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Editors
Justice Moyeenul Islam Chowdhury
Justice Sheikh Hassan Arif

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5 SCOB [2015] AD
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Supreme Court of Bangladesh

Judges of the Appellate Division

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

Judges of the High Court Division

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3. Mr. Justice Mirza Hussain Haider
4. Mr. Justice Sharif Uddin Chaklader
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6. Mr. Justice Syed A.B. Mahmudul Huq
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10. Mr. Justice Shamim Hasnain

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21. Mr. Justice Quamrul Islam Siddique

22. Mr. Justice Md. Fazlur Rahman

23. Mr. Justice Moyeenul Islam Chowdhury

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5 SCOB[2015]AD

Cases of the Appellate Division

Sl. No	Name of the Parties and Citation	Key Words	Short Ratio
1.	State Vs. Dafader Marfoth Ali Shah & ors 5 SCOB[2015]AD 1	Evidence Act, 1872 Section 57 Judicial notice Penal Code, 1860 Section 107, 109, 120A, 120B. Offence of abatement Article 104 of the Constitution	The exercise of the power of doing 'complete justice′ under article 104 is circumscribed by two conditions, (i)that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and (ii) that the order which Supreme Court passes must be necessary for doing "complete justice" in the cause or matter pending before it. Obviously the matter pending before us in this appeal is the acquittal of two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha of the charges under sections 302/34 and 302/109 of the Penal Code. Leave to file this appeal was granted to consider only whether the acquittal of the present two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code was correct and justified. So, obviously, the question whether the acquittal of all the accused persons from the charge of criminal conspiracy-is not at all a matter pending before us. It has already been pointed out above that the present State-appellant or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of criminal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appeal time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy-as ordered by a court of law. In the name of doing 'complete justice′ this right of the accused persons now cannot be ignored.
2.	Md. Abdus Sattar Miah Vs Sreemati Raman Sona Dashya & ors 5 SCOB[2015]AD 88	Hindu Widow Life Interest Partition Suit	If a Hindu widow or a Hindu woman having life interest is not allowed to pray for partition of the joint properties by metes and bounds, then she would be deprived of enjoying her such right, as in the absence of partition by metes and bounds, she would not be able to enjoy her life interest therein. And if it is held that a Hindu widow or a

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			Hindu woman having life interest would not be able to file a suit for partition, then the other co-sharers of the joint properties may use such decision as lever against such Hindu woman and thus create obstructions in the enjoyment of her life interest in the joint properties. Therefore, we find no substance in the point that plaintiff No.1 not being a co-sharer in the suit khatain and having life interest only could not maintain the suit for partition. And we hold that a Hindu widow or a Hindu woman having life interest can very much maintain a suit for partition for the fullest enjoyment of her such right in the joint properties.
3.	Bangladesh Vs. S.M. Raiz Uddin Ahmed 5 SCOB[2015]AD 94	Disciplinary action Adverse remark Disciplinary proceeding	It is not permissible to take disciplinary action against a person solely on the basis of adverse remarks made by a Tribunal in a criminal case unless the allegations imputed in the adverse remarks are proved in disciplinary proceedin
4.	M/S. Rajib Traders Vs The Artha Rin Adalat & anr 5 SCOB[2015]AD 98	How interest is to be calculated; The Artha Rin Adalat Ain, 2003, Section 50	The interest to be paid by the judgment debtor will have to be calculated according to the prevailing interest rate or rates, which may be different for different periods, from the time of filing of the suit till the payment of the decretal amount by the judgment debtor.
5.	Haji Mahmud Ali Londoni & anr Vs. State & anr 5 SCOB[2015]AD 102	Circumstantial evidence	It is settled principles that where the inference of guilt of an accused is to be drawn from circumstantial evidence only, those circumstances must, in the first place, be cogently established. Further, those circumstances should be of a definite tendency pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused excluding any other hypotheses.

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Cases of the High Court Division

SL No.	Name of the Parties and Citation	Key Words	Ratio
1.	Md. Mijanur Rahman Vs. Bangladesh and ors 5 SCOB [2015] HCD 1	Meaning of "A person in the service of the Republic or of any statutory public authority"; Administrative Tribunal	"A person in the service of the Republic or of any statutory public authority" includes a person who is or has retired or is dismissed, removed or discharged from such service but does not include a person in the defence services of Bangladesh or of the Bangladesh Rifles. *(Zinat Ara, J)*
2.	Md. Shariful Alam Vs Artha Rin Adalat & anr 5 SCOB [2015] HCD 6	Artha Rin Adalat Ain 2003 Section 6	The language used in the section makes it clear that the plaint has to be filed along with an affidavit, both as to the statements made in the plaint as well as to the documents annexed with the plaint. Therefore, non-compliance with the mandatory requirement of law has rendered the plaint invalid in the eye of law and consequently, the impugned order passed by the learned Judge of the Adalat cannot be sustained in law. (*Zubayer Rahman Chowdhury, J*)
3.	Abdul Mazid @ Khoka & ors Vs. State & ors 5 SCOB [2015] HCD 9	Evidence of interested witnesses; Section 342 and 537 of CrPC;	Evidence of interested witnesses: The rule that the evidence of interested witnesses requires corroboration is not an inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. (*Moyeenul Islam Chowdhury, J*)
4.	Renuka Rani Mondol Vs Biswajit Mondol & anr 5 SCOB [2015] HCD 33	Section 123 of Transfer of Property Act, 1872; Gift by a Hindu	Appellate court below allowed the appeal in part holding that the deed was not acted upon since there is no evidence that possession was delivered to the defendant no.1. This finding is not correct. Where the instrument of gift has been registered, delivery of possession is not essential for the validity of a gift by a Hindu. (*Borhanuddin, J*)
5.	Mrs. Hurun Nahar & ors Vs Mozammel Haque & ors	Code of Civil Procedure, 1908; Order 23, Rule1	During the course of pendency of original proceedings in the Trial Court, the Court may permit the plaintiff to withdraw the suit with liberty to file a

SL No.	Name of the Parties and Citation	Key Words	Ratio
	5 SCOB [2015] HCD 37		fresh one, when there is a formal defect in the suit or for any other reason as provided, but such a right is not available to the plaintiff when there is already a judgment against him as aforesaid manner. (*Krishna Debnath, J*)
6.	Coats Bangladesh Ltd Vs Commissioner, Customs Bond Com. & ors. 5 SCOB [2015] HCD 40	NBR; Show cause notice; closed-minded show cause notice	When a higher authority, namely the NBR, has expressed its opinion agreeing with the proposal sent by the earlier Bond Commissioner (Mr. Helal Uddin), it became very much difficult for the subsequent Bond Commissioner (Mr. Enayet) to go for any other option but to follow the proposal as was agreed upon by the NBR. This being so, this Court is of the view that, the show cause notice dated 25.05.2004 was in fact a closed-minded show cause notice. Therefore, giving reply to the such show cause notice, or attending a hearing pursuant to such show cause notice, became a mere formality for the petitioner. This view is further strengthened when we see the actions taken by the Bond Commissioner against the petitioner at the same time of issuance of the said show cause notice. When the Bond Commissioner requests other concerned authorities to suspend a license for all practical purposes, no reasonable reading can be done from such actions that the said show cause notice was in fact a closed-minded show cause notice inasmuch as that the concerned Commissioner had already decided the fate of the petitioner's license. (*Sheikh Hassan Arif, J*)
7.	State & ors Vs Syed A. Salam & ors 5 SCOB [2015] HCD 49	Section 340 of CrPC; Legal Remembrancer's Manual, 1960 Chapter XII Paragraph no.6	An Advocate to defend an undefended accused charged with capital punishment should be appointed well in time of the commencement of trial of the case to enable him to study the case and the lawyer should be of sufficient standing and able to render

SL No.	Name of the Parties and Citation	Key Words	Ratio
			assistance. The lawyer should be provided with the papers similar to that of the Public prosecutor. (*Bhabani Prasad Singha, J*)
8.	Mrs. Sitara Siddiq Vs Bangladesh & ors. 5 SCOB [2015] HCD 57	Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 Section 7 and 8:	The application under sub-section (1) of section 7 shall contain the particulars as stipulated in Sub – section (1) of section 8 and also shall be accompanied by all the documents or the Photostat or true copies, as stipulated in Sub-section (2) of section 8 of the Ordinance No. LIV of 1985. In both the Sub-sections (1) and (2) of section 8 of the said Ordinance, the word 'shall' has been used i.e. "shall contain" and "shall be accompanied. So the particulars in sub-section (i) and documents as per sub-section (2) of section 8 of the Ordinance are the essential condition in making an application under sub-section (1) of section 7 of the said Ordinance. Without any of the said particulars and documents, it is not possible to file an application under section 7 of the said Ordinance. (*Md. Ashraful Kamal, J*)
9.	Shamsun Nahar Begum Shelly Vs. Bangladesh & ors 5 SCOB [2015] HCD 67	The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 Section 5(1)(b) And Article 7 of P.O. 16 of 1972; Natural justice	The Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance, 1985. Non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the "Kha" list of the Abandoned Buildings. It is also noted that there is nothing on record to show that the Petitioner was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the Petitioner. (*Mahmudul Hoque, J*)

SL No.	Name of the Parties and Citation	Key Words	Ratio
10.	Shoel Textile Mills Ltd & ors Vs Bangladesh & ors 5 SCOB [2015] HCD 74	Bank Companies Act, 1991; Section 5 GaGa; Section 27 KaKa; loan defaulter; reschedules a loan	The moment a bank or any other financial institutions reschedules a loan or grants any kind of loan, credit facilities or any other sort of financial assistance infavour of any person, it is virtually an admission on its part that the person to whom such financial assistance is being granted is not a loan defaulter under the definition provided in Section 5 GaGa of Bank Companies Act,1991. (*Kashefa Hussain, J*)
11.	Jafri Soap and Chemical Ind. & ors Vs. Agrani Bank & ors 5 SCOB [2015] HCD 79	Artha Rin Adlat Ain, 2003 Section 19,20,41,42	Without the provisions of Artha Rin Adalat Ain, 2003 any question regarding any proceedings initiated or any order, judgment or decree passed by the Judge of the Artha Rin Adalat cannot be raised in any court or to any authority and no court or authority will take cognizance or accept any application praying for any remedy filed in any court or authority ignoring the said provisions of section 20 of the Artha Rin Adalat Ain, 2003. (*S.M. Mozibur Rahman, J*)
12.	Rahima Begum VS. The State 5 SCOB [2015] HCD 84	Penal Code, 1860 Section 201, 302/34; Code of Criminal Procedure, 1898; Section 236 and 237; Motive;	There might be, as it appears, some animosity or hostility between the accused-appellant's husband Ali Haider and the deceased's father Abdur Rashid. But there was no such enmity between the accused-appellant and deceased's father or mother. In view of the facts above and evidence given by the prosecution, it is beyond our comprehension as to how and on the basis of which the learned Session Judge became convinced with and relied upon the prosecution case of killing Rabbi by the accused-appellant. Since there was no such reason for the accused-appellant to have any motive of killing an innocent minor boy of only 3 ½ years old, it seems to us hardly possible to believe in the alleged charge of causing death of Rabbi by the accused-appellant. (*Md. Farid Ahmed Shibli, J*)

SL No.	Name of the Parties and Citation	Key Words	Ratio
13.	Motiur Rahman @ Moitta & ors Vs. The State 5 SCOB [2015] HCD 91	Section 19A and 19(f) of the Arms Act, 1878; Exclusive control and possession	The person from whose exclusive control and possession arms and ammunition are found is the only person to be liable. (*Amir Hossain, J*)
14.	Ramesh Chandra Das & ors Vs. Sureshwar Mazumdar & ors 5 SCOB [2015] HCD 96	Section 106 of Transfer of Property Act	The defendant forfeited their right to stay in the suit properties by denying the title of the plaintiffs and as such the contents of the notice or any purported facts are insignificant here. Because if someone denies title of the land lord, notice under section 106 of the Transfer of Property Act may be dispensed with. Consequently the decision referred in 51 DLR 393 is not applicable here. On the other hand the case reported in 1 BLC AD 156 as reported by Mr. A.M. Amin Uddin has got semblance with the present case. (*Khizir Ahmed Choudhury, J*)
15.	Roli Chamka Vs Kantiomy Chakma & ors 5 SCOB [2015] HCD 101	Section 64 of the *iv0vgvwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb, 1989*	In our examination it is also found that opposite party received the money, executed a bainapatra and delivered the possession of the schedule land in question and the defendants has no objection to transfer the land by register deed in favour of the plaintiff-petitioner through the Court. The law of this area does not create any bar to transfer the land to the present petitioner. Prior approval is required only for those to transfer the lands who are not inhabitant of the same hill district. Moreover, we have also found that government pleader has no authority to file the suit on behalf of the Deputy Commissioner. (*Md. Iqbal Kabir, J*)

5 SCOB [2015] AD 1

APPELLATE DIVISION

PRESENT
Mr. Justice Md. Muzammel Hossain,
Chief Justice
Mr. Justice Surendra Kumar Sinha
Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali

CRIMINAL APPEAL NO.23 of 2011 (From the judgment and order dated 28.08.2008 passed by the High Court Division in Death Reference No.150 of 2004 heard along with Criminal Appeal No.4739 of 2004, Criminal Appeal No.4740 of 2004, Jail Appeal No.118 of 2006 and Jail Appeal No.597 of 2007 accepting the death reference in part and allowing the appeals.)

The State .....Appellant

=Versus=

Dafader Marfoth Ali Shah and others .....Respondents

For the Appellant	: Mr. Mahbubey Alam, Attorney General with Mr. M. K. Rahman, Additional Attorney General, Mr. Momtazuddin Fakir, Additional Attorney General with Mothahar Hossain Saju, Deputy Attorney General, Mr. Bishwajit Deb Nath, Deputy Attorney General, Mr. Ekramul Haque, Deputy Attorney General with Mr. Md. Masud Hasan Chowdhury, Assistant Attorney General, Mr. Shaikat Basu, Assistant Attorney General, Mrs. Mahfuza Begum, Assistant Attorney General and Mr. Bashir Ahmed, Assistant Attorney General instructed by Mrs. Sufia Khatun, Advocate-on-Record.
Government Chief Prosecutor	: Mr. Anisul Huq, Senior Advocate with Mr. Nurul Islam Sujan, Advocate and Mr. Sheikh Fazle-Noor-Taposh, Advocate as Government-Prosecutor.
As State Counsel to defend the respondents (appointed by the Court)	: Mr. Abdullah-Al-Mamun, Advocate.

Date of hearing :15.01.2013, 22.01.2013, 23.01.2013, 29.01.2013, 30.01.2013, 12.02.2013, 13.02.2013, 19.02.2013, 26.02.2013, 27.02.2013, 16.04.2013, 17.04.2013.

Date of judgment : 30.04.2013.

Evidence Act, 1872
Section 57:
Courts can take judicial notice of the ordinary course of events. That a matter is judicially noticed means that it is taken as true without the necessity of being formally proved on evidence. Taylor in his Law of Evidence states that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery. Nor is it necessary to prove the course of the heavenly bodies, or the like, that a matter is judicially noticeable means that it is taken without offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. A proclamation of emergency is a matter of general information of which a court can take judicial notice. A matter of public history may be such a fact (Wigmore section 2567). Facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in clauses (1) to (13) of section 57 of the Evidence Act.

... (Surendra Kumar Sinha, J) (Para 15)

Penal Code, 1860
Section 109:
Offence of abetement:
In order to implicate a person of an offence as abettor it has to be proved the *actus reus* he has abetted with the necessary *mens rea*. To establish the charge of abetement there must be evidence that an act was abetted and that it was abetted by the person charged with. The act abetted must, moreover, amount to a crime, and in order to connect the abettor with the crime, it is not sufficient to prove that he had taken part in those steps of the transaction which are innocent, but it must also be proved that he had deliberately taken part in those steps of the transaction which constituted an offence. Section 109 may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by illegal omission.

... (Surendra Kumar Sinha, J) (Para 23)

Penal Code, 1860
Section 120A and 120B:
The essence of criminal conspiracy is an agreement to commit an illegal act by some persons. A criminal conspiracy by its nature is hatched up in secrecy and direct evidence to prove conspiracy is seldom available. The offence of conspiracy being a making of an agreement to do an unlawful act, it is a matter of inference to be drawn from direct or circumstantial evidence. It can be inferred from the acts and conduct of the parties in agreement of conspiracy that there was an agreement between two or more persons to do one or the other of the acts described in the section. The conspiracy consists not merely in the intention of two or more persons, but in the agreement of

those persons to do such acts. So long as such a design rests only in intention, it is not punishable. ... (Surendra Kumar Sinha, J) (Para 34)

Penal Code, 1860
Section 107, 109 and 120B:
Offences created by sections 109 and 120B of the Penal Code are quite distinct though in both, the element of conspiracy is present. There is analogy between these two sections and there may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Second clause of section 107 states that a person abets the doing of a thing who engages with one or more other persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy. So, in order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy. Secondly, an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing, it is not necessary that the abettor should concert in the offence with the persons who committed it.
... (Surendra Kumar Sinha, J) (Para 35)

Penal Code, 1860
Section 34:
Evidence Act, 1872
Section 10:
The 'common intention' which is a constituent of proving an offence of criminal conspiracy is different from the one 'common intention' used in section 34 of the Penal Code. The expression 'common intention' used in section 10 of the Evidence Act signifies a common intention existing at the time when the thing was said, done or written by one of the conspirators but the 'common intention' referred to in section 34 is doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention. ... (Surendra Kumar Sinha, J) (Para 41)

Article 104 of the Constitution:
The Constitution is a social document, and Article 104 is not meant for mere adorning the Constitution. The Constituent Assembly felt that a provision like the one should be kept in the Constitution so that in exceptional cases the highest court of the country could invoke its inherent powers. It is conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law. Apart from the powers given to this Division by the Constitution, a Court of law always retains some inherent powers. It is, therefore, said, the Court is not powerless to undo any injustice caused to a party. Shutting of judicial eyes even after detection of palpable injustice is in one sense denial of justice. If the Judges do not rise to the occasion to which they are oath bound to do justice, they would commit the similar illegality as the one committed by a litigant. Court's practical approach would be towards doing justice without bothering too much about any one's perception. We should never compromise to do justice. ... (Surendra Kumar Sinha, J) (Minority view)(Para 126)

Appellate Division's Rules
Rule 13 of Order XXIII and rule 5 of Order XX:
The evidence on record proved beyond doubt that the killing was perpetrated in pursuance of a conspiracy and therefore, it is consonance to law and justice that the

respondents should be awarded a legal conviction of an offence on the basis of the evidence on record. If a graver sentence is provided for murder in pursuance of conspiracy, the question of prejudice would have arisen. Here the respondents have not acquired any right against the acquittal on the charge of conspiracy. So, even without exercise of inherent power, this Division can alter the conviction of the respondents to one of murder in pursuance of the criminal conspiracy. The appellant has taken ground Nos.II and IV in its concise statement for convicting the accused on the charge of conspiracy. In view of rule 13 of Order XXIII, rule 5 of Order XX of the Appellate Division's Rules are applicable to criminal appeals, and there is no legal bar to convict them even if no leave was granted on this point. This is a settled point and I need not make any observation on this question. In support of the charge, the prosecution has adduced evidence and the accused persons have defended the same. The trial court as well as the High Court Division discussed the evidence in support of this charge but disbelieved the charge on perfunctory grounds. Therefore, there is no legal bar to convict the respondents on the basis of the evidence on record.

... (Surendra Kumar Sinha, J) (Minority view)(Para 137)

The High Court Division on a misconception of law held that the prosecution has failed to prove the conspiracy. From the evidence as discussed above, if there be any doubt about the conspiracy, it would be difficult to find out a suitable case to prove such charge. The facts found from the materials on record, the barbarity revealed in the commission of the crime and the seriousness of nature of the offence perpetrated by the accused, it would be a travesty irony if the accused persons are not convicted on the charge of conspiracy. With due respect I am unable to endorse the majority opinion that the accused-respondents cannot be convicted on the charge of criminal conspiracy. The question of the benefit of law does not arise at all for simple reason that they were charged with and defended of the charge of criminal conspiracy. If that being the position, the sentence being the same, the question of injustice or prejudice does not arise at all. The respondents cannot be fastened with vicarious criminal liability within the meaning of section 34 of the Penal Code but their conviction would be one under sections 120B read with 302, not under sections 302/34 of the Penal Code.

... (Surendra Kumar Sinha, J) (Minority view)(Para 139)

F.I.R:

Where there is no F.I.R. or where the F.I.R. cannot be proved in accordance with law in that case also the court will not detract the testimony of the witnesses which will have to be assessed on its own merits and the case is to be assessed on merit on the basis of the evidence adduced before it.

... (Nazmun Ara Sultana, J) (Para 219)

Discrepency always occurs even in the evidence of the truthful witnesses:

The learned Counsel has contended that these contradictory statements of these P.Ws. reasonably make these witnesses untrustworthy. But we are unable to accept this argument of the learned Counsel in this present case. Considering the very facts and circumstances of this case we rather, are of the view that it was very much natural on the part of the witnesses to make discrepent statements regarding colour of the wearing clothes and the weapons of the assaillants and that these discrepent or contradictory statements of the P.Ws. are so trifling in nature that these cannot raise any suspecion about the truthfulness of the witness or about the occurrence they narrated. The learned Counsel for the accused-respondents has pointed out some other alleged minor

discrepent or contradictory statements also in the evidence of the prosecution withnesses, but we do not find any of these alleged discrepent or contradictory statemetns of the prosecution witnesses fatal at all to raise any suspicion about the truthfulness of these witnesss. Discrepency always occurs even in the evidence of the truthful witnesses. It is also settled that one part of evidence of a witness even if is rejected the other part of the evidence of the same witness may be accepted.

... (Nazmun Ara Sultana, J) (Para 220)

Article 104 of the Constitution:

The exercise of the power of doing 'complete justice′ under article 104 is circumscribed by two conditions, (i)that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and (ii) that the order which Supreme Court passes must be necessary for doing "complete justice" <u>in the cause or matter pending before it</u>. Obviously the matter pending before us in this appeal is the acquittal of two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha of the charges under sections 302/34 and 302/109 of the Penal Code. Leave to file this appeal was granted to consider only whether the acquittal of the present two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code was correct and justified. So, obviously, the question whether the acquittal of all the accused persons from the charge of criminal conspiracy-is not at all a matter pending before us. It has already been pointed out above that the present State-appellant or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of criminal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appeal time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy-as ordered by a court of law. In the name of doing 'complete justice′ this right of the accused persons now cannot be ignored.

... (Nazmun Ara Sultana, J) (Majority view) (Para 239)

Considering the above stated facts and circumstances and the legal position we do not find that there is any scope now to convict the accused persons or any of them on the charge of criminal conspiracy by exercising the inherent power of this Division under article 104 of the Constitution. ... (Nazmun Ara Sultana, J) (Majority view) (Para 252)

J U D G M E N T

Md. Muzammel Hossain, C. J.-

1. I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

Surendra Kumar Sinha, J:

2. I have had the privilege of reading the draft copy of the judgment prepared by my learned sister Nazmun Ara Sultana, J. While I fully endorse her view that 'the accused

persons made a conspiracy to kill the four Awami League leaders inside the jail and in pursuance of that conspiracy accused Risalder Muslem Uddin, the present accused respondents Dafader Marfoth Ali Shah and L.S. (Dafader) Abul Hashem Mridha along with two other army personnel' perpetrated the killing in the Dhaka Central Jail on the night following 2nd November, 1975 at around 4 a.m, I am however, unable to endorse her opinion in the operating part of the judgment restoring the respondents conviction passed by the trial court under sections 302/34 of the penal code and her findings that 'The trial Court, therefore, rightly convicted' the respondents. I also fully agree with my learned sister with her concluding opinion that the High Court Division erred in law in acquitting respondents. Since my learned sister has extensively discussed the evidence on record, I will discuss the evidence shortly which are necessary in support of my opinion.

3. A prison is a place in which people are physically confined and usually deprived of a range of personal freedoms. Incarceration in prison is a legal penalty that may be imposed by the Courts for the commission of a crime. Other terms used as penitentiary, correctional facility, remand centre, detention centre, and a gaol or jail. A prison system is the organizational arrangement of the provision and operation of prisons. A prison may also sometimes be used as a tool of political repression to detain political prisoners, prisoners of conscience and enemies of the state, particularly by authoritarian regimes. In times of war or conflict, prisoners of war may also be detained in prisons. The use of capital punishment began to decline in the late 18th century, the prisons are increasingly used by courts as a place of punishment, eventually becoming the chief means of punishing serious offenders. The concept of the prison as a penitentiary (as a place of punishment and personal reform) was advocated by the English jurist and philosopher Jeremy Bentham, among others. Confinement of criminals came to be viewed as an ideal, because it was thought that solitude would help the offender to become penitent and that penitence would result in rehabilitation.

4. Prisons are normally surrounded by fencing, walls, earthworks, geographical features, or other barriers to prevent escape. Multiple barriers, concertina wire, in some cases electrified fencing, secured and defensible main gates, armed guard towers, lighting, motion sensors and roving patrols may also be present depending on the level of security. There are a number of accepted reasons for the use of imprisonment. One approach aims to deter those who would otherwise commit crimes (general deterrence) and to make it less likely that those who serve a prison sentence will commit crimes after their release (individual deterrence). A second approach focuses on issuing punishment to, or obtaining retribution from those who have committed serious crimes. A third approach encourages the personal reform of those who are sent to prison. Finally, in some cases it is necessary to protect the public from those who commit crimes-particularly from those who do so persistently. Although prisons are intended to be institutions where good order prevails, but it is also possible that in certain circumstances the discipline may break down. It is the responsibility of prison administrators to ensure that each arriving prisoner understands what type of behaviour is expected and what acts are forbidden. On top of everything, their personal security is ensured by the State itself. In addition, there must be a clear set of disciplinary sanctions for acts of indiscipline.

5. The modern prison system was born in London, influenced by the utilitarianism of Jeremy Bentham. Bentham's panopticon introduced the principle of observation and control that underpins the design of the modern prison. The notion of prisoners being incarcerated as part of their punishment or detention for the time being and simply as a holding state until trial or hanging or imprisonment was at the time revolutionary. This is when prisons had begun to be used as criminal rehabilitation centers.

6. Political prisoners are not treated as under-trial prisoners nor are they treated as convicted persons. They are kept in prison for alleged violation of prejudicial acts. They are kept separately without mixing with other prisoners. Their status is much higher than an ordinary civilian prisoner. It is the responsibility of the prison authority to ensure their safety and security. Even during medieval period it was inconceivable that a prisoner could be brutally killed by the authority in power. It is always treated as the safest place for all kinds of prisoners and detainees. This has been not only proved untrue in the case in hand, the governments in power instead of putting the killers to justice rewarded them.

7. After the killing of Sheikh Mujibur Rahman, the entire nation was maimed to hear the news of the killing of Syed Nazrul Islam, Tajuddin Ahmed, Captain Monsur Ali and M. Kamruzzaman in their prison cells in the Dhaka Central Jail. The authority remained unmoved and indifferent. Being impelled by conscience, Kazi Abdul Awal (P.W.1), the DIG (Prisons) Dhaka Central Jail, lodged an FIR on 4th November, 1975, being Lalbagh P.S. Case No.11 dated 4th November, 1975, taking risk of his life as the authority in power wanted to suppress the real incident of the killing. He stated that realizing the hatefulness and barbarism and the gravity of the incident, he himself lodged the FIR instead of allowing the Jailor to lodge the same. No investigation was held over the said incident to unearth the names of the assailants, their purpose and intention of the killing. The investigation of the case was postponed sine die by the order of the Government as revealed from the statement of Abdul Kahar Akond (P.W.64). The reason is obvious from all corners the fingers were pointing towards Khandaker Mustaq, his security team deputed at Bangabhaban and his followers as the killers. These killers were staying with Khandaker Mustaq in Bangabhaban forming his security team and associates to consolidate power for running the country.

8. In 1996, when the Awami League, the political party to which these national leaders belonged, formed Government, revived the case. P.W.64 could not trace out the original FIR. Ultimately, he colleted the true copies thereof from two places, one from the Dhaka Central Jail, ext-1 and the other from the judicial record of the Inspector General of Police, ext-3. In due course, he submitted the charge sheet on 15th October, 1998, against the respondents and 18 others. The learned Sessions Judge, Dhaka, received the case record for trial on 24th November, 1998. All 20(twenty) accused including the respondents stood charged under sections 120B and 302/109 of the Penal Code. Accused Moslemuddin was also separately charged under section 302 of the Penal Code. Most of the accused persons including the respondents remained in abscondence. They were tried in absentia. The trial Court as well as the High Court Division, believed the incident of killing but disbelieved the claim of P.W.1 that exts-1 and 3 are the true copies of the FIR. Despite that, the trial Court convicted 15 accused persons including the respondents in absentia and sentenced some of them to imprisonment for life under sections 302/109 of the Penal Code and the respondents with Moslem Uddin @ Moslem Uddin @ Heron Khan @ Moslem Uddin Khan to death under sections 302/34 of the Penal Code. All the accused persons were found not guilty of the charge of conspiracy under section 120B of the Penal Code and acquitted of the said charge.

9. Abdus Samad Azad (P.W.10) was a political prisoner with these leaders during the relevant time stated that after the killing of Sheikh Mujibur Rahman along with his family members on 15th August, 1975, Khandaker Mustaq Ahmed declared himself as President. On 23rd August, 1975, he was arrested by the police and taken to the Police Control Room. On reaching there, he found late Syed Nazrul Islam, late Kamruzzaman, late Tajuddin Ahmed and late Captain Monsur Ali and at 12.30 noon, they were taken to the Dhaka Central Jail.

Md. Nasim (P.w.14), son of late Monsur Ali stated that the killers of Sheikh Mujibur Rahman, namely Khandaker Mustaq, Col. Rashid, Col. Faruq and others took his father into the Dhaka Central Jail and there, they killed his father along with Syed Nazrul Islam, Tajuddin Ahmed and Kamruzzaman.

10. P.W.14 stated that on hearing the news on radio about the killing of Sheikh Mujibur Rahman; the usurpation of power by Khandaker Mustaq and the declaration of Martial Law, he was puzzled for the safety and security of his father as his father was then the Prime Minister of Bangladesh. He shifted his father to a house adjacent to his father's official residence. Then he shifted his father to the house of his maternal uncle Mahbubul Alam at Eskaton at noon. In the meantime Khandaker Mustaq wanted to know the whereabouts of his father. In late evening, the army personnel came in the area. On hearing the news over radio about the formation of the Government by Khandaker Mustaq his father became nervous. Then he shifted his father at night to the residence of a security staff of his father at T & T Colony. Sometimes thereafter, Shah Muazzem Hossain and Obaidur Rahman came to their Eskaton residence and wanted to know the whereabouts of his father. There was exchange of hot words with them. They told him that they were apprehensive of his father's security and they wanted to take him at a secured place for which they wanted to talk with him. They took Monsur Ali to Bangabhaban and there, Khandaker Mustaq offered him to become the Prime Minister. Monsur Ali refused the proposal disdainfully. Then Khandaker Mustaq Ahmed threatened him stating that if he did not accept the proposal, he would face similar fate like the one of 15th August. His father came back and on 22nd August he was arrested.

11. AHS Hasanuzzaman (P.W.31) stated that after taking late Kamruzzaman into jail, he along with Kamruzzaman's wife used to meet him in jail. During the relevant time Kamruzzaman was the party's chief and Sheikh Mujibur Rahman was the President of the country. Khandaker Mustaq earlier requested Kamruzzaman to support him for the post of Prime Minister but Kamruzzaman instead supported Monsur Ali for the office of Prime Minister. So, Khandaker Mustaq was displeased towards Kamruzzaman for not supporting him and the latter was apprehensive that Khandaker Mustaq would take revenge for not supporting him. When these leaders were in such detention, they were brutally killed on 3rd November, 1975.

12. P.W.36 stated that after the killing of Sheikh Mujibur Rahman, the army cordoned their residence and an officer told that all members of the family were put under house arrest. They snapped the telephone link. At 1.30 in the night, Major Dalim with an accomplice came and wanted to know what problem they were then facing. Her father being enraged abused him. On 23rd August, 1975, in the morning, the police took her father with them. Then she came to know that her father was kept in the Dhaka Central Jail. Towards mid October, 1975, she along with her mother went to meet her father in Dhaka Central Jail, when the latter told them that the country was heading towards a direction in which the pro-liberation forces would not be allowed to survive by the new regime.

13. Admittedly, these four leaders were the architects of the liberation of the country and presented to the people the fruits of liberation within a shortest period of time. They organized the unarmed young and adolescent boys to become freedom fighters for liberating the country and fought against an organized Pakistani army equipped with modern sophisticated arms, collected arms for them for fighting with them and convinced the world leaders that they were fighting for political, social and economic independence from the oppressive Government. These leaders were arrested and detained in prison only because

they did not give allegiance to the usurpation of power by Khandaker Mustaq Ahmed and refused to join his Government.

14. The object and purpose behind the killing of the said four leaders are discernible from the testimonies of P.Ws.10, 14 and 36. These leaders not only refused to give allegiance to Khandaker Mustaq's usurpation of power but also refused to join his Government. Naturally, Khandaker Mustaq was not only harbouring hatred towards them, but also realised that these leaders were thorns in his way to run the Government peacefully, and if they were kept alive, they might have mobilized the workers of Awami League after coming out from the prison in future. It is also an undisputed fact that Khandaker Mustaq came to power by killing Sheikh Mujibur Rahman with the help of some aberrated army officers, most of them were involved in the said killing. The evidence on record revealed that the killers of Sheikh Mujibur Rahman were deployed for the security of Khandaker Mustaq Ahmed and stayed with him in Bangabhaban. These are historical facts and the court can take judicial notice of these facts.

15. Courts can take judicial notice of the ordinary course of events. That a matter is judicially noticed means that it is taken as true without the necessity of being formally proved on evidence. Taylor in his Law of Evidence states that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery. Nor is it necessary to prove the course of the heavenly bodies, or the like, that a matter is judicially noticeable means that it is taken without offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. A proclamation of emergency is a matter of general information of which a court can take judicial notice. A matter of public history may be such a fact (Wigmore section 2567). Facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in clauses (1) to (13) of section 57 of the Evidence Act.

16. In the penultimate paragraph of section 57 of the Evidence Act it is stated that "*If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so*". This paragraph does not say whether the court may or may not take notice of any fact, nor does it say or mean that the court shall or may take judicial notice of every matter which comes under the head of description given there. It merely provides that when the court does take judicial notice of the fact of which it is bound to take judicial notice under clauses (1) to (13), then it may refer to appropriate books of reference about those facts. Though the matters of history, literature, science and art are not mentioned in section 57 as matters of which the court may take judicial notice, section 57 is not exhaustive of the facts of which the court may take judicial notice. This paragraph is in accordance with English law, so far as it enables the court to refer the appropriate books or documents of reference upon matters. It is directed to take judicial notice of it in advance of such law, in so far as it permits the court to refer to such books and documents on matters of public history, literature, science or arts.

17. Besides those matters, there may be other facts which are considered too notorious to require formal proof; such matters are, therefore, "judicially noticed". *"Any matter of such common knowledge that it should be an insult to intelligence to require proof of it would probably be dealt with in this way (*Cockle's Cases and Statutes on Evidence, Eighth Edition, page 13)". Of them, historical facts, geographical truths, scientific inventions, socio-economic conditions at a given time, natural phenomena, axiomatic truth, common affairs of life in general knowledge of people, religious history and prevalence of a religious belief and

distinction between ideas of two sects. The courts can take judicial notice of partition of India, the communal disturbance at that time and the consequent insecurity of lives and property of Muslims in India and Hindus in Pakistan and their migration to India and Pakistan etc. (Shiv Nath V. Union of Indai, AIR 1965 SC 1666).

18. In Onkar Nath V. Delhi Administration, AIR 1977 S.C. 1108, Onkar Nath, a Railway employee was convicted by a Magistrate and his conviction was upheld by the appellate Court and the High Court in revision. His conviction was under the provisions of the Defence of India Rules, 1971. The allegation against him is that in violation of the prohibition, the appellant who was a leader of the Railwaymen's Union held a meeting in the Railway yard inciting Railway workers to go on strike from May 8, 1971. The Supreme Court held that facts mentioned in Section 57 of the Evidence Act were not exhaustive and the purpose of this section is to provide that the Court shall take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public notice. *"Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to the commonsense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No Court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation, need no proof and are judicially noticed. Judicial notice in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof", the court observed.* Accordingly, the supreme Court held that the Courts below were justified in assuming without formal evidence the Railway strike was imminent on May 5, 1974, and that a strike paralysing the civic life of the nation was undertaken by a section of workers on 8th May, 1974.

19. Similarly the general election of Pakistan held in 1970 is a landmark in the history of struggle for the right of self-determination of the people of erstwhile East Pakistan is a historical fact and the court can take its' judicial notice. In the said election Awami League appeared as a single majority party of the National Assembly of Pakistan for the purpose of framing a Constitution so as to ensure the political, social and economic right of the people of East Pakistan. The historical speech of Sheikh Mujibur Rahman on 7th March, 1971, at Race Course Maidan which inspired the people to participate in the struggle for national liberation; the declaration of Independence of Bangladesh on the night following 25th March, 1971, when the Pakistani Army cracked down and committed genocide, rape, arson and crime against peace and humanity; the elected representatives declared and constituted Bangladesh to be a sovereign Peoples Republic on 10th April, 1971, and formed the Government and took oath on 17th April, 1971, at Mujibnagar with the national four leaders, namely, late Syed Nazrul Islam as Acting-President, late Tajuddin Ahmed as Prime Minister, late M. Monsur Ali as Finance Minister and late M. Qamruzzamman as Home and Relief & Rehabilitation Minister are historical facts and the Court can take judicial notice of them.

20. The constitution of the 'Constituent Assembly', the drafting of the Constitution of the Peoples Republic of Bangladesh and adopting it on 4th November, 1972, which came into force on 16th December, 1972, the killing of Sheikh Mujibur Rahman and his family members on 15 August, 1975, by some aberrated army officers; the usurpation of power by Khandaker Mustaq Ahmed after killing Sheikh Mujibur Rahman; the arrest of four national leaders and keeping them in the Dhaka Central jail as they refused to give allegiance to

Khandaker Mustaq's Government and also refused to join his cabinet; the killing of these four national leaders Syed Nazrul Islam, Tajuddin Ahmed, Monsur Ali and M. Kamruzzaman while they were kept as political prisoners in Dhaka Central Jail in the early hours of 3rd November, 1975, when Khandaker Mustaq Ahmed was the President of the country are so notorious facts that those cannot be disputed by any body and if any one disputes these historical events, he will be taken or treated as a person not believing the history behind the sacrifice of millions of martyrs for the liberation, and the sovereignty of Bangladesh.

21. The trial Court committed a fundamental error in convicting the respondents along with 13 others under sections 302/109 of the Penal Code and also convicting the respondents along with Moslem Uddin under sections 302/34 of the Penal Code for the self same incident of murders. This shows that the trial Court was totally confused in the application of an offence of abetment of murder and sharing of common intention by two or more accused persons in the commission of murder in a case. The accused persons cannot be convicted for these two categories of offence for the commission of the self same incident of murders. One or more accused persons can be convicted for the abetment of the offence and the others for sharing common intention. Either they could be convicted under sections 302/109 or under sections 302/34 of the Penal Code if there are legal evidence in support of either of the charges but they could't be convicted on both counts for the same offence of murders committed in course of the same transaction. The High Court Division has totally overlooked this glaring mistake and opted not to express any opinion either due to its ignorance or through inadvertence. In arriving at the conclusion of finding them guilty of those charges, it made inconsistent findings. On perusal of the judgment one can legitimately infer that the learned Judge is a novice judicial officer whose conception in criminal laws is very poor.

22. An abetment is an instigation to a person to do an act in a certain way or aid some other persons in doing an act. It is a preparatory act and connotes active complicity on the part of the abettor at a point of time prior to the actual commission of the offence. To constitute abetement the person must instigate any person to do a particular thing or he must engage with one or more persons in any conspiracy for the doing of that thing or intentionally aids by any act or illegal omission, the doing of that thing. These are the three essential ingredients to constitute abetement as crime. Section 109 is concerned only with the punishment of abetment and lays down nothing more than that if the Penal Code has not separately provided for the punishment of an abetment as such, then it is punishable as provided for the original offence. This section may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of offence or has engaged with one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy some acts or illegal omission takes place or has intentionally made it possible of the commission of an offence by an act or illegal omission.

23. It is to be noted that in order to implicate a person of an offence as abettor it has to be proved the *actus reus* he has abetted with the necessary *mens rea*. To establish the charge of abetement there must be evidence that an act was abetted and that it was abetted by the person charged with. The act abetted must, moreover, amount to a crime, and in order to connect the abettor with the crime, it is not sufficient to prove that he had taken part in those steps of the transaction which are innocent, but it must also be proved that he had deliberately taken part in those steps of the transaction which constituted an offence. Section 109 may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or

illegal omission takes place or has intentionally aided the commission of an offence by illegal omission.

24. Section 34 of the Penal Code embodies the principle of joint liability in doing of a criminal act, the essence of that liability is the existence of a common intention. Section 34 deals with the doing of separate act or acts, similar or diverse, by two or more persons, if done in furtherance of a common intention, each person is liable for the consequence of those as if he had done those himself for 'that act' and 'the act' in the latter part of the section must include the whole section covered by a 'criminal act' in the first part because they refer to it.

25. Section 34 of the Penal Code does not create a substantive offence. If two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it individually. Common intention requires a prior consent or concert or a pre-planning. It is the intention or *mens rea* to commit the offence and the accused can be convicted only if such an intention has been shared by all of them. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop at the instant when such crime is committed.

26. It is difficult, in the premises, if not impossible, to procure direct evidence of such intention. It is similar to that of criminal conspiracy. In most cases, it has to be inferred from the acts or conduct of the accused and other relevant circumstances. So, mere accompanying the other accused may not infer common intention. Existence or otherwise of common intention depends upon facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal offender. Evidence regarding development of common intention to commit an offence graver than the one originally designed, during execution of the original plan, should be clear and cogent. In this connection reference may be given to the cases of Dharam Pal V. State of Haryana, AIR 1978 S.C. 1492 and Abdur Rahman Mondal V. State, 29 DLR (SC) 247.

27. In Dharam Pal, it was observed that the common intention to commit an offence is graver than the one originally designed may develop during the execution of the original plan, that is to say, during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent beyond suspicion, however strong, cannot take place of the proof which is essential to bring home the offence of the accused. In Abdur Rahman, (supra) Ashanuddin Chowdhury,J. observed '*The common intention to bring about a particular result may well develop on the spot as between a number of persons. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference or incriminating acts must be compatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. Further, it is essence of section 34 that the person must be physically present at the actual commission of the crime'.(Italics supplied).*

28. The conduct or act of the accused can be gathered and the inference can only be drawn by the manner in which the accused or some of them, arrived on the scene and mounted the attack, the determination and the conduct with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct towards one goal which matter. It is the totality of the circumstances to be taken into consideration in arriving at the conclusion whether the accused

had a common intention to commit an offence with which they could be convicted. It is, therefore, established principle that the pre-arranged plan or even the intention may develop on the spot leading to the commission of the offence. But the crucial circumstance is that the said plan must precede the act constituting the offence. Therefore, before convicting an accused, the court must come to a definite conclusion that the said person had a prior concert with one or more persons for committing the offence.

29. The dominant feature of section 34 of the Penal Code is the element of participation in the entire canvas portraying the actions. The views taken in Abdur Rahman Mandal (supra) have been approved by this Division in a subsequent case in Major Md. Bazlur Huda V. State, ADC vol.VI(A)1. In that case, Sultan Shahriar was not present at or near the place of occurrence–he was at the Radio Station when Sheikh Mujibur Rahman and other members of his family were killed. On behalf of the accused his conviction under sections 302/34 of the Penal Code was challenged on the ground that in view of the admitted fact of his absence at the place of occurrence, his act of participation in the killing does not come within the ambit of section 34 of the Penal Code in the absence of any overt act or any other act of participation in the killing. It was also urged that in order to bring him within the ambit of sharing common intention with other accused persons his participation with other perpetrators in the scene of crime in pre-concerted or pre-arranged plan must be proved. In this connection this Division considered the cases of Barendra Kumar Ghose V. Emperor, AIR 1925 P.C.1, Shreekantiah Ramayya Muni Palli V. State of Bombay, AIR 1955 S.C. 287, Tukhram Gonopat V. State of Maharashtra, AIR 1974 S.C. 514, Jaikrishna Das Monohordas Desai V. State of Bombay, AIR 1960 S.C.889, Ramaswami V. State of T.N. AIR 1976 S.C. 2027, Abdur Rahman Mondal V. State, 29 DLR (SC) 247, Bangladesh V. Abed Ali, 36 DLR (AD) 234, Abdus Samad V. State 44 DLR (AD) 233 and State V. Tajul Islam, 48 DLR 305 and held by majority that in order to bring an accused within the ambit of section 34 of the Penal Code, the presence of the accused at the scene of occurrence must be proved and that his participation, that is to say, overt act either direct or indirect in the commission of the offence in furtherance of the common intention of all must also be proved.

30. Apart from the above, it is to be noted that there are distinguishing features in the applicability of vicarious or joint liability in offences of physical violence and other offences. Sometimes we ignore the difference and in some cases it is held that though the dominant feature is the element of participation in actions, this participation need not in all cases be by physical presence. This Division approved the distinction drawn by the Supreme Court of India in Monohardas Desai (Supra) and Ramaswami Yanangar's (supra) in cases regarding the applicability of section 34 of the Penal Code in respect of offences of physical violence and other offences in Major Bazlur Huda (supra). It is stated that in offences of physical violence, the presence of accused at the scene or, at or nearer to the scene of occurrence is necessary for rendering him liable on the principle of joint liability. The trial Court has totally ignored the applicability of sections 109 and 34 in a given case. The High Court Division ought to have expressed its opinion in this regard.

31. The offence of murder committed in consequence of a conspiracy and the offence of murder committed in pursuance of common intention by more than one accused persons are in essence, as discussed above, distinct. A criminal conspiracy differs from other offences, that is to say, an intention to do a criminal act is not a crime in itself, until something is done amounting to the doing or attempting to do some act, to carry out the intention; conspiracy on the other hand consist simply in the agreement confederacy to do some act. In a criminal conspiracy, accused persons are often required to do various acts at various stages; even if for

the first time they come into conspiracy, at a later stage they are members of the conspiracy provided their act is calculated to promote the object of the conspiracy: is attracted when an offence of culpable homicide is committed 'in furtherance of common intention' of two or more persons, then every one of them is as such guilty as the other and it is not necessary that every one of them should have participated in the commission of the murder to the same extent. It is thus not consonant to law that after the accused persons were found guilty of criminal conspiracy to kill the four leaders in the Dhaka Central Jail, their conviction under section 302/34 of the Penal Code passed by the trial court could be legally maintainable.

32. The trial court has committed another fundamental error in acquitting the accused persons of the charge of criminal conspiracy. The High Court Division also committed the similar error in maintaining the finding on the charge of criminal conspiracy. Though it maintained the death sentence of Moslem Uddin, acquitted the respondents and Syed Faruque Rahman, Sultan Shahriar Rashid Khan, Bazlur Huda and A.K.M. Mohiuddin Ahmed. On the charge of conspiracy it held that the prosecution failed to prove that the killing was perpetrated in consequence of a criminal conspiracy hatched up in Bangabhaban by Khandaker Mustaq Ahmed, the politicians staying with him and his security team deputed at Bangabhaban or that the killing was implemented and monitored from the Bangabhaban over telephone. It observed that the story of telephonic talk between Bangabahban and the Dhaka Central Jail has not been established to the hilt of the case and that "*the trial court has itself evaluated rightly discarded the testimonies of the witnesses who deposed relating to the deliberations amongst the accused persons inside the Bangabhaban over the killing of the 4 leaders*". The High Court Division concluded its opinion observing that it was not possible or probable on the part of the accused persons staying at Bangabhaban "*to go out of the same at 0.00 hours or afterwards on 03.11.75 because of promulgation of coup-d'etat by Khaled Mosharaff on the same night and the consequent withdrawal of Tank Regiment from Bangabhaban as also for deployment of rival forces lead by the leader of the coup, within the vicinity of Bangabhaban, at 12-1.00 hours of November 3, 1975*".

33. It was contended on behalf of the appellant that the four national leaders were brutally killed as a part of deep rooted conspiracy, which was hatched up in the Bangabhaban by Khandakar Mustaq Ahmed, with the political leaders staying with him and his security team, and there are sufficient evidence in support of the charge of criminal conspiracy both direct and circumstantial, and therefore, the High Court Division acted illegally in acquitting the respondents. On the other hand, learned counsel appearing for the respondents supports the judgment of the High Court Division and submits that the High Court Division as well as the trial court on a proper appreciation of the evidence on record has arrived at a right conclusion that the prosecution has failed to prove the charge of conspiracy on assigning cogent reasons-this finding being concurrent, this Division should not interfere with such finding of fact.

34. Both the High court Division and the trial Court fell in error in failing to notice that conspiracy is a matter of inference deduced from certain acts of persons done in pursuance of an apparent criminal purpose in common between them. In the very nature of the offence, the presence of the accused at the scene of occurrence is not necessary. Section 120A of the Penal Code defines criminal conspiracy, which enacts that when two or more persons agreed or cause to be done an illegal act or an act which is not illegal but by illegal means, such an agreement is designated as criminal conspiracy punishable under section 120B of the Penal Code. The essence of criminal conspiracy is an agreement to commit an illegal act by some persons. A criminal conspiracy by its nature is hatched up in secrecy and direct evidence to prove conspiracy is seldom available. The offence of conspiracy being a making of an

agreement to do an unlawful act, it is a matter of inference to be drawn from direct or circumstantial evidence. It can be inferred from the acts and conduct of the parties in agreement of conspiracy that there was an agreement between two or more persons to do one or the other of the acts described in the section. The conspiracy consists not merely in the intention of two or more persons, but in the agreement of those persons to do such acts. So long as such a design rests only in intention, it is not punishable.

35. The existence of a criminal conspiracy presupposes a guilty state of mind and a situation wherein the concerned accused, pursuant to a predetermined decision, execute a series of acts that constitute a criminal offence. In such case, the acts themselves are of such a character that a participation in those would leave no doubt that the concerned accused were taking part of an offence of criminal conspiracy. Further, offences created by sections 109 and 120B of the Penal Code are quite distinct though in both, the element of conspiracy is present. There is analogy between these two sections and there may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Second clause of section 107 states that a person abets the doing of a thing who engages with one or more other persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy. So, in order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy. Secondly, an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing, it is not necessary that the abettor should concert in the offence with the persons who committed it.

36. Whereas, section 120A consist in a mere agreement by two or more persons to do or cause to be done, an illegal act or an act which is not illegal by illegal means. When there is an agreement to commit an offence, the agreement itself becomes the offence of criminal conspiracy. So, distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this criteria. Criminal conspiracy to commit an offence is itself an offence and a person can be separately charged in respect to such a conspiracy. In this connection, reference may be given in the case of Kaher Singh V. State (Delhi Admn), AIR 1988 SC 1883, in which, the distinction of these two offences have been exhaustively dealt with and disagreed with the argument that a party to a criminal conspiracy shall be punished in the same manner as if he had abetted such an offence. It was observed by K. Jagannatha Shetty,J. in paragraph 257:

> "t*he gist of the offence of criminal conspiracy created under section 120-A is a bare agreement to commit an offence. It has been made punishable under section 120-B. The offence of abatement created under the second clause of section 107 requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by the wordings of section 107 (Secondly): "engages in any conspiracy ..... for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy ...." The punishments for these two categories of crimes are also quite different. Section 109, IPC is concerned only with punishment abetments of for which no express provision is made under the Indian Penal Code. A charge under section 109 should, therefore, be along with some other substantive offence committed in consequence of abetment. The offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under section 120B for which a charge under section 109, IPC is unnecessary and indeed, inappropriate."*

37. The distinction is that in the second clause of section 107, a mere combination of persons or agreement between them is not enough-an act or illegal omission must take place in pursuance of conspiracy and in order to doing of the thing conspired for and in the latter offence the mere agreement is enough-if the agreement is to commit an offence. Proof of a conspiracy in most cases depends on inference from the conduct of the conspirators. In Noor Mohammad Yousuf Moin V. State (1970) 1 SCC 696, the Supreme Court of India observed:

> *"Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wide amplitude than abetment by complicity as contemplated by section 107 I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarter or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most case proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both, conspiracy and the offences committed pursuant thereto".*

38. If the conspirator had agreed to the common design it can be presumed that he continued to be a party of criminal conspiracy. Since offence of criminal conspiracy can be proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design, as soon as a charge of criminal conspiracy is brought against accused persons the rules of evidence provided in section 10 of the Evidence Act will come into play. The condition precedent to the application of the rule laid down in section 10 of the Evidence Act is that there should exist a reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, i.e. there should be prima facie evidence that a person was a party to the conspiracy before his act can be used against his co-conspirators. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which, each one of them must be interested. Reference in this connection may be made to the case of Yashpal V. State of Punjab, AIR 1977 SC 2433.

39. Actual proof of conspiracy is not required; even some prima facie evidence leading to a reasonable belief that two or more persons had conspired together is sufficient. It is also well established that conspiracy need not be proved by direct evidence. The same may be proved from the surrounding circumstances and conduct of the accused. As to when conspiracy can be taken as established, it is now settled by judicial pronouncements that there can hardly be direct evidence on this, for the simple reason that conspiracy is not hatched up in public-by its very nature-those are secretly planned. So lack of direct evidence relating to conspiracy by the accused has no significance. It is unnecessary to prove that the parties actually came together and agreed in terms to pursue the unlawful object-there need never have been an express verbal agreement, it being sufficient that there was a 'tacit understanding between the conspirators as to what should be done'. The relative acts or

conducts of the parties must, however, be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. See Shiba Narayan Laxmi Narayan Joshi V. State of Maharashtra, AIR 1980 SC 439 and Noor Mohad. Yousuf (suppra).

40. The conspiracy being hatched up in secrecy, conspirators cannot discuss the plans in the presence of strangers. This privacy and secrecy being the elements of criminal conspiracy, it is difficult to obtain direct evidence in its proof. For a court to believe that two or more persons are members of a conspiracy, if the said condition is fulfilled anything said, done or written by any one of them in reference to their common intention will be evidence against the other; anything said, done or written by one of the conspirators should have said, done or written by him after the said intention was entertained is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.

41. It should be borne in mind that the 'common intention' which is a constituent of proving an offence of criminal conspiracy is different from the one 'common intention' used in section 34 of the Penal Code. The expression 'common intention' used in section 10 of the Evidence Act signifies a common intention existing at the time when the thing was said, done or written by one of the conspirators but the 'common intention' referred to in section 34 is doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention. In the light of the above discussions, it is to be looked into whether the killing of the four national leaders was planned, designed and hatched up in the Bangabhaban by the members of the security team deputed for the security of the President, the political leaders who used to stay with the President and his Military and Civilian Secretaries. On appreciation of ext.36 and other materials on record, the trial Court arrived at the conclusion that Khandaker Mustaq Ahmed, Major Rashid, Capt. Moslem and his four associates were involved in the killing.

42. The trial Court held that the evidence of Mahbub Uddin Ahmed (P.W.20) indicated that the army personnel perpetrated the killing and that Major Dalim was involved; that Major Rashid, Major Shariar, Major Faruq visited Dhaka Central Jail and that they were interested to know the entire episode of events in the Central Jail from Bangabhaban. However, after analysing the evidence of P.W.1, Md. Aminur Rahman (P.W.2), A.T.M. Nuruzzaman (P.W.3) Mahbbat Ali (P.W.4), Alauddin Sikder (P.W.5), Md. Ismail Hossain Khan (P.W.6), Md. Abdur Rouf (P.W.7), Md. abdul Gahir (P.W.8), Md. Nayeb Ali (P.W.9) and Kazi Abdul Alim (P.W.12), it has arrived at the conclusion that Shah Moazzem Hossain, Obaidur Rahman, Nurul Islam Monzur, Major Faruq, Major Noor, Major Aziz Pasha, Major Mohiuddin, Major Bazlur Huda, Major Sarful Ahmed, Major Shahriar, Captain Nazmul, Captain Majed, Captain Nurul Huda, Captain Kishmat Hashem, Captain Khairuzzaman, Major Rashed Chowdhury, Risalder Moslem and Taheruddin Thakur were not involved in the conspiracy of killing. This finding is self contradictory and misconceived. It failed to comprehend the elements of conspiracy and the evidence required to prove a charge of criminal conspiracy. The findings arrived at after sifting the evidence of P.W.20 and the witnesses examined from Bangabhaban, there is no doubt that all elements of criminal conspiracy to kill the four national leaders in the Dhaka Central Jail by the army officers deputed in the Bangabhaban are present in the case and that the trial court has failed to comprehend the same. The High Court Division also noticed inconsistency in the first part and the latter part of the judgment of the trial Court.

43. In this case the prosecution has examined 3(three) witnesses to prove the meeting of minds by all the conspirators in the Bangabhaban, that is to say, the planning, designing and implementing-they are, Md. Mokhlesur Rahman Bhuiyan (P.W.11), Md. Shakhawat Hossain (P.W.13) and Md. Manik Mia (P.W.18). To prove the previous conduct of the accused persons it has examined 4 witnesses; they are, Md. Aminur Rahman (P.W.2), A.T.M. Nuruzzaman (P.W.3), Abdus Samad Azad (P.W.10), Md. Nasim (P.W.14) and Mahbubuddin Ahmed (P.W.20). To prove the preparation and execution of the killing pursuant to the conspiracy, the prosecution has examined 8 witnesses; they are- Kazi Abdul Awal (P.W.1), Md. Aminur Rahman (P.W.2), A.T.M. Nuruzzaman (P.W.3), Md. Mokhlesur Rahman (P.W.11), Khan Mohammad Ali Alok (P.W.17), Commodore Golam Rabbani (P.W.21), Md. Yakub Hossain Khan (P.W.34), and Lt. Col. (Rtd) Anwaruzzaman (P.W.46). To corroborate them, it has also examined Md. Nayeb Ali (P.W.8), Dr. Md. Faizuddin Miah (P.W.23) and Syed Mahbub-Al-Karim (P.W.52).

44. Coupled with their evidence, the prosecution has also examined 7 witnesses to prove that the killing squad went from the Bangabhaban to execute the killing and after the killing they returned back to Bangabhaban. Those witnesses are, A.T.M. Nuruzzaman (P.W.3), Mahabbat Ali (P.W.4), Md. Ismail Hossain (P.W.6), Md. Shakhawat Hossain (P.W.13), Khan Md. Alok (P.W.17), Md. Manik Mia (P.W.18), and Commodore Golam Rabbani (P.W.21). The evidence of these witnesses have been corroborated by P.Ws.7, 16, 36, 37 and 46. In support of the circumstantial evidence, the prosecution has examined P.Ws.2, 3, 10, 20, 21, Captain A.M.M. Saifuddin (P.W.26), Oliur Rahman (P.W.28), Col. Safayat Jamil (P.W.29), Shamsher Mobin Chowdhury (P.W.33) and Md. Mostafa (P.W.63). Some of these witnesses, i.e. P.Ws.26, 28, 29, 33 and 63 also proved the subsequent conducts of the conspirators.

45. It is argued on behalf of the respondents that the evidence on record indicated that since 2nd November, 1975, the telephone connection of Bangabhaban was snapped-so, the prosecution story that the conspiracy was hatched up in Bangabhaban and that Khandakar Mustaq Ahmed, Rashid and Faruq compelled the Inspector General (Prisons)(P.W.3) to co-operate the army personnel sent from the Bangabhaban for implementing the killing is an unbelievable story. In this connection, the learned counsel has drawn our attention to the evidence of P.Ws.21 and 29 and the conclusions arrived at by the High Court Division.

46. The High Court Division approved the finding of the trial Court holding that it had rightly discarded the evidence of P.Ws.1-3 as not trustworthy witnesses. Similarly, it discarded P.Ws.4 and 5 on the reasoning that their evidence do not disclose the complicity of the accused persons other than Moslem Uddin. It also discarded P.W.6 on the reasoning that he did not disclose the name of any of the accused persons. It also discarded the evidence of P.W.7 on the reasoning that he had not seen the incident and also discarded the evidence of P.Ws.8, 9 and 10 on the reasoning that they did not disclose the complicity of other accused persons. The High Court Division disbelieved other witnesses along with Md. Yaqub Hossain (P.W.24) on the reasoning that they are not trustworthy witnesses. So, practically the High Court Division has discarded all the prosecution witnesses by ascribing this or that reason apparently without any sound reasoning and thus, this reasonings lack legal foundation. Even then, it maintained the conviction of Moslem Uddin alone-in the one breath it observed that, there is inconsistency in the judgment of the trial Court, and on the other, it itself made inconsistent findings and observations while maintaining the conviction of accused Moslem Uddin. This inconsistency has reflected in its ultimate conclusion in finding the respondents not guilty of the charge. It has illegally given them the benefit of doubt.

47. While disbelieving the charge of conspiracy, the High Court Division after assessing the evidence of P.Ws.29 and 46 came to the conclusion that "*it is very much doubtful as to whether there was at all any telephone link in operation between Bangabhaban and any other part of the city like Central Jail, Dhaka. It is also evidence from the deposition of the witnesses that on the night following 02.11.1975 from 12.00 midnight to 1 a.m. the inmates of Bangabhaban had received the message that their rival force had already been deployed within the vicinity of Bangabhaban and the tanks meant for guarding Bangabhaban had already been withdrawn by their rival force ..... Under the circumstances, the telephonic conversations from Bangabhaban to Central Jail as disclosed by the witnesses is very much difficult to be believed. Moreover, we find no reason to disagree with the learned Sessions Judge who after thorough analysis of their depositions found the testimonies of P.Ws.11, 13, 16, 17, 18 and 34 as unworthy of credence in the first part of his impugned judgment although he has contradicted his own findings at the latter part of the same judgment'*.

48. It failed to notice that identification of all the accused persons in the scene of occurrence or the disclosure of the names of all the accused persons by all the witnesses is not at all relevant and necessary to prove a charge of conspiracy. It failed to notice that a conspirator is an agent of his associates in carrying out the object of conspiracy. So, if the element of constitution of conspiracy is present, all conspirators will be equally responsible for the commission of the offence. There was no disruption of the Bangabhaban's telephone link and the High Court Division on a piecemeal consideration of those two witnesses has arrived at such conclusion over which I will discuss below. Assuming that the telephone link was disconnected, that itself is not a legal ground to disbelieve the charge of conspiracy. Because, before giving the direction over telephone from Bangabhaban, it is found from the evidence of the witnesses that some of the conspirators supervised the arrest of the leaders and tried to compel them to join the Mustaq's cabinet, and when they failed to achieve their goal, they put the leaders in detention. It has also been proved that before the directions were given from the Bangabhaban over phone, there were meetings amongst the conspirators in the Bangabhaban. There are other circumstantial evidence also to link this fact of meetings with the killing as will be evident from the evidence of P.Ws.10, 14, 20, 31 and 36 as discussed above.

49. P.W.11 was an employee of President's Secretariat. He was the Personal Assistant of the Millitary Secretary to the President. He stated that on the night following 2nd November, 1975, at about 7.30 p.m., Captain Moslem came to his room and took him into a room on the first floor and in that room he saw the respondents with other accused persons; that they were discussing about Syed Nazrul Islam, Tajuddin Ahmed, Capt. Monsur Ali and Kamruzzaman; that Major Dalim and Major Rashid wanted to know from him whether he had Dhaka Central Jail's telephone number and then they directed him to supply I.G. (Prisons) and D.I.G. (Prisons) official telephone numbers, the Jailor's residence and official telephone numbers; that he supplied their phone numbers and at that time, they were discussing that the task had to be finished within the same night; that they were quering over telephone about the exact location of the cells where the said leaders were kept in the Dhaka Central Jail; that at that time, he was asked by Major Shahriar to leave the room and stay in his room until further order; that at about 9 p.m. the President's Secretary called him in his office and on reaching there, he found some other persons sitting there and at that time, the defence secretary was talking over telephone regarding the said four political prisoners and, thereafter, the secretary and those persons went to President's bed room; that in the morning he came to know that the four leaders were killed in the Dhaka Central Jail and that on following morning, he came to know that the said accused persons who were staying in Bangabhaban had gone abroad.

50. This witness stated in unequivocal terms that the respondents along with other accused persons were discussing about the four national leaders detained in the Dhaka Central Jail preceding the incident secretly in Bangabhaban. This statement has not been challenged by the defence. This witness also stated that Major Faruq was talking over phone with the Dhaka Central Jail regarding the four national leaders and the defence had not challenged the statement. Therefore, there are uncontroverted evidence that the officers under whom the respondents were deployed were discussing in a room in Bangabhaban regarding four national leaders; that they had contacted the jail authorities through the telephone number supplied by him; that on the same night the leaders were killed in the central jail and that on the following day army officers staying in Bangabhaban left the country.

51. P.W.13 was a Khedmodker (butler man) of Bangabhaban. He stated that he was in Bangabhaban on 20th August, 1975 and in course of his duties he was acquainted with Major Rashid, Major Faruq Rahman, Major Shahriar, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Sharful, Major Mohiuddin, Major Aziz Pasha, Captain Majed, Marfat Ali, Abul Hashem Mridha, Mahbub Alam Chashi, Taher Uddin Thakur; that they were usually discussing with Khandaker Mustaq; that Taheruddin Thakur and Mahbub Alam Chashi were staying with him since Khandaker Mustaq's family was not staying at Bangabhaban; that on 2nd November, 1975, he came for duty at 2 p.m. and noticed the movements of the army officers with some other unknown persons in the Bangabhaban which appeared to him abnormal; that at 7.30 p.m. he found that the officers were holding meeting in Rashid's room on the 1st floor; that at 12.30 midnight Major Rashid and other army officers including Taheruddin Thakur and Chashi were holding meeting in the President's meeting room; that as desired he served tea to them and at that time Khandaker Mustaq was quering to Rashid about the persons who would go to jail and in reply Rashid told that Captain Moslem Uddin and his team would go; that Major Rashid told him to serve dinner to Moslem Uddin; that he went to Moslem Uddin's room on the ground floor to serve dinner and at that time, the latter refused to take dinner; that Captain Moslem Uddin brought out a bottle of alcohol from the almirah and asked him to serve; that at that time two other persons in civil dress and two lower ranked army personnel were present with him and they jointly consumed alcohol; that at about 3 a.m. he noticed that Captain Moslem Uddin, one person dressed with plain cloth, the respondents and 2/3 other lower ranking army personnel went out of Bangabhaban in a millitary jeep; that thereafter, he along with P.W.18 went in the dining room for taking rest; that at about 6 a.m. Major Bazlul Huda woke him up and directed him to serve breakfast to all persons in the first floor; that he served breakfast to all the army officers and personnel who were then discussing among themselves; that Major Rashid was quering about the fate of 4 leaders staying in the central jail and in reply, Moslem Uddin replied that he finished the job assigned to him; and that from their discussions he learnt that the four national leaders were killed by Moslem Uddin and his team in the Dhaka Central Jail. The statement that at about 3 a.m. the respondents, Captain Moslem Uddin and some other persons left Bangabhaban with an army jeep has not been challenged by the defence.

52. P.W.18 is another Khedmodker of Bangabhaban. He claimed that as he was employed at Bangabhaban from before the killing of Sheikh Mujibur Rahman; he noticed the presence of Major Rashid and other officers in the Bangabhaban in course of his duties; that Mahbub Alam Chashi and Taher Uddin Thakur stayed in Bangabhaban with Khandaker Mustaq in close association; that at that time tanks were deployed around Bangabhaban; that he came on duty at 2 p.m. on 2nd November, 1975 and P.W.13 was with him; that on that day at about 7/7.30 p.m, in the room of Major Rashid, he saw that other officers were also sitting with

him; that at about 12/12.30 at night he noticed that a meeting was going on in the meeting room of Khandaker Mustaq and in the said meeting besides the said army officers, Chashi and Taher Uddin Thakur were also present; that they were talking on different topics and at one stage, Khandaker Mustaq wanted to know from Major Rashid on whom the task of jail was given; that in reply, Rashid told that Captain Moslem and his team were assigned for the job; that things were arranged accordingly and that, soon thereafter, Major Rashid told him to serve dinner to Moslem.

53. The narration of facts regarding holding of meetings twice in Bangabhaban as disclosed by P.Ws.13 and 18 just before the incident of killing are consistent. These witnesses were public servants and there is no reason to disbelieve them particularly when the defence has failed to establish any sort of enmity or biasness to depose falsely against accused persons. Most of their statements relating to the fact of holding meetings secretly about the four national leaders detained in the Dhaka Central Jail suggesting an inference for executing their plan of an illegal act in the Central Jail through Moslem Uddin's team remain uncontroverted. The defence could not shake their testimonies. They are natural and neutral witnesses. They stated facts about what they saw and heard in their ordinary course of official duties. They were corroborated by P.W.11 on the question of discussion amongst the army officers in presence of Khandaker Mustaq, Mahbub Alam Chashi and Taher Uddin Thakur regarding the four national leaders who were detained in the Dhaka Central Jail. According to the prosecution, after these meetings in the Bangabhaban, Major Rashid, Major Faruq, Khandaker Mustaq's team compelled the Inspector General (Prisons) P.W.3, the Deputy Inspector General (Prisons) (P.W.1) and Jailor (P.W.2) to allow Moslem Uddin and his team to enter into the Dhaka Central Jail.

54. P.W.1 in first part of his chief stated that as directed by P.W.3, he came to the Central Jail gate and sat beside him (I.G. Prisons). At that time, many telephone calls came and I.G. (Prisons) received those phones and talked with them. Though he did not disclose the name of the persons with whom I.G. (Prisons) was talking over telephone, but if his statements are considered with those of P.Ws.11, 17, 23, 29 and 34, it could be inferred that P.W.3 was talking with some persons staying in Bangabhaban. More so, if his subsequent statement 'h‰ ih-el p¡-b BC ¢S ¢fËSep ®V¢m-g¡-e ®k¡N¡-k¡N L-l' made in course of his cross examination is considered, there will be no doubt to infer that P.W.3 was directed from the Bangabhaban over telephone just prior to the incident of killing to allow Moslem Uddin and his team to enter into the Central Jail, Dhaka.

55. P.W.2 stated that he was the Jailor of Dhaka Central Jail; that the four leaders of Awami League were sent to Dhaka Central Jail and they were kept in detention as per order of the Government; that on the night fallowing 2nd November, 1975, Major Faruq wanted to know from Bangabhaban over telephone about the exact location of the leaders in jail; that at about 3 a.m., the jail guard on duty informed him over phone that P.W.3 wanted his presence in jail premises without delay; that he immediately came to the jail and at that time, the jail guard informed him that P.W.3 had already reached the jail; that he arranged for the sitting of P.W.3 in the office of P.W.1 and at that time, P.W.3 told him that he was informed from the Bangabhaban that the miscreants might have abducted some prisoners and accordingly directed him to give necessary instructions to his subordinates to remain alert; that in the meantime, P.W.1 reached there and soon thereafter, P.W.3 told them that some army officers headed by Captain Moslem Uddin would come to jail from Bangabhaban and that they should be taken to P.W.1's room. He then went to his room and at that time, Major Rashid wanted to talk with P.W.3 from Bangabhaban. He then intimated the massage to P.W.3 and

the latter came to receive the phone. P.W.1 then talked with Khandaker Mustaq and after telephonic talk, P.W.3 told them that the President directed them to act in accordance with the demand to be made by Moslem Uddin.

56. P.W.3 stated that after the killing of Sheikh Mujibur Rahman the four political leaders were kept in the Central Jail; that on the night following 2nd November at 3 a.m, he received a telephone call and the caller wanted to know about his identity; that he disclosed his identity and then the caller disclosed his identity as Major Rashid who was saying that he was speaking from Bangabhanan; that Major Rashid wanted to know from him whether there was any trouble in the jail; that he expressed his ignorance in that regard and at that time, Major Rashid told him that the miscreants might have abducted some prisoners and instructed him to take precautionary measures for the security of prisoners in the Dhaka Central Jail; that after 3/4 minutes another army officer wanted to know whether he (P.W.3) had taken precautionary measures in the central jail; that realizing the gravity of the information, he intimated P.W.1 about the message received from Bangabhabnan and directed him to come immediately to the jail gate; that he then went to the room of P.W.1 and discussed about the message received from Bangabhaban; that in the meantime, a telephone call came from Bangabhaban when Major Rashid told him that an officer, namely, Captain Moslem would go to the Central Jail from Bangabhaban, who would say something to him and that he should arrange for talking of the said officer with the prisoners Syed Nazrul Islam, Tajuddin Ahmed, Captain Monsur Ali and Kamruzzaman; that on hearing the news, he wanted to talk with Khandaker Mustaq; that then Major Rashid handed over the phone to Khandaker Mustaq; that the latter talked with him for sometime and instructed him to act according to the direction given by Major Rashid; that sometimes thereafter, Captain Moslem reached P.W.1's office room and wanted his identity; that on ascertaining his identity, Moslem Uddin wanted to know about the location of the persons whose names were given from the Bangabhaban; that he reminded Moslem about the message received from Bangabhaban and in reply Moslem told him that 'I would shoot them'; that on hearing about the motive of Moslem, they were perturbed; that he then wanted to talk with Bangabhaban and in the meantime, a message came from the Jailor's room that Major Rashid wanted to talk with him; that on hearing about the news, he went to P.W.2's room and received the phone when Major Rashid asked him whether captain Moslem had reached the jail or not; that he replied that Moslem had reached, but then he wanted to ascertain from the President to know for what purpose captain Moslem was sent to the Central Jail; that he informed the President about the intention of Captain Moslem that he wanted to kill four leaders; that in reply, the President told him that '-p k¡q¡ h¢mu¡-R a¡q¡C qC-hz' and that thereafter he narrated the manner of killing the leaders by Moslem Uddin and his team.

57. P.W.16 stated that he was receptionist-cum-personal assistant attached to Bangabhaban during the relevant time; that he knew the respondents and other accused persons who were moving desperately in Bangabhaban; that on 2nd November, 1975 his duty was from 7.30 a.m. to 2 p.m.; that on that day there was special restriction at the gate of Bangabhaban and that on entering into the office he noticed that army personnel were patrolling around Bangabhaban. He came to know that they were the followers of Major Dalim, Major Rashid; that on 3rd November while he was taking charge from Yaqub Hossain Khan (P.W.34), he came to know that on the previous night four Awami League leaders were killed in the Dhaka Central Jail, that he also came to know from their discussions that followers of Dalim, Rashid, Faruq executed the killing of 4(four) national leaders and that in course of his duty, he came to know from their discussions that the army officers including the respondents killed them.

58. P.W.17 stated that he was appointed as receptionist-cum-personal assistant in the Bangabhaban during the relevant time; that on 3rd November at about 3 a.m., he was asked from President's room to give phone connection with I.G. (Prisons); that when he connected the phone when one person received the phone and on query about his identity the recipient disclosed his identity as the Inspector General (Prisons); that then he told him that Major Rashid would talk with him from the President's room; that thereafter, Rashid talked with him twice and sometimes thereafter, as per direction when he again wanted to connect I.G. (Prisons), he was told that I.G. (Prisons) had left for the Central Jail; that thereafter, he contacted I.G. (Prisons) through the telephone line of the Jailor in the Central Jail; that Major Rashid wanted to know from him as to whether Captain Moslem had reached the jail; that thereafter, as per his direction he connected the telephone line with President when the President talked with him for sometime, and thereafter, he came to know from Pritom Borua that Major Faruq and his team left Bangabhaban with arms and that at about 6 a.m., Major Rashid and other officers including the respondents returned to Bangabhaban who were then looking in fatigued condition. The statements of this witness have not been challenged by the defence.

59. P.W.21 Commodore Goalm Rabbani stated that the respondents and their accomplices were appointed as personal guards of Khandakar Mustaq and that they were performing their duties with heavy arms; that on 3rd November, 1975 at about 2 a.m., he was awakened by a messenger of Khandakar Mustaq intimating that the President was asking him for certain purposes and on getting news, he came out of his room and when he came to the lift, two armed personnel challenged him and after disclosing his identity, he was allowed to proceed; that on reaching the President's room he found Major Rashid and Major Faruq inside the room and they were busy with telephonic talks; that Mustaq queried to him about the whereabouts of the guards staying in Bangabhaban; that when he expressed his ignorance, Mustaq then asked him whether he had any idea that the guards had left Bangabhaban; that he again replied in negative; that then he left for the retiring room; and thereafter, he went to the ground floor of his office for ascertaining the whereabouts of the guards and at that time, he noticed that Resalder Moslem Uddin, Dafadar Mridha and some of their accomplices associates with arms were in restive condition; that sometimes thereafter, Moslem Uddin, Marfat Ali Mirdha and other army personnel went out of Bangabhaban and then other officers left Bangabhaban and that at about 6 a.m. they returned.

60. P.W.34 was the receptionist of Khandaker Mustaq. He stated that in course of duties he noticed that Major Rashid and other officers named by him used to stay in the Bangabhaban; that on 3rd November, 1975, his duty was from 8 a.m. to 2 p.m. and after taking charge from P.W.17, the latter told him that on previous night at 3 a.m. Major Rashid directed him from President's room to connect P.W.3; that accordingly P.W.17 connected the telephone line; that Major Rashid talked with him for some time and then Major Rashid, Dalim, Aziz Pasha, Noor, Majed, Captain Moslem entered into the room of P.W.17 with arms and directed him to connect telephone link with P.W.3; that P.W.17 connected the telephone line but he was informed that P.W.3 had left for the Central Jail; that Major Rashid then directed him to connect with the Central Jail; that P.W.3 received the phone when Major Rashid wanted to know from him whether Captain Moslem had reached the jail; that Major Rashid then instructed P.W.3 to talk with the President and handed over the phone to him and that P.W.3 talked with the President for sometime and then, Major Rashid and others left the room of P.W.17.

