6 SCOB [2016] AD 1

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mr. Justice Md. Abdul Wahhab Miah
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.159 OF 2010
(From the Judgment and order dated 05.02.2009 passed by the High Court Division in Writ Petition No.2438 of 2004)

WITH

CIVIL APPEAL NO.131 OF 2012
(From the Judgment and order dated 24.8.2010 passed by the High Court Division in Writ Petition No.6967 of 2009)

WITH

CIVIL APPEAL NO.132 OF 2012
(From the Judgment and order dated 15.5.2011 passed by the High Court Division in Writ Petition No.1929 of 2010)

WITH

CIVIL APPEAL NO.133 OF 2012
(From the Judgment and order dated 13.12.2011 passed by the High Court Division in Writ Petition No.7717 of 2010)

WITH

CIVIL APPEAL NO.134 OF 2012
(From the Judgment and order dated 10.6.2010 passed by the High Court Division in Writ Petition No.1309 of 2010)

WITH

CIVIL APPEAL NO.128 OF 2015.
(From the Judgment and order dated 08.09.2014 passed by the High Court Division in Writ Petition No. 2327 of 2014)

WITH

CIVIL APPEAL NO.119 OF 2008.
(From the Judgment and order dated 27.07.2005 passed by the High Court Division in Writ Petition No. 4935 of 2000)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.703 OF 2014
(From the Judgment and order dated 10.06.2012 passed by the High Court Division in Writ Petition No. 7483 of 2009)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.2026 OF 2015
(From the Judgment and order dated 09.09.2014 passed by the High Court Division in Writ Petition No.12321 of 2013)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.2295 OF 2010
(From the Judgment and order dated 04.08.2010 passed by the High Court Division in Writ Petition No. 454 of 2010)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.955 OF 2011
(From the Judgment and order dated 09.12.2010 passed by the High Court Division in Writ Petition No. 5670 of 2010)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.1854 OF 2011
(From the Judgment and order dated 09.12.2010 passed by the High Court Division in Writ Petition No.5670 of 2010)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.2539 OF 2012

(From the Judgment and order dated 24.11.2011 passed by the High Court Division in Writ Petition No.1118 of 2011)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.1782 OF 2015

(From the Judgment and order dated 16.4.2014 passed by the High Court Division in Writ Petition No.7657 of 2011)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1415, 1416, 1417, 1418, 1419, 1420 and 1421 OF 2015

(From the Judgment and order dated 05.02.2015 passed by the High Court Division in Writ Petition Nos. 1220, 1221, 1222, 1986, 1987, 2151, 7591 of 2011)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.644-645 OF 2015

(From the Judgment and order dated 23.7.2014 passed by the High Court Division in Writ Petition Nos.6263 and 6264 of 2014.)

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1445, 1768, 2133-34 and 2320 OF 2015

(From the Judgment and order dated 10.4.2014 passed by the High Court Division in Writ Petition Nos.7272, 8706, 8707, 1385 of 2009 and 4544 of 2010)

Government of Bangladesh and others	:	Appellants. (In C.A.No.159 of 2010 & C.A.Nos.131, 132, 133 of 2012, C.A. Nos.128 of 2015, 119 of 2008)
Bangladesh, represented by the Secretary, Ministry : of Home Affairs, Bangladesh Secretariat, Ramna, Dhaka-1000 and others		Appellants. (In C.A.No.134 of 2012)
The Board of Intermediate and : Secondary Education, Barisal, represented by the Chairman, Barisal and another		Petitioners. (In C.P.No.703 of 2014)
Government of Bangladesh and others	:	Petitioners. (In C.P.Nos.2026 of 2015, 2295 of 2010, 955, 1854 of 2011, 2539 of 2012, 1782 of 2015, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 644 and 645 of 2015)
Md. Humayun Kabir	:	Petitioner (In C.P.No.1445 of 2015)
Md. Fariduzzaman	:	Petitioner (In C.P.No.2133 of 2015)
Md. Farid Mia	:	Petitioner (In C.P.No.2134 of 2015)
Mosammat Selina Begum	:	Petitioner (In C.P.No.2320 of 2015)

Mohammad Asgar Ali	:	Petitioner (In C.P.No.1768 of 2015)
=Versus=		
Sontosh Kumar Shaha and others	:	Respondents. (In C.A.No.159 of 10)
Bangladesh Stenographer Association(BSA):		Respondent. (In C.A.No.131 of 2012)
Md. Mofazzal Hossain and another	:	Respondents. (In C.A.No.132 of 2012)
Md. Sohraowarddi and others	:	Respondents. (In C.A.No.133 of 2012)
Khalilur Rahman and others	:	Respondents. (In C.A.No.134 of 2012)
Syed Shah Alam and others	:	Respondents. (In C.A.No.128 of 2015)
Ms. Sabiha Ahmed	:	Respondent. (In C.A.No.119 of 2008)
Kazi Abdul Jalil	:	Respondent. (In C.P.No.703 of 2004)
Khan Md. Abdul Bari and others	:	Respondents. (In C.P.No.2026 of 2015)
Md. Zahir Raihan Siddique	:	Respondent. (In C.P.No.2295 of 2010)
Md. Osman Ghani and others	:	Respondents. (In C.P.No.955 of 2011)
Md. Osman Ghani and others	:	Respondents. (In C.P.No.1854 of 2011)
Md. Hafizur Rahman and others	:	Respondents. (In C.P.No.2539 of 2012)
Md. Ratan Hossain Talukder and others	:	Respondents. (In C.P.No.1782 of 2015)
Tilok Chandra Dev and others	:	Respondents. (In C.P.No.1415 of 2015)
Kazi Harun-or-Rashid and others	:	Respondents. (In C.P.No.1416 of 2015)

S.M. Hafizur Rahman and others : Respondents.
(In C.P.No.1417 of 2015)

Md. Abdul Mannan and others : Respondents.
(In C.P.No.1418 of 2015)

Muhammad Jafor Ahmed Siddique and others: Respondents.
(In C.P.No.1419 of 2015)

Bimal Chandra Sharkar and others : Respondents.
(In C.P.No.1420 of 2015)

A.B.M. Sekendeer Kabir : Respondents.
(In C.P.No.1421 of 2015)

Government of Bangladesh, : represented by the Secretary, Ministry of Local Government, Rural Development and Co- operative, Bangladesh Secretariat, Ramna, Dhaka and others Respondents.
(In C.P. No.1445 of 2015)

Government of the People's : Republic of Bangladesh, represented by the Secretary, Ministry of Education, Bangladesh Secretariat, Ramna, Dhaka and others Respondents.
(In C.P.Nos.2133, 2134 of 2015)

Government of the People's : Republic of Bangladesh, represented by the Secretary Ministry of Establishment, Bangladesh Secretariat, Ramna, Dhaka and others Respondents.
(In C.P.Nos.2330, 1768 of 2015)

Md. Jahangir Hossen and others : Respondents.
(In C.P.No.644 of 2015)

Saima Akter and others : Respondents.
(In C.P.No.645 of 15)

For the Appellant : Mr. Mahbubey Alam, Attorney General, instructed
(In C.A.No.159 of 2010) by Mr. Haridas Paul, Advocate-on-Record.

For the Appellant : Mr. Mahbubey Alam, Attorney General, instructed
(In C.A.Nos.131 & 133 of 2012) by Mr. Haridas Paul, Advocate-on-Record.

For the Appellant : Mr. Mahbubey Alam, Attorney General, instructed
(In C.A.No.132 of 2012) by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Appellant : (In C.A.No.134 of 2012)	Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Appellant : (In C.A.No.128 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Appellant : (In C.A.No.119/08)	Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Petitioner : (In C.P.No.2295 of 2010)	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner : (In C.P.No.955 of 2011)	Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.1854 of 2011 & 2539 of 2012)	Mr. Md. Shamsul Alam, Advocate-on-Record.
For the Petitioner : (In C.P.No.1872 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.1415-1421 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Petitioner : (In C.P.No.1445 of 2015)	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.1768 & 2320 of 2015)	Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.2133-34 of 2015)	Mr. Taufique Ahmed, Advocate-on-Record.
For the Petitioner : (In C.P.Nos.644-645 of 2015)	Mrs. Mahmuda Begum, Advocate-on-Record.
For the Petitioner : (In C.P.No.2026 of 2015)	Mr. Haridas Paul, Advocate-on-Record.
For the Petitioner : (In C.P.No.703 of 2014)	Mr. Syed Mahbubar Rahman, Advocate-on-Record.
For the Respondent : (In C.A.No.159 of 2010)	Mr. Moinul Hosien, Senior Advocate, instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.
For the Respondent : (In C.A.No.131 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mr. Md. Ferozur Rahman, Advocate-on-Record.
For the Respondent : (In C.A.No.132 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mr. Md. Taufique Ahmed, Advocate-on-Record.

For the Respondent : (In C.A.No.133 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mrs. Madhumaloti Chy Barua, Advocate-on-Record.
For the Respondent : (In C.A. No.134 of 2012)	Mr. Mahmudul Islam, Senior Advocate, (with Mr. Abdur Rob Chowdhury, Senior Advocate, Mr. Probir Neogi, Senior Advocate and Mr. Mahbub Ali, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent : (In C.P. No.2295 of 2010)	Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent : (In C.P. No.955 of 2011)	Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
Respondent : (In C.P. No.1854 of 2011)	N.R.
Respondent : (In C.P. Nos.2539 of 2012 and 1782 of 2015)	Mr. Md. Zahirul Islam, Advocate-on-Record.
Respondent : (In C.P. Nos.1415-1417 of 2015)	N.R.
For the Respondent : (In C.P. No.1418 of 2015)	Mr. Zainul Abedin, Advocate-on-Record.
For the Respondent : (In C.P. Nos.1419-1421 of 2015)	N.R.
For the Respondent : (In C.P. Nos.1445, 1768 and 2320/15)	Mrs. Madhumaloti Chy Barua, Advocate-on-Record.
Respondent : (In C.P.Nos.2133 & 2134/15)	N.R.
For the Respondent : (In C.P.Nos.644-645 of 2015)	Mr. Probir Neogi, Advocate (with Mr. Sk. Md. Morshed, Advocate), instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Respondent : (In C.P. No.2026 of 2015)	Mrs. Shirin Afroz, Advocate-on-Record.
For the Respondent : (In C.A. Nos.128 of 2015 & C.A. No.119 of 2008)	Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Respondent : Mr. Zainul Abedin, Advocate-on-Record.
(In C.P. No.703 of 2014)

Date of hearing : 18th, 19th, 25th August,2015, 1st September, 2015 and Judgment on 15th December, 2015.

To invoke the fundamental rights conferred by Part III of the constitution, any person aggrieved by the order, action or direction of any person performing the functions in connection with the affairs of the Republic, the forum is preserved to the High Court Division. The conferment of this power cannot be curtailed by any subordinate legislation - it being the inalienable right of a citizen. This power cannot be conferred upon any Tribunal by the Parliament in exercise of legislative power or by the High Court Division or the Appellate Division in exercise of its power of judicial review.
...(Para 42)

It is the Supreme Court alone which is empowered to examine whether or not any law is inconsistent with the constitution. The Parliament has given the legislative power under article 65 to promulgate law but this power is circumscribed by limitations and if it exercises any power which is inconsistent with the constitution, it is the Supreme Court which being the custodian of the constitution and is manned by the Judges who are oath bound to protect the law to examine in this regards. The Supreme Court is the only organ of the State to see that any law is in consonance with the constitution. So, where the constitution confers the power upon the Supreme Court to strike down laws, if found inconsistent, such power cannot be delegated to a Tribunal created under subordinate legislation. In the alternative, the Supreme Court cannot delegate its power of judicial review of legislative action to a Tribunal. ...(Para 55)

Article 102 and 44 of the Constitution:
In Mujibur Rahman, it is observed that "the right of judicial review under Article 102(1) is neither a fundamental right nor a guaranteed one. And the right of judicial review is neither an all-remedy nor a remedy falls or wrongs. It is available only when "no other equally efficacious remedy is provided by law". With due respect, these observations have been made unconsciously and therefore, we are unable to approve the same. The right of judicial review under article 102(1) is a guaranteed one which is embodied in the constitution itself, but if that right is not guaranteed, even if a citizen's fundamental right is infringed, he will be left with no remedy at all. True, article 102(1) has not been retained in the fundamental rights chapter as has been kept in India but in view of article 44(1), it is akin to fundamental right. Similarly the observation that the enforcement of fundamental right is available only when 'no other equally efficacious remedy is provided by law' is also not a correct view, inasmuch as, whenever there is infringement of fundamental rights, any person can move the High Court Division for judicial review of the administrative action under Article 102(1). The question of equally efficacious remedy arises only when it will exercise power under article 102(2) i.e. writ of certiorari and other writs mentioned in sub-clauses (a) and (b) of clause (2). If there is an alternative remedy, the High Court Division's power is debarred. It is only in exceptional cases, it can exercise this power. ...(Para 65)

Clause (5) of article 102 read with article 117(2) of the Constitution:
Except on the limited scope challenging the vires of law or if there is violation of fundamental rights, the power of the High Court Division is totally ousted under clause (5) of article 102 read with article 117(2). If a public servant or an employee of statutory corporation wants to invoke his fundamental rights in connection with his terms and conditions of service, he must lay foundation in the petition of the violation of the fundamental rights by sufficient pleadings in support of the claim. It will not suffice if he makes evasive statement of violation of his fundamental rights or that by making stray statements that the order is discriminatory or malafide. ...(Para 78)

If an order is said to be without jurisdiction or is contrary to law, the appropriate course open to the applicant is to plead to the Tribunal with such plea and ask for vacating the order or action. It is altogether within the tenor of the Tribunal. ...(Para 79)

The observations made in Shaheda Khatun (supra) that if the action complained as is found to be *coram non judice,* without jurisdiction or malafide, the judicial review is available are based on the decisions on different premises and the said views cannot be applicable in service matters in presence of an alternative forum, and this forum is created as per provisions of the constitution. It is to be borne in mind that no case can be an authority on facts. The Tribunal is created as an 'alternative' forum of the High Court Division in respect of specific purposes. If any administrative action is found without jurisdiction or *coram non judice* or malafide, the Tribunal is competent to deal with the same and adjudicate these issues satisfactorily. These issues are within its constituents of the Administrative Tribunal. ...(Para 80)

The power of Tribunal to pass interim order:
Despite the absence of any provision empowering the Tribunal to pass any interim order, the Tribunal is not powerless since it has all the powers of a civil court and in proper cases, it may invoke its inherent power and pass interim order with a view to preventing abuse of the process of court or the mischief being caused to the applicant affecting his right to promotion or other benefit. But the Tribunal shall not pass any such interim order without affording the opposite party affected by the order an opportunity of being heard. However, in cases of emergency, which requires an interim order in order to prevent the abuse of the process and in the event of not passing such order preventing such loss, which cannot be compensated by money, the Tribunal can pass interim order as an exceptional measure for a limited period not exceeding fifteen days from the date of the order unless the said requirements have been complied with before the expiry of the period, and the Tribunal shall pass any further order upon hearing the parties. ...(Para 100)

The High Court Division observed that a departmental proceedings was initiated against the respondent which has been taken without approval of the G.A. committee, and the same was a mandatory provision of law and that the Chief Justice without taking the matter to the G.A. Committee had accorded the approval. On perusal of the record the High Court Division noticed that there was an endorsement at the bottom of the note-sheet with a note of the Chief Justice 'yes' and this proved that the Chief Justice accorded the approval violating rule 3(d) of the High Court Division Rules. This

court perused the record and found that this observation was correct but that itself is not a ground for interference. It should be borne in mind that in urgent matters, sometimes the Chief Justice gives approval in respect of some proposals without placing the matter before the G.A. committee, because the calling such meeting takes time and in urgent matters the Chief Justice accords permission subject to the approval of the committee later on. In this case inadvertently the matter has not been placed before the G.A. Committee.

In order to avoid more harm to the judiciary, the Chief Justice takes such decision. The Chief Justice being the head of the judiciary is respected by the Judges and his opinion with regard to the superintendence and control over the lower judiciary has primacy and is being honoured by the Judges of the committee. This is a practice being followed by this Court and non-approval of the decision of the Chief Justice was merely an irregularity and not an illegality and this will not vitiate the decision.

...(Para 111 &112)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. These appeals and the leave petitions are disposed of by this judgment although they arise from different judgments of the High Court Division and the parties are also distinct. They raise common questions of law and therefore, they are grouped together for analogous disposal in order to avoid conflicting decisions. All of them involve the consideration of the following points:

(i) whether a disciplinary action taken against an officer of the Judicial Service of the Republic can seek judicial review against such action.

(ii) whether the General Administration Committee (G. A. Committee) can ignore a recommendation of the Executive Government to exonerate an officer of the lower judiciary and direct the concerned Ministry to take penal action.

(iii) whether an employee in the service of the Republic can claim higher status and grade without challenging his service Rules in comparison with his counterpart serving at different departments under the similar nomenclature i.e. post.

(iv) whether the Administrative Tribunal established under article 117(2) of the constitution can strike down an administrative order for infringement of fundamental rights guaranteed by the constitution.

(v) whether judicial review in the High Court Division is available in respect of the terms and conditions of service of an employee in the service of the Republic.

(vi) whether the Administrative Tribunal is competent to examine the constitutional validity of a statutory provision.

(vii) whether the Administrative Tribunal can pass interim order so as not to frustrating the proceedings pending before it.

