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Founder Editor ■ Late Khondaker Md. Abu Bakar M.A. LL.B
Former Additional Secretary
Ministry of Law, Justice & Parliamentary Affairs
URL: http://www.kmabakar.com

Editor ■ Khondaker Shariful Islam LL.B (Hon's) LL.M.
Solicitor, Supreme Court of England & Wales
E-mail: editor@mlrbd.com
URL: http://www.sharif-islam.info
Skype: mainstream_law_reports

Publisher ■ Shahanaj Khondaker
E-mail: publisher@mlrbd.com

General Manager ■ Khondaker Shafiqul Islam
E-mail: gm@mlrbd.com

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Appellate Division

Civil

Code of Civil Procedure, 1908-

Section 95- Compensation can only be paid for such expense or injury which the claimant suffered by reason of arrest or attachment or injunction-

In this appeal leave was granted to consider the questions as to whether this Division has committed any error apparent on the face of the judgment in

maintaining the judgment of the High Court Division which has affirmed the decree for compensation.

Appellate division find that- compensation can only be paid for such expense or injury which claimant suffered by reason of arrest or attachment or injunction. It must be established that the damage or loss or malice must be proximate result of the order of injunction. There is nothing on record to come to the conclusion that the actions of the appellant were founded on what is called 'an abuse of the process of the Court' or malicious proceedings. Therefore, the impugned judgment so far as it relates to maintaining the decree for compensation is required to be reviewed.

Loreeto Vs. Mrs. Nasreen Sobhan and another 1-8

Criminal

Evidence Act, 1872

Section 114- Enables court to presume only that which accords with the ordinary course of events and human nature and not what would be an aberration from such a course-

The relevant facts of these appeals, are that three appellants along with others were put on trial alleged that victim had been murdered by the appellants which gives rise to this case. In view of the evidence there is no satisfactory proof of guilt of Appellants therefore Appellate Division gave benefit of doubt to the accused.

Zahirul Islam (Md.) and others Vs. The State 8-16

High Court Division
(Special Original Jurisdiction)

Admiralty Court Act, 2000-

Section 4- Maritime lien accrues as only as security for payment for a debt of a person or company and only against the property of the creditor-

Although these two Admiralty Suit have been heard separately one after another, yet as the factual and legal aspect involved in these suits are similar, the same are disposed of by this single judgment. High Court Division find that-

as all the Issues have been disposed off in favour of the plaintiff, these three suits is required to be decreed in favour of the plaintiff not to the strict sense of the prayer but in modified form.

Kyung Hae Maritime Co. Ltd Vs. M.V. BF Glory (Ex-kunai) and others ... 20-51

State Acquisition and Tenancy Act 1950-

Section 3- Court of Wards can only keep the retainable khas land of the previous jamindars but not the "projabili property-

Transfer of Property Act, 1882-

Section 10- Even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of rule against perpetuity'-

Constitution of People's Republic of Bangladesh-

Article 42- Right to transfer property is a fundamental right, cannot be curtailed by issuing Memoranda by the third party who does not have any right, title, interest or possession in the property-

Two Rules Nisi, obtained by two different parties, involves similar facts and concerning common question of law, as such both are taken up together for hearing and accordingly disposed of by this single judgment. High Court Division held that-under the Registration Act and the Registration Manual the Registrar derives its powers and authorities of registering any deed as well as the same is under the control of the Ministry of Law. Whereas, the Court of Wards being under the control of the Land Reform Board is not a superior authority of the Registrars and Sub-Registrars to impose any prohibitory order in respect of registering any deed.

Hamdu Miah (Alhaj Md.) and others Vs. Government of Bangladesh and others 1-19

Criminal

Negotiable Instrument Act, 1881-

Section 138- Crossed cheque "account payee" must be enchased through the account of the holder in whose favour it was issued-

The Rule was issued challenging order the Special Sessions Court No.1, Dhaka passed in Special Session Case under section 138 of the Negotiable Instrument

Act, 1881 discharging opposite party on an application under section 265C of the Code of Criminal Procedure. Upon considering material fact, High Court Division made the rule absolute, set aside the order passed by the Special Sessions Judge Court No.1, Dhaka and directed trail court to proceed with trial in accordance with law and to dispose of the same expeditiously.

Shafayet Hossain Rana (Md.) Vs. The State and another 51-56

Foreign Judgment

Indian Supreme Court

(Civil Appellate Jurisdiction)

The Apex Court of Indian Supreme Court delivered its much-awaited judgment in the "Media Guidelines" case. Constitutional Bench headed by the Chief Justice, while declining to lay down broad guidelines for the media, did provide certain specific directions with respect to the reporting of matters in the mass media. The most pertinent aspect of the judgment relates to the doctrine of postponement whereby the concerned High Court or the Supreme Court can direct that the publication of judicial proceedings be delayed for a certain period of time. The judgment, penned by the Chief Justice of India, is built on the presumption that under the Indian Constitution, "probably, no values are absolute" and that "It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like the right to a fair trial." The Court went on to add that even the concept of "open justice" is not absolute and hence Courts may place a restriction on the same in "the interest of administration of justice". The Constitutionalization of free speech, the US approach, the English approach, the Canadian Approach, the Australian Approach and the New Zealand Approach has also been considered which is worth reading.

Sahara India Real Estate Corp. Ltd. & Ors. Vs. Securities & Exchange Board of India & anr 1-24

A New Year Brings a New Beginning and New Voices

[From Editor's Desk]

A New Year, and time for resolutions and refurbishment. With this issue, we're entering in the 19th year of our Journey. We constantly try to find new ways of looking at developing our approach to law and justice. This year, it begins with the debut of our expansion of foreign legal decision publication beside national legal decisions. This combination has laid the groundwork to publish a greater number of legal decision around the globe and to enhance the speed with which we publish national legal decision in 2013 and beyond. We anticipate that these changes will work synergistically to further enhance the journal's reputation and meet the evolving needs of our international readership.

As Editor, I am excited by both the prospect of providing our readers with a greater variety of legal decisions and by the opportunity to expand the diversity. Indeed, it is our goal to feature land marked legal decisions by both renowned jurisdiction in our field.

We're transforming the way we operate to continuously improve our ability to report landmark decisions of the supreme court of Bangladesh as well as other renounced jurisdiction. Our partner companies Mainstream Info Tech Ltd. and Mainstream Printing & Publications as well as our employees have continued to meet the challenges in our field and to excel despite setbacks. We're very proud of where we are today and excited about where we are headed.

We spend so much time evaluating and improving writing-as we know the legal profession is a writing profession. So the demands for us not only to sharpen our writing and editing skills, but it also demands that we substantively engage with the legal arguments that pieces we're considering or writing have in them. We are continuing developing research, writing, and editing skills-often under time pressure-all of which are relevant in our progress. Each month we receive huge number of judgments and articles but only able to publish a fraction of those pieces.

We enthusiastically look forward to a new year of MLR, and to the new beginnings and new voices that it will bring. We hope that you will join these voices by submitting your work to MLR this year.

Khondoker S. Islam
Editor, Mainstream Law Reports

JUDGES & JUDICIARY: RULE OF LAW & SUPREMACY OF THE CONSTITUTION

— *Justice Md. Rezaul Hasan*

Rule of Law: Not a mere rhetoric in legal parlance

The first question to be asked is whether the phrase "Rule of Law" is a mere rhetoric in legal parlance or is a condition to maintain a civilized society. Instead of myself answering this question, I would prefer quoting some authoritative views, to explain the concept and its significance, as follows, "The first of all law is to respect the law.....Where laws are routinely disobeyed a culture of lawlessness is engendered which is inimical to the Rule of Law....." Another essential component of the Rule of Law is that exercise of governmental powers shall be conditioned and controlled by law. In 1931, Lord Atkin, in the celebrated judgment of the Privy Council, in the case of Administrating Eshugbayi Eleko V. Officer Administrating, Govt. of Nigerial (1939) AC 662, had in mind this principle when it declared that "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice.....". When John Adams used the historic phrase, "a government of laws and not of men", he was not indulging in a rhetorical flourish but was flatly repudiating the idea of rule by fiat or by whim and caprice." Hope, what is quoted now, has plainly, explained the concept and its place as a backbone of a civilized and democratic society to sustain. (emphasis added).

About the administration of justice and the Rule of Law: My views-

"A very humble person like me do admit the limitation of my knowledge, and my standing as a commoner, but assume that many important issues the common people of this country are aware of and feel worried about, but tends to speak the least and, silently in their mind, do expect remedies, accountabilities and changes in many respects. But, in a society like that of ours, which is yet to be called a political society and where the majority of the people are poor, unaware of their rights, have no or little access to information, busy in earning their daily breads, fulfilling such expectation by the judiciary remains to be more than a challenge. Yet, the Supreme Judiciary, of its own, seems not forgetful of its role-expectation as protector of the Constitution, of human and fundamental rights, as well as, of its own authority and dignity, which is a sine qua non to ensure Rule of Law in the country. Besides, the lawyers, particularly the learned members of the Supreme Court Bar, have a complementary role to lend its support and remain as a solid ground to ensure that apex court, on which the ultimate burden to uphold the Rule of Law does rest, is not and never feels isolated in performing its constitutional functions and in exercising its constitutional powers. At the same time, it is relevant here to quote Hon'ble Mr. Justice V. R. Krishna Iyer about the concept the 'Rule of law'- "The rule of law is a basic feature of our Constitutional Order but remember, the rule of law is not the rule of lawyers even as the supremacy of the Constitution is not the supremacy of judges. Lawyers judge Judges and the country holds the Bench and Bar to social scrutiny. When I retired from the Supreme Court, some distinguished Advocates affectionately gave me a farewell address when, in decorative diction, they stated:

Permit us to remind you that the Bar is the judge of judges and no judge can avoid or escape the verdict of the Bar. We have summoned you this evening to hear our unanimous declaratory verdict. Our verdict is a decree of affection and admiration. Let us also declare, in these proceedings which are suit generis, that we are not only your judges but also judgment - debators."

If, what is quoted does not work to form the appropriate mindset of those in the Bar and in the Bench, if such mindset in fact lacking anywhere, then one can have practical

reasons to be afraid of the future of the system of administration of justice in this country."

[The view expressed above (about the administration of justice) is mine, as a then practicing lawyer in the Supreme Court, vide preface to the 2nd edition of my book "M.R. Hasan's Index of Bangladesh Laws" published in 2004]

Apex Court and the Rule of law

The judges of the apex court are oath bound to uphold the Rule of law. Supreme Court of Bangladesh, in a good number of cases, has ingrained the principle in our legal system. Similar is the role of Pakistan Supreme Court, the latest instance being the order dated 19th June, 2012, passed in Constitutional Petition No. 40 of 2012 and other connected matters, in consequence whereof Mr. Syed Yosuf Raja Gillani was disqualified from being a member of Parliament for committing contempt of court and the Election Commission of Pakistan issued Notification of his disqualification as Member of National Assembly of Pakistan, with effect from 26.04.2013, the date of pronouncement of judgment by the Supreme Court of Pakistan and in consequence thereof the notification No. F2(4)/2008-Cord, dated 1st March 2008 to extent of declaring him as returned candidate from National Assembly Constituency No. NA-151, Multun-IV stands rescinded with effect from 26.04.2012. Hon'ble Chief Justice of Pakistan Mr. Iftikhar Muhammad Chaudhry, following the judgment and with reference to a Ruling of the speaker tending to undo the judgment, observed that, "what will happen to the independence of the Judiciary if Speaker Parliament tries to scrutinize judicial ruling? No one can undo a court verdict except a Court of appeal." The main opposition leader Mr. Nawaz Sharif (currently the Hon'ble PM), welcoming the judgment, had commented that "This is real accountability". The then ruling party including all major political parties and groups accepted this judgment. This is how the judgment of the Supreme Court was respected, and abided by the people and political parties in Pakistan. This fact shows that the people of Pakistan have accepted 'Rule of Law' as the guiding factor subject to which the country will be run and governed. Then on 1st May 2011, Anti-Terrorism Tribunal, at Pakistan, issued warrant of arrest against General (Rtd) Parvez Musharraf. He was refused nomination by the Election Commission in April 2013. He was arrested by Pakistan Police as per order of Court. Besides, the Supreme Court of Pakistan forced Interior Minister Rehman Malik to resign and surrender his British passport over rules that forbids officials to hold dual citizenship. These are a few example of Rule of law prevailing in that country.

While, the supreme court of India, another largest democratic neighbor, has been consistently playing its role in a glorious manner in upholding the Rule of law, the history other two Supreme Courts, Pakistan and Bangladesh, in this region, have occasionally shown departure, perhaps for the reason that, the people in these countries are yet not fully aware of the significance of the Rule of Law and have seen to be remaining indifferent even though the occasion demanded them to rise. The people of the erstwhile East Pakistan (now Bangladesh), understood the significance of the language movement of 1952 as well as the war of independence and actively participated and supported them and have own both the battles, that claimed too much cost. But, it is not certain as to whether the people of Bangladesh understand the concept "independence of judiciary" or the concept "Rule of law" as do the people in the U.S.A. and other countries of the fist world. Unless the people want "Rule of law" and "independence of judiciary", mere provision contained in the Constitution may achieve these only theoretically, not practically. Similarly, if respect for the courts of law (the other name of the Rule of Law) is not born and grown up in the mind of the people, the judges can neither help much keeping the dignity of the court, nor can uphold the rule of law in the 3rd world or underdeveloped countries. To understand the nature and scope of 'Rule of Law' and the "independence of judiciary" in their applied condition, a few instance may be cited from the jurisdiction of U.S. Supreme Court.

Rule of law and the U.S. Supreme Court

The most revered of the Supreme Courts, is the Supreme Court of the USA (established under Article III of the U.S. Constitution). The Supreme Court is really supreme there. Because, the people in that country prefers to be governed by Rule of Law, not by men. Because, the Constitution of the USA has made provisions maintaining balance of power in the three organs. The Supreme Court (of USA) itself is the very foundation of the Rule of Law. A few instances to be cited are the cases of (i) Marbury v. Madison: 5 U.S. (1Cranch) 137 (1803), whereby judicial review of legislation has been established. The most famous of all constitutional decisions, asserted the authority over an action of the Federal congress, a co-ordinate and equal branch of the federal government with the judicial. The reasoning and power of the decision, of that case, has given permanent legitimacy to the exercise of such review of the actions of the States; (ii) Fletcher v. Peck:6 Cranch 87 (1810), holding a Georgia statute. unconstitutional; (iii) New York Times v. Sullivan : 376 U.S. 254 (1964), in which the Supreme Court, abandoning English precedent which predated the U.S. constitution, has placed strict constitutional limits on the circumstances (invoking law of torts) under which public officials could recover damages for the publication of defamatory statements about them; (iv) The New York Times Company v. United States (The Pentagon Papers Case): 403 U.S. 713 (1971), a land mark decision by The U.S. Supreme Court on the First Amendment. The ruling made it possible for the New York Times and Washington Post newspapers to publish the then *classified pentagon papers* without risk of government censorship or punishment. [It is to be noted here that Article 1, incorporated in the U.S. Constitution is not similar to Article 39 (2) (a) of the constitution of Bangladesh] (iv) Bush v. Gore, 531 U.S. 98(2000), in which the recount order of the Florida Supreme Court was reversed (in an election dispute), (v) Clinton v. Jones, 520 U.S. 681 (1997), wherein the Supreme Court has held that, when the President (of the U.S.A) takes official action, the Court has jurisdiction to determine whether he has acted within ambit of the legal authority vested in him and that the President is subject to judicial process in appropriate circumstances. The court has endorsed the view that a subpoena *duces tecum* could be directed to the President, as was done in the case of United State v Nixon, 418 U.S. 683 (1974), and President Nixon (in the water gate scandal case) had to comply with a subpoena requiring him to produce certain tape recordings of his conversation. The U.S. Supreme Court has also opined that the doctrine of "separation of powers" or the need for confidentiality of high level communications cannot help sustaining an absolute, or unqualified Presidential privilege or immunity from judicial process in all circumstances. Besides, the sitting Presidents have been seen responding to court orders to provide testimony and furnishing other information's, pursuant to the court orders. As regards the President's power to grant pardon, the Supreme Court took the view that the president's power to grant pardons and reprieves is not absolute, however, per Justice Breyer, in the concurring judgment passed in Clinton v. Jones. These are a few (amongst hundreds of) instance showing how each organs of the government are functioning within their constitutional confine, showing mutual respect and self restraint and all these three organs as well as the people in the USA are found committed to see that the 'Rule of law' is upheld in any case.

Why not to be looking much to U.K. practices in exercising the power of.

Judicial Review: Supremacy of the Constitution.

For enlightenment upon this topic, I again find it profitable to quote from *chapter one* the book "Making Our Democracy Work" by Hon'ble Associate Justice Mr. Stephen Breyer of the Supreme Court of U.S.A. Referring to the views of some Federalists and Republican, the Hon'ble judge writes that, at least on occasion, to strike down statutes it believed were in conflict with the Constitution. James Madison, for example, pointed out that the Bill of Rights would protect individuals from abuse by a majority.

And he (James Madison) immediately added: "*Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights*". Alexander Hamilton wrote the same in *The Federalist Papers* –a series of newspaper articles in which he, James Madison, and John Jay advocated adoption of the Constitution. Hamilton said that *the Constitution's limitation "can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void....[Otherwise] all the reservations of particular rights or privileges would amount to nothing."* How did the framers [of the U.S. Constitution] explain this expectation of judicial review? Hamilton, in The Federalist numbers 78 and 81, argued that the Constitution must trump any ordinary federal law. *The Constitution is fundamental, it represents the will of the people, and it is the source of lawmaking authority. A statute, by contrast, represents the exercise of constitutionally delegated authority* ..... Thus, says Hamilton, "*where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges...ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental*". *Hamilton, then, assumed that conflicts between statutes and the Constitution could not be resolved by leaving the matter to the public. Hamilton argued against placing final authority to interpret the Constitution in the hands of the president, because the president could then become too powerful. After all the "executive not only dispenses the honors but holds the sword of the community." He also argued against placing final authority to interpret the Constitution in the hands of the legislature, because the legislature would too rarely enforce the Constitution if this invalidated a law it had recently passed. How, he asked, can it "be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges?" That left the judiciary. The "interpretation of the laws," said Hamilton, "is the proper and peculiar province of the courts." Judges enjoy comparative expertise in the matter. They frequently reconcile apparently conflicting statutes; they study precedents: they are "skilled in the laws," whereas legislators are "rarely..chosen with a view to those qualifications which fit men for the stations of judges." Indeed, "there is no liberty" unless the "power of judging" be "separated from the legislative and executive powers".*

Hamilton saw a greater risk, in the opposite tendency, namely, that judges would fail to faithfully guard the Constitution when "legislative invasions of it had been instigated by the major voice of the community."It would require that judges be appointed for lengthy terms and receive constitutional guarantees as to their compensation. For all these reasons, the judiciary was the safest as well as the most natural place to lodge the power of judicial review.

[Emphasis added]

On the country, in my considered view, the U.K has no constitution, though it has some statutes (eg. Bill of Rights, 1688 and the Act of Settlement, 1700) containing some fundamental principles and provisions found in a written constitution. As such, the peculiar recognition (in my view) of unwritten constitution, is like counting an unborn child for demographic statistics. Hence, this classification of the constitution as 'written' and 'unwritten' is nothing (in my humble view) but an artifice invented by some writers of civics. Besides, a constitution can only be framed by a particular body [Constituent Assembly or Constitutional Convention] elected or appointed for framing a constitution on behalf of the people and which the people adopt, enact and give unto themselves [as we find in the case of in Bangladesh and in India.] Similarly, the Americans in 1787, declared : We the people of the United States of .....do ordain and establish this Constitution for the

United States of America. Such formalities are clearly absent in the making of so called unwritten constitution of U.K. Indeed, to give an authoritative basis to my view, I should quote, the Modern Constitutions, by K.C. Where. It is desirable to look at the questions made and the explanations given at page 9 and 10 of this book, that reads : *"Why has Britain no Constitution? The question is easier to ask than to answer, and easier to answer at great length –by outlining the constitutional history of Britain-than shortly. But we may suggest a short answer along these lines. Consider the first of the reasons why countries have constitutions –the desire to make a fresh start. Did England ever have this experience? People sometimes speak as if she did not. They talk of an unbroken line of development from earliest times, by which a few rudimentary institutions were adapted and supplemented and finally broadened out and democratized, until absolute monarchy came to be translated into parliamentary democracy. But there was a break in English history and when that break came an attempt was made to make a fresh start, and to enshrine the new principles of government in a Constitution. The break came with the Civil War in 1642 and the execution of Charles I in 1649. In the years of the Common-wealth and the protectorate, 1649-1660, several attempts were made to establish a Constitution for the British Isles-not for England alone, for Cromwell had united England, Scotland, and Ireland in one government. The best known of these attempts at a Constitution is the Instrument of Government of 1653. It exhibits all the marks of a Constitution as we understand it today. Had the Commonwealth continued, there is no doubt that there would have been a British Constitution, embodying the fundamental principles of governments they had emerged from the conflicts of the Civil War". ..... "But, it may be asked, what of the Revolution of 1688 and the Bill of Rights? Was not that a break and a fresh start? Was not the Bill of Rights a Constitution? Here again, England might have had a Constitution but did not."*

For these reasons, U.K. is a country where the Parliament is Supreme, not the Constitution that creates, confers and confines the powers of the organs/institutions created by it. The apex Court in UK has, therefore, no power to judicially review a legislative Act. Rather, in U.K, it is the Parliament, not the Court, which is invested with the power to investigate whether an Act has been obtained in breach of Parliamentary procedure. Besides, the European Community Act of 1971 (came in to force in January, 1972), has made a difference, pole apart, in the legal system between the U.K. and other countries having constitution (necessarily meaning a written constitution). Notwithstanding the fact of having no constitution, the U.K. democratic system is the superb model of true democracy and, no doubt, that is one of the oldest civilized and highly educated nations in the universe.

Supremacy of the Constitution of Bangladesh

Supremacy of the Constitution of Bangladesh has been ingrained in the PREMBLE to the constitution that "it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh".

The three separate organs & the concept of limited government

Besides, being committed to uphold the Rule of Law, each of the organs of the government must bear in mind that they are the creation of the Constitution, ordained and adopted by the people of the country and that the cause of their very existence and the legitimacy of their acts and deeds lies in the provision of the Constitution. Moreover, the existence of a written Constitution necessarily refers to a limited government. Each organ should clearly understand the limit of their respective periphery and should remain confined within that limit. The differences amongst scope of functions of the three organs of the government are well recognized, though the demarcating line (which is always there) might have been obscured (maybe in some cases)because of the change in the landscape. None of the organs is either superior or inferior to the another, but is of co-ordinate jurisdiction. The process of appointment or nomination or

election to a particular office does not make any difference in this regard, except denoting that the Constitution lays down different procedure, for assumption of different offices, either by way of selection or nomination or election, according to the nature and function of the offices.

It may not be out of place to note here that the political sovereignty lies with the people, but the legal sovereignty is exercised by the government (on behalf of the people) through it's three independent organs, having co-ordinate jurisdiction, subject, of course, to the provision of law and scrutiny by the apex court, in those cases where the vires of any executive or legislative deeds or acts are challenged before the court. This is well recognized and understood world wide, since the time immemorial. But in respect of the dispute or question leading to initiation of any proceeding before the court of law, it is the Supreme Court with whom lies the burden and authority to say the last words and giving finality to the same.

Approach in interpreting the constitution

"Maintaining Public Acceptance requires a Constitution that works well for the people today. The Court can help achieve this objective in two ways. First, the court should reject approaches to interpreting the Constitution that consider the document's scope and application as fixed at the moment of framing. Rather, the Court should regard the Constitution as containing unwavering values that must be applied flexibly to ever-changing circumstances. The Court must consider not just how eighteenth-century Americans used a particular phrase but also how the values underlying that phrase apply today to circumstances perhaps then inconceivable. Second, when the Court interprets the Constitution, it should take account of the roles of other governmental institutions and the relationships among them." -Stephen Brayer (Hon'ble sitting Associate Justice, Supreme Court of the USA), "Making our Democracy Work, 1st ed, at-75.

Separation of and controversy about the judiciary

In this respect, I should quote the Hon'ble Chief Justice of Bangladesh Mr. Justice Md. Muzammel Hossain, observing that " *Judges are independent in exercise of their judicial functions and act only on the dictation of good conscience and pronounce judgments in accordance with law. The decisions rendered by the judges may bring disappointment to some, but justice is blind. In the domain of justice, feeling, emotion and sentiment have no part to play.*" vide Supreme Court of Bangladesh, Annual Report 2012, Page- 6. With this observation, seems relevant to read Mac Gregor Dawson, writing that, *"There would seem to be little purpose in taking elaborate care to separate the judge from politics and to render him quite independent of the executive, and then placing him in a position as a Royal Commissioner where his impartiality may be attacked and his findings –no matter how ever correct and judicial they may be – are liable to be interpreted as favouring one political party at the expense of the other. For many of the inquiries or boards place the judge in a position where he cannot escape controversy,*" vide Mac Gregor Dawson, The Government of Canada, 3rd ed, at 482.

Hence, in my humble opinion, a Judge taking oath to impart justice should bother least about any step designedly taken to make him controversial, by any quarter, either acting as lobbist or owing to partisan mentality or to serve his own or other's peculiar interest or emotion or ego or due to suffering from any complex, but always keeping in mind the trend of self restraint well-advised in the words that, "let the dogs bark, caravan will pass". He (an Hon'ble Judge) should not, unlike others (few or not), look for temporary applause or publicity, nor should he entrain even a modicum of fear, as his oath requires him of. His judgment will speak for itself.

An interested reader may also go through the article "Attack on and survival of the judiciary", Journal section, of AIR (1983) and AIR (1984).

To make the Supreme Court really supreme

Before conclusion, I consider it pertinent to refer to the case of Marbury –Vs –Madison, 5 U.S. (1cranch) 137 v (1803) to remind me of

the reason how the US Supreme Court has been able to make its position supreme since Marbury and the 'infamous' case of Dread Scott –Vs- Sandford, 60 U.S. (19 How) 393 (1857), as an instance that has taken away all its glory that it had earned by that time and has also made the civil war inevitable, though the latter one was a majority judgment (7:2), the then CJ himself having authored the opinion.

When the US Constitution came into force there was even no land, earmarked for the construction of the US Supreme Court Building. The world's largest democracy and the most powerful nation, have earned unqualified respect of the nations all over the world because the people in that country (USA) believe in the Rule of Law (as distinct from rule by any person or quarter or pressure groups etc). They respect the judgments passed by the US Supreme Court even though one may not agree with the same. Otherwise, no institution could have devolved or sustained in that country.

In my personal opinion, this country should have followed the legal, administrative and political system prevailing in the USA, based on the world's first written Constitution and that have proved it's strength and efficacy as is evident even after the centuries have passed since the US constitution was signed in September 17, 1787. Even the role of Pakistan Supreme Court (at least since the era of the Hon'ble CJ Iftikhar Muhammad Chawdhry) and that of the Indian Supreme Court may be looked at, to be in harmony, so far as the role of our Supreme Court is concerned, because of homogeneity or near homogeneity in the politico-legal situation of these two latter countries.

To speak the least, supremacy of the Constitution lies in the supremacy of the Court (as distinct from supremacy of a judge), on which rests the burden to uphold the Constitution, in any situation, chaotic or normal.

Why should I be opinionated: My concern

I often wonder about the rationale for being opinionated. I do not know what the others think about it, but, so far as I am concerned, I have no alternative but to abide by the message inherent in the remarks made by Benjamin Franklin, (read over by James Wilson on his behalf as Franklin was too frail himself to talk) in his address before the Constitutional Convention, met for the final time on 17.09.1787, to adopt the Constitution for the USA. His remarks to the delegates, who were present to consider the final manuscript and to put their signature was as follows:

"Mr. President, I confess that there are several parts of this Constitution which I do not at present approve, but I am not sure that I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects which I once thought right but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment and to pay more respect to the judgment of others.....

I doubt too whether any other convention we can obtain may be able to make better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be assembled? It therefore astonishes me, sir, to find this system approaching so near to perfection as it does.....

Thus, I consent, sir, to the Constitution because I expect no better, and because I am not sure, that it is not the best.....

On the whole, sir, I cannot help expressing a wish that every member of the convention who may still have objections to it, would with me, on this occasion, doubt a little of his own fallibility- and to make manifest our unanimity, put his name to this instrument."

Quoted from: "Birth of the Constitution –"by Edmund Lindop, 1987 Ed, P. 69.

[The author of this article Mr. Justice Md. Rezaul Hasan is the honourable judge of the High Court Division, Supreme Court of Bangladesh.]

The Mainstream Law Reports 2014 (Vol. XIX) APPELLATE DIVISION

APPELLATE DIVISION (Civil)

Surendra Kumar Sinha–J.
Md. Abdul Wahhab Miah–J.
Syed Mahmud Hossain–J.
Muhammad Imman Ali–J.

CIVIL APPEAL NO. 206 OF 2007

(From the judgment and order dated 3.4.2004 passed by the Appellate Division in Civil Petition for Leave to Appeal No.1075 of 2003.)

Loreeto ..... Appellant.

Vs.

Mrs. Nasreen Sobhan and another ..... Respondents.

For the Appellant :Mr. Mahmudul Islam, Senior Advocate (with Mr. A.M. Amin Uddin, Advocate), instructed by Mr. Md. Nawab Ali, Advocate-on-Record.

For the Respondents : Mr. Mahbubey Alam, Senior Advocate (with Mr. Golam Arshad, Advocate), instructed by Mr. Ferozur Rahman, Advocate-on-Record.

