in essence are as follows:- On 10.06.1996 the Petitioner joined the Corporation as its Insurance Officer. He was then promoted to the post of Deputy Chief Accounts Officer and joined there on 16.06.2003. Subsequently he was transferred on deputation to the post of Deputy Chief Personnel Manager on 23.10.2007. By dint of the Office Order No. Ka: Be:-302/2008 dated 25.09.2008 (Annexure-D) his service was assimilated or 'আত্মীকরণকৃত' against the post of the Deputy Chief Personnel Manager giving a retrospective effect from 16.06.2003. After such assimilation he was transferred to the post of Deputy Chief Planning Manager on 16.08.2010 and since then he has been serving there. The Corporation, by its 311th meeting of the Board of Directors held on 19.12.2011 decided to cancel the order of 'assimilation' or **'আত্মীকরণ'** of the Petitioner's service and issued the Office Order dated 05.01.2012 (Annexure-G) to that effect. During pendency of this Writ Petition, in compliance with a direction of this Court, the Petitioner made a fresh application to the Board of Directors pursuant to sections 49 and 50 of the Corporation's Karmochari Chakuri Probidhanmala, 1989 for reconsideration of the impugned decision cancelling the order of 'assimilation' or **'আত্মীকরণ'** , but the said application was not considered rather rejected in the 327th meeting of the Board of Directors held on 11.06.2013. As the Corporation without any lawful authority violating the Petitioner's indefeasible right guaranteed by the Constitution has cancelled his order of **'আত্মীকরণ'**or 'assimilation', finding no other alternative he has filed the Writ Petition and obtained this Rule Nisi accordingly.

3. Respondent No. 1 i.e. the Chairman of the Corporation (hereinafter termed as 'the Respondent-Corporation') has contested the Rule filing Affidavits-in-Opposition and making allegations that the Petitioner through a sort of persuasion violating the existing rules and regulations of the Corporation obtained the order for assimilation of his service against the post of Deputy Chief Personnel Manager, although there was no such provision for 'assimilation' or **'আত্মীকরণ'** under the Corporation's Karmachari Chakuri Probidhanmala, 1989 (hereinafter termed as 'the Probidhanmala') applicable for its officers & employees. It is stated in the Affidavit-in-Opposition that Feeder Posts for the Deputy Chief Account's Officer and the Deputy Chief Personnel Manager are not the same and that is why there is a legal bar of assimilating the service of Petitioner in the Department of Accounts as its Deputy Chief Personnel Manager and the Board of Directors in its 311th meeting has legally cancelled the assimilation order of the Petitioner. According to the Respondent-Corporation, the Board of Directors has not committed any error of law or infringed any right of the Petitioner cancelling his **'আত্মীকরণ'** or 'assimilation' order, so the Writ Petition is liable to be discharged with cost.

4. Mr. Ruhul Amin Bhuiyan, learned Advocate for the Petitioner and Mr. Kazi Mynul Hassan, learned Advocate for the Respondent-Corporation have entered their appearance and participated in the hearing of this Writ Petition.

5. At the time of hearing, Mr. Md. Ruhul Amin Bhuiyan, learned Advocate for the Petitioner contends that the Corporation passed the promotion order of the Petitioner for the post of Deputy Chief Accounts Officer evaluating his service performance and he was subsequently transferred to the post of Deputy Chief Personnel Manager on deputation and finally his service was assimilated thereat with effect from 16.06.2003. Mr. Bhuiyan further contends that prior to the Petitioner's assimilation some other Officers & employees had

similarly been assimilated in various Departments or Sections of the Corporation and still now they have been continuing services against their assimilated posts without any hindrance, whereas the Board of Directors in its 311th meeting took a discriminatory view cancelling the Petitioner's order of assimilation without any lawful authority and thereby infringed his fundamental right which is to be protected by this Court.

6. Mr. Bhuiyan has argued that the Corporation by issuing the assimilation order bearing No. Ka:Be-302/2008 (Annexure-D) created an indefeasible vested right in favour of the Petitioner, who by this time has acquired a clear eligibility for his promotion to the higher post. The learned Advocate has drawn our attention to the Office Orders (Annexure- H & I), on the basis of which some other officers and employees of the Corporation were assimilated and have been continuing their services against the assimilated posts without any question from any quarter. Narrating those circumstances, as contended by Mr. Bhuiyan, the assimilation of the Petitioner's service against the post of Deputy Chief Personnel Manager cannot be questioned or cancelled flouting consistent practice of the Corporation and violating settled principles of legitimate expectations.

7. Mr. Kazi Mynul Hassan, learned Advocate for the Respondent-Corporation opposes the above contention stating that there is no such rule or regulation for assimilation of service of any Officer or employee of the Corporation and the Petitioner making a sort of persuasion allegedly using names of them influential persons obtained the assimilation order (Annexure-D) giving its retrospective effect from around 5 years back and that was why the Board of Directors had sufficient cause and reason to take the impugned decision for cancellation of the Petitioner's assimilation. Mr. Hassan states that some employees and technical staff of the Corporation had earlier been promoted or inter-changed as a part of its administrative re-organization for better functioning of the office and to that effect some Office Orders like "Annexure-H, I" were issued, where the term **'আত্মীকরণ'** had been employed quite inadvertently but that could in no way give rise to any legitimate expectation in the mind of Petitioner. The learned Advocate has drawn our attention to some unusual conduct of the Petitioner and argued that as he has not come to this Court with clean hands to get an equitable remedy available in the Writ jurisdiction, his Petition is, therefore, liable to be discharged with cost.

