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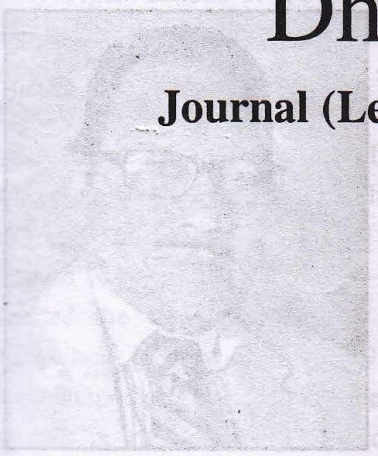
Code of Criminal Procedure (V of 1898)

Section 376—The petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell

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Happy New Year

Happy new year to all of our valued readers and patrons. It is indeed a pleasure for us to extend our greetings to our subscribers on the occasion of the New Year and the year ending anniversary of the Dhaka Law Reports (DLR). We stepped into legal journalism sixty-seven years back with a commitment to enrich legal literature of the country. We have continued our efforts in spite of many adverse situations and limited resources.

We feel very happy to inform our valued readers with a firm commitment that DLR would make the best possible use of all resources to improve this legal journal. It is needless to say that legal journalism in this country is confined to a handful of educated people but the need for legal education for the cross sections of people has been long felt. We all know that ignorance of the law is no excuse, but this proposition may not be true unless we educate our masses on legal matters in their day-to-day affairs. Law journal of this type, we believe, can be of some help to articulate the people in legal thinking.

We do not hesitate to admit that despite our due attention, printer's devil and some other mistakes might have crept into some of the issues of DLR. We always learn from our mistakes and here we assure our readers once again that we would take due care to further improve the journal in the years to come.

We invite suggestions received from the readers with respect to improvements and errors and omissions, if any, that might have crept in any issue of the DLR. We are also thinking to bring out an anthology of articles published in the issues of the DLR on law and justice that will help the legal fraternity. We, in this regard solicit your valuable suggestions.

While welcoming the New Year, we think of the preceding year that has recorded the death of some of legal luminaries of the country, namely Justice AKM Nurul Islam, Justice Sultan Hossain Khan, Justice Habibur Rahman Khan, Advocates Nawab Ali and Aftab Ahmed, who recorded their wisdoms and learning in different reported decisions to brood over.

Publishers

Justice Habibur Rahman Khan passes away

Justice Habibur Rahman Khan died in Dhaka on October 20, 2015 leaving a trail of events as a judge, a practicing lawyer, and a social worker. His father Ishaqur Rahman Khan was a Government servant, a poet and a social worker. Collection of his poetry is published under the title "গোধূলী লগ্নে" [Before the Sunset]. His mother Noor Jehan Begum was a popular lady among the women folk for her contributions and social works.

In such a background Justice Khan was shaped up with a people-oriented mind and a strong will to serve the nation. When he was elevated in 1988 to the Bench he had 'a roaring practice' not in term of money but in term of clients. His clients mostly belonged to poor segments of the society, who he served with devotion and love. Manikganj District Bar, while welcoming him on his elevation expressed with agony that "the poor clients would suffer in his absence from the Bar." This is a rare tribute, one could hardly deserve unless one has a bleeding heart and a vision to serve the society.

Justice Khan was born in Manikganj on 5 January 1931 and educated in different institutions-Bankura Zilla School, Ripon School in West Bengal, Victoria High School in Manikganj and Ripon College (Surendra Nath College) in Calcutta. He graduated in Arts with honours and law from Dhaka University, and then he joined Dhaka District Bar as an advocate in 1959, High Court in 1965, and built up a commendable practice in civil and criminal branches. He held the office as President: of Dhaka District Bar in 1984. He was also a Vice-President of the National Bar Association of Bangladesh for two terms.

In his short period of eight years as a judge of superior court (21 January 1988-1 December 1999) Justice Khan left his marks on the judiciary. He discarded the rule of technicality in order to secure the due process of law. In *Sohail Ahmed Chowdhury, 47 DLR (1995) 348* he observed, *inter alia* that "an appeal filed under section 30 of the Special Powers Act, 1974 but not admitted for hearing as it was found barred by limitation can be allowed to be converted to a miscellaneous case under section 561A of the Code of Criminal Procedure for securing the ends of justice. After conversion of an appeal to an application under section 561A of the Code the application can be disposed of by the same Bench without issuing a Rule afresh." He set aside the judgment of a Martial Law Court on the ground of coram non judice and *malafide*, the narrow scope of relief, the superior Court had provided during the period of Martial Law treating it as "a supra constitutional law". Justice Khan observed thus: "....Normally and ordinarily, the judgment and order of the Martial



Justice Habibur Rahman Khan

Law Court passed during the subsistence of the Martial Law Proclamation cannot be challenged even after the withdrawal of Martial Law after [as] it was validated by the provision of constitutional safeguard, relying on the principle laid down by our Supreme Court, we are of the view that the judgment and order passed in the instant case, where the cognizance was taken by the Special Martial Law Court without having jurisdiction is coram non judice and *malafide* and hence is liable to be quashed."

This is another aspect that the Constitution has overthrown the burden of "supra constitution" in Fifth Amendment judgment in 2010. *See Khondker Delwar Hossain, 62 DLR (AD) 298* that has disapproved in totality the Martial law supremacy over the Constitution.

Justice Khan was also a youth leader. He held the office as Secretary General and then President of National Youth Council of

***Reference:** Md Azharul Islam, "মানিকগঞ্জের শত মানিক" First Part, Shulikha Library, Dhaka, 2005; 47 DLR (1995)348; 47 DLR (1995) 355; 62 DLR (AD) (2010) 298

Bangladesh (NYCB), a co-ordinating Council of the Voluntary National Youth Organi-sations of the country affiliated to the World Assembly of Youth (WAY). He was also the Member of WAY, Copenhagen for about four years, and held the office as Secretary General of erstwhile East Pakistan Regional Council of Pakistan National Youth Council. He attended the General Assembly of Youths held in New Delhi in 1958. He participated in the Council meeting held in the University of Accra, Ghana in 1960. As a delegate and sometimes as the leader of the delegates he participated in the seminars held in Kualalampur, Pahang and Penang, Malaysia and visited Singapore and Thailand on the invitation of the Youth Organisations of those countries. In 1974 he attended the seminar and Executive Committee Meeting of Asian Youth Council held in Tokyo, Japan as a leader of the delegation. In 1975 he visited Nairobi, Kenya as the only delegate from Bangladesh. In 1977 he led the delegation from Bangladesh in the "Common-wealth Youth Enterprise" inaugurated by the Prince of Wales in London. In 1978 he represented the country in World Youth Conference held in Kenya. Justice Khan led the delegation to the Seminar sponsored by the Co-ordinating Council for Voluntary Works (CCIVS) in New Delhi. In 1968 in a conference in Lahore the delegation from East Pakistan led by him proposed amendments to the charter of Pakistan National Youth League, which was opposed by the counterparts of West Pakistan to the detrimental of the interest of the youth in the then East Pakistan. Mr Khan boycotted the conference, and disassociated the East Pakistan Chapter.

Justice Habibur Rahman khan on retirement served as a Chairman of Bangladesh Press Council. He was also founder and Vice Chancellor of BGC University Bangladesh, Chittagong.

We mourn his death and express our sympathy to the bereaved members of his family.

Editor, DLR

অচিরেই বাংলাদেশ এশিয়ার বিচার ব্যবস্থার রোল মডেল হিসেবে মাথা উঁচু করে দাঁড়াবে

*—প্রধান বিচারপতি সুরেন্দ্র কুমার সিনহা**

আজকের অনুষ্ঠানের প্রধান অতিথি গণপ্রজাতন্ত্রী বাংলাদেশের মহামান্য রাষ্ট্রপতি জনাব মোঃ আবদুল হামিদ, বিশেষ অতিথিবৃন্দ, সহকর্মী বিচারপতিবৃন্দ, জেলা পর্যায়ের সকল স্তরের বিচারকগণ, সম্মানিত সুধীমন্ডলী, ভদ্রমহিলা ও মহোদয়গণ

নমস্কার/ শুভ সকাল

আজকের এ অনুষ্ঠানে প্রধান অতিথি হিসেবে যোগ দিতে সম্মত হওয়ায় আমরা মাননীয় রাষ্ট্রপতির প্রতি গভীর কৃতজ্ঞতা জ্ঞাপন করছি। গণতন্ত্র, আইনের শাসন ও বিচার বিভাগের স্বাধীনতার প্রতি আপনার দৃঢ় অঙ্গীকার সর্বজনবিদিত। গভীর আনন্দ ও শ্রদ্ধার সাথে আমি উপস্থিত সকলকে এই ঐতিহাসিক অনুষ্ঠানে অংশগ্রহণের জন্য আমন্ত্রণ জানাচ্ছি। অধঃস্তন আদালতের বিচারক থেকে শুরু করে উচ্চ আদালতের বিচারকদের অংশগ্রহণের মাধ্যমে এই অনুষ্ঠানটি অলংকৃত হয়েছে মহামান্য রাষ্ট্রপতির সানুগ্রহ উপস্থিতিতে, যা বাংলাদেশের বিচার বিভাগের ইতিহাসে চিরস্মরণীয় হয়ে থাকবে। বিজয়ের মাসে আমি স্বাধীন বাংলাদেশের স্বপ্নদ্রষ্টা, জাতির জনক বঙ্গবন্ধু শেখ মুজিবুর রহমানের প্রতি বিনম্র শ্রদ্ধা ও কৃতজ্ঞতা জ্ঞাপন করছি। যিনি স্বপ্ন দেখেছিলেন স্বাধীন বিচার বিভাগ- যেখানে শোষিত, নির্যাতিত এবং অসহায় মানুষ স্বল্প খরচে ন্যায় বিচার পাবে। স্বাধীনতার চুয়াল্লিশ বছর পর বাঙালী জাতি এটা দৃঢ়ভাবে বলতে পারবে যে, বাংলাদেশের বিচার বিভাগ গুনগত মান বজায় রেখে নিরন্তর বিচারকার্য পরিচালনা করছে। যা বিশ্বের শ্রেষ্ঠ জরিপি প্রতিষ্ঠান Gallop এর জরিপে স্পষ্টভাবে প্রতিভাত হয়েছে। এখানে উল্লেখ্য যে, পৃথিবীর অনেক দেশে বিচার বিভাগীয় সম্মেলনে সরকারপ্রধান এবং বিচার বিভাগের কাজের সাথে সংশ্লিষ্ট মন্ত্রীগণ উপস্থিত থেকে বিচার বিভাগের বাস্তব সমস্যাসমূহ সম্পর্কে জেনে তা উত্তোরণের পদক্ষেপ গ্রহণ করে। আমাদের দেশে ইতোপূর্বে এরকম কোনো নজির ছিল না। বিচার বিভাগের সার্বিক কল্যাণ নিশ্চিত করার প্রত্যাশায় আজকের এ সম্মেলন। যাদের রক্তের বিনিময়ে আমরা পেয়েছি স্বাধীন সার্বভৌম বাংলাদেশ-সে বীর মুক্তিযোদ্ধা ও জাতির শ্রেষ্ঠ সন্তানদের আজকের এ বিজয়ের মাসে জানাই আমার আন্তরিক কৃতজ্ঞতা ও গভীর শ্রদ্ধা।

বিচার বিভাগের গুরুত্ব ঃ

গণতান্ত্রিক শাসন ব্যবস্থায় বিচার বিভাগের ভূমিকা অপরিসীম। আইনের শাসন, মৌলিক মানবাধিকার, রাজনৈতিক, অর্থনৈতিক ও সামাজিক সাম্য, স্বাধীনতা ও সুবিচার নিশ্চিত করার লক্ষ্যে প্রণীত হয়েছে রাষ্ট্রের সর্বোচ্চ আইন গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান। উক্ত সংবিধানে রাষ্ট্রের তিনটি অঙ্গ আইন বিভাগ, শাসন বিভাগ ও বিচার বিভাগের

* ৩০ ডিসেম্বর ২০১৫ইং বঙ্গবন্ধু আন্তর্জাতিক সম্মেলন কেন্দ্রে জাতীয় বিচার বিভাগীয় সম্মেলন, ২০১৫-এ প্রধান বিচারপতি কর্তৃক প্রদত্ত ভাষণ

দায়িত্ব এবং স্বাতন্ত্রিক বৈশিষ্ট্য স্পষ্টভাবে বিধৃত রয়েছে। বিচার বিভাগ এর সীমিত সম্পদ ও বাজেটের মাধ্যমে নিরন্তর দায়িত্ব পালন করছে। দুষ্টের দমন শিষ্টের পালন-এ মহৎ উদ্দেশ্যকে ধারণ করে বিচার বিভাগ ইহার উপর অর্পিত দায়িত্ব পালন করে রাষ্ট্রের আইন শৃঙ্খলা রক্ষায় অনেক গুরুত্বপূর্ণ ভূমিকা পালন করছে। বাংলাদেশ এখন বিশ্ব অর্থনীতির রোল মডেল যা বিশ্ব ব্যাংক তথা আন্তর্জাতিক সংস্থা কর্তৃক স্বীকৃত। ২০২০ সালের আগেই জিডিপি প্রবৃদ্ধি পৌঁছাতে পারে বিনিয়োগের ক্ষেত্রে বড় ধরনের প্রভাব থেকে। একটি দেশের বিচার বিভাগের দক্ষতা এবং দ্রুত বিচারের উপর ভিত্তি করে বিদেশী বিনিয়োগকারীরা আকৃষ্ট হয়। সর্বোপরি, আইনের মাধ্যমে উন্নয়নের নীতিতে দৃঢ়ভাবে বিশ্বাস করে। বিচার বিভাগের কর্ম দক্ষতার উপর একটি দেশের সভ্যতার চরিত্র পরিস্ফুট হয়ে উঠে। অন্যকথায় বলা যায় যে, কোনো দেশের সরকারের কৃতিত্ব পরিমাপ করার সর্বোত্তম মাপকাঠি হচ্ছে তাঁর বিচার বিভাগের দক্ষতা ও যোগ্যতা। জর্জ ওয়াশিংটনের মতে- "Administration of justice is the firmest pillar of government. Law exists to bind together the community; it is sovereign and cannot be violated with impunity"। বাংলাদেশের বিচার বিভাগ ন্যায় বিচার প্রতিষ্ঠায় নিরন্তর কাজ করে যাচ্ছে।

বিশেষ আদালতসমূহের স্থান সংকুলানের তীব্র অভাবঃ

প্রায়ই সরকার নূতন আইন করে বিভিন্ন ধরনের ট্রাইব্যুনাল যেমন নারী ও শিশু নির্যাতন ট্রাইব্যুনাল, এসিড অপরাধ দমন ট্রাইব্যুনাল, দ্রুত বিচার ট্রাইব্যুনাল, স্পেশাল জজ, পরিবেশ আদালত, পরিবেশ আপীল আদালত, ল্যান্ড সার্ভে ট্রাইব্যুনাল, মানব পাচার প্রতিরোধ ও দমন ট্রাইব্যুনাল ইত্যাদি ট্রাইব্যুনাল তৈরি করেছেন। এ সকল ট্রাইব্যুনালের জন্য কোনো পৃথক আদালত ভবন, পরি-কাঠামো নির্মাণ এবং রেকর্ড রুম ও বসার জায়গা ব্যবস্থা না করে ব্রিটিশ আমলের নির্মিত জরা-জীর্ণ ভবনে অস্বাস্থ্যকর পরিবেশে বিচারকার্য চালিয়ে যাচ্ছে বিচারকগণ। এক্ষেত্রে সুপ্রিম কোর্টের পরামর্শ নেওয়া উচিত ছিল। ফলে দ্রুত বিচার সম্ভব হচ্ছে না। নিম্ন আদালতের ১৫০০ বিচারকের মধ্যে অনেক বিচারককে সরকারের আইন মন্ত্রণালয়, পুলিশ প্রশাসন, পাবলিক সার্ভিস কমিশন, জাতীয় সংসদ সচিবালয়, বিশ্ববিদ্যালয় মঞ্জুরী কমিশন ইত্যাদি জায়গায় প্রেষণে নিয়োগ দিতে হয়। ফলে বিচারকের সল্পতায় বিচারকার্য বিঘ্ন হয়। আশা করি সরকারি বিভিন্ন সংস্থা সংশ্লিষ্ট মন্ত্রণালয় ও বিভাগে আইন কর্মকর্তা ও আইন উপদেষ্টা নিয়োগ করবে যাতে করে ঐসকল কর্মকর্তাকে দ্রুত প্রত্যাহার করে মাঠ পর্যায়ে পদায়ন করা যায়। এতে বিচার নিষ্পত্তির সংখ্যা বেড়ে যাবে।

এদেশের ভাবমূর্তি সমুজ্জ্বল করতে বিচার বিভাগের অবদান রাষ্ট্রের অন্য কোনো বিভাগের চেয়ে অগ্রগণ্য ভূমিকা পালন করে আসছে। যেমনঃ

(ক) বঙ্গবন্ধু হত্যা মামলার বিচার

বাঙালী জাতির স্থপতি বঙ্গবন্ধু শেখ মুজিবুর রহমান ও তাঁর পরিবারের সদস্যদেরকে নৃশংসভাবে হত্যাকারীদের রক্ষার জন্য Indemnity আইন প্রণীত করে বিচার কাজ বন্ধ করা হয়েছিল। সুপ্রীম কোর্ট তাহা অবৈধ বলে ঘোষণা করে। হত্যার বিচার করে অপরাধীদেরকে আইন অনুযায়ী শাস্তি প্রদান করে জাতিকে কলঙ্ক মুক্ত করেছে।

(খ) চার জাতীয় নেতার হত্যার বিচার

কারা অন্তরালে নৃশংসভাবে চার জাতীয় নেতাকে হত্যার বিচার কাজ বন্ধ করা হয়েছিল। এই বিচার স্বল্প সময়ের মধ্যে নিষ্পত্তি করে, বিচার বিভাগ একটি অনন্য দৃষ্টান্ত স্থাপন করে।

(গ) যুদ্ধাপরাধীদের বিচার

আপনারা সবাই অবগত আছেন, আমাদের মুক্তিযুদ্ধের সময় পাকিস্তানের দখলদার বাহিনীর সহায়তায় স্থানীয় রাজাকার আমাদের দেশে নৃশংসভাবে [illegible] নিরপরাধ মানুষকে [illegible] দুই লাখ নারীর ওপর [illegible] এবং এর পরও [illegible] চার দশক [illegible] সুযোগ ভোগ [illegible] রাজাকার এবং [illegible] আলবদরদের সদস্যরা [illegible] মেধাশূন্য করতে [illegible] ডিসেম্বরে বিজয় [illegible] বুদ্ধিজীবীদের [illegible] হত্যা করে। [illegible] বাহিনীকে গণ-[illegible] বিরোধী অপরাধ [illegible] সহায়তা [illegible] সেই যুদ্ধাপরাধীদের [illegible] বিচারের মুখোমুখি [illegible] তাদের কয়েকজনকে [illegible] অপরাধ (ট্রাইব্যুনাল) [illegible]-এর আওতায় [illegible] শাস্তি দেওয়া [illegible] বিচার কাজ এখনো [illegible]

[illegible] বিরুদ্ধে অপরাধী [illegible] Veteran যুদ্ধ [illegible] বিচার করে জনগণ [illegible] আস্থা অর্জন [illegible] এ প্রসঙ্গে বলা যায় যে, [illegible] রুয়ান্ডা, সার্বিয়া ও [illegible] বিচারের চেয়েও এ [illegible] এবং দ্রুততার [illegible] করা হয়েছে এবং হচ্ছে। [illegible] জাতির দীর্ঘ দিনের [illegible] পাওয়ার প্রত্যাশা [illegible] পূরণ হচ্ছে।

[illegible] ছিনতাইদের বিচারের [illegible] বিভাগের অবদান

[illegible] নাশকতামূলক [illegible] বিচারক হত্যার [illegible] প্রদান করে সব [illegible] ক্ষেত্রে জিরো [illegible] ক্ষেত্রে গণতান্ত্রিক [illegible] আইনের শাসন সুদৃঢ় [illegible]

(চ) ১০ ট্রাক অস্ত্র মামলা

১০ ট্রাক অস্ত্র মামলায় দ্রুত বিচার করে বিচার বিভাগ এধরনের ঘৃণিত অপরাধীদেরকে দৃষ্টান্তমূলক শাস্তি প্রদান করে জনগণের আস্থা অর্জন করতে সক্ষম হয়েছে।

(ছ) বিডিআর হত্যাকান্ডের বিচার

পূর্বতন সরকার দায়িত্ব গ্রহণের অল্পকয়েক দিনের মধ্যে বিডিআর বিদ্রোহ ঘটিয়ে সরকার তথা পুরো দেশকে অস্থিতিশীল করার জন্য চেষ্টা করা হয়েছিল। বিডিআর হত্যা মামলা কোন আদালতে বিচার হবে সে নিয়ে ধুম্রজাল সৃষ্টি করার প্রচেষ্টা ছিল। সর্বোচ্চ আদালত ইহার উপদেষ্টামূলক এখতিয়ার প্রয়োগ করে এ বিষয়ে গ্রহণযোগ্য সমাধান দিয়েছেন। যার ফলে বিডিআর হত্যাকান্ডের মতো জঘন্য অপরাধের দ্রুত বিচার নিষ্পত্তি সম্ভব হয়েছে।

(জ) নির্দলীয় তত্ত্বাবধায়ক সরকার পদ্ধতির বিধান বাতিলঃ

সংবিধান ত্রয়োদশ সংশোধনীর মাধ্যমে অগণতান্ত্রিক তত্ত্বাবধায়ক সরকার পদ্ধতির মাধ্যমে জাতীয় নির্বাচনকে একটি মহলের খেয়াল খুশি মত পরিচালনার ব্যবস্থা হয়েছিল। ত্রয়োদশ সংশোধনী আইন রাষ্ট্রের মূলভিত্তি জনগণের সার্বভৌমত্ব রাষ্ট্রের প্রজাতান্ত্রিক ও গণতান্ত্রিক পরিচয় খর্ব করায় দেশের সর্বোচ্চ আদালত ইহা অসাংবিধানিক ও অবৈধ বলে ঘোষণা করে। উক্ত সংশোধনী বাতিল করে গণতান্ত্রিক কাঠামো শক্তিশালী করতে নির্দেশ প্রদান করে। ফলে জনগণের সার্বভৌমত্ব ভোটাধিকার প্রতিষ্ঠিত হয়েছে।

(ঝ) পঞ্চম ও সপ্তম সংশোধনী বাতিল এবং সামরিক শাসন অবৈধ ঘোষণাঃ

সপ্তম সংশোধনী এবং পঞ্চম সংশোধনী বাতিল করে ঐতিহাসিক রায় প্রদান করে। পবিত্র সংবিধান থেকে সামরিক আইন ও ইহার সংশোধিত ও সন্নিবেশিত বিধানসমূহ মুছে ফেলে দেওয়ার নির্দেশ দেওয়া হয়েছে। সুপ্রীম কোর্ট পঞ্চম সংশোধনীর রায়ে স্পষ্টভাবে উল্লেখ করেন যে,

"We are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure for ever."

বিচার বিভাগের এই আদেশের ফলে সামরিক শাসনের সম্ভাবনা চিরতরে নির্বাসিত হয়েছে এবং গণতন্ত্রের অগ্রযাত্রা ব্যহত করার সুযোগ পরাহত হয়েছে।

বিচার বিভাগের বাজেটঃ

বিচার বিভাগের জন্য বাজেট অতি নগণ্য। জানা যায় যে, ২০১৫-১৬ আর্থিক বছরে সুপ্রীম কোর্ট ব্যতীত বিচার বিভাগের জন্য প্রাক্কলিত বাজেট ধরা হয়েছে ১ হাজার ৪৬ কোটি ৮ লক্ষ টাকা অথচ বিচার বিভাগ থেকে আয়ের পরিমাণ নির্ধারণ করা হয়েছে ২ হাজার ৭ শত ৩ কোটি ৯২ লক্ষ ১৮ হাজার টাকা এবং সুপ্রীম কোর্টের অনুন্নয়ন ও উন্নয়ন খাতের ব্যয় নির্বাহের জন্য প্রাক্কলিত বাজেট ধরা হয়েছে ১ শত ১২ কোটি ৬১ লক্ষ টাকা ও আয়ের পরিমাণ নির্ধারণ করা হয়েছে ১ কোটি ৯৩ লক্ষ ৯৯ হাজার টাকা। যদিও বিচার বিভাগ রাজস্ব আয়ের কোন খাত নয়।

বিভাগীয় শহরে হাইকোর্টের সার্কিট বেঞ্চ স্থাপনঃ

বিভাগীয় শহরগুলোতে সার্কিট বেঞ্চ স্থাপনের ব্যাপারে বাহিরের আইনজীবীদের দাবি জোরালো হচ্ছে এবং প্রধানমন্ত্রী শেখ হাসিনাও আগ্রহী। এ কারণে দেশের বিভাগীয় শহরগুলোতে হাইকোর্টের সার্কিট বেঞ্চ স্থাপনের বিষয়টি গুরুত্ব সহকারে বিবেচনা করতে হলে অবকাঠামোগত এবং প্রয়োজনীয় বিচারক ও জনবল অপরিহার্য। কিন্তু আমাদের পর্যাপ্ত বিচারক নাই। অবকাঠামোগত উন্নয়ন, প্রয়োজনীয় বিচারক ও জনবল নিয়োগ করা হলে সার্কিট বেঞ্চের বিষয়টি বিবেচনা করা হবে।

তথ্য ও প্রযুক্তির গুরুত্বঃ

মামলা ব্যবস্থাপনায় সংস্কার এবং দক্ষ সেবাদানের জন্য তথ্য ও যোগাযোগ প্রযুক্তির কোনো বিকল্প নেই। সফ্টওয়্যারের সহায়তায় কোনো মামলার তথ্য এখন সার্চ কমান্ড দিয়ে বের করা সম্ভব। তথ্য প্রযুক্তির সর্বশেষ সুবিধাগুলো ব্যবহার করে নাগরিকদের কাছে তাদের পছন্দের ডিভাইসে মামলার তথ্য পাঠানোর কাজটিও নিশ্চিত করা কঠিন কাজ হবে না। সুপ্রীম কোর্টে আমরা তথ্য প্রযুক্তির সুবিধা নেওয়ার প্রয়োজনীয়তাটি অনেক আগেই উপলব্ধি করি। কারণ তথ্য প্রযুক্তি দিয়েই কাজের গতি কয়েক গুণ বৃদ্ধি এবং সেবার জন্য অপেক্ষমান সর্বশেষ ব্যক্তির কাছে পৌঁছানো সম্ভব। বিচার ব্যবস্থার ডিজিটাইজেশনের পথে এরই মধ্যে আমরা কিছু এগিয়েও গিয়েছি। আমাদের জন্য ইউএনডিপির তৈরি আইসিটি ব্যবস্থার মাধ্যমে একদিন আমরা কারাগার ও পুলিশসহ সব আইন প্রয়োগকারী সংস্থাকে সঙ্গে নিয়ে সমন্বিত একটি সমাধানে পৌঁছাতে পারব বলে আশা করছি। কিন্তু বাজেটের অভাবে অগ্রসর হতে বাধা হচ্ছে। অপর্যাপ্ত বাজেট দ্বারা বিচারকদের কম্পিউটার দেওয়া যাচ্ছে না। আমরা আনন্দের সঙ্গে জানাতে পারি যে,

সুপ্রীম কোর্ট ও এর অধীন আদালতে তথ্য প্রযুক্তির ব্যবহারে সেবার মান বৃদ্ধি কার্যকর বলে প্রমাণিত হয়েছে। মানুষ এখন তাদের মামলার তথ্য ইন্টারনেট, মোবাইল অ্যাপস ও এসএমএসের মাধ্যমে লাভ করতে পারছে। বিচার ব্যবস্থায় আমরা যেসব আইসিটি সুবিধা যুক্ত করেছি তার মধ্যে আছে সুপ্রীম কোর্ট ও পরীক্ষামূলক তিন জেলায় মামলা ব্যবস্থাপনা সফ্টওয়্যার চালু, কজলিস্ট ও মামলার তথ্য অনলাইন ও এসএমএসের মাধ্যমে সরবরাহ, সুপ্রীম কোর্ট ও এর অধীনস্থ কোর্টের মামলার তথ্য খোঁজার জন্য মোবাইল অ্যাপস তৈরি এবং আদালত প্রশাসন প্রক্রিয়ায় স্বচ্ছতা বৃদ্ধির জন্য ওয়েবভিত্তিক জুডিশিয়াল অফিসার্স ডাটাবেজ ম্যানেজমেন্ট অ্যাপলিকেশন তৈরি।

বিচার বিভাগ ডিজিটালাইজেশনের লক্ষ্যে সুপ্রীম কোর্টের গৃহিত পদক্ষেপঃ

অনলাইন কজলিস্ট ব্যবস্থা

◊ অনলাইন কজলিস্ট ব্যবস্থায় সর্বপ্রথম সুপ্রীম কোর্টের আপীল বিভাগে এবং পরবর্তীতে হাইকোর্ট বিভাগের কজলিস্ট প্রতিদিন বিকাল ৬ টার মধ্যে পরের কার্যদিবসের বিভিন্ন কোর্টের কজলিস্ট অনলাইনে প্রকাশ করা হয় বিভিন্ন বেঞ্চে মামলা হওয়ার সাথে সাথে মামলার বিভিন্ন তথ্য সফ্টওয়্যারে ইনপুট দেওয়া হয় এবং তথ্যগুলো সার্ভারে জমা থাকে। ফলে একজন ব্যক্তি অতি সহজেই অনলাইনের মাধ্যমে মামলাটি কোন কোন তারিখে কজলিস্টে এসেছে, মামলার বর্তমান অবস্থা ও ফলাফল জানাতে পারে।

অনলাইনে উচ্চ আদালতের জামিন সম্পর্কে অবহিত হওয়া

◊ কোনো বেঞ্চ হতে কোনো মামলার আসামীকে জামিন প্রদান করা হলে জালিয়াতি পরিহারের জন্য নিম্ন আদালতে চিঠি প্রদানের পাশাপাশি প্রতিটি জামিনের আদেশ স্ক্যান করে অনলাইন বেইল কনফার্মেশন সফ্টওয়্যারে আপলোড করা হয়। নিম্ন আদালত হতে এ সফ্টওয়্যারে প্রবেশ করে প্রেরিত চিঠির সাথে স্ক্যানকৃত চিঠির মিল আছে কিনা তা যাচাই করে আসামীকে দ্রুত জামিনে মুক্তি দেওয়ার ব্যবস্থা গ্রহণ করা হচ্ছে।

Supreme Court Online Bulletin (SCOB)

◊ সুপ্রীম কোর্টের অনলাইন বুলেটিন 'স্কব'-এ আপীল ও হাইকোর্ট বিভাগের গুরুত্বপূর্ণ রায় এবং সেগুলোর রেসিও ডিসাইডেন্ডি হেডনোট আকারে প্রকাশ করা হচ্ছে। উভয় বিভাগের গুরুত্বপূর্ণ মামলার রায় অনলাইনে প্রকাশ করা হচ্ছে। বর্তমানে দেশের সকল আদালতে সরকারি খরচে ইন্টারনেট সংযোগ প্রদান করা হয়েছে। দ্রুত মামলা নিষ্পত্তি ও মামলা জট নিরসনে বাংলাদেশ বিচার বিভাগ সর্বদা সচেষ্ট। দ্রুত মামলা নিষ্পত্তির জন্য বিচার ব্যবস্থার বিভিন্ন ধাপের ডিজিটাইজেশন অত্যন্ত জরুরী। আমাদের শত বছরের পুরনো আইন দ্বারা ডিজিটাইজেশনের বিষয়টি সমর্থিত নয় বিধায় সময়ের প্রয়োজনে এবং মামলা দ্রুত নিষ্পত্তির জন্য বর্তমান আইনে সুস্পষ্টভাবে উহা সংযুক্ত করা অপরিহার্য।

E-Court System

◊ উচ্চ ও নিম্ন আদালতে ই-কোর্ট ব্যবস্থা চালু, ডিজিটাল পদ্ধতিতে রেকর্ড ধারণ ও সংরক্ষণ, জেলা ভিত্তিক ও কেন্দ্রীয় কারাগারের মধ্যে ভিডিও কনফারেন্সের সুবিধা চালু, দেশের বিচার ব্যবস্থায় ম্যানেজমেন্ট ইনফরমেশন সিস্টেমের প্রচলন এবং বিচারিক কর্মকর্তাদের দক্ষতা বৃদ্ধির লক্ষ্যে সরকার পাঁচ বছর মেয়াদি ই-জুডিশিয়ারি প্রকল্প গ্রহণ করতে যাচ্ছে জেনে আমরা আনন্দিত। অনেকক্ষেত্রে ভয়ংকর সন্ত্রাসীদের আদালতে হাজির করে সাক্ষ্য গ্রহণ করা আইন শৃঙ্খলা রক্ষাকারী বাহিনীর অনেক চ্যালেঞ্জ হয়ে পড়ে। এক্ষেত্রে ভিডিও কনফারেন্সিং এর মাধ্যমে সাক্ষীর সাক্ষ্য গ্রহণ করা হলে সময়, অর্থ সাশ্রয় হবে এবং নিরাপত্তার বিষয়টিও নিশ্চিত হবে।

