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Justice Sheikh Hassan Arif

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Supreme Court of Bangladesh

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   Chief Justice
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3. Madam Justice Nazmun Ara Sultana
4. Mr. Justice Syed Mahmud Hossain
5. Mr. Justice Muhammad Imman Ali
6. Mr. Justice Hasan Foez Siddique
7. Mr. Justice Mirza Hussain Haider
8. Mr. Justice Md. Nizamul Huq
9. Mr. Justice Mohammad Bazlur Rahman

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4. Mr. Justice Tariq ul Hakim
5. Madam Justice Salma Masud Chowdhury
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7. Mr. Justice Shamim Hasnain

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23. Mr. Justice Md. Ataur Rahman Khan

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26. Mr. Justice Sheikh Abdul Awal

27. Mr. Justice S.M. Emdadul Hoque

28. Mr. Justice Mamnoon Rahman

29. Madam Justice Farah Mahbub

30. Mr. Justice A.K.M. Abdul Hakim

31. Mr. Justice Borhanuddin

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35. Mr. Justice Md. Nuruzzaman

36. Mr. Justice Md. Moinul Islam Chowdhury

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38. Mr. Justice M. Enayetur Rahim

39. Madam Justice Naima Haider

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

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

42. Mr. Justice Md. Shawkat Hossain

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44. Madam Justice Krishna Debnath

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76. Mr. Justice Md. Badruzzaman

77. Mr. Justice Zafar Ahmed

78. Mr. Justice Kazi Md. Ejarul Haque Akondo

79. Mr. Justice Md. Shahinur Islam

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81. Mr. Justice S.M. Mozibur Rahman

82. Mr. Justice Farid Ahmed Shibli

83. Mr. Justice Amir Hossain

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1.	Bangladesh & ors Vs. BLAST & ors 8 SCOB [2016] AD 1	Code of Criminal Procedure, 1898 Section 54, 167, 169, 344; Special Powers Act, 1974 Section 3; Remand; Reasonable suspicion	In clause 'Firstly' of section 54 the words 'credible information' and 'reasonable suspicion' have been used relying upon which an arrest can be made by a police officer. These two expressions are so vague that there is chance for misuse of the power by a police officer, and accordingly, we hold the view that a police officer while exercising such power, his satisfaction must be based upon definite facts and materials placed before him and basing upon which the officer must consider for himself before he takes any action. It will not be enough for him to arrest a person under this clause that there is likelihood of cognizable offence being committed. Before arresting a person out of suspicion the police officer must carry out investigation on the basis of the facts and materials placed before him without unnecessary delay. If any police officer produces any suspected person in exercise of the powers conferred by this clause, the Magistrate is required to be watchful that the police officer has arrested the person following the directions given below by this court and if the Magistrate finds that the police officer has abused his power, he shall at once release the accused person on bail. In case of arresting of a female person in exercise of this power, the police officer shall make all efforts to keep a lady constable present.
2.	Bangladesh & ors Vs. Hamid Ali Chowdhury & ors 8 SCOB [2016] AD 126	Specific performance of contract; declaration of title; barred by limitation;	We hold that the plaintiff was entitled to get exclusion of the time of the absence of defendant Nos.1 and 2, the heirs of Syed Salamat Ali from Bangladesh and the High Court Division rightly gave the said benefit and held that the suit was not barred by limitation. We further hold that time was not the essence of the contract and with the execution and registration of the general power attorney in favour of the plaintiff by Salamat Ali, the earlier contract dated

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Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
			06.03.1978 was novated and the High Court Division rightly held so.
3.	S.A.M.M. Mahbubuddin Vs. Laila Fatema 8 SCOB [2016] AD 134	Custody of Minor	Considering the facts and circumstances-especially the facts that minor S.A.M.M. Zohaibuddin has already attained the age of almost 7 years and he is now residing along with his ailing elder brother in his father's house and is being taken good care of by his father, grandfather and grandmother, we are inclined to allow the prayer of the leave-petitioner to retain the custody of his minor son S.A.M.M. Zohaibuddin till disposal of Family Suit.
4.	Israil Kha & ors Vs. Syed Anwar Hossain & ors 8 SCOB [2016] AD 136	Under-raiyat; Tenancy; holding over; acquisition of rent receiving interest	The plaintiffs did not take any step to get back the land of plot No.4 after expiry of the period of lease mentioned in the kabuliyat. Defendant Nos. 1 and 2, the under-raiyat, continued their possession in suit plot No.4 as lawful tenants under the plaintiffs by holding over and after acquisition of rent receiving interest, they became tenants directly under the Government.
5.	Bangladesh & ors Vs. Ranjit Krishna Mazumdar 8 SCOB [2016] AD 141	Acid Aparadh Daman Ain, 2002 Section 13	The learned Judge of the Tribunal acted in accordance with the law in bringing the matter to the notice of the authority concerned in accordance with section 13 of the Acid Aparadh Daman Ain, 2002. We also note that the learned Judge of the Tribunal observed that all three Investigating Officers were negligent in their duties and a direction to the authority concerned was regarding all three of the Investigating Officers of that case. We find from the order of the Administrative Appellate Tribunal that it was observed that although no action was taken against the first Investigating Officer, namely Md. Akram Hossain and third Investigating Officer, Md. Mahfuzur Rahman for neglecting their duties, a departmental proceeding was started against the respondent Ranjit Krishna Mazumder, who was the second

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Sl. No	Name of the Parties and Citation	Key Word	Short Ratio
			Investigating Officer. The Administrative Appellate Tribunal held that this was a discriminatory act and the respondent's application before the Administrative Tribunal was rightly allowed.
6.	Anti Corruption Commission Vs. Md. Rezaul Kabir & ors 8 SCOB [2016] AD 144	Section 161 of the Penal Code, 1860; Section 5(2) of the Prevention of Corruption Act, 1947; Section 561A of the Code of Criminal Procedure, 1898; Durnity Daman Commission Bidhimala, 2007 Rule 16	A proceeding cannot be quashed depending on alleged procedural error in the method of collection of evidence to be adduced and used. The High Court Division failed to distinguish the allegations of demands, acceptance and attempts to accept gratifications and those with the procedure to collect evidence to substantiate allegations of acceptance and attempts to accept gratifications or demands, thereby, erroneously quashed the proceedings.

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SL No.	Name of the parties and Citation	Key Words	Ratio
1.	Shahjibazar Power Company Ltd. Vs. Bangladesh & ors 8 SCOB [2016] HCD 1	Statutory contract; Capacity of sovereign; Commercial contract; Maintainability of Writ petition	From the Contract, it transpires that it has not been entered into by BPDB in exercise of statutory power and so, it cannot be said that the contract with the statutory body i. e. BPDB is a statutory contract so, as to invoke writ jurisdiction. Further we have already seen that the contract is not entered into by the Government in the capacity of sovereign. Moreover, the Contract is purely a commercial contract for purchasing electricity on rental basis**.** Further, the requirements as settled by the Appellate Division in the above referred case are not fulfilled. For the reasons discussed hereinbefore, we are constrained to hold that the instant writ petition is not maintainable.
2.	Kazi Monirul Haque Vs. Bangladesh & ors 8 SCOB [2016] HCD 15	Artha Rin Adalat Ain, 2003, Section 28; Section 33; Artha Jari case	Section 28(4) of the Ain clearly stipulates that if a new Execution case is filed after the expiry of the 6 years from the date of filing of the 1st Execution case, the 2nd case shall also be barred by limitation. In our view, section 28(4) of the Ain contemplates and takes into account the situation were the 1st Execution case, is neither concluded nor disposed of within the period of 6 years.
3.	Abdul Kader Patwary & ors Vs. State & another 8 SCOB [2016] HCD 19	Code of Criminal Procedure, 1898 Section 265D; Framing of Charge	It has now been settled by our apex Court that, at the time of framing charge the Court concern is required to consider only the materials of the prosecution but not the materials submitted by the defence. In the instant case, it appears that, the learned Additional Sessions Judge has not committed any illegality in framing charge against all the accused persons.
4.	SJBKBSS Ltd. Vs. Sylhet City Corporation & ors.	Legitimate Expectation	In any view of the matter, the members of the petitioner-samity are not at fault. Their legitimate expectation, in all fairness, should be fulfilled by the

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SL No.	Name of the parties and Citation	Key Words	Ratio
	8 SCOB [2016] HCD 23		Sylhet City Corporation Authority by way of constructing the proposed market by removing the sheds from the Bus Terminal. Undeniably, the Sylhet City Corporation Authority has made a commitment to the petitioner-samity to make the proposed construction of the market at the site after removal of the sheds therefrom.
5.	Md. Rofiqul Islam & ors Vs. Md. Khalilur Rahman & ors 8 SCOB [2016] HCD 29	Record of rights; Section 90 of the Evidence Act, 1872	Record of right is evidence of present possession and registered kabala is an evidence of title. The registered document will prevail over the records of rights and would remain in enforce until and unless, such kabala is cancelled by an appropriate civil court. The registered deed dated 13.05.1965 is an old document more than 30 years produced from proper custody presumed under Section 90 of the Evidence Act that it was duly executed and genuine documents.
6.	Md. Ibrahim Vs. State 8 SCOB [2016] HCD 35	Nari-O-Shishu Nirjatan Daman Ain, 2000 Section 10; None cross-examined the witnesses	There is no further burden of proof when the assertions of the witnesses remain unchallenged. In the instant case the convict-appellant failed make out his defence on cross-examining the witnesses. On perusal of the aforesaid position of the facts, circumstances and other materials on record nothing cogent could be elicited to disbelieve the witnesses. Thus I find that there is no scope to interfere into the findings and decision as has been arrived by the learned Judge of the Trial Court.
7.	Begum Khaleda Zia Vs. Anti-Corruption Commission & ors 8 SCOB [2016] HCD 40	Question of laws and facts; Applicability of Emergency Power Rules-2007; The Anti Corruption Commission Act, 2004, Section 17;	The Constitution has not given any immunity to the prime Minister or Cabinet in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar on A.C.C to conduct any enquiry in respect of allegation of Commission of offences mentioned to the schedule of the A.C.C Act, 2004 and schedule to

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		Immunity	the Criminal Law Amendment Act-1958. Therefore, we are of the view that not only on the basis of any complaint but A.C.C itself is legally empowered under section 17 of the A.C.C. Act-2004 to conduct any inquiry or investigation.
8.	Fatema Enterprise Vs. Bangladesh &ors 8 SCOB [2016] HCD 59	Whether a matter of law of contract can be looked into in a writ jurisdiction; Basic principle of offer and acceptance; Principles of legitimate expectation; Grounds of judicial review	The crux of the issue is as to whether after receiving the consideration value in the form of earnest money as has been stipulated by the respondents through their own valuation and tender can be changed. Although, this is a matter of law of contract, however, since Government is a party, so this can be looked into in a writ jurisdiction. The basic principle of offer and acceptance is – the offer is binding upon the offeror (proposer) the moment the offeree (acceptor), puts the acceptance into motion. In the instant case, the offer and acceptance both were complete since the tender was invited (offer) the petitioner participated and it was accepted by the respondent No. 2 and part consideration was also paid in the form of earnest money and in such circumstance the respondents, i.e. the offeror Government has no other option left except transferring the land in favour of the petitioner. The property in the goods in fact passes over to the buyer when the sale is complete and in the instant case the sale became binding from the moment the payments were made in compliance with the tender.
9.	Golam Md. Faroque Uddin & ors Vs. Bangladesh & ors 8 SCOB [2016] HCD 67	Section 16A of the Income Tax Ordinance, 1984; Section 36 of the Finance Act, 2013; Surcharge;	Though the term 'surcharge' is not specifically mentioned in the Constitution or not defined in the said Ordinance, the basic concept of 'surcharge' was always there in our Constitution and the said Ordinance. The only difference being that while the Indian Constitution, under Article 271,

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		Constitution of Bangladesh, Article 8, 10, 27	specifically has mentioned the word 'surcharge', our Constitution has not mentioned the same in such specific way. Not only that, upon examining the dictionary meaning of the word "impost" as used under the definition of 'taxation' as provided by our Constitution under Article 152, there is no semblance of doubt that the Parliament has always had the plenary power to legislate provisions for imposition of 'additional tax', 'extra charge' or 'impost', through whatever terms it may be called, by which some additional charges may be levied on the tax payers in addition to their ordinary tax payments. In consideration of the above wide definition of 'taxation' as given by our Constitution and the definition of term 'Tax' as provided by the relevant provision of the said Ordinance, we are, therefore, of the view that the power of imposition of surcharge, as has been done by the impugned provisions, was very much within the plenary power of legislation of the Parliament.
10.	Energy Prima Ltd. Vs. Bangladesh & ors 8 SCOB [2016] HCD 84	Constitution of Bangladesh Article 102; The Arbitration Act, 2001 Section 7; Restriction of judicial intervention in matters covered by arbitration agreement	In the present case, clause 19.2 of the contracts dated 16.01.2008 entered into between the petitioner and the BPDB contains an arbitration clause stating that the arbitration shall be conducted in accordance with the Arbitration Act (Act No. 1 of 2001) of Bangladesh as at present in force and the place of arbitration shall be in Dhaka, Bangladesh, therefore, section 7 of the Arbitration Act, 2001 restricts judicial intervention in matters covered by arbitration agreement. Petitioner is trying to interpret the contract in the writ petitions which is impermissible, particularly when the petitioner is having a remedy to go for arbitration under the contract signed by the petitioner. Petitioner having signed

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			contract with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions.
11.	Shahida Khatun & ors Vs. Chairman, 1st Court of Settlement & anr 8 SCOB [2016] HCD 93	The Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972, Article 7; Specific performance of contract; The Bangladesh Abandoned Buildings Supplementary Provision Ordinance, 1985, Section 5	In the present case the Petitioners or their vendor admittedly was not in possession of the property in question at the relevant time, they entered into the possession of the property in the year 1984. Since the property was declared abandoned under the provision of P.O. 16 of 1972, question of service of notice under Article 7 upon the Petitioner or their vendor who were not in possession, active control, supervision and management of the property at the relevant time does not arise. Moreover, decree in a Suit for Specific performance of contract does not reflect a substantive determination of any issue regarding the abandoned character of the property
12.	Md. Sirajuddwla Vs. State & Anr 8 SCOB [2016] HCD 100	Article 35 (2) of the Constitution of Bangladesh; Section 403 of Code of Criminal Procedure, 1898; The principle of double jeopardy; Code of Criminal Procedure, 1898 Section 344; Negotiable Instruments Act, 1881, Section 138; Artha Rin Adalat Ain, 2003, Section 41; Code of Criminal Procedure, 1898,	In the case in hand, a sentence of fine under section 138 of the Act, 1881 may result in a proceeding of execution of decree (section 386(3) of the Cr.P.C.). Again, the same person may face an execution of decree proceeding under the Artha Rin Adalat Ain, 2003 for the same loan transactions which may together exceed the actual claimed amount. If the accused decides to file appeal against the sentence of fine as well as the decree passed in Artha Rin Suit, he has to deposit 50% of the amount of the dishonoured cheque and 50% of the decretal amount which in aggregate would almost cover the claimed amount. This may lead to unjust enrichment and thus, the inconvenience through legal process may lead to absurdity. The ends of justice and fairness demand that the process of law must not be allowed to cause or result in 'absurd

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SL No.	Name of the parties and Citation	Key Words	Ratio
		Section 344, 561A	inconvenience'. ... For the reasons discussed above, the case in hand, in our view, falls within the category of rarest of rare cases where an order of stay of the criminal proceedings under the Act, 1881 during pendency of the Artha Rin Suit which are between the same parties and over the same loan transactions, should be passed to give effect to section 344 of the Cr.P.C. in order to prevent abuse of the process of the Court and to secure the ends of justice.
13.	Badiul Alam Majumdar & ors Vs. Information Commission & anr 8 SCOB [2016] HCD 110	Registration Rules, 2008 framed under Article 94 of the Representation of the People Order, 1972; Right to Information Act, 2009, Section 9	As per the provision of the Registration Rules of our country the registered political parties are required to submit their audited statements of accounts to the Election Commission every year for the purpose of, amongst others, transparency and accountability to the people and the electorate. According to the RPO, 1972 and the said Registration Rules it is the statutory duty of the Election Commission to collect such statements of accounts from those parties on an annual basis to regulate their functioning and to ensure a free and fair electoral process. As such, such statements should not be treated as 'secret information' under the RTI Act.
14.	F.J. Geo-Tex (BD) Ltd Vs. NBR & ors 8 SCOB [2016] HCD 132	Income Tax Ordinance, 1984 Section 135(1) and 143(2)	The mandatory provision of Section 135(1) of ITO was not followed by the respondents prior to exercise of power under section 143(2) in freezing the bank account of the assessee-petitioners. In the instant matter the provisions of Section 143 of ITO can be resorted to only after the preceding of provisions of Section 135(1) have been complied with, but the Respondents in this case, circumvented the provisions of the law by outrightly ignoring the mandatory provisions to issue notice under the provisions of

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SL No.	Name of the parties and Citation	Key Words	Ratio
			Section 135 of the Ordinance, which they cannot lawfully do. The Respondents actions in the instant case are without any lawful authority and therefore has no legal effect.
15.	Md. Tasli alias Taslim & anr Vs. State 8 SCOB [2016] HCD 140	Natural and competent witness; Evidence Act, 1872 Section 8	It is gathered from the evidence of P.W.2 that out of enmity the accused Alfazuddin and Tasli @ Taslim being armed with deadly weapon like dagger "Dao" etc. came at the P.O. house and dealt indiscriminate dagger and dao blows on the person of the victim. Such facts clearly speak about their very motive and intention to kill the victim Aziron. Immediately after the occurrence, the Convict-Appellant Alfaz Uddin and Tasli @ Taslim disappeared from the locality, which indicates their guilt and that is relevant under section 8 of the Evidence Act.
16.	Aleya Begum & ors Vs. Mir Mohsin Ali & ors 8 SCOB [2016] HCD 147	Partition Suit; Impleading;	In our view the petitioners will not be prejudiced for not impleading them parties because as legal heirs, they are entitled to get the shares of their predecessors. Even a non contesting party, who has got share in the partible property, can pray for allotment of saham on payment of proper court fees before drawing up the final decree

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APPELLATE DIVISION

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

CIVIL APPEAL NO.53 of 2004
(From the judgment and order dated 07.04.2003 passed by the High Court Division in Writ Petition No.3806 of 1998)

Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs and others … Appellants

Versus

Bangladesh Legal Aid and Services Trust (BLAST) represented by Dr. Shahdeen Malik and others … Respondents

For the Appellants: Mr. Mahbubey Alam, Attorney General, (with Mr. Murad Reza, Additional Attorney General and Mr. Sheik Saifuzzaman, Deputy Attorney General,) instructed by Mr. Ferozur Rahman, Advocate-on-Record

For the Respondents: Dr. Kamal Hossain, Senior Advocate, Mr. M. Amirul Islam, Senior Advocate, (with Mr. Idrisur Rahman, Advocate & Mrs. Sara Hossain Advocate,) instructed by Mrs. Sufia Khatun, Advocate-on-Record

Date of hearing: 22nd March, 11th and 24th May, 2016
Date of Judgment: 24th May, 2016

Code of Criminal Procedure, 1898
Section 54:
In clause 'Firstly' of section 54 the words 'credible information' and 'reasonable suspicion' have been used relying upon which an arrest can be made by a police officer. These two expressions are so vague that there is chance for misuse of the power by a police officer, and accordingly, we hold the view that a police officer while exercising such power, his satisfaction must be based upon definite facts and materials placed before him and basing upon which the officer must consider for himself before he takes any action. It will not be enough for him to arrest a person under this clause that there is likelihood of cognizable offence being committed. Before arresting a person out of suspicion the police officer must carry out investigation on the basis of the facts and materials placed before him without unnecessary delay. If any police officer produces any suspected person in exercise of the powers conferred by this clause, the Magistrate is required to be watchful that the police officer has arrested the person following the

directions given below by this court and if the Magistrate finds that the police officer has abused his power, he shall at once release the accused person on bail. In case of arresting of a female person in exercise of this power, the police officer shall make all efforts to keep a lady constable present. … (Para 186)

On the plea of terrorism we cannot give a blank cheque to the law enforcing agencies to transgressing the fundamental rights of the citizens of the country. It should be borne in mind that a terrorist does not lose his fundamental rights even after commission of terrorist activities and there are laws for punishment of his crime, but he should not be deprived of his precious rights preserved in the constitution. … (Para 205)

Even if after investigation the police officer does not find any complicity of accused person, the Magistrate is not bound to accept the police report. It may direct further inquiry or further investigation over the death of the victim if he finds that the death is homicidal in nature. The power of the Magistrate is not circumscribed by any condition. The Magistrate is not bound to accept the police report. … (Para 219)

Code of Criminal Procedure, 1898
Section 54 and 167:
Special Powers Act, 1974
Section 3:

Guide lines for the Law Enforcement Agencies:
(i) A member law enforcement officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

(ii) A member law enforcement officer who arrests a person must intimate to a nearest relative of the arrestee and in the absence of his relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 12(twelve) hours of such arrest notifying the time and place of arrest and the place in custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the law enforcing officer to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the law enforcing officer in whose custody the arrestee is staying.

(iv) Registration of a case against the arrested person is *sine-qua-non* for seeking the detention of the arrestee either to the law enforcing officer's custody or in the judicial custody under section 167(2) of the Code.

(v) No law enforcing officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(vi) A law enforcing officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

(vii) If the law enforcing officer find, any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital for treatment and shall obtain a certificate from the attending doctor.

(viii) If the person is not arrested from his residence or place of business, the law enforcing officer shall inform the nearest relation of the person in writing within 12 (twelve) hours of bringing the arrestee in the police station.

(ix) The law enforcing officer shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.

(x) When any person is produced before the nearest Magistrate under section 61 of the Code, the law enforcing officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation cannot be completed within twenty four hours, why he considers that the accusation or the information against that person is well founded. He shall also transmit copy of the relevant entries in the case diary B.P.Form 38 to the Magistrate.

Guidelines to the Magistrates, Judges and Tribunals having power to take cognizance of an offence:

(a) If a person is produced by the law enforcing agency with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per section 167(2) of the Code, the Magistrate or the Court, Tribunal, as the case may be, shall release him in accordance with section 169 of the Code on taking a bond from him.

(b) If a law enforcing officer seeks an arrested person to be shown arrested in a particular case, who is already in custody, such Magistrate or Judge or Tribunal shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case and if that the prayer for shown arrested is not well founded and baseless, he shall reject the prayer.

(c) On the fulfillment of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of the arrested person as required under section 167(2) and if the case is exclusively triable by a court of Sessions or Tribunal, the Magistrate may send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(d) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter and the case diary that the accusation or the information is well founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in such custody as he deems fit and proper, until legislative measure is taken as mentioned above.

(e) The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report disclose that the arrest has been made for the purpose of putting the arrestee in the preventive detention.

(f) It shall be the duty of the Magistrate/Tribunal, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused person under section 167 of the Code.

(g) If the Magistrate has reason to believe that any member of law enforcing agency or any officer who has legal authority to commit a person in confinement has acted contrary to law the Magistrate shall proceed against such officer under section 220 of the Penal Code.

(h) Whenever a law enforcing officer takes an accused person in his custody on remand, it is his responsibility to produce such accused person in court upon expiry of the period of remand and if it is found from the police report or otherwise that the arrested person is dead, the Magistrate shall direct for the examination of the victim by a medical board, and in the event of burial of the victim, he shall direct exhumation of the dead body for fresh medical examination by a medical board, and if the report of the board reveals that the death is homicidal in nature, he shall take cognizance of the offence punishable under section 15 of Hefajate Mrittu (Nibaran) Ain, 2013 against such officer and the officer in-charge of the respective police station or commanding officer of such officer in whose custody the death of the accused person took place.

(i) If there are materials or information to a Magistrate that a person has been subjected to 'Nirjatan' or died in custody within the meaning of section 2 of the Nirjatan and Hefajate Mrittu (Nibaran) Ain, 2013, shall refer the victim to the nearest doctor in case of 'Nirjatan' and to a medical board in case of death for ascertaining the injury or the cause of death, as the case may be, and if the medical evidence reveals that the person detained has been tortured or died due to torture, the Magistrate shall take cognizance of the offence *suo-moto* under section 190(1)(c) of the Code without awaiting the filing of a case under sections 4 and 5 and proceed in accordance with law.

...(Para 222)

Judgment

Surendra Kumar Sinha, CJ:

Historical Background of the Legal System of Bangladesh

1. Blackstone's Commentaries on the Laws of England has been termed as 'The bible of American lawyers' which is the most influential book in English on the English legal system and has nourished the American renaissance of the common law ever since its publication (1765-69). Boorstin's great essay on the commentaries, show how Blackstone, employing eighteenth-century ideas of science, religion, history, aesthetics, and philosophy, made of the law both a conservative and a mysterious science. In his 'The Mysterious Science of the Law' Daniel J. Boorstin, in Chapter two under the caption 'The use of History', the author stated, "The conflict between Blackstone's Science of Law and his Mystery of Law was never to be entirely resolved. This was nothing less than the conflict between man's desire to understand all and his fear that he might discover too much. Yet eighteenth-century England was able to find a partial solution of the difficulty by appealing to experience. Since Locke had destroyed all innate ideas and made experience the primary source of ideas, the student of society, like the philosopher, could abandon the *a priori* path for the path of experience. In practice, this meant that the eighteenth-century mind came to make every social science, as Blackstone made the study of law, simply a branch of the study of history. The accumulation of all experience, history became the whole study of man, and the entire practical aspect of philosophy. In 1735, Bolingbroke summed up this notion when he said that history was "philosophy teaching by examples."

2. By “philosophy” was meant not the abstruse distinctions of metaphysics, but the practical “science of human nature”. “Nature has done her part. She has opened this study to every man who can read and think; and what she has made the most agreeable, reason can make the most useful, application of our minds.’

3. Hume, in 1739, called his *Treatise* an attempt to write other *Principia* by applying the Newtonian method to philosophy. But how was this to be done? Here he answered with the voice of Locke. “And as the science of man is the only solid foundation for the other sciences, so the only solid foundation we can give to this science itself must be laid on experience and observation.” That he thought history the final and proper source of this finally turning from philosophy to the study of the past. But he was clear in defining the data and method of this science:

4. The laws of England were for Blackstone and body for studying the anatomy of laws in general. This understanding of laws in general was to be sought in the *Commentaries* by studying the English law historically, an approach which before the eighteenth century had not been seriously undertaken. Now the awakening historical consciousness of the Enlightenment was beginning to show itself in legal scholarship.

5. Hale, the first English legal historian, had most shaped Blackstone’s general conception, and the Commentaries themselves were in turn the inspiration for John Reeves’ ‘History of English Law’.

6. From ancient times in Bangladesh, there existed local assemblies in village known as Panchayets. They settled disputes and their decisions were in the nature of compromise between the parties. But at times, they pronounced regular judgments. The law in force then was tribal customary laws. By lapse of time, there was transition to centralised rule by the king who at the apex was recognised as the ultimate judicial authority. He held courts in person to decide cases assisted by Brahmins. In the latter period, a gradation of courts was set up in towns and cities. Appeals preferred from the decisions of these local courts to the Chief Court at the capital, from whose decisions appeals laid to the Royal Court presided over by the king. The laws applied by these courts were principally the customary laws, and shastric or canon laws, the sanctity of which was well recognized both by the courts as well as the people. Besides, dicta emanating from religion were regarded as a major source of law. This system prevailed until the end of twelfth century. When the foundation of Muslim dominion was laid towards the beginning of the thirteenth century, the earlier system remained operative in the country with some modifications here and there until the advent of the Mughals. They set up courts throughout their empire with *Qazi* at the head. *Qazi* used to dispense justice both civil and criminal laws.

7. The Mughals established their rule in this part of the Sub-continent in the Sixteenth century. The main objects of their administration were to assess and collect revenue. Nonetheless, administration of justice was regarded throughout the Mughal period as a subject of great importance and they had introduced a well-organized system of law. For the purpose of overall administration, the areas now constituting Bangladesh, like other provinces (The Province was comparable to a modern division) of the Mughal empire, was divided into districts, and districts into sub-divisions.

8. At lower tier it was the village where the Mughals retained the ancient system of getting petty disputes settled by the local *Panchayets.* In every town, there was a regular Town Court presided over by a *Qazi* known as *Qazi-e-Parganah*. This court generally dealt

with both civil and criminal matters. There was Fauzdar, who as the name indicates, was a commander of and unit of armed force. He also discharged some general executive functions and was placed in charge of suitable sub-division. In the early period of the Mughal rule, the Fauzdars tried petty criminal matters, but as the system underwent some changes during the period between 1750 and 1857, in the latter period, Fauzdars maintained 'Fauzdari Court' for ad-ministration of criminal justice at the district level and dealt with most of the criminal cases except capital sentences. The trace of its name still survives. Today's Criminal Courts or 'Fauzdari Adalat' as it is called in Bengali, are the improved version of Fauzdari Courts of those days.

9. There was existence of Kotwal who functioned as chief of town police, censor of morals and local chief of the intelligence system. He performed the functions of Police Magistrate and tried petty criminal cases. The office of Kotwal was known as Kotwali, which was the principal police station of a town. The nomenclature of Kotwali even survives today. In almost all important towns and cities in Bangladesh, there exist at least one police station called 'Kotwali' police. Kotwal system remained in force until the East India Company took up the administration of justice in the country through acquisition of Diwani. There were two other judicial functionaries, known as Amin and Qanungo. Amin, as it literally means, was an Umpire between the State demanding revenue and the individual raiyats paying it. He was basically an officer of the town and his jurisdiction extended to the disposal of revenue cases. The Qanungo, as the name implies, was the Registrar of Public Records. He preserved all 'Qanuns' that is to say, all rules and practices and furnished information as to procedure, precedents and land history of the past. He used to dispose of petty cases connected with land and land-revenue.

10. The principal judicial authorities in the district level were, the District Judge, called District Qazi. He exercised appellate power to hear civil and criminal appeals against the decisions of the Qazi's Court in towns, called Qazi-e-Parganah. He also exercised criminal appellate power against the decisions of Police Magistrates at base level called Kotwals. Another noteworthy judicial authority in the district level was District Amalguzar. He heard appeals in revenue cases taken from the jurisdiction of Amin, the Revenue-Umpire and Qanungo, the Registrar of Public Records. In province-level judiciary, there existed Provincial Governor's Court called Adalat-e- Nizam-e-Subah presided over by the Governor or Subadar. This Court had original, appellate and revisional jurisdiction. The original jurisdiction was for dealing with murder cases while in appellate jurisdiction, it decided appeals preferred from the decisions passed by the court of District Qazi and that of Fauzdar. Appeals from and against the decision by this court prefer to the Emperor's Court as well as to the Court of the Chief Justice at the imperial capital. There was another Court in this level known as the Governor's own court and this court possessed only an original jurisdiction. The Provincial Qazi held a court which was called the Court of Qazi-e-Subah, This court had original as well as appellate jurisdiction. Besides, Provincial Diwan presided over provincial Revenue Court and dealt with revenue appeals against the decision of District Amalguzar.

11. In the administration of justice within the structure depicted above, *Qazis* were the judges of the canon law while *Adils* were the judges of the common law. Mir-i-Adil, was the Lord Justice. *Qazi* conducted in the trial and stated the law. Mir-i-Adil or Lord Justice passed the judgment whose opinion could override that of his colleague. But as a rule, they conducted the affairs of the court quite harmoniously which has been clearly delineated by V.D. Kulshreshtha in his book titled "Landmarks in Indian Legal and Constitutional History".

12. The law which was applied in the administration of justice during the Mughal times was primarily the Holy law as given in the Quran being regarded as fountain-head and first authority of all laws, civil and criminal, and the traditions handed down from the prophet Muhammad (SM) called Sunna which was and is at present day held to be only second to the Quran itself in sanctity. The judges further depended upon the Codes prepared on analogical deduction by the school of Imam Abu Hanifa (Abu Hanifa an Nu'man ibn Thabit, popularly known as Imam Abu Hanifa (A.D. 701 to 795) was the founder of Hanafi School of law. 'He was the first to give prominence to the doctrine of Qiyas or analogical deduction' and 'assigned a distinctive name and prominent position to the principle by which, in Muhammadan jurisprudence, the theory of Law is modified in its application to actual facts, calling it istihsan' 'which bears in many points remarkable resemblance to the doctrines of equity'. He constituted a committee consisting of forty men from among his disciples for the codification of the laws and it 'took thirty years for the Code to be completed, which has been clearly stated by C. F. Abdur Rahim in his Book “Muhammadan Jurisprudence (1958 Edn) P.L.D. Lahore, pp. 25-26”. Most of the Muslims living in Bangladesh belong to Hanafi School) as well as upon the literature of precedent of eminent jurists called Fatwas.

13. Besides, these sources, there were secular elements which were drawn upon by the judges to guide their opinions. The Ordinances known as "*Qanuns*" of various emperors were freely applied by the judges in deciding cases. Ancient customs also played an important part in the legal system of the Mughals who always accepted the sanctity of the customs under which the people of the country had been used to live. Apart from this, the judges had scope to make use of the *dictum* of equity, good conscience and justice i.e. sense of right and wrong. Matters on which no written authorities could be traced were decided by the judges in accordance with their own good conscience and discretion. They had to adjust application of the Holy law, which was of general character, to the individual cases which came up before them from time to time. This adjustment was generally the result of the decision of one man. Judges, therefore, exercised vast discretionary powers in their own spheres, has been clearly spelt out by Rum Proshad Khosla authored the book “Mughal Kingship and Nobility, Reprint, 1976”.

14. The Mughal Emperor at the imperial capital was the Legislator on those occasions when the nature of the case necessitated the creation of new law or the modification of the old. Royal pronouncements superseded everything else, provided they did not go counter to any express injunction of the Holy law. These pronouncements were based on the Emperor's good sense and power of judgment rather than on any treatise of law. All ordinary rules and regulations depended upon the Royal will for their existence.

15. The judicial procedure under the Mughals was not a long drawn-out matter as it is at present. The decisions of cases were speedy. Basically, it was an adversary procedure with provision for pleadings, calling of evidence, followed by judgment. The court was, assisted by Mufti who was well-versed in canon and lay law to assist the court. He was in many respects a fore runner of the present day Attorney General. Civil and Criminal laws were partly Muslim laws and partly customs and the royal decrees. Personal laws of Hindus and Muslims were applied in their respective field.

16. The system of law under the Mughals was effective and worked well for a long time. Its disintegration started when the Emperor's control over the provinces became less effective. The local Zamindars in course of time became powerful and gradually usurped to themselves the function of administration of justice. This was the state of affairs around the last quarter of the Eighteenth Century when in the province of Bengal justice was

administered by Nawab, in his absence by the Chancellor of the Exchequer called Diwan, and in the absence of both, by a Deputy.

17. Earlier, on the last day of the year 1600, Queen Elizabeth I of England gave the East India Company, by the First Charter, a monopoly of eastern trade and the Charter contained the power and authority to make, ordain and constitute such and so many laws, constitutions, orders and ordinances as may be necessary for the good government of the Company and for better administration of their trade and furthermore to impose "such pains, punishments and penalties, by imprisonment of body, or by fines and americaments, or by all or any of them" as might seem requisite and convenient for the observation of such laws, constitutions, orders and ordinances. In this connection it may be referred to Constitutional Documents, Vol. I, Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Div), at p 9. All these powers were placed on perpetual foundation by a fresh Charter granted by James I, in 1609, which was granted on May 31, 1609. After a few years, in 1613, the Company got permission from the Mughal Emperor to establish its first factory at Surat. The Charter of 1609 was followed by the British Crown's another grant made on the 14th December, 1615, authorising the Company to issue commissions to their captains provided that in capital cases, a verdict must be given by a jury. The purpose behind this was maintenance of discipline on board ships that was granted on February 19, 1623.

18. James I extended the Company's power by authorizing it to punish its servants for offences committed by them on land. This Charter together with the earlier grant placed the Company to the advantage of governing all its servants both on land and high sea what has been clearly stated in the Book “A. Constitutional History of India” authored by Arthur Berriedale Keith 1600-1935 (Methuen's 2nd Edn) at pp 6-7. Its power to exercise judicial authority was enlarged a step further by a Charter of Charles II, in 1661 which was granted on April, 3, 1661. The Charter a landmark in the history of the legal system, granted the Governor-in-Council of the Company the authority to administer English Law in all civil and criminal cases on Company's servants as well as on others who lived in the British settlement in India. A further Charter granted by Charles II, in 1683 (Granted on August 9, 1683.) provided for a court of judicature to be established at such places as the Company might appoint to decide cases according to equity and good conscience or by such means as the Judges should think fit.

19. In 1698, the Company by the purchase of villages in Bengal acquired the status of Zamindar which carried with it the scope for exercise of civil and criminal jurisdiction [Sir George Claus Rankin, Background to Indian Law, Cambridge University Press. (1946 Edn) at p 1]. Consequently, a Member of Council regularly held Zamindari Court to try civil and criminal cases. Earlier, the Company had constructed a fortified factory at Calcutta (Kolkata) and towards the close of 1699, the settlement in Bengal was declared Presidency. Their fort at Calcutta was named Fort William in honour of King William of England and it became the seat of the Presidency.

20. By a Charter granted by King George I, on 24th September, 1726, a Court of Record in the name of Mayor's Court and a Court of Record in the nature of a *Court of Oyer and Terminer and Gaol Delivery* was established in Calcutta. The Mayor's Court was to try all civil cases with authority to frame rules of practice. The Court of *Oyer and Terminer* was constituted for trying all criminal cases (high treason only excepted). Both civil and criminal justice was required to be administered according to English Law. This was how the King's Courts were introduced in India though the King of England had no claim to sovereignty over Indian soil. Establishment of these courts raised the question of jurisdiction over Indians.

Accordingly, by a new Charter of George II, issued in 1753, (The Charter dated January 8, 1753.) the Mayor's Court was forbidden to try action between Indians who did not submit to its jurisdiction. Yet, the Charter established a Court of Request in each presidency for prompt decisions in litigations involving small monetary value.

21. In the year 1756, as the Company refused to move the fortifications it had erected in Calcutta (Fort Wiliam), the Nawab of Bengal, Bihar and Orrisa Serajuddaula captured the town, but in 1757, the Company under the command of Clive defeated Nawab in the battle of Palassy and recaptured it. Thus, the British people grasped the rein of power. De jure recognition followed with the Mughal Emperor's grant to the Company of the Diwani of Bengal, Bihar and Orrisa. The grant of Diwani included not only the right to administer revenue and civil justice, but virtually the Nizamat also i.e., the right to administer criminal justice. In this respect, it may be mentioned that Minutes of Sir Charles Grey C.J" October 2, 1829, Parliamentary Papas, 1831, Vol. VI, p 54.) Now as the British people were required to govern the new land they naturally took over the Mughal system then prevailing, made in it only the most necessary changes and while retaining its old framework, they very slowly added new elements.

22. The Company exercised within the villages it had acquired judicial power appurtenant to its status of Zamindar, on the usual pattern then prevailing in the country. After the acquisition of Diwani in 1756, the Company introduced Adalat or Court System in 1772. In fact, it was introduced under Bengal Regulation II of 1772 by Warren Hastings after his appointment as Governor in Bengal. The Office of the Governor was styled 'Governor-General in Bengal from 1774 to 1833. The system is known as Adalat System for administration of justice in Mufassil beyond the presidency town of Calcutta and set up two types of Courts in each revenue district. For civil justice, Provincial Civil Court styled as Mufassil Diwani Adalat was established in each Collectorate with a Chief Civil Court with appellate power at Calcutta called Sadar Diwani Adalat. The Collector of the district presided over the Provincial Civil Court or Mufassil Diwani Adalat whose jurisdiction extended to disputes concerning property, inheritance, claims of debts, contract, partnership and marriage. The Collector was assisted by two Law Officers, a Moulvi and a Pandit, who expounded respectively the rules of Muslim or Hindu law applicable to the cases. The Chief Civil Court or Sadar Diwani Adalat at the seat of the Government was presided over by the President with at least two other Members of the Council.

23. For criminal justice, Provincial Criminal Court styled Mufassil Fauzdari Adalat was also established in each district with a Chief Criminal Court with supervisory power called Sadar Nizamat Adalat. In the Provincial Criminal Courts sat the Qazi and Mufti of the district with two Moulvis to expound the law. These Provincial Criminal Courts were not permitted to pass death sentences and had to transmit the evidence with their opinion to the Sadar Nizamat Adalat for decision. Besides, the proceedings of these criminal courts were supervised by the Sadar Nizamat Adalat, presided over by the Daroga Adalat representing Nawab in his capacity as Supreme Criminal Judge, with the aid of Chief Qazi, Chief Mufti and three Moulvis.

24. The criminal courts at first administered Muhammedan Law with some variations which had developed in Bengal, but innovations borrowed from English Law were also introduced. In civil courts, Hindus and Muslims were governed by their personal laws in cases dealing with marriage, succession and religious institution; in other matters in default of a statutory rule governing the case, the court applied 'justice, equity and good conscience'.

25. Soon after the acquisition of Diwani by the East India Company, the question arose whether the Company could alter the criminal law then in force in India. The first interference with the Mohammedan Criminal Law came in 1772 when Warren Hastings changed the existing law regarding dacoity to suppress the robbers and dacoits. It was provided that the dacoits were to be executed in their villages, the villagers were to be fined, and the families of the dacoits were to become the slaves of the State. Warren Hastings in his letter to the Directors dated 10th July, 1773 maintained that the East India Company as the sovereign authority in the country could and should alter the rules of Mohammedan Law. He pointed out, in his letter,

> "The Mohammedan Law often obliges the Sovereign to interpose and to prevent the guilty from escaping with impunity and to strike at the root of such disorders as the law may not reach"

26. Hastings criticised the existing rules of Mohammedan Criminal Law boldly and attempted to introduce reforms in various ways. To regulate the machinery of justice in Bengal, Warren Hastings prepared plans and introduced reforms in 1772, 1774 and 1780 respectively as well as suggested various reforms.

27. From 1772 to 1790 though steps were taken to reorganise and improve the machinery of justice no special effort was made to change the Mohammedan Criminal Law. The problem of law and order as well as to improve the defective state of the Mohammedan Law was seriously considered by Lord Cornwallis when he came to India in 1790. Lord Cornwallis, who succeeded Warren Hastings, concentrated his attention towards removing two main defects, namely (a) gross defects in Mohammedan Criminal Law and (b) defects in the constitution of courts.

28. Lord Cornwalli's reforms in the Mohammedan Criminal Law were introduced on 3rd December, 1790 by a Regulation of the Government of Bengal. The Regulation made the intention of the criminal as the main factor in determining the punishment. The intention was to be determined from the general circumstances and proper evidence and from the nature of the instrument used in committing crime. To support this reform, Cornwallis proposed that the Doctrine of Yusuf and Mohammad must be the general rule 'in respect of trials for murder'. Abu Hanifa's doctrine laying emphasis on the instrument of murder was rejected. By another important provision of the Regulation, the discretion left to the next of kin of a murdered person to remit the penalty of death on the murderer, was taken away and it was provided that the law was to take its course upon all persons who were proved guilty for the crime. Cornwallis further maintained,

> "Where Mohammedan Criminal Law prescribes amputation of legs and arms or cruel mutilation, we ought to substitute temporary hard labour or fine and imprisonment".

29. It finds support from section 66 of the Resolution in the proceedings of the Governor-General in Council dated 10th October, 1791. In this respect legislative steps were taken only in 1791.

30. Reforms were also introduced, by the Regulation of 3rd December, 1790, in the administration of justice in the Foujdari or criminal courts of Bengal, Bihar and Orissa. In 1791 a Regulation was passed which substituted the punishment of fine and hard labour for mutilation and amputation. The next important step was taken in 1792 when a Regulation provided that if the relations of a murdered person refused or neglected to prosecute the

accused person, the Courts of Circuit were required to send the record of the cases to the Sadar Nizamat Adalat for passing final orders. In the same year it was also provided that in future the religious tenets of the witnesses were not to be considered as a bar to the conviction of an accused person. The Law Officers of the circuit Courts were required to declare what would have been their fotwa if the witnesses were Muslims and not in the case of Hindus. Accordingly, this provision modified the Muslim Law of Evidence in 1792.

31. On 1st May, 1793, the Cornwallis Code a body of forty eight enactments-was passed. Regulation IX of 1793 in effect restated the enactments which provided for modification of the Mohammedan Criminal Law during the last three years. Thus, it laid down the general principles on which the administration of criminal justice was to proceed.

32. In order to make the law certain in 1793 it was also provided that the Regulations made by the Government were to be codified according to the prescribed form and they were to be published and translated in Indian languages. (Regulation XLI of 1793.)

33. The process of introducing reforms in the Mohammedan Criminal law which began first of all during Warren Hastings' tenure continued till 1832 when the application of Muslim Law as a general law was totally abolished- Various piecemeal reforms which were introduced from 1797 to 1832 in the Mohammedan Criminal Law were as follows:

34. Regulation XIV of 1797 made certain reforms in the law relating to homicide where the persons were compelled to pay blood-money. The Regulation granted relief to those persons who were not in a position to pay blood-money and were put in prison by setting them free. It further provided that all fines imposed on criminals shall go to the Government and not to private persons. If the fine was not paid, a definite term of imprisonment was fixed for the accused. After the expiry of that fixed period of imprisonment the accused person was released from prison. In cases where the application of Mohammedan Criminal Law led to injustice, the Judges were empowered to recommend mitigation or pardon to the Governor-General-in Council.

35. Throughout his tenure as Governor-General, Warren Hastings was subject to two pressures, incompatible with each other, as regards the administration of criminal justice. On the one hand, he was obsessed by the feeling that administration of criminal justice was the responsibility of the Nawab and not of the Company which was only the Diwan. On the other hand, he realised that criminal law needed to be drastically reformed. The criminal courts prior to 1772 were in a very decrepit condition. Realising that the government’s interest in the maintenance of law and order could not be ensured without the administration of criminal justice but at the same time maintaining the facade of the Nawab’s presence in this sphere, Warren Hastings had devised certain peripheral steps in 1772 in the area of criminal judicature, viz, leaving administration of criminal justice to the Muslim law officers, he had interposed supervision of English functionaries over them. Whatever the theoretical objections, the practical exigencies of the situation did not permit the government to adopt completely neutral stance towards the administration of criminal justice. But government’s freedom of action was very limited, or so it thought. Instead of taking over the administration of criminal justice also alone with civil justice, it retained Muslim law officers to decide criminal cases it fought shy of modifying Muslim criminal law even when some of its features were demonstrably not suited to the contemporary society and the notion of justice entertained by the British themselves. The criminal law itself promoted, to some extent, the commission of violent crimes because it provided ways and means of mitigating punishments. Even the British supervision over the administration of criminal justice

introduced in 1772, could not be maintained for long. In 1775, the Sadar Nizamat Adalat was removed from Calcutta to Murshidabad and placed under the control and supervision of the Naib Nazim Mohammad Reza Khan. This, however, proved to be an unfortunate step for the administration of criminal justice which was thus cut-off from the main currents of reform and improvement Reza Khan's supervision of the criminal judicature did not prove to be effective and efficient and, consequently, administration of criminal justice suffered. It came to be afflicted, with many vices; its condition became very precarious. Criminal Court became instruments of oppression and torture in the hands of unscrupulous officers; innocent persons were punished while the guilty escaped with impunity. There was no machinery for bringing the offenders to book. The criminal judicature ceased to provide any security to life or property of the people. Even though the state of affairs continually deteriorated, the Calcutta government did not give up its policy of non-interference in criminal judicature. Warren Hastings thought of taking only minimal steps to improve matters while keeping intact, as far as possible, the existing structure of criminal judicature to maintain the fiction that the Nizamat still belonged to the Nawab.

36. During the period from 1781 to 1793, there were certain other noteworthy reforms. Judges of the Mufassil Diwani Adalats were empowered to arrest the offenders and to bring them to the courts for trial and as such they were also designated as Magistrates. It was not for them to try the accused in their own court; rather as Magistrates, they were required to produce the offender for trial in the Mufassil Fauzdari Adalat. For supervision of works of the Magistrates and Provincial Criminal Courts called Mufassil Fauzdari Adalats, a criminal department was set up in Calcutta controlled by an Officer of the Company called Remembrance of Criminal Courts. In 1801, the Sadar Nizamat Adalat and the Sadar Diwani Adalat were united and in 1807, Magistrates' power to award sentence was raised to six months and a fine of two hundred rupees and in 1818, by enlarging these powers the Magistrates were empowered to pass sentence of imprisonment. By Regulation I of 1819, the Judges of the Provincial Courts of Appeal and Provincial Courts of Circuit were divested of their power to try criminal cases and in their place Commissioners of Revenue and Circuit were appointed in each division. Superintendence and control of Police, Magistrates were placed under these officers with the responsibility of conducting sessions. They heard appeals against the orders passed by the Magistrates.

37. By 1861, it had proceeded far enough to justify the enactment of the Indian High Courts Act, 1861 (The Act was entitled East India (High Courts of Judicature) Act, 1861. (24 & 25 Vic. C 104)) by the British Parliament authorising creation by Letters Patent of High Courts in the several Presidencies in place of respective Supreme Courts and the Sadar Dawani Adalat and Sadar Nizamat Adalat were to be abolished on establishment of the High Courts. Under Letters Patent dated December 28, 1865, issued pursuant to the Indian High Courts Act, 1861, the High Court of Judicature at Fort William (Calcutta) in Bengal was established replacing the Supreme Court and Chief Courts or Sadar Adalatss (Sec. 8 of the Act; The Adalat System was abolished.) The High Court thus established at Calcutta became the successor of the Supreme Court as well as of the Chief Courts or Sadar Adalats and combined in itself the jurisdiction of both set of old courts. All the jurisdictions of the Supreme Court, civil, criminal, admiralty, testamentary, intestate and matrimonial, original and appellate, and the appellate jurisdiction of Sadar Diwani Adalat and Sadar Nizamat Adalat became vested in the High Court at Calcutta, the original jurisdiction being exercisable by the original side of the High Court and the appellate jurisdiction being exercisable by the appellate side thereof (Sec. 9 of the Act). The Calcutta High Court continued to exercise its jurisdiction till partition of India in 1947. After establishment of the

High Court in 1865, a regular hierarchy of civil courts was established by Civil Courts Act, 1887. The Criminal Procedure Code of 1898 re-organised the criminal courts and the High Court exercised a general power of superintendence over all civil and criminal courts. In this respect, the book of Mr. Azizul Hoque on "The legal System of Bangladesh" may be referred to.

Criminal Judicature

38. When magisterial functions were vested in the collectors, it was understood that every collector in very district would have a deputy who would lighten the work of the collector-magistrate to some extent. But this hope was not fulfilled. Considerations of economy always stood in the way of the government ever doing anything necessary to improve the administration. In most of the districts, no deputy was appointed. The result of this was that the burden on the collector – magistrate was too heavy and he usually neglected his magisterial functions. On the plea that the collectors neglected their magisterial duties, Government – General Lord Auckland in 1837, secured the approval of the Company's Directors to separate the two offices, and for the eight years following it was effected gradually. But, as small salaries were allowed to the magistrates, the office fell in the hands of junior servants, and its effect on the administration of justice did not prove to be very happy. But eventually the Offices of collector and magistrate were united again in 1859. About this, Keith points out that the demand for union of magisterial powers in the collector was made by Dalhousie in 1854, and Canning in 1857. "This preference for patriarchal rule unquestionably corresponded with the need of the time and received effect after the Mutiny.

39. After the abortive Indian Revolution of 1857 against the misrule of the East India Company, the Government of India Act, 1858 was passed providing for taking over the administration of India in the hand of British Government. The Company's rule in India came to an end with the proclamation of Queen Victoria in 1858 by which the administration of the Company's Indian possessions was taken over by the British Government. Charter Act of 1833 made the Governor General of Bengal, Bihar and Orissa, the Governor General of India and Mr. Macaulay (afterwards Lord Macaulay) was appointed as the law member of the Governor General's Council and the said Council was empowered as the Indian Legislative Council to make laws by passing Acts instead of making Regulations. The First Law commission was constituted with Mr. Macaulay as its chairman in 1835. The second Law commission was appointed in 1853 headed by Sir John Romilly. Third Law Commission in 1861 was also headed by Sir John Romilly for preparing a body of substantive laws for India. Fourth Law Commission was appointed headed by Dr. Whitly Stokes in 1879. On the basis of the recommendation of this commission, the Code of Civil Procedure, 1859, Limitation Act, 1859, Penal Code, 1860 and Code of Criminal Procedure, 1861 were enacted by the Indian Legislative Council.

40. Above Laws and other laws were enacted with the object of replacing the modified Islamic administration of justice in the Mufassil by the modified English Common Law system. Act XVII 1862, modified Islamic system of administration of justice. This change over made the posts of law officers such as Quazis, Muftis, Moulavis and Pundits redundant and after that those posts were abolished by Act II of 1864. (Kulshrestha).

41. Fourth Law Commission appointed in 1879 recommended for amendment of some laws and enactment of some new laws. On the recommendation of this commission the present Evidence Act, 1872, the Code of Criminal Procedures 1898, the Code of Civil Procedure 1908 and some other laws were enacted.

THE CRIMINAL PROCEDURE AMENDMENT ACT, 1923

42. The Criminal Procedure Amendment Act, 1923 made some improvement in this respect. The Europeans British subjects' right to be tried by the European judges and magistrates was entirely abrogated. The accused persons whether European or Indian were placed practically on an equal footing. The only privilege allowed to the British subjects was that they could be tried with the help of a jury consisting of a majority of Europeans or Americans. A reciprocal right was allowed to the Indians as they could claim jury consisting of a majority of the Indians. Colonial of the British came to an end in August, 1947. Under the provisions of the Indian Independence Act, 1947, British India was divided into India and Pakistan. Eastern part of the Province of Bengal formed the Province of East Pakistan. But unfortunately, within 3(three) years of partition Martial Law was plagued in Pakistan and Rule of Law had been buried and Colonial Rules continued to the people of East Pakistan till independence in 1971. With the coming into operation of the constitution of the Islamic Republic of Pakistan in 1956, the Supreme Court of Pakistan was established in place of the Federal Court as the apex Court of the country. The apex Court was vested with the appellate jurisdiction from the decisions of the High Courts including Dacca High Court. The rule of law enshrined in the constitution was so transitory. In October 1958, Martial Law was promulgated and the constitution was abrogated. In 1962 another constitution was formulated by the Martial Law authorities to the country. This constitution was also abrogated in 1969 on the promulgation of the second Martial Law in the country.

Emergence of Bangladesh

43. Before stating anything about the judiciary of Bangladesh, it is necessary to know about the judicial system that was in existence in the country on the emergence of Bangladesh and a pen picture of the same has been given above. Under the provisions of the Legal Frameworks Order, 1970 a general election was held from 7th December 1970 to 17th January, 1971 in Pakistan to form a National Assembly to frame a Constitution of the country and first meeting of the National Assembly called by the President and Chief Martial Law Administrator General Yahiya Khan to be held on 3rd of March 1971 was postponed by him on 1st of March 1971. This triggered off violent protest and non-cooperation movement by the people of the then East Pakistan. On 7th of March, 1971 Bangabandhu Sheikh Mujibur Rahman, leader of the Awami League Party which secured majority seats of the National Assembly (167 out of 300 seats) called for an all-out struggle for achieving complete autonomy of East Pakistan in a mammoth public meeting held in the Dacca Race Course Field (Presently Suhrawardy Uddyan). Thereafter, on the night following 25th of March, 1971 the Armed Forces of Pakistan started armed attack on the Bangalee soldiers, policemen, riflemen and the people. Bangalee soldiers, policemen and riflemen revolted and war of liberation of Bangladesh was started. On 26th of March, 1971 independence of Bangladesh was declared and on 10th of April, 1971 elected representatives of the people of Bangladesh assembled in a meeting at Mujibnagar and issued the Proclamation of Independence confirming the declaration of Independence made by Bangabandhu Sheikh Mujibur Rahman on 26th March, 1971 and declaring and constituting Bangladesh to be a sovereign People's Republic. The Proclamation declared Bangabandhu Sheikh Mujibur Rahman as the President and Syed Nazrul Islam as the Vice-President of the Republic till framing of the Constitution. Under the said Proclamation the President was to be Supreme Commander of the Armed Forces with authority to exercise all the executive and legislative powers of the Republic including the power to grant pardon and also to appoint a Prime Minister and other Ministers, to levy taxes and spend money, to summon and adjourn Constituent Assembly and to do all

other things necessary and incidental. The Vice-President was authorised to exercise all the powers, duties and responsibilities of the President in his absence. On that very day, the Vice-President Syed Nazrul Islam, in the absence of the President Sheikh Mujibur Rahman who was confined in Pakistan jail, as Acting President promulgated the Laws Continuance Enforcement Order 1971. This Order provided, amongst others,

> ".....all laws that were in force in Bangladesh on 25th March 1971 shall subject to the Proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh and that the Government officials-civil, military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them."

44. On the 17th day of April 1971 Bangladesh Government in exile was formed with Tajuddin Ahmed as Prime Minister and members of the Cabinet took oath of the office on that day at Mujibnagar.

45. On the 16th day of December, 1971 the occupation Forces of Pakistan in the territory of Bangladesh had surrendered to the joint command of India and Bangladesh and thus Bangladesh was liberated. Thereafter on 11th January, 1972, the Provisional Constitution Order 1972 was promulgated by the President. The said Order provided for a Constituent Assembly consisting of the members of the National Assembly and Provincial Assembly elected by the People of East Pakistan in the election held in December 1970, and January, 1971. The said Order also provided for the High Court of Bangladesh consisting of a Chief Justice and other Judges, a Council of Ministers with the Prime Minister as the head and ordained the President to act on the advice of the Prime Minister, and empowered the Cabinet to appoint a President in the event of a vacancy occurring in the office of the President. (Administration of justice in Bangladesh, Justice Kazi Ebadul Hoque).

46. Debate in the Constituent Assembly regarding the maintenance of Rule of Law:

e½eÜz‡kL gyRevjing vb:

AvR Avgiv †h msweavb †`e, Zv‡Z gvbyl i AwaKv‡ii K_v †jLv _vK‡e, hv‡Z fwel¨‡Z †KD RbM‡Yi Rvbgvj wb‡q wQwbwgwb †Lj‡Z bv cv‡i| Ggb msweavbB RbM‡Yi Rb¨ †ck Ki‡Z n‡e| AvR GLv‡b e‡m Pviw¯‡¤i Dci wfwË K‡i Avgv‡`i fwel¨r eskai‡`i Rb¨ Ggb msweavb iPbv Ki‡Z n‡e, hv‡Z Zuiv `yboqvi mf¨ †`‡ki gvbyl i mvg‡b gv_v DPzK‡i `uovZ cv‡i|

`jgZ wbwe‡k‡l mK‡ji m‡½ Av‡jvPbv Kiv n‡e, RbMY‡K hv‡Z Zv‡`i B"Qv Abyhvqx GKUv mycwz msweavb †`Iqv hvq, GB D‡Ï‡k¨ mK‡ji gZvgZ PvBe| GB msweav‡b gvbweK AwaKvi _vK‡e, †h AwaKvi gvby wPiRxeb †fvM Ki‡Z cv‡i|

12B A‡±vei, 1972

e½eÜz‡kL gyRevjing vb:

kvmbZš Qvov †Kvb †`k- Zvi A_ nj gwSwenxb †bŠKv, nvjwenxb †bŠKv| kvmbZ‡š gvbyl i AwaKvi _vK‡e, kvmbZ‡š gvbyl i AwaK‡ii m‡½ m‡½ KZe¨I _vK‡e| GLv‡b* free-style democracy *Pj‡Z cv‡i bv| kvmbZ‡š RbM‡Yi AwaKvi _vK‡e, KZe¨I _vK‡e| Ges hZ`i-

m¤e, †h kvmbZš †ck Kiv n‡q‡Q, †mUv †h RbM‡Yi Avkv-AvKv•Lvi gZ cZxK n‡q _vK‡e, †m m¤‡Ü Avgvi †Kvb m‡›`n †bB|

W. Kvgvj †nv‡mb *(AvBb I msm`xq welqvejx Ges mswkøvb-cYqb-gšx):*

msweavb‡K ejv nq GKUv †`‡ki †gŠwjK AvBb ev m‡ev"P AvBb| msweavb RbMY‡K †civ †`‡e Ges RbM‡Yi Awfcvq Abyhvqx mgvR MV‡bi wfwË ms¯vcb Ki‡e, GUv Avkv Kiv hvq| AvBbMZ `wófw½ †_‡K ejv hvq †h, RbMY †h ¶gZvi gwjK, †mB ¶gZv AvBbm½Zfv‡e c‡qvM Kivi Rb¨ KZK¸‡jv cavb A½ mswkøv‡b cwZôv Kiv nq| †h †`‡ki G iKg †gŠwjK AvBb Av‡Q, †m †`‡k †Kvb e¨w³ ev †Kvb ivóxq A½ †mB AvB‡bi E‡aŸ _vK‡Z cv‡i bv| GBRb¨B ejv nq †h, mvswkøvwbK miKv‡i e¨w³i kvmb bq, AvB‡bi kvmb cewZZ nq| wVK GB Kvi‡YB Bsj¨v‡Ûi GK weL¨vZ wePviK GK megq ¶gZvm¤úb ivRvi †e-AvBbx wb‡`k gvb‡Z A¯xKvi K‡i e‡jwQ‡jb †h, wZwb ïaygvÎv jvn Ges AvB‡bi Aaxb, †Kvb gvbyl‡Ki Aaxb bb|

AvB‡bi kvmb wbwðZ Kivi D‡Ï‡k¨ ¯vaxb wePviwefvM cwZôvi e¨e¯v Kiv n‡q‡Q| wePviwefv‡Mi kxl‡`‡k i‡q‡Q mgvcxg †KvU| mgvcxg †Kv‡Ui `ßwU wefvM _vK‡e| nvB‡KvU wefvM Ges Avcxj wefvM| GB Avcxj wefvM n‡e †`‡ki Pewš Avcx‡ji †¶Î| wbevnx wefvM †_‡K wePviwefvM‡K c„ôK Kivi I e¨e¯v Kiv n‡q‡Q|

bvMwiK‡`i AwaKvi-i¶vi c×¶gZv Av`vjZ‡K †`Iqv n‡q‡Q; wKš mgvRZwšK A_-e¨e¯v প্রতিষ্ঠার জন্য প্রয়োজনীয় বলে ঘোষণা করে সম্পত্তি ও ব্যবসা সংক্রান্ত যে সব আইন সংসদ তৈরী Ki‡eb, Av`vjZ †m¸‡jv bvKP Ki‡Z cvi‡eb bv|

PZz^eVK: 19†k A‡±vei, 1972

**^mq` bRi¥j Bmjvg** *(wkí-gšx; cwil‡`i Dc-†bZv):*

gvbbxq ¯úxKvi mv‡ne, MYZ‡ši me‡P‡q eo K_v n‡"Q separation of judiciary from the executive, A_vr AvB‡bi kvmb Ggbfv‡e ceZb Ki‡Z n‡e, †hb AvBbwefvM cwic¥fv‡e wbi‡c¶ _v‡K Ges ghv`v Ges ¯vaxbZvi m‡½ Zvi KZe¨ cvjb Ki‡Z cv‡i| GB kvmbZ‡š Avgv‡`i AvBbwefvM‡K ïayAvjv`v KivB bq, Zv‡K cwic¥ ghv`v †`Iqvi Rb¨ †h e¨e¯v MnY Kiv n‡q‡Q, Zv‡Z AvB‡bi kvmb m¤‡Ü Avgv‡`i g‡b †Kvb mskq _vKv evÃbxq bq|

Rbve AvmgZ Avjx wkK`vi *(Gb. B.-70: cUqvLvjx-3):*

GB kvmbZ‡š Avi GKUv K_v cwZdwjZ n‡q‡Q, †hUv ewUk Avgj †_‡K wQj- wbevnx wefvM †_‡K wePviwefvM‡K c„ôKxKiY| KviY, A‡bK mgq †`Lv †M‡Q, Zv‡`i h‡_"QvPvi wePvi‡Ki Dci n¯--‡¶c K‡i‡Q| D‡jL Kiv †h‡Z cv‡i †h, †gv‡bg Lv‡bi mgq †Kvb mywePvi wQj bv, †Uwj‡dv‡bi gva¨‡g wePvi nZ| †mB wePviwefvM‡K c„ôK Kiv n‡q‡Q| Zv‡Z †`‡ki gvby wePvi cv‡e, rule of law establish n‡e| G †`k †mvbvi evsjvq cwiYZ n‡e|

Rbve Avjx AvRg:

Avgv‡`i A‡bK w`‡bi GKUv `vex wQj †h, AvBbwefvM‡K wbevnx wefvM †_‡K Avjv`v Ki‡Z n‡e, hv‡Z K‡i wePviKiv c¶cvZkb¨ n‡q wePvi Ki‡Z cv‡ib Ges wbevnx-wefv‡Mi hw` †Kvb Ab¨vq nq, Zvi cwZKvi hv‡Z n‡Z cv‡i, Zvi e¨e¯v GB we‡ji g‡a¨ Av‡Q| MYZš‡K iÿv Kivi Rb¨ Ges MYZwšK c×wZ‡K Kv‡qg Kivi Rb¨ mecKvi †Póv GLv‡b Kiv n‡q‡Q|

cÂg ^eVK: 20†k A‡±vei, 1972

Rbve Gg. gbmyj Avjx *(†hvMv‡hvM gšx):*

Kv‡RB MYZš ïaycwZôvi Rb¨ bq- MYZš msi¶Y Kiv Ges Gi c¥wKv‡ki Rb¨ e¨e¯v Aej¤b Kiv n‡q‡Q| MYZš hv‡Z c¥wKvk jvf Ki‡Z cv‡i, †mRb¨ AvB‡bi kvmb ceZb Kiv n‡q‡Q| AvB‡bi kvmb hv‡Z wKvk jvf Ki‡Z cv‡i, †mRb¨ wePviwefvM‡K kvmbwefvM n‡Z c„K Kiv n‡q‡Q Ges Av`vj‡Zi wePviK hv‡Z mg¯ cfve †_‡K Ges fq, fxwZ, †jv‡fi D‡aŸ †_‡K AvB‡bi kvmb Kv‡qg Ki‡Z cv‡ib, †mRb¨ wePvi‡Ki wb‡qvM Ges wePvi‡Ki Acmviy m¤‡Ü we‡kl wewa-e¨e¯vi K_v wjwce× Kiv n‡q‡Q|

mßg ^eVK: 23†k A‡±vei, 1972

†Lv` `Kvi Ave`ÿ nwdR *(Gb. B.-49: h‡kvi-7):*

Avgv‡`i †`‡k †h mswkøó n‡q‡Q, Zvi c‡e Avgiv eûevi eû mvswkøwbK e¨e¯v cewZZ n‡Z †`‡LwQ| 1935 mv‡j fviZxq AvBb cvk Kivi ci †_‡K ZrKvjxb mg¯ fviZe‡l GKUv Av‡›`vj‡bi mwó n‡qwQj †h, wePviwefvM‡K wbevnx wefvM †_‡K c„K Ki‡Z n‡e| G †`‡k eû AvBbRxex, eû gbxlx, mg¯– QvÎ-mgvR cwZev‡` gÛvi n‡q D‡VwQj †h, wePviwefvM‡K wbevnx wefvM †_‡K m¤úÿfv‡e c„K Ki‡Z n‡e| Avgiv ZLb ï‡bwQ, wKš Zviv wKQyB Ki‡Z cv‡iwb| Avi AvR hLb Avgiv wb‡RivB mswkøwb ^Zix Ki‡Z hw”Q, ZLbB Avgiv †Póv K‡iwQ evsjv‡`‡ki mswkøv‡bi g‡a¨ wePviwefvM‡K* executive body *†_‡K m¤úÿi¡c Avjv`v Kivi Rb¨|

m¨vi, G m¤úv‡K `ßiUv D`vniY Awog w`‡Z PvB| Avgv‡`i mswkøv‡bi 22 Ges 116 Abÿ‡Q`| 22 Abÿ‡Q‡`i Aš–MZ †gŠwjK AwaKvi ejv n‡q‡Q †h, wePviwefv‡Mi c„KxKiY ivó wbðZ Ki‡eb| Avi, hv‡Z †Kvbw`b †Kvb gvbÿÛl g‡b m‡›`‡ni mwó bv nq, †mB Rb¨ 116 Abÿ‡Q‡` ejv n‡q‡Q, evsjv‡`‡ki mvgxg †Kv‡Ui Aax‡b nvB‡KvU _vK‡e| nvB‡Kv‡U wbhy³ e¨w³‡`i Ges wePviwefvMxq `wqZcvj‡b iZ g¨wR‡÷U‡`i wbqšÿY, Kg¯j-wbaviY, c‡`vbwZ`vb I Qwó-gÄÿxmn mKj welq I k„Ljv mvgxg †Kv‡Ui Dci b¨¯ _vK‡e| mÿZivs GLv‡b GUv cwi®vi n‡q wM‡q‡Q †h, evsjv‡`‡k ¯vaxbZvi gvÎ `k gvm c‡i †h GKUv mswkøv‡b †`lqv n‡"Q, Zv‡Z cwi®vifv‡e wjwce× Kiv n‡q‡Q †h, wePviwefvM wbevnx wefvM †_‡K GB mswkøv‡b KvhKi nlqvi ci †_‡K m¤úÿc„K n‡q hv‡e| mÿZivs, G e¨vcv‡i Avi †Kvb m‡›`n _vK‡Z cv‡i bv|

Rbve †gvt ûgvqb-Lwjj` (Gb. B.-73: Uv½vBj-3):

GB mswkøv‡b AvBbwefvM I kvmb wefvM‡K GB c_g Avjv`v Kiv nj Ges Avjv`v K‡i RbM‡Yi mwZ¨Kv‡ii b¨vqwePv‡ii e¨e¯v Kiv nj|

Aóg ^eVK: 24†k A‡±vei, 1972

Rbve Ave`ÿ gv‡jK DwKj:

AvBqÿ Lvb 1962 mv‡j †h mswkøv‡b K‡iwQj, Zvi A‡bK K_v eZgvb mswkøv‡b Av‡Q| Awg Zv gwb| †hgb †mLv‡b nvB‡KvU wQj GLv‡bI nvB‡Kv‡Ui K_v Av‡Q| Z‡e Awg ZvuK ej‡Z PvB †h, H nvB‡KvU Ges GLvbKvi D‡j-wLZ nvB‡Kv‡Ui g‡a¨ Zdvr Av‡Q| AvBqÿei nvB‡Kv‡Ui g‡a¨ hv wQj bv equality before law, *Zv GLv‡b Av‡Q| AvBqÿei WvB‡iKwUf wcwÝcj hv wQj, Avgv‡`i wcwÝc‡ji m‡½ Zvi wgj bvB|*

eÿrevi, 25†k A‡±vei, 1974

Rbve AvQv`ÿ¼gvb Lvb *(Gb. B-90: gqgbwmsn-15):*

Avi I GKwU D`vniY w`‡Z wM‡q ejv hvq †h, 22 Abÿ‡Q‡` gÿbxwZ wnmv‡e Avgiv MnY K‡iwQ †h,

Òivóivóiv wbevnx A½mgn- nB‡Z wePvi-wefv‡Mi c„_KvKiY ivó wbwðZ Kwi‡eb|Ó wePvi-wefvM‡K m¤úv`-fv‡e wbevnx wefvM †_‡K GB mswea v‡bB c„_K Kiv n‡q‡Q|

eyP¯úwZevi, 26†k A‡±vei, 1972

Rbve †gvt AwRRyj ingvb:

AvB‡bi cwZ k×v _vKv `iKvi| Avgiv g‡b Kwi, Avgiv gvbyl‡K ewj, Ômevi Dc‡i gvbyl mZ¨, Zvnvi Dc‡i bvBÕ| AvB‡bi Øviv kvmb n‡e| wePvi wefvM c„_K n‡q †Mj| eûw`‡bi Avkv, wbevnx wefvM wePvi-wefvM †_‡K c„_K n‡e Ges Zv c„_K nj| †mUvq Av‡Q cavbgšxi K_v| hw` †KD fyj K‡i †f‡e _v‡Kb †h, e½eÜzn‡eb cavbgšx Ges wW‡±Uiwkc Pwj‡q hv‡eb, Zvn‡j wZwb Ab¨vq Ki‡eb| wZwb Zvui †mncÝy Avlqvgx jxM‡K e‡j‡Qb, †Zvgiv Ggb AvBb K‡i `vl, hv‡Z Awg †hgb fwe, †m fv‡e n‡e- GUv mZ¨ bq|

GKv`k ^eVK: 27†k A‡±vei, 1972

Rbve Gg. kvgmyj nK:

GLv‡b hv‡Z AvB‡bi kvmb cwZwôZ nq, Zvi Rb¨ wbevnx wefvM‡K wePvi-wefvM †_‡K c„_K Kiv n‡q‡Q| hv‡Z G †`‡k AvB‡bi kvmb cwZwôZ nq Ges hvui wePviK, Zvui hv‡Z me iKg †jvf-jvjmvi E‡aŸ †_‡K b¨vq I Av`‡ki cwZôv Ki‡Z cv‡ib, Zvi Rb¨ GLv‡b wewa-e¨e¯v MnY Kiv n‡q‡Q|

Rbve gxi †nv‡mb †PŠayix, G¨vW‡fv‡KU:

Avgv‡`i GB kvmbZ‡š †h †gŠwjK AwaKvi †`lqv n‡q‡Q, Zv‡Z D‡jL i‡q‡Q †h, GB †`‡k AvB‡bi kvmb n‡e Ges AvB‡bi †Pv‡L mevB mgvb| Awg wekvm Kwi, AvB‡bi cwZ k×v‡eva _vK‡j mswea vb myi n‡Z cv‡i| AvB‡bi cwZ k×v _vK‡j †mB †`kl myi nq|

GB mswea v‡b ÔRyjvWvmqvwiÕ‡K ÔGKwRwKDwUfÕ †_‡K Avjv`v K‡i †`lqv n‡q‡Q, †hb GB e¨e¯vi gva¨‡g †h †Kvb †jvK Ab¨vq‡qi cwZKvi †c‡Z cv‡ib| GB †h mswea v‡b ÔRyjvWvmqvwiÕ‡K Avjv`v K‡i †`lqv n‡q‡Q, Zv‡Z A‡b‡Ki g‡Z GB mswea vb A‡bK fvj n‡q‡Q|

Rbve Avnmvb Djvn (wc. B.-73: Kwdóqv-3):

wePvi-wefvM m¤‡Ü ejv n‡q‡Q wePviK Kx fv‡e wb‡qvM Kiv n‡e, Kx Zvui KvR n‡e| kvmbZ‡š G me welq wb`ó K‡i †`lqv n‡q‡Q| G fv‡e cwZwU wefvM m¤‡Ü GB kvmbZ‡š myôw`ó Kgcšv wbaviY K‡i †`lqv n‡q‡Q|

KvRx mvnvejÿb (wc. B.-196: XvKv-26):

Awg GB mswea v‡bi Avi I `yGKwU ^ewk‡ó¨i K_v eje| Zvi g‡a¨ GKwU n‡"Q GB †h, `xN cwðk eQi hver ÔGKwRwKDwUfÕ Ges ÔRyjvWvmqvixÕ‡K c„_K Kiv m¤e nqwb| hvi Kvdj weMZ cwðk eQi Avgv‡`i fyj‡Z n‡q‡Q| Avgiv- AvBbRxexiv- wewfb mg‡q wePvi-wefvM‡K kvmb-wefvM n‡Z c„_K Kivi Rb¨ †Rviv‡jv `vex DÌvcb K‡iwQjvg| ^¯ivPvix kvmbAvg‡j Avgv‡`i `vex ïaybvexB i‡q †Mj| AvR Avgiv †h mswea vb w`‡Z hw"Q, †mB mswea v‡b wePvi-wefvM‡K kvmb-wefvM †_‡K c„_K Kivi e¨e¯v i‡q‡Q| GUv Avgv‡`i Rb¨ AZ¨š Avb‡›`i welq|

†mvgevi, 30†k A‡±vei, 1972

Rbve ZvRDÏxb Awng` (A_ I cwiKíbvcYqb-gšx):

GKUv AwZwi³ K_v ms‡hvRb Kiv n‡q‡Q †h, Av`vjZ GB mswea v‡bi †Kvb avivi e¨vL¨v Ki‡Z wM‡q hw` AvB‡bi kb¨Zv †`‡Lb, Zvn‡j e¨vL¨v w`‡q †mB kb¨Zv c‡iY Ki‡eb| †mB e¨vL¨v w`‡Z wM‡q Av`vjZ †h wb‡`k †`‡eb, Zv KvhKi n‡e Ges Av`vj‡Zi †m iKg

¶gZv _vK‡e| Zvi Rb¨ Avgiv e¨e¯v †i‡LwQ| AvB‡bi e¨vL¨vq, RR mv‡ne †h iKg Dchy³ we‡ePbv Ki‡eb, †mB iKg ivq w`‡Z cvi‡eb|

Avgiv GKUv AvBb K‡iwQ, †h AvBb e‡j Rwg RvZxqKiY Kiv hv‡e, wkí-KviLvbv RvZxqKiY Kiv hv‡e| Avgv‡`i GB e¨e¯vi d‡j hw` †Kvb †¶‡Î †h D‡Ï‡k¨ AvBbwU cYxZ n‡q‡Q, †mB D‡Ï‡k¨ e¨vnZ nq wKsev Rbmvavi‡Yi ¯v‡_i ¶wZ nq, Zvn‡j AvR‡K huiv AvBbwUi mgv‡jvPbv Ki‡Qb ev we‡iwaZv Ki‡Qb, RR mv‡ne Zvui mc‡¶ ivq w`‡j Avgv‡`i wKQy KiYxq _vK‡e bv Avevi GB msweavb ms‡kvab Kiv Qvov| ZvB GB msweav‡b e¨e¯v ivLv n‡q‡Q †h, AvB‡bi e¨vL¨v †`evi mgq RR mv‡ne‡K GB †h gvbwZ †`Iqv n‡q‡Q, Zv‡K mvg‡b †i‡L Zvi mc‡¶ ivq w`‡Z n‡e- Zvi wecixZ †Kvb ivq †`Iqv hv‡e bv- hw` kbœZvi †¶‡Î wecixZ ivq w`‡Z cvi‡Zb|

Kv‡RB Avgv‡`i GB msweav‡b AwZwi³ myèi GKwU e¨e¯v ms‡hvwRZ n‡q‡Q| RR mv‡ne GB msweavb Abyhvqx kc_ MnY Ki‡eb| GB msweavb‡K mvg‡b †i‡L wZwb wm×vš– MnY Ki‡eb| c‡Z¨K gvby, c‡Z¨K KgPvix- Zv wZwb RR mv‡ne †nvb ev †hB †nvb- GB msweavb‡K m‡ev‡”P Zzj ai‡eb| hw` GB msweavb †KD j•Nb K‡ib ev †mB ai‡bi Avk¼v _v‡K, Zvn‡j †mB cwiw¯wZ †gvKv‡ejvi Rb¨ wewfb Dcv‡q c¯Z _vK‡Z n‡e|

Rbve wmivRyj nK, G¨vW‡fv‡KU *(Gb. B.-134: Kwgjv-4):*

†h ÔRyjvWwmqvj wm‡÷gÕ Avgiv w`‡qwQ, Avwg M‡ei m‡½ ej‡Z cwi, eÜzwó fviZel GLb chš Zv w`‡Z cv‡iwb| †Kbbv, fviZe‡l GLbI ÔRyjvWwmqvwiÕ‡K m¤úv¯—c„K Kiv m¤e nqwb| Avi, Avgiv †Póv K‡iwQ, Avjv`v Kivi| ïaynvB‡KvU bq, myweavg †KvU bq- Avgv‡`i wbgZg ÔRyjvWwmqvwiÕ‡KI ÔGw·wKDwUfÕ †_‡K Avjv`v Kievi Rb¨ Avgv‡`i msweav‡b e¨e¯v K‡iwQ| myZivs Awf‡hvM mZ¨ bq|

Rbve Ave`¨vjq gš¿vKvg †PŠayix *(Gb. B.-124: wm‡jU-5):*

GB msweav‡b Avgiv 22 Abyôv‡Q‡`i gva¨‡g wbevnx wefvM †_‡K wePvi-wefvM‡K c„K K‡iwQ| Avgv‡`i cwZ‡ekx-ivó fviZ 235 Abyôv‡Q‡`i gva¨‡g GUv Ki‡Z †P‡q‡Q; wKš myôw`ófv‡e Zv Ki‡Z cv‡iwb| ïayfwel¨‡Zi Rb¨ GKUv e¨e¯v †i‡L‡Q| wKš Avgiv AvR‡K GUv‡K m¤úv¯—i¡‡c c„K K‡i w`‡qwQ|

Rbve Ave`¨vjq gwgb Zvjyi`vi:

Rbve ¯úxKvi mv‡ne, GB MYZš ev msm`xq MYZ‡š GKUv wRwbl Av‡Q Ôi¤j Ae jÕ ev AvB‡bi kvmb| AvB‡bi †Pv‡L c‡Z¨K gvby mgvb, c‡Z¨K bvMwiK mgvb, c‡Z¨K bvMwi‡Ki mgvb AwaKvi- Zv wZwb cavbgšxB †nvb ev GKRb KIK, gyLU, gRyj ev †g_i| AvB‡bi †Pv‡L mevB mgvb| GB Ôi¤j Ae jÕ ev AvB‡bi kvmb mK‡ji Rb¨|

Rbve †gvt Ave`¨vjq AwRR †PŠayix:

ZvQvov, 35 b¤i Abyôv‡Q‡` †Mvc‡b wePvi Kivi e¨e¯v ivLv n‡q‡Q| Gi d‡j msweav‡b †h †gŠwjK AwaKvi Uz‡z`Iqv n‡qwQj, Zv Avi _vKj bv| †Mvc‡b wePviKvh cwiPvjbv Kivi kZ Av‡ivc K‡i †`Iqv‡Z cKvk¨ wePvi cvIqvi AwaKvi niY Kiv nj| GB e¨e¯v Rbg‡Zi cwZdjb bq wbðqB|

ïayfcwm‡W‡›Ui 9 b¤i Av‡`kB bq- †mB m‡½ msweav‡bi 135 b¤i Abyôv‡Q‡`i gva¨‡gI †gŠwjK AwaKvi Le Kiv n‡q‡Q| Zvui`i e¨vcv‡i MnxZ †h †Kvb e¨e¯vi wei¤× wePvi cvIqvi AwaKvi Av`vj‡Zi gva¨‡g cwZôZ Kivi myhvM bvB Ges †m m¤ú‡K AvBbMZ gxgvsmv Kivi †Kvb e¨e¯vI bvB GB msweav‡b| G‡Z K‡i ¯vfweKfv‡eB miKvix PvKzix‡`i g‡b †¶vf myó n‡q‡Q|

W. Kvgvj †nv‡mb *(AvBb I msm`xq welqvejx Ges msweavb-cYqb-gšx):*

Avgv‡`i msweav‡bi †gŠwjK AwaKv‡ii fvMwU hw` †KD we‡ePbv K‡i †`‡Lb, Zvn‡j †evSv hv‡e †h, Avgiv GB wØZxq e¨e¯vwU‡K †gŠwjK AwaKv‡ii †¶‡Î Kv‡Q jvwM‡qwQ| AvB‡bi hy³ m½Z evavwb‡la Av‡ivc Kivi GKUv weavb i‡q‡Q| hy³ m½Z nj wK nj bv, †mUv wePvi Kivi GLwZqvi mgvcxg †Kv‡Ui| GB AwaKvi mÿúó, mybwðZ| msm` GUv Le Ki‡Z cvi‡eb bv| Zuiv †Kej wePvi K‡i †`L‡eb| c‡Z¨K AwaKv‡ii e¨vcv‡i GB weavb Kiv n‡q‡Q|

<u>wePvi-wefv‡Mi ¯vaxbZv wbwðZ Kivi Rb¨ Avgiv we‡kl mZKZv Aej¤b K‡iwQ|</u> msweav‡b mgvcxg †KvU m¤ú‡K †h weavb ivLv n‡q‡Q, †m m¤ú‡K †KD †KD ck Z‡ej‡Qb †h, GKUv nvB‡KvU Avi GKUv mgvcxg †KvU Kiv nj bv †Kb|

Avgv‡`i msweav‡bi 94 Abyÿ‡Q‡` weavb K‡iwQ †h, mgvcxg †Kv‡Ui `ywU wefvM _vK‡e| GKUv nj Avcxj wefvM, Avi GKUv nvB‡KvU wefvM| GB `ywUi MVb m¤ú~ Avjv`v| †h wePvicwZ GK wefv‡M em‡eb, wZwb Ab¨ wefv‡M em‡Z cvi‡eb bv|

Z‡e `ywUv wefvM‡K GKB mgvcxg †Kv‡Ui A½ K‡i ivLvi D‡Ïk¨ nj †h, `ywUvB †`‡ki m‡ev"P Av`vj‡Zi mgvb ghv`v cv‡e| A‡bK GKK ev BDwbUvix iv‡ó m‡ev"P Av`vj‡Zi `ywUv A½ _v‡K| GKUv nj Ôtdwvivj G¨v‡c‡jU †KvUÕ Avi GKUv ÔnvB‡q÷ AwiwRbvj RywWmqvjÕ| †Kbbv, `ywUv‡K c„_K Ki‡j, `ywUv‡K Avjv`v Ki‡j A_vr GKUv nvB‡KvU Ges Gi GKUv mgvcxg †KvU ivL‡j mgvcxg †KvUB m‡ev"P Av`vjZ n‡q hv‡e| †m †¶‡Î nvB‡Kv‡Ui ghv`v Kwg‡q w`‡Z nq Ges †mUv wØZxq ¯Z‡i P‡j hvq|

Avgv‡`i †h `ywóf½x †_‡K Avgiv GB wel‡q wm×vš wb‡qwQ, †mUv nj †h, kZKiv 90 fvM †jv‡Ki Rb¨ nvB‡KvUB †kl Av`vjZ Ges nvB‡KvU‡K we‡kl AwaKvi †`lqv n‡q‡Q †gŠwjK AwaKvi i¶v Kivi e¨vcv‡i|

44 Ges 102 Abyÿ‡Q` †`L‡j †evSv hv‡e †h, †gŠwjK AwaKvi i¶v Kivi †h we‡kl ¶gZv †`lqv n‡q‡Q, †mUv Av‡M nvB‡Kv‡UiB wQj Ges †mUv GLbI nvB‡KvU wWfk‡biB _vK‡e|

†dwvivj ivó GKUv mgvcxg †KvU Qvov _vK‡Z cv‡i bv| cuPwU c‡`‡k cuPwU nvB‡KvU _vK‡j GKwU mgvcxg †KvU _vK‡Z nq Zv‡`i KvQ †_‡K Avcxj †blqvi Rb¨ wKš ÔBDwbUvixÕ iv‡ó m‡ev"P Av`vjZ‡K GBfv‡e `ywÿf v‡M we¯f ³ Ki‡j †h nvB‡KvU _v‡K, Zv‡K wØZxq ¯–‡i wb‡q Avmv nq Ges †mLv‡b kZKiv 90 fvM †jvK hvq, Zvi ghv`v Kwg‡q †`lqv nq|

GB `ywóf½x †_‡K Avgiv welqwU‡K †`‡Lwjvg| Avgiv mÿzePv‡ii D‡Ïk¨ G e¨e¯v K‡iwQ| KviY, Avgiv Rwb, Avcxj wefv‡M kZKiv 5Uv †Km hvq bv Ges nvB‡KvU wefv‡M kZKiv 90Uv †Km hvq|

†gŠwjK AwaKvi i¶v Kivi Rb¨ †h ÔixU wcwUkbÕ n‡e, †mUv Ôix‡UÕi GLwZqv‡i †`lqv n‡q‡Q| G¸wj‡K w`‡q Avgiv mgvcxg †Kv‡Ui GKUv weavb K‡iwQ| Avgiv wekvm Kwi †h, †KvU‡K †gŠwjK AwaKvi i¶vi †h ¶gZv, †h GLwZqvi †`lqv n‡q‡Q, †mUv m‡ev"P Av`vjZi GKUv A½ wnmv‡e ivLv DwPZ|

†KD †KD e‡j‡Qb, K‡qKUv jvwZb kã Avgiv †Kb e¨envi Kwiwb- †hgb: *Mandamus, habeas-corpus, quo warranto, certiorary?* huiv GUv e‡j‡Qb, Ztiv `i ejvi D‡Ïk¨ nj †hb Avgiv †Kvb wKQyev` w`‡qwQ|

wKš 102 Abyÿ‡Q` hw` †KD we‡ePbv K‡i †`‡Lb A_vr GLv‡b †h GLwZqvi †`lqv n‡q‡Q nvB‡Kv‡U wefvM‡K, Zv hw` GK GKUv K‡i †KD †`‡Lb, Zvn‡j wZwb eÿ‡Z cvi‡eb †h, Gi meB †`lqv n‡q‡Q|

†hgb, Ôg¨v‡Ûgv‡mÔi †h Ô†¯«cÔ, Zvi Rb¨ Avgv‡`i msweav‡b GKUv Dc`dv Av‡Q| ÔmwUIiwiÔi †h Ô†¯«cÔ, Zvi Rb¨ GKUv Dc`dv Av‡Q| †Zgwb ÔKz‡k Iqviv‡›UvÔi †h Ô†¯«cÔ, Zvi Rb¨I Avgv‡`i GKUv Dc`dv Av‡Q| †nweqvm-Kcv‡mi Rb¨ GKUv Dc`dv Av‡Q| Ôcwnwek‡bÔi Dci GKUv Dc`dv Av‡Q|

Avgiv †Kvb RvqMvq jwZb kã e¨envi Kwiwb| jwZb kã e¨envi Kiv †hZ| wKš Avgiv †`‡LwQ, jwZb kã e¨env‡i wKQyAmyweav Av‡Q| †mUv nj, jwZb k‡ãi †cQ‡b GKUv BwZnvm Av‡Q †mUv AZ¨š Ô†UKwbK¨vjÔ-ai‡bi Ges eû RwUj wewa-weavb Zvi m‡½ RwoZ| GB Ô†UKwbKwjwUÔi Rb¨ G¸wj GLv‡b †`Iqv nqwb| G¸wj A‡bKUv Avgiv †m‡i wb‡qwQ|

Z‡e †`Lv hvq †h, ÔmwUIiwiÔi †h BwZnvm, †mUv wePviwefvMxq Ges Avav-wePviwefvMxq UvBeÿbv‡ji g‡a¨ mxgve×|

Avgiv 102 Abÿ¨Q‡` †hfv‡e wj‡LwQ, †mB Abÿxq hw` †Kvb KZ©¶ ev e¨w³-whwb miKvix ¶gZv c‡qvM K‡ib- ÔRvimwWKk‡bi evB‡i wKQyK‡ib Ges †mRb¨ †KD ¶wZM¯nb, Zvn‡j D³ ms¶ß e¨w³ nvB‡Kv‡U Avcxj Ki‡j nvB‡Kv‡U mswk-ó KZ©¶ ev e¨w³‡K wb‡`k w`‡Z cvi‡eb| GB e¨e¯v MnY bv K‡i Avgiv hw` GKUv jwZb kã ivLZvg, Zvn‡j †mB cwigv‡Y nvB‡Kv‡Ui ¶gZv mxgve× Kiv nZ|

Avgvi GKRb AvBbRxex-eÜze‡jwQ‡jb, jwZb kã fvj †kvbvq, G¸wj ivL‡jb bv †Kb? Awg ejjvg, †Kvb †Kvb †Km jwZb kã w`‡q ÔKfviÔ nq e‡U, wKš Zv‡Z nvB‡Kv‡Ui ¶gZv mxgve× n‡q hvq| Avevi Ggb †KmI i‡q‡Q, hv †Kej jwZb kã ewm‡q w`‡jB ÔKfviÔ nq bv| †hgb, †Kvb ckvmwbK ms¯vi wei“‡× ÔmwUIiwiÔi P‡j bv| ZLb wZwb Aek¨¯xKvi Ki‡jb †h, jwZb kã e¨envi Ki‡j Av`vj‡Zi AvIZv mxgve× n‡q hvq|

†Zgwb Avgiv AviI †`‡LwQ †h, Ô†nweqvm-KcvmÔ kã MnY Ki‡j wVK †mB wRwbI nq bv, hv Avgiv PvB| †Kbbv, †mLv‡b Ô†nwiqvm-KcvmÔ w`‡j Av`vj‡Zi hZUkzGLwZqvi, GB k‡ãi e¨vL¨v Zvi †P‡q A‡bK e¨vcK, AvIZv A‡bK cmwiZ| Zvici Ô†nweqvm-KcvmÔ- GB jwZb kã e¨envi Ki‡j nvB‡KvU †K wKQzKg GLwZqvi †`Iqv nq| Zvi e`‡j Avgiv †hUv w`‡qwQ, Zv‡Z nvB‡KvU‡K AviI †ekx GLwZqvi †`Iqv n‡q‡Q|

Avi GKUv e¨e¯v Avgiv K‡iwQ| †mUv nj, †Kvb c¶ GKm‡½ wZb-Pvi ai‡bi gvgjvi AvIZvq Avm‡e bv| †m¸wj nj, Avgiv we‡klfv‡e †h me wkí-cwZôvb RvZxqKiY K‡iwQ †m¸wj; PvKix m¤úKxq gvgjv; miKvix KgPvix‡`i gvgjv; Ges miKv‡ii Dci b¨¯cwiZ³ m¤úwË m¤úKxq gvgjv| Zvi KviY, Ôix‡UÔi AvIZv wKQzKv †ekx `iKvi| Ôix‡UÔ NUbvi Dci wbfi K‡i wePvi Kiv hvq bv- ïaygvBb wb‡q wePvi nq|

A‡bK MYZwšK †`‡k mwfmgn‡K nvB‡Kv‡Ui GLwZqv‡i †`Iqv nq bv| Avgv‡`i eÜzivó fvi‡ZI GB wbqg| G¸wj nvB‡Kv‡U wb‡j mywePvi nq bv| Kvib, G¸wj AZ¨š-Lyubwe¨vcvi Ges Avmj †h Awf‡hvM, Zvi †mLv‡b wePvi nq bv| A‡bK †`‡k ZvB mwf‡mi Rb¨ Avjv`v UvBeÿbvj Av‡Q| Zuiv G wel‡qi wePvi K‡i _v‡Kb| Zuiv Gi Ô†UKwbKvjÔ w`K †`‡L we¯—wiZ NUbvi wePvi Ki‡Z cv‡ib| GB mg¯ UvBeÿbvj †_‡K Zuiv mywePv‡ii wbðqZv †c‡q _v‡Kb| nvB‡Kv‡U GB me e¨vcvi wb‡q ÔixUÔ K‡i Ah_v fxo K‡i †KD mywePvi cvb bv| Avm‡j †h me wel‡qi Rb¨ ÔixUÔ Kiv c‡qvRb, †m¸wj‡K nvB‡Kv‡Ui GLwZqvify³ K‡i evKx¸wj‡K A_vr PvKix, miKvix m¤úwË RvZxqKi‡Yi welq¸wj‡K ckvmwbK UvBeÿbv‡ji nv‡Z †Q‡o †`Iqv n‡q‡Q| G¸wji weavb 117 Abÿ¨Q‡` Kiv n‡q‡Q|

G m¤ú‡K ejv n‡q‡Q †h, Avgiv GK nv‡Z w`‡q Ab¨ nv‡Z wb‡qwQ| GUv wVK K_v bq| Avgiv c¥¶gZv nvB‡KvU‡K w`Bwb- G K_vI wVK bq| nvB‡Kv‡Ui Ôix‡UÔi AvIZv ej‡Z

†hUv †evSv‡bv nq, †mUv nvB‡KvU‡K †` Iqv n‡q‡Q| †Kej GUvi mxgve×Zvi K_v ejv n‡q‡Q 102 Abyÿ‡Q‡` i (3) `dvq|

wePviwefvM m¤‡Ü Avi GKUv K_v ej‡Z nq| wbevnx wefvM †_‡K wePviwefvM‡K c„K Kivi KvRUv mivmwifv‡e Avgiv K‡i w`‡qwQ| ck †Zvjv n‡q‡Q †h, Avgiv Zv Kwiwb| wKš Avgiv c_g w`‡K gj‡bxwZi g‡a¨ Zv K‡i w`‡qwQ| Zvici, Aevei hw` GKUzKó K‡i 114 Ges 115 Abyÿ‡Q` Zuv †`‡Lb, Zvn‡j eis Z cvi‡eb †h, GUvi weavb Kiv n‡q‡Q|

`ÿZv wRqMvq Kijvg †Kb, G ck DV‡Z cv‡i| fwel¨‡Z †h AvBb Kiv n‡e, Zv †hb GB weavb Abyiv‡i Kiv nq, †mRb¨ GB e¨e¯v| Aa¯b Av`vjZ Ges †dŠR`vix Av`vj‡Zi g¨wR‡÷U‡` i‡K Avgiv mycxg †Kv‡Ui AvIZvq wb‡q G‡mwQ|

wbevnx wefvM †_‡K wePviwefvM‡K c„K Kivi `vex Avgv‡` i eûw`b Av‡Mi cÖv‡bv `vex| Avgiv AZx‡Z †`‡LwQ, wbevnx wefv‡Mi Aax‡b wePviwefvM _vKvi d‡j Kxfv‡e Zuv` i cfweZ Kiv n‡q‡Q, Kxfv‡e fq †`Lv‡bv n‡q‡Q|

AvBqye‡j Avg‡j Avgvi g‡b Av‡Q, GKRb †Rjv-RR miKv‡ii wei‡× GKUv ÔBbRvskbÕ w`‡qwQ‡jb| †mRb¨ Zuv‡K m›Øx‡c e`jx Kiv nq| Kv‡RB G †`‡ki RvMZ RbZv wbevnx wefvM †_‡K wePviwefv‡Mi c„KxKi‡Yi `vex Z‡ej‡Qb|

Kxfv‡e AZx‡Z wePviwefv‡Mi ¯vaxbZv Le Kiv n‡q‡Q, Zvi eû bRxi Av‡Q| †mRb¨ AvBbRxex Qvovl G †`‡ki Rbmvavi Y w`‡bi ci w`b wePviwefvM‡K wbevnx wefvM †_‡K c„K Kivi `vex Rwb‡q G‡m‡Qb| Avgiv‡B †m `vex K‡iwQ Ges GLb †h‡nZz mvaviY †c‡qwQ, ZvB †m `vex Avgiv †g‡b wb‡qwQ| `vex-`vIqv Avgiv‡B KiZvg| ZLb Avgiv `vex-`vIqv †g‡b †bIqvi mvaviY cvBwb| GZw`b c‡i Avgiv G me `vex-`vIqv ci¶Y Kivi mvaviY †c‡qwQ| Avgvi g‡b nq, †Kvb-bv-†Kvb m`m¨ Gi Dci GKUv-bv-GKUv c¯ve cvm K‡i‡Qb| ZvB AvR‡K Avgiv †g‡b wbjvg †h, wbevnx wefvM †_‡K wePviwefvM‡K c„K Kiv †nvK|

msweav‡bi 114 Ges 115 Abyÿ‡Q‡` GUv K‡i †` Iqv n‡q‡Q| Zv m‡Ë I †KD †KD e‡j‡Qb †h GUv Kiv nqwb| Zuv ïaygj‡bxwZ †`‡L G K_v ej‡Qb| evKxUKzZuv †`‡Lbwb| †mUv Qvovl wePviwefv‡Mi cwi‡”Q` †`Lv| †mLv‡bI Avgiv †m e¨e¯v K‡i w`‡qwQ|

GLv‡b Awg ïaygUKzej‡Z PvB †h, Kxfv‡e Avgiv GZ Awej‡¤ GUv Ki‡Z †c‡iwQ, ZvI wePvi Kiv `iKvi| Ab¨vb¨ †`‡k GUv Ki‡Z A‡bK mgq †j‡M‡Q| BwÛqv hLb GUv MnY K‡i, ZLb 235 Ges 237 Abyÿ‡Q‡` GKUv weavb Kiv n‡qwQj g¨wR‡÷U m¤ú‡K| 1970 mvj chbš–ms‡kwaZ fviZxq msweav‡bi 237 Abyÿ‡Q`:

"Application of the provisions of this Chapter to certain class or classes of Magistrates.- The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such dates as may be fixed by him in that behalf apply in relation to any class or classes of Magistrates in the States."

