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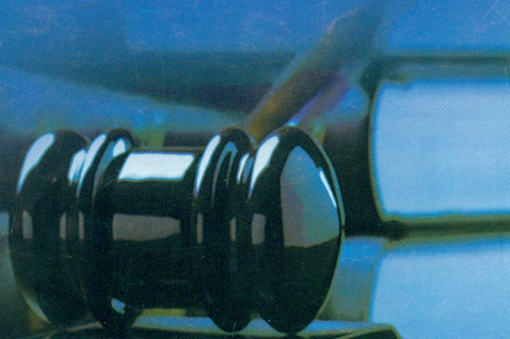
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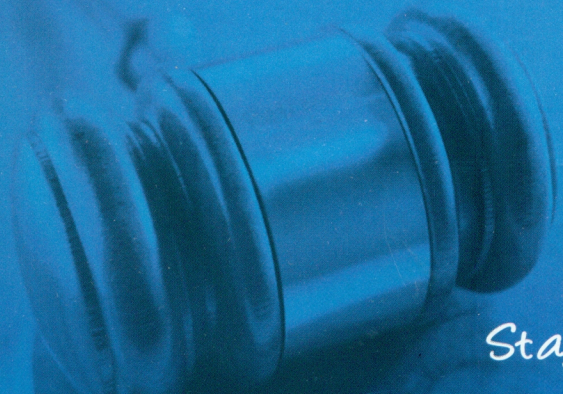
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Subject-Wise Index

Appellate Division

Civil

Constitution of the People's Republic of Bangladesh-

Article 27- All Citizens are Equal before Law and are Entitled to Equal Protection of Law-

Appeals, by leave, have arisen out of a common judgment and order passed by the High Court Division in Writ Petition making the Rules absolute.Appellate Division appreciate the decision of the Board of Governors of the BPATC in its 57th meeting to withdraw the appeals in question, because had they not taken the said decision and decided to proceed with the appeals, it would have been perpetuating a discriminatory treatment towards the petitioners (respondents in the appeals) in clear violation of their fundamental rights of equality before law and equal protection of law as guaranteed in article 27 of the Constitution of the People's Republic of Bangladesh.

Govt. of Bangladesh and others Vs. Hamento Kumar Barmon and another 28-36

Constitution of People's Republic of Bangladesh-

Article 104- Mere failure to raise objection as to the jurisdiction of a Court to hear and try a suit or a case or in other words, mere surrendering to the jurisdiction of a Court, jurisdiction cannot be conferred to a Court if it is found that the Court which heard or disposed of the suit or the case had no jurisdiction to hear such suit or case as the case may be-

This petition for leave to appeal is directed against the judgment and order passed by a Division Bench of the High Court Division in a Writ Petition making the Rule absolute.

Facts necessary for disposal of this leave petition are that respondent No.1 as writ-petitioner filed the writ petition before the High Court Division calling in question the propriety of order passed by the Joint District Judge, Artha Rin Adalat, Narayangonj in Mortgage Execution Case, rejecting the application filed under section 57 of the Artha Rin Adalat Ain, 2003 (the Ain, 2003) for cancellation of the auction sale held and allowing him to give chance to repay the loan amount. Taking into account the entire facts of the case Appellate Division held that, the claim of the auction purchaser as to the incurring of expenditure by him incidental to the auction purchase and the legal position that the decree passed by the Artha Rin Adalat was a nullity and Appellate Division invoke the power vested vide article 104 of the Constitution in order to do complete justice in a case.

Selim Hossain (Md.) Vs. Shahabuddin Ahmed and others 17-27

Criminal

Negotiable Instruments Act, 1881-

Section 138- Criminal Court has the power and jurisdiction to decide the alleged factor of forgery of the cheques while deciding the case under section 138 of the Negotiable Instruments Act-

This criminal petition for leave to appeal has been filed by the accused against the judgment and order dated the 15th day of February, 2011 passed by the High Court Division in Criminal Revision No. 1250 of 2010 discharging the Rule. Appellate Division held that, the operation of section 138 of the Act, 1881 cannot be obstructed or, in any way, circumvented by the mere fact of filing of a suit by the drawer of the dishonoured cheque in civil Court whatever allegations may be in the plaint about the same and the relief prayed for therein, because such a device shall totally make the section itself nugatory. However, if a holder or the payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheque shall have the liberty to take such defence during the trial.

Fazal Ahmed Vs. The State and another 37-40

High Court Division
(Civil)

Special Relief Act, 1877-

Section 39- A suit is not maintainable without prayer for decree for cancellation of the gift deed-

Limitation Act, 1908-

Section 91-A suit for cancellation of the deed of gift ought to have been filed within 3 years-

Rule under section 115(1) of the Code of Civil Procedure (CPC) has been issued to show cause as to why the judgment and order passed by the learned Additional District Judge, 6th Court, Dhaka, in Title Appeal allowing the appeal and reversing the judgment and order passed by the learned Assistant Judge, 8th Court, Dohar, Dhaka, in Title Suit, thereby dismissing the suit, should not be set aside. High Court Division held that-the moment High Court Division passes any judgment and order, it becomes law of the land in view of Article 111 of the Constitution, unless the same is modified or set-aside or operation of the same is stayed by the Appellate Division.

Mosammat Kamran Nessa Vs. Haji Hafez Md. Sharif Uddin and others . 57-78

Criminal

Code of Criminal Procedure, 1898-

Section 561A- To bring a case for the purpose of quashing a proceeding one of following conditions must be fulfilled- (1) Interference even at an initial stage may be justified where the facts are so preposterous that even on admitted facts no case stands against the accused; (2) Where the institution and continuation of the proceeding amounts to an abuse of the process of the court; (3) Where there is a legal bar against the initiation or continuation of the proceeding; (4) In a case where the allegations in the FIR or the petition of complaint, even if taken at their face value and accepted in their entirely, do not constitute the offence alleged; and (5) The allegations against the accused although constituted an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge-

Rule on an application filed under section 561A of the Code of criminal Procedure was issued upon the opposite parties to show cause as to why the proceedings of CR case under section 406/462(Kha), now pending in the court of Chief Judicial Magistrate, Naogaon should not be quashed. High Court Division are of the view that since there is no legal bar against the initiation and continuation of the proceedings and as such the proceedings do not amount to an abuse of the process of the court. High Court Division could safely presumed that there is no prima facie ground and as such the application under section 561A of the Code of Criminal Procedure for quashing the proceeding shall not be maintained and the accused petitioner is not therefore entitled to get relief as prayed for and as such the Rule should be discharged.

Raj Kumar Khetan Vs. Jamuna Bank Limited and another 78-84

Criminal Procedure Code, 1898-

Section 195(1)(c)- In order to attract Section 195(1)(c), the offence should be alleged to have been committed by the party to the proceeding in his character as such party, i.e. after having become a party to the proceeding-

Rule was issued on an application under section 439 read with 435 of the Code of Criminal Procedure challenging the order passed by the Special Judge, Faridpur in Special Case, out of Gopalgonj Police Station Case, framing charge against the petitioners under sections 467, 468, 471 and 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. The learned Judges of High Court are of the opinion that a Revenue Officer dealing with a mutation proceeding under the State Acquisition and Tenancy Act and the Rule framed there under does not constitute a Court. It is also noted that- mutation in question was done on the recommendation of the Assistant Commissioner (Land), Gopalgonj as well and he was likely to be made an accused in the present criminal case, but neither in the first information report nor in the charge sheet his name is included. No explanation for such exclusion has been offered. Under this circumstances, High Court Division is directed the Anti-Corruption Commission to enquire into the matter as to how the Assistant Commissioner (Land), Gopalgonj was excluded from the case and whether the Informant and Investigating Officer of the case, Inspector of the then Bureau of Anti-Corruption was justified in not including his name? If it is found that he was not justified in doing so the Commission will take appropriate action against him.

Abdul Mannan (Md.) and another Vs. The State and Anti-Corruption Commission 85-88

Foreign Judgment
The Supreme Court of Pakistan
(Review Jurisdiction)

Constitution of the Islamic Republic of Pakistan, 1973-

Article 189- The jurisdiction of the Supreme Court of Pakistan is not just to decide questions of law but also extends to enunciating principles of law which decisions and principles are binding on all other courts in the country-

The jurisdiction of the Supreme Court of Pakistan, as is evident from the provisions of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973. The principles of law contemplated by Article 189 include principles regulating the practices in vogue in the field of law and some of such practices and the principles enunciated in those regards are the subject of this judgment.

Nazir Ahmed and another Vs. The State 25-56

Bangladesh Statute

ব্যাংক-কোম্পানী (সংশোধন) আইন, ২০১৩ (২০১৩ সনের ২৭নং আইন) (আংশিক) 1-8

APPELLATE DIVISION (Civil)

Md. Muzammel Hossain–C.J.
Surendra Kumar Sinha–J.
Md. Abdul Wahhab Miah–J.
Hasan Foez Siddique–J.
A.H.M. Shamsuddin Choudhury–J.

CIVIL PETITION FOR LEAVE TO APPEAL N0. 376 OF 2011.

(From the judgment and order dated the 19th day of January, 2011 passed by the High Court Division in Writ Petition No.363 of 2009).

Md. Selim Hossain ..... Petitioner.

Vs.

Shahabuddin Ahmed and others .... Respondents.

For the Petitioner : Mr. Mahbubey Alam, Senior Advocate with Mr. Qumrul Haque Siddique, Advocate instructed by Mrs. Mahmuda Begum, Advocate-on-Record

For Respondent No. 1 : Mr. Mahmudul Islam, Senior Advocate with Mr. Fida M. Kamal, Senior Advocate instructed by Syed Mahbubur Rahman, Advocate-on-Record

For Respondent Nos. 2 and 3 : None represented.

Judgment: February 3, 2014

The Constitution of People's Republic of Bangladesh–

Article 104- Mere failure to raise objection as to the jurisdiction of a Court to hear and try a suit or a case or in other words, mere surrendering to the jurisdiction of a Court, jurisdiction cannot be conferred to a Court if it is found that the Court which heard or disposed of the suit or the case had no jurisdiction to hear such suit or case as the case may be-

From the facts of the case and also the finding of the High Court Division, one thing is very clear that Mortgage Execution Case No. 59 of 1994, in which the property in question was sold in auction, was filed for execution of the decree passed in Artha Rin Mortgage Suit No. 152 of 1991 (hereinafter referred to as the Mortgage suit) and the Mortgage suit arose out of Miscellaneous Case No. 16 of 1989 filed by the decree-holder-corporation under article 27 of P.O.No.7 of 1973 before the District Judge, Narayangonj. This miscellaneous case was transferred to the Artha Rin Adalat, Narayangonj pursuant to the provision of section 9 of the Artha Rin Adalat Ain, 1990. In view of the decision of this Division in the case of Bangladesh House Building Finance Corporation (supra) (the High

Court Division relied upon this case), the transfer of the said miscellaneous case to the Artha Rin Adalat, Narayangonj and registration thereof as Mortgage suit was without jurisdiction and the decree passed therein was a nullity and therefore, that was not executable, but that cannot altogether make the Miscellaneous Case No. 16 of 1989 filed by the decree-holder-corporation a nonest. So far as this miscellaneous case is concerned, there was no procedural defect in filing the same and that was filed in clear compliance with the mandate of the provisions of P.O.No.7 of 1973. Factually and legally, the said miscellaneous case needs to be heard afresh as per requirement of law by restoring its position as it stood when it was transferred to the Artha Rin Adalat under section 9 of the Artha Rin Adalat Ain, 1990, but in view of the so many intervening facts that in the mortgage suit, the decree was passed by the Artha Rin Adalat on 28.06.1994, the auction sale in question was held on 10.11.2008 in Mortgage Execution Case No. 59 of 1994 levied for execution of the decree passed in the mortgage suit, all the formalities of the auction sale including delivery of possession was completed and in the meantime, the judgment-debtor, writ-petitioner has paid off the entire outstanding dues of the decree-holder-corporation, it does not appear to us reasonable and practicable to take recourse to that procedure. And in fact, by reviving the miscellaneous case to its original position and sending the same for hearing afresh to the District Judge, Narayangonj, no useful purpose shall be served, as the writ-petitioner-loanee against whom the application was filed for realization of the loan amount, has already paid off the entire outstanding loan. This is clear from the affidavit-in-opposition filed by the decree-holder-corporation in the writ petition and also the submission made before the High Court Division as noted in the impugned judgment that "Mr. Shahed Alam, the learned Advocate for the respondent No.2, Bangladesh Housing Building Finance Corporation has stated before us that the writ petitioner has already paid off the entire outstanding dues of Bangladesh Housing Building Finance Corporation and Bangladesh Housing Building Finance Corporation has no objection in making the Rule absolute." .... (Para 8)

JUDGMENT

MD. ABDUL WAHHAB MIAH–J: This petition for leave to appeal is directed against the judgment and order dated the 19th day of January,

2011 passed by a Division Bench of the High Court Division in Writ Petition No.363 of 2009 making the Rule absolute.

Facts necessary for disposal of this leave petition are that respondent No.1 as writ-petitioner (hereinafter referred to as the writ-petitioner) filed the writ petition before the High Court Division calling in question the propriety of order No.99 dated 11.01.2009 passed by the Joint District Judge, Artha Rin Adalat, Narayangonj in Mortgage Execution Case No.59 of 1994 rejecting the application filed under section 57 of the Artha Rin Adalat Ain, 2003 (the Ain, 2003) for cancellation of the auction sale held on 10.11.2008 and allowing him to give chance to repay the loan amount.

From the impugned judgment and order of the High Court Division, it appears that several supplementary affidavits also were filed by the writ-petitioner in support of his case.

2. The case of the writ-petitioner as made out in the writ petition and in the supplementary affidavits was that he took loan of taka 11,87,000.00 (eleven lac eighty seven thousand) only from writ-respondent No.2, Bangladesh House Building Finance Corporation, respondent No.3 herein (hereinafter referred to as the Corporation), in 1979 for construction of a multistoried building on his land measuring 18 decimals situated within Narayangonj town and with that loan money, the writ-petitioner constructed a four storied building on that land and had been living there with his family. As security of that loan, the writ-petitioner mortgaged the said building along with the land to the Corporation. The writ-petitioner failed to repay the loan as per stipulation and consequently, the Corporation filed Miscellaneous Case No. 16 of 1989 before the District Judge, Narayangonj under article 27 of Bangladesh Housing Building Finance Corporation Order, 1973 (P.O. No.7 of 1973) against the writ-petitioner. Subsequently, Miscellaneous Case No. 16 of 1989 was transferred to the Artha Rin Adalat, Narayangonj for disposal and it was registered as Artha Rin Mortgage Suit No. 152 of 1991. Eventually, the mortgage suit was decreed. The Corporation as decree-holder levied Mortgage Execution Case No.59 of 1994 before the Artha Rin Adalat for execution of the decree by selling the mortgaged property in auction. In the execution case, the writ-petitioner appeared and entered into agreement with the decree-holder-corporation and the execution case was disposed of in terms of the solenama filed by both the parties. But as the writ-petitioner failed to repay the outstanding loan as per terms and conditions of the solenama the said execution case was revived on the prayer of the

decree-holder-corporation and eventually, the mortgaged property was put in auction on 10.11.2008. In the auction, three bidders participated of whom the added writ-respondent No.3, Md. Selim Hossain, petitioner herein, (hereinafter referred to as auction purchaser-petitioner) became the highest bidder at taka 28,00,000.00 (twenty eight lac) only. The decree-holder-corporation filed an application before the executing Court praying for cancelling the auction sale on the ground of low price. The application was rejected. Thereafter, on 24.11.2008, the writ-petitioner filed an application under section 57 of the Ain, 2003 praying for cancellation of the auction sale stating, *inter alia,* that the decree-holder-corporation, had already allowed reschedulement for payment of .the outstanding loan and he had been paying the loan money according to that reschedulement; after reschedulement, the writ-petitioner paid a big chunk amount of money to the decree-holder-corporation, but it without intimating anything to the writ-petitioner revived the execution case and behind his back sold the property in auction at taka 28,00,000.00(twenty eight lac) only on 10.11.2008 though the property is valued at taka l(one) crore; the actual price of the property in question was initially assessed by the decree-holder-corporation at taka 87,00,000.00 (eighty seven lac) and the same was accepted by the Artha Rin Adalat by order dated 10.08.2005. The application was rejected by the Artha Rin Adalat by the order dated 11.01.2008. The decree-holder-corporation filed an application under Order XXI, rule 90 of the Code of Civil Procedure for cancellation of the auction sale. The application was registered as Miscellaneous Case No.28 of 2008. The Artha Rin Adalat dismissed the miscellaneous case. Against that, the decree-holder-corporation filed Miscellaneous Appeal No.6 of 2009 before the District Judge, Narayangonj which was pending. In the above back ground, the writ-petitioner filed the writ petition.

3. The main contention raised in the writ petition was that the decree passed in Artha Rin Mortgage Suit No. 152 of 1991 by the Artha Rin Adalat, Narayangonj was without jurisdiction and as such a nullity since it had no jurisdiction to try a case filed under article 27 of P.O.No.7 of 1973, the decree passed in the Artha Rin Mortgage Suit was not executable at all and therefore, the execution case in question was illegal and the auction held therein and the impugned order along with all other orders passed in that execution case were of no legal effect.

Writ-respondent No.2, decree-holder-corporation, filed an affidavit-in-opposition praying for making the Rule absolute stating that the value of the property in question was taka 28,00,000.00, but it was sold in auction

at taka 28,00,000.00 only which was shockingly low. The respondent filed a miscellaneous case before the Artha Rin Adalat praying for setting aside the auction sale on the ground of low price, but that miscellaneous case was dismissed and against the order of dismissal the respondent filed Miscellaneous Appeal No.6 of 2009 before the District Judge, Narayangonj which was pending for disposal.

Auction purchaser-writ-respondent contested the Rule by filing an affidavit-in-opposition and also by filing several supplementary affidavits-in-opposition. This respondent denied the material case and all the allegations of the writ petitioner and contended that there was no illegality either in the judgment and decree passed by the Artha Rin Adalat in Artha Rin Mortgaged Suit No. 152 of 1991 or in the execution case started on the basis of the said decree or in the auction sale of the mortgaged property. The auction sale was held in accordance with law and there was no reason at all for setting aside the same and the impugned order did not suffer from any illegality.

4. A Division Bench of the High Court Division on hearing the Rule by the impugned judgment and order made the Rule absolute declaring the proceedings of Mortgage Execution Case No.59 of 1994 of the Artha Rin Adalat, Narayangonj and the auction sale of the mortgage property in question held in the execution case as illegal. The High Court Division further directed that the possession of the mortgage property in question be restored to the writ-petitioner. The High Court Division further observed that the auction purchaser, (writ-respondent No.3), would get return of the entire auction money deposited by him.

5. Being aggrieved by and dissatisfied with the impugned judgment and order, the auction purchaser has filed this leave petition.

6. Mr. Mahbubey Alam, learned Counsel, appearing for the auction purchaser-petitioner, has submitted that the auction sale in question took place on 10.11.2008, the sale certificate was executed and registered on 12.01.2009 and the possession of the auction sold property was delivered to the auction purchaser on 20.01.2009 at about 11:30 am and since then he has been in possession thereof. Thus, the auction sale had already taken its full effect and there remained nothing to be done in respect of the same. The High Court Division fell into an error in setting aside the auction sale. He has further submitted that the writ-petitioner himself appeared in the Artha Rin Mortgage Suit in question and he never raised any objection as to the jurisdiction of the Artha Rin Adalat in hearing and disposing of the suit and also appeared in the execution case long before and admitting the decree as valid one

entered into an agreement with the decree-holder-corporation to pay the decretal amount, but he failed to make the payment as per the terms of the agreement and thereafter the auction was held in accordance with law, he was estopped to challenge the auction sale and there was no scope to set aside the same which the High Court Division failed to consider in passing the impugned judgment and order. Mr. Alam has lastly submitted that the auction purchaser is a *bonafide* purchaser and he, besides paying the auction money to the tune of taka 28,00,000.00 (twenty eight lac), had to incur expenses on other counts such as: registration fee, gain tax and Courts fees @ 2%, but the High Court Division, while declaring the mortgage execution case and the auction sale illegal, only observed that the auction purchaser would get return of the entire auction money to his great prejudice and financial loss and therefore, the impugned judgment and order calls for interference by this Court by way of giving leave.

7. Mr. Mahmudul Islam, learned Counsel, appearing for the judgment-debtor-respondent, on the other hand, has submitted that the proceedings under article 27 of P.O. No.7 of 1973 being not a suit as already decided by this Division in the case of Bangladesh House Building Finance Corporation-Vs-Jahanara Akhtar and others, 49 DLR (AD) 80, the Artha Rin Adalat had no jurisdiction to hear the same by registering it as an Artha Rin Mortgage suit; the decree passed by the Artha Rin Adalat in Artha Rin Mortgage Suit No. 152 of 1991 was without jurisdiction and thus, was a nullity, the High Court Division rightly declared both the mortgage execution case in question and the auction sale held therein illegal and as such, no interference is called for with the impugned judgment and order and the leave petition be dismissed. Mr. Islam has further submitted that since, in the meantime, the writ-petitioner, the loanee of the decree-holder-corporation, has already paid the entire outstanding dues, the cause of action to proceed with the application filed under article 27 of P.O.No.7 of 1973 vide Miscellaneous Case No. 16 of 1987, no more subsists. Therefore, without reviving the miscellaneous case (16 of 1989), the same may be disposed of finally by this Court invoking the power vested with this Court under article 104 of the Constitution in order to do complete justice and in support of his submission, he has referred to the case of M/S. Gannysons Limited and another-Vs-Sonali Bank and others, 37 DLR (AD) 43.

8. *From the facts of the case and also the finding of the High Court Division, one thing is very clear that Mortgage Execution Case No. 59 of*

1994, in which the property in question was sold in auction, was filed for execution of the decree passed in Artha Rin Mortgage Suit No. 152 of 1991 (hereinafter referred to as the Mortgage suit) and the Mortgage suit arose out of Miscellaneous Case No. 16 of 1989 filed by the decree-holder-corporation under article 27 of P.O.No.7 of 1973 before the District Judge, Narayangonj. This miscellaneous case was transferred to the Artha Rin Adalat, Narayangonj pursuant to the provision of section 9 of the Artha Rin Adalat Ain, 1990. In view of the decision of this Division in the case of Bangladesh House Building Finance Corporation (supra) (the High Court Division relied upon this case), the transfer of the said miscellaneous case to the Artha Rin Adalat, Narayangonj and registration thereof as Mortgage suit was without jurisdiction and the decree passed therein was a nullity and therefore, that was not executable, but that cannot altogether make the Miscellaneous Case No. 16 of 1989 filed by the decree-holder-corporation a nonest. So far as this miscellaneous case is concerned, there was no procedural defect in filing the same and that was filed in clear compliance with the mandate of the provisions of P.O.No.7 of 1973. Factually and legally, the said miscellaneous case needs to be heard afresh as per requirement of law by restoring its position as it stood when it was transferred to the Artha Rin Adalat under section 9 of the Artha Rin Adalat Ain, 1990, but in view of the so many intervening facts that in the mortgage suit, the decree was passed by the Artha Rin Adalat on 28.06.1994, the auction sale in question was held on 10.11.2008 in Mortgage Execution Case No. 59 of 1994 levied for execution of the decree passed in the mortgage suit, all the formalities of the auction sale including delivery of possession was completed and in the meantime, the judgment-debtor, writ-petitioner has paid off the entire outstanding dues of the decree-holder-corporation, it does not appear to us reasonable and practicable to take recourse to that procedure. And in fact, by reviving the miscellaneous case to its original position and sending the same for hearing afresh to the District Judge, Narayangonj, no useful purpose shall be served, as the writ-petitioner-loanee against whom the application was filed for realization of the loan amount, has already paid off the entire outstanding loan. This is clear from the affidavit-in-opposition filed by the decree-holder-corporation in the writ petition and also the submission made before the High Court Division as noted in the impugned judgment that "Mr. Shahed Alam, the learned Advocate for the respondent No.2, Bangladesh Housing Building Finance Corporation has stated before us that the writ petitioner has already paid off the entire outstanding dues of Bangladesh

Housing Building Finance Corporation and Bangladesh Housing Building Finance Corporation has no objection in making the Rule absolute."

9. In the case of M/S. Gannysons Ltd and another (supra), this Division invoked the power vested under article 104 of the Constitution to do complete justice on the following facts:

"Sonali Bank, respondent No.1, obtained a decree in Title Suit No.249 of 1976 for foreclosure and sale of the mortgaged properties belonging to the appellant company and put it into execution in Title Execution No.46 of 1980. Appellant-company appeared before the Court and prayed for staying the execution of the decree on the grounds that since the Bank proceeded against the appellant Company's properties being treated as abandoned by the Government, the Directors of the appellant Company were not properly, served with notice and that had, therefore, no knowledge of the aforesaid title suit. As a result they did not appear in the suit. Also the Government which was made a party did not take any steps. However, "on the prayer of the appellant Company the proceeding in the execution case was stayed till October 20, 1981. In Writ Petition No.720 of 1981 a Rule was issued at the instance of the appellant company on October 20, 1981. But it abated on 24 March 1982 after the proclamation of Martial Law. In Miscellaneous Case No.958 of 1981 which was filed by the appellant Company under section 47 of the Code its prayer against the execution of the decree obtained in Title Suit No.249 of 1976 was disallowed by the Court. The appellant Company's appeal against this order was dismissed by the High Court Division on 9 November 1982. The appellant Company, being aggrieved, moved this Court and succeeded in having the appeal (Civil Appeal No.43 of 1983) against the order of the trial Court rejecting their objection under section 47 of the Code allowed. Appellants filed review petition against the judgment passed in the civil appeal against the concluding paragraph of the judgment which was as follows:

"Decree dated 27-3-80 passed by the Subordinate Judge, 3rd Court, Dhaka in Title Suit No.249 of 1976 be stayed for six months and the Miscellaneous Case No.958 of 1981 pending in the 3rd court of Subordinate Judge, Dhaka be struck down." And leave was granted to consider the only ground to the following effect:

"For that consistently with the reasonings in the main body of the judgment and the decision allowing the appeal (C.A.No.43 of 1983)

arising out of Miscellaneous Case No.958 of 1981 started under section 47 C.P.C.(at the instance of M/S. Gannysons Ltd. and another.) the Title Execution Case No.46 of 1980 pending in the 3rd Court of Subordinate Judge, Dhaka, needs to be struck down and the said Miscellaneous Case No.958 of 1981 of the same court allowed and that the order saying the decree dated 27.3.80 in Title Suit No.279 of 1976 of the 3rd Court of the Subordinate Judge needs to be deleted."

10. Considering the definition of abandoned property as given in President's Order No. 16 of 1972, it was found that Gannysons Limited Company, in no circumstances, could be declared as an abandoned property, allowed the review application, declared that the property was not an abandoned property, struck down the execution case subject to payment of the decretal amount to the Bank directly by the appellants and directed the Government to release the property treating Title Suit No.508 of 1982 filed by the appellant as withdrawn being infructuous. In that case, Fazle Munim, CJ observed:

"17. In view of the circumstances above and in virtue of the power conferred upon this Court by the Constitution of Bangladesh, vide Article 104, to do complete justice in a case it is declared that Gannyasons Limited is not an abandoned property, it should, therefore, be immediately, released. Along with the release of Gannysons Limited any of its properties, assets and capital should also be released and returned to it."

11. Be that as it may, before we decide whether we shall invoke the power vested in this Court under article 104 of the Constitution in order to do complete justice in this case, we need to answer one point raised by Mr. Mahbubey Alam that though the writ-petitioner appeared in the suit and also in the execution case, he did not raise any question about the jurisdiction of the Artha Rin Adalat in disposing of the suit and also the decree passed therein and accepting the decree as a valid one entered into an agreement with the decree-holder-corporation to pay the decretal amount, but failed to pay the decretal amount and then the execution case was revived and the property in question was sold in auction, so he was estopped from raising any objection as to the jurisdiction of the Artha Rin Adalat to hear and dispose of the mortgage suit in question and the validity of the decree passed therein. Our answer is very simple and is that mere failure to raise objection as to the jurisdiction of a Court to hear and try a suit or a case or in other words, mere surrendering to the jurisdiction of a Court, jurisdiction cannot be conferred to a Court if it is found that the Court which heard or disposed of the

suit or the case had no jurisdiction to hear such suit or case as the case may be. Because the decree or order passed by a Court without Jurisdiction is a nullity and such nullity, in no way, is curable or immune from being challenged. So, in the instant case, even if the writ-petitioner failed to take any objection against the disposal of the suit by the Artha Rin Adalat, the decree passed therein shall not get the seal of validity or shall not be immuned from attack or being challenged. In the context, the High Court Division did not commit any illegality in declaring the mortgage execution case in question and the auction sale held therein as illegal.

12. It is also a fact that the auction purchaser-petitioner being the highest bidder at taka 28,00,000.00 (twenty eight lac), his bid was accepted by the executing Court (though the valuation of the property assessed at taka 87,00,000.00 by the corporation was accepted by the Artha Rin Adalat by order dated 10.08.2005) and he deposited the entire bid money on 19.11.2008. In ground No.IX of the leave petition, it has been specifically mentioned that besides paying the auction money, the auction purchaser had to incur expenses of taka 1,38,800.00 as registration fee, taka 84,000.00 as advance income tax and taka 56,000.00 as poundage Court fees, which Mr. Mahmudul Islam could not dispute. Mr. Mahbubey Alam in a separate typed sheet has shown a total of taka 2,95,576.00 which included the cost on the above heads plus taka 1,000.00, 2000.00, 13,517.00 and 259.00 on the account of fee for Najir for delivery of possession, fee of the Commissioner, conveyance of police force and conveyance of the Magistrate respectively in connection with the auction purchase. Besides, another sum of taka 26,00,283.83 has been claimed as interest @ 16% on the amount .of auction purchased money which the auction purchaser allegedly took as loan from City Bank Limited and taka 15,00,000.00 as maintenance costs of the 4(four) storied building since 18.01.2009 till date.

13. Taking into account the entire facts of the case as noted down hereinbefore, the claim of the auction purchaser as to the incurring of expenditure by him incidental to the auction purchase and the legal position that the decree passed by the Artha Rin Adalat was a nullity, we invoke the power vested in this Court vide article 104 of the Constitution in order to do complete justice in a case and dispose of the leave petition in the following terms:

(i) The orders of the High Court Division declaring the proceedings of Mortgaged Execution Case No.59 of 1984 of the Artha Rin Adalat, Narayangonj and the auction sale of the mortgaged property in question held in the said execution as illegal, the observation that "The auction purchaser respondent No.3 will get return of the entire auction money

which he deposited" and the direction that "the possession of the mortgaged property in question be restored to the petitioner" are maintained subject to term Nos.(iii) and (iv) mentioned hereinafter.

(ii) It is declared that Miscellaneous Case No.16 of 1989 of the Court of the District Judge, Narayangonj arising out of the application under article 27 of the P.O.No.7 of 1973 filed by the House Building Finance Corporation has become infractuous in view of the admitted fact that the writ-petitioner-loanee has paid the entire outstanding dues to the House Building Finance Corporation.

(iii) The writ-petitioner-respondent, Shahabuddin Ahmed, shall pay in total a sum of taka 2,79,800.00 to the auction purchaser, Md. Selim Hossain, petitioner herein, on the following counts:

(a) taka 1,38,800.00 as registration fee,

(b) taka 84,000.00, as gain tax fee/advance income tax,

(c) taka 56,000.00, as poundage Court fee/Court fee @ @% and (d) taka 1,000.00(one thousand) as fee for Najir for giving delivery of possession of the mortgage property sold in auction, (e) Interest at the rate of 10% over the auction money of taka 28,00,000.00 (twenty eight lac) till this day, that is, 03.02.2014.

(iv) The writ-petitioner, Shahabuddin Ahmed, respondent No. 1 herein, shall make deposit of the amount mentioned hereinbefore (term No.(iii)) in Mortgage Execution Case No.59 of 1994 of the Artha Rin Adalat, Narayangonj in the name of the auction purchaser, Md. Selim Hossain within two months from the date of receipt of this judgment and he (the auction purchaser) shall be entitled to withdraw the money deposited by the writ-petitioner at once and the executing Court shall do the needful in that respect without causing any delay. 7(seven) days from the date of deposit of the money by the writ-petitioner-respondent as detailed in term No.(iii) hereinbefore, he shall be entitled to take appropriate steps in the Mortgage Execution Case No.59 of 1994 to restore back possession of the mortgage property to him and in that case, the auction purchaser shall restore back possession of the auction sold property to the writ-petitioner without creating any hindrance or obstacle and the executing Court shall pass necessary order in that respect.