প্রধান বিচারপতির দায়িত্ব নেওয়ার পর জারীকৃত সার্কুলারসমূহ/Practice Direction:

◊ প্রধান বিচারপতি দায়িত্ব গ্রহণের পর দেশের সকল আদালতে চলমান মামলাজট নিরসন ও মামলা-মোকদ্দমা দ্রুত নিষ্পত্তির লক্ষ্যে বিচারকের শূন্য পদ পূরণের নিমিত্ত প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য গত ২৬শে জানুয়ারি ২০১৫ইং তারিখ আইন মন্ত্রণালয়ে পত্র প্রেরণ করা হইয়াছে।

◊ বর্তমানে সারাদেশের অধঃস্তন আদালতসমূহে প্রায় ২৮ লক্ষ মামলা বিচারাধীন রয়েছে এবং এর সংখ্যা ক্রমেই বৃদ্ধি পাচ্ছে। আদালত সমূহে বিচারাধীন মামলার সংখ্যা বৃদ্ধি পাওয়ার প্রেক্ষিতে আদালতের বিচারিক কর্মঘন্টার পূর্ণ ব্যবস্থা করা একান্তভাবে জরুরী। সে প্রেক্ষিতে গত ৪ মে ২০১৫ইং তারিখ অধঃস্তন আদালতের বিচারকগণের প্রতি নিম্নবর্ণিত নির্দেশাবলীয় প্রদান করা হয়-

(১) বিচারকগণ আবশ্যিকভাবে বিচারিক কর্মঘন্টার ২য় ভাগে (দুপুর ২.০০ ঘটিকা হতে দুপুর ৪.৩০ ঘটিকা) বিবিধ মামলাসমূহ বিশেষ করে ফৌজদারী বিবিধ মামলা ও দোতরফা অস্থায়ী নিষেধাজ্ঞার আবেদনপত্র সংক্রান্ত শুনানি গ্রহণ করা এবং এরূপ মামলার শুনানি গ্রহণের পর সময় থাকলে সে সময়ও আপীল, রিভিশন ইত্যাদি মামলার শুনানি গ্রহণ করা।

(২) বিচারিক মামলা বিচারাধীন নেই এরূপ আদালতে বিচারিক কর্মঘন্টার ১ম ভাগ এবং ২য় ভাগের সময় বিচারকগণ কেবল আপীল মামলা/রিভিশন মামলার শুনানি গ্রহণ করে বিচারিক কর্মঘন্টার পূর্ণ ব্যবহার নিশ্চিত করা।

(৩) বাংলাদেশের অধঃস্তন আদালত-সমূহে বিচারাধীন মামলার বকেয়া হ্রাস করে মামলা নিষ্পত্তিতে গতিশীলতা আনয়নের সর্বোপরি দ্রুত বিচার নিশ্চিত করার লক্ষ্যে দেশের বিভিন্ন আদালতে কর্মরত সকল বিচারক বিচার বিভাগীয় কর্মকর্তাদের সাপ্তাহিক ছুটির দিন শুক্রবার কোর্টের রেজিস্ট্রার জেনারেলের অবহিতকরণ

ব্যতিরেকে কর্মস্থল ত্যাগ না করার জন্য গত ২ জুন ২০১৫ ইং তারিখ নির্দেশনা জারী করা হয়।

(৪) আবার আদালতে দায়িত্ব প্রাপ্ত কর্মকর্তা/কর্মচারী ব্যতীত বহিরাগত (উমেদার) দিয়ে মামলার নথিতে আদেশ বা মামলাসংক্রান্ত কিছু লিপিবদ্ধ না করতে ২৩ জুলাই ২০১৫ ইং তারিখ নির্দেশনা জারী করা হয়েছে। এর ফলে সকাল ৯টা হতে অনেক সময় রাত ১০টা পর্যন্ত বেঞ্চে সহকারীদের কাজ করতে হয়, যা অমানবিক। এক্ষেত্রে প্রতিটি আদালতে অতিরিক্ত বেঞ্চ সহকারীদের পদ সৃজন করা অপরিহার্য।

(৫) মামলা মোকদ্দমার শুনানি মুলতবী ও তারিখ নির্ধারণের ক্ষেত্রে গত ২৯ জুলাই ২০১৫ইং তারিখ নির্দেশনা জারী করা হয়।

(ক) মামলা মোকদ্দমায় একবার সাক্ষ্য গ্রহণ শুরু হলে (যৌক্তিক কারণে মুলতবী অপরিহার্য না হলে) সকল সাক্ষীর সাক্ষ্য গ্রহণ সমাপ্ত না হওয়া পর্যন্ত প্রতিদিন (from day to day) শুনানি অব্যাহত রাখতে হবে।

(খ) তিন বছরের অধিক পুরাতন মামলা/ মোকদ্দমায় সাক্ষ্য গ্রহণকালে শুনানি যৌক্তিক কারণে মুলতবী একান্ত অপরিহার্য হলে যতদূর সম্ভব সংক্ষিপ্ততম বিবৃতিতে (কেনোক্রমেই এক মাসের অধিক নয়) পরবর্তী শুনানির তারিখ নির্ধারণ করতে হবে।

(গ) অগ্রাধিকার ভিত্তিতে পুরাতন মামলা শুনানির জন্য গ্রহণ ও নিষ্পত্তি করা হবে।

(৬) গত ৩০ জুলাই ২০১৫ইং তারিখ বিশেষ আদালত (অতিরিক্ত দায়িত্ব) আইন ২০০৩ এর ৪ (খ) ধারায় বিধানমতে The Code of Criminal Procedure, ১৮৯৮ এর উদ্দেশ্য পূরণকল্পে জরুরীভিত্তিতে ঢাকা ব্যতীত দেশের সকল দ্রুত বিচার ট্রাইবুনালকে দায়রা আদালত হিসাবে ঘোষণার প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য সচিব আইন ও বিচার বিভাগ, আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়ে পত্র প্রেরণ করে প্রজ্ঞাপন জারীর অনুরোধ করা হয়।

(৭) দেশের অধঃস্তন আদালতসমূহে তথা সিনিয়র সহকারী জজ ও যুগ্ম জেলাজজ আদালতসমূহে The Small Causes Courts Act, ১৮৮৭ ও বাড়ি ভাড়া নিয়ন্ত্রণ আইন, ১৯৯০ এর অধীন দায়েরকৃত দীর্ঘ দিনের পুরাতন মোকদ্দমাসমূহ ও ফৌজদারী-অপরাধ সংক্রান্ত ২০০০ খ্রিঃ সালের পূর্বের GR ও Non-GR মামলায় যুক্তিসঙ্গত কারণ ছাড়াই শুনানি মুলতবী করানো উক্ত মোকদ্দমাসমূহ দ্রুত নিষ্পত্তির কার্যাবলী ব্যবস্থা গ্রহণের জন্য গত ২০ আগস্ট ২০১৫ইং তারিখ নির্দেশনা জারী করা হয়।

(৮) অধঃস্তন আদালতের বিচার বিভাগীয় কর্মকর্তা এবং সহায়ক কর্মকর্তা-কর্মচারীদের পরিচয় প্রদর্শন এবং ৪র্থ শেণীর কর্মচারীদের অফিসিয়াল ইউনিফর্ম (দাপ্তরিক পোশাক) পরিচয় বিষয়ক গত ৬ সেপ্টেম্বর ২০১৫ইং তারিখ নির্দেশনা জারী করা হয়।

(৯) তাছাড়া আইনজীবী সহকারীদের নামে পরিচয়ে অনাকাঙ্খিত ব্যক্তিদের আদালত অঙ্গনে প্রবেশের ফলে মামলার আদেশ/ রায়ের সার্টিফাইড কপি জালিয়াতিসহ অন্যান্য অনভিপ্রেত কার্যাদি রোধকল্পে গত ৬ সেপ্টেম্বর ২০১৫ইং তারিখ দেশের সকল আদালতসমূহে আইনজীবী সহকারীদের পরিচয়পত্র প্রদর্শনের নির্দেশনা জারী করা হয়।

(১০) দেশের সকল আদালতসমূহে ডিজিটাইজেশন এর প্রক্রিয়ার অংশ হিসাবে সরকারি ব্যয়ে দপ্তরে ইন্টারনেট সংযোগ স্থাপন বিধায় গত ২৯ জুলাই ২০১৫ এবং ১২ আগস্ট ২০১৫ইং তারিখ ২ টি ব্যাপক নির্দেশনা জারী করা হয়।

বিচারক সংখ্যা বৃদ্ধি ও মামলা নিষ্পত্তির অগ্রগতিঃ

প্রধান বিচারপতির দায়িত্বভার গ্রহণের পর আমি ঢাকা, চট্টগ্রাম, রাজশাহী সহ মোট ১৩ (তের) টি জেলার সকল পর্যায়ের আদালত পরিদর্শন করেছি। এ সময় বিভিন্ন জেলায় জুডিসিয়াল কনফারেন্সে যোগদান করি এবং মূল্যবান নির্দেশনা প্রদান করি। জুডিসিয়াল কনফারেন্স এবং পুলিশ-ম্যাজিস্ট্রেসী কনফারেন্স নিয়মিত অনুষ্ঠানের বিষয়ে ইতোমধ্যে এ বিষয়ে বাংলাদেশ সুপ্রীম কোর্ট হতে সার্কুলার জারী করা হয়েছে। আমার ব্যক্তিগত উদ্যোগে এবং সুপ্রীম কোর্টের নিরবিচ্ছিন্ন মনিটরিং এবং প্র্যাকটিস ডিরেকশন ইস্যুর ফলে বিচারকদের মধ্যে দ্রুত বিচার নিষ্পত্তির স্পৃহা বহুলাংশে বৃদ্ধি পায় যা পরিসংখ্যান পর্যালোচনায় দৃশ্যমান হবে। পরিসংখ্যান থেকে স্পষ্ট হয় যে, বর্তমান বছরে দেশের নিম্ন আদালত থেকে উচ্চ আদালতে মামলা নিষ্পত্তির হার বিগত বছরের এ সময়ের তুলনায় অনেক বৃদ্ধি পেয়েছে। ১৭ই জানুয়ারি ২০১৫ তারিখ হতে ৩০শে নভেম্বর ২০১৫ তারিখ পর্যন্ত আপীল বিভাগে মামলা নিষ্পত্তির পরিমাণ ৯,৩৫৬টি। এ সময়ে বিগত বছরে মামলা নিষ্পত্তি হয়েছে ৫,৭৮৯টি। এক্ষেত্রে মামলা তুলনামূলক নিষ্পত্তির শতকরা হার ১৬২% হাইকোর্ট বিভাগে ২০১৫ সালের নভেম্বর মাস পর্যন্ত মামলা নিষ্পত্তির সংখ্যা ৩৩,৩৮০টি। অথচ

not received the award how he could challenge the same in the suit with so many particulars. In the context, the trial Court rightly stated that "the plaintiff has been demanding that he did not receive the copy of the award, but as soon as he received it he may apply to the proper Court, the learned District Judge Court, but instead the plaintiff has filed this suit here in this Court."

12. Whether the plaintiff could file the suit challenging the legality of the arbitration agreement and the arbitral award, we consider it relevant to see the provisions of sections 42 and 43 of the Act, 2001 which read as follows:

"42 Application for setting aside arbitral award—(1) The Court may set aside any arbitral award under this Act other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award.

(2) The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within sixty days from the receipt of the award.

43. Grounds for setting aside arbitral tribunal—(1) An arbitral award may be set aside if—

(a) the party making the application furnishes proof that—

(i) a party to the arbitration agreement was under some incapacity;

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case.

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

(b) the court or the High Court Division, as the case may be, is satisfied that—

(i) the subject matter of the dispute is not capable of settlement by the arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is *prima facie* opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh or

(iv) the arbitral award is induced or affected by fraud or corruption.

(2) Where an application is made to set aside an ward, the court or the High Court Division, as the case may be, may order that any money payable by the award shall be deposited in the Court or the High Court Division, as the case may be, or otherwise secured

pending the determination of the application."

13. Sub-section (1) of section 42 has clearly spelt out that the Court may set aside any arbitral award under the Act, 2001 other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award and in section 43 thereof grounds have been enumerated on which an arbitral award may be set aside. And now, if we look at the prayers made in the plaint as stated earlier, it would appear that the plaintiff sought to set aside the arbitral award given by the Arbitrator by seeking declaration that the same was illegal, without jurisdiction, was of no legal effect and was *ipso facto* void and the grounds for seeking such declaration were that no arbitration agreement was entered into between the plaintiff and defendant No.1, and that on the basis of a so-called agreement, an award was given by one Alhaj Dostagir Chowdhury. The plaintiff also alleged that the so-called award was given in violation of the provisions of the Act, 2001; that Alhaj Dostagir Chowdhury was not appointed as the sole Arbitrator as per the provisions of the Act; that none of the parties or their representative signed the award and that the Arbitrator gave the award illegally, without jurisdiction and in violation of the provisions of the Act, 2001. And all these allegations clearly embrace the grounds, particularly, ground Nos. (ii), (iii), (iv) and (v) as enumerated in section 43 of the Act, 2001 quoted hereinbefore. But the plaintiff did not file any application before the District Judge within sixty days from the date of receipt of the award for setting aside the same.

14. In the context, section 39 of the Act, 2001 is also relevant. The section reads as follows:

> **"39. Award to be final and binding—(1)** An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them,
>
> (2) Notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected."

15. A reading of sub-section (1) of section 39 shows that an arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them. Sub-section (2) thereof has further provided that notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected.

16. A combined reading of the provisions of sections 42, 43 and 39 of the Act, 2001 clearly shows that the only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred and therefore, in view of the provision of section 42 of the Act, 2001, clause (d) of rule 11, Order VII of the Code is attracted.

17. The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrator(s), if it is allowed to be challenged in a civil suit, then the arbitration proceeding shall become a mock-

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ery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. Therefore, the trial Court rightly rejected the plaint and the High Court Division did not commit any error of law affirming the same and, as such, no interference is called for with the impugned judgment and decree.

Accordingly, this petition is dismissed.

Ed.

APPELLATE DIVISION
(Civil)

Md Abdul Wahhab Miah J
Md Imman Ali J
AHM Shamsuddin Choudhury J

Judgment
August 27th, 2015.

Rajib Traders.....
.....Petitioner
vs
Artha Rin Adalat as well as Joint District Judge, Additional Court, Jessore and another.....
.....Respondents*

Artha Rin Adalat Ain (VIII of 2003)
Section 50(2)

Rate of interest—Interest to be paid by the judgement debtor will have to be calculated according to the prevailing interest rate or rates, which may be different for different periods, from the time of filing of the suit till the payment of the decretal amount by the judgement debtor. .....(15)

The rate of interest charged at any given time by financial institutions under directions of the Central Bank reflects the prevalent economic condition of the country. If the interest rate was lowered then the judgement debtor would have received the benefit of the lower interest . It cannot be said that any vested right accrued to the judgement-debtor with regard to the rate of interest for all time to come. At best it can be said that within the time for payment as stipulated by the Court the rate of interest would be the same as on the date of the decree. If the Court had specified that the rate would be 8% till realization of the decretal amount then the change of rate of interest would not affect the judgement-debtor detrimentally or beneficially in case the interest was lowered. However, in this case the rate was to be the "prescribed rate from 1-4-2004 till the realization of the decretal money." 'Prescribed' would mean prescribed by law. In the facts of the instant case the 'prescribed rate' was amended more than once since 1-4-2004. .....(14)

Artha Rin Adalat Ain (VIII of 2003)
Section 50(2)

Since the matter is still pending as a money execution case before the Adalat, what rate of interest is to be awarded on appeal before the High Court Division or the Appellate Division is not material in the case. However, the rate of interest to be awarded for the period from filing of the suit till the realization of the decretal amount is clearly 12% as from 31-3-2010. Interest was calculated at 8% for the period before the Act came into force in force in 2010 because the Ordinance enhancing the rate to 12% was not approved by Parliament from 25-2-2009 to 31-3-2010. .....(12)

Artha Rin Adalat Ain (VIII of 2003)
Section 50(2)

If the judgement debtor had paid the decretal amount within the period stipulated by the trial Court, then the rate of interest applicable at that time would have been the appro-

*Civil Petition for Leave to Appeal No. 1280 of 2015.

(From the judgement and order dated 17th of September, 2014 passed by the High Court Division in Writ Petition No. 4886 of 2013.)

priate rate of interest to be paid. Since the judgement debtor did not pay the decretal amount in accordance with the order of the Court it would be liable to pay at the various rates which may change from time to time.

.....(13)

Khondaker Badiuzzaman vs GM Bangladesh Krishi Bank 14 BLD 151 and Maya Rani Punj vs CIT, Delhi (1996) 1SCC 445 ref.

Nurul Islam Chowdhury Advocate-on-Record—For the Petitioner.

None Represented—For Respondents.

Judgment

Md Imman Ali J :-This civil petition for leave to appeal is directed against the judgement and order dated 17-9-2014 passed by a Division Bench of the High Court Division in Writ Petition No. 4886 of 2013 discharging the Rule.

2. The facts, relevant for disposal of the instant civil petition for leave to appeal, are that alleging default in repayment of loan obtained by the petitioner, Agrani Bank, Bus Stand Branch, Nowapara, Jessore (respondent No. 2), filed Money Suit No. 94 of 2004 against the petitioner and two others. The petitioner accordingly contested the said suit by filing written statement. Thereafter, upon hearing the parties, the Artha Rin Adalat, Jessore, by its judgement and decree dated 20-6-2006 decreed the suit against the petitioner and others. Accordingly, the plaintiff-Bank filed Artha Execution Case No. 21 of 2006 on 7-9-2006 for realisation of Taka 76,58,097. During pendency of the said execution case, the judgment-debtor-petitioner filed an application on 23-7-2012 for computing interest on the decretal amount at the rate of 8% in view of the then applicable provisions of law when the decree was passed.

3. After hearing the aforesaid application, and objection filed by the decree holder bank, the Adalat by its order dated 21-1-2013 rejected the application of the petitioner and computed the interest as prescribed under section 50 of the Artha Rin Adalat Ain as amended from time to time.

4. Being aggrieved by the order dated 21-1-2013, the petitioner filed Writ Petition No. 4886 of 2013 before the High Court Division and obtained Rule, which upon hearing the parties, was discharged. Hence, the petitioner is now before us having filed the instant civil petition for leave to appeal..

5. Mr Nurul Islam Chowdhury, learned Advocate-on-Record appearing on behalf of the petitioner submits that the High Court Division passed the judgement and order relying on a decision passed by an Indian Court which is not relevant to the case of the petitioner as the facts leading to the said decision regarding non-payment of taxes on which interest was imposed were different. In the instant case the subject matter is different as the dispute arose out of a judgement and decree passed in an Artha Rin Adalat matter. As such the judgement and order of the High Court Division calls for interference. He further submits that the High Court Division failed to consider that Respondent No. 1 committed error in counting the interest from 23-12-2007 to 24-2-2009 at the rate of 12%, defying the amendment of the Artha Rin Adalat Ain, 2003, (Act No. 16 of 2010) which provides that 8% would be replaced by 12%, and that the interest at the rate of 12% would be computed after the above amendment, i.e. after 2010. He lastly submits that the decree was passed in the year 2006 when the applicable rate was 8%, and as such a right accrued in favour of the judgment debtor to pay interest on the decretal amount at the said rate, and hence the accrued right of the petitioner cannot be taken away by subsequent amendments, and in this regard reference may be

made to the case of *Khondaker Badiuzzaman vs GM Bangladesh Krishi Bank* reported in *14 BLD 151*, As such the judgement and order passed by the High Court Division calls for interference.

6. No one appeared for the respondents.

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

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

9. The admitted position is that on the day when the decree was passed section 50 of the Artha Rin Adalat Ain, 2003 (the Ain) provided for interest to be imposed at the rate of 8%. Subsequently, by amendment in 2007 the rate of interest was increased to 12% . The High Court Division observed that the trial Court in awarding the decree ordered that the plaintiff bank is entitled to realize interest as per prescribed rate from 1-4-4 till realization of the decretal amount and went on to hold that this meant that the interest would be applicable at the rate when the order of the Court was passed. The High Court Division further observed that if the petitioner had repaid the entire decretal amount before the rate of interest was amended then the dispute would not arise.

10. The Artha Rin Adalat (Amendment) Ain, 2010, (Act No. 16 of 2010) came into force on 30-3-2010 by which section 50 of the Ain, 2003 was amended increasing the rate of interest from 8% to 12%.

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

"৫০। (২) অর্থ ঋণ আদালত কর্তৃক প্রদত্ত ডিক্রীর বিরুদ্ধে বিবাদী-দায়িক পক্ষ কোন আপীল, রিভিশন, আপীল বিভাগে বা অন্য কোনরূপ দরখাস্ত কোন উচ্চতর আদালতে দায়ের না করিলে, মামলা দায়েরের দিবস হইতে ডিক্রির টাকা আদায় হইবার দিবস পর্যন্ত সময়ের জন্য ডিক্রিকৃত টাকার উপর ১২% (বার শতাংশ) বার্ষিক সরল হারে, কোন আপীল, রিভিশন বা অন্য কোন দরখাস্ত কোন উচ্চতর আদালতে দায়ের করিলে পূর্বোক্ত সময়কালের জন্য ১৬% (ষোল শতাংশ) বার্ষিক সরল হারে, এবং আপীল বা উচ্চতর আদালতের ডিক্রি বা আদেশের বিরুদ্ধে আপীল বিভাগে আপীল করিলে, পূর্বেক্ত সময়কালের জন্য ১৮% (আঠার শতাংশ) বার্ষিক সরল হারে, উপ-ধারা (৩) এর বিধান, সাপেক্ষে সুদ, বা, ক্ষেত্রমত, মুনাফা আরোপিত হইবে।"

12. Since the matter is still pending as a money execution case before the Artha Rin Adalat, what rate of interest is to be awarded on appeal before the High Court Division or the Appellate Division is not material in the instant case. However, the rate of interest to be awarded for the period from filing of the suit till the realization of the decretal amount is clearly 12% as from 31-3-2010. We note that interest was calculated at 8% for the period before the Act came into force in force in 2010 because the Ordinance enhancing the rate to 12% was not approved by Parliament from 25-2-2009 to 31-3-2010 .

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

change from time to time.

14. It may be noted here that the rate of interest charged at any given time by financial institutions under directions of the Central Bank reflects the prevalent economic condition of the country. If the interest rate was lowered then the judgement debtor would have received the benefit of the lower interest. It cannot be said that any vested right accrued to the judgement-debt or with regard to the rate of interest for all time to come. At best it can be said that within the time for payment as stipulated by the Court the rate of interest would be the same as on the date of the decree. If the Court had specified that the rate would be 8% till realization of the decretal amount then the change of rate of interest would not affect the judgement-debtor detrimentally or beneficially in case the interest was lowered. However, in this case the rate was to be the "prescribed rate from 1-4-2004 till the realization of the decretal money." 'Prescribed' would mean prescribed by law. In the facts of the instant case the 'prescribed rate' was amended more than once since 1-4-2004.

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

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

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

Ed.

APPELLATE DIVISION
(Criminal)

Md Muzammel Hossain J Surendra Kumar Sinha CJ Md Abdul Wahhab Miah J Nazmun Ara Sultana J Syed Mahmud Hossain J Md Imman Ali J **Judgment** April 30th, 2013.	State.....Appellant vs Dafader Marfoth Ali Shah and others..... .....Respondents*

Constitution of Bangladesh, 1972
Article 104

Complete Justice—The exercise of the power of doing 'complete justice' under article 104 is circumscribed by two conditions, it can be exercised only when Supreme Court otherwise exercises its jurisdiction and the order which Supreme Court passes must be necessary for doing "complete justice" in the cause or matter pending before it. The State or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of criminal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appeal time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy. In the name of doing 'complete justice this right of the accused persons now cannot be ignored. *(Nazmun Ara Sultana, J)* .....(241)

*Criminal Appeal No. 23 of 2011

(From the judgment and order dated 28-8-2008 passed by the High Court Division in Death Reference No. 150 of 2004 heard along with Criminal Appeal No. 4739 of 2004, Criminal Appeal No. 4740 of 2004, Jail Appeal No. 118 of 2006 and Jail Appeal No. 597 of 2007 accepting the death reference in part and allowing the appeals.)

Constitution of Bangladesh, 1972
Article 104

Complete Justice—If a substantial justice under law and on undisputed facts can be made so that the parties may not be pushed to further litigation, a recourse to the provision of Article 104 may be justified. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(128)

Constitution of Bangladesh, 1972
Article 104

Doing 'complete justice does not contemplate doing justice to one party by ignoring statutory provisions and thereby doing injustice to the other party by depriving him of the benefit of law. If a valuable right is accrued to the other side this fact should not be ignored in exercising the power of doing 'complete justice. *(Nazmun Ara Sultana, J)* .....(239)

Constitution of Bangladesh, 1972
Article 104

Complete Justice—This power is not circumscribed by any limiting words. This is an extraordinary power conferred by the Constitution and no attempt has been made to define or describe complete justice. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(127).

Constitution of Bangladesh, 1972
Article 104

We do not find that there is any scope now to convict the accused persons or any of them on the charge of criminal conspiracy by exercising the inherent power under article 104. *(Nazmun Ara Sultana, J)* .....(255)

Constitution of Bangladesh, 1972
Article 104

Complete Justice—If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified. Complete justice may not be perfect justice, and any endeavour to attain the latter will be an act of vanity. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(128)

Appellate Division Rules
Order XX rule 5
Order XXII rule 13

Even without exercise of inherent power, this Division can alter the conviction to one of murder in pursuance of the criminal conspiracy. Rrule 13 of Order XXIII, rule 5 of Order XX of the Appellate Division's Rules are applicable to criminal appeals, and there is no legal bar to convict them even if no leave was granted on this point. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(136)

Criminal Trial

An irregular order of a court of unlimited jurisdiction can be set aside by it on the application either under the rules of court dealing expressly with setting aside orders for irregularity or *ex debitio justitiae* if the circumstances warrant. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(139)

Code of Criminal Procedure (V of 1898)
Sections 154

Where there is no FIR or where the FIR cannot be proved in accordance with law in that case also the court will not detract the testimony of the witnesses which will have to be

assessed on its own merits and the case is to be assessed on merit on the basis of the evidence adduced before it. (*Nazmun Ara Sultana, J)* .....(221)

Code of Criminal Procedure (V of 1898)
Section 154

A massage given to the local police station even if cryptic, if it discloses a cognizable offence may constitute an FIR within the meaning of section 154. A telephonic message to the police station which has been recorded by police officer and started investigation basing upon the message if it discloses a cognizable offence, the police can treat it as an FIR. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(105)

Criminal Trial

One part of evidence of a witness even if is rejected the other part of the evidence of the same witness may be accepted. *(Nazmun Ara Sultana, J)* .....(222)

Evidence Act (I of 1872)
Sections 63

If a true copy of a document is proved by the maker on oath giving explanation that the original is missing from the record, it satisfies the requirement of secondary evidence within the meaning of section 63 of the Act. Where secondary evidence of the contents of a document alleged to have been destroyed/untraceable is admitted by the court of first instance without objection, even without any foundation for the reception of secondary evidence having been laid down, the opponent is estopped from taking any objection to the admissibility of such documentary evidence in the appellate Court. Even oral evidence of the contents of the original document can be proved when the original is admitted to have been lost. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(99 &100)

Code of Criminal Procedure (V of 1898)
Section 423(b)(2)

The appellate court has power to alter the finding of the trial court and convict the accused person on the basis of the evidence on record. No restriction is placed on the power of the appellate court to alter the finding to any that it considers suitable to the purpose. The expression 'alter the finding' contemplates only an alteration of the finding of conviction which was appealed against and which was the subject matter of appeal. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(118)

Penal Code (XLV of 1860)
Section 34 and 120B

If on an analysis of the evidence on record if it is found that the prosecution has proved that there was conspiracy to kill the leaders and in pursuance thereof, the killing was perpetrated, all accused persons could not avoid criminal liability. If, however, the evidence of record proved that there was no conspiracy but, the killing was committed by several persons in furtherance of common intention of all, all the accused persons cannot be convicted because the common intention requires participation in the crime. *(SK Sinha, J agreeing with Nazmun Ara Sultana, J)* .....(115)

Code of Criminal Procedure (V of 1898)
Section 423(b)(2)

If a palpable illegality is apparent in the trial Court's judgment while hearing an appeal

from conviction, the appellate court can pass appropriate conviction for ends of justice on reappraisal of the evidence on record. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(116)

Code of Criminal Procedure (V of 1898)
Sections 234 and 239; 535 and 423(b)(2)

An accused person can be convicted of a particular offence only if he was charged with the same. The ordinary rule that the accused cannot be convicted of any offence with which he is not charged is circumscribed by exceptions. The power of the appellate court under section 423(b)(2) is, however, subject to the condition that the appellate court cannot enhance the sentence imposed by the trial court. *(SK Sinha, J agreeing with Nazmun Ara Sultana, J)* .....(117)

Code of Criminal Procedure (V of 1898)
Sections 374 and 410

True, no appeal was preferred against the order of acquittal of the accused persons on the charge of criminal conspiracy but, this itself is not a legal ground to shirk its responsibility even if there are sufficient evidence in support of the charge. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(113-114)

Code of Criminal Procedure (V of 1898)
Sections 237 and 238

Even where a charge was framed against an accused person in respect of an offence, he may be convicted for lesser offence provided the case attracts section 237 and 238 of the Code. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(121)

Code of Criminal Procedure (V of 1898)
Sections 221 and 222

Object of framing of charge—The object of framing a charge is to enable an accused person to known the substantive charge which he will have to meet at the trial. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(123).

Code of Criminal Procedure (V of 1898)
Sections 120A and 535

Even if no formal charge is framed or there is omission to frame a charge unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction in view of section 535 of the Code. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)* .....(122)

Mahbubey Alam, Attorney-General with MK Rahman, Additional Attorney-General, Momtazuddin Fakir, Additional Attorney-General with Motahar Hossain Saju, Deputy Attorney-General, Bishwajit Deb Nath, Deputy Attorney-General, Ekramul Haque, Deputy Attorney-General with Md Masud Hasan Chowdhury, Assistant Attorney-General, Shaikat Basu, Assistant Attorney-General, Mahfuza Begum, Assistant Attorney-General and Bashir Ahmed, Assistant Attorney-General instructed by Sufia Khatun, Advocate-on-Record—For the Appellant.

Anisul Huq, Senior Advocate with Nurul Islam Sujan, Advocate and Sheikh Fazle Noor Taposh, Advocate as Government-Prosecutor—Government Chief Prosecutor.

Abdullah-al-Mamun, Advocate—As State Counsel to defend the Respondents (appointed by the Court) .

Shiv Nath vs Union of India, AIR 1965 SC 1666; Onkar Nath vs Delhi Administration, AIR 1977 SC 1108; Pal vs State of Haryana, AIR 1978 SC 1492; Abdur Rahman Mondal vs State, 29 DLR (SC) 247; Major Md

Bazlur Huda vs State, ADC Vol.VI(A)1; Barendra Kumar Ghose vs Emperor, AIR 1925 PC 1; Shreekantiah Ramayya Muni Palli vs State of Bombay, AIR 1955 SC 287; Tukhram Gonopat vs State of Maharashtra, AIR 1974 SC 514; Jaikrishna Das Monohordas Desai vs State of Bombay, AIR 1960 SC 889; Ramaswami vs State of TN AIR 1976 SC 2027; Abdur Rahman Mondal vs State, 29 DLR (SC) 247; Bangladesh vs Abed Ali, 36 DLR (AD) 234; Abdus Samad vs State, 44 DLR (AD) 233; State vs Tajul Islam, 48 DLR 305; Kaher Singh vs State (Delhi Admn), AIR 1988 SC 1883; Noor Mohammad Yousuf Moin vs State (1970) 1 SCC 696; Yashpal vs State of Punjab, AIR 1977 SC 2433; Shiba Narayan Laxmi Narayan Joshi vs State of Maharashtra, AIR 1980 SC 439; Biswambhor Singh vs State, AIR 1954 SC 139; Pearey vs Nanak Chand, AIR 1948 PC 108; State of UP vs Nagu, AIR 1979 SC 1567; Ramdeo Rai Yadav vs State of Bihar, AIR 1990 SC 1180; Tilkeswor vs Bihar State, AIR 1956 SC 238; Willie Slancy vs State of MP, AIR 1956 SC 116; Brathi vs State of Punjab, (1991) 1 SCC 519; GD Sharma vs State of UP, AIR 1960 SC 400; Abdul Rahman vs King Emperor, AIR 1927 PC 44; BN Srikantiah vs Mysore State, AIR 1958 SC 672; Benjamin Cardozo in People vs John Defore, 242 NY 13, 17-28; Khandaker Zillul Bari vs State, (2009) 17 BLT (AD) 28; Shahana Hossain vs Asaduzzaman, (1995) 47 DLR (AD) 155; Karnataka vs Andhra Pradesh, (2000) 9 SCC 572; Abdul Malek vs Abdus Salam, 61 DLR (AD) 124; See (Ekushey Television vs Dr Chowdhury Mahmud Hasan, 55 DLR (AD) 26; Revenue vs Nasrin Banu, 48 DLR (AD) 171; Naziruddin vs Hameeda Banu, 45 DLR (AD) 38; State vs Muhammad Nawaz, 18 DLR (SC) 503; Bangladesh vs Dhaka Lodge, 40 DLR (AD) 86; Raziul Hasan vs Badiuzzaman Khan, 16 BLD (AD) 253 = 1 BLC (AD) 35; Balaram Prashed Agarwal vs State of Bihar, (1997) 9 SCC 338; (See EK Chandrasenan vs State of Kerala, (1995) 2 SCC 99); Chandrakant Patil vs State, (1998) 3 SCC 38; Anis vs Union of India, 1994 Supp(1) SCC 145; (AR Antulay vs RS Nayak, (1988) 2SCC 602; Prem Chand Garg vs Excise Commissioner (AIR 1963 SC 996) ref.