235 Abyÿ‡Q‡` Av‡Q:

"Control over subordinate courts.- The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court."

fvi‡Z Zuv Aa¯b Av`vjZi e¨vcv‡i G K_v e‡j‡Qb| wKš Ôg¨wR‡÷mxÕi e¨vcv‡i Zuv fwel¨r †Kvb mg‡q e¨e¯v MnY Ki‡eb Ges ZwiL Rvbv‡eb e‡j D‡j-L K‡i‡Qb|

Avgv‡` i msweav‡b 114 Ges 115 Abyÿ‡Q‡` cwi®vifv‡e ejv Av‡Q †h, Zuv mycxg †Kv‡Ui Aaxb n‡eb, Zu` i wb‡qvM mycxg †Kv‡Ui mycwik-Abyfvqx n‡e| Zu` i e`jx,

c‡`vbwZ, Zvt`i weiY× k¦Ljvgj‡K e¨e¯v- me wKQz_vK‡e mycxg †Kv‡Ui Aaxb| wbevnx wefvM †_‡K wePviwefvM‡K c„_K Kivi weavb Avgiv K‡iwQ|

Rbve ¯úxKvi mv‡ne, cveZ¨ PÆMvg †_‡K wbewPZ gvbbxq m`m¨ †mB GjvKv m¤ú‡K wKQzcwk Zzxj‡Qb| wZwb e‡j‡Qb †h, e¦Uk I cwK¯vbx Jcwb‡ewkK kvm‡bi mgq †m GjvKvi †h GKUv BwZnvm wQj, msweav‡b Zv D‡jL Kiv nqwb| Av‡M †m GjvKvi e¨vcv‡i †h we‡kl weavb wQj, G msweav‡b Zv †bB|

Awg G K_v ¯xKvi KiwQ, wKš †mB m‡½ Awg G K_vI ej‡Z PvB †h, Av‡M †m GjvKvi †jvK‡`i‡K ZZxq †kYxi bvMwiK K‡i ivLv n‡qwQj| G m¤‡Ü Avgiv †`L‡Z cwi fviZ kvmb AvB‡bi 92 aviv| †m BwZnvm Avgiv msweav‡b wjwLwb| 92 avivq G¸‡jv‡K ÔG · K‡ZWW Gwiqvô ejv nZ| Zv‡Z ejv Av‡Q:

"The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area..."

AvB‡bi †Kvb Ôc‡UKkbô Zvt`i wQj bv| †Kvb AvBb Zvt`i m¤ú‡K Kiv †hZ bv| Avi I Av‡Q:

"Governor may make regulation for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area,..."

ZLb Zvui v msm‡`i Av IZv †_‡K m¤ú¥ evB‡i wQ‡jb| Zvui v AvB‡bi Avk‡qi evB‡i wQ‡jb|

1935 mv‡ji fviZ kvmb AvB‡bi 92 avivq, 1956 mv‡ji cwK¯v‡b msweav‡bi 103 Abyw"Q‡`i (4) `dvq Ges 1962 mv‡ji msweav‡bi 221 Abyw"Q‡` GUv †`L‡Z cvB| Zvt`i‡K AvB‡bi Avkq †_‡K ewÂZ K‡i †mLv‡b Mfb‡ii kvmb Pvjyi vLvi weavb Kiv n‡qwQj| msm` Zvt`i e¨vcv‡i †Kvb AvBb cYqb Ki‡Z cvi‡Zb bv| Zvui v Av`vj‡Zi Avkq †_‡K ewÂZ _vK‡Zb| nvB‡Kv‡U gvgjv Ki‡Z cvi‡Zb bv| dvumi AWvi n‡jI nvB‡Kv‡U †h‡Z cvi‡Zb bv|

m‡PZbfv‡eB Avgiv †mB BwZnvm‡K †cQ‡b †d‡j w`‡Z PvB| KviY, GB me weav‡bi mvnv‡h¨ Zvt`i‡K bvbvfv‡e †kvlY Kiv m¤e n‡qwQj| `yLRbK †h, Zvui v †kwlZ n‡q‡Qb, Zvt`i‡K †kvlY Kiv n‡q‡Q| gvbbxq m`m¨ †mB †kvl‡Yi K_v e‡j‡Qb| we‡kl weavb _vKvi d‡jB †kvlY Kiv m¤e nZ| Jcwb‡ewkK kvmKiv Ab¨vqfv‡e bvMwiK‡`i g‡a¨ we‡f` mvgó KiZ, GK As‡ki wei‡× Ab¨ Ask‡K †jwj‡q w`‡q wb‡R‡`i mvgvav Av`vq KiZ| †`‡ki Ab¨vb¨ bvMwi‡Ki mgvb AwaKvi Zvt`i‡K †`Iqv nqwb| Avgv‡`i‡K wØZxq †kYxi bvMwiK Ges Zvt`i‡K ZZxq †kYxi bvMwiK K‡i †i‡LwQj Ges Avgv‡`i‡K kvmb I †kvlY KiZ| we‡kl weavb _vKvi d‡jB Avgv‡`i‡K †kvlY Kiv m¤e nZ|

†kl Kivi Av‡M Awg GKwU K_v ej‡Z PvB| hvui v e‡jb †h, GB me AwaKvi †`evi †Kvb gj¨ †bB, KviY Av`vj‡Z ejer Kivi ¶gZv †`Iqv nqwb, Zvt`i Awg eje †h, Ab, e¯, wPwKrmv, KvR Kivi AwaKvi ejer Kivi e¨e¯v †Kvb †`‡k wePviwefv‡Mi `wq‡Z †`Iqv n‡q‡Q e‡j Avgvi Rvbv †bB| ïaywebåwš--mvgói D‡Ï‡k¨ ejv n‡"Q †h, †gŠwjK AwaKv‡ii Aa¨vq ev gj¨bxwZi Aa¨v‡q GUv †bB| †gŠwjK AwaKvi‡K Av`vj‡Zi Øviv ejer Kivi e¨e¯v †Kvb mgvRZwšK ev †Kvb MYZwšK †`‡k †`L‡Z cvIqv hvq bv| Gi Øviv A_©bwZK AwaKvi ARb Kiv hvq wKbv, Zv Avgvi Rvbv †bB|

GB AwaKvi‡K hw` Av`vj‡Zi gva¨‡g ejer Ki‡Z nq, Zvn‡j AvBb-cwil`, wbevnx wefvM- me wKQyK Av`vj‡Zi Aax‡b Ki‡Z nq|

Ab, e¯, wPwKrmv, mvgvwRK wbivcËv BZ¨vw` c‡k wbevnx wefv‡Mi e¨vcv‡i msm‡`i Dci mvswewbK wb‡`k wjwce× Kiv n‡q‡Q| GB me e¨e¯v AvBb-cwil` MnY bv Ki‡j †K Ki‡e| AvBb-cwil` A_ RbM‡Yi wbewPZ cwZwba‡`i Øviv MwVZ msm`| Awg e§‡Z cviwQ bv, AvBb-cwil‡`i Dci ev msm‡`i Dci m‡›`n †Kb! AvBb-cwil` gwšmfv‡K †Kvb `wqZ w`‡j Zuiv Zv cvjb Ki‡eb bv †Kb, Zv Awg e§‡Z cviwQ bv|

Avi GUv‡K Av`vj‡Z ejer Ki‡jB hw` KvR nq, Zvn‡j Gi Øviv msm‡`i Acgvb Kiv n‡e bv wK? RbM‡Yi cwZwba‡`i Øviv MwVZ †h cwil`, Zv‡K `wqZ †`lqv hv‡e bv, `wqZ †`lqv hv‡e Av`vjZ‡K- Gi Øviv wK cgvwYZ n‡e bv †h, RbM‡Yi cwZwba‡`i †P‡q Av`vj‡Zi ev RR mv‡ne‡`i Dci †ekx Av¯v cKvk Kiv n‡"Q? GB ai‡bi mgvRZ‡ši K_v Awg e§‡Z A¶g|

A‡bK K_v ï‡bwQ| ejv n‡q‡Q, GUv‡K Av`vj‡Z ejer‡hvM¨ bv Kiv n‡j GUv n‡e fuZv| Ab, e¯, wPwKrmv, †kvlY †_‡K gy³- G me `wqZ hw` MYcwil‡`i ev RbM‡Yi wbewPZ cwZwba‡`i bv †`lqv nq, Zvn‡j Zuv`i Acgvb Kiv nq Ges Zuv`i cwZ Awekvm †cvlY Kiv nq|

†h RvMZ RbMY wPiw`b Zuv`i AwaKvi m¤ú‡K m‡PZb, huiv wb‡Ri i³ w`‡q ¯vaxbZv ARb K‡i‡Qb, Zuiv RbcwZwba‡`i Acgvb Kiv nq Ges Zuv`i cwZ Awekvm †cvlY Kiv nq|

Zvici, gvbbxq ¯úkvi mv‡ne, wePviwefvM‡K A_‰bwZK AwaKvi w`‡j Zuiv Zv ejer Ki‡Z cvi‡eb bv| Ab, e¯, wPwKrmv, wk¶v BZ¨vw`i Rb¨ cwiKíbvi c‡qvRb nq, AvBb Ki‡Z nq, A_ eivÏ Ki‡Z nq, m¤ú` Ôgwe‡vBRÕ Ki‡Z nq, A‡bK mgq KvVv‡gv cwieZb Ki‡Z nq| G me wK Av`vj‡Zi Øviv m¤e? †Kvb †`‡ki Av`vjZ cÖPmvjv cwiKíbv c¯Z K‡i‡Qb e‡j wK †KD †Kvbw`b ï‡b‡Qb? †Kvb mgvRZwšK †`‡k wK Av`vj‡Z GB me K‡i _v‡Kb?

Rbve ¯úkvi, m¨vi, wk¶v-e¨e¯v †Kvb mgvRZwšK †`‡k Av`vjZ K‡i _v‡Kb e‡j Avgvi Rvbv †bB| mvgvwRK wbivcËvi e¨e¯v †Kvbw`b †Kvb mgvRZwšK †`‡k Av`vj‡Zi Øviv Kiv nq e‡j Awg Rwb bv|

wbevnx wefvM m¤ú‡K m¯úófv‡e Avgiv e‡jwQ| A_‰bwZK AwaKvi ejer Kivi K_v ejv n‡q‡Q| wbevnx wefv‡M bvMwiK ¯vaxbZv Avi A_‰bwZK AwaKvi- G `yvi Avjv`v ÔKb‡mÞÕ †`lqv Av‡Q| Pjv‡divi AwaKv‡ii K_v Av‡Q, Pjv †divi ¯vaxbZvi K_v Av‡Q| evK-¯vaxbZvi K_v Av‡Q| †Kvb evav †bB| K‡qKwU welq Qvov Av`vj‡Zi Dci miKv‡ii wKQyÔcwRwUf wWDwUÕ Ges wKQyÔb‡MwUf wWDwUÕ Av‡Q| G me †¶‡Î Av`vj‡Zi Dci AwaKvi w`‡j bvMwiK AwaKvi Le Kiv n‡e|

†gŠwjK AwKvimg‡ni g‡a¨ A_‰bwZK AwaKvi Ab¨Zg Ges hv‡Z Rbmvavi Y Zv †fvM Ki‡Z cv‡ib, mswea‡b Zvi h‡_ó e¨e¯v i‡q‡Q| msm‡` AvBb K‡i Avg`vbx-bxwZ wVK Kiv n‡e| GUv‡K ejer Kivi e¨vcv‡i ev Gi c‡qv‡Mi e¨vcv‡i Av`vjZ ÔBbRvskbÕ Rvix Ki‡Z cvi‡eb bv|

†Ivok ^eVK: 3iv-4Vv b‡f¤i, 1972

kxmyjvÄr †mb¸ß:

gvbbxq ¯úxKvi mv‡ne, Avgvi wb‡e`b n‡"Q, Avgv‡`i †`‡k PvKixi GKUv wewa Av‡Q, Zvi GKUv wbqg Av‡Q| Service Rule e‡j †h GKUv K_v Av‡Q- Awg GB constitutional appointment-Gi K_v ejwQ, GLv‡b huiv PvKzix Ki‡Z Av‡mb- †hgb GKRb †jvK wePvi-wefv‡Mi gyÝd n‡q Av‡mb- wZwb wbðq Avkv K‡ib Service Rule Abyhvqx wewfb cix¶vi gva¨‡g †mB cwZôv‡bi Dbœ‡Zi m‡ev"P ¯‡i wM‡q wZwb DV‡eb, GKw`b RR-†Kv‡Ui RR n‡eb, nvB‡Kv‡Ui wePvicwZ n‡eb| wVK †Zgwb BwÄwbqvi I Avkv K‡ib, wZwb Zuv wewfb cix¶vi gva¨‡g PvKzix wewfb chv‡q †gavi cwiPq w`‡q Dbœ‡Zi m‡ev"P ¯v‡b wM‡q †cÖQv‡eb|

wKš GKRb fvj BwÄwbqvi n‡jB Zvu‡K Gw·wKDwUf BwÄwbqvi ev myZxwi‡›UwÛs BwÄwbqvi K‡i †`Iqv nq bv| wVK †Zgwb GKRb Wv³vi hw` evB‡i fvj practice K‡i _v‡Kb, Zvn‡jB Zvu‡K civil surgeon K‡i †`Iqv nq bv ev †mB iKg D"Pc‡` Awaôv Kiv nq bv|

wVK †mBfv‡e Awg wb‡R GKRb advocate n‡q AvR‡K `ytmvn‡mi m‡½ GB c¯ve G‡bwQ †h, hw` myZxg †Kv‡U Ab¨vb 10 ermi c¨vKwUm Ki‡j †Kvb GKRb nvB‡Kv‡Ui RR n‡q hvb, Zvn‡j ¯vfweK Kvi‡YB huiv `xNw`b H wePvi-wefv‡M PvKzix K‡ib, Zvu`i †h AwaKvi, †mB AwaKvi‡K ¶zZ K‡i †mB AwaKv‡ii ¯v‡b Zuiv ¯vb K‡i †bb|

ZvB Avcbvi gva¨‡g AvBb-gšxi Kv‡Q Z_v Avgv‡`i cwil‡`i mvg‡b Avgvi e³e¨, AšZt wePvi-wefvM‡K hw` mwZ¨Kvifv‡e Avgv‡`i ¯vaxb Ki‡Z nq Ges wePvi-wefv‡Mi cwZ hw` mwZ¨Kvifv‡e Avgv‡`i †`‡ki †mB mKj †gavm¤úb cwZfvevb †Q‡j‡`i AvKlY Ki‡Z nq, Zvn‡j wbðqB GB wea‡bi gva¨‡g Zvu`i‡K Avb‡Z n‡e- †hb Gi g‡a¨ Zuiv Zvu`i Dbœ‡Zi c_ †e‡Q wb‡Z cv‡ib, ga¨c‡_ A‡b¨iv G‡m †hb Zvu`i AwaKvi wQwb‡q wb‡Z bv cv‡i|

G e¨vcv‡i nq‡Zv Avgv‡`i AvBb-gšx A‡bK precedent Avb‡Z cv‡ib, †mUv Awg ¯xKvi Kwi| A‡bK mswea‡bI GB precedent _vK‡Z cv‡i| Ggb wK, AvBb-gšx 70 b¤i Abyôv‡Q` Avgv‡`i †`‡ki c‡¶ Dc‡hvMx g‡b K‡i‡Qb| Awg g‡b Kwi, GUv‡KI Avgv‡`i †`‡ki Dc‡hvMx e‡j g‡b K‡i GUv‡K eRb Ki‡eb| [evsjv‡`k MYcwil` weZK, msKjb I m¤cv`bv - e¨wi÷vi †gvt Ave`yj nwjg]

47. Our Founding Fathers dreamt of a society free from exploitation and oppression. This has been the core of the entire war of liberation struggle that the nation had to withstand in 1971. This pledge is well depicted in the Proclamation of the Independence dated 10th April, 1971, where it has been unequivocally stated that we are establishing Bangladesh "in order to ensure for the people of Bangladesh equality, human dignity and social justice," and not to speak our Founding Fathers had to pay the extreme price for that dream. The preamble of our constitution says that "it shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation a society in which he rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. In *A.T. Mridha v. State 25 DLR 353*, Badrul Haider Chowdhury, J. echoed the fundamental aim of this country in the following language: "In order to build up an egalitarian society for which tremendous sacrifice was made by the youth of this country in the national liberation movement, the Constitution emphasizes for building up society free from exploitation of man by man so that people may find the meaning of life. After all, the aim of the Constitution is the aim of human happiness. The Constitution is the supreme law and all laws are to be tested in the touch stone of the Constitution (vide article

7). It is the supreme law because it exists; it exists because the will of the people is reflected in it."

48. The sole and noblest purposes of our Founding Fathers were to establish a State where no one will be subjected to any maltreatment and humiliation so that everyone's fundamental human rights and freedoms and respect for the dignity and worthy of the human person are guaranteed. This is only possible where all powers of the Republic belong to the people and the people only. And all this lofty ideals can only be materialized in a State where rights of the people given through the constitution and laws are absolutely guaranteed and protected by a free, fair and independent judiciary.

49. In the above Parliamentary debates, Bangabandu Sheikh Mujibur Rahman stressed upon the rights of the people to be secured so that our next generation could claim that they are living in a civilized country. He also highlighted the human rights which would be secured to the citizens, meaning thereby on the question of rule of law there cannot be any compromise. The father of the nation hinted that in our constitution, the people's right with their participation in the affairs of the Republic and their hopes and aspirations would be enshrined. Participating in the debate, Dr. Kamal Hossain, one of the Founding Fathers of the constitution clearly expressed that the fundamental rights of the citizens would get priority; that this constitution would inspire the citizens and all powers of the Republic belong to the people and their exercise on behalf of the people shall be effected only under and by the authority of the constitution. He also assured that the independence of the judiciary shall be protected. Syed Nazrul Islam pointed out that the foremost precondition of Democracy is separation of judiciary from the executive, that is to say, the rule of law should be established in such a way that the judiciary shall be independent in true sense and that the judiciary can perform its responsibilities independently. M/S Asmat Ali Shikder, Ali Azam, M. Monsur Ali, Khandaker Abdul Hafiz, Abdul Malek Ukil, Asaduzzaman Khan, Md. Azizur Rahman, M. Shamsul Hoque, Mir Hossain Chowdhury, Ahsan Ullah, Taj Uddin Ahmed, Sirajaul Huq, Abdul Muttaquim Chowdhury, Abdul Momin Talukder, Md. Abdul Aziz Chowdhury, Suranjit Sen Gupta and Enayet Hossain Khan expressed their opinions in same voice with the above leaders. Their advice, proposals, opinions and aspiration have been reflected in the preamble, article 7 and Part III of the constitution. Therefore, the impugned provisions of the Code of Criminal Procedure have to be looked into and interpreted in the light of the deliberations and historical background as well the constitution of the People's Republic of Bangladesh.

Facts leading to the appeal

50. On 23rd July 1998, Shamim Reza Rubel, 20, a BBA student of Independent University, died in police custody after being arrested under section 54 of the Code of Criminal Procedure, hereinafter shortly referred to as the Code and being declared dead on arrival at the Dhaka Medical College Hospital. A public outcry occurred with protests by members of the public, political parties, lawyers, teachers, students and human rights activists. His father a retired government official demanded a judicial inquiry. Sheikh Hasina, the incumbent Prime Minister, the then leader of the Opposition, Khaleda Zia, visited the bereaved family members. Within three days, on 27th July 1998, the government through the Ministry of Home Affairs established a one-person Judicial Inquiry Commission under Justice Habibur Rahman Khan, pursuant to the Commissions of Inquiry Act, 1956 by a gazette notification stating that it was doing so in relation to the 'matter of public importance' in order to among others "inquire into the incident involving Shamim Reza Rubel, find out

the perpetrators and make recommendations on how to prevent such incidents in the future" within 15 days.

51. The writ petitioners and others appeared before the Commission of Inquiry and made submissions and recommendations based on their experience of providing legal aid and advice to individual victims of torture and ill-treatment. The Commission made a set of recommendations for the prevention of custodial torture but no action was taken by the government in the light of the recommendations. The recommendations of the Commission were as under:

(a) The police personnel carrying out the arrest should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
(b) That the police officer carrying out the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
(c) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
(d) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
(e) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
(f) An entry must be made in the dairy at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
(g) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
(h) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health service of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.
(i) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.
(j) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(k) The police control room should be provided at all district headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

52. Writ Petitioner No.2 Ain-O-Salish Kendra submitted a chart (after a survey throughout the Bangladesh) wherein it ascertained during the period between January, 1997 and December, 1997, several custodial deaths and torture had taken place. For better appreciation and evaluation the Chart is appended below:

Ain O Salish Kendra (ASK)
Death in Police Custody/Violence in Bangladesh
Duration:January, 1997 to December, 1997

Sl.No.	Particulars of Victims	Detenue's/Victim's Details	Concerned P/S or Jail	Type & Cause of Death	Date of Occurrence	Source	Remarks
01.	Death in Jail Custody						
02.	Nabir Hossain (45)	Under trial prisoner	Jessore C/J	Mysterious	13.1.97	Ittefaq 14.1.97	
03.	Hafizur Rahman (28)	Under trial prisoner	Rajshahi C/J	Illness	24.1.97	Ittefaq 27.1.97	
04.	Makbul (42)	Under trial prisoner	Rajshahi C/J	Mysterious	1.2.97	Ittefaq 3.1.97	
05.	Shima Chawdhury (17)	Safe Custody	Chittagong C/J	Lacking of treatment.	7.2.97	Janakantha 13.2.97	
06.	Md. Faruque (23)	Convicted	Chittagong C/J	Mysterious	27.1.97	Ajker Kagoj 6.2.97	
07.	Badol Malo (32)	Under trial prisoner	Faridpur D/J	Illness	6.2.97	Ittefaq 7.2.97	
08.	Abdur Rahman (60)	Convicted	Jessore C/J	Illness		Inqilab 7.2.97	
09.	Abul Hossain (46)	Under trial prisoner	Jessore C/J	Illness	12.1.97	Inqilab 14.2.97	
10.	Mayenuddin		Rajshahi C/J			Inqilab 20.2.97	
11.	Forkan Munshi (40)	Convicted	Patuakhali D/J	Illness	21.3.97	Ittefaq 2.3.97	
12.	Meraz Mia (55)	Under trial prisoner	Kishorganj D/J		5.3.97	Janakantha 8.3.97	
13.	Jatindranath Mandal		Jessore D/J	Illness	16.3.97	Inqilab 18.3.97	
14.	Delip Kumar Biswas (32)	Under trial prisoner	Narshindi D/J	Illness	16.97	Ittefaq 19.3.97	
15.	Abdul Latif	Convicted	Rajshahi C/J	Illness	19.3.97	Inqilab 20.3.97	
16.	Hamidur Rahman (43)	Convicted	Dinajpur D/J	Illness	13.4.97	DK 21.4.97	
17.	Lal Kha	Under trial prisoner	Hobiganj D/J	public assault & police torture.	27.4.97	Janakantha 29.4.97	
18.	Majid Howlader (60)	Under trial prisoner	Jhalakathi D/J	Illness	9.6.97	BB 11.6.97	
19.	Mang A (Barmiz) (32)	Under trial prisoner	Chittagong C/J	Unknown	13.6.97	Ittefaq 14.6.97	
20.	Hashem Ali (42)	Under trial prisoner	Shirajganj D/J	Illness		Inqilab 25.6.97	
21.	Abdul Majed (50)	Under trial prisoner	Jessore C/J	Illness	26.6.97	Janakantha 29.6.97	
22.	Sawpan (24)	Under trial prisoner	Chandpur S/J	Suicide	3.7.97	Ittefaq 5.7.97	
23.	Kuddus Kaabiraj (40)	Under trial prisoner	Dhaka C/J	Illness	14.7.97	BB 15.7.97	
24.	Ali Fakir (45)	Under trial prisoner	Jhalokathi D/J	Unknown	20.7.97	Bhorer Kagoj	

						21.9.97	
25.	Golap Khan (60)	Under trial prisoner	Brahmanbaria D/J	Illness	20.9.97	Bhorer Kagoj 21.9.97	
26.	Abdul Hai	Under trial prisoner	Mymensingha D/J	Illness	22.9.97	SB 6.10.97	
27.	Golam Kuddus Molla (45)	Under trial prisoner	Nrial D/J	Mysterious	5.10.97	SB 6.7.97	
28.	Wazed (35)	Under trial prisoner	Kishorganj D/J	Illness	16.10.97	Inqilab 17.10.97	
29.	Anser (41)	Convicted	Rajshahi C/J	Illness	25.11.97	Inqilab 27.11.97	
30.	Kamruzzaman	Convicted	Rajshahi C/J	Illness	25.11.97	Inqilab 27.11.97	
31.	Majharul Islam Tuhin (27)	Under trial prisoner	Narayanganj D/J	Lacking of treatment	6.12.97	SB 7.12.97	
32.	Mainal Abedin Janu (41)	Under trial prisoner	Narayanganj D/J	Torture	8.12.97	Janakantha 9.12.97	

Death in Police/Jail Custody in Bangladesh
Duration: January to October '98 may be stated below for better understanding and appreciation

Sl. No.	Name	Detenues Position	Concerned Jail or Police Station	Cause of Death	Date of death	Source
01.	Abu Taher (42)	Convicted	Dhaka Central Jail	Illness	31.12.97	1.1.98 Sangbad
02.	Zakir Hossain (22)	Under Trial Prisoner	Dhaka Central Jail	Illness	8.1.98	9.1.98 Muktakantha
03.	Shahed Ali (60)	Convicted	Dhaka Central Jail	Illness	2.2.98	3.2.98 Muktakantha
04.	Nasir (32)	Under Trial Prisoner	Jessore Central Jail	Unnatural Death	2.2.98	3.2.98 Janakantha
05.	Harun Shekh (25)	Under Trial Prisoner	Khulna District Jail	Public assault & Police Torture	6.2.98	9.2.98 Janakantha
06.	Halim (28)	Under Trial Prisoner	Dhaka Central Jail		17.2.98	18.2.98 Sangbad
07.	Dulal (30)	Under Trial Prisoner	Dhaka Central Jail	Suicide	7.3.98	8.3.98 Bhorer Kagoj
08.	Dowlat Khan (30)	Convicted	Dhaka Central Jail	Conflict between two detenue	9.3.98	10.3.98 Bhorer Kagoj
09.	Emranur Rashid Jitu (26)	Under Trial Prisoner	Chittagong District Jail	Illness	9.3.98	10.3.98 Sangbad
10.	Amar Biswas (50)	Under Trial Prisoner	Khulna District Jail	Illness	16.3.98	19.3.98 Ittefaq
11.	Abdul Mannan Babu	Under Trial Prisoner	Jessore Central Jail	Killed by Police	17.3.98	19.3.98 Ittefaq
12.	Jalil Khan	Convicted	Dhaka Central Jail	Illness	22.3.98	23.3.98 Ittefaq
13.	Abbasuddin (42)	Under Trial Prisoner	Chittagong District Jail	Illness	22.3.98	24.3.98 Sangbad
14.	Unknown	Under Trial Prisoner	Chittagong District Jail	Illness	21.3.98	24.3.98 Sangbad
15.	Yusuf Ali (46)	Under Trial Prisoner	Gazipur Central Jail	Illness	20.3.98	31.3.98 Ittefaq
16.	Ramendranath Mandal (25)	Under Trial Prisoner	Khulna District Jail	Illness	19.3.98	21.3.98 Bhorer Kagoj
17.	Ali Hossain (50)	Under Trial Prisoner	Dhaka Central Jail	Beating	30.3.98	21.3.98 Bhorer Kagoj
18.	Jainal Abedin (60)	Under Trial Prisoner	Bhola District Jail	Mysterious	14.4.98	16.4.98 Janakantha
19.	Alam (30)	Under Trial	Chittagong	Killed by another	9.5.98	10.5.98

		Prisoner	District Jail	detenue		Ittefaq
20.	Hamid (30)	Under Trial Prisoner	Dhaka Central Jail	Mysterious	13.5.98	14.5.98 Ittefaq
21.	Unknown (Barmij)	Under Trial Prisoner	Chittagong Central Jail	Diarrhea	10.5.98	14.5.98 Ittefaq
22.	Jamsher Uddin (50)	Convicted	Netrokona District Jail	Illness	13.5.98	15.5.98 Sangbad
23.	Abul Kalam Azad (45)	Under Trial Prisoner	Natore District Jail	Torture	17.5.98	20.5.98 Janakantha
24.	Ghelu Mia (55)	Under Trial Prisoner	B.Baria District Jail	-	-	24.5.98 Bhorer Kagoj
25.	Sirajuddin (30)	Under Trial Prisoner	Sylhet District Jail	Torture	23.5.98	26.5.98 Sangbad
26.	Iasin Ali (60)	Under Trial Prisoner	Thakurgaon District Jail	Illness	27.5.98	30.5.98 Janakantha
27.	Abdullah (50)	Convicted	Dhaka Central Jail	Mysterious	7.6.98	9.6.98 Ittefaq
28.	Jewel Patwary (24)	Convicted	Comilla Central Jail	Illness	5.6.98	10.6.98 Inqilab
29.	Abdul Quddus (60)	Convicted	Gaibandha District Jail	Mysterious	6.6.98	12.6.98 Bhorer Kagoj
30.	Abdur Rahim	Under Trial Prisoner	Manikgonj Sub Jail	Illness	18.98	19.6.98 Bhorer Kagoj
31.	Baby (1.5 years)	Under Trial Prisoner	Dhaka Central Jail	Illness/negligence	1.7.98	2.7.98 Bhorer Kagoj
32.	Moazzen Hossain (48)	Convicted	Dhaka Central Jail	Illness	10.7.98	11.7.98 Bhorer Kagoj
33.	Md. Alamgir Hossain (15)	Under Trial Prisoner	Dhaka Central Jail	Torture	6.8.98	7.8.98 Bhorer Kagoj
34.	Majur Ali (32)	Under Trial Prisoner	Chuadanga District Jail	Torture	6.8.98	7.8.98 Bhorer kagoj
35.	Md. Musa (45)	Under Trial Prisoner	Dhaka Central Jail	Torture	5.8.98	9.8.98 Janakantha
36.	Md. Ali (32)	Under Trial Prisoner	Joypurhat District Jail	Public assault	9.8.98	12.8.98 Banglabazar
37.	Md. Mohiuddin (45)	Under Trial Prisoner	Noakhali District Jail	Illness	17.8.98	19.8.98 Ittefaq
38.	Md. Hossain (35)	Under Trial Prisoner	Dhaka Central Jail	Illness	28.8.98	29.8.98 Muktakantha
39.	Nuru Mia (42)	Convicted	Comilla Central	Illness	12.9.98	15.9.98

			Jail			Ittefaq
40.	Ilias (a minor boy)	Convicted	Narsingdi District Jail	Illness	16. 9.98	19.9.98 Janakantha
41.	Abdul Baten (30)	Under Trial Prisoner	Dhaka Central Jail	Illness	22.9.98	23.9.98 Bhorer Kagoj
42.	Mosle Uddin (60)	Convicted	Dhaka Central Jail	Illness	26.9.98	28.9.98 Muktakantha
43.	Tara Mia (49)	Convicted	Dhaka Central Jail	Illness	28.9.98	15.9.98 Ittefaq
44.	Nurul Hoque (55)	Under Trial Prisoner	Noakhali District Jail	Illness	4.10.98	5.10.98 Ittefaq
45.	Joinuddin (41)	Convicted	Sylhet District Jail	Illness	6.10.98	10.10.98 Inquilab
46.	Anisur Rahman (27)	Under Trial Prisoner	Dhaka Central Jail	Illness	15.10.98	16.10.98 Inquilab
Death by Police						
47.	Arun Chakravarty		Detective Branch (Dhaka)	Mysterious	23.2.98	23.2.98
48.	Abdul Mannan (40)		Rajapur PS Jhalakathi	Torture	5.1.98	6.1.98 Bangla Bazar
49.	Nurul Islam (37)	Arrested	Gafargaw P.S Mymensingh	Torture	20.4.98	21.4.98 Inquilab
50.	Shariful (40)	Arrested	Jessore Sadar P.S.	Mysterious	19.6.98	21.6.98 Ittefaq
51.	Amirul	Under Custody	VDP Panchagarh Sadar	Mysterious	26.8.98	29.8.98 Ittefaq
52.	Matial		Roumari, Kurigram	Torture	24.8.98	Inquilab
53.	Golam Mostafa (30)		Sonargaon P.S.	Public assault	3.9.98	5.9.98 Bhorer Kagoj
54.	Nirmal (45)		Dinajpur Police Line Dinajpur	Torture	20.9.98	22.9.98 Bhorer Kagoj
Court Custody						
55.	Ismail Hossain (60)	Convicted	Tangail 1st Class Magistrate Court	Shock	8.1.98	9.1.98 Ittefaq
56.	Joy Kumar Biswas (30)	Under Trial Prisoner	Kurigram Judge Court	Illness	12.10	13.10.98 Bhorer Kagoj

1994

Sl.No.	Name	Place	Date
01.	Mahmuduzzaman Borun	Magura	29 January
02.	Wajed Ali	Munshiganj (River Police)	9 February

03.	Mannaf	Bogra	4 March
04.	Rokonuddin	Dhaka Cantonment	10 March
05.	Abu Baker	Jhalokathi Court	5 April
06.	Hashem Mia	Habiganj Court	17 April
07.	Ejahar Ali	Paikgachha Court	23 April
08.	Ahmed Hossain	Gowainghat	16 May
09.	Anwar Hossain	Sandwip	8 June
10.	Aftabuddin	Singra	28 July
11.	Abdul Khaleque	Tejgaon	19 August
12.	Arup Kumar	Bagher Para	21 October
13.	Abdus Salam	Sundarganj	16 December
14.	Sanaullah @ Sanaul Haq	Mirpur	26 December
15.	Akbar Hossain	Alamdanga	29 December

1995

Sl.No.	Name	Place	Date
01.	Tuhin	Rajshahi	13 January
02.	Abdul Bari	Netrakona Court	19 February
03.	Munna	Khulna	9 March
04.	Abdul Hye	Bagerhat Court	14 May
05.	Enamul Haq	Lohagora	28 July
06.	Rafiqul Islam	Rangpur	4 August
07.	Mafizul Islam	Kashba	29 August
08.	Rahmat	Tala	15 September
09.	Abul Kalam	Brahmanbaria Court	7 October
10.	Ziauddin	Pabna	26 November
11.	Rayeb Ali	Moulivibazar	12 December
12.	Abul Hossain	Kalganj	12 December
13.	Shukur Mollah	Faridpur	29 December

1996

Sl.No.	Name	Place	Date
01.	Khalil Sikder	Maradipur Court	24 January
02.	Shahabuddin Shaju	Narsingdi	27 January
03.	Habiluddin	Lalpur	3 February
04.	Nurul Amin	Moheshkhali	12 February
05.	Abul Hossain	Kaliganj	13 February
06.	Nur Islam	Jhenidah Court	2 March
07.	Fazlur Rahman	Chapai Nababgonj	6 March
08.	Shamim	Brahmanbaria	19 April
09.	Ferdous Alam Shaheen	Tejgaon	1 July
10.	Sheikh Farid	Manikchhari	7 July
11.	Akhter Ali	Bogra	23 August
12.	Abdul Hamid	Nandail	30 August
13.	Nitai Baori	Moulvibazar	4 October
14.	Shahabuddin	Doara	16 October
15.	Sohail Mahmud Tuhin	Motijheel	17 October

16.	Abdul Hannan Opu	Shonadanga	5 November
17.	Joynal Bepari	Shibalay	26 November
18.	Momeja Khatun	Dinajpur	2 December

January to December
Duration: 2000

Sl No.	Source	Date of Incident	Name	Nature of Death	Kinds of Detenues	Place of Death
01.	Bhorer Kagoj 14.1.2000	8.1.2000	Md. Ali Bhuiyan	Torture	Under Trial Prisoner	Kotwali P.S. Chittagong
02.	Muktakntho 9.2.2000	8.2.200	Farid Uddin (30)	Murder		MDpur P.S. (DB police) Dhaka
03.	Prothom Alo 10.2.2000	9.2.2000	Ahmed Hossain Suman (23)	Murder		Shyampur P.S. (DB Police) Dhaka.
04.	Muktha Kantha 3.3.2000	2.3.2000	Suman	Torture		Sutrapur P.S. Dhaka.
05.	Bhorer Kagoj 26.3.2000	24.3.2000	Wang Schuci Marma	Torture		Khagrachhari Guimara Army Camp
06.	Ittegaq 13.4.2000	12.4.2000	Kabir (25)	Torture		Lalbagh P.S.
07.	Sangbad 19.4.2000	18.4.2000	Kalim (28)	Torture	Under trial Prisoner	Ramna P.S. Dhaka.
08.	Prothom Alo 17.6.2000	14.6.2000	Saiful Islam (25)	Sospctptive		Tongi, P.S. Gazipur.
09.	Bhorer Kagoj 30.7.2000	28.7.2000	Shukkurj Ali (20)	Torture		Khansama, P.S. Dinajpur.
10.	Bhorer Kagoj 20.9.2000	18.9.2000	Mahbub Hossain Oli (27)	Murder		Khilgaon P.S. Dhaka.
11.	Janakantha 6.10.2000	5.10.2000	Abul Kalam Azad	Torture		Nandail P.S. Mymensing.
12.	Dinkal 16.10.2000	13.10.2000	Akkas Ali (40)	Torture		Mongla (Khulna)
13.	DS, 6.12.2000	5.12.2000	Faruque (30)	Murder		Mongla (Khulna)
14.	DS, 6.12.2000	5.12.2000	Avi (20)	Murder		Mongla (Khulna)
15.	DS, 6.12.2000	5.12.2000	Nasir (30)	Murder		Mongla (Khulna)
16.	DS, 6.12.2000	5.12.2000	Ripon (25)	Murder		Mongla (Khulna)
17.	Janakantha	21.12.2000	Abdul	Murder		Rajbari

	23.12.2000		Khaleque (32)			(Faridpur)
18.	Bhorer Kagoj 26.12.2000	21.12.2000	Shafiqul Islam	Torture (Army)		Jamalpur

AvBb I mvwjk †K›` (AvmK)
cÖvjk †ndvR‡Z wbhvZb/g„Zz¨
Rvbœvi x - wW‡m¤i 2001

ক্রমিক bs	Drm	g„Zz¨i ZwiL	g„Zz¨i Kvi Y	bvg I eqm	wePvi vaxb/mvRvcvß	_vbv/‡Rjv
01.	BbwKj ve 13.2.2001	12.2.2001	AvZ¥nZ¨v	gwbK	wePvi vaxb	gwZwSj (XvKv)
02.	hyMvši 7.2.2001	8.2.2001	¸wj‡Z nZ¨v			ev¶¥b ewoqv
03.	evsjvevRvi 28.3.2001	25.3.2001	AvZ¥nZ¨v	I wj` wgqv	wePvi vaxb	Kzjv Dov (wm‡jU)
04.	†fv‡i i KvMR 17.3.2001	15.3.2001	cÖvjk‡ki Zvov	gwbi “j Bmjvg gwb (28)	Avmvgx	wgicÿ (XvKv)
05.	w`bKvj 22.3.2001		wbhvZb	ewki Dïxb (60)	wePvi vaxb	‡PŠMvQv (h‡kvi)
06.	B‡ËdvK 31.3.2001	29.3.2001	wbhvZb	‡gvRvnvi Avjx (45)	cÖvjk †ndvR‡Z	‡Kv‡Zvqvjx (h‡kvi)
07.	c_g Av‡jv 25.2.2001	23.2.2001	¸wj‡Z nZ¨v	Ave`ÿ nvbvb (20)		KwjMÄ (mvZw¶iv)
08.	B‡Idv K 25.4.2001	23.3.2001	nZ¨v	KvRx †`‡jvqvi †nv‡mb (30)	niZvj wcKwUs	XvKv (kwbi AvLov)
09.	‡fv‡i i KvMR 19.5.2001	17.5.2001	wbhvZb	nwim Lvb (15)	cÖvjk †ndvR‡Z	U½x (MvRxcÿ)
10.	c_g Av‡jv5.5.2001	4.5.2001	¸wj‡Z nZ¨v	Gvgbv	wQbZvBKvix	XvKv
11.	RbKÚ 15.5.2001	12.5.2001	wbhvZb	‡gvm‡jg Avjx (38)	cÖvjk †mvm/_vbv nvR‡Z	mvZ¶xiv (h‡kvi)
12.	msev` 26.5.2001	23.5.2001	nZ¨v		wQbZvBKvix	cvnvoZjx (PUMvg)

13.	RbKÚ 15.5.2001	13.5.2001	wbhvZb	‡mvnvM (22)	Pzwi gvgjv/cwjk †ndvR‡Z	mvZ¶xiv (h‡kvi)
14.	c_g Av‡jv 8.7.2001	7.7.2001	nZ¨v	BmgvBj MvRx (55)	Mgvevmxi mv‡_ msNl	kxbMi, (gý¨xMÄ
15.	B‡ËdvK 10.7.2001	8.7.2001	wbhvZb	Rýnvm Dwïb (45)	Rqvix (wWwe)	bwjZvevox (†kicý)
16.	B‡ËdvK 17.7.2001	16.7.2001	nZ¨v	Lýkx` Avjg (13)		gý¨xi nvU (†dbx)
17.	†fv‡ii KvMR 17.7.2001	15.7.2001	nZ¨v	bi- Avjg (16)		gý¨xinvU (†dbx)
18.	hyMvši 1.8.2001	30.7.2001	wbhvZb	wekbv_ gÛj (27)		Kwjmä (mvZ¶xiv)
19.	RbKÚ 9.9.2001	26.4.2001	nZ¨v	Qv‡`K Avjx (24)		i¤cMÄ (mvZ¶xiv)
20.	hyMvši 8.8.2001	7.8.2001	nZ¨v	Avey¨ Kvjvg		‡gNbv b`x‡Z (†bvqvLvjx)
21.	hyMvši 8.8.2001	7.8.2001	nZ¨v	‡gvt †mwjg		‡gNbv b`x‡Z (†bvqvLvjx)
22.	hyMvši 8.8.2001	7.8.2001	nZ¨v	‡gvt dvi“K		‡gNbv b`x‡Z (†bvqvLvjx)
23.	hyMvši 8.8.2001	7.8.2001	nZ¨v	Igi Avjx		‡gNbv b`x‡Z (†bvqvLvjx)
24.	BbwKjve 11.8.2001	10.8.2001	wbhvZb	kvnRvnvb		mÎvcý (XvKv)
25.	BbwKjve 11.8.2001	5.8.2001	nZ¨v	AvDqvj		mÎvcý (XvKv)
26.	‡fv‡ii KvMR 28.7.2001	27.7.2001	cwb‡Z Wvæe	gwbK (28)		†evqvjLvjx (PUMvg)
27.	RbKÚ 11.8.2001	10.8.2001	nZ¨v	Evey¨		mÎvcý (XvKv)
28.	B‡ËdvK 4.8.2001	3.8.2001	wbhvZb	‡gvt Avjx (35)		ei¤ov (Kvgjv)

29.	*RbKÚ 15.8.2001*	*9.8.2001*	*nZ¨v*	*KvDmvi*		*k¨vgjx (XvKv)*
30.	*RbKÚ 15.8.2001*	*9.8.2001*	*nZ¨v*	*AÁvZ*		*k¨vgjx (XvKv)*
31.	*BbwKjve 24.8.2001*	*19.8.2001*	*nZ¨v*	*Avdmvi Avjx (50)*		*k¨vgjx (XvKv)*
32.	*w`bKvj 11.9.2001*	*9.9.2001*	*wbhvZb*	*Avjv Dwïb (28)*		*bvivqbMÄ*
33.	*msev` 11.9.2001*	*9.9.2001*	*nZ¨v*	*Avj Awgb (20)*		*jvjfgvnb (†fvjv)*
34.	*msev` 11.9.2001*	*9.9.2001*	*nZ¨v*	*bgy(35)*		*jvjfgvnb (†fvjv)*
35.	*msev` 11.9.2001*	*9.9.2001*	*nZ¨v*	*kwn`y Bmjvg gKj (23)*		*jvjfgvnb (†fvjv)*
36.	*hyMvš–i 15.9.2001*	*13.9.2001*	*nZ¨v*	*Rwmg (23)*		*mfvcy (XvKv)*
37.	*hyMvš–i 29.9.2001*	*28.9.2001*	*nZ¨v (wewAvi)*	*gbv (18)*		*ivgMi (wdUKQwo)*

Rvbyqvwi Uz‡m¤i 2002 Bs

ক্রমিক bs	*Drm*	*gZvi Zwi L*	*gZvi Kvi Y*	*bvg I eqm*	*wePvivaxb/mvRvcvß*	*_vbv/‡Rjv*
01.	*‡fvt Kvt 9.1.2002*	*7.1.2002*	*inm¨RbK*	*`xcK wekvm (35)*	*wePvivaxb (_vbv †ndvR‡Z)*	*bovBj*
02.	*Rbt 31.1.2002*	*29.1.2002*	*wbhvZb (wewAvi)*	*Ave`y mvjvg (24)*	*wmgvš–*	*†UKbvd (K·evRvi)*
03.	*evt evt 12.2.2002*	*11.2.2002*	*wbhvZb*	*Avjx nvq`vi (38)*	*(_vbv nvR‡Z)*	*শালি† (mybvgMÄ)*
04.	*ct Avt 16.2.2002*	*14.2.2002*	*wbhvZb*	*KvDmvi*	*(_vbv nvR‡Z)*	*‡gvnvg¥`cy (XvKv)*
05.	*†fvt Kvt 21.2.2002*	*19.2.2002*	*cwb‡Z W‡e*	*wbqvZK †nv‡mb (22)*	*cyj‡ki avIqv*	*†`Šjzcy (Lybv)*
06.	*hyMvt 17.3.2002*	*16.3.2002*	*nZ¨v (Avbmvi)*	*†ejvj (35)*		*¸jkvb (XvKv)*

07.	Bbt 22.3.2002	21.3.2002	nZ¨v	wkgyÿ (22)		mybvgMÄ (wm‡jU)
08.	hyMvt 2.4.2003	1.4.2002	nZ¨v (weWAvi)	kvnv`Z (42)		wnwj (w`bvRcyÿ)
09.	ct Avt / Rbt 24.4.2002	22.4.2002	wbhvZb	kwdDj¨v (60)	(_vbv †ndvR‡Z)	†mvbvMvRx (†dbx)
10.	†fvt Kvt 2.6.2002	1.6.2002	wbhvZb (weWAvi)	†mv‡nj (22)	Awfhvb Pwj‡q †MdZvi	†mvqvixNvU (XvKv)
11.	Rbt 3.6.2002	2.6.2002	nZ¨v (†mbvewnbx)	†jwjb PvKgv		i“gv (ev›`ieb)
12.	Rbt 3.6.2002	2.6.2002	nZ¨v (mvbvewnbx)	Pvcvs PvKgv		i“gv (ev›`ieb)
13.	B‡Ët 24.6.2002	20.6.2002	nZ¨v	ivRb (20)		fvUcvov (wm‡jU)
14.	†fvt Kvt 13.7.2002	12.7.2002	cÖKvi Wvze	gwbi (35)	cwj‡ki Zvovq	bvivqMÄ (wmwÏiMÄ _vbv)
15.	†fvt Kvt 28.7.2002	27.7.2002	5 Zjv †_‡K c‡o	evevÿ (25)	cwj‡ki Zvov †L‡q	‡klov cvov (XvKv)
16.	hyMvt 5.8.2002	3.8.2002	cwb‡Z Wvze	Avjg Mxi †nv‡mb (20)	cwj‡ki Zvov †L‡q	MvRxcyÿ
17.	hyMvt 16.8.2002	15.8.2002	nZ¨v (Avbmvi)	Avevÿ evkvi (19)	¸wj K‡i nZ¨v	gwjevM (XvKv)
18.	hyMvt 16.8.2002	15.8.2002	nZ¨v (Avbmvi)	†iRvDj Kwig (25)	¸wj K‡i nZ¨v	gwjevM (XvKv)
19.	hyMvt 16.8.2002	15.8.2002	nZ¨v (Avbmvi)	Bqwnqv (20)	¸wj K‡i nZ¨v	gwjevM (XvKv)
20.	hyMvt 16.8.2002	15.8.2002	nZ¨v (Avbmvi)	Avj Awgb (38)	¸wj K‡i nZ¨v	gwjevM (XvKv)
21.	hyMvt 17.8.2002	15.8.2002	wbhvZb	†ejvj †nv‡mb cvày (30)	m‡›`n RbK †MdZvi	gwZwSj (XvKv)
22.	ct Avt 24.8.2002	23.8.2002	b`x‡Z Wvze	Awid (20)	¸wj K‡i nZ¨v	Kzóqv
23.	†fvt Kvt 11.9.2002	9.9.2002	nZ¨v (weWAvi)	Avnmvb (35)	weWAvi Gi ¸wj‡Z nZ¨v	kvkv (mxgvš–)
24.	Rbt 11.9.2002	9.9.2002	nZ¨v	Avãyÿ Kv‡kg	cwj‡ki ¸wj‡Z nZ¨v	XvKv (iv‡qi

						evRvi)
25.	hyMvt 14.9.2002	13.9.2002	nZ¨v	AvBR DwÏb (25)	cwYj‡ki ¸wj‡Z nZ¨v	†k‡ievsjv bMi (XvKv)
26.	hyMvt 22.9.2002	21.9.2002	nZ¨v	Nwlbd	cwYj‡ki ¸wj‡Z nZ¨v	avbgwÛ (XvKv)
27.	Rbt 26.9.2002	15.9.2002	wcwU‡q †g‡i‡Q	kvnAvjg (24)	cwYj‡ki ¸wj‡Z nZ¨v	Kvdi“j (XvKv)
28.	ct Avt 21.9.2002	19.9.2002	nZ¨v	†mvnvM (22)	wQbZvBKvix m‡›`‡n cwYj‡ki ¸wj‡Z nZ¨v	AvMvimvwU (XvKv)
30.	ct Avt 1.9.2002	30.8.2002	nZ¨v	Bwmi	cwYj‡ki ¸wj‡Z nZ¨v	PqvWv½v (Kwkcÿ)
31.	ct Avt 22.8.2002	20.8.2002	nZ¨v	‰mq` nvejy (22)	cwYj‡ki ¸wj‡Z nZ¨v	Qq`vbv (MwRcÿ)
32.	ct Avt 3.10.2002	6.10.2002	(wm.AvB.wW) wbhvZb	Av°vm Avjx (42)	wmAvBwW cwYj‡ki gvbwmK wbhvZ‡bi gZ„Zz	PUMvg
33.	B‡Ët 7.10.2002	6.10.2002	nZ¨v	মমিন উল□াহ (52)	AmZK cwYj‡ki ¸wj‡Z gZ„Zz	mv‡q`vev` (XvKv)
34.	ct Avt 27.10.2002	25.10.2002	wbhvZb	Rÿynvm †ecvix (57)	cwYjk †ndvR‡Z	gwÝMÄ
35.	B‡Ët 23.10.2002	22.10.2002	¸wj‡Z	Awgi †nv‡mb †mv‡nj (25)	cwYj‡ki ¸wj‡Z	†gvnvg¥`cÿ XvKv
36.	B‡Ët 7.11.2002	6.11.2002	f‡q	†mvnive	cwYj‡ki f‡q cjvZK	eKkxMÄ (Rvgvjcÿ)
37.		9.11.2002	wbhvZb	IqvRKz“bx		Lÿbv
38.	ct Avt 5.11.2002	5.11.2002	¸wj‡Z	Kvjv dvi“K	cwYj‡ki ¸wj‡Z	‡ZRMu (XvKv)

53. In the affidavit-in-opposition no denial was made or any statement that the above survey reports is false or that the figures have been shown by exaggeration. Even after the inquiry report the deaths in the hands of law enforcing agency, abusive exercise of them, torture and other violation of fundamental rights are increasing day by day. The recommendations made by Habibur Rahman Khan,J. had not been implemented and the government treated the said report in the similar manner as the Munim Commission on Jail Reform, Aminur Rahman Khan's Commission on Police Reform and the Commission established to inquire into individual cases including women such as the rape of Yasmin of Dinajpur, the abduction of Kalpana Chakma of the Chittagong Hill Districts and some of which had not even seen the light of the day. Government did not pay heed to the report of Habibur Rahman Commission and kept the same unimplemented. Under such juncture 3(three) organizations, Bangladesh Aid and Services Trust (BLAST), Ain-O-Salish Kendra, Shomilito Shamajik Andolon and 5(five) individuals, namely; Sabita Rani Chakraborti, Al-Haj Syed Anwarul Haque, Sultan-uz Zaman Khan, Ummun Naser alias Ratna Rahmatullah and Moniruzzaman Hayet Mahmud filed Writ Petition No.3806 of 1998 in the public interest seeking direction upon the writ respondents to refrain from unwarranted and abusive exercise of powers under section 54 of the Code or to seek remand under section 167 of the Code and to strictly exercise powers of arrest and remand within the limits established by law and the constitution on the ground that the exercise of abusive powers by the law enforcing agencies is violative to 27, 31, 33 and 35 of the Constitution. Writ petitioners prayed the following reliefs:

> (A) (i) to issue a Rule Nisi calling upon the Respondents to show cause as to why they shall not be directed to refrain from unwarranted and abusive exercise of powers under Section 54 of the Code of Criminal Procedure or to seek remand under Section 167 or the Code of Criminal Procedure and to strictly exercise powers of arrest and investigation within the limits established by law and the Constitution and in particular the constitutional safeguards contained in Articles 27, 31, 33 and 35 of the Constitution.
>
> (ii) to show cause as to why the respondents should not be required to comply with the guidelines such as those set out in paragraph 21 of the petition and in Annexure "C" to the petition.
>
> (iii) to show cause as to why the respondent No.4 shall not be directed to compile and make a report from 1972 to date of persons who died in custody or jail or in police lock up.
>
> (iv) as to why the respondents shall not be directed to make monetary compensation to the families of victims of custodial death, torture and custodial rape and as to why the respondents should not be directed to present before this Hon'ble Court reports of the Jail Reform Commission and the judicial inquiry commission relating to custodial death of Rubel and other relevant judicial inquiry commissions.

54. Writ respondent No.2, the Secretary Ministry of Home Affairs filed an affidavit-in-opposition stating that the allegations as to torture and death in police custody are vague and indefinite; that the police applied section 54 of the Code to arrest any person who has been concerned in any cognizable offence or against whom reasonable complaint has been received or a reasonable suspicion exists of his having been so concerned; that justice Habibur Rahman Khan's recommendations are under consideration of the government; that police perform duties in uniform and plain clothes for detection and prevention of crimes and uniformed police normally bear their identification with name batch and designation while on

duty, and plain clothes police carried their identity cards along with them, but those cannot be made conspicuous for obvious operational reasons; that plain clothes police are also deputed for collection of security and crime related intelligence, that is why, they do not display their identity cards in a visible manner; that every police station maintains general diary in the prescribed form vide section 377 of PRB and the Police Act, 1861 and one duty officer is deputed by the officer-in-charge to perform routine works in everyday in such police station; that the duty officer generally makes regular entry in the general dairy stating all facts; that in most cases persons who are not resident of police station are arrested at dead hours of night, and therefore, the presence of witness cannot be ensured at the time of arrest; that many of the arrestees specially in city areas are floating individuals and they do not have any specific address; that the object of interrogation of the arrestees is to find out the facts or otherwise of the incident and also the verification of the evidence forth coming against him; that if a friend of the accused in custody is being informed about his arrest there will be every chance of disclosure of other information prejudicial to the detection of case frustrating the investigation; that for want of correct name and address, the arrests cannot be done properly but if arrestees furnishes their correct address it may be possible to communicate through usual official channel whenever possible; that all the arrestees are made aware of their right to have someone informed of their arrest; that after securing arrest of any person and before putting him in lockup every arrestee is examined to ascertain whether he has any major or minor injuries; that normally in police custody nobody is detained more than 24 hours; that it is not possible to allow physical presence of a lawyer in course of interrogation, inasmuch as, that will adversely affect investigation; that every district headquarters as well as all metropolitan police areas have one central police control room and everyday a report regarding the arrests and other important incidents are being communicated to the central room by different police units and that since number of arrestees is large in the metropolitan areas, it is not always possible to display the names and particulars of the arrestees on a notice board regularly.

55. Though writ respondent No.2 denied any police abuse, torture and deaths in police and jail custody the writ petitioners have annexed some newspaper clippings highlighting the deaths and police torture as under:

56. The issue of -ভারের কাগজ তারিখ ২৬/৭/১৯৯৮ under the heading রুবেল হত্যার বিচার বিভাগীয় তদন্ত ও বিশেষ ট্যাইব্যুনাল গঠনে রাষ্ট্রপতির হস্তক্ষেপ কামনা; the issue of The Daily Star dated 26/7/1998 under the heading "Police can't probe misdeeds of other policemen; Rubel's father"; the issue of j š² Lã a¡¢lM 29/7/1998 under the heading 'মৃত্যুর পরও রুবেলকে পেটানো হয়'; the issue of pwh¡c a¡¢lM 27/7/1998 under the heading f¢mn ®Le ¢eùl আচরণ করে?; the issue of pwh¡c a¡¢lM 27/7/1998 under the heading রুবেল হত্যাঃ ¢hQ¡l বিভাগীয় তদন্ত কমিশন হচ্ছে; the issue of pwh¡c a¡¢lM 27/7/1998 under the heading ¢p B Cডি'র হাতে তদন্ত এসি আকরাম ক্লোজড; the issue of pwh¡c a¡¢lM 27/7/1998 under the heading শোকসন্তপ্ত প্রধানমন্ত্রী রুবেলের হত্যাকারীরা দৃষ্টান্তমূলক শাস্তি পাবে; the issue of -ভারের ক¡NS a¡¢lM 27/7/1998 under the heading রুবেল হত্যাকান্ড ঢেলে সাজানো হচ্ছে ¢X¢h; the issue of ভোরের কাগজ তারিখ ২৭/৭/১৯৯৮ under the heading পুলিশের হাতে ®g±Sc¡¢l L¡k¢h¢ধর ৫৪ ধারার ব্যাপক অপব্যবহার হচ্ছে; the issue of ভোরের কাগজ তারিখ 27/7/1998 under the heading HLজন ভাল ছাত্রের সব গুনই ছিল রুবেলের; the issue of ®c¢eL ইত্তেফাক তারিখ ২৭/৭/১৯৯৮ under the heading পুলিশ হেফাজতে মৃত্যু (এডিটরিয়াল); the issue of ভোরের কাগজ তারিখ ২৮/৭/১৯৯৮ under the heading এজাহারে আসামিদের নাম অন্তর্ভুক্তির জন্য আদালতে রুবেলের বাবার আবেদন; the issue of ভোরের কাগজ তারিখ ২৮/৭/১৯৯৮ under the heading আসামিদের সিআইডি জিজ্ঞাসাবাদ করেছে; the issue of j¡eh S¢je a¡¢lM 07/10/1998 under the heading স্বীকারোক্তির জন্য রিমান্ড চাওয়া যাবে না (তদন্ত কমিশন

প্রতিবেদন-1); the issue of j¡eh S¢je a¡¢lM 08/10/1998 under the heading 54 d¡l¡u গ্রেফতারকৃতদের ৮৮ ভাগ নিরপরাধ। অপপ্রয়োগ বন্ধ না হলে বাংলাদেশ পুলিশি রাষ্ট্র হবে (তদন্ত কমিশন প্রতিবেদন-2); the issue of j¡eh S¢je a¡¢lM 09/10/1998 under the heading পুলিশের অপরাধ তদন্তে এফবিআই বা সিবিআই'র মতো স্বতন্ত বিভাগ দরকার (তদন্ত কমিশন প্রতিchce-3)|

57. The issue of j¡eh S¢je a¡¢lM 10/10/1998 under the heading ¢X¢h'l q¡SaM¡e¡ A®hd; the issue of ®c¢eL SeLã a¡¢lM 27/06/2000 under the heading ৬ মাসে পুলিশের ¢hl¦দ্ধে ৭ হাজার অভিযোগ, তদন্ত হচ্ছে; the issue of দৈনিক ইত্তেফাক তারিখ ২৫/১১/১৯৯৯ under the heading পুলিশের বিরুদ্ধে আসামী নির্যাতনসহ ১০ মাসে তিনশত মামলা দায়ের; the issue of j¡š²Lã a¡¢lM 19/04/1999 under the heading ডিবি অফিসে লাশ গুম তদন্তে সি B C¢X'l কার্যকলাপ নিয়ে জনমনে প্রশ্ন; the issue of দৈনিক ইত্তেফাক তারিখ ০৮/০৭/১৯৯৯ under the heading গোয়েন্দা পুলিশের বিরুদ্ধে নিরীহ মানুষকে ব্লাকমেইল করার অভিযোগ; the issue of ®c¢eL ইত্তেফাক তারিখ ২১/০৮/১৯৯৯ under the heading পুলিশ হেফাজতে ট্রাক চালকের মৃত্যু।। ল¡n লইয়া মিছিল।। রাস্তায় ব্যারিকেড; the issue of j¡š²Lã a¡¢lM 04/07/1999 under the heading পুলিশের বিরুদ্ধে আরও এক তরুনকে হত্যার অভিযোগ; the issue of The Daily Star dated 05/09/1999 under the heading "confidence in the police" (Editorial); the issue of j¡š²Lã a¡¢lM 10/03/1999 under the heading ¢hQ¡l¡d£e h¾c£l মৃত্যু পুলিশী নির্যাতনের অভিযোগ; the issue of j¡š²Lã a¡¢lM 16/09/1999 under the heading V‰¡Cm iu¡fl b¡e¡u al¦Z£ doYz কনস্টেবল বরখাস্ত; the issue of j¡š²Lã a¡¢lM 26/11/1999 under the heading সিলেটে রক্ষক পুলিশ এখন ভক্ষকের ভূমিকায়; the issue of দৈনিক প্রথম আলো তারিখ ২১/১২/১৯৯৯ under the heading l¡Sn¡q£l A¢ikš² f¢mn; the issue of j¡š²Lã a¡¢lM 15/11/1999 under the heading ...¢mÙ¡e-মতিঝিলের ফুটপাত চাঁদাবাজ ও পুলিশের অবৈধ আয়ের উৎস; the issue of j¡š²Lã a¡¢lM 10/04/1999 under the heading পুলিশ হেফাজনে আসামীর মৃত্যু; the issue of ®c¢eL SeLã a¡¢lM 03/11/1999 under the heading f¢mn ¢ek¡তনের বিচার দাবিতে LL¡Ê¡S¡l Ešç; the issue of দৈনিক প্রথম আলো তারিখ ০২/০৪/২০০০ under the heading বিনা বিচারে আড়াই বছর জেল খেটেছে দরিদ্র কিশোর তপন; the issue of ®c¢eL Ce¢Lm¡h a¡¢lM 20/04/2000 under the heading পুলিশী নির্যাতনে অসুস্থ কালিম হাসপাতালে গিয়েও সঠিক ¢Q¢Lvp¡ f¡u¢e|

58. The issue of দৈনিক ভোরের কাগজ তারিখ ০৫/০৪/২০০০ under the heading ঝিকরগাছায় দারোগার কান্ড; স্ত্রীর মর্যাদা দাবি করায় মহিলাকে ফেন্সিডিলসহ পুলিশে সোপর্দ; the issue of দৈনিক ভোরের কাগজ তারিখ ১৪/০৫/২০০০ under the heading f¢mn kMe ¢Rea¡CL¡l£; the issue of ®c¢eL Ce¢Lm¡h a¡¢lM 01/07/2000 under the heading q¡Sa£ ü¡j£l ®M¡S নিতে এসে স্ত্রী পুলিশের হাতে লাঞ্ছিত; the issue of দৈনিক প্রথম আলো তারিখ 24/07/2000 under the heading কনস্টেবলের বিরুদ্ধে মহিলাকে বিবস্ত্র করে প্রহারের অভিযোগ; the issue of ®c¢eL প্রথম আলো তারিখ ০২/০৭/২০০০ under the heading পুলিশ হেফাজতে J কারাগারে ৬ মাসে ২৬ জনের মৃত্যু; the issue of ®c¢eL h¡wm¡ h¡S¡l a¡¢lM 28/06/2000 under the heading মাদকাসক্ত কন্যাকে পুলিcn ®p¡fcz Q¡m mV, q¡S¢al ja£; the issue of ®c¢eL pwh¡c a¡¢lM 06/06/2000 under the heading গনপিটুনি ও জননিরাপত্তা আইনে m¡jm¡; HL কিশোর এখন মৃত্যুর মুখে; the issue of ®c¢eL h¡wm¡ h¡S¡l a¡¢lM 19/06/2000 under the heading মাকে দেখতে এসে হাজতে ভারতীয় নাগরিকের মৃত্যু; the issue of ®c¢eL h¡wm¡ h¡S¡l a¡¢lM 13/06/2000 under the heading থানা পুলিশের খামখেয়ালী; the issue of দৈনিক ভোরের L¡NS a¡¢lM 25/06/2000 under the heading টঙ্গী থানা হাজতে যুবকের মৃত্যু; j¡ J ভাইয়ের অভিযোগ পুলিশ হত্যা করেছে; the issue of ®c¢eL Ce¢Lm¡h a¡¢lM 06/06/2000 under the heading রাজধানীতে বিনা কারনে থানায় এনে কিশোরকে প্রচন্ড প্রহার ও ৫০ হাজার টাকা নিয়ে j¢š²c¡e; the issue of ®c¢eL Ce¢Lm¡h a¡¢lM 19/04/2000 under the heading 10 q¡S¡l টাকা না দেয়ায় এক দারোগার নির্মম নির্যাতনে প্রাণ হারালো যুবক কালিম; the issue of ®c¢eL

pwhic a¡¢lM 19/04/2000 under the heading f¢m¢n ¢eর্যাতনের অভিযোগ ৫৪ ধারায় আটক q¡S¢al jaÉ; the issue of ®c¢eL pwhic a¡¢lM 30/03/2000 under the heading f¢mn হেফাজতে বিশ্ব মারমার মৃত্যু; the issue of দৈনিক প্রথম আলো তারিখ ২৮/০৫/২০০০ under the heading দারোগরা নির্যাতনে; the issue of ®c¢eL pwhic a¡¢lM 02/07/2000 under the heading পুলিশের বর্বরতা; the issue of The Daily Star dated 21/08/2000 under the heading "Cases against cops: Court orders go unheeded"; the issue of The Daily Star dated 18/09/1999 under the heading "Law & order in a sorry state".

59. In the newspaper clippings which are national dailies vividly focused the abusive powers of the law enforcing agencies. In some reports the authority admitted those incidents and assured to take legal actions against those violators. In the affidavit in opposition, the writ respondent no.2 simply stated that 'the offences committed against the body of the persons in custody are cognizable offences and the victim/any person on his behalf may go for legal action under the existing laws of the land and none is above law including the police.' So, the Ministry of Home Affairs has admitted those incidents but simply avoided its responsibility of curbing the abusive powers and thereby encouraged them to resort to violative acts. It failed to comprehend that the poor and illiterate people who are victims cannot take legal actions against those organised, trained and disciplined armed forces unless they are compelled to abide by the tenets of law and respect the fundamental rights of the citizen.

Findings of the High Court Division

a) To safeguard the life and liberty of the citizens and to limit the power of the police the word 'concerned' used in section 54 of the Code is to be substituted by any other appropriate word-Despite specific interpretation given to the words "reasonable", "credible", the abusive exercise of power by the police could not be checked, and therefore, any interpretation will not be served the purpose. The said provision should be amended in such a manner that the safeguard will be found in the provision itself.

b) There should be some restrictions so that the police officers will be bound to exercise the power within some limits and the police officers will not be able to justify the arrest without warrant.

c) If the police officer receives any information from a person who works as "source" of the police, the police officer, before arresting the persons named by the 'source' should try to verify the information on perusal of the diary kept with the police station about the criminals to ascertain whether there is any record of any past criminal activities against the person named by the 'source'.

d) If a person is arrested on 'reasonable' suspicion the police officer must record the reasons on which his suspicion is based.

e) The power given to the police officer under section 54 of the Code to a large extent is inconsistent with the provisions of Part III of the Constitution-such inconsistency is liable to be removed.

f) While producing a person arrested without warrant before a Magistrate, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or the information received against the person is well founded.

g) The case diary used in section 172 is the diary which is meant in section 167(1).

h) The police officer shall be bound to transmit a copy of the entries of the case diary to the Magistrate at the time when accused is produced.

i) The Magistrate cannot pass any police remand of an accused person unless the requirements of sub-section (1) of section 167 are fulfilled.

j) In the absence of any guidelines to authorize a Magistrate the detention in police custody he passes a 'parrot like' order authorizing detention in police custody which ultimately results in so many custodial deaths.

k) If the Magistrate before whom an accused person is produced under sub-section (1) of section 167, there are materials for further detention of the accused the Magistrate may pass an order for further detention otherwise he shall release the accused person forthwith.

l) The detention of an accused person in police custody is an evil necessity, inasmuch as, unless some force is not applied, no clue can be find out from hard core criminals and such use is unauthorised.

m) Any torture for extracting clue from the accused is contrary to articles 27, 30, 31, 32, 33 and 35 of the constitution.

n) Any statement of an accused made to a police officer relating to discovery of any fact may be used against him at the time of trial-if the purpose of interrogation is so limited. It is not understandable why there will be any necessity of taking the accused in the custody of the police. Such interrogation may be made while the accused is in jail custody.

o) If an accused person is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the constitution given any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment.

p) Any torture to an accused person is totally against the spirit and explicit provisions of the constitution.

q) Whenever a person is arrested he must know the reasons for his arrest. The words as soon as may be, used in article 33 of the Constitution implies that the grounds shall be furnished after the person is brought to the police station and entries are made in the diary about the arrest.

r) Immediately after furnishing the grounds for arrest to the person, the police shall be bound to provide the facility to the person to consult his lawyer if he desires so.

s) The person arrested shall be allowed to enjoy constitutional rights after his arrest.

t) If an accused's right is denied this will amount to confining him in custody beyond the authority of the constitution.

u) Besides section 54, some other related sections are also required to be amended namely section 176 of the Code, Section 44 to the Police Act, sections 220, 330 and 348 of the Penal Code, inasmuch as, those are inconsistent with clauses 4 and 5 of article 35 and in general the provision of articles 27, 31 and 32 of the constitution.

v) A police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974.

w) Torture or cruel, inhuman or degrading treatment in police custody or jail custody **is** unconstitutional and unlawful.

x) If the fundamental rights of individuals are infringed by colourable exercise of power by police compensation may be given by the High Court Division when it is found that the confinement is not legal and the death resulted due to failure of the State to protect the life.

60. With the above findings the High Court Division recommended for amendment of sections 54, 167, 176 and 202 of the Code of Criminal Procedure in the following manner on the reasoning that the existing provisions are inconsistent with Part III of the constitution in the manner mentioned in the judgment.

Recommendation-A

"(1) 'any person against whom there is a definite knowledge about his involvement in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so involved' may be amended.

(2) The seventh condition may be also amended by adding clauses:

(a) Whenever a person is arrested by a police officer under sub-section (1) he shall disclose his identity to that person and if the person arrested from any place of residence or place of business, he shall disclose his identity to the inmates or the persons present and shall show his official identity card if so demanded.

(b) Immediately after bringing the person arrested to the police station, the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information, description of the place, note the date and time of arrest, name and address of the persons, if any, present at the time of arrest in a diary kept in the police station for that purpose.

(c) The particulars as referred to in clause (b) shall be recorded in a special diary kept in the police station for recording such particulars in respect of persons arrested under this section.

(d) If at the time of arrest, the police officer finds any mark of injury on the body of the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or to a Government doctor for treatment and shall obtain a certificate from the attending doctor about the injuries.

(e) When the person arrested is brought to the police station, after recording the reasons for the arrest and other particulars as mentioned in clause (b), the police officer shall furnish a copy of the entries made by him relating to the grounds of the arrest to the person arrested by him. Such grounds shall be furnished not later than three hours from the time of bringing him in the police station.

(f) If the person is not arrested from his residence and not from his place of business or not in presence of any person known to the accused, the police officer shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him in the police station.

(g) The police officer shall allow the person arrested to consult a lawyer, if the person so desires. Such consultation shall be allowed before the person is produced to the nearest Magistrate under section 61 of the Code. "

61. In respect of section 167 it also made the following recommendations:

Recommendation-B

"(1) Existing sub-section (2) be renumbered as sub-section (3) and a new sub-section (2) may be added with the following provisions;

Sub-section (2) – (a) If the Magistrate, after considering the forwarding of the Investigating officer and the entries in the diary relating to the case is satisfied that there are grounds for believing that the accusation or information about

the accused is well-founded, he shall pass an order for detaining the accused in the jail. If the Magistrate is not so satisfied, he shall forthwith release the accused. If in the forwarding of the Investigating Officer the grounds for believing that the accused or information is well founded are not mentioned and if the copy of the entries in the diary is not produced the Magistrate shall also release the accused forthwith.

(b) If the Investigating Officer prays for time to complete the investigation the Magistrate may allow time not exceeding seven days and if no specific case about the involvement of the accused in a cognizable offence can be filed within that period the accused shall be released by the Magistrate after expiry of that period.

(c) If the accused is released under clause (a) and (b) above, the Magistrate may proceed for committing offence under section 220 of the Penal Code *suo motu* against the police officer who arrested the person without warrant even if no petition of complaint is filed before him.

(2) Sub-section (2) be substituted by a new sub-section (3) with the following provisions:

(a) If a specific case has been filed against the accused by the Investigating officer within the time as specified in sub-section (2)(b) the Magistrate may authorize further detention of the accused in jail custody.(b) If no order for police custody is made under clause. (c) the Investigating Officer shall interrogate the accused, if necessary for the purpose of investigation in a room specially made for the purpose with glass wall and grill in one side, within the view but not within hearing of a close relation or lawyer of the accused.

(c) If the Investigating officer files any application for taking any accused to custody for interrogation, he shall state in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody for a period not exceeding three days, after recording reasons, he may authorized detention in police custody for that period.

(d) Before passing an order under clause (c), the Magistrate shall ascertain whether the grounds for the arrest were furnished to the accused and the accused was given opportunity to consult lawyer of his choice. The Magistrate shall also hear the accused or his lawyer.

(3) Sub-section (4) be substituted as follows:

(a) If the order under clause (c) is made by a Metropolitan Magistrate or any other Magistrate he shall forward a copy of the order to the Metropolitan Sessions Judge or the Sessions Judge as the case may be for approval. The Metropolitan Sessions Judge or the Sessions Judge shall pass order within fifteen days from the date of the receipt of the copy.

(b) If the order of the Magistrate is approved under clause (a), the accused, before he is taken custody by the Investigating Officer, shall be examined by a doctor designated or by a Medical Board constituted for the purpose and the report shall be submitted to the Magistrate concerned.

(c) After taking the accused into custody, only the Investigating officer shall be entitled to interrogate the accused and after expiry of the period, the investigating officer shall produce him before the Magistrate. If the accused

makes any allegation of any torture, the Magistrate shall at once send the accused to the same doctor or Medical Board for examination.
(d) If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the Code against the Investigating Officer for committing offence under section 330 of the Penal Code without filing of any petition of any petition of complaint by the accused.
(e) When any person dies in police custody or in jail, the Investigating officer or the Jailor shall at once inform the nearest Magistrate of such death."

Recommendation-C

"(1) Existing sub-section (2) of section 176 of the Code be renumbered as sub-section (3) and the following be added as sub-section (2).

(2) When any information of death of a person in the custody of the police or in jail is received by the Magistrate under section 167(4)(e) of the Code (as recommended by us), he shall proceed to the place, make an investigation, draw up a report of the cause of the death describing marks of injuries found on the body stating in what manner or by what weapon the injuries appear to have been inflicted. The Magistrate shall then send the body for post mortem examination. The report of such examination shall be forwarded to the same examination shall be forwarded to the same Magistrate immediately after such examination."

Recommendation – D

"(1) A new sub-section (3) be added with the following provisions:

(3) (a) The Magistrate on receipt of the post mortem report under section 176(2) of the Code (as recommended by us) shall hold inquiry into the case and if necessary may take evidence of witnesses on oath.
(b) After completion of the inquiry the Magistrate shall transmit the record of the case along with the report drawn up under section 176(2) (as recommended by us) the post mortem report his inquiry report and a list of the witnesses to the Sessions Judge or Metropolitan Sessions Judge, as the case may be and shall also send the accused to such judge.
(c) In case of death in police custody, after a person taken in such custody on the prayer of the Investigating Officer, the Magistrate may proceed against the Investigating Officer, without holding any inquiry as provided in clause (a) above and may send the Investigating Officer to the Sessions Judge of the Metropolitan Sessions as provided in clause (b) along with his own report under subsection (2) of section 176 and post mortem report."

62. It has been observed that under the present section 202 of the Code, there is no scope on the part of the Magistrate to proceed *suo moto* to hold an inquiry even if the post-mortem report of the victim is found that the death is culpable homicide. Therefore, it is recommended that the Magistrate shall be empowered by law by adding an enabling provision to section 202 to proceed with the case by holding inquiry himself or by any order competent Magistrate.

63. In the Penal Code a separate penal section may be added after section 302 of the Penal Code.

"(a) One provision be added in section 330 (Penal Code) providing enhanced punishment up to ten years imprisonment with minimum punishment of sentence of seven years if hurt is caused while in police custody or in jail including payment of compensation to the victim.

(b) 2nd proviso for causing grievous hurt while in such custody providing minimum punishment of sentence of ten years imprisonment including payment of compensation to the victim.

(c) A new section be added as section 302A providing punishment for causing death in police custody or in jail including payment of compensation to the nearest relation of the victim.

(d) A new section be added after section 348 providing for punishment for unlawful confinement by police officer for extorting information etc. as provided in section 348 with minimum punishment imprisonment for three years and with imprisonment which may extend to seven years."

64. The High Court Division also noticed that in sections 330 and 348 of the Penal Code, nothing have been mentioned of causing hurt to a person while he is in police custody or in jail custody and the punishment provided in the section is inadequate. Accordingly, it recommended to make the following amendment to sections 330 and 348 and addition of some provisions as under:

Recommendation E

(a) One proviso be added in section 330(1) providing enhanced punishment up to ten years imprisonment with minimum punishment of sentence of seven years if hurt is caused while in police custody or in jail including payment of compensation to the victim.

(b) Second proviso for causing grievous hurt while in such custody providing minimum punishment of sentence of ten years imprisonment including payment of compensation to the victim.

(c) A new section be added as section 302A providing punishment for causing death in police custody or in jail including payment of compensation to the nearest relation of the victim.

(d) A new section be added after section 348 providing for punishment for unlawful confinement by police officer for extorting information etc. as provided in section 348 with minimum punishment of imprisonment for three years and with imprisonment which may extend to seven years.

65. The High Court Division also was of the view that a new section should be added after section 44 of the Police Act keeping the same inconformity with the recommendation made in section 54 of the Code. The High Court Division has given to the following directions to be complied with by the authority:

(1) No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(2) A police officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

(3) He shall record the reasons for the arrest and other particulars as mentioned in recommendation in a separate register till a special diary is prescribed.
(4) If he finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or government doctor for treatment and shall obtain a certificate from the attending doctor.
(5) He shall furnish the reasons for arrest to the person arrested within three hours of bringing him in the police station.
(6) If the person is not arrested from his residence or place of business, he shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him in the police station.
(7) He shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.
(8) When such person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation could not be completed within twenty four hours, whey he considers that the accusation or the information against that person is well founded. He shall also transmit copy of the relevant entries in the case diary B.P. Form 38 to the same Magistrate.
(9) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.
(10) If the Magistrate release a person on the ground that the accusation or the information against the person produced before him is not well founded and there are no materials in the case diary against that person, he shall proceed under section 190(1)(a) of the Code against the police officer who arrested the person without warrant for committing offence under section 220 of the Penal Code.
(11) If the Magistrate passes an order for further detention in jail, the investigating officer shall interrogate the accused if necessary for the purpose investigation in a room in the jail till the room.
(12) In the application for taking the accused in police custody for interrogation, the investigating officer shall state reasons.
(13) If the Magistrate pass an order of detention in police custody, he shall follow the recommendations.
(14) The police officer of the police station who arrests a person under section 54, or the investigating officer who takes a person in police custody or the jailor of the jail, as the case may be, shall at once inform the nearest Magistrate as per recommendation about the death of any person who dies in custody.
(15) A Magistrate shall inquire into the death of a person in police custody or in jail as per recommendation immediately after receiving information of such death.

Leave was granted to consider:

(i) Whether the High Court Division without proper scrutiny of the provisions of sections 54 and 167 of the Code found those provisions to some extent repugnant to constitutional provisions only on consideration of police excess in failing to consider that

there is no fault in law but there may be improper or illegal application of the process of law, the remedy of which is available in the appellate and revisional jurisdiction.

(ii) Whether the police power of arrest without warrant under specified circumstances are not confined alone under section 54, there are various other provisions in the Code empowering the police to arrest and that a safeguard against improper exercise of power is not a remedy in law but that effective and due judicial interference is the proper remedy in cases brought to the notice of the court.

(iii) Whether the High Court Division without due application of mind found sections 54 and 167 to some extent repugnant to the constitutional provisions enshrined in articles 27, 30, 31, 32, 33 and 35 and thereby illegally directed to remove the inconsistency.

66. While granting leave this court directed the writ respondents to observe the law in its letters and spirit and to implement the direction given by the High Court Division within 6(six) months from date.

67. Learned Counsel appearing for the writ petitioners submits that since the government did not implement the directions made by this court at the time of granting leave, this appeal is liable to be dismissed on this ground alone without wasting court's valuable time. The court queried to the learned Attorney General whether or not the directions given by this court have been complied with in this intervening period of more than 12(twelve) years. Learned Attorney General took several times to intimate this court on consultation with the government about the implementation, but failed to give any satisfactory reply. In fact the government has not complied with any of the directions given by the highest court to the country. Though we find substance in the submission of the learned Counsel for the writ petitioners that this appeal is liable to be dismissed on this ground alone, since some intricate constitutional points of law are involved, this court opted to hear the matter in detail on merit despite such non-compliance with the directions. This Court is at loss only to observe that this non-implementation of the directions of the highest court of the country is nothing but travesty to irony.

Submissions

68. In his submission, learned Attorney General renewed the points agitated at the time of leave granting order. He adds that the directions given by the High Court Division is unconstitutional, inasmuch as, the High Court Division usurped the power of legislature. According to the learned Attorney General, there are three organs of the State and one of the organs is the legislature which enacts law and the power of the court is to interpret the said law and to apply the said law in the facts of a given case but it has no power to direct the government to legislate the law. In this connection the learned Attorney General has referred to an unreported case of the Supreme Court of India in *Subramaniam Swami v. Union of India*, W.P. No.8 of 2015.

69. Mr. Murad Reza learned Additional Attorney General makes the following arguments:-

(1) In Article 112 the word 'Parliament' has not been mentioned, and therefore, the direction given by the High Court Division is a futile direction, inasmuch as, the executive does not legislate law.

(2) There cannot be presumption of misuse of power and the High Court Division has exceeded its jurisdiction in giving unsolicited advice as to what the Parliament should or should not do. The court cannot direct the President to

make rules because the rule making power of the President is identical with that of the Parliament.

(3) Wisdom of Parliament cannot be subject of judicial review.

(4) There is presumption as to the constitutionality of the statute.

(5) The writ petition is not maintainable, inasmuch as, the writ petitioners have no *locus-standi* to make the petition in the nature of public interest litigation.

70. In support of his contention he has referred to the cases of Novva Das v. Secretary, Department of Municipal Administration and Water Supply, (2008) 8 SCC 42; *Sheikh Abdur Sabur v. Returning Officer, 41 DLR(AD)30*; *Bangladesh v. Shafiuddin Ahmed, 50 DLR(AD)27; Kesavananda Bharti v. Kerala, AIR 1973 SC 1461; Siddique Ahmed v. Bangladesh, 33 DLR(AD)129; Kudrat-E-Elahi Panir v. Bangladesh; 44 DLR(AD)319, Khondker Delwar Hossain v. Italian Marble Works Ltd.; 62 DLR(AD)298, National Board of Revenue v. Abu Saeed Khan, 18 BLC(AD)116.*

71. On behalf of the respondent Dr. Kamal Hossain and Mr. M. Amirul Islam make the following submissions:-

A) I) The law enforcement agencies have failed to comply and to report compliance of 15 directions given by the High Court, and such failure has resulted in continuing incidents of custodial violence.

II) Existing legal measures, including revision or appeal, or individual prosecution for culpable homicide, are not adequate remedy to prevent custodial death, torture or ill-treatment.

III) The Supreme Court has the authority to issue directions and to make recommendations regarding amendment of the law to uphold the rule of law, and as guardian of the Constitution, it has power to guidelines to ensure compliance with constitutional safeguards on arrest and detention and the constitutional prohibition on torture.

B) Under the present scheme of the Code there is no adequate remedy to prevent custodial death, torture, rape or ill-treatment of an offender.

C) Legal action is not possible in cases of any offences against body of persons as well as departmental action.

D) Punitive action does not serve the same purpose as the guidelines which are preventive in nature.

E) Supreme Court may in appropriate case issue directions and recommendations to amend the law to fill up legislative vacuum until a suitable law is enacted in order to ensure that constitutional and statutory safeguards on arrest without warrant and ill treatment of persons in police custody are curbed.

F) The Supreme Court as the protector of the Constitution is competent to direct the government to take such legislative measures as are required to implement the constitutional safeguards.

G) When constitutional arrangements are interfered with and altered by the Parliament and the government, the Supreme Court is within its jurisdiction to bring back the Parliament and Executive from constitutional derailment and give necessary directions to follow the constitutional course.

H) In India the Supreme Court gave directions as preventive measures in cases of arrest and detention and the government had amended the Code of Criminal Procedure in 2008 and 2010 to incorporate those requirements into the law. Guidelines and norms to provide for effective enforcement of basic human

rights to gender equality and protection against sexual harassment to be observed at all workplaces until law is enacted for that purpose.

I) Where there is inaction by the executive for whatever reason the judiciary must step in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field.

J) It is the duty of the Supreme Court to uphold the constitution in particular the protection of the right to life, the safeguards on arrest and detention and the express prohibition on torture or cruel, degrading or inhuman treatment or punishment, which are set out in articles 32, 33 and 35(5) of the Constitution.

K) The rule of law symbolizes the quest of civilized democratic societies, be they eastern or western, to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.

L) Courts in other jurisdictions in south Asia have issued directions from time to time to ensure protection against custodial violence and have also made recommendations to reform the law.

M) Custodial violence, including torture and death in the lock up strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited.

N) The directions given by the High Court Division are essentially to ensure that constitutional promises to citizens are kept and that pre-constitutional laws such as the Police Act, the Code of Criminal Procedure, the Police Regulations of Bengal are read, interpreted and applied in line with the constitutional promises, and that they may be reframed and revised to ensure the fullest protection of each person who faces arrest or is taken into custody in order to ensure human dignity and a society based on rule of law.

72. In support of their contentions, they have referred to the cases of *Secretary Ministry of Finance v. Masdar Hossain, 20 BLD(AD)104; Kudrat-Elahi Panir v. Bangladesh, 44 DLR(AD)319; D.K. Basu v. State of West Bengal, (1997) 1 SCC 416; Vishaka v. State of Rajastan, AIR 1997 SC 3011; Union of India v. Association for Democratic Reforms, 2002(5)SC 294; Joginder Kumar v. State of UP, AIR 1994 SC 1349; Nandini Sathapathy v. PL Dhani, AIR 1978 SC 1025; Raj Narayan v. Superintendent of Central Jail, AIR 1971 SC 178; Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC117; Saifuzzaman (Md) v. State, 56 DLR 324.*

Rule of Law

73. There is no doubt that the present Code has been promulgated about 118 years ago by an imperialist government which used the subcontinent as its colony. If the scheme of the law is looked into there will be doubt in inferring that the colonial power made this law with an object to suppress their subjects by a unified law so that different religious systems of administration of justice are brought in a unified system. This would be easier to them to rule the country peacefully so that it could realize the revenues from the subject by means oppressive measures. Therefore, there is no gain saying that the penal laws and procedural laws which were promulgated by them were oppressive and against the rule of law and the administration of criminal justice. The executives were given the power to administer justice in the Magistracy level and in trial of sessions cases to the Session Judges, having no power to take cognizance of an offence triable by them unless and until the accused is committed by Executive Magistrates under Chapter XVIII of the Code. Even the evidence of a witness

recorded in the presence of an accused person by a Magistrate in a session triable case can be used in the subsequent trial i.e. such evidence is put in under section 288 of the Code and under section 37 of the Evidence Act. There were three Chapters, Chapter XX, XXI and XXII under which different offences were triable by Executive Magistrates. Chapter XXI has been deleted, Chapter XX has been substantially amended and Chapter XXII which empowers the trial before the High Courts and Courts of session has also been substantially amended recently. There are corresponding amendments in each and every Chapter of the Code apart from deleting some Chapters. There is no doubt that excessive powers have been given to the police officers and Executive Magistrates. Though the power of the Executive Magistrates has been taken away pursuant to the direction given by this court in Mazdar Hossain case, the powers of the police officers which are being exercised from the period of colonial rule have not been amended at all with the result that the police officers are using excess abusive powers against the peace loving people taking advantage of the language used in the Code. As a result, rule of law which is the foundation of our constitution, which we achieved by the sacrifice of three million martyrs and molestation of two hundred thousand women and girls, is being violated every sphere of lives.