8. We have considered the submission of the learned Advocates above and perused the documents filed by them along with the Petitions and Affidavits-in-Opposition. For proper appreciation of the points in dispute and attending circumstances to the case, let us have a peep into the relevant provision relating to the methods of appointment as laid down in Probidhi-3 of the Corporation's Karmochari Chakuri Probidhanmala, 1989:

> ৩। ''নিয়োগ পদ্ধতি।- (১) এই অধ্যায় এবং তফসিলের বিধানাবলী সাপেক্ষে, কোন পদে নিম্নবর্ণিত পদ্ধতিতে নিয়োগ দান করা যাইবে, যথাঃ-
>
> (ক) সরাসরি নিয়োগের মাধ্যমে;
>
> (খ) পদোন্নতির মাধ্যমে;
>
> (গ) প্রেষণে;
>
> (ঘ) চুক্তিভিত্তিক''

9. Within the four-corners of the Probidhanmala, we do not find any provision for **'আত্মীকরণ'** or assimilation of officers or employees of the Corporation from one department to another. Term **'আত্মীকরণ'** means assimilation or to take in absorption. In other word, it can be said that **'আত্মীকরণ'** or assimilation is a process by which surplus officers or employees instead of being thrown out are taken in or assimilated. In the service jurisprudence, the word

'আত্মীকরণ' or 'assimilation' means taking into the public service, who may, for various reasons have been found or declared to be a surplus. In this case, the Writ Petitioner was not declared as a "surplus" by the Accounts Department or any other Department of the Corporation. So the question poking our minds is- whether it was necessary for the petitioner to become assimilated in the Personnel Department or in any other Department of the Corporation?

10. On the above matter in reply to a query, Mr. Bhuiyan has informed us that the Petitioner has not acquired any higher status or drawn any enhanced financial benefit because of the assimilation because of the fact that his present and earlier parent posts are of equal rank and status. Had it been so, it seems to us mysterious as to why the Writ Petitioner has become so serious to retain his assimilated post i.e. the post of Deputy Chief Personnel Manager. In this context, Mr. Bhuiyan discloses the fact that albeit at this moment the Petitioner will not be able to savour any service benefit, but his assimilation might pave the way for his future promotion or better prospect.

11. Probidhi- 16 of the Corporation's Regulations or the Probidhanmala has clearly provided 5 criteria for deciding the promotion matters of its officers and employees. It appears from the said Probidhi that mere seniority is not sufficient to create or secure any right for promotion, rather in some cases service parameters to be considered for promotion may be determined giving priority to other criteria like- merit, service or record and other efficiency of an incumbent. In this context, we are of the view that the promotion policy is a matter to be decided by concerned authority of the Corporation. At this point of time, the impugned order cancelling the Petitioner's assimilation and his return to the parent post do not have any affect or impact on the present status or financial benefits. In a changing society, where modernization of the office-management and its reform process are the matters of paramount importance, the promotion policy of an Organization like the Corporation may be changed or revised from time to time in the public interest. Obviously the Corporation has the plenary authority to change its promotion policy for its better functioning and achieving an excellence in its office administration. So, it would be unwise for us to foresee the prospective effect of the Petitioner's assimilation and to decide the matter in anticipation. In view of the facts above, we do not find any reason to declare the right or give any direction as prayed for in favour of the Writ Petitioner under article 102 of the Constitution merely anticipating his chance of promotion or career prospect.

12. Admittedly the Petitioner joined the Corporation as an Insurance Officer on 10.06.1996 and promoted to the post of Deputy Chief Accounts Officer on 16.06.2003. It is not disputed that on 23.10.2007 the Petitioner was transferred on deputation to the Personnel Department of the Corporation, where he joined as its Deputy Chief Personnel Manager, and subsequently his service was assimilated with effect from 16.06.2003 vide order dated 25.09.2008 (Annexure-D). In relevant Probidhanmala or Regulation of the Corporation there is no such provision for assimilation or **'আত্মীকরণ'** of any officer or staff from one department to another. So, we are inclined to hold that the Petitioner's order of assimilation to the post of Deputy Chief Personnel Manager cannot be held permissible legally.

13. On scrutiny of the Office Order dated 25.09.2008 and the Note-Sheet enclosed as "Annexure-D" to the Writ Petition, it transpires that the service of Petitioner was decided to be assimilated with effect from 16.06.2003 showing the cause that there was no such bar for assimilation. Mr. Hassan has taken us through Para-5 of the Affidavit-in-Opposition dated 14.10.2012 and photo-copy of the Petitioner's application dated 02.04.2006 enclosed as "Annexure-VIII" to the Affidavit-in-Opposition dated 04.02.2013. It is noted that on

02.04.2006 the Petitioner had earlier prayed for assimilation expressing some apprehension of his career prospect, but at that time the concerned authority instead of allowing that prayer just transferred him on deputation against the post of Deputy Chief Personnel Manager. In such a situation, it is not understood as to why and how did the Petitioner subsequently obtain his order of assimilation claiming its retrospective effect from 16.06.2003 ?

14. On 16.06.2003 the Writ Petitioner was promoted to the post of Deputy Chief Accounts Officer and stayed there till 23.10.2007, on which he was transferred to the post of Deputy Chief Personnel Manager. It is thus clear like anything that prior to 23.10.2007, the Petitioner had no kind of nexus with any responsibility of the post of Deputy Chief Personnel Manager or with any other post of the Personnel Department. Whereas on the basis of the assimilation order dated 25.09.2008 (Annexure-D), the Petitioner has been claiming his status and seniority as Deputy Chief Personnel Manager with effect from 16.06.2003. Regarding such incongruent process and issuance of the assimilation order, Mr. Bhuiyan cannot give any plausible explanation before us. Taking such a topsy-turvy situation of the matter into account, it seems hardly possible for us to hold that the order of assimilation in question has created any vested right to the petitioner with effect from 16.06.2003 when he had been working at his parent post in the Accounts Department.

15. It is noted that that the very decision of the Petitioner's assimilation was not taken in a regular meeting of the Board of Directors, rather obtained through a shortcut process of by-circulation of a proposal, where the Directors of the Board could not participate in the deliberations proceedings to the decision. In the instant case, as it transpire from the Note-sheet enclosed with 'Annexure-D', the decision of the Petitioner's assimilation was taken so hastily that anyone may question the fairness of its process. Whether official proceedings including issuance of the assimilation order (Annexure-D) had been free from any fatal flaw or not- those things are the questions of facts and beyond the writ jurisdiction of this Court. In this regard, relying on the decision of Oriental Bank –Vs- A.B Siddiq reported in (2008) 13 BLC(AD) 144, Mr. Hassan has contended that as remedy available in the writ jurisdiction is equitable in nature, the Petitioner must come with clean hands and his questionable conduct as manifested through obtaining a fishy decision of his assimilation has clearly disentitled the Petitioner from getting the remedy as prayed for. We find strong force in the contention above and like to hold that the Writ Petitioner cannot get any declaratory order or remedy under article 102 of the Constitution depending on an office order regarding propriety of which there is a serious dispute between the parties.