2. For our convenience we would like to narrate short facts in Civil Appeal No.159 of 2010. The respondent Sontosh Kumar Shaha was a Senior Assistant Judge, Chuadanga and while he was serving as such two departmental proceedings under the provisions of the Government Servants (Discipline and Appeals) Rules, 1985 were initiated against him on the

allegation of corruption. He was placed under suspension and departmental inquiries were held. The inquiry officers found no evidence of corruption against him in respect of one proceeding but in respect of the other, the report was somehow misplaced from the records maintained with the Ministry and the Supreme Court, the concerned Ministry reported that the allegations could not be established against him. Pursuant thereto, Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs by letter under memo dated 17th January, 2002, recommended to the Supreme Court for its approval to exonerate him from the charges and also to withdraw his suspension order. The Supreme Court did not approve the proposal and accordingly, the Ministry thereafter sent letters to drop the proceedings. This time the Supreme Court on perusal of the inquiry report directed the Ministry to issue second show cause notice upon him on 20th November, 2003. The respondent challenged the said order in Writ Petition No.7316 of 2003. The writ petition was summarily rejected on the ground that the recommendation of the Ministry was disapproved by the Full Court. Subsequently, it was detected that the proposal for suspension was neither placed before the G.A. Committee nor the Full Court in accordance with rule 3(d) of the High Court Division Rules. The respondent thereupon moved the High Court Division in another writ petition. The High Court Division upon hearing the parties made the rule absolute observing that the proposal for suspension and the initiation of the disciplinary proceedings were not placed before the G.A. Committee and also the Full Court and therefore, the direction given by the Supreme Court was without jurisdiction.

3. The Rules of 1985, was a piece of legislation which was promulgated by the President with the consultation of the Public Service Commission with the object to regulate the conditions of service, pay, allowances, pensions, discipline and conduct of Public Servants and statutory corporations. This Court in Masdar Hossain (52 DLR (AD) 82) declared that judicial service is not a service of the Republic within the meaning of article 152(1) of the constitution, and it is functionally and structurally distinct and separate service from the administrative service of the government and that the judicial service should not be placed at par on any account and should not be mixed up with the administrative services. This Court further declared that Bangladesh Judicial Service Recruitment Rules, 1981 are applicable to the officers of judicial service and directed the government to frame Rules separately for the purpose of posting, promotion, grant of leave, discipline, pay, allowances, pension and other terms and conditions of service in accordance with articles 116 and 116A for the judicial service and Magistrates exercising judicial works.

4. Neither the President nor the Parliament framed law or Rules in respect of the conditions of service, pensions, benefits, discipline and conduct for the judicial service and Magistrates exercising judicial works. Therefore, as per direction and guidelines in Masder Hossain, the Rules of 1985 are made applicable to the judicial officers until such law or Rules are framed by the government. It was also declared that the judicial review against any disciplinary action taken against the members of judicial service is available in the Administrative Tribunal.

5. Learned Attorney General argues that in presence of alternative remedy in the Administrative Tribunal, the judicial review against the decision of the disciplinary action for taking penal action against Sontosh Kumar Shaha is not maintainable and the High Court Division is not justified in interfering with the direction. Mr. Mahmudul Islam, Learned Counsel argues that since the proposal for suspension of the respondent No.1 and the initiation of the proceedings had not been placed before the G.A. Committee and the Full Court, the decision taken for taking disciplinary action against him was violative to article

116 of the constitution, and therefore, judicial review of the said decision in the High Court Division is maintainable. Mr. Mahmudul Islam has submitted that the views taken by this court in Mujibur Rahman V. Bangladesh, 44 DLR(AD)111, is required to be reconsidered, inasmuch as, the said views are inconsistent with Part III of the constitution. On this point, the Attorney General also agrees with opinion of the learned Counsel Mr. Mahmudul Islam and adds that there are inconsistent opinions of this Court and the High Court Division on the question of maintainability of a writ petition against any disciplinary action taken against a public servant and therefore, there is need for revisiting Masder Hossain's case afresh. Since a constitutional point has been raised at the Bar, the Chief Justice reconstituted a larger Bench to decide the questions of law.

6. In Part III of the constitution there are hosts of fundamental rights - some of them are conditional and some of them are unconditional. Fundamental rights are conferred primarily for the benefit of individuals and can, therefore, be waived, and can form the subject of a lawful compromise. The fundamental rights are succinctly narrated below. Those laws which are inconsistent with the fundamental rights to be void. If any law is inconsistent with any provisions of Part III of the constitution the same shall to the extent of such inconsistency be void; all citizens are equal before law and they are entitled to equal protection of law; the State shall not discriminate against any citizen on the ground of religion, race, caste, sex etc.; there shall be equality of opportunity for all citizens in respect of appointment or in the service of the Republic; there shall be protection of law to all the citizens and no action detrimental to his life, liberty, body or reputation or property shall be taken except in accordance with law; no citizen shall be deprived of life and personal liberty except in accordance with law; no citizen shall be arrested without being informed the grounds of his detention etc.; there shall not be any forced labour in contravention of the provisions of law; no person shall be convicted of any offence except for violations of law; every citizen shall have the right to move freely within the country subject to such restrictions imposed by law; every person shall have the right to assemble and participate in public meetings and processions peacefully; a citizen has the right to form associations or unions, subject to such restrictions imposed by law in the interest of security of the State; every citizen has freedom of speech and expression; every citizen has right to hold profession, his trade or occupation, business subject to public order and morality; every citizen has the right to profess, practice or propagate any religion; every citizen shall have the right to acquire, hold and transfer any property subject to law; and finally, the right to move the High Court Division in accordance with clause (1) of article 102 for the enforcement of rights conferred by Part III of the Constitution is guaranteed.

7. Mr. Mahmudul Islam submits that there is no doubt that the right of a citizen to seek redress to the High Court Division for enforcement of fundamental rights is guaranteed; and therefore, the views taken by this Court in Mujibur Rahman V. Bangladesh, 44 DLR (AD) 111 are required to be reviewed since some of the findings are inconsistent with article 44 of the Constitution. In support of his contention he has relied on some decisions of this Court and of Indian jurisdiction. He has also referred some provisions of the High Court Division Rules and submits that since the decision taken against Sontosh Kumar Shaha was in violation of High Court Division Rules, the High Court Division was justified in making the rule absolute.

8. In Mujibur Rahman, the latter was compulsorily retired from his service as Collector of Customs. The Administrative Tribunal set aside the order of retirement. On appeal from the said judgment, the Administrative Appellate Tribunal interfered with the Tribunal's judgment

on the ground that as the order of compulsory retirement was passed by the Chief Martial Law Administrator, the judicial review of the said order was barred. A writ petition was filed by Mujibur Rahman but the High Court Division summarily rejected the petition on the ground that the petition was not maintainable under clause (5) of article 102. This Court considered article 117 of the constitution and some decisions from home and aboard and held that the Tribunals created under article 117 are not meant to be like the High Court Division or subordinate courts over which the High Court Division can exercise judicial review and superintendence. The Tribunal has been set up in exercise of its legislative power by the Parliament. The Tribunal was construed as a forum substitute, alternate or co-equal to the High Court Division. The judicial review by the High Court Division in respect of terms and conditions of service of the Republic has been deliberately excluded by clause (2) of Article 117.

9. We have meticulously perused the judgment in Mujibur Rahman and noticed some inconsistency in the conclusion arrived at therein. What disturbed us is that keeping the findings in paragraph 36, the majority opinion that "The tribunals are not meant to be like High Court Division or the subordinate court over which the High Court Division of the Supreme Court exercising both judicial review and superintendence. The tribunals are not in addition to the courts described in Chapters I and III.' and the observations that "Within its jurisdiction the Tribunal can strike down an order for violation of principle 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 out of sub-clause (a), but such tribunals cannot, like the Indian Administrative Tribunals in exercise of a more comprehensive jurisdiction under Article 323A strike down any law or rule on the ground of its constitutionality,' We find no elaborate discussion in drawing such inference. Again it has been observed, '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 other cases he will be required to seek remedy under Article 117(2).' The above findings and conclusions are required to be reconsidered with a view to avoiding confusion in the minds of the litigants.

10. The observations particularly in the first portion is correct - there is no doubt about it, but the conclusion reached at by it is not sound one over which I will discuss later on. In arriving at the conclusion this Court has assigned no reasons and secondly, a citizen's right to move the High Court Division under article 102(1) for enforcement of the rights conferred by Part III is guaranteed. Clause (2) of article 44 provides that the Parliament may empower any other court to exercise 'all or any of those powers, that is, for enforcement of the rights conferred by Part III, but this power cannot be so conferred affecting the powers of the High Court Division. The power of judicial review given to the High Court Division is a constitutional power, which can be exercised by it on the basis of an application moved by a citizen and this power has been specifically preserved for a citizen to invoke such right/privilege in the High Court Division under article 102(1). Judicial review vested in the High Court Division under article 102(1) is one of the basic structures of the constitution and it cannot be taken away by the Parliament. The Parliament in exercise of its legislative power cannot curtail the constitutional jurisdiction conferred on the High Court Division. The Parliament can confer upon the Administrative Tribunal in exercise of its legislative power the power of judicial review of administrative actions and nothing more. This has been settled in Kesavananda Bharati case (AIR 1997 S.C. 1461) and this court has accepted the said view.

11. In Mujibur Rahman case, this Court noticed article 44(1) in paragraph 47, but it has totally ignored the tenor of article 44(1). By creation of Tribunals the Parliament cannot curtail the powers of the High Court Division given under article 102(1) to issue writs, directions and orders. The High Court Division's power is extensive. It is a court of record and it has the power of contempt. It has the control and superintendence over the courts and tribunals subordinate to it. The High Court Division's power is constitutional while the power of the Tribunal is legislative and the Tribunal has been created by a subordinate legislation.

12. The constitution guaranteed the High Court Division not to become mere appendages to the administration. The basic human freedoms, including freedom of religion and the rights of all minorities – religious, cultural, linguistic will not cease to exist because these are guaranteed rights and will be enforceable on the application of a citizen in the High Court Division. These powers cannot be exercised by a Tribunal created under article 117(2). After the creation of Administrative Tribunal, the jurisdictions of the High Court Division in service matters and its propriety which it had exercised have to be exercised by the Tribunal established under article 117(2). If this provision is taken into consideration with article 44(2), there will be no confusion in coming to the conclusion that an effective alternative institutional mechanism for judicial review in respect of service matters has been created by the Parliament. In Minerva Mills Ltd. V. Union of India, AIR 1980 S.C.1789, the Supreme Court of India observed that the power of judicial review is an integral part of the constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. If there is one feature of the constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionable, which is, part of the basic structure of the constitution. It was concluded:

> "Of course, when I say this I should not be taken to suggest that, however, effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasize is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the Legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review....."

13. Under our constitutional dispensation particularly articles 44(2) and 117(2), it is possible to set up an alternative mechanism in place of the High Court Division for providing judicial review in respect of the terms and conditions of service of the Republic and other public organisations. Over a span of time after the creation of Administrative Tribunal, there is no doubt that a service jurisprudence has been developed in this country to the satisfaction of the litigants. Initially there was confusion in the minds of some as to whether the Tribunal will be able to address and adjudicate upon the problems properly since the Tribunal is manned by the District Judge who has no expertise in those field. We find no serious infirmity on the question of judicial review of administrative actions by the Tribunal. The public servants and other litigants have accepted the system.

14. In S.P. Sampath Kumar V. Union of India, AIR 1987 S.C. 386, Bhagwati, C.J. while concurring with the majority opinion observed:

> "Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review. The debates and deliberations spread over almost two decades for exploring ways and means for relieving the High Courts of the load of backlog of cases and for assuring quick settlement of service disputes in the interest of the public servants as also the country cannot be lost sight of while considering this aspect. It has not been disputed before us- and perhaps could not have been – that the Tribunal under the scheme of the Act would take over a part of the existing backlog and a share of the normal load of the High Courts. The Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. To provide the Tribunal as an additional forum from where parties could go to the High Court would certainly have been a retrograde step considering the situation and circumstances to meet which the innovation has been brought about. Thus barring of the jurisdiction of the High Court can indeed not be a valid ground of attack."

15. This Court in Mujibur Rahman held that "There is no command nor any necessary intendment in the constitution that the Tribunals or the Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division'. The views expressed above are not sound. It ought to have explained the powers of the Tribunal with a view to removing any confusion. The opinion that it is not a forum substitute is true but it is not correct to assume that it is not a forum 'alternate' inasmuch as, the court made the above observation ignoring the language used in article 44(2). In this connection it is necessary to expound the constitutional back up of the creation of the Tribunal. Articles 44(2) provides:

> "(2) without prejudice to the powers of the High Court Division under Article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise <u>all or any of those powers</u>." (emphasis supplied)

16. There cannot be any doubt in holding the view that the jurisdiction and powers conferred upon an Administrative Tribunal is an 'alternative' forum with the object to relieve the High Court Division from the huge backlog and the Parliament has been given the power to establish such Tribunal subject to certain limitations without affecting the fundamental rights of a citizen. We have discussed above, all the fundamental rights enshrined in Part III are not inalienable - some of them are conditional and this clause (2) contains in Part III. It is a forum created by the Parliament providing for judicial review with an object to relieve the High Court Division of the burden of huge backlog of cases and ensuring quick disposal of service related matters in an alternative dispute resolution mechanism. The constitution has empowered the Parliament to give such power of judicial review upon a Tribunal under article 117 in respect of –

(a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments;

(b) .....

17. Keeping the High Court Division's limited power of judicial review under Article 102(1) only in respect of violation of fundamental rights and legislative actions, we have reason to believe that unless the High Court Division is not determined to allow the Tribunal to perform the power of judicial review in its respective field and if it does not usurp its

powers, one day it will be seen that a service jurisprudence in the Tribunal level has been developed. By this time, we may legitimately say that the Tribunals have been functioning to the satisfaction of the litigants, in general. This will augment the High Court Division's control and supervision over other courts subordinate to it and the peoples confidence over the judiciary will be strengthened.

18. If the Judges of the High Court Division are over burdened with cases, how can they supervise and control its subordinate courts and Tribunals? Apart from the above, the High Court Division has the power to transfer a case pending in a subordinate court to it which involves a substantial question of law as to the interpretation of constitution or on a point of general public importance, the determination of which is necessary for the disposal of the case under Article 110. Therefore, while the power of judicial review of legislative action is vested in the High Court Division along with violation of fundamental rights, it should ensure that frivolous claims are filtered out through the process of adjudication of the Tribunal. It is hoped that the High Court Division shall be guard in exercising its power of judicial review and avoid to interfere with those matters which are cognizable under Article 117(1) of the constitution. This is necessary for the interest of justice and in that case, it can properly supervise and administer justice.

19. The High Court Division has over the years accumulated case load almost four hundred thousand. As the population is increasing, the backlog problem is becoming acute. The bar of jurisdiction to entertain a writ petition on any of the above matters is a measure for effective, expeditious and satisfactory disposal relating to service disputes of public servants and the power of judicial review in respect of those matters by the High Court Division has been debarred by clause (5) of article 102 read with clause (2) of article 117. There is thus a forum where matters of importance and grave injustice over service matters can be brought for determination. One may pose a question as to what nature of jurisdiction a Tribunal has barring the judicial review of the High Court Division. This Tribunal has all the powers and jurisdiction relating to the terms and conditions of persons in the service of the Republic that were being exercised by the High Court Division. This is a new alternative dispute resolution mechanism. There are courts under the prevailing laws in the country by which both the High Court Division and the District Courts exercise such powers. The Parliament in exercise of its legislative power has also given concurrent jurisdictions to the High Court Division and the Sessions Judges say, section 498 of the Code of Criminal Procedure. This power has been given upon a court subordinate to the High Court Division with a view to enabling the litigants to avail of prompt and less expensive criminal justice from the lower tier of the judiciary. The difference between these two enactments is that under the Code of Criminal Procedure the power of judicial review has been given to the High Court Division from the judgment of the sessions Judges, but in respect of service matters, the appellate power of judicial review has been given upon the Administrative Appellate Tribunal and then to this Court. The object is to afford the service holders to get prompt and less expensive relief in a lower tier of the judiciary. And the final power of judicial review has been given upon this Court on limited matters only on the question of law.

20. Article 44(1) says that the right to move the High Court Division under clause (1) of article 102 itself is a fundamental right, that is to say, this right is guaranteed. Under the Indian provision, though there is an enabling provision in clause (3) of article 32 of the constitution empowering the Parliament to any other court to exercise all or any of the powers exercisable by the Supreme Court, no such legislation was made in India till 1985, when Part XIV containing articles 323A and 323B have been inserted. This article 323A is

almost in *pari materia* to article 117(1) of our constitution. By Article 323A the Parliament has been given power to constitute Central Administrative Tribunal and by article 323B, the State Legislature has been given the power to constitute Administrate Tribunals in the State level.

21. The object of establishing such Tribunals in India by constitutional amendment was to take out the adjudication of disputes relating to the recruitment and conditions of public services of the Union and of the States from the hands of the civil courts and the High Courts and to place it before the Administrative Tribunals for the Union or the States. This departure was made with the object that the traditional civil courts gripped with rules of pleadings and strict rules of evidence and traditional four tier appeals, and endless revision and reviews under the Code of Civil Procedure, were not treated to be needed expeditious dispensation of litigation relating to the service matters. Reference in this connection is the case of Vatchirikuru Village Panchayat V. Deekshi Thulu Nori Venkatarama, 1991(2)SCR 531.