74. The Universal Declaration of Human Rights was drafted by the Human Rights Commission after receiving a detailed report on the prosecution evidence at the Nuremberg trials. The killing of 'useless eaters', the Einsatzgruppen orders to kill indiscriminately, the gas chambers, Mengele experiments, 'night and fog' decrees and the extermination projects after Kristallnacht were at the forefront of their minds and provided the examples to which they addressed their drafts [Johannes Morsink, 'world war Two and the universal Declaration', HRQ 15(1993) P.357]. Democracy cannot be isolated from rule of law. It has nexus with rule of law. Unless democracy is established in all fields of a country rule of law cannot be established.

75. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with dignity and authority, the courts to be respectful and protected at all costs. Today, Dicey's theory of rule of law cannot be accepted in its totality. Rather Davis (Administrative Law (1959), P.24-27) gives seven principal meanings of the term 'rule of law': a) law and order; b) fixed rules; c) elimination of discretion; d) due process of law or fairness; e) natural law or observance of the principles of natural justice; f) preference for judges or ordinary courts of law to execute authorities and administrative tribunals; g) judicial review of administrative actions.

76. It has been said that no contemporary analysis of rule of law can ignore the vast expansion of government functions which has occurred as a result of both of the growing complexity to modern life, and of the minimum postulates of social justice, which are now part of the established public philosophy in all civilized countries.

77. Over the recent years, recognition of the importance of the rule of law and the significance of the independence of the judiciary has been increased remarkably. The prime responsibility of the judiciary is to uphold the rule of law and it is the rule of law which prevents the ruler from abusing its power. By the same time we should keep in mind that the judiciary alone does not possess a magic wand to establish rule of law in the country. Rule of law means all organs of a State shall maintain the rule of law, that is to say, in all spheres of the executive and administrative branches, the government, its officers including law enforcing agencies, as well as legislative have to protect, preserve and maintain the rule of law. If there is aberration of one branch of the government it will reflect in the judiciary as

well. To discharge its onerous responsibility of protecting and enforcing the rights of the citizens of a country, the judiciary has to be and seen to be impartial and independent. Unless the public accepts that the judiciary is an independent entity, they would have no confidence even in an unerring decision taken by a court exercising its jurisdiction fairly. Unless the rule of law is established the citizens of a country will be deprived of the fruits of justice.

78. The concept of the rule of law has different facets and has meant different things to different people at different times. Professor Brian Tamanaha has described the rule of law as "an exceedingly elusive notion giving rise to a rampant divergence of understandings and analogous to the notion of the food in the sense that everyone is for it, but have contrasting convictions about what it is "[Tamanaha, Brian Z., on the Rule of Law; History, Politics, Theory, Cambridge university Press, 2004].

79. It is an essential principle of the rule of law that "every executive action, if it is to operate to the prejudice of any person must have legislative authority to support it". *[Entick v. Carrington, (1765) EWHC KB J98:95 ER 807: [1558-1774] All ER Rep 41].*

80. Lord Atkin in Eshugbayi Eleko (*Eshugbayi Eleko V. Officer Administering the Government of Nigeria, Chief Secretary of the Government of Nigeria, (1913) Appeal No.42 of 1930*) opined that "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice". It has been stated by Soli,J. Sorabjee in a lecture delivered at NL SIU, Bangalore on 5th April, 2014 that 'the rule of law; a moral imperative for the civilized world' that it needs to be emphasized that there is nothing western or eastern or northern or southern about the underlying principle of the rule of law. It has a global reach and dimension. The rule of law symbolizes the quest of civilized democratic societies, be they eastern or western, to combine that degree or liberty without which law is tyranny with that degree of law without which liberty becomes license. In the words of the great Justice Vivian Bose of our Supreme Court, the rule of law "is the heritage of all mankind because its underlying rationale is belief in the human rights and human dignity of all individuals everywhere in the world".

81. The rule of law provides a potent antidote to executive lawlessness. It is a salutary reminder that wherever law ends, tyranny begins. In the developed as well as developing countries due to the prevalence of the rule of law, no administrator or official can arrest or detain a person unless there is legislative authority for such action. In those countries a Police Commissioner or any other public functionary cannot ban a meeting or the staging of a play or the screening of a movie by passing a departmental order or circular which is not backed by law. The rule of law ensures certainty and predictability as opposed to whimsicality and arbitrariness so that people are able to regulate their behaviour according to a published standard against which to measure and judge the legality of official action. Experience testifies that absence of the rule of law leads to executive high-handedness and arbitrariness.

82. In the constitution Eight Amendment case, *Anwar Hossain Chowdhury v. Bangladesh 41 DLR(AD) 165* and also *Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225,* the apex courts of these two countries held that the rule of law is one of the basic features of the constitution. In *I.R. Coelho v. State of T.N. (2007) 2 SCC 1,* it is stated that the rule of law is regarded as part of the basic structure of the Constitution. Consequently the rule of law cannot be abolished even by a constitutional amendment. This manifests the high status accorded to the rule of law in Indian constitutional jurisprudence. The apex courts of this subcontinent do not hesitate to make such orders or directions whenever necessary when it

comes to its notice that the rule of law is violated and vigorously enforced the rule of law in practice. In *Indira Nehru Gandhi v. Raj Narain, AIR 1975 S.C.C. 2299*, a five member Bench of the Supreme Court in strong language once again made observations when it notice that the rule of law was violated as under:

> "Leaving aside these extravagant versions of rule of law there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if role of law is to be a basic structure of the Constitution one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the Constitution. The provisions of the Constitution were enacted with a view to ensuring the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. May be, the other articles referred to do the same duty."

83. The basic tenets of the rule of law articulated by the poet Thomas Fuller and adopted by court is 'Be you ever so high the law is above you' (Thomas Fuller (1733).

84. The Supreme Court of India in *S.G. Jaisinghani v. Union of India, (1976) 2 SCR 703: AIR 1967 SC 1427* ruled that "The first essential of the rule of law upon which our whole constitutional system is based is that discretion, when conferred upon executive authorities, must be confined within clearly defined limits'. This view has been reaffirmed in *Khudiram Das v. State of W.B., (1975) 2 SCC 81* observing that "in a government under law, there can be no such thing as unfettered unreviewable discretion". There is thus no ambiguity in the opinions of the apex Court that the rule of law is a dynamic concept, which takes within its ambit all human rights which are indivisible and are independent.

85. The rule of law must not be confused with rule by law. Otherwise rule of law would become an instrument of oppression and give legitimacy to laws grossly violation of the basic human rights. There is a certain core component in respect of the basic human rights of the people and for human dignity. Otherwise, commission of atrocities and gross violation of human rights could be justified by pointing to the mere existence of a law' (*ibid-Soli,J. Sorabjee*).

86. Andrew Le Sueur, Maurice Sunkin and Jo Murkens, Public Law, Text, Cases, and Materials (2013), 2nd Edn., Oxford University Press, have aptly summarized the main ideas associated with the rule of law as follows:

> *Compliance with the law*: "Like citizens, the Government and public bodies must act in accordance with the law and must have legal authority for actions which impinge on the rights of others.
>
> *The requirement of rationality*: The rule of law implies rule by reason rather than arbitrary power or whim. In order to comply with the rule of law, decisions must be properly and logically reasoned in accordance with sound argument.
>
> *The rule of law and fundamental rights*: The rule of law requires the protection of the fundamental rights of the citizens against the Government. If we summarize the above treatise on public law we find, whenever one speaks of law, it must satisfy at

least the prerequisite that it guarantees basic human rights and human dignity and ensures their implementation by due process through an independent judiciary exercising power of judicial review. Absent of these requirements the rule of law would become a shallow slogan. Lord Justice Stephen Sedley of the Court of Appeal in UK observed, "the irreducible content of the rule of law is a safety net of human rights protected by an independent legal system" (quoted from Soli, J. Sorabjee).

87. In this connection it is apt to quote the words of Justice Brandeis in *Olmstead v. United States, 277 US 438* "Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the ends justifies the means is to declare that the Government may commit crimes in order to secure the conviction of a criminal would bring terrible retribution".

88. In *D.K. Basu v. State of W.B., (1997) 1 SCC 416*, The Indian Supreme Court observed:

> "Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless.... It cannot be said that a citizen 'sheds off' his fundamental right to life the moment a policeman arrests him. Nor can it be said that the right to life of a citizen can be put in 'abeyance' on his arrest. ... If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. ... State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism. That would be bad for the State, the community and above all for the rule of law."

89. The preamble of our constitution states 'rule of law' as one of the objectives to be attained. The expression 'rule of law' has various shades of meaning and of all constitutional concepts, the rule of law is the most subjective and value laden. The concept is intended to imply not only that the powers exercised by State functionaries must be based on authority conferred by law, but also that the law should conform to certain minimum standards of justice, both substantive and procedural. Rule of law is the subordination of all authorities, legislative, executive and others to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual. The minimum content of the concept is that the law affecting individual liberty ought to be reasonably certain or predictable; where the law confers wide discretionary powers there should be adequate safeguards against their abuse; and unfair discrimination must not be sanctioned by law. A person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal; and so forth.

90. The rule of law demands that power is to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Absence of arbitrary power is the first essential of the rule of law upon which

our constitutional system is based. Discretion conferred on the executive must be confined within the defined limits and decisions should be made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know where he stands. A decision without any principle or rule is unpredictable and is the antithesis of a decision in accordance with the rule of law.

91. Rule of law contemplated in the constitution concerns the certainty and publicity of law and its uniform enforceability and has no reference to the quality of the law. The framers of the constitution, after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching the qualitative aspects of 'law', thereby showing their adherence to the concept of rule of law. If the preamble of the constitution is read as a whole in its proper perspective, there remains no doubt that the framers of the constitution intended to achieve 'rule of law'. To attain this fundamental aim of the State, the constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his action with reference to law. 'Law' does not mean anything that Parliament may pass. Articles 27, 31 and 32 have taken care of the qualitative aspects of law. Article 27 forbids discrimination in law or in State actions, which article 31 and 32 imported the concept of due process, both substantive and procedural, and thus prohibit arbitrary or unreasonable law or State action. The Constitution further guarantees in Part III certain rights including freedom of thought, speech and expression to ensure respect for the supreme value of human dignity. [Constitutional Law of Bangladesh, Third Edition Mahmudul Islam].

92. Though the constitution contains provisions to ensure rule of law, the actual governance has nullified rule of law in the country. No right can compare with the right to life without which all other rights are meaningless and rule of law can play its most significant role in this aspect. But the tolerant and rather approving attitude of the successive governments in respect of extra-judicial killings by the law enforcing agency in the name of 'cross fire' and 'shoot out' has seriously dented the operation of rule of law so much so that it will not be a misstatement to say that rule of law for the common men in the country exists only in the pages of the constitution. (Ibid)

93. It must be remembered that the rule of law is not a one-way traffic. It places restraints both on the government and individuals. If the underlying principles of the rule of law are to become a reality in governance as also in our lives no doubt laws are necessary but they alone are not sufficient. In addition fostering of the rule of law culture is imperative. The only true foundation on which the rule of law can rest is its willing acceptance by the people until it becomes part of their own way of life. Therefore we should strive to instill the rule of law temperament, the rule of law culture at home, in schools, colleges, public places, utility service locations, parks even mosques, temples and other holy places. We must respect each other holy places. We should strive for the universalisation of its basic principle. Our effort should be to constantly aim at the expansion of the rule of law to make it a dynamic concept which not merely places constraints on exercise of official power but facilitates and empowers progressive measures in the area of socio-economic rights of the people. That indeed is the moral imperative for the civilised world.

94. Justice Vivian Bose made a very remarkable observation by posing a question why it should be respected by all segments of citizenery. "Because we believe in human worth and dignity. Because, on analysis and reflection, it is the only sane way to live at peace and amity with our neighbours in this complex world. Because it is the only sane way to live in an ordered society."[N.R. Madhava Menon, Rule of Law in a Free Society (2008), Oxford University Press, p. 11.]

95. We eagerly look forward to the day when the quintessential principles of the rule of law, namely, the protection and promotion of all human rights and human dignity of all human beings is universally accepted. One hopes that in a world torn by violent sectarian and religious strife the rule of law with its capacious dynamic content becomes the secular religion of all nations based on tolerance and mutual respect. It should be borne in mind that progress is the realisation of utopia. We must earnestly strive to realise this utopia which is a moral imperative for the civilised world.

Unjust Laws

96. There are examples of the existence of Anglo-American legal sources that support the common law judicial authority (i.e. the judges) to refuse to enforce unjust laws, even where those laws do not necessarily violate a written constitution. This proposition has been stated in the cases of Bonham, Omychund, Ham, Bowman, Lindsay, Jones, Calder, Chisholm, Mcllvaine and Feltcher. On an analysis of these cases Douglas E. Edlin in his book 'Judges and Unjust Laws' observed that their views should be appreciated for what they are: a discrete, coherent and cohesive line of reported case law articulating a common law principle and a body of legal thought that reflect the distinctive authority and responsibility of common law judges to develop the law by eliminating instances of injustice from the law, a principle and a conception that have endured throughout Anglo-American common law history. This is the legal basis, derived from legal sources, for judges to refuse to enforce unjust laws (emphasis supplied).

97. As it turns out this what Coke had in mind all along:

> "In this stand for the right to give the Common Law Priority in general principles...Parliament must not go beyond the general principles of the Common Law or beyond its general reasonableness. This would place statute law in a subordinate place to the Common Law if pressed to its logical conclusion, and give at least to the Common Law courts a superior position as the interpreter of statute law. It would in many cases result in the will of the framers of statutes being set aside or at least modified by the judges of the Common Law courts. It would, in short, create a practice of judicial criticism or judicial review or statutes by the Common Law judges.... In Bonham's case he (Coke) contended there was a legal, not an extra-legal, power in the courts to do this very thing." [Judges and Unjust Laws: Common Law Constitutionalism and Foundation of Judicial Review. Douglas E.Edlin]

98. Now the question may logically arise as to what happens as the consequences of judicial failure to develop the law by refusing to enforce unjust laws. There could be three consequences, such as: legitimation of the unlawful, social and legal harm caused by that and complicity & accountability generated from the undue inaction.

99. Therefore, it the duties of the courts and judges to see if the law is sound enough to pass the test of justiciability. The following features might help one to test the justiciability of an Act or legal provision:

> *Firstly*, the epistemic threshold applicable to common law review sets exacting standards of certainty and gravity, which ensure that no judge can properly invoke common law review unless she is as certain as she can be that a mistake was made by a prior court or a legislature and that this mistake concerns a matter of grave social importance that violates the judge's deepest convictions.

> *Secondly*, the convictions with which common law review is concerned are the judge's own, not the judge's assessment of society's prevailing beliefs.
> *Thirdly,* the judge alone must determine, with reference to her personal beliefs and ideals, when the epistemic threshold has been crossed.
> *Fourthly,* the judge must undertake careful and comprehensive reflection and analysis before concluding that a particular law meets the epistemic threshold and triggers common law review.
> *Fifthly*, if the judge finally concludes that the exercise of common law review is warranted, this authority overrides any conflicting legal principle, including *stare decisis* and legislative supremacy, and requires the judge to develop the law by refusing to enforce the law deemed to be unjust.
> *Sixthly:* common law review empowers judges to refuse to enforce an unjust law only in particular case;
> *Seventhly*, common law review is consistent with judicial respect for doctrines of legal stability, such as *stare decisis* and legislative supremacy, which are overridden only in the most drastic circumstances.
> Finally, common law review allows the courts to resist threats to its institutional integrity and reinforces the judiciary's institutional obligation to maintain constitutional restrictions on the government and to ensure the legality of all government action. (Ibid)…

100. Unjust laws have troubled lawyers, political scientists, Judges, Civil Society and philosophers since they first reflected on the legal standards by which people govern themselves. Unjust laws raise difficult questions about our understanding of law, our aspirations for our laws, our obligations to one another, and our government's responsibilities to each of us. From Aristotle and Aquinas to Hart and Fuller, the debate about these questions has continued for millennia, and it will endure for as long as people need law to order their societies and to guide their lives.

101. There are several ways that a law might be unjust. It might prohibit or curtail conduct that should be permitted. It might permit conduct that should be prohibited. It might apply or enforce unfairly and otherwise unobjectionable law. People can and will disagree about whether and in what way a particular law is unjust. Suppose a particular law is unjust and then the question may arise by what legal basis, if any, a Judge can resist and attempt to correct that injustice. It seemed that it might help clarify discussion to have a specific example of an unjust law in mind. The example of an unjust law is that one permitting government-sanctioned racial discrimination or violation of human rights. If a defence is needed, that racially discriminatory laws are unjust. Of course, someone might imagine a polity in which racially discriminatory laws are not necessarily unjust by definition. Racially discriminatory laws are paradigmatically unjust refers to the related experiences of common law nations regarding, for example, treatment of indigenous populations and the political and constitutional history of the United States with respect to slavery and legalized racial segregation and subjugation. (Ibid)…

102. In addition to overtly or substantively unjust laws, certain laws also attempt, in various ways, to undermine the institutional position or constitutional obligations of common law courts. We may highlight specific fundamental common law principles that operate through judicial decisions to maintain the constitutional relationship of government organs and to enforce legal limitations on government action. Despite the long history of interest in problems presented by unjust laws, relatively little has been written about the particular

difficulties these laws raise for Judges called on to enforce them. What little has been written tends to oversimplify or misconceive the genuine nature of the conflict unjust laws pose for Judges.

103. If we carefully scrutinize the subject matter of this case then this aspects becomes obvious that there is strong chain of judicial tradition practiced and followed by the courts under common law scheme (UK, America, Australia, India etc.) that courts have a solemn obligation to test any law to see if the law is *just* and therefore capable of being called a law in the truest sense of the word, if not then there is no option left with a judge but to declare that law an unjust law. Because a judge is under no obligation to work as a mere instrument of implementing and explaining law like a machine, if he does so then this would be the highest form of injustice one can imagine of in a democratic polity. And to understand this subtle level of injustice done by unjust law the judges must have the moral compass and sensitivity to recognize injustice and feel its sting; and they must have the strength of character and will to act on their convictions, even when they must act alone. (emphasis supplied).

104. And as a final point, the role of the judges in a situation when they are confronted with in a paradox of expounding a law as unjust law is best described in the following paragraph:

> "As long as people need laws to govern themselves and as long as these laws are made by people, some of these laws will be unjust. As long as the threat of unjust laws persists, people will and should consider how judges ought best to address that threat and its occasional actualization. To this point, consideration of these problems has left judges with three possibilities. But mendacity, abnegation, or acquiescence are not the only options. The common law tradition and legal principles permit and require more of judges. Judges must develop the law. That, too, is a fundamental aspect of their legal obligations. Sometimes, as in cases involving unjust laws, development demands that judges subject government action to the rule of law. This should not elicit fear or frustration. The common law has always functioned this way, and common law judges have always, in one form or another, fulfilled this function. The common law tradition recognized long ago what we sometimes still lose sight of today: only when the waters are pure can we hope to see down to the riverbed" (Ibid)…

Natural law or observance of Principle of Natural Justice

105. Sir Henry Maine says "Seen in the light of Stoical doctrine the Law of nations came to be identified with the law of nature; that is to say, with a number of suppose principles of conduct which man in society obeys simply because he is a man. Thus the Law of Nature is simply the Law of Nations seen in the light of a peculiar theory. A passage in the Roman Institutes shows that the expressions were practically convertible," and again: "The Law of Nations so far as it is founded not the principles of Natural Law are equally binding in every age and upon all mankind".

106. It has been said by some that the principle of *audi alteram partem* was upheld in Magna Charta, and Lord Coke appears to have subscribed to that view when he said (Co.Inst. IV, 37) "…by the statutes of Mag. Cart. ca. 29, 5 E 3 Cap. 9 and 28 E 3 Cap. 5 no man ought to be condemned without answer, etc." This is, however, a paraphrase of the actual words of ca. 29 of Magna Charta, which reads:

> "The body of no free man shall be taken, nor imprisoned, nor disseized, nor outlawed, nor banished, nor destroyed in any way and the King shall not got or send against him by force except by the judgment of his peers and by the law of the land".
> Coke regarded it as a rule not only fundamental but divine. He said:
> "And the poet (Virgil, Aeneid, vi, 566), in describing the iniquity of Ramamanthus, that cruel judge of Hell, saith, '*Castigatque, auditque dolos subigitque fateri'*. First he punished before he heard; and when he had heard his deniall, be compelled the party accused by torture to confess it. But far otherwise doth Almighty God proceed, *postquam reus diffamatus est-1 vocat, 2 interogat, 3 judicat*".

107. Some inalienable natural rights expanded by Cooley, Dilon and others had a threefold aspect:

> "(1) On the lines previously foreshadowed by Marshall, Kent and others, vested property interests were held to be inalienable rights and immune from legislative interference.
> (2) The power to impose taxes was restricted to "public purposes" and public purposes were what the judges understood them to be. Under the influence of Cooley's doctrines, taxes for the purpose of purchasing railway stock" or for granting aid to private enterprises or for the development of the natural advantages of a city for manufacturing purposes"' were held invalid.
> (3) Under clauses in most American constitutions the inviolability of private property was mitigated by the power of expropriation for public purposes, by virtue of "eminent domain." Here the court imposed, in the name of natural justice, a similar limitation. Eminent domain can only be exercised for public purposes, and with adequate compensation."

108. Our constitution empowers the courts to act and administer justice according to justice, equity and good conscience where no indigenous are properly applicable. In *Waghela Rajsanji v. Sheikh Masludin, (1887) LR 14 I.A. 89(96)*, the Judicial Committee of the Privy Council pointed out that there was not in Indian law any rule which gave a guardian greater power to bind the infant ward by a personal covenant than existed in English law. Lord Hobhouse said:

> 'In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.'

109. The expressions, the laws of God, natural law, natural justice, equity and good conscience were in early times synonymous terms. It would appear probable, therefore, when the expressions "natural justice, equity and good conscience", and "natural justice and morality" and "natural justice and humanity" and "general principles of humanity" these phrases leave a wide discretion to the Judges to decide questions in accordance with their own ideas of fair play. Where a procedural law is silent on certain aspects of natural justice or may deprive the subject expressly or impliedly of their protection altogether, the courts will be anxious to ensure that so far as is compatible with the provisions of the statute, the principles of natural justice shall be upheld and rendered available for the protection of the citizen.

110. This protection has to be afforded not only when the statute is wholly or partially silent as to the procedure to be adopted, but also when a procedure has been prescribed by

statute and the statutory authority has made an attempt to carry out its functions according to such procedure, but in doing so has violated the principles of natural justice. The courts are jealous to ensure that when an authority trips into a pitfall the citizen does not suffer as a result of arbitrary act of the authority.

International Covenants and treaties

111. There are several international treaties for safeguarding civil and political rights, torture and cruel, human degradation treatment or punishment. Our country is a signatory almost all treaties, and some of those rights and freedoms have been enshrined in Part III of our constitution, some of them have not been included. However, the fundamental freedom of speech, freedom of association, freedom of movement, freedom of thought, prohibition of force labour, protection in respect of trial and punishment, protection of right to life and personal liberty, safeguard as to arrest and detention, discrimination on the ground of religion, equality before law etc. are enshrined radiantly in the firmament of Part III. We must take legitimate right that these charished freedoms are grown from strength to strength in the post independent arena. It has been consistently nourished and saved to new dimension with the contemporary needs by the constitutional court. Some of the Intentional treaties and safeguards are mentioned below.

International Covenant of Civil and Political Rights, 1966

112. Article 9 (liberty and security of persons)
Notice of reason in arrest and criminal charges
Judicial control of detention in connection with criminal charges
The right to take proceedings for release from unlawful and arbitrary detention
The right ----- to compensation for unlawful and arbitrary arrest or detention

Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment
Adopted by General Assembly resolution 43/173 of 9 December, 1988

Principle 1
All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2
Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3
There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4
Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept
separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle l0

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle ll

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2,principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance
with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph l of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

Code of Conduct for Law Enforcement Officials Adopted by General Assembly resolution 34/169 of 17 December 1979 may be summarised for better appreciation

Article 1

Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

International Covenant on Civil and Political Rights
Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
entry into force 23 March 1976, in accordance with Article 49

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. .....

5. .....

6. .....

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvict persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such which will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Provisions of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which is shortly called CAT convention 1984 may be stated hereunder for better understanding intricate issues raised in this case.

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency,

may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture
and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for

which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who
obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months
before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States
Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if re-nominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Laws Safeguarding Human Rights as per constitution of the People's Republic of Bangladesh may be stated below for making the complicated issues crystal clear

113. Articles 7, 26, 27, 28, 29, 30, 31, 32, 33, 35, 37 and 39 are as under:

> "7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
>
> (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 the commencement of this 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) Nothing in this article shall apply to any amendment of this Constitution made under article 142.
>
> 27. All citizens are equal before law and are entitled to equal protection of law.
>
> 28. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
>
> (2) Women shall have equal rights with men in all spheres of the State and of public life.
>
> (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to

access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

29. (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the State from –

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

30. No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state.

31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

32. No person shall be deprived of life or personal liberty save in accordance with law.

33. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person–

(a) who for the time being is an enemy alien; or

(b) who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as

may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

(6) Parliament may by law prescribe the procedure to be followed by an Advisory Board in an inquiry under clause (4).

35. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law.

(4) No person accused of any offence shall be compelled to be a witness against himself.

(5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

(6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.

37. Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health.

39. (1) Freedom of thought and conscience is guaranteed.

(2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence–

(a) the right of every citizen to freedom of speech and expression; and

(b) freedom of the press, are guaranteed."

114. Almost all international safeguards on unlawful detention, torture, violation of fundamental rights, protection of human rights and dignity are recognised in Part III of our constitution. These fundamental rights are not absolute. There are some restrictions and limitations. Some of the rights may be harmful if there is free exercise of such rights by one may be destructive of similar rights of others and such fundamental rights would be a hindrance to governmental measures for the welfare of the community. But as regards the life, liberty, body, regulation, dignity and property there cannot be any limitation except by or in accordance with law. 'Life' within the meaning of article 31 means something more than animal existence. (*Munn v. People of Illinois, 94 US 113.*) It includes the right to live consistently with human dignity and decency. (*Vikram v. Bihar, AIR 1988 S.C 1782*). Liberty signifies the right of an individual to be free in the enjoyment of all his faculties. No right is so basic and fundamental as the right to life and personal liberty and exercise of all other rights is dependent on the existence of the right to life and liberty.

115. We have reproduced the debate of the Constituent Assembly before the adoption of the constitution with a view to showing that the framers of the constitution intended application of a stricter scrutiny of reasonableness and maintenance of the rule of law. A law providing for deprivation of life and personal liberty must be objectively reasonable and the court will examine whether in the opinion of a prudent man the law is reasonable having

regard to the compelling and not merely legitimate, governmental interest. Except for the security of the State or the security of the ordered society deprivation of life and liberty cannot be restricted. A law providing for deprivation of personal liberty must subserve a compelling State interest and if the mischief sought to be remedied can be remedied by any other reasonable means, deprivation of personal liberty will be unreasonable in terms of article 32.

¢ekjae Hhw ®qgjSca jaÉ (¢ehlZ) BCe, 2013

In the definition clause the word ¢ekjae means suffering physical or mental torture-

(L) cLje hÉ¢š² hi Afl ®Lcej hÉ¢š²l ¢eLV qCa abÉ Abhi ü£Lcl¡¢š² Bcu;

(M) pc¾cqijSe Abhi Afl¡d£ ®Lcej hÉ¢š²cL nj¢Ù fËcje;

(N) cLcej hÉ¢š² Abhi ajqil jjdÉcj Afl ®Lcej hÉ¢š²cL iui£a ®cMcej ;

(0) ®hocjÉl ¢i¢šca Lcli fËlQei hi Eú¡¢e, Lcli pçj¢aœ²cj Abhi ¢eS rjajhcm ®Lcej plLil£ LjLai Abhi plLj¢l rjajhcm-

The expression হেফাজতে মৃত্যু means-cqgjSca jaÉ Ab plLj¢l ®Lcej LjLail ®qgjSca ®Lcej hÉ¢š²l jaÉ; Cqjsj ®qgjSca jaÉ h¢mca Acхd BVLcn, BCe fËujNLil£ pwÙi LaL ®NËjlLcm ®Lcej hÉ¢š²l jaÉcLJ ¢ecn L¢lch; ®Lcej jjmiu pir£qEL hi ei qEL ¢S ‘iphicLcm jaÉJ ®qgjSca jaÉl *Ašf-3* qChz

A non-obstante clause has been provided in section 4 of the Ain providing that notwithstanding anything contained in the court if any person makes a complaint relating to torture the court at once record his statement-

L) avr¢ZL icch l hÉ¢š²l ¢hh¢a ¢m¢fhÜ L¢lche;

M) HLSe ®l¢SØVjX¢Q¢LvpL àil¡ A¢hmcð ajqil ®cq fl£rjl Bcn¢cche;

N) A¢icki¡NLil£ j¢qmi qCcm ®l¢SØVjX j¢qmi ¢Q¢LvpL àil¡ fl£rj L¢lhil hÉhÙi L¢lchez

2) ¢Q¢LvpL A¢icki¡NLil£l hÉ¢š²l ®ccql SMj J ¢ekjacel ¢Qq² Hhw ¢ekjacel pñjhÉ pju EcõMfhL 24 O¾Vil jcdÉ Eqil HL¢V¢lcfjV®al£ L¢lchez

3) Ef-dil (2) Aekjul£ pw¢nø ¢Q¢LvpL fËaLa ¢lcfjVl HL¢V L¢f A¢icki¡NLil£ Abhi ajqil jce¡e£a hÉ¢š²cL Hhw Bcmca ®fn L¢lchez

4) ¢Q¢LvpL k¢c Hje flj¡n®ce®k fl£rjLa hÉ¢š²l ¢Q¢Lvpi fËujSe ajqi qCcm Bcma l hÉ¢š²cL qipjfacm i¢a L¢lhil ¢ecn fËje L¢lchez

116. Besides the court will direct to examine the detainee bay a registered physician. The physician shall prepare a report within twenty for hours specifying the time and the injury on the person, and shall hand over a copy to the victim and another to be submitted in court. These requirements are not charity but for taking legal action against the Police Officer in accordance with the Ain. Previously there was no safeguard of a detainee but now it is an offence punishable under the Ain. The court should not take such violation of human rights lightly and no leniency should be shown to such Officer.

117. Section 5 provides the procedure for filing the case, section 9 has provided that the provisions of the Code shall be applicable for lodging a complaint, inquiry and trial of the cases. Though there is a provision for security of the person making complaint as provided in section 11, no such security is given to any victim as yet. Section 12 is very relevant which provides:-

"HC BCɔel Adɛɔe La ®L¡e Afl¡d kÜ¡hÙ¡, kɔÜl ýj¢L, B i É¿l£Z l¡S®e¢aL A¢Ù¢an£ma¡ Abh¡ Sl¦¢l AhÙ¡u; Abh¡ Edae LjLa¡ h¡ plL¡¢l Lafɔrl Bɔcɔn Ll¡ qCu¡ɔR HCl¦f ASq¡a ANËqZɔk¡NÉ qCɔhz'

118. It says if any person commits any offence under the said Ain during the period of preparation of war, threat of war, internal political stability, or emergency or orders of superior authority or government shall not be acceptable. The court is under no obligation to accept any sort of excuse and the offender shall be dealt with according to law. This provision is very important but practically we find no application of this section. Section 15 provides the punishment which shall not be less than five years and the maximum sentence is imprisonment for life with fine.

119. This is one of the finest piece of legislation so far promulgated after the independence of the country. It reflects the aims, aspirations and objects of our Founding Fathers while framing the constitution. By this law the safeguards of human dignity, personal liberty, undue harassment and torture of a detainee in the hands of law enforcing agency, deprivation life and liberty, honour and dignity, and also payment of compensation to the victim's family has been protected. It is in conformity with the international treaties particularly 'Code of Conduct of Law Enforcement Officials' adopted by the General Assembly Resolution dated 17th December, 1979. The Ain has been promulgated in consonance with the said Resolution and also in accordance with article 9 of 'International Covenant on Civil and Political Rights' adopted by resolution No.2200A (XXI) dated 16th December, 1966. Now the question is its application in true letters and spirit. It is only the Magistrates who can ensure its enforceability and see that this piece of legislation does not remain in the statute only. The Magistrates shall not remain as silent spectator whenever they find infringement of this law and shall take legal steps against errant officers.

Legal Points

120. The first question to be considered is whether the High Court Division has illegally presumed the misuse of power by the police while using the power under sections 54 and 167 of the Code.

121. Sections 54, 60, 61, 167 and 176 of the Code are relevant for our consideration which read as follows:

> "54.(1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest-
> *firstly* , any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;
> *secondly*, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking;
> *thirdly*, any person who has been proclaimed as an offender either under this Code or by order of the Government;
> *fourthly*, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;
> *fifthly*, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh;
seventhly , any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;
eighthly , any released convict committing a breach of any rule made under section 565, sub-section (3);
ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

122. This section gives the police wide powers of arresting persons without warrant. It is however not a matter of caprice, limited only by the police officers' own view as to what persons they may arrest without warrant. Their powers are strictly defined by the Code, and being an encroachment on the liberty of the subject, an arrest purporting to be under the section would be illegal unless the circumstances specified in the various clauses of the section exist. Where a police officer purported to act under a warrant which was found to be invalid and there was nothing to show that he proceeded under this section and the arrest could not be supported under this section.

123. A police officer's power to arrest under this section is discretionary and notwithstanding the existence of the conditions specified in the section, it may be desirable in the circumstances of the particular case to simply make a report to the Magistrate instead of arresting the suspected persons.

124. A police officer can act under clause one only when the offence for which a person is to be arrested is a cognizable offence. Such person, must, as a fact, have been concerned in such offence or there must have been a reasonable complaint made or credible information received that he has been so concerned. If the person arrested is a child under 9 years of age, who cannot under section 82 of the Penal Code commit an offence, the arrest is illegal. Where, a complaint is made to a police officer of the commission of a cognizable offence, but there are circumstances in the case which lead him to suspect the information, he should refrain from arresting persons of respectable position and leave the complainant to go to Magistrate and convince him that the information justifies the serious step of the issue of warrants of arrest.

125. There was no provision in the Codes of 1861 and 1872, enabling an arrest without warrant on credible information as to the person to be arrested being concerned in a cognizable offence. Such a provision was introduced for the first time in the Code of 1882. The words "credible information" include any information which, in the judgment of the officer to whom it is given appears entitled to credit in the particular instance. It need not be sworn information. The words "credible" and "reasonable" have reference to the mind of the person receiving the information. A bare assertion without anything more cannot form the material for the exercise of an independent judgment and will not therefore amount to "credible information". The "reasonable suspicion" and "credible information" must relate to

definite averments which must be considered by the police officer himself before he arrests a person under this section.

126. A complaint of a cognizable offence recorded by a Magistrate and sent by him to the police for investigation and report is sufficient information justifying arrest under section 54 of the Code. Similarly, information that a warrant of arrest has been issued against a person in respect of a cognizable offence, may justify action being taken under the said section. Where, from a report of a Chowkider that certain persons were dacoits the police officer called them to surrender, but the latter resisted and fired shots at the officer, the latter was justified in arresting those persons.

127. Where a police officer suspecting that certain pieces of cloth which a man was carrying early morning, was stolen property, went to him and questioned him and having received unsatisfactory answers, arrested him, he was entitled to arrest him because reasonable suspicion exists of his being concerned of a cognizable offence. Where a person was found armed lurking at midnight in a village inhabited by persons well known to the police as professional dacoits, there was a reasonable suspicion against the person of his being concerned in a cognizable offence. But this does not mean that the police are limited only by their own discretion as to what persons they may arrest without warrant. Their powers in this respect are strictly defined by the Code. In order to act under the first clause, there must be a reasonable complaint or reasonable suspicion of the person to be arrested having been concerned in a cognizable offence. What is a 'reasonable' complaint or suspicion must depend upon the circumstances of each particular case; but it should be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on a mere vague surmise.

128. Section 60 of the Code states that a police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

129. Section 61 of the Code states that no police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

130. These provisions of the above two sections have been reproduced in article 33 of the constitution. The framers were conscious that despite such safeguards are ensured, this provision should be retained as integral part of fundamental rights. So the police officers must not deprive of the fundamental rights recognised to a citizen.

131. Section 167(1) of the Code provides that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, he shall forward a copy of his order, with his reasons for making it to the Chief Metropolitan Magistrate or to the Chief Judicial Magistrate to whom he is subordinate.

(4A) If such order is given by a Chief Metropolitan Magistrate or a Chief Judicial Magistrate, he shall forward a copy of his order, with reasons for making it to the Chief Metropolitan Sessions Judge or to the Sessions Judge to whom he is subordinate.

(5) If the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation-

(a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and

(b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Court:

Provided that if an accused is not released on bail under this sub-section, the Magistrate or, as the case may be, the Court of Session shall record the reasons for it:

Provided further that in cases in which sanction of appropriate authority is required to be obtained under the provisions of the relevant law for prosecution of the accused, the time taken for obtaining such sanction shall be excluded from the period specified in this sub-section.

Explanation-The time taken for obtaining sanction shall commence from the day the case, with all necessary documents, is submitted for consideration of the appropriate authority and be deemed to end on the day of the receipt of the sanction order of the authority.]

(6)-(7A) [Omitted by section 2 of the Criminal Procedure (Second Amendment) Act, 1992 (Act No. XLII of 1992).]

(8) The provisions of sub-section (5) shall not apply to the investigation of an offence under section 400 or section 401 of the Penal Code, 1860 (Act XLV of 1860).]

132. The word "accused" used in section 167 and in sections 169, 170 and 173 of the Code denote the suspected offender who has not yet come under the cognizance of court. It does not rest in the discretion of the Police-officer to keep such person in custody where and as long as he pleases. Under no circumstances, can he be retained for more than 24 hours without the special leave of the Magistrate under this section. Any longer detention is

absolutely unlawful. The accused should actually be sent before the Magistrate; the police cannot have the accused in their custody and merely write for and obtain the special leave under this section for such detention.

133. The Magistrate exercising his jurisdiction under section 167 performs judicial functions and not executive power, and therefore, the Magistrate should not make any order on the asking of the police officer. The object of requiring an accused to be produced before a Magistrate is to enable him to see that a police remand or a judicial remand is necessary and also to enable the accused to make a representation he may wish to make. Since a remand order is judicial order, the Magistrate has to exercise this power in accordance with the well settled norms of making a judicial order. The norms are that he is to see as to whether there is report of cognizable offence and whether there are allegations constituting the offence which is cognizable. Non-disclosure of the grounds of satisfaction by a police officer should not be accepted. Whenever, a person is arrested by a police during investigation he is required to ascertain his complicity in respect of an cognizable offence.

134. The entries in the diary afford to the Magistrate the information upon which he can decide whether or not he should authorise the detention of the accused person in custody or upon which he can form an opinion as to whether or not further detention is necessary. The longest period for which an accused can be ordered to be detained in police custody by one or more such orders is only 15 days. Where even within the 15 days time allowed under this section the investigation is not completed, the police may release the accused under section 169.

135. Sub-section (3) of section 167 requires that when the Magistrate authorises detention in police custody, he should record his reasons for so doing. The object of this provision is to see that the Magistrate takes the trouble to study the police diaries and to ascertain the actual conditions under which such detention is asked for. The law is jealous of the liberty of the subject and does not allow detention unless there is a legal sanction for it. So in every case where a detention in police custody is ordered the Magistrate should state his reasons clearly. He should satisfy himself (a) that the accusation is well-founded, and (b) that the presence of the accused is necessary while the police investigation is being held. The mere fact that the police state that the presence of the accused is necessary to finish the investigation, is not sufficient to order detention. To order a detention of the accused in order to get from him a confessional statement or that he may be forced to give a clue to stolen property is not justified. Similarly it is improper to order detention in police custody on a mere expectation that time will show his guilt or for the reason that the accused promised to tell the truth or for verifying a confession recorded under section 164 or for the reason that though repeatedly asked the accused will not give any clue to the property.

136. Section 167 is supplementary to section 61 of the Code. These provisions have been provided with the object to see that the arrested person is brought before a Magistrate within least possible delay in order to enable him to judge if such person has to be kept further in the police custody and also to enable such person to make representation in the matter. The section refers to the transmission of the case diary to the Magistrate along with the arrested person. The object of the production of the arrested person with a copy of the diary before a Magistrate within 24 hours fixed by section 61 when investigation cannot be completed within such period so that the Magistrate can take further course of action as contemplated under sub-section (2) of section 167. Secondly, the Magistrate is to see whether or not the arrest of the accused person has been made on the basis of a reasonable complaint or credible information has been received or a reasonable suspicion exist of the arrested persons having

been concerned in any cognizable offence. Therefore, while making an order under sub-section (2) the Magistrate must be satisfied with the requirements of sections 54 and 61 have been complied with otherwise the Magistrate is not bound to forward the accused either in the judicial custody or in the police custody.

137. The 'diary' referred to in sub-section (1) is a special diary referred to in section 172 of the Code read with regulation 68 of Police Regulations, Bengal. Regulation 68 provides the custody of case diary as under:

> "68. Custody of case diaries.
> (a) Only the following police officers may see case diaries:—
> (i) the investigating officer;
> (ii) the officer in-charge of the police-station:
> (iii) any police officer superior to such officer in-charge;
> (iv) the Court officer;
> (v) the officer or clerk in the Superintendent's office specially authorized to deal with such diaries; and
> (vi) any other officer authorized by the Superintendent.
> (b) The Superintendent may authorize any person other than a police officer to see a case diary.
> (c) Every police officer is responsible for the safe custody of any case diary which is in his possession.
> (d) Every case diary shall be treated as confidential until the final disposal of the case, including the appeal, if any, or until the expiry of the appeal period.
> (e) A case diary shall be kept under lock and key, and, when sent by one officer to another, whether by post or otherwise, shall be sent in a closed cover directed to the addressee by name and superscripted —Case diary. A case diary sent to the Court office shall be addressed to the senior Court officer by name.
> (f) A cover containing a case diary shall be opened only by the officer to whom it is addressed, except as prescribed in clauses (g) and (h) if such officer is absent, the date of receipt shall be stamped upon the cover by the officer left in charge during his absence and the cover shall be kept till his return or forwarded to him.
> (g) Covers containing case diaries received in the Superintendent's office shall be opened as prescribed in regulation 1073, and made over directly to the officer or clerk specially authorized to deal with case diaries. Such officer or clerk shall take action under clause (i) and personally place the diaries before the Superintendent or other officer dealing with the case.
> (h) Covers containing case diaries received in the Court office may be opened by any officer specially authorized in writing by the Court officer or by a superior officer.
> (i) When an officer opens a cover containing a case diary, he shall stamp or write on the diary the date, if any, which has been stamped on the cover under clause (f) or, if there is no such date on the cover, the date on which he received it, and shall, after perusing the diary, file it with any other diaries relating to the same case which are in his possession.
> A Circle Inspector and a Court officer shall stamp or write such date on every page of the diary and on every enclosure received with it, such as statements recorded under section 161, Code of Criminal Procedure, maps and the brief.

(j) Every Investigating Officer shall be provided with a deed box, and every Circle Inspector, Sub-divisional Police Officer and Court officer with a suitable receptacle, in which to keep case diaries under lock and key.

138. Learned Attorney General submits that the High Court Division has not considered the Police Regulations of Bengal while making observations relating to case diary and submits that under the Police Regulations of Bengal the court or any other person is not authorized to look into the case diary in view of G.O. No.P.8C-5/60(III) 34PI, dated 16th January, 1961 which read as follows:

139. It has been said in PRB No.68(b) that a person not being a Police-Officer can also go through the case diary on being empowered by the Superintendent of Police Every Police Officer shall keep his case-diary in proper care and custody and shall consider it a very secret and confidential document till final disposal of an appeal or a revision pending before Courts.

140. The Code clearly provides that the police officer is bound to transmit to the nearest Magistrate a copy of the entries in the diary in relation to the case, whenever, any person is arrested and detained in custody and produce before a Magistrate within a period of 24 hours.

141. A perusal of regulation 68 makes it clear that the diary should contain full unabridged statement of persons examined by the police so as to give the Magistrate a satisfactory and complete source of information which would enable him to decide whether or not the accused person should be detained in custody. Section 167(1) requires that copies of entries of the diary should be sent to the Magistrate with the object to prevent any abuse of power by the police officer.

142. The object of use of special diary under section 172 of the Code has been well explained by Edge,CJ. in Mannu, ILR 19 All 390 "the early stages of investigation which follows on the commission of a crime must necessarily in the vast majority of cases to be left to the police and until the honesty, the capacity, the discretion and the judgment of the police can be thoroughly trusted, it is necessary for the protection of the public against criminals for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day by the police officer who investigating the case and what were the lines of investigation upon which the police officer acted.'

143. Section 172 relates to the police diary made in respect of a case under inquiry or trial by the court which calls for it. It is incumbent upon a police officer who investigates the case under Chapter XIV to keep a diary as provided by section 172 and the omission to keep the diary deprives the court of the very valuable assistance which such diary can give.

144. Section 44 of the Police Act and regulations Nos.263 and 264 of the Police Regulations of Bangal are relevant for our consideration which read as follows:

"263. (a) section 172, Code of Criminal Procedure, prescribes the case diary which an investigating officer is bound by law to keep of his proceedings in connection with the investigation of each case. The law requires the diary to show—

(i) the time at which the information reached him;

(ii) the time at which he began and closed his investigation;

(iii) the place or places visited by him.

(iv) a statement of the circumstances ascertained through his investigation.

145. Nothing which does not fall under one of the above heads need be entered, but all assistance rendered by members of Union Parishads shall be noted. When the information given by a member of a Union Parishad is of a confidential nature, his name shall not be entered in the case diary, but the investigating officer shall communicate his name and the same time note briefly in the case diary that this has been done. This is an obsolete provision and in the present circumstances, the assistance as mentioned above is redundant because of political rivalry.

"Heads (iii) and (iv) shall be noted regarding the particulars of the house searched made with the names of witnesses in whose presence search was made (section 103 of the Code) by whom, at what hour, and in what place arrests were made; in what place property was found, and of what description; the facts ascertained; on what points further evidence is necessary, and what further steps are being taken with a view to completing the investigation. The diary shall mention every clue obtained even though at the time it seems unprofitable, and every step taken by the investigating officer, but it shall be as concise as possible. It shall also contain the statements of witnesses recorded under section 161 of the Code."

"264.(a) Case diaries (B.P. Form No. 38) shall be written up as the enquiry progresses, and not at the end of each day. The hour of each entry and name of place at which written shall be given in the column on the extreme left. A note shall be made at the end of each diary of the place from, the hour at, and the means by which, it is dispatched. The place where the investigation officer halts for the night shall also be mentioned.

(b) A case diary shall be submitted in every case investigated. The diary relating to two or more days shall never be written on one sheet or dispatched together. Two or more cases should never be reported in one diary; a separate diary shall be submitted in each case daily until the enquiry is completed. But it is not necessary to send one on any day on which the investigation, though pending, is not proceeded with.

(c) The diary shall be written in duplicate with carbon paper and at the close of the day the carbon copy, along with copies of any statement which may have been recorded under section 161 Code of Criminal Procedure and the list of property recovered under section 103 or 165 of that Code, shall be sent to the Circle Inspector. ..... When an investigation is controlled by an Inspector of the Criminal Investigation Department, the investigating officers shall forward the Circle Inspector's copy of the case diary through that officer who shall stamp or write on the diary the date of receipt by him and, after perusal, forward it to the Circle Inspector.

(d) In special report cases an extra carbon copy shall be prepared of the diaries, statements of witnesses recorded and lists of property recovered and sent direct to the Superintendent and a further carbon copy to the (Sub-divisional) Police Officer where there is one.

(e) Each form shall have a separate printed number running consecutively throughout the book so that no two forms shall bear the same number. On the conclusion of an investigation the sheets of the original diary shall be removed from the book and filed together. Every file shall be docketed with the number, month and year of the first information report, the final form submitted and the name of the

complainant, the accused and the investigating officer. The orders regarding preservation and destruction of these papers shall also be noted.

(f) When sending charge-sheet to the Court Officer, the investigating officer shall send all his original case diaries which shall be returned by the Court Officer on the case being finally disposed of (vide regulation 772).

(g) Case diaries shall be written in English by those officers competent to do so. Other officers shall write either diaries in the vernacular. Statements recorded under section 161 of the Code of Criminal Procedure, shall, however, always be recorded in the language of the witness. In the investigation officer is unable to do so, he should write it in English.

(h) Instructions for the custody and dispatch of case diaries are given in regulation 68.

146. By efflux of time, some of the provisions became outdated and it is difficult to say whether or not those provisions have been amended. If no amendment is made it is hoped that the police administration shall take step to update the Regulations. Case diary is a very important document for the investigation officers because it is written in every stage of the investigation of the case. The case diary is prepared by the responsible police officer in course of investigation. It helps the senior police officers in supervising the conduct of the subordinate police officers in relation to any investigation. The case diary carries relevant entries about the time of investigation, place visited by the investigation officer, people met by him, people interrogated by him, evidence collected during investigation, time and place of meeting with the witnesses, time and place of meeting with the informant and so on.

147. The investigation officers do not have any discretion to take decision as to whether he will or will not record the events during investigation in the case diary. This is a compulsory statutory duty for every officer to record all the events in the case diary. This is the duty of the Officer-in-Charge to make sure that officers subordinate to him shall record necessary entries in the case diary properly. A case diary is an indicator how good and intellectual a police officer is.

148. It is however, to be noted that the case diary is a confidential document. So, it may not be claimed by the accused person at any time for the purpose of assessing and scrutinizing its entries. A criminal court is free to ask for the case diary at any stage of the proceedings. But, the case diary cannot be used as evidence in the trial.

149. A case diary is written as the investigation progresses. It is, therefore, obligatory to record the case diary every day when investigation is taken place. The writing up of the case diary must not be held up at the end of the day. It is always wise to write up the case diary in the place where investigation is conducted. The quick and immediate writing up of case diary helps recording every little detail of the investigation properly. This sort of case diary truly reflects the nitty-gritty of the police investigation. The case diary needs to be recorded as the case advances during the course of investigation.

150. In most cases, the police officers have developed a bad habit of writing case diary long after conclusion of investigation or after a few days of the investigation. It is not at all a promising approach when the police officers follow such procedure. This is a compulsory requirement for an investigation officer to record the case diary without any apparent failure. The case diary must refer to the proceedings in investigation of an alleged offence. Section 172 of the Code clearly states:-

"Every police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary....."

151. The language used is day by day and therefore, it is mandatory duty for such officer to record every day's progress of the investigation. The case diary must include entries of necessary information for each of the days when investigation is in progress. Sometimes the investigation officers neglect the examination of the witnesses on the first day of the visit of the place of occurrence and after consuming days together record the statements in a single day. This process is totally unauthorised. In every case the investigation officers must record the statements of the witnesses present expeditiously on the first day or the following day if the FIR discloses the names of the witnesses who are acquainted with the facts of the case. Section 157 of the Evidence Act in an unambiguous language stated that the admissibility of a previous statement that should have been made before an authority legally competent to the fact 'at or about the time', when the fact to which the statement relates took place. The object of this section is to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them is accurate. But if time for reflection passes between the event and the subsequent statement it not only can be of little value but may be actually dangerous and as such statement can be easily brought into being.

152. Every detail in connection with the investigation into the offence must clearly be recorded without fail. It is to be noted that in section 172(1) of the Code the word "Shall" has been used which definitely indicates "mandatory". So, a case diary must be recorded and all the details as mentioned in the section 172(1) of the Code must be recorded without any failure by the police officer in charge of investigation of an offence.

153. The entries of case diary may not be referred to the court at the instance of the accused person. The accused in such a case can seek permission to use the case diary to show contradiction in the prosecution case. The police officer, therefore, has scope to see the case diary during his examination-in-chief for the purpose of refreshing memory. If the police officer thinks that his case diary can be helpful in giving appropriate testimony, he may request the court to permit him to use case diary for refreshing memory. Sections 159 – 161 of the Evidence Act deal with the extent to which, and mode in which, a witness may refer to a writing in order to refresh his memory while giving evidence. Section 159 of the Evidence Act may be quoted below to clear the point as under:

"159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at the time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct."

When witness may use copy of document to refresh memory – Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises."

154. Keeping case diary under safe custody is an important task. The case diary is the picture of the entire result of the investigation and other particulars regarding the topography

of the place of occurrence, the probability of approach of the offender to the scene and the direction of retreating and the location of the probable witnesses etc. The activities of the police investigation officer can very well be looked after by the senior police officers going through the records of the case diary.

155. When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police-officer, and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

156. Section 176 of the Code enables a Magistrate to hold inquiry into a suspicious death. The language used in this section does not depend merely upon the opinion of the police officer but that there should be a further check by a Magistrate to hold an independent inquiry. The object of holding inquiry is to elucidate the facts of unnatural death before there is any reasonable suspicion of the commission of any offence and when such grounds exist, the inquiry comes under Ain of 2013.

157. The case referred to by *Mr. Murad Reza, Novva Das V. Secretary, Department of Municipal Administration and Water Supply, (2008) 8 SCC 42* is not at all applicable to the facts and circumstances of the instant case and we failed to understand why he has referred to this case. In that case the validity of sections 326-A to 326-J of the Chennai City Municipal Corporation Act, 1919 and the Chennai City Municipal Corporation (licensing of Hoardings and Levy and Collection of advertisement Tax) Rules, 2003 have been challenged. The High Court dismissed the writ petitions but a committee was constituted for identifying the places of historical importance of aesthetic value and popular places of worship in and around the city of Chennai. The Supreme Court dismissed the appeals.

158. In the case of Sheikh Abdus Sabur, (supra) the appellant's nomination paper of a Union Parishad was rejected by the Returning Officer on the ground that he was disqualified from seeking election. His writ petition was dismissed. Leave was granted to consider the question whether section 7(2)(g) of the Union Parishad Ordinance is hit by the equality provision contained in article 27 of the constitution. This court dismissed the appeal. A.T.M. Afzal,J. while concurring his views added few words observing that "this court has (no) duty under the constitution to offer unsolicited advice as to what Parliament should or should not do. As long as the law enacted by it is within the bounce of the constitution it will be upheld by this court but if the law is otherwise open to criticism, it is for the Parliament itself to respond in the manner it thinks best."

159. In that case the issue is whether the defaulters can be debarred in contesting the local election. In the context of the matter this court upheld the action. This case does not help the government. The observations of ATM Afzal, J. are not application in view of the fact that the High Court Division has not given any unsolicited suggestion/advice to the government in this case on the question of amendment of laws.

160. In the case of Shafiuddin Ahmed,(supra) the writ petition was filed challenging the promotions of the writ respondents on the ground that without consultation with the Public Service Commission in respect of the promotions, the constitutionality of the constitution of

two committees for promotion, and the procedure and criteria for promotion followed by this committees and also the final notifications effecting promotions. The High Court Division made the rule absolute. In this court on behalf of the writ petitioner the question raised was whether the terms and conditions of service of persons in the service of the Republic including the procedure and criteria of promotion have to be embodied in an enactment as provided in article 133 of the constitution and also whether in the absence of any law the vacuum can be filled up by executive order. This court on construction of article 133 observed that this provision is an enabling provision which confers certain power but does not impose any duty to legislate, and it is not obligatory for the Parliament to make laws, and therefore, the court cannot direct the Parliament to make laws nor is it obligatory on the part of the President to make Rules. We failed to understand why this case has been referred to. Similarly, the other cases referred to by the learned Additional Attorney General have no relevance at all.

161. As regards the unreported decision referred to by learned Attorney General, the case of Subramanian Swami, several writ petitions were filed in the Supreme Court on the ground that the right to freedom of speech and expression of an individual should not be controlled by the State by assuming power of reasonableness ingrained in the statutory provisions relating to criminal law and uphold ones reputation. It relates to justification to keep the provisions of the defamation in the criminal law. The Supreme Court after considering the authorities observed that before taking cognizance of such offences a heavy burden lies upon the Magistrate in matters of criminal defamation to scrutinize the complaint and must be satisfied that the ingredients of section 499 of the Code of Criminal Procedure are satisfied. However, the court was of the opinion that sections 499 and 500 of the Indian Penal Code and section 199 of the Code of Criminal Procedure are *intra vires* the constitution.

162. The vital issue to be decided in this case is whether the High Court Division is justified by issuing the directions and making the recommendations as mentioned above. Learned Attorney General raised a question that the judiciary cannot direct the Parliament to adopt legislative measures or to the President to frame Rules under the proviso to article 133 of the constitution. In *Secretary, Ministry of Finance, Government of Bangladesh v. Md. Masdar Hossain, 20 BLD(AD)104*, this court noticed that there were constitutional deviations and that the constitutional arrangements have been interfered with and altered by the Parliament as well as the government by issuing various orders in respect of the judicial service and that it further noticed that sub-paragraph (6) of paragraph 6 of the Forth Schedule of the constitution had not been implemented. Accordingly, this court observed "when Parliament and the executive, instead of implementing the provisions of Chapter II of Part VI followed a different course not sanctioned by the constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course". In that case this court has given 12 guidelines to be followed by the government. The government has implemented almost all the guidelines leaving a few guidelines.

163. Similarly *the Supreme Court of Pakistan in Government of Sindh v. Sharaf Faridi, PLD 1994 SC 105* noticed inconsistencies in the provisions of the Code with the mandate contained in article 175 of Pakistan Constitution and directed the government to secure the separation of the judiciary from the executive and issued directions in the nature of adoption of legislative and executive measures. Pursuant thereto the government of Pakistan followed all the directions and separated the judiciary from the executive.

164. In *Kudrat-E-Elahi Panir v. Bangladesh, 44 DLR(AD)319*, some writ petitions were filed challenging the constitutional validity of the Bangladesh Local Government (Upazila Pairshad and Upazila Administration Reorganization) (Repeal) Ordinance, 1991 on the ground that this Ordinance was inconsistent with articles 9, 11, 59 and 60 of the constitution. Under this amendment the government abolished the Upazila Parishad. This court held that the abolition of the Upazial Parishad violates no provision of the Constitution. It, however, observed that –

> "Article 59 and 60 prescribe manner and method of establishing local government, its composition, powers and functions including power of local taxation, the plenary legislative power of Parliament to enact laws on local government is restricted *pro tanto*. The learned Attorney General submits that the plenary power still remains unaffected. I cannot conceive of a local government existing in terms of Articles 59 and 60 and another outside of it. That will make a mockery of Articles 59 and 60 and will be in direct conflict with Article 7(1) of the Constitution, namely, "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution". If Parliament has to pass a local government legislation, it has to conform to Articles 59 and 60 in the Constitution. Local government legislation became very much a subject matter of legislation within the terms of the Constitution. Parliament is not free to legislate on local government ignoring Articles 59 and 60."

165. In the case of *Khandaker Delwar Hossain v. Munshi Ahsan Kabir, Bangladesh*, the Constitution (Fifth Amendment) case, this court observed that the provisions of the constitution is the basis on which the vires of all other existing laws and those passed by the legislature as well as the actions of the executive, are to be judged by the Supreme Court under its power of judicial review. The Supreme Court being the creation of the constitution and the Judges have taken oath to preserve, protect and defend the constitution, they are duty bound to declare and strike down any provision of law which is inconsistent with the constitution. In this regard this court approved the views taken by *the Supreme Court of Pakistan in State v. Zia-ur-Rahman, PLD 1973 SC 49, Kudrat-Elahi Panir v. Bangladesh (Supra), Secretary, Ministry of Finance v. Masdar Hossain case (Supra)*.

166. In the case of *D.K. Basu v. State of W.B.*(supra) a letter has been written by the executive chairman of an organization addressing the Chief Justice of India drawing his attention to certain news items published in the news of the Telegraphs, the Statements and the Indian Express regarding deaths in police lock-ups and custody. The executive chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for forwarding compensation to the victims and/or family members of the victims for atrocities of the deaths caused in police custody and to provide it for accountability of the officers concerned. It was also stated that efforts were often made to hush up the matter in lock-up deaths and thus crime goes unpunished and 'flourishes'. Considering the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence in police lock-up, the letter was treated as a writ petition by the Supreme Court and issued notice upon the Government of West Bengal. In that case the Supreme Court upon hearing the matter deemed it appropriate to issue the following requirements to be followed in all cases arrest or detention till legal provisions are made in that behalf as preventive measures:

1. "The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name clear

identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock- up, shall be entitled to have one friend or relative or other person know to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next fried of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a penal for all tehsils and districts as well.
9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
11. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

167. The Supreme Court thereupon forwarded the requirements to the Director General of Police and the Home Secretary of every State/Union Territory observing that it shall be “their obligation to circulate the same to every police station under their charge and get the same notified in every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the *requirements* on All India Radio besides being shown on the

national Network of Doordarshan". After the issuance of the guidelines, the State Governments and Union Territory issued the police officers to follow those requirements. It is reported that after such directions the police is now following them.

168. In *Vishaka v. State of Rajastan, AIR 1997 SC 3011,* the Supreme Court held as under:

> "The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facts of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for *Immigration and Ethnic Affairs v. Teoh, 128 AIR 353*, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."

169. It relates to an incident of brutal gang rape of a social worker in a village of Rajastan and over the incident criminal action was also taken. The writ petition was filed by certain social activists, NGOs with the aim of focusing attention towards this social aberration, and to assist in finding suitable methods for realization of the true concept of 'gender equality' and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation. The Supreme Court noticed that there was no adequate law to cover the issue, and therefore, it noticed the international conventions and norms observing that in the absence of law to cover the field there is no legal bar to follow the international convention and norms for construing the fundamental rights expressly guaranteed in the constitution, which embody the basic concept of gender equality in all spares of human activity. It was also noticed that any international convention not inconsistent with the fundamental rights and is in harmony with the sprit must be read into the provisions of articles 14, 15, 19 and 21 of the Indian Constitution.

170. In *Vineet Narain v. Union of India, (1998) 1 SCC 226*, the Supreme Court in a public interest litigation in which the question was whether it was within the domain of the judicial review and effective instrument for activating the investigative process which was under the control of the executives. The question raised in the matter was whether any judicial remedy is available in such a situation. A terrorist was arrested by Delhi police and consequent upon his interrogation, raids were conducted by the Central Bureau of Investigation (CBI) in the premises of one Surendra Kumar Join. The CBI seized foreign currency, diaries and other incriminating materials containing accounts of vast payments made to persons identified by police. The initials corresponded to the initials of various high ranking politicians. As nothing has been done in the matter of investigation a public interest litigation was filed. In the background of the case, the Supreme Court was of the view that by virtue of article 141 which provides "the law declared by the Supreme Court shall be binding on all courts within the territory of India" read with Article 144 which provides that "all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court", which provisions are in *pari materia* with articles 111 and 112 of our constitution, it is the duty of all authorities, civil and judicial in the territory of India to act in aid of the Supreme Court. Where there is inaction by the executive for whatever reason, the judiciary must step in, in exercise of its

constitutional obligations to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to fill up the vacuum.

171. In that case the court noticed that a large number of cases without monitoring by the court the CBI formed opinion that no case was made out for the prosecution and did not file charge-sheet in those cases. This, according to the court, indicated that the inaction of the CBI was unjustified. Accordingly, it directed that "a suitable machinery for prosecution of the cases filed in the court by the CBI is also essential to ensure discharge of its full responsibility by the CBI".

172. In *People's Union for Civil Liberties v. Union of India, 2003 (4)SCC 399*, a writ petition was filed challenging the validity of the Representation of the people (Amendment) Ordinance 2002. The court was of the view that the voters should know the bio-data of their 'would be rulers, law makers or destine makers of the nation.' The Supreme Court directed the Election Commission to call for information by affidavit from each candidates seeking election to Parliament or State Legislature on their personal antecedents as to whether the candidate was convicted, whether he was accused or any criminal case, the assets of the candidate, liabilities and the educational qualifications etc. Thereafter the President Promulgated an Ordinance. Before the writ petition was disposed of the Ordinance was repealed by the government and the Representation of the peoples Act was amended by inserting a new section with retrospective effect. The court, thereupon, made the following guidelines:

(A) The legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a Court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the Court is not binding or is of no effect.

It is true that the legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision, therefore, it cannot enact a law which is violative of fundamental right.

(B) Section 33-B which provides that notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as this Court has held that the voter has a fundamental right under Article 19(1)(a) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment.

.....

(C) .....

(D) The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions is, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters fundamental right to know the antecedents of a candidate is independent of statutory rights under the election

law. A voter is first citizen of this country and apart from statutory rights he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.

(E) It is established that fundamental rights themselves have no fixed contents, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this Court.

173. Besides those cases, the Supreme Court of India in exercise of powers under article 142 formulated guidelines and gave directions in many cases in the similar manner. In *Erch Sam Kanga v. Union of India, W.P.No.2632 of 1978*, judgment delivered on 20.3.1979, it laid down certain guidelines relating to Emigration Act. In *Lakshmi Kanti Pandey v. Union of India, (1984) 2 SCC 244*, guidelines for adoption of minor children by foreigners were formulated. In *State of W.B. v. Sampat Lal, (1985) 1 SCC 317; K. Veeraswami v. Union of India, (1991) 3 SCC 655; Union Carbide Corporation v. Union of India, (1991) 4 SCC 584; Delhi Judicial Service Association v. State of Gujrat, (1991) 4 SCC 406; Delhi Development Authority v. Skipper Construction Co. Ltd., (1996) 4 SCC 622 and Dinesh Trivedi v. Union of India, (1997) 4 SCC 306* laying down guidelines having the effect of law, requiring rigid compliance. This has become a constitutional jurisprudence in India and this exercise, it was viewed, was essential to fill the void in the absence of suitable legislation to cover the field.

174. From the above authorities it is now settled that the apex courts in appropriate cases issued directions, recommendations and guidelines if there is vacuum in the law until a suitable law is enacted to ensure that the constitutional and statutory safeguards of the citizens are protected. In pursuance of some guidelines, the Government of Bangladesh, India and Pakistan have implemented, and a new constitutional jurisprudence has developed in these countries. This court being the guardian of the constitution cannot keep blindfolded condition despite rampant violation of fundamental rights of the citizens. In view of the above, we find no substance in the contention made by the learned Attorney General that in presence of specific provisions contained in sections 54 and 167 regarding the arrest and remand of an accused person the court cannot give any direction or guideline.

175. It was argued on behalf of the respondent that this court has a duty to uphold the rule of law and the constitutional safeguards on arrest and prevention of torture and ill-treatment of the suspected offenders. In this connection our attention has been drawn to articles 32, 33 and 35(5) of the constitution.

176. We have already discussed above exhaustively on the said issue and, therefore, they don't require any repetition.

177. Article 32 is couched in the similar language of article 21 of the Indian Constitution. Article 22 of the Indian Constitution relates to protection of arrest and detention in certain

cases. The Supreme Court of India dealing with a petition by a victim who has been detained in police custody and his whereabouts could not be located, subsequently it was detected that he was detained by the police without producing before the Magistrate. The Supreme Court relying upon some previous decisions on the subject and on construction of articles 21 and 22 of the constitution held in *Jagindra Kumar v. State of U.P., (1994) 4 SCC 260* that the police officer must justify the arrest and detention in police lockup of a person and no arrest can be made in a routine manner on a mere allegation of commission of an offence. It would be prudent, it was observed, for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. Accordingly, for effective enforcement of fundamental rights it issued the following requirements to be complied with whenever accused is arrested:

> "1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
> 2. The police officer shall inform the arrested person when he is brought to the police station of this right.
> 3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly."

178. In *Smt. Nandini Satpatty v. PL Dhani, AIR 1978 S.C. 1025*, the former Chief Minister of Orissa and one time Minister at national level. She was directed to appear at the police station, Cuttack for interrogation in connection with a case registered against her under the Prevention of Corruption Act in which the investigation was commenced against her son and others. During investigation she was interrogated with reference to a long string of questions, given to her in writing. A Magistrate took cognizance of the offence and issued summons. Thereupon she moved a writ petition challenging the validity of the Magisterial proceedings. The question arose whether the very act of directing a woman to appear before the police station is in conformity with the provisions of section 160 of the Code. Another point was raised as to whether an accused is entitled to the sanctuary of silence of any offence and secondly, whether the bar against self-incrimination operate merely with reference to a particular accusation in regard to which the police interrogates or does it extent also to other pending accusations outside the investigation which has led to the questioning. The court directed the appellant to answer all questions which do not materially incriminate her in the pending investigations or prosecutions. The Court however observed that-

> "The police officer shall not summon her (appellant) to the police station but examine her in terms of the proviso to S.160(1) of the Criminal Procedure Code."

179. In *Raj Narain v. Superintendent, Central Jail, New Delhi, AIR 1971 SC 178*, Raj Narain was put on detention. He challenged his detention on various grounds questioning the legality of his custody, remand order and detention. He did not pray for bail but he was not produced before the Magistrate after the order of detention. He also prayed for striking down certain sections of the Code as violative to the constitution. The Supreme Court in exercise of powers under sections 61, 167 and 344 of the Code and article 22(2) of the constitution held that an order of remand will have to be passed in the presence of the accused, otherwise the

order of remand to be passed by the Magistrate will be deemed to have been issued mechanically without having heard the detenu. If the accused is before the Magistrate when a remand order is being passed, he can make representation that no remand order should be passed and also oppose any move for a further remand. He may rely upon the inordinate delay that is being caused by the state in the matter and he can attempt to satisfy the court that no further remand should be allowed. It may be that an accused, on a former occasion may have declined to execute a bond for getting himself released; but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond in which case a remand order will be totally unnecessary. The Court concluded its opinion as under:

> "……in cases where a person is sought to be proceeded against under Chapter VIII of the Criminal Procedure Code, it would be open to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not being produced before the Magistrate. As the Magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the Magistrate or the Court when orders of remand are being passed."

180. Both the parties have relied upon the case of *Saifuzzaman (Md.) v. State, 56 DLR 324.*

181. Facts of the case are that Liakat Sikder and Md. Rafiqual Islam, the president and vice president of Bangladesh Chatta League were arrested on 25th February, 2002 under section 54 of the Code when they were coming out of 'Sudha Sadan', the residential house of the president of Bangladesh Awami League Sheikh Hasina and put on detention. On a habeas-corpus petition moved on their behalf, the order of detention was declared without lawful authority by the High Court Division. Thereafter, they were shown arrested in 12 different cases one after another whenever they were enlarged on bail in one case. This process continued and this way they could not come out from the jail custody for a considerable time because of showing them arrested in one after another cases. Finding no other alternative, they moved another *habeas corpus* petition in the High Court Division (the present Chief Justice, as he was then). The High Court Division noticed that the victims were shown arrested without producing them before the learned Magistrate and the Magistrates were passing mechanical orders on the asking of the police officers. The High Court Division on consideration of sections 54, 60, 61, 167, 344 and articles 27, 31, 32 and 33 quashed all the proceedings and gave the following directions:

(i) the police officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

(ii) The police officer who arrested the person must intimate to a nearest relative of the arrestee and in the absence of the relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 6(six) hours of such arrest notifying the time and place of arrest and the place of custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the police to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about

the arrest and the particulars of the police officer in whose custody the arrestee is staying.

(iv) Copies of all the documents including the memorandum of arrest, a copy of the information or complaint relating to the commission of cognizable offence and a copy of the entries in the diary should be sent to the magistrate at the time of production of the arrestee for making the order of the magistrate under section 167 of the Code.

(v) If the arrested person is taken on police remand, he must be produced before the Magistrate after the expiry of the period of such remand and in no case he shall be sent to the judicial custody after the period of such remand without producing him before the Magistrate.

(vi) Registration of a case against the arrested person is sine-qua-non for seeking the detention of the arrestee either to the police custody or in the judicial custody under section 167(2) of the Code.

(vii) If a person is produced before a magistrate with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per item no.(iv) above, the Magistrate shall release him in accordance with section 169 of the Code on taking a bond from him.

(viii) If a police officer seeks an arrested person to be shown arrested in a particular case who is already in custody, the Magistrate shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case.

(ix) On the fulfillments of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of the accused under section 167(2), the Magistrate having jurisdiction to take cognizance of the case or with the prior permission of the Judge or Tribunal having such power can send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(x) The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report discloses that the arrest has been made for the purpose of putting the arrestee in the preventive detention.

(xi) It shall be the duty of the Magistrate, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused under section 167 of the Code."

182. In Joginder Kumar (supra) the Supreme Court of India issued instructions for compliance for protecting the dignity and fundamental rights of a citizen as under:

a) An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told, as far as is practicable, that he has been arrested and where he is being detained.

b) The Police Officer shall inform the arrested person when he is brought to the police station, of this right.

c) An entry shall be required to be made in the Diary as to who was informed of the arrest.

d) It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

183. The High Court Division directed the requirement Nos.1, 2, 3, 4, 5 and 6 to be forwarded to the Secretary, Ministry of Home Affairs with an observation that it was its obligation to circulate and get the same notified in every police station for compliance within three months from date. It also directed that the requirement Nos.5, 7, 8, 9, 10 and 11 to be forwarded to the Chief Metropolitan Magistrates and District Magistrates with a directions to circulate them to every Metropolitan Magistrates and the Magistrates who have power to take cognizance of offence for compliance. The Registrar, Supreme Court of Bangladesh was also directed to circulate the requirements as per direction made above. It is unfortunate to note that the police officers did not obey the directions given by the apex court of the country.

184. In the present case the High Court Division was of the view that with a view to curbing the violation of fundamental rights, besides section 54, 167, 176 and 202 of the Code, sections 220, 330, 348 of the Penal Code and section 44 of the Police Act should also be amended. Reasons assigned by it are that the existing section 176 of the Code is not sufficient to take effective action against custodial death. Accordingly, it is recommended to amend this section. In view of the promulgation of new Ain in 2013 covering the field we find it not relevant to follow the recommendation. Similarly section 202 of the Code is also not required to be amended as per recommendation in view of the said Ain, 2013. Similarly the recommendations made regarding section 330 and 348 of the Penal Code are also redundant on the same ground.

185. A wide power has been given to a police officer to arrest a person out of suspicion. As observed above, section 54 was included in the Code by the colonial rulers and this provision cannot co-exist with Part III of the constitution. A police officer should not exercise his power of arrest on the basis of his whims and caprice merely saying that he has received information of his being involved in a cognizable offence. He is required to exercise his power depending upon the nature of the information, seriousness of the offence and the circumstance unfurled not only in the complaint but also after investigation on the basis of information or complaint. To make the point more clear, the police officer shall not exercise the power arbitrarily violating the dignity, honour, liberty and fundamental rights of a citizen. These rights are inherent and inalienable, and enshrined in articles 32 and 33 of the constitution so that no one can curtail the same. These rights are required to be scrupulously protected and safeguarded because the effective enforcement of fundamental rights will prevail over subordinate laws.

186. In clause 'Firstly' of section 54 the words 'credible information' and 'reasonable suspicion' have been used relying upon which an arrest can be made by a police officer. These two expressions are so vague that there is chance for misuse of the power by a police officer, and accordingly, we hold the view that a police officer while exercising such power, his satisfaction must be based upon definite facts and materials placed before him and basing upon which the officer must consider for himself before he takes any action. It will not be enough for him to arrest a person under this clause that there is likelihood of cognizable offence being committed. Before arresting a person out of suspicion the police officer must carry out investigation on the basis of the facts and materials placed before him without unnecessary delay. If any police officer produces any suspected person in exercise of the powers conferred by this clause, the Magistrate is required to be watchful that the police officer has arrested the person following the directions given below by this court and if the Magistrate finds that the police officer has abused his power, he shall at once release the accused person on bail. In case of arresting of a female person in exercise of this power, the police officer shall make all efforts to keep a lady constable present. If it is not possible by

securing the presence of a lady constable which might impede the course of arrest or investigation, the police officer for reasons to be recorded either before arrest or immediately after the arrest by assigning lawful reasons.

187. Sub-sections (1) and (2) of section 167 of the Code are identical with Indian provisions. In India, however, a proviso with explanations 1, 2 and sub-section (2A) have been added by Act 45 of 1978 which are as under:

> "Provided that -
> (a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding, –
> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;
> (b) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;
> (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.
> Explanation I. – For the avoidance of doubts, it is hereby declare that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.
> Explanation II.–If any question arises whether an accused person was produced before the Magistrate as enquired under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.
> (2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate may, for reasons to be recorded in writing, authorize the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorized, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):
> Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case

> together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be."

188. This addition by way of amendment is very much relevant and to safeguard from unnecessary harassment of a citizen who is a suspected offender in respect of a cognizable offence. Sub-section (2) of section 167 has given the power of a Magistrate to keep a suspected offender either in the judicial custody or in the police custody for a term not exceeding fifteen days in the whole. Under our present scheme of the Code a Magistrate has no power to detain such an offender beyond fifteen days. Under the proviso to sub-section (1) of section 344 of the Code the court has power to remand (judicial remand) from time to time but such remand shall not be for a period exceeding fifteen days at a time. This section empowered the court to pass such order when Chapter XVIII of the Code was in existence but after the deletion of this Chapter, the Magistrate can pass such order. Because the language used in this sub-section (i) is that the court if it thinks fit may postpone/adjourn 'any inquiry or trial.' The power of inquiry under Chapter XVIII by a Magistrate in respect of an offence exclusively triable by a Court of Sessions has been deleted. If the trial of an offence commences in the court of sessions, the Magistrate does not possess any power to remand an accused person. It is the trial court which will pass necessary orders if it thinks fit. But before the trial commences and after expiry of fifteen days time provided in sub-section (2) of section 167, the law does not permit the Magistrate to direct a suspected accused person to be detained in judicial custody.

189. In India to cover up this inconsistency the proviso to sub-section (2) of section 167 has been added providing that the Magistrate may direct an offender in judicial custody beyond fifteen days if he is satisfied that detention is necessary but not beyond ninety days in respect of an offence which relates to imprisonment for life or an imprisonment for a term not less than ten years. However, after the expiry of the period, if the investigation continues beyond ninety days, the accused shall be released on bail. It has been observed in *Aslam v. State (1992) 4 S.C.C 272* that this provision must be construed strictly in favour of individual's liberty since ever the law expects early completion of the investigation. The delay in completion of the investigation can be on pain of the accused being released on bail.

190. Under our provisions though sub-section (5) has been substituted by Act XLII of 1992 for the previous provisions added by Ordinance No. XXIV of 1982, there is no nexus between sub-section (2) and (5). Under Sub-section (2) the Magistrate may authorise the detention of an accused person for a period not exceeding fifteen days if the investigation cannot be completed within twenty-four ours. Sub-section (5) states that if the investigation is not completed within one hundred twenty days the Magistrate may release the accused person on bail if the case is not triable by a court of Sessions. If the case is triable by a court of Sessions, the Session Judge may release the accused on bail on assigning reasons and therefore, the language used in clauses (a) and (b) of sub-section (5) is 'may'. Nothing has been mentioned what would be the fate of the accused person after the expiry of fifteen days who has been arrested out of suspicion if the investigation cannot be concluded within the said period.

Recommendations of the Supreme Court should be respected

191. The apex Court of a country being the arbiter of State and guardian of the constitution in exercise of its right to review any legislative action can declare void any law and executive act and therefore, it is the duty of the executive to respect the law and the constitution. This

power is exercised under articles 7, 26, 104 and 112 of the constitution. It has been held by Earl Warren, CJ. in *Cooper v. Aron, 358 US 1(1958) 18* "The federal judiciary is supreme in the exposition of the law of the constitution". In three cases the US Supreme Court, such as, *Fletcher v. Peck, 10 U.S. 87(1810); Dartmouth College v. Woodward, 17 U.S. 518 (1819); and Cohens v. Virginia, 19 U.S. 264(1821)* ensured individual citizens and private institutions 'inalienable rights' promised by the 'Declaration of Independence and Bill or Rights'. John Marshall defined them as life, liberty, and property rather than pursuit of happiness. After the decision in *Marbury v. Madison, 5 U.S. 137 (1803)*, President Jefferson was impatient and said "Nothing in the Constitution has given them the right ... to decide what laws are constitutional and what not", ... such powers "would make the judiciary a despotic branch' (Thomas Jefferson to Adams September 11, 1884).

192. In *Marbury v. Madison (1803) 5 US 137*, John Marshall, CJ. did not give any direction upon the government. There were three parts in the decision, two of them restricting presidential and congressional powers and a third that expanded Supreme Court's power to put it on an even footing with the other two branches of government. In the first part of the decision Marshall declared that the President had violated the constitution by withholding Marbury's commission. Marshall rejected Jefferson's argument that 'delivery is one of the essentials to the validity of the deed'. The transmission of the commission is a practice directed by convenience not by law.'…It cannot therefore constitute the appointment.' In signing Marbury's commission and affixing the Great Seal of the United States, then President Adams and his Secretary of State had 'vested in the office Marbury's legal rights which are protected by the laws of his country. To withhold his commission … is an act deemed by the court not warranted by law, but a violation of a vested legal right'. John Marshall, declined to give any direction or issue the writ forcing the Secretary of the State to deliver the commission observing that 'cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party. …It is the essential criterion of appellate jurisdiction,' Marshall explained, 'that it revises and corrects proceedings in a cause already instituted and does not create that cause. … The authority … given to the Supreme Court by the act of Congress … to issue writs of *mandamus* … appears not to be warranted by the constitution. The particular phraseology of the constitution of the United States confirms and strengthens the principle... that a law repugnant to the Constitution is void; and that courts as well as other departments are bound by that instrument.' Despite declining the writ of mandamus, this declaration is the foundation of the independence of the judiciary in the United States and since then the judiciary has been taken and treated co-equal branch of the government and one of the pillars of the State. So, any observation of the apex court of the country as 'Supreme in the exposition of the law of the constitution' as Marshall phrased it cannot be doubted at all and we fully endorse the same. All the decisions of the Supreme Court and observations by the US Supreme Court transformed 'the Supreme Law of the land'.

193. Dr. Hossain submits that in India the guidelines and the recommendations made by Supreme Court in different cases as mentioned above have been fully complied with by the police officers and the executive, and there is no allegation at all that any one has violated the directions. On our query, the learned Attorney General fails to reply whether the submission of Dr. Hossain is correct or not. India practice democracy since 1935 and the rule of law is one of the pillars of Indian democracy which is vigorously maintained and we have not come across any sort of non-compliance with any of the directions or guidelines so far given by the Supreme Court of India. Rather the above citations clearly indicate that all guidelines have been respected by the executive. In another case the Supreme Court of Indian in *Delhi*

Judicial Service Association v. State of Gujarat, AIR 1991 SC 2176 gave the following directions:

> "(A) If a Judicial Officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be.
>
> (B) If facts and circumstances necessitate the immediate arrest of a Judicial Officer of the subordinate judiciary, a technical or formal arrest may be effected.
>
> (C) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.
>
> (D) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the District Judge, if available.
>
> (E) Immediate facilities shall be provided to the Judicial Officer for Communication with his family members, legal advisers and Judicial Officers, including the District and Sessions Judge.
>
> (F) No statement of a Judicial Officer, who is under arrest be recorded nor any panchanama be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser or the Judicial Officer of equal or higher rank, if available.
>
> (G) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be over-powered and handcuffed. In such case, immediate report shall be made to the District & Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the Judicial Officer and if it be established that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and, or damages, as may be summarily determined by the High Court."

194. It has been observed that the safeguards in respect of a judicial officer are not exhaustive and they are minimum safeguards which must be observed in case of arrest of a judicial officer. We cannot take any exception or contrary view on consideration of the office a judicial officer holds. In Masdar Hossain, this court held "while the function of the civil administrative executive services is to assist the political executive in formulation of policy and in execution of the policy decisions of the Government of the day, the function of the judicial service is neither of them. It is an independent arm of the Republic which sits on judgment over parliamentary, executive and quasi-judicial actions, decisions and orders.... Article 116A of the Constitution was also lost sight of and it was conveniently forgotten that all persons employed in the judicial service and all magistrates are independent in the exercise of their judicial functions while the civil administrative executive services are not ..... the Courts and Tribunals will be under the superintendents and control of the High Court Division, being subordinate to it but the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions is vested in the President". Therefore, we cannot undermine the status and dignity of a judicial officer and endorse the views taken in Delhi Judicial Service Association by the Supreme Court of India so far as it relates to arresting a judicial officer in connection with an offence.

195. Under the scheme of the Code as stands now, a Magistrate/Judge having power to take cognizance of an offence has no power to direct the detention of an accused person in the judicial custody, if he thinks fit, beyond a period of fifteen days from the date of production in court after arrest by a police officer in respect of a cognizable offence. The Code is totally silent to deal with an accused person who is allegedly involved in a cognizable offence if the police officer fails to conclude the investigation of the case within this period. If the Magistrate has no power to direct such accused person to be detained in judicial custody, he will be left with no option other than to release him on bail till the date of submission of police report. Normally in most cases the police officers cannot complete the investigation within the stipulated period sanctioned by law and normally they take years together. The detention/remand of an accused person beyond fifteen days by order of the Magistrate is not only an exercise of power not sanctioned by law but also violative of article 32 of the constitution. It is, therefore, necessary to take legislative measures authorising the judicial Magistrate to direct such offenders in judicial custody if the investigation cannot be concluded within the stipulated time. If no legislative measure is taken as per observation within a period of three months from the date of publication of this judgment, the State cannot take any exception if the Magistrates/Courts direct the release such accused persons irrespective of the nature of their complicity in the incidents under investigation. We allow three months moratorium period for the interest of justice and to maintain the law and order in the country, but in presence of specific constitutional provision protecting right of a citizen the court cannot remain a silent spectator for indefinite period.

196. More so, the present Code was promulgated by the colonial ruler to consolidate their power through the exercise of abusive powers by the police. There was no existence of constitution at that time and the fundamental rights of a citizen was a far cry which is being not at all recognised. After driving out two colonial powers, one of course by negotiation and the other by the sacrifice of three million martyrs, we cannot detain and prosecute an offender with a draconian law. Firstly, the object of the Code for which it was implemented on this soil is non-existed. The present procedures for holding trials by the Magistrates and courts of session are inadequate and conflicting. Secondly, some of the provisions, particularly, sections 54, 167, Chapters VII, XX, XXII, some provisions in chapters XV, XVI and XXXII are inconsistent with the constitution and the judgment in Masder Hossain case. In fact the present Code is not at all suitable for the administration of criminal justice after so many changes made in the meantime and it is high time to promulgate a new Code.

197. Learned Attorney General submits that if the power of the police officer to arrest an offender out of suspicion who appears to him or against whom credible information has been received or a reasonable suspicion exist of his having been concerned in any cognizable offence, considering the present trend of rise of terrorist activities in the country is curtailed the law and order situation will deteriorate and the citizens lives will be at stake. According to him, the terrorists are so trained that it will be difficult for the law enforcing agencies to collect information unless he is interrogated after receipt of information regarding his complicity in a cognizable offence.

198. The Sixth Amendment of the United States constitution provides “In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.” This amendment was adopted in response to English law, which, until 1836 did not provide felony offenders the right even to have retained counsel to assist them in presenting a defense at trial. After the American Revolution, most of the States rejected the English law,

and some even granted unrepresented offenders a right to appoint counsel-something England did not provide until 1903.

199. It wasn't until 1938, in *Johnson v. Zerbst, 304 U.S. 458(1938)* the U.S. Supreme Court held that the Sixth Amendment afforded indigent defendants a right to appoint counsel in the Federal Courts. And it wasn't until 1963 that the U.S. Supreme Court held, in *Gideon v. Wainwright* Gideon, *372 U.S. 335 (1963)* that the Sixth and Fourteenth Amendments required such appointment of counsel for indigent offenders in felony cases in the State Courts.

200. Prior to 1958, the U.S. Supreme Court had never indicated that a denial of counsel to a suspect was sufficient by itself to render a confession inadmissible. It had consistently held that lack of Counsel was merely a factor in determining voluntariness. But in 1964 that changed. In *Massiah v. United States, 377 U.S. 201(1964),* the U.S. Supreme Court held that once a person has been indicted or formally charged, he has a right to counsel. Unless that person voluntarily and knowingly waives that right, any incriminating statement he makes in the absence of his attorney must be excluded-if the statement has been deliberately elicited from him by a government agent.

201. Winston Massiah (supra) along with two of his shipmates, involved in the cocaine trade, obtaining the cocaine in Valparaiso, Chile, concealing it on the ship, and bringing it to New York. In New York, they passed the cocaine along to two other men who distributed it. In May 1958, customs agents boarded Massiah's ship when it docked in New York and found five packages of cocaine. Massiah was arrested for possessing drugs and later on he was released on bail. In 1959, Massiah was again indicted together with Jesse Colson, one of his New York distributors, and charged with conspiracy. Colson decided to cooperate with the government and wore a taping device during a prearranged meeting with Massiah. On November 19, 1959 Massiah entered Colson's car on West 146th Street between Seventh and Eighth Avenues. As the two men sat together in the car, Massiah made statements to Colson that fully implicated him and left no doubt of his guilt. Massiah ultimately was convicted in 1964, the Supreme Court reversed Massiah conviction.

202. The court held that Massiah was denied of his counsel when at his trial his incriminating words, which federal agents had "deliberately elicited" from him after indictment and in the absence of counsel, were used against him. This rule, the court said, applies to 'indirect and surreptitious interrogations' as well as those conducted at a police station or in a jail. The court's dissenters feared that the ruling would jeopardize all police interrogation and make it virtually impossible for the police to do their job. Justice Byron White observed "A civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it," It is, therefore, a rather 'portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable, and highly probative of the issue which the trial court has before it-whether the accused committed the act. Without the evidence, the quest for truth may be seriously impeded; Justice Byron White observed'.

203. This decision was given in 1964 and since then the police officers are bound to follow the guidelines given in Massiah (supra). We are now in 2016 and 52 years elapsed from the date of deliberation made by the Supreme Court United States. We achieved our independence in 1971 and got the constitution in 1972. We have also crossed 45 years in the meantime. If we cannot maintain the fundamental rights of the citizens of the country and allow police officers use abusive power it will be difficult to establish constitutional law and

the rule of law in this country at any point of time. Even conditions prevailing in India about the terrorist acts is much higher than ours. The police officers in India are not allowed to use their power transgressing the law and the constitution and the guidelines given by the Supreme Court. This will be evident from the following charts:

List of terrorist incidents in India

Date	**Incident & Description**	**Location**	**Fatalities**	**Injured**	**Status of case**
August 2, 1984	Meenambakkam bomb blast[1]	Tamil Nadu	30	25	Verdict given
July 7, 1987	1987 Punjab killings[2]	Punjab	36	60	N/A
June 15, 1991	1991 Punjab killings[3]	Punjab	90	200	N/A
March 12, 1993	1993 Bombay bombings[4][5]	Mumbai	350[6]	713	verdict given
December 30, 1996	Brahmaputra Mail train bombing		33	150	N/A
February 14, 1998	1998 Coimbatore bombings	Tamil Nadu	58	200+	verdict given
December 22, 2000	2000 terrorist attack on Red Fort [7]	Delhi	3	14	verdict given
October 1, 2001	2001 Jammu and Kashmir legislative assembly attack	Jammu and Kashmir	38		
December 13, 2001	2001 Indian Parliament attack in New Delhi	Delhi	7		verdict given

May 13, 2002	2002 Jaunpur train crash[8]	N/A	12	80	
December 6, 2002	2002 Mumbai bus bombing[9]	Mumbai	2	14	
December 21, 2002	Kurnool train crash	Andhra Pradesh	20	80	
September 10, 2002	Rafiganj train disaster	Bihar	130	300	
September 24, 2002	Terrorists attack the Akshardham temple in Gujarat	Gujarat	31		
January 27, 2003	2003 Mumbai bombing[10]	Mumbai	1		
March 13, 2003	2003 Mumbai train bombing[11]	Mumbai	11		
July 28, 2003	2003 Mumbai bus bombing [12]	Mumbai	4	32	
August 25, 2003	25 August 2003 Mumbai bombings	Mumbai	52		
August 15, 2004	2004 Dhemaji school bombing	Assam	18	40	
July 28, 2005	2005 Jaunpur train bombing[13]	N/A	13	50	
October 29, 2005	29 October 2005 Delhi bombings: Three powerful	Delhi	70	250	

	serial blasts in New Delhi at different places [14]				
March 7, 2006	2006 Varanasi bombings: Three synchronized terrorist attacks in Varanasi in Shri Sankatmochan Mandir and Varanasi Cantonment Railway Station[15]	Varanasi	21		
July 11, 2006	2006 Mumbai train bombings: Series of 7 train bombing during the evening rush hour in Mumbai	Mumbai	209	500	
September 8, 2006	2006 Malegaon bombings: Series of bomb blasts in the vicinity of a mosque in Malegaon, Maharashtra	Maharashtra	37	125	
February 18, 2007	2007 Samjhauta Express bombings	Haryana	68		
May 18, 2007	Mecca Masjid bombing: At least 13 people were killed, including 4 killed by the Indian police in the rioting that followed, in the bombing at Mecca Masjid, Hyderabad that took place during the Friday prayers	Hyderabad	13		
August 25, 2007	25 August 2007 Hyderabad bombings - Two blasts in Hyderabad's Lumbini park and Gokul Chat.	Hyderabad	42		
October 11, 2007	One blast at a shrine of a Sufi Muslim saint in the town of Ajmer[16]	Rajasthan	3		
October 14, 2007	One blast in a movie theatre in the town of Ludhiana on the Muslim holy day of Eid ul-Fitr[16]	Ludhiana	6		
November 24, 2007	A series of near-simultaneous explosions at courthouse complexes in the cities of Lucknow, Varanasi, andFaizabad[16]	Uttar Pradesh	16	70	
January 1, 2008	Terror attack on CRPF camp in Rampur, Uttar	Uttar Pradesh	8	5	

	Pradesh by Lashkar-e-Taiba,[17]				
May 13, 2008	Jaipur bombings: 9 bomb blasts along 6 areas in Jaipur	Jaipur	63	200	
July 25, 2008	2008 Bangalore serial blasts: 8 low intensity bomb blasts in Bangalore	Bangalore	2	20	arrests made
July 26, 2008	2008 Ahmedabad blasts: 17 serial bomb blasts in Ahmedabad	Gujarat	29	110	arrests made
September 13, 2008	13 September 2008 Delhi bombings: 5 bomb blasts in Delhi markets	Delhi	33	130	
September 27, 2008	27 September 2008 Delhi blast: Bombings at Mehrauli area, 2 bomb blasts in Delhi flower market	Delhi	3	21	
September 29, 2008	29 September 2008 western India bombings: 10 killed and 80 injured in bombings in Maharashtra (including Malegaon) and Gujarat bomb blasts	Maharashtra	10	80	
October 1, 2008	2008 Agartala bombings	Agartala	4	100	
October 21, 2008	2008 Imphal bombing	Imphal	17	40	
October 30, 2008	2008 Assam bombings	Assam	77	300	
November 26, 2008	2008 Mumbai attacks[18][19]	Mumbai	171	239	verdict given
January 1, 2009	2009 Guwahati bombings[20]	Assam	6	67	
April 6, 2009	2009 Assam bombings[21]	Assam	7	62	
February 13, 2010	2010 Pune bombing[22]	Pune	17	60	
December 7, 2010	2010 Varanasi bombing[23]	Varanasi	1	20	
July 13, 2011	2011 Mumbai bombings	Mumbai	26	130	
September 7, 2011	2011 Delhi bombing[24]	Delhi	19	76	

February 13, 2012	2012 attacks on Israeli diplomats	Delhi	0	4	
August 1, 2012	2012 Pune bombings	Pune	0	1	
February 21, 2013	2013 Hyderabad blasts	Hyderabad	16	119	
March 13, 2013	March 2013 Srinagar attack	Jammu and Kashmir	7	10	
17 April 2013	2013 Bangalore blast	Bengaluru	0	16	
25 May 2013	2013 Naxal attack in Darbha valley	Chhattisgarh	28	32	
24 June 2013	June 2013 Srinagar attack	Jammu and Kashmir	8	19	
7 July 2013	July 2013 Maoist attack in Dumka	Chhattisgarh	5		
7 July 2013	Bodh Gaya bombings	Bihar	0	5	
27 October 2013	2013 Patna bombings	Bihar	5	66	
25 April 2014	Blast in Jharkhand[25]	Jharkhand	8	4-5	
28 April 2014	Blast in Budgam District[26]	Jammu and Kashmir	0	18	
1 May 2014	2014 Chennai train bombing	Tamil Nadu	1	14	
12 May 2014	Maoist blast in Gadchiroli District[27]	Jharkhand	7	2	
28 December 2014	Bomb blast at Church Street, Bangalore[28]	Bengaluru	1	5	
20 March 2015	2015 Jammu attack[29]	Jammu and Kashmir	6	10	
27 July 2015	2015 Gurdaspur attack in Dina Nagar, Gurdaspur district	Punjab	10	15	
02 January 2016	2016 Pathankot attack in Pathankot IAF base, Pathankot	Punjab	7		

Year	**Fatalities**	**No.of incidents**
1984	30	1
1987	36	1
1991	90	1
1993	259	1
1996	33	1
1998	58	1
2000	3	1
2001	45	2
2002	202	5
2003	68	4
2004	18	1
2005	83	2
2006	267	3
2007	148	6
2008	409	11

2009	13	2
2010	18	2
2011	38	2
2012	0	2
2013	69	8
2014	17	5
2015	16	2
Total	1920	64

(Source: From Wikipedia, the free encyclopedia; *Main article: Terrorism in India)*

204. A look at the chart speaks for itself. It is apparent that India is the most affected country on the globe regarding terrorism. Two dreaded incidents stunned the country, one to the Legislative Assembly killing 38 persons and other to the National Assembly killing six police men and three Parliament staff. In Mumbai in three attacks 257 persons died and 713 persons injured in 1993 and in the second attack 166 persons died and 293 persons injured and on the three occasions 200 persons died and 715 persons injured. In the temple in Gujrat there was an attack in 2002 killing 31 persons and injuring 80 persons. In Delhi in 2005 sixty three persons died and 210 persons were injured on bomb blasting. In Joypur in 2008 there was synchronized bomb attack killing 63 persons and injuring 200 persons. In Asham in 2008 there was serial bomb blast killing 81 persons and injuring 470 persons. In Coimbatore bombings in 1998 Islamic Fundamentalist conducted series of bomb blast killing sixty people. These are a few incidents. These terrorist attacks started since 1998 and it continues till today. There is constant threat by Naxalist (Maoist) in Chhattisgarah, and other States, and terrorists in Jommu and Kashmir. Every alternate day such terrorist attacks are implemented killing innumerable number of people. We have not experienced such terrorist attacks in our country except in 2005, there were 60 terrorist attacks in the district headquarters killing only a few persons.