61. P.W.36 stated that he came to know that as per orders of the killers of Bangabandhu, such as, Major Rashid, Dalim, Faruq etc., the killing squad of 4/5 persons, headed by captain Moslem Uddin killed the four leaders after entering into the Central Jail. P.W.37 stated that he heard from the Deputy Jailor that the armed personnel came from Bangabhaban and killed the leaders. P.W.46 stated that he heard from P.W.3 that the killers headed by captain Moslem came from Bangabhaban and killed them.

62. P.W.46 stated that the night following 2nd November, 1975, at about 3 a.m., Khandakar Mustaq intimated the I.G. (Prisons) over telephone that the miscreants might have abducted some prisoners for which the security of the Central Jail should be tightened and directed him to ensure the presence of I.G. (Prisons) and D.I.G. (Prisons) in the Central Jail; that after arrival of I.G. (Prisons), Major Rashid told him from Bangabhaban over phone that Captain Moslem and other army personnel went there for discussing about four Awami League leaders; that Khandakar Mustaq then directed I.G. (Prisons) to allow those army personnel to enter into the jail; that sometimes thereafter, the army officers came to the Central Jail from Bangabhaban and expressed their desire to kill four national leaders and that thereafter, they killed the four national leaders.

63. Most of the incriminating statements made regarding the telephonic conversations between the Bangabhaban on the one side and P.ws.1-3 on the other side as disclosed by P.Ws. 3, 11, 17 and 34 remained uncontroverted. All these witnesses are neutral and reliable witnesses who were public servants. The defence failed show any enmity with them. Their claim that they had heard that directions were given from the Bangabhaban to P.Ws.1-3 to allow Moslem Uddin and his team to execute the killing on entering into the Dhaka Central Jail have been corroborated by P.Ws.8, 22 and 52. To avoid repetition, I have refrained from reiterating their statements. P.W.8 claimed that he heard from P.W.2 regarding the telephonic direction given from the Bangabhaban. P.W.23 stated that P.W.1 told him about the direction given by Col. Rashid from the Bangabhaban. P.W.52 also made similar statement that he heard from P.W.1 that Col. Rashid talked over phone from the Bangabhaban to allow the killing squad to enter into the Dhaka Central Jail. Their evidence also remain uncontroverted.

64. On an analysis of the evidence of the above witnesses we noticed that there are uncontroverted evidence of P.Ws.11 and 18 that the army officers with other civilians were holding meetings in Bangabhaban prior to the time of incident of killing. P.W.13 has corroborated them. Pursuant to such meetings, for facilitating the entrance of killing squad headed by Moslem Uddin in the Dhaka Central Jail and killing the 4(four) national leaders, directions were given to P.Ws.1-3, firstly, by Rashid and then by Khandaker Mustaq himself. P.Ws.1, 2, 3, 11, 17, 21, 34 and 46 made consistent statements that the killing squad headed by Moslem Uddin came from the Bangabhaban and that as per direction of Khandaker Mustaq, they entered into the Dhaka Central Jail and executed the killing. They have been corroborated by P.Ws.8, 23 and 52. The High Court Division disbelieved the witnesses examined from the Bangabhaban mainly because they did not produce their duty register. This itself is not enough to disbelieve those witnesses, unless their testimonies are tainted by infirmities. What's more, there was gap of about 22 years from the date of occurrence to the date of revival of the case for investigation.

65. Though the Khandaker Mustaq's Government could not remain in power after the killing, the successor Government conducted in business in the similar line and ideology until Bangladesh Awami League came to power in 1996. After the revival of the case, the trial started in 2001. Naturally, the inference that could be drawn is that the succeeding

Government supported the killers, destroyed all corroborating documentary evidence in connivance with them. It will be evident from the fact that the succeeding Government appointed most of the army officers to lucrative posts in the foreign Embassies of Bangladesh. It will not be out of place to mention here that before drawing any adverse inference against the prosecution, one must keep in mind one vital aspect that even after the killing of the four national leaders in the Dhaka Central Jail, the investigation of the case was not allowed to proceed on by the authority in power although Khandaker Mustaq was not in power at that time. This has nakedly focused the intention of the succeeding Government in power. This has not happened even in any ordinary case, particularly in respect of a serious offence like a murder. So it is an unusual case and this case should be considered in the context of the matter that the State machinery wanted to stifle the case at the very initial stage. The killing was executed in pursuance of conspiracy is evident from the conducts of the accused persons and subsequent events after the killing. Admittedly, there was also a conspiracy to protect the said killers. As a part of that conspiracy, the FIR was removed by the interested quarters from the record and that the investigation was postponed sine die.

66. The High Court Division has totally ignored the historical background of the incident of killing and wrongly drawn adverse presumption against the prosecution. Besides, nobody denied that those witnesses were not employed in Bangabhaban at the relevant time. More so, the High Court Division was totally wrong in assuming that there was no telephone link with Bangabhaban, which was allegedly snapped by the Khaled Mosharraf group by a coup d'etat in the meantime. The inference drawn in this regard is based on piecemeal consideration of the evidence of P.W.29. In this regard my learned sister has thoroughly considered his evidence and rightly came to the conclusioin that the telephone connection of Bangabhaban on the night following 2nd November was in operation. I fully agree with her views. There are unimpeachable evidence on record that telephone connection of the Bangabhaban was in operation. It is unbelievable story that the Bangabhaban's telephone link was totally snapped. It should not be ignored that Khandaker Mustaq was acting as President of the country till 4th November, 1974, and it is absurd to believe that while he was performing as President, the Bangabhaban's telephone link would be disconnected. This telephonic direction from Bangabhaban, the holding of meetings in Bangabhaban just before the incident as witnessed by P.Ws.11, 13, 17 and 18, and the subsequent conducts of the respondents and other army personnel sufficiently proved a case of conspiracy that was hatched up in Bangabhaban for executing the killing of four national leaders detained in the Dhaka Central Jail.

67. As regards the prosecution's claim that the killing squad headed by Captain Moslem Uddin went from Bangabhaban at around 3 a.m. of 3rd November, 1975, P.Ws.3, 4, 6, 13, 17, 18 and 21 made statements in that regard corroborating each other. Of them, P.Ws.17, 18 and 21 also deposed that they saw that the army officers returned to Bangabhaban at 6 a.m., when they were seen being seized with fatigue. P.Ws.7, 16, 36, 37 and 46 corroborated their above statements. Among them, the testimonies of P.Ws.3, 6, 7, 13, 16, 18, 36 and 37 remain uncontroverted. P.W.7 stated that within 2/3 minutes of entering into the Dhaka Central Jail, they heard the sounds of firing from the cell of the four leaders; that sometimes thereafter, the armed personnel ran towards the jail gate and that in the evening he came to know from the Jailor and the Deputy Jailors that as per direction of Bangabhaban, Moslemuddin and his team came to jail.

68. It was contended on behalf of the respondents that since Brigadier Khaled Moshrraf took the reins of the country by a *coup d'etat* at zero hours of 2nd November, it was not possible or probable on the part of the army officers and personnel staying at Bangabhaban to

go out from Bangabhaban to implement the killing, inasmuch as, their safety and security was predominant factor at that time. The High Court Division accepted the defence plea observing that the inmates of Bangabhaban having received the message of coup by their rival party, it was not probable for them to move outside the Bangabhaban after 1 a.m. on 3rd November particularly when there was deployment of rival force within the vicinity of Bangabhaban because the situation was such that their personnel security was very much at stake and that it was very much known to them by the withdrawal of the tanks from Bangabhaban.

69. The High Court Division has disbelieved the prosecution case showing some technical loopholes and given the accused persons except one the benefit of doubt ignoring these aspects of the matter. The circumstances leading to the killing of the 4(four) national leaders while in the safe custody of the State must be kept in mind. The accused persons couldn't have implemented the killing unless very high handed powerful State machineries were involved in the conspiracy. Under such circumstances, it is absurd to assume that the corroborating materials would be allowed to remain in the Bangabhaban. The principle that the accused may be given the benefit of doubt is in the interest of justice and it should always be applicable with great circumspection, and not to be allowed as a matter at course, otherwise, its real purpose will be frustrated and the administration of justice will also be defeated. In the facts of the given case the High court Division has wrongly applied the principle in favour of the accused and instead of doing justice, it has defeated the ends of justice by maintaining the trial court's findings that the prosecution has failed to prove that the killing was implemented in pursuance of conspiracy.

70. On the question of conspiracy, before drawing up inference as to whether there was conspiracy to kill the national leaders, besides the above facts, some other vital questions if considered, the decision of the High Court Division would have been otherwise. It failed to direct its attention towards some glaring facts which have nexus with the killing. The answer to these questions would automatically resolve all controversies in dispute. Why Sheikh Mujibur Rahman was killed? Who were responsible for his killing? Who came to power after the said killing? Whether the assumption of power by Khandaker Mustaq was legal? Why the national leaders were taken into custody after the killing of Sheikh Mujibur Rahman? Why the original FIR was not available with the record? Who was benefited by removing the same from the record? Why the investigation of such gruesome murders was stopped? Why an 'eye wash' inquiry was held even after killing of four national leaders in the Dhaka Central Jail? Why these leaders did not give allegiance to Khandaker Mustaq's Government? Why all the officers and army personnel deputed for the security of President in Bangabhaban left the country with their family on 4th November, 1975? Why an aircraft was specially arranged to facilitate their safe exit from Bangladesh? Why these army personnel were absorbed in the Ministry of Foreign affairs while they were staying abroad? Why their appointment letters were carried by an officer of the Ministry of Foreign affairs to Benggazi, Libeya and UK? The trial Court as well as the High Court Division should not ignore these chain of sinister facts.

71. As observed above, the history of the emergence of Bangladesh; the subsequent events after independence, the murder of Sheikh Mujibur Rahman and the persons involved in it; Khandaker Mustaq's usurpation of power violating the constitutional provisions; the change of socio-political condition of the country after the murder of Sheikh Mujibur Rahman; and the killing of the four national leaders in the Central Jail are not only historical facts, these acts and events are interwined with each other, not unrelated. An inference from these facts would lead to the conclusion that the killing was the consequence of a deep rooted

conspiracy which was designed, planned and executed by none other than these persons who were temporarily benefited by the murder of Sheikh Mujibur Rahman. Both the killing were the result of deep conspiracy and they were perpetrated not only for the purpose of usurping power but also to bring about a change in the political atmosphere in the country-to obliterate the spirit of the historic struggle for national liberation, to exterminate pro-liberation forces and in its place, to repatriate the rightist anti-liberation forces in the helm of the affairs of the Government.

72. Section 8 of the Evidence Act embodies the rule of evidence that the testimony of *res jestae* is allowable when it goes to the root of the matter. The motive, the preparation, the existence of a design or plan, the previous and subsequent conducts of the accused are all relevant in one great canvass to kill the 4(four) national leaders. Motive is a state of mind to show the probable existence of *mens rea* of the accused persons which moves them to commit the offence or in the alternative, motive is the reason which prompts the intention of the accused to commit the crime. Though motive is not *sine qua non* for bringing the offence of murder home to the accused, it is relevant and important on the question of intention but the preparation is also obviously important in the consideration of the question whether the accused persons committed a particular act or not, to know whether they took any measures calculated to bring it about within premeditated action preceded not only by impelling motives but by appropriate preparations. The existence of design or plan is usually employed to indicate the subsequent doing of the act planned or designed. Preparation and previous attempts are instances of previous conducts of the accused persons influencing the commission of murders. Subsequent conducts of the accused persons are equally admissible. Coupled with them, the abscondence of the accused persons immediately after the occurrence is a relevant fact to be considered along with other evidence as indicating to some extent their guilty mind.

73. In support of the circumstantial evidence, P.W.2 stated that on 2nd November, 1975, while he was working in his office at Dhaka Central Jail, Major Dalim came there and pressed him to allow him to enter into the Central Jail; that when he told him that without permission of the higher authority, he would not allow him to enter inside the jail; that Dalim forced his entry into the jail and wanted to see the exact location where the Awami League leaders were kept; that finding the ferocious attitude and for fear of reprisal, he took him infront of cell No.15; that Dalim surveyed meticulously the area around the cell and at one stage, he talked with P.W.20, who was also detained as prisoner there and then went away. P.W.3 stated that after the murder of Sheikh Mujibur Rahman, the national leaders were kept in the Dhaka Central Jail and during that time, Major Rashid, Major Dalim, Major Shariar, citing reference of Khandaker Mustaq, used to inquire about the political leaders held as detenus and gave them necessary instructions. The statements of P.W.10 in this regard has been mentioned earlier.

74. P.W.20 stated that he worked as District Magistrate in July, 1975; that during the liberation struggle he was acquainted with Major Dalim; that he was detained in Dhaka Central Jail as detenu in November, 1975; that on 2nd November, Major Dalim visited the Dhaka Central Jail and while the latter was passing in front of his cell, he wanted to know from him the cause of his visit and that Major Dalim made an evasive reply. His evidence remains uncontroverted. Major Dalim had no business to visit Dhaka Central Jail on the previous day of occurrence. He was staying at Bangabhaban with the respondents as a member of the President's security team. This visit just before the occurrence leads us to infer that it was for the purpose of making reconnaissance of the area where the leaders were

detained, that is to say, to make a preliminary survey for millitary operation. This fact leads to the inference that the conspiracy was afoot and this visit was done by a conspirator in reference to their common intention for executing the killing through the members of the conspiracy.

75. P.W.21 stated that after the killing Sheikh Mujibur Rahman, Major Faruqe, Major Rashid, Major Dalim, Major Shahriar, Major Noor, Major Mohiuddin and other officers and the respondents were staying at Bangabhaban; that after 1/2 days of killing of Sheikh Mujibur Rahman, Khandaker Mustaq gave him a letter to hand over to Captain Monsur Ali; that he directed Major Shariar to accompany him; that he handed over the letter to Monsur Ali and that 1/2 days thereafter, he came to know that the leaders were taken to jail custody. It is evident that on that the army officers staying at Bangabhaban were not in the good book of the army high command as they were transacting business (of the State) by-passing the high command.

76. P.W.26 stated that he was instructed by the authority of Bangladesh Biman flight operation on 3rd November, 1975, at about 11 a.m. that despite suspension of flight operations, he had to operate a special flight; that on his query about the purpose for operation of the special flight, the Operation Officer intimated him that some officers would be flown to Bangkok by an F-27 Craft with captain Azim and captain Ashraf, who were assigned to operate the flight; that at about 9.30/10 p.m. 4th November they landed at Chittagong airport for refuelling the aircraft and reached Bangkok at early dawn of 5th November, 1975; that on the following day, they returned back to Dhaka and after return, he came to know that passengers they had ferried in the flight were the killers of Bangabandhu, such as, Major Rashid, Major Dalim and others; that they fled from the country after killing the four national leaders on the night following 2nd November and that the officers took with them their families including children.

77. P.W.28 stated that in the afternoon of 4th November, then Chief of Protocol of the Ministry of Foreign Affairs Nazrul Islam told him that Col. Rashid and his group would leave Dhaka by a special flight and asked him to talk with Hadayet, then Managing Director of Biman; that he instructed him to take necessary permissions for flying the special flight over Burma and Thailand, and also to contact with the Embassy of Thailand for landing permission of the special flight; that thereafter, acting Foreign Secretary directed Samsher Mobin Chowdhury (P.W.33), the Deputy Chief Protocol officer, to accompany him; that they went to the concerned Embassies for communicating note verbal; that at about 11 p.m. they went to the old Airport where Col. Monnaf received them; that they found Lt. Col. Rashid, Lt. Col. Shariar, Lt. Col. Dalim, Major Bazlul Huda, Lt. Col. Nur Chowdhury, Major Ahmed Saiful Hossain, Captain Marfat Ali, Kismat Hossain, Nazmul Hossain, Ansar, Lt. Col. Pasa, Moslem Mridha and Lt. Col. Faruq amongst the passengers to be flown; that thereafter those army officers boarded the special flight and that on the following morning he came to know that the four leaders were killed in the Dhaka Central Jail on the previous day.

78. P.W.29 stated that after 40 hours of the jail killing, the killers left the country; that he then charged Major General Khalilur Rahman as to why he did not inform about the killing despite that he was then staying in Bangabhaban. P.W.31 stated that Khandaker Mustaq was displeased towards Kamruzzaman as the latter supported Monsur Ali's nomination as Prime Minister and that deceased Kamruzzaman always apprehensive that Khandaker Mustaq would not let him stay alive.

79. P.W.33 corroborated P.Ws.26 and 28 and stated that he accompanied P.W.28 for seeking permission from the Embassies of Burma and Thailand for the operation of the special flight over those countries; that when he was taken into the room by Mahbub Alam Chashi, the latter handed over a list of army officers stating that it was decided that those officers would leave the country, probably for Thailand; that he directed him to take permission for over-flight permission of Burma and landing permission from Thailand; that he handed over some papers and that they went to the Embassies of Burma and Thailand with an army jeep and handed over the letters; that they then went to the airport for intimating the pilot about the permission obtained from the Ambassadors; that the army officers left the country with a special flight from Dhaka Airport; that in April/May, 1976, then Additional Secretary, Ministry of Foreign Affairs told him that as per order of the Secretary, the listed army officers would be posted at different Embassies of Bangladesh and that he would have to carry the appointment letters for handing over to them; that he went to Bengazhaji, Libya and handed over the appointment letters to some officers and that as Major Dalim and Noor were staying in London, he went to U.K. and handed over their appointment letters in the Bangladesh High Commission Office.

80. P.W.63 stated that he was posted to Ministry of Foreign Affairs in 1996; that the investigation officer seized the connected files relating to the absorption of Bazlul Huda, Nur chowdhury, Kismat Hashem, Moslem uddin and Marfat Ali from the Ministry of Foreign Affairs in his presence and that he put his signature in the seizure lists; he proved exts.40, 41, 42, 43 and 44.

81. It is also evident from the record that most of the army personnel deputed for the security of Khandaker Mustaq were involved in the killing of Sheikh Mujibur Rahman and his family members. These security personnel were all along with Khandaker Mustaq Ahmed after 15th August till departure from the country after the killing in the central jail. This is another strong circumstance to link them in the incident of killing. Mustaq Ahmed was hostile towards these leaders as they did not give allegiance to his Government and did not agree to join his cabinet. Naturally, he realized that if these leaders were kept alive, one day they would take revenge against him if the Awami League was able to come to power in the future. So, he chalked out the plan for killing the leaders in jail with his acolytes in a calculated manner. Admittedly, the army personnel attached to Bangabhaban knew that they would become the target of attack by the pro-government forces and accordingly, they left the country by arranging a special flight through Khandaker Mustaq. Khandaker Mustaq wanted a free exit of the officers deputed for his security by arranging a special flight as a condition for surrendering his power. The army officers along with their family left the country within 40 hours of the killing and they remained in abscondence immediately after the occurrence. This fact necessarily showed that they had a guilty mind. This conduct of the army personnel is a circumstance indicating their *mens rea* if considered along with other evidence as discussed above, pointing their guilt is reasonable and realistic.

82. There are also other strong circumstantial evidence, namely, after the arrest of the deceased four leaders, Major Rashid and Major Dalim visited the Police Control Room where they were kept initially. These officers used to inquire about the leaders from the jail authority. Major Dalim visited the Dhaka Central Jail on 2nd November and ascertained the location of the cell where the leaders were detained. There was direction from the Bangabhaban to allow Moslem Uddin and his team to enter into the Dhaka Central Jail just before the killing. Moslem Uddin and his team left Bangabhaban at 3 a.m. of 3rd November,

1975. Moslem Uddin was recognized with arms in his hands when he entered into the Central Jail and that after the killing, he hurriedly left the central jail with the accomplices.

83. The positive case of the prosecution is that the Khandaker Mustaq was the principal conspirator. He had conspired with his political acolytes and security team deputed in the Bangabhaban for exterminating the four national leaders, who appeared to him to be thorns in his way to rule the country as President. An officer in the rank of Deputy Inspector General (Prisons) lodged the FIR on the following day pointing fingers at the security team of the President. It is also an admitted fact that though the FIR was lodged over the killing, the investigation of the case was kept at bay. This suggests that the stream of justice could not have been prevented even after such brutal killing unless very powerful persons were involved in the incident. It is only after a long gap of about 22 years, the case was revived and the investigation started. The case should be considered in the above backdrop.

84. The High Court Division failed to notice that the defence failed to shake the testimonies of the witnesses and that admittedly most of the witnesses examined are neutral and natural witnesses. The defence failed to bring anything adverse to the prosecution case by cross-examining them as to why they deposed against them. The High Court Division wrongly disbelieved P.Ws.11, 13, 16, 17, 18 and 21 for non production of their duty register. If their evidence are not tainted with infirmities or falsehood, there is no earthly reason to discard them. Along with their evidence, the evidence of P.Ws.2, 3, 10, 14, 20, 21, 26, 28, 29, 31, 33, 36 and 63 who deposed on the question of circumstantial evidence to corroborate the charge of criminal conspiracy, led to the inference that the story narrated by them is true and reliable.

85. This defence plea is not at all believable and absurd. If we consider the evidence of P.Ws.29, 42 and 46, it will be evident that Khaled Mosharraf took over the charge as the Chief of Army Staff on 4th November and continued in such position till 6th November, but the killing was perpetrated on the night following 2nd November. P.W.46 clarified the point in controversy in reply to a query made on behalf of Faruq Rahman stating that though the followers of Khaled Moshrraf staged a *coup d'etat* on 2nd November, 1975, they made abortive attempt to enter into Bangabhaban and that on 4th November Khandaker Mustaq gave up power. This witness did not say that Khaled Moshrraf took power on the night following 2nd November. There is evidence on record that the army officers staying at Bangabhaban were heavily armed with tanks. So they managed to keep their influence and power till 4th November morning is evident from the evidence of P.Ws.29 and 46.

86. P.W.29 stated that Khaled Moshrraf gave dead line of 2nd November for bringing the aberrated army officers and personnel under the chain of command; that the tanks should be returned back and then to surrender the unauthorized and unconstitutional Government; that on 2nd November, 1975, two infantry companies were taken back but they could not be given posting. P.W.29 further stated that "বঙ্গভবনের এবং সোহরাওরর্দী উদ্দ্যানের অবস্থানরত ট্যাংকগুলির প্রতিহত করার জন্য দুইটি কোম্পানী পাঠায় একটি সোনারগাও হোটেল রেলক্রসিংয়ে ও অপরটি সাইন্সল্যাবরোটরীর মুখে । তাহারা ৩ নভেম্বর/৭৫ এ পজিশন গ্রহণ করে। লেঃ কর্নেল গফফারের নেতৃত্বে বনানী স্টাফ রোXক্রসিংয়ে একদল সৈন্য পাঠানো হয় যাহাতে ট্যাংক রেজিমেন্ট আমাদের পিছন থেকে আক্রমন করিতে না পারে ।" In reply to a query made on behalf of Faruq Rahman in course of cross-examination, P.W.29 stated that from 4th November morning to 6th November 12 p.m., Khaled Moshrraf was the Chief of Army Staff and that on 4th November, 1975, at about 11 a.m., Khaled Moshrraf entered in the Bangabhaban and that General Khalil was there. Therefore, it is apparent from the evidence of this witness that till

4th November morning Khandakar Mustaq was in power and that Khaled Mosharraf's force could not enter beyond Sohrawarddy Udyan.

87. The control of the areas under the rebel force and the regular force has been clarified by P.w.29. He stated that the rebel forces headed by Col. Rashid deployed tanks not only around Bangabhaban but also at Sohrawarddi Uhyan to avert any counter attack; that the regular force deployed its artillery at Sonargoan railway crossing and Science Laboratory intersection. So, apparently almost half the area of the City, including the entire old Dhaka where the Dhaka Central Jail and the Bangabhaban are housed, were under the control of the rebel force. The regular force controlled the northern portion from the Science laboratory to Sonargaon Hotel. The regular force sent two companies of army to counteract the rebel force, one at the rail crossing of Hotel Sonargaon and another at the intersection of Science Laboratory but they could not take control of the areas controlled by the rebel force. Therefore, it was not at all difficult on the part of the rebel force staying at Bangabhaban to move to the Dhaka Central Jail for implementing the killing plan because the regular force were staying far away either from the Bangabhaban or from the Dhaka Central Jail.

88. The High Court Division failed to notice that most of the members of the security team deployed at Bangabhaban were the killers of Sheikh Mujibur Rahman. After the killing of Sheikh Mujibur Rahman, they enthroned Khandakar Mustaq Ahmed in the office of President and they ruled the country keeping Khandakar Mustaq as a puppet President in their hands. When they had exceeded the limits and the chain of army command was totally broken down, some senior officers including P.W.29 stood in their way. Though Major General Ziaur Rahman was Chief of Army Staff, it is on record that he had hardly any control over the army. The First Bengal Lancers and the Second Field Regiment were under the command of Faruq and Rashid, and Ziaur Rahman had no control over them.

89. P.W.29 stated that though there was direction for returning 30 tanks, which were under the control of Rashid and Faruq, they did not obey the direction and kept all artilleries under them from mid September, 1975. This statement proved that these officers were heavily armed with 30 tanks and two regiments were under their control. This fact proved that till the last moment of their departure from Bangladesh, they tried to assert their power and there was no hurdle for them to move to the Dhaka Central Jail from Bangabhaban for implementing their plan of killing of the four national leaders. The High Court Division did not advert its attention to that direction.

90. Learned counsel for the respondents tried to pursuade us that the defence plea is most probable than that of the prosecution version. The positive defence case is that it was Khaled Mosharraf who was instrumental to the killing of the four national leaders for retaining his power peacefully after the *coup d'etat* along with P.W.29. In support of his contention, he has relied upon the evidence of P.W.52. The statement of this witness that after the *coup d'etat*, Mosharraf in order to consolidate his power might have killed the four leaders after arresting Ziaur Rahman. He clearly stated that it was his assumption. Before the said statement, he stated that the *coup d'etat* was against Mustaq Ahmed but, on the other breath, he stated that the conflict was between Khaled Mosharraf and Ziaur Rahman; that after dethroning Mustaq Ahmed, Syed Nazrul Islam was supposed to be the legal successor in the office of President but, he expressed his ignorance on a query made by the defence that Khaled Mosharraf was the perpetrator. This witness was not a party to any of the groups and whatever statement he made was on guess. The High Court Division erred in giving weight to this solitary statement.

91. However, it is an admitted fact that the killing was perpetrated on the night following 2nd November and that till the departure of the rebel army offers in the afternoon of 4th November, Khaled Mosharraf had no access beyond Science Laboratory inter-section and Sohrawarddy Udyan. The High Court Division impliedly accepted the statement as an admission without giving attention to his entire evidence and the evidence of P.W.42. This defence plea is absurd, hypothetical and full of surmises, inasmuch as, it is not Khaled Mosharraf who wanted to kill the national leaders, rather, it was those rebel force who were supporting Khandaker Mustaq, and this force kept the leaders in detention in the Dhaka Central Jail in order to consolidate Khandaker Mustaq's power and position. Had Khaled Mosharraf been the perpetrator, the Government in power after the death of Khaled Mosharraf could have been prosecuted but in reality, the successor Government wanted to suppress the incident. No one suspected them as killers of the political prisoners staying in the Central Jail at any point of time. Even the relatives of the deceased leaders pointed fingers towards Khandaker Mustaq and his followers.

92. The circumstantial evidence proved beyond doubt that it was the army officers who were deputed for the Khandaker Mustaq's security were the real perpetrators of the crime. Even after the killing, the followers of Khaled Mosharraf stayed in the country and one of them deposed in this case. Though Khandaker Mustaq was dethroned, the force which came to power after killing Khaled Mosharraf could not have been differentiated from Khandakar Mustaq's regime on principle and ideology. They were birds of a same feather as would be evident from their subsequent conduct. The said Government not only wanted to conceal the killing but also stopped the investigation of the case. The difference between the two groups was not on principle but, on the question illegal retention of power. That is why, this succeeding regime rewarded the killers by giving lucrative jobs in foreign missions of Bangladesh abroad.

93. As observed above, there are uncontroverted evidence on record in support of the prosecution case that the killing squad came from the Bangabhaban and after executing the killing, they returned back again to Bangabhaban. In this regard the prosecution has been able to prove this fact by examining P.Ws.3, 4, 6, 7, 13, 16, 17, 18, 21, 36, 37 and 46. Of the witnesses, the testimonies of P.Ws.3, 6, 7, 13, 18, 36 and 37 remain uncontorverted. Their testimonies suggest that the planning, preparation and implementation of the killing was monitored from Bangabhaban. Another vital fact which revealed from the lips of these witnesses is that the killing squad was also fixed by the conspirators earlier and the said killing squad headed by Moslem Uddin executed the killing after coming from the Bangabhaban at around 3 a.m. of 3rd November. The testimonies of P.Ws.3, 4, 6, 7, 13, 16, 17, 18, 21, 36, 37 and 46 lead to an irresistible conclusion that the army officers deputed at Bangabhaban killed the four national leaders. Along with their evidence, the circumstantial evidence proved by P.Ws.2, 3, 10, 20, 21, 26, 28, 29, 31, 33, 36, 63 are so conclusive in nature that the killing was executed by the members of security team of Mustaq. The chain of circumstances is so complete as to leave no scope for drawing any inference other than that it was the respondents and their co-conspirators who killed the national leaders. The observation of the High Court Division that there are missing links in the circumstances is, therefore, misconceived and perverse.

94. Next point urged on behalf of the respondents is that the prosecution has failed to produce the FIR of the case and that the true copies of the same, exts-1 and 3, are spurious papers which cannot be used in the case. It is further contended that the FIR being a vital

document having not been proved in this case, the High Court Division is justified in giving the respondents the benefit of doubt.

95. Admittedly the original FIR was missing from the case record as well as from the police diary. Under the circumstances, the investigating officer seized a true copy of it from the Dhaka Central Jail, ext-1 and another true copy from the judicial record of the office of the Inspector General of Police, ext-3. Both the High Court Division and the trial Court disbelieved these two documents. The High Court Division on examination of ext-1 though found no discrepancy in them, observed that neither of the two could be "*treated as FIR in this case though these two papers, as it could be gathered from the attending circumstances, undoubtedly contains the contents of the report made by P.W.1 first in point of time with Lalbagh Police Station on 04.11.1975 ..... Since neither of the two falls within the purview of the definition of an FIR as contemplated under section 154 of the Code of Criminal Procedure*". The High Court Division then observed, '*from the FIR as claimed by the prosecution Ext-1 which was lodged on 4.11.1975 after the occurrence that piece of paper also testifies that he entered into Central Jail on the fateful night. True, it is the description of Moslem Uddin as disclosed by the prosecution differs from place to place though it could not be proved to the hilt by the prosecution that Moslem Uddin came out of Bangabhaban and entred into Central Jail yet it has been proved that he entered into the Central Jail on the fateful night irrespective of the place he came from, beyond reasonable doubt therefore, Muslemuddin can not absolve his liability in this case*'.

96. The above findings are self explanatory, inasmuch as, they are based on surmises. Though the High Court Division disbelieved exts-1 and 3 as true copies of FIR, accepted the claim of the prosecution that P.W.1 lodged an FIR on the following day of occurrence with Lalbagh police station, and on the other hand, while maintaining the conviction of Moslem Uddin, relied upon the same very FIR, observing that he was an FIR named accused. The High Court Division was of the view that in course of cross-examination, P.W.1 admitted that exhibit-1 did not contain any memo number although he had asserted that at the bottom of this FIR memo number "01/DIG/1/(4) dated Dacca 4.11.75" was mentioned; that he had admitted that the FIR which was seized from his possession by the investigating officer which did not contain the same memo number; that there was overwriting on the date of the said memo number; that though the P.W.1's signature was available in it, the said signature contained the date as 4th November, 1975, which date had no relevance with the accused; that the FIR which was collected from the office of the Inspector General of Police, exhibit-3, was not seized by preparing any seizure list and that Abdul Kahar Akond (P.W.64) did not seize the record from which he had collected ext-3.

97. I find fallacy in these findings. P.W.1 stated that on the following day of occurrence, he lodged an FIR with the Lalbagh police station; that after lodging the FIR, he communicated a copy of the same to all places and kept one copy in Jail which is marked as exhibit-1; that ASP Hafizuddin Dewan (P.W.56) seized a copy of the FIR which he kept with him along with a report submitted by him to I.G. (prisons); that the copy which he kept with him in the Central Jail and in the office of the Inspector General of Police are identical. P.W.64 stated that he collected a true copy of the FIR from the office of the I.G.(Prisons), ext-3. True, the investigation officer did not collect the copy of the FIR from the office of the Inspector General by preparing a seizure list, but this copy was collected from the judicial record of the said office and the contents therein are identical with the other.

98. P.W.64 got the charge of investigation of the case on 18th August, 1996. He gave an explanation for collecting the copy of the FIR stating that when he could not trace out the original FIR either from the Court record or from the case diary, on enquiry he could trace out the true copies of the same which were kept in the offices of Inspector General of Police and the Central Jail and then he collected them from those offices. The explanation appears to be cogent, reliable and trustworthy considering the nature of the offence and the delay in reviving the case for investigation. There was no wrong in his endeavour in collecting the copies. The prosecution also proved the seizure of Registers relating to the fact of lodging of the FIR by P.W.1 with the Lalbagh police station and the entries made in exts.16, 30, and 39, which corroborate the claim of the prosecution. The High Court Division has totally ignored these oral and documentary evidence and upon superficial consideration of the materials on record disbelieved exts-1 and 3 as true copies of the FIR.

99. The High Court Division failed to notice that as per rule 246(a) of the Police Regulations Bengal, 1943, a carbon copy of the FIR is required to be sent by the Officer-in-Charge of the police station to the Superintendent of Police. So, apparently the police authority was required to keep a copy of the FIR of the case. This being a sensational case, instead of keeping a copy of the FIR in the office of the Superintendent of Police, it was kept in the office of the Inspector General of Police. There is nothing wrong in it and the investigation officer has collected the same from the judicial record of the Inspector General of Police. Therefore, there is presumption that it was collected from the legal authority which kept the same, since the original one was missing. Rule 246(a) is reproduced below:

> *"The first page of the first information report viz, that signed, sealed or marked by the complainant or informant under section 154, Code of Criminal procedure shall be treated as the original. It shall be sent without delay to the District Magistrate or the Sub-divisional magistrate, as the case may be, through the court officer. The first carbon copy of the first information shall be sent to the Superintendent. The second copy shall be kept at the police station for further reference. A copy (not carbon) shall be sent to the Circle Inspector direct at the same time as the original and the first carbon copy are despatched to the Court Officer and the Superintendent. In subdivision where there is a Sub-divisional Police Officer two copies of the first information report shall be made out on ordinary papers, by the carbon process, one for the Sub-divisional Police Officer and the other for the Circle Inspetor."*

100. The prosecution adduced secondary evidence to prove the FIR by examining P.Ws.1 and 64. These witnesses explained the cause as to why they produced true copies of the FIR. The maker of the FIR himself deposed and reaffirmed that exts-1 and 3 are the true copies of the FIR and are in verbatim language. He made statements on oath. If a true copy of a document is proved by the maker on oath giving explanation that the original is missing from the record, it satisfies the requirement of secondary evidence within the meaning of section 63 of the Evidence Act. What's more, these exhibits were admitted in evidence without objection by the defence and the Court admitted them as secondary evidence. Where secondary evidence of the contents of a document alleged to have been destroyed/untraceable is admitted by the court of first instance without objection, even without any foundation for the reception of secondary evidence having been laid down, the opponent is estopped from taking any objection to the admissibility of such documentary evidence in the appellate Court. (Biswambhor Singh V. State, AIR 1954 SC 139).

101. Secondary evidence of the existence, condition or contents of the original is admissible when the original has been destroyed or lost, or when, for any other reason not arising from the default or negligence of the party offering secondary evidence of its contents, it cannot be produced within reasonable time. Even oral evidence of the contents of the original document can be proved when the original is admitted to have been lost. This view has been taken by the Judicial Committee of the Privy Council in Pearey V. Nanak Chand, AIR 1948 PC 108. In State of U.P. V. Nagu, AIR 1979 SC 1567, the original dying declaration was lost and not available, it was held by the Supreme Court of India that '*In the circumstances the prosecution was entitled to give secondary evidence which consisted of the statement to the Magistrate as also of the Head constable who had made a copy from the original and testified that the copy was a correct one'*.

102. There is no dispute that ext-3 was collected from the office of the I.G. (Prisons). The defence did not challenge the statement of P.W.64 about the collection of the copy. He was confronted only that it was not seized by preparing a seizure list and that he did not seize the record with which it was kept. These facts do not disprove the positive assertion of P.W. 64 unless his statement is challenged. More so, P.W.1 corroborated him stating that this copy and the other copy seized from jail are identical. P.Ws.1 and 64 corroborated the collection of the true copies of the FIR from the said offices. P.W.64 proved the copy recovered from the judicial record of Inspector General of Police and the defence failed to shake his testimony. The grounds on which they have been discarded are not cogent and legal, and the defects are trifling in nature. It failed to consider the nature of the offence, the power and influence of the accused persons during the time, their involvement in the case, the situation prevailing in the country during the relevant time and the delay in reviving the case by surpassing a path strewn with thorns of prickles.

103. What is more, admittedly the Lalbagh police recorded the case as Lalbagh P.S. Case No.11 dated 4th November, 1975, in pursuance of the FIR lodged by P.W.1. Therefore, I find nothing wrong, rather the date mentioned in it after the signature of P.W.1 in exhibit-1 was correct one with reference to the case registered with the Lalbagh police station. These facts coupled with the testimony of P.W.64 led us to infer that the High Court Division erred in disbelieving the prosecution's claim of collection of the true copies of the FIR, exts-1 and 3. The learned Judges failed to notice that exhibit-1 was seized by P.W.64 and the defence did not challenge his testimony on the question of seizure of the copy from Dhaka Central Jail. Therefore, fact remains that P.W.64 seized a true copy of the FIR, ext-1, from the custody of the Central Jail authority and collected another copy from the office of the I.G. of Police which are identical and legally admitted into evidence.

104. Apart from what P.Ws.1 and 64 had stated, Md. Aminur Rahman (P.W.2) stated that on 4th November, P.W.1 lodged an FIR with the Lalbagh Police Station regarding the killing of the 4 (four) national leaders and that two Magistrates, thereupon, prepared inquest reports on the dead bodies inside the Dhaka Central Jail in the evening of the same day. The defence did not controvert those statements. A.T.M. Nuruzzaman (P.W.3) made similar statement and the defence has not also challenged the same. Md. Sohrab Hossain (P.W.44) stated that the investigation officer Abdul Kahar Akond seized a register, ext.16, from Lalbagh Police Station, in which serial No.1454(3) contains case No.11 dated 4th November, 1975 under section 302 of the Penal Code; the place of occurrence was shown as Dhaka Central Jail and that the name of the informant was A.K. Awal, DIG (prisons). These statements have not been challenged by the defence.

105. Md. Abdul Malek (P.W.50) proved the G.R. Register, ext-30, stating that in serial 10698, Lalbagh P.S. Case No.11 dated 4th November, 1975 under section 302 of the Penal Code was mentioned. This statement has also not been challenged. Md. Ashraf Uddin (P.W.59) stated that Abdul Kahar Akond came to Dhanmondi Police Station (by this time Dhanmondi Police Station started functioning bifurcating Lalbagh Police Station) for seizing Lalbagh Police Station's Khatian Register which was produced by S.I. Sohrab Hossain (P.W.44), wherein serial No.1454 contained Lalbagh P.S. Case No.11 dated 4th November, 1975 and that informant's name was mentioned as A.K. Awal, DIG (Prisons). Md. Mohibul Hossain (P.W.62) also stated that Kazi A. Awal, DIG (prisons) lodged Lalbagh P.S. Case No.11 dated 4th November, 1975, under section 302 of the Penal Code which statement had not also been controverted. So we find from the evidence P.Ws.2, 3, 44, 50, 59 and 62 that they have corroborated the statements of P.Ws.1 and 64.

106. The object of filing an F.I.R is to set the process of criminal law in motion and the investigating agency to obtain information about the criminal activity, so as to able to take proper steps for tracing out and bringing to book the persons involved in the crime. However, this F.I.R is not an evidence, though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can be used as a previous statement for the purpose of either corroboration under section 157 of the Evidence Act or for contradiction under section 145 of the maker. It cannot be used for the purpose of corroborating or contradicting other witnesses. There is no hard and fast rule in recording an FIR. A massage given to the local police station even if cryptic, if it discloses a cognizable offence may constitute an FIR within the meaning of section 154. A telephonic message to the police station which has been recorded by police officer and started investigation basing upon the said message if it discloses a cognizable offence, the police can treat it as an FIR. If the object of an FIR is to set the criminal law in motion, there is no difficulty to treat exts 1 and 3 as FIR which were collected from public offices and all elements of treating it as such are present and basing upon which, the investigation officer reopened the case and started the investigation.

107. Having found that P.W.1 made an FIR with Lalbagh Police Station and that the contents in Exts.1 and 3 are identical, and P.Ws.1, 2, 3, 44, 50, 59 and 64 having corroborated each other, the memo in ext-1 might have been overwritten by any interested quarter or the person concerned who was entrusted to keep it with the record and inadvertently he might have given a number which did not tally with the previous one, and then he rectified the same. An explanation could have been given if the stream of justice was allowed to proceed as usual but, this was an exceptional case. Due to lapse of time, most of the corroborating evidence were lost or destroyed. So this overwriting in the memo does not make it's contents doubtful. These exts-1 and 3 are the true copies of the FIR is evident from the fact that P.W.1 mentioned only Moslem Uddin's name. If he had any ill motive to manufacture a true copy of the FIR for the purpose of the case, he could have included the names of all other accused persons. He was a top ranking responsible officer and an independent witness. The defence failed to reveal anything by cross-examining him about any sort of biasness against the accused or any sort of interest in the case or motive to depose falsely or his inclination towards prosecution.

108. The High Court Division failed to notice another aspect. P.W.1 deposed in the case after 22 years of the incident and the investigation officers had to search at different places for tracing out the copy of the F.I.R. The decisions considered by the High Court Division are based on the facts of those cases, which are quite distinguishable from the facts and

circumstances of the present one. The High court Division itself admitted that this is an exceptional case and that "*it is a gruesome murder it was not allowed to be proceed with for long 21 years because of the existence of a hostile atmosphere, therefore, mere delay in examination of the witnesses will not cast any doubt in the testimonies of the witnesses of this case, as was available in that particular case*", it has illegally discarded the FIR. The explanation given by P.W.1, who was a responsible officer having no nexus with the four national leaders, the explanation is cogent, reasonable and satisfactory. More so, ext.1 which was sized from the office of the Dhaka Central Jail, where the occurrence was committed and it is natural that the Central Jail authority had preserved a copy of it with a view to obviate any future controversy.

109. The High Court Division failed to consider another aspect while disbelieving the complicity of the respondents. Moslem Uddin could not alone have executed the killing by entering into a most secured place like the Dhaka Central Jail. Admittedly, huge number of security personnel with arms were deployed there for the security of the prisoners. It was not possible on his part to enter into the Dhaka Central Jail at dead of night unless the jail authority was compelled to allow him and his team. It is also not possible on his part to execute the killing in presence of I.G. (Prisons), DIG (Prisons) and other high officials unless they were compelled to allow them to enter into the Central Jail for implementing the killing.

110. This Moslem Uddin and the respondents were also in the company of the President's security team. The defence did not dispute this fact. If Moslem Uddin was staying in Bangabhaban with other conspirators, how a member of the conspiracy could alone be convicted excluding other conspirators? A conspirator is an agent of other conspirators and vice versa. In the premises, the conclusion arrived at by the High Court Division that Moslem Uddin was alone responsible in the killing is simply absurd and contrary to the provisions of law. It is also admitted fact that more than one army officers were involved in the killing in two groups. So naturally, the respondents cannot avoid their complicity in the conspiracy.

111. The High Court Division though noticed one important documentary evidence proved by P.W.1, a report submitted by him to the I.G (Prisons) on 5th November, 1975, exhibit-2, did not, however, express any opinion with regard to this document. Both in the FIR and in this report, there are positive statements that captain Moslem Uddin led the killing squad to the Dhaka Central Jail, who came from Bangabhaban. In exhibit-2, he stated that on the basis of intimation given by the Inspector General (Prisons), he reached the Dhaka Central Jail on the fateful night and at that time, he was asked by the latter to proceed towards the Dhaka Central Jail gate as directed from the Bangabhaban; that he witnessed the telephonic conversation between the President and the I.G. (prisons) and thereafter, the latter told him that one captain Moslem with some army personnel would come to the central jail; that it was directed from the Bangabhaban to comply with what he (captain Moslem) wanted to do and that the detenus Tajuddin Ahmed, Monsur Ali, Syed Nazrul Islam and M Kamruzzaman should be shown to him. The High Court Division failed to notice that P.W.1 submitted the inquiry report as per direction of P.W.3, who in turn forwarded the same along with his forwarding report, ext-6, to the Secretary, Ministry of Home Affairs. So, P.W.3 also corroborated P.W.1 and the defence did not challenge the same.

112. Thus, the trial Court and the High Court Division upon superficial consideration of the materials on record illegally discarded exhibits-1 and 3. Had there been any interpolation in the contents of exhibit-1 or exhibit-3, the High Court Division would have been justified in discarding them, but in the absence of anything in this regard and in presence of

uncontroverted evidence on record about seizure and collection of the true copies of the FIR, I find no cogent ground to disbelieve the claim of the prosecution that exts-1 and 3 are the true copies of the FIR lodged with the Lalbagh Police Station on the following day of occurrence by P.W.1 narrating the incident of killing and that after lodging the same, P.W.1 kept a copy of the same in the Dhaka Central Jail and sent a copy to the Inspector General of Police. The trial Court also believed the claim of P.W.1 that he lodged an FIR with Lalbagh police station over the killing of 4 leaders on 4th November, 1975 and that P.W.64 investigated the case on the basis of the said FIR.

113. The above facts are so consistent to link the respondents in the killing of the four national leaders that in pursuance of a pre-planned conspiracy for the killing of the national leaders, the security team headed by Moslem Uddin implemented the killing. It is an admitted fact that most of the army officers and personnel were absorbed in the Ministry of Foreign Affairs and posted in different Embassies of Bangladesh abroad instead of putting them to justice. The above facts proved that the succeeding Government in power not only showed special favour to them but also rewarded them. This absorption of the known killers in the Ministry of Foreign Affairs and posting them in different Embassies of Bangladesh suggested that they had influence over the Government, even after Khandaker Mustaq was dethroned. This fact itself indicates a strong circumstance which the court can take judicial notice as a historical fact. These series of acts are considered cumulatively lead to the inference that there was common design of all accused persons to kill the leaders in the central jail and that in consequence of that design, the conspirators had executed the killing.

114. The High Court Division disbelieved the circumstantial evidence on the reasonings that there are missing links in the chain of events and that as no appeal was preferred against the charge of acquittal of criminal conspiracy, their conviction under section 302/109 of the Penal Code is also not sustainable in law. True, no appeal was preferred against the order of acquittal of the accused persons on the charge of criminal conspiracy but, this itself is not a legal ground to shirk its responsibility even if there are sufficient evidence in support of the charge.

115. The High Court Division fell in an error in acquitting all the accused persons except one merely on the ground that the State did not take step against the order of acquittal.

116. This finding of the High Court Division is palpably illegal and against law. While administering justice it assigned a reason which has no sanction of law. There is no dispute that a heinous crime was committed on the night following 2nd November, 1975 in the Dhaka central Jail at prisoners cell in which the four national leaders were brutally murdered by armed army personnel. The question is whether the murders were perpetrated in pursuance of a conspiracy or in pursuance of a common intention of the accused respondents and others. To say otherwise, in which manner the murders were perpetrated. Both the trial Court and the High Court Division believed the prosecution case so far the place, the time and the murder is concerned. If on an analysis of the evidence on record if it is found that the prosecution has proved that there was conspiracy to kill the leaders and in pursuance thereof, the killing was perpetrated, all accused persons could not avoid criminal liability. If, however, the evidence of record proved that there was no conspiracy but, the killing was committed by several persons in furtherance of common intention of all, all the accused persons cannot be convicted because the common intention requires participation in the crime.

117. The High Court failed to notice that the acquittal was in respect of a charge on a misconception of law. If the material evidence on record are sufficient to come to the conclusion that the killing was perpetrated in consequence of a conspiracy, it has all the powers to award legal conviction altering the finding since the trial court framed a charge of conspiracy against the accused persons and the accused persons have been afforded opportunity to defend the same. The High Court Division, under such circumstances, has power to alter the finding of the trial court under section 423(b)(2) of the Code of Criminal Procedure and award conviction in accordance with law. It is settled law that if a palpable illegality is apparent in the trial Court's judgment while hearing an appeal from conviction, the appellate court can pass appropriate conviction for ends of justice on reappraisal of the evidence on record.

118. Similarly, this Division has the power to alter the finding of the High Court Division and determine the offence committed by the respondents because the appellate court has the power to 'alter the finding maintaining the sentence' without an appeal being filed by the State on the charge of conspiracy. The only bar is, no alteration can be made to the detriment of the accused persons but in this case the accused persons will not be prejudiced thereby, since they have defended the charge. The fundamental principle underlying sections 221-223 of the Code of Criminal Procedure is that an accused person can be convicted of a particular offence only if he was charged with the same. Exceptions to this principle are laid down by sections 234-239 read with section 535, which empower the trial court, in cases specified, to convict an accused person with respect to an offence even though he was not changed with the same. The ordinary rule that the accused cannot be convicted of any offence with which he is not charged is circumscribed by exceptions. The power of the appellate court under section 423(b)(2) is, however, subject to the condition that the appellate court cannot enhance the sentence imposed by the trial court.

119. The appellate court has power to alter the finding of the trial court and convict the accused person on the basis of the evidence on record. Section 423(b)(2) enjoins the appellate court to find the proper offence of which the accused person could be held to be guilty. No restriction is placed on the power of the appellate court to alter the finding to any that it considers suitable to the purpose. The expression 'alter the finding' contemplates only an alteration of the finding of conviction which was appealed against and which was the subject matter of appeal.

120. In Ramdeo Rai Yadav V. State of Bihar, AIR 1990 S.C. 1180, Ramdeo Rai Yadeb and three others were charged under section 396, in the alternative under section 302 of the Indian Penal Code. The trial court convicted all accused under section 396. The High Court found Ramdeo Rai Yadav alone guilty of offence under section 302 by altering his conviction. The Supreme Court held that the appellant couldn't be said to have been prejudiced by the alteration of the conviction in view of the specific alternative charge. The argument advanced on behalf of the convicted accused that there was an acquittal was found of no merit at all.

121. In Tilkeswor V. Bihar State, AIR 1956 S.C. 238, the appellants were charged under section 302/34 and convicted of the said charge. On appeal the High Court converted the conviction to one under section 326/149. It was contended before the High Court that there was no power in the court to substitute section 149 for section 34. The Supreme Court repelled the contention observing that the law on the point was settled in Willie Slancy V. State of M.P., AIR 1956 S.C. 116. In Brathi V. State of Punjab, (1991) 1 SCC 519, the appellant and his uncle were tried under section 302 of the Indian Penal Code. The trial court

acquitted the appellant's uncle but convicted the appellant under section 302. The Order of acquittal became final because State did not choose to challenge it in appeal. The appellant, however, preferred an appeal against his conviction. The High Court on sifting the evidence held that the fatal blow was given by the appellant's uncle and since the appellant was charged under section 302/34, he could not be convicted under section 302. However, the High Court held that the eye witnesses had given a truthful account of the occurrence and the appellant's uncle had actually participated in the commission of the crime along with the appellant. Since no appeal was filed by State against acquittal of appellant's uncle, High Court maintained the appellant's conviction under section 302/34. The Supreme Court held that in the matter of appreciation of evidence, the powers of the appellate court are as wide as that of the trial court and the High Court was, therefore, entitled in law to review the entire evidence and to arrive its own conclusion about the facts and circumstances emerging therefor. The Court further held that '*when several persons are alleged to have committed an offence in furtherance of their common intention and all except one are acquitted, it is open to the appellate court under sub-section(1)(b) of section 386 of the Code to find out on an appraisal of the evidence who were persons involved in the commission of the crime and although it could not interfere with the order of acquittal in the absence of a State appeal it was entitled to determine the actual offence committed by the convicted persons.*'

122. Even where a charge was framed against an accused person in respect of an offence, he may be convicted for lesser offence provided the case attracts section 237 and 238 of the Code of Criminal Procedure. It is said, if the graver charge gives to the accused notice of all circumstances going to constitute the minor offence. In G.D. Sharma V. State of U.P., AIR 1960 S.C. 400, three appellants who were tried separately. Two accused were convicted under section 467 and the other under section 467/471 of the Indian Penal Code and sentenced them accordingly. They preferred four appeals against their convictions in the High Court. The High Court by setting aside the conviction directed their retrial observing that at the trial a charge in the alternative under sections 467 and 477A should be framed against two accused and a charge of abetment in the alternative of offences under sections 467 and 477A should be framed against one namely OM Prakash. The High Court was of the opinion that the acquittal of accused under section 120B, was correct in the absence of sanction. Accused persons challenged the order of remand in the Supreme Court. The supreme Court set aside the order of remand and directed the High Court to re-hear the appeals observing that "*The provisions of Ss.236 and 237 are clear enough to enable a court to convict an accused person even of an offence with which he had not been charged if the court is of the opinion that the provisions of S.236 apply, that is to say, if a single act is or a series of acts are of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, then the accused can be charged with having committed all or any of such offences, and any number of such charges can be tried at once; or he may be charged in the alternative with having committed some one of the said offences and by virtue of the provisions of S.237 the accused although charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S.236, can be convicted of the offence which he is shown to have committed, although he was not charged with it*".

123. Admittedly, in this case except Resalder Mosleh Uddin, none of the prosecution witnesses has been able to recognize the respondents either in the Dhaka Central Jail gate or at the scene of occurrence. They were seen in the company of Resalder Mosleh Uddin in Bangabhaban on the fateful night and preceding to the date of occurrence when the conspiracy was afoot. We found that the respondents were parties to the criminal conspiracy hatched up at Bangabhaban for implementing the killing at Dhaka Central Jail. If the

conspiracy is proved, there is no legal bar to award a legal conviction to the accused-respondents. Even if no formal charge is framed or there is omission to frame a charge unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction in view of section 535 of the Code of Criminal Procedure.

124. The object of framing a charge is to enable an accused person to known the substantive charge which he will have to meet at the trial. References in this connection are the case of V.M. Abdul Rahman V. King Emperor, AIR 1927 P.C. 44 and B.N. Srikantiah V. Mysore State, AIR 1958 S.C. 672. The Judicial Committee of the Privy Council held that 'the bare fact of such omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships view, may be supported by the creative provisions of Ss.535 and 537'.

125. It was urged on behalf of the appellant that even if no appeal was preferred against the acquittal of the charge of criminal conspiracy, this Division in exercise of its inherent power can convict the respondents. In this connection, it was submitted that this Division should take judicial notice of the adverse situation then prevailing during the relevant time in conducting and prosecuting the case–the State was not interested to proceed with the case and its machinery did not co-operate with the special public prosecutor in conducting the case on behalf of the prosecution and under such circumstances, no appeal could be filed against the said charge as the State did not instruct the special prosecutor for filing appeal. In the premises, it is argued that it is a fit case in which this Division ought to have evaluated the evidence on the charge of criminal conspiracy in the interest of justice. In support of the contention, the learned Attorney General has referred some decisions.

126. In view of the position of law discussed above, there is no legal bar to convict the accused-respondents on the charge of conspiracy. However, since both the parties have argued at length on the question of invoking inherent powers and cited certain decisions, I feel it proper to address the question. The Constitution is a social document, and Article 104 is not meant for mere adorning the Constitution. The Constituent Assembly felt that a provision like the one should be kept in the Constitution so that in exceptional cases the highest court of the country could invoke its inherent powers. It is conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law. Apart from the powers given to this Division by the Constitution, a Court of law always retains some inherent powers. It is, therefore, said, the Court is not powerless to undo any injustice caused to a party. Shutting of judicial eyes even after detection of palpable injustice is in one sense denial of justice. If the Judges do not rise to the occasion to which they are oath bound to do justice, they would commit the similar illegality as the one committed by a litigant. Court's practical approach would be towards doing justice without bothering too much about any one's perception. We should never compromise to do justice.

127. In this connection, I would like to quote an observation of Benjamin Cardozo in People V. John Defore, 242 N.Y.13, 17-28. '*The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need the law shall not be flouted by the insolence of office*'. The powers of this Division is to ensure due and proper administration of justice. There is, therefore, no denial of the fact that in appropriate cases ends of justice warrants the exercise of this power. If we do not invoke the inherent powers in appropriate cases, there is no need for keeping this provision in the Constitution.

128. In Mahmudul Islam's Constitutional Law of Bangladesh, Third Edition, it is stated in paragraph 5.196 under the heading "power to do complete justice", that this Division has the power to issue such orders or directions as may be necessary for doing complete justice in any cause or matters pending before it. The author on consideration of the observations made by this Division and the Supreme Court of India in Khandker Zillul Bari V. State, (2009) 17 BLT(AD)28, Shahana Hossain V. Asaduzzaman, (1995) 47 DLR(AD)155, Karnataka V. Andhra Pradesh, (2000) 9 SCC 572 and Abdul Malek V. Abdus Salam 61 DLR (AD) 124 stated that this conferment of power is under special circumstances and for special reasons having the concept of justice being the predominant factor behind the inclusion of such provision in the Constitution. This power can be exercised in a matter or cause in pending appeal when this Division finds that no remedy is available to the appellant though gross injustice has been done to him for no fault or laches of his own. This power is not circumscribed by any limiting words. This is an extraordinary power conferred by the Constitution and no attempt has been made to define or describe complete justice.

129. If a substantial justice under law and on undisputed facts can be made so that the parties may not be pushed to further litigation, a recourse to the provision of Article 104 may be justified. There are cases where the High Court Division did not take into consideration certain affidavits, this Division had considered them in exercise of its inherent powers for doing complete justice. See(Ekushey Television v. Dr. Chowdhury Mahmud Hasan, 55 DLR(AD)26). It was observed by this Division in National Board of Revenue V. Nasrin Banu, 48 DLR(AD)171, that "*Cases may vary, situations may vary and the scale and parameter of complete justice also vary. Sometimes it may be justice according to law, sometimes it may be justice according to fairness, equity and good conscience, sometimes it may be justice tempered with mercy, sometimes it may be pure commonsense, sometimes it may be the inference of an ordinary reasonable man and so on.*" Speaking about the extent of power to be exercised, this Division in Naziruddin V. Hameeda Banu, 45 DLR(AD)38, observed–

> *Considering the vagaries of legal proceedings and the technicalities involved in adjudication, article 104 of the Constitution has invested as a measure of abundant caution, the last Court of the country with wide power, so that it may forestall a failure of justice and to do complete justice in an appropriate case. It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this Court. If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified. Complete justice may not be perfect justice, and any endeavour to attain the latter will be an act of vanity.*

130. In State Vs. Muhammad Nawaz, 18 DLR(SC)503, out of 28 accused persons tried by the Sessions Judge under sections 302/307/323/148 of the Penal Code, he acquitted 10 accused and convicted 18 for murder and other minor offences. It sentenced to death two accused persons while rest to imprisonment for life and also imprisonment for a shorter period against all the accused. The High Court upheld the conviction and sentence of seven accused and acquitted rest, of them, two were those who had been sentenced to death. The convicted seven filed leave petition in the Supreme Court. Supreme Court granted leave and by the said order leave was also granted to the State against the said order of acquittal of remaining eleven. Objection was raised on behalf of the accused persons in respect of the appeal by State on the ground that the leave petition by the State was barred by 76 days and they were not afforded any opportunity when the leave was granted. The Supreme Court

observed that the State's appeal was liable to be dismissed on the ground of limitation. It, however, noticed that the High Court illegally failed to convict three accused who had admittedly been present at the spot and two others who were assailants of a witness and convicted by the trial court. The Supreme Court suomoto issued notice against them who had secured order of acquittal in exercise of powers under Article 61 of the Constitution. It was observed that '*the error being patent on the record of this case*' the respondents being represented by a lawyer, '*the case against these five respondents calls for consideration by us along with the appeal of the seven convicts*' and sentenced two of them to life sentence and rest to one and half years. The Supreme Court passed the sentence in exercise of inherent powers.

131. In Bangladesh V. Dhaka Lodge, 40 DLR(AD)86, some documents which were filed on behalf of the Government in the trial Court were not exhibited by it on the reasoning that they were filed after closure of the evidence. The trial Court dismissed the suit of the respondent but the High Court Division decreed the suit. This Division allowed the appeal for doing complete justice observing that "*the constitutional obligation of this court is to do complete justice in the cause or matter and while doing so it has become imperative for giving due consideration to these annexures to clarify the factual position which in the final analysis can be given by the trial Court*".

132. Similar views have been expressed in Raziul Hasan Vs. Badiuzzaman Khan, 16 BLD(AD)253. In that case appellant Raziul Hasan was in the Foreign Service, and before the Administrative Tribunal moved by the respondent Badiuzzaman, the appellant Raziul Hasan could not defend his case and that despite assurance given by Ministry of Foreign Affairs, his case was not placed before the Tribunal. The Administrative Tribunal gave relief in favour of the respondent No.1 and the Administrative Appellate Tribunal dismissed the appellant's appeal on the ground of limitation. This Division gave relief to the appellant on the reasonings as under:

> "*We now find that no remedy is available to the appellant, though a gross injustice has been done to him for no fault or laches of his own. A valuable right accrued to the appellant in law and fact should not be lost. In that view of the matter we thought it to be a most appropriate case to exercise our jurisdiction under Article 104 of the Constitution. It will not be out of place to say that Article 32(2) of the Constitution of India invests the Supreme Court of India not only with the writ jurisdiction but also with the power to issue directions, orders or writs in any matter. Thus the Indian Supreme Court possesses original jurisdiction. But in the scheme of our Constitution we can only do complete justice under Article 104 of the Constitution in a matter or cause which is pending in appeal under Article 103 of the Constitution. A substantial injustice having been done to the appellant we feel that the jurisdiction under Article 104 of the Constitution should be exercised in the facts and circumstances of this case.*"

133. It is to be noted that judiciary works to maintain social justice and fairness in accordance with law. In doing justice-judiciary does not believe in misplaced sympathy. The above views have been correctly explained in Balaram Prashed Agarwal V. State of Bihar, (1997) 9 SCC 338. Facts in that case are that one Kiron Devi committed suicide. According to the prosecution, Kiron Devi's in-laws and her husband forced her to commit suicide by jumping in a well. Police eventually submitted charge-sheet under sections 498A, 302/34 and 120B of the Indian Penal Code against her husband and in-laws. The trial Court framed charge under sections 302/34 of the Penal Code against the accused persons. It acquitted the accused persons although it held that there was evidence on record that the members of the

family of the accused used to assault the victim; that they also used to demand dowry from her; that threats were given by the accused to the victim that they would kill her and get her husband married to another woman, but since in the meantime seven years elapsed it held that Kiron Devi might have been killed for the sake of dowry cannot be raised. The Supreme Court after appraisal of the evidence came to the conclusion that though the accused persons were rightly found not guilty of the charge of murder, there were sufficient evidence on record in support of the charge under section 498A for the offence of cruelty by husband or relatives of husband of the woman; that despite no charge was framed against them on that count, in exercise of power under Article 142 of the Constitution it might itself examine the question of culpability of the accused for the said offence in the light of the evidence on record so as to obviate protraction of trial and multiplicity of the proceedings. "*It is now well settled that in exercise of powers under Article 142, appropriate orders can be passed (See E.K. Chandrasenan V. State of Kerala, (1995) 2 SCC 99) in the interest of justice in cases which brought before this court. We have been taken through the relevant evidence on record we find that the prosecution has been able to bring home the guilt of the accused under section 498A I PC*" the court observed.

134. In Chandrakant Patil V. State, (1998) 3 SCC 38, four accused persons were found guilty under section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and sentenced to five years rigorous imprisonment. In an appeal from conviction, the Supreme Court of India issued notice upon the convicted persons for enhancement of sentence. On behalf of the accused persons it was contended that in view of section 377(3) of the Code of Criminal Procedure 1973, the High Court could not enhance the sentence without affording the accused a reasonable opportunity of showing cause and in which case, the accused might plead for his acquittal and for reduction of the sentence and in that view of the matter, the court had no power to enhance the sentence. It was held that the Supreme Court has power to pass any order and this power is not circumscribed by any restriction such as section 19 of TADA "*no enactment made by the Central Act or State Legislation can limit or restrict the power of this court under Article 142, though while exercising it the court may have regard to statutory provisions*" and enhanced the sentence to ten years imprisonment.

135. In Mohd. Anis V. Union of India, 1994 Supp(1)SCC 145 it was observed that "*This power has been conferred on the Apex Court only and the exercise of that power is not dependent or conditioned by any statutory provision. The constitutional plenitude of the powers of the apex Court is to ensure due and proper administration of justice and is intended to be co-extensive in each case with the needs of justice of a given case and to meet any exigency. Very wide powers have been conferred on this Court for due and proper administration of justice and whenever the Court sees that the demand of justice warrants exercise of such powers, it will reach out to ensure that justice is done by resorting to this extraordinary power conferred to meet precisely such a situation*."

136. On an analysis of the above cases, we find that in Balaram Prashad Agarwal (supra), the accused persons who were not even charged under section 498A were found guilty of the said offence by the Supreme Court after having noticed from the materials on record that there was grave error in not convicting them under section 498A on the reasoning that the power of the highest court was not circumscribed by any statutory limitation; that a remand order would defeat the ends of justice, and that would foster the multiplicity of proceedings. In Muhammad Nawaz (Supra), the Supreme Court of Pakistan convicted five accused persons who were acquitted by the High Court, although State did not file appeal. While convicting them, the Supreme Court issued notice upon them and heard their counsel. The statements of law argued in those cases are sound, cogent, in conformity with law and I find

no reason to take a different view. State is not required to file an appeal against the acquittal on the charge of conspiracy.

137. The evidence on record proved beyond doubt that the killing was perpetrated in pursuance of a conspiracy and therefore, it is consonance to law and justice that the respondents should be awarded a legal conviction of an offence on the basis of the evidence on record. If a graver sentence is provided for murder in pursuance of conspiracy, the question of prejudice would have arisen. Here the respondents have not acquired any right against the acquittal on the charge of conspiracy. So, even without exercise of inherent power, this Division can alter the conviction of the respondents to one of murder in pursuance of the criminal conspiracy. The appellant has taken ground Nos.II and IV in its concise statement for convicting the accused on the charge of conspiracy. In view of rule 13 of Order XXIII, rule 5 of Order XX of the Appellate Division's Rules are applicable to criminal appeals, and there is no legal bar to convict them even if no leave was granted on this point. This is a settled point and I need not make any observation on this question. In support of the charge, the prosecution has adduced evidence and the accused persons have defended the same. The trial court as well as the High Court Division discussed the evidence in support of this charge but disbelieved the charge on perfunctory grounds. Therefore, there is no legal bar to convict the respondents on the basis of the evidence on record.

138. The gist of the offence of criminal conspiracy being an agreement to break the law, it is found from the evidence that the army personnel deputed in the Bangabhaban convened meetings several times for executing the killing. Some of them visited the Dhaka Central Jail and then chalked out the plan and design, and constituted two killing squads for the purpose. They compelled the jail authority to allow the killing squad to enter into the Dhaka Central Jail with arms. They had compelled the jail authority to segregate the four leaders and keep them in one cell. It is also on record that two groups executed the killing-the first group headed by the Moslem Uddin shot at the four prisoners from short range with the arms carried by them and some time thereafter, the second group entered into the Dhaka Central Jail and in order to ensure the death of the leaders, charged bayonets upon them. The respondents being party to the conspiracy, they are agents in the objects of conspiracy, the identification of Moslem Uddin at the jail gate before shooting at the political prisoners should be taken as done by all the respondents as well. It is immaterial whether the respondents were not recognized at the Dhaka Central Jail. It also makes no difference as to their non-identification. They monitored everything over telephone from Bangabhaban. The acts which followed the killing i.e. fleeing away of the killers with their family members to Bangkok by arranging a special flight, are strong circumstances to link them in the killing. Therefore, all elements to constitute criminal conspiracy to kill the leaders in the Dhaka Central Jail are present in this case. The prosecution has been able to prove the charge of conspiracy by direct as well as circumstantial evidence beyond reasonable doubt against the respondents.

139. This case is standing on a better footing in view of the fact that a proper charge of criminal conspiracy was framed by the trial court and the accused respondents had defended the charge. In this Division as well as in the High Court Division, they were represented by a lawyer and the point in question was raised and heard. The commission of the offence is same and therefore, there is no need for alteration of the charge. It is found from the appraisal of the evidence that the accused persons perpetrated the killing in pursuance of conspiracy and since conspiracy has been proved, the same set of accused persons cannot be legally convicted for an offence of sharing the common intention of all in respect of the same incident. The High Court Division on a misconception of law held that the prosecution has failed to prove the conspiracy. From the evidence as discussed above, if there be any doubt about the conspiracy, it would be

difficult to find out a suitable case to prove such charge. The facts found from the materials on record, the barbarity revealed in the commission of the crime and the seriousness of nature of the offence perpetrated by the accused, it would be a travesty irony if the accused persons are not convicted on the charge of conspiracy. With due respect I am unable to endorse the majority opinion that the accused-respondents cannot be convicted on the charge of criminal conspiracy. The question of the benefit of law does not arise at all for simple reason that they were charged with and defended of the charge of criminal conspiracy. If that being the position, the sentence being the same, the question of injustice or prejudice does not arise at all. The respondents cannot be fastened with vicarious criminal liability within the meaning of section 34 of the Penal Code but their conviction would be one under sections 120B read with 302, not under sections 302/34 of the Penal Code.

140. It should be borne in mind that the definition of the words used in the Penal Code in sections 6 to 52A is one of the most important things. It defines with almost punctilious precision the meaning of various terms which are then used as terms of art everywhere in the Code, both in defining the offences as well as in describing their inter-relations and differences. The object of the definitions is to avoid the perplexing variety of senses. Where the enactment itself provides a definition of the offence, the court should look into the meaning of the offence assigned to the term by the statute itself for interpreting that offence used in the statute. Section 2 of the Penal Code asserts that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within Bangladesh. The object of this section is to declare the liability of every person, irrespective of rank, nationality, caste or creed, to be punished under its provisions. Therefore, all infractions of law as laid down in the Penal Code shall only be punished in the manner therein laid down. An offence is what the Legislature classes as punishable. Any act or omission can be classed as an offence is in itself an offence within the meaning of section 40. There are three elements of an offence; first, the act; secondly, the mens rea; and thirdly, the harmful social consequences of the act which is why the law makes it culpable. As criminal justice requires clear demonstration of facts, it requires also clear enunciation of law, for no one can be convicted of a doubtful offence. Therefore, I fail to understand how the act of the accused which falls under one definition of offence can be taken as another offence under different definition, and the accused persons be convicted for the offence which does not cover definition of such offence. It is illegal and not permissible in law. A court of law cannot convict an accused in respect of an offence which he has not committed.

141. Before concluding, I would like to say that the basic fundamentals of administration of justice are that no man should suffer because of the mistake of the court. No man should suffer by technical procedure of irregularities. Rules or procedure are handmaids of justice and not the mistress of the justice. If a man is wronged, so long it lies within the human machinery of administration of justice, that wrong must be remedied. An irregular order of a court of unlimited jurisdiction can be set aside by it on the application either under the rules of court dealing expressly with setting aside orders for irregularity or *ex debitio justitiae* if the circumstances warrant. Judicial vacillations undermine respect of the judiciary and judicial institutions, denuding thereby respect for law and the confidence in the even-handedness in the administration of justice. (A.R. Antulay V. R.S. Nayak, (1988) 2SCC 602.

142. For the reasons stated above, conviction of the respondent passed by the trial court is altered to one of section 120B read with section 302 of the Penal Code. The sentence of death awarded to the respondents by the trial Court is restored.

143. ***Md. Abdul Wahhab Miah, J.-*** I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

144. ***Nazmun Ara Sultana, J.-*** This criminal appeal by leave, at the instance of the State, has been filed against the judgment and order dated 28.08.2008 passed by a Division Bench of the High Court Division in Death Reference No.150 of 2004 heard together with 4 other criminal appeals filed by the convicted accused persons accepting the death reference in part and rejecting the same with respect to the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and thereby acquitting them from the charges levelled against them and allowing all the 4 appeals.

145. The prosecution case, in short, was that on 3rd November, 1975, at about 3.00 A.M. the then Inspector General of Prisons Mr. Nuruzzaman Howlader received several telephone calls from army personnel at Bagabhaban who told him that some armed miscreants might enter the jail and take away some prisoners forcibly and asked him to go to Dhaka Central Jail immediately. I.G. (Prisons) then informed D.I.G. (Prisons) Mr. Kazi Abdul Awal about those telephonic messages over telephone and asked him to go to Central Jail immediately and he himself also went to Central Jail, Dhaka. Upon arrival at the Jail I.G. (Prisons) Mr. Nuruzzaman and D.I.G. (Prisons) Kazi Abdul Awal took seat in the office of D.I.G. (Prisons). There also I.G. (Prisons) received various telephone calls; sometimes thereafter accused Captain Muslem Uddin along with 4 other armed personnel arrived at the Jail Gate, but they did not disclose their names to the persons attending the Jail Gate; D.I.G. (Prisons) Kazi Abdul Awal asked those army personnel to put their signatures in the register maintained for the purpose at the Jail Gate; those army personnel then put their signatures in the register at Jail Gate and then entered into the Jail; they wanted to know who Mr. Nuruzzaman was, Mr. Nuruzzaman-the I.G. (Prisons) disclosed his identity and those armed personnel then inquired as to whether they had kept aside those persons who were asked to be kept segregated. Mr. Nuruzzaman wanted to know the purpose of such segregation of those persons and the armed personnel then disclosed that they would be done to death; hearing such reply the I.G. (Prisons) Mr. Nuruzzaman wanted to have a telephone call to the President; at that time the jailor also received a telephone call from President Mostaq Ahmed who desired to have a talk to I.G. (Prisons) Mr. Nuruzzaman and ultimately there was talk between the President Mostaq Ahmed and I.G. (Prisons) Mr. Nuruzzaman over telephone; that President Mostaq Ahmed ordered I.G. (Prisons) over telephone to allow those 5 army personnel to do whatever they wanted to do; thereafter the second gate inside the jail was opened and the said 5 army personnel along with Mr. Nuruzzaman entered inside the jail; the D.I.G. (Prisons) Kazi Abdul Awal also followed Mr. Nuruzzaman and those army personnel. Having entered inside the jail those 5 armed personnel enquired as to why there was delay; immediately thereafter the Deputy Jailor, Habilder and some wardens had informed that those persons had been segregated. The accused Muslem Uddin and his 4 other armed companions then went to the spot where those 4 persons namely, Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A. H. M. Kamruzzaman-the four leaders-were brought as ordered and a few minutes thereafter the I. G. (Prisons), D.I.G (Prisons) and others heard sounds of opening shots from firearms; some time thereafter the assailants decamped from the scene in a hurry; thereafter, Mr. Nuruzzaman and Kazi Abdul Awal returned to office and offered Fazar prayer there; at that time they came to know that another group of armed personnel had arrived at the scene of occurrence to ensure the death of those four leaders and seeing that out of those four leaders two were still alive they caused their death by bayonet charges; that the I.G. (Prisons) and the D.I.G. (Prisons) being puzzled and knowing not what to do left the office for their respective residence and again returned at 8/9 A.M. to the Jail Gate. D.I.G. (Prisons) Kazi Abdul Awal then talked with Colonel Rashid over telephone to know the course of action at that situation and Major Rashid ordered not to move the dead bodies; at around mid-

day on the same day the I.G. (Prisons) along with D.I.G. (Prisons) went to the Secretary, Ministry of Home Affairs and apprised him of the incident but he also failed to give any satisfactory solution, rather he asked to hand over the dead bodies to their respective relations after concluding post mortem examination; that at that time the Secretary, Ministry of Home Affairs had telephonic calls with the Superintendent of Police, Deputy Commissioner, Civil Surgeon and others over the incident; that the dead bodies of four slain leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A. H. M. Kamruzzaman were handed over to their relatives after holding of postmortem examination and thereafter D.I.G (Prisons) Kazi Abdul Awal, as the informant, lodged the F.I.R. with Lalbagh Police Station on 04.11.1975 stating the fact of killing of four leaders inside Dhaka Central Jail by armed personnel; that on 05.11.1975 the informant submitted a detailed report also about that jail killing addressing the Inspector General of Prison.

146. On the basis of the F.I.R. lodged by the D.I.G. (Prisons) Kazi Abdul Awal, Lalbagh Police Station Case No.11 dated 04.11.1975 was registered, but the investigation of that case remained suspended for many years till 17.08.1996. Subsequently on the order of the Government, investigation of that case was started on 18.08.1996. The investigating officer-P.W.64 Abdul Kaher Akand, the Assistant Superintendent of Police, C.I.D. Bangladesh took over the charge of investigation on that day. He found record of the corresponding G.R. case No.10698 of 1975 missing and the original F.I.R. was not found. The record of G.R. case, however, was subsequently reconstructed. After completion of investigation the investigating officer submitted charge sheet being No.370 dated 15.10.1998 under sections 120B/302/448/109 and 34 of the Penal Code against 21 accused persons including the present accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha.