16. After holding a threadbare discussion on the matter above and considering opinions of the concerned Ministries in the Government, the Board of Directors have decided to cancel the Petitioner's order of assimilation (Annexure-D). Minutes of the 311th and the 327th meetings of the Board of Directors (Annexure-F & X- 9) have unfolded a detail account of facts with reasons as to why, how and on the basis of which some other officers or employees were transferred or assimilated or promoted in other departments of the Corporation. It has been stated that in the process of an internal administrative re-organization and due to inclusion of a new set-up for the IT-Department some employees having adequate knowledge and expertise on Computer literacy have been transferred or inter-changed and at that time one Inland Master Officer was promoted to the post of Assistant Marine Officer using the term **'আত্মীকরণ'** in their Office Orders (Annexure-H & I). Making reference to the recital of those minutes of the meetings, Mr. Hassan submits that the term **'আত্মীকরণ'** was inadvertently used in those Office Orders in place of পদোন্নতি /বদলী। Now the question is- does the presence of a term like-**'আত্মীকরণ'** in some transfer or promotion orders having no significance or

consequential implication would arouse any legitimate expectation to the Writ Petitioner? We are of the view that the legitimate expectation must be based on some clear facts and circumstances, which are reasonable and fair and they should lead the mind of the incumbent to a definite expectation not a mere anticipation or speculation.

17. Doctrine of the legitimate expectation ensures the circumstances in which, the expectation may be ensured or denied and among others the following grounds may also be taken in order to get a remedy under article 102 of the Constitution:- firstly there must be a promise or assurance from the employer or the authority that the incumbent would be assimilated at the end or during the tenure of his service; secondly - the past practice of **'আত্মীকরণ'** for other persons of similar status has been followed consistently.

18. In this case, the Writ Petitioner could not show even a scrap of paper to prove that there was any written promise or assurance by the Board of Directors or the authority of the Corporation for his assimilation. It has not been stated by the Petitioner that any authority of the Corporation even verbally made any such promise to assimilate his service to the Personal Department. Rather he was transferred simply on deputation to the Personnel Department without any such promise or assurance.

19. Let us see whether there was any past practice of **'আত্মীকরণ'**, as contended, from one department to another within the Corporation. On analysis of the Office Orders enclosed as Annexures- H & I, it is found that some of the officers and employees have been assimilated or promoted or transferred to other departments on several dates. The Respondent-Corporation has expressed that term **'আত্মীকরণ'** has been employed in those Office Orders inadvertently, although none of them was assimilated in true sense. Mr. Hassan has taken us with him through Minutes of the 327th meeting of the Board, wherein an explanation has been given that because of some internal administrative re-organizations and inclusion of a new set-up for the Computer Department those orders were made for public interest without any such intention of assimilation or **'আত্মীকরণ'**.

20. Be that as it may, the Probidhanmala or the Regulations of the Corporation do not have any such provision of **'আত্মীকরণ'** or assimilation, and the Board of Directors has already decided to remain adherent to the existing Rules and Regulations of the Corporation, so we are inclined to endorse the decision taken by the Board of Directors cancelling the Petitioner's order of assimilation as the Deputy Chief Personnel Manager of the Corporation.

21. It is to be ascertained as to whether by the Office Orders (Annexures - H, I) or otherwise any officer or employee of the Corporation has been assimilated receiving benefits like- promotion, seniority etc. or not. According to article 29 of the Constitution, being a citizen the Petitioner cannot be subjected to any sort of discrimination and he is entitled to equality of opportunity in respect of his service in the Corporation.

22. In view of the above facts, we are of the opinion that the Corporation should take immediate steps to hold an enquiry to ascertain whether any other officer or employee of the Corporation has been assimilated or has received any service benefit including seniority, promotion, etc. by dint of any decision taken or order passed by the Corporation or its Board or not. It is, therefore, directed that the Respondent-Corporation shall within 1(one) month from the date of receipt of this judgment nominate a person not below the rank or status of a Director of the Corporation to hold an inquiry on the matter as referred to above. All proceedings of the inquiry including the preparation & submission of the Report should be

completed within 3(three) months from the date of receiving the assignment by the inquiry officer.

23. On holding inquiry, if anyone be found assimilated from one department of the Corporation to another in that case such Officer or employee should be sent back or reverted, as the case may be, to his parent department or post pursuant to existing rules, regulations and orders applicable to them. At the same time a person found responsible for ominous use of term **'আত্মীকরণ'** in Office Orders issued by the Corporation from time to time shall be brought to books as per rules and regulations.

24. In view of what have been discussed on legal aspects of the matter and attending facts and circumstances to the case, we are of the opinion that the Writ Petitioner has failed to substantiate his claim and right to remain in his assimilated post or department and the Board of Directors in its meetings held on 19.12.2011 and 11.06.2013 respectively have not committed any error or mistake of law by cancelling the Petitioner's order of assimilation dated 05.01.2012 (Annexure-G).

25. In the result, the Rule is discharged with direction to the Respondent-Corporation for holding an inquiry on the matter above and takes immediate steps in view of the guide-lines stated in the body of the judgment. Parties are to bear their respective costs.

26. Let a copy of this judgment be transmitted to the Chairman, the Director (Administration) and the Secretary of the Corporation for compliance and necessary action.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION N0. 10011 of 2013 &
WRIT PETITION N0. 10023 of 2013.

Dhaka South City Corporation, represented by its Administrator, Nagar Bhaban, Fulbaria, Dhaka.

.... Petitioners in both the Writ Petitions.
-Versus-

District Judge and Arbitration Appellate Tribunal, Dhaka and others.
..... Respondents in both the Writ Petitions.