205. Despite such constant terrorist attacks and killing huge number of people in India, the apex court of the country did not hesitate to give guidelines keeping in mind the fundamental rights of the citizens cannot be compromised on the plea of terrorism. It is consistent view that the fundamental rights, people's life and liberty and their security should be given

primacy over other terrorism. Therefore, on the plea of terrorism we cannot give a blank cheque to the law enforcing agencies to transgressing the fundamental rights of the citizens of the country. It should be borne in mind that a terrorist does not lose his fundamental rights even after commission of terrorist activities and there are laws for punishment of his crime, but he should not be deprived of his precious rights preserved in the constitution.

206. If we deny the rule of law and the right of the people, we will surely disrespect our long cherished independence- it will also be denying Bangabandhu's life long political sacrifice for this nation. The architect of Bangladesh had a dream to have a country where the rule of law will be established, the independence of judiciary be secured, and oppressed, destitute and indigent people will get justice entailing minimum time and money.

207. Our constitution was enacted with the dynamic leadership of Founding Father of the nation clearly depicted the importance of rule of law and independence of judiciary. Therefore, we all have to strive to implement the dream of the Father of the Nation. Otherwise, the independence which we have achieved sacrificing the lives of 30 lac martyrs will be meaningless and the struggle against the British colonial occupation for about 200 years and 24 years long struggle against the Pakistani autocratic rulers and our 9 months sanguinary fight against occupation army will render it ineffective and useless. The guidelines embodied in the historical speech of 7th March, 1971 delivered by Bangabandhu Sheikh Mujibur Rahman will also diminish its spirit. The long cherished independence achieved after huge sacrifice should not be frustrated only for a few members of law enforcing agencies. If we do so it will be preposterous for us to continue as an independent sovereign State in the world with dignity and self-respect. It will not be out of place to mention here that the image of a State is dependent upon the way as to how its judiciary administers justice for the common people.

208. It should be kept in mind that the very nature of the job of law enforcing agencies is to respect the law even their lives are at stake, conflict resolution, problems solving through the organization, and provision of services as well as other activities. Crime control remains an important function to them. They entered into the job knowing the responsibilities reposed on them. It is known to them the object and purpose of raising a police force or equivalent force in a country and even then it is appropriate in the context to remind them their responsibilities.

209. **We think it will be profitable to discuss here, Sir Robert Peel's Principles of Law Enforcement 1829.**

1. The basic mission for which police exist is to prevent crime and disorder as an alternative to the repression of crime and disorder by military force and severity of legal punishment.
2. The ability of the police to perform their duties is dependent upon *public approval* of police existence, actions, behavior and the ability of the police to secure and maintain *public respect.*
3. The police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain public respect.
4. The degree of cooperation of the public that can be secured diminishes, proportionately, to the necessity for the use of physical force and compulsion in achieving police objectives.

5. The police seek and preserve public favor, not by catering to public opinion, but by constantly demonstrating absolutely impartial service to the law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws; by ready offering of individual service and friendship to all members of society without regard to their race or social standing, by ready exercise of courtesy and friendly good humor; and by ready offering of individual sacrifice in protecting and preserving life.
6. The police should use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of *persuasion, advice and warning* is found to be insufficient to achieve police objectives; and police should use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
7. The police at all times should maintain a relationship with the public that gives reality to the historic tradition that *the police are the public* and *the public are the police;* the police are the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the intent of the community welfare.
8. The police should always direct their actions toward their functions and never appear to usurp the powers of the judiciary by avenging individuals or the state, or authoritatively judging guilt or punishing the guilty.
9. The test of police efficiency is the *absence* of crime and disorder, not the *visible evidence* of police action in dealing with them.

The Role of Police

210. The role of policing has been dynamic since it became a profession in 1829 under Sir Robert Peel in London, England. The relationship between police and citizens in a society is generally understood as a progression from the *political era*, when police were introduced in American cities in the 1840s to the early 1900s; to the *reform era*, stretching across the middle part of the 20th century from the 1930s to the 1970s; and then to the *community era* of modern policing since the 1970s.

The Police Culture

211. The "culture" of a police department reflects what that department believes in as an organization. These beliefs are reflected in the department's recruiting and selection practices, policies and procedures, training and development, and ultimately, in the actions of its officers in law enforcement situations. Clearly, all police departments have a culture. The key question is whether that culture has been carefully developed or simply allowed to develop without benefit of thought or guidance. There are police agencies, for example, where police use of force is viewed as abnormal. Thus, when it is used, the event receives a great deal of administrative attention. Such a response reflects the culture of that department: the use of force is viewed and responded to as an atypical occurrence. Contrast such a department with one which does not view the use of force as abnormal. And, most importantly, the culture of the department is such that officers come to view the use of force as an acceptable way of resolving conflict.

212. It is clear that the culture of a police department, to a large degree, determines the organization's effectiveness. That culture determines the way officers view not only their role, but also the people they serve. The key concern is the nature of that culture and whether

it reflects a system of beliefs conducive to the nonviolent resolution of conflict. It is also important to recognize that the culture of a police department, once established, is difficult to change. Organizational change within a police agency does not occur in a revolutionary fashion. Rather, it is evolutionary.

Developing a Set of Values

213. The beginning point in establishing a departmental culture is to develop a set of values. Values serve a variety of purposes, including:

(a) Set forth a department's philosophy of policing
(b) State in clear terms what a department believes in
(c) Articulate in broad terms the overall goals of the department
(d) Reflect the community's expectations of the department
(e) Serve as a basis for developing policies and procedures
(f) Serve as the parameters for organizational flexibility
(g) Provide the basis for operational strategies
(h) Provide the framework for officer performance
(i) Serve as a framework from which the department can be evaluated

214. Finally, an essential role of the police chief is to ensure that the values of the department are well articulated throughout the organization. To accomplish this, the chief as leader must ensure that there is a system to facilitate effective communication of the values. This includes recognizing and using the organization's informal structure. This is important because, in addition to the formal structure, values are transmitted through its informal process as well as its myths, legends, metaphors, and the chief's own personality.

215. Each police department should develop a set of policing values that reflects its own community. A police executive should first clearly explain what values are to those in uniform. Then the executive should ask each member of the department to list what he or she considers the five most important values for the department. What follows is the previously mentioned general set of values of good policing, which can be the springboard for a department's own formulation:

(i) **The police department must preserve and advance the principles of democracy.** All societies must have a system for maintaining order. Police officers in this country, however, must not only know how to maintain order, but must do so in a manner consistent with our democratic form of government. Therefore, it is incumbent upon the police to enforce the law and deliver a variety of other services in a manner that not only preserves, but also extends precious American values. It is in this context that the police become the living expression of the meaning and potential of a democratic form of government. The police must not only respect, but also protect the rights guaranteed to each citizen by the Constitution. To the extent each officer considers his or her responsibility to include protection of the constitutionally guaranteed rights of all individuals, the police become the most important employees in the vast structure of government.

(ii) **The police department place its highest value on the preservation of human life.** Above all, the police department must believe that human life is our most precious resource. Therefore, the department, in all aspects of its operations, will place its highest priority on the protection of life. This belief

must be manifested in at least two ways. First, the allocation of resources and the response to demands for service must give top priority to those situations that threaten life. Second, even though society authorizes the police to use deadly force, the use of such force must not only be justified under the law, but must also be consistent with the philosophy of rational and humane social control.

(iii) **The police department believe that the prevention of crime is its number one operational priority.** The department's primary mission must be the prevention of crime. Logic makes it clear that it is better to prevent a crime than to put the resources of the department into motion after a crime has been committed. Such an operational response should result in an improved quality of life for citizens, and a reduction in the fear that is generated by both the reality and perception of crime.

(iv) **The police department will involve the community in the delivery of its services.** It is clear that the police cannot be successful in achieving their mission without the support and involvement of the people they serve. Crime is not solely a police problem, and it should not be considered as such. Rather, crime must be responded to as a community problem. Thus, it is important for the police department to involve the community in its operations. This sharing of responsibility involves providing a mechanism for the community to collaborate with the police both in the identification of community problems and determining the most appropriate strategies for resolving them. It is counterproductive for the police to isolate themselves from the community and not allow citizens the opportunity to work with them.

(v) **The police department believe it must be accountable to the community it serves.** The police department also is not an entity unto itself. Rather, it is a part of government and exists only for the purpose of serving the public to which it must be accountable. An important element of accountability is openness. Secrecy in police work is not only undesirable but unwarranted. Accountability means being responsive to the problems and needs of citizens. It also means managing police resources in the most cost-effective manner. It must be remembered that the power to police comes from the consent of those being policed.

(vi) **The police department is committed to professionalism in all aspects of its operations.** The role of the professional organization is to serve its clients. The police department must view its role as serving the citizens of the community. A professional organization also adheres to a code of ethics. The police department must be guided by the Law Enforcement Code of Ethics. The police department must ensure that it maintains a system designed to promote the highest level of discipline among its members.

(vii) **The police department will maintain the highest standards of integrity.** The society invests in its police the highest level of trust. The police, in turn, enter into a contractual arrangement with society to uphold that trust. The police must always be mindful of this contractual arrangement and never violate that trust. Each member of the police department must recognize that he or she is held to a higher standard than the private citizen. They must recognize that, in addition to representing the department, they also represent the law enforcement profession and government. They are the personifications of the law. Their conduct, both on and off duty, must be beyond reproach. There must not be even a perception in the public's mind that the department's

ethics are open to question. [Source- Principles of Good Policing: Avoiding Violence Between Police and Citizens, Revised September, 2003- www.usdoj.gov/crs; Sir Robert Peel's Principles of Policing, The Basics of Policing Can Restore Trust and Repair Relationships & The History of Modern Policing, How the Modern Police Force Evolved, http://criminologycareers.about. com/od/Criminology_Basics/a/The-History-Of-Modern-Policing.htm]

216. In our country we find no concern of the police administration about the abusive powers being exercised by its officers and personnel. This department has failed to maintain required standard of integrity and professionalism. There is aberration in other departments as well but these departments should not be compared with law enforcing agencies because of the philosophy basing upon which the responsibility reposed upon them. Their duties, actins are deponent upon the public approval at all times particularly during crisis period. They must secure and maintain public respect and this will decrease the crime in the country.

217. On a look into the law and order situation, we have reason to believe that it has forgotten its core value that it is accountable to the community it serves and by the same time the prevention of crime is its prime operational priority. Conversely it is seen that the rate of crime is on the rise. It is not known whether the department has adopted any policy to develop a set of values so that the people have faith and confidence in it. Most of the time it is noticed that the force is following the old principles and policies that were followed during the colonial period. It must be borne in mind that we have a constitution which has been achieved after sacrifying millions of martyrs and all human values which are recognised by international communities enshrined in it. Their behavioural attitude must be developed in conformity with those values and rights. Even after the Constitution is in operation, its attitude towards the citizenry has not charged. The police administration, particularly its Chief must oversee training for recruits to reduce the use of coercive force. He should strive to rebuild mutual trust and respect between its force and the citizenry especially in communities that has been subjected to heavy stop-and-frisk techniques. The department's head must keep in mind the remark of his precursor Robert Peel, who founded first police force in 1829; 'Police-should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police.' If he forgets this prime philosophy and leaves behind a demoralised force, it will be much harder for successor to combat crimes and human values.

Conclusion

218. On a close look into the judgment of the High Court Division it cannot be said that it has directed the government to legislate and/or amend the existing sections 54, 167, 176, 202 of the Code and some other provisions of the Penal Code. It noticed that the police officers taking the advantage of the language used in section 54 are arresting innocent citizens rampantly without any complaint being filed or making any investigation on the basis of complaint if filed and thereby the fundamental rights guaranteed to a citizen under articles 27, 30, 31, 32, 33 and 35 of the constitution are violated. It has observed that no person shall be subjected to torture or to cruel, inhuman, dignity or degrading punishment or treatment. So, if an offender is taken in the police custody for the purpose of interrogation for extortion of information from him the law does not give any authority to the law enforcing agencies to torture him or behave him in degradation of his human value. It further observed that it is the basic human rights that whenever a person is arrested he must know the reasons for his arrest. The constitution provides that a person arrested by the police shall be informed of the

grounds of his arrest and also that the person arrested shall not be denied of his right to consult or defend himself/herself by a legal practitioner of his/her choice. But it is seen that these rights are always denied and the police officers do not inform the nearest or close relations of the arrested persons and as a result, there is violation of fundamental rights guaranteed in the constitution. Accordingly, the High Court Division made some recommendations to amend sections 54, 167 of the Code and other provisions.

219. On perusal of the recommendations it is to be noted that most of the recommendations are in conformity with Part III of the constitution but some of the recommendations are redundant, some of them are not practically viable and some of them are exaggeration. As for example, a Magistrate cannot decide any case relying upon the post-mortem report of a victim. It is only if a case is filed whether it is a UD case or complaint, the police find that the death is unnatural, it can send the dead-body to the morgue for ascertaining the cause of death. In respect of UD case, a police officer compulsorily sends the dead body to the morgue for ascertaining the cause of death with an inquest report. After receipt of the report, if the police officer finds that the death is homicidal in nature, the police officer is under obligation to register a regular case. Even if after investigation the police officer does not find any complicity of accused person, the Magistrate is not bound to accept the police report. It may direct further inquiry or further investigation over the death of the victim if he finds that the death is homicidal in nature. The power of the Magistrate is not circumscribed by any condition. The Magistrate is not bound to accept the police report.

220. In most criminal matters, the burden of proof lies upon the prosecution to prove a charge against an offender, but in respect of spouse killing case, it has been established that the burden shifts upon the accused person. It is the responsibility of the accused to explain the cause for the death of his/her spouse if it is found that he or she died while in his/her custody or that they were staying jointly before the death. The High Court Division is of the view that with a view to giving legal safeguard in respect of such offences, sections 106 or 114 of the Evidence Act may be amended. Since the law is settled on the said issue, there is no reason for any amendment of the law. On the doctrine *stare decisis* if a decision has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts. This doctrine is explained in *Corpus Juris Secundum*: 'Under the *stare decisis* rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed on similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts it is not universally applicable.' So, there is no need for amendment to section 106 or 114 of the Evidence Act.

221. The High Court Division also directed to add a new section after section 44 of the Police Act. It observed that if a person dies in police custody or jail the police officer who has arrested the person or the police officer who has taken him in custody for the purpose of interrogation or the jail authority in which jail the death took place shall explain the reasons for death and shall prove the relevant facts to substantiate their explanation. Accordingly, it observed that in case of such incidents there is no provision for maintaining any diary for recording reason for arrest of any person without any warrant and other necessary particulars. As observed above, the government has promulgated a law covering the field namely ‡ek¡ae এবং হেফাজতে মৃত্যু (নিবারZ) BCe, 2013. In the preamble it is stated that as the Bangladesh is a signatory of the New York's Declaration on 10th December, 1984 towards cruel, inhuman, disgraceful behaviour; and as Bangladesh is a partner in the Treatise signed

on 5th October, 1998; as in article 35(5) of the constitution prohibits torture and cruel, inhuman, degrading treatment and punishment; and as in articles 2(1) and 3 of the United Nations charter demanded to promulgate a law by the countries which signed the charter treating the torture, cruel, inhuman and degrading treatment of a citizen is an offence; and therefore, in order to implement the charter the law has been promulgated. This piece of legislation covers all the above inhuman acts. In presence of specific legislation, we find it not necessary to add any provision in other laws in this regard.

222. Considering the facts and circumstances of the matter we find no merit in the contentions of the learned Attorney General and the learned Additional Attorney General. However, we are of the view that all the recommendations are not relevant under the changed circumstances. We formulate the responsibilities of the law enforcing agencies which are basic norms for them to be observed by them at all level. We also formulate guide lines to be followed by every member of law enforcing agencies in case of arrest and detention of a person out of suspicion who is or has been suspected to have involved in a cognizable offence. In order to ensure the observance of those guide lines we also direct the Magistrates, Tribunals, Courts and Judges who have power to take cognizance of an offence as a court of original jurisdiction.

Responsibilities of Law Enforcing Agencies

(I) Law enforcement agencies shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

(II) In the performance of their duty, law enforcement agencies shall respect and protect human dignity and maintain and uphold the human rights of all persons.

(III) Law enforcement agencies may use force only when strictly necessary and to the extent required for the performance of their duty.

(IV) No law enforcement agencies shall inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor shall any law enforcement agencies invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

(V) The law enforcing agencies must not only respect but also protect the rights guaranteed to each citizen by the constitution.

(VI) Human life being the most precious resource, the law enforcing agencies will place its highest priority on the protection of human life and dignity.

(VII) The Primary mission of the law enforcing agencies being the prevention of crime, it is better to prevent a crime than to the resources into motion after a crime has been committed.

Guide lines for the Law Enforcement Agencies

(i) A member law enforcement officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

(ii) A member law enforcement officer who arrests a person must intimate to a nearest relative of the arrestee and in the absence of his relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 12(twelve) hours of such arrest notifying the time and place of arrest and the place in custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the law enforcing officer to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the law enforcing officer in whose custody the arrestee is staying.

(iv) Registration of a case against the arrested person is *sine-qua-non* for seeking the detention of the arrestee either to the law enforcing officer's custody or in the judicial custody under section 167(2) of the Code.

(v) No law enforcing officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(vi) A law enforcing officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.
(vii) If the law enforcing officer find, any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital for treatment and shall obtain a certificate from the attending doctor.

(viii) If the person is not arrested from his residence or place of business, the law enforcing officer shall inform the nearest relation of the person in writing within 12 (twelve) hours of bringing the arrestee in the police station.

(ix) The law enforcing officer shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.

(x) When any person is produced before the nearest Magistrate under section 61 of the Code, the law enforcing officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation cannot be completed within twenty four hours, why he considers that the accusation or the information against that person is well founded. He shall also transmit copy of the relevant entries in the case diary B.P.Form 38 to the Magistrate.

Guidelines to the Magistrates, Judges and Tribunals having power to take cognizance of an offence

(a) If a person is produced by the law enforcing agency with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per section 167(2) of the Code, the Magistrate or the Court, Tribunal, as the case may be, shall release him in accordance with section 169 of the Code on taking a bond from him.

(b) If a law enforcing officer seeks an arrested person to be shown arrested in a particular case, who is already in custody, such Magistrate or Judge or Tribunal shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the

entries in the diary relating to such case and if that the prayer for shown arrested is not well founded and baseless, he shall reject the prayer.

(c) On the fulfillment of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of the arrested person as required under section 167(2) and if the case is exclusively triable by a court of Sessions or Tribunal, the Magistrate may send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(d) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter and the case diary that the accusation or the information is well founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in such custody as he deems fit and proper, until legislative measure is taken as mentioned above.

(e) The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report disclose that the arrest has been made for the purpose of putting the arrestee in the preventive detention.

(f) It shall be the duty of the Magistrate/Tribunal, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused person under section 167 of the Code.

(g) If the Magistrate has reason to believe that any member of law enforcing agency or any officer who has legal authority to commit a person in confinement has acted contrary to law the Magistrate shall proceed against such officer under section 220 of the Penal Code.

(h) Whenever a law enforcing officer takes an accused person in his custody on remand, it is his responsibility to produce such accused person in court upon expiry of the period of remand and if it is found from the police report or otherwise that the arrested person is dead, the Magistrate shall direct for the examination of the victim by a medical board, and in the event of burial of the victim, he shall direct exhumation of the dead body for fresh medical examination by a medical board, and if the report of the board reveals that the death is homicidal in nature, he shall take cognizance of the offence punishable under section 15 of Hefajate Mrittu (Nibaran) Ain, 2013 against such officer and the officer in-charge of the respective police station or commanding officer of such officer in whose custody the death of the accused person took place.

(i) If there are materials or information to a Magistrate that a person has been subjected to 'Nirjatan' or died in custody within the meaning of section 2 of the Nirjatan and Hefajate Mrittu (Nibaran) Ain, 2013, shall refer the victim to the nearest doctor in case of 'Nirjatan' and to a medical board in case of death for ascertaining the injury or the cause of death, as the case may be, and if the medical evidence reveals that the person detained has been tortured or died due to torture, the Magistrate shall take cognizance of the offence *suo-moto* under section 190(1)(c) of the Code without awaiting the filing of a case under sections 4 and 5 and proceed in accordance with law.

223. The appeal is dismissed with the above recommendation and guidelines without any order as to costs. The Inspector General of Police is directed to circulate the above guidelines

to all police stations for compliance forthwith to the letter and spirit. Similarly the Director General, Rapid Action Battalion is also directed circulate them for compliance of its units and officers. The Registrar General is also directed to circulate for compliance by the Magistrate forthwith. The Registrar General is further directed to transmit copy of the Judgment to the Secretary, Legislative and Parliamentary Affairs Division; Ministry of Law, Justice and Parliamentary Affairs; Secretary, Ministry of Home Affairs; IGP Police; DG RAB for taking necessary step as per the recommendations, observations and guidelines made in the body of the Judgment.

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APPELLATE DIVISION

PRESENT

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

CIVIL PETITION FOR LEAVE TO APPEAL NOs.1240 and 2883 of 2013
(From the judgment and order dated the 30th day of May, 2012 passed by the High Court Division in First Appeal No.228 of 2006)

Government of Bangladesh and others : . . . Petitioners
(in C.P.No.1240 of '13)

Nasir Mohammad Khan : . . . Petitioner
(in C.P.No.2883 of '13)

-Versus-

Hamid Ali Chowdhury and others : . . . Respondents
(in both the cases)

For the Petitioners (in C.P.No.1240 of 2013) : Mr. Mahbubey Alam, Attorney General instructed by Mr. Haridus Paul, Advocate-on-Record

For the Petitioner (in C.P.No.2883 of 2013) : Mr. Mainul Hossain, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record

For Respondent No.1 (in both the cases) : Mr. Mahmudul Islam, Senior Advocate with Mr. Probir Neogi, Senior Advocate instructed by Syed Mahbubur Rahman, Advocate-on-Record

For the applicant Ariful Islam for addition of party : Mr. Rokanuddin Mahmood, Senior Advocate

For Respondent No.1 (in both the cases) : None represented

Date of Hearing : The 18th day of August, 2015

We hold that the plaintiff was entitled to get exclusion of the time of the absence of defendant Nos.1 and 2, the heirs of Syed Salamat Ali from Bangladesh and the High Court Division rightly gave the said benefit and held that the suit was not barred by limitation. We further hold that time was not the essence of the contract and with the execution and registration of the general power attorney in favour of the plaintiff by Salamat Ali, the earlier contract dated 06.03.1978 was novated and the High Court Division rightly held so. ...(Para 26)

Specific performance of contract:
As regards, the argument of the learned Attorney General that the plaintiff had no cause of action to file the suit, we are of the view that since the original lessee entered into an agreement with the plaintiff to sell the suit property and in part performance of the contract, he was put into the possession of the suit property and admittedly he is in possession thereof and he paid good amount of money being taka 15,90,000.00 in 1978 and after the death of Syed Salamat Ali, his heirs did not execute and register the sale deed, he had every right to file the suit to pray for specific performance of contract.
...(Para 27)

We find substance in the submission of Mr. Mahmudul Islam that cancellation of lease in favour of lessee, Syed Salamat Ali after filing the suit was absolutely *malafide* as in the suit, the Government and its other functionaries concerning the suit property were very much parties and in the suit, the plaintiff prayed for declaration of title to the suit property along with the other reliefs. The suit being pending by no logic, the Government could cancel the lease. We also cannot ignore the submission of Mr. Mahmudul Islam that the cancellation order was an antedated one inasmuch as the defendant Government though filed written statement in the suit on 12.05.2004, did not say the said fact in the written statement. ...(Para 28)

Judgment

Md. Abdul Wahhab Miah, J:

1. These 2(two) civil petitions for leave to appeal (CPs) have been filed against judgment and decree dated 30.05.2012 passed by a Division Bench of the High Court Division in First Appeal No.228 of 2006 allowing the appeal.

2. C.P. No.1240 of 2013 has been filed by the Government of Bangladesh represented by the Secretary Ministry of Works and the other Government functionaries who were defendants in the suit.

3. C.P. No.2883 of 2013 has been filed by one Nasir Mohammad Khan, a 3rd party.

4. Facts necessary for disposal of the CPs are that respondent No.1, herein as the plaintiff filed Title Suit No.82 of 2005 in the Court of Joint District Judge, 4th Court, Dhaka, for declaration of title to the suit property along with the other declarations. Subsequently, the plaint was amended and prayer for specific performance of contract was added alternatively.

5. In the plaint, it was averred that by a registered lease deed being No.2584 dated 26.03.1956 executed by the then Governor of East Pakistan, the suit property was given lease in favour of Syed Salamat Ali, the owner of M/S. U.K. Battery. Syed Salamat Ali after getting possession of the suit property erected a 2(two) storied building thereon and enjoyed the possession of the same peacefully without any encumbrances. Subsequently, Syed Salamat Ali executed an agreement for sale in favour of the plaintiff on 06.03.1978 on receipt of a sum of taka 12,90,000˙00 (twelve lac ninety thousand) as advance out of the total consideration of taka 15,90,000˙00 and with the execution of the agreement handed over possession of the suit property to the plaintiff. The plaintiff is in possession of the suit property since 1978 peacefully without any interruption. In the deed of agreement, a

condition was stipulated that the vendor, namely, Syed Salamat Ali, would execute the sale deed within 1(one) year after getting all the necessary papers including the clearance certificate from the Income Tax Department as required at that time and would receive the rest consideration thereon. Subsequently, on 7.11.1978, the vendor received the remaining balance from the plaintiff and executed a registered General Power of Attorney in his favour. During that period, the plaintiff came to know that one Nasir Mohammad Khan and his brothers instituted Title Suit No.57 of 1978 in the Court of Joint District Judge, 3rd Court, Dhaka for specific performance of contract in respect of the suit property impleading Syed Salamat Ali as defendant. The plaintiff got him added in that suit as defendant No.1(a). However, the suit was dismissed for non substitution of the heirs of late Syed Salamat Ali, the original owner of the suit property. Subsequently, the plaintiff searched for defendant Nos.1 and 2, the legal heirs of late Syed Salamat Ali and came to know that they left the country much earlier and by this way, the plaintiff became the owner and possessor of the suit property. The plaintiff approached RAJUK for approval of the plan for further construction and came to know that since he had no title deed in his possession, he would not get the approval for construction. Despite having all the legal papers in favour of the plaintiff, defendant No.3 directed him to appear before the said authority and hence the suit.

6. From the judgment of the trial Court as well as the High Court Division, it appears that 3(three) sets of defendant, namely: defendant Nos.3, 4, 5, 7-9 filed 3(three) separate sets of written statement, but it is only defendant No.3, i.e. the Government of Bangladesh represented by the Secretary Ministry of Works which contested the suit.

7. In the written statement of defendant No.3 (hereinafter referred to as the defendant), after taking legal objection that there was no cause of action for filing the suit, the suit was barred by the principle of estoppel, waiver and acquiescence and was also barred by limitation; it was contended, *inter alia* that 66:10 acres land in total was acquired by the government pursuant to L.A. Case No.5/1948-49. The acquisition was finalised by Notification No.2.86 dated 09.01.1951 which was published in the Official Gazette. A plan of the acquired land was prepared dividing the same into several plots. Following the said plan 18.66 kathas land appertaining to Plot No.4-5 (the suit land) was allotted by the Government in favour of Mr. Salamat Ali, the Proprietor of M/S. U.K. Battery Manufacturing Ltd. The physical transfer of the suit land took place on 01.05.1961. Pursuant to proviso to clause 19 of the lease deed, unless prior sanction of the defendant was obtained, no transfer of suit land would be binding upon it. After taking the possession of the suit land, the lessee abandoned the same and the plaintiff entered into the suit land as trespasser and created the so-called agreement for sale. In fact, the agreement for sale had never been executed. The document was a forged one. If the agreement for sale was signed by the lessee that was made without prior consent of the defendant and as such, the agreement was not binding upon it. The plaintiff being a trespasser to the suit land got no right, title or interest over the same. Following the record maintained by defendant No.3, no existence of the plaintiff was found. The recorded lessee of the suit land is Syed Salamat Ali, proprietor, M/S. U.K. Battery Ltd. In the event, the recorded owner is not in possession of the suit land, the same would be vested under the direct control of defendant No.3 and the plaintiff could not claim any interest whatsoever over the suit land, and therefore, the suit should be dismissed.

8. At the trial, the plaintiff examined two witnesses including himself and proved bundle of documents in support of his case which were marked as exhibits. On behalf of the defendants, one S.M. Faruque Latif, the Deputy Assistant Engineer of the Ministry of Works

was examined as DW1. On conclusion of hearing of the suit, the trial Court by its judgment and decree dated 03.01.2006 dismissed the suit.

9. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the plaintiff filed the above mentioned first appeal before the High Court Division and a Division of the High Court Division by the impugned judgment and decree allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit directing the trial Court to execute the sale deed in favour of the plaintiff within 30(thirty) days from the date of receipt of the judgment; hence these petitions for leave to appeal.

10. From the judgment of the trial Court, it appears that it framed 5(five) issues. The issues were:

> *"1| ev`x Ges miKvi nB‡Z jxR MnxZv ˆmq` mvjvgZ Avjxi g†a¨ bwjkx m¤úwË n¯vši* সংক্রান্ত এগ্রিমেন্ট সম্পাদিত হয় কিনা?
> *2| ev`x bwjkx m¤úwË‡Z wei‡× `Lj RwbZ ¯Z ARb Kwiqv‡Qb wKbv?*
> *3| MYcÖZ gš¿Yvj‡qi †g‡gv/‡bwUk bs Avt‡Kvt‡et 02/2002 (Z`š)/105/(3)Zvs- 07/04/2002 †gjvdvBWx †eAvBbx Ges nqivbx gÄyK wKbv?*
> *4| AÎ gvgjv Zvgw`‡Z ewiZ wKbv?*
> *5| ev`x cv_bv Abyhvqx cwZKvi cvB‡Z wKbv?"*

11. The trial Court decided issue No.1 in favour of the plaintiff. It gave clear finding to the effect that an agreement was entered into by Syed Salamat Ali, the original lessee, with the plaintiff on 06.03.1978 and since then he has been in possession of the suit property. I consider it better to quote the relevant portion of the finding of the trial Court which is as under:

> *"Dc‡iv³ Av‡jvPbv I wm×v‡ši Av‡jv‡K ev`x Ges miKvi nB‡Z gÄyK jxR MnxZv ˆmq`* সালামত আলীর মধ্যে নালিশী সম্পত্তি হস্তান্তর সংক্রান্তে এগ্রিমেন্ট সম্পাদিত হয় এবং উ³ *GwM‡g›U ev`x 6/3/1978 Zwi‡L nB‡Z bwjkx m¤úwË‡Z `L‡j Av‡Qb g‡g wm×vš† tbIqv †Mj|"*

12. The trial Court found issue No.2 against the plaintiff on the view that though the agreement for sale was entered into by the lessee with the plaintiff and he was in possession of the suit property, but time for acquisition of title by adverse possession was not matured, as admittedly the plaintiff went into the possession of the suit property on 06.03.1978, whereas the suit was filed on 17.04.2002 and admittedly the original owner of the suit property is the Government.

13. The trial Court found issue No.3 against the plaintiff on the view that since, as per terms of the lease agreement, no permission was obtained from the lessor Government before entering into agreement with the plaintiff. The Government being the owner of the suit property, it could very much ask the plaintiff to show papers as to how he was in possession.

14. The trial Court also decided issue No.4 against the plaintiff. The trial Court took the view that as the plaintiff did not file the suit within 3(three) years from the date of disposal of the appeal by the Appellate Division on 23.06.1996, when the order of abatement of Title Suit No.57 of 1978 passed by the High Court Division on 11.01.1995 was upheld, the suit was barred under the provision of article 113 of the Limitation Act.

15. Issue Nos.2, 3 and 4 having been found against the plaintiff, the trial Court decided issue No.5 against the plaintiff.

16. So far as the plaintiff's case that the original lessee, Syed Salamat Ali, entered into a contract with him to sell the suit property at a sum of taka 15,90,000˙00 and he (Syed Salamat Ali), on receipt of taka 12,90,000˙00 as advance, executed a Bainapatra on 06.03.1978 and delivered possession of the suit property to him is concerned is concurrent. Whether the original lessee, Syed Salamat Ali, entered into an agreement with the plaintiff at a consideration of taka 15,90,000˙00 and on receipt of taka 12,90,000˙00 as advance, executed the contract is basically a question of fact. And both the Courts below found that Syed Salamat Ali entered into an agreement with the plaintiff to sell the suit property, there is no scope to re-open the matter before this Court. The learned Attorney General could not also show by pointing out to any evidence on record that the finding of fact arrived at by the trial Court as affirmed by the High Court Division as to the fact of entering into a agreement by the original lessee with the plaintiff and handing over possession of the suit property to him pursuant to the agreement was perverse.

17. Be that as it may, the whole thrust of the argument of the learned Attorney General was, in fact, on two points: (i) the plaintiff had no cause of action to file the suit and (ii) the suit was barred under article 113 of the Limitation Act, as pursuant to the said article, the plaintiff was obliged to file the suit within 3(three) years after the expiry of the period of 1(one) year as stipulated in the deed of agreement and at least from 23.06.1996, when the Appellate Division affirmed the order of abatement of Title Suit No.57 of 1978 of the High Court Division passed on 11.01.1995, as found by the trial Court. In this connection, the learned Attorney General has also submitted that the High Court Division was totally wrong in giving the benefit of section 13 of the Limitation Act to the plaintiff to save the period of limitation in filing the suit. In elaborating his submission on the point, he has further submitted that Syed Salamat Ali died on 17.07.1985. Therefore, the plaintiff had no cause of action to file the suit in 2002. In this connection, he referred to paragraph 13 of the plaint and submitted that the High Court Division failed to consider the statements made in the said paragraph of the plaint to decide the question of cause of action to file the suit. Mr. Attorney General has submitted that in view of the fact that the Government cancelled the lease of the lessee, Syed Salamat Ali, on 07.04.2003, the plaintiff could not continue the suit, the High Court Division erred in law in decreeing the suit.

18. Mr. Mahmudul Islam, learned Counsel, entering caveat on behalf of the plaintiff-respondent, on the other hand, supported the impugned judgment and decree and has submitted that the points canvassed before this Division were very much raised before the High Court Division and it answered the points in favour of the plaintiff. He has submitted that in the facts and circumstances of the case time was not the essence of the contract. In the instant case, Syed Salamat Ali entered into an agreement with the plaintiff on 06.03.1978, whereas Title Suit No.57 of 1978 by one Nasir was filed on 04.04.1978 for specific performance of contract against Syed Salamat Ali in respect of the same property and the plaintiff got him added there and fought upto this Division and the question of abatement of the suit came to an end on 23.06.1996 only, so, before that date there was no scope to file the suit. He has further submitted that in the mean time, Syed Salamat Ali died, the plaintiff had to look for his heirs and ultimately filed the suit giving last known address of his heirs and considering these facts, the High Court Division rightly gave the benefit of section 13 of the Limitation Act.

19. He has further submitted that if the law of limitation allows a person to wait to file a suit, the benefit of such law must be given to him. Syed Salamat Ali did not get the income tax clearance certificate as per terms of the agreement and in the agreement though limitation was for one year for execution and registration of the kabala after getting the income tax clearance certificate, in the Power of Attorney executed on 07.11.1978, i.e. within 4(four) months from the date of agreement, the earlier contract was novated and no limitation having been prescribed there, the period of one year prescribed in the agreement could not in any way be pleaded as a bar to maintain the suit. He has further submitted that Syed Salamat Ali deposed in Title Suit No.57 of 1978 and in that suit, he categorically admitted about the contract entered into with the plaintiff and also the giving of Power of Attorney to him and the receipt of the entire consideration amount of taka 15,90,000˙00. As Syed Salamat Ali never denied to execute and register the sale deed and in the meantime, he died in 1985 and thereafter the plaintiff looked for the whereabouts of his heirs which has been clearly stated in paragraph 9 of the plaint and when he came to know that defendant Nos.1 and 2, the heirs of Syed Salamat Ali, left the country long before and nobody could say anything as to their whereabouts filed the suit giving their last known address in the plaint. In this connection, Mr. Mahmudul Islam referred to paragraph Nos.7, 8 and 9 of the plaint. Mr. Islam has also submitted that the defendant in the written statement did not deny that defendant Nos.1 and 2 are not the son and the daughter of Syed Salamat Ali and PW1 categorically asserted in his deposition that Syed Salamat Ali died leaving behind a son and a daughter, i.e. defendant Nos.1 an 2, but no cross-examination was made to the PW on that fact and such facts clearly attract the provisions of section 13 of the Limitation Act.

20. About the cancellation of the lease agreement Mr. Islam has submitted that it was a *mala fide* action on the part the Government and, in fact, the letter of cancellation of the lease was antedated as in the written statement filed by the Government on 12.05.2004, no such fact was stated. Further the suit having filed on 17.04.2002 with the prayer for declaration of title along with other prayers, the Government could not cancel the lease.

21. Mr. Mainul Hossein, learned Counsel, appearing for the petitioner in C.P. No.2883 of 2013 has submitted that before the High Court Division, the petitioner filed an application for adding him as respondent, but the High Court Division did not dispose of the said application. He has submitted that the petitioner having obtained a decree in Title Suit No.57 of 1978 for specific performance of contract, acquired a right to contest the claim of the plaintiff. Therefore, leave may be granted in his petition to contest the decree passed by the High Court Division.

22. Mr. Mahmudul Islam for the respondent seriously opposed the submission of Mr. Moinul Islam. He has submitted that the decree passed in Title Suit No.57 of 1978 was a nullity inasmuch as the same was obtained in the said suit against a dead person.

23. An application has been also filed by one Ariful Islam, son of late Nazrul Islam to add him as a respondent in C.P. No.1240 of 2013. Mr. Rokonuddin Mahmud submits that since admittedly the applicant is in possession of the suit property, he may be added as a respondent.

24. Mr. Mahmudul Islam opposing the prayer has submitted that the applicant being a tenant under the plaintiff had/has no *locus standi* to contest the claim of the plaintiff and therefore, his prayer for addition of party does not deserve any consideration. An application has been also filed on behalf of the plaintiff-respondent with the prayer to reject the prayer

for addition of party of Ariful Islam. Mr. Islam has referred paragraph Nos.3 and 5 of the said application which are as under:

> "3. That Gharowa Hotel and Restaurant Ltd took monthly lease of a portion of the ground floor of the suit property from the applicant under agreements of lease the latest of which is one dated 6th day of June, 2011 photocopy of which is hereto annexed and marked as Annexure-A. Opposite Party no.1 Ariful Islam executed the agreement of monthly lease as Managing Director of Gharowa Hotel and Restaurant Ltd. The lease period has expired on 31.5.2012.
>
> 5. That a plain reading of the said application for addition of party shows that late Nazrul Islam father of opposite party no.1 entered into the suit property as monthly tenant under the respondent-applicant and ran a restaurant in the name of Gharowa Hotel and Restaurant which later on was converted into a private limited company. Gharowa Hotel and Restaurant Ltd. (Gharowa), which occupies approximately 1478 square feet of the ground floor of suit premises. In the last monthly tenancy agreement with Gharowa Annexure-A (the fact of which was cleverly suppressed by opposite party no.1 in his application for addition of party), Gharowa had committed to vacate the premises by 31st May, 2012 and it was further stated that Gharowa would not seek any further extension of their tenancy agreement under any circumstances."

25. In view of the submissions of the learned Attorney General, Mr. Mahmudul Islam and Mr. Mainul Hossein, the main points to be decided in this petition are whether the plaintiff had cause of action to file the suit and whether his suit was barred by limitation in view of article 113 of the Limitation Act which provides limitation for filing a suit of the instant nature within 3(three) years from the date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that the performance is refused.

26. The submissions made by Mr. Attorney General as noted hereinbefore were very much made before the High Court Division and the High Court Division in an elaborate manner met all the points raised by the learned Attorney General. From the impugned judgment, it appears that the High Court Division relying upon the principle of law enunciated in the case of Bangladesh, represented by the Deputy Commissioner, Pabna and others-Vs-Abdus Sobhan Talukder (Md.) and another 42 DLR (AD) 63, on section 13 of the Limitation Act held that the suit was not barred by limitation. We have gone through the decision and with respect we agree with the view taken therein in respect of the application of section 13 of the Limitation Act. We are not reiterating the principle here as the High Court Division exhaustively quoted in its judgment from that decision. In the facts and circumstances of the case, particularly, the statements made in paragraph Nos.7, 8 and 9 of the plaint as referred by Mr. Mahmudul Islam, the principle of law enunciated in the case of Bangladesh, represented by the Deputy Commissioner, Pabna (supra) is squarely applicable. And we hold that the plaintiff was entitled to get exclusion of the time of the absence of defendant Nos.1 and 2, the heirs of Syed Salamat Ali from Bangladesh and the High Court Division rightly gave the said benefit and held that the suit was not barred by limitation. We further hold that time was not the essence of the contract and with the execution and registration of the general power attorney in favour of the plaintiff by Salamat Ali, the earlier contract dated 06.03.1978 was novated and the High Court Division rightly held so.

27. As regards, the argument of the learned Attorney General that the plaintiff had no cause of action to file the suit, we are of the view that since the original lessee entered into an agreement with the plaintiff to sell the suit property and in part performance of the contract, he was put into the possession of the suit property and admittedly he is in possession thereof and he paid good amount of money being taka 15,90,000.00 in 1978 and after the death of Syed Salamat Ali, his heirs did not execute and register the sale deed, he had every right to file the suit to pray for specific performance of contract.

28. We find substance in the submission of Mr. Mahmudul Islam that cancellation of lease in favour of lessee, Syed Salamat Ali after filing the suit was absolutely *malafide* as in the suit, the Government and its other functionaries concerning the suit property were very much parties and in the suit, the plaintiff prayed for declaration of title to the suit property along with the other reliefs. The suit being pending by no logic, the Government could cancel the lease. We also cannot ignore the submission of Mr. Mahmudul Islam that the cancellation order was an antedated one inasmuch as the defendant Government though filed written statement in the suit on 12.05.2004, did not say the said fact in the written statement.

29. However, like a drowning man catches a straw, the learned Attorney General made a last argument that the suit property having been listed as abandoned property, the suit was barred under the provisions of Ordinance No.54 of 1985. He has filed the Gazette Notification with the application for modification of the order dated 22.04.2013. From a perusal of the said Gazette Notification it appears that although the suit property comprises two holdings, namely, holding Nos. 4 and 5, Motijheel Commercial Area, in the Gazette Notification published on 23rd September, 1986 it appears that it is the property of holding Nos.4 and 21 of Motijheel Government Market which were treated as Abandoned Property. Further admittedly Syed Salamat Ali was in Bangladesh and he owned and managed the property till 1978 when he entered into an agreement to sell the suit property with the plaintiff and since then, it is the plaintiff who is possessing and managing the property, so the question of property being abandoned does not arise at all. To us it appears that the Government did not act *bonafide* in contesting the case of the plaintiff on the plea that the suit property was an Abandoned Property.

30. Lastly, we also find substance in the submission of Mr. Mahmudul Islam that Syed Salamat Ali having constructed a two storied building, there was no necessity to obtain prior permission to enter into the contract to sell the suit property as provided in clause 19 of the lease agreement. And we approve the finding of the High Court Division in that respect.

31. So far as C.P. No. 2883 of 2013 is concerned, we find no substance in the submission of Mr. Mainul Hossain and also in the prayer for addition of party filed by the petitioner inasmuch as after Title Suit No.57 of 1978 abated against Syed Salamat Ali, defendant No.1 by the order of the High Court Division on 11.01.1995 and the same having been affirmed by this Division on 23.06.1996, the plaintiff of Title Suit No.57 of 1978, Nasir Muhammad Khan could not proceed with the suit and the decree obtained by him in the suit, in fact, was a nullity as the same was passed against a dead person.

32. So far as the application for addition of party by one Ariful Islam is concerned, we are of the view that he being an admitted tenant under the plaintiff cannot pray for adding him in the leave petition filed by the Government and the other 3rd party.

33. For the discussion made above, we find no merit in the leave petitions and accordingly, the petitions are dismissed.

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APPELLATE DIVISION

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

CIVIL PETITION FOR LEAVE TO APPEAL NO.1474 of 2015
(From the order dated 12.05.2015 passed by the High Court Division in Civil Revision No.8 of 2015.)

S.A.M.M. Mahbubuddin
...Petitioner

Versus

Laila Fatema
...Respondent

For the Petitioner : Mrs. Fawzia Karim Firoz, Advocate instructed by Shahanara Begum, Advocate-on-Record.

For the Respondent :Mr. Yusuf Hossain Humaiyun, Senior Advocate with Mr. A. M. Aminuddin, Advocate instructed by Mr. Taufique Hossain, Advocate-on-Record.

Date of hearing and judgment : 28.05.2015.

Custody of Minor:
Considering the facts and circumstances- especially the facts that minor S.A.M.M. Zohaibuddin has already attained the age of almost 7 years and he is now residing along with his ailing elder brother in his father's house and is being taken good care of by his father, grandfather and grandmother, we are inclined to allow the prayer of the leave-petitioner to retain the custody of his minor son S.A.M.M. Zohaibuddin till disposal of Family Suit. ...(Para 6)

Judgment

Nazmun Ara Sultana, J:

1. This Civil Petition for Leave to Appeal is directed against the order dated 12.05.2015 passed by the High Court Division in Civil Revision No.8 of 2015 rejecting an application of this leave-petitioner S.A.M.M. Mahbubuddin praying to retain the custody of his minor son S.A.M.M. Zohaibuddin till disposal of Family Suit No.175 of 2010 pending in 5th Court of Additional Assistant Judge, Dhaka.

2. The facts necessary for disposal of this civil petition for leave to appeal, in short, are that the petitioner and the respondent Laila Fatema got themselves married on 21.10.2000 and out of their wedlock two sons were born. But their conjugal life was not happy and ultimately they got separated and the leave-petitioner divorced her also. It has been stated that she has already got herself married again with one Wares Ahmed on 08.09.2009. Their elder son has been residing with the leave-petitioner, but the younger one S.A.M.M. Zohaibuddin was in custody of his mother. The leave-petitioner then filed Family Suit No.175 of 2010 praying for custody of his minor son S.A.M.M. Zohaibuddin which is still pending. Ultimately in Writ Petition No.2966 of 2010 filed by this present leave-petitioner an order was made by the High Court Division allowing the parents of this leave-petitioner to take minor S.A.M.M. Zohaibuddin at 11.00 A.M. and keep him in their custody till 6.00 P.M. everyday which was ultimately affirmed by the Appellate Division in Civil Petition for Leave to Appeal No.400 of 2011 with modification that

the said order will remain in force till disposal of the Family Suit No.175 of 2010. In the meantime, in Family Suit No.175 of 2010, the defendant Laila Fatema prayed for an order for keeping the minor S.A.M.M. Zohaibuddin in the custody of his father for two months which was refused by the courts below but ultimately in Civil Revision No.8 of 2015, the High Court Division, by the order dated 13.01.2014, gave the custody of the minor son to his father-the leave-petitioner for a period of 2 months. While the minor son thus was in the custody of his father-the leave-petitioner by the order of the court this leave-petitioner filed an application before the High Court Division in that Civil Revision No.8 of 2015 praying for retaining the custody of his minor son S.A.M.M. Zohaibuddin till disposal of Family Suit No.175 of 2010, but the High Court Division, by the impugned order, rejected that application on the ground that the dispute with regard to the custody of the minor S.A.M.M. Zohaibuddin has already been decided by the Appellate Division in Civil Petition for Leave to Appeal No.400 of 2011.

3. Being aggrieved by this order of the High Court Division the father of the minor has preferred this civil petition for leave to appeal.

4. Mrs. Fawzia Karim Firoze, the learned Advocate appearing for the leave-petitioner has made submissions to the effect that the minor S.A.M.M. Zohaibuddin is quite happy with living with his father and the elder brother, who is now sick due to mental agony for the separation of his parents and that having his younger brother with him he is also happy now and that the grandfather and grandmother of these minor sons also have been residing with them and taking good care of the minors. Mrs. Fawzia Karim Firoze has made submissions also to the effect that under the changed circumstances, where the mother of the minor herself kept the minor son in the custody of his father and where this minor son and also his elder brother are very much happy residing together with their father and grandfather and grandmother in the same house, they may be allowed to remain as such for the sake of their own welfare. Mrs. Fawzia Karim has made submissions to the effect also that the minor S.A.M.M. Zohaibuddin has attained the age of about 7 years by now and considering the changed facts and circumstances he may now be allowed to reside in his father's house under his custody till disposal of the family suit.

5. We have also heard Mr. Yusuf Hossain Humaiyun and Mr. A. M. Aminuddin, the learned Counsel for the respondents Lila Fatema.

6. Considering the facts and circumstances- especially the facts that minor S.A.M.M. Zohaibuddin has already attained the age of almost 7 years and he is now residing along with his ailing elder brother in his father's house and is being taken good care of by his father, grandfather and grandmother, we are inclined to allow the prayer of the leave-petitioner to retain the custody of his minor son S.A.M.M. Zohaibuddin till disposal of Family Suit No.175 of 2010 pending in the 5th Court of Additional Assistant Judge, Dhaka.

7. So, minor S.A.M.M. Zohaibuddin will remain in the custody of his father-the leave-petitioner till disposal of Family Suit No.175 of 2010 pending in the 5th Court of Additional Assistant Judge, Dhaka. However, the respondent Laila Fatema-the mother of the minor shall have liberty to take the minor S.A.M.M. Zohaibuddin at 10.00 A.M. on Friday and keep him in her custody till 6.00 P.M. of Saturday every week till disposal of Family Suit No.175 of 2010.

8. The previous order of this Division dated 26.05.2011 passed in Civil Petition for Leave to Appeal No.400 of 2011 thus stands modified.

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APPELLATE DIVISION

PRESENT

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

CIVIL APPEAL NO. 15 of 2014
(From the judgment and order dated 21.07.2008 passed by the High Court Division in Civil Revision No. 3850 of 1998)

Israil Kha and others : .....Appellants

-Versus-

Syed Anwar Hossain and others : .....Respondents

For the Appellants	:	Mr. Abdul Quiyum, Senior Advocate (Mr. Ali Reza, Advocate with him), instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
For the Respondents	:	Mr. A. J. Mohammad Ali, Senior Advocate (Mr. M. Khaled Ahmed, Advocate with him) instructed by Mr. Md. Aziz Taufique, Advocate-on-Record.
Date of Hearing	:	The 10th November, 2015
Date of Judgment	:	The 10th November, 2015

If an under-raiyat has been allowed to continue occupation after expiry of his term of lease, his tenancy can only be terminated in accordance with the provisions of the Bengal Tenancy Act. … (Para 14)

The plaintiffs did not take any step to get back the land of plot No.4 after expiry of the period of lease mentioned in the kabuliyat. Defendant Nos. 1 and 2, the under-raiyat, continued their possession in suit plot No.4 as lawful tenants under the plaintiffs by holding over and after acquisition of rent receiving interest, they became tenants directly under the Government. … (Para 15)

Judgment

Syed Mahmud Hossain, J:

1. This appeal, by leave, is directed against the judgment and order dated 21.07.2008 passed by the learned Single Judge of the High Court Division in Civil Revision No. 3850 of

1998 making the Rule absolute and setting aside the judgment and decree dated 09.11.1997 passed the then learned Subordinate Judge, Second Court, Moulvi Bazar in Title Appeal No.175 of 1986 allowing the appeal and reversing the judgment and decree dated 31.08.1986 passed by the then Upazila Munsif, Kulaura, Moulvi Bazar in Title Suit No.354 of 1983 decreeing the suit.

2. The facts, leading to the filing of this appeal, in brief, are:

The respondents as the plaintiffs filed Title Suit No.354 of 1983 for declaration of title and recovery of khas possession in the Court of the then Munsif, Kulaura, Moulvi Bazar. The plaintiffs' case, in short, is that the suit land belonged to their predecessor. The plaintiffs have been possessing the suit land as khas khamar and graveyard. On Chaitra, 1378 B.S., the plaintiffs went to the local Tahsil Office for payment of rent and came to know that the suit land appertaining to plot No.1/2 was recorded in the names of the defendants. Having learnt the above wrong record, the plaintiffs filed Title Suit No.112 of 1974 but the plaint of the suit was returned to the plaintiffs. After that, on Baishak,1388 B.S., the defendants in collusion with each other dispossessed the plaintiffs illegally from plot Nos.1,2 and 4 of the suit land. After that, the plaintiffs went to the local Tahsil Office and came to know that disputed plot Nos.2 and 3 were wrongly recorded in the names of defendant Nos.1 and 2 and plot No.4 was recorded in the name of defendant No.3. The plaintiffs approached the defendants for correction of record of right and recovery of khas possession of the suit land in plot Nos.1, 2 and 4 but the defendants denied the claim made by the plaintiffs. Hence the plaintiffs have filed this suit for declaration of title and recovery of khas possession of the suit plot Nos.1, 2 and 4.

3. The defendants contested the suit by filing written statement denying the material statements made in the plaint. Their case, in short, is that the plaintiffs were landlord (Mirasdar),who used to settle land in favour of different persons. The suit plot No.4 was settled in favour of Md. Maznu by a registered kabuliyat by plaintiff No.1 on 1st Baishak,1350 B.S. After that, Md. Maznu sold the said property in favour of defendant Nos.1 and 2 by a registered deed of sale dated 04.03.1949. Suit plot Nos.2 and 3 were owned and possessed by the plaintiff and his 2 sisters, Sundani Bibi and Dudu Bibi, who sold the same to Md. Salim in Baishak,1353 B.S. After that, Md. Salim also sold 24 decimals of land in favour of defendant Nos.1 and 2 by a registered deed of sale dated 13.04.1946 and the plaintiff had the full knowledge about that transfer. Thus the defendants became the owners and possessors of the suit land. However, the plaintiffs out of ill motive filed Title Suit No.63 of 1954, which was dismissed on contest. After that, Title Appeal No.64 of 1957 filed by the plaintiffs before the learned District Judge, Sylhet, was also dismissed. As such, the defendants-petitioners prayed for dismissal of the suit.

4. The trial Court after hearing the parties by its judgment and order dated 31.08.1986 decreed the suit. Against the judgment and decree passed by the trial Court, the defendants preferred Title Appeal No.175 of 1986 before the learned District Judge, Moulvibazar. On transfer, the appeal was heard and disposed of by the then learned Subordinate Judge, Second Court, Moulvibazar, who by his judgment and order dated 30.10.1997 allowed the appeal setting aside the judgment and decree of the trial Court.

5. Being aggrieved by and dissatisfied with judgment and decree of the appellate Court, the plaintiffs filed a revisional application before the High Court Division and obtained Rule in Civil Revision No. 3850 of 1998. After hearing the parties, the learned Single Judge of the High Court Division, by the judgment and order dated 21.07.2008 made the Rule absolute.

6. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the leave-petitioners moved this Division by filing Civil Petition for Leave to Appeal Nos.2337 of 2010, in which, leave was granted on 24.11.2013, resulting in Civil Appeal No.15 of 2014.

7. Mr. Abdul Quiyum, learned Senior Advocate, appearing on behalf of the appellants, submits that if an under-raiyat has been allowed to continue occupation after expiry of his term of lease, his tenancy can only be terminated in accordance with Bengal Tenancy Act and that in the case in hand, the defendants continued as lawful tenants by holding over and that after acquisition of rent receiving interest under the State Acquisition and Tenancy Act, the defendants became tenants directly under the Government and that the High Court Division failed to consider this aspect of the case and as such, the impugned judgment should be set aside. He further submits that the defendants have been in possession of the suit land for more than 40 years and that the plaintiffs had failed to prove the story of the possession followed by the dispossession by adducing evidence and that the suit has been filed within the statutory period of limitation and as such, the impugned judgment should be set aside.

8. Mr. A. J. Mohammad Ali, learned Senior Advocate, appearing on behalf of the plaintiffs, on the other hand, supports the impugned judgment delivered by the High Court Division.

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

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

> "The appellate Court being the last Court of fact, the High Court Division committed error in interfering with the findings of the appellate Court in the absence of any infirmity in those findings.
>
> Even if an under-raiyat has been allowed to continue occupation after expiry of his term of lease, his tenancy can only be terminated in accordance with the Bengal Tenancy Act [(1954) 8 DLR 366, 6 DLR (1952)652] and that in the case in hand, the defendants continued as lawful tenant by holding over and after acquisition of rent receiving interest under the State Acquisition and Tenancy Act, the defendants-petitioners became tenants directly under the Government and that the High Court Division failed to consider this aspect of the case.
>
> The High Court Division failed to consider that the rent receipts and record of rights have got evidentiary value and that the defendants-petitioners had been possessing the suit land for more than 40 years within the knowledge of the plaintiffs-respondents and as such, the impugned judgment should be set aside.
>
> The defendants-petitioners have been possessing the suit land for more than 40 years and the plaintiffs-respondents had failed to prove the story of possession followed by dispossession by adducing evidence and that the suit has been filed within the statutory period of limitation and as such, the impugned judgment should be set aside.
>
> The High Court Division committed error in failing to reverse the finding of the appellate Court that the plaintiffs earlier filed Title Suit No.63 of 1954 for declaration

of title in respect of 4 plots of the suit land and that the said suit was dismissed after hearing both the sides and that the present suit being Title Suit No.63 of 1954 in respect of the suit land is barred by res judicata as well as limitation and as such, the impugned judgment should be set aside.

11. The plaintiffs-respondents claimed that they are the owners of the suit land by way of inheritance. The plaintiffs further claimed that they went to the Tahsil Office for payment of rent and came to know that the suit land appertaining to plot No.1/2 was recorded in the names of the defendants. On Baishak,1388 B.S. The defendants in collusion with each other dispossessed the plaintiffs illegally from the suit plot Nos.1, 2 and 4 of the suit land. The defendants contended that that the plaintiffs were the landlords (Mirasdars), who used to settle land in favour of different persons. Plaintiff No.1 settled suit plot No.4 to Md. Maznu by a registered kabuliyat dated 01.01.1340 B.S. After that, Md. Maznu sold the said property in favour of defendant Nos.1 and 2 by a registered deed of sale dated 04.03.1949. Suit plot Nos.2 and 3 were owned and possessed by the plaintiff and his 2 sisters, Sundani Bibi and Dudu Bibi, who sold the same to Md. Salim in Baishak,1353 B.S. After that, Md. Salim also sold 24 decimals of land in favour of defendant Nos.1 and 2 by a registered deed of sale dated 13.04.1946. The plaintiff filed Title Suit No.63 of 1954 which was dismissed on contest and Title Appeal No.64 of 1957 filed by the plaintiffs before the learned District Judge, Sylhet, was also dismissed.

12. Plaintiff No.1 settled suit plot No.4 to Md. Maznu by a registered kabuliyat dated 1st Baishak,1340 B.S. (exhibit-B) for a period of 8 years. Before expiry of 8 years, Md. Maznu sold the suit land to defendant Nos.1 and 2 by a registered deed of sale dated 04.04.1949 (Exhibit-C). The trial Court came to a finding that before expiry of the tenure of lease Md. Maznu sold the suit land to defendant Nos.1 and 2 and that Md. Maznu did not have the right to sell the land of suit plot No.4 to defendant Nos.1 and 2 violating the terms of the kabuliyat. The appellate Court, however, came to the finding that defendant Nos.1 and 2 acquired title to the land of suit plot No.4 by way of holding over.

13. The plaintiffs did not state anything in the plaint about the registered kabuliyat dated 1st Baishak, 1350 B.S. which was for a period of 8 years. Admittedly, before expiry of the tenure mentioned in the kabuliyat Md. Maznu sold the land of suit plot No.4 to defendant Nos.1 and 2. This purchase is of course subject to right of plaintiff No.1 to get the property back. Since the kabuliyat was for a period of 8 years, the plaintiffs could take step to get back the land of plot No.4 from defendant Nos.1 and 2 soon after expiry of the tenure of the kabuliyat. There is even no statement in the plaint that defendant Nos.1 and 2 surrendered possession of suit plot No.4 to the plaintiffs after expiry of the period of lease. By the purchase dated 04.03.1949, defendant Nos.1 and 2 became tenants under the plaintiffs. After expiry of the tenure of lease defendant Nos.1 and 2 remained as lawful tenants under the plaintiffs by holding over.

14. In this connection reliance may be placed on the case of ***Jagabandu Basak and others Vs. Karim Mondal and others, (1956) 8 DLR 366,*** in which, it has been held that if an under-raiyat has been allowed to continue occupation after expiry of his term of lease, his tenancy can only be terminated in accordance with the provisions of the Bengal Tenancy Act.

15. We have already found that the plaintiffs did not take any step to get back the land of plot No.4 after expiry of the period of lease mentioned in the kabuliyat. Defendant Nos.1 and 2, the under-raiyat, continued their possession in suit plot No.4 as lawful tenants under the

plaintiffs by holding over and after acquisition of rent receiving interest, they became tenants directly under the Government.

16. Reliance may also be placed on the case of ***Wswini Kumar Poddar and others Vs. Taraq Chandra Rajbangish and others, (1954) 6 DLR 652,*** in which, it has been held that the provisions of section 116 of the Transfer of Property Act are applicable where the tenant remains in possession of the lease-hold property after determination of the lease granted to the tenant and his continuing possession is assented to by the landlord. A tenant, who surrendered possession, does not come within the meaning of the words "remains in possession" of this section.

17. In the case in hand, the plaintiff could not make out any case that after expiry of the tenure of lease defendant Nos.1 and 2 surrendered the land of suit plot No.4 to the plaintiffs. Therefore, defendant Nos.1 and 2 continued their possession in the land of suit plot No.4 and became tenant under the Government after wholesale acquisition of superior interest by the Government.

18. Suit plot Nos.2 and 3 were sold by plaintiff No.1 and his two sisters to Md. Salim, who sold 24 decimals of land in favour of defendant Nos.1 and 2 by a registered deed of sale dated 13.04.1946 A.D.

19. From the discussion made above, it is crystal clear that the plaintiffs miserably failed to prove their title to the suit land. Admittedly, the plaintiffs filed Title Suit No.63 of 1954 for declaration of title in respect of the suit land which was dismissed. Subsequently, the plaintiffs filed Title Appeal No.64 of 1957 before the learned District Judge, Sylhet, which was also dismissed. Therefore, it appears that instant Title Suit No.112 of 1972 filed by the plaintiffs is hopelessly barred by limitation.

20. The defendants have produced the records of right standing in their names in respect of the suit land and also the rent receipt showing payment of rent to the Government. Having gone through the evidence of the witnesses, we find that the defendants had been in possession of the suit land for more than 40 years within the knowledge of the plaintiffs. The plaintiffs-respondents failed to prove the story of their alleged possession followed by dispossession by adducing convincing evidence and they also failed to prove that the suit has been filed within the statutory period of limitation and as such, the suit was barred by limitation on this score also.

21. In the light of the findings made before, we find substance in this appeal.

22. Accordingly, this appeal is allowed without any order as to costs and the impugned judgment delivered by the High Court Division is set aside and the judgment and decree passed by the appellate Court is restored.

8 SCOB [2016] AD 141

APPELLATE DIVISION

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

CIVIL PETITION FOR LEAVE TO APPEAL NO. 2735 of 2012
(From the order dated 2nd of August, 2012 passed by the Administrative Appellate Tribunal in A. A. T. Appeal No.49 of 2011)

The Government of Bangladesh and others ... Petitioners

Versus

Ranjit Krishna Mazumder ... Respondent

For the Petitioners :Mr. Biswajit Deb Nath
Deputy Attorney General,
instructed by
Mr. B. Hossain
Advocate-on-Record

The Respondents :Mr. A.M. Amin Uddin,
instructed by,
Mrs. Sufia Khatun,
Advocate-on-Record

Date of hearing & judgement :The 15th of March, 2015

Acid Aparadh Daman Ain, 2002
Section 13:
The learned Judge of the Tribunal acted in accordance with the law in bringing the matter to the notice of the authority concerned in accordance with section 13 of the Acid Aparadh Daman Ain, 2002. We also note that the learned Judge of the Tribunal observed that all three Investigating Officers were negligent in their duties and a direction to the authority concerned was regarding all three of the Investigating Officers of that case. We find from the order of the Administrative Appellate Tribunal that it was observed that although no action was taken against the first Investigating Officer, namely Md. Akram Hossain and third Investigating Officer, Md. Mahfuzur Rahman for neglecting their duties, a departmental proceeding was started against the respondent Ranjit Krishna Mazumder, who was the second Investigating Officer. The Administrative Appellate Tribunal held that this was a discriminatory act and the respondent's application before the Administrative Tribunal was rightly allowed.

…(Para 11)

Judgment

Muhammad Imman Ali, J:

1. This civil petition for leave to appeal is directed against the order dated 02.08.2012 passed by the Administrative Appellate Tribunal, Dhaka in A.A.T. Appeal No. 49 of 2011 dismissing the appeal, thereby affirming the order dated 29.12.2010 passed by the Administrative Tribunal, Barisal, in A.T. Case No. 04 of 2010.

2. Facts of the case, in brief, are that while the respondent was working as a Sub-Inspector of Police he was entrusted with investigation of a case and ultimately he submitted final report. The informant of that case took objection against the said report and the trial Court took cognizance and after conclusion of trial convicted 7 FIR named accused persons and they were sentenced to suffer rigorous imprisonment for 14 years and to pay a fine of Tk. 20,000/- each, in default, to suffer rigorous imprisonment of 6(six) months more. The learned Judge made a remark against the petitioner for submitting false investigation report with intent to save the accused persons for illegal gain. The petitioner was charged under Rule 861 of the Police Regulations, Bengal (P.R.B.) and after completing a departmental proceeding, major penalty of "Black Mark" was imposed on 17.08.2009.

3. Being aggrieved by the said order of "Black Mark" dated 08.09.2009 the respondent filed a departmental appeal, but the authority did not dispose of the departmental appeal within six months. Thereafter, the respondent filed A.T. Case No. 4 of 2010 before the Administrative Tribunal, Barisal for setting aside the impugned order.

4. The petitioners contested the case by filing a written statement denying all the allegations made in the petition contending, inter alia, that the respondent did not properly investigate the case, and he was found by the Acid Oparadh Daman Tribunal to have been negligent in the investigation carried out in that case and in submitting a final report finding that the allegation was false. It was specifically pointed out that the respondent, who was the second Investigating Officer, only recorded the statements of three witnesses and did not investigate into any other aspect of the case and submitted a final report following the footsteps of his predecessor which was tantamount to neglect of his duties.

5. The Administrative Tribunal upon hearing the parties allowed the case of the respondent and set aside the order of major penalty of "Black Mark" dated 17.08.2009 passed by the petitioner No. 4, and a direction was given to the petitioners to take necessary steps for noting in his service book accordingly and to take necessary steps according to the rules of P.R.B to make the respondent permanent in his service as S.I.

6. Being aggrieved by the order of the Administrative Tribunal, the petitioners filed A.A.T. Appeal No. 49 of 2011 before the Administrative Appellate Tribunal, Dhaka, which upon hearing the parties concerned, was dismissed. Hence, the petitioners have filed the instant civil petition for leave to appeal.

7. Mr. Biswajit Deb Nath, learned Deputy Attorney General appearing on behalf of the petitioners submits that the Administrative Appellate Tribunal erred in law in dismissing the appeal in a slip-shod manner without properly discussing the respective case of the parties relying on the finding of the Administrative Tribunal. He further submits that the Acid Aparadh Daman Tribunal having clearly found that the respondent was guilty of neglecting

his duties, rightly brought the matter to the notice of his superior authorities in accordance with the provisions of Acid Aparadh Daman Ain.

8. Mr. A.M. Amin Uddin, learned Advocate appearing for the respondent made submissions in support of the order of the Administrative Appellate Tribunal.

9. We have considered the submissions of the learned Advocates for the parties concerned, perused the impugned order as well as the evidence and materials on record.

10. The Acid Aparadh Daman Case No. 01 of 2007 ended in conviction of the accused who preferred Criminal Appeal No. 3863 of 2008, which is now pending before the High Court Division. We have taken the opportunity to call and peruse the records of the said criminal appeal and have gone through the judgement of Acid Aparadh Daman Tribunal. We find from the said judgement that the learned Judge observed as follows:

> "" ¢L¿ºAœ j¡j¡m¡l ac¿L¡l£ LjLa¡Nƒel acƒ¿l ¢hou fk¡ƒm¡Qe¡u ®cM¡ k¡u ®k, Eš² ac¿L¡l£ LjLa¡Ne j¡j¡m¡l acƒ¿l fƒhq Eq¡l ¢pÜ¡¿ ¢Ùl L¢lu¡ ac¿ L¢lu¡ƒRez j¡j¡m¡ acƒ¿l hÉ¡f¡ƒl ac¿L¡l£ LjLa¡Ne H dlƒZl jƒe¡i¡h ®f¡oe L¢lu¡ a¡q¡ƒদের ইচ্ছা মা¢gL J jeNs¡ ac¿ L¢lƒm pjdlZ j¡eo eÉ¡u ¢hQ¡ƒll Bn¡ L¢lƒa f¡ƒl e¡z HC j¡j¡m¡l ac¿L¡l£ LjLa¡NZ AaÉ¿ A¢i ‘ a¡ pÇfæ qJu¡ pƒaJ a¡q¡ƒcl LaL Aœ ØfnL¡al j¡j¡m¡¢Vl ac¿ pÇf¢La c¡¢ua f¡mƒel ¢hou¢V ¢hØjuLl! HdlƒZl AhÙ¡ Q¢mƒa b¡¢Lƒm pjd¡lZ j¡eo BCe J ¢hQ¡l hÉhÙ¡l Efl BÙ¡ q¡l¡Cu¡ ®g¢mƒhz k¡q¡ ®cn J S¡a£l SeÉ j‰mSeL euz Hja¡hÙ¡u, Aœ j¡j¡m¡l ac¿ pÇf¢La ¢hou Edae Lafƒrl ®N¡Q£ia qJu¡ BhnÉL h¢mu¡ B¢j jƒe L¢lz Hja¡hÙ¡u, l¡ƒul Ae¢mƒf A¡C,¢S,¢f, Y¡L¡ J ¢X, BC, ¢S, h¢ln¡m hl¡hƒl ®fËZ Ll¡l ¢pÜ¡¿ ®eJu¡ ®Nm" *(*underlining added*)*

11. It is clear, therefore, that the learned Judge of the Tribunal acted in accordance with the law in bringing the matter to the notice of the authority concerned in accordance with section 13 of the Acid Aparadh Daman Ain, 2002. We also note that the learned Judge of the Tribunal observed that all three Investigating Officers were negligent in their duties and a direction to the authority concerned was regarding all three of the Investigating Officers of that case. We find from the order of the Administrative Appellate Tribunal that it was observed that although no action was taken against the first Investigating Officer, namely Md. Akram Hossain and third Investigating Officer, Md. Mahfuzur Rahman for neglecting their duties, a departmental proceeding was started against the respondent Ranjit Krishna Mazumder, who was the second Investigating Officer. The Administrative Appellate Tribunal held that this was a discriminatory act and the respondent's application before the Administrative Tribunal was rightly allowed.

12. In the facts and circumstances delailed above, we do not find any illegality or infirmity in the decision arrived at by the Administrative Appellate Tribunal. Evidently there was discrimination practiced by the petitioners in taking departmental action against the respondent alone when the Acid Aparadh Daman Tribunal highlighted neglect of duties of all three Investigating Officers, who were all on the same footing. The impugned order does not call for any interference by this Division.

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

8 SCOB [2016] AD 144

APPELLATE DIVISION

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

CRIMINAL APPEAL NO.01 OF 2013 WITH CRIMINAL APPEAL NO. 04 OF 2014 & CRIMINAL PETITION NO.305 OF 2014.
(From the judgment and order dated 11.10.2009, 27.10.2011 and 08.02.2012 passed by the High Court Division in Criminal Miscellaneous Case No.1839 of 2009, 23071 of 2009 and 334 of 2008 respectively)

Anti Corruption Commission: Appellant.
(In all the cases)

Versus

Md. Rezaul Kabir and another : Respondents.
(In Crl.A.No.01/13)

Md. Bazlur Rashid and another : Respondents
(In Crl.A. No.04/14)

A.K.M. Lutfor Rahman & another: Respondents.
(In Crl.P. No.305/12)

For the Appellant: (In Crl.A.No.01/13) — Mr. A.K.M. Fazlul Haque, Adv., instructed by Mrs. Mahmuda Begum, Advocate-on-Record.

For the Appellant: (In Crl.A.No.04/14) — Mr. Khorshed Alam Khan, Adv., instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For the Petitioner: (In Crl.P.No.305/12) — Mr. Khorshed Alam Khan, Adv., instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For the Respondent: (In Crl.A.No.01 /13) — Mr. A.J. Mohammad Ali, Senior Advocate, , instructed by Mr. Md. Abu Siddique, Advocate-on-Record.

For the Respondent: (In Crl.A. No.04/14) — Mr. Md. Nurul Islam Sujan, Adv., instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Respondent: (In Crl.P.No.305/12) — Mr. Subrata Shaha, Adv., instructed by Md. Nawab Ali, Advocate-on-Record.

Date of hearing and judgment : 03-11-2015

Section 161 of the Penal Code, 1860
read with Section 5(2) of the Prevention of Corruption Act, 1947
And
Section 561A of the Code of Criminal Procedure, 1898
And
Durnity Daman Commission Bidhimala, 2007
Rule 16:
A proceeding cannot be quashed depending on alleged procedural error in the method of collection of evidence to be adduced and used. The High Court Division failed to distinguish the allegations of demands, acceptance and attempts to accept gratifications and those with the procedure to collect evidence to substantiate allegations of acceptance

and attempts to accept gratifications or demands, thereby, erroneously quashed the proceedings. ...(Para 12)

Judgment

Hasan Foez Siddique, J:

1. The delay in filing Criminal Petition for leave to Appeal No.305 of 2012 is condoned.

2. Criminal Appeal No.01 of 2013, Criminal Appeal No.04 of 2014 and Criminal Petition for Leave to Appeal No.305 of 2012 have been heard together and they are being disposed of by this common judgment since the points for adjudication of all the three cases are identical.

3. In Criminal Appeal No.04 of 2014, the respondent Md. Bazlur Rashid filed an application under Section 561A of the Code of Criminal Procedure (the Code) in the High Court Division for quashing the proceeding of G.R. Case No.331 of 2008 arising out of Thakurgaon Police Station Case No.01 dated 03.06.2008 under Section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). Facts, in a nutshell of this case, are that the respondent demanded tk.5000/- from the informant Abdur Rohman as bribe to prepare khatian in his name in respect of the land measuring an area of 2.28 acres recorded in Khatian No.383 of Kalishaguri Mouza. The informant, promising him to pay taka 2500/-, informed the same to the members of task force, Thakurgaon camp. Thereafter, the members of the taskforce, laying trap, caught Md. Bazlur Rashid, the then Sub- Assistant Settlement Officer, Thakurgaon red handed at the time of receiving those money. On such allegation, the instant proceeding was initiated.

4. In Criminal Appeal No.01 of 2013, the respondent Md. Rezaul Kabir filed an application under Section 561A of the Code in the High Court Division challenging the proceeding of Special Case No.01 of 2009 arising out of Bhaluka Model Police Station Case No.25 dated 18.07.2007 under Section 161 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). Facts of the case, in short, are that one Ruhul Quddus Khan, S.I. of Police of Bhaluka Model Police Station lodged a First Information Report, stating that the respondent Md. Rezaul Kabir, who was the then Upozila Nirbahi Officer, Bhaluka Upazila, demanding taka 4,00,000/- as bribe, received taka 10,000/- from Mosharraf Hossain and, thereafter, at the time of receiving taka 49,500/- from said Md. Mosharraf Hossain, the members of the Joint Forces including the informant, that is , trapping party caught him red handed and seized the said money.

5. Facts of the Criminal Petition for Leave to Appeal No.305 of 2012, in short, were that the informant Md. Sona Miah lodged a First Information Report against the respondent A.K.M. Lutfor Rahman, the then Upazilla Nirbahi Officer, Habigonj under Section 161 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947) stating that demanding taka 32000/- as bribe respondent A.K.M. Lutfor Rahman received taka 20,000/- from the informant. Thereafter, at the time of receiving the rest amount of taka 12,000/- the members of task force caught him red handed. On such allegation, the instant proceeding was initiated.

6. The High Court Division quashed the proceedings on the ground that before laying those traps, the members of the trapping parties did not take any permission from the Commission or the Commissioner who was in-charge of investigation or its designed officers. Against the judgment and orders of the High Court Division, the Anti-Corruption Commission has filed these appeals and petition.

7. Mr. Khurshid Alam Khan, learned Counsel for the A.C.C., submits that the accused respondents demanding gratifications, received considerable amount or attempted to accept the same. In order to collect evidence of said demands or payments of gratifications, the trap was lounched, which is a method of collecting evidence, to connect the accused with the offence, the High Court Division erred in law in quashing the proceedings relying upon the process of collecting evidence holding that the same was not made following the law.

8. The learned Counsel for the respondents of all the cases submits that since before laying traps the trapping parties did not follow the provisions of “Bidhi” 16 of Durnity Daman

Commission Bidhimala, 2007 (hereinafter referred as Rules), the High Court Division rightly quashed the proceedings.

9. The relevant provision of the Rules for laying trap is as follows:

*Ò16| dvù gvgjv (*Trape case*) | - (1) `vwqZ cwZ‡iv‡ai wbwg‡Ë AvB‡bi Zdwmjf¤^ Aciv‡a RwoZ †Kvb e¨w³ ev e¨w³eM‡K nv‡Zbv‡Z aZ¨ Kwievi D‡Ï‡k¨ Z`‡šÍ*র দায়িত্বপ্রাপ্ত কমিশনার এর অনুমোদনক্রমে তৎকর্তৃক *¶gZvcwß KgKZv dvù gvgjv (*Trape case*) c¯Z Kwi‡Z ev cwiPvjbv Kwi‡Z cwi‡eb|*

(২) ফাঁদ মামলা তদন্ত কার্যক্রম কেবল তদন্তে*i `wqZcwß Kwgkbvi ev Z`KZK.¶gZvcwß Kwgk‡bi cwiPvjK c`gh`vi wb‡¤ b‡nb Ggb GKRb KgKZv KZK.m¤úb Kwi‡Z nB‡e| Ó*

10. The moot question in these cases, is that, whether prima facie case against the accused respondents that they had received or agreed to receive or attempted to accept from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 161 of the Penal Code, had been made out or not in view of the materials on records. In order to decide the cases the Court will consider whether (i) the respondents were public servant at the relevant times; (ii)they accepted or obtained or attempted to obtain gratifications other than legal remuneration; and (iii) those gratifications were accepted or attempted to accept by corrupt or illegal means or by otherwise abusing their position as a public servant or not.

11. The informant of the respective cases brought specific allegations against respondents that they accepted or demanded or attempted to accept illegal gratifications thereby, committed offence as alleged in the F.I.R. In support of the allegations, they narrated the facts of laying traps. It appears from the F.I.R. of all the three cases that there are specific allegations of accepting or agreement of accepting gratifications by accused respondents who are public servants. If a public servant, by corrupt or illegal means or by otherwise abusing his position as a public servant obtained for himself or for any other person any valuable thing or pecuniary advantage he would be guilty of criminal misconduct. The contents of the F.I.R. of each case, other facts and circumstances disclosed the elements of offences alleged and those offences had been committed even before laying traps. Without taking into consideration whether the prima-facie cases against the accused respondents had been made out or not in view of the facts and circumstances apparent from the F.I.R., charge-sheet and other materials, the High Court Division quashed the proceedings only on the ground that before making traps, the members of trapping parties did not take prior permission from the Anti-Corruption Commission or that the members of the trapping parties were not Commissioner-in-Charge of investigation or its designated officer empowered by the Commission inasmuch as laying a trap is a device of collecting evidence against bribe recipient. It is the functions of the Court to examine the reliability of evidence collected by way of trap after recording the evidence. The trapping party had followed the relevant Rules at the time laying trap or not or in other words, pre-arranged raid/trap carries any evidentiary value or not for non-compliance of procedural formalities before laying traps should be considered by the Courts after recording evidence along with other evidence. The Court may or may not accept the evidence of decoy witness considering the facts, circumstances, the procedure to be followed for laying traps and that the officials laying traps were designated or not. There may be other reliable evidence in the hand of prosecution against the respondents to connect with the offence. In two cases the allegations are that the accused respondents accepted considerable amounts as gratifications before laying traps. Accept means to take or receive with a consenting mind. Obviously such a consent can be established not only leading evidence of prior agreement but from the circumstances surrounding the transaction itself.

12. A proceeding cannot be quashed depending on alleged procedural error in the method of collection of evidence to be adduced and used. The High Court Division failed to distinguish the allegations of demands, acceptance and attempts to accept gratifications and those with the procedure to collect evidence to substantiate allegations of acceptance and attempts to accept gratifications or demands, thereby, erroneously quashed the proceedings.

13. Accordingly, we find the substance in the appeal and the criminal petition.

14. Consequently, the Criminal Appeal No.01 of 2013 and 04 of 2014 are allowed. The Criminal Petition for Leave to Appeal No.305 14 is disposed of.

15. The judgment and order of the High Court Division dated 27.10.2011 passed in Criminal Miscellaneous Case No.23071 of 2009 arising out of G.R. No.331 of 2008 corresponding to Thakurgaon Police Station Case No.01 dated 03.06.2008, judgment and order dated 11.10.2009 passed by the High Court Division in Criminal Miscellaneous Case No.1839 of 2009 arising out of Special Case No.01 of 2009 corresponding to Bhaluka Model Police Station Case No.25 dated 18.07.2007 pending in the Court of Special Judge, Mymensingh and judgment and order dated 08.02.2012 passed by the High Court Division in Criminal Miscellaneous Case No. 334 of 2008 arising out of Habigonj Police Station Case No.33 dated 30.05.2007 corresponding to G.R. No.165 of 2007 now pending in the Court of Chief Judicial Magistrate Habigonj are set aside.

16.The respective Court is directed to proceed the case in accordance with law.

8 SCOB [2016] HCD 1

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 513 OF 2009

An application under article 102(a)(i) and (ii) of the Constitution of the People's Republic of Bangladesh

Shahjibazar Power Company Limited represented by its Managing Director
…Petitioner

Versus

Government of the People's Republic of Bangladesh represented by the Secretary Ministry of Energy and Mineral Resources and others

…Respondents

Mr. A. M. Aminuddin with
Mr. Munshi Moniruzzaman
…For the petitioner

Mr. S. Rashed Jahangir, DAG
…For respondents No. 4

Mr. M. A. Masum
…For respondents No. 2 & 3

Heard on: 13, 08.2015, 20.08.2015, 23.08.2015, 27.08.2015, 10.09.2015 & 14.09.2015
Judgment on: 3rd November, 2015

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

From the Contract, it transpires that it has not been entered into by BPDB in exercise of statutory power and so, it cannot be said that the contract with the statutory body i. e. BPDB is a statutory contract so, as to invoke writ jurisdiction. Further we have already seen that the contract is not entered into by the Government in the capacity of sovereign. Moreover, the Contract is purely a commercial contract for purchasing electricity on rental basis. Further, the requirements as settled by the Appellate Division in the above referred case are not fulfilled.

For the reasons discussed hereinbefore, we are constrained to hold that the instant writ petition is not maintainable. … (Paras 36 & 37)

Judgment

Zinat Ara, J:

1. In this writ petition under article 102 of the Constitution, the petitioner has challenged the legality of Memo No. বিউবো/শাহাজীবাজার ৮০ মেঃওঃ রেন্টাল/২০০৮/১০৫ dated 25.08.2008 (Annexure-A to the writ petition) issued by respondent No. 5, the Project Director, Sylhet Shahjibazar 80 Metric Watt Rental Power Plant Construction Project, Bangladesh Power Development Board, refusing to issue certificates in favour of the petitioner pursuant to নং এস,আর,ও ৭৩-আইন/৯৭/১৭০০/শুল্ক dated 19.03.1997 (hereinafter referred to as SRO No. 73). The petitioner also sought for a direction upon the respondents to issue certificate to

the petitioner pursuant to SRO No. 73 in the Form Appendix-1 of the said SRO, in respect of the goods imported by the petitioner under Letter of Credit No. 0862208010231 dated 15.04.2008 issued by Islami Bank Limited, Local Office, Dhaka.

Admitted Facts

2. The petitioner, Shahjibazar Power Company Limited, is a private company incorporated under the Companies Act, 1994. The petitioner has been carrying on the business of electricity generation and supply. The petitioner has been incorporated with the object of implementation of a project of Bangladesh Power Development Board for supply of electricity on rental basis. The petitioner is also registered with the Board of Investment and has obtained permission from the Board of Investment to import equipments for the purpose of construction and setting up the Power Generation Station at Shahjibazar, Hobigonj. Respondent No. 2, Bangladesh Power Development Board (hereinafter stated as BPDB) floated tender being No. 436-BPDB/Sec/Dev-75/2005 dated 21.05.2007 for design, financing**,** construction, operation and maintenance of a power plant to be located at Shahjibazar, Hobigonj to provide 80 MW=10% electrical energy. The petitioner participated in the tender and was awarded the tender vide Notification of Award dated 08.11.2007 (Annexure-C to the writ petition). In the Notification of Award, it was stated that the Government has approved the proposal of the petitioner against the tender. The petitioner was then incorporated for implementation of the Notification of Award. Thereafter, a contract of agreement being No. 09695 dated 14.02.2008 (hereinafter stated as the Contract) was executed between the petitioner and BPDB. The petitioner for setting up 80 MW Power Plant had opened five Letters of Credit being No. 086208010482 dated 10.08.2008, 086208010231 dated 15.04.2008, 086208010443 dated 16.07.2008, 086208010364 dated 12.06.2008 and 086208020037 dated 15.04.2008 with the Islami Bank Limited, Local Office, Dhaka (the Bank, in short). The items imported against the above mentioned five Letters of Credit are for the purpose of construction and setting up of the Power Generation Station at Shahjibazar, Hobigonj. After arrival of the goods under the Letter of Credit No. 086208010231 dated 15.04.2008, the petitioner through its Clearing and Forwarding Agent (C&F Agent) submitted Bill of Entry No. C-14734 dated 20.01.2009 for releasing the imported goods and the same was received by the Customs House, Dhaka. The petitioner applied to respondent No. 5 to issue necessary certificate under SRO No. 73 for the purpose of getting exemption from payment of customs duties, value added tax (VAT) and supplementary duties under the said SRO (Annexure-H to the writ petition). On 25.08.2005, respondent No. 5 by Memo No. বিউবো/শাহাজীবাজার ৮০ মেঃওঃ রেন্টাল/২০০৮/১০৫ (the impugned Memo, in short) refused to issue certificate under SRO No. 73 to the petitioner.

Petitioner's Case

3. The equipments under the Letters of Credit were imported for setting up Power Generation Station in private sector and the petitioner has complied with the terms and conditions of SRO No. 73 and for compliance of condition No. 2, it had prayed for issuance of certificate, but respondent No. 5 refused to issue the certificate in its favour under the provisions of SRO No. 73. Respondent No. 2, the Chairman of BPDB is empowered to issue certificate, but the impugned Memo was issued by respondent No. 5 refusing to grant certificate for enjoying the tax exemption benefit by the petitioner. The benefit given as per SRO No. 73 is relating to exemption of taxes and duties at the time of importation of the machineries for setting up private sector power generation stations and the same is general in nature and applicable to all persons dealing with the said sector. But respondent No. 5 refused

to issue certificate on the ground that the petitioner is not entitled to enjoy the benefit of tax exemption under SRO No.73 and that the petitioner has agreed to pay income tax, customs duties and value added tax in the Contract. The petitioner earlier filed Writ Petition No. 6903 of 2008 challenging the same order in the High Court Division, but respondent No.7, the Commissioner of Customs, Customs House, Kurmitola, Dhaka was not made a party to the said writ petition and, as such, the order of the High Court Division was not binding upon respondent No. 7 as the goods were lying within his jurisdiction and hence, this writ petition alleging that the impugned Memo refusing to issue certificate by respondent No. 5 following SRO No. 73 is unlawful.

Respondents No. 2 and 3's Case

4. Respondents No. 2 and 3, the Chairman and the Secretary of BPDB have contested the Rule by filing a joint affidavit-in-opposition as well as a supplementary affidavit-in-opposition controverting the assertions made in the writ petition contending, inter-alia, that establishment of power station on rental basis is a new concept in Bangladesh. When Private Sector Power Generation Policy of Bangladesh (revised in 2004) (hereinafter stated as the Policy) was made, the concept of purchase electric power and energy on rental basis was not in existence. Rental basis power station is established for a particular period. Exemption from corporate income tax for a period of 15 years is given for Independent Power Project (IPP) only, which is established permanently. The petitioner being a power supply company on rental basis is not entitled to enjoy the fiscal facilities as envisaged in the Policy. The Policy or SRO No. 73 is not applicable on rental basis power project. It is applicable for power supply on IPP basis. As the petitioner is not entitled to enjoy the fiscal facilities under the Policy or SRO No. 73 respondent No. 5 lawfully declined to issue certificate in favour of the petitioner. In the Contract bearing No. 09695 dated 14.02.2008, it has been clearly stated that BPDB invited tenders for supply of power on rental basis and SRO No. 73 and the Policy never intended for exemption of VAT, duties and taxes to supply power on rental basis. The petitioner with malafide intention has filed the instant writ petition with an inordinate delay. As per section 17 of the Contract (as amended) the petitioner is liable to pay all taxes and customs duties arising out of the Contract and the petitioner agreed with each and every term and condition as laid down in the Contract without having any objection. Moreover, in clause (5) of the Notification of Award in favour of the petitioner, it has been specifically and clearly mentioned that the petitioner would be liable to pay all income taxes, duties, supplementary duties, VAT, etc arising out of the Contract. Under section 19 of the Contract, it has been clearly provided that in case of any dispute arising out of the Contract, the petitioner's option is to settle the dispute either amicably or through arbitration. The petitioner has not taken any step to settle the dispute by amicable settlement or through arbitration proceeding. As the petitioner failed to avail the equally efficacious alternative remedies available in the Contract dated 14.02.2008, the instant writ petition is not maintainable without exhausting the said forums. The disputes between the petitioner and the respondents are absolutely based on commercial contract and on that count also the writ petition is not maintainable. The grounds set forth in the writ petition are all vague, malafide, false, without basis, unspecified, indefinite and therefore, the Rule is liable to be discharged.