Cases cited:

* ***Bangladesh House Building Finance Corporation Vs. Jahanara Akhtar and others, 49 DLR (AD) 80.***

* ***M/S. Gannysons Limited and another Vs. Sonali Bank and others, 37 DLR (AD) 43.***

APPELLATE DIVISION (Civil)

Md. Muzammel Hossain–C.J.
Md. Abdul Wahhab Miah–J.
Nazmun Ara Sultana–J.
Syed Mahmud Hossain–J.
Muhammad Imman Ali–J.

CIVIL APPEAL NOS. 327 WITH 326 OF 2008.

(From the judgment and order dated the 6th day of June, 2007 passed by the High Court Division in Writ Petition Nos.1497 and 459 of 2005).

Govt. of Bangladesh and others ..... Appellants (in both cases).

Vs.

Hamento Kumar Barmon .... Respondents (in C.A. No. 327of '08).
Md. Nurul Islam .... Respondents (in C.A. No. 326 of '08).

For the Appellants (in both cases) : Mr. Murad Reza, Additional Attorney General instructed by Mr. Md. Ibrahim Khalil, Advocate-on-Record.

For the Respondents (in both cases) : Mr. Abdur Rob Chowdhury, Senior Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

Judgment: November 2, 2012

Constitution of the People's Republic of Bangladesh–

Article 27- All Citizens are Equal before Law and are Entitled to Equal Protection of Law-

From a minute reading of the decision of the Board of Governors, it appears to us that the Board, in fact, decided to withdraw the instant appeals and not the leave petitions as submitted by the learned Additional Attorney General. And this is clear from the fact that leave was granted in the two leave petitions on the 3rd day of June, 2008, whereas the 57th meeting of the Board of Governors was held on the 26th December, 2011 corresponding to the 12th Poush, 1418 B.S. It will be sheer foolishness to presume that when the meeting of the Board of Governors took place long after three and half years of the granting of leave, the Board did not know the fact of giving leave in the leave petitions by this Division and that despite the granting of leave, it considered the fact of withdrawal of the leave petitions instead of withdrawing the appeals which arose out of the leave granting order. From the discussions of the agenda as recorded in the proceedings (quoted herein-

before), it further appears that the Board considered the fact that earlier in its 43rd meeting, decision was taken to reinstate 23 other employees as per directions of the Court given in the case of similar nature and they were given their arrear salaries and other service benefits. In this regard, it is very pertinent to state that in the writ petitions, the respective petitioner categorically stated that some of the employees who were terminated by the BPATC for committing the same offence filed writ petitions and the Rules issued in those writ petitions were made absolute and pursuant to the directions given in those writ petitions, they were reinstated in their posts with back pay; some other terminated employees who were in the service of the Republic filed cases before the Administrative Tribunal and the Tribunal allowed those cases and those had also been reinstated and these facts had not been denied by the respondent in the affidavit-in-opposition filed in Writ Petition No. 1497 of 2005. In the leave petitions as well as in the concise statement also filed by the appellants, nothing contrary has been stated. Therefore, we find no rational and factual backing in the submission of the learned Additional Attorney General that the BPATC had decided to withdraw the leave petitions and not the appeals ..... (Para 14)

We appreciate the decision of the Board of Governors of the BPATC in its 57th meeting to withdraw the appeals in question, because had they not taken the said decision and decided to proceed with the appeals, it would have been perpetuating a discriminatory treatment towards the petitioners (respondents in the appeals) in clear violation of their fundamental rights of equality before law and equal protection of law as guaranteed in article 27 of the Constitution of the People's Republic of Bangladesh ..... (Para 15)

JUDGMENT

MD. ABDUL WAHHAB MIAH–J: These two appeals, by leave, have arisen out of a common judgment and order dated the 6th day of June, 2007 passed by the High Court Division in Writ Petition Nos.1497 and 459 of 2005 making the Rules absolute.

2. Facts giving rise to these appeals are that the respondent of Civil Appeal No.327 of 2008 as writ-petitioner (hereinafter referred to as the petitioner) filed Writ Petition Nos.459 of 2005 before the High Court Division calling in question the order of punishment dated 30.11.1997 passed by writ-respondent No.2, appellant No.3 herein vide annexure-'G' to the writ petition, the first appel-

late order dated 18.01.1998, vide annexure-J to the writ petition and final appellate order dated 24.08.2004, vide annexure-'L' to the writ petition to have been issued without lawful authority and are of no legal effect and also for a direction upon the writ-respondents to reinstate him in service with all arrear salaries and continuity of service.

3. The respondent of Civil Appeal No.326 of 2008 as writ-petitioner(hereinafter referred to as the petitioner) filed Writ Petition No. 1497 of 2005 before the High Court Division calling in question the order of dismissal dated 30.11.1997 passed by writ-respondent No.2, appellant No.3, herein vide annexure-'F' to the writ petition, first appellate order dated 22.01.1998, vide annexure-'H' to the writ petition and final appellate order dated 30.06.2004, vide annexure-J to the writ petition to have been issued without lawful authority and are of no legal effect and also for a direction upon the writ-respondents to reinstate him in his service with all arrear salaries and continuity of service.

4. The case of the respective petitioner as stated in the writ petitions (Writ Petition Nos.459 of 2005 and 1497 of 2005) was that they were appointed as 'Despatch Rider' and 'Club Attendant' at the scale of taka 500-20-860/=(in Grade XX of the revised scale of 1985) on 24.08.1987, 23.11.1987 respectively by the Rector of the Bangladesh Public Administration Training Centre, Savar, Dhaka, in short, BPATC, a statutory public authority established under the provisions of Ordinance No.XXVI of 1994. Although the appointment letters were issued by the Rector, *de jure,* appointing authority was the Board of Governors of BPATC. Due to persistent high-handed mismanagement by the then Rector, Dr. Ikram Hossain, there was a general resentment and protest against him from the 12th to the 14th days of August, 1997. The petitioners as 'Despatch Rider' and 'Club Attendant' respectively were not, in any way, connected with the said protest and sit-in. The Rector and the Director, Administration of BPATC, out of anger and vindictiveness, initiated a massive disciplinary action against a large number of employees including the petitioners. Over 35 employees including stenographers, UDA, LDA and MLSS were terminated. 16 employees who were appointed by the Centre belonging to class-Ill & Class-IV were terminated under regulation 50(2) of the BPATC Employees Service Regulations, 1992, in short, the Regulations, 1992. All of them had preferred writ petitions before the High Court Division and a Division Bench of the High Court Division by a judgment and order dated 31.08.2001 held that the provision of regulation 50(2) of the Regulations, 1992 was *ultra vires* the Constitution and the provisions of the

Services (Re-organization and Conditions) Act, 1990; the writ-respondents were directed to reinstate the writ-petitioners with continuity of their service and financial benefits. The judgment and order of the High Court Division was upheld by the Appellate Division and all the writ-petitioners were reinstated with back pay. 10 employees who were formerly in the service of the Republic were also terminated under regulation 50(2) of the Regulations, 1992. They being in the service of the Republic preferred a number of cases before the Administrative Tribunal. All the cases were decided in favour of the terminated employees by the Administrative Tribunal, Dhaka. The Government had preferred appeal before the Administrative Appellate Tribunal. By a common order dated 28.05.2001 in Appeal No. 159 of 1999 all the appeals were dismissed. The terminated employees were thereafter reinstated in service with back pay. Some 06 others had preferred separate writ-petitions which were then pending for final hearing in the High Court Division. The writ-petitioners and several others were terminated/ dismissed from the BPATC service as a sequel to a charter of demand which was made for improving their working conditions. The charter of demand was considered in a meeting of the BPATC under the Chairmanship of the Rector, Dr. Ikram Husain on 10.06.1997. It was decided that 05 (five) points were acceptable and all the prosecutions would be withdrawn. The Administration of the BPATC did not abide by its own decision and proceeded with bias and ill-will to punish all the employees who had supported the charter of demand. By an order dated 28.01.1998, salary for several days was withheld and deducted from 236 employees including the petitioners. The name of the petitioners appeared at serial No.211 and 157 respectively. Charge was framed against the respective petitioner on 18.09.1997 by the Director, Administration alleging, *inter alia,* that they had participated in "indisciplinary and subversive acts" on the 12th to the 14th days of August, 1997.

5. The petitioner of Writ Petition No.459 of 2005 (the respondent of C.A.No.327 of 2008) duly replied to the charges brought against him stating, *inter alia,* that he was not, at all, present in the alleged incidents which took place from the 12th to the 14th days of August 1997 as he was on duty, delivering official letters at the Bangladesh Secretariat and at the Prime Minister's Office. The petitioner of Writ Petition No. 1497 of 2005 (the respondent of C.A. No. 326 of 2008) replied to the charges brought against him stating, *inter alia,* that he was not connected with the alleged offence except taking part in the protest "by way including him as a member of the procession."

6. In Writ Petition No.459 of 2005, it was further stated that without con-

sidering the reply of the petitioner and the office order that he was sent to Bangladesh Secretariat and to the Prime Minister's Office for delivering urgent mail and as such, he could not have participated in any rowdy activities on the 12th to the 14th days of August, 1997, the Director Administration appointed an inquiry committee with his loyal supporters. The inquiry committee, on the basis of the oral evidence of the sole witness, Jane Alam (driver), submitted a report on 30.10.1997 finding the petitioner guilty of misconduct though in the evidence of the sole witness, no direct involvement of the petitioner was proved. On the basis of the said inquiry report, the Director of the BPATC passed the impugned order of dismissal, vide office order No.Bl-139/95(Pt-l)697 dated 30.11.1997. Against the said order of dismissal, the petitioner preferred an appeal to the Rector of the BPATC on 14.12.97. The appeal was rejected on 18.01.1998. After receipt of the aforesaid appellate order dated 18.01.98 and on *bona fide* belief, the petitioner's appeal was not considered on its own facts and circumstances, he made several representations, one after the other, but there was no reply. The last representation was sent on 03.07.2004 in which reference to the previous representations was made and the petitioner was sent a reply on 24.08.2004 only. In the above backdrop, the petitioner filed the writ petition.

7. In Writ Petition No. 1497 of 2005, it was further stated that without considering the reply of the petitioner, the Director, Administration, BPATC, appointed an enquiry committee with his loyal supporters headed by one Joynal Abedin and the said enquiry committee submitted its report on 28.10.1997 finding him guilty of misconduct though he was not involved with the alleged offence. On the basis of the said enquiry report, the Director of the BPATC dismissed the petitioner form service, vide office order No. B1-305/95-695 dated 30.11.1997, vide annexure-'F' to the writ petition. Against the said order of dismissal, the petitioner preferred an appeal to the Rector of the BPACT on 11.12.1997. The appeal was rejected on 18.01.1998 and the same was communicated to the petitioner, vide Memo No. ৰ১৩০৫/৯৫-১০২৫/৪(৪) dated 22.01.1998. After receipt of the appellate order on the *bona fide* belief, the petitioner's appeal was not considered on its own facts and circumstances, he made several representations, one after another, but there was no reply. The last representation was sent on 02.04.2004 in which reference to the previous representations was made. The petitioner was sent a reply on 30.06.2004. In the circumstances, the petitioner filed the writ petition.

8. In the writ petitions, it was contended that the entire proceedings including the framing of charge, appointing enquiry committee, con-

sidering the inquiry report and passing the final order of dismissal were done without jurisdiction and as such, void *ab initio;* the Director, Administration was not authorized in law to do all these things in respect of the petitioners, who were appointed by the Rector.

9. From the impugned judgment and order, it appears that writ-respondent No.1, appellant No.2, herein filed an affidavit-in-opposition in Writ Petition No. 1497 of 2005 only (copy of the affidavit-in-opposition has not been incorporated in the paper book) contending, *inter alia,* that in August, 1997, some unruly staff of the BPATC tried to disrupt its regular activities by making procession, shouting slogans, blocking the front gates, ransacking the office properties, misbehaving with the authority and placing illegal demands. An enquiry was conducted by the competent authority and on the basis of the report of the enquiry committee, the authority dismissed the petitioners from service. The Ministry of Establishment conferred power upon the Director, Administration, vide Memo No.Sama (A.Pra-1) BPATC/17/92-5 dated 29.10.1995 to appoint second class officers and third and fourth class employees of the BPATC. On 10.06.1997, the petitioners including other staff submitted a charter of demand which was unlawful and illegal. They took the initiative to stop all the activities of the BPATC by disconnecting water and gas supply and telephone line. The impugned order was passed after observing all legal formalities and as such, the same did not call for any interference under writ jurisdiction.

10. A Division Bench of the High Court Division which heard the writ petitions analogously by a common judgment and order dated 06.06.2007 made the Rules absolute in both the writ petitions. The writ-respondents filed Civil Petition for Leave to Appeal No. 1289 of 2007 against the judgment and order passed in Writ Petition No.459 of 2005 and Civil Petition for Leave to Appeal No. 1288 of 2007 against the judgment and order passed in Writ Petition No. 1497 of 2005 respectively. The leave petitions were heard analogously by this Division and leave was granted in both leave petitions on 03.06.2008 to consider the following submissions of the learned Deputy Attorney General who appeared for the leave petitioners:

> "Mr. Mohammad Ali Akanda, learned Deputy Attorney General, appearing for the petitioners submitted that the authority deducted an amount equivalent to the basic pay of the respondent for 20 day under Section 5 of the Public Employees Discipline (Punctual Attendance) Ordinance, 1982 for leaving his office during the office hours without prior permission from his higher authority and conversely

the respondent was convicted for other specific allegations under Regulation ৩৬(১)(আ)(ছ) of the বাংলাদেশ লোক প্রশাসন প্রশিক্ষণ কেন্দ্র এর কর্মচারী চাকুরী প্রবিধানমালা, ১৯৯২। Thus, the respondent has been convicted for two distinct and individual offences and he has not been punished twice for the self-same offences; that the writ petition is not maintainable since the respondent did not challenge the vires of any law in the writ petition, therefore, he cannot seek his remedy, under Article 102 of the Constitution, rather he will be required to seek remedy under Article 117(2) of the Constitution. The learned Deputy Attorney General further submitted that there is no person or official biasness in passing the order of dismissal in question since all the legal formalities provided in law have been followed by the authority." From the leave granting order, it appears that facts of Writ Petition No. 1497 of 2005 have only been taken note of, however, two appeals being Nos.326 and 327 of 2007 were registered out of the leave granting order passed in the leave petitions.

11. Mr. Murad Reza, learned Additional Attorney General, appearing for the writ-respondent-appellants, tried to make his submission in the light of the leave granting order.

12. During the hearing of the appeals on behalf of the respondent in both appeals, an additional paper book was filed annexing the decision of the Board of Governors of the BPATC in its 57th meeting. Mr. Abdur Rab Chowdury, learned Advocate, appearing for the respective writ-petitioner-respondent, drawing our attention to agendum No. 8 of the said meeting of the Board of Governors of the BPATC, made submission that since the Board of Governors took decision to withdraw the appeals filed by the BPATC, the learned Additional Attorney General had no scope to appear on behalf of BPATC and to argue on its behalf and thus, to proceed with the appeals and the appeals be dismissed.

On the other hand, the learned Additional Attorney General, in reply to the submission of Mr. Abdur Rob Chowdhury, submitted that the decision of the Board of Governors of the BPATC as filed in the additional paper book, at best, shows that the decision was taken by it to withdraw the leave petitions and not the appeals which arose out of the leave already granted by this Division, so the appeals need be disposed of on merit.

The above contra submissions of the learned Additional Attorney General and Mr. Abdur Rob Chowdhury, can easily be resolved if we see the decision of the Board of Governors of BPATC taken in its 57th meeting.

13. From the proceedings of the meeting of the Board of Governors of

the BPATC, it appears that in its 57th meeting as many as 22 agenda were transacted. Agendum No. 8 was as under:

"৮. কেন্দ্রের চাকুরিচ্যুত দু'জন কর্মচারী অনুকূলে মহামান্য হাইকোর্ট-এর রায়ের বিরুদ্ধে লিভ টু আপীল প্রত্যাহার করে তাদের চাকুরিতে পূনর্বহাল অনুমোদন।"

The Board discussed the agenda and then took decision as under:

"আলোচ্য বিষয়-৮ঃ

৮.০ কেন্দ্রের চাকুরিচ্যুত দু'জন কর্মচারীর অনুকূলে মহামান্য হাইকোর্ট-এর রায়ের বিরুদ্ধে লিভ টু আপীল প্রত্যাহার করে তাদের চাকুরিতে পূনর্বহাল অনুমোদন।

৮.১ বাংলাদেশ লোক-প্রশাসন প্রশিক্ষণ কেন্দ্রের সাবেক ক্লাব এ্যাটেনডেন্ড জনাব মোঃ নরুল ইসলাম এবং ডেসপ্যাচ রাইডার জনাব হেমন্ত কুমার বর্মন তাঁদের বিরুদ্ধে আনীত "কর্মচারী আন্দোলনে অংশগ্রহণ, কর্মবিরতি পালন ও বিশৃংখলা সৃষ্টির" অভিযোগ-এর পরিপ্রেক্ষিতে কেন্দ্র কর্তৃক ৩০.১১.৯৭ তারিখে চাকুরিচ্যুত হন। পরবর্তীকালে তারা চাকুরিচ্যুতি আদেশ-এর বিরুদ্ধে মহামান্য হাইকোর্টে রীট পিটিশন দাখিল করেন। দীর্ঘদিন মামলা চলার পর মহামান্য হাইকোর্ট তাদের পক্ষে রায় ঘোষণা করেন। উল্লিখিত রায়ের পরিপ্রেক্ষিতে কেন্দ্র কর্তৃপক্ষ মহামান্য সুপ্রীমকোর্টে আপীল (লিভ টু আপীল) দায়ের করেন। ইতোমধ্যে বিপিএটিসি কর্তৃক বোর্ড অব গভর্ণরস এর ৪৩তম সভার ৭.১১.১নং সিদ্ধান্ত "... মহামান্য আদালতের নির্দেশ বাস্তবায়নের লক্ষ্যে যথাযথ কর্তৃপক্ষের অনুমতিক্রমে ২৩ জন কর্মচারীকে কাজে যোগদান করানো হয়েছে এবং তাদের বকেয়া বেতনভাতাদিও প্রদান করা হচ্ছে এবং যেহেতু দাখিলকৃত আপীল মামলাগুলো পরিচালনা করে বিপিএটিসির কোন লাভ হবে না বলে প্রতীয়মান, সেহেতু আপীল মামলা প্রত্যাহার করার অনুমোদন দেওয়া হলো" পর্যালোচনা করে উপর্যুক্ত চাকরিচ্যুত কর্মচারীদের অনুকূলে মহামান্য হাইকোর্ট-এর রায়ের বিপক্ষে লিভ টু আপীল প্রত্যাহারের সিদ্ধান্ত গ্রহণ করেন।

উপরন্তু, উপর্যুক্ত অবস্থার পরিপ্রেক্ষিতে কেন্দ্র কর্তৃপক্ষ বর্ণিত আপীল প্রত্যাহার বিষয়ে জনপ্রশাসন মন্ত্রণালয়ের মতামত গ্রহণের জন্য পত্র প্রেরণ করলে তাঁরা এ বিষয়ে বিপিএটিসি এর সর্বোচ্চ কর্তৃপক্ষ বোর্ড অব গভর্ণরস-এর সিদ্ধান্ত অনুযায়ী এবং মহামান্য হাইকোর্ট-এর রায়ে কোন অস্পষ্টতা থাকলে– সে ক্ষেত্রে আইন ও বিচার মন্ত্রণালয়-এর মতামত গ্রহন করে বিষয়টি নিস্পত্তি করার পরামর্শ প্রদান করেন। অতঃপর, কেন্দ্রের আইনকোষ-এর সুপারিশক্রমে এ বিষয়ে সিদ্ধান্ত গ্রহণের জন্য বোর্ড অব গভর্ণরস-এর সভায় উপস্থাপন করা হলে বোর্ড নিম্নরূপ সিদ্ধান্ত প্রদান করেন।

৮.২ সিদ্ধান্ত

যেহেতু ইতঃপূর্বে একই প্রকৃতির অন্য মামলার ক্ষেত্রে মহামান্য হাইকোর্ট-এর নির্দেশ বাস্তবায়নের জন্য যথাযথ কর্তৃপক্ষের অনুমতিক্রমে সংশ্লিষ্ট কর্মচারীদের চাকরিতে যোগদান করতে দেয়া হয়েছে এবং যেহেতু বর্ণিত আপীল মামলা পরিচালনা করে কেন্দ্রের তথা সরকারের জন্যে ফলদায়ক হবে না মর্মে প্রতীয়মান হয়- সেহেতু কেন্দ্রের সাবেক ক্লাব এ্যাটেনডেন্ট জনাব মোঃ নুরুল ইসলাম এবং ডেসপ্যাচ রাইডার জনাব হেমন্তকুমার বর্মন-এর বিরুদ্ধে আপীল মামলা প্রত্যাহার করে বিধি মোতাবেক তাঁদের চাকরিতে পুনর্বহাল অনুমোদন এবং বকেয়া বেতন-ভাতাদি পরিশোধ করার প্রস্তাব অনুমোদনকরা হলো।"

14. *From a minute reading of the decision of the Board of Governors, it appears to us that the Board, in fact, decided to withdraw the instant appeals and not the leave petitions as submitted by the learned Additional Attorney General. And this is clear from the fact that leave was granted in the two leave petitions on the 3rd day of*

June, 2008, whereas the 57th meeting of the Board of Governors was held on the 26th December, 2011 corresponding to the 12th Poush, 1418 B.S. It will be sheer foolishness to presume that when the meeting of the Board of Governors took place long after three and half years of the granting of leave, the Board did not know the fact of giving leave in the leave petitions by this Division and that despite the granting of leave, it considered the fact of withdrawal of the leave petitions instead of withdrawing the appeals which arose out of the leave granting order. From the discussions of the agenda as recorded in the proceedings (quoted hereinbefore), it further appears that the Board considered the fact that earlier in its 43rd meeting, decision was taken to reinstate 23 other employees as per directions of the Court given in the case of similar nature and they were given their arrear salaries and other service benefits. In this regard, it is very pertinent to state that in the writ petitions, the respective petitioner categorically stated that some of the employees who were terminated by the BPATC for committing the same offence filed writ petitions and the Rules issued in those writ petitions were made absolute and pursuant to the directions given in those writ petitions, they were re-instated in their posts with back pay; some other terminated employees who were in the service of the Republic filed cases before the Administrative Tribunal and the Tribunal allowed those cases and those had also been re-instated and these facts had not been denied by the respondent in the affidavit-in-opposition filed in Writ Petition No. 1497 of 2005. In the leave petitions as well as in the concise statement also filed by the appellants, nothing contrary has been stated. Therefore, we find no rational and factual backing in the submission of the learned Additional Attorney General that the BPATC had decided to withdraw the leave petitions and not the appeals.

15. *We appreciate the decision of the Board of Governors of the BPATC in its 57th meeting to withdraw the appeals in question, because had they not taken the said decision and decided to proceed with the appeals, it would have been perpetuating a discriminatory treatment towards the petitioners (respondents in the appeals) in clear violation of their fundamental rights of equality before law and equal protection of law as guaranteed in article 27 of the Constitution of the People's Republic of Bangladesh.*

16. In view of the above, we find no reason to consider the submissions on which leave was granted and thus, to dispose of the appeals on merit. However, since no formal application has been filed for withdrawal of the appeals as per the decision of the Board of Governors of the BPATC, we find no other alternative but to dismiss the appeals.

Accordingly, the appeals are dismissed; no order as to costs.

APPELLATE DIVISION (Criminal)

Md. Muzammel Hossain–C.J.
Surendra Kumar Sinha–J.
Md. Abdul Wahhab Miah–J.
Syed Mahmud Hossain–J.
A.H.M.Shamsuddin Chowdhury–J.

CRIMINAL PETITION FOR LEAVE TO APPEAL N0. 187 OF 2011

(From the judgment and order dated the 15th day of February, 2011 passed by the High Court Division in Criminal Revision No. 1250 of 2010).

Fazal Ahmed ..... Petitioner.

Vs.

The State and another ... Respondents.

For the Petitioner : Mrs. Sufia Khatun, Advocate-on-Record

For Respondent No. 2 : Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent No. 1 : None represented.

Judgment: July 23, 2013

Negotiable Instruments Act, 1881-

Section 138- Criminal Court has the power and jurisdiction to decide the alleged factor of forgery of the cheques while deciding the case under section 138 of the Negotiable Instruments Act-

The operation of section 138 of the Act, 1881 cannot be obstructed or, in any way, circumvented by the mere fact of filing of a suit by the drawer of the dishonoured cheque in civil Court whatever allegations may be in the plaint about the same and the relief prayed for therein, because such a device shall totally make the section itself nugatory. However, if a holder or the payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheque shall have the liberty to take such defence during the trial ..... (Para 7)

JUDGMENT

MD. ABDUL WAHHAB MIAH–J: This criminal petition for leave to appeal has been filed by the accused against the judgment and order dated the 15th day of February, 2011 passed by the High Court Division in Criminal Revision No. 1250 of 2010 discharging the Rule.

2. Facts necessary for disposal of this leave petition are that on 03.11.2002, respondent No.2, Aer Mohammad (Azad), as complainant (hereinafter referred to as the complainant) filed a petition of complaint before the Chief Metropolitan Magistrate, Chittagong against the accused-petitioner, his elder brother alleging, *inter alia,* that there was family business in Chittagong and as the accused-petitioner is illiterate, the complainant

played a key role in the family business and earned a huge amount of money out of that business. At one stage, plot No.57 of Sugandha Residential Area, Muradpur Housing Estate, Chittagong, was purchased with the income of the family business, but the accused-petitioner got his name only inserted in the purchase deed purporting to show him as the purchaser by way of a smart trick. However, ultimately, a 6 (six) storied building was constructed thereon with the income of the family business. After completion of the construction of the building, the accused-petitioner claimed the same as his. At this, a quarrel ensued between the two brothers, namely: the accused-petitioner and the complainant. At the instance of their father, a salish was held and it was found that a sum of taka 35,00,000.00 was due to the complainant. For the said liability, the accused-petitioner negotiated two cheques bearing Nos.5250888 and 5250889 dated 15.05.2002 and 20.05.2002 for taka 15,00,000.00 and 20,00,000.00 respectively in favour of the complainant. On 20.10.2012, the two cheques were presented for encashment in the account of the complainant, but the cheques were bounced due to insufficiency of fund. The complainant on 21.10.2002 through his father requested the accused to pay the money of the dishonoured cheques, but he ousted the old father from his (the accused) room by rebuking him and insulting him. Then the complainant on 23.10.2002 through his lawyer gave a legal notice to the accused asking him to pay the amount of the dishonoured cheques, the accused received the legal notice but did not pay the money, so he filed the petition of complaint.

3. The Chief Metropolitan Magistrate sent the petition of complaint to Panchlaish Police Station to treat the same as First Information Report and accordingly, Panchlaish Police Station Case No. 14 dated 16.11.2002 under sections 406/420 of the Penal Code and section 138 of the Negotiable Instruments Act, 1881 (the Act, 1881) was started against the accused-petitioner. After investigation, Police submitted charge sheet in the case against the accused-petitioner on 30.12.2002 under the said sections of the Penal Code and the Act, 1881. Eventually, Sessions Case No.665 of 2006 has arisen out of those proceedings, which is now pending in the First Court of the Additional Metropolitan Sessions Judge, Chittagong. In the meantime, the accused-petitioner instituted Other Class Suit No. 147 of 2002 in the Third Court of the Joint District Judge, Chittagong against the complainant for declaration of title to Plot No.57 of Sugandha Residential Area, Muradpur housing Estate, Chittagong. Besides, the accused-petitioner also, instituted Other Class Suit No.76 of 2003 in the self-same Court against the complainant for a declaration that the cheques in question are forged, fabricated, illegal and inopera-

tive. The complainant also filed Money Suit No. 12 of 2005 against the accused-petitioner in the self-same Court for realization of the amount of the dishonoured cheques (taka 35,00,000.00). The accused-petitioner filed an application in the Sessions case under section 344 of the Code of Criminal Procedure (the Code) for its postponement till disposal of the Other Class Suit No. 147 of 2002 pending in the Third Court of the Joint District Judge, Chittagong. The learned Additional Metropolitan Sessions Judge, First Court, Chittagong by his order dated 09.08.2006 rejected the application. Against the order dated 09.08.2006, the accused-petitioner filed Criminal Revision No. 1280 of 2006 before High Court Division under section 435 read with section 439 of the Code. The High Court Division by its judgment and order dated 03.05.2007 made the Rule absolute and postponed the further proceedings of Sessions Case No.665 of 2006 for a period of 6(six) months and directed the parties to take steps to get Other Class Suit No. 147 of 2002 disposed of within the said period failing which, the trial of the sessions case would proceed as usual. The Third Court of the Joint District Judge, Chittagong failed to conclude the trial of Other Class Suit No. 147 of 2002 within the said time frame of 6 (six) months. Then the accused-petitioner filed another application under section 344 of the Code for postponement of the proceedings of the sessions case, but the First Court of Additional Metropolitan Sessions Judge rejected the application by his order dated 09.06.2010 holding that there was no cogent ground to adjourn the further proceedings of the sessions case. It is to be noted that this time, the application under section 344 of the Code was filed after more than three years of the expiry of time frame of six months given by the High Court Division in Criminal Revision No. 1280 of 2006. As against the aforesaid order dated 09.06.2010 passed by the learned Additional Metropolitan Sessions Judge, the accused-petitioner preferred an application before the High Court Division under section 439 read with section 435 of the Code and obtained the Rule vide Criminal Revision No. 1250 of 2010.

4. A Division Bench of the High Court Division on hearing the parties by the impugned judgment and order discharged the Rule; hence this petition for leave to appeal.

5. Heard Mrs. Sufia Khatun, learned Advocate-on-Record for the accused petitioner and Syed Mahbubar Rahman, learned Advocate-on-Record entering caveat on behalf of the complainant-respondent.

6. From the impugned judgment, it appears that the High Court Division discharged the Rule mainly on ground that a criminal case could not be stayed for indefinite period on the ground of pendency of a civil suit. The High Court Division further observed that *"It goes without saying that the Criminal Court has the power and*

jurisdiction to decide the alleged factor of forgery of the cheques while deciding the case under section 138 of the Negotiable Instruments Act."

7. This Court in the case of Md. Arif-Uz-Zaman-Vs-the State and another (Criminal Petition for Leave to Appeal No.514 of 2010, judgment delivered on 9 day of June, 2011) has taken similar view. In that case, three questions were formulated for consideration, the last question being "(iii) whether a pending civil suit in respect of the dishonoured cheque can be used as a shield by the accused for his protection from being prosecuted in respect of an offence committed under section 138 of the Act, 1881" (the other two questions are not relevant for the present purpose) and in that case, it has been observed:

> "So far as the last question is concerned, we are of the view that *the operation of section 138 of the Act, 1881 cannot be obstructed or, in any way, circumvented by the mere fact of filing of a suit by the drawer of the dishonoured cheque in civil Court whatever allegations may be in the plaint about the same and the relief prayed for therein, because such a device shall totally make the section itself nugatory. However, if a holder or the payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheque shall have the liberty to take such defence during the trial."*

In view of the above, we find no error committed by the High Court Division in passing the impugned judgment and order discharging the Rule calling for interference by this Court.

8. Accordingly, the petition is dismissed.

Case Cited:

* ***Arif-Uz-Zaman-Vs-the State and another (Criminal Petition for Leave to Appeal No.514 of 2010) [Unreported].***

Worth Reading:

* ***Hunasikattimath (G.F.) v. State of Karnataka [1991] 1 Crimes 226; [1993] 76 Comp Cas 278 (Kar).***
* ***Union Roadways (P.) Ltd. v. Shah Ramanlal Satesh Kumar [1992] 2 Crimes 215; [1993] 76 Comp Cas 315.***
* ***Abdul Samad v. Satya Narayan Mahawar [1993] 76 Comp Cas 241 (P & H).***
* ***S. Prasanna v. R. Vijayalakshmi [1993] 76 Comp Cas 522 (Mad).***
* ***Omprakash Bhojraj Maniyar v. Smt. Swati Girish Bhide [1992] 3 Crimes 306; [1993] 78 Comp Cas 797 (Bom).***
* ***Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar [1993] 78 Comp Cas 822.***
* ***Omprakash Bhojraj Maniyar [1993] 78 Comp Cas 797.***
* ***Bhageerathy v. V. Beena [1992] 3 Crimes 663; [1993] 76 Comp Cas 684***

HIGH COURT DIVISION
(Civil)

Md. Rezaul Hasan-J.