Mrs. Sufia Ahmed, Advocate
..... for the petitioners in both the Writ Petitions.
Mr. Probir Neogi, Advocate
Mr. Probir Halder, Advocate
&
Mr. Abdul Haque Khan, Advocate
.....for the Respondent Nos. 3 & 4 of Writ Petition No. 10011 of 2013 and for the respondent No. 3 of Writ Petition No. 10023 of 2013.

Heard on 15.02.2015, 22.02.2015, 03.03.2015
& 01.09.2015 and Judgment on: 01.09.2015.

Present:
Ms. Justice Zinat Ara
And
Mr. Justice J.N. Deb Choudhury

In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject- matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an Appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court. ...(Para 28)

Certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari. ...(Para 30)

Judgment

J.N. Deb Choudhury, J :

1. Similar facts and identical questions of law are involved in Writ Petition No. 10011 of 2013 and Writ Petition No. 10023 of 2013 and as such, have been heard together and are being disposed of by this common judgment.

2. In Writ Petition No. 10011 of 2013, Rule Nisi was issued calling upon the respondents to show cause as to why the impugned judgment and order dated 23.10.2008, passed by the respondent No. 1, in Arbitration Appeal No. 42 of 2003(Annexure-B), affirming the judgment and award dated 02.03.2003 passed by the respondent No. 2 in Arbitration Case No. 202 of 1991 shall not be declared to have been issued without lawful authority and of no legal effect.

3. In Writ Petition No. 10023 of 2013, Rule Nisi was issued calling upon the respondents to show cause as to why the impugned judgment and order dated 13.10.2008, passed by the respondent No. 1 in Arbitration Appeal No. 25 of 2003(Annexure-B), affirming the judgment and award dated 02.03.2003 passed by the respondent No. 2 in Arbitration Case No. 193 of 1991 shall not be declared to have been issued without lawful authority and of no legal effect.

4. Relevant facts of the Writ Petition No. 10011 of 2013, are as under:

The Government acquired 0.0330 acres of land from the respondent Nos. 3 and 4 of C.S dag No. 20 of Mouja Dhaka vide LA Case No. 42/89-90 and paid Tk. 1,11,758.62 as award of compensation to the respondent Nos. 3 and 4 of the Writ Petition which according to them was inadequate and accordingly, they filed Arbitration Revision Case No. 202 of 1991, before the learned Joint District Judge and Arbitration Court, Dhaka (shortly, stated as the Arbitration Court) constituted under Section 18 of the সম্পত্তি জরুরী অধিগ্রহণ আইন, 1989 (hereinafter referred to as the Act IX of 1989) for revision of the award. The said arbitration case was contested by the Government of Bangladesh by filing written objection contending inter alia, that, the amount as paid was correct and in accordance with law.

5. The petitioner stated in paragraph No. 5 of the writ petition that the writ petitioner being opposite party of the Arbitration Revision Case No. 202 of 1991, filed written objection, denying material allegations of the application and contending inter alia, that the Deputy Commissioner assessed the value of the land in accordance with the provision of section 12 of the Act IX of 1989 and as such, compensation determined by the Deputy Commissioner was correct and accordingly, prayed for dismissal of the Arbitration Revision No. 202 of 1991.

6. The learned Judge of the Arbitration Court, Dhaka after considering the materials on record, and on hearing the respective parties allowed the said Arbitration Revision Case No. 202 of 1991 in part, by his judgment and order dated 02.03.2003 and directed the Government to pay Tk. 5,84,988.71 within 30(sixty) days in addition to the amount of Tk. 1,11,758.62 as already paid, with statutory compensation. The Arbitration Court, Dhaka also directed to pay an interest at the rate of 10% per annum from the date of taking over possession till payment of the amount of the revised award to the respondent Nos. 3 and 4.

7. Against the said judgment and order of the Arbitration Court, Dhaka, the Government of Bangladesh preferred Arbitration Appeal No. 42 of 2003, before the learned District Judge

and Arbitration Appellate Tribunal, Dhaka, (shortly, stated as Appellate Tribunal) who by his judgment and order dated 23.10.2008, dismissed the Arbitration Appeal and affirmed the findings and decision of the Arbitration Court, Dhaka.

8. The South City Corporation, Dhaka represented by its Administrator, the requiring body, filed the present writ petition in this Court and obtained the instant Rule Nisi along with an ad-interim order of stay.

9. Relevant facts of the Writ Petition No. 10023 of 2013, are as under:

The Government acquired 0.3135 acres of land from the respondent No. 3 of C.S. Dag No.1 of Mouja Dhaka vide LA Case No. 42/89-90 and paid Tk. 10,61,706.93 as award of compensation to the respondent no. 3 of the case which according to him was inadequate and accordingly, he filed Arbitration Revision Case No. 193 of 1991 before the learned Joint District Judge and Arbitration Court, Dhaka, (shortly, stated as the Arbitration Court) constituted under Section 18 of the সম্পত্তি জরুরী অধিগ্রহণ আইন, ১৯৮৯ (hereinafter referred to as the Act IX of 1989) for revision of the award. The said arbitration case was contested by the Government of Bangladesh by filing written objection contending inter alia, that, the amount as paid was correct and in accordance with law.

10. The petitioner stated in paragraph No. 5 of the writ petition that the writ petitioner being opposite party of the Arbitration Revision Case No. 193 of 1991, filed written objection denying material allegations of the application and contending inter alia, that the Deputy Commissioner assessed the valuation of the land in accordance with the provision of section 12 of the Act 9 of 1989 and as such compensation determined by the Deputy Commissioner was correct and accordingly, prayed for dismissal of the Arbitration Revision No. 193 of 1991.

11. The learned Judge of the Arbitration Court, Dhaka after considering the materials on record and hearing the respective parties allowed the said Arbitration Revision Case No. 193 of 1991 in part, by his judgment and order dated 18.02.2003 and directed the Government to pay Tk. 55,56632.71 in addition to the amount of Tk. 10,61,706.93 as already paid with statutory compensation and also directed to pay an interest at the rate of 10% per annum from the date of taking over possession from the respondent no. 3, till payment of the amount of the revised award to the respondent No. 3.

