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Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

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Supreme Court of Bangladesh

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1. Mr. Justice Surendra Kumar Sinha,
   Chief Justice
2. Mr. Justice Md. Abdul Wahhab Miah
3. Madam Justice Nazmun Ara Sultana
4. Mr. Justice Syed Mahmud Hossain
5. Mr. Justice Muhammad Imman Ali
6. Mr. Justice Hasan Foez Siddique

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2.	Md. Noor Hossain & ors. Vs. Mahbuba Sarwar & ors. 4 SCOB [2015] AD 4	Ex-parte decree, Inherent power under section 151 of CPC, rejection of a plaint	Whether the statements made in the plaint are false or not, are purely questions of fact and are to be decided at the trial. In rejecting the plaint, the learned Judges invoked section 151 of the Code, but the inherent power under the section cannot be exercised on assumptions and presumptions of facts and or on suspicion. In other words, the truth or falsity of the statements made in the plaint cannot at all be a ground to reject a plaint either be it under Order VII, rule 11 or under section 151 of the Code.
3.	Shahid Ullah @ Shahid & ors Vs. The State 4 SCOB [2015] AD 11	Section 302 of Penal Code, 1860; Justification for death sentence	The offence which these two condemned prisoners committed is most heinous and brutal. These two condemned prisoners along with other accused Mir Hossain, with cool brain, made a plan to hijack a baby taxi by killing the driver and according to that pre- plan they hired the C.N.G. baby taxi of the deceased as passengers and took the baby taxi to a lonely place and thereafter they murdered the baby taxi driver brutally. This type of crime is on the increase in our society. For hijacking a baby taxi or any other vehicle the hijackers do not hesitate for a moment to take the life of the innocent driver of the vehicle which

Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
			is very much precious for the near and dear ones of that poor driver. This type of killers/murderers cannot and should not get any mercy from the court of law. There is no reason for showing any leniency or mercy to this type of offenders who are enemy for the whole society. So we are unable to accept the submission of the learned advocate for the condemned prisoners to reduce the sentence of death to life imprisonment. In our opinion this is a fit case for imposing death sentence on killers.
4.	Jibon Bima Corporation & ors Vs. Md. Abu Kawsar Jalil & ors. 4 SCOB [2015] AD 16	Jibon Bima Corporation (Officers and Employees) Service Regulations, 1992; seniority; selection committee	If more than one employee is appointed at the same time, their seniority will be counted on the basis of merit list prepared by the selection committee and not from the date of their joining.
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Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
			the trial would be deducted from his total sentence. Thus we find that in many serious murder cases, where the trial lasts for many years, the accused who is found guilty and sentenced to imprisonment for life gets released after serving a total of 22½ years including the period spent in custody during trial.
6.	Mosharaf Com. Tex. Mills Ltd & ors Vs. ECOM Agro. Corp. Ltd & ors 4 SCOB [2015] AD 28	Arbitration proceeding; Valid agreement	It appears from the judgment of the High Court Division that the High Court Division found that there was a valid agreement between the plaintiff and defendant wherein an arbitration clause has been stipulated and pursuant to the said agreement an arbitration proceeding has already been commenced before the Arbitration Tribunal at Liverpool. This suit has been instituted subsequent to the arbitration proceeding. The High Court Division held that though written statement has been filed but, in fact, the same can be treated as information to the court regarding pendency of arbitration proceeding before Arbitration Tribunal at Liverpool. Since arbitration proceeding has already been initiated between the parties before initiation of the instant suit, we are of the view that the High Court Division rightly disposed of the Rule staying further proceeding of the suit with a direction to settle the dispute in the arbitration proceeding.

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APPELLATE DIVISION

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

CIVIL APPEAL NOS.179-80 OF 2007.
(From the judgment and order dated 19.3.2005 passed by the High Court Division in Writ Petition Nos.954 of 2001 and 1610 of 2000)

Bangladesh Shilpa Rin Sangstha represented by its Managing Director and another: Appellants.
(In both the Appeals)

Vs.

Rony Twines Limited represented by its Director Mustafa Jamal Pasha and others: Respondents.
(In both the Appeals)

For the Appellants:
(In both the Appeals)
Mr. Sheikh Habib-ul Alam, Advocate, instructed by Mrs. Nahid Sultana, Advocate-on-Record.

For the Respondents:
(In both the Appeals)
Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mrs. Modhumaloti Chowdhury Barua, Advocate-on-Record.

Date of hearing: 21st and 22nd April, 2015.
Date of Judgment: 22nd April, 2015.

Remission of interest to the sick industry:
The question is whether the expressions 'fËi pc' and 'cä pc' used in this sub-clause (C) above include remission of all interest accrued from the day of taking loan and already paid by the sick industry by installments against the total outstanding amount to be excluded or the interest accrued on the day of recommendation made by the Special Committee out of the total amount of outstanding dues. The expression 'fËi' means obtainable or to be paid, that is, the interest which has accrued from the date of privilege of remission of interest given and not the past interest already paid. ...(Para 5)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. These appeals arose out of the same judgment of the High Court Division which disposed of the rules analogously declaring the order under memo dated 21.12.2000 issued by the Management Committee of Bangladesh Shilpa Rin Sangstha (BSRS) and the notice for auction sale of the assets of Rony Twines Limited without lawful authority. It also directed the writ respondent No.3 BSRS to implement the recommendation of the Special Committee on Interest Remission in respect of writ petitioner's sick industry.

2. Short facts are that the writ petitioner in course of its business availed a loan of Tk.49,00,700.96 from BSRS. Subsequently the industry became sick for manifold reasons

beyond its control. The then Finance Minister through the budget speech in 1998-99 placed some proposals for approval before the Parliament to provide assistance to the sick industries for their rehabilitation. Following the aforesaid budget speech, the Finance Minister constituted a Special Committee for Remission of Interest of the sick industries. The Special Committee communicated its decision to the writ petitioner by a letter dated 3.5.2000 recommending for remission of 100% interest. The writ petitioner paid an amount of Tk.50,14,547.63 as against the total loan amount of Tk.49,00,700.96 and as the Special Committee remitted 100% interest, there remained no residual amount to be paid to BSRS.

3. The High Court Division held that in view of the recommendation by the Special Committed for Remission of Interest of the writ petitioner's sick industry and also in view of the repayment of excess amount against the total amount of loan taken and the substitution of the words 'Ae¡c¡u£ pc' by the words 'fËÉ pc', BSRS cannot claim any more money from the writ petitioner.

4. The Ministry of Finance, Finance Division, constituted a Special Committee in 1996 to consider the applications for remission of interest of sick industries and then it constituted a reconciliation committee for disposal of cases pending against sick industries so that the cases pending against the sick industries can amicably be disposed of out of court. The reconstituted review committee identified some sick industries but both the committees couldn't solve the problems of sick industries. To obviate the situation, on the prayer of sick industries the concerned Ministry constituted a Special Committee under Memo dated 26th August, 1998 (annexure-A) to consider the unresolved cases. The Ministry gave guidelines to the committee as to its power of recommendation in paragraph (5) of them, sub-clause (*B*) is relevant for our consideration, which is as under:

"কমিটি প্রাপ্য সুদ এবং দন্ড সুদের ১০০% পর্যন্ত মওকুফের সুপারিশ করতে পারবে। তবে কোন অবস্থাতেই আসল ঋণ ও মামলা খরচ মওকুফের সুপারিশ করা যাবে না। এছাড়া যে সকল প্রতিষ্ঠান ইতোপূর্বে সুদ মওকুফের সুবিধা লাভ করেছে তাদের ক্ষেত্রে শতকরা ৯০ ভাগের বেশী সুদ মওকুফের সুপারিশ করা যাবে না"

5. This sub-clause said that the Special Committee may recommend for remission of 100% interest but in no case it can recommend for remission of the principal amount of loan and the expenses incurred towards the litigation. It was also directed that those organizations which had availed of the benefit of remission of interest may also be given remission of 90% interest. The question is whether the expressions 'fËÉ pc' and 'cä pc' used in this sub-clause (C) above include remission of all interest accrued from the day of taking loan and already paid by the sick industry by installments against the total outstanding amount to be excluded or the interest accrued on the day of recommendation made by the Special Committee out of the total amount of outstanding dues. The expression 'fËÉ' means obtainable or to be paid, that is, the interest which has accrued from the date of privilege of remission of interest given and not the past interest already paid.

6. The Ministry of Finance, Finance Division, as per recommendation of the Special Committee by letter under memo dated 03rd May, 2000, intimated the writ petitioner that in pursuance of its application before the review committee, the Special Committee recommended its industry as sick industry and directed it to comply with clause (*M*) in order to avail the opportunity of remission of interest, that is to say, to deposit 5% down payment of the amount remained outstanding for the renewal of loan and other expenses incurred by BSRS within 30 days of the date of receipt of the order. It was recited that all interest including penal interest, if there be, were exonerated and that the balance amount after remission to be paid in thirty months by installments as per reschedule to be made by such

financial institution. Admittedly, the writ petitioner did not comply with the said direction. Accordingly, as per sub-clause (*M*) of the said letter, the writ petitioner could not claim the benefit of Special Interest Remission. It waived the privilege of remission of interest.

7. Learned Counsel submits that since the writ petitioner has already paid Tk.50,00,000/- against the disbursement of loan of Tk.49,00,700.96, it was under no obligation to make any further down payment. This submission of the learned Counsel is devoid of substance. The condition precedent for availing the opportunity of Special Interest Remission was that from the date of recommendation of the Special Committee, the sick industry was required to make down payment of 5% out of the outstanding amount excluding the interest. Neither in annexure-A nor in annexure-B of the writ petition, there was any recital that the concerned Ministry or BSRS gave any assurance or any undertaking to the writ petitioner that the money paid by it prior to the decision of the Special Committee on Interest Remission would be adjusted against the total amount of remission of interest. To avail the opportunity one must make deposit of the required amount as a condition precedent within thirty days from the date of receipt of the notice. Since the writ petitioner did not avail of the opportunity, it does not acquire any right on the question of remission of interest.

8. The High Court Division has totally ignored that aspect of the matter and illegally held that the writ petitioner was not under any obligation to make any payment. The appeal is therefore, allowed without any order as to cost. The judgment of the High Court Division is set aside.

4 SCOB [2015] AD 4

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.574 OF 2011 WITH CONTEMPT PETITION NO.13 OF 2011

(From the judgment and order dated the 14th day of December, 2010 passed by the High Court Division in First Appeal No.89 of 2007)

Md. Noor Hossain being dead his heirs: Halima Begum and others	:	. . . Petitioners (in both the cases)
-Versus-		
Mahbuba Sarwar and others	:	. . . Respondents (in both the cases)

For the Petitioners (in both the cases)	:	Mr. Khizir Ahmed, Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record
For Respondent No.1 (in CP.No.574 of '11)	:	Mr. Qamrul Hoque Siddique, Advocate instructed by Chowdhury Md. Zahangir, Advocate-on-Record
For Respondent Nos.2-5 (in CP.No.574 of '11)	:	None represented
For the Respondents (in Cont.P.No.13 of '11)	:	None represented
Date of Hearing	:	The 2nd day of February, 2015

Consequence of setting aside *ex-parte* decree:
The moment the *ex-parte* decree was set aside, the suit stood restored in its original position and the only legal consequence of such restoration was that the suit had to be proceeded with and disposed of in accordance with law. ...(Para 15)

Inherent power under section 151 of CPC cannot be exercised on assumptions and presumptions of facts:
Whether the statements made in the plaint are false or not, are purely questions of fact and are to be decided at the trial. In rejecting the plaint, the learned Judges invoked section 151 of the Code, but the inherent power under the section cannot be exercised on assumptions and presumptions of facts and or on suspicion. In other words, the truth or falsity of the statements made in the plaint cannot at all be a ground to reject a plaint either be it under Order VII, rule 11 or under section 151 of the Code. ...(Para 17)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This petition for leave to appeal has been filed against the judgment and decree dated the 14th day of December, 2010 passed by a Division Bench of the High Court Division in First Appeal No.89 of 2007 allowing the appeal.

2. Facts essential for disposal of this petition are that the predecessor-in-interest of the petitioners as plaintiff filed Title Suit No.46 of 1991 in the Court of Subordinate Judge (now Joint District Judge), Narayangonj for specific performance of contract impleadng respondent Nos.1-3 herein as defendant Nos.1-3, RAJUK(formerly DIT) represented by its Chairman and its Deputy Director (Estates) as defendant Nos.4 and 5. The suit was decreed *ex-parte* on 05.11.1991 with the direction upon defendant Nos.1-3 to execute and register the kabala in respect of the suit land within 60(sixty) days failing which the plaintiff would get the kabala through Court. As the defendants did not execute the kabala as per the decree, the plaintiff levied Title Execution Case No.1 of 1992 and eventually, the kabala was executed and registered through Court. It further appears that the plaintiff (of Title Suit No.46 of 1991) also took possession of the suit land through Court vide the said execution case.

3. Respondent Nos.1-3 herein who were defendant Nos.1-3 in Title Suit No.46 of 1991 filed Title Suit No.146 of 2005 in the Court of Joint District Judge, 1st Court, Narayangonj for declaration that the *ex-parte* judgment dated 05.11.1991 and the decree dated 13.11.1991 passed in Title Suit No.46 of 1991 were illegal, collusive, inoperative and not binding upon them; for cancellation of the kabala dated 21.07.1992 being No.2386 executed and registered by the Subordinate Judge, Narayangonj in favour of the plaintiff in Title Execution Case No.1 of 1992 as shown in schedule-'Kha' to the plaint and also for recovery of khas possession of the land as described in schedule-'Ka' to the plaint. Eventually, the suit was renumbered as Title Suit No.1 of 2005(hereinafter referred to as the instant suit).

4. The main allegations made in the plaint of the instant suit were that plaintiff No.1 was not aware of filing the suit; the *ex-parte* decree passed therein, filing of Title Execution Case No.1 of 1992 and execution of the decree through the execution case before 06.04.2003. She came to know about the *ex-parte* decree, the registration of the kabala through Court in the said execution case on 07.04.2003. Plaintiff No.1 did not file any family suit being No.6 of 1985 for her appointment as guardian of plaintiff Nos.2 and 3. Plaintiff No.1 was not at the address at which the summons of the suit was sent, but defendant No.1 in collusion with the process server managed to obtain service returns and obtained the *ex-parte* decree by practising fraud upon the Court and also managed to execute and register the impugned kabala through Court in respect of the suit land. Plaintiff No.1 also denied the fact of entering into any contract with defendant No.1 to sell the suit land.

5. The suit was contested by the predecessor-in-interest of the petitioners who was impleaded as defendant No.1(hereinafter referred to as the defendant) by filing written statement denying the material allegations made in the plaint contending, *inter alia*, that plaintiff No.1 with intent to transfer the suit property filed an application before the 4th Court of Munsif (now Assistant Judge) and Family Court, Narayangonj being Miscellaneous Case No.6 of 1985 for appointing her as guardian of plaintiff Nos.2 and 3 and she was appointed as guardian and then obtained permission to sell the suit property vide Permission Case No.5 of 1986. Plaintiff No.1 in person and on behalf of plaintiff Nos.2 and 3 agreed to sell the suit

property to the defendant for a consideration of taka 4,00,000(four lac) and received a sum of taka 10,000(ten thousand) against a written acknowledgement under her hand on 25.04.1985 for herself and on behalf of plaintiff Nos.2 and 3 as earnest money and thereafter, she received taka 20,000(twenty thousand) on 12.02.1989 and taka 500(five hundred) on 04.05.1989 and taka 10,000(ten thousand) on 05.07.1989 as additional earnest money against separate acknowledgement receipts. There was an understanding between the defendant and plaintiff No.1 that on obtaining permission of the Court to sell the suit property, she would execute and register a saf-kabala in favour of the defendant in respect of the suit land by taking the balance consideration from him. A legal notice was also published in the daily 'Banglar Bani' on 07.11.1989 through Mr. Kazi Ahmed Ali, Advocate, drawing attention of the interested persons, if any, relating to the suit property for communicating with the said learned Advocate with "requisite documents" in support of their claim, but none turned up. Thereafter, the defendant requested plaintiff No.1 time and again to receive the balance consideration money of taka 3,55,000⁄00 and execute and register the saf-kabala in his favour, but she did not pay any heed to the request and as such, a legal notice was served upon her by the defendant through his said learned Advocate under registered post with a copy to the Deputy Director (Estates), DIT, Dhaka. But the notice was returned unserved upon plaintiff No.1 with the endorsement "Refused" on 28.07.1990. In the above circumstances, the defendant was constrained to institute the suit (Title Suit No.46 of 1991) in the Court of Subordinate Judge, Narayangonj against the plaintiffs for specific performance of contract in respect of the suit property and the suit was decreed *ex-parte* on 13.11.1991. The summonses of the suit were served upon the defendants (of Title Suit No.46 of 1991) and accordingly, the suit was decreed *ex-parte* as per the procedure. No fraud was practised by the plaintiff of that suit (the defendant of the instant suit) in obtaining the decree for specific performance of contract; the decree passed in the suit was valid and binding upon the plaintiffs (of the instant suit). As the plaintiffs of the instant suit (the defendants of Title Suit No.46 of 1991) did not comply with the terms of the operative portion of the decree, the defendant levied Title Execution Case No.1 of 1992 in the Court of Subordinate Judge, Narayangonj for execution of the decree. The defendant deposited the balance consideration of taka 3,55,000⁄00 and then the saf-kabala being No.2386 was executed and registered in his favour on 19.07.1992 in respect of the suit property and the delivery of possession was made on 07.04.2003 with the help of police force in presence of a Magistrate and since then the defendant has been possessing the suit property. Shafiuddin Sarwar, brother-in-law of plaintiff No.1 instituted Title Suit No.106 of 1993 in the Court of Subordinate Judge, Narayangonj for setting aside the *ex-parte* decree of Title Suit No.46 of 1991 against the defendant impleading the plaintiffs and defendant Nos.2-4 and others as defendants, which was dismissed for default on 20.07.1999 at the stage of further hearing. The plaintiffs filed the instant suit on some false pleas and pretext, so the suit was liable to be dismissed.

6. The trial Court by the judgment and decree dated 22.03.2006 dismissed the suit.

7. Against the judgment and decree of the trial Court, the plaintiffs preferred First Appeal No.89 of 2007 before the High Court Division and a Division Bench by the impugned judgment and decree allowed the appeal with a cost of taka 1,00,000˙00 (one lac) against the defendant, set aside the judgment and decree of the trial Court and decreed the suit. The High Court Division also set aside the *ex-parte* decree dated 05.11.1991 passed by the Subordinate Judge, Narayangonj in Title Suit No.46 of 1991 and declared the same as collusive, illegal, inoperative, void and not binding upon the plaintiffs. The High Court Division also declared the kabala dated 21.07.1992 being No.2386 executed and registered by the Subordinate Judge, Narayangonj in execution of the decree passed in Title Suit No.46 of 1991 vide Title

Execution Case No.1 of 1992 cancelled and at the same time rejected the plaint of Title Suit No.46 of 1991 as being frivolous, void, *ab-initio* and *"based upon concocted story of agreement and being barred by law"* and directed the defendant to hand over the vacant possession of the suit land to the plaintiffs within 60 (sixty) days failing which the possession would be delivered by the trial Court by evicting the defendant. The High Court Division also declared the proceedings of Title Execution Case No.1 of 1992 as void; hence this petition for leave to appeal.

8. Heard Mr. Khizir Ahmed, learned Advocate for the petitioners and Mr. Qamrul Hoque Siddique, learned Advocate who entered caveat on behalf of the respondents, perused the judgment and decree of the trial Court, the plaint, the evidence on record, the other materials on record and the impugned judgment and decree.

9. In the instant suit, the following prayers were made:

"(L) অত্রাদালতের দেঃ ৪৬/৯১ নং মোকদ্দমায় প্রচারিত বিগত ৫/১১/৯১ ইং তারিখের একতরফা রায় ও ১৩/১১/৯১ ইং তারিখের ডিক্রী বে-A¡Ce£, ®k¡Np¡S¢pL, a'La¡fZ, A®hd, অকার্যকর ও বাদীগন প্রতি প্রযোজ্য নহে মর্মে ঘোষনার ডিক্রী দিতে।

(M) দেঃ ৪৬/৯১ নং মোকদ্দমার রায় ও ডিক্রী হইতে উদ্ভুত ১/৯২ নং ডিক্রী জারী মোকদ্দমা অনুকুলে হাছিলকৃত ১নং বিবাদী বরাবরে সম্পাদিত ও রেজিষ্ট্রীকৃত আরজীর খ তপছিল h¢Za p¡h-Lhmi দলিল বাতিল ও ক্যানসেলেশন ক্রমে উহা সংশ্লিষ্ট সাব-রেজিষ্ট্রি অফিসের সংশ্লিষ্ট বালাম বহিতে নোট করার নিমিত্ত বোরকারীর আদেশ দিতে,

(N) আরজীর ক তপছিল বর্নিত সম্পত্তিতে বাদীগনের অনুকুলে মূল বিবাদীর প্রতিকূলে খাস দখল পাওয়ার ডিক্রী দিতে,

(O) মূল বিবাদীর বিরুদ্ধে ক্ষতিপূরন বাবদ ১০,০০,০০০/-(দশ লক্ষ) টাকা আদায়ের ডিক্রী দিতে এবং অত্র মোকদ্দমার উদ্ভবের সর্বশেষ দিন হইতে উক্ত ক্ষতিপূরণ এর টাকা আদায়ের দিন পর্যন্ত উক্ত টাকার উপর শতকরা ২০% হারে টাকা আদায়ের ডিক্রী দিতে,

(P) দেওয়ানী কার্যবিধি আইনের ২৪(৩) ধারার বিধান মতে মামলা খরচ এবং খরচের উপর শতকরা ৬% টাকা হারে মামলা খরচাসহ ডিক্রী দিতে,

Hhw

(Q) আইন ও ইকুইটি মতে আদালতের ন্যায় বিচারের বাদীগন অন্যান্য ফলপ্রস্ত কোন প্রতিকারের ভাজন হইলে তাহাও ডিক্রী দানে সুবিচার করিতে আজ্ঞা হয়।"

10. The trial Court considering the pleading of the parties framed the following issues:

"1z অত্রাকারে ও প্রকারে অত্র মোকদ্দমা চলিতে পারে না?

2z অত্র মোকদ্দমা তামাদিতে দুষ্ট ¢L e¡?

3z অত্র মোকদ্দমা পক্ষ দোষে দুষ্ট কিনা?

4z দেওয়ানী ৪৬/৯১ নং মোকদ্দমার ৫/১১/৯১ ইং তারিখের রায় এবং ১৩/১১/৯১ ইং তারিখের HLalg¡ ¢Xœ£ a'L£ ¢Le¡?

5z বাদীপক্ষ প্রার্থীত মতে ১০,০০,০০০/- টাকার ক্ষতিপূরন পাইতে হকদার কি না?

6z B¢Sl M af¢pm h¢ea Lhm¡ c¢mm a'L£ J AL¡kLl£ ¢L e¡?

7z বাদীপক্ষ প্রার্থীত প্রতিকার ছাড়া কি কি প্রতিকার পাইতে পারে?

8z বাদীপক্ষ প্রার্থীত প্রতিকার পাইতে হকদার কিনা?"

11. The trial Court dismissed the suit answering issue No.2 in the affirmative, issue Nos.4 and 5 in the negative, i.e. against the plaintiffs; issue No.3 in the negative, i.e. in favour of the plaintiffs and issue Nos.6-8 in the negative, i.e. against the plaintiffs.

12. The High Court Division reframed the issues as under:

"(a) Whether the ex parte judgment and decree passed in Title Suit No.46 of 1991 was valid in law on account of non appointing any guardian *ad litem* as required under Order 32 Rule 3 of the Code of Civil Procedure?

(b) Whether the ex parte judgment and decree passed in Title Suit No.46 of 1991 was passed in normal course of business or hastely and abnormally?

(c) Whether the plaintiff No.1 was appointed as guardian of person and property for plaintiff Nos.2 and 3 and got a permission for transforming (sic, it would be transferring) the suit land as claimed by the defendant No.1?

(d) Whether the plaintiff No.1 was entitled to enter into any contract on behalf of minor daughters and that was enforceable in law?

(e) Whether the Title Suit No.1 of 2005 was barred by limitation as held by the trial court?

(f) Whether the defendant could produce any paper in Title Suit No.46 of 1991 or in the instant suit to prove the fact of existence of any agreement for transfer of the suit land by the plaintiff No.1 for herself and on behalf of her minor daughters and in absence of any such evidence what would be the consequence of Title Suit No.46 of 1991?

(g) Whether the judgment and decree passed in Title Suit No.46 of 1991 were enforceable in law?

(h) As per the submission made by Mr. Quayum, the learned Advocate for the defendant, whether the title Suit No.46 of 1991 is liable to be sent back on remand?

(i) Whether the plaintiffs are entitled to get relief as prayed for?

(j) What more relief the plaintiffs are entitled to get?"

13. From the issues framed by the High Court Division, it appears to us that the High Court Division travelled beyond the scope of the suit and it went even beyond the relief prayed by the plaintiffs in the suit. Be that as it may, of the 10(ten) issues: issues (h), (i) and (j) appear to us relevant to decide the questions involved in the instant suit. And we do not consider it at all necessary to discuss the propriety of the issues other than these issues (issues (h), (i) and (j)) decided by the High Court Division.

14. So far as issue (h) is concerned, the learned Judges refused to send the suit back to the trial Court on the view that *"(a) there was no existence of any contract as alleged by the defendant No.1 (b) The plaintiff No.1 being a defacto guardian had no authority to enter into any contract (c) If existence of any contract is accepted that is void and not enforceable in law as per decisions referred to above."*

15. In taking the above view, the learned Judges totally failed to consider that the moment the *ex-parte* decree was set aside, the suit stood restored in its original position and the only legal consequence of such restoration was that the suit had to be proceeded with and disposed of in accordance with law.

16. We also failed to understand how the questions as raised by the learned Judges quoted hereinbefore were relevant in deciding the question as to whether the *ex-parte* decree passed

in Title Suit No.46 of 1991 was liable to be set aside or not. Whether there was existence of any contract, whether plaintiff No.1 had any authority to enter into any contract and whether the contract, if any, would be "void and not enforceable in law" are the matters to be decided in Title Suit No.46 of 1991. In the context, it is necessary to state that in the suit, no relief was sought against the contract for the performance of which Title Suit No.46 of 1991 was filed.

17. The learned Judges made another fundamental mistake in rejecting the plaint of Title Suit No.46 of 1991 on the finding that *"defendant No.1 instituted Title Suit No.46 of 1991 upon 100% false statements and without having a valid agreement, consequently the Title Suit No.46 of 1991 was liable to dismissed. We are of the view that Title Suit No.46 of 1991 was not liable to be decreed and that suit was barred by law and the plaint was liable to be rejected"*, though the learned Judges themselves found that *"upon eventual success in the appeal, the Title Suit No.46 of 1991 although are liable to be restored to its file and number."* It is also necessary to keep on record that though the learned Judges found Title Suit No.46 of 1991 barred by law, they did not point out or mention under what provision of law it was barred. We ourselves have tried to lay our hand on any provisions of the Statute to see whether the suit (Title Suit No.46 of 1991) was barred by law, but we failed. When Title Suit No.46 of 1991 was decreed *ex-parte* and the instant suit was filed for setting aside the said *ex-parte* decree, the question of rejection of the plaint of the suit did not arise at all. More so, when the defendants of the suit (Title Suit No.46 of 1991) did not get any chance to file written statement (as the suit was heard *ex-parte*) stating their own case, how it could be said that the suit was filed upon 100% false statements and such a finding is absolutely based on wild assumptions and presumptions. And no plaint can be rejected on the assumptions or presumptions that the facts stated in the plaint are false. Whether the statements made in the plaint are false or not, are purely questions of fact and are to be decided at the trial. In rejecting the plaint, the learned Judges invoked section 151 of the Code, but the inherent power under the section cannot be exercised on assumptions and presumptions of facts and or on suspicion. In other words, the truth or falsity of the statements made in the plaint cannot at all be a ground to reject a plaint either be it under Order VII, rule 11 or under section 151 of the Code. And if that legal proposition of the High Court Division is accepted, it will create havoc in the dispensation of justice delivery system in civil litigations. We conclude that in the facts and circumstances of the case, the learned Judges erred in law in deciding the issue in the negative. Therefore, that portion of the order of the High Court Division cannot be sustained.

18. Be that as it may, considering the evidence and the other materials on record, it appears to us that the *ex-parte* decree passed in Title Suit No.46 of 1991 cannot be sustained and the High Court Division rightly set aside the same. Consequently, the kabala executed and registered by the Court in favour of the defendant being kabala No.2386 dated 21.07.1992 in Title Execution Case No.1 of 1992 pursuant to the said *ex-parte* decree cannot also be maintained and the High Court Division rightly cancelled the same. Since the *ex-parte* decree is set aside and the defendant got delivery of possession of the suit land in execution of the *ex-parte* decree, he cannot get the benefit of the *ex-parte* decree and therefore, he cannot be allowed to enjoy the fruit of the decree continuing his possession therein and the plaintiffs must be restored back with their possession of the suit property. Therefore, the decree of the High Court Division directing the defendant to deliver possession of the suit property is to be maintained and the findings and the decisions of the learned Judges in respect of issues (i) and (j) appear to us correct subject to the findings and the observations made hereinbefore.

19. For the discussions made above, the judgment and decree of the High Court Division cannot be maintained in its entirety and it needs modification. Since we have heard the learned Counsel of both the parties and from the institution of the suit (Title Suit No.46 of 1991), 14(fourteen) years have elapsed, we are of the view that justice would be best served if the petition is disposed of finally without giving leave. Accordingly, the petition is disposed in the following terms:

> The impugned judgment and decree of the High Court Division so far as it relates to setting aside the *ex-parte* decree passed by the learned Subordinate Judge, Narayangonj in Title Suit No.46 of 1991 and cancelling the kabala dated 21.07.1992 being No.2386 executed and registered by the same Court in Title Execution Case No.1 of 1992 is maintained. The order rejecting the plaint is set aside. Title Suit No.46 of 1991 of the Court of Subordinate Judge, Narayangonj (now Joint District Judge) is restored to its file and number and shall proceed and be disposed of in accordance with law. The direction of the High Court Division upon defendant No.1 (now it will be the petitioners herein, being the heirs of the deceased defendant) to hand over the vacant possession of the suit land in favour of the plaintiffs is maintained. The direction of the High Court Division to allow defendant No.1(now it will be the petitioners herein) to withdraw taka 3,55,000˙00 deposited by him in Title Execution Case No.1 of 1992 is maintained. The awarding of cost of taka 1,00,000˙00 against defendant No.1 is set aside.

20. The judgment and decree of the High Court Division stands modified in the above terms.

21. Contempt Petition No.13 of 2011 is disposed of accordingly.

4 SCOB [2015] AD 11

APPELLATE DIVISION

PRESENT
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque
Mr. Justice Hasan Foez Siddique

JAIL PETITION NO.8 of 2011

From the judgment and order dated 31.01.2011 passed by the High Court Division in Death Reference No.170 of 2005 with Jail Appeal Nos.1430 of 2005, 1431 of 2005 and 1432 of 2005.)

Shahid Ullah @ Shahid and others: .....Petitioners

=Versus=

The State: .....Respondent

For the Petitioners	:	Mr. A. B. M. Bayezid, Advocate.
For the Respondent	:	Mr. Md. Salim, Deputy Attorney General.
Date of hearing	:	07.04.2013.

Section 302 of Penal Code,1860
Justification for death sentence:
The offence which these two condemned prisoners committed is most heinous and brutal. These two condemned prisoners along with other accused Mir Hossain, with cool brain, made a plan to hijack a baby taxi by killing the driver and according to that pre-plan they hired the C.N.G. baby taxi of the deceased as passengers and took the baby taxi to a lonely place and thereafter they murdered the baby taxi driver brutally. This type of crime is on the increase in our society. For hijacking a baby taxi or any other vehicle the hijackers do not hesitate for a moment to take the life of the innocent driver of the vehicle which is very much precious for the near and dear ones of that poor driver. This type of killers/murderers cannot and should not get any mercy from the court of law. There is no reason for showing any leniency or mercy to this type of offenders who are enemy for the whole society. So we are unable to accept the submission of the learned advocate for the condemned prisoners to reduce the sentence of death to life imprisonment. In our opinion this is a fit case for imposing death sentence on killers. ...(Para 15)

J U D G M E N T

Nazmun Ara Sultana, J.

1. Condemned prisoner Md. Shahid Ullah @ Shahid and Md. Saiful Islam @ Shahid have filed this jail petition against the judgment and order dated 31.01.2011 passed by the High

Court Division in Death Reference No.170 of 2005 with Jail Appeal Nos.1430 of 2005, 1431 of 2005 and 1432 of 2005.

2. These two condemned prisoner-petitioners along with another accused named Mir Hossaion were put on trial in Sessions Case No.597 of 2004, corresponding to G. R. Case No.81 of 2004 and Fatikchhari Police Station Case No.8(9) of 2004 under sections 302/34 of the Penal Code before the learned Sessions Judge, Chittagong.

3. The prosecution case, in short, was that deceased Reazul Karim @ Azim, the brother of the informant was a baby taxi driver. He used to ply C.N.G. vehicle bearing No.Chhatta-Metro-Tha-11-4571. On 19.05.2004 he went out with that vehicle from his house but did not come back. On 20.05.2004 the informant got information from Miraswarai Police Station that the dead body of his brother was recovered from the Datmara Takia Jalanti Rubber Plantation Garden by police. Receiving that news, the informant along with some other people went to that place and identified the dead body of his brother. He saw there 2 accused persons also in apprehended condition. At that time those 2 apprehended accused persons confessed before him and others that they along with accused Mir Hossain hired the C.N.G. baby taxi of the deceased with the intention to hijack the same and took the same along with the deceased-driver to the place of occurrence and there they brutally killed him and after killing while the accused persons were changing their blood-stained wearing clothes, the people of nearby market apprehended the present two condemned petitioners and interrogated them and the accused persons confessed that they murdered the brother of the informant. The other accused Mir Hossain managed to flee away. Being informed by the local people the police came to that place and as per showing of the apprehended accused persons they recovered the dead body of the deceased. The informant, thereafter, lodged the First Information Report on the basis of which the case was started. The police took up investigation of the case and after completion of investigation submitted charge sheet against all the three accused persons under sections 392/302/34 of the Penal Code. The trial court framed charge against all the three accused persons under sections 302/34 of the Penal Code. The charge so framed was read over and explained to the accused persons who pleaded not guilty and claimed to be tried. The prosecution examined 11 witnesses and tendered two witnesses. The defence adduced no witness. The accused persons were examined under section 342 of the Code of Criminal Procedure and that time also they pleaded innocence only and informed the court that they would not adduce any witness. The trial court, on consideration of the evidence adduced by the prosecution and the confessional statements of all the three accused persons recorded by a Magistrate, 1st class, found all the three accused persons guilty of the charges levelled against them and convicted them thereunder and sentenced these two present condemned prisoners to death and the other accused Mir Hossain to imprisonment for life along with fine.

4. On a reference made by the trial court for confirmation of the death sentences of these two condemned prisoners Death Reference No.170 of 2005 was registered. All the three accused persons also preferred three separate jail appeals as already mentioned above. A Division Bench of the High Court Division heard the death reference and all the three jail appeals analogously and by the impugned judgment accepted the death reference and dismissed all the three jail appeals affirming the judgment and order of conviction and sentence passed by the trial court.

5. The condemned prisoner Md. Saiful Islam @ Shahid in his jail petition has stated that they were entangled in this case falsely on mere suspicion by some terrorist of their locality

who beat them mercilessly causing bleeding injuries on their persons and thereafter handed them over to the police and the police also tortured them inhumanly and thus obtained the so-called confessional statements from them against their will. That the confessional statements are not voluntary and true. The other condemned prisoner Shahid Ullah @ Shahid also in his petition, has stated a same story and has stated further that he is physically handicapped- his right leg is crippled and he is not able to move normally.

6. Mr. A. B. M. Bayzid, the learned advocate for the condemned prisoner-petitioners has made argument focusing mainly on these two petitions of the condemned prisoners. The learned advocate has argued to the effect only that both these two condemned prisoners, in fact, were not at all involved in the alleged murder of the deceased and that they were caught by local people on suspicion only and were beaten mercilessly causing bleeding injuries on their persons and that the police also tortured them inhumanly and compelled them to make the so-called confessional statements as per the dictation of the police and that these confessional statements are not at all voluntary and true. The learned advocate has submitted also that the condemned prisoner Shahid Ullah @ Shaid is physically handicapped whose right leg is crippled and he is unable to move normally and has argued that it is not believable at all that such physically handicapped man could murder any person in the manner as stated by the prosecution. The learned advocate for the condemned prisoners has argued also that the death sentences imposed on these two petitioners have been too harsh and that for the ends of justice this Division may reduce the sentence of these condemned prisoners.

7. Mr. Md. Salim, the learned Deputy Attorney General, on the other hand, has made submissions to the effect that this is a very heinous crime and in this case the commission of this heinous crime by these two condemned prisoners have been proved beyond all reasonable doubt by overwhelming evidence adduced by the prosecution and that considering the very nature and gravity of this offence no lenient view can be taken and no mercy can be shown to these condemned prisoners by reducing their sentences to imprisonment for life even.

8. We have considered the submissions of the learned advocates of both the sides and gone through the impugned judgment, that of the trial court and the evidence on record.

9. The prosecution case as it appears from the F.I.R., the evidence of the prosecution witnesses and also the 164 statements of all the three accused persons is that the deceased Reazul Karim @ Azim was a baby taxi driver and he used to ply a C.N.G. vehicle. That on 19.05.2004 he went out of his house with that C.N.G. vehicle and the three accused persons hired his vehicle with intention of hijacking the same after murdering the driver Reazul Karim @ Azim and accordingly, after going some distance they stopped that vehicle at Datmara Takia Jalanti Rubber Plantation Garden and these two condemned prisoners took the deceased Reazul Karim @ Azim inside that Rubber Plantation Garden and there they brutally murdered Reazul Karim @ Azim by inflicting knife blows indiscriminately on his persons causing grievous bleeding injuries on various parts of his body including some vital parts and as a result Reazul Karim @ Azim died there. Thereafter while these accused persons were about to flee away with that baby taxi the local people saw them with their blood stained clothes and on suspicion they caught these 2 present condemned-petitioners and thereafter, on their asking, these condemned-petitioners confessed that they murdered the driver of that C.N.G. baby taxi. The local people then informed the police and the police came and thereafter as per showing of these condemned-petitioners the police along with the local people recovered the dead body of Reazul Karim from that Rubber Plantation Garden.

10. It appears that the above prosecution case has been proved by sufficient reliable and convincing evidence including the confessional statements of all the three accused persons. Both the trial court and the High Court Division have discussed all these evidence and the confessional statements of all the three accused persons elaborately in their respective judgment.

11. It appears that among the 11 prosecution witnesses the P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, P.W.7 and P.W.8 have deposed before the court to the effect that both the accused condemned prisoners Md. Saiful Islam @ Shahid and Md. Shahid Ullah @ Shahid made extra judicial confessional statements before them stating that they and the other accused Mir Hossain, with an intention to hijack the baby taxi of the deceased, hired that baby taxi as passengers and went with that baby taxi near the Datmara Takia Jalanti Rubber Plantation Garden and took the deceased driver inside that Rubber Plantation Garden and there they brutally murdered him by inflicting knife blows indiscriminately causing grievous bleeding injuries on his person. From the evidence of these prosecution witnesses it has also been proved beyond all reasonable doubt that as per these extra judicial confessional statements of these two accused condemned prisoners and also as per their showing the dead body of the deceased was recovered from that Rubber Plantation Garden. Besides these evidence of the prosecution witnesses the judicial confessional statements of all the three accused persons under section 164 of the Code of Criminal Procedure also have corroborated this prosecution case fully. In their judicial confessional statements all the three accused persons have corroborated the above stated prosecution case entirely, In their judicial confessional statements these 2 condemn-petitioners have stated that they all made a pre-plan to hijack a baby taxi and according to that pre-plan, they on the night of occurrence, hired the baby taxi of the deceased as passengers and took the baby taxi to Datmara Takia Jalanti Rubber Plantation Garden and there they asked the driver to stop the baby taxi and took the driver inside that Rubber Plantation Garden and murdered him there brutally by inflicting knife blows on his person indiscriminately. The other accused Mir Hossain also has made confessional statement supporting the prosecution case and also the confessional statements of these two condemned prisoners. It appears that both the trial court and the High Court Division, on meticulous examination of all aspects and the facts and circumstances and other evidence on record found all the 3 confessional statements of the accused persons voluntary and true.

12. Mr. A. B. M. Bayezid, the learned advocate for the accused petitioners though has alleged before us that these confessional statements were not voluntary at all, these were extracted by inhuman torture, but he could not point out anything before us in support of this argument. Rather, it appears that during the whole trial of the case these condemned accused petitioners or the other accused Mir Hossain did not make any prayer even for retraction of their confessional statements making allegations that those were not voluntary and were extracted from them under tortured. During examination under section 342 of the Code of Criminal Procedure also they did not deny the voluntariness or truth of these confessional statements though these were specifically brought to their notice by the trial Judge at that time also. The learned Magistrate who recorded the confessional statements of the accused persons, also was examined by the prosecution as P.W.12 and it appears that to this recording magistrate also, from side of these accused persons, no suggestion even was put to the effect that these confessional statements were not voluntary and true. The learned advocate for the condemned-petitioners has drawn our attention to the jail petition submitted by the condemned prisoners and argued that in fact these accused petitioners were caught by local

terrorists from their houses and they were beaten mercilessly by those terrorists and thereafter were entangled in this case falsely on suspicion. But it appears that during the whole trial of the case and even before the High Court Division no such case was put forward from any of the accused persons. During cross-examination of the prosecution witnesses also no such suggestion even was put to any of the witnesses, nor during examination under section 342 of the Code of Criminal Procedure any single statement alleging any such plea was made by any of the accused persons except the plea of innocence only. So in the circumstances we are unable to put any reliance on the mere statements made in the jail petition by the condemned-petitioners.

13. However, we find that in this case there are overwhelming evidence from the side of the prosecution to prove its case. The evidence of the prosecution witnesses have proved sufficiently that immediately after the murder of the deceased both these condemned prisoners were caught by the local people with their blood stained wearing clothes and at that time, on their asking, both these condemned prisoners confessed that they with an intention to hijack a C.N.G. baby taxi murdered the driver of that baby taxi and thereafter as per showing of these condemned prisoners the dead body of the deceased driver was recovered. The evidence of the prosecution witnesses have been corroborated fully by the own confessional statements of these condemned prisoners which have been found voluntary and true by both the trial court and the appellate court.

14. We also do not see anything to find the confessional statements of these two accused condemned prisoners not voluntary and true. We do not find anything else also to differ with the findings of the trial court and the appellate court as to guilt of these two condemned prisoners. In our opinion also the charges against these two condemned prisoners have been proved beyond all reasonable doubt.

15. The offence which these two condemned prisoners committed is most heinous and brutal. These two condemned prisoners along with other accused Mir Hossain, with cool brain, made a plan to hijack a baby taxi by killing the driver and according to that pre- plan they hired the C.N.G. baby taxi of the deceased as passengers and took the baby taxi to a lonely place and thereafter they murdered the baby taxi driver brutally. This type of crime is on the increase in our society. For hijacking a baby taxi or any other vehicle the hijackers do not hesitate for a moment to take the life of the innocent driver of the vehicle which is very much precious for the near and dear ones of that poor driver. This type of killers/murderers cannot and should not get any mercy from the court of law. There is no reason for showing any leniency or mercy to this type of offenders who are enemy for the whole society. So we are unable to accept the submission of the learned advocate for the condemned prisoners to reduce the sentence of death to life imprisonment. In our opinion this is a fit case for imposing death sentence on killers. The trial court rightly imposed the death penalty on these two condemned prisoners and the High Court Division also rightly affirmed the sentences of death of these two condemned prisoners.

16. In the circumstances this jail petition is dismissed.

4 SCOB [2015] AD 16

APPELLATE DIVISION

PRESENT:
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.281 of 2010
(From the judgment and order dated 26.08.2009 passed by the High Court Division in Writ Petition No.3237 of 2008).

Jibon Bima Corporation and others : .....Appellants.

=Versus=.

Mohammad Abu Kawsar Jalil and others: .....Respondents.

For the Appellants.	:	Mr. Mahbubey Alam, Senior Advocate, instructed by Mrs. Mahmuda Begum, Advocate-on-Record.
For the Respondents.	:	Mr. Abdul Wadud Bhuiyan, Senior Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

Date of Hearing : The 2nd September, 2015
Date of Judgment : The 2nd September, 2015

Jibon Bima Corporation (Officers and Employees) Service Regulations, 1992:
Sub-regulations (1) and (2) of Regulation 12:
If more than one employee is appointed at the same time, their seniority will be counted on the basis of merit list prepared by the selection committee and not from the date of their joining. ...(Para 17)

J U D G M E N T

Syed Mahmud Hossain, J:

1. This appeal, by leave, is directed against the judgment and order dated 26.08.2009 passed by the High Court Division in Writ Petition No.3237 of 2008 making the Rule absolute.

2. The facts, leading to the filing of this appeal, are précised below:

The respondents herein as the petitioners filed the writ petition before the High Court Division. Their case, in short, is that the respondents were recruited to a class-1 post of

Assistant Manager by way of written examination conducted by the Institute of Business Administration (IBA) and accordingly, the letters of appointment were issued on 05.09.1994.

3. At the time of appointment to the post of Assistant Manager, it was clearly mentioned in the letter of appointment that seniority would be counted from the date of their joining the post. The respondents had joined the post of Assistant Manager and were given seniority from the date of their joining. A gradation list was prepared for the first time regarding the position of the respondents, which was unquestionable for a long time. No one had ever raised any objection about the seniority among them, which reflects the inter-se seniority. After their appointment the Corporation had prepared a Master Register where the seniority of the respondents was clearly and correctly reflected. The Master Register of the Corporation is kept as a matter of record. Thereafter the respondents were promoted to the post of Deputy Managers following the original list prepared in 1994. After the expiry of more than 12 years of the preparation of the gradation list, no objection had ever been raised challenging the position of the respondents and no one claimed seniority over the respondents.

4. All of a sudden, the appellants, who were the respondents in the writ petition, circulated office order under Memo No.JIBIC/Ka:Pro/1164/2006 dated 29.05.2006 where the position of these respondents was adversely affected and they were shown junior to those who had admittedly been their junior. Challenging the office order dated 29.05.2006, the respondents as the petitioners filed the writ petition and obtained Rule Nisi.

5. Appellant No.3 as respondent No.3 contested the Rule by filling affidavit-in-opposition controverting all the material statements made in the writ petition. His case, in short, is that the gradation/seniority list was corrected as per sub-regulation (2) of Regulation 12 of the Jibon Bima Corporation (Officers and Employees) Service Regulations,1992 (in short, the Regulations).

6. The learned Judges of the High Court Division upon hearing the parties by the judgment and order dated 26.08.2009 made the Rule absolute and directed the appellants to follow this judgment at the time of next promotion of the respondents.

7. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the writ-respondents as the leave petitioners moved this Division by filing Civil Petition for Leave to Appeal No.2234 of 2009, in which, leave was granted on 09.05.2010, resulting in Civil Appeal No.281 of 2010.

8. Mr. Mahbubey Alam, learned Senior Advocate, appearing on behalf of the appellants, submits that the High Court Division fell into an error in passing the impugned judgment by only considering the provision of Regulation 12(1) of Regulations without at all taking into consideration Regulation 12(2) which controls Sub-Regulation (1) of Regulation 12 and as such, the impugned judgment delivered by the High Court Division should be set aside.

9. Mr. Abdul Wadud Bhuiyan, learned Senior Advocate, appearing on behalf of the respondents, on the other hand, supports the impugned judgment. He also submits that the respondents have been enjoying seniority for more than 12 years and as such, they have acquired vested right which cannot be taken away by a stroke of pen and as such, the impugned judgment delivered by the High Court Division is justified.

10. We have considered the submissions of the learned Senior Advocates of both the sides, perused the impugned judgment and the materials on record.

11. Before entering into the merit of the appeal, we would like to quote the grounds, for which, leave was granted. The grounds are quoted blow:

> "The learned Judges of the High Court Division fell into an error of law in passing the impugned judgment by only considering the provision as contained in Regulation 12(1) of the Jibon Bima Corporation (Officers and Employees) Service Regulation,1992 without at all taking into consideration Regulation 12(2) which controls sub-regulation (1) of Regulation 12 and as such, the impugned judgment should be set aside.
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> Non-consideration of Annexure-5 to the affidavit-in-opposition by the High Court Division led it to arrive at an erroneous decision inasmuch as the high powered committee correctly interpreted Regulation 12(1) and 12(2) of the Jibon Bima Corporation (Officers and Employees) Service Regulations,1992 and the interpretation given by the Corporation deserves to be honoured unless it is perverse or contrary to law.
>
> The observation of the High Court Division that "on the other side the statement by the respondents is not supported by the law" is the product of non-reading and non-consideration of the materials on record and also due to non-application of their minds to facts and circumstances of the case, more so when the contentions of the writ-respondents-petitioners hereof were not controverted and denied by the writ-petitioners-respondents hereof by filing any affidavit-in-reply to the affidavit-in-opposition."

12. Respondent Nos.1-11 were recruited to a class-1 post of Assistant Manager by way of written examination conducted by the Institute of Business Administration (IBA) and accordingly, the letters of appointment were issued on 05.09.1994. It appears from the record that the respondents had joined the post of Assistant Managers and were given seniority from the date of their joining. The respondent stated that after their appointment, the Corporation had prepared a master register where seniority of these respondents was mentioned correctly. These respondents were promoted to the post of Deputy Managers following the original list prepared in 1984. These respondents also stated that the Corporation published seniority/gradation list in 1994 manifesting the position regarding inter-se seniority where these respondents were shown in proper places as per the existing Rules and Regulations.

13. These respondents contended that after being promoted to the post of Deputy Manager, the Board approved confirmation of these respondents. All of a sudden, the appellants, who were the respondents in the writ petition circulated office order under Memo No.JIBIC/Ka:Pro/1164/2006 dated 29.05.2006 where the position of these respondents was adversely affected and they were shown junior to those who had been admittedly their junior.

14. Now it is to be resolved whether the office order dated 29.05.2006 fixing inter-se seniority of the respondents and others was issued in accordance with law. In order to resolve the issue it is necessary to quote sub-regulations (1) and (2) of Regulation 12, which are quoted as under:

"12z ®Sé¡ùa¡-(১) এই প্রবিধানের অন্যান্য বিধানাবলী সাপেক্ষে কোন পদে কোন কর্মচারীর জ্যেষ্ঠতা সেই পদে তাহার যোগদানের তারিখ হইতে গণনা করা হইবে।

(২) একই সময়ে একাধিক কর্মচারী নিয়োগপ্রাপ্ত হইলে, নিয়োগকারী কর্তৃপক্ষ সংশ্লিষ্ট h¡R¡C L¢j¢V LaL f¤ÐaLa ®jd¡ তালিকা ভিত্তিক সুপারিশ অনুসারে উক্ত কর্মচারীদের পারস্পরিক জ্যেষ্ঠতা স্থির করিবে।"

15. Sub-regulation (1) provides that the seniority of any officer or employee would be counted from the date of their joining the post subject to others provisions of the Regulations. Sub-regulation (2) provides that if at a time several employees are appointed, the appointing authority shall fix the date of their seniority according to the merit list prepared by the selection committee.

16. The High Court Division came to a finding that on perusal of sub-regulation (1) of Regulation 12 of the Service Regulations it did not find any basis of the contention that the authority had got the right to make any rearrangement in the gradation list at any time. Having gone through the judgment, we find that the High Court Division did not at all take any notice of sub-regulation (2) of Regulation 12.

17. Having considered the sub-regulations (1) and (2) of Regulation 12, in general, and sub-regulation (2) thereof in particular, we find that in fact, sub-regulation (2) controls sub-regulation (1) of Regulation 12. If more than one employee is appointed at the same time, their seniority will be counted on the basis of merit list prepared by the selection committee and not from the date of their joining. A different interpretation of sub-regulations (1) and (2) other than the interpretation made above will make sub-regulation (2) meaningless. Therefore, the authority corrected the mistake by restoring the spirit of the letters of sub-regulation (2) of Regulation 12 by issuing the office order under memo dated 29.05.2006.

18. In the light of the findings made before, we find substance in this appeal. Accordingly, the appeal is allowed without any order as to costs and the impugned judgment delivered by the High Court Division is set aside.

4 SCOB [2015] AD 20

Appellate Division

PRESENT
Madam Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO. 14 OF 2005
(From the judgement and order dated 16th May, 2004 passed by the High Court Division in Death Reference No.34 of 2001 with Jail Appeal No. 3201 of 2001)

Rokia Begum alias Rokeya Begum ... Appellant

=Versus=

The State ... Respondent

For the Appellant :Mr. Md. Nawab Ali
Advocate-on-Record

For Respondents :Mr. Shohrowardi,
Deputy Attorney General,
instructed by
Mr. Md. Zahirul Islam
Advocate-on-Record

Date of hearing : The 3rd of April, 2013

Meaning of life sentence:
The way it has been interpreted, the word "life" does not bear its normal linguistic meaning. In other words, a person sentenced to imprisonment for life does not necessarily spend his life in prison, although section 45 of the Penal Code defines "Life" as the life of a human being unless the contrary appears from the context. The given interpretation has been arrived at with the aid of section 57 of the Penal Code, which provides that in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 30 (thirty) years. This last mentioned section read with relevant provision of the Jail Code effectively means that a person sentenced to imprisonment for life will be released after spending a maximum of $22\frac{1}{2}$ years in prison. Under section 35A of the Code of Criminal Procedure the period of time spent by the accused in custody during pendency of the trial would be deducted from his total sentence. Thus we find that in many serious murder cases, where the trial lasts for many years, the accused who is found guilty and sentenced to imprisonment for life gets released after serving a total of 22½ years including the period spent in custody during trial. ...(Para 24)

JUDGEMENT

MUHAMMAD IMMAN ALI, J:-

1. This appeal, by leave, is directed against the judgement and order dated 16.05.2004 passed by the High Court Division in Death Reference No.34 of 2001 and the connected Jail Appeal No.3201 of 2001 accepting the reference and confirming the death sentence and dismissing the jail appeal thus maintaining the judgement and order of conviction and sentence dated 08.08.2001 passed by the Sessions Judge, Manikgonj in Sessions Case No.2 of 2001.

2. The prosecution case, in brief, was that the informant's mother-in-law, accused Rokeya Begum and her adopted son accused Farid alias Reza used to work at Nizam's Chinese Restaurant, Road No.126, House No.1/B, Gulshan. Approximately two months prior to filing of the case his mother-in-law took his sister-in-law Surja Begum (deceased victim) from his residence to her residence at Bangla Motor. On 16.06.2000 at about 10.30 p.m. his mother-in-law along with accused Farid came to the informant's house at Manikgonj and told him that Surja had gone out of the house at 11.00 a.m. with Tk.3,300/- and her whereabouts could not be traced. At that time both Rokeya Begum and accused Farid were found to be sweating. Rokeya Begum was found barefooted and on query by her daughter, i.e. the informant's wife, as to why she was not wearing her sandals, Rokeya Begum told her that at the time of boarding the bus one of the sandals fell and that is why the other one was thrown away. Rokeya Begum and Farid had their meal at the informant's house and they stayed there for the night and in the morning they left for Dhaka. At about 7.00 a.m. the informant came to know from a co-villager that a dead body was found in the sugarcane field of co-villager Jaber Mollah. Having heard this, the informant went there and identified the dead body as that of his sister-in-law Surja Begum. Her throat was found tied with a scarf and the eyes were found to be damaged. The informant found a pair of shoes and one piece of sandal by the side of the dead body and the said sandal was identified as that of Rokeya Begum. The informant came to Dhaka and at first he went to the Chinese Restaurant where his mother-in-law used to work. There he met one of his co-villagers namely Siraj and enquired about his mother-in-law, sister-in-law and accused Farid. Siraj told him that all three left for Surja Begum's maternal uncle's house at Adamji on the previous day, i.e. 15.06.2000 at 5.00 p.m. The informant got suspicious and went to the residence of his mother-in-law at Bangla Motor. The informant disclosed to his mother-in-law about the recovery of the dead body of Surja Begum and took his mother-in-law to his house at Manikgonj and there she confessed to have killed Surja Begum with the help of accused Farid alias Reza. It is alleged that the informant's mother-in-law had an illicit relationship with accused Farid and since Surja Begum disliked and protested it she was killed by strangulation. Hence, the informant lodged the First Information Report (F.I.R.) on 18.06.2000 before the Officer-in-Charge of Manikgonj Police Station, Manikgonj against the condemned prisoners under sections 302/34 of the Penal Code. Accordingly, Manikgonj P.S. Case No.13 dated 18.06.2000 corresponding to G.R. No.307/2000 was started.

3. The Investigating Officer visited the place of occurrence, prepared the sketch map with index, prepared inquest report, examined the witnesses and recorded their statements under section 161 of the Code of Criminal Procedure. After completion of investigation he submitted Charge-sheet No.113 dated 30.11.2000 under sections 302/34 of the Penal Code against the two accused persons.

4. The case was ultimately transferred to the Court of Sessions Judge, Manikgonj where it was numbered as Sessions Case No.02 of 2001. Charge was framed under sections 302/34 of the Penal Code against the accused persons and read over and explained to them, to which they pleaded not guilty and claimed to be tried. During trial the prosecution examined as many as 20 (twenty) P.Ws. who were cross-examined by the defence, but the defence did not examine any witness.

5. The defence case, as it transpires from the trend of cross-examination was that the accused persons were innocent and they had been falsely implicated in the case.

6. After close of recording of evidence, the accused persons were examined under section 342 of the Code of Criminal Procedure. They repeated their innocence.

7. The Sessions Judge, Manikgonj after hearing the parties and upon consideration of the evidence and materials on record convicted the accused persons under sections 302/34 of the Penal Code and sentenced them to death by his judgement and order dated 08.08.2001.

8. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was registered as Death Reference No.34 of 2001.

9. Before the High Court Division Jail Appeal No.3201 of 2001 was preferred by the condemned petitioner, which was heard along with the death reference. By the impugned judgement and order, the High Court Division accepted the reference and dismissed the jail appeal and confirmed the judgement and order of conviction and sentence passed by the Sessions Judge, Manikgonj.

10. The condemned prisoners filed Criminal Petition for Leave to Appeal No.311 of 2004 with Jail Petition No.3 of 2005.

11. Mr. Md. Nawab Ali, submitted that since it was a case of capital sentence the right of appeal is guaranteed under the Constitution. He further submitted that he would not argue on merit rather he would argue only on ground of sentence. After hearing, leave was granted only to consider the sentence of the condemned petitioner.

12. Mr Muhammad Nawab Ali, the learned Advocate-on-Record appearing on behalf of the appellant submitted that the case against the petitioner is one of murdering her own daughter. This, he submitted was unnatural to contemplate. He submitted that there is no ocular or direct evidence against the petitioner and she has been convicted on the basis of tenuous circumstantial evidence. He submitted that even if the petitioner had any part in the murder, which is highly unlikely, it was neither proper nor just to award the death sentence in the facts and circumstances of the case. He prayed that the sentence of death may be commuted, keeping in view that the petitioner is an old lady who has suffered through the loss of her own daughter.

13. Mr. Shohrowardi, the learned Deputy Attorney General, appearing on behalf of the State-respondent made submissions in support of the impugned judgement and order of the High Court Division. He submitted that when a mother plots and carries out the murder of her own child in order to cover up her illicit relationship, she does not deserve any sympathy. He submitted that the prosecution has been able to prove her involvement in the murder and

there is no scope to reduce the sentence in the facts and circumstances disclosed by the evidence on record.

14. We have considered the submissions of the learned Advocate-on-Record for the appellant and the learned Deputy Attorney General for the Respondent and perused the impugned judgement of the High Court Division and other connected papers on record.

15. The relevant law

The law relating to murder in Bangladesh is based upon sections 299 and 300 of the Penal Code which define culpable homicide and murder. Just by way of comparison, it is noted that the same law applies in neighbouring India. However, over the years the procedures followed and matters considered before passing sentence for murder under section 302 of the Penal Code has varied. In Bangladesh the sentence for murder is death, or imprisonment for life. Hence, it is the normal course upon finding the accused guilty of an offence under section 302 of the Penal Code to sentence him to death unless any extenuating circumstances lead the Court to award the lesser sentence of imprisonment for life, and for that he would have to give his reasons. So, effectively the burden lies on the accused to provide grounds for awarding the lesser sentence.

16. On the other hand, in India the sentence for murder under section 302 of the Penal Code is similarly either death or life imprisonment, but the difference is that life sentence is considered to be the norm and the sentence of death is to be awarded only in the rarest of rare cases.

17. At this juncture it may be noted that in Bangladesh there is no longer in existence any provision for a sentence hearing, which existed under sections 250K(2) and 265K(2) of the Code of Criminal Procedure which were introduced by the Law Reforms Ordinance, 1978 (Ordinance No. XLIX of 1978) which provided as follows:

> "250K(2):``Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 349 or section 562, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law".
>
> 265K(2):``If the accused is convicted, the Court shall, unless it proceeds in accordance with the provisions of section 562, hear the accused on the question of sentence, and then pass sentence on him according to law".

18. These two provisions provided the opportunity to the accused to plead for a lesser sentence.

19. However, these two provisions were subsequently omitted by section 21 of Ordinance XXIV, 1982 and section 3 of Ordinance XXXVII, 1983 respectively. On the other hand, section 325(2) of the Indian Code of Criminal Procedure, 1973 provides for a hearing of the accused on question of sentence, which was held in the case of ***Santa Singh Vs. State of Punjab*** reported in ***AIR 1976 (SC) 2386*** to be a mandatory provision. In the said decision it was held as follows:

> "This Court has taken the view that under the provisions of the Code of Criminal Procedure, 1973, it is incumbent on the Sessions Judge delivering a judgement of conviction to stay his hands and hear the accused on the question of sentence and give him an opportunity to lead evidence which may also be allowed to be rebutted by the prosecution".

20. In the context of Bangladesh it is noted that in the prevailing adversarial system, there is very little scope for any accused persons to urge any plea in mitigation during the course of trial or at the time of examination under section 342 of the Code of Criminal Procedure. The accused practically stands by while his lawyer pleads for him. At the time of examination under section 342 of the Code of Criminal Procedure he is simply told what evidence has been placed against him and asked to comment on that evidence and he is asked whether he will produce any defence witness or say anything further. Having pleaded not guilty all through the trial, it is felt that any plea in mitigation at this stage would weaken the case of the accused. So, he says nothing more. In the absence of a sentence hearing there is no opportunity for the accused to bring to the notice of the Court any extenuating circumstances. The learned Judge conducting trial considers the points of view of the accused only so far as it is exposed during cross-examination of the prosecution witnesses and the statement of the accused given at the time of examination under section 342 of the Code of Criminal Procedure. It must be borne in mind that those aspects elicited by the defence counsel during cross-examination of prosecution witnesses are merely with the view to exonerate the accused from the charge levelled against him. The mitigating circumstances bearing around the accused, his family, social, economic and educational background etc. are seldom given any mention or importance. Thus there is little scope for the trial Judge to consider any mitigating or extenuating circumstances other than those directly apparent from the prosecution evidence as having existed at the time of commission of the offence. This in my opinion puts the accused at a serious disadvantage so far as sentencing is concerned. Moreover, there being no sentencing guidelines, the tendency is for trial Judges to award the highest possible sentence provided by the law.

21. Sentence of death or imprisonment for life:

As mentioned earlier, according to the prevailing decisions in Bangladesh, the sentence for murder under section 302 of the Penal Code is death or imprisonment for life and also fine. The dichotomy of awarding sentence of death or life imprisonment has been raging for decades across the globe. As of the present day 35 out of 50 States in the USA still retain the death penalty. The countries of the European Union as well as European countries outside the Union have abolished the death penalty. On the other hand, India, being the largest democracy of the world has retained the death penalty.

22. England abolished the death penalty:

The Royal Commission on Capital Punishment 1949-53 was set up to consider and report whether "capital punishment for murder should be limited or modified". The Commission recommended retention of capital punishment unless there was overwhelming public support for abolition, which there wasn't. Under the terms of the Murder (Abolition of Death Penalty) Act 1965 hanging was suspended for an experimental period of five years. On the 16th of December 1969, the House of Commons reaffirmed its decision that capital punishment for murder should be permanently abolished. However, the death penalty was retained for offences like treason and piracy with violence until 1998. In 1999 the home secretary signed the sixth protocol of the European Convention of Human Rights which formally abolished the death penalty in the UK and ensured it could not be brought back.

23. Upon scrutiny of the 35th Report of the Law Commission on Capital Punishment, 1967, India retained the death penalty. There was lengthy discussion on the issue by the Indian Supreme Court in the case of ***Bachan Singh Vs. the State of Punjab (1980)2 SCC 684*** (report published in 1967). Suffice it to say that India has found the sentence of death to

be lawful penalty to be awarded, whereas in England death penalty was not favoured as a proper or necessary punishment.

24. Meaning of life sentence:

It can be stated that sentence of "imprisonment for life" as used in Bangladesh is utterly a misnomer; indeed it appears to be an erroneous interpretation. The way it has been interpreted, the word "life" does not bear its normal linguistic meaning. In other words, a person sentenced to imprisonment for life does not necessarily spend his life in prison, although section 45 of the Penal Code defines "Life" as the life of a human being unless the contrary appears from the context. The given interpretation has been arrived at with the aid of section 57 of the Penal Code, which provides that in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 30(thirty) years. This last mentioned section read with relevant provision of the Jail Code effectively means that a person sentenced to imprisonment for life will be released after spending a maximum of $22\frac{1}{2}$ years in prison. Under section 35A of the Code of Criminal Procedure the period of time spent by the accused in custody during pendency of the trial would be deducted from his total sentence. Thus we find that in many serious murder cases, where the trial lasts for many years, the accused who is found guilty and sentenced to imprisonment for life gets released after serving a total of 22½ years including the period spent in custody during trial. Hence, the sentence of imprisonment for life imposed at the time of delivery of judgement appears to be a lenient sentence and may in the minds of some appear to be not a proper sentence, especially when some horrific facts are disclosed in evidence.

25. Criminal justice in Bangladesh is guided by the Penal Code, 1860, the Code of Criminal Procedure, 1898 and the Evidence Act, 1872, all vestiges of British rule, which ended 66 years ago. The law in England has over the years transformed and developed and looks nothing like the law which the British left behind for us. Just to give one example, which is relevant in the present context, life sentence in England can mean any period of sentence measured in years and months which the Court feels is an appropriate period in the facts and circumstances of the case and can extend to a sentence of imprisonment for life which would mean that the prisoner would not be allowed to leave the prison throughout his natural life. Such a punishment is arguably "a fate worse than death". Reference may be made to the famous case of the Moors murder where the accused Ian Brady and Myra Hindley were found guilty of murder of several children which took place between July 1963 and October 1965. Both the accused were sentenced to imprisonment for life and several appeals against their life sentence were made. But they were never released. Myra Hindley died in prison when she was aged 60; the other convict was declared insane and has been repeatedly asking to be allowed to die. This case clearly shows that for a criminal sentenced of imprisonment for life meaning the rest of his life, death would have been a softer option. Hindley who was sentenced to life in 1966 just after the death penalty was abolished wrote in a letter; "I knew I was a selfish coward but I could not bear the thought of being hanged. Although over the years I wish I had been" (as reported on BBC news dated 29.02.2000).

26. This day we find that in many countries, including England, after a sentence of life imprisonment is imposed the Judge may specifically order that the prisoner is not to be released before the expiry of a term of years which can be any number of years ranging from 10 to 60 years or even for the rest of his natural life, so long as the Judge follows the sentencing guideline issued by the appropriate authority. In the past the Lord Chief Justice

sitting in the Court of Appeal issued sentencing guidelines by way of judgements. The Sentencing Council for England and Wales was established in April 2010, replacing the Sentencing Guidelines Council and the Sentencing Advisory Panel, its predecessor bodies.

27. In Bangladesh there is no specific authority to issue any sentencing guideline and as a result Judges are guided only by the sentences provided in the Penal Code and other special laws, and life sentence, in some cases, turns out to be a relatively lenient sentence. It is in this backdrop that many Judges choose the sentence of death for crimes which they consider to be most heinous since that effectively is the harshest punishment. Had there been any provision in our law for gradation of the life sentence or for expressing the view that the convict shall not be released during his life time, or for a specified number of years, then perhaps the Judges would opt for the longer life imprisonment, which may be considered a more harsh punishment than death. Moreover, as we have explained above, the trial procedure does not allow for any effective plea in mitigation after the verdict is pronounced. As a result the sentencing in most cases is arbitrary and there is no scope for the accused to plead for a lesser sentence or for the trial judge to take into account any mitigating circumstances since there was no opportunity to place any before him.

28. In considering the sentence of the appellant before us, we may aptly refer to the decision in Nalu Vs. The State, 32 BLD (AD) 247 where this Division referred to the following mitigating circumstances which are also relevant in the facts of the instant case:

(1) The condemned prisoner has no history of prior criminal activity.
(2) The condemned prisoner is not likely to commit any further act of violence.
(3) She has been in the condemned cell since 8.8.2001, i.e. more than 11 years during which period the hangman's noose has been dangling in front of her eyes.

29. We may also refer to the case of Hazer Ali Mandal and others Vs. The State, 37 DLR (AD) 87. In that case the conviction and death sentence was based on circumstantial evidence. The High Court Division commuted the sentence of death to one of imprisonment for life. This Division upheld the decision of the High Court Division.

30. Returning to the facts of the instant case, it appears that there is no direct evidence against the appellant of having taken any part in the killing of the victim, her own daughter. The confessional statement of the co-accused is no evidence by itself when considering the complicity of another co-accused, and can only be used to lend support to other evidence. In her own confessional statement the appellant did not inculpate herself in the assault on the victim. However, her subsequent conduct in confessing before the witnesses points a finger towards her complicity, but not to the extent of it. In such circumstances, the conviction of the appellant under section 302/34 cannot be said to be without basis or illegal. But in the light of the evidence it would not be consonant to justice to impose capital punishment on the appellant.

31. With regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light to this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent

there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death. It is noted that the High Court Division in rejecting this plea in other cases referred to the case of Abed Ali Vs. the State, 10 BLD (AD) 89. In that case this Division noted the observation of the High Court Division in the case of Nowsher Ali and other Vs the State, 39 DLR 57, that delay in execution cannot by itself constitute a mitigating circumstance but a delay of six years may be considered for commutation of death sentence to life imprisonment (emphasis added). When the case of Nowsher Ali came before this Division, it was held that "In some cases inordinate delay in execution of death sentence may be considered a ground for commuting it to transportation for life but some delay such as in this case should not be considered to be a ground for commutation, particularly when the delay is not due to any laches of the prosecution. In that case the condemned prisoner had been in the condemned cell for about 4 years. However, their Lordships in fact commuted the death sentence on the ground of bitter matrimonial relationship which played a part. In the instant case, when the matter was heard by the High Court Division the convict had been in the condemned cell for less than three years, and hence the plea was not put forward. However, the convict has now been in the condemned cell for more than $11\frac{1}{2}$ years, which is beyond the threshold of six years mentioned by this Division in the Abed Ali case cited above. Thus the length of period by now can be taken as one of the reasons to commute the sentence of death to one of imprisonment for life.

32. In the light of the above discussion, we are of the view that the judgement of the High Court Division be upheld so far as it relates to conviction of the appellant under section 302/34 of the Penal Code. The Criminal Appeal is, therefore, dismissed. However, in the light of the discussion regarding sentence, we are of the view that in the facts and circumstances of the case justice will be sufficiently met if the sentence of death is commuted to one of imprisonment for life. Accordingly, the sentence of the convict Rokeya Begum alias Rokaya Begum is modified to imprisonment for life.

33. With regard to Criminal Petition for Leave to Appeal No.342 of 2007, filed by condemned prisoner Faridur Rahman @ Reza, Mr. Md. Nawab Ali made similar submissions with a view to commutation of the sentence of death to one of imprisonment for life. He submitted that the condemned prisoner is in the prime of his life and has suffered in the condemned cell for over 11 years. However, unlike the evidence against the appellant Rokeya, the inculpatory confession of accused Foridur Rahman alias Forid alias Raza establishes the case against him beyond any shadow of doubt. This considered alongside the other circumstantial evidence against him, we are not inclined to interfere with the judgement and order of the High Court Division passed against the petitioner Foridur Rahman alias Forid alias Raza. Hence the Criminal Petition for Leave to Appeal is dismissed along with Jail Petition No. 03 of 2005.

4 SCOB [2015] AD 28

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.43 OF 2015
(From the judgment and order dated 28.05.2014 passed by the High Court Division in Civil Revision No.1280 of 2014.)

Mosharaf Composite Textile Mills Ltd: .....Petitioner.

=Versus=

ECOM Agroindustrial Corp. Ltd. and others: .....Respondents.

For the Petitioner :	Mr. Rokanuddin Mahmud, Senior Advocate with Mr. Ahsanul Karim, Advocate instructed by Mvi. Md. Wahidullah, Advocate-on-Record.
For the Respondents :	Mr. Ajmalul Hossain, Senior Advocate (with Mr. Omar Sadat, Advocate) instructed by Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.

Date of hearing : 25-06-2015

Arbitration proceeding:
It appears from the judgment of the High Court Division that the High Court Division found that there was a valid agreement between the plaintiff and defendant wherein an arbitration clause has been stipulated and pursuant to the said agreement an arbitration proceeding has already been commenced before the Arbitration Tribunal at Liverpool. This suit has been instituted subsequent to the arbitration proceeding. The High Court Division held that though written statement has been filed but, in fact, the same can be treated as information to the court regarding pendency of arbitration proceeding before Arbitration Tribunal at Liverpool.