147. The case was ultimately taken up for trial in the court of Metropolitan Sessions Judge, Dhaka. Charge under section 120B of the Penal Code was framed against 20 accused persons since one accused Aziz Pasha died in the meantime and charge under sections 302/109 of the Penal Code was framed against 19 accused persons except accused Risalder Moslem Uddin who was charged under section 302 of the Penal code. The charges so framed were read over to the accused persons who were present in the court. These accused persons pleaded not guilty and claimed to be tried.

148. The prosecution examined as many as 64 witnesses to prove the charges framed against the accused persons. The defence examined none. The accused persons present on dock were examined under section 342 of the Code of Criminal Procedure.

149. The defence case, as it appears from the trend of cross-examination of the prosecution witnesses and also from the statements made by the accused persons under section 342 of the Code of Criminal Procedure, was that at about 12 midnight to 1.00 A.M. of 03.11.1975 Khaled Mosharaf proclaimed a coup d' etat and thereby he along with P.W.29 Colonel Safayet Jamil withdrew the Tanks Regiment from Bangabhaban at 12 to 1.00 A.M. on 03.11.1975 and that it was the four leaders of Awami League who were the legitimate successors to the Government after killing of Bangabandhu Sheikh Mujibur Rahman and therefore Khaled Mosharaf and his partymen with a view to serving their peaceful tenure of office, had killed the four leaders inside the Central Jail and that the innocent accused persons were falsely implicated in this case.

150. However, the trial court, on consideration of evidence adduced by the prosecution and the facts and circumstances, convicted the present accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and Risalder Moslem Uddin @ Muslem Uddin @ Hiron Khan @ Muslem Uddin Khan under sections 302/34 of the Penal Code and sentenced all of them to death with fine by the judgment and order dated 20.10.2004. The trial court convicted these 3 accused persons along with 12 others under sections 302/109 of the Penal Code also and sentenced them to imprisonment for life with fine of Tk.10,000/- (ten thousand) each. The trial court found accused Major Md. Khairuzzaman, A. K. M. Obaidur Rahman, Shah Moazzem Hossain, Nurul Islam Monzur and Taher Uddin Thakur not guilty of the charge under sections 302/109 of the Penal Code and acquitted them of the said charge. The trial court found all the accused persons not guilty of the charge under section 120B of the Penal Code and acquitted them of the said charge.

151. This judgment and order of conviction and sentence of the trial was sent to the High Court Division under section 374 of the Code of Criminal Procedure for confirmation of the death sentences and accordingly Death Reference No.150 of 2004 was registered. The other convicted accused namely, Lt. Col. (released) Syed Faruk Rahman, Lt. Col. (released) Sultan Shahriar Rashid Khan, Major (retd.) Bazlul Huda and Major, (Retd.) A. K. M. Mohiuddin preferred Criminal Appeal Nos.4739 of 2004, 4740 of 2004 and Jail Appeal Nos.118 of 2006 and 597 of 2007 respectively.

152. The State or none from the deceased's family preferred any appeal against the judgment and order of acquittal of all the accused persons from the charge under section 120B of the Penal Code or against the order of acquittal of the aforesaid 5 accused persons from the charge under sections 302/109 of the Penal code.

153. However, the High Court Division heard the death reference along with aforesaid 4 appeals together and by its impugned judgment and order dated 28.08.2008 rejected the death reference so far as it relates to the present accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and acquitted them of the charges levelled against them. The High Court Division allowed the 4 appeals also preferred by Lt. Col. (released) Syed Faruk Rahman, Lt. Col. (released) Sultan Shahriar Rashid Khan, Major (retd.) Bazlul Huda and Major, (Retd.) A. K. M. Mohiuddin and acquitted all of them from the charges levelled against them. The High Court Division accepted the death reference in part and confirmed the conviction and sentence of death imposed upon the accused Risalder Moslem Uddin.

154. The state has filed this present criminal appeal challenging the acquittal of the accused respondents Dafader Marfoth Ali Shah and L. D. (Dafader) Md. Abul Hashem Mridha only. It should be mentioned here that the State though filed criminal petition for leave to appeal against the order of acquittal of Lt. Col. (released) Syed Faruk Rahman, Lt. Col. (released) Sultan Shahriar Rashid Khan, Major (retd.) Bazlul Huda and Major, (Retd.) A. K. M. Mohiuddin passed by the High Court Division by the same impugned judgment but these 4 accused having been convicted and sentenced to death in the Bangabandhu murder case being already hanged to death on 28.01.2010 upon confirmation of their death sentence by the Appellate Division those Criminal Petitions for leave to Appeal abated.

155. However, leave for filing this present appeal was granted by this Division by the order dated 11.01.2011 in Criminal Petition for Leave to Appeal No.316 of 2009 to consider the grounds agitated from the side of the leave petitioner-State which are quoted below:-

I. Because the High Court Division delivered its judgment by misreading, misquoting and misunderstanding the evidence on record especially that of P.W.29 and P.W.52 as such the judgment is perverse;

II. Because the High Court Division erred in law by not properly applying the well settled principles of law regarding circumstantial evidence and arrived at a wrong conclusion;

III. Because the High Court Division failed to appreciate the abundance of evidence on record proving the circumstances and establishing a chain between them and arrived at a wrong conclusion causing serious miscarriage of justice;

IV. Because the prosecution case that:-

(a). In order to kill the four national leaders in Dhaka Central Jail a killing squad was formed under the leadership of Risalder Moslemuddin with Dafader Marfoth Ali and Lance Dafader Abul Hashem Mridha amongst others as its members in pursuance to the said motive;

(b). The information that a squad had been sent to kill was communicated by the accused persons to the Dhaka Central Jail authority over telephone; having been proved by evidence of the witnesses a clear chain of circumstances was established to prove the guilt of the accused persons which was unfairly and injudiciously disregarded by the High Court Division.

V. Because there are serious points of law involved in this case mostly relating to the law of evidence which need to be considered and examined by the highest court of judicature to secure the ends of justice.

156. The learned Attorney General, Mr. Mahbubey Alam and the learned Senior Counsel Mr. Anisul Huq have made lengthy submissions before us on behalf of the State-appellant while Mr. Abdullah-Al Mamun, the learned Advocate appointed by the Court as State Counsel to defend the accused-respondents has made elaborate submission on behalf of both the absconding accused-respondents.

157. The learned Attorney General has placed before us the impugned judgment of the High Court Division, that of the trial court and also the evidence on record and has argued that in this case there is abundance of evidence to prove the charges against the present two accused-respondents. The learned Attorney General has referred to the relevant portion of the evidence of P.Ws.1, 2, 3, 11, 13, 16, 17, 18, 21, 26, 28, 29, 33 and 34 and has argued that these evidence, if considered together, prove sufficiently that these two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha were involved in the killing of four national leaders inside the Dhaka Central Jail, but the High Court Division on misreading and mis-appreciation of these evidence and without having taken the attending facts and circumstances into consideration passed the impugned judgment of acquittal most erroneously and unjustly. The learned Counsel has argued that the reasons which the High Court Division assigned for rejecting the evidence of above prosecution witnesses and for not finding the prosecution witnesses trustworthy-were not cogent at all and as such not acceptable. The learned Counsel has submitted more specifically that the High Court Division disbelieved the telephonic conversations between Khandaker Mustaque Ahmed-the then President and Colonel Rashid and P.W.3 I.G. (Prisons) Mr. Nuruzzaman on mis-appreciation of evidence of P.W.29 Colonel Shafayeth Jamil and P.W.46 Lt. Colonel (Rtd.) Anwaruzzaman and thus failed to arrive at a correct decision; that the telephonic conversations between the I.G. (Prisons) and the president Khandaker Mustaque Ahmed and Colonel Rashid on that fateful night was most vital part of evidence for deciding the guilt of

the accused, but the High Court Division disbelieving the telephonic conversation has committed serious error in coming to the decision. The learned Counsel has argued also that the High Court Division discarded the evidence of P.Ws.1, 2, 3, 11, 13, 16, 17 and 18 for minor discrepancies and also for the absence of some registers from both the Dhaka Central Jail and Bangabhaban without considering at all the fact that the investigation of this case started long 21 years after the incident of jail killing and after such a long period it was not possible on the part of the investigating officer and the prosecution to get those registers. The learned Counsel has argued also that the High Court Division made self contradictions by believing the evidence of some prosecution witnesses while affirming the conviction of accused Moslem Uddin and by disbelieving the same evidence of the same P.Ws. in acquitting the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha. The learned Attorney General has argued that the evidence of the prosecution witnesses have proved a strong circumstance which is consistent with the guilt of the accused-respondents and are wholly inconsistent with their innocence, but the High Court Division has totally ignored all the circumstantial evidence and also the legal aspect relating to circumstantial evidence and thus illegally acquitted the accused-respondents.

158. Mr. Anisul Huq, the learned Government Chief Prosecutor has made submission on the charge of criminal conspiracy brought against all the 20 accused persons in this case. It has already been mentioned before that the trial court found this charge of criminal conspiracy under section 120B of the Penal Code not substantiated and therefore, acquitted all the 20 accused persons from that charge, but the Government did not file any appeal against that order of acquittal of the accused persons from the charge under section 120B of the Penal Code. Before the High Court Division also, as it appears, no submission was made from the State-respondents on this charge of criminal conspiracy. However, before this Division the learned Counsel for the State-appellant has made a lengthy submission on the charge of criminal conspiracy contending that this Division, exercising its power of doing complete justice under Article 104 of the Constitution, can consider now whether the charge of criminal conspiracy was proved and if this Division finds that in this case there are sufficient evidence to prove the charge of criminal conspiracy then this Division can pass appropriate order at this stage also. Both Mr. Anisul Huq and the learned Attorney General, after making elaborate discussion on evidence on record, have argued that these evidence have proved sufficiently that there was a criminal conspiracy to kill the four leaders inside the jail and that all the 21 charge sheeted accused persons were involved in that criminal conspiracy, but the trial court most erroneously found that the charge of criminal conspiracy was not proved. The learned Counsel for the State-appellant has pointed out the relevant portion of evidence of some P.Ws. before us and argued that there are overwhelming evidence on record to prove that the accused persons made the criminal conspiracy to kill the four national leaders inside the jail. Mr. Anisul Huq has contended that in the circumstances where there are overwhelming evidence on record to prove the charge of criminal conspiracy for killing the four national leaders inside the jail this Division-the apex court of the country-cannot refuse to consider these evidence and to make a correct decision as regards this charge of criminal conspiracy-only for the reason that there was no appeal against the order of acquittal from this charge of criminal conspiracy-specially in this very case of gruesome, barbaric and heinous killing of four national leaders inside the jail. By citing several decisions of the apex court of this region Mr. Anisul Huq has argued that it is a most appropriate case where this Division can exercise its power of doing complete justice by convicting the accused involved in this criminal conspiracy and sentencing them appropriately.

159. The learned Attorney General also has submitted that this Division in exercising its power under Article 104 of the Constitution can, after issuing a notice against the absconding accused, consider now whether the charge of criminal conspiracy was proved by the evidence on record and can pass appropriate order. The learned Attorney General has made submission to the effect also that if this Division is reluctant to convict the accused persons for the charge of criminal conspiracy under section 120B of the Penal Code for the reason that no appeal was filed against the order of acquittal of the accused from this charge of criminal conspiracy this Division can discuss and consider the evidence on record in support of the charge of criminal conspiracy and can make correct observations and findings as to this charge of criminal conspiracy-at least. The learned Attorney General also has made submission to the effect that considering the very nature of the offence of gruesome and barbaric killing of four national leaders inside the jail this Division-the apex court of the country-cannot be reluctant to make correct observations and findings as regards the charge of criminal conspiracy for the reason only that the State did not file any appeal against the order of acquittal from the charge of criminal conspiracy in time.

160. Mr. Abdullah-Al-Mamun, the learned State Counsel appointed by the court to defend the absconding accused-respondents also has made very lengthy submissions supporting the impugned judgment of the High Court Division and also trying to controvert the submissions of the learned counsel for the State-appellant. The learned state Counsel for the accused-respondents has argued that in this case there is, practically, no cogent evidence to prove the involvement of the accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha in the incident of killing of four leaders inside jail and as such the High Court Division rightly acquitted these two accused-respondents. The learned Counsel has contended that the evidence produced by the prosecution before the trial court were not at all cogent and reliable; that the witnesses whom the prosecution relied on for proving the charge against the accused-appellants were not trustworthy at all; that the High Court Division rightly found that the prosecution witnesses were not trustworthy and their evidence, as such, could not be relied on. The learned Counsel for accused-respondents has pointed out that the trial court also in the first part of its judgment stated that the P.Ws. on whom the prosecution relied on to prove the charges against the accused persons, were not trustworthy at all. Mr. Abdullah-Al Mamun has argued much on some alleged discrepant and contradictory statements of the prosecution witnesses. He has pointed out some alleged discrepant statements of the prosecution witnesses from the Dhaka Central Jail as to the colour of the uniform of the assailants and also as to the weapons the assailants carried and also as to putting of their signatures in the jail register and argued that these discrepant and contradictory statements of the P.Ws. reasonably raise suspicion about the trustworthiness of these prosecution witnesses. The learned Counsel has questioned also the competency of the prosecution witnesses who claimed themselves to be the employees of Bangabhaban at that relevant time pointing out some alleged discrepancies in the statements of P.Ws.11,13,16,17,18,21 and 34 and also pointing out the fact that the prosecution could not bring any written document to prove that these P.Ws. were employees of Bangabhaban at that relevant time. The learned Advocate has argued that these P.Ws. were not at all employees of Bangabhaban and as such are not competent and reliable at all and their evidence cannot be considered for proving the charges against the accused-respondents. The learned Counsel has argued that the High Court Division duly weighed and sifted the evidence of prosecution witnesses and there is no misreading, misquoting and misinterpretation of the evidence on record by the High Court Division; that the High Court Division committed no illegality in discarding the evidence of P.Ws.1-3 and P.Ws.11,13,16,17,18,21 and 34 as unworthy of credence; The learned Counsel for the accused-respondents has argued that there is no cogent

evidence at all on record to prove the presence of these two accused-respondents in the place of occurrence or to prove that these accused-respondents in any way were involved in the incident of jail killing of four leaders and in the circumstances the High Court Division rightly acquitted these two accused-respondents of the charges levelled against them.

161. As against the submissions of the learned Counsel for the State-appellant as to the charge of criminal conspiracy the learned State Counsel for the accused-respondents has submitted that since the State did not file any appeal against the order of acquittal of the accused persons from the charge of criminal conspiracy passed by the trial court and since in this appeal also no such ground was taken and since in the leave granting order also there is nothing as regards the charge of criminal conspiracy this Appellate Division now cannot look into this charge of criminal conspiracy and cannot make any order as to this charge. The learned Counsel has argued that the trial court, on elaborate discussion and consideration of the evidence adduced by the prosecution, clearly found that the charge of criminal conspiracy was not proved at all and accordingly acquitted all the accused persons of the charge under section 120B of the Penal Code but the State or anybody else did not raise any question as to these findings and decision of the trial court regarding the charge of criminal conspiracy at any stage before and as such at this stage, in the absence of the accused persons, this Division cannot entertain this plea of the State-appellant that the charge of criminal conspiracy was proved in this case. Mr. Abdullah-Al Mamun has contended that in the above facts and circumstances there is no scope now for this Division to entertain the argument of the learned Counsel for the State-appellant for making observations and decisions as to the charge of criminal conspiracy and for making order convicting and sentencing the accused persons on this charge of criminal conspiracy.

162. Before considering the submissions of the learned Counsel of both the sides we need to State the material portion of the evidence of some of the prosecution witnesses. It has already been mentioned above that in this case the prosecution has examined as many as 64 witnesses. Out of these 64 witnesses the P.Ws.1 to 9 and 12 are the I.G.(Prisons), D.I.G. (Prisons) (the informant), Jailor, Deputy Jailors and other the then employees of Dhaka Central Jail. The P.Ws.10,19 and 20 are three detenues who were in Dhaka Central Jail in that fateful night of killing of four leaders inside Dhaka Central Jail. The P.Ws.11,13,16,17,18,21 and 34 are the witnesses from Bangabhaban. The P.Ws.14,15,30,31,35,36 and 38 are relations of slain leaders and some are the then state ministers and member of Parliament-whose evidence are not important for this present appeal. The P.Ws.26,28 and 33 have deposed as regards the fleeing away of the accused persons abroad on the next day of jail killing. The evidence of P.W.29 Colonel Shafayet Jamil and P.W.46 Colonel Anwarruzzaman will have to be discussed and considered as the High Court Division has relied on the evidence of these witnesses for disbelieving the credibility of other prosecution witnesses. The rest of the witnesses are mainly police and formal witnesses-the evidence of whom are not required to be stated in this judgment. So, in this judgment we shall discuss the relevant portion of the evidence of P.Ws.1 to 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 26, 28, 33, 34 and P.Ws.29 and 46 only.

163. P.W.1, Kazi Abdul Awal-the informant of this case has deposed before court to the effect that he has retired from service as I.G.(Prisons) and that in November, 1975 he was posted at Dhaka Central Jail as Deputy Inspector General of Prisons. That in the night following 2nd November, 1975, at dawn of 3rd November he came to jail gate by the car of I.G. (Prisons) Mr. Nuruzzaman Howlader. That after arriving at jail while he was sitting with I.G. (Prisons), I.G. (Prisons) received several telephone calls and talked over telephone. That

thereafter Captain Muslem Uddin with other four sepoys came to jail gate and after writing their names in the jail gate as per his asking they entered inside the jail and asked who Mr. Nuruzzaman was. Mr. Nuruzzaman disclosed his identity and then those army personnel asked Mr. Nuruzzaman whether those persons-who were told to be kept segregated-had been segregated or not. Mr. Nuruzzaman enquired them for what purpose those persons were to be segregated and those army personnel told that they would be shot to death. Mr. Nuruzzaman then told that he would talk to President over telephone and accordingly a telephone call was made to President from the office of D.I.G (Prisons). After a while another telephone call came from President Khandaker Mustaque Ahmed to the office of jailor for Mr. Nuruzzaman and Mr. Nuruzzaman then went to that office room of the jailor and received that phone call and talked to President over telephone and thereafter, on his asking Mr. Nuruzzaman told him that the President directed him to allow those army personnel to do what they wanted to do. That thereafter the 2nd gate of the jail was opened and those army personnel went inside the jail and Mr. Nuruzzaman and he himself (the witness) also went inside the jail with those army personnel. That those army personnel at that time enquired why so much time was being taken and told also that they finished within three minutes at the house of Sheik Mujib. That at that time he (the witness) wanted to come out of the jail, but Mr. Nuruzzaman prevented him from coming back. That at that time deputy jailor, habildar and some wardens informed that those persons were kept aside and then Muslem Uddin and his four accomplices went to that place where those four national leaders were kept. Thereafter they heard the sounds of firing and then Muslem Uddin and his other accomplices hurriedly went out of the jail. The witness then went to his office and after offering Fajor prayer he heard that some other army personnel also came to see whether those four leaders were alive still then and seeing 2 of them alive they caused their death by Bayonet charges. That he (the witness) being bewildered could not decide what to do and he and the I.G. (Prisons) then went away from the jail and subsequently at about 8/9 A.M. they again came back to jail and after consultation with each other he talked to Major Abdur Rashid over telephone who told him not to move the dead bodies of those four slain national leaders which remained lying there. Thereafter at noon, on that day, he and I.G. (Prisons) went to Home Secretary and told him about the incident but Home Secretary also could not give any advice. But on the next date Home Secretary told them to hand over those dead bodies to their respective relatives after concluding post mortem examination of those. Thereafter the Home Secretary himself contacted with the Deputy Commissioner, Civil Surgeon and others and all of them extended all co-operations and the dead bodies were then handed over to their relatives after postmortem examinations. That Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman were those four national leaders who were killed inside the jail in that fateful night.

164. P.W.1 deposed further to the effect that on the next date, on 4th November, he lodged the ejher with Lalbagh Police Station. That he sent the copies of that ejher to different places one of which was kept in the jail. This witness has identified the copy of that ejher kept in the jail which was marked as exhibit-1 and his signature thereon was marked as exhibit-1/1 as per his identification. This witness deposed also that on the next dated on 05.11.1975 he submitted a detailed report to I.G. (Prisons) about that occurrence and as per identification of the witness the said report has been marked as exhibit-2 and his signature thereon as exhibit-2/1. This witness has identified another copy of the F.I.R. which was kept in the judicial record of the case and that copy has been marked as exhibit-3.

165. This witness has been cross-examined at length on behalf of the accused persons, but from the very lengthy cross-examination of this witness nothing material came out to raise

any suspicion as to the truth of what he stated in his examination-in-chief about the killing of four national leaders inside Dhaka Central Jail in the night following 2nd November, 1975, at dawn of 3rd November, 1975 by some army personnel including accused Resalder Moslem Uddin.

166. P.W.2 is Md. Aminur Rahman. This witness has deposed to the effect that he has retired from service as D.I.G (Prisons). He was posted at Dhaka Central Jail as jailor from 2nd February, 1975 to 10th January, 1976. That in the later part of August 1975 four leaders of Awami League namely, Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman along with some other leaders and workers of Awami League were sent to Dhaka Central Jail by the then Government. They were under detention order of the Government. That Major Dalim, Major Rashid, Major Shahriar and Major Farooque on behalf of the then President Khandaker Mustaque Ahmed used to take informations of those arrested political leaders very often from Bangabhaban. That in the afternoon of 2nd November, 1975 while he was working in his office room Major Dalim with arms came to jail and threatened him and compelled him to allow him to enter inside the jail. That Major Dalim wanted to see the Awami League leaders who were confined in the jail at that time and he then took Major Dalim to cell No.15 and Major Dalim visited that place. That during that visit, at one stage, Major Dalim met the former police super of Dhaka District Mr. Shahabuddin and talked to him and thereafter he went out of the jail. That on that very date, in the night, Major Farooque from Bangabhaban telephoned him to know about the Awami League leaders who were inside the jail. That thereafter at dawn of 3rd November at about 3 A.M. the jail guard informed him over telephone that the I.G. (Prisons) asked him to come to jail gate immediately and also ordered for strengthening the security of the jail. That he then hurriedly came to jail gate at about 3.15 A.M. and knew from the jail guard that the I.G. (Prisons) had already arrived at jail gate. He then went to jail gate and received I.G. (Prisons) and took him to the office room of D.I.G. (Prisons). That I.G. (Prisons) at that time informed him that he received a telephone call from Bangabhaban that some miscreants from out side might take away some prisoners from the jail forcibly. The I.G. (Prisons) told the witness to make all the officers and employees of the jail alert and told also that the D.I.G. (Prisons) Kazi Abdul Awal had already been informed who would come to the jail gate within a while. That the D.I.G. (Prisons) Kazi Abdul Awal then arrived at jail gate and went to his office room where I.G. (Prisons) also was sitting; that as per instruction of I.G. (Prisons) the witness made all the officers and employees of the jail alert by ringing alarm bell and then Deputy Jailors Abdul Zahid, Md. Tayeb Ali Mollah, Md. Abdur Rouf, Md. Amanullah and Md. Iqbal Hossain came to jail gate. Dr. Rafiq Ahmed, the Assistant Surgeon of Dhaka Central Jail along with two other doctors also came to jail gate. Some other employees and guards also came to jail gate. That at that time the I.G. (Prisons) received telephone call from Bangabhaban. I.G. (Prisons), after receiving that telephone call, told them that one Captain Moslem along with other army personnel would come to jail gate and instructed them to take those army personnel to the office room of D.I.G. (Prisons). That thereafter at about 4 A.M. Captain Moslem along with four other armed army personnel came to jail gate and the witness received them at jail gate and took the signatures of all those army personnel in the gate register and thereafter took them to office room of the D.I.G. (Prisons) where I.G. (Prisons) was sitting. That at that time I.G. (Prisons) was talking over telephone. The witness then went to his own office room and at that time he received a telephone call from Major Rashid from Bagabhaban who wanted I.G. (Prisons) to talk and he then informed the I.G. (Prisons) about that telephone call and I.G. (Prisons) came to his room and received that telephone call. I.G. (Prisons) wanted to talk to President Khandaker Mustaque Ahmed over telephone and talked to President also addressing him “Sir”. After that telephone call I.G.

(Prisons) told them that President Khandaker Mustaque Ahmed directed him to do as per instructions of those army personnel. That at that time Captain Muslem threatened I.G. (Prisons) and D.I.G. (Prisons) and ordered them to go inside the jail and accordingly they all went inside the jail. That Captain Muslem and the other four army personnel were wearing "khaki" and black uniforms and none of them had any batch on their shoulders. That entering inside the jail Captain Muselm ordered to bring four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman in one room and accordingly I.G. (Prisons) instructed him (the witness) to bring all those four leaders in one room. Thereafter he (witness) with the help of other jail employees brought all those four leaders from different rooms to the room No.1 to the east of cell No.15 and then informed the I.G. (Prisons) about the segregation of those leaders and hearing that news Captain Muslem and the other army personnel went to that room No.1 hurriedly and murdered all those four leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by firing indiscriminately and thereafter ran away to jail gate and then went out of the jail. This witness deposed further to the effect that after a while when he was preparing for Fazar prayer one jail guard informed him that four other armed army personnel came to jail gate. He then went to jail gate and those army personnel ordered him to take them inside the jail to see whether those leaders died or not. That out of fear the guard opened the jail gate and those army personnel went to the place of occurrence and struck the dead bodies with bayonet in presence of him (witness) and other employees and thereafter those army personnel ran away from the jail. This witness deposed also that this incident of jail killing was written in the report book of the jail on 03.11.1975. That on 03.11.1975 at about 11 A.M. he (the witness) himself along with Subader Abdul Wahed Mridha went to room No.1 where dead bodies of four leaders were lying and they then kept all those dead bodies facing north with the help of other jail employees and kept the wrist watches, rings, handkerchiefs of slain leaders in his office room. That on 04.11.1975, after lodging of the F.I.R. by D.I.G. (Prisons) Kazi Abdul Awal, 2 magistrates went to the jail at evening time and held inquest of the dead bodies and thereafter in the night of 04.11.1975 the postmortem examinations also of those four dead bodies were held by civil surgeon, Dhaka along with other doctors. Thereafter on 05.11.1975 the dead bodies were handed over to their respective relatives as per instruction of the Government.

167. This P.W.2 also was cross-examined at length by the learned advocates of the accused persons, but from the lengthy cross-examination of this witness also nothing came out to make the above evidence of this witness unbelievable or false.

168. P.W.3, A. T. M. Nuruzzaman has deposed to the effect that on 3.11.1975 he was posted at Dhaka as I.G. (Prisons). That after the murder of Bangabandhu and his other relations in 1975 some political leaders were kept detained inside the Dhaka Central Jail and during that period Major Farooque, Major Rashid, Major Dalim, Major Shahrier, on behalf of the then President Khandaker Mustaque Ahmed, used to take information about those detained political leaders from Bangabahban. That in the night following 2nd November, 1975 at about 3 A.M. he received a telephone call from Major Rashid from Bangabhaban who wanted to know from him whether there was any problem with Dhaka Central Jail and also informed him that they had information that some armed miscreants might take away some prisoners forcibly showing arms and also asked him to make the jail alert immediately. That the witness then telephoned to the jail gate and informed the warden on duty about that telephone call and told him also to inform that to the jailor immediately. That 3/4 minutes later he received another telephone call from another army personnel from Bangabhaban who enquired as to whether he made the Dhaka Central Jail alert about security and told him also

to go to the jail to see its security; that he then informed the D.I.G. (Prisons) Kazi Abdul Awal about that telephonic massages and asked him to go to jail gate immediately. Thereafter he went to Dhaka Central Jail and saw that jailor Aminur Rahman also reached there who told him that he had already made all alert about security of the jail. In the meantime D.I.G. (Prisons) Kazi Abul Awal also reached there. That he (the witness), D.I.G. (Prisons) Kazi Abdul Awal and jailor Aminur Rahman then went to the office room of D.I.G. (Prisons) where he told them about the massages he received from Bangabhaban over telephone. That in the meantime telephone call from Bangabhaban again came and Major Rashid informed him over telephone that one Captain Muslem would go to Central Jail and he would talk to him and asked him also to allow Captain Muslem to talk to Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman. He (the witness) then wanted to talk to President Khandaker Mustaque Ahmed and Major Rashid then gave the telephone to President Khandaker Mustaque Ahmed and President Khandaker Mustaque Ahmed told him to do what Major Rashid asked him to do. That thereafter Captain Muslem reached the office of D.I.G. and enquired about him and getting his identity Captain Muslem asked whether the persons-the names of whom were supplied from Bangabhaban-had been kept aside. That on his asking Captain Muslem told that he would shoot them. That he, (the witness), D.I.G. (Prisons) Kazi Abdul Awal and jailor Aminur Rahman got puzzled and nervous. D.I.G. (Prisons) Kazi Abdul Awal started trying to contact President Khandaker Mustaque Ahmed over telephone, but in the meantime some one informed the witness that Major Rashid had telephoned in the telephone of the room of jailor and wanted to talk with I.G.(Prisons) and the witness then went to the office room of jailor and Captain Muslem and his other four armed companions also went to that room of the jailor. That Major Rashid from Bangabhaban asked him (the witness) over telephone whether Captain Muslem reached at jail and he then told Major Rashid that he could not understand what Captain Muslem was telling and he wanted to talk to President and Major Rashid then gave the receiver to President Khandaker Mustaque Ahmed and he then told President Khandaker Mustaque Ahmed that Captain Muslem was telling that he would kill Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by shooting. That in reply President Khandaker Mustaque Ahmed told him that what Muslem Uddin told would have to be done. That the witness then told D.I.G. (Prisons) and jailor Aminur Rahman what President told. That all of them then got puzzled and bewildered and could not understand what had to be done. That in the meantime Captain Muslem and his other companions cordoned them and ordered them to take them where those persons were kept. That Captain Muslem and his four companions were then taken to the place where those four leaders were kept. That he (the witness) heard Captain Muslem shouting and saying "hurry up." That the jailor then, at gun point, brought those four leaders to one room and the witness then heard the firing sounds and also sound of crying. That Captain Muslem and his other companions had sten gun, S.L.R. etc. with them. That after firing, Captain Muslem and his four companions went away to jail gate hurriedly without telling anything to the witness or others. He (the witness) and D.I.G. (Prisons) then went to the office room of D.I.G. (Prisons) and stayed there bewildered, speechless for about one hour. That in the meantime one of the jail staff came to them and informed them that one nayek A. Ali by name with 4/5 other armed personnel went to the place inside the jail where four leaders were shot and struck four leaders with bayonet and thereafter left the jail. He (the witness) thereafter, with the help of one prison warden, went to his government quarter.

169. This witness further deposed to the effect that subsequently he went to his office and discussed the incident with D.I.G. (Prisons) Kazi Abdul Awal and also talked to Major Rashid over telephone. At about 10.30 A.M. he along with D.I.G. (Prisons) Kazi Abdul Awal went to the Home Ministry and met Home Secretary and informed him about the incident in

detail. On 05.11.1975 he submitted a written report about the incident to Home Secretary. On 04.11.1975 he, on consultation with D.I.G. (Prisons) Kazi Abdul Awal, decided to file a case and asked D.I.G. (Prisons) to lodge ejher with Lalbagh P.S. and accordingly on 04.11.1975 D.I.G. (Prisons) lodged ejher with Lalbagh P.S. This witness deposed further to the effect that on 05.11.1975 Brigadier Khaled Mosharaf called him and D.I.G. (Prisons) at Bangabhaban and accordingly he and D.I.G. (Prisons) went to Bangabhaban at 10 P.M. at night on that very date and they narrated the occurrence to Khaled Mosharaf and also the Air force Chief and Navel Chief and two other Colonels. Those army personnel asked them to submit written reports about that incident and they submitted written reports accordingly. Those army personnel recorded their oral version about that incident also. As per identification of this witness the written report which this witness submitted to the Home Secretary on 05.11.1975 has been marked as exhibit-6 and his signature thereon as exhibit-6/1.

170. This P.W.3-the then I.G. (Prisons) also has been cross-examined at length on behalf of the accused persons. But from the lengthy cross-examination of this witness also nothing material came out to raise any suspicion about the truth of the evidence of this witness.

171. P.Ws.4, 5, 6, 9 and 12 were jail guards while P.Ws.7 and 8 were Deputy Jailors of Dhaka Central Jail at that relevant time of jail killing. All these witnesses also have deposed stating the incident of jail killing corroborating the evidence of P.Ws.1, 2 and 3. P.W.4, Mohobbat Ali has deposed to the effect that in the night following 2nd November, 1975 he was on duty as jail guard in the jail gate of Dhaka Central Jail from 3.00 A.M. to 6.00 A.M.. That at about 3.00 A.M. jailer Aminur Rahman came out of his government residence within jail premises and told them that I.G. (Prisons) and D.I.G. (Prisons) also were coming to jail and subsequently I.G. (Prisons) also came to jail. That jailor Aminur Rahman told him that 4/5 armed army personnel would come to jail from Bangabhaban and ordered him to open the jail gate when they came. That sometime after that 5 armed army personnel wearing black uniforms came to jail gate and asked to open the gate and he then opened the gate as per order of jailor. That those army personnel had Sten gun, Chines rifles in their hands. That subsequently he as per order of the jailor opened the 2nd gate also of the jail and I.G. (Prisons), D.I.G. (Prisons) and jailer Aminur Rahman with those armed army personnel entered inside the jail and after a while thereafter they heard sounds of firing and then those armed army personnel went away from jail hurriedly; that he then came to know that four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman died. That sometimes after this occurrence four other persons wearing black uniforms came to jail gate and asked for opening the gate and the witness then with the permission of jailor Aminur Rahman opened the gate and those persons entered inside the jail and 5/7 minutes thereafter they came out of jail and ran away from the jail. That at that time he informed jailor Aminur Rahman that the names of the persons who entered inside the jail were not written and jailor shaheb then told him to write the names of Captain Muslem in the register and he accordingly wrote the name of Captain Muslem in the register of the jail gate. As per identification of this witness the said register of the jail gate has been marked as exhibit-7.

172. The P.W.5, Alauddin Sikder deposed to the effect that on 3rd November, 1975 from 2.00 A.M. to 4.00 A.M. he was on duty in the main gate of Central Jail as gate sentry and at about 3.00 A.M. I.G.(Prisons) Mr. Nuruzzaman, D.I.G. (Prisons) Kazi Abdul Awal and jailor Aminur Rahman came to main gate of the jail and then went to the office and sometimes thereafter five army personnel wearing khaki and black uniforms came to the jail gate by jeep

and they entered inside the jail. That in the meantime since his duty period was over he was handing over the charge to the sentry Kazi Abdul Alim and at that time they heard firing sounds from inside the jail; within a short time thereafter those armed army personnel came out from inside the jail and left the jail through main gate. That he then came to know that those armed army personnel murdered four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by firing. That subsequently he knew also from habilder Nayeb Ali that other four armed army personnel came to jail and caused the death of those four leaders by bayonet charges. That he also knew from other officers that one army officer Captain Muslem by name with his other army companions committed that killing.

173. P.W.6 Md. Ismail Hossain deposed to the effect that on 2nd November, 1975 he was posted at Dhaka Central Jail as jail guard. On that day he was on duty from 6.00 A.M. to 12.00 P.M. in the main gate of the jail and subsequently he again was on duty in the main gate from 9.00 P.M. to 11.00 P.M. on the same date and after the duty hour he went back to his house and fall asleep. At about 4/4.15 A.M. in that very night following 2nd November, he heard ringing sound of alarm bell from Dhaka Central Jail and he then hurriedly came to the main gate of Dhaka Central Jail and knew from jail guard Mohabbat Ali that 5 armed army personnel from Bangabhaban came to jail and entering inside the jail murdered Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by firing shots and then left the jail. That thereafter at about 4.30/4.45 A.M. while he was still at jail gate four other army personnel wearing khaki uniforms came to the jail gate and one of them put his signature in the In-Out Register as K. Ali and thereafter those four army personnel went inside the jail and made bayonet charges on those four leaders and thereafter went away. That he knew also that one of the five army personnel who came to the jail was Captain Muslem Uddin. This witness deposed also that on 4th November in the evening while he was on duty at jail the dead bodies of three leaders were handed over to their respective relatives and the dead body of Kamruzzaman was handed over to his relative on 5th November, in the morning. This witness has identified the gate register of the Dhaka Central Jail which has been marked as exhibit-8. On the identification of this witness the signatures of "K. Ali" appeared at pages-144 and 145 of this register have been marked as exhibits-8/1 and 8/2. From the cross-examination of this witness also nothing material came out to make the evidence of this witness unbelievable.

174. P.W.7 Md. Abdur Rouf was posted as Dhaka Central Jail from April 1973 to September 1976 as Deputy Jailor. This witness deposed to the effect that in the night following 2nd November 1975 at about 3.00 A.M. one jail guard came to his government residence and awoke him from sleep and told him that I.G. (Prisons) Nuruzzaman Howlader, D.I.G. (Prisons) Kazi Abdul Awal and Jailor Aminur Rahman had come to jail and they told him and other Deputy Jailors to go to jail gate. He then hurriedly came to the jail gate and on his asking one of the jail guard on duty told him that I.G. (Prisons), D.I.G. (Prisons), Jailor and some army personnel wearing khaki uniforms were sitting in the office room of D.I.G. (Prisons). He then went to the office room of Deputy Jailor and saw there Deputy Jailor Abdul Zahid, Tayeb Ali Mollah, Amanullah Sarker and Iqbal Hossain sitting. 5/10 minutes thereafter one jail guard told them that I.G. (Prisons), D.I.G. (Prisons) and Jailor with those persons wearing khaki uniforms went inside the jail and they asked them also to go inside the jail. That they-the 5 Deputy Jailors also then went inside the Central Jail. That entering new jail they saw the other officers there. 2/3 minutes thereafter they heard firing sounds from the room where Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman were kept. Sometimes thereafter they saw 4 persons wearing kahki uniforms

came out of that room and running away towards the jail gate and thereafter they left. That on the next morning at about 8.00 A.M. while he came to office he knew from his colleagues that those 4 leaders were shot dead. That on 04.11.1975 in the evening time he heard from the Jailor and Deputy Jailors that Captain Muslem Uddin along with four other army personnel, at the instruction from Bangabhaban, came to the jail in the night following 02.11.1975. From the cross-examination of this witness also nothing material came out.

175. P.W.8 Md. Abdul Zahir-another the then Deputy Jailor of Dhaka Central Jail has deposed to the effect that he was posted at Dhaka Central Jail as Deputy Jailor from 1974 to 1977. That on 2nd November, 1975 in evening he went back to his residence from the jail. At about 4.00 A.M. in that night jail guard awoke him from sleep and told him that I.G. (Prisons), D.I.G. (Prisons) and Jailor were at office and they told him to go there. That at that time he heard also alarm sound from the jail. He then came to the jail and was informed by the orderly of D.I.G. that I.G.(Prisons) and D.I.G. (Prisons) were talking with some army personnel in the office room of D.I.G. He then went to his office and saw there some of his colleagues sitting. That 15/20 minutes thereafter one jail guard informed him that jailor shaheb was sitting in his office room. He then went to the office room of jailor and jailor informed him that 5 army personnel came and they told I.G. (Prisons) and D.I.G. (Prisons) that they would talk with some prisoners. That 15/20 Minutes thereafter they were informed by one jail guard that those 5 army personnel along with I.G. (Prisons), D.I.G. (Prisons) and Jailor went inside the jail. That he along with his other colleagues also then entered inside the jail and saw that those 5 army personnel with I.G. (Prisons), D.I.G. (Prisons) and Jailor were going to new jail. He followed them. As soon as he reached the gate of the new jail area he heard sounds of firing from Division-I of new jail and after a little time those 5 army personnel came out of the new jail and went out of the jail. That he then went to the office room of the jailor and wanted to know what happened and the jailor told him that Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman were shot dead. He then came back to this office and sometimes later he again went to the office room of the jailor who informed him then that four other army personnel also came to the jail and went inside the jail to be sure about death of those four leaders and thereafter they went away. That at that time jailor shaheb informed him also that I.G. (Prisons) had talked with President Mustaque Ahmed and other senior army officers over telephone several times. That he stayed at jail upto 7.00 A.M. and thereafter came back to his house. That subsequently he came to his office and knew from jailor that the dead bodies of those four leaders were still lying in that condition. At about 4.00 P.M. the inquest and postmortem examination of those four dead bodies were held inside the jail. On 05.11.1975 the dead bodies of those 4 leaders were handed over to their relatives.

176. P.W.9 Md. Nayeb Ali was the chief jail guard of Dhaka Central Jail at that relevant time. This witness deposed to the effect that in the night following 02.11.1975 from 3.00 A.M to 6.00 A.M. he was on duty at Dhaka Central Jail. That 4/5 other sepoys also were on duty along with him during that time. That while they were deputed on duty after signing in the duty book they heard alarm bell ringing and he then made all the sepoys on duty alert. That at that time he saw I.G., D.I.G., Jailor, Deputy Jailors and four other armed persons wearing black and khaki uniforms entering inside the new jail. That jailor shaheb at that time asked him to open ward No.1 but he told that he had 200/300 keys with him and did not know which was the right one. That “subader shaheb” then took the bag containing those keys from him and opened the ward No.1 as per instruction of jailor shaheb. At that time Syed Nazrul Islam and Tajuddin Ahmed were in that ward No.1. As per direction of jailor shaheb, “subader shaheb” brought Kamruzzaman shaheb from ward No.2 and Mansur shaheb from

ward No.3 to that ward No.1 and made them all sit in one cot where Syed Nazrul Islam used to sleep. That as soon as all those 4 leaders sat on that cot the armed personnel opened brush fire on them and thereafter they left the jail. That seeing that scene of brush firing and blood he went to the verandah of the new jail and remained sitting there. That a few minutes thereafter "subader shaheb" came to room No.1 and stayed there ½/1 minute and thereafter went away. 10/15 minutes thereafter 4 other army personnel with bayonets came to the new jail and entered inside the room No.1 and started striking those 4 leaders with bayonets and thereafter they left that place.

177. The P.W.10 Abdus Samad Azad was in Dhaka Central Jail as a detenue in that fateful night. This witness has deposed to the effect that in 1971, after formation of Mujibnagar Government, he worked as a moving Ambassador with the rank and status of a Minister and also as Advisor to Mujibnagar Government. That before declaration of Mujibnagar Government there were difference of opinion between Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman and Khandaker Mustaque Ahmed, Mahbub Alam Chashi and Taher Uddin Thakur. That in 1973 he was in charge of Ministry of Agriculture as Minister. After the incident of 15th August, 1975 he was confined in house arrest. On August 23, 1975 he along with those 4 leaders was brought to police control room where they found Major Rashid with movie camera. That Major Rashid told them that they would be put to firing squad. Thereafter at about 12.30 A.M. they were shifted to Dhaka Central Jail. At that time Aminur Rahman was the jailor and M. A. Awal was the D.I.G. (Prisons). That he was shifted to new jail cell in room No.1. Syed Nazrul Islam, Tajuddin Ahmed, Korban Ali, Sheikh Abdul Aziz along with 4 others were confined in room No.2. Secretary Asaduzzaman, Mofazzal Hossain Maya, Kamruzzaman and others were also confined in room No.2. He himself, Captain M. Mansur Ali, Amir Hossain Amu, Syed Hossain, Abdul Quddus Makhan and others were kept in room No.3 of new cell. That on November-1, 1975 they heard from the jail people that some of them would be released and some would be transferred elsewhere. In the morning of 2nd November the jail authority informed them that after evening, on that day, some army officer would come to jail and would visit the place where they were kept and actually in that evening they saw some army officers visiting the jail. In the later part of the night following 2nd November at about 3/4A.M. the alarm (f¡Nm¡ O¾V¡) rang and thereafter they saw the I.G. (Prisons), D.I.G. (Prisons) and Jailor with some Military Officers. That the jail authority took Captain Mosnur Ali from room No.3 to room No.2 and Sheikh Abdul Aziz from room No.1 to room No.3 and thereafter they heard sounds of brush firing, In the morning, at the time of serving breakfast, the sepoys informed them that the army personnel killed the four leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman inside the room No.1 by brush firing. That on 3rd November, 1975 they were under lock-up the whole day and night. That they were not allowed to see the dead bodies of four leaders. The dead bodies of four leaders were lying inside the jail the whole day of 4th November.

178. From the cross-examination of this witness also nothing material came out.

179. The P.W.11 Mokhlesur Rahman Bhuiyan is the Personal Assistant to Joint Secretary (Admn) of the Ministry of Chittagong Hill Tract Affairs. This witness deposed to the effect that in 1972, he was appointed as typist in the President Secretariat. In 1975 he was posted as P/A of the Military Secretary to the President namely Brigadier Masrurul Hoque. That on 15th August, 1975 at about 3.00 P.M. entering Bangabhaban he found Khandaker Mustaque Ahmed as President. At that time he saw Taher Uddin Takur, A. K. M. Obaidur Rahman, Shah Mouzzaman Hossain, Mahbub Alam Chasi, Major Farooque, Major Rashid, Major

Dalim, Major Bazlul Huda, Major Noor, Major Aziz Pasha, Major Rashed Chowdhury, Major Shahriar, Resalder Moslem and some others present at Bangabhaban; since then those army officers had been living in Bangabhaban. That on November 2nd, 1975 at about 7.30 P.M. he was brought to the 1st floor of Bangabhaban by Captain Muslem Uddin. He saw Major Farooque, Major Rashid, Major Dalim, Major Noor, Major Bazlul Huda, Major Aziz Pasha, Major Mohiuddin, Major Sharful Hossain, Captain Mazed, Captain Khairuzzaman, Lieutenant Kismat, Lieutenant Nazmul, Dofader Marfat Ali, Office Assistant Abul Hashem Mirdha, Major Shahriar and many others in that room. That they were talking about Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman who were confined in Dhaka Central Jail at that time; that Major Dalim and Major Rashid enquired him whether he had any telephone number of Dhaka Central Jail and he replied that he had. That he was then asked to supply the telephone numbers of both residence and office of I.G. (Prison), D.I.G. (Prison) and Jailor of Dhaka Central Jail quickly and accordingly he supplied those telephone numbers to Major Shahriar. That at that time he heard discussion about Dhaka Central Jail in that room and also heard to tell that the task of Dhaka Central Jail would have to be completed within that very night; that he also heard Major Farooque talk over telephone to Dhaka Central Jail, that Major Farooque was asking where the detenues were kept inside the jail. At that time Major Shahriar told him to go back to his office room and also told not to leave the office without their permission. He then came to his office. Thereafter at about 9.00 P.M. in that very night the Military Secretary to President called him to his office room. Reaching that office room of the Military Secretary to the President he saw there Taher Uddin Takur, A.K.M. Obaidur Rahman, Shah Muazzam and Nurul Islam Manjur sitting. That thereafter the Military Secretary talked to President over telephone and then told those four persons to go to the bed room of the President. That at about 11.00 P.M. in that very night he went away to his quarter within Bangabhaban. On 3rd November, 1975 he heard that Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman were killed inside the Dhaka Central Jail. Thereafter in the night of that very day the army officers who were residing at Bangabhaban went away abroad.

180. This P.W.11 was cross-examined on behalf of almost all the accused persons extensively. From the side of the accused persons repeated suggestions were put to this witness to the effect that in that night following 2nd November, 1975 after 6.00 P.M. he was not at all present in Bangabhaban and that he was not at all asked by any of the accused persons to supply the telephone numbers of the I.G. (Prisons), D.I.G. (Prisons) and jailor since there was separate section with sufficient employees including several telephone operators who used to deal with the telephone numbers etc. However this P.W.11, in course of cross-examination, has stated that he was posted in Bangabahban from 1972-1998 and that though his office hours usually was upto 6.00 P.M., he had to stay in Bangabhaban long after that time also when required. In course of cross-examination this witness has stated also that Resalder Muslem was not staff of Bangabhaban. This witness denied the defence suggestion that that he did not know Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha since before and that he did not see those accused persons in Bangabhaban in the night following 2nd November, 1975.

181. The P.W.12 Kazi Abdul Alim was another jail guard of Dhaka Central Jail at that relevant time of occurrence. This witness also has deposed to the effect that on 2nd November, 1975 from 4.00 P.M. to 6.00 P.M. he was on duty at the outer gate of Dhaka Central Jail and after completion of his duty he went back to the barrack. That he was scheduled to resume his duty at 4.00 A.M. of 3rd November, 1975, but before that at about 3.00 A.M. he heard alarm bell (f¡Nm¡ O¾V¡) from the jail and then rushed to the jail gate

and saw there I.G. (Prisons) Mr. Nuruzzaman, D.I.G. (Prisons) Kazi Abdul Awal and Jailor Aminur Rahman and other officers. Jailor Aminur Rahman instructed him to inform them immediately if any outsider came. After a while five army personnel wearing black khaki uniform came to jail gate by a open jeep and being informed about that the I.G. (Prisons), D.I.G. (Prisons) and Jailor ordered to open the gate and those five army personnel entered inside the jail. Sometimes after that they heard firing sounds from inside the jail and subsequently those army personnel went away from the jail. That sometimes after that four other armed army personnel came to the jail and entered inside the jail and later they came out of the jail and went away; that he then heard that four Awami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman were killed.

182. From the cross-examination of this P.W.12 also nothing material came out in favour of the defence.

183. The P.W.13 Md. Shawkat Hossain deposed to the effect that he was appointed as "Khedmatgar" in the Ganabhaban in 1973 and after 15th August, 1975 after the killing of Bangabandhu Sheikh Mujibur Rahman and his other family members he along with some others were transferred to Bangabhaban. That on 20th August 1975 he and other "khedmatgar" Manik were engaged on duty of the president Khandaker Mustaque Ahmed. That during his such duty he knew Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Noor, Major Bazlul Huda, Major Mohiuddin, Major Sharful, Major Rashed Chowdhury, Captain Mazed, Captain Muslem Uddin, Dofader Marfat Ali, L.D. Abul Hashem Mridha. That during his duty in Bangabhaban he knew Taher Uddin Takur and Mahbub Alam Chashi also. That on 2nd November 1975 at 2.00 P.M he went to Bangabhaban for performing his duty and at that time he saw the army personnel whom he named before and some other army personnel in Bangabhaban in busy condition. That at about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Noor, Major Mohiuddin, Major Rashed Chowdhury, Major Sharful, Captain Mazed and Captain Muslem Uddin holding meeting in the room of Major Rashid. Thereafter at about 12/12.30 A.M. in that very night he saw Major Rashid, Major Farooque Rahman, Major Shahriar, Major Bazlul Huda, Major Rashed Chowdhury, Major Sharful, Major Mohiuddin, Major Aziz Pasha, Captain Mazed, Taher Uddin Takur and Mahbub Alam Chashi holding meeting in the meeting room of President Khandaker Mustaque Ahmed in the 3rd floor. That he himself and "khedmatgar" Manik went inside that meeting room for serving tea. At that time President Khandaker Mustaque Ahmed asked Major Rashid who would go to jail and in reply Major Rashid told that Captain Muslem Uddin and his men would go there. That Major Rashid told him (the witness) then to serve the meal to Muslem. The witness then came to the ground floor and took meal from pantry room and went to the room of Captain Muslem Uddin. But Captain Muslem Uddin told that he would not take meal; Captain Muslem Uddin then brought out a bottle of wine from the almirah and he (the witness) took a glass from almirah and pour wine in that glass; that there were two other army personnel of lower rank also present in that room and they all drank wine with Muslem Uddin. That he (the witness) thereafter went away to the meeting room of 3rd floor. That after the end of the meeting President Khandaker Mustaque Ahmed went away to his bed room along with Major Rashid, Major Farooque, Taher Uddin Takur and Mahbub Alam Chashi and he (the witness) then came away to the ground floor; that at about 3.00 A.M. in that night he saw Captain Muslemuddin, Dofader Marfat Ali, L.D. Abul Hashem Mridha and 2/3 other army personnel of lower rank going out of Bangabhaban by army jeep. Sometimes thereafter Major Bazlul Huda and Major Shahriar also went out of Bangabhaban by another army jeep. The witness and "khedmatgar" Manik then fell asleep in the dining room. At about 6.00 A.M. Major

Bazlul Huda awoke him from sleep and told him to serve breakfast to all in the second floor. The witness then went to the room of Captain Muslem Uddin with breakfast and saw there Major Rashid, Major Farooque Rahman, Major Dalim, Major Shahriar, Major Rashed Chowdhury, Major Mohiuddin, Captain Mazed and Captain Muslem Uddin gossiping; that while he was serving breakfast to them, he heard Major Rashid asking about the big 4 of jail and in reply Captain Muslem Uddin telling that all were finished in jail. That he (witness) then went away from there and came to pantry in the ground floor; on that very day they were not released from duty. This witness has further stated to the effect that subsequently from the conversations of the army officers he could know and also heard that four national leaders Syed Nazrul Islam, Tajuddin Ahmed, Mansur Ali, and Kamruzzaman were killed by Captain Muslem Uddin and his other men by shooting inside the jail. That at 7/7.30 P.M. on 3rd November Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Bazlul Huda, Major Mohiuddin, Captain Mazed and some other army personnel went away from Bangabhaban and thereafter at about 9.00 P.M., in that night, he (the witness) also went away from Bangabhaban after finishing his duty and on the next day on 4th November at 2.00 P.M. the witness again came to Bangabhaban and heard that the said army officers and their companions went away abroad.

184. This witness also has been cross-examined on behalf of the all the accused persons thoroughly. During cross-examination suggestions were put to this witness to the effect that he did not know any of the army officers whom he named in his examination-in-chief and that what he deposed in his examination-in-chief were all false and that he was not on duty at all in Bangabhaban on 2nd/3rd November, 1975. This witness denied all these defence suggestions. From the lengthy cross-examination of this witness nothing material came out to prove the evidence of this witness false or to prove this witness not trustworthy.

185. The P.W.16 Abdul Quiyum Choudhury was a receptionist-cum-P.A. to the President in 1975. This witness has deposed to the effect that in Bangabhaban he was assigned with the job of connecting personal telephone of the President. That during his duty in Bangabhaban he saw Major Dalim, Major Rashid, Major Aziz Pasha, Major Rashed Chowdhury, Major Mohiuddin, Major Ahmed Sharful Hossain, Major Shahriar, Major Frooque, Captain Mazed, Lieutenant Kismat, Lieutenant Nazmul Hossain, Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. Abul Hashem Mridha and others roaming in Bangabhaban with pomp and power. That Taher Uddin Takur and Mahbub Alam Chasi also used to come to Bangabhaban frequently and they used to telephone to different places from Bangabhaban and also give different instructions and orders sitting in the room of President at Bangabhaban; that in the later part of October, 1975 there was prevailing an unusual situation in Bangabhaban; on 2nd November, 1975 his duty in Bangabhaban was from 7.30 A.M. to 2.00 P.M.; that after performing his duty on that day he went away from Bangabhaban. Thereafter on the next day on 3rd November he came to Bangabhaban at 2.00 P.M and heard from Yakub that in the previous night four Awami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman were killed inside the jail and that Major Dalim, Major Farooque and Major Rashid group had committed that killing. That Khan Mohammad Ali Olock told Yakub about this fact in the morning at the time of change of duty. That Khan Mohammad Olock told Yakub that president Mustaque and Major Rashid had talked to I.G. (Prisons) at jail in that night and they were seen very busy and atn the dawn Major Rashid and the other men of their party were seen entering Bangabhaban in sweating condition. That Yakub told him also that he himself also could know from the conversation of Major Dalim, Major Rashid and Major Farooque and others that they committed the killing incident inside the jail. This P.W.16 deposed also that he himself also could know from the conversation of

the said army personnel that they committed the jail killing in the previous night. That on that day President Mustaque Ahmed, Taher Uddin Thakur also were seen anxious. That though his duty period was upto 8.00 P.M. he had to remain on duty till 11.00 P.M. in that night.

186. This witness also has been cross-examined at length on behalf of the accused persons, but nothing material came out from his cross-examination to make his evidence false or to support the defence suggestion that he is a tutored witness and has deposed falsely as per the instruction of the prosecution.

187. The P.W. 17 Khan Mohammad Ali Olock deposed to the effect that in 1972 while he was a student of Dhaka University he was appointed as L.D. Assistant in the President Secretariat and was assigned with the duty of personal assistant of Mohammad Hanif-the personal assistant of President Bangabandhu Sheikh Mujibur Rahman. In 1975 he along with three others was posted as receptionist-cum-P.A. and they worked as such in the Ganabhaban. After 15th August 1975 he was posted in Bangabhaban. That at that time Major Farooque, Major Rashid, Major Shahriar, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Aziz Pasha, Captain Muslem Udding would reside in Bangabhaban in different V.I.P. rooms. That Taher Uddin Takur and Mahbub Alam Chashi also used to stay with Khandaker Mustaque Ahmed in Bangabhaban all the time. That in the night following 2nd November, 1975 he had telephone duty at Bangabhaban. In that night at 3.00 A.M. he was asked to connect the I.G. (Prisons) by telephone and when I.G.(Prisons) was connected he asked I.G. (Prisons) to talk with Major Rashid and they had talked for few moments. After sometimes Major Rashid again asked him to give telephone connection to I.G. (Prisons) and he then phoned to the residence of the I.G. (Prisons) but he was informed that I.G. (Prisons) went to jail. Thereafter he gave telephone connection to the phone of D.I.G. (Prisons) and Major Rashid then talked. Sometimes thereafter Major Rashid, Major Farooque, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Aziz Pasha came to his room in armed condition and told him to connect I.G. (Prisons) by telephone. The witness then tried to connect I.G. (Prisons) but could not get line and then he connected the phone of jailor and told him that Major Rashid would talk to I.G. (Prisons). I.G. (Prisons) then talked to Major Rashid over telephone and Major Rashid wanted to know whether Captain Muslem Uddin reached the jail. Thereafter Major Rashid told him (the witness) to give connection to President Mustaque Ahmed and accordingly he gave telephone connection to President Mustaque Ahmed and President Mustaque Ahmed talked to I.G. (Prisons). As soon as President Mustaque Ahmed finished his talk Major Rashid and others went away inside Bangabhaban. That sometimes thereafter Pritom Barua informed him that Major Farooque, Major Dalim, Major Rashid and others were going outside Bangabhaban. He (the witness) also then saw the going out of those army personnel from Bangabhaban. That subsequently at about 6.00 A.M. Major Rashid, Major Dalim, Major Farooque, Major Bazlul Huda, Major Shahriar, Major Rashed Chowdhury, Major Aziz Pasha, Major Ahmed Sharful, Captain Mazed, Captain Muslem, Lieutenant Kismat, Lieutenant Nazmul, Abul Hashem Mridha, Dafader Marfoth Ali came back to Bangabhaban in very tired condition. At about 8.00 A.M. he handed over his duty to Yakub Uddin Khan and at that time he narrated the whole occurrence to Yakub Khan; that on the next day he knew that Tajuddin Ahmed, Syed Nazrul Islam, Captain Mansur Ali and Kamruzzaman were killed inside the jail by those army personnel and they also fled away abroad.

188. From the lengthy cross-examination of this witness also nothing material came out to make the evidence of the witness false or to support the defence case. This witness has denied

the defence suggestion that he has deposed falsely at the instruction of others and that he was not on duty in Bangabhaban on 02.11.1975.

189. The P.W.18 Md. Manik Meah deposed to the effect that he was a "khedmatgar" in Ganabhaban in 1973 and after the assassination of Bangabandhu he was posted at Bagabhaban as "khedmatgar" of President Khandaker Mustaque Ahmed. That during his tenure in Bangabhaban he saw Major Rashid, Major Farooque, Major Shahriar, Major Dalim, Major Mohiuddin, Major Bazlul Huda, Major Ahmed Sharful, Captain Mazed, Captain Muslem Uddin, Abul Hashem Mridha, Marfat Ali Shah and some other officers in Bangabhaban. Mahbub Alam Chashi and Taher Uddin Thakur also used to stay in Bangabhaban with President Khandaker Mustaque Ahmed. That on 2nd November, 1975 at 2.00 P.M. he came to duty at Bangabhaban; Shawkat Hossain also was with him on duty at that time. At about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque, Major Bazlul Huda, Major Shahriar, Major Dalim, Major Mohiuddin, Captain Muslem Uddin sitting in the room of Major Rashid. At about 12.00/12.30 A.M. in that very night there was an urgent meeting in the meeting room of President Khandaker Mustaque Ahmed. That in that meeting all those army personnel and Mahbub Alam Chashi and Taher Uddin Thakur also were present. In that meeting all were seen agitated. President Khandaker Mustaque Ahmed asked Major Rashid who would go to jail and Major Rashid replied that Captain Muslem and his men would go inside the jail. Major Rashid then told him (the witness) to serve meal to Captain Muslem and Shawkat went to serve meal; that at about 1.00/1.30 A.M. he (witness) saw Major Rashid, Major Farooque, Mahbub Alam Chasi and Taher Uddin Takur to go to the bed room of President Khandaker Mustaque Ahmed. That at about 3.00 A.M. in that very night Captain Muslem Uddin, Marfot Ali Shah, Abul Hashem Mridha and two other army personnel and one men in civil dress went out of Bangabhaban by a army jeep. By another jeep Major Bazlul Huda and Shahriar shaheb also went out of Bangabhaban. Thereafter at about 6.00 A.M. Major Bazlul Huda awoke them from sleep and told them to serve breakfast to Captain Muslem Uddin. The witness and Shawkat then made breakfast ready and took that to the room of Muslem Uddin and saw there Major Rashid, Major Farooque, Major Shahriar, Major Bazlul Huda, Major Dalim, Major Mohiuddin and some other army officers gossiping with Captain Muslem. Major Rashid asked Captain Muslem "জেল খানায় কি বড় চারটা শেষ।" In reply Captain Muslem told "pÉ¡l ph ®noz"; that he then came out of that room after they finished their breakfast; that on that day he (the witness) was not released from duty. That from the conversation of army officers he knew that the four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman were killed inside the jail by shooting and he then realized clearly that the said army officers along with Mahbub Alam Chashi and Taher Uddin Thakur made conspiracy with President Khandaker Mustaque Ahmed to kill those four leaders. That on that evening at about 7.00/7.30 P.M. some of those army officers with their families left Bangabhaban. On the next day coming to duty at Bangabhaban he heard that those army officers left the country and went away abroad.

190. This P.W.18 also has been cross-examination at length on behalf of the accused persons. But from the lengthy cross-examination of this witness also nothing material came out to make the evidence of this witness unbelievable.

191. The P.W.19 Khandaker Asaduzzaman was the secretary of Jute Ministry in 1975. After 15th August, 1975 he was arrested along with others and was detained in Dhaka Central Jail. This witness deposed to the effect that he was kept in room No.2 of Dhaka Central Jail along with Mr. A.H.M. Kamruzzaman, Mr. Mofazzal Hossain Chowdhury Maya, Bir Bicram Mr. Mohiuddin Ahmed and in room No.1 Syed Nazrul Islam, Mr. Tajuddin Ahmed, Mr.

Korban Ali, Mr. Abdul Quddus Makhan and Sheikh Abdul Aziz were kept while in room No.3 Captain Mansur Ali, Mr. Abdus Samad Azad, Mr. Shamsuzoha and some others were kept. That during the period from 31st October, 1975 to 2nd November, 1975 he saw Major Dalim inside the jail. That in the night following 2nd November, 1975 he heard alarm bell (f¡Nm¡ O¾V¡) and he woke up from sleep. Thereafter jailor came to their room and called away Kamruzzaman from that room to room No.1. After a while they heard firing sounds which continued for 4/5 minutes. Thereafter the assailant party went away; they heard groaning sounds from room No.1. After a while they again heard sounds of somebodies' entering in room No.1 and could know later that there were bayonet charges to ensure the death. That on the next day on 3rd November, 1975 they were kept confined inside the cell the whole day. On 4th November, 1975 they were allowed to come out of the cell and could know from guards that the dead bodies of Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali, and A. H. M. Kamruzzaman were taken out of jail gate. That he could know also that Captain Muslem was the leader of the assailant party. From the cross-examination of this witness also nothing material came out.

192. The P.W.20 Mahbubuddin Ahmed, Bir Bikrom was a police superintendent in 1975. This witness also was arrested after assassination of Bangabandhu Sheikh Mujibur Rahman and his other family members and was kept in the central jail in cell No.15. This witness deposed to the effect that on 2nd November, 1975 before lock up Major Dalim came in front of his cell and he (the witness) asked him why did he come there and Major Dalim replied that he came there to see whether the lights were in order or not. This witness stated also that in 1971 he fought together with Major Dalim in sector No.2. That in the night following 2nd November, 1975 at about 3.00 A.M. the alarm ring (f¡Nm¡ O¾V¡) of the jail rang and he (the witness) woke up from sleep; that he then heard firing sounds and also sound of groaning. That sometimes thereafter he heard sounds of bayonet charges also. After "fazar azan" somebody told them that four persons were killed. On 3rd November, 1975 he was called to jail gate to meet some visitors and at the time of going to jail gate he saw four dead bodies of Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali, and Kamruzzaman lying. Next day, after evening, they heard that the dead bodies were taken away. From the cross-examination of this witness also nothing material came out.

193. The P.W.21 Commodere Golam Rabbani was the A.D.C. to the President at Bangabhaban during that relevant time. This witness has deposed to the effect that he served as A.D.C. to the President at Bangabhaban since December, 1974 for a period of 2 years 7 months and during that period he used to reside at Bangabhaban; that after the killing of Bangabandhu and his family members Major Farooque, Major Rashid, Major Dalim, Major Shahriar, Major Noor, Major Mohiuddin, Major Aziz Pasha, Captain Mazed, Nazmul, Kismat, Hashem, Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Abul Hashem Mridha and many others used to reside at Bangabhaban. That 2/1 days after the killing of Bangabandhu President Mustaque Ahmed sent a letter to Captain Mansur Ali and he (the witness) himself and Major Shahriar took that letter to Captain Mansur Ali. That 2/1 days thereafter they came to know that four Awami League leaders Captain Mansur Ali, Syed Nazrul Islam, Tajuddin Ahmed, and Kamruzzaman were sent to jail. This witness deposed to the effect also that the army officers who used to reside at Bangabhaban by- passing army command were being tried to be taken back to barrack by army head quarter and in the later part of October, 1975 there was a hint that the army head quarters would take action against those army personnel. That during that time Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Mridha and their other companions used to stay armed all the time. They used to stay in Bangabhaban as the personal guards of President Mustaque Ahmed. That in the night

following 2nd November, 1975 at 11.00 P.M. he fell asleep in his bed room at 1st floor of Bangabhaban. At about 2.00 A.M. in that night one messenger of President Mustaque Ahmed awoke him from sleep and told him that President Mustaque had called him. He then was going to the room of President Mustaque at 4th floor by lift and coming out of the lift he saw 2 armed army personnel who challenged him and getting his identity allowed him to go; he then went to the room of President and saw there Major Rashid and Major Dalim who were busy with making telephone calls to different places. The President then asked him about the guards and he replied that he did not know whether the guards went out of the Bangabhaban. That sometimes thereafter he (the witness) went to his office room to enquire about the guards and at that time he saw Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha along with others in a very restive condition. Sometimes thereafter Muslem Uddin, Marfoth Ali Shah and Abul Hashem Mridha along with some others were found going out of Bangabhaban. Subsequently other officers also went out of Bangabhaban. At 6.00 A.M., in the morning, he (the witness) saw those officers and others came back to Bangabhaban. That in the meantime they knew that four leaders Captain Mansur Ali, Syed Nazrul Islam, Tajuddin Ahmed and Kamruzzaman were killed inside the jail and that Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha and some others killed them. That the officers and others who were involved in the killing of 15th August, 1975 and 3rd November, 1975 went abroad on 3rd November.

194. This witness also has been cross-examined at length on behalf of the accused persons. During cross-examination this witness has denied the defence suggestion that he did not see Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha in Bangabhaban on that day and that they never resided at Bangabhaban and never came out of Bangabhaban and then went back to Bangabhaban.

195. This witness, the A.D.C. to President denied the defence suggestion also to the effect that Khaled Mosharaf, with a view to capture power, killed the leaders inside jail.

196. The P.W.26 Captain A.M.M. Saifuddin is a retired pilot of Bangladesh Biman. This witness has deposed to the effect that on 3rd November, 1975 at 11.00 A.M. he was informed that he would have to take some army officers to Bangkok by a special flight as safety pilot and subsequently at 9.30/10.00 P.M., on that very date, they went to Chittagong from Dhaka with some passengers by plane and from Chittagong they flew for Bangkok and reached Bangkok on 4th November. On 6th November he came back to Dhaka and after reaching Dhaka he came to know that the passengers whom they took to Bangkok were involved in the killing of Bangabandhu and his family members and also in the killing of four leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman. That about 30/35 passengers were in that plane.

197. P.W.28 Mr. Waliur Rahman was a director of Foreign Ministry. The materials part of his evidence is that on 3rd November, 1975 at about 5.00 P.M. acting Secretary of Foreign Ministry Mr. Nazrul Islam informed him that Lieutenant Colonel Rashid and some other persons of his group would go out of the country by a special flight on that day and asked him to take necessary permission from Burma and Thailand Embassy and accordingly he and Shamsher Mobin Chowdhury did all the needful and then at 10.00 P.M., in that very night he went to old airport and saw there Lieutenant Colonel Rashid, Lieutenant Colonel Shahriar, Lieutenant Colonel Bazlul Huda, Lieutenant Colonel Nur Chowdhury, Major Ahmed Sharful Hussain, Captain Marfat Ali, Kismat, Hashem, Nazmul Hussain Ansar, Lieutenant Colonel

Pasha, Moslem, Mridha and Lieutenant Colonel Farooque who left the country by the special flight. On the next morning he heard about the killing of four leaders inside the jail.

198. The P.W.33 Mr. Shamser Mubin Chowdhury, the Secretary, Foreign Ministry, deposed to the effect that at the time of occurrence he was working as Deputy Chief of Protocol in the Foreign Ministry. That on 3rd November, 1975 at 9.30 A.M. he was called to Bangabhaban by the Foreign Secretary Nazrul Islam and there he was given a list of army officers by Mahbub Alam Chashi and told to arrange their going away abroad and accordingly he did all needful. That he also went to the airport and learnt that all the army officers who prepared for going abroad already crossed the immigration area and entered inside. That thereafter in 1976, in the month of April he went to different countries and handed over some appointment letters to those army officers who left the country for their appointments in different Embassies of Bangladesh in different countries as per direction of the then Foreign Secretary.

199. The P.W.34 Md. Yeakub Khan has deposed to the effect that he was working as a receptionist at Bangabhaban at the time of occurrence. That he was given duty to operate the personal telephone of the President Khandaker Mustaque Ahmed. That during his tenure at Bangabhaban he found Major Rashid, Major Dalim, Major Noor, Aziz Pasha, Captain Moslem and other army officers residing at Bangabhaban. That on 3rd November, 1975 his duty period at Bangabhaban was from 8.00 A.M. to 2.00 P.M. and while he took over his duty from Khan Mohammad Ali Olock (P.W.17) the later informed him that in the previous night at about 3.00 A.M., major Rashid from President's room told him to give telephone connection to I.G. (Prisons) and he gave telephone connection at the residence of I.G. (Prisons) and Major Rashid then talked to I.G. (Prisons) and sometimes thereafter Major Rashid, Major Dalim, Major Aziz Pasha, Major Noor, Major Mazed came to the room of Khan Mohammad Ali Olock in armed condition and told him to connect I.G. (Prisons) over telephone again and accordingly Khan Mohammad Ali Olock again telephoned in the residence of I.G. (Prisons) but I.G. (Prisons) was not at home at that time and Khan Mohammad Ali Olock was informed that I.G. (Prisons) went to jail; that as per direction Khan Mohammad Ali Olock then gave telephone connection to jail and Major Rashid then asked I.G. (Prisons) whether Captain Muslem went to jail; Major Rashid told also I.G. (Prisons) to talk to President Mustaque Ahmed and accordingly I.G. (Prisons) talked to President Mustaque Ahmed when he was given telephone connection to President Mustaque Ahmed. That thereafter Major Rashid and others went away. This P.W. 34 deposed also that Khan Mohammad Ali Olock told him also that at dawn he saw Major Rashid and his other party men to return to Bangabhaban. This witness has stated further to the effect that he himself also could gather from the conversations of Major Rashid, Major Dalim, Aziz Pasha, Major Noor, Captain Muslem that those army personnel, in conspiracy with President Khondaker Mustaque Ahmed, killed four leaders Tajuddin Ahmed, Syed Nazrul Islam, Kamruzzaman and Captain Mansur Ali and that on the next day while he came to duty he knew that the said army personnel went abroad. During cross-examination this witness has denied the defence suggestion that he is a tutored witness.

200. These are the evidence which the prosecution has relied on to prove its case that all the accused persons made a criminal conspiracy to kill four Awami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman inside the Dhaka Central Jail and in pursuance to this conspiracy a killing squad was formed under the leadership of Risalder Muslem Uddin with Dafader Marfoth Ali and Lance Dafader Abul Hashem Mridha and others and in the night following 2nd November, 1975 at about 4 A.M.

the said killing squad entered inside Dhaka Central Jail and committed murder of the said four Awami League leaders by shooting with fire arms and subsequently another team of army personnel also went inside Dhaka Central Jail and made the death of those 4 leaders confirmed by inflicting bayonet charges on their bodies.

201. From the above discussion of evidence of the prosecution witnesses it appears that the P.Ws.1 to 9, 10, 12, 19 and 20 have deposed corroborating this prosecution case to the extent that in that fateful night of the occurrence accused Resalder Muslem Uddin along with four other army personnel entered into Dhaka Central Jail and killed four Awami League leaders by shooting with fire arms and subsequently another team of army personnel made the death of those four Awami League leaders confirmed by inflicting bayonet charges on their bodies. The P.W.1-the then D.I.G. (Prisons), the P.W.2-the then Jailor of Dhaka Central Jail and the P.W.3-the then I.G. (Prisons) deposed to the effect also that in that fateful night of occurrence, before the incident of killing of 4 leaders, there were several telephonic conversations between I.G. (Prisons) and accused Major Rashid and President Khondaker Mustaque Ahmed from Bangabhaban. The P.W.3 I.G. (Prisons) deposed to the effect also that accused Major Rashid informed him over telephone that Captain Muslem Uddin would go to jail and instructed him to allow Captain Muslem Uddin to talk to 4 leaders Sayed Nazrul Islam, Captain Monsur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman inside jail. The P.Ws.1-3 deposed to the effect that after his arrival at jail Captain Muslem Uddin, on their asking, told that they would kill the four leaders and that I.G. (Prisons) informed this very statement of accused Captain Muslem Uddin to Major Rashid and also President Khondaker Mustaque Ahmed over telephone and being thus informed even about this statement of accused Captain Muslem Uddin, Major Rashid and President Mustaque Ahmed instructed I.G. (Prisons) to allow Captain Muslem Uddin to do what he wanted to do. These evidence of the P.Ws.1, 2 and 3 have been corroborated by the evidence of P.W.17 Khan Mohammad Ali Olok-a receptionist-cum-telephone operator of Bangabhaban. The P.W. 17 deposed to the effect that in the night following 2nd November, 1975 he had telephone duty at Bangabhaban and in that night, at 3.00 P.M. he was asked from President's room to give telephone line to I.G. (Prisons) and accordingly he gave telephone line to I.G. (Prisons) at his residence and I.G. (Prisons) talked to Major Rashid for sometime and thereafter also Major Rashid again talked to I.G. (Prisons) over telephone and this time since I.G. (Prisons) was not at his residence he gave telephone connection to the phone of D.I.G. (Prisons). That sometimes thereafter Major Rashid, Major Farooque, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Aziz Pasha came to his room in armed condition and told him to connect I.G. (Prisons) through telephone; that he then tried to connect I.G. (Prisons) but getting no line he ultimately gave line to the phone of jailor and Major Rashid then talked to I.G. (Prisons) through the telephone of jailor and Major Rashid at that time wanted to know whether Captain Muslem Uddin reached the jail; that thereafter Major Rashid told him (P.W.17) to give telephone connection to President Mustaque Ahmed and accordingly P.W.17 gave telephone connection to President Mustaque Ahmed and President Mustaque Ahmed then talked to I.G. (Prisons). The P.W.17 deposed also that sometimes thereafter he saw Major Rashid, Major Dalim, Major Farooque going out of Bangabhaban and later at about 6.00 A.M. he saw those army personnel and Risalder Muslem Uddin, Dafader Marfat Ali, Abul Hashem Mridha and others come back to Bangabhaban in very tired condition. This P.W.17 stated also that on the next morning, while he handed over duty to P.W.34 Yakub Hussain Khan he informed him about this telephonic conversations of President Mustaque Ahmed and Major Rashid with I.G. (Prisons). P.W.34 has corroborated the P.W.17 mentioning that he heard about these telephonic conversations from P.W.17. P.W.16 also has deposed to the effect that he heard about these telephonic conversations between

Bangabhaban and Dhaka Central Jail from P.W.34 Yakub Hussain Khan who heard about that from P.W.17 Khan Md. Ali Olok.