Judgment: April 18, 2013

Code of Civil Procedure, 1908-

Section 95- Compensation can only be paid for such expense or injury which the claimant suffered by reason of arrest or attachment or injunction-

The materials on record reveal that the respondents are really and in fact claiming compensation on the basis of the direction given in the operating part of the judgment of the trial Court and the trial Court has drawn up decree accordingly..... Naturally, if this decree on the question of compensation remains, there would arise various complications if the respondents proceed with the execution proceeding. There is, therefore, need for examining the point in controversy despite the submission of the learned counsel for the respondents ..... (Para 6)

High Court Division observed that after the dismissal of Rent Case No.15 of 1998, the appellant did not pay rent; that he is therefore, not entitled to get any protection from being evicted as a tenant and that the lease agreement having expired after March, 2001, the appellant was no longer a tenant under the respondents. This Division has

reproduced the above observations of the High Court Division and dismissed the petition without meeting the point argued. Therefore we find substance in the contention of the learned counsel that the High Court Division as well as this Division pro tanto affirmed the decree for compensation as claimed by the respondents in their legal notice. .... (Para 7)

The words taka 'ten thousand' have been substituted for the words 'one thousand' by the Code of Civil Procedure (Third Amendment) Act, 2003. What we find from a, plain reading of this section is that it is a summary remedy for getting compensation where a temporary injunction or an order of arrest or an order of attachment of the property before judgment has been made under section 94 if such prayers were made on insufficient grounds or there were, no reasonable or probable grounds for claiming such reliefs. The defendant in such a proceeding can present a petition to give compensation. The remedy for such claims provided in the section is optional to the person aggrieved. The affected person can also file a regular suit for compensation against the person who sought an injunction/attachment/arrest etc. on malicious ground if he has. not already sought relief under the aforesaid provision. It is thus apparent that this is an alternative remedy in cases of wrongful obtainment of such orders, if any, and it does not in any way interfere with the principles regulating suits for damages for torts of malicious legal process. As a general principle, where two remedies are available under law one of them should not be taken as operating in derogation of the other ..... (Para 8)

If a party has chosen to persue one remedy, he cannot afterwards of his failing therein proceed under another provision. A regular suit for damages/ compensation is not barred by the omission to proceed under the summary procedure provided in section 95 but, if an application is made and disposed of, such disposal would operate as a bar to regular suit whatever may be the result. The regular suit is based on tort for abusing the process of the Court. In a suit for compensation based on tort the plaintiff is required to prove want of reasonable or probable cause for obtaining injunction/attachment and also that the defendant was affected by malice which is an improper motive ..... (Para 9)

A distinction can be drawn between acts done without judicial sanction and acts done under judicial sanctions improperly obtained. Proof of malice is not necessary when the property to, a stranger, not a party to the suit, is taken in execution but if the plaintiff bringing a suit for malicious legal process is a party to a suit proof of malice is necessary. The plaintiff must prove special damage. The claim of a person for damages for wrongful attachment of property or injunction can fall under two heads- (1) trespass and (2) malicious legal process. Where property belonging to a person, not a party to the suit is

wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of party, the remedy is an action for malicious legal process. In the case of malicious legal process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case the plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary ..... (Para 10)

The respondents could claim compensation not exceeding taka one thousand when the suit was instituted in 1999 provided they fulfilled the conditions set out in section 95. If the defendant chose to avail the forum provided in section 95, he was required to establish the ingredients referred to in the section and no more. Sub-section (2) bars a litigant who makes an application from instituting a suit for the same purpose. In case of attachment it is incumbent upon the applicant to prove affirmatively that the attachment was applied for on insufficient ground. The words 'on sufficient grounds' must be taken to mean 'without reasonable or probable cause'. The appellant did not secure an order of attachment of the suit premises and therefore, the respondents couldn't claim compensation on this ground. Similarly, the respondents were not arrested on the prayer of the appellant and therefore, they are not entitled to compensation ..... (Para 11)

If an injunction was applied for on insufficient ground or the suit of the plaintiff failed, and if it appeared to the Court that there was no reasonable or probable ground for instituting the suit, the Court could in an appropriate case pass order of compensation .... (Para 12)

The compensation can only be paid for such expense or injury which the claimant suffered by reason of arrest or attachment or injunction. It follows that the claimant has to plead in his petition or in the plaint that by reason of such order he has suffered loss or expense or injury, for which, he claims compensation. He is also required to prove the same by evidence. General damages may be awarded in cases where an order of injunction is obtained on insufficient grounds and there is damage to the credit and reputation of the claimant. It must be established that the damage or loss or malice must be proximate result of the order of injunction. There is nothing on record to come to the conclusion that the actions of the appellant were founded on what is called 'an abuse of the process of the Court' or malicious proceedings. They are also required to make positive statements in the pleadings and prove that the abuse of the process of the court was malicious. They must also prove want of reasonable and probable cause for claiming damages or compensation. ..... (Para 13)

JUDGMENT

SURENDRA KUMAR SINHA–J: In this appeal leave was granted to consider the questions as to whether this Division has committed any error apparent on the face of the judgment in C.P. No.1075 of 2003 in maintaining the judgment of the High Court Division which has affirmed the decree for compensation at the rate of Tk.5000/- per day from the date of termination of the tenancy by legal notice under section 106 of the Transfer of Property Act while passing a decree for ejectment and secondly, whether in the absence of sufficient pleadings, prayer, evidence and findings in support of compensation, the court has power to pass such decree.

2. Facts are shortly narrated as under Respondents instituted a regular suit in the Civil Court for ejectment of the appellant from the suit premises on the ground of default in paying monthly rents. Appellant, a school, contested the suit claiming that it was not a defaulter- the monthly rents were being deposited regularly in a rent control suit on their refusal to accept the same. The trial Court observed that the appellant was a defaulter; that the period of lease in respect of the suit premises expired on 10th March, 2001 and accordingly, decreed the suit. While passing the decree, it also directed that "এতদ্বসংঙ্গে বিবাদী উক্ত তারিখের মধ্যে বিগত ১০.৩.২০০১ইং তারিখ হইতে বাদী পক্ষের দাবীকৃত ক্ষতি পূরণ আদায় না করিলে বাদীপক্ষ আদালতযোগে বিধি মোতাবেক উক্ত ক্ষতিপূরণের টাকা আদায় করিয়া লইবার অধিকারী রহিলেন।" The above direction suggested that while passing the decree for ejectment, it also decreed compensation but the amount of compensation had not been specified and stated that the amount would be calculated and recovered on the basis of the respondents' claim, if not paid in the meantime. The trial Court did not make any finding on the point of sustaining any loss or damage by the respondents due to the appellant's remaining in possession as tenant in the premises. In the operating part of the judgment, it was directed that the appellant shall vacate the premises within 25th November, 2002, failing which, it was further directed that the respondents would be entitled to possession through the process of the court. The High Court Division maintained the decree in its entirety. Appellant then moved a leave petition in this Division which also affirmed the judgment of the High Court Division.

3. Admittedly no prayer was made in the plaint seeking a decree for awarding compensation. Even no foundation was laid in the plaint on the point of claiming compensation. Naturally, no issue was framed on the point of compensation and no finding was also made by the trial Court. In the legal notice, ext-7, issued on behalf of the respondents determining the tenancy, it was pointed out that 'you are requested to deliver the vacant possession of the premises on 1.2.1999 to my client (s) or their representatives failing which legal action would be taken 'against you and you would be charged a sum of Tk.5000/- per diem by your illegal occupation of the tenanted premises'. On a cursory glance of the trial Court's judgment it may be presumed that it passed the decree on the assumption that since the appellant did not vacate the premises as per demand of the respondents in their

legal notice and since the period of tenancy expired, the respondents are entitled to compensation on the basis of their claim made in the legal notice.

4. In the High Court Division it was argued on behalf of the appellant that the direction given on the question of compensation was beyond the power of the Court. The High Court Division did not address the point and maintained the decree observing: 'the trial Court committed no illegality in decreeing the suit and the impugned judgment and decree do not call for any interference by this Court'. In course of hearing of the leave petition, learned counsel appearing on behalf of the appellant submitted that the appellant agitated in the High Court Division that it was not liable to pay damage of Tk.5000/- per day for staying in the suit premises even after expiry of the lease ..... the learned Judges- of the High Court Division seriously erred in law in not deciding the point though noticed in the judgment .....' In course of the hearing of the leave petition as well, it was urged that 'the petitioner (appellant) is not liable to pay damage of Tk.5000/- a day for staying in the premises even after expiry of the lease .....' and thus' 'a serious injustice has been caused to the petitioner'. This Division did not deal with the point and affirmed the judgment of the High Court Division.

5. It was urged on behalf of the appellant that in the absence of pleadings, prayer, evidence and findings on the question of compensation, this Division has committed error of law in maintaining the judgment of the High Court Division so far as it relates to the decree for compensation. Learned counsel appearing for the respondents finds it difficult to repel the contention and argues that the trial Court, in fact has not passed any decree for compensation and that the respondents are also not claiming any such compensation.

6. This admission of the learned counsel is sufficient to dispose of the appeal but the operating part of the judgment as quoted above shows otherwise. More so, *the materials on record reveal that the respondents are really and in fact claiming compensation on the basis of the direction given in the operating part of the judgment of the trial Court and the trial Court has drawn up decree accordingly.* The appellant has enclosed the copy of the decree drawn up by the trial Court on 7th October, 2002 by filing an additional paper book wherein the trial Court reproduced the words used in the operating part of the decree in verbatim. *Naturally, if this decree on the question of compensation remains, there would arise various complications if the respondents proceed with the execution proceeding. There is, therefore, need for examining the point in controversy despite the submission of the learned counsel for the respondents.*

7. In the judgment, *the High Court Division observed that after the dismissal of Rent Case No.15 of 1998, the appellant did not pay rent; that he is therefore, not entitled to get any protection from being evicted as a tenant and that the lease agreement having expired after March, 2001, the appellant was no longer a tenant under the respondents. This Division has reproduced the above observations of the High Court Division and dismissed the petition without meeting the point argued. Therefore we find*

substance in the contention of the learned counsel that the High Court Division as well as this Division pro tanto affirmed the decree for compensation as claimed by the respondents in their legal notice. Now the question that calls for consideration is under what circumstances can a Court pass decree or order, for awarding compensation to a party to the suit. In this connection section 95 of the Code of Civil Procedure is relevant for resolving the point in dispute, which reads:

"95.(1.) Where, in any suit in which an arrest of attachment has been effected or a temporary injunction granted under the last proceeding (sic) (preceding) section-

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds,

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such -amount, not exceeding [ten thousand] Taka, as it deems a reasonable compensation to the defendant for the expense or injury caused to him; Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction."

8. *The words taka 'ten thousand' have been substituted for the words 'one thousand' by the Code of Civil Procedure (Third Amendment) Act, 2003. What we find from a, plain reading of this section is that it is a summary remedy for getting compensation where a temporary injunction or an order of arrest or an order of attachment of the property before judgment has been made under section 94 if such prayers were made on insufficient grounds or there were, no reasonable or probable grounds for claiming such reliefs. The defendant in such a proceeding can present a petition to give compensation. The remedy for such claims provided in the section is optional to the person aggrieved. The affected person can also file a regular suit for compensation against the person who sought an injunction/attachment/arrest etc. on malicious ground if he has. not already sought relief under the aforesaid provision. It is thus apparent that this is an alternative remedy in cases of wrongful obtainment of such orders, if any, and it does not in any way interfere with the principles regulating suits for damages for torts of malicious legal process. As a general principle, where two remedies are available under law one of them should not be taken as operating in derogation of the other.*

9. *If a party has chosen to persue one remedy, he cannot afterwards of his failing therein proceed under another provision. A regular suit for damages/ compensation is not barred by the omission to proceed under the summary procedure provided in section 95 but, if an application is made and disposed of, such disposal would operate as a bar to regular suit whatever may be the result. The regular suit is based on tort for abusing the process of the Court. In a*

suit for compensation based on tort the plaintiff is required to prove want of reasonable or probable cause for obtaining injunction / attachment and also that the defendant was affected by malice which is an improper motive.

10. *A distinction can be drawn between acts done without judicial sanction and acts done under judicial sanctions improperly obtained. Proof of malice is not necessary when the property to, a stranger, not a party to the suit, is taken in execution but if the plaintiff bringing a suit for malicious legal process is a party to a suit proof of malice is necessary. The plaintiff must prove special damage. The claim of a person for damages for wrongful attachment of property or injunction can fall under two heads- (1) trespass and (2) malicious legal process. Where property belonging to a person, not a party to the suit is wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of party, the remedy is an action for malicious legal process. In the case of malicious legal process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case the plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary.* Similar views have been expressed in Bank of India V. Lakshmani Dass, AIR 2000 SC 1172. None of the above conditions are applicable in this case, even if it is assumed that there are findings in support of awarding compensation.

11. So, *the respondents could claim compensation not exceeding taka one thousand when the suit was instituted in 1999 provided they fulfilled the conditions set out in section 95. If the defendant chose to avail the forum provided in section 95, he was required to establish the ingredients referred to in the section and no more. Sub-section (2) bars a litigant who makes an application from instituting a suit for the same purpose. In case of attachment it is incumbent upon the applicant to prove affirmatively that the attachment was applied for on insufficient ground. The words 'on sufficient grounds' must be taken to mean 'without reasonable or probable cause'. The appellant did not secure an order of attachment of the suit premises and therefore, the respondents couldn't claim compensation on this ground. Similarly, the respondents were not arrested on the prayer of the appellant and therefore, they are not entitled to compensation.*

12. *If an injunction was applied for on insufficient ground or the suit of the plaintiff failed, and if it appeared to the Court that there was no reasonable or probable ground for instituting the suit, the Court could in an appropriate case pass order of compensation.* Though the appellant instituted Title Suit No.49 of 1999 for permanent injunction against the respondent and lost-up to this Division in Civil Petition No.274 of 2001, the respondents did not file any petition in the trial Court for awarding compensation pursuant to the dismissal

of the suit for injunction. They also did not file any independent suit for damages- or compensation after the dismissal of the suit for injunction. Section 95 does not authorize a defendant to claim compensation against his tenant on the ground of overstaying in possession of the premises after the termination of tenancy or the expiry of the period of tenancy.

13. *The compensation can only be paid for such expense or injury which the claimant suffered by reason of arrest or attachment or injunction. It follows that the claimant has to plead in his petition or in the plaint that by reason of such order he has suffered loss or expense or injury, for which, he claims compensation. He is also required to prove the same by evidence. General damages may be awarded in cases where an order of injunction is obtained on insufficient grounds and there is damage to the credit and reputation of the claimant. It must be established that the damage or loss or malice must be proximate result of the order of injunction. There is nothing on record to come to the conclusion that the actions of the appellant were founded on what is called 'an abuse of the process of the Court' or malicious proceedings. They are also required to make positive statements in the pleadings and prove that the abuse of the process of the court was malicious. They must also prove want of reasonable and probable cause for claiming damages or compensation.*

14. Therefore, there is apparent error in the judgment of this Division in maintaining the decree for compensation. The impugned judgment so far as it relates to maintaining the decree for compensation is required to be reviewed. The words "এতদ্বসংঙ্গে বিবাদী উক্ত তারিখের মধ্যে বিগত ১০.৩.২০০১ইং তারিখ হইতে বাদী পক্ষের দাবীকৃত ক্ষতি পূরণ আদায় না করিলে বাদীপক্ষ আদালতযোগে বিধি মোতাবেক উক্ত ক্ষতিপূরণের টাকা আদায় করিয়া লইবার অধিকারী রহিলেন।" wherever appear in the judgment and the decree are hereby expunged.

15. The appeal is disposed of with the above expunction without, however, any order as to costs.

Case Cited

* ***Bank of India V. Lakshmani Dass, AIR 2000 SC 1172.***

APPELLATE DIVISION (Criminal)

Nazmun Ara Sultana–J.
Mohammad Anwarul Haque–J.
Hasan Foez Siddique–J.

CRIMINAL APPEAL NO.11-13 OF 2010

(From the judgment and order dated 29.11.2007 passed by the High Court Division in Criminal Appeal No.3215 of 2004, No.3346 of 2004 and 2910 of 2004)

Md. Zahirul Islam @ Dipu (in Cr. Appeal No.11/10) ..... Appellant.

Vs.

The State ..... Respondents.

Md. Zamshed Imam @ Liton @ Neuton (in Cr. Appeal No. 12/10) .... Appellant.

Vs.

The State ..... Respondents.

Md. Kuddus (in Cr. Appeal No.13/10) ..... Appellant.

Vs.

The State ..... Respondents.

For the Appellants (in all cases) :Mr. Khandker Mahbub Hossain, Senior Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For respondents (in all cases) :Mr. Momtaz Uddin Fakir, Additional A.G., instructed by Mrs. Mahmuda Begum, Advocate-on-record.

Judgment: June 20, 2013

Evidence Act,1872-

Section 114- Enables court to presume only that which accords with the ordinary course of events and human nature and not what would be an aberration from such a course-

A witness may be tendered by the prosecution if his evidence is not much important or his evidence will make unnecessary addition to the evidence already adduced by the other witnesses. Sometimes a witness is tendered by the prosecution from motive, not examined lest something undesirable comes out from his lips. The best evidence, of which the case in its nature is susceptible, should always be presented ..... (Para 11)

In criminal cases the court cannot proceed to consider the evidence of the prosecution witnesses in a mechanical way. The board features of the prosecution case, the probabilities and normal course of human conduct of prudent persons are some of the factors which are always kept in mind while evaluating the merit of the case. The entire case of the prosecution rests on the circumstantial evidence as no prosecution witness has given any direct testimony against the appellants for the commission of the offence for which they have been convicted .... (Para 12)

In a murder case the Court of law would be justified in demanding full satisfaction about the proof of offence before the lethality of section 302/34 can be used. Before recording conviction the court has to give specific finding not merely that the accused "may" have killed the victim but in fact, that they must have killed the victim and the distance from "may" to "must" has to be traversed by reliable evidence. It is fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused ..... (Para 15)

No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Suspicion however, so strong cannot be allowed to take the place of legal proof ..... (Para 16)

It is seen from the evidence of the prosecution witnesses that a large number of disinterested witnesses were present near the place of occurrence. Naturally it should be

so because the occurrence had taken place in the middle of a street, a crowded locality..... It has been broadly laid down that it is undoubtedly the duty of the prosecution in a case involving capital sentence to place before the court all available witnesses irrespective of their evidence being favourable or unfavourable where a necessary witness mysteriously not cited as witness, the court may properly draw an inference adverse to the prosecution. If a material witness has been deliberately kept back, then a serious reflection is cast on the validity of the conviction .... (Para 17)

Since the entire case rests on circumstantial evidence it is necessary to refer to the principles which should guide the court in considering the conviction of an accused resting on circumstantial evidence. Circumstantial evidence means a combination of facts creating a net without there being any tear through which the accused can escape..... The circumstantial evidence in order to sustain conviction must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused ;(iii) the circumstances taken cumulatively should form a chain no complete that there is no escape from the conclusion that crime was committed by the accused any none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused" .....(Para 18)

JUDGMENT

HASAN FOEZ SIDDIOUE–J: In these three Appeals being Criminal Appeal Nos. 11/2012, 12/2010 and 13/2010 by leave, the three appellants have challenged the judgment and order dated 29.11.2007 passed by a Division Bench of the High Court Division in Criminal Appeal No.3215 of 2004, 3346 of 2004 and 2910 of 2004 affirming the judgment and order of conviction dated 19.07.2004 passed by the Additional Metropolitan Sessions Judge, Fifth Court, Dhaka in Sessions Case No. 1215 of 2002 convicting the appellants under section 302/34 of the Penal Code and sentencing each of them to suffer imprisonment for life and pay fine of taka 10,000/-, in default, to suffer rigorous imprisonment for one year more.

2. The relevant facts, for disposal of these appeals, are that these three appellants along with others were put on trial in the Fifth Court of Additional Metropolitan Sessions Judge, Dhaka in Sessions Case No.1215 of 2002. They were charged under section 302/34 of the Penal Code. At about 8.30 p.m. on 20.3.2002 one Sheikh Masud Pervez Mukti son of P.W.1 Sheikh Md. Borhan Uddin of 1830/Ga, Purba Badda, Police Station Badda, Dhaka was alleged to have been murdered by the appellants which gives rise to this case.

3. The prosecution case, as appeared from the evidence of P.W.1, is that his son victim Mukti was called away by his friend acquitted accused Sharif at about 7.30 p.m. on 20.03.2000 from their

house. Just after completion of "Esha" prayer his tenant tendered witness Jalil Miah went his house and informed him that the victim Mukti had been killed by gun fire. Informant and his younger son P.W.2 Manik rushed to the place of occurrence and found the body of his son Mukti lying on a road near the house of Abdus Satter. Appellants Dipu, Kuddus, Neutan and one Ratan and 3 others came out from the house of Satter and threatened the P.W.1 and his son Manik and thereafter left the place. The informant and others shifted the victim to Dhaka Medical College Hospital. The doctor, on duty, examined the victim and declared him dead. The P.W.1, thereafter, lodged the F.I.R. (exhibit-1) with the Badda Police Station at about 11.55 p.m. on 20.3.2000.

4. P.W.17 Md. Zillur Rahman, A.S.I, of Police, of Ramna Police Station prepared inquest report of the dead body of victim at Dhaka Medical College Hospital and sent the same to the morgue for holding post mortem examination through constable Delowar Hossain, P.W.14. P.W.13 Dr. Mizanur Rahman held post mortem examination of the dead body of the victim Mukti and submitted report (exhibit-7). P.W.16 S.I. Mr. Manirul Islam, P.W. 18 Saidur Rahman and P.W.20 S.I. Mahbubur Rahman held investigation. P.W.20 S.I. Mahbubur Rahman, completing the investigation, submitted charge sheet against 11 accused persons including the present appellants under section 302/34 of the Penal Code. However, he submitted final report in favour of F.I.R. named accused Ratan who allegedly came out from the house of Sattar along with the convicts.

5. At the trial, the prosecution examined 20 witnesses. Out of them P.W.1 informant Md. Burhan Uddin, father of victim and P.W.2 Manik, brother of the victim claimed that they saw accused appellants Zahirul Islam @ Dipu, Md. Zhamshedul Imam @ Liton @ Newton, Quddus and Ratan to leave the house of Satter. They threatened the P.W.1 and P.W.2 . None of the witnesses claimed that he saw the actual act of killing the victim. P.W.3 Mohammad Ullah and P.W.8 Mr. Nur Hossain accompanied with P.Ws.1 and 2 but they did not say anything that they saw the accused persons to leave the place of occurrence coming out from the house of Abdus Satter. P.W.4 Rawshan Ara is the mother of victim she did not claim that she saw any accused to flee away. P.W.5 Abu Miah went to the place of occurrence immediate after the occurrence saw the accused Babu and Emran to leave the place hurriedly. P.W.6 Mizanur Rahman heard the names of the appellants. P.W.7 is the witnesses of inquest and he went to the place of occurrence subsequent after the occurrence. He came to know about the names accused persons after the occurrence P.W.9 was tendered by the prosecution and defence did not cross examine him. P.W.10 and 11, who made statement under section 164 of the Code of Criminal Procedure before the Magistrate, were declared hostile. P.W.12 Kazi Meraz Hossain, Magistrate recorded the statements of the P.W.10 and 11 under section 164 of the Code of Criminal Procedure. P.W.14, 15, 16, 17, 18 and 20 are the official and formal witnesses. P.W.9 is the brother of victim went to Cox's Bazar on 20.03.2000 and returned on 21.03.2000.

6. Defence plea as it appears from cross examination that the appellants had been falsely implicated in the case out of previous enmity.

7. The Trial Court, on consideration of the evidence on record, convicted the accused 1) Md. Emran, 2) Shariful Islam, 3) Md. Zahirul Islam Dipu, 4) Md. Zamshed Imam @ Liton @ Neuton and 5) Md. Kuddus under section 302/34 of the Penal Code and sentenced each of them to suffer rigorous imprisonment for life and pay fine of taka 10,000/-, in default, to suffer rigorous imprisonment for 1(one) year. The Trial Court acquitted the accused Sukurjan, Abu Sayem, Satter, Manir and Simul. Convict Md. Emran preferred Criminal Appeal No.3001 of 2004, Md. Shariful Islam @ Sharif preferred Criminal Appeal No.2959 of 2004, Md. Zahirul Islam @ Dipu preferred Criminal Appeal No.3215 of 2004, Md. Zamshed Imam @ Liton @ Neuton preferred Criminal Appeal No.3346 of 2004 and Md. Kuddus preferred Criminal Appeal No. 2910 of 2004 in the High Court Division. A Division Bench of the High Court Division allowed the Criminal Appeal No.3011 of 2004 and Criminal Appeal No. 2959 of 2004 thereby acquitted the convict Md. Emran and Md. Shariful Islam @ Sharif. The High Court Division dismissed the appeals preferred by this appellants namely Md. Zahirul Islam @ Dipu, Md. Zamshed Imam @ Liton @ Neuton and Md. Kuddus. They preferred these Appeals being Criminal Appeal No.. 11-12 and 13 of 2010 respectively getting leave.

8. Leave was granted to consider the submissions of the learned Advocate for the appellants that whether the affirmation of conviction of the appellants on the basis of circumstantial evidence with regard to their presence in the place occurrence, threatening the informant by appellant Dipu and altercation with them are adequate to support their conviction, whether mere threatening by appellant Dipu that if their names are disclosed they would kill the victim's brother Manik (P.W.2) is enough to sustain a charge of murder of the victim; whether the evidence of P.W.1 and P.W.2 that they saw the appellants along with others coming out from the house of the co-accused Sattar can be the basis of conviction when on the self same evidence co-accused Sattar was acquitted.

9. Mr. Khandker Mahbub Hossain, learned Senior Advocate appearing for the appellants, submits that the order of conviction of the appellants on the basis of circumstantial evidence with regarding to their presence at the place of occurrence and threatening P.W.1 and P.W.2 by Jahirul Islam @ Dipu is bad in law. He submits that the evidence of the P.W.1, father of the victim and P.W.2, brother of the victim, that they saw the appellants to come out from the house of Abdus Satter and threatened them could not be the basis of conviction. He further submits that since the accused Raton whose name had been mentioned in the F.I.R. by the P.W.1 in the similar manner those of the present appellants, got final report and the co-accused Satter, Sharif and Emran who are all most on similar standings, got order of acquittal, the order of conviction of the appellants is not sustainable in the eye of law.

10. Mr. Momtaz Uddin Fakir, the learned Additional Attorney General appearing on behalf of the respondent,

submits that the evidence of the P.Ws.1 and 2 that they went to the place of occurrence subsequent after the occurrence and saw these three appellants to come out from the house of accused Abdus Satter and that they threatened the P.W. 2 to kill him if he cross the limit, is a strong circumstance that nobody else but the appellants had killed the victim. He submits that the High Court Division rightly affirmed the order of conviction.

11. It is a case depending entirely on circumstantial evidence and the obvious contention of the defence is that the circumstantial evidence is wholly insufficient to bring home the guilt to the accused. At about 7.30 p.m. on 20.03.2000 when the victim Mukti was at his house accused Sharif (acquitted by the High Court Division) called him away from his house. Few minutes, thereafter, the witnesses heard the sound of firing. From the assessment of the evidence of P.Ws. 1 , 2 and 8 father, brother and brother-in-law of victim Mukti that P.W.9 A. Jalil informed them that Mukti had been killed and then they rushed to the place of occurrence. That is, Jalil saw the dead body of the victim and then went to the house of informant which is situated about 300/350 yards far from the place of occurrence. P.W.1 said in cross, "আমার বাসা হইতে আমার ছেলে গুলি খাইয়া পড়িয়াছিল সেই স্থান অনুমান ৩০০/৩৫০ গজ দুরে হইবে।" and thereafter he said; "আমার বাড়ী হইতে অনুমান ১৫/২০ বাড়ী পরে আমার ছেলেকে গুলি খাইয়া পড়িয়া থাকতে দেখি।" Jalil, seeing the dead body, went to the house of P.W.1 and informed him then P.W.1, 2 and 8 rushed to the place of occurrence. This P.W.9 Jalil is the first man who saw the dead body and the persons present there and prevailing circumstances at the place of occurrence. But this important witness P.W.9 was tendered by the prosecution. In the case of Shamsul Haque and others Vs. The State reported in 6 BLD (AD) 216 this Division observed that *a witness may be tendered by the prosecution if his evidence is not much important or his evidence will make unnecessary addition to the evidence already adduced by the other witnesses. Sometimes a witness is tendered by the prosecution from motive, not examined lest something undesirable comes out from his lips. The best evidence, of which the case in its nature is susceptible, should always be presented.*

12. *In criminal cases the court cannot proceed to consider the evidence of the prosecution witnesses in a mechanical way. The board features of the prosecution case, the probabilities and normal course of human conduct of prudent persons are some of the factors which are always kept in mind while evaluating the merit of the case. The entire case of the prosecution rests on the circumstantial evidence as no prosecution witness has given any direct testimony against the appellants for the commission of the offence for which they have been convicted.* The prosecution relied on P.Ws.1 and 2 who went to the place of occurrence few minutes after the occurrence and claimed to have identified the assailants when there was no electricity. P.W.2 said; "গুলি শব্দ শোনার ১০/১৫ মিনিট পর কারেন্ট আসে।" Usually the killing party after killing the victim does not stay in the place of occurrence. Section 114 of the Evidence Act enables court to presume only that which accords with the ordinary course of events and human

nature and not what would be an aberration from such a course.