Respondent No. 4's Case

5. Respondent No. 4, the National Board of Revenue, has also contested the Rule by filing a separate affidavit-in-opposition stating that the petitioner was given award for supply, installation and putting into commercial operation of Shahjibazar 80 MW=10% Rental Power Plant for a tenure of 15 years. The tender being No. 436-BPDB /Sec/Dev-75/2005 dated

21.05.2007 was purely a commercial contract/agreement signed between the petitioner and BPDB for supply of power on rental basis at the tariff provided in Schedule-8 of the Contract. The Contract not being a statutory contract between the petitioner and BPDB and the same being a simple commercial contract, the instant writ petition is not maintainable. The Government purchases electricity from two categories of power providers,- (a) Independent Power Producers (IPP), who generates power under the guidelines, terms and conditions of the Policy and (b) Rental Power Producers (RPP), who supply electricity on rental basis. The terms, conditions and the purchase price for electricity are completely different between IPP and RPP. Independent Power Producers enters with an Agreement with the Government to supply electricity on IPP basis holding the guidelines, terms and conditions laid down in the Policy. The power purchase tenure is 15, 22 or 25 years in case of IPP. Under the Policy, each IPP basis electricity provider needs to sign an implementation agreement with the Government that includes agreements on term (period), consent for project, site acquisition, construction and operation, liability and indemnification, import controls, transfer of funds, assignment and security, restrictions on acquisitions and transfers of shares or assets, force majeure, taxation and customs duties, termination and default, rights and obligations of parties upon termination, etc. Under Implementation Agreement, the IPP basis electricity provider has been given exemption from taxation in Bangladesh or withholding of tax by BPDB or GOB on its import from tariff charges. Under the Policy, each IPP basis electricity provider needs to sign a Power Purchase Agreement with the Government that includes the agreement on the price of electricity. IPPs may also need to sign Land Lease Agreement in relevant cases. On the other hand, a RPP is an awarded power supply contract on rental basis for the tenure of 3, 5 or 15 years. The RPPs do not need to fulfill the terms and conditions of the Policy. A RPP does not need to sign Implementation Agreement, Power Purchase Agreement or Land Lease Agreement. Instead of that, a RPP signs a contract/agreement for supply of power on rental basis. The Contract for supply of power on rental basis clearly shows that the power provider is liable to pay the taxes, duties, etc. Since RPP earlier knows that its income from the supply of power is taxable, it quotes the price of power accordingly. In other words, when the Government/BPDB purchases the electricity from a RPP, it pays a higher price than the price that of an IPP of similar location would charge. SRO No. 73 is not applicable to RPP and the petitioner is not required to comply with the Policy or SRO No. 73. Thus, the petitioner is not entitled to get exemption of duties, taxes, VAT, etc. under SRO No. 73. Mere issuance of license by the Bangladesh Energy Regulatory Commission cannot have any effect on the contractual obligation of the taxability of the petitioner. The petitioner submitted and signed a price schedule (Form G-2) as part of the tender document containing that the tenderer (petitioner) would be liable for payment of all income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside and outside Bangladesh before COD and throughout the contract period. Financial incentives provided in the Policy are not applicable for this tender. Under the principle of estoppels by acquiescence or waiver, the petitioner is estopped from claiming tax exemption and any other fiscal incentive provided in the Policy or SRO No. 73. There is an alternative forum for amicable settlement of the disputes in Section 19 of the Contract between BPDB and the petitioner. The petitioner having not exhausting the said forum, the writ petition is not maintainable and the Rule is liable to be discharged.

Affidavit-in-Reply by the Petitioner

6. The petitioner applied for IPP license, but the respondents unlawfully granted RPP license to the petitioner. Thereafter, the petitioner filed Writ Petition No. 8086 of 2009 before the High Court Division challenging issuing of RPP license. Subsequently, as per order of the

High Court Division, the Bangladesh Energy Regulatory Commission (shortly, BERC) has issued an IPP License to the petitioner on 11.01.2012. Since IPP License has been issued to the petitioner, the petitioner is entitled to enjoy all the benefits under SRO No. 73. The Policy provides that the companies generating power would be exempted from payment of customs duties, VAT, supplementary duties, etc. and the petitioner being a power generating company and IPP License having been issued in its favour, it is entitled to get exemption under SRO No. 73. But the respondents unlawfully refused to issue necessary certificate for getting exemption from payment of taxes, etc.

Arguments of the Contending Parties

7. Mr. A. M. Aminuddin, the learned Advocate for the petitioner appearing with Mr. Munshi Moniruzzaman and Mr. Md. Minhaduzzaman, has taken us through the writ petition, the affidavits-in-opposition, the supplementary affidavit-in-opposition, the affidavit-in-reply, SRO No. 73 and the relevant provisions of the Policy and advances before us, the following arguments:-

(1) the petitioner was given RPP License by BERC and the petitioner then filed Writ Petition No. 8086 of 2009 before the High Court Division and as per order of the High Court Division, IPP License was issued in favour of the petitioner on 11.01.2012. As the petitioner holds IPP License, the Policy as well as SRO No. 73 are applicable in its case;

(2) the petitioner has mostly complied with the conditions under the Policy and SRO No. 73;

(3) it is true that the petitioner at the time of submitting tender agreed to pay all the taxes, duties, VAT, etc and in the Notification of Award, there is a provision for payment of taxes, duties, etc. by the petitioner, but under SRO No. 73 the Government exempted all IPP from payment of supplementary duties, taxes, etc. and, as such, the petitioner is entitled to get exemption;

(4) The petitioner agreed to pay taxes, duties, VAT, etc. in its tender, etc. and in the Notification of Award as well as the Contract, similar provision was incorporated. But the Policy and SRO No. 73 would be applicable in the case of the petitioner, as there is no estoppel on applicability of law;

(5) the Chairman of BPDB may issue or refuse issue of a Certificate under SRO No.73. But respondent No. 5, who had no jurisdiction, illegally refused to issue certificate for exemption of taxes, duties, VAT, etc.;

(6) it is true that the Contract was in between the petitioner and BPDB. But BPDB executed the contract with the petitioner with the approval of the Government and therefore, it is to be treated as contract executed by the Government and, as such, the petitioner's contract is to be treated as a statutory Contract. Therefore, the writ petition is maintainable, though the petitioner has not availed the alternative remedies.

8. In support of his arguments, Mr. Aminuddin has relied on the decisions of the following cases:

(i) Bangladesh Bank and others vs. Zafar Ahmed Chowdhury and another, reported in 56 DLR (AD) 175;

(ii) M.A. Hai, Md. Wazed Ali Miah & Md. Moslem Vs. Trading Corporation of Bangladesh, reported in 40 DLR (AD) 206;

(iii) Bangladesh Telecom (Pvt.) Ltd. [In CA No. 73/92] Bangladesh Telegraph and Telephone Board and anr (in CA No.3/93) Vs. Bangladesh T&T Board and ors [in CA No.73/92] Bangladesh Telecom(Pvt.) Ltd. and another [In CA No3/93], reported in 48 DLR(AD) 20;

(iv) Muhammad Amir Khan Vs. Controller of Estate Duty reported in PLR 1961 (SC) 119;

(v) Commissioner of Income Tax, Karachi Vs. Mst. Khatija Begum, Partner, Shakil Impex, Karachi, reported in 17 DLR(SC) 415;

(vi) Grameen Phone Ltd. Vs. Bangladesh Telecommunication Regulatory Commission (BTRC) and others, reported in 18 BLC, 401.

9. Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing on behalf of respondent No. 4, takes us through the notice inviting tenders by BPDB, the Notification of Award, the Contract executed between the petitioner and BPDB, the Policy and SRO No. 73 and put forward the following arguments before us:-

(a) the Government purchases electricity through BPDB from two categories of power providers,- (a) Independent Power Producers (IPP), who generates power under the guidelines, terms and conditions of the Policy and (b) Rental Power Producers (RPP), who supply electricity on rental basis;

(b) the terms, conditions and the purchase price for electricity are completely different between IPP and RPP. Independent Power Producers enters in an Agreement with the Government to generate and supply electricity following the Policy and the tenure being 15, 22 or 25 years. They have to sign an implementation agreement with the Government and there are many requisites for Independent Power Producer (IPP). Under implementation agreement, the IPPs have only been given exemption from payment of taxes or withholding of tax by BPDB or GOB; The Policy and SRO No. 73 are applicable only in their case. The Rental Power Providers (RPP) are awarded power supply contract on rental basis for the tenure of 3, 5 or 15 years. They do not need to fulfill the terms and conditions of the Policy or SRO No. 73;

(c) the Government through BPDB purchases the electricity from the IPP with much lower price than the price of the electricity supplied by RPP as RPP includes cost of taxes, duties, etc at the time of quoting price in its tenders and, as such, the Policy or SRO No. 73 are not applicable in their case;

(d) for the aforesaid reason, in the notice inviting tenders, the tender submitted by the petitioner and the contract of agreement executed between the petitioner and BPDB, there is specific provision relating to the petitioner's liability for payment of duties, taxes, VAT and other charges. The petitioner having submitted the

tender accepting the said liability and in executing the Contract, with the said liability, there is no scope to go beyond the Contract;

(e) the Contract executed between the petitioner and BPDB is not a statutory contract, but purely a commercial contract. Therefore, the instant writ petition is not maintainable;

(f) in section 19 of the Contract, there is specific provision to settle the disputes either amicably or through arbitration. Therefore, there is an equally efficacious alternative remedy for settlement of disputes by amicable settlement or arbitration proceeding. But the petitioner has not availed the said forums and so, the instant writ petition is not maintainable;

(g) only because an IPP License has been issued subsequently, to the petitioner upon direction by the High Court Division, the status of the petitioner as an electricity producer on rental basis has not changed so as to get benefit under SRO No. 73;

(h) the petitioner has not entered with any statutory agreement with the Government and therefore, the question of issuance of certificate by the respondents or to exempt the petitioner from payment of taxes under SRO No. 73 does not arise;

(i) in the facts and circumstances, the Rule is liable to be discharged with costs.

10. In support of his arguments on maintainability, the learned Deputy Attorney General has relied on the decisions in the cases of Sharping Matshajibi Samabaya Samity Ltd. Vs. Bangladesh and others reported in 39 DLR (AD)(1987) 85; Bangladesh Power Development Board and Others vs. Md. Asaduzzaman Sikder reported in 8 MLR (AD) 241; 9 BLD (AD) 63, Ananda Builders Limited vs. BIWTA and others, reported in 57 DLR (AD) 31 and Government of Bangladesh and others vs Excellent Corporation, reported in 20 BLC (AD)(2015) 355.

11. Mr. A. M. Masud, the learned Advocate appearing for respondents No. 2 and 3, takes us through the affidavit-in-opposition, the supplementary affidavit-in-opposition, the decision of the Ministry, the provisions of Section 17 of the Contract, the impugned order, adopts the arguments as advanced by the learned Deputy Attorney General, and adds the following arguments before us:-

(a) as per section 17 of the Contract (as amended) the petitioner shall be entirely responsible for payment of all income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside and outside Bangladesh before COD and throughout the contract period. Applicable income taxes and VAT, charges etc. levied by the GOB shall be deducted at source during payment of invoice;

(b) the petitioner's Chairman and Managing Director having signed the Contract agreeing with the said provision cannot now claim that the petitioner is entitled to get exemption from payment of taxes, etc. under the Policy or SRO No. 73;

(c) in clause (1) of Table-1 of SRO No. 73 it is stipulated that "pw¢nø ¢nÔf প্রতিষ্ঠানকে বাংলাদেশ সরকারের সহিত চুক্তিবদ্ধ হইতে হইবে।" Admittedly, the Contract was between the petitioner and BPDB and not with the Government of

Bangladesh. Therefore, there was no scope for issuance of any certificate under SRO No. 73 by the respondents;

(d) SRO No. 73 is only applicable in case of agreement/contract between the Government and an industrial establishment;

(e) the petitioner is provider of electricity on rental basis and therefore, SRO No. 73 is not applicable in its case;

(f) the petitioner did not submit any application to the Chairman of BPDB for issuance of any certificate, so it cannot now claim that refusal to issue certificate by respondent No.5 is unlawful;

(g) since SRO No. 73 is not applicable in case of the petitioner, the respondents legally refused to issue certificate under the said SRO;

(h) in the facts and circumstances of the case, the Rule is liable to be discharged with costs.

Points for Determination

12. In view of the arguments as advanced by the learned Advocate for the contending parties and the learned Deputy Attorney General, the questions to be determined in this Rule are as under:-

(i) whether the writ petition is maintainable?

(ii) whether the impugned Memo No. বিউবো/শাহাজীবাজার ৮০ মেঃওঃ রেন্টাল/২০০৮/১০৫ dated 25.08.2008 (Annexure-A to the writ petition) issued by respondent No. 5 is lawful?

(iii)whether the respondents may be directed to issue certificate to the petitioner pursuant to SRO No. 73 in respect of its imported goods under Letter of Credit No. No. 080208010231 dated 15.04.2008 issued by the Bank?

Examination of the record

13. We have examined the writ petition, the affidavits-in- opposition, supplementary affidavit filed by respondents No. 2 and 3, affidavit-in-reply and the materials on record. We have also gone through the Contract, the Policy and SRO No. 73. We have further carefully studied the decisions as referred to by the learned Advocates for the contending parties and the learned Deputy Attorney General.

Deliberation of the Court

14. The points for determination are inter-related and so, those are taken up together for consideration for the sake of convenience of discussions.

15. We have already noticed that Contract of Agreement being No. 09695 dated 14.02.2008 was executed between the petitioner and BPDB for generation and supply of electricity on rental basis. From Annexure-K, it transpires that Certificate No. RPP-0010 was

issued in favour of the petitioner with effect from January 8, 2009 under the terms and conditions incorporated in License No. BERC/Power/RPP-0010/8/0008/0541 dated February 19, 2009. Therefore, it is evident that no license was issued by BERC in favour of the petitioner when the machineries were imported by the petitioner. But, subsequently, license was issued in favour of the petitioner on February 19, 2009 with effect from January 8, 2009 i.e. long after opening of the Letters of Credit and submission of Bills of Entry. However, since RPP license was issued to the petitioner, the petitioner filed a writ petition being No. 8086 of 2009 and the High Court Division by judgment dated 03.06.2010 decided that there was no scope to issue Rental Power Producer License to the petitioner and so, directed for issuance of a proper license in favour of the petitioner. Whereupon, IPP license was issued in favour of the petitioner on 11.01.2012.

16. Be that as it may, the admitted fact is that the petitioner is generating and supplying electricity on rental basis. The tender inviting generation and supply of electricity and the Contract for supply of power on rental basis executed on 14th February, 2008 have not been filed by the petitioner. However, at the time of hearing and delivery of judgment, the learned Deputy Attorney General placed the same before us.

17. Section 1 of Tender document is relating to instructions to the Tenderers. Clause 28 of this section reads as under:-

> "28 Taxes and Duties
>
> 28.1 The supplier shall be entirely responsible for all taxes, duties, license fees, and other such levies imposed or incurred until delivery of the contracted goods to the Purchaser."

18. Agreeing with the aforesaid condition as contained in the tender document, the petitioner submitted tender accepting entire responsibilities for all taxes, duties, license fees and other such levies imposed or incurred.

19. In the Tender Price Schedule (Form G-2), clause 6, the Tenderer i.e. the petitioner specifically mentioned as under:-

> "6) **The Tenderer shall be entirely responsible for Payment of all income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred;** inside and outside Bangladesh before COD and throughout the contract period. Applicable income tax and VAT levied by GOB shall be deducted at source during payment of Invoice. **Fiscal incentives provided in Private Power Sector Generation Policy of Bangladesh shall not be applicable for this Tender."**
>
> (Bold, emphasis supplied)

20. Now, the petitioner cannot claim that Private Sector Generation Policy is applicable to it.

21. Section 17 of the Contract reads as under:-

> "17. Taxes
>
> **The Tenderer shall be entirely responsible for payment of all income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside and outside Bangladesh before COD and through out the contract period. Applicable**

income tax & VAT levied by GOB shall be deducted at source during payment of Invoice.

The Company shall import required machinery, equipment etc. as per prevailing import policy of Bangladesh."

(Bold, emphasis given)

22. The relevant portion of SRO No. 73 (Annexure-G to the writ petition) reads as under:-

"টেবিল-১

(১) সংশ্লিষ্ট শিল্প প্রতিষ্ঠানকে বাংলাদেশ সরকারের সহিত চুক্তিবদ্ধ হইতে হইবে।

(২) বিদ্যুৎ জ্বালানী ও খনিজ সম্পদ মন্ত্রণালয়ের অন্যুন যুগ্ম সচিব পদমর্যাদার কর্মকর্তা ডাইরেক্টর জেনারেল (পাওয়ার সেল), পল্লী বিদ্যুতায়ন বোর্ডের চেয়ারম্যান বা বিদ্যুৎ উন্নয়ন বোর্ডের চেয়ারম্যান, অতঃপর প্রত্যায়নকারী কর্তৃপক্ষ বলিয়া অভিহিত, এর নিকট হইতে পরিশিষ্ট-১ এ বিধৃত বিষয়ে চালানওয়ারি একটি প্রত্যয়নপত্র আমদানিকৃত প্লান্ট ও ইকুইপমেন্ট খালাসের সময় সংশ্লিষ্ট শুল্ক স্টেশনে দাখিল করিতে হইবে।

(৩) সংশ্লিষ্ট প্লান্ট ও ইকুইপমেন্ট বাণিজ্যিক উৎপাদন শুরু করার পূর্বেই আমদানি করিতে হইবে।

.....

টেবিল-২

(১) অস্থায়িভাবে আমদানিকৃত ইরেকশন ম্যাটেরিয়ালস, যন্ত্রাংশ বানিজ্যিক উৎপাদন শুরুর পূর্বে যে কোন সময় আমদানি হইতে হইবে এবং বানিজ্যিক উৎপাদন শুরু হওয়ার ৬ (ছয়) মাসের মধ্যে বিদেশ ফেরত পাঠাইতে হইবে।

....."

(Underlined by us)

23. It is not the case of the petitioner that it has imported erection materials, equipments and machineries on temporary basis or that it has returned those machineries within six months from the date of commercial production.

24. Mr. Aminuddin, in course of arguments, relied on the conditions as mentioned in Table-1 of SRO No. 73.

25. Under condition No. (1) of Table-1 of SRO No. 73 an industrial establishment would be entitled to get exemption of import duties, VAT and supplementary duties for import of plant's equipments permanently for establishment of power generation station, on condition that,- "সংশ্লিষ্ট শিল্প প্রতিষ্ঠানকে বাংলাদেশ সরকারের সহিত চুক্তিবদ্ধ হইতে হইবে।"

26. Admittedly, tenders were invited by Bangladesh Power Development Board **(**BPDB). The petitioner submitted tender in response thereof and the petitioner entered into the Contract with BPDB. The Contract for supply of power on rental basis, executed on 14th February, 2008**,** also shows that the same is between the Bangladesh Power Development

Board and Shahajibazar Power Company Limited (the petitioner). Therefore, it is evident that the Contract of the petitioner is not with the Government. It is true that approval might have been taken from the Government before entering into the Contract by BPDB. But, for that reason, it cannot be said that the Contract is entered by the People's Republic of Bangladesh with the petitioner or that the contract is entered by the Government in the capacity as sovereign.

27. Now let us examine the impugned Memo dated 25.08.2008**.** For better understanding, the relevant portion of the Memo is quoted below:-

"……

অতএব আপনার প্রেরিত পত্রের মর্ম অনুযায়ী বিষয়োক্ত এস আর ও-৭৩-আইন/৯৭/১৭০০/শুল্ক তারিখ ১৯ শে মার্চ, ১৯৯৭ এ বর্ণিত ছক পরিশিষ্ট-১ মোতাবেক আপনাদের প্রতিষ্ঠানের অনুকুলে আমদানীকৃত Plant এবং Equipment খালাসের নিমিত্ত প্রত্যয়নপত্র জারী করার সুযোগ আছে বলে প্রতীয়মান হয় না।"

28. We have earlier seen that in order to issue a certificate under Table-1 of SRO No. 73, the Contract should be between the Government and an industrial establishment and, as such, there is no scope for issuing certificate under SRO No. 73 by the respondents.

29. The learned Advocate for the petitioner submits that respondent No. 5 had no jurisdiction to refuse issuance of the certificate, as the Chairman of BPDB is the authority to issue or refuse issuance of such certificate. But the petitioner neither claimed nor produced any iota of evidence showing that it ever applied to the Chairman of BPDB for issuance of certificate under SRO No. 73. The learned Advocate for the petitioner also admits that the petitioner has not applied to the Chairman, BPDB for issuing certificate under SRO No. 73.

30. From the application filed by the petitioner to issue certificate under SRO No. 73 (Annexure-H to the writ petition), it appears that application was given to respondent No. 5 for issuance of certificate and respondent No. 5 with reference to SRO No. 73 refused to issue certificate by the impugned Memo. Now, the petitioner cannot claim that the impugned Memo is unlawful.

31. In view of the above, it is evident that the petitioner, without applying to the Chairman, BPDB for issuance of certificate under SRO No. 73, has filed this writ petition seeking direction upon BPDB represented by its Chairman and other respondents for issuing certificate under SRO No. 73.

32. Section 19 of the Contract is relating to choice of law and resolution of disputes. Section 19.2 of the Contract reads as under:-

"19.2 Resolution of disputes

(a) Amicable Settlement
BPDB and the Company shall use their best efforts <u>to settle amicably all disputes arising out of or in connection with this Contract or its interpretation.</u>

(b) Arbitration

> If the parties are unable to reach a settlement as per Section 19.2(a) within twenty-eight (28) days of the first written correspondence on the matter of disagreement, then either Party may give notice to the other party of its intention to commence arbitration in accordance with Section 19.2(b).
>
> The arbitration shall be conducted in accordance with the Arbitration Act (Act No. 1 of 2001) of Bangladesh as at present in force. The place of Arbitration shall be in Bangladesh."
>
> (Underlined by us)

33. Admittedly, the petitioner has not availed the forums of amicable settlement and arbitration.

34. We have already seen that the impugned Memo has been issued by respondent No. 5 in response to the petitioner's application. The petitioner has not applied to the Chairman, BPDB for issuance of certificate under SRO No. 73. Thus, it is evident that the petitioner has not applied to the appropriate authority under clause (2) of Table-1 of SRO No. 73.

35. Furthermore, there are equally efficacious alternative remedy for settlement of dispute through amicable settlement and arbitration. The petitioner ought to have availed those forums. Without availing those forums the instant writ petition cannot be said to be maintainable. Further, the petitioner's Contract with BPDB is for supply of power on rental basis. The latest decision of the Appellate Division on the principle of availing writ jurisdiction relating to Contract as reported in 20 BLC (AD) (2015) is as under:-

> "14, This Division upon consideration of different decisions of the subcontinent in Bangladesh Power Development Board vs Mohammad Asaduzzaman Sikder, 9 BLC (AD) 1, recapitulated the principle upon which writ jurisdiction can be invoked for breach of contract as under:
>
> (a) **the contract is entered into by the Government in the capacity as sovereign;**
>
> (b) where contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority;
>
> (c) where contract is entered into in exercise of an enacting power conferred by a statute that by itself does not render the contract a statutory contract, **but "if entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract.** If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory";
>
> (d) where a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions and **the contract so entered by the statutory body is not an exercise of statutory power then merely because one of the parties to the contract is a statutory or public body such contract is not a statutory contract;**

(e) when contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power;

(f) where the contract has been entered into in exercise of statutory power by statutory authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke writ jurisdiction because the relief sought is against breach of statutory obligation.

15. It is stated in the above case that **no writ is maintainable unless the aforesaid requirements are fulfilled.** In the above case, the writ petition sought a direction upon the Government and its official to make payment for the execution of the works as per work order given to him. Though the High Court Division make the rule absolute, this Division set aside the judgment on the reasoning that the writ petition is not maintainable. **None of the above conditions for seeking a relief in writ jurisdiction is available to the writ petitioner and thus, the writ petition is not maintainable. Similar views have been expressed in an unreported case in Civil Appeal Nos. 244-250 of 2005. Those cases were relating to construction of a bridge on the basis of tender. In that case also this Division approved the views taken in Asaduzzaman Sikder and held that the writ petition is not maintainable.**

16. The Government is under no obligation to pay commission to the writ petitioner for the works done on behalf of its principal. The High Court Division unnecessary wasted its energy in exploring Annexures-D, E, E-1, J and J-1, which are nothing but correspondences made among the writ respondents, and the writ petitioner's principal's correspondences with the Government and its reply and after the execution of the contract. In the contract, as observed above, no provision was provided for payment of commission to the writ petitioner by the Government of Bangladesh. The High Court Division, in the premises, on a misconception of law made the rule absolute. The writ petition is a misconceived one.

The appeal is allowed without any order as to cost. The judgment of the High Court Division is set aside."

(Bold, to give emphasis)

36. From the contract, it transpires that it has not been entered into by BPDB in exercise of statutory power and so, it cannot be said that the contract with the statutory body i. e. BPDB is a statutory contract so**,** as to invoke writ jurisdiction. Furth**e**r we have already seen that the contract is not entered into by the Government in the capacity of sovereign. Moreover**,** the Contract is purely a commercial contract for purchasing electricity on rental basis**.** Further, the requirements as settled by the Appellate Division in the above referred case are not fulfilled.

37. For the reasons discussed hereinbefore, we are constrained to hold that the instant writ petition is not maintainable.

38. The facts and circumstances of the instant case and the decisions as referred to by the learned Advocate for the petitioner are quite distinguishable and so, not applicable in the facts and circumstances of the instant case. Therefore, we do not like to discuss those decisions unnecessarily.

39. In view of the above, we find no merit in the submissions of Mr. A M. Aminuddin and we find merit and force in the submissions of Mr. S. Rashed Jahangir and Mr. A. M. Masum.

40. As it is decided that the writ petition is not maintainable, we are not inclined to discuss further in the matter being redundant.

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

42. The respondents are at liberty to encash the bank guarantee.

43. Communicate the judgment to respondents No. 1 and 2 at once.

8 SCOB [2016] HCD 15

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 6698 of 2010

An application under Article 102 of the Constitution of the People's Republic of Bangladesh

Kazi Monirul Haque
…Petitioner

Versus

Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs and others
…Respondents

Mr. Saifur Rashid, Advocate
…For the Petitioner

Mrs. Khursheed Jahan, Advocate
…For Respondent No. 3

Mr. Md. Shahidul Islam, DAG
…For the Respondents

Date of Hearing: 13.05.2015 & 14.05.2015
Date of Judgment: 17.05.2015

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

Artha Rin Adalat Ain, 2003
Section 28:
Section 28(4) of the Ain clearly stipulates that if a new Execution case is filed after the expiry of the 6 years from the date of filing of the 1st Execution case, the 2nd case shall also be barred by limitation. In our view, section 28(4) of the Ain contemplates and takes into account the situation were the 1st Execution case, is neither concluded nor disposed of within the period of 6 years. ...(Paras 14 & 15)

Artha Rin Adalat Ain, 2003
Section 33:
It is to be noted that in the instant case, the respondent no. 3 Bank had obtained a certificate from the Adalat by filing an application under section 33(7) of the Ain, Therefore, in our view, once a certificate has been issued under section 33(7) of the Ain in favour of the decree holder Bank, that by itself would bring to an end of the proceeding of the Artha Jari case. … (Para 20)

Judgment

Zubayer Rahman Chowdhury, J :

1. By the instant Rule, the petitioner challenges the legality and propriety of Order No. 38 dated 26.01.2009, as evidenced by Annexure M, passed by the learned Judge, Artha Rin

Adalat, Khulna in Artha Jari Case No. 255 of 2005, issuing warrant of arrest against the petitioner.

2. Relevant facts necessary for disposal of the Rule are that the respondent no. 3 Bank (hereinafter referred to as the Bank) instituted Title Suit No. 50 of 1994 before the 2nd Artha Rin Adalat, Khulna impleading Azhar Limited and others, including the petitioner as defendant no. 7, for realization of Tk. 2,59,83,461/-. The suit was decreed exparte on 09.02.1995 (decree signed on 16.02.1995).

3. Subsequent to passing of the exparte, a resolution was passed by Qazi Azharul Haque and Sons Limited in its Board Meeting on 27.06.1996 to the effect that the amount lying in the company's account with the Bank would be adjusted against the liability of Azhar Limited.

4. Thereafter, the Bank adjusted an amount of T. 13,47,874.01/= from the account of Qazi Ajharaul Haque and Sons against the dues in respect of Ajhar Limited and at the same time, also deposited Tk. 4,80,000/- on 13.02.1996. In this way, the Bank adjusted a sum of Tk. 18,27,874.21 in respect of the liability of the Azhar Limited and an amount of Tk. 29,15,64.79 remained due and outstanding which increased to Tk. 40,37,000/- on 31.12998 on account of accumulation of interest.

5. Qazi Azharul Haque and Sons Limited filed Money Suit No. 2 of 2000 on 02.01.2000 against the Bank claiming Tk. 18,02,565/- before the 1st Court of Subordinate Judge, Khulna, which was later renumbered as Money Suit No. 26 of 2002 and is now pending before the Court of 2nd Joint District Judge, Khulna.

6. Despite the position as aforesaid, the Bank filed Artha Jari Case No. 255 of 2005 before the Artha Rin Adalat, Khulna for execution of exparte decree claiming Tk. 5,85,14,151.25. The present petitioner was impleaded as judgment debtor no. 7 in the Artha Jari Case, who appeared and filed written objection and prayed for rejection of the case on the ground stated therein.

7. On 05.02.2006, the Bank filed an application under section 34 of the Artha Rin Adalat Ain, 2003 (briefly, the Ain) for issuance of Warrant of Arrest against the judgment debtor nos. 2-8. However, although the said application was filed before the Adalat in February, 2006, after 3 (three) years of filing of the said application, the Adalat vide, Order No. 38 dated 26.01.2009, issued warrant of arrest against the petitioner. Being aggrieved thereby, the petitioner moved this Court and obtained the present Rule along with an order of stay, as noted at the outset.

8. Mr. Saifur Rashid, learned Advocate appears in support of the Rule, while the same is being opposed by Mrs. Khursheed Jahan, the learned Advocate appearing on behalf of respondent no. 3 Bank.

9. Mr. Rashid submits that Order No. 38 dated 26.01.2009 is not tenable in law as the said order was issued during the pendency of the 2nd Artha Jari Case, which was admittedly filed beyond the statutory period of limitation. Elaborating his submission, Mr. Rashid contends that the first Artha Jari Case was instituted on 23.07.1998, which concluded through the issuance of the certificate in favour of the Bank, as evident from Order No. 48 dated 20.06.2004.

10. Referring to Annexure J of the instant Writ Petition, Mr. Rarshid submits that the 2nd Artha Jari Case, being Artha Jari Case No. 255 of 2005, was filed on 27.07.2005. Therefore, according to Mr. Rashid, the 2nd Artha Jari Case was barred by limitation on two grounds; firstly, the 2nd Artha Jari Case was filed after a period of over one year since the conclusion of the 1st Artha Jari Case and secondly, the 2nd Artha Jari Case, which was admittedly filed in 2005, was filed after a period of 7 years since the filing of the 1st Artha Jari Case. Therefore, Mr. Rashid contends that on both counts, the 2nd Execution case was hopelessly barred by limitation and consequently, the impugned order dated 26.01.2009 issuing warrant of arrest against the petitioner was also hit by the said principle. Accordingly, Mr. Rashid prayed for making the Rule absolute.

11. Mrs. Khursheed Jahan, the learned Advocate appearing on behalf of the Bank submits that the 2nd Execution Case was not filed within one year of the conclusion or disposal of the 1st Artha Jari Case. However, she submits that sub-section (4) of section 28 of the Ain will not be attracted in the present case. Since the 1st Execution Case was not concluded, section 28(4) would only apply after conclusion of the 1st Artha Jari Case as because the 1st Artha Jari Case may not be concluded within the period of six years, but may take a longer time.

12. For a proper understanding of the issues before us, let us refer to the provision of section 28 of the Ain, which reads as under :

> "28z (1) The Limitation Act, 1908 Hhw The Code of Civil Procedure, 1908 H ¢iæal ®k বিধানই থাকুক না কেন, ডিক্রীদার, আদালতযোগে ডিক্রী বা আদেশ কার্যকর করিতে ইচ্ছা করিলে, ডিক্রী বা আদেশর প্রদত্ত হওয়ার অনুর্ধ্ব ১ (এক) বৎসরের মধ্যে, ধারা ২৯ এর বিধান সাপেক্ষে জারীর জন্য আদালতে দরখাস্ত দাখিল করিয়া মামলা করিবে।
>
> (2) Ef-ধারা (১) এর বিধানের ব্যত্যয়ে, ডিক্রী বা আদেশ প্রদানের flha£ ১ (এক) বৎসর অতিবাহিত হইবার পরে S¡l£l Se£ দায়েরকৃত কোন মামলা তামাদিতে বারিত হইবে এবং অনুরূপ তামাদিতে বারিত মামলা আদালত কার্যার্থে N¢Z e¡ L¢lu¡ pl¡p¢l খারিজ করিবে।
>
> (3) S¡l£l Se£ ¢àa£u h¡ flha£ j¡jm¡, f§ÿj h¡ fhha£ S¡l£l j¡jm¡ M¡¢lS h¡ ¢eôf¢š qJu¡l flha£ HL বৎসর সময় উত্তীর্ণ হওয়ার পরে দাখিল করা হইলে, উক্ত মামলা তামাদিতে বারিত হইবে ; এবং তামাদিতে বারিত অনুরূপ মামলা আদালত কার্যার্থে গ্রহণ না করিয়া সরাসরি খারিজ করিবে।
>
> (৪) জারীর জন্য কোন নতুন মামলা প্রথম জারীর মামলা দাখিলের পরবর্তী ৬ (ছয়) বৎসর সময় অতিবাহিত হইবার পরে দাখিল করা হইলে, উক্ত মামলা তামাদিতে বারিত হইবে এবং তামাদিতে বারিত অনুরূপ মামলা আদালত কার্যার্থে গ্রহণ না করিয়া সরাসরি খারিজ করিবে। "

13. On a perusal of the provision quoted above, it is apparent that as per section 28 (3), the 2nd Execution Case has to be filed within one year of the conclusion or disposal of the 1st Artha Jari Case, as the case may be. If the 2nd Execution Case is filed after the period of one year, the same shall be barred by limitation.

14. Section 28(4) of the Ain clearly stipulates that if a new Execution case is filed after the expiry of the 6 years from the date of filing of the 1st Execution case, the 2nd case shall also be barred by limitation.

15. In our view, section 28(4) of the Ain contemplates and takes into account the situation were the 1st Execution case, is neither concluded nor disposed of within the period of 6 years. Therefore, in view of the aforesaid provision of law, it is evident that there is substantial force and substance in the contention advanced by Mr. Rashid.

16. Although Mr. Rashid has referred to several decisions namely, 64 DLR (2012) 435, 189 and 61 DLR (2009) section 760, on a perusal of the said, we do not find the aforesaid decision to be applicable to the present case before us.

17. As we have found that the 2nd Execution case is hopelessly barred by limitation, consequently, the impugned Order No. 38 dated 26.01.2009, arising out of the 2nd Execution case, issuing warrant of arrest against the petitioner, cannot be sustained in law.

18. In the result, the Rule is made absolute.

19. Order No. 38 dated 26.01.2009, as evidenced by Annexure M, passed by the learned Judge, Artha Rin Adalat, Khulna in Artha Jari Case No. 255 of 2005, issuing order of arrest against the petitioner, is hereby declared to be without lawful authority and is of no legal effect and consequently, the same is set aside.

20. It is to be noted that in the instant case, the respondent no. 3 Bank had obtained a certificate from the Adalat by filing an application under section 33(7) of the Ain, Therefore, in our view, once a certificate has been issued under section 33(7) of the Ain in favour of the decree holder Bank, that by itself would bring to an end of the proceeding of the Artha Jari case.

21. There will be no order as to cost.

22. The office is directed to communicate the order.

8 SCOB [2016] HCD 19

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

Criminal Revision No. 904 of 2012

Abdul Kader Patwary and others
…petitioners

Versus

The State and another
…opposite parties

Mr. Md. Shameem Sarder, Advocate
…For the petitioners

Mr. Syed Amzad Hossain,Advocate
…For the opposite party No.2

Mr. Zahirul Hoque Zahir, D.A.A. with
Mr. Md. Atiqul Haque (Salim), A. A.G. and
Mr. Nizamul Hoque Nizam, A.A.G.
…For the opposite party No.1

Heard on: 17.08.2015, 18.08.2015
Judgment on: 18.08.2015

Present:
Mr. Justice Shahidul Islam
And
Mr. Justice K.M. Kamrul Kader

Code of Criminal Procedure, 1898
Section 265D
Framing of Charge:
It has now been settled by our apex Court that, at the time of framing charge the Court concern is required to consider only the materials of the prosecution but not the materials submitted by the defence. In the instant case, it appears that, the learned Additional Sessions Judge has not committed any illegality in framing charge against all the accused persons. … (Para 14)

Judgment

Shahidul Islam, J:

1. The Rule was issued calling upon the opposite party to show cause as to why the order dated 29.02.2012 passed by the learned Additional Sessions Judge, Chandpur in Sessions Case No. 152 of 2010 arising out of Foridgonj Police Station Case No. 15 dated 27.03.2010 corresponding to G.R. No. 61 of 2010 under sections 147/ 447/ 448/ 307/ 323/ 324/ 302/ 379/ 380/34 should not be set aside and or pass such other or further order or orders passed as to this Court may seem fit and proper.

2. This Court stayed all further proceedings of the Sessions Case for a period of 3(three) months and that was being extended from time to time and the last extension was made dated 29.4.2014 till disposal of the Rule.

3. The informant initially was not made a party in the Rule and thereafter the informant came up with an application for a being added as opposite party no. 2 and that application was allowed by an order dated 12.2.2014.

4. Facts relevant for disposal of the Rule are that, the opposite party No.2 lodged a first information report with the Foridgonj Police Station on 27.03.2010 against the petitioners of

the Rule and others contending interalia that, the informant is the owner of a piece of land (place of occurrence) by away of inheritance. The informant and the witness No. 1 have been living in the said land for a long time by constructing house. The accused persons named in the F.I.R. were trying to dispossess them from the said land since a for long time but failed. A salish was held on the date of occurrence and the local elite persons took an attempt to make a peaceful compromise between the accuseds and the informant parties. At the time of holding salish, the accused persons, all on sudden, being armed with deadly weapons made on attacked upon the informant and his relations with lathal weapon. The witnesses nos. 1-8 as shown in the F.I.R. tried to restrain them but the accused persons assaulted the informant and his relations severally, broken down their houses and took away valuable articles of the house (worth of) valued at TK. 4,00000 (four lacs). It is stated in the F.I.R. that, amongst the accused persons, accused Mohin with a view to kill the victim Anzoman Begum inflicted a "Chheni" hit on her head and the victim sustained a grievous cut injury. She was sent to Dhaka for treatment. The accused no. 3 with a view to kill Jolekha inflicted a "Dao" hit on the head of Jolekha and she also sustained grievous cut injuries. Accused Nos. 2-9 dealt lathi hits on the body of witness No. 5 and caused lacerated injury and other accused persons also took part in the occurrence. The victims were taken to Faridgonj Health Complex but they were prevented. Thereafter they were sent to Chandpur Sadar Hospital and was admitted. But the Chandpur Medical Authority did not issue any certificate to the injured persons. Lastly the victim Anzuman Begum was admitted to Dhaka Medical College Hospital wherein she ultimately succumbed to her injuries.

5. The case was duly investigated by the Investigating Officer who submitted charge sheet against as many as 50 accused persons under sections 147/ 447/ 448/ 307/ 323/ 324/ 302/ 379/ 380/ 114/ 34 of the Penal Code.

6. Thereafter the case record was transmitted before the learned Sessions Judge, Chandpur and was registered as being Sessions Case No. 152 of 2011. Ultimately the case was transferred to the Court of learned Additional Sessions Judge, Chandpur for trial.

7. The learned Additional Sessions Judge took up hearing for framing of charge on 29.2.2012 and accused persons submitted an application under section 265C of the Code of Criminal Procedure for getting them discharged from the allegations made out in the F.I.R. The learned Additional Sessions Judge after hearing the parties framed charges against the accused petitioners by the impugned order dated 29.2.2012 under sections 147/447/ 448/ 307/ 323/ 324/ 302/ 379/ 380/ 34 of the Penal Code.

8. Being aggrieved by the said judgment and order the petitioners have obtained the instant Rule.

9. Mr. Md. Shameem Sarder, the learned Advocate appeared for the accused petitioners, Mr. Syed Amzad Hossain, the learned Advocate appeared for the informant opposite party No.2 and Mr. Zahirul Hoque Zahir, the learned Deputy Attorney General appeared for the State.

10. Mr. Md. Shameem Sarder, the learned Advocate on appearing for the petitioners took us through the F.I.R., charge sheet, Postmortem report made on the dead body of the victim, 161 statements made by the witnesses as well as 164 statements made by the witnesses and submitted that, the witnesses implicated specifically as to who had taken what part in the commission of offence and who had inflicted what sort of fatal blow individually on the victim. He further submitted that, there is averments made in the F.I.R that the accused

persons in furtherance of their common intention made an attacked upon the victim to kill her. He further submitted that, the learned Additional Sessions Judge failed to consider the F.I.R. statement, the statement recorded under section 161 of the Code of Criminal Procedure by the Investigating Officer as well as the statements made under section 164 of the Code of Criminal Procedure of the witnesses. He submitted that, the accused persons had no intention to kill the victim and as such framing of charge under section 302 of the Penal Code was illegal. With this submission he prayed for an interference by this Court as against the order.

11. Mr. Syed Amzad Hossain, the learned Advocate appeared for the informant opposite party No. 2 who on the other hand submitted that, the F.I.R. statements disclosed specifically that, the accused persons with a view to kill the victim and others made sudden attack upon them being armed with lethal weapons while they were engaged in a Salish over the dispute of the place of occurrence and the accused persons had beaten up the informant party mercilessly and the informant party being female persons had no scope to save them from merciless beating of the accused persons. He further submitted that, all the injured persons initially were taken to Faridgonj Health Complex but they were prevented by the accused persons and thereafter they were sent to Chandpur Sader Hospital and were admitted but no medical certificates were issued in their favour ultimately the victim was taken to the Dhaka Medical College Hospital wherein she succumbed to her injuries. He submitted that, the F.I.R. statements itself are enough to frame charge against all the accused persons under sections 302/34of the Penal Code along with other sections, he prayed for discharged the Rule.

12. Mr. Zahirul Hoque Zahir, the learned Deputy Attorney General appeared for the state and adopted the submission made by Mr. Syed Amzed Hossain and prayed for discharge of the Rule.

13. We have considered the submissions made by the learned Advocate for the petitioners as well as the informant opposite parties.

14. We have gone through the statements made in the F.I.R. as well as statements recorded under sections 161 and 164 of the Code of Criminal Procedure. It appears that, the occurrence took place on 10.03.2010 at about 10:00 A.M. and the F.I.R. was lodged on 27.03.2010 and the F.I.R. itself discloses specifically the part played by the accused persons in-furtherance of their common intention to kill the victim and others. The victim as well as other injured were admitted to Chandpur Sader Hospital and thereafter the victim was shifted to the Dhaka Medical College Hospital wherein she succumbed to her injuries. The F.I.R. discloses specific allegation against all the accused persons and the police in course of investigation found prima-facie case against all the accused persons and as such submitted charge sheet. The learned Sessions Judge at the time framing charge has taken into consideration the case as made out in the F.I.R., charge sheet, inquest report, postmortem report, as well as statements made under sections 161 and 164 of the witnesses. It appears that, the learned Additional Sessions Judge at the time framing charge has applied his judicial mind and passed a very sound and lawful order in framing charge against all the accuse persons. It appears that, the impugned order is not only a speaking order but in framing charge he has come to his own judicial opinion by writing a very lawful order in support of framing charge. It has now been settled by our apex Court that, at the time of framing charge the Court concern is required to consider only the materials of the prosecution but not the materials submitted by the defence. In the instant case, it appears that, the learned Additional Sessions Judge has not committed any illegality in framing charge against all the accused persons. Accordingly, we do not find any merit in the Rule.

15. In the result, the Rule is discharged. Stay order passed in connection with the Rule stands vacated. The learned Additional Sessions Judge, Chandpur is directed to conclude trial of the case as early as possible

16. Send a copy of the judgment and order to the concern Court below at once.

8 SCOB [2016] HCD 23

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 232 OF 2011

Sylhet Janakallayan Bahumukhi Khudra Baboshayee Samabaya Samity Limited
.....Petitioner

Versus

Sylhet City Corporation and others
..... Respondents

Mr. Maqbul Ahmed with
Mr. Shah Alam, Advocates
.....For the petitioner.

Mr. Didar Alam Kollal with
Mr. Zahid Ahmed, Advocates
...For the respondent nos. 1 & 4.

Heard on 19.10.2014, 12.11.2014, 11.12.2014, 19.04.2015, 17.05.2015, 19.05.2015, 01.07.2015 & 02.08.2015.

Judgment on 09.08.2015.

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

Legitimate Expectation:
The principle of legitimate expectation, as we see it, is predicated upon the following:

- **(a) The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding.**
- **(b) The statement or practice must be shown to be applicable and relevant to the case in hand.**
- **(c) Legitimate expectation is enforced in order to achieve fairness.**
- **(d) If the statement said to be binding was given in response to any information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.**
- **(e) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice applied.**
- **(f) Even though a case is made out, the legitimate expectation shall not be enforced if there is overriding public interest which requires otherwise.**

...(Para 16)

In any view of the matter, the members of the petitioner-samity are not at fault. Their legitimate expectation, in all fairness, should be fulfilled by the Sylhet City Corporation Authority by way of constructing the proposed market by removing the sheds from the Bus Terminal. Undeniably, the Sylhet City Corporation Authority has made a commitment to the petitioner-samity to make the proposed construction of the market at the site after removal of the sheds therefrom.

...(Para 23)

Judgment

Moyeenul Islam Chowdhury, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to start and complete the construction of a 4(four)-storied Shopping Complex at South Surma Bus Terminal, Sylhet and rehabilitate the members of the petitioner-samity therein and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

On 11.03.2002, the petitioner-samity submitted an application to the then State Minister for Local Government for rehabilitation of 350 small businessmen by constructing a 4(four)-storied market at South Surma Bus Terminal, Sylhet City, Sylhet. The respondent no. 1 prepared a plan for the said purpose and approved the same in its meeting and forwarded it to the respondent no. 2 for necessary approval on 27.03.2003. The respondent no. 3 by Memo No. পৌর-1/7Hj-2/2003/1137/9/10 dated 09.10.2003 approved the project of the Sylhet City Corporation subject to certain conditions. On 11.08.2005, the petitioner-samity wrote a letter to the respondent no. 1 for construction of the market along with underground parking facilities as per modern design. Subsequently the petitioner-samity submitted several representations to the respondent no. 1 for early construction of the 4(four)-storied Shopping Complex; but in vain. The petitioner-samity deposited a prodigious amount of money to the tune of Tk. 3 crore with the respondent no. 1 by way of salami; but in spite of that, the respondent no. 1 did not take any tangible step for construction of the proposed market. The members of the petitioner-samity are all hawkers. Given this situation, the respondent no. 1 may be directed to complete the construction of the proposed market at an early date.

3. In the Supplementary Affidavit dated 23.11.2014 filed on behalf of the petitioner, it has been stated that the members of the petitioner-samity deposited the construction costs of the proposed market with the Sylhet City Corporation and the City Corporation received the money and issued money receipts to them.

4. In the Supplementary Affidavit dated 04.05.2015 filed on behalf of the petitioner, it has been stated that the petitioner-samity deposited a big amount of money with the Sylhet City Corporation as per their promise and as such there is a legitimate expectation of every member of the petitioner-samity that all of them will be allotted shops after construction of the market.

5. The respondent nos. 1 and 4 have contested the Rule by filing an Affidavit-in-Opposition. Their case, as set out in the Affidavit-in-Opposition, in short, runs as follows:

One Hazi Mohammad Solaiman Meah, Secretary, Sylhet Janakallayan Bahumukhi Khudra Baboshayee Samabaya Samity Limited filed an application dated 11.03.2002 to the Sylhet City Corporation for rehabilitation of 350 members of the samity by constructing a 4(four)-storied Shopping Complex on the premises of South Surma Bus Terminal, Sylhet by way of making allotment of a shop measuring 10′ X 12′ to each of them on taking salami towards the costs of the construction of the Shopping Complex. Anyway, in the monthly meeting of the Sylhet City Corporation dated

09.02.2003, a resolution was taken for construction of a 4(four)-storied Shopping Complex on the vacant space of South Surma Bus Terminal, Sylhet and making allotment of the shops in favour of 350 members of the petitioner-samity subject to the approval of the Government. Accordingly the resolution was sent to the Government vide Memo No. Hpx¢px¢px/প্রকৌঃ/পই-7/3128/02 /440 dated 27.03.2003 and the Ministry of Local Government by its Memo No. পৌর-1/7Hj-2/2003/1137/9/10 dated 09.10.2003 conveyed the approval of the Government for construction of the proposed market and allotment of the shops thereof to 350 members of the petitioner-samity. However, during the regime of the Caretaker Government in 2007, several sheds were constructed on the vacant space of the Bus Terminal subject to the approval of the Ministry of Local Government, Government of Bangladesh and are being occupied by some persons as allottees made during that regime. At the moment, the City Corporation is unable to take any step to implement the said decision until removal of those sheds from the premises of the Bus Terminal. By Memo No. ¢pxLx-1/7Hj-02/2003/168 dated 16.02.2010, the Ministry of Local Government asked the respondent no. 4 to apprise them as to the latest development in respect of rehabilitation of the hawkers at the Bus Terminal and the respondent no. 4 informed the authority of the difficulty and the delay in implementing the project of the construction of the market. Moreover, the urban population is increasing day-by-day and vehicles are also on the increase at the Bus Terminal and there is no sufficient space there to accommodate the increasing number of vehicles. Be that as it may, after removal of the aforesaid sheds from the Bus Terminal, the proposed market will be constructed by the respondent no. 1 in greater public interest. As the Writ Petition is premature, the Rule is liable to be discharged with costs.

6. At the outset, Mr. Maqbul Ahmed, learned Advocate appearing on behalf of the petitioner-samity, submits that the facts of the case are virtually admitted and the respondent no. 1 took a hefty amount of Tk. 3 crore from the petitioner-samity for construction of the proposed market at South Surma Bus Terminal; but no concrete step has been taken as yet for construction of the market.

7. Mr. Maqbul Ahmed also submits that indisputably the construction of the proposed Shopping Complex was approved by the Government vide its Memo No. পৌর-1/7Hj-2/2003/1137/9/10 dated 09.10.2003 (Annexure-'E' to the Writ Petition); but even then the Sylhet City Corporation has been gaining time without any apparent reason in the matter of construction of the Shopping Complex at South Surma Bus Terminal, Sylhet.

8. Mr. Maqbul Ahmed further submits that the members of the petitioner-samity deposited Tk. 3 crore by way of salami for construction of the proposed market and despite the approval of the Government in this regard, the Sylhet City Corporation has been dilly-dallying with the construction thereof without any justifiable reason and the conduct of the Sylhet City Corporation in this respect amounts to denial of the legitimate expectation of the members of the petitioner-samity.

9. On this point, Mr. Maqbul Ahmed refers to the decisions in the cases of The Chairman, Bangladesh Textile Mills Corporation…Vs…Nasir Ahmed Chowdhury and others, 22 BLD (AD) 199 and Sirajul Islam (Md) and others…Vs…Bangladesh and others, 60 DLR (HCD) 79.

10. Per contra, Mr. Didar Alam Kollal, learned Advocate appearing on behalf of the respondent nos. 1 and 4, submits that it is true that the Sylhet City Corporation received a sum of Tk. 3 crore from the members of the petitioner-samity for construction of a 4(four)-storied Shopping Complex at South Surma Bus Terminal and the resolution of the Sylhet City Corporation in this regard was approved by the Government as evidenced by Annexure-'E' to the Writ Petition; but the fact remains that during the regime of the last Caretaker Government in 2007, some sheds were erected on the vacant premises of the Bus Terminal subject to the approval of the Government and are being occupied by some persons as allottees at present and by that reason, the City Corporation is unable to take any concrete step with regard to the construction of the proposed market till removal of those sheds therefrom.

11. Mr. Didar Alam Kollal also submits that with the exponential growth of population, the number of various types of vehicles has increased manifold and there is no sufficient space available at the Bus Terminal to accommodate those vehicles. In this respect, he draws our attention to the decision in the case of Union of India and others…Vs…Hindustan Development Corporation and others reported in AIR 1994 SC 988.

12. Mr. Didar Alam Kollal next submits that the City Corporation will be able to erect the proposed market after removal of the sheds from the Bus Terminal raised during the regime of the Caretaker Government in 2007.

13. We have heard the submissions of the learned Advocate Mr. Maqbul Ahmed and the counter-submissions of the learned Advocate Mr. Didar Alam Kollal and perused the Writ Petition, Supplementary Affidavits, Affidavit-in-Opposition and relevant Annexures annexed thereto.

14. It is admitted that at the instance of the petitioner-samity, a resolution was taken by the Sylhet City Corporation to erect a 4(four)-storied Shopping Complex on the vacant space of the South Surma Bus Terminal in Sylhet City and the resolution of the Sylhet City Corporation was duly approved by the Government by the Memo No. পৌর-1/7Hj-2/2003/1137/9/10 dated 09.10.2003 (Annexure-'E' to the Writ Petition). It may be mentioned that the approval was accorded by the Government under certain terms and conditions. It transpires from the Affidavit-in-Opposition filed on behalf of the respondent nos. 1 and 4 that the Government by the Memo No. ¢pxLx-1/7Hj-02/2003/168 dated 16.02.2010 wanted to know about the latest development of the rehabilitation of the members of the petitioner-samity at the Bus Terminal; but the respondent no. 1 expressed its difficulty and explained away the delay in implementing the project. Given this scenario, it is palpably clear that the Government wants the rehabilitation of the members of the petitioner-samity at the South Surma Bus Terminal, Sylhet.

15. The plea that has been advanced on behalf of the Sylhet City Corporation before us is that at the moment because of exponential growth of population, there is no sufficient space available at the Bus Terminal to accommodate the various types of vehicles. Again in the same breath, the City Corporation has stated in unmistakable, categorical and unequivocal terms that they would construct the proposed market after removal of the sheds from the Bus Terminal which were raised during the regime of the Caretaker Government in 2007. On this issue, the stand of the Sylhet City Corporation appears to be self-contradictory, self-defeating, antithetical and paradoxical. What we are driving at boils down to this: the Sylhet City Corporation cannot blow hot and cold in the same breath.

16. The petitioner-samity has come up with the principle of legitimate expectation in support of their case. The principle of legitimate expectation, as we see it, is predicated upon the following:

(g) The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding.

(h) The statement or practice must be shown to be applicable and relevant to the case in hand.

(i) Legitimate expectation is enforced in order to achieve fairness.

(j) If the statement said to be binding was given in response to any information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.

(k) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice applied.

(l) Even though a case is made out, the legitimate expectation shall not be enforced if there is overriding public interest which requires otherwise.

17. In the decision in the case of Union of India and others…Vs…Hindustan Development Corporation and others reported in AIR 1994 SC 988 adverted to by Mr. Didar Alam Kollal, it has been spelt out that the protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision, in that event, the decision-maker should justify the denial of such expectation by showing some overriding public interest.

18. In the decision in the case of Food Corporation of India…Vs…M/S. Kamdhenu Cattle Feed Industries reported in AIR 1993 SC 1601, the Court recognized the legitimate expectation of the highest bidder; but refused relief because of the overriding public interest in getting further higher price obtained through subsequent negotiation with all the bidders.

19. In the decision in the case of Sirajul Islam (Md) and others…Vs…Bangladesh and others reported in 60 DLR (HCD) 79 relied on by Mr. Maqbul Ahmed, it has been held that the mere reasonable or "legitimate expectation" of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a "legitimate expectation" forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every "legitimate expectation" is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case.

20. In the decision in the case of The Chairman, Bangladesh Textile Mills Corporation…Vs…Nasir Ahmed Chowdhury and others reported in 22 BLD (AD) 199 referred to by Mr. Maqbul Ahmed, it has been held that an expectation could be based on an express promise or representation or by an established past action of settled conduct and the representation must be clear and unambiguous. It could be a representation to an individual or generally to a class of persons. It has been further held in that decision that every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.

21. There goes an age-old adage—"Procrastination is the thief of time". By unnecessarily making procrastination in the matter of construction of the proposed market at the Bus Terminal, the Sylhet City Corporation Authority has, for all practical purposes, thrown the members of the petitioner-samity in a state of complete incertitude and despair.

22. It is evident from the materials on record that the Sylhet City Corporation Authority did not expressly deny the legitimate expectation of the members of the petitioner-samity in the matter of construction of the proposed Shopping Complex at South Surma Bus Terminal in Sylhet City. Rather it has been averred in the Affidavit-in-Opposition of the respondent nos. 1 and 4 that the Sylhet City Corporation Authority would construct the Shopping Complex after removal of the sheds therefrom which were erected during the regime of the Caretaker Government in 2007.

23. Now a pertinent question arises: why did the Sylhet City Corporation Authority fail in removing the sheds that were erected on the vacant space of the Bus Terminal during the regime of the last Caretaker Government in 2007? What rendered the Sylhet City Corporation Authority impotent and powerless in this regard? That is anybody's guess. However, having regard to the facts and circumstances of the case, a man of ordinary prudence will be loath to accept the fact that the Sylhet City Corporation Authority is powerless in removing the aforementioned sheds from the Bus Terminal. In any view of the matter, the members of the petitioner-samity are not at fault. Their legitimate expectation, in all fairness, should be fulfilled by the Sylhet City Corporation Authority by way of constructing the proposed market by removing the sheds from the Bus Terminal. Undeniably, the Sylhet City Corporation Authority has made a commitment to the petitioner-samity to make the proposed construction of the market at the site after removal of the sheds therefrom.

24. In view of the discussion made above, we direct the Sylhet City Corporation Authority to remove the sheds from South Surma Bus Terminal, Sylhet which were raised during the regime of the Caretaker Government in 2007 and construct the proposed Shopping Complex there within a specific time-frame and allot shops thereof to the members of the petitioner-samity as agreed upon. But if any overriding public interest intervenes or if any contingency of a compelling nature occurs, then the Sylhet City Corporation Authority may allot shops to the members of the petitioner-samity at some other market or shopping complex constructed or to be constructed in Sylhet City by the Sylhet City Corporation Authority. In case of failure of the above 2(two) options, as a last resort, the Sylhet City Corporation Authority will refund the salami-money along with 10% compensation to the members of the petitioner-samity within a reasonable time.

25. With these directives, the Rule is disposed of without any order as to costs.

26. Communicate a copy of this judgment to the respondent no. 1 for information and necessary action.

8 SCOB [2016] HCD 29

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Civil Revision No. 1269 of 2014

Md. Rofiqul Islam and others

…Petitioner

Versus

Md. Khalilur Rahman and others

…Opposite-Parties

Mr. Kadom Ali Mollick, Advocate
…for the petitioners

Mr. Kamruzzaman Bhuiyan with

Mrs. Nusrat Yesmin, Advocate
…for the opposite-parties

Heard on: 18.08.2015
Judgment on: 20.08.2015

Present:
Mr. Justice Md. Rais Uddin

Record of rights
And
Section 90 of the Evidence Act, 1872:
Record of right is evidence of present possession and registered kabala is an evidence of title. The registered document will prevail over the records of rights and would remain in enforce until and unless, such kabala is cancelled by an appropriate civil court. The registered deed dated 13.05.1965 is an old document more than 30 years produced from proper custody presumed under Section 90 of the Evidence Act that it was duly executed and genuine documents. … (Para 14)

Judgment

Md. Rais Uddin, J:

1. This Rule was issued calling upon the opposite party Nos. 1-4 to show cause as to why the judgment and decree dated 11.03.2014 passed by the learned Joint District Judge, 2nd Court, Chuadanga in Title Appeal No. 36 of 2013 disallowing the appeal and thereby affirming the judgment and decree dated 30.05.2013 passed by the learned Assistant Judge, Damurhuda in Title Suit No. 152 of 2000 decreeing the suit, should not be set-aside.

2. The relevant fact giving rise to this Rule, in short, is that the opposite party Nos. 1-4 as plaintiffs instituted a suit for declaration that R.S. record was wrong and partition claiming $8\frac{1}{4}$ decimals of land out of 82 decimals of land contending, inter-alia, that the suit lands measuring .42 acres appertaining to plot No. 25 of S.A. Khatian No. 110 of Babhadanga Mouza originally belonged to Joti Mandal who sold $16\frac{1}{2}$ acres land of the suit plot by means of a registered deed being No. 5334 dated 13.05.1965 in favour of Hossen Ali, Bokter Mandal and delivered possession thereof. Hossain Ali become the owner of $8\frac{1}{4}$ acres land died leaving two sons namely Khalilur, Foroj Ali and two daughters namely, Bulbuli Khatun, Sonahar Khatun and wife Sonaton Bibi as his heirs. Foroj Ali, Bulbuli Khatun, Sonaher

Khatun and Sonatan Bibi sold .$6\frac{3}{4}$ acres land including .$5\frac{1}{2}$ acres land of suit plot by virtue of a registered deed being No. 6559 dated 27.11.2000 in favour of plaintiff No. 2 Julfiker and handed over possession thereof. As such the plaintiffs are in possession and enjoyment of .$8\frac{1}{4}$ acres land. The plaintiffs after obtaining certified copy of R.S. record came to know R.S. record was prepared in the name of Montaj Ali also who is the predecessor of defendant Nos. 1-3 about some land of the land in question and refused to make partition on 01.05.2000. Hence, the instant suit.

3. The defendant contested the suit by filing written statements denying the material allegations made in the plaint contending, inter-alia, that the suit lands measuring .42 acres appertaining to plot No. 25 of S.A. Khatian No. 110 of Babhadanga Mouza originally belonged to Joti Mandal. Joti Mandal sold $16\frac{1}{2}$ acres land of the suit plot by means of a registered deed being No. 5334 dated 13.05.1965 in favour of Hossen Ali, Bakter Mandal. Hossen Ali and Montaj Ali are the full brother and they lived in the same house in ejmali and the suit land was purchased in the names of both Hossen Ali, Montaj Ali and therefore Montaj Mandal, Hossen Ali got in equal shares of land by the alleged deed. As such the heirs of Montaj Ali owners of .$4\frac{1}{8}$ acres land since the suit land was purchased with the money of their ejmali property and R.S. record is correctly prepared in the names of aforesaid Montaj Ali and his successors and defendants are in possession for about 30 years in suit land. Therefore, the suit is liable to be dismissed.

4. At the trial, the plaintiffs examined 3(three) witnesses and the defendants examined 3(three) witnesses in support of their respective cases.

5. The learned Judge of the trial court on conclusion of trial after hearing the parties, considering the evidence and materials on record decreed the suit by his judgment and decree dated 30.05.2013. Against the said judgment and decree the defendants preferred appeal before the learned District Judge, Chuadanga. On transfer it was heard and disposed of by the learned Joint District Judge, Chuadanga who after hearing the parties, considering the evidence and materials on record dismissed the appeal and affirmed the judgment and decree of the trial court by his judgment and decree dated 11.03.2014.

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

7. Mr. Kadom Ali Mollick, the learned advocate appearing for the petitioners has placed the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below and submits that the suit is not maintainable without consequential relief and suit is barred by limitation. He submits that during pendency of the suit without permission of the court cannot transfer the suit land and is barred by principle of lis pendens. He submits that the defendants successfully proved their title and possession and their homestead in the suit land by rent receipts and R.S. record. He further submits that the courts below on misreading and non-consideration of evidence both oral and documentary passed the judgment and decree and thereby committed error of law resulting in an error occasioning failure of justice. He lastly submits that without prayer for declaration of title and recovery of khas possession the suit is not maintainable and prayed for to make the rule absolute. In support of his

contention he has referred the decisions reported in: (1) 35 DLR224, (2) 17 BLD 68, (3) 13 BLD 621, (4) AIR 1946 Bombay 207, and (5) AIR 1946 Patna 306.

8. Mr. Kamruzzaman Bhuiyan, the learned advocate appearing for the opposite-parties opposed the rule and submits that the suit is not barred by principle of lis pendens because the subsequent transfer brought to the notice of the court. He submits that the plaintiffs added party as plaintiffs by amendment of plaint against which the defendants did not take any step before higher forum and as such they are not entitled to raise the question at this stage. He submits that the possession of the plaintiffs is admitted by D.W.1 and as such the partition suit is maintainable. He further submits that in a suit for partition the status of the plaintiffs and the defendants are same and the defendants failed to prove their title in the suit land and as such both the courts below rightly decreed the suit. He also submits that R.S. Khatian is not document of the title and the defendants failed to produce any deed in support of their claim and as such both the courts below rightly decreed the suit in favour of the plaintiffs. He lastly submits that in a partition suit all kind of incidental relief can be decided however complicated. In support of his contention he has referred the decisions reported in: (1) 13 DLR(SC)191, (2) 4BLT(AD) 224, (3) 55 DLR(AD) 115, (4) 42 DLR (AD) 53, and (5) 49 DLR(AD) 68.

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

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

11. On perusal of the record it appears that the plaintiffs brought a suit for declaration that R.S. record was wrong and for partition claiming $8\frac{1}{4}$ decimals of land out of 82 decimals of land. The predecessors of the plaintiff namely, Hossen Ali purchased the suit land by a deed dated 13.05.1965 along with one Bokter Ali measuring $16\frac{1}{2}$ decimals of land and predecessors of the plaintiffs namely, Hossen Ali are entitled $8\frac{1}{4}$ decimals of land (exhibit-3). The defendant Nos. 1-3 also claimed the suit land as inheritance and claimed that Hossen Ali predecessor of the plaintiffs and Montaj Ali predecessors of the defendants were full brothers and as such defendants have been possessing the suit land. The defendants claimed the suit land on the basis of purchase by Hossen Ali since Hossen Ali and Montaj Ali were full brothers. On perusal of the exhibits-3 deed of 1965 dated 13.05.1965, it appears that the name of Hossen Ali and Bokter Ali in the deed. The defendants in support of the claim submitted D.C.R. and mutation Porcha.

12. The plaintiffs and the defendants claimed the suit land by purchase by their predecessors namely, Hossen Ali, predecessor of the plaintiffs and Montaj Ali predecessors of the defendants. The defendants claimed that suit land was purchased in the name of Hossen Ali from the income of joint family since Montaj Ali predecessors of the plaintiffs was brother of Hossen Ali. In this context D.W.2 a vital witness who is sister of Hossen Ali and Montaj Ali may be referred who in examination-in-chief stated that- *"ev`x weev`xi wcZviv Avgvi fvB| bwjwk Rwg Avgvi gv Avgvi eo fvB ‡nv‡mb Avjx wK‡b ‡`q| `yB fvB‡qi †Q‡j iv †mLv‡b evm K‡i|"*

D.W.2 Amena Khatun in cross-examination stated that-"*†nv‡mb eo Awg †gS Ges gbZvR †QvU| †nv‡mb I gbZvR Gi 5 eQi e¨eav‡b we‡q nq| evsjv‡`k ¯vaxb nIqvi 8 eQi Av‡M Zv‡`i we‡q nq| we‡qi ci Zviv Avjv`v nq| `wjj mªúv`‡bi mgq Awg* ছিলাম না। নালিশি জমি ক্রয়ের টাকা মা দিয়েছিল।"

13. Upon reading of the exhibit-3 and evidence of D.W.2 it appears that suit land was purchased in the name of Hossen Ali. Therefore, it appears to me that the learned Judge of the trial court considering the evidence and materials on record rightly decreed the suit. The learned Judge of the appellate court considering the evidence and materials on record both, oral and documentary affirmed the judgment and decree of the trial court.

14. Record of right is evidence of present possession and registered kabala is an evidence of title. The registered document will prevail over the records of rights and would remain in enforce until and unless, such kabala is cancelled by an appropriate civil court. The registered deed dated 13.05.1965 is an old document more than 30 years produced from proper custody presumed under Section 90 of the Evidence Act that it was duly executed and genuine documents. This view find supports in the case of:

(1) A.D.C.(revenue) Vs. Md. Reaz Uddin Pramanik and others, reported in 5 BLC (AD)76, wherein their lordships held:

> *"Once a document more than 30 years old is produced from proper custody under section 90 of the Evidence Act entitles the court to presume that it is a genuine document."*

(1) Abdul Mannan Bhuyan and others Vs. Md. Nasir Hossain and others, reported in 18 BLC (AD) 44, wherein their lordships held:

> *"S.A. and R.S. records were not an evidence of title and that a registered document would prevail upon the records of rights and that the registered document would remain in enforce unless the same was cancelled by an appropriate civil Court."*

15. Now, let us see the legal position of the case in the light of decisions cited by the learned advocate for the petitioners and the opposite parties.

1) Manager Personal Division Vs. Md. Sazahan Miah and others, reported in 35 DLR 224, wherein his lordship held:

> *"A suit for declaration that plaintiff's dismissal was illegal and not binding without asking for consequential relief for enforcing the declaratory decree. Omission to pray for consequential relief for enforcing declaratory decree renders it unenforceable in law."*

2) Basharatullah Vs. Md. Managing Committee for New Academy and another, reported in 17 BLD 68, wherein his lordship held:

> *"A simple prayer for declaration that the impugned order of dismissal from service is illegal, void and not binding upon the plaintiff without a further prayer for consequential relief in the form of back salary and for mandatory injunction to reinstate him in his former post is hit by the proviso of section 42 of the Specific Relief Act and such a suit is not maintainable in law."*

3) Md. Usman Mia and others Vs. Sunu Mia and others, reported in 13 BLD 621, wherein his lordship held:

> *"Plaintiffs cannot get partition simplicitor. They must have to pray for declaration of title before succeeding in getting partition. On the very averment of the plaint, the plaintiff should pay requisite court fees."*

4) Ajiruddin Mondal and another Vs. Rahman Fakir and others, reported in 13 DLR(SC) 191, wherein their lordships held:

> *"There is, strictly speaking, no right at all in a defendant to have his share partitioned. Any person who wants some relief from a court has to file a suit and to pay court fee on it. The defendant may be out of possession and he cannot have his share separated and possession granted to him just because he happens to be a defendant in the suit. Even if he be in possession, he wants to get relief for which he would otherwise have to pay court fee under Article 17(v-a), Schedule II. If a defendant wants to have his share partitioned the ordinary rule should be that he files a suit for it."*

5) Syed Ahmed and others Vs. Azamullah being dead his heirs: Raja Miah and others, reported in 4 BLT(AD) 224, wherein their lordships held:

> *"That may be so, but in a suit for declaration of title the plaintiffs cannot succeed merely on an entry of their names in the R.S. khatian, because R.S. khatian is not document of title."*

6) Cinmoy Chowdhury and another Vs. Mridul Chowdhury and others, reported in 55 DLR(AD) 115, wherein their lordships held:

> *"In a suit for partition all the incidental question of title, however complicated it may be, can be decided and finally disposed of."*

7) Rezaul Karim and others Vs. Shamsuzzoha and others, reported in 49 DLR(AD) 68, wherein their lordships held:

> *"In a suit for partition the court will no doubt consider the title of the plaintiffs to the suit land in some details more than in a suit for permanent injunction, but it cannot in either case convert itself into a court for determination of the respective titles of the parties if a serious dispute emerges from the pleadings as to the title of the plaintiffs to the partible property and if it is not possible to effect partition without formally determining the plaintiffs' title to the property claimed in the partition suit."*

16. On consideration of records it appears to me that findings arrived at by the court of appeal below having been rested upon considerations and discussions of the evidence and the materials on record and also on a correct and proper analysis of the legal aspect involved in the case. Moreover, impugned judgment and decree of the appellate court below in it's entirety are well founded in the facts and circumstances of the case and law. Therefore, grounds urged and contentions advanced by the learned advocate for the petitioners are not correct exposition of law. However, I have gone through the decisions reported in (1) 35 DLR224, (2) 17 BLD 68, (3) 13 BLD 621, (4) AIR 1946 Bombay 207, and (5) AIR 1946 Patna 306 are quite distinguishable to that of the instant case and therefore, to that

effect I am also unable to accept his submissions. On the contrary the legal pleas taken by the learned advocate for opposite parties prevail and appear to have a good deal of force.

17. In view of the discussions, decisions and reasons stated above, I am of the view that impugned judgment and decree of the court of appeal below suffers from no legal infirmity which calls for no interference by this court in revision. Thus, I find no merit in the Rule.

18. In the result, the Rule is discharged. However, there will be no order as to costs. The judgment and decree passed by the learned Joint District Judge, 2nd Court, Chuadanga in Title Appeal No. 36 of 2013 dismissing the appeal and affirming the judgment and decree of the trial court are hereby affirmed.

19. The order of stay and status-quo granted earlier by this Court stands vacated.

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

8 SCOB [2016] HCD 35

HIGH COURT DIVISION

Criminal Appeal No. 2634 of 2015
(Jail Appeal No. 185 of 2013)

Md. Ibrahim
…Convict-appellant

Versus

The State
...Respondent

Mr. Muhammad Tafazzal Hossain Patwary, Advocate.
...For the appellant.

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

The 2nd day of July, 2015.

Present:
Mr. Justice Abu Bakar Siddiquee

Nari-O-Shishu Nirjatan Daman Ain, 2000
Section 10:
There is no further burden of proof when the assertions of the witnesses remain unchallenged. In the instant case the convict-appellant failed make out his defence on cross-examining the witnesses. On perusal of the aforesaid position of the facts, circumstances and other materials on record nothing cogent could be elicited to disbelieve the witnesses. Thus I find that there is no scope to interfere into the findings and decision as has been arrived by the learned Judge of the Trial Court.
… (Paras 28 and 29)

JUDGMENT

Abu Bakar Siddiquee, J.

1. This Criminal appeal is directed against the Judgment and order of conviction and sentence dated 30.09.2013 passed by the learned Judge, Nari-O-Shishu Nirjatan Daman Tribunal, Chandpur in Nari-O-Shishu Case No. 104 of 2009 arising out of Faridgonj Police Station Case No. 01 dated 01.07.2009 corresponding to G.R. No. 108 of 2009 convicting the appellant under Section 10 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended, 2003) and thereunder to suffer rigorous imprisonment for 7(seven) years and to pay a fine of Tk. 20,000/- (twenty thousand) in default to suffer rigorous imprisonment for further period of 1(one) year more.

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

One Md. Lokman Hossain lodged the F.I.R. with Faridgonj Police Station as informant alleging inter alia that he has been rendering his service as Assistant Teacher, Rupsha Ahamadia High School and victim is his daughter who has been performing her study is in Greedkalindia Hajera Hashmot Degree College on the other hand convict Md. Ibrahim is criminal type of man who used to lease School going student. It has been further alleged that on 01.07.2009 at about 2.30 p.m. while the victim returning back to her house from her College, reached to eastern side of

Chatura Bridge and at that time convict-appellant Md. Ibrahim rushed there and embraced the victim whereupon she raised hue and cry. It has been further alleged on hearing hue and cry the witness No. 1 rushed to the spot whereupon the convict-appellant tried to assault him. However, he was able escape his daughter and lodged the FIR after being rushed to the Police Station.

3. One S.I Abul Kashem took over the task of investigation and visited the place of occurrence and prepared its sketch map along with index. Thereafter he recorded the statements of the P.Ws. On completion of the investigation he has submitted a charge sheet against the convict-appellant with recommendation to stand trial for commission of offence punishable under Section 10 of the Nari-O-Shishu Nirjatan Daman Ain, 2000. Thereafter the case record was sent to the Nari-O-Shishu Nirjatan Daman Tribunal, Chandpur who after performing all formalities has farmed a formal charge and read over the same to the convict-appellant whereupon he pleaded not guilty of the offence and claimed to be tried.

4. Prosecution adduced as many as 8 (eight) witnesses. On the other hand, defence examined none.

5. The defence case as it appears that he is innocent and he has been falsely implicated in the case and that he is a victim of village policy.

6. On conclusion of the trial the learned judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Chandpur found the convict-appellant guilty of the offence and attributed the order of conviction and sentenced him to suffer rigorous imprisonment for 7(seven) years and to pay a fine of Tk. 20,000/- (twenty thousand) in default to suffer rigorous imprisonment for further period of 1(one) year more.

7. Being aggrieved by and dissatisfied with the order of conviction and sentence the convict-appellant preferred this appeal.

8. Mr. Muhammad Tafazzal Hossain Patwary, the learned Advocate appearing on behalf of the convict-appellant strenuously argued that there is no eye witness of the occurrence and the prosecution hopelessly failed to prove the case beyond reasonable shadow of doubt in spite of that the learned Tribunal imposed the order of conviction and sentence mere on surmise and conjecture and as such the impugned judgment and order of conviction and sentence is liable to set aside.

9. On the other hand, Mr. Abdullah Al Mamun, the learned Deputy Attorney General appearing on behalf of the respondent strenuously argued that all the formalities has been duly complied with and all the P.Ws. duly supported the prosecution case mentioning the time place and manner of occurrence and as such the impugned judgment and order of conviction is liable to be affirmed.

10. I have heard the learned Advocate for both the parities and perused material available on record.

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

12. P.W. 1, Md. Lokman Hossain Master is the informant of this case who deposed that the victim Amena Akhter is his daughter and she has been reading in Greedkalindia Hajera Hashmot Degree College. He further deposed that Ibrahim Khalil is a scoundrel type of man. He further deposed that on the day of occurrence at about 2.30 p.m. victim started to return to her house and the convict-appellant embraced the victim on the spot who tried to escape and raised hue and cry. Thereafter he deposed that witness Giasuddin all on a sudden rushed to the place of occurrence and rescued the victim and sent her to the house. He further deposed that after stating all those facts, he lodged F.I.R. which has been marked as exhibit-1.

13. None cross-examined this witness.

14. P.W. 2 Amena Akter is the victim in this case who deposed that her father is a School Teacher and she has been reading in a nearby college. She further adds on 01.07.2009 while she was on the way of returning back from her college, the convict-appellant Ibrahim Khalil apprehended her near Chatura Bridge area at about 2.30 a.m. and she was trying to escape and also raised hue and cry. She further deposed that at that time her close neighbour Gias Uddin was also returning back on riding of his bicycle who rushed there to help her and was able to escape from the grip of the convict-appellant. Thereafter she deposed that the convict-appellant became angry with Gias Uddin and took a iron rod from the tea-stall of one Belal Hossain and thereafter the convict-appellant was resisted by one Hafez Ahmed and others. She further deposed that after arrival at her home, she informed the matter to her parents who informed the matter to the police. Thereafter police apprehended the convict-appellant. She further deposed that her father lodged the FIR on stating all the facts.

15. None cross-examined this witness.

16. One Gias Uddin while deposing as P.W. 3 stated that both the parties are known to him and they are his close neighbour. He further deposed that on 01.07.2009, at 2.30 p.m. while he was returning to his house on riding his bicycle the convict-appellant caught the victim near Chatura Bridge area and he has escaped the victim from grip of the convict-appellant and took her to her house. He further deposed that the convict-appellant tried to inflict rod blow towards him but he was resisted by some other local people and subsequently the convict-appellant was caught by the police.

17. None cross-examined this witness.

18. P.W. 4 Hafez Ahmed deposed that both the parties are known to him they are his close neighbour. He also deposed that on 01.07.2009 the convict-appellant apprehended the victim near Chatura Bridge and thereby outraged her modesty. He further deposed that another close neighbour rescued the victim from the grip of the convict-appellant who became angry and tired to caused blow towards the Gias Uddin but due to his interference it was not possible on his part to inflict such blow.

19. None cross-examined this witness.

20. P.W. 5 Md. Selim Mia is Additional Chief Judicial Magistrate attached to Chandpur Magistracy who deposed that while he was serving as Judicial Magistrate the police forwarded one Amena Begum before him for recording her statements under Section 22 of the Nari-O-Shishu Nirjatan Daman Ain. Thereafter he deposed that he recorded statement of

victim Amena Begum after performing all legal formalities and victim executed the confessional statement on putting signature.

21. None cross-examined this witness.

22. P.W. 6, Md. Abul Kashem is the investigating officer in this case who deposed that after taking over the task of investigation, he rushed to the place of occurrence and prepared its sketch map along with index. He also deposed that he recorded 161 statements of the P.Ws and forwarded the victim before the Magistrate for recording her statements. Thereafter he deposed that completion of investigation, he has submitted a charge sheet against the convict-appellant with recommendation to stand trial for communication of offence punishable under Section 10 of the Nari-O-Shishu Nirjatan Daman Ain. He produced the FIR Form sketch map along with index which has been marked as exhibit-3, 4 and 6 series.

23. None cross-examined this witness.

24. P.W. 7 Abul Kalam Mizi deposed that both the parties are known to him and he is their close neighbour. He further deposed that on 01.07.2009 at about 3.00 p.m. on hearing hue and cry he rushed to tea-stall near their Jame Mosque and wherein witness Gias Uddin informed him the convict-appellant Ibrahim Khalil apprehended the victim near Chatura Bridge area and tried outrage her modesty. He further deposed Gias Uddin told that he rescued the victim and took her their house. He identified the convict-appellant on dock.

25. None cross-examined him.

26. P.W. 8 Nasima Begum deposed that both are her close neighbour. She deposed that on 01.07.2009 at about 2.30 p.m. the convict-appellant caught the victim while she was returning towards to her house at Chatura Bridge area and tried to outrage her modesty. She also deposed that all on a sudden Gias Uddin rushed their and rescued the victim and took her to their house. Thereafter she deposed that the convict-appellant tried to inflict injury towards Gias Uddin and she rushed to the tea-stall one Belal Hossain on hearing hue and cry and saw the occurrence.

27. None cross-examined this witness.

28. On perusal of the evidence on record it appears that all the P.Ws are local witness excepting the P.W. 5 who is a Magistrate and recorded the statements of the victim under Section 22 of the Nari-O-Shishu Nirjatan Daman Ain. It further appears that P.W. 1 is the informant, P.W. 2 is the victim, P.W. 3 is the Gias Uddin who rescued the victim from the grip of the convict-appellant. All those witnesses are eye witnesses of the occurrence. P.W.4 Hafez Ahmed is another witness who rescued the Gias Uddin from grip of the convict-appellant since the convict-appellant became angry with Gias Uddin and P.W. 6 and P.W. 7 are hearsay witnesses who have heard the fact just after the occurrence. None cross-examined these witnesses. A reference may be made from the decision enunciated in 40 DLR, 186 wherein it has been held that there is no further burden of proof when the assertions of the witnesses remain unchallenged. In the instant case the convict-appellant failed make out his defence on cross-examining the witnesses.

29. On perusal of the aforesaid position of the facts, circumstances and other materials on record nothing cogent could be elicited to disbelieve the witnesses. Thus I find that there is

no scope to interfere into the findings and decision as has been arrived by the learned Judge of the Trial Court. Hence, I have no other option but to agree with the decision as has been arrived by the Trial Court. Thus the impugned judgment and order of conviction is liable to be affirmed.

30. On perusal of the evidence on record it appears to me that the convict-appellant had already suffered almost 6 (six) years imprisonment in addition to the agony of trial and total punishment was for 7(seven) years imprisonment.

31. Having considered the aforesaid facts, circumstances and evidence on record, it is felt that the sentence already undergone by him is sufficient to meet the ends of justice. Thus, I would like to reduce the sentence to that extend which has been already served out.

32. In the result, the appeal is dismissed with modification in respect of sentence. The Judgment and order of conviction and sentence dated 30.09.2013 passed learned Judge, Nari-O-Shishu Nirjatan Daman Tribunal, Chandpur in Nari-O-Shishu Case No. 104 of 2009 arising out of Faridgonj Police Station Case No. 01 dated 01.07.2009 corresponding to G.R. No. 108 of 2009 is hereby modified and reducing to sentence undergone by him**.**

33. The order and sentence regarding imposition of fine is hereby affirmed. The trial Court is to take step for realization of the same.

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

8 SCOB [2016] HCD 40

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 8557 of 2007
With
Writ Petition No. 5054 of 2008

An application under Article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh

Begum Khaleda Zia
…Petitioner

Versus

Anti-Corruption Commission and others
…Respondents

Mr. Khandker Mahbub Hossain, Advocate with
Mr. A.J. Mohammad Ali with
Mr. Zainul Abedin with
Mr. A.M. Mahbub Uddin with
Mr. Md. Bodruddoza with
Mr. Raghib Rouf Chowdhury and
Mr. Md. Zakir Hossain Bhuiyan
…For the petitioner

Mr. Md. Khurshid Alam Khan, Advocate with
Mr. Rafiqul Islam Sohel, Advocate
…For the Respondent No. 01

MS. Anwara Shahjahan, D.A.G with
Ms. Yesmin Begum Bithi, A.A.G and
Mr. Abdur Rokib (Montu), A.A.G
…For the Respondent No. 6

Heard on: 19.04.2015, 29.04.2015, 20.05.2015, 26.05.2015, 14.06.2015, 15.06.2015, 16.06.2015 and 17.06.2015 (in writ petition No. 8557 of 2007)
Heard on: 19.04.2015, 30.04.2015, 06.05.2015, 07.05.2015, 20.05.2015, 21.05.2015, 14.06.2015, 15.06.2015, 16.06.2015 and 17.06.2015 (in writ petition No. 5054 of 2008)
Judgment on: The 05th August, 2015

Present:
Mr. Justice Md. Nuruzzaman
And
Mr. Justice Abdur Rob

If in any case the question of laws and facts are involved, in such case law point regarding maintainability should be decided first. … (Para 48)

Where the tribunal had no jurisdiction to try the case and passed any judgment in that case the writ petition can be maintainable. … (Para 58)

Applicability of Emergency Power Rules-2007 in the case after lifting of State emergency:
After lifting the state of emergency there is no scope of Judicial review regarding applicability of the Emergency Power Rules in the instant case because after lifting the state emergency the trial court would not be able to try the case under Emergency Power Rules, and as such, this writ petition has become in-fructuous. More-so, the

learned Advocate for the respondent No. 1 has already admitted that at the trial the prosecution will not propose to frame charge under the emergency power Rules as it would not be applicable after lifting the state emergency. Moreover our considered view that mere inclusion the Emergency Power Rules-2007 in the case of the accused petitioner's is not illegal as the said case has not been tried under the said Rules and before the trial of the said case the applicability of the said Emergency powers has lost it force. … (Para 84)

The Anti Corruption Commission Act, 2004
Section 17:
The Constitution has not given any immunity to the prime Minister or Cabinet in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar on A.C.C to conduct any enquiry in respect of allegation of Commission of offences mentioned to the schedule of the A.C.C Act, 2004 and schedule to the Criminal Law Amendment Act-1958. Therefore, we are of the view that not only on the basis of any complaint but A.C.C itself is legally empowered under section 17 of the A.C.C. Act-2004 to conduct any inquiry or investigation. … (Para 92)

Judgment

Md. Nuruzzaman, J.

1. In both the writ petitions, the petitioner has challenged the legality and propriety of the initiation and continuation of the proceedings of Special Case No. 4 of 2008 arising out of A.C.C. G.R. No. 88 of 2007 corresponding to Tejgaon Police Station Case No. 05 dated 02.09.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409 and 109 of the Penal Code, and also applying the provisions of the Emergency Power Rules, 2007 to the instant case vide Memo No. ¢p-/93-2007 (ac¿-2)/8323/1(4) dated 18.09.2007 issued by the respondent No. 3 (Secretary, Anti-Corruption Commission) now pending in the Court of Special Judge, Special Court No. 03, Dhaka so far as it relates to the petitioner.

2. The Writ Petition No. 8557 of 2007 and Writ Petition No. 5054 of 2008 have been heard together and are being disposed of by this common Judgment as the parties are same and they do involve common question of laws and facts.

3. It has been stated in the application that the petitioner is the former Prime Minister of the Government of Bangladesh. She was elected thrice as the Prime Minister. She was the leader of the opposition of the Parliament. She is also the Chairperson of Bangladesh Nationalist Party (B.N.P.)

4. The prosecution case, in brief, is that on 02.09.2007 a Deputy Director of Anti-Corruption Commission, Head Office, Dhaka as an informant lodged an F.I.R., with Tejgaon Police Station being Tejgaon Police Station Case No. 05, dated 02.09.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409 and 109 of Penal Code implicating 13 (thirteen) persons including the accused-petitioner stating, inter alia, that in connection with the Nathi No. DUDOK/197-2007 (Anu-2); the Commission conducted an enquiry and it was revealed through enquiry that the government had decided to handle the containers at ICD, Dhaka and Chittagong Port through a single contractor. For this purpose the Chittagong Port Authority invited a tender on 01.03.2003. The main conditions of the tender were that only the experienced equipment owners, equipment suppliers, equipment users and equipment handling firms and port users experienced in

container handling shall be eligible for participating in the said tender. The interested firms must also submit their documents relating to technical experience. 25 (Twenty five) bidders participated in the tender. The Technical Evaluation Committee in its report having stated that Global Agro Trade (Pvt.) Company Limited (hereinafter referred as to in short) GATCO which was evaluated as the lowest bidder, however did not have any experience in container handling, yet, the committee declared GATCO as responsive bidder. The Evaluation Committee recommended to the Chittagong Port Authority to award the contract to GATCO. The said recommendation was placed before the Ministry of Shipping, which sent it to the Ministerial Committee on 12.11.2003. But the said Ministerial committee refused to accept the proposal and recommended to cancel the same and invite re-tender; the recommendation of the Ministerial Committee was sent to the Prime Minister's Office. The Prime Minister (present petitioner) on 06.12.2003 without considering the recommendation of the Ministerial Committee sent the matter back to the Ministerial Committee for re-consideration. So far as the present petitioner is concerned it has been stated in the F.I.R. that Lt. Col. (Rtd.) Akber Hossain, who was present in the Ministerial Committee, informed the recommendations of the Committee to his son namely Ismail Hossain (Saimon) who is the F.I.R. named accused no. 7. At this stage Saimon contacted the petitioner's son namely Arafat Rahman (Coco), F.I.R. accused no. 8 and sought his assistance. Coco was informed of the details and after getting all information he demanded half of the money that Saimon would receive, if he *i.e.* Coco helps GATCO to get the work by influencing his mother (the petitioner). Saimon had agreed to that proposal and accordingly Arafat Rahman Coco influenced his mother the then Prime Minister in the matter. The relevant F.I.R version is quoted below:-

> "সায়মন এ পর্যায়ে তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়ার অনুকুল্য লাভের উদ্দেশ্যে তার পুত্র আরাফাত রহমান (কোকো)-র সাথে যোগাযোগ করে তার সহায়তা কামনা করে। কোকো সবকিছু অবগত হন এবং তার মাকে প্রভাবিত করার বিনিময়ে গ্যাটকো কাজটি পেলে সায়মনের প্রাপ্তব্য A¯hd অর্থের অর্ধেক দাবী করে সায়মন এতে রাজী হলে আরাফাত রহমান তার মা তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়াকে এ বিষয়ে প্রভাবিত করে।"

Thereafter, the Ministerial Committee for Purchase being influenced by the owners of the GATCO approved the proposal of the Shipping Ministry and recommended to give the work to GATCO, which was later approved by the Prime Minister. Thus, the accused petitioner collusively helped to give the work to the inexperienced company namely GATCO, for which the container handling operations at Chittagong Port and ICD, Dhaka were greatly hampered and the exporters, importers and C&F agents and Bangladesh Railway suffered a great loss. The government also suffered about one thousand crore Taka for the aforesaid act. During the enquiry a Director of GATCO admitted that he paid Tk. 2,19,45,091/- to the accused No. 7 for influencing the other accused for obtaining the work. Thus, the accused petitioner including the former Shipping Minister Lt. Col. (Retd.) Akber Hossain and others collusively awarded the work to an inexperienced and non-qualified firm namely Global Agro Trade (Pvt.) Company Ltd. (GATCO). On the basis of such allegations the instant case was lodged by the Anti-Corruption Commission (hereinafter referred as to Commission).

5. The provisions of Emergency Power Rules, 2007 were made applicable to the instant case vide memo No. ¢p-/93-2007 (ac¿-2)/8323/1(4) dated 18.09.2007 issued by the respondent no. 6 under the authority of the respondent no. 1.

6. The petitioner challenging the inclusion of Emergency Power Rules-2007 in her case filed the writ petition No. 8557 of 2007.

7. The Commission vide memo No. ¢p-/93-2007(ac¿ -2)/7626 dated 02.09.2007 through a Deputy Director of the Commission investigated the case. Thereafter, vide memo No. ¢p-/93-2007(ac¿ -2)/7236 dated 11.05.2008 the Commissioner (Investigation) of the Commission issued a sanction letter to submit the charge sheet in the case. Accordingly, Charge Sheet No. 169 dated 13.05.2008 was submitted against the petitioner and others under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409 and 109 of the Penal Code and the Emergency Power Rules, 2007.

8. The learned Additional Chief Metropolitan Magistrate, Dhaka upon receipt the charge-sheet with sanction letter vide order dated 14.05.2008 sent the case records to the learned Chief Metropolitan Magistrate, Dhaka who on the same day sent the case records to the Court of learned Metropolitan Sessions Judge, Dhaka for disposal.

9. The learned Metropolitan Sessions Judge, Dhaka on 07.05.2008 received the case records and the case was registered as Metropolitan Special Case No. 62 of 2008 and took cognizance of the offence. Eventually, the case was sent to the Court of learned Special Judge, Special Court No. 03, Dhaka and 20.07.2008 was fixed for charge hearing.

10. At this stage of the proceeding although charged has not yet been framed in this case the petitioner preferred the instant writ petition No. 5054 of 2008.

11. Mr. Md. Bodruddoza, learned Counsel appearing for the accused petitioner in Writ Petition No. 8557 of 2007 has submitted that the impugned Memo No. ¢p/93-2007(ac¿ -2)/8323/1(4) dated 18.09.2007 (the impugned Memo) issued by respondent No. 3 under the authority of respondent No.1 applying the Emergency Power Rules, 2007 (hereinafter referred to as the said Rules) in A.C.C. G.R. Case No. 88 of 2007 corresponding to Tejgaon P.S. Case No. 05(09)07 for the offences occurred during the period between 01.03.2003 and 31.12.2006 is contrary to Section 3 (3L) of the Emergency Power Ordinance, 2007 (hereinafter referred to as the said Ordinance) and, as such, the issuance of the impugned Memo and the initiation and continuation of the said Case under Rule 15 of the said Rules is without lawful authority and is of no legal effect.

12. He has further submitted that the said Case having been filed in clear violation of section 17 M of the said A.C.C. Act without conducting any investigation, the same has been initiated without lawful authority and is of no legal effect.

13. He has also submitted that the said case being a scheduled offence under the said Act, before filling of the said Case the same was required to be enquired and investigated into by two different persons under Rule 24 of the Anti-Corruption Commission Rules, 2007 (the ACC Rules) but no such enquiry or investigation having been made as required in the said Rules, the said case has been initiated without lawful authority.