CIVIL REVISION NO. 2866 OF 2010

(Rule under section 115(1) of the Code of Civil Procedure (CPC) has been issued at the instance of the plaintiff-petitioner calling upon the opposite party Nos.1-3 to show cause as to why the judgment and order passed by the learned Additional District Judge, 6th Court, Dhaka, allowing the appeal and reversing the judgment and order passed by the learned Assistant Judge, 8th Court, Dohar, Dhaka, thereby dismissing the suit, should not be set aside)

Mosammat Kamran Nessa .... Petitioner.

Vs.

Haji Hafez Md. Sharif Uddin and others ..... Opposite Parties.

For the Petitioner : Mr.Mahbubey Alam, Advocate with Mr.Md.Harun-or-Rashid, Advocate.

For the Opposite Party Nos.1,2 and 3 : Mr.A.F.M. Mesbahuddin, Advocate with Mr.Md.Zakir Hossain, Advocate.

Judgment: March 13, 2014

Special Relief Act, 1877-

Section 39- A suit is not maintainable without prayer for decree for cancellation of the gift deed-

Limitation Act, 1908-

Section 91- A suit for cancellation of the deed of gift ought to have been filed within 3 years-

I also do find that the appellate court has discussed the evidence of the prosecution witnesses of the plaintiff and records that in spite of the P.W.2 and 3 having supported the affidavit and the P.W.4 having supported the title and possession of the defendant in the suit property, the lower court has failed to appreciate their evidence and arrived at findings contrary to the evidences on record. The plaintiff Kamran Nessa, as P.W.1, has admitted to have signed the affidavit and helped in getting mutation of the suit property in the name of the defendant No.1. She did not raise any objection in recording this suit property in the name of the donee in the income tax return of defendant No.1. The P.W.4 deposed to have assisted to get mutation of suit property in the name of defendant No.1, with consent of all parties. The defendant No.1 subsequently gifted the suit property in favour of defendant Nos. 2 and 3. But, even after know-

ing about this registered gift deed the plaintiff has simply filed a suit for declaration instead of filling a suit for cancellation of the registered deed of gift made by the defendant No.1 in favour of the defendants No.2 and No.3. As such, the suit is not maintainable in its present form. Next, referring to the cross-examination of defendant No.1, the learned appellate court records that, from the evidence on record, it appears that the defendants are maintaining title and possession in the suit property. The P.W.2 has indirectly admitted in his cross-examination that on 10.12.1994 he had signed in the affidavit as a witness and that the defendant No.1 is in possession of the suit property. P.W.3, in his cross-examination, has admitted that he has signed below the affidavit dated 10.12.1994 as a witness and that defendant No.1 is living in the suit property. P.W.4, Haji Kamaluddin, Commissioner, in his deposition, stated that he has signed the 'no objection certificate'. The D.W.2 deposed that the suit property was gifted by the defendant Nos.1 to his two sons and that the defendants are in possession of the suit property through their tenants. D.W.3, Anwar Hossain, deposed that Kamran Nessa was owner of the suit property and subsequently, in the year 1994, she has gifted the suit land to his son (defendant No.1). The D.W.4, in his deposition, has also stated that the defendants are in possession of the suit land through their tenants. The D.W.5, Caretaker of the suit property, in his deposition, stated that from 1988 to 1994 he was serving as an employee of Kamranness and that in 1994 the property was gifted by her to her son (defendant No.1), and that he (D.W.5) is serving as an employee of defendant No.1 since 1994 ..... (Para 15)

The appellate court, as apparent in it's judgment, having considered the deposition of the witnesses, has arrived at independent findings that the defendants are maintaining their title and possession in the suit property by duly getting their name mutated in respect of the suit property and on payment of land development taxes (Khajna) and income taxes etc. Appellate court has also recorded in it's judgment that before the trial court the plaintiff has not mentioned any specific date on which she has come to know about the affidavit dated 10.12.1994, but she has filed the suit on 10.7.2008. As such the suit was clearly barred by limitation, but the trial court has not given proper decision on that issue. On the issue of estoppel, the appellate court holds that in spite of the plaintiff having complied with all formalities pursuant to the oral gift and the witnesses to the affidavit, who are alive, having

deposed that the defendant is in possession of the suit property through his tenants, therefore, the suit was not maintainable without prayer for decree for cancellation of the gift deed, as per provision of section 39 of the Special Relief Act, 1877, and for recovery of khas possession, but the trial court has failed to appreciate this. He also holds that in this case advolerume court fees ought to have been paid on proper valuation of the suit. The learned trial court, he records, have found that offer and acceptance in respect of the gift was in favour of the defendant and has also recorded that the defendant was in possession of the suit land before 10.12.1994. Then referring to the power of attorney (Ext. Ka) to the affidavit recording oral gift (Ext. Kha), to Ext. Ga series, namely the DCR and land development taxes receipts, to Ext. Gha khatians (record of rights), to Ext. 'Uma'- certified copy of the objection Miscellaneous Case No.70 of 2003 filed before the Assistant Commissioner (Land), Dhanmondi Revenue Circle, to (Ext. Cha)-land development tax receipts etc, the appellate court has arrived at the finding that the suit property is in possession of the defendant and that they are maintaining possession on payment of taxes and Khazna in respect of the suit properties. Referring to (Ext.8), a register deed of partition of 2008, the learned appellate court records that it appears from Ext. 8 that there were a huge properties left by deceased husband of the plaintiff and that have been partitioned long back amongst the successors of the deceased Faizuddin . He also holds that since the suit property was transferred to the defendant No.1 through gift and plaintiff herself has assisted in doing the necessary formalities pursuant to the gift, as recorded in affidavit dated 10.12.1994, it is admitted by both sides that the gift was made and the oral gift was recorded long before 2008 and the defendant was recovering rents from the tenants residing/using the suit properties. But, the learned Court below, without discussing the evidences of the witnesses in detail or specifically, has declared void the affidavit dated 10.12.1994, although the defendant has been able to prove their case. Accordingly, he has allowed the appeal against the contesting respondents, without any order as to cost and has reverse set-aside the judgment and order dated 01.06.2009, passed by the court below (the decree signed on 8.6.2009) ..... (Para 16)

In the case of gift made between the family members, there is always a legitimate expectation from the side of the doner, as distinct from a condition or consideration for the gift, that the doner shall reside in the gifted property with the doner, as a family mem-

ber. The donee is estopped to deny such legistimate expectation implicit in this kind of gift made for no consideration, but out of love, affection and concern about the welfare of the donee. Such, proposition is supported by the doctrine of 'legitimate expectation', application of which can be extended to secure ends of justice, in a case like this ..... (Para 24)

Handing over of possession of a gifted property, gift being made between blood relations, like parent and children, does not and should not require physical evacuation of the doner or physically giving up possession of the gifted property by the doner. Handing over of possession, in such a case, can be proved by evidence like the mutation of name of the donee, opening Khatian in his name, payments of Khajna/ tax etc. by him, as has been done in this case. Because, in case of such a gift, made out of love, care and concern between the parties, a legitimate expectation to live jointly, as family members, is supported by long prevailing custom of our society ..... (Para 25)

It is legitimate expectation of the donor to reside with the donee based on their peculiar relationship as mother and son. The doner, in such case, shall be deemed to have acquired the status of licensee to reside in the suit property. Therefore, for ends of justice, the defendants Nos.1, 2 and 3 are hereby directed to maintain status quo in respect of peaceful living of the plaintiff and of her attendants, if any, in the suit property (in the ground floor, or at any other floor to be determined by the donee), during her life time. In the facts of this case, the plaintiff is estopped, it is to be confirmed as well, to deny the title and possession of the defendants in the suit of properties and she has no legal right to let out or to transfer or to enjoy the usufruct of the suit property .... (Para 26)

As to the binding character of this view, that this court, as a Constitutional Court, not only decides the lies, but also develops and declares the law, as one of its fundamental functions. This court is authorized, by Article 111 of the Constitution, to declare the law and the law declared by it is binding on all courts subordinate to it..... the moment High Court Division passes any judgment and order, it becomes law of the land in view of Article 111 of the Constitution, unless the same is modified or set-aside or operation of the same is stayed by the Appellate Division..... any judgment passed by the High Court Division is binding on all and the sub-ordinate courts are duty bound to comply with such judgment ..... (Para 27)

JUDGMENT

MD. REZAUL HASAN-J: This Rule under section 115(1) of the Code of Civil Procedure (CPC) has been issued at the instance of the plaintiff-petitioner calling upon the opposite party Nos.1-3 to show cause as to why the judgment and order dated 30.5.2010 (decree signed on 7.6.2010) passed by the learned Additional District Judge, 6th Court, Dhaka, in Title Appeal No.274 of 2009 allowing the appeal and reversing the judgment and order dated 01.06.2009 (decree signed on 8.6.2009) passed by the learned Assistant Judge, 8th Court, Dohar, Dhaka, in Title Suit No.4007 of 2008, thereby dismissing the suit, should not be set aside or such other order be passed this court may seem fit and proper.

2. Facts, in short, for the disposal of the Rule are that the petitioner Mst. Kamran Nessa has filed Title Suit No.4007 of 2008 on 10.7.2008 against the opposite parties, being defendant Nos.1, 2 and 3 in the said suit, before the court of learned District Judge, Dhaka, as by that time the central filing system has been introduced. The said suit was transferred to the learned court of Assistant Judge, Dohar Court, Dhaka. In the plaint it has been stated that, the suit property, described in the schedule, was transferred to the plaintiff (petitioner) by a sale deed executed on 9.12.1971 and registered on 18.1.1972, as deed No.314; that her husband Alhaj Faizuddin died on 16.2.1982, leaving 4 sons namely (1) Haji Kamaluddin (ii) Haji Hafez Sharif Uddin (defendant-1) (iii) Haji Taizuddin and (iv)Haji Md. Nasir Uddin and 3 daughters, namely (I) Kaniz Fatema (ii) Mst. Anessa Khatoon and (iii) Raisa Khatoon and all heirs of the deceased had become successors to the property of the deceased Faizuddin; that in the last part of the year 1994, the defendant No.1 brought a written paper before the plaintiff and told that her signature was required for the purpose of business and the plaintiff, having concern about the welfare and prosperity in the life of her son, had signed that document at the request of defendant No.1 (her second son), but the contents of the said deed was neither read over nor explained to her, and, as such, she had signed the document on good faith; that thereafter the defendant No.1 had got the suit land mutated in his own name on the basis of that deed and has also secured other documents showing him as owner of the suit property; that from the local revenue office she came to learn that the suit property, that also includes a residential building, was stated to have been orally gifted by her on 1.11.1994 to the defendant No.1 and that she had accordingly executed an affidavit on 10.12.1994, recording the fact of making the oral gift, in presence of 3 witnesses and of a notary public who has attested the said affidavit; that the plaintiff had

never made any oral gift on 1.11.1994 in favour of defendant No.1, as recorded in the said affidavit dated 10.12.1994, and that she never went to the office of the notary public, however, she has put her signature below the affidavit without knowing about the contents of the said affidavit; that there was no question of making oral gift of entire property to defendant No.1, as because she has other children too; that in the residential building of the suit property her son Md. Hafez Farid Uddin (defendant No.1) and her widowed daughter Anisa Khatoon along with her two sons are living with her; that the affidavit dated 10.12.1994, in which signature of the plaintiff was obtained, was prepared by the defendant No.1 and got signed by her taking advantage of her weakness, love and affection to her son, that the said affidavit 10.12.1994 is nothing but a paper transaction and is collusive one; that all the documents that are prepared in the name of the Defendant No.1, pursuant to Mutation Case No.3999/94/95 and Jamabagh Case No.15 of 2005 dated 31.7.2005 are all voidable and that the conduct of the defendant, in procuring those documents, comes within the scope of committing fraud; hence all those documents are liable to be treated as illegal and void; that in order to perpetuate the ill design to grasp the entire property the defendant No.1 has subsequently created a register gift deed No.5315, dated 30.12.2004, in favour of his 2(two) sons, namely Md. Zaki Uddin, who are defendant Nos. 2 and 3; that the cause of action for filing the suit has arose on 10.12.1994 when the aforesaid affidavit was created and thereafter on 31.7.2005 when the defendant No.1 got the suit properties mutated in his name pursuant to the Mutation Case No.3999/94-95-Namjari-Jamabagh Case No.15 of 2005 and was claiming exclusive ownership in the suit property by asking the plaintiff and other successors to leave the suit property and, thereafter, in the month of September, 2003, when the plaintiff- petitioner went to Land Development Tax Office to pay Khazna and came to know about procuring of this affidavit, the mutation khatian, Mohanagor khatian, mutation with the Dhaka City Corporation (DCC) in the name of the defendant No.1, and finally in May 2008, because the defendant No.1, by assuring her that the matter would be settled amicably, but for finally refusing to settle. The plaintiff has valued the suit at Tk.1000/- and paid fix court fees and prayed for relief to declare the aforesaid affidavit dated 10.12.1994 as void and that all the documents that was prepared pursuant to Namjari and jamabah Case No.15 of 2005 to be declared void. The plaintiff has further prayed that the deed of gift No.5315 dated 30.12.2008, executed by defendant No.1 in favour of his sons defendant Nos. 2 and 3, should also be declared void and she has also prayed for permanent injunc-

tion not to disturb her possession in the suit property.

3. The defendant Nos. 1, 2 and 3 have filed a joint written statement alleging, amongst other that the defendants have contested the suit by filing written statement denying all the material allegations brought against them and contending inter alia;

a) that the suit is not maintainable in its present form and the suit is barred by law of limitation . The defendants thereafter stated that the disputed house was bought in the name of the successors of Hazi Fayez Uddin. Thereafter the death of Hazi Foyez Uddin, the successors amicably made a partition deed through Notary public wherein the plaintiff got the disputed house along with other property;

b) that thereafter the plaintiff charmed with natural love and affection gifted the suit land to his son i.e defendant No.1 in front of notary public through registered affidavit deed No.30 dated 30.12.1994. The defendant No.1 therefore got his name mutated through namjari case No.3999/94-95 and enjoyed the suit land by way of tenancy;

c) that whenever the defendant went to mutate his name in city corporation, the plaintiff was informed the matter through notice and the plaintiff thereafter in front of Kamal Uddin Kabul i.e. Ward Commissioner No.64 issued a No Objection Letter dated on 09.09.1995. Thereafter the defendant No.1 mutated his name and paid rent, tax accordingly;

d) that therefore, the Dhaka City Survey was recorded in the name of defendant No.1. The plaintiff informed the Deputy Taxes Commissioner, Circle 20 about the gift and paid the income tax without the disputed house in the income tax statement. The TIN No. of the plaintiff is 051-1000-5218/sa-20. Thereafter the other sons and daughter became aggrieved about the gift and pressurized the plaintiff to file a Misc. Case No.7003 against the namjari and joma bhag case No.3999/94-95. Thereafter the plaintiff understood the conspiracy of her other children withdrew the misc. case voluntarily and thus the Assistant Commissioner (Land confirmed the namjari case No.3999/94-95;

e) that thereafter the defendant on 30.12.2004 gifted the suit land to the defendant Nos. 2 and 3 through registered Heba deed NO.5315. Thereafter the defendant Nos. 2 and 3 got their name mutated through Namjari and Joma Bhag Case No.1505 dated 31.07.2005 and paid rent accordingly;

f) that the plaintiff due to pressure from other children have filed this suit. The defendants claimed that the plaintiff has no prima-facie

arguable case and thus they have prayed for dismissal of the suit.

4. That the learned Senior Assistant Judge, Dohar, Dhaka after hearing both the parties decreed the suit by its judgment and decree dated 01.06.2009 (decree signed on 08.06.2009) in Title Suit No.4007 of 2008.

5. That against the judgment and decree passed by the trial court the defendant as appellants preferred Title Appeal No.274 of 2009 before the learned District Judge, Dhaka, on transfer the same was heard by the learned Additional District Judge, 6th Court, Dhaka who by its judgment and decree dated 30.05.2010 (decree drawn on 07.06.2010) allowed the appeal and reversed the judgment and decree of the trial court.

6. That being aggrieved by and dissatisfied with the judgment and decree of the Court of appeal below the plaintiff-petitioner preferred this revisional application under Section 115(1) of the Code of Civil Procedure before this Hon'ble Court Division on the following amongst other.

7. The petition filed under section 115(1) of the Code of Civil Procedure, being moved as a motion, this court has issued the Rule mentioned above.

8. The learned Advocate Mr. Mahbubey Alam, appearing along with the learned Advocate Mr. Md. Harun-or-Rashid, having placed the petition and the documents lying with the lower court record, first of all submits that the Appellate Court below has utterly failed to the appreciate the evidence on record. It has failed to notice that the plaintiff, being P.W.1, herself appeared before the court and denied to have made any oral gift on 1.11.1994 or to have signed the affidavit dated 10.12.1994. He further submits that P.W.1 has also deposed in her examination and in the course of her cross-examination that she has other children and she had no intention to make any gift in favour of his one son only by excluding other children. The P.W.1 has further deposed that she is possessing the suit property along with the residential building. Next, drawing my attention to the certified copy of a registered partition deed No.2922 dated 20.10.1998, (Ext.8) the learned Advocate for the petitioner submits that, very unfortunately, neither the lower court nor the appellate court has sufficiently discussed this registered partition deed signed in the year 1998 by all heirs of late Faizuddin that clearly proves that no oral gift was made in the year 1.11.1994 and no question to sign any affidavit, on 10.12.1994,to confirm the oral gift by the petitioner did arise. Then referring to the judgments of the appellate court, the learned Advocate further submits that the appellate court, as the last court of facts, has utterly failed to appreciate that, since a deed of partition was executed and registered in the year 2008, in which

the defendant No.2 is also a signatory, there is no need to seek any relief for cancellation of the affidavit (half-nama) dated 10.12.1994 inasmuch as by virtue of the subsequent deed of partition, registered in the year 2008, the affidavit dated 10.12.1994 has become ineffective and non-existent in the eye of law. Moreover, this registered deed of partition dated 20.10.2008 also proves that the oral gift, even if there was any, was never acted upon. Besides, he further submits that, the signature in the impugned affidavit in written as..... "কামরুন নেসা" whereas in the "আপত্তিহীন সনদপত্র" it appears as "কামরান নেসা।" As such, he adds, the genuineness of the affidavit dated 10.12.1994 has been rightly questioned. He, next, submits that the appellate court ought not to have relied upon the evidence of the defence witnesses, because the defendant No.1 himself did not appear before this court. Whereas, the other defendants are not neutral witnesses. As such, he continues, the defendants could not prove their positive case stated in the written statement. As regards the lower court's finding that the suit was barred by limitation, the learned Advocate for the petitioner submits that in fact the plaintiff has claimed to have learnt about this halafnama in the year 2003, as stated in paragraph No.10 of the plaint, when she went to the Land Development Tax office for the purpose of payment of Khazna. Thereafter, the defendants, assuring the plaintiff that they would settle the dispute amicably, had dragged the matter and finally refused to settle the matter in May, 2008. So the cause of action has arisen in the year 2008. As such, the suit has been filed on 10.7.2008, i.e. within the period of 6(six) years limitation from May, 2008. But the learned Appellate Court, without at all taking into notice these material facts and circumstances, has passed the impugned judgment and decree reversing the judgment passed by the trial court, by which the suit was allowed, and thereby the Appellate Court has committed error of law resulting in an error in the decision and that has occasioned failure of justice in this case. Accordingly, he has prayed that the Rule issued in this case may be made absolute.

9. The learned Advocate Mr. A.F.M.Mesbahuddin, appearing along with the learned Advocate Mr. Md. Zakir Hossain, on the other hand, having placed the petition along with the materials on record, for the opposite parties, submits that the appellate court, being the last court of facts, the findings of the appellate court cannot be lightly interfered with and it is the trend of decisions of this court. He further submits that a mere perusal of the trial court judgment would prima-facie show that the trial court, when the passed the judgment dated 01.06.2009 in Title Suit

No.4007 of 2008, did not discuss any evidence of the P.Ws (the plaintiff's witnesses) or of the D.Ws(defendant's witnesses), with specific reference to their deposition or to the documents exhibited in the suit and had arrived at wrong findings regarding the issues framed by the said court. The trial court, in passing it's judgment and decree, had not applied its mind judiciously to the facts and circumstances of this case, it has utterly failed to appreciate the evidence on record and has failed to arrive at correct findings on the issues framed. On the contrary, he submits, that a plain reading of the judgment passed by the appellate court evidently shows that the learned Judge of the Appellate Court has discussed the deposition of each witnesses of the plaintiff (P.W) and of each defence witness (D.W.) as well as it has examined all the exhibits meticulously and judiciously and the judgment passed by the Appellate Court is apparently based on proper appreciation of evidence on record. The appellate court, he continues, has reversed the findings of the trial court upon proper appreciation of the evidence, both oral and documentary, as will be apparent from the materials on record and the judgment and decree of the Appellate is in clear consonance with the provisions of law. Next, referring to the deposition of P.W.2 Hazi Amir Hossain, who is the son in law of the plaintiff, has admitted the fact of making oral partition in 1994. During his cross-examination that "আমি ব্যবসা করি। ব্যবসা প্রতিষ্ঠানের নাম হোসেন ট্রেডাস। হোসেন আমার পুত্র। আগে ব্যবসাটা আমার শ্বশুরবাড়ির সাথে Joint ছিল। ১৯৯৪ সালে বন্টন হওয়ার পর পৃথক হই।" He has also admitted that "আমার প্রদত্ত হলফ নামায় (প্রদঃ-১০) এবং ১০/০১/১৯৯৪ ইং তারিখের স্বাক্ষর এক হতে পারে।" As such, this P.W.2 admits that there was an oral partition in the year 1994, pursuant to which he has separated his joint business that was previously being done with his father-in- laws family and he has also admitted to have made signature on the affidavit dated 10.2.1994, when his attention was drawn, to his admitted signature. The learned advocate also submits that, P.W.3, Amir Hossain, has straight way admitted during his cross-examination that, "10/12/1994 Bs তারিখের হলফনামার ৩নং স্বাক্ষর আমার।" But, neither the PW.2 nor P.W.3, nor any other PWs, had deposed that the partition of the suit properties was effected by any deed of partition in the year 1988. He also submits P.W.4 , Haji Kamal, a neighbor of the parties and local commissioner, acquainted to the parties deposed that "এই অনাপত্তি নামায় আমার স্বাক্ষর আছে, কিন্তু আমি সরল বিশ্বাসে স্বাক্ষর করি।".As such this P.W 4 has also admitted that he had put his signature on a document "আপত্তিহীন সনদপত্র।" On 09.09.1995 signed by the plaintiff for the purpose of mutation of the suit property in the name of defendant No.1 by striking out her name. This P.W.4 did not refer exclusively to the request made by the defendant No.1., but the asserts that the request was

made by the family members of the plaintiff. As such, he submits that, evidently the fact of swearing and signing the affidavit on 12.12.1994 by the plaintiff/ P.W. 1, recording the oral gift made on 1.11.1994, has been proved by P.W.3 in clear language and P.W. 2 has admitted that his admitted signature (exhibit-10/1) has similarly with the signature appearing in the affidavit dated 10.12.1994 (exhibit-Kha). Both these P.W.2, nor the P.W.3 are witnesses to the affidavit dated 10.12.94, while another witness named Muhammad Ahammad Khan was not alive at the time of hearing of the suit. Next referring to the deposition of P.W.5 Md. Nasiruddin, son of the plaintiff/P.W.1, he submits that, in his deposition P.W.5 has simply states that the suit property was purchased by his father in the name of his mother i.e. in the benami of her mother. After death of his father the suit property, including other properties, was partitioned amongst his mother and the brothers and sisters. In paragraph No.3 of the plaint, it has been stated that husband of the plaintiff, died in the year 1992. As such, as per deposition of P.W.5, the suit property and other properties left by his deceased father was partitioned amongst the family members after death of his father i.e. sometime after 16.12.1982. This P.W.5 also does not state that the property was partitioned by any registered deed in the year 1998, although he himself is a signatory to that deed. P.W.6, Anisa Khatoon, is daughter of the plaintiff/ P.W. She is an widow and deposed that she in stays a flat on the suit land along with her two sons, and she has deposed in examination chief, regarding the oral gift, that "আমার মা কখনই এই বিষয়ে আমার সাথে আলোচনা করে নাই।" As such, the deposition of this P.W also does not in any way support the case of the plaintiff- petitioner, the learned Advocate submits. On the contrary, the defence case has been consistently supported by all the defence witnesses i.e. by D.W.1 to D.W.5, as has been elaborately discussed in the judgment passed by the appellate court, as the last court of facts. The defendant No.1 did not appear in this case for obvious reason, he explains, that this is a suit between the mother and son and there was reason for feeling embarrassment by the defendant No.1 to personally appear in this case. This does not in any way cast any doubt to the deposition made by the defence witnesses or on the defence case, inasmuch as the defence witness, as a whole, is consistant, elaborate and there is no contradiction amongst their deposition. The learned Appellate Court has, therefore, he concludes, has recorded his findings on facts based on deposition of these witnesses and on law. The trial court has failed to appreciate that the suit was barred by limitation and that the suit was not maintainable for not seeking cancellation of the impugned deeds and the appellate court has,

therefore, rightly reversed the findings of the court below on point of facts and law. As such, the findings of the appellate court does not suffer from any perversity or misreading or non-reading of evidence or misconstruction of law and the same does not call for any interference by this court. Hence he has prayed for discharging the rule.

10. Heard the learned Advocates, perused the petition along with the judgments of the courts below and have examined the evidence and other materials on record.

11. The issue before this court is to consider whether the appellate court has committed any error law resulting in any error in the decision occasioning failure of justice in passing the impugned judgment and order dated 30.5.2010 (decree signed on 7.6.2010) in Title Appeal No.274 of 2009.

12. To arrive at the conclusion, I have taken for consideration the judgment passed by the appellate court.

13. In it's judgment the appellate court has framed the following issues, namely (1) whether the judgment and decree passed by the learned court below is liable to be reversed and set aside and (ii) whether the appellant (plaintiff) is entitled to get the relief as prayed for.

14. To arrive at my findings on the said issues, I have taken for considering the judgment dated 30.5.2010, of the appellate court, for consideration. I find that under the heading "আলোচনা ও সিদ্ধান্ত" the appellate court has recorded that admittedly Kamran Nessa, the plaintiff, was owner of the suit property. The suit has been brought for declaring void the affidavit dated 10.12.1994. The trial court by its judgment and order dated 10.12.1994 has declared the said affidavit dated 10.12.1994 void and not binding on the plaintiff. Hence the defendant-appellant has filed this appeal against the said judgment stating 7 grounds in the Appeal Memo, for setting aside the said judgment. In the appeal memo, the appellant has stated that there is no cause of action for filing the suit for the reason, that no specific date of acquiring knowledge about the impugned affidavit has been mentioned in the plaintiff and that the trial court has erred in passing the judgment and order because of misconception on the issues involved and has also failed to appreciate that the suit was barred by limitation and on the principle of estoppeal. It has also been stated that in the Appeal Memo that from the return of income tax and the documents relating to the mutation it was further apparent that the plaintiff Kamran Nessa has gifted the suit property in favour of her son defendant No.1, and that the suit property was not shown in the income tax return filed related to their joint property, after the oral gift was made.

Mutation has been done and mutation khatian has been recorded in favour of the defendant No.1 pursuant to the said oral gift made in the year 1994. In Mahanagar jarip (Mahanagar survey) name of the plaintiff has been duly recorded as possessor and owner of the suit property.

15. Thereafter, *I also do find that the appellate court has discussed the evidence of the prosecution witnesses of the plaintiff and records that in spite of the P.W.2 and 3 having supported the affidavit and the P.W.4 having supported the title and possession of the defendant in the suit property, the lower court has failed to appreciate their evidence and arrived at findings contrary to the evidences on record. The plaintiff Kamran Nessa, as P.W.1, has admitted to have signed the affidavit and helped in getting mutation of the suit property in the name of the defendant No.1. She did not raise any objection in recording this suit property in the name of the donee in the income tax return of defendant No.1. The P.W.4 deposed to have assisted to get mutation of suit property in the name of defendant No.1, with consent of all parties. The defendant No.1 subsequently gifted the suit property in favour of defendant Nos. 2 and 3. But, even after knowing about this registered gift deed the plaintiff has simply filed a suit for declaration instead of filling a suit for cancellation of the registered deed of gift made by the defendant No.1 in favour of the defendants No.2 and No.3. As such, the suit is not maintainable in its present form. Next, referring to the cross-examination of defendant No.1, the learned appellate court records that, from the evidence on record, it appears that the defendants are maintaining title and possession in the suit property. The P.W.2 has indirectly admitted in his cross-examination that on 10.12.1994 he had signed in the affidavit as a witness and that the defendant No.1 is in possession of the suit property. P.W.3, in his cross-examination, has admitted that he has signed below the affidavit dated 10.12.1994 as a witness and that defendant No.1 is living in the suit property. P.W.4, Haji Kamaluddin, Commissioner, in his deposition, stated that he has signed the 'no objection certificate'. The D.W.2 deposed that the suit property was gifted by the defendant Nos.1 to his two sons and that the defendants are in possession of the suit property through their tenants. D.W.3, Anwar Hossain, deposed that Kamran Nessa was owner of the suit property and subsequently, in the year 1994, she has gifted the suit land to his son (defendant No.1). The D.W.4, in his deposition, has also stated that the defendants are in possession of the suit land through their tenants. The D.W.5, Caretaker of the suit property, in his deposition, stated that from 1988 to 1994 he was serving as an employee of Kamranness and that in 1994 the property was gifted by her to*

her son (defendant No.1), and that he (D.W.5) is serving as an employee of defendant No.1 since 1994.

16. Accordingly, *the appellate court, as apparent in it's judgment, having considered the deposition of the witnesses, has arrived at independent findings that the defendants are maintaining their title and possession in the suit property by duly getting their name mutated in respect of the suit property and on payment of land development taxes (Khajna) and income taxes etc. Appellate court has also recorded in it's judgment that before the trial court the plaintiff has not mentioned any specific date on which she has come to know about the affidavit dated 10.12.1994, but she has filed the suit on 10.7.2008. As such the suit was clearly barred by limitation, but the trial court has not given proper decision on that issue. On the issue of estoppel, the appellate court holds that in spite of the plaintiff having complied with all formalities pursuant to the oral gift and the witnesses to the affidavit, who are alive, having deposed that the defendant is in possession of the suit property through his tenants, therefore, the suit was not maintainable without prayer for decree for cancellation of the gift deed, as per provision of section 39 of the Special Relief Act, 1877, and for recovery of khas possession, but the trial court has failed to appreciate this. He also holds that in this case advolerume court fees ought to have been paid on proper valuation of the suit. The learned trial court, he records, have found that offer and acceptance in respect of the gift was in favour of the defendant and has also recorded that the defendant was in possession of the suit land before 10.12.1994. Then referring to the power of attorney (Ext. Ka) to the affidavit recording oral gift (Ext. Kha), to Ext. Ga series, namely the DCR and land development taxes receipts, to Ext. Gha khatians (record of rights), to Ext. 'Uma'- certified copy of the objection Miscellaneous Case No.70 of 2003 filed before the Assistant Commissioner (Land), Dhanmondi Revenue Circle, to (Ext. Cha)-land development tax receipts etc, the appellate court has arrived at the finding that the suit property is in possession of the defendant and that they are maintaining possession on payment of taxes and Khazna in respect of the suit properties. Referring to (Ext.8), a register deed of partition of 2008, the learned appellate court records that it appears from Ext. 8 that there were a huge properties left by deceased husband of the plaintiff and that have been partitioned long back amongst the successors of the deceased Faizuddin . He also holds that since the suit property was transferred to the defendant No.1 through gift and plaintiff herself has assisted in doing the necessary formalities pursuant to the gift, as recorded in affidavit dated 10.12.1994, it is admitted by both sides that the gift was made and the*

oral gift was recorded long before 2008 and the defendant was recovering rents from the tenants residing/using the suit properties. But, the learned Court below, without discussing the evidences of the witnesses in detail or specifically, has declared void the affidavit dated 10.12.1994, although the defendant has been able to prove their case. Accordingly, he has allowed the appeal against the contesting respondents, without any order as to cost and has reverse set-aside the judgment and order dated 01.06.2009, passed by the court below (the decree signed on 8.6.2009).

17. In the light of the findings of the appellate court, I have considered the judgment and decree passed by the trial court. I find that the learned trial court, in arriving at her findings, had neither specifically referred to, nor had discussed, in it's judgment, the evidence of the plaintiff's witnesses (P.Ws) or of the defendant's witnesses (D.Ws) or to the documents proved in the course of trial. Whereas, I find that, the appellate court has, in his judgment, specifically referred to and discussed the entire deposition on record as well as the documentary evidence, marked as exhibits, in arriving at his findings on the issues of law and of facts, and has passed the judgment based upon the independent findings arrived at by him and upon proper appreciation of the evidence on record.