Judgment

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

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

3. A prison is a place in which people are physically confined and usually deprived of a range of personal freedoms. Incarceration in prison is a legal penalty that may be imposed by the Courts for the commission of a crime. Other terms used as penitentiary, correctional facility, remand centre, detention centre, and a goal or jail. A prison system is the organizational arrangement

of the provision and operation of prisons. A prison may also sometimes be used as a tool of political repression to detain political prisoners, prisoners of conscience and enemies of the state, particularly by authoritarian regimes. In times of war or conflict, prisoners of war may also be detained in prisons. The use of capital punishment began to decline in the late 18th century, the prisons are increasingly used by courts as a place of punishment, eventually becoming the chief means of punishing serious offenders. The concept of the prison as a penitentiary (as a place of punishment and personal reform) was advocated by the English jurist and philosopher Jeremy Bentham, among others. Confinement of criminals came to be viewed as an ideal, because it was thought that solitude would help the offender to become penitent and that penitence would result in rehabilitation.

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

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

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

7. After the killing of Sheikh Mujibur Rahman, the entire nation was maimed to hear the news of the killing of Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and M Kamruzzaman in their prison cells in the Dhaka Central Jail. The authority remained unmoved and indifferent. Being impelled by conscience, Kazi Abdul Awal (PW 1), the DIG (Prisons) Dhaka Central Jail, lodged an FIR on 4th November,

1975, being Lalbagh PS Case No.11 dated 4th November, 1975, taking risk of his life as the authority in power wanted to suppress the real incident of the killing. He stated that realizing the hatefulness and barbarism and the gravity of the incident, he himself lodged the FIR instead of allowing the Jailor to lodge the same. No investigation was held over the said incident to unearth the names of the assailants, their purpose and intention of the killing. The investigation of the case was postponed sine die by the order of the Government as revealed from the statement of Abdul Kahar Akond (PW 64). The reason is obvious from all corners the fingers were pointing towards Khandaker Mustaque, his security team deputed at Bangabhaban and his followers as the killers. These killers were staying with Khandaker Mustaque in Bangabhaban forming his security team and associates to consolidate power for running the country.

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

9. Abdus Samad Azad (PW 10) was a political prisoner with these leaders during the relevant time stated that after the killing of Sheikh Mujibur Rahman along with his family members on 15th August, 1975, Khandaker Mustaque Ahmed declared himself as President. On 23rd August, 1975, he was arrested by the police and taken to the Police Control Room. On reaching there, he found late Syed Nazrul Islam, late Kamruzzaman, late Tajuddin Ahmed and late Captain Monsur Ali and at 12-30 noon, they were taken to the Dhaka Central Jail. Md Nasim (PW 14), son of late Monsur Ali stated that the killers of Sheikh Mujibur Rahman, namely Khandaker Mustaque, Colonel Rashid, Colonel Faruq and others took his father into the Dhaka Central Jail and there, they killed his father along with Syed Nazrul Islam, Tajuddin Ahmed and Kamruzzaman.

10. PW 14 stated that on hearing the news on radio about the killing of Sheikh Mujibur Rahman; the usurpation of power by Khandaker Mustaque and the declaration of Martial Law, he was puzzled for the safety and security of his father as his father was then the Prime Minister of Bangladesh. He shifted his father to a house adjacent to his father's official residence. Then he shifted his father to the house of his maternal uncle Mahbubul Alam at Eskaton at noon. In the meantime Khandaker Mustaque wanted to know the whereabouts of his father. In late evening, the army personnel came in the area. On hearing the news over radio about the formation of the Government by Khandaker Mustaque his father became nervous. Then he shifted his father at

night to the residence of a security staff of his father at T & T Colony. Sometimes thereafter, Shah Muazzem Hossain and Obaidur Rahman came to their Eskaton residence and wanted to know the whereabouts of his father. There was exchange of hot words with them. They told him that they were apprehensive of his father's security and they wanted to take him at a secured place for which they wanted to talk with him. They took Monsur Ali to Bangabhaban and there, Khandaker Mustaque offered him to become the Prime Minister. Monsur Ali refused the proposal disdainfully. Then Khandaker Mustaque Ahmed threatened him stating that if he did not accept the proposal, he would face similar fate like the one of 15th August. His father came back and on 22nd August he was arrested.

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

12. PW 36 stated that after the killing of Sheikh Mujibur Rahman, the army cordoned their residence and an officer told that all members of the family were put under house arrest. They snapped the telephone link. At 1-30 in the night, Major Dalim with an accomplice came and wanted to know what problem they were then facing. Her father being enraged abused him. On 23rd August, 1975, in the morning, the police took her father with them. Then she came to know that her father was kept in the Dhaka Central Jail. Towards mid October, 1975, she along with her mother went to meet her father in Dhaka Central Jail, when the latter told them that the country was heading towards a direction in which the pro-liberation forces would not be allowed to survive by the new regime.

13. Admittedly, these four leaders were the architects of the liberation of the country and presented to the people the fruits of liberation within a shortest period of time. They organized the unarmed young and adolescent boys to become freedom fighters for liberating the country and fought against an organized Pakistani army equipped with modern sophisticated arms, collected arms for them for fighting with them and convinced the world leaders that they were fighting for political, social and economic independence from the oppressive Government. These leaders were arrested and detained in prison only because they did not give allegiance to the usurpation of power by Khandaker Mustaque Ahmed and refused to join his Government.

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

and the court can take judicial notice of these facts.

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

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

17. Besides those matters, there may be other facts which are considered too notorious to require formal proof; such matters are, therefore, "judicially noticed". "Any matter of such common knowledge that it should be an insult to intelligence to require proof of it would probably be dealt with in this way (Cockle's Cases and Statutes on Evidence, Eighth Edition, page 13)". Of them, historical facts, geographical truths, scientific inventions, socioeconomic conditions at a given time, natural phenomena, axiomatic truth, common affairs of life in general knowledge of people, religious history and prevalence of a religious belief and distinction between ideas of two sects. The courts can take judicial notice of partition of India, the communal disturbance at that time and the consequent insecurity of lives and property of Muslims in India and Hindus in Pakistan and their migration to India and Pakistan etc. *(Shiv Nath vs Union of India, AIR 1965 SC 1666).*

18. In *Onkar Nath vs Delhi Administration, AIR 1977 SC 1108*, Onkar Nath, a Railway employee was convicted by a Magistrate and his conviction was upheld by the appellate Court and the High Court in revision. His conviction was under the provisions of the Defence of India Rules, 1971. The allegation against him is that in violation of the prohibition, the appellant who was a leader of the Railway men's Union held a meeting in the Railway yard inciting Railway workers to go on strike from May 8, 1971. The Supreme Court held that facts mentioned in Section 57 of the Evidence Act were not exhaustive and the purpose of this section is to provide that the Court shall take judicial notice of certain facts rather

than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public notice. "Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to the commonsense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No Court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation, need no proof and are judicially noticed. Judicial notice in such matters takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof", the court observed. Accordingly, the Supreme Court held that the Courts below were justified in assuming without formal evidence the Railway strike was imminent on May 5, 1974, and that a strike paralyzing the civic life of the nation was undertaken by a section of workers on 8th May, 1974.

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

20. The constitution of the 'Constituent Assembly', the drafting of the Constitution of the Peoples Republic of Bangladesh and adopting it on 4th November, 1972, which came into force on 16th December, 1972, the killing of Sheikh Mujibur Rahman and his family members on 15 August, 1975, by some aberrated army officers; the usurpation of power by Khandaker Mustaque Ahmed after killing Sheikh Mujibur Rahman; the arrest of four national leaders and keeping them in the Dhaka Central jail as they refused to give allegiance to Khandaker Mustaque's Government and also refused to join his cabinet; the killing of these four national leaders Syed Nazrul Islam, Tajuddin Ahmed, Monsur Ali and M. Kamruzzaman while they were kept as political prisoners in Dhaka Central Jail in the early hours of 3rd November, 1975, when Khandaker Mustaque Ahmed was the President of the country are so notorious facts that those cannot be disputed by anybody and if any one disputes these historical events, he will be taken or treated as a person not believing the history behind the sacrifice of millions of martyrs for the liberation, and the sovereignty of Bangladesh.

21. The trial Court committed a fundamental error in convicting the respondents along with 13 others under sections 302/109 of the Penal Code and also convicting the respondents along with Moslem Uddin under sections 302/34 of the Penal Code for the self same incident of murders. This shows that the trial Court was totally confused in the application of an offence of abetment of mur-

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

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

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

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

25. Section 34 of the Penal Code does not create a substantive offence. If two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it individually.

Common intention requires a prior consent or concert or a pre-planning. It is the intention or mens rea to commit the offence and the accused can be convicted only if such an intention has been shared by all of them. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop at the instant when such crime is committed.

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

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

28. The conduct or act of the accused can be gathered and the inference can only be drawn by the manner in which the accused or some of them, arrived on the scene and mounted the attack, the determination and the conduct with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct towards one goal which matter. It is the totality of the circumstances to be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. It is, therefore, established principle that the pre-arranged plan or even the intention may develop on the spot leading to the commission of the offence. But the crucial circumstance is that the said plan must precede the act constituting the offence. Therefore, before convicting an accused, the court must come to a definite conclusion that the said person had a prior concert with one or more persons for committing the offence.

29. The dominant feature of section 34 of the Penal Code is the element of participation in the entire canvas portraying the actions. The views taken in Abdur Rahman Mondal (supra) have been approved by this Division in a subsequent case in *Major Md Bazlur Huda vs State, ADC Vol.VI(A)1.* In that case, Sultan Shahriar was not present at or near the place of occurrence-he was at the Radio Station when Sheikh Mujibur Rahman and other members of his family were killed. On behalf of the accused his conviction

under sections 302/34 of the Penal Code was challenged on the ground that in view of the admitted fact of his absence at the place of occurrence, his act of participation in the killing does not come within the ambit of section 34 of the Penal Code in the absence of any overt act or any other act of participation in the killing. It was also urged that in order to bring him within the ambit of sharing common intention with other accused persons his participation with other perpetrators in the scene of crime in pre-concerted or pre-arranged plan must be proved. In this connection this Division considered the cases of *Barendra Kumar Ghose vs Emperor, AIR 1925 PC 1, Shreekantiah Ramayya Muni Palli vs State of Bombay, AIR 1955 SC 287, Tukhram Gonopat vs State of Maharashtra, AIR 1974 SC 514, Jaikrishna Das Monohordas Desai vs State of Bombay, AIR 1960 SC 889, Ramaswami vs State of TN AIR 1976 SC 2027, Abdur Rahman Mondal vs State, 29 DLR (SC) 247, Bangladesh vs Abed Ali, 36 DLR (AD) 234, Abdus Samad vs State 44 DLR (AD) 233* and *State vs Tajul Islam, 48 DLR 305* and held by majority that in order to bring an accused within the ambit of section 34 of the Penal Code, the presence of the accused at the scene of occurrence must be proved and that his participation, that is to say, overt act either direct or indirect in the commission of the offence in furtherance of the common intention of all must also be proved.

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

31. The offence of murder committed in consequence of a conspiracy and the offence of murder committed in pursuance of common intention by more than one accused persons are in essence, as discussed above, distinct. A criminal conspiracy differs from other offences, that is to say, an intention to do a criminal act is not a crime in itself, until something is done amounting to the doing or attempting to do some act, to carry out the intention; conspiracy on the other hand consist simply in the agreement confederacy to do some act. In a criminal conspiracy, accused persons are often required to do various acts at various stages; even if for the first time they come into conspiracy, at a later stage they are members of the conspiracy provided their act is calculated to promote the object of the conspiracy: is attracted when an offence of culpable homicide is committed 'in furtherance of common intention' of two or more persons, then every one of them is as such guilty as the other and it is not necessary that every one of them should have participated in the commission of the murder to the same extent. It is thus not consonant to law that after the accused persons were found guilty of criminal conspiracy to kill the four leaders in the Dhaka Central Jail, their conviction under section 302/34 of the Penal Code passed by the trial court could be legally maintainable.

32. The trial court has committed another fundamental error in acquitting the accused persons of the charge of criminal conspiracy. The High Court Division also committed the similar

error in maintaining the finding on the charge of criminal conspiracy. Though it maintained the death sentence of Moslem Uddin, acquitted the respondents and Syed Faruque Rahman, Sultan Shahriar Rashid Khan, Bazlur Huda and AKM Mohiuddin Ahmed. On the charge of conspiracy it held that the prosecution failed to prove that the killing was perpetrated in consequence of a criminal conspiracy hatched up in Bangabhaban by Khandaker Mustaque Ahmed, the politicians staying with him and his security team deputed at Bangabhaban or that the killing was implemented and monitored from the Bangabhaban over telephone. It observed that the story of telephonic talk between Bangabhaban and the Dhaka Central Jail has not been established to the hilt of the case and that "the trial court has itself evaluated rightly discarded the testimonies of the witnesses who deposed relating to the deliberations amongst the accused persons inside the Bangabhaban over the killing of the 4 leaders". The High Court Division concluded its opinion observing that it was not possible or probable on the part of the accused persons staying at Bangabhaban "to go out of the same at 00-00 hours or afterwards on 3-11-75 because of promulgation of *coup-d'etat* by Khaled Mosharaff on the same night and the consequent withdrawal of Tank Regiment from Bangabhaban as also for deployment of rival forces lead by the leader of the coup, within the vicinity of Bangabhaban, at 12-1-00 hours of November 3, 1975".

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

34. Both the High court Division and the trial Court fell in error in failing to notice that conspiracy is a matter of inference deduced from certain acts of persons done in pursuance of an apparent criminal purpose in common between them. In the very nature of the offence, the presence of the accused at the scene of occurrence is not necessary. Section 120A of the Penal Code defines criminal conspiracy, which enacts that when two or more persons agreed or cause to be done an illegal act or an act which is not illegal but by illegal means, such an agreement is designated as criminal conspiracy punishable under section 120B of the Penal Code. The essence of criminal conspiracy is an agreement to commit an illegal act by some persons. A criminal conspiracy by its nature is hatched up in secrecy and direct evidence to prove conspiracy is seldom available. The offence of conspiracy being a making of an agreement to do an unlawful act, it is a matter of inference to be drawn from direct or circumstantial evidence. It can be inferred from the acts and conduct of the parties in agreement of conspiracy that there was an agreement between two or more persons to do one or the other of the acts described in the section. The conspiracy consists not merely in the intention of two or more persons, but in the agreement of those persons to do such acts. So long as such a design rests only in intention, it is not punishable.

35. The existence of a criminal conspiracy presupposes a guilty state of mind and a situation wherein the concerned accused, pursuant to a predetermined decision, execute a series of acts that

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

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

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

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

> "Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is

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

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

39. Actual proof of conspiracy is not required; even some prima facie evidence leading to a reasonable belief that two or more persons had conspired together is sufficient. It is also well established that conspiracy need not be proved by direct evidence. The same may be proved from the surrounding circumstances and conduct of the accused. As to when conspiracy can be taken as established, it is now settled by judicial pronouncements that there can hardly be direct evidence on this, for the simple reason that conspiracy is not hatched up in public-by its very nature-those are secretly planned. So lack of direct evidence relating to conspiracy by the accused has no significance. It is unnecessary to prove that the parties actually came together and agreed in terms to pursue the unlawful object-there need never have been an express verbal agreement, it being sufficient that there was a 'tacit understanding between the conspirators as to what should be done'. The relative acts or conducts of the parties must, however, be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. *See Shiba Narayan Laxmi Narayan Joshi vs State of Maharashtra, AIR 1980 SC 439* and Noor Mohd. Yousuf (supra).

40. The conspiracy being hatched up in secrecy, conspirators cannot discuss the plans in the presence of strangers. This privacy and secrecy being the elements of criminal conspiracy, it is difficult to obtain direct evidence in its proof. For a court to believe that two or more persons are

members of a conspiracy, if the said condition is fulfilled anything said, done or written by any one of them in reference to their common intention will be evidence against the other; anything said, done or written by one of the conspirators should have said, done or written by him after the said intention was entertained is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.

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

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

43. In this case the prosecution has examined 3(three) witnesses to prove the meeting of minds by all the conspirators in the Bangabhaban, that is to say, the planning, designing and implementing- they are, Md. Mokhlesur Rahman Bhuiyan (PW 11), Md Shakhawat Hossain (PW 13) and Md. Manik Mia (PW 18). To prove the previous conduct of the accused persons it has examined 4 witnesses; they are, Md. Aminur Rahman (PW 2), ATM Nuruzzaman (PW 3), Abdus Samad Azad (PW 10), Md. Nasim (PW 14) and Mahbubuddin Ahmed (PW 20). To prove the preparation and execution of the killing pursuant to the conspiracy, the prosecution has examined 8 witnesses; they are- Kazi Abdul Awal (PW 1), Md Aminur

Rahman (PW 2), ATM Nuruzzaman (PW 3), Md. Mokhlesur Rahman (PW 11), Khan Mohammad Ali Alok (PW 17), Commodore Golam Rabbani (PW 21), Md. Yakub Hossain Khan (PW 34), and Lieutenant Colonel (Retd) Anwaruzzaman (PW 46). To corroborate them, it has also examined Md. Nayeb Ali (PW 8), Dr Md Faizuddin Miah (PW 23) and Syed Mahbub-Al-Karim (PW 52). Coupled with their evidence, the prosecution has also examined 7 witnesses to prove that the killing squad went from the Bangabhaban to execute the killing and after the killing they returned back to Bangabhaban. Those witnesses are, ATM Nuruzzaman (PW 3), Mahabbat Ali (PW 4), Md Ismail Hossain (PW 6), Md. Shakhawat Hossain (PW 13), Khan Md. Alok (PW 17), Md. Manik Mia (PW 18), and Commodore Golam Rabbani (PW 21). The evidence of these witnesses have been corroborated by PWs 7, 16, 36, 37 and 46. In support of the circumstantial evidence, the prosecution has examined PWs 2, 3, 10, 20, 21, Captain AMM Saifuddin (PW 26), Oliur Rahman (PW 28), Colonel Safayat Jamil (PW 29), Shamsher Mobin Chowdhury (PW 33) and Md Mostafa (PW 63). Some of these witnesses, i.e. PWs 26, 28, 29, 33 and 63 also proved the subsequent conducts of the conspirators.

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

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

46. While disbelieving the charge of conspiracy, the High Court Division after assessing the evidence of PWs 29 and 46 came to the conclusion that "it is very much doubtful as to whether there was at all any telephone link in operation between Bangabhaban and any other part of the city like Central Jail, Dhaka. It is also evidence from the deposition of the witnesses that on the night following 2-11-1975 from 12-00 midnight to 1 am the inmates of Bangabhaban had received the message that their rival force had already been deployed within the vicinity of Bangabhaban and the tanks meant for guarding Bangabhaban had already been withdrawn by their rival force.....

property or to surrender the same which has definitely denied the right of natural justice.

.....(17)

Jebon Nahar vs Bangladesh, 49 DLR 108; Bangladesh vs Chand Sultana, 1 MLR 310 = 48 DLR 547; Jebon Nahar vs Bangladesh, 49 DLR 108; Bangladesh vs Chand Sultana, 51 DLR (AD) 24; Bangladesh vs Md Jalil, 48 DLR (AD) 10; Secretary Ministry of Works vs Rowshan Ara Begum, 57 DLR (AD) 167; Bangladesh vs ATM Mannan 1 BLC (AD) 8 and Md Feroj Mia vs Bangladesh in Writ Petition No. 4971 of 2001 ref.

Khandaker Shahriar Shakir—For the Petitioner.

Shahidul Islam, DAG with Sukumar Biswas, AAG—For Respondents.

Judgment

Mahmudul Hoque J : In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the decision dated 10-12-2009 passed by Respondent No. 3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57 Khalishpur Housing Estate, Khulna, from Kha list of the Abandoned Buildings as published in the Bangladesh Gazette, dated 23-9-1986 at page No. 9764 (36) against serial No. 615 (Mistakenly mentioned in the decision as published in the Bangladesh Gazette dated 28-4-1986 against Serial No. 634) (Annexure "L") should not be declared to have been passed without lawful authority and is of no legal effect and as to why the Respondents should not be directed to exclude the house being No. T-57, Khalishpur Housing Estate, Khulna from the 'Kha' list of Abandoned Building as published in the Bangladesh Gazette dated 23-9-1986 as detailed hereinbefore and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of this rule, in brief, are that the property in question being House No. T-57, Khalishpur Housing Estate, Khulna, measuring an area of 144 square yards was allotted by the Government to one SG Mustafa son of SM Yousuf by a registered deed of lease being No. 8753 dated 5-9-1963 and after getting allotment of the said property the lessee SG Mustafa had been possessing the same and constructed a two-storied building thereon obtaining loan from House Building Finance Corporation ("HBFC") by mortgaging the said property as security against loan. The said SG Mustafa while in possession and enjoyment of the property in question died in the year 1972 and he was buried in Khalishpur grave-yard, Khulna. The said SG Mustafa died leaving son Abid Hossain, who was in possession of the disputed property. Subsequently he decided to dispose of the property in question and accordingly he executed a registered deed of agreement for sale being No. 22877 dated 12-12-1980 in favour of one Abdur Rob Biswas, the husband of the present Petitioner at a consideration of Taka.80,000 out of which he received Taka 40,000 as earnest money and delivered possession of the property. On the same day he executed and registered a power of attorney appointing the Petitioner authorizing her to act on his behalf and to deal with the property in question in any manner including power of transfer of the same. After passing of a considerable time while Abdur Rob Biswas pressed the said Abid Hossain to execute and register the sale deed upon receipt of the remaining money it was revealed that the property has been mortgaged to the HBFC and the original documents are lying with them. Thereafter the petitioner after making necessary inquiry came to know that the original loan amount stood at Taka 43,778 as on 7-12-1981. The petitioner made payment of the entire loan amount to the HBFC by a payment receipt dated

7-12-1981 through Sonali Bank, Khulna Branch. After payment of the entire amount HBFC released the property from mortgage and since then the petitioner is continuing in the possession of the disputed property without any objection from any quarter. By this time the Petitioner as possessor of the disputed property did not receive any notice either under Article 7 of the President's Order No. 16 of 1972 or under section 5(l)(b) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. 54 of 1985) from the Government. Subsequently the Petitioner came to know that the disputed property has been enlisted as Abandoned Property at serial No.615 in the "Kha" list vide SRO 364-L/86-1985 published in the Gazette (Extra-ordinary) on 23-9-1986. Then the Petitioner filed a Case under Section 7 (1) of the Ordinance 54 of 1985 in the Second Court of Settlement being Case No. 221 of 1992, Dhaka annexing all the relevant documents in support of her claim by a Firisti. But the Second Court of Settlement after hearing dismissed the Case by the impugned Judgment and Order dated 10-12-2009. At this stage the Petitioner moved this Court by filing this application and obtained the present Rule and Order of Stay.

3. The Respondent-Government contested the Rule by filing Affidavit-in-Opposition and Supplementary Affidavit-in-Opposition denying all the material allegations made in the application contending, *inter alia*, that the property in question was leased out by the Government to one SG Mustafa for 99 years by a lease deed dated 4-9-1963. During the war of independence said SG Mustafa left the case property uncared for and taking such advantage the present Petitioner entered into possession and created some false documents to grab the case property. It is also stated that the claimant could not produce any document to show that the original owner was in possession of the case property at the material time from 26-3-1971 to 28-2-1972 and, as such, the case property has been rightly included in the 'Kha' List of the abandoned buildings under the provision of Article 2(1) of PO 16 of 1972 upon compliance of all the legal formalities. Further case of the Respondents-Government is that the claimant Petitioner while deposed before the Court of Settlement admitted in her cross-examination that she entered into the case property as an abandoned property, the Petitioner could not prove the death of SG Mustafa in Bangladesh and Abid Hossain is the son of said SG Mustafa and also failed to prove the right, title and interest in the case house and as such the Rule is liable to be discharged.

4. Mr Khandaker Shariar Shakir, the learned Advocate appearing for the Petitioner submits that admittedly the Petitioner as constituted attorney of Abid Hossain, son of SG Mustafa, has been possessing the case property since 1982 and before that Abid Hossain was in possession. In this situation the Respondent-Government ought to have served a notice under Article 7 of PO 16 of 1972 upon the owner or the occupier asking them to surrender the possession of the property to the Deputy Commissioner but in the present case no such notice was issued and subsequently when the Ordinance No. 54 of 1985 came into force before enlistment of the property as abandoned property in the "Kha" list, the Government ought to have served a notice upon the owner or occupier of the property under section 5(1)(b) of the Ordinance 54 of 1985 asking the owner or possessor to surrender the property or to explain on what basis they are occupying the disputed property but in the instant case no such notice was issued and served upon the Petitioner or upon her principal Abid Hossain, as such inclusion of the property in question in the "Kha" list of the Abandoned Buildings is palpably illegal and without lawful authority. Mr Shakir referring an inquiry report dated 30-9-1996 Annexure 1(1) furnished by the Officer-in-Charge, Abandoned Property Division, Khulna, submits that in the

said report it has been clearly stated that there is no paper in the office to show on what basis the house in question included in the 'Kha' list of the abandoned buildings.

5. He also submits that from the said report it is evident that the property in question was never declared abandoned or any notice to that effect was issued or served upon the owner or occupier of the disputed property. Mr Shakir also argued that to substantiate the claim of the Petitioner, she deposed before the Court of Settlement and exhibited relevant documents in support of her claim such as the original lease deed, mortgage deed executed in favour of HBFC, death certificate of SG Mustafa nationality certificate of Abid Hossain, Affidavit sworn by Abid Hossain before the Magistrate, irst Class, utility bills, succession certificate, registered power of attorney, payment receipt showing payment of loan money to HBFC by the petitioner but the Court of Settlement totally failed to consider those documents in its true perspective and upon misconstruction of the said documents most illegally dismissed the case holding that the property has been rightly declared abandoned and included in the "Kha" list of the Abandoned Buildings. He further argued that the record of Khalishpur Housing Estate placed before the Court Settlement shows that wife of SG Mustafa, namely, Hosneara Begum filed an application on 13-12-1972 before the Housing Authority, Khulna praying for allotting the said quarter in her favour stating that the property was leased out to her husband SG Mustafa in the year 1963 and subsequently her husband SG Mustafa constructed a two storied building on the property obtaining loan from HBFC who was killed on 10-3-1972. It is also argued that the Government file shows that said SG Mustafa died in Bangladesh in 1972 and several notices were issued by the housing authority demanding outstanding, installments from said SG Mustafa. Therefore, it is established that the original owner of the property was present in Bangladesh at the relevant time and he never left this country leaving the property uncared for but he died in this country and after his death his heirs had been in possession of the disputed property till 1980 and thereafter Abdur Rob Biswas and then the Petitioner as attorney of Abid Hossain has been possessing the disputed property.

6. For the above reason the property in question cannot be declared abandoned and as such the listing of the property in the "Kha" list of the Abandoned Buildings is illegal and without lawful authority. In support of his submission he has referred to the cases of *Jebon Nahar vs Bangladesh* reported in *49 DLR 108*, *Bangladesh vs Chand Sultana* reported in *1 MLR 310 = 51 DLR (AD) 24.*

7. Mr Md Shahidul Islam, the learned Deputy Attorney General with Mr Sukumar Biswas, the learned Assistant Attorney General appearing for the Respondent Government submit that the Petitioner is not the owner of the property and as such she cannot file application before the Court of Settlement for release of the property from the 'Kha' list of the Abandoned Buildings. It is also argued that the Petitioner having failed to prove the case, the Court of Settlement has rightly dismissed the case. Mr Islam further submits that the burden of proof squarely lies on the Petitioner to prove that SG Mustafa or his heirs occupied, managed and supervised the case properly on the relevant date i.e. on 28-2-1982 to establish that the said property is not an abandoned property. But the petitioner having failed to prove the same the inclusion of the Building in the "Kha" list is proof of its being an abandoned property and the Government has nothing in prove or deny .

8. In the present case the petitioner could not show that SG Mustafa was present in Bangladesh on material dates or that he occupied, managed or supervised the case property when PO 16 of 1972 came into operation, as such the

listing of the property in the "Kha" list as abandoned property is lawful and conclusive proof of facts. It is also argued that the papers and documents submitted on behalf of the Petitioner to prove her case showing payment of utility bills are after 1980 onwards as such it can not be said that the Petitioner or her principal was in active control and possession of the property in question. He further argued that the Court of Settlement rightly observed that though the Petitioner submitted some documents but those have not been proved by evidence. Mr. Islam also argued that the Petitioner is not the owner of the property and she can not be a claimant of the property as per law. It is also argued that this Court can not sit as a Court of appeal sitting in writ jurisdiction. This Court only can interfere if it is found that the Court of Settlement acted malafide and in violation of principle of natural justice. But in the present case no such allegation has been brought on behalf of the Petitioner. In support his of his submissions he referred to the cases of *Bangladesh vs Md Jalil* reported in *48 DLR (AD)10*, *Secretary Ministry of Works vs Rowshan Ara Begum* reported in *57 DLR (AD) 167 and Bangladesh vs ATM Mannan* reported in *1 BLC (AD) 8* and an unreported judgment dated 29-10-2009 passed in the case of *Md Feroj Mia vs Bangladesh in Writ Petition No. 4971 of 2001.*

9. Heard the learned Advocates for the parties, perused the Application, Supplementary Affidavits, Affidavits-in-Opposition, Supplementary Affidavit-in-Opposition and Affidavit-in Reply, along with the annexures annexed thereto.

10. In the instant Rule the moot question to be looked into whether the property in question has been legally declared as abandoned property and whether the property is at all come within the purview of the definition "abandoned." Before going through the merit of the case the provisions of law in this regard may be looked into.

11. The purpose of PO 16 of 1972 is to make provisions for the control, management and disposal of certain property abandoned by certain persons who are not present in Bangladesh or whose whereabouts are not known or who have ceased to occupy or supervise or manage in person their property or who are enemy aliens.

12. It appears that the purpose of PO 16 of 1972 is not to declare as abandoned the property of citizens who are very much present in Bangladesh and who have been occupying, supervising and managing their property at all times. In the present case the Government submitted the concerned record before the Court of Settlement. This Court finds that there are some papers which show that the Housing Authority on different dates wrote letters to the lessee after 1972 onwards demanding payment of outstanding instalments. It is also found that wife of original lessee SG Mustafa has filed an application on 13-12- 1972 praying for allotment of the house in her name since her husband has been killed on 10-3-1972. Apart from this the petitioner in her application categorically asserted that the original owner of the case property died in Bangladesh in the year 1972. Subsequently, while his son Abid Hossain was in active control, supervision and management of the case property, he, by a registered power of attorney, authorized the Petitioner to manage, supervise and control the property on his behalf. The Government though claimed that the property was rightly declared abandoned and enlisted in the "Kha" list as abandoned property, but could not produce any document in support of enlistment and declaration of the property as abandoned or even a notice to surrender under Article 7 of PO 16 of 1972 or under section 5(1) (b) of the Ordinance 54 of 1985 Furthermore, the Govern-ment could not show any paper in respect of treating the property as abandoned except a Gazette notification. The record of the Housing Settlement shows that the original owner of the case property SG Mustafa was present in Bangladesh at the relevant time i.e. on 28-2-1972

when PO 16 of 1972 came into force, as such the claim regarding whereabouts of the original allottee was not known to the Government was not correct. The Petitioner in support of her claim submitted all the original documents before the Court of Settlement including Deed of Lease, Mortgage Deed executed in favour of HBFC. Receipt showing payment of loan to HBFC, payment of utility bills and other connected documents. The Court of settlement though discussed about the documents but upon a misconstruction raised question about the genuineness of those documents.

13. It is true that there are some anomalies in the papers of he Petitioner submitted before the Court of Settlement as well as before this Court but those anomalies in this court's view contributes a little in the merit of the case.

14. Furthermore, it is always to be borne in mind that in any case as this it must be accepted as a truism that the act of abandonment implies two fundamental factors:

(i) Desertion of the property; and

(ii) Giving up one's right to the property.