Since arbitration proceeding has already been initiated between the parties before initiation of the instant suit, we are of the view that the High Court Division rightly disposed of the Rule staying further proceeding of the suit with a direction to settle the dispute in the arbitration proceeding. ...(Para 7 &8)

JUDGMENT

Hasan Foez Siddique, J:

1. This civil petition for leave to appeal is directed against the judgment and order dated 28.05.2014 passed by the High Court Division in Civil Revision No.1280 of 2014.

2. The relevant facts, for the disposal of this petition, in short, are that the petitioner as plaintiff instituted Title Suit No.73 of 2012 in the First Court of Joint District Judge, Dhaka for declaration that the contract No.315510058 dated 31.01.2011 was illegal, void and the same is not binding upon the plaintiff; and for further declaration that the reciprocal performance of the plaintiff under the said contract is barred by law, and for further declaration that initiation of arbitration before International Cotton Association under reference No.AO1/2011/2000 by the defendant No.1 against the plaintiff is illegal and void and for permanent injunction. The respondent appeared in the said suit and filed an application under Order VII Rule 11(d) read with section 151 of the Code of Civil Procedure for rejection of the plaint. The plaintiff filed objection against the said petitioner.

3. The trial Court rejected the said application for rejection of the plaint by the order No.29 dated 22.01.2014.

4. Against the said order, the respondent No.1 filed Civil Revision in the High Court Division and obtained rule. The High Court Division disposed of the rule with an order to stay the further proceeding of Title Suit No.73 of 2012 and directed the parties to settle the matter through arbitration. Against the said order the plaintiff has filed this petition for leave to appeal.

5. Mr. Rokanuddin Mahmud, learned Senior Counsel appearing for the petitioner submits that the instant revision was filed against the order rejecting the prayer for rejection of the plaint. The moot question before the High Court Division was as to whether the trial Court has rightly rejected the said application for rejection of plaint or not, the High Court Division erred in law in staying in the further proceeding of the suit.

6. Mr. Ajmalul Hossain, learned Senior Counsel appearing for the respondent that there is a valid agreement between the parties with an arbitration clause, pursuant to the agreement an arbitration proceeding has already been commenced before Arbitration Tribunal at Liverpool. The High Court Division rightly stayed the further proceeding of the suit.

7. It appears from the judgment of the High Court Division that the High Court Division found that there was a valid agreement between the plaintiff and defendant wherein an arbitration clause has been stipulated and pursuant to the said agreement an arbitration proceeding has already been commenced before the Arbitration Tribunal at Liverpool. This suit has been instituted subsequent to the arbitration proceeding. The High Court Division held that though written statement has been filed but, in fact, the same can be treated as information to the court regarding pendency of arbitration proceeding before Arbitration Tribunal at Liverpool.

8. Since arbitration proceeding has already been initiated between the parties before initiation of the instant suit, we are of the view that the High Court Division rightly disposed

of the Rule staying further proceeding of the suit with a direction to settle the dispute in the arbitration proceeding.

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

10. Accordingly, the petition is dismissed.

Cases of the High Court Division

SL No.	Name of the parties and Citation	Key Words	Ratio
1.	Md. Mahbub Alam Vs. The State 4 SCOB [2015] HCD 1	561A of the Code of Criminal Procedure; Inherent power	The allegations as made in the first information report do not disclose any offence against the petitioner. Interference of this Court in exercise of its inherent power under section 561A of the Code of Criminal Procedure before framing charge is justified only when this Court finds, as in the present case, that the allegations as made in the first information report or charge sheet do not constitute the offence alleged against the accused or that on admitted facts no case can stand against the accused.
2.	Karnaphuli Industries Ltd Vs The Commissioner of Taxes 4 SCOB [2015] HCD 4	Income Tax Ordinance 1984, Section 83(2); Audi Alterm Partem	The DCT concern did not comply the provision of section 83(2) before opining that the claimed expenditure has not been adequately evidenced by the assessee applicant. Therefore it appears that the disallowance of expenditure has not only violated the provision of section 83(2) of the Income Tax Ordinance 1984, but also violated the time honored maxim Audi Alterm Partem which obliged a adjudicator to allow adequate opportunity of being head or to submit adequate representation. Accordingly this court finds merit in these seven Income Tax Reference Applications.
3.	Shamsur Rahman Vs. Zhang Yu & ors 4 SCOB [2015] HCD 12	Company Act, 1994, Section 20 & 87(2); EGM; Relationship between the Articles and the law	It is also found that attempts at the EGM held on 20.11.2013 to introduce changes in Article 14, thereby, facilitating the induction of the Respondent No.3 as a director, were equally unwarranted in law and irregular in form. Notably further, this EGM was held upon notice on 10.11.2013 to adopt a special resolution, thereby, falling far short of the statutory twenty-one days' notice requirement mandated under Section 87(2) of the Act. That in turn exposes the Company to violation of Section 20

Cases of the High Court Division

SL No.	Name of the parties and Citation	Key Words	Ratio
			of the Act that authorizes alteration of the Articles by special resolution but only by necessary adherence to the notice period requirement of Section 87(2).
4.	Alvi Spinning Mills Ltd & ors Vs. Bangladesh & ors 4 SCOB [2015] HCD 23	Letter of Credits; contract of sale; case of fraud	The decisions referred to above consistently spelt out that when an irrecoverable Letter of Credit issued / opened and confirmed by the bank such a bank is left with no option but to respect its obligation under the letter of credit and pay if the draft and documents are found to be in order and terms and conditions of such L/C satisfied.
5.	Gazi A.K.M. Fazlul Haque & ors Vs. Privatization Commission & ors 4 SCOB [2015] HCD 42	Article 102 of the Constitution; Privatization Commission (Officers and Employees) Service Regulations, 2002; right to be considered for promotion; Selection Committee; deputation	Only seniority is not the sole yardstick for promotion of any officer of the Commission to the next higher post. Along with his seniority, merit of the officer shall be taken into consideration for promotion to the next higher post by the Selection Committee/DPC. In case of promotion of a Deputy Director to the post of Director of the Commission, he must have completed a minimum of 5(five) years service and his service record must be satisfactory and free from any blemish or stain. If no Deputy Director having the requisite service length and satisfactory service record is available for promotion, only in that event, the post of Director of the Commission may be filled up by deputation.
6.	Md. Shajahan Bhuiyan & ors Vs. Md. Nurul Alam & ors 4 SCOB [2015] HCD 52	State Acquisition and Tenancy Act 1950, Section 86; diluvion; lawful right to lease out	Section 86 of the Act, 1950 clearly provides that a land that has diluvated before the of P.O No. 135 of 1972 (i.e. after April 1956) or that will diluvate in future shall vest in the Government. It follows that irrespective of what ever title or right was acquired by Oli Ullah from the D.S. recorded tenant Zinnat Ali by virtue of the unregistered patta dated 28.1.1931 (Exhibit-ka) and the

Cases of the High Court Division

SL No.	Name of the parties and Citation	Key Words	Ratio
			three rent receipts for the years 1341 to 1362 D.S (Exhibit-Ga-series) it had extinguished as a result of diluvion that took place some time before 1965 i.e. before the Diara Map. It follows that the Government has acquired lawful right to lease out the land that was earlier recorded as D.S. plot No.1657 and 1658.
7.	State & ors Vs. Md. Saiful Islam & ors 4 SCOB [2015] HCD 61	Code of Criminal Procedure, 1898 Section 103; Madak Drabbya Niontran Ain, 1990, Section 36 and 37; search and seizure	Strict non-compliance of section 103 of the Code in order to search and seizure of madak articles either from a person or any place will not render the case unbelievable.
8.	BSRM Steels Ltd. & ors. Vs NBR & ors. 4 SCOB [2015] HCD 80	Income Tax Ordinance, 1984, Section 53 and 82C; Advance payment of income tax; final discharge of tax liability; deduction of tax	According to sub-section (3) of the said Section 53, the importers are given credit for such advance payment of income tax during their assessment of tax in the concerned assessment year. Not only that, according to Section 82C as quoted above, such deduction shall even be deemed to be the final discharge of tax liability of an assessee-importer from that source. Therefore, since the source in the present case in respect of the petitioners is the source of importation of scrap vessels by the ship breaking industries, or sometimes by the petitioners themselves, and there is no dispute that at the time of importation of the scrap vessels AIT were deducted in view of the provisions under Section 53, the said deduction of tax shall be deemed to be the final discharge of liability from that source in view of Clause (g) sub-section (2) of Section 82C of the said Ordinance.
9.	Md. Selim Mollah Vs. Bangladesh & ors 4 SCOB [2015] HCD 86	Druto Bichar Ain, 2002, Section 6; public interest; objective satisfaction	Alongside the five categories of cases, the Government in the public interest can transfer any pending case at any stage of trial to Druto Bichar Tribunal. A question may still arise as to when this particular provision of law gives authority on the Government to transfer

SL No.	Name of the parties and Citation	Key Words	Ratio
			any pending criminal case at any stage of trial to any Druto Bichar Tribunal, why five categories of cases relating to the offence of murder, rape, firearms, explosive substances and drug are required to be specifically mentioned. Here the necessity of objective satisfaction on the part of the Government arises as to which cases other than the cases of those five categories are to be transferred in what public interest, and without any objective satisfaction recorded to that effect transfer of any other case to the Tribunal constituted under the Ain is not permissible. The concerned officials of the Ministry of Home Affairs must be careful and expressive in sending any case other than the cases of five categories specifically mentioned in section 6 of the Ain.
10.	BBC Vs. Registrar, DPDTM & ors 4 SCOB [2015] HCD 89	Trade Marks Act, 2009, Section 24 & 30; priority of use of trade mark; action for passing off	Section 30 of the Trade Marks Act, 2009 provides that priority of use of this mark gets paramount consideration compared to registration. The right created in favour of a registered proprietor of a trade mark is not an absolute right and is subservient to other provisions of the Act. In other words, registration of a trade mark does not provide a defence to the proceedings for passing of as under section 24 of the Act, 2009. A prior user of trade mark can maintain an action for passing off against any subsequent user of an identical trade mark including a registered user thereof.
11.	Md. Forhad Hossain Sheikh Vs. The State 4 SCOB [2015] HCD 102	Circumstantial Evidence; Burden of proof in wife killing case;	Commission of crime can also be proved by circumstantial evidence. Circumstantial evidence is more cogent and convincing than the ocular evidence. It is correctly said that witnesses may tell a lie and it is not difficult to procure false tutored and biased witnesses but it is very much

Cases of the High Court Division

SL No.	Name of the parties and Citation	Key Words	Ratio
			difficult to procure circumstantial evidence.
12.	Kazi Mazharul Islam Vs. Bangladesh & ors 4 SCOB [2015] HCD 115	Article 36 of the Constitution of Bangladesh;	If the government is allowed to restrict a person from going abroad at its discretion, then Article 36 of the Constitution will become nugatory. This Court being the guardian of the Constitution cannot condone such practice.
13.	Kazi Md. Salamatullah & ors Vs. Bangladesh & ors 4 SCOB [2015] HCD 117	Court-conduct of the learned Advocates; norms and etiquettes of the legal profession	Court is well empowered to oversee the professional performance and also to regulate the Court-conduct of the learned Advocates and, in an appropriate case, impose costs upon a learned Advocate for finding his conduct to be unbefitting with the norms and etiquettes of the legal profession. Accordingly, instead of referring this incident to the Bar Council towards drawing up proceedings against the learned Advocate for the petitioners, we are taking a lenient view by warning him with an expectation that this kind of incident shall never be repeated by him in future.
14.	Syed Aynul Akhter Vs. Sanjit Kumar Bhowmik & ors 4 SCOB [2015] HCD 127	Evidence Act, 1872, Section 91 and 92; Code of Civil Procedure, 1908, Order XIV Rule 1; Oral evidence; Documentary evidence; Issue not taken up earlier	We are surprised that the Courts below did not take these rent receipts into any consideration at all and which are relevant documentary evidences. Instead, as is obvious from their findings, the Courts below have erroneously and unlawfully relied upon oral evidences bypassing the documentary evidences and which they are barred from doing under the law. Section 91 and 92 of the Evidence Act expressly bar the reliance upon oral evidences where documentary evidences are there on record.
15.	State & ors Vs. Rafiqul Islam & ors 4 SCOB [2015] HCD 139	Penal Code, 1860, Section 302; Last seen together theory; Retraction of	According to the prosecution, in the morning of 05.06.2008 all accused persons with the victim Mamun alive were last seen together at the Gate of

SL No.	Name of the parties and Citation	Key Words	Ratio
		confession	Rafique's house no. Ka-109/4, Kureel Bishwaroad and at that time P.W.3 i.e. the Darwan himself saw them coming out together from that house. After they were last seen together, the dead body of the victim was found at an open place of Bholanathpur by the Esapur River on 07.06.2008. In such a situation it is the burden of the accused persons to prove and explain as to how the victim had been taken and done to death there.
16.	Shuvash Chandra Das Vs. Customs, Excise & VAT App. Tribunal & ors 4 SCOB [2015] HCD 171	VAT Act, 1991, Section 37 & 55; Determining amount of evaded VAT; Opportunity of hearing	A notice under section 37 of the VAT Act cannot be issued without first determining the amount of evaded VAT if any. In doing so the authority have to issue notice under section 55(1) of the VAT Act 1991, claiming the evaded VAT and after giving an opportunity of hearing to the party concern, determine the amount of evaded VAT, under section 55(3) of the VAT Act 1991. After such determination of evaded VAT if the defaulter fails to repay the evaded VAT, only then, can proceed under section 37 along with other provisions of the VAT Act.

4 SCOB [2015] HCD 1

High Court Division
(Criminal Miscellaneous Jurisdiction)

Criminal Misc. Case No.8286 of 2012

Md. Mahbub Alam
.....Petitioner

-Versus-

The State
…..Opposite party

Mr. Md. Yousuf Hossain Humayun with
Ms. Shamima Sultana
.....For petitioner.

Ms. Sakila Rawshan, D.A.G. with
Ms. Sharmina Haque, A,A,G, and
Mr. Md. Sarwardhi,A.A.G
.....For opposite party No.1.

Heard and judgment on 6th September, 2015

PRESENT:
Madam Justice Salma Masud Chowdhury
And
Mr. Justice F.R.M. Nazmul Ahasan

Code of Criminal Procedure, 1898
Section 561A:
The allegations as made in the first information report do not disclose any offence against the petitioner. Interference of this Court in exercise of its inherent power under section 561A of the Code of Criminal Procedure before framing charge is justified only when this Court finds, as in the present case, that the allegations as made in the first information report or charge sheet do not constitute the offence alleged against the accused or that on admitted facts no case can stand against the accused. ...(Para 11)

Judgment

SALMA MASUD CHOWDHURY, J.

1. This Rule arising out of an application under section 561A of the Code of Criminal Procedure at the instance of the accused petitioner was issued calling upon the opposite party to show cause as to why the proceedings of Poba Police Station Case No.24 dated 25.9.2011 corresponding to G.R. No.199 of 2011 under section 19A and 19(f) of the Arms Act read with section 332/353 of the Penal Code, now pending in the Court of Chief Judicial Magistrate, Rajshahi should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The prosecution case in short is that one Nayeb Subeder Md. Firoz Alam lodged a first information report with the Poba Police Station against the accused persons alleging that on 24.9.2011 at about 23.05 hours accused Nos.1,2 and 3 asked the informant party to stop their motor cycle and then asked them to switch off the light but they did not switch off and consequently accused No.1 aimed a revolver at the chest of the informant and other accuseds dealt blows on the members of the informant party and thereafter with the help of the witnesses, the informant party caught the accused persons red handed and recovered one 0.32

bore revolver and 20 rounds of cartridges and the accused persons assaulted the informant group and prevented them from performing their duties and hence the present case.

3. The accused petitioner was arrested on 24.9.2011 and was enlarged on bail by the Sessions Judge, Rajshahi.

4. The police investigated the case and submitted charge sheet against the accused persons under section 332/353 of the Penal Code.

5. Being aggrieved by the proceedings of the case, the petitioner filed an application under section 561-A of the Code of Criminal Procedure before this Court and obtained the present Rule.

6. Mr. Md. Yousuf Hossain Humayun, the learned Advocate appearing on behalf of the petitioner submits that the petitioner is innocent and he is not involved in the alleged offence in any way and as such the instant proceeding against him is liable to be quashed. He also submits that from the plain reading of the first information report the allegation brought against the petitioner is totally absurd and concocted. The learned Advocate brings into our notice the charge sheet, from where it was found that since the petitioner possessed a valid licence for his pistol sections 19A and 19(f) of the Arms Act were dropped from the charge sheet and it is also evident from charge sheet that the petitioner did not believe the informant and his group to be the members of law enforcing agency and thought them to be terrorists and are pretending to be members of law enforcing agency which is very much happening these days especially in the locality of the petitioner and is coming out in the news media. He also brings into our notice that the present case is Paba Police Station Case No.24 and in Poba Police Case No.25, filed on the same day i.e. on 24.9.2011, at 23.50 hours, allegations have been brought that from an abandoned car one unsealed and open whisky bottle and five bottles of phensidyle of which two bottles being uncorked and open were recovered. He also submits that this Court in Criminal Miscellaneous Case No.8290 of 2012 quashed the proceedings of Poba Police Station Case No.25 dated 24.9.2011. He next submits that the petitioner knowingly did not assault or used force to deter public servants from discharge of their duties. The learned Advocate submits that the ingredients of section 332 and 353 of the Penal Code are totally absent against the petitioner.

7. Ms. Sakila Rawshan, the learned Deputy Attorney General appearing on behalf of the State opposes the Rule. She also submits that quashment of proceedings at the stage before framing of charge is not permissible. In support to her contention the learned Advocate has referred decisions as reported in 28 D.L.R.(AD) page 39 and 13 M.L.R. (AD) page 185.

8. We have heard the learned Advocate appearing on behalf of the petitioner and the learned Deputy Attorney General representing the State and perused the application under section 561A of the Code of Criminal Procedure along with other materials on record.

9. It appears that although the first information report was lodged under section 19A and 19(f) of the Arms Act read with section 332/353 of the Penal Code, subsequently it was revealed that the petitioner was holding a pistol with a valid license and thereafter the said pistol was handed over to the petitioner by way of Jimma and the charge sheet was submitted under section 332/353 of the Penal Code.

10. There is nothing on record to show that the petitioner caused hurt to the informant group. It has been stated in the charge sheet that the petitioner did not believe that the

informant and his group belonged to the law enforcing agency rather the petitioner challenged the informant group as terrorists who were creating terror in the locality for quite some time in the guise of the members of the law enforcing agency. During investigation it was revealed that the petitioner disbelieved the informant and challenged them. The police report does not disclose that the petitioner assaulted or used force upon the informant group to deter them, the public servants, from discharging their duties. The ingredients of section 332/353 of the Bangladesh Penal Code do not attract the petitioner in the present case, as evident from first information report and charge sheet.

11. The exercise of jurisdiction under section 561A of the Code of Criminal Procedure will depend upon the facts and circumstances of each case. Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stand against the accused and that a further prolongation of the proceeding would amount to harassment to an innocent party and abuse of the process of the Court. This view has been adopted in the case of Abdul Qader Chowdhury versus the State as reported in 28 D.L.R. (AD) page 38. In the present case it would be legitimate for this Court to hold that it would be manifestly unjust to allow process of the Criminal Court to be continued against the accused petitioner. The inherent power of this Court are applied for ends of justice when the allegations even if accepted as true do not constitute any offence. The allegations as made in the first information report do not disclose any offence against the petitioner. Interference of this Court in exercise of its inherent power under section 561A of the Code of Criminal Procedure before framing charge is justified only when this Court finds, as in the present case, that the allegations as made in the first information report or charge sheet do not constitute the offence alleged against the accused or that on admitted facts no case can stand against the accused.

12. Considering the facts and circumstances of the case, we are of the view that the further proceedings of the case against the petitioner would be sheer abuse of the process of the Court.

13. In the result, the Rule is made absolute. The proceedings of Poba Police Station Case No.24 dated 25.9.2011 corresponding to G.R. No.199 of 2011 under section 19(1) and (f) of the Arms Act read with section 332/353 of the Penal Code, now pending in the Court of Chief Judicial Magistrate, Rajshahi are hereby quashed, so far as it relates to the present petitioner.

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

15. Communicate a copy of the judgment and order to the Court concerned.

4 SCOB [2015] HCD 4

HIGH COURT DIVISION
(SPECIALSTATUTORY JURISDICTION)

Income Tax Ref: Application No. 651 of 2003.
With
Income Tax Ref: Application No. 652 of 2003
With
Income Tax Ref. Application No. 504 of 2004
With
Income Tax Ref. Application No. 209 of 2005
With
Income Tax Ref. Application No. 93 of 2006
With
Income Tax Ref. Application No. 403 of 2007
With
Income Tax Ref. application No. 109 of 2008

Karnaphuli Industries Limited, represented by its Chairman Hedayet Hossain Chowdhury, 94, Agrabad C/A, P.S. Doublemooring, District-Chittagong.
...Assessee-applicant.

-Vs-

The Commissioner of Taxes,
Tax Zone-3, C.G.O. Building-2 (2nd floor), Agrabad, Chittagong.
...Respondent.

Mr. Mosharaf Hossain, Adv.
... For the Assessee-applicant.
Mr. S. Rashed Jahangir, D.A.G. with
Mr. Saikat Basu, A.A.G. with
Ms. Nasrin Parvin Shefali, AAG
...for the tax department.

Heard On: 22.10.2014 & 23.10.2014
And
Judgment On: 18.11.2014 & 19.11.2014

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

Section 83(2) of the Income Tax Ordinance 1984:
The DCT concern did not comply the provision of section 83(2) before opining that the claimed expenditure has not been adequately evidenced by the assessee applicant. Therefore it appears that the disallowance of expenditure has not only violated the provision of section 83(2) of the Income Tax Ordinance 1984, but also violated the time honored maxim *Audi Alterm Partem* which obliged a adjudicator to allow adequate opportunity of being head or to submit adequate representation. Accordingly this court finds merit in these seven Income Tax Reference Applications. ...(Para 22)

It appears that due to fixation of target by the Finance Ministry as to collection of income tax to a certain amount, the tax executives either deliberately ignore the provision of law or twist the same in order to attain the target by realizing the more and more tax upon whims and caprice which is deplorable and hereby deprecated by this court. This tendency of the tax executives to realize tax by any means is required to be

changed by fixing supervision of the National Board of Revenue in this respect. Therefore a copy of the judgment is required to be sent to the National Board of Revenue for the perusal of its Chairman. ...(Para 25)

Judgment

A. F. M. Abdur Rahman, J:

1. The Assessee applicant Karnaphuli Industries Ltd., preferred the instant seven income tax reference applications under the provision of section 160(1) of the Income Tax Ordinance 1984 with the re-formulated questions of law mentioned in the supplementary affidavit.

2. Income Tax Reference Application No. 651 of 2003 is related to assessment year 1999-2000, Income Tax Reference Application No. 652 of 2003 is related to assessment year 2000-2001, Income Tax Reference Application No. 504 of 2004 is related to assessment year 2001-2002, Income Tax Reference Application No. 209 of 2005 is related to assessment year 2002-2003, Income Tax Reference Application No. 403 of 2006 is related to assessment year 2003-2004, Income Tax Reference Application No. 93 of 2007 is related to assessment year 2004-2005, Income Tax Reference Application No. 109 of 2008 is related to assessment year 2005-2006.

Facts of the Case.

3. It has been asserted in these seven income tax reference applications that the Assessee-applicant is a private limited company incorporated under the Companies Act 1913, on 1st January, 1963, who is engaged in the business of assembling motor cycle and derives income from the sales of those motor cycles, motor cycle spare parts and service charges, which is a regular income tax assessee under the Tax Identification Number (TIN): 377-200-1090. The Assessee-applicant company maintains its accounts in accordance with the provision of the Companies law and provision of section 75(2)(d)(iii) of the Income Tax Ordinance 1984, which was regularly audited and certified by the chartered accountant. The assessee-applicant submitted its income tax return for these seven assessment year from 1999-2000 up to 2005-2006 in due time, along with the required documents attached to it, pursuant to the provision of section 75(2)(d)(III) and section 35(3) of the Income Tax Ordinance 1984. Later pursuant to receipt of the notice under section 83(1) and 79 of the Income Tax Ordinance 1984, issued by the DCT concerned, the authorized representative of the assessee-applicant company further submitted all the documents supporting the accounts audited and certified by the Chartered accountant. But the DCT concern upon his whim and caprice disallowed the claimed expenditure which were allowable under the provision of section 29 of the Income Tax Ordinance 1984 and most arbitrarily estimated the gross profit at an exaggerated rate and re-estimated the sales to add back the amount with the income.

4. This having prejudiced the Assessee-applicant in respect of its tax liability, the Assessee-applicant preferred two unsuccessful appeal firstly before the Commissioner of Taxes (Appeal) and then to the Taxes Appellate Tribunal and thereafter upon formulating the questions of law as to the legality and propriety of the order passed by the Taxes Appellate Tribunal, preferred the instant income tax reference applications, seven in number for seven separate assessment years from 1999-2000 up to 2005-2006 with the formulated identical questions which appears from the supplementary affidavit:-

I. *In the circumstances and on the facts whether the Taxes Appellate Tribunal was justified maintaining "estimation of sales" from Motor Cycle Section, three wheeler section & workshop section & non-operating income of the Company and addition of income with disclosed sales of those sections discarding trading version of the Company as audited in accordance with law.*

II. *In the circumstances and on the facts whether the Taxes Appellate Tribunal was justified maintaining disallowances of expense from profit & loss accounts and other establishment expenses without complying the provision of section 83(2) & 30A of the Income Tax Ordinance 1984.*

Claim of Taxes Department.

5. Pursuant to the service of the notice, the learned Assistant Attorney General Ms. Nasrin Parvin and Mr. Saikat Basu appeared on behalf of the taxes department and submitted affidavit-in-reply, wherein it has been stated that the taxes appellate tribunal having correctly apprised the basic assessment order and the order passed by the First Appellate Authority did not commit any error of law and as such this court has no reason to answer the question raised by the Assessee applicant in negative and in favour of the Assessee applicant.

6. Further it has been sated that the Assessee-applicant failed to produce relevant documents in support of the audited accounts of the seven assessment years, which were elaborately discussed in the assessment order by the DCT concern and as such the two Appellate Authority did not set aside the order of assessment, although they have reduced the amount of disallowance substantially.

7. It has been further asserted that the Taxes Appellate Tribunal was legally justified in directing the DCT concern to adopt rate of gross profit of the applicant company in the Motor cycle section at the rate of 12.5%, Workshop section at the rate of 31%, Fan section at the rate of 16% and Automobile section at the rate of 22.5% respectively relying on the past record of Assessee- Applicant. The applicant company having failed to produce relevant evidence in support of trading expense under different section, the tribunal as well as Commissioner of Taxes (Appeal) and the DCT concern was legal and fair in adopting the fair gross profit and therefore the question as has been formulated in this Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

8. The learned Advocate Mr. Mosharaf Hossain appeared on behalf of the Assessee applicant, while the learned Assistant Attorney General Ms. Nasrin Parvin and Mr. Saikat Basu argued on behalf of the taxes department.

Argument of the Assessee-applicant.

9. The learned Advocate Mr. Mosharaf Hossain at the very outset has drawn the attention of this court to the facts that the DCT concern has disallowed the claimed expenditure on his whims and caprice without assigning any dissatisfaction as to the method of accounting regularly employed by the Assessee-applicant as required under section 35(4) of the Income

Tax Ordinance 1984 and without pin pointing the defect in the account and also erroneously opined that the Assessee-applicant could not prove the sales expenditure by adequate evidence, without complying the provision of section 83(2) of the Income Tax Ordinance 1984.

10. The learned Advocate Mr. Mosharaf Hossain contends that this issue has already been decided in several cases by this court out of which, the cases of Titas Gas (T&D) –Vs- The Commissioner of Taxes, reported in 53 DLR 209, Mark Builder Limited –Vs- The Commissioner of Taxes, reported in 59 DLR 463, Eastern Hardware Store –Vs- The Commissioner of Taxes, reported in 28BTD(2000)20, the case of T.K. Chemical Complex Ltd. –Vs- The Commissioner of Taxes in ITRA No. 13 of 2008 heard along with ITRA No. 345 of 2010 passed by this court on 24.02.2014, the case of Godrej Sara Lee (Bangladesh) Pvt. Ltd., in ITRA No. 353 of 2007 along with ITRA No. 354 of 2007 passed by this court on 28.01.2014, which may be profitably examined, wherein their lordships in this bench differently constituted, and also by this bench and the apex court of the country, decided that prior to discarding the book version of account, the DCT concern is liable to raise dissatisfaction as to the method of accounting and also has to pin point any defect in the accounts submitted before the DCT concern which was audited by the Chartered Accountant.

11. The learned Advocate Mr. Mosharaf Hossain vigorously argued that a tendency has grown up in the taxes department that the DCT concern firstly discard the book version of the accounts, submitted along with the return and thereafter the DCT concern used to fix the gross profit at an exaggerated rate and then either disallows the allowable expenditure or re-estimates the sales of the company in order to enhance the rate of gross profit. This tendency not only violates the provision of income tax ordinance 1984 but also liable the assessee applicant to face a 'A¢euj j¡jm¡' by the VAT authority, since after such a whimsical assessment, the VAT authority raises objection that the assessee applicant has evaded the VAT which he has paid on its actual sales. Therefore such a tendency is required to be taken into notice by this court and to make an observation as to such illegality committed by the taxes department.

Argument by the Taxes department.

12. The learned Assistant Attorney General Ms. Nasrin Parvin while relying upon the paragraph No. 6 of the affidavit-in-reply strenuously argued that when the Assessee-applicant failed to substantiate its accounts before the DCT concern by filing adequate evidential documents, the DCT concern has got no alternative but to estimate the allowable expenditure and the sale. That being the power coming out from the provision of section 35(4) of the Income Tax Ordinance 1984, the two appellate authority correctly apprised the action taken by the DCT concern in these seven income tax assessment years, although the two appellate authority reduced the amount of disallowances, but they did not set aside the order of assessment which is otherwise lawful.

13. The learned Assistant Attorney General Ms. Nasrin Parvin next argued that admittedly the DCT concern has served notice under section 79 and also under section 83(1) of the Income Tax Ordinance 1984 which implies that the Assessee applicant has obliged to submit all its adequate evidences supporting the accounts certified by the Chartered Accountant. But since it failed to submit all the document the DCT concern is not obliged to serve a further notice under the provision of section 83(2) of the Income Tax Ordinance 1984, which will be a futile exercise of the provision of law. Therefore the questions as has been

formulated by the Assessee-applicant in these seven income tax reference applications, are not required to be answered in negative and in favour of the Assessee-applicant.

Deliberation of the Court.

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

15. Upon apprising the seven basic assessment orders, made by the DCT concern, it appears that the claimed amount of expenditure has been disallowed by the DCT concern in several heads, but nowhere from the basic assessment order it appears that the DCT concern has raised any dissatisfaction as to the method of accounting or the fact that the DCT concern has pin pointed any defect in the account, which was audited by the Chartered Accountant and submitted with the return as per the requirement of section 75(2)(d)(III) and section 35(3) respectively of the Income Tax Ordinance 1984.

16. But it appears from the provision of section 35(4) of the Income Tax Ordinance 1984 that the DCT concern has to raise dissatisfaction as to the method of accounting, regularly employed by the Assessee-applicant, prior to invoke the power available under the said provision to disallow the claimed expenditure, allowable under the provision of section 29 of the Income Tax Ordinance 1984. The provision of section 35(4) is reproduced below for better appreciation;-

Income Tax Ordinance 1984

Section 35(4). Method of accounting.-

1) .....
2) ……..
3) ……..
4) *Where-*

a) *no method of accounting has been regularly employed, or if the method is such that, in the opinion of the Deputy Commissioner of Taxes, the income of the assessee cannot be properly deduced therefrom; or*

b) *in any case to which sub-section (20 applies, the assessee fails to maintain accounts, make payments or record transactions in the manner directed under that sub-section; or*

c) *a company [or a registered firm] has not complied with the requirements of sub-section (3);*

the income of the assessee shall be computed on such basis and in such manner as the Deputy Commissioner of Taxes may think fit.

17. The issue of invocation of power under the provision of section 35(4) of the Income Tax Ordinance 1984 has already been decided in so many cases in this bench and also by the apex court of the country, some of them referred by the learned Advocate Mr. Mosharaf Hossain is examined profitably for the purpose of this judgment.

18. The aforesaid provision was taken for consideration in the case of Titas Gas (T&D) Ltd. –Vs- The Commissioner of Taxes, reported in 53 DLR 209, wherein their Lordship in this Bench, differently constituted, held as under:

> *The legal position is that in the computation of income profit and gains of company the DCT is entitled to reject the books of accounts if he is of the opinion that no method of accounting has been regularly employed by the assessee or if the method employed is such that the income of the assessee cannot be properly deduced therefrom or that a company has not complied with the requirement of sub-section (3) of section 35 of the Ordinance.*

19. Similarly in the case of Mark Builders Ltd.–Vs-The Commissioner of Taxes, reported in 59 DLR 463 their Lordship in this Bench, differently constituted, further held as follows:

> *The latitude available to the Deputy Commissioner of Taxes under section 35 is no doubt very wide but cannot be thought to be without any restraint in the process of assessment of the total income of an assessee under sub-section (2) of section 83 of the Ordinance. Discretion of statutory authority in the exercise of statutory power, particularly in taxation matter if though to be unlimited then exercise of such discretion may result in arbitrariness and selectivity.*
>
> *After close examination of the power of the Deputy Commissioner of Taxes under section 83 of the Ordinance to assess the total income of an assessee, we find that after submission of a return or revised return by the assesee, if the Deputy Commissioner of Taxes is not satisfied with the return, he shall serve a notice under sub-section (1), requiring the assessee to appear either in person of through a representative or produce the evidence that the return is correct and complete. After hearing the person or his representative and/or considering the evidence produced pursuant to the notice, he may under sub-section (2) require further evidence on specified points before he could complete the assessment. That could only be done by asking again in writing the assesee to produce evidence upon such points as he should specify, the Deputy Commissioner of Taxes appears to be acquainted with.*

20. In the case of Eastern Hardware Store Ltd.–Vs-The Commissioner of Taxes, reported in 54 DLR (2002) 125 their Lordship in this Bench on the provision of section 35(4) of the Income Tax Ordinance 1984 held as under:

> *As the Appellate Additional Commissioner of Taxes did not find any defect either with the method of accounting or in the accounts neither of them can resort to estimation under section 35(4) of the Ordinance and thereby both of them acted illegally and that illegal order has been mechanically affirmed by the Appellate Tribunal which cannot be sustained in law.*

21. From the basic assessment orders it appears that the expenditures were disallowed on the ground of verifiability that adequate evidence were not produced before the DCT concern against which the learned Advocate Mr. Mosharaf Hossain drawn the attention of this court to the fact that in that case the DCT concern has to comply the provision of section 83(2) of the Income Tax Ordinance 1984, which mandates the DCT concern to issue a further notice, directing the assessee concern to submit further evidence as to any issue which was treated by the DCT concern as not to have been adequately evidenced. The provision of section 83(2) read as follows:

Income Tax Ordinance 1984
Section 83(2) Assessment after hearing.

(1) Where a return or revised return has been filed under Chapter VIII and the Deputy Commissioner of Taxes is not satisfied without requiring the presence of the person who filed the return or the production of evidence that the return is correct and complete, he shall serve on such person a notice requiring him, on a date to be therein specified, to appear before the Deputy Commissioner of Taxes, or to produce or cause to be produced before him or at his office, any evidence in support of the return.

(2) The Deputy commissioner of Taxes shall, after hearing the person appearing, or considering the evidence produced in pursuance of the notice under sub-section (1) and also considering such other evidence, if any, as he may require on specified points, by an order in writing assess, within thirty days after the completion of the hearing or consideration, as the case may be, the total income of the hearing or the assessee and determine the sum payable by him on the basis of such assessment, and communicate the order to the assessee within thirty days next following.

22. It appears that the DCT concern did not comply the provision of section 83(2) before opining that the claimed expenditure has not been adequately evidenced by the assessee applicant. Therefore it appears that the disallowance of expenditure has not only violated the provision of section 83(2) of the Income Tax Ordinance 1984, but also violated the time honored maxim *Audi Alterm Partem* which obliged a adjudicator to allow adequate opportunity of being head or to submit adequate representation. Accordingly this court finds merit in these seven Income Tax Reference Applications.

23. Before parting with the judgment an observation is required to be given as to a very pertinent question of public importance which has been raised by the learned Advocate Mr. Mosharaf Hossain as to the tendency of the taxes department in order realize more and more tax from the citizen of the country by any means and to make an assessment with exaggerate amount of income.

24. In the recent past this court has found in several disputed tax cases that the tax executives are very egger to realize tax by any means in order to fulfill the target as has been fixed by the higher authority. With that end in view, the assessing officers are making the assessment with an object to realize more and more tax. In this manner the assessing officers are assessing any return, filed by the company, by discarding the book version of the accounts, submitted along with the return, complying the provision of section 35(3) of the Income Tax Ordinance 1984. Companies Act 1994 mandates the company to maintain the account in certain method and to audit the same by the chartered accountant firm and to submit those accounts before the meeting of Board of Director and thereafter to submit the account to the Register of Joint Stock companies & firms. This exercise of the provisions of the Companies Act becomes a futile exercise when the same account is submitted before the assessing officer who almost in all the cases disbelieves the genuintiy of the accounts. Further those companies which are engaged in production job has to comply the compulsory provision of the VAT Act 1991 and to pay the VAT, penny to penny, the concerned authority, which is also under the control and management of the National Board of Revenue. The VAT authority regularly examines the accounts of the assessee company by way of

inspecting the day to day production and sale of the relevant company on the spot and no sells could be escaped from their eyes as the VAT executive upon remaining present at the assessee premises inspects day to day production to realize the correct amount of VAT. Therefore the company which is engaged in production job has no scope to conceal any income from the eyes of VAT authority. But this aspect is being ignored by the income tax executives, although under section 30AA of the Income Tax Ordinance 1984. It has been provided that if the VAT is not deducted in accordance with the j¤¢ সংযোজন কর আইন ১৯৯১ (১৯৯১ সনের ২২ নং আইন) from the bill paid to 3rd party then the amount of expenditure in respect of payment of such bill to a 3rd party, cannot be taken as a allowable expenditure. Therefore by implication although the provision of VAT is required to be taken into consideration, but the tax executive never take the same into consideration, although whenever the VAT has not been deducted from the bill paid to 3rd party that is immediately added with the income, under the provision of section 19(1) and 30g of the Income Tax Ordinance 1984.

25. It appears that due to fixation of target by the Finance Ministry as to collection of income tax to a certain amount, the tax executives either deliberately ignore the provision of law or twist the same in order to attain the target by realizing the more and more tax upon whims and caprice which is deplorable and hereby deprecated by this court. This tendency of the tax executives to realize tax by any means is required to be changed by fixing supervision of the National Board of Revenue in this respect. Therefore a copy of the judgment is required to be sent to the National Board of Revenue for the perusal of its Chairman

26. It appears in the instant case that the DCT concern first fixed the gross profit of the assessee company for the relevant year and then adjusted the amount befitting to the said gross profit, for which the DCT concern enhanced the income by discarding the book version of the account and ignored some of the allowable expense to be allowed, although the expense are adequately evidence by papers and documents, submitted along with the return.

Result of the Case.

27. In the result, this court finds merit in these seven income tax reference application and accordingly the questions as have been formulated in these income tax reference applications are answered in negative and in favour of the assessee applicant.

28. The connected Rules being No. 11(ref:)/09, 26(ref:)/2006, 13(ref:)/2009, 27(ref:)/2006, 6(ref:)/2009, 10(ref:)/2009 and 4(ref:)/2009 are hereby disposed off.

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

30. The office is directed to send a copy of this judgment to the Chairman of the National Board of Revenue.

4 SCOB [2015] HCD 12

HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

COMPANY MATTER NO. 254 OF 2013

Shamsur Rahman, S/O Md. Amir Hossain of House : 36, Flat- C3, Road No. 3, Dhanmondi, Dhaka- 1212 represented by its Managing Director.
..... Petitioner .

VERSUS

Zhang Yu, S/O Mr. Zhang Shaofeng, Of House No. 66, Road No. 7, Block-H, Banani, Dhaka- 1213 and others.
..... Respondents.

Mr. Tanjib-ul Alam, Advocate with
Mr. Mohammad Hasan Habib, Advocate
.... For the Petitioner .
Mr. Sarder Alamgir Ahmed, Advocate
…. For the Respondents.

Heard on: 16.4.2015, 19.4.2015, 30.4.2015, 26.5.2015, 15.6.2015, 16.6.2015 and 19.6.2015.
Judgment on: 2.8.2015

Present :
Mr. Justice Syed Refaat Ahmed

Company Act, 1994
Section 20 & 87(2)
It is also found that attempts at the EGM held on 20.11.2013 to introduce changes in Article 14, thereby, facilitating the induction of the Respondent No.3 as a director, were equally unwarranted in law and irregular in form. Notably further, this EGM was held upon notice on 10.11.2013 to adopt a special resolution, thereby, falling far short of the statutory twenty-one days' notice requirement mandated under Section 87(2) of the Act. That in turn exposes the Company to violation of Section 20 of the Act that authorizes alteration of the Articles by special resolution but only by necessary adherence to the notice period requirement of Section 87(2). ...(Para 18)

Relationship between the Articles and the law:
The Articles, as a negotiated constituent document of the Company, in turn must correspond to a higher authority which is the law itself. Indeed, it is this indivisible relationship between the Articles and the law and the fact of such Articles being the outcome of careful negotiation by free will and for business expediency executed by subscribers of the memorandum that clothes the Articles with an essential binding nature. ...(Para 22)

Judgment

Syed Refaat Ahmed, J:

1. This Application under Section 43 of the Companies Act, 1994 ("Act") pertains to competing shareholding interests in Shinglong Water Purifier Manufacturing Co. Ltd., the Respondent No. 4, Company. The said Company was incorporated in 2011 with an authorized capital of Taka 3,00,00,000/- (Taka Three Crore) divided into 3,00,000 (Three

Lac) ordinary shares of Taka 100/- each. At the time of the Company's incorporation there were two subscribers of the Memorandum i.e., the Respondent No. 1 Mr. Zhang Yu and the Respondent No. 2 Ms. Zhang Yuying who agreed to subscribe to a total of 2,000 ordinary shares of Taka 100/- each in the following manner:

Sl	Name of Subscriber	No. of shares subscribed
1	Zhang Yu	1,600
2.	Zhang Yuying	400

2. On 23.1.2012 the Board of Directors (BOD) passed a resolution approving the transfer of 400 ordinary shares of the Respondent No. 1 to the Petitioner upon the Respondent No. 2 having declined to purchase the same. A further resolution was passed in the said meeting whereby the Petitioner was appointed as the new Director of the Company. Accordingly, the Company submitted a *Form-117: Instrument of Transfer* evidencing the transfer of shares, *Form-IX* recording the Petitioner's consent to act as director and *Form-XII: Particulars of Directors etc.* updating the particulars of directors before the pro forma Respondent Registrar, Joint Stock Companies and Firms ("RJSC"). The Respondent No. 1 also filed an affidavit evidencing the transfer of 400 ordinary shares to the Petitioner.

3. It also transpired that the Respondent No. 2 offered the other members in writing her entire 400 ordinary shares citing personal difficulties for stepping down as a director. The Petitioner accepted the offer and subsequently at the BOD meeting of 12.2.2012 a resolution was passed approving such transfer to the Petitioner. The Petitioner was further appointed as the new Managing Director in place of the retiring Respondent No. 2 vide another resolution passed at the same meeting. Accordingly, the Company submitted a *Form-117* evidencing the transfer of the said shares and an updated *Form-XII* before the RJSC. The Respondent No. 2 also filed an affidavit evidencing the transfer of 400 ordinary shares to the Petitioner.

4. It is against this backdrop that on 7.10.2012 the Respondent No. 1 and the Petitioner entered into an Agreement whereby the Respondent No. 1 agreed to *"rent"* the Company factory to the Petitioner for a period of five years beginning 1.11.2012 for a monthly rental payment of Taka. 5,20,000/-. It was also agreed in Clause 3 of the Agreement that upon expiry of a five-year term the Respondent No. 1 shall transfer all his shares in the Company to the Petitioner.

5. Given the above developments, the Petitioner is said to have been rather alarmed by subsequent turn of events evident in the Petitioner's discovery that the Respondent No. 1 had on 29.11.2013 submitted online returns before the RJSC being two *Forms- XII*, two *Forms-117* and one *Form-VIII* consequent upon a purported transfer by the Petitioner of 400 shares.

6. Of the two said *Forms-XII*, the Petitioner detects in one a record of his purported resignation from his directorship due to the disputed transfer of his entire shareholding interest on 10.10.2013. In the other *Form-XII* there is a discordant, and dubious, assertion by the Petitioner's reckoning of his resignation from the post of Managing Director but continuing as existing director. Further, one *Form-117* shows that the Petitioner has transferred 400 ordinary shares to the Respondent No. 1 whereas the other *Form-117* shows

that the Respondent No. 1 has transferred the said 400 shares to Respondent No. 2, i.e., Ms. Zhang Yuying who had left the Company after selling all her shares to the Petitioner. Moreover, a *Form-VIII* was also submitted specifying that a special resolution was passed on 20.11.2013 to alter Article Nos. 14 and 21 of the Company's Articles of Association to bring these in line with the information contained in the aforementioned *Forms-XII* and *Forms-117*. The Petitioner further discovered that the Respondent No. 1 again on 30.11.2013 made statutory filings without these being backed up by any BOD resolutions. Accordingly, a *Form- 117* shows that the Respondent No. 1 transferred 1,200 ordinary shares to Respondent No. 3, Mr. Zu Yang and in *Form-IX* it is shown that Mr. Yang has consented to act as director. Furthermore, the Petitioner is shown in a *Form-XII* as having resigned as Managing Director on 10.10.2013 and the Respondent No. 3 appointed in his place as the new Managing Director. The Petitioner submits that the purported transfer of shares vide *Forms-117* as above indicated in the statutory filings are unlawful and have no validity in the eye of law in that the purported transfers have not been approved by the BOD as required under the law and the Articles of Association.

7. Moreover, it is submitted that the said purported transfers of shares are misconceived and have no legal effect in as much as under Section 38 of the Act, the Company is authorized to register a transferee of shares only upon receipt of a valid Instrument of Transfer *inter alia* duly executed by the transferor of shares. That element of execution is absent in the present case given that the Petitioner denies having ever executed any such instrument transferring 400 shares in favor of the Respondent No. 1. Rather, it is contended, the entire purported transfer took place without the Petitioner's knowledge. Resultantly, the Petitioner prays for the Company's share register to be rectified in the following ways:

(i) deleting the entry recording the transfer of 400 ordinary shares of the Petitioner to the Respondent No. 1;

(ii) deleting the entry recording the transfer of 400 ordinary shares from the Respondent No. 1 to Respondent No. 2;

(iii) deleting the entry recording the transfer of 1,200 ordinary shares from Respondent No.1 to Respondent No. 3; and

(iv) deleting the name of Respondents No. 2 and 3 as shareholders of the Company.

8. It is noted that the Petitioner through a Supplementary Affidavit of 13.7.2014 has filed the stamped copies of the two *Forms 117* dated 23.1.2012 and 12.2.2012 in evidence of the transfer by the Respondent No. 1 and the Respondent No. 2 respectively of 400 shares each to the Petitioner (Annexures- 'M' and 'M-1'). An Affidavit-in-Opposition dated 1.4.2014 filed on behalf of the Respondent Nos. 1-4 bears the Respondents' initial stance that on 12.2.2012 the Respondent No. 2 did indeed transfer 400 shares to the Petitioner while emphatically denying that the Respondent No. 1 ever transferred an initial 400 shares to the Petitioner on 23.1.2012. In this regard, documents in evidence of such transfer filed by the Petitioner are claimed to be false, forged and fraudulent. The Respondent No. 1 alleges that the Petitioner obtained his signature on the relevant *Form 117* as well as on an Affidavit dated 25.1.2012 by misrepresentation and practicing fraud upon him. It is also asserted that the Agreement of 7.10.2012 was executed by the Respondent No.1 upon the Petitioner's instigation and influence and that its status as an agreement of sale is now wholly questionable. Notably, the Petitioner has all along maintained that on 7.10.2012, the Respondent No. 1 and the Petitioner entered into the Agreement whereby the Respondent No. 1 agreed to hand over the operations of the Respondent No. 4 Company to the Petitioner for a period of 5 years starting from 1.11.2012 in return of a monthly payment of Tk. 5,20,000/-. It was also agreed in Clause 3 of

the Agreement that upon expiry of the five-year term computed from the date of commencement of the Agreement, the Respondent No. 1 shall transfer all his shares in the Company to the Petitioner. The Respondent No. 1 asserts on the contrary that he transferred 1,200 shares on 10.10.2013 in favour of the Respondent No. 3 upon due consideration paid *" and, hence this transfer has acted upon"*. The Affidavit-in-Opposition in sum total declares, therefore, that the Respondent No. 1 remains the owner of 400 shares, the Respondent No. 3 of 1,200 shares, thereby, leaving the Petitioner in possession of only 400 shares in the Company.

9. A volte-face, however, by the Respondents on factual and legal issues in this case is noted with the filing of the Affidavit-in-Opposition of the Respondent No. 3 of 1.5.2015. In the absence of any clear reason precipitating such about turn, there is noted in this regard the concomitant departure from the scene of the learned Advocate Mr. Mohammad Abdul Karim as the initially appointed Counsel for the Respondent Nos. 1-4 and the appointment afresh of Mr. Sardar Alamgir Ahmed as Counsel for the Respondent No. 3. This Affidavit-in-Opposition filed not only seeks to diminish, albeit by contradictory statements, the extent of the Petitioner's shareholding in the Company but also curiously wittingly or unwittingly to defeat the claim of the Respondent No. 3 himself as an existing shareholder in the Company.

10. Referring to a Search Report dated 5.5.2015 from the RJSC the Respondent No. 3 highlights three share transfer *Forms -117* showing a transfer on 23.1.2012 by the Respondent No. 1 of 100 shares in favour of the Petitioner, by the Respondent No. 2 of 400 shares in favour of the Petitioner on 12.2.2012, (thereby, bringing the Petitioner's total interest to 500 shares), and by the Respondent No. 1 of 1,200 shares on 10.10.2013 in favour of the Respondent No. 3. These declarations by Mr. Xu Yang, Respondent No. 3 comes with the significant caveat that the transfer of 1,200 shares in his favour by Mr. Zhang Yu, Respondent No. 1 was in fact never registered. It is in that context that in this Supplementary Affidavit the Board of Investment (BOI) is assigned a role as looms large to deny the Respondent No. 3 his shareholding interest. It is submitted that all the *Forms-117* above-referred along with a *Form XII* were submitted to the RJSC without prior BOI permission and, therefore, in breach of an ostensible mandatory requirement imposed on a 100% Foreign Private Investment Company as the Respondent No. 4, Company. The Respondent No. 3 contends, therefore, that such efforts at transferring shares being unlawful and void the instant petition under Section 43 of the Act is not maintainable at all. It is averred that as per the BOI-imposed terms and conditions of the Company's BOI registration letter it was incumbent upon it to secure prior permission from the BOI for transferring ownership and relocating its factory (which apparently wasn't done) and as such all transfers of shares witnessed in this case are to be deemed unlawful and void. In adopting such a stance, a conflict is, therefore, introduced in this case between the BOI regulatory régime and that established under the Act.

11. In response the Petitioner's general assertion, evident in an Affidavit-in-Opposition of 9.6.2014, is that the position adopted by the Respondent No. 3 of shares in the Company not permitting of transfer without prior BOI approval is false and misleading. In this regard the Petitioner asserts that the law relating to the transfer of shares is provided for squarely in the Act. It is submitted, accordingly, that the transfers of shares, both by the Respondent Nos. 1 and 2, in favour of the Petitioner were effected in due compliance with the Act's provisions and the Company's Articles of Association. Given further that there are no requirements in the Act for obtaining prior approval from the BOI, according to the Petitioner, the question of the transfers of shares in favour of the Petitioner not being effective does not resultantly arise

at all. The Petitioner views with some concern, therefore, the Respondents' attempts at misleading and misdirecting the Court by referring to non-existent legal requirements.

12. Considering the above facts and circumstances, it is to be noted at the outset that the Respondents' positioning vis-à-vis this case has involved a sifting through a series of arguments marked by prevarication. Resorting to evasion and equivocation the tendency has been, particularly on the part of the Respondent No. 3, to evade the governing issues of law and delve instead into matters irrelevant or unrelated to the case in hand. The Respondent No. 3, acting as an attorney for the Respondent No. 1 has, accordingly, made far-fetched arguments by sheet anchoring his case on an ostensible absence of the BOI's prior consent to explain away the stark irregularity otherwise apparent in all acts initiated by the Respondent No. 1 to deprive the Petitioner of his full beneficial and legal entitlement to the 800 shares as transferred in 2012 and as evident in Annexures-'M' and 'M-1'. Indeed, the BOI angle has been overplayed to such an extent by the Respondent No. 3 as to wholly deny even the legality of the transfers, otherwise admitted, of shares by the Respondent No. 1 to the Respondent No. 3 himself.

13. This development in the proceedings has placed on this Court an essential task, therefore, to revisit the essentials of a valid transfer of shares envisaged under the law and, consequentially, to remind the Respondents of the primacy to be accorded to such law as endorsed by the Company's constituent documents like its Articles of Association, relative to any imposition made by any other regulatory régime otherwise as so emphasized by the Respondents.

14. The fundamentals of companies law dictate that by its very nature a private company as the Respondent No. 4 Company is governed by restrictions on the right to transfer shares. In other words, a private company would do well to pay heed to the notion of transfer of shares taking place with due regard to preemptive rights exercisable by existing shareholders, i.e., their right of first refusal of an offer of shares made. That notion finds place in the Act in Section 2(1)(q) defining a private company as one in which the right to transfer its shares is restricted by its Articles. The significance attached in Section 2(1)(q) to the restriction being endorsed in a company's Articles of Association readily acknowledges the status of the Articles as an agreement binding the relationship between a Company's members within the boundary of the law. Terms of such agreement negotiated by the subscribers of the memorandum and binding on subsequent members of a company, in the case of a private corporate entity, will invariably subject transfers of shares to a right of preemption. Article 8 of the Company's Articles is no exception in this regard and reads thus:

> *"8. Subject to the approval of the Board of Directors Shares may be transferred at any time by a member to his/her (spouse or children only) on his/her lineal descendants and suposeu only, Transfer to any other person other than those mentioned shall have to be made or registered by prior approval of the board of Directors. Any member desirous to sell or transfer his shares shall first offer the same in writing to the existing members at a fair negotiated price settled by the transferee and the Directors. If within seven days of such offer none of the existing members are wiling to accept the offer the transferor may sell or transfer the share to any body outside the existing members. The executor, administrator of heirs of a deceased member shall be recognized by the Company as having title to his/her shares on giving thereof sufficient proof to the satisfaction of the Directors of the Company."*
> (Emphasis added by this Court)

15. It cannot be gainsaid that the right of preemption per se and the restrictions set out in Article 8 above are equally of strict application. Deconstructing Article 8, it is not difficult to ascertain that a clear restriction has been imposed upon a transfer of shares to an outsider or non-member when any existing member is willing to purchase at a fair negotiated price settled by the transferee and the directors. It necessarily follows that Article 8 aptly anticipates a permissible transfer to an outsider (e.g., in the position of the Respondent No. 3 in this case) only upon the BOD's inability to find a member willing to acquire the shares within the stipulated period of seven days computed from the date of offer. The rule of thumb here is, and as noted, for example, in *Satyanarayana Rathi vs. Annamalaiar Textiles Pvt. Ltd.* reported in *1999 95 CompCas 386 CLB* thus:

> *"Any transfer of shares of the company shall be in strict compliance with the articles of association, failing which the transfer will be violative of the provisions of articles and such transfer is liable to be set aside."*

16. This judicially entrenched ratio is found in various precedents cited by the learned Advocates for the Petitioner Mr. Tanjib-ul Alam and Ms. Farhana Khan being, notably, *Cruickshank Company Ltd. And Anr. Vs. Stridewell Leather Pvt. Ltd.* reported in *1996 86 CompCas 439 CLB* and *Hurst vs. Crampton Bros (Coopers) Ltd. and others* reported in *[2002] EWHC 1375 (Ch).*

17. Notwithstanding the Respondents' constantly shifting grounds to deny the Petitioner beneficial and legal entitlement to the claimed 800 shares in the Company, this Court upon a perusal of all Affidavits and documents placed and a consideration of submissions before this Court, accordingly, finds that

(a) the Respondent No. 1 validly transferred 400 shares to the Petitioner in January, 2012;
(b) there was no valid transfer of 1,200 shares to the Respondent No. 3 per se; and
(c) the regulatory requirements defining the Company's relationship with the BOI do not, in the facts and circumstances, take any precedence over the provisions of the Act and the Articles to nullify all acts of transfer of shares in the Petitioner's favour.

18. This Court further finds that all acts done at the initiative of the Respondent No. 1 in supersession of and to negate the transfer of 400 shares by himself in January, 2012 favouring the Petitioner evident in the Annexure-'M' duly stamped *Form-117: Instrument of Transfer of Shares* has been an exercise in irregularity not sanctioned in law. Thus, for example, a purported transfer of the Petitioner's 400 shares to the Respondent No. 3 evident in Annexure-'N' on the face of it is irregular by not having been executed by the transferor. Of some significance is the ostensible approval granted by the BOD to such transfer at its meeting of 10.10.2013. A perusal of the minutes of that meeting reveals that the same was conducted in violation of Article 18 as mandates a quorum of two directors for a BOD meeting. In this instance, evidently, it was the Respondent No. 1, who was the sole driving force behind the resolution adopted at that meeting purportedly aimed at securing the Petitioner's departure as a director and the contemporaneous induction of the Respondent No. 3 as an ostensible shareholder-director beneficiary of freshly transferred 1,200 shares. This whole exercise of swapping directors in the persons of the Petitioner and the Respondent No. 3 is found to be without any sanction in law. That being the case, it is also found that attempts at the EGM held on 20.11.2013 to introduce changes in Article 14, thereby, facilitating the induction of the Respondent No.3 as a director, were equally unwarranted in law and irregular in form. Notably further, this EGM was held upon notice on 10.11.2013 to adopt a

special resolution, thereby, falling far short of the statutory twenty-one days' notice requirement mandated under Section 87(2) of the Act. That in turn exposes the Company to violation of Section 20 of the Act that authorizes alteration of the Articles by special resolution but only by necessary adherence to the notice period requirement of Section 87(2).

19. Having initially alleged fraud and misrepresentation in the transfer of shares of the Respondent No. 1 to the Petitioner on 23.1.2012 and the fraudulent affixation of signature by the Respondent No. 1 on an Affidavit of 25.1.2012, it is noted that the Respondents have acted further to their discredit by attempting to salvage the legality of such transfer process but only to the extent of 100 shares transferred by the Respondent No.1 in favour of the Petitioner by filing the Annexure-'H' series documents by a Supplementary Affidavit dated 10.5.2015.

20. It is resultantly found that there is nothing in the Respondents' case that has in any way undermined the credibility and the veracity of the contents of the *Form-117: Instrument of Transfer of Shares* (Annexure-'M' of the Petitioner's Supplementary Affidavit dated 13.7.2014). This *Form-117*, which is a true copy of the original, gauged against requirements of the law in Section 38 of the Act, i.e., due stamping, signatures of the transferor and transferee as well as those witnessing such transfer, proves to be sufficient in law. Though the date of the BOD's approval appears to be missing in this Annexure- 'M' document, it has been established to the satisfaction of this Court that minutes of the BOD meeting of 23.1.2012 categorically record the transfer of 400 shares by the Respondent No. 1 to the Petitioner (Annexure-'B-1'). Furthermore, the *Memorandum of Transfers* on the reverse of the Share Certificate pertaining to the 1,600 shares held in the Company by the Respondent No. 1 attests further to 400 of such shares numbering from 1,201 to 1,600 being transferred on 23.1.2012 in favour of the Transferee Petitioner. The *Memorandum* further attests to the Respondent No. 1 consequentially remaining entitled to a balance of 1,200 shares of the Company.

21. The requirements under Section 38(3) of the Act for a valid transfer of shares are of a submission of a duly stamped and executed *Form-117* delivered to the company for registration along with the share scrip. The Annexure-'M' *Form-117* of 23.1.2012 is found to answer fully to these statutory requirements. There is, therefore, found nothing that can now deter such transfer by entering the Petitioner's name against the said 400 shares in the Company's register as per Section 43 of the Act.

22. It is noted that the Respondents' attempts at having this Court nullify *all* transfers of shares, including those to the Petitioner, have seen to the introduction of an additional facet to this case, i.e., the role of the BOI in validating such transfers through prior permission. It is this Court's view that, and as satisfactorily argued by the learned Advocate for the Petitioner Mr. Tanjib-ul Alam, the BOI's role of whatever nature and degree is a matter extraneous to the Act in general and its operation in the facts and circumstances as a condition precedent for a valid transfer of shares in one wholly alien to Section 38 of the Act. Indeed, this Court finds, any imposition of such requirement by the BOI may jeopardize or negate the Company's registration with BOI but cannot necessarily invalidate a transfer or indeed its subsequent registration under Sections 38 and 43 respectively of the Act. Regulatory requirements as these, the Respondents will appreciate, are necessarily addressed to an entity like the Respondent No. 4 Company but the transfer of shares is a matter *inter se* the shareholders as governed by the Articles. The Articles, as a negotiated constituent document of the Company, in turn must correspond to a higher authority which is the law itself. Indeed,

it is this indivisible relationship between the Articles and the law and the fact of such Articles being the outcome of careful negotiation by free will and for business expediency executed by subscribers of the memorandum that clothes the Articles with an essential binding nature (*Hemlata Saha vs. Stadmed (P) Ltd.* reported in *AIR 1965Calcutta 436 [V 52 C 81])*.

23. Even given the compelling and mandatory dictates of the law as endorsed by the Articles in this case, the learned Advocates for the Petitioner Mr. Alam and Ms. Khan remind this Court that the Respondents through their prevarication and equivocation at various stages in these proceedings had lost sight of the essential judicial dictate that no one must be permitted to take advantage of their own wrongs. Indeed, the Appellate Division in *Secretary, M/o Public Works vs. Momtaz Begum & another* reported in *10 MLR (AD)2005, 23* emphasized thus:

> *"We are not oblivious of the legal maxim "Commondum Ex Injuria Sua Nemo Habera Debet" i.e. no person ought to have advantage from his own wrong."*

24. The BOI angle so belatedly introduced by the Respondents in this case appears, therefore, as no more than an afterthought and a device for covering-up the illegality committed by the Respondent No. 1 in denying the Petitioner's entitlement to the 400 shares transferred to him and in further seeking a transfer of 1,200 shares to the Respondent No. 3. Section 2(1)(q) of the Act read with Article 8 of the Articles incorporating the rule of preemption are found, accordingly, to cumulatively deprive the Respondents the benefit of such illegality. Indeed, the Respondent No. 1 was always subject to a clear restriction curtailing his right to transfer his shares to the Respondent No. 3 in the manner that he did. This Court finds that such purported transfer of interest and title was in clear violation of the law and the Articles and always open to challenge, as indeed endorsed in the *Hurst vs. Crampton Bros Case*, at the Petitioner's instance an Application as this.

25. There are additional transactions in shares in this Matter that have merited this Court's attention. First, the Petitioner questions the validity of the transfer of 400 shares purportedly by himself to the Respondent No. 1 ostensibly through a *Form-117 Instrument of Transfer* (Annexure 'N' to the Petitioner's Supplementary Affidavit) procured online from the Respondent No. 5, RJSC's website. While the Petitioner denies outright the fact of such transfer, the Respondents notably have not positively acknowledged or submitted on the fact of such transfer. Moreover, though the transfer is declared in the *Form-117* to have been approved by the BOD at the meeting held on 10.10.2013, the minutes of that BOD meeting (Annexure- 'B series' of the Respondents' Affidavit in Opposition) do not attest to any such transfer or indeed the BOD's approval of the same. Second, a *Form-117* of 10.8.2013 (Annexure- 'E-(2)') indicates the reemergence of the Respondent No. 2 as a shareholder for the first time since she divested herself of all equity participation in the Company upon transfer of her 400 shares to the Petitioner on 12.2.2012. The Court is shown a transfer of 400 shares by the Respondent No. 1 to the Respondent No. 2, accordingly, on 10.8.2013 with the BOD's approval accorded on the same date. This copy of the *Form-117* procured online by the Petitioner is considered along with two *Forms-XII: Particulars of Directors* dated 29.11.2013 (Annexures- 'E' and 'E-1') also collected online. The *Form-XII* in Annexure- 'E(1)' records the Petitioner's resignation as a Managing Director but continued status as director as of 10.8.2013 with the contemporaneous appointment of the Respondent No. 2 as a newly appointed director/Managing Director. The competing *Form-XII* of the same date in Annexure- 'E' records the cessation of the Petitioner's directorship due to a transfer of his entire shares on 10.10.2013. Notably, however, there is no evidence on record of the transfer of the Petitioner's entire share holding interest in anybody's favour on 10.10.2013.

26. In the bare minimum the *Form-XII* in Annexure-'E-1' attests to the Petitioner being an existing shareholder as of 10.8.2013 notwithstanding his purported resignation from the post of Managing Director. If that is the case it is not readily understood how the Respondent No. 2, an outsider non-member since February, 2012 could readily been re-inducted into the membership of the Company by a transfer of shares from the Respondent No. 1 without the Petitioner being granted the first right of refusal to acquire those shares. Here also there appears to be a blatant disregard of the right of preemption. The learned Advocate for the Petitioner Mr. Tanjib-ul Alam questions not only the authenticity and the veracity of the contents of the documents above in Annexures- 'E', 'E-1' and 'E-2' but also highlights the fact of these transaction being actually recorded in the Company's books and the register of shares and being reflected ultimately in the RJSC's records accessible online.

27. Given these facts and circumstances and the findings above, the Court has now to consider the rectification of the Company's share register accordingly:

(i) deletion of the entry recording the transfer of 400 ordinary shares of the Petitioner to the Respondent No. 1;

(ii) deletion of the entry recording the transfer of 400 ordinary shares from the Respondent No. 1 to Respondent No. 2;

(iii) deletion of the entry recording the transfer of 1200 ordinary shares from Respondent No.1 to Respondent No. 3; and

(iv) deletion of names of Respondents Nos. 2 and 3 as shareholders of the Respondent No. 4 Company.

28. Furthermore, with regard to deletion of the name of the Respondent No. 3 in relation to the 1,200 shares, Mr. Alam has satisfactorily argued that given the illegality that has tarnished such transaction the Respondent No. 3 had always run the risk of his title being defeated at the Petitioner's behest seeking this Court's intervention under Section 43. This Court in applying the *Hurst vs. Crampton Bros Case* ratio and on a true construction of the preemption clause in Article 8 of the Company's Articles, accordingly, finds the Respondent No. 1 to have been in breach of the Articles the moment he executed an instrument of share transfer transferring 1,200 shares to the Respondent No. 3. This was sought to be done by ignoring the Petitioner's overriding right of preemption as an existing member of the Company. Resultantly, and the Petitioner having never waived his right of preemption, the Respondent No. 3 is found to have acquired in law no entitlement to these shares. In other words, that purported transfer, a nullity in law shall henceforth be treated as not having taken place at all. The Respondent No. 3 was and has always been, therefore, a claimant only to the price that would have been paid once the right of preemption was allowed to be freely exercised by the Petitioner. That price, as indicated in Article 8 itself, would be a fair negotiated price settled by the Transferee and the directors. Since, however, the ostensible transfer of 1,200 shares (as evident in Annexure- '2' of the Affidavit-in-Opposition) was for a consideration of Tk. 1,20,000/- calculated at the face value of Tk. 100 each, it is a reimbursement of that consideration value that the Respondent No. 3 can expect to be entitled to from the Respondent No. 1 qualifying as a fair price under Article 8.

29. It is found, accordingly, that the Petitioner remains a shareholder in the Respondent No. 4 Company to the extent of his 800 shares. Furthermore, until his beneficial and legal interest in the 1,200 shares are fully restored in his favour he shall be deemed a *'cestui que trust'* in whose favour the Respondent No. 1 shall hold the 1,200 shares in trust. As enunciated by the Indian Supreme Court in *R. Mathalone vs. Bombay Life Assurance Co. Ltd*.

reported in *AIR 1953 (SC), 385* the relation of a trustee and a *'cestui que trust'* is established on the transfer of shares, whereby, *'cestui que trust'* i.e., (the Petitioner in these facts) becomes the sole beneficial owner of those shares sold by the transferor in whom the legal title remains vested. It is the crux of such relationship that the transferor holds the shares for the benefit of the transferee. In the facts and circumstances it will be the Respondent No. 1 who will hold such shares to the benefit of the Petitioner. It was also found in that case by the Indian Supreme Court that within this relationship-

> *"equity clothes the transferor with the status of a constructive trustee and this obliges him to transfer all the benefits of property rights annexed to the sold shares of the 'cestui que trust'."*

30. The Agreement of 7.10.2012 which was a prelude to the transfer of shares to the Petitioner by the Respondent Nos. 1 and 2 in January and February 2012, upon perusal, provides no indication or guideline as to the actual transactions in shares that followed such execution. The Agreement speaks of an anticipated departure of the Respondent No. 1 from Bangladesh upon divesting himself of all interest in the Company in fvour of the Petitioner. The Respondents though initially acknowledging the validity of this Agreement have by a subsequent Supplementary Affidavit-in-Opposition of 7.4.2014 denied outright the legal effect of the same. This is on account of the Agreement, purportedly a *"rental agreement"*, never being registered with the relevant Government authority pursuant to Clause-9 of the Agreement. Be that as it may, this Court finds that the Agreement in effect has no bearing on determining the extent of the shareholding interest of the parties thereto under this Section 43 Application, and consequentially deems it superfluous to arrive at any substantive finding on the validity or not of Agreement or the consequences thereof.

31. In light of the above, this Court now finds that the facts merit an intervention by this Court by virtue of its authority under Section 43 of the Act only to the extent of recognizing the the Petitioner's continued beneficial interest and legal title accruing under 800 shares transferred to him by the Respondent Nos. 1 and 2 and the existing beneficial interest of the Petitioner to the 1,200 share illegally transferred by the Respondent No. 1 to the Respondent No. 3, such shares to be deemed now to be held by the Respondent No. 1 in constructive trust for the Petitioner until such time that the Petitioner acquires the same for a consideration determined at par value of Tk. 100 each.

32. Accordingly, this Court, hereby, directs the rectification of the Company's share register by cancelling and deleting all previous entries showing the Respondent No. 1 as a transferee of 400 ordinary shares from the Petitioner and of the Respondent No. 2 as the transferee of 400 shares from the Respondent No. 1. It shall be incumbent further upon the Company to delete any entry recording the transfer of 1,200 ordinary shares from the Respondent No. 1 to the Respondent No. 3 consequent upon the Petitioner making a one-time payment of Tk.1,20,000/- in favour of the Respondent No. 1 within a period of 1(one) month from the date of the drawing up of this Order. This shall necessarily lead to the Petitioner emerging as the Company's sole shareholder director allowing for Section 222 of the Act to be called into operation permitting the Company to carry on business for a period of up to 6(six) months with sole membership beyond which period the induction of a new member shall become necessary. In that regard, Mr. Alam, by reference to Article 14 read with Regulation 90, Schedule 1 to the Act, submits on the induction of a member from amongst

the Petitioner's family members without being in breach in any way of the rule of preemption and until such time enabling the Petitioner to act solely for the purpose of increasing the number of directors to the required minimum of two shareholders-directors. This will satisfy, therefore, the requirement of Section 90(2) of the Act that obligates a private company to have at least two directors. Consequentially, it shall be incumbent upon the Petitioner to ensure the due subscription of qualification shares by such new shareholders-directors within a period of 60 (sixty) days of such induction/appointment to the extent of at least 400 ordinary shares as per Article 14 of the Articles of Associations.

33. This Court further directs the Respondent No. 4 Company to file, pursuant to Section 44 of the Act, a notice of the rectification of the share register as hereinbefore ordered upon to the Respondent No. 5, Registrar, Joint Stock Companies and Firms within 15 (fifteen) days from the date that the transfer is effected of 1,200 shares by the Respondent No. 1 in favour of the Petitioner.

34. In the result, the Application is allowed subject to the directions and observations above.

35. There is no Order as to costs.

36. The Respondent No. 3 is, hereby, consequentially allowed to take back documents filed in their original and in certified copy upon replacing all such documents with photocopies thereof duly attested and dated by the learned Advocate Mr. Sarder Alamgir Ahmed himself.