12. Against the said judgment and order of the Arbitration Court, Dhaka, the Government of Bangladesh preferred Arbitration Appeal being No. 25 of 2003, before the learned District Judge and Arbitration Appellate Tribunal, Dhaka, (shortly, stated as Appellate Tribunal) who by his judgment and order dated 13.10.2008 dismissed the Arbitration Appeal on affirming the findings and decision of the Arbitration Court, Dhaka.

13. The South City Corporation, Dhaka represented by its Administrator, the requiring body filed the present writ petition in this Court and obtained the instant Rule Nisi along with an ad-interim order of stay.

14. In both the writ petitions the petitioners mainly taken the ground that the Arbitrator while allowing the case did not consider the matter in the light of the provisions of sections 12 and 13 of Act IX of 1989.

15. The respondent Nos. 3 and 4 of the Writ Petition No. 10011 of 2013 and respondent No. 3 of Writ Petition No. 10023 of 2013 contested the Rule by filing, affidavits-in-opposition and supplementary affidavits-in-opposition and stated inter alia, that the Arbitration Court rightly considered the case of the contesting respondents upon proper consideration of the materials on record and rightly found the price of the acquired land upon considering the market value of that relevant time and passed the order though not as prayed for by the petitioners of those Arbitration cases; but, being satisfied, did not file any appeal. The Government of Bangladesh preferred Arbitration Appeals; but, the same were dismissed on affirming the award as passed by the Arbitration Court and being satisfied Government of Bangladesh, did not move further and accordingly, prayed for discharging the Rule.

16. Mrs. Sufia Ahmed, the learned Advocate appearing for the petitioners in both the writ petitions submits that while passing the award, the arbitrator failed to consider the mandatory provisions of sections 12 and 13 of the Act IX of 1989 and also submits that by passing the award the arbitrator considered the market price of the acquired land with reference to another arbitration case and thereby committed illegality and accordingly, prays for making the Rules absolute.

17. On the other hand, Mr. Probir Neogi, the learned Advocate appearing with Mr. Probir Halder, the learned Advocate for the respondent Nos. 3 and 4 of Writ Petition No. 10011 of 2013 and respondent No. 3 of Writ Petition No. 10023 of 2013 and submits that the Arbitration Court on proper appreciation of the facts passed the order dated 02.03.2003 in Arbitration Revision Case No. 202 of 1991 and order dated 18.02.2003 in Arbitration Revision Case No. 193 of 1991. He further submits that the Arbitrators while passing the order dated 02.03.2003, did not violate the provision of sections 12 and 13 of the Act IX of 1989 and the Appellate Tribunals also rightly affirmed the same and accordingly, prays for discharging the Rule.

18. We have heard the learned advocates for both the parties, perused the writ petitions, judgments and orders of the Arbitration Court and Appellate Tribunal, affidavit-in-oppositions, supplementary affidavits and other materials on record.

19. The only point to be decided in both the writ petitions is that, whether the award passed by the Arbitrators were in accordance with law or not.

20. This Court by order dated 05.03.2015 directed the respondent No. 5 to submit copies of Gazette Notification dated 10.09.1990, Gazette Notification dated 03.01.1991 and order dated 22.02.1986 passed by the Ministry of Public Works and the valuation of the lands of Lalbagh area and the respondent No. 5 on 12.04.2015 filed an affidavit-in-compliance stating inter alia that, pursuant to the direction of the Hon'ble Court, the office of the respondent No. 5 wrote a letter being Memo No. 05.41.2600.045.18.001.13-19 (pw) dated 01.04.2015 to the Ministry of Public Works requesting to provide the copy of the Gazette Notifications. In response to the letter dated 01.04.2015 issued by the respondent No. 5, the Ministry of Public Works, Bangladesh Secretariat, Dhaka vide Memo No. 25.00.0000.020.31.001.2014-565 dated 05.04.2015 sent the copy of the Gazette Notification dated 03.01.1991 (published pursuant to a decision adopted on 10.09.1990) and the Gazette Notification dated 07.03.2011 in respect of the value of land, though any order or Gazette Notification dated 22.02.1986 of the concerned Ministry in relation to the value of land could not be found and annexed those in the affidavit. We have considered the statements and also perused the annexures.

21. In the present case the learned advocate for the petitioners mainly argued that the respective Arbitrators while passing the award failed to comply with the provisions laid down in sections 12 and 13 of the Act IX of 1989.

22. For better understanding we like to quote the relevant sections 12 and 13 of the aforesaid Act as under:

১২। চূড়ান্ত ক্ষতিপূরণ নির্ধারণের বিষয়- (১) এই আইনের অধীন অধিগ্রহনকৃত কোন সম্পত্তি চূড়ান্ত ক্ষতিপূরণের পরিমাণ নির্ধারণ করার সময় জেলা প্রশাসক নিম্নলিখিত বিষয়গুলি বিবেচনা করিবেন, যথাঃ

(ক) অধিগ্রহণ করার সময় সম্পত্তির বাজার দরঃ

তবে শর্ত থাকে যে, বাজার দর নির্ধারণের সময় জেলা প্রশাসক একই ধরনের এবং একই পারিপার্শ্বিক সুবিধাযুক্ত সম্পত্তির বিগত বার মাসের গড়পড়তা মূল্য বিবেচনা করিবেন,

(খ) অধিগ্রহনকৃত সম্পত্তির দখল করার সময় উহার উপর যে ফসল বা গাছপালা ছিল তাহা নষ্ট হওয়াজনিত কারণে ক্ষতি,

(গ) অধিগ্রহনকৃত সম্পত্তির দখল করার সময় উহাকে অন্য সম্পত্তি হইতে পৃথককরণজনিত কারনে ক্ষতি,

(ঘ) অধিগ্রহনকৃত সম্পত্তির দখল করার সময় সাধিত কোন স্থাবর অস্থাবর সম্পত্তি বা কোন উপার্জনের উপায়ের ক্ষতি,

(ঙ) সম্পত্তি অধিগ্রহনের ফলে বাধ্যতামূলকভাবে আবাসস্থল বা কর্মস্থল স্থানান্তরের জন্য যুক্তিসংগত খরচ,

(২) অধিগ্রহনকৃত সম্পত্তির জন্য জেলা প্রশাসক উপ-ধারা (১) (ক) এ উল্লিখিত বাজারদরের উপর অতিরিক্ত শতকরা ২৫ ভাগ ক্ষতিপূরণ প্রদান করিবেন।