15. The word "abandonment" connotes in this sense the idea of the owner not merely temporarily vacating but deserting the property with the intention of never returning to it. Such absolute desertion must be concomitant with the positive intention to give up the right vested in the property. It follows, therefore, that mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. These two determinants of the notion of "abandonment" appear not to have been established in this case. It is true that the petitioner before us is not the owner of the property she represents the heirs of S.G. Mustafa namely, Abid Hossain and in other words she has some interest and she produced the power of attorney, receipt showing payment of loan money to the HBFC and possessing the disputed house, as such the case property does not in any way answer to the description of the abandoned property as mentioned above and defined particularly under Article 2 of the PO 16 of 1972 as there was no desertion of the property accompanied by a giving up the right to the property by the owner.

16. A perusal of the Government file pertaining to the case property at page 113 it is found that the Officer-in-Charge of the Abandoned Property, Khulna submitted a report on 30-9-1996. He relevant portion of the said report is reproduced below for ready reference.

"এ বাড়ী সংক্রান্তে অত্র কার্যালয় হতে 'খ' তালিকায় ৬৩৪ নং ক্রমিকে গেজেটে প্রকাশের জন্য ২২-৪-১৯৮৬ তারিখে প্রেরণ করা হয়। সে মতে ১৯৮৬ সালে ২৮ শে এপ্রিল মাসের গেজেটে ৬৩৪ নং ক্রমিকে পরিত্যক্ত বাড়ী হিসেবে ঘোষিত হয়েছে। কিসের বুনিয়াদে বা কোন প্রতিবেদনের উপর পরিত্যক্ত বলে এ বাড়ী ঘোষিত হবে তার কোন তথ্য অত্র দপ্তরে বর্তমানে খুঁজে পাওয়া যাচ্ছে না বা এ সংক্রান্ত কোন নথিও নেই। ঘোষণা হয়েছে কিনা তাও পরিদৃষ্ট হচ্ছে না।

উপরোক্ত তথ্য প্রমান হতে বাড়ীটি পরিত্যক্ত সম্পত্তির তালিকা হতে অবমুক্তির যোগ্য প্রতীয়মান"।

17. The above mentioned observation of the concerned Officer of the Abandoned Property Division, Khulna, establishes that the Government never declared the property as abandoned. In the present case the ownership of the property is not paramount consideration for this Court. The main question is whether the property in question has been rightly included in the "Kha" list of the Abandoned Building in accordance with law. This court also finds that the Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of PO 16 of 1972 or under section 5(1)(b) of the Ordinance, 1985 non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the "Kha" list of the Abandoned Buildings. It is also noted that there is nothing on

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

61. PW 46 stated that the night following 2nd November, 1975, at about 03-00 am, Khandakar Mustaque intimated the IG (Prisons) over telephone that the miscreants might have abducted some prisoners for which the security of the Central Jail should be tightened and directed him to ensure the presence of IG (Prisons) and DIG (Prisons) in the Central Jail; that after arrival of IG (Prisons), Major Rashid told him from Bangabhaban over phone that Captain Moslem and other army personnel went there for discussing about four Awami League leaders; that Khandakar Mustaque then directed IG (Prisons) to allow those army personnel to enter into the jail; that sometimes thereafter, the army officers came to the Central Jail from Bangabhaban and expressed their desire to kill four national leaders and that thereafter, they killed the four national leaders.

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

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

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

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

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

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

67. It was contended on behalf of the respondents that since Brigadier Khaled Mosharraf took the reins of the country by a coup d'etat at zero

hours of 2nd November, it was not possible or probable on the part of the army officers and personnel staying at Bangabhaban to go out from Bangabhaban to implement the killing, inasmuch as, their safety and security was predominant factor at that time. The High Court Division accepted the defence plea observing that the inmates of Bangabhaban having received the message of coup by their rival party, it was not probable for them to move outside the Bangabhaban after 1 am on 3rd November particularly when there was deployment of rival force within the vicinity of Bangabhaban because the situation was such that their personnel security was very much at stake and that it was very much known to them by the withdrawal of the tanks from Bangabhaban.

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

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

70. As observed above, the history of the emergence of Bangladesh; the subsequent events after independence, the murder of Sheikh Mujibur Rahman and the persons involved in it; Khandaker Mustaque's usurpation of power violating the constitutional provisions; the change of socio-political condition of the country after the murder of Sheikh Mujibur Rahman; and the killing of the four national leaders in the Central

Jail are not only historical facts, these acts and events are interwined with each other, not unrelated. An inference from these facts would lead to the conclusion that the killing was the consequence of a deep rooted conspiracy which was designed, planned and executed by none other than these persons who were temporarily benefited by the murder of Sheikh Mujibur Rahman. Both the killing were the result of deep conspiracy and they were perpetrated not only for the purpose of usurping power but also to bring about a change in the political atmosphere in the country-to obliterate the spirit of the historic struggle for national liberation, to exterminate pro-liberation forces and in its place, to repatriate the rightist anti-liberation forces in the helm of the affairs of the Government.

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

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

73. PW 20 stated that he worked as District Magistrate in July, 1975; that during the liberation struggle he was acquainted with Major Dalim; that he was detained in Dhaka Central Jail as detenu in November, 1975; that on 2nd November, Major Dalim visited the Dhaka Central Jail and while the latter was passing in front of his cell, he wanted to know from him the cause of his visit and that Major Dalim made an evasive reply. His evidence remains uncontroverted. Major Dalim had no business to visit Dhaka Central Jail on the previous day of occurrence. He

was staying at Bangabhaban with the respondents as a member of the President's security team. This visit just before the occurrence leads us to infer that it was for the purpose of making reconnaissance of the area where the leaders were detained, that is to say, to make a preliminary survey for military operation. This fact leads to the inference that the conspiracy was afoot and this visit was done by a conspirator in reference to their common intention for executing the killing through the members of the conspiracy.

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

75. PW 26 stated that he was instructed by the authority of Bangladesh Biman flight operation on 3rd November, 1975, at about 11 am that despite suspension of flight operations, he had to operate a special flight; that on his query about the purpose for operation of the special flight, the Operation Officer intimated him that some officers would be flown to Bangkok by an F-27 Craft with captain Azim and captain Ashraf, who were assigned to operate the flight; that at about 9-30/10 pm 4th November they landed at Chittagong airport for refuelling the aircraft and reached Bangkok at early dawn of 5th November, 1975; that on the following day, they returned back to Dhaka and after return, he came to know that passengers they had ferried in the flight were the killers of Bangabandhu, such as, Major Rashid, Major Dalim and others; that they fled from the country after killing the four national leaders on the night following 2nd November and that the officers took with them their families including children.

76. PW 28 stated that in the afternoon of 4th November, then Chief of Protocol of the Ministry of Foreign Affairs Nazrul Islam told him that Colonel Rashid and his group would leave Dhaka by a special flight and asked him to talk with Hadayet, then Managing Director of Biman; that he instructed him to take necessary permissions for flying the special flight over Burma and Thailand, and also to contact with the Embassy of Thailand for landing permission of the special flight; that thereafter, acting Foreign Secretary directed Shamsher Mobin Chowdhury (PW 33), the Deputy Chief Protocol officer, to accompany him; that they went to the concerned Embassies for communicating note verbal; that at about 11-00 pm they went to the old Airport where Colonel Monnaf received them; that they found Lieutenant Colonel Rashid, Lieutenant Colonel Shahriar, Lieutenant Colonel Dalim, Major Bazlul Huda, Lieutenant Colonel Nur Chowdhury, Major Ahmed Saiful Hossain, Captain Marfat Ali, Kismat Hossain, Nazmul Hossain, Ansar, Lieutenant Colonel Pasa, Moslem Mridha and Lieutenant Colonel Faruq amongst the passengers to be flown; that thereafter those army officers boarded the special flight and that on the following morning he came to know that the four leaders were killed in the Dhaka Central Jail on the previous day.

77. PW 29 stated that after 40 hours of the jail killing, the killers left the country; that he then charged Major General Khalilur Rahman as to why he did not inform about the killing despite that he was then staying in Bangabhaban. PW 31 stated that Khandaker Mustaque was displeased towards Kamruzzaman as the latter supported Monsur Ali's nomination as Prime Minister and

that deceased Kamruzzaman always apprehensive that Khandaker Mustaque would not let him stay alive.

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

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

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

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

team to enter into the Dhaka Central Jail just before the killing. Moslem Uddin and his team left Bangabhaban at 3 am of 3rd November, 1975. Moslem Uddin was recognized with arms in his hands when he entered into the Central Jail and that after the killing, he hurriedly left the central jail with the accomplices.

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

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

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

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

from the evidence of this witness that till 4th November morning Khandakar Mustaque was in power and that Khaled Mosharraf's force could not enter beyond Sohrawarddy Udyan.

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

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

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

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

erred in giving weight to this solitary statement.

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

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

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

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

been proved in this case, the High Court Division is justified in giving the respondents the benefit of doubt.

94. Admittedly the original FIR was missing from the case record as well as from the police diary. Under the circumstances, the investigating officer seized a true copy of it from the Dhaka Central Jail, ext-1 and another true copy from the judicial record of the office of the Inspector General of Police, ext-3. Both the High Court Division and the trial Court disbelieved these two documents. The High Court Division on examination of ext-1 though found no discrepancy in them, observed that neither of the two could be "treated as FIR in this case though these two papers, as it could be gathered from the attending circumstances, undoubtedly contains the contents of the report made by PW 1 first in point of time with Lalbagh Police Station on 4-11-1975..... Since neither of the two falls within the purview of the definition of an FIR as contemplated under section 154 of the Code of Criminal Procedure". The High Court Division then observed, 'from the FIR as claimed by the prosecution Ext-1 which was lodged on 4.11.1975 after the occurrence that piece of paper also testifies that he entered into Central Jail on the fateful night. True, it is the description of Moslem Uddin as disclosed by the prosecution differs from place to place though it could not be proved to the hilt by the prosecution that Moslem Uddin came out of Bangabhaban and entered into Central Jail yet it has been proved that he entered into the Central Jail on the fateful night irrespective of the place he came from, beyond reasonable doubt therefore, Muslemuddin can not absolve his liability in this case'.

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

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

97. PW 64 got the charge of investigation of the case on 18th August, 1996. He gave an explanation for collecting the copy of the FIR stating

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

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

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

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

100. Secondary evidence of the existence, condition or contents of the original is admissible when the original has been destroyed or lost, or when, for any other reason not arising from the

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

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

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

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

104. Md Abdul Malek (PW 50) proved the G.R. Register, ext-30, stating that in serial 10698, Lalbagh PS Case No.11 dated 4th November, 1975 under section 302 of the Penal Code was

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

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

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

107. The High Court Division failed to notice another aspect. PW 1 deposed in the case after 22 years of the incident and the investigation officers had to search at different places for tracing out the copy of the FIR The decisions considered by the High Court Division are based on the facts of those cases, which are quite distinguishable from the facts and circumstances of the present one. The High court Division itself admitted that this is an exceptional case and that "it is a gruesome murder it was not allowed to be proceed with for long 21 years because of the existence of a hostile atmosphere, therefore, mere delay in

The

Dhaka Law Reports

Volume LXVIII

2016

Reports of the Decisions of the **High Court Division**
of the Supreme Court of Bangladesh

HIGH COURT DIVISION
(Special Original Jurisdiction)

Md Nuruzzaman J
Zafar Ahmed J

Judgment
June 18th, 2015.

Begum Khaleda Zia.....
.....Petitioner
vs
Anti-Corruption Commission and others.....
.....Respondents*

Constitution of Bangladesh, 1972
Article 145
Anti-Corruption Commission Act (V of 2004)
Section 17

ACC is legally empowered under section 17 to conduct any enquiry, the subject matter of which may fall under Article 145 of the Constitution, so long as it attracts criminal liability and ACC acts within the ambit of law.

.....(62)

*Writ Petition No. 4982 of 2008.

Editor's Note : Civil Petition for Leave to Appeal No. 3479 of 2015 is now pending for hearing before the Hounorable Appellate Division against the aforesaid judgement.

Prevention of Corruption Act (II of 1947)
Sections 5(1)(d) and 5(2)

The issue as to whether the Prime Minister is the public servant is irrelevant in the case inasmuch as section 109 of the Penal Code is present in the case and other public servants are also accused in the case. .....(69)

Prevention of Corruption Act (II of 1947)
Section 5(1)(d)

The allegation against the petitioner that she otherwise abused her office or abetted others to use the office for any illegal gain within the meaning of criminal misconduct as defined in section 5(1) of the Act, or her alleged involvement as an abettor under section 109 of the Penal Code cannot be determined in a separate criminal proceeding and the same must be adjudicated in the proceeding by the Special Judge. .....(69)

Penal Code (XLV of 1860)
Section 109

Abetment under section 109 of the Code is such an offence which can be inferred from the conduct of the accused and attending circumstances of the case. .....(69)

NIKO Case—Distinction between Sheikh Hasina and Khaleda Zia

So far as the erstwhile Prime Minister Sheikh Hasina is concerned, there is no such allegation that the process of approving the 'procedure' by her involves any unlawful financial or other transaction. The only allegation against her is that she approved the 'procedure' which, the High Court Division in her case held, does not attract any criminal liability. In the instant case it appears from the confession of the co-accused that bribe was given to the then State Minister of Ministry of Energy and Mineral Resources AKM Mosarraf Hossain, Selim Bhuiyan and Gias Uddin-al-Mamun to ensure that the 'JVA' is to be finalized and signed which clearly comes within the ambit of definition of criminal misconduct given in section 5(1) of the Act, 1947. The involvement of the petitioner as an abettor in the alleged offence as Minister-in-Charge of Energy and Mineral Resources is a question of fact which cannot be determined at this stage. We also note that the petitioner as Prime Minister refused to give approval to take legal action as per inquiry report prepared by a committee headed by a Director General of the office of the Prime Minister in respect of corruption indulged in the process leading to signing the JVA and to send the report to the ACC. So, it is not the question of approving the 'procedure' as approved by the erstwhile Prime Minister Sheikh Hasina or the draft JVA by the petitioner as Minister-in-Charge, rather the issue is determination of criminal liability of the accused persons of the instant case in the alleged offence of giving and receiving bribe which is absent in the case of Sheikh Hasina. These factual aspects clearly show that the cases of Sheikh Hasina and Begum Khaleda Zia are not the same. ...(56 & 57)

Constitution of Bangladesh, 1972
Article 102(2)

Maintainability of writ petition—The case of Sheikh Hasina was decided upon an application under section 561A of the Code of Criminal Procedure, whereas the petitioner seeks to quash the criminal proceeding by making an application under Article 102 of the Constitution, which we have already held, is not maintainable. .....(58)

Constitution of Bangladesh, 1972
Article 102(2)

It appears from a plain reading of the Rule that the petitioner has prayed for quashing the criminal proceeding. While adjudicating the matter in exercise of writ jurisdiction, we have to strictly follow the terms of the Rule issuing order. .....(49)

Anti-Corruption Commission Act (V of 2004)
Section 32
Anti-Corruption Commission Rules, 2007
Rule 15(7)

Sanction has been given in the prescribed 'Form-3' under Rule 15(7) of the Rules, sanction under section 32 of the ACC Act, is to be given in Form No. 3 under Rule 15(7) of the Rules, 2007 which has been prescribed by the legislature. 'Form-3' is a part of the statute and accordingly, when a specified form is prescribed in the statute for a particular purpose, the sanctioning authority has no scope to

assign any reason of its satisfaction beyond the format given in the form. .....(32)

Constitution of Bangladesh, 1972
Article 102(2)
Code of Criminal Procedure (V of 1898)
Section 561A

The vires of the law has not been challenged in the writ petition. There is no assertion in the writ petition that the statutory relief under section 561A of the Code was ever sought to agitate the grievances. Surprisingly, there is no statement in the writ petition to the effect that the petitioner is constrained to file the writ petition because of either the absence of or inadequacy of equally efficacious alternative statutory remedy. .....(46)

Anti-Corruption Commission Act (V of 2004)
Section 17

Constitution has not given any immunity to the Prime Minister or the Cabinet in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar on the ACC to conduct an enquiry in respect of allegation of commission of offence mentioned in the schedule. .....(62)

Anti-Corruption Commission Act (V of 2004)
Section 32

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 in 'Form-3' of the schedule to the ACC Rules, 2007. It need not be a speaking one. Sanction given in th case does not suffer from any legal infirmity and has been given in accordance with law. .....(38)

Anti-Corruption Commission Act (V of 2004)
Section 32

One sanction is required to proceed with the case at the time of filing of the police report. .....(33)

Sheikh Hasina Wazed alias Sheikh Hasina vs State, 63 DLR 40; Begum Khaleda Zia vs State, 55 DLR 596; Sk. Mujibur Rahman vs State, 15 DLR 549; Sheikh Hasina Wazed alias Sheikh Hasina vs State, 63 DLR 162; Habibur Rahman Molla vs State, 61 DLR 1; Habibur Rahman Mollah vs State, 62 DLR (AD) 233; Anti-Corruption Commission vs Dr. Mohiuddin Khan Alamgir, 62 DLR (AD) 290; SM Zafarullah vs Durniti Daman Commission, 20 BLC 311; Government of the People's Republic of Bangladesh vs Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku, 60 DLR (AD) 147; Anti-Corruption Commission vs Md Enayetur Rahman, 16 MLR (AD) 297 = 64 DLR (AD) 14; SM Zafarullah 20 BLC 311 (supra); Anti-Corruption Commission vs Mehedi Hasan, 67 DLR (AD) 137; Nesar Ahmed vs Bangladesh, 49 DLR (AD) 111; Anti-Corruption Commission vs Md Bayazid, 65 DLR (AD) 97; Jahangir Hossain Howlader, 58 DLR 106; MA Hai vs TCB, 40 DLR (AD) 206; Secretary, Ministry of Establishment vs Amzad Hossain, 18 BLC (AD)16 and Hossain Mohammed Ershad, former President vs State, 45 DLR (AD) 48 ref.

Khandker Mahbub Hossai, AJ Mohammad Ali, Zainul Abedin, AM Mahbub Uddin, Md Bodruddoza with Raghib Rouf Chowdhury and Md Zakir Hossain Bhuiyan, Advocates—For the Petitioner.

Md Khurshid Alam Khan, Advocate—For the Respondent No. 1.

Anwara Shahjahan, DAG with Yesmin Begum Bithi, AAG and Abdur Rokib (Montu), AAG—For the Respondent No. 6.

Judgment

Md Nuruzzaman J: In this application under Article 102 of the Constitution Rule was issued on 9-7-2008 calling upon the respondents to show cause as to why the proceeding of Special Case No. 16 of 2008 arising out of Tejgaon Police Station Case No. 20 dated 9-12-2007 corresponding to ACC General Registered Case No. 161/07, now pending in the Court of Special Judge, Court No. 9, Dhaka should not be declared unlawful, without jurisdiction and quashed and/or such other or further order or orders to be passed as to this Court may seem fit and proper.

2. At the time of issuance of the Rule this Court passed *an interim* order staying all further proceedings of the said Special Case for a period of 2(two) months which was extended for a further period of 3(three) months on 28-8-2008 and then till disposal of the Rule on 24-11-2008.

3. Upon an application for correction filed by the petitioner, this Court on 17-7-2008 passed the following order:

> "This is an application for correction.
>
> It is stated that words "without legal sanction" were not typed inadvertently in the petition and the words "done" was typed in place of the words "initiated and is being continued" and, as such, the words "without legal sanction" should be inserted after the word "Dhaka" at page No. 69 of 4th line from bottom of the prayer "A" and the words "initiated and is being continued" should be replaced after the word "have been" in place of the word "done at page No. 69 of 3rd line from bottom in prayer "A" of this writ petition and without jurisdiction should be added at end of the prayer A.
>
> Perused the application and heard the learned advocate. On the ground stated therein the application is allowed.
>
> Let this application be formed part of the main petition and kept with the record to be considered at the time of hearing."

4. The proceeding of Special Case mentioned in the Rule issuing order is under sections 409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947.

5. The petitioner is the former Prime Minister of the Government of Bangladesh. She was elected thrice as the Prime Minister. She was also the Leader of the Opposition of the Parliament. She is the Chairperson of Bangladesh Nationalist Party (BNP).

6. Following an inquiry, Anti-Corruption Commission (in short 'ACC') vide memo No. দুদক/৭৬-২০০৭ (অনুঃ-১)/১১৯৪০ dated 9-12-2007 under the signature of Deputy Director of the ACC accorded sanction to lodge an FIR against the petitioner and others under section 5(2) of the Prevention of Corruption Act, 1947 (in short 'Act, 1947') and section 109 of the Penal Code. Thereafter, on 07-12-2007 an Assistant Director of the ACC lodged an FIR with Tejgaon Police Station against the petitioner and 4 (four) others and accordingly Tejgaon Police Station Case No. 20 dated 9-12-2007 under section 5(2) of the Act, 1947 read with section 109 of the Penal Code started against the FIR named accused persons.

7. The prosecution case, in brief, is that in 1997 NIKO Resources Bangladesh Ltd. (in short 'NIKO') participated in the 2nd round bidding for oil and gas exploration in Bangladesh and was declared ineligible by the Technical and Financial Evaluation Committee. Being unsuccessful in the tender, NIKO then submitted a proposal before the then Prime Minister Sheikh Hasina for extraction of gas from the small size gas fields of Bangladesh and that proposal was also rejected. On 28-6-1998 NIKO again submitted a proposal before the Secretary of the Ministry of the Energy and Mineral Resources showing Chatak, Fenchugonj, Biani Bazar and Kamta Gas fields as

non-producing and marginal and proposed to develop and extract gas from these gas fields. Thereafter, Framework of Understanding (FOU) was signed on 23-8-1999 between BAPEX and NIKO to conduct a joint study for the development and production of hydrocarbon from the non-producing marginal gas fields of Chatak, Feni and Kamta. Subsequently, on 14-6-2001 the then Prime Minister, Sheikh Hasina approved a 'Procedure for Development of Marginal and Abandoned Gas Fields' in which Chatak, Feni and Kamta gas fields were identified as marginal and abandoned with instructions to finalize a Joint Venture Agreement (JVA) for extraction of gas by NIKO from those fields and place the JVA before the Government for approval.

8. After the change of Government, NIKO, on 17-11-2001, made a representation to the then State Minister for Energy and Mineral Resources to finalize the said Joint Venture Agreement (JVA). To follow up the matter on 29-7-2002 a meeting was held between Petrobangla and BAPEX which was presided over by the Secretary, Ministry of Energy and Mineral Resources. In the said meeting it was decided that Chatak gas field means Chatak (west) and it does not include Chatak (east). The JVA agreement as proposed by NIKO shall apply to Chatak (west). As per decision of the said meeting BAPEX informed NIKO that Chatak (east) gas field will not be included in the Joint Venture Agreement (JVA). On 10-8-2002 NIKO made representation to the concerned State Minister for inclusion of Chatak (east) gas field in the Joint Venture Agreement. Along with the representation NIKO enclosed a legal opinion given by its legal advisor, namely Moudud Ahmed and Associates, a Law Firm owned by the then Minister for Law, Justice and Parliamentary Affairs Barrister Moudud Ahmed. In the legal opinion it was opined that chatak gas field means and includes the area specified in Exhibit-A of the Framework of Understanding (FOU) approved in 1997 in which the Chatak eastern territory is included. Then, the State Minister of Energy and Mineral Resources gave instruction to conclude the Joint Venture Agreement (JVA) as per Framework of Understanding (FOU). Since BAPEX and Petrobangla did not finalize the JVA by including Chatak (east) in there, NIKO again vide two letters dated 25-11-2002 and 3-3-2003 respectively requested to include Chatak (east) in the JVA. Opinion was sought from the Ministry of Law, Justice and Parliamentary Affairs as to whether Chatak (east) would be included as part of Chatak Marginal/Abandoned Gas fields. Barrister Moudud Ahmed, the then Minister of Law, Justice and Parliamentary Affairs gave opinion on 17-3-2003 which is similar to that of the earlier opinion dated 10-8-2002 given by his Law Firm. Thereafter, a summary was prepared for the purpose of finalizing the JVA and also for resolving the dispute between BAPEX and NIKO in respect of defining Chatak Gas field. Vide memo dated 18-3-2003 the said summary was presented before the petitioner for approval who was the Minister-in-charge of Energy and Mineral Resources Ministry. The petitioner approved the summary in the following terms:

(১) আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়ের প্রাপ্ত মতামতের আলোকে ছাতক গ্যাস ফিল্ড Frame Work of Understanding (FoU) Hl Exhibit-A তে বর্ণিত মতে বিবেচনা করা যেতে পারে। এবং

(২) বাপেক্স ও নাইকো রিসোর্সেস লিঃ এর মধ্যে যৌথ সহযোগিতা চুক্তি স্বাক্ষরের জন্য প্রাক্তন প্রধানমন্ত্রী কর্তৃক ১৪-৬-২০০১ তারিখে অনুমোদিত প্রান্তিক এবং পরিত্যক্ত গ্যাস ফিল্ড উন্নয়ন সংক্রান্ত পদ্ধতি (Procedure For Development of Marginal/ Abandoned Gas Fields) এর মাঝে বর্ণিত সমুদয় শর্ত এবং অপরাপর প্রাসঙ্গিক বিধি-বিধান অনুসরণে যৌথ সহযোগিতা চুক্তি (Joint Venture Agreement) এর খসড়া চূড়ান্তকরণের জন্য পেট্রোবাংলা-কে নির্দেশ প্রদান করা যেতে পারে।"

9. Thereafter, the draft Joint Venture Agreement (JVA) was finalized and on 7-9-2002 a summary along with the draft Joint Venture Agreement (JVA) was sent to the Prime Minister (the petitioner) for approval, but the same was sent back without any comment/approval. Mr AKM Mosharaf Hossain the then State Minister of Energy and Mineral Resources wrote a note on the file being No. 397 stating that a discussion with Prime Minister was held on 15.9.2003 in which she mentioned that on 18-3-2003 she had already approved the summary proposal of the Ministry and, as such, re-approval of the Prime Minister is not required.

10. On 16-10-2003 the Joint Venture Agreement (JVA) was signed between BAPEX and NIKO permitting NIKO to extract 1744 BCF gas from Chatak and Feni gas field which is worth Taka 10,000 (ten thousand) crore.

11. The case was investigated by an officer of the ACC, who, after completion of the investigation, submitted charge sheet No. 156 dated 5-5-2008 against the petitioner and 10 (ten) others under sections 409/ 109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947. In the charge sheet it has been stated that the ACC vide memo No. সি/১৫৯-২০০৯ (তদন্ত-২) ৬৮০৫ dated 30-4-2008 accorded sanction to submit the charge sheet.

12. After submission of the charge sheet the case records were transmitted to the Court of Metropolitan Senior Special Judge, Dhaka who vide order dated 7-5-2008 took cognizance of the offence against the petitioner and 10 others under section 409 of the Penal Code, section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code. Charge has not been framed yet in the case.

13. The respondent No. 1 ACC contested the Rule by filing an affidavit-in-opposition. The respondent No. 1 did not controvert facts stated in the writ petition. The case of the respondent No. 1 is that it lodged the FIR and submitted charge sheet against the petitioner and others after compliance of provisions of law. Both in the FIR and the charge sheet there are specific allegations against the petitioner which can only be decided on evidence, both oral and/or documentary as well as circumstantial. The instant writ petition is not maintainable in its present form and manner, and, as such, the Rule is liable to be discharged.

14. The petitioner filed an affidavit-in-reply annexing copies of the FIR and charge sheet of Special Case No. 5 of 2008 rebutting the statements made in the affidavit-in-opposition.

15. Mr AJ Mohammad Ali, along with Mr. Bodruddoza and Mr Raghib Rouf Chowdhury, the learned Advocates appearing for the petitioner places before us the writ petition, the FIR , charge sheet and other materials on record. We have extensively heard the submissions advanced by the learned Advocates of both sides. During the course of hearing the learned Advocates of both sides relied upon number of decisions in support of their arguments.

16. Prior to entering upon assessment of the arguments of the parties and the merit of the case, it is pertinent to mention that the case in hand has some distinctive features as well as a chequered history. The case is commonly known as 'NIKO Graft' case. Facts of the case stretch back to the era of the erstwhile Prime Minister Sheikh Hasina who held the office from 23-6-1996 to 15-7-2001 and the successive Prime Minister Begum Khaleda Zia (the petitioner) who held the office from 10-10-2001 to 29-10-2006.

17. In the charge sheet of the instant case it has been stated that the then Prime Minister Sheikh Hasina and others were involved in the alleged offence at the preliminary stage (তদন্তে প্রাপ্ত তথ্যের আলোকে সাবেক প্রধানমন্ত্রী শেখ হাসিনা.....অত্র অপরাধের প্রাথমিক পর্যায়ে সংশ্লিষ্ট ছিলেন বলে তথ্য প্রমান পাওয়া

যায়) and since a separate case being Tejgaon Police Station Case No. 19 dated 9-12-2007 has been lodged, they including the former Prime Minister Sheikh Hasina are not recommended to be included in the charge sheet to be sent up for trial.

18. Against the above backdrop, Mr AJ Mohammad Ali, the learned Advocate for the petitioner, places before us the case of *Sheikh Hasina Wazed alias Sheikh Hasina vs State, 63 DLR 40* which relates to the offence committed, as alleged by the ACC, at the preliminary stage of the NIKO saga and arises out of Tejgaon Police Station Case No. 19 dated 9-12-2007. The learned Advocate submits that in the case of Sheikh Hasina, the High Court Division quashed the proceedings of the case against her upon consideration of both facts and laws. He submits that facts of the case of Sheikh Hasina and those of the instant case, so far as they relate to the petitioner, are same and, as such, the fate of the petitioner should be the same as that of Sheikh Hasina. The learned Advocate employs the Bengali saying "একই যাত্রায় পৃথক ফল হওয়া উচিৎ না". Mr Ali submits that since the petitioner stands on the same footing as that of the erstwhile Prime Minister Sheikh Hasina, the proceeding against whom has been quashed, it is not legally possible to prosecute the successive Prime Minister Khaleda Zia i.e., the present petitioner.

19. Mr AJ Mohammad Ali next submits that the allegation against the petitioner is that she approved the summary on 18-3-2003 and instructed Petrobangla to finalize the draft Joint Venture Agreement as per 'Procedure for Development of Marginal Abandoned Gas Fields' which was approved by the then Prime Minister Sheikh Hasina on 14-6-2001. Joint Venture Agreement was signed on 16-10-2003 and thus, the Swiss Challenge Tender Procedure was avoided which would have ensured transparency and competition in awarding contract to foreign company to extract gas in Bangladesh. Under the Joint Venture Agreement (JVA) NIKO was given an exclusive authority to extract gas from the gas fields and the entire process of awarding the contract to NIKO through JVA not only lacks transparency and competition but also is illegal which has caused huge financial loss to the country and rendered illegal benefit to NIKO and others. Mr. Ali draws our attention to the charge sheet, the relevant portion of which runs thus:

> "Policy এর পরিবর্তে বিতর্কিত Procedure প্রবর্তন সংক্রান্ত দুর্নীতির বিষয়ে দেখা যায় যে, এ দেশে তেল ও গ্রাস অনুসন্ধান ও উৎপাদনের লক্ষ্যে সরকারের সাথে সরাসরি কোন বিদেশী কোম্পানীর Joint Venture Agreement (JVA) করার কোন নীতিমালা বা দিক নির্দেশনা ছিল না। এমনকি কোন মডেল JVA কখনো প্রণয়ন করা হয়নি।"

20. Mr Ali submits that since admittedly there was no law/ rule/ guideline/ policy for entering into Joint Venture Agreement, there cannot be any violation of law or illegality in approving JVA by the petitioner. Mr Ali refers to Article 55(2) and Article 145(2) of the Constitution and submits that the executive power of the Republic is exercised by or on the authority of the Prime Minister and where a contract is made or executed in exercise of the executive authority of the Republic, neither the President nor any other person making or executing the contract in exercise of that authority is personally liable in respect thereof. Mr Ali further adds that unless it can be shown that the petitioner committed criminal misconduct as defined in section 5(1) of the Prevention of Corruption Act, 1947, section 17 of the Anti-Corruption Commission Act, 2004 does not authorize the ACC to scrutinize the acts of the Prime Minister or the Cabinet in taking an executive decision in the performance of their functions of the Republic, and, as such, the same cannot be called in question by ACC.

21. Mr. Ali argues that in the instant case the prosecution materials do not reveal any criminal intention on part of the petitioner which is *sine qua non* for an offence under section 5(1) of the

Act, 1947. To substantiate the contention Mr Ali refers to the case of *Begum Khaleda Zia vs State 55 DLR 596* and submits that this case has been referred to and relied upon in the case of Sheikh Hasina *63 DLR 40.* Mr. Ali contends that there is no allegation whatsoever against the petitioner that she committed any criminal misconduct.

22. Mr AJ Mohammad Ali further argues that section 5(1) of the Act, 1947 applies to public servant and according to the Constitutional provisions and analogy drawn from the ratio laid down in the case of *Sk. Mujibur Rahman vs State 15 DLR 549* (relevant part at paragraph 31) the Prime Minister is not a public servant, and, as such, the petitioner, who is the former Prime Minister, cannot be prosecuted under section 5(2) of the Act, 1947.