13. In the F.I.R., P.W.1 stated; "তখন আমার ছেলে মানিক মুক্তিকে নাড়াচাড়া করার সময় সাত্তারের ঘরের ভিতর হইতে ১) দিপু, পিতা মোমতাজ উদ্দিন, ২) লিটন, পিতা ভূঞা, ৩) কুদ্দুস, পিতা আতু মিয়া, ৪) রতন, পিতা অজ্ঞাত সর্ব সাং- পূর্ব বাড্ডা, ঢাকাগন এবং অজ্ঞাতনামা ৩/৪ জন যাহাদের নাম জানি না তবে পুনরায় দেখিলে চিনিব। তাহারা বাহির হইয়া আসে এবং তাহাদের মধ্যে হইতে দিপু আমার ছেলে মানিককে হুমকি দিয়া বলে যে, তাহাদের নাম কোথায়ও বলিলে মানিককে গুলি করে হত্যা করিবে এই হুমকি দিয়া পূর্ব দিকে কবরস্থানের দিকে চলিয়া যায়।"

14. P.W.1 in his evidence said: "আমার ছোট ছেলে মানিককে ও আমাকে আসামী ছাত্তারের বাড়ী হইতে দীপু, কুদ্দুস, লিটন এবং রতন সহ ৩/৪ জন বাহির হইয়া আমার ছেলেকে হুমকি দিয়া বলে বেশি বাড়াবাড়ি করিলে তাকেও গুলি করিয়া হত্যা করিবে।"

15. P.W.2 Manik in his evidence said: "আনুমানিক ৮.৩০ দিকে আমার বাড়ীর ভাড়াটিয়া আঃ জলিল আসিয়া জানায় যে, মুক্তিকে গুলি করিয়াছে। এই কথা শুনিয়া সকলে বাহির হই। যাওয়ার সময় আমি, আমার বাবা, ভাই মঞ্জুও যাইতে থাকি। রাস্তার সাক্ষী মোহাম্মদ উল্লাকে পাই। সকলে মিলিয়া ভাইকে খোঁজাখুজি করিতে থাকাকালে আসামী ছাত্তারের বাড়ীর কাছে রাস্তার উপর আমার ভাইকে গুলিবিদ্ধ অবস্থায় পড়িয়া থাকিতে দেখি। আমরা আমার ভাইকে নড়াচড়া করিয়া দেখিতে থাকাকালে ঐ সময় সাত্তারের বাড়ী হইতে দীপু, কুদ্দুস, লিটন, রতন সহ আরো অজ্ঞাতনামা কয়েকজনকে বাহির হইয়া যাইতে দেখি। আমি তাহাদের দেখিয়া তাহাদের পিছু যাইতে থাকিলে দীপু বলে যে, তুমি যদি আমাদের পিছে আস তাহলে তোমাকেও গুলি করিব। তারা এই কথা বলিয়া কবরস্থানের পূর্ব দিকে নামিয়া যায়।" Those P.Ws. went to P.O. after hearing the gun fire and had seen the accused leaving the house of Satter and thus they cannot strictly speaking said to be eye-witness. Those are the circumstantial evidence to connect the appellants with the occurrence. *In a murder case the Court of law would be justified in demanding full satisfaction about the proof of offence before the lethality of section 302/34 can be used. Before recording conviction the court has to give specific finding not merely that the accused "may" have killed the victim but in fact, that they must have killed the victim and the distance from "may" to "must" has to be traversed by reliable evidence. It is fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.* We have already mentioned that Ratan managed to get final report and he had been discharged. A. Satter got an order of acquittal. Only question is whether the conviction of the appellants on the basis of aforesaid evidence of that the P.Ws.1 and 2 that they saw these appellants to came out from the house of acquitted accused Satter and out of them appellant Dipu threatened the P.W. 2 sufficient to establish of chain of circumstances relying upon which it cannot be concluded beyond reasonable doubt that these three appellants had killed the victim Mukti none else. P.Ws.1 and 2 in their cross examinations said that they did not see the man who shot fire towards the victim and relevant time there was no electricity in the area. The P.W.3 Mohammad Ullah went to the place of occurrence along with the P.Ws.1 and 2 and searched the victim. P.W.3 in his examination in chief said: "সাত্তারের বাড়ীর পূর্ব উত্তর পার্শ্বে মুক্তিকে দেখিতে পাই। লাশ দেখিয়া মানিককে ডাকি।" That is he saw the dead body of victim before P.Ws.1 and 2. Then he said, "মানিক তখন ভয়ে কাপছিল। ঐ সময় ছাত্তারের বাড়ী হইতে ২/৩ জনকে পূর্ব দিকে দৌড়াইয়া যাইতে দেখি। আমি ও মানিক মুক্তিকে বেবীতে

করিয়া মেডিকেল নিয়া যাই।" He saw 2/ 3 persons to run away from the house of Sattar but he did not disclose their identify. Even he did not claim that he had been able to identify the persons run away. In cross examination he said: "কুদ্দুসকে চিনি। কুদ্দুসকে আমি ঐ দিন দেখি নাই।" Quddus is the appellant of Criminal Appeal No. 13 of 2010. This independent witness did not support the testimonies of P.Ws.1 and 2. P.W.5 Abu Miah went to the place of occurrence subsequent after the occurrence and found the P.Ws.1 and 2. In his examination in chief he said: "সেখানে পৌছিয়া দেখি বাবু, এমরান, তাড়াহুড়া করিয়া দৌড়িয়া যাইতেছে"। Babu is not accused and Imran got acquittal from High Court Division. P.W.6 rushed to the place of occurrence subsequent after the occurrence. He said in his evidence; "আমি বের হইয়া দেড়শত/দুইশত গজ দুরে ছাত্তারের বাড়ীর উত্তর পার্শ্বে রাস্তার উপরে মুক্তিকে গুলিবিদ্ধ অবস্থায় শায়িত দেখি। তার শরীরে বেশ কয়েকটি গুলি বাহির হইয়া গিয়াছে। মূহুর্তে মুক্তির আব্বা, মানিক, মালু, আবু, মোহম্মদ আলী ও অনেকে চতুর্দিকে আসে।" That is, he also went there before arrival of P.Ws.1 and 2. Thereafter, he said; "পরে লোক মুখে জানিতে পারি এমরান, দিপু, ছাত্তার, লিটন, নাসির, কুদ্দুস এরা একজোট হইয়া মুক্তিকে হত্যা করিয়াছে"। He did not claim that he saw the appellants to run away from the house of Satter. He said that he came to know the names of appellants and other persons afterwards from the people.

16. P.W. 7 Mahbub Hasan another independent witness went there and found the other witnesses there including P.Ws.1, 2 and 3 but he also said nothing regarding departure of the appellants from the house of Satter. P.W.8 is the brother-in-law of the victim, this witness in his evidence said that his father-in-law P.W.1 and brother-in-law P.W.2 and he himself rushed to the place of occurrence together after receiving information from P.W.9 Jalil. But this witness also did not say the fact of departure of this appellants coming out from the house of Satter. In view of the testimonies of P.W.3, 5, 6, 7 and 8 the intrinsic reliability of the evidence of P.W.1 and 2 that these appellants coming out from the house of Satter threatened P.W.2 and fled away has become shaky. *No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Suspicion however, so strong cannot be allowed to take the place of legal proof.*

17. *It is seen from the evidence of the prosecution witnesses that a large number of disinterested witnesses were present near the place of occurrence. Naturally it should be so because the occurrence had taken place in the middle of a street, a crowded locality.* P.W.1 in his cross examination has said– "ঘটনাস্থলের রাস্তার দক্ষিনে ছাত্তারের বাড়ী উত্তরে কিসমত মোল্লা সাহেবের বাড়ী। আশপাশ বাড়ী আছে। পূর্ব পার্শ্বে চায়ের দোকান।" Satter is an accused. None of the rests had been examined. Particularly the owner of the tea stall. *It has been broadly laid down that it is undoubtedly the duty of the prosecution in a case involving capital sentence to place before the court all available witnesses irrespective of their evidence being favourable or unfavourable where a necessary witness mysteriously not cited as witness, the court may properly draw an inference adverse to the prosecution. If a material witness has been deliberately kept back, then a serious reflection is cast on the validity of the conviction.*

18. *Since the entire case rests on circumstantial evidence it is necessary to refer to the principles which should guide the court in considering the conviction of an accused resting on circumstantial evidence. Circumstantial evidence means a combination of facts creating a net without there being any tear through which the accused can escape.* In the case of Jaharlal Das Vs. State of Orissa reported in AIR 1991 (S.C.) page 1388 Supreme Court of India has observed that; *"The circumstantial evidence in order to sustain conviction must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused ;(iii) the circumstances taken cumulatively should form a chain no complete that there is no escape from the conclusion that crime was committed by the accused any none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused"* When the evidence of P.Ws 1 and 2 are found to be unreliable in view of the evidence of P.Ws 3, 5, 7, and 8 the order of conviction basing on a circumstances from the evidence of P.Ws 1 and 2 is unsafe, The chain of circumstances is not complete so as it lead to the conclusion that the appellants and no other could have been the assailant. We do not find anything in the evidence that at or about the time of murder, no third person, excepting the appellants and the deceased was present at the place of occurrence. It can be a case of "may be true". But there is distance between "may be true" and "must be true". The same divides conjecture from sure conclusion.

19. In view of the evidence discussed about it is difficult for us to draw conclusion that within all human probability it was the accused appellants none else, who had murdered the victim Mukti.

20. We are conscious that a grave and heinous crime has been committed but when there is no satisfactory proof of the guilt we have no option but to give the benefit of doubt to the accused and we are constrained to do so in this case.

21. Accordingly we find merit in these three appeals.

22. Accordingly, all the appeals being Criminal Appeal No. 11 of 2010, 12 of 2010 and 13 of 2010 are allowed. The impugned judgment and order of the High Court Division in Criminal Appeal No. 3215 of 2004, Criminal Appeal No.3346 of 2004 and Criminal Appeal No.2910 of 2004 are set aside. Consequently, the judgment and order of Metropolitan Additional Sessions Judge, 5th Court, Dhaka dated 19.07.2004 passed in Metropolitan Sessions Case No.1215 of 2002 arising out of G.R. Case No. 342 of 2000 corresponding to Badda P.S. Case No.19 dated 20.3.2000 is set aside. The accused appellants are acquitted from the charge under Section 302/34 of the Penal Code. The respondent is directed to set them at liberty at once if they are not wanted in any other case.

Cases Cited

* ***Shamsul Haque and others Vs. The State 6 BLD (AD) 216***

* ***Jaharlal Das Vs. State of Orissa AIR 1991 (S.C.)***

The Mainstream Law Reports 2014 (Vol. XIX) HIGH COURT DIVISION

HIGH COURT DIVISION
(Special Original Jurisdiction)

Mirza Hussain Haider-J.
And
Muhammad Khurshid Alam Sarkar-J.

WRIT PETITION NO. 17056 OF 2012. WITH WRIT PETITION NO. 17216 OF 2012.

(An application under Article 102 of the Constitution of the People's Republic of Bangladesh.)

Alhaj Md. Hamdu Miah and others ..... Petitioners
(In Writ Petition No. 17056/12).
With
Sagufta N.M. Housing Ltd and another ..... Petitioners
(In Writ Petition No. 17216/12)

Vs.

Government of Bangladesh, represented by the Secretary, Ministry of Land, and others ..... Respondents
(in both the writ petitions.)

For the petitioners in both the writ petitions : Mr. Md. Khalilur Rahman, with Mr. Md. Khalilur Rahman (Helal) and Dr. Md. Abdul Malek Hawlader, Advocates.

For the respondents No. 3 and 4 : Mr. Muhammad Faizul Kabir,with Ms. Aysha Flora, advocates.

Judgment: April 15, 2013

State Acquisition and Tenancy Act 1950-

Section 3- Court of Wards can only keep the retainable khas land of the previous jamindars but not the "projabili property-

Transfer of Property Act, 1882-

Section 10- Even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of rule against perpetuity'-

Constitution of People's Republic of Bangladesh-

Article 42- Right to transfer property is a fundamental right, cannot be curtailed by issuing Memoranda by the third party who does not have any right, title, interest or possession in the property-

With the publication of notifications under section 3 all rent-receiving interests including wakf and debuttor property stood acquired by and vested in the Government..... after the notification issued under section 3 of the Act the status of the under-raiyat became upgraded to that of raiyat. The rent receiving interests can be acquired even before the preparation of record of rights and publication of compensation assessment rolls'..... with the acquisition of the rent-receiving interests by the government all intermediary interests disappeared and a person holding the land under the government becomes a "tenant", becomes a "raiyat" or a "malik" of the land recognized by the government. Consequently, the under-raiyat who actually holds the land becomes a tenant under the government. Superior land lord (i.e. the raiyat) of an under-raiyat by virtue of elimination of his rent-receiving interests disappears and the under-raiyat is upgraded to the status of a "raiyat"..... record of rights prepared and finally published under section 144 cannot be varied by any authority and remedy of wrong entry if any lies with the appropriate court'..... the property enlisted/shown in the "projabili property" Gazette are the properties of "projas" who have been accepted as "owners" and the "rent receiving" interest whatsoever it had therein, of the jamindars all vested to the Government by operation of SAT Act, 1950 ..... (Para 16)

Section 144A of the State Acquisition and Tenancy Act 1950 provides "Every entry in the record of rights prepared or revised under section 144 shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect". Thus after final publication of the records under the Revisional survey and the Dhaka City Survey in the names of the predecessors in interest of the petitioners and the respondents having not taken any step against the same till date by producing any evidence to prove that the entries in those records are incorrect, the law clearly provides that the names of the predecessors in interests of the petitioners recorded in those surveys are presumed to be correct. ..... (Para 18)

When the property does not belong to the court of wards the court of wards has no legal authority to direct the registering authority not to register any deed of transfer in respect of the said properties ..... (Para 19)

Under the Registration Act and the Registration Manual the Registrar derives its powers and authorities of registering any deed

as well as the same is under the control of the Ministry of Law. Whereas, the Court of Wards being under the control of the Land Reform Board is not a superior authority of the Registrars and Sub-Registrars to impose any prohibitory order in respect of registering any deed. According to section-53 (A) of the Registration Act, the concerned Registrar/Sub-Registrar has been given a guideline as to which property can be registered and which property cannot be registered. So, if the Registrar/Sub-Registrars are restrained by the two impugned Memos at the instance of the Manager, Court of Wards, even if the criteria of section-53/A is fulfilled, it would be an unwarranted interference by an unauthorized person in the lawful function of the Registrar/sub-Registrar which is not permitted under the law .... (Para 21)

We want to focus about the role of the learned advocate for the respondents as well as the respondents No. 3 and 4. We find it very difficult to understand from the affidavit in opposition filed by the Respondents No. 3 and 4 that what is the gist of the case of the respondents and the respondents without stating the fact that the respondents are the owners of the land and as such have issued such directions upon the registering authority rather stated that the impugned memos have been issued for protecting the historic and heritage properties of Bhawal Raj. Nor the respondents could show that the registering authority has responsibility to abide by such directions and thereby refusal to registration has been done in accordance with law. On the other hand respondents No. 3 and 4 could not come forward with any piece of document to show that they have right, title or possession in the land in question, specifically, when the property has been published in the gazette notification under section 3 of the State Acquisition and Tenancy Act 1950 and the said publication being finalized and protected by PO 90 of 1972, the respondents No. 3 and 4 did not come forward to assist the court by showing a piece of paper for the said plots, which have already been recorded in the name of the projas fall within the "retainable khas land" of the Zaminders being up to 375 bigas with the commencement of the SAT Act 1950 which has subsequently been reduced to 100 Bigas and lastly to 60 bigas. The respondents No. 3 and 4 did not even come forward with any piece of paper to show that the limit of retainable khas land has been raised to more than 60 bigas for which the court of wards can act as the custodian. ..... (Para 22)

Before withdrawing our pen, we would like to note that, now a days time and time again we are confronted with unnecessary and uncalled for litigations like the present one in spite of settling the self same issue connecting with "projabili property" by the Apex court in its different decisions reported in 33 DLR(S.C) 13 and 53, 27 DLR(S.C) 109 and lastly in the case reported in 14 MLR (A.D) 401. In these two writ petitions the question over the title of "projabili property" of the previous Zamindar, Kumar Rabindra Narayan Roy Chowdhury, represented by the Court of Wards, Bhawal Raj Estate, again came up for our consideration as the court of Wards claimed the "projabili property" as its own property and accordingly issued the two impugned Memoranda, though it has already been settled earlier in the aforesaid cases holding that the "projabili property" can never be claimed by the previous zamindars represented by the court of Wards. The Court of Wards though legally bound to follow the said decision according to Article 112 of the constitution but time and again they are harassing the people claiming title over the "projabili property", either by issuing Memorandum or by other ways and means and thereby also wasting the courts valuable time. So it is high time to caution the Court of Wards, Bhawal Raj Estate and also the Land Reform Board to abstain from creating such situation on frivolous issues and thereby pushing the public to the Court. Thus they are cautioned not to harass anybody specifically the previous "projas" or their successors-in-interests any more, claiming title over the "projabili property" as cited in the "projabili property" gazette published on 24.03.1952. If in future, any such illegal and uncalled for claim is sought for by the court of wards or if any litigation is continuing or started afresh because of court of wards action by claiming title over the said "projabili property" by the Court of Ward and the Land Reform Board, then they would be liable to be dealt with for contempt of Court, apart from such litigations be in abated under P.O.90 of 1972 ..... (Para 25)

Under such circumstances we think it would be proper to call the Manager, court of wards and the Land Administrator to explain their position in this respect because the government officials under no circumstances can play with the property of the general peoples. This court thus thought that exercising the power conferred under the law we should call the said officials to explain their conduct as to these two cases in particular. But considering that it will be nothing but a futile exer-

cise of this Court on the matter, because when the respondents could not come forward with a proper affidavit giving proper explanations supported by the papers, we simply can express our anxiety and great concern that the government officials are doing this only to harass the general people of the country and thereby they are trying to have some personal gain over it . As such the respondents No. 3 and 4 are cautioned not to deal with such property of the general people in such manner which can be subject matter of harassment of the general people .... (Para 26)

JUDGMENT

MIRZA HUSSAIN HAIDER-J: These two Rules Nisi, obtained by two different parties, involves similar facts and concerning common question of law, as such both are taken up together for hearing and accordingly disposed of by this single judgment.

2. In Writ Petition No. 17056 of 2012, Rule Nisi has been issued calling upon the respondents 'to show cause as to why the impugned Memos, bearing No. B.R-Dhaka No. 98/98/792 dated 01.10.2012 and No. B R- Dhaka/ 98/98/799 dated 02.10.2012, Annexures- I and I(1) respectively, both issued under the signature of Respondent No. 4 requesting Respondents no. 5 to 7 not to register any type of transfer/sale deed covering the properties in CS Plot No. 2497 and 2582 of CS Khatian No. 118, Mouza Baunia, JL No. 211 as found at page 510 of the "Projabili Property" Gazette (Annexure-C) which corresponds to SA Khatian Nos. 118/41, 118/76, 183, 184, 188, 198, 212, 220, 174, 179, 118/2 and 234 and also corresponds to RS Plot No. 6108, 6109, 6110, 6112 and 6116 of RS Khatian Nos. 63, 116, 117, 181, 240, 811, 818, 819, 862, 1083, 1371, 1490 and 1589, should not be declared to have been issued without lawful authority and of no legal effect, and/ or pass such other or further order or orders as to this Court may seem fit and proper'.

3. Similarly, in Writ Petition No. 17216 of 2012, Rule Nisi has been issued calling upon the respondents to show cause as to why the impugned Memos, bearing No. B.R-Dhaka No. 98/98/792 dated 01.10.2012 and No. B R- Dhaka/ 98/98/799 dated 02.10.2012, Annexures- J and J(1) respectively, both issued under the signature of Respondent No. 4 requesting Respondent no. 5 to 7 not to register any type of transfer /sale deed covering the properties in CS Plots No. 2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and $\frac{2977}{3459}$ recorded in CS Khatian No. 556, along with Plots of two other C.S. Khatians being CS Khatian Nos. 554 and 555 belonging to other private persons' "projabily property" and C.S Plots No. 2748 and 2970 of CS Khatian No. 118 , CS Plot No. $\frac{3280}{3438}$ of CS Khatian No. 646 and CS Plot No. 3279 of CS Khatian No. 12 of Mouza Baunia

of JL No. 211 corresponding to RS Plots No. 9175, 9176, 9177, 6928, 7113, 6881, 6862, 6869, 6911, 6609, 6743, 6735, 6735/6993, 6996, 6735/6994, 6868, 6868/6995, 6868/6996, 6911, 6709, 6711, 6853, 6841, 10054, 10055, 10056, 11400, 10050, 10057, 10058, 10066, 10059, 10060, 10064, 10063, 10061, 10062, 10040, 10043, 10045, 10046, 10044, 10047, 10048, 10084, 10081, 10082, 10083, 10017, 10018, 10116, 11387, 10113, 10112, 11386, 10111, 10108, 10110, 10109, 10115, 10114, 10121, 10122, 10120, 3857 and 10135, of RS Khatian Nos. 139, 1194, 695, 1447, 1644, 855, 515, 1447, 264, 515, 743, 265, 1050, 1051, 1464, 210, 910, 1538, 1490, 706, 707, 1087, 1327, 694, 968, 94, 648, 720, 1539, 661, 68, 1326, 216, 136, 1051, 379, 384, 968, 1577, 699, 714, 148, 216, 571, 1538, 1650, 631, 714, 1577, 741, 700, 1390, 1243, 281, 366, 1601, 430, 998, 632, 769, 743, 1568, 626, 276, 382, 876, 486, 678, 1190, 106, 301, 456, 924, 1197, 129, 687, 694, 1645, 877, 1082, 367, 978, 632, 628, 337, 726, 278, 303, 382, 209, 1406, 89 and 208, should not be declared to have been issued without lawful authority and of no legal effect, and/ or pass such other or further order or orders as to this Court may seem fit and proper'.

4. Facts necessary for the disposal of Rule in Writ Petition No.17056 of 2012, in short, are that the writ petitioners being involved in purchase and selling lands upon developing the same, intended to purchase 5.16 acre land of C.S. plot No. 2497 and 9.72 acre land of C.S. plot No. 2582, both of C.S. khatian No.118 of mouza Baunia, under Police Station Pallabi, District-Dhaka, and accordingly contacted Md. Ahsanullah and others, the SA, RS and Dhaka City Survey recorded owners, who are owning and possessing the same upon paying the land Development Taxes, in their names, to the government regularly. The said Writ petitioners, after being satisfied with the right, title and possession of the said owners in the aforesaid government records, took 9 registered powers of Attorney in their favour from the aforesaid owners in possession. But when the writ petitioners went to the respondent No.6, the concerned sub-Registrar of Mirpur, for execution and registration of the deeds of sale by using those powers the said respondent refused to register the same on the plea that by the aforesaid two impugned Memoranda, being No. BR Dhaka-98/98/792, dated 01.10.212 and BR Dhaka-98/98/799 dated 02.10.2012 issued under the signature of respondent No.4, the present Manager, Court of Wards, Bhawal Raj Estate, under the management of the Land Reform Board (Respondent No.3), he has been directed not to register any deed of transfer in respect of the said plots mentioned in the said two impugned memoranda.

5. On the other hand, the facts of the writ petition No.17216 of 2012, in short, are that the writ petitioners, being a

developer Company and its Managing Director, respectively, earlier purchased the properties contained in 17 C.S. Plots of Baunia Mouza, under Police Station Pallabi, from its lawful owners in possession, whose names have been duly and successively recorded in the S.A, R.S and Dhaka City Survey khatians. Out of the aforesaid 17 C.S plot, 13 C.S plots being No. 2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and $\frac{2977}{3459}$ were commonly recorded under three C.S. Khatians being No. 554, 555 and 556 amongst which, two C.S. khatians, namely, 554 and 555 comprising of plot numbers 13, 285, 212, 3280, 2035, 2106, 3290, 2116, 3295, 2137, 2142, 2150, 2151, 2176, 2972, 2976, 2977, 2987, 3001, 3030, and 29773457 are recorded in the name of two private persons in the cadastral survey(CS) Khatian, who had/have no connection, whatsoever, with the Court of Wards, Annexures- B and B(1), respectively. The other CS khatian, being No. 556, was recorded in the name of the original owner, the then Zaminder, represented by the court of wards(Annexure-B-2). The remaining four C.S. plots, being No. 2748 and 2970 under C.S. khatian No. 118 and CS plot No. 3279 and No. $\frac{3280}{3438}$ under CS khatian No. 12 and 646 respectively, were also recorded in the name of the original owner, the then Zaminder, represented by the Court of wards in the C.S. record Annexure-C, C(1) and C(2) respectively, which were settled with the "projas" and as such the said lands covering the aforesaid four khatians being "projabili properties" the rent receiving interests thereof were acquired by the then government under the State Acquisition and Tenancy Act, 1950, by way of publishing "Projabili Property" Gazette (Annexure-D) for which the rent receiver i.e. the zaminder received compensations, as evident from Annexure- D(1). Pursuant to Annexure D and D(1) the zaminders, as well as the court of wards, lost all right, title, interest and possession in those properties/plots by operation of section 3 of the State Acquisition and Tenancy Act 1950. Consequently, all the subsequent record of rights, namely, the S.A, R.S and Dhaka City Survey were duly prepared and finally published in the names of the previous projas upgrading them as owners and their subsequent successors and transferees as "owners" in possession whose title and possession are protected against all, under the State Acquisition and Tenancy Act 1950 as well as by the subsequent enactment of President's Order (PO) 90 of 1972. Under such circumstances, the writ petitioners, having purchased the said properties from the SA, RS and Dhaka City Survey recorded owners, went to respondent No.6 for registration of the deeds of transfer of their purchased properties from those khatians to the subsequent transferees as well as also for registration of the deeds of purchase of other properties from the said plots but the said respondent, pursuant to the aforesaid two impugned Memoranda No.BR Dhaka-98/98/792,

dated 01.10.212 and BR Dhaka-98/98/799 dated 02.10.2012, Annexure-J and J(1), respectively, declined to register any transfer deed on the plea that respondent No. 4, Manager, Court of Wards, prohibited him from registering any deed connecting the aforesaid C.S plots.

6. Further case of the writ petitioners of both the writ petitions are that the aforesaid two impugned memos are illegal and are of no legal effect as respondent No. 3, the Manager Court of Wards, has no right, title, possession or authority to issue such, impugned Memos after publication of the "projabili property" Gazette (Annexure-C and D in the aforesaid two writ petitions respectively) after the State Acquisition and Tenancy Act 1950 came into operation and also that the Respondent No.3 and 4 are neither the controlling authority of the respondent No. 5 to 7 nor those respondents are answerable to respondent No.3 and 4. Moreover, President's Order No. 90 of 1972 has imposed a complete bar in claiming ownership over the "projabili properties" by the previous zaminders or any one claiming through the said zaminders. Hence these two Rules.

7. The Respondents No. 3 and 4 namely, the Land Reforms Board and the Court of Wards, entered appearance in both the Rules and filed affidavits in opposition contending *inter alia* that on the basis of recent decision and the directive of the Ministry of Land and also the Parliamentary Standing Committee for Ministry of Land, registration of any deed of transfer of any property belonging to the then Bhawal Raj Estate, which are managed by the Court of Wards, has been stopped for the purpose of preserving the historic and heritage properties of the Bhawal Raj as such the said respondents have issued the impugned memos being duty bound to protect the interest of the Bhawal Raj. The said respondents in their affidavits did not deny the facts of acquisition of the rent receiving interest by the government. Rather in para 3 they also admitted the facts stated in the writ petitions stating to be matters of record. However, in para 10 they stated that the last record of right i.e. Dhaka City Survey, was erroneously prepared and published in the name of illegal occupiers, which they did not establish by any paper. Having gone through the said affidavit in opposition, we could not understand the head and tail of the same. The affidavits in opposition filed in Writ Petition No. 17056 of 2012 is not only chaotic but also confusing. The respondents did not state as to how the property belongs to the court of wards or how the same are not "projabili properties" or how Annexure C and D to the aforesaid two writ petitions respectively, do not focus on the correct picture nor they could show that the court of wards took appropriate steps in last 60 years to protect the properties of the Bhawal Raj. Similar is the position in respect of the affidavit in opposition filed in Writ Petition No. 17216 of 2012.

8. Mr. M Khalilur Rahman, the learned advocate appearing on behalf of the petitioners in both the Rules, submits that when by operation of law the rent receiving interests of all the properties possessed by "projas", of all the zamindaries vested with the government pursuant to sections 3 of the East Bengal State Acquisition and Tenancy Act, 1950 and thereby raising the status of "projas" to those of "owners" of such lands and also declaring them to be the owners of the said land which they were settled with by the then zaminders and accordingly, gazette notifications (Annexure C in Writ Petition No. 17056 of 2012 and Annexure D in Writ Petition No. 17216 of 2012) have been published incorporating the CS khatian numbers with mouzas, JL Numbers, thanas and districts throughout the then East Pakistan, which were thereafter, by operation of law recorded in the names of the said "projas" transformed as "owners", the predecessors in interest of the petitioners, in the subsequent SA and RS records, giving them the title and accordingly, in the last Dhaka City Survey, the successors of such owners' name being recorded, the respondents have no right under any law to direct the registering authority not to register any document and as such, the embargo, as imposed by the impugned memos are not only illegal but also examples of high handedness.

9. He next submits that as it is known to everybody that in one khatian there may be several plots number and similar plots number may be available in different khatians citing ratio of shares of the owners, and in the impugned two memoranda no khatian number having been mentioned, the same are vague, indefinite and rather incomplete which cannot be applied on any land. In the absence of stating any khatian number in the impugned orders, rather simply upon incorporating only the CS plot numbers no specific right over any property can be construed, rather then to create confusion in the mind of the respondents No. 5 to 7, i.e. the registering authority as such the impugned orders are not sustainable under any law as the same are vague and indefinite.

10. He further submits that section 53 A of the Registration Act gives the authority to the Registrar to register any deed of transfer, instrument, subject to compliance of some conditions as required under the said law. As such the Registrar, under any circumstances, cannot be bound by any other authority or by directives to do or not to do anything relating to registration of any deed. Referring to section 43 of the Transfer of Property Act, 1882 he, lastly, submits that the property intended to be transferred or purchased by the petitioners with notice that the same are owned and possessed by the appropriate person, upon examining the records of the government imposition of embargo on the registering authority not to register any document in respect of the said property is not sustainable in law.

Hence the Rules should be made absolute.

11. On the other hand Mr. Faizul Kabir, along with Ms. Aysha Flora, the learned advocates appearing on the behalf of Respondents No. 3 and 4, on the face of the submissions made by the learned advocates for the petitioners, in both the writ petitions, as to acquisition of the rent receiving interests of the zaminders under the State Acquisition and Tenancy Act, could not make out any case in favour of the respondents. Mr. Kabir did not put forward any argument on the publication of the "projabili property" gazette notification (Annexure-C in Writ Petition No. 17056 of 2012 and Annexure-D in Writ Petition No. 17216 of 2012) and also on finally published Dhaka City Survey in the names of the predecessor in interest of the petitioners. The learned advocate did not make any statement or submission on the presumptive value of the latest survey i.e. Dhaka City Survey nor as to why no step has been taken for correcting the Dhaka City Survey, if any. Rather he simply confined himself within the submission that the property being historic and heritage property of Bhawal Raj, the respondents have taken appropriate steps to stop transferring such properties by the present petitioners, who are, according to him, mere "illegal occupants" and as such the impugned memos have been properly issued. Thus the writ petitions are not maintainable and both the Rules are liable to be discharged.