22. Under the Indian Central Administrative Tribunals Act, 1985, the Tribunal would adjudicate upon disputes and complaints with respect to the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union and Corporations and other authorities under control of the Union Government excepting (a) members of the defence services, (b) officers and servants of the Supreme Court or of any High Court, (c) members of the Secretarial staff of Parliament or of any legislature of any States or Union territorial etc.

23. In India there was no separate provision like articles 44 and 101 of our constitution, but similar provisions have been incorporated in clauses (1) and (3) of article 32 but no such provision is included in article 226 with the result that in case of violation of fundamental rights, its citizens can move the Supreme Court only under article 32. Whatever other remedy may be open to a person aggrieved, he has no right to complain under article 32, if there is no infringement of fundamental rights. Article 32 is included in Part III in the Chapter of 'fundamental rights' but Article 102 of our constitution is included in Part VI under the heading 'The Judiciary'.

24. The Constitutional Bench in L. Chandra Kumar (AIR 1997 SC 1125) held that if the power under Article 32 of the constitution, which has been described as the "heart" and "soul" of the constitution, can be additionally conferred upon "any other Court" there is no reason why the same situation cannot subsist in respect of jurisdiction conferred upon the High Courts under Article 226 of the constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of Supreme Court's power under Article 32 is retained, it is observed, there is no reason why the power to test the validity of legislations against the provisions of the constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is observed that, apart from the authorization that flows from Articles 323A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power, it is further observed, is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

25. The Supreme Court of India summarized its opinion in L. Chandra Kumar that the Tribunals function in this respect is only supplementary and all such decisions of the

Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also be left with the power to test the vires of subordinate legislations and rules.

26. As regards the powers of Central Administrative Tribunal of India section 14 provides:

> "14. Jurisdiction, powers and authority of the Central Administrative Tribunal-
> (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court [xx]) in relation to-
>
> (a) recruitment, and matters concerning recruitment, to any All India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filed by a civilian;
> (b) all service matters concerning-
> (i) a member of any All-India Service; or
> (ii) a person [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the union or any civil post under the union; or
> (iii) a civilian [not being a member of an All-India Service or a persons referred to in clause (c)] appointed to any defence services or a post connected with defence.
> and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or, of any corporation [or society] owned or controlled by the Government.
> (c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) of sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.
> (3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with the effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court [xx] in relation to-
>
> (a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and
>
> (b) all service matters concerning a person [other than a person referred to in clause (a) or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs."

27. We noticed from the above that the Parliament did not empower the Tribunals to declare legislative actions ultra vires the constitution but by judicial pronouncement the Supreme Court in L. Chandra Kumar has given such power. Reasons assigned by the Supreme Court are that the 'constitution confers the power to strike down laws upon the High Courts and Supreme Court it also contains elaborate provisions dealing with..... though the tribunals created by ordinary legislations cannot exercise the power of judicial review of legislative actions to the exclusion of the High Courts, there is no constitutional prohibition against their performing a supplemental as opposed to a substitutional role....' "so long as the jurisdiction of the High Courts under Articles 226/227 and that of this court under Article 32 is retained, there is no reason why the power to test the validity of legislation against the provisions of the Constitution cannot be conferred upon the Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution "This power is available to Parliament under Entries 77, 78, 79 and 95 of List LI and to the state legislature under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose".

28. As per the jurisdiction given to Indian Central Administrative Tribunal, in relation to all service matters covering All-India service or a person not being a member of All-India service or a person appointed to any civil service of the Union or a post connected with the defence service. Thereafter, by an amendment, the Central Administrative Tribunal has been given power to have the jurisdiction of the officers of all the civil courts other than Supreme Court. The Administrative Tribunals in India are competent to exercise all powers which the respective courts could have exercised. Our Administrative Tribunal is not invested with the power of judicial review of legislative actions even if there is violation of any of the provisions of the fundamental rights. It is because of Article 44(1). Indian Tribunals have been given the power of judicial review in respect of legislative action by judicial pronouncement in Minerva Mills case, AIR 1980 SC 1789. Bhagwati, J. observed:

> "The judiciary is the interpreter of the constitution and to the judiciary is assigned the delicate task to determine what is the conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that the exercise of powers by the Government whether it be the legislature or the executive or any other authority be conditioned by the constitution and the law."

29. This enlargement of power may be termed as judicial legislation signifies new legal rules made by Judges. In 'Introduction of jurisprudence' by Mr. Lloyd, it is pointed out that how there remains a consensus of opinion that, within certain narrow and clearly defined limits, new law is created by the judiciary. On reading great deal in theoretical text-books on Politics and Government about that Trinity, which exists in all free governments, the Executive, the Legislative and the Judiciary, as to how these departments should be entirely distinct and each adhere strictly to its own duties and limits. These duties are so internally connected, so closely interwoven, so act and re-act upon each other, that it is often difficult, sometimes impossible to decide where the jurisdiction of one department ends and that of another begins.

30. As regards Acts passed by the legislature, judicial legislation comes in to modify and to re-enforce principally in four ways: (1) by applying to them the rules of statutory construction. Much law is created in this way; or (2) the judiciary may decide that a certain

statute is unconstitutional or is not unconstitutional as the case may be, and thus, either destroy it altogether, or in order to save it, may greatly modify its effect and in a large measure thwart the interest of the legislature; (3) or in construing any statute, the Judges may impute a narrow meaning to certain words used or a liberal meaning as the case may be and thus modify and mould the law to their own notions of justice and the public good; (4) A statute may be ignored altogether in some important particulars and new law created by the judiciary. (Judicial Legislation, Frank Bowman).

31. With due respect, we are unable to endorse the said view of Bhagwati,J. 'Judiciary' includes all tiers of judiciary including the Supreme Court, High Courts, Tribunals and the District Courts. In both countries, say, India and Bangladesh the power of judicial review in respect of legislative actions has been assigned to the Supreme Courts by the constitution but it has not given to the District Courts and the Tribunals created by Subordinate legislations. It is, therefore, not fair and permissible to equate the Judges of the Supreme Court with the Judges of the District Courts or Tribunals although all of them are part of judiciary. More so, the power of judicial review is given to the Supreme Court of Bangladesh by the constitution but the said power to the lower judiciary is given by subordinate legislation.

32. There are three organs of the State, of them, the judiciary' is one but if the higher judiciary is equated with the lower judiciary, there will create chaos and confusion. There is no doubt that the Indian High Courts and Supreme Court have been assigned a delicate task to determine what is the power conferred on each branch of the government but this power has not been assigned to the lower judiciary which is also a part of 'judiciary'. This anomaly has been reflected in a later decision in L. Chandra Kumar V. Union of India, AIR 1997 S.C. 1125. In this case, the Supreme Court citing the dictum in Marbury V. Madison, Crauch 137 (1803) observed that Henry, J. Abraham's definition of judicial review in the American context is subject to a few modification equally applicable to the concept as it is understood in Indian constitutional law. Broadly speaking, it is observed, judicial review in India comprises three aspect: Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. So far this view is correct but the question is whether the judicial review of legislative action is permissible by the lower judiciary or a Tribunal.

33. It has been observed in L.Chandra Kumar (supra) that 'Indeed, when the Framers of our constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly enacted legislations had already acquired a history of nearly a century and a half;' (emphasis supplied). Here also the powers of the Supreme Court have been equated with those of the Subordinate Courts and Tribunals. It has concluded its arguments in Para 93 observing that 'The Tribunals are competent to hear matters where the vires of statutory provisions are questioned.' This conclusion is in direct conflict with its observation in paragraph 80 wherein it has been observed that 'However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no Constitutional Prohibition against their performing a supplemental as apposed to a substitutional role in this respect.'

34. In R.K. Jain V. Union of India, AIR 1993 SC 1769, the Supreme Court of India analyzed the theory of alternative institutional mechanisms which have been functioning in practice and recommended that the Law Commission of India or a similar expert body to conduct a survey of the functioning of Tribunals and that such study conducted after gauging

the working of the Tribunals over a sizeable period provides an answer to the questions critics of the theory. It was observed as under:

> "The over all picture regarding the tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted. Not many tribunals satisfying the aforesaid tests can possibly be established."

35. The constitutional court did not approve all the recommendations submitted by the Malimath Committee constituted for the purpose and it was of the opinion that the Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, it was observed, they should not act as substitutes of the High Courts and Supreme Court which have under constitutional set up, been specifically entrusted with such obligations. It was observed 'Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to security before a Division Bench of the respective High Courts. The Tribunals will consequently have the power to test the vires of subordinate legislations and rules'.

36. Let us consider some provisions of law relating to the phrase 'judicial review' other than Bangladesh and India. In the early 1980's Canada experienced a fundamental change in its political and legal structures. A new Constitution Act, 1982 came into effect declaring itself to be 'the Supreme law of Canada." The new Constitution Act further decreed that 'any law that is inconsistent with (its) provisions... is, to the extent of the inconsistency, of no force or effect. (Constitution Act, 1982, Schedule B, Part I, Canadian Charter of Rights and Freedoms, section 52(1)'. Judicial review under the Canadian system 'refer to any form of judicial assessment of legal validity of government action (typically legislation) under a constitutional Charter of Bill of Rights'. It has been observed by W.J. Waluchow, in his 'A common Law Theory of Judicial Review', this judicial assessment is such as one finds in Canada and United States, or under sections of nation's constitution that outline basic civil rights like equality and freedom of association.

37. In Edwards V. A.G. of Canada, (1930) A.C. 124, it is observed that a constitution is a 'living tree' trends, and reliefs and whose current and continued authority rests on its justice or on factors like the consent, commitment, or sovereignty of the people-now, not the framers or the people - now particularly relevant. In viewing a constitution as a living tree, malleable in the hands of contemporary interpreters, consistent with its status as foundational law, and with the entrenchment and stability that may see essentials aspects of the very idea of constitutionalism?

38. All judicial review - all manner of adjudication by courts – is itself an exercise of judicial accountability – accountability to the people who are affected by a judicial pronouncement. That accountability gets evidenced in critical comments, by Fali S. Nariman, on judicial decision when Judges behave as they should as moral custodian of the constitution; the function they perform enhances the spirit of constitutionalism. He observed, 'My only regret some times is that some of our modern-day Judges – whether in India or elsewhere – do not always realise the solemnity and importance of the functions they are expected to perform. The ideal judge of today, if he is to be a constitutional mentor, must move around, in and outside court, with the constitution in his pocket, like the priest who is never without the Bible (or the Bhagavad Gita). Because, the more you read the provisions of

our Constitution, the more you get to know of how to apply its provisions to present-day problems.' (Before Memory Fades...)

39. The main impact of judicial review of legislation, based upon a combination of eighteenth-century natural law principles with the constitution, did not come until the second half of the nineteenth century. The American Constitution regulates the relations between executive, legislature, and judiciary differently from the British. It gives to a law court a supervisory function which, cannot hold having deep political implications and it isolates legislative and executive from each other, instead of the British method of constituting government as an executive committee of the majority in Parliament.

40. Modern democracies also differ widely in the organisation of the administration of justice. In continental democracies, a Ministry of justice is in administrative control of the entire judicial machinery, and also the central agency for the drafting of legislation. In Britain, these functions are divided between the Lord Chancellor's Secretariate, the Parliamentary draftsman and ad-hoc law revision committees. In 1965, the process of law revision was given institutional continuity, through the creation of Law Commissions for England and Scotland. In the United States, the Attorney General's Department exercises some of the functions of a Ministry of justice, together with numerous congressional committees and *ad-hoc* commissions. Each of these national institutions has certain merits and deficiencies.

41. There is no doubt that the constitution is the supreme law of the country and therefore, any Court or Tribunal can exercise any of the provisions of the constitution but with regard to judicial review in respect of legislative actions, this power has been restricted to the High Court Division in our constitution. When the constitution itself has preserved the right of a citizen to move the High Court Division for infringement of fundamental rights against any administrative action, such power cannot be exercised by any Tribunal other than the one established by the constitution i.e. the High Court Division. This power has been assigned to the High Court Division as will be evident from articles 7(2) 26(2), 44(1), 101 and 102(1). Article 101 which provides that the High Court Division shall have such original, appellate and other jurisdictions and the powers that are conferred on it by the constitution or any other law.

42. To invoke the fundamental rights conferred by Part III of the constitution, any person aggrieved by the order, action or direction of any person performing the functions in connection with the affairs of the Republic, the forum is preserved to the High Court Division. The conferment of this power cannot be curtailed by any subordinate legislation - it being the inalienable right of a citizen. This power cannot be conferred upon any Tribunal by the Parliament in exercise of legislative power or by the High Court Division or the Appellate Division in exercise of its power of judicial review. This Court itself noticed in Mujibur Rahman that "The Tribunals are not meant to be like to the High Court Division or subordinate court over which the High Court Division of the Supreme Court exercises both judicial review and superintendence. The Tribunals are not in addition to the court described in Chapters I and III of Part VI. There is no command nor any necessary intendment in the constitution that the Tribunal or Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division".

43. Here possibly this Court has overlooked article 44(2) of the constitution. The constitution has conferred legislative power to promulgate law empowering a court to

exercise all or any of the powers of fundamental rights. Though the Parliament has such power, this clause is to be read not in isolation. Parliament's power is limited to the extent of giving powers of judicial review of administrative actions only and not more than that. There is no dispute that there is provision in the constitution in article 117(2) conferring upon the Parliament the power to establish Administrative Tribunal to exercise judicial functions relating to the terms and conditions in the service of the Republic, 'including the matters provided in Part IX'.

44. Chapter-1 of Part IX provides so far as it relates to appointment and conditions of service of persons in the service of Republic, their tenure of office, disciplinary actions and Chapter-II relates to the Public Service Commission. The subordinate judiciary contains in Part-VI. Chapter-II relates to the subordinate judiciary and Chapter III of Part VI relates to Administrative Tribunal. Though this Court in Mujibur Rahman was silent regarding the Administrative Tribunal, clause (2) of article 117 debars the High Court Division of its power of judicial review relating to the terms and conditions of the persons in the service of the Republic. For that purpose it has created an appellate forum to be created by law. By Act No. VII of 1981, the government has established the Tribunal with effect from 5th June, 1981, both for exercising the original and appellate jurisdictions. Later on by Act No.XXIII of 1991, another forum for judicial review of the judgment of the Administrative Appellate Tribunal has been created. Now the question is whether this creation of the original or appellate forum is to be construed as substitute, alternative or co-equal to the High Court Division.

45. If we summarise the language used in Indian provision in article 323A, which provides "Parliament may, by law, provide for adjudication or trial by administrative tribunals of disputes..... with respect to conditions of service of persons.....'. Under our provision article 117 provides 'Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of ..... 'the terms and conditions of persons.....'. The language used in both the enactments is almost identical only with the difference that under the Indian provision the Tribunals have been given the power to make interim orders in appropriate cases subject to fulfillment of certain conditions. It has been observed in L. Chandra Kumar (supra) that the 'judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging function of constitutional interpretation'. We fully endorse the said view, but the question is whether they can be taken as substitutes of High Court Division. There is no doubt that the Tribunals in India cannot act as substitute of the High Courts and Supreme Court which have, it is observed under the constitutional set up been specifically entrusted with such obligation'. Reasons assigned by it is that the 'constitution confers the power to strike down laws upon the High Courts and Supreme Court it also contains elaborate provisions dealing with..... though the tribunals created by Ordinary legislations cannot exercise the power of judicial review of legislative actions to the exclusion of the High Courts, there is no constitutional prohibition against their performing a supplemental as apposed to a substitutional role....'

46. Under the Act VII of 1981, there is provision for an appeal to the Administrative Appellate Tribunal with three members, the Chairman shall be a person who is or has been or is qualified to be a Judge of the Supreme Court, and of the two other members, one shall be a person who is or has been an officer in the rank of Joint Secretary and the other person who is or has been a District Judge, from an order or decision of the Tribunal. So practically the power of a Division Bench of the High Court Division has been given to the Administrative Appellate Tribunal. The composition of the appellate authority by including a high level

administrative officer with specialised knowledge be better equipped besides the judicial officers to dispense with prompt justice. And it is expected that a judicious mix of judicial members and an experienced grass-root officer will serve the purpose effectively and speedily. On the contrary, there is no provision for appeal under the Indian Act of 1985 and the High Courts power of judicial review was ousted except the Supreme Court's power under Article 136. So our provision is more comprehensive to some extent so far as it relates to creation of an appellate forum than that of the Indian except the power for issuing interim order by our Tribunal.

47. We have almost four hundred thousand cases pending in the High Court Division. The docket is increasing day by day. If this trend continues one day it will not be exaggerated to say that the number will exceed one million in ten years. If this process is allowed, the administration of justice is bound to collapse and the peoples perception towards the judiciary will erode. This is not healthy for the administration of justice in a democratic country like ours. There may be excesses in the administration and politics and the Tribunal is set up to maintain equilibrium and check the excesses. To meet the above eventuality, it is high time to think over the matter and reduce the docket by decentralizing the power of the High Court Division and Tribunal's power of alternative dispute resolution should be expanded through subordinate legislations.

48. Part IX of our constitution contains the heading 'The Services of Bangladesh' and in proviso to article 133, the President has been given power to make Rules regulating the appointment and the conditions of service of persons in the service of Republic. Chapter II of this Part, there is an enabling provision in article 137 for 'establishing one or more Public Service Commissions for Bangladesh'. In Masder Hossain, this Court directed the government to make recruitment Rules regulating appointment in judicial service. It observed that the Services (Reorganization and Conditions) Act, 1975 have no application to the judicial service. In pursuance of this direction, the President has created the Bangladesh Judicial Service Commission by Promulgating Rules. The subordinate judiciary contains in Part-VI Chapter-II and Chapter III relates to Administrative Tribunal.