23. Mr Ali next submits that in the instant case the FIR was lodged without any proper sanction and the sanction accorded before submission of the charge sheet is absolutely a mechanical sanction and being contrary to the law, the very initiation of the instant proceeding is barred by law. In support of the argument on point of sanction Mr. Ali relies upon the case of *Sheikh Hasina 63 DLR 40* (supra, which is the NIKO case) and the case of *Sheikh Hasina Wazed alias Sheikh Hasina vs State 63 DLR 162* (commonly known as *'Barge Mounted Power Plants case'*).

24. Mr. Ali lastly submits that ACC has filed the case against the petitioner with a *malafide* intention and with an ulterior motive to harass and humiliate her.

25. Mr Md Khurshid Alam Khan, the learned Advocate appearing for the respondent No. 1 ACC, on the contrary, rebutting the submissions of Mr Ali submits that the petitioner has been implicated in the instant case not as Prime Minister, but as Minister-in-Charge of the concerned Ministry and there are allegations of committing criminal misconduct against the petitioner and others.

26. Mr. Khan submits that so far as sanction under section 32 of the Anti-Corruption Commission Act, 2004 is concerned, it is now settled through judicial pronouncement both by the High Court Division and the Appellate Division that no sanction is required to file a complaint either with the ACC or with the police. Only one sanction is required under the section before taking cognizance of the offence by the Special Judge. The sanction is accorded in prescribed 'Form-3' and it need not be a speaking one. The learned Advocate refers to the cases of *Habibur Rahman Molla vs State 61 DLR 1; Habibur Rahman Mollah vs State 62 DLR (AD) 233; Anti-Corruption Commission vs Dr Mohiuddin Khan Alamgir 62 DLR (AD) 290; SM Zafarullah vs Durniti Daman Commission 20 BLC 311.* The learned Advocate argues that in the instant case sanction accorded by the ACC is proper and legal.

27. The learned Advocate for ACC next submits that it is also now settled principle of law that there is no scope for quashing a criminal proceeding under the writ jurisdiction unless the vires of law involved in the case is challenged. The learned Advocate refers to the cases of *Government of the People's Republic of Bangladesh vs Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku 60 DLR (AD) 147; Anti-Corruption Commission vs Md Enayetur Rahman 16 MLR (AD) 297; SM Zafarullah 20 BLC 311 (supra); Anti-Corruption Commission vs Mehedi Hasan 67 DLR (AD) 137.* The learned Advocate argues that in the instant case, the vires of law has not been challenged and therefore, the writ petition, in which the petitioner seeks to quash the criminal proceeding, is not maintainable, and, as such, the Rule is liable to be discharged.

28. The learned Advocate lastly submits that facts of the instant case and those of the case of Sheikh Hasina 63 DLR 40 ('NIKO' case, supra) are not same, rather different. In the instant case there are allegations against some of the accused persons that they accepted bribe to ensure that the

Joint Venture Agreement (JVA) is to be finalized and executed. The petitioner's involvement as Minister-in-Charge in the said illegal monetary transaction can only be determined during the trial after taking evidences. Mr Khan further argues that there are other specific allegations against the petitioner which prima facie attract the definition of criminal misconduct and also come within the ambit of abettor under section 109 of the Penal Code.

29. So far as maintainability of writ petition is concerned, Mr AJ Mohammad Ali, the learned Advocate for the petitioner, places before us the case of *Nesar Ahmed vs Bangladesh 49 DLR (AD) 111* and submits that in the facts, circumstances and the unique as well as distinctive features of the instant case, which he has already outlined, writ petition is maintainable.

30. It appears from the arguments of the learned Advocates of both sides that the case involves both question of law and facts. First, we shall deal with the question of law and then, the question of facts.

31. The certified copy of the sanction given by the ACC vide memo No. সি/১৫৯-২০০৯ (তদন্ত-২)/ ৩৮০৫ dated 30-4-2008 to submit the charge sheet has been annexed in the supplementary affidavit (Annexure-E1). The relevant portion of the said sanction runs thus:

"বিষয় ঃ চার্জশীট দাখিলের অনুমোদন জ্ঞাপন।

সূত্রঃ তেজগাঁও থানা মামলা নং-২০, তারিখ ঃ ৯-১২-০৭ খ্রিঃ।

ধারা ঃ ১৯৪৭ সনের দূর্নীতি প্রতিরোধ আইনের ৫(২) ধারা এবং দন্ডবিধির ১০৯ ধারা।

তদন্তকারী কর্মকর্তা কর্তৃক দাখিলকৃত সাক্ষ্য স্মারক ও অন্যান্য রেকর্ড পত্র পর্যালোচনা করিয়া দূর্নীতি দমন কমিশন পরিতুষ্ট হইয়া দূর্নীতি দমন কমিশন আইন, ২০০৪ এর ৩২ ধারা এবং দূর্নীতি দমন কমিশন বিধিমালা, ২০০৭ এর বিধি ১৫-এর উপ-বিধি-১ প্রদত্ত ক্ষমতা বলে নিম্নোক্ত ব্যক্তিদের বিরুদ্ধে নিম্নোক্ত ধারায় চার্জশীট দাখিলের অনুমোদন জ্ঞাপন করা হইলঃ"

32. It appears that in the instant case the sanction has been given in the prescribed 'Form-3' under rule 15(7) of the Anti-Corruption Commission Rules, 2007 (in short ACC Rules, 2007). In the case of *Habibur Rahman Molla 61 DLR 1* the High Court Division held that sanction under section 32 of the ACC Act, 2004 is to be given in Form No. 3 under rule 15(7) of the ACC Rules, 2007 which has been prescribed by the legislature. 'Form-3' is a part of the statute and accordingly, when a specified form is prescribed in the statute for a particular purpose, the sanctioning authority has no scope to assign any reason of its satisfaction beyond the said format given in the form. The judgment was affirmed by the Appellate Division which has been reported in *62 DLR (AD) 233.*

33. Section 32 of the ACC Act, 2004 was amended by Ordinance No. VII of 2007, which came into effect on 18th April, 2007 wherein it has been enacted in the section 32 of the said Act that one sanction is required to proceed with the case at the time of filing of the police report before the Court of Special Judge.

34. In the instant case the FIR was lodged on 9-12-2007. So, the amended section 32 applies to the present case. In respect of the amended section 32 it was held in the case of *Dr Mohiuddin Khan Alamgir 62 DLR (AD) 290* at para 29 that:

> "Under the above amended section, 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 filing 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 (কোন আদালতক এই আইনের অধীন কোন অপরাধ বিচারার্থ আমলে গ্রহণ করিবে না) under sub-section (1) of section 32."

35. Same view was expressed in the case of *Anti-Corruption Commission vs Md Bayazid 65 DLR (AD) 97.*

36. On point of sanction the learned Advocate for the petitioner relies upon the cases of *Sheikh Hasina 63 DLR 40 (NIKO case)* and *Sheikh Hasina 63 DLR 162 (Barge Mounted Power Plants case)* wherein it was held by the High Court Division that sanction given before submission of charge sheet being mechanical and contrary to law and decisions of this Court, the cognizance taken by the Court on such charge sheet is illegal and the proceeding itself is barred by law. The learned Advocate submits that no appeal was preferred against the judgments passed in those cases and therefore, the judgments stand as good law on point of sanction and the issue as to sanction should be decided in line with these two reported cases.

37. The above argument of the learned Advocate for the petitioner on point of sanction in light of the reported cases of *63 DLR 40* and *63 DLR 162* is devoid of any substance. In those cases the petitioner namely Sheikh Hasina invoked the inherent jurisdiction of this Court under section 561A of the Code of Criminal Procedure. The judgments were given on 11-3-2010 *(NIKO case)* and 13-4-2010 (Barge Mounted case) respectively. The case of Habibur Rahman Molla was decided by the High Court Division on 20-11-2008 and was reported in *61 DLR (2009).* Against the said judgment, the petitioner Habibur Rahman Molla preferred appeal and the Appellate Division granted leave to appeal. The Appellate Division affirmed the judgment of the High Court Division vide judgment dated 4-4-2010. Mr Md Khurshid Alam Khan was the lawyer for ACC in all the cases i.e., the cases of Sheikh Hasina (both *NIKO* and *Barge Mounted* case), and the case of Habibur Rahman Molla (both at the High Court Division and the Appellate Division). Mr. Khan submits that although the Appellate Division decided the case of Habibur Rahman Molla on 4-4-2010, but the full text of the judgment was not available, and, as such, he could not refer it in the case of Sheikh Hasina (Barge Mounted case) which was decided on 13-4-2010. He further submits that since the Appellate Division granted leave to appeal against the judgment passed by the High Court Division in the case of Habibur Rahman Molla, the same was not also referred to in Sheikh Hasina's cases. The case of *Dr Mohiuddin Khan Alamgir* reported in *62 DLR (AD) 290* was decided subsequently on 4-7-2010.

38. Upon a close scrutiny of the reported cases on question of sanction, it appears to us that during the period when the cases of Sheikh Hasina (both NIKO and Barge Mounted cases) were decided, the High Court Division, except in the case of Habibur Rahman Molla, took the view that two sanctions 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 in 'Form-3' of the schedule to the

ACC Rules, 2007. It need not be a speaking one. In facts and circumstances of the instant case we find no reason to deviate from the settled principle on the issue of sanction. Moreover, under Article 111 of the Constitution the law declared by the Appellate Division is binding on the High Court Division. In view of this position 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.

39. Now, we turn to the issue as to maintainability of the writ petition. The decisions of the Appellate Division cited by Mr Md Khurshid Alam Khan on point of maintainability show that by now, it has become trite law that except in cases where vires of law involved in the case is challenged, or filing an application under section 561A of the Code of Criminal Procedure is not an adequate alternative remedy as contemplated under Article 102(2) of the Constitution, or when it becomes impossible to avail of the alternative statutory remedy, or when the question of law and interpretation of statute is involved in the case, there is no scope for the High Court Division in exercise of its special original jurisdiction under Article 102 of the Constitution to quash a criminal proceeding.

40. In *Iqbal Hasan Mahmood 60 DLR (AD) 147* (supra), a case under sections 165 and 166 of the Income Tax Ordinance, 1984, the Appellate Division referred to the cases of *Jahangir Hossain Howlader 58 DLR 106; MA Hai vs TCB 40 DLR (AD) 206 and Nesar Ahmed vs Bangladesh 49 DLR (AD) 111* and vide judgment dated 20-5-2008 held that since the writ petition has raised question of law and interpretation of statute and further, the accused-petitioner had no other efficacious alternative remedy under the Income Tax Ordinance to challenge the criminal case now pending against him, the writ petition is maintainable.

41. In *Md Enayetur Rahman 16 MLR (AD) 297 = 64 DLR (AD) 14*, a case under sections 409/420 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 read with section 156 of the Customs Act, the Appellate Division vide judgment dated 28-2-2011 held:

> "The exercise of extraordinary jurisdiction by the High Court Division to examine the legality of a criminal proceedings initiated under the general laws is deprecated.... The High Court Division's power under writ jurisdiction to quash criminal proceedings should be exercised sparingly in rarest cases. On perusal of the impugned judgment we noticed that the High Court Division in fact exercised its power under section 561A of the Code of Criminal Procedure in the garb of a writ jurisdiction.... 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."

42. In *Mehedi Hasan 67 DLR (AD) 137*, cases under sections 409/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947, the issue as to maintainability of writ petition again cropped up. The Appellate Division vide judgment dated 11-2-2015 held:

> "...there is no scope for quashing a criminal proceeding under the writ jurisdiction

unless the vires of the law involved is challenged. Having gone through the Rule issuing order, we find that the vires of the law involved in the present 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 15 criminal cases (Special Case Nos. 12-26 of 2007) in exercise of its power under Article 102 of the Constitution."

43. The case of *Nesar Ahmed 49 DLR (AD) 111 [*referred to in *Iqbal Hasan Mahmood's case (supra)]* has been relied upon by Mr AJ Mohammad Ali, the learned Advocate for the petitioner, in support of his contention submits that the instant writ petition is maintainable.

44. In this case the appellant Nesar Ahmed and another were convicted under section 19(f) of the Arms Act read with section 26 of the Special Powers Act. The appellant had no reasonable opportunity to avail of the statutory remedy by way of filing an 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 and this Court observed that the application was not maintainable and the same was taken back. Then the appellant filed a writ petition which was rejected in limine. The appellant preferred leave to appeal before the Appellate Division and leave was granted. Ultimately, the appeal was allowed and impugned judgment and order of conviction and sentence was set aside on the ground that the Special Tribunal had no jurisdiction to try the case.

45. In this case it was 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."

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."

46. Upon re-visit of the Rule issuing order dated 9-7-2008 passed in the instant case and order dated 17-7-2008 which have been set out at the beginning of this judgment, it appears that the vires of the law has not been challenged in the writ petition. There is no assertion in the writ petition that the statutory relief under section 561A of the Code of Criminal Procedure was ever sought to agitate the grievances. Surprisingly, there is no statement in the writ petition to the effect that the petitioner is constrained to file the writ petition because of either the absence of or inadequacy of equally efficacious alternative statutory remedy.

47. However, in the affidavit -in-reply dated 31-5-2015 filed by the petitioner it has been stated at paragraph No. 6 that:

"The petitioner had to file the instant writ petition under an exceptional circumstance finding no other alternative equally efficacious remedy. Moreover, after lapse of eight years of issuance of the Rule, the instant writ petition should not be thrown out by this Hon'ble Court merely on technical grounds for ends of justice. Furthermore, the instant

writ petition raises substantial questions of law which call for authoritative pronouncement form the High Court Division of the Hon'ble Supreme Court in relation to interplay between governmental functions and criminal prosecution under prevention of Corruption Act, especially in cases where there is not even a whiff, let alone an allegation, of quid pro quo and the case is based upon the process of governmental decisions."

48. However, to address the above point as stated in Para 6 of the reply, the Rule issuing order is quoted below for ready reference:

"Let a Rule issue calling upon the Opposite party to show cause as to why the proceeding of Special Case No. 16 of 2008 arising out of Tejgaon Police Station Case No. 20 dated 9-12-2007 corresponding to ACC General Registered Case No. 161 of 07, now pending in the Court of Special Judge, Court No. 9, Dhaka should not be declared unlawful, without jurisdiction and quashed and/or such other or further order or orders passed as to this Court may seem fit and proper."

49. The point raised in the reply is not reflected in the Rule, rather, it appears from a plain reading of the Rule that the petitioner has prayed for quashing the criminal proceeding. While adjudicating the matter in exercise of writ jurisdiction, we have to strictly follow the terms of the Rule issuing order according to the principle enunciated by the apex Court in the case of *Secretary, Ministry of Establishment vs Amzad Hossain* reported in *18 BLC (AD)16* which is as follows:

"The prayer to the effect "and/or such other or further order or orders as your Lordships may deem fit and proper" do not authorize a writ Court to give relief beyond the Rule issuing order, such prayer authorizes the writ Court to give any incidental relief or reliefs which may follow from the main relief according the Rule issuing order."

50. More so, Mr Ali argues that the case against the petitioner is nothing but *malafide*. However, upon meticulous scrutiny of the prosecution case and charge sheet it clearly appears that it is not a case of *malafide*, rather, certain accusation allegedly against the petitioner in respect of using her official capacity to have the contract materialized for the benefit of others has been brought and this factual aspect cannot be resolved in writ jurisdiction. In view of the facts and circumstances of the instant case and case laws discussed above on point of maintainability being binding upon this Division according to the Article 111 of the Constitution, the irresistible conclusion is that the instant writ petition is not maintainable.

51. Mr AJ Mohammad Ali, the learned Advocate for the petitioner, in a passionate manner urges before us to consider his submission that since facts of the case of *Sheikh Hasina 63 DLR 40 (NIKO case)* and those of the present case, so far as it relates to the petitioner, are same; the petitioner stands on the same footing as that of the erstwhile Prime Minister Sheikh Hasina; and since the criminal proceeding against Sheikh Hasina has been quashed, the fate of the present petitioner should be the same as that of Sheikh Hasina. The learned Advocate submits that against the backdrop of this unique and distinctive feature of the case and other issues regarding interpretation of some provisions of the Constitution raised in the affidavit-in-reply, it would be improper, inequitable and a denial of justice if the door is shut upon the face of the petitioner on ground of maintainability issue without considering the merit of the case as well as the other legal issues.

52. It appears that the petitioner before us as Minister-in-Charge of Ministry of Energy and Mineral Resources on 18-3-2003 approved a sum-

mary by which Chatak gas field was considered to be treated as was defined in Exhibit-A of the Framework of Understanding (FoU) which was signed on 23-8-1999 between BAPEX and NIKO during the era of the erstwhile Prime Minister Sheikh Hasina. Vide the said summary, the petitioner also gave approval to finalize the draft Joint Venture Agreement (JVA) as per terms and conditions laid down in the 'Procedure for Development of Marginal Abandoned Gas Fields' which was approved on 16-4-2001 by the former Prime Minister Sheikh Hasina and also by following the relevant rules. JVA was signed on 16-10-2003. It further appears from the charge sheet that there was no policy or guideline to conclude the JVA with foreign company in respect of exploration and extraction of gas and oil in Bangladesh. Even no model JVA was framed yet. Had this been the only and the entire prosecution case, we would have concluded that the petitioner had followed the footsteps of the erstwhile Prime Minister Sheikh Hasina and thus, facts of both the cases are same.

53. However, facts narrated above are neither the only nor the entire part of the prosecution case.

54. In the charge sheet, it has been stated that the FIR accused No. 5 Kashem Sharif, who was the then Vice President (South Asia) of NIKO Resources Ltd., engaged Selim Bhuiyan, the then Chairman of Dhaka Club to maintain liaison with AKM Mosarraf Hossain the then State Minister of Energy and Mineral Resources Ministry and Gias Uddin Al Mamun who was the friend of the petitioner's influential son Tarique Rahman. For this purpose Selim Bhuiyan was given Taka 3 (three) crore. On 15-1-2008 Selim Bhuiyan made a judicial confession before the Dhaka Metropolitan Magistrate which was recorded under section 164 of the Code of Criminal Procedure. In the said confession he stated that he had contact with Gias Uddin Al Mamun and both of them met the State Minister AKM Mosarraf Hossain and solicited his assistance to get NIKO the work. The State Minister assured him that he would try his best. Selim Bhuiyan and Gias Uddin Al Mamun used to maintain regular contact with the State Minister and follow up the matter. As a result of lengthy negotiations the Joint Venture Agreement (JVA) was signed between BAPEX and NIKO at the end of 2003. Kashem Sharif deposited Taka 3 (three) crore in the Standard Chartered Bank account of Selim Bhuiyan. Out of that money Selim Bhuiyan gave Gias Uddin Al Mamun Taka 1 (one) crore 80 (eight) lac and Taka 60 (sixty) lac to the State Minister. The confession of Selim Bhuiyan has not been produced before us.

55. It has been stated in the FIR that on 15-8-2005 a 3-member inquiry committee headed by a Director General of the Office of the Prime Minister was formed to enquire into the matters relating to the basis of declaration of Chatak gas field as abandoned and the process of approval of the JVA between BAPEX and NIKO and other related matters. In the said enquiry report various irregularities and commission of corruption in the process leading to approval given to sign the JVA were highlighted. A summary was sent to the petitioner, who was the Prime Minister at that time, for according approval to take legal action as per the report of the inquiry committee and to send the report to the ACC, but the Prime Minister (the petitioner) sent back the file with instruction not to send the report and relevant files to the ACC.

56. So far as the erstwhile Prime Minister Sheikh Hasina is concerned, there is no such allegation that the process of approving the 'procedure' by her involves any unlawful financial or other transaction. The only allegation against her is that she approved the 'procedure' which, the High Court Division in her case held, does not attract any criminal liability. In the instant case it appears from the confession of the co-accused that bribe was given to the then State Minister of

Ministry of Energy and Mineral Resources AKM Mosarraf Hossain, Selim Bhuiyan and Gias Uddin Al Mamun to ensure that the 'JVA' is to be finalized and signed which clearly comes within the ambit of definition of criminal misconduct given in section 5(1) of the Act, 1947. The involvement of the petitioner as an abettor in the alleged offence as Minister-in-Charge of Energy and Mineral Resources is a question of fact which cannot be determined at this stage. We also note that the petitioner as Prime Minister refused to give approval to take legal action as per inquiry report prepared by a committee headed by a Director General of the office of the Prime Minister in respect of corruption indulged in the process leading to signing the JVA and to send the report to the ACC.

57. So, it is not the question of approving the 'procedure' as approved by the erstwhile Prime Minister Sheikh Hasina or the draft JVA by the petitioner as Minister-in-Charge, rather the issue is determination of criminal liability of the accused persons of the instant case in the alleged offence of giving and receiving bribe which is absent in the case of Sheikh Hasina. These factual aspects clearly show that the cases of Sheikh Hasina and Begum Khaleda Zia (the petitioner) are not the same.

58. The case of *Sheikh Hasina* (in which the proceeding of Special Case No. 5 of 2008 arising out of Tejgaon Police Station Case No. 19 dated 9-12-2007 corresponding to ACC GR Case No. 160 of 2007 was challenged) was decided upon an application under section 561A of the Code of Criminal Procedure, whereas the petitioner seeks to quash the criminal proceeding Special Case No. 16 of 2008 arising out of Tejgaon Police Station Case No. 20 dated 9-12-2007 corresponding to ACC General Registered Case No. 161/07 by making an application under Article 102 of the Constitution, which we have already held, is not maintainable.

59. It has been argued on behalf of the petitioner by making reference to Articles 55(2) and 145(2) of the Constitution that inasmuch as contract made or executed in exercise of the executive authority of the Republic, neither the President nor any other person making or executing the contract in exercise of that authority is personally liable in respect thereof, ACC has no authority under section 17 of the ACC Act, 2004 to enquire into the acts of the Prime Minister or the Cabinet in taking an executive decision in performance of their functions of the Republic.

60. We do not find any substance in the above argument because of the language employed in Article 145(2) which clearly suggests that the Article applies to matters of civil liability, not in the case of criminal liability. We have already held that in the instant case the issue is determination of criminal liability of the petitioner in respect of the alleged offence under sections 409/109 of the Penal Code read with section 5(2) of the Act, 1947 i.e., criminal breach of trust by public servant, criminal misconduct by a public servant and abetment of the offence that took place in the process of executing the 'JVA'.

61. Moreso, section 17 of ACC Act, 2004 provides *inter alia* that—

> "১৭। কমিশনের কার্যাবলি।-কমিশন নিম্নবর্ণিত সকল বা যে কোন কার্য সম্পাদন করিতে পারিবে, যথা ঃ—
>
> (ক) তফসিলে উল্লিখিত অপরাধসমূহের অনুসন্ধান ও তদন্ত পরিচালনা;
>
> (খ) অনুচ্ছেদ (ক) এর অধীন অনুসন্ধান ও তদন্ত পরিচালনার ভিত্তিতে এই আইনের অধীন মামলা দায়ের ও পরিচালনা;"

62. The Constitution has not given any immunity to the Prime Minister or the Cabinet in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar on the ACC to conduct an enquiry in respect of allegation of commission of offence mentioned in the schedule to the ACC Act, 2004. Therefore, ACC is

legally empowered under section 17 of Act, 2004 to conduct any enquiry, the subject matter of which may fall under Article 145 of the Constitution, so long as it attracts criminal liability and ACC acts within the ambit of law.

63. It has also been argued that the Prime Minister is not a public servant and hence, cannot be prosecuted under section 5(2) of the Act, 1947. Upon perusal of section 5 of the Criminal Law Amendment Act, 1958 (in short 'Act, 1958') and the schedule to the Act we do not find any relevancy in the argument.

64. Section 5(1) of the Act, 1958 state—

"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."

65. The relevant portion of the schedule to the Act, 1958 runs thus:

"Schedule
(See section 5)

"(a) Offences punishable under দুর্নীতি দমন কমিশন আইন, ২০০৪;

(aa) ...

(b) Offences punishable under the Prevention of Corruption Act, 1947;

(c) ...

(d) Abetment described in section 109 including other abetments, ... of the Penal Code, 1860 related to or connected with the offences mentioned in clause (a) to (c) above."

66. The relevant portion of the schedule to the দুর্নীতি দমন কমিশন আইন, ২০০৪ (ACC Act, 2004) states:

"তফসিল
[(ধারা ১৭(ক) দ্রষ্টব্য]

(ক) এই আইনের অধীন অপরাধসমূহ;

(খ) the Prevention of Corruption Act, 1947 এর অধীন শাস্তিযোগ্য অপরাধসমূহ;

(খখ) ...

(গ) the Penal Code, 1860 (Act XLV of 1860) এর sections 161-169, 217, 218, 408, 409 and 477 এর অধীন শাস্তিযোগ্য অপরাধসমূহঃ

(ঘ) অনুচ্ছেদ (ক) হইতে (গ) তে বর্ণিত অপরাধসমূহের সহিত সংশ্লিষ্ট বা সম্পৃক্ত the Penal Code, 1860 (Act XLV of 1860) এর section 109 এ বর্ণিত সহায়তাসহ অ্যান্য সহায়তা,..... অপরাধসমূহ।"

67. The charge sheet of the present case was submitted against the petitioner and 10 others including the State Minister of Energy and Mineral Resources AKM Mosarraf Hossain, the maker of judicial confession Selim Bhuiyan, Gias Uddin Al Mamun, the then Vice-President (South Asia) of NIKO Kashem Sharif. Cognizance of the offence has been taken by the Special Judge against the petitioner, former State Minister and others some of whom were admittedly public servant during the commission of the alleged offence. According to the ratio laid down at paragraph 31 in the case of Sheikh Mujibur Rahman (supra) a State Minister, no doubt, is a public servant within the meaning of Act, 1947 read with Act, 1958. Under section 5(1) of the Act, 1958, which has been quoted above, offences specified in the schedule to the Act are exclusively triable by the Special Judge.

68. In the case of *Hossain Mohammed Ershad, former President vs State 45 DLR (AD) 48* 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."

69. Against the backdrop of the above provisions of law and facts and circumstances of the case, we are of the view that in the instant case the allegation against the petitioner that she otherwise abused her office or abetted others to use the office for any illegal gain within the meaning of criminal misconduct as defined in section 5(1) of the Act, 1947 or her alleged involvement as an abettor under section 109 of the Penal Code cannot be determined in a separate criminal proceeding and the same must be adjudicated in the instant proceeding by the Special Judge appointed under section 5 of the Act, 1958. Abetment under section 109 of the Penal Code is such an offence which can be inferred from the conduct of the accused and attending circumstances of the case. It may be proved either by oral, or documentary or circumstantial evidence. So, the issue as to whether the Prime Minister is the public servant is irrelevant in the instant case inasmuch as section 109 of the Penal Code (abetment of the offence) is present in the case and other public servants are also accused in the case.

70. Facts and circumstances of the case of *Begum Khaleda Zia 55 DLR 596 (supra)* are totally different from those of the instant case and hence does not apply to the case in hand.

71. In view of the facts, circumstances and laws discussed above, we do not find any merit in Rule.

72. In the result, the Rule is discharged. The order of stay is re-called and vacated. However, there is no order as to cost.

73. It appears that pending disposal of the Rule, the petitioner was granted bail on 9-9-2008 which was extended till disposal of Rule vide order dated 24-11-2008. Since the Rule is discharged the petitioner is directed to surrender before the trial court within a period of 2(two) months from the date of receipt of this judgment. The trial court shall consider the bail of the petitioner, if any, as she did not misuse the privilege of bail.

Send down the lower Court records and communicate the judgment to the court concern at once.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Moyeenul Islam Chowdhury J
Md Ashraful Kamal J

Judgment
November 20th, 2014.

Gazi AKM Fazlul Haque and others.....Petitioner
vs
Privatization Commission represented by its Chairman, Prime Minister's Office, and others .....Respondents*

Privatization Commission Service Regulation, 2002

Regulation 6

Only seniority is not the sole yardstick for promotion of any officer of the Commission to the next higher post. Along with his seniority, merit of the officer shall be taken into consideration for promotion to the next higher post by the Selection Committee/DPC. In case of promotion of a Deputy Director to the post of Director of the Commission, he must have completed a minimum of 5(five) years service and his service record must be satisfactory and free from any blemish or stain. If no Deputy

*Writ Petition No. 10746 of 2013.

Director having the requisite service length and satisfactory service record is available for promotion, only in that event the post of Director of the Commission may be filled up by deputation. .....(23)

ABM Siddiqur Rahman Khan with M. Mainul Islam, Advocates—For the Petitioner.

Md Motahar Hossain (Sazu), Advocate —For the respondent Nos. 1 & 6.

Purabi Rani Sharma, AAG and Md Shafiqul Islam Siddique, AAG—For the respondent Nos. 2-5.

Judgment

Moyeenul Islam Chowdhury J: On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to consider the promotion of the petitioners as per the Privatization Commission (Officers and Employees) Service Regulations, 2002 framed under the Privatization Act, 2000 and why the filling up of the posts of Directors of the Commission by deputation despite the availability of the eligible/qualified Deputy Directors of the Commission being violative of the Privatization Commission (Officers and Employees) Service Regulations, 2002 should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

3. The petitioners have been working as Deputy Directors of the Privatization Commission (previously Privatization Board) for long 15-18 years. Pursuant to sections 15 and 26(1) of the Privatization Act, 2000, the Privatization Commission, with the prior approval of the Government, framed the Privatization Commission (Officers and Employees) Service Regulations, 2002 (hereinafter referred to as the Service Regulations of 2002) specifying the terms and conditions of service for its officers and employees. However, Regulation 3 of the Service Regulations of 2002 provides that appointments in the vacant posts of the Commission will be made by direct recruitment, promotion and deputation. Regulation 6 of the Service Regulations of 2002 deals with the provisions of promotion of the officers and employees of the Commission. According to the schedule of the Service Regulations of 2002, there are 4(four) posts of Director and one Legal Advisor in the Commission. The Legal Adviser of the Commission shall be appointed by deputation and in case of failure, he will be appointed on contractual basis. Anyway, the Commission treats the post of Legal Advisor as Director (Law) for all practical purposes. According to the schedule of the Service Regulations of 2002, the posts of Director will be filled up by promotion from amongst the Deputy Directors of the Commission who have completed 5(five) years of service and if no competent or eligible candidates are found amongst the Deputy Directors, the posts of Director may be filled up by deputation. But since the framing of the Service Regulations of 2002, all posts of Director of the Commission were filled up by the officers on deputation from various Ministries of the Government. The respondents have been disregarding the Service Regulations of 2002 in the matter of promotion of the Deputy Directors to the posts of Director. All the Deputy Directors have been eligible for appointment as Directors of the Commission having completed more than 5(five) years of service and in view of their unblemished service records. Although the petitioners were eligible/competent for promotion to the posts of Director of the Commission, they were left out for reasons best known to the respondents themselves. However, the petitioners made several representations to the respondent No. 2 ventilating their grievances and requesting

him to act in accordance with the Service Regulations of 2002 in the matter of promotion of the petitioners to the posts of Director of the Commission, but in vain. As a matter of fact, by resorting to various smart tricks and dilatory strategies, the respondents have been depriving the petitioners of their promotion to the posts of Director of the Commission with the *malafide* intention of accommodating various officers of the Government on deputation. Since the inception of the Privatization Commission, there have been 4(four) Deputy Directors including the petitioners. These Deputy Directors pursued their claim for appointment as Directors of the Commission from time to time as per the Service Regulations of 2002. At last, the respondents considered the case of the senior most Deputy Director of the Commission, namely, Mr Md Mizanur Rahman and promoted him as Director and he joined the Commission as Director on 2-1-2013 and subsequently, he was allocated the post of Director (Law) on 23-6-2013. But the petitioners were deprived of their legal right to be promoted as Directors of the Commission despite their repeated representations to the respondent No. 2 in that regard. Eventually the petitioners served a notice demanding justice upon the respondents for legal redress of their grievances; but the respondents turned a deaf ear thereto. Hence the Rule.