12. Heard the learned Advocates of both the parties, perused the two writ petitions, the affidavits in opposition and the Annexures appended to the two writ petitions. It appears that the properties of writ petition No. 17056 of 2012 bearing C.S plot No. 2497 and 2582 have been recorded in C.S khatian No.118 along with other C.S plots. The said C.S khatian No.118 appears at page 510 of the "projabili property" Gazette dated 24.03.1952 (Annexure-C) by which the rent receiving interest of the then zaminders have been acquired by the government under section 3 of the State Acquisition and Tenancy Act 1950. It also appears that the previous Zaminder Kumar Rabindra Narayan Roy Chowdhury has been paid up compensation for that purpose, as evident from compensation payment Gazette Notification No. 3126 dated 27.02.1956 published on 29.02.1956 in the then Dacca Gazette, Annexure-C(1), by the then Government. Similarly, the properties of the writ petition No. 17216 of 2012, as it appears from Annexure B, B(I), B(2) and Annexures C, C(1) and C(2), that 43 C.S plots in 6 Khatians out of which plots No. 2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and $\frac{2977}{3459}$ of CS Khatian No. 554 as well as those of CS khatian No. 555, total 26 plots, have been recorded in the names of private individuals, not the zaminder or the court of wards. As such the court of wards has no connection, whatsoever, with the same. On the other hand 13 plots bearing same numbers namely,

2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and $\frac{2977}{3459}$ of CS khatian No. 556 along with CS plots No. 2748 and 2970 of CS khatian No.118; CS plot No. $\frac{3280}{3438}$ of CS Khatian No. 646 and CS plot No. 3279 of CS khatian No. 12 (total 17 plots) all were originally recorded in the name of the then Zaminder, Kumar Rabindra Narayan Ray Chowdhury, represented by the Court of Wards, the respondent No. 4, in the C.S. Survey, as appears from Annexure B, B(1), B(2), C, C(1) and C(2) respectively, which were settled with the "projas" as underraiyts. Thereafter, with the enactment of the Statement Acquisition and Tenancy Act, 1950 the rent receiving interests of the raiyots i.e. the then zaminders vested with the government and the "projas" were upgraded and recognized by the government as owners of their settled land they had been possessing under the zaminder. Under such circumstances in all subsequent surveys the previous "projas" and their successors' names have been recoerded as owners, duly recognized by the government. But it reveals that all the plots mentioned above in six khatians which have been recorded in the names of the then projas or their successors have been claimed as the properties of the Court of Wards without providing any khatian number by the impugned memos. On examination of the "Projabili Property" Gazette it appears that the plots of CS khatian No. 556, 118 , 646 and khatian No. 12 have been duly recorded as "projabily properties" whose "rent receiving" interests of the then Zaminders have been acquired by the government under the State Acquisition and Tenancy Act 1950. As such whatever rights, title and interest, the Court of Wards, if any, had, in all these plots, have been ceased by the Government. In Annexure C to writ petition No. 17056 of 2012, the "projabily Property" Gazettee, at page 510 plots of C.S khatian No. 118 have been enlisted as projabili properties. Similarly in Annexure-D to the writ petition No. 17216 of 2012 all the plots of CS khatians No. 12 , 118, 556 and 646 have been shown at pages 503, 510 and at page 516 respectively in the "projabili property" Gazette.

13. It further appears that following the "projabili property" Gazette the S.A khatians were published recording the names of the then "projas" upon upgrading their status as the "owners" in different S.A khatians by the Survey and Settlement Department of the Government. Similarly, the next R.S khatians were also prepared and published recording the names of the said "projas"/ "owners" and their subsequent legal heirs and assignees as "owners". The Land Reform Board and the Court of wards as respondent No. 3 and 4, in both the writ petitions, respectively, did not deny the statements in respect of publishing the "projabili property" Gazette and the compensation payment Gazette and preparation and final publication of the S.A and R.S record of rights in the names of the previous

"projas" and their successors in interests as "owners". Even in respect of preparation and publication of the recent Dhaka City Survey record the respondents frankly admitted, in paragraph-10 of their affidavit that those were recorded in the names of the previous "projas" as "owners" but claimed that those recordings as wrong although no step has yet been taken by the respondents to correct the said final recording, of course time allowed for correction of such wrong recording, as alleged, has expired long before. The learned Advocate for the petitioners referring to the "projabili property" Gazette (Annexure-C and D in the aforesaid two writ petitions, respectively) and also to the P.O 90 of 1972 (Annexure-D and E in the aforesaid two writ petitions, respectively) and also to the decision of the Appellate Division in the case reported in 33 DLR (A.D) 13 and 53, 27 DLR (S.C) 109, and 14 MLR (A.D) 401 submitted that the Appellate Division in those cases has already settled that the property mentioned in the "projabili property" Gazette are the properties of the projas and their successors in interests, as the rent receiving interest, therein, of the previous Zamindars have been acquired by the Government. As such when the petitioners went for registering the transfer deeds of the land purchased from the successor in interest of the then "projas", whose names have been correctly recorded and finally published in the aforesaid khatians, the respondents No. 5 to 7 have no authority to refuse registration on the direction of respondents No. 3 and 4. Thus having not done what they are suppose to do under the law they have committed illegality in not registering the deeds.

14. Under such circumstances when the said plots are published in the gazette notification as "Projabili Properties" and the rent receiving interests of the then zaminders are acquired under section 3 of the State Acquisition and Tenancy Act 1950 (hereafter referred to as the SAT Act) the same no longer belongs to the then zaminders or the Court of Wards rather to the "projas" as per SAT Act 1950 who have been upgraded and declared to be the "owners", the respondents have no authority to issue the impugned notices. Moreover when no khatian number has been mentioned in the impugned memos simply mentioning the CS plot numbers does not specify the land as such the impugned notices are vague and indefinite by which no legal force can be ascertained. Section 3 of the State Acquisition and Tenancy Act 1950, reads as follows:

> "3. Acquisition of the interest of certain rent-receivers and consequences thereof- (1) At any time after the commencement of this Act, it shall be lawful for the Government) to acquire, by notification in the official Gazette, with effect from such date as may be specified in the notification (hereinafter referred to as the notified date),-
>
> (i) all interests of such of the rent –receivers as may be specified in

the notification, in their respective estates ,(taluks,tenures,holdings or tenancies), as the case may be, in any district, part of a district or local area, and

(ii) All interests of all rent-receivers whose properties are, for the time being, under the management of the court of Wards under the court of Wards Act, 1879, in their respective estates, (taluks, tenures, holdings or tenancies), as the case may be, including all their interests in all sub –soil and rights to minerals in such estates, (taluks, tenures, holdings or tenancies)

(2) Subject to the provisions of sub-sections [(4), (5) and (6)] of section 20, the Government may also, simultaneously with or at any time after the publication of a notification under sub-section (1) in respect of the interests of any rent receiver in any estate [taluk ,tenure, holding or tenancy] acquire, by notification in the official Gazette, with effect from such date as may be specified in the notification (hereinafter referred to as the notified date), [all or any of the lands in his khas possession of which he shall not be entitled to retain possession under the said section and so much of the lands in his khas possession as has been acquired under this sub-section and has not vested in the [Government]under clause (a) of sub-section (4), shall vest absolutely in the [Government]free from all encumbrances.

[(2a) In a notification issued under this section, rent –receivers may be specified or described by name, or by reference to areas wherein they have interests or in such other manner as the [Government] may determine].

(3)The notification referred to in sub-section (1) or sub-section (2) shall be in such form and shall contain such particulars as may be prescribed.

(4) On and from the date specified in a notification under sub-section.

(a) all interests of the rent –receivers in the estates,[taluks, tenures, holding ,or tenancies] specified in the notification, including their interests in all lands in their khas possession , and interests in all subsoil and rights to minerals , in such estates, [taluks, tenures, holding or tenancies] and also including the interests of any such rent-receiver in any building or part of a building standing on any such land and used primarily as office or kutchery for the collection of rent of any estate [taluk, tenure, holding or tenancy], shall vest absolutely in the [Government]free from all encumbrances; 4* * * provided that nothing in this clause shall apply to any building within the homestead of the rent-receiver concerned;

(b) all arrears of revenue or rent and all cesses, together with interest, if any, payable thereon, remain-

ing lawfully due to the Collector on the notified date in respect of any interest acquired under sub-section(1) shall after the said date , continue to recoverable from the person by whom they were payable and shall, without prejudice to any other mode of recovery, be recoverable by the deduction of the amount of such arrears, cesses and interest from the compensation money payable to such person under section 58, when so ordered by the collector,

(c) .....

(d) .....

(dd) .....

(e) .....

(f) .....

(ff) .....

(g) .....

(h) .....

(5) The outgoing rent-receivers, whose interests have been acquired under this section, shall be entitled to compensation as provided in this Act."

15. On the other hand Presidents Order(P.O) 90 of 1972 has given the protection to such projas. Article 2 of PO 90 reads as follows:

"2.Notwithstanding anything contained in any other law for the time being in force, on the commencement of this order, all suits, appeals, applications and other legal proceedings pending or continuing or deemed to be pending or continuing in any court against the Government of the people's Republic of Bangladesh in which the legality or validity of the State Acquisition and Tenancy Act, 1950 (E. B. Act No. XXVIII of 1950), or of the East Bengal State Acquisition and Tenancy (Amendment) Ordinance, 1956 (E .B. ord . No III of 1956), or of any other law making any amendment in the said Act, or of the acquisition of any property made under any provision thereof is challenged or called in question shall abate, and all orders, including orders of injunction and other interlocutory orders, passed in such suits, appeals, applications and other legal proceedings shall cease to have any effect; and no court shall entertain, and no person shall bring, any fresh suit, appeal, application or other legal proceedings in which the legality or validity of any such law or acquisition is challenged or called in question ."

16. The Appellate Division in the case of People's Republic of Bangladesh and others Vs. Sri Sri Madan Gopal Jew Bigraha and others, reported in 33 DLR(AD) 13 after considering and discussing the legal effect of the aforesaid laws, held that *'with the publication of notifications under section 3 all rent-receiving interests including wakf and debuttor property stood acquired by and vested in the Government'*. Again in the case of Promode Ranjan Saha and others Vs. Government of Bangladesh and another, reported in 33 DLR(AD) 53 it

has been observed that 'after the promulgation of PO 90 of 72 all orders including orders of injunction, etc. passed in appeals, application, etc. shall cease to have any effect and no court shall entertain any fresh suit, appeal, application, etc. in which the legality of any such law of acquisition is challenged or called in question'. In the case of Anwara Begum Chowdhurani Vs. Nur Jahan Begum and others reported in 27 DLR(AD) 109 it has been held that *'after the notification issued under section 3 of the Act the status of the under-raiyat became upgraded to that of raiyat. The rent receiving interests can be acquired even before the preparation of record of rights and publication of compensation assessment rolls'*. It has further been held therein that *'with the acquisition of the rent-receiving interests by the government all intermediary interests disappeared and a person holding the land under the government becomes a "tenant", becomes a "raiyat" or a "malik" of the land recognized by the government. Consequently, the under-raiyat who actually holds the land becomes a tenant under the government. Superior land lord (i.e. the raiyat) of an under-raiyat by virtue of elimination of his rent-receiving interests disappears and the under-raiyat is upgraded to the status of a "raiyat"*. Lastly, in the case of Bhawal Raj Court of Wards Estate Vs. Rasheda Begum and others reported in 14 MLR(AD) 401 the Appellate Division has held " *record of rights prepared and finally published under section 144 cannot be varied by any authority and remedy of wrong entry if any lies with the appropriate court'*. It has further been held in that judgment by the Appellate Division that "Manager, Bhawal Raj Estate, Court of Wards can manage only the retainable land." The Appellate Division in the aforesaid cases has already settled that *the property enlisted/shown in the "projabili property" Gazette are the properties of "projas" who have been accepted as "owners" and the "rent receiving" interest whatsoever it had therein, of the jamindars all vested to the Government by operation of SAT Act, 1950.* The relevant portion of the finding of the Appellate Division in the case reported in 14 MLR (A.D) 401 are as follows:

> *"The learned advocate appearing for the leave petitioner, when confronted with the aforesaid gazette notifications dated 24.03.1952 and 29.02.1956, as to acquisition of rent receiving interest and the vesting of lands of the leave petitioners, including the case lands, found it difficult to substantiate the locus standi of the leave petitioner in challenging the draft records of right prepared in the names of the respective writ petitioners in respect of their respective case lands prepared during the Mahanagar Survey. Further with the publication of the gazette notifications dated 24.03.1952 and 29.02.1956 the leave petitioner ceased to have any right, title and interest and possession in the case lands, because of acquisition, and vesting of said lands in the*

Government." Thereafter, the full bench of the Hon'ble Appellate Division, on an application corrected the said judgment stating that 'the rent receiving interest of projabili property had vested to the Government and land has been vested to the projas as owners'. In that case the Court of Wards, Bhawal Raj Estate and the Land Reform Board the present contesting respondents were parties and had challenged the Dhaka City Survey khatian prepared and published in the names of the successors in interests of the projas". The Apex Court in that case further held:

"Thus we are of the view that the leave petitioner had no locus-standi to challenge the draft Mahanagar Survey khatian as prepared in the names of the respective writ petitioners, at-least after publication of the gazette notifications dated 24.03.1952 and 29.02.1956."

17. In the aforesaid judgment the Appellate Division lastly held that 'the Court of Wards can only keep in his custody, the retainable khas land of the previous jamindars (which was 375 bighas at the time of SAT Act, 1950) and not the "projabili property"'. It may be mentioned, in this connection, that the land holding limitation thereafter has been reduced to 100 bighas and lastly to 60 bighas. On the face of the aforesaid decision of the Appellate Division the Court of Wards and Land Reform Board, cannot, under any circumstances, claim ownership over the projabili property of the previous jamindar, Kumar Rabindra Narayan Ray Chowdhury and as such cannot issue the impugned two Memoranda, specifically when they were parties in the aforesaid case before the Appellate Division. Such interference by the respondents are nothing but harassment to the previous "projas" who has become owners of their respective properties by operation of law.

18. On the other hand *section 144A of the State Acquisition and Tenancy Act 1950 provides "Every entry in the record of rights prepared or revised under section 144 shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect". Thus after final publication of the records under the Revisional survey and the Dhaka City Survey in the names of the predecessors in interest of the petitioners and the respondents having not taken any step against the same till date by producing any evidence to prove that the entries in those records are incorrect, the law clearly provides that the names of the predecessors in interests of the petitioners recorded in those surveys are presumed to be correct.* On this score also the respondents' case are not sustainable in law.

19. Considering the provisions of law mentioned above and the findings of the Appellate Division in the aforesaid cited cases we are of the view that the property in question in both the Rules being "projabili properties", as evident from Annexures C and D to Writ Petition No. 17056 of 2012 and Writ Petition No. 17216 of 2012, respectively, and the same being finally pub-

lished in SA, RS and Dhaka Mohanagar City Survey khatains in the name of the predecessors in interest of the petitioners and the then zaminders having not taken any step in respect of wrong entry, as claimed by the respondents, the court of wards, the said respondents cannot, under any circumstance, claim that the property belongs to the court of wards. As such *when the property does not belong to the court of wards the court of wards has no legal authority to direct the registering authority not to register any deed of transfer in respect of the said properties.*

20. The right to transfer the property being a part of enjoyment of property, is a fundamental right of the citizen under article 42 of the constitution, it cannot be curtailed by issuing Memoranda by the third party who does not have any right, title, interest or possession in the property. Moreover, section-10 of the Transfer of Property Act provides that even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of rule against perpetuity'. So, on that score also the impugned orders, prohibiting the transfer of other persons' property is illegal and of no legal effect.

21. Moreover, *under the Registration Act and the Registration Manual the Registrar derives its powers and authorities of registering any deed as well as the same is under the control of the Ministry of Law. Whereas, the Court of Wards being under the control of the Land Reform Board is not a superior authority of the Registrars and Sub-Registrars to impose any prohibitory order in respect of registering any deed. According to section-53 (A) of the Registration Act, the concerned Registrar / Sub-Registrar has been given a guideline as to which property can be registered and which property cannot be registered. So, if the Registrar / Sub-Registrars are restrained by the two impugned Memos at the instance of the Manager, Court of Wards, even if the criteria of section-53 / A is fulfilled, it would be an unwarranted interference by an unauthorized person in the lawful function of the Registrar / sub-Registrar which is not permitted under the law.* Nor the respondents have any right to issue such direction upon respondents No. 5 to 7 and the Registrar, under the law, is not obligated to abide by such illegal directions issued by unauthorized persons like respondents No. 3 and 4.

22. Apart from the above, *we want to focus about the role of the learned advocate for the respondents as well as the respondents No. 3 and 4. We find it very difficult to understand from the affidavit in opposition filed by the Respondents No. 3 and 4 that what is the gist of the case of the respondents and the respondents without stating the fact that the respondents are the owners of the land and as such have issued such directions upon the registering authority rather stated that the impugned memos have been issued for protecting the historic and heritage properties of Bhawal Raj. Nor the*

respondents could show that the registering authority has responsibility to abide by such directions and thereby refusal to registration has been done in accordance with law. On the other hand respondents No. 3 and 4 could not come forward with any piece of document to show that they have right, title or possession in the land in question, specifically, when the property has been published in the gazette notification under section 3 of the State Acquisition and Tenancy Act 1950 and the said publication being finalized and protected by PO 90 of 1972, the respondents No. 3 and 4 did not come forward to assist the court by showing a piece of paper for the said plots, which have already been recorded in the name of the projas fall within the "retainable khas land" of the Zaminders being up to 375 bigas with the commencement of the SAT Act 1950 which has subsequently been reduced to 100 Bigas and lastly to 60 bigas. The respondents No. 3 and 4 did not even come forward with any piece of paper to show that the limit of retainable khas land has been raised to more than 60 bigas for which the court of wards can act as the custodian.

23. For the reasons and discussions made hereinabove we find merit in both the Rules. Accordingly both the Rules in Writ Petitions No. 17056 of 2012 and 17216 of 2012 are made absolute.

24. The two impugned Memos bearing No. B.R-Dhaka No. 98/98/792 dated 01.10.2012 and No. B R- Dhaka/ 98/98/799 dated 02.10.2012 Annexures- I and I(1) in Writ Petition No. 17056 of 2012 and Annexure J and J-(1) in Writ Petition No. 17216 of 2012 are declared to have been issued without lawful authority and of no legal effect.

25. *Before withdrawing our pen, we would like to note that, now a days time and time again we are confronted with unnecessary and uncalled for litigations like the present one in spite of settling the self same issue connecting with "projabili property" by the Apex court in its different decisions reported in 33 DLR(S.C) 13 and 53, 27 DLR(S.C) 109 and lastly in the case reported in 14 MLR (A.D) 401. In these two writ petitions the question over the title of "projabili property" of the previous Zamindar, Kumar Rabindra Narayan Roy Chowdhury, represented by the Court of Wards, Bhawal Raj Estate, again came up for our consideration as the court of Wards claimed the "projabili property" as its own property and accordingly issued the two impugned Memoranda, though it has already been settled earlier in the aforesaid cases holding that the "projabili property" can never be claimed by the previous zamindars represented by the court of Wards. The Court of Wards though legally bound to follow the said decision according to Article 112 of the constitution but time and again they are harassing the people claiming title over the "projabili property", either by issuing Memorandum or by other ways and means and thereby also wasting the courts valuable time. So it is high time to caution the Court of Wards,*

Bhawal Raj Estate and also the Land Reform Board to abstain from creating such situation on frivolous issues and thereby pushing the public to the Court. Thus they are cautioned not to harass anybody specifically the previous "projas" or their successors-in-interests any more, claiming title over the "projabili property" as cited in the "projabili property" gazette published on 24.03.1952. If in future, any such illegal and uncalled for claim is sought for by the court of wards or if any litigation is continuing or started afresh because of court of wards action by claiming title over the said "projabili property" by the Court of Ward and the Land Reform Board, then they would be liable to be dealt with for contempt of Court, apart from such litigations be in abated under P.O.90 of 1972.

26. *Under such circumstances we think it would be proper to call the Manager, court of wards and the Land Administrator to explain their position in this respect because the government officials under no circumstances can play with the property of the general peoples. This court thus thought that exercising the power conferred under the law we should call the said officials to explain their conduct as to these two cases in particular. But considering that it will be nothing but a futile exercise of this Court on the matter, because when the respondents could not come forward with a proper affidavit giving proper explanations supported by the papers, we simply can express our anxiety and great concern that the government officials are doing this only to harass the general people of the country and thereby they are trying to have some personal gain over it . As such the respondents No. 3 and 4 are cautioned not to deal with such property of the general people in such manner which can be subject matter of harassment of the general people.*

27. Let a copy of the judgment and order be communicated to the Hon'ble Minister, Ministry of Land , Hon'ble Minister, Ministry of Law for issuing guidelines to the concerned officers for the purpose of dealing with such property of the public in accordance with law so that the government officials do not create any impediment in general peoples' enjoyment of property right freely or harass the people upon taking undue advantage of being a government official.

However, there will be no order as to cost.

Cases Cited

* ***People's Republic of Bangladesh and others Vs. Sri Sri Madan Gopal Jew Bigraha and others 33 DLR(AD) 13.***
* ***Promode Ranjan Saha and others Vs. Government of Bangladesh and another, 33 DLR(AD) 53.***
* ***Anwara Begum Chowdhurani Vs. Nur Jahan Begum and others 27 DLR(AD) 109***
* ***Bhawal Raj Court of Wards Estate Vs. Rasheda Begum and others 14 MLR(AD) 401.***

HIGH COURT DIVISION
(Admiralty Jurisdiction)

A.F.M. Abdur Rahman-J.

ADMIRALTY SUIT NO. 19 OF 2009

(Admiralty Suit No. 19 of 2009, Admiralty Suit No. 27 of 2009 and Admiralty Suit No. 28 of 2009, although have been heard separately one after another, yet as the factual and legal aspect involved in these suits are similar, the same are disposed off by single judgment.)

Kyung Hae Maritime Co. Ltd 1197-2 choryang 3, Dong Dong-Gu Pusan City Republic of Korea as Manager / M.V. BF Glory (Ex-Kunai) represented by their Constituted Attorney M/S Kabir & Associates, 40/A, Panchlish Residential Area, Chittagong, Bangladesh ..... Plaintiff.

Vs.

1. M.V. BF Glory (Ex-kunai) A vessel now berth at CUFL, Jetty,P.S.-Bandar, Chittagong,Represented by their local agent defendant No. 5 M/S. Mariners Transport System Co. 67, Agrabad Commercial Area, Chittagong.
2. Kysco shipping Co. Ltd. R.M. 710, Daesung Bldg# 01, Naesco-Dong, chonguo-Gu, Seoul, republic of Korea, Disponent Owner/Charterer of the vessel M.V. BF Glory (Ex-kunai) now berth at CUFL, Jetty P.S. Bandar, Chittagong, represented by their local agent defendant No. 5 M/S/ Mariners transport system Co.67, Agrabad Commercial Area, Chittagong.
3. Owner and parties interested of the vessel M.V. BF Glory (Ex-kunai) A vessel now berth at CUFL, Jetty, P.S. Bandar, Chittagong represented by their local agent defendant No.5, M/S. Mariners Transport System Co. 67,Agrabad Commercial Area Chittagong.
4. Master of M.V. BF Glory (Ex-kunai) A vessel now berth at CUFL, Jetty, P.S. Bandar, Chittagong.
5. Mariners Transport System Co. Agrabad commercial Area, Chittagong, Bangladesh as local Agent of the vessel M.V. BF Glory (Ex-kunai) A vessel now berth at CUFL, Jetty. P.S.-Bander, Chittagong. .... Principal-Defendants.
6. The Chairman, Chittagong Port Authority, P.S. Bandar, Chittagong.
7. The Harbor Master, Chittagong Port Authority, P.S. Bandar, Chittagong.
8. The Commissioner of Customs, Chittagong,Customs House P.S. Bandar, Chittagong.
9. The Deputy Commissioner of Police Chittagong Port, P.S. Bandar, Chittagong. ..... Proforma-Defendants.

ADMIRALTY SUIT NO. 28 OF 2009

BIZ & SHIPPING CO., Ltd.
RM 1021, Byuksan Kwanghwamunsidae b/d 74 Naesu-dong, Chongno, Seoul, Korea-110-070 As Charterer M.V. BF Glory(Ex-Kunai), represented by their constituted Attorney, M/S Kabir &

Associates, represented by Md. Ahsanul Kabir, Advocate, 40/A, Panchlish Residential Area, Chittagong, Bangladesh. .... Plaintiff.

Vs.

1. M.V. BF Glory (Ex. Kunai) A vessel now berthed at CUFL Jetty. P.S-Bandar, Chittagong. represented by their local agent defendant No. 5 M/S Fast Shipping Agencies, 31, Agrabad Commercial Area, Chittagong.
2. Owners and parties interested of the vessel M.V. BF Glory (Ex Kunai) A vessel now berthed at CUFL Jetty. P.S. Bandar, Chittagong. represented by their local agent M/S Fast Shipping Agencies, 31, Agrabad Commercial Area, Chittagong.
3. Master of M.V. BF Glory (Ex Kunai) A vessel now berthed at CULF Jetty. P.S. Bandar, Chittagong.
4. M/S Fast Shipping Agencies, 31, Agrabad Commercial Area, Chittagong, as local Agent of the vessel M.V. BF Glory (Ex Kunai) A vessel now berthed at CUFL Jetty. P.S-Bandar, Chittagong .... Principal-Defendants.
5. The chairman, Chittagong Port Authority P.S-Bandar, Chittagong.
6. The Harbour Master Chittagong port Authority. P.S-Bandar, Chittagong.
7. The Commissioner of Customs, Chittagong, Customs House, P.S-Bandar, Chittagong.
8. The Deputy Commissioner of Police (Port), P.S-Bandar, Chittagong. .... Proforma-Defendants.

ADMIRALTY SUIT NO. 27 OF 2009

Saint Oil & Trading Co., Ltd. Rm 1204, Artnouveau Park officetel 1367, Soong in-Dong, Jong Ro-Gu, Seoul 110-828, Republic of Korea; Represented in Bangladesh by: Interport Maritime Limited HBFC Building (5th Floor) 1/D, Agrabad Commercial Area Chittagong, Bangladesh ..... Plaintiff.

Vs

1. M.V. BF Glory (ex: MV KUNAI); represented in Bangladesh by her local agents: Maritimes Transport System Co. Monzoor Building, 67, Agrabad Commercial Area, Chittagong, Bangladesh;
2. Master of the vessel M.V. BF GLORY (ex: MV KUNAI); represented in Bangladesh by her local agents: Mariners Transport System Co. Monzoor Buiilding, 67, Agrabad Commercial Area Chittagong, Bangladesh;
3. Doosan Capital Co., Ltd. 16th, 17th Doosan Tower, 18-12, Euljiro 6-ga, Jung-gu, Seol, Republic of Korea, the owner of the vessel MV BF GLORY; represented in Bangladesh by the local agents: Mariners Transport Systems Co. Monzoor Building, 67, Agrabad Commercial Area, Chittagong, Bangladesh;
4. Charterers and parties interested in the vessel MV BF GLORY (ex: MV KUNAI); represented in Bangladesh by the local agents: Mariners Transport System Co. Monzoor Building, 67, Agrabad Commercial Area, Chittagong, Bangladesh.
5. Mariners Transport System Co. Monzoor Building, 67, Agrabad

Commercial Area, Chittagong, Bangladesh;.....Principal Defendants
6. The Chairman, Chittagong Port Authority, Chittagong, Bangladesh.
7. The Harbour Master, Chittagong Port Authority, Chittagong , Bangladesh
8. The Commissioner of Customs, The Customs House, Chittagong, Bangladesh.
9. The Principal Officer, Mercantile Marine Department Chittagong, Bangladesh. ..... Proforma Defendants.

For the plaintiff (In Ad. Suit No. 19 of 09 and Ad. Suit No. 28 of 09) : Mr. Kamal-ul-Alam, Adv. with Mr. Giasuddin Ahmed, Advocate.

For the defendants (In Ad. Suit No. 19 of 09, Ad. Suit No. 28 of 09 and Ad. Suit No. 27 of 09) : Mr. A.K.M. Fakrul Islam, Advocate.

For the plaintiff (In Ad. Suit No. 27 of 09) : Mr. A.K.M. Nazrul Islam, Advocate.

Judgment: May 4, 2011

Admiralty Court Act, 2000-

Section 4- Maritime lien accrues as only as security for payment for a debt of a person or company and only against the property of the creditor-

A maritime lien is well defined ...to mean a claim or privilege upon a thing to be carried into effect by legal process.....that process to be a proceeding in rem.....this claim of privilege travels with the thing in to whosever possession it may come. It is in chohet from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached ..... (Para 73)

A maritime lien will arise when owner of maritime vessel incurr's debt for which he is personally liable and defaults in repaying the debt a charge is immediately created and automatically attached to his property i.e. the vessel as a security for re-payment. Therefore, a maritime claim may be turned into a maritime lien to be attached to the maritime res if the claim arises against the owner of that particular maritime res in personem. But a long practice in maritime jurisprudence have classified the charges, which only creates maritime lien ..... (Para 74)

Following claims have been recognized as creating maritime lien: (a)Damage done to ship (b) Salvage (c) Seamans wages (d) Master's wages & disbursements (e) Battomry and Respondtia ..... (Para 75)

A lease of a vessel for specific period has the implication as Bareboat charter party upon which the full possession and con-

trol of the vessel and its crew member including the master goes to the lessee and in that case the master of the vessel derives authority from the lessee and not from the original owner ..... (Para 85)

JUDGMENT

A.F.M. ABDUR RAHMAN-J: Admiralty Suit No. 19 of 2009, Admiralty Suit No. 27 of 2009 and Admiralty Suit No. 28 of 2009, although have been heard separately one after another, yet as the factual and legal aspect involved in these suits are similar, the same are now disposed off by this single judgment.