202. All the witnesses from Bangabhaban also, namely, the P.W.11 Mokhlesur Rahman Bhuiyan, P.W.13 Md. Shawkat Hossain, P.W.16 Abdul Quiyum Choudhury, P.W.17 Khan Mohammad Ali Olok. P.W.18 Md. Manik Meah, P.W.21 Commodere Golam Rabbani and P.W.34 Md. Yeakub Hussain Khan deposed in support of the prosecution case to the extent that all the accused persons made conspiracy to kill the four leaders inside the jail and in pursuance of that conspiracy Resalder Muslem Uddin, the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and some other army personnel were sent to Dhaka Central Jail at about 3.00 A.M. in the night following 2nd November, 1975. The P.W.11 deposed that in the fateful night of jail killing, at about 7.30 P.M., he saw all the accused persons including accused Resalder Muslem Uddin, accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha on the 1st floor of Bangabhaban talking about Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman who were confined in Dhaka Central Jail at that time and that at that time, at the asking of Major Dalim and Major Rashid he supplied them with the telephone numbers of both the residence and office of I.G. (Prisons), D.I.G. (Prisons) and Jailor of Dhaka Central Jail. This witness deposed to the effect also that at that time he heard the accused persons to discuss about Dhaka Central Jail and also to tell that the task of Dhaka Central Jail would have to be completed within that very night and also heard Major Farooque to talk over telephone to Dhaka Central Jail and to ask where the detenues were kept inside the jail. The P.W.13 deposed to the effect that in the fateful night of occurrence at about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, major Noor, Major Mohiuddin, Major Rashed Chowdhury, Major Sharful, Captain Mazed and Captain Muslem Uddin holding meeting in the room of Major Rashid and thereafter at about 12/12.30 A.M. in that very night he saw those army personnel and also Taher Uddin Thakur and Mahbub Alam Chashi holding meeting in the meeting room of President Khandaker Mustaque Ahmed in the 3rd floor of Bangabhaban and that in that meeting he himself and other "khedmatgar" Manik while were serving tea he heard Khandaker Mustaque Ahmed asking Major Rashid who would go to jail and in reply Major Rashid to tell that Captain Muslem Uddin and his men would go there. This P.W.13 deposed also that at about 3.00 A.M. in that very night he saw Captain Muslemuddin, Dafader Marfoth Ali. L.D. Abul Hashem Mridha and 2/3 other army personnel of lower rank going out of Bangabhaban by a army jeep and sometimes thereafter Major Bazlul Huda and Major Shahriar also went out of Bangabhaban by another army jeep and thereafter at about 6.00 A.M. Major Bazlul Huda awoke him from sleep and told him to serve breakfast to all in the 2nd floor. That he then went to the room of Captain Muslem Uddin with breakfast and saw there Major Rashid, Major Farooque Rahman, Major Dalim, Major Shahriar, Major Rashed Chowdhury, Major Mohiuddin, Captain Mazed and Captain Muslem Uddin and heard Major Rashid asking about the "big four" in the jail and in reply Captain Muslem Uddin telling that all were finished in jail. The P.W. 16 deposed to the effect that during his duty in Bangabhaban he saw all the accused persons roaming in Bangabhaban with pomp and power and that in the later part of October, 1975 there was prevailing an unusual situation in Bangabhaban; that on 2nd November, 1975 after performing his duty he went away from Bangabhaban at 2.00 P.M. and thereafter on the next day he came to Bangabhaban at 2.00 P.M. and heard from Yakub about the killing of four leaders inside the jail and heard also that Major Dalim, Major Farooque and Major Rashid group had committed that killing. This P.W.16 has corroborated also the evidence of P.W.17 mentioning that P.W.17 Khan Mohammad Ali Olok narrated those to P.W.34 and P.W.34 subsequently told him about that.

The evidence of p.W.17 has already been stated above. The P.W.18 deposed to the effect that during his tenure in Bangabhaban he saw Major Rashid, Major Farooque, Major Shahriar, Major Dalim, Major Mohiuddin, Major Bazlul Huda, Major Ahmed Sharful, Captain Mazed, Captain Muslem Uddin, Abul Hashem Mridha, Marfat Ali Shah and some other officers to stay in Bangabhaban; that in the night following 2nd November, 1975 at about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque, Major Bazlul Huda, Major Shahriar, Major Dalim, Major Mohiuddin, Captain Muslem Uddin sitting in the room of Major Rashid and subsequently in that very night at about 12.00/12.30 A.M. he saw those army personnel holding a meeting in the meeting room of President Khandaker Mustaque Ahmed and in that meeting all of those army personnel were found agitated and at that time President Khandaker Mustaque Ahmed asked Major Rashid who would go to jail and Major Rashid replied that Captain Muslem and his men would go insdie the jail and that subsequently at about 3.00 A.M., in that very night, he saw Captain Muslem Uddin, Marfoth Ali Shah, Abul Hashem Mridha and two other army personnel to go out of Bangabhaban by a army jeep and later by another jeep Major Bazlul Huda and Major Shahriar also went out of Bangabhaban. Thereafter at about 6.00 A.M. Major Bazlul Huda awoke them from sleep and told them to serve breakfast and while he and P.W.13 Shawkat was serving breakfast in the room of Muslem Uddin they saw there Major Rashid, Major Farooque, Major Shahriar, Major Bazlul Huda, Major Dalim, Major Mohiuddin and some other army officers and at that time Major Rashid asked Captain Muslem whether "the big four" in the jail were finished and in reply Captain Muslem Uddin told all were finished. The P.W.21 Commodere Golam Rabbani-the A.D.C. to the President deposed to the effect that after the killing of Bangabandhu and his family members Major Farooque, Major Rashid, Major Dalim, Major Shahriar, Major Noor, Major Mohiuddin, Major Aziz Pasha, Captain Mazed, Nazmul, Kismat, Hashem, Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Hashem Mridha and many others used to reside at Bangabhaban. This witness deposed also that the army officers-who used to reside in Bangabhaban bypassing army command-were being tried to be taken back to barrack by army head quarter and in the later part of October, 1975 there was a hint that the army head quarter would take action against that army personnel. That during that period Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Mridha and their other companions used to keep armed all the time and they used to stay in Bangabhaban as the personal guards of Prdsident Mustaque Ahmed. This P.W.21 deposed further that in the night following 2nd Novembr, 1975 at about 2.00 A.M. one messenger of President Mustaque Ahmed awoke him from sleep and told him that President Mustaque had called him and he then went to the room of President Mustaque and saw there Major Rashid and Major Dalim who were busy making telephone calls and that the President asked him about the guards and he replied that he did not know whether the guards went out of Bangabhaban. That sometimes thereafter he went to his office room and at that time he saw Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha along with others in a very restive condition and a little time thereafter he saw Resalder Muslem Uddin, Marfoth Ali Shah and Abul Hashem Mridha along with some others going out of Bangabahaban and subsequently he saw some other officers also going out of Bangabhaban and later at about 6.00 A.M., in the morning, he saw all those army personnel to come back to Bangabhaban. This witness deposed also that in the meantime they could know that Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha and some others killed the four leaders inside the jail. This witness deposed also that the army personnel and others who were involved in the killing of 15th August, 1975 and 3rd November, 1975 went abroad on 3rd November. The P.W.34 deposed to the effect that during his tenure at Bangabhaban he found Major Rashid, Major Dalim, Major Noor, Major Aziz Pasha, Captain Muslem and other army officers residing at Bangabhaban and that on 3rd November, 1975 at 8.00 A.M. while he took over his duty from P.W.17 Khan Mohammad

Ali Olok the later informed him about the telephonic conversations of President Mustaque Ahmed and Major Rashid with I.G. (Prisons) in the previous night.

203. The above narrated evidence of P.Ws.11, 13, 16, 17, 18, 21 and 34 coupled with the eivdence of P.Ws.1 to 9, 10, 12, 19 and 20-as narrated above-support the prosecution case strongly that the accused persons made a conspiracy to kill the four Awami League leaders inside the jail and in pursuacne of that conspiracy accused Resalder Muslem Uddin, the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha along with two other army personnel were sent to Dhaka Central Jail in the night following 2nd November, 1975 at about 4.00 P.M. and all these five members of this killing squad entered inside the jail and killed the four Aweami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman by shooting with fire arms and subsequently, within a short time, another team of army personnel entered the Dhaka Central Jail and inflicted bayonet charges on the bodies of slain leaders to ensure their death.

204. The trial court though appears to have rasied some questions in the first part of his judgment about the credibility of the above mentioned prosecution witnesses but ultimtately believed the above narrated evidence of these P.Ws. and relying on these evidence convicted and sentenced 15 accused persons including the present accused-respondents-as already mentioned above. But the High Court Division-the appellate court-did not believe the P.Ws.1 to 3 and the other prosecution witnesses from Bangabhaban. The High Court Division though has accepted the prosecution case that the accused Resalder Muslem Uddin along with some other army personnel murdered four Awami League leaders inside the jail at about 4.00 A.M. in the night following 2nd November, 1975 as true and therefore confirmed the conviction and sentence of the accused Resalder Muslem Uddin, but has disbelieved almost all the above mentioned prosecution witnesses.

205. The High Court Division has disbelieved the P.W.1-the informant and also an eye witnesses of the occurrence of jail killing mainly on the ground that "he (P.W.1) had disclosed many a thing before the court which were not there in the purported F.I.R."

206. It should be mentioned here that in the F.I.R.—the P.W.1 stated thus:

> "on 03.11.1975 at about 4.00 A.M. one army officer wearing khaki uniform giving his identify as Captain Muslem Uddin attached to Bangabhaban accompanied by four army personnel wearing khaki uniforms came to the jail. They were armed with Sten gun and S.L.R. etc. They entered into the jail and killed four persons, namely, Mr. Tajuddin Ahmed, Mr. Monsur Ali, Mr. Syed Nazrul Islam and Mr. A. H. M. Kamruzzaman. More details about the incident will be furnished in due course. The incident has been reported verbally by the Inspector General of Prisons to the Secretary of the Ministry of Home Affairs yesterday (03.11.1975). The dead bodies of four persons are still lying in the jail, necessary action may kindly be taken in the matter."

207. During examination before the court this P.W.1 has proved that detailed report mentioned in the F.I.R. which he submitted on 05.11.1975 to the Inspector General of Police narrating about the telephonic conversations between I.G. (Prisons) and accused Major Rashid and President Khandaker Mustaque Ahmed in that fateful night of occurrence and also narrating the occurrence of jail killing in details-which has been marked as ext.2.

208. However, the High Court Division did not place reliance on the evidence of P.W.1 for the reason also that the F.I.R. did not contain name of the accused persons except Captain Muslem Uddin. These reasons assigned by the High Court Division for disbelieving the evidence of P.W.1 cannot be accepted in the given facts and circumstances of the case. It is a settled position of law that an F.I.R. does not require to contain all the details about the occurrence. The F.I.R. generally is lodged immediate after an occurrence to start the investigation in the matter, the details of the occurrence may be disclosed at a later stage during investigation. However, in this particular case considering the very nature of the occurrence of jail killing we are of the view that the non-mentioning of the fact of telephonic conversations between accused Major Rashid and President Mustaque Ahmed from Bangabhaban and the P.W.3 I.G. (Prisons) in that fateful night of occurrence cannot be a reason for not believing the P.W.1-who lodged the F.I.R. within a short time of the occurrence of jail killing mentioning that he would submit a detailed report about that incident afterwards. This P.W.1, in his deposition before the court, did not name any other accused persons except accused Muslem Uddin. He named accused captain Muslem Uddin only stating that Captain Muslem Uddin himself disclosed his identity as Captain Muslem Uddin. This P.W.1 though stated also that Captain Muslem Uddin and his other companions put their signatures in the Gate register, but it cannot be expected that seeing the singatures (which might be initials only) the names and other identities of the signatories could be ascertained. In the circumstances how the High Court Division could say that this P.W.1 cannot be believed for the reason also that the F.I.R. did not contain the name of other accused persons except accused Captain Muslem Uddin.

209. The High Court Division has disbelieved the P.W.2-the then jailor of Dhaka Central Jail Md. Aminur Rahman also, but we fail to find out from the impugned judgment of the High Court Division any reason for which the High Court Division disbelieved this P.W.2. The High Court Division stated thus:-

> "We do not find this witness (P.W.2) a trustworthy one because his disclosure amounts to travesty of truth."

210. We have examined the evidence of this P.W.2 minutely. We do not find anything to say that this P.W.2 is not trustworthy. We don't understand why the High Court Division made this comment that the evidence of P.W.2 "amounts to travesty of truth."

211. The High Court Division disbelieved the P.W.3-the then Inspector General of Prisons also stating to the effect that the F.I.R. did not disclose any reference whatsoever about the telephonic conversation from Bangabhaban with him at the Central Jail and that the alleged detailed report submitted by him one day after- on 05.11.1975-the ext.6 containing details about the telephonic conversation of the accused persons from Bangabhaban with this P.W.3 and others at the central jail was fabricated one-created subsequently for the purpose of this case. The High Court Division disbelieved this ext.6 for the reason only that in the F.I.R. there was no disclosure about the telephonic conversation between the accused persons from Bangabhaban and this P.W.3. We cannot agree with the High Court Division on this point also. The only fact of non-disclosure about the telephonic conversation in the F.I.R.

cannot prove this ext.6 false and fabricated. In this case, in the very F.I.R., it was stated clearly that a detailed report about the occurrence would be submitted afterwards. Moreover this fact of telephonic conversations between the accused persons from Bangabhaban and the I.G. (Prisons) have been corroborated by the P.W.17-the then telephone operator of Bangabhaban-a most competent witness. The High Court Division disbelieved this P.W.17 Khan Mohammad Ali Olock also on the contention that there was no proof to prove that this P.W.17 actually was an employee of Bangabhaban at that relevant time. The High Court Division pointed out that the attendance register for the employees of Bangabhaban of that relevant time was not produced by the prosecution before the court to prove that this P.W.17 was actually an employee of Bangabhaban at that relevant time. The High Court Division, obviously, did not take into consideration at all the fact that the investigation of this case started long 21 years after the alleged occurrence and in that circumstances it might not be possible for the prosecution to find out the relevant attendance registers of the employees of Bangabhaban. In this connection it is also mentioned here that the High Court Division has commented that the non-production of gate register of the Dhaka Central Jail containing the signatures of the assailants warranted an adverse presumption under section 114(g) of the Evidence Act. The High Court Division has stated that according to the P.W.1 all the 5 assailants who committed murder of four leaders put their signatures in the gate register before their entrance inside the jail and in the circumstances those gate registers could have been most vital document to connect all the 5 assailants in this case. This time also the High Court Division did not take into consideration at all the fact that the investigation of this case started long 21 years after the occurrence and in the circumstances it might not be possible on the part of the prosecution to find out that gate register of Dhaka Central Jail. The High Court Division, obviously, did not consider also that the signatures or initials only of the assailants in the gate register might not be sufficient for ascertaining the name and identity of those assailants and in that circumstances the non-production of gate register was not fatal at all-specially where neither the F.I.R. nor any of witnesses from jail named any accused person excepting accused Risalder Muslem Uddin only.

212. It appears that the High Court Division has disbelieved the evidence of the prosecution witnesses from Bangabhaban, namely, P.Ws.11, 13, 16, 17, 18, 21 and 34 relying on some statements of P.Ws.21, 29 and 46 also. Taking into consideration some statements of these P.Ws.21, 29, and 46 the High Court Division arrived at the findings that in the very night of occurrence there was no telephone connnection at Bangabhaban as that was snapped by the rebel group of brigadier Khaled Mosharraf and that brigadier Khaled Mosharraf proclaimed coup in the night following 2nd November, 1975 and withdrew two Infantry company from Bangabhaban at about 1.00 A.M. of that very night and the inmates of Bangabhaban having received a message of the coup by their rival party was not in a position to move outside Bangabhaban after 1.00 A.M. in that night following 2nd November, 1975. On these findings and observations the High Court Division disbelieved all the evidence regarding telephonic conversations between I.G. (Prisons) and Major Rashid and President Khandaker Mustaque Ahmed and also regarding going out of army personnel including the present accused-respondents from Bangabhaban in that fateful night of occurence. Before weighing these findings and observations of the High Court Division we require to state the relevant portion of the evidence of P.Ws.29 and 46 here.

213. P.W.29 Colonel Safayet Jamil (Rtd.) who was posted at Dhaka as 46 Brigade Commander at the time of occurrence-deposed to the effect that after 15th August, 1975 Khandaker Mustaque Ahmed became the President of Bangladesh and Khandaker Mustaque Ahmed and his associates-the assailants Major Rashid, Major Farooqur Rahman, Major

Dalim, Major Shahriar, Major Noor Chowdhury, Major Rashed Chowdhury, Major Huda, Major Ahmed Sharful Hossain, Major Aziz Pasha, Lieutenant Kismot, Lieutenant Ansar, Resalder Muslem and others used to reside at Bangabhaban. That on 1st November, 1975 Khaled Mosharaff, Brig. Nurazzaman and he (the witness) himself had a meeting at the office of the Chief of General Staff where they decided that in the night following 2nd November, 1975 at 12.00 hours two Infantry company under him would be withdrawn from Bangabhaban and taken to the Cantonment and that it was the hint or proclamation of the coup. That subsequently in the night following 2nd November, 1975 at 12.00/1.00 A.M. two Infantry company from Bangabhaban were withdrawn; that in order to disconnect the rebels staying at Bangabhaban one battalion of soldiers was sent to Bangabhaban under the leadership of Captain Hafizulla. Captain Hafizulla snapped the telephone connection for disconnecting Khandaker Mustaque from the rebel officers. This P.W.29 deposed also that at dawn of 3rd November, 1975 there started oral fight (h¡LkÜ) between them and the rebel group residing at Bangabhaban over telephone, but all the attempts for negotiation failed and they then gave intimation of Air Strike and then Khandaker Mostaque Ahmed demanded safe passage of rebels through General Osmani and they agreed to avoid further bloodshed as they knew that subsequently the rebels could be brought back to country through Interpol; that the rebels were then sent to Bangkok with the help of Chief of Air force A.B.M. Toab. That Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Noor, Major Huda, Major Rashed Chowdhury, Major Ahmed Sharful Hossain, Captain Mazed, Lieutenant Anser, Lieutenant Kismot, Resalder Muslem and Sarwaer and Captain Jaman left the country. During cross-examination this witness denied the defence suggestion to the effect that he himself and Khaled Mosharaf committed that jail killing with a view to capturing power.

214. The P.W. 46 Lieutenant Colonel (Rtd.) Anwaruzzaman deposed to the effect that in 1975 he, as a Major, was posted at Reverine Support Unit at Sadarghat, Dhaka. That the then Vice President Syed Nazrul Islam was his "Fufa". That on 3.11.1975 at 10.00/11.00 A.M. he was informed by his paternal uncle late Asaduzzaman over telephone that in the night following 02.11.1975 there was firing inside Dhaka Central Jail and asked to take information about that, but as he was busy, he sent one habilder to take information; but that habilder could not get any information. That on 03.11.1975 Khaled Mosharof proclaimed coup and as such he (the witness) himself could not come out of his unit. That on 04.11.1975 he again sent another person to Dhaka Central Jail but that person informed him that his "Fufa" and other leaders were well. Thereafter he was called to Dhaka Cantonment and at the time of his return in the evening, he went to jail and could know that in the night following 02.11.1975 the four leaders were killed inside jail. In course of cross-examination this witness stated that on 02.11.1975 Khaled Mosharof proclaimed coup, but they could not capture Bangabhaban; that on 03.11.1975 Khondaker Mustaque Ahmed was compelled to give up power and that on 02.11.1975 the situation of Dhaka town was such that it was not possible on his part to collect information from central jail for the sake of his personnal security.

215. From the above narrated evidence of P.W.29 Colonel Safayet Jamil it is evident that this P.W.29 did not state at all that the telephone connections of Bangabhaban were snapped in the night following 2nd November, 1975, rather this witness by deposing that at dawn of 3rd November, 1975 they had oral fight (h¡Lk¤Ü) with rebel group residing at Bangabhaban over telephone-has confirmed that in the night follwoing 2nd November, 1975 the telephone connections of Bangabhaban were intact. Obviously the High Court Division ignored this very clear statement of P.W.29 that in the dawn of 3rd November, 1975 they talked to the inmates of Bangabhaban over telephone. It appears that the High Court Division has relied on

the evidence of P.W.21 Commodere Golam Rabbani also to come to the finding that in the fateful night of occurrence there was no telephone connections in Bangabhaban. This P.W.21-the A.D.C. to the Presidnet Khandaker Mostaque Ahmed-deposed to the effect that in the fateful night of occurrence, at about 2.00 A.M. one messenger of President Mostaque Ahmed awoke him from sleep and informed him that he was called by the President. The High Court Division inferred that the President could talk to his A.D.C.-the P.W.21-over telephone and since the President did not do that, rather sent a messenger to call A.D.C. it indicated that the telephones of Bangabhaban were not in operation in that night following 2nd November, 1975. But we are unable to accept this inference arrived at by the High Court Division. It cannot be accepted that the President had to communicate with his A.D.C. through telephone all the time and he was not supposed to call his A.D.C. by sending a messenger. The calling of his A.D.C. by the President by sending a messenger is no proof of disconnection of telephone lines of Bangabhaban in that fateful night of occurrence. Moreover, as we have already pointed out above, the evidence of P.W.29-whom the High Court Division has relied on-has proved sufficiently that in the night of occurrence i.e. in the night following 2nd November, 1975 the telephone connections of Bangabhaban were intact.

216. Relying on the evidence of P.Ws.29 and 46 the High Court Division came to the findings also that in the night following 2nd November, 1975 brigadier Khaled Mosharaf proclaimed coup and withdrew two Infantry company from Bangabhaban and thus the inmates of Bangabhaban received a message of coup by their rival party in that very night and in that circumstances it was not possible on the part of the inmates of Bangabhaban to go out of Bangabhaban in that night following 2nd November, 1975 and then again to return to Bangabhaban in the early morning of 3rd November, 1975. The High Court Division thus disbelieved the evidence of the P.Ws. regarding going out of army personnel including accused Resalder Muslem Uddin and the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha from Bangabhaban in that night following 2nd November, 1975 and also their subsequent coming back to Bangabhaban in the dawn of 3rd November, 1975. But on scrutiny of the evidence of P.Ws.29 and 46 we are unable to agree with these findings also of the High Court Division. The P.W.29 though stated to the effect that in the mid night following 2nd November, 1975 two Infantry company from Bangabhaban were withdrawn, but this statement does not prove that the control of Bangabhaban was taken over by the group of brigadier Khaled Mosharraf in that very night and that the withdrawl of two Infantry company only from Bangabhaban was sufficient to give a message of coup by the rival party to the inmate of Bangabhaban. Rather, the clear statement of P.W.46 in his examination-in-chief to the effect that on 03.11.1975 Khaled Mosharraf proclaimed coup suggests that in the night following 2nd November, 1975 there was not prevailing any such situation in Bangabhaban for which the army personnel residing at Bangabhaban did not dare to go out of Bangabhaban. This P.W.46, in course of cross-examination, though stated that on 02.11.1975 Khaled Mosharaf proclaimed coup, but they could not capture Bangabhaban and that on 02.11.1975 the situation of Dhaka town was such that it was not possible on his part to collect information from central jail for the sake of his personal secutiry, but considering the other statements made by this P.W.46 himself in his examination-in-chief we are unable to accept these very statements of P.W.46 made in course of cross-examination as correct. In his examination-in-chief-the P.W.46 stated that in the morning of 3rd November, 1975 he was informed by his relative that in the previous night there was firing inside Dhaka Central Jail and was asked to take information about that, but as he was busy he sent one habilder to take information. In view of these statements of this P.W.46 it is evident that the question of taking information of Dhaka Central Jail on 2nd November, 1975 did no arise at all and as such the statement of this P.W.46 that on

02.11.1975 the situation of Dhaka town was such that it was not possible on his part to collect information from Dhaka Central Jail for the sake of his personal security-which he made in course of cross-examination-is not acceptable at all.

217. The High Court Division though has drawn some adverse inference taking into consideration some particular statements of P.Ws.29 and 46 and thus disbelieved the prosecution witnesses but it did not consider why so many witnesses including very responsible witness like P.W.21 Commodere Golam Rabbani-the then A.D.C. to the President-would depose lie against the accused persons. This P.W.21, on taking oath, deposed to the effect that in the night following 2nd November, 1975 at about 3.A.M. he saw Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha (the present 2 accused-respondents) and other army personnel to go out of Bangabhaban and subsequently to come back to Bangabhaban. We find no reason to disbelieve these evidence of this P.W.21 Commodere Golam Rabbani. We do not find any reason to disbelieve the other P.Ws. also of whom P.Ws.1 to 3 also were responsible officers of Government. None of the above mentioned prosecution witnesses could have been shown by the defence to have any enmity or ill feelings with any of the accused persons or to have any other reason for deposing falsely against the accused persons. However, we are unable to accept the reasonings the High Court Division has assigned in its impugned judgment for disbelieving the prosecution witness-as cogent or convincing.

218. It appears that the High Court Division has dwelt much on the F.I.R. and ultimately has concluded thus:

> "..... neither Ext.1 nor ext.3 can be treated as F.I.R. in this case though these two papers, as it could be gathered from attending circumstances, undoubtedly contains the contents of the report made by P.W.1 first in point of time with Lalbagh Police Station on 04.11.1975."

219. Obviously the High Court Division has committed a mistake here. In this case it was stated by the prosecution itself that the original F.I.R. which was lodged by the P.W.1 with Lalbagh Police Station on 04.11.1975 was found missing from the record of the G.R. case concerned while the case was taken up for investigation after a long period of 21 years and that the ext.1 and ext.3 were two copies only of the said F.I.R. procured from two different places. The High Court Division believed that these Ext.1 and ext.3 "undoubtedly contains the contents" of the original F.I.R. lodged by the P.W.1 and also has taken into consideration the contents of these ext.1 and ext.3. We fail to understand why the High Court Division then wrote so many pages on these ext.1 and ext.3 where the prosecution itself made these two papers exhibited as the copies only of the original F.I.R. The ext.1 and ext.3, admittedly, are the copies only of the original F.I.R and these were never tried to be put as the F.I.R. The High Court Division, however, has appreiciated the correct legal position that where there is no F.I.R. or where the F.I.R. cannot be proved in accordance with law in that case also the court will not detract the testimony of the witnesses which will have to be assessed on its own merits and the case is to be assessed on merit on the basis of the evidence adduced before it.

220. Mr. Abdullah-Al-Mamun, the learned defence Counsel has tried much before us to discredit the prosecution witnesses by pointing out some alleged contradictory or discrepent statements of these witnesses. The learned Counsel has pointed out that the P.Ws.1 to 9 and 12 made some discrepent statements regarding colour of the wearing uniforms of the assaillants and also regarding the kind of the weapons they carried. The learned Counsel has

contended that these contradictory statements of these P.Ws. reasonably make these witnesses untrustworthy. But we are unable to accept this argument of the learned Counsel in this present case. Considering the very facts and circumstances of this case we rather, are of the view that it was very much natural on the part of the witnesses to make discrepent statements regarding colour of the wearing clothes and the weapons of the assaillants and that these discrepent or contradictory statements of the P.Ws. are so trifling in nature that these cannot raise any suspecion about the truthfulness of the witness or about the occurrence they narrated. The learned Counsel for the accused-respondents has pointed out some other alleged minor discrepent or contradictory statements also in the evidence of the prosecution withnesses, but we do not find any of these alleged discrepent or contradictory statemetns of the prosecution witnesses fatal at all to raise any suspicion about the truthfulness of these witnesss. Discrepency always occurs even in the evidence of the truthful witnesses. It is also settled that one part of evidence of a witness even if is rejected the other part of the evidence of the same witness may be accepted.

221. Mr. Abdullah-Al-Mamun has tried to discredit the P.W.17 making argument to the effect that from the evidence of the P.w.3 it is evident that all the telephonic conversations between Major Rashid and I.G. (Prisons) were made through direct telephones, but P.W.17 claimed that all the telephonic conversations between Bangabhaban and Central Jail were made through P.B.X. number operated by him. But we are unable to accept this argument also of the learned Counsel. We do not find that the evidence of P.W.3 prove conclusively that the telephonic conversations between him and the accused Major Rashid and President Khandaker Mustaque Ahmed were made directly and not through P.B.X number.

222. Mr. Abdullah-Al-Mamun has given much importance on the fact that P.Ws.11 and 17 could not say the name of the then military sceretary to the President correctly and has aruged that this fact also suggests that these two P.Ws.11 and 17 were not employees of Bangabhaban. But we are unable to accept this argument also of the learned Cousel for the defence. These two P.Ws. were employees of Bangabhaban long 21 years before. So, it was not unnatural at all that they might not recollect the name of military secretary to the President correctly. Mr. Abdullah-Al-Mamun has argued to the effect also that the evidence of P.Ws.16 and 34 if considered togather will show that the P.W.17 was not on duty in the Bangabhaban in the night of occurrence. But we find this argument also of the learned Counsel of the accused-respondents not correct. We have minutely examined the evidence of P.Ws.16, 17 and 34-the 3 receptionists-cum-P.A. and found that it was clearly proved that the P.W.17 Khan Md. Ali Olok was on duty in Bangabhaban in the night following 2nd November, 1975 and on the next morning at about 8.00 a.M. he handed over his duty to P.W.34 Yakub Hossain Khan.

223. The learned Counsel for the accused-respondents has argued also that the defencne case has been supported by the evidence of the own witness of the prosecution and in the circumstances, according to settled principle of law the accused persons are entitled to get benefit of boubt. In support of this argument the learned Counsel has cited several decisions also. The learned Counsel has referred to certain portion of the evidence of the P.W.52 Syed Mahbub-Al-Karim, Special Officer to slain leader Syed Nazrul Islam which is quoted below:-

> "মোশতাক সরকারের বিরূদ্ধে অভূথান ঘটানোর পরে, জিয়াউর রহমানকে বন্দী করার পরে, খালেদ মোশারফ গংরা অভূথানের মাধ্যমে প্রাপ্ত ক্ষমতা নিরস্কুশ ভাবে ধরিয়া রাখার জন্য সেই মুহুca fËç rja¡u বৈধ দাবীদর জেল খানায় থাকা নজরুল ইসলাম সাহেবদের হত্যার ষড়যন্ত্র করা হয় বলিয়া আমার ধারনা ।"

224. Mr. Abdullah-Al-Mamun has argued that this very statement of the own witness of the prosecution has strongly supported the defence case that Khaled Mosharraf and his partymen proclaimed a coup and that it was the four leaders of Awami League who were the legitimate successors to the government after killing of Bangabandhu and, therefore, Khaled Mosharaff and his partymen, with a view to securing their peaceful tenure of office, had killed those 4 leaders inside the Central Jail and the innocent accused persons have been falsely implicated in this case. But we are unable to accept this argument also of the learned Counsel in view of this very statement itself of P.W.52. The above quoted statement of P.W.52, evidently, was a mere assumption of the witness himself-it was neither from his knowledge nor he was a witness of any such occurrence; this witness did not or could not say anything else also to show that his such assumption was correct. Moreover, the above quoted statement of the P.W.52 itself shows that it does not at all support the defence case, becuase in the above quoted statement of P.W.52 it was clearly told that it was the assumption of witness that after materializing the coup against Mustaque Government and after arresting Ziaur Rahman, Kahled Mosharraf and others, with a view to securing their power which they captured through coup, made conspiracy to kill Syed Nazrul Islam and others inside the jail-who were legitimate claiments of the power. Evidently, according to this statement of P.W.52 the conspiracy to kill the four leaders inside the jail was hatched by Khaled Mosharaff and his partymen after they materialized the coup against Mustaque Government and arrested Ziaur Rahman. But undisputedly the four leaders were killed inside the jail in the night following 2nd November, 1975 before the coup by Khaled Mosharraf was materialized and also before the arrest of Ziaur Rahman. So, evidently, the above quoted statement of P.W.52 does not support the defence case at all and also is of no help for the defence.

225. The other points raised by the learned State-Counsel for the accused-respondents have already been answered before while discussing about the impugned judgment of the High Court Division.

226. However, in view of the above discussion it is evident that in this case it has been proved by sufficient evidence that in the night following 2nd November, 1975 at about 4.00 P.M. the accused Resalder Muslem Uddin along with the present accused-respondents Dafader Marfoth Ali Shaha and L.D. (Dafader) Abul Hashem Mridha and two other army personnel entered inside the Dhaka Central Jail and there they killed four Awami League learders by shooting with fire arms. The evidence of P.Ws.1-10, 12, 19 and 20 to the effect that in the night following 2nd November, 1975 at 4.00 A.M. accused Risalder Muslem Uddin along with 4 other army personnel entered inside Dhaka Central Jail and killed 4 leaders Sayed Nazrul Islam, Captain Mansur Ali, Tazuddin ahmed and A.H.M. Kamruzzaman by shooting with fire arms-coupled with the evidence of P.Ws.13, 17, 18 and 21 to the effect that in that fateful night of occurrence at about 3.00 A.M. they saw accused Risalder Muslem Uddin and the present 2 accused respondents Dafader Marfoth Ali Shaha and L.D. (Dafader) Abul Hashem Mridha along with 2 other army personnel to got out of Bangabhaban by a army jeep and subsequently at 6.00 A.M. they saw those army personnel to come back to Bangabhaban prove sufficiently that the present 2 accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha also were with accused Risalder Muslem Uddin at the time of alleged occurrence and were actively involved in the murder of 4 leaders inside the jail. These 2 accused-respondents remained absconding althrough till date and their such absconsion also very reasonably tells infavour of their guilt. The trial court, therefore, rightly convicted and sentenced the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha. The High Court Division, evidently, has

committed wrong and injuscitce in finding these two accused-respondents not guilty and thereby in acquitting them of the charges levelled against them.

227. Before parting with this judgmnet we shall have to deal with another important question as agitated from the side of the State-appellant. It has already been stated above that in this case though charge under section 120B of the Penal Code was framed against all the accused persons by the trial court, but the trial court found this charge not proved and consequently acquitted all the accused persons of the charge of criminal conspricy. Against this order of the trial court acquitting the accused persons of the charge of criminal conspricy neither the State preferred any appeal nor any relatives of the four slain leaders preferred any revision. At the time of hearing of the death reference and appeals filed by some of the convicted accused persons before the High Court Division the State-respondents though appeared and contested, but this time also the State did not raise any question even against the acquittal of the accused persons from the charge of criminal conspricy. Before this Divsion also, at the time of seeking leave to appeal against the acquittal of the present two accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha-the Sate-petitioner did not raise any question against the acquittal of the accused persons from the charge of criminal conspricy. But at the time of hearing of this appeal, for the first time, the learned Counsel for the State-appellant have made submission regarding the charge of criminal conspiracy and have also prayed for conviction of the accused persons on the charge of criminal conspricy also. Both Mr. Anisul Huq and the learned Attorney General Mr. Mahbubey Alam have made elaborate submissions to the effect that in this case there are overwhelming evidence on record to prove the charge of criminal conspiracy against the accused persons and in the circumstances, considering the very nature of the offence of gruesome and barbaric killing of 4 national leaders inside jail, this Division-the apex court of the country, by exercising its power of doing complete justice under Article 104 of the Constitution, can now consider whether the charge of criminal conspiracy was proved and if finds this charge of criminal conspiracy proved then can pass appropriate order at this stage also.

228. Criminal conspiracy has been defined in section 120A of the Penal Code as under:-

> "When two or more persons agree to do, or cause to be done,-
>
> (1). an illegal act, or
>
> (2). an act which is not illegal by illegal means, such an agreement is desingated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

229. In this present case, from the evidence narrated above, we, in agreement with the learned Counsel for the State-appellant, find that there are sufficient evidence to prove that there was a criminal conspiracy to kill the 4 leaders inside jail. The evidence of the P.Ws.1-3 and 17-whom we have found trustworthy-have proved sufficiently that in the fateful night of occurrence, before the assailants accused Risalder Muslem Uddin and others came to the jail, several telephone calls from Major Rashid and others from Bangabhaban came to I.G. (Prisons) and that Major Rashid informed I.G. (Prisons) over telephone that Riselder Muslem Uddin would go to jail and asked I.G. (Prisons) to allow him to talk to 4 leaders and later Major Rashid asked I.G. (prisons) whether Risalder Muslem Uddin reached to the jail and asked I.G. (Prisons) to allow them to talk to 4 leaders and that after the arrival of accused

Risalder Muslem Uddin and his accoplices to jail Major Rashid and President Khandaker Mustaque Ahmed, being informed by the I.G. (Prisons) that Risalder Muslem Uddin wanted to kill the 4 leaders, told I.G. (Prisons) to allow Risalder Muslem Uddin to do what he wanted to do. These evidence of the P.Ws.1-3 and 17 lead to the only inference that there was a criminal conspiracy to kill 4 leaders inside the jail. The evidence of P.W.11, P.W.13 and P.W.18 to the effect that in the fateful night of occurrence they saw the accused persons holding meeting and discussing about the 4 leaders confined in the jail and also heard President Khandaker Mustaque Ahmed to ask who would go to jail and in reply Major Rashid to tell that Risalder Muslem Uddin and his men would go to jail-also, coupled with the other evidence, support the charge of criminal conspiracy. The evidence of P.W.17 to the effect that in the night of occurrence, sometime after 3.00 A.M., Major Rashid, Major Farooque, Major Dalim, Major Bajlul Huda, Major Rashed Chowdhury and Major Aziz Pasha came to his (P.W.17's) room in armed condition and told him to connect I.G. (Prisons) by telephone and while got telephone connection Major Rashid asked the I.G. (Prisons) whether Captain Muslem Uddin reached to the jail-coupled with the other evidence mentioned above-strongly supports the prosecution case that there was an agreement among the accused persons to kill the 4 leaders inside the jail by sending the killing squad of Risalder Muslem Uddin and his men. The evidence of P.Ws.26, 28, 29 and 33 narrated above have proved that the accused persons left the country together on the very next day of the occurrence. This fact of fleeing away of the accused persons together on the very next day of the occurrence also supports the prosecution case that the accused persons together hatched criminal conspiracy to kill the 4 leaders inside the jail.

230. Considering all these evidence and facts and circumstances we are of the opinion that in this case there are sufficient evidence-both direct and circumstantial-to prove the charge of criminal conspiracy.

231. Now the pertinent question is whether at this stage, this Division can make any order convicting and sentencing the accused persons or any of them on the charge of criminal conspiracy by exercising its power of doing complete justice under Article 104 of the Constitution.

232. Article 104 of the Constitution Provides:

> "The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pedning before it, including orders for the purpose of securing the attendence of any persons or the discovery or production of any document."

233. This article of the Constitution has invested the last court of the country with wide power of issuing necessary directions, orders etc. for doing complete justice in appropriate cases. The exercise of this power, however, *"is circumscribed only by two conditions, first is, that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and the other is that the order which Supreme Court passes must be necessary for doing 'complete justice' in the cause or matter pending before it.*" (**vide Chandrakant Patil V. State, (1998)3 SCC 38)**. *'Complete justice'*, however, has not been defined or described in this article of the Constitution. Mr. Mahmudul Islam in his "Constitutional Law of Bangladesh" (First Edition) at page-536 para:5.200 has stated thus:-

> *"Power to do 'complete justice' is an extraordinary power given to the highest tribunal of the land and the power is to be exercised sparingly and in*

exceptional circumstances to remove manifest and undoubted injustice. Facts may be of such varied pattern, that it is difficult to lay down any fixed principles for doing 'complete justice'. All that can be said is that 'complete justice' should be done not according to the personal views of the judges, but in exceptional circumstances on clear showing of injustice for the removal of which the existing laws have not made any provision."

234. In the case of **AFM Naziruddin V. Hameeda Banu reported in 45 DLR(AD)38** this Division observed:-

"It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this Court. If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified."

235. In **Prem Chand Garg V. Excise Commissioner (AIR 1963 SC 996)** the Indian Supreme Court held:-

"an order which this Court can make in order to do 'complete justice' between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."

236. In a subsequent case of **Union Carbide Corp. V. Union of India (AIR 1992 SC 248**) the Indian Supreme Court observed that in order to preclude the exercise of this constitutional power the prohibition of the statutory law must be *"shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory prohibitions override a constitutional provisions. Perhaps, the proper way of expressing the idea is that in exercising powers under article 142 and in assessing the needs of 'complete justice' of a cause or matter, the apex court will take note of the express provisions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly"*.

237. Doing **'**complete justice′ does not contemplate doing justice to one party by ignoring statutory provisions and thereby doing injustice to the other party by depriving him of the benefit of law. If a valuable right is accrued to the other side this fact should not be ignored in exercising the power of doing 'complete justice′.

238. In the present case, as it has already been mentioned above, the trial court acquitted all the accused persons of the charge of criminal conspiracy. Against this order of acquittal from the charge of criminal conspiracy the State had a right to seek remedy in appeal as per statutory provisions or by filing a recision by any of the relatives of the slain leaders. But none of the aggrieved parties including the State-informant filed any appeal or revision against that order of acquittal from the charge of criminal conspiracy within the statutory period of limitation or even beyond the statutory period of limitation. Even before the appellate court-which heard the death reference and some appeals filed by the convicted accused persons against the judgment of the trial court the State-respondents, though contested, but did not raise any objection against the order of acquittal from the charge of

criminal conspiracy. Even at the time of seeking leave to appeal before this Division against the judgment of the appellate court the State-leave petitioner did not raise any question against that order of acquittal from the charge of criminal conspiracy. Leave to appeal was granted only to examine whether the order of acquittal of present two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha from the charges under sections 302/34 and 302/109 of the Penal Code passed by the High Court Division was correct and justified. In the present appeal, therefore, the only matter for our consideration is the propriety of the impugned acquittal of these two accused-respondents of the charges under sections 302/34 and 302/109 of the Penal Code only. But at the time of hearing of this appeal, for the first time, the learned Counsel for the State-appellant have questioned the acquittal of all the accused persons from the charge of criminal conspiracy by the trial court and submitted that by exercising the power under article 104 of the Constitution this Division now, considering the overwhelming evidence on record, can convict and sentence the accused persons on the charge of criminal conspiracy.

239. But it has already been pointed out above that the exercise of the power of doing 'complete justice′ under article 104 is circumscribed by two conditions, (i)that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and (ii) that the order which Supreme Court passes must be necessary for doing "complete justice" in the cause or matter pending before it. Obviously the matter pending before us in this appeal is the acquittal of two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha of the charges under sections 302/34 and 302/109 of the Penal Code. Leave to file this appeal was granted to consider only whether the acquittal of the present two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code was correct and justified. So, obviously, the question whether the acquittal of all the accused persons from the charge of criminal conspiracy-is not at all a matter pending before us. It has already been pointed out above that the present State-appellant or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of criminal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appeal time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy-as ordered by a court of law. In the name of doing 'complete justice′ this right of the accused persons now cannot be ignored.

240. In the case of **AFM Naziruddin V. Mrs. Hameeda Banu (45 DLR(AD) 38)** this Division has cautioned the exercise of power of doing complete justice thus:

> *"In the name of 'complete justice' if a frequent recourse is made to article 104 then this Court will be exposed to the opprobrium of purveyor of "palmtree justice".* In that case this Division observed also thus *"in the name of complete justice the Appellate Division may not grant relief which the Court of first instance will not be able under the law to grant, otherwise no litigant, in search of complete justice will rest till he reaches the end of the long tunnel of litigation in this Court."*

241. The learned Counsel for the State-appellant have cited several cases of the apex courts of this region where the apex courts exercised the power of doing 'complete justice′ by issuing necessary orders. The learned Counsel have cited the cases of **D.M Prem Kumari V. Divisional Commissioner, Mysore and others, ((2009)12 SCC 267), Gannysons Ltd. V. Sonali Bank, ((37 DLR(AD)42), Balram Prasad Agrawal V. State of Bihar, ((1997)9 SCC 338), Raziul Hasan V. Badiuzzaman Khan, (48 DLR(AD)71), AFM Naziruddin V.**

Mrs. Hameeda Banu, (45 DLR(AD)38), Bangladesh Vs. Mashiur Rahman, (50 DLR(AD)205), State Vs. Muhammad Nawaz, (18 DLR(SC)503) and Chandrakant Patil V. State, ((1998) 3 SCC 38).

242. We have gone through all these judgments and found that the facts and circumstances of all these cited cases were completely different from the facts and circumstances of the present case. In all those cases the Supreme Court exercised the power of doing **'**complete justice**'** in the matters which were pending before the Supreme Court for decision.

243. In **D.M. Prem Kumari V. Divisional Commissioner, Mysore,** the Supreme Court, considering the peculiar facts and circumstances of the case, instead of deciding the matter on merits-which might have gone against appellant Prem Kumari, directed the respondent authorities to save appellant's wrong appointment as primary school teacher, without treating it as a precedent in order to do complete justice. In that case the matter for decision of the court was whether the writ petitioner-appellant's appointment as a primary school teacher was lawful.

244. In **Gannysons V. Sonali Bank,** Sonali Bank obtained a decree in a suit for foreclosure of mortgage of the property of Gannysons (which was being treated as an abandoned property) and levied execution of the decree. Gannysons filed objection against the decree under section 47 of the Code of Civil Procedure and the matter came up before the Appellate Division which decided the dispute in favour of Gannysons. But Gannysons filed a review petition on the ground that the order of the court was not fully in conformity with the decision. In allowing the review, the court in exercise of the power under article 104 gave relief to Gannysons declaring that the property of Gannysons was not an abandoned property-against the fundamental principle of our legal system of granting relief only to the person approaching the court seeking it. The court exercised this power saying that Gannysons had already suffered and to compel it to further litigation in the form of a suit for declaring that the properties in question were not abandoned property would result not only in further harassment but also long delay and deprivation of the enjoyment of the property.

245. In **Balaram Prasad Agrawal V. State of Bihar**, the accused persons were charge-sheeted under sections 498-A, 302 and 120-B of Indian Penal Code. But the trial court framed charge only under section 302 of IPC which was not found proved on trial by the trial court and the trial court acquitted the accused persons from that charge under section 302 of IPC, but the trial court, in its judgment made some observations to the effect that the evidence on record showed that the accused persons used to torture the victim wife in various way. The complainant-the father of the victim filed revision against the acquittal of the accused persons which ultimately came before the Supreme Court of India. Considering the facts and circumstances and evidence on record, the Supreme Court, instead of remanding the case for retrial, itself framed charge against the accused persons under section 498-A and on consideration of the evidence on record found the accused persons guilty under the said section and accordingly convicted and sentenced them. In that case it was held that in the circumstances of the case, the Supreme Court can itself examine the question of culpability of the accused for offence under the said section so as to obviate protraction of trial and multiplicity of proceedings against the accused.

246. In **Raziul Hasan V. Badiuzzaman Khan**, the respondent Badiuzzaman Khan filed a case before the Administrative Tribunal praying for a declaration that he had been the

Director/Deputy Secretary with effect from 18.04.1981 or in the alternative from 29.06.1981 and also for a declaration that the placement of Raziul Hasan and another above him in the seniority list was illegal and void. The Administrative Tribunal allowed that case. After disposal of that administrative tribunal case Raziul Hasan, being informed about that judgment of the Administrative Tribunal, filed an appeal before the Administrative Appellate Tribunal which was dismissed as time barred. Thereafter, Raziul Hasan came to this Division with a petition for leave to appeal and leave was granted to consider the case of the appellant Raziul Hasan for doing complete justice under article 104 of the Constitution. Ultimately this Division, on hearing both the parties, found that the appellant Raziul Hansal was senior to respondent and that a gross injustice had been done to him for no fault or latches of his own and held that since a valuable right accrued to the appellant in law and fact it was the most appropriate case to exercise the jurisdiction under article 104 of the Constitution and consequently remanded the case to the Administrative Tribunal to reconsider its order as to the gradation list only.

247. In **AFM Naziruddin V. Mrs. Hameeda Banu**, the appellant during the subsistence of his marriage with the defendant built at his cost a house on the land belonging to the defendant. Subsequently the relationship became strained and ended in dissolution. The appellant filed a suit for declaration that he is the irrevocable licensee of his wife and the real owner of the suit house. The suit was decreed by the trial court, but was dismissed by the High Court Division. This Division, considering the facts and circumstances of the case, made a rough and ready adjustment of the claims of the parties and ordered that the appellant will retain his possession in that floor of the suit building where he was then residing with no right to transfer his possession, the respondent may recover possession thereof any time within one year from date on payment of Tk.6,00,000/-(the construction cost of the building) in default of which the appellant would have only right to live in that floor of the building where he was then residing during his life time.

248. In **Bangladesh V. Mashiur Rahman**, an ex-parte decree was challenged on the ground of being obtained by fraud by filing miscellaneous case under Order IX rule 13 of the Code of Civil Procedure. The trial court dismissed that miscellaneous case though found that fraud seemed to have been practised. The High Court Division also dismissed the miscellaneous appeal filed against the judgment of the trial court. The case ultimately came up before this Division. This Division having found that fraud was practised upon court in obtaining that ex-parte decree set aside that ex-parte decree though the application for setting aside that ex-parte decree was barred by limitation for doing complete justice by preventing abuse of the process of law.

249. In the case of **State V. Muhammad Nawaz** the Supreme Court, issued suo moto notices to the accused persons who were improperly acquitted by the High Court and ultimately, after hearing, convicted and sentenced some of those accused persons exercising its power under article 104 of the Constitution. In that case 28 persons were tried for offences under sections 148, 333, 307 and 302 of the Penal Code read with section 140 of the Penal Code by the trial court. The trial court acquitted 10 persons and convicted 18 of the accused. Munammad Nawaz and Fazal Ilahi-the two accused persons were sentenced to death while the rest were awarded sentences of transportation for life. On appeal the High Court upheld the convictions and sentences of 7 of the convicts and acquitted the rest. The two accused who were awarded death sentences were also among those acquitted. The 7 persons whose appeal was dismissed by the High Court were granted special leave to appeal and by the same order, leave was also granted to the State to appeal against the acquittal of the remaining 11

persons by the High Court. Ultimately the Supreme Court, on objection raised from the accused persons rejected the appeal preferred by the State on the ground that it was barred by limitation. However, the Supreme Court found out that "the High Court purported to adopt two criteria for convicting some of the accused persons. They held that 6 of the accused who had admitted their presence during the occurrence and had raised the plea of self-defence, should be convicted along with those who were named by the injured P.Ws. as their own assailants. While giving effect to these findings, however, the High Court committed an error in so far as, inadvertently, it failed to record convictions against three of those 6 who had admittedly been present at the spot at the relevant time and 2 others who had been named by Raja P.W. as his own assailants, those 5 being included among those who were convicted by the trial judge." On such findings the Supreme Court held, "the error being patent on the record in this case, this Court should have suo motu issued notices to those of the respondents who had secured an acquittal from the High Court as the result of the above mentioned error." The Supreme Court ultimately, after hearing the learned Counsel for those acquitted accused persons convicted and sentenced some of them.

250. In the case of **Chandra Kant Patil V. State ((1998)3 SCC 38)** the Supreme Court of India, considering the very grave nature of the offence committed, enhanced the sentences of the accused-appellants by exercising its power of doing complete justice.

251. Obviously in all these above cited cases, excepting the case of **State V. Muhammad Nawaz**, the apex courts exercised the power of doing complete justice in the matters pending before the court and in very exceptional circumstances. In the case of **State V. Muhammad Nawaz** the Supreme Court exercised the power of doing complete justice to rectify the patent error made inadvertently by the High Court. So none of these cited cases is of any help for the learned Counsel of the State-appellant to support their argument that in the present appeal filed challenging the acquittal of two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code the other accused persons-who were acquitted by the trial court from the charge of criminal conspiracy-can be convicted now on the charge of criminal conspiracy.

252. However, considering the above stated facts and circumstances and the legal position we do not find that there is any scope now to convict the accused persons or any of them on the charge of criminal conspiracy by exercising the inherent power of this Division under article 104 of the Constitution.

253. However, this appeal is allowed. The impugned judgment of the High Court Division, so far as it relates to the accused-respondents Dafader Marfoth Ali Shah and L.d. (Dafader) Abul Hashem Mridha is set aside. The order of conviction and sentence of these two accused-respondents passed by the trial court is maintained.

254. ***Syed Mahmud Hossain, J.-*** I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

255. ***Muhammad Imman Ali, J.-*** I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

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APPELLATE DIVISION

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

CIVIL APPEAL NO.63 OF 2006

(From the judgment and order dated the 13th day of July, 2004 passed by the High Court Division in Civil Revision No.507 of 2000)

Md. Abdus Sattar Miah : . . . Appellant

=Versus=

Sreemati Raman Sona Dashya and others : . . . Respondents

For the Appellant	: Mr. Abdul Wadud Bhuiyan, Senior Advocate instructed by Chowdhury Md. Zahangir, Advocate-on-Record
For Respondent No.2	: Mr. Mahmudul Islam, Senior Advocate with Mr. Probir Neogi, Senior Advocate instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record
For Respondent Nos.1, 3-11	: None represented
Date of Hearing	: 21.04.2015 and 19.05.2015
Date of Judgment	: The 26th day of May, 2015

A Hindu widow or a Hindu woman having life interest can maintain a suit for partition:

If a Hindu widow or a Hindu woman having life interest is not allowed to pray for partition of the joint properties by metes and bounds, then she would be deprived of enjoying her such right, as in the absence of partition by metes and bounds, she would not be able to enjoy her life interest therein. And if it is held that a Hindu widow or a Hindu woman having life interest would not be able to file a suit for partition, then the other co-sharers of the joint properties may use such decision as lever against such Hindu woman and thus create obstructions in the enjoyment of her life interest in the joint properties. Therefore, we find no substance in the point that plaintiff No.1 not being a co-sharer in the suit khatain and having life interest only could not maintain the suit for partition. And we hold that a Hindu widow or a Hindu woman having life interest can very much maintain a suit for partition for the fullest enjoyment of her such right in the joint properties.

...(Para 13)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This appeal, by leave, is from the judgment and order dated the 13th day of July, 2004 passed by a Single Bench of the High Court Division in Civil Revision No.507 of 2000 making the Rule absolute.

2. Facts necessary for disposal of this appeal are that respondent Nos.1 and 2 as the plaintiffs filed Title Suit No.627 of 1991 in the Court of Subordinate Judge, 4th Court, Dhaka for partition of the suit land on the averment, *inter alia*, that the suit land belonged to the C.S. recorded tenants, Piari Mohan Mondal and Rai Mohan Mondal, in equal share. Piari Mohan Mondal by amicable arrangement with Rai Mohan Mondal used to possess the land of C.S. Plot No.661 measuring ˙39 acre exclusively and other plots of the suit khatian in ejmali with said Rai Mohan Mondal. Piari Mohan Mondal had a son named Denguri Mondal who married Sreemati Ramon Mondal, plaintiff No.1. Denguri Mondal died during the life time of his father, Piari Mohan Mondal, leaving plaintiff No.1 as widow and a daughter plaintiff No.2. As plaintiff No.1 became a helpless widow, Piari Mohan Mondal out of love and affection gifted the entire land of C.S. Plot No.661 to her by a registered deed of gift dated 25.10.1984 and handed over possession thereof to her and since then she has been in possession thereof. Rai Mohan Mondal died leaving behind only son-Rameswar Mondal who transferred his share from C.S. Plot No.971 to defendant No.3-6. Rameswar Mondal died childless leaving a widow, defendant No.1. After her husband exhausted his shares by transfer to defendant Nos.3-6, defendant No.1 had no saleable interest, but sold some land of the suit land to defendant Nos.1 and 7. By virtue of such purchase, defendant Nos.1 and 7 did not acquire any title and interest in the suit land. Piari Mohan Mondal died leaving behind son-Nagar Bashi and a son's daughter, Priya Bala, plaintiff No.2. Nagar Bashi also died childless leaving behind plaintiff No.2 as his brother's daughter as the sole heir. In the aforesaid manner, the plaintiffs became the owner of the entire /8/-annas share of Piari Mohan Mondal and they have been possessing the same. The suit land was not partitioned among the co-shares by metes and bounds. The plaintiffs asked the co-sharers to make amicable partition of the suit land to which they did not pay heed and hence, the suit.

3. Defendant Nos.1, 2 and 8 appeared in the suit and filed separate written statements.

4. The case of defendant No.1 was that the suit land belonged to Piari Mohan Mondal and Rai Mohan Mondal in equal share. Piari Mohan Mondal used to possess the land of C.S. Plot No.661 exclusively and Rai Mohan Mondal used to possess the land of C.S. Plot Nos.937 and 971 by amicable arrangement. Piari Mohan Mondal transferred the land of C.S. Plot No. 661 to plaintiff No.1 by a registered deed of gift. Rai Mohan Mondal died leaving behind a son-Rameswar Mondal. Rameswar Mondal transferred some land from C.S. Plot No.971 to defendant Nos.3-6. Rameswar Mondal died childless leaving behind defendant No.1 as his heir to have life interest in his share, if any portion of the land remained in the suit land after transfer by Rameswar Mondal, defendant No.1 was entitled to get a separate saham for her share if the /8/-annas share of her husband had not been exhausted.

5. The case of defendant No.2 was that the suit was not maintainable in its present form, the suit was bad for defect of parties. The suit land originally belonged to Rai Mohan Mondal and Piari Mohan Mondal. Piari Mohan Mondal died leaving behind only son-Nagar Bashi. His other son Denguri Mondal died during his life time and as such, the heirs of Denguri Mondal did not inherit any property of Piari Mohan Mondal. Nagar Bashi sold out ˙54 acre

land from C.S. Plot No.929 and other lands. Nagar Bashi went to India in 1964 and as such, his properties became enemy properties. Rai Mohan Mondal owned and possessed the land of C.S. Plot No.661 and other lands by way of amicable arrangement. Rai Mohan Mondal died leaving behind his only son-Rameswar Mondal who subsequently died leaving behind his wife, defendant No.1. Defendant No.1 transferred $19\frac{1}{2}$ acre land from the western portion of C.S. Plot No.661 to defendant No.2 vide registered kabala dated 19.10.81, and since purchase, defendant No.2 has been possessing the same. The plaintiffs had no right, title and possession in the suit land, so the suit was liable to be dismissed with cost.

6. The case of defendant No.8 was that the suit land originally belonged to Piari Mohan Mondal. He (Piari Mohan Mondal) had two sons named Nagar Bashi Mondal and Denguri Mondal. Denguri Mondal died during the life time of his father leaving behind a widow, a daughter and brother-Nagor Bashi. Thereafter, Piari Mohan Mondal died leaving behind Nagar Bashi as his sole heir. Nagar Bashi did not have any son. He died leaving behind his daughter, defendant No.8 as his only heir. Nagar Bashi in his life time gave defendant No.8 marriage with one Jatindra Sarker who have two sons, namely, Sangram and Pintu. Defendant No.8 is entitled to get saham in respect of /8/-anas share as the heir of Nagar Bashi.

7. The trial Court by the judgment and decree dated 17.08.1992 decreed the suit in preliminary form on contest against defendant Nos.2 and 8 and *ex-parte* against the other defendants holding that the plaintiffs were entitled to get the partition in respect of /8/ annas share in the suit land. The trial Court directed the defendants to effect amicable partition within 45 days from that date and to make "allotment to the plaintiffs according to their saham."

8. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, only defendant No.2 filed Title Appeal No.384 of 1992 before the District Judge, Dhaka. The learned Additional District Judge, 6th Court, Dhaka, hearing the appeal by his judgment and decree dated 20.09.1991 allowed the appeal and set aside those of the trial Court and dismissed the suit. Against the judgment and decree of the Appellate Court, the plaintiffs preferred Civil Revision No.507 of 2000 before the High Court Division and a learned Judge of the Single Bench by the impugned judgment and order made the Rule absolute, set aside the judgment and decree of the Appellate Court and restored those of the trial Court. Feeling aggrieved by the judgment and order of the High Court Division, defendant No.2 filed Civil Petition for Leave to Appeal No.1322 of 2004 before this Court and leave was granted to consider the submissions of his learned Advocate-on-Record as under:

> "The learned Advocate-on-record submits that considering the proved facts, circumstances and evidences (sic) on record it is clear that the exhibit N0.1, a registered deed dated 25.10.1948 is not a deed of gift but admittedly a deed creating life interests only of the plaintiff No.1 and the plaintiff No.1 is not a co-sharer of the disputed properties and thus the life interest holder has no right and authority to file a suit for partition and get a decree, but the High Court Division upon misconception about the aforesaid law has allowed the partition to a life interest holder causing complete miscarriage of justice. The learned Advocate-on-record also submits that considering the proved facts, circumstances and evidences (sic) on record the High Court Division upon misconception of law has shifted the burden of proof of pleadings upon the defendants illegally and arbitrarily causing miscarriage of justice."

9. Mr. Abdul Wadud Bhuiyan, learned Counsel, appearing for the appellant, has reiterated the submissions on which leave was granted that the suit for partition at the instance of the plaintiffs was not maintainable inasmuch as they were not the co-sharers in the case jote. Therefore, the impugned judgment and order is liable to be set aside and the appeal be allowed.

10. Mr. Mahmudul Islam, learned Counsel, for the plaintiff-respondents, on the other hand, has supported the impugned judgment and order. He has submitted that even for assuming that plaintiff No.1 had life interest only in the suit land, the suit for partition was maintainable, because if the suit land was not partitioned by metes and bounds, plaintiff No.1 who had life interest would not be able to enjoy the land in its fullest terms; the High Court Division did not commit any error of law in restoring those of the trial Court which decreed the suit. Mr. Islam has further submitted that plaintiff No.1, in the meantime, died and now plaintiff No.2 is the only heir of Piari Mohan Mondal. Therefore, she alone is entitled to get saham to the extent of /8/ annas share in the suit land and the decree passed by the trial Court needs to be modified to that effect. He has lastly submitted that so far as the right, title and interest of the appellant (defendant No.2 is the appellant) is concerned, the Appellate Court concurred with the trial Court that he did not acquire any right, title, interest and possession in the suit land on the basis of his alleged purchase vide kabala dated 19.10.1981, i.e. Ext-'Ka', so he is not entitled to get any relief in the appeal and the same is liable to be dismissed.

11. In the facts and circumstances of the case, the submissions of the learned Counsel of the respective party and in view of the leave granting order, the points to be decided in this appeal are: (i) whether, even if it is accepted that plaintiff No.1 had life interest in the suit land only, she was entitled to bring the suit for partition in the suit land by metes and bounds, (ii) whether the High Court Division at all shifted the burden of proving the pleading of the defendants upon them.

12. So far as the first point is concerned, Mr. Mahmudul Islam in support of his submission that a Hindu woman having life interest can maintain a suit for partition referred the case of Ranada Kishore Roy-Vs-Swarnamoyee Debi, 44 CWN 114. The facts of the case were that Swarnamayee Debi as the plaintiff filed a suit for partition by metes and bounds of her /8/ annas share in large number of properties described in the schedule to the plaint. In the suit, the plaintiff also prayed for a declaration of title to /8/ annas share in two touzis being Nos.2575 and 2576 which were known as the Syama Gram Properties and were included in item No.4 of the plaint. In that case a question was raised whether the plaintiff who had only a Hindu widow's estate in the properties left by her adopted son and also in those properties which were subsequently acquired by Ramani on his own behalf and on behalf of the estate of his brother Nalini Kishore could maintain the suit for partition. In that case, a Division Bench of the Calcutta High Court held that a Hindu widow had a right to maintain a suit for partition against the co-sharers of her deceased husband, without making out any special *bona fide* cause or necessity such as renders partition desirable; the only consideration to be regarded by the Court is that the allotments are fair so as not to prejudice the reversioner who would be bound by the result of the partition. And the Division Bench held that the suit was maintainable. In taking the above view, the Division Bench relied upon the case of Bipin Behari Modack-Vs-Lal Mohan Chattapadhya, I.L.R. 12 cal, 209(1885) where it was held:

> "That a Hindu widow has a right to partition has been established by the Full Bench decision in Janoki Nath Mukhopadhya v. Mothuranath Mukhopadhya (1) and the assignee of a Hindu widow is in the same position. All that has to be secured in favour

of the reversioners is that the partition should be so carried out as not to affect their rights."

13. Mr. Abdul Wadud Bhuiyan could not show any contra-decision to the decision referred by Mr. Mahmudul Islam. We fully endorse the view taken by the Calcutta High Court. Because if a Hindu widow or a Hindu woman having life interest is not allowed to pray for partition of the joint properties by metes and bounds, then she would be deprived of enjoying her such right, as in the absence of partition by metes and bounds, she would not be able to enjoy her life interest therein. And if it is held that a Hindu widow or a Hindu woman having life interest would not be able to file a suit for partition, then the other co-sharers of the joint properties may use such decision as lever against such Hindu woman and thus create obstructions in the enjoyment of her life interest in the joint properties. Therefore, we find no substance in the point that plaintiff No.1 not being a co-sharer in the suit khatain and having life interest only could not maintain the suit for partition. And we hold that a Hindu widow or a Hindu woman having life interest can very much maintain a suit for partition for the fullest enjoyment of her such right in the joint properties.

14. Now coming to the factual aspects of the case, it appears that the trial Court clearly noticed that the assertion of the plaintiffs made in the plaint that Piari Mohan Mondal by amicable arrangement with Rai Mohan Mondal used to possess exclusively the land of C.S. Plot No.661 measuring an area of ˙39 acre and the land of other plots of the suit khatian in ejmali with Rai Mohan Mondal and that Piari Mohan Mondal out of love and affection gifted the entire land of C.S. Plot No.661 to plaintiff No.1 by a registered deed of gift dated 25.10.1941 and handed over possession thereof to her and since then she has been "holding and possessing" the same and that Rameswar Mondal transferred his entire share to defendant Nos.3 and 6 and hence the widow of Rameswar Mondal, defendant No.1 had no saleable interest in the suit land and that Piari Mohan Mondal died leaving behind a son, Nagar Bashi and a son's daughter plaintiff No.2 and that Nagar Bashi also died childless leaving behind plaintiff No.2 as his sole heir and that in the aforesaid manner, the plaintiffs became the owner of the entire /8/ annas share of Piari Mohan Mondal and that they have been "holding and possessing" the same and that the suit land was not "effectuated partition" amongst the co-sharers were not specifically denied by the main contesting defendant, i.e. defendant No.2 The trial Court held that such non-denial of the assertions of the statements made by the plaintiff in the plaint by the defendant in his written statement amounts to admission of the assertions made in the plaint. The trial Court gave finding that defendant No.1 in her written statement admitted that Piari Mohan Mondal used to possess the land of C.S. Plot No.661 exclusively and that Piari Mohan Mondal transferred the land of C.S. Plot No.661 to plaintiff No.1 by a registered deed of gift. The trial Court also noticed that defendant No.8 in her evidence admitted that Piari Mohan Mondal transferred the land of C.S. Plot No.661 to plaintiff No.1 and since the death of Piari Mohan Mondal, plaintiff No.1 has been "holding and possessing" the same. The trial Court further noticed that though defendant No.8 in her examination-in-chief stated that Piari Mohan Mondal gave plaintiff No.1 only the right of enjoyment of C.S. Plot No.661 and that Piari Mohan Mondal did not gift the land of C.S. Plot No.661 to plaintiff No.1, but no such case was made out in the four corners of the written statement filed by her. Therefore, the said statements of PW8 in her examination-in-chief did not merit any consideration.

15. The trial Court considering the recitals of exhibit-'1', the deed of gift dated 25.10.1948, came to the finding that *"very version of exhibit-1 deed of gift dated 25.10.48 indicates that by virtue of it Piari Mohan Mondal made full fledged transfer of the C.S. Plot*

No.661 to the plaintiff No.1" and that a reading of the deed from top to bottom indicated that it was an out and out deed of gift. The trial Court considering the evidence of PWs1, 2 and 3 and exhibit-'2' rent receipt found possession of the plaintiffs in the suit land. The trial Court also found that defendant No.2 failed to prove his title by virtue of his purchase from defendant No.1 in C.S. Plot No.661. The trial Court further found that defendant No.1 by filing written statement in the suit "cut the case of the defendant No.2 from the root. As such defendant No.1 herself does not admit the case of defendant No.2, the case of the defendant No.2 does not stand." The trial Court also found that defendant No.8 failed to prove that she was the daughter of Nagar Bashi.

16. The above factual findings of the trial Court have been affirmed by the High Court Division by the impugned judgment and order. Mr. Bhuiyan could not show from the record that the above factual findings of the trial Court as affirmed by the High Court Division were the result of any misreading of the pleading of the parties and the evidence adduced by them as well non-consideration of any material evidence. We have ourselves gone through the plaint, the written statements filed by defendant Nos.1, 2 and 8 respectively and the deposition of the witnesses; we find that the High Court Division rightly affirmed those findings of the trial Court.

17. In view of the above, we find that the second submission on which leave was granted was totally misconceived, so we find no merit in the second point as formulated hereinbefore.

18. For the discussions made hereinbefore, we find no merit in the appeal and the same is liable to be dismissed.

19. As submitted by Mr. Mahmudul Islam since plaintiff No.1 died in the meantime leaving behind plaintiff No.2 as the only heir of Piari Mohan Mondal, she (plaintiff No.2) is entitled to get partition of the entire /8/ annas share in the suit land and so the operating portion of the judgment and decree of the trial Court needs to be modified to the effect that only plaintiff No.2 is entitled to get partition in respect of /8/ annas share in the suit land as decreed by the trial Court. The appeal is dismissed with the above modification of the ordering portion of the judgment of trial Court and the decree be modified accordingly.

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APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha
-Chief Justice
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.99 of 2013
(From the decision dated 11.02.2010 passed by the Administrative Appellate Tribunal, Dhaka in A.A.T. Appeal No.01 of 2008)

Government of Bangladesh, represented by the Secretary, Ministry of Establishment Bangladesh Secretariat, Ramna, Dhaka. : .....Appellant.

Versus

S.M. Raiz Uddin Ahmed. : .....Respondent.

For the Appellant.	:	Mr. Goutam Kumar Roy, Deputy Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.
For the Respondent.	:	Mr. Bivash Chandra Biswas, Advocate-on-Record.
Date of Hearing.	:	The 4th November, 2015.
Date of Judgment.	:	The 4th November, 2015.

It is not permissible to take disciplinary action against a person solely on the basis of adverse remarks made by a Tribunal in a criminal case unless the allegations imputed in the adverse remarks are proved in disciplinary proceeding. ...(Para 14)

J U D G M E N T

SYED MAHMUD HOSSAIN, J:

1. This appeal, by leave, is directed against the decision dated 11.02.2010 passed by the Administrative Appellate Tribunal, Dhaka in A.A.T. Appeal No.01 of 2008 affirming the decision dated 23.09.2007 passed by Administrative Tribunal No.1, Dhaka, in A.T Case No.151 of 2006.

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

The respondent instituted A.T. Case No.151 of 2006 for declaration that the letter communicated under Memo No.pj/n-2 (¢hj¡)-23/95/233 a¡¢lM10/7/1993, awarding punishment to him, which was served upon him on 28.09.2006 was illegal, void, collusive and the same was not binding upon him. The case of the respondent, in short, is that on 21.01.1986, he joined as Assistant Commissioner under the Ministry of Establishment. He was promoted as Senior Assistant Secretary on 14.09.1994 and thereafter as Deputy Secretary on 10.02.2003. While he was serving as Thana Nirbahi Officer at Atgoria, Pabna, the Secretary, Ministry of Establishment, framed charge against him stating that at the time of serving as Magistrate at Bagerhat, he, without writing the statements of the witnesses under section 164 of the Code of Criminal Procedure himself, allowed the Investigating Officer to write those statements and thereafter put his signatures in those statements. The respondent in his reply denied the allegation. It has further been stated in the petition before the Administrative Tribunal that being satisfied, the concerned Secretary, after hearing the respondent, informally told him that no action would be taken against him. Thereafter, the respondent got two promotions and selection grade. While searching his position to get promotion as Joint Secretary, the respondent came to know that in that proceeding punishment in the form of "censure" had been awarded to him. He filed an application addressing the Secretary of the concerned Ministry to get the order of 'censure' and got the said order on 18.09.2006. Thereafter, he preferred an appeal before the President of the Republic but did not receive any reply. Then he filed the instant Administrative Tribunal case.

3. The Government, represented by the Secretary, Ministry of Establishment, contested the case by filing a written objection contending, inter alia, that Eklas Khan, Mizan Khan and Yousuf Sheikh, the witnesses of G.R. No.57 of 1995 arising out of Bagerhat P.S. Case No.6 dated 18.05.1992 were produced by the Investigating Officer before the respondent for recording their statements under section 164 of the Code of Criminal Procedure. The respondent, without recording their statements himself, allowed Investigating Officer of the said case to write the statements of those witnesses and then he put his signatures in the said statements which were found in the judgment in S.T.C. Case No.36 of 1993 by the Tribunal. Bringing such allegation, a departmental proceeding was initiated against the respondent and the same was established on holding departmental inquiry. Accordingly, the respondent was awarded punishment. The order awarding punishment was duly communicated to the respondent. Therefore, the case should be dismissed.

4. The learned Member of Administrative Tribunal No.1, Dhaka, upon hearing the parties and considering the evidence on record, by the decision dated 23.09.2007 allowed the said case and declared the punishment awarded to the respondent void.

5. Being aggrieved by and dissatisfied with the decision dated 23.09.2007 passed by the learned Member, Administrative Tribunal No.1, Dhaka, the Government-respondent preferred A.A.T. Appeal No.01 of 2008 before Administrative Appellate Tribunal, Dhaka, which was dismissed by the decision dated 11.02.2010.

6. Feeling aggrieved by and dissatisfied with the decision passed by the Administrative Appellate Tribunal, Dhaka, the appellant as the leave-petitioner moved this Division by filing Civil Petition for Leave to Appeal No.794 of 2010, in which, leave was granted on 21.07.2013, resulting in Civil Appeal No.99 of 2013.

7. Mr. Goutam Kumar Roy, learned Deputy Attorney General, appearing on behalf of the appellant, submits that there is a specific finding by the Special Tribunal that while acting as

Magistrate of Rampal, Bagerhat, the respondent put his signatures in the statements of three witnesses recorded under section 164 of the Code of Criminal Procedure which were alleged to have been written by another person and on such allegation, the Government initiated a departmental proceeding against the respondent and that as there was no specific denial on behalf of the respondent, the Administrative Tribunal and Administrative Appellate Tribunal committed an error of law in interfering with the punishment awarded to the respondent and as such, the impugned decision should be set aside.

8. Mr. Bivash Chandra Biswas, learned Advocate-on-Record, appearing on behalf of the respondent, on the other hand, supports the impugned judgment delivered by the High Court Division.

9. We have considered the submissions of the learned Deputy Attorney General for the appellant and the learned Advocate-on-Record for the respondent, perused the impugned decision and the materials on record.

10. Before entering into the merit of the appeal, it is necessary to go through the ground, for which, leave was granted. The ground is quoted below:

> "There is a specific finding by the Special Tribunal that while acting as Magistrate of Rampal, Bagerhat, the respondent put his signatures in the statements of three witnesses recorded under section 164 of the Code of Criminal Procedure alleged to have been written by another person and on such allegation, the Government initiated a departmental proceeding against the respondent and that as there is no specific denial on behalf of the respondent, the Administrative Tribunal and Administrative Appellate Tribunal committed an error of law in interfering with the punishment awarded to the respondent and as such, the impugned decision should be set aside."

11. Having gone through the record, we find that while performing the function of the Magistrate, First Class, the respondent recorded the statements of some of the witnesses under section 164 of the Code of Criminal Procedure. It is alleged that the respondent did not record the statements of Eklas Khan, Mizan Khan and Yousuf Sheikh with his own hand and that he signed those statements alleged to have been written by another person. Unless the allegations brought against the respondent are inquired into, it is difficult to believe that the allegations brought against him are true. In reply to the show cause notice, the respondent in writing denied the allegations brought against him and as such, the allegations could not be established without any inquiry. The respondent also alleged that the allegations were brought against him out of a conspiracy at the instance of a vested quarter. Therefore, the censure made by the appellant against the respondent cannot be said to be legal.

12. The case in hand has similarity with ***Ridge v. Baldwin, [1964] AC 40.*** In the cited case, the Chief Constable of Brighton has been tried and acquitted on criminal charge of conspiracy to obstruct the Court's justice. Two other Police Officers were convicted and the Judge took opportunities to comment adversely on the Chief Constable's leadership of the force. Thereupon, the Brighton Watch Committee, without giving any notice or offering any hearing to the Chief Constable, uninimously dismissed him from service. His Solicitor then applied for a hearing and was allowed to appear before a later meeting. The committee confirmed their previous decision, but by a vote of nine against three. The Chief Constable exercised his right of appeal to the Home Secretary, but his appeal was dismissed. Finally, he

turned to the Courts of law, claiming a declaration that his dismissal was void since he had given no notice of any charge against him and no opportunity of making his defence. This was refused by the High Court and by a uninimous Court of appeal. The House of Lords by a majority of 4 to 1 held that the initial dismissal was not only a breach of principle of natural justice, it was contrary to the express provisions of the statutory regulations governing police discipline which in cases of misconduct required notice of the charge and an opportunity for self-defence. The hearing given to the Chief Constable's Solicitor was held to be irrelevant since even no notice of specific charge was given and natural justice was again violated.

13. In the case in hand, relying only on the adverse remarks of the Tribunal, the respondent herein was censured without giving him any opportunity of being heard.

14. The Administrative Tribunal and the Administrative Appellate Tribunal rightly found that the allegations brought against the respondent could not be substantiated. It is not permissible to take disciplinary action against a person solely on the basis of adverse remarks made by a Tribunal in a criminal case unless the allegations imputed in the adverse remarks are proved in disciplinary proceeding.

15. In the light of the findings made before, we do not find any substance in this appeal. Accordingly, this appeal is dismissed.

5 SCOB [2015] AD 98

Appellate Division

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

CIVIL PETITION FOR LEAVE TO APPEAL NO. 1280 OF 2015
(From the judgement and order dated 17th of September, 2014 passed by the High Court Division in Writ Petition No. 4886 of 2013.)