১৩। ক্ষতিপূরণ নির্ধারণে বিবেচ্য বিষয় নয়- এই আইনের অধিগ্রহণকৃত কোন সম্পত্তির ক্ষতিপূরণের পরিমাণ নির্ধারণ করার সময় জেলা প্রশাসক নিম্নলিখিত বিষয়গুলি বিবেচনা করিবেন না, যথাঃ

(ক) অধিগ্রহণের প্রয়োজনীয়তার তারতম্য

(খ) অধিগ্রহণকৃত সম্পত্তিতে স্বার্থ রহিয়াছে এমন কোন ব্যক্তির সম্পত্তি হস্তান্তরে অনীহা

(গ) যে পরিমাণ ক্ষতির কারণে কোন বেসরকারী লোকের বিরুদ্ধে কোন মামলা করা যায় না

(ঘ) অধিগ্রহণের কারণে অধিগ্রহণকৃত সম্পত্তির মূল্য বৃদ্ধি

(ঙ) অধিগ্রহণের আদেশ জারির পর জেলা প্রশাসকের অনুমোদন ব্যতীত অধিগ্রহণকৃত সম্পত্তির কোন পরিবর্তন, উন্নয়ন, বা অন্য কোন বিলিবন্দেজ।

23. This is a writ of certiorari, where the scope of interference with the judgment and orders of the Subordinate Court or Tribunal is very limited.

24. In the Case of Government of the People's Republic of Bangladesh Vs. Abdul Wahed Talukder, 11 BLC (AD) 218, their Lordships held that,

> "*The law is now settled as to the extent of power of the High Court Division while exercising jurisdiction in certiorari in respect of the judgment of the Tribunal or a subordinate Court and that while the High Court Division exercising the jurisdiction in certiorari the same is not competent to act as a Court of appeal i.e. to reassess the evidence and the other materials on record and then to arrive at a decision which it feels ought to have arrived at by the Tribunal or the subordinate Court in making the judgment although while making the judgment the Tribunal or the subordinate Court did not leave the evidence out of consideration or that misread the evidence or misconstrued the document or misinterpreted the law and that had any one of those errors been not committed the judgment would have been otherwise*"

25. In the Case of Government of Bangladesh and another Vs. Mrs. Rawshan Ara Begum and another, 17 BLT (AD) 65, their Lordships held that,

> "*The High Court Division while exercising its jurisdiction under Article 102(2) of the Constitution in respect of the judgment of a tribunal or in other words exercises its jurisdiction in certiorari is certainly not acting as a Court of appeal and to re-assess the evidence and finally to arrive at a view different from the tribunal in the*

absence of arriving at a finding that the view taken by the tribunal in the background of the materials noticed by it is not legally tenable or logically not well founded e.g. the case as the instant one. The High Court Division while examining the correctness of the judgment of the subordinate tribunal does not act as the Court of appeal "

26. In the Case of Bangladesh, represented by the Secretary, Ministry of Works Vs. Md. Jalil and others, 48 DLR (AD) 10, their Lordships held that,

"*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 mala fide 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.*"

27. Article 226 of the Constitution of India preserves to the High Court power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well-settled. It would suffice for our purpose to quote from the 7-Judge Bench decision of that Court in Hari Vishnu Kamath Vs. Ahmad Ishaque and Ors. (1955) 1 SCR 1104. The four propositions laid down therein were summarized by the Supreme Court in The Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc. (1961) 3 SCR 855 as under :-

"the High Court was not justified in looking into the order of December 2, 1952, as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under Article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by that Court in Hari Vishnu Kamath Vs. Ahmad Ishaque AIR 1955 SC 233 and the following four propositions were laid down :-

"(1) Certiorari will be issued for correcting errors of jurisdiction;

(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."

28. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject- matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an Appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.

29. In Nagendra Nath Bora & Anr. Vs. Commissioner of Hills Division and Appeals, Assam & Ors., (1958) SCR 1240, the parameters for the exercise of jurisdiction, calling upon the issuance of writ of certiorari where so set out by the Supreme Court of India;

> "The Common law writ, now called the order of certiorari, which has also been adopted by our Constitution, is not meant to take the place of an appeal where the Statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extra-ordinary jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inference or in other words errors which a court sitting as a court of appeal only, could have examined and, if necessary, corrected and the appellate authority under a statute in question has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been shown that in exercising its powers the appellate authority disregarded any mandatory provisions of the law but what can be said at the most was that it had disregarded certain executive instructions not having the force of law, there is not case for the exercise of the jurisdiction under Article 226."

30. Certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari.

31. According to the provision of Act IX of 1989, any person aggrieved with the award given by concerned Deputy Commissioner may file an application under section 18 of the Act IX of 1989 before the Arbitrator and after disposal of the case, if dissatisfied may prefer appeal under section 23 of the Act IX of 1989, before the Arbitration Appellate Tribunal and the judgment and order passed therein shall be final. In the instant case the contesting respondents being aggrieved with the award moved before the Arbitrator under section 18 of the Act IX of 1989 and though the present petitioner was a party therein and filed written objection; but, ultimately did not contest the case nor filed any appeal therefrom. It is only the respondent No. 5 filed appeal and after dismissal of the appeal did not move further. In such circumstances it cannot be said that the writ petitioner is an aggrieved person.

32. It appears that the Arbitrator while passing the order dated 02.03.2003 in Arbitration Revision Case No. 202 of 1991 considered the depositions of the respective parties and also considered the exhibit-1 which is an order passed in Arbitration Revision Case No. 188 of 1991. The copy of the said order as passed in Arbitration Case No. 188 of 1991, placed before this Court by way of supplementary affidavit from which it appears that the value of the acquired land had been settled as Tk.1,68,88905.00 per acre upon considering the market value of the relevant time. Similarly, the Arbitration Revision Case No. 193 of 1991 also decided in the said manner.