2. Fact of the suits in Admiralty Suit No. 19 of 2009

The plaintiff Kyung Hae Maritime Co. Ltd. of Korea instituted the Admiralty Suit No. 19 of 2009 against the vessel M. V. BF GLORY (EX-KUNAI), as defendant No. 1, Kysco, Shipping Co. Ltd., of Korea as Principal defendant No. 2, Owners and parties interested of the vessel M. V. BF GLORY, (EX-KUNAI) as Principal defendant No. 3, the Master of the vessel M. V. BF GLORY as defendant No. 4 and Mariners Transport System Co. Ltd. of Bangladesh as principal defendant No. 5 along with other Pro-forma defendants, praying for decree for realization of a sum of BD. Tk. 11,02,97,152.70 equivalent to U$ 15,90,442.76 to be realized from the principal-defendant jointly and severally.

3. The factual aspect of the plaintiff's claim *inter-alia* is that the plaintiff is a company incorporated in South Korea and engaged in shipping business as Ship Manager and ship managing agent who in course of its business upon a negotiation made a ship management agreement with the defendant No. 2, the disponent owner/charterer regarding the vessel M. V. TINAI and M. V. KUNAI (now renamed as M. V. BF GLORY i.e. the defendant No. 1 vessel) for the purpose of marine operation, supply of bunkers, marine insurance, claims for seamen's wages and for repair and new building of the vessel and accordingly the plaintiff company supplied crews as per crew list to the defendant No. 1 vessel for which it was stipulated in the said ship management agreement that the owners shall remit the monthly management fee including seamen's wages to the Bank account of the manager by telegraphic transfer. The plaintiff also supplied bunkers to the defendant No. 1 vessel through lubricants delivery receipt dated 19-10-2008 at the port of Masan in Republic of Korea.

4. The plaintiff also supplied necessaries items to the defendant No. 1 vessel on 14-10-2008 and also on other dates at the owners/master disbursement. The plaintiff also completed electrical works to the defendant No. 1 vessel through POS electric engineering company and supplied necessaries of electrical items as per list dated 23-10-2008 for the period of 7-10-2008 to 23-10-2008. The plaintiff also made serv-

ices as per service report to the defendant No. 1 vessel by the order of the disponent owner/charterer the defendant No. 2 which commenced on 30-9-2008 and further on 16-10-2008 and completed on 23-10-2008. The plaintiff submitted the statement of account to the defendant No. 2 on different dates namely on 31-10-2008 for US$ 663211.33, on 30-11-2008 for US$ 88102.26, on 31-12-2008 for US$150728.52, on 31-1-2009 for US$ 149636.02, on 28-2-2009 for US$ 71829.51, on 31-3-2009 for US$ 49569.98 and on 30-4-2009 for US$ 44187.24 totalling an amount of US$ 15,90,442.76. Although the plaintiff supplied the statement of accounts to the defendant No. 2, but the same is still outstanding for which the plaintiff is constrained to file the instant Suit finding the vessel within the territorial jurisdiction of this court.

5. It has been asserted in the plaint that the owner of the defendant No. 1 vessel wants to quit the BBC contract with the charterer defendant No. 2 as the charterer have not paid charter hire more than three months. The owners defendant No. 3, asked the BBC charterer the defendant No. 2, to re-deliver the vessel. As the defendant No. 2 i.e. the charterer is about to go bankruptcy, the plaintiff has no alternative but to institute the instant suit in Bangladesh to recovery their legitimate dues.

6. The Admiralty suit 19 of 2003 was contested by the defendant Nos. 1 and 3 by filing written statement denying all the materials allegation of the plaint stating, *inter-alia,* that Doosan Capital Co., Ltd. of South Korea is the owner of the vessel M. V. TINAI and M. V. KUNAI (now renamed as M. V. BF GLORY the defendant No. 1 vessel) and the defendant No. 2 is Kysco, Shipping Co., Ltd. is not the owner of the defendant No. 1 vessel nor has any authority to enter into any agreement with the plaintiff for management of the vessel M. V. BF GLORY. The defendant No. 2 is the lease user of the vessel and under article 27 of the lease agreement dated 27-5-2008, the defendant agreed to have no right to transfer the right of the vessel to the plaintiff without the owner's prior cosent. The plaintiff with ill motive executed ship management agreement with the defendant No. 2 who is not the owner of the defendant No. 1 vessel and has no authority to transfer the right on the vessel and as such the owner of the vessel M/S. Doosan Capital Co. Ltd. is not responsible for any liability in any manner under such unlawful agreement between the plaintiff and the defendant No. 2. Since the owner of the defendant No. 1 vessel has no connection or any agreement with the plaintiff regarding the vessel or any supply of necessary or bunkers and the owner of the defendant No. 1 vessel never consented to transfer the right of such obtaining any supply or repair work from anybody, the owner of the vessel is not liable for any such payment. The plaintiff cannot carry out any service on the vessel without the order of the owner of the vessel as such

any service allegedly rendered by the plaintiff to the vessel is unlawful and the owner is not liable for any such unlawful service.

7. It has been further asserted in the written statement that if there was any supply of crew members, spare parts, repairing work supply of bunker and any other services done to the vessel the same shall be business transactions in between the plaintiff and the defendant No. 1 and therefore the owner of the vessel is not responsible for such services as the plaintiff admittedly entered into an agreement with the defendant No. 2 who is not the owner of the vessel or had any authority to enter into any agreement with the plaintiff. The plaintiff may realize his alleged claim of U$ 15,90,442.76 from the defendant no. 2 Kysco, Shipping Co. Ltd., in personem and since the plaintiff is a Korean Company and the defendant No. 2 is also a Korean Company, the plaintiff with malafide intention did not institute suit in Korean jurisdiction. The owner of the vessel Doosan Capital Co. Ltd. never requested the plaintiff to do any job or made any supply in respect of the defendant No. 1 vessel and as such the owner of the vessel is not liable for the payment to the plaintiff. It has been categorically asserted that the plaintiff and the defendant No. 2 with ill motive created a fictitious ship management agreement dated 22nd September, 2008 knowing fully well that the defendant No. 2 had no authority to enter into such agreement. The plaintiff in order to make unlawful gain in collision with the defendant No. 2 created the ship management agreement dated 22nd September, 2008. The defendant No. 2 is lease user of the vessel M. V. BF GLORY under a lease agreement dated 27-5-2008 and under article 27 of the said lease agreement, the defendant No. 2 is prohibited from transfer any right to the third party and therefore the suit is liable to be dismissed against the defendant No. 1 and 3.

8. Upon the aforesaid pleadings of the parties this Court framed the issue to be adjudicated as follows:

1. Is the suit is maintainable under the Admiralty jurisdiction in its present form and manner?

2. Is the suit is barred by the principals of limitation, estoppel, waiver and acquiescence?

3. Is there in ship manage agreement dated 22-9-2009?

4. Is there any cause of action against the defendant Nos. 1-3 for filing the instant suit?

5. Is the plaintiff is entitled to the relief as prayed for? or any other relief or relieves granted to the plaintiff?

6. Is the defendant acknowledges receipt of the invoices for supply of necessaries and other services and settled such outstanding invoices?

9. In support of the plaint case the plaintiff examined one Mr. Md.

Ahsanul Kabir, an Advocate of this Court, as a constituted attorney of the plaintiff as P.W.1 while Mr. Gujeong Song being the President of the plaintiff company was examined as P. W. 2.

The P. W. 1 exhibited the following documents:

Exhibit No. Identity of the documents.

1, 1(a) Power of Attorney dated 28.5.2009 and 16.3.2010

2 Fixture Notes

3 Bank slip dated 31.3.2009

4.5 Bank slip dated 7.4.2009 & 24.4.2009

6 Legal expenses on behalf of the owner

7. Invoice dated 12.5.2009

8.9 E-mail dated 11.5.2009 & 12.6.2009

10 Statement of delivery letter

2(a)(b), 6(a),7(a) and 8(a)

Signatures.

10. On the other hand the defendant Nos. 1 and 3 examined Mr. Mehedi Hasan an Advocate of this court being the constituted attorney of the owner of the defendant No. 1 vessel as D. W. 1 who exhibited the following documents.

Exhibit No. Identity of the documents.

A. Certificate of Registry of vessel

B. Lease agreement dated 27.5.2008

C. Change of lease

D. Notice of default

Evidence of the plaintiff in Admiralty Suit No. 19 of 2009:

11. The P.W. 1 in his examination-in-chief stated that the plaintiff entered into the ship management agreement with the defendant No. 2 Kysco, Shipping Co. Ltd., on 22-9-2008. The defendant No. 2 is the charterer and disponent owner of the defendant No. 1 vessel. As per the terms and condition of the agreement, the plaintiff is to manage the defendant No. 1 vessel and consequently authorised to make supply of bunker and all necessaries including supply of electrical goods payment of seamen's, wages, marine discharge and marine consultation and all kinds of incoming and out going services of the vessel. Accordingly, the plaintiff supplied bunkers, electrical goods made repairing of the vessel made payment of the seamen's, wages and also rendered other services in various ports including the port of Marcel in Korea from 1st October, 2008 till 30-4-2009. The plaintiff through various e-mail, sent to the defendant No. 2, requested for settlement of their claim, but the defendant No. 2 did not respond to the plaintiff's claim and therefore the plaintiff instituted the instant suit for realization of U$ 15,90,442.76 equivalent to BD. Tk. 11,02,97,152.70 against the defendant jointly and severally along with a prayer for pendentility interest @ 20% per annum on the decreetal amount. This P.W. denied the defendant case as to existence of any lease agreement with the defendant No. 2 by the owner of the vessel and also

denied the claim of the defendant Nos. 1 and 3 that they are not liable to pay the claim amount of the plaintiff.

12. In his examination-in-cross the P. W. 1 stated that at the relevant time the defendant No. 2 Kysco, shipping Co., Ltd. was in the possession of the defendant No. 1 vessel by virtue of an agreement dated 22-9-2008 as charterer and disponent owner of the vessel and the plaintiff entered into the ship management agreement with the defendant No. 2 Kysco, Shipping Co., Ltd., who was at that time the chartarer of the vessel. This P. W. 1 admitted that there was no agreement in existence in between the plaintiff and defendant No. 3 and the plaintiff has got no business relationship with the Doosan Capital Co. Ltd., and the defendant No. 2 Kysco Shipping Co. Ltd. has already became a bankrupt. He further stated that the plaintiff has the claim against the defendant No. 2 and the other party as defendant in the suit. The P. W. 1 further stated that the master of the defendant No. 1 vessel placed the order and not the defendant Nos. 1 and 3 and that all these bills have been sent to the defendant No. 2 and not the defendant Nos. 1 and 3 the owner of he vessel and that the plaintiff has claim not only against the defendant No. 2 but against all the defendants.

13. The P. W. 2 Mr. Gujeong Song stated in his examination-in-chief that the plaintiff company entered into a ship management agreement on 22-9-2008 with the defendant No. 2 Kysco, Shipping Co., Ltd. for the purpose of making all kinds of supply including bunker, Marine Insurance, supply of the siemens and their wages and repair. The plaintiff company supplied all kinds of supply to the defendant company in terms of the agreement for the period commencing from October, 2008 to April, 2009 and sent invoices, statement of accounts, debit notes and other documents along with the concerned receipt signed by the master of the defendant No. 1 vessel to the defendant No. 2. But the defendant No. 2 did not pay the dues so the suit filed by the plaintiff. This P. W. 2 proved the signature of the master and the engineer of defendant No. 1 the vessel on different receipt of documents.

14. In his examination-in-cross, the P. W. 2 stated that the defendant No. 2 Kysco, Shipping Co., Ltd is not the owner of the vessel M. V. B. F. GLORY and the said Kysco, Shipping Co. Ltd., is now a bankrupt company. P. W. 2 admitted that the plaintiff has got no contract with the Doosan Capital Co. Ltd. or that no prior consent of Doosan Capital Co. Ltd., was taken prior to executing the ship management agreement with the defendant No. 2. This P. W. 2 further admitted that the plaintiff has an agreement with the Kysco, Shipping Co., Ltd., and as such the plaintiff is asking money from the said company, the defendant no. 2, and also stated that although he has not filed any documents regarding the negotiation for three million with the owner of the ves-

sel Doosan Capital Co. Ltd., yet the defendant Nos. 1 and 3 is liable to pay the claimed amount to the plaintiff.

15. Evidence of the Defendant No. 1-3 in Admiralty suit No. 19 of 2008

On the other hand the D.W.1, Mr. Mehdi Hasan in his examination-in-chief stated that the defendant No. 2 is not the owner of the defendant No. 1 vessel and the defendant Nos. 1 and 3 being owner of the defendant No. 1 vessel had no business relations with the plaintiff and that the defendant No. 2, Charterer of the defendant No.1 vessel failed to pay the hire money to the defendant No.1 and 3 for more then three months and as such the owner of the vessel served termination notice upon the defendant No. 2, terminating the lease agreement, requesting return of the vessel to the defendant No. 3. The D. W. 1 further stated that there is a lease agreement between the defendant No. 2 and the owner of the vessel Doosan Capital Co. Ltd, the defendant No. 3, dated 27th May, 2008 Exhibit No. B and Article 27 of the said lease agreement prohibited the defendant No. 2 from transferring his right under the lease without prior consent of the owner to any third party. The ship management agreement as alleged by the plaintiff is a fictitious agreement only to gain unlawful profit.

16. In his examination-in-cross the D. W. 1 stated that he has filed power of Attorney on behalf of the defendant Nos. 1 and 3 in the office of this court when the application for release of the vessel was filed for which he could not exhibit the said power of Attorney which still remains in the office till the date of taking deposition.

17. Argument of the parties in Admiralty Suit No. 19 of 2008 of the conclusion of the Evidence.

18. Although the defendant has the right to summarize the case yet we have allowed the plaintiff to do so and accordingly while summarizing the entire case in Admiralty Suit No. 19 of 2009 before this Court, the learned Advocate Mr. Kamal-ul-Alam, appearing on behalf of the plaintiff, argued that the defendant No. 2, while admittedly a charterar of the defendant No. 1 vessel entered into the ship management agreement with the plaintiff for supply of the seamens and their wages, bunker, repair of the vessel etc. and accordingly the plaintiff supplied the agreed service to the defendant No. 1 vessel on the order of the defendant No. 2 and since the defendant No. 1 vessel received the necessaries and the service, the defendant No. 2 became liable for payment and accordingly the plaintiff served the required bill which has been exhibited before this court for a total amount of US$15,90,442.76. But as the defendant No. 2 failed to pay the said bill a maritime lien has been caused upon the vessel entitling the plaintiff to proceed in rem against the vessel as the vessel itself became primarily liable to pay for which the owner of the vessel is also liable in personem

for the payment of the same. Since the instant maritime claim itself is a maritime lien making the vessel liable for payment and as the vessel would be sold for the purpose of satisfying its creditor, the question of contractual relationship with the owner of the vessel for the payment against the supply of the necessaries is immaterial. He strenuously argued that the supply of the necessaries and other service to the defendant No. 1 vessel was not denied by the defendant No. 1 and 3 and therefore the vessel itself or through the vessel the defendant Nos. 3 is liable to pay the dues to the plaintiff and on its failure the vessel would be sold in satisfying the decreetal amount.

19. The learned Advocate Mr. Kamal-ul-Alam, further argued that the supply of necessary and rendering service to the maritime vessel causes maritime lien upon the vessel itself and since the maritime lien runs with the res alike the order of injunction attached to the land and not against the party, therefore the res itself i,e. the defendant No. 1 vessel have been liable under the ship management agreement to pay the plaintiffs dues, in default the vessel will be sold in order to realize the decreetal amount. In this respect the learned Advocate Mr. Kamal-ul-Alam relied on the decision of an unreported case of this court in Admiralty Suit No. 37 of 1999 and also cases reported in 14 BLC 836, 310 US 268 and 2 LG 287.

20. The learned Advocate Mr. Kamal-ul-Alam, argued that the plaintiff was not aware about any lease agreement regarding the defendant No. 1 vessel allegedly executed in between the defendant No. 2 and the owner of the vessel defendant No. 3 and as such not bound by of its any terms and condition and as such the defendant Nos. 1 and 3 cannot rely upon any prohibition as alleged in Article 27 of the said lease agreement. Moreover, the application of maritime lien cannot be prohibited under contract or agreement and the same will always run along with the res and as such irrespective of the existence of the alleged lease agreement the defendant No. 1 vessel will remain liable for all time to come till payment is made to the plaintiff for the supply of necessaries, bunker and other services.

21. The learned Advocate Mr. Kamal-ul-Alam, finally argued that the defendant Nos. 1 and 3 failed to prove their alleged claim stated in the written statement, since the D. W. 1 did not produce any lawful authority to depose before this court on behalf of the defendant No. 2 and since the D.W. 1 has not obtained any valid power of Attorney from the defendant Nos. 1 and 3 nor he deposed as a witness upon having summons served from this Court. Moreover, the defendant Nos. 1 and 3 exhibited documents which being the photocopy, hit under Section 65 of the evidence Act 1876 and as such cannot be taken into consideration and therefore the legal implication renders that the plaintiff's claim in the suit has not been contro-

verterd. Therefore the plaintiff is entitled to the decree as prayed for.

22. On the other hand the learned Advocate Mr. A. K. M. Fakrul Islam appearing on behalf of the defendant Nos. 1 and 3 argued that admittedly the defendant No. 2 is the charterer in possession of the defendant No. 1 vessel and the Doosan Capital Co., Ltd. is the Registered owner of the defendant No. 1 vessel and at the relevant period a lease agreement dated 27.5.2008 was in existence in between the defendant No. 2 and the said Doosan Capital Co. Ltd. regarding the long term lease of the defendant No. 1 vessel and under Article 27 of the said agreement the defendant No. 2 was debarred from transferring his right acquired under the agreement to any third party. But by violating the said clause the defendant No. 2 executed a ship management agreement with the plaintiff, obtained the supply of alleged seamens their wages, bunker, necessaries, repairs and other services for the defendant No. 1 vessel which however may be a liability of the defendant No. 2 but in no way made the Registered owner Doosan Capital Co., Ltd. liable to pay the dues of the plaintiff.

23. The learned Advocate Mr. A. K. M. Fakrul Islam, strenuously argued that as the alleged supply of necessaries and services was made to the defendant No.1 on the order of the charterer, the defendant No. 2, the defendant No.2 is only liable and not the owner of the vessel liable in any way and as such no maritime lien can be treated attached to the defendant No. 1 vessel for the reason that maritime lien only accurse when the owner of the Res is liable to pay in personem for anything consumed by the res and fails to discharge his liability and only on that case a maritime lien attaches to his ownership vessel. But in the instant case as the defendant No.3 is not liable in personem to pay the dues of the plaintiff, no maritime lien can be attaches to his ownership vessel, the defendant No.1 and as such this suit is not maintainable in rem though may be maintainable in personem against the defendant No. 2 Kysco Shipping Co. Ltd. and therefore the suit is liable to be dismissed against the defendant Nos. 1 and 3.

24. The learned Advocate Mr. A. K. M. Fakrul Islam, further argued that the plaintiff cannot direct his claim against the defendant No. 1 or the Registered owner of the defendant No. 1 vessel since the plaintiff made the alleged supply on the order place by the defendant No. 2 Kysco, Shipping Co., Ltd., and since at the relevant period the master of the vessel was the employee of the defendant No.2 the charterer, the entire authority of the master to act shall be considered to have been derived from the charter i,e. the disponent owners as such the liability accrued from receiving such supply of necessaries goes to the shoulder of the defendant No. 2. Therefore the receipt and other documents issued by the master and the chief engineer of the

defendant No. 1 vessel shall not be treated as made liable the registered owner of the vessel M/S. Doosan Capital Co., Limited to pay the so-called dues of the plaintiff.

25. The learned Advocate Mr. A. K. M. Fakrul Islam, finally submits that the Power of Attorney appointing the D. W. 1 as a Attorney of the Registered owner of the defendant no. 1 vessel, was filed in the registry of this Court along with the application for release of the vessel and although at the time of making deposition the original copy of the power of Attorney was not available, later the same has been brought from the court's registry and filed in the record prior to which a photocopy of the same was made exhibit. Therefore the D.W. 1 had the authority to depose before this Court on behalf of the defendant Nos. 1 and 3. In this respect the learned Advocate Mr. A.K.M. Fakrul Islam, relied on the case reported in 55 DLR 471.

26. Refuting the argument of the learned Advocate Mr. A. K. M. Fakrul Islam, the learned Advocate Mr. Giasuddin Ahmed argued that the basic right under the agreement dated 27.5.2008 executed in between the defendant No. 3 and the defendant No. 2 was regarding the Bareboat charter of the defendant No. 1 vessel and that had not transferred to the plaintiff by the defendant No. 2, rather only a ship management agreement was executed by the defendant No. 2 with the plaintiff which cannot be treated as transfer of the basic right under the said agreement and since the basic right of the defendant No. 2 under the said agreement dated 27.5.2008 is the lease hold right of the defendant No. 1 vessel, therefore in no way this can be termed as a transfer of the basic right. Accordingly, the learned Advocate Mr. Giasuddin Ahmed argued the ship management agreement is not violative of the provision of Article 27 and Article 33 of the agreement dated 27.5.2008 executed in between the defendant Nos. 2 and the original owner of the vessel.

27. This is all about the agreements of the parties in Admiralty suit No. 19 of 2009. Now we will entire into Admiralty Suit No. 28 of 2009.

28. FACTS IN ADMIRALTY SUIT NO. 28 OF 2009

One BIZ and SHIPPING COMPANY LIMITED of Korea is the plaintiff in Admiralty Suit No. 28 of 2009 and the vessel M. V. BF GLORY (ex-KUNAI) is the defendant No. 1 in the suit so also the owners and the parties interested in the vessel M. V. BF GLORY (ex-KUNAI) is the defendant No. 2, the master of the vessel defendant No. 3, M/S. Fast shipping Agencies, identified as the local agent of the vessel M. V. BF GLORY (ex-KUNAI) is the defendant No. 4 along with the others are proforma defendant Nos. 5-8 in the suit.

29. The contention of the plaintiff in this suit is that the plaintiff acted as voyage charterer of the defendant No. 1 vessel M. V. BF GLORY by virtue of

charter party (fixture note) agreements dated 2nd March, 2009 and 19th March, 2009 with BF SHIPPING COMPANY LIMITED as owners of the defendant No. 1 vessel M.V. BF GLORY (ex-KUNAI). As per the condition of the said charter party agreement (fixture note) the plaintiff as charterer carried 12500 M. T. of bagged urea loaded at the port of Measaieed for discharging the same at the port of Chittagong through the charter party agreement dated 2nd March, 2009. The plaintiff also carried 8800 M. V. of Soyabean Meals loaded at the port of VIZAC, INDIA for discharging at Japan through charter party agreement dated 9th March, 2009. The defendant No. 1 vessel under the 1st charter party agreement loaded the cargo at port Measaieed, Qatar, on 11th March 2009 and arrived at Chittagong Port on 24th March, 2009. The vessel commenced discharging the cargo on 25th March 2009 with an estimated completion of discharge date to be on 1st April, 2009. But due to derrick and the generator problem and also for the shortage of barge the defendant No. 1 vessel could not complete the discharge and ultimately complete the same on 14th April, 2009. Consequently, the vessel could not sail out from Chittagong Port due to the generator problem mainly UT for which the defendant No. 1 vessel incurred huge liabilities as additional port charges and repairing cost of generator etc. amounting to U$S 1,00,000.00 and the cost of the appointed broker Chang-bo shipping company limited. The plaintiff as charterer paid U$S 75,561.00 on different dates to the owners M/S. BF SHIPPING COMPANY LIMITED and the then local agent of the defendant No. 1 vessel at Chittagong M/S. Mariners Transport System company. The plaintiff submitted invoice dated 12th May, 2009 to the defendant No. 2 BF. SHIPPING COMPANY LIMITED for U$S 80,561.00 with request to pay the proceed in the plaintiff Bank account maintained at Korea. But the defendants did neither pay and the defendant No. 2 nor showed any interest for payment of the same. The plaintiff made repeated demand through Telephone and other medium but as the defendant did not pay the plaintiff constrained to file the instant Admiralty suit.

30. The defendant Nos. 1 and 2 contested the suit by filing written statement denying the all the materials allegation made in the plaint, stating *inter-alia* that the DOOSAN CAPITAL COMPANY LIMITED of Korea is the owner of the vessel M. V. BF GLORY. The owners DOOSAN CAPITAL COMPANY LIMITED had no connection with BF SHIPPING COMPANY LIMITED and the owner is not aware of any such charter party agreement in between the plaintiff and the BF SHIPPING CO. LTD. But the plaintiff, with ill motive, did not make BF SHIPPING CO. LIMITED a party in the instant suit. Since the plaintiff made the

alleged payment to BF SHIPPING COMPANY LIMITED his claim may be directed against the BF SHIPPING COMPANY LIMITED and not against the owner of the vessel. The vessel M. V. BF GLORY is under lease with KISCO SHIPPING COMPANY LIMITED of Korea and KYSCO SHIPPING COMPANY LIMITED unlawfully entered into a ship management agreement with Kyung Hae Maritime Company Limited of Korea who is the plaintiff in Admiralty suit No. 19 of 2009. The plaintiff did not enter into any charter party agreement with the said BF SHIPPING COMPANY LIMITED and as such any claim against the said BF SHIPPING COMPANY LIMITED cannot make liable the plaintiff and as such the instant suit is liable to be dismissed against the owner of the vessel.

31. On the aforesaid pleadings of the parties this Court framed issues as follows:

1. Is the suit maintainable under the Admiralty jurisdiction in its present form and manner?

2. Is the suit is barred by the principal of limitation estoppels, waiver and acquiescence?

3. Is there any ship management agreement dated 22.9.2009?

4. Is there any cause of action against the defendant Nos. 1 and 2 for filing the instant suit?

5. Is the plaintiff is entitled to the relief as prayed for or any other relief or relieves granted of the plaintiff?

6. Is the plaintiff suffered any losses and damage as alleged?

32. In support of the suit the plaintiff examined one Mr. Ahsanul Kabir as P.W. 1 who relied upon the plaint case stating that the plaintiff entered into a charter party agreements with the owner of the defendant No. 1 vessel BF SHIPPING CO. LTD. on 2.3.2009 and 19.3.2009 and as a voyage charterer the plaintiff carried 12.500 M.T. of bagged urea from the port of Measaieed and discharged the same at the port of Chittagong. The defendant No. 1 vessel arrived at Chittagong Port on 24.3.2009 with cargo on board. The vessel commenced discharging on 25.3.2009 and although the same was due to complete on 1.4.2009, but as the derrick problem of the vessel occurred and also shortage of the barge, the discharge was not completed up to 14.4.2009 for such delay the vessel faced demurrage and as such the plaintiff paid U$S 80.561.00 to the defendant and submitted invoice in May 2009. But the same not being paid back by the defendants, he filed the instant suit.

33. In his examination-in-chief he admitted that M/S. DOOSAN CAPITAL COMPANY LIMITED is the owner of the vessel M. V. BF GLORY but claimed that the said owner chartered the vessel M/S. BF SHIPPING COMPANY LIMITED who was in con-

trol of the vessel as chartered and disponent owner.

34. The P.W.1 exhibited the following the documents which are as follows:

Exhibit No. Identity of the documents

1. power of Attorney dated 28.5.2009

1(a). power of attorney dated 16.3.2010

2 Fixture notes dated 2.3.2009

3. Bank slip dated 31.3.2011

4,5 Bank slip dated 7.4.2009, 24.4.2009

6. Legal expenses on behalf of the owner

7. invoices dated 12.5.2009

8,9 E-mail dated 11.5.2009, 12.6.2009

10. Statement of delivery letter

2(a)(b), 6(a), 7(a), 8(a)

Signatures

35. The plaintiff also examined Mr. Jeong Jae Huk as P.W. 2 who deposed in the line of the P.W. 1 in chief and also proved the signature of the representative of the BF Shipping Company which were marked as Exhibit 2(a), 2(b), 6(a), 7(a), 8(a).

36. On the other hand the defendant No. 2 examined Mehedi Hasan as D.W. 1 who stated in his examination in chief that the defendant No. 2, the registered owner of the defendant No. 1 vessel, had an agreement with BF SHIPPING CO. LTD. who has not been made a defendant in the instant suit; because of the reason that BF SHIPPING CO. LTD. had gone liquidation. But the plaintiff in Admiralty suit No. 19 of 2009 made BF SHIPPING CO. LTD. a defendant. The defendant No. 2 did not place any order regarding the vessel MV. BF GLORY and as such plaintiff has no claim against the defendant Nos. 1 and 2.

37. In his examination in cross D.W.2 stated that he deposed on behalf of the defendant No. 1 and 2 and filed power of Attorney executed by defendant No. 1 and 2 in the section (of the court). He denied the suggestion that he did not filed the power of attorney in the section though he admitted that he has not made the same as exhibit.

38. The D.W. 1 filed the following documents as exhibit:

Exhibit No. Identity of documents

A Certificate of registry of vessel

B Lease agreement dated 27.5.2008

C Change of lease

D Notice of default

39. ARGUMENT OF THE PARTIES IN ADMIRALTY SUIT NO. 28 OF 2009.

Upon summarizing the evidence on record in the instant Admiralty suit No. 28 of 2009, the learned Advocate Mr. Kamal-ul-Alam appearing on behalf of the plaintiff argued that the plaintiff obtained voyage charter party agree-

ment from the admitted disponant owner of the defendant No. 1 vessel M/S BF SHIPPING CO. LTD. who having failed to compensate the plaintiff a maritime lien upon the vessel accrued and as such the vessel is liable for due compensation payment and since the defendant failed to repay the dues of the plaintiff the suit is required to be decreed and to sell the vessel to realize the plaintiff's claim.