M/S. Rajib Traders .....Petitioner

Versus

The Artha Rin Adalat as well as Joint District Judge, Additional Court, Jessore and another .....Respondents

For the Petitioner : Mr. Nurul Islam Chowdhury
Advocate-on-Record

For the Respondents : Not represented

Date of hearing & judgment : The 27th of August, 2015

How interest is to be calculated:
The interest to be paid by the judgment debtor will have to be calculated according to the prevailing interest rate or rates, which may be different for different periods, from the time of filing of the suit till the payment of the decretal amount by the judgment debtor. ...(Para 15)

J U D G E M E N T

MUHAMMAD IMMAN ALI, J:-

1. This civil petition for leave to appeal is directed against the judgement and order dated 17.09.2014 passed by a Division Bench of the High Court Division in Writ Petition No. 4886 of 2013 discharging the Rule.

2. The facts, relevant for disposal of the instant civil petition for leave to appeal, are that alleging default in repayment of loan obtained by the petitioner, Agrani Bank, Bus Stand Branch, Nowapara, Jessore(respondent No. 2), filed Money Suit No. 94 of 2004 against the petitioner and two others. The petitioner accordingly contested the said suit by filing written statement. Thereafter, upon hearing the parties, the Artha Rin Adalat, Jessore, by its judgement and decree dated 20.06.2006 decreed the suit against the petitioner and others.

Accordingly, the plaintiff-Bank filed Artha Execution Case No. 21 of 2006 on 07.09.2006 for realisation of Tk. 76,58,097/-. During pendency of the said execution case, the judgment-debtor-petitioner filed an application on 23.07.2012 for computing interest on the decretal amount at the rate of 8% in view of the then applicable provisions of law when the decree was passed.

3. After hearing the aforesaid application, and objection filed by the decree holder bank, the Adalat by its order dated 21.01.2013 rejected the application of the petitioner and computed the interest as prescribed under Section 50 of the Artha Rin Adalat Ain as amended from time to time.

4. Being aggrieved by the order dated 21.01.2013, the petitioner filed Writ Petition No. 4886 of 2013 before the High Court Division and obtained Rule, which upon hearing the parties, was discharged. Hence, the petitioner is now before us having filed the instant civil petition for leave to appeal.

5. Mr. Nurul Islam Chowdhury, learned Advocate-on-Record appearing on behalf of the petitioner submits that the High Court Division passed the judgement and order relying on a decision passed by an Indian Court which is not relevant to the case of the petitioner as the facts leading to the said decision regarding non-payment of taxes on which interest was imposed were different. In the instant case the subject matter is different as the dispute arose out of a judgement and decree passed in an Artha Rin Adalat matter. As such the judgement and order of the High Court Division calls for interference. He further submits that the High Court Division failed to consider that Respondent No. 1 committed error in counting the interest from 23.12.2007 to 24.02.2009 at the rate of 12%, defying the amendment of the Artha Rin Adalat Ain, 2003, (Act No. 16 of 2010) which provides that 8% would be replaced by 12%, and that the interest at the rate of 12% would be computed after the above amendment, i.e. after 2010. He lastly submits that the decree was passed in the year 2006 when the applicable rate was 8%, and as such a right accrued in favour of the judgment debtor to pay interest on the decretal amount at the said rate, and hence the accrued right of the petitioner cannot be taken away by subsequent amendments, and in this regard reference may be made to the case of ***Khondaker Badiuzzaman Vs GM Bangladesh Krishi Bank and others*** reported in ***14 BLD 151.*** As such the judgement and order passed by the High Court Division calls for interference.

6. No one appeared for the respondents.

7. We have considered the submissions of the learned Advocate for the petitioner and perused the impugned judgement and order of the High Court Division and other connected papers on record.

8. The point in issue in this case concerns the rate of interest to be awarded in view of amendment of the legal provision from time to time changing the rate of interest.

9. The admitted position is that on the day when the decree was passed section 50 of the Artha Rin Adalat Ain, 2003 (the Ain) provided for interest to be imposed at the rate of 8%. Subsequently, by amendment in 2007 the rate of interest was increased to 12%. The High Court Division observed that the trial Court in awarding the decree ordered that the plaintiff bank is entitled to realize interest as per prescribed rate from 01.04.04 till realization of the decretal amount and went on to hold that this meant that the interest would be applicable at the rate when the order of the Court was passed. The High Court Division further observed

that if the petitioner had repaid the entire decretal amount before the rate of interest was amended then the dispute would not arise.

10. The Artha Rin Adalat (Amendment) Ain, 2010, (Act No. 16 of 2010) came into force on 30.3.2010 by which section 50 of the Ain, 2003 was amended increasing the rate of interest from 8% to 12%.

11. Section 50 (2) of the Ain, 2003, as amended, provides as follows:

> *""50z (2) অর্থঋণ আদালত কর্তৃক প্রদত্ত ডিক্রীর বিরুদ্ধে hhjc£-cjuL পক্ষ কোন আপীল, রিভিশন, আপীল বিভাগে বা অন্য কোনরূপ দরখাস্ত কোন উচ্চতর আদালতে দায়ের না করিলে, মামলা দায়েরের দিবস হইতে ডিক্রির টাকা আদায় হইবার দিবস পর্যন্ত সময়ের জন্য ডিক্রিকৃত টাকার উপর ১২% (hjl শতাংশ) বার্ষিক সরল হারে, কোন আপীল, রিভিশন বা অন্য কোন cরখাস্ত কোন উচ্চতর আদালতে দায়ের করিলে পূর্বোক্ত সময়কালের জন্য ১৬% (ষোল শতাংশ) বার্ষিক সরল হারে, এবং আপীল বা উচ্চতর আদালতের ডিক্রি বা আদেশের বিরুদ্ধে আপীল বিভাগে আপীল করিলে, পূর্বোক্ত সময়কালের জন্য ১৮% (আঠার শতাংশ) বার্ষিক সরল হারে, উপ-ধারা (৩) এর বিধান সাপেক্ষে, সুদ, বা, ক্ষেত্রমত, মুনাফা আরোপিত হইবে।''*

12. Since the matter is still pending as a money execution case before the Artha Rin Adalat, what rate of interest is to be awarded on appeal before the High Court Division or the Appellate Division is not material in the instant case. However, the rate of interest to be awarded for the period from filing of the suit till the realization of the decretal amount is clearly 12% as from 31.3.2010. We note that interest was calculated at 8% for the period before the Act came into force in force in 2010 because the Ordinance enhancing the rate to 12% was not approved by Parliament from 25.02.2009 to 31.03.2010.

13. The High Court Division placing reliance upon a decision of the Indian Supreme Court in the case of **Maya Rani Punj vs. C.I.T., Delhi(1996)1SCC-445** held that the non-payment of the decretal amount by the judgement debtor was a continuing default which meant that each and every day the judgement debtor incurred a liability to pay interest at a rate applicable on that day. With respect, we agree that if the judgement debtor had paid the decretal amount within the period stipulated by the trial Court, then the rate of interest applicable at that time would have been the appropriate rate of interest to be paid. Since the judgement debtor did not pay the decretal amount in accordance with the order of the Court it would be liable to pay at the various rates which may change from time to time.

14. It may be noted here that the rate of interest charged at any given time by financial institutions under directions of the Central Bank reflects the prevalent economic condition of the country. If the interest rate was lowered then the judgement debtor would have received the benefit of the lower interest. It cannot be said that any vested right accrued to the judgement-debtor with regard to the rate of interest for all time to come. At best it can be said that within the time for payment as stipulated by the Court the rate of interest would be the same as on the date of the decree. If the Court had specified that the rate would be 8% till realization of the decretal amount then the change of rate of interest would not affect the judgement-debtor detrimentally or beneficially in case the interest was lowered. However, in this case the rate was to be the "prescribed rate from 01.04.2004 till the realization of the decretal money." 'Prescribed' would mean prescribed by law. In the facts of the instant case the 'prescribed rate' was amended more than once since 01.04.2004.

15. Accordingly, we are of the view that the interest to be paid by the judgement debtor will have to be calculated according to the prevailing interest rate or rates, which may be different for different periods, from the time of filing of the suit till the payment of the decretal amount by the judgement debtor

16. In the light of the discussion above, we find that the impugned judgement does not suffer from any illegality or infirmity and does not call for any interference.

17. Accordingly, the civil petition for leave to appeal is dismissed.

5 SCOB [2015] AD 102

APPELLATE DIVISION

PRESENT:

Mrs. Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO.14 OF 2013 WITH CRIMINAL APPEAL NO.15 OF 2013.
(From the judgment and order dated 20.06.2011 passed by the High Court Division in Death Reference No.134 of 2008 with Criminal Appeal No.8716 of 2008 and Jail Appeal No.100 of 2009)

Haji Mahmud Ali Londoni	**:**	Appellant. (In Crl.Ap.No.14/2013)
The State	**:**	Appellant (In Crl.Ap. No.15/2015

Versus

The State	**:**	Respondent. (In Crl.Ap.No.14/2013)
Bancsa Begum and others	**:**	Respondent. (In Crl.Ap. No.15/2015

For the Appellant (In Crl.Ap.No.14/2013)	:	Mr. Abdul Matin Khasru, Senior Advocate, instructed by Mr.Zahirul Islam, Advocate-on-Record.
For the Appellant (In Crl.Ap.No.15/2013)	:	Mr. Khondakar Diliruzzaman Deputy Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Respondent Crl.Ap.No.14/2013)	:	Mr. Khondakar Diliruzzaman Deputy Attorney (In General, instructed by Mr. Shamsul Alam, Advocate-on-Record.
For the Respondents (In Crl.Ap.No.15/2013)	:	Mr. Abdul Matin Khasru, Senior Advocate, instructed by Mr. Zahirul Islam, Advocate-on-Record.

Date of hearing : 11-11-2015
Date of judgment : 12-11-2015

Circumstantial evidence:
It is settled principles that where the inference of guilt of an accused is to be drawn from circumstantial evidence only, those circumstances must, in the first place, be cogently established. Further, those circumstances should be of a definite tendency

pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused excluding any other hypotheses. ...(Para 22)

JUDGMENT

Hasan Foez Siddique, J:

1. These two criminal appeals being Criminal Appeal No.14 of 2013 and Criminal Appeal No.15 of 2015 are directed against the judgment and order dated 20.06.2011 passed by the High Court Division in Death Reference No.134 of 2008, Criminal Appeal No.8716 of 2008 and Jail Appeal No.100 of 2009 affirming the judgment and order of conviction of Haji Mahmud Ali Londoni (the appellant) and reducing his sentence from death to imprisonment for life.

2. The prosecution case, in short, was that on the morning of 08.07.2004 3(three) victims Fazlul Huq @ Babul, Mujahid and Md. Abdul Mutalib were found dead in the house of the appellant. The appellant informed Jagannathpur Police Station that at about 1.30 a.m. on 08.07.2004 the victims went to sleep in a room of the ground floor of his two storied building. At about 2.30 a.m., he went out his room to answer his natural call. At that time, he did not find those 3(three) victims in the said room. At about 9.30 a.m., the appellant's Khalu Eshaque Ullah went there and called the victims but they did not respond. Thereafter, they entered into the said room and found the dead bodies of those 3(three) victims. Getting such information, the police, starting an U.D. Case, rushed to the place of occurrence and held inquest of the dead bodies of the victims and, thereafter, sent those dead bodies to morgue for holding autopsy. The P.W.19 Doctor, holding postmortem examinations, did not find any marks of violence on the persons of the victims and kept the opinion pending till arrival of pathological report of chemical examination of the visceras of the victims. On chemical examinations, the Chemical Examiner found alcohol and methanol in the visceras. Accordingly, the Doctor submitted P.M. reports stating that the death of the victims was caused due to poisonous effect of Methanol and Alcohol. Thereafter, on 29.09.2004, P.W.1 Jamirul Huq as complainant filed a petition of complaint in the Court of Cognizance Magistrate, Jagonnathpur, Sunamgonj against the appellant and three others namely Banesa Begum, Enamul Huq Tony and Emamul Huq Rony under Section 302/201/34 of the Penal Code stating, inter alia, that appellant's daughter Setu Begum had love affairs with victim Babul and she was given in marriage elsewhere but she was not happy. In the evening of 07.07.2004 accused persons invited the victims in a dinner in their house and thereafter, in collusion with each other, killed them administering poisons. Similar two other petitions of complaint were filed by the family members of other victims. However, the complaint petition filed by P.W.1 was sent to police station to treat the same as First Information Report. Accordingly, Jagonnathpur Police Station Case No.6 dated 13.10.2004 was started.

3. After holding investigation, the Investigating Officer submitted Charge Sheet against the present appellant and others under sections 302/201/34 of the Penal Code.

4. The case was ultimately tried by the Druto Bichar Tribunal, Sylhet, where the case was registered as Druta Bichar Tribunal Case No.13 of 2004.

5. The Tribunal framed charge against the appellant and others under Section 302/201/34 of the Penal Code. The trial of the co-accuseds Banesa Begum, Enamul Huq Tony, Emamul Huq Rony and Bedena Begum were held in absentia. The appellant pleaded not guilty and claimed to be tried.

6. The prosecution examined 24 witnesses in support of its case and defence examined none. From the trend of cross examination of the P.Ws. it appears that the defence case was of innocence and false implication. His further case was that the victims used to look after the interest of the appellant at his village home. The appellant and his family member had been living in London and occasionally came to Bangladesh. On the night of occurrence, after taking dinner, the appellant went to bed. Parhaps, thereafter, the victims went outside the house and after having alcohol they went to sleep but due to have poisonous alcohol they died.

7. The Tribunal convicted the appellant and 4(four) others namely Banesa Begum, Enamul Huq Tony Amamul Huq Rony and Bedena under section 302/109 of the Penal Code and sentenced the appellant to death and pay fine of taka 9,00000/-(nine lacs) and the sentenced the rest accuseds to suffer imprisonment for life and to pay fine of 2,00,000/- to accused Banesa Begum, Anamul Huq Tony and Emamul Huq Rony and taka 10,000/- to accused Bedena, in default, each of them to suffer R.I. for a period of 2(two) years more. The Tribunal transmitted the case record in the High Court Division for confirmation of sentence of death of the appellant. The appellant preferred above mentioned criminal appeal and Jail appeal which was heard together. The High Court Division rejected the death reference but upheld the judgment and order of conviction of the appellant. However, his sentence was reduced from death to rigorous imprisonment for life. The High Court Division acquitted the other accuseds of the charges. The appellant,thus preferred Criminal Appeal No.14 of 2013 and the State preferred Criminal Appeal No.15 of 2013 against the order of commutation of sentence of the appellant from death to imprisonment for life.

8. Mr. Abdul Matin Khasru, the learned Senior Counsel appearing on behalf of the appellant, who is the respondent of Criminal Appeal No.15 of 2013, submits that there was no eye witnesses of the occurrence and that the appellant had been convicted and sentenced on the basis of circumstantial evidence but the prosecution hopelessly failed to prove any such circumstances where from it could be inferred beyond reasonable doubt that the appellant had killed the victims by administering poison. He submits that the story of love affairs of Setu Begum with the victim Babul Miah had not been proved. He further submits that on the night of occurrence, the victims after having dinner, went to bed. Perhaps they took alcohol, which was poisonous, from outside the house and, then, went to sleep and died. He submits that the respondent is aged about 80 years and he had been implicated in the case falsely.

9. Mr. Khondakar Diliruzzaman, learned Deputy Attorney General appearing on behalf of State, in both the appeals submits that in the afternoon on 07.07.2004, the accuseds called the victims in a dinner and at the time of having dinner; they administered poisons, consequently, the victims died. There was love affairs of the appellant's daughter Setu Begum with victim Babul Miah and she was unhappy at her husband's house and denied to go there. So, in order to take revenge, the accused persons, in collusion with each other, had killed the victims administering poisons.

10. Admittedly victims Babul, Mujahid and Motaleb died in the house of the appellant on the night following on 07.07.2004. It appears from the evidence on record that the appellant, knowing about the death of victims, informed the same to the local Police Station. On the basis of such information, an U.D. case was started and the police sent the dead bodies to morgue for holding autopsy. The Doctor, after receiving opinion of the Chemical examiner, opined that death was due to poisonous effect of methanol and alcohol. The chemical expert, in his opinion observed that- Òcwó‡Ki cv‡Î iw¶Z wfmvivq ÒGj‡Kvnj ó I Ò †g_vbj (wel) ó cvIqv wMqv‡Q|Ó Thereafter, at the instance of P.W.1, the case was started.

11. The function of the Court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. In this case it appears that out of the 24 prosecution witnesses, P.W.1 is the informant and father of victim Babul, P.W.2 is the mother of victim Mujahid, P.W.3 is the son of victim Motaleb, P.W.4 is the "Khalato Bhai" of victim Babul, P.W.5 is the son of Motaleb, P.W. 6 is the "bhagina" of victim Mujahid, P.W.7 is the "Chachato bhai" of victim Babul, P.W. 8 is the brother-in-law victim Mujahid, P.W. 10 is wife of victim Motaleb, P.W.11 is the maternal uncle of the victim Mujahid, P.W.12 is the son of victim Motaleb and P.W.15 is the sister of Babul. P.W.13 was declared hostile, P.W.14, a seizure list witness, was also declared hostile. P.W.16 is a constable who went to morgue along with dead bodies of victims. P.W.17 is a Magistrate, who recorded the statements of witnesses under Section 164 of the Code of Criminal Procedure. P.W.19 is the Doctor who held Post Mortem examination of the persons of victims. Rest witnesses P.W.18, 20, 21, 22, 23 and 24 are Investigating Officers of the case.

12. On perusal of the evidence of P.Ws.1, 2, 3, 4, 5, 6, 7, 8,10, 11, 12 and 15 it appears that they have tried to establish the facts that there was a previous love affairs with the appellant's daughter Setu Begum with the victim Babul. The victim Babul was a poor man and used to look after the interest of the appellant at his village home. The appellant gave marriage of Setu Begum elsewhere beyond her consent and she did not accept such marriage and she started hesitation going to her husband's house after returning therefrom. In such situation, the appellant invited the victims at his house on the night following 07.07.2004 and they, in collusion with each other, had killed the victims administering poisons. It appears that those interested witnesses have put their hands to rope in the whole family of the appellant including their maid servant Bedana Begum.

13. Admittedly, there is no eye witness of occurrence of administering poisons by the appellant to the victims. The Courts below convicted the appellant mainly on the basis of circumstantial evidence. When a case rests upon circumstantial evidence, such evidence must satisfy that the circumstances from which an inference of guilt is sought to be drawn, must be cogent and firm, those circumstances should be of a definite tendency pointing towards guilt of the accused and the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The facts and circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and the facts and circumstances should not only be consistent with the guilt of the accused but they must be entirely incommutably with the innocence of the accused and must exclude every reasonable hypothesis consist with his innocence.

14. In the present case let us see whether the prosecution had been able to fulfill the chain of such circumstances or not.

15. On perusal of the evidence of the witnesses, it appears that P.Ws. contradicted each other as to their claim that there was love affairs between the appellant's daughter Setu Begum and the victim Babul. Informant P.W.1, father of victim Babul, in his evidence said, "*Avmvgx gvngỳ Avjxi †Q‡j †g‡qiv †`‡k Awmqv KLbI Mv‡gi evox‡Z _vKZ bv Ges wm‡jU kn‡ii evmv‡Z _vKZ wK bv Awg Rvwb bv|*" Thereafter he said, *ÔÔAvgvi †g‡q I †g‡q RvgvB Avgv‡K ewjqv‡Q eveỳyji mwnZ †mZz †eM‡gi cYq wQj|-------- †g‡q I †g‡qi RvgvB eveỳyji mwnZ †mZz†eM‡gi cY‡qi m¤ú‡Ki K_v K‡e †Kv_vq Avgv‡K RvbvBqv‡Q ewj‡Z cwiev bv|*" P.W.4 Md. Tajuddin, son-in-law of P.W.1 in his evidence did not say that he stated such story to his father-in-law P.W.1. He said that he heard about story of love affairs of Setu Begum and victim Babul from his wife P.W.15 Sahana but P.W.15 in her evidence did not say that she had told such story to her husband P.W.4. Though P.W.4 in his evidence has said, "*Avgvi kïo gvngỳ Avjxi wbKU †mZz†eM‡gi mwnZ eveỳyji weev‡ni c¯ve †`q|*" but the Investigating Officer P.W.22 in his cross examination has said, "*eveỳyji evev Avmvgx gvngỳ Avjxi evox‡Z weev‡ni c¯ve jBqv hvq GBiƒc K_v mv¶x ZvRDÏxb Z`šK‡j Avgvi wbKU e‡j bvB|*". That is, he has tried to improve the prosecution case adding the story of giving proposal of marriage of Babul with Setu Begum to the appellant. In view of such evidence, it appears that the story of love affairs of Babul and Setu Begum had not been proved beyond doubt. Moreover, P.W.6 Roshahid Ahmed in his cross-examination has said, "*gvngỳ Avjxi †g‡q †mZz†eMg‡K wPwb †m jÛ‡b _v‡K|*" He added, *ÔÔeveỳyji mv‡_ gvngỳ Avjxi †Kvb †g‡q‡K †Nvi‡div Ki‡Z †`wL bvB|*" So, it is difficult to accept the story of love affairs of Setu and Babul as true.

16. The PWs also gave contradictory evidence as to invitation of victims in the house of appellant.

17. On perusal of the evidence, it appears that the victims used to look after the interest of the appellant at his village home. P.W.1, in his testimony, said, "*Avmvgx‡`i mwnZ Avgvi AvZxqZvi m¯có iwnqv‡Q| Avmvgx‡`i evox‡Z Avgvi cŷ Avmv hvIqv I LvIqv `vIqv Kwiz|*". That is, it is not unlikely that the victims went to the house of the appellant and had their meals. P.W.5 Jholon Mia son of another victim Motaleb in his deposition said, "*Avmvgx gvngỳ Avjxi mwnZ Avgvi AveŸvi m¤úK fvjB wQj|*"

18. P.W19 Dr. Abdul Hakim, who held Postmortem examinations of the dead bodies, in his cross examination has said- *ÒG¨vj‡Kvnj †gqv` DËxY nBqv †M‡j weIv³ nBqv hvB‡Z cv‡i| ivmvqwbK cix¶vi cwZ‡e`‡b wg_vbj we‡li A¯–‡Zi weIq D‡jwLZ nBqv‡Q|Ó* Specific case of the defence is that after having poisonous alcohol the victims went to sleep and died. In this juncture, it is relevant to peruse the medical jurisprudence in this regard. Modi in his Medical Jurisprudence and Toxicology has observed about denatured sprit, Metheyl Alcohol (wood Alchol or spirit, phroxylic spirit, Methanol or wood Naphtha) Ch30H with the following words,

"This is formed by the destructive distillation of wood or molases. It is a colourless mobile liquid, having a peculiar, nauseating odour and a burning taste, and boiling at 64.7·C. It mixes with water in all proportions. It burns with a pale blue, nonluminous flame, and its vapour forms an explosive mixture with air or oxygen. It is largely used as a solvent in shelliac and varnish manufacture and as an antifreeze. It is also mixed with rectified spirit to make industrial methylated spirit."

19. Modi further stated, "Cases of mass poisoning are becoming quite frequent as methyl alcohol adultered intoxicating beverage is to persons who can not get ordinary alcohol." He added, "Ninety persons died in Khopoli in Maharashtra and 20 in Madras within a week after consuming a cheap liquor." H W V COX in his Medical Jurisprudence and Toxicology has

stated, "Methyl alcohol is not fit for human consumption and is found as impurity in a number of cheap alcoholic drinks." From the table showing the effect of different concentration of alcohol in the said book it appears that above 600 mg of concentration of alcohol in blood may cause of death of the victim. If alcohol is taken in bounts, the blood concentration rises more rapidly. Modi stated that acquit poisoning may result from consumption of an alcoholic beverage in small doses at short intervals or in an excessively large does at a time. Sometimes death occurs from asphyxia due to respiratory paralysis. It may occur from shock secondary to paralysis of the abdominal nerve centre, if a very large quantity of undiluted alcohol is taken.

20. In view of the aforesaid Medico- legal aspect of the matter the defence version that the victims after having poisonous alcohol went to sleep and died became probable. The evidence of P.W.7 supported the defence case who in his cross-examination has said, "*7/7/2004 Bs ZwiL w`evMZ iv‡Z †Kvb GK mgq evey, gZvje I gRvwn` ¯Kz‡i N‡i, wKsev Ab¨ †Kv_vq I ewmqv we‡l³* মদ্য পান করিয়া মাসুদ আলীর ঘরে আসিয়া ঘুমায় এবং ঘুমের মধ্য বিষ ক্রিয়ায় মারা যায়।"

21. Since the motive of killing of the victims had not been proved and that the defence version, as it appears from the evidence, became probable, and that we do not find any earthly reason that for the alleged love affairs between Setu Begom and Babul an old man would take decision to kill Motalib and Mozahid along with Babul, particularly, when it is evident that Setu Begom had been living in London with her husband.

22. It is settled principles that where the inference of guilt of an accused is to be drawn from circumstantial evidence only, those circumstances must, in the first place, be cogently established. Further, those circumstances should be of a definite tendency pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused excluding any other hypotheses. Such circumstances are totally absent in this case, particularly when the story of administering poisons is found to be doubtful.

23. Accordingly, we found substance in the appeal preferred by the appellant Hazi Mahmud Ali Londoni.

24. Thus the appeal preferred by appellant Hazi Mahmud Ali Londoni is allowed and that of the State is dismissed. The judgment and order dated 08.6.2011, 09.06.2011, 14.06.2011 and 20.06.2011 passed by the High Court Division in Death Reference No.134 of 2008 with Criminal Appeal No.8716 o9f 2008 and Jail Appeal No.100 of 2009 affirming the judgment and order of Druto Bichar Tribunal, Sylhet in Druto Bichar Case No.13 of 2004 arising out of G.R. Case No.117 of 2004 corresponding to Jagonnathpur Police Station Case No.6 dated 13.10.2004 is hereby set aside. The appellant is acquitted of the charge. He may be set at liberty at once if he is not wanted in any other case.

25. Communicated the order at once.

5 SCOB [2015] HCD 1

HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 5920 OF 2007

Md. Mijanur Rahman
… Petitioner
Versus

Bangladesh and others
… Respondents

Mr. Shamsuddin Babul with
Mr. Kanai Lal Shaha
… For the petitioner

Mr. S. Rashed Jahangir, DAG with
Mr. Titus Hillol Rema, AAG
… For the respondents

Heard on the 4th November 2015,
Judgment on the 9th November, 2015

Present:

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

Meaning of "A person in the service of the Republic or of any statutory public authority":
"A person in the service of the Republic or of any statutory public authority" includes a person who is or has retired or is dismissed, removed or discharged from such service but does not include a person in the defence services of Bangladesh or of the Bangladesh Rifles.
... (Para 14)

From the Rule and supplementary Rule issuing orders, it appears that the petitioner has not challenged the *vires* of any law on the ground of its fundamental right. Therefore, the petitioner's remedy is before the Administrative Tribunal having jurisdiction and not in writ jurisdiction. **... (Para 18)**

Judgment

Zinat Ara, J:

1. In the original writ petition, the petitioner has challenged the legality of departmental proceeding No. 9/2006 dated 25.11.2006, charges dated 11.11.2006 and order dated 30.05.2007 (Annexures-C-1, G and H respectively to the writ petition).

2. During pendency of the Rule Nisi, final order dated 25.06.2007 (Annexure-K to the writ petition) was issued under the signature of respondent No. 3 dismissing the petitioner from service. Therefore, the petitioner filed an application dated 27.07.2009 for issuance of supplementary Rule and accordingly, a supplementary Rule Nisi was issued on 30.05.2012 with the following terms:-

> "Let a supplementary Rule issue calling upon the respondents to show cause as to why the final order dated 25.06.2007 issued under the signature of the respondent No. 3 dismissing the petitioner from service as in Annexure-K to the petition should not be declared to have been passed without any lawful authority and to be of no legal effect and why a direction shall not be issued upon the respondents to reinstate the petitioner in service with all attendant benefits and/or pass such other or further order or orders as to this Court may seem fit and proper."

3. The petitioner's case as narrated in the writ petition and a series of supplementary affidavits, in brief, are as under:-

The petitioner through written and viva-voce examinations was selected for appointment to the post of a Sub-Inspector of Police on 17.08.2005 vide Memo No. 4048 issued by the D.I.G., Barisal Range of Bangladesh Police (Annexure-A to the writ petition). After successful completion of six months' training in the Police Academy, Sarda, Rajshahi, he joined as a Probationer Sub-Inspector of Police on 10.03.2006 vide Memo No. RADM/17-2002. Earlier on successful completion of the foundation course, certificate was issued to him by the Principal of

Sarda Police Academy. But within six months from his joining, a show cause notice was issued upon him by the Superintendent of Police, Patuakhali, with the allegations that in his application, he had suppressed that he had been in jail for more than three months in connection with Ramna P. S. Case No. 46 dated 14.04.2001 and Ramna P. S. Case No. 47 dated 14.04.2001. Thereafter, departmental proceeding was initiated against the petitioner. In fact, the petitioner was arrested on suspicion and he was forwarded to the court under section 54 of the Code of Criminal Procedure, 1898 (hereinafter stated as the Cr. P. C.). Subsequently, he was granted bail after 78 days on 11.11. 2006, but he was neither named in the F.I.R. nor he was sent up in charge-sheet. So, he was not an accused of any case. A charge under the provisions of PRB was framed against the petitioner with the allegation that the petitioner has committed an offence under section 861 of the PRB. Then after a short enquiry, on 12.05.2007, the enquiry officer submitted an enquiry report with a recommendation to terminate the petitioner from service on the finding that the petitioner had given wrong information at serial Nos. 11 and 13 of BP Form No. 150. Respondent No. 3 then issued an order purporting to dismiss the petitioner temporarily on 30.05.2007 which was received by the petitioner on 13.06.2007. Eventually, during pendency of the Rule, the petitioner was finally dismissed from service by order dated 25.06.2007 issued under the signature of respondent No. 3.

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

5. Respondent No. 2, the Inspector General of Police, contested the Rule by filing an affidavit-in-opposition controverting and denying the statements made in the writ petition contending, inter-alia, that the enquiry was made with due process of law against the petitioner; that the petitioner was not dismissed under Rule 3 of the Public Servants (Dismissal on Conviction) and that the petitioner by suppressing truth has deliberately provided wrong information in his V. R. roll and the dismissal has been awarded as a punishment under Rule 857 of the PRB; that the petitioner himself admitted that he was arrested in connection with Ramna P. S. Case No. 46 dated 14.04.2001 and Ramna P. S. Case No. 47 dated 14.04.2001 and he was in custody for 78 days and so, he had full knowledge about those cases at the time of filing information in his VR roll, but he suppressed the same fact intentionally; that the petitioner is disqualified for the job of Bangladesh Police, as he has committed an offence under Rule 861 of the PRB; that the punishment awarded to the petitioner for committing an offence under Rule 861 of the PRB in accordance with law; that the writ petition is not maintainable and the Rule is, thus, liable to be discharged with costs.

6. Mr. Shamsuddin Babul, the learned Advocate for the petitioner, appearing with Mr. Kanai Lal Shaha, takes us through the writ petition, the supplementary affidavits and the materials on record and submits that the petitioner was appointed by D.I.G. and therefore, the dismissal order of the petitioner by the Superintendent of Police is without lawful authority. He next submits that the petitioner was arrested under section 54 of the Cr. P. C. in connection with Ramna P. S. Case No. 46 dated 14.04.2001 and Ramna P. S. Case No. 47 dated 14.04.2001, but he was neither named in the F.I.R. nor he was shown arrested in the said cases and therefore, the petitioner did not mention that he was an accused in connection with any case. He also submits that the arrest of the petitioner under section 54 of the Cr. P. C. does not mean that the petitioner is an accused in any specific case and, as such, the entire proceeding brought against the petitioner is unlawful. He finally submits that as there is no provision for appeal against the order of dismissal of the petitioner, there is no scope for challenging his dismissal order before the Administrative Tribunal as constituted under article 117 of the Constitution.

7. In reply, Mr. S. Rashed Jahangir, the learned Deputy Attorney General, appearing with Mr. Titus Hillol Rema, the learned Assistant Attorney General, takes us through the writ petition, the affidavit-in-opposition, the relevant provisions of law and contends that under section 4 of the Administrative Tribunal Act, 1980 (hereinafter referred to as the Act), the Administrative Tribunal has exclusive jurisdiction to hear and determine the application made by any person in the service of the Republic. He next contends that the petitioner was admittedly in the service of the Republic and his dismissal order falls within the terms and conditions of his service and therefore, the petitioner’s remedy lies before the Administrative Tribunal having jurisdiction and the instant writ petition is not maintainable.

8. In support of his submission, the learned Deputy Attorney General has relied in the case of Government of Bangladesh and others Vs Md. Mojibul Hoque and others reported in 20 BLC (AD) 177.

9. At this stage, in reply, Mr. Shamsuddin Babul, the learned Advocate for the petitioner, submits that if it is found that the writ petition is not maintainable, as the petitioner's remedy is before the Administrative Tribunal, in such case, an opportunity may be given to the petitioner to file an application before the Administrative Tribunal considering the fact that the petitioner has pursued his case in wrong forum.

10. In support of his contention, he has relied in the case of Abdul Wahab Shaikh Vs Md. Kamal Hossain alias Md. Kalam Hossain and others reported in 20 BLT (AD) 282.

11. We have examined the writ petition, the series of supplementary affidavits filed by the petitioner, the affidavit-in-opposition filed by respondent No. 2 and the connected materials on record.

12. Let us first examine the question relating to maintainability of the writ petition.

13. To decide the question, it is necessary to examine the relevant provisions of section 4 of the Act which runs as under:-

> "4. **Jurisdiction of Administrative Tribunals—**
>
> (1) An Administrative Tribunal shall have **exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic or of any statutory public authority in respect of the terms and conditions of his service including pension rights, or in respect of any action taken in relation to him as a person in the service of the Republic** or of any statutory public authority.
>
> **(2) A person in the service of the Republic or of any statutory public authority may make an application to an Administrative Tribunal under sub-section (1), if he is aggrieved by any order or decision in respect of the terms and conditions of his service including pension rights or by any action taken in relation to him as a person in the service of the Republic or of any statutory public authority.**
>
> Provided that no application in respect of an order, decision or action which can be set aside, varied or modified by a higher administrative authority under any law for the time being in force relating to the terms and conditions of the service of the Republic or of any statutory public authority or the discipline of that service can be made to the Administrative Tribunal until such higher authority has taken a decision on the matter:
>
> Provided further that, where no decision on an appeal or application for review in respect of an order, decision or action referred to in the preceding proviso has been taken by the higher administrative authority within a period of two months from the date on which the appeal or application was preferred or made, it shall, on the expiry of such period, be deemed, for the purpose of making an application to the Administrative Tribunals under this section, that such higher authority has disallowed the appeal or the application.
>
> Provided further that no such application shall be entertained by the Administrative Tribunal unless it made within six months from the date of making or taking of the order, decision or action concerned or making of the decision on the matter by the higher administrative authority, as the case may be.

> (3) **In this section "person in the service ml of the Republic or of any statutory public authority" includes a person who is or has retired or is dismissed, removed or discharged from such service** but does not include a person in the defence services of Bangladesh or of the Bangladesh Rifles."
>
> (Bold, emphasis supplied)

14. Thus, it appears that "a person in the service of the Republic or of any statutory public authority" includes a person who is or has retired or is dismissed, removed or discharged from such service but does not include a person in the defence services of Bangladesh or of the Bangladesh Rifles.

15. In the instant case, admittedly, the petitioner as a person in the service of the Republic, has been dismissed from service. Therefore, under section 4(3) of the Act, the Administrative Tribunal has the exclusive jurisdiction to hear and determine the matter relating to the dismissal of the petitioner from service.

16. In the case of reported in 20 BLC (AD) 177, it was decided by their lordships as under:-

"67. The question can be answered in a short compass by referring to the case of Mujibur Rahman (supra). In that case, this Court has held that

> **"Within its jurisdiction the Tribunal can strike down an order for violation of principles of natural justice as well as for infringement of fundamental rights, guaranteed by the Constitution, or of any other law, in respect of matters relating to or arising of sub-clause (a), but such Tribunals cannot, like the Indian Administrative Tribunals** in exercise of a more comprehensive jurisdiction under Article 323 (see SP Sampath Kumar vs Union of India, AIR 1937 SC 386 (Para 16) and JB Chopra vs Union of India AIR 1987 SC 357 (Para 2), **strike down any law or rule on the ground of its constitution. A person in the service of the Republic who intends to invoke fundamental right for challenging the vires of a law will seek his remedy under Article 102(1), but in all other cases he will be required to seek remedy under Article 117(2).**
>
> 68. In the case of **Delwar Hossain Mia (Md) and another vs Bangladesh, represented by the Secretary, Ministry of Home Affairs, 52 DLR (AD) 120** the same statement of law has been reiterated and this is being followed consistently."
>
> (Bold, to give emphasis)

17. Similar view was taken by their lordships of the Appellate Division in a series of cases.

18. From the Rule and supplementary Rule issuing orders, it appears that the petitioner has not challenged the vires of any law on the ground of its fundamental right. Therefore, the petitioner's remedy is before the Administrative Tribunal having jurisdiction and not in writ jurisdiction.

19. In view of the discussions made hereinbefore, vis-à-vis the law, our considered view is that the instant writ petition is not maintainable.

20. Be that as it may, admittedly, the petitioner was dismissed from service by order dated 25.06.2007 during pendency of Writ Petition No. 5920 of 20078 challenging the departmental proceeding against the petitioner. However, it appears that the petitioner pursued in the wrong forum without approaching the Administrative Tribunal having jurisdiction by filing application challenging his dismissal order. If the petitioner submits any application before the Administrative Tribunal, then the petitioner may refer the decision reported in 20 BLT (AD) 282 before the concerned Administrative Tribunal.

21. At this stage, in this writ petition, there is no scope to allow the petitioner to file an application before the Administrative Tribunal by condoning the delay.

22. In view of above, we find no merit in the submissions of Mr. Shamsuddin Babul and we find merit and force in the submissions of Mr. S. Rashed Jahangir.

23. Since it is found that the instant writ petition is not maintainable, we do not like to enter into the other issues touching the merit of the Rule.

24. In the result, the Rule is discharged without any order as to costs.

25. Communicate the order to respondent No. 1 at once.

5 SCOB [2015] HCD 6

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9299 of 2014

Md. Shariful Alam
…… Petitioner

Versus

Joint District Judge, 1st Court and Artha Rin Adalat, Jessore and another.
……Respondents

Mr. Md. Sohel Rana, Advocate
..…. For the petitioner.

Mr. Hassan M.S. Azim, Advocate
…… For the Respondent No. 2

Date of Hearing : 16.06.2015
Date of Judgment : 18.06.2015

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

Artha Rin Adalat Ain 2003:
Section 6
The language used in the section makes it clear that the plaint has to be filed along with an affidavit, both as to the statements made in the plaint as well as to the documents annexed with the plaint. Therefore, non-compliance with the mandatory requirement of law has rendered the plaint invalid in the eye of law and consequently, the impugned order passed by the learned Judge of the Adalat cannot be sustained in law.
... (Para 8)

Judgment

Zubayer Rahman Chowdhury, J :

1. The instant Rule was issued calling in question the legality and propriety of Order No. 10 dated 01.09.2014, as evidence by Annexure- D, passed by the learned Joint District Judge, 1st Court and Artha Rin Adalat, Jessore in Artha Rin Suit No. 42 of 2013 rejecting the petitioners application under order VII, Rule II of the Code of Civil Procedure read with section 57 of Artha Rin Adalat Ain, 2003.

2. Short facts necessary for disposal of the Rule are that respondent no. 2 Bank, as plaintiff, filed Artha Rin Suit No. 42 of 2003 impleading the petitioner as defendant no. 2 for realization of Tk. 10,05,08,707.20 (Taka Ten Crores Five Lacs Eight Thousand Seven Hundred Seven and Paisa Twenty only).

3. During the pendency of the suit, the petitioner filed an application under order VII, Rule II of the Code of Civil Procedure read with section 57 of Artha Rin Adalat Ain, 2003 (briefly, the Ain) for rejection of the plaint filed by the Bank on the ground that the plaint was filed without complying with the mandatory provisions of sub-section 2 of section 6 of the

Ain. The learned Judge of the Adalat, upon hearing the parties, rejected the said application by the impugned Order No. 10 dated 01.09.2014. Being aggrieved thereby, the petitioner filed the instant application.

4. Mr. Md. Sohel Rana, the learned Advocate appearing in support of the Rule has referred to section 6, sub-section 2 of the Ain and submits that the Bank is required to file the plaint along with an affidavit, both as to the facts and the documents annexed with the plaint. However, in the instant case, that has not been done. Consequently, according to Mr. Rana, non-compliance with the mandatory requirements of law has rendered the plaint, as framed and filed by the Bank, invalid in the eye of law. Therefore, the learned Judge of the Adalat erred in rejecting the petitioner's application for rejection of the plaint.

5. The Rule is being opposed by Mr. Hassan M.S. Azim, the learned Advocate appearing for respondent no. 2 Bank by filing an affidavit-in-opposition.

6. Mr. Hassan M.S. Azim, the learned Advocate appearing with Mr. Ashfiqur Rahman Arafat, Advocate on behalf of respondent no.2 Bank submits that the omission on the part of the Bank to file the plaint along with an affidavit is merely an irregularity and not a illegality. The learned Advocate further submits that since the suit is still pending before the Adalat, the Bank has an opportunity to correct the plaint by filing a duly affirmed affidavit, thereby correcting the omission which was made at the time of filing the suit. The learned Advocate further submits that the learned Judge of the Adalat had rightly rejected the petitioners application to order VII, Rule II of the Code of Civil Procedure read with section 57 of the Ain and therefore, the impugned order does not warrant any interference from this Court.

7. We have perused the instant application and considered the submission advanced by both the learned Advocates of the contending sides.

8. A reading of sub-section 2 of section 6 of the Ain makes it abundantly clear that the requirement laid down in the section are mandatory and not obligatory or directory in nature. The language used in the section makes it clear that the plaint has to be filed along with an affidavit, both as to the statements made in the plaint as well as to the documents annexed with the plaint. Therefore, non-compliance with the mandatory requirement of law has rendered the plaint invalid in the eye of law and consequently, the impugned order passed by the learned Judge of the Adalat cannot be sustained in law.

9. However, in our view, the learned Judge of the Adalat, in compliance with the mandatory requirement of section 2(6) of the Ain, ought to have directed the plaintiff Bank to correct the defect in the plaint by filing an affidavit in support of the statement made in the plaint as well as the documents annexed thereto. However, without doing so, the learned Judge erred in rejecting the application out right by the impugned order dated 01.09.2014.

10. We are of the view that instead of issuing a Rule and stopping all further proceedings of the suit, the writ petition may be disposed of with an appropriate direction. Accordingly, we are direct the learned Judge to afford an opportunity to the Bank to file an affidavit with regard to the statement made in the plaint as well as the documents filed in support of the plaint with a period of 4(four) weeks from the date of receipt of this order.

11. The learned Judge shall also provide an opportunity to the defendants to file a reply, if so advised, within a period of 4(four) weeks from the date of filing of the amended plaint, as

indicated above. Thereafter, the learned Judge shall proceeded with the suit in accordance with law.

12. With the observation and directions made above, the Rule is disposed of.

13. The order of stay of all further proceedings of Artha Rin Suit No. 42 of 2013, granted at the time of issuance of the Rule, is hereby vacated.

14. There will be no order as to cost.

15. The office is directed to communicate the order forthwith.

5 SCOB [2015] HCD 9

High Court Division

CRIMINAL APPEAL NO. 4289 OF 2009
WITH
CRIMINAL APPEAL NO. 4322 OF 2009
WITH
CRIMINAL APPEAL NO. 4324 OF 2009
WITH
CRIMINAL APPEAL NO. 4358 OF 2009
WITH
JAIL APPEAL NO. 452 OF 2009
WITH
JAIL APPEAL NO. 453 OF 2009
AND
DEATH REFERENCE NO. 43 OF 2009

Abdul Mazid @ Khoka
….Condemned-appellant.
Versus
The State
….Respondent.
-And-
Abdur Rahman
…Condemned-appellant.
Versus
The State
….Respondent.
-And-
Md. Faruk @ Faruk and others
…Convict-appellants.
Versus
The State
….Respondent.
-And-
Asadul
…Convict-appellant.
Versus
The State
….Respondent.
-And-
Abdul Mazid @ Khoka
…Condemned-appellant.
Versus
The State
…Respondent.
-And-
Abdur Rahman
…Condemned-appellant.
Versus
The State
….Respondent.
The State
…..Petitioner
Versus
Abdul Mazid @ Khoka and another
…..Condemned-prisoners.

Mr. Md. Nazrul Islam Khan with
Mr. Md. Golam Rabbani, Advocates
….For the condemned-appellant in Criminal Appeal No. 4289 of 2009.
Mr. Moudud Ahmed with
Mr. Sheikh Muhammed Sirajul Islam,
Mr. Md. Kalimullah Mazumder,
Mr. Anwarul Islam Shahin and
Ms. Tasmia Prodhan, Advocates
….For the condemned-appellants in Criminal Appeal Nos. 4322 of 2009 and 4358 of 2009.

Mr. Md. Shamsur Rahman, Advocate
For the appellants in Criminal Appeal No. 4324 of 2009.

Mr. Md. Hatem Ali, Advocate appointed by the National Legal Aid Committee, Dhaka, Bangladesh.
.....For the condemned-appellant in Jail Appeal No. 452 of 2009.

Mr. Md. Khabir Uddin Bhuiyan, Advocate appointed by the National Legal Aid Committee, Dhaka, Bangladesh.
.....For the condemned-appellant in Jail Appeal No. 453 of 2009.

Mr. Md. Khurshedul Alam, DAG with
Mr. Delowar Hossain Somadder, AAG and
Mrs. Mahmuda Parveen, AAG
....For the State in Criminal Appeal Nos. 4289 of 2009, 4322 of 2009, 4324 of 2009 and 4358 of 2009 and Jail Appeal Nos. 452 of 200 and 453 of 2009 and Death Reference No. 43 of 2009.

Heard on 24.01.2013, 27.01.2013, 28.01.2013,29.01.2013 & 30.01.2013. Judgment on 03.02.2013 & 04.02.2013.

Present:
Mr. Justice Moyeenul Islam Chowdhury
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

Evidence of interested witnesses:
The rule that the evidence of interested witnesses requires corroboration is not an inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. ... (Para 107)

Prosecution must bear the responsibility for all its laches and lapses:
In the present case before us, there are many laches and lapses as noticed above and those lapses may be by default or by design and the prosecution must bear the responsibility for all its laches and lapses. ... (Para 122)

Section 342 and 537 of CrPC:
Assuming for the sake of argument that the accused-appellant Abdul Mazid was examined by the learned trial Judge in a slipshod and cavalier fashion, that is curable by Section 537 of the Code of Criminal Procedure and in this perspective, the question of suffering any prejudice by the accused-appellant Abdul Mazid in his defence can not be acceptable to us. ... (Para 124)

Penal Code, 1860
Section 302
Benefit of doubt:
From the foregoing discussions and in the facts and circumstances of the case, it is ex-facie clear that the defence version of the case has received some indication or support from the cross-examination of some of the prosecution witnesses as detailed above. Consequently, we are inclined to award the benefit of doubt to the accused-appellants. ... (Para 131)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. The Criminal Appeal Nos. 4289 of 2009, 4322 of 2009, 4324 of 2009, 4358 of 2009 and the Jail Appeal Nos. 452 of 2009 and 453 of 2009, at the instance of the convict-appellants, are directed against the judgment and order of conviction and sentence dated 22.06.2009 passed by the learned Additional Sessions Judge, 1st Court, Bogra in Sessions Case No. 14 of 2002 arising out of G. R. Case No. 242 of 1999 corresponding to Adamdighi Police Station Case No. 13 dated 25.12.1999. By the impugned judgment and order, the learned Additional Sessions Judge convicted the appellant Abdul Mazid @ Khoka under Sections 302/34/307 and the appellant Md. Abdur Rahman under Sections 302/34 of the Penal Code,1860 and sentenced each of them thereunder to death and also convicted the appellant Faruk, son of Abdul Jalil and Asadul under Sections 302/34/324 of the Penal Code and sentenced them thereunder to suffer imprisonment for life and to pay a fine of Tk.50,000/- each, in default, to suffer imprisonment for a further period of 3(three) years

each and further convicted the appellants Maznu, Bhola and Shutka under Sections 302/34/323 of the Penal Code and sentenced them thereunder to suffer imprisonment for life and to pay a fine of Tk. 50,000/- each, in default, to suffer imprisonment for a further period of 3(three) years each and acquitted the co-accused Bakul, Zano, Sirajul, Shahidul, Anisur, Mukul, Jamal, Abul, Abdur Rahim, Ferdous, Delwar and Faruk, son of Anisur of the charge levelled against them under Sections 302/34/324/323 of the said Code.

2. The learned Additional Sessions Judge also made a Reference to the High Court Division under Section 374 of the Code of Criminal Procedure for confirmation of the death sentence imposed upon the two condemned-prisoners, namely, Abdul Mazid @ Khoka and Md. Abdur Rahman.

3. All the appeals and the Death Reference have been heard together and are disposed of by this consolidated judgment.

4. The prosecution version of the case, in short, is as follows:

On 24.12.1999 at 2:00 A.M., the accused Ferdous and Faruk set ablaze the haystack in the courtyard of the informant-party at village Jurpukuria under Police Station Adamdighi, District- Bogra and the informant-party and the villagers came to the spot and extinguished the fire. Thereafter the informant-party went to the house of the local Chairman, namely, Towhidul Islam to apprise him of this incident. When the informant-party were returning from the house of the Chairman at 6:00 A.M., the accused Abdul Mazid @ Khoka, Maznu, Anisur, Mukul, Bakul, Faruk son of Anisur, Jamal, Abul, Sirajul, Zano, Rahim, Abdur Rahman, Asadul, Ferdous, Faruk, Shutka, Delwar, Bhola and Shahidul being variously armed with deadly weapons encircled them in their courtyard and the accused Abdul Mazid ordered the co-accused to beat up the informant-party. At this, the accused Abdur Rahman dealt a Chinese axe blow on the head of the father of the informant Md. Ishak Ali, namely, Ismail as a result of which he fell down on the ground. Then the accused Abdul Mazid landed a Chinese axe blow on the head of Mozammel resulting in a bleeding injury thereon. The accused Bakul dealt a knife blow on the left eye of the witness Moslem and the accused Maznu assaulted the witness Aminul with a lathi. The accused Zano dealt a knife blow on the right elbow of the witness Lutfor and a knife blow on the back of the witness Alamgir. The accused Asadul landed fala blows on the left forehead and left ear of the witness Sirajul and the accused Sirajul assaulted the witness Jalal with a lathi. The accused Faruk landed a Chinese axe blow on the head of the witness Rashid and the accused Shutka inflicted lathi blows on the right ear of the witness Saiful and the accused Shahidul struck the left wrist of the witness Azizar with a lathi. The accused Bhola dealt ram dao blows on the right occipital region, left elbow and wrist of the informant Md. Ishak Ali. Thereafter all the accused damaged the doors and windows of the house of the informant. Eventually the accused took to their heels following an outcry from the informant-party and the informant Md. Ishak Ali lodged an ejahar with Adamdighi Police Station against the accused.

5. The Investigating Officer of the case is Sub-Inspector Md. Riaz Uddin of Adamdighi Police Station, Bogra. During investigation, he visited the place of occurrence, made a sketch-map thereof along with a separate index, examined witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. However, having found a prima facie case, the Investigating Officer Sub-Inspector Md. Riaz Uddin submitted charge-sheet no. 30 dated 30.03.2000 against the appellants and others under Sections 148/ 149/448/323/324/302/34/427/435/114 of the Penal Code.

6. At the commencement of the trial of the case, the learned trial Judge charged all the accused under Sections 302/34 and also charged the accused Abdul Mazid and Faruk under Section 307 and further charged the accused Bakul, Asadul and Bhola under Section 324 and also charged the accused Maznu, Sirajul, Shutka and Shahidul under Section 323 of the Penal Code. The charge with various heads was read over and explained to the accused in the dock; but they pleaded not guilty thereto and claimed to be tried as per law.

7. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses, is that they are innocent and have been falsely implicated in the case out of enmity arising from land disputes at the behest of the local Chairman Towhidul Islam and the victim Ismail might have sustained the fatal head-injury at the hands of some unknown terrorist youths resulting in his eventual death at Rajshahi Medical College Hospital.

8. After hearing both the prosecution and the defence and on an appraisal of the evidence and materials on record and having regard to the attending circumstances of the case, the Court below came to the finding that the prosecution brought the charge home against all the appellants and accordingly, it convicted and sentenced them by the impugned judgment and order as aforesaid.

9. Being aggrieved at and dissatisfied with the impugned judgment and order, all the convict-appellants have preferred the appeals. As already observed, the learned trial Judge has also made a statutory reference to the High Court Division for confirmation of the death sentence imposed upon the condemned-prisoners, namely, Md. Abdul Mazid and Abdur Rahman.

10. The only point for determination in the appeals and the Death Reference is whether the impugned judgment and order dated 22.06.2009 is sustainable in law or not?

11. At the outset, Mr. Md. Golam Rabbani, learned Advocate appearing on behalf of the appellant Abdul Mazid in Criminal Appeal No. 4289 of 2009, submits that according to the FIR and the evidence on record, Abdul Mazid was the order-giver and he landed a Chinese axe blow on the head of Mozammel (P.W. 3); but curiously enough, the doctor concerned was not examined by the prosecution in order to prove the alleged injury sustained by Mozammel at the hands of the appellant Abdul Mazid and in this view of the matter, it is crystal clear that no conviction can be recorded against the accused Abdul Mazid under Section 307 of the Penal Code; but the learned trial Judge erroneously convicted the appellant Abdul Mazid thereunder by the impugned judgment causing a miscarriage of justice.

12. Mr. Md. Golam Rabbani next submits that some of the allegedly injured witnesses, that is to say, Moslem, Lutfor, Alamgir, Jalal and Azizar were not admittedly examined by the prosecution in support of the prosecution version of the case and since they are star prosecution witnesses, their non-examination definitely casts doubt as to the veracity of the prosecution story and in this regard, Section 114- Illustration (g) of the Evidence Act, 1872 may be called in aid.

13. Mr. Md. Golam Rabbani further submits that indisputably the P.W. 3 Mozammel @ Md. Mozam and P.W. 11 Md. Emdadul Haque are witnesses to the inquest held on the deceased Ismail on 03.01.2000; but surprisingly enough, the inquest-report is conspicuously

silent about the names of the accused and their alleged overt acts and given this scenario, the prosecution case is doubtful, though the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are the professed eye-witnesses to the occurrence; but the lower Court did not consider this aspect of the case causing a failure of justice.

14. Mr. Md. Golam Rabbani also submits that the examination of the convict-appellant Abdul Mazid under Section 342 was not done in accordance with the provisions of Section 364 of the Code of Criminal Procedure and as such the accused Abdul Mazid was prejudiced in his defence entitling him to an order of acquittal.

15. Mr. Md. Golam Rabbani further submits that it is in the cross-examination of the P.W. 1 Md. Ishak Ali that there was blood-stained earth to the extent of $1/1\frac{1}{2}$ feet at the courtyard (place of occurrence); but admittedly the Investigating Officer (P.W. 9) failed to seize the blood-stained earth therefrom and the non-seizure of any blood-stained earth therefrom renders the prosecution case doubtful.

16. Mr. Sheikh Muhammed Serajul Islam, learned Advocate appearing on behalf of the appellants in Criminal Appeal Nos. 4322 of 2009 and 4358 of 2009, contends that according to the prosecution version of the case, the condemned-prisoner Abdur Rahman allegedly landed a Chinese axe blow on the head of Ismail resulting in his eventual death; but the alleged injury sustained by the deceased Ismail at the hands of the accused Abdur Rahman was an irregular and uneven lacerated injury as found by the P.W. 7 Dr. Md. Emdadur Rahman during autopsy and since as per the medical evidence on record, the deceased Ismail did not receive any penetrating injury in view of the fact that a Chinese axe is a sharp-cutting weapon, the prosecution case is necessarily doubtful.

17. Mr. Sheikh Muhammed Serajul Islam also contends that the P.W. 4 Md. Sirajul Islam has testified that the accused Asadul dealt a fala blow on his left ear; but the P.W. 12 Dr. Md. Gaziul Haque did not find any injury on the left ear of the P.W. 4 and by that reason, the story of sustaining any injury by the P.W. 4 Md. Sirajul Ialam at the hands of the accused-appellant Asadul does not inspire any confidence at all.

18. Mr. Sheikh Muhammed Serajul Islam further contends that the inquest-report dated 03.01.2000 (Exhibit-7), it is admitted, does not indicate the name of any accused and this is unnatural in that the ejahar was undeniably lodged with the concerned Police Station on 25.12.1999 and that being so, the case appears to be shrouded in mystery.

19. Mr. Sheikh Muhammed Serajul Islam next contends that the P.W. 10 Md. Abdur Rahman is the inquest-holding officer and it is in his cross-examination that he could not know the names of the terrorists who killed Ismail and it is undisputed that the P.W. 3 Mozammel and P.W. 11 Md. Emdadul Haque were witnesses to the inquest-report (Exhibit-7) and this being the position, it does not stand to reason and logic as to why they failed to divulge the actual occurrence to the P.W. 10 Md. Abdur Rahman at the time of holding of the inquest on the deceased Ismail and this state of affairs is a pointer to the fishy character of the prosecution story.

20. Mr. Moudud Ahmed, another learned Advocate appearing for the condemned-appellant Abdur Rahman, argues that all the alleged eye-witnesses to the occurrence, namely,

the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam being inter-related are interested and partisan witnesses and in view of the facts and circumstances of the case, it seems that the ocular evidence of those prosecution witnesses is tainted with blemish and suspicion and a man of ordinary prudence will be reluctant to attach any credence to their testimony; but the learned trial Judge erroneously relied upon the direct evidence of the P.W. 1 to P.W.6 without caring a fig for the attending circumstances of the case and thereby illegally convicted and sentenced the appellant Abdur Rahman.

21. Mr. Moudud Ahmed further argues that it is ex-facie clear from the prosecution evidence on record that the first incident of burning of the haystack at the place of occurrence at the relevant time by the accused Faruk and Ferdous was not proved at all in view of the statement made by the P.W. 9 Md. Riaz Uddin in his cross-examination that not a single witness narrated that incident to him nor did he find any alamats of fire during investigation of the case and viewed from this standpoint, the prosecution case is suspect.

22. Mr. Moudud Ahmed next argues that according to the prosecution version of the case, the alleged occurrence of killing of Ismail took place on 24.12.1999 at 6:00 A.M. at his courtyard and it is in the evidence of some of the alleged eye-witnesses that in winter, the sun did not rise at 6:00A.M. meaning thereby that at the alleged time of the occurrence, it was dark and no means of recognition were disclosed by any of the alleged eye-witnesses and the non-disclosure of means of recognition of the accused by them renders the prosecution story suspicious.

23. Mr. Moudud Ahmed also argues that it is clear from the cross-examination of the P.W. 6 Md. Saiful Islam and P.W. 9 Md. Riaz Uddin that the victim Ismail was done to death by some unknown terrorists; but this dimension of the case was not taken into account by the learned trial Judge causing grave prejudice to the accused-party.

24. Mr. Md. Shamsur Rahman, learned Advocate appearing on behalf of the appellants of Criminal Appeal No. 4324 of 2009, contends that it is the definite assertion of the prosecution that the accused Bhola dealt ram dao blows on the back of the head, left elbow and left wrist of the informant Ishak Ali and the accused Maznu assaulted the P.W. 2 Md. Aminul Islam with a lathi and the accused Faruk landed a Chinese axe blow on the head of Abdur Rashid (P.W.5) and the accused Shutka dealt lathi blows on the right ear of the P.W. 6 Md. Saiful Islam; but no medical evidence is forthcoming on record in support of the above injuries and in the absence of any medical evidence in that regard, the claim of the prosecution falls to the ground.

25. Mr. Md. Shamsur Rahman further contends that the local Chairman Towhidul Islam was not examined on the side of the prosecution, though his evidence appears to be material to the nexus between the alleged first incident of burning of the haystack at 2:00A.M. and the alleged subsequent incident of assault on the informant-party by the accused-party at 6:00A.M. on 24.12.1999 and the non-examination of the Chairman Towhidul Islam undoubtedly throws some doubt about the veracity of the prosecution story.

26. Mr. Md. Shamsur Rahman next contends that although the other accused, namely, Bakul, Zano, Sirajul, Shahidul, Anisur, Mukul, Jamal, Abul, Abdur Rahim, Ferdous, Faruk and Delwar were acquitted of the charge levelled against them under Sections 302/34 of the Penal Code by the learned trial Judge, he did not assign any reason as to why he convicted

and sentenced the appellants of the Criminal Appeal No. 4324 of 2009 standing on the same footing with the acquitted accused and as such it seems that the learned trial Judge arbitrarily convicted and sentenced the appellants of the Criminal Appeal No. 4324 of 2009 by the impugned judgment.

27. Mr. Md. Shamsur Rahman further contends that it is in the cross-examination of the P.W. 9 Md. Riaz Uddin that the prosecution witnesses concerned did not state the names of the appellants of the Criminal Appeal No. 4324 of 2009 to him at the time of their examination under Section 161 of the Code of Criminal Procedure and in such view of the matter, it leaves no room for doubt that the implication of those appellants in the commission of the alleged offence is clearly an afterthought.

28. Mr. Md. Hatem Ali, learned Advocate appearing on behalf of the appellant in Jail Appeal No. 452 of 2009, submits that regard being had to the attending circumstances of the case, the lower Court should have acquitted the Jail appellant Md. Abdul Mazid of the charge levelled against him.

29. Mr. Md. Khabir Uddin Buhiyan, learned Advocate appearing on behalf of the appellant in Jail Appeal No. 453 of 2009, submits that the Jail appellant Abdur Rahman has been falsely implicated in the case and this false implication gets support from the cross-examination of the Investigating Officer Md. Riaz Uddin (P.W. 9) and as such the appellant Abdur Rahman should be acquitted of the charge brought against him.

30. In support of the above submissions, the defence mainly relies upon the decisions in the cases of Babor Ali Mollah and others……Vs… The State, 44 DLR(AD)11; Sk. Shamsur Rahman @ Shamsu …Vs….The State, 10BLD (AD) 251 and Abdur Rashid and another…Vs…The State, 6BLC (HCD) 225.

31. Per contra, Mr. Md. Khurshedul Alam, learned Deputy Attorney-General appearing on behalf of the State-respondent and in support of the Death Reference, contends that the 6(six) star prosecution witnesses, namely, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam proved the prosecution case beyond all reasonable doubt and as such the learned trial Judge did not commit any illegality in convicting and sentencing the appellants by the impugned judgment.

32. Mr. Md. Khurshedul Alam also contends that although the star prosecution witnesses, that is to say, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are inter-related and interested witnesses; yet the fact remains that their evidence is truthful and as they did not resort to any falsehood, the lower Court did not commit any illegality in relying on their evidence.

33. Mr. Md. Khurshedul Alam also contends that in furtherance of common intention of all the accused, Ismail was done to death by the accused Abdur Rahman and since all the accused shared the common intention of Abdur Rahman, they can not get off scot-free in this gruesome murder case and the learned trial Judge lawfully convicted and sentenced the appellants by the impugned judgment.

34. Mr. Md. Khurshedul Alam also contends that the appellant Abdul Mazid being a literate person was capable of understanding the deposition of the prosecution witnesses and since no objection was raised by the defence against the alleged slipshod manner of his examination under Section 342 of the Code of Criminal Procedure, the irregularly, if any, is curable by Section 537 of the Code of Criminal Procedure.

35. Mr. Md. Khurshedul Alam next contends that the investigation of the case was not carried out properly by the P.W. 9 Md. Riaz Uddin and by that reason, the ocular evidence of the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam can not be thrown overboard and the Court below was perfectly justified in recording of the order of conviction and sentence against the appellants.

36. In order to buttress up the above contentions, Mr. Md. Khurshedul Alam has drawn our attention to the decisions in the cases of Yogeshwar Gope ….Vs…. The State, 58 DLR (AD) 73; The State represented by the Solicitor, Ministry of Law & Justice, Government of Bangladesh…Vs….Montu @ Nazrul Haque & others, 44 DLR(AD)287 and Mostafa (Md)….Vs…The State, 1 BLC(HCD)82.

37. In view of the submissions of the learned Advocates Mr. Md. Golam Rabbani, Mr. Sheikh Muhammad Serajul Islam, Mr. Moudud Ahmed, Mr. Md. Shamsur Rahman, Mr. Md. Hatem Ali and Mr. Md. Khabir Uddin Bhuiyan and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Khurshedul Alam, we are to review the entire evidence on record in order to arrive at a correct decision in this case.

38. Anyway, the prosecution has examined 12(twelve) witnesses in all on its side. But the defence has examined none.

39. The informant Md. Ishak Ali has examined himself as P.W. 1 in the case. He deposes that on 24.12.1999 at 2:00A.M., the accused Ferdous and Faruk set fire to the haystack at their courtyard and the villagers came forward and extinguished the fire and subsequently they (informant-party) went to the house of the Chairman at Adamdighi.

40. The P.W. 1 Md. Ishak Ali further deposes that while they were returning from the house of the Chairman, the accused Abdul Mazid, Maznu, Anisur, Mukul, Bakul, Faruk, son of Anisur, Jamal, Abul, Sirajul, Zano, Rahim, Abdur Rahman, Asadul, Ferdous, Faruk, Shutka, Delwar, Bhola and Shahidul encircled them on 24.12.1999 at 6:00 A.M. and Abdul Mazid ordered the co-accused to beat up the informant-party and at this, the accused Abdur Rahman dealt a Chinese axe blow on the head of his father, namely, Ismail in consequence of which Ismail fell down on the ground in bleeding condition and the accused Abdul Mazid landed a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of the witness Moslem and the accused Maznu assaulted the witness Aminul with a lathi and the accused Zano landed knife blows on the right elbow of the witness Lutfor and on the back of the witness Alamgir and the accused Asadul dealt fala blows on the left forehead and left ear of the witness Sirajul and the accused Sirajul struck the chest of the witness Jalal with a lathi and the accused Faruk landed a Chinese axe blow on the head of the witness Rashid and the accused Shutka dealt a lathi blow on the right ear of the witness Saiful and the accused Shahidul dealt lathi blows on the left wrist of the witness Azizar and the accused Bhola dealt ram dao blows on the right side of his (P.W. 1) occipital

region, left elbow and left wrist and thereafter the accused damaged the doors and windows of his house and at their outcry, the villagers came forward and the accused fled away.

41. The P.W. 1 Md. Ishak Ali further deposes that they whisked away the injured witnesses to Adamdighi Health Complex and since the condition of his father Md. Ismail and Mozammel was critical, they were brought to Naogaon Sadar Hospital and Naogaon Sadar Hospital Authority referred them to Rajshahi Medical College Hospital and on 03.01.2000, Ismail died there.

42. The P.W. 1 Md. Ishak Ali also deposes that on 25.12.1999, he lodged an ejahar with the concerned Police Station (Exhibit-1) and on 04.01.2000, the Investigating Officer seized a torn vest, a piece of blood-stained panjabi and a kiriz as per seizure-list (Exhibit-2) and he signed the seizure-list as a witness.

43. In his cross-examination, the P.W. 1 Md. Ishak Ali states:

"ঘটনার সময় বেলা উঠে উঠে ভাব । আমার পিতা আঘাত প্রাপ্ত হইয়া মাটিতে পড়ে। মাটিতে রক্ত ঝড়ে প্রায় 1/1½ gV জায়গায়। চাইনিজ কুড়াল দিয়া জানালায় আঘাত করে এবং আলমারী ভাংগে।"

44. In his cross-examination, the P.W. 1 Md. Ishak Ali further states that they showed the Investigating Officer the blood-stained earth and a broken steel almirah, but the Investigating Officer did not seize the blood-stained earth.

45. In his cross-examination, the P.W. 1 Md. Ishak Ali further states that Md. Emdadul Haque (P.W. 11) knew as to how the occurrence took place and his father purchased 0.03 acres of land and disputes arose with regard to that land; but the parties had been at loggerheads with each other from before.

46. In his cross-examination, the P.W. 1 Md. Ishak Ali also states:

"Bpj£NZ ®dL¡ দিবার জন্য আমাদের বিরুদ্ধে মামলা করে। তাহারা মিথ্যা মামলা করে। তাহাদের মামলা আগের, I j¡jm¡u discharged হয়। ইহার বিরুদ্ধে revision quz"

47. In his cross-examination, the P.W. 1 Md. Ishak Ali denies a defence suggestion that he has filed the case falsely as per the directive of the Chairman Towhidul Islam.

48. The P.W. 2 is Md. Aminul Islam. He testifies that on 24.12.1999 at 2:00A.M., the accused Ferdous and Faruk caused the first incident of burning of the haystack at the courtyard of Ismail and there was a hue and cry and the villagers put out the fire and Ismail and his sons went to the house of the Chairman at Adamdighi.

49. The P.W. 2 Md. Aminul Islam also testifies that on 24.12.1999 at 6:00A.M., he came out of his house and saw an assemblage of 30/35 people including the accused Abdul Mazid, Maznu, Bakul, Mukul, Faruk, Jamal, Abul, Sirajul, Zano, Rahim, Abdur Rahman, Asadul, Ferdous, Faruk, Shutka, Delwar, Shahidul, Bhola and others and the accused Abdul Mazid told the co-accused to assault the informant-party and at this, the accused Abdur Rahman landed a Chinese axe blow on the head of Ismail and the accused Abdul Mazid landed a Chinese axe blow on the head of Mozam and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Zano dealt knife blows on the right hand of Lutfor and the back of Alamgir and the accused Maznu struck his (P.W. 2) chest with a lathi and the accused Bhola dealt a ram dao blow on the occipital region of Ishak and the accused Faruk

dealt a Chinese axe blow on the head of Rashid and the accused Asadul dealt a fala blow on the left ear of Sirajul and the accused Shutka struck the right ear of Saiful with a lathi and the accused Shahidul struck the left hand of Azizar with a lathi and the accused Sirajul assaulted Jalal with a lathi and thereafter the accused damaged the doors and windows of the house of Ismail and went away.

50. The P.W. 2 Md. Aminul Islam next testifies that the injured were brought to Adamdighi Hospital and ultimately Ismail and Mozammel were referred to Rajshahi Medical College Hospital and while Ismail was under treatment there, he died on 03.01.2000.

51. In his cross-examination, the P.W. 2 Md. Aminul Islam states:
"ঘটনার সময় বেলা উঠে নাই। আমি পায়খানা হইতে বাহির হইয়া ঘটনা দেখি। B¢j Aacl i¡m L¢lu¡ ®c¢M e¡Cz"

52. In his cross-examination, the P.W. 2 Md. Aminul Islam admits that Ismail is his maternal uncle as a neighbour and the distance between his house and that of Ismail is about 500/600 feet and he did not see the setting of the haystack on fire.

53. In his cross-examination, the P.W. 2 Md. Aminul Islam states that Ismail purchased land to the extent of 0.03 acres from Shahadat and disputes arose out of the purchase of the land.

54. The P.W. 3 is Mozammel. He states in his evidence that about three years back in the month of Ramadan at 2:00A.M., the accused Faruk and Ferdous set fire to the haystack of Ismail as he learnt from Ishak (P.W. 1) and the fire was doused.

55. The P.W. 3 Mozammel also states in his evidence that Ismail and his sons went to the Chairman at Adamdighi and they came back at about 6:00A.M. and he (P.W.3) came out of his house at that time and heard an outcry from the courtyard of Ismail and saw that the accused Abdul Mazid, Maznu, Mukul, Bakul, Faruk, Jamal, Abul, Sirajul, Rahim, Zano, Abdur Rahman, Asadul, Ferdous, Faruk son of Jalil, Shutka, Delwar, Shahidul and others had encircled the informant-party and the accused Abdul Mazid ordered the accused Abdur Rahman to catch hold and then Abdur Rahman dealt a Chinese axe blow on the head of Ismail and Abdul Mazid dealt a blow on his head and he lost his senses and regained the same at Rajshahi on the following day at about 4:30 P.M. and he was treated by the doctor and ultimately he was discharged.

56. The P.W. 3 Mozammel further states in his evidence that after 4(four) days, he found the informant Ishak at Adamdighi Bus Stand and saw a bandage over his head and Ishak told him that the accused Bhola struck him with a ram dao and the accused Bakul dealt a knife blow on the eye of Moslem and the accused Maznu struck the chest of Aminul with a lathi and the accused Faruk landed a Chinese axe blow on the head of Rashid and Alamgir, Lutfor, Saiful, Sirajul and Jalal were also injured.

57. In his cross-examination, the P.W. 3 Mozammel clearly admits that he did not see the act of setting fire to the haystack.

58. In his cross-examination, the P.W. 3 Mozammel denies a defence suggestion that he has deposed falsely on being tutored.

59. The P.W. 4 is Md. Sirajul Islam. He claims in his evidence that about 3 (three) years back in the month of Ramadan at about 2:00A.M. he woke up from sleep on hearing a hue and cry and then came to the courtyard of Ismail and all of them doused the fire which was set by the accused Ferdous and Faruk as he heard and Ismail told that they would approach the Chairman Towhidul Islam and thereafter he (P.W. 4) left the spot.

60. The P.W. 4 Md. Sirajul Islam also claims in his evidence that he again heard an outcry at 6:00 A.M. and came out and saw Ismail and his sons were engaged in altercations with the accused-party and the accused Abdul Mazid ordered to finish the informant-party off and then Abdur Rahman landed a Chinese axe blow on the head of Ismail and the accused Abdul Mazid dealt a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Maznu struck the chest of Aminul with a lathi and the accused Zano dealt knife blows on Lutfor and Alamgir and the accused Asadul dealt a fala blow on his (P.W. 4) left ear and the accused Sirajul struck the chest of Jalal with a lathi and the accused Faruk landed a Chinese axe blow on the head of Rashid and the accused Shutka struck the right ear of Saiful with a lathi and the accused Shahidul struck the left wrist of Azizar with a lathi and the accused Bhola dealt a ram dao blow on the occipital region of Ishak and at the sight of the people, the accused fled away

61. The P.W. 4 Md. Sirajul Islam next claims in his evidence that they (injured persons) were admitted to the Hospital and the injured Mozammel and Ismail were taken to Naogaon from Adamdighi Health Complex and ultimately those two persons were shifted to Rajshahi and while he was under treatment in Rajshahi, Ismail died.

62. In his cross-examination, the P.W. 4 Md. Sirajul Islam categorically admits:
"দ্বিতীয় ঘটনার সময় বেলা উঠে নাই।"

63. In his cross-examination, the P.W. 4 Md. Sirajul Islam states that he does not remember as to who held a Chinese axe in his hand and at the time of the assault, about 30/40 people came to the spot; but he can not tell their names.

64. In his cross-examination, the P.W. 4 Md. Sirajul Islam further states that he took his 'Sehri' at about 4:00/4:30 A.M. on his return from the place of occurrence and he did not see any blood-stained earth at the courtyard of Ishak.

65. The P.W. 5 is Md. Abdur Rashid. He gives out in his evidence that on 24.12.1999 at 2:00 A.M., the accused Ferdous and Faruk set ablaze the haystack at their courtyard and the villagers came forward and doused the fire and they (P.W. 5 and others) went to the house of the Chairman at Adamdighi and while they were returning from the house of the Chairman, the accused-party being variously armed lay in ambush near the courtyard and encircled them.

66. The P.W. 5 Md. Abdur Rashid further gives out in his evidence that at the directive of the accused Abdul Mazid, the accused Abdur Rahman landed a Chinese axe blow on the head of Ismail and the accused Abdul Mazid inflicted a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Maznu assaulted the face of Aminul with a lathi and the accused Zano dealt knife blows on Lutfor and Alamgir and the accused Asadul dealt a fala blow on the left ear of Sirajul and the accused Sirajul struck the chest of Jalal with a lathi and the accused Faruk dealt a Chinese axe blow on his (P.W. 5) head and the accused Shutka struck the right ear of

Saiful with a lathi and the accused Shahidul struck the left wrist of Azizar with a lathi and the accused Bhola dealt a ram dao blow on the parietal region of Ishak and thereafter the accused entered their house by breaking open its doors and windows and at their outcry, the villagers came forward, but the accused fled away.

67. The P.W. 5 Md. Abdur Rashid next gives out in his evidence that the villagers whisked away the injured to Adamdighi Hospital for treatment and the injured Ismail and Mozammel were brought to Nagoaon Sadar Hospital for better treatment and ultimately they were referred to Rajshahi Medical College Hospital for advanced treatment and on 03.01.2000, Ismail died there.

68. In his cross-examination, the P.W. 5 Md. Abdur Rashid unmistakably states:

> "B…e ®L m¡Nju ®Vl f¡C e¡Cz NËh¡p£l চিৎকারে বাড়ীর বাহিরে আসি, আগুন জ্বম¡ ®c¢M, NËh¡p£ B…e নিভাচ্ছিল, আমি নি i¡চ্ছিলাম।"

69. In his cross-examination, the P.W.5 Md. Abdur Rashid also states:

> "শাহাদতের কাছ থেকে আমরা খলিয়ান নেই, শাহাদত তার বাবা জহিরের কাছ থেকে f¡uz S¢ql j¡রা গেলে তার ৩টা মেয়ে mvge, B'u¡l¡ J gরিদা (সকলে বিবাহিতা)। লুৎফনের স্বামী BLL¡R, ফরিদার স্বামী জালাল ও আজ্জুয়ারার বিয়ে আঃ মজিদের সাথে হয়। এরাও ঐ জমির অংশ পেয়েছে। খলিয়ানের জমিটা ওদের বসত h¡s£l Awnz"

70. In his cross-examination, the P.W.5 Md. Abdur Rashid next states that at the time of the occurrence, the day was a bit clear and he did not state to the Investigating Officer that the accused had damaged the doors and windows of their house.