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

5. According to the schedule of the Service Regulations of 2002, the post of Director of the Privatization Commission is equivalent to that of a Joint Secretary to the Government of Bangladesh. A Joint Secretary or an officer having equivalent status of a Joint Secretary can be appointed to the post of Director of the Privatization Commission on deputation. None of the petitioners has been promoted to the post of Joint Secretary or any equivalent post of Joint Secretary. In the absence of any qualified officers, the Government transferred Joint Secretaries from different Ministries to the Commission to fill up the posts of Director on deputation. Anyway, the 4th colunm of the schedule of the Service Regulations of 2002 refers to the minimum requirement for promotion from the post of Deputy Director to the post of Director and unless and until any Deputy Director completes 5(five) years of service, the Selection Committee or the Departmental Promotion Committee (DPC), as the case may be, will not consider his case for promotion to the post of Director. However, mere completion of 5(five) years service as Deputy Director of the Commission is not the sole criterion for promotion to the post of Director of the Commission. In this respect, the Selection Committee DPC will take into account other factors specified in Regulation 6 of the Service Regulations of 2002. Promotion is generally given on the principles of seniority, merit, integrity, fitness and satisfactory service records subject to availability of vacant posts. After considering all the criteria for promotion, the Selection Committee, or for that matter, the DPC arrives at the decision to promote a Deputy Director to the post of Director of the Commission. Unfortunately, the petitioners have not been able to satisfy all the criteria for promotion to the posts of Director of the Commission. So they have not been promoted to the posts of Director as yet. Without the Selection Committee/ DPC's recommendation, the respondent No. 2 has no authority whatsoever to appoint or promote any Deputy Director to the post of Director of the Commission. The authority has no *malafide* intention of depriving the petitioners of their promotion to the posts of Director of the Commission. In due course, the DPC recommended the senior most Deputy Director of the Commission, that is to say, Mr Md Mizanur Rahman for promotion to the post of Director and accordingly he was promoted to a post of Director of the Commission. In

the absence of any vacancy in the post of Director, the respondent No. 2 could not take any step for promotion of the petitioners to the posts of Director of the Commission. If the petitioners are able to fulfill all the criteria for promotion and if any vacancy arises, the Selection Committee/DPC will recommend the petitioners for promotion to the posts of Director of the Commission. Before fulfillment of all the criteria and/or in the absence of any vacancy in the post of Director, it is not possible on the part of the Privatization Commission to consider the petitioners for promotion to the posts of Director. The respondents did not violate any provision of the Service Regulations of 2002 on the question of promotion of the petitioners to the posts of Director. In the absence of any qualified Deputy Director for promotion to the post of Director, all the posts of Director were duly filled up by the officers on deputation in the past. The petitioners cannot claim promotion as a matter of right. Promotion has to be earned by the meritorious service of the concerned officer. After the promotion of the Deputy Director Mr Md Mizanur Rahman to the post of Director, no vacancy has arisen in the post of any Director of the Commission and, as such, there is no question of violation of Article 27 of the Constitution.

6. In the Supplementary Affidavit-in-Opposition filed on behalf of the respondent nos. 1 and 6, it has been stated that according to the Bangladesh Civil Service Recruitment Rules, 1981, for recruitment in the post of Deputy Director in any Government, Semi-Government or Autonomous Organization, the required condition is 10 (ten) years experience with adequate qualifications. In the Privatization Board (Appointment Rules), 1993 and in the advertisement notice for recruitment of Deputy Directors of the Privatization Board in 1994, it was mentioned that candidates need only 5(five) years experience which may be relaxed. That is totally contradictory to the Bangladesh Civil Service Recruitment Rules for appointing a Deputy Director. However, the Privatization Board was subsequently transformed into Privatization Commission on 11th July, 2000. All officers and employees of the Privatization Board were transferred to the Privatization Commission as a matter of course. Only 5(five) years experience in the feeder post of Deputy Director with no mention of total service length is against the general recruitment rules of the Government. This type of relaxed opportunity is never found in any Government Office or Autonomous Body. The Privatization Commission has already taken steps to review the Service Regulations of 2002 in order to remove the anomalies and inconsistencies with the existing Bangladesh Civil Service Recruitment Rules, 1981. Anyway, promotion is a continuous process. Apart from Mr Md Mizanur Rahman, if other Deputy Directors are found eligible for promotion, they will definitely be considered for promotion to the posts of Director of the Commission. Any officer working on deputation in the Commission may be withdrawn from the deputed post at any time, if any officer of the Commission is promoted. So the deputed officers are not an impediment in the way of promotion of the Deputy Directors of the Commission.

7. In the Affidavit-in-Reply dated 22-10-2014 filed by the petitioners, it has been mentioned that only the Privatization Commission is empowered to deal with the promotion of the officers and employees of the Commission as per the Service Regulations of 2002. According to the Service Regulations of 2002, the posts of Director are firstly and mainly reserved for competent Deputy Directors of the Commission and only in the absence of competent Deputy Directors, Joint Secretaries of the Government, Officers of Statutory Corporations and Semi-Government Organizations may be appointed as Directors of the Commission on deputation. Officers in an Autonomous Body, Semi-Government Organization or Corporation having the salary scale of a Joint Secretary are also competent for the posts of

Director of the Commission. Officers having the salary scale of a Joint Secretary are not necessarily Joint Secretaries. It is evident from the Service Regulations of 2002 that only the competent Deputy Directors are to be promoted to the posts of Director of the Commission. Only in case of unavailability of any competent Deputy Director, the question of filling up of the post of any Director of the Commission by deputation arises. All the petitioners are qualified and competent Deputy Directors; but the respondents did not promote them to the posts of Director of the Commission with *malafide* intention. However, the authority arbitrarily recommended only one Deputy Director, namely, Mr Md Mizanur Rahman for promotion to the post of Director leaving out the petitioners without any cogent reason which is discriminatory. On 5-12-2012, the DPC recommended Mr Md Mizanur Rahman for promotion to the post of Director of the Commission. It is interesting to note that Mr Md Mizanur Rahman was promoted to the post of Director of the Commission without having any clear vacancy in the Directorship of the Commission. So the plea of non-existence of any vacancy in the Directorship of the Commission is a flimsy excuse which is indicative of the bad faith of the respondents. The respondents grossly violated the provisions of Regulation 6 and those of the schedule of the Service Regulations of 2002 and thereby deprived the petitioners of their due promotion as Directors of the Commission.

8. In the Affidavit-in-Reply dated 29-10-2014 submitted on behalf of the petitioners, it has been averred that the respondent No. 1 is the only authority in respect of the promotion of the petitioners and accordingly it exercised its authority in the case of Mr Md Mizanur Rahman, one of the Deputy Directors of the Commission. The Bangladesh Civil Service Recruitment Rules, 1981 have no manner of application in the case of promotion of the petitioners to the posts of Director of the Commission. The petitioners were not appointed as Deputy Directors under the Bangladesh Civil Service Recruitment Rules, 1981. Privatization Commission is a statutory body having its own Service Regulations for its officers and employees. As such the terms and conditions of the service of the officers and employees of the Commission are regulated by the Service Regulations of 2002. However, after the joining of Mr Md Mizanur Rahman as Director of the Privatization Commission on promotion on 2-1-2013, the respondent No. 2 requested the respondent No. 5 to withdraw Mr Paresh Chandra Roy from the Commission and accordingly on 2-6-2013, Mr Paresh Chandra Roy was withdrawn from the Commission and on 23-6-2013 Mr Md Mizanur Rahman was given the charge of Director (Law) of the Commission. Although Mr Md Mizanur Rahman is a textile graduate, yet he was given the charge of Director (Law) of the Commission. In effect, any Director of the Commission may be put in charge of any section of the Commission irrespective of his academic background and this has been a long-standing practice of the Privatization Commission since its inception.

9. In the Supplementary Affidavit dated 29-10-2014 filed by the petitioners, it has been stated that at the moment, there are 2(two) vacant posts of Director in the Privatization Commission. One vacancy arose when Syed Jaglul Pasha was withdrawn from the Commission on 10-2-2014. Against that vacancy on the same day, one Dr. Syed Nesar Ahmed Rumy was appointed on deputation and that appointment was stayed by the High Court Division. Another vacancy in the post of Director of the Commission arose when Mr Md Mizanur Rahman went on Post Retirement Leave (PRL) on 25-8-2014 vide Memo dated 13-8-2014.

10. At the outset, Mr ABM Siddiqur Rahman Khan, learned Advocate appearing on behalf of the petitioners, submits that the Bangladesh Civil Service Recruitment Rules, 1981 are not clearly

applicable in the case of the petitioners and the recruitment, promotion and deputation of the officers and employees of the Privatization Commission are regulated by the Service Regulations of 2002 which have been framed pursuant to sections 15 and 26(1) of the Privatization Act, 2000.

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

12. Mr ABM Siddiqur Rahman Khan next submits that as per the schedule of the Service Regulations of 2002, there are 4(four) posts of Director of the Commission and one post of Legal Advisor, but in practice, the post of Legal Advisor is being treated as Director (Law) which is evident from the designation of Mr Md Mizanur Rahman, Director (Law) who was admittedly promoted to the post of Director of the Commission on 2-1-2013 from the post of one of the Deputy Directors of the Commission and the plea of non-existence of any vacancy in the post of any Director of the Commission stands belied by the promotion of Mr Md Mizanur Rahman to the post of Director of the Commission on 2-1-2013 when admittedly there was no vacancy in that post and after joining the Commission as Director, admittedly after a lapse of 6(six) months or so, one of the deputed Directors, namely, Mr Paresh Chandra Roy was withdrawn from the Commission and in such a posture of things, it can not be agitated at all that the non-existence of any vacancy in the post of Director of the Commission is an impediment in the way of promotion of any one of the petitioners to the post of Director of the Commission.

13. Mr ABM Siddiqur Rahman Khan further submits that at present, there are 2(two) vacant posts of Director in the Privatization Commission and one vacancy occurred when one Director Syed Jaglul Pasha was withdrawn from the Commission on 10-2-2014 and though against that vacancy, one Dr Syed Nesar Ahmed Rumy was appointed by deputation; yet that appointment was admittedly stayed by the High Court Division and another vacancy in the post of Director of the Commission arose when Mr Md Mizanur Rahman went on PRL on 25-8-2014 and as there are 2(two) clear vacancies in the Directorship of the Commission at this point of time, the respondents may be directed to fill up those vacancies in accordance with the provisions of Regulation 6 read with the schedule of the Service Regulations of 2002 so that the petitioners will get fair play and their long sufferings will come to an end.

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

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

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

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

18. We have heard the submissions of the learned Advocate Mr ABM Siddiqur Rahman Khan and the counter-submissions of the learned Advocate Mr Md Motahar Hossain (Sazu) and perused the writ petition, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition, Affidavits-in-Reply and Supplementary Affidavit and relevant Annexures annexed thereto.

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

20. It is a settled proposition of law that the writ Court cannot direct the authority to promote the petitioners to the posts of Director of the Commission; but they have the right to be considered for promotion in accordance with Regulation 6 and the schedule of the Service Regulations of 2002. There is no gains lying in the fact that barring the petitioner No. 1, the other petitioners along with Mr Md Mizanur Rahman were considered for promotion and the DPC recommended Mr Md Mizanur Rahman, the senior most Deputy Director, for promotion and accordingly he was promoted to the post of Director of the Commission. Such being the state of affairs, it cannot be said that apart from the petitioner No. 1, the other 2(two) petitioners were not considered for promotion by the DPC. Presumably, the case of the petitioner No. 1 was left out by the DPC in that he was the junior most Deputy Director of the Commission at the relevant time. The learned Advocate Mr Md Motahar Hossain (Sazu), it appears, has rightly submitted that the petitioners did not challenge any specific deputation order in this writ petition. But nonetheless, all the petitioners have the right to be considered for promotion in accordance with the Service Regulations of 2002.

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

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

"৬। পদোন্নতির মাধ্যমে নিয়োগ।—(১) এই প্রবিধানমালার অন্যান্য বিধান ও তফসিল সাপেক্ষে কোন কর্মচারীকে পরবর্তী পদোন্নতির জন্য বিবেচনা করা হইবে।

(২) কেবলমাত্র জ্যেষ্ঠতার কারণে কোন ব্যক্তি অধিকার হিসাবে তাহার পদোন্নতি দাবী করিতে পারিবে না।

(৩) জ্যেষ্ঠতা তথা মেধার ভিত্তিতে পদোন্নতির মাধ্যমে নিয়োগ করা হইবে, তবে চাকুরীর বৃত্তান্ত সন্তোষজনক না হইলে কোন ব্যক্তিকে পদোন্নতির জন্য বাছাই কমিটি সুপারিশ করিবে না।"

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

24. What we are driving at boils down to this: in the matter of promotion to the posts of Director the Deputy Directors shall have the first priority if they are found to be incompetent or unqualified only in that case, the authority is empowered to fill up the posts of Director by deputation. From the whole gamut of the facts and circumstances of the case and the materials on record, it is palpably

clear that the authority filled up the posts of Directors of the Commission in the past without caring for the relevant provisions of law. This is the long-standing practice of the Privatization Commission. The only recent exception is the case of promotion of the Deputy Director Mr Md Mizanur Rahman to the post of Director of the Commission. Against this backdrop, it seems to us that this single instance of promotion of one of the Deputy Directors to the post of Director of the Commission is a face-saving device. However, we feel constrained to hold that the authority failed to properly regulate Regulations of 2002 in the matter of promotion of the Deputy Directors to the posts of Director of the Commission. In this respect, the respondents ought to be circumspect and careful in the future.

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

26. It transpires that on the plea of non- existence of any vacancy in the post of Director of the Commission, the petitioners were not considered for promotion in the past. But at a subsequent stage, Mr Md Mizanur Rahman along with the petitioner Nos. 2 and 3 were considered for promotion by the DPC. As per the recommendation of the DPC, it is undisputed, the senior most Deputy Director Mr Md Mizanur Rahman was promoted to the post of Director on 2-1-2013 and he joined the Commission as Director when there was no clear vacancy in the Directorship of the Commission. Afterwards the respondent No. 2 requested the respondent No. 5 to withdraw one of the deputed Directors of the Commission, namely, Mr Paresh Chandra Roy and in accordance with the request, the respondent No. 5 withdrew Mr Paresh Chandra Roy from the Commission on 2-6-2013 and on 23-6-2013 Mr Md. Mizanur Rahman was put in charge of the office of Director (Law) of the Commission.

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

was no clear vacancy in the Directorship of the Commission. This conduct of the respondents is reprehensible and cannot be countenanced at all.

28. At present, there are 2 (two) clear vacancies in the Directorship of the Commission as evidenced by Annexures-Z-1 to the supplementary affidavit dated 29-10-2014. That being so, those 2 (two) vacancies are to be filled up in accordance with Regulation 6 read with the schedule of the Service Regulations of 2002. From legal standpoint, the petitioners being Deputy Directors must be considered first for promotion to the vacant posts of Director of the Commission, having regard to their length of service and satisfactory service records and if they are not found to be eligible for promotion for some reason or other to be recorded in black and white, only then those vacant posts can be filled up by deputationists. The question of filling up of the posts by deputationists will not come first as has been the long-standing practice in the Commission as we find from the various Annexures on record. Precisely speaking, the question of filling up of the vacant posts of Director of the Commission by way of deputation will arise only when the petitioners are considered for promotion and the Selection Committee/DPC does not recommend them for promotion for any justifiable cause. That is the bottom line.

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

Ed.

HIGH COURT DIVISION
(Civil Revisional Jurisdiction

Sheikh Abdul Awal J Shahidul Karim J **Judgment** August 4th, 2015.	Mahabub Alam (Md)..... .....Plaintiff-Petitioner vs Liton Gosh and others..... .....Defendant-Opposite Parties*

Code of Civil Procedure (V of 1908)
Order XXXVIII, rule 5

Attachment before judgment—If the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him the Court is empowered to pass an order of attachment before judgment. .....(18)

Code of Civil Procedure (V of 1908)
Order XXXVIII, rule 5

Attachment before judgment—The power of attachment of property before judgment being an extraordinary power of interfering with a party's right to use and enjoy its own property before any decree is passed, the Court should be very circumspect in allowing such prayer and must decide the matter on the strength of the facts of each case. An aapplication under Order XXXVIII, rule 5 of the Code for attachment before judgment does not contain any concrete or specific allegation with specific materials to satisfy the Court that the defendant has been trying to transfer his property from the court's jurisdiction with intent to obstruct or defeat the prospective decree or to defraud the plaintiff and to frustrate the suit, no relief can be given on such vague and general allegation. .....(18)

*Civil Revision No. 591 of 2013.

AJ Mohammad Ali with AHM Mushfiqur Rahim, Advocates—For the Petitioner.

Moudud Ahmed with Mohammad Jamal Hossain, Advocates—For the Opposite Party No. 1.

Judgment

Sheikh Abdul Awal J: This Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned Order No. IX dated 6-1-2013 passed by the learned Joint District Judge, 1st Court, Comilla in Money Suit No. 6 of 2012 rejecting the application dated 9-7-2012 under Order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure for attachment of the property which belonged to the defendant No. 1 as described in the schedule of the application (Annexure-B) should not be set-aside and as to why the said property of the defendant-opposite party No. 1 should not be attached and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. Plaintiff-petitioner instituted the aforesaid suit seeking the following reliefs:

"(ক) মোকদ্দমার বাদী মং ২০,৮০,৫০,০০০ (বিশ কোটি আশি লক্ষ পঞ্চাশ হাজার) টাকা ১/৩ নং মূল বিবাদীর নিকট পাওনীয় সাব্যস্থে বাদীর অনুকুল ১/৩ নং বিবাদীদের বিরুদ্ধে এক মানি ডিক্রী প্রচার করিতে;

(খ) বিজ্ঞ আদালতের রায় ডিক্রীমতে নির্দিষ্ট সময় সীমার মধ্যে যদি ১/৩ নং বিবাদীপক্ষ ডিক্রীকৃত টাকা পরিশোধ না করে, তাহা হইলে ১/৩ নং বিবাদীর সমুদয় স্থাবর অস্থাবর সম্পত্তি ক্রোকাবদ্ধ করিয়া লাটবদ্ধ করিয়া প্রকাশ্যে নিলামে বিক্রয় করিয়া ডিক্রীকৃত টাকা আদায়ের বিহিত ব্যবস্থা করিতে;

(গ) উপরোক্ত মতে বাদীর পাওনার দাবী পরিশোধ না হইলে যে কোন short fall এর জন্য ১/৩ নং বিবাদীগনকে গ্রেফতার করিয়া আদায়তক জেল খানায় আটক রাখার আদেশ দিতে;

(ঘ) মামলা দায়ের হইতে ডিক্রীকৃত টাকা আদায়তক ২০% হারে Pendentitle Interest পাওয়ার তরে বাদীর অনুকুলে ডিক্রী প্রচার করিতে;

(ঙ) মোকদ্দমার যাবতীয় ব্যয়ভার ও ক্ষয়ক্ষতি পাওয়ার তরে বাদীর অনুকুলে অপর এক ডিক্রী প্রচার করিতে;

(চ) সাম্য সুনীতিবোধ ও আদালতের ন্যায় বিচারে বাদী অপরাপর যে যে বৈধ উপকার ও প্রতিকার পাইতে পারে তাহাও পাওয়ার তরে বাদীর অনুকুলে ১/৩ নং বিবাদীদের ডিক্রী/আদেশ প্রচার করিয়া মোকদ্দমায় সুবিচার করিয়া বাদী ও তাহার পরিবারবর্গকে কৃতজ্ঞতা পার্শ্বে আবদ্ধ করিতে আজ্ঞা হয়।"

3. Immediately, after institution of the suit the plaintiff-petitioner filed an application under Order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure for attachment of the property which belonged to the defendant No. 1 before judgment on the allegation that the defendant in order to avoid payment of the plaintiff, is trying to transfer his properties described in the schedule of the application.

4. The defendant No. 1 resisted the said application by filing written objection on 11-9-2012 contending, *inter-alia,* that the application for attachment is based on some false, vague and indefinite allegations, which fails to make out any definite case that the defendant is trying to transfer his property with intent to obstruct or delay the execution of the decree that might be passed against him.

5. The learned Joint District Judge, 1st Court, Comilla after hearing both the sides by the impugned order dated 6-1-2013 rejected the application on the finding that the plaintiff having failed to make out a *prima-facie* case that defendant is trying to transfer his properties described in the schedule of the application with intent to obstruct or delay the execution of the decree that might be passed against him.

6. Feeling aggrieved thereby the plaintiff-petitioner has come before this Court and obtained the present Rule.

7. Mr AJ Mohammad Ali, the learned Advocate appearing on behalf of the plaintiff-petitioner submits that the learned trial Judge erred in law in rejecting the application under Order XXXVIII, rule 5 of the Code of Civil Procedure for attachment of the property which belonged to the defendant No. 1 before judgment without properly considering the facts of the case and the case made out by the petitioner and the same has occasioned failure of justice. Mr Mohammad Ali, in the course of his argument takes us through the plaint of the suit and other materials on record including the application under Order XXXVIII, rule 5 of the Code of Civil Procedure (Annexure-B) and then submits that the defendant No. 1 was a petty employee under the plaintiff- petitioner, who in the changing political circumstances of the country in 2007 took control over the business of the petitioner's company and misappropriated huge amount of money of the petitioner's company and thereafter, he purchased some properties and deposited huge amount of money in his bank accounts described in the schedule of the application, now he having realized the difficulties is trying to leave the country after transferring his property as well as withdrawing his money from bank with intent to grab the same and also to obstruct or delay the execution of the decree that might be passed against him.

8. Finally, Mr AJ Mohammad Ali, submits that the plaintiff made out a very clear case of attachment before judgment and the conduct of defendant No. 1 and the circumstances on record clearly showed that if the attachment order is not made, there would be nothing left for the plaintiff to satisfy the decree.

9. Mr Moudud Ahmed, the learned Advocate appearing on behalf of the defendant-opposite party No. 1, on the other hand, supports the impugned order and contends that the learned Joint District Judge was perfectly justified in refusing the petitioner's prayer for attachment before judgment on the clear finding that the plaintiff failed to make out any case that the defendant is trying to remove his property with intent to obstruct or delay the execution of the decree that might be passed against him. Mr Moudud Ahmed further submits that the allegations made in the application under Order XXXVIII, rule 5 of the Code of Civil Procedure based on bundle of vague, unspecified facts and no order of attachment before judgment can be passed on such vague, general and unspecified allegations or facts.

10. Drawing support for his submissions, the learned Advocate referred to some decisions reported in *27 DLR 256, AIR 1986 Page 87, 46 DLR 44, 17 BLD (AD) 223 = 50 DLR (AD) 21, 27 DLR 156, 31 DLR (AD) 112* and *50 DLR (AD) 21.*

11. We have heard the learned Advocates for both the sides at length and perused the revisional application, counter affidavit dated 29-7-2015, supplementary affidavit dated 2-8-2015 along with other connected papers as filed thereto. Now, only question that is to be decided in the rule is, whether the Joint District Judge has committed any illegality in refusing the prayer for attachment before judgment.

12. In approaching the controversy it will be profitable to notice the provision contained in Order XXXVIII, rule 5 of the Code of Civil Procedure, which is quoted hereunder:

> Attachment before judgment:
>
> 5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of the property from the local limits of the jurisdiction of the Court;

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, of such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property be specified.

13. A reading of the above quoted provision transpires that if the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him the Court is empowered to pass an order of attachment before judgment.

14. In this case it appears that the petitioner herein as plaintiff filed Money Suit No. 6 of 2012 in the Court of Joint District Judge, 1st Court, Comilla claiming an amount of Taka 20,80,50,000 against the defendant opposite party No. 1, Liton Gosh and just after institution of the suit the plaintiff-petitioner filed an application under Order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure for attachment of the property which belonged to the defendant No. 1 before judgment on the allegation that the defendant in order to avoid payment of the plaintiff, is trying to transfer his properties described in the schedule of the application.

15. In this connection, we feel it necessary to quote hereunder the material portion of the application under Order XXXVIII, rule 5 read with section 151 of the Code of Civil Procedure for having a better view of the dispute in question. Paragraph No. 8 of the application under Order XXXVIII, rule 5 of the Code reads as follows:

"মোকদ্দমার ১ নং বিবাদী অত্র মোকদ্দমার বিষয়ে অবগত হইয়া অবগত হইয়া তদীয় মালিক দখলীয় নিম্ন তফসিলোক্ত সম্পত্তি অন্যত্র হস্তান্তর করিবে এবং বাংলাদেশ ত্যাগ করিবে মর্মে এলাকায় বলাবলি করিতেছে। মোকদ্দমার ১ নং বিবাদী Minority Community-র লোক তদীয় মালিকীয় এবং নিম্ন তফসিলোক্ত সম্পত্তি বেচা বিক্রী করিয়া বাংলাদেশ ত্যাগ করিলে মোকদ্দমার উদ্দেশ্যই ব্যাহত হইবে কেন না ইতিপূর্বে বিবাদীর বহু আত্মীয় স্বজন বিভিন্ন লোকের সহিত fraud করিয়া বহু টাকা কড়ি হাতাইয়া নিয়া চিরতরে ভারতে চলিয়া গিয়াছে এবং বাদী পক্ষ উপযুক্ত প্রতিকার পাইবে না। তৎ কারনে ১ নং বিবাদীর মালিকীয় নিম্ন তফসিলোক্ত ও ব্যাংক হিসাব সমুহ ক্রোকাবদ্ধ করার আদেশ প্রচার বিকল্পে ১ নং বিবাদীকে আর্থিক Security furnish করার নির্দেশ প্রচার করার প্রার্থনায় বাদী পক্ষ অত্র দরখাস্ত দাখিল করিলেক।"

16. Reading the application under Order XXXVIII, rule 5 of the Code order as a whole, we find that there is no specific particulars as to when and from whom or from which source the plaintiff side came to know that the defendant No. 1 is trying to transfer his property or withdrawing his money from bank with intent to obstruct or delay the execution of the decree that might be passed against him.

17. On a careful perusal of the application, it appears to us that the plaintiff's application under Order XXXVIII, rule 5 of the Code of Civil Procedure does not disclose any particulars in support of the allegation and in that view of the matter, the learned Joint District Judge was per-

fectly justified in rejecting the petitioner's application for attachment before judgment.

18. The power of attachment of property before judgment being an extraordinary power of interfering with a party's right to use and enjoy its own property before any decree is passed, the Court should be very circumspect in allowing such prayer and must decide the matter on the strength of the facts of each case. In this case, we have already indicated that the application under Order XXXVIII, rule 5 of the Code of Civil Procedure for attachment before judgment does not contain any concrete or specific allegation with specific materials to satisfy the Court that the defendant has been trying to transfer his property from the court's jurisdiction with intent to obstruct or defeat the prospective decree or to defraud the plaintiff and to frustrate the suit, no relief can be given on such vague and general allegation. Therefore, we find no substance in either of the contentions as raised by the learned Advocate for the petitioner.

19. The learned Joint District Judge appears to have considered all the material aspects of the case and justly rejected the application for attachment before judgment by the impugned order, we find no reason to interfere therewith.

20. In the result, the Rule is discharged without any order as to costs. The order of attachment passed earlier by this Court stands vacated. Since the instant suit is a long pending case the trial Court is directed to dispose of the case as early as possible preferably within 6 months from the date of receipt of the order.

Let a copy of this judgment be communicated to the Court concerned at once.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Zubayer Rahman Chowdhury J
Mahmudul Hoque J

Judgment
July 8th, 2015.

Shamsun Nahar Begum Shelly.....Petitioner

vs

Bangladesh, represented by the Secretary, Ministry of Housing and Public Works and others.....Respondents*

Abandoned Buildings (Supplementary Provision) Ordinance (LIV of 1985)
Sections 2(b), 9 and 10

The Court of Settlement without following a judicial approach in determining the question of facts unfortunately passed the judgment without giving a judicial consideration of the whole dispute between the parties. .....(20)

Bangladesh Abandoned Property (Control, Management & Disposal) Order (PO No. 16 of 1972)
Article 2

Mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. .....(15)

Bangladesh Abandoned Property (Control, Management & Disposal) Order (PO No. 16 of 1972)
Article 7

Abandoned Buildings (Supplementary Provision) Ordinance (LIV of 1985)
Section 5(1)(b)

Non-service of notice as required by law disentitled the Government to claim that the property was legally declared abandoned and enlisted in the "Kha" list. There is nothing on record to show that the petitioner was ever asked to show cause about inclusion of the

*Writ Petition No. 1657 of 2010.

property or to surrender the same which has definitely denied the right of natural justice.

.....(17)

Jebon Nahar vs Bangladesh, 49 DLR 108; Bangladesh vs Chand Sultana, 1 MLR 310 = 48 DLR 547; Jebon Nahar vs Bangladesh, 49 DLR 108; Bangladesh vs Chand Sultana, 51 DLR (AD) 24; Bangladesh vs Md Jalil, 48 DLR (AD) 10; Secretary Ministry of Works vs Rowshan Ara Begum, 57 DLR (AD) 167; Bangladesh vs ATM Mannan 1 BLC (AD) 8 and Md Feroj Mia vs Bangladesh in Writ Petition No. 4971 of 2001 ref.

Khandaker Shahriar Shakir—For the Petitioner.

Shahidul Islam, DAG with Sukumar Biswas, AAG—For Respondents.

Judgment

Mahmudul Hoque J : In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the decision dated 10-12-2009 passed by Respondent No. 3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57 Khalishpur Housing Estate, Khulna, from Kha list of the Abandoned Buildings as published in the Bangladesh Gazette, dated 23-9-1986 at page No. 9764 (36) against serial No. 615 (Mistakenly mentioned in the decision as published in the Bangladesh Gazette dated 28-4-1986 against Serial No. 634) (Annexure "L") should not be declared to have been passed without lawful authority and is of no legal effect and as to why the Respondents should not be directed to exclude the house being No. T-57, Khalishpur Housing Estate, Khulna from the 'Kha' list of Abandoned Building as published in the Bangladesh Gazette dated 23-9-1986 as detailed hereinbefore and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of this rule, in brief, are that the property in question being House No. T-57, Khalishpur Housing Estate, Khulna, measuring an area of 144 square yards was allotted by the Government to one SG Mustafa son of SM Yousuf by a registered deed of lease being No. 8753 dated 5-9-1963 and after getting allotment of the said property the lessee SG Mustafa had been possessing the same and constructed a two-storied building thereon obtaining loan from House Building Finance Corporation ("HBFC") by mortgaging the said property as security against loan. The said SG Mustafa while in possession and enjoyment of the property in question died in the year 1972 and he was buried in Khalishpur grave-yard, Khulna. The said SG Mustafa died leaving son Abid Hossain, who was in possession of the disputed property. Subsequently he decided to dispose of the property in question and accordingly he executed a registered deed of agreement for sale being No. 22877 dated 12-12-1980 in favour of one Abdur Rob Biswas, the husband of the present Petitioner at a consideration of Taka.80,000 out of which he received Taka 40,000 as earnest money and delivered possession of the property. On the same day he executed and registered a power of attorney appointing the Petitioner authorizing her to act on his behalf and to deal with the property in question in any manner including power of transfer of the same. After passing of a considerable time while Abdur Rob Biswas pressed the said Abid Hossain to execute and register the sale deed upon receipt of the remaining money it was revealed that the property has been mortgaged to the HBFC and the original documents are lying with them. Thereafter the petitioner after making necessary inquiry came to know that the original loan amount stood at Taka 43,778 as on 7-12-1981. The petitioner made payment of the entire loan amount to the HBFC by a payment receipt dated

7-12-1981 through Sonali Bank, Khulna Branch. After payment of the entire amount HBFC released the property from mortgage and since then the petitioner is continuing in the possession of the disputed property without any objection from any quarter. By this time the Petitioner as possessor of the disputed property did not receive any notice either under Article 7 of the President's Order No. 16 of 1972 or under section 5(l)(b) of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. 54 of 1985) from the Government. Subsequently the Petitioner came to know that the disputed property has been enlisted as Abandoned Property at serial No.615 in the "Kha" list vide SRO 364-L/86-1985 published in the Gazette (Extra-ordinary) on 23-9-1986. Then the Petitioner filed a Case under Section 7 (1) of the Ordinance 54 of 1985 in the Second Court of Settlement being Case No. 221 of 1992, Dhaka annexing all the relevant documents in support of her claim by a Firisti. But the Second Court of Settlement after hearing dismissed the Case by the impugned Judgment and Order dated 10-12-2009. At this stage the Petitioner moved this Court by filing this application and obtained the present Rule and Order of Stay.

3. The Respondent-Government contested the Rule by filing Affidavit-in-Opposition and Supplementary Affidavit-in-Opposition denying all the material allegations made in the application contending, *inter alia*, that the property in question was leased out by the Government to one SG Mustafa for 99 years by a lease deed dated 4-9-1963. During the war of independence said SG Mustafa left the case property uncared for and taking such advantage the present Petitioner entered into possession and created some false documents to grab the case property. It is also stated that the claimant could not produce any document to show that the original owner was in possession of the case property at the material time from 26-3-1971 to 28-2-1972 and, as such, the case property has been rightly included in the 'Kha' List of the abandoned buildings under the provision of Article 2(1) of PO 16 of 1972 upon compliance of all the legal formalities. Further case of the Respondents-Government is that the claimant Petitioner while deposed before the Court of Settlement admitted in her cross-examination that she entered into the case property as an abandoned property, the Petitioner could not prove the death of SG Mustafa in Bangladesh and Abid Hossain is the son of said SG Mustafa and also failed to prove the right, title and interest in the case house and as such the Rule is liable to be discharged.

4. Mr Khandaker Shariar Shakir, the learned Advocate appearing for the Petitioner submits that admittedly the Petitioner as constituted attorney of Abid Hossain, son of SG Mustafa, has been possessing the case property since 1982 and before that Abid Hossain was in possession. In this situation the Respondent-Government ought to have served a notice under Article 7 of PO 16 of 1972 upon the owner or the occupier asking them to surrender the possession of the property to the Deputy Commissioner but in the present case no such notice was issued and subsequently when the Ordinance No. 54 of 1985 came into force before enlistment of the property as abandoned property in the "Kha" list, the Government ought to have served a notice upon the owner or occupier of the property under section 5(1)(b) of the Ordinance 54 of 1985 asking the owner or possessor to surrender the property or to explain on what basis they are occupying the disputed property but in the instant case no such notice was issued and served upon the Petitioner or upon her principal Abid Hossain, as such inclusion of the property in question in the "Kha" list of the Abandoned Buildings is palpably illegal and without lawful authority. Mr Shakir referring an inquiry report dated 30-9-1996 Annexure 1(1) furnished by the Officer-in-Charge, Abandoned Property Division, Khulna, submits that in the

said report it has been clearly stated that there is no paper in the office to show on what basis the house in question included in the 'Kha' list of the abandoned buildings.