18. The trend of decisions of this court, as the learned advocate for the opposite-parties submits, is that the appellate court, being the last court of facts, the findings of the appellate court should not be lightly interfered with. The appellate court, I find that, has reversed the findings of the trial court upon proper appreciation of the evidence, both oral and documentary, as will be apparent from the materials on record. I also find that the judgment of the Appellate Court is in clear consonance with the provisions of law. Next, having examined the deposition of the witnesses and the documents exhibited, I find that P.W.2, Hazi Amir Hossain, who is the son in law of the plaintiff, has admitted the fact of making oral partition in 1994. During his cross-examination he admits that "আমি ব্যবসা করি। ব্যবসা প্রতিষ্ঠানের নাম হোসেন ট্রেডাস। হোসেন আমার পুত্র। আগে ব্যবসাটা আমার শ্বশুরবাড়ির সাথে joint ছিল। ১৯৯৪ সালে বন্টন হওয়ার পর পৃথক হই" He has also admitted that "আমার প্রদত্ত হলফ নামায় (প্রদঃ-১০) এবং ১০/০১/১৯৯৪ ইং তারিখের স্বাক্ষর এক হতে পারে।" As such, this P.W.2 admits that there was an oral partition in the year 1994 pursuant to which he has separated his joint business that was earlier done jointly with his father-in- laws family and he has also admitted to have made signature on the affidavit dated 10.2.1994, when his attention was drawn, to his admitted signature. This P.W.2 is one of the 3 witnesses to the affidavit dated 10.2.1994 (exhibit-Kha). The P.W.3, Amir Hossain, has straight way admitted during his cross-examination that, "10/12/1994 Bs তারিখের হলফনামার ৩নং স্বাক্ষর আমার।"

Neither this PW.2, nor the P.W.3 nor any other PWs had deposed that the oral partition of 1993, as recorded in the notorised affidavit dated 10.11.1993, recording the oral partition, was not acted upon or that the partition of the suit properties was effected by any deed of partition in the year 1988. I also find that the P.W.4 , Haji Kamal,, a neighbor of the parties and local commissioner, acquainted to the parties, deposed that "এই অনাপত্তি নামায় আমার স্বাক্ষর আছে, কিন্তু আমি সরল বিশ্বাসে স্বাক্ষর করি।".As such this P.W 4.has also admitted that he had put his signature on a document "আপত্তিহীন সনদপত্র" on 09.09.1995, that had been signed by the plaintiff for the purpose of mutation of the suit property in the name of defendant No.1 by striking out her name and this admission also proves the oral gift made in the meantime, in 1994. This P.W.4 did not refer exclusively to the request made by the defendant No.1, but he asserts that the request was made by the family members of the plaintiff. As such, I find that the fact of swearing and signing the affidavit on 12.12.1994 by the plaintiff/ P.W. 1, recording the oral gift made on 1.11.1994, has been proved by P.W.3, in clear language, in his deposition and also the P.W. 2 has admitted, in his deposition, that his admitted signature (exhibit-10/1) has similarity with his signature appearing in the affidavit dated 10.12.1994 (exhibit-Kha). Both these P.W.2 and the P.W.3 are witnesses to the affidavit dated 10.12.94, while another witness named Muhammad Ahammad Khan was not alive at the time of hearing of the suit. Next, referring to the deposition of P.W.5 Md. Nasiruddin, son of the plaintiff/P.W.1, I find that, in his deposition P.W.5 has simply stated that the suit property was purchased by his father in the name of his mother i.e. in the benami of her mother. After death of his father the suit property, including other properties, was partitioned amongst the heirs of the deceased Faizuddin late husband of the plaintiff. In paragraph No.3 of the plaint, it has been stated that husband of the plaintiff, died in the year 1992. As such, according to the deposition of P.W.5, the suit property and other properties left by his deceased father was partitioned amongst the family members after death of his father i.e. sometime after 16.12.1982. This P.W.5 also does not state that the property was partitioned by any registered deed in the year 1998, although he himself is a signatory to that deed. The P.W.6, Anisa Khatoon, daughter of the plaintiff, simply deposed, in examination chief, regarding the oral gift, that "আমার মা কখনই এই বিষয়ে আমার সাথে আলোচনা করে নাই।" Therefore, the deposition of this P.W also does not in any way support the case of the plaintiff- petitioner. I find, on the contrary, the defence case has been consistently supported by all the defence witnesses i.e. by D.W.1 to D.W.5, as has been elaborately discussed in the judgment passed by the

appellate court, as the last court of facts. I also find substance in the submission of the learned advocate for the opposite parties that, non-appearance of the defendant No.1 does not in any way cast any doubt to the deposition made by the defence version, or on the defence case, inasmuch as the defence witness, as a whole is consistent, elaborate and there is no contradiction amongst their deposition.

19. I have also taken into notice that, the D.W.1, Md. Zakir Uddin, has elaborately and specifically stated the defence case and proved the case of defendant No.1. He has proved the affidavit dated 10.12.94, the DCR and all documents relating to mutation, khatians, khajna Dhakilas in the name of the defendant No.1. as well as the mutation with the DCC, the orders dated 30.9.2003 to 09.2.2003 of the A.C (Land), Dhanmondi Revenue Circle, Dhaka, whereby the Misc. Case No.70 of 2003 initiated by the plaintiff, challenging the mutation, was withdrawn, the documents relating to mutation in the name of defendants No.2 and 3 and the Khajna Dhakila, pursuant to the gift made in their favour by defendant No1, by proving the original gift deed No.5315 dated 30.12.2004. All these documents are marked as exhibits 'Ka' to exhibit 'Cha' series and the documents exhibited on behalf of the plaintiff are marked exhibits No.1 to 11. Next, having considered the deposition of the D.W No.2, Jalilur Rahman, and 3.Md. Selim, two neutral witnesses, I find they have deposed that the defendants are owners of the suit properties and they possess the same through their tenants. D.W. 3 is also a neighbour and living in the next door to the disputed property. The D.W.3 deposed that the plaintiff was the owner and in the year 1994 and she had gifted the property to defendant No.1, and that the defendants are occupying and possessing the suit land along with the residential buildings through their tenants. He further deposed, in his cross-examination, that his age was about 22 years in the year 1994 when the gift was made. Nothing adverse or to contradict these witnesses could be extracted from during their cross-examination. The D.W.4, Shamim Ahmed, is living to the north side of the disputed property. He has deposed that the suit land along with the residential property is in possession of the defendants and they are occupying the same through their tenants. The D.W.5, Md. Rafiqul Islam, is the caretaker of the residential building. He, I find, is also a neutral and non-partisan witness. In his deposition he stated that the suit property earlier belonged to the plaintiff and he was serving under the plaintiff until 1994. In the year 1994 the property was gifted to the defendant No.1 and since then he is serving under defendant No.1. In his cross-examination, he deposed that, since 1991 he is staying at Muradpur alongwith his

family. His salary, while was serving under Kamrun Nessa, was Tk.4,000/-. His duty was to pay various utility bills. He is recently receiving Tk.5,000/- as the monthly wages. He also deposed in his cross examination that "কামরুন নেসা ১৯৯৪ ইং সালে ১নং বিবাদীকে দান করে, তবে তারিখ মনে নাই। ঐ সময় খাজে দেওয়ান এর নিচ তলায় ছিলাম।" The D.W.2 to D.W 5 also deposed that they have received summons at their respective places and they have come to the court independently and they have not brought before this court by any parties to the suit. They have in a voice, corroborated the D.W.1 in all respect, regarding the oral gift, ownership and possession of the suit properties, as neighbours and inmates/ employee, respectively. They have personal knowledge and there is nothing on record to disbelieve them or to discard their deposition. I have also considered the application filed before the Assistant Commissioner of Land by the plaintiff and the orders dated 30.9.2003 to 09.12.2003, recorded in the Objection Miscellaneous case No.70 of 2003, that was filed by the plaintiff-petitioner in the year 2003, it was recorded by the Assistant Commissioner in his order dated 19.12.2013 (exhibit- 'Uma' series).Presumption of legality is attached to these official acts as per provision of Evidence Act. Accordingly, I hold that the period of limitation, has started from the 1994 since the partition was made in the year, 1994, as admitted by the P.W.1 in 'Uma series, and by the P.W.3 and D.W.5, whose deposition can be safely relied upon. Even if the plaintiff's case that she came to know about this gift in the year 2003 were acceptable, as stated in paragraph No.10 of the plaint, then also the period of limitation starts from 2003 and a suit for cancellation of the deed of gift, as per section 39 of the S.R.Act ought to have been filed within 3 years from 2003, as required by section 91 of the Limitation Act. For this reason alone, the suit is hopelessly the barred by limitation. Besides, the submission of the learned advocate of the plaintiff-petitioner that her signature appears as "কামরুন নেসা" in the affidavit dated 10.12.1994 (exhibit-Kha), but her signatures in the "আপত্তিহীন সনদপত্র" appears as "কামরান নেসা" does not have any substance. Because, the plaintiff herself admits to have signed the said affidavit and, 2ndly, she has signed below her deposition, as P.W.1, as "কামরান নেসা "

20. To summarise, I record that, by P.W.4, Md. Kamaluddin admitted his making recommendation along with signature on 9.9.1995 on a no objection certificate, wherein the plaintiff Kamrunnessa has stated that she has no objection if the suit properties are recorded in the name of his son Hafez Md. Sharif Uddin (defendant No.1), in the place of her name in respect of the suit properties. This no objection certificate, bearing signature of P.W.4 with his recommendation made on

9.9.1995, ought to have been marked as exhibit, as admitted by him in his deposition before the trial court. As to the registered deed of partition No.2922 dated 20.10.1998 (Ext-8), I find that the P.W.3 (witness to the affidavit) has clearly deposed that he has signed the affidavit dated 10.12.194 as one of the witnesses. The P.W.2, another witness to the affidavit, has also admitted that his signature made on the affidavit dated 10.12.1994 is similar to his admitted signature (exhibit-10/1). I also find that in an unregistered partition deed dated 10.11.1993 i.e. "আপোষ বন্টননামা দলিল।" The fact of oral partition, amongst all the heirs of deceased Faizuddin, has been put into record. This aposh bantannama deed, containing schedule 'Ka' to 'Cha' has been signed by all heirs of the late alhaj Faizuddin, and their signatures have been duly verified and authenticated by a Notary Public on the same date of execution. This notarized deed of partition is a memorandum showing that an oral partition was made after death of Faizuddin on 16.12.1982, as admitted by P.W.5 (son of late Faizuddin) deposing that the property was partitioned after the death of his father. This has been admitted by P.W.1 in her deposition, admitting that, "আমার স্বামী ১৯৮২ সনে ১৬ ডিসেম্বর চার ছেলে ৩ মেয়েকে ওয়ারিশ রেখে মারা যান। ১৯৯৩ সনে আমাদের business ও সম্পত্তির ব্যাপারে বাড়িতে উকিল এনে বন্টন করায়। বন্টন নামার মূল কপি আদালতে দাখিল করিলাম (প্রদ-৭)।" All defence witness have also gave deposition that the suit property was gifted in 1994, i.e. after oral partition was made, as recorded in the notarised deed of partition of 1993 (exhibit-7). The registered partition deed No.2922 of 2008, though admitted in evidence and marked as Ext. 8, also refers to the same schedules and contents of the previous notorised deed of partition dated 10.11.1993, signed by and between the same parties, in the year 1993 and it simply confirms the previous oral partition of 1993. I am also of the view that the materials on record are adequate to dispose of this matter.

21. The subsequent registered partition deed No.2922 dated 20.10.1998 cannot, in my considered opinion, nullify the previous oral partition recorded in the notorised partition deed dated 10.11.1993, submitted by the plaintiff and proved by P.W.1, marked as exhibit-7 that was permitted by law and has the legal force and was acted upon amongst the parties, as admitted by the PW-1, in her examination-in-chief, deposing that, "আমার স্বামী ১৯৮২ সনে ১৬ ডিসেম্বর চার ছেলে ৩ মেয়েকে ওয়ারিশ রেখে মারা যান। ১৯৯৩ সনে আমাদের business ও সম্পত্তির ব্যাপারে বাড়িতে উকিল এনে বন্টন করায়। বন্টন নামার মূল কপি আদালতে দাখিল করিলাম (প্রদ-৭)।". I am also of the view that the registered partition deed No.2922 dated 20.10.1998 is nothing but a memorandum of the previous oral partition, recorded in the notarized deed of partition of the year 2003 and admitted by P.W.1 in

her deposition, based on which the suit property fell into the shaham (share) of the plaintiff and she had made the oral gift of 1994. This registered partition deed of 1998, therefore, has neither created nor extinguished the right of the parties in the properties that was partitioned in year 1993. Besides, in the plaint, the plaintiff herself also did not rely on this subsequent deed of partition dated 20.10.1998 (exhibit-8) in support of her title or claim to the suit property. Rather, in her deposition, she claims title to the suit property, based on partition of 1993. Before partition of 1993, the plaintiff claimed title on the basis of a deed No.314 registered on 18.1.1972 (exhibit-4), as stated in paragraph No.2 of the plaint. None of the parties, I find, has claimed title to the suit or other properties of the deceased Faizuddin on the basis of this deed of partition registered in 2008 (exhibit-8). Next, having considered the affidavit dated 10.12.1994 (exhibit-Kha), in which the oral gift dated 1.11.1994 has been recorded, I find that it has been proved by P.W.3 who is a witness to the affidavit and has also admitted the fact of oral partition taking place in the year 1994, followed by consequent partition of the joint family business as well. Similarly, P.W.2, another witness to the affidavit dated 10.12.94 has also admitted his signature in this affidavit, by admitting similarity of his signature put an this affidavit dated 10.12.1994, with that of his admitted signature (exhibit-10/1). Besides this affidavit dated 10.12.1994 (Ext.Kha) has been attested on the same date on which it was executed by the plaintiff. As such the attestation itself is a proof of execution of the affidavit by the plaintiff. Moreover, the plaintiff herself has admitted in the plaint more then once, that she has signed the affidavit dated 10.12.1994 although she states that she did not know about the contents of this affidavit. But, she however admits that she has signed it out of love and affection to her son (defendant No.1) and that she signed because she was told that her signature was required for the purpose of business. But the contention she signed this deed for the purpose of business is not supported or corroborated by any witnesses or any other materials on record. On the other hand, the learned Advocate for the petitioner submits that the petitioner no business at all and the question of signing the affidavit for the purpose of business does not arise. I find substance in his submission.

22. The learned Advocate for the petitioner, Mr. Mahbubey Alam, lastly submitted that if the suit is dismissed on technical point then the equity will be defeated and if the suit is decreed then the defendant No.1 as well as other children/ plaintiff would get their respective title after death of the plaintiff. In this respect, the court's duty is to consider as to

whether the plaintiff has been able to prove her case by adducing required degree of proof and the submission made by the learned Advocate for the petitioner since not material for the purpose of disposal of this rule.

23. The learned trial court, though recorded in her judgment that the burden of proof the case of the plaintiff fully lies on him, has, however, failed to appreciate that the plaintiff has not been able to discharge her onus by adducing the required proof or evidence.

24. However, before parting of, I must hold that *in the case of gift made between the family members, there is always a legitimate expectation from the side of the doner, as distinct from a condition or consideration for the gift, that the doner shall reside in the gifted property with the doner, as a family member. The donee is estopped to deny such legistimate expectation implicit in this kind of gift made for no consideration, but out of love, affection and concern about the welfare of the donee. Such, proposition is supported by the doctrine of 'legitimate expectation', application of which can be extended to secure ends of justice, in a case like this.*

25. For the same reason, I further hold that *handing over of possession of a gifted property, gift being made between blood relations, like parent and children, does not and should not require physical evacuation of the doner or physically giving up possession of the gifted property by the doner. Handing over of possession, in such a case, can be proved by evidence like the mutation of name of the donee, opening Khatian in his name, payments of Khajna/ tax etc. by him, as has been done in this case. Because, in case of such a gift, made out of love, care and concern between the parties, a legitimate expection to live jointly, as family members, is supported by long prevailing custom of our society.*

26. Accordingly, I also hold that, *it is legitimate expectation of the donor to reside with the donee based on their peculiar relationship as mother and son. The doner, in such case, shall be deemed to have acquired the status of licensee to reside in the suit property. Therefore, for ends of justice, the defendants Nos.1, 2 and 3 are hereby directed to maintain status quo in respect of peaceful living of the plaintiff and of her attendants, if any, in the suit property (in the ground floor, or at any other floor to be determined by the donee), during her life time. In the facts of this case, the plaintiff is estopped, it is to be confirmed as well, to deny the title and possession of the defendants in the suit of properties and she has no legal right to let out or to transfer or to enjoy the usufruct of the suit property.*

27. It is also to be recorded here, *as to the binding character of this view, that this court, as a Constitutional Court, not only decides the lies, but*

also develops and declares the law, as one of its fundamental functions. This court is authorized, by Article 111 of the Constitution, to declare the law and the law declared by it is binding on all courts subordinate to it. It has been held, in the case reported in 32 BLD (AD) 2012: GOB v. Md. Mosharraf Hossain, at page 67, that "*the moment High Court Division passes any judgment and order, it becomes law of the land in view of Article 111 of the Constitution, unless the same is modified or set-aside or operation of the same is stayed by the Appellate Division.*" Again, in the case of Azzad Hossain v. State, reported in 62 DLR (AD) 288, page 288, at it has been held by the apex court that, *any judgment passed by the High Court Division is binding on all and the subordinate courts are duty bound to comply with such judgment.*

28. In view of the deliberation recorded above, I am of the considered view that the findings arrived at by the appellate court, as the last court of facts, does not suffer from any perversity and that there is no misreading or misconstruction of any evidence, documentary or oral or of the provisions of law. He has, as supported by the materials on record, rightly reversed the findings of the trial court on the basis of the independent findings arrived at by him on proper appreciation of the evidence on record and reversed the judgment and decree passed by the trial court and thereby he has committed no error of law resulting in any error in the decision or occasioning failure of justice.

29. For the reasons aforesaid, I find no merit in this Rule. In the result this rule is liable to be discharged.

30. In view of the deliberation recorded above and the directions given, the rule is discharged without any order as to costs.

Case Cited

* ***GOB vs. Md. Mosharraf Hossain , 32 BLD (AD) 2012.***
* ***Azzad Hossain vs. State, 62 DLR(AD) 288.***

HIGH COURT DIVISION
(Criminal)

Siddiqur Rahman Miah-J.
And
Naima Haider-J.

CRIMINAL MISC. CASE NO. 28911 OF 2009

(This Rule on an application filed under section 561A of the Code of Criminal Procedure was issued upon the opposite parties to show cause as to why the proceedings of CR case No. 499C/08 (Naogaon) under section 406/462 (Kha), now pending in the Court of Chief Judicial Magistrate, Naogaon should not be quashed)

Raj Kumar Khetan ..... Petitioner.

Vs.

Jamuna Bank Limited and another .... Opposite parties.

For the petitioner : Mr. Golam Ahmed.
For the opposite party No.2 : Mr. Habibul Islam Bhuiyan.
For the state : Mr. K.M. Zahid Sarwar DAG.

Judgment: August 24, 2011

Code of Criminal Procedure, 1898-

Section 561A- To bring a case for the purpose of quashing a proceeding one of following conditions must be fulfilled- (1) Interference even at an initial stage may be justified where the facts are so preposterous that even on admitted facts no case stands against the accused; (2) Where the institution and continuation of the proceeding amounts to an abuse of the process of the court; (3) Where there is a legal bar against the initiation or continuation of the proceeding; (4) In a case where the allegations in the FIR or the petition of complaint, even if taken at their face value and accepted in their entirely, do not constitute the offence alleged; and (5) The allegations against the accused although constituted an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge-

The ingredients of 406 of the Penal Code- to constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged . There must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract; and thirdly the misappropriation or conversion or disposal must be with a dishonest intention.

Ingredients _ The section requires-

1) Entrusting any person with property or with any dominion over property.

2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property ; or

b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation.

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of such trust ..... (Para 12)

This offence consists of any one of four positive acts, namely, misappropriation, conversion, user or disposal of property. Neither failure to account nor breach of contract however dishonest, is actually and by itself the offence of criminal breach of trust.

A compromise was effected between the parties and the accused undertook in writing that he would return them within one month from the date of writing. Having failed to do that he was prosecuted under section 406 from criminal breach of trust .. (Para 13)

Partnership- Breach of trust- A partner failing to account may not be accused for fraudulent and breach of trust unless there is a clear agreement whereby the accused is entrusted with the property for specific purpose which the accused fails to carry out and misappropriated it ..... (Para 14)

From the allegation made in the petition of complaint, it clearly shows that the petitioner had initial intention to deceive the complainant and thereby misappropriated the money. So, it cannot be said that it is a case of civil nature. The petition of complaint undoubtedly discloses criminal offence against the accused petitioner ..... (Para 15)

JUGDMENT

SIDDIQUR RAHMAN MIAH-J: This Rule on an application filed under section 561A of the Code of Criminal Procedure was issued upon the opposite parties to show cause as to why the proceedings of CR case No. 499C/08 (Naogaon) dated 22.10.2008 under section 406/462(Kha), now pending in the Court of Chief Judicial Magistrate, Naogaon should not be quashed.

2. Necessary facts for the purpose of disposal of this Rule, is that the petitioner is a citizen of Bangladesh and businessman by profession. He is a renowned businessman of Bangladesh having the business of export import. He imports rice, wheat, onion, dal and other articles from India. He is an Income tax payee. He paid 4,04,50,250.00 (four core four lac fifty thousand two hundred and fifty) taka as tax in the year 2005-06 and taka 25,04,190.00 (twenty five lac four thousand one hundred and ninety) in the year 2006-07. He is proprietor of M/S. KT International, M/S Sugandha International and M/S. Khetan Traders.

3. It is further stated that for business purpose, there developed relationship with the complainant Bank namely Jamuna Bank Limited, Naogoan Branch, Naogaon" Who is the complainant of the instant case.

4. It is further stated that the Manager of Jamuna Bank Ltd. Naogaon Branch, Naogaon filed CR Case No- 499C/08(Naogaon) before the Chief Judicial Magistrate, Naogaon against the petitioner under section 406/462(Kha) of the Penal Code stating that the petitioner entered into a contract on 27.08.2006 with the bank and an agreement was also executed on 31.08.06 with a condition that he will pay an amount of Taka 18,75,000 (Eighteen lac seventy five thousand) in every three months being failure the bank have the right to sell the trucks of the petitioner mortgaged with the said bank; that the petitioner took loan of an amount of Taka 3,83,70,000 (three core eighty three lac and seventy thousand) but did not pay the instalment rather the cheque issued by him was dishonoured by the bank, and in this way the petitioner committed offence under section 406/462(Kha) of the Penal Code and hence the case.

5. The case was filed on 22.10.2008 and cognizance was taken on that day by the Chief Judicial magistrate, Naogaon. The petitioner was in custody in other cases and he was enlarged on bail by the Chief Judicial Magistrate, Naogaon on 10.09.2009.

6. It is further stated that charge has not yet been framed in the instant case and the next date is on 25.11.2009 as it appears from the order dated 10.09.2009.

7. Being aggrieved by and the dissatisfied with the proceedings of CR case No. 499C/08 under section 406/462(Kha) of the Penal Code pending in the Court of Chief Judicial Magistrate, Naogaon, the petitioner has preferred the application under section 561A of the Code of Criminal Procedure before this court and obtained the present Rule.

8. Mr. Golam Ahmed, the learned Advocate on behalf of the petitioner submits that from plain reading of the complaint petition it is clear that there an agreement between the complainant bank and the petitioner and if there is any violation of breach of said agreement or contract only civil suit lies but the bank with a view to harass the petitioner imitated the instant case which is nothing but illegally barred by law and hence the same is liable to be quashed. He further submits that the petitioner as plaintiff instituted Title Suit No. 09 of 2008 impleading the complainant bank as defendants for declaration that the sanction is created and not binding upon him, the petitioner did not execute or furnish any documents regarding the alleged trucks etc, as such subsequent case filed by the bank against the petitioner is nothing but harassment through the abuse of process of court. Hence the same is liable to be set aside.

9. It is further submitted that the petitioner took loan as proprietor of M/s. Sugandha International even if

assuming it's true without conceding that the said firm M/S. Sugandha International has not been made party in the complaint petition which is mandatory as per the provision provides in section 140 of the Negotiable Instruments Act and as such the instant proceedings against the petitioner is barred by law. He further submits that the alleged cheque issued by the petitioner in favour of the complainant bank to adjust the liability of that bank for that the petitioner did not commit any offence as per that section as such the instant proceedings against the petitioner is barred by law.

10. Mr. Habibul Islam Bhuiyan, the learned Advocate for the opposite party No. 1, on the other hand, submits that the opposite party categorically described the very arising out of cause of action having no ambiguity in it and therefore there is no legal flaws in filing the case and the learned Chief Judicial Magistrate, Naogaon, on appreciating the said legal aspect rightly took cognizance of the offence. He further submits that there is no legal ground in the instant Rule by which this court can at all interfere with the impugned proceedings initiated and pending for trial and as such, the Rule is liable to be discharged and stay be vacated.

11. In order to appreciate the submission made by the learned Advocates of the contending parties, let us now see whether the complainant opposite party No. 1 has filed the case before the learned Chief Judicial Magistrate strictly complying with the provision of law envisaged under section 406/462(Kha) of the Penal Code and whether the proceedings under section 561A of the Code of Criminal Procedure is liable to be quashed. Now let us see the provision of section 406 and 462(Kha) of the Penal Code which reads as follows:

"Section 406:- Punishment for criminal breach of trust- whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both".

"Section 462B- Penalty for defrauding banking company- whoever fraudulently receives any benefit from a banking company in the course of any banking transaction shall be punished with imprisonment of either description for a term which may extend to two years, or with fine , or with both".

12. Now let us see *the ingredients of 406 of the Penal Code- to constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged . There must be an entrustment; there must be misappropriation or conversion to one's own use or use in viola-*

tion of any legal direction or of any legal contract; and thirdly the misappropriation or conversion or disposal must be with a dishonest intention.

Ingredients— The section requires-

1) Entrusting any person with property or with any dominion over property.

2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property ; or

b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation.

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of such trust.

13. *This offence consists of any one of four positive acts, namely, misappropriation, conversion, user or disposal of property. Neither failure to account nor breach of contract however dishonest, is actually and by itself the offence of criminal breach of trust.*

A compromise was effected between the parties and the accused undertook in writing that he would return them within one month from the date of writing. Having failed to do that he was prosecuted under section 406 from criminal breach of trust.

14. The only contention of the accused petitioner is that the allegation against the accused petitioner is civil in nature and criminal case does not lie.

The learned Advocate of the contesting opposite party controvert the above contention and cited the following decision reported in the case of Musa Bin Shamsher vs Ansarul Huq, 39 DLR-24:.

Partnership- Breach of trust- A partner failing to account may not be accused for fraudulent and breach of trust unless there is a clear agreement where by the accused is entrusted with the property for specific purpose which the accused fails to carry out and misappropriated it."

15. *From the allegation made in the petition of complaint, it clearly shows that the petitioner had initial intention to deceive the complainant and thereby misappropriated the money. So, it cannot be said that it is a case of civil nature. The petition of complaint undoubtedly discloses criminal offence against the accused petitioner.* The Appellate Division held that the High Court Division rightly refused the prayer for quashing the proceeding as referred in (1998) 18 BLD (AD) Abu Baker Siddique vs. The State and anr. (AD)289.

16. To meet the arguments of the learned Advocate for the petitioner , it is said that these are question of facts which will be decided in the trial

court. We find support of the above view in the case of Nizamuddin vs. Abdul Hamid reported in 60 DLR (AD)145.

In this connection we may also profitably refer the decision in the case of Ali Akkas vs. Enayet Hossain and others reported in 17 BLD(AD) 44 wherein their Lordships held: "the settled principle of law is that to bring a case within the purview of section 561A for the purpose of quashing a proceeding one of following conditions must be fulfilled:

(1) Interference even at an initial stage may be justified where the facts are so preposterous that even on admitted facts no case stands against the accused;

(2) Where the institution and continuation of the proceeding amounts to an abuse of the process of the court;

(3) Where there is a legal bar against the initiation or continuation of the proceeding;

(4) In a case where the allegations in the FIR or the petition of complaint, even if taken at their face value and accepted in their entirely, do not constitute the offence alleged; and

(5) The allegations against the accused although constituted an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge."

17. In the light of the above decision and considering the facts and circumstances of the case, we are of the view that since there is no legal bar against the initiation and continuation of the proceedings and as such the proceedings do not amount to an abuse of the process of the court. We could safely presumed that there is no prima facie ground and as such the application under section 561A of the Code of Criminal Procedure for quashing the proceeding shall not be maintained and the accused petitioner is not therefore entitled to get relief as prayed for and as such the Rule should be discharged.

18. In the result, the Rule is discharged and the proceedings in CR Case No. 499C/08 under section 406/462(Kha) of the Penal Code which is now pending in the court of Chief Judicial Magistrate, Naogaon should not be quashed.

19. The order of stay granted earlier shall stands vacated. Send down the L.C.R at once.

Case Cited

* ***Musa Bin Shamsher vs Ansarul Huq, 39 DLR-24.***
* ***Abu Baker Siddique vs. The State and anr. (1998) 18 BLD (AD) 289.***
* ***Nizamuddin vs. Abdul Hamid 60 DLR (AD)145.***
* ***Ali Akkas vs. Enayet Hossain and others 17 BLD (AD) 44.***

HIGH COURT DIVISION (Criminal Revisional Jurisdiction)

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

CRIMINAL REVISION NO.1338 OF 2005

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

1. Md. Abdul Mannan, son of late Abdul Zabbar Miah, of village Khagra Baria;
2. Rustom Ali, son of Dudu Khan, of village- Aruakandi, both of Police Station-Kashiani, District-Gopalgonj ..... Petitioners.

Vs.

1. The State ..... Opposite Party.
2. Anti-Corruption Commission, represented by its Chairman, having its office at 1, Shegun Bagicha, Dhaka .... Added Opposite Party.

For the petitioners : Mr. Sk. Baharul Islam, Advocate.

For the added opposite party : Mr. Hasan Shahid Kamruzzaman, Advocate.

Judgment: January 2, 2014

Criminal Procedure Code, 1898-

Section 195(1)(c)- In order to attract Section 195(1)(c), the offence should be alleged to have been committed by the party to the proceeding in his character as such party, i.e. after having become a party to the proceeding-

When an offence specified in section 195(1) (c) of the Criminal Procedure Code appears to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such a proceeding, no Court is competent to take cognizance of such an offence except on the complaint in writing of the Court concerned or some other Court to which it is subordinate. This provision thus requires that without a complaint in writing of the Court concerned or some other Court to which it is subordinate no prosecution for an offence mentioned in clause (c) of sub-section (1) of section 195 of the Code can be taken cognizance of ..... (Para 6)

The mutation in question was done on the recommendation of the Assistant Commissioner (Land), Gopalgonj as well and he was likely to be made an accused in the present criminal case, but neither in the first information report nor in the charge sheet his name is included. No explanation for such exclusion has been offered. Under the circumstances, the Anti-Corruption Commission is directed to enquire into the matter as to

how he was excluded from the case and whether the Informant and Investigating Officer of the case Mr. Md. Harunur Rashid, Inspector of the then Bureau of Anti-Corruption was justified in not including his name. If it is found that he was not justified in doing so the Commission will take appropriate action against him ..... (Para 8)

JUDGMENT

MD. RUHUL QUDDUS-J: This Rule at the instance of the two accused was issued on an application under section 439 read with 435 of the Code of Criminal Procedure challenging the order dated 21.06.2005 passed by the Special Judge, Faridpur in Special Case No. 67 of 2004 arising out of Gopalgonj Police Station Case No. 36 (4) 02 framing charge against the petitioners under sections 467, 468, 471 and 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947).

2. Md. Harunur Rashid, an Inspector of the then Bureau of Anti-Corruption, Gopalgonj District lodged an ejahar with Gopalgonj Police Station on 30.4.2002 against the petitioners alleging, inter alia, that on an enquiry held by the Bureau under Nothi No. ER 17/1998 it was revealed that petitioner 1 had filed an application for release of 50 decimals of land appertaining to different plots of Mouja Aroakandi under Kashiani Police Station of Gopalgonj District from the list of vested property. The Additional Deputy Commissioner (Revenue) on receipt of the said application directed the Assistant Commissioner (Land), Kashiani to enquire into the matter and submit a report. In compliance thereto the Assistant Commissioner (Land) asked the Tahshilder of Aroakandi Tahshil Office to submit a report to that effect. Although the original owner of the said land Basu Deb Das had left the country long before, the Tahshilder Mr. Rustom Ali Khan (herein petitioner 2) submitted a report that the said Basu Deb Das transferred the land to petitioner 1 by executing and registering a sale deed. On receipt of the said report the Assistant Commissioner (Land) recommended release of the land from the list of vested property and accordingly the office of Deputy Commissioner, Gopalgonj released the land on 15.02.1998. The report further revealed that no sale deed as claimed by the petitioner 1 was ever registered in Kashiani Sub-Registry Office. The petitioner 1 in order to grab the public property created false document and used it releasing the property and mutation of record for illegal gain.