71. In his cross-examination, the P.W.5 Md. Abdur Rashid further states that the name of the Chairman is Towhidul Islam and Towhidul Islam and Anisur were candidates for the post of the Chairman and the accused supported Anisur in the election.

72. In his cross-examination, the P.W.5 Md. Abdur Rashid also states that Anisur lodged a case prior to their case and this is why, the police came to the hospital; but the police did not arrest them because they were under treatment.

73. In his cross-examination, the P.W.5 Md. Abdur Rashid also states that it is not possible to say who of the accused assaulted whom and in what manner during the occurrence.

74. The P.W. 6 is Md. Saiful Islam. He asserts in his evidence that on 24.12.1999, the accused Ferdous and Faruk set ablaze the haystack at their courtyard and the people extinguished the fire and they (P.W. 6 and others) went to the house of the Chairman at Adamdighi Bazaar in order to inform him of the incident and while they were on their way back to their house, the accused-party being variously armed lay in ambush at the courtyard and encircled them.

75. The P.W. 6 Md. Saiful Islam further asserts in his evidence that as per the order of the accused Abdul Mazid, the accused Abdur Rahman dealt a Chinese axe blow on the head of Ismail and the accused Abdul Mazid landed a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Maznu struck the chest of Aminul with a lathi and the accused Zano dealt knife blows on the right

elbow of Lutfor and the back of Alamgir and the accused Asadul dealt a fala blow on the left forehead of Sirajul and the accused Sirajul struck the chest of Jalal with a lathi and the accused Faruk landed a Chinese axe blow on the head of Abdur Rashid and the accused Shutka struck his (P.W. 6) right ear with a lathi and the accused Shahidul struck the left wrist of Azizar with a lathi and the accused Bhola dealt a ram dao blow on the head of Ishak and thereafter the accused-party entered their house and damaged its doors and windows and when the villagers came forward on hearing their (P.W. 6 and others) outcry, the accused made good their escape.

76. The P.W. 6 Md. Saiful Islam further asserts in his evidence that the villagers whisked away the injured to Adamdighi Hospital and as the condition of Ismail and Mozammel was critical, they were sent to Naogaon Sadar Hospital and eventually both of them were referred to Rajshahi Medical College Hospital for advanced treatment and Ismail died there on 03.01.2000.

77. In his cross-examination, the P.W. 6 Md. Saiful Islam clearly states that he did not narrate the occurrence to anybody and the accused Abdur Rahman is a retired primary school teacher.

78. In his cross-examination, the P.W. 6 Md. Saiful Islam also states:

> "আসামীদের খড়ের পাল¡ ও আমাদের খড়ের পালার ¢ho f¡n¡f¡¢nz Bp¡j£ Bël lqj¡e J
> আমাদের বাড়ী পাশাপাশি। আসামীদের বাড়ী ঘর উঠান পাশাপাশি।"

79. In his cross-examination, the P.W. 6 Md. Saiful Islam also states that the occurrence of assault continued for about half an hour and during that time, many people came to the place of occurrence and saw the occurrence and out of them, there were around ten non-partisan and neutral persons who attempted to save them (informant-party) from the assault of the accused-party and all of them are alive and the names of those ten neutral persons were disclosed to the police.

80. In his cross-examination, the P.W. 6 Md. Saiful Islam next states that the neutral persons also witnessed the act of damage of their house, but they did not offer any resistance.

81. In his cross-examination, the P.W. 6 Md. Saiful Islam admits:

> "সত্য যে প্রথমে যে অভিযোগ হইয়াছিল, Eq¡তে
> বলা হয়েছে যে, সম্এাসী যুবকদের হাতে
> Cpj¡Cm j¡b¡u SMj f§ÿ quz"

82. In his cross-examination, the P.W. 6 Md. Saiful Islam further admits that he is an accused in a case initiated by the present accused-party beforehand and that case is in respect of damage of the houses of the accused-party and the place and time of occurrence of that case are separate.

83. The P.W. 7 is Dr. Md. Emdadur Rahman. He deposes that on 03.01.2000, he held an autopsy on the deceased Ismail Hossain on being identified by Constable No. 609 Md. Shakib Hossain and found the following injury thereon:

> "1.One stitched up semi-healed up wound over left parieto-temporal region ē 22 stitches and 6″ in length. On detailed dissection, left parietal, temporal & frontal bones were found fractured. Subdural haematoma

(clotted blood) detected inside. Margins of the wound were found irregular & uneven."

84. The P.W. 7 Dr. Md. Emdadur Rahman also deposes that in his opinion, the death of Ismail Hossain was due to shock and intra-cranial haemorrhage following the above-mentioned injury which was homicidal in nature.

85. In his cross-examination, the P.W. 7 Dr. Md. Emdadur Rahman states that the injury found on the deceased Ismail Hossain was lacerated, irregular and uneven and it was caused by a blunt weapon and the deceased had signs of a cardiac ailment.

86. The P.W. 8 is Md. Abdul Kadir. The long and the short of his testimony is that on 25.12.1999, he was on duty as Officer-in-Charge of Adamdighi Police Station, Bogra and on that date, on receipt of a written ejahar from the informant Md. Ishak Ali, he registered the instant case by filling in the prescribed form of the First Information Report and he endorsed the case to Sub-Inspector Md. Riaz Uddin for investigation.

87. The P.W. 9 is Md. Riaz Uddin. He testifies that on 25.12.1999, the Officer-in-Charge of Adamdighi Police Station Md. Abdul Kadir registered the case and endorsed the same to him for investigation and having taken up investigation of the case, he visited the place of occurrence, made a sketch-map thereof along with a separate index, examined witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure.

88. The P.W. 9 Md. Riaz Uddin also testifies that while the injured Ismail Hossain was under treatment at Rajahahi Medical College Hospital, he died there and Assistant Sub-Inspector Abdur Rahman held an inquest on the dead body of Ismail Hossain and during investigation, he (P.W.9) seized alamats as per seizure-list and procured a copy of the autopsy-report of the deceased Ismail Hossain and having found a prima facie case, he submitted charge-sheet no. 30 dated 30.02.2000 against the accused under Sections 148/ 149/ 448/ 323/324/326/307/ 435/302/34/427/114 of the Penal Code.

89. In his cross-examination, the P.W. 9 Md. Riaz Uddin states:

"সুরতহাল রিপোর্টে যে কাহিনী এসেছে তা তদন্তে যথার্থই প্রমান হয়েছে। সুরতহাল রিপোর্টের কাহিনী সঠিক বলে প্রমানিত হয়েছে।"

90. In his cross-examination, the P.W. 9 Md. Riaz Uddin further states:

"24|12|1999 Cw তারিখে ভোর ৬.০০ 0tVL¡u St¡jSj¡ pwH²i¿ ®N¡mj¡লে সম্ত্রাসী যুবক দ্বারা মাথায় আঘাতের পর অসুস্থ্য হয়ে স্থানীয়ভাবে পরে নওগাঁ হাসপাতালে J l¡Sn¡q£ ®মডিকেল কলেজে ভর্তি হয়ে মারা যায়।"

91. In his cross-examination, the P.W. 9 Md. Riaz Uddin next states that he submitted charge-sheets in both the cases and the informant-party and their relations and witnesses of this case were the accused-party of the other case arising out of an incident that took place on 24.12.1999 at 5:00 A.M.

92. In his cross-examination, the P.W. 9 Md. Riaz Uddin admits that he did not find any alamats of fire, damage and blood-stain during investigation of the case and no witness stated to him about the story of burning of the haystack.

93. In his cross-examination, the P.W. 9 Md. Riaz Uddin further states that the P.W. 3 Mozammel did not tell him about the implication of the accused Rahim, Maznu, Mukul, Bakul, Zano, Asadul, Ferdous, Faruk, Shutka, Delwar, Bhola and Shahidul in the commission of the offence at the time of his examination under Section 161 of the Code of Criminal Procedure.

94. In his cross-examination, the P.W. 9 Md. Riaz Uddin next states that the P.W. 4 Md. Sirajul Islam did not state to him under Section 161 of the Code of Criminal Procedure that the accused Asadul assaulted him (P.W. 4) or that the accused Sirajul assaulted Jalal or that the accused Faruk assaulted Rashid or that the accused Shutka assaulted Saiful or that the accused Shahidul assaulted Azizar or that the accused Bhola assaulted the informant Md. Ishak Ali.

95. In his cross-examination, the P.W. 9 Md. Riaz Uddin denies defence suggestions that he diverted the investigation of the case to the wrong course on being influenced by the enemies of the accused-party and the Union Parishad Chairman or that he submitted the charge-sheet against the accused-party falsely.

96. The P.W. 10 is Md. Abdur Rahman. He states in his evidence that on 03.01.2000, he was on duty at Rajpara Police Station, Rajshahi and on that day, Unnatural Death Case No. 04 dated 03.01.2000 was endorsed to him for investigation and he along with the accompanying force rushed to the morgue of Rajshahi Medical College Hospital and as per identification of the son of the deceased Ismail, that is to say, Emdadul, he held an inquest on the dead body and during inquest, he found the following injury:

"j¡bj¡l Q¡¢lc hl¡hl 4" f¢lj¡e mðj¡ 21/22 ¢V
®pm¡C kJ² kMj ¢Rmz"

97. The P.W. 10 Md. Abdur Rahman further states in his evidence that after holding of the inquest on the deceased Ismail, he made an inquest-report (Exhibit-7) and took the signatures of the witnesses thereon and it transpired that Ismail had died as a result of the assault perpetrated on him by the terrorists because of land disputes.

98. In his cross-examination, the P.W. 10 Md. Abdur Rahman states that he could not know the names of the terrorists.

99. The P.W. 11 is Md. Emdadul Haque. He deposes that his father Ismail died at Rajshahi Medical College Hospital in injured condition and according to his identification, the police held an inquest on the dead boy of his father as per inquest-report and he along with Mokbul, Sekandar and Mozam (P.W. 3) signed the same as witnesses.

100. In his cross-examination, the P.W. 11 Md. Emdadul Haque states:

"সুরতহাল প্রতিবেদন দারোগা পাঠ করিয়া শুনাইলে পর আমরা তাহাতে
p¢q L¢lz B¢j Hp,Hp,¢p f¡nz"

101. The P.W. 12 is Dr. Md. Gaziul Haque. He testifies that on 24.12.1999, he was on duty at Adamdighi Health Complex and on that day, he examined one Lutfor Rahman, son of Farez and after examination, he granted a certificate in his favour and on that day, he also examined Sirajul and found the following injuries on his person:

> "1. Bruise (Scratch), 4 cm length, left cheek in front of left tragus, simple injury caused by a sharp weapon.
> 2. Swelling (2.5cm X 2.5cm), left side of the forehead, simple injury caused by a blunt weapon."

102. In his cross-examination, the P.W. 12 Dr. Md. Gaziul Haque admits that he did not find any injury on the ear of Sirajul.

103. Out of 12(twelve) prosecution witnesses, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are alleged eye-witnesses to the occurrence and in that view of the matter, they are star prosecution witnesses. Besides, in the facts and circumstances of the case, the evidence of the P.W. 7 Dr. Md. Emdadur Rahman, P.W. 9 Md. Riaz Uddin and P.W. 11 Md. Emdadul Haque appears to be very vital. Anyway, admittedly the P.W. 1 to P.W. 6 being inter-related are partisan and interested witnesses. So we must record our findings upon the trustworthiness or otherwise of the evidence of those prosecution witnesses.

104. In the case of Nowabul Alam and others…..Vs… The State reported in 15BLD(AD)54, it was held in paragraph 17:

> "17. The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses, must be closely and critically scrutinized. They should not be accepted on their face value. Their evidence can not be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinized with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implicating an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence can not be thrown out mechanically because of his interestedness, so his evidence can not be accepted mechanically without a critical examination. "

105. In the case of Ali Ahmed ….Vs….The State reported in 14 DLR(SC) 81, Mr. Hamoodur Rahman, J. (as his Lordship then was) observed:

> "Prudence, of course, requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon."

106. In the case of Masalti…Vs… State of Uttar Pradesh, AIR1965 (SC) 202, the Indian Supreme Court spelt out:

> "There is no doubt that when a Criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence, whether or not the evidence strikes the Court as genuine, whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, Criminal Courts have to deal with the evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would inevitably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan can not be accepted as correct."

107. The rule that the evidence of interested witnesses requires corroboration is not an inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. The Supreme Court of Pakistan explained the rule in the case of Nazir…Vs…The State, 14 DLR (SC) 159 as follows:

> "……we had not intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it can not be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated along with the guilty, the Court will in the case of an ordinary interested witness look for some circumstances that give sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration."

108. Now let us see whether the evidence of the alleged eye-witnesses, namely, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam is worthy of credence or not.

109. It is the definite assertion on the part of the prosecution that the accused Faruk and Ferdous set fire to the haystack of the informant-party at their courtyard on 24.12.1999 at 2:00A.M. and thereafter on that date (24.12.1999) at 6:00 A.M., the accused-party caused the occurrence of assault upon the informant-party at the same spot resulting in the death of the victim Ismail at Rajshahi Medical College Hospital, Rajshahi on 03.01.2000. It is not understandable as to why the trial Court failed to charge the accused Faruk and Ferdous under Section 435 of the Penal Code, though the two incidents are interlinked. However, it will be convenient for us if we deal firstly with the alleged incident of burning of the haystack by fire by the accused Faruk and Ferdous. In this context, the evidence of the P.W. 9 Md. Riaz Uddin may be gone into. A reference to his evidence unerringly shows that he did not find any alamats of burning of the haystack at the place of occurrence courtyard. Further, it is also in his evidence that not a single witness narrated to him the incident of burning of the haystack at the time of his examination under Section 161 of the Code of Criminal Procedure. Besides, it is in the relevant prosecution evidence that when the haystack was set ablaze by the accused Faruk and Ferdous, the villagers came forward and they along with the informant-party doused the fire. But curiously enough, not a single villager has turned up before the Court below to depose to that effect. As such, the alleged story of burning of the haystack by fire by the accused Faruk and Ferdous does not inspire any confidence in us.

110. It does not transpire from the evidence of the P.W. 1 Md. Ishak Ali and P.W. 2 Md. Aminul Islam that they have pinpointed the alleged place of assault (courtyard of the deceased Ismail) in their evidence. Precisely speaking, their evidence does not indicate that the occurrence of assault is at the courtyard of the deceased Ismail. Moreover, it is the definite claim of the prosecution that after the assault of the accused-party upon the informant-party, the accused-party smashed the doors and windows and other articles of the house of the deceased Ismail; but no alamats thereof could be seized by the P.W. 9 Md. Riaz Uddin in that regard. So the question of vandalizing the house of the deceased Ismail immediately after the occurrence of assault is doubtful.

111. In the cross-examination of the P.W. 1 Md. Ishak Ali, we find that "ঘটনার সময় বেলা উঠে উঠে ভাব" meaning thereby that the sun was about to rise and blood trickled down on the ground from the head-injury of his father Ismail and the earth to the extent of $1/1\frac{1}{2}$ feet got blood-stained; but stunningly enough, undeniably no blood-stained earth could be seized by the P.W. 9 Md. Riaz Uddin during investigation of the case. Again, in the cross-examination of the P.W. 2 Md. Aminul Islam, we find that at the time of the occurrence of assault on 24.12.1999 at 6:00 A.M., the sun did not rise and as such he could not eye-witness the occurrence properly. In the cross-examination of the P.W.4 Md. Sirajul Islam, he says that at the time of the occurrence on 24.12.1999 at 6:00 A.M., the sun did not rise and 30/40 people came to the spot; but no one of them has been examined by the prosecution in support of the prosecution version of the case raising reasonable doubt about the veracity of the prosecution story. It is also in the cross-examination of the P.W. 4 Md. Sirajul Islam that he did not see any blood-stained earth at the place of occurrence courtyard. A reference to the cross-examination of the P.W. 5 Md. Abdur Rashid manifests that at 6:00 A.M., the sky was a bit clear, but he concedes that it is not possible to say who of the accused assaulted whom during

the occurrence which lasted for about half an hour. What is most striking in this respect is that the P.W. 6 Md. Saiful Islam in his cross-examination has admitted that he did not narrate the occurrence to anybody presumably prior to his examination before the lower Court. This astounding and startling disclosure of the occurrence for the first time before the Court below after a number of years is very much contrary to normal human conduct.

112. In this country, December falls within winter. In this context, we can take judicial notice of the fact that in the later part of December, the sun rises at 6:40A.M. or thereabout. Given this scenario, it can be safely concluded that on 24.12.1999 at 6:00A.M., there was dark or at least partly dark for all practical purposes and in this view of the matter, the question of means of recognition of the accused by the alleged eye-witnesses comes up as argued by Mr. Moudud Ahmed. In the facts and circumstances of the case, we are at one with Mr. Moudud Ahmed on this point. It is an admitted fact that no means of recognition of the accused have been disclosed in the evidence on record. In the absence of disclosure of any means of recognition of the accused at the time of the alleged occurrence, the prosecution version of the case, as we see it, is bound to fail.

113. In addition, the P.W. 6 Md. Saiful Islam has unmistakably stated in his cross-examination that 10(ten) non-partisan and neutral persons eye-witnessed the occurrence of assault and they attempted to save the informant-party from the assault of the accused-party and they are still alive. But it is mysterious and inexplicable as to why the prosecution has failed to examine even a single non-partisan and neutral person to prove the occurrence of assault. As the alleged eye-witnesses, namely, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are partisan and interested witnesses, a duty is cast upon the prosecution to examine at least any one of those 10(ten) non-partisan and neutral persons. In the facts and circumstances of the case, it seems to us that the non-examination of any such non-partisan and neutral person in support of the prosecution version of the case is suspicious and mind-boggling.

114. The prosecution case is that on 24.12.1999 at 6:00A.M. during the occurrence of assault, the accused Abdur Rahman dealt a Chinese axe blow on the head of Ismail resulting in his eventual death at Rajshahi Medical College Hospital on 03.01.2000. Anyway, it is evident from the cross-examination of the P.W. 7 Dr. Md. Emdadur Rahman that the head-injury sustained by the deceased Ismail is an irregular and uneven lacerated injury caused by a blunt weapon and not a penetrating injury caused by a sharp-cutting weapon. It goes without saying that a Chinese axe is a sharp-cutting weapon and not a blunt weapon. The causing of the head-injury which has been found to be a lacerated one by a blunt weapon by the P.W. 7 Dr. Md. Emdadur Rahman runs counter to the prosecution version of the case rendering the same doubtful. In other words, the ocular evidence of the alleged eye-witnesses does not appear to be in accord with the medical evidence on record. This being the position, we feel constrained to take the ocular evidence of the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W. 4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam with a pinch of salt.

115. The prosecution evidence on record shows that virtually disputes arose between the informant-party and the accused-party after purchase of 0.03 acres of land forming a part of the courtyard of the deceased Ismail from one Shahdat by him. The P.W. 9 Md. Riaz Uddin has admitted in his cross-examination that there was another occurrence between the informant-party and the accused-party on 24.12.1999 at 5:00 A.M. and with regard to that

occurrence, the accused-party lodged a case against the informant-party and witnesses of this case. The case lodged by the accused-party against the informant-party of this case appears to be earlier in point of time. It is also in the cross-examination of the P.W. 9 Md. Riaz Uddin that he has submitted charge-sheets in both the cases.

116. It is in the cross-examination of the P.W. 9 Md. Riaz Uddin that the P.W. 3 Mozammel did not mention the names of the accused- appellants of Criminal Appeal No. 4324 of 2009 and others to him at the time of their examination under Section 161 of the Code of Criminal Procedure. The cross-examination of the P.W. 9 Md. Riaz Uddin also indicates that the P.W. 4 Md. Sirajul Islam did not mention the names of the some of the accused to him (P.W. 9) at the time of his examination under Section 161 of the said Code. In this respect, the decision in the case of Babar Ali Mollah and others…..Vs….The State reported in 44 DLR (AD) 11 may be referred to wherein their Lordships of the Appellate Division observed:

> "Vital omissions in FIR and statements to the Investigation Officer make their substantive evidence unreliable."

117. So the non-mentioning of the names of the accused-appellants of Criminal Appeal No. 4324 of 2009 by the P.W. 3 Mozammel and non-mentioning of the names of the some of the accused by the P.W. 4 Md. Sirajul Islam at the time of their examination under Section 161 of the Code of Criminal Procedure makes the prosecution case shaky. In this regard, we fully agree with the contention of the learned Advocate Mr. Md. Shamsur Rahman.

118. The claim of the prosecution is that on 24.12.1999 at 6:00 A.M., the occurrence of assault took place at the courtyard of the deceased Ismail and Ismail received the fatal head-injury during the occurrence and ultimately he succumbed thereto at Rajshahi Medical College Hospital on 03.01.2000. The P.W. 10 Md. Abdur Rahman held an inquest on the deceased Ismail in connection with Rajapara Unnatural Death Case No. 4 dated 03.01.2000. It is in his evidence as well as in the inquest-report that the death of Ismail was caused by some terrorists, though admittedly the ejahar was lodged with Adamdighi Police Station against the accused-party on 25.12.1999. There is no gainsaying the fact that the P.W. 3 Mozammel and P.W. 11 Md. Emdadul Haque are witnesses to the inquest-report and in their presence, the inquest was held on the deceased Ismail. Moreover, it is in the cross-examination of the P.W. 11 Md. Emdadul Haque that they signed the inquest-report after it was read over to them and that he has passed the SSC Examination. So it may be presumed that the P.W. 11 Md. Emdadul Haque is an educated man and that he knows what is what. As an educated man, he is not supposed to sign any piece of paper blindfold. On top of that, the P.W. 9 Md. Riaz Uddin has admitted in his cross-examination that the incident adverted to in the inquest-report has been found to be true during investigation of the case, albeit he has charge-sheeted the accused-party. We fail to understand as to why on the one hand, he has admitted that the incident adverted to in the inquest-report has been found to be true and on the other hand, he has charge-sheeted the accused-party. This stance of the Investigating Officer Md. Riaz Uddin (P.W. 9) appears to be self-contradictory, paradoxical and self-defeating.

119. A reference to the cross-examination of the P.W. 6 Md. Saiful Islam positively shows that he has admitted that initially it was stated that Ismail had sustained the head-injury at the hands of some terrorist youths. Had some terrorist youths really caused the death of Ismail, then those terrorist youths instead of the accused-party should have been brought to

justice. This dimension of the case was not properly unfolded by the P.W. 9 Md. Riaz Uddin during investigation of the case. It is not understandable as to why the P.W. 3 Mozammel being a professed eye-witness and the P.W. 11 Md. Emdadul Haque being fully aware of the occurrence failed to narrate the same to the P.W. 10 Md. Abdur Rahman at the time of holding of the inquest on the deceased Ismail. Such being the state of affairs, the causing of death of Ismail by some terrorist youths can not be ruled out altogether.

120. In the decision in the case of Abdur Rashid and another …Vs…The State reported in 6BLC (HCD) 225 relied on by the defence, it was observed in paragraph 26:

> "26. We have already found that the defence disputed the place of occurrence. It is surprising to find that no blood-stained earth was recovered, admittedly, from the place of occurrence and no explanation has also been offered. As such there is room for doubt as to the occurrence taking place at the place of occurrence shown by the prosecution. The benefit of doubt must go to the accused."

121. Reverting to the case in hand, the Investigating Officer Md. Riaz Uddin (P.W. 9) has offered an explanation for non-seizure of the blood-stained earth. According to his deposition, he has not found any blood-stained earth at the alleged place of occurrence courtyard. So the claim of the prosecution that blood trickled down from the head-injury of Ismail to the ground and the earth got blood-stained to the extent of $1/1\frac{1}{2}$ feet falls through.

122. In the case of Sk. Shamsur Rahman @ Shamsu …..Vs…The State reported in 10 BLD (AD) 251 referred to by the defence, it has been held, inter alia, in paragraph 25 that this is a case where the prosecution must bear the responsibility for all its laches and lapses, be they by default or by design. In the present case before us, there are many laches and lapses as noticed above and those lapses may be by default or by design and the prosecution must bear the responsibility for all its laches and lapses as held in the decision reported in 10 BLD(AD) 251.

123. As to the contention of the learned Advocate Mr. Md. Golam Rabbani that the accused Abdul Mazid was prejudiced in his defence inasmuch as he was not examined under Section 342 in terms of the provisions laid down in Section 364 of the Code of Criminal Procedure, we find from the prescribed form for examination of an accused under Section 342 read with Section 364 of the said Code that the incriminating pieces of evidence were brought to his notice, but those were not spelt out with reference to the evidence of the prosecution witnesses concerned. However, paragraph 15 of the decision in the case of Mostafa (Md) ….Vs….The State reported in 1BLC(HCD) 82 adverted to by the learned Deputy Attorney-General Mr. Md. Khurshedul Alam runs as follows:

> "15. In the examination of the appellant under Section 342 of the Code of Criminal Procedure, summary of incriminating facts appearing in evidence against the appellant has not been mentioned but it is stated that he heard the witnesses deposing against him after stating the allegations made against him. In reply, he simply said that he was innocent. The appellant appears to be a literate person from the signature put by him in the form recording

> his examination under Section 342 of the Code of Criminal Procedure and capable of understanding the deposition of prosecution witnesses adduced and recorded in Bengali in his presence. But no objection as to the same was taken in the trial Court by the defence that the appellant was prejudiced by such slipshod manner of examination. In our view, the same is a mere irregularity curable under Section 537 of the Code of Criminal Procedure and has not prejudiced the appellant in his defence. Reference may be made in this respect to the decision in the case of Abdul Wahab…Vs…Crown reported in 7DLR(FC) 87 in which case in similar circumstances such slipshod manner of examination of the accused under Section 342 of the Code of Criminal Procedure, though deprecated, held to be a mere irregularity curable under Section 537 of the Code of Criminal Procedure."

124. Coming back to the instant case, assuming for the sake of argument that the accused-appellant Abdul Mazid was examined by the learned trial Judge in a slipshod and cavalier fashion, that is curable by Section 537 of the Code of Criminal Procedure and in this perspective, the question of suffering any prejudice by the accused-appellant Abdul Mazid in his defence can not be acceptable to us. So the contention of the learned Advocate Mr. Md. Golam Rabbani stands negatived.

125. In the decision in the case of Yogeshwar Gope…Vs……The State reported in 58 DLR(AD) 73 adverted to by learned Deputy Attorney-General Mr. Md. Khurshedul Alam, it has been held, amongst others, in paragraph 15 that only because of relationship, the witnesses' evidence can not be thrown away unless the evidence is found to be untrue or tainted with motive. There is no dispute about this 'ratio decidendi.' In the present case before us, we have already smelt a rat in the evidence of the star prosecution witnesses, namely, the P.W. 1 Md. Ishak, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W. 4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam.

126. In the decision in the case of the State represented by the Solicitor, Ministry of Law & Justice, Government of Bangladesh…Vs…Montu alias Nazrul Haque & others reported in 44 DLR (AD) 287 relied on by the learned Deputy Attorney-General Mr. Md. Khurshedul Alam, it was held, inter alia, in paragraph 9:

> "9. Section 34 lays down the principle of joint liability for doing a criminal act. The essence of the liability is to be found in the existence of common intention animating the accused persons to the doing of a criminal act in furtherance of the common intention of them all. "Common intention" of several persons is to be inferred from their conduct, manner of doing the act and the attending circumstances. If one has intention to do any act and others share this intention, their intention becomes "common intention" of them all. And if the act is done in furtherance of the common intention, then all who participated in the act are equally liable for

> the result of the act……
> ……
> ……..”

127. It transpires from the impugned judgment that the learned trial Judge convicted and sentenced some of the accused under Sections 302/34 of the Penal Code and acquitted the remaining accused standing on the same footing with the convicts. Specifically speaking, the accused Bakul, Zano, Sirajul, Shahidul, Anisur, Mukul, Abul, Jamal, Abdur Rahim, Ferdous, Delwar and Faruk son of Anisur were acquitted of the charge brought against them under Sections 302/34 of the Penal Code. But no cogent reason was assigned by the learned trial Judge for conviction and sentence of the remaining accused under Sections 302/34 of the Penal Code. According to the finding of the Court below, had all the accused participated in the criminal act in furtherance of their common intention, then all of them should have been convicted under Sections 302/34 of the Penal Code. If it is found that the occurrence did not take place in furtherance of the common intention of all the accused, then the alleged criminal act of the accused Abdur Rahman should have been found to be an individual criminal act by the Court below. What we are driving at boils down to this: the learned trial Judge can not blow hot and cold in the same breath. So the convict-appellants did not have a fair deal before the lower Court.

128. With regard to the alleged assault upon the witnesses by the accused concerned, we would like to say that the alleged injuries sustained by the witnesses have not been supported by any medical evidence. Of course, the P.W. 12 Dr. Md. Gaziul Haque has deposed that he treated Lutfor Rahman and Sirajul. But it does not transpire from his testimony that what injuries he found on the person of the witness Lutfor Rahman. Furthermore, it is in the cross-examination of the P.W. 12 Dr. Md. Gaziul Haque that he did not find any injury on the ear of the witness Sirajul. Against this backdrop, we hold that the sustaining of the alleged injuries by the witnesses concerned at the hands of the accused-party does not carry any conviction.

129. In the facts and circumstances of the case, it seems that the Chairman of Adamdighi, namely, Towhidul Islam is a vital prosecution witness. It is the positive assertion of the prosecution that after the alleged burning of the haystack by fire by the accused Faruk and Ferdous, the informant-party rushed to the house of Towhidul Islam and when they were returning from that house at about 6:00A.M. on 24.12.1999, the alleged occurrence of assault took place wherein Ismail received the fatal head-injury. The withholding of the Chairman Towhidul Islam and the other alleged eye-witnesses to the occurrence, namely, Moslem, Lutfor, Alamgir, Jalal and Azizar have affected the prosecution case on merit. In this connection, the defence has rightly invoked Section 114- Illustration (g) of the Evidence Act, 1872.

130. The defence version of the case that the accused-appellants have been falsely implicated in the case out of enmity at the instance of the Chairman Towhidul Islam and the victim Ismail might have sustained the fatal head-injury at the hands of some terrorist youths resulting in his eventual death can not be brushed aside at all in the face of the evidence on record and attending facts and circumstances of the case. On this point, the decision in the case of Shamsul Huq @ Shamsul and others….Vs… The State reported in 38DLR (AD) 75 may be referred to. In that decision, it was held, amongst others, in paragraph 8:

> "8.The defence case need not be proved by examining witnesses; if some indication in their favour is available from cross-examination of the prosecution witnesses, then this may be sufficient for their acquittal. The manner of the incident as alleged by the prosecution must be proved by the prosecution alone; that burden never shifts. If the manner of the incident is not proved, the prosecution must fail no matter the defence version of the case has not been proved either."

131. From the foregoing discussions and in the facts and circumstances of the case, it is ex-facie clear that the defence version of the case has received some indication or support from the cross-examination of some of the prosecution witnesses as detailed above. Consequently, we are inclined to award the benefit of doubt to the accused-appellants.

132. It appears that the learned trial Judge failed to consider the evidence and attending circumstances of the case in their proper perspective and erroneously convicted and sentenced the appellants. According to us, the impugned judgment suffers from inherent infirmities. The learned trial Judge, it seems, did not scan the evidence of the alleged eye-witnesses and the Investigating Officer (P.W.9) and medical evidence on record with searching eyes. The finding of conviction arrived at by the Court below is struck down.

133. In view of what have been stated above and regard being had to the facts and circumstances of the case, we find merit in the appeals. The appeals, therefore, succeed.

134. Accordingly, the Criminal Appeal Nos. 4289 of 2009, 4322 of 2009, 4324 of 2009, 4358 of 2009 and the Jail Appeal Nos. 452 of 2009 and 453 of 200 are allowed and the Death Reference is rejected. The impugned judgment and order dated 22.06.2009 passed by the Additional Sessions Judge, 1st Court, Bogra in Sessions Case No. 14 of 2002 is hereby set aside and the accused-appellants stand acquitted of the charge levelled against them.

135. Let the convict-appellants, namely, (1) Abdul Mazid @ Khoka, (2) Abdur Rahman, (3) Md. Faruk @ Faruk, son of Abdul Jalil, (4) Asadul, (5) Md. Monjur Rahman @ Maznu, (6) Md. Bhola @ Bhola and (7) Md. Shutka be set at liberty at once, if not wanted in connection with any other case.

136. Let the appellant Asadul be discharged from his bail bond at once.

137. Let the lower Court records along with a copy of this judgment be transmitted immediately.

5 SCOB [2015] HCD 33

High Court Division

CIVIL REVISION NO. 2691 OF 2002

Renuka Rani Mondol alias Roy
.... Petitioner
Versus
Biswajit Mondol alias Roy and another
... Opposite Parties

Mr. Zainul Abedin, with
Mr. M. Mahbubur Rahman, Advocates
..... For the Petitioner
Mr. Md. Anwarul Islam, with
Mrs. Farjana Sharmin, Advocates
..... For Opposite Party no.1
Heard on- 02.09.2015, 03.09.2015, and 07.09.2015
Judgment dated: 09.09.2015

Present:

Mr. Justice Borhanuddin

Section 123 of Transfer of Property Act, 1872:
Appellate court below allowed the appeal in part holding that the deed was not acted upon since there is no evidence that possession was delivered to the defendant no.1. This finding is not correct. Where the instrument of gift has been registered, delivery of possession is not essential for the validity of a gift by a Hindu. ... (Para 12)

Judgment

Borhanuddin, J:

1. This Rule has been issued calling upon opposite party no. 1 to show cause as to why judgment and decree dated 16.03.2002 passed by the learned Additional District Judge, 1st Court, Khulna, in Title Appeal No. 121 of 2000 allowing the appeal in part by way of modifying the judgment and decree dated 13.03.2000 passed by the learned Subordinate Judge, 3rd Court, Khulna, in Title Suit No. 17 of 1998 dismissing the suit, should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.

2. Facts relevant for disposal of the rule are that opposite party no.1 herein as plaintiff instituted Title Suit No. 17 of 1998 in the 3rd Court of learned Subordinate Judge, Khulna, for declaration of Title in respect of $.47\frac{1}{3}^{rd}$ acres land out of 1.43 acres as $\frac{1}{3}^{rd}$ share by way of inheritance described in schedule "Ka" of the plaint and for further declaration that the deed of gift no.3315 dated 14.12.1997 registered at Batiagata Sub registry office is forged, fraudulent, inoperative, void and not binding upon the plaintiff.

3. Plaintiff's case in short is that suit land belonged to Bhabesh Mondol who married Purnima Rani, daughter of Pulin Bairagee; Out of the wedlock, plaintiff was born who was brought up in the house of his maternal uncle; Since Purnima lost her procreation capacity,

Bhabesh Mondol married Renuka and out of that wedlock two sons namely, Bhudeb and Bidhu were born; In the year 1997, Bhabesh was admitted in Khulna Seba Clinic for treatment; Bhabesh was a heart patient; At critical stage of his ailment, Bhabesh again admitted at Batiaghata Health Complex and remained there till 18.12.1997; Plaintiff was residing at Chittagong for the purpose of his service; His mother was at his maternal uncle's house; Bhudeb, Bidhu and their mother Renuka looked after Bhabesh at the clinic; Taking advantage of the situation, on 14.12.1997 defendant no.1 and her two sons took Bhabesh out of the clinic for 2(two) hours by executing a bond and within this time incollusion with the subregistrar created a forged deed of gift dated 14.12.1997 in respect of the suit land; Said deed of gift was not executed voluntarily by Bhabesh; Bhabesh died on 19.04.1998 without any treatment; After the cremation ceremony, defendant no.1 disclosed about the deed of gift; Then the plaintiff procured certified copy of the deed on 17.05.1998 and constrained to file the suit.

4. Defendant no.1 contested the suit by filing written statement denying material allegations made in the plaint and contending *interalia* that there is no cause of action, suit is not maintainable, bad for defect of parties and barred by limitation. Further contending that Bhabesh Mondol willingly and voluntarily executed and registered the deed of gift in favour of his wife; She is in possession of the land; Plaintiff is not son of Bhabesh Mondol; All the rituals after expiry of Bhabesh Mondol performed by the defendant and her two sons; Suit is liable to be dismissed.

5. After hearing the parties and assessing evidenced on record, learned Subordinate Judge dismissed the suit on contest against defendant no.1 and exparte against the rest holding that plaintiff did not pray for cancellation of the deed and the suit is bad for defect of parties and also held that suit for declaration on an undemarcated and unspecified land is not maintainable.

6. Being aggrieved, plaintiff as appellant filed Title Appeal No. 121 of 2000 in the Court of learned District Judge, Khulna. On transfer, the appeal was heard and disposed of by the learned Additional District Judge, 1st Court, Khulna, who after hearing the parties and reassessing evidence on record allowed the appeal in part upholding portion of the judgment and decree passed by the trial court so far as it relates to declaration of title but decreed that the deed of gift dated 14.12.1997 is forged, inoperative and not binding upon the plaintiff.

7. Having aggrieved by and dissatisfied with the judgment and decree, defendant-respondent as petitioner preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present rule with an order of stay.

8. Mr. Zainul Abedin with Mr. M. Mahbubur Rahman, learned advocates appearing for the petitioner submits that appellate court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree without adverting findings of the trial court and thus violated provisions of 0rder XLI rule 31 of the Code of Civil Procedure as such, impugned judgment and decree is liable to be set aside. He also submits that appellate court below committed an illegality in not considering that plaintiff filed the suit praying for declaration that the deed of gift dated 14.12.1997 is forged and fraudulent as such, burden of proof lies upon the plaintiff under Section 103 of the Evidence Act to prove that the registered deed of gift is executed and registered fraudulently. He next submits that since the deed of gift is duly registered it has presumption of genuineness and correctness under section 114(e) of the Evidence Act and the

appellate court below committed an illegality without considering this legal aspect. He again submits that appellate court below allowed the appeal with extraneous finding that the deed of gift was not acted upon without looking into the provisions of Section 123 of the Transfer of Property Act inasmuch as amongst Hindus gift make subsequent to the Act does not require delivery of possession if there is registration. He lastly submits that the impugned judgment and decree passed by the appellate court below is based on misreading and non appreciation of evidence on record and as such liable to be set aside. In support of his submissions, learned advocate referred to the case of Abani Mohan Saha-Vs- Assistant Custodian (S.D.O) Vested Property, Chandpur and others, reported in 39 DLR(AD)323 and the case of Abul Kashem Howlader-Vs- Sultan Ahmed and others, reported in 9 BLC 333.

9. On the other hand Mr. Anwarul Islam Shahin with Ms. Farjana Sharmin, learned advocates for the opposite party submits that since the defendant no.1 claims title in the suit land by dint of deed of gift dated 14.12.1997, duty cast upon her under the provisions of Sections 101 and 103 of the Evidence Act to prove that the deed was acted upon. He also submits that it is apparent from evidence on record that at the time of execution and registration of the deed of gift, the donor was critically ill and admitted in the hospital so, it can be easily presumed that the deed of gift was not executed and registered voluntarily. He next submits that from the circumstances which is proved by the witnesses, it is evident that at the time of execution and registration of the deed of gift, the donor was not physically and mentally sound and the same is also proved from the testimony of PW.5 i.e. doctor of the clinic. He next submits that the very circumstances of the clinic wherein plaintiff and his mother were absent proves that the deed of gift executed under undue influence by defendant no.1 and her two sons to deprive the plaintiff from his due share. In support of his submissions, learned advocate referred to the case of Official Assignee of Bengal -Vs- Bidyasundari Dasi and others, reported in The Calcutta Weekly Notes, Vol-XXIV, P.145.

10. Heard the learned advocates. Perused revisional application, judgment of the courts below along with lower courts record and the decisions cited by the learned advocates.

11. Admittedly plaintiff instituted the suit for declaration of title in respect of “Ka” scheudle land and for further declaration that the deed of gift dated 14.12.1997 registered at Bhatiagata sub register office is forged, fraudulent, void, inoperative and not binding upon the plaintiff. Deed of gift dated 14.12.1997 which is under challenge is a registered instrument. It is not a case of the plaintiff that said deed was not executed and registered by Bhabesh Mondol rather plaintiff’s case is that the donor did not execute and register the deed voluntarily and willingly but under undue influence of defendant no.1 and her sons.

12. I have gone through the judgments passed by the trial court as well as appellate court below. Plaintiff filed the suit under Section 42 of the Specific Relief Act. By now it is settled that a suit for mere declaration without seeking cancellation of the document is not maintainable. Further that the impugned deed of gift which is duly registered has a presumption of correctness as provided under Section 114 (e) of the Evidence Act as such onus lies upon the plaintiff to prove that the deed is forged and fabricated. On perusal of the record, it is evident that plaintiff failed to prove that the deed of gift is forged and fabricated by adducing credible oral and documentary evidence. From deposition of PW.5, it appears that the donor was permitted by the doctor to go out of the clinic for two hours, when the deed was executed and registered. Appellate court below allowed the appeal in part holding that the deed was not acted upon since there is no evidence that possession was delivered to the defendant no.1. This finding is not correct. Where the instrument of gift has been registered, delivery of possession is not essential for the validity of a gift by a Hindu.

13. Section 123 of the Transfer of Property Act. runs as follows:

> *"**123. Transfer how effected-** For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.*
>
> *[Notwithstanding anything contained in any other law for the time being in force, a heba under Muhammadan law shall be deemed to be a gift of immovable property for the aforesaid purpose.]*
>
> *For the purpose of making a gift of movable property, the transfer may be effected either by registered instrument signed as aforesaid or by delivery.*
>
> *Such delivery may be made in the same way as goods sold may be delivered."*

14. On plain reading of Section 123, it is clear that delivery of possession is essential to the validity of a gift is abrogated by section 123 of the Act. A gift under the Act can only be effected in a manner provided by Section 123.

15. On perusal of the testimony of DWs it appears that DW.4 is a attesting witness of the deed of Gift and DW.5 is scribe of the deed but the appellate court below on the basis of testimony of DWs.2 and 3 arrived at a finding that DWs.2-4 did not heard about the deed of Gift when Bhabesh was alive. But on perusal of the testimony of DWs.2, 3 and 4, it is apparent that the appellate court below arrived at such a finding on misreading of evidence. In such view of the matter, I am of the opinion that the appellate court below committed an error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

16. Facts and circumstances of the case cited by the learned advocate for the opposite party is quite distinguishable from the facts and circumstances of the case in hand.

17. In the result, the rule is made absolute without any order as to cost.

18. Judgment and decree dated 16.03.2002 passed by the learned Additional District Judge, 1st Court, Khulna, in Title Appeal No. 121 of 2000 is set aside and the judgment and decree dated 13.03.2000 passed by the learned Subordinate Judge, 3rd Court, Khulna, in Title Suit No. 17 of 1998 is hereby restored.

19. Order of stay granted at the time of issuance of the rule is vacated.

20. Send down lower courts record along with a copy of this judgment to the court concern at once.

5 SCOB [2015] HCD 37

High Court Division

Civil Revision No. 2592 of 2000

Mrs. Hurun Nahar after death of her heirs:
Md. Hasanur Rashid and others
.. .. Petitioners.

Versus

Mozammel Haque after death her heirs:
Mrs. Shamsun Nahar and others
.. .. Opposite parties.

None appears
.. .. For the petitioners.

None appears
.. .. For the opposite parties.

The 26th of August, 2015

Present:
Justice Krishna Debnath

Code of Civil Procedure, 1908
Order 23, Rule1:
During the course of pendency of original proceedings in the Trial Court, the Court may permit the plaintiff to withdraw the suit with liberty to file a fresh one, when there is a formal defect in the suit or for any other reason as provided, but such a right is not available to the plaintiff when there is already a judgment against him as aforesaid manner. ... (Para 9)

Judgment

Krishna Debnath:

1. This Rule under Section 115(1) of the Code of Civil Procedure was issued calling upon the opposite party Nos. 1(a) to 1(f) to show cause as to why the impugned orders dated 29.03.2000 and 09.04.2000 in Title Appeal No. 257 of 1997 passed by the Additional District Judge, 4th Court, Dhaka setting aside those of the Trial Court should not be set aside.

2. The facts relevant for the purpose of disposal of the Rule, in short, are that, plaintiff-appellant-opposite party filed a Title Suit No. 40 of 1994 in the Court of Assistant Judge, 3rd Court, Dhaka for partition. Plaintiff-appellant-opposite parties case, in short, is that Malik Dewan, Salim Dewan and Kalim Dewan in Savar District Dhaka Mouza No. 582 in C.S. Khatian No. 137 measuring area of 3.53 decimals of land mutually divided 3 shares and every sharer got 1.22 decimals of land. Kadam Molla purchased 1.22 decimals of land from Malik Dewan. Kadam Molla died behind 2 sons namely Yaz Uddin Molla and Moyez Uddin. They became owner of 164 decimals by way of inheritance and nilam purchase in C.S. Dag No. 323. Moyez Uddin Molla died behind one son namely Madan Molla and 3 daughters Hamela, Amela and Baytunnesa. Thereafter Jahangir Nagar University

acquired 1.22 decimals of land and accordingly compensation money was received by Yaz Uddin Molla, Mone Molla and other share holders. Said Hamela, Amela and Baytunnesa did not receive compensation money and thereafter Baytunnesa and Hamela Khatun sold out .02 decimals of land to their sister Amela Khatun. The plaintiff-appellant-opposite party purchased .01 decimals of land from Baytunnesa and $.04\frac{1}{2}$ decimals land from Amela Khatun by exchange deed. Accordingly plaintiff-appellant-opposite party became owner of 05.5 decimals of land and they are possessing the same. But defendant-respondent-petitioner No. 14 on 07.06.1991 erecting home and boundary wall by bricks and planting vegetable in the suit land and also plaintiff-appellant-opposite party was dispossessed from her possession of 05.5 decimals of land and as such the cause of action raised on that date.

3. The case of the defendant-respondent-petitioners in short, is that the defendant No. 6 Madan Molla and defendant No. 5 Yamuddin Molla purchased 1.24 decimals of land from Hosain Uddin son of Pachu Mandal on 01.03.1955 by registered deed in C.S. Plot No. 323. Jahangir Nagar University acquired 1.22 decimals of land and accordingly Yamuddin and Madan Molla and other share holders received compensation money from Jahangir Nagar University. Thereafter defendant No. 11 Rahela Khatun purchased 3 decimals of land on 21.03.1983 by registered deed from Madan Molla and defendant No. 14 Hurun Nahar purchased the said 3 decimals of land by registered deed on 02.05.1991 from defendant No. 11 Rahela Khatun. Defendant No. 14 purchased 3.5 decimals of land from Madan Molla by registered deed on 02.05.1991 and accordingly the defendant No. 14 possessing 6.5 decimals of land. Plaintiff-appellant-opposite party without any legal claim and without any cause of action want to grab the suit land and filed this suit.

4. Learned Assistant Judge, 3rd Court, Dhaka after hearing both parties dismissed the suit. Plaintiff-appellant filed appeal before the learned District Judge and learned District Judge transferred this appeal for disposal to Additional District Judge, 4th Court, Dhaka. In this stage plaintiff-appellant filed an application under Order 23 Rule 1 of the Code of Civil Procedure on 29.03.2000 to withdraw the plaint. Learned Additional District Judge, 4th Court, Dhaka directed to withdraw the plaint. The plaintiff-appellant filed another application for amendment of the order dated 29.03.2000 before the Court of appeal under Section 152 of the Code of Civil Procedure to amend the order dated 29.03.2000 and accordingly the learned Additional District Judge, 4th Court, Dhaka allowed the same on 09.04.2000.

5. Being aggrieved thereby the defendant-respondent-petitioner moved this Court by filing a revisional application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

6. None appears.

7. I have perused the application filed by the defendant-respondent-petitioners and ground stated therein. It appears from record that plaintiff-appellant-opposite party filed a Partition Suit before the Assistant Judge, 3rd Court, Dhaka which was dismissed by the learned lower Court. The learned Court below in her judgment stated that "নালিশি সম্পত্তিতে বাদীপক্ষের মালিকানা অর্জিত হয়নি এবং নালিশি জায়গায় তার দখলও নেই সেহেতু বাদীপক্ষ প্রার্থীত মতে কোন f¢ea L¡l f¡h¡l qLc¡l eu z" The plaintiff appellant filed an appeal and subsequently they filed a petition under Order 23 Rule 1 to withdraw the suit with liberty to file afresh one. Learned Additional District Judge, 4th Court, Dhaka ordered to withdraw the suit on 29.03.2000 and subsequently on 09.04.2000 learned Court setting aside the judgment and

decree of the Assistant Judge, 3rd Court, Dhaka and further directed to return the plaint to the plaintiff-appellant-opposite party.

8. It appears from Order 23 that where the Court is satisfied that a suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

9. It is well settled that defects can be cured by filing a petition for amendment of the plaint. The discretion of the Court to allow withdrawal of suit with liberty to sue afresh has to be exercised judiciously. When such discretion is exercised properly there is nothing wrong in it, but in this case it appears from record that plaintiff-appellant-opposite party did not prove his title and possession in the suit land. It was decided by the lower Court that defendant-respondent-petitioner is the owner of suit land and they did not dispossess the plaintiff-appellant-opposite parties. In this case on the passing of the judgment and decree by the Trial Court, whereby the suit was dismissed, a vested right had accrued in the defendants. The said right could not be permitted to be taken away by the plaintiff. Neither any justification was offered by the plaintiff in the application seeking withdrawal of the suit nor the appellate authority has given any reason to justify the aforesaid ground of permission. During the course of pendency of original proceedings in the Trial Court, the Court may permit the plaintiff to withdraw the suit with liberty to file a fresh one, when there is a formal defect in the suit or for any other reason as provided, but such a right is not available to the plaintiff when there is already a judgment against him as aforesaid manner.

10. According to above discussion, I find that the learned Additional District Judge, 4th Court, Dhaka committed gross error and I find merit in this Rule and as such there is reason to make absolute the Rule.

11. In the result, the Rule is made absolute without any order as to cost. The impugned order passed on 29.03.2000 and 09.04.2000 in Title Appeal No. 257 of 1997 by the learned Additional District Judge, 4th Court, Dhaka are set aside.

12. The order of stay as granted at the time of the issuance of the Rule and extended subsequently is hereby vacated.

13. Communicate the judgment to the Court below.

5 SCOB [2015] HCD 40

High Court Division
(Special Original Jurisdiction)

Writ Petition No. 3690 of 2004

Coats Bangladesh Limited
……. Petitioner.
Versus
Commissioner, Customs Bond Commissionerate and others
……Respondents.

Mr. A.F. Hassan Arif with
Mr. Ashraful Hadi, Advocates
…… For the petitioner.

Ms. Israt Jahan, D.A.G. with
Mr. Shams-ud-Doha, A.A.G with
Ms. Nurun Nahar, A.A.G
…..For the Government.

Heard on 07.09.2015, 08.11.2015 and 15.11.2015.
Judgment on: 17.11.2015.

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

When a higher authority, namely the NBR, has expressed its opinion agreeing with the proposal sent by the earlier Bond Commissioner (Mr. Helal Uddin), it became very much difficult for the subsequent Bond Commissioner (Mr. Enayet) to go for any other option but to follow the proposal as was agreed upon by the NBR. This being so, this Court is of the view that, the show cause notice dated 25.05.2004 was in fact a closed-minded show cause notice. Therefore, giving reply to the such show cause notice, or attending a hearing pursuant to such show cause notice, became a mere formality for the petitioner. This view is further strengthened when we see the actions taken by the Bond Commissioner against the petitioner at the same time of issuance of the said show cause notice. When the Bond Commissioner requests other concerned authorities to suspend a license for all practical purposes, no reasonable reading can be done from such actions that the said show cause notice was in fact a closed-minded show cause notice inasmuch as that the concerned Commissioner had already decided the fate of the petitioner's license. ... (Para 19)

Judgment

Sheikh Hassan Arif, J

1. Rule was issued calling upon the respondents to show cause as to why (i) the order dated 16.05.2004 (Annexure-A) issued by respondent No.2 directing cancellation of the petitioner's Bonded Warehouse License (Annexure-C), (ii) order dated 25.05.2004 (Annexure A-1) issued by respondent No.1 directing the petitioner to show cause within 15(fifteen) days as to why its above Bonded Warehouse Licence should not be cancelled and ((iii) Order dated 04.07.2004 (Annexure-A-2) issued by respondent No.1 cancelling the petitioner's Bonded Warehouse License should not be declared to be without lawful authority and are of no legal effect.

2. <u>Background Facts</u>:

Short facts, relevant for the disposal of the Rule, are that the petitioner, being a joint venture company and engaged in 100% deemed export oriented business, has been manufacturing sewing thread and supplying the same to different export-oriented manufacturers of this country. Being a joint venture company of Coats Limited, U.K., which is one of the largest textile groups in the world, the petitioner company was awarded the title of "Best Joint Venture Enterprise of the Year 2003" in Bangladesh. The petitioner, at the time of filing of this writ petition, had total earning of US$175 million and was the employer of about 900 people in Bangladesh and had an investment of about Tk. 950 million. It is stated that 80% to 85% sales of the petitioner company take place in Dhaka, while its Bulk Production Unit is in Chittagong. The petitioner occupies 53% of the market share in the thread sector in Bangladesh and have been doing business as such for the last 24 years with reputation. It is stated that, there has been no such allegation against the petitioner for evasion of taxes or wrong doing. After establishment of petitioner company in Bangladesh along with its factory, the petitioner obtained a bonded warehouse licence, granted by respondent no.1, bearing license, No. 783/cus-sbw/90 dated 10.02.1990 under the address "Medona Tower" 28 Mohakhali C-A, Dhaka-1212 in view of the provisions under Section 13(1) of the Customs Act, 1969. In addition to the said bonded warehouse facilities, the petitioner had another bonded warehouse in Chittagong along with factory, and it subsequently obtained another license for boned warehouse facility in Gazipur. The bonded house at Dhaka, from the very beginning, was granted and used for effective distribution of the finished products within a shortest possible time against back to back letters of credit in Dhaka and the same was mainly utilized to warehouse goods manufactured by petitioner's factory at Chittagong for the purpose of distribution. It is further stated that, such use of the bonded warehouse facility in Dhaka is allowed under the provisions of Section 100 of the Customs Act, 1969. Before manufacturing, the petitioner applies to the concerned bond Commissionerate for utilization permit and, accordingly, after manufacturing the finished products, most of the them are transferred to the Dhaka bonded warehouse under the cover of risk bond and under inter-bond transfer facilities in accordance with law. In doing so, the petitioner has always complied with the relevant provisions of law. After supply of those finished goods to the export oriented companies and to the ultimate purchasers in foreign countries, the petitioner has always obtained proceeds realization certificates and the same have been submitted before the concerned Commissioner.

3. That, on 09.02.2003, the petitioner filed application for renewal of its license at Dhaka, but, unfortunately, received no response in spite of reminders. That, on 13.08.2009, the then Bond Commissioner sent correspondences to the NBR suggesting cancellation of petitioner's bonded warehouse licence at Dhaka mainly on the ground of administrative inconveniences. Thereupon, the NBR, vide letter dated 29.11.2003, made enquiry with the subsequently appointed Bond Commissioner, who, through reply dated 24.01.2004, confirmed that there was no allegation of any wrong doing or evasion of taxes against the petitioner. However, the NBR, pursuant to the earlier recommendation of the then Bond Commissioner, vide order dated 16.05.2004, directed the Commissioner of Customs (Bond) to cancel petitioner's said licence. Pursuant to such direction, it is alleged, a show cause notice dated 25.05.2004 was issued by respondent No.1 containing mostly the same contention of administrative inconveniences. By the said show cause notice, the respondent no.1 also directed the concerned Banks not to open any back to back letters of credit in favour of the petitioner and also directed some other concerned authorities to stop some ongoing facilities in favour of the petitioner. The petitioner, accordingly, vide letter dated 08.06.2004, replied to the said show cause notice denying such contention and praying for withdrawal of the cancellation proceeding in respect of its licence. However, the respondent No.1, vide subsequent

impugned memo dated 04.07.2004, cancelled the said licence and directed the petitioner to account for its records within 10 (ten) days. Being aggrieved by such directions and cancellation, the petitioner moved this Court calling in question the said opinion of NBR dated 16.05.2004(Annexure-A), show cause notice/order dated 25.05.2004 (Annexure-A-1) and final cancellation order dated 04.07.2004 (Annexure-A-2) and, accordingly, obtained the aforesaid Rule Nisi. At the time of issuance of Rule, this Court, vide order dated 07.07.2004, stayed operation of the aforesaid impugned orders/letters initially for 03 (three) months and, subsequently, the said period of stay was extended time to time.

4. The Rule Nisi is contested by respondent no.1by filing affidavit-in-opposition as well as supplementary affidavit-in-opposition contending, inter alia, that the bonded warehouse facilities, as enjoyed by the petitioner, was against relevant provisions of law as it was used as the distribution center, which was contrary to the provisions of law. According to the respondent No. 1, the cancellation was done upon following due process of law and in strict compliance of the provisions under Section 13 of the Customs Act, 1969 and as such this Court has got nothing to interfere into the same. It is further contended that the privilege of bonded warehouse may only be enjoyed for the joint purpose of manufacturing, keeping raw materials and finished goods. However, admittedly, the petitioners bonded warehouse having not been used for those purposes, as the same was only used as distribution center, which was causing huge conveniences and other difficulties to the respondent no.1, the same was lawful cancelled.

5. <u>Submissions:</u>

Mr. A.F. Hassan Arif, learned senior counsel appearing, along with Mr. Ashraful Hadi, learned advocate, for the petitioner, has taken us to the entire documents as annexed to the writ petition and to the relevant provisions of law, in particular Section 13 and the provisions under Chapter-11 of the Customs Act, 1969. At the beginning, drawing our attention to Annexure-A along with letter of the then Commissioner of Customs dated 13.08.2003 as enclosed their-with, as well as a letter dated 24.01.2004 (Annexure-F), Mr. Ariff argues that mere reading of these letters and correspondences will reveal the very intention and mindset of the respondents before taking the impugned actions against the petitioner. According to him, though Section 13 has conferred independent power on the Bond Commissioner for cancellation of licence of a licensee, the Commissioner concerned did not exercise that power independently in as much as that from the very beginning he was advised by the NBR and acted under the dictation of the NBR. Further referring to Annexure-A, which is a letter of NBR dated 16.05.2004 in response to the recommendation of the earlier Bond Commissioner, learned advocate submits that when the NBR, by this letter, has agreed to the recommendation given by the then Bond Commissioner the next Bond Commissioner did not have any option but to follow such consent of the NBR, and as such, according to him, from the very beginning, the exercise of power by the Bond Commissioner under Section 13 was not an independent exercise and as such the impugned show cause notice as well as the impugned action of cancellation were without lawful authority, the same having been initiated and issued not in strict compliance with the provisions of Section 13, in so far as the independent exercise of discretion of the Commissioner was concerned. Therefore, according to Mr. Ariff, since the very issuance of the show cause notice followed by the cancellation of licence was done under the influence of NBR, the same cannot stand in the eye of law. In this regard, learned advocate has drawn our attention to the very words used in the said show cause notice, namely that "fËma ¢h¢ধও পদ্ধতী অনুযায়ী এইরুপ ক্ষেত্রে বন্ড সুবিধা প্রদান সমুচিত নয়, <u>এ ব্যাপারে S¡a£u l¡জস্ববোর্ডের দিকনির্দেশনা চাওয়া হলে জাতীয় রাজস্ববোর্ড সুত্রক্ত পত্রের মাধ্যমে প্রতিষ্ঠানটির বন্ড লাইসেন্সটি বাতিল</u> করার পক্ষে অভিমত ব্যাক্ত করেনz".

(Underlined to give emphasis).

6. Learned advocate further argues that the impugned show cause notice has further addressed another issue, namely that a bonded warehouse facility should not be allowed to be used only for the purpose of sales center. Mr. Ariff then argues that since the licence in favour of the petitioner was originally issued for the purpose of using of the same as distribution center, which is evident from the licence itself, this opinion, as expressed in the said show cause notice, tantamounts to imposition of restrictions, conditions and limitations "on goods to be warehoused" in petitioner's warehouse as provided under Clause-(b) of sub-section (2) of Section 13. Thus, according to him, in view of the provisions of sub-section (2), such restrictions can only be imposed by notification in the official gazette, which has not been done in the instant case. To substantiate his contention that respondent no.1 acted under the influence of the NBR, learned advocate refers to two decisions of Indian Supreme Court, namely **Padfield v. Minister of Agriculture (1968) AC 997 and Purtabpur Co. v. Cane Commissioner, AIR 1970 SC 1896**.

7. Learned advocate further submits that, apart from being influenced by the NBR, it is evident from the very show cause notice as well as other concerned correspondences between the Bond Commissioner and NBR that, even before issuance of the show cause notice in questions, both the NBR and respondent no.1 pre-decided the issues and as such the issuance of show cause notice as well as the opportunity of hearing to the petitioner were nothing but a mare ceremonial proceedings just to reach the conclusion already decided by the respondent no.1 and the NBR. Therefore, since the show cause notice was not issued with open-mind and, rather, it was issued with closed-mind, the same is not a show cause notice in accordance with law and as such the same was violation of the principles of natural justice. To strengthen this submission, the learned advocate has then drawn our attention to the very show cause notice dated 25.05.2004 (Annexure-A1) and has pointed out the actions taken along with the said show cause notice as mentioned at the bottom of the same under Clauses 1 to 4, 9 and 11 to 13. Mr. Ariff then submits that since the Bond Commissioner has already started taking actions along with the show cause notice against the petitioner and thereby virtually suspended the license of the petitioner even before any hearing, those actions, in clear terms, reveal the closed mindset of the respondents in that they have initiated the proceedings with closed-mind and the issuance of the show cause notice was only ceremony just to reach their be pre-determined conclusion. Therefore, according to him, though the petitioner gave reply to the said show cause notice, it was already known to the petitioner that such reply was a futile reply as the decision had already been taken from the highest level, i.e. NBR, to cancel the license of the petitioner. To substantiate such submissions, learned advocate has again referred to two decisions of the Indian Supreme Court, namely **ORYX Fisheries Private Ltd. V. Union of India and others 2011 (1) AWC 849 (SC)** and **HJ Trehan Vs. Union of India (1989) 1 SCC-764.**

8. Further drawing our attention to Section 196A of the Customs Act, 1969 as well as the Bonded Warehouse Licensing Rules, 2008, as contained in SRO No. 181-BCe/2008/2209/öó dated 26.06.2008, in particular Rule 16 therein, learned advocate submits that the existence of an appellate forum as against the order of the Commissioner of Customs (Bond) came into being only in 2008 and as such, at the relevant time, namely in 2004 when the impugned actions were taken, there was no such appellate forum against the impugned actions, and as such, the petitioner in fact did not have any efficacious remedy but to come before the High Court Division under writ jurisdiction. Further referring to the relevant provisions under

Chapter 11 of the Customs Act, 1969, in particular Sections 84, 97, 98, 99, 100 and 101, learned advocate argues that nowhere in the said Chapter it has been provided that the use of bonded warehouse facilities only for distribution purpose is prohibited under the law. Therefore, when the law does not make any provisions for use of bonded warehouse facilities as distributions center, the vested right of the petitioner under the said license cannot be taken away, as has been done in the present case, without following the due process of law.

9. Opposing the Rule, Ms. Israt Jahan, learned Deputy Attorney General, appearing on behalf of respondent No. 1, though concedes that at the relevant time there was in fact no appellate forum, submits that since the impugned actions were taken upon issuing show cause notice as well as considering the reply given by the petitioner, this Court will only examine whether the due process of law was followed in cancelling the license. According to her, since the due process as provided by law has been followed in the instant case, this Court has got nothing to interfere. Learned DAG further submits that except for the petitioner company, no other company or entity in the country has ever been allowed to use bonded warehouse facilities as distribution center inasmuch as that the use of bonded warehouse facilities of the petitioner as distribution center is in clear violation of the condition No. 3 of the very license. Thus, according to her, the Bond Commissioner committed no illegality in cancelling the said license. Further drawing our attention to Annexure-A, which is an opinion expressed by the NBR, learned DAG submits that nowhere from this letter it can be inferred that the NBR had dictated the Bond Commissioner to take actions against the petitioner for cancellation of license. Rather, according to her, it shows that the opinion was initially formed by the Bond Commissioner and the NBR only agreed to such opinion and expressed its consent to take appropriate legal actions. This being so, according to her, this cannot be termed to be a dictation by the NBR, as has been argued by the learned advocate for the petitioner.

10. <u>Deliberations of the Court</u>

Since the issue of absence of alternative remedy of appeal at the relevant time has been frankly conceded by learned DAG and also found by this Court upon examination of relevant provisions of law, including Section 196A of the Customs Act, 1969 as well as Rule 16 of the Bonded Warehouse License Rules, 2008, we do not need to elaborate the issue of maintainability of the Writ Petition in as much as that the petitioner in fact had no alternative remedy at the relevant time but to move this Court under writ jurisdiction against the impugned actions. In view of above, we hold that the writ petition is maintainable.

11. To examine the other issues raised by the learned Advocates in this writ petition, let us first examine the very Section 13 of the Customs Act, 1969, under which the impugned actions are claimed to have been taken by the respondent No. 1.

12. At the relevant time of granting of the license in question, i.e. in 1990, Section 13 of the Customs Act was as follows:-

> "*13. (1) At any warehousing station, the Collector of Customs may, from time to time, license private warehouses wherein dutiable goods may be deposited.*
>
> *(2) Every application for a licence for a private warehouse shall be made in such form as may be prescribed by the Collector of Customs,*
>
> *(3) Every licence granted under this section may be cancelled on conviction of the licensee of any offence under this Act relating to*

warehouses, or for infringement of any condition provided in the licence, or on the expiration of one month's notice in writing given to the licensee by the Collector of Customs.

(4) Pending consideration whether a licence be cancelled under sub-section (3), the Collector of Customs may suspend the licence."

(Underlines supplied)

13. It appears from the above quoted original provision under Section 13 at the relevant time that there was no authority like Commissioner of Customs (Bond) and it was the Collector of Customs, namely Commissioner of Customs, who had the power to issue licenses time to time for private warehouses wherein dutiable goods might be deposited. Sub-section (3) of the original Section 13 further provided that such license could be cancelled on conviction of the licensee of any offence under the said Act relating to warehouses or for infringement of any condition provided in the license etc. or on the expiration of one month notice in writing given to the licensee by the Collector of Customs. Sub-section (4) further provided that during consideration as to whether the license would be cancelled or not under sub-section (3), the license could be suspended by the Collector of Customs.

14. After substitution of the above section in 2003 vide Act No. 17 of 2003, i.e. at the time when the impugned actions were taken, Section 13 has got the following position:

***"13. Licensing of private warehouses**—(1) Subject to sub-section (2), at any warehousing station, the Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board may licence private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited.*

(2) The Board may, from time to time, by notification in the official Gazette, impose conditions, limitations or restrictions-

(a) on granting licence for private warehouse;

(b) on goods to be warehoused; and

(c) on import entitlement of the warehouse.

(3) The Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board may suspend or cancel a licence granted under sub-section (1)-

(a) If the licensee contravenes any provision of this Act or the rules made thereunder or commits breach of any of the conditions of the licence; or

(b) in the case where, he deems fit, a licence to be suspended or cancelled in the public interest;

Provided that in case of cancellation of any licence, the licensee shall be served with a show cause notice of thirty days and shall be given a reasonable opportunity of being heard."

(Underlines supplied)

15. It appears from the above provisions at the relevant time i.e. when the impugned actions were taken, the Commissioner of Customs (Bond) had already come into being and he was given the power to suspend or cancel a license granted under sub-section (1) for contravention of any provision of the said Act or Rule by the licensee or for commission of

breach of any conditions of license or if it was deemed by the Bond Commissioner that suspension or cancellation of license was in public interests. Further, a proviso was inserted therein in the meantime mandating a show cause notice of 30 days upon the licensee and to allow him reasonable opportunity of being heard in case of cancellation of licence.

16. Upon close scrutiny of the above provisions under Section 13, it appears that the Bond Commissioner may impose two types of distinct actions, namely 'suspension' or 'cancellation' of the license. Therefore, the initial position of suspension of license by the Collector of Customs pending consideration of cancellation of the license has been removed by the amendment, and the position after such amendment is that a license may be suspended or cancelled by the Bond Commissioner. However, in view of the proviso to sub-section (3) of Section 13, only in case of cancellation of license a show cause notice of 30 days was required to be issued followed by reasonable opportunity of hearing. No such procedural requirement of hearing or show cause notice is provided in respect of action of suspension. However, considering these aspects, this Court, in **Badar Box Industries Ltd. vs. Commissioner of Customs, reported in 19 BLC (2014)-411,** has already held that 'suspension' as occurring is sub-section (2) of Section 13 is itself an independent action or punishment and as such, under the amended dispensation of Section 13, no such suspension order can be issued pending consideration of the final cancellation of the license or pending hearing leading to the final cancellation of license. In the said case (one of us was the author judge), this Court also held that though the statute did not specifically provide for issuance of show cause notice and hearing for issuing suspension order, the requirement of show cause notice followed by reasonable opportunity of being heard had to be read therein. We do not find any reason to depart from that position of law in so far as the facts and circumstances of the present Case are concerned.

17. In line with the above legal position, if we examine the show cause notice in the present case as well as the correspondences between the NBR and the concerned Bond Commissioner, it will be evident that when the show cause notice (though titled as 'order' (A¡-cn) dated 25.05.2004) was issued asking the petitioner to show cause as to why it's license should not be cancelled, the concerned Bond Commissioner took some other drastic actions against the petitioner, as evident from Clauses-1-4, 9 and 11-13 at the bottom of the said show cause notice. By those clauses, the Bond Commissioner in fact stopped the release of petitioner's goods under the bonded Warehouse facilities, asked the BGMEA not to issue any UD and asked some lien banks not to open back to back letters of credit in favour of the petitioner. Mere reading of those clauses along with the show cause notice will reasonably reveal that the Bond Commissioner in fact suspended the license of the petitioner pending hearing on the show cause notice. As observed above and decided by this Court in the case referred to above, such suspension of license on the face of it is without lawful authority firstly on the ground that at the relevant time Section 13 did not empower the Bond Commissioner to suspend the license of a licensee pending hearing on the show cause notice leading to the final cancellation of the license, the secondly, since this Court has already held that 'suspension' in Section 13 is itself a punishment and as such prior show cause notice followed by hearing is required to impose such punishment, the show cause notice itself is not a show cause notice in view of the provisions under Section 13 of the Customs Act, 1969. Though the Rule Nisi in this Writ Petition succeeds merely on this point, this Court will examine some other arguments as raised by the parties.

18. To examine the other issue that the Bond Commissioner was in fact dictated by the NBR or that the show cause notice in question was a closed minded show cause notice, we

have gone through the said letter of the NBR dated 16.05.2004 (Annexure-A) along with the recommendation/suggestion of the then Bond Commissioner, as enclosed therewith, and earlier correspondences between NBR and the concerned Commissioner of Customs dated 14.01.2004 (Annexure-F) and 29.12.2003 (Annexure-3 to the supplementary affidavit-in-opposition of respondent No. 1). It appears form those correspondences that, pursuant to the recommendation sent by the earlier Bond Commissioner (Mr. Helal Uddin Ahmed) on 13.08.2003, the NBR, through its Second Secretary, made some enquiry from the concerned Bond Commissioner. However, in the meantime, a new Bond Commissioner (Mr. Md. Enayet Hossain) took over, and in response to such querries, he, vide letter dated 24.01.2004, informed NBR that he did not find any wrong doings or that there was no allegation of evasion of Tax against the petitioner company. Thereafter, NBR expressed it's opinion vide letter dated 16.05.2004 and communicated it to the new Commissioner (Mr. Enayet) informing him that the Board had agreed with the opinion of the earlier Bond Commissioner. Referring to these two-three letters, Mr. Ariff has vigorously argued that when the NBR vide letter dated 16.05.2004 expressed it's agreement with the opinion of the earlier Commissioner to cancel licence, the new Commissioner, though he was favourable to the petitioner as there was no allegations against the petitioner for tax evasion, had no option but to follow the said opinion as expressed by the earlier Commissioner and agreed upon by the NBR. Therefore, according to him, issuance of show cause order or notice in question pursuant to such agreement of the NBR was a mere formality as the decision to cancel licence had already been taken. This Court finds this argument very forceful in as much as that the show cause notice itself clearly reveals the fact that the NBR has already agreed to such actions of cancellation of license.

19. When a higher authority, namely the NBR, has expressed its opinion agreeing with the proposal sent by the earlier Bond Commissioner (Mr. Helal Uddin), it became very much difficult for the subsequent Bond Commissioner (Mr. Enayet) to go for any other option but to follow the proposal as was agreed upon by the NBR. This being so, this Court is of the view that, the show cause notice dated 25.05.2004 was in fact a closed-minded show cause notice. Therefore, giving reply to the such show cause notice, or attending a hearing pursuant to such show cause notice, became a mere formality for the petitioner. This view is further strengthened when we see the actions taken by the Bond Commissioner against the petitioner at the same time of issuance of the said show cause notice. When the Bond Commissioner requests other concerned authorities to suspend a license for all practical purposes, no reasonable reading can be done from such actions that the said show cause notice was in fact a closed-minded show cause notice inasmuch as that the concerned Commissioner had already decided the fate of the petitioner's license. Therefore, we are unable to agree with the submissions of the learned Deputy Attorney General that due process of law has been followed before taking the impugned action of cancellation of the licence. If this show cause notice dated 25.05.2004 is read along with the previous correspondences between the NBR and the concerned two Bond Commissioners of the same station, as exchanged behind the back of the petitioner, we find no option but to conclude that this show cause notice is not a show cause notice in the eye of law and as such the impugned actions pursuant to the said show cause notice cannot stand.

20. Now, the contention in the show cause notice that the petitioner should not be allowed to use the bonded warehouse facilities as a sale center. According to Mr. Ariff, such restrictions can only be imposed by the NBR in view of the provisions under sub-section (2) of Section 13 by gazette notification. It is true that one of the reasons for cancellation of the license, as contemplated by the then Bond Commissioner and the NBR, was that the

petitioner was using the facilities as a sale center. But, it appears that, there were some other reasons, one being the administrative inconvenience of the respondent No. 1 in dealing with such licensees. Had it been the case of the respondents that a licensee should not be allowed to use the bonded warehouse facilities only for sale center, they NBR could impose such conditions on the petitioner by notification in the official gazette. When NBR has been given the power by the law to impose restrictions/conditions on the goods to be warehoused in view of the provisions under Clause (b) of sub-section (2) of the Section 13, we also do not find any reason as to why the Bond Commissioner as well as the NBR opted for cancellation of the license as a whole given the obvious fact that the very license was issued in 1991 for the purpose of keeping the finished goods. It is evident from the license, as annexed to the writ petition, that the respondents deliberately granted such license in favour of the petitioner for keeping finished goods inasmuch as that the said license even did not mention the areas for factory and the areas meant for keeping raw materials etc. Therefore, we are of the view that, the NBR was very much competent to impose restrictions on the petitioner to keep raw materials and/or to keep spaces for factory in the bonded warehouse facilities by way of gazette notification. However, they opted for illegal cancellation.

21. Regard being had to the facts and circumstances of the case and discussions herein above, we find merit in the Rule and as such the same should be made absolute.

22. In the result, the Rule is made absolute. Accordingly, (i) the order dated 16.05.2004 (Annexure-A) issued by respondent No.2 directing cancellation of the petitioner's Bonded Warehouse License (Annexure-C), (ii) order dated 25.05.2004 (Annexure A-1) issued by respondent No.1 directing the petitioner to show cause within 15(fifteen) days as to why its above Bonded Warehouse Licence should not be cancelled and ((iii) Order dated 04.07.2004 (Annexure-A-2) issued by respondent No.1 cancelling the petitioner's Bonded Warehouse Licence are hereby declared to be without lawful authority and are of no legal effect.

23. Communicate this.

5 SCOB [2015] HCD 49

High Court Division

Death Reference No.06 of 2006.
with
Criminal Appeal No.208 of 2006.
with
Criminal Appeal No.231 of 2006.
with
Criminal Appeal No.447 of 2006.
with
Criminal Appeal No.1157 of 2006.
with
Jail Appeal No.87 of 2006.
with
Jail Appeal No.88 of 2006.
with
Jail Appeal No.89 of 2006.