5. He also submits that from the said report it is evident that the property in question was never declared abandoned or any notice to that effect was issued or served upon the owner or occupier of the disputed property. Mr Shakir also argued that to substantiate the claim of the Petitioner, she deposed before the Court of Settlement and exhibited relevant documents in support of her claim such as the original lease deed, mortgage deed executed in favour of HBFC, death certificate of SG Mustafa nationality certificate of Abid Hossain, Affidavit sworn by Abid Hossain before the Magistrate, irst Class, utility bills, succession certificate, registered power of attorney, payment receipt showing payment of loan money to HBFC by the petitioner but the Court of Settlement totally failed to consider those documents in its true perspective and upon misconstruction of the said documents most illegally dismissed the case holding that the property has been rightly declared abandoned and included in the "Kha" list of the Abandoned Buildings. He further argued that the record of Khalishpur Housing Estate placed before the Court Settlement shows that wife of SG Mustafa, namely, Hosneara Begum filed an application on 13-12-1972 before the Housing Authority, Khulna praying for allotting the said quarter in her favour stating that the property was leased out to her husband SG Mustafa in the year 1963 and subsequently her husband SG Mustafa constructed a two storied building on the property obtaining loan from HBFC who was killed on 10-3-1972. It is also argued that the Government file shows that said SG Mustafa died in Bangladesh in 1972 and several notices were issued by the housing authority demanding outstanding, installments from said SG Mustafa. Therefore, it is established that the original owner of the property was present in Bangladesh at the relevant time and he never left this country leaving the property uncared for but he died in this country and after his death his heirs had been in possession of the disputed property till 1980 and thereafter Abdur Rob Biswas and then the Petitioner as attorney of Abid Hossain has been possessing the disputed property.

6. For the above reason the property in question cannot be declared abandoned and as such the listing of the property in the "Kha" list of the Abandoned Buildings is illegal and without lawful authority. In support of his submission he has referred to the cases of *Jebon Nahar vs Bangladesh* reported in *49 DLR 108*, *Bangladesh vs Chand Sultana* reported in *1 MLR 310 = 5l DLR (AD) 24.*

7. Mr Md Shahidul Islam, the learned Deputy Attorney General with Mr Sukumar Biswas, the learned Assistant Attorney General appearing for the Respondent Government submit that the Petitioner is not the owner of the property and as such she cannot file application before the Court of Settlement for release of the property from the 'Kha' list of the Abandoned Buildings. It is also argued that the Petitioner having failed to prove the case, the Court of Settlement has rightly dismissed the case. Mr Islam further submits that the burden of proof squarely lies on the Petitioner to prove that SG Mustafa or his heirs occupied, managed and supervised the case properly on the relevant date i.e. on 28-2-1982 to establish that the said property is not an abandoned property. But the petitioner having failed to prove the same the inclusion of the Building in the "Kha" list is proof of its being an abandoned property and the Government has nothing in prove or deny .

8. In the present case the petitioner could not show that SG Mustafa was present in Bangladesh on material dates or that he occupied, managed or supervised the case property when PO 16 of 1972 came into operation, as such the

listing of the property in the "Kha" list as abandoned property is lawful and conclusive proof of facts. It is also argued that the papers and documents submitted on behalf of the Petitioner to prove her case showing payment of utility bills are after 1980 onwards as such it can not be said that the Petitioner or her principal was in active control and possession of the property in question. He further argued that the Court of Settlement rightly observed that though the Petitioner submitted some documents but those have not been proved by evidence. Mr. Islam also argued that the Petitioner is not the owner of the property and she can not be a claimant of the property as per law. It is also argued that this Court can not sit as a Court of appeal sitting in writ jurisdiction. This Court only can interfere if it is found that the Court of Settlement acted malafide and in violation of principle of natural justice. But in the present case no such allegation has been brought on behalf of the Petitioner. In support his of his submissions he referred to the cases of *Bangladesh vs Md Jalil* reported in *48 DLR (AD)10*, *Secretary Ministry of Works vs Rowshan Ara Begum* reported in *57 DLR (AD) 167 and Bangladesh vs ATM Mannan* reported in *1 BLC (AD) 8* and an unreported judgment dated 29-10-2009 passed in the case of *Md Feroj Mia vs Bangladesh in Writ Petition No. 4971 of 2001.*

9. Heard the learned Advocates for the parties, perused the Application, Supplementary Affidavits, Affidavits-in-Opposition, Supplementary Affidavit-in-Opposition and Affidavit-in Reply, along with the annexures annexed thereto.

10. In the instant Rule the moot question to be looked into whether the property in question has been legally declared as abandoned property and whether the property is at all come within the purview of the definition "abandoned." Before going through the merit of the case the provisions of law in this regard may be looked into.

11. The purpose of PO 16 of 1972 is to make provisions for the control, management and disposal of certain property abandoned by certain persons who are not present in Bangladesh or whose whereabouts are not known or who have ceased to occupy or supervise or manage in person their property or who are enemy aliens.

12. It appears that the purpose of PO 16 of 1972 is not to declare as abandoned the property of citizens who are very much present in Bangladesh and who have been occupying, supervising and managing their property at all times. In the present case the Government submitted the concerned record before the Court of Settlement. This Court finds that there are some papers which show that the Housing Authority on different dates wrote letters to the lessee after 1972 onwards demanding payment of outstanding instalments. It is also found that wife of original lessee SG Mustafa has filed an application on 13-12- 1972 praying for allotment of the house in her name since her husband has been killed on 10-3-1972. Apart from this the petitioner in her application categorically asserted that the original owner of the case property died in Bangladesh in the year 1972. Subsequently, while his son Abid Hossain was in active control, supervision and management of the case property, he, by a registered power of attorney, authorized the Petitioner to manage, supervise and control the property on his behalf. The Government though claimed that the property was rightly declared abandoned and enlisted in the "Kha" list as abandoned property, but could not produce any document in support of enlistment and declaration of the property as abandoned or even a notice to surrender under Article 7 of PO 16 of 1972 or under section 5(1) (b) of the Ordinance 54 of 1985 Furthermore, the Govern-ment could not show any paper in respect of treating the property as abandoned except a Gazette notification. The record of the Housing Settlement shows that the original owner of the case property SG Mustafa was present in Bangladesh at the relevant time i.e. on 28-2-1972

when PO 16 of 1972 came into force, as such the claim regarding whereabouts of the original allottee was not known to the Government was not correct. The Petitioner in support of her claim submitted all the original documents before the Court of Settlement including Deed of Lease, Mortgage Deed executed in favour of HBFC. Receipt showing payment of loan to HBFC, payment of utility bills and other connected documents. The Court of settlement though discussed about the documents but upon a misconstruction raised question about the genuineness of those documents.

13. It is true that there are some anomalies in the papers of he Petitioner submitted before the Court of Settlement as well as before this Court but those anomalies in this court's view contributes a little in the merit of the case.

14. Furthermore, it is always to be borne in mind that in any case as this it must be accepted as a truism that the act of abandonment implies two fundamental factors:

(i) Desertion of the property; and

(ii) Giving up one's right to the property.

15. The word "abandonment" connotes in this sense the idea of the owner not merely temporarily vacating but deserting the property with the intention of never returning to it. Such absolute desertion must be concomitant with the positive intention to give up the right vested in the property. It follows, therefore, that mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. These two determinants of the notion of "abandonment" appear not to have been established in this case. It is true that the petitioner before us is not the owner of the property she represents the heirs of S.G. Mustafa namely, Abid Hossain and in other words she has some interest and she produced the power of attorney, receipt showing payment of loan money to the HBFC and possessing the disputed house, as such the case property does not in any way answer to the description of the abandoned property as mentioned above and defined particularly under Article 2 of the PO 16 of 1972 as there was no desertion of the property accompanied by a giving up the right to the property by the owner.

16. A perusal of the Government file pertaining to the case property at page 113 it is found that the Officer-in-Charge of the Abandoned Property, Khulna submitted a report on 30-9-1996. He relevant portion of the said report is reproduced below for ready reference.

> "এ বাড়ী সংক্রান্তে অত্র কার্যালয় হতে 'খ' তালিকায় ৬৩৪ নং ক্রমিকে গেজেটে প্রকাশের জন্য ২২-৪-১৯৮৬ তারিখে প্রেরণ করা হয়। সে মতে ১৯৮৬ সালে ২৮ শে এপ্রিল মাসের গেজেটে ৬৩৪ নং ক্রমিকে পরিত্যক্ত বাড়ী হিসেবে ঘোষিত হয়েছে। কিসের বুনিয়াদে বা কোন প্রতিবেদনের উপর পরিত্যক্ত বলে এ বাড়ী ঘোষিত হবে তার কোন তথ্য অত্র দপ্তরে বর্তমানে খুঁজে পাওয়া যাচ্ছে না বা এ সংক্রান্ত কোন নথিও নেই। ঘোষণা হয়েছে কিনা তাও পরিদৃষ্ট হচ্ছে না।
>
> উপরোক্ত তথ্য প্রমান হতে বাড়ীটি পরিত্যক্ত সম্পত্তির তালিকা হতে অবমুক্তির যোগ্য প্রতীয়মান"।

17. The above mentioned observation of the concerned Officer of the Abandoned Property Division, Khulna, establishes that the Government never declared the property as abandoned. In the present case the ownership of the property is not paramount consideration for this Court. The main question is whether the property in question has been rightly included in the "Kha" list of the Abandoned Building in accordance with law. This court also finds that the Government- Respondent never issued and served any notice upon the owner and the occupier under Article 7 of PO 16 of 1972 or under section 5(1)(b) of the Ordinance, 1985 non-service of notice as required by law disentitled the Government-Respondent to claim that the property was legally declared abandoned and enlisted in the "Kha" list of the Abandoned Buildings. It is also noted that there is nothing on

record to show that the Petitioner was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the Petitioner.

18. In the case of *Syeda Chand Sultana vs Bangladesh* reported in *1 MLR 310 = 48 DLR 547* which was affirmed by the Appellate Division and reported in *51 DLR (AD) 24*, it has been held that,

> "Where the owners as Bangladeshi nationals having lawful title have been in possessions of the property all through and never having ceased to manage or supervise the same and not having left the country and when there was no proper service of notice upon the petitioners as required under Article 7 of the PO No. 16 of 1972. the inclusion of the said building in the "Kha list" of abandoned properties being violative of the fundamental right as contained in article 42 of the Constitution is illegal, without jurisdiction and of no legal effect and as such the petitioners are entitled to invoke the writ jurisdiction for enforcement of fundamental rights.

19. In the present facts and circumstances, this Court finds itself wholly subscribing to that *ratio decidendi* in the *Syeda Chand Sultana* Case.

20. Given this Court's understanding of the essentials of enquiry as to the status of property under the relevant provisions of Ordinance as above explained, it is found that the claimant had duly discharged her onus of proving her case independently of the Government and that in doing so she had by a set of mutually reinforcing evidence produced generally established a continuous scenario of active ownership, occupation, supervision and management of the said property through her principal both before and after the promulgation of PO 16 of 1972. There was nothing on record that could have reasonably led the Court of Settlement to find otherwise. However, the Court of Settlement without following a judicial approach in determining the question of facts involved in this case unfortunately passed the Judgment without giving a judicial consideration of the whole dispute between the parties and decided the matter erroneously. By that reason, and by confining this Court's scrutiny to the objective of finding whether the impugned Judgment is perverse or not, this Court has inevitably arrived at the conclusion that the Court of Settlement's Judgment and Order dated 22-2-2001 is indeed highly perverse, one being contrary to the facts and circumstance and evidence on record and by that reason we are inclined to interfere with the impugned Judgment of the Court of Settlement as prayed for.

21. In the result, the Rule is made absolute, without any order as to costs.

22. It is hereby declared that the Judgment and Order dated 10-12-2009 passed by the Respondent No. 3 in Case No. 221 of 1992 dismissing the case and thereby refusing to release the property being House No. T-57, Khalishpur Housing Estate Khulna from the "Kha" list of abandoned buildings, published in the Bangladesh Gazette on 23-9-1986 at page No. 9764(36) against serial No. 615 (mistakenly mentioned in the decision as published in the Bangladesh Gazette dated 28-4-1986 against serial No 634 is without lawful authority and is of no legal effect and the Respondents are hereby directed to exclude the same from the "Kha" list of the Abandoned Buildings within 60 (sixty) days from the date of receipt of this Judgment and Order.

23. The order of stay granted at the time of issuance of this Rule is stand vacated.

Communicate a copy of this Judgment and Order to the Court of Settlement concerned at once.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Shamim Hasnain J
Mohammad Ullah J

Judgment
April 30th, 2015.

Hossain Ali alias Hassan Ali Matbar and others...
.....Petitioner
vs
Government of Bangladesh and others.....
.....Respondents*

State Acquisition & Tenancy Act (XXVIII of 1951)
Section 144
State Acquisition & Tenancy Rules, 1955
Rule 33

When a record-of-rights is finally published under rule 33, the publication shall be conclusive evidence that the record has been duly revised under section 144 of the Act. Every entry in a record-of-rights finally published shall be presumed to be correct until it is rebutted on taking evidence before the appropriate civil court. .....(14)

State Acquisition & Tenancy Rules, 1955
Rule 42A

Pursuant to a complaint or on receipt of an official report the Revenue Officer with the additional designation of Settlement Officer has jurisdiction to correct a fraudulent entry in the record-of-rights upon consulting the relevant records and making other inquiries as he may deem necessary and make direct excision of the fraudulent entry as per the provision of Rule 42A. However, before such excision the contending parties shall be notified giving opportunities of personal hearing. .....(15)

*Writ Petition No. 4912 of 2003.

State Acquisition & Tenancy Rules, 1955
Rules 42 and 42A

Misquoting of rule or non-mentioning of a particular section in the concerned application does not preclude the Settlement Officer to act under applicable provision of the Act and Rules thereof for the purpose of arriving at a correct decision with regard to the final publication of the record-of-right. .....(17)

State Acquisition & Tenancy Rules, 1955
Rule 42

Settlement Officer may at any time before final publication of the record-of-rights exercise his jurisdiction under rule, 42 of the Rules, 1955. Having regard to the observations and decisions, we find no merit in this Rule. .....(20)

Bhawal Raj Court of Wards Estate represented by its Manager vs Rashida Begum, 15 BLC (AD) 115 and Md Aftab All Sheikh vs Director of Land Records and Survey, 58 DLR 397 ref.

Md Khairul Alam, Advocate—For the Petitioner.

Sashanka Shekhar Sarker, DAG with Arobinda Kumar Roy, AAG and Shafiqul Islam Siddique, AAG—For the Respondent No.2.

Judgment

Mohammad Ullah J : This Rule Nisi was issued calling upon the respondents to show cause as to why the notices dated 10-4-2003 issued under the signature of the respondent No. 4, Charge Officer and Assistant Settlement Officer (Appeal Officer-in-Charge) for re-hearing of Appeal Case Nos. 62948 to 62951 all of 2002 (as contained in Annexure-I, I-1, I-2, and I-3) in respect of DP Khatian No. 1645 should not be declared to have been issued without lawful authority and of no legal effect.

2. The Rule was directed to be heard along with Writ Petition No. 4027 of 2003. Since the record of the aforesaid Rule could not be placed before this Bench at the time of hearing, the Rule issued in the said writ petition will be heard and disposed of subsequently by a separate judgment, if the same has not been disposed of in the mean-time.

3. It is stated in the writ petition that 84.09 acres of land under CS Plot No. 565 appertaining to CS Khatian No. 107 of Mouza Keraniganj at present Tejgaon Industrial Area originally belonged to the respondent No. 5, Bhawal Raj Court of Wards Estate in 16 annas permanent Zamindary rights and accordingly CS Khatian was prepared in the name of Bhawal Raj Court of Wards Estate. The petitioners became the owners of 59.36 acres of land out of 84.90 acres by way of settlement from Bhawal Raj Court of Wards Estate in the year 1941 to 1943 corresponding to 1348 BS to 1351 BS with the permission of the Board of Revenue vide office Memo Nos. 21 of 1347 BS and 15 of 1349 BS through 6(six) separate Settlement Cases being No. 48(M) of 1349 BS, S Case No. 49/T of 1350 BS, LS Case No. 270(M) of 1350 BS, LS Case No. 117/50(M) of 1349 BS, LS Case No. 215(5)M of 1349 BS and = LS Case No. 37(M) of 1350, Annexure-B, B-l, B-2, B-3,B-4 and B-5.

4. After taking the aforesaid settlement the petitioners had been paying rent to the Bhawal Raj Court of Wards Estate and got rent receipt from the Estate accordingly, Annexure-C series. Since the petitioners sold some portion of the land out of 59.36 acres, the SA record was correctly prepared in the names of the petitioners in respect of the land under SA Khatian Nos. 508, 511, 512, 554, 648, 655, 663, 666, 675, 695, 703, 680, Annexure-D series. Thereafter, after the acquisition of the land of the Zamindars on cessation of the Zamindary system the rent receiving interest of the Mouza was acquired by the Government under section 3 of the State Acquisition and Tenancy Act, 1950 (hereinafter referred to as "the SAT Act") Accordingly, the petitioners paid rent to the Government up to 1997, Annexure-E series. It has also been stated that the petitioners have been possessing and enjoying 41.24 acres of land through different tenants. During the recent Mahanagar Survey Operation the draft record-of-rights (Tasdik Stage) was prepared in the name of the petitioners in accordance with rule 29 of the State Acquisition and Tenancy Rules, 1955 (hereinafter referred as "the Rules, 1955"), Annexure-F series. The respondent No. 5, Bhawal Raj Court of Wards Estate filed 4 objection cases being Nos. 263 to 266 all of 2000 under rule 30 of the Rules, 1955 for removing the name of the petitioners as appeared against the respective possession in their respective case lands in the draft record-of-rights challenging their tenancy; the Revenue Officer after hearing the parties rejected the objection cases of the respondent No. 5, vide order dated 17-1-2002 Annexure-G.

5. Being aggrieved by the aforesaid rejection order, the respondent No. 5 preferred four appeals being Nos. 62948 to 62951 all of 2002 under rule 31 of the Rules, 1955 before the appellate authority who after hearing the parties rejected the appeals vide judgment and order dated 10-2-2002, Annexure-H. According to the petitioners after delivery of the judgment of the appellate authority, the draft record-of-rights was finally published in the name of the petitioners under section 144(7) of the SAT Act read with rules 32 and 33 of the Rules, 1955, Annexure-K to the supplementary affidavit dated 8-4-2015. The respondent No.5, Bhawal Raj Court of Wards Estate made an application mentioning rule 42A of the Rules, 1955 before the Settlement Officer at Dhaka against the aforesaid appellate order for cancellation of the same and for hearing of the appeals as contained in Annexure-1 to the affidavit-in-opposition filed by the respondent No.5. Accordingly, the revenue authority on 10-4-2003 issued four notices under the signature of the respondent No. 4, Charge Officer and Assistant Settlement Officer

(Appellate Officer-in-Charge) upon the petitioners for hearing of the aforesaid appeals afresh, fixing the date for hearing on 24-4-2003.

6. This writ petition is directed challenging the legality and propriety of the notices of hearing of the appeal cases as issued by the respondent no. 4. At the time of issuance of the Rule this Court vide order dated 20-7-2003 stayed further proceedings of the appeal cases No. 62948 to 62951 all of 2002 then pending before the respondent No. 4 till disposal of the Rule.

7. This Rule is contested by the respondent No. 2, Director Land Records and Survey and respondent No. 5, Bhawal Raj Court of Wards Estate, represented by its Manager through Mr Sashanka Shekhar Sarker, learned Deputy Attorney General and Mr Manzill Murshid, learned Advocate respectively who also filed two separate affidavits-in-opposition.

8. Mr Md Khairul Alam, learned Advocate appearing on behalf of the petitioners upon placing the relevant provisions of the rules incorporated under Chapter VII of the Rules, 1955 submits that the Appellate Officer has not been given any power whatsoever to rehear the appeal cases under rule 31 of the Rules, 1955 which had earlier been disposed of on final adjudication pursuant to which City Survey Khatian had been prepared and finally published under section 144(7) of the SAT Act read with rules 32 and 33 of the Rules, 1955, in the names of the petitioners, and, as such, the impugned notices as issued by the respondent No. 4 Appellate Authority without setting aside the earlier order dated 10-2-2002 was absolutely without jurisdiction. He further argues that pertinency of rule 42 of the Rules, 1955 is limited to a period prior to publication of the final record-of-rights under section 144(7) of the Act. He submits that on the face of the final publication of the record-of-rights in the name of the petitioners, the respondent No. 4 had no jurisdiction to hear the appeal cases except for a challenge of the said decision under section 145A of the Act before the Land Survey Tribunal constituted under SAT Act and, as such, the respondent No. 5 could not invoke jurisdiction even under rule 42A of the Rules, 1955 for rehearing the decision of the Appellate Authority, afresh. In support of his submissions Mr. Alam, cited the decision in the case of *Bhawal Raj Court of Wards Estate represented by its Manager vs Rashida Begum* reported in *15 BLC (AD) 115 and Md Aftab All Sheikh vs Director of Land Records and Survey and others* reported in *58 DLR 397.*

9. On the other hand, Mr. Sashanka Shekhar Sarker, learned Deputy Attorney General appearing on behalf of the respondent No. 2, drawing our attention to Annexure-2, a letter issued under Memo No. 31.3.26920 22.44.001 14.217 dated 27-5-2015 by the Zonal Settlement Officer, Dhaka, submits that the record-of-rights has not yet been finally published and notified in the official Gazette in the names of the petitioners in respect of Khatian No. 1645 in view of the provisions of rules, 32, 33 and 34 of the Rules, 1955 and, as such, the Revenue Officer with the additional designation of Settlement Officer can invoke the jurisdiction to initiate a proceeding afresh from such stage as he may direct under rule 42 of the Rules, 1955.

10. Mr Manzill Murshid, learned Advocate appearing on behalf of the respondent No. 5, Bhawal Raj Court of Wards Estate adopted the submissions of the learned Deputy Attorney General appearing on behalf of the respondent No.2.

11. We have perused the petition and the annexures thereto, the impugned notices and the relevant provisions of law and considered the submissions of the learned Advocates for the respective parties.

12. The question which requires to be determined is whether the respondent No. 4, Charge Officer, Dhaka Settlement is empowered under the provisions of Rules, 1955 to adjudicate the

appeal cases which had earlier been heard and disposed of under the provisions of rule 31. It appears that the petitioners got settlement of the land in question from the CS recorded tenant i.e. Bhawal Raj Court of Wards Estate under six settlement cases. Initially they paid rent to the Estate and after enactment of the SAT Act when Zamindery system was abolished and the rent receiving interest vested in the Government under section 3 of the SAT Act vide publication of notification No. 2773 LR dated 26-2-1952 and the said notification being published in the Dhaka Gazette on 24-3-1952 whereby it was declared that all rent receiving interest vested in the Government with effect from 14-4-1952, the petitioners paid the rent to the Government Estate upto 1997. During SA Survey Operation the name of the petitioners were correctly recorded in the SA Khatian, as produced by the petitioner, without any objection from any quarter. But when RS record-of-rights had not been prepared and published in the name of the petitioners, they filed Title Suit No. 191 of 2005 for correction of the said record-of-rights and some other ancillary reliefs in the Court of Joint District Judge and Arbitration Court, Dhaka wherein they got decree as prayed for vide judgment and decree dated 12-9-2013. Against the said judgment and decree dated 12-9-2013, defendant of the suit as appellant preferred First Appeal before this Court which is now pending for disposal. The petitioners have been owning and possessing their respective case land as tenants on payment of rates and rent initially to the Bhawal Raj Court of Wards Estate and subsequently to the Government after cessation of the Zamindery system. During recent Mahanagar Survey Operation, Revenue Authority prepared the draft record-of-rights in respect of the land in question in the names of the petitioners under the provisions of rule 29 of the Rules, 1955. The respondent No. 5 Bhawal Raj Court of Wards Estate thereafter filed the aforesaid objection cases under rule 30 of the Rules, 1955 for removing the names of the petitioners from the draft record-of-rights; the revenue authority after hearing the parties rejected the objection cases of the respondent No. 5. The respondent No. 5 moved the appellate authority under rule 31 of the Rules, 1955 unsuccessfully. The respondent No. 5, Bhawal Raj Court of Wards Estate represented by its Manager filed an application on 10-4-2013 mentioning rule 42A of the Rules, 1955 for hearing the appeal cases afresh. Accordingly, the impugned notices have been issued and served upon the petitioners mentioning section 19(2) of the Act, 1950 read with rule 31 of the Rules, 1955 for taking a decision afresh about the record-of-rights in question.

13. Section 144 of the SAT Act states that the Government may, in any case if it thinksfit, make an order directing that the record-of rights in respect of any district, part of a district or local area be prepared or revised by a Revenue-Officer in accordance with such rules as may be made by the Government in this behalf.

14. Chapter VII of the Rules, 1955 deals with the procedure to be adopted by the Revenue Officer for revision of record-of- rights under section 144 of the SAT Act. According to rule 27, ten stages are involved in preparation of the revision of record-of-rights. Among these stages six to ten concern attestation, publication of draft record, disposal of objections, filing of appeals and disposal thereof and preparation and publication of final record-of-rights. After completion of attestation in accordance with the Rules, 1955 and instructions of the settlement department under rule 28, the Revenue Officer is required to provide opportunity for raising objections, if any regarding the ownership or possession of land or of any interest in the land; while disposing of the objection, the Revenue Officer shall record the brief decision. Rule 28 sets out the procedure of the work, up to attestation. Rule 29 states that after completion of attestation the Revenue Officer shall publish the draft record-of-rights by placing it for public inspection during a period of not less

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Representation of the People Order, 1972 এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে Representation of the People Order, 1972 (PO No. 155 of 1972) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদদ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।**—(১) এই আইন Representation of the People (Amendment) Act, 2013 নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **PO No. 155 of 1972 এর Article 2 এর সংশোধন।**—Representation of the People Order, 1972 (PO No. 155 of 1972), অতঃপর উক্ত Order বলিয়া উল্লিখিত, এর Article 2 এর—

(ক) clause (vi) এর পরিবর্তে নিম্নরূপ clause (vi) প্রতিস্থাপিত হইবে, যথাঃ—

"(vi) "contesting candidate" means a candidate who has been validly nominated for election as a member and whose candidature has not been either withdrawn under clause (1) or ceased under clause (2) of Article 16,;"

(খ) clause (xi) এ উল্লিখিত "the Electoral Rolls Ordinance, 2007 (Ord. No. XVII of 2007)" শব্দগুলি, কমা, সংখ্যাগুলি ও বন্ধনীর পরিবর্তে "ভোটার তালিকা আইন, ২০০৯ (২০০৯ সনের ৬নং আইন)" শব্দগুলি, কমা, সংখ্যাগুলি ও বন্ধনী প্রতিস্থাপিত হইবে;

(গ) clause (xiaa) এ উল্লিখিত "Bangladesh Rifles" শব্দগুলির পরিবর্তে Border Guard Bangladesh শব্দগুলি প্রতিস্থাপিত হইবে;

(ঘ) clause (xxiv) এর পরিবর্তে নিম্নরূপ clause (xxiv) প্রতিস্থাপিত হইবে, যথাঃ—

"(xxiv) "ward" means a ward of a Union, Paurashava of City Corporation;"।

৩। **PO No. 155 of 1972 এর Article 3 এর**

প্রতিস্থাপন।—উক্ত Order এর Article 3 এর পরিবর্তে নিম্নরূপ Article 3 প্রতিস্থাপিত হইবে, যথাঃ—

"3. The Election Commission shall be constituted in accordance with Article 118 of the Constitution."।

৪। **PO No. 155 of 1972 এর Article 4 এর সংশোধন।**—উক্ত Order এর Article 4 এ উল্লিখিত "its chairman of any of its members" শব্দগুলির পরিবর্তে "the Chief Election Commissioner or any of the Election Commissioners" শব্দগুলি প্রতিস্থাপিত হইবে।

৫। **PO No. 155 of 1972 এর Article 12 এর সংশোধন।**—উক্ত Order এর Article 12 এর—

(ক) clause (1) এর—

(অ) sub-clause (j) বিলুপ্ত হইবে;

(আ) sub-clause (m) এ উল্লিখিত "who" শব্দের পরিবর্তে "which" এবং "him" শব্দের পরিবর্তে "the concerned company or firm" শব্দগুলি প্রতিস্থাপিত হইবে;

(ই) sub-clause (o) এর পরিবর্তে নিম্নরূপ sub-clause (o) প্রতিস্থাপিত হইবে, যথাঃ—

"(o)has been convicted of any crime under the International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973).";

(ঈ) Explanation III এর—

(১) clause (b) পরিবর্তে নিম্নরূপ clause (b) প্রতিস্থাপিত হইবে, যথাঃ—

"(b) Bangladesh Development Bank Limited incorporated under the Companies Act, 1994 (Act No. 18 of 1994);";

(২) clause (c) বিলুপ্ত হইবে;

(খ) clause (3a) এর sub-clause (b) এর শর্তাংশের পরিবর্তে নিম্নরূপ শর্তাংশ প্রতিস্থাপিত হইবে, যথাঃ—

"Provided that any registered political party may primarily nominate more than one candidate and if more than one candidate are nominated, their candidature are subject to the provision of clause (2) of Article 16.";

(গ) clause (5) এ উল্লিখিত "except the one received first by the Returning Officer or the Assistant Returning Officer, as the case may be" শব্দগুলি ও কমার পরিবর্তে "except the one found valid under clause (3a) of Article 14" শব্দগুলি, বন্ধনী ও সংখ্যাগুলি প্রতিস্থাপিত হইবে।

৬। **PO No. 155 of 1972 এর Article 13 এর সংশোধন।**—উক্ত Order এর Article 13 এর clause (1) এর sub-clause (a) এ উল্লিখিত "a sum of Taka ten thousand is deposited in cash" শব্দগুলির পরিবর্তে "a sum of Taka twenty thousand is deposited in cash or by bank draft or pay order or treasury challan in favour of the Election Commission" শব্দগুলি প্রতিস্থাপিত হইবে।

৭। **PO No. 155 of 1972 এর Article 14 এর সংশোধন।**—উক্ত Order এর Article 14 এর clause (3) এর পর নিম্নরূপ নূতন clause (3a) সন্নিবেশিত হইবে, যথাঃ—

"(3a) If any person subscribes to more than one nomination papers, all such nomination papers, except the one found valid, shall not be required to be scrutinized."।

৮। **PO No. 155 of 1972 এর Article 16 এর প্রতিস্থাপন**—উক্ত Order এর Article 16 এর পরিবর্তে নিম্নরূপ Article 16 প্রতিস্থাপিত হইবে, যথাঃ—

"16. (1) Any validly nominated candidate may, by notice in writing signed by him and delivered on or before the withdrawal day, to the Returning Officer, either by such candidate in person or by

an agent authorised in this behalf in writing by such candidate, withdraw his candidature.

(2) where more than one candidate are nominated in the same constituency by a registered political party, the chairman or secretary or a person holding the same rank of the party shall inform, by notice in writing signed by him and delivered, either by himself or by any other person authorized by him in this behalf on or before the withdrawal day, to the Returning Officer, about the final nomination of a candidate and the other candidate of that party shall be ceased to be a candidate.

(3) A notice of withdrawal under clause (1) or final nomination under clause (2), as the case may be, shall in no circumstances, be open to recall or cancellation.

(4) Upon receipt of a notice of withdrawal under clause (1) and final nomination under clause (2), the Returning Officer shall, if he is satisfied that the signature on the notice is that of the candidate or of the chairman or secretary or person holding the same rank of the party, as the case may be, cause a photocopy of the notice to be affixed at some conspicuous place in his office.