3. The then Bureau of Anti-Corruption, investigated the case and submitted a charge sheet on

31.05.2004 against the petitioners under the aforesaid penal sections. In course of proceedings the matter being ready for trial was sent to the Special Judge, Gopalgonj wherein it was registered as Special Case No. 67 of 2004. The petitioners filed an application under section 241A of the Code of Criminal Procedure for their discharge from the case, which the learned Special Judge rejected by the impugned order dated 26.06.2005 and framed charge against them. Challenging the said order the accused-petitioners moved in this Court with the instant criminal revision and obtained the Rule with an order of stay.

4. Mr. Sk. Baharul Islam, learned Advocate appearing for the petitioners submits that in the first information report it was clearly stated that the document in question which is subject matter of the present case was used before the Deputy Commissioner in an application for release of the land in question from the list of vested property and mutation of the record. In such a position section 195 of the Code of Criminal Procedure imposes a bar against bringing the present criminal case by the Bureau. Since the sale deed No. 87 dated 11.01.1979 upon which petitioner 1 claimed his title and which is the subject matter of the present criminal case was used in a proceeding for release of the property and mutation of record in the name of petitioner 1 and was produced before the Deputy Commissioner/Additional Deputy Commissioner (Rev), only the Deputy Commissioner/Additional Deputy Commissioner was competent to refer the matter by a complaint in writing to the criminal Court. No other person/authority was competent to initiate such criminal proceeding except the Deputy Commissioner/ Additional Deputy Commissioner.

5. On the other hand, Mr. Hasan Shaheed Kamruzzaman, learned Advocate for the added opposite party, the Anti-Corruption Commission submits that there are ingredients of offences under sections 467, 468 and 109 of the Penal Code read with section 5(2) of the Act II of 1947. The Additional Deputy Commissioner (Rev) sitting in a mutation proceeding being not a Court, the barring clause of section 195 of the Code of Criminal Procedure will not apply in the present case. The Rule is therefore liable to be discharged.

6. We have considered the submissions of the learned Advocates and gone through the record. On this point we find the case of Idrish Ali and another vs. The State, 38 DLR 270. In the said case Justice Bimalendu Bikash Roy Chowdhury observed:

"It provides that *when an offence specified in section 195(1) (c) of the Criminal Procedure Code appears to have been committed by a party to*

any proceeding in any Court in respect of a document produced or given in evidence in such a proceeding, no Court is competent to take cognizance of such an offence except on the complaint in writing of the Court concerned or some other Court to which it is subordinate. This provision thus requires that without a complaint in writing of the Court concerned or some other Court to which it is subordinate no prosecution for an offence mentioned in clause (c) of sub-section (1) of section 195 of the Code can be taken cognizance of.". . . .

"....We are, therefore, of the opinion that a Revenue Officer dealing with a mutation proceeding under the State Acquisition and Tenancy Act and the Rule framed thereunder does not constitute a Court...."

7. In the said case their lordships relied upon the cases of Bharat Bank Ltd. vs. Employees of Bharat Bank Ltd., AIR 1950 (SC) 188; Brajnandan Sinha vs. Jyoti Narain PLD, 1956 (SC) (Ind) 65 and many other cases of the Superior Courts of this Subcontinent. We have no reason to deviate or defer with the principle enunciated in those cases. The Additional Deputy Commissioner sitting in a mutation proceeding or in a proceeding for release of a vested property cannot be construed as a Court and therefore there was nothing wrong in initiation of the present criminal case by the then Bureau of Anti-Corruption.

8. Before parting we note it that *the mutation in question was done on the recommendation of the Assistant Commissioner (Land), Gopalgonj as well and he was likely to be made an accused in the present criminal case, but neither in the first information report nor in the charge sheet his name is included. No explanation for such exclusion has been offered. Under the circumstances, the Anti-Corruption Commission is directed to enquire into the matter as to how he was excluded from the case and whether the Informant and Investigating Officer of the case Mr. Md. Harunur Rashid, Inspector of the then Bureau of Anti-Corruption was justified in not including his name. If it is found that he was not justified in doing so the Commission will take appropriate action against him.*

9. The Rule having no merit is thus discharged. The stay granted earlier stands vacated. The trial Court is directed to dispose of the case expeditiously.

Cases Cited:

* ***Idrish Ali and another vs. The State, 38 DLR 270.***

* ***Bharat Bank Ltd. vs. Employees of Bharat Bank Ltd., AIR 1950 (SC) 188.***

* ***Brajnandan Sinha vs. Jyoti Narain PLD, 1956 (SC) (Ind) 65.***

SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Asif Saeed Khan Khosa-J.
Ijaz Ahmed Chaudhry-J.
Gulzar Ahmed-J.

CRIMINAL REVIEW PETITIONS NO. 8-L AND 10-L OF 2013 IN CRIMINAL PETITION NO. 896-L OF 2012

(Against the judgment dated 03.01.2013 passed by this Court in Criminal Petition No. 896-L of 2012)

Nazir Ahmed (in Cr.R.P. No. 8-L of 2013)
Sayyed Mazahar Ali Akbar Naqvi (in Cr.R.P. No. 10-L of 2013) .. Petitioners.

Vs.

The State, etc. (in both cases) .... Respondents.

For the petitioners : Mr. Muhammad Ahsan Bhoon, ASC (in Cr.R.P. No. 8-L of 2013) Khawaja Haris Ahmed, Sr. ASC (in Cr.R.P. No. 10-L of 2013)

For the State : Mr. Ahmad Raza Gillani, Additional Prosecutor-General, Punjab(in both cases)

For the complainant : Ch. Muhammad Riaz Ahmad, ASC (in both cases).

Judgment: January 15, 2014

Constitution of the Islamic Republic of Pakistan, 1973-

Article 189- The jurisdiction of the Supreme Court of Pakistan is not just to decide questions of law but also extends to enunciating principles of law which decisions and principles are binding on all other courts in the country-

JUDGMENT

ASIF SAEED KHAN KHOSA-J: The jurisdiction of this Court, as is evident from the provisions of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973, is not just to decide questions of law but it also extends to enunciating principles of law which decisions and principles are binding on all other courts in the country. The principles of law contemplated by Article 189 include principles regulating the practices in vogue in the field of law and some of such practices and the principles enunciated in those regards are the subject of the present judgment.

2. The facts forming the basis for passage of the judgment of this Court under review admit of no ambiguity and the already settled principles of practice and propriety applicable thereto pose no difficulty of comprehension but the judgment under review has been taken exception to not only by the litigant affected by that judgment but also by the learned Judge of the Lahore High Court, Lahore whose order was set aside by this Court through the said judgment. The matter of a litigant filing a review petition before this Court is run of the mill

but a Judge of a High Court approaching this Court in person and seeking review of a judgment of this Court is surely out of the ordinary and it may raise many an eyebrow in view of the provisions of Article VI of the Code of Conduct prescribed by the Supreme Judicial Council adherence to which a Judge of a High Court swears while making oath of his office. The said Article of the Code of Conduct reads as follows:

> "A Judge should endeavour to avoid, as far as possible, being involved in litigation either on his own behalf or on behalf of others."

In this peculiar, and rather disturbing, backdrop we have attended to different aspects of these review petitions with utmost care and have decided to restate some of the relevant principles of law and practice with clarity so that in future no Judge may maintain that he had difficulty in comprehending or applying the same.

3. The facts of the case are that one Muhammad Islam Advocate was murdered and in that respect Muhammad Siddique complainant (respondent No. 2 herein) had lodged FIR No. 733 at Police Station Baseerpur, District Okara on 29.10.2008 for offences under sections 148, 302, 149 and 109, PPC. In the FIR the complainant had implicated six persons as the culprits including Nazir Ahmed (petitioner in Criminal Review Petition No. 8-L of 2013) and one Madad Ali and according to the FIR Nazir Ahmed petitioner had caused multiple firearm injuries in the abdomen of the deceased whereas Madad Ali co-accused had caused firearm injuries on the chest and other specified parts of the body of the deceased. During the investigation Nazir Ahmed petitioner and Madad Ali co-accused were opined by the police to be innocent and they were not even arrested which prompted the complainant to file a private complaint in respect of the same incident and against the same accused persons who had already been nominated in the FIR. After a full-dressed trial conducted in the private complaint the learned Additional Sessions Judge, Depalpur, District Okara found both Nazir Ahmed petitioner and Madad Ali co-accused guilty of the murder and vide judgment dated 19.05.2011 he convicted them for an offence under section 302(b), PPC read with section 34, PPC and sentenced them to imprisonment for life each as Ta'zir besides ordering them to pay a sum of Rs. 1,00,000/- each to the heirs of the deceased by way of compensation under section 544-A, Cr.P.C. or in default of payment thereof to undergo simple imprisonment for six months each. The benefit under section 382-B, Cr.P.C. was extended to them. Nazir Ahmed petitioner and Madad Ali co-convict assailed their convictions and sentences before the Lahore High Court, Lahore through Criminal Appeal No. 1082 of 2011 jointly filed by them. During the pendency of that appeal Madad Ali co-convict filed Criminal Miscellaneous No. 01 of 2011 seeking suspension of his sentence and release on bail which application was allowed by a learned Judge-in-Chamber of the Lahore High Court, Lahore (Sayyed Mazahar Ali Akbar Naqvi, J.) on

23.01.2012 on the grounds that there was previous enmity between the parties; Madad Ali was found by the police to be innocent; the complainant had filed his private complaint with a delay of six months; and the firearm injuries on some specified parts of the body of the deceased attributed to Madad Ali in the FIR were non-existent in the Postmortem Examination Report pertaining to the dead body of the deceased and in his private complaint the complainant had changed the locale of the injuries allegedly caused by Madad Ali so as to bring them in line with the medical evidence. The operative part of the order dated 23.01.2012 reads as under:

"6. There is no denial to this factum that the petitioner is nominated in the FIR with specific role, however, previous enmity between the parties is also an admitted fact. During the course of investigation, the petitioner was found innocent by the police and as such he was let off. In view of the premium of innocence, the complainant filed private complaint with the delay of six months, for which no plausible explanation has been rendered by the complainant and in the complaint the complainant has changed his stance qua locale of injuries ascribed to the petitioner. There is contradiction in the ocular as well as medical ocular account. Keeping in view the dictum of law laid down in the cases of 1994 SCMR 453 (Muhammad Afzal and another Versus The State), 2006 YLR 1953 (Muhammad Waheed Akhtar Versus The State) and 2008 MLD 396 (Fayyaz Maqsood and 3 others Versus The State), this Court is persuaded to accept this petition and suspend the sentence awarded to the petitioner and admit him to bail pending disposal of the main appeal subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of the Deputy Registrar (J) of this Court."

The said order of the Lahore High Court, Lahore was challenged by Muhammad Siddique complainant before this Court through Criminal Petition No. 95-L of 2012 which petition was dismissed by this Court on 14.03.2012 as having been withdrawn. After suspension of Madad Ali co-convict's sentence and his admission to bail Nazir Ahmed petitioner filed Criminal Miscellaneous No. 01 of 2012 before the Lahore High Court, Lahore seeking the same relief for himself but that application was dismissed by another learned Judge-in-Chamber of the said Court (Abdus Sattar Asghar, J.) on 20.02.2012 for non-prosecution. The order dated 20.02.2012 reads as follows:

"Despite repeated calls no one entered appearance on behalf of the petitioner. Name of learned counsel for the petitioner appears in the cause list but there is no intimation with regard to his absence.

2. Dismissed for non-prosecution."

Subsequently Nazir Ahmed petitioner made his second attempt for the same relief through Criminal Miscellaneous No. 02 of 2012 which application was dismissed by Sayyed Mazahar Ali

Akbar Naqvi, J. on 11.04.2012 with the following order:

> "Learned counsel for the petitioner, after arguing the case at some length, wishes to withdraw the instant petition. Dismissed as withdrawn."

Undeterred by failure of his two earlier applications for suspension of sentence and release on bail Nazir Ahmed petitioner made his third attempt for obtaining the same relief through Criminal Miscellaneous No. 03 of 2012 which was not filed through the original learned counsel who had filed and represented him in the earlier two applications but was filed through a different learned counsel and this time the attempt was crowned with success as the same learned Judge-in-Chamber of the Lahore High Court, Lahore who had dismissed the second application of the petitioner for the same relief suspended his sentence and released him on bail on 19.11.2012. The operative part of the order dated 19.11.2012 passed by Sayyed Mazahar Ali Akbar Naqvi, J. reads as follows:

> "This is the third petition on the subject. The first one bearing Crl. Misc. No. 01/2012 was dismissed for non-prosecution vide order dated 20.02.2012, whereas the second petition bearing Crl. Misc. No. 02/2012 was dismissed as withdrawn vide order dated 11.04.2012.

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6. From the perusal of the record it reveals that the petitioner was nominated in the FIR with specific role but during the course of investigation, he was found innocent and was let off by the investigating agency and thereafter, the complainant filed private complaint after a delay of six months for which no plausible explanation has been rendered. Moreover, there is previous enmity between the parties. The role ascribed to the petitioner is that he while armed with .222 bore Rifle fired two fire shots, which hit to Muhammad Islaa (deceased), whereas the role ascribed to the co-accused, Madad Ali, is that he also made two successive fire shots with his rifle .222 bore, which hit his chest. Thus, the role ascribed to the petitioner is identical to that of his co-accused, namely Madad Ali, whose sentence has already been suspended by this Court vide order dated 23.01.2012, passed in Crl. Misc. No. 01/2011, filed in Crl. A. No. 1082/2011, which was assailed before the august Supreme Court of Pakistan through Criminal Petition No. 98-L of 2012 and the same was dismissed as withdrawn.

7. For the foregoing reasons, this Court is persuaded to accept this petition suspend the sentence awarded to the petitioner and admit him to bail pending disposal of the main appeal subject to his furnishing bail bonds in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of deputy Registrar (Judicial) of this Court."

That order passed by the Lahore High Court, Lahore on 19.11.2012 was assailed before this Court by Muhammad Siddique complainant through Criminal Petition No. 896-L of 2012 which petition was converted into

an appeal and was allowed by this Court on 03.01.2013, the impugned order was set aside and bail allowed by the Lahore High Court, Lahore to Nazir Ahmed petitioner was cancelled. The relevant parts of the judgment passed by this Court on 03.01.2013 are reproduced below:

"6. The complainant in his private complaint ascribed respondent No. 2 the role of causing two injuries on the person of the deceased Muhammad Islam on his abdominal area and Madad Ali co-convict made two successive fire shots with his .222 bore rifle which hit the deceased on his chest. Both the aforesaid accused having been found guilty by the learned trial Court were convicted under section 302(b) PPC and sentenced to imprisonment for life. Madad Ali co-convict of respondent No. 2 filed Crl. Misc. 01/2011 in Crl. Appeal No. 1082/2011 for suspension of his sentence before the learned Lahore High Court, Lahore which stood allowed on 23.01.2012 whereby his sentence was suspended. Thereafter, respondent No. 2 moved an application (Crl. Misc. 01/2012) for suspension of his sentence which stood dismissed for non-prosecution as is evident from the certificate given by the learned counsel for respondent No. 2 at the bottom of Crl. Misc. 03/2012. Thereafter, respondent No. 2 filed Crl. Misc. 02/2012 before the learned Lahore High Court, Lahore, which stood dismissed as withdrawn but on the same grounds the third application (Crl. Misc. 03/2012) was allowed by the learned Lahore High Court, Lahore by totally ignoring the principles for suspension of sentence and other material availableon record by suspending the sentence of respondent No. 2 through impugned order. The main ground taken by the learned Judge of the Lahore High Court for suspending the sentence of respondent No. 2 was rule of consistency having similarity of roles ascribed to respondent No. 2 as well as Madad Ali coconvict, as such, the impugned order has been passed in violation of the law laid down by this Court in the case of "The State through Advocate General NWFP vs. Zubair and four others" (PLD1986 Supreme Court 173) wherein it has been held as under:

8. It might be useful to mention here that the second or the subsequent bail application to the same Court shall lie only on a fresh ground namely, a ground which did not exist at the time when the first application was made. If a ground was available to the accused at the time when the first bail application was filed and was not taken or was not pressed, it cannot be considered as a fresh ground and made the basis of any subsequent bail application. We may also point out, with respect to the learned Judge who dealt with the second bail application that the mere fact that the learned Judge who had rejected the first bail application of the respondents with the observation that as far as the remaining petitioners (the respondents herein) are concerned no case had been made out for their release on bail, does not mean that the application had not been disposed of on merits. It must be assumed that he had

considered all the pleas or grounds raised by the applicant's counsel before him and that the same had not found favour with him."

In such circumstances it is apparent on the face of record that the ground of similarity of role and rule of consistency was available to the petitioner at the time of filing first application for suspension of sentence but the learned Judge has totally ignored it. From the tenor of impugned order it appears that the learned Judge of the Lahore High Court while suspending the sentence of respondent No. 2 has not exercised discretion in a proper and judicious manner rather has not at all adverted to the guidelines laid down in Zubair's case (supra).

7. In view of the above, we while converting the instant petition into an appeal allow the same, set aside the impugned order dated 19.11.2012 passed by the Lahore High Court, Lahore in Crl. Misc. 03/2012 in Crl. Appeal No. 1082/2011 and cancel the bail granted to respondent No. 2.

8. Before parting with this order we may observe that discretion exercised by the learned Judge while passing the impugned order in the instant case has appeared to us to be somewhat colourable because after dismissal of second application for suspension of sentence bearing the same ground the only difference in the respondent's third application for the same relief was a different learned counsel for that respondent. Office is directed to send a copy of this order to the learned Judge of the Lahore High Court, Lahore for his information."

Hence, the present review petitions before this Court. Criminal Review Petition No. 8-L of 2013 has been filed by Nazir Ahmed petitioner seeking restoration of his bail and Criminal Review Petition No. 10-L of 2013 has been preferred by Sayyed Mazaha Ali Akbar Naqvi, Judge, Lahore High Court, Lahore praying for expunction of some observations concerning him made by this Court in paragraph No. 8 of the judgment under review.

4. In support of the review petition filed by Nazir Ahmed petitioner it has been argued by Mr. Muhammad Ahsan Bhoon, ASC that keeping in view the facts and circumstances of the case as well as the rule of consistency the learned Judge-in-Chamber of the Lahore High Court, Lahore was quite justified in suspending the sentence of Nazir Ahmed petitioner and in admitting him to bail during the pendency of his appeal, particularly when the case against the said petitioner for such relief was at par with that of his co-convict namely Madad Ali who had already been granted the same relief by the same Court. Mr. Bhoon has also argued that in entertaining and deciding the relevant application of Nazir Ahmed petitioner on its merits the learned Judge-in-Chamber of the Lahore High Court, Lahore had followed the law declared by this Court in the cases of Muhammad Riaz v. The State (2002 SCMR 184) and Ali Hassan v. The State (2001 SCMR 1047) and, therefore, the legitimate exercise of jurisdiction and discretion in the matter by the learned

Judge-in-Chamber of the Lahore High Court, Lahore ought not to have been interfered with by this Court through the judgment under review. While referring to the case of Makhdoom Javed Hashmi v. The State (2008 SCMR 165) Mr. Bhoon has submitted that in an appropriate case this Court may suspend the sentence of a convict and grant him bail even through exercise of review jurisdiction of this Court. Mr. Bhoon has lastly maintained that the contents of paragraph No. 8 of the judgment under review tend to cast aspersions not only upon the learned Judge-in-Chamber of the Lahore High Court, Lahore but also upon him as he was the counsel for Nazir Ahmed petitioner in the said petitioner's third application for suspension of sentence and bail which application was allowed by the Lahore High Court, Lahore. He, therefore, not only seeks review of the judgment of this Court under review but also prays for expunction of the relevant observations made by this Court in that judgment.

5. Khawaja Haris Ahmad, Sr. ASC appearing for Mr. Justice Sayyed Mazahar Ali Akbar Naqvi petitioner has submitted that he only seeks expunction of the remarks made by this Court in paragraph No. 8 of the judgment under review and that he has nothing to say regarding the merits or otherwise of Nazir Ahmed petitioner's case for suspension of sentence and bail. The main thrust of his submissions has been that the case of The State through Advocate-General, N.W.F.P. v. Zubair and 4 others (PLD 1986 SC 173) was not relevant to the case in hand because nothing had been said in that precedent case about maintainability or otherwise of a subsequent application for bail after dismissal of an earlier application for bail as having been withdrawn. According to Mr. Khawaja the only precedent cases relevant to the issue involved in the present case were the cases of Muhammad Riaz v. The State (2002 SCMR 184) and Ali Hassan v. The State (2001 SCMR 1047) and the relevant order passed by Sayyed Mazahar Ali Akbar Naqvi, J. was in accord with the principle laid down in the said precedent cases. Mr. Khawaja has maintained that till the passage of the judgment under review different Honourable Judges of different High Courts of the country had been taking the same view of the matter as was taken by Sayyed Mazahar Ali Akbar Naqvi, J. in the order set aside by this Court through the judgment under review and even Sayyed Mazahar Ali Akbar Naqvi, J. had taken the same view in seven other orders passed by him in different cases decided by him in the year 2012. In this respect he has placed on the record copies of the said seven orders passed by Sayyed Mazahar Ali Akbar Naqvi, J. and has also referred to the cases reported as Wajid Ali v. The State (2009 P.Cr.L.J. 275), Mustaqeem v. The State (2005 P.Cr.L.J. 661), Rasheed Ahmad v. The State (2007 MLD 1440), Muhammad Mansha v. The State (2006 P.Cr.L.J. 47), Muhammad Asif alias Kala v. The State (2007 P.Cr.L.J. 1292), Muhammad Idrees v. The State (2005 MLD 899), M. Latif v. The State (1996 MLD 2041) and Akbar Ali v. Jamshaid Ali and others (2012 P.Cr.L.J. 1301). Mr. Khawaja has gone on to sub-

mit that there was no malice on the part of Mr. Justice Sayyed Mazahar Ali Akbar Naqvi petitioner in passing the relevant order in the case of Nazir Ahmed petitioner and the mistake, if any, in the bona fide order passed by him in the said case could only be attributed to confusion and lack of proper understanding of the true import of the principle laid down in the above mentioned cases of Muhammad Riaz v. The State (2002 SCMR 184) and Ali Hassan v. The State (2001 SCMR 1047). He has, therefore, maintained that the remarks or observations made by this Court in paragraph No. 8 of the judgment under review were uncalled for and has urged that this Court may order expunction of the same. In the end Mr. Khawaja has submitted that ordinarily no adverse remark or observation is to be made or recorded in a judgment of a court without issuing notice to the concerned person or before affording him an opportunity of being heard in the relevant connection and in this respect he has placed reliance upon the cases of Muhammad Punhal v. Abdul Wahid Abbasi and another (2003 SCMR 1406), In the matter of expunging certain remarks made by a Magistrate against Additional District and Sessions Judge, Lyallpur (PLD 1950 Lahore 34), Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf (PLD 1963 SC 51) and Malik Firoz Khan Noon, Prime Minister's House, Karachi v. The State (PLD 1958 SC (Pak.) 333).

6. The learned counsel for Muhammad Siddique complainant has maintained that the judgment of this Court under review is a just and fair judgment besides being a considered judgment and the same addresses and cures a serious malady creeping into conducting of criminal cases and, therefore, the same does not call for a review. Regarding the scope of review jurisdiction he has referred to the case of Muhammad Riaz v. The State (2011 SCMR 1019). He has complained that despite cancellation of his bail by this Court Nazir Ahmad petitioner has so far managed to avoid his arrest although no interim relief has been granted to him by this Court during the pendency of the captioned review petitions. The learned Additional Prosecutor-General, Punjab appearing for the State has supported the learned counsel for the complainant and has added that these review petitions essentially seek rehearing of the merits of the case which exercise lies beyond the scope of review jurisdiction of this Court.

7. After hearing the learned counsel for the parties and going through the relevant record with their assistance we find that there are many issues involved in these review petitions and, thus, in the background of the facts of this case we have decided to discuss and resolve these issues one by one in the light of the principles concomitant thereto laid down by this Court from time to time. We find that the first issue involved in the review petitions in hand is as to whether the considerations weighing with the learned Judgein- Chamber of the Lahore High Court, Lahore for suspending the sentence of Nazir Ahmed petitioner and for releasing him on bail during the pendency of his appeal were valid considerations for grant of the said

relief on the merits of the case. We note in this context that the reasons prevailing with the learned Judge-in-Chamber of the Lahore High Court, Lahore for suspending the sentence of Nazir Ahmed petitioner and for admitting him to bail were that in the Challan case the police had found the petitioner innocent; the complainant had filed his private complaint after a delay of six months; there was previous enmity between the parties; and the sentence of a co-convict of the petitioner namely Madad Ali, attributed a role identical to that alleged against the petitioner, had already been suspended and he had been admitted to bail by the Lahore High Court, Lahore through an order which had not been interfered with by this Court. The facts and circumstances of the case, however, show that none of the said reasons provided a valid or sufficient ground for suspending the sentence of Nazir Ahmad petitioner and for his admission to bail during the pendency of his appeal before the Lahore High Court, Lahore. It ought to have been appreciated by the learned Judge-in- Chamber of the Lahore High Court, Lahore that any declaration of innocence of Nazir Ahmad petitioner recorded by the police in the Challan case was irrelevant as the petitioner's trial had been conducted in the complainant's private complaint and not in the Challan case and even otherwise opinion of the police regarding the petitioner's innocence was inadmissible in evidence being irrelevant besides such opinion having already paled into further irrelevance in view of the judicial verdict recorded by the learned trial court in respect of the petitioner's guilt. The learned Judge-in-Chamber of the Lahore High Court, Lahore had also failed to appreciate that the complainant had filed his private complaint when the investigating agency had disappointed and frustrated him on account of its alleged collusion with the accused party and the reasons for the delay in filing of the private complaint had been explained by the complainant before the learned trial court which reasons had been accepted by it as justified. Mere existence of enmity between the parties was hardly a valid ground for suspending the petitioner's sentence and for his admission to bail because the learned trial court had already adjudged the petitioner guilty of the alleged murder and the existing enmity between the parties had been found by it to be supporting the motive set up by the prosecution. Apart from that existence of enmity between the parties and a possibility of false implication of the petitioner on the basis of such enmity was a factor which could only be attended to and appreciated by the learned appellate court after a detailed assessment of the evidence at the time of hearing of the main appeal and certainly not at the time of deciding an application seeking suspension of sentence and release on bail during the pendency of the appeal. The learned Judge-in-Chamber of the Lahore High Court, Lahore was also clearly unjustified in holding that the case of Madad Ali co-convict was "identical" to that of Nazir Ahmed petitioner and, therefore, in view of Madad Ali's admission to bail upon suspension of his sentence Nazir Ahmed petitioner was also entitled to the same relief. The

learned Judge-in-Chamber of the Lahore High Court, Lahore had committed a serious error in this respect by not appreciating, or ignoring, the fact that most of the firearm injuries to the deceased attributed by the complainant in the FIR to Madad Ali were non-existent in the Post-mortem Examination Report pertaining to the dead body of the deceased and, therefore, in his private complaint the complainant had changed the locale of the injuries allegedly caused by Madad Ali to the deceased whereas the complainant had throughout been quite consistent in his FIR as well as in his private complaint regarding the firearm injuries caused by Nazir Ahmed petitioner to the deceased which injuries stood duly reflected in the Postmortem Examination Report. In view of this factual position it could not be urged with any degree of seriousness or held with any degree of reasonableness that the case of Nazir Ahmad petitioner was identical to that of Madad Ali co-convict for the purpose of treating them alike in the matter of suspension of sentence and release on bail. For all these reasons a conclusion is irresistible and inescapable that the learned Judge-in-Chamber of the Lahore High Court, Lahore was not justified in suspending the sentence of Nazir Ahmed petitioner and in admitting him to bail on the merits of the case and, thus, cancellation of his bail by this Court brought about through the judgment under review cannot be taken any legitimate exception to. The learned counsel for Nazir Ahmed petitioner has remained unable to point out any error patent on the face of the record justifying review of that decision by this Court.

8. The second issue involved in the present review petitions is as to whether all the grounds prevailing with the learned Judge-in-Chamber of the Lahore High Court, Lahore for suspending the sentence of Nazir Ahmed petitioner and for releasing him on bail during the pendency of his appeal were available to the petitioner at the time of dismissal of his earlier two applications filed before the Lahore High Court, Lahore for the same relief and, thus, the said grounds could not have been agitated or entertained for granting him the same relief through his third application. It may be recapitulated that Nazir Ahmed petitioner and Madad Ali coconvict had been convicted and sentenced by the learned trial court on 19.05.2011, the sentence of Madad Ali was suspended and he was released on bail by the Lahore High Court, Lahore on 23.01.2012, the first application filed by Nazir Ahmed petitioner for the same relief was dismissed for non-prosecution by the Lahore High Court, Lahore on 20.02.2012, the second application filed by him for the same relief had been dismissed by the Lahore High Court, Lahore on 11.04.2012 as having been withdrawn after the learned counsel for the petitioner had addressed arguments "at some length" but had remained unable to convince the Court on the merits of the case and the third application filed by the petitioner for the same relief was allowed by the Lahore High Court, Lahore on 19.11.2012. It has already been noted by us above that the grounds prevailing with the Lahore High Court, Lahore for suspending the sentence of Nazir Ahmed petitioner and for releasing him on bail were that in the Challan

case the police had found the petitioner innocent; the complainant had filed his private complaint after a delay of six months; there was previous enmity between the parties; and the sentence of a co-convict of the petitioner namely Madad Ali, attributed a role identical to that alleged against the petitioner, had already been suspended and he had been admitted to bail by the Lahore High Court, Lahore through an order which had not been interfered with by this Court. It is nothing but obvious from the chronological sequence detailed above that all the said grounds were already available to Nazir Ahmed petitioner at the time of filing of his first and second applications for suspension of sentence and release on bail and the said grounds had in fact been mentioned by him in those applications and, thus, the said grounds, none of which could be termed as a fresh ground, could not be taken or urged by him or on his behalf for the purposes of his third application seeking the same relief, particularly when the second application filed by him had been dismissed as having been withdrawn after his learned counsel had argued the matter "at some length" but had remained unable to convince none other than Sayyed Mazahar Ali Akbar Naqvi, J. himself for grant of the desired relief to the petitioner. 9. In the context of the issue under discussion it may be pertinent to mention that on a number of occasions this Court has held that the principles for exercise of jurisdiction under sections 497 and 426, Cr.P.C., one pertaining to grant of bail after arrest at the stage of trial and the other relating to suspension of sentence and release on bail at the stage of appeal against conviction, are essentially the same as the two provisions are analogous, they deal with a similar relief and they are parts of the same statute. A reference in this respect may be made to the cases of Maqsood v. Ali Muhammad and another (1971 SCMR 657), Bashir Ahmad v. Zulfiqar and another (PLD 1992 SC 463), Muhammad Nabi and 4 others v. The State (2006 SCMR 1225) and Raja Shamshad Hussain v. Gulraiz Akhtar and others (PLD 2007 SC 564). Over a passage of time this Court had noticed some mischiefs and malpractices being practised in the matter of applying for bail and from time to time this Court had enunciated and laid down certain principles for curbing such mischiefs and malpractices. One of such mischiefs and malpractices was repeated or successive filing of applications for bail for the same accused person in the absence of availability of any fresh ground and another was getting subsequent applications for bail fixed before a Judge different from the one who had refused the desired relief on an earlier occasion.

We deem it appropriate to refer here to the leading judgments handed down by this Court in these regards and the principles of propriety and practice enunciated in the same. In the case of Farid v. Ghulam Hassan and others (1968 SCMR 924) this Court had observed as follows:

> "It should also have been a matter of some concern to the learned Judge that one of his brother Judges had already dealt with the case and expressed himself strongly against the grant of bail by the Additional Sessions Judge. Not

only the long established practice of his Court, but also the rule of propriety required that he should have transferred the application for bail to the first Judge for disposal. Such a course would have had the merit of avoiding the possibility of two contradictory orders being passed in the same case by the High Court. It was urged that the plea of alibi was not considered by the High Court while cancelling the bail granted to the respondents, but the plea was neither urged before the Sessions Judge nor before Mr. Justice Jamil Asghar. It could not, therefore, be said that a new circumstance was made to appear which justified the passing of a contradictory order."