4 SCOB [2015] HCD 23

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION NO. 1529 of 2013
With
WRIT PETITION NO.16322 of 2012
WRIT PETITION NO.16323 of 2012
WRIT PETITION NO.11229 of 2013
WRIT PETITION NO. 866 of 2013
WRIT PETITION NO. 867 of 2013
WRIT PETITION NO. 609 of 2013
WRIT PETITION NO. 610 of 2013
WRIT PETITION NO. 4045 of 2013
WRIT PETITION NO.16381 of 2012
WRIT PETITION NO.16384 of 2012
WRIT PETITION NO. 235 of 2013
WRIT PETITION NO. 237 of 2013
WRIT PETITION NO.16380 of 2012
WRIT PETITION NO.16383 of 2012
WRIT PETITION NO. 2665 of 2013
WRIT PETITION NO.16386 of 2012
WRIT PETITION NO.16385 of 2012
WRIT PETITION NO.16382 of 2012
WRIT PETITION NO. 2664 of 2013
WRIT PETITION NO. 2670 of 2013
WRIT PETITION NO.16387 of 2012

Alvi Spinning Mills Ltd and others
..…… Petitioners
-Versus-

Government of Bangladesh and others
..... Respondents

Mr. Mainul Hosein,
Mr. A.F.Hasan Arif,Senior Advocates with
Mr. Moudud Ahmed, Senior Advocate,
Mr. Yousuf Hossain Humayun, Senior Advocate,
Mr. S. M. Rezaul Karim,
Mr. Md. Nuruzzaman Khan,
Mr. Shasti Sarker,
Mr. Md. Imrul Haydar,
Mr. Kazi Akhtar Hosain, and
Mr. Md. Kamruzzaman, Advocates
…… For the petitioners
Mr. Md. Forrukh Rahman with
Mr. Sk. Abdullah, Advocates
.....….For the Respondents

Mr. A.S.M. Abdur Razzague, Advocate
..….. ....Respondent No.4
Mr. Abdullah Al-Mubin, Advocate
..... … For Respondent No. 6
(In Writ Petition No. 2670 of 2013)
Mr. Md. Abdun Nur, Advocate
.....…...For Bangladesh Bank
(In Writ Petition No. 16386 of 2012)
Mr. Shamim Khaled Ahmed, Advocate
..... For the Respondents
Mr. Kazi Akhtar Hosain, Advocate.
……..…For the Respondents
Mr. Shahjada Al-Amin Kabir, Advocate
..... ….For the Respondents
Mr. Md. Azizul Huq, Advocate.
…..... For the respondents
Mr. Kazi Akhtar Hossain, Advocate
..... … For respondent No. 5

(In Writ Petition No.16387 of 2012)
Mr. Md. Azizul Hoque,
Mrs . Shamsed Banu,
Mr. M. Khaled Ahmed,
Mr. Ashiqur Rahman and
Mr. Hosneara Begum, Advocate
.....…For the Respondent.
(Sonali Bank Ltd.)
Mr. Sheik Shafique Ahmed Puspa,
Mr. A. M. Masum, Advocates
.....……..For the Respondents

Mr. Md. Kamruzzaman, Advocate
..... …..For the Respondents
(Agrani Bank Ltd. and Al-Arafa Islam Bank Ltd.)

Mr. Sk. Abu Musa Mohammad Arif, Advocate.
..... ……For the Respondent
(Nakshi Knit Composite Ltd.)

Mr. Shafiqul Karim Khan, Advocate.
..... …… For the Respondent
(One Bank Ltd.)

Mr. A.S.M Abdur Razzaque, Advocate.
.....……For the Respondents

Mr. Kazi Akhtar Hossain, Advocate
.....… For respondent No. 4
(In writ petition No.16380 of 2012).

Mr. Md. Kamruzzaman, Advocate.
…..... For respondents

Mr. A. M. Showkatul Huq, Advocate
..... …For the respondents

Mr. M. Khaled Ahmed , Advocate.
…….....For Respondent No.6
(In writ petition No.866 of 2013).

Mr. Md. Kamruzzaman, Advocate.
..... … For respondent No.10.
(In writ petition No.5087 of 2013)

Mr. Md. Shafiqur Rahman, Advocate
..... …. For respondents

Mr. Md. Arifur Rahman, Advocate
.....….. for the respondent No. 5 and 6
(National Bank Limited)

Mr. Shafayat Ullah, Advocate
..... …. For respondents

Heard on 22.01.2014 & 23.01.2014
Judgment on 30 January 2014

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

Letter of Credits must be respected:
The decisions referred to above consistently spelt out that when an irrecoverable Letter of Credit issued / opened and confirmed by the bank such a bank is left with no option but to respect its obligation under the letter of credit and pay if the draft and documents are found to be in order and terms and conditions of such L/C satisfied.
...(Para 28)

Payment can be refused by the issuing bank only when fraud is established:
Customer cannot instruct the bank not to pay and bank cannot act upon such instruction, if any, for withholding the payment. Any dispute between buyer and seller is to be settled between them in accordance with the terms and conditions of the contract of sale. If the buyer suffers in any way, he can file suit for damages. But at the same time in all these decisions it has also been manifested that only exception to such general statement of principle i.e. recognized by a court of law is obvious and clear case of fraud brought to the knowledge of the L/C issuing bank. However, mere allegation of fraud is not sufficient to entitle the issuing bank to withhold payments. It must be found that the draft/ documents submitted for payment must be tainted by real fraud. When that can be established only in that case payment can be refused by the issuing bank.
...(Para 30)

Judgment

Md. Ashfaqul Islam, J:

1. All these Writ petitions are taken up together and disposed of by a single judgment as there involved common question of fact and law.

2. In Writ Petition Nos. 1529 of 2013, 11229 of 2013, 866 of 2013, 867 of 2013 and 16322 of 2012 Rule was issued calling upon the respondents to show cause as to why a direction should not be given upon the respondents to pay the outstanding bill along with over due interest of the petitioners.

3. In Writ Petition Nos. 609 of 2013, 610 of 2013 and 4045 of 2013 Rule was issued challenging the enlistment of the names of the petitioners in the CIB list of its Credit Information Bureau as loan defaulter to be illegal and a direction was sought for the enlistment should be declared to have been done without lawful authority having no legal effect.

4. In rest of the Writ Petitions i.e. Nos. 16323 of 2012, 16380 of 2012, 16381 of 2012, 16383 of 2012, 16384 of 2012, 2665 of 2013, 235 of 2013, 237 of 2013, 16385 of 2012,16386 of 2012, 16382 of 2012, 2664 of 2013, 2670 of 2013 and 16387 of 2012 Rule was issued in both the terms as aforesaid.

5. Broadly the facts are almost similar in all the petition bereft of the particulars of the parties (petitioners and respondents) and their position in the cause title.

6. For the sake of convenience and brevity we would first take up Writ Petition No. 1529 of 2013. The background leading to the Petition is that the petitioner Company Alvi Spinning Mills Ltd. has been running on its business with reputation in respect of trading and import and export, and attracted several companies who became interested to purchase textile and garments products from the petitioner through their several Letter of Credits and accordingly the petitioner accepted the Letter of Credit issued by the Sonali Bank Limited, Hotel Sherton (now Rupashi Bangla) Corporate Branch and supplied the product through Agrani Bank Limited, BWAPDA Branch, Motijheel, Dhaka and also Al-Arafa Bank Jatrabari Branch who are the Negotiating Bank. Respondent No.8 Sonali Bank Hotel Sheraton Branch (Now Rupashi Bangla) is the L/C. issuing Bank. It has been stated that after accepting the export Bills from Respondent No.11 Agrani Bank Limited, the negotiating Bank, 42 Export Bills were accepted by the Sonali Bank. Upon accepting those over due bills amounting to U.S.$ 52,11,000 the respondent No.8 Sonali Bank is under an obligation to make payment through Respondent No.11 Agrani Bank and also Respondent No.12 Al Arafa Islami Bank to the petitioner. But instead of releasing the same in favour of the petitioner it has been held up by the Sonali Bnak. It is at this stage the petitioner moved this Division asking for a direction upon the respondents to pay the over due bills along with over due interest of the petitioner through respondent Agrani Bank and Al Arafa Islami Bank and obtained the present Rule.

7. In Writ Petition No. 609 of 2013 the Rule was issued in the following terms:-"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the action of the respondent No. 1 and 2 enlisting the name of the petitioner in the CIB list of its Credit Information Bureau as a loan defaulter should not be declared to have been done without any lawful authority and is of no legal effect."

8. Mr. A.F. Hasan Arif, the learned Senior Advocate has appeared in Writ Petition No. 1529 of 2013 and in all other Writ Petitions Mr. Mainul Hossein the learned Senior Advocate appeared for the petitioners. Both of them argued unequivocally that the petitioner, who supplied fabrics and yarns through the negotiating Bank, approached the above branches of Sonali Bank Ltd. for issuing necessary certificate and acceptance that whether the shipping documents in all these transactions namely, L/Cs, Delivery Challan, Bills of Exchange etc.

were genuine and valid. The above branch of respondent-Sonali Bank Ltd., in turn issued certificate and acceptance in favour of the negotiating banks of the petitioners saying that the shipping documents were all genuine and valid and the sale proceeds would be paid by the date of maturity.

9. Their further submission is that the payment has to be made on the documents supplied to L/C opening Bank (namely respondents Sonali Bank by the negotiating Bank Agrani Bank (Agargoan Branch) as per international customs having the force of law, i,e, UCPDC-600 (2007 Revision). L/C is an independent contract and not qualified by the original contract of sale though it is based on it and in the cases in hand since the L/C issuing bank, (Sonali Bank) found no discrepancy in the documents supplied by the sellers bank and moreover, Sonali Bank confirmed payment by advising the date of maturity, there is no scope further to stop the payment as such. It has been also contented that Sonali Bank is a statutory public authority as per Article 152 of the Constitution as well as local authority defined under section 2(27) of the General Clauses Act, 1897. Besides, UCPDC-600 has the force of law as defined by Article 152 of the Constitution. Consequently they have also argued that whatever the allegation may be made against the buyer or the seller outside the contract of L/C has no relevance for the obligations under the L/C. The remedies are available elsewhere, but L/C must be honoured only on the basis of L/C related documents.

10. They further contended that there is no allegation of fraud or forgery in respect of documents supplied by the banks of the sellers. Internal irregularities of the bank also will not affect payment under the L/C. Only vague allegations of fraud against L/C issuing forgery about document supplied by buyers for securing L/Cs are not relevant for the payment under the L/Cs to the negotiating bank. They went on submitting that in respect of payment by the Sonali Bank principle of estoppel shall also operate and the bank is stopped from denying payment in as much as the negotiating bank of the seller acted in buying document on the confirmation made by the respondent Sonali Bank.

11. In support of the Rule in Writ Petition No. 1529 of 2013 i.e. withholding of payment by the Sonali Bank Mr. Mainul Hosein cited some authorities :- Uttara Bank Vs. Macneill and Kilbon Ltd. and others 33 DLR (AD) 298, Zyta Garments Ltd. Vs. Union Bank 55 DLR (AD) 56. , Gujarat State Financial Company Vs. M/s Lotus Hotel Pvt. Ltd. AIR 1983 (SC) 848 and also Standard Bank Ltd. Vs. Tripost Engineering and Training Company (GD) and others 56 DLR 55. All these decisions have been focused on the settled proposition of law that when an irrecoverable Letter of Credit is open and confirmed by a bank such bank is left with no option but to honour its obligation under the Letter of Credit and pay.

12. As it has been submitted that UCPDC-600 through several article has also fortified the said proposition of law as discussed above.

13. In respect of Writ Petition No. 609 of 2013 which concerns with the illegal enlistment of the petitioners' name in the CIB list, Mr. Mainul Hosein submits that the petitioners are neither loanee nor borrowers as the claim being for "sale proceed" on receipt of document of title. As no credit limit was sanctioned by the negotiating bank, only by purchase of document of title the petitioners automatically do not become borrowers under Article 42 of the Bangladesh Bank Order 1972.

14. The respondent Sonali Bank Ltd. in some cases paid 70% and in some cases even 90% of the 'sale proceeds' in advance and purchased the relevant shipping documents

namely, L/Cs, Delivery Challan, Bills of Exchange etc. from the petitioners. The said negotiating Banks thereafter obtained sale proceeds from Sonali Bank Ltd. in some cases and failed to receive the sale proceeds in other cases. Hence, the negotiating Bank of the petitioners requested for payment and issued reminders to Sonali Bank Ltd. for payment of the unpaid sale proceeds. But the negotiating Banks failed to receive payment of the sale proceeds from Sonli Bank Ltd. Thereafter in league with Sonali Bank Bangladesh Bank illegally but on a misconception of law has shown the said sale proceeds as loan and included the petitioners' name in the CIB list of Bangladesh Bank.

15. CIB is creation to Bangladesh Bank Order 1972 and it being protected by first schedule of the Constitution which shall prevail over the Bank Companies Act. It was also positive argument from the bar that the petitioners are not borrower under Article 42 where Credit Information has been defined in Bangladesh Bank Order 1972.

16. The petitioners received the advance payment against sale proceeds by selling their shipping documents to the negotiating bank thus transfer their title over the sale proceeds to the negotiating bank on the basis of the documents and the purchasing bank should get money from Sonali bank. Therefore, it cannot be claimed that the petitioners became loanee under the Bank Companies Act or borrower under the Bangladesh Bank Order. In any view of the matter the petitioners names should not have been included in CIB list as they are not borrower or loanee.

17. Notably, in respect of second point for consideration i.e. illegal enlistment of the name of the petitioner in CIB list no authority has been cited by the learned counsel appearing for both the sides.

18. Mr. Azizul Hoque, the learned Advocate appearing for the respondent No.8 in Writ Petition No.1529 of 2012 by filing affidavit in opposition on the other hand opposes the Rule and made his submissions. He has submitted two affidavits in oppositions in support of his contention. Be it mentioned that at one point of time we in our anxiety directed personal appearance of the Managing Director of Sonali Bank to clarify the entire aspect and he personally appeared before us and in his own way tried to give clarification explaining the entire scenario. We then asked Mr. Azizul Hoque, the learned Advocate for the Sonali Bank to give further affidavit in opposition containing the statement of the Managing Director, Sonali Bank that have been stated before us and accordingly he submitted affidavit in opposition where in paragraph 3 it has been stated : In view of the facts and circumstances of the cases as narrated by the petitioner as lately discovered by the writ respondent No.8 Sonali Bank Limited that under a Memo dated 23 September, 2012 a complaint to the Chairman, Anti Corruption Commission, Head Office, Segun Bagicha, Dhaka has been lodged against the writ petitioners and others and the Anti Corruption Commission vide its letter dated 10.3.2013 acknowledged the same stating, inter alia, that Anti-Corruption Commission filed several cases against the petitioners and others in Miscellaneous Case No.4842 of 2013 before this Division and filed Ramna Model Police Station (DNP) Case No.9 dated 04.10.2012. The Respondent bank categorically lodged the complaint stating that :-

ÔcecwiKwíZfv‡e cZviYvi D‡Ï‡k¨ Rvj `vjj I A¯Zvenxb fqv cwZôvb mgRb Kwiqv D³ Rvj `vjjv` I A¯Zvenxb fqv cwZôvb mgn¨K mvVK evjqv Dc¯vcb Kwiqv wb¤ wjwLZ Dcv‡q eviYZ cwigvb A_ AvZ¥mvZ Kwiqv‡Q|Õ

19. The copies of the complaint and their acknowledgement letter of the Anti Corruption Commission have been annexed as Annexure- 'X' and 'X-1' to the affidavit in opposition. Therefore, he submits that while the cases of the petitioners are under investigation by the Anti Corruption Commission (ACC) and also in other forum, in such situation the respondents bank cannot make any payment to the petitioners till their decisions.

20. In elaborating his submissions the learned counsel by filing another affidavit in opposition dated 8.7.2013 further submits that due to non-compliance/violation of existing rules and regulations in connection with disbursement and drawing of Funded Loan of the respondent No. 8 (Sonali Bank Limited, Hotel Sheraton Corp. Branch, Dhaka), Anti-Corruption Commission (ACC) has filed several cases against the officials of Sonali bank Limited and the applicant (Hall Mark Fashion Ltd., Farhan Fashion Ltd., Dol Apperals Ltd., Islam Fashion Ltd., T & Brothers Knit Composite Ltd. and Dress Me Fashion Ltd.) involving L/Cs. As a result some of the accused persons are now in jail and the cases are still pending before the court. Anti Corruption commission (ACC) also informed Sonali Bank Limited that the non-funded loan (Accepted Liabilities) of respondent No. 8 (Sonali Bank Limited, Hotel Sheraton Corporate Branch, Dhaka) is under their investigation. Bangladesh Bank's existing guidelines for Foreign Exchange Transactions (GFET) Volum-1, Chapter-7, Page-33 stipulates as under:

"LC covering value more than USD 5000 or equivalent should be sent through SWIFT or other similar arrangements to the advising Bank."

21. *AÎ kvLvq* SWIFT *myeav _vKv m‡ZI Zv e¨envi bv K‡i* Manually typed L/C*. BmÿgKiv n‡q‡Q Ges mieivnKvixi (†gmwm* Taiba Rotor Spinning *wgjm wjt)*Ûi *e¨vsK Iqvb e¨vsK wjt kvLv, XvKv Zv MnY K‡i* Bill Purchase/negotiate *K‡i‡Q hv evsjv‡`k e¨vs‡Ki we`¨gvb* GTFET' *I wb‡`kbvi cwicwš (*Violation*)|*

22. The relevant text of Bangladesh Bank's existing guidelines for Foreign Exchange Transactions (GFET) Volume-1, Chapter-7, Page-39 Para 37 stipulates as under:

"Inland back to back L/Cs denominated in foreign exchange may be opened in favour of local manufacture-cum-suppliers of inputs."

23. *A_P Ki e¨vs‡Ki cavb Kwhvjq KZ¦K MwVZ cwi`kb wU‡gi `wLjKZ.cwi`kb cwZ‡e`‡b ixU Av‡e`bKvix Avjfx w¯úwbs wgjm wjt (mieivnKvix cwZôvb) Gi d¨v±ix‡Z Drcw`Z 10-20 KvD‡›Ui myZv ißvbxgŁx bxU Mv‡g›Um wk‡í e¨env‡ii †Kvb AeKvk †bB| d¨v±ixi Drcv`b ¶gZvi Zyjbvq AwaK mieivn A_vr we`¨gvb †gwkb Gi gva¨‡g Drcw`Z hrmvgvb¨ cY¨ Øviv Gjwmôi Pwn`vKZ.c‡Y¨I †hvMvb †`qv/mieivn Kiv †Kvb fv‡eB mvgÄm¨c¥` bq| KviLvbvi mwnK w`K Z_v Drcw`Z c‡Y¨i aiY, ^`wbK Drcv`b ¶gZv ev m¶gZvi wePv‡i gvt Wt 52,11,000.00 gj¨gv‡bi wecyj cwigvb myZv mieiv‡ni welqwU h‡_ó AmsMwZc¥` g‡g D‡jL Kiv n‡q‡Q|*

24. Though the subject L/Cs stipulate that " this credit is subject to uniform customs and practice for documentary credit 2007 (Revision) International Chamber of Commerce publication No. 600" but this rule/norms are not applicable where High Scale irregularities, fraud/forgeries are involved and the Court cases filed by ACC is pending. So at this stage the question of payment the bills dues not arise.

25. Therefore, he submits that in all fairness this Rule should be discharged outright.

26. That being the situation the questions need to be addressed by this Division in all these Petitions are whether under the facts and circumstances of the different cases in hand

the L/C issuing bank was at all justified in withholding the payment to be paid by honourig respective L/Cs and whether the enlistment of the names of the petitioners in the list of CIB by the respondent Bangladesh Bank is in keeping with the relevant provisions of law.

27. Let us now discuss the first point.

28. The decisions referred to above consistently spelt out that when an irrecoverable Letter of Credit issued / opened and confirmed by the bank such a bank is left with no option but to respect its obligation under the letter of credit and pay if the draft and documents are found to be in order and terms and conditions of such L/C satisfied.

29. In 55 DLR (AD) (56) referred to above our Appellate Division clearly observed in paragraph-9

> "As soon as the letters of credit are established between the issuing bank and the negotiating bank, it becomes an independent agreement between the two banks, neither the seller nor the buyer has any (privacy) to that agreement. It is by nature a separate transaction from the sale agreement between the seller and the buyer. Consequently, the undertakings and obligation of a bank to pay, accept and pay drafts or negotiate under a letter credit are not subject to claims or defences by either the seller or the buyer. The only exception to this strict rule is the knowledge of the bank that the documents presented are forged and fraudulent."

30. Customer cannot instruct the bank not to pay and bank cannot act upon such instruction, if any, for withholding the payment. Any dispute between buyer and seller is to be settled between them in accordance with the terms and conditions of the contract of sale. If the buyer suffers in any way, he can file suit for damages. But at the same time in all these decisions it has also been manifested that only exception to such general statement of principle i.e. recognized by a court of law is obvious and clear case of fraud brought to the knowledge of the L/C issuing bank. However, mere allegation of fraud is not sufficient to entitle the issuing bank to withhold payments. It must be found that the draft/ documents submitted for payment must be tainted by real fraud. When that can be established only in that case payment can be refused by the issuing bank.

31. Article-5 of UCPDC-600 envisages that bank deal with documents and not with goods, services or performance to which the documents may relate.

32. Article-7 depicts issuing Bank under taking as under:-

a. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available.

b. An issuing bank is irrevocable bound to honour as of the time it issues the credit.

c. An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit

available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

33. On the other hand UCPDC-600 through its several Articles also focused exception to the proposition of law as discussed above. Article 34, 36 & 37 of UCPDC-600 envisage a bank assumes no liability or responsibility for the Form, sufficiency, accuracy genuineness, falsification or legal effect of any document or for general or particular condition stipulated in a document. Needless to mention that it concerns about L/Cs.

34. UCPDC-600 Article-36 clarifies further:-

"A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control."

35. The submissions of Mr. Hasan Arif and Mr. Mainul Hosein on different points have been considered by us in meticulous adherence to the settled proposition of law in a given situation.

36. Lord Dening once observed in [R. -Vs- Metropolitan Police Commissioner (1968) 2 All. E.R.-139] that silence is not an option when things are ill done. May be His Lordship in a particular case observed this but we have found that in many grave exigencies this immutable observation still applies. We have come across from the affidavit in opposition of the Respondent bank as quoted above that the parties involved in all these petitions are alleged to have been involved in a large scale of scam and mall practices which touched the conscience of the people of the country of late. However, that is not relevant for the purpose of deciding the petition at all. Significantly in all the decisions referred to above we have found that all the cases were first filed in the court of origin i.e. the trial court and then went up to the High Court Division and Appellate Division. Not a single decision on this issue could be found in a Writ jurisdiction.

37. Truth or otherwise of the allegation whatsoever branded against the parties shall have to be decided of course on evidence and in the court of origin i.e. in the trial court. This Court in summary jurisdiction under Article 102 while exercising its discretion will be loath to interfere with and give a decision in such a situation. In the case of Chairman, Bangladesh Water Development Board and another -Vs- Shamsul Hoque and Company Ltd. and others 51 DLR (AD) 169 Chief Justice Mustafa Kamal (As his Lordship then was) held the direction of the High Court Division to pay a sum of Taka 24,90,724.25 by the respondent No. 1 Bangladesh Water Development Bank to the Writ Petitioner to be untenable in Writ jurisdiction His Lordship observed:

> "The High Court Division in its writ jurisdiction is not a court for the recovery of money and has no jurisdiction to give a direction for payment of a particular amount of money, to the writ petitioner unless the amount claimed is both an admitted amount as well as statutory payment."

38. Moreover, the cases are absolutely based on contract between the parties as such this Division would be reluctant to dwell upon the same. The parties, if so advised, can redress their grievances, if any, before the appropriate forum. Therefore, the first point which relates to the first part of the Rule has no legs to stand and fails.

39. Next comes the second part i.e. the illegal inclusion of the names of the petitioner in the list of CIB by the Bangladesh Bank. Substituted Section 5 Ga Ga of Bank Company Act *(e¨vsK-†Kv¤úvbx (ms‡kvab) AvBb, 2013 (2013 m‡bi 27 bs AvBb) Gi 4(L) avivi e‡j `dv (MM) cwZ¯wcZ)* defines defaulter borrower. It says:-

> *"‡Ljvcx FY MnxZvÓ A_ - †Kvb ‡`bv`vi e¨w³ ev cwZôvb ev †Kv¤úvbx hvnvi wb‡Ri ev ¯v_ mswkó cwZôv‡bi Abyk‡j c`Ë AMxg, FY ev Ab¨ †Kvb Awf_K myeav ev Dnvi Ask ev Dnvi Dci AwRZ mÿ ev Dnvi gbvdv evsjv‡`k e¨vsK KZ…K RvixKZ.msÁv Abyhvqx †gqv‡`vËxY nIqvi 6 (Qq) gvm AwZewnZ nBqv‡Q|"*
>
> *e¨vL¨v|-GB `dvi D‡Ïk¨ ci-YK‡í †Kvb e¨w³ ev, †¶Îgv, cwZôvb ev †Kv¤úvbx Ab¨ †Kvb cwZôv‡bi cwiPvjK bv nB‡j A_ev D³ cwZôv‡b Zvnvi ev Dnvi †kqv‡ii Ask 20% Gi AwaK bv nB‡j A_ev D³ cwZôv‡bi F‡Yi Rwgb`vZv bv nB‡j, D³ cwZôvb Zvnvi ev Dnvi ¯v_ mswkó cwZôvb ewjqv MY¨ nB‡e bv;]*

40. Section 27 KaKa depicts that whenever names of the loan defaulter by any bank company have been sent to the Bangladesh Bank who in its turn at once enlist the name in the CIB list. It has no choice other than that. In every three months it rotates which is a continuing process. Mr. Hosein tried to impress upon us that as per Article 42 of Bangladesh Bank Order 1972 where borrower have been categorized, no definition of loan has been given and the definition of loan *ev ÔFY* which could be found in Artha Rin Ain.2003 in section 2 Ga is also for the purpose of realizing money under the Ain itself.

41. In the case of M/S Ripon Traders Vs. Bangladesh Bank, VII ADC (2010) 152 the enlistment of the name of the incumbent in list of CIB by the High Court Division was held to be justified. The Appellate Division upheld the said decision of the High Court.

42. In Md. Abul Kashem Vs. Mahmudul Hasan, IX ADC (2012) 489, our Appellate Division held that section 27 KaKa of Bank Companies Act, 1991 provides for identification and preparation of a list of defaulter loanees by the bank itself and then to send it to Bangladesh Bank. The purpose of sending such list to the Bangladesh Bank having regulatory authority, is clearly stated in sub-sections (2) and (3) to the effect that Bangladesh Bank shall distribute such list to other banks and financial institutions which are prohibited from giving loan to the defaulter.

43. Mr. Shamim Khaled Ahmed, the learned Senior Advocate appearing for the Bangladesh Bank, however, by filing affidavit in opposition detailed out and clear the scheme

of loan and its implication in terms of Section 5 GaGa of Bank Companies Act read with section 27 KaKa and Article 42 of Bangladesh Bank Ordinance 1972 with special reference to section 2 of Artha Rin Adalat Ain that defines loan. Mr. Khaled categorically submits that in paragraph 5 of the Writ Petition No. 235 of 2013 in particular and also in other petitions statements to the effect that amount received by the Respondent beneficiary is not a loan rather a "sale proceed" is totally misconceived and not at all correct. He clarified: –

> "It is stated that in amount admittedly received by the writ petitioner from the respondent No.4 United Commercial Bank Ltd. admittedly by way of 'bill purchase' is a term of art known and understood throughout the business world. The term bill purchase is very much in the definition of loan in Artho Rin Adalat Ain 1990 and its substitute Artho Rin Adalat Ain 2003. 'Loan' as defined in section 2 of the Ain is as follows:-
>
> ÔÔ FYÒ A_
>
> 1| AwMg, avi, bM` FY, Ifvi WvdU, e¨vswKs †µwWU , evUvKZ.ev µqKZ wej, Bmjvgx kixqv †gvZv‡eK cwiPwjZ Awl_K cwZôvb KZ„K wewb‡qvMKZ.A_ ev Ab¨ †h ‡Kvb Awl_K Avbœ¡¨ ev mœ¡hvM- mœeav , †h bv‡gB AwfwnZ nDK bv †Kb;
>
> 2| M¨vivwU, Bb‡WgwbwU, FYcÎ ev Ab¨ †Kvb Awl_K e‡›`ve¯ hvnv †Kvb Awl_K cwZôvb FY MnxZvi c‡¶ c`vb ev Rvix K‡i ev `vq wnmv‡e Mnb K‡i |
>
> 3| †Kvb Awl_K cwZôvb KZK.Dnvi ‡Kvb KgKZv ev KgPvix‡K c`Ë †Kvb FY; Ges
>
> 4| ceeZx µwgK (1) nB‡Z (3) G Dwjwl LZ FY, ev †¶Îgz Bmjvgx kixqv Abœwqx cwiPwjZ Awl_K cwZôvb KZ„K wewb‡qvMK„Z A_ Gi Dci ‰eaf¨v‡e Av‡iwcZ m`y`Û mÿ ev gœvdv ev fvov : Ó

44. We have found considerable force in the submissions of learned counsel for Bangladesh Bank. It is clear that the assertions and averments made by the petitioners in different petitions that the amount received from the negotiating bank is a "sale proceed" does not at all merit substance. We hold that it is absolutely an "advance" taken by the customer within the meaning of section 2 of the Artha Rin Ain, 2003 that defines advance as a loan and therefore, attracts section 5 (GAGA) of the Bank Company Act and for that reason inclusion of the names of the petitioners in the list of CIB is justified. Submission of Mr. Moinul Hosein for the petitioner on that score is misconceived and fallacious one. Our Appellate Division and this Division in several decisions had already decided this aspect which is no longer a resintegra.

(All the underlings are mine to add emphasis)

45. Fortified with all the decisions referred to above conjunct with the discussions and observations made thereto we are of the view that both the Writ petition Nos. 1529 of 2013 and 609 of 2013 miserably fail and for that matter all other Writ Petitions having been standing on the same footing also equally fail. They are absolutely devoid of any substance and should be discharged outright.

46. In the result, all the Rules are discharged without any order as to cost. The orders of stay granted earlier by this court are hereby recalled and vacated.

Md. Ashraful Kamal, J

47. I agree with His Lordship Md. Ashfaqul Islam, J. that the Rules should be discharged. I would however, add some observations of my own since the questions raised in the Rules are of considerable public importance.

48. The Hall Mark episode has been the 'talk of the country'. The Hall Mark loan scandal has put the entire banking sector in an embarrassing situation and the confidence of the depositors has gone shattered in consequence.

49. The petitioners' cases are based on a claim arising out of a commercial letter of credit. The facts may be briefly stated at the outset:

According to the petitioners, their customers intended to purchase garments products from them to export garments to their (purchasers) buyers. For the purpose of facilitating trade, their customers opened back-to-back letter of credit in their respective banks in favour of the petitioners to purchase the garments products. After that their customers sent those LCs to the petitioners.

50. The petitioners then submitted those LCs to their respective banks and took 90% of the LC amount as sale proceeds. Thereafter, petitioners have supplied the goods and their customers received those goods duly.

51. After that petitioners respective banks (Negotiating Bank) submitted all the documents of the goods delivered by the petitioners as per LC before the LC issuing bank i.e Sonali Bank to have their payment against the letter of credit. But the respondent Sonali Bank refused to pay LC amount of the petitioners' to their respective banks.

52. In view of the above situation the petitioners invoked this extraordinary jurisdiction under Article 102 of the Constitution and the above Rules were issued in the following three different terms:

> *a)Why a direction should not be given upon the respondents to pay the outstanding bill along with overdue interest of the petitioners.*
>
> *b)Challenging the enlistment of the names of the petitioners in the CIB list of its Credit Information Bureau as loan defaulter to be illegal and a direction was sought for the enlistment should be declared to have been done without lawful authority having no legal effect.*
>
> *c)both the terms as aforesaid*.

53. Since the entire matter relates to Letter of Credit, therefore, it is necessary to understand what Letter of Credit is.

54. Letters of credit (LCs) are one of the most versatile and secure instruments available to international traders. An LC is a commitment by a bank on behalf of the importer (foreign buyer) that payment will be made to the beneficiary (exporter) provided that the terms and conditions stated in the LC have been met, as evidenced by the presentation of specified documents. Since LCs are credit instruments, the importer's credit with his bank is used to obtain an LC. The importer pays his bank a fee to render this service.

55. Letters of credit (LCs) are also referred to as a documentary credit, is a contractual agreement whereby the issuing bank (importer's bank), acting on behalf of its customer (the importer or buyer), promises to make payment to the beneficiary or exporter against the receipt of "complying" stipulated documents. The issuing bank will typically use intermediary banks to facilitate the transaction and make payment to the exporter.

56. Letters of credit (LCs) are a separate contract from the sales contract on which it is based; therefore, the banks are not concerned with the quality of the underlying goods or whether each party fulfils the terms of the sales contract. [Article 4 of UCP 600 (2007 Revision)]

57. The bank's obligation to pay is solely conditioned upon the seller's compliance with the terms and conditions of the LC. In LC transactions, banks deal in documents only, not goods. [Article 5 of UCP 600 (2007 Revision)]

58. The Letters of credit (LCs) are always irrevocable, which means the document may not be changed or cancelled unless the importer, banks, and exporter agree. [Article 2 of UCP 600 (2007 Revision)]

59. There are two types of letters of credit: *commercial and standby*. Commercial letters of credit are used primarily to facilitate foreign trade. The commercial letter of credit is the primary payment mechanism for a transaction, whereas the standby letter of credit is a secondary payment mechanism.

60. A commercial letter of credit is a contractual agreement between a bank, known as the issuing bank, on behalf of one of its customers, authorizing another bank, known as the advising or confirming bank, to make payment to the beneficiary. The issuing bank, on the request of its customer, opens the letter of credit. The issuing bank makes a commitment to honor drawings made under the credit. The beneficiary is normally the provider of goods and/or services.

61. Commercial letters of credit have been used for centuries to facilitate payment in international trade. Their use will continue to increase as the global economy evolves.

62. Letters of credit used in international transactions are governed by the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits. The general provisions and definitions of the International Chamber of Commerce are binding on all parties.

63. The International Chamber of Commerce's (ICC), which was established in 1919, had as its primary objective facilitating the flow of international trade.

64. The Uniform Customs and Practice (UCP) for Documentary Credits is promulgated by the Commission on Banking Technique and Practice of the International Chamber of Commerce headquartered in Paris, France. It articulates standard international commercial letter of credit practice.

65. The current revision, ICC Publication No. 600 (UCP600), became effective July 2007. Prior versions were issued in 1933 (UCP82), 1951 (UCP151), 1962 (UCP222), 1974 (UCP290), 1983 (UCP400) and 1994 (UCP 500).

66. On the other hand, domestic letters of credit or Inland Letter of Credit (ILC) are used as payment instruments for business transactions in which the principal and the beneficiary live in the same country. They are defined as the conditioned payment order a loan institution (issuing bank) issues to guarantee that a business corporation (buyer/principal) will pay another (seller/beneficiary) and honor its payment obligations upon receiving certain documents regarding the sale of goods or services, which must comply with all of the terms and conditions established in such Letter of Credit.

67. In the cases in hand, admittedly the applicants of the Letters of Credit and the beneficiaries (petitioners) of the letters of credit are living in the same country i.e Bangladesh; therefore, the back-to-back letters of credit herein are Domestic Letters of Credit or Inland Letters of Credit (ILC). In these letters of credit it is stipulated that those are governed by the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits UCP 600 (2007 Revision).

68. Since in the case in hand, the Inland Letters of Credit presented by the petitioners are alleged to have been obtained by fraud, so these Letters of Credit have to be examined thoroughly.

69. As per Article 28 of the ICC Uniform Customs and Practice says that;

> *" a.....*
> *b.....*
> *c.....*
> *d.....*
> *e.....*
> *f. (i) The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit.*
> *(ii) A requirement in the credit for insurance coverage to be a for a percentage of the value of the good's of the invoice value or similar is deemed to be the minimum amount of coverage required.*
> *If there is no indication in the credit of the insurance coverage required, the amount of insurance coverage must be at least 110% of the CIF or CIP value of the goods.*
> *When the CIF or CIP value cannot be determined from the documents, the amount of insurance coverage must be calculated on the basis of the amount for which honour or negotiation is requested or the gross value of the goods as shown on the invoice, whichever is greater.*
> *iii. The insurance document must indicate that risks are covered at least between the place of taking in charge or shipment and the place of discharge or final destination as stated in the credit.*
> *G. A credit should state the type of insurance required and, if any, the additional risks to be covered. An insurance document will be accepted without regard to any risks that are not covered if the credit uses imprecise terms such as "usual risks" or "customary risks".*
> *h.....*
> *i.....*
> *j..... "*

70. On a plain reading of the aforesaid Article 28 it appears that a credit should state the type of insurance required but in the case in hand none of the letters of credit mentioned the name of the insurance company and its type. Rather the column of the insurance of the Letters of Credit was found blank.

71. Moreover, according to the guidelines issued by Bangladesh Bank for foreign exchange transactions (FFET) Volume I, Chapter-7, page-33, which provide that "LC covering value more than USD 5000 or equivalent should be sent through SWIFT Code or other similar arrangements to the advising Bank". But, mysteriously, in the instant letters of credit, SWIFT Code were not used and issued either by the negotiating Bank or by the L/C issuing Bank.

72. Apart from that, according to inspection report dated 8th July, 2012, the letters of credit in question were not issued by the Sonali Bank Limited, and acceptance also were not issued by the said bank and the respective Inland Letters of Credit (ILC) were not found in Bank's record.

73. Further, according to Inspection report dated 14th October, 2012, the letters of credit in question issued by the 26 Branches of several Banks for which no register acceptance of margin and realization of commission and acceptance of the bills were not available in the records of the Sonali Bank. This may be the result of running unauthorized/parallel banking operation by some officials in connivance with the concerned client.

74. During the course of Sonali Bank's audit, the audit team have obtained and reviewed the documents provided by the private banks in support of their lodged claims against accepted bills, but they have however been informed by the Branch Management that no Inland Letters of Credit were opened or issued from the concerned Branch and acceptance on inland bills were not given by the said Branch. Transaction occurred between Sonali Bank Ltd. and other commercial Banks which purchased inland bills, has been obtained illegally out of Bank's network, without recording of the related transactions in the books of the Branch.

75. So, in issuing these Inland Letters of Credit, Credit discipline has been grossly violated and disregarded in defiance of the existing rules, regulations, principles and guideline of bank.

76. The documents submitted by the private commercial banks do not contain all the required supporting papers to establish their right against the claims. They could not provide any documents to confirm that the acceptances have been taken by them from concerned branch through the Branch Management or proper official channel. Moreover the documents submitted by other banks against accepted bills were not signed /endorsed by the Branch In-charge or the Manager.

77. Bills purchasing banks (negotiating banks of the petitioners) should be held responsible for taking such acceptances without observing generally accepted banking norms i.e. through official channel. Therefore, we can assume that the concerned private commercial banks have purchased inland bills from the suppliers without discharging their responsibility diligently in purchasing such bills. They have also taken the acceptances without any proper channel of Agargaon Branch of Sonali Bank Ltd. We have also found that in most of the

cases acceptances were obtained from concerned Branch by these bill purchasing banks through interested party which has created the opportunity of parallel banking.

78. So it appears from the record that Hall mark group has managed to obtain a fake letter of credit (LC) from abroad and submitted it to Sonali Bank, Rupashi Bangla Branch to have opening local back-to-back letter of credit in the name of its sister concern, which maintain their account with other banks. The other banks thereafter submitted a fake fabricated local bill to Rupashi Bangla Branch of Sonali Bank for acceptance. After having obtained the acceptance of Sonali Bank, the respective banks paid the bill amount to the beneficiary by debit to their IBP account. On maturity date of the bill, the collecting bank availed the bill proceeds from the Sonali Bank and adjusted the IBP outstanding accordingly. Without movement of any goods, Hall mark group have snatched away the public money in the name of fake spinning companies.

79. The Sonali Bank is not only the largest nationalised bank in Bangladesh, but also the biggest commercial bank in this sector having the responsibility to perform the treasury function of the Sonali Bank places, where Bangladesh bank does not have its runs. Sonali Bank has been functioning with full confidence of the people and the nation as a whole. The Hall mark scam has not only thrown the Sonali Bank in a 'black hole' but also ruined the trust and confidence of the people in the entire banking sector.

80. About Tk. 3700 crore that has been distributed alone in the name of Hall Mark by Sonali Bank, Rupashi Bangla Branch, which includes the amount taken by their sister concern in the name of various Spinning Mills from other banks.

81. As per Bangladesh Bank guide lines, the single/party exposure is maximum 30% (funded 15% and non-funded 15%) of the respective banks paid up capital. The present paid up capital of Sonali Bank Ltd. is Tk. 1125.00 crore. Therefore, Sonali Bank Ltd. can extend credit facility to a single party to the tune of Tk. 168.75 crore as funded and Tk. 164.75 as non-funded, Tk. 337.50 crore in total. Therefore, it is crystal clear that Sonali Bank allowed Tk. 3700 crore to a single party (Hall Mark) as opposed to the 337.50 crore breaking the single party exposure limit as fixed by Bangladesh bank, the central bank of the country.

82. Lord Denning Mr. in the case of Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd. and Umama Bank reported in 1978 Lloyd's Law Reports Vol-1 page 166, wherein it has been observed.

> *"It is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contracted obligation or not nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand, if so stipulated, without proof of conditions. The only exception is when there is clear fraud of which the bank has notice."*
>
> *(emphasis is supplied)*

83. As per Article 34 of the ICC Uniform Customs and Practice the UCP 600 (2007 Revision) it speaks about the disclaimer on effectiveness of Documents which reads as thus;

> *"A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any*

> *document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility of the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignce or the insurer of the goods or any other person. "*
>
> *(emphasis is supplied)*

84. Therefore, on a reading of the aforesaid article 34 it is crystal clear that a bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification.

85. Since in the present cases in hand the respondents Bangladesh Bank and Sonali Bank disputed the Inland back-to-back letters of credit presented by the petitioners (beneficiaries) being forged documents, therefore, the issuing bank of the letters of credit has no liability or responsibility to honour them.

86. So, a letter of credit bank undertakes to honor a document that represents the underlying transaction. But, it does not undertake to honor a document that is fraudulent regardless of the innocence of the person presenting it.

87. In the present case it was alleged that Inland back-to-back letters of credit submitted by the petitioners are false documents by colluding with the applicant or a third party and there isn't any true basic transaction.

88. Fraud vitiates everything and in most cases it originates when a commercial party contracts with a rouge.

89. Thus it appears that only in two exceptional circumstances an issuing bank can absolve its responsibility of not honoring the obligation created by it under a letter of credit. Firstly, if it is proved that there is a clear fraud of which it has knowledge the bank may refuse to pay and secondly, if the cases are of such a nature that there is very special circumstance which warrants an interference by the court.

90. Since the genuineness of these letters of credit have been questioned by the issuing bank, therefore, under Article 102 we cannot entertain complicated disputed question of the fact as to whether the letters of credit annexed herein in the writ petitions are genuine or not.

91. The well-known principle that complicated questions of fact should not be entertained in a writ petition and the writ jurisdiction cannot be invoked when any alternative remedy is available to the aggrieved party cannot be disregarded at all. In the summary proceedings under Article 102 of the constitution, it is neither desirable nor advisable to enter into their merit and record a finding as to a disputed question of fact.

92. In the case of New India Tea Company Ltd. Vs. Bangladesh and others reported in 31 DLR(AD) (1979)-303 it was held that;

> "There is a long line of decisions in favour of the view that the High Court should not enter into disputed questions of fact nor

decide any question as to title which require investigation into facts and taking of elaborate evidence."

93. It is necessary to quote Section 45 of the Banking Companies Act, 1991, which runs thus:

৪৫। বাংলাদেশ ব্যাংকের নির্দেশ দানের ক্ষমতা। - (১) বাংলাদেশ ব্যাংক যদি এই মর্মে সন্তুষ্ট হয় যে, -
(ক) জনস্বার্থে, বা
(M) j â¡e£¢a Hhw hÉ¡wL -নীতির উন্নতি বিধানের জন্য, বা
(N) ®L¡e hÉ¡wL -কোম্পানীর আমানতকারীদের স্বার্থের পরিপন্থী বা hÉ¡wL -কোম্পানীর স্বার্থের পক্ষে ক্ষতিকর কার্যকলাপ প্রতিরোধ করার SeÉ; h¡
(0) ®L¡e hÉ¡wL -®L¡Ç f¡e£l kb¡kb hÉhÙ¡ f e¡ ¢e¢ÕQa L l¡l SeÉ, সাধারণভাবে সকল ব্যাংক-কোম্পানীকে, অথবা বিশেষ কোন ব্যাংক -কোম্পানীকে নির্দেশ প্রদান করা প্রয়োজন, তাহা হইলে বাংলাদেশ ব্যাংক যথাযথ নির্দেশ জারী করিতে পারিবে; এবং সংশ্লিষ্ট ব্যাংক -®L¡Ç f¡e£ উক্ত নির্দেশ পালন করতে বাধ্য থাকিবে।
(২) বাংলাদেশ ব্যাংক স্বেচ্ছায় অথবা উহার নিকট পেশকৃত কোন আবেদনের পরিপ্রেক্ষিতে উপ-ধারা (১) এর অধীন প্রদত্ত নির্দেশ বাতিল বা পরিবর্তন করিতে পারিবে; এবং এইরুপ বাতিলকরণ বা পরিবর্তন শর্তসাপেক্ষে হইতে পারিবে।

94. So the supervisory powers of the Bangladesh Bank within the meaning of Section 45 of the Bank Companies Act, 1991which is to the effect:

(a) In the public interest; or
(b) In furtherance of monetary and banking policy; or
(c) To prevent the affairs of any banking company being conducted in a manner detrimental to the interest of the depositors of any banking company or in a manner prejudicial to the interest of the banking company; or
(d) To secure the proper management of any banking company.

95. It is a well-settled principal of law that in order to get a Rule of mandamus the petitioner must show that his claim is rooted in the statute or statutory Rule.

96. So, it is always required that the applicant for a mandamus should have a specific legal right to enforce the performance of those duties.

97. In the case of Queen v. Guardians of the Lewisham Union, reported in (1897) 1 QB 498 it was observed;

"This court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance."

98. In the case of Talekhal Progressive Fisherman Co-operative Society Ltd. Vs. Bangladesh and others reported in 1981 BLD(AD)-103 wherein it has been runs thus:

> *"In order to entitle a person to ask for performance of any public duty by mandamus it is necessary to show that he has a legal right for claiming such performance apart from the fact that he is interested in the performance of the duty."*

99. In the case of National Engineers vs. Ministry of Defence reported in 44 DLR (AD) (1992) 179 our Apex Court held thus:

> *"In order to enforce the performance by public bodies of any public duty by mandamus, the applicant must have a specific legal right to insist upon such performance"*.

100. So, a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the public bodies and there is a failure on the part of that public bodies to discharge their statutory obligations. The paramount function of a writ is to compel performance of public duties prescribed by statute and to keep public bodies exercising public functions within the limits of their jurisdiction. Therefore, mandamus may issue to compel the public bodies to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

101. Section 45 of the Act gives a clear indication, as to which situation Bangladesh Bank shall act and the petitioners failed to show us any legal right under section 45 of the Act which imposed a legal duty upon the Bangladesh Bank. Therefore, the petitioners are not entitled to seek any relief under section 45 of the Banking Companies Act, 1991 and as such these writ petitions are not maintainable in law.

102. The petitioners' main allegation is against their respective negotiating banks (those are private banks) and as such writ petition does not lie under the provision of Article 102 of the Constitution.

103. Since the petitioners are borrowers (as they took 90% of the sale proceeds of the letters of credit as loan from their respective negotiating banks), they are obliged to repay their outstanding liability to their respective banks as their letters of credit were refused by the LC issuing banks being forged and the petitioners are also subject to the provisions of Artha Rin Adalat Ain, 2003.

104. The petitioners being defaulter-borrowers completely failed to show us any such specific legal right which imposes a legal duty upon the Bangladesh Bank.

105. According to M/S. Ripon Traders and others Vs. Bangladesh Bank reported in VII ADC(2010)152, it was held that " once the borrower is found by the bank as loan defaulter under section 27 ka ka of Bank Companies Act, 1991. Every bank is required to send its report to Bangladesh bank and then Bangladesh Bank in turn is required in the interest of the lending market and the national economy at large in general and for compliance of the relevant laws in particular to send such list of loan defaulter to each and every banking company and or financial institution."

106. In the instant cases as the petitioners as borrowers cannot curtail the power of the respondent No.2 by filing the instant writ petitions with a prayer for direction upon the respondents not to show their names in the CIB list.

107. Relying on the principle of law, in the instant case, we find that alternative forum is open to the petitioners to place their grievances seeking remedy before the civil court and hence we are inclined to keep our hands off in the matter of deciding the case on merit.

108. Having regard to the facts and circumstances of the case, we hereby discharge the Rules with observation that the petitioners may seek remedy in the proper forum, if any, for vindication of their right, if they are so advised.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 10746 of 2013

Gazi A. K. M. Fazlul Haque and others
..... Petitioners

-Versus-

The Privatization Commission represented by its Chairman, Prime Minister's Office, Paribahan Pool Bhaban (9th and 10th Floor), Secretariat Link Road, Dhaka-1000 and others
.....Respondents

Mr. A. B. M. Siddiqur Rahman Khan with
Mr. M. Mainul Islam, Advocates
.....For the petitioners.

Mr. Md. Motaher Hossain (Sazu),
Advocate
….For the respondent nos. 1 & 6.

Ms. Purabi Rani Sharma, AAG and
Mr. Md. Shafiquel Islam Siddique, AAG
….For the respondent no. 2-5.

Heard on 09.09.2014, 22.10.2014,
29.10.2014 and 19.11.2014.
Judgment on 20.11.2014.

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

Article 102 of the Constitution:
It is a settled proposition of law that the Writ Court cannot direct the authority to promote the petitioners to the posts of Director of the Commission; but they have the right to be considered for promotion in accordance with Regulation 6 and the schedule of the Service Regulations of 2002. ...(Para 18)

Privatization Commission (Officers and Employees) Service Regulations, 2002
Regulation 6:
Only seniority is not the sole yardstick for promotion of any officer of the Commission to the next higher post. Along with his seniority, merit of the officer shall be taken into consideration for promotion to the next higher post by the Selection Committee/DPC. In case of promotion of a Deputy Director to the post of Director of the Commission, he must have completed a minimum of 5(five) years service and his service record must be satisfactory and free from any blemish or stain. If no Deputy Director having the requisite service length and satisfactory service record is available for promotion, only in that event, the post of Director of the Commission may be filled up by deputation.
...(Para 22)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to consider the promotion of the petitioners as per the

Privatization Commission (Officers and Employees) Service Regulations, 2002 framed under the Privatization Act, 2000 and why the filling up of the posts of Directors of the Commission by deputation despite the availability of the eligible/qualified Deputy Directors of the Commission being violative of the Privatization Commission (Officers and Employees) Service Regulations, 2002 should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The petitioners have been working as Deputy Directors of the Privatization Commission (previously Privatization Board) for long 15-18 years. Pursuant to Sections 15 and 26(1) of the Privatization Act, 2000, the Privatization Commission, with the prior approval of the Government, framed the Privatization Commission (Officers and Employees) Service Regulations, 2002 (hereinafter referred to as the Service Regulations of 2002) specifying the terms and conditions of service for its officers and employees. However, Regulation 3 of the Service Regulations of 2002 provides that appointments in the vacant posts of the Commission will be made by direct recruitment, promotion and deputation. Regulation 6 of the Service Regulations of 2002 deals with the provisions of promotion of the officers and employees of the Commission. According to the schedule of the Service Regulations of 2002, there are 4(four) posts of Director and one Legal Adviser in the Commission. The Legal Adviser of the Commission shall be appointed by deputation and in case of failure, he will be appointed on contractual basis. Anyway, the Commission treats the post of Legal Adviser as Director (Law) for all practical purposes. According to the schedule of the Service Regulations of 2002, the posts of Director will be filled up by promotion from amongst the Deputy Directors of the Commission who have completed 5(five) years of service and if no competent or eligible candidates are found amongst the Deputy Directors, the posts of Director may be filled up by deputation. But since the framing of the Service Regulations of 2002, all posts of Director of the Commission were filled up by the officers on deputation from various Ministries of the Government. The respondents have been disregarding the Service Regulations of 2002 in the matter of promotion of the Deputy Directors to the posts of Director. All the Deputy Directors have been eligible for appointment as Directors of the Commission having completed more than 5(five) years of service and in view of their unblemished service records. Although the petitioners were eligible/competent for promotion to the posts of Director of the Commission, they were left out for reasons best known to the respondents themselves. However, the petitioners made several representations to the respondent no. 2 ventilating their grievances and requesting him to act in accordance with the Service Regulations of 2002 in the matter of promotion of the petitioners to the posts of Director of the Commission; but in vain. As a matter of fact, by resorting to various smart tricks and dilatory strategies, the respondents have been depriving the petitioners of their promotion to the posts of Director of the Commission with the malafide intention of accommodating various officers of the Government on deputation. Since the inception of the Privatization Commission, there have been 4(four) Deputy Directors including the petitioners. These Deputy Directors pursued their claim for appointment as Directors of the Commission from time to time as per the Service Regulations of 2002. At long last, the respondents considered the case of the senior most Deputy Director of the Commission, namely, Mr. Md. Mizanur Rahman and promoted him as Director and he joined the Commission as Director on 02.01.2013 and subsequently, he was allocated the post of Director (Law) on 23.06.2013. But the petitioners were deprived of their legal right to be promoted as Directors of the Commission despite their repeated representations to the respondent no. 2 in that regard. Eventually the petitioners served a notice demanding justice

upon the respondents for legal redress of their grievances; but the respondents turned a deaf ear thereto. Hence the Rule.

3. The respondent nos. 1 and 6 have opposed the Rule by filing an Affidavit-in-Opposition. Their case, as set out in the Affidavit-in-Opposition, in short, is as follows:

According to the schedule of the Service Regulations of 2002, the post of Director of the Privatization Commission is equivalent to that of a Joint Secretary to the Government of Bangladesh. A Joint Secretary or an officer having equivalent status of a Joint Secretary can be appointed to the post of Director of the Privatization Commission on deputation. No one of the petitioners has been promoted to the post of Joint Secretary or any equivalent post of Joint Secretary. In the absence of any qualified officers, the Government transferred Joint Secretaries from different Ministries to the Commission to fill up the posts of Director on deputation. Anyway, the 4th column of the schedule of the Service Regulations of 2002 refers to the minimum requirement for promotion from the post of Deputy Director to the post of Director and unless and until any Deputy Director completes 5(five) years of service, the Selection Committee or the Departmental Promotion Committee (DPC), as the case may be, will not consider his case for promotion to the post of Director. However, mere completion of 5(five) years service as Deputy Director of the Commission is not the sole criterion for promotion to the post of Director of the Commission. In this respect, the Selection Committee/DPC will take into account other factors specified in Regulation 6 of the Service Regulations of 2002. Promotion is generally given on the principles of seniority, merit, integrity, fitness and satisfactory service records subject to availability of vacant posts. After considering all the criteria for promotion, the Selection Committee, or for that matter, the DPC arrives at the decision to promote a Deputy Director to the post of Director of the Commission. Unfortunately, the petitioners have not been able to satisfy all the criteria for promotion to the posts of Director of the Commission. So they have not been promoted to the posts of Director as yet. Without the Selection Committee/DPC's recommendation, the respondent no. 2 has no authority whatsoever to appoint or promote any Deputy Director to the post of Director of the Commission. The authority has no malafide intention of depriving the petitioners of their promotion to the posts of Director of the Commission. In due course, the DPC recommended the senior most Deputy Director of the Commission, that is to say, Mr. Md. Mizanur Rahman for promotion to the post of Director and accordingly he was promoted to the post of Director of the Commission. In the absence of any vacancy in the post of Director, the respondent no. 2 could not take any step for promotion of the petitioners to the posts of Director of the Commission. If the petitioners are able to fulfill all the criteria for promotion and if any vacancy arises, the Selection Committee/DPC will recommend the petitioners for promotion to the posts of Director of the Commission. Before fulfillment of all the criteria and/or in the absence of any vacancy in the post of Director, it is not possible on the part of the Privatization Commission to consider the petitioners for promotion to the posts of Director. The respondents did not violate any provision of the Service Regulations of 2002 on the question of promotion of the petitioners to the posts of Director. In the absence of any qualified Deputy Director for promotion to the post of Director, all the posts of Director were duly filled up by the officers on deputation in the past. The petitioners can not claim promotion as a matter of right. Promotion has to be earned by the meritorious service of the concerned officer. After the promotion of the Deputy Director Mr. Md. Mizanur Rahman to the post of Director, no vacancy has arisen in the post of any Director of the Commission and as such there is no question of violation of Article 27 of the Constitution.

4. In the Supplementary Affidavit-in-Opposition filed on behalf of the respondent nos. 1 and 6, it has been stated that according to the Bangladesh Civil Service Recruitment Rules,

1981, for recruitment in the post of Deputy Director in any Government, Semi-Government or Autonomous Organization, the required condition is 10(ten) years experience with adequate qualifications. In the Privatization Board (Appointment Rules), 1993 and in the advertisement notice for recruitment of Deputy Directors of the Privatization Board in 1994, it was mentioned that candidates need only 5(five) years experience which may be relaxed. That is totally contradictory to the Bangladesh Civil Service Recruitment Rules for appointing a Deputy Director. However, the Privatization Board was subsequently transformed into Privatization Commission on 11th July, 2000. All officers and employees of the Privatization Board were transferred to the Privatization Commission as a matter of course. Only 5(five) years experience in the feeder post of Deputy Director with no mention of total service length is against the general recruitment rules of the Government. This type of relaxed opportunity is never found in any Government Office or Autonomous Body. The Privatization Commission has already taken steps to review the Service Regulations of 2002 in order to remove the anomalies and inconsistencies with the existing Bangladesh Civil Service Recruitment Rules, 1981. Anyway, promotion is a continuous process. Apart from Mr. Md. Mizanur Rahman, if other Deputy Directors are found eligible for promotion, they will definitely be considered for promotion to the posts of Director of the Commission. Any officer working on deputation in the Commission may be withdrawn from the deputed post at any time, if any officer of the Commission is promoted. So the deputed officers are not an impediment in the way of promotion of the Deputy Directors of the Commission.

5. In the Affidavit-in-Reply dated 22.10.2014 filed by the petitioners, it has been mentioned that only the Privatization Commission is empowered to deal with the promotion of the officers and employees of the Commission as per the Service Regulations of 2002. According to the Service Regulations of 2002, the posts of Director are firstly and mainly reserved for competent Deputy Directors of the Commission and only in the absence of competent Deputy Directors, Joint Secretaries of the Government, Officers of Statutory Corporations and Semi-Government Organizations may be appointed as Directors of the Commission on deputation. Officers in an Autonomous Body, Semi-Government Organization or Corporation having the salary scale of a Joint Secretary are also competent for the posts of Director of the Commission. Officers having the salary scale of a Joint Secretary are not necessarily Joint Secretaries. It is evident from the Service Regulations of 2002 that only the competent Deputy Directors are to be promoted to the posts of Director of the Commission. Only in case of unavailability of any competent Deputy Director, the question of filling up of the post of any Director of the Commission by deputation arises. All the petitioners are qualified and competent Deputy Directors; but the respondents did not promote them to the posts of Director of the Commission with malafide intention. However, the authority arbitrarily recommended only one Deputy Director, namely, Mr. Md. Mizanur Rahman for promotion to the post of Director leaving out the petitioners without any cogent reason which is discriminatory. On 05.12.2012, the DPC recommended Mr. Md. Mizanur Rahman for promotion to the post of Director of the Commission. It is interesting to note that Mr. Md. Mizanur Rahman was promoted to the post of Director of the Commission without having any clear vacancy in the Directorship of the Commission. So the plea of non-existence of any vacancy in the Directorship of the Commission is a flimsy excuse which is indicative of the bad faith of the respondents. The respondents grossly violated the provisions of Regulation 6 and those of the schedule of the Service Regulations of 2002 and thereby deprived the petitioners of their due promotion as Directors of the Commission.

6. In the Affidavit-in-Reply dated 29.10.2014 submitted on behalf of the petitioners, it has been averred that the respondent no. 1 is the only authority in respect of the promotion of the

petitioners and accordingly it exercised its authority in the case of Mr. Md. Mizanur Rahman, one of the Deputy Directors of the Commission. The Bangladesh Civil Service Recruitment Rules, 1981 have no manner of application in the case of promotion of the petitioners to the posts of Director of the Commission. The petitioners were not appointed as Deputy Directors under the Bangladesh Civil Service Recruitment Rules, 1981. Privatization Commission is a statutory body having its own Service Regulations for its officers and employees. As such the terms and conditions of the service of the officers and employees of the Commission are regulated by the Service Regulations of 2002. However, after the joining of Mr. Md. Mizanur Rahman as Director of the Privatization Commission on promotion on 02.01.2013, the respondent no. 2 requested the respondent no. 5 to withdraw Mr. Paresh Chandra Roy from the Commission and accordingly on 02.06.2013, Mr. Paresh Chandra Roy was withdrawn from the Commission and on 23.06.2013 Mr. Md. Mizanur Rahman was given the charge of Director (Law) of the Commission. Although Mr. Md. Mizanur Rahman is a textile graduate, yet he was given the charge of Director (Law) of the Commission. In effect, any Director of the Commission may be put in charge of any Section of the Commission irrespective of his academic background and this has been a long-standing practice of the Privatization Commission since its inception.

7. In the Supplementary Affidavit dated 29.10.2014 filed by the petitioners, it has been stated that at the moment, there are 2(two) vacant posts of Director in the Privatization Commission. One vacancy arose when Syed Jaglul Pasha was withdrawn from the Commission on 10.02.2014. Against that vacancy on the same day, one Dr. Syed Nesar Ahmed Rumy was appointed on deputation and that appointment was stayed by the High Court Division. Another vacancy in the post of Director of the Commission arose when Mr. Md. Mizanur Rahman went on Post Retirement Leave (PRL) on 25.08.2014 vide Memo dated 13.08.2014.

8. At the outset, Mr. A. B. M. Siddiqur Rahman Khan, learned Advocate appearing on behalf of the petitioners, submits that the Bangladesh Civil Service Recruitment Rules, 1981 are not clearly applicable in the case of the petitioners and the recruitment, promotion and deputation of the officers and employees of the Privatization Commission are regulated by the Service Regulations of 2002 which have been framed pursuant to Sections 15 and 26(1) of the Privatization Act, 2000.

9. Mr. A. B. M. Siddiqur Rahman Khan also submits that as per Regulation 3 of the Service Regulations of 2002, the permanent vacant posts of the Commission shall be filled up, subject to certain restrictions, through direct recruitment, promotion and deputation and as per Regulation 6 and the schedule of the Service Regulations of 2002, it is crystal clear that a Deputy Director having completed 5(five) years of satisfactory service is eligible for promotion to the post of Director of the Commission and if no competent/suitable/qualified Deputy Director is available for promotion to the post of Director of the Commission, only in that case, the post of Director of the Commission may be filled up by a Joint Secretary or an officer working in any Autonomous Body or Semi-Government Organization or Body enjoying the scale of a Joint Secretary of the Government of Bangladesh by deputation and as the petitioners are all competent for promotion to the posts of Director having unblemished service records for over 15(fifteen) years, the question of filling up of the posts of Director of the Commission by way of deputation is out of the question and in this perspective, the authority ought to have promoted the petitioners to the posts of Director of the Commission along with Mr. Md. Mizanur Rahman and by not so doing, the authority violated the

provisions of Regulation 6 and the relevant provisions of the schedule of the Service Regulations of 2002 causing grave prejudice to them.

10. Mr. A. B. M. Siddiqur Rahman Khan next submits that as per the schedule of the Service Regulations of 2002, there are 4(four) posts of Director of the Commission and one post of Legal Adviser; but in practice, the post of Legal Adviser is being treated as Director (Law) which is evident from the designation of Mr. Md. Mizanur Rahman, Director (Law) who was admittedly promoted to the post of Director of the Commission on 02.01.2013 from the post of one of the Deputy Directors of the Commission and the plea of non-existence of any vacancy in the post of any Director of the Commission stands belied by the promotion of Mr. Md. Mizanur Rahman to the post of Director of the Commission on 02.01.2013 when admittedly there was no vacancy in that post and after joining the Commission as Director, admittedly after a lapse of 6(six) months or so, one of the deputed Directors, namely, Mr. Parsh Chandra Roy was withdrawn from the Commission and in such a posture of things, it can not be agitated at all that the non-existence of any vacancy in the post of Director of the Commission is an impediment in the way of promotion of any one of the petitioners to the post of Director of the Commission.

11. Mr. A. B. M. Siddiqur Rahman Khan further submits that at present, there are 2(two) vacant posts of Director in the Privatization Commission and one vacancy occurred when one Director Syed Jaglul Pasha was withdrawn from the Commission on 10.02.2014 and though against that vacancy, one Dr. Syed Nesar Ahmed Rumy was appointed by deputation; yet that appointment was admittedly stayed by the High Court Division and another vacancy in the post of Director of the Commission arose when Mr. Md. Mizanur Rahman went on PRL on 25.08.2014 and as there are 2(two) clear vacancies in the Directorship of the Commission at this point of time, the respondents may be directed to fill up those vacancies in accordance with the provisions of Regulation 6 read with the schedule of the Service Regulations of 2002 so that the petitioners will get fair play and their long sufferings will come to an end.

12. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Advocate appearing on behalf of the respondent nos. 1 and 6, submits that promotion is not a matter of right and it has to be earned by the meritorious service of the officer or the employee concerned and seniority ipso facto is not sufficient for considering the petitioners for promotion to the posts of Director of the Commission and excepting the petitioner no. 1, the other petitioners along with Mr. Md. Mizanur Rahman were considered for promotion by the DPC and the DPC, having been satisfied with the seniority and satisfactory service record of Mr. Md. Mizanur Rahman, recommended him for promotion to the post of Director of the Commission and accordingly he was promoted thereto and indisputably Mr. Md. Mizanur Rahman was the senior most Deputy Director of the Commission at the time of consideration of his case for promotion to the next higher post, that is to say, to the post of Director of the Commission and given this scenario, it cannot be said by any stretch of imagination that the Deputy Directors were not considered for promotion at all.

13. Mr. Md. Motaher Hossain (Sazu) further submits that the Bangladesh Civil Service Recruitment Rules, 1981 are the general rules for appointment, promotion etc. of the persons in the service of the Republic and as the Service Regulations of 2002 run counter to the provisions of the Bangladesh Civil Service Recruitment Rules, 1981, necessary amendments to the Service Regulations of 2002 are in progress.

14. Mr. Md. Motaher Hossain (Sazu) next submits that the Service Regulations of 2002 contemplate a minimum of 5(five) years service for a Deputy Director for promotion to the post of Director of the Commission; but the total length of service of a Deputy Director for promotion has not been specified in the Service Regulations of 2002 and at the time of promotion of the Deputy Director Mr. Md. Mizanur Rahman to the post of Director of the Commission, his total length of service was taken into account together with his unblemished service record and having been satisfied, the DPC recommended him for promotion to the post of Director and accordingly he was promoted as one of the Directors of the Commission.

15. Mr. Md. Motaher Hossain (Sazu) also submits that the petitioners did not specifically challenge the appointment of any Director of the Commission by way of deputation and as Mr. A. B. M. Siddiqur Rahman Khan is very vocal against the deputation orders of the Directors of the Commission, he ought to have challenged the same in specific terms; but since he did not do so and no Rule was issued in that regard, this Court will not go into the question of legality or otherwise of those deputation orders and this being the landscape, the Rule is necessarily incompetent and as such the Rule is liable to be discharged on this count alone.

16. We have heard the submissions of the learned Advocate Mr. A. B. M. Siddiqur Rahman Khan and the counter-submissions of the learned Advocate Mr. Md. Motaher Hossain (Sazu) and perused the Writ Petition, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition, Affidavits-in-Reply and Supplementary Affidavit and relevant Annexures annexed thereto.

17. There are two components of the Rule-issuing order, that is to say, (1) the respondents were called upon to show cause as to why they should not be directed to consider the promotion of the petitioners as per the Service Regulations of 2002 and (2) why the filling up of the posts of Director of the Commission by deputation despite the availability of the eligible/qualified Deputy Directors of the Commission in violation of the Service Regulations of 2002 should not be declared to be without lawful authority and of no legal effect.

18. It is a settled proposition of law that the Writ Court cannot direct the authority to promote the petitioners to the posts of Director of the Commission; but they have the right to be considered for promotion in accordance with Regulation 6 and the schedule of the Service Regulations of 2002. There is no gainsaying the fact that barring the petitioner no. 1, the other petitioners along with Mr. Md. Mizanur Rahman were considered for promotion and the DPC recommended Mr. Md. Mizanur Rahman, the senior most Deputy Director, for promotion and accordingly he was promoted to the post of Director of the Commission. Such being the state of affairs, it cannot be said that apart from the petitioner no. 1, the other 2(two) petitioners were not considered for promotion by the DPC. Presumably, the case of the petitioner no. 1 was left out by the DPC in that he was the junior most Deputy Director of the Commission at the relevant time. The learned Advocate Mr. Md. Motaher Hossain (Sazu), it appears, has rightly submitted that the petitioners did not challenge any specific deputation order in this Writ Petition. But none the less, all the petitioners have the right to be considered for promotion in accordance with the Service Regulations of 2002.

19. The second component of the Rule-issuing order relates to filling up of the posts of Director of the Commission by deputation despite the availability of the competent Deputy Directors of the Commission in violation of the Service Regulations of 2002. From the materials on record, it is manifestly clear that in the past excepting Mr. Md. Mizanur Rahman, all the posts of Director of the Privatization Commission were filled up by deputationists. Now a pertinent question arises: is the filling up of the posts of Director by the deputationists permissible in view of Regulation 6 and the schedule of the Service Regulations of 2002? As we see it, the fate of the Rule Nisi hinges upon the answer to this question.

20. Anyway, for proper appreciation of the matter, Regulation 6 of the Service Regulations of 2002 is quoted below verbatim:

> "৬। পদোন্নতির মাধ্যমে নিয়োগ।— (1) HC fÐdিejালার অন্যান্য বিধান ও তফসিল সাপেক্ষে কোন কর্মচারীকে পরবর্তী পদোন্নাতের জন্য বিবেচনা করা হইবে।
> (২) কেবলমাত্র জ্যেষ্ঠতার কারণে কোন ব্যক্তি অধিকার হিসাবে তাহার পদোন্নতি দাবী করিতে পারিবেন না।
> (৩) জ্যেষ্ঠতা তথা মেধার ভিত্তিতে fcc¡¢al j¡dÉমে নিয়োগ করা হইবে, তবে চাকুরীর বৃত্তান্ত সন্তোষজনক না হইলে কোন ব্যক্তিকে পদোন্নতির জন্য বাছাই কমিটি সুপারিশ করিবে না।"

21. The relevant portion of the schedule of the Service Regulations of 2002 is reproduced below:

"œ¢jL ew	পদের নাম	pl¡p¢l নিয়োNের ক্ষেত্রে সর্বোচ্চ বয়সসীমা	নিয়োগ পদ্ধতি	eÉeaj ®k¡NÉa¡
1	2	3	4	5
1z	[illegible]	[illegible]	[illegible]	[illegible]
2z	f¢lQ¡mL (f¡V/hÙ)z	[illegible]	Ef-পরিচালক পদ হইতে পদোন্নতির মাধ্যমে; পদোন্নতির SeÉ যোগ্য প্রার্থী পাওয়া না গেলে সরকারের যুগ্ম-p¢Qh/ü¡ušn¡¢pa h¡ Bd¡-plL¡l£ fÊ¢aÖW¡e h¡ pwØq¡l kN-সচিবের বেতনক্রমের A¿¡ক্ত কর্মকর্তাগণের মধ্য হইতে plL¡l LaL ®fÊ¢ণে বদলীর মাধ্যমে।	পদোন্নতির ক্ষেত্রেঃ Ef-পরিচালক পদে অন্যূন ৫ বৎসরের Q¡LlÊz
3z	f¢lQ¡mL (f¢lLÒfe¡, Hj, BC, Hp, h¡Ùh¡ue, f¢lh£rZ J jmÉ¡ue)z		I	I
4z	f¢lQ¡mL (Lø Hä ¢p, H)z		I	I
5z	f¢lQ¡mL (Ip¡ue, প্রকৌশল ও অন্যান্য শিল্প)।		I	I"

22. From a combined reading of Regulation 6 and the relevant portion of the schedule of the Service Regulations of 2002, we find that only seniority is not the sole yardstick for promotion of any officer of the Commission to the next higher post. Along with his seniority, merit of the officer shall be taken into consideration for promotion to the next higher post by the Selection Committee/DPC. In case of promotion of a Deputy Director to the post of Director of the Commission, he must have completed a minimum of 5(five) years service and his service record must be satisfactory and free from any blemish or stain. If no Deputy Director having the requisite service length and satisfactory service record is available for promotion, only in that event, the post of Director of the Commission may be filled up by deputation.

23. What we are driving at boils down to this: in the matter of promotion to the posts of Director, the Deputy Directors shall have the first priority and if they are found to be incompetent or unqualified, only in that case, the authority is empowered to fill up the posts of Director by deputation. From the whole gamut of the facts and circumstances of the case and the materials on record, it is palpably clear that the authority filled up the posts of Directors of the Commission in the past without caring for the relevant provisions of law. This is the long-standing practice of the Privatization Commission. The only recent exception is the case of promotion of the Deputy Director Mr. Md. Mizanur Rahman to the post of Director of the Commission. Against this backdrop, it seems to us that this single instance of promotion of one of the Deputy Directors to the post of Director of the Commission is a face-saving device. However, we feel constrained to hold that the authority failed to properly construe the provisions of Regulation 6 read with the schedule of the Service Regulations of 2002 in the matter of promotion of the Deputy Directors to the posts of Director of the Commission. In this respect, the respondents ought to be circumspect and careful in the future.

24. As to the contention of the learned Advocate Mr. Md. Motaher Hossain (Sazu) that the Bangladesh Civil Service Recruitment Rules, 1981 are contradictory to the Service Regulations of 2002 in the matter of promotion of the Deputy Directors of the Commission, suffice it to say that he can not make such a contention when admittedly the recruitment and promotion of the officers and employees of the Commission are regulated by the Service Regulations of 2002. It will not be out of place to mention that the Privatization Commission is a Statutory Body. As a Statutory Body under the Privatization Act of 2000, the Service Regulations of 2002 have been framed with a view to regulating the recruitment, promotion etc. of the officers and employees of the Commission. In this context, it may be pointed out that the authority may take necessary steps for amendment of the Service Regulations of 2002 in line with the Bangladesh Civil Service Recruitment Rules of 1981, if it is so advised. Unless and until any such amendment is made, the contention of the learned Advocate Mr. Md. Motaher Hossain (Sazu) in this regard is fully and wholly irrelevant.