49. As regards the powers and jurisdiction of our Administrative Tribunal section 4 says:

> "(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 is 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 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)."

50. Under our constitutional scheme, there is no doubt that the power of judicial review in respect of legislative action has not been conferred upon the Tribunal by subordinate legislation. As observed above, it is the High Court Division which has been given the power under articles 7(2), 26, 44(1), 101 and 102(1) which read as follows:

"7(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void".

26(1) All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on commencement of the Constitution.
(2) The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the extent of such inconsistency be void.
(3)....."

"44(1).The right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed.
"101. The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law."
"102(1). The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution."

51. If the right to move the High Court Division is guaranteed and this power having been conferred on the High Court Division by the constitution, it cannot be said that for enforcement of that right and as the right to judicial review under article 102(1) is a guaranteed one, if a citizen's fundamental rights is infringed, the remedy for enforcement of that right is conferred by the constitution under article 102(1). Therefore, the exercise of this power by the High Court Division cannot be curtailed or taken away by the Parliament.

52. Apparently a Tribunal created by an ordinary legislation or subordinate legislation cannot exercise the power of judicial review of legislative action. It is only the Supreme Court which is the creation of the constitution itself can exercise that power because this power has been given by constitution itself. If the entire scheme of the constitution is looked into, it will appear that the three organs of the State have been created by the constitution of which the judiciary is headed by the Supreme Court, and the other two organs are the Legislature and the Executive. These three organs are independent and not dependent on any other organ but in a unitary form of government, these three organs must work harmoniously with a view to avoiding any conflict in the administration of justice. Each organ, is therefore, supplementary to the other. Our Fore Fathers were conscious about the independence of judiciary and realizing any future encroachment over judiciary, they gave full independence to the Supreme Court in the administration of justice. This will be borne out from the following discussions.

53. Clause (4) of article 94 says, the Chief Justice and other Judges shall be independent in the exercise of their judicial functions. They cannot be removed by any provisions of subordinate legislation. The Supreme Court is a court of record. A law declared by the Appellate Division is binding on all courts and the decisions of the High Court Division are binding on all courts subordinate to it. All authorities, executive and judicial in the Republic shall act in aid of the Supreme Court. All staff of the Supreme Court shall be appointed by the Chief Justice. The remuneration payable to the Judges of the Supreme Court shall be charged upon the Consolidated Fund and the remuneration, privileges and other terms and conditions of service of the Judges shall be determined by Act of Parliament. These are the safeguards of the Judges of the Supreme Court for discharging their duties and responsibilities independently.

54. The Judges are under obligation to subscribe an oath as per provisions of article 148 in accordance with the 'Third Schedule'. Article 148 speaks of subscribing an oath by all constitutional office holders as soon as he enters upon the office. In accordance with this provision the President, the Prime Minister, the Speaker, the members of Parliament, the Election Commissioners and other constitutional holders of office have to subscribe oaths. But the oath of a Judge is some what different from other constitutional office holders. Judges have to subscribe an oath to "Preserve, protect and defend the Constitution and the laws of Bangladesh". In respect of other holders of constitutional posts they are not required to subscribe an oath to defend 'the laws'. They have to subscribe oath to 'preserve, protect and defend the constitution'. So, the Judges of the highest Court are defenders of the 'law' and the 'constitution'. 'Law' according to the constitution means 'any Act, Ordinance, Order, Rule, Regulation, Bye law, Notification or other legal instruments, and any customs or usage, having the force of law'.

55. Therefore, it is the Supreme Court alone which is empowered to examine whether or not any law is inconsistent with the constitution. The Parliament has given the legislative power under article 65 to promulgate law but this power is circumscribed by limitations and

if it exercises any power which is inconsistent with the constitution, it is the Supreme Court which being the custodian of the constitution and is manned by the Judges who are oath bound to protect the law to examine in this regards. The Supreme Court is the only organ of the State to see that any law is in consonance with the constitution. So, where the constitution confers the power upon the Supreme Court to strike down laws, if found inconsistent, such power cannot be delegated to a Tribunal created under subordinate legislation. In the alternative, the Supreme Court cannot delegate its power of judicial review of legislative action to a Tribunal. It is only on the principle that the donee of a limited power cannot, by the exercise of that very power, convert the limited power into an unlimited one or in the alternative a delegatee cannot exercise same or more power than the delegator.

56. Let us look at the powers that can be conferred upon the Supreme Court. Article 101 states that the High Court Division shall have the original, appellate and other jurisdictions and powers as are conferred on it by the constitution or any other law. So, apart from the constitution, the Parliament can confer any other power upon the High Court Division by subordinate legislation. There is no doubt about it. Similarly as to the powers of the Appellate Division, sub-clause (c) of clause (2) of article 103 provides that if the High Court Division "has imposed punishment of a person for contempt of that Division; and in such other cases as may be provided by Act of Parliament" an appeal shall lie as of right. I am of the view that the Framers ought to have included the latter part of sub-clause (c), such as, "and in such other cases as may be provided for by Act of Parliament" by a separate sub-clause because the empowerment of these two powers conflict each other. This will be evident if we consider the Bengali version in sub-clause (N) which says "উক্ত বিভাগের অবমাননার জন্য কোন ব্যক্তিকে দন্ডদান করিয়াছেন"; and in the next sentence it is said "এবং সংসদে আইন-à¡l¡ ®kl ‡f বিধান করা হইবে, সেরূপ অন্যান্য ক্ষেত্রে " This Bengali version is more clear and accurate than the English version and this version will prevail over the English version. The first part of the clause says about the power of contempt and the other part relates to the conferment of powers by Parliament upon this Court. So, there is no nexus between these two.

57. If we compare the constitutional provisions between ours and the Indian, the Indian one is more comprehensive than ours so far as it relates to making of interim orders in urgent cases with a view to preserving the subject matter of the litigation in *status-quo* for the time being. Such order is necessary for equitable considerations and it is an extraordinary relief, which is normally granted in accordance with reasons and sound judicial principles. It is not a grace or on default of any person. It is passed in the interest of justice and it is necessary in order to prevent the abuse of the process of law, or to prevent wastage or to maintain the situation as on date or from recurrence of certain incident which were existing as on the date presenting such application.

58. Under the Indian provision as opposed to our provision, article 245 under the heading 'Distribution of Legislative Powers' provides extent of laws to be made by Parliament and by Legislatures of the States. Article 246 which contains in the same Chapter relates to 'Subject-matter of laws made by Parliament and by the Legislatures of States.' Clause (1) is relevant for our consideration which provides "notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List 1 in the Seventh Schedule (in this constitution referred to as "Union list") (emphasis supplied). In the Seventh Schedule, Entry No.77 under the heading "Constitution and Jurisdiction of Courts"- list are: (a) the jurisdiction and powers of the courts are several entries; Entry No.77, List 1; of the Supreme Court relating to any matter. Entry No.95, List 1, of all courts other than the Supreme Court, relating to any matter in this List 1, Entry 65 List

2; of all courts other than Supreme Court relating to any matter in List 2 have been included. Article 246 deals with legislative powers of the Legislatures of the Union and the States with reference to the different Lists in the Seventh Schedule. So, there is specific provision in the constitution of India itself enabling the Parliament to add, confer or delete the powers of the Supreme Court as well as of the High Courts.

59. Under our provisions, the President has power to promulgate any Ordinance under Article 93 if the Parliament is dissolved or is not in session. Apart from this legislative power, the Parliament can delegate its power under the proviso to clause (1) of article 65 by Act of Parliament, to make Orders, Rules, Regulations, Bye-laws or other instruments having legislative effect. At any event, the Parliament has the power to invest the power from time to time upon both the Divisions of the Supreme Court by subordinate legislation but this conferment of power cannot supersede the constitutional powers conferred upon this Court. Similarly, the Parliament by this legislative powers cannot take away the powers of both the Divisions of the Supreme Court which are invested on it by the constitution. As discussed above, under article 44, the Parliament may empower any court other than the High Court Division within its local limits of jurisdiction "to exercise all or any of those powers" i.e. the powers that are being exercisable by the High Court Division under the fundamental rights Part.

60. As observed above, though the Parliament has been given wide power to invest upon any court of those powers of the High Court Division, it cannot give all powers to any Court or Tribunal similar to those given by the constitution upon the High Court Division over which I have discussed above. It can be done by a constitutional amendment but then also, the question will arise as to whether the right to move the High Court Division being one of the basic feature of the constitution, the Parliament cannot delegate such power by setting up a parallel Tribunal with powers equal to those of the High Court Division. This will be hit by 'basic feature' doctrine and it will be beyond the amending powers of the Parliament under article 142 of the constitution.

61. In Mujibur Rahman, this Court held that the Administrative Tribunal is not in addition to the courts described in Chapters 1 and III of the Constitution. It, however, observed that the Tribunal or Appellate Tribunal cannot be construed as a forum substitute or co-equal of the High Court Division. Taking the language used in article 44(2), I am of the view that if the original constitution empowers the Parliament to give power to a Court or Tribunal all (of course subject to limitation) or any of the powers of the High Court Division, why not it can empower 'alternative power' to the Tribunal as opposed to 'substitutional' as observed by the Supreme Court of India. But in no case, it can be treated as co-equal to the High Court Division to deal with all matters in respect of the terms and conditions of persons in the service of the Republic, including the matters provided in Part IX, that is to say, the services of Bangladesh. However, we are unable to endorse the views taken by the Supreme Court of India in L. Chandra Kumar (Supra) that "The Tribunals are competent to hear matters where vires of statutory provisions are questioned'.

62. In India as noticed above, its constitution was amended by inserting articles 323A and 323B providing a separate forum of creation of Administrative Tribunals prohibiting the power of judicial review of its decisions except the Supreme Court under Article 32 in respect of disputes and complaints referred to in clause (a) of article 323A or any of the matters specified in clause (2) in article 323B. The power of judicial review conferred on the High Courts under articles 226/227 of the constitution has been given by the Supreme Court

only in respect of matters relating to legislative actions by a Division Bench in L. Chandra Kumar (supra).

63. The Administrative Tribunals of India have been given the power under section 24 to make interim orders but such power cannot be exercised unless "(a) copies of such application and of all documents in support of plea for such interim order are furnished to any party against whom such application is made are proposed to be made and (b) opportunity is given to such party to be heard in the matter. A proviso is added therein empowering the Tribunal to dispense with the above conditions and may make an interim order as exceptional measure if it is satisfied, for reasons to be recorded in writing and that "it is necessary so to do for preventing any loss being caused to the applicant which cannot be adequately compensated in money but any such interim order shall, if it is not sooner vacated, cease to have effect on the expiry of a period of fourteen days from the date on which it is made unless the said requirements have been complied with ....."

64. Under our Administrative Tribunals Act, the powers have been given to the Administrative Tribunal under section 4 to hear and determine applications made by any person in the service of Republic or of any statutory public authority in respect of the terms and conditions of his service including persons right or in respect of any action taken in relation to him as a person in the service of Republic or of any public authority. So, the Tribunal can adjudicate upon in relation to only terms and conditions of service of any public servant or of any statutory public authority. Though an exclusive jurisdiction has been invested upon the Tribunal, it has no power to nullifying any law, rules or regulations. The Tribunal has been given limited power in the relation to those mentioned in sub-section (1) of section 4. Therefore, this Court has rightly held in Mujibur Rahman that the Tribunal cannot strike down any law or rule on the ground of its constitutionality.

65. In Mujibur Rahman, it is observed that "the right of judicial review under Article 102(1) is neither a fundamental right nor a guaranteed one. And the right of judicial review is neither an all-remedy nor a remedy falls or wrongs. It is available only when "no other equally efficacious remedy is provided by law". With due respect, these observations have been made unconsciously and therefore, we are unable to approve the same. The right of judicial review under article 102(1) is a guaranteed one which is embodied in the constitution itself, but if that right is not guaranteed, even if a citizen's fundamental right is infringed, he will be left with no remedy at all. True, article 102(1) has not been retained in the fundamental rights chapter as has been kept in India but in view of article 44(1), it is akin to fundamental right. Similarly the observation that the enforcement of fundamental right is available only when 'no other equally efficacious remedy is provided by law' is also not a correct view, inasmuch as, whenever there is infringement of fundamental rights, any person can move the High Court Division for judicial review of the administrative action under Article 102(1). The question of equally efficacious remedy arises only when it will exercise power under article 102(2) i.e. writ of certiorari and other writs mentioned in sub-clauses (a) and (b) of clause (2). If there is an alternative remedy, the High Court Division's power is debarred. It is only in exceptional cases, it can exercise this power.

66. Under clause (2) of article 102, a citizen cannot invoke judicial review of legislative action. Judicial review under this clause is not available if there is 'any other equally efficacious remedy' is provided by law. Mostafa Kamal J. rightly observed in the last sentence in paragraph 77 that this power of judicial review of legislative action is exclusively preserved to the High Court Division under article 102(1).

67. In Anwar Hossain Chowdhury V. Bangladesh, 41 DLR(AD) 165, this Court by majority held that the power to amend the constitution is there in the constitution itself. An amendment of the constitution is not a grund-norm because it has to be according to the method provided in the constitution. "Total abrogation of the constitution, which is meant by destruction of its basic structure, cannot be comprehended by Constitution". It observed, 'call it by any name 'basic feature' or whatever but that is the fabric of the constitution which cannot be dismantled by an authority created by the constitution itself-namely the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against article 7, because the amending power is but a power given by the constitution to Parliament; it is a higher power than any other given by the Constitution to Parliament but nevertheless it is a power within and not outside the constitution'.

68. In Khondker Delwar Hossain V. Bangladesh Italian Marble Works, 62 DLR(AD) 298, this Court held in paragraph 231 that "the framers of the constitution made the right to move the Supreme Court of Bangladesh for enforcement of fundamental rights itself a fundamental right". In that case this court approved the views taken in Anwar Hossain (Supra).

69. In Siddique Ahmed V. Bangladesh, 65 DLR(AD)8, this Court held that all laws, Rules, Regulations and Orders in whatever terms those are named must conform to the words of the constitution and any such laws which is inconsistent with the constitution to the extent of the inconsistency is void and non-est in the eye of law. It was further observed that the Parliament can make any law but within the bounds of the constitution which is the embodiment of the will of the people and it can also rectify any Ordinance made by a lawfully elected President following a proper and lawful procedure. This case relates to the Constitution (Seventh Amendment) Act, 1986, which was added in paragraph 19 of the Fourth Schedule of the constitution. This court declared the said Act unconstitutional.

70. There is thus no gainsaying the fact that if the vires of any law is challenged notwithstanding ouster of the jurisdiction of the High Court Division by an Act of Parliament, the High Court Division has power of judicial review to examine the constitutionality of the law. In this connection this Court in Shaheda Khatun V. Administrative Appellate Tribunal, 3 BLC(AD) 155, modified the dictum in Mujibur Rahman observing that "Mujibur Rahman's case is not only case which defines the writ jurisdiction of the High Court Division. We regret to say that the Appellate Tribunal seems to be totally unaware of settled law that notwithstanding ouster of the jurisdiction of the High Court Division by any legislative provision or even under article 102 itself the High Court Division is yet entitled to exercise its power of judicial review under Article 102 if the action complained of before the High Court Division is found to be *coram non judice,* without jurisdiction or taken malafide.' This view has been taken following the cases in Ehtesham Uddin V. Bangladesh, 33 DLR(AD) 154, Ismail Hoque V. Bangladesh, 34 DLR(AD) 125, Mostaque Ahmed V. Bangladesh, 34 DLR(AD)222 and Helal Uddin Ahmed V. Bangladesh, 45 DLR(AD)1.

71. We are unable to endorse views taken in Shaheda Khatun because the cases in Ehtesham Uddin, Ismail Hoque, Mostaque Ahmed and Helal Uddin Ahmed were decided on different premises and context. The principle of law propounded in those cases cannot be applicable in respect of service matters. In those cases, the issues were whether despite specific bar to challenge the orders and conviction by the Tribunals created under the Martial Law Proclamations, Martial Law Regulations and Martial Law Orders, the High Court Division can examine the legality of the decisions or in the alternative, judicial review is

available against decisions of Tribunals created under the Martial Law Proclamations. The writ petitions were filed in the nature of writ of certiorari to quash the judgments. Even there was specific bar ousting the jurisdiction of the High Court Division, it was observed in Helaluddin Ahmed that under three eventualities, that is to say, even in the purported exercise of those powers do not have the effect of validating acts done *corum non judice* or without jurisdiction or malafide, the High Court Division can examine the legality of the judgment.

72. In Ehteshamuddin, the question was in spite of ouster of jurisdiction, in a *writ of certiorai*, the High Court Division can examine the legality of the order. It was observed that in appropriate cases 'the court's power to examine the proceedings has not been taken away. Since it has been conceded by the learned Attorney General that when a proceeding or an action taken under Martial Law Regulation is challenged on the ground of want of jurisdiction or malafide, the superior court in exercise of its writ jurisdiction is competent to make it necessary to discuss this question at length.'

73. In Jamil Huq, this Court by majority while considering the power of judicial review of the High Court Division observed that 'The writ jurisdiction will be attracted if the proceedings are *coram non judice* or malafide. If the court is constituted properly and the offence is cognizable then the proceedings of such court cannot be interfered, with on the ground of procedural irregularities'. In that case, the writ petitioner was convicted by the Court Martial on the charge of mutiny under the Army Act, 1952. In Mostaque Ahmed, he was convicted by the Special Martial Law Court. He challenged his conviction unsuccessfully in the High Court Division. This Court in the context observed that the earlier views taken in such cases are that 'the malafide or coram non judice proceedings are not immune from the scrutiny of the Supreme Court notwithstanding any ouster clause by Martial Law Proclamations'.