40. On the other hand the learned Advocate Mr. A.K.M. Fakrul Islam appearing on behalf of the defendant No. 2 argued that at the relevant period the vessel was under the lease with the Kysco Shipping Co. Ltd. and although the lease of transferred later to M/S B.F. SHIPPING CO. LTD. yet defendant No. 2 has got no relation with the plaintiff and as such the defendant No. 2 is not liable to the plaintiff.

41. The learned Advocate Mr. A.K.M. Fakhrul Islam further argued that the nature of the claim of the plaintiff itself proves that it can not attaches any maritime lien on the vessel and therefore the defendant No. 1 vessel is not also liable for repayment to the plaintiff.

42. This is all about the Admiralty Suit No. 28 of 2009. We will now entire into the facts of the Admiralty Suit No. 27 of 2009.

43. FACTS OF THE ADMIRALTY SUIT NO. 27 OF 2009

One M/S. Saint Oil and Trading Company Limited of Korea is the plaintiff in Admiralty Suit No. 27 of 2009 and the vessel M. V. BF GLORY (Ex-KUNAI) is the defendant No. 1 in the suit so also the master of the said vessel is the defendant No. 2, M/S. Doosan Capital Co., Ltd., of Korea is the defendant No. 3 Charterers and the party interested in the vessel of BF GLORY is the defendant No. 4 and Mariners Transport System Limited is the defendant No. 5, along with the other parties as pro-forma defendants No. 6-9 through which the plaintiff prayed for a decree for realization of BD. Tk. 10,13,23,368.42 equivalent to US$ 1,47,917.32 along with pendentility interest @ 20% per annum stating *inter alia* that the plaintiff is a company registered in South Korea and engaged in bunker trading for supply to the ocean going vessel .In course of its business the plaintiff supplied 30 M.T. MGO and 198 M. T. IFO 180 to the defendant No. 1 vessel M. V. BF GLORY (Ex-KUNAI) at Fugeria, United Arab Emirates on 14.3.2009, upon which the master and the chief engineer of the vessel signed the bunker delivery notes with full satisfaction. Thereafter, the plaintiff served the invoice for an amount of US$ 68,250.00 to the defendant No. 2. Later the plaintiff also supplied 55.545 M. T. of MGO and 600.061 M.T. of IFO 180 to another vessel owned by defendant No. 3 M.V. TINAI now M. V. BF HOPE at Singapore on 7.3.2009 which is the sister vessel of the defendant No. 1 vessel M. V. BF GLORY (ex M. V. KUNAI) under the same ownership of the principal defendant No. 3 upon which the master of the vessel singed the bunker

delivery note upon satisfaction. But the defendant failed to pay the dues up to 17.4.2009 and thereafter made a part payment of US$ 1,20,000.00 against the invoice No. S09-031601while US$ 59,412.11 remained unpaid and no payment against the invoice No. S09-031602 has ever been made. Therefore, an amount of US$ 1,27,663.11 is now outstanding with the defendants and since the defendants failed to settle the lawful claim of the plaintiff, despite several request and reminder sent the plaintiff is constrained to file the instant suit and prayed for a decree along with other claim at an amount of US$ 1,47,917.32 equivalent to BD. Tk. 10,13,23,36.42 .

44. The instant Admiralty suit No. 27 of 2009 was contested by the defendant Nos. 1 and 3 who filed written statement denying all the materials allegation brought in the plaint, stating *inter alia,* that the defendant No. 1 vessel M. V. BF GLORY is under the lease agreement dated 27.5.2008 with M/S. Kysco, Shipping Co., Ltd., of Korea and the said lessee entered into an ship management agreement unlawfully with Kyung High Company Maritime Limited of Korea who filed Admiralty Suit No. 19 of 2009 on 22.9.2008. The plaintiff supplied the bunker at the order placed by the said M/S. Kysco, Shipping Co., Ltd. The lease agreement dated 27.5.2008 having prohibited the transfer of the right under the lease agreement to any third party, the ship management agreement with the Kyung Hae Maritime Company Limited was violative of the terms as made in Article 27 of the lease agreement and as such the defendant Nos. 1 and 3 is not liable to pay the alleged dues of the plaintiff. Their being no business transaction or relationship created in between the plaintiff and the defendant No. 3, the liability of paying the dues cannot be directed against the defendant No. 3 and as such the instant suit against the defendant Nos. 1 and 3 is liable to be dismissed.

45. Upon aforesaid pleadings this court has framed the following issues in the instant Admiralty Suit No. 27 of 2009:

1. Is the suit maintainable under the Admiralty jurisdiction in its presence form and manner?

2. Is the suit is barred by the principles of limitation, estoppel, waiver and acquiesce?

3. Is their any cause of action against the defendant Nos. 1 and 3 for filing the instant suit?

4. Is the plaintiff is entitled to the relief as prayed for? or any other relief or relieves granted to the plaintiff?

5. Whether the defendants' vessel M. V. BF Glory and her sister vessel M. V. BF Hope received bunkers from the plaintiff?

6. Whether the defendant failed to pay for the price of the bunkers

received by the vessel M. V. BF Glory and her sister ship M. V. BF Hope?

7. Is the plaintiff suffered any losses and damages as alleged?

8. Are the defendant Nos. 1 and 3 is liable for the alleged loss and damage?

46. In order to substantiate the plaint case, the plaintiff examined Mr. Sun Suokain who being the President of the plaintiff company deposed as P. W. 1 who stated that he knows the vessel M.V. BF GLORY and also the master of the vessel. The plaintiff made the first delivery of bunker on 14th March, 2009 to the defendant No. 1 vessel for 198 M.T. of IFO 180 and 30 M. T. of MGO which was delivered at Fugeria UAE. The Invoice of the said supply being No. S09031602, dated 14.3.2009, was signed by the master of the vessel M. V. BF GLORY. The claim on the first invoice was US$ 68250 which was not paid. The plaintiff made another supply to M. V. TINAI, which is the sister vessel owned by the same owner, a quantity of 6,061 M. T. of IFO 180 and 55.545 M.T. of MGO on 7.3,2007 at the port of Singapore which costs US$1,79,412.11. Thereafter, another supply was made on 12.3.2009 at Singapore to the vessel M. V. TINAI and all the bunker notes was singed by the master and the engineer of the respective vessel. The total claim of the plaintiff is US$ 1,47,917.32 out of which a part payment was made to the extent of US$1,20,000.00 on 17th April, 2009 for which the plaintiff now filed the suit for realization of the remaining dues from the defendants.

47. The P.W. 1 denied that the defendant No. 3 the registered original owner of the defendant No. 1 vessel is not liable for payment of the plaintiff's claim or that the claim cannot be directed against the defendant No. 1 vessel since the same is not a maritime claim.

48. In his cross-examination the P.W.1 stated that the Doosan Capital Co., Ltd., is the owner of the vessel with whom the plaintiff has no direct business relationship and admitted the fact that the plaintiff has got business relationship with Kysco, Shipping Co., Ltd. The P.W.1 further stated that at the request of the master, the plaintiff supplied the bunker to the vessel M. V. BF GLORY. But he has no documentary evidence to show that the master placed the order for supply of the bunker.

49. The P.W.1 filed and made exhibited the following documents;

Exhibit No. Identity of the document

1. Invoice No. S09-031602

2,2(1) Bunker delivery notes

3 vessel's nationality certificate

4 24% interest per annum payment

5,5(1),5(2) Three Bunker delivery notes

6 Original Investment for amount US$ 64,056

7 Investment for amount US$ 1,68,700.24

50. On the other hand the defendant Nos. 1 and 3 examined Mr. Mehedi Hasan, an Advocate of this court as a constituted Attorney of the defendant No. 3, as D.W. 1. This D.W. 1 stated in his examination-in-chief that at the relevant period the defendant No. 1 vessel was under lease with the Kysco Shipping Co. Ltd. and the said company is not the owner of the vessel. The defendant Nos. 1 and 3 has no business relationship with the plaintiff and since the Kysco Shipping Co. Ltd. failed to pay the hire money a notice of termination has been served upon the said company Kysco Shipping Co. Ltd. The defendant No. 3, not having placed any order for supply of the bunker to the defendant No. 1 vessel, is not liable to pay the alleged dues of the plaintiff. The D.W.1 further stated that he deposed as a Attorney of the defendant No. 1 and 3 and the original copy of the power of Attorney appointing him as a Attorney was filed in the registry of the court earlier along with the application for release of the defendant No. 1vessel. When the lease agreement dated 27.5.2008 was shown to the D.W.1 and asked to read, this D.W.1 read the Article 21(2) of the said agreement which provided that "all the loss, cost and share of expenses which must be born or paid by A and shall be born by B and B shall pay it immediately on A's demand. No sharing of expenses shall be applicable to lease charge, specified loss amount or other amount which 'B' must pay to 'A' according to the lease agreement." The D.W.1 also read the Article 25(4) (2) of the said lease agreement. He stated that the person-A mentioned in the lease agreement is 'Doosan Capital Co., Ltd.' and the person-B is the Kysco Shipping Co. Ltd. He expressed his ignorance whether there is a change of lessee but stated that the earlier lessee was Kysco Shipping Co. Ltd. He admitted that the bunker delivery note was signed by the master of the vessel M. V. BF GLORY and that the master derived the authority from the disponent owner of the vessel, although the master put the seal of the vessel itself on the bunker delivery note.

51. ARGUMENTS OF THE PARTIES IN ADMIRALTY SUIT NO. 27 OF 2009.

While summarizing the evidence before this court the learned Advocate Mr. A.K.M. Nazrul Islam, appearing on behalf of the plaintiff argued that the supply of bunker attaches maritime lien upon the res itself. The supply of the bunker to the defendant No. 1 vessel having never been denied by the contesting defendants, the defendant No. 1 vessel M.V. BF GLORY is liable to pay the dues for the supply of bunker to it.

52. The learned Advocate Mr. A.K.M. Nazrul Islam, further argued that the plaintiff is not aware of any lease agree-

ment when it has supplied the bunker to the defendant No. 1 vessel M. V. BF GLORY and since the master and the chief engineer of the vessel received the bunker and signed the delivery note the vessel itself became liable for payment of the same. He further argued that the master of the vessel always acts on behalf of the owner of the vessel and since the defendant No. 3 was the owner at the relevant period of supply of the bunker, the liability for payment of the same also rests upon the shoulder of defendant No.3 and since the defendant Nos. 1 and 3 failed to pay the lawfull claim of the plaintiff, the plaintiff is entitled to get a decree as prayed for along with the pendentility interest @ 20% per annum.

53. The learned Advocate Mr. A.K.M. Nazrul Islam, finally argued that the attachment of maritime lien upon the vessel cannot be prohibited by way of agreement in between the parties and it always remains with the res wherever it goes and for any non-payment of such dues causing maritime lien, the res itself is liable for the realization of the claim of the plaintiff and therefore the defendant No. 1 vessel is liable to be sold in execution of the prospective decree to be granted in favour of the plaintiff.

54. The learned Advocate Mr. A. K. M. Fakrul Islam, appearing on behalf of the defendant Nos. 1 and 3 primarily reiterated his earlier arguments made in Admiralty Suit No. 19 of 2009 and further argued that since the bunker has been allegedly supplied at the period of existence of the lease agreement as aforesaid the lessee is liable to pay the price for the bunker and the lessor, the defendant No. 3, has no liability for the payment of the same and therefore the suit is liable to be dismissed against the defendant Nos.1 and 3 although the same may be maintainable against the defendant No. 2 in personem.

55. These are all about the facts and evidence in Admiralty Suit No. 27 of 2009.

Accumulated issues to be Adjudicated.

56. Upon hearing the evidence and considering the respective claim of the parties in these three Admiralty suits, it appears that issues framed separately is required to be accumulated and recast and accordingly the same has been framed as follows:

1. Is the Admiralty Suit No. 19 of 2009, Admiralty Suit No. 27 of 2009 and Admiralty Suit No. 28 of 2009 is maintainable as an action in rem against the owner of the vessel or maintainable as an action in personem, against any other defendant?

2. Do the plaintiff's in Admiralty Suit No. 19 of 2009, Admiralty Suit No. 27 of 2009 and Admiralty Suit No. 28 of 2009 have any cause of action against the defendants?

3. Which of the defendants in Admiralty Suit No. 19 of 2009,

Admiralty Suit No. 27 of 2009 and Admiralty Suit No. 28 of 2009 are liable for the alleged claim of the plaintiff of these suits?

4. What are the further relief or relieves to be awarded to the plaintiff's of the aforesaid suits?

57. Issue No. 1: the maintainability aspect

This issue of maintainability of the action in rem so far it relates to Admiralty suit No. 19 of 2009 and 28 of 2009 has been seriously dealt with by the learned Advocate Mr. Kamal-ul-Alam. According to the learned Advocate Mr. Alam, the plaintiff's claim in Admiralty suit No. 19 of 2009 since involves realization of unpaid remuneration due on the basis of ship management agreement and for re-imbursement of the price for the supply of bunker, supply of necessaries and the cost of repairs made to the vessel and so far the claim raised in Admiralty Suit No. 28 of 2009 the same caused maritime lien upon the vessel and as such the action in rem against the vessel is maintainable. it is his further contention that the claim of the charterar ought to be taken as directed against the vessel itself causing maritime lien upon it and as such these two Admiralty suits being Admiralty suit No. 19 of 2009 and Admiralty Suit No. 28 of 2009, are maintainable as an action in rem under the provision of Section 4 of the Admiralty Court Act, 2000 (Act 43/2000). His bone of contention is that three categories of situation is contemplated under Section 4 of the Admiralty court Act, 2000, out of which the plaintiff's in these two Admiralty Suits relied upon the Provision of Section 4(2) and Section 4(3) of the Act on the ground that the supply of bunker, necessaries and cost for repair creates maritime lien upon the vessel itself and as such the vessel itself became liable for payment of the maritime claim, since the maritime lien traces with the res alike the order of injunction attached to the land and not against the party.

58. The learned Advocate Mr. Kamal-ul-Alam made out a case that although the registered owner of the vessel relied upon the so-called lease agreement dated 27.5.2008 and a prohibition under Article 27 and 30 of the same, yet it shall have no implication against the actual attachment of maritime lien upon the vessel on the ground that the maritime lien can not be prohibited to be attached to the vessel by contractual agreement and more so that the said lease agreement has not been proved before this court through a competent witness. Therefore, these two Admiralty Suits being No. 19 of 2009 and Admiralty Suit No. 28 of 2009 are squarely maintainable as an action in rem against the vessel M. V. BF Glory.

59. The learned Advocate Mr. AKM. Nazrul Islam appearing on behalf of the plaintiff in Admiralty Suit No. 27 of 2009 in the same manner developed arguments that the plaintiff in this suit

raised claim for the price of the bunker supplied to the vessel M. V. BF Glory and since the claim for bunker causes maritime lien upon the res the instant Admiralty Suit No. 28 of 2009 is squarely maintainable under the Provision of Section 4(3) of the Admiralty Court Act, 2000.

60. The contention of the learned Advocate Mr. AKM. Nazrul Islam is that irrespective of the position of the vessel either under any demise or time charter the claim for payment of bunker always remains with the vessel itself if the bunker is supplied under the order of the master of the vessel and since the plaintiff in Admiralty suit No. 27 of 2009 by P.W.1 proved the invoice through which the receipt of the bunker by the master and chief engineer of the vessel has been proved, the maritime lien accrued against the vessel can be satisfied through the legal proceeding against the vessel itself in rem and as such the Admiralty Suit No. 27 of 2009 is maintainable as an action in rem.

61. The learned Advocate Mr. A.K.M. Fakrul Islam, appearing on behalf of the defendant Nos. 1 and 3 in the aforesaid three Admiralty Suits refuted the claim and contentions of the plaintiff's making out the case that the question of accrual of maritime lien is the vital question as to the maintainability of the instant three Admiralty Suits under the Provisions of Section 4(3) of the Admiralty Court Act, 2000 and according to him the maritime lien arises as security for payment of the debt of a person, primarily against in person, and secondarily against the res since the failure of the person in discharging his debt shift's the burden of payment to the property, i. e. the vessel M. V. BF Glory.

62. The contention of the learned Advocate Mr. AKM. Fakrul Islam is that the fee of ship management, supply of bunker, necessaries and the cost of repair allegedly made to the vessel M. V. BF Glory have been done under the authority of the lease user of the vessel M/S. Kisco Shipping Lines Limited, albeit, most illegally and the same was prohibited under the Provision of Article 27 of the lease agreement dated 27.5.2008 and therefore the alleged maritime lien on the vessel has never been accrued and as such the provision of section 4(3) of the Admiralty Court Act, 2000 cannot be invoked in order to initiate and maintain a proceeding in rem against the vessel. Although any alleged claim of fee for ship management, price of bunker and necessary and also cost of repair may be directed against the lease user M/S. Kisco Shipping Lines Limited the defendant No. 2 in Admiralty Suit No. 19 of 2009 in personeme.

63. The learned Advocate Mr. AKM. Fakrul Islam prayed for dismissal of the instant suit against the defendant Nos. 1 and 3 being the vessel and the owner of the vessel itself, but does not dispute whether the same may be decreed against the defendant No. 2 in Admiralty Suit No. 19 of 2009.

64. DELEBERATION OF THE COURT ON ISSUE NO. 1.

We have heard the learned Advocates, on the point of maintainability of the suit which having an implication vitally on the result of the suit, is required to be disposed off first.

65. The instant two Admiralty suits, being Admiralty Suit No. 19 of 2009 and Admiralty Suit No. 28 of 2009 have been instituted as an action in rem by the same plaintiff M/S Kyung Hae Maritime Company Limited against the defendant No. 1 M.V. BF GLORY, defendant No. 2 M/S. Kysco, Shipping Co., Ltd., defendant No. 3 Owner and parties interested in the vessel M. V. BF Glory, defendant No. 4 Master of M.V. BF GLORY, defendant No. 5 Mariners Transport system company as principal defendants for realization of unpaid ship management fee, bunker price, price for necessaries and service rendered to the vessel M.V. BF GLORY out of which the defendant Nos. 1 and 3, being the vessel and the owner and interested parties in the vessel respectively, M/S Doosan Capital Co. Limited appeared and contested these two suits. The defendant No. 2 M/S. Kysco Shipping Co. Ltd. has not appeared in the suit despite the receipt of the notice of this suit and therefore no question of controverting the assertion of the plaint by them arises at all.

66. In Admiralty Suit No. 27 of 2009 M/S Saint Oil and trading Company Limited being the plaintiff raised a claim for realization of unpaid bunker price against the defendant No. 1 BF GLORY, defendant No. 2 Master of the vessel M.V. BF GLORY, defendant No. 3 Doosan Capital Co., Limited and defendant No 4, Charterar and parties interested in the vessel M. V. BF GLORY and defendant No. 5 Mariners Transport System Company Limited out of which the defendant Nos. 1 and 3 being the vessel and the owner of the vessel have appeared in the suit and contested the same and no charterar being the defendant No. 4 has appeared for contesting the suit nor the said M/S Kysco Shipping Co. Ltd. has been made a defendant in this suit.

67. M/S Biz and Shipping Co. Limited instituted Admiralty Suit No. 28 of 2009 as plaintiff against the vessel M. V. BF GLORY as defendant No. 1, owners and parties interested of the vessel M. V. BF GLORY as defendant No. 2, Master of the M.V. BF GLORY, defendant No. 3, M/S First Shipping Agencies, Local Agent of the vessel M.V. BF GLORY as defendant No. 4 for realization of reimbursement of payment made by the plaintiff as charterar of the vessel M.V. BF GLORY out of which the defendant Nos. 1 and 2, being the vessel and the owner of the vessel M.V. BF GLORY respectively have appeared and contested the suit. According to the learned Advocates of the plaintiff of the three Admiralty Suits the instant suits have been instituted as an action in rem is maintainable under the Provision of Section 4(2) and Section 4(3) of the Admiralty Court Act 2000 (Act No. 43 of 2000).

68. Section 4 of the Admiralty Court Act, 2000 with its sub-section provide as follows;

Admiralty Court Act 2000

Section 4: Mode of exercise of admiralty jurisdiction: (1) Subject to the provisions of section 5, the admiralty jurisdiction of the High Court Division may in all cases be exercised in personem.

(2) The Admiralty Jurisdiction of the High Court Division as the Court of Admiralty may in the cases of claims mentioned in clauses (a) to (c)and (r) of Sub-section (2) of Section 3 be exercised in rem against the property in question.

(3) In any case where the amount claim relates to any ship, aircraft or other property over which there is a maritime lien or other charge, the Admiralty Jurisdiction of the High Court Divisions as the Court of Admiralty may in such a case be exercised by an action in rem against that ship, aircraft or property.

(4)In the case of any such claim as is mentioned in clauses (d) to (q) of sub-section 2 of section 3 of the Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High court Division as the Court of Admiralty may (whether the claim gives rise to a maritime lien on the ship or not) by invoked by an action in rem against the following ships, namely—

(a) if at the time when section is brought, the person has beneficial ownership over all the shares of the ship; or

(b) if any other ship which, at the time when action is brought, is under the beneficial ownership of the person as aforesaid.

5.....

6.....

7.....

8.....

69. In view of the aforesaid provisions, it appears that the question of attachment of maritime lien upon a maritime vessel has a vital implication of the maintainability of a suit as an action in rem.

70. The plaintiff's claim for price of bunker, necessaries and the cost of repairs and also ship management fees in Admiralty Suit No. 19 of 2009 and also charterar expenses in Admiralty suit No. 28 of 2009 are undoubtedly claim against the other party engaged in maritime business to be termed as maritime claim but whether such maritime claim attached any 'maritime lien' upon the vessel M.V. BF GLORY has to be considered by this court on the general meaning of lien as consid-

ered in all the legal jurisdiction of the whole world.

71. CARVER, the celebrated author in Admiralty matter, defined lien as a privileged charge upon a property in order to secure the payment of a legitimate claim. The chambers Dictionary defined lien as a right to retain possession of another's property until the owner pay's a debt or fulfils a contract.

72. The question of attachment of maritime lien on the res has been considered in many cases in the common law jurisdiction. In THE CASTLEGATI reported in 1893 AC 38 Lord Watson observed that "a proper maritime lien must have its root in the personal liability of the owner".

73. In the case of THE BOLD BUCCLEGGH, sir John Jervies provided the first comprehensive and authoritative definition of maritime lien in the following language;

".....*A maritime lien is well defined ...to mean a claim or privilege upon a thing to be carried into effect by legal process.....that process to be a proceeding in rem.....this claim of privilege travels with the thing in to whosever possession it may come. It is in chohet from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached*"

74. Therefore, it appears that *a maritime lien will arise when owner of maritime vessel incurr's debt for which he is personally liable and defaults in repaying the debt a charge is immediately created and automatically attached to his property i.e. the vessel as a security for re-payment. Therefore, a maritime claim may be turned into a maritime lien to be attached to the maritime res if the claim arises against the owner of that particular maritime res in personem. But a long practice in maritime jurisprudence have classified the charges, which only creates maritime lien.*

75. The celebrated author D.R. THOMAS in his British shipping laws writes that

"currently *following claims have been recognized as creating maritime lien:*

a) Damage done to ship

b) Salvage

c) Seamans wages

d) Master's wages & disbursements

e) Battomry and Respondtia".

76. There appears no other maritime claim as identified as creating maritime lien upon the vessel neither in the common law jurisdiction or elsewhere.

77. Doosan Capital Co. Limited is the admitted registered owner of the vessel M.V. BF GLORY. In paragraph No. 3 of the plaint in the Admiralty Suit No. 19 of 2009 the plaintiff asserted that after negotiation the plaintiff made a ship management agreement with the

deponent owner/charterer, the defendant No. 2 on 22.9.2008 regarding the vessel M. V. TINAI and M. V. KUNAI (now renamed as M. V. BF GLORY i.e. the defendant No. 1 vessel. In paragraph No. 3 of the plaint in Admiralty Suit No. 28 of 2009 the plaintiff stated that it has acted as voyage charterer of the defendant No. 1 vessel by virtue of charter party (fixture note) agreement dated 2.3.2009 and 19.3.2009 with BF Shipping Company (as owner of the defendant No. 1 vessel M.V. BF GLORY ex-M.V.KUNAI). The vessel M. V. BF GLORY and the owner of the vessel M/S. Doosan Capital Co. Limited in their written statement asserted that the M/S. Doosan Capital Co. Limited is the original owner of the vessel M. V. BF GLORY and under a lease agreement dated 27.5.2008 the possession of the vessel M. V. BF Glory was handed over to the lease user M/S Kysco Shipping Co. Ltd. Upon such factual aspect the D.W.1 in both the Admiralty Suit No. 19 of 2009 and Admiralty Suit No. 28 of 2009 stated in his deposition that M/S Kysco Shipping Co. Ltd., is the lease user of the vessel M. V. BF GLORY. This D.W.1 also exhibited the lease agreement as exhibit-B who has been heavily assailed by the learned Advocate Mr. Kamal-ul-Alam on the ground that no authority of the D.W.1 has been filed to this Court to depose and the Exhibit-B being photocopy of the documents, allegedly to be a lease agreement, cannot be taken into consideration by this Court.

78. It appears that the D.W.1 denied this suggestion that he has not filed the power executed by the M/S. Doosan Capital Co. Limited in his favour to depose in these suits, rather he has asserted that the power in original has been filed in the registry of this Court along with the application for release of the vessel M.V. BF GLORY and the learned Advocate Mr. A.K.M. Fakrul Islam by an application prayed for bringing the original copy of the power from the office although he has made a photocopy of the said power as exhibit for which we have brought the power from the registry wherefrom it appears that the D.W.1 has been engaged by the M/S. Doosan Capital Co. Limited to depose in these suits. Therefore, the argument of the learned Advocate Mr. Kamal-ul-Alam assailing the authority of D.W.1 to depose has no merit to be considered by this Court.

79. It further appears that the exhibit-B, although a photocopy of the lease agreement, executed in between the owner of the vessel M. V. BF GLORY, M/S. Doosan Capital Co. Limited and the lease user M/S. Kysco Shipping Co. Ltd. has been admitted by the plaintiff that the defendant No. 2 was the disponent owner as charterar of the vessel M. V. BF GLORY in the plaint of the Admiralty Suit No. 19 of 2009. Therefore this assertion proved by admission that the defendant No. 2 M/S. Kisco Shipping Lines Limited, in Admiralty Suit No. 19 of 2009, is not the original owner of the vessel M. V. BF GLORY(Ex-KUNAI).

80. Therefore it is now to ascertain whether this deponent owner M/S. Kysco Shipping Lines Ltd. had the authority to enter into ship management agreement with the plaintiff.

81. In this respect the P.W. 2, the president of the plaintiff's company in his examination-in-chief, categorically stated that the plaintiff's company entered into a ship management agreement on 22nd September, 2008 with the defendant No. 2 M/S. Kysco Shipping Co. Ltd. for managing the defendant No. 1 vessel, making all kinds of supply including bunkers, marine insurance, supply of the seamen and their wages and repair and all these supplies were made to the defendant company the period commencing from 28th October, 2009. This P.W.2 exhibited the ship management agreement as exhibit No. 2 and he proved the signature of the defendant No. 2 M/S. Kysco Shipping Co. Ltd., upon the said agreement.

82. The D.W.1 in this respect stated that the Kysco Shipping Co. Ltd. made the exhibit-2 unauthorised since the Article 27 of the lease agreement prohibited such an agreement to be executed by the lease users. But the learned Advocate Mr. Giasuddin Ahmed, appearing on behalf of the plaintiff in Admiralty Suit No. 19 of 2009 and 28 of 2009, categorically asserted that Article 27 of the lease agreement reveals that the basic right of the lease user cannot be transferred to a third party and since the basic rights involved the lease hold right of the Kysco Shipping Co. Ltd. to use the vessel the same cannot be transferred under the prohibition of Article 27 of the lease agreement. But since the Kysco Shipping Co. Ltd. has only made the ship management agreement, the same will not come under the purview of the prohibition as made in Article 27 of the lease agreement dated 27.5.2008.

83. Upon examination of Article 27 of the lease agreement, Exhibit-B, it appears that these stipulated a restriction in the Provision against the transferability of the rights of the lease uses to any 3rd party. But the question involved here is not regarding the prohibition, rather the question involve is whether the claim for the price of bunker and necessaries, the cost of ship management and the cost of repairs as allegedly incurred by the plaintiff can be directed against the original owner of the vessel when the vessel was under the deponent owner as charterer who admittedly received the said services.

84. It further appears from exhibit-3,6,8,10,12,14 and 16 in Admiralty Suit No. 19 of 2009, which are statement of accounts submitted to the defendant No. 2 the Kysco Shipping Co. Ltd. so also the exhibit-5 series being the receipt invoice and delivery note to the defendant No. 2 Kysco Shipping Co. Ltd., that the master of the defendant No. 1 vessel and the chief Engineer received the supply as alleged. The P.W.2 proved the signature of the master of the vessel and the engineer on

exhibit-5 series which are marked as exhibit-7 series. Therefore question arises as to the authority of the Master whether he has received the service and the bunker, as supplied by the plaintiff, under the authority of the original owner or the admitted deponent owner/charterer of the vessel?

85. It appears that at the relevant period admittedly the vessel was under the lease agreement with M/S. Kysco Shipping Co. Ltd., the defendant No. 2, under which the entire control and possession of the vessel was transferred to the defendant No. 2 Kysco Shipping Co. Ltd. *A lease of a vessel for specific period has the implication as Bareboat charter party upon which the full possession and control of the vessel and its crew member including the master goes to the lessee and in that case the master of the vessel derives authority from the lessee and not from the original owner.* In this respect we can profitably consider the decision in the case of Marine Oil Broking Company Pte Ltd.-Vs-Daizu Maru reported in 55 DLR(HC) 471 as referred by the learned Advocate Mr. Kamal-ul-Alam wherein their lordship in this Court on a similar point held as under;

"Had it been proved on a preponderance of evidence that the bunkers were supplied on the orders made for and on behalf of the Owners of Daizu Maru, in that case, the plaintiff would be able to maintain an action in rem against the vessel, otherwise not"

86. In the aforesaid case a similar cause arose as to who is liable for payment of bunker price when the vessel M. V. Daizu Maru was under time charter with the defendant. This decision is well founded and there is no reason to disagree with the position mentioned therein. Because, the maritime lien accrues as only as security for payment for a debt of a person or company and only against the property of the creditor. In the instant case it appears that the claim of the plaintiff being a debt is squarely against the defendant No. 2 M/S Kysco, Shipping Co. Ltd., which will create maritime lien upon their ownership vessel and not upon a vessel upon which they have only a lease hold interest for a definite period.