In the case of Gul Nawaz alias Gul Mowaz and 2 others v. The State (1970 SCMR 667) it had been observed by this Court as under:

"The High Court was in our view also right in holding that repeated applications for bail on the same facts did not lie in the High Court."

This Court had gone a step further in this respect in the case of Chaudhry Muhammad Khan v. Sanaullah and another (PLD 1971 SC 324) as is evident from the following passages of the judgment delivered in that case:

"The order passed by the learned Judge allowing bail to the respondent No. 1 was thus based on misconstruction of the record and it also suffered from the impropriety pointed out by this Court in the case of Farid v. Ghulam Hussain and others (1968 SCMR 924). Dealing with a similar case in which a learned Judge had allowed bail to an accused person who had been refused bail by another Judge, it was observed by this Court:

"It should also have been a matter of some concern to the learned Judge that one of his brother Judges had already dealt with the case and expressed himself strongly against the grant of bail by the Additional Sessions Judge. Not only the long established practice of his Court, but also the rule of propriety required that he should have transferred the application for bail to the first Judge for disposal. Such a course would have had the merit of avoiding the possibility of two contradictory orders being passed in the same case by the High Court. It was urged that the plea of alibi was not considered by the High Court while cancelling the bail granted to the respondents, but the plea was neither urged before the Sessions Judge nor before Mr. Justice Jamil Asghar. It could not, therefore, be said that a new circumstance was made to appear which justified the passing of a contradictory order."

We fail to see why the rule laid down in Farid v. Ghulam Hussain and others which must have been brought to the notice of the learned Judge was not followed in the present case. We were told that when interim bail was granted the first Judge was not available. But having granted interim bail to the respondent No. I he should have stayed his hand and sent the case back to the first Judge who had in the first instance refused bail. We do not want to lay more stress on this point except to

point out to the learned Judge the constitutional duty that any decision of the Supreme Court shall to the extent that it decides a question of law or is based upon or enunciates a principle of law is binding on all other Courts in Pakistan and that all Judicial authorities throughout Pakistan shall act in aid of the Supreme Court. If these provisions of the Constitution were given due consideration, we are sure that the second learned Judge would not have passed the order dated 31st July 1970, which in effect was tantamount to countermanding the order of the first learned Judge.

In the circumstances, the order granting bail to the respondent No. 1 cannot be sustained on any hypothesis. It is erroneous in law, is based on misconstruction of record and suffers from the impropriety that another learned Judge having refused bail it was necessary that the case be sent to him for passing final orders.

We, accordingly, allow the appeal and set aside the order dated 31st July 1970 of the High Court granting bail to the respondent No. 1. He shall surrender to his bail bond forthwith."

Another ground was broken by this Court in this regard in the case of Muhammad Khan v. Muhammad Aslam and 3 others (1971 SCMR 789) by holding as follows:

"Since leave was granted this Court has in more than one case pointed out that as a judgment delivered in a criminal case is not open to review under the Code, it is not proper for a learned Judge of the High Court to allow bail to an accused person who has been earlier refused bail by another Judge of the same Court. It does not mean that once bail is refused by the High Court no fresh application for bail will lie. If fresh grounds have come into existence bail may be allowed, but in such a case the rule of propriety and harmony of the Court requires that the case be referred to the same learned Judge who had earlier refused bail."

The case of Saleh Muhammad v. The State and another (1983 SCMR 341) was the next case in line wherein the same principle was reiterated as under:

"It will be observed that the request of the respondent for bail was once rejected on merits by the first order of the High Court, dated 14-10-1980 and normally, unless the repeated request was made on grounds other than those available at the time of the first application, no fresh application on merits could be entertained by the High Court."

Both the mischiefs and malpractices under discussion were subsequently commented upon by this Court in the case of Khan Beg v. Sajawal and others (PLD 1984 SC 341) in the following words:

"That being the legal position, the plea that the challan had not been filed in the trial Court but is still with the Magistrate could hardly furnish a fresh ground for re-opening of the bail matter disposed of on 4-2-1984. Nor could the interval of ten days between the disposal of the first petition and

the filing of the second, be said to amount to delay in the trial of the case. Normally a bail petition should be placed before the same Judge who had dealt with the earlier petition. We are told that the learned Judge who had dealt with the earlier petition had returned to Lahore. Even so, the petition could have been sent to Lahore for hearing by the same learned Judge. The practice of withdrawing a petition from before one Judge and then making a fresh petition soon thereafter so that the same be dealt with by another Judge cannot be approved. We are satisfied that no proper or fresh ground existed for making or entertaining the second bail petition. We, therefore, convert this petition into appeal and allow it. The impugned order granting bail to respondents 1 to 7 is set aside."

Then came the landmark case of The State through Advocate-General, N.W.F.P. v. Zubair and 4 others (PLD 1986 SC 173) wherein this Court dealt with the mischiefs and malpractices under discussion in some detail and laid down the relevant principles with exactitude and clarity leaving no room for any mischievous machination. The relevant passages of the judgment rendered in that case are reproduced below:

"5. We have heard the learned counsel for the parties at length and have also gone through the case-law on the subject. With profound respect to the learned Judges of the High Court who dealt with second bail application, we notice that a salutary and well-established principle relating to the hearing of successive bail applications filed by the accused persons in the same case (or in the cross-case), has been violated in this case. As already mentioned the learned Judge who heard the first bail application declined to hear their subsequent bail application on the ground that he had already expressed his opinion thereon. No doubt, on general principle, a Judge having once expressed his opinion of a lis should, ordinarily, decline to hear the same matter again directly or collaterally. There are, however, well-known exceptions to this rule, one of which is hearing of a review application where ever this power is given by statute. The other is the general practice which has been established by series of judgments delivered by this Court as well as by the High Courts during the last about 20 years, namely, that when a bail application of one or more accused is heard by a learned Single Judge of the High Court, it is he alone who should also hear all the subsequent bail applications filed by the same or other accused in the same case, or the cross case. The following authorities may be referred to in this connection:-

(1) Farid v. Ghulam Hussain 1968 SCMR 924.

(2) Muhammad Khan v. Sanaullah PLD 1971 SC 324,

(3) Muhammad Khan v. Muhammad Aslam 1971 SCMR 789.

(4) Khan Beg v. Sajawal PLD 1984 SC 341.

(5) Muhammad Adam v. The State 1968 P.Cr.L.J. 152.

(6) The State v. Muhammad Yousaf 1979 P.Cr.L.J. 665.

(7) Ghulam Hussain v. Karim Bakhsh NLR 1980 Criminal 248.

6. It is held in some of these judgments that if a Judge of the High Court has heard the bail application by an accused person all subsequent petitions for bail by the same accused or in the same case should be referred to the same Bench which had disposed of the earlier petition.

7. Another principle enunciated in some of the rulings is that it is the duty of the counsel to mention in a bail application filed by him the fact of having filed an earlier bail application, also stating the result thereof. Failure on the part of the counsel to do so would, in fact, amount to professional misconduct because the concealment of the fact of the dismissal of the earlier bail application of the accused or the co-accused and getting a subsequent bail application decided by another Judge of the same Court may result in conflicting judgments and disharmony to the Court. It was held in the case of Farid v. Ghulam Hussain (1968 SCMR 924) that where one Judge of the High Court has expressed himself against the grant of bail, another learned Judge of the same High Court in accordance with the long established practice and rule of propriety, when moved for bail of an accused or his co-accused in the same case should transfer such bail application for disposal to the same Judge who had already dealt with the matter earlier in order to avoid contradictory order. The latest ruling on the subject is Khan Beg v. Sajawal (PLD 1984 SC 341) where, apart from holding that all subsequent bail applications in the same case should be placed before the same learned Judge who had dealt with the earlier bail application, this Court also disapproved the practice of withdrawing a petition from one Judge and then making a fresh bail application, soon thereafter, so that same may be dealt with by another Judge.

The aforementioned principles enunciated by these judgments are based on the salutary principles, inasmuch as the practice of filing successive bail applications in the same case by the same person or his co-accused and getting it fixed before a different Judge, is not only likely to result in conflicting judgments but also tends to encourage malpractice by the accused persons and to bring the judicial system into disrepute, because in the event of a conflicting order being given by another learned Judge in a subsequent application, an impression, though false, may be created that the second order was based on extraneous considerations. It is mainly to avoid this that this Court has emphasized, over and over again, that subsequent bail application must be placed for disposal before the same learned Judge who had dealt with the first bail application and also that the counsel must disclose the fact of having filed a previous application and to state the result thereof. It is regrettable that this salutary rule was overlooked by the

learned Judges who dealt with the second bail application in the present case.

8. It might be useful to mention here that the second or the subsequent bail application to the same Court shall lie only on a fresh ground namely, a ground which did not exist at the time when the first application was made. If a ground was available to the accused at the time when the first bail application was filed and was not taken or was not pressed, it cannot be considered as a fresh ground and made the basis of any subsequent bail application. We may also point out, with respect to the learned Judge, who dealt with the second bail application that the mere fact that the learned Judge who had rejected the first bail application of the respondents with the observation that as far as the remaining petitioners (the respondents herein) are concerned no case had been made out for their release on bail, does not mean that the application had not been disposed of on merits. It must be assumed that he had considered all the pleas or grounds raised by the applicant's counsel before him and that the same had not found favour with him. It may be pointed out, with great respect, that the notion that each contention raised before the Court in a bail application must be dealt with separately or repelled by recording elaborate reasoning is totally misconceived. We are of the view that in the present case the learned Judge who dealt with the second bail application had in fact embarked on a review of the order of the learned Judge who had earlier dismissed the first bail application."

Subsequently some clarifications were made in this regard by this Court in the case of In re: To revisit "The State v. Zubair" [PLD 1986 SC 173 (PLD 2002 SC 1 and 2002 SCMR 171) in the following terms:

"6. In the light of the observations made, the case-law referred to in order dated 24.09.2001, the submissions made by the learned Attorney-General for Pakistan, the stance taken at the Bar by the learned Advocates-General/Additional Advocates-General and the reproduced reports of the Registrars of the Federal Shariat Court and the High Courts, there can be no dispute with the proposition that there is a pressing need to lessen the intensity of the ratio in Zubair (supra) vis-a-vis the forum for disposal of second or subsequent bail applications. Resultantly, the interim order dated 24.09.2001 is confirmed with the following modifications/clarifications:

(1) Constitution of the Benches is the exclusive function of the Chief Justice.

(2) Ordinarily, subsequent bail application by the same accused or in the same case must be placed for disposal before the same Single Judge/Division Bench of the High Court which had dealt with the first bail application.

(3) If the learned Single Judge who had dealt with the first bail application is not available and departure from (2) above is unavoidable, the learned Chief Justice concerned may refer the

second or subsequent bail application to another learned Single Judge at the Principal Seat or Permanent Benches/Circuit Benches, as the case may be.

(4) Where the first bail application is heard and disposed of by a Division Bench which is not available either at the Principal Seat or the Permanent Benches/Circuit Benches at the time of filing of the second or subsequent bail application then such bail application shall be heard by a Division Bench of which one of the Judges was a Member of the Division Bench which dealt with the first bail application. If none of the Members of the Division Bench which heard the first bail application is available, the learned Chief Justice concerned may assign the subsequent bail application to any appropriate Division Bench at the Principal Seat or the Permanent Benches/Circuit Benches, as the case may be.

(5) Subsequent bail applications shall be filed, heard and disposed of at the Principal Seat or the Permanent Benches/Circuit Benches, as the case may be, where the first bail application was filed and finally disposed of. In the event of nonavailability of the learned Single Judge or the learned Member/s of the Division Bench, who had dealt with the earlier bail applications, the office at the Principal Seat shall obtain appropriate orders from the learned Chief Justice and the office at the Permanent Benches/Circuit Benches shall obtain appropriate orders from the learned Chief Justice through fax or on telephone for fixation of subsequent bail application before other appropriate Benches, in the interest of expeditious and inexpensive dispensation of justice in bail matters.

(6) Subsequent bail application shall not be entertained unless accompanied by copies of earlier bail applications and copies of orders thereon."

The above mentioned principles of practice and propriety laid down by this Court from time to time have consistently been followed by the courts in the country ever since. A later case in the same thread was the case of Ali Sheharyar v. The State (2008 SCMR 1448).

9. The echo or resonance of the principles of propriety and practice enunciated by this Court in the above mentioned cases was also heard in India and in the case of Shahzad Hasan Khan v. Ishtiaq Hasan Khan and another (AIR 1987 SC 1613) the Supreme Court of India had observed as follows:

"Long standing convention and judicial discipline required that respondent's bail application should have been placed before Justice Kamleshwar Nath who had passed earlier orders, who was available as Vacation Judge. The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court in as much as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to

his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different judges there would be conflicting orders and a litigant would be pestering every judge till he gets an order to his liking resulting in the creditability of the court and the confidence of the other side being put in issue and there would be wastage of courts' time. Judicial discipline requires that such matter must be placed before the same judge, if he is available for orders. Since Justice Kamleshwar Nath was sitting in Court on June 23, 1986 the respondent's bail application should have been placed before him for orders. Justice D. S. Bajpai should have respected his own order dated June 3, 1986 and that order ought not to have been recalled, without the confidence of the parties in the judicial process being rudely shaken."

Later on in the case of State of Maharashtra v. Captain Buddhikota Subha Rao (1990 PSC 797) the Supreme Court of India had made somewhat similar observations in the following words:

"In the present case the successive bail applications preferred by the respondent were rejected on merits having regard to the gravity of the offence alleged to have been committed. One such application No. 36 of 1989 was rejected by Suresh, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail applications were rejected by Puranik, J. by a common order on 6th June, 1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995/89 otherwise he would have disposed it of by the very same common order. Before the ink was dry on Puranik, J.'s order, it was upturned by the impugned order. It is not as if the court passing the impugned order was not aware of the decision of Puranik, J., in fact there is a reference to the same in the impugned order. Could this be done in the absence of new facts and changed circumstances? What is important to realize is that in Criminal Application No. 375 of 1989, the respondent had made an identical request as is obvious from one of the prayers (extracted earlier) made therein. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline, propriety and comity demanded that the impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J. only a couple of days before, in the absence of any

substantial change in the fact situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one Judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course, we think, is to direct that the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the Court's time as a Judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In this view that we take we are fortified by the observations of this Court in paragraph 5 of the judgment in Shahzad Hasan Khan v. Ishtiaq Hasan Khan [1987] 2 SCC 684. For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact situation. That is what prompted Shetty, J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint demands that we say no more."

10. The discussion made above shows that for suspending the sentence of Nazir Ahmed petitioner and admitting him to bail during the pendency of his appeal on the basis of the grounds which could not have been urged or entertained through his third application for the same relief the learned Judge-in-Chamber of the Lahore High Court, Lahore had failed to follow or had chosen to disregard or trump the well-established principles enunciated by this Court governing successive applications for bail which principles were binding on him by virtue of the provisions of Article 189 of the Constitution. In this view of the matter cancellation of Nazir Ahmed petitioner's bail by this Court through the judgment under review hardly warrants any reconsideration or review.

11. Through his review petition and also through Criminal Miscellaneous Application No. 23 of 2014 filed in his review petition Mr. Justice Sayyed Mazahar Ali Akbar Naqvi petitioner has, however, maintained that the principles governing successive applications for bail enunciated in the precedent cases referred to above were not applicable to a situation where an earlier application for bail had been dismissed as having been withdrawn and in such a situation a subsequent application for bail could be entertained and decided on its merits even on the basis of the same grounds which were available and had been urged before dismissal of the earlier application as having been withdrawn. In view of such stance having been taken before us the third issue relevant to the present review petitions is

as to whether dismissal of Nazir Ahmed petitioner's second application for suspension of sentence and release on bail by the learned Judge-in-Chamber of the Lahore High Court, Lahore as having been withdrawn after his learned counsel had unsuccessfully addressed arguments in support of that application foreclosed any possibility of obtaining a favourable order in that regard from the same Court through the petitioner's third application when the third application was based upon the same facts and grounds which were available and urged at the time of decision of his second application. In other words, the question is as to whether for the purposes of a subsequent application for bail on the basis of the same facts and grounds dismissal of an earlier application for bail as having been withdrawn after addressing arguments and failing to convince the court has the same legal effect and consequence as dismissal of such application on the merits or not. Such a question came up for consideration before this Court, probably for the first time, in the case of Muhammad Riaz v. The State (2002 SCMR 184) decided on 18.01.2001 and it was observed in that case as follows:

"The other vital issue was about the scope of the second bail application and the observations of this Court have been reproduced supra. In the instant case, the earlier bail application Criminal Miscellaneous No. 4101-B-2000 was disposed of by a learned Division Bench of the Lahore High Court comprising Mr. Justice Khalil-ur-Rehman Ramday and Mr. Justice Dr. Munir Ahmad Mughal and the order passed therein dated 24-7-2000 reads as under:—

"Having argued the matter at some length, prays for permission to withdraw this petition. Dismissed as withdrawn."

(Sd.)
Judges."

A bare reading of the above order clearly shows that decision on merit was not at all pressed and the counsel in his own wisdom or on the instructions of his client desired to withdraw the first bail application. In such-like cases it cannot be said that the case had been decided on merits, nor it can be asserted that certain grounds were raised but were repelled or had found favour with the learned Judges as the case may be.

The extract from Zubair's case reproduced in the preceding paragraph of this judgment shows that the case had been heard at length and all grounds which were available were pressed because the first bail application was rejected with the observation that: "As far as rest of the petitioners are concerned, no case has been made out for their release on bail". It was further held that it did not mean that the application had not been disposed of on merits and further that it must be assumed that the learned Judge had considered all the pleas or grounds raised by applicant's counsel before him and that the same had not found

favour with him. It was further laid down that notion that each contention raised before the Court in a bail application must be dealt with separately or repelled by recording elaborate reason was totally misconceived.

We are therefore, of the view that withdrawal of a bail application would not mean that its disposal was on merits or the ground had been taken into consideration, therefore, in our view there is no bar in moving a second bail application after withdrawal of the first one but inevitably the second bail application should be heard by the same Judge or the Judges who had allowed the withdrawal of the first application. In the present case, the first bail application was allowed to be withdrawn by a learned Division Bench of the Lahore High Court consisting of Mr. Justice Khalil-ur-Rehman Ramday and Mr. Justice Munir Ahmad Mughal but the judgment impugned was delivered by a different Bench comprising Mr. Justice Khalil-ur-Rehman Ramday and Mr. Justice Zafar Pasha Chaudhry. On the touchstone and criteria laid down in Zubair's case in our view the second bail application ought to have been heard by the same learned Bench who had permitted the withdrawal of the earlier bail application.

For the foregoing reasons, we hold that withdrawal of an application simpliciter does not mean that the same was dealt with on merits or on the grounds pressed. However, the situation would be different if the earlier bail application was decided on merits and in such case while deciding the subsequent bail application, of course, the ground which was not urged although the same was available would not constitute a fresh ground justifying the filing of second bail application. Secondly, propriety requires that the bail application dismissed in terms or order impugned be heard by the same learned Bench who had earlier allowed the withdrawal of the first bail application. In this view of the matter, we allow this appeal and remand this case to the learned Lahore High Court for re hearing of the bail application by the same learned Bench who had permitted to withdraw the first application in terms of order dated 24-7-2000."

12. The case of Muhammad Riaz (supra) was followed by the case of Ali Hassan v. The State (2001 SCMR 1047) decided on 01.03.2001 wherein the said issue had been dealt with by this Court in the following manner:

"5. We have carefully examined the respective contentions as agitated on behalf of the parties. We have gone through the impugned judgment. The controversy revolves around the interpretation of the dictum as laid down in Zubair's case (supra) which has already been interpreted/clarified recently by this Court in Criminal Appeal No. 458 of 2000 (Muhammad Riaz v. The State) and relevant portion whereof is reproduced here in below:—

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6. It transpires from the scrutiny of record that Criminal Miscellaneous Appeal No. 4130-B and Criminal Miscellaneous Appeal No. 1803-M of 1999 were not pressed and withdrawn which makes it abundant clear that the same were not disposed of on merits and in view of the interpretation/clarification of Zubair's case (supra) as mentioned hereinabove, Criminal Miscellaneous Appeal No. 75-B of 2000 is not hit by the dictum laid down in Zubair's case (supra). In such view of the matter the appeal is accepted and the impugned order is set aside and case is remanded back to learned Lahore High Court and Criminal Miscellaneous Appeal No. 75-B of 2000 shall be treated as pending and decided in accordance with law and merits after affording proper opportunity of hearing to all concerned."

13. We have gone through the judgments delivered in the cases of Muhammad Riaz and Ali Hassan (supra) quite minutely. The case of Ali Hassan had proceeded simply on the basis of what had been held earlier on in the case of Muhammad Riaz and, therefore, it is important to understand as to what was the ratio decidendi of the case of Muhammad Riaz. We find that what was held in the judgment delivered in that case was as under:

(i) In Zubair's case the earlier application for bail had been dismissed on the merits of the case whereas in the case of Muhammad Riaz the earlier application for bail had been dismissed as having been withdrawn.

(ii) Dismissal of an application for bail as having been withdrawn "simpliciter" is not to be equated with a dismissal on the merits.

(iii) Withdrawal of an application for bail "simpliciter" does not preclude or debar "moving" of another application for bail.

(iv) If the earlier application for bail had been decided on the merits then a subsequent application for bail can be "moved" only on the basis of grounds which were not existing or available till the decision of the earlier application.

(v) In a case of withdrawal of an earlier application for bail and also in a case of its decision on the merits a subsequent application for bail is to be fixed before and heard by the same Judge(s) who had dealt with the earlier application.

We have particularly noticed, and we observe so with profound respect, that in the said judgment no specific comment had been made on as to what constituted withdrawal "simpliciter" and on as to whether there was any difference between withdrawal "simpliciter" and withdrawal after addressing arguments and failing to convince the court on the merits. An indication is, however, available in the said judgment as to what was deemed to be withdrawal "simpliciter" and in this respect the following observation made in the judgment may be referred to:

"We are therefore, of the view that withdrawal of a bail application would

not mean that its disposal was on merits or the ground had been taken into consideration, therefore, in our view there is no bar in moving a second bail application after withdrawal of the first one"

(underlining has been supplied for emphasis)

The said observation made in the judgment indicates that filing a subsequent application for bail on the same grounds was held to be permissible where withdrawal of the earlier application was not preceded by consideration of the grounds for bail on their merits. Such understanding of that judgment is fortified by a later observation made in that judgment which reads as under:

"For the foregoing reasons, we hold that withdrawal of an application simpliciter does not mean that the same was dealt with on merits or on the grounds pressed."

(underlining has been supplied for emphasis)

The above mentioned observations made in that judgment throw some light on what was meant in that judgment by withdrawal "simpliciter" but, with great reverence for the Honourable Judges deciding the said case, we find that exposition of that issue in the said judgment was not the finest example of judicial clarity. We note that on the one hand withdrawal of an application for bail after arguing the matter at some length was held to be withdrawal "simpliciter" and not constituting a bar against filing of another application for the same relief on the basis of the same facts and grounds but on the other hand the above mentioned observations were made which declared that withdrawal "simpliciter" did "not mean that" the application for bail had been "dealt with on merits or on the grounds pressed". The said observations tended to hold that in a case wherein withdrawal of an application for bail had come about after the grounds for bail had been "pressed" and "dealt with" was not a case of withdrawal "simpliciter". After a very careful analysis of what had been held and what had been observed in that judgment and after a cautious and judicious examination and scrutiny of the issue involved we understand that what is reasonably discernable or deducible is that if an application for bail was withdrawn without addressing any argument on the merits of the case then another application for bail on the basis of the same facts and grounds can be filed but if the "merits" and the "grounds pressed" had been "dealt with" by the court before allowing withdrawal of an application for bail or, in other words, an application for bail was withdrawn after addressing arguments on the merits of the case but failing to convince the court then a fresh application can be filed and entertained only on the basis of grounds which were not existing or available till disposition of the earlier application for the same relief. This was the understanding and the premise upon which the judgment under review in the present case had proceeded.

14. It may not be out of place to mention here that the judgment under review in the present case has already been approvingly referred to and in fact followed by a different 3-member Bench of this Court in the case of Amir Masih v. The State and another (2013 SCMR 1059 & 1524) decided on 03.05.2013 and it had been observed in that case as under:

"5. Learned High Court has dismissed the bail application of the petitioner on the ground that earlier application filed by him was dismissed as withdrawn vide order dated 5.12.2012. In the case of The State through Advocate-General, N.W.F.P. v. Zubair and 4 others (PLD 1986 SC 173) it was held by this Court that the grounds which were available at the time of withdrawal of the earlier application shall be deemed to have been considered and dealt with and the second application can only be filed on the fresh ground. The relevant portion is reproduced as under:—

"8. It might be useful to mention here that the second or the subsequent bail application to the same Court shall lie only on a fresh ground, namely, a ground which did not exist at the time when the first application was made. If a ground was available to the accused at the time when the first bail application was filed and was not taken or was not pressed, it cannot be considered as a fresh and made the basis of any subsequent bail application. We may also point out, with respect to the learned Judge, who dealt with the second bail application that the mere fact that the learned Judge who had rejected the first bail application of the respondents with the observation that as far as the remaining petitioners (the respondents herein) are concerned no case had been made out for their release on bail, does not mean that the application had not been disposed of on merits. It must be assumed that he had considered all the pleas or grounds raised by the applicant's counsel before him and that the same had not found favour with him. It may be pointed out, with great respect that the notion that each contention raised before the Court in a bail application must be dealt with separately or repelled by recording elaborate reasoning, is totally misconceived. We are of the view that in the present, case the learned Judge who dealt with the second bail application had, in fact embarked on a review of the order of the learned Judge who had earlier dismissed the first bail application.

6. As far as the case-law cited by the learned counsel for the petitioner in (i) Ali Hassan v. The State (2001 SCMR 1047) and (ii) Muhammad Riaz v. The State (2002 SCMR 184) is, concerned, the latest case which has been disposed of on this point is Muhammad Siddique v. The State (Criminal Petition No. 896-L of 2012) wherein it has been held by this Court that if earlier application is dismissed as withdrawn, the second application can only be filed on any fresh ground and not on the same grounds which were available at the time of the disposal of the earlier application. Relevant portion

from the said judgment is reproduced herein below:—

"In such circumstances it is apparent on the face of record that the ground of similarity of role and rule of consistency was available to the petitioner at the time of filing first application for suspension of sentence but the learned Judge has totally ignored it. From the tenor of impugned order it appears that the learned Judge of the Lahore High Court while suspending the sentence of respondent No. 2 has not exercised discretion in a proper and judicious manner rather has not at all adverted to the guidelines laid down in Zubair's case (supra)."

Thus the latest view of this Court is to be followed and the learned High Court has rightly dismissed the application which could only be entertained on the fresh grounds, hence, this petition being without merits is, hereby, dismissed and leave is refused."

The judgment under review has also been referred to with approval by another 3-member Bench of this Court in the case of Muhammad Naveed v. The State and another (Criminal Petition No. 324-L of 2013 decided on 03.05.2013) in the following terms:

"Even this Court in a recent judgment passed in Criminal Petition No. 896-L of 2012 titled Muhammad Siddique v. The State has held that even if the application is dismissed as withdrawn, subsequent application is not entertainable until and unless any fresh ground is urged."

15. We have also noticed that the understanding of the meanings of withdrawal "simpliciter" propounded above already stands expressed and iterated by this Court in the case of Rizwan Ali v. The State, etc. (Criminal Petition No. 658-L of 2013 decided on 16.07.2013) as follows:

"We have heard the learned counsel for the petitioner, the learned Additional Prosecutor-General, Punjab appearing for the State and Saleem Akhtar complainant in person and have gone through the record of this case with their assistance. It has been agreed between the learned counsel for the petitioner, the learned Additional Prosecutor-General, Punjab and the complainant appearing in person that the principle laid down by this Court in the case of Muhammad Siddique v. The State (Criminal Petition No. 896-L of 2012) and in the case of Amir Masih v. The State and another (2013 SCMR 1059) has not been correctly applied by the learned Judge-in-Chamber of the Lahore High Court, Multan Bench, Multan to the facts of the present case vis-a-vis the present petitioner namely Rizwan Ali. On the basis of such consensus all of them have requested that this petition may be converted into an appeal and the same may be allowed, the impugned order passed by the Lahore High Court, Multan Bench, Multan on 19.06.2013 may be set aside and the matter of the petitioner's bail may be remanded to the Lahore High Court,Multan Bench, Multan for its decision afresh on the merits of the

case. In the peculiar circumstances of the case we have found the consensus between the parties to be justified because the merits of the petitioner's case for bail had never been attended to by the Lahore High Court, Multan Bench, Multan in the orders passed by it in all the three successive applications filed by the petitioner for the said relief and every time such application was allowed to be withdrawn the withdrawal so sought and allowed was nothing but withdrawal simpliciter. This petition is, therefore, converted into an appeal and the same is allowed, the impugned order passed by the Lahore High Court, Multan Bench, Multan on 19.06.2013 is set aside, Criminal Miscellaneous No. 2084-B of 2013 shall be deemed to be pending before the said Court and the same shall be decided afresh after attending to the merits of the petitioner's case for bail."

(underlining has been supplied for emphasis)

In the said case of Rizwan Ali all the earlier applications for bail filed by an accused person had been dismissed by the Lahore High Court, Multan Bench, Multan as having been withdrawn without any argument having been addressed or heard on the merits of the case and, therefore, this Court had treated the earlier withdrawals as withdrawal "simpliciter". The approach adopted in that case was expressly followed by this Court in the later case of Umar Hayat v. The State, etc. (Criminal Petition No. 786-L of 2013 decided on 31.07.2013) as under:

"The situation in the present case is almost identical to that in the case of Rizwan Ali v. The State, etc. (Criminal Petition No. 658- L of 2013 decided on 16.07.2013) and, thus, we are minded to pass an order in the present petition similar to that passed in the case of Rizwan Ali (supra) and the learned counsel for the parties have also agreed on that course to be adopted. This petition is, therefore, converted into an appeal and the same is allowed, the impugned order passed by the Lahore High Court, Lahore on 02.07.2013 in Criminal Miscellaneous No. 3987-B of 2013 is set aside, the said criminal miscellaneous petition shall be deemed to be pending before the said Court and the same shall be decided afresh after attending to the merits of the petitioner's case for bail."

16. With great regard and respect for the Honourable Judges of this Court deciding the cases of Muhammad Riaz and Ali Hassan (supra) we have observed that it had never been considered in the judgments passed in the said cases that if a Judge had allowed a counsel to withdraw an application for bail after the counsel had addressed arguments on the merits of the case and had remained unable to convince the court in that regard then even if such withdrawal of the application for bail is to be deemed as withdrawal "simpliciter" still on the basis of the same set of facts and on the basis of the same grounds urged through a subsequent application for bail the Judge concerned cannot take a view and reach a conclusion different from that taken or reached by him in the

earlier round and that if the Judge concerned takes a different view and reaches a different conclusion in the subsequent round then he may inevitably invite many allegations including those of inconsistency or extraneous influence which may impinge upon his competence or integrity. This aspect of the issue had specifically been adverted to by this Court in the landmark case of The State through Advocate-General, N.W.F.P. v. Zubair and 4 others (PLD 1986 SC 173) referred to by us earlier on in this judgment. It had been observed by this Court in that case that permitting such a course to be adopted may open doors for conflicting judgments and encouraging malpractices which may bring the judicial system into disrepute by creating an impression that the subsequent favourable orders were based upon extraneous considerations. It had also been observed in that case that a subsequent favourable order in the same case on the basis of the same set of facts may be perceived as reviewing an earlier unfavourable order which may not be permissible in law. To us even a possibility of creating an impression in respect of extraneous considerations may speak volumes against permitting such a course to be adopted. We may add that the case in hand itself is a case in point as the learned Judge-in-Chamber of the Lahore High Court, Lahore had dismissed Nazir Ahmed petitioner's second application for suspension of sentence and release on bail as having been withdrawn after the learned counsel for the petitioner had addressed arguments on the merits but had failed to convince the leaned Judge-in-Chamber for grant of the desired relief but through his third application filed through a different learned counsel for the same relief and based upon the same facts and grounds the desired relief had been extended to Nazir Ahmed petitioner by the same learned Judge-in-Chamber. Such inconsistency of approach adopted by the learned Judge-in- Chamber had prompted, nay compelled, this Court to record some observations in the judgment under review concerning the conduct of the learned Judge-in-Chamber expunction of which observations is sought by him through one of the review petitions under consideration. We may add that we have particularly noticed with interest that in the cases of Muhammad Riaz and Ali Hassan (supra) it had only been observed by this Court that after withdrawal "simpliciter" of an earlier application for bail another application for the same relief can be "moved" but it had never been observed therein that the same Judge can be inconsistent and can take a different view or reach a conclusion different from the one reached by him on the same set of facts and on the same grounds in the earlier round.