74. It is apt to observe here that this Court in Shaheda Khatun has unconsciously approved the views taken in those cases while deciding an issue as to whether in presence of an Administrative Tribunal created under article 117(2) read with article 44(2), the decision of the Administrative Appellate Tribunal is amenable to the writ jurisdiction. The jurisdiction of the High Court Division has been ousted by clause (5) of article 102 read with article 117(2) and the Tribunal has been created in exercise of powers under article 117(2) with powers that are exercisable by it in accordance with article 44(2) read with article 117(1) of the constitution. How then the High Court Division can exercise its power of judicial review of the administrative actions. That's too, in presence of appellate forum and this Court's power to examine the legality of the Appellate Tribunal's decision under article 103. These points have not been considered and addressed in Shaheda Khatun (supra) and unconsciously this court made those observations.

75. In Khalilur Rahman V. Md. Kamrul Ahasan, 11 MLR(AD) 5, the question arose as to whether the High Court Division is competent to entertain a writ petition since the Administrative Tribunal does not possess the power of granting ad-interim relief and since the disposal of the case and the appeal will take long time, by which time, the mischief will be done. This Court taking consideration of sub-section (1) of section 4 of the Administrative Tribunals Act held that the Administrative Tribunals Act does not authorize the Administrative Tribunal or the Administrative Appellate Tribunal to pass any ad-interim order restraining the government or other functionaries from taking any action relating to the terms and conditions of service of the Republic or any statutory authority while the case has been filed by a person. We have held earlier that even without challenging the vires of law,

the High Court Division has jurisdiction to entertain a writ petition on limited ground if there is violation of fundamental rights in view of article 44(1) of the constitution. This point has totally been over looked by this Court in Khalilur Rahman.

76. In Khalilur Rahman (Supra), this court observed that a public servant may out of desperation or just for taking a sportive chance in the summary writ jurisdiction alleged contravention of some fundamental rights which may turn out to be frivolous or vexatious or not even remotely attracted in the case. The court, it is observed, however, is on guard in such attempt that the great value of the rights given under article 102(1) is not frittered away or misused as a substitute for more appropriate remedy available for an unlawful action involving no infringement of any fundamental rights. It further observed that a person in the service of the Republic who intends to invoke fundamental rights for challenging the vires of law or a relief by way of striking down of a particular law on the ground of its constitutionality, writ petition under article 102(1) can be maintained. In the alternative, a person in the service of the Republic can file a writ petition on limited grounds. In other cases, he will be required to seek remedy under Article 117(2). So, this Court did not altogether oust the jurisdiction of the High Court Division, rather in appropriate cases it may exercise its jurisdiction.

77. However, it took the view that since the Administrative Tribunal or the Administrative Appellate Tribunal has no power to pass any interim order relating to terms and conditions of a person in the service of the Republic or of any statutory public authority, in the absence of any power to pass any interim order, though the Tribunal refused the prayer for interim order, the applicant ought to have preferred an appeal, if so advised, but instead, he moved the High Court Division in its writ jurisdiction, which is not maintainable. What we find from the above observations made in paragraph 13 that the court impliedly said the Tribunal has power to make such order in appropriate cases but the applicant has chosen the wrong forum. So far the observation as to the interference of the judgment of the High Court Division is correct view but we are unable to subscribe the view that the Tribunal cannot pass any interim order.

78. We want to make in this connection that except on the limited scope challenging the vires of law or if there is violation of fundamental rights, the power of the High Court Division is totally ousted under clause (5) of article 102 read with article 117(2). If a public servant or an employee of statutory corporation wants to invoke his fundamental rights in connection with his terms and conditions of service, he must lay foundation in the petition of the violation of the fundamental rights by sufficient pleadings in support of the claim. It will not suffice if he makes evasive statement of violation of his fundamental rights or that by making stray statements that the order is discriminatory or malafide. A malafide action or act is a disputed question of fact and law, and the Tribunal is, therefore, competent enough to decide the question of malafide or collusion or arbitrariness in taking the decision. The expression 'malafide' has a definite significance in the legal phraseology and the same cannot emanate out of fanciful imagination or even apprehensions but there must be existing definite evidence of bias and actions which cannot be attributed to be otherwise bonafide, however, by themselves would not amount to be malafide unless the same is accompanied with some other facts which would depict a bad motive or intent on the part of the authority and the same cannot be decided in summarily proceedings in writ jurisdiction.

79. Similarly if an order is said to be without jurisdiction or is contrary to law, the appropriate course open to the applicant is to plead to the Tribunal with such plea and ask for

vacating the order or action. It is altogether within the tenor of the Tribunal. *Coram non Judice* is a Latin phrase which means 'not in the presence of a judge'. It is a legal term typically used to indicate a legal proceeding held without a judge, with improper venue such as before a court which lacks the authority to hear and decide a case in question, or without proper jurisdiction. I find no cogent ground why the Tribunal cannot deal with these issues for the reasons assigned above. Mere superficial pleadings on the point of fundamental rights will not confer any power on the High Court Division in respect of the terms and conditions of service.

80. The observations made in Shaheda Khatun (supra) that if the action complained as is found to be *coram non judice*, without jurisdiction or malafide, the judicial review is available are based on the decisions on different premises and the said views cannot be applicable in service matters in presence of an alternative forum, and this forum is created as per provisions of the constitution. It is to be borne in mind that no case can be an authority on facts. The Tribunal is created as an 'alternative' forum of the High Court Division in respect of specific purposes. If any administrative action is found without jurisdiction or *coram non judice* or malafide, the Tribunal is competent to deal with the same and adjudicate these issues satisfactorily. These issues are within its constituents of the Administrative Tribunal. If the order complained of was passed by an officer who is not competent to make such order, the order would be without jurisdiction. If the Rules provide for the constitution of a domestic tribunal with designated persons but the tribunal was constituted by persons not authorized by the Rules, the action would be *coram non judice*. If the decision is taken malafide out of vengeance or with motive to take revenge, in all those cases the Tribunal can strike down the action taken against the applicant. Article 117(1)(a) specifically provides that the Tribunal can exercise jurisdiction in respect of matters relating to 'the terms and conditions of persons .....' Section 4(1) of the Act of 1980 was also couched with the similar language. The language used in those provisions are so wide enough to come to the conclusion that the Tribunal is competent to deal with those issues. The Tribunal has been given all powers relating to the terms and conditions of service and therefore, there is no reason to restrict the powers of the Tribunal by judicial pronouncement. These matters are within the powers of the Tribunal and therefore, if a public servant wants to challenge the actions as above under article 102(1), it will be barred under clause (2) of Article 117.

81. Let us now consider the cases referred by the parties. In Junnur Rahman V. BSRS, 51 DLR(AD)166, the writ petitioner, a senior principal officer of Bangladesh Shilpa Rin Sangsta challenged a circular containing promotion criteria of BSRS and an office order promoting some other persons to the post of Assistant General Manager superseding him. The High Court Division found no violation of fundamental rights of the writ petitioner under articles 27 and 29 of the constitution and rejected the writ petition as was not maintainable. This Court maintained the judgment of the High Court Division on the view that the writ petitioner did not seek to enforce any fundamental rights, and therefore, it was within the competence to the Administrative Tribunal to entertain the grievance of the writ petitioner. In Delwar Hossain Mia V. Bangladesh, 52 DLR(AD)120, it has been held that a person in the service of the Republic who intends to invoke fundamental rights 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.

82. In Government of Bangladesh V. Md. Abdul Halim Mia, 9 MLR(AD)105, it was observed that the right of judicial review under article 102(2) of the constitution is neither a fundamental right nor a guaranteed right. It has further observed that the judicial review of an

administrative action is neither an all weather remedy nor a remedy for all wrongs but is only available when there is no other equally efficacious remedy. The question of enforcement of fundamental rights is not available in the case as the question involved in the decision was mere clarifications of the Rules for giving effect thereto, and therefore, the assumption of jurisdiction under article 102(2) of the constitution for ventilating certain grievance regarding terms and conditions of service of the writ petitioner has never been contemplated. It, however, found no fundamental rights involved in the case. This case does not help the appellants.

83. In Secretary Ministry of Establishment V. Shafi Uddin Ahmed, 2 MLR(AD) 257, a writ petition was filed challenging the promotion to the post of Joint Secretary breaking the seniority. The writ petition was moved on the principle of violation of the fundamental rights, inasmuch as, according to him there was discrimination in considering his case. The High Court Division made the rule absolute. This Court did not interfere with the judgment of the High Court Division on the reasonings that the High Court Division struck down some paragraphs of impugned notifications as ultra vires articles 27 and 29 of the constitution holding that these notifications had the force of law. This Court further held that the writ petitioners invoked article 44(1) of the constitution and the petition was filed for enforcement of fundamental rights and that the Administrative Tribunal has no power to strike down an order for infringement of fundamental rights or any other law and that the right to move the High Court Division under article 102(1) for enforcement of fundamental rights is a fundamental right itself and is guaranteed by under Article 44(1) and has been recognized and that the right of judicial review under article 102(2) is neither a fundamental right nor a guaranteed one.

84. In Shamsun Nahar Begum V. Secretary Ministry of Health and Family Welfare, 3 MLR(AD)68, a writ petition challenging the order of transfer of the writ petitioner. The High Court Division rejected the writ petition summarily. This Court maintained the judgment holding that the writ petitioner's job was transferable, and therefore, such action relates to the terms and conditions of service. The writ petition was barred under article 117(2). The views taken by this Court is based on sound principle. No writ petition is maintainable challenging any action of the authority transferring a government servant from one station to other station, inasmuch as, it being an administrative action for the purpose of proper administration of the department-this relates to the terms and conditions of the service and the remedy, if there be any, lies with the Administrative Tribunal.

85. In Bangladesh V. Mahabubuddin Ahmed, 3 MLR(AD) 121, this Court held that the dismissal of service of an employee of the Republic relates to its terms and conditions of his service. In that case the writ petitioner was dismissed from the service under Martial Law Order No.9 of 1982. He challenged the said order before the Administrative Tribunal which dismissed the case and an appeal from its decision was also dismissed. He then filed the writ petition and the High Court Division made the rule absolute. It was observed that the matter being one relating to the terms and conditions of service, the jurisdiction of the High Court Division has been excluded and that the grounds taken in the order of dismissal were such as fully cognizable by the Administrative Tribunal.

86. In Government of Bangladesh V. Member Administrative Tribunal, 6 MLR(AD)181, a police officer challenged an order of his compulsory retirement under section 9(2) of the Public Servants (Retirement) Act, 1974 before the Administrative Tribunal which upon hearing the parties set aside the order and directed for re-instatement of the officer with

benefits admissible to him. The government without challenging the said judgment before the Administrative Appellate Tribunal, moved a writ petition in the High Court Division. The High Court Division was of the view that writ petition was not maintainable in view of clause (2) of Article 117 of the constitution. This Court maintained the judgment of the High Court Division holding that there was hardly any ground to saying the correctness of the views taken by the High Court Division.

87. In Bangladesh V. A.K.M. Enayet Ullah, 11 BLC(AD)2001, the respondent challenged an order of his retirement by a writ petition before the High Court Division. The High Court Division made the rule absolute. This Court interferes with the judgment of the High Court Division holding that the respondent was a government servant and his remedy was available before the Administrative Tribunal. The order of retirement was in violation of the terms and conditions of the service, and therefore, the writ petition was not maintainable.

88. In Government of Bangladesh V. M. Salauddin Talukder, 15 BLT(AD) 60, the respondent Salauddin Talukder moved the High Court Division by a writ petition challenging his transfer order as Appraiser of Customs and also section 8 of Act XX of 2000 by which the government made different grades equivalent to each other inter- changeable and inter-transferable on the ground that his seniority was affected. The High Court Division made the rule absolute. This Court held that the classification made under section 8 of Act XX of 2000 based on distinctive characteristic of the respective class of officers could not be assailed of on the ground of violation of articles 27 and 31 of the Constitution. The post of Inspector, Appraiser, Preventive Officer and Intelligence Officer were previously third class posts and subsequently they were made second class posts, and therefore, the appointing authority has transferred the respondent as an Inspector. Accordingly, this Court held that the respondent's fundamental rights have not been violated or infringed and the writ petition was not maintainable in view of article 117(2) of the constitution. It was further held that the right to move the High Court Division under article 102(1) of the constitution is guaranteed under article 44(1) but a right of judicial review under article 102(2) is neither a fundamental right nor a guaranteed right one.

89. In Delwar Hossain Mollah V. Bangladesh, 15 BLT(AD) 124, the writ petitioner was appointed as Thana Live Stock Officer on Ad-hoc basis. He along with some other officers of the same department challenged some Rules of Bangladesh Civil Service Examination for Promotion Rules, 1986 on the ground that they were discriminatory and violative of their fundamental rights guaranteed under Articles 26, 27, 29(1) and 31 of the Constitution. The High Court Division discharged the rule.

90. In Md. Shamsul Islam Khan V. Secretary, 8 BLT(AD)64, this Court held that a government servant who intends to challenge the vires of law on the ground of violation of fundamental rights may seek remedy under article 102 of the Constitution but in all other cases his remedy lies before the Administrative Tribunal under Article 117(2) thereof. In that case writ petition filed by the appellant was found not maintainable. In TNT Board V. Md. Shafiul Alam, 8 BLT(AD) 225, this Court held that the respondent being an employee of the Telegraph and Telephone Department, a government employee, and therefore, the High Court Division lacks its jurisdiction to interfere with the action taken against him removing him from service. This Court rejected the respondent's prayer for doing complete justice on the reasoning that such prayer cannot be upheld because the High Court Division which lacks jurisdiction in the matter cannot give him such relief.

91. In Government of Bangladesh V. Abdul Halim, 13 BLT(AD) 120, this Court held that the judicial review under article 102(2) of the constitution is neither a fundamental right nor a guaranteed right. Similarly 'the judicial review of an administrative action is neither an all weather remedy nor a remedy for all wrongs but is only available when there is no other efficacious remedy' and that since there was no infringement of fundamental rights guaranteed under articles 27 and 29 of the Constitution, the writ petition was not maintainable.

92. The next question is whether in the absence of power of the Tribunal to pass any interim order, the judicial review of the administrative action is available in the High Court Division if the action complained of is found acted upon during the pendency of the case before the Tribunal. Clause (b) of section 2 of the Act defines "Tribunal" which means 'the Administrative Tribunal or Administrative Appellate Tribunal established under this Act.' The constitution of the Tribunal has been provided under section 3 as under:

> "Establishment of Administrative Tribunals-(1) The Government may, by notification in the official Gazette, establish one or more Administrative Tribunals for the purpose of this Act.
>
> (2) When more than one Administrative Tribunal is established, the Government shall, by notification in the official Gazette, specify the area within which each Tribunal shall exercise jurisdiction.
>
> (3) An administrative Tribunal shall consist of one member who shall be appointed by the Government from among persons who are or have been District Judges.
>
> (4) A member of an Administrative Tribunal shall hold office on such terms and conditions as the Government may determine."

93. In sub-section (3) it is provided that the member of the Tribunal is among persons who are or have been District Judges. The expression 'District Judge' has been described in the Civil Courts Act, 1887 as a senior most judicial officer of Civil Courts. In the classification of 'Courts' under the Civil Courts Act, clause (a) provides, 'the Court of District Judge' i.e. it is a court. Section 18 provides the ordinary jurisdiction of the District Judge which says: save as otherwise provided by an enactment for the time being in force, the jurisdiction of the District Judge.....' Here also the expression 'District Judge' is used. Again under section 21, it has been provided:

> (1) Save as aforesaid, an appeal from a decree or order of a joint District Judge shall lie –
>
> (a) to a District Judge where the value of the original suit in which.....'

94. So, according to Civil Courts Act, the office of the 'District Judge' is a Civil Court and not a *persona designata*. Similar question arose in Ruhul Amin V. District Judge, 38 DLR (AD) 172. In that case the question was whether a revision or a writ petition will lie in the High Court Division against a judgment passed by an Election Tribunal constituted under the Local Government (Union Parishad) Ordinance, 1983. In sub-section (3) of section 29, it is provided "the decision of the Election Tribunal on an election petition shall be final and shall not be called in question in or before any court". Under the law the Election Tribunal was composed of by a judicial officer. By an amendment of the Ordinance, an appellate forum was created by Ordinance XLIV of 1984. By this amendment, there is a provision to prefer an appeal to the 'District Judge' within whose jurisdiction the election petition in dispute was held and the decision of the 'District Judge' on such appeal shall be final.

95. It has been held in Ruhul Amin (supra) that "the conclusion depends upon the decision regarding the nature of District Judge's function, that is, whether the District Judge, in passing the impugned order, was exercising powers of a Court or acting as *persona designata*? .....if he was exercising the powers of a Court in deciding a dispute he was found to be subordinate to the High Court but if he was acting in his personal capacity that is, as a *persona designata*, he was not amenable to the jurisdiction of the High Court. The dispute in civil nature, judicial officers who decide civil disputes have been empowered to decide election disputes. Procedure for holding the trial of such disputes is the same as that of an Ordinary Civil Court being constituted by munsifs and empowered to decide election disputes relating to right to office, after taking evidence and hearing arguments, both on facts and law, are definitely exercising judicial powers, and not administrative powers, though it may be that they are constituted by the Election Commission, an executive authority'.