33. Accordingly it appears that the Arbitrator while passing the order dated 02.03.2003 did not violate the provisions of sections 12 and 13 of the Act IX of 1989. Moreover, it appears that the petitioner before us though filed written objection in Arbitration Case No. 202 of 1991 and Arbitration Case No. 193 of 1991; but, did not participate in hearing nor prefer any appeal from the order dated 02.03.2003 before the Arbitration Appellate Tribunal and thereby, accepted the order passed on 02.03.2003 as passed by the Arbitrator. It is only the respondent No. 5 who preferred Arbitration Appeals before the Arbitration Appellate Tribunal, Dhaka and the same was dismissed on merit. The petitioners almost after 10 years from the date of decision of Arbitrators and 5 years from the decision of Appellate Tribunal filed the instant writ petitions without any explanation for such long delay.

34. This being so, we are of the view that the petitioner accepted the award as given by the Arbitrators in the Arbitration Case No. 202 of 1991 and Arbitration Case No. 193 of 1991 and as such, have no cause of action to file this instant writ petition, nor the judgments under challenge suffers from any lack of jurisdiction or any error of law.

35. Considering the above facts and circumstances of the case and considering the relevant law and decisions as stated above we found nothing to interfere with the judgment and orders under challenge in these writ petitions.

36. Accordingly, we do not find substance in the arguments of the learned advocate for the petitioners of both the writ petitions and find substance in the argument of the learned advocate for the contesting respondents.

37. In the result, the Rules issued in Writ Petition No. 10011 of 2013 and Writ Petition No. 10023 of 2013 are discharged without any order as to costs.

38. The order of stay granted at the time of issuance of the Rules are recalled and vacated.

39. Communicate the judgment and order to the respondent No. 5 at once.

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High Court Division
(Criminal Revisional Jurisdiction)

Criminal Revision No.132 OF 2012

Hafez Ahmed.
……...…… Petitioner
-Versus-

The State & others
…….. Opposite parties

Mr. Ahsanul Karim with
Mr. Md. Mizanul Hoque Chowdhury, Advocate
..…… for the petitioner
Mr. Mohammad Faridul Islam, Advocate
…….. for opposite party No.2

Heard on 26.08.2015, 02.09.2015 and Judgment on 15.09.2015.

Bench:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakrabortty

Penal Code, 1860
Section 161
and
Prevention of Corruption Act, 1947
Section 5(2)

The offence under section 161 of the Penal Code relates to take illegal gratification by any public servant, while offence under section 5(2) of Act II of 1947 speaks of criminal misconduct by the same if he by corrupt and illegal means abusing his position as public servant obtains for himself any pecuniary advantage. The offences of the above sections are quite different and a person may be punished in each section separately and independently. ...(Para 15)

Judgment

Bhishmadev Chakrabortty, J:

1. On an application under section 439 of the Code of Criminal Procedure filed by the accused petitioner this Rule was issued calling upon the opposite parties to show cause as to why the order dated 14.06.2010 passed by the Divisional Special Judge, Chittagong in Special Case No.12 of 2010 arising out of Hathazari Police Station Case No. 5(11)08 dated 03.11.2008 corresponding to G.R. No.229 of 2008 framing charge against the petitioner under sections 161/162 and109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 (briefly Act II of 1947)should not be set aside.

2. At the time of issuance of the Rule all further proceeding of the case, so far it was related to the petitioner, was stayed for a period of 3(six) months. Eventually the said order of stay was extended till disposal of the Rule.

3. The facts relevant for disposal of the Rule, in short, are that Md. Ali Akbar, an Assistant Director of Anti-Corruption Commission, District Office, Chittagong (briefly the A.C.C. Chittagong) producing accused Md. Taslim Uddin, Sub-Assistant Officer, Chikandandi Land Office and five others of the same office including the petitioner to Hathazari Police Station lodged the First Information Report (briefly the FIR) alleging, *inter alia*, that accused Md. Taslim Uddin demanded Taka 15,000/- further as bribe from Md. Hosen Ali for mutating his name in respect of his purchased land. Hosen Ali agreed to pay and informed the matter in writing to the Director, A.C.C., Chittagong. The officer took permission from the Commission for conducting a trap case. After taking permission inventory of Taka 15,000/- currency notes to be given to Taslim Uddin was made. Hosen Ali with those currency notes went to the concerned Land Office to give it to him. The trap team at the time of handing over the currency notes to Taslim Uddin appeared, apprehended him and recovered the notes of Taka 15,000/- from him; that an additional amount of Taka 9,671/- was also seized from his possession. Other people who were present there at that time informed the trap team that usually the employees of that office takes bribe for each and every work. Searching body of the petitioner the team got Taka 11,500/-, they also got Taka 74,000/- from inside a trunk kept in his room under his control and he failed to explain the source of the amount. On the aforesaid allegations Hathazari Police Station Case No. 5 dated 03.11.2008 under sections 161/162 and 109 of the Penal Code read with section 5(2) of Act II of 1947 was started against the accused persons including the petitioner.

4. An Assistant Director A.C.C., investigated the case and submitted charge sheet against six accused including the petitioner under sections 161/162 and 109 of the Penal Code read with section 5(2) of Act II of 1947.

5. After submission of the charge sheet the case record was transmitted to the Court of Senior Special Judge, Chittagong and registered as Special Case No.5 of 2010 who took cognizance of the offence. The case was subsequently transferred to the Court of Divisional Special Judge, Chittagong for trial and renumbered as Special Case No.12 of 2010. The petitioner obtained bail therefrom and filed an application under section 241A of the Code of Criminal Procedure (briefly the Code) for his discharge. The said application was rejected by the impugned order and charge was framed accordingly under the aforesaid sections.

6. Being aggrieved by the said order of framing charge the petitioner moved before this Court and obtained the present Rule and interim order of stay.

7. Mr. Ahsanul Karim along with Mr. Md. Mizanul Hoque Chowdhury, learned Advocates appearing on behalf of the petitioner submits that according to the FIR, charge sheet and other materials laying with the record no allegation against the petitioner of demanding gratification from any person has been disclosed. The allegation brought against the petitioner do not come within the purview of sections 161/162 and 109 of the Penal Code. Furthermore, the offence as disclosed also do not come within the meaning of section 5(2) of Act II of 1974. Bringing the offence within the definition of section 5(1)(e) of Act II of 1947, the procedure as required was not followed. He further submits that failure to explain the source of money disproportionate to one's income does not create an offence and no such allegation has been brought in the *ejahar*. Referring to the provisions of law of sections 161/162 and 109 of the Penal Code and section 5(1)(e)/5(2) of Act II of 1947, Mr. Karim submits that as the allegation brought against the petitioner do not come within the meaning of any of the above sections, the very framing of charge cannot be sustained in law, and the Rule would be made absolute.