25. It transpires that on the plea of non-existence of any vacancy in the post of Director of the Commission, the petitioners were not considered for promotion in the past. But at a subsequent stage, Mr. Md. Mizanur Rahman along with the petitioner nos. 2 and 3 were considered for promotion by the DPC. As per the recommendation of the DPC, it is undisputed, the senior most Deputy Director Mr. Md. Mizanur Rahman was promoted to the post of Director on 02.01.2013 and he joined the Commission as Director when there was no clear vacancy in the Directorship of the Commission. Afterwards the respondent no. 2 requested the respondent no. 5 to withdraw one of the deputed Directors of the Commission, namely, Mr. Paresh Chandra Roy and in accordance with the request, the respondent no. 5

withdrew Mr. Paresh Chandra Roy from the Commission on 02.06.2013 and on 23.06.2013 Mr. Md. Mizanur Rahman was put in charge of the office of Director (Law) of the Commission.

26. In this connection, we feel tempted to say that unless and until there is any clear vacancy in the Directorship of the Commission, no attempt should be made to appoint anybody thereto either by way of promotion or by way of deputation. Be that as it may, since it is admitted that Mr. Md. Mizanur Rahman, the senior most Deputy Director, was appointed as Director on promotion when there was no vacancy in the Directorship of the Commission, it does not lie in the mouth of Mr. Md. Motaher Hossain (Sazu) to say that if there is no vacancy in the Directorship of the Commission, the question of promotion of the petitioners to the posts of Director of the Commission does not arise at all. In a word, he can not blow hot and cold in the same breath. What we are trying to emphasize is this: the Privatization Commission admittedly made a departure or deviation from Regulation 3 of the Service Regulations of 2002 in the matter of promotion of Mr. Md. Mizanur Rahman when there was no clear vacancy in the Directorship of the Commission. This conduct of the respondents is reprehensible and cannot be countenanced at all.

27. At present, there are 2(two) clear vacancies in the Directorship of the Commission as evidenced by Annexures-'Z' and 'Z-1' to the supplementary affidavit dated 29.10.2014. That being so, those 2(two) vacancies are to be filled up in accordance with Regulation 6 read with the schedule of the Service Regulations of 2002. From legal standpoint, the petitioners being Deputy Directors must be considered first for promotion to the vacant posts of Director of the Commission, having regard to their length of service and satisfactory service records and if they are not found to be eligible for promotion for some reason or other to be recorded in black and white, only then those vacant posts can be filled up by deputationists. The question of filling up of the posts by deputationists will not come first as has been the long-standing practice in the Commission as we find from the various Annexures on record. Precisely speaking, the question of filling up of the vacant posts of Director of the Commission by way of deputation will arise only when the petitioners are considered for promotion and the Selection Committee/DPC does not recommend them for promotion for any justifiable cause. That is the bottom line.

28. From the foregoing discussions and in view of the facts and circumstances of the case, the Rule is disposed of with the above observations made in the body of the judgment without any order as to costs.

4 SCOB [2015] HCD 52

High Court Division
(Civil Revisional Jurisdiction)

Civil Revision No. 2485 of 2009
Md. Shajahan Bhuiyan and others
…….. Petitioners.

Versus.

Md. Nurul Alam and others
..…..Opposite parties.

Mr. Md. Anowar Hossain, Advocate.
……. For the petitioners.
Mr. Khair Ezaz Masud, Advocate.
.... For the opposite parties.

Heard on: 1.9.14, 3.9.14, 15.9.14, 16.9.14,21.9.14, 10.11.14, 12.11.14, 2.12.14 and 7.12.2014.

Judgment on: 30.3.2015.

Present:
Mr. Justice Md. Emdadul Huq

State Acquisition and Tenancy Act 1950
Section 86 :
Section 86 of the Act, 1950 clearly provides that a land that has diluvated before the of P.O No. 135 of 1972 (i.e. after April 1956) or that will diluvate in future shall vest in the Government. It follows that irrespective of what ever title or right was acquired by Oli Ullah from the D.S. recorded tenant Zinnat Ali by virtue of the unregistered patta dated 28.1.1931 (Exhibit-ka) and the three rent receipts for the years 1341 to 1362 D.S (Exhibit-Ga-series) it had extinguished as a result of diluvion that took place some time before 1965 i.e. before the Diara Map. It follows that the Government has acquired lawful right to lease out the land that was earlier recorded as D.S. plot No.1657 and 1658. ...(Para 48)

Judgment

Md. Emdadul Huq, J:

1. The Rule issued in this Civil Revision is about sustainability of the judgment and decree dated 14.06.2009 by which the learned Special District Judge, being the Nari-0-Shishu Nirjatan Daman Tribunal, Judge, Noakhali allowed Title Appeal No.57 of 2007 and thereby decreed Title Suit No. 30 of 1996 on reversing the judgment of dismissal dated 17.01.2007 passed by the learned Senior Assistant Judge, Hatiya, Noakhali in the said suit.

2. **Plaintiffs' Case**: The plaintiffs filed the above noted Title Suit for the following four relieves:

(1) declaration of their title to the suit land comprising being 3 (three) parcels of land each measuring 1.50 acres i.e. a total of 4.50 acres as described in item Nos. 1, 2 and 3 of the Ka schedule to the plaint;

(2) declaration that the decree obtained by Oli Ullah, the predecessor of defendants Nos.1-8 in Title Suit No.210 of 1983 of the Court of Munsif, Hatiya, Nokhalia, is illegal and not binding upon the plaintiffs;

(3) declaration that mutation khatian No.398 obtained by the said Oli Ullah in respect of 7.31 acres of land including the suit land as part of Block Dag Nos. 4261 and 4262 is illegal and not binding upon the plaintiffs;

(4) declaration that the suit land recorded in the Diara Survey as being part of the Bora Dail Mouja appertaining to khas khatian No.1 comprising Block Dag Nos. 4261 measuring 48 decimals and Block Dag No.4261 measuring 4.02 acres in the name of defendant No.11, being the Government, is illegal.

3. The plaintiffs claim that item Nos. 1 and 2 of the suit land measuring 2×1.500 = 3.00 acres is part of District Settlement (D.S) plot No.1657 and 1656 appertaining to D.S. Khatian No.368 of the Mouja Burir Char under P.S. Hatya, District Noakhali.

4. The said D.S. recorded plots and surrounding plots diluvated as a result of cyclonic erosion and subsequently reappeared. So, in the Diara Survey operation of 1969-70, the suit land along with other lands was correctly recorded as part of Block Dag No. 4261 and 4262 in the Khas Khatian No.1 in the name of the Government. However the Mouja was wrongly shown as Bora Dail. In fact this land forms part of Burir Char Mouja.

5. The plaintiffs, as landless people, applied for permanent lease of the khas land in the year 1978-79. The Government functionaries prepared a Khas Mohal Map (K.M Map) of the two Block Dags and identified these Block Dags as land of Mouja Burir Char and divided the Block Dags into a number of smaller plots. Out of these smaller plots, the suit land was identified as Khas Mohal Plot Nos. 21153, 21154 and 21154/1, each measuring 1.50 acres. These three new plots were allotted to plaintiff Nos. 10 and 11 and to the predecessor of plaintiff Nos.1-9 for lease.

6. The Revenue Department officials dealt with the lease matter in three different files opened in 1978-79, and allowed the lease prayers of the said three applicants who finally executed three separate registered kobuliats on the same date 28.06.1979. Thereafter three new khatians were opened in the names of the said three lessees for the said three new plots. Plaintiffs have paid rent for the suit land and have been in possession thereof.

7. However the defendants disclosed that their predecessor Oli Ullah had obtained a decree in respect of the suit land. So, on 06.11.1995, plaintiffs obtained certified copies of the decree and also of the disputed khatian No.398 opened on the basis of the said decree.

8. In the said suit, defendants' predecessor Oli Ullah claimed to be a tenant under the D.S. tenant Zinnat Ali for 7.31 acres of the land of D.S. plot No. 1657 and 1658 appertaining to D.S. Khatian No. 368 by virtue of on unregistered patta dated 28.01.1931. But the interest of the D.S tenant and also of the said under tenant Oli Ullah had extinguished because of the duluvion and the land had vested in the Government.

9. Oli Ullah did not implead the plaintiffs in that suit and suppressed the fact of diluvion and fraudulently obtained the decree. Hence the present suit.

Case of defendants No.1-10:

10. These defendants, in their joint written statement, deny plaintiffs' right, title and possession. They contend that the suit is not maintainable, that it is barred by limitation and it also suffers from the defect of party.

11. The defendants claim that the D.S. recorded tenant Zinnat Ali executed an un-registered patta dated 28.1.1931 on receiving a salami of Tk.70/- and settled D.S plot No.1657 measuring 7.19 acres and plot No.1658 measuring 12 decimals i.e. a total of 7.31 acres to Oliullah being the predecessor of the defendants.

12. The said D.S. recoded land diluvated as a result of river erosion but title of the D.S. tenant and also of Oli Ullah was never lost. But, in the Diara Jariap, the said D.S. recorded land was wrongly shown as part of Block Dag Nos.4262 and 4261 and both these two plots were included in Mouja Bora Dail. The draft khatian for both the plots were recorded in the name of Oli Ullah, but the final khatian was wrongly prepared in the name of the Government as khas khatian No.1.

13. So Oli Ullah filed Title suit No.210 of 1983 against the Government and obtained an ex-parte decree. Thereafter Oli Ullah obtained Mutation Khatian No.398 for his 7.31 acres and the Government functionarises have identified the said 7.31 acres as 7 sub-plots under the said two Block Dags.

14. Defendants Nos.1-8, being the children of Oli Ullah, sold the said 7.31 acres to defendants No.9-10 by registered kabala dated 25.10.1995 and the leters as purchasers, have been possessing that land through bargadars.

Case of Government functionaries (defendant Nos. 11, 12 and 13):

15. The Government of Bangladesh, represented by the Deputy Commissioner, Noakhali and two other Revenue Officers, in their joint written statement, contend that there is no official record to ascertain asto whether the suit land is identical with the land of D.S. plot Nos. 1656 and 1657 or asto whether these plots ever diluvated.

16. They further contend that in the last Diara Survery the suit land along with other lands was correctly recorded as the khas land of the Government in khatian No.1 and that the suit land has been leased out to the plaintiffs after preparation of Khas Mohal Naksha in respect of the two Block Dag Nos.4261 and 4262 and the three new plot numbers as mentioned in the schedule to the plaint have been identified in the Map prepared under Khas Mohal Survey.

17. However these defendants admit that Oli Ullah, being the predecessor of defendant Nos.1-8, obtained an ex-parte decree in Title Suit No.210 of 1983 and that pursuant to the said decree the Revenue office opened Mutation Khatin No.398 for 7.31 acres out of the land of the two Block Dag Nos. 4262 and 4261.

18. **Proceeding and decisions of the courts below:** The trial court framed 5 issues on (1) maintainability of the suit, (2) limitation, (3) defect of party, (4) plaintiffs' right, title and possession over the suit land and (5) the relieves prayed for by the plaintiffs.

19. At the trial, the plaintiffs produced oral and documentary evidence through 3 (three) witnesses. Their documents were marked as exhibit-1 to 9, Exhibit-10 (series), Exhibit-11 (series) and Exhibit-12.

20. Defendants Nos.11-13, the Government functionaries, produced only oral evidence through a single witness D.W.1 being an employee of the Revenue Department.

21. Defendants Nos. 9 and 10 produced oral and documentary evidence through 5 witnesses (D.W.2-6). Their documents were marked as Exhibit-L, M, N (৳p৳IS), O (৳p৳IS), P, Q (৳p৳IS), R, S (৳p৳IS), T (৳p৳IS).

22. Upon consideration of the evidence on record, the trial court delivered **its first judgment dated 17.01.2004 and decreed the suit**. Against that judgment the defendants Nos.9 and 10 preferred Title Appeal No. 28 of 2004 in which the learned Joint District Judge, by **his judgment dated 16.07.2005 recorded a finding that the suit land had diluvaled and reappeared. However the said court set aside the judgment of the trial court and sent the original suit back on remand with specific direction to cause a local investigation** for the purpose of ascertaining the identity of the suit land with the D.S. recorded land.

23. Accordingly local investigation was held by a Civil Court Commissioner (P.W.4) who submitted his report along with a sketch map and proved the same as Exhibit-X.

24. Thereafter the trial court delivered its **second judgment dated 17.01.2007 and dismissed the suit** against which the plaintiffs preferred an appeal and after contested hearing the impugned judgment of reversal was passed which is under challenge in this Revision.

25. **Deliberation at the hearing in Revision**: Mr. Md. Anowar Hossain, the learned Advocate for the petitioner-defendants, submits that the predecessor of the defendants Oli Ullah obtained an exparte decree in Title Suit No.210 of 1983 with regard to his title and that the defendant Nos.9 and 10, as his successor-in-interest, proved their title in the instant suit by producing all the title documents, namely the D.S. khatian, the unregistered patta dated 28.01.1931 executed by D.S. tenant Zinnat Ali, the rent receipts showing payment of rent by Oli Ullah to the D.S. tenant and other subsequent documents.

26. Mr. Hossain, the learned Advocate, next submits that the said ex-parte decree was passed by a competent court against the Government and the decree has not been set aside by a competent Court and therefore it is binding on the plaintiffs as the lessees under the Government.

27. Mr. Hossain, the learned Advocate, next submits that the lease documents of the plaintiffs were executed on the basis of a Khas Mohal Map allegedly prepared by the Government functionaries without following the legal procedure as laid down in the State Acquisition Rules 1955 and the Land Survey Act, 1877 which require that the draft map must be published for inspection and objection of the people, but the same has not been so published and therefore the leases granted to the plaintiffs on the basis of the said Khas Mahal Map are illegal.

28. Mr. Hossain, the learned Advocate lastly submits that the appellate court failed to consider the above legal and factual aspects and the material documentary evidence and therefore the impugned Judgment and decree is liable to be set aside.

29. **In reply** Mr. Khair Ezaz Masud, the learned Advocate for the opposite party-plaintiffs, submits that the two vital issues in the instant case are (1) whether the suit land ever diluvated and re-appeared and whether the same has vested in the Government and (2)

whether the ex-parte decree obtained by the defendants predecessor Oli Ullah is binding upon the plaintiffs.

30. Mr. Masud, the learned Advocate, next submits that in the first time appeal being Title Appeal No. 28 of 2004 the appellate court in its judgment dated 16.07.2005 recorded a clear finding that the suit land firstly diluvated and then re-appeared and that in the Diara Jariap the Government functionaries identified the suit land and other lands as part of two larger plots being Block Dag Nos. 4161and 4162 and neither of the parties challenged that finding in a Revision and therefore the trial court was bound by that finding but the trial court failed to consider this legal aspect.

31. Mr. Masud, the learned Advocate next submits that the appellate court, in the said Judgment dated 16.07.2005, recorded further finding with regard to the necessity of ascertaining the point asto whether the land of the said two Block Dags are identical with the D.S. plot Nos. 1657 and 1658 as claimed by the defendants and accordingly directed local investigation and the same has been done by the Civil Court Commissioner with a finding that the suit land is identical with the D.S. plot Nos. 1657 and 1658 which have merged with the land of the said Block Dag Nos. 4261 and 4262.

32. Mr. Masud, the learned Advocate, next submits that since the D.S. plot Nos. 1657 and 1658 as claimed by the defendants had diluvated, it has vested with the Government by virtue of the amended section 86 of the State Acquisition and Tenancy Act 1950 (**the SAT Act, 1950**) and the Government has legal authority to lease out the same and accordingly the plaintiffs lawfully acquired their title by virtue of the lease deeds in 1978-1979.

33. Mr. Masud, the learned Advocate submits that the Government functionaries prepared Khas Mohal Map not under the general provisions of the Lands Survey Act, 1877 but under the instructions contained in Estate Manual and that the said Map was confined only to the plot already recorded in the name of the Government under the general survey operation called Diara Survey and there was no legal necessity to invite objection for preparing such Khas Mohal Map.

34. Mr. Masud, the learned Advocate, next submits that the defendants' predecessor obtained the disputed ex-parte decree in Title Suit No. 210 of 1983 without impleading the plaintiffs as parties, although the plaintiffs had acquired title before institution of the suit and therefore the decree is not binding upon the plaintiffs.

35. Mr. Masud, the learned Advocate lastly submits that the plaintiffs could prove their title and possession by producing sufficient oral and documentary evidence and that the appellate court legally passed the impugned judgment and decree and therefore the Rule should be discharged.

36. **Findings and decision in Revision**: This Revision arose from a Judgment of reversal. So I have carefully perused all the materials on record and considered the grounds taken by the petitioners and the submission made by the learned Advocates for both sides.

37. It appears that the first vital fact-in-issue is whether the suit land ever diluvated and re-appeared and whether it vested in the Government as claimed by the plaintiffs.

38. On the question of diluvion and re-appearance of the suit land the defendants in their written statement of the present suit, stated in para-13 that "নালিশী জমি নদী সিকস্তি। নালিশী জমিতে সাবেক মালিকদের স্বত্ব কখনো eø qu e¡C"

39. The record of Title Suit No.210 of 1983 instituted by defendants' predecessor Oli Ullah was called for. The plaint of this suit shows that Oli Ullah, as the plaintiff had clearly admitted that the suit land had diluvated and re-appeared. He has stated as follows:

> *"1362 hjw pe aL Ef‡lÙ তালুকদার সেরেস্তায় খাজনাদি আদায়ে দাখিলা প্রাপ্তে মালিক দখলকার থাকাবস্থায় নদীভাঙনে সিকস্তি হইয়া পুনঃ ১৩৬৮ বাং সনে পয়োস্থি হইয়া ধীরে ধীরে ইহা ১৩৭৬/১৩৭৭ বাং সনে চাষোপযোগী হয়"*

40. Thus it is evident that the defendants and also their predecessor admitted the fact that the land of D.S. plot Nos. 1657 and 1658 diluvated.

41. Material evidence on record namely, the D.S. khatian (Exhibit-Ka), the D.S. Map and Diara Maps (Exhibit-Gha and Gha(1)) produced by the defendants and from the sketch map (Exhibit-X) prepared by the Civil Court Commissioner (P.W.4) and the information slip (Exhibit-9) issued by the District Record Room reveal the following scenario:

(a) D.S. plot Nos. 1656, 1657 and 1658 were recorded as the land of Mouja Burir Char and these three plots were located in the contiguous coast of the sea and the indenting canal at the time of preparation of the D.S. Map in 1932-1934.

(b) The site of those three D.S. plots and the surrounding plots diluvated and re-appeared and the Diara Map was prepared in 1965-70 identifying the entire area as block Dag Nos. 4261 and 4262. However these two Block Dags were shown as part of Mouja Bora Dail and not of Mouja Burir Char as shown in the D.S. Map.

(c) The land of D.S plot Nos. 1657 and 1658 of Mouja Burir Char as claimed by the defendants was recorded in khas khatian No.1 of the Governemnt.

(d) The Diara Map was prepared under section 144 of the SAT Act, 1950 and the Land Survey Act, 1877 after publication of Notification dated 12.12.1968 issued under the SAT At Act, 1950 as specifically certified in the body of the Map.

42. The diluvion situation is further proved by D.W.2 aged 72 years old. He deposed as the attorney of defendant Nos. 9 and 10 and stated that both the MRR khatian and Diara Khatian were prepared in the name of Government. But he is silent about the time of re-appearance of the land. Other D.W's are also silent about re-appearance or the time thereof.

43. The information slip (Exhibit-9) produced by the plaintiffs states that the MRR Khatian was prepared in the name of the Government in respect of D.S. plot Nos. 1657 and 1658.

44. Thus the averment made by the predecessor of the defendants Oli Ullah in the earlier suit and and the documentary evidence available in the instant suit jointly prove that the land of D.S plot No.1657 and 1658 diluvated before preparation of the MRR Khatian and it reappeared some time before the Diara Survey Map prepared in 1965-70.

45. However the plaintiffs or the defendants could not produce any credible evidence to prove the exact time of diluvion or re-appearance of the land after diluvion.

46. The plaintiffs have filed three rent receipts, Exhibits-Ga series, indicating payment of rent by Oli Ullah to Zinnat Ali for the years 1341 B.S. 1341-1348 B.S. and 1359 to 1362 B.S. These rent receipts are not consistent with the admitted diluvion situation and in the absence of any supporting evidence by the heirs Oli Ullah or of Zinnat Ali or other competent witness these rent receipts by themselves do not establish the fact of re-appearance of the land in 1341 B.S. or of continuity of the tenancy of Oli Ullah under Zinnat Ali.

47. The admitted fact of diluvion of the D.S. plots Nos. 1657 and 1658 attracts the self operative application of section 86 of the SAT Act, 1950 which was inserted by P.O. 135 of 1972 with retrospective effect i.e. from the commencement of the SAT Act, 1950 (*vide Abdul Mannan vs Kulada Ranjan Manali-31 DLR (AD) page-195*). It is noted that the SAT Act, 1950 came into force in the Noakhali district in April 1956 (*vide Obaidul Haq chowdury the Sate Acquisition and Tenancy Act, 1950 DLR publication 2001, page-21*).

48. Section 86 of the Act, 1950 clearly provides that a land that has diluvated before the of P.O No. 135 of 1972 (i.e. after April 1956) or that will diluvate in future shall vest in the Government. It follows that irrespective of what ever title or right was acquired by Oli Ullah from the D.S. recorded tenant Zinnat Ali by virtue of the unregistered patta dated 28.1.1931 (Exhibit-ka) and the three rent receipts for the years 1341 to 1362 D.S (Exhibit-Ga-series) it had extinguished as a result of diluvion that took place some time before 1965 i.e. before the Diara Map. It follows that the Government has acquired lawful right to lease out the land that was earlier recorded as D.S. plot No.1657 and 1658.

49. With regard to the identity of the said two D.S. plots the Civil Court Commissioner (P.W.4) has submitted his report dated 10.04.2006 (Exhibit-X) with a clear finding that the land of the two D.S plots have merged with the two Block Dags being Diara plot Nos. Nos.4261 and 4262. He also identified the suit land measuring m4.50 acres out of 7.19 acres of D.S. plot Nos. 1657 with the three new plot Nos. being 21153, 21154 and 21154/1 as in the subsequent Khas Mahal Plots.

50. The report dated 10.04.2006 submitted by the Commissioner was accepted by the trial court by its order dated 28.09.2006 after hearing both sides and it was never challenged by the defendants.

51. It is in evidence that the plaintiffs were given permanent settlement of the land by the Government out of the Block Dag Nos.4261 and 4262 in the year 1978-79 by the three lease document (Exhibit-1-3) for the lands of three Khas Mohal plot Nos. 21153, 21154 and 21154/1 of Mouja Burir Char It follows that the plaintiffs were necessary parties in Title Suit No.210 of 1983 which was instituted by Olli Ullah in 1983 claiming 7.31 acres of land of D.S. plot No. 1657 and 1658 corresponding to Block Dag Nos. 4261 and 4262. Because the plaintiffs were already in the scenario as lessees since 1978-79. But the suit was filed only against the Government. So the decree passed in that suit is not binding upon the plaintiffs so far their interest is concerned.

52. With regard to possession, the plaintiffs have adduced oral and documentary evidence. They have produced their lease documents (Exhibits-1-3) and their mutation documents (Exhibit-4-6) showing opening of the new khatians in 1979 and the rent receipts

Exhibit-10(series) showing payment of rent from 1979 to 1984. The plaintiffs have also produced two local witnesses being a resident living in suit village and another person P.w.3. Both of them supported possession of the plaintiffs.

53. The defendants Nos.9 and 10 appeared in the scenario only in 1995 by virtue of a kabala dated 25.10.1995 (Exhibit-R) executed by the defendants Nos.1-8. These purchasers (defendants No.9 and 10) did not personally appear in court nor did they produce any of their vendors as witness. However their attorney deposed on their behalf as D.W.2. Defendants also produced three bargardars (D.W.3-5) and another witness (D.W.6) being a local resident. These witnesses (D.W.3-6) stated only about the possession of the defendants Nos. 9 and 10, and they are totally silent about the possession of the defendant Nos. 1-8 being the vendors or of Oli Ullah.

54. The appellate court has independently discussed and assessed the oral and documentary evidence produced by both sides and also considered the finding earlier recorded by the appellate court in the 1st Judgment dated 16-07-2005 in the first time appeal being Title Appeal No. 28 of 2004 by which the original suit was sent back on remand.

55. The appellate court disbelieved the possession of the defendants over the suit land and believed that of the plaintiffs. I agree with the findings of the appellate court.

56. The appellate court correctly found that in the earlier T.S. No. 210 of 1983, the present plaintiffs as lessees under the Government since 1978-1979 were necessary parties, but they were not made parties and therefore the exparte decree passed therein will not affect plaintiffs title to the suit land.

57. With regard to the legality of the Khas Mohal Naksha, I agree with Mr. Khair Ejaj Masud the learned Advocate for the plaintiff-opposite parties, that it was legally prepared by the Government functionaries for leasing out the khas land of the Government to the plaintiffs. This map relates only to the khas land which was already lawfully recorded in the finally published Diara khatian in the name of the Government. So it was not necessary to invite objection as in case of a map generally prepared for the purpose of preparation of record of right under the Land Survey Act, 1877 read with section 144 of SAT Act, 1950 and the SAT Rules, 1955.

58. In view of the above I hold that plaintiffs have been able to prove their right, title and possession over the suit land measuring 4.50 acres. They could also prove their claim with regard to the ex-parte decree and the Mutation opened in the name of the defendants predecessor Oli Ullah. However that decree is binding on the government but excluding the land of the plaintiffs.

59. The trial court misread the direction of the appellate court as recorded in the judgment dated 16.07.2005 passed in the first time Title Appeal No. 28 of 2004 and erroneously found that "*there was neither scope nor justification of obtaining settlement of the suit land by the plaintiffs in the year 1979……*". The trial court without properly considering the pleadings as a whole and the evidence on record and erroneously found that (the Government) "*defendant Nos. 11-13 have specifically denied such alluvion and diluvion of the suit land*".

60. The trial court also failed to consider that the plaintiffs were necessary parties to the earlier suit, but not made parties and therefore the decree passed therein does not bind the

plaintiffs so far the suit land is concerned. The trial court erroneously found that the failure of the government to challenge the exparte decree against the government will affect plaintiffs right.

61. The appellate court correctly found that the land in question diluvated and re-appeared and thus vested in the Government and subsequently it was lawfully leased out to the plaintiffs. I agree with the findings and decision of the appellate court on other issues and hold that the impugned judgment and decree is sustainable.

62. The Rule issued in this Civil Revision has no merit.

63. In the result, the Rule is discharged.

64. No order as to costs.

65. Send down the lower court records with a copy of the judgment and order to the courts below.

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HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Death Reference No. 35 of 2009

The State
-vs-
Md. Saiful Islam

Mr. Shafiul Bashar Bhandary, D.A.G
- for the State.
Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the condemned prisoner.
with

Criminal Appeal no. 3849 of 2009

Md. Delowar Mallik
- Appellant.
-vs-
The State
- Respondent.

Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the Appellant.
Mr. Mr. Shafiul Bashar Bhandary , D.A.G
- for the Respondent.
with
Criminal Appeal no. 3723 of 2009

Md. Saiful Islam
- Appellant.
-vs-
The State
- Respondent.

Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the Appellant.
Mr. Mr. Shafiul Bashar Bhandary , D.A.G
- for the Respondent.
with

Jail Appeal no. 425 of 2009

Md. Saiful Islam
- Appellant.
-vs-
The State
- Respondent.
Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the Appellant.
Mr. Mr. Shafiul Bashar Bhandary , D.A.G
- for the Respondent.

Heard on 05.05.2015
Judgment on 10.05.2015 and 12.05.2015

Present:
Mr. Justice A.N.M. Bashir Ullah

Code of Criminal Procedure, 1898
Section 103:
Strict non-compliance of section 103 of the Code in order to search and seizure of madak articles either from a person or any place will not render the case unbelievable.
...(Para 62)

Madak Drabbya Niontran Ain, 1990
Section 36 and 37
And
Code of Criminal Procedure, 1898
Section 103:
From the plain reading of section 36 of the Ain it has been found that the law enforcing agency in order to recover madak articles can enter into any place and on search can

seize the madak articles along with the aiding articles and documents and he is also empowered to search a person even for the same purpose. The provisions of section 36 of the Ain appear to be more progressive and dynamic than that of the section 103 of the Code. In section 103 of the Code before making the search calling upon two or more respectable inhabitants of that locality is must but there appears no such obligatory provision in section 36 of the Ain. ...(Para 65)

Judgment

A.N.M. Bashir Ullah, J:

1. The learned Sessions Judge, Sylhet passed the judgment and order of conviction and sentence dated 17.05.2009 convicting the condemned prisoner Md. Saiful Islam and convict Delowar Mallik under serial no. 1(Kha) of the table attached to section 19(1) of the Madak Drabbya Niontran Ain, 1990 (in short, the Ain) awarding sentence of death upon condemned prisoner Md. Saiful Islam while sentenced convict Delowar Mallik to suffer imprisonment for life with a fine of taka 20,000/- in Sessions Case no. 114 of 2009 in default to suffer rigorous imprisonment for 2(two) years.

2. Consequent upon the said order of conviction and sentence of death, the proceeding was submitted to the High Court Division under section 374 of the Code of Criminal Procedure (in short, the Code) by the Sessions Judge, Sylhet and the same was registered as Death Reference no. 35 of 2009. The condemned prisoner Md. Saiful Islam against the said judgment and order of conviction and sentence preferred Criminal Appeal no. 3723 of 2009 and Jail Appeal no. 425 of 2009 and Delwoar Mallik preferred Criminal Appeal no. 3849 of 2009.

3. A division bench of the High Court Division heard the death reference together with the appeals and upon the hearing the said bench passed dissenting judgments in the death reference. One of Judge of the division bench rejected the death reference and allowed all the appeals filed by the condemned prisoner Saiful Islam and another convict appellant Delowar Mollik acquitting them from the charge levelled against them and the another judge though rejected the death reference but upheld the conviction of both the appellants commuting the death sentence of Md. Saiful Islam into the imprisonment for life. Since the judgment and order of conviction and sentence passed by the division bench of the High Court Division was a split one, the Hon'ble Chief Justice of Bangladesh referred the death reference and the appeals to this single bench as third bench to dispose of the same.

4. The prosecution case as unfurled at trial, in short, is that on 22.012.2008 at 19.45 hours the informant BDR Nayek Subedar Abdul Motaleb on the basis of a secret information along with BDR Habilder Md. Hakikul Islam, Nayek Md. Abdur Razzak, Sepahi Md. Akramuzzaman, Sepahi Sree Provash Singh, Sepahi Md. Mohsin Ali, Sepahi Sree Nemai Kanti, Lance Nayek Signal Mozammal Hoque and Lance Nayek Batellion Md. Moniruzzaman had started for a patrol duty from the BDR, Sector Head Quarter, Sylhet and reached at Humayun Rashid square on the Dhaka-Sylhet high way in front of Apon restaurant. They halted a Sylhet bound bus from Dhaka of Hanif Enterprise being no. Dhaka Metro-Ba-14-2336 at 20.45 hours and searching the bus found a bag in the possession of Md. Saiful Islam sitting on the seat nos. 3 and 4, son of Tohed Molla at village Kalakhali, Post office and district Pirojpur. He in presence of Md. Rezaul Alam, Supervisor of the bus, and Md. Khorshed Alam, the driver of the bus and also in presence of the passengers of the bus

searching the said bag found a packet wrapped by carbon paper at a weight of 1,100 kgs. The informant also found accused Delowar Mollik sitting by the side of accused Saiful Islam. Saiful Islam told the informant that Delowar Mollik is his accompanying member. The informant arrested those two persons and seized the goods under a seizure list and lodged the First Information Report (in short, the FIR) with the Kotwali Model Police Station, Sylhet narrating the above facts. Before filing of the FIR, the recovered heroin was measured at Rony Enterprise, Sheikh Ghat, Sylhet.

5. On the basis of the above FIR, Sylhet Kotwali Model Police Station case no. 60 dated 23.12.2008 corresponding to G.R no. 124 of 2008 was started. The case was investigated by Police Sub-Inspector Khorshed Alam who on completion of the investigation submitted police report on 24.01.2009 recommending the trial of both the accused under serial no. 1(Kha) of the table attached to section 19(1) of the Ain.

6. The Chief Judicial Magistrate, Sylhet on receipt of the case record sent the same to the Sessions Judge, Sylhet where the case was registered as Sessions Case no. 114 of 2009 and the accused were put on trial before the Sessions Judge, Sylhet. At trial, charge under serial no. 1(Kha) of the table attached to section 19(1) of the Ain was framed on 31.03.2009. The charge was read over and explained to the accused to which they pleaded not guilty and claimed to be tried.

7. The prosecution in order to prove the charge examined 9 witnesses and tendered 4 witnesses and on completion of the recording of the evidence the accused were examined under section 342 of the Code of Criminal Procedure when they repeated their innocence and disclosed their unwillingness to adduce any defence witness but both of the accused made oral statements before the Court which has duly been recorded by the trial Court.

8. The defence case, as it appears from the trend of cross-examination of the prosecution witnesses and also from the statements given at the time of examination under section 342 of the Code of Criminal Procedure is the case of innocence, false implication and total denial of the prosecution case. The further defence taken by accused Saiful Islam is that he is innocent, he did not bring and possess those heroin. He had come to Sylhet to pay respect in the Mazar and in his language for ziarot of Mazar but he has been falsely implicated in this case.

9. The defence case of Delowar Mollik is that he is a sanitary contractor and he used to work as sanitary contractor in various places of sylhet town as such enmity developed between him and others. His such enemies had involved him with the occurrence of this case. He is innocent and has become the victim of circumstances etcetera.

10. The trial Court on consideration of the evidence and other materials on record found both the accused guilty under serial no. 1(Kha) of the table attached to section 19((1) of the Ain and sentenced the condemned prisoner to death while imprisonment for life to Delowar Mallik and sent the case record to the High Court Division for confirmation of sentence of death of condemned prisoner Md. Saiful Islam and since there were split judgments on the conviction and sentence of the condemned prisoner Md. Saiful Islam and another convict appellant Delowar Mallik, the death deference along with 3 appeals preferred by the condemned prisoner and Delowar Mallik has been sent to this bench by the Hon'ble Chief Justice of Bangladesh as has been narrated earlier.

11. Mr. Shafiul Bashar Bhandary, the learned Deputy Attorney General appearing for the state having been taken me through the judgment and order of conviction and sentence under

the reference, the FIR, the evidence and other materials on record makes his submissions supporting the reference and opposing the appeals. He submits that in a very transparent way the members of the BDR had recovered 1100 grams heroin from the possession of the condemned prisoner Md. Saiful Islam when he was carrying the same on 22.12.2008 through a Sylhet bound us from Dhaka. The PW 1 BDR Nayek Subedor Md. Abdul Motaleb, on the basis of a secret information had reached at Humayun Rashid Square on Dhaka-Sylhet highway along with other forces and he entering into the bus in question of Hanif Enterprise found both the accused sitting on the seat nos. 3 and 4 of the bus with a bag in the possession of condemned prisoner Md. Saiful Islam. The informant in presence of the driver and supervisor of the bus had searched the said bag and found 1100 grams heroin within the bag which was possessed by condemned prisoner Md. Saiful Islam.

12. The learned Deputy Attorney General also submits that the bus was standing in an open place of the road and in that prevailing circumstances the driver and supervisor of the bus were the most competent witnesses of the search and seizure. Neither the BDR party nor the informant had any special interest into the matter and the accused were not known to the informant party. The driver and supervisor were very much independent and disinterested witnesses for the purpose of search and seizure and as such in their presence the search and seizure were made and although at last they did not support the prosecution case in to-to but they could not deny the entry of the BDR personnel into the bus and the recovery of the goods from the passenger of the bus. The Deputy Attorney General also submits that the said driver and supervisor for the reasons best known to them had become bias at the time of giving deposition in the Court but the pious intention of the informant has been revealed through the search and seizure in their presence.

13. The learned Deputy Attorney also submits that now a days there is no bar to rely upon the evidence of the members of the recovery party when their evidence is found unimpeachable and unshaken and even they are not supported by the witnesses of the search and seizure. He also submits that in this particular case the PWs 1 and 2 as the members of the BDR party had recovered those heroin from the accused Saiful Islam and at trial they have given a clear picture as to the said recovery and the defence cross-examined them very meticulously but their evidence as to the recovery of the heroin from the condemned prisoner Saiful Islam has not been shaken away in any way. Moreso, it is to be looked into that the accused were not known to the members of the recovery party. There is no any suggestion of enmity between them, so there appears no earthly reason on the part of the BDR members for giving any false evidence against the accused. The members of the recovery party as part of their solemn duty had recovered the heroin from the accused and they had simply said the occurrence of the case to the trial Court and their such evidence had inspired confidence in the mind of the trial Judge. As such, though the witnesses of search and seizure did not support the prosecution case accurately but the trial Court relying upon the evidence of the members of the recovery party (PWs 1 and 2) rightly found the accused guilty under serial no. 1(Kha) of the table attachéd to section 19(1) of the Ain.

14. He also submits that after the recovery of the heroin the same was measured by PW 12 who found that the weight of the recovered substance is 1100 grams and whenever more than 25 grams of heroin is found in the possession of an accused he is liable to be convicted and sentenced under serial no. 1(kha) of the table attached to section 19(1) of the Ain.

15. He next submits that the recovered heroin was examined by a chemical examiner and the report will go to show that the recovered substance was heroin. He also submits that

though the chemical examiner was not examined at trial but there was no necessity for the examination of the chemical examiner. Section 510 of the Code of Criminal Procedure as well as the section 50 of the Ain provide that the report of a chemical examiner will be admitted into the evidence without examining of its maker. Since the law is very much clear on the subject that a report of a chemical examiner is admitted into the evidence without his examination, the trial Court rightly admitted the chemical examiner report into the evidence.

16. He also submits that a lot of madak articles are available in the society in this or that way. The Madak Drabbya Niontran Ain, 1990 was incorporated by the legislature in order to save the people from the injury of madak and to that end for some of the madak there are some stringent provisions in the Ain and the heroin is one kind of madak which can cause severe harm to the people. As such, the legislature has provided the death sentence for preserving or possessing only more than 25 grams of heroin but in the instant case the quantity of the recovered articles is of 1100 grams. So, considering the quantity of the heroin and also considering the very unequivocal and nitid evidence of the members of the recovery party the trial Court convicted both the accused and sentenced Saiful Islam to death as the heroin was found in his possession and his accomplice Delowar Mollik has rightly been convicted under the said section of law and was sentenced to suffer imprisonment for life. So, the death reference may kindly be accepted affirming the conviction and sentence of both the condemned prisoner and convict Delowar Mallik dismissing the appeals filed by the condemned prisoner Saiful Islam and appellant Delowar Mallik.

17. On the other hand Mr. Farid Uddin Khan, the learned Advocate appearing with Mr. Saifuddin Md. Aminur Rahim (Chandan) for the condemned prisoner as well as for the appellant Delowar Mallik sought to impeach the judgment and the order of conviction and sentence of them on the following grounds.

18. He firstly submits that the heroin was allegedly recovered on 22.12.2008 at 20.45 hours but the FIR was lodged on the following day on 23.12.2008 at 16.10 hours with a delay of more than 19 hours but there is no explanation for such delay. The un-explained delay in lodging the FIR creates doubt as to the genuineness of the prosecution case.

19. The heroin was measured by PW 12 but PW 12 stated at trial that he did not know what was in the packet. Had there been anything like heroin in the said packet, the BDR party at the time of measuring of the same with the help of PW 12 surely would have disclosed the name of the articles. So, there is no scope to say that BDR party had recovered the heroin.

20. The learned Advocate also submits that the search and seizure of the heroin from the accused Saiful Islam is totally doubtful and not believable. Had there been any such search and seizure of the heroin from accused Saiful Islam that would have been done in presence of the local witnesses. Admittedly the BDR party had halted in the bus in front of the restaurant Apon and the BDR party before entering into the bus could have called the manager, proprietor or any other persons from the said restaurant but they without doing so had entered into bus alone. As such, the search and seizure is not at all believable. The members of the recovery party had violated the provisions of section 103 of the Code of Criminal Procedure in making the search and seizure of the heroin from the condemned prisoner. So, the trial Court should have not relied upon the so-called search and seizure conducted by the PW 1.

21. He next submits that though the so-called search and seizure were made in presence of the driver and the supervisor of the bus but they did not support the prosecution case in any

way and had there been any search and seizure in presence of the said driver and supervisor they would have surely supported the prosecution case, but since no such recovery was made in their presence they did not ultimately support the search and seizure done by the PW 1.

22. He also submits that it is fact that the evidence of the members of the recovery party can be taken into consideration in order to find the guilt of the accused when their such evidence appear to be unimpeachable and unshaken in nature and when it inspired confidence in the mind of the judge. But there is no reason to consider the evidence of PWs 1 and 2 to be such of unimpeachable and unshaken as because they without following the provision of section 103 of the Code of Criminal Procedure tried to make the search and seizure.

23. He also submits that sections 36 and 37 of the Ain provide that any member of law enforcing agency can search a person or place in order to recover or to find out madak but before making such search the reasons for his such believing that somebody else has been possessing madak needs to be recorded but the PWs 1 and 2 before moving to the place of occurrence in order to recover the madak articles did not record any such reason for their believing that the accused might have possessed the madak within the bus. So, the very movement of the PWs 1 and 2 towards the place of occurrence without proper compliance of the provisions of sections 36 and 37 of the Ain rendered the whole job and attempt of the PWs 1 and 2 unbelievable. So, the evidence of PWs 1 and 2 should have not been taken into consideration by the trial Court.

24. The learned Advocate also submits that after recovery of heroin a very small portion of heroin was sent for chemical examination, so relying on the said chemical examination report which is based on the examination of a small portion of the heroin it is difficult to hold that all the recovered articles were heroin but the trial Court has ignored the said facts of the case.

25. He also submits that the trial Court considered and admitted the chemical examination report into the evidence without examining its maker. Before admitting the chemical examination report, the maker of the same should have been examined by the trial Court. So, the trial Court should have not been relied upon the report which was admitted into evidence without examining its maker.

26. The learned Advocate lastly submits that the prosecution could not show transparency in searching the bus and in filing of the case against the accused. So, the conviction and sentence as awarded upon the condemned prisoner Saiful Islam by the trial Court is not sustainable in law.

27. The learned Advocate in respect of accused Delowar Mallik submits that there appears no tangible evidence against Delowar Mallik that he had committed any offence leading to the recovery of heroin as nothing was found in his possession. The learned Advocate also submits that if it is conceded for a moment that they were coming jointly from Dhaka to Sylhet but it does not mean and indicate that Delowar Mallik had any knowledge about the goods which were allegedly in the exclusive possession of another accused. So, for the recovery of any goods from another accused Delowar Mallik cannot be convicted and sentenced and there is nothing in the hands of the prosecution to show that within the knowledge of Delowar Mallik, the another accused was possessing and carrying those article. So the conviction and sentence of Delowar Mallik did not justify at all in any way. So, both the convicts may kindly be acquitted from the charge levelled against them.

28. I have considered the above submissions and arguments of the learned Advocates of both the parties with profound attention and have gone through the materials on record particularly the FIR, the exhibited documents, the judgment under reference and the materials on record.

29. Now, in order to appreciate the arguments advanced by the learned Advocates for the prosecution and the convict appellants, let the evidence adduced by the prosecution in this case be scrutinized and analyzed.

30. PW 1 BDR Nayek Subedar Abdul Motaleb has stated in his examination-in-chief that at present he is posted at BDR Sector Head Quarter, Akhalia, Sylhet, on 22.12.2008 at 19.45 hours on the basis of a secret information he, BDR Habilder Md. Kakihul Islam, Nayek Abdur Razzak, Sepahi Mohosin, Provash Singh along with other BDR forces nine in numbers forming a raiding party under his leadership had gone in front of Apon restaurant at Humayun Rashid Square, they halting a Sylhet bound bus from Dhaka of Hanif Enterprise being no. Dhaka Metro-Ba-14-2336 searched the bus and at one stage of his such searching at 8.45 pm found accused Saiful Islam sitting on the seat no. F-3 having a school bag on his lap and the said accused being suspected by him, he in presence of the supervisor and driver of the bus had searched the said bag and found 1100 grams heroin in a packet wrapped by carbon paper, on query Saiful Islam told that Delowar Mallik who was sitting by his side in seat no. F-4 is also his accomplice and they entered into the bus upon a joint ticket. He seized the said heroin in presence of the witnesses. He proved the seizure list and his signature in it, marked exhibits 1 and 1/1.

31. He further stated that he separated 4 grams heroin from the recovered heroin for chemical examination and sealed the remaining 1096 grams heroin. He identified the school bag and the heroin in the Court marked material exhibits I and II respectively. He also stated that the recovered heroin has been scaled at Rony Enterprise and the proprietor of Rony Enterprise Kumar Das has given a certificate to that effect. He proved the said certificate marked exhibit 2. He arrested accused Saiful Islam and Delowar Mallik and producing them before the Sylhet kotowali Police Station lodged the First Information Report (in short, the FIR) of this case. He proved the FIR and his signature in it, marked exhibits 3 and 3/1, he also proved the ticket no. F-3. He also identified both the accused in the Court.

32. In cross-examination of the defence he stated that on the basis of a secret information he had left the BDR Head Quarters at 19.45 hours and he got the information before 15 minutes of his movement, the place of occurrence is a busy area of the locality and on that day they did not search any other bus, in the bus there was shelf under the roof of the bus, at the time of search there were other passengers in the bus, there were some restaurants and shops adjacent to the place of search and there were also some peoples near the bus at the time of occurrence but they were not made the witnesses, no one from Apon restaurant was made witness in the seizure list, he did not know whether Saiful was in the Ansar bahini, he cannot say whether Saiful Islam was going to Sylhet, he cannot say whether Delowar Mallik was a sanitary contractor. He denied the defence suggestion that no such recovery was made from the accused. He also denied the further defence suggestion that the accused have been entangled with the occurrence of this case falsely. He denied the further defence suggestion that he got the materials in the shelve of the bus and using the same has involved the accused in the case.

33. PW 2 BDR Habilder Hakikul Islam has testified that at present he has been serving at Sylhet BDR Head Quarters, on 22.12.2008 he was posted in the same place and on that day he as a member of the raiding party under the leadership of the informant had come at Apon restaurant at Humayun Rashid Square and they halting a bus of Hanif Paribahan being Dhaka Metro Ba-14-2336 searched the same, accused Saiful Islam and Delowar Mallik were found sitting on the seat nos. F-3 and 4 and there was also a bag on the lap of accused Saiful Islam belonged to seat no. F-3 of the bus, they searched the bag of Saiful Islam and found a packet wrapped by the carbon paper in which there were 1100 grams heroin, he identified the bag and the heroin in the Court, the informant seizing the heroin took signature of the witnesses in the seizure list. He identified the accused in the dock of the Court, the informant producing the accused and heroin lodged the FIR with the police station. They had sealed the heroin, scaled the same into a shop and found 1100 grams heroin in the packet.

34. In cross-examination of the defence he stated that they had searched 30-35 passengers of the bus spending a time of 15-20 minutes, the passengers of the bus generally put their bags on the shelf under the roof but the bag belonged to Saiful Islam was in his lap, the seizure list was prepared in front of the Apon restaurant, They took 4-5 hours time to prepare the seizure list and to lodge the FIR, they had come in the place of occurrence through pickup. He denied the defence suggestion that Delowar used to work as a sanitary contractor at the cantonment area. He also denied the defence suggestions that no such heroin was recovered from the accused Saiful Islam. He further denied the defence suggestion that the heroin might have been recovered from the others but they have entangled the accused Saiful Islam with the same.

35. PW 3 BDR Sepahi Provash Singh testified that on 22.12.2008 at 7.45 hours he as one of the members of the informant party had gone at Humayun Rashid Square and on arrival of a bus of Hanif Enterprise they halted the same, the informant searching the bus found a bag on the lap of accused Saiful Islam in which there were 1100 grams heroin, he identified the bag and the heroin in the Court. He also identified the accused Saiful Islam and Delowar Mallik in the Court, the informant seizing those goods under a seizure list filed the case with the police station. In cross-examination of the defence he stated that on the date of occurrence he was not in any other duty, the bus had arrived at the place of occurrence after 15 minutes of their arrival there, they did not search any other bus, he did not enter into the bus, they 7 in numbers were outside of the bus, the informant and Habilder Hakikul Islam were within the bus, they took 15-20 minutes time to prepare the seizure list. He denied the defence suggestion that no such recovery was made from the accused.

36. PW 4 Md. Khorshed Alam, the driver of the bus being no. Dhaka Metro-Ba-14-2336 of Hanif Enterprise has said that on 22.12.2008 at 4.45 pm they had started from Sayedabad, Dhaka for Sylhet and at 8.30 pm of the night reached at Humayun Rashid Square, he stopped the bus on the signal of the BDR, thereafter two BDR personnel had entered into the bus and got down with two passengers of the bus along with a black bag, on query the BDR told them that there were heroin in the bag, the informant seized those heroin under a seizure list and he signed the same, they showed the heroin and bag to him. He proved his signature in the seizure list, marked exhibit 1/2. He identified 2 accused in the Court whom arrested the BDR. In cross-examination of the defence he stated that there were 34 passengers in the bus, at the time of occurrence he was sitting in his driving seat and he cannot say from whom the heroin containing bag was recovered, he did not find the alamats within the bag but he put his signature on the seizure list at the time of preparation of the same, the informant had searched

the bus for half an hour, two BDR personnel had entered into the bus and the rest were outside of the bus.

37. PW 5 Md. Rezaul Alam, the supervisor of the bus in question has stated that on 22.12.2008 at 8.30 pm of the night when they had reached at Humayun Rashid Square the BDR stopping the bus entered into the bus and informed them that they recovered the heroin from the custody of the two accused, the informant had seized the said goods under a seizure list on which he put his signature, marked exhibit 1/3, the BDR arrested the passengers of seat nos. F-3 and F-4, he also identified the accused in the Court. In-cross examination of the defence he stated that he cannot say which goods were recovered from whom but the BDR entering into the bus had recovered some substance, the accused were not known to him earlier.

38. PW 6 Md. Afzalur Rahman testified that on 23.12.2008 he was posted at BDR Sector Head Quarters, on that day the informant had come to him with some alamats of the recovered goods and he examined the same in his own lab and furnished a report, he found that the recovered goods are heroin. He proved the report furnished by him, marked exhibit 5 and his signature in it marked exhibit 5/1. In cross-examination of the defence he stated that he is not a chemical examiner but the informant brought the recovered articles before filing of the case for its chemical examination. He also stated that he being a doctor has been posted in the BDR Sector Head Quarters, Sylhet and he examined the heroin before filing of the case as a result there was no number of the case in the report. He has experience in examining the heroin. He denied the defence suggestion that the recovered substance are not heroin.

39. The prosecution tendered PW 7 BDR Sephai Mohsin Ali, PW 8 BDR Sepahi Nemai Chakrabortty, PW 9 BDR Nayek Mozammel Haque and PW 10 BDR Lance Nayek Moniruzzaman and the defence declined to cross-examine them.

40. PW 11 BDR Nayek Md. Abdur Razzak has testified that on 22.12.2008 he was posted at BDR Sector Head Quarters, Akalia, Sylhet, on that day at 8.15 pm he under the leadership of Nayek Subeder Abdul Motaleb had gone at Humayun Rashid Square, the informant on the basis of a secret information had halted a Sylhet bound bus of Hanif Enterprise being no. Dhaka Metro-Ba 14-2336 and the informant entering into the bus searched the bus, they were standing outside of the bus, the informant got down from the bus with two accused along with a bag of 1100 grams heroin. He identified the said two accused in the Court whose name is Saiful and Delowar Mallik. The informant seizing the said goods under a seizure list took signature of the witnesses. Thereafter, the informant producing the accused with the alamats in the police station lodged the FIR. In cross-examination of the defence PW 11 stated that they had gone at Humayun Rashid Square by motor car, they searched only one bus, he was outside of the bus as such he did not witness the exact place of the bus from where the heroin was recovered, they had showed the heroin to the people present there. He denied the defence suggestion that no such heroin was recovered from the accused.

41. PW 12 Manik Kumar Das has testified that he is the proprietor of Rony Enterprise, on 23.12.2008 the members of the BDR having been in his shop asked him to scale a packet, he found 1100 grams weight of the packet but the BDR did not tell as to the substance of the pocket. He also furnished a certificate as to the weight of the packet, he proved his signature on the said certificate, marked exhibit 2/1. In cross-examination of the defence he stated that his shop Rony Enterprise is situated in front of the Kotwali police station under Sylhet district which is 2½ kilometers away from the Humayun Rashid Square, he gave the certificate at

4.05 pm of the day. He cannot say who wrote the said certificate and also cannot say which substance did he scale?

42. PW 13 and the last witnesses Md. Khorshed Alam, the Sub-Inspector of Police and the Investigating Officer of this case testified that on 23.12.2008 he was posted at Sylhet Kotwali Model Police Station, Police Sub-Inspector Abdul Awal as duty officer on receipt of the FIR from the informant had recorded the present case filling up the FIR columns, he proved the FIR columns and signature of Abdul Awal on it, marked exhibits 6 and 6/1. He further stated that the case was endorsed to him for investigation and at the time of investigation he visited the place of occurrence, prepared sketch map and index of the place of occurrence, the sketch map and index have been marked as exhibits 7 and 8 and his signature on it marked as exhibits 7/1 and 8/1, he sent some alamats from the recovered articles for chemical examination, he examining the witnesses recorded their statements under section 161 of the Code, during the investigation he got the chemical examination report of the alamats, he proved the said report marked exhibit 9, the chemical examiner found that the recovered substance was heroin and on completion of the investigation he submitted Police report recommending the trial of the accused.

43. In cross-examination of the defence he stated that the occurrence of this case was taken place at 20.45 hours on 22.12.2008 but the case was filed on 23.12.2008 at 16.10 hours, neither in the FIR nor in the seizure list there is any remark about the colour of the heroin, the witnesses of the seizure list belonged to Mirpur, Dhaka, he visited the place of occurrence at 10.00 am on 24.12.2008 which is in front of the Apon restaurant, he has examined the owner and staffs of the restaurant, since they were not aware about the occurrence of this case he did not record their statements, most of the surrounding people of the place of occurrence are floating as such he did not record their statements, there are homestead 400-500 yards away from the place of occurrence, he had sent some alamats for chemical examination seeking permission from the Court, the previous record of the accused are nil, he cannot say whether Delowar Mallik was a sanitary contractor or not. He denied the defence suggestion that no such heroin was recovered from the accused. He also denied the further defence suggestion that he without any proper investigation submitted a perfunctory Police report in this case.

44. These are the evidences that have been given by the prosecution in this case. From the evidence discussed above it appears that the prosecution examined 9 witnesses and tendered 4 witnesses and among these 9 witnesses PWs 1,2,3 and 11 are the members of the BDR party, PWs 4 and 5 are the seizure list witnesses, PW 6 is a doctor attached to the BDR Head Quarters who examined the heroin before filing of the case, PW 12 is a local shop keeper of Sylhet who had scaled the heroin before filing of the case and PW 13 is the Investigating Officer of this case.

45. It was argued by the defence before me that the alleged recovery of heroin was made at 20.45 hours on 22.12.2008 while the FIR was lodged at 16.10 hours on 23.12.2008, that is, the FIR was lodged after 19 hours 25 minutes of the recovery of the articles. It is fact that there is no any statement or explanation in the FIR as to the reasons of the said delay. In the case of Abdul Latif-Vs-State 44 DLR 492 it has been held that the Court have always view the FIR with grave suspicion when there has been unexplained delay in lodging it and under this situation it can be presumed that the delay of the FIR was caused for the purpose of manipulation of specific story and the same view was also taken in the case of Kishore Kumar-Vs-State, 11 BLC 251.

46. As I have found from the record that there is no explanation as to the said delay in lodging the FIR but at the time of arguing the learned Deputy Attorney General submits that immediately after recovery of the heroin the BDR members held that they should be sure whether the recovered articles are heroin or not and in order to examine the said articles in their own ways they had waited till the office time of the following days as PW 6 though is not a chemical examiner but being a doctor has the experience to identify any substance whether the same is heroin or not and to take him with the said heroin the BDR had to wait till the office time of the following day. As such immediate after recovery of the goods the FIR could not be filed.

47. The learned Deputy Attorney General candidly submits that considering the nature of the case the FIR could have been filed earlier. From the materials on record it appears that before filing of the case the recovered articles were examined by PW 6 for a primary satisfaction as to whether the articles were heroin or not. So, there appears some substance in the submissions of the learned Deputy Attorney General.

48. I have scanned the evidence of PW 1 who is the maker of the FIR. There appears no suggestion or cross-examination from the defence regarding the delay in lodging the FIR. Generally when the FIR is lodged with some delay that is done with some motive in order to manipulate some untrue story. In this particular case there appears no suggestion to the PW 1 that he had taken those times or he had filed the FIR with delay in order to manipulate some false story. Now, whether the delay in filing the FIR was taken place in order to take undue advantage that will be ascertained and considered along with other facts of the case which will be discussed and determined later on.

49. The learned Advocate for the defence argued before me that search and seizure of the heroin has not been made in compliance of the provisions of section 103 of the Code. He categorically submits that Apon restaurant is situated at Humayun Rashid Square and in front of the said restaurant the bus was halted, so it is possible on the part of the PW 1 to make the search and seizure calling upon the staffs who have been working in the restaurant. So, the search and seizure have not been made in compliance of section 103 of the Code. So, the condemned prisoner and the convict appellant cannot be found guilty relying on such a defective search and seizure.

50. The materials of this proceeding clearly reveal that at the time of search and seizure the PWs 1 and 2 did not enter into the bus with any local people as the same has been admitted by them. Now, the prominent question before me whether a search and seizure in order to recover any madak article should be made under section 103 of the Code or by any other law.

51. The learned Advocate for the defence also raised the question as to the legal capacity of the PW 1 as to making search and seizure in view of section 36 of the Ain. He submits that though the section 36(1) of the Ain empowers the subordinate or the higher officer of BDR to make search in order to recover the narcotics but the informant was not subordinate or higher officer of BDR. So, the search and seizure by the PW 1 was not legal and fair.

52. He also submits that the informant was not empowered or directed by his superior officer in order to make the search and seizure and he did not record the reasons for his believing that an offence may likely be commenced at the time of the occurrence, so the search and seizure by the PW 1 is not legal.

53. Now, coming to the question regarding the legal capacity of the PW 1 as to the search and seizure of the narcotic articles the learned Deputy Attorney General submits Pw 1 Nayek Subddor Md. A. Motaleb who is the leader of the recovery party is a Junior Commissioned Officer of BDR and the same will be revealed from the FIR itself, so, there is no any legal infirmity on his part to lead a recovery party. The first sentence of the FIR reads as follows:

Se¡h,

বিনীত নিবেদন এই আমি জেসিও নং ৫৩৪৩ নাঃ/সুবেঃ মোঃ আঃ মোতালেব সেক্টর সদর দপ্তর, বিডিআর, সিলেট . . . . . |||||||||||||||||||z

54. From the above statement of the FIR it appears that the informant before his name put the very word 'JCO' which means "Junior Commissioned Officer" and this identity of the informant has not been challenged by the defence at any point of trial as such it can safely be said that the informant was a Junior Commissioned Officer at the relevant time. So, in my consideration I find it difficult to hold that the PW 1 was not empowered to make the search and seizure in connection of this case in view of the provisions of section 36 of the Ain.

55. The another question raised by the learned Advocate for the defence that PW 1 was not specially empowered on behalf of the authority to cause a search and seizure in connection of this case. PW 1 appears to be a Junior Commissioned Officer in the post of Nayek Subedor and it is both in the FIR and in his evidence that on the basis of a secret information he forming a raiding party had reached to the place of occurrence in order to nab the narcotics trafficker. Section 59 of the Code provides that any private person may arrest any person who in his view commits a non-bailable and cognizable offence. The offences under the Madak Drabbaya Niontran Ain are cognizable offence in view of section 31 of the Ain.

56. The BDR personnel are the members of the law enforcing agencies. The primary object of such a force to curb the crime in the society and if a Junior Commissioned Officer of BDR on the basis of a secret information storms in the place of occurrence in order to nab the narcotics trafficker that cannot be considered as illegal and unfair.

57. The learned Advocate for the defence also raised objection as to the non-recording of the reasons of his believing of commission of offence. It is fact that section 36 of the Ain provides the provisions that before making any search and seizure in order to recover any narcotic articles there is necessity to record the reasons for his such believing that any such offence may likely to commit. From the materials on record there appears no recording of the reasons by the PW 1 before proceeding towards the place of occurrence.

58. Now, if it is taken as a fact that the PW 1 without recording the reasons of his believing as to the commission of offence relating to narcotics had moved to the place of occurrence, that is simple an irregularity but not illegality and this provisions of law has been made to regulate the members of the law enforcing agency so that they cannot abuse their inherent power to search and to nab the offender but for not recording the reasons as has been found in this case, the accused has not been prejudiced in any way.

59. Now, the prominent question before me whether the search and seizure as conducted by the PW 1 has been done in compliance with the provisions of section 103 of the Code. In this regard, the learned Deputy Attorney General referring the decision of the case of Tajendra Nama-Vs-the Tripura Administration, reported in AIR 1965 Tripura 45 submits that

section 103 of the Code of Criminal Procedure applies only to search the places but does not apply to search a person. From the reading of the referred case it appears that the said case was under section 15 clause(b) of the Opium Act and in that case 30 tolas of opium was recovered from the pocket of Tajendra Nama and in that case the total search and seizure was challenged by the defence taking the arguments that section 103 of the Code has not been complied with. In answering the said question, the High Court Division, Tripura observed in the following ways:

> "There is no force in this contention of the learned lawyer for the petitioner. In the instant case the search was not conducted under section 103 of the Code of Criminal Procedure. It is to be noted that, section 103 of the Code of Criminal Procedure refers only to search of places and does not apply to search of persons. The ruling cited by the lawyer for petitioner does not apply to this case as it refers to a search of a house. In the present case the search of the accused and the seizure of a tin containing opium was effected under clause (b) of S.15 of the Opium Act which empowers an Excise Officer to detain and search any person whom he has reason to believe to be guilty of any offence under the said Act and also to arrest him if he is found to be in possession of opium. That being so, no question arises of any compliance with the provisions of section 103 of the Code of Criminal procedure in effecting the search. In support of this I may refer to Aung Kim Sein –Vs-the King, AIR 1941 Rang 333."(para 13 of the judgment)

60. The same view has also been taken in the case of Dilip Kumar Ghose-Vs-The State, reported in 42 DLR 464. This Court in the said reported case observed in the following ways:

> "Now let me revert to the first contention. Section 103 Code of Criminal Procedure, in my opinion, has no application to the facts of the instant case. This section falls under Chapter VII of the Code. Chapter VII relates to issuance of processes to compel the production of documents and other moveable property and for discovery of persons wrongfully confined. Section 103 relates to search to which process is required to be issued to compel production of the moveable and requires that before making such search the officer conducting the search shall call upon two or more respectable inhabitants of the locality in which the place to be searched situates to attend and witness the search and the seizure list shall be prepared in their presence and they shall sign the same. In this case the question of compelling the petition to produce the country-made wine which is being sold secretly to the officer conducting the search upon secret information does not arise inasmuch as the very issuance of summons to produce the wines in question will frustrate the purpose of the search and no useful result will be had. I thing that for the purpose of conducting search in order to find out as to whether a person is guilty of an offence punishable under section 46 of the Excise Act the provision of section 103 of the Code of Criminal Procedure has no application." (para 12 of the judgment)

61. The same view has also been taken in the case of Tarikul Islam -Vs- the State, 21 BLD 140. This Court in the said case held in the following manner:

> "The provision of section 103 of the Code of Criminal Procedure apply only when search is made under Chapter VII of the Code. These provisions do not apply to a case of apprehension of persons suspected to be carrying any intoxicant, or any other nothing liable to be confiscation under the law. The

incriminating article of the present case are, no doubt, intoxicated element and as such we are of opinion that the compliance of section 103 of the Code of Criminal Procedure is not necessary. On the other hand, it appears that the members of raiding party have proved the recovery of the incriminating articles from the control and possession of the accused appellant and the private witnesses admitted their signatures over the seizure list, but did not support their knowledge about seizure of the incriminating articles in their presence without any explanation as to why they signed in the seizure list without seeing the incriminating articles. In view of such facts and circumstances we are led to hold that the learned Tribunal has rightly found that the prosecution has successfully proved the recovery of the incriminating articles from the control and possession of the accused appellant and as such the same deserves no interference by this Court." (para 15 of the judgment)

62. Now, having regards to the above views as has been emerged from the above cited decisions I am of the view that the strict non-compliance of section 103 of the Code in order to search and seizure of madak articles either from a person or any place will not render the case unbelievable. Section 103 of the Code finds place in chapter VII of the Code. The purpose and scheme of chapter VII has been described in its preamble which runs as follows:

"OF PROCESS TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED"

63. The above preamble of chapter VII of the Code clearly indicates the very purpose of the chapter which enables the Court as well as the Police to procure documents including the movable properties and the persons wrongfully confined. The chapter contsists from sections 94 to 105 of which section 94 deals with the production of any document or other things while section 96 deals for the production of person. Sections 101 to 103 of the Code belonging to this chapter deal as to how the search and seizure will be made in order to address the provisions of sections 94 and 96 of the Code. It is fact that in section 103 of the Code there is also provisions as to how a place and person will be searched but the whole purpose of 103 of the Code has been attributed and designed to make the provisions of sections 94 and 96 effective. So, there is a little scope to say that for non-compliance of section 103 of the Code at the time of seizing of madak articles from a madak peddler, the whole case will be unbelievable.

64. Now, the vital question before me whether sections 36 and 37 of the Madak Drabbya Niontran Ain are the relevant laws for the recovery of madak articles from a madak merchandiser. Section 36 of the Ain runs as follows:

"(1) jq¡-f¢lQ¡mL h¡ a¡q¡l ¢nekট হইতে এতদুদ্দেশ্যে সাধারণ বা বিশেষভাবে ক্ষমতাপ্রাপ্ত কোন কর্মকর্তা বা Ef-পুলিশের পরিদর্শক বা তদূর্ধ্ব কোন কর্মকর্ত¡ বা কাস্টমসের পরিদর্শক বা সমমান সম্পূর্ণ বা তদূর্ধ্ব কোন কর্মকর্তা, বা বাংলাদেশ রাইফেলস্ এইরুপ বিশ্বাস করিবার কারণ থাকে যে, এই আইনের অধীনে কোন অপরাধ কোন স্থানে সংঘটিত হইয়াছে, হইতেছে বা হওয়ার সম্ভাবনা আছে, তাহা হইলে অনুরুপ বিশ্বাসের কারণ ¢m¢fhÜ L¢lu¡ ¢ae ®k ®L¡e pju-

(ক) উক্ত স্থানে প্রবেশ করিয়া তল্লাসি করিতে পারিবেন এবং প্রবেশে বাধাপ্রাপ্ত হইলে, বাধা অপসারণের জন্য clS¡-জানালা ভাংগাসহ যে কোন প্রয়োজনীয় বাবস্থা গ্রহন করিতে পারিবেন;

(খ) উক্ত স্থান তল্লাসিকালে প্রাপ্ত অপরাধ সংঘটনে ব্যবহার্য মাদকদ্রব্য বা বস্তু এই আইনের অধীন আটক বা বাজেয়াপ্তযোগ্য বস্তু এবং এই আইনের অধীন কোন অপরাধ প্রমাণের সহায়ক কোন দলিল, দস্তাবেজ বা জিনিস আটক করিতে পারিবেন;

(গ) উক্ত স্থানে উপস্থিত যে কোন ব্যক্তির দেহ তল্লাসি করিতে পারিবেন;

(ঘ) উক্ত স্থানে উপস্থিত কোন ব্যক্তিকে এই আইনের অধীন কোন অপরাধ করিয়াছে বা করিতেছে বলিয়া সন্দেহে গ্রেফতার করিতে পারিবেন।

(2) Ef-dj l¡ (1)-এ যাহা কিছু থাকুক না কেন, সূর্যাস্ত হইতে সূর্যোদয় পর্যন্ত সময়ের মধ্যে কোন স্থানে প্রবেন L¢lu¡ am¡C পরিচালনা না করিলে অপরাd pçfL£u ®L¡e hÙ¹eø h¡ mç qCh¡l h¡ Afl¡d£ f¡m¡Cu¡ k¡Ch¡l সম্ভাবনা আছে বলিয়া উক্ত উপধারায় উল্লিখিত কোন কর্মকর্তার বিশ্বাস করিবার সংগত কারণ থাকিলে অনুরুপ বিশ্বাসের কারণ লিপিবদ্ধ করিয়া তিনি উক্ত সময়ের মধ্যে উক্ত স্থানে প্রবেশ ও তল্লাসি করিতে পারিবেন।"

65. From the plain reading of section 36 of the Ain it has been found that the law enforcing agency in order to recover madak articles can enter into any place and on search can seize the madak articles along with the aiding articles and documents and he is also empowered to search a person even for the same purpose. The provisions of section 36 of the Ain appears to be more progressive and dynamic than that of the section 103 of the Code. In section 103 of the Code before making the search calling upon two or more respectable inhabitants of that locality is must but there appears no such obligatory provisions in section 36 of the Ain. Section 37 of the Ain provides the provisions of mechanical examination for the recovery of hidden madak articles from the person.

66. But both the sections 36 and 37 of the Ain which are relevant for the search and seizure of madak articles from a place and person are almost silent as to how the seizure list will be prepared by an officer who had conducted the search and seizure. The provisions of section 36 of the Ain appears to have stopped empowering the officer to search and seize of the goods but what will be the manner of seizing of the goods are very much absent in sections 36 and 37 of the Ain which is available in section 103 of the Code.

67. Section 103 of the Code provides that before making search of a place, the officer concerned will call upon two or more respectable inhabitants of that locality and in their presence he will search, thereafter, he will make a list of the goods which he intends to seize and he will take the signatures of those respectable persons on the list. In section 36 of the Ain though there is provisions of seizing of the goods but the very terms "seizure list" is absent in the said section but in order to seize something, the preparation of the seizure list is must.

68. Now, in my consideration section 103 of the Code is not legally applicable for making search and seizure in order to recover the madak articles as the Madak Drabbya Niontran Ain, 1990 is self contained on this subject being it is decorated by section s 36 and 37 of the Ain but as I have found so far that a law enforcing officer cannot complete the search and seizure relying on sections 36 and 37 of the Ain only because these sections are very much incomplete as to how an officer will prepare the seizure list and as to who will be the witnesses of the search and seizure. Sections 36 and 37 of the Ain are very much silent on those important points. But since the search of a place or a man and seizing of the materials are not sufficient to bring those articles into the book rather there must be a seizure list also for seizing the articles in presence of the local witnesses.

69. Since in the sections 36 and 37 of the Ain there appears no provision or any indication as to how the seizure list will be prepared, the seizing officer pursuant to section 42 of the Ain may follow the provisions of 103 of the Ain. Section 42 of the Ain provides that the provisions of the Code shall be applied for warrants, search, arrest and seizure under this Act if the same did not appear contradictory with the provisions of the Ain (Madak Drabbya Niontran Ain).

70. Now, until and unless there is a comprehensive and complete provisions of law under the Ain (Madak Drabbya Niontran Ain), regarding the search and seizure, an officer is to follow the provisions of the Ain to enter into the place of the occurrence in view of sections 36 and 37 of the Code and after seizing of the goods he will prepare the seizure list keeping harmony with the provisions of section 103 of the Code, so far, as the law relating to search and seizure of the madak articles as provided in sections 36 and 37 of the Ain is not fit and comprehensive and also there is no any better and alternative provisions before the seizing officer.

71. Now, I will consider the search and seizure of the madak articles of this particular case in the light of the above observation. From the discussion made hereinabove.

72. Now, coming to the fact of search and seizure of this case it appears that PW 1 in his evidence stated that he entering into a bus found a bag on the lap of the accused Saiful Islam and in presence of the supervisor and driver of the bus had searched the said bag and found 1100 grams heroin within the bag. Thus it is found that the search was made in presence of the driver and supervisor of the bus who appears to be the witnesses nos. 4 and 5 in this case.

73. In this connection as I have told it earlier that for the recovery of any madak articles on search there appears specific provisions in section 36 of the Ain but there is no provision regarding the preparation of seizure list in sections 36 and 37 of the Ain. Surely until and unless there is any law in connection of sections 36 and 37 of the Ain for preparing of seizure list of madak articles, every seizure list should be prepared as nearly as possible complying the provisions of section 103 of the Code.

74. Section 103 of the Code provides that the search and seizure must be done in presence of two local inhabitants and also the seizure list will be signed by them. The seizure list was made in presence of the PWs 4 and 5. The learned Advocate for the defence repeatedly tried to say that in order to make search and seizure the PW 1 should have called the Manager or staffs of Apon restaurant in order to comply the provisions of section 103 of the Code. Section 103 of the Code has given much stress upon two local respectable inhabitants in order to make search and seizure. The driver and the supervisor of the bus were going to Sylhet from Dhaka boarding 34 passengers in it, so, the supervisor and driver are the most competent witnesses of the search and seizure as the recovery was made from within the bus. In my consideration, the search and seizure in presence of the driver and the supervisor of the bus has fulfilled the demand of the law as provided in section 103 of the Code. .

75. But how far their (PWs 4 and 5) evidence will be relevant for the prosecution or the defence, that is the subject matter of discussion of evaluation but so far the preparation of seizure list in presence of the local inhabitants is concerned in my consideration that condition has been covered by the presence of the driver and the supervisor of the bus. So, I find no legal infirmity in the search and seizure of the articles from the bus and the accused.