96. About the constitution of the Administrative Tribunal, section 3(3) says 'An Administrative Tribunal shall consist of one member who shall be appointed by the Government from among persons who are or have been District Judges'. Section 5 provides the constitution of the Appellate Tribunal with one Chairman and two members and 'the Chairman shall be a person who is, or has been or is qualified to be a Judge of the Supreme Court, and of two other members..... the other person who is or has been a District Judges.' Section 7 provides for the powers and procedure of the Tribunal. Sub-section (1) of section 7 provides that the Tribunal shall have "all powers of a Civil Court, while trying a suit under the Code of Civil Procedure". Sub-section (2) says "any proceedings before the Tribunal shall be deemed to be a judicial proceeding within the meaning of section 193 of the Penal Code".

97. So in all practical purposes the Tribunal or the Appellate Tribunal is exercising powers of a civil court and disposing of Civil disputes determining the terms and conditions of service, that is to say, the right to his office, privileges promotion including pension rights. The Tribunal has power to substitute the heirs in case of death of the applicant. The Tribunal has been given the power under section 7B to amend the pleadings. Again in section 8(2), it is provided that the decision of the Administrative Tribunal be binding upon the parties, that is, the government. Again in section 10A, it is provided that the Administrative Appellate Tribunal has power to punish for contempt of its authority or that of the Administrative Tribunal, as if it were the High Court Division of the Supreme Court'. The language used in Section 10A is self explanatory that the Tribunal has been created as an 'alternative' forum of the High Court Division in respect of matters mentioned above. It can also initiate execution proceeding for enforcement of the judgment. Therefore, the Tribunal or the Appellate Tribunal has all the trappings of a Civil Court.

98. Suppose a gradation list has been published by any department of the government for promotion to the next higher post. The aggrieved employee filed objection to the authority for correction of the gradation list. The authority overlooked the objection and had proceeded with the promotion process of some junior officers and proceeded with filling up all posts superseding the senior officer. He filed a petition to the Administrative Tribunal after complying with all formalities. Could it be said that the Tribunal will be powerless to pass any interim order even in such blatant violation of the law? In that event, the junior officer would become senior to him and will get all benefits if the promotion is acted upon. The disposal of the case before the Tribunal, the appeal, and then a leave petition will take years together. In the meantime, the aggrieved officer may attain superannuation. He will be deprived of his promotion, financial benefits and status. At the fag end of his career, the authority will say, since he has attained superannuation, the cause of action for filing the case

does not exist. Would the Tribunal in such eventuality be a silent spectator for technical reason and avoid its responsibility for doing justice to the aggrieved officer?

99. In some departments of the government, Rules have been framed for promotion, transfer, deputation etc. providing the criteria of transfer of an officer who is technically skilled and fit for promotion to a higher post. If any junior officer without fulfilling the criteria and technical expertise is filled up or promoted to such post, would the Tribunal shirk its responsibility on the plea of having no power. If events change during the pendency of the proceedings, the Tribunal will not be powerless to pass an interim order or an order of status quo-ante under such circumstances in exercise of its inherent powers.

100. Despite the absence of any provision empowering the Tribunal to pass any interim order, the Tribunal is not powerless since it has all the powers of a civil court and in proper cases, it may invoke its inherent power and pass interim order with a view to preventing abuse of the process of court or the mischief being caused to the applicant affecting his right to promotion or other benefit. But the Tribunal shall not pass any such interim order without affording the opposite party affected by the order an opportunity of being heard. However, in cases of emergency, which requires an interim order in order to prevent the abuse of the process and in the event of not passing such order preventing such loss, which cannot be compensated by money, the Tribunal can pass interim order as an exceptional measure for a limited period not exceeding fifteen days from the date of the order unless the said requirements have been complied with before the expiry of the period, and the Tribunal shall pass any further order upon hearing the parties.

101. As observed above, a Tribunal is constituted with a judicial Officer in the rank of a 'District Judge' and therefore, he is a 'civil court' and not 'persona designata'. While prescribing the powers of the Tribunal, it is specifically provided that 'a Tribunal shall have all the powers of civil court'. Monetary compensation cannot be measured while considering the status of an officer. An officer's dignity, status, privilege, position in office etc. cannot be measured in terms of money.

102. The inherent powers of a Tribunal reminds the Judges of what they ought to know already, namely that if the ordinary rules of procedure results in injustice in any case and there is no other remedy it can be broken for the ends of justice. This power furnishes the legislative recognition of the old age and well established principle that every Tribunal has inherent power to act *ex debito justitiae* i.e. to do that real and substantial justice and administration of which alone it exists to prevent abuse of the process of the court. This power can be exercised when no other power is available under the procedural law. Nothing can limit or affect the inherent power of a Tribunal to meet the ends of justice since it is not possible to foresee all possible circumstances that may arise to provide appropriate procedure to meet all those situation. This inherent power is recognized. All tribunals whether civil or criminal possess this power in the absence of any provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "*quando lex aliquid alique, concedit, conceditor, it sine quo res ipsa eshe non potest*" i.e. when the law gives a person anything it gives him that also without which the thing itself cannot exists.

103. It is a power of a Tribunal in addition to and complementary to the powers expressly conferred under the procedural law but this power should not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary

implication conferred by the procedural law. It cannot be exercised capriciously or arbitrarily. It should be borne in mind that authority of the Tribunal exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice the Tribunal has power to prevent such abuse. Therefore, while exercising this power the Tribunal is to consider whether the exercise of such power is expressly prohibited by any other provision and if there is no such prohibition, then the Tribunal will consider whether such power should be exercised or not in the facts of a given case. Reference in this connection is the case of Shipping Corporation of India V. Machadeo Brothers, AIR 2004 SC 2093.

104. Similar question arose in a civil review petition filed by Abdul Quader Mollah in Criminal Review Petition No.17-18 of 2013. Under the International Crimes (Tribunals) Act, 1973 there was no provision for review. The condemned prisoner filed a review petition. Learned Attorney General raised a preliminary objection about the maintainability of the review petition on the ground that in view of article 47A(2) of the constitution, the review petition is not maintainable, inasmuch as, the Act of 1973 is protected by article 47A of the constitution. According to him, a judgment which has attained finality cannot be challenged by resorting to the constitutional provisions which has been totally ousted by the Constitution (Fifteenth Amendment) Act, 2011 and the Constitution (First Amendment) Act, 1972 respectively. This court repelled the objection and held that the review petition was maintainable, inasmuch as, apart from article 105 of the constitution, this court can invoke its inherent power if it finds necessary to meet the ends of justice or to prevent the abuse the process of the court. There is inherent right to a litigant to a judicial proceeding and it requires no authority of law.

105. This Court held that "We cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If the primary function of the court is to do justice in respect of causes brought before it, then on principle, it is difficult to accede to the proposition that in the absence of specific provision the court will shut its eyes even if a wrong or an error is detected in its judgment. To say otherwise, courts are meant for doing justice and must be deemed to possess as a necessary corollary as inherent in their constitution all the powers to achieve the end and undo the wrong. It does not confer any additional jurisdiction on the court; it only recognizes the inherent powers which it already possesses". It further held that "If the law contains no specific provisions to meet the necessity of the case the inherent power of a court merely saves by expressly preserving to the court which is both a court of equity and law, to act according to justice, equity and good conscience and make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the court. It is an enabling provision by virtue of which inherent powers have been vested in a court so that it does not find itself helpless for administering justice.

106. The Tribunal can use its inherent powers to fill up the lacuna left by the legislature while enacting law or where the legislature is unable to foresee any circumstance which may arise in a particular case. There is a power to make such order as may be necessary for the ends of justice and to prevent the abuse of the process of the Tribunal. The inherent powers of a Tribunal are in addition to and complementary to the powers expressedly conferred upon it by other provisions of the Act of 1973. They are not intended to enable the Tribunal to create rights for the parties, but they are meant to enable the Tribunal to pass such orders for ends of justice as may be necessary. Considering the rights which are conferred upon the parties by substantive law to prevent abuse of the process of law, it is the duty of all Tribunals to correct the decisions which run counter to the law.'

107. The High Court Division's power of judicial review and its jurisdiction under article 102(1) cannot be overlooked. It has jurisdiction over ordinary as well as extra ordinary matters - it has a special jurisdiction, it has also testamentary, matrimonial and gorgeous jurisdiction. It can exercise original jurisdiction under the Companies Act, Admiralty and several other special statutes. Its extraordinary jurisdiction enabling it to issue prerogative writs in the nature of habeas corpus, mandamus, prohibition or writ of certiorari. The function of the Administrative Tribunal is a mode of alternative dispute resolution in respect of service matters and the object of creation of this Tribunal is to relieve the High Court Division of its burden in respect of only those matters mentioned in Article 117(1). Similar other alternative dispute resolution forums have been created in the Taxes Department, Customs Department, Labour Courts, Press Council etc. and those Tribunals have been adjudicating matters expeditiously and as a result, the High Court Division's work load is reduced to some extent. Administrative Tribunal is also created keeping the above object in view.

108. Taking into consideration the principles of law discussed above, let us now consider the individual cases on merit as to whether the writ petitions moved in the High Court Division are maintainable.

109. **Civil Appeal No.159 of 2010**

Respondent Sontosh Kumar Shaha claimed that while serving as Senior Assistant Judge, he was served with a notice on 6th September, 2000, with allegations of corruption under Rule 3(b) of the Governments servants (Discipline and Appeal) Rules, 1985. He claimed that his suspension order has not been recommended by the General Administration Committee (G.A Committee) of the High Court Division and it was not also approved by the Full Court. He claimed that he did not take any money for his personal purposes. He took leave due to illness of his mother and denied the misappropriation of taka 19,500/-. He claimed that he did not commit any offence of corruption and no charge has been proved against him. The authority having considered the inquiry report and other materials found him not guilty and discharged him of the charges leveled against him on 24th October, 2001. The writ respondent No.1, the Ministry of Law decided to drop the suspension order and communicated the Registrar of the Supreme Court, but his name did not appear in the promotion list illegally. Pursuant thereto, he made representation for his posting as Subordinate Judge. Despite that the junior officers had been promoted. The writ respondent No.2 issued the second show cause notice on 20th November, 2003, with a recommendation for his removal from the service under Rule 4(3)(c). Pursuant thereto, he filed a writ petition claiming his seniority on the basis of promotion list dated 14th March, 2000 which was duly approved by the President.

110. The issuance of second show cause notice was without lawful authority and of no legal effect. He further stated that the Chief Justice approved of the proposal for suspension and departmental proceedings without placing the matter before the G.A. Committee. Ultimately, the proposal of the writ respondent No.2 for review of the proposal of the writ petitioner was placed before the G.A. Committee and the committee disapproved the proposal. The G.A. Committee did not approve the proposal of the Chief Justice for withdrawal of the suspension order. There was also violation of rule 3(d) of the High Court Rules, Part 1, Chapter-1, and also rule 16(e) of Chapter 1, Part 1, inasmuch as, in respect of the suspension or removal, the Full Court's decision was necessary. On perusal of the pleadings, we find that the respondent did not challenge the vires of any law nor did he claim the violation of his fundamental rights. Whatever statements in respect of violation of fundamental rights were made are superficial in nature without laying any foundation.

111. The High Court Division observed that a departmental proceedings was initiated against the respondent which has been taken without approval of the G.A. committee, and the same was a mandatory provision of law and that the Chief Justice without taking the matter to the G.A. Committee had accorded the approval. On perusal of the record the High Court Division noticed that there was an endorsement at the bottom of the note-sheet with a note of the Chief Justice 'yes' and this proved that the Chief Justice accorded the approval violating rule 3(d) of the High Court Division Rules. This court perused the record and found that this observation was correct but that itself is not a ground for interference. It should be borne in mind that in urgent matters, sometimes the Chief Justice gives approval in respect of some proposals without placing the matter before the G.A. committee, because the calling such meeting takes time and in urgent matters the Chief Justice accords permission subject to the approval of the committee later on. In this case inadvertently the matter has not been placed before the G.A. Committee.

112. In order to avoid more harm to the judiciary, the Chief Justice takes such decision. The Chief Justice being the head of the judiciary is respected by the Judges and his opinion with regard to the superintendence and control over the lower judiciary has primacy and is being honoured by the Judges of the committee. This is a practice being followed by this Court and non-approval of the decision of the Chief Justice was merely an irregularity and not an illegality and this will not vitiate the decision. Suppose, the Chief Justice noticed that some members of the G.A. Committee are unable to attend the court, but for that reason the Chief Justice cannot sit idle leaving urgent and emergency matters pending. The functions of the Supreme Court should not be kept in abeyance due to this technical ground.

113. The High Court Division held that the Ministry of Law having found the respondent not guilty in respect of the allegations made in Case No.4 of 2000, wrote a letter to the Registrar for exonerating him of the departmental proceedings. It renewed its opinion on two other occasions subsequently but the Supreme Court without consenting to the proposal directed the concerned Ministry to issue second show cause notice on 20th November, 2003 and that the order of suspension of the respondent was made in violation of rule 3(d) of the High Court Division Rules. As observed above, this is a mere irregularity and this cannot be a ground for interference by the High Court Division. The High Court Division further held that as per Rules, any decision relating to the terms and conditions of service as a judicial officer should be placed before the Full Court but in case of the respondent, this has not been followed; that the Ministry of Law upon perusal of the inquiry reports and other materials was convinced that the respondent should be exonerated from both the charges; that there was total violation of rule 16 of the High Court Division Rules and the respondent was victimized due to unwitting decision of the G.A. committee; that the G.A. Committee illegally considered the circular of the High Court Division under memo dated 13th April, 2003, which has no manner of application in case of the respondent and that any order passed by the Ministry in accordance with Article 116 of the constitution shall have the force of law.

114. The superintendence and control over all courts and tribunals subordinate to it is upon the High Court Division as per article 109 of the constitution. The Supreme Court has its own system and machinery to evaluate the conduct, discipline, performance of all judicial officers working in the subordinate courts and tribunals. Firstly, through the judgments pronounced by them which ultimately come to the High Court Division for judicial review. Secondly, from the annual confidential reports being prepared in accordance with Rules. Finally, through inspections made from time to time by the Judges of the High Court Division

as per direction of the Chief Justice. This system is being followed right from 1861 when the High Courts were established in this sub-continent under the High Courts Act, 1861. Whenever, any recommendation, proposal or opinion regarding the terms and conditions of service of any judicial officer is made by the Supreme Court, this recommendation is being honoured by the Executive government without further inquiry because the Executive does not have such machinery or system to evaluate the conduct and performance of the judicial officers.

115. If the superintendence and control of the subordinate judiciary is left in the hands of Executive, the independence of judiciary will be in question. From the time of the separation of the judiciary from the Executive, it is the Supreme Court under whose supervision the subordinate judicial officers are working and it supervises its administration and controls the conduct of judicial officers. There cannot be any doubt about it. The lower judiciary cannot be independent if its superintendence and control over the judicial officers remains with the Executive. The Executive is also conscious about that, and all the time it represents that it does not interfere with the administration of justice.

116. If articles 116, 116A are read along with article 109, it will be manifest that it is the Supreme Court which has the exclusive power to supervise and control the terms and conditions of service of the subordinate judicial officers. Article 116 does not control article 109, rather if these two provisions are placed in juxtaposition, it will be clear that the superintendence and control of the officers of the lower judiciary remains with the Supreme Court. At any event, in order to remove any doubt this Court in Khandker Delwar Hossain V. Bangladesh Italian Marble works Ltd., BLD 2010(AD) 1 (special Issue) popularly know as 'Constitution 5th Amendment case' observed:

> "However we are of the view that the words, 'but we find no provision in the Constitution which curtails, demolishes or otherwise abridges this independence' do not depict the actual picture because unless Articles 115 and 116 are restored to their original position, independence of judiciary will not be fully achieved."

117. Despite such observation the government has not restored original article 116. It is hoped that the original article 116 will be restored with a view to avoid any controversy in future. This is healthy for the proper administration of justice. Any opinion given by the Supreme Court regarding the terms and conditions of service of any judicial officer should be respected by the Executive and its opinion cannot be ignored. There cannot be any dual administration in the administration of justice and the same will not be healthy for the administration of justice. If the views taken by the High Court Division is accepted, there will be chaos and confusion in the administration of justice. If we look at the scheme of the constitution, there will be no doubt that the opinion of the Supreme Court regarding the terms and conditions of the service of the lower judicial officers would prevail. There is no doubt about it.

118. The High Court Division further held that the writ petition is maintainable and in this connection, it has noticed the case of Shahida Khatun V. Bangladesh, 3 BLC (AD) 155 and Abul Basher V. Bangladesh, 1 BLC (AD) 77. In respect of Shahida Khatun, we have expressed our opinion earlier. In Shahida Khatun the Administrative Appellate Tribunal was not constituted properly when the impugned judgment was delivered, inasmuch as, it was signed by two members, and therefore, a question arose as to whether the decision of the Appellate Tribunal was *coram non judice*. This Court held that the Tribunal was properly

constituted and in the midst of the hearing, one member departs temporarily and in his absence two other members signed the judgment and thereby it has committed no illegality. The High Court Division possibly wants to mean that since the suspension order of the respondent not having been approved by the G.A. Committee, and the decision having not been placed before the Full Court, the suspension order and the initiation of the proceedings is *coram non judice*. As observed above, in case of emergency the Chief Justice sometimes passes orders relating to the terms and conditions of the service and due to unavoidable situation, the matter had not been placed before the Committee.