8. Lastly Mr. Karim submits that another co-accused Pankaj Kumar Sen filed Criminal Miscellaneous Case No.23614 of 2011 before this Court for quashment of the same proceeding. A Division Bench of this Court by the judgment and order dated 22.11.2012 was pleasd to make the Rule of the said miscellaneous case absolute by quashing the proceeding against him. The petitioner having been on similar footing is entitled to get the similar relief from this Court.

9. On the other hand, Mr. Mohammad Faridul Islam, learned Advocate appearing on behalf of opposite party No.2, the A.C.C., referring the case of Gazi Mozibul Huq & others -Vs- Abid Hossain Babu, 5 MLR(AD) 63, submits that when there are primafacie ingredients of the offence alleged, the accused cannot be discharged. Unless the charge is exfacie groundless in the light of the materials on record, the prosecution should not be stifled by discharging the accused. The actual nature of the offence against the accused may well be thrashed out in a trial.

10. Referring to the provisions of section 27 of the A.C.C. Ain, 2004 Mr. Islam further submits that at the time of trial the petitioner is to explain to the Court about the money recovered from him and in case of failure to explain, the Court is empowered to take into account the aid of this section. Apparently Taka 85,500/-, recovered from the possession of the petitioner is disproportionate to his legal source of income and he would make explanation about it at the time of trial according to the provision of section 27 of the Ain, 2004, and as such Rule having no merit liable to be discharged.

11. We have heard the learned Advocates of the respective parties and perused the revisional application, the FIR, charge sheet, impugned order and consulted with the relevant provisions of law.

12. It appears from the ejahar that when the trap was laid and the team caught accused Taslim Uddin red handed with Taka 15,000/- paid to him as bribe, at the same time the team recovered Taka 11,500/- from the body of the accused-petitioner and also Taka 74,000/- from inside a trunk kept in his room. On interrogation he failed to furnish any explanation about the source of the amount. It also appears from the charge sheet that the key of the said trunk was with him. Although there is no specific allegation in the FIR that the petitioner at that time received that money from anybody as bribe in the pretext of doing official work, but from the FIR and charge sheet it appears that allegation has been made out that he took money as brive and kept the same in a trunk under his control. The amount (Taka 85,500/-) recovered from him apparently appears disproportionate to his legal source of income. Section 5 (1)(e) of Act II of 1947 reads as follows:

> "5. **Criminal Misconduct**- (1) A public servant is said to commit the offence of criminal misconduct
>
> (a) …….
>
> (b) ……
>
> (c) ……..
>
> (d) ……
>
> (e) if he or any of his dependents is in possession, for which the public servant reasonably account, of pecuniary resources or of property disproportionate to his known sources of income "

13. In the case of **Hussain Muhammad Ershad -Vs- The state, 6 BLC (AD) 18**, it has been held:

> "*Further payment of Taka six and a half crore for construction of building being disproportionate to his known sources of income, also committed an offence under section 5(1)(e) of the Prevention of Corruption Act" (para-27).*

14. In the case of **Md. Nazimuddin Ahmed @ Md. Nasiruddin -Vs-The State, 10 BCR 56**, it has been held:

> "*Separate punishment is legal under section 161 of the Penal Code and under section 5(2) of the Prevention of Corruption Act as the offence under those two sections are distinct and different*."

15. On going through the law of section 161 of the Penal Code, section 5(2) of Act II of 1947 and the principle of the case reported in 10 BCR 50, it can case of safely be held that the offence under section 161 of the Penal Code relates to take illegal gratification by any public servant, while offence under section 5(2) of Act II of 1947 speaks of criminal misconduct by the same if he by corrupt and illegal means abusing his position as public servant obtains for himself any pecuniary advantage. The offences of the above sections are quite different and a person may be punished in each section separately and independently.

16. On going through the citation referred by Mr. Islam and the provisions of section 27 of the Ain, 2004 we find force in his submission.

17. We have carefully perused the judgment and order dated 22.11.2012 passed by this Division in Criminal Miscellaneous Case No.23614 of 2011. It appears from the FIR and charge sheet that the allegation made against Pankaj Kurmar is that Taka 1580/- only was recovered form him. The said amount is very nominal and may have in any one's pocket at any time. But the amount recovered from this petitioner (Taka 85,500/-) is apparently disproportionate to his (being a petty service holder) known or legal source of income. So the footing of Pankaj Kumar and the present petitioner are quite different, allegations are also not identical and as such the said judgment cannot help this petitioner in any way.

18. In the instant case charge sheet has been submitted under sections 161/162 and 109 of the Penal Code read with section 5(2) of Act II of 1947 and charge has also been framed against the petitioner under the aforesaid sections. But the trial Court during trial or even after conclusion of trial is empowered to alter the charge if the Court thinks it fit to that effect. Since some sorts of offence has been disclosed in the FIR which has been found true during investigation and charge has been framed, at this stage this Court should not interfere with the proceeding by setting aside the order of framing charge, giving a premium to the petitioner releasing him from the case. The questions raised by the petitioner that no offence under sections 161/162 and 109 of the Penal Code or under section 5(2) of the Act II of 1947 has been disclosed, should be decided at trial by taking evidence of the witnesses.

19. However, the trial Court is at liberty to alter the charge at any stage of trial if it seems justified for effective conclusion of the trial. The trial Court is empowered to do that even after conclusion of the trial and before pronouncement of the judgment.

20. In the above premises this Rule merits no consideration.

21. In the attending facts and circumstances, we find no illegality in the impugned order of framing charge and the same calls for no interference by this Court.

22. In the result, the Rule is discharged with observation made in the body of the judgment. The order of stay granted earlier stands vacated.

23. Communicate copy of the judgment at once.