76. Now, the question whether the evidence of the search and seizure as given by the PWs 1,2,3,4,5 and 11 are believable and sufficient to find the accused guilty. PWs 1 and 2 are the BDR personnel who had entered into the bus in order to search the bus and the accused, they in a chorus voice very consistently stated that they had found the school bag on the lap of the accused Saiful Islam and on search of the said bag, they recovered 1100 grams heroin from the said bag wrapped by a carbon paper. The PWs 1 and 2 has been cross-examined

meticulously by the defence. But there appears nothing in the said cross-examination of PWs 1 and 2 for which their such evidence can be discarded in any way.

77. PWs 1 and 2 are the members of the BDR party while the accused Saiful Islam is a man of another district of Pirojpur. There is no any suggestion from the defence that for any reason, the BDR party became interested to entangle Saiful Islam in a case like this. There appears no suggestion of enmity, even no suggestion that for any reason they were known to each other. A case against the accused may be false but there must be some reasons for filing a false case against a particular accused. In this particular case there is no suggestion from the defence why the BDR personnel who had conducted the search and seizure will be interested against accused Saiful Islam. I find no reason to discard the unimpeachable and unshaken evidence of the PWs 1 and 2 regarding the recovery of the bag as well as the heroin from the physical possession of Saiful Islam.

78. PWs 4 and 5 as the seizure list witnesses who ultimately did not support the prosecution case in to-to. But at the same time they could not deny the very appearance of the BDR party in their bus and taking away of two accused from the bus with a bag. So, the evidence of PWs 4 and 5 ultimately corroborate the prosecution case. The total evidence of PW 4, Md. Khorshed Alam reads as under:

> "আমি হানিফ এন্টারপ্রাইজের ঢাকা মোট্রো-h-14-২৩৩৬ নং বাসের চালক। ২২/১২/০৮ ইং তারিখ বিকাল অনুমান ৪.৪৫ মিঃ এর সময় ঢাকা সাইদাবাদ হইca সিলেটের উদ্দেশ্যে রওয়ানা দিয়া রাত ৮.৩০ মিঃ এর সময় হুমায়ুন রশিদ চত্তরে পৌঁছি। বিডিআর সিগনাল দেওয়ার পর আমি গাড়ি থামাইলে তাহারা ২ জন গাড়িতে উঠিয়া ২ জন যাত্রীকে কালো ব্যাগসহ নামিয়া যাইতেছিল। জিজ্ঞাসাবাদে বিডিআর সদস্যগন তাহাতে হিরোইন আছে বলিয়া জানাইয়াছে। এজাহারকারী উদ্ধারকৃত হিরোইনের জব্দ তালিকা তৈরী করিলে আমি তাহাতে দস্তখত করিয়াছি। EÜ¡lLa হিরোইন ও ব্যাগ এখন আমাকে দেখানো হইল। বাদী জানাইয়াছে যে, হিরোইন উক্ত ২ জন যাত্রীর নিকট হইতে পাওয়া গিয়াছে। বিডিআর যে ২ জন যাত্রীকে আটক করিয়াছে তাহারা এখন ডকে উপস্থিত আছে জব্দ তালিকায় দস্তখত প্রদঃ 1/2z
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> গাড়ীতে ৩৪ জন যাত্রী ছিল। তল্লাশীর সময় যাত্রীগন যার যার সীটে বসা ছিল। আমি আমার ড্রাইভিং সিটে বসা ছিলাম। কার নিকট হইতে হিরোইন ভর্তি ব্যাগটি উদ্ধার করিয়াছে তাহা বলিতে পারিব না। আমি ব্যাগের মধ্যে রক্ষিত আলামত দেখি নাই। এজাহারকারী জব্দ তালিকা প্রস্তুত করার সময় আমি তাহাতে দস্তখত করিয়াছি। এজাহারকারী অনুমান আধা ঘন্টা বাসটি তল্লাশী করিয়াছে। বাসের ভিতর ২ জন বিডিআর ঢুকিয়াছে। বাকীরা বাহিl ¢Rmz ¢h¢XBl সদস্য ২ জন অন্য কোন লোককে নিয়া বাসে উঠW e¡Cz Cq¡ paÉ euz B¢j ¢h¢XBl HL Lb¡u ¢jbÉ¡ p¡rÉ fËe L¢lu¡¢Rz"

79. From the above noted evidence of PW 4 it appears that he had halted the bus on the signal of the BDR party, he found two BDR persons to enter into the bus and also found to get down from the bus with two passengers and a bag, the BDR personnel told them that they had seized heroin and after preparation of seizure list he signed the seizure list but in cross-examination he also tried to help the accused as he stated that he cannot say from whom the bag was recovered and he did not find the alamat kept in the bag. A bus is always a confined place and it cannot be more than 50'X12' and the accused were found sitting on seat no. F3 and F4, so, it is not a believable story that the driver did not see the recovery from the particular person and his such evidence clearly reveals that he tried to help the accused out of the way.

80. PW 5 Rezaul Islam, the Supervisor of the bus and at the same time witness of the seizure list has stated in the following ways:

> "B¢j q¡¢eg এন্টারপ্রাইজের ঢাকা মেট্রো-h-২৩৩৬ নং বাসের সুপারভাইজার। ২২/১২/০৮ ইং তারিখ বিকাল বেলা বাসটি ঢাকা হইতে ছাড়িয়া রাত অনুমান ৮.৩০ মিঃ এর সময় হুমায়ুন রশিদ চত্তরে পৌঁছার পর বিডিআর

¢pNe¡m ®cJu¡l fl Bমার বাসটি থামাই। এরপর ২ জন বিডিআর জওয়ান বাসে উঠিয়া তল্লাশী করিয়া ২ জন যাত্রীকে নিয়া আমাদেরকে জানাইয়াছে যে, তাহাদের নিকট হইতে ১টি ব্যাগ যাহাতে হিরোইন ছিল উদ্ধার করিয়াছে। তাহাতে আটার মত পদার্থ ছিল। এজাহারকারী উদ্ধারকৃত বস্তুর জব্দ তালিকা তৈরী করিলে আমি তাহাতে দস্তখত L¢lu¡ছি। দস্তখত প্রদঃ ১/৩। যে ২ জন যাত্রীকে ধৃত করিয়াছে তাহারা F3 J F4 নং সীটের যাত্রী। ধৃত আসামী ২ জন ডকে উপস্থিত আছে।

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কার নিকট হইতে কি জিনিস উদ্ধার করা হইয়াছে তাহা আমি দেখি নাই। তবে বিডিআর সদস্য গন গাড়ীর ভিতর হইতে বস্তু উদ্ধার করিয়াছে। আসামীগন আমার পূর্ব পরিচিত নয়।"

81. The findings of this Court regarding the evidence of PW 4 is also relevant and applicable for this PW 5 who as supervisor of the bus surely was vigilant as to what was going to be happened in presence of the BDR party in his bus. So this is not a believable and rational story that he did witness the recovery closely. In fact, for the reasons best known to everyone PWs 4 and 5 tried to help the accused but ultimately they could not deny the appearance of two BDR personnel in his bus and taking away of two accused which ultimately supports the prosecution case.

82. Now, if we accept the arguments of the defeence as a whole that for any reason the PWs 4 and 5 did not support the recovery in that case the evidence of PWs 1 and 2 are sufficient to find the accused Saiful Islam guilty. In the case of 8 BLD 106, 59 DLR 104 and15 MLR (AD) 77 it was held by this Court and also by the Appellate Division that the evidence of the recovery officer can be taken into consideration if the same appears to be unimpeachable, fair and inspired confidence into the mind of the Judge that they have given a true version of the case in the Court. I find it difficult to show any disagreement with the findings and decision made in the above cited cases.

83. In the case of Asadul Hossain-Vs-State, 57 DLR 615 it was held that even if the seizure list witnesses do not support the prosecution case or do not speak for the prosecution case, the conviction can be given if the case is proved otherwise on the basis of the evidence of the members of the recovery party. In my consideration, the principle enunciated in the above noted case is applicable in this case. So, I find it difficult to discard the evidence of PWs 1 and 2 which has been supported by the evidence of PWs 4 and 5 to a greater extent regarding the recovery of a bag and 1100 grams heroin from the said bag of Saiful Islam. I find that the trial Court did not commit any error of law and fact in believing the evidence of recovery officers in convicting and sentencing the accused Saiful Islam for possessing of 1100 grams heroin.

84. At trial, the chemical examination report of heroin was admitted as evidence and the same report was marked as exhibit 9. The learned Advocate of the condemned prisoner submits that without examining the chemical examiner, the report should have not been admitted into evidence. I find it difficult to consider this submission as a good argument. The submission is inconsistent with the provisions of section 510 of the Code. Section 510 of the Code clearly provides that any document purporting to be a report under the hand of Chemical examiner or Assistant chemical examiner to the Government, may without calling him as a witness be used as evidence in any trial. As such, I find that non-examination of the chemical examiner cannot be a point or controversy in a case like this.

85. In the case of Kamruzzaman-Vs-State, 12 BLC 553 it has been held by this Court that the report of chemical examiner may be used in evidence in the trial without calling the said

chemical examiner as witness. The report exhibit 9 is going to show that the chemical examiner found the existence of the heroin in the substance sent to him in examination.

86. The heroin was scaled by the PW 12, so in view of the case of State-Vs-Miss Eliadah Mc Cord, 16 BLD (AD) 239, the recording of conviction under serial no. 1(Kha) of the table attached to section 19(1) of the Madak Drabbya Niontran Ain, 1990 from possessing more than 25 grams heroin against condemned prisoner Saiful Islam has rightly been made by the trial Court. Now, having consideration of the above facts and discussion I find it difficult to interfere in the findings and decisions of the trial Court so far as it relates for the condemned prisoner Saiful Islam but so far the sentence of Saiful Islam is concerned he has been sentenced to death but it has come from the arguments that he is a young man of 30 years. In my consideration the best purpose of justice would be served if his death sentence is commuted into the imprisonment for life.

87. So far the conviction and sentence of Md. Delowar Mallik is concerned it is found from the materials on record that he was found sitting on the seat no. F-4 by the side of condemned prisoner Saiful Islam and they were going to Sylhet through a joint ticket but all the evidence so far it has been found that the packet of the heroin was found within the school bag which was possessed by accused Saiful Islam. If it is conceded for a moment that the condemned prisoner Saiful Islam and Delowar Mallik were sitting side by side in a Sylhet bound bus, can it be said that Delowar had any knowledge about the objectionable materials inside the bag of Saiful Islam. I find no legal evidence in the record to show that with the knowledge of Delowar Mallik and Saiful Islam was carrying the heroin within his bag. So, in my consideration there appears no legal evidence against Delowar Mallik that he had abated Saiful Islam in order to carry the heroin from Dhaka to Sylhet in any manner. Mere taking a seat with Saiful Islam side by side does not mean that Delowar Mallik had any knowledge or he had abated Saiful Islam in carrying those heroin. So, I find that the conviction and sentence upon Delowar Mallik based on no evidence. In fact, there appears no material in the hands of the prosecution to show that the accused Delowar Mallik is guilty in any manner whatsoever in carrying the heroin. So the conviction and sentence of Delowar Mallik does not deserve at all.

88. Now, having regards to the above decision the death reference is rejected but the conviction of the condemned prisoner Saiful Islam under serial 1(Kha) of the table attached to section 19(1) of the Madak Drabbya Niontran Ain, 1990 is upheld and the death sentence is commuted into the sentence of imprisonment for life. As a result, the Criminal Appeal being no. 3723 of 2009 and Jail Appeal being no. 425 of 2009 filed by Saiful Islam are disposed of accordingly.

89. The convict appellant Delowar Mallik is found not guilty of the charge as levelled against him and he is acquitted of the charge. Consequently the Criminal Appeal being no. 3849 of 2011 filed by him is allowed.

90. Let a copy of this judgment along with the lower Court's record be sent to the Court concerned at once.

4 SCOB [2015] HCD 80

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 5093 of 2014

BSRM Steels Ltd.
….... Petitioner.

-Versus-

National Board of Revenue and others
….. . Respondents.

WRIT PETITION NO. 5094 of 2014

BSRM Iron and Steels Co. Ltd.
….... Petitioner.

-Versus-

National Board of Revenue and others
….. . Respondents.

Mr. Mosharaf Hossain, Advocate
..For the petitioner in both writ petitions.

Ms. Shuchira Hossain with
Ms. Nurun Nahar, A.A.G
…..For the Government in both writ petitions.

Heard on: 03.09.2015 and09.09.2015.
Judgment on: 17.09.2015.

Present
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J. N. Deb Choudhury

Income Tax Ordinance, 1984
Section 53 and 82C:
According to sub-section (3) of the said Section 53, the importers are given credit for such advance payment of income tax during their assessment of tax in the concerned assessment year. Not only that, according to Section 82C as quoted above, such deduction shall even be deemed to be the final discharge of tax liability of an assessee-importer from that source. Therefore, since the source in the present case in respect of the petitioners is the source of importation of scrap vessels by the ship breaking industries, or sometimes by the petitioners themselves, and there is no dispute that at the time of importation of the scrap vessels AIT were deducted in view of the provisions under Section 53, the said deduction of tax shall be deemed to be the final discharge of liability from that source in view of Clause (g) sub-section (2) of Section 82C of the said Ordinance. ...(Para 9)

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. Rules in the aforesaid writ petitions were issued in similar terms, namely calling upon the respondents to show cause as to why the Circular being e¢b ew-08.010000.031.03.004.2013/109 a¡¢lM 07/11/2013 (Nothi No.08.010000. 031.03.004.2013/109 dated 07.11.2013) issued by the National Board of Revenue (NBR) under the signature of its 1st Secretary (Annexure-A) and Circular being No. ¢hBl¢f¢X p¡Lm¡l ®mV¡l ew 22 a¡¢lM 19.12.2013 (BRPD Circular No. 22 dated 19.12.2013) issued by the Bangladesh Bank, in so far as they relate to the deduction/collection of advance income tax (AIT) by the respondent banks from the transaction of pay orders/account payee cheques issued by the petitioner Company in favour of the scrap-iron sellers as against direct purchase of scrap iron (raw materials) from the local Market, should not be declared to be without lawful authority and are of no legal effect and as to why the respondents should not be directed not to deduct or collect advance income tax (AIT) from the transaction of pay orders/account payee cheques given by the petitioner Company against such direct purchases of scrap iron (raw materials).

3. Short facts, relevant for disposal of the Rules, are that the petitioner-companies, being engaged in business of manufacturing steel products, namely rod, angel, bar, panel and steel plates etc., purchase iron scraps, to be used as raw materials for the production of said goods, directly from ship breakers or scrap importers in the country. In such purchases, they make payments of price by way of pay orders or account payee cheques drawn on their bankers. Since the petitioners are listed companies in the stock exchange, other modes of payment are not allowed. It is further stated that, in view of the relevant provisions of law, namely section 53 of the Income Tax Ordinance, 1984 read with Rule 17A of the Income Tax Rules, 1984, the importers of scrap vessels pay advance income tax during import of the vessels. According to the petitioners, there are two types of scrap vessel importers in this country, namely the Steel Re-Rolling Mills like the petitioners and the Ship Breaking Industries, and both classes of importers pay advance income tax at the time of import of the scrap vessels in view of the above provisions in addition to other applicable duties and charges. That being the admitted position, according to the petitioners, such payment of advance income tax on the said scrap vessels at the time of importation of the same are deemed to be final discharge of tax liability in view of the provisions under Section 82C(2)(g) of the said Ordinance and as such whoever purchases the scraps from the said importers or from the ship breakers after dismantling of the said scrap vessels, he is not required to deduct AIT from the payments in view of the provisions under Section 53 of the said Ordinance. However, according to the petitioners, out of a sheer misconception of law, the NBR has issued the impugned circular dated 07.11.2013 asking the concerned banks, through which the payments are made by the petitioners, to deduct AIT in view of the provisions under Section 52 of the said Ordinance read with Rule 16 of the Income Tax Rules, 1984. That circular was followed by the impugned BRPD circular dated 19.12.2013 issued by the Bangladesh Bank directing the concerned banks in Bangladesh to comply with the impugned circular issued by the NBR. It is further stated that, because of the aforesaid circulars asking the concerned banks to deduct AIT from payments of invoice finance and supplier finance, the payments usually made by the petitioners through cheques and/or pay orders as against direct purchases of scraps from the ship breaking industries and other importers have become subjected to such deduction thereby discouraging the concerned sellers of the scraps not to sell any scraps to the petitioners. Under such predicament, the petitioners moved this Court and obtained the aforesaid Rules. Thereafter, upon applications by the petitioners for injunction, this Court, vide orders both dated 04.09.2014, restrained the respondents from deducting/collecting any AIT from the pay orders and account payee cheques issued by the petitioners as against direct purchases of scrap irons from the ship breakers as well as from the importers of scrap vessels.

4. Rules are opposed by the respondent no. 3 (Commissioner of Taxes, Chittagong) by filing affidavits-in-opposition contending, inter alia, that the NBR rightly issued the impugned circular under which the concerned banks are obliged to deduct AIT from the petitioners pay orders and cheques issued in favour of the sellers of the scraps. Therefore, according to the respondent, the Rules should be discharged.

5. Mr. Mosharaf Hossain, learned advocate appearing for the petitioners in both the writ petitions, at the very outset, reading out the relevant provisions of law, namely Sections 52, 53, 82C(2) (g) of the Income Tax Ordinance, 1984 and Rule 16 and 17A of the Income Tax Rules, 1984, submits that since, in view of the provisions under Section 53(2) read with Rule 17A of the Income Tax Rules, 1984, the ship breaking industries and other importers, while importing scrap vessels, are bound to pay advance income tax which are deducted at a prescribed rate at the time of import, the said importers of vessels are not liable to pay further advance income taxes in so far as the scraps as derived from the said scrap-vessels are concerned. Drawing this Court's attention to Clause (g) of sub-section (2) of Section 82C, learned advocate submits that, according to this provision, the advance income tax deducted from the said imported scrap vessels at the time of import has to be deemed to be final discharge of tax liability in so far as the payment of AIT in respect of said scrap vessels are concerned. Therefore, he continues, neither the NBR nor the Bangladesh Bank can direct the concerned banks to deduct further AIT from the payments made in the direct purchases of scraps through pay orders and account payee cheques in favour of the said importers or ship breakers. Mr. Hossain further argues that in view of the specific provisions under Section 52 of the Income Tax Ordinance, 1984, it is the person responsible for making payment is required to deduct AIT from such payments. However, according to him, since the banks are just custodian of money of the depositors and make payment upon specific direction given by its depositors/clients like the petitioners, under no circumstances a particular bank can be directed by the NBR to deduct AIT inasmuch as that the banks cannot be regarded as the 'person responsible' for making such payment. Therefore, according to him, even if such direction is given by the NBR, a bank in Bangladesh is not bound to comply with such direction. However, in the instant case, he submits, since the Bangladesh Bank has directed the concerned banks to comply with the said directions given by the NBR through the impugned circular, the banks are now bound to follow such direction.

6. Learned Assistant Attorney General, as against the above submissions, submits that since the NBR is authorized to issue such circular for ensuring correct deduction of AIT for the sake of the interest of the national exchequer, this Court has got nothing to interfere in the same.

7. For better understanding of the issues involved in the aforesaid writ petitions, Sections 52, 53 and relevant parts of Section 82C are quoted below:

> ***" 52. Deduction from payment to contractors, etc****.-(1) Where any payment is to be made, whether in full or in part, or by way of advance, on account of indenting commission or shipping agency commission or supply of goods or [execution of contract or sub-contract] to any such person or class of persons as may be prescribed, the person responsible for making the payment shall, at the time of making such payment deduct tax on the amount so payable at such rate as may be prescribed.*

(2) Any amount deducted under sub-section (1) shall be deemed to be an advance payment of tax by the payee and shall be given credit for in the assessment of his tax".

"53. ***Collection of tax from importers.-*** *(1) The [Commissioner of Customs] shall make collection of tax payable by the importers on account of import of goods.*
(2) The Board shall, for the purpose of collection of tax under sub-section (1).-
(a) specify the importers from whom collections are to be made : and
(b) prescribe the method and rate of calculation of the amount to be collected and the manner of collection.
(3) Any amount collected under sub-section (1) shall be deemed to be an advance payment of tax by the importer concerned, and shall be given credit for, in the assessment of his tax".

"82C. Tax on income of certain persons.-*(1) subject to sub-section (3), (4), (5), (6), (7), (8) and (9), notwithstanding anything contained in any other provisions of this Ordinance, tax deducted or collected at source in accordance with the provisions mentioned in sub-section (2) shall be deemed to be the final discharge of tax liability from that source.*
(2) The provisions referred to in sub-section (1) shall be the following, namely-
(a)……
(b)……
(C)……
(d)……..
(e)……
(f)……..
(g) the amount as computed for the purpose of collection of tax under section 53 in respect of goods imported, not being goods imported by an industrial undertaking as raw materials for its own consumption;
(h)……
(i)……
(j)……..
(k)……..
(l)……
(m)……..
(n)……..
(o)……
(p)……..
(q)……..
(r)……..
(s)……..
(t)……..."

8. It appears that one entire chapter in the Income Tax Ordinance, namely Chapter-VIII, is dedicated to the provisions involving payment of tax before assessment, or deduction of tax at source, which is normally called advance income tax (AIT). This AIT, or taxes at source, are deducted even before assessment and the such deduction at source from the income of an assessee in the income year is given credit at the time of assessment in the corresponding

assessment year. The provisions under the said Chapter have made it mandatory for the persons specified therein to make such deductions at source with specific harsh consequences for their failure of such deductions. One such obligation of deduction is imposed by the above quoted Section 52 of the said Ordinance on the persons responsible for making payment to contractors or suppliers etc. from such payment at rates prescribed by the said Ordinance or Rules made thereunder. According to Section 52, it is the person responsible for making such payment who is required to deduct AIT at certain rates at the time of making payment.

9. The next quoted provision, namely Section 53, has made specific provision for deduction of AIT by the concerned Commissioners of Customs at the time of importation of goods. Therefore, by virtue of the provision of Section 53, the Commissioner concerned is required to deduct AIT from the importers in respect of goods imported by them at the time of assessment of duties on the bill of entries and it is the NBR, under sub-section (2), who is to determine or specify the specific type of importers who are to be subjected to such deduction of AIT in respect of goods to be imported by them. According to sub-section (3) of the said Section 53, the importers are given credit for such advance payment of income tax during their assessment of tax in the concerned assessment year. Not only that, according to Section 82 C as quoted above, such deduction shall even be deemed to be the final discharge of tax liability of an assessee-importer from that source. Therefore, since the source in the present case in respect of the petitioners is the source of importation of scrap vessels by the ship breaking industries, or sometimes by the petitioners themselves, and there is no dispute that at the time of importation of the scrap vessels AIT were deducted in view of the provisions under Section 53, the said deduction of tax shall be deemed to be the final discharge of liability from that source in view of Clause (g) sub-section (2) of Section 82C of the said Ordinance.

10. Now, when the NBR is directing a particular bank to deduct AIT from the payment made by the purchasers like petitioners, it is in fact directing to deduct AIT from the income of the said importers or ship breaking industries who had already been subjected to AIT at the time of importation of the said vessels. The scheme of law in this regard is that when a 'person responsible to make payment' is required to deduct AIT in view of the provisions under Section 52, he is in fact deducting AIT on behalf of the sellers, and that AIT, as deducted by the said persons, are to be deposited in the national exchequer. Therefore, it is evident from the aforesaid provisions as well as facts and circumstances of the cases that if the impugned circular is implemented in respect of the petitioners in case of their direct purchases from the ship breaking industries or any other importers of scrap vessels, the 'person responsible for making payment' like the petitioners is subjecting the said importers to double taxation in so far as the AIT is concerned, which is not permitted by law. In this regard, though the impugned circular does not specifically mention anything for deduction in respect of petitioners' aforesaid payments, the words mentioned therein, namely 'invoice financing' or 'supplier financing' are admittedly attracting the petitioners such purchases, and that is the reason why the petitioners are aggrieved. On the other hand, by filing a supplementary-affidavit to the writ petition today, the petitioners have referred to some specific letters issued by their bankers (Annexures-B & B1) where in the bankers have stated that they are bound to deduct AIT from such payments.

11. However, we are of the view that, the applicable laws, namely Section 52, Section 53 and Section 82C of the Income Tax Ordinance, do not permit the NBR to compel the bankers of the petitioner's or even the petitioners to deduct AIT from such payments made by way of

cheques or pay orders in favour of the ship breaking industries and/or scrap vessel importers. The provisions under the Income Tax Ordinance, 1984 having not made any avenue for double AIT imposition, the impugned circulars, Annexures-A and A-1, in so far as they relate to the payments by the purchaser like petitioners as against direct purchases of scrap irons as raw materials from the ship breaking industries and importers of scrap vessels by way of making payments through Cheques and pay orders are liable to be struck down inasmuch as that the same have been issued in violation of the scheme of law. Though the learned advocate for the petitioners has raised another issue as regards 'the person responsible to make payment, in other words, whether the bankers may be termed as 'persons reasonable to make payment', we do not want to examine that issue in the instant cases. May be in a proper case in future, this Court will address the said issue.

12. Regard being had to the above facts and circumstances of the cases and relevant provisions of law as discussed above, this Court finds merit in the Rules and as such the same should be made absolute.

13. In the result, the Rules are made absolute. The impugned circular being e¢b ew-08.010000.031.03.004.2013/109 a¡¢lM 07/11/2013 (Nothi No.08.010000. 031.03.004.2013/109 dated 07.11.2013), issued by the National Board of Revenue, Dhaka under the signature of its 1st Secretary (Annexure-A) and Circular being No. ¢hBl¢f¢X p¡Lm¡l ®mV¡l ew 22 a¡¢lM 19.12.2013 (BRPD Circular No. 22 dated 19.12.2013) issued by the Bangladesh Bank under the signature of its Deputy General Manager, in so far as they relate to the deduction/collection of advance income tax (AIT) by the respondent banks from the transaction of pay orders/account payee cheques, issued by the petitioners in favour of the scrap-iron sellers against direct purchase of scrap iron (raw materials) from the local Market, are declared to be without lawful authority and of no legal effect. Accordingly, the respondents, including all the bankers of the petitioners, are directed not to deduct AIT from any payments made by the petitioners as against direct purchases of raw materials scraps from the ship breaking industries and/or scrap vessels importers.

14. Communicate this.

4 SCOB [2015] HCD 86

High Court Division
(Special Original Jurisdiction)

Writ Petition No. 5546 of 2008

Md. Selim Mollah

... Petitioner

Vs.

Bangladesh and others

... Respondents

Ms. Rana Kawser, Advocate

... for the Petitioner

Mr. Biswojit Roy, Deputy Attorney General with Mr. Bibhuti Bhuson Biswas, Assistant Attorney General

... for the Respondents

Judgment on 04.08.2015

Present:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakrabortty

Druto Bichar Ain, 2002
Section 6:
Alongside the five categories of cases, the Government in the public interest can transfer any pending case at any stage of trial to Druto Bichar Tribunal.
A question may still arise as to when this particular provision of law gives authority on the Government to transfer any pending criminal case at any stage of trial to any Druto Bichar Tribunal, why five categories of cases relating to the offence of murder, rape, firearms, explosive substances and drug are required to be specifically mentioned. Here the necessity of objective satisfaction on the part of the Government arises as to which cases other than the cases of those five categories are to be transferred in what public interest, and without any objective satisfaction recorded to that effect transfer of any other case to the Tribunal constituted under the Ain is not permissible. The concerned officials of the Ministry of Home Affairs must be careful and expressive in sending any case other than the cases of five categories specifically mentioned in section 6 of the Ain.
...(Para 9 and 10)

Judgment

Md. Ruhul Quddus, J:

1. This Rule at the instance of an accused in a criminal case was issued challenging the legality of transfer of Druto Bichar Tribunal Case No. 3 of 2008 (previously Metropolitan Special Tribunal Case No. 316 of 2005) arising out of Motijheel Police Station Case No.3 dated 02.10.2004 corresponding to G. R. No. 915 of 2004 under section 25A of the Special Powers Act,1974 from the Metropolitan Special Tribunal No.12, Dhaka to Druto Bichar Tribunal No.2, Dhaka by a notification being SRO No. 23-Ain/2008 dated 31.01.2008 [annexure-D to the writ petition] so far it relates to the said case.

2. The informant Md. Anwar Hossain, a Sub-Inspector of Police posted to the Detective Branch of Dhaka Metropolitan Police lodged the case long back on 02.10.2004 against the petitioner and three others bringing allegation of possessing counterfeit currency-notes of Taka 1,22,000/- (one lac twenty thousand) in total. Another Police Officer investigated the case and submitted a charge sheet on 31.12.2004 against the same set of accused including the petitioner under the said penal law.

3. Eventually the case being registered as Metropolitan Special Tribunal Case No. 316 of 2005 was pending in trial before the Metropolitan Special Tribunal No.12, Dhaka. At one stage, it was transferred to the Druto Bichar Tribunal No.2, Dhaka under the provision of Druto Bichar Ain, 2002 (hereinafter referred to as "the Ain"). In that event the petitioner moved in this Court and obtained the Rule with an interim order of stay, which was extended from time to time.

4. Ms. Rana Kawser, learned Advocate for the petitioner submits that the Government has no scope to transfer a case for illegal possession of counterfeit currency-note within the scope of section 6 of the Ain. The law gives authority on the Government only to transfer the cases relating to the offence of murder, rape, fire arms, explosive substances and drug. The impugned notification was, therefore, issued without jurisdiction.

5. On the other hand, Mr. Biswojit Roy, learned Deputy Attorney General submits that alongside the five categories of cases, the Government can also transfer any criminal case to Druto Bichar Tribunal in public interest. It is very much permissible under section 6 of the Ain. The Rule is therefore liable to be discharged, learned Deputy Attorney General thus concludes.

6. In turn of reply Ms. Rana Kawsar opposes the contention of the leaned Deputy Attorney General submitting that all criminal cases somehow involve public interest, and it cannot be the scheme of law to transfer all the criminal cases to Druto Bichar Tribunal, where the cases of five categories are specifically mentioned.

7. We have gone through the record, considered the submissions of the learned Advocates and consulted the relevant provisions of law. Section 6 of the Ain confers authority on the Government to transfer actually six categories of cases. Those are (1) any criminal case in public interest, and the cases relating to the offence of (2) murder, (3) rape, (4) firearms, (5) explosive substances and (6) drug. For better appreciation of the meaning, spirit and essence of the said provision of law, section 6 of the Ain is quoted below:

> *Òavivi 6| gvgjv ¯vbvšÍi-*
> *miKvi miKvix †M‡R‡U cÁvcb Øviv, Rb¯v‡_, nZ¨v, aIY, Av‡Mqv¯, we‡ùvwiK `e¨ Ges gv`K `e¨ msµvš Aciva wePviwaxb †Kvb gvgjv Dnvi †h †Kvb chv‡q `vqiv Av`vjZ ev we‡klI Av`vjZ ev g¨vwR‡óU Av`vjZ n‡Z wePv‡ii Rb¨ `vZv wePvi UvBeÿbv‡j ¯vbvšÍi Ki‡Z cvi‡e|Ó* (Bangladesh Code, Volume-35).

8. Because of use of the coma before and after the word '*Rb¯v‡_*' it can easily be construed that "in public interest, any pending case" has been made a separate category for transfer to Druto Bichar Tribunal under the Ain. It will be more clear, if we read the said provision omitting the words "*nZ¨v, aIY, Av‡Mqv¯, we‡ùvwiK `e¨ Ges gv`K `e¨ msµvš Aciva*". After so omission the provision of law would stand as follows:

> *ÒmiKvi miKvix †M‡R‡U cÁvcb Øviv, Rb¯v‡_ ... wePvivaxb †Kvb gvgjv Dnvi †h †Kvb chv‡q `vqiv Av`vjZ ev we‡kl Av`vjZ ev g¨wR‡óU Av`vjZ n‡Z wePv‡ii Rb¨ `ªZ wePvi UvBeÿbv‡j ¯vbvši Ki‡Z cvi‡e|Ó*

9. The above quoted part of section 6 makes a clear sense that alongside the five categories of cases, the Government in the public interest can transfer any pending case at any stage of trial to Druto Bichar Tribunal.

10. A question may still arise as to when this particular provision of law gives authority on the Government to transfer any pending criminal case at any stage of trial to any Druto Bichar Tribunal, why five categories of cases relating to the offence of murder, rape, firearms, explosive substances and drug are required to be specifically mentioned. Here the necessity of objective satisfaction on the part of the Government arises as to which cases other than the cases of those five categories are to be transferred in what public interest, and without any objective satisfaction recorded to that effect transfer of any other case to the Tribunal constituted under the Ain is not permissible. The concerned officials of the Ministry of Home Affairs must be careful and expressive in sending any case other than the cases of five categories specifically mentioned in section 6 of the Ain.

11. This is true that all criminal cases involve public interest as it relates to law and order situation of the Country as well as the safety and security of the people in general and also their peace and discipline. But the degree of public interest involved in each criminal case and its importance cannot be the same.

12. In the present case, allegation of recovery of huge counterfeit currency-notes has been brought against the accused including the present petitioner. The police submitted a charge sheet after completion of investigation into the allegation. The nature of offence apparently involves public interest as it affects the monetary system of the Country, and in course of transaction of the said counterfeit currency-notes any innocent citizen can be victimized. This is not an ordinary criminal case between two individuals affecting individual interest or injuring an individual that involves less public interest.

13. Under the facts and circumstances of this particular case, although no objective satisfaction on the part of the Government except simple mentioning of the word "*Rb¯v‡_*" (in public interest) at the top of the impugned gazette notification has been recorded, we are of the view that the present case involves public interest and therefore, the ultimate decision of the Government in transferring the case by issuing the impugned notification is approved with a note to be cautious in future.

14. In view of the above, we are not inclined to interfere with the impugned gazette notification transferring the present case.

15. Accordingly, the Rule is discharged with the above observations. The order of stay granted earlier stands vacated. The Druto Bichar Tribunal No.2, Dhaka is directed to proceed with the case in accordance with law.

16. Communicate the judgment to the Secretary, Ministry of Home Affairs as well.

4 SCOB [2015] HCD 89

HIGH COURT DIVISION
(SPECIAL STATUTORY JURISDICTION)

Trade Mark Appeal No. 02 of 2011

British Broadcasting Corporation (BBC)
.....Appellant
-Versus-

Registrar, Department of Patents, Designs and Trade Marks, and others.
.....Respondents

Mr. Syed Shahid Hossain, Advocate with
Mr. Syed Imran Hossain, Advocate
.....For the appellant
No one appears
.....For the respondents

Heard on: 10.07.2014 and Judgment on: 16.07.2014.

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

Trade Marks Act, 2009
Section 24 & 30:
Section 30 of the Trade Marks Act, 2009 provides that priority of use of this mark gets paramount consideration compared to registration.
The right created in favour of a registered proprietor of a trade mark is not an absolute right and is subservient to other provisions of the Act. In other words, registration of a trade mark does not provide a defence to the proceedings for passing of as under section 24 of the Act, 2009. A prior user of trade mark can maintain an action for passing off against any subsequent user of an identical trade mark including a registered user thereof. ...(Para 32 &33)

Judgment

Md. Ashraful Kamal, J:

1. This is an appeal under section 100 of the Trade Marks Act, 2009 presented on 28.02.2011 and the same was accepted on 01.03.2011 against the decision and order dated 15.07.2007 (communicated on 14.09.2010) passed by the Registrar of Trademarks, Dhaka rejecting the Trade Mark Application No. 49040 dated 14.11.1996 in Class-9 filed by the appellant for registration of the Mark BBC.

2. Short facts, necessary for the disposal of this appeal, are as follows;

The British Broadcasting Corporation (BBC) a public corporation incorporated and organized under the law of England and Wales by Royal Charter whose principal address is Broadcasting house, Portland Palace, London W1A 1AA, United Kingdom filed an application before the Registrar of Trademarks on 14.11.1996 for registration of the trade mark BBC being Application No. 49040 in class 9 in respect of sound, video and date recordings; films and sound films prepared for exhibition; carriers including records, discs, tapes, cassettes, cartridges and cards bearing or for use in bearing sound recordings, video

recordings, data, images, games, graphics, text, programs or information; computer software; computer games; video games; electronic games; memory carriers; interactive compact discs; CD-ROMs; electrically, magnetically and optically recorded data for computers; instructional and teaching apparatus and instruments; sound, video and data recording and reproducing apparatus; games, apparatus for games and amusement apparatus all for use with or incorporating a television screen or video monitor; coin of token operated electrical or electronic amusement apparatus; loudspeakers; apparatus for use in recording, producing, presenting, broadcasting, transmitting, receiving, processing, reproducing, encoding and decoding of radio and television programmes, information and data; electrical and electronic broadcasting apparatus; parts and fittings for all the aforesaid goods; all other goods in class 9.

3. After receiving the appellant's trade mark application dated 14.11.1996, the respondent No.1 issued notice under section 14(1) of the Trade Marks Act, 1940 on 29.07.2004 upon the appellant to show cause as to why its application shall not be rejected under section 6(1)(e), 8(a) and 10(1) of the Trade Marks Act, 1940 for the reason of pendency of two marks namely application No. 9236 of Brown Boveri A.G. (BBC Products C/O Ramfry and son) and application No.37533 Bangladesh Brevy Centre (C/O Rajan Agency Dhaka).

4. Thereafter, as per sub-rule (2) of the rule 24 of the Trade Marks Rules, 1963, the appellant on August 02, 2004 (within two months) sent his observations to the Trade Mark Registry, which was received by the respondent No.1's office on 08.08.2004 vide memo No. 6474, the respondent No.1 on 30.04.2007 issued notice upon the appellant to appear before him on that date for hearing. Accordingly the appellant appeared on that date by giving hajira.

5. After that appellant filed an application before the respondent No.1(which was received by the respondent No.1 on 08.06.2008) requesting him for passing an early advertisement order for the process of registration of trade mark. Then on 08.02.2010 the appellant again filed an application before the respondent No.1 enquiring about his pending application.

6. Thereafter on 14.09.2010 the appellant filed another application before the respondent No.1 to inquire into the status of his trade mark. Then on 14.09.2010, the respondent No.1 informed the appellant that its application was rejected on 15.07.2007 and immediately on 20.09.2010 the appellant applied for the grounds of decision dated 15.07.2010 and the respondent No.1 supplied the said ground and decision on 01.11.2010.

7. Being aggrieved by the said orders dated 14.09.2010 and 01.11.2010 passed by the Registrar of Trademarks Dhaka in Trade Mark Application No. 49040 in Class-9 rejecting the application filed by the Appellant for registration of the Mark BBC, the appellant preferred this appeal under section 100 of the Trade Marks Act.

8. Mr. Syed Shahid Hossain alongwith Mr. Syed Imran Hossain, the learned Advocates appearing for the appellant, submits that the appellant's mark BBC is in the use in Bangladesh territory earlier than Trade Marks No. 9236 and 37533. From Wikipdia, free Encyclopedia (page 13 supplementary paper Book) it is seen that Appellant uses and broadcast Bangla Program with the Trade Name BBC from 11.10.1941 whereas from the Trade Mark Journal (Page 14 and 15 of the supplementary paper book) it is evident that the use of the Trade Mark 9236 is from 26.04.1974 and that of the Trade Mark No. 37533 is after 20.04.1993.

9. He also submits that the appellant having Agreement at the same time with respondent No.3 i.e. owner of the Trade Mark 9236 since 19.10.1987 did not object to registration of the Trade Mark BBC of the appellant. So, there is no bar in registration of the appellant's mark BBC as prayed for inspite of existence of the Trade Mark 9236 (Pg 01-08 of the supplementary paper Book). Moreover, the Respondent No.3 also issued a letter of Consent to the use and registration of the appellant's trade mark BBC. Therefore, the existing Mark 9236 does not create any bar to register the appellant's mark BBC (pg 16 of the supplementary paper book)

10. He further submits that Trade Mark Application No. 37533 has no chance to be registered in view of already registered mark 9236 which is also earlier in use than the Mark 37533 and therefore cannot stand on the way of registration of the appellant's mark who has co-existence Agreement with the mark 9236.

11. He also submits that the Appellant has co-existence Agreement with the owner of Registered Mark 9236 and also consent letter in respect of registration of the appellant's mark BBC (P-16 of supplementary paper book) and the trade Mark application No. 37533 is actually abandoned.

12. Finally, Mr. Shahid submits that the appellant's mark BBC as in use in Bangladesh since October 11, 1941 (pg 13 of the supplementary paper book) i.e. earlier to the mark 9236 which in use since 26.04.1974 and the mark 37533 which in use after 20.04.1993 (pg 14015 of the supplementary Paper Book) the appellant is entitled to registration as per section 30 of the Act 2009 as earlier user.

13. No one appears for the respondents.

14. We have gone through the Trade Mark Appeal alongwith the annexures annexed thereto, perused the record and considered the submissions made by the learned Advocate for the appellant.

15. It appears from the record that the respondent No.1 (the office of Trade Mark Registrar) on 29.07.2004 issued a notice under section 14(1) of the Trade Marks Act, 1940 upon the appellant to show cause as to why its application should not be rejected under section 6(1)(e), 8(a) and 10(1) of the Trade Marks Act, 1940 for the reason of pendency of two marks, namely, application No. 9236 of Brown Boveri A.G. (BBC Products C/O Ramfry and son) and application No. 37533 Bangladesh Brevy Centre (C/O Rajan Agency Dhaka).

16. Thereafter, as per sub-rule (2) of rule 24 of the Trade Marks Rules, 1963, the appellant on August 02, 2004 (within two months) sent his observation to the Trade Mark Registry, which was received by the respondent No.1's office on 08.08.2004 vide memo No. 6474. The aforesaid reply dated August 02, 2004 verbatim runs as follows;

"*Bangladesh & Foreign Patents, Designs & Trade Marks*
REMFRY & SON
PATENT & TRADE MARK ATTORNEYS
ESTABLISHED 1827

IN REPLY PLEASE QUOTE
OUR REF

REMFRY & SON LIMITED
56, NEW ESKATON
ROAD, 4TH FLOOR, DHAKA

OUR REF: SA/9666
YOUR REF.

The Registrar of Trade Marks
Trade Marks Registry
Dhaka.

August 02, 2004

Dear Sir,

Re: The British Broadcasting Corporation.
Bangladesh TM Application No. 49040 'BBC in Class 9.

We write with reference to the show cause notice issued under your letter No. TMO/8722/04 dated the 29th July 2004 and have the honour to submit the considered reply as under:-

1. *That the mark consist of BBC which is a part of the company and as such is registrable.*
2. *That the mark does not conflict with the cited marks as the goods of the cited marks are different description and as such the objection raised under Section 8(a) & 10(1) in our opinion is not tenable.*
3. *As desired, we enclose herewith a copy of the power of attorney duly executed by the applicant in our favour to act on their behalf.*

In view of the above submission an acceptance of the application is respectfully requested.

Thanking you,

Yours faithfully

Salauddin Abdullah
(Advocate)

17. After receipt of the appellant's observations on 08.08.2004, the Respondent No.1 did not proceed further regarding the appellant's trade mark till 30.04.2007. However, on 30.04.2007 the Respondent No. 1 issued notice upon the appellant to appear before him on that date for hearing. Accordingly, the appellant appeared before the Respondent No. 1's office on 30.04.2007. Appellant's appearance verbatim runs as follows;

"*Bangladesh & Foreign Patents, Designs & Trade Marks*
REMFRY & SON
PATENT & TRADE MARK ATTORNEYS
ESTABLISHED 1827

IN REPLY PLEASE QUOTE
OUR REF

REMFRY & SON LIMITED
56, NEW ESKATON
ROAD, 4TH FLOOR, DHAKA

OUR REF: SA
YOUR REF. 30/4

The Registrar
The Department of Patent Designs and Trademarks
The Trademarks Registry Wing
Dhaka.

Dear Sir,

Re: Bangladesh Trade Mark Application/Registration No.(s) 49040-9

We have the honour to inform your that we act on behalf of the client relating to the above matter.

Today has been fixed for hearing before your goodself and we file hajira in this regard.

Thanking you, *Yours faithfully*

30.04.2007
Salauddin Abdullah
(Advocate)

18. Thereafter, H & H Company filed an application regarding his appointment as Attorney in place of M/S. K.A. Bari. The respondent No.1 approved the said change on 26.06.2007. The application filed by the H & H Company verbatim runs as follows;

H & H COMPANY
HCQ Hä HCQ ®L¡Ç f¡e£
BARISTER-AT LAW, ADVOCATES, NOTARIES, TAX
TRADE MARKS & PATENT ADVISERS

Our Ref: RH:MSU: ha/L-225

June 13, 2007

The Registrar
Department of Patents, Designs & Trade Marks
The Trade Marks Wing
Dhaka

SHAREEF MANSION
(Second Floor)
56-57, Motijheel C/A,
Dhaka-1000

Dear Sir,

Re: Application for Registration of Trade Mark "BBC" App. No. 49040 in Class-9 in the name of British Broadcasting Corporation.

We would refer to the above matter and inform that H &H Company has been appointed as Attorney of the above Applicant in place of M/S K.A. Bari.

We enclose a copy of the said power of Attorney for your records. As the matter is long pending, we request your to inform us the present status of the above application.

Kindly forward us all future correspondence to the following address:

H & H Company
Barrister and Advocates
56/57 Motijheel C/A (Shareef Mansion)
2nd Floor, Dhaka-1000
Bangladesh
Phone: 88-02-9550705, Fax 9552447
E-mail: hnh @ bangla.net

Yours faithfully,

(REZWANUL HAQUE)
Partner
H & H Company

Enclosed : As above *2695*
26/6

19. On May 25th of 2008 Attorney of the appellant filed an application before the Respondent No. 1 (which was received by the office of the respondent No. 1 on 08.06.2008) to look into the appellant's trade mark and pass an early advertisement order for processing of registration of its trade mark, which verbatim runs as follows;

"Bangladesh & Foreign Patents, Designs & Trade Marks
REMFRY & SON
PATENT & TRADE MARK ATTORNEYS
ESTABLISHED 1827

REMFRY & SON LIMITED
IN REPLY PLEASE QUOTE *56, NEW ESKATON*
OUR REF *ROAD, 4TH FLOOR, DHAKA*

OUR REF: SA/6396
YOUR REF.

The Registrar *May 25th, 2008*
The Department of Patent Designs and Trademarks
The Trademarks Registry Wing
Shilpa Bhavan
Dhaka.
Attn: Mr. Mesbah Uddin
Registrar

Re: *The British Broadcasting Corporation.*
Bangladesh TM Application No.
49040 for 'BBC' in Class 9.

Dear Sir,

We have the honour to bring to your kind notice that the application No. 49040 was filed in November 16th, 1996 which is pending for registration since then.

As our client is pressing very hard in the matter we would request your goodself to look into the matter concerned and pass an early advertisement order for processing of registration of the aforesaid trade mark.

Thanking you, *Yours faithfully*

Salauddin Abdullah
(Advocate)

20. Despite the appellant's application dated 25.05.2008, the respondent No. 1 office kept silent about the matter. Then, on 08.02.2010 appellant filed an application before the respondent No. 1 to inquire into the matter which verbatim runs thus;

H & H COMPANY
HCQ Hä HCQ ®Li¡Ç f¡e£
BARISTER-AT LAW, ADVOCATES, NOTARIES, TAX
TRADE MARKS & PATENT ADVISERS

Our Ref: RH:MSU: ha/L-225

February 8, 2010

The Registrar
Department of Patents, Designs & Trade Marks
The Trade Marks Wing
Dhaka

SHAREEF MANSION
(Second Floor)
56-57, Motijheel C/A,
Dhaka-1000

Dear Sir,

Re: Application for Registration of Trade Mark

Trade Mark	***App. No.***	***Class***
"BBC"	***49040***	***9***

in the name of British Broadcasting Corporation.

We would refer to the above Application which is pending for examination since last 13 years.

The applicant of the above mark is new very anxious for such delay in getting the examination report.

We therefore request your to urgently take care of the matter and sent us the examination report to our filing address.

H & H Company
Barrister and Advocates
56/57 Motijheel C/A (Shareef Mansion)

2nd Floor, Dhaka-1000
Bangladesh

Yours faithfully,
(REZWANUL HAQUE)

21. Then, on 14.09.2010 the appellant filed another application before the respondent No. 1 to inquire about the status of the appellant's trade mark, which verbatim runs as follows;

H & H COMPANY
HCQ Hä HCQ ®L¡Ç f¡e£
BARISTER-AT LAW, ADVOCATES, NOTARIES, TAX
TRADE MARKS & PATENT ADVISERS

Our Ref: RH:MSU: ha/L-225

February 8, 2010

The Registrar
Department of Patents, Designs & Trade Marks
The Trade Marks Wing
Dhaka

SHAREEF MANSION
(Second Floor)
56-57, Motijheel C/A,
Dhaka-1000

Dear Sir, ***U R G E N T***

Re: Application for Registration of Trade Mark

Trade Mark	***App. No.***	***Class***
"BBC"	***49040***	***9***

in the name of British Broadcasting Corporation.

We would refer to our several reminders including last letter to you dated 08.02.2010 regarding the above application. We have not been informed any development since 2007.

The applicant of the above mark has become very anxious for such delay in getting any development.

We therefore request your to urgently take care of the matter and inform us the present status to our following address to take proper steps by the applicant

H & H Company
Shareef Mansion
56/57 Motijheel C/A (Shareef Mansion)
2nd Floor, Dhaka-1000
Bangladesh

Yours faithfully,
(REZWANUL HAQUE)

22. Further, on 14.09.2010, the respondent No. 1 informed the appellant that its application was rejected on 15.07.2007. The said memo dated 14.09.2010 verbatim runs as follows;

¢V,Hj, BI-12

" NZfËja¿£ hjwmjcn pILjI
পেটেন্ট, ¢XSjCe J ®VÊjLp A¢dcçI
¢nÔf j¿Zjmu, ¢nÔf ihe
91, j¢a¢Tm hj/H, YjLjz

CpÉ ew AXjI - 21301/10 ajIMx 14/09/2010
ট্রেডমার্কস বিধিমালার ২৪(২) বিধি মতে কারণ দর্শানোর নোটিশ।
fËL x H & H Company
Remtry & Son
Dhaka.
বিষয়ঃ ট্রেডমার্কস দরখাস্ত নম্বর ঃ ৪9040 ®nË -09z
আবেদনকারী নাম/ ট্রেডমার্কের বিবরন.....

Sejh,
EfIjš² ¢hoয় আপনাকে জানানো যাইতেছে যে, আপনার দরখাস্তের ট্রেডমার্ক নিম্ন h¢Za ®VÊjLp HI p¢qa pjj"ÉfZx
ট্রেড মার্কস দরখাস্ত নং পন্যের বিবরন প্রতিষ্ঠানের নাম ও ঠিকানা

AR-1 HI 15-07-০৭ তারিখের সিদ্ধান্ত মোতাবেক নথিটি প্রত্যখ্যান করা হলো।

এই সামঞ্জস্যতা ও অন্যান্য কারণে ট্রেড মার্কস এ্যাক্ট ২০০৯ এর ধারা . . . . অনুসারে আপনার ট্রেডমার্কটির নিবন্ধনে আপত্তি রহিয়াছে, বিধায় কেন আপনার দরখাস্ত খানা প্রত্যাখান করা হইবে না তাহার উপযুক্ত কারণ দর্শাত্ব হইবে। এই নোটিশ জারীর ৩ (তিন) মাসের মধ্যে ¢mMai¡বে জবাব দাখিল করিতে হইবে অথবা শুনানী দাবী করিতে হইবে। এই নির্ধারিত সময়ের মধ্যে প্রয়োজনীয় ব্যবস্থা গ্রহন না করিলে আপনার দরখাস্তখানা পরিত্যক্ত বলিয়া গণ্য হইবে।

üjrI/AØfø
fক্ষ®I¢SøÊ,
®fV¾V, ¢XSjCe J ®VÊjLp A¢dcçI, YjLjz"

23. Thereafter, on 20.09.2010, the appellant applied for the grounds of the decision dated 15.07.2007 and the respondent No. 1 delivered the said grounds and decision on 01.11.2010, which verbatim runs as follows;

¢V,Hj, BI-12

" NZfËja¿£ hjwmjcn pILjI
পেটেন্ট, ¢XSjCe J ®VÊjLp A¢dcçI
¢nÔf j¿Zjmu, ¢nÔf ihe
91, j¢a¢Tm hj/H, YjLjz

CpÉ ew AXjI 28995/10 ajIMx 1/11/2010
ট্রেডমার্কস বিধিমালার ২৪(২) বিধি মতে কারণ দর্শানোর নোটিশ।

fËL x H & H Company
Remtry & Son
Dhaka.

¢houx ট্রেডমার্কস দরখাস্ত নম্বর ঃ ৪৯০৪০ শ্রেনী -09z
আবেদনকারী নাম/ ট্রেডমার্কের বিবরন.....

Se¡h,
Efl¡Š² ¢ho়য় আপনাকে জানানো যাইতেছে যে, আপনার দরখাস্তের ট্রেডমার্ক নিম্ন h¢Za ®VÊ j¡Lp Hl p¢qa p¡j "Ét fZx
ট্রেড মার্কস দরখাস্ত নং পন্যের বিবরন প্রতিষ্ঠানের নাম ও ঠিকানা

fËÊue f¤œ ew 21301/10 a¡w 14-09-10 Hl grounds of Decision হচ্ছে-
নথিটি পরীক্ষান্তে দেখা যায় যে, সমস্ত পেন্ডিং মার্কস রহিয়াছে তাহার সংগে মিল রহিয়াছে। বিধায় নথিটি প্রত্যাখ্যান করা যাইতে পারে।

ü¡rl/ ü¡rl/
flÉrL H, Bl-1

এই সামঞ্জস্যতা ও অন্যান্য কারণে ট্রেড মার্কস এ্যাক্ট ২০০৯ এর ধারা . . . . . অনুসারে আপনার ট্রেডমার্কটির নিবন্ধনে আপত্তি রহিয়াছে, বিধায় কেন আপনার দরখাস্ত খানা প্রত্যাখান করা হইবে না তাহার উপযুক্ত কারণ দর্শাতে হইবে। এই জারীর ৩ (¢ae) মাসের মCÉ ¢m¢Ma i¡বে জবাব দাখিল করিতে হইবে অথবা শুনানী দাবী করিত হইবে। এই নির্ধারিত সময়ের মধ্যে প্রয়োজনীয় ব্যবস্থা গ্রহন না করিলে আপনার দরখাস্তখানা পরিত্যক্ত বলিয়া গণ্য হইবে।

ü¡rl/AØfø
f¢ç¾®l¢SøÊ,
®fV¾V, ¢XS¡Ce J ®VÊ j¡Lp A¢dcçl, Y¡L¡z"

24. In this trade mark appeal, the admitted position is that the application No. 49040 in Class-9 was filed on 14th November, 1996 by the appellant and the respondent No.1 issued notice under section 14(1) of the Trade Marks Act, 1940 on 29.07.2004. It is also admitted that as per sub Rule (2) of the rule 24 of the Trade Marks Rules, 1963, the appellant on 02.08.2004 sent his observations to the trade mark registrar, which was received by the respondent No.1's office on 08.08.2004 vide Memo No. 6474.

25. It is also admitted that after receiving the observations on 08.08.2004, the respondent No.1 on 30.04.2007 issued notice upon the appellant to appear before him and accordingly the appellant appeared on that date.

26. But curiously enough, the respondent No.1 even after taking hearing of the appellant on 30.04.2007 did not communicate its decision in writing to the appellant till 14.09.2010.

27. As per sub-rule (1) of Rule 25 of the Trade Marks Rules 1940, the decision of the registrar should be communicated to the applicant in writing. But, in the present case, it is crystal clear from the record that the respondent No.1 did not communicate its decision in writing to the appellant till 14.09.2010 for reasons best known to them.

28. It further appears from the record that the appellant on 08.06.2008, by filing an application requested the respondent No.1 to go for an order of advertisement or for the process of registration of trade mark. Then, again on 08.02.2010, the appellant filed another application before the respondent No.1 enquiring about the fate of the pending application and finally on 14.09.2010 the appellant filed another application before the respondent No.1

enquiring about the status of the trade mark and then the respondent No.1 on 14.09.2010 informed the appellant that his application had been rejected on 15.07.2007.

29. The appellant claims of using the trademark BBC in Bangladesh which dates back in 1941 even prior to its registration in 1949.

30. Indisputably, the appellant has been using the trade mark of the suffix BBC; since 11.01.1941 in Bangladesh. On the other hand, the respondent's trade mark application No. 9236 was registered on 26.04.1974 and trade mark application No. 37533 was registered on 20.04.1994 but, they actually have not been using the same, or for that matter even now.

31. It is also necessary to quote Section 30 of Trade Marks Act, 2009 (Same as section 25 of Trade Marks Act, 1940), which commences with a non obstante clause as under;

> *"**30. Saving for vested rights**- Nothing in this Act shall entitle the proprietor of a registered trademark or well-known mark or a registered user to interfere with or restrain any person or his predecessor from using a trademark identical with or nearly resembling it in relation to goods or services if it has continuously been used by them from a date prior to the use of the first – mentioned trademark or well – known mark in relation to those goods or services by the proprietor or a predecessor in title of his, and the Registrar shall not refuse to register the second – mentioned trademark by reason only of the registration of the first – mentioned trademark. Besides above, as earlier user the appellant has right of registration under section 30."*

32. Section 30 of the Trade Marks Act, 2009 provides that priority of use of this mark gets paramount consideration compared to registration.

33. The right created in favour of a registered proprietor of a trade mark is not an absolute right and is subservient to other provisions of the Act. In other words, registration of a trade mark does not provide a defence to the proceedings for passing of as under section 24 of the Act, 2009. A prior user of trade mark can maintain an action for passing off against any subsequent user of an identical trade mark including a registered user thereof.

34. The right of good will and reputation in a trade mark was recognized at common law even before it was the subject of statutory law, prior to codification of trade mark law there was no provision in Bangladesh for registration of a trade mark . The right in a trade mark was acquired only by use thereof. This right has not been affected by the Act and is preserved and recognized by section 30.

35. Section 30 of the Trade Marks Act, 2009 is similar to Section 34 of the Trade Marks Act, 1999 of India.

36. In the case of Rolex Sa Vs. Alex Jewellery Pvt. Ltd. & Ors., 2009(41) PTC 284 (Del.), the Court concluded that there is no user of the trade mark prior to the date of registration of the trade mark in favour of the plaintiff. Hence, the Court held as follows:-

> *" 11..... There is thus nothing to show user by the defendants of the mark since prior to registration in favour of plaintiff, except admitted*

factum of registration having been applied for. The benefit of Section 34 is available only by continuous use since prior to user or date of registration, whichever is earlier, by/of the registered proprietor. The benefit is not available merely by applying for registration. The defendants have failed to prima facie bring their case within the ambit of section 34."

37. In the case of Smithkline Beecham PLC & Anr. Vs. Sunil Sarmarkar & ors, 2012 (132) DRJ 880 it was held that; Registration of a trade mark cannot confer a right unless goods have been sold under the said trade mark. It was further held that a person cannot be allowed to squat on a trade mark without actually using the same.

38. A somewhat similar view was taken in the case of Allergran INC & Anr. Vs. INTAS Pharmaceuticals 2013 (53) PTC 36 (Del). Similarly in Rikhab Chand Jain & Anr. Vs. T.T. Enterprises Pvt. Ltd., 2013 (54) PTC 489 (Del) it was reiterated that no squatting on a trade mark is permissible.

39. In the present case, it further appears from the record that there is absence of user of the trade of the respondents and that a trade mark which drops out of the use, dies when there are no goods which are offered for sale as there is no use of the trade mark.

40. Apart from that, the respondents failed to appear before this Court with any affidavit-in-opposition and thereby failed to show that they have carried on any business in the relevant class i.e. class 30 or have used the concerned trade mark for the said business. In such a position, we have no choice but to accept the averments and the claims that have been laid by the appellant.

41. It is further necessary to quote the **Article 6bis** of the Paris Convention for the Protection of Industrial Property (Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979) which runs thus:-

Article 6bis
Marks: Well-known Marks

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries

of the Union may provide for a period within which the prohibition use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

42. The British Broadcasting Company (BBC) evolved as a life in 1922. Subsequently, in 1926, the company was dissolved and the British Broadcasting Corporation formed with a royal charter on 1st January, 1927. BBC is well known trade mark as defined under Article 6bis of the Paris Convention to which Bangladesh is a party and as a well known trade mark deserving protection against unauthorised use by various foreign courts. [Bangladesh joined WIPO (World Intellectual Property Organisation) in 1985. Accession: November 29, 1990 – Entry into force March 3, 1991.]

43. In the light of the above facts and circumstances, this appeal is allowed. We, hereby, set aside the decision and order dated 15.07.2007 (communicated on 14.09.2010) passed by the Registrar of Trade Marks, Dhaka rejecting the trade mark application No. 49040 dated 14.11.1996 in class-9. We allow the application No. 49040 dated 14.11.1996.

44. Further, we direct the respondent No. 1 to register the appellant's mark BBC in class-9. We permit the appellant to use the name BBC.

45. Communicate this judgment and order to the Registrar, Department of Patents, Designs and Trade Marks Registry Wing, Ministry of Industries, Government of the People's Republic of Bangladesh, 91, Motijheel Commercial Area, Dhaka.

46. Send down the Lower Court Records at once.

4 SCOB [2015] HCD 102

High Court Division
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 02 of 2006

Md. Forhad Hossain Sheikh
....Appellant

Vs.

The State
....Respondent.

Mr. Md. Zamiruddin Sircar, Adv. with
Mr. Abdul Bari, Adv. with
Mr. Idris Khan, Adv. And
Mr. Md. Zahirul Islam, Adv.
....For the Appellant
Mr. Zahirul Haque Zahir, DAG with
Mr. Nizamul Haque Nizam AAG and
Mr. Atiqul Haque Salim A.A.G.
…..For the State.

Heard on 25.05.2005 and
Judgment on: 26.05.2015

Present:
Mr. Justice Shahidul Islam
And
Mr. Justice K. M. Kamrul Kader

Circumstantial Evidence:
Commission of crime can also be proved by circumstantial evidence. Circumstantial evidence is more cogent and convincing than the ocular evidence. It is correctly said that witnesses may tell a lie and it is not difficult to procure false tutored and biased witnesses but it is very much difficult to procure circumstantial evidence. ...(Para 43)

Burden of proof in wife killing case:
Ordinarily, an accused has no obligation to account for which he is placed on trial but in a wife killing case or wife murder case, the position of law is all together is different. The murder having taken place while the convict was living with the deceased wife Asmina in the same house, the convict has an obligation to explain how his wife met her death. ...(Para 51)

Judgment

K. M. Kamrul Kader, J.

1. This appeal is directed against the judgment and order of conviction and sentence dated 29.11.2005 passed by the Sessions Judge, Faridpur in Sessions Case No. 150 of 2004 convicting the appellant under section 302 of the Penal Code and sentenced him to suffer imprisonment for life and also to pay a fine of Taka 5000/- in default to suffer simple imprisonment for two years more.

2. Short facts, relevant for disposal of this appeal are that on 21.11.2001, at 12:05 hour, one Md. Idris Kazi lodged a First Information Report to the Bhangha Police Station alleging, inter alia, that his elder daughter Asmina Akhter aged about 19 years is married to this appellant Md. Forhad Hossain, 4/5 months before the alleged incident. Thereafter on 20.11.2001 at about 4.00 a.m. one Md. Hafiz Sheikh, uncle of this appellant Forhad Sheikh came to the informant's house and informed them that the mother of the appellant Forhad is

seriously ill and asked them if they want to see her, they have to go there at once. On receipt of this information the informant and his wife PW-6 Seria Begum went to the matrimonial house of their daughter, situated at Adampur. They found a dead body was covered with a piece of cloth at the eastern veranda (corridor) of their dwelling hut. The informant removed the cloth and found the dead body of their daughter Asmina Akhter. He also saw several injury marks on the dead body. He found injuries on top and bottom of the left eye, a blackish mark on the neck, an injury mark above waist on her back, an injury mark on the left side of her face and some small blackish marks on right hand of the dead body of their daughter. The informant suspected that the accused persons in connivance each other caused death of the victim Ashmnia Akhter. The informant also came to know that on 20.11.2001 at about 11 p.m. his daughter along with her husband went to bed at their matrimonial home and on that night at about 3.00 a.m. she was found death at eastern bank of the pond of their matrimonial home. He also came to know that accused Forhad wanted to marry a girl of his village on taking an amount of Taka 50,000/- as dowry and for that reason this appellant and others conspired to kill his daughter Asmina. Thereafter, he lodged this F.I.R and the same was registered as Bhanga Police Station case No. 12 dated 22.11.2001 under sections 302/34 of the Penal Code.

3. Inspector Abu Bakker Talukder the Officer–in-Charge of the Bhanga Police Station and Sub-Inspector Md. Motiur Rahman as investigating officers investigated the case. During investigation the investigating officers visited the place of occurrence, prepared a sketch map with separate index, seized alamats, recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure and collected the statement of the witnesses under section 164 of the Code of Criminal Procedure and post mortem report. On conclusion of the investigation and after finding prima facie case against this appellant he submitted the Charge Sheet being No. 6 dated 19.01.2003 under section 302 of the Penal Code.

4. Thereafter, the case was transmitted to the Court of Sessions Judge, Faridpur for trial. At the commencement of trial, charge was framed against this appellant under section 302 of the Penal Code to which he pleaded not guilty and claimed to be tried.

5. During trial prosecution examined as many as 14 witnesses to prove their case and the defence cross examined them but did not adduce any witness on his defence. However, the defence case as it appears from the trend of cross examination is that the appellant is innocent and he did not commit any offence as alleged against him and he was falsely implicated in this case. He did not conspire to kill the deceased for marrying a girl of his village on taking an amount of Taka 50,000/- as dowry. Further case is that on the alleged night and time of occurrence the accused husband was not present at their matrimonial house.

6. On conclusion of taking evidence, the accused was examined under section 342 of the Criminal Procedure to which he reiterated his innocence and refused to adduce any evidence in his defence.

7. On conclusion of the trial, the learned Sessions Judge, Faridpur convicted and sentenced the appellant as aforesaid.

8. Having aggrieved by and dissatisfied with the said judgment and order of conviction and sentence, the convict appellant preferred this instant Criminal Appeal before this Court.

9. Learned Counsel Mr. Jamir Uddin Sircar alongwith Mr. Abdul Bari, Mr. Idris Khan and Md. Zahirul Islam the learned Advocates for the appellant taken us through the First

Information Report, inquest report, Post Mortem Report, Charge Sheet, deposition of the prosecution witnesses and other material on record and submits at the very outset that in passing the impugned judgment and order the learned Sessions Judge, Faridpur seriously failed to consider that the prosecution totally failed to prove their case by adducing reliable oral, documentary and circumstantial evidence. The learned Sessions Judge also failed to consider the defence case, which more probable that the appellant was falsely implicated in the instant case. The appellant is innocent and he was not at all liable for the charge levelled against him. He further submits that the prosecution seriously failed to ascertain the exact place of occurrence, which makes the prosecution case shaky and doubtful. The place of occurrence mentioned in the sketch map as eastern side of the pond but the inquest report was prepared at the house of one Rustom Sheikh and PW-1 in his deposition as well as in the First Information report stated that he found the dead body of his daughter Asmina at the eastern veranda of her matrimonial home. As the place of occurrence is shifted from one place to another and the prosecution failed to prove the place of occurrence of the alleged incident, as such, the appellant is entitled to get the benefit of doubt, according to the provision of section 114 (G) of the Evidence Act. He next submits that the appellant was convicted under section 302 of the Penal Code, but it is evident from the prosecution case that the appellant and others tried to save the victim and took her to the pond to pour water on her head, as such the convict-appellant was at best liable to be found guilty under Section 304, Part-I and not under Section 302 of the Penal Code. Otherwise he would not try to save the victim. As such, it does not come within the preview of Section 302 of the Penal Code rather it attracts the ingredient of Section 304 Part-I of the Penal Code. He prays for allow the appeal and discharged the appellant from the charge levelled against him.

10. To substantiate his submission the learned Advocate for the appellant placed reliance on the decisions in the cases of ***Bandez Ali @ Md. Bandez Ali vs. The State reported in 40 DLR (AD) (1988) 200 and the State vs. Ashraf Ali and others reported in 46 DLR(AD) (1994) 241.***

11. Mr. Zahirul Haque Zahir, the learned Deputy Attorney General alongwith Mr. Atiqual Haque Salim, the learned Assistant Attorney General and Mr. Nizamul Haque Nizam, the learned Assistant 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 as well as circumstantial evidence. He also submits that the learned Sessions Judge rightly found the appellant guilty under section 302 of the Penal Code. 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 and 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 Deputy 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. He further submits that this is a wife killing case and there is no eye witness to this incident. The cardinal principle of the criminal jurisprudence is that the prosecution has to prove their case beyond reasonable doubt. However, in a wife killing case, where wife died at her matrimonial home and husband was present in that house. Under such circumstances, some liabilities were imposed upon the husband by the decisions of our Apex Court that the husband is under an obligation to explain the circumstances under which his wife was done to

death, when both of them were residing in the same house at the relevant time. He further submits that the appellant husband failed to discharge his duty as to how the victim, his wife met her death. He further submits that the prosecution proved their case by adducing oral and documentary as well as circumstantial evidence that on the alleged night of occurrence the appellant-husband was present at his home when his wife met her death. To make the husband liable the minimum facts either by direct or circumstantial evidence is that he was in the house at the relevant time. Then certain liabilities were imposed on the husband to explain how his wife met her death. The medical evidence suggest that the victim wife death was caused, due to asphyxia as result of throttling which was ante mortem and homicidal in nature and the appellant husband did not take any step to inform the police or any other law enforcing agency that the death was caused by any other reason. As such, the trial court after considering the evidence on record convicted the appellant. He further submits that the place of occurrence was not shifted from one place to another place and the victim wife was done to death at her matrimonial home. Thereafter, she was taken to the pond to pour water at her head and the dead body was left there, later on they took the dead body to the courtyard of one Rustom Sheikh, the uncle of this appellant. Thereafter, she was taken to the eastern veranda of the appellant's father's dwelling hut. The pond is also adjacent to the house of appellant Farhad. The victim met her death at her matrimonial home and the appellant with intention to suppress the facts and to divert the case of murder that they placed the dead body of the victim at different place, on different time. The learned Deputy Attorney General further submits that it is clear case of wife killing. At the time of alleged incident the appellant has requisite intend to kill the victim wife. As the medical evidence revealed that there are 8 (eight) injuries on the dead body of the deceased and death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature. Death of the victim was not caused by sudden provocation or sudden altercation between the husband and wife or it cannot be consider as mere killing of a person or mere causing a person's death. Rather it was pre-planned murder with certain guilty mind or guilty intention of the appellant and there is motive for this murder. The convict appellant (husband) tried to marry a girl of his village on taking an amount of Taka 50,000/- as dowry and for that reason this appellant and others conspired to kill his daughter Asmina. As such, there is no ingredient to convert the sentence under section 304 Part -I of the Code of Criminal Procedure. There is no illegality or irregularity in the judgment and order of conviction and sentence passed by the Court below and he prays for dismiss the appeal.

12. Before entering into the merit of this appeal, let us discuss the prosecution witnesses one after another.

13. PW-1, Md. Idris Kazi is the informant and father of the victim Asmina Akhter, deposed that the alleged occurrence took place after 11.00 in the night of 20.11.2001. At about 4.00 a.m. on 21.11.2001 this appellant and his uncle Md. Hafiz Sheikh went to his resident and informed them that the mother of his son-in-law is seriously ill. He deposed that on receipt of this information this witness and his wife PW-6 Seria Begum went to the matrimonial house of their daughter, situated at Adampur and as they reached the resident of Idris Sheikh, the father of this appellant they found a dead body was covered with a piece of cloth at the eastern veranda (corridor) of the dwelling hut of Idris Sheikh. This witness removed the cloth and found the dead body of his daughter Asmina Akhter. This witness saw injuries on top and bottom of the left eye, a blackish mark on the neck, an injury mark above waist on her back, an injury mark on the left side of her face and some small blackish marks on right hand of the dead body of their daughter. He suspected that his son-in-law Forhad Hossain in connivance with his father Idris Sheikh, uncle Siddique Sheikh, cousin Hanif

Sheikh and uncle Harun Sheikh killed his daughter. This witnesses also deposed that he came to know that accused Forhad wanted to marry a girl of his village on taking an amount of Taka 50,000/- as dowry and for that reason his son-in-law Forhad Hossain and others family members conspired to kill his daughter Asmina. Thereafter, he filed this Ejaher on 21.11.2001, which marked as Exhibit-1 and his signature on it marked as Exhibit-1/1. He identified the accused Forhad Hossain Sheikh on dock.

14. During cross examination this witness deposed that his house is situated two mile away from the house of accused Forhad Sheikh. This witness deposed that the accused conspired to marry one Rafiza. He denied the suggestion that the accused did not conspire to marry Rafiza on taking an amount of Taka 50,000/-. During cross examination this witness deposed that he himself went to the Police Station and narrated the incident to the police officer and the Ejaher was prepared at his instruction. He denied the suggestion that he did not go to the Police Station. He denied the suggestion that the ejahar was not prepared at his instruction. He denied the suggestion that he lodged this ejahar falsely and the accused was not present at his home at the time of alleged occurrence.

15. PW-2, Abdus Sobhan Fakir, this witness deposed that on 20.11.2001 at about 8.00-8.30 p.m. he along with Omed Ali and Alauddin went to Sadipur to treat the wife of the nephew of Alauddin and on completion of treatment while they were returning home at about 11:30 p.m. they saw some persons were carrying a women to the ghat of the pond of Forhad, situated at village Adampur. This witness also deposed that Alauddin by flashing his torch asked them who they were, at that time; Forhad replied by disclosing his name and stated that they brought a woman to the ghat of the said pond for pouring water on her head as she was ill. Thereafter, they went to their home and on the following morning he came to know that Asmina Akhter was killed by her husband Forhad. Thereafter he went to the matrimonial home of the victim and saw the dead body of Asmina Akhter. These witnesses also saw blackish mark on the neck and hand of the dead body and he came to know that the accused Forhad killed her. He identified the accused on dock.