The State
... Petitioner
Versus
Syed A. Salam & others
... Condemned Prisoner
Jahangir @ Kala jahangir
... Appellant
(In Crl. A.No.208 of 2006)
Syed Abdus Salam @ Md. Salam
... Appellant
(In Crl. A. No.231 of 2006)
Al-Amin
... Appellant
(In Crl. A. No.447 of 2006)
Sumon
... Appellant
(In Crl. A. No.1157 of 2006)
Syed A. Salam
... Appellant
(In jail A. No.87 of 2006)
Al-Amin
... Appellant
(In Jail A. No.88 of 2006)
Md. Jahangir
... Appellant
(In Jail A. NO.89 of 2006)
Versus
The State
...Respondent

Mr. Alal Uddin, Advocate with
Mr. Jalal Uddin Ahmed with
Ms. Suraya Begum, Advocates
...For the condemned Prisoner No.1 and appellant in Criminal Appeal No.231 of 2006.
Mr. Mantu Chandra Ghosh, Adv.
...For the condemned Prisoner No.2 and appellant in Criminal Appeal No.208 of 2006.
Mr. Sattoyendro Chandra Bhakto
... For the appellant
(In Crl. A. No.447 of2006)
Mr. Md. Sharafatullah, Adv.
... For the appellant
(In Crl. A. No.1157 of 2006)
Mr. Aminur Rashid(Raju), Adv.
... For the appellant
(In Jail A. No.87 of 2006)
Ms. Nahid Hossain (Liza), Adv
... For the appellant
(In Jail A. No.88 of 2006)
Ms. Zinnat Akhter Nazley Begum
... For the appellant
(In Jail A. No.89 of 2006)
Ms. Hasna Begum, State Defence Adv.
... For the absconding condemned accused Shah Kamal Rony and Sabuj @ Hanif.
Mr. Bhishmadev Chakraborty,D.A.G with

Mr. Md. Atiqul Haque, A.A.G
... For the State.

Heard on:08.05.11, 09.05.11, 10.05.11, 11.05.11 and 12.05.2011.
Judgment on:15.05.2011.

Present:
Mr.Justice Syed Refaat Ahmed
And
Mr.Justice Bhabani Prasad Singha

Legal Remembrancer's Manual, 1960
Chapter XII
Paragraph no.6:
An Advocate to defend an undefended accused charged with capital punishment should be appointed well in time of the commencement of trial of the case to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. The lawyer should be provided with the papers similar to that of the Public prosecutor. ... (Para 20)

Section 340 of CrPC
And
Legal Remembrancer's Manual, 1960
Chapter XII
Paragraph no.6:
The convict-accused-persons have been denied the right of an accused punishable with capital punishment as per the provision of section 340 of the Code of Criminal Procedure and the same also resulted in the breach of the provisions of Chapter XII of the Legal Remembrancer's Manual, 1960 (Specially the provision of Paragraph no.6 of the Legal Remembrancer's manual, 1960) which have rendered the trial as one not according to law requiring fresh trial. ... (Para 26)

Judgment

Bhabani Prasad Singha,J:

1. The Criminal Appeal No.208 of 2006 and Jail Appeal No.89 of 2006 at the instance of the convict-accused Jahangir @ Kala jahangir, the Criminal Appeal No.231 of 2006 and Jail Appeal No.87 of 2007 at the instance of the convict-accused Syed Abdus Salam @ Md. Salam, the Criminal Appeal No.447 of 2006 and Jail Appeal No.88 of 2006 at the instance of the convict-accused Al-Amin and the Criminal Appeal No.1157 of 2006 at the instance of the convict-accused Sumon are directed against the judgment and order of conviction dated 30.01.2006 passed in Sessions Case No.672 of 2005 corresponding to G.R. Case No.1011 and Narayanganj P.S. Case No.14(9)2004 passed by the Sessions Judge, Narayanganj. By the said judgment and order of conviction the leaned trial court convicted the accused persons Syed A. Salam, Jahangir @ kala jahangir, Al-Amin, Shah Kamal Rony(Absconding) and Sabuj @ Hanif under sections 302/34 of the Penal Code awarding them death sentence and to pay a fine of Tk.50,000/- each. By the selfsame judgment the learned trial court convicted the accused-persons Syed A. Salam, Jahangir @ Kala Jahangir, Al-Amin, Shah Kamal Rony (Absconding) and Sabuj @ Hanif under section 201 of the Penal Code sentencing them to suffer rigorous imprisonment for 10(ten) years and to pay a fine of Tk.2,000/- each, in default, to suffer imprisonment for another 1(one) year and convicted the accused Sumon under sections 302/34 of the Penal Code sentencing him to suffer imprisonment for life and to pay a fine of Tk.50,000/-, in default, to suffer rigorous imprisonment for another 1(one) year.

2. The learned trial Judge also made a Death Reference (Death Reference No.06 of 2006) for confirmation of the death sentences imposed upon the condemned accused-persons Syed A. Salam, Jahangir @ Kala Jahangir, Al-Amin, Shah Kamal Rony (Absconding) and Sabuj @ Hanif.

3. The Death Reference and the aforesaid Criminal Appeals being cropped up from the self-same judgment and common question of law and facts being involved in the Death Reference and the Criminal and Jail Appeals, said cases have been heard analogously and are being disposed of by this single judgment.

4. The prosecution case, to narrate in brief, is that on 12.09.2004 at about 8.30 p.m. at night the accused A. Salam went to the house of the informant and on the pretext of having some talks he along with 3/4 unknown youths called away Jewel, the younger brother of the informant towards Bowbazar. The brother of the informant did not return home after he was called away by the accused-persons. Mentionably, in the 2nd floor of the house no.145/2, Mobarak Shah Road situated beside the house of the informant, a new tenant came where two young girls, namely, Shila and Suma used to reside. In that residence the accused Salam often used to come. The accused Salam had love affair with said Shila. Said two girls used to banter with Jewel. As a sequel to the said matter, in furtherance of their common intention in a pre-planned way the accused-persons Salam, Shah Kamal Rony, Jahangir @ Kala jahangir, Sumon and Al-Amin called away the brother of the informant i.e. the deceased, took him to the rented residence of the accused Salam, killed him by strangulation with a "gamchha" (towel), cut his throat totally, amputated his left hand from the shoulder, poured the cut pieces of the body of the deceased in to a bag and dropped into the "Ambagan Canal"

5. On receipt of the First Information Report(hereinafter referred to as the FIR) of the case, police took up investigation of the case and after investigation prima facie case having been made out against the accused persons submitted charge sheet No.15 dated 25.01.2005 of Narayanganj Police Station, under sections 364/302/201/34 of the Penal Code against them.

6. At the commencement of trial of the case charge under Sections 302/201/34 of the Penal Code was framed against the accused-persons. The charge was read over and explained to the accused-persons Syed A. Salam, Jahangir @ Kala Jahangir, Al-Amin, Shah Kamal Rony and Sabuj @ Hanif to which they pleaded not guilty and claimed to be tried. The accused Sumon being absconding the charge could not be read over and explained to him

7. To substantiate it's case the prosecution in all examined as many as 18(eighteen) witnesses. On the other hand, none was examined on behalf of the defence.

8. On the closure, of the evidence of the prosecution the accused-persons Sumon, Al-Amin, Jahangir @ Kala Jahangir and Syed A. Salam were examined under Section 342 of the Code of Criminal Procedure whereupon they once again pleaded their innocence informing the Trial Court that they would not adduce any evidence on their behalf. The other accused-persons being absconding, they could not be examined under section 342 of the Code of Criminal Procedure.

9. The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses is the denial and the plea of innocence in the alleged occurrence.

10. After trial, on hearing the learned Advocates for both the sides and so also on perusal and on analysis of the evidences and materials on record, the learned trial Judge came to the finding that the prosecution succeeded in bringing home the charge as brought against the accused-persons and accordingly, he convicted and sentenced them by the impugned judgment and order as aforesaid.

11. Md. Alal Uddin, the learned Advocate for the condemned-accused-appellant A. Salam submits that the State defence lawyer for the accused A. Salam was not appointed at proper time; that the defence lawyer for the accused A. Salam was appointed at the last moment at the time of cross-examination of the P.W.3; that the case of the said accused was not conducted properly and as such, the instant case is a fit case to be sent back on remand for re-trial. In support of his submission the learned Advocate has referred the case of The State Vs. Purna Chandra Mondol reported in 22 DLR at page 289, the case of State Vs. Altaf reported in 32 DLR at page 254 and the case of Abdul Gani Vs. The State reported in 16 DLR at page 388.

12. Mrs. Hasna Begum, the learned Advocate representing the absconding convict-appellants Kamal Rony and Sabuj @ Hanif made her submission in the line of the learned Advocate for the accused A. Salam.

13. Mr. Montu Chandra Ghosh, the learned Advocate representing the accused jahangir @ Kala jahangir submits that the confessional statement of the accused Al-Amin has been used against this accused without having any corroboration by any independent witness and weighing the same on legal basis and as such, the impugned judgment so far as it relates to the accused Jahangir @ Kala Jahangir is liable to be set aside.

14. No one appears on behalf of the convict-accused Al-Amin.

15. On the other hand, Mr. Bhishmadev Chakraborty, the learned Deputy Attorney General representing the State submits that in a case of capital punishment the appointment of a State Defence Lawyer is the mandatory provision of law; that after examination of the P.W.1 and the P.W.2, the State Defence Lawyer was appointed for the accused A. Salam; that after the said State defence Lawyer relieved himself from the charge of defending the accused A. Salam, said accused himself cross examined the remaining prosecution witnesses; that although the overwhelming evidence on record points to the guilt of the convict-appellants and there are sufficient material on record to base conviction against them, due to procedural defects the conviction against the convict-appellants cannot be upheld and that on setting aside the entire judgment the case should be sent back on remand for retrial to pass a judgment after removing all the procedural defects giving chance to the Advocates or the state defence lawyers to be appointed on behalf of the accused A. Salam and the absconding convict-accused-persons to cross-examine the prosecution witnesses. The learned Deputy Attorney General also referred the case of Abdur Rashid Vs. The State reported in 27 DLR(AD) at page 1 and the case of The State Vs. Hanif Gani reported in 45 DLR at page 400.

16. In view of the submissions and the counter submissions of the learned Advocates for the parties, let us review the relevant materials on record and scan the attending circumstances of the case to arrive at a proper and correct decision.

17. On perusal of the lower court's record, it transpires that on receipt of the record of Sessions Case No.672 of 2005 from the court of Magistrate, 1st Class(South) by the Sessions Judge, Narayanganj on 04.10.2005 cognizance was taken on that date fixing 9.10.2005 for framing charge. On 9.10.2005 charge under sections 364/302/201/34 of the Penal Code was framed against the accused-persons fixing 16.10.2005 for trial of the case. On 16.10.2005 i.e. on the very first date of trial of the case Advocate Md. Kamruzzaman was appointed the State Defence Lawyer for the absconding accused persons and Advocate Md. Zakaria Habib was appointed the State Defence Lawyer for the accused A. Salam and that on that date 6 prosecutions witnesses, namely, Ripon, Dr. Shahjahan Mia, Shahidul Alam, Mafia Begum, Shafi Uddin Swapan and Nasir Uddin were examined. Although from the order dated 16.10.2005, it appears that the State Defence Lawyer on behalf of the accused A. Salam was appointed before start of recording evidence of the said witnesses but from the observation of the learned trial court to the effect that the accused A. Salam himself was cross examining the P.W.3, it appears that after examination of the P.W.1 and the P.W.2 Advocate Mr. Zakaria Habib was appointed State Defence Lawyer on behalf of the said accused at the time of cross examining the P.W.3. Said State Defence lawyer conducted the case on behalf of the accused A. Salam up to the examination of the prosecution witness No.9. Record further shows that on 18.10.2005 after examination-in-chief of the P.W.10 accused A. Salam orally informed the court that he himself would cross-examine the witness. In the said circumstances, the learned State Defence Lawyer filed an application for dropping him as the State Defence Lawyer for the accused A. Salam stating that said accused had no confidence in him. The learned trial court allowed the petition and thereafter, the accused A. Salam cross examined the remaining prosecution witnesses. In the said state of affairs it was a duty cast upon the learned trial court to appoint a fresh State Defence Lawyer for the accused A. Salam at that point of time which he did not do. Now, with regard to the State Defence Lawyer Advocate Kamruzzaman on behalf of the absconding accused-persons. As stated earlier on the very date of start of trial of the case Advocate Kamruzzaman was also appointed State Defence Lawyer for the absconding accused-persons. Said State Defence Lawyer conducted the case on behalf of the absconding accused-persons till 24.10.2005. His appointment as a State Defence Lawyer for the absconding accused-persons was cancelled on that date and a new State Defence Lawyer namely Selina Yesmin was appointed State Defence Lawyer on behalf of the absconding accused-persons who only adopted the cross examination of the remaining prosecution witnesses i.e. the P.W.11,to the P.W.18 of the other lawyers and declined to cross examine them which is apparent on the face of the record.

18. Section 340(1) of the Code of Criminal procedure guaranteed the right to an accused to be defended by an Advocate which runs as follows:

> "Section 340(1) of the Code of Criminal Procedure. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court,may of right be defended by a pleader".

19. In the light of provision of section 340 of the Code of Criminal Procedure, provisions have been made in Chapter XII of the Legal Remembrancer's Manual, 1960 to provide defence to an undefended accused charged with the offence punishable with death. The provisions of paragraphs 1-7 of Chapter XII of the Legal Remembrancer's Manual, 1960 relating to undefended accused are as follows:

> "1.Pauper accused punishable with capital sentence to be given legal assistance. Every persons charged with committing an

offence punishable with death shall have legal assistance at his trial and the Court should provide advocate or pleader for the defence unless they certify that the accused can afford to do so.

2. Committing Magistrate to report to the District magistrate. In committing murder cases to the Sessions Court, the Magistrate will report to the District Magistrate whether the accused was represented in the proceedings before him, and if not, whether he can afford to engage an advocate or pleader for his trial in the Sessions Court. If the Magistrate reports that the accused has not sufficient means, it will be incumbent on the District Magistrate to engage an Advocate or pleader at Government expense.

3. Judge to take action when accused goes unrepresented. In any case, if the accused is unrepresented in the Sessions Court and the Judge considers that he has insufficient means to obtain legal assistance, in spite of the committing Magistrate's report to the contrary, the Judge shall immediately inform the District Magistrate, who must make the necessary arrangement for the defence of the accused.

4. No discretion of the Court allowed. It is no longer left to the discretion of the courts to decide whether the nature of the case makes legal assistance essential.
The sole criterion is whether the accused has sufficient means or not and the courts are bound to satisfy themselves on this point.

5. In each district the Magistrate may, after consulting the District Judge, form a panel of pleaders for the defence of pauper accused in murder cases subject to the approval of the Legal Remembrancer and the panel should consist of pleaders of sufficient standing and ability and should not be unreasonably large. The number of pleaders who will constitute the panel shall be fixed after approval by the Legal Remembrancer and shall not be altered without his approval. The District Magistrate may, however, appoint or remove any pleader after consulting the District Judge within the number approved by the Legal Remembrancer and after obtaining the Legal Remembrancer's previous sanction.

6. Engagement of pleaders to be made in time. In all cases, the advocate or pleader should be appointed in time to be able to study the case, and the person selected should be of sufficient standing and ability to render substantial assistance. He should be given a brief similar to that prepared for Public Prosecutor and it would be convenient if the two briefs were prepared together. He should be supplied free of cost with copies of all papers of which an accused person is ordinarily allowed copies.

7. Employment of pleaders in mutually antagonistic defence- When two or more paupers accused of murder in the same trial put forward mutually antagonistic defence, arrangement should be made for separate representation of the accused by different pleaders or advocates at the expense of Government".

20. Paragraph 6 of the Legal Remembrancer's Manual regarding an undefended accused clearly shows that an Advocate to defend an undefended accused charged with capital punishment should be appointed well in time of the commencement of trial of the case to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. The lawyer should be provided with the papers similar to that of the Public prosecutor.

21. From the facts as stated above, it is found that two types of lapses which are erroneous on the face of the record took place in disposal of the Sessions Case No.672 of 2005.

22. Firstly, the lapse of the learned trial court in not appointing the State Defence Lawyer for the accused A. Salam and the other condemned-accused-persons as per the provisions of the Legal Remembrancer's Manual, 1960(specially the provision of paragraph No.6) and not appointing a fresh lawyer when the learned State Defence Lawyer for the accused A. Salam surrendered power on behalf of the said accused in the face of non confidence of the accused A. Salam to him. The aforesaid facts and circumstances show that the learned trial court did not comply with the provision of section 340 of the Code of Criminal Procedure and so also the rules of the Legal Remembrancer's Manual, 1960(Specially the provision of paragraph no.6) for an accused punishable with punishable with capital punishment.

23. Secondly, the laches on the part of the State Defence Lawyers for the accused A. Salam and the absconding accused-persons. After they were appointed to be State Defence Lawyers they should have taken proper preparations to conduct the case on behalf of the said accused persons on taking relevant papers from the court. But instead of doing that, in cases of most of the prosecution witnesses they either adopted the cross examination of the lawyer of other accused-persons or declined to cross examine the prosecution witnesses.

24. As stated earlier, the learned Advocate for the condemned-accused A. Salam referred the cases of The State Vs. Purna Chandra Mondol reported in 22 DLR at page 289, the case of State Vs. Altaf reported in 32 DLR 254 and the case of Abdul Gani and another Vs. State reported in 16 DLR at page 388 and that the learned Deputy Attorney General referred the case of Abdur Rashid Vs. The State reported in 27 DLR(AD) at page 1 and the case of the State Vs. Hanif Gani reported in 45 DLR at page 400.

25. In the case of The State Vs. Purna Chandra Mondol reported in 22 DLR at page 289 it is held that "Last moment appointment of a defence lawyer for an undefended accused virtually negatives the right of the accused to be properly defended in the case". In the case of the State Vs. Altaf reported in 32 DLR at page 254 it is held that "Last minute engagement with hardly any time to prepare for defence in consultation with the convict-accused amounts to denial of justice to the accused". In the case of Abdul Gani and another Vs. State reported in 16 DLR at page 388 it is held that " in a case of an undefended accused to be defended at the State's cost the brief must be supplied and proper opportunity be given to the lawyer to make himself ready". In the case of Abdur Rashid Vs. The State reported in 27 DLR(AD) at page 1 our apex court deprecated the last moment appointment of a defence-lawyer to defend an accused on a murder charge. The apex court also held that elaborate provisions made in the first paragraphs of Chapter XII of the Legal Remembrancer's Manual, 1960 must be kept in view when a defence lawyer to represent an undefended accused is appointed. In the case

of the State Vs. Hanif Gani reported in 45 DLR at page 400 it is held that "An Advocate to defend an undefended accused charged with capital offence should be appointed well in time to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. He should be provided with papers which are ordinarily allowed to the accused".

26. In the light of discussion made here above, and so also on consideration of the facts and circumstances of the case we are of the view that the convict-accused-persons have been denied the right of an accused punishable with capital punishment as per the provision of section 340 of the Code of Criminal Procedure and the same also resulted in the breach of the provisions of Chapter XII of the Legal Remembrancer's Manual, 1960 (Specially the provision of Paragraph no.6 of the Legal Remembrancer's manual, 1960) which have rendered the trial as one not according to law requiring fresh trial. The accused A. Salam should be offered the choice of choosing a lawyer to defend himself within a reasonable time. It he does not do so than he as well as the absconding accused-persons be provided with the defence at State expense allowing them reasonable time to prepare the case providing all relevant papers to enable them to cross examine the prosecution witnesses.

27. In view of the discussion made here above, we are not inclined to discuss the evidences and merit of the prosecution case as well as the other submission made by the learned Advocates.

28. In the result, the death reference is rejected and the Criminal Appeal No.208 of 2006, Jail Appeal NO.89 of 2006, Criminal Appeal No.231 of 2006, Jail Appeal No.87 of 2006, Criminal Appeal No.447 of 2006, Jail Appeal No.88 of 2006, Criminal Appeal No.1157 of 2006, Jail Appeal No.89 of 2006 are allowed. The impugned judgment and order dated 30.01.2006 passed in Sessions Case No.672 of 2005 convicting and sentencing the accused-persons under sections 302/201/34 of the Penal Code is hereby set aside and the said case is to be retried on the charge already framed. Let the case be sent back on remand to the court of learned Sessions Judge, Narayanganj for fresh trial. The learned trial court shall dispose of the case within 4(four) months from the date of receipt of the judgment in the light of discussion made here above (specially keeping in view the provisions of the paragraph no.6 of the Legal Remembrancer's Manual, 1960) giving the State Defence lawyers or the learned lawyers for the accused-persons adequate time and opportunity to prepare for and to cross-examine the prosecution witnesses.

29. Let the condemned-prisoners be shifted from the condemned cells to the cells meant for under trial prisoners in jail.

30. The accused Sumon is directed to surrender before the court of the learned Sessions Judge, Narayanganj within 15 days from the date of receipt of the judgment. He will remain on bail as granted by this court as before till disposal of the case.

31. Let a copy of this judgment along with the lower court records be sent down expeditiously.

5 SCOB [2015] HCD 57

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION No. 9397 of 2013

Mrs. Sitara Siddiq
.....Petitioner.
Versus-
Government of the people's Republic of Bangladesh and others.
..... Respondents.

Mr. Shafique Ahmed, Senior Advocate

Mr. Md. Ziaul Haque, Advocate
.....For the petitioner

Mr. Md. Motaher Hossain (Sazu), D.A.G
with
Ms. Purabi Rani Sharma, A.A.G.
Mr. Md. Shafiqul Islam Siddique, A.A.G.
..... For the respondent No.1

Heard on: 16.11.2014, 23.11.2014, 10.12.2014 and judgment on: 11.02.2015.

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

Abandoned Buildings (Supplementary Provisions) Ordinance, 1985
Section 7 and 8:
The application under sub-section (1) of section 7 shall contain the particulars as stipulated in Sub –section (1) of section 8 and also shall be accompanied by all the documents or the Photostat or true copies, as stipulated in Sub-section (2) of section 8 of the Ordinance No. LIV of 1985. In both the Sub-sections (1) and (2) of section 8 of the said Ordinance, the word 'shall' has been used i.e. "shall contain" and "shall be accompanied. So the particulars in sub-section (i) and documents as per sub-section (2) of section 8 of the Ordinance are the essential condition in making an application under sub-section (1) of section 7 of the said Ordinance. Without any of the said particulars and documents, it is not possible to file an application under section 7 of the said Ordinance. ...(Para 21, 22 and 23)

Judgment

Md. Ashraful Kamal, J:

1. This Rule was issued calling upon the respondents to show cause as to why the inclusion of the property of the petitioner measuring 14 kathas 15 ½ chattaks lying in Plot No. SW(D)-9, Road No. 8 of Gulshan Model Town, Dhaka in the `Kha` list of the Abandoned property shown at Serial No. 19, Page No. 9764 of Gulshan Area, Dhaka published in the Bangladesh Gazette, Additional Issue dated 23.09.1986 (Annexure J) should not be declared to have been published without any lawful authority and is of no legal effect and why the respondent Nos. 1 &2 should not be directed for taking necessary steps to ensure the exclusion of the property of the petitioner from the abandoned list and for publishing a Gazette Notification for the same.

2. Brief facts, necessary for the disposal of this rule, are as follows:

The property in question was allotted by the then DIT to one Mrs. Nurunnahar Abedin wife of Mr. Zainul Abedin of 244, Jubilee Road, Enayet Bazar, Chittagong and the DIT executed standard Lease Deed No. 145 dated 04.01.1967 registered with the Sadar Sub-registrar, Dhaka in favour of Mrs. Nurunnahar Abedin and accordingly she got delivery of possession by metes and bounds and had been paying the Government dues during continuance of her possession.

3. Thereafter, Mrs. Nurunnahar Abedin transferred the property in question to one Mr. H.A. Rehman @ Abdur Rahman vide Deed No. 23462 dated 08.12.1967 registered with the District Registrar, Dhaka. The said H.A. Rahman constructed a residential building on the land in question by taking approval from the then DIT and loan from the House Building Finance Corporation (HBFC). Subsequently, vide memo No. DIT/EO/252 dated 05.02.1968 DIT mutated the plot in question. Then, he obtained no objection certificate vide memo No. DIT/EO/2886 dated 08.11.1968 from DIT and accordingly mortgaged the property to the House Building Finance Corporation vide registered mortgaged deed No. 2232 dated 19.03.1969.

4. The present petitioner on behalf of H.A. Rahman paid capital gains tax of the house on 28.1.1972 and Mr. H.A. Rehman sworn an affidavit before the Magistrate, 1st Class, Dhaka on 05.04.1972 declaring that he is a permanent resident of Bangladesh. The then Member of Constituent Assembly (MCA) K.M. Obaidur Rahman issued a certificate on 20.05.1972 that Mr. H.A. Rehman did not take part any activity subversive of the state and against the interest of Bangladesh and the Deputy Magistrate and Deputy Collector, Dhaka issued memo No. 102NC/DC dated 31.07.1972 that Mr. H.A. Rehman is a Bangladeshi citizen.

5. The S.D.O. South, Dhaka has confirmed that the house is not abandoned property vide memo No. 2003-PASA/2/72 dated 22.08.1972 and the Executive Engineer, Central Dhaka Division, issued memo No. EE/CD/DIT/561(6)6.stha dated 23.08.1972 to the effect that the holding had been dropped from the list of the abandoned property and the said memo was communicated to the Ministry of Public Works. He obtained income tax clearance certificate vide serial No. 108020 No. 6/72/73 and capital gain tax certificate No. 473 CGP/72/73 dated 31.08.1972. The petitioner took permission from the DIT vide memo No DIT/EO/1064/2 dated 05.09.1972. She paid loan of the House Building Finance Corporation on 08.09.1972.

6. On 09.09.1972, said Rahman by showing affidavit declared himself as a member of Ismailia Somproday and he executed a power of attorney on 09.09.1972 in favour of the petitioner's husband Mr. Abu Bakar Siddiq. The petitioner paid income tax against the house on 31.12.1972.

7. The petitioner paid a sum of Tk. 14,473.77 to the House Building Finance Corporation on 27.02.1975 against the loan of H.A. Rahman. On 19.11.1975, the petitioner applied for mutation and accordingly the then DIT vide memo No. DIT/EO/4091-L dated 23.06.1976 mutated her name.

8. The Bangladesh House Building Finance Corporation issued Memo No. HBFC/Law/ HBD-5103 dated 19.09.1979 to the effect that loan account of H. A. Rahman has been closed and the property has been redeemed in favour of the petitioner. Thereafter, the property was mortgaged with the Bangladesh Shilpa Rin Sangsta against loan, which was released on 09.05.1988. Thereafter, the land in question was mortgaged with ICB Islami Bank Ltd. in the year 1988. The petitioner filed Title Suit No. 209 of 2002 before the Subordinate Judge, 5th

Court, Dhaka to get back her property documents. Ultimately, the petitioner got release of her title deed on 13.09.2012. After that the petitioner intended to develop the land in question and some developers submitted their proposals for developing the property. Thereafter, the petitioner sent her representative to the local revenue office to clear up the dues. But, the revenue office refused to take khazna and taxes showing the reason that the property is in the list of abandoned property published in the Bangladesh Gazette. Then, the petitioner served notice upon the respondents on 08.09.2013 demanding justice for exclusion of the property from the abandoned list, but in vain.

9. Being aggrieved by the said inclusion of the property of the petitioner measuring 14 kathas 15 ½ chattaks lying in Plot No. SW(D)-9, Road No. 8 of Gulshan Model Town, Dhaka in the `Kha` list of the Abandoned property shown at Serial No. 19, Page No. 9764 of Gulshan Area, Dhaka published in the Bangladesh Gazette, Additional Issue dated 23.09.1986 (Annexure J), the petitioner preferred this Writ Petition and obtained the present Rule.

10. The respondent No.1 by filing an affidavit-in-opposition contended that the writ petition is misleading, mala-fide, incorrect and based on false statements. The petitioner had full knowledge about inclusion of the properties. Moreover, H.A. Rehman was a non Bangali and he left this country during the liberation war of Bangladesh. After liberation his house was vacant and accordingly the properties were declared abandoned as per law. The respondent No 1. further stated that the so-called mortgage- deeds and documents are fake and collusive which has been created by the petitioner for grabbing the properties in question and the petitioner had prior knowledge about the abandoned list. Moreover, the SDO did not issue any release order/exclusion of the properties from abandoned list. The respondent issued notice upon the dweller of the said house, but as per direction of the notice the petitioner or anybody did not appear before the authority concerned with the documents, if any. H.R. Rehman was never a citizen of Bangladesh and all documents using his name are also false and fake documents. An illegal claimer has no right to get any protection from the state. Although the property was in the abandoned property list H.A. Rehman i.e. allottee transferred the property to Mr. A.B. Siddiq and on 19.11.1975 the wife of A.B. Siddiq i.e. Sittara Siddiq filed an application for mutation to the Estate Officer, DIT Dhaka and the Estate Officer in Charge DIT Dhaka getting the same on 22.04.1976 issued a letter for supplying or producing the original copy of the transfer deed but the petitioner could not produce the same. Mr. Kamrul Hasan authorized officer issued a notice through a special messenger on 07.08.1984 upon the dweller of the said house and the gazette of the abandoned list of scheduled properties was published on 23.09.1986 but till now the petitioner did not file any case before the court of settlement as per provision of specific law for exclusion of the scheduled land from abandoned list.

11. Mr. Shafiq Ahmed with Mr. Md. Ziaul Haque the learned Advocates appearing for the petitioners submits that the petitioner is lawful owner of the property through purchase and the petitioner is a Bangladeshi citizen purchased the property by taking prior permission from the DIT and the DIT recognized the petitioner as lessee and the petitioner paid municipal taxes on 25.02.1975. He further submits that SDO Sadar, Dhaka vide Memo No. 2003PASA/2/72 dated 22.08.1972 declared that the property is not an abandoned property rather belonged to Mr. H.A. Rehman. The Executive Engineer, Central Dhaka Division, DIT also confirmed vide memo No. EE/CD/DIT/651(6). tha dated 23.08.1972 that the property is not an abandoned property. He also submits that the petitioner was not given any notice at any time to surrender possession or to furnish her papers relating to title or information

regarding her legacy of the title or possession. He further submits that the respondent No.1 has filed a letter dated 07.08.1984 by which none was asked to produce some documents and there is no mention of the name of the petitioner in the so-called letter and nobody received it on 07.08.1984 making it clear that the said document is a fake document purportedly to mislead the court and the said letter is not a notice under section 5 (1)b of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. LIV of 1985) and the said letter does not contain any notice for surrendering possession or taking over possession of the house of the petitioner. Mr. Shafique Ahmed finally submits that it has already been held by the apex Court by referring to the case of Bangladesh Vs. Amela Khatun and others reported in 53 DLR(AD)-55 that in the absence of notice under section 5(1)(b) of Ordinance, 1985, enlistment of any property is illegal and without any lawful authority.

12. Mr. Motaher Hossain, the learned Deputy Attorney General alongwith Ms. Purabi Rani Sharma and Mr. A.B.M. Mahbub the learned Assistant Attorney Generals appearing on behalf of the respondent No.1 submits that H.A. Rahman was never a citizen of Bangladesh and the petitioner did all evil producing a fake H.A. Rahman and all the documents which have used his name are also forged and fake documents and to testify the genuineness of all documents, the proper court is only the Court of Settlement. He further submits that the so-called deed of Sitara Siddiq was a fake one, therefore, she could not submit the original copy of the said deed before DIT authority and for want of original one, DIT authority refused to mutate the land in her name on 22.04.1976. He also submits that as per provision of Article 4 of P.O. of 1972, the control, management and disposal of abandoned properties vested in the government and accordingly the government is discharging its duty in that regard. The case land is under their control and management. The petitioner had full knowledge regarding the status of the case land i.e. same is lying in the list of abandoned property, but the petitioner never filed any application before the concerned authority of the government. He also submits that the alleged deed No. 23462 dated 03.12.1967 which was executed between Mrs. Nurunnahar Abedin and H.A. Rahman ex-facie shows that the same was executed by one Jamil Chowdhury and as such it appears that the deed is a fake one. Mr. Motaher finally submits that the petitioner ought to have come to the court of settlement and without exhausting that forum the petitioner could not come before this court.

13. We have perused the writ petition, annexures therein, affidavit-in-opposition filed by the respondent No.1 and considered the submission of the both the learned Advocates for the petitioner and the leaned Deputy Attorney General for the respondents.

14. At the outset, we deem it essential to refer to the first part of the 'Preamble' of the Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 (President's Order No. 16 of 1972), which runs thus:

> *"WHEREAS it is expedient to make provisions for the control, management and disposal of certain property abandoned by certain persons who are not present in Bangladesh or whose whereabouts are not known or who have ceased to occupy or supervise or manage in person their property, or who are enemy aliens;"*

15. So, the whole purpose of the P.O. 16 of 972 is for the control, management and disposal of certain properties which were abandoned by four categories of person, (1) those who had left Bangladesh (2) those whose whereabouts were not known (3) those who had ceased to occupy or supervise or manage in person and (4) those who were enemy aliens.

And their such act of desertion or abandonment ought to be completed on or before 28-02-1972, when the said President's Order No. 16 of 1972 was promulgated and come into force.

16. After the enactment of the P.O. 16 of 1972, the Government to get the actual detailed list of the said abandoned properties, made and promulgated 'The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985', (Ordinance No. LIV of 1985).

17. Sub-section (2) of the Section 5 of the said Ordinance 54 of 1985 says that the lists published under sub-section (1) of the section 5 shall be conclusive evidence of the fact that the buildings included therein are abandoned properties and have vested in the Government.

18. In the case of Government of Bangladesh Vs. Ashraf Ali @ Ashraf Ali and another reported in 49 DLR (AD) – 161 Our apex Court held that;

> *"It has been held by this Division in various decisions that* ***the enlistment of building under section 5(1) of Ordinance 54 of 1985 raised a presumption in law that the property is an abandoned property under section 5(2) of the Ordinance. This presumption is, of course, a rebuttable presumption."***

19. Therefore, if any person wants to rebut such presumption, alternatively, claim any property of the lists published under Sub- section (1) of the section 5 of the said Ordinance 54 of 1985, such person ought to file an application under Sub-section (1) of the section 7 of the Ordinance 54 of 1985, which runs thus:-

> ***" 7. Persons claiming interest in certain buildings to apply to the Court of Settlement.-*** *(1) Any person claiming any right or interest in any building which is included in any list published under section 5 may, within a period of one hundred and eight days from the date of publication of the list in the official Gazette, make an application to the Court of Settlement for exclusion of the building from such list or return or restoration of the building to him or for any other relief on the ground that the building is not an abandoned property and has not vested in the Government under the President's Order or that his right or interest in the building has not been affected by the provisions of that Order."*

20. It is also important to quote section 8 of the said Ordinance, which runs thus:

> ***8. Contents of application. (1) An application under section 7 shall contain the following particulars, namely,-***
> ***(a) name, description, citizenship and place of residence of the applicant;***
> ***(b) date and place of birth of the applicant;***
> ***(c) full particulars of the building in respect of which any right or interest is claimed by the applicant;***
> ***(d) date, if known, on which the possession of the building was first taken by the Government;***
> ***(e) period for which the applicant is not in possession of the building;***
> ***(f) occupation and residence of the applicant immediately before the commencement of the President's Order and during the period from such commencement till the making of the application;***

(g) name and description of the person in possession of the building immediately before the commencement of the President's Order;
(h) name and description of the person in possession of the building immediately before the possession is taken by the Government under the President's Order;
(i) action taken by the applicant for protecting his right or interest or getting back the possession of the building;
(j) brief statement in support of the claim of the applicant;
(k) relief claimed by the applicant; and
(l) any other matter relevant to the relief claimed.
(2) The application shall be accompanied by all the documents, or the photostat or true copies thereof, on which the applicant relies as evidence in support of his claim.

21. So, the application under sub-section (1) of section 7 shall contain the particulars as stipulated in Sub –section (1) of section 8 and also shall be accompanied by all the documents or the Photostat or true copies, as stipulated in Sub-section (2) of section 8 of the Ordinance No. LIV of 1985.

22. In both the Sub-sections (1) and (2) of section 8 of the said Ordinance, the word 'shall' has been used i.e. "shall contain" and "shall be accompanied."

23. So the particulars in sub-section (i) and documents as per sub-section (2) of section 8 of the Ordinance are the essential condition in making an application under sub-section (1) of section 7 of the said Ordinance. Without any of the said particulars and documents, it is not possible to file an application under section 7 of the said Ordinance.

24. Since the petitioner had no such particulars and documents as per sub-section (1) of Section 8, therefore, he did not go before the Court of Settlement and file any application as per sub-section (1) of Section 7 of the Ordinance No. LIV of 1985.

25. In the case of Government of Bangladesh and another vs. Rowshan Ara Begum and another reported in 10 MLR (AD) (2005) 337, wherein it has been held that:

"The claimant of the property for releasing the claimed property from the list of abandoned buildings is required to file petition before the Court of Settlement as per provision of section 7 of the Ordinance."
"12. The property in question has been listed in the 'kha' list as abandoned property and the said list as per provision of the Ordinance No. 54 of 1985 has been published in the official Gazette. Section 5(2) of the Ordinance attaches statutory presumption that a particular building listed in the list of abandoned buildings and published in the official Gazette then the property so listed is an abandoned property and has vested in the Government. In such a situation if a person claiming right title and interest therein intends to take the property out of the list of the abandoned building or seeks any other relief's as provided in section 7 of the Ordinance he is required to apply to the Court of Settlement established under section 7 of the Ordinance and there he is required to establish that the property is not an abandoned property and that has not vested in the Government.

13. The provisions as are in section 5(2) and section 7 of the Ordinance clearly show that onus of rebutting the presumption. i. e. the property is an abandoned property and has vested in the Government or in other words establishing the fact that the property is not an abandoned property and has not vested in the Government is totally on the person who challenges the presumption or in other words claiming the property and intends to take such property out of the list of the abandoned property ;published in the official Gazette or for any other relief as are in section 7 of the Ordinance. In this connection reference may be made to the case of Government of Bangladesh Vs. Md. Jalil and others reported in 48 DLR (AD) 10 wherein it has been held "section 5(2) of the Ordinance clearly provides that the list published under sub-section (1) shall be conclusive evidence of the fact that the buildings included therein are abandoned property and have vested in the Government as such. Section 7 says that a person claiming any right or interest in any such building may make an application to the Court of Settlement for exclusion of the building from such list etc. on the ground that the building is not an abandoned building and has not vested in the Government under President's Order No. 16 of 1972 or that his right or interest in the building has not been affected by the provisions of that Order. The onus, therefore, is squarely on the claimant of the building to prove that the building is not an abandoned property. The Government has no obligation either to deny the facts alleged by the claimant or to disclose the basis of treating the property as abandoned property merely because the same is disputed by the claimant". Similar view has been expressed in the case of Hazerullah and another vs. Chairman, 1st Court of Settlement and another reported in (1998) 3 BLC (AD), 42. Therein it has been held "that the onus lies upon the claimant of the building to prove that the building is not an abandoned property" and that the onus lies upon the claimant of the property and that any other person claiming through the original owner to prove to establish the fact that the owner of the property or any other person claiming through the owner "had been present in Bangladesh or had been occupying, supervising or managing in person the disputed property" when on 28 February, 1972 president's Order No. 16 of 1972 came into operation. This Division in the case of Government of Bangladesh vs. Ashraf Ali and another reported in 49 DLR (AD), 161 has held "that the enlistment of a building under section 5(1) of Ordinance 54 of 1985 raises a presumption in law that the property is an abandoned property under section 5(2) of the Ordinance. The presumption is, of course, a rebuttable presumption but respondent No. 1 failed to rebut this presumption". In the case of Bangladesh vs. Md. Shajahan reported in (2000) 20 BLD (AD), 166 it has been held "Thus, section 7 enjoins upon the claimant before the Court of Settlement to prove that the property is not an abandoned property, in a like manner the plaintiff is to prove his case and the Government, like that of a defendant, is under no legal obligation to prove that the property is an abandoned property or to disclose the basis of treating the property as an abandoned property". In the case of Asma Begum vs. Bangladesh and others reported in (2001) 21 BLD (AD), 134 it has been held that the onus lies on the claimant of the property ' to rebut the conclusive evidence as provided in section 5(2) of the Ordinance". The

High Court Division in disregard of the provisions as are in sections 5(2) and of the Ordinance encumbered the appellants to establish that the property in question is not an abandoned property and has not vested in the Government or that to establish the facts in the presence whereof the property can be listed as abandoned property and vests in the Government. This approach of the High Court Division was erroneous and as the High Court Division thereupon interfered with the judgment of the Court of Settlement, the judgment under appeal is not sustainable.

14. The Court of Settlement on consideration of the materials brought on record by the claimant of the property for having the property delisted from list of abandoned buildings arrived at the finding that the allottee of the property (to whom the property in question belonged and who gifted the same to her daughter and from whom Respondent No. 1 is claiming by purchase in October, 1979) was not present in Bangladesh and whereabouts of the allottee were not known at the time when President's Order No. 16 of 1972 came into operation i.e. on February 28, 1972. It may be mentioned the consistent case of the Government is that the allottee of the property Sahera Khatun was not present in Bangladesh at the time of emergence of Bangladesh and thereafter her whereabouts were not known and also on the date when P.O. 16 of 1972 came into operation. From claimant's side no oral or documentary evidence was led to show that Sahera Khatun was present in Bangladesh and her whereabouts were known when P.O. 16 of 1972 came into operation. The Respondent No. 1 tried to establish that Sahera Khatun was very much in Bangladesh by producing the affidavit affirmed on 14.07.1973 before the Magistrate in confirmation of the oral gift said to have been made by Sahera Khatun in favour of her daughter Anwari Khatun on 16.04.1973. The property said to have been gifted at a time when in the background of the assertion of the appellants the property has become abandoned property. The Court of Settlement in the background of the facts and circumstances of the case held that the alleged oral gift was not formally proved since the person in whose presence as mentioned in the affidavit were not examined and thereupon arrived at the finding that it has not been established that Sahera Khatun was present in Bangladesh and her whereabouts were known when P.O. 16 of 1972 came into operation. It is seen from the judgment of the High Court Division that the said Division discarded the aforesaid finding of the Court of Settlement placing reliance upon the affidavit affirmed by Sahera Khatun and the recitals therein as well as the recitals in the kabala executed by the donee Anwari Khatun (daughter of Sahera Khatun) and finally arrived at conclusion that Sahera Khatun was very much in Bangladesh and as such the property is not an abandoned property. The Respondent No. 1 has not led evidence or brought materials on record to discharge the onus of rebutting the presumption that the property is not an abandoned property and that has also not established that the property is not an abandoned property. This being the position High Court Division was in error in interfering with the judgment of the Court of Settlement.

15. The High Court Division while exercising its jurisdiction under Article 102(2) of the Constitution in respect of the judgment of a tribunal or in other words exercises its jurisdiction in certiorari is certainly not acting as

a Court of appeal and to reassess the evidence and finally to arrive at a view different from the tribunal in the absence of arriving at a finding that the view taken by the tribunal in the background of the materials noticed by it is not legally tenable or logically not well founded e.g. the case as the instant one. The High Court Division while examining the correctness of the judgment of the subordinate tribunal does not act as the Court of appeal and this has been held in the case of Government of Bangladesh Vs. Md. Jalil and others reported in 48 DLR (AD) 10 "The High Court Division was not a Court of appeal required to make determination of facts on its own. It could interfere with the findings of a tribunal of fact under its extraordinary jurisdiction under Article 102 only if it could be shown that the tribunal had acted without jurisdiction or made any finding upon no evidence or not considering any material evidence / facts causing prejudice to the complaining party or that it had acted mala fide or in violation of any principle of natural justice. In the absence of any of these conditions the interference by the High Court Division will itself be an act of without jurisdiction". It may be mentioned in the instant case there is absence of any one of the aforesaid matters or situations. In the case of Government of Bangladesh Vs. Ashraf Ali reported in 49 DLR(AD), 161 it has been held that the High Court Division while exercising its power under certiorari in connection with the judgment of an interior tribunal is not within its jurisdiction if it act in a manner or that considering the materials on record in the manner "in which a Court of appeal disposes of an appeal". In the instant case the High Court Division did this error in considering the materials on record in the manner as if it sat as a Court of appeal over the judgment of the Court of Settlement. In the case of Mostafa Kamal vs. First Court of Settlement and others reported in 48 DLR (AD) 61 it has been held that the High Court Division in exercise of its writ jurisdiction in connection with the judgment of the Court of Settlement "cannot sit as a Court of Appeal over the judgment of the Court of Settlement for re-setting questions of fact". The High Court Division in fact did that i.e. without arriving at a finding that the Court of Settlement committed any procedural error or that Court of Settlement had arrived at the finding as regard the material fact that Sahera Khatun was not present in Bangladesh and her whereabouts were not known when P.O. 16 of 1972 came into operation and that oral gift made by Sahera Khatun in favour of her daughter Anwari Khatun has not been proved by calling the persons in whose presence the gift said to have been made upon ignoring any material or any material fact having the bearing in making the decision in the aforesaid matter was left out of consideration. In fact the High Court Division on fresh assessment of the fact of its own resettled the question of fact upon sitting over the judgment of the Court of Settlement like the Court of appeal."

26. In the case of Mohammad Abdul Alim Vs. Government of Bangladesh and ors reported in 21 BLT (AD) 2013, it has been held that;

8. The petitioner, an alleged transferee of the abandoned property, alleged to have obtained, a kabala from the alleged owners on 18.02.1999. The High Court Division has found that the said deed is absolutely

malafide and void as it is contrary to the provisions of Article 6 of P.O No. 16 of 1972 which reads as under;

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

Since the property was declared as abandoned property pursuant to Article 2(1) of the P.O. No. 16 of 1972 thereby vested in the Government and subsequently was included in 'Ka' list prepared under Section 5(1) of the Ordinance, 1985 and there is nothing to show that the transfer was in accordance with the provisions of P.O. No. 16 of 1972 the alleged purchase was of no avail to the appellant and the same is void being a purported deed of transfer of an abandoned property contrary to the provisions of The Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972.

9. The building was constructed as a residential building but simply letting out the same for alleged commercial purpose could not attract the provisions regarding the commercial building under rule 6(3) of the Abandoned Property (Taking Over Possession) Rules, 1972 and the alleged purchase was of no avail to the petitioner and have not acquired any locus standi. Moreover, as the alleged purchase was made at a time when the property has already been declared abandoned and accordingly vested in the Government as abandoned property rendering the deed of transfer in favour of the petitioner as void and the alleged transferee have not acquired any interest in the abandoned property, as such, the appellant-petitioner has no locus standi to file the writ petition and thereby writ petition and consequently, this appeal at the instance of the alleged purchaser during the continuance of the property as abandoned is not maintainable.

27. Admittedly, the petitioner purchased the land from one Mr. H. A. Rahman (ALHAS ABDUR REHMAN) by virtue of the deed No. 5103 dated 30.08.1972 (Annexure-D to the writ petition). So, it is seen that the alleged purchase was made at the time when the property has already been declared abandoned and accordingly vested in the Government as abandoned property rendering the deed of transfer in favour of the petitioner as void and the alleged transferee has not acquired any interest in the abandoned property.

28. However the extraordinary this Court may be, it cannot verify the documents and truthfulness of the documents. The annexures annexed to the writ petition require elaborate investigation which is not the function of this Court and there being a forum namely the Court of Settlement set up to investigate into the facts of the case.

29. In light of the aforesaid facts and circumstances, we are of the view that that the petitioner Mrs. Sitara Siddiq fabricated some papers and documents with the aid of some unscrupulous people to grab the abandoned property in question illegally. Since the original allottee was not found in the house in question after the liberation war, the Govt. rightly declared the house as an abandoned property and included it in the 'kha' list.

30. Accordingly, the Rule is discharged without any order as to cost.

5 SCOB [2015] HCD 67

High Court Division
(Special Original Jurisdiction)

Writ Petition No. 1657 of 2010

Shamsun Nahar Begum Shelly

… Petitioner.

Versus

Bangladesh & others.

… Respondents.

Mr. Khandaker Shahriar Shakir

… For the Petitioner.

Mr. Shahidul Islam, D.A.G. with

Mr. Sukumar Biswas, A.A.G

... for Respondents.

Heard on the 13th, 16th, 19th April, 21st, 22nd June & 5th July,2015.

&

Judgment on the 8th July, 2015.

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

The Abandoned Buildings (Supplementary Provisions) Ordinance, 1985
Section 5(1)(b)
And
Article 7 of P.O. 16 of 1972:
The Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance, 1985. Non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the "Kha" list of the Abandoned Buildings. It is also noted that there is nothing on record to show that the Petitioner was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the Petitioner. ... (Para 17)

Given this Court's understanding of the essentials of enquiry as to the status of property under the relevant provisions of Ordinance as above explained, it is found that the claimant had duly discharged her onus of proving her case independently of the Government and that in doing so she had by a set of mutually reinforcing evidence produced generally established a continuous scenario of active ownership, occupation, supervision and management of the said property through her principal both before and after the promulgation of P.O. 16 of 1972. There was nothing on record that could have reasonably led the Court of Settlement to find otherwise. However, the Court of Settlement without following a judicial approach in determining the question of facts involved in this case unfortunately passed the Judgment without giving a judicial consideration of the whole dispute between the parties and decided the matter

erroneously. By that reason, and by confining this Court's scrutiny to the objective of finding whether the impugned Judgment is perverse or not, this Court has inevitably arrived at the conclusion that the Court of Settlement's Judgment and Order dated 22.2.2001 is indeed a highly perverse one being contrary to the facts and circumstances and evidences on record and by that reason we are inclined to interfere with the impugned Judgment of the Court of Settlement as prayed for. ... (Para 20)

Judgment

Mahmudul Hoque, J:

1. In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the decision dated 10.12.2009 passed by Respondent No.3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57 Khalishpur Housing Estate, Khulna, from Kha list of the Abandoned Buildings as published in the Bangladesh Gazette, dated 23.09.1986 at page No. 9764(36) against serial No. 615 (Mistakenly mentioned in the decision as published in the Bangladesh Gazette dated 28.04.1986 against Serial No. 634) (Annexure "L") should not be declared to have been passed without lawful authority and is of no legal effect and as to why the Respondents should not be directed to exclude the house being No. T-57, Khalishpur Housing Estate, Khulna from the 'Kha' list of Abandoned Building as published in the Bangladesh Gazette dated 23.09.1986 as detailed hereinbefore and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of this rule, in brief, are that the property in question being House No. T-57, Khalishpur Housing Estate, Khulna, measuring an area of 144 square yards was allotted by the Government to one S.G. Mustafa son of S.M.Yousuf by a registered deed of lease being No. 8753 dated 05.09.1963 and after getting allotment of the said property the lessee S.G.Mustafa had been possessing the same and constructed a two storied building thereon obtaining loan from House Building Finance Corporation ("HBFC") by mortgaging the said property as security against loan. The said S.G.Mustafa while in possession and enjoyment of the property in question died in the year 1972 and he was buried in Khalishpur grave yard, Khulna. The said S.G. Mustafa died leaving son Abid Hossain who was in possession of the disputed property. Subsequently he decided to dispose of the property in question and accordingly he executed a registered deed of agreement for sale being No. 22877 dated 12.12.1980 in favour of one Abdur Rob Biswas, the husband of the present Petitioner at a consideration of Tk.80,000/- out of which he received Tk.40,000/- as earnest money and delivered possession of the property. On the same day he executed and registered a power of attorney appointing the Petitioner authorizing her to act on his behalf and to deal with the property in question in any manner including power of transfer of the same. After passing of a considerable time while Abdur Rob Biswas pressed the said Abid Hossain to execute and register the sale deed upon recipt of the rest money it was revealed that the property has been mortgaged to the HBFC and the original documents are lying with them. Thereafter the Petitioner after making necessary inquiry came to know that the original loan amount stood at Tk.43,778/- as on 7.12.1981. The Petitioner made payment of the entire loan amount to the HBFC by a payment receipt dated 7.12.1981 through Sonali Bank, Khulna Branch. After payment of the entire amount HBFC released the property from mortgage and since then, the petitioner is continuing in the possession of the disputed property without any

objection from any quarter. By this time the Petitioner as possessor of the disputed property did not receive any notice either under Article 7 of the President's Order No. 16 of 1972 or under Section 5(1)(b) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. 54 of 1985) from the Government. Subsequently the Petitioner came to know that the disputed property has been enlisted as Abandoned Property at serial No. 615 in the "Kha" list vide S.R.O. 364-L/86-1985 published in the Gazette (Extraordinary) on 23.9.1986. Then the Petitioner filed a Case under Section 7(1) of the Ordinance 54 of 1985 in the Second Court of Settlement being Case No. 221 of 1992, Dhaka annexing all the relevant documents in support of her claim by a Firisti. But the Second Court of Settlement after hearing dismissed the Case by the impugned Judgment and Order dated 10.12.2009. At this stage the Petitioner moved this Court by filing this application and obtained the present Rule and Order of Stay.

3. The Respondent-Government contested the Rule by filing Affidavit-in-Opposition and Supplementary Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the property in question was leased out by the Government to one S.G. Mustafa for 99 years by a lease deed dated 4.9.1963. During the War of independence said S.G. Mustafa left the case property uncared for and taking such advantage the present Petitioner entered into possession and created some false documents to grab the case property. It is also stated that the claimant could not produce any document to show that the original owner was in possession of the case property at the material time from 26.3.1971 to 28.2.1972 and as such the case property has been rightly included in the 'Kha' List of the abandoned buildings under the provision of Article 2(1) of P.O. 16 of 1972 upon compliance of all the legal formalities. Further case of the Respondents-Government is that the claimant Petitioner while deposed before the Court of Settlement admitted in her cross-examination that she entered into the case property as an abandoned property, the Petitioner could not prove the death of S.G.Mustafa in Bangladesh and Abid Hossain is the son of said S.G.Mustafa and also failed to prove the right, title and interest in the case house and as such the Rule is liable to be discharged.

4. Mr. Khandaker Shariar Shakir, the learned Advocate appearing for the Petitioner submits that admittedly the Petitioner as constituted attorney of Abid Hossain son of S.G.Mustafa has been possessing the case property since 1982 and before that Abid Hossain was in possession. In this situation the Respondent-Government ought to have served a notice under Article 7 of P.O. 16 of 1972 upon the owner or the occupier asking them to surrender the possession of the property to the Deputy Commissioner but in the present case no such notice was issued and subsequently when the Ordinance No. 54 of 1985 came into force before enlistment of the property as abandoned property in the "Kha" list, the Government ought to have served a notice upon the owner or occupier of the property under Section 5(1)(b) of the Ordinance 54 of 1985 asking the owner or possessor to surrender the property or to explain on what basis they are occupying the disputed property but in the instant case no such notice was issued and served upon the Petitioner or upon her principal Abid Hossain, as such inclusion of the property in question in the "Kha" list of the Abandoned Buildings is palpably illegal and without lawful authority. Mr. Shakir referring an inquiry report dated 30.9.1996 [Annexure J(1)] furnished by the Officer-in-Charge, Abandoned Property Division, Khulna, submits that in the said report it has been clearly stated that there is no paper in the office to show on what basis the house in question included in the 'Kha' list of the abandoned buildings.

5. He also submits that from the said report it is evident that the property in question was never declared abandoned or any notice to that effect was issued or served upon the owner or occupier of the disputed property. Mr. Shakir also argued that to substantiate the claim of the Petitioner, she deposed before the Court of Settlement and exhibited relevant documents in support of her claim such as the original lease deed, mortgage deed executed in favour of HBFC, death certificate of S.G.Mustafa , nationality certificate of Abid Hosssain, Affidavit sworn by Abid Hossain before the Magistrate, First Class, utility bills, succession certificate, registered power of attorney, payment receipt showing payment of loan money to HBFC by the Petitioner but the Court of Settlement totally failed to consider those documents in its true perspective and upon misconstruction of the said documents most illegally dismissed the case holding that the property has been rightly declared abandoned and included in the "Kha" list of the Abandoned Buildings. He further argued that the record of Khalishpur Housing Estate placed before the Court of Settlement shows that wife of S.G.Mustafa , namely, Hosneara Begum filed an application on 13.12.1972 before the Housing Authority, Khulna praying for allotting the said quarter in her favour stating that the property was leased out to her husband S.G.Mustafa in the year 1963 and subsequently her husband S.G.Mustafa constructed a two storied building on the property obtaining loan from HBFC who was killed on 10.3.1972. It is also argued that the Government file shows that said S.G. Mustafa died in Bangladesh in 1972 and several notices were issued by the Housing authority demanding outstanding installments from said S.G.Mustafa. Therefore, it is established that the original owner of the property was present in Bangladesh at the relevant time and he never left this country leaving the property uncared for but he died in this country and after his death his heirs had been in possession of the disputed property till 1980 and thereafter Abdur Rob Biswas and then the Petitioner as attorney of Abid Hossain has been possessing the disputed property.

6. For the above reason the property in question cannot be declared abandoned and as such the listing of the property in the "Kha" list of the Abandoned Buildings is illegal and without lawful authority. In support of his submission he has referred to the cases of Jebon Nahar and Others Vs. Bangladesh reported in 49 DLR (HCD) 108, Bangladesh Vs. Chand Sultana reported in 1 MLR (HCD) 310 and 51 DLR (AD) 24.

7. Mr. Md. Shahidul Islam, the learned Deputy Attorney General with Mr. Sukumar Biswas, the learned Assistant Attorney General appearing for the Respondent Government submit that the Petitioner is not the owner of the property and as such she cannot file application before the Court of Settlement for release of the property from the 'Kha' list of the Abandoned Buildings. It is also argued that the Petitioner having failed to prove the case, the Court of Settlement has rightly dismissed the case. Mr. Islam further submits that the burden of proof squarely lies on the Petitioner to prove that S.G.Mustafa or his heirs occupied , managed and supervised the case property on the relevant date i.e. on 28.2.1982 to establish that the said property is not an abandoned property. But the Petitioner having failed to prove the same the inclusion of the Building in the "Kha" list is proof of its being an abandoned property and the Government has nothing to prove or deny .

8. In the present case the Petitioner could not show that S.G. Mustafa was present in Bangladesh on material dates or that he occupied, managed or supervised the case property when P.O. 16 of 1972 came into operation, as such the listing of the property in the "Kha"list as abandoned property is lawful and conclusive proof of facts. It is also argued that the papers and documents submitted on behalf of the Petitioner to prove her case showing payment of utility bills are after 1980 onwards as such it cannot be said that the Petitioner or

her principal was in active control and possession of the property in question. He further argued that the Court of Settlement rightly observed that though the Petitioner submitted some documents but those have not been proved by evidence. Mr. Islam also argued that the Petitioner is not the owner of the property and she cannot be a claimant of the property as per law. It is also argued that this Court cannot sit as a Court of appeal sitting in writ jurisdiction. This Court only can interfere if it is found that the Court of Settlement acted malafide and in violation of principle of natural justice. But in the present case no such allegation has been brought on behalf of the Petitioner. In support of his submissions he referred to the cases of Bangladesh and others Vs. Md. Jalil and others reported in 48 DLR(AD) 10 , Secretary Ministry of Works Vs. Rowshan Ara Begum reported in 57 DLR (AD) 167 and Bangladesh Vs. A.T.M. Mannan & others reported in 1 BLC (AD) 8 and an unreported judgment dated 29.10.2009 passed in the case of Md. Feroj Mia and another Vs. Bangladesh in Writ Petition No. 4971 of 2001.

9. Heard the learned Advocates for the parties, perused the Application, Supplementary Affidavits, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and Affidavit-in-Reply, along with the annexures annexed thereto.

10. In the instant Rule the moot question to be looked into whether the property in question has been legally declared as abandoned property and whether the property is at all come within the per view of the definition “abandoned.” Before going through the merit of the case the provisions of law in this regard may be looked into.

11. The purpose of P.O. 16 of 1972 is to make provisions for the control , management and disposal of certain property abandoned by certain persons who are not present in Bangladesh or whose whereabouts are not known or who have ceased to occupy or supervise or manage in person their property or who are enemy aliens.

12. It appears that the purpose of P.O. 16 of 1972 is not to declare as abandoned the property of citizens who are very much present in Bangladesh and who have been occupying, supervising and managing their property at all times. In the present case the Government submitted the concerned record before the Court of Settlement. This Court finds that there are some papers which show that the Housing Authority on different dates wrote letters to the lessee after 1972 onwards demanding payment of outstanding instalments. It is also found that wife of original lessee S.G. Mustafa has filed an application on 13.12. 1972 praying for allotment of the house in her name since her husband has been killed on 10.3.1972. Apart from this the petitioner in her application categorically asserted that the original owner of the case property died in Bangladesh in the year 1972. Subsequently, while his son Abid Hossain was in active control, supervision and management of the case property, he, by a registered power of attorney, authorized the Petitioner to manage, supervise and control the property on his behalf. The Government though claim that the property was rightly declared abandoned and enlisted in the “Kha” list as abandoned property, but could not produce any document in support of enlistment and declaration of the property as abandoned or even a notice to surrender under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance 54 of 1985. Furthermore, the Government could not show any paper in respect of treating the property as abandoned except a Gazette notification. The record of the Housing Settlement shows that the original owner of the case property S.G. Mustafa was present in Bangladesh at the relevant time i.e. on 28.2.1972 when P.O. 16 of 1972 came into force, as such the claim regarding whereabouts of the original allottee was not known to the Government was not correct. The Petitioner in support of her claim

submitted all the original documents before the Court of Settlement including Deed of Lease, Mortgage Deed executed in favour of HBFC, Receipt showing payment of loan to HBFC, payment of utility bills and other connected documents. The Court of settlement though discussed about the documents but upon a misconstruction raised question about the genuineness of those documents.

13. It is true that there are some anomalies in the papers of the Petitioner submitted before the Court of Settlement as well as before this Court but those anomalies in this court's view contributes a little in the merit of the case.

14. Furthermore, it is always to be borne in mind that in any case as this it must be accepted as a truism that the act of abandonment implies two fundamental factors:

(i) Desertion of the property; and

(ii) Giving up one's right to the property.

15. The word "abandonment" connotes in this sense the idea of the owner not merely temporarily vacating but deserting the property with the intention of never returning to it. Such absolute desertion must be concomitant with the positive intention to give up the right vested in the property. It follows, therefore, that mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. These two determinants of the notion of "abandonment" appear not to have been established in this case. It is true that the petitioner before us is not the owner of the property she represents the heirs of S.G. Mustafa namely, Abid Hossain and in other words she has some interest and she produced the power of attorney, Receipt showing payment of loan money to the HBFC and possessing the disputed house, as such the case property does not in any way answer to the description of the abandoned property as mentioned above and defined particularly under Article 2 of the P.O. 16 of 1972 as there was no desertion of the property accompanied by a giving up the right to the property by the owner.

16. A perusal of the Government file pertaining to the case property at page 113 it is found that the Officer-in-Charge of the Abandoned Property, Khulna submitted a report on 30.09.1996, the relevant portion of the said report is reproduced below for ready reference.

"এ বাড়ী সংক্রান্তে অত্র কার্যালয় হতে "M' তালিকার ৬৩৪ নং ক্রমিকে গেজেটে প্রকাশের জন্য ২২/০৪/৮৬ তারিখে প্রেরণ করা হয় । সে মতে ১৯৮৬ সালে ২৮ শে এপ্রিল মাসের গেজেটে ৬৩৪ নং ক্রমিকে পরিত্যক্ত বাড়ী হিসেবে ঘোষিত হয়েছে । কিসের বুনিয়াদে বা কোন প্রতিবেদনের উপর পরিত্যক্ত বলে এ বাড়ী ঘোষিত হবে তার কোন তথ্য অত্র দপ্তরে বর্তমানে খুঁজে f¡Ju¡ kাচ্ছে না বা এ সংক্রান্ত কোন নথিJ নেই । খোলা হয়েছে কিনা তাও পরিদৃষ্ট হচ্ছে না ।

উপরোক্ত তথ্য প্রমান হতে বাড়ীটি পরিত্যক্ত সম্পত্তির a¡ৰmL¡ হতে অবমুক্তির যোগ্য বলে প্রতীয়মান"z

17. The above mentioned observation of the concerned Officer of the Abandoned Property Division, Khulna, establishes that the Government never declared the property as abandoned. In the present case the ownership of the property is not a paramount consideration for this Court. The main question is whether the property in question has been rightly included in the "Kha" list of the Abandoned Building in accordance with law. This court also finds that the Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of P.O. 16 of 1972 or under Section 5(1)(b) of the Ordinance, 1985. Non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the "Kha" list of the Abandoned Buildings. It is also noted that there is nothing on record to show

that the Petitioner was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the Petitioner.

18. In the case of Syeda Chand Sultana & others. Vs. Bangladesh reported in 1 MLR (HC) 310 which was affirmed by the Appellate Division and reported in 51 DLR(AD) 24, it has been held that,

> *"Where the owners as Bangladeshi nationals having lawful title have been in possession of the property althrough and never having ceased to manage or supervise the same and not having left the country and when there was no proper service of notice upon the petitioners as required under Article 7 of the P.O. no. 16 of 1972, the inclusion of the said building in the "Kha list" of abandoned properties being violative of the fundamental rights as contained in article 42 of the Constitution is illegal, without jurisdiction and of no legal effect and as such the petitioners are entitled to invoke the writ jurisdiction for enforcement of fundamental rights.*

19. In the present facts and circumstances, this Court finds itself wholly subscribing to that *ratio decidendi* in the Syeda Chand Sultana Case.

20. Given this Court's understanding of the essentials of enquiry as to the status of property under the relevant provisions of Ordinance as above explained, it is found that the claimant had duly discharged her onus of proving her case independently of the Government and that in doing so she had by a set of mutually reinforcing evidence produced generally established a continuous scenario of active ownership, occupation, supervision and management of the said property through her principal both before and after the promulgation of P.O. 16 of 1972. There was nothing on record that could have reasonably led the Court of Settlement to find otherwise. However, the Court of Settlement without following a judicial approach in determining the question of facts involved in this case unfortunately passed the Judgment without giving a judicial consideration of the whole dispute between the parties and decided the matter erroneously . By that reason, and by confining this Court's scrutiny to the objective of finding whether the impugned Judgment is perverse or not, this Court has inevitably arrived at the conclusion that the Court of Settlement's Judgment and Order dated 22.2.2001 is indeed a highly perverse one being contrary to the facts and circumstances and evidences on record and by that reason we are inclined to interfere with the impugned Judgment of the Court of Settlement as prayed for.

21. In the result, the Rule is made absolute, without any order as to costs.

22. It is hereby declared that the Judgment and Order dated 10.12.2009 passed by the Respondent No. 3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57, Khalishpur Housing Estate, Khulna from the ''Kha" list of abandoned buildings, published in the Bangladesh Gazette on 23.9.1986 at page No. 9764(36) against serial No. 615 (mistakenly mentioned in the decision as published in the Bangladesh Gazette, dated 28.4.1986 against serial No. 634) is without lawful authority and is of no legal effect and the Respondents are hereby directed to exclude the same from the "Kha" list of the Abandoned Buildings within 60 (sixty) days from the date of receipt of this Judgment and Order.

23. The order of stay granted at the time of issuance of this Rule is stand vacated.

24. Communicate a copy of this Judgment and Order to the Court of Settlement concerned at once.

5 SCOB [2015] HCD 74

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURUSDICTION)

WRIT PETITION NO.12210 of 2013
With
WRIT PETITION NO.12211 of 2013
WRIT PETITION NO.12212 of 2013

Shoel Textile Mills Ltd and another.
..…… Petitioner
(In writ petition No. 12210 of 2013)

Rahnuma Fashion Wears Ltd. and another.
..…… Petitioner
(In writ petition No.12211 of 2013)

Harp Fashion Wears Ltd. and others.
..…… Petitioner
(In writ petition No. 12212 of 2013)

Versus

Bangladesh Bank represented by Governor and others
..... Respondents

Mr. A.K.M. Asiful Haque, with
Md. Atikul Islam , Advocates
…… For the petitioners

Mr. S.M. Moniruzzaman, D.A.G with
Mrs. Shuchira Hossain, and
Mr. S.M. Quamrul Hasan, A.A.Gs.
.....…For the respondents

Heard and Judgment on 05.04.2015

Present:
Mr. Justice Md. Ashfaqul Islam
And
Madam Justice Kashefa Hussain

Bank Companies Act, 1991
Section 5 GaGa:
The moment a bank or any other financial institutions reschedules a loan or grants any kind of loan, credit facilities or any other sort of financial assistance infavour of any person, it is virtually an admission on its part that the person to whom such financial assistance is being granted is not a loan defaulter under the definition provided in Section 5 GaGa of Bank Companies Act,1991. ... (Para 13)

Bank Companies Act, 1991
Section 27 KaKa:
Granting of loan to a person whose name has been included as a loan defaulter in the CIB list, by granting him such loan or by rescheduling the loan or extending any other credit facilities, it is practically redeeming a person from the classification of loan defaulter within the definition provided in Section 5GaGa of Bank Companies Act, 1991. ... (Para 14)

Judgment

Kashefa Hussain, J:

1. Let the supplementary affidavit do form part of the main petition.

2. All these Writ petitions are heard together and disposed of by a single judgment as there are involved common questions of fact and law.

3. In writ petition No. 12210 of 2013 on an application under Article 102 (2)(a)(i) of the Constitution filed by the petitioners Shoel Textile Mills Ltd and another, Rule was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why respondent nos. 1-3 should not be directed to strike-off the name of the petitioners from the CIB list maintained by the respondent no.3 in views of reschedulement of the written-off liabilities of the petitioners by the respondent nos. 4 and 5 through its board decision dated 23.05.2011 should not be declared to have been made without lawful authority and is of no legal effect.

4. The petitioner no. 1 in Writ Petition No. 12210 of 2013 is Sohel Textile Mills Limited represented by its Managing Director and the petitioner no. 2 is Mr. Md. Razzakul Hossain who is the Managing Director of Petitioner no.1, Sohel Textile Mills Limited.

5. The respondent no.1 is Bangladesh Bank represented by its governor, i.e. the respondent no.2, is governor Bangladesh Bank , respondent no.3 is the General Manager of Credit Information Bureau, (hereinafter called as CIB) Bangladesh Bank, the respondent no.4 is United Commercial Bank Pvt. Ltd. (hereinafter called as UCBL) represented by its Managing Director while respondent no.5 is a Branch of the respondent no.4 represented by its Branch Head.

6. The facts leading to the Rule of Writ Petition No. 12210 of 2013 in short, is that the petitioner is a registered Private Limited Company and in course of its business the respondent nos. 4 and 5 allowed the petitioners to enjoy various credit facilities of Tk.36,11,98,288.58 inter-alia, through negotiation of some letter of credits for its export business and at one stage the petitioner failing to pay the monthly installments against credit facilities and failing to adjust all the local and foreign export proceeds according to payment schedule became defaulter and upon the petitioner's failure to pay the outstanding dues within a certain period , the respondent no.5 the branch office of UCBL with consent of the respondent no.1 Bangladesh Bank had written-off the entire claim amount ,and, thereafter, the respondent no.5 under instruction of respondent no.4 the Head Office of UCBL filed Artha Rin Suit No. 140 of 2009 against the petitioner impleading them as defendants for realization of the outstanding dues of Tk. 36,11,98,288.58 including interest. The petitioners duly appeared in the Artha Rin Suit and subsequently approached the respondent no.5 the branch office of UCBL for adjustment of written-off liabilities through a letter dated 14.03.2010 and upon consideration of the said approach, the respondent no.5 on 08.08.2010 referred the matter to its Head Office (the respondent no.4) for necessary actions. In pursuance of the matter, the respondent no.4 through its Board decision dated 23.05.2011 arrived at a decision to settle the matter and subsequently reached an agreement of understanding executed on 09.06.2011 and in pursuance of such agreement both the parties i.e. the petitioners and the respondent nos. 4 and 5 filed a solenama in the Artha Rin Suit No.

140 of 2009 and the Artha Rin Adalat upon appreciation of the said Solenama and upon duly examining the parties allowed the Solenama by its order dated 15.01.2012 and accordingly a Sole-decree was drawn on 22.01.2012 by the said Adalat. After the said Sole decree in respect of outstanding dues, the respondent no.3 the General Manager of CIB did not take any appropriate action to strike off the name of the petitioners from the CIB list though the petitioners have been paying regular installments to the respondent no.5, Thereafter, the petitioners approached the respondent no.5, the Branch office of the UCBL to issue a clearance certificate in respect of reschedulement of the outstanding amount and in pursuance of the matter the respondent no. 5 issued a certificate on 10.10.2013 to that effect which is marked as Annexure-'D' in Writ Petition No. 12210 of 2013. In spite of reschedulement of the credit facilities, the petitioners are facing problems in seeking fresh credit facilities from other banks,

7. when the concerned bank enquired about the status of the petitioner from the respondent no.3,the respondent no. 1 in proceeding for credit facilities sought by the petitioners, and, thereafter, without finding any alternative the petitioners through their Advocate served a notice demanding justice on 26.11.2013 with registered post to the respondent nos. 1-3 with a copy of the same to the respondents no. 4 and 5 requesting the respondent nos. 1-3 for taking appropriate action to strike out the name of the petitioners from the CIB list maintained by respondent no.3. After receiving the aforesaid notice, the respondents neither yet informed the petitioners or their lawyer that they have struck out the name of the petitioners from the said CIB list nor did they take any action according to the request of the petitioners and at this stage the petitioner moved this Division and obtained the present Rule. (Annexure-E).

8. Learned Advocate Mr. A.K.M. Asiful Haque appeared on behalf of the petitioner, while learned Advocate Mr. Ali Mustafa Khan by filing an Affidavit-in-opposition represented the respondent no.5, Branch office of the UCBL.

9. Learned Advocate Mr. A.K.M. Asiful Haque on behalf of the respondent Nos. 1-3 submits that in spite of reschedulement of the credit facilities in terms of the sole decree and the clearance certificate granted by the respondent no.5 and in spite of request made to the respondent nos. 1- 3, they are unlawfully maintaining the name of the petitioners in the CIB list. The learned Advocate for the petitioners assails that once the reschedulement was granted in terms of the sole decree and clearance certificate was given to that effect by the respondent no.5, the respondent nos. 1- 3 have no legal right to include the name of the petitioner in the CIB list. He contends that by including the name of the petitioners in the CIB list maintained by the respondent no.3, the respondent nos. 1- 3 are violating the statutory provisions provided in section 27 KaKa of the Bank Companies Act and such acts of the respondent nos. 1- 3 being conflictive with the statutory provisions of the Act, the Rules therefore should be made Absolute for ends of Justice.

10. On the other hand, learned Advocate Mr. Ali Mustafa Khan for the respondents by filing an affidavit-in-opposition opposes the Rule and argues that even after issuance of the certificate by the respondent no.5, the petitioner violated the terms of the compromise with respondent no.5 and also assails that the respondent 'merely' issued a certificate to the effect that the petitioner had a written off liability of Tk. 36,11,98,288.58 with the respondent no.5 and he further asserts that "mere" issuance of a certificate does not imply that the petitioner has no liability with the respondents, and, therefore, the petitioner is definitely a defaulter

within the terms of section 5 GaGa of Bank Companies Act, 1991 and persuades that the Rules ought to be discharged.

11. We have heard the Learned Advocates, perused the documents and other materials placed before us. From perusal of the same, it transpires that though the petitioner's name was included in the CIB list, yet at one stage in Artha Rin Suit No. 140 of 2009, a sole decree was drawn upon mutual compromise and the credit facilities were rescheduled within the terms of the sole decree and in pursuance of the terms of the sole decree respondent no.5 also issued a clearance certificate, the first one dated 10.10.2013 and subsequently another one dated 08.03.2015, which is marked in the supplementary-affidavit as Annexure-'E' filed by the petitioners. But it is also evident from the records as is placed before us that the petitioners had informed them of the current status in consequence of the sole decree and the notice demanding justice and requested the respondent nos. 1- 3 to that effect, but as is obvious from the records of the respondent nos. 1- 3, particularly the respondent no.3 i.e. General Manager of CIB remained passive in this matter and failed to take any steps from excluding and cancelling the name of the petitioner from the CIB list. The learned Advocate for the petitioner had contended, that in spite of having full knowledge of subsequent reschedulement status of the petitioner, in accordance with the statutory provisions of law, and, thereafter, the respondent Nos. 1-3 failure to exclude the petitioner's name from the CIB list is clearly in violation of the provisions of section 27 KaKa of the Bank Companies Act,1991.

12. Now let us take a look into the relevant provisions of section 27 KaKa of the Bank Companies Act,1991 which reads as follows:

27 KK| †Ljvcx FY MnxZvi Zwjkv, BZ¨vw` (1) c‡Z¨K e¨vsK-†Kv¤úvbx ev Aww_K cwZôvb, mgq mgq, Dnvi †Ljvcx FY MnxZv‡`i Zwjkv evsjv‡`k e¨vs‡K †ciY Kwi‡e|

2| Dc-avivi (1) Gi Aaxb cvß Zwjkv evsjv‡`k e¨vsK †`‡ki mKj e¨vsK-†Kv¤úvbx I Aww_K cwZôv‡b †Kvbi¡c FY myeav c`vb Kwi‡e bv|

3| †Kvb †Ljvcx FY MnxZvi Abyk‡j †Kvb e¨vsK-†Kv¤úvbx ev Aww_K cwZôvb †Kvbi¡c FY myeav c`vb Kwi‡ebv|

4| Avcwi ZZt ejer Ab¨ †Kvb AvB‡b hvnv wKQyB _vKzK bv †Kb, †Ljvcx FY MnxZvi wei‡× FY c`vbKvix e¨vsK-†Kv¤úvbx ev †¶Îgv, Aww_K cwZôvb cPwjZ AvBb Abyw‡i gvgjv `v‡qi Kwi‡e|

13. We have very minutely examined sections 27 KaKa particularly Sub-Section 3 of Section 27 KaKa, where it is unequivocally stated that no banking company or financial institutions shall grant any kind of loan facilities in favour of any defaulter borrower. Therefore, upon an interpretation of the law, it is our considered view that the moment a bank or any other financial institutions reschedules a loan or grants any kind of loan, credit facilities or any other sort of financial assistance infavour of any person, it is virtually an admission on its part that the person to whom such financial assistance is being granted is not a loan defaulter under the definition provided in Section 5 GaGa of Bank Companies Act,1991. Section 5GaGa clearly defines the class of persons who come within the definition of a loan defaulter which reads as follows:

"5(MM) †Ljvcx FY MnxZv A_ †Kvb e¨w³ ev cwZôvb, hvnvi wb‡Ri ev ¯v_ mswkó cwZôv‡bi Abyk‡j c`Ë AMxg, FY ev Dnvi Ask ev Dnvi Dci AwRZ mÿ evsjv‡`k e¨vsK KZ„K RvixKZ.msÁv Abyhvqx †gqv‡`vËxY nIqvi 6 (Qq) gvm AwZewnZ nBqv‡Q|

5(Q) †`bv`vi A_ jvf-¶wZi fvMvfwM, Lwi` ev BRviv‡i wfwË‡Z ev Ab¨ †Kvbfv‡e Aww_K mÿhvM myeav MnYKvix e¨w³ †Kv¤úvbx ev cwZôvb Ges Rwgb`vi Bnvi Aš—fy³ nB‡e|"

14. Therefore, as is obvious from a comparison of the relevant sections particularly Sub-section 3 of section 27 kaka where it is quite unambiguously laid down that a "loan defaulter" shall not be entitled to the benefits of any loan or any other credit facilities by any bank or any financial institutions in the country and from our interpretation of the law particularly section 27kaka of the Bank Companies Act, 1991, we are of the view that granting of loan to a person whose name has been included as a loan defaulter in the CIB list, by granting him such loan or by rescheduling the loan or extending any other credit facilities, it is practically redeeming a person from the classification of loan defaulter within the definition provided in Section 5GaGa of Bank Companies Act, 1991, since the law is very clearly laid out in section 27 KaKa on the point. We find a paradox both in their actions and in terms of the relevant law, that the respondents on the one hand declares the petitioner a loan defaulter while on the other hand they do not hesitate to reschedule loan facilities to him.