87. In Admiralty Suit No. 19 of 2009 and Admiralty Suit No. 28 of 2009 since the defendant No. 2 admittedly not the real owner rather the deponent owner, particularly under a lease agreement, the debt incurred by it cannot create a lien upon the property not owned by it. The vessel M.V. BF GLORY being the property of real owner of M/S. Doosan Capital Co. Limited cannot be liable for the debt created by the lease user of the vessel, liability of which always remains with the said company M/S. Kysco Shipping Co. Ltd. Therefore, this court finds that the maritime claim of the plaintiff in respect of the ship management fee price of bunker and necessaries and cost of repair of the vessel could not cause maritime lien upon the vessel M. V. BF GLORY and as such cannot be realized in Admiralty Jurisdiction through an action in rem

and therefore the claim of the plaintiff against the res as an action in rem cannot be maintained neither against the vessel itself nor the real owner of the vessel M/S. Doosan Capital Co. Limited.

88. But does that mean the plaintiff's claim will be frustrated against M/S. Kysco Shipping Lines Ltd. as it went to bankruptcy. The answer is empathic 'No'.

89. It appears that the plaintiff rendered service in favour of the said Kysco shipping Lines Ltd. under the ship management agreement, supplied the bunker to the vessel and necessaries and also rendered service in respect of the repair of the vessel under the authority of the defendant No. 2 Kysco Shipping Co. Ltd. and therefore the defendant No. 2 is liable to pay the price due to the plaintiff. Accordingly, the instant proceeding in Admiralty Suit No. 28 of 2009 is maintainable as an action in personem against the said defendant No. 2 company M/S. Kysco Shipping Co. Ltd. and also against the BF Shipping Company Limited who was the later lease user of the vessel at the relevant time. Therefore, the issue No. 1 as to the maintainability of the suit is disposed off in favour of the plaintiff , albeit, only as an action in personem against the defendant No. 2 M/S. Kysco Shipping Co. Ltd., in Admiralty Suit No. 19 of 2009 and against the BF Shipping Company Limited in Admiralty Suit No. 28 of 2009.

90. Admiralty Suit No. 27 of 2009 has also be alleged to have been initiated as an action in rem. In this suit the plaintiff raised claim for the price of bunker against the vessel M.V. BF GLORY on the different fact that not only bunker has been supplied to the vessel M.V. BF GLORY when the same was named as M.V. KUNAI, but also to the sister vessel M.V. TINAI (now M.V. BF Hope) during the period of 14th March, 2009 at Fujeria United Arab Emirates. The D.W.1 stated in his evidence that the vessel was under the lease hold use of the said Kysco Shipping Co. Ltd. at the relevant date 14th March, 2009. As the court has already held elsewhere in this judgment that the supply of bunker to the vessel M.V.GLORY and received by the master of the said vessel since did not confer any maritime lien upon the vessel, the instant proceeding in Admiralty Suit No. 27 of 2009 to realize unpaid bunker price from the owner of the vessel for both the vessel also is not maintainable as an action in rem but maintainable as an action in personem against the charterer and parties interested in the vessel M.V. BF Glory the defendant No. 4 the registered owner of the vessel Doosan Capital Co. Limited the defendant No. 3 is not liable for the payment of the price of bunker as supplied by the plaintiff to the vessel which is a undoubted liability of the charterar. Therefore, the Issue No. 1 in respect of Admiralty Suit No. 27 of 2009 is disposed off in favour of the plaintiff only to the extent that the instant suit is maintainable in personem against

the defendant No. 4 Charterer and parties interested the vessel M. V. BF Glory.

91. Issue No. 2 the cause of action aspect:

P.W.2 in Admiralty Suit No. 19 of 2009 and Admiralty suit No. 28 of 2009 proved the statement of accounts and the receipt of invoice by the master of the vessel M.V. BF GLORY in respect of the supply of bunker and also invoices of the ship management fee along with the bill for the repair the supply of seamens and their wages against which no dispute has been made by the contesting defendant, rather it has been admitted by the defendant No. 1 and 3 that since the defendant No. 2 Kysco, Shipping Co., Ltd., and the BF Shipping Limited at their respective lease period obtained the service and the supply of bunker and necessaries, the said defendant No. 2 is liable to pay the dues of the plaintiff. This court finds substance in the contention and hold finds that the plaintiff successfully proved the cause of action of the suit against the defendant No. 2 Kysco Shipping Co. Ltd. and the BF Shipping Ltd. so far the claim as made in Admiralty Suit No. 19 of 2009 and Admiralty Suit No. 28 of 2009 is concerned.

92. It appears that in Admiralty suit No. 27 of 2009 bunker was also supplied on 14th March, 2009 to the vessel M.V. BF GLORY while the same was named as M.V. KUNAI but the said vessel M. V.KUNAI was at that time was on lease to BF Shipping Limited and therefore the BF Shipping Limited is liable to pay the price of the bunker to the plaintiff as receipt by the master of the vessel under the exhibits, made before this court, are the acknowledgment of the receipt of the bunker delivery.

93. But in Admiralty Suit No. 27 of 2009 although a further claim was raised in respect of supply of bunker to M.V. TINAI on 7th March, 2009, but no cogent evidence has been adduced by the plaintiff in this suit in respect of supply of bunker to the vessel M.V. TINAI when the same vessel allegedly to have been under the possession of the concerned lessee BF Shipping Limited. Therefore, the claim against the M.V. TINAI not being proved before this Court cannot entertain the same and finds that the so far the question of payment of bunker price is concerned regarding the BF GLORY (ex-KUNAI), the plaintiff of Admiralty Suit No. 27 of 2009 successfully proved the cause of action against the BF Shipping Limited. Therefore, this Issue is disposed off in favour of the plaintiff of the aforesaid three suits and against the defendant Kysco Shipping Co. Ltd. and BF Shipping Limited.

94. Issue No. 3 the liability aspect:

The defendant No. 2 in Admiralty Suit No. 19 of 2009, the Kysco shipping Lines Limited opted not to contest the suit although the notice has been properly served upon their local agent, defendant No. 5 Mariners Transport

System Company, 67 Agrabad Commercial Area, Chittagong, so also the owners and parties interested in the vessel M. V. BF GLORY did not contest the suit despite the fact that the notice of the suit has been served with notice of the suit duly.heir local agent M/S. Atlas Shipping Agency, 31, Agrabad Commercial Area, Chittagong.

95. In Admiralty Suit No. 27 of 2009 the defendant No. 4 Charterer and parties interested in the vessel M.V. BF GLORY also opted not to contest the suit although the local agent of the Charterer and parties Interested in the vessel M/S. Mariners Transport System company Limited has been served with notice of the suit duly. Therefore all the suits have proceeded exparte against the aforesaid defendants. The exhibited documents in the aforesaid suit, the corroborating evidence of P.Ws has clearly proved that the lease user of the vessel M.V. BF GLORY (ex-KUNAI) since received the service, bunkers, necessaries and the repairs of the vessel are liable to pay the price and cost of the same to the plaintiff. Therefore as the plaintiff could successfully proved the cause of action against the said defendant as liable in personema, decree is required to be passed against the said defendant in favour of the plaintiff for realization of the amount as claimed in the suit. Therefore, this issue is disposed off in favour of the plaintiff and against the aforesaid defendant.

96. Issue No. 4: aspect of further relief or relieves to the plaintiff.

It appears from the evidence on record that the defendant No. 2 in Admiralty Suit no. 19 of 2009 Kysco Shipping Co. Ltd. is either about to be bankrupt or in the meantime became bankrupt. But the status of the other defendant i.e. the BF Shipping Ltd. has not been clarified by any cogent evidence before this Court. Therefore, this Court finds that the decree to be passed in the suit against the Kysco Shipping Co. Ltd. will be executable against the asset of the said company, the defendant No. 2 Kysco Shipping Co. Ltd. if the same has already done into liquidation, as a secured debt of the plaintiff. Therefore, this Court finds that if the said company Kysco Shipping Co. Ltd. already liquidated the decree passed against it shall stands against the available assets in the hands of the liquidator with a priority in payment. Therefore, this Issue is disposed off in favour of the plaintiff against the aforesaid defendant.

97. As all the Issues have been disposed off in favour of the plaintiff, these three suits is required to be decreed in favour of the plaintiff not to the strict sense of the prayer but in modified form.

The Court fee paid is sufficient.

98. Hence, ordered.

Let a decree be and hereby passed in Admiralty suit No. 19 of 2009 for realization of an amount of US$ 15,90,442.76 (equivalent to BD. Tk. 11,02,97,152.70) along with interest pendentility @ 20%

of the decreetal amount from the date of filing of the suit and also the cost of suits against the defendant No. 2 Kysco Shipping Co. Ltd. and the suit is dismissed against the defendant Nos. 1, 3 and 4 and also decreed in Admiralty Suit No. 28 of 2009 against the BF Shipping Limited, Parties and Interested in the vessel MV. BF GLORY (ex-KUNAI) for realization of an amount of US$ 80,561.00(equivalent to BD. Tk. 55,86,905.35) along with interest pendentility @ 20% till the actual realization of the decreetal amount and also the cost of the suit. Further it is hereby decreed in Admiralty Suit No. 27 of 2009 against the defendant No. 4 Charterer and Parties Interested in the vessel M.V. BF. Glory being BF Shipping Limited for realization of an amount of US$ 1,47,917.32 (equivalent to BD Tk. 1,01,32,336.42) along with interest pendentility @ 20% and the cost of the suit and the suit is dismissed against the defendant Nos. 1, 2 and 3.

99. All the amount decreed will be treated as liquidated debt against the defendant No. 2 in Admiralty Suit No. 19 of 2009 M/S. Kysco Shipping Co. Ltd. and also against the BF. Shipping Limited in Admiralty Suit No. 27 of 2009 and Admiralty Suit No. 28 of 2009.

Case Cited

* ***Marine Oil Broking Company Pte Ltd. Vs Daizu Maru 55 DLR (HC) 471.***

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

Muhammad Abdul Hafiz-J.
And
Md. Ruhul Quddus-J.

CRIMINAL REVISION NO. 823 OF 2012
with
CRIMINAL REVISION NO. 826 OF 2012

(Applications under sections 439 and 435 of the Code of Criminal Procedure)

Md. Shafayet Hossain Rana, son of late Md. Motiur Rahman, Sabbir Tower (5th Floor), 3/4, Purana Paltan, Police Station-Paltan, District-Dhaka ..... Petitioner in both the revisions.

Vs.

1. The State ..... Opposite parties.
2. Md. Syed Rejaul Karim Salim, son of late Abdur Rauf and the Managing Director, Gomati Housing Ltd. House No.38 (1st Floor) Road No.5, Block-G, Police Station-Banani, District- Dhaka ... Opposite parties in both the revisions

For the petitioner : Mr. Md. Abdul Quadir Talukder, Advocate.

For opposite party 1 : Mr. A. S. M. Fazle Rabbi Khan, Assistant Attorney General.

Judgment: January 21, 2014

Negotiable Instrument Act, 1881-

Section 138- Crossed cheque "account payee" must be enchased

through the account of the holder in whose favour it was issued-

Since the 'Account payee cheque' mentioned in the complaint-petition has not lost it's character as negotiable instrument, the same can be easily brought within the mischief of 'any cheque' mentioned in section 138(1) of the Negotiable Instruments Act because cheque includes 'account payee cheque' also ..... (Para 9)

From a mere reading of sub-section (1) of section 138 of the Act it is apparent that the legislature has consciously used the word any 'cheque' drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account. Legislature very well knew about section 123A of the Act. Had it been the intention of the legislature to exclude a crossed cheque "account payee" as used in clause (a) of sub-section (2) of section 123A from the mischief of sections 138 and 141 of the Act, 1881, then they would have definitely mentioned cheque other than 'crossed cheque'. It appears to us that the moment a cheque is dishonoured, either a bearer or crossed cheque "account payee", for any reason whatsoever including the alleged dissimilarity of the signature of the drawer on the cheque as found by the High Court Division while interpreting the meaning of the abbreviation "etc" used in the heading of section 138, the offence under the section shall be complete and in that case the payee shall have the liberty to file a petition of complaint before the competent Magistrate against the drawer of the cheque, of course, by complying with the proviso to sub-section (1) of section 138. And in the instant case admittedly those requirements were clearly complied with before filing the case. The legislative mandate as used in clause (a) of sub-section (2) of section 123A of the Act, 1881 that when a cheque is crossed "account payee" shall cease to be negotiable means it cannot be negotiated or encashed with any other person except the person in whose favour the same was issued. To make it clearer, a crossed cheque "account payee" must be enchased through the account of the holder in whose favour it was issued. So, by no means, a crossed cheque "account payee" loses its character as a negotiable one within the meaning of section 138 of the Act, 1881 moreover, section 13 of Act, 1881 which has defined "Negotiable instrument" has not made any distinction between crossed cheque "account payee" or cheque of other kind such as 'bearer cheque' as we ordinarily mean. Thus, we find that section 123A of the Act, in no

way, creates any bar in proceeding with a case under section 138 of the Act, 1881. ..... (Para 10)

JUDGMENT

MD. RUHUL QUDDUS-J: These two Rules between the same parties involving common questions of facts and law have been heard together and are being disposed of by one judgment.

2. The Rule in Criminal Revision No. 823 of 2012 was issued challenging order No. 22 dated 29.04.2012 of the Special Sessions Court No.1, Dhaka passed in Special Session Case No. 08 of 2010 arising out of C.R. Case No. 5515 of 2008 under section 138 of the Negotiable Instrument Act, 1881 discharging opposite party 2 Md. Syed Rejaul Karim Salim on an application under section 265C of the Code of Criminal Procedure, while Rule in the latter was issued challenging order No. 25 dated 29.04.2012 of the same Court passed in Special Case No. 223 of 2009 arising out of C.R. Case No. 5516 of 2008 discharging the opposite party 2.

3. The petitioner had filed both the complaint cases on the allegations, *inter alia,* that opposite party 2 had given him two cheques both dated 11.02.2008 one being No. SSD14872 for an amount of taka seventy lac fifty-two thousand two hundred twenty-six (70,52,226/-) only and another being No.SSD 14871 dated 11.2.2008 for an amount of taka twenty lac (20,00,000/-) only to be drawn on his account No. 1503100286445001 maintained with BRAC Bank Ltd. The petitioner placed the cheques for encashment through his bank H.S.B.C. Bank Ltd. but both the cheques were dishonoured on 15.07.2008 with remark "insufficient fund". Thereafter, the complainant-petitioner served two statutory legal notices both dated 14.08.2008 upon the opposite party 2 informing him about the dishonour of the two cheques and demanding payment of the amount. Getting no result, he was constrained to file the complaint cases against opposite party 2 under section 138 of the Negotiable Instrument Act in the Court of Chief Metropolitan Magistrate, Dhaka.

4. The Chief Metropolitan Magistrate, Dhaka on examining the complainant issued process upon the opposite party 2, who voluntarily surrendered before the Chief Metropolitan Magistrate and obtained bail on furnishing an undertaking that he would pay the entire amount by installments. The cases being ready for trial were sent to the Metropolitan Sessions Judge, Dhaka, wherefrom those were sent to the Special Sessions Court No. 3 and thereafter to Special Sessions Court No.1 for disposal.

5. Meanwhile the opposite party 2 instituted Title Suit No. 07 of 2010 against the petitioner as sole defendant before the Third Court of Joint District Judge, Dhaka for declarations *inter alia,* that there was transaction

of taka sixty-seven lac only between the parties, out of which taka fifty lac was already paid by the plaintiff to the defendant and taka seventeen lac only was due with some other declarations. In paragraphs 12, 13 and 14 of the plaint in the suit opposite party 2 referred to the facts relating to issuance of the two cheques in question.

6. Opposite party 2 also filed two separate applications in the complaint cases for staying the proceedings on the ground of pendency of the said title suit and being rejected further attempted to stay the proceedings by filing applications on the ground of moving in the High Court Division. Thereafter, he filed applications under section 265C of the Code of Criminal Procedure for his discharge from both the cases taking the plea that during the state of emergency in 2007, he was compelled to issue the cheques under illegal pressure of one Major Afzal, for which he had already instituted a title suit and that since on the self same cheques, a civil suit was pending, he (opposite party 2) cannot be prosecuted simultaneously in the present cases of criminal nature. The learned Special Judge by the impugned orders allowed the applications and discharged opposite party 2 from the cases without any discussion on the point raised in the application for discharge, but on a different ground that the cheques were account payee cheques which according to section 123A of the Negotiable Instrument Act did not fall within the definition of Negotiable Instrument Act and that apparently the cheques were issued by managing director of a company, but the complainant did not indict the other directors of the company and therefore, the instant cases could not proceed against the managing director as sole opposite party.

7. Mr. Md. Abdul Quadir Talukder, learned Advocate appearing for the complainant-petitioner in the both the cases submits that it has already been settled that a proceeding under section 138 of the Negotiable Instrument Act is maintainable even in the event of dishonoring a crossed cheque. He further submits that the accused-opposite party issued the cheques in favour of the petitioner. He made the previous transaction with the complainant in personal capacity, even he instituted the title suit in his name as an individual and also signed an agreement with the petitioner in personal capacity. There is no scope to take the plea at this stage that the cheques were issued by a company and without indicting all the directors, the cases are not maintainable. In support of his submission Mr. Quadir refers to the cases of Mohammad Ali vs. State and another, 64 DLR 426 and Arif-uz-Zaman vs. State, 17 BLC(AD) 167.

8. The copies of the Rules were served upon the opposite party 2, who appeared through his learned Advocate Mr. Md. Showkat Ullah Khan by filing a power on 14.01.2013

against entry No. 2523. We kept it pending in the list for several days as a part heard matter just to accommodate the learned Advocate for opposite party 2, but he did not feel to appear. However Mr. A. S. M. Fazle Rabbi Khan, learned Assistant Attorney General appears for the Opposite Party-State and submits that when a *prima facie* case under section 138 of the Negotiable Instrument Act is made out i.e. a cheque is bounced, statutory legal notice is served and the case is filed within time, there is a very little scope of quashment of the case.

9. We have gone through the documents and the decisions cited. In the case of Mohammad Ali vs. State and another, 64 DLR 426 under similar facts and circumstances Md. Anwarul Haque, J as his lordship then was observed:

> *"since the 'Account payee cheque' mentioned in the complaint-petition has not lost it's character as negotiable instrument, the same can be easily brought within the mischief of 'any cheque' mentioned in section 138(1) of the Negotiable Instruments Act because cheque includes 'account payee cheque' also."*

10. In the case of Arif-uz-Zaman (Md) vs. State, 17 BLC (AD) 167 his lordship Md. Abdul Wahhab Miah, J speaking on behalf of the Court observed:

> *"From a mere reading of sub-section (1) of section 138 of the Act it is apparent that the legislature has consciously used the word any 'cheque' drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account. Legislature very well knew about section 123A of the Act. Had it been the intention of the legislature to exclude a crossed cheque "account payee" as used in clause (a) of sub-section (2) of section 123A from the mischief of sections 138 and 141 of the Act, 1881, then they would have definitely mentioned cheque other than 'crossed cheque'. It appears to us that the moment a cheque is dishonoured, either a bearer or crossed cheque "account payee", for any reason whatsoever including the alleged dissimilarity of the signature of the drawer on the cheque as found by the High Court Division while interpreting the meaning of the abbreviation "etc" used in the heading of section 138, the offence under the section shall be complete and in that case the payee shall have the liberty to file a petition of complaint before the competent Magistrate against the drawer of the cheque, of course, by complying with the proviso to sub-section (1) of section 138. And in the instant case admittedly those requirements were clearly complied with before filing the case. The legislative mandate as used in clause (a) of sub-section (2) of section 123A of the Act, 1881 that when a cheque is crossed "account payee" shall cease to be negotiable means it*

cannot be negotiated or encashed with any other person except the person in whose favour the same was issued. To make it clearer, a crossed cheque "account payee" must be enchased through the account of the holder in whose favour it was issued. So, by no means, a crossed cheque "account payee" loses its character as a negotiable one within the meaning of section 138 of the Act, 1881 moreover, section 13 of Act, 1881 which has defined "Negotiable instrument" has not made any distinction between crossed cheque "account payee" or cheque of other kind such as 'bearer cheque' as we ordinarily mean. Thus, we find that section 123A of the Act, in no way, creates any bar in proceeding with a case under section 138 of the Act, 1881."

11. It appears from the supplementary affidavits (affirmed on 12.01.2014) that the opposite party 2 instituted Title Suit No.07 of 2010 by his name in individual capacity although the description "Managing Director, Gomoti Housing Limited" has been given as his principal identity. The same name and description in same manner have been used in the complaint cases filed by the petitioner. Opposite party 2 executed the powers filed by Mr. Showkat Ullah Khan in the instant criminal revisions simply by putting his name in individual capacity. For the sake of argument, even if the cheques were issued on behalf of the company, the drawer of the cheques being the managing director sitting at the helm of the affairs of the company cannot escape the liability. Moreover, he did not take any such ground in his application under section 265C and did not make any reply after service of the notices on him in individual capacity. Under the facts and circumstances of the present cases, we do not think that the drawer of the cheques can be discharged without facing trial.

12. In view of the decisions cited and the discussions made above we find substance in the Rules.

13. Accordingly, both the Rules are made absolute. The order No.22 dated 29.04.2012 passed by the Special Sessions Judge, Court No.1, Dhaka in Special Sessions Case No.8 of 2010 (arising out of C.R. Case No. 5515 of 2008) and the order No. 25 dated 29.04.2012 passed by the Special Sessions Judge, Court No.1, Dhaka in Special Sessions Case No.223 of 2009 (arising out of C.R. Case No. 5516 of 2008) are set aside. The trial court is directed to proceed with trial of both the cases in accordance with law and to dispose of the same expeditiously.

14. Send down the lower Courts' records and communicate the judgment.

Case Cited

* ***Mohammad Ali vs. State and another, 64 DLR 426***

* ***Arif-uz-Zaman (Md) vs. State, 17 BLC (AD) 167***

The Mainstream Law Reports 2014 (Vol. XIX)

FOREIGN JUDGMENT

THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction

S. H. Kapadia-CJI.
D.K. Jain-J.
Surinder Singh Nijjar-J.
Ranjana Prakash Desai-J.
Jagdish Singh Khehar-J.

I.A. Nos. 4-5, 10, 11, 12-13, 16-17, 18, 19, 20-21, 22-23, 24-25, 26-27, 30-31, 32-33, 34, 35-36, 37-38, 39-40, 41-42, 43-44, 45-46, 47-48, 49-50, 55-56, 57, 58, 59, 61 and 62

in

C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011

Sahara India Real Estate Corp. Ltd. & Ors. ..... Appellants

Vs.

Securities & Exchange Board of India & anr. ..... Respondents.

with

I.A. Nos. 14 and 17 in C.A. No. 733 of 2012

New Delhi; September 11, 2012

The Apex Court of Indian Supreme Court delivered its much-awaited judgment in the "Media Guidelines" case. Constitutional Bench headed by the Chief Justice, while declining to lay down broad guidelines for the media, did provide certain specific directions with respect to the reporting of matters in the mass media. The most pertinent aspect of the judgment relates to the doctrine of postponement whereby the concerned High Court or the Supreme Court can direct that the publication of judicial proceedings be delayed for a certain period of time. The judgment, penned by the Chief Justice of India, is built on the presumption that under the Indian Constitution, "probably, no values are absolute" and that "It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like the right to a fair trial." The Court went on to add that even the concept of "open justice" is not absolute and hence Courts may place a restriction on the same in "the interest of administration of justice". Paras 17 to 24 and 34 dilate upon the Constitutionalization of free speech, the US approach, the English approach, the Canadian Approach, the Australian Approach and the New Zealand Approach has also been considered-

JUDGMENT

S. H. KAPADIA, CJI-Finding an acceptable constitutional balance

between free press and administration of justice is a difficult task in every legal system.

Factual background

2. Civil Appeal Nos. 9813 and 9833 of 2011 were filed challenging the order dated 18.10.2011 of the Securities Appellate Tribunal whereby the appellants (hereinafter for short "Sahara") were directed to refund amounts invested with the appellants in certain Optionally Fully Convertible Bonds (OFCD) with interest by a stated date.

3. By order dated 28.11.2011, this Court issued show cause notice to the Securities and Exchange Board of India (SEBI), respondent No. 1 herein, directing Sahara to put on affidavit as to how they intend to secure the liabilities incurred by them to the OFCD holders during the pendency of the Civil Appeals.

4. Pursuant to the aforesaid order dated 28.11.2011, on 4.01.2012, an affidavit was filed by Sahara explaining the manner in which it proposed to secure its liability to OFCD holders during the pendency of the Civil Appeals.

5. On 9.01.2012, both the appeals were admitted for hearing. However, IA No. 3 for interim relief filed by Sahara was kept for hearing on 20.01.2012.

6. On 20.01.2012, it was submitted by the learned counsel for SEBI that what was stated in the affidavit of 4.01.2012 filed by Sahara inter alia setting out as to how the liabilities of Sahara India Real Estate Corporation Ltd. (SIRECL) and Sahara Housing and Investment Corporation (SHICL) were to be secured was insufficient to protect the OFCD holders.

7. This Court then indicated to the learned counsel for Sahara and SEBI that they should attempt, if possible, to reach a consensus with respect to an acceptable security in the form of an unencumbered asset. Accordingly, IA No. 3 got stood over for three weeks for that purpose.

8. On 7.02.2012, the learned counsel for Sahara addressed a personal letter to the learned counsel for SEBI at Chennai enclosing the proposal with details of security to secure repayment of OFCD to investors as precondition for stay of the impugned orders dated 23.06.2011 and 18.10.2011 pending hearing of the Civil Appeals together with the Valuation Certificate indicating fair market value of the assets proposed to be offered as security. This was communicated by e-mail from Delhi to Chennai. Later, on the same day, there was also an official communication enclosing the said proposal by the Advocate-on-Record for Sahara to the Advocate-on-Record for SEBI.

9. A day prior to the hearing of IA No. 3 on 10.02.2012, one of the news channels flashed on TV the details of the said proposal which had been com-

municated only inter parties and which was obviously not meant for public circulation. The concerned television channel also named the valuer who had done the valuation of the assets proposed to be offered as security.

10. On 10.02.2012, there was no information forthcoming from SEBI of either acceptance or rejection of the proposal.

11. The above facts were inter alia brought to the notice of this Court at the hearing of IA No. 3 on 10.02.2012 when Shri F.S. Nariman, learned senior counsel for Sahara orally submitted that disclosure to the Media was by SEBI in breach of confidentiality which was denied by the learned counsel for SEBI. After hearing the learned counsel for the parties, this Court passed the following order:

> "We are distressed to note that even "without prejudice" proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate orders could be passed by this Court with regard to reporting of matters, which are sub-judice."

12. Pursuant to the aforesaid order, IA Nos. 4 and 5 came to be filed by Sahara. According to Sahara, IA Nos. 4 and 5 raise a question of general public importance. In the said IA Nos. 4 and 5, Sahara stated that the time has come that this Court should give appropriate directions with regard to reporting of matters (in electronic and print media) which are sub judice. In this connection, it has been further stated:

"it is well settled that it is inappropriate for comments to be made publicly (in the Media or otherwise) on cases (civil and criminal) which are sub judice; this principle has been stated in Section 3 of the Contempt of Courts Act, which defines criminal contempt of court as the doing of an act whatsoever which prejudices or interferes or tends to interfere with the due course of any judicial proceeding or tends to interfere or interfere with or obstruct or tends to interfere or obstruct the administration of justice". In the IAs, it has been further stated that whilst there is no fetter on the fair reporting of any matter in court, matters relating to proposal made inter-parties are privileged from public disclosure. That, disclosure and publication of pleadings and other documents on the record of the case by third parties (who are not parties to the proceedings in this court) can (under the

rules of this Court) only take place on an application to the court and pursuant to the directions given by the court (see Order XII, Rules 1, 2 and 3 of Supreme Court Rules, 1966). It was further stated that in cases like the present one a thin line has to be drawn between two types of matters; firstly, matters between company, on the one hand, and an authority, on the other hand, and, secondly, matters of public importance and concern. According to Sahara, in the present case, no question of public concern was involved in the telecast of news regarding the proposal made by Sahara on 7.02.2012 by one side to the other in the matter of providing security in an ongoing matter. In the IAs, it has been further stated that this Court has observed in the case of ***State of Maharashtra v. Rajendra J. Gandhi [(1997) 8 SCC 386]*** that: "A trial by press, electronic media or public agitation is the very antithesis of rule of law". Consequently, it has been stated in the IAs by Sahara that this Court should consider giving guidelines as to the manner and extent of publicity which can be given to pleadings/ documents filed in court by one or the other party in a pending proceedings which have not yet been adjudicated upon.

13. Accordingly, vide IA Nos. 4 and 5, Sahara made the following prayers:

"(b) appropriate guidelines be framed with regard to reporting (in the electronic and print media) of matters which are sub- judice in a court including public disclosure of documents forming part of court proceedings.

(c) appropriate directions be issued as to the manner and extent of publicity to be given by the print / electronic media of pleadings / documents filed in a proceeding in court which is pending and not yet adjudicated upon;"

14. Vide IA No. 10, SEBI, at the very outset, denied that the alleged disclosure was at its instance or at the instance of its counsel. It further denied that papers furnished by Sahara were passed on by SEBI to the TV Channel. In its IA, SEBI stated that it is a statutory regulatory body and that as a matter of policy SEBI never gives its comments to the media on matters which are under investigation or sub judice. Further, SEBI had no business stakes involved to make such disclosures to the media. However, even according to SEBI, in view of the incident having happened in court, this Court should give appropriate directions or frame such guidelines as may be deemed appropriate.