17. This brings us to the last issue as to whether the observations made by this Court in the judgment under review concerning the conduct of Sayyed Mazahar Ali Akbar Naqvi, J. were justified in the circumstances of the case. We may observe at the outset that it is quite unpleasant to discuss the conduct of a Judge of the superior judiciary through a judgment but we are compelled to

undertake such an exercise in this case because it is none other than a Judge of a High Court himself who has formally approached this Court and has insisted that we may comment upon some comments already made by this Court about his conduct.

18. It may be clarified straightaway that Nazir Ahmed petitioner's bail had been cancelled by this Court because the facts of the case did not justify suspension of his sentence and release on bail during the pendency of his appeal and the law had not been correctly applied to his case by the Lahore High Court, Lahore. A bare perusal of paragraph No. 8 of the judgment under review shows, and shows quite clearly, that the observations made therein regarding the learned Judge had not been made with reference to his wrong decision on the law and facts of the case but the observation were based squarely upon his inconsistency in the matter which inconsistency unfortunately, created an impression regarding an extraneous consideration coming into play. For facility of reference the said paragraph of the judgment under review is reproduced below:

> "8. Before parting with this order we may observe that discretion exercised by the learned Judge while passing the impugned order in the instant case has appeared to us to be somewhat colourable because after dismissal of second application for suspension of sentence bearing the same ground the only difference in the respondent's third application for the same relief was a different learned counsel for that respondent."

In this view of the matter the stance of the learned Judge and his learned counsel before us that the learned Judge had entertained and decided the third application for suspension of sentence and release on bail filed by Nazir Ahmed petitioner in the light of the law declared by this Court in the cases of Muhammad Riaz and Ali Hassan (supra) has appeared to us to be a stance which completely misses the point in issue. The issue fairly and squarely was inconsistency creating an impression of extraneous consideration and not correct application of the law or otherwise.

19. We note that in the case of Noraz Akbar v. The State and another (2011 P.Cr.L.J. 852) decided by Sayyed Mazahar Ali Akbar Naqvi, J. on 29.11.2010 it had been held by him as under:

> "4. At the outset learned counsel for the petitioner when questioned that what is fresh ground available with the petitioner as his earlier such bail application already stands dismissed, learned counsel states that the earlier bail application was not dismissed on merits and the instant application is to be considered as his first bail petition. To substantiate his version, learned counsel for the petitioner has placed reliance on Muhammad Riaz v. The State (2002 SCMR 184).

7. Firstly I dilate upon the question that whether the instant bail petition being second petition on the subject, can be given weight in absence of any fresh ground, which is pre-requisite for filing such petition. There is no cavil to this proposition that there is no fresh ground available with the petitioner and the grounds taken herein were already available with the petitioner at the time of filing of first bail petition. Therefore, the same is not maintainable in view of ratio decidendi of august Supreme Court of Pakistan in the case of Gul Nawa alias Gul Mowaz and 2 others v. The State (1970 SCMR 667) wherein Mr. Justice Hamoodur Rahman, the then Hon'ble Chief Justice, being author of the order had held as under;

"The High Court was in our view also right in holding that repeated applications for bail on the same facts did not lie in the High Court."

8. Now question arises that whether the instant petition can be termed as second bail petition or the first one. Having much regard for the case law cited by learned counsel for the petitioner, I may submit here that bare perusal of the order dated 4-11- 2010, passed in Criminal Miscellaneous No. 11712-B of 2010, whereby the petitioner's earlier bail petition was dismissed, reflects that after arguing the case at some length, learned counsel for the petitioner requested to withdraw the petition, which in the interest of justice was allowed. Had the petitioner very good case, learned counsel for the petitioner might have not withdrawn the same after arguing at some length."

(underlining has been supplied for emphasis)

It is quite noticeable that the case of Muhammad Riaz (supra) had been taken notice of by Sayyed Mazahar Ali Akbar Naqvi, J. in the said order dated 29.11.2010 but still while dealing with the subsequent application for bail he had refused to take a view or reach a conclusion different from that taken or reached by him in the earlier round because the facts of the case and the grounds for bail had not undergone any change. The said order further shows that according to the reported, and therefore considered, view of Sayyed Mazahar Ali Akbar Naqvi, J. dismissal of an earlier application for bail as having been withdrawn after arguments had been addressed in support of such application at some length clearly indicated that the Judge concerned did not feel persuaded to grant bail on the facts disclosed and the grounds urged and, thus, the counsel for the accused person requested for withdrawal of the application which request was acceded to by the Judge. As the facts of that reported case had not undergone any material change and no fresh ground had become available to the accused person in that case for his subsequent application for bail, therefore, Sayyed Mazahar Ali Akbar Naqvi, J. did not want to be inconsistent in the matter in that case. It is unfortunate that in the present case the same learned Judge had decided to

proceed otherwise and that had allowed many an eyebrow to be raised.

20. Another aspect of this matter, equally disturbing, is that if the facts of the case and the grounds available to Nazir Ahmed petitioner for suspension of his sentence and release on bail during the pendency of his appeal were the same at the time of applying for such relief through his second and third applications then if such facts and grounds were valid and sufficient for granting the desired relief on the third occasion then the said relief ought not to have been denied to him by the same learned Judge on the second occasion. This implies that either a due relief was denied to the said petitioner on the second occasion or an undue relief was extended to him on the third occasion. In this backdrop engaging the services of a different learned counsel by Nazir Ahmed petitioner for his third attempt for the same relief on the same facts and grounds and the said learned counsel's crowning with success in that attempt was a matter which ostensibly provided fodder to an impression about an extraneous consideration coming into play and the same seemingly reflected adversely upon the learned Judge's conduct. The principles of consistency and propriety demanded that if the facts and the grounds were the same and they were valid and sufficient for granting the desired relief then the learned Judge ought to have allowed Nazir Ahmed petitioner's second application and if the said relief was not due on the same facts and grounds then the learned Judge ought to have been consistent and he should have dismissed the third application as well. In these peculiar circumstances of the case this Court could reasonably entertain an impression that the exercise of discretion in the matter by the learned Judge was "somewhat colourable".

21. There is yet another aspect of this matter which is also quite disconcerting. Through Criminal Miscellaneous Application No. 23 of 2014 filed by him in his review petition Mr. Justice Sayyed Mazahar Ali Akbar Naqvi petitioner has himself brought on the record of this case copies of seven other orders passed by him wherein after dismissing the earlier applications for bail filed by some accused persons as having been withdrawn after having heard the arguments of the accused persons' learned counsel at some length on the merits of the case he had allowed bail to the same accused persons through their subsequent applications for the same relief filed on the basis of the same facts and grounds within a few weeks or months of dismissal of the earlier applications. This surely reflects or depicts a conscious pattern being followed by the learned Judge which is a pattern which cannot be approved. It shows that in the first round the learned Judge refuses the desired relief to an accused person but in the second round the same facts and grounds are found to be valid and sufficient for the same relief. Unfortunately the said pattern also fits into the facts and circumstances of the present case. We must admit that we are at a loss to understand why such a pattern is being followed by the learned Judge and what can be the factual or legal justification for adopting such a pattern.

22. It is important to mention here that in the judgment under review this Court had been particularly careful and had deliberately stopped short of naming therein the learned Judge-in-Chamber of the Lahore High Court, Lahore or the learned counsel for Nazir Ahmed petitioner appearing before the said Court in connection with that petitioner's third application for suspension of sentence and release on bail and the judgment under review had not even been approved for reporting. All that care had been taken by this Court only to save the learned Judge-in-Chamber and the concerned learned counsel from any embarrassment that may be caused to them by naming them in the judgment. In that backdrop there was hardly any occasion for issuing notice to the learned Judge-in-Chamber or the learned counsel before recording the observations made in paragraph No. 8 of the judgment under review because that would have ensured their embarrassment which this Court deliberately wanted to avoid. Apart from that we have heard the learned counsel for Mr. Justice Sayyed Mazahar Ali Akbar Naqvi petitioner and Mr. Bhoon at some length in connection with the present review petitions and such subsequent hearing neutralizes the effects of any previous omission in hearing them.

23. For what has been discussed above both the captioned review petitions are dismissed. Nazir Ahmed petitioner may be arrested forthwith and be lodged in the jail from which he had been released so as to serve the sentence passed against him by the learned trial court. He may, however, approach the Lahore High Court, Lahore for any relief if and when any ground for such relief accrues to him under the law.

24. Before parting with this judgment we would like to, for the benefit of all concerned, restate the principles of propriety and practice enunciated by this Court thus far regarding filing, entertaining and deciding applications for bail, cancellation of bail or suspension of sentence and release on bail during the pendency of an appeal in criminal cases and would expect all the courts below to scrupulously and meticulously adhere to and follow the same. The said principles, as enunciated in the precedent cases referred to above and some others, are as follows:

(Note: A reference here to an application for bail may be read as a reference to all applications for bail, cancellation of bail or suspension of sentence and release on bail during the pendency of an appeal in the same criminal case or its cross-case filed by the same accused person, any other accused person, the State or the complainant party.)

(i) At the bottom of every application for bail it is obligatory to attach a certificate regarding non-filing of any such application before the same court previously and, in case of a repeated or successive application, a certificate disclosing filing of any such application previously by the same accused person, any other accused person, the State or the complainant party before the same court in the same criminal case or its cross-case and such certificate must also disclose the number of the previous application, the date of its decision

and the name of the Judge dealing with and deciding the same. No subsequent bail application is to be entertained unless the same is accompanied by copies of the earlier bail applications and copies of the orders passed thereon.

(ii) All repeated or successive applications for bail must be fixed for hearing before and heard and decided by the same Judge(s) who had dealt with and decided any earlier application for bail unless the Judge or one or some of the Judges dealing with and deciding the earlier application(s) is/are not available at the relevant station of posting/PrincipalSeat/Bench.

(iii) Dismissal of an application for bail after attending to the merits of the case amounts to rejection of all the grounds available or in existence till the time of such dismissal whether such grounds were actually taken or urged or not and whether such grounds were expressly dealt with in the order of dismissal or not.

(iv) In case of dismissal of an earlier application for bail on the merits of the case a subsequent application for the same relief can be filed and entertained only if it is based upon a fresh ground, i.e. a ground which was not available or in existence at the time of decision of the earlier application.

(v) Withdrawal simpliciter of an earlier application for bail before addressing or hearing of any argument on the merits of the case does not preclude filing of a subsequent application for the same relief before the same court and its decision by such court on the merits of the case. In all cases of withdrawal of such an application the court must faithfully record in its order as to whether withdrawal of the application had been requested and allowed after addressing and hearing of some or all the arguments on the merits of the case or withdrawal of the application had been requested and allowed before addressing and hearing of any argument on the merits of the case.

(vi) In a case of withdrawal of an earlier application for bail after addressing and hearing of some or all the arguments on the merits of the case no subsequent application for the same relief can be filed before or entertained by the same court unless such subsequent application is based upon a fresh ground, i.e. a ground which was not available or in existence at the time of disposition of the earlier application.

25. The Office is directed to send a copy of this judgment to the Registrars of all the High Courts in the country who are directed to ensure that every Judge and Magistrate dealing with criminal cases within the jurisdiction of each High Court receives a copy of this judgment and complies with the principles of practice and propriety enunciated or recapitulated herein.

Cases cited:

* ***Umar Hayat v. The State, etc. (Criminal Petition No. 786-L of 2013.***

* ***Noraz Akbar v. The State and another (2011 P.Cr.L.J. 852.***

* ***Gul Nawaz alias Gul Mowaz and 2 others v. The State (1970 SCMR 667).***

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বাংলাদেশ জাতীয় সংসদ

ঢাকা, ২২ জুলাই, ২০১৩/০৭ শ্রাবণ, ১৪২০

সংসদ কর্তৃক গৃহীত নিম্নলিখিত আইনটি ২২ জুলাই, ২০১৩ (০৭ শ্রাবণ, ১৪২০) তারিখে রাষ্ট্রপতির সম্মতি লাভ করিয়াছে এবং এতদ্বারা এই আইনটি সর্বসাধারণের অবগতির জন্য প্রকাশ করা যাইতেছে:–

২০১৩ সনের ২৭ নং আইন

ব্যাংক-কোম্পানী আইন, ১৯৯১ (১৯৯১ সনের ১৪নং আইন) এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে ব্যাংক-কোম্পানী আইন, ১৯৯১ (১৯৯১ সনের ১৪নং আইন) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্‌দ্বারা নিম্নরূপ আইন করা হইল:

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।– (১) এই আইন **ব্যাংক-কোম্পানী (সংশোধন) আইন, ২০১৩** নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। ১৯৯১ সনের ১৪নং আইনের ধারা ৩ এর প্রতিস্থাপন।– ব্যাংক-কোম্পানী আইন, ১৯৯১ (১৯৯১ সনের ১৪ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর ধারা ৩ এর পরিবর্তে নিম্নরূপ ধারা ৩ প্রতিস্থাপিত হইবে, যথা:–

"৩। **সমবায় সমিতি ও অন্যান্য আর্থিক প্রতিষ্ঠানের ক্ষেত্রে আইনের সীমিত প্রয়োগ।**– (১) এই আইনের কোন কিছুই সমবায় সমিতি আইন, ২০০১ (২০০১ সনের ৪৭নং আইন) অথবা সমবায় সমিতি সম্পর্কিত আপাততঃ বলবৎ অন্য কোন আইনের অধীন নিবন্ধিত কোন সমবায় সমিতি এবং মাইক্রোক্রেডিট রেগুলেটরী অথরিটি আইন, ২০০৬ (২০০৬ সনের ৩২নং আইন) এর অধীন ক্ষুদ্রঋণ কার্যক্রম পরিচালনার জন্য সনদপ্রাপ্ত কোন ক্ষুদ্রঋণ প্রতিষ্ঠানের ক্ষেত্রে প্রযোজ্য হইবে না:

তবে শর্ত থাকে যে, কোন সমবায় সমিতি সদস্য ব্যতীত কোন ব্যক্তি বা প্রতিষ্ঠানের নিকট হইতে অবৈধভাবে আমানত গ্রহণ করিলে ধারা ৪৪ এবং ৪৫ এর অধীন ব্যাংক-কোম্পানী যেভাবে পরিদর্শন করা হয় বা উহাকে যেভাবে নির্দেশ দেওয়া হয়, বাংলাদেশ ব্যাংক একইভাবে যে কোন সমবায় সমিতি পরিদর্শন করিতে, এবং ঐ সকল সমিতিকে নির্দেশ দিতে পারিবে।

(২) ধারা ১৭ এর উপ-ধারা (৬), ধারা ২৭ক এবং ধারা ২৭কক এর বিধানাবলী ব্যতীত অন্য কোন কিছুই আর্থিক প্রতিষ্ঠান আইন, ১৯৯৩ (১৯৯৩ সনের ২৭ নং আইন) এর অধীন লাইসেন্সপ্রাপ্ত কোন আর্থিক প্রতিষ্ঠানের ক্ষেত্রে প্রযোজ্য হইবে না।

(৩) আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, বা অন্য যে কোন আইনের অধীনে নিবন্ধীকৃত হইয়া থাকুক না কেন, ধারা ৪৪ এবং ৪৫ এর অধীন ব্যাংক-কোম্পানী যেভাবে পরিদর্শন করা হয় বা উহাকে যেভাবে নির্দেশ দেওয়া হয়, বাংলাদেশ ব্যাংক একইভাবে ধারা ২৬ এর উপ-ধারা (১) এর বিধান অনুসারে গঠিত কোন ব্যাংক-কোম্পানীর সাবসিডিয়ারী কোম্পানী পরিদর্শন করিতে, এবং ঐ সকল সাবসিডিয়ারী কোম্পানীকে নির্দেশ দিতে পারিবে।"।

৩। ১৯৯১ সনের ১৪নং আইনের ধারা ৪ এর বিলুপ্তকরণ।– উক্ত আইনের ধারা ৪ বিলুপ্ত হইবে।

৪। ১৯৯১ সনের ১৪ নং আইনের ধারা ৫ এর সংশোধন।– উক্ত আইনের ধারা ৫ এর–

(ক) দফা (ক) এ উল্লিখিত '১৩(৪)' সংখ্যাগুলি ও বন্ধনীর পরিবর্তে '১৩(৩)' সংখ্যাগুলি ও বন্ধনী প্রতিস্থাপিত হইবে;

(খ) দফা (গগ) এর পরিবর্তে নিম্নরূপ দফা (গগ) প্রতিস্থাপিত হইবে, যথা:–

"(গগ) "খেলাপী ঋণ গ্রহীতা" অর্থ কোন দেনাদার ব্যক্তি বা প্রতিষ্ঠান বা কোম্পানী যাহার নিজের বা স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠানের অনুকূলে প্রদত্ত

অগ্রীম, ঋণ বা অন্য কোন আর্থিক সুবিধা বা উহার অংশ বা উহার উপর অর্জিত সুদ বা উহার মুনাফা বাংলাদেশ ব্যাংক কর্তৃক জারীকৃত সংজ্ঞা অনুযায়ী মেয়াদোত্তীর্ণ হওয়ার ৬ (ছয়) মাস অতিবাহিত হইয়াছে;

ব্যাখ্যা।– এই দফার উদ্দেশ্য পূরণকল্পে কোন ব্যক্তি বা, ক্ষেত্রমত, প্রতিষ্ঠান বা কোম্পানী অন্য কোন প্রতিষ্ঠানের পরিচালক না হইলে অথবা উক্ত প্রতিষ্ঠানে তাহার বা উহার শেয়ারের অংশ ২০% এর অধিক না হইলে অথবা উক্ত প্রতিষ্ঠানের ঋণের জামিনদাতা না হইলে, উক্ত প্রতিষ্ঠান তাহার বা উহার স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠান বলিয়া গণ্য হইবে না;";

(গ) দফা (গগ) এর পর নিম্নরূপ একটি নূতন দফা (গগগ) সন্নিবেশিত হইবে, যথা ঃ–

"(গগগ) "ক্ষুদ্রঋণ প্রতিষ্ঠান" অর্থ মাইক্রোক্রেডিট রেগুলেটরী অথরিটি আইন, ২০০৬ (২০০৬ সনের ৩২নং আইন) এর ধারা ২ এর দফা (২১) এ সংজ্ঞায়িত কোন ক্ষুদ্রঋণ প্রতিষ্ঠান;";

(ঘ) দফা (ঙ) এর পরিবর্তে নিম্নরূপ দফা (ঙ) প্রতিস্থাপিত হইবে, যথা:–

"(ঙ) "জামানতী ঋণ বা অগ্রিম" অর্থ সেই ঋণ বা অগ্রিম যাহা সম্পদের জামানত গ্রহণ করিয়া প্রদান করা হয় এবং বাংলাদেশ ব্যাংক কর্তৃক নির্ধারিত পদ্ধতিতে নির্ণীত উক্ত সম্পদের বাজার মূল্য কোন সময়েই ঋণের পরিমাণের চাইতে কম হয় না, এবং "অজামানতী ঋণ বা অগ্রিম" অর্থ সেই ঋণ বা অগ্রিম বা উহার ঐ অংশ যাহার বিপরীতে কোন জামানত গ্রহণ করা হয় না;";

(ঙ) দফা (ছ) এ উল্লিখিত 'অর্থ' শব্দটির পর 'ঋণ ও অগ্রিম গ্রহণ,' শব্দগুলি ও কমা সন্নিবেশিত হইবে;

(চ) দফা (জ) বিলুপ্ত হইবে;

(ছ) দফা (ঝ) এর উপ-দফা (১) এ 'লাভ-ক্ষতির' শব্দগুলি ও হাইফেনের পরিবর্তে 'আমানত প্রদানকারী বা লাভ-ক্ষতির' শব্দগুলি ও হাইফেন প্রতিস্থাপিত হইবে;

(জ) দফা (ড) এ দুইবার উল্লিখিত 'বিশিষ্ট ব্যাংক' শব্দগুলির পরিবর্তে উভয় স্থানে 'বিশেষায়িত ব্যাংক' শব্দগুলি প্রতিস্থাপিত হইবে;

(ঝ) দফা (ঢ) এর–

(অ) উপ-দফা (১) বিলুপ্ত হইবে;

(আ) উপ-দফা (২) এ উল্লিখিত 'বিশিষ্ট' শব্দটির পরিবর্তে 'বিশেষায়িত' শব্দটি প্রতিস্থাপিত হইবে;

(ঞ) দফা (ণ) এর পরিবর্তে নিম্নরূপ দফা (ণ) প্রতিস্থাপিত হইবে, যথা:–

"(ণ) "ব্যাংক-কোম্পানী" অর্থ ধারা ৩১ এর অধীন লাইসেন্সপ্রাপ্ত বাংলাদেশে ব্যাংক ব্যবসা পরিচালনাকারী কোন কোম্পানী, এবং যে কোন বিশেষায়িত ব্যাংকও উহার অন্তর্ভূক্ত হইবে;";

(ট) দফা (থথথ) এ উল্লিখিত 'শরিয়ত' শব্দটির পরিবর্তে 'শরীয়াহ' শব্দটি প্রতিস্থাপিত হইবে;

(ঠ) দফা (থথথথথ) এ উল্লিখিত 'শরিয়ত' শব্দটির পরিবর্তে 'শরীয়াহ' শব্দটি প্রতিস্থাপিত হইবে।

৫। ১৯৯১ সনের ১৪ নং আইনের ধারা ৬ এর সংশোধন।– উক্ত আইনের ধারা ৬ এর দফা (ক) এ উল্লিখিত 'নূতন ব্যাংক বা বিশিষ্ট' শব্দগুলির পরিবর্তে 'বিশেষায়িত' শব্দটি প্রতিস্থাপিত হইবে।

৬। ১৯৯১ সনের ১৪ নং আইনের ধারা ৭ এর সংশোধন।– উক্ত আইনের ধারা ৭ এর–

(ক) উপ-ধারা (১) এর–

(অ) দফা (ঘ) এ উল্লিখিত 'ক্রেডিট কার্ড' শব্দগুলির পরিবর্তে 'ব্যাংক কার্ড' শব্দগুলি প্রতিস্থাপিত হইবে;

(আ) দফা (জ) এর পরিবর্তে নিম্নরূপ দফা (জ) প্রতিস্থাপিত হইবে, যথা:–

"(জ) বন্ড, স্ক্রিপ বা অন্যান্য প্রকারের সম্পত্তি নিদর্শন পত্র যথা, মেয়াদী অংশগ্রহণ-পত্র, মেয়াদী অর্থ সংস্থান-পত্র, মুদারাবা সার্টিফিকেট, মুশারিকা সার্টিফিকেট এবং বাংলাদেশ ব্যাংক কর্তৃক অনুমোদিত অন্যান্য অনুরূপ দলিল, সরকারের পক্ষে বা অন্যান্যদের পক্ষে ক্রয় ও বিক্রয়;"; এবং

(খ) উপ-ধারা (২) এর পর নিম্নরূপ একটি নূতন উপ-ধারা (৩) সংযোজিত হইবে, যথা:–

"(৩) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, এই আইনের ধারা ২৬ এর বিধান সাপেক্ষে, কোন ব্যাংক-কোম্পানী স্টক-ব্রোকার, স্টক-ডিলার, মার্চেন্ট ব্যাংকার, পোর্টফোলিও ম্যানেজার হিসাবে বা সিকিউরিটিজ ও এক্সচেঞ্জ কমিশন হইতে নিবন্ধন গ্রহণের প্রয়োজন পড়ে এইরূপ কোন ব্যবসায়ে সরাসরি লিপ্ত হইতে পারিবে না।"।

৭। ১৯৯১ সনের ১৪ নং আইনের ধারা ৮ এর সংশোধন।– উক্ত আইনের ধারা ৮ এ উল্লিখিত 'অন্য কোন কোম্পানী' শব্দগুলির পরিবর্তে 'অন্য কোন কোম্পানী কিংবা প্রতিষ্ঠান' শব্দগুলি প্রতিস্থাপিত হইবে।

৮। ১৯৯১ সনের ১৪ নং আইনের ধারা ৯ এর সংশোধন।– উক্ত আইনের ধারা ৯ এর–

(ক) শর্তাংশে উল্লিখিত 'শরিয়ত' শব্দের পরিবর্তে 'শরীয়াহ' শব্দটি প্রতিস্থাপিত হইবে; এবং

(খ) ব্যাখ্যায় উল্লিখিত 'এবং অন্যান্য ধাতু ব্যতীত, সকল প্রকারের অস্থাবর সম্পত্তি এবং ধারা ৭(১) এর (গ), (ঘ), (ছ) ও (জ) দফাসমূহে উল্লিখিত সকল দলিল দস্তাবেজ' শব্দগুলি, বন্ধনীগুলি, সংখ্যাগুলি ও কমাগুলির পরিবর্তে "ও অন্যান্য ধাতু এবং ধারা ৭ এর উপ-ধারা (১) এর দফা (গ), (ঘ), (ছ) ও (জ) এ উল্লিখিত সকল দলিল দস্তাবেজ ব্যতীত, সকল প্রকারের অস্থাবর সম্পত্তি" শব্দগুলি, বন্ধনীগুলি, সংখ্যাগুলি ও কমাগুলি প্রতিস্থাপিত হইবে।

৯। ১৯৯১ সনের ১৪ নং আইনের ধারা ১১ এর সংশোধন।– উক্ত আইনের ধারা ১১ এর উপ-ধারা (১) এর দফা (খ) এর উপ-দফা (আ) এর শর্তাংশের অনুচ্ছেদ (২) এর শেষাংশে উল্লিখিত 'বা' শব্দটি বিলুপ্ত হইবে।

১০। ১৯৯১ সনের ১৪ নং আইনের ধারা ১২ এর সংশোধন।– উক্ত আইনের ধারা ১২–

(ক) এর উপান্ত-টীকায় উল্লিখিত 'নথিপত্র' শব্দটির পরিবর্তে 'নথিপত্র এবং কর্মপ্রক্রিয়া' শব্দগুলি প্রতিস্থাপিত হইবে;

(খ) তে উল্লিখিত 'নথিপত্র' শব্দটির পরিবর্তে 'নথিপত্র কিংবা তথ্যপ্রযুক্তির মাধ্যমে প্রক্রিয়াযোগ্য কার্যক্রম' শব্দগুলি প্রতিস্থাপিত হইবে; এবং

(গ) এর ব্যাখ্যা অংশের দফা (ক) এবং (খ) এ দুইবার উল্লিখিত 'বৈদ্যুতিক' শব্দটির পরিবর্তে উভয় অংশে 'তথ্যপ্রযুক্তি' শব্দটি প্রতিস্থাপিত হইবে।

১১। ১৯৯১ সনের ১৪ নং আইনের ধারা ১৩ এর সংশোধন।– উক্ত আইনের ধারা ১৩ এর–

(ক) উপান্ত-টীকা এবং উপ-ধারা (১) ও (২) এর পরিবর্তে নিম্নরূপ উপান্ত-টীকা এবং উপ-ধারা (১) ও (২) প্রতিস্থাপিত হইবে, যথা:–

"**১৩। মূলধন সংরক্ষণ।**– (১) বাংলাদেশে কার্যরত সকল ব্যাংক-কোম্পানীকে বাংলাদেশ ব্যাংক কর্তৃক, সময়ে সময়ে, নির্ধারিত পরিমাণে, হারে ও পন্থায় মূলধন সংরক্ষণ করিতে হইবে:

তবে শর্ত থাকে যে, সরকার, বাংলাদেশ ব্যাংকের সহিত পরামর্শক্রমে, বিশেষায়িত ব্যাংকসমূহকে এই ধারার বিধান হইতে অব্যাহতি দিতে পারিবে।

ব্যাখ্যা।– এই ধারার উদ্দেশ্য পূরণকল্পে "মূলধন" বলিতে বাংলাদেশ ব্যাংক কর্তৃক, সময়ে সময়ে, জারিকৃত মূলধন সংরক্ষণ সংক্রান্ত নীতিমালায় যে সকল উপাদানকে মূলধন বলিয়া নির্দিষ্ট করা হইবে সেই সকল উপাদানকে বুঝাইবে।

(২) আদায়কৃত মূলধন, শেয়ার প্রিমিয়ামসহ সংবিধিবদ্ধ সঞ্চিতি ও রিটেইন্ড আর্নিংসে এর সমষ্টি, এই উপ-ধারার উদ্দেশ্য পূরণকল্পে বাংলাদেশ ব্যাংক কর্তৃক, সময় সময়, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, নির্ধারিত পরিমাণের কমপক্ষে সমান সংরক্ষিত না হইলে এই আইন কার্যকর হইবার পর হইতে, বিদ্যমান কোন ব্যাংক-কোম্পানী, একাদিক্রমে অনুরূপ সংরক্ষণে ব্যর্থতার ২ (দুই) বৎসর অতিবাহিত হইবার পর, বাংলাদেশে উহার ব্যবসা পরিচালনা করিবে না:

তবে শর্ত থাকে যে, বাংলাদেশ ব্যাংক সমীচীন মনে করিলে বিশেষ ক্ষেত্রে উল্লিখিত মেয়াদ অনধিক ১ (এক) বৎসর পর্যন্ত বর্ধিত করিতে পারিবে।

(খ) উপ-ধারা (৩) এ উল্লিখিত 'উপ-ধারা (২) মোতাবেক রক্ষণীয় অর্থ জমা না রাখিলে উক্ত ব্যাংক-কোম্পানী উক্ত উপ-ধারার' শব্দগুলি, সংখ্যা, বন্ধনী, হাইফেন ও কমার পরিবর্তে 'উক্ত অর্থ জমা না রাখিলে উক্ত ব্যাংক-কোম্পানী উপ-ধারা (২) এর' শব্দগুলি, সংখ্যা, বন্ধনী ও উহার হাইফেন এবং উহার শর্তাংশে উল্লিখিত 'হস্তান্তর' শব্দটির পরিবর্তে 'আনয়ন' শব্দটি প্রতিস্থাপিত হইবে;

(গ) উপ-ধারা (৬) এ উল্লিখিত 'কোন ব্যাংক-কোম্পানীর আদায়কৃত মূলধন ও সংরক্ষিত তহবিলের মোট মূল্য' শব্দগুলি ও হাইফেনের পরিবর্তে 'কোন ব্যাংক-কোম্পানী কর্তৃক সংরক্ষিতব্য বা সংরক্ষিত মূলধনের পরিমাণ বা উপাদান ইত্যাদি' শব্দগুলি ও হাইফেন প্রতিস্থাপিত হইবে;

(ঘ) উপ-ধারা (৭) এর পরিবর্তে নিম্নরূপ উপ-ধারা (৭) প্রতিস্থাপিত হইবে, যথা:–

"(৭) বাংলাদেশ ব্যাংক যদি এই সিদ্ধান্তে উপনীত হয় যে, কোন ব্যাংক-কোম্পানী উপ-ধারা (১) মোতাবেক আবশ্যক পরিমাণে, হারে ও পন্থায় মূলধন সংরক্ষণ করিতে ব্যর্থ হইয়াছে তাহা হইলে সংশ্লিষ্ট ব্যাংক-কোম্পানীকে অনধিক (১) বৎসরের মধ্যে উক্ত ঘাটতি পূরণের নির্দেশ দিতে পারিবে এবং এইরূপ নির্ধারিত সময়সীমা অতিক্রান্ত হওয়ার পরও ব্যর্থতা অব্যাহত থাকিলে উক্ত ব্যাংক-কোম্পানীর বিরুদ্ধে নিম্নবর্ণিত যে কোন অথবা সকল শাস্তিমূলক ব্যবস্থা গ্রহণ করিতে পারিবে, যথা:–

(ক) নির্দিষ্ট মেয়াদে বা অনুরূপ ঘাটতি পূরণের পূর্ব পর্যন্ত উক্ত ব্যাংক কর্তৃক নূতন আমানত গ্রহণ নিষিদ্ধ করা;

(খ) নির্দিষ্ট মেয়াদে বা অনুরূপ ঘাটতি পূরণের পূর্ব পর্যন্ত উক্ত ব্যাংক কর্তৃক নূতন ঋণ ও অগ্রিম প্রদান নিষিদ্ধ করা;

(গ) উক্ত ব্যর্থতার জন্য সর্বনিম্ন বিশ লক্ষ টাকা হইতে অনূর্ধ্ব এক কোটি টাকা জরিমানা আরোপ এবং যদি উক্ত লংঘন অব্যাহত থাকে, তাহা হইলে উক্ত লংঘনের প্রথম দিনের পর প্রত্যেক দিনের জন্য অতিরিক্ত অনূর্ধ্ব পঞ্চাশ হাজার টাকা জরিমানা আরোপ; এবং