16. During cross examination this witness admitted that his house is situated at 100 cubits away from the house of Idris Kazi and his village is more than a mile away from the house of Forhad. He came to know about this murder at about 7.00 a.m. on 21.11.2001. He told the informant Idris Kazi that he saw Forhad and others took a woman to the ghat of the pond in the previous night. He denied the suggestion that he deposed falsely about his going to sadipur on 20.11.2001 and the seeing of the accused Forhad and others carrying a woman to the ghat of the pond. He denied the suggestion that he deposed falsely in this case.

17. PW-3, Alauddin, this witness deposed that on 20.11.2001 at about 8.00 p.m. this witness alongwith Omed Ali and Sobhan Fakir went to Sadipur at his sister's home and Sobhan Fakir treated his nephew's wife. They started for their home at about 12:00 O-Clock at night and on their returning home, as they reached near the house of Forhad situated at Adampur, they saw 3 persons were carrying a women to the ghat of the pond. This witness also deposed that he by flashing his torch asked them who they were, at that time; Forhad replied by disclosing his name and stated that they brought a woman to the ghat of the said pond for pouring water on her head as she was ill. Thereafter, they returned to their respective home and in the following morning he came to know that the wife of Forhad and daughter of Idris Kazi namely Asmina was killed by the accused Forhad. This witness also deposed that at about 7.00 a.m. in the morning he went to the house of Forhad and saw the dead body of

Asmina. He also saw there are injury marks at the top of left eye, lip, back and on the neck of the dead body. He identified the accused on dock.

18. During cross examination this witness deposed that his house is situated 400 yard away from the Idris's house and more than a mile away from the house of accused Forhad. He denied the suggestion that he did see the accused Farhaed on the alleged night of occurrence. He denied the suggestion that he did not see Forhad and others were carrying a woman towards the ghat of the pond. He denied the suggestion that he depose falsely in this case, at the instigation of Idris Kazi.

19. PW-4, Md. Haider Kazi, this witness deposed that on 20.11.2001 at about 5.00 p.m. he went to the house of accused Forhad to invite them. At that time, his brother's daughter Asmina told him that accused Forhad beat her at 10.00 a.m. on that day and he tore her cloths and broke her bracelets. He further deposed that the accused assaulted her and asked her to bring an amount of Taka 50,000/= from her parents. The victim Asmina wanted to come with him, at that time he told her that he could not take her with him as he will go elsewhere for inviting others. On the following day, he came to know that accused Forhad killed Asmina. This witness also deposed that on getting that information he went to the house of accused Forhad and saw the dead body of Asmina and also noticed a blackish mark on the neck and injuries on the left eye of the dead body. He further deposed that the police prepared inquest report in his presence and he put his signature on it. He identified the inquest report, which marked as Exhibit-2 and his signature on it marked as Exhibit 2/1. This witness also identified the accused on dock.

20. During cross examination this witness deposed that the inquest report was prepared by the police at 9:00 a.m. on 21.11.2001. This witness denied the suggestion that he did not go to the dwelling hut of Forhad on 20.11.2001 or Asmina did not tell him that she was assaulted by the accused. This witness admitted that he is full brother of the informant. He denied the suggestion that he deposed falsely in this case.

21. P.W-5, Sheikh Omed Ali, in his deposition he deposed that on 20.11.2001 he alongwith Alauddin and Sobhan Fakir went to Sadipur for treatment of Alauddin's nephew's wife. On their returning home at about 11:00 p.m. as they reached near the house of accused Forhed, they saw 3 to 4 persons were carrying a woman to the pond and Alauddin by flashing his torchlight asked their identity, at that time, the accused Forhad replied by disclosing his name and stated that they brought a woman to the ghat of the said pond for pouring water on her head as she was ill. Thereafter they went to their respective houses; on the next date he came to know from one Abdur Rashid Matabber and others that the accused Forhad killed his wife Asmina. Next, he went to the house of accused Forhad and saw the dead body of Asmina. He also deposed that he saw the injury mark on the left eye and black mark on the neck of the dead body of Asmina.

22. During cross examination this witness admitted that his house is situated 150/200 cubits away from the house of the informant and the house of Forhad is situated two miles away from his house. He also admitted that he did not see informant Idris Kazi at the place of occurrence. He denied the suggestion that he did not see the accused Forhad on the alleged night of occurrence. He denied the suggestion that he made his statement to the Magistrate on 22.05.2002, after six months of the alleged incident. He denied the suggestion that the investigating officer recorded his statement after 3/4 months of the alleged incident. He

denied the suggestion that he did not see Forhad and others were carrying a woman towards the ghat of the pond. He denied the suggestion that he deposed falsely in this case.

23. PW-6 Seriya Begum is the mother of the victim Asmina and wife of the informant. In her deposition she deposed that the alleged occurrence took place on 20.11.2001. The accused Forhad's uncle came to their house and told them that Forhad's mother was serious ill and she was about to die. She also deposed that on getting that information they went to the house of accused Forhad and saw the dead body of her daughter Asmina. She also saw black mark on the neck and injury mark on left eye of the deceased Asmina. This witness further deposed that 4/ 5 days before the alleged incident accused took her daughter to their matrimonial home and the accused Forhad demanded an amount of taka 50,000/-from them. She identified the accused on dock.

24. During cross examination this witness deposed that her house is situated two mile away from the house of the accused. She admitted that they get this information in the early morning, at the time when the people taking their *Saheri*. Thereafter, this witness along with her husband went to the place of occurrence. The police came to the place of occurrence after some time. This witness denied the suggestion that she did not receive any information about this incident from Shekih Hafez, uncle of the accused Forhad. She denied the suggestion that she did not make any statement to the police officer that the accused demanded an amount of Taka 50,000/= from them. She denied the suggestion that she did not see black mark on the neck or any injury mark on the left eye of the dead body. She denied the suggestion that she deposed falsely in this case.

25. PW-7, Rowshanara Begum, this witness deposed that on 20.11.2001 her cousin Alauddin alongwith Kabiraj Sobhan Fakir and another came to her house on her call to treat her daughter-in-law and Kabiraj gave her treatment on the night they left Sadipur for their home. On the following morning this witness came to know from the passerby that the accused Forhad killed his wife Asmina. This witness also deposed that two days after the alleged incident she came to the house of Alauddin, at that time, he disclosed that on their returning home from her house after treatment, they saw Forhad carried a woman to the pond.

26. During cross examination this witness deposed that her house is situated about 1 ½ /2 miles away from the house of Alauddin. During cross examination this witnessed denied the suggestion that the plea of illness of her daughter-in-law was false. She denied the suggestion that she deposed falsely in this case.

27. PW-8, Shahed Ali is a hawker, deposed that about 4 years before the alleged incident, at about 11.00-12.00 a.m. he went to Adampur for hawking cosmetics and some other items and many women came to him to purchase these articles. At that time, accused Forhad came to him and took away Asmina and assaulted her. He also deposed that Asmina was purchasing a chain from him and the Forhad asked her why she purchase this articles and threaten to kill her. At that time, other women told him that they are husband and wife. This witness identified the accused on dock.

28. During cross examination this witness deposed that the place of occurrence is situated 3 ½/4 miles away from his house. He denied the suggestion that he does not hawking any articles and the accused did not assault or abuse the victim Asmina for purchasing articles.

29. PW-9, Sheikh Satter, deposed that on 20.11.2001 at about 9.00 p.m. while he was returning home from the Autrashi, at that time, he saw people at the resident of Idris Sheikh

of village Adampur and they are saying that the wife of Forhad was ill. He further deposed that on the following day he heard that the accused Forhad's wife died.

30. During cross examination this witness admitted that Police Officer recorded his statement after 7/8 months of the alleged incident.

31. PW-10, Abdur Rashid, this witness testified that on 21.10.2001 at about 8.00-9.00 a.m. he came to know from the passersby that the daughter of Idris Kazi namely Asmina died at her matrimonial home situated in village Adampur. He deposed that her husband name is Forhad. During cross examination this witness deposed that his house is situated quarter mile away from the house of informant Idris Kazi.

32. During cross examination this witness admitted that he made his statement to the police officer after 2/3 months of the alleged incident. He denied the suggestion that he deposed falsely in this case.

33. PW-11, Md. Zahidul islam is a Magistrate First Class, this witness deposed that on 22.05.2002 he recorded the statement of the witnesses namely Alauddin, Abdus Sobhan and Omed Ali, under section 164 of the Code of Criminal Procedure.

34. During cross examination this witness admitted that in their statements he did not mention the Police station case number.

35. PW-12 Inspector Md. Elahi Box Sikder, C.I.D of police is the 2nd investigating officer, he after receiving the charge of investigation of this case, perused the diary of the previous investigating officer. He also deposed that during investigation he visited the place of occurrence and after conclusion of the investigation he submitted the charge sheet against the accused under Section 302 of the Penal Code.

36. During cross examination this witness admitted that Sub-Inspector Motiur Rahman of Bangha Police Station as the investigating officer, investigate the case previously. He denied the suggestion that he did not visit the place of occurrence.

37. PW-13 Dr. Ajoy Kumar Sarker is the medical officer, in his testimony testify that he held autopsy on the dead body of the deceased Asmina on 22.11.2001 brought and identified by Constable No. 414 Mojibur Rahman and found the following injuries:-

1.One abrasion over anterior aspect of middle part of neck measuring 3" x 1 ½"size.
2.Rounded bruised area with crescentric nail marked over anterior aspect of both side of neck, 4 on left side and 2 on right side (diameter of each is about 1.5 cm.).
3.1"x1" area of abrasion over left eye lid found.
4.½"x ½" area of abrasion found over lower eye lid.
5. 2"x1" area of abrasion found over left cheek close to left angle of mouth.
6.2" x 2" size area of bruise found over left side of back.
7.Tongue found protruded in between the teeth.
8. ½"x1" abrasion found over pina (over tragus).

38. He opined that death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature.

39. During cross examination this witness denied the suggestion that his opinion was not correct.

40. PW-14 Inspector Md. Motiur Rahman is the 1st investigating officer; this witness deposed that on 21.11.2001 he was working as Sub-Inspector at Bhanga Police Station. On receipt of written Ejahar, the Officer-in-Charge Abu Bakker Talukder lodged the Bhanga Police Station case No. 12 (11) 2001. He identified the FIR Form, which marked as Exhibit-3 and he identified the signature of the Officer-in- Charge Abu Bakker Talukder, which marked as Exhibit-3/1. This witness deposed that he was appointed as investigating officer by the Officer-in-Charge. During investigation he visited the place of occurrence, prepared sketch map with separate index, sketch map marked as Exhibit- 4 and his signature on it marked as Exhibit- 4/1 and the index marked as Exhibit-5 and his signature on it marked as Exhibit-5/1. He prepared the inquest report at the resident of one Rustom Sheikh which marked as Exhibit-2 and his signature on it marked as Exhibit-2/2. He recorded the statement of the witnesses under Section 161 of the Code of Criminal Procedure and collected the statement of the witnesses under Section 164 of the Code of Criminal Procedure and he arrested the accused. On conclusion of investigation and after finding prima facie case against the appellant, he submitted the charge sheet, under section 302 of the Penal Code.

41. During cross examination this witness admitted that he recorded statements of the witnesses Abdus Sobhan, Alauddin and Sheikh Omed Ali on 04.12.2002 and the statements of witnesses Satter and Abdur Rashid on 25.12.2002. This witness admitted that he went to the place of occurrence on 28.05.2002 and he prepared a sketch map and index on that day. He denied the suggestion that he did not go to the place of occurrence on 21.11.2001. He also denied the suggestion that his investigation was perfunctory.

42. These are the deposition of the prosecution witnesses.

43. We have gone through the First Information Report, Inquest Report, Charge sheet, deposition of the prosecution witnesses, impugned judgment and order, grounds taken in the petition of appeal and other materials on record and we have given our anxious consideration to the submissions advanced by the learned Advocates for both sides. We find that the appellant Forhad Sheikh was convicted and sentenced on the basis of the evidence adduced by the PW-1 Idris Kazi, PW-2 Abdus Sobhan Fakir, PW-3 Alauddin, PW-5 Skeikh Omed Ali, PW-6 Seriya Begum and PW-13 Dr. Ajoy Kumar Sarker and circumstantial evidence. In the instant case, there is no ocular evidence witnessing the commission of offence committed by convict appellant in their matrimonial home. Prosecution relied upon circumstantial evidence to proof of its case. Commission of crime can also be proved by circumstantial evidence. Circumstantial evidence is more cogent and convincing than the ocular evidence. It is correctly said that witnesses may tell a lie and it is not difficult to procure false tutored and biased witnesses but it is very much difficult to procure circumstantial evidence.

44. In the instant case, we find that PW-1 Idris Kazi the father of the deceased Asmina Akhter lodged the First Information Report to the Bhanga Police Station on 22.11.2001 alleging that at about 4.00 a.m. on 21.11.2001 one Hafiz Sheikh uncle of this appellant Forhad came to their house and informed him that appellant mother was serious ill and asked him if they wanted to see her, they have to go their home at once. On getting this information, PW-1 and his wife PW-6 Seriya Begum went to the matrimonial house of their daughter, situated at Adampur. They found a dead body was covered with a piece of cloth at

the eastern veranda (corridor) of the dwelling hut of appellant's father. The informant removed the cloth and found the dead body of their daughter Asmina Akhter. He also saw several injury marks on the dead body. He found injuries on top and bottom of the left eye, a blackish mark on the neck, an injury mark above waist on her back, an injury mark on the left side of her face and some small blackish marks on right hand of the dead body of their daughter. The informant suspected that the accused persons in connivance each other caused death of the victim Ashmnia Akhter. The informant also came to know that on 20.11.2001 at about 11 p.m. his daughter along with her husband went to bed at their matrimonial home and on that night at about 3.00 a.m. she was found death at eastern bank of the pond of their matrimonial home. He also came to know that accused Forhad wanted to marry a girl of his village on taking an amount of Taka 50,000/- as dowry and for that reason this appellant and others conspired to kill his daughter Asmina. Thereafter, he lodged this F.I.R and the same was registered as Bhanga Police Station case No. 12 dated 22.11.2001 under sections 302/34 of the Penal Code. PW-14 Inspector Md. Motiur Rahman came to the place of occurrence and prepared the inquest report at the residence of one Rustom Sheikh, in presence of witnesses. He sent the dead body to the morgue for autopsy. PW-13 Dr. Ajoy Kumar Sarker, who examined the dead body of the victim Asmina on 22.11.2001 and the prepared Post Mortem Report. He found 8 (eight) injury marks on the dead body and opined that death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature. Prosecution examined as many as 14 witnesses to prove their case and defence examined none in their defence. On conclusion of the trial the appellant was convicted and sentenced as aforesaid.

45. **First** question raised by the learned Advocate for the appellant that whether or not the prosecution failed to ascertain the exact place of occurrence. In the instant case, we find that in the sketch map the investigating officer marked the place of occurrence is the western side of the pond of the victim's matrimonial home. PW-2, Abdus Sobhan Fakir, PW-3, Alauddin and P.W-5, Sheikh Omed Ali in their deposition they deposed that they went to Sadipur for treatment of Alauddin's nephew's wife. On their returning home at about 11:00 p.m. as they reached near the house of this appellant Forhed, they saw 3 to 4 persons were carrying a woman to the pond and Alauddin by flashing his torchlight asked their identity, at that time, the appellant Forhad replied by disclosing his name and stated that they brought a woman to the ghat of the said pond for pouring water on her head as she was ill. PW-14 Inspector Md. Motiur Rahman prepared the inquest report; he found the dead body was lying at the courtyard of one Rustom Sheikh. PW-1 Idris Kazi in his deposition deposed that he found the dead body of his daughter was lying at the eastern veranda (corridor) of the house of appellant's father. The learned Advocate for the appellant argued that the shifting of place of occurrence one after another creates reasonable doubt of the prosecution case. The learned Deputy Attorney General argued that there is no shifting of the place of occurrence the accused persons to suppress the killing of the deceased, to divert the murder and to take a false plea took the dead body to the ghat of said pond and the dead body was lying there till morning. Thereafter they took the dead body into their house. So there is no shifting of the place of occurrence.

46. We have perused the evidence on record and find that PW-1 Idris Kazi came to know that the victim Asmina Akhter went to bed along with her husband on their matrimonial home at about 11.00 p.m. on the alleged night of occurrence. Thereafter, at about 11:00 to 12;00 p.m. on alleged night of occurrence PW-2, Abdus Sobhan Fakir, PW-3, Alauddin and P.W-5, Sheikh Omed Ali saw this appellant Forhed alongwith 3 to 4 persons were carrying a woman to the pond. Further, all three places were mentioned by the prosecution witnesses are

actually the matrimonial home of the deceased. So we are of the view that the occurrence took place at the matrimonial dwelling hut of the victim, thereafter she was taken to the pond of the said house to pour water on her head as her condition further deteriorated or in the mean time, she met her death and the dead body was lying there till morning. Thereafter, they took the dead body into their house. So we are of the view that there is no shifting of the place of occurrence and the dead body of the deceased was taken by the appellant and others from one place to another for their own convenience and the victim was found dead at her matrimonial home.

47. **Second** question is raised by the learned Advocate for the appellant that the appellant was convicted under section 302 of the Penal Code, but it is evident from the prosecution case that the appellant and others tried to save the victim and took her to the pond to pour water on her head, as such the convict-appellant was at best liable to be found guilty under Section 304, Part-I and not under Section 302 of the Penal Code.

48. In a case where requisite *mens rea* is found proved the accused still can be convicted and punished under section 304, Part-I of the Penal Code, if the act amounting to murder falls within any of the five exceptions to Section 300 of the Penal Code.

49. In the Instant case, we find that the defence did not take any plea except his innocence. There is no eye witness or ocular evidence and none of the prosecution witnesses witnessed the incident. There is no evidence that the appellant was provoked by victim or he lost his self-control or mischief was committed by a sudden act or fight, without any premeditation, rather it is evident appellant Forhad wanted to marry a girl of his village on taking an amount of Taka 50,000/- and for that reason this appellant and others conspired to kill the victim Asmina. Further, the incident took place in between at about 11.p.m. to 3.00 a.m. in the middle of the night and PW-13 Dr. Ajoy Kumar Sarker examined the dead body of the victim Asmina on 22.11.2001 and he prepared Post Mortem Report. He found 8 (eight) injury marks on the dead body and opined that death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature. We are of the view that at the time of alleged incident the appellant has requisite intend to kill the victim wife. As the medical evidence revealed that there are 8 (eight) injuries on the dead body of the deceased and death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature. Death of the victim was not caused by sudden provocation or sudden altercation between the husband and wife or it cannot be consider as mere killing of a person or mere causing a person's death. Rather it was pre-planned murder with certain guilty mind or guilty intention of the appellant and there is motive for this murder. As such, the appellant Forhad was rightly found guilty under Section 302 of the Penal Code as there is no evidence in this case to bring the said murder within any of the five exceptions to Section 300 of the Penal Code.

50. Now the question is who caused her death and whether the prosecution could prove that the convict appellant in furtherance of his intention caused her death. There is no ocular evidence. None of the prosecution witnesses saw the death of the deceased. The Trial Court convicted and sentenced the appellant mainly on the basis of the evidence adduced by the PW-1 Idris Kazi, PW-2 Abdus Sobhan Fakir, PW-3 Alauddin, PW-5 Skeikh Omed Ali, PW-6 Seriya Begum and PW-13 Dr. Ajoy Kumar Sarker and circumstantial evidence. We have categorically considered the depositions of all the prosecution witnesses and other relevant documents on record and we find that this is a wife killing case. In this case, there is no direct evidence against the convict appellant in causing murder of the deceased. The prosecution

sought to prove the charge on certain circumstantial facts that victim was living with the convict appellant and he was present in the house at the time of murder. We find that prosecution to prove its case relied upon the following circumstantial evidence.

51. **Firstly**, the deceased and the convict appellant were admittedly husband and wife and they lived in the same house at the time of occurrence. The convict appellant was present there and it was not strongly denied by the defence. Ordinarily, an accused has no obligation to account for which he is placed on trial but in a wife killing case or wife murder case, the position of law is all together is different. The murder having taken place while the convict was living with the deceased wife Asmina in the same house, the convict has an obligation to explain how his wife met her death. The plea adopted from the side of husband appellant that he was not present in his house at the time of alleged occurrence proved to be false.

52. **Secondly,** the medical evidence of PW-13 Dr. Ajoy Kumar Sarker, who held autopsy on the dead body of the deceased Asmina Akhter on 22.11.2001 and found following injuries on the dead body:-

1. One abrasion over anterior aspect of middle part of neck measuring 3" x 1 ½"size.
2. Rounded bruised area with crescentric nail marked over anterior aspect of both side of neck, 4 on left side and 2 on right side (diameter of each is about 1.5 cm.).
3. 1"x1" area of abrasion over left eye lid found.
4. ½"x ½" area of abrasion found over lower eye lid.
5. 2"x1" area of abrasion found over left cheek close to left angle of mouth.
6. 2" x 2" size area of bruise found over left side of back.
7. Tongue found protruded in between the teeth.
8. ½"x1" abrasion found over pina (over tragus).

53. He opined that death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature.

54. **Thirdly**, the convict appellant as the husband or any member of their family did not take any initiative to inform the local police station in respect of unnatural death of his wife the deceased Asmina Akhter. The silence on the part of the convict appellant and his other family members are unnatural and unbelievable.

55. **Fourthly,** it is evident from the record that the appellant flee away from the place of occurrence thereafter he was arrested by the local Police, which could be regarded as guilty mind of the convict appellant.

56. **Fifthly,** the false plea adopted by the convict appellant that he was not present on the alleged date, time and place of occurrence i.e. their matrimonial home, when his wife met her death. But the PW-2, Abdus Sobhan Fakir PW-3, Alauddin and P.W-5, Sheikh Omed Ali in their deposition deposed that on the alleged night of occurrence he was present at their matrimonial home, when his wife met her death. The convict appellant was present there and it was not strongly denied by the defence and the trial court also found the plea as false and fabricated one. This false plea completes the chain of circumstances.

57. As there is no break in the chain of causation and chain or circumstances connecting the convict appellant with the killing of the victim Asmina Akhter and as circumstantial evidence is more cogent than the evidence of eye witnesses and after perusing the materials on record, we are of the view that the prosecution able to connect the convict appellant with

the killing of his wife the victim Asmina Akhter, which attract the provision of section 302 of the penal Code.

58. In view of the above discussion, we are constrained to hold that the prosecution prove the charge brought against the appellant, under Section 302 of the Penal Code beyond reasonable doubt, as such, we are of the view that there is no reason to interfere with the impugned judgment and order of conviction and sentence. We are inclined to dismiss the appeal and upheld the judgment and order of conviction and sentence dated 29.11.2005 passed by the Sessions Judge, Faridpur in Sessions Case No. 150 of 2004.

59. **Accordingly, the appeal is dismissed.** The appellant is directed to surrender before the trial court within 30 (thirty) days from the date of receipt of this order failing which the trial court is directed to secure his arrest as per law.

60. Send down the lower Court records with a copy of this judgment at once.

4 SCOB [2015] HCD 115

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 9546 of 2014

Kazi Mazharul Islam, son of Kaqzi Mosharef Hossain and Hosne Ara Begum, Water Kingdom, Flat No.: A/3, House No. 39/A, Dhammondi R/A, Dhanmondi, Dhaka-1205.
…Petitioner.

Versus

Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh, Bangladesh Secretariat Building, Dhaka and others.
… Respondents.

Mr. Nitai Roy Chowdhury
… For the Petitioner.

Mr. Sashanka Shekhar Sarker, DAG with
Mr. Arobinda Kumar Roy, A.A.G and
Mr. Shafiqul Islam Siddique, A.A.G
… For the respondent no.1.

Heard on The 4th March, 2015.

Judgment on The 5th March, 2015.

Present:
Mr. Justice Shamim Hasnain
And
Mr. Justice Mohammad Ullah

Article 36 of the Constitution of Bangladesh:
If the government is allowed to restrict a person from going abroad at its discretion, then Article 36 of the Constitution will become nugatory. This Court being the guardian of the Constitution cannot condone such practice. ...(Para 6)

Judgment

Mohammad Ullah, J:

1. This *Rule Nisi* was issued calling upon the respondents to show cause as to why hindrance and interception by the respondents to and of the petitioner's departure on 19.09.2014 from Hazrat Shahjalal International Airport, Dhaka, and thereby barring him from boarding his flight to London, United Kingdom, should not be declared to be without lawful authority and why the respondents should not be directed to allow the petitioner to depart and re-enter Bangladesh as and when necessary in exercise of his fundamental right to freedom of movement.

2. Short facts, relevant for the purpose of disposal of this Rule, are that the petitioner is a professor of Orthopedics and Head of Department of Orthopedics, Shahabuddin Medical College, Gulshan, Dhaka. It is stated that the petitioner has been prevented from leaving Bangladesh without any justification or cogent explanation. No reason was offered by the respondents or any Immigration Official either at the time of refusal or any time thereafter although the petitioner possessed all relevant and valid travel documents including a valid Bangladeshi Passport, valid visa, and a ticket. Moreover, there is no criminal proceedings debarring the petitioner from leave the country pending in any court of law. Further the actions of the respondents are violative of the fundamental rights guaranteed under Articles 31, 36 and 41 of the Constitution; hence the writ-petition. The petitioner has disclosed in a supplementary affidavit that he has been suffering from cardiac disease and that he needs better treatment abroad; hence he is to leave this country at once for his treatment purposes.

3. Mr. Nitai Roy Chowdhury, learned Advocate appearing on behalf of petitioner, reiterates the aforesaid facts and further contends that the petitioner is to leave this country for his better treatment abroad at once and that it is within the ambit of the fundamental rights of the petitioner guaranteed under Article 36 of the Constitution.

4. Mr. Sashanka Shekhar Sarker, learned Deputy Attorney General appearing with Mr. Arobindo Kumar Roy and Mr. Shahidul Islam Siddique, learned Assistant Attorneys General on

behalf of the respondent no. 3, on the other hand, contends that the petitioner is under surveillance by the concerned authority of the government and during such surveillance he should not be allowed to leave this country. Mr. Sarker, submits further that there is positive information with the intelligent agency that the petitioner intents to go abroad for impending the War Crime Tribunal proceedings initiated by the government. It has been contended that the petitioner also has links with an International terrorist organization.

5. We have heard the learned Advocates from both the parties and perused the materials on record including the writ petition, annexures thereto and supplementary affidavits and affidavit-in-opposition filed by the respondent no.3

6. The petitioner has impugned the action of the respondents in preventing him from leaving Bangladesh for United Kingdom. It appears that the petitioner on 19th September, 2014 arrived at Hazrat Shahjalal International Airport for going to the United Kingdom. He completed check in formalities and was issued a boarding pass by the staff of the Emirates Airlines. The boarding time was fixed at 21:30 on 19th September, 2014. While the Immigration Officer was scrutinizing the Passport and Visa of the petitioner, the immigration police arrived at the immigration desk and informed the petitioner that he had instructions from higher authorities not to permit him from leaving the country. When the petitioner asked for the reason of his refusal, the respondents could not show any valid document for the purpose of stopping the petitioner from leaving the country. At the time of hearing the learned Deputy Attorney General has not been able to cite a single law on the basis of which the petitioner is being restricted from leaving the country. The framers of the Constitution made special provision to protect the freedom of movement of citizens. Article 36 of the Constitution guaranteed freedom of movement subject to any reasonable restriction imposed by law in the public interest. Every citizen has the right to move freely thoughout Bangladesh, to reside and settle in any place in Bangladesh and to leave and re-enter Bangladesh. This means the article permits imposition of restrictions but such restrictions must be reasonably needed in the public interest. Without the backing of law imposition of restriction on the freedom of movement of the citizens by the government authorities or by an executive order of the government will be unconstitutional. Mere assertion of the government that it has secret information that the petitioner will conduct activities abroad against the ongoing proceedings of the international war crimes cases or against the verdict of the war crime tribunal are insufficient to restrain the petitioner from leaving the country. The petitioner filed supplementary-affidavit having denied the alleged activities as brought against him about controverting the war crime tribunal's proceedings abroad. If the government is allowed to restrict a person from going abroad at its discretion, then Article 36 of the Constitution will become nugatory. This Court being the guardian of the Constitution cannot condone such practice. Furthermore, we have noticed that neither any criminal proceeding is pending against the petitioner nor he is wanted in any other criminal case, even no custodial order or warrant by a court of law under the laws of the land is pending against the petitioner. In such a situation, we are of the view that the act and conduct of the respondents in preventing the petitioner from leaving the country should not only be declared unlawful, but violative of the fundamental rights of the petitioner. Regard being had to the above discussions of law and facts, we are of the view that the Rule has substance and as such the same should succeed.

7. In the result, the Rule is made absolute.

8. The respondents are directed to allow the petitioner to depart and re-enter Bangladesh as and when necessary in exercise of his fundamental right to freedom of movement subject to any reasonable restrictions imposed by law in the public interest.

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HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 7517 of 2015

Kazi Md. Salamatullah & others
..... Petitioners

Vs.

The Government of the People's Republic of Bangladesh & others
.... Respondents

Mr. A.S.M. Moniruzzaman, Advocate,
.... For the petitioners

Mr. Sabyasachi Mondal, Advocate
.... For respondent no. 6

The 19th October, 2015

Present:
Mr. Justice Gobinda Chandra Tagore
&
Mr. Justice Muhammad Khurshid Alam Sarkar

Court's power to oversee the professional performance and to regulate the Court-conduct of the learned Advocates:
Court is well empowered to oversee the professional performance and also to regulate the Court-conduct of the learned Advocates and, in an appropriate case, impose costs upon a learned Advocate for finding his conduct to be unbefitting with the norms and etiquettes of the legal profession. Accordingly, instead of referring this incident to the Bar Council towards drawing up proceedings against the learned Advocate for the petitioners, we are taking a lenient view by warning him with an expectation that this kind of incident shall never be repeated by him in future. ...(Para 30)

Judgment

MUHAMMAD KHURSHID ALAM SARKAR, J:

1. By filing an application under Article 102 of the Constitution, the petitioners sought for a direction upon the respondents to mutate their names on Plot no. 32, Sector no. 13, Road no. 03 for a quantum of land of 5 kathas under Uttara Model Town, Dhaka.

2. Succinctly, the facts of the case, as stated in the writ petition, are that on 01.08.1991 the RAJUK (respondent no. 2) under the signature of its Deputy Director (respondent no. 5) allotted the case land in favour of Md. Asar Uddin and the possession thereof was handed over to him on 25.10.1992. Thereafter, the said allottee, Md. Asar Uddin, executed a bainapatra with Kazi Suriya Begum, who is the predecessor of these petitioners, for selling the case property and after receiving the advanced earnest money when the said allottee was dilly-dallying to register the said plot in favour of Kazi Suriya Begum, the latter filed Title Suit no. 259 of 1998 in the 1st Subordinate Judge Court, Dhaka for specific performance of contract. Eventually, on 25.09.2002 the suit was decreed *exparte* and sale deed was executed and registered through Court in Execution Case no. 02 of 2003 in favour of Kazi Suriya Begum vide registered deed no. 10233 dated 27.06.2004. Pursuant to the Court's order

passed in Execution Case no. 2 of 2003, Kazi Suriya Begum paid transfer fees and filed an application to the RAJUK for mutation of the land in her favour. Thereafter, Kazi Suriya Begum made a Will in favour of these petitioners vide the Will dated 27.08.2009. These petitioners, then, approached RAJUK for mutating the property in their names, but the RAJUK has remained silent. In the premises, they approached this Court and hence this Rule.

3. Respondent no. 6 has filed an affidavit-in-opposition contending, *inter-alia,* that the petitioners have managed to obtain the instant Rule by suppressing the following facts namely; the *exparte* decree passed in Title Suit no. 259 of 1998 on 25.09.2002 was obtained and the execution of the same vide Execution Case no. 02 of 2003 on 24.02.2005 was done by practicing fraud upon the Courts below. Coming to know about the *exparte* decree and the Execution Case this respondent, on 24.02.2005, instituted in the trial Court Miscellaneous Case no.18 of 2005 for setting aside the said *exparte* decree and its execution on the ground that the receipt of summons, as has been recorded in the order sheet, is concocted and the appearance of this respondent no.6, as shown in the order sheet, is also a forged one. The said Miscellaneous Case having been renumbered as 46 of 2006, then, as Miscellaneous Case no. 34 of 2006 was allowed on contest on 09.08.2007 by the learned Joint District Judge, (Arbitration Court), Dhaka, upon setting aside the *exparte* decree dated 25.09.2002 together with its execution and, accordingly, Title Suit no. 259 of 1998 was restored to its original file and number. Thereafter, the predecessor of these writ petitioners, Kazi Suriya Begum, filed Civil Revision no. 3984 of 2007 in the High Court Division whereupon a Rule was issued and, later on, the same was discharged on 27.04.2008, against which she filed Civil Petition for Leave to Appeal no. 680 of 2009 and during pendency of the said Civil Petition for Leave to Appeal, when she died on 31.08.2009, these petitioners substituted themselves in the said Civil Petition for Leave to Appeal which was finally rejected on 14.12.2010. That is how the order passed by the trial Court in Miscellaneous Case no. 34 of 2006 was upheld by the Appellate Division by restoring the said Title Suit no. 259 of 1998 to its original file and number. Thereafter, respondent no. 6 made an application before the learned trial Court under Section 144 of the Civil Procedure Code (CPC) for restitution and the same having been registered as Miscellaneous Case no. 20 of 2011, was allowed on 08.10.2012, against which these petitioners approached the High Court Division having filed the Civil Revision no. 3397 of 2012 wherein a Rule was issued and, later on, the same was discharged on 25.07.2013. Against the said order of the High Court Division, these petitioners filed Civil Petition for Leave to Appeal no. 114 of 2014 which was also rejected on 15.06.2015 and, lastly, they filed Civil Review Petition no. 131 of 2015 before the Appellate Division and the same is pending before the said Court.

4. On 11.10.2015, the added respondent no. 6, Mrs. Saleha Akter, filed an application for vacating the order of status quo which was granted on 12.08.2015 by this Court upon a separate written prayer made by this petitioner. The said application for vacating the order of status quo appeared in the daily cause list of this Bench as an application on 12.10.2015. Upon hearing both the parties, this Court was of the view that instead of disposing of the application, the Rule itself should be heard and disposed of and, accordingly, the Rule has been fixed for hearing on 13.10.2015.

5. Mr. A.S.M. Moniruzzaman, the learned Advocate, appears for the petitioners. At the very outset of making his submissions, he was confronted with a query as to his failure to appear before this Court on 13.10.2015, for, the Rule was fixed on 12.10.2015 in his presence with an avowal from this Court to both the parties that the matter shall be taken up for hearing on the following day. On 13.10.2015 in the morning, the learned Advocate for the

petitioners prayed for time, but the same was rejected making the parties understood that this Bench will continue for 3 (three) weeks and there was hardly any item in the Daily Cause List to exhaust this Court's working hours. However, just after a while, when the matter was taken up for hearing, to our utter dissatisfaction the learned Advocate for the petitioners was not found.

6. In the said premises, we asked the learned Advocate for respondent no. 6 to place the facts of the case before the Court to make use of the Court's time with an expectation that the learned Advocate for the petitioner might rush back, but he did not turn up. The learned Advocate for respondent no. 6, upon comprehensively dissecting the chronology of the facts which took place prior to filing the instant writ petition, prayed for discharging the Rule on the ground of practicing fraud upon this Court. He referred to the case of Moulana Md. Abul Kader Azadi Vs Bangladesh 58 DLR 114 and, relying on the *ratio* laid down in paragraph 13 thereof, candidly submitted that since the suppression of the fact as to the pendency of a suit in a competent civil Court on the self-same matter is nakedly evident from the annexed papers, for, not a single word has been mentioned in this regard in the writ petition, this Court is well competent to discharge the instant Rule without hearing the learned Advocate for the petitioner. He, then, referred to the case of AKM Asaduzzaman Vs Public Service Commission 4 ALR 2014 (2) 278 and the case of Bandar Nagari Bahumukhi Samabay Samity Limited Vs Bangladesh 5 ALR 2015(1) 194 and forcefully submitted that the learned Advocate and the writ petitioner, both, should be penalized for abusing the process of this Court.

7. However, for ends of justice, we asked the learned Advocate for respondent no. 6 to personally inform the learned Advocate for the petitioner that this Court has directed him to appear before us on the following day to assist the Court in disposing of the Rule.

8. Since then the matter was appearing in the daily cause list with the name of the learned Advocate for the petitioners and, furthermore, every day the learned Advocate for respondent no. 6 was reporting to this Court that, as per the verbal direction of this Court, although he is personally communicating with the learned Advocate for the petitioners to appear before the Court to conduct the hearing of the matter, he was not paying heed thereto.

9. Being faced with this avalanche, the learned Advocate for the petitioners harped on his explanation that after receiving the copy of the application for vacating the order of status quo he endeavored to contact his client to receive his instructions but he is yet to receive any instructions. He contends that at the time of filing this writ petition, even at the time of moving the application for injunction, he was not aware of the facts that the original suit is pending in the concerned civil Court as the *exparte* decree in question, on the basis of which this writ petition is filed, has already been set-aside by the Apex Court. He vehemently claims that he came to know about these facts only on 23.08.2015 after receiving the copy of the application for vacating the order of status quo.

10. After presenting the above facts before this Court by himself, we asked him whether still he considers to proceed with the Rule or wishes to have the Rule discharged on non-prosecution ground. In reply thereto, he produced the order dated 06.08.2015 passed by the Hon'ble Judge-in-Chamber of the Appellate Division passed in Civil Review Petition no.131 of 2015 and submits that since the date of hearing of the said Review Petition has been fixed by the Apex Court on 07.06.2016, this Rule may be discharged with an observation to that effect and, accordingly, he opted to have a detailed judgment.

11. In order to verify the veracity of the learned Advocate's above contentions that he was not posted with the background-story of this case and that he came to know about it only on 23.08.2015 through receiving the copy of the application for vacating the order of Status quo, this Court, in a round-about manner, quizzed the learned Advocate for the petitioners regarding the source of procuring the certified copy of the Civil Review Petition no. 131 of 2015, for example, how did he get hold of the same. He promptly informed this Court that he collected the said certified copy through his clerk.

12. Upon skimming through the certified copy of the said Civil Review Petition no. 131 of 2015, it reveals that the same was obtained by the learned Advocate for the petitioner on 10.08.2015, whereas the copy of the application for vacating the order of status quo was received by him on 23.08.2015 i.e. after 13 days of receiving the certified copy of the Civil Review Petition no.131 of 2015 he received the copy of the application for vacating the order of status quo. In other words, the learned Advocate for the petitioners came to know about the suppression of the above facts well before the date of receiving the application for vacating the order of status quo. That is how, by resorting to our own mode of investigation, it surfaced that the contentions of the learned Advocate for the petitioners that he was not aware of the fact of setting aside the decree dated 25.09.2002, and that he came to know about the said facts recently on 23.08.2015, are completely false.

13. After hearing the learned Advocate for the petitioners, albeit without pin-pointing the revelation of the above state of affairs through our own device, we again gave him an opportunity to consider as to whether he should non-prosecute the Rule or whether he wants to receive a full judgment, for, it is within the competency of an Advocate to non-prosecute a Rule or not to press an application, be it a writ petition or other application, whenever it becomes known to him that facts have been suppressed by the petitioner or if an indication is made by the Court that there is no merit in the case after being afforded the opportunity of presenting his case at length. The source of this power of an Advocate is his Vokalatnama, wherein all the litigants confer upon an Advocate the power of filing the case in tandem with the power to do the needful in connection with the said case which necessarily includes the power of taking a decision to non-prosecute a petition (not to press a petition) and non-prosecute the Rule. However, to be on safer side, the filing Advocate may seek a written instruction from his client for an untainted and bonafide case where the writ petition/application is immune from the blame of suppression of facts or adopting any other unfair means. Since the learned Advocate for the petitioners, as per his claim, came to know on 23.08.2015 about the non-disclosure of the facts which are the foundation of issuance of the instant Rule, within the last two months he could have taken instructions from his client not to proceed with the Rule. However, for this case, after exposure of the suppressions of facts in obtaining this Rule there was no need to receive his client's written instructions for non-prosecution of this case.

14. Instead of availing the said opportunity, the learned Advocate for the petitioners today wished to have a detailed judgment discharging the Rule and, accordingly, when this Court was delivering judgment upon recording the manner and style of the learned Advocate for the petitioners in conducting this case, at this juncture, he made a prayer to this Court that he does not want to proceed with the Rule and begged unconditional apology for his conduct in dealing with this case.

15. Although this Court may have decided to discharge the instant Rule for non-prosecution, as prayed for by the learned Advocate for the petitioner, however, given the fact

that the learned Advocate for the petitioner made the said prayer at a belated stage in a compelling circumstance only when this Court was recording his unscrupulous mode of presentation of this case before this Court, it is not unlikely that these writ petitioners might subsequently challenge their Advocate's prayer as to non-prosecution of the case with a motive to squander further time. Under the circumstances, we thought it to be just, fair and prudent to dispose of the case on merit.

16. In adjudication upon the Rule on merit, the only issue required to be examined is whether the petitioner is entitled to have an order of direction from this Court compelling the RAJUK to mutate their names on the case land. From the submissions made and grounds taken in the writ petition, it appears that the writ petitioners' basis for seeking such a direction is the *exparte* decree dated 25.09.2002 passed in Title Suit No. 259 of 1998 in tandem with the registered deed no. 10233 dated 27.06.2004, obtained through Execution Case No.02 of 2003. In the light of the fact that it, now, appears from the papers annexed to the application for vacating the order of status quo that the *exparte* decree in question has been set aside by the Apex Court on 14.12.2010 and the original suit being Title Suit no. 259 of 1998 is pending before the trial Court upon being renumbered as Title Suit no. 25 of 2013, there can be no legal basis to pray for a writ of mandamus, for, this Court shall be competent to direct the RAJUK to do something, only when it will be established that the RAJUK was required by law to do. Given the disclosure of the true position of the mutation of the case land, RAJUK being not legally bound to mutate the names of the petitioners, the instant Rule is liable to be discharged.

17. Now, we may take up the issue as to whether the learned Advocate for the petitioners and also the petitioners deserve any penalty, as prayed for by the learned Advocate for respondent no. 6.

18. As per the statements of the learned Advocate for the petitioners, the certified copy of the order of Civil Review Petition no. 131 of 2015 passed by the Appellate Division was picked up by his clerk on 10.08.2015 and, therefore, there is no scope for the learned Advocate for the petitioners to refute that he had the knowledge of setting aside the *exparte* decree in question, its execution, restoration of the original suit which is now pending in the concerned trial Court and the fact of allowing application for restitution at least on 10.08.2015, if not at the time of filing the writ petition. With all the above information in his hand, he ought not to have prayed for injunction before this Court on 12.08.2015 by suppressing the series of events that took place centering the Title Suit no. 259 of 1998. After finding him to be a false statements-maker for the facts happened upto 10.08.2015, no one would believe his forceful claim as to not having information about the past facts of this case at the time of filing this writ petition. With the said revelation of making untrue statements, no sign or reflection of remorse for committing such an offence by him was noticed in his demeanour, rather he was insisting on delivering judgment. His apparent U-turn to pray for non-prosecuting the case is nothing but an attempt to escape from the aspersions which were being recorded in delivering this judgment. Prior to that, despite the sporadic adverse observations made by this Court regarding the learned Advocate's conduct in handling this case, he was boldly maintaining his position that he came to know about these episodes only on 23.08.2015 after receiving the copy of the application for vacating the order of status quo and until this Court proved his statements to be untrue by showing the date of procurement of the Apex Court's order by his clerk on 10.08.2015 with the date of obtaining the order of injunction on 12.08.2015 and the date of receiving the copy of the application for vacating the order of status quo on 23.08.2015, he did not feel conceding the misdeeds committed by

him in collusion with these writ petitioners. If he is taken to be an Advocate with the least professional knowledge, even as a naive one, his sense in no way can dictate him to pursue a writ petition in this Court with an expectation to obtain mutation of a land which is registered in the names of other persons who had been possessing the same upon mutating their names and obtaining a building plan from the RAJUK.

19. This is, thus, a clear case of practicing fraud upon the Court and a sheer example of extreme abuse of the process of the Court and, accordingly, the learned Advocate for the petitioner as well as the petitioners deserve to be exemplarily penalized.

20. With the above resolution on the issue of conduct of the learned Advocate for the petitioners, this Court now needs to see whether this Court is competent to impose any penalty on any delinquent Advocate for his professional misdeed or misconduct.

21. In the case of Bandar Nagari Bahumukhi Samabay Samity Limited Vs Bangladesh 5 ALR- 2015(1)194, this Court imposed a token fine on the learned Advocate for the petitioner for getting the extension of stay in spite of the expiry of the tenure of the Samity. This Court in imposing fine upon the learned Advocate by discharging the Rule made the following observations;

> "The Courts are inherently empowered to monitor the professional conduct of the Advocates, for, the members of this profession being the integral part of the judiciary their manner and style of presentation of a case before the Courts are well within the radar of this Court." (Para 10)

22. In the said case, with regard to the power of the High Court Division in monitoring the conduct of the learned Advocates, the Court made the following observations;

> "With this aspect in view, while upholding of the prestige and image of the judiciary is considered to be the foremost duty of this Court, it may unhesitatingly be held that this Court is well empowered to monitor and control the conduct of the learned Advocates by justifying the reasons for carrying out such exercise." (Para 10)

23. With regard to absence of legal provision to monitor the professional dealings of the learned Advocates, this Court in the afore-cited case observed that;

> "The High Court Division cannot shrug off its duty to maintain the high standard of the judiciary, which includes the quality of the legal profession, on the plea that there is no legal provision to control and monitor the professional conduct of the Advocates." (Para 10)

24. The Court in the said case further opined that;

> "When no law of our land prohibits this Court to monitor and control the lawyers' affairs related to or arising out of or connected to a case, we are of the view that this Court should not hesitate to pass necessary orders based on the principles of equity and good conscience with an aim to benefit the judiciary by endeavoring to maintain the quality of the legal profession." (Para 10)

25. In the said case, then, the Court laid down the basis and source of the power of this Court on monitoring the conduct of the Advocates in the following manner;

> "It is known to us that when there was no formal Parliament in the civilized societies, it is the Courts who, upon being approached by the citizens with their grievances

against an individual or agent of the ruler, used to adjudicate upon the complaints on the basis of good conscience and principles of equity with reasonings and, that is how, the common law used to dominate the field of legislation." (Para 10)

26. Then, the Court declared that this Court is well empowered to regulate the conduct of the learned Advocates in the following words;

"The fact that the State has not made adequate legal provisions to oversee the conduct of the learned Advocates, it does not ipso facto debar this Court from looking at the affairs of the Advocates inasmuch as they are inseparable part of the judiciary." (Para 10)

27. In the case of AKM Asaduzzaman Vs Public Service Commission 4 ALR 2014 (2) 278, the Court, upon hearing the learned Advocate at length, found the case to be without any merit, and in the said premises, the Court was expecting that the learned Advocate for the petitioner would non-prosecute the said case instead of receiving the full judgment. However, when the learned Advocate for the petitioner of the cited-case opted to have a detailed judgment, the Court was obliged to hand down a full judgment with the following observations with regard to the power of this Court to make an assessment about the professional competency and also to oversee and regulate the overall conduct of the learned Advocates;

"The members of our Bar have almost forgotten that Courts are duty-bound to oversee the quality, skill and overall conduct of an Advocate and make observations as to the competency of an Advocate and, in an appropriate case, it may also suo motu suspend their license and, then, refer the same to the Bangladesh Bar Council for adjudication on the allegations raised by the Court and, thereby, seek cancellation of the license and removal of the Advocate."

28. In the case at hand, while the appropriate course of action for this Court would be to ask the Bangladesh Bar Council to initiate proceedings against the learned Advocate for the petitioners, considering the likely fatal consequence of suspending his license, even if it may be for the least time, following the disposal of the Bar Council's proceedings, we think that it would be a harsh order for a practitioner who has joined the profession only a couple of years ago on 23.07.2013. In the case of AKM Asaduzzaman Vs Public Service Commission 4 ALR 2014(2) 278, the following observations were made by this Court for the learned Advocates who are the first time wrong-doers:

"Failure of an Advocate to properly advise his client demonstrates his professional incompetency which may result in cancellation of the practicing license of such an Advocate given the fact that if this Court refers a matter to the Bar Council for adjudication, questioning the professional conduct of an Advocate, this may culminate into cancellation of his license thereby affecting his livelihood and, thus, instead of going for the aforesaid rigorous action, the Courts, taking a lenient view, may impose costs upon an Advocate to record his conduct on file."

29. In the afore-cited case the High Court Division opined that imposing a token fine on the learned Advocate, instead of sending him to the Bar Council, would be a favourable order for the delinquent Advocate.

30. From the above-quoted observations made in the case of AKM Asaduzzaman Vs Public Service Commission 4 ALR 2014(1)278 and in the case of Bandar Nagari Bahumukhi Samabay Samity Limited Vs Bangladesh 5 AIR 2015(1) 194, it is abundantly clear that this

Court is well empowered to oversee the professional performance and also to regulate the Court-conduct of the learned Advocates and, in an appropriate case, impose costs upon a learned Advocate for finding his conduct to be unbefitting with the norms and etiquettes of the legal profession. Accordingly, instead of referring this incident to the Bar Council towards drawing up proceedings against the learned Advocate for the petitioners, we are taking a lenient view by warning him with an expectation that this kind of incident shall never be repeated by him in future.

31. With the passage of time, it is hoped, the learned Advocate will rectify himself and will not be enticed to engage himself in any activity unsuited to this noble profession. We wish to see the learned Advocate make himself a man of high moral. It was observed in the case of Bandar Nagari Bahumukhi Samabay Samity Limited Vs Bangladesh 5 ALR 2015 (1) 194 that;

> "Legal profession is considered to be the most sophisticated and noble profession across the globe and the members of this profession are perceived by the commoners not only to possess vast knowledge but also to be the mentors and guides of the societies and, accordingly, it is the normal optimism of the citizenry that they would hold an image of high moral standard." (Para 10)
>
> "While the learned Advocates in general are expected to hold and maintain a high standard of transparency both in rendering services to their clients as well as performing their duties to the Courts, the Advocates of the Apex Court, in particular, are hoped to play a fair positive role in dispensation of justice." (Para 10)
>
> "There should not be any performance by any learned member of the Bar which might appear to be unbefitting to the etiquette, norms and practice of the legal profession such as non-disclosure of a fact before the Court or non-submissions of the relevant laws etc." (Para-10)

32. We, however, feel that the present case is a fit and proper case to impose exemplary costs upon the petitioners for their deliberate suppression of the facts with a motive to achieve the Rule and subsequent interim order from this Court.

33. Notwithstanding making the above observations about the mode of handling this writ petition by the learned Advocate for the petitioners as well as the observations about the conduct of the petitioners, the learned trial Court should proceed with the trial without taking any negative impression about the petitioners. In other words, in conducting the trial of the suit, the learned trial Court should not be influenced by this order of penalty upon the petitioners. Because, a fine in this case is being imposed merely for non-disclosure of the fact of pendency of the suit in the trial Court and the past history connected thereto. In a desperate move, litigants like these petitioners, for retaining their possession on the case land, being misguided by their engaged Advocates at the lower Courts or the people who are entrusted with the duty to look after the property, sometimes choose this type of route. In this case, admittedly most of the petitioners are Non-Resident Bangladeshis (NRBs) and it might happen that the learned Advocates at lower Courts or the caretaker of this property out of their over-enthusiasm instigated the petitioners to choose this path. Thus, the petitioners' claim in the suit must be assessed and judged only on the basis of the evidence and other materials produced before the trial Court. The trial Court must put its best effort to do the

justice to all the parties to the suit, for, it is not unlikely to be revealed from the evidence that both the purchasers (these petitioners as well as respondent no. 6) are genuine, but the seller cheated them by taking money from both of them; these writ petitioners as well as from respondent no. 6. All that this Court wishes to suggest is that truth must prevail and falsehood must be defeated so that the people of this land, specifically the NRBs who sometimes get frustrated with the trial system of Bangladesh, may find confidence in the performance of the Bangladesh judiciary.

34. Given the chequered history of this case and, particularly, the failure of the trial Court to notice and detect the activities of the plaintiff-side in making out a case for obtaining *exparte* decree by showing service of summons and then the appearance of respondent no. 6 of this writ petition, and since this Court, sitting in Constitutional jurisdiction, owes a duty to superintend the performances of the subordinate Courts, as engraved in Article 109 of the Constitution, it would be appropriate to make some directions for the learned trial Court in an effort to prevent further abuse of the process of the Court by any of the parties of the suit;

(i) The Title Suit No. 25 of 2013, which was originally numbered as Title Suit No. 259 of 1998, shall be disposed of within 6 (six) months from the date of receipt of this order with appropriate costs upon these petitioners, if it surfaces that their claim of entering into agreement with Asir Uddin is fabricated.

(ii) It is for the trial Court to consider and decide whether it would proceed with the eviction process against these petitioners from the suit property in the light of the fact that the Appellate Division has already fixed a date for hearing of the Civil Review Petition No. 131 of 2015.

(iii) In order to stop recurrence of practicing fraud upon the Courts in obtaining *exparte* decree aiming at establishing a transparent judiciary, we feel that the main culprits involved in showing the summons had been served upon respondent no. 6 of this writ petition and, subsequently, she had appeared in the trial Court, must be to be identified. Unfortunately our Courts usually do not tend to take these issues seriously by bringing the culprits to book probably because of being loaded with their routine works, the same occurrences are going on for decades and the judiciary is being overburdened with huge backlog of cases. Therefore, the learned District Judge, Dhaka should be directed to investigate into the aforesaid matter towards detecting the persons involved in these types of misdeeds and take disciplinary actions as well as criminal case against the perpetrator/s.

35. In the result, with the above observations and directions the Rule is discharged with a cost of Taka 5,00,0000/- (Five lacs) to be paid by the petitioners to the National Exchequer by way of submitting Treasury Challan within 29.11.2015. The order of status quo granted at the time of issuance of the Rule is hereby vacated.

36. The learned Advocate for the petitioners is directed to file an affidavit-in-compliance on or before 30.11.2015.

37. The learned District Judge, Dhaka is directed to probe into the occurrences took place in showing the service of summons as well as appearance of respondent no. 6 of this writ petition in Title Suit no. 259 of 1998. He is further directed that upon detecting the persons involved in the incident, he shall take appropriate legal action against them.

38. Office is directed to send a copy of this judgment to the learned District Judge, Dhaka at once for his information and necessary action.

39. Let the matter appear before the concerned Bench on 30.11.2015 for recording the compliance of this order of direction as to payment of the above costs and then dispose of this Rule finally.

4 SCOB [2015] HCD 127

High Court Division
(Civil Revisional Jurisdiction)

Civil Revision No. 5441 of 2000

Syed Aynul Akhter being dead his heirs
.....Petitioners
Vs.
Sanjit Kumar Bhowmik and others
…..Opposite Parties

Mr. Muhammad Nazrul Islam with
Mr. Md. Abdul Baten, Advocates.
….For the Petitioners
Mr. Netai Roy Chowdhury with
Mr. Bivash Chandra Biswas, Advocates
…..For the Opposite Parties

Heard on: 15.01.2014, 19.01,2014, 26.01.2014, 09,02.2014, 10.02.2014 and Judgment on : 13.02.2014.

Present :
Mr. Justice Nozrul Islam Chowdhury
And
Justice Kashefa Hussain

Evidence Act, 1872
Section 91 and 92:
We are surprised that the Courts below did not take these rent receipts into any consideration at all and which are relevant documentary evidences. Instead, as is obvious from their findings, the Courts below have erroneously and unlawfully relied upon oral evidences bypassing the documentary evidences and which they are barred from doing under the law. Section 91 and 92 of the Evidence Act expressly bar the reliance upon oral evidences where documentary evidences are there on record.
...(Para 22)

Code of Civil Procedure, 1908
Order XIV Rule 1:
It is a settled principle of law and as per Order XIV Rule 1 of the Code of Civil Procedure that an issue which was not taken up earlier in the Courts below, cannot be taken up at a later stage before the superior Courts. ...(Para 35)

Judgment

Kashefa Hussain, J :

1. This Rule was issued calling upon the opposite-party Nos.1-4 to show cause as to why the judgment and decree dated 24.10.2000 passed in Title Appeal No.38 of 1998 by the Learned Sub-ordinate Judge, 2nd Court, Magura affirming those dated 22.03.1998 in Title Suit No. 120 of 1983 passed by the Senior Assistant Judge, Sadar, should not be set aside.

2. The facts relevant for the disposal of the Rule in short are that ;

One Rajendra Nath Dhar as plaintiff filed Title Suit No. 120 of 1983 seeking a decree for declaration that the registered Deed No. 5029 dated 05.06.1969 is a mortgage deed and not a sale deed inrespect of the properties, namely plot no. 612 comprising an area of .33 decimals and plot no. 1045 comprising an area of .31 decimals being a total area of .64

decimals of land and the consideration of the deed amounted to a sum of total Tk. 2000/-. That the plot no. 1045 was an agricultural land and plot no. 612 was low land, but the plaintiff used half portion of plot No. 612 for residential purposes by filling earth and the rest was used to rear fish.

3. The defendant in the Suit in defence raised the grounds in contrary, that the defendant's two storied building comprising of an area of .82 decimals was purchased in the year 1968 for a consideration of Tk. 8600/- and where he has been living with his family since his purchase in 1968. The defendant in his defence also states that the ground floor was occupied by the original plaintiff late Rajendra Nath Dhar since before purchase of the plaintiff and even after his purchase of the residential house from the plaintiff, the defendant allowed the original plaintiff to continue to live in the ground floor of the house, but that after some time it became inconvenient for them to live in the same building with a tenant from a different community , and, therefore, the defendant-petitioner requested the plaintiff opposite parties to live in the adjacent plot no. 612, half portion of which he had developed by filling earth by creating a ditch. He also stated in his defence that he had even given some used (*cÿ¨vZb*) C.I. Sheets to the plaintiff to construct temporary huts in the raised portion of Plot no. 612 and allowed him to stay there till he could find out an alternative accommodation.

4. That the Assistant Judge who tried the Suit on the first occasion after consideration of evidence and other relevant documents came to the finding that the deed was not a mortgage deed but a sale deed, and, therefore, dismissed the Suit vide Judgment and Decree dated 27.02.1988. Thereafter, being aggrieved by the said Judgment and decree the plaintiff opposite parties filed Title Appeal No. 57 of 1988 and the Appellate Court vide judgment and order dated 27.04.1991 allowed the Appeal and remanded the suit for a fresh Trial.

5. Upon remand, the Court of the Assistant Judge decreed the Suit hearing the parties and adducing evidence, recording further evidence decreed the Suit vide his Judgment and Decree dated 22.03.1998. Thereafter, being aggrieved by the Judgment and Decree dated 22.03.1998 passed by the Senior Assistant Judge, Sadar the defendant-petitioner preferred an Appeal before the District Judge, Magura and which upon transfer to the Court of Sub-Ordinate judge, 2nd Court, Magura, the Sub-ordinate Judge, 2nd Court Magura after hearing both sides by his Judgment and Decree dated 24.10.2000 dismissed the Title Appeal No. 38 of 1998 affirming the Judgment and Decree dated 22.03.1998 passed earlier by the Senior Assistant Judge, Sadar, Magura, the defendant as petitioner obtained the present Rule in this Revisional Application.

6. Mr. Md. Nazrul Islam, the learned Advocate appearing on behalf of the petitioner made his submission, while learned Advocate Mr. Nitai Roy Chowdhury with Mr. Bivash Chandra Biswas appeared on behalf of the opposite parties.

7. The learned Advocate appearing for the petitioner submits that the alleged Deed No. 5029 dated 05.06.1969 is not a deed of mortgage, rather it is an out and out Sale Deed. In support of his submission he claims that the word "‡Lvk Kevjv" "khosh kabala" Is written on the face of the said Deed and the word "wewµq" has been used in the body of the said deed and the use of these terms only comes to aid to clarify the fact that the document is a Sale-Deed and not a mortgage deed. The Learned Advocate argues that if it was a mortgage deed there would have been a specific date mentioned for repayment of the mortgage loan and he also asserts that in the recital of the sale deed it is stated that the property transferred was heritable, transferable and that no body from the side of the plaintiff would ever raise any

objection claiming any interest in the property at any time in the future and the deed also contained a condition that if any such claim is raised from the side of the plaintiffs it would not be tenable in any Court of law. The learned Advocate stresses on the point that the nature of the deed is to be determined from an examination of the language of the document itself and that in the instant case the language of the document itself is clear enough proof that it is a sale deed and not a mortgage deed. He also submits that the Courts below upon an erroneous finding came drew the conclusion that the document is a mortgage deed and not a sale deed and the Learned Advocate asserts that it is a principle of law that the intention of the parties in a document or any other legal instrument has to be deduced from that instrument or document and the facts that gave rise to it. Relying upon such principle, the Learned Advocate in support of his case cited the case of Somedulla being dead his heirs Saika Bibi and others -Vs- Mahmud Ali being dead his heirs Monsur Ali and others and which is reported in 44 DLR (AD) page-83.

8. Upon making an effort to stress upon his assertion that the said deed is actually a "sale deed" and not a ''mortgage deed'', the Learned Advocate drew the Court's attention upon the essential ingredients of a mortgage deed. He submits that in order to constitute a mortgage, there are certain ingredients of which the recital of the mortgage-deed has to be comprised of and the learned Advocate for the petitioner persuades that in the event of those ingredients being absent in the recital, a deed cannot be considered by a mortgage-deed in the eye of law. In this context, the Learned Advocate for the petitioner referred to a decision of our Apex Court in the case of Ganu Mia –Vs- Abdul Jabbar and others reported in 10 DLR 1958 page-636 in which the Court below had relied upon in arriving at its decision. The Learned Advocate submits that the Courts below while relying upon that Case erred in that it failed to appreciate the legal principle set out in the test applied in that case as the criteria to determine and comprehend a mortgage by conditional sale and submits that in the said decision reported in 10 DLR the learned judges set out six conditions as determining factors to construe that a document is a mortgage by conditional sale. The Learned Advocate on behalf of the petitioner further submits that the Appellate Court below failed to apply their judicious mind in that they failed to interpret the judgment in its true perspective. While stressing on this point, the Learned Advocate asserted that all the six determinants as has been decided in that case are intrinsic to fulfill the conditions necessary to constitute a mortgage by conditional sale. He argues that from a perusal and interpretation of the 10 DLR Case, it leaves no doubt that the Court in that case intended that in order to constitute a mortgage all these conditions have to be fulfilled and embodied in the document itself, and none of those conditions may be omitted and that the parties to the deed have not been accorded any option to choose one from the other. He moreover points out the fact that the alleged registered deed dated 05.06.1969 only fulfills two of the conditions and those two are the conditions No. 3 and 5 set out in the criteria in the 10 DLR Case and forms part of the recital of the deed, but the rest four determining factors or conditions precedent are totally absent from the recital and do not constitute any part of the deed.

9. The learned Advocate on behalf of the petitioner also attracts our attention to Section 58C of the Transfer of Property Act, 1882 . He submits that from a scrutiny and interpretation of Section 58C of the Transfer of Property Act, 1882, it is clear that the Deed in question is a deed of sale and not a deed of mortgage. In support of his contention he relied upon a decision of this Court in the case of Serajul Huq and others -Vs- Ahmed Hossain and others reported in 1984 BLD page 194, wherein the principle setout is that a transaction of sale cannot be treated as a mortgage, even if the sale was made with a condition of resale, unless the condition is embodied in the document which effects or purports to effect the sale. The

Learned Advocate also submits that the opposite parties in support of their contention that the said deed is a mortgage deed failed to produce any documentary evidence, rather in support of their contention they only adduced oral evidences. In this context the Learned Advocate for the Petitioner refers to Section 91 and 92 of Evidence Act,1872 and stresses on the point that according to the provision of Section 91 and 92 of the Evidence Act, 1872 when documentary evidences are in existence, those documentary evidence in these cases are primary evidence and that cannot be changed or altered by secondary evidence, and, therefore, oral evidence with documentary evidence in existence are not acceptable in the eye of law. He further asserts that the Courts below made a serious error in law upon basing their finding on the oral evidences adduced by the opposite parties while ignoring the documentary evidences before it. In this context he also takes us to the decision in the case of Feroja Majid and another -Vs- Jiban Bima Corporation reported in 39 DLR (AD) page-78, wherein the underlying principle set out in Section 91 & 92 of the Evidence Act, 1872 has been enunciated and corroborated.

10. He also submits that the learned Courts below in passing the impugned Judgment and Decree committed an error in law by not taking into any consideration the evidences produced by the defendant-petitioner as exhibits B-B7 and rent receipt C-C1 (dhakhila). He contends that the Courts below failed to appreciate the legal significance of these rent receipts in the present case and also failed to appreciate that those two rent receipts evidence the fact that the Suit house was rented out and was also rented to the plaintiff and by not taking those into consideration the Courts below committed a serious error of law which thereby led to an erroneous decision and thereupon occasioned failure of justice. In support of his submissions he placed his reliance in the case of Syed Abdul Huq and another –VS- Surendra Nath Majumder and others reported in 59 DLR (AD) page-111 , in which case the Learned Advocate submits that our Apex Court settled the principle that ;

> *"when the finding of fact arrived at in the result of misreading and non-consideration of the evidence or misconstruction of the document, the High Court Division is quite competent to set aside the finding of fact so arrived at by the last Court of fact"*.

11. Referring to this principle, the Learned Advocate persuades that since, in this case also there has been a non-consideration of material evidence, those are the rent receipts which were exhibited as Exhibit B-B7 and Exhibit C & C1 by the Courts of fact, hence the Judgment and Decree given by the Court below cannot be sustained in law, and ,therefore, ought to be set-aside for the sake of Justice.

12. The Learned Advocate for the petitioner further contends that the vendor of the Deed i.e. the plaintiff put his signature in the deed in sound mind, knowing and understanding the contents thereof fully and therefore, there is now no scope for him to contend otherwise and he is actually barred by law to claim that it is a "mortgage deed" and not a Sale deed. He submits that the Courts below arrived at a wrong finding upon misconstruction of the documents and misinterpretation and non-consideration of evidences and thus gave an erroneous decision ultimately resulting in failure of justice and hence the Rule issued in the instant application ought to be made Absolute.

13. The Learned Advocate for the opposite parties Mr. Nitai Roy Chowdhury opened his averments by submitting that the Kabala deed dated 05.06.1969 is a mortgage-deed and not a sale deed and in support he basically echoed his reliance on the same decision as was relied upon by the Court below, that is the decision cited from 10 DLR 1958, Page-636 in the case

of Ganu Mia –Vs-Abdul Jabbar in which case certain criteria were set out as conditions determinant of a mortgage-deed. Out of the six conditions set out as test applicable for the purpose of determining a mortgage-deed, the Learned Advocate for the Opposite parties argues that two of the conditions that is condition number 3 (three) and 5(five) are fulfilled and forms part of the recital of the deed and therefore argues that the said deed is indeed a mortgage-deed and not a sale-deed.

14. The learned Advocate for the opposite parties while making his arguments primarily relied upon the oral evidences that were deposed by the witnesses in the Trial Court. The Learned Advocate for the opposite parties argues that the defendant No. 1 in the Original Suit in his written statement did not state anywhere that the plaintiff was a "tenant" under the defendant upon the Suit land and he also submits that rent receipts marked as exhibits "C" series could not lawfully be considered as a piece of evidence as per the provision of Order 6 Rule 7 of the Code of Civil Procedure.

15. The Learned Advocate for the opposite parties also raised an issue of "adverse possession" before this Court upon Title and Ownership. In course of his argument claiming Title by way of adverse possession, he submits that the impugned deed was executed and registered on 5.6.1969 and the Title Suit No. 120 of 1983 was filed on 27.02.1983 and as such a period of 12 (twelve) years had elapsed from the date of the Kabala till filing of the Suit, while the plaintiff-opposite-parties have been in possession of the suit property prior to the kabala and therefore the right to claim title by way of adverse possession has accrued upon them.

16. The Learned Advocate also refutes the defendant-petitioner's claim that the plaintiffs are in possession only as "permissive" possessors and also submits that the said property was never transferred in the name of the defendant nor did the defendant mutate his name, and, therefore, the defendant failed to prove his possession on the basis of the deed dated 05.06.1969. He further submits that the lower Courts below arrived at their findings based on evidences adduced by parties and deposition of witnesses from both sides available on record and that there was no misconstruction or non consideration of any of the evidences on record and there has been no miscarriage of justice and the said concurrent findings and facts cannot be set-aside under Section 115 of the Code of Civil Procedure and that therefore the Rule issued in the instant Revisional Application ought to be discharged.

17. We have heard the learned Advocates from both sides, perused the application, documents and judgment of the Courts below and other materials on record placed before us for our scrutiny. Upon such perusal and scrutiny we have found that the impugned deed dated 05.06.1969 is the main bone of contention and issue in question wherefrom the cause of action in the original suit had ensued, ultimately leading to the instant Civil Revisional Application , therefore, let us first focus our attention towards the document itself.

18. From our perusal and examination and from what transpires from the record, we find that it is an admitted fact by both parties that a deed was signed by the parties having full knowledge of the contents thereof and we also find that both the original plaintiff being the present opposite parties in no way denied the contents in the recital of the said documents and have at no stage denied its validity. While scrutinising the registered document, the decision reported in 10 DLR 1958 in the case of Ganu Mia –Vs- Abdul Jabbar and others was cited by the Learned Advocates for the parties and placed before us for our appreciation thereof. We have read the case and we have also perused the impugned registered deed. While so doing,

we have compared the recital contained in the registered deed with the conditions laid down in the said case, reported in 10 DLR as the test applicable for the purpose of determining a mortgage by conditional sale. Upon comparison, it is our considered opinion that the Courts below in relying upon that case upon a misconceived notion misinterpreted the intention of the court in laying down the conditions set out for the test applicable for the purpose of determining the documents to be a mortgage by conditional sale. The conditions set out in the said decision in 10 DLR (1958) page-636 in the case of Ganu Mia-Vs- Abdul Jabbar has been reproduced as under ;

> ***"Mortgage by conditional sale-Test applicable for the purpose of determining it.***
> *In order to determine that the document is a mortgage by conditional sale, the following tests, though not exhaustive, should be applied:-*
> *(1) the existence of a debt;*
> *(2) the period of repayment, a short period being indicative of sale and a long period of a mortgage;*
> *(3) the continuance of the grantor in possession Indicates a mortgage;*
> *(4) a stipulation for interest on repayment indicates a mortgage;*
> *(5) a price below the true value indicates a mortgage;*
> *(6) a contemporaneous deed stipulated for reconvenes indicates a mortgage, but one executed after a lapse of time points to a sale.*

19. Now six conditions as we have seen, been laid out as conditions determinant for the purpose of determining a mortgage deed by conditional sale. After perusal of the registered deed No. 5029 dated 05.06.1969, we find that out of the six conditions set out as the criteria to determine a mortgage by conditional sale, in the present case, only two of the conditions have been fulfilled in the impugned registered deed dated 05.06.1969. As to the remaining four conditions, those are totally absent from the recital of the impugned registered deed. Pursuant to our perusal and scrutiny, we find that the Court in the 10 DLR case while laying out the six conditions had intended that to form a valid a mortgage deed, all six conditions have to be mandatorily fulfilled and it would not suffice even if one of those conditions are left out from the recital. There is no indication anywhere in the said 10 DLR Judgment that these conditions are optional, and furthermore no choice have been given out of the six conditions. Consequently there is no room for any presumption that all the six conditions are not necessary to fulfill the criteria for a mortgage deed. But the Learned Courts below upon a fallacy and misinterpretation of the afore mentioned 10 DLR Judgment committed a serious error in law and to their own satisfaction decided that since two of the conditions are featuring in the recital of the instant registered deed, it is adequate enough to constitute a valid mortgage deed by conditional sale and wrongly presumed that the said deed is in conformity with the decision in 10 DLR (1958) Page-636. Here the Courts below have gone wrong. We are also of the view that to constitute a valid mortgage deed all six conditions have to be mandatorily fulfilled and even one condition cannot be left out from the recital of the deed and in the event of it being left out, it shall not constitute a valid mortgage deed by conditional sale. Therefore, the Learned Courts below misinterpreted and upon misconceived reliance on the said 10 DLR case and upon fallacy of law misconstrued the intention of the court in the said case and consequently in the instant case misconstrued the impugned registered deed as a mortgage deed where under the law it is actually a "sale-deed".

20. It also appears from the materials on record and other documents placed before us that the Courts below arrived at the conclusion that the impugned deed is a mortgage deed relying mainly on the ground that the consideration money paid by the defendant-petitioner is

inadequate and disproportionate in comparison to the valuation of neighboring lands of similar nature, lands and class as prevailing in contemporaneous times. The Courts below arrived at such conclusion placing their reliance upon certain contemporaneous documents pertaining to the deed as it prevailed at the time when the impugned deed was executed and certain documents were produced before the Court by the plaintiff-opposite parties featuring as exhibit 1 and 1 (Kha). But, our opinion is, under the principles of law we cannot rely on such contemporaneous documents only, when the impugned deed itself and other relevant factors speak differently and indicate otherwise. We could have relied on such contemporaneous documents indicating a higher value of the suit land existing at that time than the value that was paid by the defendant-opposite parties as consideration money and we could have accepted those as relevant pieces of evidence, if other relevant documents and factors placed in the instant case did not appear so clearly and distinctly before us. But in the instant case, these other documents, for example the impugned deed itself and the rent receipts were produced before the Courts below, but the courts relied only on the "lesser" amount paid for the suit land as consideration which conclusion the Courts arrived upon comparison of the value paid as consideration of sum of some neighboring lands during contemporaneous times. Such a finding is contrary to the principle laid down in the decision in the case of Somedulla -VS- Mahmud Ali reported in 44 DLR (AD) page-83 where our Apex Court has set out the principle that reads as under;

"Mere inadequacy of consideration is no ground to treat a document to be a mortgage".