15. As is evident, sub-section 3 of section 27 KaKa unambiguously states that no loan defaulter shall be accorded any kind of loan facilities. Therefore, our considered view is that the moment, through reschedulement of loan facilities or by any other manner any sort of financial assistance is granted to any such person, he can no more be classified nor by any other manner be treated as a loan defaulter within the meaning of section 5 GaGa of the Bank Companies Act, 1991 or under any other law. The exercise of any statutory power by the public functionaries must be just, fair, reasonable, transparent, bonafide, and their actions must be consistent ,and, as such, the impugned CIB list maintained by the office of the respondent Nos. 1-3, showing the petitioners as a loan defaulter while simultaneously rescheduling the loan is a self contradictory act on the part of the respondents and is in clear violation of the relevant provisions of law, in particular the provisions of sub-section 3 of Section 27 KaKa of the Bank Companies Act,1991.

16. Under the foregoing facts and circumstances, our conclusion is that inclusion of the petitioner's names in the CIB list is unlawful being in contravention of the statutory provisions provided for in the Bank Companies Act, 1991 and is in utter disregard of the fundamental rights of the petitioner guaranteed under the constitution.

17. In that view of the matter, we find substance in the Rules and are of the view that all the 3 (three) Rules ought to be made absolute.

18. Consequently, the enlistment of the petitioner's name in the CIB list by the office of the respondent Nos. 1-3 treating the petitioners as a loan defaulter is declared to have been passed without any lawful authority and is of no legal effect.

19. In the result, all the 3 (three) Rules are made absolute without any order as to costs.

20. Let a copy of this judgment be sent to the office of the Bangladesh Bank, Bangladesh Bhaban, Motijheel, Dhaka for future reference and guidance.

5 SCOB [2015] HCD 79

HIGH COURT DIVISION

(Civil Appellate Jurisdiction)

FIRST APPEAL No. 277 of 2011.

M/S Jafri Soap and Chemical Industries and others.

.....Plaintiff-appellants.

Vs.

Agrani Bank and others.

….Defendant-respondents.

Mr. Sk. Shamsul Alam, Advocate

…..For the Plaintiff-appellants.

Mr. Md. Kamruzzaman, Advocate.

...For the Defendant-respondent No. 2.

Heard on: 14.05.2015, 21.06.2015.

Judgment: on 24.06.2015.

Present:
Mr. Justice Muhammad Abdul Hafiz
And
Mr. Justice S.M. Mozibur Rahman

Artha Rin Adlat Ain, 2003
Section 20:
Without the provisions of Artha Rin Adalat Ain, 2003 any question regarding any proceedings initiated or any order, judgment or decree passed by the Judge of the Artha Rin Adalat cannot be raised in any court or to any authority and no court or authority will take cognizance or accept any application praying for any remedy filed in any court or authority ignoring the said provisions of section 20 of the Artha Rin Adalat Ain, 2003. ... (Para 13)

Artha Rin Adlat Ain, 2003
Section 19, 20, 41 and 42:
Without taking any such step under section 19 of the Artha Rin Adalat Ain, 2003 subsequently filing of a separate suit on the ground of fraud practices upon the court is not maintainable in view of section 20 of the Artha Rin Adalat Ain, 2003. Further more there is a provision of filing appeal and revision against any order or judgment and decree passed by the learned Judge of the Artha Rin Adalat in view of section 41 and 42 of the Artha Rin Adalat Ain, 2003. Plaintiff appellant apparently ignoring the provision of section 19 and 41 instituted a separate suit against the impugned judgment and decree which is absolutely barred by section 20 of the Artha Rin Adalat Ain, 2003.
...(Para 15)

Judgment

S.M. Mozibur Rahman, J:

1. This appeal is directed against the judgment and decree dated 16.06.2011 passed by learned Joint District Judge, 1st Court, Narayanganj dismissing the Title Suit No. 90 of 2005.

2. Short fact, necessary for disposal of the Rule, is that the plaintiff No. 2 as the proprietor of the plaintiff-appellant Messrs Jafri Soap and Chemical Industries, took a loan facility of Tk. 80,000/- by opening a C.C pledge account No. 150 and deposited two purchase deeds being Nos. 801 and 8743 respectively as Security for obtaining loan from defendant Agrani Bank Head Office Dhaka. But no Mortgage deed was executed between the plaintiffs and the defendant Bank in the year of 1977. While plaintiff No. 2 was carrying on the said business in the name and style of the plaintiff No. 1 by taking loan and paying up the same from time to time in course of banking transaction with defendant Bank till 1980 all on a sudden in the year of 1980 the defendant Bank stopped to grant loan facility of Tk. 1,31,310/- causing damage of Tk. 1,31,310/- to the plaintiff No. 1 without assigning any reason whatsoever. Plaintiff No. 2 on several occasion requested the defendant Bank to release the purchase deeds shown in schedule-'B' of the plaint in favour of the plaintiff No. 1 as the loan facility had already been stopped by the defendant Bank but in vain. Rather, the defendant Bank as plaintiff instituted a suit, being Artho Rin Mortgage Suit No. 38 of 1991 for realization of Tk. 57,83,725/51 in the court of Artha Rin and the then Sub-ordinate Judge, now Joint District Judge, Narayongonj, against one Messrs Jafri Jute Balling and others as defendants which was decreed ex-parte in preliminary form on 27.01.1992.

3. Thereafter in the year of 1993 the defendant Bank as decree-holder filed a case, being Mortgage Execution Case No. 25 of 1993 for realization of decreetal amount of Tk. 57,83,725/51 by auction sale of the land shown in schedule-'A' of the plaint along with other lands in the Court of Artha Rin Adalat, Narayongonj, against the aforesaid Messrs Jafri Jute Balling and others as judgment-debtors on 07.03.1993. At one stage the auction sale of the suit property mentioned in schedule-'A' of the plaint was held at a consideration money of Tk. 35,28,000/00 which is too much lower than its actual value of Tk. 95,00,000/- in favour of one M A Awal (defendant no. 3 of the original suit) on 19/11/2007. The plaintiff No. 1 was neither made party to Artha Rin Mortgage Suit No. 38 of 1991 nor the schedule-A land to the plaint was mortgaged nor the sale deeds were given as security of mortgage by the plaintiffs to the defendant Bank. So, the decree dated 27.01.1992 of Artha Rin Mortgage Suit No. 38 of 1991 is not binding upon the plaintiffs as the land mentioned in schedule 'A' as well as the sale deeds shown in schedule 'B' of the plaint are not the actual subject Matter of Artha Rin Suit No. 38 of 1991 and Mortgage Execution Case No. 25 of 1993 pending in the Court of Artha Rin Adalat, Narayangonj. The defendant Bank has taken all measures to execute the auction sale of the land noted in schedule-'A' of the plaint although it is not so mortgaged in respect of loan sanctioned in favour of Messrs Jafri Jute Balling. So, the plaintiffs have been compelled to file the original suit praying for a declaration that the decree of Artha Rin Suit No. 38 of 91 is not binding upon them along with a separate declaration that auction sale of the suit land at the consideration money of taka 35,28000/- instead of taka 95,00000/- in favour of defendant no.3 held on 19.11.2007 in strength of which sale deed was executed in the name of defendant nos. 3 is illegal, collusive, void and without jurisdiction.

4. The defendants contested the suit by filing a written statement and contended inter alia that the suit was not maintainable in the form it was instituted. The suit was clearly barred by section 20 of the Artha Rin, Adalat Ain, 2003. Generally denying the material allegations made in the content of the plaint the defendant stated as real fact that the suit was instituted with malafide intention with a view to delay the prayers of the mortgage Execution Case No. 25 of 1993. The plaintiffs have no legal authority to institute a suit under the provision of Artha Rin Adalat Ain. The trial court had rightly dismissed the suit though it ought to have rejected the plaint as it was barred by law of Artha Rin Adalat Rin, 2003. They further

contended that admitting the facts of obtaining loan in the name of Messrs Jafri Jute Balling, plaintiff appellant No. 2 filed a petition dated 10.04.1994 in Mortgage Suit No. 38/91 and Mortgage Execution Case No. 25 of 93 with a prayer to set aside the auction sale.

5. In view of the above pleadings the learned Trial Court framing the issues as usual and examining 2 P.Ws. and 2 D.Ws. for both sides respectively passed the impugned judgment and decree dismissing the suit after scanning the oral and documentary evidences adduced and produced by both the parties to the suit.

6. Being aggrieved by and dissatisfied with the impugned judgment and decree dated 16.06.2011 passed by the learned Joint District Judge, 1st Court, Narayanganj, dismissing the Title Suit No. 90 of 2005 the appellant preferred this appeal amongst others on the main grounds that the learned trial court did not consider the law, facts, evidences and other relevant papers submitted by the plaintiffs and therefore arrived at a wrong decision. Had the learned court below perused properly all the relevant papers admitted in to evidence by the plaintiff it could not have dismissed the original suit.

7. In view of the above situations the only point needs to be decided in this civil appeal is whether the impugned judgment and decree dismissing the original suit is tenable in law or not.

8. We have heard the learned lawyers for both sides. Mr. Sk. Shamsul Alam, the learned Advocate appearing on behalf of the plaintiff-appellants supporting the grounds of the Memorandum of Appeal stated that the learned Joint District Judge, 1st Court seriously failed to consider the facts and circumstance of the case and evidence both oral and documentary adduced and produced by both the parties to the suit and as such the impugned judgment and decree are liable to be set-aside. He further submits that the court below erred in law in not considering that the P.W. 2 in his examination in-chief deposed in court "*80 mv‡j ev`x e¨vs‡Ki Kv‡Q 1,31,310/- UvKv †jvb Pvb| wKš‘yeev`x e¨sK †mB* Loan *†`q bvB|* Loan *bv †`qv‡Z Avgv‡`i ¶wZ nq| e¨emv eÜ n‡q hvq| Avgvi `wjj 2Uv †dir †P‡qwQjvg e¨vsK ‡`q bvB*" and as such the impugned judgment and decree are liable to be set-aside. He further submits that the learned trial court erred in law and fact in failing to consider that the said PW 2 further in his examination-in-Chief deposed in Court "*Awg*" "A" Schedule *Gi fwg* Zafri Jute balling *G* Mortgage *c`vb Kwi bvB|* Auction Sale *Uv A‰ea|* Auction Sale *G 35,28,000/-* "A" Schedule এর সম্পত্তি বিক্রী *nq| GB* weক্রয়টা সঠিক হয় নাই। কম মূল্য বিক্রয় *n‡q‡Q| cKZ gj¨ 95,00,000/- UvKv* and as such the impugned judgment and decree are liable to be set-aside. He further submits that the court below erred in law and fact in failing to consider that the DW-2 in his examination-in-Chief deposed in Court "*1bs ev`x Rvdix †mvc Avgv‡`i †_‡K* Loan *wbqwQj| F‡Yi wec ix‡Z bwjkx m¤úwË* Mortgage *‡i‡Lwj|*" and as such the impugned judgment and decree passed by the learned Court below is liable to be set aside.

9. In support of his arguments, he cited the following decisions given in the case of Tafizul Huq Serker Vs. Bangladesh and others reported in 18BLD(AD)1998, Page-269, in the case of M. Tariqullah Sikder Vs. Sonali Bank, reported in 12 MLR(HC) 2007, Page 73, in the case of Shamsuddin Ahmed Vs. A.L. Bhuiyan, reported in 1 BCR 1981 AD, Page 257.

10. On the other hand Mr. Md. Kamruzzaman, the learned Advocate appearing on behalf of the defendant-respondent submits that the original suit is totally barred by section 20 of the Artha Rin Adalat Ain, 2003. There is no scope to file a civil suit against any judgment or

order passed by the learned Judge of the Artha Rin Adalat except otherearise expressly provided in the said Act of 2003.

11. In the light of the above arguments agitated by the learned counsel for both sides, we have carefully examined the impugned Judgment and order along with oral and documentary evidences produced by both sides.

12. It is admitted that Messrs Jafri Soap and Chemical Industries took loan of Tk. 80,000/- by opening a C.C pledge account No. 150 against which "A" schedule land of the plaint was mortgaged to the defendant bank. But the plaintiff appellants grievance is that respondent bank instituted the mortgage Money Suit No. 38 of 91 and obtained exparte decree against Messrs Jafri Jute Balling. Thereafter, as decree holder Execution Case No. 25 of 93 was initiated by the plaintiff appellant impleading Messrs Jafri Jute Balling as Judgment debtor instead of Messrs Jafri Soap and Chemical Industries. But it has not been clearly mentioned by the appellant plaintiff as to whether the two organization belongs to the same person or Messrs Jafri Jute Balling is the sister organization of the Messrs Jafri Soap and Chemical Industries. Admittedly land shown in A schedule was shown as mortgaged property against the loan money sanctioned infavour of Messrs Jafri Soap and Chemical Industries. In that view of the matter learned Judge of the Artha Rin Adalat opined accurately that the respondent bank authority correctly instituted the Mortgage Suit No. 38 of 1991 against the plaintiff appellant considering Messrs Jafri Jute Balling as sister organization of Messrs Jafri Soap and Chemical Industries. Learned Trial court further observed that in view of section 20 of the Artha Rin Adalat Ain, 2003 plaintiff appellant cannot institute or raised any question regarding any process or order, judgment and decree passed by the Artha Rin Adalat in any court or to any authority as per section 20 of the Artha Rin Adalat Ain, 2003 which runs as follows:-

dj l j-20

Ab ঋণ আদালতের চূড়ান্ততা।

এই আইনের বিধান ব্যতিরেকে কোন আদালত বা কর্তৃপক্ষের নিকট অর্থ ঋণ আদালতে বিচারাধীন ®Lje Ljkdj l j বা উহার কোন আদেশ, রায় বা ডিক্রীর বিষয়ে কোন প্রশ্ন উত্থাপন করা যাইবে না z এই আইনের বিধানকে উপেক্ষা করিয়া কোন fËaL j l cjh£ hj fËbei করা হইলে ঐরুপ আবেদন কোন আদালত বা কর্তৃপক্ষ গ্রাহ্য করিবে না।

13. In view of above provision of section 20 of the Artha Rin Adalat Ain, 2003 it is seen that without the provisions of Artha Rin Adalat Ain, 2003 any question regarding any proceedings initiated or any order, judgment or decree passed by the Judge of the Artha Rin Adalat cannot be raised in any court or to any authority and no court or authority will take cognizance or accept any application praying for any remedy filed in any court or authority ignoring the said provisions of section 20 of the Artha Rin Adalat Ain, 2003. So we think that learned trial court rightly passed the impugned judgment and decree considering the provision laid down in section 20 of the Artha Rin Adalat Ain, 2003.

14. It should be mentioned here that the learned Advocate for the appellant behemently submitted that changing the name of Messrs Jafri Shop and Chemical Industries the defendant appellant filed the original suit in the name of Messrs Jafri Jute Balling and obtained the exparte decree by practicing fraud upon the court. This submission of the learned Advocate for the plaintiff appellant could be raised in Artha Rin mortgage Suit No. 38 of 1991 by filing a petition for setting aside the exparte decree and thereafter the appellant

plaintiffs could have restored the suit in its original file and number in view of the specified section 19 of the Artha Rin Adalat Ain, 2003, which runs as follows:-

d¡l¡-19
HLalg¡ ¢X¢œ² p¢f¢La ¢hd¡e

(1) মামলার শুনানীর জন্য ধার্য কোন তারিখে বিবাদী আদালতে অনুপস্থিত থাকিলে, কিংবা মামলা শুনানীর জন্য গৃহীত হইবার পর ডাকিয়া বিবাদীকে উপস্থিত পাওয়া না গেলে, আদালত মামলা একতরফা সূত্রে নিষ্পত্তি করিবে।

(২) কোন মামলা একতরফা সূত্রে ডিক্রী হইলে, বিবাদী উক্ত একতরফা ডিক্রীর তারিখে অথবা উক্ত একতরফা ডিক্রী সম্পর্কে অবগত হইবার ৩০(ত্রিশ) দিবসের মধ্যে, উপ-d¡l¡ (3) Hl ¢hd¡e সাপেক্ষে, উক্ত একতরফা ডিক্রী রদের জন্য দরখাস্ত করিতে পারিবেন।

(3) Ef-ধারা (২) এর বিধান অনুযায়ী দরখাস্ত দাখিলের ক্ষেত্রে বিবাদীকে উক্ত দরখাস্ত দাখিলের তারিখের পরবর্তী ১৫(পনের) দিবসের মধ্যে ডিক্রীকৃত অর্থের ১০% এর সমপরিমাণ টাকা বাদীর দাবীর সেই পরিমাণের জন্য স্বীকৃতি স্বরুপ নগদ সংশ্লিষ্ট আর্থিক প্রতিষ্ঠান, অথবা জামানত স্বরুপ hÉ¡wL XÊgV, ®f-অর্ডার বা অন্য কোন প্রকার নগদায়নযোগ্য বিনিময়ে দলিল (Negotiable Instrument) আকারে জামানত হিসাবে আদালতে জমাদান করিতে হইবে।

(4) Ef-ধারা (৩) এর বিধানমতে ডিক্রীকৃত অর্থের ১০% সমপরিমাণ টাকা জমাদানের সংগে সংগে দরখাস্তটি মঞ্জুর হইবে, একতরফা ডিক্রী রদ হইবে এবং মূল মামলা উহার পূর্বের নম্বর ও নথিতে পুনরুজ্জীবিত হইবে এবং আদালত ঐ মর্মে একটি আদেশ লিপিবদ্ধ করিবে এবং অতঃপর মামলাটি যে পর্যায়ে একতরফা নিষ্পত্তি হইয়াছিল, ঐ পর্যায়ের অব্যবহিত পূর্ববর্তী পর্যায় হইতে পরিচালিত হইবে।

(5) ----------

(6) ----------

15. But without taking any such step under section 19 of the Artha Rin Adalat Ain, 2003 subsequently filing of a separate suit on the ground of fraud practices upon the court is not maintainable in view of section 20 of the Artha Rin Adalat Ain, 2003. Further more there is a provision of filing appeal and revision against any order or judgment and decree passed by the learned Judge of the Artha Rin Adalat in view of section 41 and 42 of the Artha Rin Adalat Ain, 2003. Plaintiff appellant apparently ignoring the provision of section 19 and 41 instituted a separate suit against the impugned judgment and decree which is absolutely barred by section 20 of the Artha Rin Adalat Ain, 2003.

16. In view of the discussion made above we are of the view that there is no flaw we need to assail in the impugned judgment and decree passed by the learned Joint District Judge, Narayanganj.

17. In the result, the appeal is dismissed without any order as to cost.

18. The impugned judgment and decree dated 16.06.2011 passed by learned Joint District Judge, 1st Court, Narayanganj dismissing the Title Suit No. 90 of 2005 be affirmed.

19. Send down the L. C. Record along with a copy of this Judgment to the court concerned at once for information and necessary steps.

5 SCOB [2015] HCD 84

High Court Division
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 3358 of 2009.

Rahima Begum
…...accused-appellant.
Versus

The State
.....Respondent.

Mr. Md. Ishrafil Hossain, Advocate
...For the Appellant.

Mrs. Rona Naharin, D.A.G with
Mrs. Monju Nazneen, A.A.G
... For the Respondent.

Heard on 22.02.2015, 23.02.2015, 24.02.2015 and Judgment on: 04.03.2015.

Present
Mr. Justice Syed A.B. Mahmudul Huq
And
Mr. Justice Md. Farid Ahmed Shibli

Motive:
There might be, as it appears, some animosity or hostility between the accused-appellant's husband Ali Haider and the deceased's father Abdur Rashid. But there was no such enmity between the accused-appellant and deceased's father or mother. In view of the facts above and evidence given by the prosecution, it is beyond our comprehension as to how and on the basis of which the learned Session Judge became convinced with and relied upon the prosecution case of killing Rabbi by the accused-appellant. Since there was no such reason for the accused-appellant to have any motive of killing an innocent minor boy of only 3 ½ years old, it seems to us hardly possible to believe in the alleged charge of causing death of Rabbi by the accused-appellant.
... (Para 26)

Penal Code, 1860
Section 201, 302/34:
And
Code of Criminal Procedure, 1898
Section 236 and 237:
An accused appellant charged under section 302/34 could be found guilty under section 201 of the Penal Code on consideration of the evidence on record and in that case such conviction need be upheld by referring to sections 236 and 237 of the Code of Criminal Procedure.
... (Para 32)

Judgment

Md. Farid Ahmed Shibli, J.

1. This Criminal appeal is directed against the Judgment and order of conviction dated 19.04.2009 passed by the learned Sessions Judge of Noakhali in Sessions Case No. 127 of 2006 arising out of Begumgonj P.S Case No. 46 dated 29.12.2005 corresponding to G.R Case No. 521 of 2005. Passing the impugned judgment and order the learned Sessions Judge found the accused Rahima Begum guilty under section 302 of the penal Code and sentenced her to

suffer life imprisonment and a fine of Tk. 10,000/= in default to suffer rigorous imprisonment for 1 (one) year more.

2. Case of the prosecution, in short, is as follows:-

On 29.12.2005, early in the morning, the informant Abdur Rhaman (P.W.-1) went out for work leaving his wife Rawshan Akter (P.W.-6) and son Abdur Rhaman @ Rabbi aged around 3½ years in his house at village Amanatpur under Police Station Begumgonj of Noakhali. In the morning P.W. 6 went to the Ghat of a nearby pond to clean her house-hold utensils leaving her son i.e. Rabbi in front of the house. After her return, P.W.-6 did not find her son Rabbi and at that time the accused Rahima Begum was saying that Rabbi had followed an Ice-cream Seller. PW-6 along with others then started search for Rabbi at and around the surrounding places. At last Shah Kamal (P.W.-7) accompanied by three others entered into the house of the accused Rahima Begum. At that time Rahima Begum was found sitting on a bedstead inside her house and the body of deceased Rabbi was found lying there covered with a Katha. Shah Kamal (P.W.-7) unveiled the body of Rabbi in a motionless condition pulling the Katha. P.W.-6 and other witnesses at that time noticed some injuries on neck, chest and beneath navel of the deceased Rabbi. The accused Rahima Begum was at that time feeding her suckling baby Zihad. Some Siddique Ullah taking Rabbi in his lap ran up to the Chamber of a doctor named Ahsanullah, who declared Abdur Rahman @ Rabbi as dead.

3. Subsequently the body of Rabbi was taken back to his house, where S.I. Kamruzzaman held inquest on the body of deceased and prepared the report dated 29.12.2009 (Ext.2) and seized the katha (Material Ext.-I) preparing a seizer list (Ext. 3) to that effect.

4. Md. Hafiz Ullah (P.W.-2) identified his signature in the inquest report as Ext. 2/1 and in the seizer list as "Ext. 3/1". Pursuant to the instruction of S.I Kamruzzaman, Constable Kazi Shajahan (PW-3) carried the body of deceased Rabbi to the Morgue of Noakhali Sadar Hospital, where Dr. A.B.M Abdul Motaleb (P.W.-4) held autopsy and prepared the report (Ext. 4)

5. Being assigned with the responsibility, S.I. Kamruzzaman conducted the investigation visiting the place of occurrence, recording statement of witnesses under section 161 of the Code of Criminal Procedure and procuring available documents and incriminating materials in support of the accusation against the accused Rahima Begum. S.I Kamruzzaman concluded the process of investigation submitting the charge-sheet bearing No. 147 dated 09.05.2006 against the accused Rahima Begum wife of Ali Haider for the offences under section 302/ 201 of the Penal Code.

6. On receipt of the record from the court of learned Magistrate, the learned Session Judge took cognizance of offences fixing a date for framing of charge. On framing a charge under section 302 of the Penal Code, the same was read over to the accused Rahima Begum, who pleaded not guilty and claimed to be tried as per law.

7. In order to prove the charge framed, the prosecution has examined 9 witnesses and produced available incriminating materials and documents including Post Mortem Report, Seizer-list, Inquest Report, etc.

8. On conclusion of the prosecution witnesses, the learned Session Judge examined the accused Rahima Begum under section 342 of the Code of Criminal Procedure. During such

examination, the accused-appellant pleaded not guilty. She mentioned that she had nothing to say any more and would not adduce any witness on her defence.

9. On analysis of the evidence, given by the prosecution and materials on record, the learned Session Judge was convinced with the accusation of killing the victim Rabbi and found the accused appellant Rahima Begum guilty under section 302 of the Penal Code and awarded a sentence of life imprisonment with fine of taka 10,000/- in default to suffer R.I for 1 (one) year more.

10. Being aggrieved by and dissatisfied with the said judgment and order of conviction the accused-appellant Rahima Begum has filed the instant petition of appeal contending inter-alia that the prosecution has miserably failed to prove its case beyond all reasonable doubt and as such the order of conviction passed by the trial Court is not legal and not based on the evidence on record and that is why the decision of the Trial Court recording the order of conviction under section 302 of the Penal Code against the accused-appellant deserves this Court interference.

11. In course of hearing of the appeal, learned Advocate Md. Israfil Hossain appearing on behalf of the accused-appellant contends that the witnesses adduced by the prosecution and statements made by them are contradictory and just by building the castles on the basis of some concocted facts, the prosecution has made some attempts to establish the charge under section 302 of the Penal Code levelled against the accused-appellant. According to the learned advocate for accused-appellant, being a mother of another child i.e. Zihad, it was not at all possible for the accused Rahima Begum to cause the death of an innocent minor boy Rabbi and the prosecution story cannot be relied upon on the basis of evidence given by the prosecution witnesses, who did not even see the alleged occurrence of killing Rabbi.

12. In reply, learned Deputy Attorney General Mrs. Rona Naharin retorts stating that the very fact of recovery of the body of deceased Abdur Rahman @ Rabbi from the house of accused-appellant Rahima Begum and her failure to give any satisfactory explanation on that account has made the task for prosecution easy to vindicate the alleged charge of causing the death of deceased Rabbi by the accused-appellant. It is evident that the husband of the accused-appellant Ali Haider was at that time out of his house for work and that is why the Investigating Officer did not find his involvement with the alleged occurrence. So, he was not implicated in the case.

13. At the very outset, it would be incumbent for us to ascertain as to who caused the death of deceased Rabbi and whether the accused-appellant had any intention or participation in causing his death or not.

14. In this case, P.W. 1 Abdur Rashid is the informant and the father of deceased Rabbi. P.W. 2 Md. Hafizullah is a witness to the Inquest Report and the Seizure-list. P.W. 3 Constable Kazi Shahajahan carried the body of deceased Rabbi to the Morgue for autopsy. P.W. 4 Dr. A.B.M. Abdul Motaleb performed autopsy on the body of the deceased, P.W. 5 Mahmud Ullah is a neighbour having his house in the southern side of the accused-appellant's dwelling hut i.e. the P.O. After hearing a hue and cry, P.W. 5 rushed towards the place of occurrence at around 10.30 to 10.45 a.m. and participated in the drive for searching Rabbi along with others. P.W. 6 Rawshan Akhter is the mother of deceased Rabbi, P.W. 7 Shah Kamal is a cousin of both Abdur Rashid (P.W. 1) and Ali Haider (i.e the husband of the accused-appellant). P.W. 7, in true sense, is a common relative of Ali Haider and Abdur

Rashid (i.e. P.W. 1). P.W. 7 has deposed that he found the accused Rahima Begum feeding her suckling baby sitting on a bedstead in her house and at that time the body of Rabbi was found inside the house of the accused-appellant lying in a motionless condition and covered by a katha. P.W. 7 has claimed that along with Abdur Rashid (P.W. 1) he went to Dr. Ahsanullah who declared Rabbi as dead. P.W. 8 Abul Khair, an owner of a Tea-stall and Battle-nut Shop, has stated that he heard the occurrence through a Rickshaw puller. P.W. 8 has deposed that on the date of occurrence at 10.30 a.m. he reached the house of Abdur Rashid and at around 12.00 to 12.30 p.m. found the body of deceased Abdur Rahman there.

15. Investigating Officer S.I. Kamruzzaman was not adduced by the prosecution because of his stay in a foreign country as a member of the United Nation's Peace Keeping Team. Inspector A.K.M. Mohiuddin (P.W.-9), who is a departmental colleague of S.I. Kamruzzaman and acquainted with the signatures of the letter, got the Inquest Report, Seizure-list, Sketch-Map, Index, etc. exhibited identifying signatures of S.I. Kamruzzaman.

16. Now, let we analyze the testimony of the witnesses and sift the evidences on record to see whether the prosecution materials are sufficient for believing in the alleged charge under section 302 of the Penal Code against the accused-appellant Rahima Begum or not.

17. Admittedly the deceased's father (P.W. 1) or mother Rawshan Akter (P.W. 6) did not see the alleged occurrence of killing of Rabbi by the accused-appellant or anybody else. The prosecution, as it is noted, could not produce any eye-witness in that respect. P.W. 1 Abdur Rashid has stated the followings in clear terms:-

"29.12.2005 wLt Zwi‡L NUbvi w`b mKvj †ejv Awg ewo nB‡Z Kv‡R Pwjqv hvB| `yy 12:30 NwUKvq ewo‡Z Awmqv ïwb †h, Avgvi †Q‡j‡K cvIqv hvB‡Z‡Q bv| mv¶x Kvgvj, gwngyy-vn, nwdR Dj-vn‡`i wbKU nB‡Z ïwb †h, Avgvi gZ †Q‡j ji jvk GKB ewo‡Z Aew¯Z Avgvi eo fvB‡qi N‡i cvIqv wMqv‡Q| Avgvi †Q‡j ji jvk wKfv‡e eo fvB‡qi N‡i wMqv‡Q ewj‡Z cwie bv| wKfv‡e Avgvi †Q‡j gviv wMqv‡Q, A_ev ‡Kn Zvnv‡K Lyy K‡i‡Q wKbv ewj‡Z cwie bv|"

18. The above testimony of P.W. 1 has mark-ably emaciated the credibility of the prosecution story to a large extent. At one stage of his examination P.W. 1 has further stated that he could not say by whom or how his son Rabbi was killed.

19. During his cross examination, P.W. 1 has also stated:-

"Awg Avmvgxi wei‡×† Kvb wePvi PvB bv|"

20. Deceased Rabbi's mother P.W. 6 Rawshan Akter has testified that on the date of occurrence after her return from a nearby pond her son Rabbi, who had been in front of her dwelling hut, was not found. P.W. 2 Md. Hafizullah, P.W. 5 Mahmud Ullah and P.W. 7 Shah Kamal during their respective examinations also failed to narrate as to how or by whom the deceased Rabbi was killed. All those witnesses, as claimed, rushed to the homestead of the informant P.W. 1 and on hearing the alleged disappearance of Rabbi participated in the drive for searching the victim Rabbi.

21. Being requested by the learned Advocate Mr. Md. Israfil Hossain we have gone through the testimony of P.W. 7 Shah Kamal, who is a common relative of both informant and the accused-appellant. P.W. 7 has stated that along with others he had made the search for Abdur Rahman @ Rabbi but did not find him anywhere and at one stage with others he

entered into the dwelling hut of the accused Rahima Begum, who was feeding her baby sitting on a bedstead and at that time the body of Rabbi was found in motionless condition and lying there covered with a Katha.

22. The Post Mortem Report (Ext. 4) has been exhibited by Dr. A.B.M. Abdul Motaleb (P.W. 4). The said report provides us that the death of deceased Rabbi was due to asphyxia which was due to throttling and head injury and that was anti-mortem and homicidal in nature. During the autopsy, P.W. 4 found the clotted blood in the injury which remained on washing and the external organs found congested. The said report of the autopsy has made it clear like anything that the death of deceased Rabbi was caused by squeezing his throat and at one stage due to failure of breathing he was done to death.

23. Crux of the problem to be resolved is whether the accused Rahima Begum throttled the victim Rabbi by his neck and killed him or not. No such evidence to that effect was led by the prosecution. The prosecution has not adduced even a single witness, who has last seen Rabbi with accused Rahima Begum before his disappearance. Even the deceased Rabbi's mother P.W. 6 has not made any such claim. Rather P.W. 6 during her deposition has stated that she went to the pond to clean some utensils leaving Rabbi with 2 apples in his hand in front of her (P.W-6) house. Had there been any participation by the accused-appellant Rahima Begum in the alleged offence of killing the victim Rabbi, it would then not be possible for her i.e. the accused to remain engaged in feeding her suckling baby. Again had the accused been involved in killing, she would then supposed to try to hide herself or flee away. Prosecution witnesses like P.W. 2, 5 or 7 did not notice any sign of fatigue or abnormality on the face of the accused Rahima Begum. In such a circumstance, how could we believe in the charge of killing Rabbi by her i.e. the accused Rahima Begum.

24. The entire prosecution story, as it appears, is dependent on some circumstantial facts and evidence. In such a crucial position, it was incumbent for the prosecution to see whether there was any motive or animosity of the accused with Rabbi's mother or father. The prosecution has failed to do anything in this regard.

25. On this point except P.W. 7 no other witness has made any statement. In his cross examination P.W-7 has said:-

"Avjx nvq`vi Avgvi Avcb ‡RVv‡Zv fvB| Zvnviv fvB‡`i g‡a¨ we‡iva Av‡Q, Z‡e Avgvi mv‡_ bvB|"

26. There might be as it appears some animosity or hostility between the accused-appellant's husband Ali Haider and the deceased's father Abdur Rashid. But there was no such enmity between the accused-appellant and deceased's father or mother. In view of the facts above and evidence given by the prosecution, it is beyond our comprehension as to how and on the basis of which the learned Session Judge became convinced with and relied upon the prosecution case of killing Rabbi by the accused-appellant. Since there was no such reason for the accused-appellant to have any motive of killing an innocent minor boy of only 3 ½ years old, it seems to us hardly possible to believe in the alleged charge of causing death of Rabbi by the accused-appellant.

27. The learned Judge of the court below, so far we understand, was misconceived the evidence on record and misdirected himself by arriving at a decision of finding the accused-appellant guilty under section 302 of the Penal Code, which immensely deserves the interference of this Court of Appeal. So, we are inclined to hold that the impugned order of

conviction and sentence under section 302 of the Penal Code against the accused-appellant seriously suffers from material legal infirmity and liable to be set aside accordingly.

28. Informant Abdur Rashid (P.W. 1) has heard the fact of recovering the body of deceased Rabbi from the house of his elder brother Ali Haider (the husband of the accused Rahima Begum). P.W. 1 has claimed that he heard the said fact from Shah Kamal, Mahmud Ullah and Md. Hafizullah. Shah Kamal (P.W. 7) has testified in clear terms that after making an intensive search at and around the surrounding places including a pond, at one stage with other witnesses he entered into the house of the accused Rahima Begum, where the body of deceased Rabbi was found lying beneath a Katha and at that time Rahima Begum was feeding her suckling baby. P.W. 7 has claimed himself as a cousin of the accused's husband Ali Haider. Md. Hafizullah (P.W. 2) and Mahmud Ullah (P.W. 5) have deposed in explicit terms that the body of Rabbi was found inside the dwelling hut of the accused-appellant in a motionless condition and at that time she was feeding her baby sitting on a bedstead. P.Ws. 2, 5 & 7, as it appears, are the most vital witnesses for the prosecution. All of them have deposed that the body of Rabbi was recovered from the dwelling hut of the accused-appellant Rahima Begum and at that time she was inside the house feeding her baby. Wherefrom and how the body of the deceased Rabbi had been taken to the dwelling hut of the accused-appellant Rahima Begum and why it was kept inside her house concealed beneath a Katha:- in this respect the defence has failed to give any plausible account even during accused-appellant's examination under section 342 of the Code of Criminal Procedure.

29. On the above matter, learned D.A.G. has argued that if this Appellate Court be not convinced with the charge of an offence under section 302 of the Penal Code, on that plea the accused-appellant shall not be allowed to get rid of her liability of committing an offence by causing the disappearance of the body of deceased Rabbi, and there was an intention of screening the offender from punishment, which clearly comes under the garb of section 201 of the Penal Code.

30. Learned Advocate Mr. Md. Israfil Hossain has tried to controvert the above submission stating that learned Session Judge had already framed a charge against the accused-appellant only under section 302 excluding section 201 of the Penal Code and in such a situation it would not be proper for this Court of Appeal to record any decision finding the accused-appellant guilty under section 201 of the Penal Code.

31. We have given our anxious consideration to the submission advanced by the learned Advocate for defence and learned D.A.G. for the State and the facts and evidence on record. It is true that the principal offender responsible for the alleged offence of causing the death of the deceased Rabbi has not been detected by the prosecution and it has failed to adduce any ocular tangible evidence to that effect. But the fact remains is that the prosecution has succeeded in proving the fact of recovery of the body of deceased Rabbi, which was found inside the dwelling hut of the accused-appellant. At that time, the body of the deceased was found in a motionless condition and covered with a Katha. In course of holding the inquest, S.I. Md. Kamruzzaman has seized the Kath measuring 5´ X 4´ square cubits and got the same marked as "Material Ext. I." It becomes transparent to us that the accused-appellant by causing the disappearance of the body of deceased Rabbi has manoeuvred her ill intention of screening the actual offender from the legal punishment and thereby committed an offence punishable under section 201 of the Penal Code.

32. It is true that the learned Judge of the trial Court in framing the charge excluded the offence under section 201 of the Penal Code. In this context, we may refer to the decision reported in 1 B.C.R. 1981 (AD) at page 129 in the case of Kalu & another –Vs- The State, where their Lordships have observed that an accused appellant charged under section 302/34 could be found guilty under section 201 of the Penal Code on consideration of the evidence on record and in that case such conviction need be upheld by referring to sections 236 and 237 of the Code of Criminal Procedure.

33. Having regard to the facts and attending circumstances and the decision referred to above, we are inclined to hold that the learned Judge of the trial Court ought to find the accused-appellant guilty of an offence under section 201 in place of 302 of the Penal Code and the order of conviction and sentence passed under section 302 of the Penal Code are not maintainable in the eye of law.

34. By finding the accused-appellant guilty under section 302 of the Penal Code, as it appears, the learned Judge of the Trial Court has committed an error of fact and of law and thereby made the impugned order of conviction and sentence liable to be set aside. In case of a punishment of an offence punishable with death, the offender is liable to a sentence of imprisonment, which may be extended to 7 years and a fine as per section 201 of the Penal Code.

35. On perusal of the record, it is noted that the accused-appellant has been in jail since 13.04.2009 and her period of custody till to date will be around 5 years 8 months. Being an woman and mother of a minor boy named Zihad, the accused-appellant deserves a compassionate view of this Court of Appeal. Taking the above facts, and other extenuating circumstances into consideration, we are of the opinion that a sentence of Rigorous Imprisonment for 5 (five) years and a fine of Tk. 1,000/= in default to suffer simple imprisonment for 1(one) month will squarely meet the demand of justice.

36. In the result, the appeal is allowed in part with modification. The impugned order of conviction and sentence dated 19.04.2009 passed by the learned Sessions Judge, Noakhali in Sessions Case No. 127 of 2006 is hereby set aside in part. We find the accused-appellant Rahima Begum guilty of an offence under section 201 of the Penal Code and sentenced her to suffer rigorous imprisonment for 5(five) years and fine of Tk. 1,000/= in default to suffer simple imprisonment for 1(one) month.

37. The period of sentence already spent by her in jail will be deducted according to the provision of section 35A of the Code of Criminal Procedure.

38. Let copies of the order be transmitted to all concerned.

39. Send down the Lower Court’s Records.

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HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 603 of 1998

Motiur Rahman @ Moitta and others
… Convict-Appellants
Versus

The State
… Respondent

No one appears for the Appellants

Mr. Md. Matiur Rahman, A.A.G.
… For the respondent

Judgment on: 11.08.2015

Present:
Mr. Justice Md. Abu Tariq
And
Mr. Justice Amir Hossain

Section 19A and 19(f) of the Arms Act, 1878:
The person from whose exclusive control and possession arms and ammunition are found is the only person to be liable. ... (Para 21)

Judgment

Amir Hossain, J.

1. This appeal is directed against the judgment and order of conviction and sentence dated 23.03.1998 passed by the learned Special Tribunal No. 14 and Additional District and Sessions Judge, Court No. 6, Chittagong in Special Tribunal Case No. 245 of 1992 arising out of Patia Police Station Case No. 4, dated 11.4.1992 corresponding to G. R. case No. 28 of 1992 convicting the accused appellants Motiur Rahman @ Moitta, Abul Hossain@ kalu under section 19 A and 19 (f) of the Arms Act, 1878 and sentencing them there under to suffer rigorous imprisonment for 10 (ten) years and 7(seven) years respectively and passed the order to run the sentence concurrently.

2. The prosecution case, in brief, is that on 10.4.1992 at 22.15 P.M. S.I Golam Mostafa along with Daroga Delwar Hossain, Constable Abdul Mannan, Belal Hossan, Ershad Hossain, Golam Mostafa, Md. Moslem and Shahjahan of Patia police station went for petrol duty. On 11.4.1992 at 1.15 A. M. when they were near the Dhal Ghat Union Parishad office, they received a secret information that, one Abul Hossain @ kalu was loitering with illegal arms and ammunition near the bridge over the Hargazi Khal (Canel) of north Surma. There after the police force reached to the Hargazi bridge along with Dafadar Abedur Rahman and the witnesses namely Abdul Karim, Mojibur Rahman and arrested Abul Hossain @ Kalu, On interrogation Abul Hossain @ Kalu Admitted that he had a local made Banduk and a cartridge which he handed over to his friend Motiur Rahman alias Moitta on 10.04.1992 at night. The police force thereafter went to the home of Matiur Rahman @ Moitta along with Abul Hossain @ Kalu and detained Motiur Rahman @ Moitta. During interrogation, Matiur Rahman @ Moitta Produced a local made Bonduk and a cartridge from the poultry hut. The poultry hut was made of mud and was at the north corner inside the house. Accused Motiur

Rahman @ Moitta admitted that, he and accused Abul Hossain @ Kalu possessed this arms. Informant Golam Mostafa Seized the arms and ammunition and prepared a seizure list. Thereafter he went to the Patia Police Station and lodged the Ejhar (Exhibit- 2)

3. Police investigated the case and submitted charge sheet No. 24, dated 17.4.1992 against accused appellant Motiur Rahman @ Moitta and Abul Hossain @ Kalu under Sections 19A and 19 (f) of the Arms Act, 1878.

4. During trial, the learned Tribunal framed charge against both the accused-persons under Sections 19A and 19(f) of the Arms Act, 1878 and the same was read over to them, to which they pleaded not guilty and claimed to be tried as per law.

5. At the time of trial out of 12 witnesses, 5 witnesses were examined by the prosecution and on closure of the prosecution witnesses the accused persons were also examined under section 342 of the Code of the Criminal Procedure. In this stage the accused persons further pleaded not guilty and claimed to the tried. After that the defence examined as many as two witnesses.

6. Defence case as gathered from their cross examination and from the statement of D.Ws in short is that the accused persons were innocent and they have been implicated in this case falsely and out of enmity caused in connection with Union parishad Election campaign.

7. In considering the evidence on record, the learned Tribunal, Chittagong found the accused Motiur Rahman @ Moitta and Abul Hossain@ Kalu guilty of the charge under section 19 A and 19 (f) of the Arms Act, 1878 and convicted and sentenced both of them as mentioned above.

8. Against the said judgment and order of conviction, the convict-appellants filed the instant appeal.

9. No one appears on behalf of the convict appellants.

10. Mr. Md. Matiur Rahman, the learned Assistant Attorney General appearing on behalf of the state submits that the evidence on record and the other material facts and circumstances are sufficient to justify the conviction and sentence and as such, the appeal should be dismissed.

11. Let the relevant versions of the prosecution witnesses be discussed to assess how far the sentence of both the convicts were justified.

12. S.I. Golam Mostafa as PW-1, stated in his examination in Chief that, on 10.4.1992 he went to Dalghat where on 11.4.1992 at 01.15 A. M. he got the information that Abul Hossain @ kalu is possessing an arms. Thereafter he along with his force, arrested Abul Hossain @ kalu, after interrogation Abul Hossain @ kalu informed that, he had a country made L.G. and ammunition which he handed over to Matiur. Thereafter they along with Abul Hossain @ kalu went to the house of Motiur and arrested him. According to his confession a local made Banduk and one round cartridge was seized from the poultry hut of his kitchen in presence of witnesses and prepared seizure list. Thereafter, he went to the Police Station along with the accused persons and lodged the ejhar. He identified the seizure list and the ejhar marked as exhibit 1 and 2 accordingly. He also identified his signature in the seizure list and ejhar

marked as exhibit 1/1 and 2/1 respectively. He identified the sized Banduk and cartridge and they were marked as material exhibit I and II respectively.

13. This witness is also the investigating officer of this case, as investigating officer he deposed as a P.W.5, he stated in his examination in chief that, after getting the charge of investigation of the case, he visited the place of occurrence, drew the map of the place of occurrence along with the index thereof. He recorded the deposition of the witnesses. As the allegation against the accused persons has been proved primarily, so, he submitted the charge sheet No. 24, dated 17.4.1992 under section 19 Ka and 19 (cha) of the Arms Act. He identified the sketch Map and Index which was marked as exhibit -4 and 5 respectively. He also identified his signature in the sketch map and in the index which was marked as exhibit 4/1 and 5/1 respectively. This witness identified the accused persons in the dock.

14. This witness in his cross examination stated that he was in "Ranapahara" (petrol duty). First he went Dhalghat at 1.15 A. M. and arrested Abul Hossain @ kalu. He reached at the house of Matiur Rahman at 2.20 P. M. The poultry hut is a small house made of mud. He denied the suggestion that, arms has not been recovered from the poultry hut as shown by Matiur Rahman.

15. P.W.2 Ahdul Karim stated in his examination in chief that, on 11.4.1992 he and Ali Akbor, Mojibor Rahman and dafadar Abedur Rahman were voluntarily acting as guard. At 2.30 A. M. Police came from Patia police station and along with them went to the south of the bridge over the Hargazi Khal(Canel) of north surma and arrested accused Abul Hossain @ kalu. He further stated that, along with them and Abul Hossain @ kalu police went to the house of accused Motiur Rahman, produced a country made Banduk and a cartridge from his poultry hut. Then police prepared the seizure list and he put his signature thereon. He identified the seizure list and his signature thereon which was marked as ext.-1/2. He also identified the accused persons in the dock. This witness in his cross-examination has stated that the seizure list was prepared at the house of Matiur Rahman. He also stated that Ali Akbor was first who put his signature in the seizure list. Dafadar Abedur Rahman was also present at that time. He also stated that, the poultry hut was inside the house.

16. P.W.3 constable Abdul Mannan stated in his examination in chief that, on 10.4.1992 at 11.00 P.M. he started for that. They went to Dhalghat, North Surma area and took a man. There after along with that man they went to the house of Motiur Rahman and surrounded the house. Daroga entered into the house of Motiur Rahman. Dafadar was with him. Then daroga searched the home and told that, he had recovered an arms and cartridge then a seizure list was prepared. No one crossed this witness.

17. P.W. 4 constable Ershad Hossain stated in his examination in chief that, on 10.4.1992 at 1.30 A. M. when he was in patrol duty found a man loitering in the bank of the Surma Khal. He arrested the man, thereafter with that man they went to the house of Motiur Rahman. Daroga recovered an L. G. and a cartridge from the poultry Hut of the house of Matiur Rahman. A seizure list was prepared. Thereafter with the accused persons and arms they went to the Patia police station. This witness in his cross examination stated that, the way to the poultry hut is through the main door of the house.

18. We have heard the learned Assistant Attorney General. Perused the evidence of P.W. 1 to 5, D.W.1 and 2, perused the memo of appeal and other materials on record. The prosecution alleged that on 10.4.1992 while under the guidance of informant S.I. Golam

Mostafa (P.W.1) along with the police force were on petrol duty at night. On getting secret information, arrested Abul Hossain @ kalu and as per his information they surrounded the house of the accused Motiur Rahman @ Moitta. After searching the house they recovered country made L.G and a cartridge from the Poultry hut of said Motiur Rahman @ Moitta. The poultry hut was inside the house. A seizure list was prepared instantly in front of the witnesses. Thereafter along with the accused persons and the seized articles he went to Patia Police station and lodged the Ejhar. The said informant S. I. Golam Mostafa (P.W.1) in his deposition in dock supported the case of prosecution and identified the accused persons, seized arms and cartridge. He disclosed a chronological description of the arrest of accused Abul Hossain @ kalu and the recovery of arms and cartridge from the house of accused Motiur Rahman @ Moitta. The learned advocate for the accused could not become able to bring out anything contrary from him during cross examination. Constable Abdul Mannan (P.W.3) and Constable Ershad Hossain (P.W. 4) who were the members of the raiding party, supported the case of the prosecution in their evidence and corroborated with the evidence of the informant. P.W.2 who is a private witness, also described the fact of recovery of the arms and cartridge from the house of the accused Motiur Rahman@ Moitta. He in his evidence admitted his presence in the place of occurrence, identified the seizure list and his signature thereon. Learned advocate for the accused could not extract anything contrary from the witnesses. All the prosecution witnesses have corroborated the case of the prosecution in to to. They are not local people. It appears that though it is only the private witness (P.W.2) of seizure list, other than him all are police witnesses. Mere thereof, we found nothing to disbelieve the prosecution case. Nothing appeared as regard having any prior relationship or enmity of them with the accused.

19. In the case of Abdur Razzak Talukder Vs. State reported in 51 DLR at page- 83, the High Court Division has observed that, a police witness is reliable. Moreover P.W. 2, who is a public has also corroborated the evidence given by the police witnesses.

20. On the other hand, although the accused persons adduced 2 defence witnesses (D.W.1 & D.W.2) but they failed to shake the credibility of the prosecution case.

21. From above discussion, it appears that the Poultry hut has been inside the house of accused Matiur Rahman @ Moitta and the fire arms and one cartridge have been recovered from that hut. So, it becomes clear that the arms and ammunitions were found in exclusive possession and control of the accused Matiur Rahman@ Moitta and it is he, who alone has to be liable for such illegal possession. It appears from the evidence on record that the arms and ammunition have not been recovered from direct or exclusive possession of another accused Abul Hossain @ kalu. The person from whose exclusive control and possession arms and ammunition are found is the only person to be liable. Same principle of law has also been approved by our apex Court in Pannu Mollah and other Appellant Versus State Respondent Reported in 56 DLR- at page-142.

22. In such a situation, it is not understood, as to how and on the basis of which learned Trial Court recorded its decision finding the accused Abul Hossain @ kalu guilty of the charge under section 19A and 19(f) of the Arms Act.

23. Since the recovery of the arms and ammunition was not made from exclusive possession or control of accused Abul Hossain @ Kalu. So, we are inclined to acquit him from the charge.

24. We do not find any lacuna in the evidence of P.Ws or incriminating materials brought to prove the charge levelled against the convict appellant Matiur Rahman @ Moitta. Prosecution witnesses have reciprocally corroborated each other and thereby enhanced the credibility of the convict appellant Matiur Rahman @ Moitta's complicity in the offence of possessing the fire arms and ammunition, which come under the mischief of sections 19A and 19(f) of the Arms act, 1878.

25. We are of the opinion that the learned Tribunal has committed an error in convicting appellant Abul Hossain @ Kalu which is liable to be set aside. Since the conviction and sentence passed by the learned Tribunal have sufficient merit both on facts and legal aspect of the matter. We are thus inclined to maintain the sentence against the convict appellant Matiur Rahman @ Moitta. However the appellant Abul Hossain @ Kalu be acquitted from the charge brought under section 19A and 19(f) of the Arms Act and the order of conviction and sentence recorded against Matiur Rahman @ Moitta is hereby upheld.

26. In the result, the appeal is allowed in part. Consequently the impugned judgment and order of conviction and sentence dated 23.03.1998 passed by the learned Special Tribunal No.14 and Additional District and Sessions Judge, Court No.6, Chittagong in Special Tribunal Case No. 245 of 1992 is upheld in respect of convict appellant Matiur Rahman @ Moitta and set aside against the Abul Hossain @ Kalu.

27. The convict appellant Abul Hossain @ Kalu be therefore acquitted from the charge and he be set at liberty if not wanted in any other connection.

28. The convict appellant Motiur Rahman alias Moitta is directed to surrender before the trial Court within 30(thirty) days from the date of receipt of this Judgment, to serve out the remaining period of his sentence.

29. The period of custody of convict appellant Motiur Rahman @ Moitta which has already been spent shall be deducted in accordance with section 35A of Criminal Procedure Code.

30. Send down the lower Courts record along with a copy of the judgment at once.

5 SCOB [2015] HCD 96

High Court Division

(Civil Appellate Jurisdiction)

First Appeal No. 03 of 2013

Ramesh Chandra Das and others
..... Appellants

Versus

Sureshwar Mazumdar and others
..... Respondents

Mr. Md. Oziullah, Advocate
…….. For the appellants

Mr. A.M. Aminuddin, Advocate
……. For the Respondents

Heard On: 05.07.2015 and
Judgment On: 07.07.2015.

Present:
Mr. Justice Sharif Uddin Chaklader
And
Mr. Justice Khizir Ahmed Choudhury

Section 106 of Transfer of Property Act:
The defendant forfeited their right to stay in the suit properties by denying the title of the plaintiffs and as such the contents of the notice or any purported facts are insignificant here. Because if someone denies title of the land lord, notice under section 106 of the Transfer of Property Act may be dispensed with. Consequently the decision referred in 51 DLR 393 is not applicable here. On the other hand the case reported in 1 BLC AD 156 as reported by Mr. A.M. Amin Uddin has got semblance with the present case. ... (Para 14)

Judgment

Khizir Ahmed Choudhury, J:

1. This first appeal has been preferred against the judgment and decree dated 04.11.2012 passed by learned Joint District Judge, 5th Court, Dhaka in Title Suit No. 484 of 2012 decreeing the suit in favour of the plaintiff.

2. Gopal Chandra Majumder, the predecessor-in-interest of respondent Nos. 1-7 and respondent Nos. 8-2 as plaintiffs instituted the aforesaid title suit impleading the present appellants and respondent Nos. 15-26 as defendants praying for declaration of title in the "ka" schedule property and further declaration that registered deed of sale No. 4132 dated 07.09.1996, deed of sale No. 4134 dated 07.09.1996, deed No. 4130 dated 07.09.1996, deed No. 4139 dated 07.09.1996. deed No. 3510 dated 31.08.1998, as described in the "kha" schedule to the plaint are inoperative, valueless, ineffectual and plaintiffs are not bound by those deeds and also to pass decree for evicting the defendant Nos. 1-11 from schedule Ga(1)-Ga(5).

3. The case of the plaintiff, in brief, is that suit properties belonged to Satish Mohon Roy who has two sons namely Sushil Mohon Roy and Narayon Chandra Roy, 4 daughters namely Purno Shashi, Chara Bala, Swadesh Bala and Bina Bala. Purno Shashi was married with Subol Chandra Das, son of Subodh Chandra Das. Except Purno Shashi Das, sons and others daughters left for India where they started residing as their permanent abode and in spite of earnest request by Satish Mohon Roy, they did not return to Bangladesh. Purno Shashi Das and her Husband Subol Chandra Das came to the homestead of Satish Mohon Roy and started to reside there taking care of Satish Mohon Roy. Subsequently Satish Mohon Roy executed a will in favor of Purno Shashi Das on 03.01.1963 appointing Subol Chandra Das as executor of the will. Purna Shashi Das and her husband Subol Chandra Das continued to reside with Satish Monon Roy by looking after him. Thereafter Satish Mohon Roy passed away and subsequently Subol Chandra Das, executor of the will initiated a Probate Case being Probate Case No. 19 of 1963 and learned District Judge granted Probate on 01.07.1963 in favor of Purno Shashi Das. Subsequently, Subol Chandra Das, transferred the suit land to plaintiff Nos. 1-3, Jatendra Chandra Majumder, father of plaintiff Nos. 4-6 and grand father and father-in-law respectively of plaintiff Nos. 7-8 vide five (5) sale deeds and delivered possession thereof. The plaintiffs mutated their names in the record of rights, paid rent and continued to hold and possess the same by themselves and through Bharatias. The defendants were monthly ejectable tenants but they were habitual defaulter in payment of rent and in spite of repeated demand they didn't pay rents. Subsequently, on being approached, Marshal Law authority issued notice to defendants to quit suit properties.

4. Challenging the Notices, the defendants instituted Civil Suit being Civil Suit No. 98 of 1984 in the 1st Court of Subordinate Judge Dhaka which was renumbered as civil Suit No.93 of 1991, wherein they made an application for amendment of plaint claiming to have purchased the suit land from Narayon Chandra Roy through registered deed of sale but their application for amendment of plaint was rejected against which they preferred Civil Revision No.**1810** of 2000 before the High Court Division.

5. In the plaint they admitted to be a Bharatia but subsequently they claimed ownership to the suit land by filing amendment application and as such their claim has rightly been rejected. The plaintiffs have been holding and possessing the suit land but due to creation of collusive deeds, title of the plaintiffs being clouded, they issued notice under section 106 of Transfer of Property Act but in spite of getting Notice, the defendants did not pay heed thereto which constrained the plaintiffs to file the instant suit.

6. Defendant Nos. 1 and 2, 10-12 contested the suit by filing written statement contending, inter-alia that Sotish Mohon Roy being owner of the suit properties died leaving behind two sons namely Sushil Mohon Roy and Narayan Chandra Roy, wife Naresh Bala Roy and four daughters namely Tanu Bala Roy, Shadeshi Bala Roy, Bina Bala Roy and Purno Sashi Das. The defendants were tenants under the original owner and subsequently under Narayan Chandra Roy son of Sushil Chandra Roy. Thereafter, they used to pay rent to Narayan Chandra Roy through plaintiff No.1. Narayan Chandra Roy transferred .017 acres of land on 07.09.1996 in favor of Romesh Chandra Das vide deed of sale No. 4131, .0175 acres of land in favor of Nur Mohammad Gazi vide deed of sale No. 4132, .0175 acres of land in favor of Shanti Ranjon Sarker vide deed of sale No. 4133 and .0175 acres of land in favor of Khorshed Alom vide deed sale No. 4134 and thereafter transferred .1697 acres of land in favor of Shanti Ranjon Sarker and aforementioned other purchasers vide deed of sale No. 3510 dated 31.08.1998.

Defendant Nos. 1-2 in the meantime filed Civil Suit No. 94 of 1984 before the sub-Judge, 1st Court Dhaka praying declaration of title and challenging Notice dated 06.03.1984 issued from the office of Deputy Commissioner, Dhaka for evicting defendant Nos. 1-2. Satish Mohon Roy without executing any will died leaving behind his aforesaid heirs and hence, the will as mentioned in the plaint is fraudulent and the plaintiff probated the will through deceitful means without serving any Notice to the next of kin of Satish Mohon Roy. With a view to grab the suit property plaintiffs created the deed of sale showing Subal Chandra Das as vendor who had no saleable interest in the suit land and as such the suit be dismissed.

7. Both the parties examined 3 witnesses from each side and also submitted documentary evidences. The trial Court, after hearing the parties and upon perusal of the evidences held that the plaintiffs submitted the certified copy of the Probated will dated 01.07.1963 whereby it is proved that Sotish Chandra executed will in favour of daughter Purnososhi which has been duly probated and record of right has been prepared in the name of Purnososhi. The trial Court further found the defendants contention that the sons and daughters of Sotish Chandra did not go to India has not been substantiated. The trial Court further found that Purno Shashi through the executor transferred the suit properties to the plaintiffs and they mutated their name in the record of right and paid all utility bills to the authority and the defendants being tenants under the plaintiffs subsequently claimed title by creating registered documents denying plaintiffs title and accordingly decreed the suit.

8. Mr. Md. Oziullah, the learned Advocate appearing for the appellant submits that the Subal Chandr Das, the executor of the will has no right to transfer the suit property. He further submits that the suit is barred by Limitation. The suit as framed by the plaintiff for declaration of title and other claims are not maintainable and the defendants being purchaser of the suit land have been possessing the same. He further submitted that notice under section 106 of the Transfer of Property Act is not a proper notice and without filing a suit for partition instant suit is not maintainable. In support of his contention learned Advocate has referred the case of Kamruzzaman Khan -vs- Shahidul Alam Khan and others reported in 51 DLR 393 and case of the Most. Sahida Alam –vs- Md. Hasmat Ali reported in 61 DLR(AD) 8.

9. On the other hand Mr. A.M. Aminuddin, learned Advocate appearing on behalf of the respondents submits that the plaintiff purchased the suit property from the lawful owner namely Purno Shashi who has got the suit properties from her father Sotish Chandra Roy by virtue of will which was duly probated and also record of right was prepared in her name. Purno Shashi transferred the suit property through her husband Subol Chandra Das by registered sale deeds and after purchase, the plaintiffs have mutated their names in the record of right, paid utility bills and while owning and possessing through tenants i.e. the defendants, they denied title of the plaintiffs for which the plaintiffs have been constrained to file the instant suit and as such the suit is maintainable. He further submits all the reliefs are required to be sought in a suit for proper adjudication. He further submits that as the defendants by creating documents regarding the suit properties denied title of the plaintiffs, their varatia right has been forfeited and the trial Court rightly and reasonably decreed the suit. Mr. Aminuddin in support of his contention referred a decision reported in 1 BLC (AD) 156 wherein it has been reiterated that the tenant cannot set up title to a property in which he is monthly tenant, without surrendering possession to his landlord.

10. It is found that the original owner Sotish Chandra made a will in favour of his daughter Purno Shashi Roy on 03.01.1962 which has duly been probated and by virtue of the said will Purno Shashi as owner and possessor, transferred the same to plaintiffs through his executor Subol Chandra Das. The said will has not been challenged till date by any other heirs of Sotish Chandra Roy for which it is assumed that the will is genuine one. By filing title suit being Title Suit No.93 of 1991, defendants challenged the eviction notices and also they prayed for declaring the plaintiffs deeds being collusive and void and also for decree of permanent injunction in respect of the suit land wherein the present plaintiff are defendants. Although the defendants intended to assert that they tendered rent to the plaintiffs on behalf of the Narayan Chandra Roy son of Sotish Chandra Roy, but said contention is not sustainable as because they failed to submit papers showing payment of rents to Narayan Chanda Roy. In that suit they have challenged the notices issued by Martial Law Authority and also they have claimed tenancy right for the suit properties. But subsequently they sought to amend the plaint claiming purchase of the suit property from Narayan Chandra Roy son of Sotish Chandra Roy by registered instrument. Such prayer for amendment has not been allowed by the Court of original jurisdiction which has been upheld up to revisional stage. From the above conduct of the defendants, it can be assumed that the defendants shifted from their earlier position and subsequently they raised claim for ownership and thereby forfeited bharatia right in the suit property.

11. The plaintiffs, after purchase mutated their name in the record of right, paid rents and other utility services which also proved that plaintiffs documents have been acted upon. It is curious that no heirs of Sotish Chandra Roy challenged the probate proceeding at any point of time and also they did not challenge the documents executed and registered in favour of the plaintiffs which also prove that plaintiffs are owner of the suit properties.

12. Now we shall deal with the contention of the learned advocate for the Appellant that due to insertion of so many prayers in the plaint, the suit is not maintainable. Order 2 rule 2(1) of the Code of Civil Procedure runs as follows:

> ***2. "(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court"***.
>
> ***(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.***
>
> ***(3).....***

13. So, as per provisions of law all the prayers are to be inserted in a suit which the plaintiffs have rightly done.

14. So far the defects of notice under section 106 of the Transfer of Property Act as submitted by the learned advocate for the appellant, it can be said that the defendant forfeited their right to stay in the suit properties by denying the title of the plaintiffs and as such the contents of the notice or any purported facts are insignificant here. Because if someone denies title of the land lord, notice under section 106 of the Transfer of Property Act may be dispensed with. Consequently the decision referred in 51 DLR 393 is not applicable here. On the other hand the case reported in 1 BLC AD 156 as reported by Mr. A.M. Amin Uddin

has got semblance with the present case. Submission of the learned Advocate for the appellant that instead of filing a SCC suit the present suit filed by the plaintiff for declaration of title along with other prayers being not maintainable is also cannot stand. In the instant case the defendants have created some registered instruments regarding the suit properties denying the title of the plaintiffs and as such plaintiffs have legitimate right to file the instant suit for declaration of title and other reliefs and the present suit is quite maintainable.

15. Upon consideration of the evidences, documents and other circumstances we found that the defendants as tenant denied title of the plaintiffs and so they forfeited right to stay in the suit properties and as such the trial Court justifiably decreed the suit in favour of the plaintiffs.

16. We find no merit in the appeal.

17. In the result, the appeal is dismissed without any order as to costs.

18. Let a copy of this judgment be sent to the concerned Court. Send down the Lower Court Record.

5 SCOB [2015] HCD 101

High Court Division

Civil Revision No. 1923 of 2013

Roli Chakma

.....Plaintiff-Respondent–Petitioner.

Versus

Kantimoy Chakma and others.

…..Appellant –Opposite Parties

Mr. Md. Zulfiqur Matin, Advocate.

…….. for the petitioner.

Ms. Promila Biswas Deputy Attorney General

..…. for the opposite parties.

Heard on 29.07.2015 and

Judgment on 02-08-2015.

Present:

Mr. Justice A.K.M Asaduzzaman

And

Mr. Justice Md. Iqbal Kabir

Section 64 of the *ivOvgvwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb, 1989*

In our examination it is also found that opposite party received the money, executed a bainapatra and delivered the possession of the schedule land in question and the defendants has no objection to transfer the land by register deed in favour of the plaintiff- petitioner through the Court. The law of this area does not create any bar to transfer the land to the present petitioner. Prior approval is required only for those to transfer the lands who are not inhabitant of the same hill district. Moreover, we have also found that government pleader has no authority to file the suit on behalf of the Deputy Commissioner. ... (Para 15)

Judgment

Md. Iqbal Kabir. J:

1. This rule directed against the judgment and decree dated 25.04.2012 passed by the District Judge, Rangamati hill district in Civil; Appeal No.11 of 2011 reversing the judgment and decree dated 26.01.2009 passed by the Joint District Judge, Rangamati hill district in Civil Suit No.21 of 2009.

2. The facts relevant for disposal of the civil revision application are that the petitioner as plaintiff instituted the suit before the Court of Joint District Judge for registration of the deed regarding the schedule suit land through court; the plaintiff and the mother and wife of the defendants on 22.04.2008 executed a registered bainapatra to sell out the suit land by fixing or securing taka 20 lacs and received the said amount; the plaintiff erected dwelling houses and started living therein; in the meantime Jharna Chakma mother of the defendant No. 2 and wife of the defendant No. 1 had died without registered the suit land infavour of plaintiff Roli Chakam; the defendant no.1 is the husband and the defendant no. 2 is the son of the Jharna Chakma; the plaintiff on several occasions requested them to take steps for registration and they also agreed to do the same but practically they are taking tactics or plea of delay, therefore, the plaintiff filed this suit. The plaintiff is the permanent inhabitant of the Chittagong hill district; therefore, it is not necessary to deposit the court fees.

3. The defendant respondent contested the suit by filing a set of written statement stating *inter-alia* that the Jharna Chakma in order to pay the loan amount, which was taken for her treatment; received the said amount on 22.04.2008 and thereafter, executed a baninapatra. She (Jharna Chakma) also handed over the possession and position of the suit land to the petitioner plaintiff; thereafter, Jharna Chakma died living behind her husband and one son as her heirs. Due to the death of the said Jharna Chakma the said land was not transferred to the plaintiff; on the other hand the defendants were busy in various businesses therefore, they could not able to register the same in favour of the plaintiff; however, if the plaintiff got registration of the suit land through court they have no objection.

4. After hearing both the parties and considering the evidences on record, the Joint District Judge, Rangamati by his judgment and decree dated 26.01.2009 decreed the suit.

5. Being aggrieved against the said judgment and decree the opposite party No.3 that is the Deputy Commissioner, Rangamati preferred an appeal before the Court of District Judge, Rangamati being Civil Appeal No. 11 of 2011 and the appeal was heard and considering the evidence on record the learned District Judge vide his judgment and decree dated 25.04.2012 reversed the judgment and decree dated 26.01.2009 and allowed the appeal.

6. Being aggrieved against the said judgment and decree passed by the District Judge, the petitioner obtained the instant rule.

7. Mr. Md. Zulfiquer Matin, learned Advocate appearing for the petitioner submits that the court below committed error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree. He submits that since the petitioner is a tribal people and living within the territory of the same district as a result it is not required to take permission from the local authority. He also submits that the court below without considering the provision of law passed this judgment, though the law stated that now a day's to sell out or transfer the land permission is not required from the Jilla Parishad for the persons who resides in the same district. The learned lawyer further submits that the Ministry of Land issued a Notification being No. *ftygt/kv-9/16/89-580* which was published in the Bangladesh Gazette on 03.08.1989 shows that permission is required for the person who is not the local inhabitant of the same hill district.

8. He further submits that from the Memorandum of Appeal of Civil Appeal No. 11of 2011 it appears that the government pleader filed the instant appeal on behalf of the Deputy Commissioner, Rangamati Hill District though Deputy Commissioner does not authorized him to do or government pleader did not obtain permission from the concerned authority to do the same. However, the government pleader has no authority to file appeal on behalf of the Deputy Commissioner without following the due procedure of law and as such committed error of law resulting in an error in the decision occasioning failure of justice.

9. He further submits that by this time some other land has been transferred wherein the Deputy Commissioner did not raise any objection or challenge those transfer and sometime after filing appeal they did not contest the suit, as would apparent from the document annexed here to by way of supplementary affidavit.

10. Mrs. Promila Biswas learned Deputy Attorney General appearing on behalf of the opposite party submits that permission is required from the concerned authority to transfer

the land and without permission no one can transfer the land in the hill district. In support of her submission, she drew our attention to section 64 of the *ivOvgwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb,1989*, She further submits that the concern authority has rightly filed this appeal to protect the tribal peoples rights and interest. In this connection she submits that Government Pleader file the appeal on behalf of the Deputy Commissioner and this kind of mistake can be cured by authorizing him.

11. Heard the learned Advocates for both the sides, perused the impugned judgment, lower Court record considered submissions made by the parties and examined the relevant provisions of law.

12. In our examination and having considered the aforesaid fact it has found that the appellate court below considering the provision of law that is section 64 of *ivOvgwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb,1989* allowed the appeal and set aside the trial courts judgment and decree. On perusal of the entire evidence, laws other material on record led us to presume and hold that the appellate court below failed to consider the provision which has subsequently been laid down by amending section 64 of the said Act and publishing those in the Bangladesh Gazette. From the plain reading of the law it would be apparent that only to reduce controversy and/or for the smooth function of the local people and to transfer the land subsequently those changes has came out.

13. The section 64 of the *ivOvgwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb, 1989*, speaks as follows:

> *ÔÔ[64| (1) AvcvZZt ejer Ab¨ †Kvb AvB‡b hvnv wKQyB _vKzK bv †Kvb-*
> *(K) ivOvgwU cveZ¨ †Rjvi GjvKvaxb e‡›`ve¯‡hvM¨ Lvm Rwgmn †h †Kvb RvqMv Rwg, cwil‡`i cevbtgv`b e¨wZ‡i‡K, BRviv c`vb, e‡›`ve¯, ক্রয়, বিক্রয় ev Ab¨vea fv‡e n¯vši Kiv hvB‡e bv:*
> *Z‡e kZ _v‡K †h, iw¶Z (*Reserved*) ebvÂj , KvßvB Rjwe`ÿr cKí GjvKv, †eZeybqv f~ÐcMn GjvKv, ivóxq gwjKvbvaxb wkíKviLvbv I [miKv‡ii] bv‡g †iKWKZ.Rwgi †¶‡Î GB weavb c‡hvR¨ nB‡e bv|ÔÔ*

14. We have examined the relevant provision of law and Notification being No. *ftgt/kv-9/16/89-580* which was published in Bangladesh Gazette on 03.08.1989. The content of this Gazette show as follows:

> *ÔÔftgt/kv-9/16/89-580 Ñ cveZ¨ PUMvg †Rjvmg‡n ivOvgwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb,1989, LvMovQwo cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb, 1989 ev›`ievb cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb, 1989 Abyhvqx wZbwU cveZ¨ †Rjv ¯vbxq miKvi cwil` MVb Kiv nBqv‡Q| GB AvBb wZbwU‡K KvhKix Kivi j‡¶¨ miKvi ckvmwbK cbweb¨vm I D³ cbweb¨vm welqK wm×všmgn~ ev¯evqbK‡í GKwU D"P ¶gZvm¤úb we‡kl mswkó AvBb ¸wji avivi 64 †Z ewYZ weavb ev¯evq‡bi D‡Ï‡k¨ wb‡¤v³ Av‡`k Rvix Kiv nBjt*
>
> Chittagong Hill Tracts Regulation (Regulation I of 1900) *Ges Bnvi ms‡kvabxmgn~ Abyhvqx cveZ¨ †Rjvmg‡n †Wcwj Kwgkbvi fwg e‡›`ve¯ I A¯vbxq‡`i wbKU fwg n¯vš‡ii Abyôgv`b w`‡Zb| Dwjwl cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBbmgn~ ceZ‡bi ci G¶‡Y mswkó ¯vbxq miKvi cwil‡`i cevbtgv`b e¨ZxZ †Kvb RvqMvRwg e‡›`ve¯ Ges D³ i‡c RvqMvRwg †Rjvi ewm›`v b‡nb GBi‡c †Kvb e¨w³ i wbKU n¯vši Kiv hvB‡e bv| Z‡e msiw¶Z I iw¶Z ebvÂj, KvßvB n` GjvKv, KvßvB we`ÿr cKí GjvKv, †eZeybqv f~ÐcMn GjvKv, ivóxq wkí KviLvbv GjvKv, miKvi ev Rb¯v‡_ I iv®Uxq ¯v‡_ c‡qvRb nB‡Z cv‡i GBi‡c †Kvb RvqMvRwg ev e‡bi †¶‡Î GB weavb c‡hvR¨ nB‡e bv|*
> *GB Av‡`k, mswkó ¯vbxq miKvi cwil` †h w`b nB‡Z c_g Avbyôvwb K mfvq wgwjZ nB‡eb, H ZwiL nB‡Z KvhKix nB‡e|ÔÔ*

15. In our examination it is also found that opposite party received the money, executed a bainapatra and delivered the possession of the schedule land in question and the defendants has no objection to transfer the land by register deed in favour of the plaintiff- petitioner through the Court. The law of this area does not create any bar to transfer the land to the present petitioner. Prior approval is required only for those to transfer the lands who are not inhabitant of the same hill district. Moreover, we have also found that government pleaders has no authority to file the suit on behalf of the Deputy Commissioner.

16. From the aforementioned enunciation, it is clear to us that to protect the tribal people's right, title and interest and to control law and order situation and for the welfare of the hill people since long hill people and authority follows some rules and procedure in respect of the land, especially at the time of transfer of land in the hill districts. From the very beginning those area follows Regulation 1900, as per those regulation permission was required to transfer the land. However, *iv0vgwU cveZ¨ †Rjv ¯vbxq miKvi cwil` AvBb, 1989*, also imposed restriction in respect of requirement of permission. Now people are aware about their rights, title and interests and people are entering in to the global arena and as Bangladeshi national all people are equal before the law, though for the welfare of the tribal people few specific laws and rules are governed in that area and we trust that for the welfare of the hill people or the tribal people this amendment has came into force.

17. Perusing the record and in view of the facts we find that the impugned judgment appears to have been passed arbitrarily without applying his judicial mind. However in any point of view the impugned judgment and order is not sustainable in law which is liable to be set aside, accordingly we find merit in this Rule.

18. In the result, the Rule is made absolute without any order as to cost. The judgment and decree dated 25.04.2012 passed by the District Judge Rangamati in Civil Appeal No.11 of 2011 is set aside and the judgment and decree dated 26.01.2009 passed by the Joint District Judge Rangamati in Civil Suit No.21 of 2009 is here by affirmed.

19. Send down the L.C.R along with the judgment at once.