(ঘ) এই আইনের অধীন অন্যান্য শাস্তি বা প্রতিকারমূলক ব্যবস্থা গ্রহণ।"।

১২। ১৯৯১ সনের ১৪ নং আইনের ধারা ১৪ এর সংশোধন।– উক্ত আইনের ধারা ১৪ এর–

(ক) উপ-ধারা (১) এ উল্লিখিত 'নূতন ব্যাংক বা বিশিষ্ট' শব্দগুলির পরিবর্তে 'বিশেষায়িত' শব্দটি প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (১) এর দফা (গ) এ উল্লিখিত 'উহার মূলধন' শব্দগুলির পরিবর্তে 'উহার অনুমোদিত মূলধন' শব্দগুলি প্রতিস্থাপিত হইবে;

(গ) উপ-ধারা (২) এ উল্লিখিত 'নূতন ব্যাংক বা বিশিষ্ট ব্যাংক ব্যতীত অন্য' শব্দগুলি বিলুপ্ত হইবে।

১৩। ১৯৯১ সনের ১৪ নং আইনের ধারা ১৪ক এর সংশোধন– উক্ত আইনের ধারা ১৪ক এর–

(ক) উপ-ধারা (২) এ উল্লিখিত 'ব্যাংকের শেয়ার ক্রয়ের সময় ক্রেতা' শব্দগুলির পরিবর্তে 'কোন ব্যাংক-কোম্পানী কর্তৃক যাচিত হইলে উক্ত ব্যাংকের শেয়ার ক্রয়ের সময় ক্রেতা' শব্দগুলি ও হাইফেন প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (৩) এ 'বাংলাদেশ ব্যাংকে' শব্দগুলির পরিবর্তে 'বাংলাদেশ ব্যাংকের অনুকূলে' শব্দগুলি প্রতিস্থাপিত হইবে;

(গ) ব্যাখ্যা অংশের 'উপ-ধারায়' শব্দগুলি ও হাইফেনের পরিবর্তে 'ধারায়' শব্দটি প্রতিস্থাপিত হইবে।

১৪। ১৯৯১ সনের ১৪ নং আইনে ধারা ১৪খ এর সন্নিবেশ।– উক্ত আইনের ধারা ১৪ক এর পর নিম্নরূপ একটি নূতন ধারা ১৪খ সন্নিবেশিত হইবে, যথা:–

"**১৪খ। উল্লেখযোগ্য শেয়ার ধারক।**– (১) বাংলাদেশ ব্যাংকের পূর্বানুমোদন ব্যতীত, কোন ব্যক্তি বা প্রতিষ্ঠান বা কোম্পানী প্রত্যক্ষ বা পরোক্ষভাবে, একক বা অন্যের সহিত যৌথভাবে, কোন ব্যাংক-কোম্পানীর উল্লেখযোগ্য শেয়ার ধারক হইতে পারিবে না।

(২) উপ-ধারা (১) এ বর্ণিত পূর্বানুমোদন গ্রহণের জন্য বাংলাদেশ ব্যাংক কর্তৃক নির্ধারিত ফরমে আবেদন করিতে হইবে এবং বাংলাদেশ ব্যাংক কর্তৃক যাচিত তথ্য উহাতে অন্তর্ভুক্ত করিতে হইবে।

ব্যাখ্যা।– 'উল্লেখযোগ্য শেয়ার ধারক' বলিতে কোন ব্যক্তি, প্রতিষ্ঠান বা কোম্পানী কর্তৃক প্রত্যক্ষ বা পরোক্ষভাবে, একক বা অন্যের সাথে যৌথভাবে, কোন ব্যাংক-কোম্পানীর মালিকানা স্বত্বের শতকরা পাঁচ ভাগের অধিক শেয়ার ধারণকে বুঝাইবে।

১৫। ১৯৯১ সনের ১৪ নং আইনের ধারা ১৫ এর সংশোধন।– উক্ত আইনের ধারা ১৫ এর–

(ক) উপ-ধারা (১) এ উল্লিখিত 'নূতন ব্যাংক বা বিশিষ্ট' শব্দগুলির পরিবর্তে 'বিশেষায়িত' শব্দটি প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (৪) এর পরিবর্তে নিম্নরূপ উপ-ধারা (৪) প্রতিস্থাপিত হইবে, যথা:–

'(৪) বিশেষায়িত ব্যাংক ব্যতীত অন্য যে কোন ব্যাংক-কোম্পানীকে উহার পরিচালক, ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী কর্মকর্তা নিযুক্তি বা পদায়নের পূর্বে বাংলাদেশ ব্যাংকের অনুমোদন গ্রহণ করিতে হইবে এবং এইরূপ নিযুক্ত কর্মকর্তাগণকে বাংলাদেশ ব্যাংকের পূর্বানুমোদন ব্যতিরেকে তাহার পদ হইতে অব্যাহতি দেওয়া, বরখাস্ত করা বা অপসারণ করা যাইবে না।"।

(গ) উপ-ধারা (৫) এর পরিবর্তে নিম্নরূপ উপ-ধারা (৫) প্রতিস্থাপিত হইবে, যথা:–

"(৫) বাংলাদেশ ব্যাংক, উপ-ধারা (৬) এর বিধান সাপেক্ষে, কোন ব্যাংক-কোম্পানীর পরিচালক এবং ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী কর্মকর্তা নিযুক্তির বিষয়ে অনুমোদন প্রদান করিবে।

(ঘ) উপ-ধারা (৫) এর পর নিম্নরূপ সাতটি নূতন উপ-ধারা যথাক্রমে (৬), (৭), (৮), (৯), (১০), ১১) এবং (১২) সংযোজিত হইবে, যথা:–

"(৬) কোন ব্যক্তি কোন ব্যাংক-কোম্পানী কর্তৃক পরিচালক, ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী কর্মকর্তা নিযুক্ত হইবার যোগ্য হইবেন না, যদি–

(অ) তাহার অন্যূন ১০ (দশ) বৎসরের ব্যবস্থাপনা বা ব্যবসায়িক বা-পেশাগত অভিজ্ঞতা না থাকে;

(আ) তিনি ফৌজদারী অপরাধে দণ্ডিত হন কিংবা জাল-জালিয়াতি, আর্থিক অপরাধ বা অন্যবিধ অবৈধ কর্মকাণ্ডের সহিত জড়িত ছিলেন বা থাকেন;

(ই) তাহার সম্পর্কে কোন দেওয়ানী বা ফৌজদারী মামলায় আদালতের রায়ে কোন বিরূপ পর্যবেক্ষণ বা মন্তব্য থাকে;

(ঈ) তিনি আর্থিক খাত সংশ্লিষ্ট কোন নিয়ামক সংস্থার বিধিমালা, প্রবিধান বা নিয়ামাচার লংঘনজনিত কারণে দণ্ডিত হন;

(উ) তিনি এমন কোনো কোম্পানী বা প্রতিষ্ঠানের সহিত যুক্ত থাকেন, যাহার নিবন্ধন বা লাইসেন্স বাতিল করা হইয়াছে বা প্রতিষ্ঠানটি অবসায়িত হইয়াছে;

(ঊ) তাহার নিজের কিংবা স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠানের নামে কোনো ব্যাংক বা আর্থিক প্রতিষ্ঠান হইতে গৃহীত ঋণ পরিশোধে ব্যর্থ বা খেলাপী হন;

(এ) তিনি কোনো সময় আদালত কর্তৃক দেউলিয়া ঘোষিত হন।

(৭) ব্যাংক-কোম্পানীর প্রস্তাবিত পরিচালক, ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী কর্মকর্তা বাংলাদেশ ব্যাংক কর্তৃক নির্ধারিত ফরমে এই মর্মে ঘোষণা প্রদান করিবেন যে, তিনি উপ-ধারা (৬) এর বিধান অনুসারে পরিচালক হইবার অনুপযুক্ত নহেন:

তবে শর্ত থাকে যে, মনোনীত প্রার্থী নিযুক্তির ক্ষেত্রে স্বাক্ষরিত ঘোষণাপত্রটি সংশ্লিষ্ট ব্যাংক-কোম্পানী বাংলাদেশ ব্যাংকে প্রেরণ করিবে।

(৮) উপ-ধারা (৬) এর বিধান এই সম্পর্কিত প্রচলিত অন্যান্য আইনের অতিরিক্ত হিসাবে গণ্য হইবে।

(৯) আপাততঃ বলবৎ অন্য কোন আইন অথবা কোন ব্যাংক-কোম্পানীর সংঘস্মারক বা সংঘবিধিতে যাহা কিছুই থাকুক না কেন, এই আইন কার্যকর হইবার ১(এক) বৎসর অতিবাহিত হইবার পর ৩ (তিন) জন স্বতন্ত্র পরিচালকসহ কোন ব্যাংক-কোম্পানীতে সর্বমোট ২০ (বিশ) জনের অধিক পরিচালক থাকিবে না:

তবে শর্ত থাকে যে, কোন ব্যাংক কোম্পানীর পরিচালক সংখ্যা ২০ (বিশ) জনের কম হইলে স্বতন্ত্র পরিচালকের সংখ্যা অন্যূন দুইজন হইবে:

আরো শর্ত থাকে যে, স্বতন্ত্র পরিচালক নিয়োগের পূর্বে বাংলাদেশ সিকিউরিটিজ অ্যান্ড এক্সচেঞ্জ কমিশনের অনুমোদন গ্রহণ করিতে হইবে:

আরও শর্ত থাকে যে, আইন কার্যকর হইবার ৩ (তিন) বৎসরের মধ্যে এই উপ-ধারার বিধান মোতাবেক স্বতন্ত্র পরিচালকগণের নিয়োগ নিশ্চিত করিতে হইবে।

ব্যাখ্যা- এই উপ-ধারায় "স্বতন্ত্র পরিচালক" বলিতে এইরূপ ব্যক্তিকে বুঝাইবে যিনি ব্যাংক-কোম্পানীর ব্যবস্থাপনা এবং শেয়ারধারক হইতে স্বাধীন এবং যিনি কেবলমাত্র ব্যাংক-কোম্পানীর স্বার্থে স্বীয় মতামত প্রদান করিবেন এবং ব্যাংকের সহিত কিংবা ব্যাংক-সংশ্লিষ্ট কোন ব্যক্তির সহিত যাহার অতীত, বর্তমান বা ভবিষ্যৎ কোন প্রকৃত স্বার্থ কিংবা দৃশ্যমান স্বার্থের বিষয় জড়িত নাই।

(১০) আপাততঃ বলবৎ অন্য কোন আইন অথবা কোন ব্যাংক-কোম্পানীর সংঘস্মারক বা সংঘবিধিতে যাহা কিছুই থাকুক না কেন, এই আইন কার্যকর হইবার ১ (এক) বৎসর অতিবাহিত হইবার পর হইতে কোন একক পরিবার হইতে দুইজনের অধিক সদস্য একইসময়ে কোন ব্যাংক-কোম্পানীর পরিচালক পদে অধিষ্ঠিত থাকিবে না।

(১১) এই ধারার উদ্দেশ্য পূরণকল্পে, কোন ব্যাংক-কোম্পানীর কোন পরিচালকের পদ ত্যাগ করার আবশ্যক হইলে পরিচালকগণের মধ্য হইতে কোন পরিচালক উক্ত পদ ত্যাগ করিবেন তাহা পরিচালকদের পারস্পরিক সমঝোতার মাধ্যমে নির্ধারিত হইবে এবং পারস্পরিক সমঝোতায় উপনীত হইতে ব্যর্থ হইলে তাহা পরিচালক পর্ষদের সভায় লটারী অনুষ্ঠানের মাধ্যমে নির্ধারণ করা হইবে।

(১২) ব্যাংক-কোম্পানীর এমন কোন পরিচালক থাকিবেন না যিনি বাংলাদেশ ব্যাংক কর্তৃক এতদুদ্দেশ্যে নির্ধারিত পরিচালক হওয়ার যোগ্যতা ও উপযুক্ততার শর্তাবলী পূরণ না করেন।

ব্যাখ্যা।– এই ধারার উদ্দেশ্য পূরণকল্পে পরিবারের সদস্য হিসাবে স্বামী বা স্ত্রী, পিতা, মাতা, পুত্র, কন্যা, ভাই ও বোন এবং সংশ্লিষ্ট ব্যক্তির উপর নির্ভরশীল সকলেই অন্তর্ভূক্ত হইবেন।

১৬। ১৯৯১ সনের ১৪ নং আইনের ধারা ১৫কক এর প্রতিস্থাপন।– উক্ত আইনের ধারা ১৫কক এর পরিবর্তে নিম্নরূপ ধারা ১৫কক প্রতিস্থাপিত হইবে, যথা:–

"**১৫কক। পরিচালক পদের মেয়াদ, ইত্যাদি।**– (১) আপাততঃ বলবৎ অন্য কোন আইনে অথবা কোন ব্যাংক-কোম্পানীর সংঘস্মারক ও সংঘবিধিতে ভিন্নতর যাহা কিছুই থাকুক না কেন, এই আইন কার্যকর হইবার পর

কোন ব্যাংক-কোম্পানীর পরিচালক পদের সর্বোচ্চ মেয়াদ হইবে ৩ (তিন) বৎসর:

তবে শর্ত থাকে যে, কোন ব্যাংক-কোম্পানীর ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী কর্মকর্তা, যে নামেই অভিহিত হউক না কেন, ব্যতীত অন্য কোন পরিচালক একাদিক্রমে ২ (দুই) মেয়াদের অধিক উক্ত পদে অধিষ্ঠিত থাকিতে পারিবেন না।

(২) উপ-ধারা (১) অনুসারে কোন পরিচালক একাদিক্রমে ২ (দুই) মেয়াদে পরিচালক পদে অধিষ্ঠিত থাকিলে দ্বিতীয় মেয়াদ শেষ হইবার তারিখ হইতে পরবর্তী ৩ (তিন) বৎসর অতিবাহিত না হওয়া পর্যন্ত উক্ত ব্যাংক-কোম্পানীর পরিচালক পদে পুনঃনির্বাচিত হইবার যোগ্য হইবেন না।

ব্যাখ্যা।– এই ধারার উদ্দেশ্য পূরণকল্পে কোন একটি মেয়াদের আংশিক মেয়াদ পূর্ণ মেয়াদ হিসাবে গণ্য হইবে।"।

১৭। ১৯৯১ সনের ১৪ নং আইনে দুইটি নূতন ধারা ১৫খ ও ১৫গ এর সন্নিবেশ।– উক্ত আইনের ধারা ১৫কক এর পর নিম্নরূপ দুইটি নূতন ধারা যথাক্রমে ১৫খ ও ১৫গ সন্নিবেশিত হইবে, যথা:–

"**১৫খ। পর্ষদের ভূমিকা।**– (১) ব্যাংক-কোম্পানীর নীতি প্রণয়ন ও বাস্তবায়ন,ঝুঁকি ব্যবস্থাপনা, অভ্যন্তরীণ নিয়ন্ত্রণ, অভ্যন্তরীণ নিরীক্ষা ও উহার পরিপালনের জন্য পরিচালনা পর্ষদ দায়বদ্ধ থাকিবে।

(২) প্রত্যেক ব্যাংক-কোম্পানী উহার পরিচালনা পর্ষদের নির্বাহী কমিটির সদস্য নহেন এইরূপ সদস্যদের সমন্বয়ে একটি অডিট কমিটি গঠন করিবে।

(৩) প্রত্যেক ব্যাংক-কোম্পানী উহার পরিচালনা পর্ষদের সদস্যদের সমন্বয়ে একটি ঝুঁকি ব্যবস্থাপনা কমিটি গঠন করিবে।

১৫গ। অভ্যন্তরীণ নিরীক্ষা ও নিয়ন্ত্রণ।– (১) পরিচালনা পর্ষদ ও ব্যাংক-কোম্পানীতে একটি কার্যকর অভ্যন্তরীণ নিরীক্ষা ও নিয়ন্ত্রণ ব্যবস্থা নিশ্চিত করিবে; এবং অভ্যন্তরীণ নিরীক্ষা কার্যক্রম ব্যবস্থাপনা হইতে স্বাধীনভাবে পরিচালিত হইবে এবং উহার প্রতিবেদন ব্যাংকের অডিট কমিটির নিকট পেশ করিতে হইবে।

(২) অভ্যন্তরীণ নিরীক্ষক কার্য সম্পাদনের জন্য ব্যবস্থাপনা কর্তৃপক্ষের সহিত আলোচনা করিতে পারিবে এবং তাহাদের নিকট হইতে নিরীক্ষার জন্য প্রয়োজনীয় তথ্য বা নথি সংগ্রহ করিতে পারিবে।

(৩) অভ্যন্তরীণ নিরীক্ষার দায়িত্বে নিযুক্ত ব্যক্তি একই সময়ে ব্যাংক-কোম্পানীর কোন চুক্তি বা লেনদেনে সংযুক্ত হইতে বা ব্যাংক-কোম্পানীর প্রতিনিধিত্ব করিতে পারিবে না।"।

১৮। ১৯৯১ সনের ১৪ নং আইনের ধারা ১৭ এর সংশোধন।– উক্ত আইনের ধারা ১৭ এর–

(ক) উপ-ধারা (৫) এ উল্লিখিত "ব্যাংক-কোম্পানী বা আর্থিক প্রতিষ্ঠানে" শব্দগুলি ও হাইফেনের পরিবর্তে "ব্যাংক-কোম্পানীতে" শব্দগুলি ও হাইফেন প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (৬) এর পর নিম্নরূপ দুইটি নূতন উপ-ধারা যথাক্রমে (৭) ও (৮) সন্নিবেশিত হইবে, যথা:–

"(৭) উপ-ধারা (১) এর অধীনে কোনো ব্যাংকে-কোম্পানীর পরিচালক নোটিশ প্রাপ্ত হইলে, তাহার নিকট সংশ্লিষ্ট ব্যাংক বা আর্থিক প্রতিষ্ঠানের সমুদয় পাওনা পরিশোধিত না হওয়া পর্যন্ত তিনি যেই ব্যাংকে পরিচালক নিয়োজিত ছিলেন সেই ব্যাংকে তাহার নামে ধারণকৃত শেয়ার হস্তান্তর করিতে পারিবেন না।

(৮) এই ধারার অধীন গৃহীত কোন ব্যবস্থা, আদেশ বা সিদ্ধান্ত সম্পর্কে কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮নং আইন) এর ধারা ৩ এর অধীন এখতিয়ারসম্পন্ন আদালত ব্যতীত অন্য কোন আদালত বা ট্রাইব্যুনালে কোন প্রশ্ন উত্থাপন করা যাইবে না।"।

১৯। ১৯৯১ সনের ১৪নং আইনের ধারা ১৮ এর সংশোধন।– উক্ত আইনের ধারা ১৮ এর–

(ক) উপান্ত-টীকার পরিবর্তে নিম্নরূপ উপান্ত-টীকা প্রতিস্থাপিত হইবে, যথা:–

"ব্যাংক-কোম্পানীর পরিচালক, কর্মকর্তা ও কর্মচারীদের সহিত লেনদেন সম্পর্কিত বিধান।-";

(খ) উপ-ধারা (২) এর পরিবর্তে নিম্নরূপ উপ-ধারা (২), (৩), (৪), (৫), (৬), (৭) ও (৮) প্রতিস্থাপিত হইবে, যথা:–

"(২) ব্যাংক-কোম্পানীর প্রত্যেক পরিচালক, ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী ও তাহার নিম্নতর দুইস্তর পর্যন্ত কোন কর্মকর্তাকে স্ব স্ব বাণিজ্যিক, আর্থিক, কৃষি, শিল্প এবং অন্যান্য ব্যবসার নাম, ঠিকানা ও অন্যান্য বিবরণ এবং পারিবারিক ব্যবসায়িক স্বার্থসংশ্লিষ্টতার বিবরণ

লিখিতভাবে পরিচালনা পর্ষদের নিকট বাৎসরিক ভিত্তিতে প্রদান করিতে হইবে।

(৩) উপ-ধারা (২) এ বর্ণিত কোন ব্যক্তি কর্তৃক উক্তরূপ ব্যবসায়িক স্বার্থের বিবরণ প্রদান ছাড়াও, তাহার সহিত যদি এইরূপ কোন ব্যক্তির সাথে সম্পর্ক থাকে, যিনি ব্যাংক-কোম্পানীর সাথে কোন উল্লেখযোগ্য চুক্তিতে আবদ্ধ কিংবা আবদ্ধ হইতে যাইতেছেন, তাহা হইলে উক্ত চুক্তি অথবা প্রস্তাবিত চুক্তি গোচরে আসিবামাত্র লিখিতভাবে পরিচালনা পর্ষদকে অবহিত করিতে হইবে।

(৪) কোন পরিচালকের এই ধারার অধীন ঘোষণাযোগ্য তথ্য রহিয়াছে এইরূপ কোন বিষয় যদি পরিচালনা পর্ষদের সভায় আলোচিতব্য থাকে তাহা হইলে সভার শুরুতেই উক্ত পরিচালক বিষয়টি সম্পর্কে পর্ষদকে অবহিত করিবেন এবং অতঃপর তিনি উক্ত বিষয়ক আলোচনায় অংশগ্রহণ করা হইতে অথবা এই বিষয়ে কোন ভোট প্রদানে বিরত থাকিবেন এবং তাহার উপস্থিতি উক্ত সভার কোরামের জন্য গননা করা যাইবে না।

(৫) স্বার্থসংশ্লিষ্ট স্বত্বের মূল্যমান, আকার কিংবা আয় অর্জনের পরিমাণ ইত্যাদির ভিত্তিতে বাংলাদেশ ব্যাংক উপ-ধারা (২) এ উল্লিখিত বিবরণী হইতে কোন উপাদান বাদ দিতে পারিবে এবং উপ-ধারার (৩) এ উল্লিখিত সম্পর্ক বিষয়ে বিধান জারী করিতে পারিবে।

(৬) যদি কোন ব্যক্তি উপ-ধারা (১) ও (২) এর বিধান অনুযায়ী স্বার্থসংশ্লিষ্টতার বিবরণী প্রদান বা কোন গুরুত্বপূর্ণ সম্পর্ক প্রকাশ করিতে ব্যর্থ হন তাহা হইলে সংশ্লিষ্ট ব্যাংক-কোম্পানী বা উহার কোন শেয়ারধারক অথবা বাংলাদেশ ব্যাংকের আবেদনক্রমে কোন যথাযথ ক্ষমতাসম্পন্ন আদালত আলোচ্য চুক্তিটি, যদি থাকে, বাতিল ঘোষণা করিতে পারিবে এবং বাংলাদেশ ব্যাংক লিখিত আদেশ দ্বারা, ১ (এক) বৎসরের অধিক নয় এমন যে কোন সময়ের জন্য, উক্ত ব্যক্তিকে সাময়িক বরখাস্ত করিতে অথবা এই আইনের অধীনে অন্য কোন শাস্তি প্রদান করিতে পারিবে।";

(৭) উপ-ধারা (১) এর আওতায় বিবরণী প্রদানকারী কোন ব্যক্তি এবং ব্যাংক-কোম্পানীর কর্মকর্তা-কর্মচারীগণ ব্যাংকের আস্থাভাজন ও অনুগত থাকিবেন এবং স্বীয় স্বার্থের উপরে আমানতকারীদের স্বার্থ এবং ব্যাংক-কোম্পানীর স্বার্থকে স্থান দিবেন।

(৮) ব্যাংক-কোম্পানী এইরূপ কার্যপদ্ধতি প্রবর্তন করিবে যাহাতে কোন পরিচালক, কর্মকর্তা বা কর্মচারীর কোন একজন গ্রাহকের প্রতি দায়-দায়িত্ব অপর কোন গ্রাহক স্বীয় স্বার্থের সাথে সাংঘর্ষিক না হয়।

২০। ১৯৯১ সনের ১৪ নং আইনের ধারা ২১ এর সংশোধন।– উক্ত আইনের ধারা ২১ এর–

(ক) উপ-ধারা (৩) এ উল্লিখিত "সরকারের নিকট আপীল" শব্দগুলির পরিবর্তে "বাংলাদেশ ব্যাংকের পরিচালনা-পর্ষদের নিকট পুনর্বিবেচনার আবেদন" শব্দগুলি প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (৪) বিলুপ্ত হইবে।

২১। ১৯৯১ সনের ১৪ নং আইনের ধারা ২২ এর প্রতিস্থাপন।– উক্ত আইনের ধারা ২২ এর পরিবর্তে নিম্নরূপ ধারা ২২ প্রতিস্থাপিত হইবে, যথা:–

"২২। **লভ্যাংশ (dividend) প্রদানের উপর বাধা-নিষেধ।**– বিশেষায়িত ব্যাংক ব্যতীত অন্য কোন ব্যাংক-কোম্পানী উহার শেয়ারের উপর কোন লভ্যাংশ প্রদান করিবে না, যদি–

(ক) উহার প্রাথমিক ব্যয়, সাংগঠনিক ব্যয়, শেয়ার বিক্রি ও দালালীর কমিশন, লোকসান এবং অন্যান্য ব্যয়সহ মূলধনী ব্যয়ে পরিণত হইয়াছে এইরূপ সকল ব্যয় সম্পূর্ণরূপে অবলোপন না করা হইয়া থাকে, অথবা

(খ) উহা ধারা ১৩ এর উপ-ধারা (১) এর বিধান অনুসারে মূলধন সংরক্ষণে ব্যর্থ হয়।"।

২২। ১৯৯১ সনের ১৪ নং আইনের ধারা ২৩ এর সংশোধন।– উক্ত আইনের ধারা ২৩ এর–

(ক) উপ-ধারা (১) এর–

(অ) দফা (ক) এর পরিবর্তে নিম্নরূপ দফা (ক) প্রতিস্থাপিত হইবে, যথা:–

"(ক) কোন ব্যক্তি কোন ব্যাংক-কোম্পানীর পরিচালক হইলে একই সময়ে তিনি অন্য কোন ব্যাংক-কোম্পানী বা আর্থিক প্রতিষ্ঠানের পরিচালক থাকিবেন না। তবে এই আইন কার্যকর হইবার পর হইতে সর্বোচ্চ দুই মেয়াদে কোন বীমা কোম্পানীর পরিচালক থাকিতে পারিবেন;

(আ) দফা (খ) এ–

(১) উপ-দফা (ই) এ উল্লিখিত "কোন কোম্পানীর পরিচালক যে কোম্পানী বা কোম্পানীসমূহ" শব্দগুলির পরিবর্তে "কতিপয় কোম্পানীর পরিচালক যে কোম্পানীসমূহ একত্রে" শব্দগুলি প্রতিস্থাপিত হইবে;

(২) উপ-দফা (ই) এ প্রান্তঃস্থিত কোলন (:) এর পরিবর্তে সেমিকোলন (;) বসিবে এবং অত:পর নিম্নরূপ উপ-দফা (ঈ) সংযোজিত হইবে, যথা:–

"(ঈ) অপর কোন ব্যাংক-কোম্পানীর পক্ষে পরিচালক হিসাবে নিযুক্ত হইয়াছেন:";

(ই) শর্তাংশে উল্লিখিত "পরিচালকের" শব্দটির পরিবর্তে "বিশেষায়িত ব্যাংকের পরিচালকের" শব্দগুলি প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (১ক) এর প্রান্তঃস্থিত কোলন (:) এর পরিবর্তে দাঁড়ি (।) বসিবে এবং অত:পর উল্লিখিত শর্তাংশ দুইটি বিলুপ্ত হইবে;

(গ) উপ-ধারা (২) এ উল্লিখিত "যেসব কোম্পানী" শব্দগুলির পর "একত্রে" শব্দটি সন্নিবেশিত হইবে।

২৩। ১৯৯১ সনের ১৪ নং আইনের ধারা ২৪ এর সংশোধন।– উক্ত আইনের ধারা ২৪ এর–

(ক) উপান্ত-টীকার পরিবর্তে নিম্নরূপ উপান্ত-টীকা প্রতিস্থাপিত হইবে, যথা:–

"সংবিধিবদ্ধ সঞ্চিতি।– ";

(খ) উপ-ধারা (১) এ উল্লিখিত "সংরক্ষিত তহবিল" এবং "সংরক্ষিত তহবিলে" শব্দগুলির পরিবর্তে যথাক্রমে "সংবিধিবদ্ধ সঞ্চিতি" এবং "সংবিধিবদ্ধ সঞ্চিতিতে" শব্দগুলি প্রতিস্থাপিত হইবে এবং 'যে পরিমাণ' শব্দগুলির পর উল্লিখিত "প্রিমিয়াম" শব্দটি বিলুপ্ত হইবে;

(গ) উপ-ধারা (২) এ উল্লিখিত "সংরক্ষিত তহবিল" শব্দগুলির পরিবর্তে "সংবিধিবদ্ধ সঞ্চিতি" শব্দগুলি প্রতিস্থাপিত হইবে।

২৪। ১৯৯১ সনের ১৪ নং আইনের ধারা ২৫ এর সংশোধন।– উক্ত আইনের ধারা ২৫ এর–

(ক) উপ-ধারা (১) এর পরিবর্তে নিম্নরূপ উপ-ধারা (১) প্রতিস্থাপিত হইবে, যথা:–

"(১) তফসিলি ব্যাংক ব্যতীত প্রতিটি ব্যাংক-কোম্পানী বাংলাদেশে সংরক্ষিত নগদ তহবিল হিসাবে এই পরিমাণ নগদ অর্থ বাংলাদেশ ব্যাংক বা উহার প্রতিনিধিত্বকারী ব্যাংকে মওজুদ রাখিবে যাহা যে কোন কার্যদিবসের সমাপ্তিতে উহার সমুদয় মেয়াদী ও চাহিবামাত্র দায়ের বাংলাদেশ ব্যাংক কর্তৃক সময় সময় নির্ধারিত হারের কম হইবে না:

তবে শর্ত থাকে যে, কোন বিশেষ ক্ষেত্রে বাংলাদেশ ব্যাংক, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা এবং উহাতে এতদুদ্দেশ্যে নির্ধারিত শর্ত সাপেক্ষে, সংরক্ষিত নগদ তহবিল সংক্রান্ত প্রয়োজনীয়তা রহিত করিতে পারিবে।

ব্যাখ্যা।– এই ধারার উদ্দেশ্য পূরণকল্পে, পরিশোধিত মূলধন, বা সংরক্ষিত সঞ্চিতিসমূহ বা লাভ-ক্ষতির হিসাবে প্রদর্শিত আকলন স্থিতি, বা বাংলাদেশ ব্যাংক হইতে গৃহীত কোন ঋণ, "দায়" এর অন্তর্ভূক্ত হইবে না।";

(খ) উপ-ধারা (২) এ উল্লিখিত "সংরক্ষিত তহবিল" শব্দগুলির পরিবর্তে "সংরক্ষিত নগদ তহবিল" শব্দগুলি প্রতিস্থাপিত হইবে;

(গ) উপ-ধারা (৩) এ উল্লিখিত "দুই হাজার পাঁচশত টাকা" শব্দগুলির পরিবর্তে "পঁচিশ হাজার টাকা" শব্দগুলি প্রতিস্থাপিত হইবে;

(ঘ) উপ-ধারা (৫) এ উল্লিখিত "পাঁচ হাজার টাকা" শব্দগুলির পরিবর্তে "পঞ্চাশ হাজার টাকা" শব্দগুলি প্রতিস্থাপিত হইবে।

২৫। ১৯৯১ সনের ১৪নং আইনের ধারা ২৬ এর সংশোধন।– উক্ত আইনের ধারা ২৬–

(ক) এর (১) সংখ্যা ও বন্ধনী বিলুপ্ত হইবে;

(খ) এ উল্লিখিত 'গঠন করিতে' শব্দগুলির পর 'বা সাবসিডিয়ারী কোম্পানীতে পরিণত করার উদ্দেশ্যে কোন বিদ্যমান কোম্পানীর নিয়ন্ত্রণমূলক শেয়ার ক্রয় করিতে' শব্দগুলি সন্নিবেশিত হইবে;

(গ) এর দফা (ঘ) এ উল্লিখিত "শরীয়তের" শব্দটির পরিবর্তে "শরীয়াহ" শব্দটি প্রতিস্থাপিত হইবে;

(ঘ) এর দফা (ঙ) এর উপ-দফা (আ) এর পর নিম্নরূপ উপ-দফা (ই) সংযোজিত হইবে, যথা:–

"(ই) স্টক ব্রোকার, স্টক ডিলার, মার্চেন্ট ব্যাংকার, পোর্টফোলিও ম্যানেজার হিসাবে বা সিকিউরিটিজ ও এক্সচেঞ্জ কমিশন হতে নিবন্ধন গ্রহণের প্রয়োজন পড়ে এইরূপ কোন প্রকার ব্যবসায় পরিচালনা করা;" এবং

(ঙ) এর উপ-ধারা (২) ও (৩) বিলুপ্ত হইবে।

[চলিবে]