14. He has further added that the said Ordinance authorizes the Government to exercise its power and delegate the authority to its subordinate whereas the said Commission being an independent, neutral and statutory body is not subordinate to the Government, and as such, the framing of the said Rules by way of excessive delegated legislation empowering the said Commission to exercise various powers under the said Rules 15, 15L, 15M(1), 15M(2), 15M(4), 15N(1), 15O, 16(2), 19O, 19P and 19Q is ultra vires the said Ordinance, and as such, the said Notice and the proceeding in the instant Case is void and has been issued without lawful authority.

15. He has lastly argued that the respondent No. 3 issued the impugned Memo dated 18.09.2007 without sanction of law, and as such, the said Memo has been issued without lawful authority and is of no legal effect.

16. Mr. Md. Khurshid Alam Khan in reply of Mr. Badrudozza has submitted that, so far prayer made in Writ Petition No. 8557 of 2007 as to inclusion of Emergency Power Rules 2007 vide Memo No. C/93-2007 (ac¿ -2/8323/1(4) dated 18.9.2007 (the impugned Memo) in the instant Case has already become in-fructuous because the emergency declared by the then President has already been lifted. Thereafter an elected government has taken over the charge. In that view of the matter the Rule of the Writ Petition No. 8557 of 2007 is liable to be discharged as being in-fructuous.

17. He has further argued that though in the charge sheet the emergency Rule has been included against all the accused persons but charge has not yet been framed in the instant case and, as such, at the time of framing of charge the accused is liable be discharged from the charge of emergency power Rules 2007. Therefore, continuation of the instant Rule is superfluous.

18. Mr. Raghib Rouf Chowdhury, has placed the writ petition No. 5054 of 2008 before us and Mr. A. J. Mohammad Ali finally argued the case and submitted that the present case has been lodged and initiated without sanction as required to lodge the FIR and for taking cognizance of the Case as provided in section 32(1) of the Anti-Corruption Commission Act, 2004 (as amended) and further, the sanction which was obtained for filing the charge sheet is no sanction in the eye of law, because it is a mechanical sanction and ex-facie the said sanction dose not disclose any application of mind and satisfaction of the commission in giving the sanction relating to offences alleged to have been committed by the petitioner.

19. Mr. Ali has further alleged that sanction accorded by the prosecution is no sanction in the eye of law because it has been given under the signature of a Commissioner and not by the Commission as stipulated in the said Rules, and as such, the same has been given without lawful authority.

20. Mr. Ali has further added that the Anti-Corruption Commission has acted grossly in violation of its authority as well as the section 17 of the said A.C.C. Act. He has elaborated the point by arguing that the functions of the Anti-Corruption Commission are enumerated in section 17 of the Anti-Corruption Commission Act, 2004 and the said functions of the Commission does not authorize it to scrutinize the acts of the Prime Minister or the Cabinet in taking an executive decision in the performance of their function of the Republic and, as such, cannot be called in question by the Anti-Corruption Commission, and hence, the lodging of the instant case has been done without lawful authority and is of no legal effect.

21. He has also asserted that no prior sanction (অনুমোদন) for lodging the said case against the petitioner was issued by the commission in accordance with and in compliance with the mandatory provisions of law and, as such, the lodging of the case against the petitioner by the informant has no sanction of law and is ex-facie illegal and, is a malice in law and hence, the initiation and continuation of the proceeding of the said case is without jurisdiction and is of no legal effect.

22. Mr. Ali has argued that no complaint (অভিযোগ) was lodged by any person or quarter against the petitioner under rules 3 and 4 of the Ant-Corruption Commission Rules, 2007 and the said case not being lodged by the Commission on the basis of any complaint (অভিযোগ), the lodgment of the case against the petitioner is malafide and ex-facie illegal;

23. Mr. Ali also added that the proceeding and trial of the said case is a nullity for want of a proper and valid sanction and, as such, the continuation of the proceeding of the said case is liable to be quashed. Moreover, such purported sanctions dated 02.09.2007 and 11.05.2008 do not show that those related to the acts in respect of which the prosecution was launched and, therefore, the said Sanctions are invalid and the Court below has no jurisdiction to proceed with the trial of the said case.

24. Mr. Ali reiterating the submission of Mr. Badruddoza submitted that the said Case having been filed in clear violation of section 17M of the Anti-Corruption Commission Act, 2004 (the said Act) without conducting any investigation, the same has been initiated without lawful authority and is of no legal effect.

25. Mr. Ali further reiterating the submission of Mr. Badruddoza further argued that said Case being a scheduled offence under the said Act, before lodging of the said Case the same was required to be enquired and investigated into by two different persons under Rule 24 of the Anti-Corruption Commission Rules, 2007 (the ACC Rules) but no such enquiry or investigation having been made as required in the said Rules, the said Case has been initiated without lawful authority.

26. In support of his submissions the learned Advocates referred to the case of Sheikh Hasina Wazed alias Sheikh Hasina vs. State and another, reported in 63 DLR (2011) 40, Begum Khaleda Zia vs. State, reported in 55 DLR (2003)596, Nesar Ahmed also known as Babul vs. Government of Bangladesh, represented by the Deputy Commissioner, Noakhali and another, reported in 49 DLR (AD) (1997) 111, Sheikh Mujibur Rahman and another vs. The State reported in 15 DLR (1963) 549.

27. In both the writ petitions the Government as respondent contested without filing any affidavit-in-opposition. However, the learned Deputy Attorney General has opposed the Rules and prayed for discharging the same.

28. The respondent No. 1 contested in both the Rules by filing affidavit-in-oppositions whereof it does not opposes the facts of the case, however, it denied all legal proposition as alleged in the writ petitions by the petitioner that the lodging of the F.I.R, charge-sheet and according the sanction for trial etc are without lawful authority.

29. Mr. Khurshid Alam Khan, the learned Advocate appearing on behalf of the respondent No. 1 referred the Rule issuing order and submitted that the instant Rules were issued under Article 102 (2) of the Constitution for declaring that initiation and continuation of a criminal case and **inclusion of the Emergency Power Rules – 2007** is void, illegal, without lawful authority and is of no legal effect and hits under Articles 35 and 93 (1) of the Constitution therefore, crux of the argument of his was that the Rules are not maintainable in the present facts and circumstances of the case as the apex Court enunciating the principle has well settled that a Criminal Case can not be quashed invoking the writ Jurisdiction under Article 102 (2) of the Constitution unless the vires of the law is challenged.

30. He by referring some portion from the First Information Report of the Case submitted that it is a case of corruption and the petitioner is involved in the case as per averment of the F.I.R which are as follows:

> সায়মন এ পর্যায়ে তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়ার অনুকুল্য লাভের উদ্দেশ্যে তার পুত্র আরাফাত রহমান (কোকো)-র সাথে যোগাযোগ করে তার সহায়তা কামনা করে। কোকো সবকিছু অবগত হন এবং তার মাকে প্রভাবিত করার বিনিময়ে গ্যাটকো কাজটি

পেলে সায়মনের প্রাপ্তব্য অবৈধ অর্থের অর্ধেক দাবী করে সায়মন এতে রাজী হলে আরাফাত রহমান তার মা তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়াকে এ বিষয়ে প্রভাবিত করে।

31. Mr. Khan further referring to annexure '**D'** the charge-sheet submitted that it has been clearly depicted in the charge-sheet that Mr. Saimon in his confessional statement made under section 164 of the Code of Criminal Procedure before the Judicial Magistrate confessed the guilt implicating himself and other accused. He has also submitted that other two co-accused namely Syed Tanvir Ahmed and Syed Galib Ahmed also made confessional statement under section 164 of the Code of Criminal Procedure confessing guilt to themselves and implicating other accused persons.

32. According to him from the averment of the F.I.R, charge-sheet and confessional statements the prosecution has made out a clear case of corruption against the accused petitioner and others and, as such, it needs scrutiny upon taking evidence. Therefore, the Rules are liable to be discharged.

33. Mr. Khan has elaborated his submissions referring some precedents placing reliance to those in support of his submissions which are to the case of ***Government of Bangladesh and another Vs. Sheikh Hasina and another*** 60 DLR (AD) (2008) 90, in which the High Court Division quashed the proceeding of Metropolitan Sessions Case No. 2576 of 2007 under Sections 385/109 of the Penal Code in exercise of its power under Article 102 of the Constitution in a writ petition filed by Sheikh Hasina who was an accused in the Case. However, on appeal the appellate Division *vide Judgment dated 08.05.2008 allowed the appeal and set aside the Judgment of High Court Division.*

34. He further referring to the case of ***Government of the People's Republic of Bangladesh and others vs. Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku*** 60 DLR (AD) (2008) 147 argued that the Senior Special Judge, Dhaka took cognizance of the offence against the accused namely Iqbal Hasan Mahmood under sections 165 and 166 of the Income Tax Ordinance, 1984 read with rule 15 of the Emergency Power Rules, 2007. The High Court Division quashed the entire proceedings of the case in a writ petition filed by the accused Iqbal Hasan Mahmood. On appeal, the Appellate Division vide judgment dated 20.05.2008 allowed the appeal.

35. In this connection Mr. Khan further referred the precedent to the case of ***Anti Corruption Commission and another vs. Md. Enayetur Rahman and others*** 16 MLR (AD) (2011) 297 and argued that in that case Charge was framed against the accused Enayetur Rahman and two others under sections 409/420 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 read with section 156 of the Customs Act. At this stage the accused Enayetur Rahman challenged the proceedings of the case before the High Court Division by filing a writ petition and the High Court Division quashed the proceedings. Anti Corruption Commission and another preferred appeal to the Appellate Division. The Appellate Division vide judgment dated 28.02.2011 set aside the judgment of the High Court Division.

36. Mr. Khan rebutted the argument advanced by the learned Advocate for the petitioner regarding the sanction of the instant case and referred to the provision of law regarding sanction as contemplated in section 32 of the Anti Corruption Commission Act, 2004 which has already been settled by the Appellate Division on a Judicial pronouncement to the Case of ***Anti-Corruption Commission vs. Dr Mohiuddin Khan Alamgir*** 62 DLR (AD) 290.

37. He further referred to the Case of ***SM Zafarullah vs. Durniti Daman Commission and others*** 20 BLC (2015) 311. wherein, the petitioner filed separate writ petitions challenging the proceedings of three cases, all under sections 409/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 read with Rule 15 of the Emergency Power Rules, 2007 and also the memo dated 20.09.2007 according sanction to submit the charge sheets.

38. The High Court Division applied the ratio laid down in the case of ***Dr Mohiuddin Khan Alamgir*** 62 DLR (AD) 290 (supra) and held that since a sanction is required under section 32 of the Act, 2004 read with Rule 15(2) of the Durniti Daman Commission Bidhimala, 2007 was given before submitting the charge sheets, the impugned proceedings initiated against the petitioner cannot be declared to have been initiated and proceeded without lawful authority.

39. In respect of the issue of maintainability of writ petition challenging the preceding of criminal case, the High Court Division also applied the ratio laid down by the Appellate Division in the case of ***Enayetur Rahman and others*** 16 MLR(AD) (2011) 297 (supra) and thereby observed that the criminal proceeding can not be quashed under Article 102 of the Constitution invoking the writ jurisdiction.

40. He lastly referred to the case of ***Anti-Corruption Commission vs. Mehedi Hasan and another*** 67 DLR (AD) (2015) 137 wherein the Appellate Division vide judgment dated 11.02.2015 disposed of five appeals setting aside the Judgment of the High Court Division out of which one arises against the judgment passed by the High Court Division in a writ petition quashing the proceedings of Special Cases under Sections 409 and 109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 read with Rule 15 of the Emergency Power Rules, 2007. The rest four appeals were preferred against judgments passed by the High Court Division quashing the proceedings of cases on applications made under section 561A of the Code of Criminal Procedure in exercise of its inherent power.

41. Mr. Khan in reply of Mr. Ali in respect of maintainability of the writs submitted that the principle enunciated in the Nesar Ahmed's case by the apex Court is not applicable in the instant case, rather, the decisions referred above by him are applicable in the present case as per latest pronouncement of the apex Court.

42. Mr. Khan has argued that in the instant writ petitions, the vires of the law has not been challenged by the petitioner and therefore, the writ petitions, in which the petitioner seeks to quash the criminal proceeding is not maintainable, and as such, the Rules are liable to be discharged.

43. Mr. Khan has lastly submitted that according to F.I.R, charge-sheet and confessional statements made under section 164 of the Code of Criminal Procedure by some other co-accused there are prima-facie involvement of the petitioner in the transaction is apparent which discloses the Criminal offence. Therefore, the case should be disposed of by taking evidence.

44. The learned Advocate of the petitioner by filing two affidavit-in-reply denied the some statements of the affidavit-in-oppositions filed by the respondent No. 1. It has been asserted in the said two reply that some statements of the affidavit-in-oppositions are misleading and false. In the reply of the affidavit-in-opposition of the writ petition No. 8557 of 2007 the petitioner also annexed a certificate copy of the Judgment of the writ petition No. 7250 of 2008 which was delivered by a Division Bench of this Division. It has also been

stated in the reply of affidavit-in-opposition that at the time of filing the instant case the Rules and Ordinance challenged in the instant writ petition was very much exist and the said proceeding was initiated and continued under the said Rules and Ordinance. If the impugned Rules and Ordinance are found illegal, the proceeding initiated and continued under the said Rules and Ordinance should be declared illegal as well.

45. Further it has been mentioned in one of the reply that implicating petitioner alleging corruption due to approving the recommendation of the concern Ministry to give work to concern company is a clear violation of Article 55 and 145(2) of the Constitution for which interpretation of law is required which can only be adjudicated under writ jurisdiction and, as such, the writ petition is maintainable.

46. We have anxiously considered the submissions of the learned Advocates of both sides.

47. From the submissions of the learned Advocates of both sides and facts and circumstances of the case it appear that the pertinent question of laws and facts are involved in the writ petitions.

48. Therefore, according to the settle maxim of law as has been laid down by the apex Court that if in any case the question of laws and facts are involved in such case law point regarding maintainability should be decided first.

49. We shall first deal with the question of laws.

50. So far as maintainability of the writ petitions Mr. Ali the learned Advocate for the petitioner, placed reliance to the case of Neser Ahmed Vs- Bangladesh and another 49 DLR (AD)111. He relying upon the principle, enunciated in that case, submitted that the instant writ petitions are maintainable.

51. In that case the appellant Neser Ahmed and another were convicted under section 19(f) of Arms Act read with section 26 of the Special Powers Act. The convict appellant had no reasonable opportunity to avail the statutory remedy by way of filing appeal under section 30 of the Special Powers Act. Challenging the judgment and order of conviction and sentence he filed an application under section 561A of the Code of Criminal Procedure in the High Court Division wherein this court observed that the application is not maintainable and the same was taken back. Therefore, the convict appellant filed a writ petition before this Division which was rejected in limine. Then the appellant preferred leave to appeal before the Appellate Division and leave was granted. Ultimately, the appeal was allowed and judgment and order of conviction was set aside on the ground that the special tribunal had no jurisdiction to try the case.

52. It appears form the precedents of the case of chairman, Anti-corruption Commission and another –vs- Enayetur Rahman and others, reported in 64 DLR (AD) 14, the Appellate Division set aside the Judgment of the High Court Division. The Judgment of the High Court Division while setting aside by the Appellate Division the author Judge was Mr. Justice S.K. Sinha, now the Hon'ble Chief Justice in that case his lordship has clearly observed:

> "This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extra ordinary jurisdiction to the converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill suite to meet the demands of extra ordinary situations that is to say where vires of a statute is in

> question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is *intra vires* but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102(2) of the Constitution."

53. From the above observation of the apex Court it further clearly divulged that the accused petitioner elsewhere in the instant applications do not make out the case in the light of the above observation of the appellate Division.

54. We have very closely gone through the precedent to the case of Anti-Corruption Commission –vs- Mehedi Hasan and another for dispensing the proper and fair Justice to the instant Case.

55. It also appears that the Hon'ble appellate Division has been further observed to the Case of Anti-Corruption Commission –vs- Mehedi Hasan and another reported in 67 DLR (AD) 137 that:

> There is no scope for quashing a criminal proceeding under the writ jurisdiction unless the vires of the law involved is challenged. The vires of the law involved in the case has not been challenged. Therefore, there is no scope for aggrandizement of jurisdiction of the High Court Division in quashing a criminal proceeding. Consequently, the High Court Division was not justified in quashing criminal cases in exercise of its power under Article 102 of the Constitution.

56. From the aforementioned principle as pronounced by the apex Court we are of the considered view that the cases in hand do not come within the scope of the above settle principles.

57. From the discussions and the decisions referred herein above regarding maintainability of the instant writ petitions it is our further view that the case of 49 DLR (AD) 111 and the facts and question of laws involve in the instant case is quite distinguishable. However, on the other hand the precedents referred as above on behalf of the respondents it is clearly divulged that the principles enunciated to the referred case of the **Anti Corruption Commission –vs- Enayetur Rahman and another 64(AD) 14,** and to the case of **Anti Corruption Commission –vs- Mehedi Hasan 67 DLR (AD) 137** would be applicable in the instant Case.

58. On a meticulous scrutiny the above referred decision we are of the considered view that the principle laid down in the referred case regarding maintainability is that where the tribunal had no jurisdiction to try the case and passed any judgment in that case the writ petition can be maintainable. But in the instant writs neither Rule nisi were issued challenging the Jurisdiction of the Special Judge nor argued to that effect. Apart from that there are some other observations in the Nesar Ahmed's case and if we look into that observations it would be crystal clear that those do not come to play any vital role in the present case in hand. Rather, those observations are quite nugatory to the facts and laws of the instant writ petitions. Hence, we are unable to accept the referred principle in the instant case.

59. For better understanding and clarification the jurisdiction of the Special Judge, we shall refer and discuss the relevant laws as well as jurisdiction of the Special Judge in the Judgment later on.

60. Next, it has also contended by the learned Advocate for the petitioner that the sanction accorded in the instant case is not a valid sanction in the eye of law as it was issued by one of the Commissioner not by the Anti Corruption Commission.

61. It has further contended by the learned Advocate for the petitioner that in the instant case no valid sanctions were accorded to file the case as well as submitting the charge sheet for prosecuting the accused petitioner in accordance with law and in support of his submission he relied to the case of **Sheikh Hasina Wazed alias Sheikh Hasina –vs- state reported in 63 DLR (HCD) 40** and to the case of **Begum Khaleda Zia –vs- state reported in 55 DLR (HCD) 596.**

62. Before we enter, upon the discussion regarding the question of sanction in the instant case, we think that it would be proper to deal with the relevant law and settle judicial pronouncement of our jurisdiction as well as other jurisdiction.

63. It appears that section 32 was amended by Ordinance No. VII of 2007, which came to effect on 18th April 2007. After amendment of the said A.C.C. Act it has been enacted in the section 32 of the said A.C.C. Act that one sanction is required to proceed with the case at the time of filing of the charge-sheet in the Court of Special Judge.

64. Moreover in this connection we can profitably refer the following precedent of the apex Court i.e. to the case of **Government of the people's Republic of Bangladesh and other –vs- Iqbal Hasan Mahmud alias Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku** reported in 60 DLR (AD) 147 wherein it has held that:

> "Sanction for prosecution – The process of sanction is an administrative act and is not subject to any judicial scrutiny. Since the chairman of the NBR is an inseparable and essential constituent part for the Board to function. The sanction given by it cannot be taken to be in any way tainted for his presence on the Board. The principle of coram-non-judice has no application in the instant case."

65. More-so, in the Case of Dr. Mohiuddin Khan Alamgir reported in 62 DLR (AD) 290 wherein it has been held by the apex Court that as per Section 32 of A.C.C Act one sanction is required to proceed with the case which are as follows:-

> No sanction is required to file a complaint (A¢i-k¡N) and the unamended as well as the amended section 32 requires only one sanction from the Commission.

66. The High Court Division, however, misinterpreted section 32 of the Act, the original as well as the amended one, in holding that a sanction by the Commission is required before lodging a first information report. The High Court Division, further misconceived the amended section 32 and wrongly held that a further sanction is required to take cognizance of the offence by the Court inspite of the sanction given earlier under sub-section (2) of section 32 of the Act.

67. It has been further held that:-

> Sanction from the Commission will be required when the charge sheet is filed under sub-section (2) and on receipt of the charge sheet along with a copy of the letter of sanction the Court takes cognizance of the offence for trial, either under the original section 32 or the amended section 32. As a matter of fact, only one sanction will be required under section 32, unamended or amended.

After completion of the investigation, the investigating officer, under sub-section (2) of section 32, on obtaining the sanction from the Commission, would submit the police report before the Court along with a copy of the letter of sanction. The Court, under sub-section (1), would take cognizance, only when there is such sanction from the Commission. Both the sub-section (1) and sub-section (2) of the section 32 envisages only one sanction, not two. Sub-section (1) does not spell out or even envisage filling of any fresh sanction when the sanction to prosecute has already been filed along with the charge sheet of the investigating officer. It only envisages that without such sanction from the Commission (কমিশনের অনুমোদন ব্যতিরেকে) as spelt out in sub-section (2), no Court shall take cognizance of the offence (®L¡e Bc¡ma HC BCe¡l Ad£e ®L¡e Afl¡d¢hQ¡l¡b Bjm NËZ L¢lch e¡) under sub-section (1) of section 32.

68. Upon a close scrutiny of the reported cases on the question of sanction, as referred above, it appears to us that during the period when the cases of *Sheikh Hasina* (both NAIKO and Barge Mounted Cases) were decided, the High Court Division, except the view took in the case of H*abibur Rahman Molla*, that two sanction are required under section 32 of the ACC Act, 2004, and that the sanction before submitting the charge sheet has to be a speaking one based on reason, not mere mechanical. This was the prevailing view and *Sheikh Hasina's* cases were decided accordingly. We have already noted that subsequently, law on point of sanction has been settled by the Appellate Division in series of cases to the effect that under the amended section 32 of the ACC Act, 2004 one sanction is required before submitting the charge sheet and it will be given 'Form-3' of the schedule to the ACC Rules, 2007. It need not be a speaking one. In the facts and circumstances of the instant case we find no reason to deviate from the settled principle on the issue of sanction. In view of the legal proposition of law we hold that the sanction given in the instant case does not suffer from any legal infirmity and has been given in accordance with law.

69. We are therefore, of the view that the precedents referred in 63 DLR(HCD)40, 55 DLR (HCD)596 and 63 DLR(HCD)162 would not be applicable in the instant case as regard the sanction matter rather, the principles enunciated to the case of *Dr. Mohiuddin Khan Alamgir* reported in 62 DLR (AD) 290 was decided on 04.07.2010. Therefore, it will prevail over all other decisions as the latest decision of the apex Court.

70. It has contended on behalf of the petitioner that earlier the proceedings of the case of Begum Khaleda Zia and the case of Sheikh Hasina Wazed alias Sheikh Hasina were also quashed although those cases were filed by the Anti-Corruption Commission which have been reported in 55 DLR (HCD) 596 and 63 DLR (HCD) 162 respectively.

71. On a close scrutiny of the above referred cases however, it appears that the case of Begum Khaleda Zia-Vs-State reported 55 DLR 593 and the case of Sheikh Hasina Wazed alias Sheikh Hasina reported 63 DLR 40 were filed as Criminal Miscellaneous cases under Section 561A of the Code of Criminal Procedure for quashing the proceeding of the relevant cases but in the instant case the petitioner invoked the writ Jurisdiction under Article 102(2) of the Constitution for quashing the Criminal Case. It is, therefore, appears that the facts and circumstances as well legal proposition of those cases and case in hand is quite distinguishable. We are, therefore, disagreeing to accept those principles in the present case. The argument of the learned Advocate for the petitioner on point of sanction in the light of the reported cases of 63 DLR,40 and 63 DLR, 162 is devoid any substance.

72. More-so, it is our considered view that two sanctions are not required for filing and trial the case respectively as per provision of law because the section 32 of the A.C.C Act, 2004 was amended by Ordinance No. VII of 2007 which came into effect on 18th April, 2007. In support of our above view we can place reliance upon the decision of the appellate Division held to the case of Anti-Corruption Commission-Vs- Md. Bayazid and others reported 65 DLR (AD) 97 wherein it has been held that:

> Therefore, under the amended provision no prior sanction of the Commission for filing a case is necessary in accordance with Form-3. The High Court Division was confused by the use of the words "sanction for filing case' which were deleted by Ordinance No. VII of 2007 and by overlooking this aspect of the matter quashed the proceeding."

73. Further it would be noteworthy to discuss the case of Nasar Ahmed's which was referred by Mr. Ali.

74. In the case of Nasar Ahmed another –vs- state it has also held:

> ''It is free from any doubt that when an equally efficacious alternative statutory remedy is provided for in section 30 of the Special powers Act enabling the accused to prefer an appeal to the High Court Division the question of invoking the jurisdiction of the High Court Division under Article 102 of the Constitution normally does not arise.''

75. It has further been held in this case that,

> ''Upon satisfying itself that the accused person had no reasonable opportunity to avail of the statutory remedy, the High Court Division however, in exercise of jurisdiction under Article 102 of the Constitution, will not sit on appeal over the judgment of the Special Tribunal and will not convert itself into a Court of Appeal under section 30 of the Special Powers Act. It will confine itself to the jurisdictional issues that are usually associated with judgments of inferior Tribunals and quasi-judicial bodies.''

76. So, if we revisit the Rules issuing orders of both the writ petitions, it appears that the vires of the law has not been challenged by the writ petitioner in any of the writ petitions. More so, there is no assertion in the writ petitions that the petitioner has ever sought to agitate the grievances under section 561A for the statutory relief as has been done to the case of Nesar Ahmed reported in 49 DLR (AD)111.

77. Upon a meticulous scrutiny of the writ petitions we do not find any statement in the writ petitions to the effect that the petitioner was constrained to file the writ petition because of either the absence of or inadequacy of equally efficacious alternative statutory remedy.

78. However, in Writ Petition No. 8557 of 2007 it has been stated that the normal courts can not decide the aspect as to applying the Emergency Rules which only can be judicially reviewed by writ court. So, this writ is maintainable. It is pertinent to mention here that in the Rule issuing order of the aforesaid writ it was mentioned inclusion of the case under Emergency Rules 2007 is bad since the alleged offence took place between 01.03.2003 and 31.12.2006 thus hits the provision of section 3 (3Ka) of the Emergency Power Ordinance 2007.

79. In this context it would be noteworthy to refer to the case of Government of Bangladesh and another –vs- Sheikh Hasina and another 60 DLR (AD) 90. The writ

petitioner in that writ the legality of the approval given in her case by the Additional Secretary, Law section 1, Ministry of Home Affairs under Rule 19U (1) and (2) of the Emergency Power Rules, 2007 as amended by SRO No. 39-Ain/2007 on 08.04.2007 was challenged as being illegal, malafide and ex-facie void because the case does not come within the scope of the said SRO and High Court Division quashed the proceeding. On appeal, the appellate Division observed that vires of the Rules of the Emergency Power Rules, 2007 was not challenged in the writ petition. After elaborate discussions and intense scrutiny of various provisions of law and authorities of our jurisdiction and others, the Appellate Division vide judgment dated 08.05.2008 allowed the appeal and set aside the judgment of the High Court Division.

80. In that case it has been held that:

> That the sanction given by the respondent No. 2, Additional Secretary, Ministry of Home Affairs, Government of Bangladesh vide Memo No. üxü (BCe-1)/Srh-1/07/(Awn-5)/712 dated 16-7-2007 purportedly under Rule-19U (2) of the Emergency Power Rules, 2007, for proceeding with Gulshan Police Station Case No. 34 dated 13-6-2007 filed under sections 385/109 of the Penal Code, 1860, under the Emergency Power Rules, 2007, treating the offence to be of public importance, evidenced by the Annexure C to the writ petition, does not suffer from any illegality or infirmity and is a valid sanction in the eye of law.

81. It has been further held that:

> What is prohibited under Article 35(1) is only conviction or sentence under an expost facto law and not the trial thereof. A trial under a procedure different from what obtained at the time of the commission of the offence or a trial by a Court different from that which had competence at that time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or violation of any other fundamental right may be involved.

82. It has been also held in that case that:

> There is nothing in the Emergency Power Ordinance or Emergency Power Rules, 2007 which contravened the provisions of Article 35(1) of the Constitution.

83. In the present facts and circumstances of the case it is our considered view that in the instant writs the petitioner neither challenged virse of the Emergency Power Ordinance nor its Rules 2007 therefore, the writs are not maintainable.

84. It is the cardinal principle of law that while a law and Rules framed there under not in force and under the provisions of that law or Rules no punitive action can be done in accordance with that law or Rules in such situation earlier mere inclusion of the same law and Rules do not require to interpretate regarding applicability. In the case in hand, therefore, we can not but to the view that after lifting the state of emergency there is no scope of Judicial review regarding applicability of the Emergency Power Rules in the instant case because after lifting the state emergency the trial court would not be able to try the case under Emergency Power Rules, and as such, this writ petition has become in-fructuous. More-so, the learned Advocate for the respondent No. 1 has already admitted that at the trial the prosecution will not propose to frame charge under the emergency power Rules as it would

not be applicable after lifting the state emergency. Moreover our considered view that mere inclusion the Emergency Power Rules-2007 in the case of the accused petitioner's is not illegal as the said case has not been tried under the said Rules and before the trial of the said case the applicability of the said Emergency powers has lost it force. Therefore, we are of the view that it is nugatory to further discuss aforesaid point to decide in the instant writ petitions as the Rule of writ petition No. 8557 of 2007 being in-fructuous on this point.

85. If we further look at the case of Nesar Ahmed reported in 49 DLR (AD) 111 wherein their lordships allowed the appeal only one ground that the special Tribunal had no jurisdiction to try the case. Had it been the same episode in the instant case in that case the petitioner obviously has got the same remedy.

86. Since Mr. Ali, the learned Advocate for the petitioner referred the above case and argued that the petitioner is entitled to have the same relief therefore; it is pertinent to examine the jurisdiction of the Special Judge, Special Court No. 3, Dhaka wherein the instant case is pending.

87. It is a case under section 5(2) of the prevention of corruption Act, 1947, read with section 409 and 109 of the Penal Code implicating 13 persons including the petitioner. Upon perusal of section 5 of the Criminal Law amendment Act, 1958 (in short 'Act'1958) and the schedule to the Act. It appears that the law enacted with the following provision which runs thus: Section 5(1) of the Act, 1958 states ''Notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law, the offences specified in the schedule shall be triable exclusively by a Special Judge"

88. The relevant portion of the schedule to the Act, 1958 runs thus:

"Schedule

(See section 5)

"(a) Offences punishable under ce£¢a cje L¢jne BCe, 2004;

(aa) .....

(b) Offences punishable under the Prevention of Corruption Act, 1947;

(c) .....

(d) Abetment described in section 109 including other abetments, conspiracies described in 120B, and attempts described in section 511, of the Penal Code, 1860 related to or connected with the offences mentioned in clause (a) to (c) above."]

89. Again if we see the section 28 of the A.C.C. Act-2004 then it would be further divulged that the schedule offence under this law only tryable by special Judge which has been enacted in the section 28 of the A.C.C Act. Thus the section 28 and schedule of the Act is quoted herein below:-

28z **অপরাধের বিচার, ইত্যাদি।** - (১) আপাতত বলবৎ অন্য কোন আইনে ভিন্নরুপ যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র স্পেশাল জজ কর্তৃক বিচারযোগ্য হইবে।

(2) এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহের বিচ¡l J B f£m নিষ্পত্তির ক্ষেত্রে The Criminal Law Amendment Act, 1958 Hl section 6 Hl sub-section (5) Hhw sub-section (6) এর বিধান ব্যতীত অন্যান্য বিধানাবলি প্রয়োজ্য হইবে।

(3) The Criminal Law Amendment Act, 1958 এর কোন বিধান এই আইনের কোন বিধানের সহিত অসঙ্গতিপূর্ণ হইলে এই আইনের বিধান কার্যকর হইবে।

ag¢pm

[(d¡l¡ 17(L) âøhÉ]

(L) এই আইনের অধীন অপরাধসমূহ;

(M) the Prevention of Corruption Act, 1947 (Act II of 1947) এর অধীন শাস্তিযোগ্য Afl¡dpjq;

(MM) .....

(N) the Penal Code, 1860 (Act XLV of 1860) Hl sections 161 -169, 217, 218, 408, 409 and 477A এর অধীন শাস্তিযোগ্য অপরাধসমূহ :

(0) অনুচেছদ (ক) হইতে (গ) তে বর্ণিত অপরাধসমূহের সহিত সংশ্লিষ্ট বা সম্পৃক্ত the Penal Code, 1860 (act XLV of 1860) Hl section 109 H h¢Za pq¡ua¡pq Aeé¡eé pq¡ua¡, H h¢Za osk¿ Hhw section 120B H h¢Za osk¿ Hhw section 511 H বর্ণিত প্রচেষ্টার Afl¡dpjqz

90. From the referred laws and schedules as discussed above we have no hesitation to opined that none else but only Special Judge has the exclusive jurisdiction to try the instant case.

91. It has contended on behalf of the petitioner that Anti-Corruption Commission has no authority to scrutinize the function of Prime Minister and Cabinet according to section 17 of the A.C.C Act, and as such, grossly violated its authority. Therefore, it is necessary to examine the section 17 of the A.C.C Act to address the pertinent question of law which runs thus:-

(a) to enquire into and conduct investigation of offences mentioned in the schedule;

(b) to file cases on the basis of enquiry or investigation under clause (a) and conduct cases under this Act;

(c) to hold enquiry into allegations of corruption on its own motion on the application of aggrieved person or any person on his behalf;

(d) to perform any function assigned to Commission by any act in respect of corruption;

(e) to review any recognized provisions of any law for preventing of corruption and submit recommendation to the President for their effective implementation;

(f) to undertake research, prepare plan for prevention of corruption and submit to the President, the recommendation for the action based on in the result of such search;

(g) to raise awareness and create felling of honesty and integrity among people with a view two prevent corruption;

(h) to organize seminar, symposium, workshop etc. on the subjects falling with in the functions and duties of the Commission;

(i) to identify the various causes of corruption in the context of socio-economic conditions of Bangladesh and make recommendation to the President for taking necessary steps;

(j) to determine the procedure of enquiry, investigation, filing of cases and also the procedure of according sanction of the Commission for filing case against corruption and;

(k) to perform any other duty as may be considered necessary for prevention of corruption.

92. On perusal of the above section it appears that clauses (a) (b) (c) of the section 17 of the A.C.C Act clearly empowers the Commission to enquire or investigate any offences mention in the schedule and conduct case under this Act. From the F.I.R of the present case we find that the prosecution allegedly has made out a prima facie criminal case within the ambit of section 5(2) of the Prevention of Corruption Act, 1947 read with section 409 and 109 of the Penal Code. Therefore, we are of the view that there is no legal bar under the law to inquire or investigate the present case by the A.C.C. Hence, the argument put forward by the learned Advocate on behalf of the petitioner has no substance. It is very pertinent to mention here that the Constitution has not given any immunity to the Prime Minister or Cabinet in respect of any Criminal offence. There is neither any constitutional nor any statutory or legal bar on A.C.C to conduct any enquiry in respect of allegation of Commission of offences mentioned to the schedule of the A.C.C Act, 2004 and schedule to the criminal law amendment Act-1958. Therefore, we are of the view that not only on the basis of any complaint but A.C.C itself is legally empowered under section 17 of the A.C.C. Act-2004 to conduct any inquiry or investigation. So, long as it attracts the Criminal liability of A.C.C and within the ambit of law.

93. From the discussions, legal proposition of law, facts and circumstances of the case, as mentioned hereinabove it transpires that in the instant case the prosecution alleged that the petitioner otherwise abused her office or abetted others to use the office for illegal gain within the meaning of the criminal misconduct as defined in section 5(1) of the Act, 1947 as her alleged involvement as an abettor under section 109 of the Penal Code which cannot be determined in a separate Criminal Proceeding and the same must be adjudicated in the instant proceeding by the Special Judge as a competent Court as empowered by the section 5 of the Act, 1958 and section 28 of the A.C.C Act-2004. More-so 3 co-accused namely Ismail Hossain Saimon, Syed Galib Ahmed and Syed Tanvir Ahmed, son of Minister Akber Hossain, the Managing Director and Director of GATCO respectively made confessional statements under section 164 of the Code of Criminal Procedure wherefrom it is divulged that there is a illegal transaction of crores of money and share of TK. 2,03,31,500/-. In this connection we can place reliance to the case of ***Hossain Mohammed Ershad, former President and others vs. State*** 45 DLR (AD) 48 wherein it has been held that:

> "Though the offence of abetment was not mentioned in Act II of 1947 it was mentioned as an item in the schedule 'C' to the Criminal Law Amendment Act, 1958. Under section 5 of the Act that the special Judge, appointed under the Act, has

> jurisdiction to try that offence. Besides where the prosecution case is that the offences were committed in the course of the same transaction all the accused who were alleged to have committed the offence as principals and abettors in the course of the alleged transaction can be tried under section 239 of the Code of Criminal Procedure."

94. Therefore, the argument on behalf of the petitioner regarding authority of A.C.C and the question of lack of Jurisdiction of the Court cannot be sustained in law.

95. In the reply of affidavit-in-opposition the learned Advocate referred the Judgment of the writ petition No. 7250 of 2008 and strongly submitted that this writ petition is maintainable and the petitioner is entitled to have the same remedy under the law.

96. We have gone through the Judgment of the writ petition No. 7250 of 2008. Upon scrutiny of the referred Judgment it appears that it has been preferred against the order of framing of charge in absence of the accused petitioner. The same Court earlier allowed the application of the accused dispensing with her appearance and to be represented through her lawyer. Ultimately, the trial Court without asking her to appear in Court in-spite of prayer for time rejected the application of the accused petitioner and thereby framed the charged. In such circumstances the Court interfere under the writ Jurisdiction. However, by the lapse of time there are several decisions pronounced by the Appellate Division on the same point of law settling the legal principles regarding the Jurisdiction of the writ Court which have already been referred herein above of this Judgment. Since those are the latest decisions and the Judgment of writ petition No. 7258 of 2008 was passed earlier on 09.03.2010. So, those latest decisions will prevail to earlier decisions of the either Division.

97. Moreover, under Article 111 of the Constitution the law declared by the Appellate Division is binding on the High Court Division, and as such, this Division has nothing but to abide by the law declared by the Appellate Division. Therefore, the referred decision could not be any way helpful in this case for the petitioner.

98. Although in the Rules issuing orders of the instant writ petitions nothing have been mentioned or challenged regarding the applicability of the Article 55 and 145 (2) of the Constitution in the facts and circumstances of the writs. However, in reply of affidavit-in-opposition on behalf of the accused petitioner the learned Advocate for the petitioner has raised the question of power of A.C.C regarding inquiry and investigation of the case referring Article 55 and 145(2) of the Constitution. In this regard our considered view is that the petitioner since did not raise aforementioned question of law in the substantive application and the Rules were not issued on those Constitutional point, the petitioner has no right to have any legal remedy beyond the Rule issuing orders. We find support of our above view to the case of Secretary, Ministry of Establishment and others –vs- Amzad Hossain and others reported 18 BLC (AD)16 wherein it has held by the apex court that

> "Jurisdiction on the writ Court – The prayer to the effect "*and/or such other of further order or orders as your Lordships may deem fit and proper"* do not authorise a writ Court to give relief beyond the Rule issuing order, such prayer authorises the writ Court to give any incidental relief or reliefs which may follow from the main relief according the Rule issuing order."

99. Therefore, it is not a fit case to discuss the above constitutional point raised by the petitioner in the reply to affidavit-in-opposition, rather, in an appropriate case this constitutional point may be discussed elaborately.

100. The petitioner in the reply of the affidavit-in-opposition referred the decision reported in 64 DLR (AD) 14 stating that writ Court can interfere in Criminal Proceeding. However, for the convenient of discussions and ready reference the cardinal principle decided in the referred case is quoted below:

> "This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extra ordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill suited to meet the demands of extra ordinary situations that is to say where vires of a statute is in question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102(2) of the Constitution".

101. Upon meticulous scrutiny of the above decision it is divulged that the instant case neither come within the purview of the principles of above decision nor it is a case of malafide. Rather, it is suggestive from F.I.R facts and the discussions made herein above allegedly criminal offences disclose in the case and the prosecution allegedly made out a prima facie criminal case.

102. Upon further a close scrutiny the averment of the writ petition No. 5054 of 2008 and 8557 of 2007 and Rule issuing orders it is divulged that the petitioner do not challenged the any vires of the law, rather, both the Rules were issued as to why the proceeding of the aforesaid case should not be declared unlawful, without jurisdiction and quashed on the basis of the some factual grounds without challenging vires of any law which are disputed question of facts. It is our considered view that in exercising the Jurisdiction under Article 102(2) of the Constitution the High Court Division is not empowered to embark an inquiry as to whether the allegation made in the F.I.R. and charge sheet against the accused are false or true as those are disputed question of facts which needs inquiry and such inquiry requires appreciation of evidences. Therefore it would not be open to any party to invoke the writ Jurisdiction of the High Court Division to ascertain as to whether the facts are false or true as has been claimed in the instant case.

103. Thus, upon discussions and the preponderant judicial views of the authorities referred to above. We are of view that both the writ petitions are not maintainable.

104. Thus, the Rules having no merit, it fail.

105. In the result, both the Rules are discharged, however, without any order as to cost.

106. The order of stay granted earlier by this Court is hereby recalled and vacated. The accused petitioner is directed to surrender to the concern Court within 2(two) months from the date of receipt of this Judgment.

107. The trial Court is further directed to consider the bail application of the accused petitioner, if any, as she did not misuse the privilege of bail.

108. Communicate this Judgment to the Court below at once.

8 SCOB [2016] HCD 59

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 1836 of 2011

An application under Article 102 of the Constitution of the People's Republic of Bangladesh

Fatema Enterprise
…Petitioner

Verses

Bangladesh and others
…Respondents

Mr. Sarwar Ahmed, with
Mr. Zaidy Hasan Khan, Advocates
…for the petitioner

Mr. Tapash Kumar Biswas, Advocate
…for the respondents

Heard on: 15.04.2015
Judgment on: 06.05.2015

Present
Mr. Justice Quazi Reza-Ul Hoque
And
Mr. Justice Abu Taher Md. Saifur Rahman

A matter of law of contract can be looked into in a writ jurisdiction if Government is a party:
Basic principle of offer and acceptance:
The crux of the issue is as to whether after receiving the consideration value in the form of earnest money as has been stipulated by the respondents through their own valuation and tender can be changed. Although, this is a matter of law of contract, however, since Government is a party, so this can be looked into in a writ jurisdiction. The basic principle of offer and acceptance is – the offer is binding upon the offeror (proposer) the moment the offeree (acceptor), puts the acceptance into motion. In the instant case, the offer and acceptance both were complete since the tender was invited (offer) the petitioner participated and it was accepted by the respondent No. 2 and part consideration was also paid in the form of earnest money and in such circumstance the respondents, i.e. the offeror Government has no other option left except transferring the land in favour of the petitioner. The property in the goods in fact passes over to the buyer when the sale is complete and in the instant case the sale became binding from the moment the payments were made in compliance with the tender. … (Para 22)

Principles of legitimate expectation:
The above principles are directly applicable in the instant case as the respondents promise to transfer the land on payment of consideration had been overridden by the further invitation of tender or initiating a new valuation without cancelling the previous tender or returning the money of the Petitioner. … (Para 28)

Grounds of judicial review:
The House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal head, namely– illegality, procedural impropriety and irrationality, illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision

making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures, such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. … (Para 30)

Judgment

Quazi Reza-Ul Hoque, J:

1. The instant Rule was issued on 02.03.2011calling upon the respondents to show cause as to why the Memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure-E), issued by respondent No. 2 under signature of respondent No. 4 proposing valuation of plots to be leased by respondent No. 2, shall not be declared without lawful authority and is of no legal effect and why the respondents shall not be directed to execute lease deed and hand over possession to the petitioners of Plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka advertised by respondent No. 2 vide auction tender No. 1/2007-2008 dated 30.04.2008 (annexure- A) and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts necessary for disposal of the Rule, as has been stated by the petitioner, in short, is that the petitioners seek a direction upon the respondents to execute lease deed and hand over possession of plot No. 65 of Utara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka(hereinafter referre3d to as the plot) in favour of the petitioner advertised vide auction tender No. 1/2007-2008 dated 30.04.2008 (annexure- A).

3. The petitioner also impugns memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure-E) issued by respondent No. 2 under signature of the respondent No. 3 proposing valuation of plots to be leased by respondent No. 2 the petitioner who prays for a direction upon the respondents to lease out the plot to the petitioner.

4. Rajdhani Unnayan Kartripakha (RAJUK) through auction tender No. 1/2007-2008 dated 30.04.2008 (annexure- A) invited sealed offers for leasing out the plots scheduled therein,which included Plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka. And by memo dated 05.06.2008; RAJUK extended the last date for submission of sealed bids for the aforesaid tender to 30.06.2008 (annexure- B).

5. The petitioner participated in the said tender upon purchase of tender document at the price of Taka 2, 000/- and submitted bids of Taka 4,90,00.000/- (Taka four crores and ninety lacs only) (at Taka 49,00,000/-per katha) for plot No. 65 measuring 10 kathas in Uttara Commercial Area, Sector 13 (annexure- C). Each bid was accompanied by pay orders for earnest money of Taka 20, 00,000/- against each plot, as required by the terms and conditions of the tenders (annexure- D).

6. The bids of the petitioner at Taka 49,00,000/-(forty nine lac only) was much higher than the value of Taka 20,00,000/- per katha for the plots in Uttara as estimated at the time by RAJUK.The petitioner's bid for the said plot was found to be the highest and accordingly, the said plots ought to have been allotted to the petitioners by RAJUK. However, RAJUK has

since been prevaricating on the issue, and the plot has not been allotted and leased to the petitioner till date.

7. By a memo dated 27.01.2009, i.e. subsequent to the invitation of the above tender and submission of the bid, RAJUK, by reference to the said tender sent a proposal to the Secretary, Ministry of Public works and Housing for approval of revision of, amongst others, the values for commercial plots in Uttara to Taka 1,20,00,000/- per katha (annexure- E).

8. Subsequently the Ministry by a memo asked R AJUK to give a comparison between the proposed values and the earlier values and by memo dated 18.10.2009, RAJUK confirmed the previous values of Taka20,00,000/- per katha in Uttara. By a memo dated 15.11.2009 the Ministry asked for the basis of such valuation and the rules and regulations pertaining thereto. Since then, no further action has been taken (annexure- F and F-1).

9. Under clause 4(2) of the Tender Schedule, RAJUK was obligated to refund the earnest money of the unsuccessful bidders and accordingly RAJUK refunded the same to all bidders except the petitioner who was adjudged to be the highest successful bidder which is evidenced by the minutes of the meeting of the Board of RAJUK being Board Memo no. 09/2008 of the meetings dated 03.09.2008, o4.09.2008 and 07.09.2008 and as such the prolongation of awarding and leasing out the plot in the favour of the petitioner is nothing but an abuse of process (annexure- I).

10. The admitted position that the petitioner's bids for the plots was the highest, being much more than the value of the plot estimated by RAJUK at the time of the bid. Hence the petitioner is entitled to have the plot allotted and leased in its name. However, RAJUK has not done so, despite having retained the earnest money for a period which has now exceeded two years. RAJUK's inaction in this regard has continued despite the petitioners letter dated 10.10.2010 and 20.12.2011 (annexure- G and G-1).

11. Having received no response from RAJUK, the petitioner finally was forced to sendanotice demanding justice dated 22.12.2011 upon the respondents, but without any avail (annexure- H).It is stated that till date RAJUK has not rejected the bids of the petitioner.

12. Mr. Sarwar Ahmed, with Mr. Zaidy Hasan Khan, the learned Advocates appearing for the petitioner submitted that it is apparent on the face of the records that admittedly the petitioner was the highest bidder offering Taka 61,00,000/- per katha, which was much higher than the prevailing valuation of Taka 20 lac per katha as stipulated by RAJUK in the Tender Notice. The petitioner made the payment of earnest money which is retained by RAJUK till date. The bid of the petitioner has not been cancelled.

13. He further submitted that the petitioner had/have a legitimate expectation to the effect that pursuant to the payment of the earnest money in compliance with the terms and conditions of the tender, the respondents should have transferred the properties in favour of the petitioner upon executing and registering deed of transfer but without doing so, they have committed gross illegality and acted beyond their jurisdiction in not honouring the bid as per law.

14. He again submitted that the impugned order (annexure-E) is *ex facie* illegal without any lawful authority and is of no legal effect in as much as it has been issued without cancelling the tender and retaining the entire earnest money from the petitioner without giving them an opportunity of being heard inasmuch as admittedly no show cause notice had

ever been issued upon the petitioner before issuing the impugned order, which therefore have been issued without lawful authority and therefore that is of no legal effect.

15. Mr. Ahmed, again submitted that the petitioner have acquired a vested right in the scheduled land, in as much as, pursuant to their application, the respondents had accepted his bid as the highest bid and the vested right has been denied and curtailed by the impugned order which is an act of blatant arbitrariness and without jurisdiction committed by the respondents.

16. He further submitted that the impugned order has been passed proposing a so called valuation report which was yet to be approved, which was prepared after the payment of earnest money was made in compliance with the tender and, as such, the issuance of the impugned order on the ground of valuation of a subsequent date cannot be tenable in the eye of law in as much as it cannot have any retrospective effect.

17. He again submitted that the impugned order is issued without applying the judicial mind by the respondents affecting the right to property and right to be treated in accordance with law of the petitioner guaranteed under Articles 31 and 42 of the Constitution. And in this regard he referred to the persuasive decision of Union of India vs. Hindustan Development Corporation, AIR 1994 SC 988 wherein the Supreme Court of India held inter alia that;

> It is true, as today, that the Government on a welfare State has the wide powers in Regulating and dispensing of special services like leases, licenses and contracts etc. the magnitude and range of such Government function is great. The Government while entering into contracts or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. In the matter of awarding contracts inviting tenders is considered to be one of the fair ways. If there are any reservations or restrictions then they should not be arbitrary and must justifiable on the basis of some policy or valid principles which by themselves are reasonable and not discriminatory.

18. And the said principle has also seen reflected in our jurisdiction in the case of Golam Mustafa vs. Bangladesh and Others, 15 BLT 128, wherein legitimate expectation has been enunciated in the following terms:

> The work order was issued in favour of the Principal Information Officer, Department of Information but it was known to all the respondents that earlier on an open tender notified by the Ministry of Information, the petitioner alone was selected to print and market the said sets of 'Dalilpatra', that there was no other printer or publisher other than the petitioner who was authorized to do so for and on behalf of the Respondent No.2 that in any case the respondent No.4 himself or his department was not going to print, bind and supply the said sets, that earlier the respondent No.4 himself acknowledged that Hakkani Publishers would print, publish and deliver 2317 sets of Dalilpatra (annexure-L). As such, when the work-order was issued on 27.05.2004, it was presumed to be known to all concerned in both the Ministries of the Government that Hakkani Publishers was going to supply the required sets. this presumption was not denied by any of the respondents. Under such circumstances, on the issuance of the work order on 27.05.2004, the petitioner now can claim that it can legitimately expect that he would be entitled to supply 2317 sets of Dalilpatra' by 10.06.2004 and receive the payment thereon. Although the petitioner earlier when he participated in

> the tender had no legal right to supply the sets of dalilpatra' to the selected schools under the project but by now on the conducts and various representations of the concerned respondents as narrated above, it was no longer a hope or wish or an anticipation not even a mere expectation but it ripened into a legitimate expectation clothing the petitioner with the legal rights to force the respondents to honour and fulfill their commitments indicated in their various correspondences, culminated in issuing the work-order dated 27.05.2004. This expectation was independent of any contractual right. It appears that thereafter by his letters dated 07.06.2004 and 08.06.2004 (annexure-O and O1), the petitioner informed the respondent No.4 that the total number of 2317 sets of the 'Dalilpatra' were then ready for delivery and he asked for the place where those sets are to be delivered. But in the meantime suddenly the work order itself had been cancelled by the memo dated 07.06.2004 (annexure-P) issued by the respondent No.6, addressed to the respondent No.4- as such, the cancellation of the work order dated 27.05.2004 (annexure-P1) issued by the respondent no.5 were irrational and perverse and also in violation of the legitimate expectation of the petitioner as he was debarred from supplying the 'Dalilpatra' or distribution in 2317 selected schools, as such, illegal.
>
> ...Apparently, this decision to cancel the work-order was arbitrary, unfair and unreasonable. The petitioner, although may not have strict legal rights against any of the respondents but has a legitimate expectation to supply 2317 sets of "Dalilpatra' to the respondent No.6, as such, has right to challenge the said decision.

19. He concluded his submission by saying that in the facts and circumstances, the Rule may kindly be made absolute, with cost, and the impugned order being Memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure- E), issued by respondent No. 2 under signature of respondent No. 4 proposing valuation of plots to be leased by respondent No. 2 should be declared to have been made without lawful authority and is of no legal effect and the respondents be directed to lease out to the petitioner, the Scheduled Plot advertised by respondent No. 2 vide auction tender No. 1/2007-2008 dated 30.04.2008.

20. None appeared to contest the Rule.

21. On perusal of the submission of the learned Advocates of the both the parties, the petition and the available documents, it is apparent that by auction tender No.1/2007-2008 dated 30.04.2008 RAJUK invited sealed offers for leasing out the plots scheduled therein, which included Scheduled Plot. By a memo dated 05.06.2008, RAJUK extended the last date for submission of sealed bids for the aforesaid tender to 30.06.2008. The petitioner participated in the said tender upon purchase of tender documents at the price of Taka 2,000/- for auction documents and submitted bids of Taka 4,90,00,000/- (at the rate of Taka 49,00,000/- per katha) for the Scheduled Plot. Bid was accompanied by pay orders for earnest money of Taka 20,00,000/- against the Scheduled Plot, as required by the terms and conditions of the tenders. The bids of the petitioner was much higher that the value of Taka 20,00,000/- per katha for the plots in Uttara as estimated at the time by RAJUK, which is clearly embraced in the Tender Advertisement/ documents. The petitioner's bid for the said plot was found to be the highest by the convenor of the Auction Committee. The Committee also suggested refunding the rest earnest money retaining the highest bid. Accordingly, the Scheduled Plot expected to have been allotted to the petitioner by RAJUK. However, RAJUK has since been prevaricating on the issue, and the plots have not been allotted and leased to the petitioner till date. By a memo dated 27.01.2009, i.e. subsequent to the invitation of the

above tender and submission of the bid, RAJUK, by reference to the said tender, sent a proposal to the Secretary, Ministry of Public Works and Housing for approval of revision of, amongst others, the values for commercial plots in Uttara to Taka 1,20,00,000/- per katha. The Ministry by a memo asked RAJUK to give a comparison between the proposed values and the earlier values and by memo dated 18.10.2009, RAJUK confirmed the previous values of Taka 20,00,000/- per katha in Uttara. By a memo dated 15.11.2009, the Ministry asked for the basis of such valuation and the rules and regulations pertaining thereto. Since then, no further action has been taken. It is the admitted fact that the petitioner's bid for the above plot was the highest, being much more than the value of the plots estimated by RAJUK at the time of the bid. However, RAJUK has retained the earnest money till date. RAJUK's inaction in this regard has continued despite the petitioner's letter dated 16.05.2010. Seeing no response from RAJUK, the petitioner finally caused a notice demanding justice dated 22.12.2011 to be served upon the respondents, but without any avail. The respondents, RAJUK have not rejected the bids of the petitioner.

22. The crux of the issue is as to whether after receiving the consideration value in the form of earnest money as has been stipulated by the respondents through their own valuation and tender can be changed. Although, this is a matter of law of contract, however, since Government is a party, so this can be looked into in a writ jurisdiction. The basic principle of offer and acceptance is – the offer is binding upon the offeror (proposer) the moment the offeree (acceptor), puts the acceptance into motion. In the instant case, the offer and acceptance both were complete since the tender was invited (offer) the petitioner participated and it was accepted by the respondent No. 2 and part consideration was also paid in the form of earnest money and in such circumstance the respondents, i.e. theofferor Government has no other option left except transferring the land in favour of the petitioner. The property in the goods in fact passes over to the buyer when the sale is complete and in the instant case the sale became binding from the moment the payments were made in compliance with the tender.

23. The respondents' plea that the valuation was much lower than the true market value is not at all sustainable since there is no stipulation that there was any interference by the petitioner in ascertaining the value of the property, rather the valuation of RAJUK was Taka 20 lac per katha when the petitioner offered Taka 49,00,000/- per katha. A mere plea of public interest applying against public itself must have some basis.

24. The governing principles was laid down by the Court of Appeal in R v North and East Devon Health Authority exp Coughlan [2001] QB 213, at paragraph 57, wherein three categories of case were identified:

i. Those where the public authority was only required to bear in mind its previous policy giving eight, but no more, if it thinks right to the promise before deciding to change course.
ii. Those where the promise is of consultation before a particular course is adopted.
iii. Those where the promise has induced a legitimate expectation of a benefit which is substantive.

25. In the first category of case the Court of Appeal held that it could only intervene on traditional Wednesbury [1948] 1KB 223, sense. In the second category of case the consultation has to be given unless there is an overriding reason to resile from the promise. Here the Court judges the requirement of fairness. In the third category of case the Court will require the promise to be performed, if it frustrates the promise, which is so unfair as to

amount to an abuse of power. The Court will weigh upon the requirement of fairness against any overriding interest relied upon for the change of policy.

26. There is a recent and significant decision of the Court of Appeal in R (Bhatt Murphy) and Others v Secretary for the Home Department, [2008] EWCA Civ 755, wherein it was held that:

> The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of if the stipulated amount is paid as per conditions contained in the letter of intent.

27. In the case of Golam Mostafa vs. Bangladesh and others 2007 (XV) BLT(HCD) 128, the concept of legitimate expectation was explained. The crux of the decision is that a judicial review may be allowed on the plea of frustration of legitimate expectation in the following situations:

i. If there is a promise by the authority expressed either by their representations or by conducts.
ii. The decision of the authority was arbitrary or unreasonable within the Wednesbury principle.
iii. There was a failure on the part of the concerned authority to act fairly in taking the decision.
iv. The expectation to be crystallized into a legitimate one, it must be based on clear facts and circumstances leading to a define expectation and not a mere anticipation or a wish or hope and also must be reasonable in the circumstances.
v. Judicial review may allow such a legitimate expectation and quash the impugned decision even in the absence of a strict legal right unless there is an overriding public interest to defeat such an expectation.

28. The above principles are directly applicable in the instant case as the respondents promise to transfer the land on payment of consideration had been overridden by the further invitation of tender or initiating a new valuation without cancelling the previous tender or returning the money of the Petitioner.

29. In A.K.M. Kawser Ahmed and others vs. Bangladesh, 65 DLR 277, wherein it was observed that:

> The potentially important point is that change of policy should not violate the substantive legislative expectation and if does so it must be as the change of policy which is necessary and such a change is not irrational or perverse.

30. The House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal head, namely– illegality, procedural impropriety and irrationality, illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures, such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.

31. In a recent case of Chairman, All India Railway Rec. Board vs. K. Shyam Kumar, 2010, the Indian Supreme Court has applied the principle of Wednesbury unreasonableness as well as the doctrine of proportionality. The case involved appointment of some railway employees, where investigation done by the CBI (Central Bureau of Investigation) found mass irregularities including cheating, impersonification etc. The findings of the High Court came before the Supreme Court. The Court very pertinently observed the view of some English author's view that Wednesbury "unreasonableness" principle is at its terminal point having been replaced by the principle of "rationality", as not just.

32. It is to be noted that a Government office must not act in a manner that vitiates the right of a citizen. In this regard our Court observed in Bangladesh vs. Dr. Nilima Ibrahim, 1981 BCR (AD) 177 *inter alia* that:

> Any action taken by an authority outside the power conferred is invalid and ultra vires.

33. And also have set its own standard in the light of decisions made in other jurisdictions and of our own, such as, in Bangladesh Soya-Protein Project Ltd. vs. Secretary, Ministry of Disaster Management and Relief 22 BLD (2000) HCD 378; The Chairman, Bangladesh Textile Mills Corporation vs. Nasir Ahmed Chowdhury 22 BLD (AD) (2002) 199; Dhaka WASA vs. Superior Buildings and Engineers Ltd. 51 DLR AD 1999. In Khizar Hayat vs. Zainab, 19 DLR (SC) 372 it was observed *inter alia* that:

> …failure to exercise jurisdiction is an error to the root of jurisdiction. The principle is well established that if a statutory tribunal fails to exercise jurisdiction vested in it by law, such failure will open to correction in exercise of power of judicial review.

34. So, in the premises set forth above, we are of the view that the impugned letter receiving the earnest money and asserting the petitioner as the highest bidder was unjust and were done without lawful authority and are of no legal effect.

35. It is further to be noted that there is no allegation of fraud or *mala fides* from the respondents in the process of the first tender in which the petitioner became the highest bidder. Hence, we find that the petitioner is an innocent bidder who had offered more than thrice the amount of the existing valuation.

36. In the result, the Rule is made absolute. The impugned order being Memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure- E), issued by respondent No. 2 under signature of respondent No. 4 proposing revaluation of plots to be leased by respondent No. 2 (annexure-E) issued by respondent No. 2 under signature of the Respondent No. 4, proposing revaluation of plots is hereby declared without lawful authority and is of no legal effect. The respondents are directed to transfer the land as described in the tender being Plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka advertised vide auction tender No. 1/2007-2008 dated 30.04.2008 to the petitioner within 30 days of receipt of this judgment and order upon receipt of the rest of the value of the plot, i.e. the bid amount, as per bid dated 30.06.008.

37. There is no order as to costs.

38. Send a copy of this order to the concerned authority immediately.

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HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 1335 of 2015
With
WRIT PETITION NO. 1336 of 2015
With
WRIT PETITION NO. 1337 OF 2015
With
WRIT PETITION NO. 1338 OF 2015
With
WRIT PETITION NO. 1340 OF 2015
With
WRIT PETITION NOS. 10057,10058 & 10059 OF 2014
With
WRIT PETITION NOS. 4748 & 4749 OF 2015
With
WRIT PETITION NOS. 4750 & 4751 OF 2015
With
WRIT PETITION NO. 6343 OF 2015
With
WRIT PETITION NO. 6344 OF 2015
With
WRIT PETITION NOS. 10947, 10948, 10949 of 2013 and 11946 of 2014
With
WRIT PETITION NOS. 10950, 10951, 10952 of 2013 and 11947 of 2014
With
WRIT PETITION NOS. 12174, 12175,12176 of 2013 and 10120 of 2014
With
WRIT PETITION NOS. 8076, 8077, 8078 and 8079 of 2014
With
WRIT PETITION NOS. 11155, 11156, 11157 and 11158 of 2014
With
WRIT PETITION NO. 9085 of 2013
With
WRIT PETITION NO. 5308 of 2014
With
WRIT PETITION NO. 6672 of 2014
With
WRIT PETITION NO. 7245 of 2014

Golam Mohammad Faroque Uddin and others
...Petitioners
Vs.
Bangladesh and others
...Respondents

Mr. Mosharaf Hossain with
Mr. Md. Nasim Miah, Advocates.
..For the petitioner in Writ Petition Nos. 1335-1338 of 2015 and 1340 of 2015.

Mr. Ashek-E-Rasul, Advocate
..For the petitioner in Writ Petition Nos. 10057-10059 of 2014.

Mr. Ashikur Rahman, Advocate
..For the petitioner in Writ Petition Nos. 4748-4751 of 2015 and 6343-6344 of 2015.

Mr. Sarder Jinnat Ali with
Mr. Md. Umbar Ali, Advocates.
..For the petitioner in Writ Petition Nos. 10947-10952 of 2013, 11946-11947 of 2014, 12174-12176 of 2013, 10120 of 2014, 8076-8079 of 2014 and 11155-11158 of 2014.

Mr. Mustafa Tarique Husain, Advocate
..For the petitioner in Writ Petition Nos. 9085 of 2013 and 5308 of 2014.

Mr. Md. Tajul Islam Majumder, Advocate
..For the petitioner in Writ Petition Nos. 6672 of 2014 and 7245 of 2014.

Mr. A.F. Hassan Ariff, Senior Advocate and
Mr. Rokanuddin Mahmud, Senior Advocate
…Submitted as Amici Curiae.

Mr. S. Rashed Jahangir, D.A.G with
Ms. Israt Jahan, D.A.G. with

Mr. Swarup Kanti Deb, A.A.G with
Ms. Nurun Nahar, A.A.G

…..For the respondent no.5 in W.P. Nos. 1335-1338 of 2015 and 1340 of 2015

Heard on 13.08.2015, 11.11.2015, 18.11.2015, 24.11.2015, 29.11.2015, 02.12.2015, 08.12.2015 and 09.12.2015.
Judgment on: 12.01.2016.

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

Section 16A of the Income Tax Ordinance, 1984
And
Section 36 of the Finance Act, 2013:
Power of imposition of surcharge is very much within the plenary power of legislation of the Parliament:
Though the term 'surcharge' is not specifically mentioned in the Constitution or not defined in the said Ordinance, the basic concept of 'surcharge' was always there in our Constitution and the said Ordinance. The only difference being that while the Indian Constitution, under Article 271, specifically has mentioned the word 'surcharge', our Constitution has not mentioned the same in such specific way. Not only that, upon examining the dictionary meaning of the word "impost" as used under the definition of 'taxation' as provided by our Constitution under Article 152, there is no semblance of doubt that the Parliament has always had the plenary power to legislate provisions for imposition of 'additional tax', 'extra charge' or 'impost', through whatever terms it may be called, by which some additional charges may be levied on the tax payers in addition to their ordinary tax payments. In consideration of the above wide definition of 'taxation' as given by our Constitution and the definition of term 'Tax' as provided by the relevant provision of the said Ordinance, we are, therefore, of the view that the power of imposition of surcharge, as has been done by the impugned provisions, was very much within the plenary power of legislation of the Parliament. ...(Para 34)

Constitution of Bangladesh
Article 8, 10, 27:
Courts have always emphasized that having regard to the wide variety of diverse economic criteria that go into the formation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc. for the purposes of taxation ("see also Elel Hotels and Investments Ltd. Vs. Union of India AIR-1990 SC 1664). In enacting legislations regarding fiscal matters, it is the obligation of the State or the Legislature to bring about equality in the society in order to establish equality before law in real sense as contemplated by Articles-8 and 27 of our Constitution. According to sub-article-(2) of Article-8, the principle set-out in Part-II of the Constitution shall be fundamental to the Government of Bangladesh and shall be applied by the State in the making of laws and shall be a guide to interpretation of the Constitution and of other laws of Bangladesh. In addition, Article-10 of our Constitution contemplates achievement of socialist economic system for ensuring the attainment of a just and egalitarian society free from the exploitation of man by man. Therefore, while Legislating a particular enactment, it is the obligation of the State as well the Legislature to keep in mind the said fundamental principles of State policy, in

particular Article-8, in order to attain a just and equitable society in real sense so that the equality before law, as guaranteed under Article-27 of the Constitution, can be established in real sense. It has to be further borne in mind that equality before law, under no circumstances, cannot be achieved if the people of the country are situated un-equally. In an unequal society, equality before law is a mere myth. Therefore, considering the above aspects, it has become a long practice that the Courts allow a larger or extended latitude to the Legislature in taxing matters inasmuch as that while legislating a financial policy of a particular government, the Legislature has to contemplate various complicated issues, which are beyond the contemplation of judicial review. ...(Para 38 & 39)

The inherent distinction between a juristic person like company and an individual can easily be a basis for classification between a company and an individual. Under no circumstances that can be said unreasonable classification. Again, the classification between people having certain amount of properties or assets and the people not having such properties or amounts of assets is also reasonable in as much as that such classification is always there even if it is not made by law. An individual having total net worth above two crores or ten crores is always in a distinct group than an individual having total net worth of one crore or below two crores. Therefore, a Legislature cannot be insisted on not to differentiate between two classes of people when such classification is already there in the society, and it is the obligation of the State to enact law to reduce such disparity between different classes, in particular rich and poor. ...(Para 40)

Judgment

Sheikh Hassan Arif, J:

1. Since the questions of law and facts involved in the aforesaid writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this single judgment.

SHORT BACKGROUND FACTS:-

2. Though the background facts towards the issuance of the aforesaid Rules are not that much material, yet they are stated below in short keeping some similar facts in separate groups.

Writ Petition Nos. 1335-1338 of 2005, 1340 of 2015, 10057 of 2014, 10949 of 2013, 10952 of 2013, 12176 of 2013, 8077 of 2014 and 11157 of 2014.

3. Rules in the aforesaid writ petitions were generally issued calling in question the constitutionality of Section 16A of the Income Tax Ordinance, 1984 (in some writ petitions), as inserted therein by Finance Act, 1988, and Section 36 of the Finance Act, 2013 (Act No.25 of 2013), thereby, incorporating the provisions in the Second Part of the Schedule-2 thereto imposing surcharge at a rate of 10% on the tax payable by the individual assessees having total net-worth exceeding Tk. 02(two) crore and at a rate of 15% on the tax payable by the individuals having total net worth exceeding Tk. 10(ten) core. Apart from challenging the aforementioned provisions, the petitioners also challenged the legality of the respective demands of surcharge on them made by the concerned tax authorities in the relevant

assessment years or sought a direction from the Court on the concerned tax authorities to allow the petitioners to submit their returns without payment of any surcharge.

4. More particular background facts are narrated below:

W.P. Nos. 1335-1338 of 2015:

5. The petitioners, being individual assessees, having TIN No. 320-101-6496/Sha-81 and E-TIN No. 129369223588, TIN No. 320-101-6517/Sha-81 and E-TIN No. 114403298089, TIN No. 320-101-8851/Sha-81 and E-TIN No. 198060384543 and TIN No. 320-101-8868/Sha-81 and E-TIN No. 661881651462, respectively, are engaged in the business of importation of complete trees, i.e. round wood, from Myanmar, Malayasia Indonesia etc. As importers, the petitioners paid advance income tax under Section 53 of the Income Tax Ordinance, 1989 ("the said Ordinance", in short) read with Rule 17A of the Income Tax Rules, 1984 ("the said Rules", in short). The petitioners, accordingly, submitted their returns for the assessment year 2014-2015 under Section 82BB(1) of the said Ordinance and obtained receipt thereof from the concerned Deputy Commissioner of Taxes (DCT). Thereafter, the concerned Extra Assistant Commissioner of Taxes (Current charge), Circle-81, Tax Zone-04, Chittagong issued impugned demand letters, all dated 25.01.2015 (Annexure-B in writ petitions), upon the petitioners asking them to pay surcharges for Tk. 5,17,072/-, 14,00,976/-, 2,77,505/- and 3,83,423/- respectively on the said advance income tax as deducted from the petitioner at the time of import. Since such demands were issued pursuant to the impugned provisions under Section 16A of the said Ordinance and Section 36 read with 2nd Part of the Schedule 2 to the Finance Act, 2013, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. Nos. 1340 of 2015, 10949 of 2013, 10952 of 2013 and 12176 of 2013

6. The petitioners in these writ petitions, being individual assessees having E-TIN No. 757699520135 (petitioner of Writ Petition No. 1340 of 2015, but no TIN or E-TIN number mentioned in W.P. Nos. 10949 of 2013, 10952 of 2013 and 12176 of 2013) and engaged in different types of business, intended to submit their returns for concerned assessment years. However, when they tried to submit the same, the concerned tax officials at the tax offices refused to accept them and asked them to deposit surcharges on the taxes payable by them in view of the impugned provisions. Being aggrieved by such actions of the tax officials, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. 10057 of 2014:

7. The petitioner in this writ petition is an individual assessee having TIN No. 314-100-9491 and E-TIN No. 350175670404. Being an importer, he was subjected to deduction of advance income tax in the normal course of business in view of the previsions under Section 53 of the said Ordinance. The petitioner, accordingly, submitted his return for the assessment year 2013-2014 under universal self-assessment scheme under Section 82BB of the said Ordinance and, accordingly, obtained receipt thereof. Thereafter, the concerned tax officer issued impugned demand notice dated 30.06.2014 (Annexure-E) asking the petitioner to pay an amount of Tk.56,55,715/- on account of surcharge payable on the said advance income tax. Being aggrieved by such demand, the petitioner moved this Court and obtained the aforesaid Rule.

W.P. 8077 of 2014 and W.P. No. 11157 of 2014:

8. The petitioners in these writ petitions are individual assessees having TIN No. 351-100-9369 (E-TIN No. 544218590837) and TIN No. 354-101-6076 (E-TIN No.

639216748212), respectively. Being businessmen, they submitted their returns for the assessment year 2013-2014 under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance. The petitioners, accordingly, obtained receipts thereof and paid surcharges on the tax payable by them for an amount Tk. 20,44,854/- and Tk. 5,78,968/-, respectively, at a rate of 15%. Being aggrieved by such payment of surcharges, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. Nos. 10058-10059 of 2014, 7245 of 2014, 6672 of 2014, 10951 of 2013 and 10948 of 2013.

9. Rules in the aforesaid writ petitions were generally issued challenging the constitutionality of imposition of surcharges vide Section 58 read with the 2nd Part of Schedule 2 to the Finance Act, 2012 along with demands of surcharges vide different demand letters.

10. The petitioners in these writ petitions are individual assessees having TIN No. 314-100-9491 [(E-TIN No. 350175670404/C-53(Companies)], TIN No. 393-101-3102, TIN No. 393-105-0157, TIN No. 376-100-4464 and TIN No. 381-101-0281, respectively. In the course of their business, they imported several goods. In such imports, advance income taxes were deducted from the petitioners in view of the provisions under Section 53 of the said Ordinance. The petitioners, accordingly, filed their returns for the assessment year 2012-2013 under universal self-assessment scheme in view of the provisions under Section 82BB of the said Ordinance and obtained receipts thereof. Thereafter, the concerned tax officers issued the impugned notices demanding certain amounts of money from the petitioners on account of surcharges payable by them on the advance taxes deducted from their aforesaid imports. Being aggrieved, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, vide Rule issuing orders, stayed operation of the said demand notices.

W.P. Nos. 11156 of 2014, 8076 of 2014 and 12175 of 2013

11. Rules in the aforesaid writ petitions were generally issued questioning the constitutionality of Section 58 read with Schedule 2 of the Finance Act, 2012 and Section 16A of the said Ordinance (in writ petition No.12175/2013).

12. The petitioners in these writ petitions are individual assessees having TIN No. 354-101-6076, TIN No. 351-100-9369 and TIN No. 351-102-3697, respectively. They submitted their returns for the concerned assessment years under universal self assessment scheme in view of the provisions under Section 82BB of the said Ordinance. Through the said returns, the petitioners paid taxes and further amounts as surcharges, being 10% of the tax paid, pursuant to the impugned provisions. Being aggrieved by such payment of surcharges, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. Nos. 4748-4751 of 2015, 6343-6344 of 2015

13. Two individual petitioners in the aforesaid writ petitions challenged the constitutionality of Section 16A of the said Ordinance and Section 57 read with 2nd Part of Schedule 3 to the Finance Act, 2011 imposing surcharges.

14. The petitioners are individual assessees having TIN No. 557-288-317255 and TIN No. 856737857654, respectively. They filed their returns for different assessment years under self assessment scheme in view of the provisions under Section 82BB of the said Ordinance.

Since the petitioners did not pay the surcharges on the tax paid by them, the concerned tax officials issued the impugned demand notices asking them to pay the said surcharges. Being aggrieved by such demands, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court stayed operation of the said demand of surcharges.

W.P. Nos. 10947 of 2013, 11155 of 2014, 10950 of 2013, 12174 of 2013 and 8079 of 2014:

15. The petitioners in the aforesaid writ petitions challenged the constitutionality of Section 16A of the said Ordinance as well as the corresponding provisions of the Finance Act, 2011 imposing surcharges.

16. The petitioners are individual assessees having TIN No. 381-101-0281, TIN No. 354-101-6076, TIN No. 326-100-4464, TIN No. 351-102-3697 and TIN No. 351-100-9369, respectively. They submitted their returns for the concerned assessment years under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance along with tax and surcharges on the said tax, pursuant to the impugned provisions of the said Ordinance. Being aggrieved by such payment of surcharges, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, in some writ petitions (W.P. No. 10947 of 2013 and W.P. No. 10950 of 2013), directed the concerned tax Officials to accept the returns of the petitioners for the assessment year 2013-2014.

W.P. Nos.11946-11947 of 2014, 10120 of 2014, 8078 of 2014 and 11158 of 2014:-

17. The petitioners in the aforesaid writ petitions challenged the constitutionality of Section 16A of the said Ordinance as well as imposition of surcharges vide Section 57 of the Finance Act, 2014.

18. The petitioners are individual assessees having TIN No. 776176782854 (in W.P. No. 11946 of 2014) and E-TIN No. 727126527155 (in W.P. No. 11947 of 2014) (but no TIN or E-TIN number has been mentioned in W.P. Nos. 10120 of 2014, 8078 of 2014 and 11158 of 2014). They submitted their returns for the concerned assessment years 2014-2015 under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance. However, the said returns having been submitted without payment of surcharges as imposed by the impugned provisions, the concerned officials refused to accept the same. Being aggrieved by such actions, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court directed the concerned Tax Officials to accept the returns of the petitioners for the said assessment year.

W.P. Nos. 9085 of 2013 and 5308 of 2014:-

19. The petitioners in the aforesaid writ petitions challenged the imposition of surcharge vide Section 58 read with 2nd Part of the Schedule 2 to the Finance Act, 2012 and Section 16A of the said Ordinance as well as the demands of unpaid surcharges.

20. The petitioners are individual assessees having TIN No. 620063782637/Circle-05(Co)/ 311-101-1849/Circle-05(Co) and TIN No. 311-101-1849/Circle-05, respectively. They submitted their returns under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance, which were accordingly accepted and receipts were issued. Thereafter, the tax authorities issued the impugned demand notices demanding certain amount of money as surcharges alleging that though the advance income taxes were deducted at source from the petitioners, surcharges thereon were not collected.

Being aggrieved by such demands, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, vide Rule issuing orders, stayed operation of the said demand notices.

Common contention:

21. It is commonly stated by some of the above petitioners that since, unlike the Constitution of India, there is no such provision of 'surcharge' in the Bangladesh Constitution, the very incorporation of Section 16 A in the Income Tax Ordinance, 1984 vide Finance Act, 1988, and, pursuant to that, imposition of surcharges upon the petitioners vide different corresponding provisions enacted vide different Finance Acts are ultra vires the Constitution and as such should be knocked down by this Court. It is further stated that since either in the Constitution or in the entire provisions under the Income Tax Ordinance, 1984 there is no such concept for imposition of Tax on Tax, the imposition of surcharges at certain rates on the taxes payable by the petitioners are beyond the scope of the Constitution as well as contrary to the scheme of the said Ordinance. Alternatively, it is stated by the petitioners that, since, vide Section 16-A, Parliament itself has set a parameter for imposition of surcharges on every person, imposition of the same by different Finance Acts only on some individuals is beyond the scope of such parameter and as such should be struck down. Further common contention of the petitioners is that since the surcharge has been imposed by different Finance Acts at different rates on the petitioners on the basis of their net- worth and not on income, which can only be the basis of the imposition of tax, the impugned imposition of surcharges are beyond the scope of the taxation scheme under the said Ordinance as well as the Constitution inasmuch as that such imposition of surcharges were not been done under the authority of the Parliament in accordance with Article 83 and other relevant provisions of the Constitution. Petitioners further contend that since only the individuals with net-worth beyond certain amount having been classified for imposition of surcharges, the said classification among the individuals as well as the classification between the individuals and the juristic persons are not reasonable classifications and that by such classification the rights of the petitioners to hold property and their rights to equality before law as guaranteed vide Articles 42, 27 and 31 have been violated and as such the impugned provisions of the relevant Finance Acts should be declared to be ultra vires the said Articles of the Bangladesh Constitution.

22. The Rules are opposed by the Government through the concerned Commissioner of Taxes contending, inter alia, that the term "surcharge", though not specifically mentioned in the Bangladesh Constitution, the definition of 'tax', as provided in our Constitution and the said Ordinance, are so wide that no illegality has been committed by enacting the said provisions for imposition of surcharge. The further contention of the respondents is that since the Parliament has the plenary legislative power in view of Article 65 of the Constitution and enacted the relevant impugned provisions by way of placing money bills in the Parliament and the same having been passed by the Parliament in exercise of its power under Article 83, no question of illegality or unconstitutionality can arise in so far as the enactments of the said provisions are concerned, and, as such, the Rules in the aforesaid writ petitions should be discharged. The further contention of the respondents is that since imposition of tax is part of the financial policy of the State, which is approved by the Parliament, Court should not enquire into the exigencies of such policies inasmuch as that such enquiry will be a futile exercise given the fact that before adopting such policy a government has to take into consideration different factors which are beyond the judicial contemplation. It is further contended by the respondents that since surcharges have been imposed on a particular group of individuals, namely the rich individuals having net worth beyond certain amount, such

classification among individuals as well as the classification between the individuals and juristic persons are reasonable classification as has been decided by our Apex Court in various cases.

Appointment of Amici Curaie:

23. After preliminary hearing of the learned advocates for the petitioners and respondents, this Court, vide order dated 11.11.2015, requested two learned Senior Counsels of this Court, namely Mr. A.F. Hassan Ariff and Mr. Rokanuddin Mahmud, senior advocates, to assist this Court as Amici Curaie. Accordingly, the said learned advocates have made extensive submissions before this Court and cited several decisions as well as text books.

Submissions:

24. Mr. Sarder Jinnat Ali, Mr. Mosharaf Hossain, Mr. Md. Tajul Islam Mojumder, Mr. Ashik-E- Rasul, and Mr. Ashikur Rahman, learned advocates, appearing for different sets of petitioners, presented extensive submissions before this Court. At the very outset, Mr. Mosharaf, learned advocate, has presented the historical aspect of the imposition of surcharge in this sub-continent, including how the same secured it's place in the Government of India Act, 1935 (vide Section 137) and the Indian Constitution (vide Article 271). Thereafter, referring to different dictionary meaning of the term 'surcharge', learned Advocate has referred to different decisions of the Indian subcontinent, namely, **Sarojini Tea Company Ltd. vs. Collector of Dibrugarh, Assam, 1992 SCR supl. 2 25 1993 SCC Supl**:, **Bisra Stone Lime Company Ltd. vs. Orissa State Electricity Board, (1976) 2 SCR 307 and CIT vs. K. Srinivasan, 1972 AIR 491, 1972 SCR (2) 309,** to explain the meaning of the said term. Referring to such decisions and dictionary meaning, Mr. Mosharaf submits that 'surcharge' is in fact 'an additional tax' or 'a tax at an increased rate' or 'a super added charge' or 'additional charge' on the tax payers. By referring to Article 271 of the Indian Constitution along with Article 83 and definition of 'taxation' as provided under Article 152 of our Constitution, learned Advocate submits that since the very term 'surcharge' has no-where been mentioned or incorporated in our Constitution, insertion of the provisions under Section 16 A of the said Ordinance, declaring thereby that the Parliament can impose surcharge, is ultra vires the Constitution, the same having not been done under the authority of the Constitution. Learned advocate argues that since the very provision in the Constitution under Article 83 as well as the entire provisions of the Income Tax Ordinance, 1984 contemplate only tax on income and not on property or total net-worth, the imposition of surcharges by the impugned provisions on the total net worth of individual tax payers is beyond the scope of the Constitution as well as the relevant provisions of the said Ordinance and as such the same should be declared to be ultra vires the Constitution. Further drawing our attention to specific words, namely 'every person' as occurring in the impugned Section 16 A, learned advocate submits that since the impugned provisions of different Finance Acts have imposed surcharges only on two categories of individuals having net worth beyond certain amounts, the same is directly in conflict with the provisions of Section 16 A and as such should be declared to be ultra vires the Constitution. Further referring to the relevant words in the Second Part of the Second Schedule as incorporated by different provisions of the concerned Finance Acts for imposition of surcharges, learned advocate submits that tax on tax has never been contemplated either by the Constitution or by the said Ordinance and as such the same cannot stand in the eye of law. Learned advocate further argues that since the impugned provisions have classified and separated two particular groups of individuals having net-worth beyond certain amount from the rest of the individuals as well as the juristic persons like, the companies without any reasonable basis, such classification is not a reasonable classification and as such the same is hit by Article 27 as well as Article 31 of the Constitution. Again, referring to Article 42 of the Constitution, learned advocate submits that,

by imposing surcharge on a particular group of individuals, the impugned provisions have unreasonably restricted the petitioners' rights to hold property as guaranteed under Article 42 of the Constitution and as such the said impugned provisions should be declared to be ultra-vires the Constitution inasmuch as that the same are directly contrary to some particular fundamental rights guaranteed under Part-III of the Constitution.

25. Mr. Sardar Zinnat Ali, learned advocate appearing in W.P Nos.10947-10952 of 2013, 11946-11947 of 2014, 12174-12176 of 2013, 10120 of 2014, 8076-8079 of 2014 and 11155-11158 of 2014, for the petitioners, after adopting the submissions made by Mr. Mosharaf, submits that tax on tax has already been declared void by our Appellate Division in **Commissioner I. Tax Vs. Zeenat Textile, 27 DLR (AD) (1975)-85.** This being so, according to him, the imposition of tax on tax by the impugned provisions under different Finance Acts being not contemplated either by the Constitution and the relevant provisions of the said Ordinance, the same should be declared to be ultra vires the Constitution.

26. As against the aforesaid submissions, Mr. Rashed Jahangir, learned Deputy Attorney General, has also made extensive submissions referring to different provisions of the Constitutions as well as the said Ordinance. Drawing our attention to different paragraphs of the affidavit-in-opposition filed by the respondents, learned DAG submits that since the enactment of Section 16 A as well as the impugned provisions of the concerned Finance Acts for imposition of surcharge have been enacted through the passage of money bills in view of the provisions under Article 81, the same cannot be called in question by any Court including this Court. According to him, only if it is found that by passage of such money bills a fraud has been committed either on the Constitution or on the Parliament, that can only be looked into by this Court. Referring to the very provisions under Section 16 A of the said Ordinance, in particular the words 'every person' as mentioned therein, learned DAG submits that, under no circumstances, this usage of the words 'every person' in Section 16 A can be taken to be imposing a restriction on the Parliament by which the Parliament may be prevented from imposing surcharges on certain persons and/or individuals. According to him, since it is an enabling charging provision recognizing the legislative power of the Parliament to impose surcharge on every person, by such provision the plenary legislative power of the Parliament cannot be interpreted to have been curtailed. He further argues that even if it is remotely found that there is a conflict between Section 16 A and the plenary legislative power of the Parliament under Article-65, the plenary power of the Parliament shall prevail without any doubt. Further drawing our attention to the preamble of the Constitution as well as Article-8, wherein principle of equality has been enshrined for adoption by the State in enacting laws as well as interpreting the law and the Constitution, learned DAG submits that the wealthy group of individuals have been selected by the Legislature purposefully for bringing about equality in the society so that equal protection and right to equality as guaranteed under Article-27 of the Constitution can be ensured. According to him, as the wealthy group of individuals have been selected depending on their total net-wroth, no tax has been imposed on their wealth. Rather, tax has been imposed on the income of the said wealthy group. Therefore, he submits, the submission that tax has been imposed on wealth has no substance. Again, drawing this Court's attention to different paragraphs in the books of Mr. Mahamudul Islam (Constitution of Bangladesh, 3rd eddition), namely paragraphs-2.28, 2.29, 2.32, 2.35 and 2.44, learned DAG submits that since the Legislature has deliberately picked up the wealthy groups of individuals depending on their total net-worth for imposition of additional charge on them, the impugned classification, under no circumstances, can be said to be an unreasonable classification. In this regard, he refers to a decision of this Court in **Sheikh Abdus Sabur vs. Returning Officer and others, 41 DLR (AD)-30,** in particular

Paragrph-29 therein. Further drawing our attention to paragraph-6 of the affidavit-in-opposition, learned DAG submits that surcharge is not a new concept in our country. According to him, it has been there since1988 and in different years different rates of surcharges have been imposed vide different Finance Acts. In this regard, to have an idea of the intention of the Legislature, learned DAG even refers to the relevant portion of budged speech of the Finance Minister for the 2011-2012 fiscal year, which is reproduced in paragraph-7 of the affidavit-in-opposition. Learned DAG further argues that, in taxation matters, the Courts of the subcontinent have always given larger latitude to the Legislature considering the economic and social policies of the State and the complexity of fiscal adjustment involved therein. Therefore, since the Legislature, within their wisdom, has chosen a particular rich group of individuals for imposition of surcharge, this Court should not interfere into it considering the same as unreasonable classification inasmuch as that the petitioners have failed to show anything on record that such classification is unreasonable in any way. In this regard, learned DAG refers to some decisions of Indian Jurisdiction, namely **P.M. Ashwathanarayana Setty vs. State of Karnataka (1989) Suppl. 1 SCC 696, 723 and In Re The Special Courts Bill, (1978) (1979) 2 SCR 476, page 478 of AIR 1979 SC.** Further drawing our attention to the definition of the word 'taxation' as provided by Article-152 of our Constitution, learned DAG submits that the word "impost" occurring therein clearly refers to 'additional charge', which corresponds to the admitted definition of the term 'surcharge' as presented by the learned advocate for the petitioner. Thus, according to him, imposition of surcharge can easily be found to have been contemplated by the framers of our Constitution and, as such, under no circumstances, it can be said that the 'surcharge' is a concept which is beyond the scope of the Constitution. Learned DAG then argues that imposition of different rates of taxes for different groups is an inherent and historic process of taxation in every country without which no taxation can be done. Therefore, the only obligation of this Court is to examine whether such differentiation or classification between groups is unreasonable and thus hit by Articles-27 and 31 of the Constitution. Since, according to him, every enactment by parliament have strong presumption of constitutionality, the onus is on the petitioner to point out in clear terms the unconstitutionality therein, and, in the present cases, since the petitioners have failed to do so, the Rules should be discharged.

Submissions by the Amici Curiae:

27. Mr. A.F. Hassan Ariff, learned senior counsel acting as Amicus curiae, has also made elaborate submissions. However, he begins with the submission that Section 16 A of the said Ordinance has nothing therein to hold the same unconstitutional or ultra vires the Constitution. Basing on this premise, Mr. Ariff submits that even imposition of surcharge is also a valid taxation process as the term used in the definition of 'taxation' in Article 152 may easily encompass imposition of surcharge. Again, according to him, fixation of a rate to impose surcharge on the tax payable by a tax payer (tax on tax) being a method of calculation, no objection should be raised against the same. Nevertheless, he submits, by imposing surcharges only on the individuals vide different concerned Finance Acts, the Legislature has gone beyond the scope of Section 16A of the said Ordinance. According to him, since the Legislature, by providing the words 'every person' in Section 16-A of the said Ordinance, has set an obligational parameter itself to impose surcharge on every person, it has gone beyond the said parameter set by itself and, accordingly, though the impugned provisions of different Finance Acts are not directly in conflict with the constitutional provisions, they are contrary to and/or beyond the scope of Section 16A of the said Ordinance. From that point of view, according to him, the impugned provisions under different concerned Finance Acts should be knocked down. Mr. Ariff further argues that

though the tax has not been imposed on wealth directly, by incorporating a provision for imposition of surcharge on a particular group of individuals depending on their total net-worth is in fact a taxation on wealth in disguise. Therefore, he submits, such provision of imposition of surcharge is not within the contemplation of the relevant provisions of the Constitution, and that can only be done by separate legislation by the Parliament, as has been done in the past vide Wealth Tax Act, 1963. Further referring to Articles 27 and 31 of the Constitution, Mr Ariff submits that since some particular groups of individuals have been picked up for imposition of surcharge and thereby excluded the rich juristic persons there from, the classification is not a reasonable classification inasmuch as that it does not have a nexus with its object of bringing about equality in the society. Mr. Ariff then, drawing our attention to different authoritative paragraphs of Text Books of some renowned authors, namely **Statutory Interpretation, F.A.R. Bennion MA (Oxon), Barrister, London Butterworths, 1984, The Construction of Statues, Earl T. Crawford, 1998, Pakistan Law House, Karachi, Lahore and N.S. Bindra's interpretation of Statutes, Revised by Justice K. Shanmukham, Eighth Edition, 1997, The Law Book Company (P) Limited, Allahabad,** submits that when there is a conflict between the Schedule and the main provision of a particular Act, the main provision should prevail over the Schedule. In this regard, he submits that, since there is an apparent conflict between the provisions under Section 16A and the impugned provisions as incorporated in the 2nd schedule vide different provisions of different Finance Acts, the Schedule should go and the said Section 16A should prevail.

28. Mr. Rokanuddin Mahmud, the other Amicus Curiae, however, has adopted a totally different position. According to him, there is no un-constitutionality either in the provisions under Section 16A or in the impugned provisions of the concerned Finance Acts by which surcharges have been imposed. Drawing our attention to the definitions of 'tax', and 'total income' as well as different charging provisions under Sections 16, 16A etc., as provided in the said Ordinance, learned advocate submits that though the term 'surcharge' has not been specifically mentioned in the Constitution, the same should be taken to be included in the definitions of 'taxation' and 'tax' as provided by Article 152 of the Constitution and Section 2(62) of the said Ordinance respectively. According to him, since rich groups of individuals depending on their total net worth have been selected by the Legislature and no discrimination has been made within the same group, the classification is a reasonable classification and as such this Court has got nothing to interfere into the same. Mr. Mahmud further argues that even if it is found that there is a conflict between the impugned imposition of surcharge and the provisions under Section 16A of the said Ordinance, this Court should not interfere. According to him, this Court should only interfere if it is found that the imposition of surcharge vide relevant enactments are ultra vires the provisions of the Constitution. Learned advocate finally submits that since the Parliament, in exercise of it's plenary legislative power under Article 65 of the Constitution, has enacted Section 16A and impugned provisions under different Finance Acts for imposition of surcharge, the same should not be interfered with by this Court.

DELIBERATIONS OF THE COURT:

29. In these writ petitions, the constitutionality of charging provision under Section 16A of the Income Tax Ordinance, 1984 as well as relevant provisions of some Finance Acts imposing surcharges at different rates have been questioned. It should be mentioned at the very outset that a law is enacted by our Parliament in exercise of its plenary legislative power under Article 65 of the Constitution. According to sub-article (1) of Article 65, the legislative powers of the republic are vested in the Parliament subject to the provisions of the

Constitution. Thus, the power in vested in the Parliament to legislate over all subjects except those excepted by the Constitution itself. Not only that, such legislation must be in conformity with different Articles mentioned under Part-III of the Constitution as well as with the Constitution in view of Article 26 and Article 7 respectively, and any provision enacted by the Parliament shall be void or declared ultra vires to the extent it is inconsistent either with the Constitution or with the fundamental rights guaranteed under Part-III. However, the petitioners have challenged Section 16A of the said Ordinance and concerned provisions of different Finance Acts imposing surcharges on both counts, namely that the surcharges have been imposed contrary to the provisions of Article 83 of the Constitution and that such imposition has violated fundamental rights guaranteed in favour of the petitioners under Articles 27, 31 and 42 of the Constitution.