119. In this case this court clearly observed that except challenging the vires of law or violation of fundamental rights, judicial review of a decision of authority relating to the terms and conditions of service under article 102(1) is not permissible. None of the above conditions is available in this case and therefore, the writ petition is not maintainable. In respect of Abul Bashar, the writ petition was summarily rejected on the ground that the order impugned in writ petition cannot be said to be malafide or passed for collateral purpose and that no discrimination has taken place at all. In respect of case no.3 of 2000 since no inquiry report is available with the record, we direct the concerned Ministry to appoint an inquiry officer with the consultation of the G.A. Committee and complete the inquiry proceedings within two months from date, since the case is very old one. So this decision does not have any help for the respondent.

120. **Civil Appeal No.131 of 2012**

This appeal arises out of judgment in Writ Petition No.6967 of 2009. It was a public interest litigation filed by the Bangladesh Stenographers Association. Its claim is that some Stenographers of the Appellate Tribunal and the Labour Appellate Tribunal have formed the association. By notification dated 17th May, 1978, the government allowed special allowance to the Stenographers of the Secretariate. One Mir Mohammad Moinuddin, a Personal Assistant-cum-Stenographer filed Writ Petition No.1922 of 1990. Similarly one Md. Shamsul Huq, a Personal Assistant-cum-Stenographer of the Supreme Court also filed Writ Petition No.2256 of 2002 for raising their status and the rules were made absolute. The Stenographers who formed the Bangladesh Stenographers Association (BCS) were being discriminated against, inasmuch as, they were not given status equal to those given to the Stenographers of the Secretariate. Therefore, the refusal to treat the members of the writ petitioners Samity is discriminatory. The High Court Division observed that the Stenographers who were initially appointed on the same pay scale and attached to the Secretaries, Joint Secretaries and Deputy Secretaries of different Ministries were redesignated as Personal Officers and subsequently their posts have been upgraded as class-2 Officers; that the P.A.-cum-Stenographers of the Judges of the High Court Division have been accorded to the similar privilege and that the refusal of the members of writ petitioners Samity is discriminatory. The High Court Division made the rule absolute mainly relying upon some decisions of the Indian jurisdiction.

121. The High Court Division has not at all considered about the maintainability of the writ petition. On the principles discussed above, the writ petitioners' petition was barred under Article 117(2). No question of violation of fundamental rights or any statutory provision was challenged. Discrimination should not be based on a mere possibility of a better classification. The court should look at whether there is some difference which bears a just reasonably to the object of legislation. Mere differentiation in equality or treatment or inequality or burden does not amount to discrimination within the inhibition of the equal protection clause. Suppose an army personnel who has joined the service knowing that he may sacrifice his life during external interference. An employee on the same scale of

different department cannot claim equal opportunity and status with the army officer. Equal opportunity should be given to those who stand on the same footing in the same department. An employee of different department cannot be equated with another employee of another department only because his salary is equal with the other department. The High Court Division has totally overlooked this aspect of the matter.

122. **Civil Appeal No.132 of 2012**

This appeal arises out of a judgment in Writ Petition No.1992 of 2010. Two writ petitioners challenged the letter under memo dated 13th September, 1995, issued by the Ministry of Establishment refusing to upgrade their scale and status. They were appointed as Typist and Upper Division in the Ministry of Food Department. Their claim is that the Ministry has upgraded the Personal Officers of Secretariates. The Supreme Court also upgraded its Stenographers, and therefore, they are also entitled to equal protection of law and status. There was, therefore, discrimination regarding their status and pay scale.

123. The writ petitioners did not plead any violation of fundamental rights in their writ petition nor did they challenge vires of any law. The High Court Division made the rule absolute mainly relying upon a decision of this Court in respect of some employees of the High Court Division. Though the High Court Division observed that there were infringement of writ petitioners' fundamental rights, it has assigned no reason in respect of infringement of such rights. Secondly, as observed above, there was no sufficient pleadings on the question of infringement of fundamental rights. The High Court Division observed that there was violation of articles 27 and 29 of the constitution but mere observation that there was violation of these provisions will not suffice. In the absence of proper pleadings and laying foundation, the writ petition is barred under clause (2) of Article 117.

124. **Civil Appeal No.133 of 2012**

In these appeals, 57 employees who are Upper Division Assistants of the Local Government Engineering Department jointly filed a writ petition seeking a direction to grant second class gazetted status with other benefits. In their petition also they made similar averments made in other writ petitions. They did not make sufficient pleadings as regards violation of fundamental rights except that due to rejection of their prayer, it was claimed, they had been deprived of their rights guaranteed under article 29 of the constitution. The High Court Division in a very concise judgment made the rule absolute relying upon some decisions of this Court in respect of the Personal Assistant-cum- Stenographers of the High Court Division and another writ petition. It has not at all discussed as regards the maintainability of the writ petition and totally ignored the decisions of this court in respect of maintainability of the writ petition.

125. **Civil Appeal No.134 of 2012**

This appeal arises out of a judgment of the High Court Division made in Writ Petition No.1309 of 2010 in which 93 writ petitioners who were in the police service of different wings such as Special Branch, Upper Division Assistants etc. Their claim is that while the employees of the Secretariate and the Supreme Court of Bangladesh in the same rank have been given status and salary, they have been discriminated under articles 27 and 29 of the constitution. They have not also pleaded anything on the question of alleged violation of their fundamental rights by the administrative action of the authority. The High Court Division in a very precise judgment made the rule absolute mainly relying upon the case of Bangladesh V. Md. Shamsul Huq, 59 DLR(AD)54, in respect of the Personal Officers of the Secretariate. This case is not at all applicable as discussed above.

126. **Civil Appeal No.128 of 2015**

In this appeal four writ petitioners who were Lower Division Assistants and Typists of the Directorate of Inspection and Audit Ministry of Education challenged the inaction of the authority by a writ petition. They also made similar averments with other writ petitions as mentioned above. They did not plead the violation of any fundamental rights though they sought for enforcement of fundamental rights guaranteed under articles 27 and 29 of the constitution. The High Court Division in a very slip-shod judgment made the rule absolute mainly on the reasoning that the employees of Directorate of Inspection of Audit, Ministry of Education are regulated by the terms and conditions recruitment Rules, 1984 but they have been deprived of their rights and that the authority have not amended the recruitment Rules illegally. In this case also the High Court Division has not made any finding as regards the maintainability of the writ petition.

127. **Civil Appeal No.119 of 2008**

One Ms. Sabiha Ahmed moved the High Court Division challenging an order under memo dated 11th January, 2000 promoting 15 officers junior to her. Her claim is that she worked in the Directorate of Women's and Children's Affairs for 23 years and posted with the National Women's Training and Development Academy as a teacher in non formal education. In 1982 she was transferred to the Women's Cell in the Ministry of Social Welfare. In due course, she was absorbed as Probation Officer and was posed in the head office of the Directorate of Women's Affairs. She was not given promotion to the post of District Women Affairs Officer although she had rendered service for more than 15 years. In the seniority list published on 30th January, 1999, she was shown at serial No.15 below some junior officers. Subsequently, she was promoted to the post of Assistant Director but on the same date by an another notification dated 11th September, 2000, fifteen officers were promoted to the post of District Women Affairs Officers, although they were all working with her in the same rank and status.

128. The High Court Division upon hearing the parties made the rule absolute. The High Court Division declared the writ petitioner to be the District Women Affairs Officers on and from 11th September, 2000, with attended salary and benefits. The High Court Division entered into the merit of the case and made the above direction. In the writ petition the writ petitioner did not raise any constitutional point of violation of fundamental rights or on the question of discrimination. It is simply stated in the form of submission in paragraph 16 "two impugned orders are both discriminatory, illegal bad in law, malafide, made for collateral purposes and cannot be sustained in law". She made statements of the effect that the authority arbitrarily promoted junior officers with malafide motive. No specific pleadings in that regard have been made. Leave was granted to consider whether "the High Court Division failed to appreciate that the matter relates to the terms and condition of service of the writ petitioner who is a person in the service of the Republic" and as such, the writ petition is not maintainable. We have already observed that a government servant cannot maintain a writ petition in presence of Administrative Tribunal relating to the terms and conditions of service. In the absence of challenging the vires of law, the writ petition is not maintainable.

129. **Civil Petition for Leave to Appeal No.703 of 2014**

17 Upper Division Assistants of the Board of Intermediate and Secondary Education, Barisal sought a direction to upgrade their scale and status similarly with those employees of Bangladesh Secretariate and Supreme Court. They stated that their fundamental rights have been violated by reason of not giving their status and scale. There was not at all pleadings in

support of the claim. The High Court Division made the rule absolute considering its other earlier decisions. According to it the writ petitioners, they being employees of public authority are entitled to the same benefit and uniform terms and conditions of the service. In view of the discussions to be made below, the writ petition is not maintainable.

130. **Civil Petition for Leave to Appeal No.2026 of 2015**

Delay of 322 days is condoned. In this petition 23 Assistant Engineers of the Public Works Department sought a direction to give selection grade pursuant to the provisions of Services (Reorganizations and Conditions) Act, 1975 on the ground that some cadres of the office of the Prime Minister got 50% selection grade and that in respect of BCS (Agriculture Cadre) got higher status pursuant to judgment in a writ petition. The High Court Division made the rule absolute on the reasonings that there was pick and choose policy by the government making discrimination between the cadres and government services and that the said discrimination should be removed. The doctrine of discrimination is not applicable to them because they do not work in the same department.

131. **Civil Petition for Leave to Appeal No.2295 of 2010**

An Upper Division Assistant of Customs, Exercise and VAT Appellate Tribunal sought a direction to convert his post to Administrative Officer on the ground that some staff of the Bangladesh Secretariate have been given higher status and scale and thereby he has been discriminated. The High Court Division made the rule absolute on the reasoning that some employees of the Republic have been given the status while the writ petitioner's claim was denied and thereby there was discrimination and violation of fundamental rights under article 27. This judgment is also hit by the above principles of law discussed above.

132. **Civil Petition for Leave to Appeal No.955 of 2011**

Delay of 158 days is condoned. In this petition 49 Upper Division Assistants of Police Department sought a direction to provide the scale, pay and other facilities as gazetted status similar to those given to the Bangladesh Secretariate. They also made similar statements and claimed that their fundamental rights guaranteed under article 27 have been denied and thereby there was discrimination. The High Court Division following the judgments in earlier writ petitions made the rule absolute.

133. **Civil Petition for Leave to Appeal No.1854 of 2011**

49 Upper Division Assistants to the Police Head Quarter sought a direction to treat them gazetted status in the similar manner of the Upper Division Assistants of the Secretariate. The substance of their claim is altogether similar to those made earlier. The High Court Division made the rule absolute following its earlier judgment in four writ petitions on the reasoning that there was violation of articles 27 and 29 of the constitution.

134. **Civil Petition for Leave to Appeal No.2539 of 2012**

Delay of 322 days is condoned. In this petitions 143 Upper Division Assistants of the Special Branch of Police of different Districts sought enforcement of fundamental rights under articles 27 and 31 of the constitution on the ground that for refixation of their scale and status as gazetted position with those situated in the similar status of the Bangladesh Secretariate. The High Court Division made the rule absolute following its earlier decisions in respect of P.A.-cum-Stenographers of the Secretariate and other employees as mentioned above. On the similar principles of law this writ petition is not maintainable.

135. **Civil Petition for Leave to Appeal No.1782 of 2015**

Delay of 439 days is condoned. In this matter, 23 Upper Divisions Assistants of Bangladesh Public Administration, Savar, sought a direction to give gazetted status similar to those provided with Upper Division status of the Assistants of the Bangladesh Secretariate. The High Court Division made the rule absolute following the case of its earlier judgment and some cases of this Division in 59 DLR(A)54 and 12 BLC(AD)142 on the reasoning that the writ petitioners have been discriminated.

136. **Civil Petition for Leave to Appeal No.1415 of 2011**

44 Upper Division Assistants of the Police Department of different districts sought direction to grant gazetted status- similar to those provided to the Upper Division status of Bangladesh Secretariate. The High Court Division following its decision in writ petition Nos.5608 of 2010 and 5670 of 2010, made the rule absolute on the reasoning that there was violation of article 27 of the constitution. There was no sufficient pleading in support of the claim.

137. **Civil Petition for Leave to Appeal No.1416 of 2011**

23 Upper Division Assistants of the office of Superintendent of Police of different districts sought a direction to give them higher rank and status similar to those given to the Upper Division Assistants of Bangladesh Secretariate. The High Court Division following its earlier judgment in Writ Petition Nos.5670 of 2010, 2256 of 2002, 7456 of 2003, 2256 of 2002 and 7478 of 2002 made the rules absolute on the reasoning that identical matters have already been disposed of and that there was infringement of articles 27 and 29 of the constitution. There was no pleading in support of the claim.

138. **Civil Petition for Leave to Appeal No.1417 of 2011**

32 Accountants of the office of Superintendent of Police of different districts sought a direction to give them gazetted status similar to those given to the Lower Division Assistants and Upper Division Assistants of Bangladesh Secretariate. The High Court Division following the similar set of earlier judgments made the rule absolute. No case has been made out in the writ petition.

139. **Civil Petition for Leave to Appeal No.1418 of 2011**

23 Upper Division Assistants of Prisons Directorate sought a direction to give them gazetted status similar to those given to Upper Division Assistants of the Bangladesh Secretariate. The High Court Division made the rule absolute following its earlier decisions in the above writ petitions on the ground that there has been infringement of their fundamental rights guaranteed under article 27 of the constitution. There is no pleading sufficient for giving such relief.

140. **Civil Petition for Leave to Appeal No.1419 of 2011**

25 employees of Police Department working at Khulna and Chittagong sought direction to grant higher scale and other facilities including gazetted status given to those Upper Division Assistants of the Bangladesh Secretariate. In this case also the High Court Division following its earlier judgments gave the direction as prayed for. No case has at all been made out.

141. **Civil Petition for Leave to Appeal No.1420 of 2011**

21 head Assistant-cum-Accountants of Police Department working in different districts sought a direction to provide gazetted status and scale similar to those given to the Upper

Division Assistant of the Secretariate. The High Court Divisions in a stereo type judgment following its earlier decisions gave the status and benefits as prayed for. There is no sufficient pleading.

142. **Civil Petition for Leave to Appeal No.1421 of 2011**

One employee of Khulna Metropolitan Police sought a direction to grant him higher scale and status of Accounts Officer similar to those given to Upper Division Assistants of the Bangladesh Secretariate. The High Court Division in a verbatim judgment gave the direction as prayer for. In this case also, there is no sufficient pleading.

143. **Civil Petition for Leave to Appeal Nos.644 and 645 of 2015**

Delay in filing of these two petitions is condoned. In these petitions some employees of the High Court Division and the Appellate Division of the Supreme Court of Bangladesh sought direction to grant selection grade, pay and status similar to those given to other officers of the Supreme Court. It is stated in the applications that the Assistant Bench Officers were promoted to the post of Bench Officers (grade 8) as 1st Class Gazetted Officers on and from 1st December, 2003 and they were also upgraded. It is further stated that the Supreme Court by notification under memo dated 11th December, 2011, 19th June, 2012, 31st December, 2012 granted selection grade and pay scale in grade No.7 upgrading from grade No.8 instead of grade No.6 in respect of Bench Officers but no such notification was made in respect of the writ petitioners, and thereby, they were discriminated in granting them selection grade of two tiers from grade No.8 to grade No.6 of the National Pay Scale, 2005.

144. The High Court Division made the rules absolute and directed the writ-respondents to grant them selection grade and pay scale to the writ-petitioners and others standing on the same footing in grade-6, that is, Tk.11000-475x14-17650 as per National Pay Scale, 2005 and Tk.18500-800x14-29700 as per National Pay Scale, 2009 from the date of completion of four years in service as Bench Officers in Class-1 post in the High Court Division with all arrears upon modification of the orders under notification dated 11th December, 2011 circulated under Memo dated 11th December, 2011, notification dated 19th June, 2012, 19th June, 2012 and notification dated 31st December, 2012, 31st December, 2012 and other similar notifications circulated in this regard granting selection grade within 30 (thirty days) from the date of receipt of the judgment.

145. In respect of the above petitions Particularly in C.P. Nos.644 and 645 of 2015, the Bench Readers and Bench Officers were upgraded to 1st Class Gazetted Officers (grade No.8) on and from 23rd February, 2000 and 1st December, 2003 respectively, but the writ petitioners' scale was not upgraded to grade No.6 as selection grade scale, although they have already completed four years service as Bench Readers 1st Class, and therefore, they are entitled to selection grade of two tiers from 8th grade to 6th grade of the National Pay Scale, 1997 (for writ petitioner No.1) and National Pay Scale, 2005 (for writ petitioner Nos.2-4). They further stated that the Supreme Court by notification dated 10th October, 2013, granted selection grade to writ petitioner No.1 and others in grade No.7 but after completion of four years in service, the Bench Readers were granted selection grade scale in grade No.7 instead of grade No.6, and thereby, the writ petitioners were denied such benefit, and therefore, there was discrimination in considering the case of the writ petitioners.

146. The High Court Division made the Rule absolute and directed the writ-respondents to grant them selection grade and pay scale in grade-6, that is, Tk.7200-260x14-10840 as per National Pay Scale, 1997 and Tk.18500-800x14-29700 as per National Pay Scale, 2009 to

writ-petitioner No.1 and Tk.11000-475x14-17650 as per National Pay Scale, 2005 and Tk.18500-800x14-29700 as per National Pay Scale, 2009 to writ-petitioner Nos.2-4 from the date of completion of four years service as Bench Readers of the Appellate Division of the Supreme Court of Bangladesh with all arrears upon modification of the notification dated 10th October, 2013 within 30 (thirty days) from the date of receipt of this judgment. It was directed that the judgment shall be applicable to other Bench Officers and Bench Readers, if any, who are placed in the same status with those petitioners.