21. What the Court meant by this is that a lesser payment of consideration money alone and only by itself does not indicate the existence of a ''mortgage deed'' in place of a ''sale deed'' and that the intention of the parties have to be gathered from the document itself in addition to surrounding circumstances. In our case in hand, the impugned registered deed dated 05.06.1969, the rent receipts and Dakhilas marked as Exhibits B-B(7) and C-C(1) however, tell a different story, different from the claims and assertions of the plaintiff-opposite parties and which we have discussed above and which under the principles of law are more relevant for us to decide upon the contention raised in the instant case, and therefore these other evidences we are in no position to ignore. Moreover, as regarding the principle in adducing evidence relating to the valuation of land we have drawn support from the established principle set out by our Apex Court in the aforementioned Case of Somedullah-Vs-Mahmud Ali reported in 44 DLR (AD) Page-83

22. While scanning through the records of the case and the judgment we find that the courts below had basically relied upon oral evidences and have ignored and thereupon not taken into consideration documentary evidences produced by the defendant available on record. In this context, we mean the rent receipts produced before the court by the defendant, and those receipts were marked as Exhibit "B" series and Exhibit 'C' series. We have found from the records that the defendant No. 1 (DW.1) in his deposition also mentioned the existence of the rent receipts. These rent receipts are substantive evidences in that Exhibit 'B' is the ground rent receipts paid to the Government by the defendant while Exhibit 'C' series are the monthly rent receipts for living in the ground floor of the building. We are surprised that the Courts below did not take these rent receipts into any consideration at all and which are relevant documentary evidences. Instead, as is obvious from their findings, the Courts below have erroneously and unlawfully relied upon oral evidences bypassing the documentary evidences and which they are barred from doing under the law. Section 91 and 92 of the Evidence Act expressly bar the reliance upon oral evidences where documentary evidences are there on record.

23. **Section 91 of the Evidence Act, 1872 reads as under:**

> 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

24. **Section 92 of the Evidence Act, 1872 reads as under:**

> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms;

25. The principle underlying the provisions of the statute as in section 91 and section 92 Evidence Act, 1872 has been echoed in the decision in the Case of Feroja Majid and another –Vs-Jiban Bima Corporation reported in 39 DLR (AD) (1987) Page:78 where our Apex Court has unequivocally decided that:

> "Oral or extraneous evidence to contradict the terms of the contents of a document is inadmissible under section 92 of the Evidence Act"
>
> "What sections 91 and 92 provide- It is an established rule of evidence that oral evidence is inadmissible for the purpose either of construing terms of a document or of ascertaining the intention of the parties thereto"

26. Therefore, upon an interpretation of Section 91 and Section 92 of Evidence Act, 1872 read with the aforementioned decision cited from 39 DLR (AD) (1987) Page-78 in the Case of Feroza Majid and another –Vs-Jiban Bima Corporation, we being bound by the statute as provided for in Section 91 and 92 of the Evidence Act,1872 and which received its interpretation in the said decision given by our Apex Court, we cannot make a departure from such principle, while deciding the case in hand. Therefore, our finding is that the Courts below while bypassing the documentary evidence and accepting the oral evidences instead thereby committed a serious error of law thus arriving at an erroneous decision resulted in failure of Justice.

27. The Courts below had also in their findings stated that the defendant no. 1 had claimed that the plaintiffs were earlier residing in the suit land upon ''permission'' of the defendant and that the defendant could not at any point prove their own possession in the suit land. The learned Advocate for the opposite parties in course of his submissions had raised the point that the defendant had stated in his written statement that the plaintiff was living in the suit land with the ''permission'' of the defendant, but the defendant No.1 did not state anywhere in his written statement that the plaintiff was a ''fvowUqvÖ, that is a tenant under the defendant on the suit land and persuaded that, therefore the rent receipts could not be considered as a valid piece of evidence, since as per the provisions of Order 6 Rule 7 of the

Code of Civil Procedure those evidences are precluded from being considered as lawful piece of evidence. Now let us examine Order 6 Rule 7 of CPC which reads thus;

> *"No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the parties pleading the same."*

28. In attracting Order VI Rule 7 of the Code of Civil Procedure the Learned Advocate for the Opposite Parties contention is that since the defendant had earlier stated that the plaintiffs were living in the suit land with the defendant's permission, therefore, they the defendant as per the provisions of Order VI Rule 7 cannot now claim that they are their tenants and were residing in that capacity.

29. Now on this point also we cannot agree with the opposite parties. In our opinion, the defendant-petitioner have not deviated from the scheme of Order 6 Rule VII of CPC, given that he has not made any substantive departure from his claims. The opposite parties according to the petitioner were earlier residing in that house upon permission of the defendant-petitioners i.e. as licensees and eventually they became their tenants by paying rents and started residing upon the suit land in the capacity of tenant. We do not find anything unreasonable or inconsistent in this statement of the petitioner. Such an arrangement is quite reasonable under the circumstances and the conversion of a person who had originally started living upon a property as a licensee and eventually converted into a tenant by paying rent is very much possible and probable under the circumstances and may not call for further enquiry.

30. The Appellate Court in its Judgment has made an observation in the terms of *"bwjkx 612 `vMi Rwg‡Z gÿ ev`x I Zvi Iqwik cÖvPwi emZ evox wn‡m‡e fvM `Lj K‡i Avm‡Q| Av‡`Š H Rwgi `Lj n¯vši K‡ib bvB| †ebwjkx 1045 `vMi Rwg I Zviv n¯vši K‡ib K‡ib bvB"* This observation of the Appellate Court is based upon a misconceived notion. The Courts below tried to justify its finding upon the rationale that the defendant was not in possession of the suit property and that it has all through been in the possession of the plaintiff opposite parties. But, we feel that the question of possession by the petitioner is not very relevant here in that after purchasing the property from the plaintiff-opposite parties, the defendant-petitioner had continued to let them reside in the property first as licensees and subsequently in the capacity of tenants by payment of rent and as we have already opined it is reasonable and very much possible under the particular circumstances of this case. Further our view is that, nobody is denying the fact that the opposite-parties were in possession even after execution of the impugned registered deed No. 5029 dated 05.06.1969, but the Courts below failed to comprehend the fact that they, the plaintiffs after the execution of the registered deed dated 05.06.1969 were allowed to reside therein initially as licensees with permission to live there and then subsequently in the capacity of tenants subject to payment of rent. Therefore our finding is that though the literal physical possession is still under the plaintiffs, but the ownership had passed to the defendant-petitioner after the execution of the deed. We must not confuse possession with ownership or title to property. Ownership and title to property can only be determined by the construction of the deed or document itself and not by any extraneous considerations.

31. As is apparent from the Judgment of the District Judge, The Courts below had also arrived upon the erroneous finding that the defendant had no Title to the suit property relying upon the ground that the suit property comprising of Dag No. 1045 was subsequently acquired by the Government under the Act and against that acquisition nobody had ever come to claim or receive any compensation money from the government and that the defendant No. 1 neither tried to receive the compensation money nor did they file any suit against them.

Placing their reliance upon this ground, the court below committing a fallacy in law decided that the defendant's Title to the suit land could not be proved. We do not agree with this reasoning of the Courts below given that as it transpires upon perusal of the judgment itself, the land was acquired by the Government between the years 1984-1985. As is also evident from the records, the original Suit was filed in 1983, that is prior to the acquisition of the land by the government. Therefore, since the land was acquired between 1984-1985, that is after the Original Suit being Title Suit No. 120 of 1983 was filed in the year 1983, it was already a pending litigation for declaration of ownership and Title to the property, and therefore, Title to the property being a Sub-judice matter, it can only be reasonably concluded that the question of receiving the compensation money by either parties cannot arise under the laws.

32. Upon scrutinizing the Judgment and the depositions made by the witnesses, we find that the Courts below while relying upon oral evidences also referred to a verbal contract "‡gŠwLK Pvi" regarding the return of the so called mortgage loan. Therefore, the Courts below have again erroneously relied upon the assertion of the Plaintiffs and the deposition of the prosecution witnesses alluding to a "‡gŠwLK Pvi" between the parties to the effect that the "mortgage" shall be redeemed upon repayment of the so called "loan" that was as claimed by the plaintiff-opposite parties was taken by them from the defendant-petitioner. The Court below states that although there was no "ikrarnama'' there was a "‡gŠwLK Pvi" verbal agreement between the parties and in its Judgment the Court below casually refers to the so-called "‡gŠwLK Pvi" or "verbal agreement" being a local custom or convention. In this point, we would like to remind everyone once again that under Section 91 & 92 of the Evidence Act, 1872, oral evidences cannot prevail over documentary evidence and documentary evidence is primary evidence which cannot be changed or altered by any secondary evidence and also no custom or convention can prevail over any law that is in existence. Therefore, our view is that in the present case no oral evidence in the form of "‡gŠwLK Pvi" or ''Verbal Agreement'' whatsoever, can be relied upon, when a legal document, in the present case, the impugned deed dated 05.06.1969 itself is in existence and speaks differently and the Courts below on relying upon the oral evidence referring to a so-called "‡gŠwLK Pvi" committed a serious error in law and ultimately occasioned a failure of Justice. Therefore, these findings of the Courts below being devoid of any legal basis cannot be sustained.

33. The Learned Courts below have also relied on the plaintiff opposite parties's assertion that the plaintiff-opposite parties repaid the so called ''mortgage'' loan which the original plaintiff had received from the petitioner. We find that here the lower Courts below while relying upon such claim had relied only upon the oral evidences as has been given as deposition of the witnesses and not on any proper legal documents. Here we can only repeat that repayment of loan cannot be sustained in law in the absence of any document to prove such claim and when there is another legal document in existence, in this case the impugned registered deed itself, that indicates otherwise.

34. The opposite parties, while making their submissions before us, had also in the course of their arguments before us made a plea of adverse possession. The contention of the Learned Advocate for the opposite parties is that they are entitled to claim acquisition of Title to the property through adverse possession. The Learned Advocate for the opposite parties argued that the impugned registered deed was executed and registered on 05.06.1969 and the instant suit was filed on 27.02.1983 and twelve (12) years had elapsed from the date of the Kabala till filing of Title Suit No. 120 of 1983 and the Plaintiffs having been in possession of the Suit land even long before that and the defendant-opposite parties having full knowledge of the plaintiff's possession never opposed to such possession and had not mutated the

defendant's name on the basis of the alleged Kabala. and that hence the Plaintiff-Opposite parties have acquired Title through adverse possession and that the Courts below lawfully decreed the suit in favour of the Plaintiffs.

35. We would now like to address this claim of adverse possession made by the opposite parties at this juncture of the case. Interestingly, we discover from the records that the plaintiff-opposite parties did not take up this issue in the Trial court and as is evident from the records, no issue of adverse possession was framed in the Trial Court during the course of the proceedings. Now, it is a settled principle of law and as per Order XIV Rule 1 of the Code of Civil Procedure that an issue which was not taken up earlier in the Courts below, cannot be taken up at a later stage before the superior Courts. The Learned Advocate for the plaintiff-opposite parties argued otherwise and while trying to contradict this legal point, the Learned Advocate for the plaintiff-opposite parties cited a decision by our Apex Court in the case of Mohammmad Abdul Jalil Miah –Vs- Nirupama Ritchil and others reported in 17 BLD (AD) 1997, Page-63 wherein our Apex Court had given its finding as follows ;

> *"Order XIV Rule 1 of the Code casts a definite responsibility upon the trial Court to frame issues upon the material assertions by one parties and denied by the other and this can be done at any stage of the suit if found necessary. But it is necessary that the contending parties are afforded adequate opportunity to contest the issue."*

36. Now after perusal of this Judgment, we find that this particular finding of our Apex Court is not relevant for our present case, since in the present case the issue of adverse possession was never taken up by the Trial Court at all ever at any stage of the proceedings. So we do not need to discuss this decision any further and in the instant case the plaintiff-opposite parties cannot claim any adverse possession relying upon this finding of the Apex Court.

37. Regarding the claim of the opposite parties of acquisition of Title by adverse possession, we find it very much pertinent and necessary to point out the fact that in the present case it is obvious from the materials on record, other documents and the submissions made on behalf of the opposite parties, that the plaintiff-opposite parties at the very outset, in limine, brought the suit relying upon the claim that they are the original owners of the Property and that the Title to the property was never transferred and that the registered deed No. 5029 dated 05.06.1969 that was executed by them in favour of the defendant was only a "mortgage-deed", and, therefore, legal ownership and Title to the Suit land had always remained with them. But after making such a claim all through, suddenly at this stage, before us, they take up the plea of acquisition of Title through Adverse possession. Now there are various incidents attached to a claim that may determine a title through adverse possession. Adverse possession is inter alia a way of gaining or acquiring legal title to property by the hostile, exclusive continuous possession of the property within the knowledge of the true owner for a certain period as prescribed under the law and if the real owner fails to bring a suit within the statutory period, title shall be acquired by the person in adverse possession. Adverse possession therefore as was also observed by our Apex Court in the above mentioned decision in Mohammad Abdul Jalil Miah –Vs-Nirupamer Ritchil reported in 17 BLD (AD) (1997)

"Implies that it commenced in wrong and is maintained against right"

38. In the present case, the Plaintiffs-Opposite parties did not at any stage of the Suit rely upon the claim that they were living in that property in hostile possession as to the title or

ownership of the true owner. They never said anywhere that they were not the original owners but had acquired Title by adverse possession of more than twelve years that is the statutory period of limitation. Their prayer for declaration of Title has been based on their claim that they had been the lawful owners of the property all through. Therefore, their claim at this stage that they have acquired Title through Adverse Possession is an absurdity and cannot be sustained under the law. On the one hand, the opposite Parities claim that they are the Original lawful owners holding Title and on the other hand they claim that they have acquired Title through Adverse possession. We regret to say that such claims run counter to each other and the plaintiff-opposite parties are not themselves certain about their legal standing as to the suit property and is thus making inconsistent and contradictory statements to that effect and according to their own convenience and such arguments and claims cannot be sustained in law and is hence not acceptable to us.

39. Upon perusal of the judgment of the Courts below and other documents and materials on record it transpires that the Lower Courts below in arriving at their findings had relied primarily upon the oral evidences and deposition made by the prosecution witnesses as against the documentary evidences relied upon by the defendant-petitioner.

40. Therefore, under the aforesaid facts and circumstances stated above and upon perusal of documents and other materials on record and the Judgments of the Courts below, we find substance in the Rule and in the submissions made by the Learned Advocate for the petitioner, and, therefore, the Rule is made Absolute without any order as to costs and the Judgment and Decree dated 24.10.2000 passed by the learned Sub-ordinate Judge, 2nd Court , Magura in Title Appeal No. 38 of 1998 affirming those dated 22.03.1998 passed by Senior Assistant Judge, Sadar, Magura decreeing the Suit in Title Suit No. 120 of 1983 are hereby set-aside and the said suit stands dismissed.

41. In view of what has been stated above, this Rule is made absolute without any order as to costs.

42. Send the Lower Court s record along with the copy of this judgment to the Courts below at once for compliance.

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High Court Division
(Criminal Appellate Jurisdiction)

Death Reference No. 43 of 2010
with
Criminal Appeal No. 1217 of 2011
with
Criminal Appeal No. 6972 of 2011
with
Jail Appeal No. 172,173,174 of 2010

The State
-Versus-
Rafiqul Islam and others
....Condemned-Prisoners.

Rafiqul Islam
....Appellant of Crl. Appeal No. 1217 of 2011.

Kajol
....Appellant of Crl. Appeal No. 6972 of 2011.

Md. Noor Alam
...Appellant of Jail. Appeal No. 173 of 2010.

Mr. Md Mansurul Haque Chowdhury with
Mr. A.K.M. Kamruzzaman, Advocates.
……for the Appellant of Crl. Appeal No. 1217 of 2011.
Mr. Syed Mahmudul Haque with
Mr. Basharatul Mowla with
Mr. Md. Sanower Hossain, Advocate.
.....For the Appellant of Crl. Appeal No. 6791/2009.
Mr. Sk. A.K.M. Moniruzzaman Kabir, D.A.G
Mr Md. Shahidul Islam Khan, A.A.G.and
Mr. Mia Shiraj ul Islam, A.A.G
..... For the State.
Mrs. Hasna Begum, Panel Advocate.
.....In Jail Appeal No. 173 of 2010.

Heard: 20.05.2015, 21.05.2015, 27.05.2015 and Judgment on: 28.05.2015.

Present
Mr. Justice Md Nizamul Huq
And
Mr. Justice Md. Farid Ahmed Shibli

Penal Code, 1860
Section 302
Last seen together theory:
According to the prosecution, in the morning of 05.06.2008 all accused persons with the victim Mamun alive were last seen together at the Gate of Rafique's house no. Ka-109/4, Kureel Bishwaroad and at that time P.W.3 i.e. the Darwan himself saw them coming out together from that house. After they were last seen together, the dead body of the victim was found at an open place of Bholanathpur by the Esapur River on 07.06.2008. In such a situation it is the burden of the accused persons to prove and explain as to how the victim had been taken and done to death there. ...(Para 119)

Code of Criminal Procedure, 1898
Section 164:
If a confession recorded under section 164 of the Code of Criminal Procedure is true and voluntary, the same alone is sufficient for convicting the confessing accused and retraction of confession is immaterial, once it is found to be true and voluntary.
...(Para 138)

Motive:

The prosecution cannot be saddled with an exclusive responsibility of proving motive of each of the assailants. Because it is only the assailant, who can best say his motive for causing the death. But on that ground we cannot lessen the credibility of alleged complicity of the condemned-appellants in killing the victim. ...(Para 148)

Judgment

Md. Farid Ahmed Shibli, J.

1. Criminal Appeal Nos. 1217 & 6972 of 2011 with Jail Appeal Nos. 172, 173 & 174 of 2010, at the instance of Condemned Appellants namely Md. Rafiqul Islam @ Rafique, Md. Noor Alam and Md. Kajol (hereinafter named as "Condemned-Appellants" or "accused persons" or "accused Rafique, Noor Alam and Kajol" for the sake of brevity), are directed against the judgment and order of conviction dated 29.06.2010 passed by Mr. A.K.M. Nasiruddin Mahmud, learned Special Session Judge of Court No. 5, Dhaka in Special Sessions Case no. 143 of 2009 arising out of G.R. Case no. 371 of 2008 corresponding to Badda Police Station Case no. 53(6)08. In his judgment, the learned Session Judge found accused Rafique, Noor Alam and Kajol guilty of the charge under sections 302&34 of the Penal Code and sentenced each of them to death thereunder. A reference to the High Court Division under section 374 of the Code of Criminal Procedure has also been made for confirmation of the sentence of death imposed upon the condemned-appellants. All the Criminal Appeals are taken up together with the Death Reference and disposed of by this single judgment.

2. Factual scores pertinent to the disposal of the Appeals and the Death Reference are as follows:-

On 03.06.2008 at around 7 O'clock in the morning the victim Md. Abdul Hye Mamun (hereinafter named as "victim Mamun" or "the victim" or "the deceased") set out of the residence of his father Abdus Sobhan (P.W.1) for his village home in Noakhali, where his mother Kohinoor Akhter Beauty (P.W.4) and other family members had been living. Immediately after his setting out the victim changed his mind receiving a mobile call from accused Rafique and at around 8 a.m. on that day he went to the residence of accused Rafique situated at 5th Floor of House No. Ka-109/4 of Kureel Bishwaroad under P.S Badda of Dhaka straightaway. The victim was staying there up to the morning of 05.06.2008. Accused Rafique's father, mother and other members of his family used to reside in that house. Being a Sublettee another accused Noor Alam, who is a distant relation of Rafique, was also residing in some part of that house. In response to the request of accused Noor Alam on 04.06.2008 at the night accused Kajol came and stayed in that house. In the morning of 05.06.2008 Rafique, Noor Alam and Kajol alongwith the victim came out of the house and went to the open place of a government-acquired land situated by the Esapura River at Bholanathpur Boro-bazar area under P.S Rupgonj of Narayangonj. After their arrival at that place of Bholanathpur, accused Rafique, Noor Alam and Kajol in furtherance of their common intention laid down the victim there and killed him dealing several knife blows and causing a cut throat injury applying the knife against his neck. At that time, accused Rafique remained vigilant patrolling and watching the surrounding area. After completing their dreadful mission and ensuring death of the victim, all accused persons left the place throwing the blood stained knife and the Mobile SIM Card of the victim into the Esapura River.

3. On 07.06.2008 at 3.15 p.m. the police of Rupgonj Police Station recovered the dead body as of an unnamed young person and registered a Case bearing no. 20 dated 07.06.2008 with the Police Station of Rupgonj under sections 302/34 of the Penal Code. Officer-in-

Charge of the Rupgonj Police Station endorsed the case to S.I. Md. Ashraful Islam, who held inquest on the body of the deceased visiting the place of occurrence and sent it through Con/351 Md. Sirajul Islam (P.W.16) to the General Hospital of Narayangonj for autopsy. Being a member of the Post Mortem Examination Board, P.W.19 Dr. Prodip Kumar Das examined the body of the deceased and prepared the report dated 08.06.2008 (Ext. 11).

4. P.W.1 Abdus Sobhan, who is the father of the victim, had not been getting the whereabouts of his son i.e. the victim and then lodged the Ejahar (Ext.1) on 25.06.2008 with the Police Station of Badda showing Rafique, Noor Alam and some others as the accused of the case under section 365 of Penal Code. Being endorsed with the responsibility, P.W.27 S.I Md. Hanif started the process of investigation consulting concerned Police officers of Rupgonj, who at that time informed the fact of recovery of an unidentified dead body from the open place of Bholanathpur. Getting such information the Investigating Officer i.e. P.W.27 visited the said place at Bholanathpur along with father, maternal grandfather and other relatives of the victim. They found a photograph of the dead body and its wearing apparels in the Police Station of Rupgonj and identified it as the body of the victim Mamun.

5. On the application of the Investigating Officer (P.W.27) corpse of the deceased was then exhumed from the Majdair Graveyard at Narayangonj in presence of the Executive Magistrate Zinat Rehana (P.W. 17) and other witnesses. At that time relatives of the victim identified the corpse and received the same in presence of the Executive Magistrate and others. The victim's maternal uncle Md. Nurul Haque (P.W.) and others took the corpse away with them and buried the same at a graveyard in the village home of the deceased.

6. P.W.27 S.I. Md. Abu Hanif conducted the investigation visiting the place of occurrence, collecting the incriminating materials including the Post Mortem Report (Ext.11) and recording the statement of witnesses under section 161 of the Code of Criminal Procedure. On 28th & 29th June 2008 accused Rafique, Noor Alam and Kajol made their respective confessional statements under section 164 of the Code of Criminal Procedure. On analysis of the evidence and the materials on record getting a prima-facie case against all the accused persons the I.O. submitted the Charge Sheet having no. 573 dated 31.12.2008 under sections 302/34 of the Penal Code.

7. At the very outset, the learned Special Session Judge framed the charge against 3 accused persons namely Rafique, Noor Alam and Kajol under sections 302/34 of the Penal Code and the same was read over and explained to them, who pleaded not guilty and claimed to be tried as per law.

8. The defence case, as it transpires from the trend of cross-examination of the witnesses and the statements made by the accused persons during their examinations under section 342 of the Code of Criminal Procedure, is that the accused persons had no kind of complicity in the alleged occurrence of causing death of the victim and because of some land disputes of the victim's father with accused Rafique's maternal grandfather and some other disputes with accused Noor Alam's family, the instant case has been planted by the informant party narrating a concocted story of causing death of the victim by the accused persons. According to the defence, the prosecution has cooked up this case falsely on some ill-advice of the deceased's maternal grandfather i.e. 'Nana' named Nurul Haque (P.W.2) and that is why the learned Trial Court ought to disbelieve the prosecution case and record a decision of acquittal for the accused persons in place of their conviction.

9. On hearing both the prosecution and the defence and appraisal of the evidence along with the materials on record, the learned Special Session Judge found all accused persons namely Rafique, Noor Alam and Kajol guilty of the charge levelled against them and recorded the impugned decision of conviction awarding death sentence against each of them.

10. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction, the condemned-prisoners Rafique and Kajol have preferred 2 separate Criminal Appeals and another condemned-prisoner Noor Alam filed a petition of Jail Appeal castigating the judgment and order of conviction passed in Special Sessions Case no. 143 of 2009. Besides, the learned Special Session Judge has also made a Reference to this Court for confirmation of death sentence awarded against the condemned-prisoners i.e. the condemned-appellants.

11. Points to be decided are:- whether the impugned judgment and order of conviction dated 29.06.2010 suffer from any legal or infirmity and whether finding of guilt and the sentence of death awarded against the condemned-appellants are sustainable in law or not.

12. We have heard the submissions advanced by Mr. Mansurul Haque Chowdhury & Mr. Bashratul Mawla, learned Advocates for condemned-appellants Rafique and Kajol respectively and Mrs. Hasna Begum, learned Panel Advocate for condemned-appellant Noor Alam and Mr. Sk. A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General with Mr. Md. Shahidul Islam Khan, learned Assistant Attorney-General representing the State. We have also carefully scrutinized the evidence of the witnesses along with the materials on record particularly the confessional statements made by the accused persons under section 164 of the Code of Criminal Procedure taking their nitty-gritty into consideration.

13. Let us first try to know the status of the witnesses in this case and their other credentials. P.W.1 Abdus Sobhan is the informant and father of the victim, P.W. 2 Nurul Haque is maternal grandfather or "Nana" of the victim, P.W. 3 Md. Rezaul is a Gate-keeper or "Darwan" of accused Rafique's house having no. Ka-109/4 of Kureel Bishwaroad under P.S Badda of Dhaka, P.W. 4 Kohinur Akhter Beauty is the mother of the victim, P.W. 5 Md. Zafor Iqbal and P.W. 6 Humayun Kabir Bhutto are maternal uncles or "Mamas" of the victim, P.W. 7 Md. Abul Kashem is a cultivator and the victim's "Nana" by village-courtesy, P.W. 8 Abul Khair is a villager residing at North Ambornagar of P.S Sonaimuri of Noakhali, P.W. 9 Md. Amirul Islam @ Alam is the President of Roky Samabay Samity at Kureel Bishwaroad, P.W.10 Md. Sahadat Sheikh is a tailor working at 'Shishir Tailors' at Kureel Bishwaroad, P.W. 11 Md. Shahidullah is an Ex-Chairman of Ambornagor Union Parishad no.5 under P.S. Sonaimuri of Noakhali, P.W.12 Md. Rubel Islam is a student of Class X and a playmate of the accused persons, P.W.13 Rakib Ahmed @ Roky is a witness, who purchased the Sony Ericson Mobile Set from accused Kajol, P.W. 14 Masud Hassan and P.W.15 Md. Majibur Rahman are witnesses of the Inquest Report, P.W. 16 Constable no. 351 Md. Serajul Islam escorted the unidentified dead body to Narayangonj General Hospital for autopsy and he is also a seizure-list witness, P.W. 17 Zeenat Rehena is the Executive Magistrate in whose presence the dead body was exhumed from the Majdair graveyard, P.W.18 Sheikh. Md. Tofaiel Hossain is a Metropolitan Magistrate, who recorded the confessional statements of the condemned-appellants, P.W. 19 Dr. Prodip Kumar Das held autopsy on the body of the deceased and prepared the Report (ext. 11), P.W. 20 Dr. A. K. M. Shafiquzzaman and P.W. 25 Dr. Jalil Ahmed were members of the Post Mortem Examination Board, P.W.21 Kazi Md. Shahidul Islam and P.W. 22 Kazi Md. Hedayetul Islam are the seizure-list witnesses, P.W.23 Md. Abu Saleh Mallik and P.W.24 Md. Golam Mostafa are

"Khademdar" & "Caretaker" of the Majdair Graveyard respectively. P.W.26 S.I Md. Farid Uddin verified the names and addresses of the accused persons and P.W. 27 S.I. Md. Abu Hanif is the Investigating Officer.

14. Let us now recapitulate the evidence of the Prosecution Witnesses necessary for their proper appreciation P.W.1 Abdus Sobhan deposes that he had a greengrocery shop at Boardbazar under Gazipur district for last 19 years and his eldest son Mamun used to help him in running the shop. According to him on 03.06.2008 at around 8.00 or 9.00 a.m. the victim Mamun set out for the village home at Noakhali taking a Sony Ericson Mobile Set and Tk. 12,000/= in cash with him. Accused Rafique called the victim on his mobile and he accordingly went to the residence of accused Rafique situated at House no. Ka-109/4 of Kureel Bishwaroad. At that time P.W.1 was not getting the victim Mamun on his mobile owing to which he (P.W.1) called his wife (P.W.4), who later informed that her son Mamun would come the village home with accused Rafique and Noor Alam. P.W.1 states that the accused Rafique is his grandson through a daughter of his (P.W.1's) one cousin (*Avmvgx iwdK n‡jv wc,WweD-1 Gi PvPv‡Zv fvB‡qi †g‡qi w`‡Ki bwZ*) and the accused Noor Alam is a nephew through his cousin (*Avmvgx bi-Avjg n‡jv wc,WweD-1 Gi PvPv‡Zv fvB‡qi †Q‡j i w`‡Ki fwZRv*).

15. P.W.1 deposes that since the victim Mamun was not arriving at the village home in Noakhali, he (P.W.1) became anxious and started searching for him and at one stage made a G.D. Entry with the Joydebpur Police Station and his wife's (P.W.4's) maternal uncle Nurul Haque (P.W.2) lodged another case with the Badda Police Station. He further deposes that in the G.D. of Badda police station they suspected some persons namely- Rafique, Noor Alam, Barkaullah and Habibur Rahman and on the basis of the said G.D. the police started investigation and arrested accused Rafique and Noor Alam. P.W.1 states that on interrogation of the police accused Rafique, Noor Alam and Kajol admitted their culpability in the alleged occurrence and the Investigating Officer i.e. the I.O. taking the accused persons with him visited the East Zone Project Area of Bholanathpur under P.S. Rupgonj, where the victim was done to death by accused persons dealing knife blows and they left the body on a sandy ground situated by the Esapura River.

16. P.W.1 deposes that initially the police of Rupgonj P.S. recovered the body as of an unidentified person and after completion of the Post Mortem Examination handed over the same to the Anjuman-e-Mofidul Islam, who buried it at the Majdair Graveyard of Narayangonj observing funeral formalities. He further deposes that on 25.06.2008 the case was lodged with the Police Station and seeing the wearing clothes and a photograph of the body at the Rupgonj Police Station it was identified.

17. According to P.W.1, the victim had Tk. 12,000/- in cash and a mobile phone with him and the police recovered Tk. 6000/- each from Rafique and Noor Alam. P.W.1 testifies that the police recovered the mobile set from a person to whom it was sold out by accused Md. Kajol. He states that the accused persons admitted the alleged occurrence giving their statements under section 164 of the Code of Criminal Procedure. He discloses the fact that accused Rafique's 'Mama' named Jahangir and accused Noor Alam's one relative Sobhan were possessing and enjoying his (P.W.1's) property illegally and on that matter a 'Village Shalish' was also arranged. P.W.1 states that after exhumation of the body, it was identified and taken to the village home and buried there. He has exhibited the Ejahar (Ext.1) and identified all accused persons namely Rafique, Noor Alam and Kajol present in the dock.

18. In cross-examination, P.W. 1 states that his wife and other children lived at his village home and within the area of their homestead the house of accused Rafique's maternal

grandfather has been located. He further states that Rafique's maternal uncle named Jahangir had a dispute with him (P.W.1) regarding a land and on that matter a 'Shalish' i.e. 'Village Arbitration' was held. At one stage of his cross-examination P.W.1 claims that on 03.06.2008 his son set for the village home and the G.D. Entry was made with Joydebpur Police Station on 07.08.2010. He could not remember the G.D. number or date of the G.D. Entry made with Badda Police Station. P.W.1 expresses that he was not at the place of occurrence and hearing the facts of occurrence the Ejahar was lodged by him.

19. P.W.1 has denied the defence suggestion that because of land disputes with the maternal grandfather of accused Rafique the instant case was filed setting forth a got-up story implicating name of accused Rafique. At one stage of his cross, P.W.1 states that in the Ejahar names of Borkatullah and Habibur Rahman were shown but there was no such mention of accused Kajol. He has denied the defence suggestion that name of Kajol was included in the Charge-Sheet collusively. He has also denied the defence suggestion that the confessional statements of accused persons were recorded under duress or inflicting any physical torture to them.

20. According to P.W.2 Nurul Haque, the victim Mamun used to stay with his father Abdus Sobhan (P.W.1) at Boardbazar under Gazipur district and support him (P.W.1) in the Greengrocery Shop and his (P.W.2's) niece Kohinur Akhter Beauty used to reside at the village home in Noakhali with her children. P.W.2 deposes that on 10.06.2008 his niece informed on his mobile that the victim had been sent by his father on 03.06.2008 for the village home Noakhali, but since then he was not coming there and she failed to contact him because of his (the victim's) mobile phone was found switched off. P.W.2 further deposes that getting such information from his niece, he (P.W.2) called accused Rafique on his mobile and the latter told him that the victim had already gone to the village home. On 12.06.2008 P.W. 2 again called accused Rafique and Noor Alam and at that time Rafique gave the phone number of some Habibur Rahman and requested to contact him. P.W.2 testifies that pursuant to the said information he called Habib, who expressed that he had no communication with Rafique or Noor Alam for last 2 or 3 years.

21. P.W.2 deposes that on 16.06.2008 he himself made a G.D. Entry having no. 1185 with the Badda Police Station and then went to the house of accused Rafique with a Sub Inspector of the Badda P.S. In reply to his (P.W.2's) query, accused Rafique's mother informed him that the victim Mamun had come to her residence on 03.06.2008 and left in the morning of 05.06.2008. P.W.2 testifies that the police went to the Purbachal Housing Area under Bholanathpur with accused Rafique and Noor Alam, who then disclosed that the victim was killed by them with the help of some Kajol.

22. P.W. 2 testifies that seeing the photograph of the body and wearing clothes it was identified and subsequently the same was exhumed from Majdair Graveyard and handed over to the informant party for its burial at their village home in Noakhali. P.W.2 further testifies that accused Rafique and Noor Alam took away Tk. 12,000/- from the victim and then got the amount equally divided between themselves and the mobile set of the victim was taken away by accued Kajol, who later sold it out to some Roky Ahmed @ Roky. A sum of taka 6,000/-, as deposed by P.W.2, was deposited by accussed Rafique using a fake-name of 'Shishir' in a Somabay Samity. P.W.1 states that the knife, with which Mamun was killed by the accused persons, was thrown away in a river and it had been collected by the accused earlier from some Rubel. During his examination, P.W.2 has identified all accused persons namely Rafique, Noor Alam and Kajol present in the dock of the Court.

23. In his cross-examination, P.W.2 discloses that the informant's wife is his (P.W. 2's) niece and his dwelling house and the house of accused Rafique's maternal grandfather are intervened by 2 or 3 other houses and the house of Rafique is about 1 or 1½ k.m. away from him. According to P.W.2, there was no such litigation between accused Rafique's father and the informant. P.W.2 has denied the defence suggestion that at his instance accused Rafique was included in this case and he (Rafique) had no kind of involvement with the alleged killing of the victim. He has denied another defence suggestion that accused Noor Alam and Kajol did not say anything in his presence regarding alleged murder of Mamun and being a relative of the victim he (P.W.2) has been deposing falsely just to favour the informant (P.W.1).

24. Being the Darwan of House no. Ka-109/4 of Kureel Bishwaroad, P.W.3 Md. Rezaul has stated that he had been serving in that house for around 5 years and at 5th Floor of the building, accused Rafique used to reside with his father & mother and in a small part of that house the accused Noor Alam was also residing as a Sublettee. According to P.W.3, the victim came at the house of accused Rafique on 03.06.2008 and he saw him in that house till 05.06.2008. P.W.3 testifies that in the morning of 05.06.2008 accused Noor Alam and Rafique along with the victim came out of that house and at that time they were accompanied by another unknown boy. He further testifies that subsequently he (P.W.) came to know that the victim Mamun had been done to death. During his examination, P.W.3 has identified all the accused persons present in the dock.

25. In cross-examination, P.W.3 discloses that he used to reside in a room at the ground-floor of the building and the room is contiguous to the Gate of the building and he opens the Gate everyday at 7.00 or 7.30 a.m. He states that he was serving as the Darwan of that house for around 5 years. On 04.06.2008 and 05.06.2008, as stated by P.W. 3, the Gate was opened at around 7.00 or 7.30 a.m. He further states that he did not see the alleged occurrence of the death of Mamun. In his cross, P.W. 3 claims that he did not know the name of Mamun, but by appearance Mamun was known to him. He denies the defence suggestion that he did not serve as a Darwan of that house and deposing falsely in favour of the informant.

26. P.W.4 Kohinur Akhter Beauty used to reside with her children at the village home. P.W. 4 deposes that on 03.06.2008 the victim called her on mobile and said that he would stay at the house of Rafique at Kureel Bishwaroad and set for the village home on 04.06.2008. She further disposes that on 03.06.2008 at night she also talked to Mamun and accused Rafique and Noor Alam, who assured her that they would come together on 04.06.2008.

27. According to P.W.4, on 04.06.2008 she found mobile phones of Mamun and Rafique switched off, owing to which she called Rafique's father Borkatullah collecting his mobile number from Rafique's 'Nani' and at that time Barkatullah told her that Mamun, Rafique and Noor Alam would come to the village home by 05.06.2008. P.W.4 states that on 05.06.2008 she again found mobile phones of Mamun and Rafique switched off and then contacted her maternal uncle i.e. 'Mama' Nurul Haque. P.W.4 further states that Nurul Haque's son Nipu phoned Rafique and his father Borkatullah, who on query had given different versions at different times regarding whereabouts of the victim. By that time her (P.W.4's) husband filed a G.D. Entry with the Badda Police Station on 16.06.2008, because of which the police raided the house of Rafique and arrested both Rafique and Nurul Alam therefrom. P.W.4 testifies that Rafique, Nurul Alam and Kajol admitted their complicity in the alleged killing of the

victim by the knife, which was collected from some Rubel and his (the victim's) death was caused giving 7 knife-blows on his chest and removed the skin of his face. She discloses that her family had a dispute with both Rafique's 'Khalu' A. Sobhan and Noor Alam's brother Jashim regarding some land property and for that matter more than once 'Shalish Baithaks' were held at the locality. She identified accused Rafique, Noor Alam and Kajol present in the dock and claimed that they killed her son Mamun.

28. In cross-examination, P.W. 4 states that her family had no dispute with father or mother of accused Rafique, but her family had some conflicts with the maternal grandfather of accused Rafique. She discloses in her cross-examination that once Rafique's maternal uncle Jahangir threatened her family to fracture their legs and limbs. In cross, she testifies that on 04.06.2008 accused Mamun, Rafique and Noor Alam talked to her on mobile phone and informed that they would come together on 04.06.2008 and at one stage she (P.W.4) came to the residence of her maternal uncle Nurul Haque, who made a G.D. Entry with the Badda Police Station accompanying her husband.

29. P.W.4 denies the defence suggestion that because of the dispute with maternal grandfather i.e. 'Nana' of accused Rafique, the case was filed implicating Rafique's name as an accused. In cross, she claims that she gave her statement to the I.O. of the Badda Police Station narrating the alleged occurrence. P.W. 4 has denied the defence suggestion that the accused persons did not kill her son Mamun and the case was lodged just to harass the accused persons.

30. P.W. 5 Md. Zafor Iqbal is maternal uncle of the victim. According to this witness, on 04.06.2008 his (P.W.5's) sister informed him about the fact of missing his nephew i.e. the victim and his Mama Nurul Haque subsequently made a G.D. Entry with the Badda Police Station and prior to that his brother-in-law (i.e. P.W.1) had also made another G.D. Entry with the Joydebpur Police Station. P.W.5 expresses that accused Rafique, Noor Alam and Kajol have confessed their involvement with the alleged killing of Mamun and they caused the death of the victim at Bholanathpur giving knife blows on his person. P.W.5 claims that in his presence the accused persons have admitted their guilt. This witness states that the dead body was initially buried as an unidentified body by the Anjuman-e-Mofidul Islam and it was exhumed subsequently. He further states that his brother-in-law (P.W. 1) had some dispute with Rafique's Mama Jahangir and Noor Alam's brother Jashim on land property. P.W.5 has identified all the accused persons present in the dock.

31. In cross-examination, P.W.5 discloses that he is the Headmaster of a Primary School and his brother-in-law (P.W. 1) had no such direct dispute with accused Rafique. He has denied the defence suggestion that on some ill-advice of his 'Mama' Nurul Haque the instant case was instituted falsely implicating names of Rafique, Noor Alam and Kajol.

32. P.W. 6 Humayun Kabir Bhutto is also a maternal uncle of the victim. He deposes that the victim started for the village home taking a mobile phone and Tk. 12,000/= in cash with him. He testifies that the accused persons killed the victim and got Tk. 12,000/- in cash found with him distributed among themselves and Rafique & Noor Alam received Tk. 6000/- each. He discloses that Rafique deposited an amount of Tk. 5,500/- using a fake name 'Shishir' in the Roky Samobay Samity and the said amount (Mat Ext.II) was subsequently seized preparing a seizure list 'Ext.2' to that effect. According to P.W.6, accused Rafique, Noor Alam and Kajol have admitted their involvement in the alleged killing of the victim.

33. In cross-examination, P.W. 6 states that after the death of his nephew he came to Dhaka and the police recorded his statement. He discloses that after writing the seizure list he signed the same and at that time the Investigating Officer, the informant and some others were present. He has denied the defence suggestion that the police took his signature on a paper written by them and as the informant is his brother-in-law, he is deposing falsely.

34. P.W. 7 Md. Abul Kashem lives at the same homestead of the informant's village home in Noakhali and the victim is his (P.W.7's) 'Nati' i.e. grandson by the village courtesy. He testifies that since the victim had not been going to his village home, his mother and father started searching for him at various places and at one stage the victim's father made a G.D. Entry with the Joydebpur Police Station and Nurul Haque made another G.D. Entry with the Badda Police Station. P.W. 7 states that accused Rafique, Noor Alam and Kajol have confessed their alleged involvement in killing the victim Mamun at Bholanathpur and initially his dead body was buried as of an unknown person. P.W.7 further states that the dead body was subsequently exhumed and it was then sent to the village home for its burial. He claims that accused Rafique and Noor Alam had some land dispute with the victim.

35. In cross-examination, P.W.7 has made an account that he did not see as to who killed the victim and stated that he heard about the alleged occurrence. He denies the defence suggestion that he has deposed at the dictation of the victim's father and mother.

36. P.W. 8 Abul Khayer has been tendered and the defence has declined to cross examine him. P.W. 9 Md. Amirul Islam Alam is the President of the Roky Somabay Samity of Kureel Bishwaroad and states that somebody in the name of 'Shishir' deposited Tk. 5,500/= in the Samity and the police seized the money preparing a seizure-list (Ext.2) to that effect. In cross, this witness testifies that filling-up the prescribe Form 'Shishir' became a member of the Samity. He denies the defence suggestion that he signed a blank paper and did not know what had been written there.

37. P.W.10 Md. Shahadat Sheikh is a Tailor of the shop named 'Shishir Tailors' opposite to the office of the Roky Somabay Samity. He deposes that on 16.08.2008 the police seized Tk. 5,500/= preparing a seizure list (Ext.2) and he signed the same as a witness. In cross, he denies the defence suggestion that the police did not seize any money and he was deposing falsely.

38. P.W.11 is an Ex-Chairman of Ambornagar Union Parishad no.5 under P.S Sonaimuri of Noakhali. According to him, the informant's son had not been going to his village home and subsequently on search it was learnt that he i.e. the victim was done to death. He testifies that accused Rafique, Noor Alam and another boy from Dhaka slaughtered the victim. He discloses that accused Rafique's Mama and his cousin Wali Ullah had a land dispute with the informant. He claims that the body of the victim was buried at the village home in his presence. In cross-examination P.W. 11 states that Rafique's Mama had a land dispute with the informant and on that matter there was litigation in the Court. He denies the defence suggestion that he is deposing falsely.

39. P.W. 12 Md. Rubel Islam is a neighbour and cricket-playmate of accused Rafique, Noor Alam and Kajol and a student of Class X in Sheer-E-Bangla Ideal School. P.W. 12 testifies that sometimes back the accused Rafique collected a knife from him (P.W.12), which belonged to his 'Choto Mama' and used in slaughtering the sacrificing-beasts. P.W. 12 states that subsequently the knife was not returned to him and he came to know that accused Rafique, Noor Alam and Kajol slaughtered the victim with that knife. In cross-examination

P.W. 12 testifies that after taking away the knife he did not see or meet the accused persons again. He discloses the name of his 'Choto Mama' as Moni. He denies the defence suggestion that accused Rafique did not take any knife from him and he was deposing falsely.

40. P.W.13 Rakib Ahmed @ Roky testifies that the Sony Ericson Mobile Set was purchased by him from accused Kajol in consideration of Tk. 5,500/-. He identified accused Kajol present in the dock and also exhibited the Mobile Set as 'Mat. Ext-II'. In cross, he states that there was no such document regarding the purchase of Mobile Set. He denies the defence suggestion that 'Material Exhibit-II' Mobile Set was not purchased by him from accused Kajol.

41. P.W.14 Masud Hasan deposes that on 07.06.2008 he was going through the open place situated by the river at Bholanathpur and at that time seeing some people and police assembled thereat he proceeded and found a dead body wearing a shirt and a Jeans Pant. On the request of the police he (P.W.14) signed the Inquest Report (Ext.3). In cross he claims that around the place of occurrence he had some vegetable producing land and he signed a white paper seeing the dead body there.

42. P.W.15 Md. Majibur Rahman deposes that on his way to village Bholanathpur on 07.06.2008, he found some people and police assembled there and going there found a dead body. He testifies that the police prepared the Report, where he signed as a witness (Ext. 3/2). In cross, P.W.15 discloses that he was going towards the house of his one sister-in-law and at that time seeing a dead body he signed a white paper.

43. P.W. 16 Constable Serajul Islam deposes that on 07.06.2008 Sub Inspector Selim Reza and he saw an unidentified dead body and at that time a liver-colour Check Shirt and a Jeans Pant were found with the body of the deceased and some pieces of those clothes were seized preparing a seizure-list (Ext.4) to that effect. He has identified his signature in the seizure-list as 'Ext. 4/1' and got some cut pieces of the clothes as 'Mat. Ext.III and IV'. In cross P.W.16 claims that in his presence the pieces of clothes were cut away from the Shirt and the Pant of the dead body. He denies the defence suggestion that there was no such 'alamats' with the body of the deceased.

44. On re-call P.W.16 states that he carried the dead body to the General Hospital of Narayangonj vide C.C. No. 1/08 dated 07.06.2008 and signed the Chalan Form (Ext.5). He claims that the inquest of the body was held in his presence. In cross P.W.16 testifies that the inquest was held at the place of occurrence in presence of the witnesses and people of the locality and the body was carried to Narayngonj General Hospital by a Van. He claims that at the time of holding inquest the body was found decomposed. He denies the defence suggestion that he did not see the dead body.

45. P.W. 17 Zeenat Rehana is an Executive Magistrate of Narayangonj. She testifies that in connection with Badda P.S case no. 53 dated 25.06.2008 corresponding to G.R. Case no. 371 of 2008 in presence of S.I Abu Hanif (P.W.27) and other witnesses on that day at 4.30 p.m. the body was exhumed from the Majdair Graveyard in Narayangonj and at that time relatives of the deceased identified the body of the victim. This witness handed over the dead body of the victim to his relatives according to a letter issued by the Deputy Commissioner. In cross-examination, P.W. 17 claims that she herself saw the dead body and handed over the same to the victim's Nana 'Nurul Haque' in presence of S.I. Md. Hanif. She asserted in cross-examination that relatives of the deceased identified the dead body of the victim.

46. P.W. 18 Sk. M. Tofaiel Hossain deposes that the confessional statement of accused Noor Alam was recorded on 28.06.2008 and the confessional statements of accused Kajol and Rafique were recorded on 29.06.2008. He claims that before recording statement of each accused person 3 hours time was given to think over the matter and all legal requirements were fulfilled. P.W.18 testifies that the accused persons have made their confessional statements voluntarily and contents of their statements were read over to them, who signed admitting them as true.

47. In his cross-examination, P.W.18 expresses that he did not notice any sign of injury on the body of any accused and after recording the confessional statement they were sent back to the Jail Custody. He denies the defence suggestion that at the time of recording the confessional statements relevant provisions under sections 164 and 364 of the Code of Criminal Procedure were not followed and their statements were recorded putting them under duress or intimidation. He also denies the suggestion that the accused persons did not make the statement voluntarily and after recording them he did not certify properly.

48. P.W.19 Dr. Prodip Kumar Das deposes that he held the autopsy on the dead body of an unknown male person and gave his opinion that cause of the death was due to hemorrhage and shock resulting from cut throat wounds and the injuries stated in the Report, which were ante-mortem and homicidal in nature.

49. In his cross-examination, P.W.19 testifies that age of the victim was around 28 years and his relatives identified the dead body. He expresses that at the time of autopsy decomposition of the body started. He denies the defence suggestion that the body of deceased was not identified. P.W. 20 Dr. K.M. Shafiquzzaman and P.W. 25 Dr. Jalil Ahmed are the members of the Medical Board for holding the Post Mortem Examination and they depose that the Report of autopsy was prepared and also signed by them.

50. P.W.21 Kazi Md. Shahidul Islam and P.W. 2 Kazi Md. Hedayetul Islam depose that the Investigating Officer recovered the Mobile Set from Roky and seized it preparing a seizure list (Ext. 12) to that effect and they signed it as the witnesses thereto.

51. P.W. 23 Md. Abu Saleh Mallik is a 'Khademdar' of Majdair Graveyard in Narayangonj. According to this witness, after observing all funeral formalities including the Namaj-e-Janaja, the body was buried at Majdair Graveyard and a few days after burial the police and Magistrate along with some guardians of the deceased came there and in their presence it was exhumed and identified by relatives of the deceased and then it was taken to his village home in Noakhali. The defence has declined to cross-examine this witness. P.W.24 Md. Golam Mostafa is a Caretaker of Majdair Graveyard. He was tendered by the prosecution, but the defence declined to cross-examine him. P.W.26 S.I. Md. Fariduddin has verified names and addresses of all the accused persons and found them correct. The defence declined to cross-examine him.

52. Being the Investigating Officer, P.W.27 S.I. Md. Abu Hanif has visited the place of occurrence and recorded the statements of witnesses. He has prepared the Sketch-Map and Index of the places of occurrences. P.W.27 testifies that on the basis of the Ejahar accused Noor Alam and Rafique were arrested and on interrogation they have disclosed that on 05.06.2008 at 10.30 a.m. the victim Mamun was done to death by them at an open place of Bholanathpur under P.S Rupgonj of Narayangonj dealing repeated knife blows on his person

and left away the body there. He further testifies that accused Rafique and Noor Alam took Tk. 12,000/- and accused Kajol took away the Mobile Set away from the deceased as their dividends of participation in slaughtering the victim. P.W.27 claims that after arrest of all accused persons namely Rafique, Noor Alam and Kajol they have confessed their guilt making their respective statements under section 164 of the Code of Criminal Procedure.

53. According to the evidence of P.W.27, on 07.06.2008 the police of Rupgonj found the body of an unknown young person at an open place of Bholanathpur under P.S. Rupgonj and a Case having no. 20 dated 07.06.2008 was registered on the basis of which the inquest and autopsy were held and it was then buried at Majdair Graveyard in Narayangonj. P.W. 27 states that seeing a photograph of the dead body and its wearing clothes, relatives of the deceased have identified it and subsequently in view of the discloser made by accused Kajol, the Mobile Set of the deceased was recovered from some Rakib Hossain @ Roky preparing a seizure-list to that effect. P.W.27 testifies that on getting the permission from the Executive Magistrate the body of the deceased was exhumed from the Majdair Graveyard of Narayangonj.

54. According to this witness, on 28.06.2008 accused Noor Alam and on 29.06.2008 remaining 2 accused persons namely- Rafique and Kajol made their respective statements before the learned Metropolitan Magistrate under section 164 of the Code of Criminal Procedure. P.W.27 testifies that pursuant to accused Rafique's discloser the Pass Book containing the name of some 'Shishir' was recovered from the Roky Multipurpose Somabay Samity. He further testifies that the victim's father had land disputes with the accused party. P.W.27 claims that during investigation all incriminating materials were collected and finding a prima-facie case against the accused persons, he submitted the Charge Sheet bearing no. 573 dated 31.12.2008 against the accused persons under sections 364,302,307/411/34 of the Penal Code. He has identified all accused persons present in the dock.

55. During his cross-examination, P.W.27 has denied the defence suggestion that in Ejahar the age of the victim was shown as 18 yrs and in the Post Mortem Report it was shown as 28 yrs. He has denied the suggestion that confessional statements of the accused persons were recorded under duress and intimidation and they did not do that voluntarily. He claims that there are two places of the occurrence and he visited both of them but did not find any eye-witness of the alleged occurrence.

56. On the threshhold of his submission Mr. Md. Mansurul Haque Chowdhury, learned Advocate appearing for condemned-appellant Rafique contends that the prosecution has failed to produce any eye-witness of the alleged occurrence of killing the victim and that is why it was not legal for the Session Court to rely on the evidence, which was hearsay in nature. The learned Advocate further contends that the confessional statements of the condemned-appellants, as recorded, were neither true nor voluntary, whereas the learned Session Judge has recorded its impugned order of conviction awarding the sentence of death depending on those statements and thereby committed a gross error of law and fact occasioning failure of justice.

57. Mr. Chowdhury has submitted the fact that the alleged occurrence took place on 05.06.2008 and the informant lodged Ejahar (Ext.1) on 25.06.2008 without any explanation for the delay caused thereto. He has further submitted that on exhumation of the body of deceased it was not properly identified by relatives of the victim and the very motive, as

assigned for causing the death of the victim has not been substantiated by any trustworthy witness or document.

58. The learned Counsel has argued that since the prosecution has failed to unearth the root-cause of killing the victim by the condemned-appellants and since the matters relating to land disputes between the maternal grandfather of accused Rafique and the informant-party have not been proved, it would thus hardly be possible for the Court to believe in the alleged involvement of the condemned-appellants with the death of the victim.

59. Mr. Basharatul Mawla, learned Advocate for condemned-appellant Kajol contends that in a case of murder if the prosecution cannot examine any eye-witness and remains dependent on the circumstantial evidence, in that case specific motive of the assailant(s) is to be proved and that should commensurate with the alleged occurrence. Mr. Mawla further contends that in the instant case the prosecution has neither succeeded to prove the motive of accused Kajol nor linked the evidence with the chain of events on the basis of which accused Kajol could be connected with the alleged occurrence.

60. Mr. Mawla submits that accused Kajol did not make the confessional statement voluntarily and the same was recorded under duress and intimidation and that is why the impugned order of conviction against accused Kajol is liable to be set aside and a decision of acquittal needs be recorded for him.

61. Mrs. Hasna Begum, learned Panel Advocate for condemned-appellant Noor Alam contends that the confessional statements of the accused persons are not substantive pieces of evidence and they may be relied upon only when they are found inculpatory, true and voluntarily. Mrs. Hasna Begum further contends that accused Noor Alam did not make the statement voluntarily rather being threatened by the police under duress he had to make such a statement, which was not recorded fulfilling the requirements laid down in sections 164 and 364 of the Code of Criminal Procedure.

62. Mrs. Hasna Begum has further argued in line with the submission made by Mr. Mawla above that in the instant case, which is dependent on the circumstantial evidence, it becomes imperative to see whether the alleged occurrence is being proved by the prosecution so consistently that it excludes every other possible hypothesis except the guilt of the condemned-appellants.

63. In reply, Mr. Sheikh A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General has vehemently opposed the submissions advanced by the learned Advocates for the defence above and contended inter alia that the prosecution examined the concerned Metropolitan Magistrate as P.W.18, who recorded the confessional statements of the condemned-appellants under section 164 of the Code of Criminal Procedure and the defence has cross-examined him but failed to elicit any statement from him on the basis of which the Court can disbelieve or discard the confessional statements made by them.

64. The learned Deputy Attorney-General contends that in the Trial Court along with the confession recording Magistrate Sk. Md. Tofaiel Hossain (P.W. 18) other vital witnesses like P.W.3 Md. Rezaul, the Darwan, P.W.12 Md. Rubel Islam, from whom the knife was taken, and P.W.19 Dr. Prodip Kumar Das were examined, whose evidence was fully corroborative, impeccable and trustworthy. In such a situation, as contended by learned D.A.G, the learned Session Judge had no other alternative but to believe in the charge levelled against the

condemned-appellants under sections 302/34 of the Penal Code and in doing he has not committed any error of law or fact as alleged by the defence.

65. In order to visualize and sift the evidence and attending circumstances in their true perspective and discover the ring of truth relating to the alleged occurrence of death of the victim, it would be convenient and proper for us to consider the whole chain of events in the following 3 (three) phases:

firstly, whether on 03.06.2008 the victim went to the house of accused Rafique at Kureel Bishwaroad receiving a call from the latter and whether accused Rafique had any motive to call the victim or not;

secondly, whether the victim stayed at the house of Rafique at Kureel Bishwaroad till the morning of 05.06.2008 and whether during that period the accused persons took and completed the preparations for killing the victim or not; and

thirdly, whether on 05.06.2008 at around 10.30 a.m. the accused persons took the victim with them to the open place situated by the Esapura River at Bholanathpur and he was killed by them in furtherance of their common intention by dealing knife blows and causing cut throat injury and whether their confessional statements were inculpatory, true and voluntary or not.

66. Before entering into the phase-wise discussion, we may take note of the fact that the victim's father Abdus Sobhan (P.W. 1) had a greengrocery shop at Boardbazar under P.S. Joydebpur of Gazipur, where being the eldest son the victim used to help his father and on that matter there is no dispute between the parties. It is gathered that P.W.1's wife Kohinur Akhter Beauty (P.W. 4) and his other children used to reside at the village home under P.S. Sonaimuri of Noakhali and from time to time she (P.W. 4) maintained communication with her husband (P.W. 1) and the son (i.e. the victim) on mobile phone. It is not challenged by the defence that on 03.06.2008 at around 8 O'clock or 9 O'clock in the morning the victim set out for his village home in Noakhali taking taka 12,000.00 in cash, some mangoes, a Sony Ericson Mobile Phone and other articles with him.

67. According to the prosecution, the victim set out of his residence at Boardbazar for a journey to Noakhali and at that time received a mobile call from accused Rafique, who requested him to go to his residence at House no. Ka-109/4 of Kureel Bishwaroad owing to which changing his mind he (i.e. the victim) went there.

68. Firstly, we are to elucidate the evidence and attending circumstances in order to verify some vital questions like- did the victim receive any call from accused Rafique? And did the latter request the victim to go to his house at Kureel Bishwaroad? Another question is- what was the intention or motive of accused Rafique to take the victim to his house?

69. In the first phase of our discussion, we are to find out answers to those questions and that would, so far we understand, pave our way for determining the issues. The victim's father Abdus Sobhan (P.W.1) deposes in chief that on 03.06.2008 at around 8.00 or 9.00 a.m. the victim set out of his (P.W1.'s) residence at Boardbazar for the village home in Noakhali. In cross-examination, P.W.1 has echoed the said testimony saying that on 03.06.2008 his son Mamun started for the village home. P.W.1 discloses his relationship with accused Rafique stating:- "আসামী রফিক চাচাতো ভাইয়ের মেয়ের দিকের নাতি। আসামী নূরুল আলম আমার চাচাতো ভাইয়ের ছেলের দিকে i¡‰aS¡". It appears from the said testimony that both Rafique and Noor Alam are distantly

related with the victim and accused Rafique is his (victim's) nephew and accused Noor Alam is his cousin.

70. After getting out of the residence at Boardbazar, by which mobile accused Rafique called the victim and requested him to go to his house:- in this context no clear evidence is available on the record. So, we have to depend on the facts-as to whether the victim in place of proceeding towards his village home changing his mind went to the residence of accused Rafique or not. On that matter the evidence given by Md. Rezaul (P.W. 3) and the confessional statement of accused Rafique are the only available tools which can be used to verify the said fact.

71. P.W.3 was a Darwan of the house at Kureel Bishwaroad. He has deposed that in 5th floor of the building accused Rafique was staying with his father Borkatullah and in some part of the apartment accused Noor Alam used to stay as a sublettee. P.W.3 testifies that some relatives of Rafique from time to time used to visit his house and on 03.06.2008 Mamun also came to that house. P.W.3 has disclosed stating:-

"৩/৬/০৮ তারিখে মামুন রফিকদের বাসায় আসে। ৩/৬/০৮, ৪/৬/০৮/, 05/06/08 a¡‡lM l‡gL, el¦m Bmj J মামুনকে ঐ বাসায় দেখি। ৫/৬/০৮ তারিখ সকালে মামুন, নূরুল আলম ও রফিককে বাসা হইতে বাহির হইয়া যাইতে দেখি| *mv‡_ Acwi wPZ GKwU †Q‡j I wQj | c‡i ïwb †h, gvgby gviv hvq |*"

72. According to this witness on 03.06.2008 the victim came and stayed at the house of Rafique with other accused persons upto 05.06.2008. During his cross-examination P.W.3 says:- "মামুনকে আমি চিনিতাম না চেহারায় মামুনকে ‡Qea¡jz e¡j S¡ea¡j e¡zÕÕ

73. Above testimony of P.W.3 i.e. the Darwan of the building has clearly unfolded the fact that the victim was known to him by his appearance, but he (P.W.3) did not know detailed antecedents of him. In other words, it can be said that by face and appearance Mamun was known to the Darwan i.e. P.W.3, who on 03.06.2008 recognized him and witnessed his arrival at the house of Rafique. By cross-examining P.W.3 nothing has been elicited from him to discard his evidence on that matter.

74. On the other hand, in his statement under section 164 of the Code of Criminal Procedure accused Rafique has stated the following:

"মামুন আমার চাচাতো মামা। আমার মামা নানাদের সঙ্গে মামুনদের জা*q*গা জমি নিয়ে ঝগড়া ছিল। আমার মামা জাহাঙ্গীর এসে আমাকে বলে মামুনদের সাথে আমাদের ঝগড়া। তুই কেন মামুনের সাথে চলিস। মামুনের ঠ্যাং হাড় ভেঙ্গে দিতে পারিস না। আমার মামা (জাহাঙ্গীর) পরে সৌদি আরব চলে গেছে। নূর আলম ও আমার মামা লাগে। নূর আলম বলে ওকে মারতে হলে out side এ নিয়ে যেতে হবে। মামুন আমার সাথে একসাথে বাড়ি যাওয়া আসা করত। আমার/ hål ja চলাফেরা করতাম। আমি গত ৩/৬/০৮ ইং তারিখ মোবাইল করে আমার বাড়ী নিয়ে আসি। নূর আলম মামুনকে দেখে বলে আমার মায়ের সাথে ও মামুনদের ঝগড়া লেগেছে। শালাকে মার ঠিকই দিব। *bv‡* আলম আমাকে বলে যে*L*ান থেকে পারp HLV¡ Q‡Ÿ ‡eu¡ Bp‡hz B‡j ‡S ' ¡p *Kwi* ®R¡ I v দিয়ে কি হবে? *bv‡* আলম বলল সময় হলেই দেখবি কি করি।"

75. Mr. Sk. A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General has drawn our attention to the tone and tenor of the said part of confessional statement made by accused Rafique and submitted that as a part of his attempt and plan for taking revenge against the victim's family because of some land disputes accused Rafique called the victim on 03.06.2008 to his residence at Kureel Bishwaroad. Learned Deputy Attorney-General has claimed that the statement of accused Rafique was completely true and voluntarily.

76. On perusal of the above statement of accused Rafique, it becomes clear like anything that because of land disputes between the victim's father and Rafique's maternal-uncle's family at a certain point of time on 03.06.2008 accused Rafique had made up his mind to assault Mamun and that plan has subsequently culminated and developed into a devastating blood thirst when accused Noor Alam opened his mind making a reference to the quarrel between his mother and the victim's family. In his confessional statement Rafique has referred to the following utterances of accused Noor Alam:- "*Avgvi gv‡qi mv‡_ I gvgbœ‡`i SMov †j‡M‡Q| kvjv‡K wVKB gvi w`e|*ÕÕ It is noted that even during his examination under section 342 of the Code of Criminal Procedure accused Noor Alam, in reply to question no. 2 made by the Court has stated the following:-

ÔÔ*2| Avcwb †Kvb wKQyewj‡eb wK?*

*Dt nüu, ewje| gvgbœ I Avgvi dzv‡Zv fvB BKevj Avgvi †QvU‡evb †Rvrm¾v‡K Agvbwl K fv‡e wbhvZb K‡i| Zvnv wbqv †`‡k wePvi nq| Avgiv b¨vh¨ wePvi cvB bvB|*ÕÕ

77. Taking those disputes and other quarrels into their account accused Rafique and Noor Alam, as it reveals, ultimately decided not to allow the victim to go by, rather to kill him implementing their brutal plan and design. It appears that on 03.06.2008 Rafique called the victim to his house at Kureel Bishwaroad and seeing the victim there accused Noor Alam took his final decision to finish him off and accordingly ordered Rafique to collect a knife, who complied with that order collecting a knife from some Rubel (i.e. P.W.12).

78. It is proved by the evidence of P.W.1 that on 03.06.2008 in the morning the victim set out of the residence at Boardbazar for the village home in Noakhali. As the prosecution cannot produce any ocular evidence to spell out the exact fact regarding at what time and by which mobile Rafique called the victim to his residence at Kureel Bishwaroad, it becomes imperative for us to examine the facts and attending circumstances along with the confessional statement made by accused Rafique in that score. The Darwan of the house i.e. P.W.3 has sharply corroborated the fact that Mamun arrived at the residence of Rafique in the morning of 03.06.2008. Now by juxtaposing the evidence given by the P.Ws. 1 & 3 with the confessional statement of accused Rafique, it transpires that the victim was a relative i.e. 'Mama' of accused Rafique and all along they were friendly to each other and of the same age group and that was why the victim did not hesitate to respond and decided to meet Rafique at his house at Kureel Bishwaroad.

79. Now the question is- what was the motive of accused Rafique to call the victim to his residence? On this question our opinion is that accused Rafique and Noor Alam had some latent vengeance and enmity against the victim and his family for reasons stated by Rafique in the aforesaid part of confessional statement and in the evidence of P.W.1 and that is why accused Rafique needed the victim like a prey to cater to his revengeful motive. So immediately after arrival of the victim at his residence both Rafique and Noor Alam started all out preparations for implementing their plan of killing him and with that the first phase of the occurrence came to an end.

80. We may now turn our approach to the second phase of the occurrence and ascertain:- whether the victim stayed at House no. Ka-109/4, Kureel Bishwaroad and left that house on 05.06.2008 in the morning or not. On those facts except the evidence of P.W.3 and the confessional statement of the accused persons we have no other material on record. But there are some evidence of P.W.1 and P.W.4, who claimed that during the period from 03.06.2008 to 05.06.2008 they from time to time talked on mobile phone to accused Rafique and Noor Alam and sometimes to the father of Rafique.

81. P.W.1 Abdus Sobhan has claimed that his wife P.W.4 Kohinur Akhter Beauty informed him that their son Mamun was staying at the house of Rafique. In this context P.W.4 has deposed the following:-

৩/৬/২০০৮ তারিখ দুপুরে মামুন প্রথমে আমাকে ফোন দেয়। ৩/৬/০৮ তারিখ রাত্রে মামুন, রফিক, নূরুল আলম একত্রে আমার সাথে কথা বলে এবং ৪/৬/০৮ তারিখ বাড়ীতে আসার কথা জানায়। ৪/৬/০৮ তারিখ মামুন, রফিক, bvIm Bmj HLত্রে সবার সাথে আসার কথা বলে এবং পরদিন বাড়ীতে আসিবে বলিয়া তাহারা জানায়। ৪/৬/০৮ তারিখ রাত্রে আমি মামুন, রফিকের মোবাইলে ফোন দিয়া তাহা বন্ধ পাই। রাত্রে রফিকের নানীর নিকট হইতে রফিকের পিতা বরকত উল্লার ফোন নম্বর নেই। ফোন করিয়া বরকত উল্লাহকে রফিকের কথা জিজ্ঞাসা করিলে সে বলে রফিক নীচে আছে এবং তাহারা ৫/৬/০৮ তারিখ বাড়ী আসিবে বলিয়া জানায়। ৫/৬/০৮ তারিখ সকালে আবার মামুন ও রফিকের ফোন দিয়া ফোন বন্ধ পাই hIকত উল্লাকে ফোন দিলে সে জানায় যে, রফিক ঘুমাইতেছে। মামুন বাড়ী না আসায় আমি তাহা আমার মামা নুরুল হককে Sje¡Cz

82. On analysis of the above testimony of P.W.4 and the evidence given by P.W.3, it becomes abundantly clear that since his arrival at the house of Rafique the victim had been staying there till the morning of 05.06.2008 with other accused persons. P.W.3 (i.e. the Darwan of the house) has stated:- "৫/৬/০৮ তারিখ সকালে মামুন, নূরুল আলম ও রফিককে বাসা হইতে বাহির হইয়া যাইতে দেখিz *mv‡_ AcwiwPZ GKwU †Q‡j I wQj | c‡i ïwb †h, gvgbv gviv hvq*".

83. Above corroborative evidence of P.W.3 and other attending circumstances have made us to believe in the fact that the victim Mamun had not only came to the house of Rafique but also stayed there till the morning of 05.06.2008 with accused Rafique, Noor Alam and another boy i.e. Kajol. On perusal of the evidence, it is observed that during that period accused Rafique and Noor Alam have masterly proceeded with their dreadful preparations keeping the victim in their custody like a prey and distracting his attention thereto. Unfortunately the victim, as it appears, has failed to understand the plan and design taken and their progress of which he (victim) was going to be the target.

84. Accused Rafique has made a clean breast of his complicity in taking preparation of causing the death of the victim stating the following in his confessional statement:-

ÔÔbi- Avjg Avgv‡K e‡j †hLvb †_‡K cvim GKUv Qyi wb‡q Avmwe | ..... c‡i Awg i‡e‡j i wbKU †_‡K Qyiv wb‡q Awm | i‡ej e‡j GUv gvgvi Qyi | †m Dnv w`qv Mi‡ KvUvKwU K‡i | mZ¨ivs Qyiv wU †dir w`‡q hv‡eb | el আলম ছুরিটি দেখে নীচে থেকে ধার দিয়ে নিয়ে আনে। অতঃপর গত ৪/৬/০৮ Bs তারিখ সকাল ১০ টার দিকে আমি মামুন আর নুর আলম ইছাপুরা যাই। ঐখানে ঐ দিন যেয়ে খেজুরের রস খেয়ে ঘুরে ঘুরে সমস্ত জায়গা আমরা দেখি নুর আলমের নেতৃত্বে। পরে আমরা বাসায় চলে আসি। নুর আলম ঐ দিন ফিরে বাসায় আমাকে বলে আজ পারলাম না। আগামী কাল তুই dI‡h B‡j j¡Ihz B‡j AÜ‡L¡I LRi। নুর আলম পরে বলে তুই না পারলে অন্য একটি ছেলেকে নিয়ে *Avq †h gvi‡Z cvi‡e | AZci bi- Avjg KvRj‡K †W‡K wb‡q Awm‡Z ej‡j* আমি কাজলকে ডেকে নিয়ে আসি।ÔÔ

85. On the said matter accused Noor Alam has also made a clean breast of his active involvement and disclosed the following in his confessional statements under section 164 of the Code of Criminal Procedure:

ÔÔewo bs- 109/4, KvRxewo, wek‡ivW, evÇv, XvKv | gvgbv g½jev‡i G‡m H ewo _v‡K | g½jevi I ewevi | ep¯úwZevi KvRj bvgK GKwU †Q‡j‡K iwdK wb‡q Gm‡Q | AZtci KvRj, gvgbv I iwdK BQvcyi D‡Ï‡k¨ i I bv nq |...AZtci Awg, gvgbv, KvRj I iwdK BQvcy †h‡q b`x cvi n‡q †fvjviv bvgK hvqMvq †cŠQvB | c‡i A‡bK `y tntU Kj vMvQ, QbMv‡Qi mv‡_ evjyj gv‡V Avgiv †h‡q ewm | iwdK Avgv‡`i Avi I e‡j H RvqMvq †h‡q †g‡i †dj‡j †KD Rvb‡e bv |ÔÔ

86. Accused Kajol in his statement under section 164 of the Code of Criminal Procedure has stated the following:

"MZ 04/06/2008Bs ZwiL iwdK Avgvi Kv‡Q G‡m e‡j ZvB wK GKUv †Q‡j †K gvi‡Z w`‡Z cvi‡e| Awg wRÁvmv Kijvg wK iKg †Q‡j| iwdK ejj ‡Zvi mgvbB ïayj¤^q GKUy‡QvU| ...ZLb Awg ejjvg wVK Av‡Q| iwdK P‡j †h‡q Avevi Avav N›Uv c‡i Av‡m Ges e‡j I‡K gvi‡Z n‡e bv G‡Kev‡i †g‡i †dj‡Z n‡e| ZLb Awg ewj, ÔÔcvie bv|ÕÕ AZtci bv÷ Avjg Avgvi Kv‡Q Av‡m| †m Avgv‡K wRÁvmv K‡i †h, ZvB cvi‡e bv? Awg wRÁvmv Kijvg wK? †m e‡j iwdK †Zv‡K GKUv †Q‡j‡K †g‡i †djvi K_v e‡jwb? Awg A¯xKvi Kwi †h, Awg Ki‡Z cvie bv| †m e‡j AvR‡K iwd‡Ki ewo‡Z Zvnvi Av¤^v bvB| ZvB AvR iwd‡Ki ewo‡Z Avq GKmv‡_ _vKe| Awg ejjvg `vovI evmv t_‡K e‡j Awm| c‡i iwdK‡`i evmvq †Mjvg Ges _vKjvg, Ngvjvg| mKvj 5 Uvi mgq mevB Ngy ‡_‡K DVjvg Ges wek‡iv‡oi gv_vq GKwU †nv‡U‡j bv¯v Ki‡Z hvB Awg, bv÷ Avjg, gvgby I iwdK| bv¯v Kivi mgq iwdK e‡j BQvcyw b`xi c‡i †fvjv bv_cy Mv‡g Avgvi GK eÜy bvbvi ewo| †m bvbvi ewo‡ZB Av‡Q Ges Zvi Kv‡Q Awg UvKv cve| iwdK gvgby‡K e‡j, I i KvQ t_‡K UvKv ¸‡jv cvB‡j Awg †Zvi mv‡_ t`‡ki ewo †h‡Z cvie|ÕÕ

87. It appears from the statements of accused Rafique, Noor Alam and Kajol that they not only made the plan to kill the victim Mamun rather took all preparation so carefully that it could be executed without fail. The confessional statement of Rafique has received a strong support and corroboration from the testimony of P.W. 12 Md. Rubel Islam, who disclosed the fact that accused Rafique, Kajol and Noor Alam were his playmates and from him (P.W.12) accused Rafique collected the knife that belonged to his "Choto Mama" which was used for slaughtering the sacrificing beasts. Accused Rafique, as stated by P.W.2, did not return the knife and afterwards he (P.W.12) came to know that the accused persons killed Mamun with that knife. During his examination, P.W.12 has identified all accused persons present in the dock. In his cross-examination, P.W.12 has denied the defence suggestion that accused Rafique did not take any knife from him.