(5) The Returning Officer shall, on the day next following the withdrawal day prepare and publish, in the perscribed manner, a list of contesting candidates."।

৯। **PO No. 155 of 1972 এর Article 27 এর সংশোধন।**—উক্ত Order এর Article 27 এর clause (2) এর sub-clause (a) এ উল্লিখিত "sub-clause (a)" শব্দগুলি, বন্ধনী ও বর্ণের পর "and (c)" শব্দ, বন্ধনী ও বর্ণ সন্নিবেশিত হইবে।

১০। **PO No. 155 of 1972 এর Article 28 এর সংশোধন।**—উক্ত Order এর Article 28 এর clause (4) এর sub-clause (aa) এর পরিবর্তে নিম্নরূপ sub-clause (aa) প্রতিস্থাপিত হইবে, যথাঃ—

"(aa) deliver such empty ballot box to the Assistant Presiding Officer or Polling Officer recording the serial number of the concerne ballot box and the serial number of the seal thereon and obtaining signature of the receiver in the respective column of the prescribed form and endeavour to obtain signature of the agents of candidates who is willing to put signature on the said form;"।

১১। **PO No. 155 of 1972 এর Article 44B এর সংশোধন।**—উক্ত Order এর Article 44B এর clause (3) এ উল্লিখিত "fifteen" শব্দের পরিবর্তে "twenty five" শব্দগুলি প্রতিস্থাপিত হইবে।

১২। **PO No. 155 of 1972 এর Article 44CC এর সংশোধন।**—উক্ত Order এর Article 44CC এর clause (3) এর sub-clause (d) এর শর্তাংশের প্রান্তস্থিত ফুলস্টপ এর পরিবর্তে কোলন প্রতিস্থাপিত হইবে এবং অতঃপর নিম্নরূপ নূতন শর্তাংশ সংযোজিত হইবে, যথাঃ—

"Provided further that the expenditure incurred by the party chief for travelling to various constituencies for the purpose of election compaign shall be excluded."।

১৩। **PO No. 155 of 1972 এর Article 44E এর সংশোধন।**—উক্ত Order এর Article 44E এর—

(ক) clause (1) এর—

(অ) sub-clause (aa) এর পরিবর্তে নিম্নরূপ sub-clause (aa) এবং (aaa) প্রতিস্থাপিত হইবে, যথাঃ—

"(aa) Divisional Commissioner;

(aaa) Metropolitan Police Commissioner;";

(আ) clause (d) এ উল্লিখিত "district" শব্দের পরিবর্তে "division, district or metropolitan area" শব্দগুলি ও কমা প্রতিস্থাপিত হইবে;

(খ) clause (2) এর পরিবর্তে নিম্নরূপ clause (2) প্রতিস্থাপিত হইবে, যথাঃ—

"(2) when it appears necessary to transfer any employee of any department of the Government of any other organisation in the interest of fair election, the Commission may request the concerned authority in the matter in writing and such transfer shall have to be made efective as soon as possible on receipt of such request from the Commission."।

১৪। **PO No. 155 of 1972 এর Article 49 এর সংশোধন।**—উক্ত Order এর Article 49 এর clause (4) এ উল্লিখিত "Taka two thousand" শব্দগুলির পরিবর্তে "Taka five thousand" শব্দগুলি প্রতিস্থাপিত হইবে।

১৫। **PO No. 155 of 1972 এর Article 87 এর সংশোধন।**—উক্ত Order এর Article 87 এর clause (a) এ উল্লিখিত "Article 73(2B)," শব্দ, সংখ্যাগুলি ও বন্ধনীর পর "(4)," বন্ধনী, সংখ্যা ও কমা সন্নিবেশিত হইবে।

১৬। **PO No. 155 of 1972 এর Article 89A এর সংশোধন।**—উক্ত Order এর Article 89A এর clause (a) এ উল্লিখিত "Article 73 for personation" শব্দগুলি ও সংখ্যার পরিবর্তে "Article 73(2B), 74(2A), (3), (4), (5), (6)," শব্দ, সংখ্যাগুলি বন্ধনীগুলি ও কমাগুলি প্রতিস্থাপিত হইবে।

১৭। **PO No. 155 of 1972 এর Article 90B এর সংশোধন।**—উক্ত Order এর Article 90B এর clause (1) এর—

(ক) sub-clause (a) এর দফা (iii) এ উল্লিখিত "(as a base for the organizing structure of the party in various administrative level in the country, effective)" বন্ধনী, শব্দগুলি ও কমার পরিবর্তে, "functional" কমা ও শব্দ and এবং শব্দের পরিবর্তে "in" শব্দ প্রতিস্থাপিত হইবে;

(খ) "sub-clause (b) এ উল্লিখিত "clause (1)" শব্দ, বন্ধনী ও সংখ্যার পরিবর্তে sub-clause (a)" শব্দ, বন্ধনী ও বর্ণ প্রতিস্থাপিত হইবে।

১৮। **PO No. 155 of 1972 এর Article 90F এর সংশোধন।**—উক্ত Order এর Article 90F এর clause (1) এর sub-clause (a) এর—

(ক) paragraph (i) এ উল্লিখিত "five" শব্দের পরিবর্তে "ten" শব্দ প্রতিস্থাপিত হইবে;

(খ) paragraph (ii) এ উল্লিখিত "twenty five" শব্দগুলির পরিবর্তে "fifty" শব্দ প্রতিস্থাপিত হইবে।

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নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তির অধিকার সুরক্ষায় একটি ট্রাস্ট স্থাপনের উদ্দেশ্যে বিধান প্রণয়নকল্পে প্রণীত আইন

যেহেতু নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তির অধিকার সুরক্ষায় নিমিত্ত একটি ট্রাস্ট স্থাপন করা সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইলঃ—

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প্রারম্ভিক

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।**—(১) এই আইন নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী সুরক্ষা ট্রাস্ট আইন, ২০১৩ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **সংজ্ঞা।**—বিষয় বা প্রসঙ্গের পরিপন্থী কোনো কিছু না থাকিলে, এই আইনে—

(১) **"অভিভাবক"** অর্থ নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তির মাতা বা পিতা বা তদ্‌কর্তৃক নিয়োজিত কোনো অভিভাবক;

(২) **"উপদেষ্টা পরিষদ"** অর্থ ধারা ১১ এর অধীন গঠিত উপদেষ্টা পরিষদ;

(৩) **"চেয়ারপারসন"** অর্থ বোর্ডের চেয়ারপারসন;

(৪) **"জেলা কমিটি"** অর্থ ধারা ২০ এর অধীন গঠিত জেলা কমিটি;

(৫) **"ট্রাস্ট"** অর্থ ধারা ৮ এর উপ-ধারা (১) এর অধীন স্থাপিত নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী সুরক্ষা ট্রাস্ট;

(৬) **"তহবিল"** অর্থ ট্রাস্টের তহবিল;

(৭) **"নির্ধারিত"** অর্থ বিধি দ্বারা নির্ধারিত;

(৮) **"নিবন্ধিত সংগঠন"** অর্থ ধারা ২১ এর অধীন নিবন্ধিত কোনো সংগঠন;

(৯) **"নিয়োগপ্রাপ্ত অভিভাবক"** অর্থ ধারা ২৩ এর অধীন নিয়োগপ্রাপ্ত কোনো অভিভাবক;

(১০) **"নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তি"** অর্থ ধারা ৩ এ উল্লিখিত যে কোনো ধরনের প্রতিবন্ধিতাসম্পন্ন ব্যক্তি;

(১১) **"প্রবিধান"** অর্থ এই আইনের অধীন প্রণীত প্রবিধান;

(১২) **"বোর্ড"** অর্থ ধারা ১৩ এর অধীন গঠিত ট্রাস্টি বোর্ড;

(১৩) **"বিধি"** অর্থ এই আইনের অধীন প্রণীত বিধি;

(১৪) **"বিশেষ শিক্ষা প্রতিষ্ঠান"** অর্থ এমন কোনো শিক্ষা প্রতিষ্ঠান যেখানে নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তিকে মূলধারার শিক্ষার পরিবর্তে বিশেষ ধরনের শিক্ষা প্রদান করা হয়;

(১৫) **"ব্যবস্থাপনা পরিচালক"** অর্থ ধারা ৩০ এর অধীন নিযুক্ত ব্যবস্থাপনা পরিচালক;

(১৬) **"সদস্য"** অর্থ চেয়ারপারসন ও ভাইস চেয়ারপারসনসহ বোর্ডের কোনো সদস্য।

দ্বিতীয় অধ্যায়

নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধিতা

৩। **নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধিতার ধরন।**—এই আইনের উদ্দেশ্য পূরণকল্পে, শারীরিক, মানসিক, বুদ্ধিগত, বিকাশগত এবং ইন্দ্রিয়গত ক্ষতিগ্রস্ততা ও প্রতিকূলতার ভিন্নতা বিবেচনায়, নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধিতার ধরনসমূহ হইবে নিম্নরূপ, যথাঃ—

(ক) অটিজম বা অটিজম স্পেকট্রাম ডিসঅর্ডারস্ (autism of autism spectrum disorders);

(খ) ডাউন সিনড্রোম (sown syndrome);

(গ) বুদ্ধিপ্রতিবন্ধিতা (intellectual disability); এবং

(ঘ) সেরিব্রাল পালসি (cerebral palsy)।

৪। **অটিজম বা অটিজম স্পেকট্রাম ডিসঅর্ডারস।**—যাহাদের মধ্যে নিম্নবর্ণিত দফাসমূহে উল্লিখিত লক্ষণসমূহের মধ্যে দফা (ক), (খ), ও (গ) এর উপস্থিত নিশ্চতভাবে এবং দফা (ঘ), (ঙ), (চ), (ছ), (জ), (ঝ), (ঞ) ও (ট) তে উল্লিখিত লক্ষণসমূহের মধ্যে এক বা একাধিক লক্ষণ পরিলক্ষিত হইবে, তাহারা অটিজম বা অটিজম স্পেকট্রাম ডিসঅর্ডারস্ বৈশিষ্ট্যসম্পন্ন প্রতিবন্ধী ব্যক্তি বলিয়া বিবেচিত হইবেন, যথাঃ—

(ক) মৌখিক বা অমৌখিক যোগাযোগে সীমাবদ্ধতা;

(খ) সামাজিক ও পারস্পরিক আচার-আচরণ, ভাববিনিময় ও কল্পনাযুক্ত কাজ-কর্মের সীমাবদ্ধতা;

(গ) একই ধরনের বা সীমাবদ্ধ কিছু কাজ বা আচরণের পুনরাবৃত্তি;

(ঘ) শ্রবণ, দর্শন, গন্ধ, স্বাদ, স্পর্শ, ব্যথা, ভারসাম্য ও চলনে অন্যদের তুলনায় বেশি বা কম সংবেদনশীলতা;

(ঙ) বুদ্ধি প্রতিবন্ধিতা বা অন্য কোনো প্রতিবন্ধিতা বা খিচুনী;

(চ) এক বা একাধিক নির্দিষ্ট বিষয়ে অসাধারণ দক্ষতা এবং একই ব্যক্তির মধ্যে বিকাশের অসমতা;

(ছ) অন্যের সহিত সরাসরি চোখে চোখ (eye contact) না রাখা বা কম রাখা;

(জ) অতিরিক্ত চঞ্চলতা, উত্তেজনা বা অসঙ্গতিপূর্ণ হাসি-কান্না

(ঝ) অস্বাভাবিক শারীরিক অঙ্গভঙ্গি;

(ঞ) একই রুটিনে চলার প্রচন্ড প্রবণতা; এবং

(ট) সরকার কর্তৃক, সময় সময়, গেজেট প্রজ্ঞাপন দ্বারা

নির্ধারিত অন্য কোনো বৈশিষ্ট্য।

[ব্যাখ্যা।—অটিজম বা অটিজম স্পেকট্রাম ডিসঅর্ডারস মস্তিষ্কের স্বাভাবিক বিকাশের এইরূপ একটি জটিল প্রতিবন্ধকতা যাহা শিশুর জন্মের এক বৎসর ছয়মাস হইতে তিন বৎসরের মধ্যে প্রকাশ পায়। এই ধরনের প্রতিবন্ধী ব্যক্তিদের সাধারণত শারীরিক গঠনে কোনো সমস্যা বা ত্রুটি থাকে না এবং তাহাদের চেহারা ও অবয়ব অন্যান্য সুস্থ ও স্বাভাবিক মানুষের মতই হইয়া থাকে। ইহারা পরিবেশের সহিত যথাযথভাবে যোগাযোগ করিতে পারে না, যেমন—ভাষার ব্যবহার রপ্ত করিতে না পারা, নিজের ভিতর গুটাইয়া থাকা, ইত্যাদি। তবে, অনেক ক্ষেত্রে ছবি আঁকা, গান করা, কম্পিউটার চালনা বা গাণিতিক সমাধানসহ অনেক জটিল বিষয়ে এই ধরনের ব্যক্তিরা বিশেষ দক্ষতা প্রদর্শন করিয়া থাকে।]

৫। **ডাউন সিনড্রোম**।—কোনো ব্যক্তির মধ্যে এইরূপ কোনো বংশানুগতিক (genetic) সমস্যা, যাহা ২১ তম ক্রমোসোম জোড়ায় একটি অতিরিক্ত ক্রমোসোমের উপস্থিতির সঙ্গে সম্পর্কযুক্ত, এবং মৃদু হইতে গুরুতর মাত্রার বুদ্ধিপ্রতিবন্ধিতা, দুর্বল পেশীক্ষমতা, খর্বাকৃতি ও মঙ্গোলয়ড মুখাকৃতির বিশেষ বৈশিষ্ট্য পরিলক্ষিত হইলে, তিনি ডাউন সিনড্রোমসম্পন্ন প্রতিবন্ধী ব্যক্তি বলিয়া বিবেচিত হইবেন।

৬। **বুদ্ধিপ্রতিবন্ধিতা**।—নিম্নবর্ণিত বৈশিষ্ট্যসমূহের মধ্যে এক বা একাধিক বৈশিষ্ট্যের অধিকারী কোনো ব্যক্তি বুদ্ধিপ্রতিবন্ধি ব্যক্তি বলিয়া বিবেচিত হইবেন, যথাঃ—

(ক) বয়স উপযোগী কার্যকলাপে তাৎপর্যপূর্ণ সীমাবদ্ধতা;

(খ) বুদ্ধিবৃত্তিক কার্যকলাপে সীমাবদ্ধতা, যেমন-কার্যকারণ বিশ্লেষণ, শিক্ষণ বা সমস্যা সমাধান;

(গ) দৈনন্দিন কাজের দক্ষতায় সীমাবদ্ধতা, যেমন-যোগাযোগ, নিজের যত্ন লওয়া, সামাজিক দক্ষতা, নিজেকে পরিচালনা করা, স্বাস্থ্য ও নিরাপত্তা, লেখাপড়া, ইত্যাদি; বা

(ঘ) বুদ্ধাঙ্ক স্বাভাবিক মাত্রা অপেক্ষা কম।

৭। **সেরিব্রাল পালসি**।—(১) অপরিণত মস্তিষ্কে কোনো আঘাত বা রোগের আক্রমণের কারণে যদি কোনো ব্যক্তির,—

(ক) সাধারণত চলাফেরা ও দেহভঙ্গিতে অস্বাভাবিকতা, যাহা দৈনন্দিন কার্যক্রমকে সীমাবদ্ধ করে;

(খ) মস্তিষ্কের ক্ষতিগ্রস্ততার পরিমাণ পরবর্তীতে হ্রাস বা বৃদ্ধি না হয়; এবং

(গ) উপযুক্ত স্বাস্থ্যসেবা প্রদানের মাধ্যমে দৈনন্দিন কার্যক্ষমতা বৃদ্ধি করা যায়,—

তাহা হইলে তিনি সেরিব্রাল পালসিজনিত প্রতিবন্ধী ব্যক্তি বলিয়া বিবেচিত হইবেন।

(২) সেরিব্রাল পালসিজনিত প্রতিবন্ধিতার বৈশিষ্ট্যসমূহ হইবে নিম্নরূপ, যথাঃ—

(ক) পেশী খুব শক্ত বা শিথিল থাকা;

(খ) হাত বা পায়ের সাধারণত নড়াচড়ায় অসামঞ্জস্যতা বা সীমাবদ্ধতা;

(গ) স্বাভাবিক চলাফেরায় ভারসাম্যহীনতা বা ভারসাম্য কম থাকা;

(ঘ) দৃষ্টি, শ্রবণ, বুদ্ধিগত বা সর্বক্ষেত্রে কম বা বেশী মাত্রায় ক্ষতিগ্রস্ততা;

(ঙ) আচরণগত সীমাবদ্ধতা;

(চ) যোগাযোগের সীমাবদ্ধতা; বা

(ছ) এক হাত বা দুই হাত অথবা এক পা বা দুই পা অথবা এক পাশের হাত ও পা বা উভয় পাশের হাত ও পা আক্রান্ত হওয়া।

তৃতীয় অধ্যায়
ট্রাস্ট স্থাপন, উদ্দেশ্য, ইত্যাদি

৮। **ট্রাস্ট স্থাপন**।—(১) এই আইন বলবৎ হইবার পর, সরকার, যথাশীঘ্র সম্ভব, এই আইনের বিধান অনুযায়ী নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী সুরক্ষা ট্রাস্ট নামে একটি ট্রাস্ট স্থাপন করিবে।

(২) ট্রাস্ট একটি সংবিধিবদ্ধ সংস্থা হইবে এবং উহার স্থায়ী ধারাবাহিকতা ও একটি সাধারণ সীলমোহর থাকিবে এবং উহার স্থাবর ও অস্থাবর উভয় প্রকার সম্পত্তি অর্জন করিবার, অধিকারে রাখিবার ও হস্তান্তর করিবার ক্ষমতা থাকিবে এবং উহার নামে উহার পক্ষে বা বিরুদ্ধে মামলা দায়ের করা যাইবে।

৯। **ট্রাস্টের কার্যালয়**।—ট্রাস্টের প্রধান কার্যালয় থাকিবে ঢাকায় এবং বোর্ড, প্রয়োজনবোধে, সরকারের পূর্বানুমোদনক্রমে, বাংলাদেশের যে কোনো স্থানে উহার শাখা কার্যালয় স্থাপন করিতে পারিবে।

১০। **ট্রাস্টের লক্ষ্য ও উদ্দেশ্য**।—ট্রাস্টের লক্ষ্য ও উদ্দেশ্য হইবে, সমাজের অংশ হিসাবে মর্যাদার সহিত বসবাস করিবার উপযোগী করিয়া তুলিবার লক্ষ্যে, নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তিকে,—

(ক) যথাসম্ভব শারীরিক, মানসিক ও আর্থিকভাবে সহায়তা

প্রদান করা;

(খ) উপযোগী শিক্ষা ও কারিগরি জ্ঞানের ব্যবস্থা করা; এবং

(গ) সামাজিকভাবে ক্ষমতায়ন করা।

১১। **উপদেষ্টা পরিষদ**।—(১) ট্রাস্টের একটি উপদেষ্টা পরিষদ থাকিবে যাহা নিম্নবর্ণিত সদস্য সমন্বয়ে গঠিত হইবে, যথাঃ—

(ক) গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের প্রধানমন্ত্রী, যিনি উহার সভাপতিও হইবেন;

(খ) সমাজকল্যাণ মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী বা, ক্ষেত্রমত, প্রতিমন্ত্রী, যিনি উহার সহ-সভাপতিও হইবেনঃ

তবে শর্ত থাকে যে, মন্ত্রী ও প্রতিমন্ত্রী একই সঙ্গে উক্ত *মন্ত্রণালয়ের দায়িত্বে নিয়োজিত থাকিলে, উক্ত ক্ষেত্রে* প্রতিমন্ত্রী সদস্য হইবেন;

(গ) অর্থ মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ঘ) আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ঙ) শিক্ষা মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(চ) স্বাস্থ্য ও পরিবার কল্যাণ মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ছ) প্রাথমিক ও গণশিক্ষা মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(জ) শিল্প মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ঝ) শ্রম ও কর্মসংস্থান মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ঞ) স্থানীয় সরকার, পল্লী উন্নয়ন ও সমবায় মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ট) তথ্য মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ঠ) মহিলা ও শিশু বিষয়ক মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ড) খাদ্য মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী;

(ঢ) দুর্যোগ ব্যবস্থাপনা ও ত্রাণ মন্ত্রণালয়ের দায়িত্বে নিয়োজিত মন্ত্রী; এবং

(ণ) সচিব, সমাজকল্যাণ মন্ত্রণালয়, যিনি উহার সদস্য-সচিবও হইবেন।

(২) উপদেষ্টা পরিষদ, প্রয়োজনবোধে, সময় সময়, বোর্ডকে প্রয়োজনীয় দিক্-নির্দেশনা ও পরামর্শ প্রদান করিবে।

(৩) উপদেষ্টা পরিষদের সভার কার্যপদ্ধতি এবং দায়িত্ব ও কার্যাবলী বিধি দ্বারা নির্ধারিত হইবে।

১২। **প্রশাসন ও পরিচালনা**।—ট্রাস্টের প্রশাসন ও পরিচালনা একটি ট্রাস্টি বোর্ডের ওপর ন্যস্ত থাকিবে এবং ট্রাস্ট যে সকল ক্ষমতা প্রয়োগ ও কার্য সম্পাদন করিতে পারিবে, উক্ত বোর্ডও সেই সকল ক্ষমতা প্রয়োগ ও কার্য সম্পাদন করিতে পারিবে।

১৩। **ট্রাস্টি বোর্ড গঠন**।—(১) ট্রাস্টি বোর্ড নিম্নবর্ণিত সদস্য সমন্বয়ে গঠিত হইবে, যথাঃ—

(ক) সরকার কর্তৃক মনোনীত, নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধিতা বিষয়ে অভিজ্ঞতা ও দক্ষতাসম্পন্ন, একজন ব্যক্তি, যিনি উহার চেয়ারপারসনও হইবেন;

(খ) ব্যবস্থাপনা পরিচালক, জাতীয় প্রতিবন্ধী উন্নয়ন ফাউন্ডেশন, যিনি উহার ভাইস চেয়ারপারসনও হইবেন;

(গ) মহাপরিচালক, সমাজসেবা অধিদপ্তর;

(ঘ) মহাপরিচালক, স্বাস্থ্য অধিদপ্তর;

(ঙ) যুগ্মসচিব (উন্নয়ন), সমাজকল্যাণ মন্ত্রণালয়;

(চ) মহিলা ও শিশু বিষয়ক মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ছ) স্বাস্থ্য ও পরিবারকল্যাণ মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(জ) শ্রম ও কর্মসংস্থান মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ঝ) শিক্ষা মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ঞ) প্রাথমিক ও গণশিক্ষা মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ট) যুব ও ক্রীড়া মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ঠ) খাদ্য মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ড) অর্থ বিভাগ কর্তৃক মনোনীত উক্ত বিভাগের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ঢ) ব্যাংক ও আর্থিক প্রতিষ্ঠান বিভাগ কর্তৃক মনোনীত উক্ত বিভাগের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ণ) স্থানীয় সরকার বিভাগ কর্তৃক মনোনীত উক্ত বিভাগের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ত) লেজিসলেটিভ ও সংসদ বিষয়ক বিভাগ কর্তৃক মনোনীত উক্ত বিভাগের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা;

(থ) স্বাস্থ্য ও পরিবার কল্যাণ মন্ত্রণালয় কর্তৃক গঠিত অটিজম ও স্নায়ু বিকাশজনিত সমস্যা বিষয়ক জাতীয় পর্যায়ের স্টিয়ারিং কমিটি কর্তৃক মনোনীত একজন প্রতিনিধি;

(দ) নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তি বা তাহার মাতা, পিতা, অভিভাবক বা নিবন্ধিত সংগঠনের প্রতিনিধিগণের মধ্য হইতে সরকার কর্তৃক মনোনীত ৭ (সাত) জন প্রতিনিধি;

তবে শর্ত থাকে যে, উক্ত ৭ (সাত) জন প্রতিনিধির মধ্যে অন্যূন ৪ (চার) জন প্রতিনিধি নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধী ব্যক্তির মাতা, পিতা বা অভিভাবকগণের মধ্য হইতে মনোনীত হইবেন;

(ধ) সরকার কর্তৃক মনোনীত জনহিতৈষীমূলক কার্যক্রমে জড়িত ব্যক্তিগণের বা প্রতিষ্ঠানের ২ (দুই) জন প্রতিনিধি;

(ন) ব্যবস্থাপনা পরিচালক, পদাধিকারবলে, যিনি উহার সদস্য-সচিবও হইবেন।

(২) উপ-ধারা (১) এর দফা (ক), (থ), (দ) ও (ধ) এর অধীন মনোনীত সদস্যগণ তাহাদের মনোনয়নের তারিখ হইতে ৩ (তিন) বৎসর পর্যন্ত স্বীয় পদে বহাল থাকিবেন।

(৩) শুধু সদস্যপদে শূন্যতা বা বোর্ড গঠনে ত্রুটি থাকিবার কারণে বোর্ডের কোনো কার্য বা কার্যধারা অবৈধ হইবে না এবং তৎসম্পর্কে কোনো প্রশ্নও উত্থাপন করা যাইবে না।

(৪) সরকার, প্রয়োজনে, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, বোর্ডের সদস্য সংখ্যা হ্রাস বা বৃদ্ধি করিতে পারিবে।

১৪। চেয়ারপারসন এবং সদস্যবৃন্দের যোগ্যতা ও অযোগ্যতা।—(১) নিউরো-ডেভেলপমেন্টাল প্রতিবন্ধিতা বিষয়ে পেশাগত অভিজ্ঞতা এবং বিস্তৃত বিশেষায়িত জ্ঞান ও দক্ষতাসম্পন্ন ব্যক্তি চেয়ারপারসন হিসাবে নিয়োগ লাভের যোগ্য হইবেন।

(২) কোনো ব্যক্তি চেয়ারপারসন বা সদস্য হিসাবে নিয়োগ লাভের যোগ্য হইবেন না, যদি তিনি—

(ক) বাংলাদেশের নাগরিক না হন;

(খ) কোনো ব্যাংক বা আর্থিক প্রতিষ্ঠানের ঋণ খেলাপী হন;

(গ) কোনো উপযুক্ত আদালত কর্তৃক দেউলিয়া ঘোষিত হইবার পর দেউলিয়াত্বের দায় হইতে অব্যাহতি লাভ না করেন; এবং

(ঘ) কোনো উপযুক্ত আদালত কর্তৃক নৈতিক স্খলনজনিত কোনো অপরাধের দায়ে কারাদণ্ডে দণ্ডিত হন।

১৫। পদত্যাগ, অপসারণ বা দায়িত্ব পালনে অসমর্থতা।—(১) চেয়ারপারসন বা মনোনীত কোনো সদস্য কমপক্ষে ৩ (তিন) মাস পূর্বে নোটিশ প্রদান করিয়া, সরকারের উদ্দেশ্যে স্বাক্ষরযুক্ত পত্রযোগে, স্বীয় পদ হইতে পদত্যাগ করিতে পারিবেন এবং সরকার কর্তৃক পদত্যাগপত্র গৃহীত হইবার তারিখ হইতে সংশ্লিষ্ট পদটি শূন্য হইবে।

(২) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, সরকার, চেয়ারপারসন বা মনোনীত কোনো সদস্যকে তাহার পদ হইতে অপসারণ করিতে পারিবে, যদি তিনি—

(ক) কোনো উপযুক্ত আদালত কর্তৃক দেউলিয়া ঘোষিত হন;

(খ) কোনো উপযুক্ত আদালত কর্তৃক নৈতিক স্খলনজনিত কোনো অপরাধে দোষী সাব্যস্ত হন;

(গ) কোনো উপযুক্ত আদালত কর্তৃক অপ্রকৃতস্থ ঘোষিত হন;

(ঘ) কর্মসম্পাদনের ক্ষেত্রে শারীরিক বা মানসিকভাবে অসমর্থ হন; অথবা

(ঙ) দায়িত্ব পালনে অবহেলা বা বিশ্বাসভঙ্গ করেন কিংবা বেআইনীভাবে কোনো আর্থিক বা অন্য কোনো প্রকার সুবিধা গ্রহণ করেন।

১৬। চেয়ারপারসন পদে সাময়িক শূন্যতা পূরণ।—চেয়ারপারসন এর পদ শূন্য হইলে কিংবা অনুপস্থিতি, অসুস্থতা বা

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for more than 14 years. Death sentence of the petitioner be commuted to imprisonment for life. *Bangladesh Legal Aid and Services Trust (BLAST) vs Bangladesh, Secretary, Ministry of Home Affairs (Civil)* 1

Constitution of Bangladesh, 1972

Article 104—Doing 'complete justice does not contemplate doing justice to one party by ignoring statutory provisions and thereby doing injustice to the other party by depriving him of the benefit of law. If a valuable right is accrued to the other side this fact should not be ignored in exercising the power of doing 'complete justice. *(Nazmun Ara Sultana, J) State vs Dafader Marfoth Ali Shah (Criminal)* 13

Article 104—Complete Justice—This power is not circumscribed by any limiting words. This is an extraordinary power conferred by the Constitution and no attempt has been made to define or describe complete justice. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J)State vs Dafader Marfoth Ali Shah (Criminal)* 13

Evidence Act (I of 1872)

Sections 63—If a true copy of a document is proved by the maker on oath giving explanation that the original is missing from the record, it satisfies the requirement of secondary evidence within the meaning of section 63 of the Act. Where secondary evidence of the contents of a document alleged to have been destroyed/untraceable is admitted by the court of first instance without objection, even without any foundation for the reception of secondary evidence having been laid down, the opponent is estopped from taking any objection to the admissibility of such documentary evidence in the appellate Court. Even oral evidence of the contents of the original document can be proved when the original is admitted to have been lost. *(SK Sinha, J, agreeing with Nazmun Ara Sultana, J) State vs Dafader Marfoth Ali Shah (Criminal)*... ... 13

Penal Code (XLV of 1860)

Sections 34 and 120B—If on an analysis of the evidence on record if it is found that the prosecution has proved that there was conspiracy to kill the leaders and in pursuance thereof, the killing was perpetrated, all accused persons could not avoid criminal liability. If, however, the evidence of record proved that there was no conspiracy but, the killing was committed by several persons in furtherance of common intention of all, all the accused persons cannot be convicted because the common intention requires participation in the crime. *(SK Sinha, J agreeing with Nazmun Ara Sultana, J) State vs Dafader Marfoth Ali Shah (Criminal)* 13

High Court Division

Anti-Corruption Commission Act (V of 2004)

Section 17—Constitution has not given any immunity to the Prime Minister or the Cabinet in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar on the ACC to conduct an enquiry in respect of allegation of commission of offence mentioned in the schedule. *Begum Khaleda Zia vs Anti-Corruption Commission (Spl Original)* 1

Section 32—One sanction is required to proceed with the case at the time of filing of the police report. *Begum Khaleda Zia vs Anti-Corruption Commission (Spl Original)* 1

Abandoned Buildings (Supplementary Provision) Ordinance (LIV of 1985)

Sections 2(b), 9 and 10—The Court of Settlement without following a judicial approach in determining the question of facts unfortunately passed the judgment without giving a judicial consideration of the whole dispute between the parties. *Shamsun Nahar Begum Shelly vs Bangladesh, Secretary, Ministry of Housing and Public Works (Spl Original)* ... 30

Code of Civil Procedure (V of 1908)

Order XXXVIII, rule 5—Attachment before judgment—If the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him the Court is empowered to pass an order of attachment before judgment. *Mahabub Alam (Md) vs Liton Gosh (Civil)* 26

Constitution of Bangladesh, 1972

Article 102(2)—Maintainability of writ petition—The case of Sheikh Hasina was decided upon an application under section 561A of the Code of Criminal Procedure, whereas the petitioner seeks to quash the criminal proceeding by making an application under Article 102 of the Constitution, which we have already held, is not maintainable. *Begum Khaleda Zia vs Anti-Corruption Commission (Spl Original)* 1

Constitution of Bangladesh, 1972

Article 145

Anti-Corruption Commission Act (V of 2004)

Section 17—ACC is legally empowered under section 17 to conduct any enquiry, the subject matter of which may fall under Article 145 of the Constitution, so long as it attracts criminal liability and ACC acts within the ambit of law. *Begum Khaleda Zia vs Anti-Corruption Commission (Spl Original)* 1

State Acquisition & Tenancy Act, 1950 (XXVIII of 1951)

Section 144

State Acquisition & Tenancy Rules, 1955

Rule 33—When a record-of-rights is finally published under rule 33, the publication shall be conclusive evidence that the record has been duly revised under section 144 of the Act. Every entry in a record-of-rights finally published shall be presumed to be correct until it is rebutted on taking evidence before the appropriate civil court. *Hossain Ali alias Hassan Ali Matbar vs Government of Bangladesh (Spl Original)* 37

Penal Code (XLV of 1860)

Section 109—Abetment under section 109 of the Code is such an offence which can be inferred from the conduct of the accused and attending circumstances of the case. *Begum Khaleda Zia vs Anti-Corruption Commission (Spl Original)* ...1

Prevention of Corruption Act (II of 1947)

Sections 5(1)(d) and 5(2)—The issue as to whether the Prime Minister is the public servant is irrelevant in the case inasmuch as section 109 of the Penal Code is present in the case and other public servants are also accused in the case. *Begum Khaleda Zia vs Anti-Corruption Commission (Spl Original)* 1

Privatization Commission Service Regulation, 2002

Regulation 6—Only seniority is not the sole yardstick for promotion of any officer of the Commission to the next higher post. Along with his seniority, merit of the officer shall be taken into consideration for promotion to the next higher post by the Selection Committee/DPC. In case of promotion of a Deputy Director to the post of Director of the Commission, he must have completed a minimum of 5(five) years service and his service record must be satisfactory and free from any blemish or stain. If no Deputy Director having the requisite service length and satisfactory service record is available for promotion, only in that event the post of Director of the Commission may be filled up by deputation. *Gazi AKM Fazlul Haque vs Privatization Commission represented by its Chairman, Prime Minister's Office (Spl Original)* ... 17

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