147. These petitions are quite distinguishable from the other cases. The writ petitioners invoked their fundamental rights as they were discriminated by the same authority and they are working in the same court. More so, the works of Bench Readers of the Appellate Division and Assistant Bench officers of the High Court Division are completely different. The Bench Readers are appointed from among the Bench Officers/Assistant Bench Officers of the High Court Division and if the Bench Officers get status higher than them, certainly they will be discriminated. It is to be noted that the working hours of these officers is from 9 a.m. to 5 p.m. but they used to work till 8/9 p.m. every day. In respect of Assistant Bench Officers, the very nature of their job is painstaking. They work almost 12/14 hours a day and even on holidays because they are attached to the Judges. During the vacation as well, they cannot enjoy the holidays as they remain busy with the finalization of judgments. The High Court Division has rightly exercised its jurisdiction and we find no infirmity to interfere with the judgment.

148. **Civil Petition for Leave to Appeal Nos.1445, 1768, 2133-2134 and 2320 of 2015**

Five writ petitioners, the Head Assistants of Public Health and Engineering Department, Lakshmipur sought a direction to refix their pay scale and granting gazetted status. They did not make any pleading in respect of violation of its fundamental rights. The High Court Division in an elaborate judgment following the cases of 52 DLR(AD) 120, 1 BLC(AD)44, 44 DLR(AD)111, 9 MLR(AD) 105, 32 DLR(AD) 67 and 46 DLR(AD) 19 discharged the rules on the ground that the writ petitions are not maintainable along with rule issued Writ Petition Nos.8706 of 2009, 8707 of 2009, 7272 of 2009 and 4544 of 2010. This judgment according to us is in conformity of the views taken by this Court.

149. On an overall consideration of the writ petitions, the pleadings, the impugned judgments, we are shocked to note that in none of the petitions except leave petitions Nos.644 and 645 of 2015, the writ petitioners made no sufficient pleadings in support of their alleged violation of fundamental rights which compelled them to seek judicial review of the actions of the authorities. In these petitions they made out a case of discrimination. All these petitions were drawn up in a stereo type manner and except in Writ Petition Nos.6263 of 2014, 6264 of 2014. The High Court Division delivered judgments without looking at the pleadings, the question of law involved in those petitions. We have held earlier that a public servant or an employee of the Statutory Corporation can maintain a writ petition if he challenges the vires of a statute or if his fundamental rights are violated and not otherwise. There are consistent views in this regard of this Court but the High Court Division has totally ignored the statements of law settled by this Court.

150. In respect of violation of fundamental rights, there must be sufficient pleadings in support of the claim that the applicant's cherished rights enshrined in the constitution have been denied by the administrative action for which he seeks protection of his rights and that he will not get the remedy in the Tribunal. It will not suffice if he simply makes a superficial statement of discrimination and/or violation of fundamental rights. A writ petition is decided

on the basis of affidavit evidence and in disposing of such petition, the Law of Evidence Act is not applicable. When he will come with a specific case with sufficient pleadings, there will be scope for contravention of those facts by the authority and then the High Court Division can decide whether those rights claimed by the aggrieved persons have been violated. The applicant cannot raise any disputed fact. If on admitted facts the High Court Division can arrive at the conclusion that the fundamental rights of the litigant have been utterly violated, then certainly it cannot sit as a silent spectator to shirk its responsibility but it is only in rarest of the rare cases the High Court Division shall exercise its power.

151. The constitution being the Supreme Law of the country, if the violation of fundamental rights alleged by the claimant is mixed up with disputed facts and law, then certainly the jurisdiction of the High Court Division to entertain such petition will be ousted and the remedy of the applicant is with the Tribunal. It should be borne in mind that the Tribunal has been created as an alternative forum of the adjudication of service matters only with a view to reducing the backlog of the High Court Division and the constitution has also provides such provision authorizing the Parliament to create alternative institutional mechanism. Alternative Tribunals have been set up in almost all over the countries of the globe and those Tribunals have been working effectively and satisfactorily. If the High Court Division usurps those powers in every case, the provisions contained in article 117(2) will be nugatory. The theory of alternative institutional mechanism has to be recognized and encouraged by the High Court Division.

152. If the High Court Division should not shirk its responsibility of superintendence and control over all Tribunals subordinate to it provided in article 109 of the constitution, it should allow those Tribunals to work in accordance with law otherwise there will create chaos and confusion in the administration of justice. These Tribunals have been created in exercise of the powers provided in the Constitution. It is only constitutional courts alone are competent to exercise power of judicial review to pronounce the constitutional validity of statutory provisions and rules and not otherwise. Our Fore Fathers had incorporated special provisions to ensure that it would be immune from any pressure from the Executive and such powers have not been invested to the lower Tribunals. This precious power shall not be exploited merely on the asking by a litigant lest ends of justice will be defeated. The constitution has provided provisions divesting powers to the traditional courts of a considerable question of judicial works and this includes tax matters, customs matters, industrial and a labour disputes, service matters, petty civil and criminal matters. The Supreme Court being the guardian of the constitution must safeguard the constitution and its mandate. If the Supreme Court itself violates the mandates of the constitution who else will preserve and protect the constitution.

153. Learned Attorney General has placed some Rules of the respective departments of the writ petitioners and submits that since almost all the writ petitioners' services are being governed by their respective service Rules, the writ petitions are not maintainable.

154. We noticed that except one department the government has promulgated Rules in respect of the terms and conditions of the Officers and Employees (Directorate of Inspection and Audit, Ministry of Education Recruitment) Rules, 1984. In this Rules, the procedure for appointment by the direct recruitment and promotions has been provided. The police department have also promulgated f¢mn ¢hi¡N (ee-পুলিশ কর্মকর্তা কর্মচারী) নিয়োগ বিধিমালা, 1996 by gazette notification dated 1st January, 1997. In these Rules, the requisite qualification, the mode of appointment of direct recruits, the departmental promotion and the

promotion to next higher posts have been elaborately mentioned. In this department the post of Senior Assistant is four steps lower than the Administrative Officer intervened by Accounts Officer, Statistics Officer, Head Assistant, Office Super and Typist. If the Head Assistant is upgraded to the rank of Administrative Officer, there will be chaos and confusion in the administrative set up and the other staff will be prejudiced.

155. In the Department of Special Branch, the post of Administrative Officer is a post on promotion from Accounts Officer and Head Assistant is two step lower. If the Head Assistant is promoted/upgraded to the post of the Accounts Officers and the reporters will be prejudiced. Similarly, the Upper Assistants and Accounts Assistants are of the same grade and their status is serial No.7. If these Account Assistants are upgraded to Administrative Officer, then 5 senior posts such as Account Officers, Reporter, Head Assistant, Typist and Librarian will be affected. In Crime Detection Department, the Administrative Officer is at serial No.5 and Office Superintendent/Head Assistant is at serial No.6 and Upper Division Assistant is at serial No.8. If Upper Division Assistant is upgraded to Administrative Officer, two senior officers to them will be prejudiced. In the office of Divisional Deputy Inspector General, (Inspection), it has separate service Rules. In this Department there is no post of Administrative Officer. Now if a Upper Division Assistant or Account officer or Accountant, who ranks at serial No.3 is promoted to the post of Administrative Officer in the similar rank to the Special Department, there will create anomaly in this Department.

156. Similarly in the District Superintendent of Police Department, there is no post like Administrative Officer. If the Head Assistant is upgraded to the post of Administrative Officer, there is no clarification whether such Head Assistant will be upgraded above Medical Officer who is at serial No.1. Similarly the Upper Assistant/Head mohorar, a Reader are at serial No.6. If this Upper Assistant is upgraded to Administrative Officer, there will create more anarchy in the administration.

157. In the Dhaka Metropolitan Police, the post of Administrative Officer is at serial No.1, the Upper Assistant is at serial No.2 and the Head Assistant/head mohora/CA are at serial No.4. If the Head Assistant is upgraded to Administrative Officer, certainly the other two employees who are above their rank and status will be prejudiced. There are criteria for promotion to the higher posts of Administrative Officer. If these criteria are not fulfilled and the Upper Division Assistants are upgraded to the rank of Administrative Officer, the service Rules will be violated. In respect of Chittagong Metropolitan Police also similar provisions for the posts and status. In Khulna Metropolitan Police, the post of Upper Assistant/Head mohora/accountant/reader/CA are in the same rank at serial No.5 and above them is the post of Head Assistant and the Administrative Officer is two step higher than Head Assistant. So, the Khulna Metropolitan Police Service Rules are completely different from Chittagong Metropolitan Police.

158. In respect of Rajshahi Metropolitan Police, the post Head Assistant is one step lower than the Khulna Metropolitan Police. If Head Assistant post is upgraded to Administrative Officer, then the Accounts Officer will be prejudiced and then if the Upper Division Assistant is upgraded to Administrative Officer, the other Upper Employees holding the higher posts will be prejudiced. In the Transmission Department, there is no post like Administrative Officer and Head Assistant are at serial No.1. The post-Upper Assistant/Accountant and Casher are at serial No.3. The post of Head Assistant must have three years experience in the feeder post and Upper Assistant must have five years experience in the feeder post. So, there will create anomaly if this Upper Assistant is upgraded with the Administrative Department.

In Railway Police, there is no post like Administrative Officer and Head Assistant is at serial No.1. Their rank and status is similar to Communication Department. In the Armed Police Battalion, there is no post like Administrative Officer and the post of typist is at serial No.1 and Head Assistant is two step lower than typist. There will also create anomaly if this Upper Assistant is upgraded above typist.

159. In respect of Police Academy, Sarada, there is no post of Administrative Officer and Senior Medical Officer is heading the seniority. A Senior Head Assistant is at serial No.7. If he is upgraded in the rank of Administrative Officer, how he will be accommodated is not clear because if he is accommodated then he will be senior to Medical Officer. The Head Assistant/Upper Assistant and Accountant are at serial No.9. If they are upgraded then they have to supersede eight senior posts. In Local Police Training School, Head Assistant is at serial No.3 and Upper Assistant/Accountant is at serial No.4. If these two groups are upgraded they will be put above the Medical Officer. There is no post of Administrative Officer in this department. In the police hospital, the Superintendent (Medical Officer) is heading the post and Head Assistant-cum-Accountant is at serial No.4 and Office Assistant-cum-Typist is at serial No.6. There is no post like Administrative Officer. If these posts are upgraded as Special Officer, then they must be placed above Superintendents.

160. In the Food Department, there is separate service Rules under the name the Non Cadre Gazetted Officers and Non-gazetted Employees (Director General of Food) Recruitment Rules, 1983. In these Rules, the provisions for recruitment, promotions, scales, everything have been clearly mentioned in the schedule. Head Assistant/Head Assistant-cum-Accountant/ Superintendent are at serial No.9. UDA/LDA cum typist/stenographer/steno typist are at serial No.11. If these two groups are upgraded, since there is no post of Administrative Officer, they must have to be placed at 8 or 9 grade. Certainly they will be placed above the Chemist, which post is senior most and the post has been yearmarked for promotion from Assistant Chemist with five years experience.

161. In the Public administration, there is a service Rules under the name বাংলাদেশ সচিবালয় (ক্যাডার বর্হিভুত গেজেটেট কর্মকর্তা এবং নন গেজেটেট কর্মচারী নিয়োগ বিধিমালা), 2014. Under these Rules, different grades have been amalgamated in rule 6(Gha) and the post of Administrative Officer has been abolished. According to this Rules, the Deputy Secretary (Non-cadre) is at serial No.1, Senior Assistant Secretary (Non-cadre)is at serial No.2, Assistant Secretary (non-cadre) is at serial No.3 and there are different criteria for promotion of those posts from the lower post. These Rules have been promulgated by repealing the previous Rules namely বাংলাদেশ সচিবালয় (ক্যাডার বর্হিভূত গেজেটেড এবং নন গেজেটেট কর্মকর্তা কর্মচারী নিয়োগ বিধিমালা), 2006.

162. Similarly in the Supreme Court, there is a service Rules under the name বাংলাদেশ সুপ্রীম কোর্ট হাইকোর্ট বিভাগ (কর্মচারী নিয়োগ বিধিমালা) 1987. Except one department there are separate service Rules in respect of the writ petitioners regulating the procedure for recruitment, promotion and other related matters. The recruitment, promotion, status and other benefits are being regulated by the respective service Rules of the Departments. Thus it will not be fair to equate the Senior Assistants of the Secretariate with those working in the Supreme Court of Bangladesh, Police Department, Local Government and Engineering Department, Customs Department, various Tribunals, Appellate Tribunals etc. In some departments there are posts of Administrative Officers and alike posts, the post of Administrative Officers has been abolished in the Department and new Rules have been framed deleting those posts. Under such circumstances, if Senior Assistants or Upper

Division Clerks or Stenographers or typists are equated with those posts giving them similar status and rank, there is no use of framing Rules by different Departments. These Rules have been framed by the concerned Departments for the purpose of recruitment, promotion and administration of their employees. One service Rules can not regulate the employees of other Department. Similarly the criteria for appointment of each Department and promotion are completely different.

163. The expression equal protection of law or equality before law has to be interpreted in its absolute sense. All persons are equal in all respect disregarding different conditions and circumstances in which they are placed. Equal protection of law means all persons are equal in all cases. It means the persons similarly situated should be treated equally. The term equality is a dynamic concept with many aspect and diminution and it cannot be confined within traditional and doctrinaire limits. Indian Supreme Court taking into consideration article 14 of the constitution held that article 14 does not forbid reasonable classification for the purposes of legislation. There can be permissible classification provided two conditions are satisfied namely; (a) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together for other left out of the group; (b) differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis. There cannot be any question of discrimination on the ground of some acts providing for different set up and each must be taken to be a class by itself. The legislature has a right to make such provision for its constitution as it thinks fit subject always to the provisions of the constitution. References in this connection are EP Royappa V. TN, AIR 1974 SC 555, Maleka Gandhi V. India, AIR 1970 SC 597, Romana Shetly V. International Airport Authority, AIR 1979 SC 1628, Ajay Hashia V. Khalid Mujud, AIR 1983 SC 130, A L Kalra V. P & N Corporation of India, AIR 1984 SC 1361, Shree Ram Krishna Dal Mia V. Shree SR Tendulkar, AIR 1958 SC 538, S. Azeez Basher V. Union of India, AIR 1968 SC 662, Jibendra Kishore Achary V. Province of East Pakistan, 9 DLR(SC)21 and Kazi Mohammad Akhtaruzzman V. Bangladesh, Writ Petition No.2252 of 2009 disposed of along with three other writ petitions. Sheikh Abdus Sabur V. Returning Officer, 41 DLR (AD) 30 and Bangladesh V. Md. Azizur Rahman, 46 DLR (AD) 19.

164. In Jibendra Kishore (supra), it has been observed, “It is not possible to formulate a comprehensive definition of the clause ‘equal protection of law’; nevertheless some broad propositions as to its meaning have been enunciated. One of these propositions is that equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes, in like circumstances, in their lives, liberty and property and in pursuit of happiness. Another generalization more frequently stated is that the guarantee of equal protection of the laws requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. In the application of these principles, however, it has always been recognized that classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of the legislation. It is not for the Courts, in such cases, it is said, to demand from the legislature a scientific accuracy in the classification adopted. If the classification is relevant to the object of the Act, it must be upheld unless the relevancy is too remote or fanciful. A classification that proceeds on irrelevant consideration, such as differences in race, colour or religion will certainly be rejected by the Courts. Applying these tests to the present case, it cannot but be held that if, in consequence of abolishing the system of private rent for agricultural land, it also became necessary to make some provision for the outgoing landlords, the classification

of the landlords in the basis of their net incomes at the time of their expropriation was a necessary, and not an unreasonable, classification."

165. In Sheikh Abdus Sabur (supra), this court held: "Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term 'protection of equal law' is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot he applied uniformly to all persons disregarding their basic differences with others; and if these differences are identified, then the persons or things may be classified into different categories according to those distinctions; this is what is called 'permissible criteria' or "intelligible differentia",, The Legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit, has power to make classification on reasonable basis. Classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of 'equality' a classification, besides being based on intelligent differentia, must have reasonable nexus with the object the legislature intends to achieve by making the classification. A classification is reasonable if it aims at giving special treatment to a backward section of the population; it is also permissible to deal out distributive justice by taxing the privileged class and subsiding the poor section of the people. The above views have been approved in Azizur Rahman (supra).

166. On the above conspectus, we hold the view that almost all the writ petitions except writ petition Nos. 6263 of 2014 and 6264 of 2014 are not maintainable. All judgments except those in writ petition Nos.6263 of 2014 and 6264 of 2014 are set aside. The appeals are, therefore, allowed without any order as to costs with the above observations. C.P. Nos. 1445, 1768, 2133, 2134 and 2320 of 2015 are dismissed. C.P. Nos.1415, 1416, 1417, 1418, 1419, 1420, 1421 of 2015, 703 of 2014, 2026 of 2015, 2295 of 2010, 955 of 2011, 1854 of 2011, 2539 of 2012 and 1782 of 2015 are disposed of with the above observations. Civil Petition for Leave to Appeal Nos.644 and 645 of 2015 are dismissed.

167. This judgment will have prospective operation so as not to disturb the procedure in relation to decisions already rendered.