88. On appraisal of the evidence given by P.W.12 and the confessional statements of the accused persons, it transpires that during the period from 03.06.2008 to 05.06.2008 the accused persons not only kept the victim at the house of Rafique moreover they carried out all preparations including collection of the knife and recruitment of another assailant namely Kajol for murdering the victim in line with their plan.

89. Mr. Sheikh A.K.M Moniruzzaman Kabir, learned Deputy Attorney-General has drawn our attention to the degree of culpability and craftsmanship adopted by the accused persons in orchestrating the plan to finish the victim off the earth. It is noted that after collecting the knife accused Rafique and Noor Alam a day before the date of occurrence i.e. on 04.06.2008 took Mamun with them to that area by the Esapura River at Bholanathpur village and on that date after spending the whole day there, they returned because of lack of their confidence to overpower the victim and that was why decided to take another assailant namely Kajol with them to make sure the execution of their plan. It is thus evident that with those activities the accused persons completed their arrangements and preparation for killing the victim and thereby concluded the second phase of the alleged occurrence.

90. Now we are to proceed and examine the last episode i.e. the third phase of the occurrence and see as to whether the victim Mamun was taken to and allegedly done to death by the accused persons intentionally at the open place of Bholanathpur on 05.06.2008 at around 10.30 a.m in furtherhence of their common intention or not.

91. Regarding the alleged occurrence of causing death of the victim, the prosecution has not produced any eye-witness or ocular evidence. So, as usual we have to sift the materials on record and the evidence led in that score to try out the truth of the alleged death of the victim. In this regard, the prosecution has to connect the accused persons with the chain of events so

coherently that it must exclude every other possible hypothesis except the one indicating the guilt of the accused persons.

92. P.W.3 i.e. the Darwan or of House no. Ka-109/4 of Kureel Bishwaroad has deposed in clear terms that on 05.06.2008 in the morning he (P.W.3) saw Mamun with accused Rafique and Noor Alam and an unknown boy (i.e. Kajol) coming out of that house. On that day (i.e. on 05.06.2008) the victim's mother Kohinur Akhter Beauty (P.W.4) could not contact Mamun or Rafique and at that time their mobile phones remained switched off.

93. It is noted that before apprehension of the accused persons on 25.06.2008 in connection with Badda P.S. case no. 53 dated 25.06.2008 under section 365 of the Penal Code the victim's father had no idea about the cause of disappearance of his son. On 25.06.2008 and 26.06.2008 the police arrested all accused persons, who admitted their involvement in killing the victim at Bholanathpur on 05.06.2008. On the basis of such disclosure the Investigating Officer S.I. Md. Abu Hanif (P.W. 27) went to the place of occurrence and tried to recover "alamats" of the occurrence.

94. Being flanked with relatives of the victim, P.W.27 went to the Police Station of Rupgonj and came to know about recovery of the dead body of an unknown young boy on 07.06.2008 from an open place of Bholanathpur and in this respect a case bearing no. 20 dated 07.06.2008 was lodged with the Rupgonj Police Station. P.W.27 also got the information that the body had been buried at the Majdair Graveyard and a photograph of the dead body and its wearing clothes had been laying with the Rupgonj Police Station. According to the I.O. i.e. the P.W.27, seeing the photo and wearing clothes of the deceased his relatives identified the body. P.W.27 claims that on getting permission from the Executive Magistrate P.W.17 Zenat Rehana the body was exhumed, identified and finally handed over to the deceased's relatives for its burial at their village home.

95. During his cross-examination P.W.27 has asserted that in presence of the witnesses the corpse had been disinterred and after identification it was handed over to the deceased's 'Nana' namely Nurul Haque (P.W.2). Above evidence of P.W.27 has received clear corroboration from the testimony of P.W.2 who stated:- *"Avgiv Qwe I Kvco †Pvci ‡`wLqv jvk mbv³ Kwi| Av`vj‡Z `iLv‡¯i gva¨‡g gvR`vBi Kei¯vb n‡Z gvgybi jvk D×vi Kiv nq| jvk Avgiv †`‡k wb‡q `vdb Kwi|* The evidence of P.W.2 has been also corroborated by P.W.17 Zenat Rehana, who in her cross-examination has expressed that:- *"jvk D‡Ëvj‡bi mgq Gm,AvB nwbd, g‡Zi AvZxq-¯Rb I Ab¨vb¨iv Dcw¯Z wQ‡jb| jvk Awg †`wLqwQ| jvk n¯vši Kwiqw Q|..... g‡Zi AvZxq-¯Rbiv jvk mbv³ Kwiqv‡Q| wfKwU‡gi bvbv bÿ¨j n‡Ki wbKU jvk n¯vši Kwiqw Q|"*

96. It is patent that the body of the deceased was correctly identified by his kith and kin including P.W.1&2s in presence of the official witnesses like the Investigating Officer P.W.27 and the Magistrate P.W.17. We do not get any explanation from the defence as to why they did not challenge the fact of identification of the corpse at best by putting a suggestion to the witnesses in that score. In the sequel of which, the evidence led by the prosecution on the facts of identification and handing over the body of the victim have remained unassailed.

97. P.W.14 Masud Hasan deposes that on 07.06.2008 in his presence the police held autopsy on the body of the deceased and at that time it was found with a Check Shirt and a Jeans Pant. In cross-examination, P.W.14 claims that he signed a white paper seeing the corpse of the deceased. According to P.W.16 Constable Md. Serajul Islam, on 07.06.2008 a

Police Officer of Rupgonj namely S.I. Selim Reza found the unknown dead body having a liver colour Check Shirt and a black Jeans Pant. During deposition P.W.16 has identified one piece of the Check Shirt and another piece of Jeans Pant collected from the corpse and got them marked as "Material Ext. III and IV".

98. According to the evidence given by P.W.23 "Khademdar" of the Majdair Graveyard, on 08.06.2008 getting a body of deceased from the Anjuman-e-Mofidul Islam, it was buried after performing funerals including Namaz-e-Zanaja and after a few days the Police, the Magistrate and the deceased's 'Nana' and others came at the Graveyard, in whose presence the corpse was exhumed and identified. At that time, as claimed by P.W.23, relatives of the deceased has disclosed name of the deceased as Mamun and took the corpse away with them for Noakhali. Surprisingly, the defence has not shown any interest or celerity to challenge the above testimony of P.W.23 putting him on fire of cross-examination for the cause best known to it.

99. Applying the rules of prudence upon the anvil of the evidence given by the witnesses above and other materials on records, we find the strong reason to believe in the fact that the dead body recovered by the police of Rupgonj P.S. on 07.06.2008 from the open place of Bholanathpur situated by the Esapura River belonged to the victim Mamun and subsequently it was identified by P.Ws. 1, 2 and other relatives of the victim in presence of the witnesses like P.Ws. 14-17, 23 and 27. During cross-examination of those witnesses nothing has been elicited from them on the basis of which the Trial Court may disbelieve the prosecution story of identification of the corpse and its exhumation from the Graveyard.

100. In this context, Mr. Md. Mansurul Haque Chowdhury, the learned Advocate representing the condemned-prisoner Rafique and Mr. Basharatul Mowla, learned Advocate representing the condemned-prisoner Kajol have argued on the same string that the prosecution's failure to examine the Sub Inspector Selim Reza of Rupgonj Police Station and produce the photograph of the dead body has cast a doubt on the matter of identification of the corpse and in such a situation, it would not be wise for this Court to endorse a decision of conviction like the death sentence as awarded by the learned Session Judge.

101. In reply, Mr. Sk. A.K.M. Moniruzzaman Kabir, the learned Deputy Attorney-General has vehemently opposed and contended that such omissions and failure on the part of the prosecution are not so serious or substantive and they may at best be taken as omissions of minor nature. Learned D.A.G has further contended that the fact of identification of the wearing clothes and the corpse after its exhumation by relatives of the deceased has already been proved beyond all reasonable doubt, so on the plea of some minor omissions no prudent Court can let off accused persons, who in clear terms confessed their guilt making statements under section 164 of Code of Criminal Procedure.

102. We have given our anxious consideration to the submission advanced by the learned Advocates above and the evidence available on the record and found it difficult to disbelieve the fact of identification of the body of the victim and its subsequent exhumation from the Majdair Graveyard. It is true that the prosecution could further fortify its claim of identification of the body by exhibiting the photograph of the dead body and examining the concerned Police Officer of Rupgonj P.S. as a witness. But such minor omissions, so far we understand, by themselves can in no way mop up the very credibility of identification of the corpse and its exhumation from the Majdair Graveyard. The evidence of the witnesses namely P.Ws. 1, 2, 14, 15, 16, 17, 23 and 24 and the medical evidence given by P.W.19, 20

& 25 are found so corroborative and consistently interwoven that they do not inspire us to disbelieve the prosecution story of identification of the body of the victim. So, we are inclined to put our reliance upon the fact that the dead body recovered by the Police of Rupgonj on 07.06.2008 belonged to the victim and it was rightly identified by the relatives of the deceased.

103. We are to now consider the questions as to:- who and how did take the victim Mamun to the open place of Bholanathpur situated by the Esapur River under P.S Rupgonj and kill him there? Facts of last seen together by the Darwan (P.W.3) of the house at Kureel Bishwaroad and recovery of the body of the victim from the open place at Bholanathpur would definitely guide us to arrive at an unerring decision on the above matter. It is noted that the only eye-witness P.W.3 had last seen the accused persons with the victim alive in the morning of 05.06.2008 and at that time they were coming out of accused Rafique's residence at the 5th floor of building at house no. Ka-109/4 of Kureel Bishwaroad. After their departure from that house, how and when the accused persons with the victim reached at the open place of Bholanathpur- in this context, there is no eye-witness or direct evidence and that is why the learned Court below has to draw its inference relying on the attending circumstances and other paraphernalia including the materials like the confessional statements of the accused persons.

104. Let us now reproduce in verbatim the relevant part of the confessional statements made by 3 condemned-appellants. In his statement under section 164 of Code of Criminal Procedure accused Rafique stated: "পরের দিন সকাল ৬.৩০ wgwb‡Ui দিকে আমার বাবা মামুনকে গাড়ীতে উঠায়ে দিয়ে আসতে বলে। অতঃপর আব্বু পত্রিকা দিতে চলে যায়। পরে আমরা একত্রে নাস্তা করি। নুল আলম বলে আমাকে মামুনকে বলবি আমি এক বন্ধুর কাছে টাকা পাই, চল ইছাপুরা যাই। অতঃপর আমরা সবাই ইছাপুরা নদীপার হয়ে রুপগঞ্জ থানার ভোলানাথপুর যাই। পরে মামুন এক দিকে দাড়িয়ে মোবাইলে কথা বলছিল। নুর আলম আমাকে বলে তুই ঐ দিকে দাড়িয়ে দেখ কেউ আসে নাকি। অতঃপর প্রথম নুর আলম মামুনের চোখ পিছন থেকে ধরে মাটিতে শুয়াইয়া ফেলে এবং কাজলকে ছুরি চালাইতে বলে। কাজল ১টি পার (আঘাত) পেটে ছুরি দিলে করে। ঐ টি বেশি না লাগার কারণে I Blম কাজলের কাছ থেকে Qvjvi Uv wb‡q †bq Ges gvgyby‡bi e¨vKi Dci e‡m Qvjvi gvgyby‡bi Mjvq †cvUvB‡Z _v‡K| c‡i gvgby gviv hvq|"

105. Accused Noor Alam expressed the following under section 164 of Code of Criminal Procedure: ÔÔAZtci Awg, gvgby, KvRj I iwdK BQvcyi †h‡q b`x cvi n‡q †fvjvivg bvgK hvqMvq †cŠQvB| c‡i A‡bK `y† ntU Kjv MvQ, Qb Mv‡Qi mv‡_ evjyi gv‡V Avgiv †h‡q ewm| iwdK Avgv‡`i Avi I e‡j H RvqMvq †h‡q †g‡i †dj‡j †KD Rvb‡e bv| ‡mLv‡b †h‡q e‡m Avgiv †ek mgq Mí K‡iwQ| Zvici iwdK Avgv‡K Bkvivi †`q gvgby‡K a‡i †djvi Rb¨| ZLb Awg gvby‡K wcQb‡gvov (`B nvZ wcQ‡b) w`‡q awi| AZtci KvRj PvKzb‡q gvgyby‡bi †c‡U AvavZ K‡i| c‡i Awg gvgby‡K †Q‡o w`B Ges KvR‡ji †_‡K Awg PvKzb‡q gvgyby‡bi †c‡U 3Uv AvNvZ Kwi| AZtci KvRj Avgvi †_‡K PvKzb‡q †bq| c‡i Awg gvgby‡K †kvqvBqv †dwj| AZtci KvRj gvgyby‡bi Mjvq †cvB gvi‡j Mjv †K‡U hvq Ges gvgby wb_i n‡q c‡o|ÕÕ

106. In his statement under section 164 of the Code of Criminal Procedure, accused Kajol disclosed:

ÔÔmKvj 5 Uvi mgq mevB Ngy‡_‡K DVjvg Ges wek‡iv‡oi gv_vq GKwU †nv‡U‡j bv¯v Ki‡Z hvB Awg, bi-Avjg, gvgby I iwdK| bv¯v Kivi mgq iwdK e‡j ÔÔBQvcyw b`x c‡i †fvjv bv_cyi Mv‡g Avgvi GK e×y bvbvi ewo| †m bvbvi ewo‡ZB Av‡Q Ges Zvi Kv‡Q Awg UvKv cveÕÕ| iwdK gvgby‡K e‡j, I i KvQ †_‡K UvKv ¸‡jv cvB‡j Awg †Zvi mv‡_ †`‡ki ewo †h‡Z cvie| ZLb gvgby e‡j, ÔÔPj Zvn‡j GKmv‡Z hvB, UvKv DVvBqv †`‡ki ewo P‡j hveÕÕ| Awg ejjvg ÔÔAwg evmvq P‡j hvBÕÕ| wKš gvgby e‡j Avc‡bI Avgvi m‡½ Av‡mb| AZtci wek‡ivW †Z‡K 10 b¤i ev‡m D‡V ¶xj‡¶Z bwg Ges I fvievR w`‡q iv¯vi Gcv‡i G‡m †QvU g¨w· †Z K‡i BQvcyw hvB|..... †mLv‡b dwKv RvqMv, gv‡S gv‡S Qb Mv‡Qi †Svc †jvKRb bvB, wKbv‡i Kjvmv‡Qi evmvb| H Lv‡b iwdK Avgv‡`i emvq| AZtci mKvj 9 Uvi w`‡K bi-Avjg Avgvi Kv‡Q Av‡m es e‡j gvgby‡K wKš Awg

†g‡i †divi Rb¨ G‡bwQ| ..... bv‡Avjg e‡j ZvB ïaygAvgv‡K GKwU help *Kiwe| Gi g‡a¨ iwdK G‡m ejj Ii (Avgvi) Mv‡q kw³ bvB, I ai‡j Qy‡U hv‡e| c‡i bv‡Avjg e‡j Awg aie ZvB (KvRj) GKUv cvo (QvjvKvnZ) w`we| AZtci Awg Av‡k cv‡k ZvKvB| bv‡Avjg gvgyby‡bi 1 nvZ w`‡q †PvL I Ab¨ nvZ w`‡q gyLv †P‡c a‡i Ges wPrKvi w`‡q e‡j cvo †` cvo †`| AZtci Awg cvo w`B| cvo (QvjvKvnZ) †e‡ëi eK‡j‡Q jv‡M, c‡i gvgby Qvjvi a‡i †d‡j| Awg Uvb w`‡q Qvjvi QvVv‡j gvgyby‡bi nvZ †K‡U hvq| c‡i bv‡Avjg e‡j Avgvi Kv‡Q †`| c‡i bv‡Avjg Wvb nvZ w`‡q gvgyby‡bi Mjv †cwP‡q a‡i evg nvZ w`‡q Qvjvi †c‡Ui wfZi Xvjv‡q| ZLb gvgby bov Pov Ki‡Z _v‡K wKš bovPov Kiv chš bv‡Avjg gvgyby‡bi Mjv †cwP‡q iv‡L| c‡i gvgyby‡bi bovPov eÜ n‡j Zviv gvgby‡K qvBqv bv‡Avjg gvgyby‡bi ey‡Ki Dci D‡V e‡m Ges Mjvi wfZi †cvP gv‡i| ZLb gvgby ejwQj gymZvB Avgv‡K gwim bv Avgvi †gvevBj UvKv cqmv wbqv †b| bv‡Avjg Avgv‡K e‡j Dc‡ii w`‡K PvBqv _vK|ÎÎ*

107. It appears that all confessing accused persons have replied to the questions put to them by the recording Magistrate understanding their meanings and significance and the Magistrate (P.W.18) has recorded their answers and statements in accordance with the provisions laid down in sections 164/364 of the Code of Criminal Procedure. The confessional statement of accused Noor Alam was recovered on 28.06.2008 and accused Rafique and Kajol on 29.06.2008. After recording their statements, as deposed by P.W.18, the contents were read over and explained to them, who signed admitting them as correct. P.W. 18 has certified all those confessional statements in the following manner:-

"Avmvgx‡K fvebv wPšv Kivi Rb¨ 3(wZb) N›Uv mgq †`Iqv n‡q‡Q| Avmvgx †¯"Qvq ¯Áv‡b, ¯ZùZfv‡e Revbe›`x c`vb K‡i‡Q ewjqv g‡b nq| Avmvgx †Kvb cKvi fq, c‡jvfb, fwZi †cw¶‡Z Revbe›`x c`vb K‡ib bvB Ges mZ¨ e³e¨ c`vb Kwiqv‡Q ewjqv g‡b nq|"

108. It transpires that the learned Magistrate has complied with all legal requirements in recording the confessional statements of accused persons and finally made a memorandum at the foot of them. Learned Magistrate (P.W.18) in his examination in chief has stated:- *ÎÎAvmvgx †¯"Qvq Revbe›`x c`v‡bi m¤ú‡Z nIqvq Awg Zvnvi ¯xKv‡iw³gq‡K Revbe›`x †iKW Kwi| Revbe›`x †iKWKv‡j Awg I Avmvgx Qvov K‡¶ Ab¨ †Kn wQj bv|ÎÎ*

109. In cross-examination, P.W.18 has stated that he did not find any sign of torture on the body of accused Noor Alam. He has denied the defence suggestion that the confessional statement was recorded under duress or intimidation.

110. On analysis of the evidence given by P.W.18 and other attending circumstances, it becomes evident that the confessional statements of the condemned-appellants namely- Rafique, Noor Alam, and Kajol were inculpatory and voluntary. In their respective statements under section 164 of Code of Criminal Procedure the statement makers have chronologically narrated all the events connecting themselves thereto and stated as to how they started from the house of accused Rafique and moved to the 2nd place of occurrence i.e. Bholanathpur under P.S. Rupgonj with the victim Mamun and the manner of killing him.

111. Being requested by the learned Deputy Attorney-General, we have gone through the reply given by accused persons during their examination under section 342 of the Code of Criminal Procedure. Accused Noor Alam, as it appears, has made a statement before the Trial Court disclosing the reason as to why he made up his mind to finish off the victim. In his statement accused Noor Alam said the following:

"gvgby I Avgvi dzv‡Zv fvB BKevj Avgvi †QvU †evb †Rvrv‡K AgvbwmK fv‡e wbhvZb K‡i| Zvnv wbqv †`‡k wePvi nq| Avgiv b¨vh¨ wePvi cvB bvB| Awg XvKvq iwdK‡`i evmvq _wK| NUbvi 5/6 gvm c‡i gvgby‡K iwdK‡`i evmvq cvB| gvgby wK Rb¨ Awmqv‡Q wRÁvmv Kwi‡j iwdK e‡j †h, gvgby Zvnvi mwnZ GK‡Î †`‡k

hvB‡e| GB K_v ïwbqv Awg wb‡P hvB| bx‡P wMqv Avgvi cwiwPZ i‡ej bv‡g GK †Q‡ji mv‡Z K_v ewj| ZLb Zvnvi Kv‡Q GKwU PvKzPvB †m Avgv‡K GKwU PvKz`q| PvKzbqv Awmqv KvR‡ji ms‡M K_v ewj Ges Zvnv‡K RvbvB †h, GKwU †Q‡j‡K gwi‡Z nB‡e| †m Zvnv‡Z ivRx nq| KvR j‡K ZLb mv‡_ Kwiqv evmvq wbqv Awm"|

112. It is true that in course of making the statement under section 164 of Code of Criminal Procedure, accused Noor Alam did not disclose the above reason of his anger or enmity against the victim. During the cross-examination of the prosecution witnesses, the defence has tried to make out a case of land dispute. In any view of the matter, it seems to us that because of inhuman torture, as alleged, on his sister Jutsna a sense of retaliation developed in the mind of Noor Alam, who finally participated in the plan and completed the preparation with his cohorts namely Rafique and Kajol to kill the victim. When the Trial Court, as noted from the examination under section 342 of Code of Criminal Procedure, has drawn the attention of accused Noor Alam to his statement made under section 164 of the Code of Criminal Procedure putting a question to him, at that time Noor Alam responded stating the following in clear terms:- *"Awg ¯wKv‡iv ³g‡jK Revbe›`x c`vb Kwiqv wQ|*ÓÓ

113. Condemned-appellant Rafique gave his confessional statement under section 164 of Code of Criminal Procedure on 29.06.2008. During his examination under section 342 of Code of Criminal Procedure learned Judge of the Trial Court also drew his attention to the confessional statement. For argument's sake, if we believe in the defence claim that the condemned-appellant Rafique did not make any confessional statement, the question arises is- then why in the Trial Court filing an application dated 29.06.2010 Rafique tried to retract his confessional statement, which is noted from the Trial Court's order no. 41 dated 07.06.2010. The confessional statement of Rafique was recorded on 29.06.2008 and the effort for retraction was made on 07.06.2010 that is after around 2 yrs.

114. Mr. Kabir, learned Deputy Attorney-General has contended that such a belated petition for retraction of the confessional statement and taking of some fancy pretences at different times in different manners merely to let off the accused from the liability of a heinous offence like murder cannot legally be considered or accepted. We find strong force in the contention of the learned D.A.G. It is observed that the statement made by accused Rafique was inculpatory, true and voluntary and after conclusion of all prosecution evidence, when he realized that it would be difficult for him to side track his culpability for the alleged murder of Mamun, he then started manouvring different tactics changing his stands- sometimes speaking that he did not at all make any confessional statement and sometimes undertook some efforts for retraction of the same. We do not find any coherence or reliability in those pleas as taken accused Rafique and that was why the learned Session Judge was justified to accept the confessional statement Rafique as true and voluntary discarding all of them.

115. Another accused Kajol made his confessional statement on 29.06.2008 and stated- *"c‡i iwdK gvgyb i †gvevBjwU Avgv‡K t`q Ges wmg †d‡j w`‡Z e‡j| Awg wmg †d‡j t`B| ..... iwdK Avgv‡K †gvevBj wewµ K‡i UvKv w`‡Z e‡j Ges cyj‡ki Sv‡gjv †m wgUv‡e|"* In his examination under section 342 of Code of Criminal Procedure, accused Kajol has disclosed-*"H weKv‡jB Awg †gvevBjwU Avgvi Aci GK eÜyiwKi wbKU wewµ K‡i t`B|*ÓÓ

116. It appears from the above statement of Kajol made under sections 164 & 342 of Code of Criminal Procedure that getting the victim's mobile set from accused Rafique, it was sold out by accused Kajol to his friend Roky. Those statements of Kajol have received a sharp corroboration from the evidence of Roky, who has deposed as P.W.13. We do not find

any missing-link in the above chain of events as taken place immediately after the alleged killing of Mamun. So, it can safely be held that the statements of Kajol were not only true but also inculpatory in nature.

117. During examination under section 342 of Code of Criminal Procedure when the attention of Kajol was drawn to his statement made under section 164 of Code of Criminal Procedure, he replied that his statement was recorded under duress and intimidation. Although Kajol has made such an allegation at his examination under section 342 of Cr.P.C, but no evidence was led by the defence in that score before the Trial Court. On the other hand, the Recording Magistrate P.W.18 has made a point-blank denial to the defence suggestion that Kajol made his statement under any duress or fear of torture.

118. Although other accused Rafique and Noor Alam made some abortive attempts to retract their earlier statements, but accused Kajol did not do anything in that regard. Even by cross-examining the Recording Magistrate (P.W.18) no such contradictory statement has been elicited which might emaciate the credibility of statement made by accused Kajol. In view of the above, it becomes transparent that the confessional statements made by all the accused persons namely Rafique, Noor Alam and Kajol were wholly true, voluntary and inculpatory in nature.

119. According to the prosecution, in the morning of 05.06.2008 all accused persons with the victim Mamun alive were last seen together at the Gate of Rafique's house no. Ka-109/4, Kureel Bishwaroad and at that time P.W.3 i.e. the Darwan himself saw them coming out together from that house. After their last seen together, the dead body of the victim was found at an open place of Bholanathpur by the Esapur River on 07.06.2008. In such a situation it is the burden of the accused persons to prove and explain as to how the victim had been taken and done to death there.

120. In their confessional statements, accused Rafique, Noor Alam and Kajol have disclosed some of the deceptive ploy adopted by them to distract the victim's attention from their plan and target. In the morning of 05.06.2008 before starting their journey for Esapur under the village Bholanathpur the accused persons gave an understanding to the victim, as stated in their confessional statements, that they were going to a house of Rafique's friend at Esapur under the village Bholanathpur to recover some loan money, with which they would then go to their village home and the victim on good faith believed that and agreed to accompany them. We think, had the victim been able to understand actual motive or target of the accused persons, he would then try to avoid them and save his life.

121. According to the statement made by accused Kajol, they first went to Khelkhet from Bishwaroad boarding a bus and changing the transport went to Esapura by a small taxi. It is revealed from the record that the open place of occurrence under village Bholanathpur of P.S. Rupgonj has been situated by the Esapur River and so that reason the said place is also known as "Esapura" or "Esapur".

122. Condemned-appellants Noor Alam and Kajol have confessed the fact that dealing some knife blows and causing a cut throat injury on the person of the victim he was done to death. At that time accused Rafique, as disclosed in the confessional statement, in compliance with the order of Noor Alam remained busy by watching the surrounding area of the place of occurrence to see whether anybody was coming up or not. In the above ways, all accused persons namely- Rafique, Noor Alam and Kajol participated in causing death of the victim.

123. Above descriptions regarding the knife blows and the cut throat injury allegedly caused on the person of the victim have received substantive corroboration from the medical evidence given by P.W.19 Dr. Prodip Kumar Das and the inquest report (Ext.3) prepared by the Police in presence of P.Ws. 14 & 15. It is noted that the inquest and autopsy reports clearly speak about some incised wounds of the inner side of the victim's finger which indicates a link with the following part of the confessional statement made by Kajol: "*bv- Avjg gvgyybi 1 nvZ w`‡q †PvL I Ab¨ nvZ w`‡q gLv †P‡c a‡i Ges wPrKvi w`‡q e‡j cvo †` cvo †`| AZtci Awg cvo w`B| cvo (QvjvKvnZ) †e‡ëi eK‡j‡Q jv‡M, c‡i gvgyb Qvjvi a‡i †d‡j| Awg Uvb w`‡q Qvjvi Qvjv‡j gvgyybi nvZ †K‡U hvq|*''

124. Such statement of accused Kajol has made it abundently clear that when a knife bolw was given at the belly of the victim, it missed the target because of buckle of the victim's waistbelt and when the victim tried to catchhold of the knife to save him on the following moment accused Kajol snatched the knife away from the victim.

125. Following part of the confessional statement of accused Rafique has also lent corroboration to the above statement of Kajol:- অতঃপর প্রথম নুর আলম মামুনের চোখ পিছন থেকে ধরে মাটিতে শুয়াইয়া ফেলে এবং কাজলকে ছুরি চালাইতে বলে। কাজল ১টি পার (আঘাত) পেটে ছুরি দিতে করে। ঐ টি বেশি না লাগার কারণে নুর আলম কাজলের কাছ থেকে ছুরি*iUv wb‡q †bq Ges gvgyybi e¨vKi Dci e‡m Qvjvi gvgyybi Mjvq †cvPvB‡Z _v‡K|*

126. If the portions of the confessional statements made by accused Kajol and Rafique, as stated hereinabove, are taken together with description of wounds found at the finger of the victim, it would then be patent that the first blow of knife was given by accused Kajol, but that failed to hurt, owing to which accused Noor Alam took the knife and caused some other stab injuries on person of the victim and at one stage he caused a cut throat injury applying the knife against the victim's neck.

127. P.W.19 Dr. Prodip Kumar Das has proved the autopsy report and got the same marked as "Ext.11". He found the following injuries and made his opinion in the Autopsy Report:-

ÔÔewnwnK j¶bt-

1| e¨w³i Ae¯v- ejevb, kxb, MwjZ, BZ¨w` t- Highly decomposed meggats of found whole body.

2| hLg-Ae¯vb, AvKvi I aibt- 1) Body is decomposed (highly) and maggots present all over the body, 2) Incised wound in front of neck below the level of the thyroid cartilage, extending from anterior border of the right sterrocleodo merited muscle to the anterior border of the left steernideodo metoid muscles, measuring 5" X 3" cutting skin subcutantaves itissue, neck muscles, tracha, asophagous up to the anterior surface of the certical vestabrae 3) Penetrating wound measuring 1" X 1 ½ " depth left tharalic cavity, situated lefe 4th". 4) One incised wound in the left between right thumb and index finger measuting 1 ½ " X ½ " X ¼ "and left betwwn left index and middle fingher 1" X ½ " X ¼ ".

.....

3) e¶¯jt-

.....

2| dzdzdz Avei Yxt- Decomposed and injured on left side.

.....

5| evg dzdzdzt- Injured & decomposed.

128. On dissection body is found decomposed and ante-mortem congestion found in and around the above mentioned injuries. Mention viscera are found injured and mentioned viscera are found decomposed.

129. Opinion: In our opinion cause of death was due to hemorrhage and shock resulting from cut throat wound and above mentioned injuries which were ante-mortem and homicidal in nature.''

130. Above mentioned medical evidence containing description of injuries and confessional statements disclosing the manner of knife-blows are found reciprocally corroborative and complementary to each other.

131. Mr. Md Mansurul Haque Chowdhury, learned Advocate for accused Rafique has pointed out some discrepancies noted in the autopsy report and the confessional statements regarding the stab injuries found on the body. In the confessional statement of Noor Alam and Kajol, it has been mentioned that the knief blows were given on the belly or stomach *(‡cU)* of the victim, whereas in the autopsy report no such injury on the belly was noted by the Doctor (P.W.19). Mr. Chowdhury, learned Advocate for accused Rafique contends that depending on some inconsistent and contradictory description of injuries found on the body of the victim the Court cannot consider the confessional statements as true or trustworthy documents.

132. In reply, Mr. Sk. A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General opposes stating that there is no discrepancy in the description of the cut throat injury found on the neck, so on the plea of a minor discrepancy regarding other stab injuries found on the body of the victim, it would not be proper to discard or disbelieve the entire prosecution case and the alleged complicity of the accused persons in commission of the offence. Learned D.A.G. has referred to the decision in the case of State of Rajastha-Vs- Smt. Kalki and another reported in (1981)2 SCC 752 and argued that normal discrepancies are not material discrepancies and on that plea the Court cannot legally discard the prosecution case.

133. In the above referred case, it has been observed:-

> "The discrepancies are with regard to as to which accused pressed the deceased and at which part of the body to the ground and sat on which part of the body; with regard to whether the respondent, Kalki, gave the axe blow to the deceased while the latter was standing or lying on the ground, and whether the blow was given from the side of the head or from the side of the legs. In the deposition of witnesses there are always normal discrepancies however honest and truthful that may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and the like. Material discrepancies are those which are not normal and not expected of a normal person."

134. In the instant case, the description of injuries shown in serial nos. 3(2)(5) of the autopsy report (Ext.11) provides us that the deceased's left lung and its membrin were found injured. So it can be held that the victim received stab injuries on his left chest. In the confessional statement, accused persons disclosed the fact of a knife blow on the belly of the deceased, but the said blow, as stated by accused Kajol, failed because of the buckle of

deceased's waistbelt. Regarding the place of injuries as noted in the autopsy report and mentioned in the confessional statements, as pointed out by Mr. Chowdhury, the discrepancies are not so material as to shake the overall credibility of the occurrence and complicity of the accused persons in causing the death of the victim.

135. In respect of the last phase of occurrence that is the events of taking the victim to Bholanathpur and killing him there, the learned Session Judge relied upon the confessional statements of accused Rafique, Noor Alam and Kajol made under section 164 of Code of Criminal Procedure On plain reading of those statements, they appear to be inculpatory and voluntary. In the case of State-Vs-Minbu @ Gul Hasan reported in 16 DLR(SC)598, as referred to by learned D.A.G, their lordship's held as follows:

> "As against the maker himself, his confession, judicial or extra-judicial, whether retracted or not, can in law validity form the sole basis of his conviction. So, we are also of the opinion that a confession, if proved true and voluntary, can be the sole basis for conviction of the maker of the confession."

136. In the case of the State-Vs-Punardhar @Kudu and Shefali reported in 31 DLR (HCD) 312, it has been held that the accused first made a confession statement under section 164 of the code of Criminal Procedure that he committed the murder, although subsequently he retracted his confessional statement before the Court and the confession being found voluntary and without any threat, coercion or inducement, conviction of the accused based on his confession, though subsequently retracted by him, is valid in law.

137. The core principle as enunciated in the case of Hazrat Ali and another-Vs-The State reported in 1990 BLD(HCD) 38 is that once a confession has been found to be true and voluntary, conviction can be based solely on the confession, even if it is retracted.

138. In the case of Bakul Chandra Sarker-Vs-The State, reported in 45 DLR(HCD) 260, it was held that if a confession recorded under section 164 of the Code of Criminal Procedure is true and voluntary, the same alone is sufficient for convicting the confessing accused and retraction of confession is immaterial, once it is found to be true and voluntary.

139. Regard being had to the decisions referred to above and attending facts and circumstances to the case, we are inclined to hold that the confessional statements made by accused Rafique, Noor Alam and Kajol were recorded not under any duress or any fear from any quarter and the learned Session Judge was well-justified to accept them as true and voluntary and recorded his decision of conviction against them under sections 302/34 of the Penal Code.

140. Mr. Md. Mansurul Haque Chowdhury, learned Advocate for accused Rafique has argued that the alleged occurrence took place in the morning of 05.06.2008 and the Ejahar (Ext.1) was lodged on 25.06.2008 without any explanation for the delay caused. In such a situation, as contended by Mr. Chowdhury, it was not proper for the Trial Court to convict the accused persons relying on the facts disclosed in the Ejahar and the evidence led to that effect.

141. In reply Mr. Kabir, learned D.A.G. retorts and takes us with him through the recital of the Ejahar dated 25.06.2008 (Ext.1), where P.W.1 Abdus Sobhan has stated the following:-

> ÔÔevOx‡Z bv hvIqvq gvgbx‡K †LvRvLyR Kwi‡Z _wK| Zvnv‡K †LvRvLyR Kwiqv bv cvBqv AvZxq ¯Rb mn Rq‡`ecyÝ _vbvq GKwU wRwW Kwi| evÇv _vbvq Avgvi gvgv kïi bi‡j nK GKwU gvgjv `v‡qi K‡ib| evÇv

*_vbvi wRWW‡Z Avgiv iwdK, byæj Avjg, eiKZ Djvn, nweeyÿ ingvb‡K m‡›`n Kwi| wRWvi wfwË‡Z cyjk Z`‡š hvq Ges iwdK I bv‡æj Avjg‡K †MdZvi K‡i mnKvix cyjk mgvi Avgv‡`i‡K mnvqZv K‡i| _vbvq wRÁvmvev‡` iwdK, bv‡æj Avjg I KvRj NUbvi K_v ¯xKvi K‡i| ..... Avmvgx‡`i evÇv _vbvq wb‡q Av‡m Ges c‡i †Kv‡U wbqv Av‡m| c‡i Awg 25/06/2008 Zwi‡L _vbvq gvgjv `v‡qi Kwi|*ÕÕ

142. On examination of the above recital of the Ejahar (Ext.1) and the evidence given by P.W.1, it transpires that the victim's father (P.W.1) initially took time to contact accused Rafique's family and know the whereabouts of his son and at one stage receiving incongruous responses from Rafique's family, he became suspisious about them and finally lodged the Ejahar on 25.06.2008. In view of the above, can we be doubtful about the credibility of the alleged involvement of the accused persons?

143. After missing his eldest son i.e. the victim being a father P.W.1 and his other relatives were supposed to be anxious and shocked. So immediately after finding the mobile phones of Mamun and Rafique switched off on 05.06.2008, the informant supposed to be not so vigilant, which is expected from a normal person in lodging the Ejahar. Taking those things into consideration along with the explanation, so far, we get from the Ejahar (Ext.1) and the evidence of P.Ws. 1, 2 & 4, we are of the opinion that the delay caused in lodgment of the Ejahar by P.W.1 can in no way dissipate overall credibility of the prosecution case and there was sufficient and reasonable causes for such delay.

144. Mr. Mawla, learned Advocate for the accused Kajol contends that in a case to be proved by the circumstantial evidence, the root-cause and the motive of an offender is very much significant and without establishment of that it would not be safe to record any decision of conviction. Mr. Chowdhury, learned Advocate for accused Rafique has added that the prosecution has not produced even a scrap of paper or any dependable witness to prove the story of land dispute or quarrel between the families of Mamun and Rafique or between the families of Mamun and Noor Alam.

145. In course of his reply Mr. Kabir, learned D.A.G has taken us to the relevant part of evidence given by P.W.1, 4 & 27 and the confessional statements made by Rafique and Noor Alam. On analysis of the evidence and other materials on record, it transpires that accused Rafique's maternal-grandfather and Noor Alam's sister Jutsna had disputes and quarrel with the family of Mamun and that was why Rafique and Noor Alam together hatched up a criminal plan to call the victim as a prey to the house of Rafique and took all preparations to finish him off the earth.

146. It appears from the confessional statement of Rafique that on 04.06.2008 in the morning at 10 O'clock he and Noor Alam took the victim to Esapura of Bholanathpur, but on that date they were not confident of their power and physical ability and that was why they called accused Kajol to join them so that they can conjointly overpower the victim. In this case the motive of accused Kajol was to fortify the power of his cohorts namely Rafique and Noor Alam, who gathered strength getting companion of Kajol and finally executed the plan of annihilating the victim from this world.

147. It has been stated by the defence that no specific motive of each of the accused persons has been substantiated by the prosecution and for that reason it is to be ended in smoke. In the instant case, the prosecution, as noted above, has to the best to its ability proved the motives of all the assailants along with the complete chain of events implicating them thereto beyond all reasonable doubt. For argument sake, if it is found that the

prosecution has failed to disclose or prove any motive of the condemned-appellants, even then it would not be a lawful ground to absolve them of their liability or culpability. In this regard we may profitably refer to what has been stated by their Lordships in the case of Lal Khan –Vs- Muhammad Sadiq and others reported in 20 DLR(SC) (1968)307, where it has been held that:-

> "What moves an individual to commit crime being within his exclusive knowledge, there is no onus on the prosecution to lead positive evidence of motive in a given case and a charge established by reliable evidence will not fail, if there be no ostensible motive on the part of the accused to the crime."

148. In view of the above referred decision and the evidence on record, we are of the opinion that the prosecution cannot be saddled with an exclusive responsibility of proving motive of each of the assailants. Because it is only the assailant, who can best say his motive for causing the death. But on that ground we cannot lessen the credibility of alleged complicity of the condemned-appellants in killing the victim.

149. Mr. Basharatul Mowla, learned Advocate representing condemned-appellant Kajol has pointed out some omissions done by the prosecution by not exhibiting the Sketch-Map and Index of the 2nd Place of Occurrence, which occurred at Bholanathpur under P.S. Rupgonj. It is noted that in the Trial Court during cross-examination by the learned Advocate for Noor Alam and Kajol, the Investigating Officer S.I Md. Abu Hanif (P.W. 27) categorically disclosed the following:-

"NUbv¯‡j `ßvwU| Awig Dfq ¯v‡bB Z`š Kwiqv wQ| NUbvi Pv¶m †Kvb mv¶x cvB bvB|ÕÕ

150. It is noted that regarding the 2nd place of occurrence the defence did not make any challenge putting any suggestion in that score to the I.O. (P.W.27). Whereas in his examination in chief P.W.27 stated:- *''NUbv¯‡j †cŠQqv cÿivq i¡cMÄ _vbvi Gm,AvB Avkivdz‡j (ev`x) †`Lv‡bv g‡Z gvgjvi NUbv¯j cwi`k‡b hvB|..... †MdZvi KZ Avmvgx‡I wbqv NUbv¯‡j Pwjqv Avwm|ÕÕ*

151. The learned Deputy Attorney-General has argued that the Investigating Officer at that time visited the 2nd place of occurrence at Bholanathpur and prepared the Sketch-Map and Index, but unfortunately for the laches of learned Public Prosecutor, the said Sketch-Map and its Index were not taken to the Judicial File of the Court and exhibited therein, which are nothing but a mere irregularity. We find substance in the submission of the learned Deputy Attorney-General and opine to hold that for the above reason no Court can mop up the entire credibility of the alleged occurrence, which took place at an open place known as the government acquired land situated by the Esapura River under Bholanathpur of Rupgonj P.S.

152. A significant aspect of this case is that after recovery of the dead body and its identification, the Investigating Officer P.W. 27 has succeeded to recover the Sony Ericson Mobile Set from Rakib Ahmed @ Roky (P.W.13), who expressed that he purchased it from Kajol in consideration of Tk. 5,500/=. P.W.13 has identified the said Mobile as "Material Ext.II" and also the accused Kajol present in the dock.

153. It is noted that the I.O. (P.W.27) has also realized a part of the money taking which the victim supposed to go to his village home in Noakhali and pay to his mother. After receiving his share accused Rafique, as it appears, deposited Tk. 5,500/= in the name of some "Shishir" in the Roky Somaboy Samity and the I.O. recovered the said money in presence of witnesses preparing a seizure-list (Ext.2) to that effect. P.W. 9 Md. Amirul Islam, who is the

President of the Samity, has corroborated the said fact stating that in the name of "Shishir" a person deposited Tk. 5,500/= in the Samity.

154. Mr. Chowdhury learned Advocate representing the condemned-appellant Rafique submits that accused Rafique had no such name like Shishir and the prosecution has planted a story manufacturing some papers showing the name of Shishir. In this regard the learned D.A.G. retorts stating that after commission of an offence, it becomes a usual propensity of all the offenders to hide their appearance and identity, so that they cannot be brought to book and the similar things happen in this case. He has argued that had there been any other persons having actual name as Shishir, the defence could produce him to the Court.

155. We find strong force in the above submission made by learned Deputy Attorney-General. Besides, the defence has not made any challenge giving suggestion to the witnesses that the name "Shishir" was not an anonym of accused Rafique. So we can safely believe in the fact that money recovered from body of the victim by accused Rafique was kept deposited in anonymity with the Samity and that was finally recovered by the I.O. (P.W.27).

156. At the end, Mr. Mawla, learned Advocate for accused Kajol has pointed out the following discrepancies found in the testimony of the prosecution witnesses:-

157. In chief P.W.1 says that he himself made G.D Entry no. 1185 on 16.06.2008, but in cross he states that on 14 or 13 he did not go to Badda Police Station. Again P.W.1 says in cross that he had land disputes with only Rafique's 'Mama' Jahangir, but P.W.4 states that the informant i.e. P.W.1 had several disputes with Rafique's 'Khalu' A. Sobhan Member, his Mama Jahangir and Noor Alam's brother Jashim.

158. P.W.1 in his cross-examination by the Advocate of accused Rafique has stated that his son set out for the village home on 03.06.2008. Whereas at one stage of his examination he (P.W.1) has claimed that the G.D. entry with the Police Station of Joydebpur was made by him on 07.08.2010.

159. Listing the above discrepancies Mr. Mawla has contended that the evidence given by the prosecution is not consistent and there exist some material discrepancies and that is why they cannot be relied upon by any prudent Court. Mr. Kabir, learned Deputy Attorney-General has opposed the above contention stating that all those discrepancies, as listed, are not at all material in the instant case and that is why the learned Session Judge has considered them as minor discrepancies.

160. We have given our careful consideration to the submission above and scrutinized the evidence given by the witnesses keeping in view the discrepancies as pointed out and examined the nitty-gritty of the matters. The occurrence of the victim's death took place on 05.06.2008 and the Trial Court completed the examination of all prosecution witnesses on 30.05.2010. In other words, around 1½ yrs after the alleged occurrence, the prosecution witnesses including the victim's father, mother and others came to depose before the court.

161. It is known to all that human memory is always subjected to lapses and omissions and after such a long time it was not possible for any person to narrate all events with complete accuracy and all mathematical precisions. We know, the evidence of the witnesses should be considered as a whole, not in utter fragmentation taking them out of the context. Mr. Mawla, learned Advocate for accused Kajol has tried to make an approach by taking the

sentences torn out of the context here or there from the evidence, which cannot be appreciated by any rule of prudence. As the discrepancies pointed out by the learned Advocate Mr. Mawla are on some trivial matters and do not touch the core of the case and as the accused persons themselves confessed their culpability and complicity in causing the death of the victim making statements under section 164 of Code of Criminal Procedure, we are, therefore, inclined to hold that the prosecution case cannot be disbelieved on the basis of those minor discrepancies which are found on some trivial matters of the case.

162. Be that as it may be, we have considered the entire chain of events regarding the alleged occurrence in three phases and carefully scrutinized all evidence on record and other materials including the inculpatory confessional statements made by the accused persons and the attending circumstances in their true perspective. It becomes abundantly clear that the condemned-appellants namely Rafique, Noor Alam and Kajol in furtherhence of their common intention in a cruel and barbaric manner killed the victim dealing knife blows and causing a cut throat injury on his person and it was so shocking nature of crime that we find no alternative but to inflict a punishment to them under sections 302/34 of the Penal Code.

163. In the instant case, it appears from the confessional statements of the condemned-appellants and other materials on record that mainly accused Rafique and Noor Alam devised the plan in collaboration with accused Kajol and pursuant to that all preparations for implementation of the plan was completed for killing the victim. In other words it can be held that all the condemned-appellants were animated by the common intention in accordance with the pre-concerted plan and in the morning of 05.06.2008, they jointly set out for the place of occurrence situated by the Esapur River at village Bholanathput and participated in the criminal acts resulting in instantaneous death of the victim Mamun. It is revealed from the evidence on record and circumstances to the case that a meeting of minds and fusion of ideas have taken place amongst accused Rafiique, Noor Alam & Kajol and in furtherance of their common intention they caused the death.

164. We know that all murders are culpable homicides but all culpable homicides are not murders. Mere killing of a person or mere causing his death is not murder. In section 300 of the Penal Code, there are 4 (four) cases of death described as murder and when a death is caused by an act done with the intention of causing death, then it would come under the first part of the definition of murder under section 300 of the Penal Code. In the instant case, all accused persons namely Rafique, Noor Alam and Kazol had clean and common intention of causing death of the victim Mamun and they all participated in the offence through their overt acts and that is why, the first part of section 300 of the Penal Code will attract the alleged occurrence of causing the death of the victim.

165. Under the above legal position and attending circumstances, we are inclined to hold that the criminal act done and the offence committed by accused Rafique, Noor Alam and Kajol is the culpable homicide amounting to murder, which is an offence punishable under sections 302/34 of the Penal Code.

166. Before conclusion of his submission Mr. Md. Mansurul Haque Chowdhury, learned Advocate for the accused Rafique has drawn this Court's attention to the fact that according to the Children Act, 2013 any child up to the age of 18 years on the date of occurrence shall be tried by concerned Juvenile Court and in the instant case on the date of occurrence the accused-persons had been below 18 yrs and that is why no punishment of death or life imprisonment can legally be inflicted to them.

167. Mr. Sk. A.K.M. Moniruzzaman Kabir, learned D.A.G. has replied contending inter alia that as the children Act 2013 came into force on June 20, 2013 that is about 2 years after pronouncement of the impugned judgment and order of conviction, the instant case thus supposed to be guided by the Children's Act of 1974, which provides that the age limit of a child should be less than 16 years.

168. On analysis of the record it transpires that the occurrence took place on 05.06.2008, the charge was framed on 06.12.2009 and the trial was concluded by the judgment and order dated 29.06.2010. Being requested by the learned D.A.G. we have gone through the relevant materials particularly the Police Report, confessional statements made by the accused persons and other documents on record and observed that on the date of framing charge all the accused-persons were more than 16 yrs.

169. Learned Deputy Attorney-General has calculated the age of accused Rafique, Noor Alam and Kajol on the basis of the recital of Ejahar and the Police Report and stated that on 06.12.2009 (i.e. the date of charge framing) each of the accused-persons was around 16½ yrs. In this context, learned Deputy Attorney-General has relied upon the decision of the Case of Bimal Das-Vs-the State reported in 46 DLR(1994)460, where their lordships have observed that at the time of framing the charge against an accused with an offence, if he reaches the age of 16 yrs that would forfeit his right to claim a trial by the Juvenile Court.

170. Having regard to the submission made by the learned Advocates above and the decision cited by the learned Deputy Attorney-General, we are of the view that at the time of framing of the charge before the Trial Court each of the accused persons was more than 16 years and in such a position, under the Children's Act of 1974, they were lawfully tried and decided by the Special Session Court No.5 of Dhaka. In doing that the learned Judge of the Trial Court, as it appears, has not committed any error of law or fact.

171. It appears from the record that no condemned-appellant had earlier involvement with any other criminal offence and that was why in the police reports their P.C & P.R. have been shown as 'Nil'. It reveals that the condemned-appellants had no complicity in any other crime during their past life and they were the boys of tender- age. Taking those extenuating facts and circumstances into account, we think, justice will be met if we sentence the condemned-appellants with life imprisonment and fine in place of the death sentence. Consequently the impugned judgment and order passed by the Trial Court are upheld with modification in respect of the sentence awarded against the condemned-appellants.

172. In view of the above, all the criminal appeals are dismissed with modification of sentence awarded by the Special Session Court No.5 of Dhaka. The condemned-appellants namely Md. Rafiqul Islam @ Rafique, Md. Noor Alam and Md. Kajol are found guilty of the charges under section 302/34 of the Penal Code and each of them is sentenced to suffer life imprisonment and to pay a fine of Tk. 5,000/= in default to suffer rigorous imprisonment for 6(six) months more. The reference made by the learned Judge of the Trial Court under section 374 of the Code of Criminal Procedure for confirmation of the death sentence is hereby rejected.

173. The period, the accused-appellant has already spent in the custody, shall be deducted pursuant to section 35A of the Code of Criminal Procedure, 1898.

174. Let a copy of this judgment along with Lower Court's Record be sent down at once.

4 SCOB [2015] HCD 171

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION N0. 5083 of 2004

Shuvash Chandra Das
.... Petitioner.
Vs.
Customs, Excise & VAT Appellant Tribunal and others
.... .. Respondents.

Mr. Munsshi Moniruzzaman, Advocate
..... for the petitioner.
Mr. Shams-ud-Doha Talukder, A.A.G
.....for Respondents.

Heard on: 22.11.2015 and
Judgment on: 29.11.2015

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J.N. Deb Choudhury.

VAT Act, 1991
Section 37 & 55:
A notice under section 37 of the VAT Act cannot be issued without first determining the amount of evaded VAT if any. In doing so the authority have to issue notice under section 55(1) of the VAT Act 1991, claiming the evaded VAT and after giving an opportunity of hearing to the party concern, determine the amount of evaded VAT, under section 55(3) of the VAT Act 1991. After such determination of evaded VAT if the defaulter fails to repay the evaded VAT, only then, can proceed under section 37 along with other provisions of the VAT Act. ...(Para 16)

Judgment

J.N. Deb Choudhury, J :

1. Rule Nisi was issued upon the respondents to show cause as to why the Order dated 20.07.2004 passed by the respondent No. 1 in Nothi No. CEVT/CASE (VAT) -12/2003 (Annexure-"I") dismissing appeal filed by the petitioner and thereby affirming the order No. 22/Musak/2002 dated 30.11.2002 (Annexure-"F") passed by the respondent No. 2, should not declared to have been passed without lawful authority and is of no legal effect and /or such other or further order or orders passed as to this Court may seem fit and proper.

2. Relevant facts necessary for disposal of this Rule, in brief, are that, the petitioner has been manufacturing Coconut Oil and marketing the same in the local market and supplying the same on payment of VAT under VAT Registration No. 3052001944, area code No. 301.05. Respondent No. 4 seized goods on 29.06.2002 on the plea that there was no Musak - 11 chalan showing payment of VAT. On the basis of the said seizure, respondent No. 2 issued a show cause notice dated 06.07.2002 upon the petitioner to deposit Tk. 65,688/- as evaded VAT. The respondent No. 2 issued another show cause notice dated 09.07.2002 upon petitioner to deposit Tk. 10,85,263.50 and asking the petitioner to deposit the same within 14 days. After receiving the aforesaid show cause notices the petitioner replied to the respondent

No. 2 on 07.08.2002 denying all the allegations. Respondent No. 2, passed the adjudication order No. 22/Musak/ 2002 dated 30.11.2002 and demanded Tk. 10,19,575.50 as evaded VAT and imposed a penalty of Tk. 10,25,000/- and also Tk. 2,00,000/- as fine in lieu of confiscation. Petitioner being aggrieved preferred an appeal before the Customs, excise and VAT appellate Tribunal, Dhaka the respondent No. 1 on depositing 10% of the demanded amount vide treasury challan who dismissed the same by the order dated 20.07.2004.

3. The Respondent No. 5 filed affidavit in opposition on stating that, the adjudication order No. 22/j§pL/2002 dated 30.11.2002 has been passed by the Respondent No. 2 in accordance with the provision of section 37(2) of the Value Added Tax Act, 1991 as this section provides the strength of imposition of penalty up to 2.5 times of the evaded tax. An amount of Tk. 2,00,000/- was imposed as redemption fine in lieu of confiscation of the consignment and also passed release order in addition of payment of taxes, penalty and fine as per provision of section 41 of the said Act but the petitioner has failed to take this opportunity the petitioner by suppressing the related fact of seizure of the consignment, evasion of tax by himself, has obtained a rule and an ad-interim order by misleading the Honourable Court. So, the writ petition is not maintainable and bears no merit.

4. Mr. A.M. Amin Uddin the learned Advocate along with Mr. Munshi Moniruzzaman, Advocate, appearing for the petitioner submits that in both the show cause notices dated 06.07.2002 (annexure C) and dated 09.07.2002 (annexure D) respectively, the claim was for both evaded VAT and also for taking penal action, which not tenable in the eye of law. Mr. Uddin further submits that the respondent No. 2 while passing the adjudication order also claimed the evaded VAT and imposed penalty and the Tribunal respondent No. 1 also most illegally affirmed the same, and those are as such passed without lawful authorities and are of no legal effect and accordingly prays for making the Rule absolute.

5. On the other hand the learned Assistant Attorney General submits that there were no illegalities in the adjudication order and the Tribunal rightly affirmed the same. He further submits that under section 37 of the VAT Act, the authority have the power to settle the amount of evaded VAT and so also impose penalty and accordingly prays for discharging the Rule.

6. We have gone through the writ petition, affidavit in opposition and annexures thereto.

7. For appreciating the arguments of both the parties we like to quote some relevant lines from the show cause notice dated 06.07.2002 (annexure C).

> *"Efl-উক্ত বেআইনী কার্য সংঘটনের মাধ্যমে আপনি/আপনারা ৪,৩৭,৯২০/- টাকা মূল্যমানের নারিকেল তেলের উপর প্রযোজ্য ৬৫,৬৮৮.০০ টাকা সরকারের মূসক ফাঁকি দিয়েছেন। ফলে আপনি/আপনারা মূল্য সংযোজন কর আইন, ১৯৯১ ধারা ৬, ৩২ ও ৩৭ এবং মূল্য সংযোজন কর বিধিমালা, ১৯৯১ এর বিধি ৪(১৬), ১৬ ও ২৩ লংঘন করেছেন। E¢õ¢Ma dj l¡ J th¢d mwOe L l¡ l Aপরাধে কেন ফাঁকি প্রদত্ত মূসক Aic¡upq আপনার/ আপনাদের বিরুদ্ধে n¡¢Ùjm L hÉhÙ¡ গ্রহণ করা হবে না তার লিখিত জবাব এ নোটিশ জারীর ১৪ (চৌদ্দ) দিনের মধ্যে এ দপ্তরে দাখিল করার জন্য আপনাকে বলা হলো।"*
>
> *(Underlines given for emphasis)*

8. And also like to quote some line from the second show cause notice dated 09.07.2002 (annexure D)

> *"উপরোক্ত বেআইনী কার্য সংঘটনের মাধ্যমে আপনি/আপনারা 4,37,920/- টাকা মূল্যমানের নারিকেল তেলের উপর প্রযোজ্য মূসক বাবদ ৬৫,৬৮৮.০০ টাকা সরকারের প্রাপ্য রাজস্ব ফাঁকি দিয়েছেন। এছাড়া আপনি ২০০১-2002 Ab বছরে এ কমিশনারেটের শুধুমাত্র ঝিনাইদহ ও চুয়াডাঙ্গা এলাকায় ৬৭,৯৭,১৭০/- টাকা মূল্যমানের নারিকেল তেল*

সরবরাহ করেন; যার উপর প্রযোজ্য মূসক এর পরিমান হয় ১০,১৯,৫৭৫.৫০ টাকা। পক্ষান্তরে আপনি ট্রেজারী চালানের মাধ্যমে ৪৪,০০০/- টাকা টার্ণওভার কর সরকারী কোষাগারে জমা দিয়েছেন। অর্থাৎ আপনি টার্নওভার করের ছত্রছায়ায় টাকা ১০,১৯,৫৭৫.৫০ সরকারের প্রাপ্য মূসক ফাঁকি দিয়েছেন। উপরোক্ত বিশ্লেষন হতে প্রমানিত হয় আপনি সংnø আটক মামলার ক্ষেত্রে ৬৫,৬৮৮/- টাকা ও এ দপ্তর থেকে তদন্তে প্রাপ্ত তথ্যের ক্ষেত্রে ১০,১৯,৫৭৫.৫০ টাকা অর্থাৎ সর্বমোট ১০,৮৫,২৬৩.৫০ টাকা মূসক ফাঁকি দিয়েছেন। বর্ণিত কার্যকলাপের মাধ্যমে আপনি মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩, ৬, ১৫, ৩২ ও ৩৭ এবং মূল্য সংযোজন কর বিধিমালা, 1991 HI thd 49, 16 J 23 এর লংঘন করেছেন। উল্লিখিত ধারা ও বিধি সমূহের বিধান লংঘন করার অপরাধে কেন ফাঁকি প্রদত্ত রাজস্ব Aic¡upq আপনার বিরুদ্ধে ni¢Ùjm‡L h¢ehÙ¡ গ্রহণ করা হবে না তার লিখিত জবাব এ নোটিশ জারীর ১৪ (চৌদ্দ) দিনের মধ্যে এ দপ্তরে দাখিল করার জন্য আপনাকে বলা হলো।"

(Underlines given for emphasis)

9. From a pain reading of the said two notices it appears that though section 55 of the VAT Act has not been mentioned ; but the words *"Aic¡upq"* and *"ni¢Ùjm‡L h¢ehÙ¡"*, clearly shows that the notices were infact, issued, under sections 55 and 37 of the VAT Act 1991.

10. It also appears from the adjudication order dated 30.11.2002 (annexure F) passed by respondent No. 2, it appears that respondent No. 2 determined the unpaid VAT as Tk. 10,19575.00 and directed to deposit the same along with a fine of Tk. 10,25,000.00 and a penalty of Tk. 2,00,000.00 in place of confiscation. The relevant part of the order is quoted below;

"কাজেই প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষ টার্ণওভার করের ছত্রছায়ায় টার্ণওভার করের আওতায় তালিকাভুক্তির যোগ্যতা না থাকা সত্ত্বেও ৬৭,৯৭,১৭০/- টাকা মূল্যমানের নারিকেল তেল সরবরাহ কল্পে সরকারের ১০,১৯,৫৭৫/৫০ টাকা মূসক ফাঁকি দিয়েছে। ফলে প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষ মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩, ১৫ ৩২ ও ৩৭ Hhw jmÉ সংযোজন কর বিধিমালা, ১৯৯১, এর বিধি ৪, ৯, ১৬ ও ২৩ লংঘন করেছেন। উল্লিখিত আইন ও বিধি লংঘন করার অপরাধে প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজর, বাগেরহাট এর কর্তৃপক্ষের উপর মূল্য সংযোজন কর আইন, ১৯৯১ এর ৩৭ ধারার প্রদত্ত ক্ষমতাবলে ১০,২৫,০০০/-(cn mr f¢Qn qi¡Sir) টাকা অর্থদন্ড আরোপ করা হলো এবং ফাঁকিকৃত ১০,১৯,৫৭৫/৫০ টাকা মূসক অনতিবিলম্বে সরকারী কোষাগারে জমা প্রদান করার জন্য বলা হলো। তবে প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজর, বাগেরহাট এর প্রতি নমনীয় মনোভাব পোষণ করে মূল্য সংযোজন কর আইন, ১৯৯১ এর ৪১ ধারার প্রদত্ত ক্ষমতাবলে ২,০০,০০০/- (দুই লক্ষ) টাকা বিমোচন জরিমানা আরোপ করা হলো। উল্লিখিত ফাঁকিকৃত রাজস্ব, অর্থদন্ড এবং বিমোচন জরিমানা পরিশোধ সাপেক্ষে আটককৃত সমূদয় নারিকেল তেলসহ পিক আপ ভ্যান গাড়িটি ছাড় প্রদানের আদেশ দেয়া হলো। উল্লিখিত সমূদয় টাকা পরিশোধের পর প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষ পিকআপ ভ্যান গাড়িটি অন্তবর্তীকালীন ছাড় প্রদনের মূচলেকা থেকে অব্যাহতি বলে গণ্য হবে।"

11. From a plain reading of the adjudication order, it also appears that the respondent No. 2 not only passed order determining the evaded VAT, but also imposed penalty for evasion of VAT.

12. The respondent No. 1, Tribunal by order dated 20.07.2004 (annexure I) affirmed the said order of adjudication.

13. It appears from a plain reading of section 37 of the VAT Act that, it not only deals with offences concerning evasion of VAT, rather it also deals with othr offences committed under the VAT Act, which are not at all related to evasion of VAT and for which there is no necessity to avail the provisions under section 55(1) of the VAT Act or to determine anything before proceeding under section 37 of the VAT Act; but while the question, evasion of VAT, the authority have to first follow the procedure as laid down in section 55 of the VAT Act for determing the evaded VAT.

14. Section 55 of the VAT Act deals with evasion of VAT and in order to proceded with, under that section, service of prior notice is mandatory and after hearing, if the notice receivers desire so, determine the amount of evaded VAT under sectin 55(3) of the VAT Act.

15. Now comes the question as to how the evated VAT could be realised. It is section 56 of the VAT Act which deals with realisation of evated VAT. There are some primary steps to compel the defaulter to pay the evaded VAT and on failure, the authority will issue a certificate under section 56(2) of the VAT Act and send it to District Collector for proceeding with in accordance with Public Demand Recovery Act.

16. It is the consistent view of this Division that a notice under section 37 of the VAT Act cannot be issued without first determining the amount of evaded VAT if any. In doing so the authority have to issue notice under section 55(1) of the VAT Act 1991, claiming the evaded VAT and after giving an opportunity of hearing to the party concern, determine the amount of evaded VAT, under section 55(3) of the VAT Act 1991. After such determination of evaded VAT if the defaulter fails to repay the evaded VAT, only then, can proceed under section 37 along with other provisions of the VAT Act.

17. It has been decided in the case of United Mineral Water and PET Industries–vs-Commission, Customs Excise and VAT Commissionarate and others, reported in, 61 DLR 734, that;-

> *"On the other hand, section 37 of the said Act defines various offences and punishments for such offence. Before any final demand could be made under section 55(3), none of the provisions of section 37 could be resorted to. It is needless to say as the fiscal law demands strict interpretation so equally demands for strict application by an authority authorized to apply. The VAT Act is a comprehensive tax law. It has defined the tax to be paid as VAT on the specified sales and/or services. Similarly, it has laid down elaborate procedure for realization of the tax and punishment for any violation or omission. The concerned authority is therefore, duty bound to follow the procedure as laid down in the Act for each and every action. The Act does not empower any of the authorities created to become zealot to overpower and/or overawe any tax payer. Invoking and/or resorting to section 37 while issuing notice under section 55(1) of the VAT Act therefore could not be said to have been issued bonafide for the simple reason that at the time of issue of the notice, the authority concerned had not yet arrived at as to any evasion of VAT by the petitioner".*

18. It has also been held in a case of Abdul Motaleb and others –vs-Customs, Excise and VAT Appellate Tribunal reported in 64 DLR 100, that;

> *"On the conspectus, we hold that nothing short of prior compliance of section 55 of the VAT Act, the VAT authority by any stretch of imagination cannot go for an action under section 37 of the VAT Act, which is a penal provision. Liability has to be fixed first under section 55 of the Act nothing more nothing less".*

19. And in an unreported case of M/s. Doctor's Chemical Works Limited -vs- National Board of Revenue, Customs passed in writ petition No. 6215 of 2004 held that;

> *"The argument of the learned assistant Attorney General that the failure to issue separate show cause notice under section 55 and subsequently invoke penal provision under section 37(1) may be technicalities for which the customs authorities should not be liable is misconceived. "There is no dearth of authority to say when an authority is created to exercise certain authority and a \procedure laid down to follow in the exercise of such authority by a statute , the authority concerned shall exercise the*

authority in accordance with the procedure otherwise its action shall become unauthorized. Thus the Respondents claim in Annexure-A notice demanding VAT under section 55(1) of the VAT Act as well as 55(3) served upon the petitioner along with invoking the penal provisions under section 37(2) the VAT Act, is hereby struck down".

20. Similarly in another unreported case of Sonear Laboratories Ltd. -vs- The Commissioner, Customs, Excise & VAT, Dhaka, passed in writ petition No. 5768 of 2008. Their Lordships held that:-

"Upon going though all the decisions referred by Ms. Mobina Asaf, it is found that this Court categorically held that the demand under section 37 of the Act without complying with the provision of section 55 is not tenable in law. So the demand of VAT authority being not under section 55 of the Act the issuance of the impugned notice under section (37) (2) is not sustainable because the same cannot be determined under section 37 of the VAT Act. The allegation of evasion of VAT or evaded VAT cannot be determined under any other provision other than section 55 but when the question of imposition of penalty for determined evasion of VAT arises section 37, to the extent of its conditions quoted above, can be invoked."

21. On going through the aforesaid decisions of this Division, we also do not find any reason to disagree with the view taken therein.

22. The learned Assistant Attorney General also fails to show any authority or decision, which taken any contrary view.

23. In view of the discussions made above we find substance in the arguments of the learned advocate for the petitioner and find no substance in the arguments of the learned Assistant Attorney General for the respondent No.2.

24. Accordingly Rule is made absolute, the order dated 20.07.2004 passed by the respondent No. 1 in Nothi No. CEVT/CASE (VAT) -12/2003 (Annexure-"I") dismissing appeal filed by the petitioner and thereby affirming the order No. 22/Musak/2002 dated 30.11.2002 (Annexure-"F") passed by the respondent No. 2 are hereby declared to have been passed without lawful authority and are of no legal effect.

25. The respondent No. 2 are at libarty to proceed with, in accordance with law for realization of evaded VAT, if any.

26. Communicate the judgment to respondent No. 2 at once.

Meaning of 'life imprisonment' in light of some decisions of the Supreme Court of India

[1]**Md. Shamim Sufi**

Life imprisonment is a punishment that is generally awarded in cases involving heinous crime such as murder, rape etc. Sometimes it is awarded in lieu of capital punishment i.e. death penalty when extenuating circumstances are found. But general concept about the length of life imprisonment in view of section 53 and 57 of the Penal Code is that it does not exceed 30 years. However, Appellate Division of the Supreme Court of Bangladesh in a recent decision (4 SCOB [2015] AD 20) deplored this misinterpretation and referring to the system prevailing in UK opined that it should mean the rest of the natural life of the convict.

It appears that in India in many decisions it has been clearly explained by the Supreme Court that the life imprisonment means imprisonment for rest of the natural life of the convict.

In **Gopal Vinayak Godse v. The State of Maharashtra and others - (1961) 3 SCR 440** the question was: "whether, under the relevant statutory provisions, an accused who was sentenced to transportation for life could legally be imprisoned in one of the jails in India; and if so what was the term for which he could be so imprisoned". In replying to the second part of the question the Supreme Court observed:

> "A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life".

In **Sambha Ji Krishan Ji v. State of Maharashtra - AIR 1974 SC 147**, in paragraph 4 it was held as under:

> "**4**....As regards the third contention, the legal position is that **a person sentenced to transportation for life may be detained in prison for life.** Accordingly, this Court cannot interfere on the mere ground that if the period of remission claimed by him is taken into account, he is entitled to be released. It is for the Government to decide whether he should be given any remissions and whether he should be released earlier." **(Emphasis added)**

In **State of Madhya Pradesh v. Ratan Singh and others - (1976) 3 SCC 470**, it was held as under:

> "**9.** From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following proposition emerge: **(i)** that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. **A sentence of imprisonment for life means a sentence for the entire life of the prisoner** unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;" **(Emphasis added)**

[1] Research and Reference Officer (Senior Assistant Judge), Appellate Division of the Supreme Court of Bangladesh.

In **Maru Ram etc., etc. v. Union of India and another - 1981 (1) SCR 1196** at pages 1222-1223, The Supreme Court of India while endorsing the earlier ratio laid down in **Godse case (supra)** held as under:

> "A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totaled upto 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoners cannot claim his liberty. **The reason is that life sentence is nothing less than life-long imprisonment.**" **(Emphasis added)**

Again at page 1248 it is held as under:

> "We follow Godse's case (supra) to hold **that imprisonment for life lasts until the last breath**, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government". **(Emphasis added)**

In **Subash Chander v. Krishan Lal and others - (2001) 4 SCC 458**, the Supreme Court followed **Godse (supra)** and **Ratan Singh (supra)** considering section 57 of the Penal Code and held that a sentence for life means a sentence for entire life of the prisoner unless Government chooses to exercise its discretion to remit the sentence under Section 401 of Code of Criminal Procedure. Excerpts from the judgment read as under:

> "**20**. **Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years.** The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. In *Gopal Vinayak Godse* v. *State of Maharashtra* the petitioner convict contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in *Pandit Kishori Lal* v. *King Emperor* this Court held: (SCR pp. 444-45)
>
> > "If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by Appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10: 'Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not

> earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.' **Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."**
>
> **(Emphasis added)**

One thing is needed to be clarified-difference between 'calculating fractions of terms of punishment' as mentioned in section 57 of the Penal Code and 'actual length of imprisonment for life'. Actual length of life cannot be determined by human beings. It varies from man to man. That is why when fraction of terms of punishment in case of life imprisonment is required to be determined under section 65 or say section 116 of the Penal Code, section 57 has made it equivalent to 30 years.[2] If someone is awarded imprisonment for life and fine, then in that case in default of payment of fine, his imprisonment cannot be extended beyond one-fourth of thirty years rigorous imprisonment in view of section 65 of the Penal Code. But for the sake of that calculation, life imprisonment does not mean to be confined to thirty years.

The above referred decisions of the Supreme Court of India overwhelmingly lead to the conclusion that imprisonment for life in terms of section 53 read with section 45 of the Penal Code only means imprisonment for rest of the natural life of the prisoner.

[2] In section 57 of Indian Penal Code in calculating fractions of terms of punishment imprisonment for life has been made equivalent to 20 years. But in Bangladesh vide Ordinance No. XLI of 1985 it has been changed to 'rigorous imprisonment for thirty years'.