15. At the very outset, we need to state that since an important question of public importance arose for decision under the above circumstances dealing with the rights of the citizens and the media, we gave notice and hearing to those who had filed the IAs; the question of law being that every citizen has a right to negotiate in confidence inasmuch as he/ she has a right to defend

himself or herself. The source of these two rights comes from the common law. They are based on presumptions of confidentiality and innocence. Both, the said presumptions are of equal importance. At one stage, it was submitted before us that this Court has been acting suo motu. We made it clear that Sahara was at liberty to withdraw the IAs at which stage Shri Sidharth Luthra, learned senior counsel stated that Sahara would not like to withdraw its IAs. Even SEBI stated that if Sahara withdraws its IAs, SEBI would insist on its IA being decided. In short, both Sahara and SEBI sought adjudication. Further, on 28.03.2012, learned counsel for Sahara filed a note in the Court citing instances (mostly criminal cases) in which according to him certain aberration qua presumption of innocence has taken place. This Court made it clear that this Court is concerned with the question as to whether guidelines for the media be laid down? If so, whether they should be self-regulatory? Or whether this Court should restate the law or declare the law under Article 141 on balancing of Article 19(1)(a) rights vis-a-vis Article 21, the scope of Article 19(2) in the context of the law regulating contempt of court and the scope of Article 129/ Article 215.

16. Thus, our decision herein is confined to IA Nos. 4, 5 and 10. This clarification is important for the reason that some accused have filed IAs in which they have sought relief on the ground that their trial has been prejudiced on account of excessive media publicity. We express no opinion on the merits of those IAs.

Constitutionalization of free speech

Comparative law: differences between the US and other common-law experiences

17. Protecting speech is the US approach. The First Amendment does not tolerate any form of restraint. In US, unlike India and Canada which also have written Constitutions, freedom of the press is expressly protected as an absolute right. The US Constitution does not have provisions similar to Section 1 of the Charter Rights under the Canadian Constitution nor is such freedom subject to *reasonable restrictions* as we have under Article 19(2) of the Indian Constitution. Therefore, in US, any interference with the media freedom to access, report and comment upon ongoing trials is *prima facie* unlawful. Prior restraints are completely banned. If an irresponsible piece of journalism results in prejudice to the proceedings, the legal system does not provide for sanctions against the parties responsible for the wrongdoings. Thus, restrictive contempt of court laws are generally considered incompatible with the constitutional guarantee of free speech. However, in view of cases, like O.J. Simpson, Courts have evolved procedural devices aimed at neutralizing the effect of *prejudicial*

publicity like change of venue, ordering re-trial, reversal of conviction on appeal (which, for the sake of brevity, is hereinafter referred to as **"neutralizing devices"**). It may be stated that even in US as of date, there is no absolute rule against "prior restraint" and its necessity has been recognized, albeit in exceptional cases [see ***Near v. Minnesota, 283 US 697***] by the courts evolving neutralizing techniques.

18. In 1993, Chief Justice William Rehnquist observed: "constitutional law is now so firmly grounded in so many countries, it is time that the US Courts begin looking at decisions of other constitutional courts to aid in their own deliberative process".

19. Protecting Justice is the **English approach**. Fair trials and public confidence in the courts as the proper forum for settlement of disputes as part of the administration of justice, under the common law, were given greater weight than the goals served by unrestrained freedom of the press. As a consequence, the exercise of free speech respecting ongoing court proceedings stood limited. England does not have a written constitution. Freedoms in English law have been largely determined by Parliament and Courts. However, after the judgment of ECHR in the case of ***Sunday Times v. United Kingdom [(1979) 2 EHRR 245],*** in the light of which the English Contempt of Courts Act, 1981 (for short "the 1981 Act") stood enacted, a balance is sought to be achieved between fair trial rights and free media rights vide Section 4(2). Freedom of speech (including free press) in US is not restricted as under Article 19(2) of our Constitution or under Section 1 of the Canadian Charter. In England, Parliament is supreme. Absent written constitution, Parliament can by law limit the freedom of speech. The view in England, on interpretation, has been and is even today, even after the Human Rights Act, 1998 that the right of free speech or right to access the courts for the determination of legal rights cannot be excluded, except by clear words of the statute. An important aspect needs to be highlighted. Under Section 4(2) of the 1981 Act, courts are expressly empowered to postpone publication of any report of the proceedings or any part of the proceedings for such period as the court thinks fit for avoiding a substantial risk of prejudice to the administration of justice in those proceedings. Why is such a provision made in the Act of 1981? One of the reasons is that in Section 2 of the 1981 Act, strict liability has been incorporated (except in Section 6 whose scope has led to conflicting decisions on the question of intention). The basis of the strict liability contempt under the 1981 Act is the publication of "prejudicial" material. The definition of publication is also very wide. It is true that the 1981 Act has restricted the strict liability contempt to a fewer circum-

stances as compared to cases falling under common law. However, ***contempt is an offence sui generis.*** At this stage, it is important to note that the strict liability rule is the rule of law whereby a conduct or an act may be treated as contempt of court if it tends to interfere with the course of justice in particular legal proceedings, regardless of intent to do so. Sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents **possible contempt.** That seems to be the underlying reason behind enactment of Section 4(2) of the 1981 Act. According to Borrie & Lowe on the "Law of Contempt", the extent to which prejudgment by publication of the outcome of a proceedings (referred to by the House of Lords in Sunday Times's case) may still apply in certain cases. In the circumstances to balance the two rights of equal importance, viz., right to freedom of expression and right to a fair trial, that Section 4(2) is put in the 1981 Act. Apart from balancing it makes the media know where they stand in the matters of reporting of court cases. To this extent, the discretion of courts under common law contempt has been reduced to protect the media from getting punished for contempt under strict liability contempt. Of course, if the court's order is violated, contempt action would follow.

20. In the case of ***Home Office v. Harman [(1983) 1 A.C. 280]*** the House of Lords found that the counsel for a party was furnished documents by the opposition party during inspection on the specific undertaking that the contents will not be disclosed to the public. However, in violation of the said undertaking, the counsel gave the papers to a third party, who published them. The counsel was held to be in contempt on the **principle of equalization of the right of the accused to defend himself/herself in a criminal trial with right to negotiate settlement in confidence.** [See also ***Globe and Mail v. Canada (procureur général), 2008 QCCA 2516]***

21. The Continental Approach seeks **to protect personality**. This model is less concerned with the issue of fair trial than with the need for safeguarding privacy, personal dignity and presumption of innocence of trial participants. The underlying assumption of this model is that the media coverage of pending trials might be at odds not only with fairness and impartiality of the proceedings but also with other

individual and societal interests. Thus, *narrowly focused prior restraints* are provided for, on either a statutory or judicial basis. It is important to note that in the common-law approach the protection of sanctity of legal proceedings as a part of administration of justice is guaranteed by institution of contempt proceedings. According to Article 6(2) of the European Convention of Human Rights, *presumption of innocence* needs to be protected. The European Courts of Human Rights has ruled on several occasions that the presumption of innocence should be employed as a *normative parameter* in the matter of balancing the right to a fair trial as against freedom of speech. The German Courts have accordingly underlined the need to balance the presumption of innocence with freedom of expression based on employment of the above normative parameter of presumption of innocence. France and Australia have taken a similar stance. Article 6(2) of the European Convention of Human Rights imposes a positive obligation on the State to take action to protect the presumption of innocence from interference by non-State actors. However, in a catena of decisions, the ECHR has applied the *principle of proportionality* to prevent imposition of overreaching restrictions on the media. At this stage, we may state, that the said principle of proportionality has been enunciated by this Court in ***Chintaman Rao v. The State of Madhya Pradesh [(1950) SCR 759].***

22. The Canadian Approach: Before Section 1 of Canadian Charter of Rights, the balance between fair trial and administration of justice concerns, on the one hand, and freedom of press, on the other hand, showed a clear preference accorded to the former. Since the Charter introduced an express guarantee of "freedom of the press and other media of communication", the Canadian Courts reformulated the *traditional sub judice rule*, showing a more tolerant attitude towards trial-related reporting [see judgment of the Supreme Court of ***Canada in Dagenais v. Canadian Broad-casting Corp., [1994] 3 SCR 835*** which held that a publication ban should be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice when reasonably alternative measures like postponement of trial or change of venue will not prevent the risk (necessity test); and that salutary effects of the publication bans outweigh the deleterious effects on the rights and interests of the parties and the public, including the effect on the right to free expression and the right of the accused to open trial (i.e. proportionality test)]. The traditional common law rule governing publication bans – that there be real and substantial risk of interference with the right to a fair trial – emphasized the right to a fair trial over the free expressions interests of

those affected by the ban. However, in the context of post-Charter situation, the Canadian Supreme Court has held that when two protected rights come in conflict, Charter principles require a balance to be achieved that fully respects both the rights. The Canadian Courts have, thus, shortened the distance between the US legal experience and the common-law experiences in other countries. It is important to highlight that in Dagenais, the publication ban was sought under common law jurisdiction of the Superior Court and the matter was decided under the common law rule that the Courts of Record have inherent power to defer the publication. In ***R. v. Mentuck [2001] 3 SCR 442*** that Dagenais principle was extended to the presumption of openness and to duty of court to balance the two rights. In both the above cases, Section 2(b) of the Charter which deals with freedom of the press was balanced with Section 1 of the Charter. Under the Canadian Constitution, the Courts of Record (superior courts) have retained the common law discretion to impose such bans provided that the discretion is exercised in accordance with the Charter demands in each individual case.

23. The Australian Approach: The Australian Courts impose publication bans through the exercise of their inherent jurisdiction to regulate their own proceedings. In Australia, contempt laws deal with reporting of court proceedings which interfere with due administration of justice. Contempt laws in Australia embody the concept of "sub judice **contempt**" which relates to the publication of the material that has a tendency to interfere with the pending proceedings.

24. The New Zealand Approach: It recognizes the Open Justice principle. However, the courts have taken the view that the said principle is not absolute. It must be balanced against the object of doing justice. That, the right to freedom of expression must be balanced against other rights including the fundamental public interest in preserving the integrity of justice and the administration of justice.

Indian Approach to prior restraint

(i) Judicial decisions

25. At the outset, it may be stated that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information

and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of *freedom of expression* as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgment of this Court in the case of ***Maneka Gandhi v. Union of India [(1978) 1 SCC 248].***

Decisions of the Supreme Court on "prior restraint"

26. In ***Brij Bhushan v. State of Delhi [AIR 1950 SC 129***], this Court was called upon to balance exercise of freedom of expression and pre- censorship. This Court declared the statutory provision as unconstitutional inasmuch as the restrictions imposed by it were outside Article 19(2), as it then stood. However, this Court did not say that pre-censorship per se is unconstitutional.

27. In ***Virendra v. State of Punjab [AIR 1957 SC 896],*** this Court upheld pre-censorship imposed for a limited period and right of representation to the government against such restraint under Punjab Special Powers (Press) Act, 1956. However, in the same judgment, another provision imposing pre-censorship but without providing for any time limit or right to represent against pre-censorship was struck down as unconstitutional.

28. In the case of ***K.A. Abbas v. Union of India [AIR 1971 SC 481],*** this Court upheld prior restraint on exhibition of motion pictures subject to Government setting up a corrective machinery and an independent

Tribunal and reasonable time limit within which the decision had to be taken by the censoring authorities.

29. At this stage, we wish to clarify that the reliance on the above judgments is only to show that "prior restraint" per se has not been rejected as constitutionally impermissible. At this stage, we may point out that in the present IAs we are dealing with the concept of "prior restraint" per se and not with cases of misuse of powers of pre- censorship which were corrected by the Courts [see ***Binod Rao v. Minocher Rustom Masani reported in 78 Bom LR 125 and C. Vaidya v. D'Penha decided by Gujarat High Court in Sp. CA 141 of 1976 on 22.03.1976*** (unreported)]

30. The question of prior restraint arose before this Court in 1988, in the case of ***Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd. [AIR 1989 SC 190]*** in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be "based on reasonable grounds for keeping the administration of justice unimpaired" and that, there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J of **"clear and present danger"**. This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.

31. In the case of ***Naresh Shridhar Mirajkar v. State of Maharashtra [AIR 1967 SC 1]***, this Court dealt with the power of a court to conduct court proceedings in camera under its inherent powers and also to incidentally prohibit publication of the court proceedings or evidence of the cases outside the court by the media. It may be stated that "open Justice" is the cornerstone of our judicial system. It instills faith in the judicial and legal system. However, the right to open justice is not absolute. It can be restricted by the court in its inherent jurisdiction as done in Mirajkar's case if the necessities of administration of justice so demand [***see Kehar Singh v. State (Delhi Administration), AIR 1988 SC 1883].*** Even in US, the said principle of open justice yields to the said necessities of administration of justice [see: ***Globe Newspaper Co. v. Superior Court, 457 US 596***]. The entire law has been reiterated once again in the judgment of this Court in ***Mohd. Shahabuddin v. State of***

Bihar [(2010) 4 SCC 653], affirming judgment of this Court in Mirajkar's case.

32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In Mirajkar, the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in this Court under Article 32. This Court held that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where administration of justice so demanded. This Court held vide para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend Article 19(1)(a) rights [which includes freedom of the press to make such publication], this Court held that an order of a court passed to protect the interest of justice and the administration of justice could not be treated as violative of Article 19(1)(a) [see para 12]. The judgment of this Court in Mirajkar is delivered by a Bench of 9- Judges and is binding on this Court.

33. At this stage, it may be noted that the judgment of the Privy Council in the case of ***Independent Publishing Co. Ltd. v. AG of Trinidad and Tobago [2005 (1) AC 190]*** has been doubted by the Court of Appeal in New Zealand in the case of ***Vincent v. Solicitor General [(2012) NZCA 188*** dated 11.5.2012]. In any event, on the inherent powers of the Courts of Record we are bound by the judgment of this Court in Mirajkar. Thus, Courts of Record under Article 129/Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness. The judgments in Reliance Petrochemicals Ltd. and Mirajkar were delivered in civil cases. However, in Mirajkar, this Court held that all Courts which have inherent powers, i.e., the Supreme Court, the High Courts and Civil Courts can issue prior restraint orders or proceedings, prohibitory orders in exceptional circumstances temporarily prohibiting publications of Court proceedings to be made in the media and that such powers do not violate Article 19(1)(a). Further, it is important to note, that, one of the Heads on which Article 19(1)(a) rights can be restricted is in relation to "contempt of court" under Article 19(2). Article 19(2) preserves common law of contempt as an "exist-

ing law". In fact, the Contempt of Courts Act, 1971 embodies the common law of contempt. At this stage, it is suffice to state that the Constitution framers were fully aware of the Institution of Contempt under the common law which they have preserved as "existing law" under Article 19(2) read with Article 129 and Article 215 of Constitution. **The reason being that contempt is an offence sui generis.** The Constitution framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to the criminal process and provides a sanction. Other civil courts have the power under Section 151 of Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In Mirajkar, this Court referred to the principles governing Courts of Record under Article 215 [see para 60]. It was held that the High Court is a Superior Court of Record and that under Article 215 it has all the powers of such a court including the power to punish contempt of itself. At this stage, the word "including" in Article 129/Article 215 is to be noted. It may be noted that each of the Articles is in two parts. The first part declares that the Supreme Court or the High Court "shall be a Court of Record and shall have all the powers of such a court". The second part says "includes the powers to punish for contempt". These Articles save the pre-existing powers of the Courts as courts of record and that the power includes the power to punish for contempt [see ***Delhi Judicial Service Association v. State of Gujarat [(1991) 4 SCC 406]*** and ***Supreme Court Bar Association v. Union of India [(1998) 4 SCC 409].*** As such a declaration has been made in the Constitution that the said powers cannot be taken away by any law made by the Parliament except to the limited extent mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to Contempt of Court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that "the administration of justice is not perverted, prejudiced, obstructed or interfered with". To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court/High Court to prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts. In view of the judgment of this Court in ***A.K. Gopalan v. Noordeen [(1969) 2 SCC 734***], such statements which could be prohibited temporarily

would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under Article 21 from the time when the criminal proceedings in a subordinate court are imminent or where suspect is arrested. This Court has held in ***Ram Autar Shukla v. Arvind Shukla [1995 Supp (2) SCC 130]*** that the law of contempt is a way to prevent the due process of law from getting perverted. That, the words "due course of justice" in Section 2 (c) or Section 13 of the 1971 Act are wide enough and are not limited to a particular judicial proceedings. That, the meaning of the words "contempt of court" in Article 129 and Article 215 is wider than the definition of "criminal contempt" in Section 2 (c) of the 1971 Act. Here, we would like to add a caveat. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice [see Nigel Lowe and Brenda Sufrin, Law of Contempt (Third Edition)]. Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice [see Nigel Lowe and Brenda Sufrin, page 5 of Fourth Edition]. According to Nigel Lowe and Brenda Sufrin [page 275] and also in the context of second part of Article 129 and Article 215 of the Constitution the object of the contempt law is not only to punish, it includes the power of the Courts to prevent such acts which interfere, impede or pervert administration of justice. Presumption of innocence is held to be a human right. [See : ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294].*** If in a given case the appropriate Court finds infringement of such presumption by excessive *prejudicial publicity* by the newspapers (in general), then under inherent powers, the Courts of Record suo motu or on being approached or on report being filed before it by subordinate court can under its inherent powers under Article 129 or Article 215 pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided he is able to displace the presumption of open Justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.

34. The above discussion shows that in most jurisdictions there is power in the courts to postpone reporting of judicial proceedings in the interest of administration of justice. Under Article 19(2) of the Constitution, law in relation to contempt of court, is a reasonable restriction. It also satisfies the test laid down in the judgment of this Court in ***R. Rajagopal v. State of T.N. [(1994) 6 SCC 632].*** As stated, in most common law jurisdictions, discretion is given to the courts to evolve

neutralizing devices under contempt jurisdiction such as postponement of the trial, re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media *prejudicial publicity*. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (supra) vis-a-vis presumption of Open Justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from *prejudicial publicity* or mis- information, in other words, where the court is satisfied that Article 21 rights of a person are offended. There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(a) and the right of the media to challenge the order of postponement.

(ii) Contempt of Courts Act, 1971

35. Section 2 defines "contempt", "civil contempt" and "criminal contempt". In the context of contempt on account of publications which are not fair and accurate publication of court proceedings, the relevant provisions are contained in Sections 4 and 7 whereas Section 13 is a general provision which deals with defences. It will be noticed that Section 4 deals with "report of a judicial proceeding". A person is not to be treated as guilty of contempt if he has published such a report which is fair and accurate. Section 4 is subject to the provisions of Section 7 which, however, deals with publication of "information" relating to "proceedings in chambers".

Here the emphasis is on "information" whereas in Section 4, emphasis is on "report of a judicial proceeding". This distinction between a "report of proceedings" and "information" is necessary because Section 7 deals with proceedings in camera where there is no access to the media. In this connection, the provisions of Section 13 have to be borne in mind. The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The reason behind Section 4 is to grant a privilege in favour of the person who makes the publication provided it is fair and accurate. This is based on the presumption of "open justice" in courts. Open justice permits fair and accurate reports of court proceedings to be published. The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt by the Media.

(iii) "Order of Postponement" of publication- its nature and Object

36. As stated, in US such orders of postponement are treated as restraints which offend the First Amendment and as stated courts have evolved neutralizing techniques to balance free speech and fair trial whereas in Canada they are justified on the touchstone of Section 1 of the Charter of Rights. What is the position of such Orders under Article 19(1)(a) and under Article 21?

37. Before examining the provisions of Article 19(1)(a) and Article 21, it may be reiterated, that, the right to freedom of speech and expression, is absolute under the First Amendment in the US Constitution unlike Canada and India where we have the test of justification in the societal interest which saves the law despite infringement of the rights under Article 19(1)(a). In India, we have the test of "reasonable restriction" in Article 19(2). In the case of ***Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal [(1995) 2 SCC 161]*** it has been held that "it is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but the several grounds mentioned in

Article 19(2) for imposition of restrictions such as security of the State, public order, law in relation to contempt of court, defamation etc. are ultimately referable to societal interest which is another name for public interest" [para 189]. It has been further held that, "the said grounds in Article 19(2) are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully be exercised by the citizens of this country" [para 151].

38. In the case of ***E.M.S. Namboodripad v. T. Narayanan Nambiar [AIR 1970 SC 2015]*** it has been held that "the existence of law containing its own guiding principles, reduces the discretion of the Courts to the minimum. But where the law [i.e. 1971 Act] is silent the Courts have discretion" [para 30]. This is more so when the said enactment is required to be interpreted in the light of Article 21. We would like to quote herein below para 6 of the above judgment which reads as under:

"The law of contempt stems from the right of the courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all courts when contempt is committed in facie curaie and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a court of record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts."

39. The question before us is whether such "postponement orders" constitute restrictions under Article 19(2) as read broadly by this Court in the case of Cricket Association of Bengal (supra)?

40. As stated, right to freedom of expression under the First Amendment in US is absolute which is not so under Indian Constitution in view of such right getting restricted by the test of reasonableness and in view of the Heads of Restrictions under Article 19(2). Thus, the clash model is more suitable to American Constitution rather than Indian or Canadian jurisprudence, since First Amendment has no equivalent of Article 19(2) or Section 1 of the Canadian Charter. This has led the American Courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive *prejudicial publicity*, there is usurpation of court's functions. These are techniques such as retrials being ordered, change of venue, ordering acquittals even at the Appellate stage, etc. In our view, orders of postponement of publications/ publicity in appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to

challenge such orders is just a neutralizing device, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.

(iv)Width of the postponement orders

41. The question is - whether such "postponement orders" constitute restriction under Article 19(1)(a) and whether such restriction is saved under Article 19(2)?

42. At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen, in the context of Article 19(1)(a) not being an absolute right. The US clash model based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to Indian Constitution. In certain cases, even accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the judges are under scrutiny and at the same time people get to know what is going on inside the court rooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, Courts have to evolve balancing techniques or measures based on re-calibration under which both the rights are given equal space in the Constitutional Scheme and this is what the "postponement order" does subject to the parameters, mentioned hereinafter. But, what happens when courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognized as a human right. These presumptions existed at the time when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is "the end and purpose of all laws". However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when nec-

essary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straightjacket formula enumerating such categories. In our view, keeping the above parameters, if the High Court/ Supreme Court (being Courts of Record) pass postponement orders under their inherent jurisdictions, such orders would fall within "*reasonable restrictions*" under Article 19(2) and which would be in conformity with societal interests, as held in the case of Cricket Association of Bengal (supra). In this connection, we must also keep in mind the language of Article 19(1) and Article 19(2). Freedom of press has been read into Article 19(1)(a). After the judgment of this Court in Maneka Gandhi (supra, p. 248), it is now well-settled that test of reasonableness applies not only to Article 19(1) but also to Article 14 and Article 21. For example, right to access courts under Articles 32, 226 or 136 seeking relief against infringement of say Article 21 rights has not been specifically mentioned in Article 14. Yet, this right has been deduced from the words "equality before the law" in Article 14. Thus, the test of reasonableness which applies in Article 14 context would equally apply to Article 19(1) rights. Similarly, while judging reasonableness of an enactment even Directive Principles have been taken into consideration by this Court in several cases [see recent judgment of this Court in ***Society for Unaided Private Schools of Rajasthan v. U.O.I. 2012 (4) SCALE 272***. Similarly, in the case of ***Dharam Dutt v. Union of India reported in (2004) 1 SCC 712***, it has been held that rights not included in Article 19(1)(c) expressly, but which are deduced from the express language of the Article are concomitant rights, the restrictions thereof would not merely be those in Article 19(4)]. Thus, balancing of such rights or equal public interest **by order of postponement of publication or publicity** in cases in which there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial and within the above enumerated parameters of necessity and proportionality would satisfy the test of reasonableness in Articles 14 and 19(2). One cannot say that what is reasonable in the context of Article 14 or Article 21 is not reasonable when it

comes to Article 19(1)(a). Ultimately, such orders of postponement are only to balance conflicting public interests or rights in Part III of Constitution. They also satisfy the requirements of justification under Article 14 and Article 21. Further, we must also keep in mind the words of Article 19(2) "in relation to contempt of court". At the outset, it may be stated that like other freedoms, clause 1(a) of Article 19 refers to the common law right of freedom of expression and does not apply to any right created by the statute (see page 275 of Constitution of India by D.D. Basu, 14th edition). The above words "in relation to" in Article 19(2) are words of widest amplitude. When the said words are read in relation to contempt of court, it follows that the law of contempt is treated as reasonable restriction as it seeks to prevent administration of justice from getting perverted or prejudiced or interfered with. Secondly, these words show that the expression "contempt of court" in Article 19(2) indicates that the object behind putting these words in Article 19(2) is to regulate and control administration of justice. Thirdly, if one reads Article 19(2) with the second part of Article 129 or Article 215, it is clear that the contempt action does not exhaust the powers of the Court of Record. **The reason being that contempt is an offence sui generis.** Common law defines what is the scope of contempt or limits of contempt. Article 142(2) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under Article 129/ Article 215. Superior Courts of Record have *inter alia* inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the "real and substantial risk of serious prejudice" to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. **The principle underlying postponement orders is that it prevents possible contempt.** Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postpone-

ment orders operate on **actual publication.** Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/ Article 215 and Article 142(2), it is clear that Courts of Record "have all the powers including power to punish" which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests. It is well settled that precedents of this Court under Article 141 and the Comparative Constitutional law helps courts not only to understand the provisions of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as stated by Ronald Dworkin are propositions describing rights [in terms of its content and contours] (See "Taking Rights Seriously" by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a neutralizing device evolved by the courts to balance interests of equal weightage, viz., freedom of expression vis-a-vis freedom of trial, in the context of the law of contempt. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. Keeping in mind the important role of the media, Courts have evolved several neutralizing techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice about **possible contempt.** However, it would be open to Media to challenge such orders in appropriate proceedings. ***Contempt is an offence sui generis.*** Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding. **Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove.** Therefore, in our view, such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-a-vis another societal interest in fair administration of justice. One more aspect needs to be mentioned. Excessive *prejudicial publicity* leading to usurpation of functions of

the Court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving **displacement of such a presumption in appropriate proceedings.** Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforestated reasons, we hold that subject to above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.

(v) Right to approach the High Court/ Supreme Court

43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

Maintainability

44. As stated above, in the present case, we heard various stake holders as an important question of public importance arose for determination. Broadly, on maintainability the following contentions were raised: (i) the proceedings were not maintainable as there is no lis; (ii) there is a difference between law-making and framing of guidelines. That, law can be made only by Parliament. That, guidelines to be framed by the Court, therefore, should be self-regulatory or at the most advisory. (iii) under Article 142, this Court cannot invest courts or any other authority with jurisdiction, adjudicatory or otherwise, which they do not possess.

45. Article 141 uses the phrase "law declared by the Supreme Court." It

means law made while interpreting the statutes or the Constitution. Such judicial law-making is part of the judicial process. Further under Article 141, law-making through interpretation and expansion of the meanings of open-textured expressions such as "law in relation to contempt of court" in Article 19(2), "equal protection of law", "freedom of speech and expression" and "administration of justice" is a legitimate judicial function. According to Ronald Dworkin, "Arguments of principle are arguments intended to establish an individual right. Principles are propositions that describe rights." [See "Taking Rights Seriously" by Ronald Dworkin, 5th Reprint 2010, p. 90]. In this case, this Court is only declaring under Article 141, the constitutional limitations on free speech under Article 19(1)(a), in the context of Article 21. The exercise undertaken by this Court is an exercise of exposition of constitutional limitations under Article 141 read with Article 129/Article 215 in the light of the contentions and large number of authorities referred to by the counsel on Article 19(1)(a), Article 19(2), Article 21, Article 129 and Article 215 as also the "law of contempt" insofar as interference with administration of justice under the common law as well as under Section 2(c) of 1971 Act is concerned. What constitutes an offending publication would depend on the decision of the court on case to case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of "law of contempt" hangs over our jurisprudence. This Court is duty bound to clear that shadow under Article 141. The phrase "in relation to contempt of court" under Article 19(2) does not in the least describe the true nature of the offence which consists in interfering with administration of justice; in impending and perverting the course of justice. That is all which is done by this judgment. We have exhaustively referred to the contents of the IAs filed by Sahara and SEBI. As stated above, **the right to negotiate and settle in confidence is a right of a citizen and has been equated to a right of the accused to defend himself in a criminal trial.** In this case, Sahara has complained to this Court on the basis of breach of confidentiality by the Media. In the circumstances, it cannot be contended that there was no lis. Sahara, therefore, contended that this Court should frame guidelines or give directions which are advisory or self-regulatory whereas SEBI contended that the guidelines/directions should be given by this Court which do not have to be coercive. In the circumstances, constitutional adjudication on the above points was required and it cannot be said that there was no lis between the parties. We reiterate that the **exposition of constitutional limitations** has been done under Article 141 read with Article 129/Article 215. When the

content of rights is considered by this Court, the Court has also to consider the enforcement of the rights as well as the remedies available for such enforcement. In the circumstances, we have expounded the constitutional limitations on free speech under Article 19(1)(a) in the context of Article 21 and under Article 141 read with Article 129/Article 215 which preserves the inherent jurisdiction of the Courts of Record in relation to contempt law. We do not wish to enumerate categories of publication amounting to contempt as the Court(s) has to examine the content and the context on case to case basis.

Conclusion

46. Accordingly, IA Nos. 4-5 and 10 are disposed of.

47. For the reasons given above, we do not wish to express any opinion on the merit of the other IAs. Consequently, they are dismissed.

Cases Cited

* *State of Maharashtra v. Rajendra J. Gandhi [(1997) 8 SCC 386]*
* *Near v. Minnesota, 283 US 697*
* *Sunday Times v. United Kingdom [(1979) 2 EHRR 245],*
* *Home Office v. Harman [(1983) 1 A.C. 280]*
* *Globe and Mail v. Canada (procureur general), 2008 QCCA 2516]*
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* *Maneka Gandhi v. Union of India [(1978) 1 SCC 248].*
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* *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd. [AIR 1989 SC 190]*
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