30. Let us first examine whether by enacting Section 16A or by enacting different concerned provisions under different Finance Acts and thereby imposing surcharges, the Legislature has in any way violated Article 83 of the Constitution. For such examination, let us quote Article 83:-

"83. No tax shall be levied or collected except by or under the authority of an Act of Parliament."

31. Upon mere reading of above Article, it appears that the impugned imposition of surcharge will have to pass the test that the same has been enacted under the authority of an Act of parliament. However, to be an Act of Parliament, the concerned enactment has to be within the scope of the legislative power of the Parliament. Thus, imposition of surcharge has to be within the scope and contemplation of the Constitution; otherwise, the Parliament will be bereft of authority to impose surcharge. The definitions of surcharge, as referred to by learned advocate for the petitioners, are very much pertinent in this regard, which are quoted below:

> ***Black's Law Dictionary****: Surcharge- (noun) an additional tax, charge, or cost, usually one that is excessive. Surcharge-(verb) To impose an additional usually excessive tax, charge, or cost.*
> ***Oxford****: Surcharge-(n.) an extra amount of money that you must pay in addition to the usual price.*
> ***Cambridge****: Surcharge- (n.) a charge in addition to the usual amount paid for something; (v.) to charge an extra amount.*
> (Underlines supplied)

32. It appears from the above definitions of the term 'surcharge' that surcharge is basically understood as an additional charge or extra charge, or an additional tax, in addition to the ordinary tax payable by a taxpayer. It is true that, unlike Indian Constitution, our Constitution does not specifically mention the word 'surcharge'. However, our Constitution, under Article 152, defines the word 'taxation' in the following terms:-

> *"In this Constitution, except where the subject or context otherwise requires- "taxation" includes the imposition of any tax, rate, duty or impost, whether general, local or special, and "Tax" shall be construed accordingly.*
> (Underlines supplied)

33. On the other hand, Section 2(62) of the Income Tax Ordinance, 1984 defines "tax" in the following terms:

"2(62) "tax" means the income-tax payable under this Ordinance and includes any additional tax, excess profit tax, penalty, interest, fee or other charges leviable or payable under this Ordinance;"

(Underlines supplied)

34. Upon examination of the above two definitions as against the dictionary meaning of the word 'surcharge', it appears that, though the term 'surcharge' is not specifically mentioned in the Constitution or not defined in the said Ordinance, the basic concept of 'surcharge' was always there in our Constitution and the said Ordinance. The only difference being that while the Indian Constitution, under Article 271, specifically has mentioned the word 'surcharge', our Constitution has not mentioned the same in such specific way. Not only that, upon examining the dictionary meaning of the word "impost" as used under the definition of 'taxation' as provided by our Constitution under Article 152, there is no semblance of doubt that the Parliament has always had the plenary power to legislate provisions for imposition of 'additional tax', 'extra charge' or 'impost', through whatever terms it may be called, by which some additional charges may be levied on the tax payers in addition to their ordinary tax payments. In consideration of the above wide definition of 'taxation' as given by our Constitution and the definition of term 'Tax' as provided by the relevant provision of the said Ordinance, we are, therefore, of the view that the power of imposition of surcharge, as has been done by the impugned provisions, was very much within the plenary power of legislation of the Parliament. This conclusion will be much more clear if we examine the exact provisions under Article 271 of the Indian Constitution, which is quoted below:-

"Surcharge on certain duties and taxes for purposes of the Union.-

Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated fund of India".

(Underlines supplied)

35. Thus, it appears from the above provision under Article 271 of the Indian Constitution that the very word 'surcharge' has been used therein to "increase any of the duties or taxes". Therefore, even the contemplation of the framers of the Indian Constitution was that the Indian Parliament would be at liberty to increase ordinary duties or taxes by imposition of surcharge. Exactly the same provision, though in different terms, has been incorporated in our Constitution through Article-83 read with the definition of the term 'taxation' in Article-152. Thus, considering above aspects of our Constitution as well as the Indian Constitution, it can not be said that our Constitution framers did not contemplate the imposition of 'surcharge' while the Constitution was drafted. Accordingly, we are not in a position to accept the submissions of the learned advocates for the petitioners that the imposition of surcharge is not within the scope of the Constitution and as such is not within the authority of the Parliament in view of Article 83 of the Constitution read with Article-65.

36. Now, let us examine whether the imposition of surcharges by the impugned provisions have in any way violated the fundamental rights of the petitioners as guaranteed under Articles 27, 31 or 42. In this regard, the main thrust of the arguments of the petitioners is that picking up of groups of individuals for imposition of surcharge basing on their total net-worth is not a reasonable classification and that it does not have any nexus with the objects sought to be achieved by such enactments. Before examination of this issue of classification, we should first bear in mind that not only in our sub-continent, but also in

European and American countries, Courts have always granted greater latitude to the Legislature in respect of taxing matters considering the intrinsic complexity of fiscal adjustment of diverse elements. Regarding classification in tax-matters, the observation of the Indian Supreme Court in **Khandige Sham Bhai v. Agri. Income. Tax Officer, AIR 1963 SC 591, at page 594-95,** is pertinent to quote here:-

> *"….The courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."*

37. Similar observation has been made by the Indian Supreme Court in another case, namely in **Hoechst Pharmaceuticals Ltd. v. State of Bihar, 1983 SC-1019** which is as follows**.**

> *"When the power to tax exists, the extent of the burden is a matter for discretion of the law-makers. It is not the function of the court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirements is satisfied".*

38. Therefore, considering the above referred aspects, in particular the complexity of financial policy of a republic, the Courts have always emphasized that having regard to the wide variety of diverse economic criteria that go into the formation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc. for the purposes of taxation ("see also **Elel Hotels and Investments Ltd. Vs. Union of India AIR-1990 SC 1664**).

39. In enacting legislations regarding fiscal matters, it is the obligation of the State or the Legislature to bring about equality in the society in order to establish equality before law in real sense as contemplated by Articles-8 and 27 of our Constitution. According to sub-article-(2) of Article-8, the principle set-out in Part-II of the Constitution shall be fundamental to the Government of Bangladesh and shall be applied by the State in the making of laws and shall be a guide to interpretation of the Constitution and of other laws of Bangladesh. In addition, Article-10 of our Constitution contemplates achievement of socialist economic system for ensuring the attainment of a just and egalitarian society free from the exploitation of man by man. Therefore, while Legislating a particular enactment, it is the obligation of the State as well the Legislature to keep in mind the said fundamental principles of State policy, in particular Article-8, in order to attain a just and equitable society in real sense so that the equality before law, as guaranteed under Article-27 of the Constitution, can be established in real sense. It has to be further borne in mind that equality before law, under no circumstances, cannot be achieved if the people of the country are situated un- equally. In an unequal society, equality before law is a mere myth. Therefore, considering the above aspects, it has become a long practice that the Courts allow a larger or extended latitude to the Legislature in taxing matters inasmuch as that while legislating a financial policy of a particular government, the Legislature has to contemplate various complicated issues, which are beyond the contemplation of judicial review.

40. Keeping the above view in mind, if we examine the impugned classification that a group of individuals having total net worth above two crores or ten crores have been selected by the Legislature for imposition of surcharge, it will be crystal clear that such selection can

not be hit by Article- 27 of the Constitution. It would have been so hit by Article-27 if it were to be found that the individuals in the same group had been discriminated between them, which is totally absent in the facts and circumstance of the present case. The admitted position is that the individuals having total net worth above two crores or ten crores have been selected by the Legislature for imposition of different rates of surcharge on the tax payable by them, thereby, charging additional tax on a rich group of individuals. Therefore, under no circumstances, it can be said that this classification of a particular group, and/or this differentiation of a particular group from others, has no nexus with the objects sought to be achieved by such classification. Besides, classification is an integral part of taxation which is almost every where in our Income Tax Ordinance, 1984. Classification of different income groups for imposition of different rates of taxes is an accepted legislative practice and has never been questioned by any Courts. The only exception is that persons situated alike in a similar group cannot be discriminated between them. On the other hand, the inherent distinction between a juristic person like company and an individual can easily be a basis for classification between a company and an individual. Under no circumstances that can be said unreasonable classification. Again, the classification between people having certain amount of properties or assets and the people not having such properties or amounts of assets is also reasonable in as much as that such classification is always there even if it is not made by law. An individual having total net worth above two crores or ten crores is always in a distinct group than an individual having total net worth of one crore or below two crores. Therefore, a Legislature cannot be insisted on not to differentiate between two classes of people when such classification is already there in the society, and it is the obligation of the State to enact law to reduce such disparity between different classes, in particular rich and poor.

41. A question has been raised as to why rich companies have been excluded. The answer to such question can only be given by the policy maker of the State. Thus, the Court is not in a position to examine the complexities behind such policy decision, and those complexities involving facts and different issues are always beyond the contemplation of the judicial review. Therefore, such question cannot be asked by the Court. When on the face of the record, and on the facts and circumstances of the case, it is found that the classification of a group of individuals having net worth of more two crores or above ten crores is not an unreasonable classification, we are not in a position to accept the submissions of the learned advocates for the petitioners as well as Mr. A.F. Hassan Ariff, learned Amicus Curiae, on this point. On the other hand, relying on the principle enunciated in the **Sheikh Abdur Sabur's** case, we are of the view that the impugned classification is a reasonable classification.

42. Now, let us examine whether there is any conflict between the provision under Section 16 A of the said Ordinance and the impugned imposition of surcharges in that surcharges have not been imposed on every persons rather on a particular group of individuals. To examine this, let us quote the entire provision of Section 16 A of the said Ordnance:-

"16A. Charge of surcharge.-

(1) Where any Act of Parliament enacts that a surcharge on income shall be charged for any assessment year at any rate or rates, such surcharge at that rate or those rates shall be charged for that year in respect of the total income of the income year or the income years, as the case may be, of every person;

(2) All the provisions of this Ordinance relating to charge, assessment, deduction at source, payment in advance, collection, recovery and refund of

income tax shall, so far as may be, apply to the charge, assessment, deduction at source, payment in advance, collection, recovery and refund of the surcharge"

43. It appears from the provision and the provisions under Sections 16, 16-B, 16-C and 16-CCC of the said Ordnance that the provisions under Chapter-IV of the said Ordinance are in fact enabling charging provisions, by which it has been acknowledged that the Parliament has power to impose different taxes in different names, sometimes 'tax', sometimes 'surcharge', sometimes 'additional charge', sometimes 'access profit tax' and sometimes 'minimum tax'. Therefore, by these provisions, the said Ordnance has merely recognized the plenary legislative power of the Parliament to legislate on financial matters as well. Thus, these provisions cannot be deemed in any way to have curtailed such legislative plenary power of the Parliament under Article 65. Any contrary suggestion will totally be an absurd proposition. An Act of Parliament can not curtail the power of the Parliament. Thus, by mere providing that income tax shall be charged on every person or surcharge shall be charged on every person, either by Section-16 or Section 16A of the said Ordnance, it cannot be said that income tax or surcharge, as the case may be, cannot be imposed on some selected persons or group of persons. When the Act of parliament has recognized that the Parliament can impose tax or surcharge on every person, by necessary implication, it has acknowledged the plenary power of legislation by the Parliament to impose tax or surcharge on some persons or class of persons. Therefore, the submissions, as has been put forward by the learned advocates, that the imposition of surcharge on a particular group of individuals has violated the parent provision of Section-16A, has no substance. For the same reason, this Court does not find any conflict between the impugned provisions under the concerned Schedules as impugned in these writ petitions and the parent provision, namely Section 16 A. Thus, the question that in case of conflict the parent law shall prevail over the Schedule.

44. The other aspect, which has been raised by Mr. Sarder Zinnat Ali, learned advocate, relying on the **Commissioner I. Tax vs. Zeenat HTextile, reported in 27 DLR (AD)-85,** is that our Supreme Court has already declared tax on tax as void and ultra vires the Constitution. Therefore, according to him, tax on tax, as has been imposed by the impugned provisions, should also be declared to be void. To address this issue, we have examined the said decision of our Appellate Division [27 DLR (AD)-85] as well as the decision of the High Court Davison in the same case as reported in 21 DLR-255. It appears from reading of the said judgments that though the then Section 45A of the Income Tax Act, 1922, imposing additional tax on the existing tax for the delay in payment of tax, has not been challenged in the concerned writ petition, the High Court Division declared the said provision void mainly on the ground that the said imposition of Additional Tax was not in the central list of the Constitution i.e. imposition of such additional charge and tax was not within the scope of legislation by the central Legislature in accordance with the central list as provided in the Third Schedule to the then Pakistan Constitution of 1962. Thus, considering this aspect, our Apex Court, in that case, declared such provision void ab-initio. From the very reading of paragraph 10 of the reported decision of the Appellate Division as well as other relevant paragraphs, it is clear that tax on tax in that case was declared void on different context; namely, that such power was not conferred on the central Legislature by the Constitution itself. However, there is no such aspect in our present Constitution. Therefore, this reported case does not have any manner of application in the facts and circumstances of the present case inasmuch as that our present Constitution has not in any way prevented the Parliament from enacting or imposing surcharge.

45. Regard being had to the above facts and circumstances of the case and the discussions of law made therein, we do not find any merit in the Rules and as such the same should be discharged.

46. In the result, the Rules are discharged without any order as to costs. The respondent-Income Tax Authorities are at liberty to take appropriate legal steps for realization of surcharges in accordance with law.

47. Before parting, we convey our gratitude to both the learned Amici Curiae, who took huge trouble to prepare for these cases and make their valuable submissions.

8 SCOB [2016] HCD 84

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 3877 of 2009 with

Writ Petition No. 3904 of 2009

An application under Article 102(2) of the Constitution of the People's Republic of Bangladesh

Energy Prima Limited
…Petitioner

Versus

People's Republic of Bangladesh and others
…Respondents

Mr. Ahsanul Karim, Advocate with
Mr. Khairul Alam Chowdhury, Advocate
Mr. Tanveer Hossain Khan, Advocate
Mr. Shamim Ahmed Mehedi, Advocate
…For the petitioner

Mr. Tofailur Rahman, Advocate with
Ms. Umme Salma, Advocate
…For the respondent No. 2-4
(In writ petition No. 3904 of 2009)

Mr. Rajik Al Jalil, D.A.G.
…For the respondent No.2-4
(In writ petition No. 3877 of 2009)

Heard on: 11.07.12, 15.07.12, 22.07.12, 23.07.12, 26.07.12
Judgment on: 29.07.2012

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

Constitution of Bangladesh
Article 102
The Arbitration Act, 2001
Section 7
Restriction of judicial intervention in matters covered by arbitration agreement:

In the present case, clause 19.2 of the contracts dated 16.01.2008 entered into between the petitioner and the BPDB contains an arbitration clause stating that the arbitration shall be conducted in accordance with the Arbitration Act (Act No. 1 of 2001) of Bangladesh as at present in force and the place of arbitration shall be in Dhaka, Bangladesh, therefore, section 7 of the Arbitration Act, 2001 restricts judicial intervention in matters covered by arbitration agreement. Petitioner is trying to interpret the contract in the writ petitions which is impermissible, particularly when the petitioner is having a remedy to go for arbitration under the contract signed by the petitioner. Petitioner having signed contract with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions. … (Para 25)

Judgment

Md. Ashraful Kamal, J:

1. Since in these Writ Petitions there involved a common question of fact and law, those are heard and disposed of by this judgment.

2. In Writ Petition No. 3877 of 2009 Rule was issued calling upon the respondents to show cause as to why the deduction of Advance Income Tax (AIT) @ 4% by the respondent Nos. 1-4 from the monthly Rental and Energy Payment bill (Annexure-E & E-1) of the petitioner under Contract No.09689 dated 16.01.2008 executed by and between the respondent No.2 and the petitioner for 50 MW Power Plant at Shahjibazar (wrongly written as Kumargaon) Sylhet, should not be declared to have been passed without lawful authority and is of no legal effect and also to show cause as to why the respondents shall not be directed to refund USD 1,57,892.24 (U.S. Dollar one lac fifty seven thousand eight hundred ninety two and cent twenty four) deducted as Advance Income Tax (AIT) @ 4% from the Monthly Rental and Energy Payment of the petitioner under the said Contract No. 09689 dated 16.01.2008 and/or pass such other or further order or orders as to this Court may seem fit and proper.

3. In both the Petitions Rule were issued in common terms where only the contract and refund amounts are different being Contract No. 09690 in respect of 50MW Power Plant at Kumargaon, Sylhet and refund of USD 2,61,667.82 (US Dollar two lacs sixty one thousand six hundred and sixty seven cents eighty two).

4. The brief facts necessary for disposal of these writ petitions are as follows:

The petitioner is doing the business of generating and selling of electricity on rental basis or under IPP, BOO & BOT basis by setting by power plant in Bangladesh. The Government of Bangladesh in order to meet the electricity crisis decided to purchase electric power and energy from the Company on rental basis under the existing Private Sector Power Generation Policy of Bangladesh- 1996 (Revised in 2004). The Government of Bangladesh created and set up a Power Cell under the Ministry of Energy & mineral Resources (MEMR) in 1995. The power Cell has a mandate to lead private power development, recommend power sector reforms & restructuring, conduct study on tariffs and formulation of a regulatory framework for the power sector. The Power Cell shall facilitate all stages of promotion, development, implementation, commissioning and operations of private power generation projects and suitably address the concerns of project sponsors. It will also assist project sponsors to secure necessary consents and permits from GOB where such consents and permits would be needed. Under the existing Policy the Fiscal facilities including tax exemption for the private power generator company are available. The Petitioner is a private power generating company and it is a 'Rental Power Company' like other private power generating company the petitioner is also entitled to enjoy the fiscal facilities as envisaged in the said Policy.

That the Power Cell as constituted under the said Power Policy through the Respondent No. 2 i.e. Bangladesh Power Development Board (BPDB) invited tender for design, finance, insure, build, own, operate and maintenance of 50 MW power Plant project on rental basis at Kumargaon and Shahjibazar, Sylhet and accordingly the Petitioner as a Joint Venture Consortium participated in the said Tender

successfully and entered into a Contract bearing Nos. 09689(for Shahjibazar) and 09690(for Kumargaon) dated 16.01.2008 with the BPDB. Under the said Contracts dated 16.01.2008, the Petitioner is under legal obligation to sell electricity capacity and energy output of the facility of BPDB in accordance with the terms and conditions set forth in the Contracts.

According to Article 13.1 of the Contract dated: 16.01.2008, the respondent No. 2 shall pay to the Petitioner the tariff payment for each month for dependable capacity and net energy output. The Petitioner submits invoice on monthly basis and after verifying the same the respondent No. 2 pays the monthly bill to the Petitioner by way of letter of credit in US Dollar.

As per Article 17 of the said Contracts BPDB shall be responsible for payment of income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside Bangladesh for the importation of plant/equipment before Commercial Operation Date and for operation throughout the contract period. In this regard, the Rental Power Company shall submit to BPDB Bank certified copy of Pro-forma Invoice, Bill of Lading, Letter of Credit, Packing List, Original Invoice etc. The Rental Power Company shall submit an undertaking provided in schedule 9 for importation of materials. The Rental Power Company shall be entitled to import & re-export required machinery, equipment etc as per prevailing import -export policy of Bangladesh. And the Government of Bangladesh, Ministry of Finance on 26.05.1999 issued a S.R.O bearing No. 114-Ain/99 exempting the private power generation company from all income taxes under Income Tax Ordinance, 1984.

The petitioner after fulfilling all the terms and conditions as set out in the said Contract No 09690 dated 16.01.2008 started the commercial operation of the Kumargaon Rental Power Plant on 22.07.2008 and has been supplying energy to the BPDB. Thereafter, the petitioner submitted monthly bills for the month of July-2008, August-2008, September- 2008, October-2008, November-2008, December-2008, January-2009, February-2009, March-2009, to the respondent No. 2 against available Dependable Capacity and net Energy Output Generation and Supply as per Article 13 of the said Contract. But the respondent No. 2, deducted an amount of USD 2,61,667.82 (US Dollar two lac sixty one thousand six hundred sixty seven and Cents eighty two) from the said Rental and Energy Payment bills of the petitioner as 4% Advance Income Tax (AIT) in violation of the said S.R.O and Contract as well. Thereafter, Petitioner submitted Rental and Energy payment bill for the month of April 2009 to the BPDB after supply of the energy and available Dependable Capacity and the Respondent No. 2 as usual has taken all steps to deduct @ 4% AIT from the said bill despite repeated requests. Then, the petitioner raised objection about the said deduction of the AIT from the Rental and Energy payment Bill. Accordingly, on 06.10.2008 petitioner wrote a letter to the respondent No. 4 to refund the deducted AIT amount.

As per Contract No. 09689 dated 16.01.2008 petitioner started the commercial date of operation of the Shahjibazar Rental Power Plant on 12.11.2008 and has been supplying energy to the BPDB. Thereafter, the petitioner submitted monthly bills for the month of November-2008, December-2008, January-2009, February-2009, March-2009 to the respondent No. 2 against available Dependable Capacity and net Energy Output Generation and Supply as per Article 13 of the said Contract. But the respondent No. 2, deducted an amount of USD 1,57,892.24 (US Dollar one lac fifty

seven thousand eight hundred ninety two and Cents twenty four) from the said Rental and Energy Payment bills of the petitioner as 4% Advance Income Tax (AIT) in violation of the said S.R.O and Contract as well. Thereafter, petitioner submitted Rental and Energy payment bill for the month of April 2009 to the BPDB after supply of the energy and available Dependable Capacity and the respondent No. 2 as usual has taken all steps to deduct @ 4% AIT from the said bill despite repeated requests. Then, the petitioner raised objection about the said deduction of the AIT from the Rental and Energy payment Bill. Accordingly, on 06.10.2008 petitioner wrote a letter to the respondent No. 4 to refund the deducted AIT amount.

5. Mr. Ahsanul Karim, learned advocate appearing for the petitioner in both the writ petitions submits that the petitioner being a private power generation company is exempt from income tax under the Income Tax ordinance-1984 for a period of 15 years from the date of commercial production i.e. from 22.07.2008(for Kumargaon) and 12.11.2008 (for Shahjibazar) as per S.R.O No. 114-Ain/99 dated: 26.05.1999, therefore, the deduction of Advance Income Tax (AIT) from the monthly Rental and Energy Payment bill of the petitioner is without lawful authority and is of no legal effect. He further submits that Article 17 of the said Contracts specifically provides that the Respondent No. 2 shall be responsible for payment of income taxes and other taxes for operation of the Power Plant during the Contract period, therefore, deduction of the Advance Income Tax from the monthly rental and energy bill or the petitioner is without jurisdiction.

6. Mr. Karim also argued that the respondent No. 2 (BPDB) is not the authority to deduct or impose income tax upon the petitioner under the law and as such deduction of AIT @ 4 % from the monthly rental and energy payment bill of the petitioner by the respondent No. 2-4 is without lawful authority and is of no legal effect. Moreover, under the same international tender and tender documents and draft agreement, another rental power company namely Aggreko International Projects Limited has been enjoying the AIT exemption facility but the petitioner being under the equal footing and having been awarded under the same terms and conditions of the Tender and even after being recommended by the Power Cell in not enjoying the AIT exemption facility which is highly discriminatory and arbitrary exercise of power of the respondents.

7. Mr. Karim further submits that the aforesaid contracts were executed between the parties on 16.01.2008 and the law enabling the respondents to impose or deduct the Advance Income Tax came into force on July 01, 2009 by virtue of incertion of section 52N of the income Tax Ordinance, 1984. So, the contracts in question were entered into prior to the law for deducting the Advance Income Tax. The petitioner having participated in the bid relying that the PDB would pay income tax, clause 5.1 of the policy having stipulated that private power companies will be exempted from the income tax and the said S.R.O having exempted all private power generation company from paying income tax and there being no law as on the day of contract authorising any deduction, the petitioner acquired a vested right which cannot be taken away by subsequent amendment of law. Under the said S.R.O and stipulation of contract the petitioner is exempted from paying tax. Even if the PDB is held authorised to deduct at source the income tax authority is bound to refund the same under section 163 of the Income Tax Ordinance.

8. Finally, Mr. Karim submits that issues agitated by the petitioner are not subject to arbitration and the issues raised in the writ petition are not between the parties alone and this writ petition has not filed to enforce any breach of contract but involves a different issue which is extraneous to the contract.

9. Mr. Razik-Al-Jalil, the learned Deputy Attorney General appearing for the respondent Nos. 2-4 of the writ petition No. 3877 of 2009 by filling affidavit in opposition at first raises the issue of maintainability of the writ petition itself on the ground that since there is an Arbitration clause in the contracts dated 16.01.2008, the Writ petition is not maintainable as the petitioner has come before this court without availing of the alternative remedy as agreed by parties.

10. He further submits that when the private sector power generation policy of Bangladesh 1996 (Revised in 2011) was made, the concept of purchase electric power and energy on rental basis was not in existence. Next, he submits that the rental basis power station is established for a particular period and the exemption from corporate income tax for a period of 15 years is given for Independent Power Project (IPP) only, which is established permanently. Therefore, the petitioner being a power supply company on rental basis are not entitled to enjoy the fiscal facilities as envisaged in the said policy.

11. Mr. Jalil further submits that in 2008 the rental power company started production of power in Bangladesh and then the Hob'ble president by promulgating an ordinance in 2008 inserted the section 52 N by Ordinance No. XIII of 2008 on 15.04.2008 amended the Income Tax ordinance 1984 providing for advance income tax by the rental power generation company and subsequently it was confirmed by parliament by Act No. 11/09. The petitioner knowing fully well was making payment advance income tax as per law. He further submits that an unreported judgment of this Hon'ble Court passed in Writ Petition No. 1185 of 2009, whereupon - the Hon'ble High Court Division clearly stated that the rental power generation company are bound to pay advance income tax as per section 52 N of Income Tax Ordinance. As such it is the legal duty of the respondent to deduct 4% as advance income tax while payment of the bill of Rental Power Company for supplying powers on rental basis.

12. Mr. Jalil also submits that as per clause 17 of the agreement, BPDB shall be responsible for payment of income taxes other taxes, vat, duties levis all other charge imposed or incurred inside Bangladesh for the importation of plant/equipment before commercial operation date and spare parts for operation throughout the contract period. Nowhere in the contracts stated that the BPDB is responsible to pay advance income tax against the payment of their bill. Accordingly BPDB is paying 2.50% import duty on the bill of rental payment and deduct on 4% advance income tax against payment of their bill as per section 52N of the Income tax ordinance and Rule 16 of the Income tax Rule. In this connection it may be mentioned that the existing private sector power generation policy of Bangladesh 1999 (Revised in 2004) or SRO dated 26.05.1994 issued on the basis of the said policy and are not applicable to the petitioner rental company.

13. Finally, Mr. Jalil submits that Private Sector Power Generation policy of Bangladesh 1996 is applicable for Independent Power Producing only not for Rental Basis company under clause 3.2 and clause 4.5 of Power Generation policy the Power Generation Company on IPP basis are exempted for income Tax for 15 years. But the Rental Power Company cannot get the benefit of Private Sector Power Generation Policy of Bangladesh 1996. Provision lay down in Section. 52 N of the Income Tax Ordinance, 1984 is applicable for Rental Power Company which is quoted below;

> *'52N. Collection of tax on account of rental Power:- Notwithstanding anything contained in this ordinance. Bangladesh Power Development Board, at the time of payment to any rental power company on account of purchase of rental power from that company, shall collect, deduct or pay tax on the said payment for a term not*

exceeding three years from the date of its operation in Bangladesh at the rate of 4% (four percent) which shall be treated as final discharge of tax liability of the rental power company regarding the sale of such rental power'

14. Therefore, the BPDB lawfully deducted 4% as advance income tax from the bill of the writ petitioner for supplying of power to BPDB on rental basis and the instant writ petition is not maintainable and is liable to be discharged.

15. We have considered the submissions made by the learned advocate appearing for the petitioner as well as learned advocates appearing for the respective respondents.

16. The point arises for consideration in these writ petitions is whether the writ petitions filed by the petitioner for the issuance of a mandamus restraining the BPDB from deducting Advance Income Tax (AIT) at the rate of 4% from the monthly rental and energy payment bill of the petitioner under the contracts is maintainable.

17. Similar contracts were entered into between the same petitioner in both the writ petitions and the BPDB for different power plants. Clause 19.2 of the terms of both the contracts reads as follows:

"19.2 Resolution of Dispute
(a) BPDB and the Company shall use their best efforts to settle amicably all dispute arising out of or in connection with this contract or its interpretation
(b) If the Parties are unable to reach a settlement as per Article 19.2(a) within 28 days of the first written correspondence on the matter of disagreement, then either party may give notice to the other party of its intention to commence arbitration in accordance with Article 19.2(c).
(c) The arbitration shall be conducted in accordance with the Arbitration Act (Act No 1 of 2001) of Bangladesh as at present in force. The place of arbitration shall be in Dhaka, Bangladesh. "

18. The language of the clause 19.2 makes it very clear that in the event of dispute arising out of contract; it is referable to the arbitrator. Whether a dispute has arisen out of the contract, the pleadings of the parties assume significance and a cursory glance on the same unfolds that the petitioner claims relief on the basis of recitals of the agreement whereas the respondents deny his entitlement on the strength of the very terms and conditions of the agreement pressed into a service by the petitioner. It is appropriate to notice that the case in hand does not represent a situation where petitioner relies on one set of conditions and the respondents on a different one but fact of the matter is that both the parties rely upon a set of conditions contained in contracts dated 16.01.2008. In essence, the rights and obligations of the parties are sought to be worked out in the light of the terms of the agreement, thus the controversy centres around the interpretation of the terms and conditions of the contract which are binding on the parties and as a matter of fact by medium of their pleadings they have reiterated such binding. In this backdrop the petitioner is not entitled to invoke the jurisdiction of this court under article 102 of the Constitution, for, such course will tantamount to saying good bye to the terms of the agreement which cannot be permitted in view of the candid admission of the parties, evidencing the fact that their relationship is governed by the agreement.

19. As per the contract between the petitioner and the BPDB, for resolving disputes arbitration is provided. Such 'Arbitration' will be governed by the provisions of the

Arbitration Act, 2001 or any statutory amendments or re-enactment thereof. Petitioner having agreed by signing the said contract, is bound to raise any dispute for arbitration and the 'Arbitrator' can very well go into all aspects, particularly in the facts pleaded by the petitioners viz., the deduction of Advance Income Tax (AIT) @ 4% by the respondents Nos. 1-4 from the monthly rental and energy payment bill of the petitioner under contracts No. 09689 and 09690 dated 16.01.2008 and the respondents to refund the deducted Advance Income Tax (AIT) to the petitioner, which may be raised for consideration and an appropriate decision can be arrived at.

20. Here it is beneficial to refer to the judicial pronouncement of the Supreme Court of India in State of U.P. v. Bridge & Roof Co. (India) Ltd. reported in AIR 1996 SC 3515 at 3520. In para (21), it was observed;

> *" 21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contain a clause providing inter-alia for settlement of disputes by reference to arbitration (Clause 67of the Contract). The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said Article wasn't meant to supplant the existing remedies at law but only to supplement them in certain well recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction was misconceived for the reasons mentioned supra."*

21. In (2007) 14 SCC 680; (2007)4 ALR 74 (SC) (Empire Jute Company Limited v. Jute Corporation of India Limited) in paragraph 18 it is held thus;

> *"18. The power of judicial review vested in the superior courts undoubtedly has wide amplitude but he same should not be exercised when there exists an arbitration clause. The Division Bench of the High Court took recourse to the arbitration agreement in regard to one p[art of the dispute but proceeded to determine the other part itself. It could have refused to exercise its jurisdiction leaving the parties to avail their own remedies under the agreement but if it was of the opinion that the dispute between the parties being covered by the arbitration clause should be referred to arbitration, it should not have proceeded to determine a part of the dispute itself."*

22. In yet another case, the apex court of India in the decision reported in (2010) 11 SCC 186 (Central Bank of India v. Devi Ispat Ltd.) held that mandamus can be issued by the High Court under Article 226 of the Constitution, if a legal right exist and corresponding legal duty is liable to be performed by the State or its instrumentality. In paragraph 28 the Supreme Court held thus;

> *"28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective*

alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power."

23. Recently, in the decision reported in (2011) 2 SCC 782 (Kanaiyalal Lalchand Sachdey v. State of Maharashtra) the apex court of India held thus;

"In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd., Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)"

24. Our Appellate Division in Bangladesh Telecom (Pvt.) Ltd. vs BTTB reported in 48 DLR (AD) (1996) Page 20 Para 18 held thus;

"18. With regard to the availability of arbitration and civil suit as an alternative remedy, Article 102 of the Constitution Provides that if there is 'no other equally efficacious remedy' 'provided by law' then the Writ jurisdiction of the High Court Division may be invoked. 'Provided by law' means a remedy provided in the statute in invocation of which the impugned order was passed. The Telegraph Act, 1885 does not provide for any appeal or review against the order of cancellation of licence. The Provision for arbitration is term and condition of the licence and clause 18 of the Agreement Provides for arbitration if there is any disagreement or dispute regarding the subject matter covered by the agreement. As the conditions of the agreement stood merged with the licence the arbitration clause may be invoked if there was disagreement or dispute regarding the subject matter covered by the licence, but when the licence itself is cancelled under section 8 the efficacious remedy, if any, must be provided in the Telegraph Act itself so as to disentitle the licensee to invoke the writ jurisdiction without exhausting the remedy. The Telegraph Act does not do so."

25. In the present case, clause 19.2 of the contracts dated 16.01.2008 entered into between the petitioner and the BPDB contains an arbitration clause stating that the arbitration shall be conducted in accordance with the Arbitration Act (Act No. 1 of 2001) of Bangladesh as at present in force and the place of arbitration shall be in Dhaka, Bangladesh, therefore, section 7 of the Arbitration Act, 2001 restricts judicial intervention in matters covered by arbitration agreement. Petitioner is trying to interpret the contract in the writ petitions which is impermissible, particularly when the petitioner is having a remedy to go for arbitration under the contract signed by the petitioner. Petitioner having signed contract with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions.

26. In light of the above findings, we are of the firm view that these writ petitions are not maintainable and the petitioner has to go for arbitration in terms of clause 19.2 of the

contracts, if he has any grievance. Since the writ petitions are dismissed only on the ground of maintainability, the observations made herein shall not be construed giving any finding in favour of either party.

27. In the result, both the Rules are discharged. The ad-interim order granted earlier by this court are hereby vacated accordingly. There is no order as to costs.

28. Communicate this judgment at once.

8 SCOB [2016] HCD 93

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 1367 of 2003

An application under Article 102 of the Constitution of the People's Republic of Bangladesh

Shahida Khatun & others
…Petitioners

Versus

Chairman, 1st Court of Settlement and another
…Respondents

Mr. Moksadul Islam, Advocate
…For the Petitioners

Mr. Shahidul Islam, D.A.G. with
Mr. Sukumar Biswas, A.A.G.
…For the Respondents

Heard on: 22nd, 25th November, & 1st December, 2015
Judgment on: 7th December, 2015

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

The Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972
Article 7:
In the present case the Petitioners or their vendor admittedly was not in possession of the property in question at the relevant time, they entered into the possession of the property in the year 1984. Since the property was declared abandoned under the provision of P.O. 16 of 1972, question of service of notice under Article 7 upon the Petitioner or their vendor who were not in possession, active control, supervision and management of the property at the relevant time does not arise. Moreover, decree in a Suit for Specific performance of contract does not reflect a substantive determination of any issue regarding the abandoned character of the property. … (Para 15)

The Bangladesh Abandoned Buildings Supplementary Provision Ordinance, 1985
Section 5:
Since the property has been listed under Section 5(1) of the Ordinance as abandoned property and the said list has been published in the official gazette the claimant of the property are required to dislodge the statutory presumption as under Section 5 (2) of the Ordinance that the property in question is not an abandoned property and the same has been wrongly enlisted. … (Para 18)

Judgment

Mahmudul Hoque, J

1. In this application under Article 102 of the Constitution of Bangladesh Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to

why the Judgment and Order dated 06.11.2002 passed by the 1st Court of Settlement as contained in Annexure-P should not be declared to have been passed without any lawful authority and of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts necessary for disposal of this Rule, in brief, are that the then Government of East Pakistan allotted House No. 27/6, Block-F, Mohammadpur Housing Estate, Dhaka by Memo No. 2136-A.O 3L-388/61 dated 10.10.61 to one Israil the predecessor of the Petitioners. Subsequently a lease deed in between the said Israil and the then Government of East Pakistan was executed and duly registered on 2.6.1962. While the said Israil was in possession and enjoyment of the property, the Administrative Officer, Mohammadpur Housing Estate issued a clearance certificate on 14.10.1970 in favour of the said Israil certifying that the allottee has paid entire amount of money payable by him in respect of the house in question. Thereafter the said Israil transferred the property in question to one Anwar Ali, S/O Jumrati Miah by a registered deed of sale dated 15.1.1970. The said Anwar Ali was a Bangladeshi citizen and he was issued certificate certifying to that effect by the Ministry of Home Affairs vide Memo dated 30.10.1978. The said Anwar Ali while in possession of the property in question died in Bangladesh and was buried in Mirpur grave yard. The certificate to that effect has been issued by the local Commissioner of the then Pourashava, Dhaka. After the death of Anwar Ali his heirs obtained a Succession Certificate from the 3rd Court of Subordinate Judge, Dhaka on 13.1.1981 vide Succession Case No. 1003 of 1980. The said Anwar Ali after purchase while in possession of the property entered into an agreement on 22.02.1970 with Md.Abdul Bari Miah, the predecessor of the present Petitioners to sell the house at a consideration of Tk. 12,000/- out of which said Anwr Ali received Tk.4,000/- as advance towards total consideration. In the agreement it was stipulated that he will execute the sale deed within 6(six) months after obtaining necessary clearance certificate from the concerned authority.

3. Subsequently, Anwar Ali received Tk. 1,000/- on 23.1.1974 and again Tk. 1,000/- on 31.12.1976 and also Tk. 2,000/- on 27.10.1978 from Md. Abdul Bari Miah as part payment. The said Anwar Ali died on 19.7.1980 and after his death his heirs admitting the bainapatra received Tk. 2,000/- and Tk. 1,000/- by two instalments from the predecessor of the Petitioners and subsequently they also received Tk. 1,000/- in the manner as aforesaid. After receiving consideration money they avoided execution of sale deed in favour of the Petitioners. In this situation the Petitioners finding no way out filed Title Suit No. 534 of 1983 against the heirs of Anwar Ali impleading the Government as proforma Defendant before the First Court of Munsif, Dhaka for a decree of specific performance of contract. In the said suit the Government appeared and took time for filing written statement on 10.11.1983 but subsequently the Government did not appear and consequent upon which the suit was decreed ex parte. Thereafter the Petitioners filed Title Execution Case No. 7 of 1984 to execute the decree passed in Title Suit No. 534 of 1983 and obtained the kabala duly executed and registered through Court and also took delivery of possession on 10.4.1984.

4. The Government filed Miscellaneous Case No. 85 of 1984 under Order 9 Rule 13 of the Code of Civil Procedure ("Code") praying for setting aside the ex parte decree passed in the said Title Suit. The trial Court upon contested hearing dismissed the same, against which the Government preferred Miscellaneous Appeal No. 17 of 1985 before the District Judge, Dhaka which was eventually heard by the 3rd Court of Subordinate Judge, Dhaka

who by his Judgment and Order dated 13.5.1989 allowed the appeal and set aside the ex parte decree. Against the said judgment of the appellate court the predecessor of the Petitioners filed Civil Revision No. 592 of 1989 before the High Court Division and the High Court Division after hearing the parties made the Rule absolute and thereby set aside the Judgment and Order of the lower Appellate Court and restored the Judgment and Order of the trial Court. After getting delivery of possession of the suit House through Court the Petitioners through their predecessor Abdul Bari Miah has been possessing the same on payment of rents, taxes and other charges due to different authorities of the Government.

5. Subsequently, it has come to the notice of the Petitioners that the property has been illegally included in the "Ka" list of the abandoned buildings and against the said illegal inclusion the predecessor of the Petitioners filed Case No. 54 of 2001 before the Court of Settlement praying for releasing and or excluding the property from the said list. The Court of Settlement after hearing the parties dismissed the case by the Impugned Judgment and Order dated 6.11.2002 finding that the Petitioners have failed to prove their title and possession in the suit property and the property has been rightly included in the "Ka" list as abandoned property.

6. At this stage the Petitioners being aggrieved by the said Judgment and Order of the Settlement Court moved this Court by filing this Writ Petition under Article 102 of the Constitution and obtained the present Rule.

7. The Respondent No.2 contested the Rule by filing an Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the original allottee Israil transferred the property in question without obtaining permission from the concerned authority in favour of Anwar Ali by a registered deed of sale and as such the transfer is not valid in the eye of law. Moreover, the agreement for sale allegedly executed by Anwar Ali in favour of Md. Abdul Bari Miah is also not true and the said agreement for sale has been created with a motive to grab the Government property. It is also stated that the said Anwar Ali or his Vendor Israil was not in control, occupation, supervision and management of the case property at the relevant time i.e. on or before 28.2.1972. The said Anwar Ali and his vendor Israil were non-Bengali and during the war of liberation they left this country leaving the case property uncared for and as such the property in question was declared abandoned under the provisions of P.O. 16 of 1972. Finally the property as an abandoned property has rightly been included in the "Ka" list under the provision of Article 2(1) of the P.O. 16 of 1972 and duly vested with the Government under Article 4 of P.O. 16 of 1972. The Court of Settlement upon consideration of the respective cases of the Petitioners and upon proper assessment of the documents submitted before it and the evidences so far adduced by the Petitioners has rightly rejected the application of the claimant finding that the Petitioners could not prove whereabouts of the original owners at the relevant time. It is also stated that, it is the duty of the claimants to prove that the property in question is not abandoned property but the Petitioners utterly failed to establish their claim before the Court of Settlement and as such there is nothing to be interfered with by this Court.

8. Mr. Moksadul Islam, the learned Advocate appearing for the Petitioners submit that the Court of Settlement wrongly found that the Petitioners have failed to prove their case in true perspective and also failed to consider the papers and documents submitted before it and on a wrong finding most illegally dismissed the case of the Petitioners. He further submits that Article 7 of P.O. 16 of 1972 and Section 5(1)(b) of the Bangladesh

Abandoned Buildings Supplementary Provision Ordinance, 1985 ("Ordinance") has provided provision for service of notice upon the occupant before declaring the property abandoned and enlistment of the same in the abandoned property list but in the instant case no such notice was issued or served upon the occupant, the Petitioners or their vendor before enlisting the property in the "Ka" list. It is also argued that the Petitioners are claiming the property on the basis of an agreement for sale executed by the owner Anwar Ali in favour of the predecessor of the Petitioners in the year, 1970. Subsequently, the Petitioners got the sale deed duly registered through Court pursuant to a decree passed in Title Suit No. 534 of 1983 and also got delivery of possession through court in the year 1984. Admittedly the Ordinance in question came into force in the year 1985 and the abandoned list in question was published for the first time on 28.4.1986 and finally on 23.9.1986. Since the Petitioners obtained possession of the property in question before the Ordinance came into force and publication of the abandoned property list it was incumbent upon the Government to serve notice upon the Petitioners being possessor in the property in question, but in the instant case before enlistment of the property in the "Ka" list in the year 1986 no notice as prescribed under Section 5(1)(b) of the Ordinance was served upon the Petitioners and as such the enlistment of the property in the "Ka" list is palpably illegal and without jurisdiction.

9. Mr. Moksaful Islam also argued that the Petitioners acquired title in the property through Court and also got possession by way of execution of the decree and as such the possession of the Petitioners cannot be in any way treated as unauthorized. He further submits that the property can be included in the "Ka" list where the Government took over the possession of the property and Supervising, managing and controlling the same. But in the instant case it is apparent from the papers and documents and the statements made in the Affidavit-in-Opposition, there is no taking over of possession by the Government and as such the enlistment of the property in "Ka" list is illegal and without lawful authority. Mr. Islam further submits that the petitioner got the registered Sale Deed through Court by way of execution of a decree passed in Title Suit No. 534 of 1984 against the government and as such the Government is legally stopped from raising the claim that the case property is an abandoned property. It follows, Mr. Islam submits, that in view of the said decree the Government cannot claim that the property is an abandoned one and the Court of Settlement's Judgment and Order is submitted to be a perverse one and liable to be declared illegal and passed without lawful authority. In support of his submissions he has referred to the case of Abdur Rashid Mollah Vs. Bangladesh reported in 58 DLR (AD), 20.

10. Mr. Shahidul Islam, the learned Deputy Attorney General with Mr. Sukumar Biswas, the learned Assistant Attorney General appearing for the Respondent No.2 submit that the original lessee Israil and alleged purchaser Anwar Ali were non-Bengali and they left this country leaving the property uncared for immediate after the war of liberation in the year 1971. The said owner of the property was not in occupation, management and supervision of the property in question on the relevant date i.e. on 28.2.1972 and as such the property under the provision of P.O. 16 of 1972 was declared abandoned and subsequently, the property has been enlisted in the "Ka" list of the abandoned buildings of the Government. In this situation the onus is on the claimant to prove that the building in question is not an abandoned property. The Government has no obligation either to deny the facts alleged by the claimant or to disclose the basis of treating the property as abandoned merely because the same has disputed by the claimant. They also argued that the Petitioners are claiming the property on the basis of a decree passed in Title Suit No.

534 of 1983. Decree in a Suit for Specific Performance of Contract does not debar the Government in any way from including the property in the list of abandoned buildings. It is also argued that the Petitioners have totally failed to prove before the Court of Settlement the whereabouts of the original owner Anwar Ali or Israil at the relevant time. They further submit that enlistment of a property in the abandoned buildings list under Section 5(1) of the Ordinance raises a presumption of law that the property is an abandoned property under Section 5(2) and this presumption will continue until the complainant prove otherwise. It is also submitted that a decree passed in a Suit for Specific Performance of Contract does not mean that the property is not an abandoned property. Therefore, the said decree is not in any way binding upon the Government as there was no declaration to the effect that the property in question is not abandoned property. At best it can be said that the Petitioners got a kabala through Court in respect of the abandoned property and for the reason of having kabala through Court, character of the building has not been changed.

11. Heard the learned Advocates, perused the Application, Affidavit-in-Opposition and other relevant documents available in file called for by this courts.

12. A perusal of the documents annexed to the Petition such as the decree passed in Title Suit No. 534 of 1983 and the other documents relating to the property in question show that admittedly the property in question, originally belonged to one Israil who got the same by a registered deed of lease in the year 1962 executed by the then Government of East Pakistan. The said Israil by a deed of sale dated 14.1.1970 transferred the property to one Anwar Ali. The Petitioners claim that the said Anwar Ali executed a bainanama in favour of their predecessor Md. Abdul Bari Miah on 22.2.1970. Admittedly the Petitioners or their predecessor was not in active control, supervision and management of the property till 1984. The Petitioners claim that the said Anwar Ali received part payment from the predecessor of the Petitioners in the year, 1974, 1976 and 1978. Subsequently, after his death his heirs also received part payment out of the balance consideration in the year 1981 and 1983 but the Petitioners could not explain why their predecessor or they themselves awaited for such a long time with a hope to get the Kabala registered from Anwar Ali or his heirs. We have gone through the Judgment and Order passed by the Court of Settlement and it appears that the Court of Settlement in its Impugned Judgment clearly observed that,

> "জনাব আনোয়ার আলী। উত্তরাধিকারীদের সাথে বর্তমান দরখাস্তকারীর পূর্ববর্তী দাবীকৃত করা বায়না দলিলের বরাতে বিক্রী দলিল সম্পাদিত হয় ২১/২/১৯৮৪ ইং তারিখে। সরকার উল্লেখিত সম্পত্তি পরিত্যক্ত সম্পত্তি হিসাবে ঘো¡¢oa qu 1972 Cw সনে। সে সময় উক্ত সম্পত্তিতে কে দখলে ছিলেন, সে সময় জনাব ইpl¡Cm h¡ জনাব আনোয়ার আলী কোথায় ছিলেন এসমস্ত তথ্য দালিলিক বা মৌখিক কোনো i¡বেই প্রার্থীপক্ষ আদালতে উপস্থাপন করেন নাই। বায়না পত্র Execution Hl SeÉ দেওয়ানী মামলা করেন প্রার্থীপক্ষ ১৯৮4 ইং সনে। এতে 1971-72 Hhw তৎপরবর্তী সময়ে Se¡h Cসরাইল বা জনাব আনোয়ার আলী উক্ত বাড়িতে বসবাস করতেন কিনা প্রমানিত হয়নি। 1971-৭২ সনে সরকার যখন তৎকালীন Ah¡wN¡mীদের সম্পত্তি পরিত্যক্ত ঘোষনা করেন, তা করা হয় মূলতঃ সম্পত্তি দখলে কে ছিলেন তার উপর ভিত্তি করে। এখানে Presumption সরকার পক্ষে যায় যে, সে pময় উক্ত সম্পত্তিতে জনাব ইসরাইল বা জনাব আনোয়ার আলী গং দখলে ছিলেন e¡z Q¢š² Execution Hl j¡jm¡u fËQ¢ HLalg¡ ডিক্রি অত্র কোর্টের উপর দায়বদ্ধতার সৃষ্টি করে না এই মর্মে ৪৭ ডি,এল,আর (এ,ডি) পৃষ্ঠা ৭১ প্রণীধান ®k¡NÉ"z

13. The aforesaid observations of the Court of Settlement show that it has considered the case of the Petitioners and upon consideration observed that the owner of the property in question left the country leaving the property uncared for and was not in active control, supervision, management and possession of the property in question at the relevant time.

14. The paramount question to be considered in the instant case is that whether the Petitioners or their vendor Anwar Ali or Israil was in active control, supervision and management of the property at the relevant time. From the papers available on record, we do not find anything to support the Petitioners claim that the property is not an abandoned property. The property in question has not been declared abandoned in the year 1986, it was declared abandoned under P.O. 16 of 1972 which came into force on 28.2.1972. The Petitioners could not prove that till their taking over possession through Court the property in question was under the possession, control and management of the original owner or their alleged vendor. In the absence of any evidence to that effect the contention of the Respondents-Government stand good. As per law the Petitioners as claimant cannot depend on the weakness of the Government but they are to prove their claim independently by producing relevant documents in support of their claim establishing that the property is not an abandoned property. In the instant case the obligation of the Petitioners has not been properly discharged and the documents produced before the Court of Settlement does not prove the claim of the Petitioners that the property has been illegally included in the "Ka" list.

15. We have gone through the decision cited by the learned Advocate for the Petitioners. The fact of the said case is a bit different from the present one. In the aforesaid case the claimant admittedly was in active possession, control and management of the property since 17.12.1971 i.e., at the relevant time. But in the present case the Petitioners or their vendor admittedly was not in possession of the property in question at the relevant time, they entered into the possession of the property in the year 1984. Since the property was declared abandoned under the provision of P.O. 16 of 1972, question of service of notice under Article 7 upon the Petitioner or their vendor who were not in possession, active control, supervision and management of the property at the relevant time does not arise. Moreover, decree in a Suit for Specific performance of contract does not reflect a substantive determination of any issue regarding the abandoned character of the property. In this regard the *ratio decidendi* of the Judgment passed in the cases of CQMH Md. Ayub Ali Vs. Bangladesh and others reported in 47 DLR (AD) 71 and Bangladesh Vs. ATM Mannan and others reported in 1 BLC (AD) 8 are relied upon.

16. The preamble of the Gazette published on 23.09.1986 shows that the declaration by its own express terms permits of construction to the effect that the properties listed in the Notification have already been taken control of by the government and that the Notification is predicated on that essential fact of control assumed over such property. Furthermore, this has to be read with Section 114, illustration (e) of the Evidence Act, 1872 that permits of a presumption of regularity to be attached to all governmental function discharged in due course. Furthermore, the petitioner could not satisfy the Court of Settlement by producing any evidence that the vendor Md. Anwar Ali was in possession of the property in question at the time of execution of the alleged bainanama in the year 1970 or indeed before or after the P.O. 16 of 1972 came into force. From this, it is to be deduced that the Notification as above records not only the listing of certain properties as abandoned properties but more importantly the fact of these having passed

into the control, supervision and management of the Government at the material date in due course.

17. We have gone through the Judgment and Order of the Court of Settlement and this Court finds that the Court of Settlement considered all the crucial questions raised before it and the Court of Settlement rightly decided the questions considering all the papers and evidences placed before it on the very day of the delivery of judgment.

18. Therefore, the contention of the learned advocate for the Petitioners finds no merit. Since the property has been listed under Section 5(1) of the Ordinance as abandoned property and the said list has been published in the official gazette the claimant of the property are required to dislodge the statutory presumption as under Section 5 (2) of the Ordinance that the property in question is not an abandoned property and the same has been wrongly enlisted.

19. In view of the above facts, this Court finds that the case of the petitioners in its entirety is nothing but a castle in the air having no leg to stand and as such we find that the Court of Settlement committed no illegality and find no reason to interfere with the judgment passed by the Court of Settlement.

20. In the result, the Rule is, hereby discharged, however, without any order as to costs.

21. Communicate a copy this Judgment and send down the lower court's records at once.

8 SCOB [2016] HCD 100

HIGH COURT DIVISION

Criminal Misc. Case No. 2893 of 2016
With
Criminal Misc. Case No. 2895 of 2016
With
Criminal Misc. Case No. 2896 of 2016
With
Criminal Misc. Case No. 2897 of 2016
With
Criminal Misc. Case No. 2898 of 2016
With
Criminal Misc. Case No. 2899 of 2016

Md. Sirajuddwla
…Petitioner
(In all cases)

Versus

The State and another
…Opposite parties
(In all cases)

Mr. Sk. Abu Musa Muhammad Arif, Advocate
…for the petitioner
(In all cases)

Mr. Sabel Newaz, Advocate
…for the opposite party no. 2
(In all cases)

Heard on: 16.11.2016
Judgment on: 20.11.2016

Present:
Mr. Justice A.K.M. Asaduzzaman
And
Mr. Justice Zafar Ahmed

Article 35 (2) of the Constitution of Bangladesh
and
Section 403 of Code of Criminal Procedure, 1898
The principle of double jeopardy:

The principle of double jeopardy, as argued before us, has been incorporated in Article 35(2) of the Constitution and the concept is firmly established in section 403 of the Cr.P.C. The principle protects a person from trial for the same offence for which he has already been convicted or acquitted (*autrefois convict* or *autrefois acquit*). The protection is available only when both the proceedings are for criminal proceedings and both the prosecutions are for the same offence. Here, we are dealing with two proceedings– one is criminal and the other is civil. Therefore, the principle of double jeopardy has no manner of application to the issue in hand.

... (Para 17)

The proposition of law, which is no longer a *res integra*, is that a criminal case and civil suit, though arising out of the same transaction, can proceed simultaneously.

... (Para 18)

Code of Criminal Procedure, 1898
Section 344:
It is not an invariable rule that there cannot be any parallel proceedings on the same facts in Criminal and Civil courts. At the same time, section 344 of the Cr.P.C. vests power upon the Court to postpone or adjourn criminal proceedings 'for any other reasonable cause'. Thus, proceedings in Criminal Court should be stayed or adjourned where identical issues based on same facts as in criminal cases are involved in suits pending in Civil Court.

... (Para 38)

Negotiable Instruments Act, 1881
Section 138:
and
Artha Rin Adalat Ain, 2003
Section 41:
and
Code of Criminal Procedure, 1898
Section 344, 561A:
In the case in hand, a sentence of fine under section 138 of the Act, 1881 may result in a proceeding of execution of decree (section 386(3) of the Cr.P.C.). Again, the same person may face an execution of decree proceeding under the Artha Rin Adalat Ain, 2003 for the same loan transactions which may together exceed the actual claimed amount. If the accused decides to file appeal against the sentence of fine as well as the decree passed in Artha Rin Suit, he has to deposit 50% of the amount of the dishonoured cheque and 50% of the decretal amount which in aggregate would almost cover the claimed amount. This may lead to unjust enrichment and thus, the inconvenience through legal process may lead to absurdity. The ends of justice and fairness demand that the process of law must not be allowed to cause or result in 'absurd inconvenience'. ... For the reasons discussed above, the case in hand, in our view, falls within the category of rarest of rare cases where an order of stay of the criminal proceedings under the Act, 1881 during pendency of the Artha Rin Suit which are between the same parties and over the same loan transactions, should be passed to give effect to section 344 of the Cr.P.C. in order to prevent abuse of the process of the Court and to secure the ends of justice.

...(Para 41 & 43)

Judgment

Zafar Ahmed, J:

1. Separate Rules were issued in the instant applications filed under section 561A of the Code of Criminal Procedure in which the accused-petitioner has prayed for quashing the respective proceedings under section 138 of the Negotiable Instruments Act, 1881. In all the cases the parties are same, they arise out of similar facts and the issue involved for adjudication is identical. Hence, they are heard together and disposed of by this single judgment.

2. Md. Sirajuddula, who is the accused in all the cases, has filed the instant applications. The proceedings in question are now pending in the Court of Additional Metropolitan Sessions Judge, Court No.3, Chittagong.

3. In **Criminal Miscellaneous Case No. 2893 of 2016**, the proceedings of Sessions Case No. 593 of 2013 arising out of C.R. Case No. 1540 of 2012 have been challenged.

4. In **Criminal Miscellaneous Case No. 2895 of 2016**, the proceedings of Sessions Case No. 253 of 2013 arising out of C.R. Case No. 1498 of 2012 have been challenged.

5. In **Criminal Miscellaneous Case No. 2896 of 2016**, the proceedings of Sessions Case No. 592 of 2013 arising out of C.R. Case No. 1521 of 2012 have been challenged.

6. In **Criminal Miscellaneous Case No. 2897 of 2016**, the proceedings of Sessions Case No. 354 of 2013 arising out of C.R. Case No. 1005 of 2012 have been challenged.

7. In **Criminal Miscellaneous Case No. 2898 of 2016**, the proceedings of Sessions Case No. 674 of 2013 arising out of C.R. Case No. 1480 of 2012 have been challenged.

8. In **Criminal Miscellaneous Case No. 2899 of 2016**, the proceedings of Sessions Case No. 586 of 2013 arising out of C.R. Case No. 1550 of 2012 have been challenged.

9. The opposite party no.2 Eastern Bank is the complainant of all the C.R. cases. Facts of the cases are almost similar. The accused-petitioner obtained credit facility from the complainant bank. In order to discharge the loan liability, he gave separate cheques to the bank which, on presentation to the bank for encashment, were dishonoured on ground of insufficiency of fund. Following compliance of the statutory procedure laid down in section 138 of the Negotiable Instruments Act, 1881 (in short, 'the Act, 1881') the bank filed the respective C.R. cases against the accused. The cases were ultimately transferred to the Court of Additional Metropolitan Sessions Judge, Court No.3, Chittagong for disposal.

10. The proceedings have been challenged and sought to be quashed not on the ground of any violation of the provisions of section 138 of the Act, 1881 rather, mainly on two separate grounds, firstly, the cheques are post dated blank cheques which were given to the bank as security against the loan, and the bank subsequently filled in the cheques and used them at its own sweet will which, according to the petitioner, is illegal and secondly, the bank has already filed Artha Rin Suit against the accused claiming the amount which also covers the value of the cheques in question. It has been argued that the bank is not allowed to pursue two separate proceedings for the same cause of action and for the same purpose *i.e.* recovery of loan which amounts to double jeopardy and unjust enrichment.

11. The learned Advocate for the petitioner made submissions in support of the Rules. On the other hand, the learned Advocate for the opposite party bank opposed the Rules. We have heard the learned Advocates of both sides and perused the materials on record.

12. Section 6 of the Act, 1881 defines a cheque as a "bill of exchange drawn on a specified banker and not expressed to be payable otherwise on demand". A cheque is a negotiable instrument. There are some presumptions regarding a cheque under the Act, 1881. As to date, the presumption of law is that every cheque bearing a date was made or drawn on such date (section 118(b)). This presumption has to be read in conjunction with section 20 under which presumption is made in favour of the holder of a cheque which was delivered to him blank or incomplete that the drawer has given *prima facie* authority to him to make or complete it, as the case may be, into a negotiable instrument for the amount, if any specified therein, or where no amount is specified, for the amount, not exceeding, in either case, the amount covered by the stamp. Again, every negotiable instrument is presumed to be made or

drawn for consideration and it so accepted, indorsed, negotiated or transferred for consideration (section 118(a)). When a negotiable instrument is made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction (section 43).

13. It is a common scenario that the bank/financial institution files a case under section 138 of the Act, 1881 against the borrower stating that the cheque in question was given to it to repay the instalment(s) towards adjustment of the loan liability. The accused, who is also the borrower, moves this Division invoking its inherent power to quash the proceedings on the grounds that the cheque in question is a post-dated security cheque; that it was a blank cheque; that it was an undated cheque; that it was obtained by the bank prior to issuance of the loan sanction advice and disbursement of the loan instalment(s) and hence, no consideration passed when the borrower was compelled to sign the blank undated cheque; that it was obtained through undue influence, coercion or that the borrower was under duress and had no option but to sign the blank cheque albeit sufficient property was mortgaged as security against the loan; that the cheque was signed for purposes other than as a method of realisation of loan etc. By raising these points the accused attempts to argue that the cheque in question cannot be treated as a cheque within the meaning and ambit of the Act, 1881. Some of these points are simply irrelevant. Some other points involve resolution of disputed question of facts which cannot be determined without taking evidences. Inevitably, this Division refuses to exercise its inherent power to quash the proceeding.

14. Suffice it to say that once it is proved that the complainant has filed the case after compliance of the provisions of the section 138 of the Act, 1881 and that the cheque has been executed by the accused, the presumptions laid down in section 118 of the Act, 1881 and other presumptions discussed hereinbefore come into operation in favour of the complainant. It is then for the accused to establish his defence by adducing evidences to rebut the presumptions to be absolved of the criminal liability.

15. It is a common practice that the bank/financial institution takes recourse to section 138 of the Act, 1881 and simultaneously files a suit against the borrower under the Artha Rin Adalat Ain, 2003 (in short, 'the Ain, 2003') for recovery of loan. Invariably, the accused in the criminal proceeding is also a defendant in the civil suit. The accused in the criminal proceedings, while invoking the inherent power of this Division under section 561A of the Code of Criminal Procedure, raises the above mentioned points and in addition takes a plea that the criminal proceedings under the Act, 1881 is barred by the *non-obstante* clause contained in section 5 of the Ain, 2003 and that to allow the criminal proceedings to continue along with the civil suit would amount to double jeopardy. The case in hand falls within this scenario.

16. It has been stated in the instant applications that on 31.07.2012, the complainant bank as plaintiff filed Artha Rin Suit No. 90 of 2012 before the Court of the Artha Rin Adalat No. 1, Chittagong against the petitioner and another for recovery of Tk. 39,12,98,043.39. The said suit is still pending. The amount claimed in the suit covers the value of the cheques and that both the Artha Rin Suit and the instant criminal cases arise out of the same loan transaction. The learned Advocate for the complainant bank does not dispute this factual matrix.

17. The principle of double jeopardy, as argued before us, has been incorporated in Article 35(2) of the Constitution and the concept is firmly established in section 403 of the Cr.P.C. The principle protects a person from trial for the same offence for which he has already been convicted or acquitted (*autrefois convict* or *autrefois acquit*). The protection is

available only when both the proceedings are for criminal proceedings and both the prosecutions are for the same offence. Here, we are dealing with two proceedings– one is criminal and the other is civil. Therefore, the principle of double jeopardy has no manner of application to the issue in hand.

18. The proposition of law, which is no longer a *res integra*, is that a criminal case and civil suit, though arising out of the same transaction, can proceed simultaneously. ***Monzur Alam (Md) vs. State and another*** 55 DLR (AD) 62 and ***Shamsul Islam Chowdhury vs. Uttara Bank*** 11 BLC 116 are authorities on the point.

19. Parliament enacted the Artha Rin Adalat Ain, 2003 (in short, 'the Ain, 2003') for recovery of loans given by the financial institution. 'Financial Institution' includes banks and financial institution established under the Financial Institutions Act, 1993. Section 5(1) of the Ain, 2003 states that notwithstanding anything contained in any other law, all suits relating to recovery of loan of a financial institution shall be filed and disposed of in Artha Rin Adalat. Referring to section 5 of the Ain, 2003, it has been argued, which we have already noted, that because of the *non obstante* clause contained in the section, the financial institution is barred from filing a criminal case under the Act, 1881 for dishonour of cheque which is essentially also a mode for recovery of loan.

20. The argument is misconceived. Proceeding under section 138 of the Act, 1881 is for trial of the offence although it is *quasi* civil and criminal in nature. It would be seen at later part of the judgment that the proceeding serves two fold purposes– trial of the offence and recovery of the value of the dishonoured cheque. But payment of the amount of dishonoured cheque by the accused to the complainant or recovery of the same during the pendency of the criminal case does not absolve the accused of the criminal liability nor the proceeding is dropped automatically for this reason unless the complainant opts for non-prosecution of the case. If the offence is proved, and the accused is found guilty, the payment of money can be considered as a mitigating factor and the Court shall certainly take into account of the same so far as sentencing is concerned.

21. It follows from the above discussions that the criminal proceeding under the Act, 1881 cannot be throttled on the ground of pendency of Artha Rin Suit or even after ending the suit in decree in favour of the bank/ financial institution.

22. So far as permissibility as to simultaneous civil and criminal proceedings is concerned, the position in India is no different. The Indian position on the issue is succinctly stated in S. Krishnamurthi Aiyar's *'Law Relating to The Negotiable Instruments Act'* (10th Ed.) where at pp. 760-761 the author observed by referring to Indian case laws that,

> "The filing of civil suit and criminal proceedings are the alternate remedies available to the complainant and they create different types of rights in the complainant which he can legally proceed in the Court. The civil and criminal proceedings are not only different but also they are independent from each other. Simply because a suit has been decreed in a case of dishonoured cheque, that *ipso facto* does not decide criminal proceedings and *vice-versa*. It is so for the reason that in such matter in criminal proceedings, relief would be for punishing a person for the offence committed whereas, in civil proceedings, the relief would be for the amount of the bounced cheque and thus, for the same matter the remedies/ reliefs under Civil Law and Criminal Law are different and independent. Section 138 of N.I. Act being a quasi civil

> and criminal nature, it would be wrong to say that under section 138 proceedings could not have been launched at all by the complainant because of the pendency of the civil suit. Ultimately at the most if the complainant is successful in getting the fruits of the decree in the civil suit, it would be helpful only as a mitigating circumstance while imposing sentence under section 138 of Negotiable Instruments Act." *(underlining is ours)*

23. Be it noted that in India there is no analogous law to that of Artha Rin Adalat Ain.

24. In ***Majed Hossain and others vs. State*** 17 BLC (AD) 177 an issue was raised as to whether a proceeding under section 138 of the Act, 1881 would lie against the drawer of the unpaid/dishonoured cheque(s) when the accused obtained the loan by creating equitable mortgage and the complainant had the option to recover the loan money by selling the mortgaged property. The apex Court observed,

> "A close reading of sub-section (1) of section 138 of the Act, 1881 shows that it has nothing to do with the recovery of loan amount. The whole scheme of the law as discussed hereinbefore, is to haul up the drawer of the unpaid/ dishonoured cheque(s) for not arranging the funds against the issuance of such cheques(s) and then its/ his failure to make the payment of the amount of the money of the unpaid/ dishonoured cheque(s) on demand by the payee or, as the case be, by the holder in due course of the cheque(s) in writing within thirty days of the receipt of such notice as provided in clauses (b) and (c) respectively of sub-section (1) of section 138 of the Act, 1881."
>
> *(emphasis supplied)*

25. The decided cases in our jurisdiction have echoed the Indian view that section 138(1) has nothing to do with the recovery of loan amount and the proceeding is for trial of the offence for dishonour of the cheque. The inevitable conclusion that follows from the decided cases is that there is no bar upon the bank/financial institution to file criminal case under section 138 of the Act, 1881 and at the same time civil suit under the Artha Rin Adalat Ain, 2003 for recovery of the loan amount.

26. Be that as it may, the settled proposition of law does not answer the issue in hand which is whether the bank can simultaneously proceed with the criminal proceedings under the Act, 1881 and the civil suit filed under the Ain, 2003. The answer to the issue requires a comparative study of the relevant laws of both India and Bangladesh.

27. In India, section 138 is not divided into any sub-sections. It contains a proviso and an 'explanation'. Originally, in Bangladesh the provisions of section 138 were identical to those of Indian section 138. However, by Act No. XVII of 2000 dated 6th July, the words "for discharge in whole or in part, of any debt or other liability" contained in main body of section 138 in Bangladesh were repealed. The 'explanation' to the section was also omitted. The omitted 'explanation' stated that, *"For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability"*. By the amending Act, sub-sections (2) and (3) were also added to section 138 in Bangladesh. Thus, section 138, as it now stands in Bangladesh, is divided into three sub-sections. In India, the words *"for discharge in whole or in part, of any debt or other liability*" are still contained in the section and 'explanation' has not been amended. Both in India and in Bangladesh the Act, 1881 has been subjected to various amendments. However, those amendments have no bearing upon the adjudication of

the issue in hand. In spite of the amendments to section 138 in Bangladesh, the elements or conditions precedent to the commission of the offence of dishonour of cheque have remained similar to those of Indian law except some minor differences which have no impact upon the main ingredients of the offence.

28. Sub-sections (2) and (3) of section 138 of our law, which are absent in Indian law, run thus:

> (2) Where any fine is realised under sub-section (1), any amount up to the face value of the cheque as far as is covered by the fine realised shall be paid to the holder. *(emphasis supplied)*
>
> (3) Notwithstanding anything contained in sub-sections (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized.

29. Fine referred to in sub-section (2) may extend to thrice the amount of the cheque, or both. In India the fine may extend to twice the amount of the cheque.

30. Fine or part of fine received or recovered from the convict is deposited with the Treasury (rule 602 of the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009). Whenever a Criminal Court imposes a fine, or a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order that the whole or any part of the fine recovered to be applied in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court (section 545(1)(b) of the Cr.P.C.). Section 117 of the Act, 1881 provides rules for determination of compensation payable in case of dishonour of a cheque etc.

31. Generally, fine imposed by a Criminal Court cannot be equated with or treated as compensation. Section 545 of the Cr.P.C. deals with circumstances in which fine can be converted into compensation and paid to the person who sustained loss or injury caused by the offence. Special penal law may contain provisions regarding distribution of fine. For example, section 15 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 provides that,

> 15z **ভবিষ্যৎ সম্পত্তি হইতে অর্থদন্ড আদায়।-** এই আইনের ধারা ৪ হইতে ১৪ পর্যন্ত ধারাসমূহে উল্লিখিত অপরাধের জন্য ট্রাইব্যুনাল কর্তৃক আরোপিত অর্থদন্ডকে, প্রয়োজনবোধে, ট্রাইব্যুনাল অপরাধের কারণে ক্ষতিগ্রস্ত ব্যক্তির জন্য ক্ষতিপূরণ হিসাবে গণ্য করিতে পারিবে এবং অর্থদন্ড বা ক্ষতিপুরনেণর অর্থ দন্ডিত ব্যক্তির নিকট হইতে বা তাহার বিদ্যমান সম্পদ হইতে আদায় করা সম্ভব না হইলে, ভবিষ্যতে তিনি যে সম্পদের মালিক বা অধিকারী হইবেন সেই সম্পদ হইতে আদায়যোগ্য হইবে এবং এইরূপ ক্ষেত্রে উক্ত সম্পদের উপর অন্যান্য দাবী অপেক্ষা উক্ত অর্থদন্ড বা ক্ষতিপূরণের দাবী প্রাধ্যন্য পাইবে।

32. Another example is section 35 of the রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ which runs as under:

> 35z **BcjuLa Ab h¡Vez-** (১) এই অধ্যায়ের অধীন দোষী সাব্যস্ত ও দন্ডিত ডেভেলপারের নিকট হইতে অর্থ দন্ড বাবদ কোন অর্থ আদায় হইলে আদালত আদায়কৃত অর্থর অনূর্ধ্ব ৫০% ক্ষতিগ্রস্ত ভূমি মালিক বা ক্ষেত্রমত, ক্রেতার অনুকূলে এবং অবশিষ্ট অংশ রাষ্ট্রের অনুকূলে প্রদান করার আদেশ দিতে পারিবে।

(2) Bc¡ma Ef-ধারা (১) এর অধীন বন্টন সম্পর্কিত কোন আদেশ প্রদান না করিলে সমcu Ab রাষ্ট্রের অনুকূলে জমাকৃত হইবে।

33. Under sub-section (2) of section 138 of the Act, 1881 fine is paid to the holder for the amount up to the face value of the cheque so far as covered by the fine and thus, this provision is an exception to the general principle regarding fine that fine or part of fine, if paid or recovered, is deposited with the Treasury.

34. The sub-section (2) was added to section 138 in 2000, but the offence was triable by a Court of Metropolitan Magistrate or a Magistrate of the first class. It caused a practical problem. A Metropolitan Magistrate or first class Magistrate has the power to impose fine up to Tk. 10,000/-. Cases, in which, the value of the cheque exceeded Tk. 10,000/-, a Magistrate could not impose fine for the entire amount. To remove this anomaly, section 141 of the Act, 1881 was amended by the Act No. III of 2006 and now, the offence is tried by a Court not inferior to that of a Court of Sessions. By the said amending Act, section 138A was inserted by which it has been made a condition precedent to deposit 50% of the amount of the dishonoured cheque before filing an appeal against the order of sentence. No deposit is required under the Indian law to file an appeal against order of sentence.

35. We have already noted that the corresponding Indian Negotiable Instruments Act, 1881 does not contain any analogous provision contained in section 138(2) of our Act, 1881. The offence under section 138 in India is tried by a Metropolitan Magistrate or a Judicial Magistrate of the first class who cannot impose a sentence of fine exceeding Rs. 10,000/- (previously it was Rs. 5,000/-). In a deserving case where the Magistrate thinks that the complainant must be compensated with his loss, he can resort to the course indicated in section 357 of the Indian Cr.P.C. (similar provisions albeit not the same are contained in section 545 of our Cr.P.C.). The power of awarding compensation to the complainant has been dealt within two phases in section 357 of Indian Cr.P.C. When sentence of fine is imposed, the trial Court as well as the appellate Court can order the whole or any part of the fine recovered to be paid by way of compensation if any loss or injury is caused by the offence. Under section 357(3), compensation can be ordered only when a Court imposes a sentence, of which fine does not form a part. There is no limit for awarding compensation. Thus, in ***Pankajhai Nagjibhai Patel vs. State of Gujrat*** AIR 2001 SC 567 the Indian Supreme Court retained the sentence of imprisonment of six months, but deleted the fine portion from the sentence and directed the accused to pay compensation of Rs. 83,000 to the complainant.

36. Reverting back to the law of our land, we note that the legislature did not use the word 'compensation' in section 138(2) and hence, it intended the added sub-section (2) of section 138 as a mode for recovery of the amount of the dishonoured cheque although section 138(1) has nothing to do with the recovery of the same. Thus, the criminal proceeding under the Act, 1881 in our jurisdiction serves two purposes, firstly, to punish the offender, and secondly, to recover the value of the cheque as compensation in the name of fine, if the same is not yet paid to the holder. The absence of analogous provision in Indian law suggests that in India the purpose of the criminal proceeding under the Act, 1881 is to try and punish the offender only. In India fine is not equated with compensation.

37. There is another aspect of the scenario. To recapitulate, the adjudication involves a situation where the bank has filed criminal case under section 138 of the Act, 1881 as well as civil suit against the same accused under the Artha Rin Adalat Ain over the same loan transaction(s). If the accused is awarded a sentence, he has to deposit 50% of the amount of

the dishonoured cheque to file an appeal. Again, if the Artha Rin Suit is decreed in favour of the bank, the same accused being a defendant has to deposit 50% of the decretal amount to file the appeal.

38. The above discussions and comparative study of the relevant laws of India and Bangladesh pose an important question– whether the criminal proceeding under section 138 of the Act, 1881 should be stayed pending the Artha Rin Suit which are between the same parties and over self same loan transactions or they can proceed simultaneously. It is not an invariable rule that there cannot be any parallel proceedings on the same facts in Criminal and Civil courts. At the same time, section 344 of the Cr.P.C. vests power upon the Court to postpone or adjourn criminal proceedings 'for any other reasonable cause'. Thus, proceedings in Criminal Court should be stayed or adjourned where identical issues based on same facts as in criminal cases are involved in suits pending in Civil Court (***Vasu Vydier vs. State of Kerala***, 1975 CrLJ 494, 497 (Ker)). If the object of the criminal proceedings, instituted while a civil suit in respect of the same matter is pending, is in reality to prejudice the trial of the civil suit by a preliminary enquiry into the subject matter of the suit or to coerce the accused to authorise a compromise, it will only be just and fair to stay the criminal proceedings (***Shaikh Davud vs. Yusuff,*** (1954) Travan 1326).

39. It is often found that laws enacted for the general advantage do result in individual hardship and inconvenience; for example laws of Limitation, Registration, Attestation although enacted for the public benefit, may work injustice in particular cases but that is hardly any reason to depart from the normal rule to relieve the supposed hardship or injustice in such cases.

40. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. According to BRETT, M.R., the inconvenience necessitating a departure from the ordinary sense of the words should not only be great but should also be what he calls an "absurd inconvenience" (***R. vs. The Overseers of the Parish of Tonbridge*** (1884) 13 QBD 339).

41. In the case in hand, a sentence of fine under section 138 of the Act, 1881 may result in a proceeding of execution of decree (section 386(3) of the Cr.P.C.). Again, the same person may face an execution of decree proceeding under the Artha Rin Adalat Ain, 2003 for the same loan transactions which may together exceed the actual claimed amount. If the accused decides to file appeal against the sentence of fine as well as the decree passed in Artha Rin Suit, he has to deposit 50% of the amount of the dishonoured cheque and 50% of the decretal amount which in aggregate would almost cover the claimed amount. This may lead to unjust enrichment and thus, the inconvenience through legal process may lead to absurdity. The ends of justice and fairness demand that the process of law must not be allowed to cause or result in 'absurd inconvenience'.

42. The accused-petitioner did not make any application before the trial Court for adjournment of the criminal proceedings. In the instant applications, he has invoked the inherent power of the High Court Division under section 561A of the Cr.P.C. to quash the criminal proceedings. We have already held that the criminal proceedings under the Act, 1881 cannot be throttled on the ground of pendency of the Artha Rin Suit. In the instant applications, the petitioner has not made any prayer for adjournment of the criminal proceedings till disposal of the Artha Rin Suit.

43. The inherent power of the High Court Division can be exercised: (a) to make such orders as may be necessary to give effect to any order under the Code, or (b) to prevent abuse of the process of any Court, or (c) to otherwise to secure the ends of justice. It is now settled principle of law established through judicial pronouncements that the inherent power has to be exercised sparingly with circumspection and in the rarest of rare cases. For the reasons discussed above, the case in hand, in our view, falls within the category of rarest of rare cases where an order of stay of the criminal proceedings under the Act, 1881 during pendency of the Artha Rin Suit which are between the same parties and over the same loan transactions, should be passed to give effect to section 344 of the Cr.P.C. in order to prevent abuse of the process of the Court and to secure the ends of justice.

44. Hence, it is ordered that the proceedings of the respective C.R. cases shall remain stayed till disposal of the Artha Rin Suit No. 90 of 2012 now pending in the Court of Artha Rin Adalat, Chittagong. Adjournment *sine die* is not in accordance with law. Therefore, if the Artha Rin Suit is stayed or adjourned at the instance of the accused-petitioner, the order of stay shall stand vacated and the proceedings of the respective C.R. cases shall continue.

45. With the above observations and directions, the Rules are disposed of.

46. There is no order as to costs.

47. Communicate the judgment at once.

8 SCOB [2016] HCD 110

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 798 of 2015

An application under Article 102 (2) of the Constitution of the People's Republic of Bangladesh

Badiul Alam Majumdar and others
…Petitioners

Versus

Information Commission, Bangladesh and another
…Respondents

Mr. Dr. Sharif Bhuiyan with
Mr. Tanim Hussain Shawon, Advocates
…For the petitioners
Mr. Tawhidul Islam, Advocate
…For the respondent No.2

Ms. Amatul Karim, D.A.G
…For the respondent No.1

Heard on: 29.04.2015, 30.04.2015 and 14.02.2016
Judgment on: 18.02.2016

Present:
Madam Justice Farah Mahbub
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

In modern democratic countries citizens have a right to information in order to be able to know about the affairs of each political party which, if elected by them, seeks to formulate policies of good governance. This right to information is a basic right which the citizens of a democratic country aspire in the broader horizon of their right to live. This right has reached a new dimension and urgency, which puts better responsibility upon those political parties towards their conduct, maintenance of transparency and accountability to the public whom they aspire to represent in the parliament.
… (Para 59)

Registration Rules, 2008 framed under Article 94 of the Representation of the People Order, 1972
Right to Information Act, 2009
Section 9:
As per the provision of the Registration Rules of our country the registered political parties are required to submit their audited statements of accounts to the Election Commission every year for the purpose of, amongst others, transparency and accountability to the people and the electorate. According to the RPO, 1972 and the said Registration Rules it is the statutory duty of the Election Commission to collect such statements of accounts from those parties on an annual basis to regulate their functioning and to ensure a free and fair electoral process. As such, such statements should not be treated as 'secret information' under the RTI Act. … (Para 60)

Ignoring the people's right to know, keeping them in dark and playing hide-and-seek with them in a democratic country like us where all powers belong to the people and their mandate is necessary for ruling the country no registered political party can be

allowed to take the stand that the audited statements submitted to the Election Commission were "secret information". … (Para 62)

In the case in hand, though, admittedly, the political parties did not consider their submitted audited statements of accounts as 'secret information' or 'confidential', but the respondents without any mandate of law erroneously served notices upon the respective political parties concern seeking their opinion in respect of providing information to the petitioners and most of the political parties, which operate in the public sphere and have constitutional and statutory obligations for accountability and transparency, provided a negative opinion in providing such information violating the citizen's right to information guaranteed under the RTI Act, frustrating the purpose of the Registration Rules and the RTI Act and also damaging the spirit of ensuring and guaranteeing their transparency and accountability in all spheres including the people, which is unfortunate and hence, is deprecated. … (Para 63)

Judgment

Kazi Md. Ejarul Haque Akondo, J:

1. This Rule Nisi, under Article 102 (2) of the Constitution of the People's Republic of Bangladesh, was issued calling upon the respondents to show cause as to why the impugned decision/order dated 16.07.2014 issued by the respondent No.1 in Complaint No.57/2014 (Annexure-N-1) affirming the decision/order dated 22.10.2013 passed in Complaint No.97/2013 directing the respondent No.2 to seek consent/opinion from the respective political parties with respect to disclosure of their annual audited reports to the petitioner No.1, should not be declared to have been passed without lawful authority and is of no legal effect and/ or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts, in short, are that the petitioner No.1 is the Secretary of Shushashoner Jonno Nagorik (SHUJAN), an organization in Bangladesh, which conducts various activities with a view to establishing and promoting democracy and good governance in the country by creating awareness among the citizens and ensuring their active participation for achieving transparency and rule of law at all levels.

3. The petitioner Nos. 2 to 6 are various office-bearers of SHUJAN, and have been closely involved with various activities to promote transparency in the public life and the right of the citizens to information. It has also been contended that all the petitioners have played active roles in pursuing the proceedings under the Right to Information Act, 2009 (in short, RTI Act, 2009), which resulted in the decision/order impugned in the instant writ petition, and have thus genuine interest in the subject matter of the instant writ petition.

4. The respondent No.1 is the Information Commission, Bangladesh, which has been constituted under the provisions of the RTI Act, 2009 and the respondent No.2 is the Election Commission of Bangladesh, which has been constituted pursuant to Article 118 of the Constitution of the People's Republic of Bangladesh, and is responsible for the registration and regulation of the registered political parties in accordance with the Political Parties Registration Rules, 2008 (in short, Registration Rules, 2008) framed under Article 94 of the Representation of the People Order, 1972 (in short, RPO-1972).

5. It has been stated that according to rule 9(b) of the Registration Rules, 2008 every registered political party is required, as a part of its continuous obligation to satisfy the conditions of registration, to submit its audited annual statement of accounts to the Election Commission, the respondent No.2 by 31st July every year. The petitioner No.1, along with the petitioner Nos.2 to 6, submitted an application dated 12.06.2013 to the designated Officer (RTI) of the Election Commission requesting him to provide photocopies of the audited annual statements of accounts filed by the registered political parties for all calendar years (Annexure-A). In response thereof, the said designated Officer (RTI) vide Memo No. 17.00.0000.040.22.001.10-80 dated 14.07.2013 informed the petitioner No.1 that the information requested by him was not Election Commission's own information and hence, requested him to collect those directly from the respective political parties (Annexure-B). Being aggrieved by the same, the petitioner No.1 on 04.08.2013 preferred an appeal under section 24 of the RTI Act to the Secretary of the Election Commission, which is the appellate authority for the purposes of the right to information requests, on the ground that if the information sought by him were not provided, his right to information would be infringed and consequently, the objectives and the effectiveness of the RTI Act would be hindered (Annexure-C). Thereafter, the Secretary of the Election Commission vide letter dated 03.09.2013 bearing Memo No. 17.00.0000.040.22.001.10-149 gave a decision on the said appeal affirming the decision dated 14.07.2013 given by the designated Officer (RTI) without assigning any reason whatsoever (Annexure-D). Being aggrieved, the petitioner No.1 filed a complaint dated 09.09.2013 under section 25 of the RTI Act before the respondent No.1-Information Commission stating that as a citizen of Bangladesh he was entitled under the RTI Act to be provided with the information requested from the Election Commission (Annexure-E). On receipt thereof, it was registered as Complaint No. 97/20103. Accordingly, the respondent No.1 issued a summons dated 26.09.2013 requiring the petitioner No.1 to attend a hearing at the office of the Information Commission on 22.10.2013 at 11.00 AM. In compliance thereof, he duly appeared and attended the hearing (Annexure-F).

6. After the hearing on 22.10.2013, the respondent No.1 issued its decision dated 22.10.2013 (Annexure-G) holding that the information requested involved a "third-party" and that the disclosure of such information was not possible without the opinion of the "third-party". Said decisions are quoted below:

> *"1. The petitioner No.1 is directed to make an application to the designated Officer (RTI) of the Bangladesh Election Commission Secretariat by 31.10.2013 requesting for specific information by mentioning the names of the political parties and specifying the years in relation to which the information are sought.*
> *2. The designated Officer (RTI) is directed to serve, within 5(five) working days of receipt of such application , a notice to the third-parties concern requiring their written consent/opinion in accordance with section 9(8) of the RTI Act, and to intimate the petitioner No.1 of the same.*
> *3. The designated Officer (RTI) is directed to deposit the money, received under section 9 of RTI Act and the Right to Information (Receipt of Information Related) Rules, 2009, as the payment of the price of the information provided, to the Government treasury under code No. 1-3301-0001-1807.*
> *4. Both the parties are asked to inform the Information Commission of their compliance with the directions after they have been complied with."*

7. Pursuant to the aforesaid decision, the petitioner No.1 made an application on 23.10.2013 with a list of the names of 40 political parties, and requesting for copies of all

audited annual statements of accounts submitted by the registered political parties since the date of their respective registration (Annexure-H). However, the designated Officer (RTI) did not respond to the same; as a result, the petitioner No.1 preferred an appeal dated 19.12.2013 to the Secretary, Election Commission stating that although 30 working days had passed since the application had been made but he had not been informed of anything by the said Officer (RTI) [Annexure-I]. The Election Commission issued a reply vide Memo No. 17.00.0000.040.22.001.10-271 dated 23.12.2013 informing the petitioner No.1 that the Election Commission received opinions on his request from 21 registered political parties out of which only 3 (three) political parties, namely Bangladesh Muslim League, Jatiya Shomajtantrik Dal (JSD) and Bikalpadhara Bangladesh consented to the disclosure of their audited annual statements of accounts. The Election Commission further stated that the Commission was in the process of collecting opinion from the rest of the registered political parties, but did not specify any time-limit for completing the process. The Secretary of the Election Commission accordingly issued a direction dated 01.01.2014 to the designated Officer of the Commission requiring him to supply to the petitioner No.1 statements of accounts of those political parties, who had consented to the disclosure (Annexure- J and J-1 respectively).

8. It has further been stated that since the petitioner No.1 did not receive any further information or response from the Election Commission, he submitted a review application dated 06.04.2014 to the Chief Information Commissioner, with copies to the two Information Commissioners, expressing his grievance about the failure of the Election Commission to provide any further information in relation to the remaining political parties since its communication dated 23.12.2013. In the said review application, the petitioner No.1 also stated that he was of the view that the decision of the respondent No.1-Commission laying down a requirement of consent from the "third-parties" was not correct, as the information sought were "public information", to which every citizen is entitled under section 4 of the RTI Act; as such, he sought review of the decision dated 22.10.2013 (Annexure-K). On receipt thereof, the respondent No.1 issued a letter dated 13.04.2014 concluding that there was no scope under the RTI Act to review a decision issued by the Information Commission and accordingly, advising the petitioner No.1 to file a complaint in prescribed Form 'A' in case of any dissatisfaction (Annexure L). Pursuant thereto, he filed a further complaint in Form 'A' on 01.06.2014 to the respondent No. 1 narrating the facts leading up to the 2nd complaint stating, *inter alia,* that the information sought by him were already in the possession of the respondent No. 2, who could have provided the information to him as an "Authority" by virtue of the RTI Act without recourse to any third-party. In the complaint he prayed that: (a) the respondent No.1 should direct the Election Commission to provide the requested information to him from the information preserved by the Commission itself without seeking opinion from any third-party; (b) the respondent No.1 should declare that section 9(8) of RTI Act does not apply to the statements of accounts submitted by the registered political parties; (c) the respondent No. 1 should direct the Election Commission to publish all information provided by the political parties on their website; and (d) the respondent No.1 should direct the Commission to dispose of all applications under the RTI Act within the timeframe stipulated by the RTI Act (Annexure M). The said complaint was numbered as Complaint No.57 of 2014. In response thereto, the respondent No.1 issued a summons dated 01.07.2014 requiring the petitioner No.1 to attend a hearing on 16.07.2014 at 11.00 A.M at the office of the Information Commission, wherein the petitioner Nos.2, 3 and 4 were also present. After hearing the same on 16.07.2014, the respondent No.1 issued the impugned decision dated 16.07.2014 affirming its earlier decision/order dated 22.10.2013 in

Complaint No.97/2013 (Annexure-N and N-1 respectively). In the circumstances, the petitioners had filed this application and obtained the instant Rule Nisi.

9. The respondent No.1-Information Commission contested the case by filing an affidavit-in-opposition stating, *inter-alia,* that according to the provision of section 25 of the Right to Information Act, 2009 the Information Commission had disposed of the Complaint No. 57/2014 and thereby the petitioners have in no way been deprived of any legal right and hence, they are not entitled to get any remedy as prayed for.

10. The respondent No.2-Election Commission also contested the case by filing a separate affidavit-in-opposition stating, *inter-alia,* that the information demanded by the petitioners from the Election Commission are not information of their own institution; rather those are submitted to the Commission by different political parties under the relevant law, and as such, those are categorized as information supplied by third-parties (aa£u fr LaL plhl¡qLa abÉ). Since those falls under the category of information supplied by third-parties, the incumbent Officer of the Election Commission was bound under section 9(8) of the RTI Act, 2009 to seek consent of the political parties concern. Most of the political parties expressed their opinion in negative in respect of disclosure and supplying of those reports to the petitioners; therefore, the Commission, considering such opinion decided not to disclose and supply that information to the petitioners. However, some of the political parties expressed their opinion in positive in respect of disclosure and supplying of those reports to the petitioners; therefore, the Commission acted according to their opinion and disclosed and supplied those information to the petitioners. The Commission acted in accordance with the RTI Act, 2009 and thereby committed no illegality. It has also been stated that some of the registered political parties have submitted audit reports of their income and expenses to the Election Commission for the year 2012, 2013 and 2014 respectively along with the forwarding letters (Annexure-7series), where none of the political parties, so far, have made any specific request to the Commission to consider those audit reports as "*confidential*".

11. At the outset, Dr. Sharif Bhuiyan, the learned Advocate appearing with Mr. Tanim Hussain Shawon, the learned Advocate on behalf of the petitioners submits that the Right to Information Act, 2009 (in short, the Act) and the Political Parties Registration Rules, 2008 are intended to ensure transparency, accountability and good governance with respect to the political parties, which are major stakeholders in the democratic process and in public affairs. He also submits that the impugned decision has the effect of curtailing the citizen's right to information with regard to the affairs of the political parties and holds them accountable through public discourse. Such an interpretation of the RTI Act could not have been intended by the legislature.

12. He goes to argue that incompatibility of the impugned decision with the RTI Act is manifest from the preamble of the said Act, which makes it clear that the Act has been enacted to give effect to the right to information, as an inalienable part of freedom of thought, conscience and speech, and to empower the people by ensuring transparency and accountability of all public, autonomous and statutory organizations. Therefore, any interpretation of the RTI Act restricting the people's right to have access to information provided to the Election Commission by the political parties, both of which are public bodies, is contrary to both the Constitution and the RTI Act. He further goes to argue that the Election Commission by framing the Registration Rules has sought to ensure effective transparency and accountability of the political parties, which are to be registered with the Election Commission and are to enjoy the benefits of such registration. Therefore, withholding the audited financial accounts submitted by the political parties as a requirement

under the said Rules frustrates the purpose of the Rules and has the consequence of disempowering the people and the electorate in relation to accountability of the political parties.

13. He next submits that by issuing the impugned decision/order, the respondent No.1-Information Commission has in effect abdicated its role of ensuring that all public bodies adhere to the principle of the right to information of all citizens, and has purported to condone the failure of the Election Commission to provide information in its possession in relation to political parties. Thus, the Commission has acted against the provisions, intention and the spirit of the RTI Act and the Constitution of Bangladesh. He also argues that the respondent No.1, in passing the impugned order/decision, has misinterpreted the relevant provisions of the RTI Act. In this regard he further submits that section 9(8) of the Act sets out the procedure for dealing with information, which may have been considered by a third-party as " secret information" as referred to in sections 7(a), (d), (o) and (r) of the RTI Act. Hence, the provisions of section 9(8) could not have been the basis for not allowing /ordering supply of copies of the audited statements of the registered political parties, who, according to the materials on record, did not take the position that the audited statements were "secret information" under the above quoted provisions of law. He further argues that section 7 of the said Act contains the grounds /circumstances under which an "authority" is not bound to provide information, and the second proviso to section 7 requires that "the concerned authority shall take prior approval from Information Commission for withholding information under this section". Since the Election Commission did not seek any prior approval from the Information Commission in respect of withholding the audited statements of accounts submitted by the political parties; hence, issuance of the impugned decision/order is without any jurisdiction and in violation of the RTI Act.

14. He further submits that the definition of the term "information" as provided in section 2(f) of the RTI Act clearly states that "information" includes "….any other documentary material regardless of its physical form or characteristics, and any copy thereof in relation to the …. official activities of any authority." According to section 2(b) of the said Act, the Election Commission is an "authority" with responsibilities and obligations to ensure transparency. Since the political parties are required by the Registration Rules to submit their audited statements of accounts to the Election Commission, such statements of accounts, as soon as submitted to the Election Commission, fall under the scope of "information" defined in the RTI Act. Therefore, the Election Commission, being an "authority" under the said Act is under a clear obligation to provide to anyone who seeks such audited statements of accounts under the said Act. He also argues that the respondent No.1 in passing the impugned decision/order misinterpreted section 9(8) of the RTI Act in violation of the provisions of the Act and the Rules made thereunder in holding that the audited financial accounts of a registered political party is "secret information". Political parties, being constitutionally recognized public organizations, are required by the Registration Rules to submit such accounts to the Election Commission for the main purpose of transparency and accountability to the people and the electorate, and therefore, withholding such statements/accounts as third-party's secret documents amounts to negating the purpose of both the Registration Rules and the RTI Act.

15. He again submits that as soon as a political party submits its audited statements of accounts to the Election Commission, the same becomes a "public document" under section 74(2) of the Evidence Act, 1872. The RTI Act and the Rules made thereunder having not provided for obtaining opinion of political parties for supplying copy of the same to the

petitioners; the impugned order is without jurisdiction. According to the provisions of section 9(8) of the RTI Act, the authority from which the information has been sought is not required to rely solely on the "opinion" of a third-party in taking its decision, and is required to have regard to such "opinion" if expressed, and to arrive at a decision in accordance with the provisions of the RTI Act. Therefore, the refusal of the Election Commission to provide the audited statements on the pretext that the political parties concern have not provided an affirmative opinion is wholly in violation of the provisions of the said Act. He also submits that in passing the impugned decision/order, the respondent No.1 has acted in a mechanical way to deny the right of the people to information, and has, thus, acted in violation of the very legislation under which the Information Commission has been constituted for the purpose of upholding and promoting the people's right to information.

16. He lastly submits that the provisions of the RTI Act, in particular, section 13(5) entrust the Information Commission with the positive responsibilities to preserve, promote and uphold the right of the citizens to information by, amongst others, giving effect to the principles enshrined in the Constitution of Bangladesh and making recommendation for promoting the application of the provisions of the RTI Act so as to ensure and guarantee transparency and accountability in all spheres. The impugned decision/order is contrary to the functions of the Information Commission as set out in section 13 of the said Act; and as such, the same is liable to be declared without any lawful authority and of no legal effect.

17. Conversely, Mr. Tawhidul Islam, the learned Advocate appearing on behalf of the respondent No.2 submits that the information demanded by the petitioners from the Election Commission are not information of their own, rather those are submitted to the Commission by different political parties under the relevant law, and as such those are categorized as information supplied by third-parties (a«a£u fr La«ÑL plhl¡qLªa abÉ) as defined in section 2 (i) of the RTI Act, 2009. Since those information falls under the category of information supplied by third-parties, the incumbent Officer of the Election Commission was bound under section 9 (8) of the RTI Act to seek consent of the political parties who have submitted their audited reports to the Commission. He also argues that most of the political parties expressed their opinion in negative in respect of disclosure and supplying of those reports to the petitioners; therefore, the Commission considering the opinion of those political parties, decided not to disclose and supply those information to the petitioners.

18. He next submits that some of the political parties expressed their opinion in positive in respect of disclosure and supplying of those reports to the petitioners; therefore, the Commission acted according to their opinion and disclosed and supplied that information to the petitioners. He goes to argue that the Commission acted in accordance with the provisions of the RTI Act and thereby committed no illegality.

19. He further submits that section 7 of the RTI Act provides for the conditions when disclosure of information is not mandatory; and the condition of section 7 (d) of the said Act is more relevant to the present matter. On the other hand, the petitioners did not make out a case of larger public interest before the Election Commission or Information Commission as against the confidentiality pleaded by the political parties for non-disclosure of the relevant information as such the Election Commission or the Information Commission did not at all have the opportunity to consider any issue of public interest. He further argues that since the plea of confidentiality of the political parties has already been approved by the respondent No.1 the requirement of prior approval from the respondent No.1 under the proviso to section 7 of the RTI Act for postponing disclosure has become redundant.

20. He lastly submits that the petitioner is to make out a case of larger public interest before the Election Commission in a fresh application, if they so desire for such disclosure; and then the Election Commission would have the opportunity to decide on the issue of public interest, if at all involved, after hearing objections from the political parties concern.

21. Ms. Amatul Karim, the learned Deputy Attorney General appearing for the respondent No.1-Information Commission submits that the respondent No.1 had acted as per the provision of section 25 of the RTI Act, 2009 and accordingly disposed of the petitioners' Complaint No. 57/2014 and thereby committed no illegality. In the circumstances, she prays for discharging the Rule.

22. We have heard the learned Advocates of both the contending parties and have perused the writ petition and the affidavit-in-oppositions.

23. It appears that the petitioner No.1 submitted an application to the designated Officer (RTI) of the Election Commission on 12.06.2013 requesting him to provide photocopies of the audited annual statements of accounts filed by the registered political parties for all calendar years to the Election Commission (Annexure-A). In response thereto, the said designated Officer (RTI) by Memo No. 17.00.0000.040.22.001.10-80 dated 14.07.2013 informed the petitioner No.1 that the information requested by him were not Election Commission's own information, and requested him to collect those statements of accounts directly from the political parties concern (Annexure-B). Being aggrieved by the same, the petitioner No.1 on 04.08.2013 preferred an appeal (Annexure-C) to the Secretary of the Election Commission, who by Memo No. 17.00.0000.040.22.001.10-149 dated 03.09.2013, affirmed the said decision dated 14.07.2013 given by the designated Officer (RTI) (Annexure-D). Being aggrieved thereto, the petitioner No.1 filed a complaint before the respondent No.1-Information Commission under section 25 of the RTI Act, 2009 on 09.09.2013 (Annexure-E), which was registered as Complaint No. 97/2013. Upon hearing the same, the respondent No.1 decided the matter on 22.10.2013 holding that the information requested involved a "third-party" and that the disclosure of such information was not possible without the opinion of the "third-party" (Annexure-G), which runs as follows-

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অভিযোগ নং: 97/2013

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cj¢uafËç LjLaj (Bl¢VBC)
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শেরে বাংলা নগর, ঢাকা।

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(aj¢lMx 22-10-2013 Cw)

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02| D³ Av‡e`‡bi †cw¶‡Z 14-07-2013 Zwi‡L 80 bs ¯§vi‡Ki gva¨‡g বাংলাদেশ নির্বাচন L¢jne mwPevj‡qi f¢lQ¡jK (জনসংযোগ) ও দায়িত্বপ্রাপ্ত কর্মকর্তা (আরটিআই) জনাব এস Hj Bp¡c‹ ¡j¡e Awf‡hvMKvix‡K Zvi cv_xZ Z_¨ msMk- ó ivR‰bwZK `‡ji wbKU n‡Z msMn Kivi Rb¨ Abyôvi va K‡ib| cieZx‡Z, Awf‡hvMKvix 04-08-2013 Zwi‡L বাংলাদেশ নির্বাচন কমিশন mwPevj‡qi mwPe I Avcxj KZc¶ (AviwUAvB) eive‡i Avcxj Av‡e`b K‡ib| Avcxj Av‡e`‡bi †cw¶‡Z 03-09-2013 Zwi‡L 149 bs ¯§vi‡Ki gva¨‡g Avcxj KZc¶ (AviwUAvB) Awf‡hvMKvix‡K cv_xZ Z‡_¨i wel‡q wbevPb Kwgkb mwPevj‡qi Z_¨ c`vbKvix KgKZvi †cwiZ 14-07-2013 Zwi‡Li wPwVi wm×vš envj ivLvi welqwU AewnZ K‡ib| G †cw¶‡Z Awf‡hvMKvix 09-09-2-013 Zwi‡L Z_¨ Kwgk‡b Awf‡hvM `wLj K‡ib|

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04| ïbvbxi avh Zwi‡L Awf‡hvMKvix W. h¢cEm Bmj jSjc¡l, বাংলাদেশ নির্বাচন কমিশন mwPevj‡qi f¢lQ¡jK (জনসংযোগ) ও দায়িত্বপ্রাপ্ত কর্মকর্তা (আরটিVBC) Se¡h Hp Hj Bp¡c‹ ¡j¡e Ges `wqZcvß KgKZv (AviwUAvB) পক্ষে বিজ্ঞ আইনজীবী জনাব তৌহিদুল ইসলাম Dcw¯Z n‡q Zv‡`i e³e¨ Dc¨vcb K‡ib| Awf‡hvMKvix Zvi e³‡e¨ D‡j-L K‡ib †h, Z_¨ AwaKvi AvBb, 2009 Abyôvqx `wqZcvß KgKZv (AviwUAvB) Gi wbKU 01 bs Abyôv‡` Dwj-wLZ Z_¨ †P‡q Av‡e`b K‡ib| `wqZcvß KgKZv (AviwUAvB) Z_¨ c`v‡b AcivMZv cKvk Ki‡j wZwb Avcxj KZc¶ (AviwUAvB) eive‡i Avcxj Av‡e`b K‡ib| Avcxj KZc¶ (AviwUAvB) GKB wm×vš c`vb Ki‡j wZwb Z_¨ Kwgk‡b Awf‡hvM `wLj K‡ib|

05| বাংলাদেশ নির্বাচন কমিশন mwPevj‡qi f¢lQ¡jK (জনসংযোগ) ও দায়িত্বপ্রাপ্ত কর্মকর্তা (Bl¢VBC) Zvi e³‡e¨ D‡j-L K‡ib †h, wbevPb Kwgk‡bi †Kvb †Kvb Z_¨ c`vb‡hvM¨ Zvi GKwU Zwjkv l‡qemvB‡U i‡q‡Q| Z_¨ AwaKvi AvBb, 2009 Gi aviv 9 (8) Abyôvqx ZZxq c‡¶i †Kvb †Mvcbxq Z_¨ Zvi gZvgZ ev m¤$wZ e¨wZ‡i‡K Abyôv aKvix‡K c`vb Kivi wea vb i‡q‡Q| Awf‡hvMKvixi cv_xZ Z‡_¨i †¶‡Î ZZxq c‡¶i msMk- óZv _vKvq Zv mieivn Kiv m¤e nqwb| weÁ AvBbRxex Zvi e³‡e¨ D‡j-L K‡ib †h, wbevPb Kwgk‡b RgvKZ.ivR‰bwZK `‡ji evrmwiK Avq-e¨‡qi wnmve (AwWU wi‡cvU) wbevPb Kwgk‡bi wbR¯ Z_¨ bq | ivR‰bwZK `‡ji gZvgZ Qvov Z_¨ mieivn Kiv m¤e bq|

06| Awf‡hvMKvixi cv_xZ Z_¨ mÿúó bv nIqvq Awf‡hvMKvix †Kvb †Kvb ivR‰bwZK `‡ji Ges ‡Kvb †Kvb mv‡ji Z_¨ †c‡Z AvMnx Zv mÿúófv‡e `wqZcvß KgKZv (AviwUAvB) Gi wbKU Av‡e`b Kivi Rb¨ Kwgkb gZvgZ c`vb K‡ib| Z_¨ AwaKvi AvBb ,2009 Gi aviv 9 (8) Abyôvqx ZZxq c‡¶i gZvgZ Mn‡Yi c‡qvRbxqZv _vKvq ZZxq c‡¶i eive‡i `wqZcvß KgKZv (AviwUAvB) †K gZvgZ Mn‡Yi Rb¨ †bwUk c`v‡bi wel‡q Kwgkb Awfgz e¨³ K‡ib|

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3| Z_¨ AwaKvi AvBb, 2009 Gi aviv -9 Ges Z_¨ AwaKvi (Z_¨ cwß msµvš) wewagvjv, 2009 Gi wewa-8 Abyhvqx mieivnKZ Z‡_¨i g~j¨ eve` Av`vqKZ. A_ 1-3301-0001-1807 bs †Kv‡W miKvix †KvlvMv‡i Rgv c`v‡bi Rb¨ `vwqZcvß KgKZv (AviwUAvB) †K wb‡`©k †`qv n‡jv|

4| wb‡`©kbv¸‡jv ev¯evqb/cwZcvj‡b K‡i Z_¨ Kwgkb‡K AewnZ Kivi Rb¨ Dfq c¶‡K ejv n‡jv|

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24. Pursuant to the aforesaid decision, the petitioner No.1 made an application on 23.10.2013 to the designated Officer (RTI), Election Commission with a list of names of 40 political parties, and requesting for copies of all audited annual statements of accounts submitted by the registered political parties since the date of their respective registration (Annexure-H). But the said designated Officer (RTI) did not respond to the same as such, the petitioner No.1 further preferred an appeal to the Secretary, Election Commission on 19.12.2013 (Annexure-I). During pendency of the appeal, the said designated Officer by memo dated 23.12.2013 informed the petitioner No.1 about the said application (Annexure-J), which is quoted below-

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bs-17.00.0000.040.22.001.10-271 ZvwiL: 23wW‡m¤i, 2013

‡ciK: Gm Gg Avmv`y¾vgvb

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Z_¨ c`vbKvix KgKZv

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g‡nv`q

Dchy³ wel‡q Avcbvi wPwVi †cw¶‡Z Rvbv‡bv hv‡"Q †h, wbevPb Kwgk‡b wbewÜZ ivR‰bwZK `‡ji evrmwiK Avq-e¨‡qi AwWU wi‡cvU ZZxq c¶‡K c`v‡bi wel‡q 21 wU ivR‰bwZK `‡ji gZvgZ

cvIqv †M‡Q Gi g‡a¨ evsjv‡`k gyw³jg jxM, RvZxq mgvRZvwšK `j- Rvm` Ges weKíavi evsjv‡`k Zv‡`i evrmwiK Avq-e¨‡qi wnmve ZZxq c¶‡K mieiv‡ni Abvc wË c`vb K‡iQ| wbewÜZ Ab¨vb¨ `j¸‡jvi gZvgZ msM‡ni cwðgv Pj‡Q|

iv R‰bwZK `jmg‡ni Avq-e¨‡qi AwWU wi‡cvU Z_¨ AwaKvi AvB‡bi wewa 8 †gvZv‡eK cwZ cô vi Rb¨ 02 (`yB) UvKv wbaviY Kiv n‡q‡Q| 1-3301-0001-1807 †Kv‡W 50 (cÂvk) cô vi Rb¨ c‡qvRbxq A_ †KvU wd/ †URwi Pvjv‡b Rgv w`‡q AvMvgx 5 Kvhw`e‡mi g‡a¨ Dwj wLZ wZb cwUi Z_¨ MnY Kivi Rb¨ Abyiva Kiv n‡jv|

ab¨ev`v‡š

GKvš f v‡e_ Avcbvi
v: A úó
(Gm Gg Avmv`y¾vgvb)
cwiPvjK (Rbms‡hvM)
Z_¨ c`vbKvix KgKZv
‡dvb: 9180812

m`q AeMwZ:
mwPe, Z_¨ Kwgkb
cZZË feb, 3q Zjv , 4/G AvMviMvu.XvKv|Ó

25. Subsequent thereto, the Secretary of the Election Commission by disposing of the said appeal (Annexure-I) on 01.01.2014 had directed the designated Officer of the Commission to supply the statements of accounts of those political parties, who had consented to the disclosure (Annexure- J-1), which runs as follows-

Òwbe vPb Kwgkb
evsjv‡`k
wbe vPb Kwgkb mwPevjq
‡k‡ievsjv bMi, XvKv-1207|

bs-17.00.0000.040.22.001.10-319 Zwi L: 01 Rvbyqvwi 2014

wbe vPb Kwgk‡b `wLjKZ.iv R‰bwZK `‡ji evrmwiK Avq-e¨‡qi AwWU wi‡cvU c`vb wel‡q W. ew`Dj Avjg gRyg`vi Z_¨ AwaKvi AvBb Abyôv‡i Awcj `v‡qi K‡i‡Qb| †h me iv R‰bwZK `j wbe vPb Kwgk‡b `wLjKZ.evrmwiK Avq e¨‡qi AwWU wi‡cvU ZZxq c¶‡K †`qvi wel‡q Abvc wË c`vb K‡i‡Qb Zv c`v‡bi wel‡q Kwgk‡bi Abyôvb i‡q‡Q| †m †gvZv‡eK Z_¨ AwaKvi AvB‡bi Awcj wb®úwËi wel‡q 24 (3) avivi (K) Abyôvqx Rbve ew`Dj Avjg gRyg`vi, wcZv-i½ygqv gRyg`vi-‡K D³ Abvc wËKZ.Z_¨ miei v‡ni Rb¨ wb‡`k c`vb Kiv hv‡”Q|

v: A úó
W. †gvnv¤§` mw`K
mwPe
I
Awcj KZc¶

cvcK:
Gm Gg Avmv`y¾vgvb
cwiPvjK (Rbms‡hvM)
Z_¨ c`vbKvix KgKZv
wbe vPb Kwgkb mwPevjq

Abyjwc:
W. ew`Dj Avjg gRyg`vi
wcZv- i½ygqv gRyg`vi
12/2, BKevj †iwW,‡gvnv¤§`cyi, XvKv|Ó

26. Thereafter, the petitioner No.1 further filed a complaint in Form 'A' to the respondent No.1-Information Commission on 01.06.2014 (Annexure-M) stating that the information sought by him were already in the possession of the respondent No.2-Election Commission, who could have provided the information to him as an "Authority" by virtue of section 2(b)(i) of the RTI Act without recourse to any third party. He further stated that the information sought did not fall within the ambit of section 7 of the RTI Act; the objective of rule 9(b) of the Registration Rules, 2008 was to establish transparency and accountability of the registered political parties, which is also the objective of the RTI Act, and that the information sought by him were not in the nature of "secret information" referred to in section 9(8) of the RTI Act. In the said complaint he prayed that: (a) the respondent No.1 should direct the Election Commission to provide the requested information to him from the information preserved by the Commission itself without seeking opinion from any third-party; (b) the respondent No.1 should declare that section 9(8) of RTI Act does not apply to the statement of accounts submitted by the registered political parties; (c) the respondent No. 1 should direct the Election Commission to publish all information provided by the political parties on their website; and (d) the respondent No.1 should direct the Election Commission to dispose of all applications under the RTI Act within the timeframe stipulated by the RTI Act. The said complaint was numbered as Complaint No.57/2014. After hearing the same, the respondent No.1 issued the impugned decision on 16.07.2014 (Annexure-N-1) affirming the earlier decision dated 22.10.2013 passed in Complaint No.97/2013 (Annexure-G), in which the respondent No.2-Election Commission was directed to seek consent/opinion from the political parties with respect to disclosure of their annual audit reports to the petitioner No.1. The said impugned decision dated 16.07.2014 is quoted below-

Ò abÉ L¢jne
fËaJÅhe (3u am¡)
Hg-4/H, BN¡lN¡J fËip¢eL Hm¡L¡
শেরে-h¡wm¡ eNl, Y¡L¡-1207

অভিযোগ নং-57/2014

অভিযোগকারীঃ জনাব বদিউল আলম jSjc¡l
¢fa¡-l‰ ¢ju¡ jSjc¡l
12/2 CLh¡m ®l¡X,
®j¡q¡ç jcfl,XvKv

fËaf rx Se¡h Hp,Hj Bp¡c ‹¡j¡e
পরিচালক (জনসংযোগ) ও দায়িত্বপ্রাপ্ত
LjLa¡ (Bl¢VBC)
বাংলাদেশ ¢eh¡Qe L¢jne p¢Qh¡mu,
শেরে বাংলা নগর, ঢাকা।

¢pÜ¡¿ fœ
(a¡¢lMx 16-07-2014Cw)

অভিযোগকারী জনাব বদিউল আলম মজুমদার তার দাখিলকৃত ৯৭/২০১৩ নং অভিযোগের বিষয়ে 22-10-২০১৩ তারিখে তথ্য কমিশন কর্তৃক প্রদত্ত সিদ্ধান্ত মোতাবেক নির্বাচন কমিশন রাজনৈতিক দলসমূহের কাছে তথ্য আdL¡র আইনের ধারা ৯ (৮) এর ভিত্তিতে তৃতীয় পক্ষের মতামত নেয়ার যে পদক্ষেপ নিয়েছে তাতে আইনের সঠিক পাঠ ও প্রয়োগ প্রতিফলিত হয়নি বলে অভিযোগ করেন। তথ্য কমিশনের সিদ্ধান্ত ও নির্বাচন কমিশনের উক্ত পদক্ষেপের বিরুদ্ধে তিনি ০১-06-২০১৪ তারিখে Z_¨ কমিশনে অভিযোগ দায়ের করেন।

০২। বিষয়টি কমিশনে 29-06-২০১৪ তারিখের সভায় আলোচনা করা হয়। সভার সিদ্ধান্ত অনুযায়ী অভিযোগের বিষয়ে ১৬-07-২০১৪ তারিখ শুনানীর দিন ধার্য করে সংশ্লিষ্ট পক্ষগণের প্রতি সমন জারী করা quz

০৩। শুনানীর ধার্য তারিখে অভিযোগকারী জনাব বদিউল আলম মজুমদার ও প্রতিপক্ষ বাংলাদেশ নির্বাচন কমিশনের পরিচালক (সংযোগ) ও দায়িত্বপ্রাপ্ত কর্মকর্তা (BIVBC) Sejh Hp,Hj, Bpjc ‹jje Hhw Zvi পক্ষে নিয়োজিত বিজ্ঞ আইনজীবী জনাব তৌহিদুল ইসলাম হাজির। অভিযোগকারী তার বক্তব্যে উল্লেখ করেন যে, রাজনৈতিক দলের অডিট রিপোর্ট প্রাপ্ত হননি। তথ্য কমিশনে দায়েরকৃত ৯৭/২০১৩ নং অভিযোগের বিষয়ে কমিশন কর্তৃক প্রদত্ত সিদ্ধান্তে রাজনৈতিক দলের মতামত নেয়ার কথা বলা হয়েছে কিন্ত রাজনৈতিক দলের অডিট রিপোর্ট নির্বাচন কমিশনে রয়েছে এবং তা পাবলিক ডকুমেন্ট। যেহেতু পাবলিক ডকুমেন্ট তাই এ তথ্য সরবরাহযোগ্য।

০৪। বাংলাদেশ নির্বাচন কমিশনের পরিচালক (জনসংযোগ) ও দায়িত্বপ্রাপ্ত কর্মকর্তা (আরটিআই) তার বক্তব্যে উল্লেখ করেন যে, ইতোপূর্বে তথা কমিশনে দায়েরকৃত ৯৭/২০১৩ নং অভিযোগের প্রেক্ষিতে তথা কমিশনের নির্দেশনা অনুযায়ী নির্বাচন কমিশনের পক্ষ থেকে ২১ (একুশ) টি রাজনৈতিক দলের কাছে তাদের সম্মতি চেয়ে চিঠি প্রদান করা হয়, এবং তার মধ্যে মাত্র তিনটি রাজনৈতিক দল তথ্য প্রদানে তাদের Aejfvšl কথা জানায়। এ প্রেক্ষিতে অভিযোগকারীকে ২৩-12-২০১৩ তারিখের পত্রের মাধ্যমে জানিয়ে দেয়া হয় যে, তিনি ঐ তিনটি রাজনৈতিক দলের Z_¨ পেতে পারেন। তথ্য অধিকার আইন, ২০০৯ এর ধারা ৯(৮) অনুযায়ী তৃতীয় পক্ষের কোন গোপনীয় তথ্য তার মতামত ও সম্মতি ব্যতিরেকে অনুরোধকারীকে প্রদান ej Llj vhje রয়েছে। সংশ্লিষ্ট যে সমস্ত রাজনৈতিক দলসমূহ উল্লিখিত তথ্যাদি কোন তৃতীয় পক্ষের নিকট প্রদান করার বিষয়ে কোন সম্মতি প্রদান করেনি, সে সমস্ত তথ্যাদি প্রদান আইনসংগত নয় বিধায় তা যথাযথভাবে অভিযোগকারীকে জানিয়ে দেয়া হয়েছে।

chv‡jvPbv

অভিযোগকারী ও দায়িত্বপ্রাপ্ত কর্মকর্তা (আরটিআই) উভয়ের বক্তব্য শ্রবনান্তে এবং দাখিলকৃত প্রমাণাদি পর্যালোচনান্তে পরিলক্ষিত হয় যে, দায়িত্বপ্রাপ্ত কর্মকর্তা (আরটিআই) ৯৭/২০১৩ নং অভিযোগে কমিশনের প্রদত্ত নির্দেশনা অনুযায়ী ব্যবস্থা গ্রহণপূর্বক অভিযোগকারীকে অবগত করায় অভিযোগটি নিস্পত্তিযোগ্য মর্মে fËuj¡e quz

vpÜ¿z

vhÙ¡vrত পর্যালোচনান্তে নিম্নলিখিতভাবে অভিযোগটি নিস্পত্তি করা হলোঃ-

যেহেতু, দায়িত্বপ্রাপ্ত কর্মকর্তা (আরটিআই) অভিযোগকারীকে তথ্য কমিশনের নির্দেশনা অনুযায়ী Z_¨ সরবরাহের বিষয়ে অবগত করেছেন, সেহেতু পূর্বের সিদ্ধান্ত বহাল রেখে অভিযোগটি wb:®úwË করা হলো।

সংশ্লিষ্ট পক্ষগনকে অনুলিপি প্রেরন করা হোক।

ü¡x Ax
(®j¡q¡ç jc g¡l¦L)
fËje abÉ Lvjne¡l Ó

27. In view of the above, it appears that the Election Commission refused to supply the audited statements of accounts of the registered political parties to the petitioners without their opinion considering those statements as “secret information”; but it appears from Annexure-7 series to the supplementary affidavit-in-opposition filed by the respondent No.2 and the statements of paragraph No.4 to the said affidavit-in-opposition that none of the political parties specifically requested the Election Commission to consider their submitted audit statements of accounts as “confidential”.

28. However, citizens’ right to information has been enshrined in section 4 of the RTI Act, 2009, which runs as follows-

"Subject to the provisions of this Act, every citizen shall have the right to information from the authority, and the authority shall, on demand from a citizen, be bound to provide him with the information."

29. As per section 8 (1) of the RTI Act any person may apply for information, which is as follows-

"Under this Act a person may apply to the officer-in-charge requesting for information either in writing or through electronic means or through e-mail."

30. According to section 2 (f) of the RTI Act *'Information' includes any memo, book, design, map, contract, data, log book, order, notification, document, sample, letter, report, accounts, project proposal, photograph, audio, video, drawing, painting, film, any instrument done through electronic process, machine readable record, and any other documentary material regardless of its physical form or characteristics, and any copy thereof in relation to the constitution, structure and official activities of any authority:*

Provided that it shall not include note-sheets or copies of note-sheets;

31. On the other hand, in view of section 2 (b) of the RTI Act the Election Commission is an 'authority' and the registered political parties are required to submit their audited statements of accounts to the Election Commission under rule 9 of the Registration Rules, 2008, which runs as follows-

Ò9| wbeÜ‡bi kZvw` cwicvjb m¤ú‡K Kwgkb‡K AewnZKiY|- c‡Z¨K wbewÜZ ivR‰bwZK `j wbeÜ‡bi kZvejx cwicvjb m¤ú‡K Kwgkb‡K, mgq mgq, AewnZ Kwi‡e Ges Z`j‡¶¨ mswkó `j‡K wb¤wjwLZ e¨e¯v MnY Kwi‡Z nB‡e, h_vt-

(K) `‡ji †K›`xq chv‡q bZzb KwgwUi wbewPZ m`m¨‡`i Zvwjkv Ges mswkó `‡ji এতদ্‌সংক্রান্ত সভার কার্যবিবরণীর অনুলিপি কমিশনে দাখিল;

(L) cwZ ermi 31‡k Rvbv‡B Gi g‡a¨ Ae¨ewnZ c‡ei cwÄKv erm‡ii mswkó `‡ji Avw_K †jb‡`b GKwU †iwRóvW PvUvW GKvD›Us dvg Øviv AWvU KivBqv AWvU wi‡cv‡Ui GKwU Kwc Kwgk‡b `wLj;

(M) Kwgkb, mgq mgq, †h mKj Z_¨ ev KvMRcÎ Pwn‡e Dnv Kwgk‡b †ciY; Ges

(N) Kwgkb, mgq mgq, †h mKj wel‡qi Dci gše¨ ev e¨vL¨v Pwn‡e Dnv cwicvjb | Ó

32. In view of the above provisions of law, the registered political parties are required to submit their audited statements of accounts to the Election Commission and soon after submission of such statements it falls under the category of 'information' as defined in the RTI Act. Moreover, soon after submission of the said audited statements it becomes "public document" under section 74 (2) of the Evidence Act, 1872. Therefore, the Election Commission being an authority under the said Act is under obligation to provide the concerned information to the petitioners.

33. However, section 9(8) of the RTI Act, 2009 sets out the procedures for dealing with third-party's "secret information" as referred to in sections 7(c), (d), (o) and (r) of the said Act. The said provision of section 9 (8) of the RTI Act is quoted below-

"Where an officer-in-charge thinks that the request made for information under sub-section (1) of section 8 is appropriate, and such information has been supplied by a third party or a third party's interest is involved in it and the third party has

> *considered it as secret information, the officer-in-charge shall cause a notice to be served upon the third party within 5 (five) working days for written or oral opinion, and if the third party gives any opinion in response to such notice, the officer-in-charge shall take into consideration such opinion and make a decision in respect of providing information to the applicant."*

34. In the case in hand, the registered political parties did not consider their audited statements as "secret information" under sections 7(c),(d),(o) or (r) of the RTI Act; as such, in view of the said provision there was no need to seek opinion from the registered political parties for supplying their audited statements of accounts to the petitioners.

35. Moreover, according to the said provision, the authority from which the information has been sought is not required to rely solely on the opinion of a third-party in taking its decision; rather it shall take into consideration such opinion and arrive at a decision in accordance with the provisions of the RTI Act. As such, refusal of the Election Commission to provide with the concerned information on the ground that the political parties concerns have not provided an affirmative opinion is violative of the provisions of the said Act.

36. On the other hand, section 7 of the RTI Act provides with certain types of information, which the authority is not bound to provide, and the 2nd proviso to section 7 requires that "the concerned authority shall take prior approval from the Information Commission for withholding information under this section". But in the instant case, since the Election Commission did not seek any such prior approval from the Information Commission in respect of withholding the audited statements of accounts submitted by the political parties; hence, issuance of the impugned order is without jurisdiction and violative of the RTI Act.

37. In support of his submissions Mr. Sharif Bhuiyan relied on the following sets of decisions.

38. In the case of *Abdul Momen vs. Bangladesh 66 DLR (2014) 9,* the High Court Division issued a Rule Nisi calling upon the respondent Nos. (1) Bangladesh and (2) Bangladesh Election Commission to show cause as to why they should not be directed to secure to the voters particulars from the candidates for the election to the Parliament in the form of information disclosing the past of the candidates including certain facts necessary for making correct choice for candidates. In its judgment the Court held as follows:

> *"….. that the Election Commission has been given a plenary power of superintendence direction and control of the preparation of the electoral rolls for elections and therefore whatever power is necessary for the purpose must be presumed to be there unless there is an ouster by express provisions.' (Para-8)*
> *'….The respondent No.2 is further directed to disseminate the information amongst the voters about the candidates through mass media and respondent No.1 is directed to provide necessary logistic support for the purpose to the respondent No.2." (Para-11)*

39. The said decision was subsequently upheld by the Appellate Division in *Abu Safa vs. Abdul Momen Chowdhury 66 DLR (AD) 17.*

40. In *Ms. Anumeha, C/o Association for Democratic Reforms and the Chief Commissioner and Income Tax-XI , New Delhi and others,* the subject-matter of which case

was similar to the instant matter, the Central Information Commission of India, in its decision dated 29 April, 2008, stated in paragraphs 28, 29, 45 and 49 as follows:

> *"Political parties are a unique institution of the modern Constitutional State. These are essentially civil society institutions and are, therefore, non-governmental. Their uniqueness lies in the fact that in spite of being non-governmental, political parties come to wield or directly or indirectly influence, exercise of governmental power. It is this link between State power and political parties that have assumed critical significance in the context of the Right of Information- an Act which has brought into focus the imperatives of transparency in the functioning of State institutions. It would be facetious to argue that transparency is good for all State organs, but not so good for the political parties, which control the most important of those organs. For example, it will be a fallacy to hold that transparency is good for the bureaucracy, but not good enough for the political parties which control those bureaucracies through political executives.' (Para-28)*
>
> *'In modern day context, transparency and accountability are spoken of together- as twins. Higher the levels of transparency greater the accountability. This link between transparency and accountability is sharply highlighted in the Preamble to the RTI Act. -------In people's Union for Civil Liberties (PUCL) and Ors vs. Union of India and Anr. (AIR 2003 SC 2363), the apex court stated that it is true that the elections are fought by the political parties, yet election would be a farce if the voters are unaware of antecedents of candidates contesting elections. Their decisions to vote either in favour of 'A' or 'B' candidate would be without any basis. Such election would be neither free nor fair.----' (Para-29)*
>
> *"The scheme of the Act makes it abundantly clear that disclosure of information to a citizen is the norm and non-disclosure by a Public Authority an exception and it necessitates justification for any decision not to disclose an information.'(Para-45)*
>
> *'-------The German Basic Law contains very elaborate provisions regarding political funding. Section 21 of the Basic Law enjoins that political parties shall publicly account for the sources and the use of their funds and for their assets. The German Federal Constitutional Court has in its decisions strengthened the trend towards transparency in the functioning of political parties. It follows that transparency in funding of political parties in a democracy is the norm and, must be promoted in public interest.-----" (Para-49)*

41. In Complaints No.CIC/SM/C/2011/001386 and CIC/SM/C/2011/000838 filed by Shri Subhash Chandra Aggarwal and Shri Anil Bairwal respectively against the six political parties of India including Indian National Congress/ All India Congress Committee (AICC), Bharatiya Janata Party (BJP) and others, the Central Information Commission of India, in its decision dated 3rd June, 2013 stated in paragraph 77 as follows:

> *"The Political Parties are the life blood of our polity. As observed by Laski 'The life of the democratic state is built upon the party system.' Elections are contested on party basis. The Political Parties select some problems as more urgent than others and present solutions to them which may be acceptable to the citizens. The ruling party draws its development programs on the basis of its political agenda. It is responsible for the growth and development of the society and the nation. Political Parties affect the lives of citizens, directly or indirectly, in every conceivable way and*

are continuously engaged in performing public duty. It is, therefore, important that they became accountable to the public."

42. Before passing of the Right to Information Act, 2005 in India, the Supreme Court of India upheld people's right to access to information in relation to political parties and candidates in elections. *In Common Cause (A Registered Society) v. Union of India and others 2 SCC (1996) 752,* the following was held by the Supreme Court of India:

"------The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows. In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted.' (Para-18)

'Superintendence and control over the conduct of election by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression "conduct of election" is wide enough to include in its sweep, the power to issue directions- in the process of the conduct of an election –to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorized by the parties in connection with the election of their respective candidates". (Para-26)

43. In *Union of India v. Association for democratic Reforms and another 5 SCC (2002) 294,* another case decided by the Supreme Court of India before the commencement of the Right to Information Act, 2005, it was held as follows:

"-----After considering the relevant submissions and the reports as well as the say of the Election Commission, the High Court held that for making a right choice, it is essential that the past of the candidate should not be kept in the dark as it is not in the interest of the democracy and well being of the country. The Court directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to Parliament and to the State Legislatures and the parties they represent:

1. *-----*
2. *Assets possessed by a candidate, his or her spouse and dependent relations.*

------.' (Para-4)

'Thereafter, this Court in Common Cause (A Registered Society) v. Union of India dealt with election expenses incurred by political parties and submission of return and the scope of Article 324 of the Constitution, where it was contended that cumulative effect of the three statutory provisions, namely, Section 293-A of the Companies Act, 1956, Section 13-A of the Income Tax Act, 1961 and Section 77 of the Representation of the People Act, 1951, is to bring transparency in the election funding and the people of India must know the source of expenditure incurred by the political parties and by the candidates in the process of election. It was contended that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election and that this vicious circle has totally polluted the basic democracy in the country. The Court held that purity of election is fundamental to democracy and the

Commission can ask the candidates about the expenditure incurred by the candidates and by a political party for this purpose.-----' (Para- 28)

'-----it can be deducted that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.'(Para-34)

'If right to telecast and right to view sport games and the right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen /voter –a little man-to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a). In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of "speech and expression" and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy .' (Para-38)

' The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:

(1)-------

(2)-------

(3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.

(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or government dues.

(5)-------." (Para-48)

44. We have gone through the aforementioned decisions and we are in respectful agreement with the ratio so decided therein. The very spirit of the said decisions in respect of the citizen's right to information and disclosure of antecedents of candidates contesting elections and information of political parties relating to funding and candidates expenditure in election are applicable in the instant case.

45. We have gone through the aforementioned decisions and we are in respectful agreement with the ratio so decided therein. The very spirit of the said decisions in respect of the citizen's right to information and disclosure of antecedents of candidates contesting elections and information of political parties relating to funding and candidates expenditure in election are applicable in the instant case.

46. In this connection it is the contention of Mr. Tawhidul Islam that the provisions of sections 7 and 9 (8) of the Right to Information Act, 2009 of Bangladesh are quite similar and identical to the provisions of sections 8 and 11 of the Right to Information Act, 2005 of India. Sections 8 and 11 of the RTI Act, 2005 of India were interpreted together by the Delhi High Court in *Arvind Kejriwal vs. Central Public Information Officer* reported in *AIR 2010 Delhi 216*. In this case disclosure of information was sought to be resisted on the ground of privacy; but the Court observed (Para- 21, 22, 23, 24 and 25) that-

(a) The procedural safeguard that has been inserted in the RTI Act intends to balance the rights of privacy and the public interest involved in disclosure of such information, and whether one should trump the other (i.e. privacy and public interest) is ultimately for the Information Officer to decide in the facts of a given case; and
(b) The logic of section 11(1) of the RTI Act is plain; once the information seeker is provided information relating to a third-party, it is no longer in the private domain and such information seeker can then disclose in turn such information to the whole world; and
(c) The defense of privacy cannot be lightly brushed aside; and
(d) The competing interest (i.e. privacy and public interest) can possibly be weighed after undertaking hearing of all interested parties.

47. The above interpretation of section 11 of the Indian Act given by the Delhi High Court was again considered by a larger bench of the Delhi High Court *(Arvind Kejriwal vs. Central Public Information Officer)* on 30 September, 2011, wherein the Court after exhaustively interpreting that section observed that- (Para 5, 9, 10, 11, 12, 13, 14 and 15).

(a) The said section 11 has to be read along with the exemptions which have been provided in section 8; and the right of the citizens to access any information held or under the control of any public authority, should be read in harmony with the exclusions /exemptions in the Act; and
(b) The test which has to be applied in such conflicting interest is the larger public interest.

48. The Supreme Court of India in *R.K. Jain vs. Union of India* (decided on 16 April, 2013) agreed with the above two decisions, while giving observations on the issue of disclosure of some information of ACR, which are quoted below (para-13, 14, 15 and 16):

(a) The third-party may plead privacy defense, but such defense may, for good reasons, be overruled, in other words, after following the procedure outlined in section 11 of the RTI Act, and the authority may decide that information should be disclosed in public interest overruling any objection that the third-party may have to the disclosure; and
(b) The disclosure must have nexus to any public activity or public interest; and
(c) The bonafide of the applicant must be considered.

49. The above criteria of public activity/public interest in disclosing third-party's information was reiterated in *Girigh Ramachandra Deshpande vs. Central Information Commission and others* (2013) 1 SCC 212.

50. In *Abdul Momen Chowdhury and others vs. Bangladesh and others* [66 DLR (2014) 9], people's right to know was acknowledged and disclosure and dissemination of

information relating to candidates of elections to the house of nation was directed through mass media.

51. In view of the above decisions, it is the further contention of Mr. Tawhidul Islam that the petitioners did not make out a case of larger public interest before the Election Commission or the Information Commission as against the confidentiality pleaded by the political parties for non-disclosure of the relevant information, as such no illegality was committed by the respondent No.1 in the impugned order.

52. It is the admitted position of fact that the registered political parties concern did not consider their audited statements of accounts as "confidential" (as discussed herein before). On the other hand, the petitioner No.1 is the Secretary of Shushashoner Jonno Nagorik (SHUJAN), an organization which conducts various activities with a view to establishing and promoting democracy and good governance in the country by creating awareness among the citizens and ensuring their active participation. He has been involved with various activities aimed at achieving transparency, rule of law and citizens' rights at all levels while the petitioner Nos.2 to 6 are various office-bearers of SHUJAN, who have been closely involved with various activities to promote transparency in the public life and the right of the citizens to information. As such, the above contention of Mr. Tawhidul Islam in respect of 'confidentiality of information' and 'case of larger public interest' falls through.

53. We have gone through the decisions of *Arvind Kejriwal vs. Central Public Information Officer AIR 2010 Delhi 216* and *R.K. Jain vs. Union of India,* which are not applicable in the facts and circumstances of the present case, for both the decisions involved the disclosure of information relating to Annual Confidential Rolls (ACRs) of government officers, which are treated as personal information; but in the instant case, issue is disclosure of the annual audited statements of accounts of the registered political parties, which the political parties are under obligation to submit to the Election Commission according to the provision of the Registration Rules, 2008, for as soon as a political party submits such statements it becomes a "public document" (as discussed herein before). Hence, the subject matter of the instant writ petition is different from that of the above cited cases.

54. However, both the contesting parties relied on the decision of our jurisdiction in the case of *Abdul Momen vs. Bangladesh* reported in *66 DLR (2014) 9,* wherein citizen's right to information was upheld, is applicable here in the case in hand, for the Election Commission has a similar obligation to disclose the audited statements of accounts submitted by the registered political parties concern under the Registration Rules so as to enable the public to assess the financial transparency within the political parties.

55. In the light of the foregoing discussions and findings, the submissions made by the learned Advocate for the respondent No.2 in respect of sections 7 and 9 (8) of the RTI Act, 2009, falls through.

56. Moreover, amongst others the following objectives and purposes of the RTI Act are set out in the preamble to the said Act for establishing good governance:

> *"Whereas freedom of thought, conscience and speech is recognized in the Constitution of the People's Republic of Bangladesh as one of the fundamental rights and right to information is an inalienable part of freedom of thought, conscience and speech; and*

Whereas all powers of the Republic belong to the people, and it is necessary to ensure right to information for the empowerment of the people…."

57. On the other hand, the provision of section 13(5) of the RTI Act entrust the Information Commission with the positive responsibilities to preserve, promote and uphold the right of the citizens to information by, amongst other, giving effect to the principles enshrined in the Constitution of Bangladesh and making recommendation for promoting the application of the provisions of the RTI Act so as to ensure and guarantee transparency and accountability in all spheres.

58. The impugned order is contrary to the said provision of law and hence, the same is liable to be declared without lawful authority and is of no legal effect.

59. In modern democratic countries citizens have a right to information in order to be able to know about the affairs of each political party which, if elected by them, seeks to formulate policies of good governance. This right to information is a basic right which the citizens of a democratic country aspire in the broader horizon of their right to live. This right has reached a new dimension and urgency, which puts better responsibility upon those political parties towards their conduct, maintenance of transparency and accountability to the public whom they aspire to represent in the parliament.

60. As per the provision of the Registration Rules of our country the registered political parties are required to submit their audited statements of accounts to the Election Commission every year for the purpose of, amongst others, transparency and accountability to the people and the electorate. According to the RPO, 1972 and the said Registration Rules it is the statutory duty of the Election Commission to collect such statements of accounts from those parties on an annual basis to regulate their functioning and to ensure a free and fair electoral process. As such, such statements should not be treated as 'secret information' under the RTI Act.

61. It is to be remembered, the political parties registered with the Election Commission are doing politics in the name of the people, amongst others, for the betterment of the citizens and the nation and towards establishing democracy in the country. The Central Information Commission of India in Complaints No.CIC/SM/C/2011/001386 and CIC/SM/C/2011/000838 profoundly held that "*The Political Parties are the life blood of our polity. As observed by Laski 'The life of the democratic state is built upon the party system.' Elections are contested on party basis. The Political Parties select some problems as more urgent than others and present solutions to them which may be acceptable to the citizens. The ruling party draws its development programs on the basis of its political agenda. It is responsible for the growth and development of the society and the nation. Political Parties affect the lives of citizens, directly or indirectly, in every conceivable way and are continuously engaged in performing public duty. It is, therefore, important that they became accountable to the public."*

62. Ignoring the people's right to know, keeping them in dark and playing hide-and-seek with them in a democratic country like us where all powers belong to the people and their mandate is necessary for ruling the country no registered political party can be allowed to take the stand that the audited statements submitted to the Election Commission were "secret information".

63. In the case in hand, though, admittedly, the political parties did not consider their submitted audited statements of accounts as 'secret information' or 'confidential', but the respondents without any mandate of law erroneously served notices upon the respective political parties concern seeking their opinion in respect of providing information to the petitioners and most of the political parties, which operate in the public sphere and have constitutional and statutory obligations for accountability and transparency, provided a negative opinion in providing such information violating the citizen's right to information guaranteed under the RTI Act, frustrating the purpose of the Registration Rules and the RTI Act and also damaging the spirit of ensuring and guaranteeing their transparency and accountability in all spheres including the people, which is unfortunate and hence, is deprecated.

64. In view of the above, we find substance in the submissions made by the learned Advocate for the petitioners and merit in the Rule.

65. In the result, the Rule is made absolute without any order as to costs.

66. The impugned decision/order dated 16.07.2014 issued by the respondent No.1-Information Commission in Complaint No.57/2014 (Annexure-N-1) affirming the decision/order dated 22.10.2013 passed in Complaint No.97/2013 directing the respondent No.2-Election Commission to seek consent/opinion from the respective political parties with respect to disclosure of their annual audited reports to the petitioner No.1 is hereby declared to have been passed without lawful authority and is of no legal effect.

67. Communicate this judgment at once.

8 SCOB [2016] HCD 132

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6882 OF 2012

F.J. Geo-Tex (BD) Limited
...Petitioner

Versus

National Board of Revenue and others
...Respondents

Mr. Sarder Jinnat Ali with
Mr. Md. Delower Hossain, Advocates,
------ For the Petitioner.

Mr. S. Rashed Jahangir, D.A.G with
Ms. Nurun Nahar, A.A.G. and
Mr. Saikat Basu, A.A.G.
-----For the Respondents

Heard on: The 17.09.2013, 24.09.2013 and Judgment on 26.09. 2013.

Present.
Justice A.F.M Abdur Rahman
And
Justice Kashefa Hussain

Income Tax Ordinance, 1984
Section 135(1) and 143(2):
The mandatory provision of Section 135(1) of ITO was not followed by the respondents prior to exercise of power under section 143(2) in freezing the bank account of the assessee-petitioners. In the instant matter the provisions of Section 143 of ITO can be resorted to only after the preceding of provisions of Section 135(1) have been complied with, but the Respondents in this case, circumvented the provisions of the law by outrightly ignoring the mandatory provisions to issue notice under the provisions of Section 135 of the Ordinance, which they cannot lawfully do. The Respondents actions in the instant case are without any lawful authority and therefore has no legal effect.
...(Para 27)

Judgment

Kashefa Hussain, J;

1. This Rule Nisi was issued calling upon the respondents to show cause as to why the impugned alleged demand notice vide TIN-003-201-5215 dated 12.06.2011 (Annexure-B) issued by the Respondent No.3 in respect of the assessment year 2010-2011 and notice u/s 143 of Income Tax Ordinance, 1984 to the bank, for attachment of bank account vide Nathi No.003-201-521/pi-315/2011-2012/56 dated 29.05.2012 (Annexure-A) shall not be declared to have been issued without lawful authority and of no legal effect and/or such other or further orders passed as to this Court may deem fit and proper.

2. The facts in short relevant for the purpose of the case are that the petitioner is a Company engaged in the business of production of Synthetic, Geotube, Geobag and Concrete etc, holding TIN No. TIN-003-201-5215 and the petitioner company filed the instant writ petition challenging the assessment in respect of the assessment year 2010-2011 and notice under section 143 of the ITO 1984 dated 29.05.2001 and the demand notice vide Tin-003-

201-5215 dated 12.06.2011 to have been unlawfully issued, without lawful authority and having no legal effect. The respondent No.1 is National Board of Revenue the Respondent No.2 is the Commissioner of Taxes and the Respondent No.3 is the Deputy Commissioner of Taxes against whom the instant Rule Nisi was issued.

3. The petitioner duly filed Income Tax return for the assessment years 2010-2011. The Respondent No.3, Deputy Commissioner of Taxes, pursuant to the submission of the return for the said assessment year 2010-2011 by the assessee-petitioner issued notices under Section 79 and 83(1) of IT Ordinance, 1984 and the same were complied and the hearing of the case completed on 12.06.2011. But the concerned DCT did not serve the demand notice under section 135(1) of the Income Tax Ordinance 1984, and IT 88, and 30 within 30 days from the dated of completion of assessment as mandated under section 135(1) read with 1st provisio of section 178(1) of the ITO 1984. The concerned DCT thereupon issued notice under Section 143 of the IT Ordinance, 1984 to the Basic Bank Ltd. Dilkusha Branch, Dhaka, wherein the assessee-applicant maintains account to stop operation of the petitioner's bank account Nathi No.003-201-5215/Sha-315/2011-2012/56 dated 29.05.2012 and demanded payment of Tk.98,25,180/- without specifying the amount of demand for the years and as such it is not legible which of the year or years relate to the demand. Therefore, the impugned demand notice sent under Section 143 of ITO 1984 to the bank for attachment of bank account without complying with the mandatory provision of section 135(1) read with 1st proviso of section 178(1) of ITO 1984 is illegal and has no legal footing to stand on and therefore liable to be declared illegal. Thereafter the petitioner moved this Court and obtained the aforesaid Rule.

4. The petitioner asserted that the respondents by their acts infringed the petitioner's fundamental rights of legal protection enshrined in Article 31 of the Constitution of the People's Republic of Bangladesh. The assessee-petitioner also states that on his own interest, he obtained a photocopy of the notices under Section 143 of IT Ordinance, 1984 issued by the Deputy Commissioner of Taxes.

5. That notice of the instant Rule Nisi was duly served upon the Respondents pursuant to which the learned Deputy Attorney General Mr. S. Rashed Jahangir representing the respondents along with learned Assistant Attorney General Ms. Nurun Nahar filed an affidavit-in-opposition on behalf of the respondent.

6. In the Affidavit-in-Opposition it is stated inter alia, that the Respondent No.3, the concerned Deputy Commissioner of Taxes after completion of hearing the assessee-petitioner under Sections 82BB/82BB(2)/83(2) on 12.06.2011, issued Assessment order, demand notice and IT 30 which was served upon the assessee-petitioner on 16.06.2011 under the provision of Section 178(2) (b) read with Section 2(48) of the Income Tax Ordinance, 1984 within the prescribed time limit as per provision of Section 94(3) of the Income Tax Ordinance, 1984. The respondent further states that the assessee-petitioner's submission in this respect is wrong and incorrect; the respondents had issued a "reminder" under Nothi No. TIN 003-201-5215/C-315 dated 03.05.2012 for arrear due demands for the assessment years 2003-2004, 2004-2005 and 2010-2011 with a request to pay the arrear demands amounting to Tk.98,25,180/- on or before 15.05.2012; for the purpose of collection of arrear demand to fulfill the requirement of national budget. That the respondents further state that the DCT, the respondent No.3 did not take any initiative or any measure under the provision of Sections 137, 138, 139, 142 of the ITO 1984, which the respondents could have proceeded against the Assessee-petitioner, but in the instant case they only proceeded under Section 143(2) of ITO

1984. The Respondents further persistently claim that the Assessment Order, Demand notice and I.T 30 for the assessment year 2010-2011 was lawfully and validly served upon the assessee-petitioner within time and hence any question of violation of any law or the violation of the provisions of any rule made thereunder does not arise at all in this respect.

7. The respondents further state that the DCT after completion of assessment under Sections 82BB/82BB(2)/83(2) on the basis of hearing on 12.06.2011 issued the assessment order, demand notice and IT 30 to the assessee-petitioner on 16.06.2011 as per the prescribed time limit i.e. within 30 days from the completion of assessment as required under Section 94(3) of the I.T. Ordinance, 1984 of the Income Tax Ordinance, 1984 and under the provision of section 178(2)(b) read with section 2(48) of the Income Tax Ordinance, 1984. As the assessment order, demand notice and I.T. 30 were lawfully and validly served upon the assessee-petitioner no question arises at all in this issue. The respondent also states that there was no violation of Article-31 of the Constitution of the People's Republic of Bangladesh by issuing notice under section 143(2) of the Income Tax Ordinance, 1984 and that it is a procedural function of the department of taxes to collect the arrear demand in the interests of the public.

8. Mr. Sarder Jinnat Ali with Mr. Md. Delower Hossain, the learned Advocates appeared on behalf of the petitioner while Mr. S. Rashed Jahangir the learned Deputy Attorney General with Ms. Nurun Nahar and Mr. Saikat Basu, the learned Assistant Attorneys General appeared on behalf of the Respondents to oppose the Rule.

9. Mr. Sarder Jinnat Ali, the Learned Advocate appearing on behalf of the assessee-petitioner took us through the impugned order inter alia, other documents/papers and materials available on record. The learned Advocate for the assessee-petitioner emphatically submits that under the provisions of the Income Tax Ordinance, 1984, after complying with Section 83(1), the DCT shall in accordance with the provision of law in the relevant cases, complete assessment under Section 83(2) of the ITO and upon completion of assessment, the DCT concerned, shall before taking any other steps, first proceed under and send a notice under Section 135(1) of ITO 1984 read with Section 178 of the Income Tax Ordinance and the said notice has to be served upon the assessee-petitioner, since it is a mandatory of provision of law. But in the instant case no such notice as required under Section 135(1) of ITO was ever served upon the assesse-petitioner. The learned Advocate for the assessee-petitioner further submits that without serving notice under Section 135(1) of ITO Ordinance, 1984, no question of recovery of taxes, attachment of bank account of the assessee-petitioner under Section 143(2) can arise and to do so is in utter disregard and violation of the law.

10. The learned Advocate strenuously argued that a valid and lawful demand notice can only be served under Section 135(1) of the ITO 1984 and also only in the manner prescribed in the 1st proviso of Section 178(1) of the Ordinance, but in the instant case, the Respondent No.3 proceeded against the petitioner directly under Section 143(2) of the Income Tax Ordinance 1984 for recovery of taxes violating the mandatory provisions of law regarding issuance of the original Demand notice under Section 135(1) read with the provisions of Section 178 of the ITO. The learned Advocate for the petitioner finally argued that the "reminder" dated 03.06.2012 sent by the Respondent No.3 to the assessee-petitioner bears no validity or legality in the eye of law, since no notice was initially served under Section 135(1) of ITO 1984, therefore the so-called "reminder notice " without first exhausting the provision of Section 135(1) is not a notice at all under the provisions of the Act or under any other law.

11. Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing on behalf of the respondents makes his arguments eloquently and takes us through the affidavit-in-opposition and submits that a " reminder " notice dated 03.05.2012 was sent to the assessee-petitioner for realization of arrear demands for the relevant years for the purpose of fulfilling the requirements of the national budget. That the DCT after completion of assessment under Sections 82BB/82BB(2)/83(2) on the basis of hearing on 12.06.2011 issued assessment order, demand notice and I.T 30 to the assessee-petitioner on 16.06.2011 as per the prescribed time limit i.e. within 30 days from completion of assessment as required under Section 94(3) of the I.T Ordinance, 1984 and the learned Deputy Attorney General argues that notice was duly served under the provision of Section 178 (2)(b) read with Section 2(48) of the Income Tax Ordinance, 1984 and that the assessment order, demand notice and I.T 30 were lawfully and served upon the assessee-petitioner and therefore there arises no question of any violation of law at all.

12. The learned Deputy Attorney General further asserted that there has been no violation of Article 31 of the Constitution of the People's Republic of Bangladesh or any of the provisions of the I.T.O, 1984 nor has there been any infringement of any other legal rights by issuing notice under Section 143(2) of the Income Tax Ordinance, 1984 and that it is a procedural function of the department of taxes to collect the arrear demand and is to be mandatarily complied with by the assessee-petitioner and argued that the alleged impugned Notice under Section 143(2) was served within the parameters of the scheme of the Ordinance and therefore is a lawful notice.

13. We have heard the learned Advocates of both sides and perused the documents and other materials available on record.

14. From the records it appears that the petitioner company filed their Income Tax Return for the assesment year 2010-2011 under the Universal Self Assessment Scheme as prescribed under Section 82BB of the Income Tax Ordinance, 1984, pursuant to which, in the assessee-petitioner's case, the said return was selected for audit by the National Board of Revenue under Section 82BB(3) of the Income Tax Ordinance, 1984 and thereafter the DCT Respondent No.3 proceeded under the provision of Section 83(1) of the Income Tax Ordinance, 1985 which was duly complied with, by the assessee-petitioner in the instant matter.

15. From our scrutiny of the documents and materials placed before us, it is also apparent and quite obvious from the records that as has been alleged by the assessee-petitioner that pursuant to assessment, no Notice of Demand was ever served upon the assessee-petitioner as is required under the provisions of Section 135(1) of the Income Tax Ordinance, 1984 and therefore the petitioner did not get any opportunity at all to comply with the demand, and appears quite obvious that the assessee-petitioner was surprise to learn that the Respondents had taken steps for attachment of his bank accounts by only sending a notice dated 29.05.2012 to the concerned bank under the provisions of section 143(2) of the Income Tax Ordinance, 1984, but without any compliance of the other mandatory provisions.

16. Now the pertinent question for our determination that arises is that whether the sudden and unexpected notice dated 29.05.2012 sent to the concerned bank asking for freezing the bank account of the assessee-petitioner under Section 143(2) of the Ordinance and the alleged assessee-petitioner's " reminder " notice dated 12.06.2011 were at all lawfully served and valid notices in the eye of law. The assessee-petitioner categorically

asserted in his writ petition that no notice was lawfully and validly served upon him under the mandatory provisions of Section 135(1) of the Income Tax Ordinance, 1984 read with Section 178(2)(b). The onus now therefore, lies upon the respondents to show us that the demand notice as they claimed was validly and lawfully served upon the assessee-petitioner.

17. On perusal of the materials on record our finding is that pursuant to assessment of return under Section 83(1), no notice of demand was served upon the assessee-petitioner under the mandatory provision of Section 135(1) of the ITO and furthermore we also find that no such documents have been annexed herewith in the affidavit-in-opposition from which it can be adduced before sending Notice under Section 143 to the concerned bank that the demand notice was duly served under Section 135(1) of the Ordinance the sending of such notice being a mandatory provision of law Section 135(1) of the ITO reads as follows :-

> "Where any tax is payable in consequence of any assessment made or any order passed under or in pursuance of this Ordinance, the Deputy Commissioner of Taxes shall serve upon the assessee (which expression includes any other person liable to pay such tax) a notice of demand in the prescribed form specifying therein the sum payable and the time within which, and the manner in which, it is payable, together with a copy of an assessment order."

18. From a plain reading and interpretation of Section 135(1) it becomes crystal clear to us and we opine that this Section makes it mandatory to serve a demand notice under this Section and particularly the use of the word " shall " means and it is the intention of the legislature in the above Section 135(1) that the assessee-applicant is entitled under the law to be served with a notice in the prescribed form specifying other requirements under the law and there is no ambiguity in the language of Section 135(1) that may indicate a different intention. It appears quite clearly that no other provisions of the Act can be resorted to prior to issuing the mandatory notice under Section 135(1) subsequent to any order of assessment under the act. The words " in consequence of any assessment made or any order passed " only puts stress on the intention of the legislature, that any assessment or order of assessment, shall be mandatorily followed by a notice under Section 135(1) before any other Section of this Ordinance can be resorted to.

19. Therefore pursuant to any Order of assessment, the next valid and lawful step to be taken by the DCT concern for the purpose of recovery of tax shall be a Service of proper notice under Section 135(1) read with Section 178 of the Ordinance and the said Section 179 sets out the procedure to be followed in sending the Notice

20. Upon a plain reading of the relevant Sections and from our appreciation and understanding of the scheme of the Ordinance we find merit in the arguments of the learned Advocate for the assessee-petitioner and we are in conformity with his assertions. It is crystal clear that Section 143 of the Ordinance cannot be directly resorted to under any circumstances under the law without first exhausting the provisions of Section 135 read with Section 178(1) of ITO 1984 and such notice does not bear only validity and is unlawful.

21. The relevant portion of Section 143 for the purpose of determining the instant case is Section 143(2)(a) of the Income Tax Ordinance which reads as follows :-

> " Income Tax Ordinance 1984
> Section:143
> Other modes of recovery-
> (1) ----------

1(A) ----------
(2) For the purposes of recovery of any tax payable by an assessee, the Deputy Commissioner of Taxes may, by notice in writing, require any person.

(a) from whom [any money or goods] is due or may become due to the assessee, or who holds, or controls the receipt or disposal of, or may subsequently, hold, or control the receipt or disposal of, [any money or goods] belonging to, or on account of, the assessee, to pay to the Deputy Commissioner of Taxes the sum specified in the notice on or before the date specified therein for such payment."

(3) -------- (8) ----------

22. But we feel necessary to persuade here that this Section 143(2) cannot be lawfully resorted to without following the mandatory provisions of Section 135(1) of ITO read with Section 178 of the Ordinance. Contrarily the Respondents have tried to circumvent the mandatory provisions of law and have flouted the mandatory provisions required to be complied with and it is our view that by doing so they bypassed the law, acted arbitrarily and in total disregard of the law and the mandatory procedures prescribed under the law for recovery of taxes.

23. The respondents asserted and claimed in their affidavit-in-opposition that they have complied with the law following the provisions of Section 178(1) of Section 178(1) reads as under :-

"Income Tax Ordinance 1984
Section 178

(1)" A notice, an assessment order, a form of computation of tax or refund, or any other document may be served on the person named therein either by registered post or in the manner provided for service of a summons issued by a Court under the Code of Civil Procedure, 1908 (Act V of 1908);

[Provided that where a notice, an assessment order, a form of computation of tax or refund, or any other document is received by an authorized representative as referred to in section 174, such receipt by the authorized representative, shall be construed as valid service on that person.]

1(A) ----------
(2) ------ (3) ------

24. The assertion of the Respondents here is misplaced and we cannot agree with it and since sending the Demand notice under Section 135(1) is a substantial duty and mandatory function prescribed under the Ordinance thereunder and ought to be carried out by the Respondents. Therefore a mere procedural function provided for under Section 178(1) has no meaning or validity without first serving proper demand notice under Section 135(1) of ITO. The proviso to Section 178(1) including the Section 178 2(b) is quite clear that the said provision in this Section is only a part of the procedural function that has to be complied with only for the purpose of serving Demand notice inter alia, other Orders etc under Section 135(1). In this regard the rationale we apply here is that, since no "notice" was issued at all under section 135(1) of ITO 1984, therefore it follows upon legal reasoning that issuance of the same under the provisions of or any part thereof Section 178 does not arise at all in the instant case and bears no relevance to the issue in question.

25. Therefore we must disagree with the learned Deputy Attorney General's contention that "Notice" was validly served upon the Assessee-Petitioner under the provisions of Section 178 (1) (2) (b) since these Sections as we have already explained above only sets out

mere procedural formalities to be followed pursuant to any Notice under Section 135 (1) of the Ordinance. We do not agree with the Learned DAG when he persists that the impugned "Notice" served upon the Bank under Section 143 of the IT Ordinance for attachment of the Bank account of the Assessee-Petitioner and the "reminder" are valid and lawful Notices and the Learned Deputy Attorney General submission bears no merit.

26. In our opinion, the action of the Respondents in directly serving a Notice upon the concerned Bank under Section 143 without first issuing Notice under Section 135 (1) of the IT Ordinance upon the Assessee-Petitioner is arbitrary, unlawful and a direct infringement upon the fundamental rights of the Assessee-Petitioner and is in no way acceptable in the eye of law and equity. And to come to the so called "reminder" dated 03.05.2012 sent by the Respondents, is to say the least, an absurdity since no question of any "reminder" can even arise, since no valid, lawful initial Notice under Section 135 (1) of the Ordinance was ever sent to the Assessee-Petitioner. The Assessee-Petitioner in our opinion has been deprived of his fundamental right under the constitution *inter-alia,* his statutory rights under the Ordinance of his entitlement to be served with a valid Notice under Section 135 (1) before any other steps may be taken under any other Section of the Ordinance for recovery of any Tax that may be due from him by the Respondents.

27. In view of the foregoing facts and circumstances and discussions made above, we are of the opinion that the mandatory provision of Section 135(1) of ITO was not followed by the respondents prior to exercise of power under section 143(2) in freezing the bank account of the assessee-petitioners. In the instant matter the provisions of Section 143 of ITO can be resorted to only after the preceding of provisions of Section 135(1) have been complied with, but the Respondents in this case, circumvented the provisions of the law by outrightly ignoring the mandatory provisions to issue notice under the provisions of Section 135 of the Ordinance, which they cannot lawfully do. The Respondents actions in the instant case are without any lawful authority and therefore has no legal effect.

28. In consequence, upon analysis of the legal reasoning we have relied upon and taking consideration the corresponding facts presented before us and the other the reasons explained above, we find no merits in the Rule and we have arrived at the conclusion that the said notice sent by them are not valid notices and are a nullity in the eye of law.

29. We are further inclined to add here that, as is apparent from the materials on record and the assessee-petitioner's submissions an Application of Stay of Recovery of Taxes was made by the assessee-petitioner during pendency of the Rule. The petitioner stated in his subsequent application for recovery of tax that this Court while pleased to issue Rule in the matter, did not issue any ad-interim order against recovery of tax, conversely while issuing Rule this Court directed the petitioner to prefer an appeal first and in case of failure to obtain relief the assessee-petitioner would be at liberty to come back to this Court with the appellate result for consideration by us in matters relating to stay of recovery of such tax.

30. From the assessee-petitioner's statement made in the application for stay and Annexure-C (annexed in the application for stay) that pending Rule, the assessee-petitioner preferred an appeal to the Commissioner of Taxes (Appeals), on the grounds of non-service of Demand Notice and I.T. 30 within the prescribed period of 30 days following the assessment, asserting that consequently the assessment order is barred by limitation and the demand is unenforceable.

31. The Commissioner of Taxes (Appeals) allowed the appeal but as far as the assessment order under Section 83 of ITO 1984 is concerned, the Commissioner of Taxes (Appeal) Dhaka in his order dated 22.11.2012 upheld the earlier Demand Notice dated 12.06.2011 passed by the DCT and which is the impugned Demand Notice in the instant Writ Petition. Consequently the earlier assessment order passed by the DCT is still alive so far as it relates to the assessment of return filed by the petitioner. It further appears that against the order of the CTA dated 22.11.2012 the assessee-petitioner did not prefer a further appeal before the Taxes Appellate Tribunal which is the next proper forum to obtain proper relief. But since it appears that not preferring an appeal before the Appellate Tribunal was an inadvertent mistake on the part of the petitioner and the writ jurisdiction is not the proper forum to obtain relief against upholding and affirmation of the assessment order of the DCT by the C.T.A, we feel inclined to add that the petitioner will be at liberty to prefer an appeal before the Taxes Appellate Tribunal and thereby leave it at the assessee-petitioner's discretion to try his luck there if he so desires.

32. In the Result, the Rule is made absolute with the observations made above and the impugned alleged demand notice vide TIN-003-201-5215 dated 12.06.2011 (Annexure-B) issued by the Respondent No.3 in respect of the assessment year 2010-2011 and notice u/s 143 of Income Tax Ordinance, 1984 to the bank, for attachment of bank account vide Nathi No.003-201-521/p¡-315/2011-2012/56 dated 29.05.2012 dated 29.05.2012 (Annexure-A) are declared to have been issued without lawful authority and of no legal effect.

33. However, there shall be no order as to costs.

8 SCOB [2016] HCD 140

HIGH COURT DIVISION
(Criminal Appellate Jurisdiction)

Criminal Appeal No. 7403 of 2009
With Criminal Appeal No. 8820 of 2009

Mr. Md. Tajul Islam, Advocate
…For the Appellants

Md. Tasli alias Taslim & Another
…Convict-Appellants

Versus

The State
…Respondent

Mr. Nazibur Rahman, D.A.G with
Mr. Md. Matiur Rahman, A.A.G.
…For the state, respondent

Heard on: 02.09.2015
Judgment on: 08.09.2015

Present:
Mr. Justice Md. Abu Tariq
And
Mr. Justice Amir Hossain

Natural and competent witness:
Although the P.W.2 is the mother of the deceased but she is a natural and competent witness. Her evidence cannot be discarded only because of her relation with the deceased. ... (Para 31)

Evidence Act, 1872
Section 8:
It is gathered from the evidence of P.W.2 that out of enmity the accused Alfazuddin and Tasli @ Taslim being armed with deadly weapon like dagger "Dao" etc. came at the P.O. house and dealt indiscriminate dagger and dao blows on the person of the victim. Such facts clearly speak about their very motive and intention to kill the victim Aziron. Immediately after the occurrence, the Convict-Appellant Alfaz Uddin and Tasli @ Taslim disappeared from the locality, which indicates their guilt and that is relevant under section 8 of the Evidence Act. ... (Para 36)

Judgment

Amir Hossain, J.

1. These two Criminal Appeals are taken up together for hearing and disposal by a single Judgment.

2. These two appeals at the instance of convict appellants Tasli @ Taslim and Alfazuddin are directed against the judgment and order of conviction and sentence dated 22.04.2008 passed by the learned Sessions Judge, Jamalpur in Sessions Case No. 162 of 2007 arising out of Dewangonj P.S. Case No. 14, dated 23.11.2004 corresponding to G.R. Case No. 40(2)/04 convicting the appellants under section 302/34 of the Penal Code and sentencing them

thereunder to suffer rigorous imprisonment for life and to pay a fine of Tk. 20,000/= (twenty thousands) each, in default to suffer imprisonment for further 6(six) months more.

3. The prosecution case, in short, is that one Zariful Begum wife of Md. Azizul Hoque (Now dead) of south Vatkhawa P.S. Dewangonj, District-Jamalpur lodged a F.I.R to the effect that her second son Abdur Rahman got married with Rasheda Khatun, daughter of Tasli@ Taslim of the same Village. Her son being poor went to Dhaka and had been staying there to pull Rickshow. However, taking his absence said Rasheda Khatun fell herself in immoral relation with Pakkir of the same village, the matter was circulated in the locality. At that her son sent Rasheda to her parents house. On that enmity between two families and other family of Pakkir, the matter became very serious. Many cases and counter cases amongst them. Before this occurrence, brother of said Rasheda namely Alfaz and other came to the house of Zariful Begum and tortured her husband Azizul and also searched her and her daughter deceased Aziron. Later on, at about 7:00 P.M. in the evening on 22.11.2004 said Alfaz and Taslim and others armed with deadly sharp cutting weapon like "Dagger" Ramdao" etc. entering in their home and attacked on her daughter Aziron and on her and her husband Azizul. The accused Alfaz could hold the hair bundle of Aziron and pointed dagger blow in her right side of neck. At that Aziron came out from the house with shouting and fell on the ground on the courtyard, at that the accused Alfaz started blow of Ramdao hap-hazardly. Informant Zariful Begum along with her husband came forward to save Aziron but inflicted blows hap-hazardly by accused Alfazuddin with Ramdao with an intention to kill them and other accused persons surrounded Aziron. At that she (informant) and her husband Azizul were injured. At their shouting neighbour Asia Begum came forward to the spot who tried to save Aziron pouring water in her head but in vain. Aziron died on the spot.

4. Stating the facts that F.I.R was lodged against the eight persons which was record as Dewangonj P.S. Case No. 14, dated 23.11.2004. At first the Sub-Inspector Hashem Ali Mridah then sub inspector S.M.Fazlul Hoque attached in the police station was entrusted to investigate the case who after getting the charge of investigation, visited the place of occurrence, prepared the sketch map of the place of occurrence and recorded the statement of witnesses under section 161 of the Code of Criminal Procedure and having found prima-facie case against both the accused 1. Md. Alfaz Uddin and 2. Md. Tasli (Taslim) submitted charge sheet No.40, dated 25.04.2005 under section 448, 323, 324, 326, 307, 302/114 of the Penal Code and did not send up the rest.

5. The case record was transmitted in the Court of Sessions Judge and same got registered as Sessions Case No. 162 of 2007.

6. At the commencement of the trial of the case a charge was framed under section 302/34 of the Penal Code against both the accused persons namely 1. Md. Alfaz Uddin and 2. Md. Tasli (Toslim). Since both the accused persons were absconding from the beginning, the charge could not be read over to them.

7. At the time of trial, the prosecution examined as many as 08(eight) witnesses and defence examined none. After recording the statements of the P.Ws the learned Sessions Judge could not examine the accused persons under section 342 of the Code of Criminal Procedure as they were absconding.

8. The defence case as it appears from the trend of cross-examination by the state defence both the accused persons have been falsely implicated in the case.

9. After conclusion of all formalities and considering the evidence on record the learned Sessions Judge, Jamalpur found the accused Alfazuddin and Tosli @ Taslim as guilty of the charge under section 302/34 of the Penal Code and convicted and sentenced them as stated above.

10. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, the convict-appellants have filed instant two Criminal Appeals separately.

11. Mr. Md. Tajul Islam, the learned Advocate appears for the convict-appellants submits that most vital eye witness Asia Begum was not examined by the prosecution and no explanation was given from the prosecution side as to why she was not examined. He further submits as per Zariful Begum (P.W.2) and Amena Begum (P.W.7) are the eye witnesses but here P.W.7 did not see the alleged occurrence. Learned Advocate submits that except the informant two other persons namely Shuku and Tajimul Islam came to the place of occurrence but they were not produced before the Court without any plausible reasons or explanation and as such in the absence of any *mens rea* or intention of killing the punishment under section 302 of the Penal Code cannot be sustained.

12. The learned Deputy Attorney General appearing on behalf of the State submits that the evidence on record and the other material facts and circumstances are sufficient to justify the conviction and sentence and as such the appeal should be dismissed.

13. Now let us discuss the evidence of the prosecution witnesses:
P.W.1 Dr. Abdullah Al Amin, stated in his deposition that on 24.11.2004 he held the Post-mortem examination upon the dead body of Aziron a woman of 20 years old and found the following injuries:
1. One penetrating injury 3″ x 1″ x chest cavity over lower part of right side of front of the neck passing obliquely in the right side of chest cavity.
II. One incised wound on each wrist 2″ x ¼″ x skin each.
III. One incised wound 3″ x 1″ x ½″ over left leg below knee.

14. According to P.W's opinion the death of Aziron was caused due to shock and haemorrhage as the result of above stated injuries which were ante-mortem and homicidal in nature.

15. State defence has declined to cross examine the witness.

16. P.W.2 Jariful Begum has stated that she is the informant of the case and her daughter Aziron was murdered at her home, in her presence out of enmity by the accused Alfaz, Taslim and others. P.W.2 further deposed that accused Alfaz pierced her daughter by a dagger and accused Taslim chopped her by a Ramdao right and left and at that point of time her husband Md. Azizul (now dead) also saw the incident. P.W.2 states that witnesses namely Asia Begum (Now dead) and Amena Begumalso saw the incident. P.W.2 discloses that the accused Alfaz is the brother and accused Taslim is the father of her daughter in-law Rasheda. P.W.2 also disclosed that the original problem started between deceased Aziron and his daughter in law Rasheda.

17. P.W.2 in cross-examination has stated that there were two other cases against the accused.

18. In her cross-examination P.W.2 has denied the defence suggestion that she did not see the incident of assault inflicted upon her daughter Aziron by the accused persons.

19. P.W.3 Jahurul Islam, brother of the deceased Aziron stated in his examination in chief that the deceased Aziron was murdered more than three years back at their paternal home by the accused Alfaz and Taslim and others. According to this witness he has heard that incident from his mother and he was not present at home at the time of occurrence. In cross-examination, P.W.3 has denied the suggestion that he did not hear the name of accused from his mother.

20. P.W.4 Jainal Abedin, stated in his examination-in-chief that he is a rickshaw puller and Aziron was his sister and he heard the incident of murder from his mother that the accused Alfaz and Taslim and other accused murdered his sister at his paternal home.

21. In cross-examination, P.W.4 has denied the suggestion that he did not hear the name of accused from his mother.

22. P.W.5 Rabijul Hoque, Village doctor was tendered by the prosecution and the state defence declined to cross-examine him.

23. P.W.6 Ful Mia, in his examination-in-chief stated that on 22.11.2004 at about 7:00 P.M. the victim Aziron was killed in her paternal home by the accused Alfaz, Taslim and other. He heard the incident from the informant. He proved the seizure list as Ext. I, his signature Ext. 1/1 and platemat as material Ext. I, lungi mat Ext. II and bamboo stick Ext. III and blood strain mat Ext.IV respectively.

24. The defence declined to cross-examine him.

25. P.W.7 Amena Begum stated in her examination in chief that about three years back accused Alfaz and Taslim and others killed the victim Aziron at her paternal home. She said that hearing hue and cry she ran to the place of occurrence and saw the accused during retreat with “dao” and dagger. In her cross-examination she (P.W.7) denied the suggestion that she did not see the accused running with arms after assaulting the victim Aziron.

26. P.W.8 S.M. Fazlul Haque, the S.I. of Police and I.O. of the case, stated in his examination in chief that, S.I. Hashem Mirdha has investigated the case before him. Then he took over the investigation of case and adopted the investigation held by Hashem Mirdha. He stated that during his investigation he examined 8 witnesses and submitted the charge sheet against the accused persons. He proved the F.I.R marked as Ext.2 and the signature of O.C. Abul Fazal as Ext. 2/1, Sketch map marked as Ext.3 and Index Ext.4, Inquest report Ext.5.

27. In cross-examination, P.W.8 denied the suggestion that he did the investigation perfunctorily and the Charge Sheet submitted by him has no basis.

28. We have heard the learned Advocate for the convict-appellants and the learned Deputy Attorney General, perused memo of appeals, FIR, charge sheet, statement of the

P.Ws and other materials on record. Also perused the findings of the Sessions Judge in the impugned judgment.

29. On scrutiny it appears that the prosecution has examined as many as eight witnesses, of whom P.W.2, the mother of the deceased, who is the informant, saw the alleged occurrence of causing death of her daughter Aziron by the convict-appellants. So, P.W.2 is an eye witness of the occurrence. Another vital witness is P.W.7 Amena, who rushed to the place of occurrence hearing the hue and cry and it is P.W.7 who has clearly stated that she saw the accused persons fleeing away with deadly weapon like "dao" and "dagger" in their hands. They are the two vital witnesses, who are the star witnesses of the case. The doctor witness P.W.1 Dr. Abdullah Al Amin held post-mortem on the body of the deceased and disclosed the reason of death of Aziron, which was caused due to injuries by a sharp cutting weapon. According to P.W.1, the death was ante-mortem and homicidal in nature. It is found that the Post-Mortem Report lends a clear support to the prosecution story of causing the death of Aziron. P.W.2, the mother of the deceased being an eye witness narrated the occurrence stating that she herself saw the convict-appellants' participation in killing her daughter. Another eye witness P.W.7Amena Begum also saw the accused persons fleeing away immediately after the occurrence with lethal weapons in their hands. It is noted that two other charge sheet named vital witnesses namely Md. Azizul Hoqueand Asia Begum have died by this time. So, the prosecution could not produce them during the trial. In this case except P.W.2 Zariful Begum, no other witness saw the alleged occurrence. It is important to mention here that the occurrence took place in an evening at a village and at that time the deceased was at the kitchen of the dwelling hut and her mother and father were also there. In front of them the appellants attacked their daughter Aziron. The victim Aziron cried out to be saved from the attack of the appellants and she fellon courtyard but in vain. Aziron died on the spot. The occurrence took place on 22.11.2004 at about 7:00 P.M. There prevails silence at that time in the village area and that time is considered as night. Other brothers of the deceased were not then present at the house during the occurrence. So, the provable witness of the alleged occurrence were the deceased's mother and father. Since, the father has alreadydied, so it was not possible for prosecution to adduce the deceased's father. However, her mother P.W.2 Zariful Begum has deposed as an eye witness and corroborated the alleged involvement of the convict appellants with the occurrence. We do not find any reason to disbelieve the evidence given by P.W.1, P.W.2 and P.W.7.

30. In the case of Abdul Hai Sikder and other Vs State reported in 43 DLR (AD) 1991 at page-95, their lordships of the Appellate Division observed as follows: "conviction of the appellants can safely be based on the solitary evidence of the eye witness P.W.1. His evidence is full, complete and self contained. It may not have received corroboration from other witnesses, but it stands fully corroborated by the circumstances of the case and the medical evidence on record. Its fullness and completeness are enough to justify the conviction."

31. Although the P.W.2 is the mother of the deceased but she is a natural and competent witness. Her evidence cannot be discarded only because of her relation with the deceased. In the case of Sadat Ali and another Vs State reported in 44 DLR, 1992 at page-217 High Court held that" PWs though relations they are natural and competent witnesses. Their evidence cannot be discarded only because they are relations." Similar principle of law has also been approved by our Apex Court in the case of Badsha Mia (Md) Vs State reported in 2 BLC(AD) 1997 at page-179. From the evidence of P.W.2, it is observed that her evidence is wholly trustworthy and during her cross-examination the defence could not shake her

credibility. We do not find any reason to disbelieve the evidence given by the P.W.1, the Doctor witness, the P.W.2 Zarful Begum and P.W.7 Amena Begum.

32. Mr. Md. Tajul Islam, the learned Advocate contends that non-examination of the witnesses gives rise to an adverse presumption under section 114(g) of the Evidence Act and the prosecution has failed to examine a vital charge sheet named witness that will lessen the credibility of the prosecution.

33. In reply, the learned D.A.G submits that the prosecution has kept no stone unturned to produce the available witnesses and for that end exhausted all the processes to secure the attendance of the witnesses. He submits that some of the witnesses have died during the trial and some of them could not be produced in the trial Court even after taking all legal steps. The learned D.A.G contends that non-production of some witnesses cannot by itself be taken as a plea for raising any adverse presumption regarding the charge made against the accused persons, we find strong force in the submissionmade by the learned D.A.G. Moreover, in the evidence of P.W.1, P.W.2 and P.W.7 have, so far we find sufficiently substantiated the prosecution case and to attract its credibility.

34. Having regard to what we have discussed above and attending facts and circumstances, we do not find any reason to disbelieve the charge made against the convict-appellants or interfere with the findings and decision taken by the learned Trial Court.

35. The Trial Court, as it appears, on scanning the incriminating materials on record and considering the evidence given by P.Ws along with relevant papers has rightly come across to record its decision finding the accused guilty of the charge under section 302/34 of the Penal Code and in doing so, the Trial Court has not done any mistake on any question of fact or law.

36. It is gathered from the evidence of P.W.2 that out of enmity the accused Alfazuddin and Tasli @ Taslim being armed with deadly weapon like dagger “Dao” etc. came at the P.O. house and dealt indiscriminate dagger and dao blows on the person of the victim. Such facts clearly speak about their very motive and intention to kill the victim Aziron. Immediately after the occurrence, the Convict-Appellant Alfaz Uddin and Tasli @ Taslim disappeared from the locality, which indicates their guilt and that is relevant under section 8 of the Evidence Act. It transpires that the convict-appellants had a clear intention and premeditated plan to finish off the victim Aziron and there was no element of provocation on her part.

37. Considering the above aspects of the case, attending facts and circumstances and the evidence on record, we are inclined to hold that the prosecution has succeeded to prove the charge under section 302/34 of the Penal Code against the convict appellants beyond all reasonable doubt and thereby make them liable to suffer the sentences thereunder.

38. Since the impugned judgment and order of conviction does not suffer from any infirmity or illegality, we thus find no reason to interfere with the impugned judgment passed by the trial Court.

39. Consequently both the appeals are dismissed. The judgment and order of conviction dated 22.04.2008 passed by the learned Sessions Judge, Jamalpur, in Sessions Case No. 162 of 2007 arising out of Dewangonj Police Station Case No. 14, corresponding to G.R. Case

No. 40 of 2004 convicting the appellants and sentencing them to suffer rigorous imprisonment for life under section 302/34 of the Penal Code are hereby affirmed.

40. The convict-appellant Md. Tasli @ Taslim on bail is directed to surrender before the Trial Court within 60(sixty) days from the date of receipt of the record and to serve out the remaining period of sentence.

41. Send down the L.C. Record along with the copy of this judgment to the Court concerned and Jail authority immediately.

8 SCOB [2016] HCD 147

HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

Civil Revision No. 2702 of 2013

Aleya Begum and others
…Petitioner

Versus

Mir Mohsin Ali and others
…Opposite-Parties

Mr. Md. Khalilur Rahman, Advocate
…for the petitioners

Mr. Mohammad Eunus, Advocate
…for the opposite-parties

Heard on: 01.04.2015, 02.04.2015 & 08.04.2015
Judgment on: 16.04.2015

Present:
Mr. Justice Sharif Uddin Chaklader
And
Mr. Justice Khizir Ahmed Choudhury

Partition Suit:
In our view the petitioners will not be prejudiced for not impleading them parties because as legal heirs, they are entitled to get the shares of their predecessors. Even a non contesting party, who has got share in the partible property, can pray for allotment of saham on payment of proper court fees before drawing up the final decree. … (Para 13)

Judgment

Khizir Ahmed Choudhury, J:

1. Instant Rule has been issued calling upon opposite parties to show cause as to why judgment and decree dated 13.03.2013 passed by learned Joint District Judge, 2nd Court, Patuakhali in Title Appeal No.84 of 1996 allowing the appeal by setting aside the judgment and decree dated 30.05.1996 passed by leaned Additional Senior Assistant Judge-in-charge, Patuakhali Sadar, Patuakhali in Title Suit No.84 of 1981 decreeing the suit should not be set-aside.

2. Sona Banu Bibi, predecessor of present petitioners being plaintiff No.1, Abdur Rahman predecessor of opposite party No.2 and Lal Banu Bibi plaintiff No.3 filed the aforesaid suit contending inter-alia that entire lands of cadastral survey khatian No.599, eight annas share of C.S. khatian No.611 and fourteen annas share of C.S. Khatian No.709 belonged to Meher Ali Khan and rest land of C.S. Khatian No.611 and 709 belonged to Jahur Jan Bibi; that Jahur Jan Bibi died leaving behind two sons Meher Khan and Alam Khan and three daughters Khatejan, Abejan and Elemjan; that Meher Khan executed and registered a deed of release on 12.04.17 in favour of Alam Khan in respect of ten annas share of C.S. khatian 599, eight annas share of C.S. khatian 611 and six annas share of C.S. khatian 709 and handed over possession; that Meher Khan also sold .75 acres of land of C.S. khatian Nos.599, 611 and 709 to plaintiff Nos.1 and 3 in the benami of Maizuddin Peada and Abdul Ali Howeader and subsequently Abdul Ali and heirs of Maizuddin peada executed deed of release in favour of the plaintiffs on 07.10.1976; that Alam Khan died leaving behind one

Brother Meher Khan, two daughters plaintiff Nos.l and 3 and wife Aiful and thereafter Aiful died leaving behind two daughters plaintiff Nos.l and 3; that Meher Khan died leaving two sisters Elemjan and Abejan and thereafter, Elemjan died leaving behind her only sister Abejan and then Abejan died leaving behind only son plaintiff No.2 and thus plaintiffs got 3.62 acres of land but the defendants declined to effect partition taking advantage of wrong record and hence the suit.

3. Defendant Nos. 5-6 and 18-19 contested the suit by filing a separate written statement contending that Tara Khan being owner and possessor of C.S. Khatian Nos. 599, 611 and 709 died leaving behind wife Jahur Jan, one son Alam khan and three daughters Khatejan, Elemjan and Abejan. Jahur Jan died leaving aforesaid son and daughters and then Khatejan died leaving behind one son defendant No.l who sold $25\frac{1}{2}$ decimal land on 04.04.1970 to defendant Nos.5 and 6 and $25\frac{1}{2}$ decimal to defendant No.7 who sold his interest to plaintiff Nos.1 and 3 by a kabala dated 07.7.1976. Present plaintiffs earlier filed Title Suit No.253 of 1970 before the First Munsif, Patuakhali wherein they admitted Tara Khan as the owner of C.S. Khatian No. 599, 611 and 709.

4. Defendant No.18 and 19 contested the suit by filing written statement contending inter-alia that Tara Kha being original owner of the suit land married Johura Bibi who has a son namely Meher Ali by her previous husband Dhonai; that one son Alam Kha and three daughters namely Abejan, Alemjan and Khotejan were born in the wedlock of Johura Bibi and Tara Kha and during C.S. record Meher Ali prepared entire land of Tara Kha in his name but subsequently he executed and registered a deed of release on 12.08.1977 in favour of Alom Kha; that in fact Alom Kha and his 3 (three) sisters became owner as heirs of Tara Kha; Alom Kha survived by 2 (two) daughters Lalboru, Sona Boru and 2 (two) sisters Abejan and Elemjan and thereafter Abejan and Elemjan transferred their shares to defendants Nos.18 and 19 by deed of sale dated 18.07.1975 but as there was mistake in the sale deed regarding plots, they instituted Civil Suit No. 207/91 to the court of Assistant Judge, Patuakhali. Hence they prayed for dismissal of the suit.

5. The case of defendant No.16 in short, is that, Abejan Bibi, Sona Banu Bibi and Lal Boru while owning and possessing lands under (in S.A. khatian No.4149), R.S. khatian No.1761, and R.S. Khatian No.1701 corresponding to S.A. khatian No.394 sold .11 decimals land to Motaharuddin and Farooq Ahmed on 13.02.1997 and also transferred .11 decimals land to Mizanur Rahman and Haron-or-Rashid on 20.02.1971 and thereafter Sona Boru and Lal Boru jointly sold .11 decimals of to Mizanur Rahman and Nurun Nahar alias Rebaka Begum on 22.03.1972 and Sona Banu alone sold .11 decimals land to Motahar Uddin on 13.02.1971; that in the aforesaid manner Motaharuddin and others became owners of 44 decimal land and they transferred said land on 14.02.1977 and 15.02.1977 to defendant No.16 Abdul Latif Miah and who has been holding and possessing 22 decimal land as homestead.

6. Plaintiff examined 4 witnesses, defendant No.5 and 6 examined 6 witnesses, defendant No.18 and 19 examined 4 witnesses and defendant No.16 examined himself in support of his claim.

7. Trial Court decreed the suit in part by judgment and decree dated 30.05.1996 allotting 3.21 acres of land to the plaintiffs and 0.22 acres to defendants No.16.

Plaintiffs preferred appeal, being Title Appeal No.84 of 1996 before District Judge, Patuakhali. Learned Subordinate Judge, 2nd Court, Patuakhali after hearing, allowed the appeal by judgment and decree dated 05.11.1997 allotting 3.62 acres land to the plaintiffs. In Civil Revision 812 of 1998, preferred by defendant No.18 and 19, High Court Division made the rule absolute and remanded the Appeal to the Appellate Court by judgment and order dated 25.07.2010 directing the appellate court to determine the share of Abejan and Elemjan keeping the share of the plaintiffs intact.

8. By filing an application on 23.10.2012 under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure present petitioners prayed for amendment of plaint of original suit which was disallowed by the appellate Court on 12.02.2013 holding that the plaintiffs brought certain new facts beyond the order of remand. The appellate court found that the Hon'ble High Court Division kept the share of the appellant having 3.62 acres intact. By judgment and decree dated 13.03.2013, appellate court allowed the appeal granting .56 acres land to the share of defendant No.18 and 19 keeping shares of the plaintiffs intact.

9. Mr. Md. Khalilur Rahman learned advocate appearing on behalf of the petitioners submits that the appellate court committed error in not impleading the heirs of deceased Sonabanu Bibi and deceased Abdur Rahman in the appeal as they are entitled to get 3.62 acres of land left by their predecessors. Learned lawyer further submits that the appellate Court committed error by rejecting the application for amendment.

10. Mr. Md. Younus learned advocate appearing on behalf of the opposite parties submits that the appellate court passed decree in favour of the appellants in preliminary form which is not inconsistent with remand order and the appellate Court also committed no error in rejecting the application for amendment of plaint filed by the petitioners.

11. We have studied, and considered impugned judgment and decree of the appellate court and other papers. The contention of the petitioners is that as legal heirs of decree holders, they are entitled to be impleaded as parties in the appeal as there would be complicacy to draw final decree in their absence. Their further contention is that as the revisional court impleaded them as parties, so the appellate Court also ought have implead them as parties.

12. It appears that in appeal they brought a lengthy application for amendment of plaint where also they sought to be impleaded as plaintiffs but the petitioners brought some new facts beyond the findings of the revisional Court for which their plea of impleading them parties might be kept out of consideration by the appellate court.

13. In our view the petitioners will not be prejudiced for not impleading them parties because as legal heirs, they are entitled to get the shares of their predecessors. Even a non contesting party, who has got share in the partible property, can pray for allotment of saham on payment of proper court fees before drawing up the final decree.

14. In the case of Sayeda Khatoon -vs- Abdur being dead his heirs 1A Abdus Salam and others reported in 6 MLR (AD) 234 our Apex Court held that "***Although the petitioner did not contest the suit for partition, she could pray for allotment of her Saham on payment of proper court fee before drawing up the final decree. With the drawing up of the final decree the proceedings come to an end. This being the position of law with regard to partition suit, the stay of the execution proceeding as prayed for***

in the subsequently instituted suit can not be granted." So, they can brought this matter to the notice of the trial Court where final decree will be drawn and they are entitled to get the share as allotted in favour of their predecessors.

15. In the present case, the claim of the petitioners are on better footings as their predecessors got saham from the court of law which they are entitled to get and they were also impleaded in the Civil Revision. If they so desire, they still can file application to the trial Court to implead them as heirs in place of their predecessors as the trial Court is in seisin of the matter and can consider such application.

16. Considering the facts and circumstances and legal aspect appellate Court rightly allowed the appeal and we find no infirmity therein.

17. In the result, the rule is discharged without any order as to costs. The judgment and decree dated 13.3.2013 passed by the learned Joint District Judge, 2nd Court, Patuakhali in Title Appeal No.84 of 1996 is hereby upheld.

18. The order of status-quo granted earlier by this Court stands vacated.

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